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BY

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DACOITY. *See* PENAL CODE, SS. 395 AND 396.

DAMAGES. *See also* (1) CONTRACT ACT, S. 73.
(2) TORT.

———*Anticipatory breach of contract—Date of performance as the material point of time.*

Where a contract is for delivery of goods on a certain day and the defendant repudiates the contract before that date, damages must be assessed on the basis of the market rate prevailing on the due date of delivery and not on the basis of the rate prevailing on the date of the repudiation. (*Brown, J.*) MAUNG PO KYAW *v.* SAW TAGO. **150 I.C. 760=I.R. 1933 Rang. 42 A.I.R. 1933 Rang. 25**

———*Assault—Costs of criminal prosecution, if recoverable*

Costs incurred in the criminal prosecution cannot be recovered as part of damages or compensation for an assault. (*Jai Lal, J.*) LAHORI *v.* RAM CHAND. **I.R. 1931 Lah 911=134 I C. 207=32 P.L R 421=A.I R. 1931 Lah 648 (1).**

———*Breach of contract—Acceptance of repudiation—Measure of damages.*

The plaintiffs alleged that they were instructed to purchase linseed as defendants' brokers, that the defendants repudiated the contract, that the plaintiffs accepted the repudiation and that they were entitled to damages at the market rate prevailing on the date of repudiation. It was contended by the defendants that in order that the plaintiffs may be entitled to damages, it was necessary for them to show that at the due date they had as brokers dealt with third parties in the market and suffered loss on that basis.

Held, the plaintiffs were entitled to accept the repudiation and claim damages on the then prevailing rate without showing that they continued to act as agents even after the repudiation. (*Beaumont, C.J and Mirza, J.*) RATAN LAL *v.* BRIJ MOHAN. **I R. 1931 Bom. 445 (2)=133 I C. 861 (2)=33 Bom L.R 703=A.I R. 1931 Bom. 386.**

———*Breach of contract of sale of land by buyer—Damages—Assessment of—Principle to be applied.*

The principle as to the measure of damages in the case of a breach of contract of sale of goods is not applicable to contracts relating to land; in the latter case the principle adopted by the Common Law Courts in England must come into play; the plaintiff is entitled to have his damages assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed. (*Niyogi, A. J. C.*) MOTILAL *v.* SETH JAMNADAS. **31 N L R. (Supp.) 101=162 I.C. 944=8 R.N. 293=18 N.L.J 313=A.I R. 1936 Nag. 4.**

———*Cause of action—Satisfaction of decree—Subsequent improper execution — Damages — Claim to—Nature & liability—Enforceability by third party.*

The liability of a decree holder, who executes a decree even after receiving satisfaction, is not one in tort; the true basis of a claim for damages by any one injured by the improper execution proceeding can only be that it is a breach of an implied agreement not to execute the decree; and such a claim for damages against the decree-holder is not available to a private alienee of the properties after attachment and prior to the sale in execution, who is not party to the contract not to execute. (*Varadachariar, J.*) PAPPU REDDIAR *v.* PICHU AYYAR. **161 I.C. 963=8 R.M. 901=42 L.W. 435=1935 M.W.N. 898=A.I R. 1935 Mad. 961.**

———*Conversion—Measure of damages.*

The measure of damages in an action for trover is the value of the goods. According to the circumstances the general damages may be a substantial sum or may be a nominal sum, but there may be additional special damages given besides the actual value of the goods if the damages sustained are held not to be too remote. (*Wort, J.*) SITARAM SHAM NARAYAN *v.* ISWARI CHARAN SARANGI. **154 I.C. 198=7 R.P. 442=A.I.R. 1934 Pat. 57.**

———Conversion — Wrongful intermingling of goods by defendant—Measure of damages. *See* EVIDENCE ACT, S. 106. **11 Pat L T. 702.**

———Divorce proceedings. *See* DIVORCE ACT, S. 34.

———*Exemplary damages—Deliberate assault and loss of eye sight—Quantum of damages.*

Where owing to a deliberate and wanton assault by the defendant, the plaintiff loses his eye-sight and has suffered considerable pain and loss of earning and he files a suit for damages, substantial and exemplary damages should be awarded. The principles which guide the Courts in estimating damages in a case of this kind are as follows:—The injured person is entitled to damages for personal suffering and for loss of enjoyment of life and also to actual pecuniary loss resulting to and

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the expenses reasonably incurred by him. If he is engaged in a profession, trade or other occupation, he must be compensated for the probable future loss by reason of incapacity or diminished capacity to work. 38 Bom. 552, Ref. (*Jai Lal and Abdul Rashid, JJ.*) GURDIT SINGH *v.* FAKIR CHAND. **6 I.R. (Lah.) 20 = 144 I.C. 729 = 34 P.L.R. 783 = A.I R. 1933 Lah. 761.**

———*Exemplary damages—Principle.*

Exemplary damages are awarded, rather to express indignation at the defendant's wrong than as representing the plaintiff's loss. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) VENKATAPPAYYA *v.* RAMA KRISTNAMMA. **I.R 1932 Mad. 187 = 135 I.C. 619 = 34 L.W. 898 = A.I.R. 1932 Mad. 53 = 62 M.L J. 107.**

———Exemplary damages—Wanton and malicious trespass on land—Principles. *See* TORT—TRESPASS ON LAND. **69 M.L.J 98.**

———*General and special—Mode of pleading.*

Special damages must be specially pleaded. General damages have to be claimed as a separate and distinct item, but it is enough to claim them in a lump sum without any particulars. General damages are defined as 'matters which cannot be stated in money or money by worth' and include such things as bodily or mental suffering, loss of reputation in the like. Special damages have to be specifically proved general do not. (*Bose, A. J. C.*) DAMODHAR *v.* VISHWANATH. **I R. 1933 Nag. 19 = 141 I.C. 58 = 28 Nag L.R. 320 = A.I.R. 1933 Nag. 29.**

———*Injunction—Restraint on alienation or disposal of properties—Reflection on character and prejudice to business stability—Suit for damages—Maintainability.*

The appellant had obtained an injunction against the respondent restraining the latter from disposing of or alienating any of the movable or immovable properties. The injunction was in force for a month and then dissolved. In the present proceedings, the respondent claimed damages caused to him by reason of the operation of the injunction. He alleged that the injunction was a reflection upon his character and upon his business capacity and in consequence thereof, he lost the benefit of contracts with third persons who lost faith in his credit.

Held, that in order to claim damages, the respondent must show that he had suffered loss by his inability to do one or more of the things which the injunction restrained him from doing, and that the allegations made by him were insufficient to found a claim to damages. (*Rankin, C.J. and C.C. Ghose, J.*) JOHAR MULL CHIMANLAL & CO. *v.* ISWARDAS AGARWALLA. **59 Cal. 1082 = I R. 1932 Cal. 636 = 139 I.C. 515 = 36 C.W.N. 323 = A.I.R. 1932 Cal. 695.**

———*Interest—When allowed.*

Interest cannot be granted on damages in the absence of proof of any mercantile usage or agreement to that effect. (*Percival, J.C. and Wild, A.J.C.*) PREMCHAND GANOMAL *v.* NEWANDMAL BHIRUMAL. **25 S.L.R. 104 = I.R. 1931 Sind 141 = 134 I.C. 397 = A.I.R. 1931 Sind 121.**

———*Interest—Suit for value of articles entrusted with defendant.*

In a suit to recover the value of certain articles entrusted with the defendant, interest cannot be allowed on the amount decreed, as it will be tantamount to awarding damages upon damages. (*Wazir Hasan, C.J. and Raza, J.*) BRIJ NATH SHARGHA *v.* LAKSHMI NARAIN KAUL. **8 Luck. 35 = I.R. 1932 Oudh 228 = 137 I.C. 217 = 9 O.W.N. 239 = A.I.R. 1932 Oudh 165.**

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———*Legal damage — Mortification due to legal search.*

Though no doubt it is very mortifying to be searched in the public street, and though the police approached the house and the rumour got about that plaintiff's house was going to be searched, still the plaintiff cannot be said to have suffered any loss or damage, which the law could recognize where the Police Officer acted legally and *bona fide*. (*Aston, A.J.C.*) ASANDAS HASHMATRAI *v.* KHANCHAND. **148 I.C. 178 = 6 R.S. 189 = 1933 Cr.C. 800 = A.I.R 1933 Sind 240.**

———*Malicious prosecution—Suit against plaintiff pending—Plaintiff kept out of employment thereby—Loss—Quantum of.*

That a criminal case for misappropriation was proceeding against a person would be a very good reason why he could not obtain service, as employers would naturally be chary of engaging a man against whom there were allegations of misappropriations and breach of trust, and therefore such a person would be entitled in suit for malicious prosecution for damages for loss of service, if any, for the period during which the criminal proceedings lasted. (*Staples, A.J.C.*) RAGHUNATH RAO *v.* MOTIRAM. **30 N L.R. 101 = 147 I.C. 1084 = 6 R.N. 153 = A.I.R. 1933 Nag. 299.**

———Measure of—Auction of pawn-shop licence for one year—Condition that purchaser should pay $\frac{1}{5}$ immediately—Failure to so pay—Resale for three years—Liability of purchaser to difference. *See* CONTRACT—BREACH. **A.I.R. 1935 Rang. 143.**

———*Measure of—Basis of valuation—Deterioration of goods in transit—Place of booking or place of destination.*

In a claim for damages for deterioration caused to goods consigned by railway, the measure of damages is to be assessed on the basis of the valuation at the place of destination and not at the place of booking of the goods. (*M. C. Ghose, J.*) LADURAM HIRALAL *v.* SECRETARY OF STATE. **153 I C. 867 = 7 R.C. 404 = 59 C.L.J. 467 = A.I.R 1934 Cal. 834.**

———*Measure of—Lessee—Contumaciously holding over.*

Where the lessee contumaciously holds over, the landlord is clearly entitled to damages. In the absence of definite proof as to the actual loss, the Court may in such cases award double the normal rent by way of damages. (*Broadway and Bhide, JJ.*) SUNDAR SINGH *v.* RAMSARAN DAS. **14 Lah. 137 = 142 I.C. 754 = I R. 1933 Lah. 269 = 33 P.L R. 323 = A.I.R. 1933 Lah. 61.**

———Measure of—Principal and agent—Agent selling his own goods to principal. *See* CONTRCT ACT (1872), S. 216. **36 Bom.L.R. 68 = A.I.R. 1934 Bom. 86.**

———Measure of—Suit for compensation for breach of covenant for title under sale-deed — Criterion—Material date—Date of sale or date of breach. *See* T. P. ACT, S. 55 (2) **68 M.L J 588.**

———*Measure of—Trade mark—Infringement of—Plaintiff's loss and defendant's profits.*

In trade mark case, the plaintiff is entitled, if he succeeds in getting an injunction, either to claim the damage sustained from the defendant's wrongful act or the profit which the defendant might have made by his wrongful act. The computation in the two cases is not the same. The proper way to approach the question as to how much damage the plaintiffs had suffered by reason of the infringement of their mark by the defendants is to ascertain what profit the plaintiffs would have made if the offending articles had not been upon the market and the best evidence in support of such a claim is evidence of any loss of trade that the plaintiff

had suffered during the period in which the defendants were importing goods with the infringing mark on them, 51 All. 182 (P.C.), Ref. (*Page, C.J. and Das, J.*) SALLAY MAHOMED HAJEE SULAIMAN *v.* NEOGI & CO. **10 Rang. 85=I.R. 1932 Rang. 92=137 I.C. 202=A.I.R. 1932 Rang. 56.**

——Measure of—Wrongful attachment of goods—Malice—Effect of. *See* TORT—WRONGFUL ATTACHMENT. **39 C.W.N. 357.**

——*Mitigation of—Rule as to.*

The rule that damages must be mitigated only requires that a reasonable course of action must be taken, and does not require the plaintiff to do anything unreasonable or of a speculative nature. He cannot increase his damages by his own default or his own wrong. (*Remfry, J.*) W.C. BINNS *v.* W. & T. AVERY, LTD. **61 Cal. 548=152 I.C. 117=7 R.C. 240=38 C.W.N. 908=A.I.R. 1934 Cal. 778.**

——*Nuisance.*

A man is liable for damages if he causes vibrations by an engine and thereby causes injury to the property of another. (*Percival, J. C. and Barlee, A. J. C.*) EBRAHIM PEER MAHOMED *v.* GANGARAM. **24 S.L.R. 401=123 I.C. 289=A.I.R. 1930 Sind 310.**

——*Prospective damages—Decree for damages for physical injury—Direction to determine prospective damages in execution — Legality—Jurisdiction of execution Court.*

Where a suit is brought for damages on account of physical injury sustained by the plaintiff from the wrongful act of the defendant, it is within the jurisdiction of the Court to award damages for the injury which the plaintiff has suffered up to date and also to pass a decree for prospective damages, *i.e.*, damages which would include probable and future injury which would result to the plaintiff. Such prospective damages must be ascertained and awarded at the time of the trial. The C.P. Code following the English Procedure on the point contemplates that a decree for damages should be final and should state the full amount of damages to be granted. It is only in the case of mesne profits that there is an exception to this rule. The Court has, therefore, no jurisdiction to make any enquiry in execution as to the amount of prospective damages after the case has been decreed. The fact that the decree directs that the matter would be taken up in execution proceeding cannot invest the execution Court with jurisdiction which is not given to it by the Code or by any other law and, therefore, the execution Court is barred from adopting that procedure. (*Bennet, J.*) SECRETARY OF STATE *v.* RAGHUBER SINGH. **153 I.C. 574=7 R.A. 523=4 A.W.R. 1441=A.I.R. 1935 All. 186.**

——Right to — Easement — Right to support—Withdrawal of—Infringement—Cause of action. *See* EASEMENT—RIGHT TO SUPPORT. **61 C.L.J. 503.**

——Right to—Vendor and purchaser—Direction to discharge encumbrances—Default - Vendor entitled to a decree for refund of the whole of the amount left in the hands of the vendee—No right to damages without proof of extent of the damages actually incurred. *See* T. P. ACT, S. 55. **1934 A.L.J. 318=A.I.R. 1934 All. 406 (F.B.).**

——*Special damage—Obstruction to highway—Immediate access to private property—Blocking of.*

The rule requiring special damage in cases of obstruction to a public highway is qualified in cases where the plaintiff complains of an interference with his beneficial enjoyment of property thereby. A right of immediate access from private property to public highway or *vice versa* is a private right distinct from the rights of the

owner of the property to use the highway itself as one of the public, the violation or infringement of which would furnish a cause of action in respect of an obstruction on the public way, without any further proof of special damage. (Case-law discussed). (*Niyogi, A. J. C.*) SHEONARAYAN *v.* DINDAYAL. **27 N.L.R. 213=I.R. 1931 Nag. 161=134 I.C. 673=A.I.R. 1931 Nag. 189.**

——*Special damage—Obstruction to highway—Right of action.*

The rule of English Common Law has been applied in India as a rule of equity, justice and good conscience —that no action can be maintained by one member of the public for the obstruction of a highway without proof of special damage. 9 Mad. 463; 3 Cal. 20 (F.B.); 2 Bom. 457; 2 Bom. 469; 23 C.W.N. 91; 26 C.W.N. 587, Foll. (*Wort, J.*) MAHOMED DIN MIAN *v.* MT. ATIRAJU KUER. **10 Pat. 568=I.R. 1931 Pat. 383=133 I.C. 463=12 Pat.L.T. 885=A.I.R. 1931 Pat. 418.**

——*Suit for—Defence to— Want of mutuality.*

The Court of Wards in management of a minor zemindar's estate put up his leasehold properties in auction. The defendant was the highest bidder. In a suit for damages against the defendant,

Held, that the want of mutuality between the minor zamindar and the defendant was no defence. (*Krishnan Pandalai, J.*) DOMBERU PANDA *v.* SRI RAMACHANDRA DEO **1933 M.W.N. 818.**

——*Trespass and assault—Use of abusive language —Relevancy.*

Though the mere use of abusive language is not actionable unless special damage is proved, yet where the cause of action is based on trespass and assault, the amount of damages may be indefinitely enhanced by evidence of malicious motive or violent and insulting conduct on the part of the defendant. In that connection, the use of abusive language may properly be taken into account to enhance the damages. 26 Cal. 653, Dist. (*Rowland, J.*) SHEO NARAYAN PATHAK *v.* LALMAN PATHAK. **I.R. 1931 Pat. 484=134 I.C. 628=12 Pat. L.T. 698=A.I.R. 1931 Pat. 404.**

——*Trespass—Measure of damages—Depreciation in selling value as the basis.*

In respect of injury done to land by trespass, the measure of damages is the depreciation in the selling value of the land, not the amount required to put the premises in repair. It is only where no adequate compensation could otherwise be given that a decree for restoration should be passed especially in a case where the cost of restoration is much more than the depreciation in the value of the land. (*Suhrawardy and Jack, JJ.*) KRISHNALAL SAHA CHOUDHURY *v.* RADHIKA MOHAN DAS. **I.R. 1931 Cal. 637=133 I.C. 109=53 C.L.J. 148=A.I.R. 1931 Cal. 462.**

——*Trespass—Suit for use and occupation—Maintainability.*

The action for use and occupation is founded in the English Common Law upon a permission, expressed or implied, giving rise to a presumption that a reasonable compensation for the use of the premises has been agreed upon between the parties; so that the action is not, according to English authorities, maintainable against a wilful trespasser who sets up a tenancy for a third person claiming adversely to the plaintiff. But in India, actions of this kind against trespassers are recognized:— 17 C. 541; 22 M. 149; A.I.R. 1925 Lah. 196; A.I.R. 1928 Nag. 118. The question, however, was left open. (*Doraiswami Iyer, C.J.*) HUSSAIN BI *v.* ABDUL RAHIMAN SAHEB. **8 Mys.L.J. 443.**

DAMDUPAT. *See* (1) C. P. CODE, S. 34.
(2) INTEREST.

DANCING GIRL. *See* HINDU LAW—ADOPTION AND SUCCESSION.

DANGEROUS DRUGS ACT (II OF 1930)—*Scope—If retrospective.*

Where a conspiracy punishable under S. 120-B, I. P. Code, and Opium Act is formed before Act II of 1930 came into operation but continues to exist even subsequent to the coming into force of the Act and a prosecution is launched, reference to Act II of 1930 can be made in the charge and the sections of the Act can be applied and the accused can be punished with the punishment provided for in the relevant sections of the Act. (*Costello and M. C. Ghose, JJ.*) ABDUL RAHMAN *v.* EMPEROR. **62 Cal. 749=156 I C. 678=36 Cr.L.J. 982=8 R.C. 21=1935 Cr C. 467=A.I.R. 1935 Cal. 316.**

——**Ss. 2 (b) (i) and (iii) and (g) and 14**—"*Manufactured drug*" *and* "*coca derivatives*"—*Meaning.*

The expression "manufactured drug" is not exhaustively defined in the Act, S. 2 (*g*) merely provides as to what "manufactured drug" includes. Among other things, it includes all "coca derivatives" which expression is defined in S. 2 (*b*) (*iii*) as "cocaine, that is methyl benzoyl laevo ecogenine having the chemical formula C-17, H-21, No. 4, and its salts." The expression "coca-derivatives" also includes "crude cocaine." (*Niamatullah, J.*) SADLU *v.* EMPEROR. **155 I.C. 406=7 R.A. 926=36 Cr.L J. 742=1934 Cr.C. 438=A.I.R. 1934 All. 374.**

——**Ss. 7 and 20**—*Possession of opium for delivery at foreign place—Stage of preparation—Offence whether constituted.*

The accused was found travelling in a bus to Tranquebar carrying certain quantity of opium for delivery to a certain person in French territory. He had to leave the bus at Tranquebar and make a journey of 6 or 7 miles. The accused having been prosecuted under Ss. 7 and 20 of the Dangerous Drugs Act.

Held, that the acts of the accused amounted to preparation and not to attempt and that at any rate he should be given the benefit of the doubt that he might have repented of his intention before reaching French territory. (*Pakenham Walsh, J.*) NARAYANASWAMI PILLAI *v.* EMPEROR. **I.R. 1932 Mad. 547=33 Cr.L.J. 582=138 I.C. 286=1932 M.W.N. 545=36 L.W. 127=1932 Cr.C. 511=A.I.R 1932 Mad. 507.**

——**S. 10 (b)**—*Possession of beinsi and beinchi—Nature of offence.*

"Opium" as defined in S. 3 does not include opium prepared or in course of preparation such as beinsi and beinchi. Hence a person in possession of both beinsi and beinchi is not guilty under S. 9, Opium Act, but if guilty under S. 10 (*b*), Dangerous Drugs Act. (*Page, C.J. and Das, J.*) EMPEROR *v.* AH KIM. **11 Rang. 436=6 I.R. (Rang.) 58=145 I.C. 825=34 Cr L.J. 1085=1933 Cr.C. 997=A.I.R. 1933 Rang. 258.**

——**Ss. 22 and 23**—*Constables not authorized to take steps taken by them—Irregularity.*

Where the constables are not authorized to take the steps which they have taken under Ss. 22 and 23, the irregularity does not vitiate the trial. (*Mir Ahmad, A.J.C.*) HABIBULLAH *v.* EMPEROR. **155 I.C. 267=7 R Pesh. 97=36 Cr.L J. 780=1935 Cr.C. 253=A.I.R. 1935 Pesh. 47.**

DARKHAST GRANT. *See also* GRANT.

——*Setting aside—Powers of Civil Court.*

If the grant of land on dharkhast by an authority competent to make such grant is proved to have been made, such a grant cannot be set aside by a Civil Court on proof of mere irregularities in the procedure adopted and when there is no question of fraud or want of jurisdiction. 18 Mad. 434 and 32 Mad. 300, Ref. (*Sundaram Chetty, J.*) ARUMUGAM PILLAI *v.* VELLACHAMI MANNADY. **1932 M.W.N.1292.**

DARKHAST RULES (as amended in 1921)—Applicability to grants made prior to amendment. *See* GRANT—DARKHAST. **69 M.L.J. 795.**

——*Madras Board's Standing Order No.* 15, *R.* 23 (1)—*Applicability—Land transferred to Revenue department.*

R. 23 (1) of the Board's Standing Order No. 15 would apply only to land which has been set apart as reserve forest under S. 26 of the Forests Act and it is only in such a case, no patta granted for such land would be valid unless it is granted with the special sanction of the collector to be recorded on the face of the patta, and unless the Collector has obtained the sanction of the Conservator of Forests, before sanctioning the grant of patta. These directions and conditions have no application to land which, though originally part of the reserve forest, has by means of a G. O. excluded from it and assigned to be dealt with by the Revenue Department as unassessed waste land. (*Sundaram Chetty, J.*) ARUMUGAM PILLAI *v.* VELLACHAMI MANNADY. **1932 M.W.N.1292.**

DAR PATNI. *See* BENGAL PATNI REGULATION (VIII OF 1819).

DASIPUTRA. *See* HINDU LAW—SUCCESSION.

DATTAKA MIMAMSA. *See* HINDU LAW—TEXTS.

DAYABHAGA. *See* HINDU LAW—STRIDHANAM AND SUCCESSION.

DEAD PERSON—Decree against. *See* C. P. CODE, O. 22.

DEATH BED GIFT. *See* MAHOMEDAN LAW—GIFT AND SUCCESSION.

DEATH OF PARTY. *See* C. P. CODE, O. 22, R. 6.

——Prior to hearing of appeal. *See* DECREE—VALIDITY OF.

DE BENE ESSE EXAMINATION. *See* EVIDENCE—DE BENE ESSE EXAMINATION.

DEBT. *See* (1) C. P. CODE, O. 21, R. 46.
(2) CONTRACT ACT, SS. 59 AND 60.
(3) DEBTOR AND CREDITOR.
(4) HINDU LAW.
(5) SUCCESSION ACT. S. 214.
(6) T. P. ACT, S. 58.

DEBTOR AND CREDITOR—Appropriation of payment—Right of debtor. *See also* CONTRACT ACT, S. 60.

——*Appropriation of payment—Running account.*

Where there is a running account between the plaintiff firm and the defendants and a large number of items are taken and payments made from time to time, the final amount due is a single debt and any payment made is a payment to the entire account. (*Skemp, J.*) DAYAL & CO., LAHORE *v.* RADHA KISHAN. **158 I.C. 260=8 R L. 214=A.I.R. 1935 Lah. 559.**

——*Assignment of debt—Order by debtor on third person to pay out of a specified fund—Effect of.*

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds, to which the agreement or order refers. (*Tek Chand and Monroe, JJ.*) THAKAR DAS BHATIA *v.* MALIK CHAND. **14 Lah. 325=I.R. 1933 Lah 412 (2)=144 I.C. 6=34 P.L.R. 988=A.I.R. 1933 Lah. 102.**

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———Composition deed—Creditor not party thereto, electing to abide by it—Right to enforce. *See* CONTRACT—RIGHT TO ENFORCE. **1935 A.W.R 426 = A.I R. 1935 All. 441.**

———*Composition deed—Debtor assigning his property to trustees—Effect of—Rights of subsequent execution creditor.*

An arrangement by which a debtor *bona fide* assigns his entire property to trustees for the benefit of his creditors has the effect of divesting the debtor of any interest in the property so assigned, although some of the creditors may not have expressed their willingness to accept that arrangement. A creditor who does not assent to the assignment can sue the debtor but cannot proceed against the property which under the deed of assignment has vested in the trustees. The document cannot be deemed to have been made only for the debtor's convenience nor can the trustees be treated as mere mandatories. They have a right to claim directly under the deed as parties taking a legal and equitable interest which cannot be defeated at the instance of a subsequent execution creditor. (*Allsop and Baipai, JJ.*) GOVIND RAM *v.* KASHI NATH. **161 I.C. 903 = 8 R.A 802 = 1936 A L.J. 350 = 1935 A.W.R. 1432 = A.I.R. 1936 All. 239.**

———*Composition deed—Validity—Debtor allowed to reserve small portion of his property to himself.*

The mere fact that the creditors allow the debtor to reserve a small portion of his property for his own purposes would not invalidate a composition deed, whereby the debtor *bona fide* assigns his property to trustees for the benefit of his creditors. 3 Agra H. C. R. 104, Rel. on. (*Allsop and Baipai, JJ.*) GOVIND RAM *v.* KASHI NATH. **161 I C. 903 = 8 R.A. 802 = 1936 A.L J. 350 = 1935 A.W.R 1432 = A.I.R. 1936 All. 239.**

———*Composition deed—Validity—Debtor assigning his property to trustees—Negligence of trustees—Effect of.*

A composition deed by which a debtor *bona fide* assigns his property to trustees for the benefit of his creditors cannot be invalidated by subsequent negligence on the part of the trustees. 3 Agra H. C. R. 104, Rel. on. (*Allsop and Baipai, JJ.*) GOVIND RAM *v.* KASHI NATH. **161 I.C. 903 = 8 R A. 802 = 1936 A.L.J. 350 = 1935 A.W.R. 1432 = A I.R. 1936 All. 239.**

———*Composition deed—Validity—Property assigned to trustees—Trustees empowered to engage old servants of debtor.*

A composition deed by which a debtor *bona fide* assigns his property to trustees for the geneal benefit of all his creditors is not void, although it empowers the trustees to engage the oid servants of the debtor for the purpose of realising the outstandings (*Allsop and Baipai, JJ.*) GOVIND RAM *v* KASHI NATH. **161 I. C. 903 = 8 R.A 802 = 1936 A L.J. 350 = 1935 A.W.R. 1432 = A.I.R. 1936 All. 239.**

———*Debt joint and several—Judgment without satisfaction against one—No bar to action against other.*

A judgment without satisfaction recovered against one of two joint-debtors is not a bar to an action against the other, where the debt is joint and several. *King* v. *Hoare*, 153 E.R. 206 Ref. (*Agarwala, J.*) TRADERS' CO-OPERATIVE BANK, LTD., PATNA *v* MALLICK. **6 R.P. 367 = 147 I.C. 702 (2) = A.I R. 1934 Pat 52 (2).**

———*Executor—Borrowing for benefit of estate—Right of creditor against estate.*

Where an executrix executed promissory notes as such executrix and it appeared the loans were taken for the benefit of the estate and the creditor impleaded all the parties and applied for a decree binding the estate.

Held, that the only right which the creditor could claim was the right to be subrogated to the right of the executrix to be indemnified out of the estate to the necessary extent. It is consequently necessary that the right of the executrix to the indemnity is established before the creditor can be subrogated to such a right. Case-law elaborately discussed. (*Mukerji and Guha, JJ.*) MAHARAJA SIR MANINDRA CHANDRA NANDI *v.* SUDHIR KRISHNA BANERJEE. **I.R. 1932 Cal. 245 = 136 I.C. 893 = 35 C.W.N. 850 = 53 C.L.J. 589 = A. I.R. 1932 Cal. 182.**

———*Joint debt—Several persons jointly liable—New contract between creditor and some of debtors reducing liability—Reduction enures to benefit of all debtors.*

Where a number of persons are under a joint liability to pay a definite sum of money and a new contract is entered into between the creditor and some of the many persons originally liable whereby the liability is to be reduced from the original amount to lesser amount, that reduction enures *pro tanto* for the benefit of the persons originally liable as well as for the benefit of the persons actually parties to the contract. (*Courtney-Terrell, C. J. and Luby, J.*) MT. LALTAPATI KUER *v* NARAIN MAHTON. **14 Pat. 275 = 7 R.P. 287 = 152 I C. 989 = A.I.R. 1934 Pat. 663.**

———*Loan—Repayment—Implied term.*

When a loan is contracted, it is an implied term of the agreement between the debtor and creditor, that the loan shall be repaid. (*Page, C. J., Baguley, Sen, Leach and Dunkley, JJ.*) MAUNG CHIT *v.* ROSHAN N.M.A. KAREEM OOMER & Co. **12 Rang. 500 = 152 I C. 1038 = 7 R.R. 184 = A.I.R. 1934 Rang. 389 (F.B.).**

———*Mistake of fact—Auction purchaser getting symbolical possession—Payment of rent to Zamindar—Suit for refund—Maintainability.*

Where an auction-purchaser at a patni sale obtained symbolical possession and paid rents to the zamindar but the sale was subsequently set aside.

Held, that the payments were not made under a mistake of fact, and cannot be treated as money paid without consideration and the auction-purchaser cannot maintain a common law cause of action for money paid without consideration. (*Rankin, C. J. and Pearson, J.*) ABDUL HAMID SARDAR *v.* BIJOY CHAND MAHATAP. **136 I.C. 472 = 36 C.W.N. 238 = 54 C.L.J. 302 = A.I.R. 1932 Cal. 108.**

———*Negotiable security—Passing of for debt—Effect—Presumption of conditional payment.*

The giving of a negotiable security by a debtor to a creditor operates only as a conditional payment and has not the effect of satisfying the debt, and the presumption arising from the giving of such negotiable-instrument is that the debt is conditionally paid. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) MUNISUBBIAH *v.* MUNGUMULL JESSASING SAIT. **12 Mys. L.J. 279 = 39 Mys.H.C.R. 342.**

———*Personal liability—Running account—Shop offered as collateral security.*

Where the dealings between the parties were in a running account, the mere fact that a shop has been offered as collateral security does not relieve the debtors of their personal liability and the creditor is legally entitled to claim a personal decree against the debtor in the event of the sale proceeds of the charged property being found insufficient to meet his dues. (*Tek Chand and Din Mahomed, JJ.*) KESARI MAL UMRAO SINGH *v.* TANSUKH RAI KIDAR NATH **16 Lah. 137 = 153 I.C. 1064 = 7 R.L. 503 = 37 P.L.R. 482 = A.I.R. 1934 Lah. 765.**

———*Place of repayment—Debtor to go to creditor.*

Where no application has been made by the debtor to appoint a place for the performance of the promise, the place of performance is to be determined with refer-

ence to the intention of the parties, and that in doing so, regard should be had to the fact that the obligation to pay the creditor involves the further obligation of finding the creditor so as to pay him. On an urgent request of defendant for a loan, the plaintiff deposited Rs. 500 with the Kothi at Hyderabad to be paid to defendant through the branch of that Kothi in Karachi. The plaintiff in his plaint averred that the loan had to be returned at Hyderabad. The plaintiff brought the present suit at Hyderabad.

Held, that even if there was no promise to return the money at Hyderabad and the agreement between the parties was silent on that point, the defendant who had promised to return the loan must be presumed to have promised to return it at Hyderabad. 5 Rang. 451 (P.C.), Foll (*Ferrers, J.C. and Mehta, A.J.C.*) TULJARAM DOWLATRAM *v.* WADHUMAL PAMANAS. **I.R. 1933 Sind 118=142 I.C. 844=A.I.R. 1933 Sind 62.**

———Place of re payment of debt—Duty of debtor to seek out creditor—Loan under negotiable instrument—Where payable. *See* NEGOTIABLE INSTRUMENTS ACT, S. 70. **155 I.C. 953=A.I.R. 1935 Nag. 144.**

———*Place of re payment—Duty of debtor to find out creditor—Deposit paid under contract—Conversion into debt—Suit to recover.*

The plaintiffs entered into a contract with the defendant, by which the latter agreed to employ the plaintiffs as their sole agents in connection with a business. In pursuance of the arrangement, the plaintiffs sent to the defendant a certain amount by way of deposit. The arrangement having been subsequently cancelled, the plaintiffs sued for damages and for recovery of the deposit amount.

Held, that the money advanced became a debt after the cancellation of the agreement and the rule that the debtor should find his creditor was applicable and the agent may bring the suit where he resides. (*Rangnekar, J.*) CHAMPAKLAL *v.* NECTAR TEA CO. **57 Bom. 306=I.R. 1933 Bom. 273=143 I.C. 335=35 Bom.L. R. 168=A.I.R. 1933 Bom. 179.**

———*Place of re payment—Mortgage debt.*

A mortgage debt is payable at the place where the mortgagee resides, for unless a particular place be agreed upon for payment of mortgage debt, a personal tender is generally necessary. (*Mitter and M.C. Ghose, JJ.*) DHARANIDHAR ROY *v.* P. D. SETHI. **60 Cal. 782=I.R. 1933 Cal. 476=143 I.C. 785=37 C.W.N. 439=57 C.L.J. 205=A.I.R. 1933 Cal. 379.**

———*Plea of discharge—Proof—Onus.*

In a suit for recovery of money the defendant pleaded payment and produced a *baki* on which he said there was the plantiff's thumb-mark. The plaintiff denied the thumb-mark.

Held, that the initial onus was rightly placed on the defendant but as soon as the finding was given that the thumb mark was that of the plaintiff the onus shifted. (*Harrison and Tek Chand, JJ.*) BAL MOKAND *v.* RAM LAL. **I.R. 1931 Lah. 835=133 I.C. 867=32 P. L.R. 407.**

———*Promissory note—Suit against one legal representative of deceased executant—Other legal representatives added after limitation—Effect of.*

A creditor is no doubt entitled to a simple money decree against the legal representatives of a deceased executant of a promissory note, and to realize that decree from his assets. But if more than one person is in possession of those assets, every one of those persons is, to the extent to which he is in possession of the assets, a legal representative of the deceased. The mere fact that one of them is impleaded as a defendant within time could not warrant the passing of a decree against the others who are not made defendants till the period of limitation for the suit expires. The decree that is passed against the legal representative who is impleaded in time is confined in its operation to the assets, if any, of the deceased in his hands, and the assets in the possession of the others could not be disturbed in execution of that decree. (*Iqbal Ahmad, J.*) MANNI GIR *v.* AMAR JATI **160 I.C 1030=8 R.A. 691=1936 A.L.J. 431=1935 A.W.R. 1502=A.I.R. 1936 All. 94.**

———Remedy—Obligation of debtor — Nature of—Remedy of creditor—Right to perpetual injunction restraining sale of properties by debtor. *See* SPECIFIC RELIEF ACT, S. 54. **18 N.L.J. 123.**

———*Remedy—Promissory notes executed by way of settlement of accounts—Right of action based on settlement of accounts.*

Where promissory notes are executed by way of settlement of accounts, the notes must be treated as conditional payment of the amount found due at the settlement, and so long as the notes are outstanding and as long as the rights thereunder are enforceable, the right of action based on the settlement of accounts is kept suspended. (*Baguley and Ba U, JJ.*) MA KYI *v.* P. R. M. A. C. T. V. R. CHETTIAR FIRM. **159 I.C. 720 =8 R.R. 277=A.I.R. 1935 Rang. 365.**

———*Remedy—Promissory note for loan—Effect—Suit on debt—Maintainability.*

The giving of a negotiable security by the debtor to the creditor operates only as a conditional payment and not as satisfaction of debt, unless the parties agree to treat it so ; and such conditional payment is liable to be defeated on non-payment at maturity. If the instrument given by the debtor is itself the consideration for the loan, or if it is accepted as accord and satisfaction of the original debt, the lender is restricted to his rights under the instrument, and he must stand or fall by it. But if it is agreed between the parties that the instrument is merely a collateral security for the re-payment of the loan, the lender has a right to sue on the original consideration, independently of the security and without regard to his rights under the instrument. (*Page, C.J., Baguley, Sen, Leach and Dunkley, JJ.*) MAUNG CHIT *v.* ROSHAN N. M. A. KAREEM OOMER & CO. **12 Rang. 500=152 I.C. 1038=7 R.R. 184=A.I.R. 1934 Rang. 389 (F.B.).**

———*Remedy—Right to sue for debt—Dissipation of security by creditor.*

If a creditor holding security sues for his debt, he is under an obligation on payment of the debt to hand over the security and if having improperly made away with the security, he is unable to return it to his debtor, he cannot have judgment for the debt. Hence where the security has been dissipated, he cannot sue to recover the debt in respect of which the security was furnished and the Official Assignee of the creditors' estate is in no better position. (*Leach, J.*) OFFICIAL ASSIGNEE *v.* HARIKRISHNA & SONS. **156 I.C. 1044=8 R R. 66= A.I.R. 1935 Rang. 201.**

———*Right to sue for accounts—Assignment—Validity.*

Where at the time of the assignment, a liquidated amount had become due to the assignors of the plaintiff, the assignment of a right to recover this debt is more than a mere right to sue for accounts and it does not therefore offend the provisions of S. 6 (*e*), T. P. Act. The mere fact that a calculation will have to be made before determining the exact amount does not make that amount any the less a debt due the assignors validly assignable in law. (*Madhavan Nair and Jack*

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son, JJ.) MATHU *v.* ACHU. **57 Mad. 1074=151 I.C. 353=7 R.M. 123=40 L.W. 524=A.I.R. 1934 Mad. 461=67 M.L.J. 158.**

———*Situs of debt—Principal and agent—Separate accounts at two places.*

As a general rule the situs of a debt is the residence of the debtor but there is either a parallel rule of validity or at any rate an exception to be found in situating the debt in the place where it is properly payable. The principal *S* employed the agent *O* to enter into executory contracts of purchase and sale for him both in Indore and in Bombay. The agent's head place of business was in Indore. Separate accounts were kept in Indore and Bombay and the transactions were kept distinct. *S*, who was employed at the Court of Indore, was in the habit of giving orders for his Bombay account in Indore where they were transmitted if necessary at his expense by telegram to Bombay, and made and received payments in respect of the Bombay account in Indore. The agent was under liability at any time to account to the principal for his transactions, and to pay to the principal any balance due on such accounting.

Held, that the accounting would in ordinary circumstances take place in Indore where the head office of the agent, was, and where both parties resided. It would not be part of the obligation of the agent that he should have to pay to the principal sums due on one account without setting against them sums due to the agent on another account. There being no sole or primary obligation to pay in Bombay, and no exclusive right to suit in Bombay, and both parties being resident in Indore, the debt was situate in Indore. *(Lord Atkin.)* CHATURBHUJ PIRAMAL *v.* CHUNILAL OOMKARMAL. **60 I.A. 211=57 Bom. 474=I R. 1933 P C. 145=37 C.W.N. 825=1933 M.W.N. 705=57 C.L J 487=1933 A.I. J. 629=35 Bom.L R. 799=38 L.W. 71=143 I.C. 211=A.I.R. 1933 P.C. 150=65 M.L J. 37 (P.C.).**

———*Subrogation—Debt due to Bank—Third party paying debt and taking back title-deeds—Right of third party to be subrogated to the rights of the Bank.*

One *P* was indebted to the Bank in the sum of Rs. 10,000, payment of this amount being secured by the deposit of certain title-deeds. An arrangement was entered into between *P* and *S* by which the latter advanced to the former a sum of Rs. 35,000 of which Rs. 10,000 were paid to the Bank and the title deeds taken back. Subsequently *P* was adjudicated an insolvent on his property vested in the Official Receiver. *S* put forward his claim as a creditor and contended that *qua* the sum of Rs. 10,000 he was in equity entitled to be subrogated to the Bank.

Held, that it was clearly the intention of the parties that out of the Rs. 35,000 advanced by *S* the debt due to the Bank was to be liquidated and therefore *S* was entitled to be subrogated to the Bank. *(Shadi Lal, C.J. and Broadway, J.)* SITA RAM *v.* KARTAR SINGH. **6 I.R. (Lah.) 191=146 I C. 239=34 P.L.R. 477=A.I R. 1933 Lah. 416.**

———*Subrogation—Payment by mere volunteer.*

A mere volunteer is not entitled to the benefit of any payment that he might make on behalf of a debtor whether it be to redeem a mortgage or to pay off a simple money debt. Hence the right of subrogation does not extend to those persons who pay off other people's debts without having any concern in them. *(Addison nd Din Mahomed, JJ.)* FATEH CHAND *v.* MOTI SINGH. **16 Lah. 1065=158 I.C. 78=8 R.L. 175=38 P.L.R. 127=A.I.R. 1935 Lah. 523.**

———*Unconscionable bargain — Interest exceeding amount of loan enormously.*

DECREE—Amendment of.

A debtor who does not choose to pay has no right to complain that the amount of interest has reached an enormous figure in course of time. The fact that the sum claimed enormously exceeds the amount originally advanced is no ground for holding that the transanction is unconscionable, unless it also appears that there was something unconscionable, either in the original dealings or in the subsequent stages of the transaction. *(Hilton and Rangi Lal, JJ.)* NANUN *v.* LACHHMAN. **7 R.L. 281=152 I.C. 522=A.I.R. 1935 Lah. 38.**

DEBUTTER PROPERTY. *See* HINDU LAW—RELIGIOUS ENDOWMENT.

DECLARATION. *See* (1) DECREE—SETTING ASIDE. (2) SPECIFIC RELIEF ACT, S. 42.

DECLARATION OF TRUST. *See* (1) HINDU LAW—RELIGIOUS ENDOWMENT. (2) MAHOMEDAN LAW—WAKF (3) TRUST. (4) TRUSTS ACT

DECLARATORY DECREE. *See* SPECIFIC RELIEF ACT, S. 42.

———Relief. *See* SPECIFIC RELIEF ACT, S. 42.

———Suit. *See* (1) COURT FEES ACT, S. 7 (*iv*) (*c*) AND (*v*) (*b*) AND SCH. II, ART. 17. (2) SPECIFIC RELIEF ACT, S. 42.

DECREE. *See also* (1) C.P. CODE, SS. 2 (2), 47, 96, 152 AND O. 9, R. 13. (2) EXECUTION.

Amendment of.
Binding nature.
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Conflicting decrees.
Construction.
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Date of.
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Instalment decree.
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Modification of.
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Validity of.

Amendment of.

———Amendment of. *See* CIVIL PROCEDURE CODE, S. 152.

———*Amendment of—Conditions.*

The only cases in which the decree can be amended by the Court which passed it are as follows: (1) Where there has been a clerical or arithmetical mistake or an error arising from an accidental slip or omission (S. 152, C. P. Code). (2) Where the Court itself finds its decree as drawn up does not correctly state what the

DECREE—Amendment of.

Court actually decided and intended to decide provided the amendment can be made without injustice or in terms which preclude injustice. A.I.R. 1933 C. 627; A.I. R. 1926 P.C. 136; *Ainsworth* v. *Wilding*, (1896) 1 Ch. D. 673 and In re *Swire*, 30 Ch. D. 239, Rel. on. (*Nasim Ali and Henderson, JJ.*) HEEMANTA KUMAR GHOSE *v.* RAJENDRA MONDAL. **158 I.C. 436=8 R.C. 186—62 C.L.J. 79=39 C.W.N. 1295=A.I.R. 1935 Cal. 619.**

——*Amendment of—Court's powers—Notice to parties—Necessity.*

Though no notice is necessary for amendment of decree by Court, it would be unfair to allow a decree to be amended without an opportunity being given to the party who will be affected by the amendment. 32 C. 253 (F.B.), Appl. (*Nasim Ali and Henderson, JJ.*) HEMANTA KUMAR GHOSE *v.* RAJENDRA MONDAL. **158 I.C. 436=8 R.C 186=62 C.L.J. 79=39 C.W.N. 1295—A.I.R. 1935 Cal. 619.**

——*Amendment of—Suit for—Competency.*

A suit does not lie for the rectification of a decree. 8 C.W.N. 473, Diss. (*Wort, J.*) MAHINDRA NARAIN *v.* MT. LALJHARI KUAR. **I.R. 1931 Pat. 366=133 I.C. 366=12 Pat L.T. 466=A.I.R. 1931 Pat. 296.**

[**Rel.** 62 M.L.J. 350 (353, 362).]

Binding nature.

—— Binding nature—Partnership suit—Declaration by Court on taking of accounts—*Ex parte* defendant. *See* PARTNERSHIP. **A.I.R. 1934 Mad. 665=67 M.L.J. 413.**

——*Binding nature—Person not party.*

It is an elementary rule of law that a decree cannot bind a person who was not a party to it. (*Agha Haidar, J.*) DHANPAL SINGH *v.* MT. FAHIMAN. **7 R.L. 477=153 I.C. 870=A.I.R. 1935 Lah. 203.**

Compromise decree.

See also COMPROMISE.

——*Compromise decree—Payment in instalments—Property offered as security—Effect.*

A decree was based on a compromise and provided for payment of the decretal amount in certain instalments and it also recited in the end that certain house property will be considered as mortgaged for satisfaction of the decree.

Held, that the mere fact that the house property was to be considered as mortgaged for the satisfaction of the decree would not convert the decree into a mortgage decree under O. 34. (*Bhide, J.*) CHAMAN LAL BODH RAJ *v.* HIRA NAND JAI RAM SINGH. **A.I.R. 1934 Lah. 176 (1).**

Conflicting decrees.

——Conflicting decrees—First decree to be regarded as dead—Last one, effective decree between the parties. *See* C. P. CODE, S. 11—SCOPE. **155 I.C. 571=1935 A.W.R. 270=A.I.R. 1935 All. 645.**

——*Conflicting decrees—Later one prevails.*

In case of conflicting decrees the later must prevail and the reason for this is that the previous decree cannot be looked into and must be held to have been discharged by the later decree. (*Staples, A. J. C.*) MIR GULAMALLI *v.* RAHIMUDDIN. **31 N.L.R. 211=155 I.C. 726=A.I.R. 1935 Nag. 122.**

Construction.

AMBIGUITY.
COMPROMISE DECREE.
CONSENT DECREE.
COSTS.
DECLARATORY DECREE.
EXECUTABILITY.
MAINTENANCE DECREE.

DECREE—Construction—Compromise decree.

MESNE PROFITS.
MORTGAGE DECREE.
RECKONING OF PERIOD.
REFERENCE TO ISSUES, JUDGMENT AND PLEADINGS.
RENT DECREE.
SETTLEMENT DECREE.
MISCELLANEOUS.

Ambiguity.

——*Construction—Ambiguity.*

In case of doubt in the construction of a decree, the benefit of it should be given to the judgment-debtor. (*Srivastava and Smith, JJ.*) MATHURA PRASAD *v.* MT. ASGHARI KHANAM. **6 R.O. 306=147 I.C. 788=11 O.W.N. 35=A.I.R. 1934 Oudh 45.**

——*Construction—Ambiguity—Words capable of more than one meaning—Reference to relevant papers and circumstances.*

To ascertain the meaning and effect of a decree of any Court it is permissible, where the words are capable of more than one meaning, to look at all relevant papers and circumstances which were before the Court, and the objects which the directions contained in the decree were aimed to achieve. Of two possible constructions the Court will not accept the one which leads to plain injustice and make its own decree an instrument of depriving parties, whose case had not been heard and decided, of valuable and cherished rights, which no one had any intention to destory. (*Wallace and Pandalai, JJ.*) MANA VIKRAMA RAJA *v.* THATTAMANGALATH. **54 Mad. 532=131 I.C. 19=A.I.R. 1931 Mad. 328.**

Compromise decree.

See also EXECUTABILITY, *infra.*

——*Construction—Compromise decree—Decree by Settlement Court—Creation of mortgage.*

Where in a suit filed in the settlement Court, the plaintiff claimed the land in suit as his *brit* or underproprietary tenure, and the defendant talukdar contended that the land was not the brit of the plaintiff but that it was mortgaged to him and the suit was compromised by the parties and the compromise was to the effect that as soon as the defendant talukdar paid a certain sum to the plaintiff, the latter and his heirs would give up the land and have nothing to do with the property, and the judgment of the Settlement Court embodied the terms of the compromise.

Held, that the parties, by the compromise, and the judgment of the Settlement Court which gave effect to that compromise, created a fresh mortgage in respect of the land in suit and there was thus a novation of contract. (*Nanavutty, J.*) BHABHUTI PRASAD *v.* PARBATI KAUR. **155 I.C. 534=7 R.O. 608=1935 R.D. 243=1935 O.W.N. 533=A.I.R. 1935 Oudh 366.**

——*Construction — Compromise decree — Partition suit—Allotment of properties and debts—Rights of creditors to enforce charge — Transaction whether amounts to trust for creditors.*

In a partition suit the parties entered into a compromise decree by which certain properties were given to certain branches to which also were allotted some debts and then it was provided "that until the said debts were fully discharged, the properties allotted to the several persons should be liable in the first instance". The subsequent conduct of the parties showed that the parties did not intend to create a charge in favour of the creditors.

Held, that the compromise merely contained a contract of indemnity conferring no benefit on the creditors and that the latter could not sue to enforce ths same, because the compromise neither created a trust for cre-

DECREE—Construction—Consent decree.

ditors nor a charge in their favour. 1917 M.W.N. 553 and 1921 M. W. N. 680, Ref. (*Jackson and Pakenham Walsh, JJ.*) SURYANARAYANA RAO *v.* BASIVIREDDY. **55 Mad. 436=I.R. 1932 Mad. 622=139 I.C. 135=1932 M.W.N. 44=35 L.W. 490=A.I.R 1932 Mad. 457=62 M.L.J. 533.**

Consent decree.

———*Construction—Consent decree—Option to execute.*

A consent decree provided that "in default of payment of two consecutive instalments by the Receiver and in breach of the terms in Cl. (*d*)" (as to insurance) execution should be proceeded with.

Held, that the effect is that in default of payment of two consecutive instalments the plaintiff will be entitled to execute the decree and in case of a breach of covenant to insure the plaintiff will be similarly entitled to execute the decree. (*Rankin, C.J. and C. C. Ghose, J.*) CHANDRA NATH BAGCHI *v.* NABADWIP CHANDRA DUTT. **I.R. 1931 Cal. 494=131 I.C. 702=35 C.W.N. 9=53 C.L J. 329=A I.R. 1931 Cal. 476.**

Costs.

———*Construction — Costs — 'Costs of the suit'—Whether includes costs of defendant against whom no relief is sought.*

The expression "the costs of the suit" in a decree means all costs of the suit including the costs in respect of defendants against whom no relief had been obtained by plaintiff. (*Wadia, J.*) RAMGOPAL *v.* SECRETARY OF STATE. **57 Bom. 589=I.R. 1933 Bom 220=142 I.C. 367=35 Bom.L.R. 105=A.I.R. 1933 Bom 106.**

———*Construction—Costs—Decree including costs not allowed under the rules—Duty of Court to correct.*

Where the judgment awards costs to a party, it implies costs allowed by the rules. If the decree includes costs which are not permissible under the rules, the decree is not in accordance with the judgment and does not correctly state what the Court intended. It is therefore the duty of the Court to correct it so as to make it in conformity with the judgment. (*Nasim Ali and Henderson, JJ.*) HEMANTA KUMAR *v.* RAJENDRA MONDAL. **63 Cal. 181=158 I.C. 436=8 R.C. 186=62 C.L J. 79=39 C.W N. 1295=A.I.R. 1935 Cal. 619.**

———*Construction—Costs—Direction directing defendants to pay costs—Personal liability.*

A direction in a decree directing defendants to pay costs amounts to a personal decree against them to that effect, even if such defendants are Dharmakartas, unless it is expressly provided that the costs are to be recovered only from the estate which they administer. (*Curgenven, J.*) PANCHAKSHARI *v.* VENKATARATNAM. **58 Mad. 160=150 I.C. 87=6 R.M. 688=40 L.W. 22=1934 M.W.N. 1178=A.I.R 1934 Mad. 430=67 M.L.J. 209.**

———*Construction—Costs—Joint and several liability for costs.*

Where the decree for costs did not indicate the proportions in which the costs were to be borne by the respondents, it imposes a joint and several liability on all the respondents. 70 I. C. 782, Foll. (*Khaja Mahomed Noor and Dhavle, JJ.*) JAMUNA PROSAD SINGH *v.* RAM SAKHI KUER. **140 I.C. 874=I.R. 1933 Pat. 33=13 Pat.L.T. 619=A.I.R. 1933 Pat. 24.**

Declaratory decree.

———*Construction—Declaratory decree.*

Where an award on which a decree was passed was to the effect that certain sum is due from defendant to plaintiff and several provisions were made for its payment.

Held, that the decree was a declaratory one. (*Middleton, J.C. and Almond, A. J. C.*) RAM CHAND *v.* SUNDAR LAL. **157 I.C. 865=8 R. Pesh. 42=A.I.R. 1935 Pesh. 119.**

DECREE—Construction—Executability.

———*Construction—Declaratory decree or executory one.*

Decrees can be construed to be executory or declaratory. (*Almond, J.C. and Kazi Mir Ahmad, A.J.C.*) KHAN MAHOMED NAWAZ KHAN *v.* SHIVA RAM SINGH. **151 I.C 235=7 R. Pesh. 16=A.I.R. 1934 Pesh. 64.**

———*Construction—Declaratory decree or one for possession.*

The award on which a decree was passed was to the effect that the lands situated in the villages in question, which were entered in list *A*, were the joint property of the parties in equal shares and in the decree sheet what was said was that the parties were declared joint owners in equal shares of the lands specified in list A filed with the award.

Held, it was impossible to interpret this document as being a decree for possession. (*Addison and Sale, JJ.*) THANA RAM *v.* HIMTU RAM. **157 I.C. 816=A.I.R. 1935 Lah. 96.**

Executability.

———*Construction—Executability—Compromise decree in mortgage suit.*

By a compromise, the plaintiff became a mortgagee by conditional sale in respect of the properties mortgaged, and the decree was passed in these terms: 'It is ordered and decreed that the suit be decreed in terms of the petition of compromise filed on behalf of both parties, that the parties be bound by the terms of the compromise and they do get their respective remedies in accordance therewith and that the petition of compromise which has been filed do form part of the decree."

Held, that the decree not only declared the rights of the parties under the solenama but directed certain acts to be done and was capable of being executed. (*Nasim Ali and Khundkar, JJ.*) SURENDRA NARAIN SAHA *v.* KANAI LAL DUGAR. **152 I.C. 854=7 R.C. 324=A.I.R. 1934 Cal. 735.**

———*Construction—Executability — Decree against managing committee of school—Execution against assets of school.*

A decree against the managing committee of an unincorporated association, for example a school, with a direction that the managing committee are not personally liable must be reasonably construed to mean a decree against them in their representative capacity and binds the school even if the members of the managing committee change after the decree; such a decree can be executed against the assets of the school at the time of execution; it is enough if all the members of the present managing committee are on the record before execution is to proceed with and the members of the managing committee if they pay the debt due by the school are liable to be indemnified out of the assets of the institution. (*Mitter and M. C. Ghose, JJ.*) TARAPRASANNA GANGULY *v.* NARESH CHANDRA CHAKRABARTY. **60 Cal. 794=I.R 1933 Cal. 438=143 I.C. 457=37 C.W.N. 495=A.I R. 1933 Cal 329.**

———*Construction—Executability — Reasonable construction—Avoiding inexecutability.*

A reasonable construction must always be put on a decree and the Court should always lean against a construction which renders a decree inexecutable. (*Mitter and M. C. Ghose, JJ.*) TARAPRASANNA GANGULY *v.* NARESH CHANDRA CHAKRABARTY. **60 Cal 794=I.R. 1933 Cal. 438=143 I.C. 457=37 C.W.N. 495=A.I.R. 1933 Cal. 329.**

———*Construction—Executability — Suit to declare rent decree void—Order that decree holder is entitled to proceed against tenures in arrears, "without prejudice to the rights of the plaintiffs"—Meaning of.*

DECREE—Construction—Executability.

In a title suit to declare that certain rent decrees were null and void, having been obtained by fraud and misrepresentation and for an injunction restraining execution, an order was passed, that execution might proceed against the tenures in arrears only without prejudice to the rights of the plaintiff to be decided in the title suit.

Held, that the order did not exclude the share of the plaintiff from the execution proceedings against the tenures in arrears. (*Jack and Khundkar, JJ.*) PRAFULLA NATH TAGORE *v.* PARUK. **154 I.C. 98 = 7 R.C. 435 = 59 C.L.J. 452 = A.I.R. 1935 Cal. 13.**

———*Construction—Executability—Suit for mandatory injunction — Dismissal — Direction regarding accounts.*

A suit for a permanent injunction was dismissed but the Court modified the decree as follows."—It is declared that the plaintiff's gumasthas are entitled to prepare and should be allowed opportunity of preparing independent accounts which the defendant's gumasthas should countersign if correct".

Held, that the decree embodied a direction and was executable. (*Venkatasubba Rao and Reilly, JJ.*) DHARMAKARTHA OF TIRUMALAI *v.* PRAYAG DOSS JEE VARU. **1932 M W.N. 1059.**

Maintenance decree.

———*Construction—Maintenance decree in favour of Hindu widow—Charge over specific items—Remedy against other properties.*

A decree for maintenance obtained by a Hindu widow against her husband's coparceners directed the latter to pay maintenance at a certain rate out of the assets of their joint family and further charged certain specific items of property with the maintenance. The payment of maintenance having fallen into arrears, the widow applied by way of execution for attachment of the family house, an asset of the joint family but not an item over which the charge was created.

Held, that since the decree had provided for concurrent execution, the application was legally sustainable and it was not incumbent on the decree-holder to proceed against the security in the first instance.

Per *Venkatasubba Rao, J.*—If it is shown in such a case that the decree-holder's application is *mala fide* the Court may in the exercise of its discretion refuse the application and compel her to pursue her remedy against the security. (*Venkatasubba Rao and Reilly, JJ.*) SRINIVASA IYER *v.* LAKSHMIAMMAL. **56 Mad. 343 = I R. 1933 Mad. 7 = 1932 M.W.N. 1200 = 140 I.C 408 = 36 L W. 714 = A.I.R. 1933 Mad. 33 (1) = 63 M.L.J. 843.**

Mesne profits.

———*Construction—Mesne profits—Co-sharer in possession of entire land as lessee of the others—Compensation in lieu of mesne profits subsequent to the institution of suit—Power of Court to award.*

A co sharer was in possession of the entire land in his capacity as a co-sharer and as lessee of the other co-sharers. On the expiry of the lease, the other co-sharers brought a suit for joint possession and mesne profits and a decree was passed in their favour. Subsequently the decree was modified by disallowing joint possession and though compensation was allowed in lieu of mesne profits, the decree did not specify the period over which the payment of compensation was to extend.

Held, as a matter of construction of the decree, the compensation was intended to continue from the expiration of the lease just so long as the payment of mesne profits would have continued had the original decree with reference to them remained in force. So as the co-sharer had throughout remained in possession the plaintiffs would be entitled to compensation, till the expiry of three years from the date of the decree. Although, as a general rule, the court has no jurisdiction to give plaintiffs a decree in respect of a cause of action, that had not accrued to them at the date of the institution of their suit and the plaintiffs are not entitled to a decree for compensation in respect of a period subsequent to the institution of their suit. (*Lord Balanesburgh.*) RAGHUBANS NARAIN SINGH *v.* KHUB LAL SINGH. **58 I A. 299 = 11 Pat. 22 = 35 L.W. 49 = I.R. 1931 P.C. 266 = 133 I.C. 730 = 12 Pat.L.T. 737 = 1931 M.W.N. 1301 = 35 C W N. 949 = A.I.R. 1931 P.C. 209 = 61 M.L.J. 186 (P.C.).**

DECREE—Construction—Reference to Judgment.

Mortgage decree.

———*Construction—Mortgage decree.*

A decree provided that the mortgagor was to pay a certain amount to the mortgagee within a certain time. It further provided that if he failed to pay, the mortgagee would be entitled to realise the decree amount with interest by the attachment and sale of the mortgaged property.

Held, that the decree was a mortgage decree. (*Abdul Qadir, J.*) MAM CHAND *v.* ROSHAN LAL. **14 Lah. 243 = 142 I.C. 759 = I.R. 1933 Lah. 267 = 33 P.L.R. 975 = A I.R. 1933 Lah. 48.**

Reckoning of period.

———*Construction—Reckoning of period—"Act to be done by a certain date."*

When time is given for the performance of any act till or by a certain date it includes that date also, so that an order dismissing a petition for non performance of that act on that date is without jurisdiction. 39 Mad. 583 and 55 M.L.J. 274, Foll. (*Venkatasubba Rao and Reilly, JJ.*) CHINNIAH CHETTIAR *v.* KUMARASWAMIAH. **1933 M.W.N. 88 (1)**

———*Construction—Reckoning of period—Amount to be deposited "within three months from to day".*

The General Clauses Act embodies a principle of equity which should be applied to decree apart from Statutes. As the date from which one reckons may be either inclusive or exclusive, the period to be reckoned should exclude the day mentioned. Where the decree-holders obtained a decree against the judgment debtor that he should pay Rs. 6,000 to the decree-holders or deposit the same amount in the trial Court "within three months from to day", the date of the decree being 18th April, 1933, and that if the sum was not so paid, the plaintiff's suit was to be deemed to have been decreed in full with costs throughout.

Held, the deposit made on 18th July, 1933, was within time. (*Addison and Din Mohammad, JJ.*) PURAN CHAND *v.* MOHAMMAD DIN. **157 I.C. 149 = 8 R.L. 96 = 38 P L R. 124 = A.I.R. 1935 Lah. 291.**

Reference to issues, judgment and pleadings.

———*Construction—Reference to issues, judgment and pleadings.*

In order to determine what a decree actually decides, it is necessary and sometimes it becomes incumbent to refer to the judgment on which it is based, to the issues in the suit and in some cases to the pleadings. (*Suhrawardy and Costello, JJ.*) GAURI SANKAR PODDAR *v.* GURUPADA HALDAR. **I.R. 1931 Cal. 577 = 132 I.C 625 = 35 C.W N. 66 = A.I.R. 1931 Cal. 511.**

———*Construction—Reference to judgment—When permissible.*

A Court cannot look at its judgment to interpret its decree where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment. 50 Cal. 35, Ref. (*Smith, J.*) RAM SAROOP *v.* JWALA PRASAD. **7 Luck. 421 = 136 I.C. 252 = I.R.**

DECREE—Construction—Reference to pleadings.

1932 Oudh 108=8 O.W.N. 1337=A.I.R. 1932 Oudh 77 (2).

———*Construction—Reference to judgment and pleadings.*

The pleadings and the judgment must be looked at to ascertain the true meaning of a decree which is unintelligible. (*Dalip Singh and Bhide, JJ.*) MUNICIPAL COMMITTEE, SONEPAT *v.* DHARAM CHAND. **162 I.C. 59=8 R.L. 842=37 P.L.R. 289=A.I.R. 1935 Lah. 632.**

———*Construction of—Reference to pleadings.*

Where a decree against the father and son composing a joint family is unrestricted in terms, it is open to the executing Court to refer to the pleadings in order to find out what the decree really is. (*Terrell, C. J. and Khaja Mohammad Noor, J.*) SUKHDEO PRASAD NARAIN SINGH *v.* MADHUSUDAN PRASAD NARAYAN SINGH. **10 Pat. 305=12 Pat.L.T. 75=132 I.C. 871 =A.I.R. 1931 Pat. 177.**

[**Expl.** 15 L. 326 (328).]

———Construction—Reference to pleadings—Decree against Hindu widow—Execution against estate—Prayer in plaint claiming relief to her properties—If can be looked into—Debt incurred for estate expenses. *See* HINDU LAW—WIDOW. **68 M.L.J. 643.**

Rent decree.

———*Construction—Rent decree—Execution.*

The appellant obtained a decree in a rent suit brought against two persons who had formerly been tenants of the holding and also against the respondents who had purchased the holding at a Court sale held in execution of a previous rent decree. The decree was for a total sum of the amount payable by each, for the periods for which they were tenants of the holding. It was executed as a rent decree for the whole amount and the holding was put up for sale.

Held, that the decree could not be executed as rent decree as it included the money which the respondent was not liable to pay, that it could be executed only as money decree and that the sale should be set aside. (*Saunders, J.*) KESHO PRASAD SINGH *v.* MADHO PRASAD SINGH. **6 I.R. (Pat.) 328=146 I.C. 1049= A.I.R. 1933 Pat. 608.**

Settlement decree.

———*Construction—Settlement decree—Provision for payment of increased rent by thekadar—Enforcement by taluqdar.*

A settlement decree provided as follows: "The claim of the plaintiffs to be under-proprietors is dismissed. A decree is passed for 'daswandh' and for the theka of the village. As regards this theka, the taluqdar is to have power to fix a new Jama or to assess or amend the Jama in accordance with the practice prevalent in Shahi times. In any year in which the talukdar is himself in charge of the property or in which the plaintiffs refuse the theka the plaintiff will be entitled to receive 'daswandh' from the assets of the village."

Held, that it was the intention of the decree that the tenants should be in occupation so long as they paid Jama in accordance with the practice prevalent in the Shahi days and that it was not intended that the land could be resumed at the option of the taluqdar or that the taluqdar could charge an exhorbitant rent. He can sue for ejectment only under Ss. 52 (3) and 71, Oudh Rent Act for non-payment of rent. (*Smith, S.M. and Oppenheim, J.M.*) LAKHPAT *v.* JAGDAMBA DEVI. **15 R. D. 593=12 L.R. 299 (Rev.).**

Miscellaneous.

———*Construction—Miscellaneous—Secured creditor—Object of decree taken into account.*

The simple mortgagee of certain goods sued for money due. The plaintiff however did not ask for a decree that the mortgaged goods be sold but urged at the hearing that he had a remedy against the goods and in the course of the argument insisted upon his right. The Court passed a decree which was not clearly expressed but the object of which was to give the plaintiff recourse to the goods.

Held, that the position of the plaintiff decree-holder is that of a secured creditor. (*Mears, C.J. and Sen, J.*) MUNNA LAL & SONS *v.* OFFICIAL RECEIVER, JHANSI. **I.R. 1932 All. 320 (1)=137 I.C. 208 (2)= A.I.R. 1932 All 550 (1).**

DECREE—Executability.

———*Construction—Miscellaneous—Sole plaintiff—Suit not filed in representative capacity—Decree not in favour of persons other than plaintiff.*

Where the plaint did not show that it was filed in a representative capacity and there was no mention of the other claimant in it or in any other documentary evidence or in the decree,

Held, that the decree should be taken to enure for the benefit of the sole plaintiff. (*Nanavutty, J.*) ABDUL RAHIM *v.* MOHAMMAD NAZIR. **I.R. 1931 Oudh 379 =134 I.C. 475=8 O.W.N. 797.**

Costs.

———*Costs—Provision for payment to solicitor named—Right of solicitor to enforce.*

Where a decree provides that the costs of one of the parties should be paid to the solicitors named in the decree, the solicitors so named can enforce the decree, notwithstanding the fact that they are not parties to the suit. (*Tyabji, J.*) RUSTOMJI AND GINWALA *v.* FAZAL RAHIM. **I.R. 1932 Bom. 445=138 I.C. 832=34 Bom. L.R. 670=A.I.R. 1932 Bom. 378.**

Date of.

———*Date of—decree relating to costs.*

The judgment is split up into two parts. That part which relates to costs is postponed until the costs are taxed and determined and finally entered in the decree. The judgment as regards the costs must be considered to be delivered when the costs are taxed and noted in the margin and the decree as to costs must date from that time. (*Tyabji, J.*) RUSTOMJI AND GINWALA *v.* FAZAL RAHIM. **I.R. 1932 Bom. 445=138 I.C. 832 =34 Bom. L.R. 670=A.I.R. 1932 Bom. 378.**

Executability.

See also PARTITION DECREE.

———*Executability — Compromise in execution — Judgment-debtor allowed time for payment—Execution adjourned—Decree not extinguished.*

Where in course of execution proceedings, on the date fixed for sale, the parties made a statement amounting to an arrangement by which a certain sum was to be paid by the judgment-debtor in a month and the remainder in five months on the first payment being made, three lots were to be released from attachment; in the event of default in the second payment, the remaining lots to be considered as sold to the decree-holders. No final orders were passed on the compromise which was merely recorded and the execution petition was adjourned.

Held, that the order sanctioning the sale subject to the terms contained in the statement was not a final order sanctioning a new contract and that the decree remained executable. 30 C. 1021, dist. (*Fraser, J.C.*) RADHA KISHEN MOHAR CHAND *v.* KISHAN CHAND. BOOTA MAL. **I.R. 1933 Pesh. 20=143 I.C. 228= A.I.R. 1933 Pesh. 63.**

———*Executability—Compromise by parties varying terms of decree and recorded under O.21, R. 2—Effect of*

A decree directed immediate recovery, but parties entered into agreements whereby the decretal amount was to be paid by instalments The agreements were

DECREE—Executability.

submitted to executing Court and accepted. The judgment debtor undertook to pay interest on decretal amount, a condition which did not exist in the decree. A person also stood surety for payment of decretal money and the agreement of payment by instalments was entered into between decree holder and surety;

Held, that the agreement amounted to a fresh contract between the parties, which did not keep the decree alive and capable of execution, even though it had been recorded by the Court and it could not be enforced by the executing Court (Case law dicussed.) (*Fraser, J.C. and Saaduddin, A.J.C.*) RAM DAS *v.* ALI BAHADUR. **6 I.R. (Pesh.)1=144 I.C. 721=A.I.R. 1933 Pesh. 53.**

———*Executability—Decree merely declaratory or executable—Test.*

The test to see whether a decree is an executable one or is merely declaratory is whether there is a direct order against any one or whether the decree merely deelares rights and obligations on the part of any one. After sale of attached property, the judgment-debtor preferred objection that the decree was void and could not be executed. The parties had referred their dispute to arbitration out of Court. An award was delivered in pursuance thereof which effected mortgage of judgment-debtor's property of one house for Rs. 3,000 to be paid by the mortgagee decree holder; the mortgage was to be with possession for a period of a year and a half to be counted from date of the award. Arrangment as regards repayment of mortgage-money was also laid down. The award was filed and a decree was passed incorporating the terms of the award. The Mortgagee-decree-holder took out execution of this decree and prayed for recovery of his mortgage-money with certain item due for rent by sale of the mortgaged property.

Held, that the decree was merely declaratory of the rights and obligations of the parties and was not capable of enforcement in execution proceedings. A. I. R. 1930 Lah. 110, Rel on. *Middleton, J.C. and Saaduddin, A.J.C.*) HUKM CHAND TILOK CHAND *v.* LORINDA RAM. **6 I.R. (Pesh.) 24=146 I.C. 1094=A.I.R. 1933 Pesh. 83.**

———*Executability — Decree merely declaratory—Insertion of clause that recovery can be made by execution—Effect.*

Where a decree is merely declaratory in nature and therefore cannot be executed, *e.g.*, a decree declaring certain property to be under mortgage for the amount due, the mere insertion of a clause that recovery can in future be made by execution cannot change its nature. (*Middleton, J.C.*) TIKAYA RAM KHUSHAL RAM *v.* GHANSHAM DAS. **6 R. Pesh. 41=147 I.C. 837=A.I.R. 1934 Pesh. 3.**

———*Executability—Portion of decretal rights devolving on judgment-debtor—Effect of.*

Where subsequent to a decree, a portion of the rights to which the decree relates, devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. And the remaining portion can be executed. 10 All. 570, Rel. on; 9 Cal. 482 (P.C.) and 61 P. R. 1910, Ref. (*Rupchand J. C. and Lobo A. J. C.*) MT. GHULAM FATMA *v.* ABDUL AZIZ. **27 S.L.R. 411=149 I.C. 608=6 R.S. 225=A.I.R. 1933 Sind 371.**

———*Executability—Preliminary decree and final decree—Appeal from preliminary decree and compromise modifying such decree—Final decree as such cannot be executed unless fresh final decree is obtained.*

Where a preliminary decree, on which the final decree sought to be executed is based, is modified by a compromise entered into in an appeal by the parties and accepted and incorporated in a decree by the High Court, the final decree is no longer executable and a fresh final decree must be obtained. A I. R. 1926 Lah. 534, Rel. on. (*Dalip Singh, J.*) MEWA SINGH *v.* TARA SINGH. **6 I.R. (Lah.) 251 (1)=146 I.C. 597 (1)=34 P.L.R. 998=A.I.R. 1933 Lah. 859 (2).**

———*Executability—Scheme decree—Directory clause in scheme of management.*

The clauses in a decree in the portion not embodying the scheme which are otherwise capable of being executed, do not cease to be executable, merely because the decree also embodies a scheme of management. But any provision inserted in the part of the decree containing the scheme is *prima facie* inexecutable although in form it is directory. (*Venkatasubba Rao and Reilly, JJ.*) RAMACHARYULU *v.* NARASIMHA SURYANARAYANA. **1933 M.W.N. 183.**

Execution.

See also EXECUTION AND INSTALMENT DECREE, *infra.*

———*Execution—Decree creating charge.*

A decree creating a charge can be executed by sale without a fresh suit or even a fresh attachment. 33 M. L.J. 601, Foll. (*Reilly and Anantakrishna Ayyar, JJ.*) BUCHAYYA *v.* SRIRAMAMMA. **I R. 1931 Mad. 479=131 I.C. 15=33 L.W. 559=A.I.R. 1931 Mad. 603 (1).**

———Execution—Decree for damages for physical injury—Direction to determine prospective damages in execution—Legality—Jurisdiction of execution court. *See* DAMAGES. **A.I.R. 1935 All. 186.**

———*Execution—Limitation—Ground for exemption not mentioned in petition—Right subsequently to rely on it.*

Where a person relies upon a particular ground as reviving limitation for an execution application, it is incumbent upon him to specify that ground in the application. If he fails to do so, it is not open to him to take advantage of it subsequently. (*Rupchand J. C. and Mehta, A. J. C.*) KALIANDAS BALCHAND *v.* MAHOMED KHAN. **147 I.C. 30=6 R S. 133=A.I.R. 1933 Sind 365.**

———*Execution—Objection as to jurisdiction of Court cannot be waived.*

If the objection goes to the matter of jurisdiction of the Civil Court to hold sale in execution of a decree, the waiver of the objection by the councel for the judgment-debtor is of no consequence. A. I. R. 1931 Oudh 398, Rel. on. (*Wazir Hasan, C.J. and Nanavutty, J.*) AMIR HAIDAR *v.* BABBU LAL. **9 Luck. 390=6 R O. 282=147 I.C. 613=10 O.W.N. 1267=A I.R 1934 Oudh 16.**

———*Execution—U. P. Government—Notification No. 576-1 A 93, dated 26th March, 1932—Sale in execution not made previous to 1st April—Proceedings held to be pending.*

Held, that U. P. Government Notification No 576-1A-93, dated 26th March, 1932, declaring that, "with effect from 1st April, 1932, the execution of decrees in cases in which the civil Court has ordered any agricultural land situated in the Untited Provinces of Agra and Oudh or any interest in such land to be sold, shall be transferred to the Collector" applied to all cases of sales which were not made prior to 1st April as execution proceedings must be held to be pending. A.I.R. 1933 Oudh 274, Foll. (*Wazir Hasan, C. J. and Nanavutty, J.*) AMIR HAIDER *v.* BABBU LAL. **9 Luck. 390=6 R.O. 282=147 I C. 613=10 O.W.N. 1267=A.I.R. 1934 Oudh 16.**

[**D.** 11 O.W.N. 411 (413).]

Exparte Decree.

See also BINDING NATURE, *supra.*

———Ex parte *decree—Suit to set aside—Fraud—Proof.*

DECREE—Form of.

Where a suit has been decided even though it is decided *ex parte*, the decree cannot be set aside or impeached merely on the ground that the claim of the plaintiffs was false ; something more should be proved in support of the allegation of fraud, and it must be shown that fraud was practised in relation to the proceedings in the Court and the decree must be shown to have been procured by practising fraud of some sort on the Court. (*Guha and M. C. Ghose, JJ.*) ESMILE UDDIN BISWAS *v.* SHAJORAN NESSA BEWA **I.R 1931 Cal 609=132 I.C. 897=35 C.W.N. 303=A.I.R. 1931 Cal. 649 (2).**

Form of.

———*Form of—Appellate decree.*

Except when the appellate Court confirms without variation the decree of the original Court, the decree of the appellate Court must be drawn up in such a form that it can be executed without reference to the decree of the original Court. (*Dunkley, J.*) RAM SABAD *v.* SUBBIAH NAIDU. **156 I.C. 318=7 R.R. 391=A.I.R. 1935 Rang. 139.**

Instalment decree.

———*Instalment decree—Default clause—Stipulation for recovery of entire amount on three successive defaults —Suit to recover single default instalment—Maintainability.*

A decree provided for payment of the decree amount in 15 equal instalments ; it was further provided that if a particular instalment was not paid on the due date, the judgment-debtors would pay interest on the sum at the rate of 8 annas per cent. per annum for the period by which the payment was delayed. There was another clause to the effect that in case of three successive defaults in the payment of the instalments, the decree-holders would be entitled to realise the whole balance due at once. The first instalment not having been paid the decree holder applied to realise the same.

Held, that the decree-holder could proceed in execution for each of the defaults and need not wait for three consecutive defaults in the payment of the instalment amount. (*Abdul Qadir, J.*) SUNDAR LAL *v.* RUP CHAND. **I.R. 1932 Lah. 632.**

———*Instalment decree — Default — Option given to decree holder—Effect—Execution.*

When a decree holder has an option to execute his decree in the event of a default in the payment of an instalment, he is not bound to execute the decree immediately on the default taking place and may execute his decree for any instalment not paid within the prescribed period. (*Shadi Lal, C.J. and Broadway, J.*) GOPI RAM JAITHU RAM *v.* RAMI DAS SRI KISHAN. **6 R. L. 513=118 I.C. 177 (2)=A.I.R. 1934 Lah. 48.**

———*Instalment decree—Execution in respect of instalments not barred.*

In the case of an instalment decree, it is open to the decree-holder to execute such of the instalments which are not time barred. 109 I. C. 272, Foll. (*Dalip Singh, J.*) GOPI RAM JAITHU RAM *v.* RAMJI DAS SRI KRISHAN DAS. **I. R 1932 Lah. 339 (1)=137 I. C. 292=33 P.L.R. 30.**

Joint decree.

———*Joint decree—Appeal by defendant against one—Sustainability.*

Where a joint decree was made by the Courts below in favour of two persons declaring their title to an eight annas share in the *jama* and giving them possession.

Held, that the defendant cannot prefer an appeal challenging the validity of the decree as against one of the joint decree holders. (*Mukerji, J.*) DWARIKANATH PAR *v.* KRISHNA BARAI. **6 I.R. (Cal.) 41=144 I.C. 814=37 C.W.N. 84=A.I.R. 1933 Cal. 464.**

DECREE—Minor.

———*Joint decree—Decree against persons as legal representatives.*

A decree passed against persons as legal representatives is a joint and several decree. Execution can be taken out against any one or any number, or all of them and any one of them can be made to satisfy the whole amount of the decree to the decree-holder, and he will then, on so satisfying the decree have a right of contribution against the other legal representatives in proportion as they each obtained the property of the deceased. The fact that there is a limit to the amount which any one judgment debtor can be required to pay, namely, the amount of the property of the deceased which has come into his possession, does not have the effect of making the decree a several decree. 38 Mad. 1102, Dist. (*Mya Bu and Dunkley, JJ.*) U NYO *v.* U PO HLAING. **149 I.C. 98=6 R R. 279=A.I R. 1934 Rang. 101.**

Liberty to apply.

———*"Liberty to apply"—Meaning of.*

The "liberty to apply" reserved in an order passed by consent is merely liberty to carry out the order and not to vary it or set it aside. (*Wadia, J.*) YUSUF ISMAILBHAI *v.* ABDULLABHAI. **56 Bom. 231=I R. 1932 Bom. 559=139 I.C. 845=34 Bom L.R. 880=A I R. 1932 Bom. 615.**

———*"Liberty to apply"—Scope of—Partition decree —Application to provide for charity — Permissibility.*

Liberty to apply means liberty to carry out the provisions of the decree. Under the guise of such a liberty in a partition suit, a notice of motion cannot lie for the purpose of asking the Court to set apart a fund for the maintenance and upkeep of a temple when there is no endowment or trust created in its favour or mentioned in the decree. (*Wadia, J.*) BANSILAL *v.* GOVINDLAL. **140 I.C. 819=I.R. 1933 Bom. 45=34 Bom.L R. 733 =A.I.R. 1932 Bom. 439.**

Mesne profits.

———*Mesne profits—Final decree in partition suit—Erroneous direction regarding mesne profits—Validity —Executing Court.*

Though where a preliminary decree has either intentionally or inadvertently omitted to direct an enquiry into mesne profits, the final decree cannot award mesne profits or direct an enquiry into the same. Yet where, in a partition suit, a final decree has been passed directing such an enquiry and the decree has become final the judgment-debtor having taken no steps to revise it or vacate it, it is not open to the executing Court to refuse to execute the decree, there being no question of want of jurisdiction. 1931 M.W.N. 586, Ref. (*Cornish, J.*) BAPA LAKSHMAMMA *v.* KOTESWARA RAO. **1931 M.W.N. 846.**

———*Mesne profits—Mistake—Correction by appellate Court.*

Where the plaintiff's suit included a claim for mesne profits and the parties agreed that if the suit were decreed, mesne profits should be calculated at a certain rate but the Court omitted to include mesne profits in the decree,

Held, that in the circumstances there was nothing to prevent the Court from rectifying the omission in the exercise of its inherent powers under S. 151, C. P. Code. (*Kisch, J.*) ZAHIDA BEGAM *v.* AKHTAR JAHAN. **I R. 1931 Oudh 359=134 I C. 407=8 O. W.N. 883=15 R D. 427=12 L.R. 213 (Rev.)=A.I. R. 1931 Oudh 346.**

Minor.

———Minor—Decree against—Negligence of guardian —Test. *See* MINOR, **54 All. 646=A.I.R. 1932 All. 293 (F B.).**

DECREE—Modification of.

Modification of.

———*Modification of—Provision for modification—Happening of contingency—Power of Court to alter decree.*

Where a decree provides for automatic modification on the happening of a contingency the Court passing the decree has no jurisdiction to modify it after the contingency has happened and the proceeding has terminated. (*Dalal, J.*) BALMAKUND *v.* PIYARE LAL. **I.R. 1931 All. 220=129 I.C. 732=A.I.R. 1931 All. 318.**

Mortgage decree.

———*Mortgage decree—Rights of judgment-debtors* inter se.

A mortgage decree so far as it orders the sale of a certain property is not joint and several but so far as the liability of payment of money is concerned it may be a joint and several decree against the mortgagors *inter se*. (*Courtney Terrell, C.J. and Khaja Mohammad Noor, J.*) BANSIDHAR DHANDHANIA *v.* HAZARI RAM MARWARI. **I.R. 1933 Pat. 198=143 I.C. 542=14 Pat. L.T. 197=A.I.R. 1933 Pat. 210 (2).**

Partition decree

See also LIBERTY TO APPLY, AND MESNE PROFITS *supra* AND PRELIMINARY DECREE *infra*.

———*Partition decree—Final determination of rights—Execution of decree—Permissibility.*

By a compromise petition in a partition suit, it was agreed that the shares should be decided by the Court and that certain named arbitrators should proceed to allot the properties by metes and bounds. This was done and it was accepted by all parties. Pending these proceedings, one of the defendants died and a dispute arose among them as to the proportion in which the deceased defendant's share was to be divided. Then a deed of settlement was drawn up to which all the members alive were parties and which dealt with not only the share of the deceased member but also all other matters outstanding between them. After this, a final decree for partition was passed. Subsequently the decree in the partition suit was sought to be executed.

Held, that there was nothing to be executed and that it must be deemed to have been satisfied. (*Courtney, Terrell, C.J. and Saunders, J.*) GOPI NATH *v.* GOPALJI. **147 I.C. 389=6 R.P 352=A.I.R. 1933 Pat. 625 (2).**

Preliminary decree.

———*Preliminary decree—Partition suit—Subsequent dismissal of—Permissibility.*

After a preliminary decree in a partition suit has been passed, it is not competent to the Court to dismiss the suit subsequently. The preliminary decree can only be reversed on appeal and whatever default there may be in the subsequent stages of the suit, that preliminary decree itself cannot be vacated. A.I.R. 1924 P.C. 198; A.I.R. 1928 Mad. 914 and A.I.R. 1925 Pat. 433, Foll.; A.I.R. 1928 Mad. 963, Ref. (*Ramesam, Offg. C.J. and Cornish, J.*) SUNDARARAJAMMA *v.* RAMULU CHETTY. **I.R 1932 Mad. 789=139 I.C. 761=36 L.W. 414=A.I.R. 1932 Mad. 519.**

Priority.

———*Priority—Decree against estate of deceased—Priority over decree against heirs for personal debts of deceased.*

A decree obtained against the estate of the deceased has priority over a decree obtained against the heirs for the personal debts of the deceased. 26 All. 28, Foll. (*Abdul Rashid, J.*) MUKHI RAM *v.* ATMA RAM. **150 I.C. 964=7 R.L. 40=A.I.R. 1934 Lah. 478.**

DECREE—Setting aside.

Rectification.

See also MESNE PROFITS *supra*.

———*Rectification—Misdescriptions as to properties—Admission of oral evidence.*

In order to explain a decree one can look at the judgment and at the pleadings Where however the point of doubt is not determinable from them the Court may permit oral evidence to be adduced in order to correct the misleading descriptions in the decree. (*Dalip Singh, J.*) ALLAH BAKHSH *v.* PUNJAB AND SINDH BANK, LTD. **6 R.L 355=147 I.C. 23=35 P.L.R. 20=A.I.R. 1934 Lah. 181.**

———*Rectification — Suit for— Maintainability — Wrong property specified in the decree—Proper remedy.*

Apart from the case of a compromise decree and the case where a decree has been obtained by fraud, no suit is maintainable for the rectification of a decree in a previous suit on the ground that the wrong survey numbers which had by inadvertence been entered in the mortgage-deed had been copied in the decree. But the deed itself may be amended in a suit for rectification by the plaintiff. He may then apply for amendment of the plaint and have the preliminary decree in his mortgage-suit corrected by means of an application for review or an application for amendment under S. 152, C. P. Code. (Case law discussed.) (*Reilly and Anantakrishna Ayyar, JJ.*) LATCHAYYA *v.* SEETHAMMA. **I.R. 1932 Mad. 325=136 I.C. 850=35 L.W. 322=1931 M. W N. 1329=A.I.R. 1932 Mad. 275=62 M.L.J. 350.**

Setting aside.

———Setting aside—Decree against minor—Negligence of guardian—Test. *See* MINOR. **54 All. 647=A.I.R. 1932 All. 293 (F.B.).**

———*Setting aside—Decree against several defendants—Decree set aside at the instance of one—Decree, when need not be set aside against others also.*

Where the decree against all the defendants is not one and indivisible, but they are different, the relief given against the first defendant being quite different from the dismissal of the suit against the other two defendants, the suit will not result in inconsistent decrees if the decree were not set aside against the other defendants also and the same relief granted against the first defendant can again be given if the plaintiff should succeed, otherwise than by setting aside the decree against defendants 2 and 3 also, the decree which has been set aside against defendant 1 need not be set aside as against defendants 2 and 3. (*Doraswami Iyer, C.J.*) NANJUNDIAH *v.* PEDMARAJIAH. **10 Mys. L.J. 124.**

———*Setting aside—Decree set aside against one of several defendants—Procedure for revising suit.*

The effect of setting aside a decree passed against several defendants at the instance of one of them on the ground that he was a minor and not properly represented by a validly appointed guardian *ad litem* is to remit the minor to his original rights in the previous suit and to leave it open to the parties, if so advised, to revive the previous suit This can be done on a mere application without being obliged to have recourse to a review or a fresh suit. (*Doraswami Iyer, C.J.*) NANJUNDIAH *v.* PADMARAJIAH. **10 Mys. L J. 124.**

———*Setting aside—Effect—Parties restored to position before decree.*

After a decree has been set aside, the Court should restore the parties to the position which they occupied on the date of the decree. (*Jai Lal, J.*) BHAGWAN SINGH *v.* ALI. **154 I.C. 404=7 R.L. 566=A.I.R. 1934 Lah. 45.**

DECREE—Setting aside.

———*Setting aside*—Ex-parte *decree set aside in subsequent suit—Whether original suit revives.*

As to whether, when an *ex parte* decree is set aside in a subsequent suit, the original suit in which that decree was obtained is revived or not, depends upon the pleadings, the issues and the actual decision in the subsequent suit. If, upon an issue properly raised and tried in the subsequent suit, it is held that the claim itself of the plaintiff in the original suit was false and fraudulent, the effect of such a decision is to put an end to the original suit which cannot be revived and retried. If, on the other hand, the *ex parte* decree is set aside on the ground that it was obtained by suppression of summons by means of fraud and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiff, the first suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law, though in the subsequent suit the Court might have arrived at the conclusion that the plaintiff's claim was false as incidental to its finding of fraudulent suppression of summons (*Jwala Prasad, Wort, and Kulwant Sahay, JJ.*) NIRSAN SINGH *v.* KISHUN SINGH. **10 Pat 516=I.R. 1931 Pat 275=132 I.C. 355=12 Pat.L.T. 493=A.I.R. 1931 Pat. 204 (2) (F.B.).**

[R. 15 Pat.L.T. 160 (161).]

———*Setting aside—Form of action.*

Whenever a party to a prior decree wants relief to the effect that he is in no way bound by the prior decree, he should ask for the setting aside of the prior decree. Such a form of action is well known to law. It is not sufficient for the plaintiff to seek a declaration that the decree is not binding on him. (*Reilly and Anantakrishna Iyer, JJ.*) VENKATASIVA RAO *v.* VENKATA NARASIMHA SATYANARAYANA MURTHY. **56 Mad. 212=I.R. 1932 Mad. 643=36 L.W. 225=139 I.C. 317=1932 M.W.N. 992=A.I.R. 1932 Mad. 605=63 M.L.J. 764.**

———*Setting aside—Fraud.*

In a suit to set aside a compromise-decree in a partition suit on the ground of fraud, the only issue for the court is to see if the plaintiff has or has not established the allegation of fraud. The question whether the division effected by the decree was unequal or worked hard ship on the plaintiff is not germane to the suit. (*Courtney Terrell, C.J. and Fazl Ali, J.*) MAHABIR TEWARY *v.* CHHATHU TEWARY. **11 Pat. 613=I.R. 1932 Pat. 154=137 I.C. 700=13 Pat.L.T. 197=A.I.R. 1932 Pat. 170 (2).**

———*Setting aside—Fraud.*

When a party obtains a decree in a suit in which the defendant is *ex parte* by deliberately putting forward a false case before the Court, by suppressing a fact which it was his duty to disclose and thereby misleading the Court, that decree can be set aside on the ground that it was vitiated by fraud. The mere fact that the decree has been obtained by perjury is not a sufficient ground for setting it aside but if a false claim is made, false to the knowledge of the plaintiff and a decree obtained by means of a fraud practised on the Court, the Court has jurisdiction in a sub equent suit to set aside the decree. The fraud, necessary to set aside the decree, must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and thereby obtaining a decree. 38 Mad. 203; 41 Mad. 743; 21 L.W. 300; 16 C.W.N. 1002; 56 I.C. 607; 37 All. 535; 41 Cal. 990 Dist; 18 C.W.N. 447; 63 I C. 712 and 23 I.C. 976, Foll. (*Madhavan Nair, J.*) BASAVAYYA *v.* VEERABHADRA RAO. **I R 1931 Mad. 769=133 I.C. 769=1931 M.W.N. 1016=34 L.W. 69=A.I.R. 1931 Mad. 679.**

DECREE—Setting aside.

———*Setting aside—Fraud—Correctness of endorsements on processes disputed—Duty to examine process-server.*

In a suit to set aside an *ex parte* decree on the ground of fraud, if the execution of processes in accordance with the endorsements on them is disputed, the plaintiff should ordinarily examine the server of the process in question and the attestors of the endorsement thereon, who alone could give the best evidence on the matter. (*Doraswami Iyer, C.J. and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys. L J. 151.**

———*Setting aside—Fraud—Decree on award.*

A suit lies to set aside a decree passed on the basis of an award, on the ground that the decree had been obtained by fraud. And if the consent of a party to arbitration proceedings is obtained by fraud and if he is kept ignorant of the real nature of those proceedings, no distinction can be made between decrees based on awards and ordinary decrees. (*Bhide and Din Mahomed, JJ.*) MT. PURAN DEVI *v.* DILA RAM. **16 Lah. 340=156 I.C. 518=7 R.L. 911=37 P.L.R. 422=A.I.R. 1934 Lah. 794.**

———*Setting aside—Fraud—Decree obtained in suit upon mortgage already discharged.*

To bring a suit upon a discharged mortgage bond is to commit a fraud upon the Court and such fraud is extrinsic to the proceedings in the suit brought on such mortgage bond. Therefore, a suit by a person aggrieved by the decree to declare the decree, so far as he is concerned null and void and to have it set aside is maintainable. (*Dunkley, J.*) KO SU YA *v.* N. N. K. P. L. CHETTYAR FIRM. **152 I.C. 486=7 R.R. 158=A.I.R. 1934 Rang. 286.**

———*Setting aside—Fraud—Fraud of co-defendant to which plaintiff was not a party—Not sufficient.*

The plaintiff brought a suit to set aside an *ex parte* decree passed against him and another (the First defendant in the previous suit) in favour of the first defendant (plaintiff in the previous suit). He alleged that in that suit, the plaintiff (the first defendant herein) and the second defendant, the only contesting party in the prior suit, had colluded and fraudulently consented to a decree operating to the prejudice of the present plaintiff.

Held, that the plaintiff having remained *ex parte*, he could not have been defrauded in any way by the first defendant; that if the second defendant in the previous suit had by means of any representation induced the plaintiff to remain *ex parte* and fraudulently consented to a decree, the first defendant was not responsible for it and so the *ex parte* decree could not be set aside. (Case-law discussed.) (*Doraswami Iyer, C.J. and Mahadevayya, J.*) HANUMANTHA RAO *v.* SUBBAIYA CHETTY. **10 Mys.L J. 359.**

———*Setting aside—Fraud—Maintainability of suit.*

A regular suit is maintainable to have an *ex parte* decree set aside on the ground of extrinsic fraud. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys.L J. 151.**

———*Setting aside—Fraud—Nature of.*

In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the court and if it is not proved, he cannot succeed, whether the original claim against him was true or false. 10 I.C. 905, Foll. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys. L J. 151.**

———*Setting aside—Fraud—Nature and sufficiency of—Burden and nature of proof.*

In order to maintain a suit to set aside a decree on the ground of fraud, the plaintiff must do something more than prove that the evidence on which the decree

DECREE—Setting aside.

was based was false. He must show that the defendant had carried out a deliberate fraud, which, through no fault or neglect on his part, he was unable to expose in the previous suit. The mere reagitating of questions already decided (question of due service in previous suit) cannot be permitted, otherwise there would be no finality. Case law considered. 28 Cal. 475 and 29 Cal. 395, Dist. (*Leach, J.*) U TUN *v.* U SEIK. **150 I.C. 908=7 R.R. 16=A.I.R. 1934 Rang. 135.**

———*Setting aside—Fraud—Non-service of summons on defendant—Plaintiff not taking part in service.*

If a plaintiff in an action gives a wrong address of the defendant and takes no part in serving the summons on the defendant, the giving of the wrong address by itself would not prevent the defendant from appearing before the Court to defend the suit. The plaintiff cannot under those circumstances be charged with having deliberately suppressed the service of summons or having obtained an *ex parte* decree by fraud even though he might have had some cause for suspecting that the service effected on the defendant might not have been good service. (*Roy, J.*) TARUNANGANATH BANERJI *v* PREMNARAYANLAL RAIZADA **60 Cal. 98=I.R. 1933 Cal. 468=143 I.C. 710=A.I.R. 1933 Cal. 274.**

———*Setting aside—Fraud—Particulars of fraud to be clearly specified.*

In a suit to set aside a decree on the ground that it was obtained by fraud, the plaintiff is bound to specify in his plaint the facts which constitute the fraud in a clear and definite manner. In order to entitle the plaintiff to succeed, the fraud alleged must be satisfactorily established and it must be proved how, when, where, and in what way the fraud was committed, since a prior judgment cannot be upset on general allegations of fraud or collusion. (*Mahadevayya and Ramachandra Rao, JJ.*) RANGAPPA *v.* MOODLAPPA. **10 Mys L.J. 233.**

———*Setting aside—Fraud—Proof of—Non-service of summons.*

The mere fact that summonses were not served is not necessarily a fraud; if, on the other hand, it is shown that there was any deliberate suppression of summonses particularly to give effect to any fraudulent scheme, that such suppression of summonses would be fraud. (*Mahade ayya and Ramachandra Rao, JJ.*) RANGAPPA *v.* MOODLAPPA. **10 Mys.L.J. 233.**

———*Setting aside—Fraud—Unpaid vendor suing for purchase money omitting to state possession of goods.*

Where a plaintiff suing for the recovery of purchase price of goods omits to state in the plaint, that goods remain in his possession, such omission does not amount to any fraud or false averment so as to enable defendant to sue for setting aside an *ex parte* decree. (*Staples, A. J. C.*) MAHOMED ABDUL SUBHAN *v.* GHULAM HUSSAIN. **31 N.L.R. 159=156 I.C. 156=7 R.N. 233=A.I.R. 1935 Nag. 66.**

———*Setting aside—Nature of suit for—Second appeal—Maintainability.*

A suit alleging fraud and claiming to set aside the decree of a Court is of the nature of a title suit. It is not in any case cognizable by a Court of Small Causes, and therefore whatever its value a second appeal will lie. (*Rowland, J.*) DEODUTT MISSIR *v.* BENOD BEHARI. **158 I.C. 155=16 Pat. L.T. 844=A.I.R. 1935 Pat. 432.**

———*Setting aside—Suit for—Mode of enquiry.*

Where a decree is sought to be set aside by a separate suit, the Court before which the decree is impeached cannot decide the matter as if it was sitting in appeal against the decree passed on the previous occasion. 21 C. 612, Ref. (*M.C. Ghose and Guha, JJ.*) ESMILE UDDIN BISWAS *v.* SHAJOREN NESSA BEWA. **I.R. 1931 Cal. 609=132 I.C. 897=35 C.W.N. 303=A.I.R. 1931 Cal. 649 (2).**

DECREE—Validity of.

Stamp.

———*Stamp.*

A decree of Court in the terms of an award is not an instrument chargeable with stamp duty. (*Irving, F.C.*) REFERENCE UNDER S. 56 (2) OF THE STAMP ACT. **11 Lah.L.T. 147.**

Validity of.

———*Validity of—Death of defendant—Decree passed without notice and a false return.*

Where a defendant was dead before the decree was passed, and the decree was obtained by concealing from the Court the fact of his death and by getting a false return, such a decree amounts to a nullity and cannot be executed against the defendant's heirs and legal representatives. (*Mukerji, A.C.J. and S.K. Ghose, J.*) BASIRUDDIN FARIADAR *v.* SARADINU NARAYAN ROY. **154 I.C. 451=60 C.L.J. 102=38 C.W.N. 1124=A.I.R. 1935 Cal. 130.**

———*Validity of—Death of party before appeal.*

The fact that one of the parties in the appeal to the Privy Council died before the appeal was heard and his legal representatives had not been brought on the record does not make the decree of the Privy Council a nullity, owing to the special provisions of S 23 of St. III and IV Will. IV, Ch 41. 5 Pat.L.J. 314; 1 Pat.L.T. 426; 47 M. 618 and 103 I.C. 618, Foll (*Wort and Fazl Ali, JJ.*). SRI CHANDRA CHUR DEO *v.* MT. SHYAM KUMARI. **11 Pat. 445=I.R. 1931 Pat 229=139 I.C. 397=13 Pat.L.T. 719=A.I.R. 1932 Pat. 261.**

———*Validity of—Decree against dead person.*

Where the respondent died after the presentation of the appeal against the decree obtained by the plaintiff and later on, the appeal was heard and accepted and the suit was dismissed, it not having been discovered that the plaintiff-respondent had died 18 months before,

Held, that the order of the Court on appeal is a nullity, as the appeal had abated then. (*Harrison and Addison, JJ.*) S.M. ABDULLAH *v.* BALKISHEN DAS BISHESHAR NATH. **I.R. 1932 Lah. 494=138 I.C. 444=33 P.L.R. 735.**

———*Validity of—Decree on foot of mortgage—Property non transferable—Decree, if a nullity.*

It cannot be said that a Court which passes a decree on foot of a mortgage, which relates to non-transferable property and is therefore invalid, has no jurisdiction to pass it, and such a decree cannot be treated as a nullity. (*Niamatullah and Rachhpal Singh, JJ.*) TAHIR HASAN *v.* CHANDER SEN. **58 All. 98=157 I.C. 511=8 R.A. 190=1935 A.W.R. 867=A.I.R. 1935 All. 678.**

———*Validity of—Person interested in estate not represented—Effect.*

During the course of a trial, the defendant died leaving a will and the executor named therein applied to be substituted in the suit in the place of the deceased. But the application was disallowed and the intestate heirs were added and a decree was made against them. The will conferred an estate on an idol.

Held, that the decree having been passed without the idol being represented was invalid, and that the same could not be enforced in execution. 12 C.L.J. 561 Foll, (*Graham and Mitter, JJ.*) CHERAG ALI SARKAR *v* NAWAB KHAJE HABIBULLA. **I.R. 1931 Cal. 807=134 I.C. 311=53 C.L.J. 421=A.I.R. 1931 Cal. 782.**

———*Validity of—Test of—Nullity or mere irregularity.*

DEDICATION.

One well-established test of whether an order or decree is nullity or a mere irregularity is it open to the parties against whom the decree or order is passed to waive objection to it? 35 Cal 61 (P. C.) Foll. A judgment-debtor who was arrested in execution of the decree was released on condition he furnished security under S. 55 (4), C. P. Code. The judgment-debtor furnished surety who executed a surety bond which, however, was not in accordance with S. 55 (4) and under which he only undertook that the judgment debtor would file insolvency application and that he as surety could produce the judgment-debtor in Court on the date to be fixed by the Court. No objection was raised by the decree-holder to the bond and after producing the judgment-debtor on the date fixed, the surety applied for cancellation of the bond. The Court accordingly discharged him.

Held, that the order was not a nullity but one which the Court had jurisdiction to pass. (*Thom and Rachhpal Singh, JJ.*) NAGESHAR PRASAD *v.* GUDRI LAL NARAIN DAS. **55 All 548=6 I.R. (All.) 3=144 I C 731=A.I R. 1933 All. 382.**

DEDICATION.

See (1) HINDU LAW--RELIGIOUS ENDOWMENT.
(2) MAHOMEDAN LAW—WAKF.

DEED.

Admission.
Consideration.
Construction.
Execution.
Genuineness.
Material alteration.
Setting aside.
Trust receipt-
Validity.

Admission.

———*Admission—Rebuttal— Burden of proof.*

The onus of showing that the recitals in a deed admitting the receipt of certain sums are incorrect lies heavily on the executant where he is literate and admits that he understood the deed before he signed it. (*Tek Chand and Coldstream, JJ.*) DAULAT RAM *v.* HARDIYAN SINGH. **I.R 1932 Lah. 502=138 I.C. 525=33 P.L.R. 207.**

Consideration.

———Consideration—Endorsement of payment by registering officer—Value of—Onus of proof. *See* REGISTRATION ACT, S. 60 **1935 O.W.N. 11=A.I.R. 1935 Oudh 86.**

———*Consideration—Sale deed—Failure of—Burden of proof.*

Though the burden of proof may be on the person who alleges failure of consideration, yet, the weight of that burden will vary according to the circumstances of each particular case. (*Fraser, J. C.*) KISHAN SINGH *v.* ABDUL QADIR. **A.I.R. 1934 Pesh. 123.**

———*Consideration — Proof — Oral evidence—Admissibility.*

Oral evidence is admissible to show what the real consideration was for a Kabuliyat. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DOE *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I C. 98=8 R.C. 257=60 C.L.J. 477=A.I. R. 1935 Cal. 368.**

———*Consideration—Recitals—Passing of consideration—Denial—Burden of proof.*

In the case of a document in which the receipt of consideration by the executant is recited, the burden of proving want of consideration is on him who denies it. (*Jai Lal and Abdul Qadir, JJ.*) GOKAL CHAND *v.*

DEED—Construction—Acknowledgment or promissory-note.

HARCHARAN DAS. **I.R. 1931 Lah. 870=134 I.C. 102=32 P.L.R. 577.**

———**Construction.**

ABSOLUTE OR LIMITED INTEREST. *See* GIFT, *infra.*
ACKNOWLEDGMEMT OR PROMISSORY NOTE.
ADOPTION DEED.
AGREEMENT.
AMBIGUITY.
ANCIENT DOCUMENT.
AUTHORITY TO ADOPT.
AWARD.
BOND OF HUNDI.
BOUNDARIES AND AREA.
CHARGE.
CONDUCT OF PARTIES.
CONTEMPORANEOUS DOCUMENTS.
CONVEYANCE OR RECEIPT.
CONVEYANCE OR RELEASE.
COVENANTS.
FAMILY ARRANGEMENT OR SETTLEMENT.
GIFT.
GRANT.
GUARANTEE.
HIRE-PURCHASE AGREEMENT.
INSTALMENT BOND.
INTENTION OF PARTIES.
INTEREST.
KABULIAT.
KAT KOBALA.
LEASE.
LEASE OR LICENCE.
LEASE OR MORTGAGE. *See* MORTGAGE OR LEASE.
LEASE AND MORTGAGE.
MARRIAGE SETTLEMENT.
MORTGAGE.
MORTGAGE OR LEASE.
MORTGAGE OR SALE.
MUKHTARNAMA.
NATURE OF TRANSACTION.
PARTITION DEED.
PERSONAL LIABILITY.
POWER.
POWER OF ATTORNEY.
PRINCIPLES.
RECITALS.
RELIGIOUS ENDOWMENT.
SALE.
SALE OR AGREEMENT TO SELL.
SALE OR EXCHANGE.
SALE OR LEASE.
SALE OR MORTGAGE. *See* MORTGAGE OR SALE.
SALE CERTIFICATE.
SETTLEMENT DEED.
SINGLE OR ALTERNATIVE CONTRACT.
SECURITY BOND.
SOLENAMA.
SURETY BOND.
SURROUNDING CIRCUMSTANCES.
TRUST.
VESTED INTEREST.
WAKAFNAMA.
WILL OR ADOPTION DEED OR CONVEYANCE.
WILL OR GIFT.
WILL OR SETTLEMENT.
WORDS.
MISCELLANEOUS.

Acknowledgment or promissory note.

———*Construction—Acknowledgment or promissory note—Title of document, if material.*

DEED—Construction—Adoption deed.

The mere fact that a person chooses to give a certain title to a document by no means makes it that document. A document provided as follows. On June 25, 1925, Rs. ..... were found due from me to *P* about February 27, 1923, and as the money cannot be given at present hence it has been agreed that I would pay interest at 1 per cent. per annum. Therefore this pro-note payble on demand has been executed so that it may serve as evidence and may be useful in time.

Held, that the document was a mere acknowledgment of debt coupled with an agreement to pay a debt and not a promissory note. Effect of use of words "on demand" discussed. (*Sulaiman and Young, JJ.*) RATAN SINGH *v.* PIRBHU DAYAL. **131 I.C. 135=1931 A L. J. 230=A.I.R. 1931 All. 302.**

Adoption deed.

———Construction—Adoption deed—Document stating adoption and bequeathing entire property—Document not a deed of adoption but will. *See* WILL OR ADOPTION DEED OR CONVEYANCE, *infra*. **58 I.A. 148 =54 Mad. 440=61 M.L.J. 91 (P.C.).**

———Construction—Adoption deed—Whether the document is a will or one recording adoption. *See* WILL OR ADOPTION DEED, *infra*. **13 Lah. 270=A. I.R. 1932 Lah 118 (F.B.).**

Agreement.

———*Construction—Agreement between parties regarding devolution of property—Heirs, if can claim right under agreement.*

The material passage in an agreement was as follows: "It has been finally settled by all of us three men that if any of us, God forbid, may become childless, then his properties movable and immovable or *nami* and *benami* shall devolve upon him whose heir will remain alive any other third person shall have no right or claim to the said properties."

Held, on a construction of the agreement, that the benefit of the devolution was confined to "as three men" that is, to the three parties to the agreement and that it was a condition that the party taking the benefit of the provision should have a living heir, but no right to take was conferred on such heir. (*Lord Thankerton.*) RAM NARAIN *v.* PAN KUER. **62 I.A. 16=14 Pat. 268= 37 Bom.L.R. 144=60 C.L.J. 544=7 R.P.C. 133= 1935 M.W.N. 92=37 P.L.R. 199=39 C.W.N. 265= 16 Pat.L.T. 57=1935 O.W.N. 201=153 I C. 705=41 L.W. 151=1935 A L.J. 270=1935 A.W R. 82=A.I. R. 1935 P.C. 9=68 M L.J. 139(P.C.).**

———*Construction—Agreement to finance litigation—Description as sale deed—Effect.*

Where a document, though described as a sale-deed, is merely an agreement to divide the fruits, if any, of a contemplated litigation between the parties to the agreement, the description of the document cannot make the transaction a sale, if it is not so on its merits and the so-called vendee is not entitled to maintain a suit for ejectment before the successful termination of the contemplated litigation. (*Hasan, C.J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282= I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010 =A.I.R. 1930 Oudh 481.**

———*Construction—Agreement to finance litigation—Suit on—Plea of want of authority—Proof of authority.*

A suit was to be conducted by *B* against her brother and for this she sought help of *A*, who consented to help her. Whereupon a document was drawn up in two parts, by the terms of which *A* was to contribute one-quarter of the costs of the litigation, and in the event of failure, to pay one-quarter of any costs that might be awarded to the other side, and in return *B* was to make over to him one-quarter of whatever she might recover. One part was executed by *A* and the other by the husband of *B* in her name. *B* succeeded in her suit and *A* was put in possession of 13 acres of land by the husband of *B*. But quarrels ensued whereupon *A* brought the suit to enforce the agreement. *B* set up want of authority to the execution of document by her husband.

Held, that though a genuine thumb print of *B* on the document might in the present case be unimpeachable evidence of her authorization, it was not essential to the validity of the document. Authority or no authority is a question of fact, and may be proved in various ways, it might be a legitimate deduction from the circumstances under which the transaction took place, and on the evidence the document was executed by *B*. (*Sir George Lowndes.*) RAMANAMMA *v.* VIRANNA. **I.R. 1931 P.C. 129=1931 A L.J. 544=33 Bom.L R. 960=54 C.L.J. 183=1931 M.W.N. 609=131 I.C. 401=33 L.W. 757=35 C.W.N. 633=A.I.R. 1931 P.C. 100=61 M. L.J. 94 (P.C.).**

———*Construction—Agreement for sale of goods—Further stipulation regarding third party risk—Effect.*

A person agreed to purchase standing timber in certain jungle for a certain consideration and executed a document which he called kabuliyat (counterpart of lease) under which he promised to pay the price in a lump sum on a certain date and in case of default, he agreed that the owner of the timber would have the right to realize the amount from him. He further promised to have the wood of the said jungle cut and removed within a year.

Held, that the transaction was one of sale of goods or merchandise and the deed was an agreement or memorandum of agreement evidencing such sale, and was exempt from stamp duty under Sch. I, Art. 5 of the Stamp Act. The mere fact that beyond the stipulation as to a sale of goods there was an agreement that in case a rival proprietor raised any objection to the cutting of timber and removal of the same, the vendor was to have the responsibility did not in any way detract from the character of the agreement. (*Sulaiman, A.C.J., Mukerji and Boys, JJ.*) RAJ BALAMGIR, *In the matter of*. **I.R. 1931 All. 605=133 I.C. 157=1931 A.L J. 608=A.I R. 1931 All. 392 (F B.).**

———*Construction—Agreement for sale of interest in immovable property—Assignment of right over earth and sand.*

An agreement by which on payment of a certain amount as compensation, the defendants were given the liberty to remove earth and sand from certain lands belonging to the plaintiff and the defendants also undertook to level up the land after removal is not a lease or an agreement for the sale of chattels. It is an agreement for the sale of an interest in immovable property. (*Beasely, C.J. and Cornish, J.*) KANJI & MOOLJI BROS. *v.* SHANMUGAM PILLAI. **56 Mad. 169=I R. 1932 Mad. 805=139 I.C. 870=1932 M.W.N. 897= 36 L.W. 626=A.I.R. 1932 Mad. 734=63 M.L.J. 587.**

Ambiguity.

See also CONDUCT OF PARTIES, *infra*.

———*Construction—Ambiguity—Construction leading to validity of deed to be preferred.*

The sense and meaning of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus* every part of it may be brought into action in order to collect from the whole, one uniform and consistent sense, if that may be done. But where a clause is ambiguous, construction which will make it valid is to be preferred to one which will make

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it void. (*Ferrers, J.C. and Rupchand, A.J.C.*) DEVIDAS ZOWKIRAM *v.* ALU WALLA BROS. **26 S.L.R. 377 = I.R. 1933 Sind 10 = 140 I.C. 681 = A.I.R. 1932 Sind 217.**

Ancient document.

———*Construction—Ancient document—Contemporaneous exposition by persons living at the time—Admissibility.*

Evidence as to the interpretation placed upon an ancient document by persons who lived at, or at a time not remote from, the time of execution of the document is not only admissible but very valuable, for "*contemporanea exposito est fortissima in lege.*" (*Nanavutty and Zia-ul-Hasan, JJ.*) GIR HAR SAROOP *v.* BHAGWAN DIN. **152 I.C. 861 = 7 R.O. 250 = 11 O.W.N. 1435 = A.I.R. 1935 Oudh 96.**

———*Construction—Ancient document—Contemporaneous usage—Reference to.*

One of the most settled rules of law for the construction of ambiguities in ancient instrument is that resort may be had to contemporaneous usage to ascertain the meaning of the deed. *Attorney-General* v. *Drummond*, 1 Dr. & War. 353; *Watcham* v. *Attorney-General of the East African Protectorate*, (1919) A.C. 533. Ref. (*Mitter and Patterson, JJ.*) SOURISH CHANDRA ROY BAHADUR *v.* SAROJ RANJAN SINGHA. **150 I.C. 1019 = 7 R.C. 53 = 60 C.L.J. 353 = 38 C.W.N. 707 = A.I.R. 1934 Cal. 571.**

Authority to adopt.

———*Construction—Authority to adopt—Intention of executant—Reference to surrounding circumstances.*

In construing a document it is the duty of the Court to ascertain intention from the words used in a document and the surrounding circumstances are to be looked into merely with the object of ascertaining the real intention of the executant from the words used by him. Where a husband authorized his wife aged 13 or 14 to adopt in accordance with the opinion or advice of his father who died later,

Held, that the power to adopt ceased to have effect after the father's death. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727 = 149 I.C. 809 = 6 R.P. 652 = 14 Pat.L.T. 258 = A.I.R. 1933 Pat. 250.**

Award.

———*Construction—Award.*

Where disputes relating to a mortgage are referred to an arbitration Board which delivered an award modifying some terms of the mortgage deed with a note that "regarding these things are original document should be considered to have been corrected" and making one co-mortgagor solely responsible for redemption, the award does not extinguish the original mortgage. A.I.R. 1921 P.C. 13, Rel. on. (*Niyogi, O. A. J. C.*) JAIRAM *v.* BHILAJI. **27 N.L.R. 152 = I.R. 1930 Nag. 361 = 127 I.C. 889 = A.I.R. 1930 Nag. 300.**

Bond or hundi.

———*Construction—Bond or hundi.*

Where a document written on hundi paper was treated by the parties as a hundi but it contained no promise to pay to the order of any person or to bearer, and the drawer and the drawee were the same person,

Held, that the document was a bond and fell within the purview of S. 2 (5) (*b*) of the Stamp Act. (*Coldstream and Johnstone, JJ.*) MOHINDAR SINGH *v.* NAGINA MAL BHANA RAM. **135 I.C. 191 = I.R. 1932 Lah. 63 = 32 P.L.R. 753 = A.I.R. 1932 Lah. 22.**

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Boundaries and area.

———Construction—Boundaries and area—Conflict between—Ambiguity in language—Sale-deed—Intention—Extrinsic evidence—Admissibility. *See* EVIDENCE ACT, S. 97. **155 I.C. 634 = 1935 A.L.J. 664 = A.I.R. 1935 All. 662.**

———*Construction—Boundaries and area—Difference.*

It is not an invariable rule that in all cases of conflict between description by area and specification of boundaries, the latter must prevail. It is a matter for examination in each case as to what was the intention of the parties and the understanding between them at the time of entering into the contract. (*Rowland and Agarwala, JJ.*) GANGA SAHU *v.* KANHU LAL MARWARI. **141 I.C. 423 = I.R. 1933 Pat. 73 = 13 Pat.L.T. 734 = A.I.R. 1933 Pat. 60.**

———*Construction—Boundaries and area—Difference between—Rule.*

Where there is dispute as to whether a particular piece of land is part of the land purchased under a deed, the boundaries given in the deed must prevail over the area. Where the boundaries are vague and indefinite, the area should prevail, but where the bundaries are specified and definite, the land that is conveyed must be the land within those specified boundaries, and the area must be taken to have been given approximately. A plaintiff cannot claim title to the disputed land on the basis of his deed, simply because the area mentioned therein is in excess of the area mentioned within those boundaries. The plaintiff must show that the disputed strip of land is included within the boundaries given in the deed, where the boundaries are specified and definite. The recitals about area in the body of the document cannot be read as divorced from what is stated in the boundaries. (*Nasim Ali, J.*) BHOLANATH CHATTOPADHAYA *v.* MRITYUNJOY CHATTOPADHAYA. **153 I.C. 532 = 7 R.C. 286 = 59 C.L.J. 532 = A.I.R. 1934 Cal. 851.**

———*Construction—Boundaries and area—Difference—Effect.*

Where the plaintiff sold to the defendant a parcel of land specifically described with reference to its boundaries and survey number, its measurement being also stated as three acres and four gunthas, and subsequently it was found that the land conveyed in fact measured four acres and four gunthas, in a suit by plaintiff to get back the excess of the land, *held*, that the parties intended to convey, and take a conveyance of, the actual plot of land, that the measurement was not the governing portion of the description and the plaintiff was not entitled to relief. (*Tyabji, J.*) MAHARUDRAPPA *v.* LAKSHMAN. **I.R. 1932 Bom. 311 = 137 I.C. 583 = 34 Bom.L.R. 212 = A.I.R. 1932 Bom. 449.**

———*Construction— Boundaries and area — False demonstration—Boundaries precisely stated—Mis-statement of area is mere surplusage.*

A mere mis-statement of the area of land sought to be conveyed is not to be regarded as anything more than a false demonstration. If the space to be conveyed is precisely defined by boundaries, the statement of its measurement may be treated as surplusage and of no consequence. 5 Bom. 208 and 41 Cal. 493, Rel. on. (*Dunkley, J.*) LEON GON KYA *v.* MAUNG MAUNG GYI. **I.R. 1933 Rang. 34 = 142 I.C. 12 = A.I.R. 1933 Rang. 24.**

———*Construction—Boundaries and area*—Patta — *Extent of land demised specified—Right to claim on basis of boundaries.*

When the lessee was granted a *patta* in which the area of land demised was stated to be measuring, by

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guess, but not by actual measurement, three *bighas* of land, at a rent of Re. 1 per *bigha*.

Held, that the lessee could not claim to be entitled to all the lands found within the boundaries stated in the *patta* on the strength of that *patta*, but could only get three *bighas*. (*M.C. Ghose and McNair, JJ.*) MOKAM HALDAR *v.* MAIMADDI SHAIKH. **61 Cal. 886=154 I.C. 71=7 R.C. 426=A.I.R. 1935 Cal. 28.**

———*Construction—Boundaries and area—Question as to area—Reference to boundaries.*

Where the area sold was presumably definitely agreed upon between the parties and its length and breadth were clearly stated, the inference is that the parties were not left in any doubt as to the measurements and it is not necessary to discuss the question of boundaries in such a case. 41 C. 493 (P. C.), expl. (*Abdul Qadir, J.*) THAKAR DAS *v.* MIR ZAMAN. **131 I.C. 127=32 P.L.R. 240=A.I.R. 1931 Lah 349.**

Charge.

See also GIFT, *infra.*

———Construction—Charge—Agreement for sale—Undertaking not to mortgage or sale—Charge not created—*See* CONSTRUCTION MORTGAGE. **13 Pat. 620=A.I.R. 1934 Pat. 495.**

———*Construction—Charge subsequent to mortgage.*

The weight of authority is against recognising any clog on the equity of redemption in the absence of a clear agreement between the parties creating a subsequent charge on the mortgaged property. Where a bond merely recites the fact that a separate mortgage deed has been executed in favour of the creditor and that the amount of the bond will be paid before the mortgage deed and does not contain any agreement forbidding redemption of the mortgage until the bond has been paid off, it does not in any way affect the equity of redemption or create a charge on the property previously mortgaged. (*Addison and Sale, JJ.*) HAKIM SINGH *v.* GAJJA SINGH. **155 I.C. 288=7 R.L. 683=36 P.L.R. 195=A.I.R. 1934 Lah 938.**

Conduct of Parties.

———*Construction—Conduct of parties—Ambiguity in words in* kabuliat.

When the interpretation of words used in *kabuliat* is not altogether free from ambiguity, the Court is justified in looking into the conduct of the parties to determine the real intention of the parties. (*Srivastava, Ag. C.J. and Smith, J.*) JWALA SAHAY & SONS *v.* PANDIT MATHURA PRASAD. **10 Luck. 307=152 I.C. 786=7 R.O. 238=11 O.W.N. 1397=A.I.R. 1935 Oudh 209.**

———*Construction—Conduct of parties—Deed clear—Subsequent conduct irrelevant.*

Where the words in a deed are clear, the subsequent conduct of parties is an irrelevant consideration. *N. E. Railway Co.* v. *Hastings*, (1900) A C. 260, Rel on. (*Lord Alness.*) BARABONI COAL CONCERN, LTD *v.* GOKULANANDA MOHANTA THAKUE. **61 I.A. 35=61 Cal 313=3 A.W.R. 193=11 O.W.N. 225=18 R.D. 112=59 C.L.J. 257=1934 A.L.J. 295=36 Bom. L.R. 390=1934 M.W.N. 300=6 R.P.C. 85=147 I.C. 884=39 L.W. 291=38 C.W.N. 325=A.I.R. 1934 P.C. 58=66 M.L.J. 399 (P.C.).**

[R 38 C.W.N. 707 (715).]

———*Construction—Conduct of parties—Relevancy.*

Although evidence as to subsequent conduct of parties is relevant, if there is a doubt as to the effect of any instrument, when the instrument itself is clear and free from any ambiguity, subsequent conduct is altogether irrelevant. (*Niyogi and Staples, A. J. Cs.*) RAM SWAROOP *v.* THAKUR RAMCHANDRA II. **31 N.L.R. 188=157 I.C. 17=8 R.N. 12=A.I.R. 1935 Nag. 35.**

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———*Construction—Conduct of parties—Relevancy of.*

Where there is a registered document like a mortgage setting out the terms of the contract, namely, the interest, it is improper to look at the subsequent parol conduct for the purpose of interpreting the document. (*Pandalai, J.*) NARASIMHAM *v.* VENKATA SUBBAYYA. **6 I.R. (Mad.) 135=145 I.C. 762=A.I.R. 1933 Mad. 171.**

Contemporaneous documents.

———*Construction — Contemporaneous documents — Reading together.*

Where a person executed a ruqqa (Ex. P-1) in favour of another person for Rs. 2,000 and also another document (Ex. D 1) on the same date, describing the mode of payment of this amount.

Held, that the Ex. P-1 is governed by Ex. D 1 executed on the same date. Both the documents should be read together as forming one whole. (*Tek Chand and Agha Haidar, JJ.*) MT JAIN MATI *v.* NANU RAM. **154 I.C. 477=7 R.L. 575 (2)=A.I.R. 1934 Lah. 314.**

Conveyance or receipt.

———Construction—Conveyance or receipt—Intention of parties—Receipt mentioning terms of sale and delivery of possession. *See* STAMP ACT, S. 23. **13 Lah. L.T. 48.**

Conveyance or release.

———*Construction—Conveyance or release.*

A deed of release pure and simple connot operate as a conveyance. The owners relinquished their right, title and interest in a granary in favour of the defendant-respondent as the latter agreed not to demand the payment of her money, invested, in the business of the relinquishers.

Held, that the document was not a deed of release but a deed of conveyance. (*Ba U J.*) A.K R.M.M.K. FIRM *v.* IN NYAUNG. **156 I.C. 658=8 R R. 33=A.I.R. 1935 Rang. 149.**

Covenants.

———*Construction—Covenants—Transferee if bound.*

Conveyancing in India is generally unilateral in a sense that sale-deeds, mortgage deeds and the like are all executed by the transferor. The stipulations contained in the sale-deed or the mortgage deed are therefore binding on the transferees, because the transferee who accepts the transfer on conditions stated in the deed, cannot resile from those conditions. A person who steps into the shoes of the transferee cannot have a better right and the stipulations in the deed are binding upon him. (*Niamatullah, J.*) HABIB ULLAH *v.* MT. GANESH DAI. **150 I.C. 601=7 R.A. 5=A.I.R. 1934 All. 447.**

Family arrangement or settlement.

See also TRUST, *infra.*

———Construction—Family arrangement—Agreement by Hindu co-parceners to tie up properties indefinitely—Provision for appointment of manager—Manager to utilise income for maintenance of members of family and with surplus to purchase properties for benefit of family fund—Executants not to act contrary to arrangement—Validity—If amounts to trust. *See* T. P. ACT, S. 14. **62 C.L.J. 71.**

———*Construction—Family arrangement between two co-parceners—Benefit secured to widow on death of co-parcener—Restriction in derogation of grand cannot be imposed by surviving co parcener.*

Where a transaction of the nature of a family arrangement has been arrived at by the agreement of

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two co-parceners, who constitute a joint family, whereby on the death of one of them, a moiety of the profits was to be paid to his widow, it is not permissible to the survivor to impose any restriction or condition in derogation of the original grant by making subsequent unchastity as a bar to the claim, where the deed does not contain any such clause for defeasance and in fact the grant is not even expressed to be for maintenance. (*Sen and Allen, JJ.*) LAKHMI CHAND *v.* MT. ANANDI **I.R. 1933 All. 335=143 I.C. 815=1932 A.L.J. 208=A.I.R. 1933 All. 130.**

———*Construction—Family arrangement—Provision as to succession.*

The relevant clause in a family arrangement ran as follows: "If no male is born to a guzardar, then the female issue will be allowed maintenance allowance like sisters and the widow of each guzardar will remain in possession of the entire property without the power of alienation, during her life-time, and after her death, the property will be divided in equal shares amongst all the male brothers. Guzardars will also have the power * * in case of their having no issue, to adopt any one from amongst their brothers or their issue by a biradori woman as they like, and their guzara will revert to the said adoptee after the death of the widow."

Held, that on the death of guzardar without male issue and without having made an adoption, the brothers got a vested remainder, but that their right to devision and possession was postponed till the death of the widow. (*Nanavutty and Smith, JJ.*) ABDUL QAYUM *v.* ABDUL RAHMAN. **8 Luck. 602=6 I.R. (Oudh) 160 (2)=146 I.C. 710=10 O.W.N. 844=A.I.R. 1933 Oudh 439.**

———*Construction—Family Settlement—Life estate with remainder—Rights of transfer of life tenant—Rents and profits—Right to.*

A deed of agreement of settlement, after describing the property, "as well as non-taluqdari and movable property" proceeded to state that (1) *N.* shall remain owner and in possession of the immovable property Taluqdari and non-taluqdari for his life time without power of transfer in any form—and that (2) after the death of *N. S.* shall own and possess the entire movable and immovable property Taluqdari and non-taluqdari; and further stated that "as to movable property, it is settled that *N.* shall be the owner of the whole, etc."

Held, on a construction of the deed, that *N* acquired only the life-estate in the whole of the immovable property, Taluqdari and non-taluqdari, and was not the owner in the sense of being possessed of absolute proprietary rights, and that he was to be life-owner only of the movable property as well, without any power of alienation *inter vivos* or testamententary disposition in either class of property; (2) that *S.* took a remainderman's estate in both classes of property by absolute right; (3) that the same principles applied to future property acquired after the agreement by virtue of the rule of equity that where future property is intended to be included within the terms of the settlement the limitations imposed by the settlement will fasten on that property whenever it is acquired; (4) that rents and profits were incidents of the estate and must go with the estate. (*Wazir Hasan, C.J. and Smith, J.*) HARI SARAN DAS *v.* HAR KISHEN DAS. **6 R.O. 648=150 I.C. 425=11 O.W.N. 917=A.I.R. 1934 Oudh 337.**

———*Construction—Family settlement — Payment of maintenance to daughter in-law—Residence with husband, if a condition precedent.*

The defendant bound himself by an agreement to pay his daughter-in law Rs. 30 every month for her kharch-

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i-pandan and other expenses. At that time the plaintiff was living with her parents and away from her husband the defendant's son. The defendant was anxious about his son's health and sanity and made the offer mentioned in the agreement hoping she would return to and live with her husband. But no such condition was mentioned in the agreement.

Held, that the agreement to pay was not qualified by any condition precedent and that the document did not reserve any power of revocation either upon the happening of a future contingency or at his own sweet will and pleasure. (*Sen and Allen, JJ.*) LATIF JAHAN BEGAM *v.* MAHOMED NABI KHAN. **I.R. 1932 All. 288=137 I.C. 231=1932 A.L.J. 9=A.I.R. 1932 All. 174.**

———*Construction—Family settlement—Settlement in favour of son with restraint on alienation and gift over to* "santeathi"—*Nature of son's estate.*

Where a Sudra executed a deed of settlement of certain properties in favour of his son by which the latter was to enjoy the income during his lifetime and after his time, his *santhathi* were to take it and the son was to have no power to sell or mortgage the properties,

Held, that the son took an heritable (but not absolute) estate, and not merely a life estate and that after his death, the *santhathi* whether that expression included illegitimate children or not, were to enjoy the property. (*Krishnan Pandalai, J.*) SUBRAMANIA CHETTI *v.* MAHALAKSHMI AMMAL. **6 I.R. (Mad.) 41=145 I.C. 300=38 L.W. 272=1933 M.W.N. 701 =A.I.R 1933 Mad. 659.**

———Construction—Family settlement—Trust of certain property by Mahomedan—Gift to sons—No settlement of family dispute or claims—Family settlement not created. *See* MAHOMEDAN LAW—WAKF. **13 Rang. 679.**

Gift.

———*Construction—Gift—Absolute or limited estate—Donor describing herself and donee's children as absolute owner but not so the donee.*

Per *Smith* and *Allsop, JJ., in order of reference.*—*S* made a gift to *R.* In the deed the donor described herself as "mallik-i-mustaqil" that is "absolute owner," and she also stated that *R's* male descendants shall be "malik-i-mustaqil," but she nowhere used these words in respect of *R.*

Held, that the conclusion to be drawn from the deed as a whole must inevitably be that the gift to Mt. *R* was not an absolute gift, but a gift only of a life-interest. (*Srivastava, Nanavutty and Smith, JJ.*) GIRJISH DATT *v.* DATA DIN. **9 Luck. 329=6 R.O 337=147 I.C. 991=11 O.W.N. 1=A.I.R 1934 Oudh 35 (F.B.).**

———*Construction—Gift—Absolute or limited interest—Settlement deed by Hindu—Powers of donee—Appointment to office of shebaitship.*

The Court in construing the intentions of a Hindu donor must bear in mind that the form of expression or the literal sense is not to be so much regarded as the real meaning of the parties. A gift is absolute when by such gift an interest or ownership is created, entitling the donee to deal with the subject of the gift according to pleasure and conferring upon him an uncontrollable power of alienation, either by deed, gift or will, Where there is a gift of shebaitship not limited in any way but equally capable of being construed as a gift for life or an absolute gift and it is followed by a general power of appointment and a gift over in default of appointment, the first gift should be treated as an absolute gift unless the whole frame of the will suggests otherwise.

Held the true intention of the deed was to confer the shebaitship in absolute right to *H*, with

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power to him to appoint his successor at any time he pleased, and should he not exercise that power, to leave the shebaitship to be inherited by his heirs, but with a condition restricting such inheritance to the eldest descendant to the exclusion of others.

Held, further, that the clause in that in the absence of such appointment, the shebaitship devolved on the eldest son to the exclusion of other heirs was invalid and that condition did not affect the gift in favour of *H*, what was an absolute gift of the shebait in his favour and the heirs of *H*, the original donee, in the line of inheritance as under the Hindu Law, were entitled to the office. (*Mukerji and S. K. Ghose, JJ.*) KANDARPA MOHAN GOSSAIN *v.* AKHAV CHANDRA BOSE. **61 Cal. 106=38 C.W.N. 156=150 I.C. 179=6 R.C. 785=A.I.R. 1934 Cal. 379.**

[**Rel.** 61 Cal. 393 (398).]

———*Construction—Gift by a Hindu in favour of his wife—Nature of estate.*

It is well settled that considerations governing the construction of one particular document cannot be of much help in construing another document and as such judicial decisions dealing with the interpretation of documents are by no means an infallible guide when the construction of a particular document is in question. But there are certain principles peculiar to transfers in favour of Hindu females that cannot be lost sight of. Where the transfer is in favour of a Hindu wife who ordinarily gets an estate for life under the Hindu Law, and an heritable estate is not by express words tranferred to her and a restraint on the donee's power of alienation is put by express words in the deed, the facts clearly indicate that the donor intended to transfer only a life-estate in the property gifted by the deed. (*Kendall and Iqbal Ahmad, JJ.*) SHEORAJ *v.* RAM SAWARI DEVI. **152 I.C. 387=7 R A 333=1934 A.L.J. 1013=4 A.W.R. 860=A.I.R. 1935 All. 43.**

———Construction—Gift by Hindu widow to daughters—Conferment of absolute estate—Defeasance clause that in the event of death of one without issue, the others should take equally—Validity and effect of. *See* T.P. ACT, S. 28. **156 I.C. 33=16 P.L.T. 215=A.I.R. 1935 Pat. 491.**

———*Construction—Gift—Intention of maker—Construction leading to validity of instrument.*

A document ought to be construed in such a way that the intention of the maker shall be given effect to so far as his meaning can be ascertained from the document and so far as his intention is in accordance with law. If therefore a gift is made to a certain person and his heirs according to a line of succession not in accordance with the law of inheritance, the gift may be valid so far as those persons are concerned who are qualified to take as a gift, though not by way of inheritance. (*Lort Williams, J.*) KANDARPAMOHAN GOSWAMI *v.* AKSHAYCHANDRA BASU. **60 Cal. 706=6 I.R. (Cal.) 199=146 I.C. 312=A.I.R. 1933 Cal. 529.**

[**Reversed.** 61 Cal. 106.]

———*Construction—Gift of jungle—Trees, not land passing.*

Where according to a deed of gift a jungle without exception of any tree is gifted away, and there is no mention of land upon which the jungle stood, it means that what was gifted away was the timber of the jungle and not also the land upon which the jungle stood. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

DEED—Construction—Gift.

———*Construction—Gift by stranger to members of joint family—Gift expressed to be made in favour of each of the donees individually—Donees take as tenants-in-common.*

Where a deed of gift executed by a person in favour of the defendants, stated as follows:—"Out of you *G* is my brother-in law, *P* is my nephew and *R* is the son of my another nephew. Therefore out of affection I bear towards you, I have conveyed to you the immovable property described, in the schedule below worth Rs. 10,000 and I have delivered possession of the same to you now alone. Therefore, from this date forwards, you and your heirs should enjoy permanently the said property with absolue rights with water, trees, stones, treasure and hidden treasure standing thereon. But I, my heirs and my relations have nothing to do with the same. I shall get the pattas from the said land transferred in your name, when you desire. You yourself should pay sircar cists payable on the said land. *G* out of you should keep the said property in his possession till his death and preserve the said property without causing any damage to it. One need not raise any dispute with the other in respect of the same. This is the dakhal (conveyance) deed of immovable property executed and given with my consent."

Held, that the deed should be construed as a whole; since the gift was made by a person who was in the position of a stranger to the donees and stated to be made in favour of each one of them, and further the donees and their heirs were asked to enjoy the properties, the donor intended the donees to take the properties as tenants in common even though they were members of a joint family and even though it was stated that the 1st defendant was to keep possession till his death. (*Madhavan Nair and Jackson, JJ.*) VENKAYAMMA *v.* GANGAYYA. **149 I.C. 335=6 R.M. 634=1933 M.W.N. 1310=38 L.W. 779=A.I.R. 1934 Mad. 16=65 M.L.J. 703.**

———*Construction—Gift—Tamliknama in favour of minor son—No mention of specific debts—Creditor impugning deed and obtaining renewal of promissory note—Deed, if creates charge in respect of debt.*

A father tranferred by means of a tamliknama his half share in certain ancestral villages in favour of his minor son. The document recited that the donor was heavily indebted, that most of the debts were fictitious, and that his wife, the guardian of his minor son, had expressed her willingness to pay off his debts. There was no mention of any specific debts in the document. A creditor, in a suit brought by him impugned the deed of gift, on the ground that it had been executed to defraud creditors and obtained a declaration to that effect. Further, after the execution of the deed in question, the donor renewed his promissory note in favour of the creditor. In a suit based on the promissory note, it was contended that the tamliknama created a charge in favour of the creditor in respect of the debt in suit.

Held, that the tamliknama did not create any charge in favour of the plaintiff in respect of the debt in suit, which conclusion is also borne out by the subsequent conduct of the donor as well as of the plaintiff. (*Srivastava and Nanavutty, JJ.*) DEPUTY COMMISSIONER, SITAPUR *v.* MOHAMMAD BAHADUR ALI KHAN. **1935 O.W.N. 288.**

———Construction—Gift—Trust of certain property by Muhomedan—Sons appointed trustees—Condition that donor is to remain in possession for life and to be sole trustee during his lifetime—Gift to sons, if valid. *See* MAHOMEDAN LAW—WAKF. **13 Rang. 679.**

DEED—Construction—Grant.

Grant.

———*Construction—Grant—Grantee to be faithful to the British Government—Grantee joining the Indian National Congress—Effect of.*

The plaintiff was a hereditary Desai and held lands and cash allowances under a sanad of 1864 which contained the condition, "that the said holders and their heirs shall continue faithful subjects of the British Government." The plaintiff joined Indian National Congress in 1895, was President of the Congress Committee in 1921 and subscribed to the Congress creed changed by the Nagpur Congress in 1920, *viz.*, the object of attainment of Swaraj by all legitimate and peaceful means, which, as explained by the Congress, included the boycott of schools, Courts, methods of making India economically independent, etc. In 1922, the plaintiff's sanad was forfeited. In a suit by the plaintiff to declare the forfeiture illegal.

Held, that if a man became an active member of a body the object of which was to bring the British Government of India to an end, whether by violent or non-violent means and to substitute for it a national Government, he cannot be said to be faithful to the British Government and that the forfeiture was not illegal. (*Beaumont, C.J. and Broomfield, J.*) NARSING RAO *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1932 Bom. 402=138 I.C. 530=34 Bom.L.R. 453=A.I.R. 1932 Bom. 226.**

Guarantee.

———*Construction—Guarantee—Liability of guarantor.*

An instrument of guarantee executed by the defendants in favour of the creditor recited that in consideration of his having agreed at their request to obtain a loan of rupees forty lakhs for *G*, the repayment whereof was to be secured by a mortgage to be executed by the said *G*, they guaranteed the repayment of the sum to the limit of their aggregate liability to the extent of 18 lakhs of rupees and their individual liability to the extent of 6 lakhs of rupees. Cl. (3) provided: "Within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said *G* in respect of such advance and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder." It was held by the High Court that the liability of the sureties was contingent not merely on the failure of the principal debtor but also on the realization of the security specified in the opening clause.

Held, that there was nothing in Cl. (3) or Cl. (1) to suggest that the sureties were liable only in the event of a deficiency remaining after the realization of the security and that the sureties were liable in the first instance. (*Lord Tomlin.*) ALERED ERNEST MITCHELL *v.* CARR LAZARUS PHILLIPS. **58 I.A. 306=59 Cal. 320=136 I.C. 407=I.R. 1932 P.C. 103=1931 A.L.J. 793=35 O.W.N. 986=54 C.L.J. 269=A.I.R. 1931 P.C. 224 =61 M.L.J. 191 (P.C.).**

Hire-purchase agreement.

———*Construction—Hire-purchase agreement—Contract of hire or sale.*

The question whether a contract is one of hire or sale should be decided on the language of the agreement. Where the goods were received on hire and the conditions provided that the hirer should take care of the article, that if he failed to pay hire in any month the owner could terminate the hiring and take possession of the article, that if the hirer terminated the agreement within the period, he should not be entitled to ask for any refund of the hire already paid and that the article should become the property of the hirer on his paying the several instalments.

Held, that it was a case of hire and that the hirer could return the article and stop further payment. 54 Bom. 381 and 57 M.L.J. 618, Cons. (*Mukerji, J.*) SURAJ AND SONS *v.* J. O. BRIN. **I.R. 1931 All. 607 =133 I.C. 159=A.I.R. 1931 All. 759.**

DEED—Construction—Kabuliat.

Instalment bond.

———*Construction — Instalment bond — Default — Failure to sue—Effect.*

A mere failure to sue in respect of the earlier instalments cannot be construed as a waiver of the right given by the bond to recover the amount due, if two instalments were not paid. (*Jackson, J.C., Subhedar and Niyogi, A.J.Cs.*) VISHWANATH *v.* SADASHIVA. **28 N.L.R. 44=135 I.C. 414=I.R. 1932 Nag 14=14 Nag. L.J. 141=A.I.R. 1932 Nag. 1 (F.B.).**

Intention of parties.

———*Construction— Intention of parties—Document to be taken as a whole.*

In construing a document, the deed must be read as a whole, and the intention of the executant must be given effect to, in so far as it can be obtained from the document as a whole. (*Courtney-Terrell, C.J. and Dhavle, J.*) RAMESHWAR KUER *v.* SHEO LAL UPADHYA. **14 Pat. 640=156 I.C. 33=7 R.P. 677=16 Pat.L.T. 245 =A.I.R. 1935 Pat. 401.**

———*Construction—Intention of parties—Sum payable on demand—Demand as part of cause of action.*

Although *prima facie* a sum payable "on demand" is repayable forthwith and the words "on demand" are superfluous, in each case the question whether or not the parties intended that the words "on demand" should be treated as an integral and operative part of the agreement depends upon the true construction of the agreement into which the parties entered. (*Page, C.J. and Mya Bu, J.*) TAN SOON THYE *v.* LIONEL EMILE DU BERN. **11 Rang. 328=147 I.C. 281=6 R.R. 154 =A.I.R. 1933 Rang. 188.**

Interest.

———*Construction—Interest—Provision for payment of interest in certain years on specified dates and in default interest on interest—Right to interest on interest after last date specified.*

A document provided for payment of interest on 16th July, 1916, 16th July, 1917 and 16th July, 1918, and for payment of interest on interest in default of payment of interest on those dates. It did not however provide generally for annual payment of interest at a particular date or for further interest on interest in default of payment of interest.

Held, that the document carried interest even after 16th July, 1918, but a provision to pay interest on a specified date after 16th July, 1918, or to pay interest on interest in default could not be spelled out. A.I.R. 1932 P. C. 99 and A.I.R. 1927 Mad. 774, Dist. (*Ramesam and Curgenven, JJ.*) GOPALASWAMI BAGHAVATHAR *v.* NATARAJA CHETTIAR **151 I.C. 916 (1)=7 R.M. 151 (1)=1934 M.W.N. 671 (2)=A.I.R. 1934 Mad. 645.**

Kabuliat.

———*Construction* — Kabuliat—*Provision for rent, interest and damages—Enforceability.*

A *kabuliat* contained a clause as follows:—"If we make default in payment of the instalments we shall pay interest at the rate of Rs. 2 per cent. per mensem. If we neglect to pay rent, you shall be competent to realize damages at 25 per cent. therefor by auction sale according to Reg. VIII of 1810 and the law in force or

DEED—Construction—Kat Kobala.

that shall be in force in future. Tne landlord having sued to recover rent, interest and damages,

Held, that under the contract the plaintiff was entitled to recover besides rent both interest and damages as stipulated in the *kabuliat*.

Held, further, that the provision for damages at 25 per cent. was not a penalty and even if it were so, the Court should give effect to the terms of the agreement. (*Cuming, J.*) CHANDI CHARAN LAHA *v.* JIBAN KUMAR MAJUMDAR. **I.R. 1931 Cal. 624=132 I.C. 912=53 C.L.J. 516=A.I.R. 1931 Cal. 772 (1).**

Kat Kobala.

See also MORTGAGE OR SALE, *infra*.

———Construction—*Kat kobala*—Case, if one of cancellation or rectification of mistake—No redemption without paying the amount due for principal and interest. *See* TRANSFER OF PROPERTY ACT, SS. 76 AND 77. **53 C.L.J. 380.**

Lease.

———*Construction—Lease—Agreement between* Guzardar *and lessee—Effect—Status of under-proprietor if conferred.*

Certain under proprietors transferred their property by a deed which was described as a lease in perpetuity. The property was to remain with the transferors as '*guzara*'. The *Guzardar* was to pay a fixed sum and if the same was not paid, the lessee was to recover the same according to law. There was a definite prohibition of enhancement of rent or ejectment. There was no mention of rights of transfer. There was provision that there should be no interference or ejectment by the lessee except according to law.

Held, that the Guzardar did not become an underproprietor under the agreement. (*Oppenheim, J. M.*) JAR BANDHAN SINGH *v.* RAI BAJRANG BAHADUR SINGH. **13 L.R. 132 (Rev.)=15 R.D. 764.**

———*Construction—Lease—Agricultural lease—Use of word "theka"—Effect.*

Where a document is otherwise an ordinary agricultural lease, the mere use of the word "theka" does not alter it. (*Keane, S. M. and Oppenheim, J. M.*) MAHOMED BAKHSH *v.* PABITTARA PANDAIN. **15 R.D. 212=12 L.R. 55 (Rev.).**

———*Construction—Lease—Further advance—Mortgage constituted.*

The appellant an occupancy tenant borrowed Rs. 100 for his marriage from respondent in 1915. He took Rs. 60 on a *Zarpeshgi* lease for five years and next day Rs. 40 on an agreement that if Rs. 40 was not repaid within five years, respondent would remain in possession until it was repaid.

Held, that the two transactions were part of the same transaction, that the effect of the second was to convert the first from a lease into a mortgage and that the same was inadmissible in evidence for want of registration. (*Oakden, S. M. and Smith, J. M.*) PANCHA *v.* MOTI RAM. **15 R.D. 144.**

———*Construction—Lease—Patta and kabuliat—Permanent lease at fixed rent made out.*

Where the land was shown to be full of jungle at the inception of the tenancy and the tenure was a permanent and a heritable one and the word *nirdharita* was frequently used in the patta and kabuliyat and it contained a provision for rent regarding excess area.

Held, that though the word *mokarari* was not used, the effect of the document was to create a permanent lease at a fixed rent. (*C. C. Ghose and Pearson, JJ.*) AMBIKACHARAN DAS *v.* BASANTKUMAR MANDAL. **58 Cal. 1046=134 I.C. 1130=I.R. 1932 Cal. 42=36 C.W.N. 178=A.I.R. 1932 Cal. 73.**

DEED—Construction—Lease and mortgage.

———*Construction—Lease by shebaits of mauza for raising coal—Agreement to pay certain commission per maund of coal to extent of interest of deity—Royalty held payable not on whole maunds but only on deity's interest thereon.*

Four shebaits of a deity granted a lease to a Coal Company of a certain mauza (in which the deity had only eight annas interest) for raising coal. The company agreed to pay a certain commission per maund of coal, "to the extent of the interest of the family deity."

Held, that the stipulated royalty was payable not on the whole maunds but only on the raisings which correpond with the extent of the interest of the family deity in the Mouza, *viz.*, an eight annas share. (*Lord Alness.*) BARABONI COAL CONCERN, LTD. *v.* GOKULANANDA MOHANTA THAKUR. **61 I.A. 35=61 Cal. 313=3 A. W.R. 193=11 O.W.N. 225=18 R D. 112=59 C L.J. 257=1934 A.L J. 295=36 Bom.L R. 390=1934 M. W.N. 300=6 R P.C. 85=147 I.C. 884=39 L.W. 291 =38 C.W.N. 325=A.I.R. 1934 P.C. 58=66 M.L J. 399 (P.C.).**

———*Construction—Lease—*Zar peshgi *lease—Whether can be construed as mortgage.*

There is very little actual difference between a mortgage and a *Zar peshgi* lease with a condition against ejectment but there is no justification for treating as a mortgage, a document which is termed a lease and has all the characteristics of a lease. (*Oakden, S. M. and Smith, J.M.*) ZORA *v.* JAHANIA. **15 R.D. 135.**

Lease or licence.

———*Construction—Lease or license—Document headed "agreement"—No mention of "rent."*

Where the document was headed "an agreement" and in the body of the said agreement, no vernacular word was used which corresponds to the word "rent" and where the transferor who was in *khas* possession from before, gave the exclusive right of *khas* possession to the transferee, the document is a lease. (*Mitter, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* AMANADDIN. **159 I.C. 235=8 R.C. 297=40 C W.N. 156= A.I.R. 1935 Cal. 638.**

Lease and mortgage.

———*Construction—Lease and mortgage of property to same party—Lessee-mortgagee to be at liberty to appropriate royalty payable by him towards mortgage debt—Such appropriation, held not compulsory on mortgagee—Lease hold and mortgage interests purchased by different persons—Suit by transferee of mortgage—Mortgagor, if entitled to decree for royalty.*

M granted a mining lease of certain premises to *L*. The royalties were charged upon the lease-hold interest. By the same deed, *M* also mortgaged the premises to *L* to secure a loan taken. The royalties payable to the mortgagor as lessor were made part of the mortgage security. The mortgage debt was primarily payable out of the rents and rayalties. The mortgagee was to be at liberty to appropriate or recover and have the rents and royalties payable by him to the mortgagors when they were to become due. *L* then mortgaged to *T* his lease-hold interest and the interest as mortgagee. *T* obtained a mortgage decree for sale and during execution proceedings an arrangement was arrived at by which *L's* lease hold interest was sold to *B*, free from *T's* mortgage, and the price paid was applied to the reduction of the mortgage debt. The execution proceedings were then resumed and finally *T's* son, who had succeeded his father, purchased the right, title and interest of *L* in the mortgage in execution. *T's* son then brought a mortgage suit against *M* and *B*. He claimed against *M*, a decree for the full amount due

DEED—Construction—Marriage settlement.

under the mortgage,but if it should be held that under the clause as to appropriation of royalties in the mortgage-deed, the mortgagee was bound to recover and appropriate the same, he asked for a decree against *B* also for the sum found due from him as royalties on an account. Neither *M* nor *T's* son had prior to the institution of the suit realised any royalties from *B* each thinking that it was the duty of the other to do so.

Held, (1) that under the clause, appropriation of royalties was not compulsory on the mortgagee, but optional with him. (2) that in any case *M* was not entitled to any decree in the suit against *B* as the hardship, if any, had been brought on by his own negligence; (3) that *B* could not be saddled with the costs of the appeal of *M* who had only succeeded on a point which did not affect *B*. (*Sir George Lowndes.*) BARABONI COAL CONCERN, LTD. *v.* DEBA PRASANNA MUKERJEE. **38 C.W.N. 481=154 I.C. 596=7 R.P.C. 147=59 C.L.J. 207=39 L.W. 722=A.I.R. 1934 P.C. 119=66 M.L.J. 479 (P.C.).**

Marriage settlement.

———*Construction—Marriage settlement — Absolute estate cut down by defeasance clause—Gift over taking effect.*

A Hindu executed a settlement deed in favour of his wife at the time of his marriage. The deed provided as follows: "I have accordingly given you the undermentioned properties and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue after your death, your brothers should take the properties". The wife died without issue and left behind her brothers.

Held, that by reason of the operation of the defeasance clause, on the happening of the contingency, the original estate was cut down to a life-estate and that the gift over to the brothers was valid and operative. Distinction between repugnant and defeasance provisions pointed out. (*Sundaram Chetty, J.*) GOVINDARAJA PILLAI *v.* MANGALAM PILLAI. **I.R. 1932 Mad. 808=139 I.C. 867=36 L.W. 733=1932 M.W.N. 1277=A.I.R. 1933 Mad. 80=63 M.L.J. 911.**

———*Construction—Marriage settlement—Intention of settlor to provide fixed annual income—Covenant regarding depreciation of securities—Income-tax—Incidence.*

The father of the bridegroom made a settlement on the marriage, wherein it was recited that it was the intention of the settlor that the beneficiaries thereunder should receive a yearly income of Rs. 14,000 being equivalent to 7 per cent. per annum on the nominal value of the securities settled thereunder and that in the event of such securities failing to yield the aforesaid income, he shall supplement and make up the deficiency. The covenant was as follows: "if in any year the securities . . . . shall not yield an annual income of Rs. 14,000 then the settlor shall on demand . . . . pay any deficiency between the sum actually realised by way of dividends or income on the said securities and the sum of Rs. 14,000."

Held, that the true construction of the covenant was that any deficiency was to be calculated by deducting the full amount of dividends received in respect of the securities including an income tax deducted at the source from Rs. 14,000. (*Remfry, J.*) OFFICIAL TRUSTEE OF BENGAL *v.* G. A. ARRATOON. **58 Cal. 469=I.R. 1931 Cal. 836=134 I.C. 532=A.I.R. 1931 Cal. 518.**

Mortgage.

———*Construction—Mortgage.*

DEED—Construction—Mortgage.

Where under the deed the executant handed over complete control of the property for 14 years in consideration of money advanced in the past and it was recited that the debt was to be liquidated by the proceeds of the property,

Held, that the deed was one of mortgage. (*Oppenheim, S. M. and Drake Brockman, J. M.*) FAIYAZ ALI KHAN *v.* GOBIND RAM. **18 R.D. 231=15 L.R. 238 (Rev.).**

———*Construction—Mortgage—Agreement for sale—Undertaking not to mortgage or sell—Effect of.*

In an agreement for sale of land, the vendor after reciting that he has received a portion of the consideration stated that : "I the declarant mortgaged, hypothecated, and pledged the land entered in this deed of contract, so that should I execute any deed of any kind whatsoever, deed of sale, *rehan, etc.*, in respect of the land entered in the deed of contract, the same shall be treated as null and void and imperative."

Held, that the intention of the vendor was only to enter into covenant, usually found in such deeds, against encumbering or selling the property to another, and that the clause did not create either a charge or a mortgage. (*Wort and Dhavle, JJ.*) ABDUL LATIF MIAN *v.* DEBI MAHTON. **13 Pat. 620=155 I.C. 47=7 R.P. 534=15 Pat L.T. 443=A.I.R. 1934 Pat. 495.**

———*Construction—Mortgage or agreement for repurchase—Test.*

The test to be applied to determine whether a mortgage has been created is the intention of the parties to the instruments. That intention is to be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. 38 All. 570 (P.C.), Foll. (*Page, C. J. and Mya Bu, J.*) GNANASUNDARAM *v.* VULCAN INSURANCE CO., LTD. **9 Rang. 452=I.R. 1931 Rang. 285=134 I.C. 221=A.I.R. 1931 Rang. 210.**

———Construction—Mortgage or mere agreement to give mortgage—Deed purporting to be mortgage with possession—Properties in possession of the then mortgagees—New mortgagee to open account to be operated upon by debtor for their redemption. *See* REGISTRATION ACT, S. 17 (1) (*b*). **68 M.L.J. 339 (P.C.).**

———Construction — Mortgage — Further charge—Clause in subsequent mortgage deed providing for payment of amount of prior mortgage also in lump sum before redemption—Effect of. *See* T. P. ACT, SS. 59-A AND 61. **11 O.W.N. 1601=A.I.R. 1935 Oudh 213.**

———Construction—Mortgage—Primary and secondary agreement—Agreement to pay interest at one per cent. —Provision for enhanced rate at compound interest on default of payment in any one year—If penal—Discretion of Court. *See* CONTRACT ACT, S. 74. **18 N.L.J. 220.**

———*Construction—Mortgage—Redemption clause.*

The mortgage deed provided for a term of 10 years but there was also a clause to the effect that the mortgagor would be entitled to redeem the property if he paid within ten years.

Held, that the term as to duration having been distinctly mentioned, the mortgagor could not sue for redemption before the expiry of 10 years.

Quaere.—whether the mortgagor could sue for redemption before that period, if the mortgagee commits a breach of contract. (*Mukerji and Allen, JJ.*) AKBAR HUSAIN *v.* SHAH AHSANUL HAQ. **I.R. 1931 All. 843=134 I.C. 459=A.I.R. 1932 All. 155.**

———*Construction—Mortgage—Settlement of account—Property made security for payment of money—Transaction as one of mortgage.*

DEED—Construction—Mortgage or lease.

A document in Guzarati executed in favour of one *V* by his partner *G* after stating that the accounts between the parties had been examined by an arbitrator went on to state that a sum of Rs. 1,12,500 had been found to be due to *V*. This amount the executant *G* promised to pay as soon as his movable and immovable properties situated in Calcutta and its suburbs could be sold. In the paragraph which followed, the executant said: "I have lands and estates in Kankurgachi, Belur, Manik-tola, Manharpuker and Puri, etc. Suits are pending in respect of some of them as there are disputes in connexion with document relating thereto. Some of the disputes are settled and the rest will be settled in a short time. And for selling these lands and estates, I have in my possession their title deeds. When they are sold, I will pay in full anyhow your dues within four years. Till then as a security I pledge to you all these properties and the properties of my share in the company. The documents thereof which I hold are to be deemed to be held on your behalf. After paying your debts I can make any other disposal. I pass the writing to that effect."

Held, whether the word "pledge" was a correct translation of the vernacular word or not, the document had got to be taken as a whole and taking the document as a whole there could be no doubt that the document did amount to a transfer by way of assurance or mortgage. (*C. C. Ghose, A. C. J., Pearson and Mukerji, JJ.*) VERAJLAL MULJEE *v.* SECRETARY OF STATE. **134 I.C. 1269 = I R. 1932 Cal. 53 = A.I.R. 1931 Cal. 732 (S.B.).**

Mortgage or lease.

———*Construction—Mortgage or lease—"Khanda gutta Cowle"—Provision for repayment of advance by annual cists—Absence of provision for interest.*

Under a document called a "khandagutta cowle," land described as a carpenter's service inam was put in possession of a person who advanced Rs. 693 in consideration thereof. The person who advanced the money was to be in possession for a period of 33 years and the amount of Rs. 693 advanced under the deed was to carry no interest and was to be extinguished by a cist or rent of Rs. 21 per annum, which for 33 years would amount to the sum of Rs. 693. It was recited in the body of the document that the land had been mortgaged.

Held, that the document was a lease for a fixed premium and not a mortgage, and that whatever the word "khandagutta" might mean, 'cowle" ordinarily denoted a lease and not a mortgage. 25 A. 115 (P.C.), Foll. (*Curgenven and Cornish, JJ.*) YERRANNA *v* SOMANNA. **156 I.C 873 = 8 R.M. 70 = 41 L.W. 271 = 1935 M.W.N. 515 = A.I.R. 1935 Mad. 320 = 69 M. L J. 115.**

———*Construction—Mortgage or lease—Possession of property for a fixed period as security for debt—Power of sale—Usufructuary mortgage and not lease.*

Whether a person is a usufructuary mortgagee or a lessee must be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. Where a person goes into possession of property for the purpose of securing the payment of his debts owing to him and the language of the document creates a charge and gives a power of a conditional sale, the transaction amounts to a usufructuary mortgage and not a lease or a charge. 22 All. 149 (P.C.), Ref; 25 All. 45 (P.C.), Dist. (*Wort and Mohammad Noor, JJ.*) RAMESHWAR NARAIN SINGH *v.* PANI RAM MODI. **A.I.R. 1934 Pat. 217.**

DEED—Construction—Mortgage or sale.

———*Construction—Mortgage or lease—Test.*

A *sarpeshgi* lease may be a mortgage as well. No hard and fast rule can be laid down for deciding whether a particular transaction is a lease, pure and simple, or whether it is also a mortgage. The important criterion is whether there is a loan and the property transferred is a security for the payment of the principal or interest of the loan. (*Mohammad Noor and Dhavle, JJ.*) PARAMESHWAR RAI *v.* RAMRUDRA PRASAD. **158 I. C. 162 = 8 R.P. 178 = A.I.R. 1935 Pat. 360.**

Mortgage or sale.

———*Construction—Mortgage or sale.*

Where a person executed a document whereby he purported to sell the property in consideration of the loan due by the executant but it was agreed that if the executant paid the money within three years the property would be 'released' (*wi guzasht kara lengen*).

Held, that the transaction fell within the language of S. 58 (*c*), T. P. Act, and the transaction did not amount to an out and out sale but it was a mortgage. The use of the word 'release' indicates that the property was regarded as being under a sort of restraint, that is to say was a security. (*Mukerji and Bennet, JJ.*) MUMTAZ BEGAM *v.* LACHHMI. **I.R. 1931 All 239 = 130 I.C. 15 = 1930 A.L.J. 1435 = A.I.R. 1931 All. 196.**

———*Construction—Mortgage or sale—Considerations to be taken into account.*

In every case in which the plaintiff sues upon the ground that a certain transaction, though in the form of a mortgage, was in fact a sale, the Court must decide as to the real nature of the transaction upon all the available material, including the terms of the document itself, the *onus* being in the first instance on the plaintiff to establish his case and the true question being as to the real intention of the parties when entering into the transaction. If it is established beyond reasonable doubt, that the parties intended a permanent transfer, the Court will find the transaction to be one of sale though the deed is in the form of a mortgage. Where a document was described as a mortgage deed and the rent of the property was to be set-off towards a portion of the debt while the other portion was to carry interest, and there were stipulations against increase of rent, and for payment of money spent on improvements with interest and the deed further provided that the mortgagors were not liable for the debt either personally or out of their other property, *held*, that the transaction was a mortgage and not a sale. The fact that some of the stipulations therein were of an onerous character was not sufficient to throw any doubt on the real nature of the transaction. 100 P.R. 1895, Rel. on. (*Tek Chand and Agha Haidar, JJ.*) MIHAN CHAND *v.* ISHAR DAS. **12 Lah. 488 = I R. 1931 Lah. 318 = 130 I.C. 526 = 32 P L R. 749 = A.I.R. 1931 Lah. 258.**

———*Construction—Mortgage or sale—Evidence.*

The fact that the stamp on which the sale deed was engrossed was purchased by the vendor is inconclusive to determine whether transaction is a sale or mortgage. So also is the circumstance that in the extract of the record of-rights exhibited with the plaint, the sale deed was entered in Col. 11 which was intended for recording incumbrances on the land, because the subsequent conduct of the parties cannot be considered in interpreting the nature of an instrument of title. (*Niyogi, A.J.C.*) RAMNARAYAN RAMRAKH *v.* RAMRATAN. **149 I.C. 354 = 6 R.N. 222 (2) = A.I.R. 1934 Nag. 18.**

———Construction—Mortgage or sale — Intention—Deed to be construed as a whole. *See* FATAL ACCIDENTS ACT. **37 Bom.L.R. 410 = A.I.R. 1935 Bom. 333.**

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———*Construction—Mortgage or sale—Kat-kobala—Language of document to be looked into.*

Where a document which was in the margin described as a kat kobala, but in the body of it purported to be a deed of sale with the following condition that "if the said principal amount and an equal amount of profit be paid to you within the period of eight years, then you shall return back the said lands with this kobala."

Held, that the question whether the deed was a mortgage or an out-and-out sale has to be determined mainly with reference to the terms of the document itself with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

Held also, on a construction of the deed, that it is a sale and not a mortgage by conditional sale. (*Costello, J.*) ALTAPALI KHAN *v.* UZIRALI KHAN. **60 Cal. 167=I.R. 1933 Cal. 528=144 I.C. 220=A.I.R. 1933 Cal. 381.**

———*Construction—Mortgage or sale—Plain language.*

Where a document is on the face of it a mortgage deed, the mere fact that the conditions of the deed are onerous does not alter the real nature of the transaction. (*Jai Lal, J.*) MILKHI RAM *v.* GUJAR MAL. **141 I.C. 494 (1)=I R. 1933 Lah 130=33 P.L.R. 974=A.I.R. 1933 Lah. 104.**

———*Construction—Mortgage or sale—Test—Intention to transfer possession to vendee.*

Where the recitals in a sale-deed showed that the intention was to transfer possession to the vendee, and the vendor stipulated to pay back exactly the amount of the purchase-money which he received and the purchase-money closely approximated to the market value of the property, the transaction is one of sale and not of mortgage. (*Niyogi, A. J. C.*) RAMNARAYAN *v.* RAMRATAN. **149 I.C. 354=6 R.N. 222 (2)=A.I.R. 1934 Nag. 18.**

Mukhtarnama.

———*Construction*—Mukhtarnama—*Terms—Power to act under Ss.* 8, 9 *and* 10, *Oaths Act.*

Where the *mukhtarnama* gave the *mukhtar* authority to make a compromise, confess judgment or make a reference to arbitration,

Held, that the powers were sufficiently wide to include authority to take action under Ss. 8, 9 and 10 of the Oaths Act. (*Bisheshwar Nath, J.*) JASODA *v.* GOPAL. **136 I.C. 246=I.R. 1932 Oudh 102=8 O.W.N. 880=A.I.R. 1931 Oudh 350.**

Nature of transaction.

———*Construction—Nature of transaction — Document not bearing particular description—How determined—Conduct of parties—Relevancy.*

Where a document does not bear any particular description as to the interest created by it and is a mere memorandum though registered, the effect thereof has got to be determined with reference to the substance of its provisions and the conduct of the parties and other relevant circumstances so far as the same may be admissible to throw light on the nature of the transaction. (*Varadachariar, J.*) CHATHANNI RAVIRAN *v.* NARAYANA. **158 I.C. 228=8 R.M. 241=1935 M.W.N. 866=42 L.W. 596=A.I.R. 1935 Mad. 682.**

Partition deed.

———*Construction—Partition deed—Description as 'karar'—Surrounding circumstances and subsequent conduct.*

The document was styled a 'karar' but besides maintenance arrangements, it contained provisions for allocation of the entire tarwad properties between several branches and it also provided for the management, and

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the subsequent conduct of the parties also indicated that the parties intended to treat the transaction as a partition arrangement.

Held, that the document was a partition deed and the mere fact that the pattas were not transferred to the respective branches was immaterial. The name given by the parties to document is not conclusive as to its real nature and effect. (*Jackson and Anantakrishna Aiyar, JJ.*) APPA *v.* KACHAI BAYYAN KUTTI. **I.R. 1932 Mad. 389=137 I.C. 458=1932 M.W.N. 975=35 L.W. 444=A.I.R. 1932 Mad. 689.**

———*Construction—Partition deed—Partition in the erroneous belief of existing rights—If can operate to create interest in person having none before.*

The widow of the last male holder in a Hindu joint family and her minor son entered into a partition arrangement with the widow of a predeceased coparcener and her minor adopted son, by which the properties of the family were divided. The former were under the erroneous belief that the latter were also entitled to a share in the estate, though in law the adopted son of the latter had no rights, as he had been invalidly adopted.

Held, the widow of the last male holder and her son were not divesting themselves of any part of their estate, but only acted on the supposition that they held only a joint interest in the estate and that they were relinquishing what in law they were bound to relinquish in the belief, that the other widow and her adopted son were members of the coparcenary and were as such entitled to partition. The so-called partition could not consequently be regarded as a valid document so as to create an interest in favour of persons in whom, apart from such document, no interest previously existed at all. (*Grille, Offg. J. C.*) MST. KASHI *v.* GOPALDAS. **159 I.C. 84=8 R.N. 117=18 N.L.J. 81.**

———*Construction — Partition deed in Malabar tarwad—Sharers taking absolute estate—Residuary clause providing for survivorship in respect of undisposed of properties—Will by sharer—Validity.*

Four members of a Malabar tarwad, two brothers, a sister and a nephew, effected a partition of their properties by a deed under which the properties were divided into four shares, and one of the terms of the deed provided: "The respective sharers shall enjoy the property belonging to their respective shares with absolute rights such as purchase, sale, etc., and by effecting improvements as they please, getting pattas, and paying tirwa to the sircar, etc." It was also stipulated that thereafter one sharer shall have no manner of right, interest, title or entry in the entire property allotted to the other sharer and that if any one sharer died while enjoying his share as he pleased as aforesaid, and if any properties of the deceased sharer were left behind, such properties shall devolve in equal shares on the others "out of us living at the time". One of the brothers subsequently executed a will bequeathing certain properties to his wife and children, and after his death, the other sharers challenged the bequest and claimed all his properties by right of survivorship as per the arrangement in the deed.

Held, that the words "purchase and sale" in the partition deed were analogous to technical terms describing an absolute estate, and that the deceased sharer was competent to dispose of his property by will and consequently only his undisposed of property devolved on the other sharers in equal shares.

Held, further, that a "limited estate" in the sense in which that term is understood in Hindu Law was un-

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known to the Marumakkathayam Law. (*Pakenham Walsh and Varadachariar, JJ.*) UTHE AMMA *v.* MANI AMMA. **157 I.C. 509=8 R. M. 149=41 L.W. 465=1935 M. W. N. 284=A.I.R. 1935 Mad. 337=68 M. L.J. 372.**

———Construction—Partition deed—Partition lists—If constitute instrument of partition or mere memoranda—Test—Similar documents—Kelevancy of decision on. *See* REGISTRATION ACT, S. 17 (1) (*b*). **A.I.R. 1935 Lah. 448.**

Personal liability.

———*Construction—Personal liability—Agreement to purchase immovable property—Sale to a firm or their nominees or assigns—Conveyance in favour of nominee of firm—Personal liability of members.*

A company agreed to sell to the firm or their nominees or assigns certain immovable property. There was no provision that in the case of a nominee the firm were to remain liable for the balance of the purchase-money. The conveyance was made to the nominee as purchaser, reciting that the agreed part of the consideration had been made good by him, and that he was ready and willing to pay the outstanding balance.

Held, that the nominee was substituted for the firm and therefore no personal liability could be fixed on the members of the firm. (*Sir George Lowndes.*) RAM RAGHUBIR LAL *v.* UNITED REFINERIES (BURMA), LTD. **60 I.A. 183=11 Rang. 186=57 C.L.J. 308=1933 A.L.J. 541=35 Bom L.R. 753=I.R. 1933 P.C. 106=37 C W.N. 633=37 L.W. 784=142 I.C. 788=1933 M.W N. 461=A.I.R. 1933 P.C. 143=64 M L.J. 655 (P.C.).**

Power.

———*Construction—Power—Power conferred—Effect of disclaimer.*

A person to whom any power whether coupled with an interest or not, is given may by deed disclaim power, and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer, the power may be exercised by the other person or persons or the survivor or survivors of the other person to whom the power is given, unless the contrary is expressed in the instrument creating the power. Where one of the widows, a donee under a will of Taluqdari refused the life estate as well as the power to adopt she was justified in doing so, her estate by reason of disclaimer was lost and the estate of the second widow was accelerated. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I. C. 642=I.R 1932 Oudh 130=8 O.W.N 349=A. I. R. 1931 Oudh 177.**

Power of attorney.

———*Construction—Power-of attorney—General power to do necessary and requisite things—Whether includes power to compromise.*

Where the power of-attorney recited: " To do all and every deed and thing requisite and necessary for all or any of the purposes as fully and effectually as I myself could do if personally present."

Held, that this was not wide enough to include authority to compromise; the general clause in a power of-attorney was not to be construed at large, but as giving general powers for the carrying into effect of the special purposes for which the power was given. (*Mya Bu and Dunkley, JJ.*) VEERAPPA CHETTIAR *v.* VELUSWAMI THEVAR. **6 I.R. (Rang.) 120=146 I.C. 707=A.I.R. 1933 Rang 186.**

———*Construction — Power of-attorney — Managing agent of Chettyar firm—Power to grant lease.*

Under a power of-attorney, a Chettyar firm gave authority to its managing agent "to transact, conduct

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and manage all and every or any of the affairs, concerns, matters and things in which we now are or hereinafter may be in any wise interested or concerned, and for that purpose to use or sign our names to all and every or any document or documents, writing or writings whatever."

Held, that taking into consideration the nature and the manner in which the Chettyar firm in Rangoon carry on business, the managing agent had authority to execute a lease on behalf of the firm for premises for carrying on business. (*Page, C.J. and Das, J.*) BHAGWAN DAS BAGLA *v.* S.P.K.A.A.M. CHETTYAR FIRM. **150 I. C. 697=7 R. R. 6 (2)=A. I. R. 1933 Rang. 385.**

———*Construction—Power of-attorney—Plain language—Words whether can be imported—Earlier and later clauses—Mode of construction.*

There is no principle of construction, which permits a document contrary to its actual wording to be read, as though it followed a proposed precedent unless between the parties it has been rectified or at least is such as would by the Court be rectified. The question at issue was whether the acting manager of the defendant Bank had the authority to certify cheques drawn by a constituent as good for payment on a future day. The plaintiff sought to read the word "accept" into the power-of-attorney suggesting that it had been omitted owing to the copyist's mistake.

Held, that such a construction was not permissible. The general words in the later clauses of the power-of-attorney should be read with the special powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers there mentioned.

Held, further, that the power to "endorse" did not confer the power to "back" bills on behalf of the Bank and that the power to pay cheques did not include the power to "promise to pay." (*Lord Atkin.*) ADAIKAPPA CHETTIAR *v.* THOMAS COOK AND SON, LTD. **I.R. 1933 P.C. 114=142 I.C. 660=37 L.W. 319=1933 A. L. J. 277=A. I. R. 1933 P. C. 78=64 M. L. J. 184 (P.C.).**

———*Construction—Power-of-attorney—Provision for representation of principal in Court proceedings—If confers power to sign and verify income-tax returns.*

An interpreting a power-of-attorney, the words contained therein must be looked at in connection with the context, as well as with the general object of the power. A power-of-attorney must be strictly construed as giving only such authority as it confers expressly or by necessary implication. Where a mukhtarnama executed by an assessee confers authority on the mukhtar to file suits in Courts, Board of Revenue and other Government departments and also to file applications, plaints, written statements and affidavits filed in support of applications, the general object of the power is that the agent should be able to represent his principal in proceedings in Court so as to dispense with the necessity of the principal appearing personally It does not confer any authority to sign or verify a return of income of the assessee under S. 22 (2) of the Income-tax Act. Although the words "other Government departments" are sufficiently wide to include the department of income-tax, the return of income cannot be regarded as an application or a written statement within the meaning of the terms of the mukhtar. (*Srivastava and Zia ul-Hasan, JJ.*) COMMISSIONER OF INCOME TAX, C. P. AND U.P., *In the matter of.* **155 I.C. 180=7 R.O. 564=1935 O.W.N. 490=A.I.R. 1935 Oudh 305.**

Principles.

———*Construction — Principles—Construction as a whole.*

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A document should be read as a whole, and the intention of the executant ascertained from all the clauses considered together and not individually. (*Niamatullah, J.*) SUMERA *v.* MORMUKAT. **157 I.C 256=8 R.A. 150=1935 A.W.R. 846=A.I.R 1935 All. 632.**

———*Construction — Principles — Construction as a whole.*

It is a well-recognized rule of construction of documents that they must be read as a whole. To pick out some passages torn from their context and to try to interpret the document as a whole in the light of those extracts would be putting a forced construction on the document which cannot but defeat the operation of the deed as a whole. (*Niyogi and Staples, A.J.Cs.*) RAM SWAROOP *v.* THAKUR RAMCHANDRAJI. **31 N.L.R. 188=157 I.C. 17=8 R.N. 12=A.I.R. 1935 Nag. 35.**

———*Construction — Principles — Construction as a whole.*

All the terms of a deed must be taken into consideration when construing the deed. (*Sir Lancelot Sanderson.*) DON CHARLES WEERASEKERA *v.* HEETIGE DON JOHN PERIS **I.R. 1933 P.C 134=143 I.C. 170 =A.I.R. 1933 P.C. 49 (P.C.).**

———*Construction — Principles — Construction as a whole.*

It is a rule of construction applicable to all written instruments, that the instrument must be construed as a whole in order to ascertain the true meaning of several clauses and the words of each clause must be so interpreted as to bring them into harmony with the other provisions of the instrument. If that interpretation does no violence to the meaning of which they are naturally susceptible, the best construction of deeds is to make one part of the deed expound the other and so to make all parts agree and effect must as far as possible be given to every part and every word of evey clause. 54 M.L.J. 82 (P.C.), Ref. (*Niyogi, A J.C.*) MT. BANA BAI *v.* MT. CHANDRABHAGA. **27 N.L.R. 24=I R. 1931 Nag. 98=132 I.C. 450=A.I.R. 1931 Nag. 60.**

———*Construction — Principles — Construction as a whole.*

Written documents must be construed as a whole. Each provision they contain must receive attention and from their several provisions the true intention of the parties to them is to be ascertained. 54 M.L.J. 82 (P.C.), Ref. (*Raza and Smith, JJ.*) SARFARAZ AHMAD *v.* BABAR ALI. **6 R.O. 261=147 I.C. 397= 17 R.D 885=10 O.W.N. 956.**

———*Construction — Principles — Construction as a whole—Intention—Form of deed—If a safe guide—Covenant imposing owner's liability—Strict construction.*

The intention of parties concerned has to be gathered from the documents as they stand, taking all the provisions contained in the same together. The real nature of a transaction must always be carefully looked into, as the mere form of the instrument is a very delusive guide. In construing documents which purport to impose liabilities of a very onerous nature on one party, the covenant on which such liability is based must be strictly construed, and effect should be given to all the parts of the document. (*Guha and Lodge JJ.*) SATYA CHARAN SRIMANI *v.* RAMKINKAR BANERJEE. **159 I.C. 1001=8 R.C. 369=62 C.L.J. 28=A I.R. 1935 Cal. 659.**

———*Construction—Principles—Description of property —Rule of* falsa demonstratio—*Applicability.*

Where one description, and that an incomplete one, has been added to an already sufficient description, the added description may be disregarded under the maxim *falsa demonstratio.* Where certain properties were described as *C* estate and later there was an erroneous enumeration of the properties,

Held, that the later description might be ignored. (*Lort Williams, J.*) JALPAIGURI BANKING AND TRADING CORPORATION, LTD. *v.* SAMARESH CHAKRABARTI **60 Cal. 701=6 I.R. (Cal.) 126=145 I.C. 666=A.I.R. 1933 Cal. 535.**

———*Construction — Principles — Descriptions of property—Several and inconsistent with one another— Several inconsistent descriptions of property.*

Where there are several descriptions which when evidence of surrounding facts is admitted, are not consistent one with the other, there is no general rule by which the Court can decide which description ought to prevail. There are two principles for deciding such cases. The first is that, where there is a general description given in a deed and then a particular and detailed description given, the particular description will prevail. The other principle is that where the property has been sufficiently identified in a deed and later on, an incomplete or false description is given, the later description should be disregarded on the principle that *false demontratao non nocet* (the first principle was applied in this particular case and the second one was held not applicable.) (*Staples, A.J.C.*) GOURISHANKAR *v.* SHAIAMLAL. **153 I.C 523=7 R.N. 140=A.I.R. 1934 Nag. 280.**

———*Construction—Principles—General.*

The following principles were applied in construing a 'karar': (1) The name given by the parties to a document is not conclusive as to its real nature and effect, though that undoubtedly is a circumstance to be taken into consideration along with the contents of the document. (2) Where the document is somewhat ambiguous and difficult to construe, the subsequent conduct of the parties can legitimately be taken into account. (3) The non mention or rights of alienation, etc., in a document would not prevent the usual legal incidents from attaching to ownership of property, in case it is found that ownership of such property passed to particular persons by virtue of the provisions of a document. (*Jackson and Anantakrishna Ayyar, JJ.*) APPA *v.* KACHAI BAVYAN KUTTI. **I.R. 1932 Mad. 389=137 I C 458=1932 M.W.N. 975=35 L.W. 444=A.I.R. 1932 Mad. 689.**

———*Construction—Principles—Meaning of words— Actual and not technical sense.*

The term in a document should not be taken in its technical sense in opposition to the actual meaning of the parties. Preference should be given to intent, over technical import and form. *Cholmondeley* v. *Clinton*, (1820) 2 J. & W. 81, Ref. (*Mitter and Paterson, JJ.*) SOURISH CHANDRA ROY BAHADUR *v.* SAROJ RANJAN SINGHA. **150 I.C. 1019=7 R.C. 53=60 C.L.J. 353=38 C.W.N. 707=A I.R 1934 Cal 571.**

———*Construction—Principles — Meaning of word occurring at different places—Meaning of* 'law walad' *in* wajib ul-arz.

The general rule that if a word occurs at several places in the same document it should be taken to have been used everywhere in the same sense is subject to the qualification, that the context does not show a contrary intention. Meaning of *la walad* in *wajib ul-arz* discussed. (*Raza, J. on difference between Bisheshwar Nath and Smith, JJ.*) DWARKA *v.* RAGHUBANSA. **8 Luck. 354=I.R. 1933 Oudh 144=142 I.C. 872=10 O.W.N. 69=A.I.R. 1933 Oudh 182.**

———*Construction—Principles—Natural meaning.*

The general rule of construction is that the Court must ascertain the intention of the parties from the

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language they have used, giving to that language its fair and natural meaning and construing the document as a whole. Having ascertained the intention of the parties in that manner, the Court must apply the law to the intention so ascertained. If the arrangement which the parties intended infringes wholly or in part some provision of law, then the rights of the parties must be adjusted on that basis. If the words of the deed are ambiguous, the Court may lean to a construction which produces a legal arrangement rather than one which is illegal. But the Court is never justified in giving to the language used by the parties a meaning other than that which it naturally bears in order to save the intention from being rendered invalid. Rules of construction applied to a wakf deed containing a power of revocation. (*Beaumont, C.J. and Blackwell, J.*) ABDUL SATAR *v.* ADVOCATE GENERAL OF BOMBAY. **I.R. 1933 Bom 286=143 I.C. 799=35 Bom L.R. 18=A.I.R. 1933 Bom. 87.**

———*Construction — Principles — Reference to case-law.*

It is always dangerous to make an attempt to interpret one document with the aid of another and unless a question of principle is involved, it is no use of referring to any case as an authority. (*Mukerji, J.*) SURAJ & SONS *v.* J.O. BRIN **I.R. 1931 All. 607=133 I.C. 153=A.I.R. 1931 All. 759.**

———*Construction—Principles—Similar document—Construction of one, if guide to another.*

The construction put upon one document cannot be used as a guide to the construction of another, since every document varies in so many particulars, that no two documents are identical. (*Niyogi, A.J.C.*) MST. SARUPA *v.* KORAT. **160 I.C. 632=8 R.N. 192=18 N.L.J. 32.**

———*Construction—Principles—Similar document—Decisions construing—Value of.*

In matters of construction of documents, cases construing documents with conditions more or less of a similar nature cannot be of much use, more so when the cases are decisions of English Courts construing English documents. (*Madhavan Nair and Pandurang Rao, JJ.*) MURUGESAM PILLAI *v.* MEENAKSHISUNDARA AMMAL. **154 I.C. 529=7 R.M. 435=40 L.W. 875=A.I.R. 1935 Mad. 107 (2).**

———*Construction - Principles- Similar document—If reliable guide.*

The language of one document does not afford much assistance in the construction of another document. Every document has to be construed according to the words used in that particular document, and a particular construction put on one document cannot be regarded as a reliable guide in the interpretation of another document. Hence the question whether the deed executed by a Hindu gives the grantor's estates to an idol subject to a charge in favour of the heirs or makes the gift to the idol a charge upon the estate, depends upon the construction of the deed as a whole. (*Niyogi and Staples, A J.Cs.*) RAM SWAROOP *v.* THAKUR RAMCHANDRAJI. **31 N.L.R. 188=8 R.N. 12=157 I.C. 17=A.I.R. 1935 Nag. 35.**

———*Construction—Principles—Similar document—Relevancy.*

Each document must be interpreted in the light of its own language, and with the aid of evidence relevant thereto. Precedents are not of much use in this connection. (*Wazir Hasan, C.J. and Smith, J.*) MT. RAJ RANI *v.* DWARKA NATH SINGH. **147 I.C. 160=6 R.O. 236=10 O.W.N. 1041=A.I.R. 1933 Oudh 491.**

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———*Construction—Principles—Title of document—Value.*

The title given by the executant himself to a document is not consclusive but cannot be eliminated from consideration.

Held, that the document described as a will was in reality a will and not a deed of gift. (*Niyogi, A.J.C.*) MT. RANGOO *v.* HARISA. **141 I.C. 150=I.R. 1933 Nag. 36=28 Nag.L.R. 255=A.I.R. 1932 Nag. 163.**

Recitals.

———*Construction—Recitals—Evidentiary value—Old transaction.*

Recitals by themselves do not establish legal necessity but they may be taken into consideration along with other evidence and circumstances in considering the truth of the matters to which they relate. The exact weight to be given to them is a matter upon which no rule can be laid down, but ordinarily the older the transanction the greater the value of the recitals. 44 C. 186 (P.C.) and 43 M. 541 (P.C.), Ref. (*Bose, O.A.J.C.*) FULSINGH *v.* GANESH PRASAD. **I.R. 1931 Nag. 118=133 I.C. 390=14 N.L.J. 84=A.I.R. 1931 Nag. 147.**

———Construction—Recitals—Hindu widow—Deed of release in respect of properties of her husband—Property standing in her name—Reservation of right to maintenance and charge for religious rights—Recital that property acquired by husband—Effect—If *benami*. *See* BENAMI—TEST. **39 C.W.N. 598=68 M.L.J. 559 (P.C.).**

Religious endowment.

———*Construction—Religious endowment—Charge for specific purposes—Direction as to use of surplus income—Property, if conveyed.*

Where the deed of endowment provided that after the expense of religious worship and ceremony had been met, the surplus income was to be invested in tenanted houses for the production of still greater revenue and the sole purpose mentioned as the ultimate destination of the fund was the building of a house or houses in which the settlor's descendants or some of them may reside.

Held, that the properties were charged for the purposes mentioned but were not absolutely dedicated to the endowment. (*Rankin, C.J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SHREE SHREE ISHWAR BHUBANESHWARI THAKURANI. **60 Cal. 54=6 I.R. (Cal.) 20=144 I.C. 792=A.I.R. 1933 Cal. 295.**

———*Construction—Religious endowment—Deed of endowment—Property to belong to Mandir in perpetuity—Expenses to be defrayed out of income—Donor declared as manager of temple—Surplus, if reserved for donor or his heirs.*

The executant of the deed declared in unmistakable terms that the village, save some lands which had been or would be acquired by foreclosure in the course of money-lending business of her shop would belong to the Mandir, in perpetuity and the expenses would be defrayed out of the income thereof. The executant or her heirs and successors were to have no right to deal with the property as if it was theirs and to utilize profits thereof for their private purpose. She further declared herself to be the Sarbarakar or the manager of the temple during her lifetime and enjoined upon her successors to carry out the terms of the document.

Held, regard being had to the plain language of the document, there was hardly any room for the suggestion that it intended appropriation of the income only to upkeep of the temple reserving the surplus for the executant or her successors. (*Niyogi and Staples, A J.Cs*).

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RAM SWAROOP *v.* THAKUR RAMCHANDRAJI. **31 N. L.R. 181=157 I.C. 17=8 R.N. 12=A.I.R. 1935 Nag. 35.**

———*Construction—Religious endowment—Deed executed in Urdu—Words "Pesran, Warisan, Kaymokamian"—Effect of—Trusteeship confined to male line alone.*

A deed of endowment to a family deity was executed by a Bengali Hindu not well versed in Urdu, in Urdu language. The words "Pesran, Warisan, Kaymokamian" were used in the deed to limit trusteeship of the endowment.

Held, that in view of the facts of the case, the said words limited the trusteeship of the endowment to the male line of descent of the donor and even the donor's daughters were excluded from trusteeship. In Persian the said words generally connoted or meant 'sons, heirs and representatives." (*Ross, J.*) DEBKINKAR GHOSE *v.* BIMALABALA SINHA. **140 I.C. 673=I R. 1933 Pat. 13=A.I.R. 1932 Pat. 265.**

———Construction—Religious endowment—Gift of shebaitship—Power to appoint successor. *See* GIFT, *supra*. **61 Cal 106.**

———*Construction—Religious endowment—Intention to transfer—Inconsistent terms.*

Where there was no expression of an intention to transfer the property but all it purported was to place the defendant in possession as mutawalli and the deed contained contradictory terms regarding the dedication, *held*, that a transfer could not be made out. (*Srivastava, J.*) ABDUL QAVI *v.* MAHBOOB ALI. **6 Luck. 382=I.R. 1931 Oudh 83=129 I.C. 163=7 O. W.N. 1052=A.I.R. 1931 Oudh 133.**

———*Construction—Religious endowment—Office of shebait—Intention of donor—Surrounding circumstances—Relevancy of.*

The directions given by the founder of a religious endowment as to how the office of the shebait is to devolve are not to be construed on the same principle as the gift of property. The most obvious distinction is that the founder of a trust is generally concerned about the fitness of the person who is to carry on the trust after his death, but no such considerations generally arise in the case of a gift to a private individual. When the intention of the donor is clearly expressed, there can obviously be no difficulty in construing the document and no extraneous evidence would be admissible for the purpose. Where, however, the words used in the document are not very clear, the intention of the executant may be construed not only in the light of the surrounding circumstances but also of such considerations as are generally present in the mind of a Hindu founder of a trust. (*Courtney Terrell, C.J. and Fazl Ali, J.*) BIMALABALA SINHA *v.* DEBKINKAR GHOSH. **140 I.C. 687=I.R. 1933 Pat. 15=A I.R. 1932 Pat. 267.**

[On appeal from 1932 Pat. 265.]

———*Construction—Religious endowment—Wakf by Hindu—Charge for expenses of idol—Right to surplus.*

Where property has been dedicated by a Hindu to a certain idol and it is directed that "whatever may be saved after defraying the expenses of the temple, etc., and the pay of the servants, shall be used by his legal heirs to meet their expenses," and the expenditure on the temple would be small, it may be presumed that the intention of the testator was that the heirs should take it subject to a charge for the performance of religious worship. A.I.R. 1921 P C. 20, Foll. (*Addison and Bhide, JJ.*) RIKHI KESH *v.* MELA RAM. **I.R. 1931 Lah. 411=131 I.C. 283=32 P.L.R. 304=A.I.R. 1931 Lah. 170.**

DEED—Construction—Sale or exchange.

Sale.

———*Construction—Sale — Conveyance of easement rights.*

The meaning of general words used in a conveyance is to be determined according to the intention of the parties as expressed in the instrument and as ascertainable from the state of circumstances existing at the date of its execution.

Held, on a construction of the suit document, that it was implied that the purchaser took the property with easements of light and air. (*Guha, J.*) GANGA CHARAN DHAR *v.* SATKARI LAL DEY. **I.R. 1931 Cal. 662=133 I.C. 214=53 C.L.J. 604=A.I.R. 1932 Cal. 113.**

———Construction—Sale deed by lessee of share in materials of house standing on land—If passes any right or interest in land—Right of transferee to occupy land. *See* EASEMENTS ACT, S. 60 **156 I.C. 48.**

———*Construction—Sale deed relating to two items—Separateness of transactions.*

Where a deed of sale relates to two separate estates, the presumption would be that the two transactions were separate unless there was something to show that the vendee would not have purchased the one estate without the other. The question whether the transaction is one in essence or represents two transactions which are embodied in one document is one of intention. (*Dalip Singh, J.*) ABDUL KARIM *v* GHULAM NABI KHAN. **151 I.C. 367=7 R.L 123 (1)=A I.R. 1934 Lah. 402 (1).**

Sale certificate.

———*Construction—Sale certificate—Sale of Zemindari—If passes groves mentioned in details of encumbrances but not recited in certificate.*

Where a sale certificate in respect of an auction sale of a zemindari does not mention any grove land as having been sold or purchased, the fact that there is a mention in the details showing encumbrances of certain groves which have been mortgaged, would not warrant the inference that the groves were actually sold under the sale certificate. (*Nanavutty and Zia ul-Hasan, JJ.*) SHEO NARAIN SINGH *v* JWALA PRASAD. **154 I.C. 1017=7 R O. 532=1935 R D. 161=16 L.R. 234 (Rev.)=1935 O W N. 365=A.I R. 1935 Oudh 304.**

Sale or agreement to sell.

———*Construction—Sale or agreement to sell.*

Where a document was executed on a non-judicial stamp of Re. 1 and it was recited in the document that it was an agreement for sale and the sale was to be completed within two months.

Held, that the document was merely an agreement to sell and not a completed sale. (*Tek Chand and Walker, JJ.*) RAM ASRA *v.* ALLAH JAWAYA. **I R. 1931 Lah. 822=133 I.C. 646=32 P.L R. 278=A.I.R. 1931 Lah. 595.**

Sale or exchange.

———*Construction—Sale or exchange*

A land transferred to vendee was worth Rs. 300. This sum was paid to the vendor by transferring to him a portion of land worth Rs. 18, by payment of Rs. 142 in cash and by the repayment of a debt of Rs. 140. The plaintiff sued on the allegation that the transaction was in effect a sale and not an exchange as described in the deed and that as he was a collateral of the vendor, he was entitled to a decree for possession by pre-emption.

Held, that on the facts the transaction in dispute could be regarded as a sale for a sum of Rs. 142 and not an exchange and that the plaintiff was entitled to pre-emption. (*Abdul Rashid, J.*) ALLAH DITTA *v.* HAJI. **154 I.C. 643=7 R.L. 584=A.I.R. 1934 Lah. 823.**

DEED—Construction—Sale or lease

Sale or lease.

———*Construction—Sale or lease*—Palta istimrari—*Stipulation for payment of annual rent and* malikhana *at fixed rates—Premium also fixed—Heritable and transferable rights conferred—Absence of right of re-entry—If sale giving right of pre emption.*

A document purporting to be a *palta istimrari* or perpetual lease of certain plots of land had Rs. 2,500, fixed thereunder as premium and provided that the lessee was to pay a sum of Rs. 7-8 per annum as rent together with Rs. 1-8 as *malikhana* dues. The rights transferred by the deed were heritable and transferable, and the transferor relinquished all rights to the property transferred without reserving any right of re entry.

Held, that full under-proprietary rights were conferred by the deed on the "lessee"; that the transaction amounted to a sale and gave rise to a right of pre-emption. (*Nanavutty, Thomas and Ziaul Hasan, JJ.*) JAGDEO SINGH *v.* RAM NARESH SINGH. **10 Luck. 392 = 153 I.C. 334 = 7 R.O. 326 = 18 R D. 677 = 11 O.W.N. 1494 = A.I.R. 1935 Oudh 217 (F.B.).**

Security bond.

———*Construction—Security bond.*

Where during the pendency of an appeal, the executing Court directed execution to proceed on condition of the decree-holder offering security for the restitution of any property taken and thereupon a third person executed a bond to the Court undertaking to give compensation if the decree holder failed in appeal and he also made certain immovable properties security for the due performance of the covenant.

Held, that the document was a security bond. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) BOARD OF REVENUE *v.* LALTA BAKSH SINGH. **6 Luck. 601 = I. R. 1931 Oudh 241 = 132 I C. 225 = 14 O.L J. 224 = 8 O.W.N. 116 = A.I.R. 1931 Oudh 99.**

———Construction—Security bond for release of property attached before judgment—Suit dismissed for default and subsequently restored—Liability of surety. *See* C. P. CODE, O. 38, R.6(2). **68 M.L.J. 444.**

Settlement deed.

———*Construction—Settlement deed—Grant of mouza—Conveyance of* Jalkar *rights.*

Where the *Jalkar* appertains to a *mouza*, it is not necessary that a deed of settlement referring to the *mouza* should expressly convey the *Jalkar* right. (*Mitter, J.*) KUMAR KRISHNA NANDY CHOUDHURY *v.* LOKENATH MOOKERJEE. **59 Cal. 344 = 137 I.C 279 = I.R. 1932 Cal. 287 = 35 C.W.N. 1256 = A.I.R. 1932 Cal. 300.**

Single or alternative contract.

———*Construction—Single or alternative contract—Agreement—Contract to sell—Covenant regarding damages.*

The defendant who was a grentee of certain lands from Government entered into an agreement with the plaintiff, by which he undertook to convey the said lands to the latter on his paying the balance of the *nazrana* to Government and a certain amount to him for the *nazrana* already paid and by way of excess money. There was a further provision to the effect that if the defendant chose to keep the land himself he would pay damages to the plaintiff. The plaintiff who was placed in possession paid the *nazrana* but the defendant refused to execute a sale deed. The plaintiff having sued for specific performance,

Held, that the agreement embodied a single contract to sell which could be specifically enforced and that it did not contain alternative contracts, the defendant having an option to sell or retain the land.

DEED—Construction—Surety bond.

Held, further, that even if it be treated as a case of alternative contract, the defendant had not elected to claim the option within a reasonable time and could not therefore resist the suit. (*Harrison and Tek Chand, JJ.*) ABDUR RAHIMAN *v.* NAZIR ALI KHAN. **I R. 1931 Lah. 601 = 132 I.C. 489 = 33 P.L.R. 66 = A.I.R. 1931 Lah. 657.**

Solenama.

———Solenama—*Discharge of mortgage—Registration, if necessary—Parties acting on solenama—Effect.*

Where a *solenama* merely provided for the discharge of a mortgage debt and not for variance of the terms of the mortgage deed and it further appeared that the parties had adjusted their rights in terms thereof.

Held, that the document did not require registration and that assuming it did, the parties had acted on it so as to supply the defect as to registration. (*Guha and M. C. Ghose, JJ.*) RAMCHANDRA SAU *v.* KAILASH-CHANDRA PATRA. **58 Cal. 532 = I.R. 1931 Cal. 749 = 133 I.C. 701 = A.I.R. 1931 Cal. 667.**

Surety bond.

See also SURETY.

———*Construction—Surety bond—Extent of liability.*

In considering whether a security bond executed by a Hindu father was one for the payment of a debt or for the honesty of the guardian of a minor, the proper course is to refer to the terms of the bond and the circumstances of the case. Where the bond recited *inter alia* several possible acts of dishonesty, of which the guardian may be guilty and provided that in all those cases, compensation should be recoverable from the surety, it was held that it was a bond for the honesty of the guardian and not for payment. 86 I. C. 791, Dist. (*Fazl Ali and James, JJ.*) GOVINDA CHANDRA DAS *v* HAYAGRIBA UPADHAYA. **10 Pat. 94 — 138 I C. 414 = I R. 1932 Pat 181 = 13 Pat.L.T. 473 = A.I.R. 1932 Pat. 162.**

——— *Construction—Surety bond—Extent of liability.*

Where a surety bond recited that the principal debtor has been appointed to the office of gomastha and provided that the sureties should make good to the Treasurer any loss occasioned to him by any negligence or misconduct on the part of the principal debtor or any substitute appointed by him, and it further provided that in the event of his resigning or being dismissed, the sureties were to remain liable for any defalcations that might come to light for a period of one year thereafter, *held* that the terms of the bond were very wide and applied not only to the office held by the principal debtor at the time but also to any office to which he might be appointed in future. (*Raza and Smith, JJ.*) PRAG DAS *v* DHANI RAM. **7 Luck. 226 = I.R. 1932 Oudh 9 = 8 O.W.N. 1077 = 134 I.C. 1097 = A.I.R. 1931 Oudh 426.**

———*Construction—Surety bond—Independent agreement by principal—Reference—Permissibility.*

Where apart from the surety bond, the principal entered into an agreement with a third person without the knowledge of the surety and the terms of the agreement were not incorporated in the surety bond,

Held, that the surety bond must be interpreted on its own terms and not with reference to the agreement. (*Hasan, C.J. and Bisheshwar Nath, J.*) MAQSUDUL HASAN *v.* THE COLLECTOR OF FARRUKHABAD. **8 O.W N. 1095 = I R 1932 Oudh 12 = 134 I.C. 1100 = A.I.R. 1931 Oudh 430.**

———*Construction—Surety bond — Words must be strictly construed*

Where the words in the surety bond are capable of different meanings, they must be strictly construed

DEED—Construction—Surrounding circumstances.

(*Abdul Rashid, J.*) BRANDRO NATH MITRA *v.* KISHORI LAL SURETY. **150 I.C. 750 (2)=7 R.L. 21 (2)=A.I.R. 1934 Lah. 401 (1).**

Surrounding circumstances.

———*Construction — Surrounding circumstances—Subsequent conduct of parties—Relevancy.*

Per *Sulaiman, C.J.*—In the interpretation of a document, the subsequent conduct of the parties cannot be taken into account, but the surrounding circumstances can certainly be taken into account. (*Sulaiman, C. J. and Bennet, J.*) DHANPATTI *v.* BADRI SINGH. **156 I.C. 53=7 R A. 1031=1935 A.W.R. 753=1935 R.D. 303 (2)=A.I.R. 1935 All. 729.**

Trust.

———*Construction—Trust—Conveyance of property to son—Direction for payment to daughters—Effect.*

Where a father executed a settlement deed by which the son who was given the properties was directed to pay a certain amount to the settlor's daughters.

Held, that there was a trust in favour of the daughters and a suit to enforce the same was not governed by any rule of limitation. (*Krishnan Pandalai, J.*) NACHIMUTHU AMMAL *v.* MUTHUSWAMI MANIAGARAN. **6 R.M. 529=148 I.C. 685=1934 M.W.N. 64=39 L.W. 486=A.I.R. 1934 Mad. 273.**

———*Construction—Trust deed—Allowances to widow and daughter—Vested interest conferred on sons—Divesting on their not attaining 21 years—Settlor's debts and liabilities whether charged on properties settled.*

Three deeds of trust were executed by the settlor in 1921, 1924 and 1926. The deed of 1921 gave a life-interest to the settlor and directed that after his death the trustee should, after paying Rs. 20 a month to the daughter or each of the daughters, pay the balance to the widow for life for the maintenance of herself and her children and thereafter hold the trust fund for the use and benefit of the sons or sons of the settlor in equal shares to be made over to him or them on the attainment of the age of 21 with power in meantime to the trustee to spend sums out of the income for the maintenance, etc., of such sons as the trustee deemed fit and accumulate the balance to form part of the corpus. There was also a power to the settlor to vary by will subject to certain limitations. The deed of 1924 also gave a life interest to the settlor and after making provision for payment of monthly allowance, directed the trustee to hold the rent of the estate for the use of the sons of the settlor. The other provisions in the earlier deed were repeated. The deed of 1926 also contained similar provisions.

Held, on a construction of the items of the deeds (1) that there was no resulting trust in favour of the estate of the settlor to which the heirs of the settlor were entitled subject to payment of his debts, (2) that the trustee did not hold the estate on behalf of the sons subject to the payment of his debts and liabilities; and (3) that the monthly allowance to the daughter in the deed of 1921 was invalid by reason of Ss. 14 and 15 of T. P. Act and the sons who were living obtained a vested interest in the property subject to its being divested if they did not attain 21 and a similar interest was conveyed by the later deeds. (*Pankridge, J.*) SEWDAYAL RAMJEEDAS *v.* OFFICIAL TRUSTEE OF BENGAL. **58 Cal. 768=I R. 1931 Cal. 820=134 I.C. 436=A.I.R. 1931 Cal. 651.**

———*Construction—Trust deed—Language of document—Persons entitled to benefits under trust.*

In deciding the question whether certain persons are entitled to benefits under a deed of trust, the Court has to see what the words used in the deed show. (*Kania,*

DEED—Construction—Will or adoption deed or conveyance.

J.) ALICE RICE *v.* CAMA. **58 Bom. 181=147 I.C. 579=6 R.B. 216=35 Bom.L.R. 840=A.I.R. 1933 Bom. 404.**

———*Construction—Trust deed—Vesting of property—Right of trustee to sue for possession.*

Where according to a deed the trustees were to sell the property only in the event of the executors' failure to pay their debts within the specified period, and where there was no specific words in the document to the effect that the legal ownership of the property could be transferred to the trustees either immediately or even in the contingency referred to above, but that the trustees would be entitled to sell the property,

Held, that the deed certainly gave the trustees power to sell the property and they would have been perfectly within their rights if they had proceeded to sell the house in dispute on the failure of the executors to pay their debts within the specified period, but their present suit for possession of the house is ill-advised. In view of the wording of the documents, no possession of the property can be given. (*Addison and Bhide, JJ.*) MANU MAL *v.* CHIRANJI LAL. **150 I.C. 989=7 R L. 42=A.I.R. 1934 Lah. 307.**

Vested interest.

———*Construction—Vested interest — Compromise—Permanent absolute rights conferred in the event of* R. *surviving* L—*No vested interest.*

A compromise effected between *R* and *L* was as follows—In the event of *R* surviving *L*, *R* will be the permanent owner with powers of transfer and of transmitting inheritance of the whole of his property . . . In the event of *R* not so surviving, his male descendant according to the rule of lineal primogeniture will be entitled to the said property with powers of transfer and heritability.

Held, that the words "*R* will be the permanent owner with powers of transfer and of transmitting inheritance" did not convey a vested interest which was liable to be defeated in case *R* did not survive *L*. (Case law discussed.) (*Wazir Hasan, C.J. and Nanavutty, J.*) SURENDRA NARAIN SINGH *v.* RAJA LAL BAHADUR SINGH. **9 Luck. 379=147 I.C. 1088=11 O.W.N. 109=18 R D. 70=A.I R 1934 Oudh 59.**

Wakfnama.

———*Construction—Wakfnama—Conditional power of alienation to trustees—Effect.*

Where the *wakfnama* conferred wide powers on the trustees to convert the trust estate to money for the purpose of investing the same to be held in trust,

Held, that the power could not be taken to be an absolute power to alienate trust property for any kind of purpose.

Held also, that the residue that was left should be taken to be held by the trustees in trust and that the trustee would not take the unconsumed income absolutely but would only be entitled to enjoy the same. (*Mukerji and Guha, JJ.*) SAILENDRA NATH PALIT *v* SYED HADE KAZA MANE. **59 Cal. 586=I.R 1932 Cal 326=137 I C 500=36 C.W.N. 193=54 C.L.J. 328=A I R. 1932 Cal. 356.**

———Construction—Wakfnama—*Naslan bad naslan—Batnam bad batnam*—Descent through females—If excluded. *See* MAHOMEDAN LAW—WAKF. **68 M.L. J. 684.**

Will or adoption deed or conveyance.

———*Construction—Will or adoption deed or conveyance—Document stating adoption and bequeathing entire property—Effect.*

The deceased executed a document in favour of defendant No. 2. It ran as follows:—"As I have had

DEED—Construction—Will or adoption deed.

no issue, I have brought you up, have adopted you, and have chosen you as a son, so I have communicated this fact to the Revenue Authorities and got your name for the office of Karnam held by me. Further you shall be my son and you shall be entitled to my entire property as a son." No actual adoption had ever taken place.

Held, the document was not a conveyance *depresenti* or a deed of adoption, the last sentence had testamentary effect. The document having been executed in the moffussil, it required no formalities and the mere fact that it was registered in a wrong Book No IV instead of Book No. III was insufficient to prevent its taking effect as a will. (*Lord Thankerton*) KRISHNA RAO *v.* SUNDARA SIVA RAO. **58 I A 148—54 Mad 440=I.R. 1931 P C. 126=33 Bom.L R 937=35 C.W.N. 617=53 C.L.J. 355=1931 M W.N. 568=35 L.W. 54=131 I.C. 318=A.I.R. 1931 P.C. 109=61 M.L.J. 91 (P.C.).**

———*Construction—Will or adoption deed.*

The document which began by reciting the factum of adoption went on to say that no document was executed at the time or subsequently and therefore that the said document was being executed later to affirm the adoption. Then followed a recital of the consequences of the adoption and the document wound up by saying "hence this deed of adoption was executed". It also contained directions regarding the performance of the executant's obsequies, etc.

Held, that the document was one "recording" an adoption and not a will and that fell under Art. 3 of the First Schedule of the Stamp Act. Meaning of the word "recording" considered. (*Harrison, Jai Lal and Bhide, JJ.*) LABH SINGH *v.* MEHR SINGH. **13 Lah. 270—33 P.L R. 585=I R. 1932 Lah. 65—135 I.C. 193=A.I.R. 1932 Lah. 118 (F B.).**

Will or gift.

———*Construction—Will or gift—Deed styled "deed of partition of inheritance"—Shares to be received by each child specified—Properties to children of two former marriages transferred to them outright—Power of attorney by these children in favour of father to enjoy usufruct during his lifetime—No power to deal with corpus.*

One *K* had three wives. *K* and his surviving wife *S* executed a "deed of partition of inheritance." The deed set out in meticulous detail the "share of inheritance" to be received by each child of the two former marriages, and the "share of inheritance" to be received by *S* and her children, and that all right, title and interest of the said children in and to the properties therein partitioned were thereby transferred outright to them. On the same date, the children of the two former marriages executed a power of attorney, which was also registered in favour *K* alone, authorizing him to manage the lands granted to them by the other deed, to retain and make use of as he liked the usufruct of these lands during *K*'s lifetime. The power-of attorney gave him no authority to deal with the corpus of the property.

Held, that the oral evidence of intention was inadmissible under the provisions of S. 92, Evidence Act. So also the power of attorney could not be used to aid in the interpretation of the first document, which clearly amounted to a gift *in presenti* and not a will. The deed was not therefore invalid under the Burman Buddhist Law (*Mya Bu and Dunkley, JJ.*) MA SHIN *v* MA THIN KYI. **150 I.C. 966=7 R R. 28=A I.R. 1934 Rang. 129.**

Will or settlement.

———*Construction—Will or settlement.*

An instrument may be partly testamentary and partly a settlement intended to take effect during the life-time of the executant. (*Niyogi, A.J.C.*) MSI SARUPA *v.* KORAT. **160 I.C. 632=8 R.N. 192=18 N L.J. 32.**

DEED—Construction—Words.

———*Construction—Will or settlement—Test—Reservation of life-estate—Effect of.*

A primary test of whether any particular document is a will or not is whether or not it is revocable. If it is irrevocable, then it cannot be a will. Another test is that of whether a document confers an immediate right to property. Even the reservation of a life estate by the settlement does not render the instrument the less a settlement. Where an executant of a deed of settlement of his properties on his children, stamped and registered as such, had reserved to himself possession with rights of enjoyment of some items for his maintenance but he made it clear that he was retaining no right of ownership in those items, as the document recited "I have by this document established and given you right to items 1 and 2" and went on to say that his retention of enjoyment, which was to be along with his wife, was to be "without in any circumstances incurring debts on their security" and it further set out that a right to his wife and children in those two items "has been established by the document," while as to the properties generally it recited "if the properties covered by the deed of settlement are alienated debts, etc., incurred on this security, you shall be entitled to get possession of and enjoy them as you please according to the terms of settlement after getting cancelled such alienation and security bonds".

Held, that the recitals clearly indicated that the disposition of property was to take effect at once and was irrevocable. Hence the document was not a will but a deed of settlement. (*Beasley, C.J. and Baraswell, J.*) IGNATIA BRITO *v.* REGO. **6 I R (Mad) 204=146 I.C. 46—1933 M.W.N. 471=37 L W. 716=A I.R. 1933 Mad. 492—64 M.L J. 650.**

Words

———*Construction—Words—Grammatical and ordinary sense.*

The words used in a deed should be given effect to according to their grammatical and ordinary sense in the absence of evidence to show that they are intended to be used in any other sense. (*Rupchand, A.J.C.*) SRIKRISHNA KHANNA, *In re*. **6 R.S. 214=148 I.C. 977=A I R. 1934 Sind 29.**

———*Construction — Words—Interest on interest—Agreement to pay.*

Documents must be construed as a whole; each provision they contain must receive attention; and from their several provisions the true intention of the parties to them is to be ascertained. An agreement to pay interest on interest does not amount to an agreement to pay compound interest. 54 M.L.J. 82 (P.C.), Foll. (*Niyogi, A J.C.*) BHADU *v.* GANPATI. **I R. 1931 Nag. 39=130 I.C. 103=A.I.R 1931 Nag. 25.**

———*Construction—Words—"Interest on interest"—Mortgage.*

The expression "interest on interest" used in mortgage deeds means compound interest. (*Raza and Allsop, JJ.*) MAHOMED HUSAIN KHAN *v.* LACHHMAN SINGH. **147 I.C. 807=6 R.O. 303=10 O.W.N. 915=A I.R. 1933 Oudh 411.**

———*Construction—Words—Malik.*

The word "malik" imports full proprietary rights, unless there is something in the context to indicate an intention to the contrary. 49 I.A. 1; 57 I.A. 291. Ref. (*Sir Dinshaw Mulla.*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270=59 Cal. 142=34 L. W. 51=8 O.W.N. 944=33 Bom.L.R. 1257=1931**

DEED—Construction—Words.

M.W.N. 989=134 I.C. 648=I.R. 1931 P.C. 296=54 C.L.J. 393=35 C.W.N. 903=1931 A.L.J. 555=A.I.R. 1931 P.C. 179=61 M.L.J. 501 (P.C.).

[Disc. 16 Pat.L.T. 245 (251, 255)]

———*Construction—Words—'Malik mastakil'—Effect—Bequest to daughter-in-law by Hindu—Nature of estate taken.*

A Hindu conveyed by a deed of gift certain property to his daughter in law for her 'support and maintenance.' The daughter-in law was to remain absolute owner (malik mastakil) of the property under the deed.

Held, that the deed conferred upon the donee an absolute estate in the property and not one which determined with her life. (*Lord Blanesburgh.*) RAI BISHUNATH PRASAD SINGH *v.* RANI CHANDRIKA PRASAD KUMARI. **60 I.A. 56=55 All. 61=I.R. 1933 P.C. 48—142 I.C. 6=37 L.W. 407=35 Bom.L.R. 341=1933 M.W.N. 239=57 C.L.J. 115=1933 A.L.J. 347—37 C.W.N. 417=A.I.R. 1933 P.C. 67=64 M.L.J. 302 (P.C.).**

[D. 58 C.L.J. 499 (501).]

———*Construction—Words—Malik owner — Meaning and significance of.*

There is no magic in the use of any particular word or form of words, the deed must be construed as a whole and its fair import deducted in the ordinary word. It is not that the word 'malik-owner" is a term of art; it does not necessarily define the quality of the estate taken, but the ownership of whatever that estate may be. (*Wazir Hasan C.J. and Smith. J.*) HARI SARAN DAS *v.* HAR KISHEN DAS. **6 R.O. 648 150 I.C. 425=11 O.W.N. 917=A.I.R. 1934 Oudh 337.**

———*Construction—Words—'Prompt payment'—Discount to be allowed for "prompt payment".*

Where under the terms of the licence of an Electric Supply Company, a certain discount was to be allowed to the consumer by the company in case a prompt payment of the price of the energy consumed was made on the submission of the bill and the company fixed a date in the bill for payment to entitle the consumer to get discount.

Held that the discount was allowed only for immediate or quick payment of the bill from the date when amount of the bill became due and the consumer who did not receive the bill for a long time being out of station could not claim a fresh date to be fixed for payment to entitle him to the discount. (*Jai Lal, J.*) LAHORE ELECTRIC SUPPLY CO., LTD., LAHORE *v.* DEVI DAYAL. **15 Lah. 729=150 I.C. 972=7 R.L. 38=36 P.L.R. 486=A.I.R. 1934 Lah. 292.**

———*Construction — Words — 'Sarwaswathanthiramayi' (Tamil word)—Settlement in favour of wife—Limited or absolute estate.*

The Tamil word "Sarwaswathanthiramayi" in a deed of settlement in favour of a wife clearly indicates an absolute estate. (*Sundaram Chetty, J.*) GOVINDARAJA PILLAI *v.* MANGALAM PILLAI. **I.R. 1932 Mad. 808=139 I.C. 867=36 L.W. 733=1932 M.W.N. 1277=A.I.R. 1933 Mad. 80=63 M.L.J. 911.**

———*Construction—Words—Thavanai — Meaning—Money when becomes payable—Promissory note.*

The word "thavanai" in a promissory note is not merely a provision for calculation of compound interest. At one time there was a difference of opinion as to whether, in the case of thavanai documents among Nattukottai Chetties, the money becomes payable immediately on the expiry of the first thavanai or only upon an express demand after the expiry of the thavanai. But there was no doubt at any time that during the first thavanai the money is not repayable. This is also the well established usage among the Chetties. Such an instrument is not therefore one payable on demand. (*Varadachariar and Burn, JJ.*) CHOCKALINGAM CHETTIAR *v.* PALANIAPPA CHETTIAR. **58 Mad. 261=155 I.C. 184—7 R.M. 553=42 L.W. 979=1934 M.W.N. 1261=A.I.R. 1935 Mad. 23=67 M.L.J 595.**

DEED—Execution.

Miscellaneous.

———*Construction — Miscellaneous— Conditions of work contained in book of specification—Special contract executed by contractor for execution of a particular work—In case of conflict between specifications and contract, terms in contract should prevail.*

The book of specifications issued by a Municipal Committee contained an offer of the conditions on which work was intended to be done by the Committee. One of the conditions therein mentioned was that no alteration or variation in the work was to be done by the contractor without the written order of the President where the value of such alteration exceeded Rs. 1,000. The plaintiff undertook a contract and the rights and obligations were embodied in a deed. One of the terms was that the Engineer-in Chief was the sole judge as regards the quality, soundness and nature of the work and that the contractor was to obey and satisfy to the minutest detail the instructions given by the Engineer in Chief. Under instructions from the Engineer, the plaintiff changed the construction from uncoursed to coursed masonry the value for which exceeded over Rs. 1,000 without the written order of the President.

Held, that the deed executed for the particular work prevailed over the specifications and that as the contractor had executed the work in accordance with the orders of the Engineer, the Committee could not escape liability on the ground that there was no written order of the President. (*Tek Chand and Monroe, JJ.*) MUNICIPAL COMMITTEE, SIMLA *v.* BELI RAM & CO. **149 I.C. 1068=6 R.L. 790=A.I.R. 1933 Lah. 1011.**

Execution.

———*Execution—Documents prepared by lawyers.*

In cases where legal documents are prepared by lawyers it is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer. (*Sir John Wallis.*) RAJKUMAR SEN CHOWDHURY *v.* RAM SUNDAR SHAHA. **I.R. 1932 P.C. 54=136 I.C. 102=1932 A.L.J. 198=55 C.L.J. 120=35 L.W. 409=1932 M.W.N. 534=34 Bom.L.R. 526=A.I.R. 1932 P.C. 69=62 M.L.J. 457 (P.C.).**

———*Execution—Essentials—Mere signing, if sufficient.*

Execution does not mean mere signing, but it means all acts necessary to make the parties to the contract bound thereby If a man merely signs a contract and puts it in his pocket and does no allow it to depart from him as his act, it is not execution. Consequently where in a suit on a mortgage, the mortgagors defendants plead that they signed the contract but they never allowed it to depart from them or to come into the possession of any other person who could make use of it and hold them bound by it, the pleading must be construed as a denial of execution. (*Courtney Terrell, C.J.*) SUNDAR CHAUDHARI *v.* LALJI CHAUDHRI. **6 I.R. (Pat) 201=145 I.C. 698=14 Pat L.T. 727=A.I.R. 1933 Pat. 129.**

———*Execution—Proof—Mark—"Shree sahi."*

Held, that the word "shree sahi" can be taken to be the signature of the person whose name appears in the document as the executant of the same. (*Guha and M.C. Ghose, JJ.*) SHAILENDRANATH MITRA *v.* GIRIJABHUSHAN MUKHERJI. **58 Cal. 686=I.R. 1931 Cal. 744=133 I.C. 696=A.I.R. 1931 Cal. 596.**

DEED—Execution.

———*Execution—Sale deed—One executant not signing—Effect.*

Where a deed purports to be a sale by all the heirs, the absence of the signature of one of them would show that the document was incomplete and never became an instrument of sale. (*Dalip Singh and Abdul Qadir, JJ.*) MT. WALAYAT JAN *v.* JAMAL DIN. **151 I.C. 462—7 R L. 138=35 P.L R. 316=A I.R. 1934 Lah. 262.**

———*Execution—Signature—Whether includes mark.*

According to the general policy of the law, signature includes a mark—a mark being a sort of symbolic writing. 2 C.W N. 603, Rel. on. (*Guha and M. C. Ghose, JJ.*) SHAILENDRANATH MITRA *v.* GIRIJABHUSHAN MUKHERJI. **58 Cal. 686=I R 1931 Cal. 744=133 I C. 696=A.I.R. 1931 Cal. 596.**

———*Execution—Statement that signature was given only on blank paper—If denial of execution.*

In a suit on pro note the defendant admitted his signature but contended that his signature was taken upon a blank paper.

Held, that the statement was a denial and not admission of execution of the pro note and burden lay on plaintiff to prove the execution of the pro note. 35 I C. 56; A.I.R. 1922 All. 401 and A I.R. 1924 Nag. 103, Rel. on (*Shadi Lal, C.J. and Rangi Lal, J.*) MIRZA GORGANI *v.* BHOLA MAL NIBAL CHAND. **151 I.C. 60 (2)=7 R.L 92=36 P.L.R. 275=A I.R. 1934 Lah. 293 (2)**

———Execution—What constitutes—Mere signing—Sufficiency—Appreciation of contents—Necessity. *See* REGISTRATION ACT, SS. 72, 73, 74 AND 75. **16 Pat L.T. 706=A I.R. 1935 Pat. 497.**

Genuineness.

———*Genuineness—If can be attacked on ground that it is not written by professional scribe.*

There is no law under which a party, who executes a document in favour of another, is bound to have that document engrossed by a professional deed-writer, and hence its genuineness cannot be attacked on the ground that it is not written by a professional scribe. (*Agha Haidar, J.*) MT. MIRAJ BEGAM *v.* SETH RAM PRASHAD & SONS. **A.I R 1935 Lah 122.**

Material alteration.

———*Material alteration—Addition of compound interest in mortgage bond.*

A mortgage bond containing an alteration so as to include a stipulation for compound interest, cannot be said to be void *in toto* and its existence cannot altogether be ignored. (*Bhide and Rangi Lal, JJ.*) NAU NIHAL SINGH *v.* MANGAL SINGH. **152 I.C. 697=35 P.L R 469=A.I R. 1934 Lah 543.**

———*Material alteration—Hand note—Addition of executants—Consideration proved against some—Entire suit, if liable to be thrown out.*

Where a suit was based not only on a hand-note but also on the original loan and it appeared that though the document had been apparently tampered with, in the sense that the thumb impressions of two out of the four executants did not tally, there was nothing to show that there was forgery.

Held, that the ends of justice required that there should be a re trial of the suit as against these executants against whom the loan was proved and that the entire suit was not liable to be thrown out. (*Mitter, J.*) NARSINGDAS AGARWALA *v.* SHAIK BHORTOO. **I.R. 1931 Cal 878=134 I.C. 766=53 C.L J. 219=A.I.R. 1931 Cal. 472**

———*Material alteration—Pro-note executed by one—Addition of a forged signature.*

DEFAMATION.

Where a suit is brought on a pro note purporting to have been executed by two persons, of which one is proved to be a real executant, while the other person did not execute the note at all but his alleged signature was a forgery, such a forgery is a material alteration of the document and no claim can be brought on such invalid note even against the executant. (*Mackney, J.*) SATYA NARAYAN TEWARI *v.* SITAL MISSIR. **153 I. C 631=7 R.R. 228=A.I.R. 1934 Rang. 345.**

Setting aside.

———*Setting aside—Fictitious document—Proof of consideration.*

Where the executants admit receipt of consideration under certain deeds, they cannot impugn the deeds as being fictitious or obtain a declaration to that effect. (*Bisheshwar Nath and Nanavutty, JJ.*) UMA SHANKAR SINGH *v.* SUKHRAJ KUNWAR. **136 I C. 247=I R. 1932 Oudh 103=8 O.W N. 878=A.I.R. 1931 Oudh 400.**

———*Setting aside— Onus— Execution admitted—Party seeking to avoid.*

Where the execution of a document is admitted, it is for the party who wants to avoid the consequences of it, to prove that he executed it under circumstances which do not make it binding on him. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat 332=6 I R (Pat) 17=145 I. C. 1=14 Pat L.T. (Sup.) 1=A I.R. 1933 Pat. 306.**

Trust receipt.

———*Trust receipt—Nature of.*

A trust receipt is a document of great undesirability, because it is of a secret nature, and it is the type of document which leaves the possession of the property which is concerned with the document in the hands of the vendor, *i e*, in the legal possession of the vendor and not in the hands of whoever it is who has executed the trust receipt and has apparently got the goods in his possession. It is basically a document for the protection of the vendor. (*Cunliffe, J.*) BUDHSING BALCHAND *v* ARNHOLD & CO. **39 C.W.N. 1018.**

Validity.

———*Validity—Instrument void* ab initio—*Ratification—Effect of.*

If an instrument is void *ab initio*, there can be no ratification of it. An interested party's conduct cannot legalise what is illegal and cannot validate what was invalid in its very inception. (*Din Mahomed and Addison, JJ.*) MT. MALAN *v.* MOHAN SINGH. **158 I C. 261=8 R L 217=A I R. 1935 Lah. 547.**

———*Validity—Right to challenge—Third party.*

Persons who are not parties to a sale-deed have no *locus standi* to challenge the consideration of the sale-deed. (*Mukerji, A.C.J. and Bennet, J.*) ZAMIN ALI *v.* MT. AZIZUNNISSA **55 All. 139=1933 A L.J. 483=I.R. 1933 All. 432=144 I.C. 433=A.I.R. 1933 All 329.**

———*Validity—Right to challenge—Third party.*

Where the plaintiff is not a party to a deed, he cannot sue for the document being delivered up, cancelled, and its registration set aside. (*Bisheshwar Nath and Nanavutty, JJ.*) DAVA SHANKAR *v.* MAHOMED IBRAHIM KHAN. **8 Luck 674=I.R 1933 Oudh 86=141 I.C. 798=10 O.W.N. 19=A I.R. 1933 Oudh 116.**

DEFAMATION.

See (*i*) PENAL CODE, SS. 492, 499 AND 500.
(*ii*) TORT—DEFAMATION.

DEFAULT.

See (1) C. P. CODE, O. 9.
(2) CONTRACT ACT, S. 74.
(3) DECREE—INSTALMENT DECREE.

DEGRADED WOMAN. *See* HINDU LAW—MAINTENANCE.

DEITY. *See* HINDU LAW—RELIGIOUS ENDOWMENT.

DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)—*Expressions "mortgage" and "mortgagor"—Meaning.*

The expressions "mortgage" and "mortgagor" in the Act are intended to refer only to mortgages of immovable property and not to pledges or pawns (*Aston and Rupchand, A. J. Cs.*) MILKIMAL BOLUMAL *v.* HUSSAIN. **28 S L R 154=151 I C. 988=7 R S. 76 =A.I R. 1934 Sind 65.**

———*Mortgage—Decree for redemption—Second suit for redemption—Maintainability.*

A decree in a redemption suit under the Act which did not put an end to the relationship of mortgagor and mortgagee does not bar a second suit for redemption. 43 Bom. 477, Foll.; 43 Bom. 703, Dist. (*Patkar and Broomfield, JJ.*) GOVIND GANGADHAR *v.* NARAYAN DAMODAR. **I.R. 1931 Bom. 507=134 I C. 699 (2)= 33 Bom.L R. 844 = A.I.R. 1931 Bom. 480.**

———*Plea of being agriculturist—Whether can be raised in execution.*

It is open to the judgment debtor to plead that he is an agriculturist within the Dekkhan Agriculturists' Relief Act in execution proceedings and that execution proceedings in respect of agricultural lands should be transferred to Collector under Sch. III, C. P. Code, read with Rr. 19 and 20 of Sind Judicial Commissioners Court Rules. A.I.R. 1925 Sind 49, Rel on. (*Wild, J. C. Aston and Rupchand, A.J.Cs.*) DEUMAL RACHANDMAL *v.* FIRM OF LAL CHAND. **25 S L R. 475=I.R. 1931 Sind 97=133 I.C. 65=A.I R. 1931 Sind 97 (F B.).**

———S. 2—"*Agriculturist*"—*Lessee of lands growing and selling grass.*

'Grass' is a crop and a person, who sells grass provided that it is produced by his own land and makes his living thereby, would be regarded as an "agriculturist." A person, who has taken on lease lands on which grass is grown and sells the grass, is also an agriculturist. (*Baker and Nanavati, JJ.*) MORESHWAR PANDHARINATH *v.* UMRAOSING. **I.R. 1932 Bom. 594=140 I. C. 248=34 Bom.L.R. 778=A.I.R. 1932 Bom. 397.**

———S. 2—"*Agriculturist*"—*Minor son of agriculturist.*

The minor son of an agriculturist who is staying with his father cannot be an "agriculturist." 36 Bom. 496 and 33 Bom.L.R. 325, Foll. (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom 36=I.R. 1932 Bom. 323=137 I.C. 717=34 Bom.L.R. 55= A.I.R. 1932 Bom. 136.**

———S. 2—"*Agriculturist*"—*Minor son of agriculturist.*

The minor son of an agriculturist who is depending for his support on his father is not an agriculturist within the meaning of S. 2 of the Act. 'To earn' is not to derive. 36 Bom. 496, Foll. (*Broomfield, J.*) GADADHAR KAKAJI *v.* GANGARAM TATYA. **I.R. 1931 Bom. 511=134 I.C. 703=33 Bom.L R. 825= A.I R 1931 Bom. 453.**

———S 2—"*Agriculturist*"—*One partner being—Firm whether agriculturist.*

The mere fact that one partner of a firm is an agriculturist does not involve the firm itself as being an agriculturist. The definition of "agriculturist" applies to a firm, only if that firm by itself or by its servants or by its tenants earns its livelihood wholly or principally by agriculture carried on within the limits of a district, to which the Act extends. 31 Bom.L.R. 984, Foll. (*Percival, J. C. and Wild, A. J. C.*) PREM CHAND *v.* NEWANDMAL. **25 S L R. 104=I.R 1931 Sind 141=134 I.C. 397=A.I.R. 1931 Sind 121.**

DEKKHAN AGRICULTURISTS' RELIEF ACT (1879), S. 2 (1).

———S. 2—"*Agriculturist*"—"*Ordinarily*"—*Meaning of—Milkmaid also engaged in agricultural labour.*

The word "ordinarily" does not mean solely or in the main. It only means regularly and habitually, not casually, whether it be for a larger or a smaller portion of the day. 15 Bom.L.R. 68, Foll. The plaintiff who has lands of her own and ordinarily engages herself in agricultural labour either in her own lands or in those of her brothers is not taken out of the definition of "agriculturist" by reason of the fact that she is also a milkmaid. The facts that the number of hours she engages personally in agricultural labour varies and may sometimes be very small or that the income from the sale of milk exceeds her income from the lands are not material to the question. (*Madgavkar, J.*) SAHOO BALA *v.* NARAYAN SHASTRI. **55 Bom 411=I.R. 1931 Bom. 319=131 I.C. 895=33 Bom.L R 476= A.I R. 1931 Bom. 284.**

[F. 58 B. 58 (61, 66)]

———S. 2 (1)—"*Agriculturist*"—*Definition—Rules governing.*

The word "ordinarily" which occurs in S. 2 (1) shows that it is only a *bona fide* agriculturist who comes within the definition. The word "ordinarily" means regularly and habitually and not casually. The word does not also mean 'solely.' The onus of proof is on the person who sets himself up as an agriculturist. It is difficult for the Court to lay down any rules for determining the exact nature and the quantity or extent of the work required to be done by an agriculturist. It may however be stated, first that it is not necessary for the agriculturist to engage personally in agricultural labour throughout the day; it is enough if he is engaged for a larger or smaller portion of the day. It must however be an appreciable amount of work which he engages in and not merely some casual or desultory work in the fields. Secondly, the agriculturist cannot be said to engage personally in agricultural labour if he gets the work done only through labourers but he can still be said to be engaged personally if he himself works side by side with the labourers employed by him. He need not cultivate the lands all by himself. Thirdly, even if the principal income of the agriculturist is from non-agricultural sources, he would still be an agriculturist if he does an appreciable amount of agricultural work for a portion of the day. The mere description as trader does not prevent a person from showing that he is an agriculturist. (*Wadia, J.*) RAMCHANDRA ATMARAM *v.* TUKARAM NANA. **58 Bom. 58=6 I.R. (Bom.) 92 =145 I C. 563=35 Bom.L R. 715=A.I.R. 1933 Bom. 374.**

———S. 2 (1)—"*Agriculturist*"—*Status of—Acquisition—Conditions of.*

It is impossible to say that a man who has been a trader can, merely by working in the fields for a couple of months, acquire the status of an agriculturist on the ground that he ordinarily engages personally in agricultural labour. It would be necessary to have evidence of a full agricultural season or at any rate a much longer period than two months, before it can be reasonably said that he comes within the definition of the term in S 2 (1) of the Dekkhan Agriculturists' Relief Act. (*Broomfield and Barlee, JJ.*) SOPANA APPA *v.* DATTATRAYA KRISHNAPPA. **152 I.C. 589 (2)=7 R. B. 146=36 Bom.L.R. 804=A I.R. 1934 Bom. 383.**

DEKKHAN AGRICULTURISTS' RELIEF ACT (1879), S. 2 (1).

——**S. 2 (1)**—*Duty of Court—Applicability of exemption—Determination.*

It is generally left to the Commissioner of the High Court for taking accounts, to determine whether a person's income is derived principally from agricultural sources, and that is generally done by ascertaining whether his income from agricultural sources exceeds his income from non-agricultural sources for a period of three years before the date of the suit. But it is for the Court to determine whether the person who claims to be an agriculturist under the second branch of the definition is a person who ordinarily engages personally in agricultural labour, within the limits of the District to which the Act applies. (*Wadia, J.*) RAMCHANDRA ATMARAM *v.* TUKARAM NANA. **58 Bom. 58 = 6 I.R. (Bom.) 12 = 145 I C. 563 = 35 Bom L.R. 715 = A.I.R. 1933 Bom 374.**

——**S 3, (b) (3)**—*Scope—Suit involving validity of sale deeds—If falls under.*

A suit involving not only the simple question of redemption, but also the voidability or otherwise of certain sale-deeds is not within the terms of S. 3, (*b*) (3) of the Dekkhan Agriculturists' Relief Act, 1879. A suit though in form for redemption, but claiming substantially to recover possession of property of which according to the plaintiff, he has been fraudulently deprived is not maintainable in that form, as it is outside the scope of S. 3, (*b*) (3) of the Act. (*Murphy and Divatia, JJ.*) CHHOTABHAI *v.* DADABHAI. **152 I. C. 715 7 R B. 166 = 36 Bom L R. 738 = A I R. 1935 Bom. 54.**

——**S 3 (x), (y) and (z)**—*Suit for recovery of movable property pledged or its value.*

A suit for recovery of movable property pledged or its value falls within S. 3, Cls. (*x*), (*y*) and (*z*) deal only with mortgage of immovable property. (*Acton and Rupchand, A.J.Cs.*) MILKIMAL BOLUMAL *v.* HUSSAIN. **28 S L.R 154 = 151 I C. 988 = 7 R S. 76 = A I.R 1934 Sind 65.**

——**S. 3 (y)**—Suit on mortgage—Jurisdiction—Effect of S. 11—Suit for sale or foreclosure maintainable in the High Court, but not as regards prayer for personal decree. *See* DEKKHAN AGRICULTURISTS' RELIEF ACT, S. 11. **55 Bom. 536 = A.I.R. 1931 Bom 161**

——**S. 6**—*Scope.*

All that S. 6 purports to do is to empower the Local Government to limit the jurisdiction of a Court of Small Causes in respect of suits other than those relating to mortgages of immovable property to be tried as ordinary suits in such areas as it deems fit. (*Acton and Rupchand, A.J.Cs.*) MILKIMAL BOLUMAL *v.* HUSSAIN. **28 S L R 154 = 151 I.C. 988 = 7 R.S. 76 = A. I.R. 1934 Sind 65.**

——**S 11**—*Agriculturist partner—Suit against firm—Place of suing.*

The mere fact that one partner of a firm is an agriculturist does not involve the firm itself as an agriculturist, and so the firm need not therefore be necessarily sued under S. 11 at the place where it resides in the sense of carrying on its business, irrespective of the place where the cause of action arose. 53 Bom. 787, Foll. (*Percival, J.C. and Weld, A.J.C.*) PREMCHAND *v.* NEWANDMAL. **25 S L R. 104 = I.R. 1931 Sind 141 = 134 I C 397 = A I R 1931 Sind 121.**

——**S 11**—*Applicability—Suit for damages for breach of contract.*

S. 11 has no application to a suit for damages for breach of contract, as it is not a suit falling under S. 3 (*w*) of the Act. (*Broomfield, J.*) KHANDESH

DEKKHAN AGRICULTURISTS' RELIEF ACT (1879) S. 13.

LAKSHMIVILAS MILLS CO. *v.* VINAYAK ATMARAM. **156 I C. 277 = 7 R.B. 496 = 37 Bom L.R. 157 = A.I. R. 1935 Bom. 198.**

——**S. 11**—*Jurisdiction of High Court—Suit on mortgage—Prayers for personal decree and for sale.*

Under S. 11, suits for money lent so far as mortgage actions are concerned should, if the defendant or one of the defendants is an agriculturist, be brought within the local limits of the Court within whose jurisdiction the defendant resides. But the section does not refer to suits falling within S. 3 Cl. (*y*). So an action on a mortgage executed at some other place can be maintained in the High Court, so far as the reliefs for sale or foreclosure are concerned but not as regards the prayer for a personal decree for the deficiency that may be found due if the sale-proceeds should be insufficient. 51 Bom. 516, Dist. (*Beaumont, C.J. and Blackwell, J.*) ESSA *v.* KHATIJABAI. **55 Bom 536 = I.R. 1931 Bom. 270 = 33 Bom. L.R. 13 = 130 I.C. 590 = A.I.R. 1931 Bom. 161.**

——**S. 12**—*Scope—Burden of proof.*

Under S. 12, the burden of proof is on neither side. The Court has to find out the facts after hearing both parties. (*Beaumont, C J. and Rangnekar, J.*) GANPAT BHUJANG *v.* HANAMGOUDA. **57 Bom. 593 = 147 I C. 919 = 6 R B. 225 = 35 Bom.L.R. 956 = A I R. 1933 Bom. 439.**

——**Ss 12 and 13**—*Contract rate of interest—Power of Court to award higher rate.*

The Agriculturists' Relief Act was passed to 'relieve' the agriculturist and in his interest. What Ss. 12, 13 and 71-A contemplate is that in cases where the Court finds that the interest charged is unreasonable or extortionate or oppressive, it should substitute a reasonable rate of interest, that is the rate which is generally known as the mercantile rate of interest. The Court cannot award to the creditor anything more than what he bargains for. (*Rangnekar, J.*) SHRIDHAR *v.* RAMCHANDRA. **6 I.R. (Bom.) 90 = 145 I C. 581 = 35 Bom.L R 573 = A.I.R. 1933 Bom 297.**

——**S. 13**—Applicability and scope—Mortgage suit—Accounts and interest from date of plaint to date of preliminary decree—Rule as to. *See* C. P. CODE, O. 34, RR. 7 AND 11. **36 Bom.L.R. 1242 = A.I.R. 1935 Bom 97.**

——**Ss. 13 and 13-A and T.P. Act—S. 76**—*Applicability and scope—Mortgage with possession—Profits in lieu of interest—Accounts—Basis—Agriculturists.*

Under a mortgage executed by an agriculturist, the mortgagee was put into possession of the property and there was an agreement to appropriate profits of the land in lieu of interest; but no rate of interest was mentioned in the bond. The mortgagor having sued for an account,

Held, that the transaction was governed by Ss. 13 and 13-A of the Dekkhan Agriculturists' Relief Act, which is a Special Act regulating the relations of the impoverished and indebted agriculturists with their creditors and under which the relations between the mortgagor and mortgagee, as settled between themselves, are practically set aside and the Court is directed to go into the history of the transactions between them, and to calculate debits and credits according to the rules in the Special Act and to set aside certain kinds of contracts, such as the one in the case, that the profits are to be taken in lieu of interest. The Transfer of Property Act, which is a general Act prescribing the relations between the mortgagor and mortgagee generally and for circumstances where the Special Act does not lay down exceptions to the general rule does not therefore apply to the case; as such, the basis of the taking of accounts between the parties should be the actual receipts by the mort-

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gagee and not as provided for S. 76 (*a*) of the T. P. Act. (*Murphy and Divatia, JJ.*) SAKHARAM *v.* DHAKTOJIRAO. 58 **Bom.** 472=152 I.C 434=7 R. B. 143=36 **Bom L R.** 633=**A.I.R. 1934 Bom.** 321.

———**S** 13—Mortgage suit—Accounts after date of suit—Procedure. *See* C. P. CODE, O. 34, R. 7. 37 **Bom.L.R.** 76=**A.I.R. 1935 Bom.** 122.

———**S. 13 (c)**—*Mortgage in contravention of—Validity of—Splitting of the clause relating to interest—Permissibility.*

When a mortgage is found to be in contravention of S. 13 (*c*) and the money that was agreed to be paid in consideration of the mortgage was the entire sum of money mentioned as principal in the deed along with interest on it, the entire agreement is invalid and it is not permissible for the Court to split the consideration, to delete the clause relating to interest and enforce the other portion of the agreement. (*Baker and Shingne, JJ.*) DATTATRAYA NAGAPPA *v.* SAVLO SUBRAO. **I.R. 1932 Bom.** 393=138 I C. 459 (2)=34 **Bom.L.R.** 404=**A I.R. 1932 Bom** 237.

———**S. 13 (c)**—*Scope—C. P. Code* (1882), *S.* 259-*A*—*Repeal—Effect of.*

The repeal of S. 257-A of the C. P. Code, 1882, in the C. P. Code of 1908 does not affect S. 13, Cl. (*c*) of the Dekkhan Agriculturists' Relief Act. The effect of that provision is that every agreement for the satisfaction of a judgment debt which provides for the payment directly or indirectly of any sum in excess of the sum due under the decree is void, unless it is made with the sanction of the Court which passed the decree. 35 B. 307; 22 B. 693 (F.B) and 27 B. 96, Ref. (*Baker and Shingne, JJ.*) DATTATRAYA NAGAPPA *v.* SALVO SUBRAO. **I R. 1932 Bom.** 393=138 I.C. 459 (2)=34 **Bom L R.** 404=**A.I. R. 1932 Bom.** 237.

———**S. 13 (c)**—*Scope—Pro note for decree amount and other amount—Payment not certified—Instrument, if wholly void.*

Plaintiff obtained a decree against the defendant, an agriculturist, for a sum of Rs. 75 with interest at 6 per cent Later he obtained from the defendant, a promissory note for Rs. 201 carrying interest at 12 per cent. Out of Rs. 201, Rs. 75 was the decretal amount and the balance of Rs. 126 was due on other accounts. Plaintiff sued on the promissory note and the defendant pleaded S. 13 (*c*) of the Act in bar of the claim.

Held, that the promissory note was hit by S. 13 (*c*) only in respect of the decree amount of Rs. 75, but that it was perfectly valid as to Rs. 126, the latter sum not being due under the decree, but due *aliunde*. (*Beaumont, C.J. and Wadia, J.*) BAKOR *v* ISHVAR. **156 I.C. 911=8 R.B. 35=37 Bom.L.R. 372=A.I R. 1935 Bom. 257.**

———**(as amended by Act XIV of 1932), S 13 (c)**—*If retrospective—Pending suits.*

An amendment of an Act of the Legislature during the currency of a suit is irrelevant, and the rights of the parties are governed by the Act as it existed at the time when the suit was started. Bombay Act XIV of 1932 which amended S. 13 (*c*) of the Dekkhan Agriculturists' Relief Act is not retrospective and does not apply to pending suits. The case will be governed by the section as it existed before the amendment at the date when the suit was instituted. (*Beaumont, C.J. and Wadia, J.*) BAKOR *v.* ISHVAR. **156 I C. 911=8 R.B 35=37 Bom L R. 372=A.I.R. 1935 Bom. 257.**

———**S. 15-B**—*Decisive date.*

A person, who at the time the decree was passed, was not, but has since, become an agriculturist cannot avail himself of the provisions of S. 15-B. of the Dekkhan Agriculturists' Relief Act. 24 Bom.L.R. 370, Foll. (*Patkar and Tyabji, JJ.*) BALKAJARAM *v.* MANEKLAL. **56 Bom.** 36=**I.R. 1932 Bom.** 323=**137 I.C. 717=34 Bom.L.R.** 55=**A.I R. 1932 Bom.** 136.

———**S. 15 B**—*Decree by Court where Act in force—Transfer for execution—Grant of instalments—Powers of executing Court.*

Per *Baker, J.*—When a decree has been passed by a Court where the Dekkhan Agriculturists' Relief Act does not apply and transferred for execution to another Court where the Act is in force, it is not open to the executing Court to grant instalments to the defendants under S. 15-B of that Act on the ground that they are agriculturists. (Case law discussed.) (*Baker and Nanavati, JJ.*) RAMLAL HARIRAM *v.* RATANLAL. **136 I.C. 504=I.R. 1932 Bom.** 200=33 **Bom.L R.** 1466=**A.I.R. 1932 Bom.** 99.

———**S. 15-D**—*Scope—Special suit under—Suit formally for redemption but substantially for recovery of properties fraudulently deprived—Maintainability.*

A special suit is not maintainable under S. 15 D of the Dekkhan Agriculturists' Relief Act when the suit, though in form one for redemption, is really one to recover property of which the plaintiff is alleged to have been deprived by fraud. (*Murphy and Divatia, JJ.*) CHHOTABHAI *v.* DADABHAI. **152 I.C. 715=7 R B. 166=36 Bom.L.R. 738=A.I.R. 1935 Bom.** 54.

———**S. 15-D**—*Suit for account—Question as to transaction being sale or mortgage.*

Under S. 15 an agriculturist mortgagor can sue for an account, even though one of the issues raised in the suit is whether the transaction is a mortgage or a sale. (*Beaumont, C J.*) SAVANT YELLAPPA *v.* BHARMAPPA NAGAPPA. **6 I.R. (Bom) 137=146 I C. 165=35 Bom. L.R. 604=A.I R. 1933 Bom.** 306.

———**S. 15 D**—*Suit under—Right to bring—Dispute as to title and quantum of interest—Suit not incompetent on that account.*

What is wanted by S. 91, T. P. Act, is that the person seeking to redeem has a proprietary interest in the mortgaged property He need not be the original mortgagor or any person claiming through or under him. Similarly any person who is interested in the equity of redemption, provided he is an agriculturist within the meaning of the term as defined in the Dekkhan Agriculturists' Relief Act, though he may not be the original mortgagor or a person claiming through under him, can sue under S. 15 D. And existence of any dispute as to plaintiff's interest having been lost by adverse possession and also as to quantum of his interest does not prevent him from maintaining such a suit; for having regard to the object of the Act, it should be construed liberally and it would be unjust to throw out a suit on this ground. (Case-law discussed. (*Shingne, J.*) GANESH RAGHUNATH *v* RAJARAM LAXMAN. **58 Bom.** 75=**6 R B. 330=148 I.C. 1145=35 Bom.L.R 1123=A.I.R. 1934 Bom.** 32.

———**S. 20**—*Agriculturist after decree.*

The crucial date in a case under S. 20 of the Act is the date of decree. Where a decree has been passed against the defendant who was not at that time (the date of the decree) an agriculturist, he cannot raise the plea in execution proceedings that he was an agriculturist at the date of decree, and is not entitled to instalments on that footing and S. 20 has no application. 24 Bom. L. R. 1291 and 15 Bom. L. R. 387, Foll. (*Beaumont, C. J. and Baker J.*) HASSAN ALI *v.* SANLI BEGAM. **I.R. 1931 Bom.** 554=**134 I.C. 970=33 Bom.L.R. 1139=A.I.R. 1931 Bom.** 507.

DEKKHAN AGRICULTURISTS' RELIEF ACT (1879). S. 20.

———**S. 20**—*Plea of agriculturist—Discretion of Court.*

S. 20 is not so absolutely imperative that an executing Court must needs order instalments the moment the judgment-debtor proves that he is an agriculturist and where the Judge has exercised his discretion it is presumed to have proceeded on judicial lines unless the contrary is made to appear from the record. (*Ferrers, J.C. and Mehta, A.J.C.*) ABDUL SATAR JAN *v.* FIRM OF VAPARIMAL. **27 S.L.R. 183 = 150 I.C. 258 = 6 R.S. 276 (1) = A.I.R. 1933 Sind 331 (1).**

———**S. 20**—*Plea of agriculturist, if open in execution—Effect of the plea.*

The plea for the status of agriculturist can be raised at any time, even during execution but the only benefit that the debtor can claim by proving the status of an agriculturist is the benefit of paying the decretal amount by instalments under S. 20. (*Ferrers, J. C. and Mehta, A.J.C.*) ABDUL SATAR JAN *v.* FIRM OF VAPARIMAL. **27 S.L.R. 183 = 150 I.C. 258 = 6 R.S. 276 (1) = A.I.R. 1933 Sind 331 (1).**

———**S. 21**—*Scope—Plea of being agriculturist—Waiver—Consent decree—Execution—Arrest—Plea by defendant that he is an agriculturist—If open.*

The waiver by a defendant of the plea that he is an agriculturist, and the passing of a consent decree against him in the ordinary way under which he gives up his right to plead his agricultural status both in the suit and the execution proceedings which might follow, does not preclude him from raising such a plea when he is sought to be arrested in execution of the decree. The mandatory provisions of S. 21 of the Dekkhan Agriculturists' Relief Act cannot be whittled away by any agreement between a proved agriculturist and his creditor. (*Murphy and Sen, JJ.*) SHANKARLAL *v.* RAGHUNATHDAS. **160 I.C. 38 (2) = 8 R.B. 245 = 37 Bom.L.R. 778 = A.I.R. 1935 Bom. 433.**

———**S. 22**—*Agriculturist after decree—Heir of non agriculturist being agriculturist.*

Where the original debtor against whom a decree was obtained by the plaintiff was a non agriculturist but pending execution, the debtor died and his property passed into hands of his heir who was an agriculturist the latter is entitled to the benefit of the Dekkhan Agriculturists' Relief Act. 47 Bom. 44; 32 Bom.L.R. 320, Foll. (*Madgavkar and Baker, JJ.*) SHAMRAO RAMCHANDRA *v.* MALKARJUN APPA RAO. **I.R. 1931 Bom. 398 = 133 I.C. 750 = 33 Bom.L.R. 797 = A.I.R. 1931 Bom. 451.**

———**S. 22 and C. P. Code, O. 21, Rr. 64 and 66**—*"Agriculturist"—Objection in execution to attachment and sale—Finding as to status in suit—Date from which it operates—Date for determination in execution.*

In a suit which was filed on 16th March, 1931, and decreed on 20th February, 1932, there was an issue as to whether the defendant was an agriculturist and the Court held that he was not. The Court on 21st April, 1932, ordered, in execution, sale of the attached property. Subsequently in reply to a notice under O. 21, R. 66, C. P. Code, the defendant objected to the sale on the ground that he was an agriculturist as under S. 22 of the Dekkhan Agriculturists' Relief Act, the property could not be attached or sold.

Held, that the finding as to status of the defendant not being an agriculturist spoke from the date of the decree, *viz.*, 20th February, 1932, and not from the date of the suit, and that the defendant who was a trader on 20th February, 1932, cannot be deemed to have become an agriculturist by 21st April, 1932, the date of the order for sale. The date for determining the status in execution is the date of the order for sale under O. 21, R. 64, C. P. Code, and not the date of the subsequent order made after issue of notice under O. 21, R. 66, C. P. Code. (*Broomfield and Barlee, JJ.*) SOPANA APPA *v.* DATTATRAYA KRISHNAPPA. **152 I.C. 589 (2) = 7 R.B. 146 = 36 Bom.L.R. 804 = A.I.R. 1934 Bom. 383.**

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———**S. 22**—*Applicability—Execution proceedings for the enforcement of awards under Arbitration Act.*

S. 22 applies to execution proceedings taken for the enforcement of awards under S. 15, Arbitration Act. 14 S.L.R. 217, Over. (Case law discussed.) (*Wild, J.C., Aston and Rupchand, A.J.Cs.*) DEUMAL RACHANDMAL *v.* FIRM OF LAL CHAND. **25 S.L.R. 475 = I.R. 1931 Sind 97 = 133 I.C. 65 = A.I.R. 1931 Sind 97 (F.B.).**

———**S. 22**—*"Mortgage"—Charge created under decree—Enforceability.*

The term "mortgage" is not used in S. 22 in the strict sense of a mortgage within the meaning of the T.P. Act. The section would apply to a charge as well, whether it is created antecedent to the decree or by the decree itself. (*Rangnekar and Broomfield, JJ.*) MANEKCHAND *v.* GANESHLAL. **6 I.R. (Bom.) 86 (2) = 145 I.C. 582 (2) = 35 Bom.L.R. 588 = A.I.R. 1933 Bom. 298.**

———**S. 22**—*"Order"—Meaning of—Order in execution for the purpose of enforcing award.*

Per *Rupchand, A.J.C.*—The expression "execution" is sometimes used in a technical sense as referring to the carrying out of a previous order of the Court usually embodied in a decree. But one of the fundamental canons of construction of statutes is that as a general rule the Court should follow the ordinary and popular meaning of expressions used by the legislature. This would be the more so, when the popular meaning of the expression used in a statute conforms to the avowed intention of the legislature. Therefore, a narrow construction cannot be put upon S. 22, so as to limit its operation to attachment and sale of property in execution proceedings filed for enforcement of a decree or a previous order of the Court for payment of the money and thereby to exclude from its operation an attachment and sale made in pursuance of an order of the Court, though such order may have been passed for the purpose of enforcing an award made by the arbitrators under the Act which is enforceable as a decree.

Per *Wild, J.C.*—The word "execution" has a definite and a certained meaning when used with the word "decree" and refers to the carrying out of the order or decision embodied in the decree. No decree can be executed without a subsequent order of the Court which executes it and the word "order" in S. 22 means an order which can be executed as a decree can be executed and not order subsequent to the decree or executable order. (*Wild J.C., Aston and Rupchand, A.J.Cs.*) DEUMAL RACHANDMAL *v.* FIRM OF LAL CHAND. **25 S.L.R. 475 = I.R. 1931 Sind 97 = 133 I.C. 65 = A.I.R. 1931 Sind 97 (F.B.).**

———**S. 53**—*High Court—Interference in revision.*

The High Court is reluctant to interfere in cases under the Dekkhan Agriculturists' Relief Act, where the revisional powers of the District Judge suffice. (*Madgavkar, J.*) SAHOO BALA *v.* NARAYAN SHASTRI. **55 Bom. 411 = I.R. 1931 Bom. 319 = 131 I.C. 895 = 33 Bom. L.R. 476 = A.I.R. 1931 Bom. 284.**

———**S. 63 A**—*Applicability—Deed of adoption.*

The section does not apply to a deed of adoption, as it is not a document compulsorily registrable under S. 17 of the Registration Act. It is not the adoption deed which confers the status of an adopted son or any interest in the property of the adoptive father but the

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factum of adoption which does not require any deed for its validity. 38 B. 227, Dist. (*Beaumont, C J. and Baker, J.*) VISVANATH *v.* RAHIBAI. **55 Bom 103 = I.R. 1931 Bom. 117--128 I.C. 901 = 32 Bom.L.R. 1385 = A.I.R. 1931 Bom. 105.**

——**S. 71 A**—*Contract rate of interest—Power of Court to award higher rate.*

The Agriculturists' Relief Act was passed to "relieve" the agriculturist and in his interest. What Ss. 12, 13 and 71-A contemplate is that in cases where the Court finds that the interest charged is unreasonable or extortionate or oppressive it should substitute a reasonable rate of interest, that is the rate which is generally known as the mercantile rate of interest. The Court cannot award to the creditor anything more than what he bargains for. (*Rangnekar J.*) SHRIDHAR *v.* RAMCHANDRA **6 I.R. (Bom.) 20 = 145 I.C. 581 = 35 Bom L.R. 573 = A I R. 1935 Bom 297.**

DELAY.
See (1) CONTRACT ACT, S. 73.
(2) LIMITATION ACT, S. 5.
(3) PRACTICE.
(4) SPECIFIC RELIEF ACT, S. 22.

DELIVERY.
See (1) CONTRACT—CONSTRUCTION — MILLING CONTRACT.
(2) CONTRACT ACT, Ss. 73, 83, 92, 118, 148 AND 172.
(3) MAHOMEDAN LAW—GIFT.
(4) RAILWAYS ACT, S. 72,
(5) SALE OF GOODS.

DEMONSTRATIVE LEGACY. *See* SUCCESSION ACT (1925), Ss. 142, 150 AND 351.

DEPOSIT.
See (1) C. P. CODE, O. 21, RR. 84 AND 89.
(2) CONTRACT.
(3) CONTRACT ACT, S. 73.
(4) T. P. ACT, Ss. 83 AND 84.

DEPOSIT OF TITLE DEEDS—Mortgage by.
See (1) T. P. ACT, S. 59.
(2) REGISTRATION ACT, S. 17 (1) (*b*).

DEPOSITORY. *See* LIMITATION ACT, ART. 145.

DESABANDAM INAM. *See* GRANT.

DESCENDANTS.
See (1) HINDU LAW—SUCCESSION.
(2) MAHOMEDAN LAW—SUCCESSION.

DETENTION IN CUSTODY.
See (1) CR. P. CODE, S. 344.
(2) CRIMINAL TRIAL—UNDER-TRIAL PRISONER.

DETERIORATION OF GOODS. *See* RAILWAYS ACT (1890), S. 72.

DETERMINATION OF TENANCY.
See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P ACT, Ss. 106 AND 111.

DEVADAYAM. *See* GRANT—INAM.

DEVASTATION BY EXECUTOR. *See* SUCCESSION ACT (1925), S. 368.

DHARDHURA or the deep stream rule.
See (1) ALLUVION AND DILUVION.
(2) BENGAL REGULATION (XI OF 1825).
(3) CUSTOM —ALLUVION AND DILUVION.
(4) WAJIB-UL ARZ. .

DHARKHAST. *See* DARKHAST.

DHARMAKARTHA. *See* HINDU LAW — RELIGIOUS ENDOWMENT.

DIVORCE.

DICTA. *See* PRACTICE—PRECEDENT.

DILUVION.
See (1) ALLUVION AND DILUVION.
(2) BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825).

DIRECTORS.
See (1) COMPANY.
(2) COMPANIES ACT.

DISAFFECTION. *See* PENAL CODE, S. 124-A.

DISAPPEARANCE. *See* EVIDENCE ACT, Ss. 107 AND 108.

DISCHARGE.
See (1) CR. P. CODE, Ss. 209 AND 253.
(2) CRIMINAL TRIAL.

DISCIPLINARY JURISDICTION.
See (1) CONTEMPT.
(2) LEGAL PRACTITIONER.
(3) LEGAL PRACTITIONER'S ACT.
(4) LETTERS PATENT.

DISCONTINUANCE OF POSSESSION.
See (1) ADVERSE POSSESSION
(2) LIMITATION ACT, ARTS. 142 AND 144.

DISCOVERY. *See* C. P. CODE, O 11.

DISCRETION.
See (1) C. P. CODE, Ss. 35, 100 AND 115.
(2) SPECIFIC RELIEF ACT, S. 22.

DISCRETIONARY RELIEFS. *See* SPECIFIC RELIEF ACT, S. 42

DISHONESTY. *See* PENAL CODE, S. 24.

DISHONOUR—Hundi. *See* NEGOTIABLE INSTRUMENTS ACT, Ss. 92 AND 98.

DISMISSAL OF COMPLAINT. *See* CR. P. CODE, Ss. 203 AND 247.

DISMISSAL FOR DEFAULT. *See* C. P. CODE, O. 9, R. 8.

DISMISSAL FROM SERVICE. *See* MASTER AND SERVANT.

DISPOSAL OF DEAD BODY. *See* PENAL CODE, S. 318.

——**Of property.** *See* CR. P. CODE, S. 517.

DISPUTE ABOUT LAND. *See* CR. P. CODE, S. 144.

DISQUALIFICATION. *See* HINDU LAW—SUCCESSION.

——To give evidence. *See* EVIDENCE ACT, S. 118.

DISSOLUTION OF MARRIAGE.
See (1) DIVORCE ACT.
(2) MAHOMEDAN LAW—DIVORCE.

DISSOLUTION OF PARTNERSHIP.
See (1) CONTRACT ACT, *S.* 263, *etc.*
(2) PARTNERSHIP.

DIVERSION.
See (1) EASEMENT.
(2) EASEMENTS ACT.

DIVESTING OF ESTATE. *See* HINDU LAW—ADOPTION AND SUCCESSION.

DIVORCE.
See also (1) DIVORCE ACT.
(2) HUSBAND AND WIFE.
(3) MAHOMEDAN LAW

——Adultery—Evidence of. *See* DIVORCE ACT (1869), S. 10.

——*Christian British subjects—Mysore Courts—Jurisdiction.*

DIVORCE.

Courts in Mysore have no jurisdiction to make decrees for dissolution of marriage or for judicial separation in respect of Christian British subjects. 3 Mys. C.C.R. 78, Foll. (*Rama Rao and Sreenivasa Iyer, JJ.*) KENT *v.* KENT. **9 Mys.L.J. 269.**

———*Domicile—Duty of Court to decide.*

In a case of divorce, the question of domicile is important from the out set, as it is necessary to decide the question whether the Indian Divorce Act or the Indian and Colonial Divorce Jurisdiction Act, applies to the case to confer jurisdiction to make a decree. It goes to the root of the jurisdiction, and the position bears no analogy whatever to cases where it is doubtful under which particular statute or branch of the law an order should be made. (*Buckland, J.*) STROUD *v.* STROUD **58 Cal. 1332 I R 1932 Cal. 125=135 I C. 445- A I.R. 1932 Cal. 161.**

[R. 60 C. 601 (602)]

———*Judicial separation -Decree for--Subsequent resumption of cohabitation—Effect of.*

A decree for judicial separation and payment of alimony to the wife is annulled by subsequent resumption of cohabitation by the parties and the wife cannot claim any rights under the decree, even if the husband had executed an agreement that the decree ordering payment should remain in force, and that she should have the right to live separate if she had any fresh grievance against him *Haddon* v. *Haddon*, 18 Q.B.D. 778 and 2 Rang. 163, Foll (*Kisch, J.*) JULIUS *v.* JULIUS **I.R. 1932 Oudh 267-137 I C. 737=9 O.W N. 49= A.I R. 1932 Oudh 142.**

———*Order for costs—Liability of co respondent.*

Where it appeared that from the very beginning of their life in India the petitioner had thought of means by which he might rid himself of his wife and it was further found that he had himself before marriage committed adultery with her and procured her divorce from her first husband.

Held, that the petitioner was disentitled to damages from the co respondent but that an order regarding costs might be made against the latter (*Pullan, J.*) HEARSEY *v.* HEARSEY. **I R. 1931 Oudh 325 - 132 I.C. 773- 14 O.L J. 11=8 O.W.N. 168=A.I R. 1931 Oudh 259.**

[R 7 Cuck. 683 (694).]

———*Order for costs—Liability of wife.*

Just as a wife, whose misconduct puts her husband to expense in a matrimonial suit, may be condemned in her husband's costs, if she has separate property so, in a proper case, if a wife brings a suit which is ultimately dismissed, the question whether she ought to get an order against the husband for her costs, where she has separate estate, is a question entirely within the discretion of the Court. (English cases discussed.) (*Rankin, C.J. and Buckland, J.*) FORRESTER *v.* FORRESTER **57 Cal. 1350- I R. 1931 Cal. 374=130 I.C. 246= A I R 1931 Cal. 206.**

———*Order for costs—Preliminary order of trial Court—Whether binds appellate Court.*

An order of the trial Court against the husband for security of the wife's costs in prosecuting her suit for divorce does not bind the hands of the appellate Court when it comes to make an order as to whether the wife should be given her costs of the appeal. (*Rankin, C.J. and Buckland, J.*) FORRESTER *v.* FORRESTER. **57 Cal. 1350-I R 1931 Cal. 374=130 I.C. 246= A.I.R. 1931 Cal. 206.**

———*Proceeding under—Appeal—Conditional stay—Amount deposited in Court by co-respondent—Liability for petitioner's costs.*

An attaching creditor does not acquire more rights than what the debtor had. Where the co-respondent had deposited a certain amount in Court as security for payment of damages and there was after satisfying the claim ultimately decreed a surplus and the question arose whether the attaching creditor or the party in the divorce action whose claim for costs remained unsatisfied was entitled to the surplus.

Held, that the party was entitled to recover the costs and the surplus and the attachment did not affect his rights. (*Rankin, C.J. and C. C. Ghose, J.*) HORST GUDERIAN, *In re* **58 Cal 1--I R. 1931 Cal. 625= 133 I.C. 97-A.I R. 1931 Cal. 474.**

DIVORCE ACT (IV OF 1869)—Ex parte *proceeding —Duty of Court.*

When in an application for divorce neither the respondent nor the co-respondent seek to resist the petition the duty of special circumspection is thrown upon the Court The Court has a discretion in certain specified events either to pronounce a decree for divorce or to dismiss the petition. The exercise of that discretion must be regular and systematic. For this purpose the Judge should make free use of his power to look into all the necessary circumstances even though his attention is not called to them by the party. The danger of collusion between the parties must always be borne in mind especially when there has been a long delay in applying to the Court for relief. (*Ferrers, J.C.*) W.D. *v.* E.D. **26 S L.R. 423=141 I C. 284--I R. 1933 Sind 44= A I.R. 1933 Sind 27.**

———*Scope—Suit by wife for dissolution—Allegation of adultery—Alleged adultress—Right to intervene—Suggested legislation.*

Obiter—In a suit for dissolution under the Divorce Act, 1869, by a wife against her husband on the ground of the husband's alleged adultery with a named woman, the latter has no right to intervene, whereas in a suit under the Indian and Colonial Divorce (Jurisdiction) Act, the alleged adultress has a right to so intervene. This defect ought to be remedied by inserting a like provision in the Divorce Act at the earliest opportunity. (*Costello, J.*) ENID PEACHERS, *In the matter of.* **62 Cal. 82--156 I.C 928 1 R.C. 46- 39 C.W.N. 95= A.I R. 1935 Cal. 456.**

———**S. 2**—*Domicile—Circumstances to be considered.*

Domicile must be decided on the facts as they exist and not on future possibilities. Every person must have a domicile and until the petitioner abandons his present domicile in India and becomes domiciled in some other country, he will remain within the jurisdiction of the Indian Courts The father, grandfather and great-grandfather of the petitioner all lived and died in India. The petitioner himself was born in India and his only means of his livelihood was derived from an estate in Oudh which he inherited from his father.

Held, that his domicile of origin was India as his property was situated in Oudh and he himself resided in Oudh. He could *prima facie* bring a petition for divorce in the Oudh Court provided other requirements of S. 2 were complied with. (*Pullan, J.*) HEARSEY *v.* HEARSEY. **I R. 1931 Oudh 207 (1)=14 O L J. 193 =131 I.C. 447 (1)=8 O.W.N. 177=A I R. 1931 Oudh 126.**

———**S. 2**—*Domicile—Mode of determining—European claiming under Indian domicile—Considerations.*

The question of domicile should be treated with care, for unless the parties to the marriage are domiciled in India at the time when the petition is presented there is no jurisdiction in a District Court to dissolve the marriage. Residence alone, for however long a period, is by no means the test, and a safer guide to enquire where the person, whose domicile is in question, intends to end

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his days. Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise. To these may be added the further propositions that the presumption of law is against a change of domicile, which must be proved by the person alleging it, and that a wife's domicile is the domicile of her husband Where a European claims to be domiciled in India, it will be pertinent to enquire where his father lived and died, or resides, as the case may be. where he and his father were born, the circumstances in which he came to and resides in India, which will assist in ascertaining whether there exists an *animus revertendi* or an *animus manendi*, his object in residing in India, and generally as to the conditions under which he lives and his habits of life. (1868) L R. 1 H.L.S.C. 307 and (1904) A.C. 287, Rel. on (*Rankin, C.J., C.C Ghose and Buckland, JJ.*) WRIGHT *v.* WRIGHT. **58 Cal 259 =I.R 1931 Cal. 521=132 I C. 89- A.I.R 1931 Cal. 383 (S.B.).**

———**S. 2** —*Effect—Amendment Act XXV of* 1926.

By the amending Act XXV of 1926 the jurisdiction of the Indian Courts under S. 2 of the Divorce Act, 1869, has been taken away only in respect of making decrees of dissolution of marriage between parties, who are not domiciled in India. The other reliefs under the Act and the power to make decrees of nullity of marriage remain unaffected, the only requirements in the latter case being that the parties profess the Christian religion, the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition. (*Bhide and Fapp, JJ.*) JAMES GRAY WILSON *v.* WILSON. **I.R 1931 Lah. 316 130 I C. 524=32 P.L R. 159=A I.R. 1931 Lah. 245.**

———**S. 2**—*English domicile—Dissolution of marriage—Jurisdiction of Indian Courts.*

If the domicile of the parties be English, the Courts in India have no jurisdiction to dissolve their marriage notwithstanding that it was solemnized in India and that the adultery was committed in India. 47 B. 843, Foll. (*Ferrers, J.C.*) HALL *v.* HALL. **I R 1933 Sind 132 =143 I.C. 618=A.I R. 1933 Sind 70**

———**S. 2** —*Indian domicile—Proof.*

It is necessary to see that in cases of divorce there is proper proof of Indian domicile before giving a decree under the Act. The fact, that the petitioner is shown to have been born in India and residing there, is not sufficient to prove Indian domicile. (*Rankin, C. J., Buckland and Costello, JJ.*; CRESSWELL *v.* CRESSWELL. **60 Cal 601=6 I R. (Cal) 48=144 I C. 827 =37 C W.N. 255=A.I R. 1933 Cal 524 (S B).**

———**Ss. 2 and 3**—*Jurisdiction—Judicial separation—Petition by wife to High Court—Petitioner resident within the local limits of High Court—Maintainability of petition.*

Petitioner (wife) was married to the respondent in Bombay in 1919, after which they lived as husband and wife in Bombay for a time and then went to Nairobi in East Africa where they resided till 1921. After certain comings and goings, the parties went to Nairobi and lived there till October, 1933, when the petitioner left for Bombay, and on May 7, 1934, she presented a petition for judicial separation to the High Court of Bombay.

Held, on the question of jurisdiction, that under S. 2 read with S. 3 of the Divorce Act, the High Court had jurisdiction to entertain the petition and to grant a decree for separation. (*Beaumont, C. J.*) HARTENCIA DE SOUZA *v.* JOHN SEBASTIAN DE SOUZA. **59 Bom 570 =154 I.C. 900=7 R B. 383=37 Bom.L.R. 55=A.I.R. 1935 Bom.121.**

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———**S. 3**—*Construction—"Reside"—Meaning—Temporary residence of Government servant.*

A person who was a resident of Delhi for about six years and was a Government servant liable to transfer and who came only for the purposes of prosecuting a criminal proceeding in Calcutta and put up at his brother's who also was liable to transfer was held not to "reside" within the jurisdiction of the Calcutta High Court. (*Panckridge, J.*) M. M. ROBEY *v.* A. V. ROBEY **I R. 1931 Cal. 368=130 I.C 240=A.I.R. 1931 Cal. 121.**

———**S. 3**—*Construction—Together—Effect.*

The word "together" in the definition only qualifies the words 'last resided" and not the word "reside" **44** Bom. 924, Foll. (*Panckridge, J.*) M M. ROBEY *v.* A. V. ROBEY. **I R. 1931 Cal 368=130 I C. 240= A.I R. 1931 Cal 121.**

———**S. 3 (1)**—*'Last resided"—Husband with no permanent residence—Casual visit to Calcutta—Jurisdiction.*

Petition by the wife for judicial separation. The husband was a railway employee. He had no permanent place of residence. Shortly before the petition, he went to Calcutta and lived with his wife and her parents for five days and then separated.

Held, that the High Court at Calcutta had jurisdiction to entertain the petition for judicial separation. (*Ameer Ali, J.*) RITCHSON *v.* RITCHSON. **152 I.C. 32=7 R C. 250=38 C.W.N. 347=A I R 1934 Cal. 570.**

———**S 3 (1)**—*Residence—Determination of—Intention immaterial.*

Intention has nothing whatever to do with the question of residence. Whether or not a person resides in a particular district is a question of fact and depends in each case upon the evidence. Mere casual or temporary visits do not constitute "residence" within the meaning of the Act. *C*, a Railway employee, had official quarters provided for him by the Railway Company at Gondia in the Central Provinces. He had a bungalow there, and in the same compound an office. *C* had himself furnished the bungalow allotted to him. His position as inspector entailed a good deal of travelling over the Railway line, and in every month he used to be for several days away from Gondia. But when in Gondia he lived at the quarters assigned to him. Shortly before the petition was filed, *C* came to Allahabad for two days and thereafter every month for the same period, and on each occasion he saw his counsel in connexion with his case It was also alleged that he busied himself in trying to discover some portion of land which might be suitable for carrying on farming operations, when he would retire from the Railway and set up business as a farmer and as a breeder of dogs.

Held, that *C* had failed to establish that he was residing in Allahabad and his residence within the meaning of S. 3 (1) was in Gondia (*Young, J.*) CAROL *v.* CAROL **I R 1933 All. 385=144 I C. 136=1933 A L J. 8=1933 Cr C 50=A.I.R. 1933 All. 39.**

———**S. 7**—*Age of consent.*

There is nothing either in the Divorce Act or in the Christian Marriage Act as regards the age of consent for a Christian marriage. Under S. 7, Divorce Act the Indian High Courts have to act according to the principles and rules of English Courts. Therefore in India the age of consent for a Christian marriage will be determined according to the law in England at the time of the marriage. (*Young, J.*) GOODAL *v.* GOODAL. **55 All. 243=6 I.R. (All) 20=144 I.C. 960= 1933 A.L.J. 168=A.I.R. 1933 All. 135 (2).**

DIVORCE ACT (1869), S. 7.

———**S. 7**—*Construction—Reference to English practice—Permissibility.*

Though an Indian Act should not ordinarily be construed in the light of statutes enacted by another legislature, yet S. 7 of the Divorce Act makes it abundantly clear that the legislative authority in enacting the Indian Divorce Act had in view the principles and rules upon which the Court in England then acted and gave relief. It is therefore not irrelevant to enquire into the English practice with a view to the resolution of any question arising under the Act. (*Lord Russell of Killowen.*) ISWARAYYA *v.* SWARNAM ISWARAYYA. **58 I.A 350 = 54 Mad. 774 = I.R. 1931 P.C. 252 = 133 I.C. 716 = 34 L W. 518 = 33 Bom L R. 1402 = 1931 A.L.J. 808 = 35 C W N. 1185 = 8 O.W.N. 980 = A.I R. 1931 P.C. 234 = 61 M.L.J. 367 (P.C.).**

———**S. 7**—*Discretion of Court—How exercised.*

In exercising the discretion with which Courts in India have been entrusted, they should be guided by the principles and rules upon which the Divorce Division of the High Court in England acts and gives relief. The discretion is unfettered, though it should be exercised not capriciously but cautiously and carefully, not only in regard to the parties themselves but also with reference to the interests of public morality and of decent society. (*Page, C.J. and Mya Bu, J.*) SWAINE *v.* SWAINE. **10 Rang. 299 = I.R. 1932 Rang. 191 = 139 I.C. 479 = A.I.R. 1932 Rang. 172.**

———**S. 7**—*Divorce suit—Question of subsistence of prior marriage of one party—Law applicable.*

In considering, in a divorce suit in India, the question whether a previous marriage of one of the parties is or is not still subsisting, the Court must apply the law in India applicable to that marriage at the time when that question arises. (*Blackwell and Broomfield, JJ.*) KHAMBATA *v.* KHAMBATA. **59 Bom. 278 = 154 I.C. 1075 = 7 R.B. 387 = 36 Bom.L.R. 1021 = A.I.R. 1935 Bom. 5.**

———**S. 7**—*Domicile — Change of—Presumption—Burden of proof.*

Domicile is of two kinds: domicile of origin and domicile of choice. The domicile of origin is irrevocably ascertained at the party's nativity. A domicile of choice he can indeed acquire: but the domicile of origin remains in abeyance and is at any moment ready to revive. Every presumption is to be made in favour of the original domicile. It is for the party who relies on a change of domicile to prove a double intention: the intention of abandoning his domicile of origin and the intention of adopting the domicile of choice. A domicile of choice is not established by mere assertion. The petitioner left his native land under orders and not of his own free-will. He came to India in obedience to other authority, and not in the exercise of any choice of his own. Being thus transplanted he did not strike root. The petitioner, moreover, was neither a house-holder, nor any member of any club in India, nor was he permanently employed.

Held, that the petitioner was not domiciled in India. (*Ferrers, J.C.*) HALL *v.* HALL. **I.R. 1933 Sind 132 = 143 I.C. 618 = A I.R. 1933 Sind 70.**

———**S. 7**—*Non publication of banns—English rule—Applicability in India.*

The rule of law in England, that the non-publication of the banns is only a ground of declaring the marriage void if the lack of due publication is within the knowledge of both the parties to the marriage, is no guide to an Indian Court. (*Young, J.*) ALFRED ROBERT JONES *v.* MT. TITLI. **55 All. 185 = 6 I.R. (All.) 11 = 144 I.C. 906 = A.I.R. 1933 All. 122.**

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———**S. 7**—Practice. *See* DIVORCE ACT, S. 45.

———**S. 7**—*Practice and procedure—Parties to comply with rules—Proof of marriage.*

It is almost impossible to administer the law on principles and rules as laid down by the Divorce Court in England if the parties do not conform to the rules of procedure both under the Civil Procedure Code which applies to cases under the Divorce Act and to the principles and rules upon which the Court in England acts. The rules must be complied with. A petition which does not comply with the rules and which does not contain all the particulars ought not to be admitted. In divorce case, the parties must first establish the fact of marriage. The Divorce Court in England does not act upon the evidence of the petitioner only to prove the factum of marriage, but it is necessary to produce a statutory certificate of marriage. But the practice, though universal, is not necessarily a rule of law, and if the circumstances warrant it, the Court may still hold the marriage proved even in the absence of a certificate. (*Wort, J.*) CARROLL *v.* CARROLL. **13 Pat. 129 = 154 I.C 113 = 7 R.P. 409 = 15 Pat L T. 353 = A.I.R. 1934 Pat. 475.**

———**S. 7**—*Principles applicable—Nature of enquiry—Procedure.*

Under S. 7, the provisions of which must be strictly complied with, Courts in India are required to give relief on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial cases in England for the time being acts and gives relief. One of these principles is that a decree for dissolution of marriage cannot be made merely on admission and without recording evidence. Even if the Court is satisfied that the petitioner has established his case by evidence, it is necessary for it to go further and find whether there has been collusion ; and whether the petitioner has been in any manner accessory to or conniving at the adultery or has condoned the same. Having found on these questions, in favour of the petitioner, the Court is not bound to give a decree if it finds that the petitioner has been guilty of adultery or has been guilty of unreasonable delay in presenting the petition or of having wilfully separated himself from the other party before the adultery complained of. A.I.R. 1930 Lah. 771, Rel. on ; 17 Bom. 624, Ref. (*Addison, Johnstone and Abdul Qadir, JJ.*) FATIU *v.* MT. ALLA RAKHI. **I.R. 1931 Lah. 273 = 130 I C. 401 = 31 P.L R. 1008 = A.I R. 1931 Lah. 2 (S B).**

———**S. 7**—*Scope—English law—How far applicable.*

S. 7, Divorce Act, directs the Courts in India to apply the rules and principles of the English Divorce Court only to those cases in respect of which specific provision is not made by the Act itself. (*Courtney-Terrill, C.J., Dhavle and Agarwala, JJ.*) GALLIMORE *v.* ALICE GALLIMORE. **15 Pat. 238 = 160 I.C. 156 = 8 R.P. 341 = 16 Pat.L.T. 823 = A.I R. 1936 Pat. 15 (S.B.).**

———**S. 10**—*Adultery—Delay in applying for divorce—Inference.*

When a charge of adultery is proved, the first thing to which a Court directs its attention is the delay which has occurred since the husband became aware of the fact. Delay is not by itself a bar to the suit but it is a most material matter, which unexplained, would lead the Court to conclusions fatal to the petitioner's relief. (*Ferrers, J.C.*) W.D. *v.* E. D. **26 S.L.R. 423 = 141 I.C. 284 = I.R. 1933 Sind 44 = A.I.R. 1933 Sind 27.**

———**S. 10**—*Adultery—Proof of.*

Where a husband applies for the dissolution of the marriage on ground of adultery of his wife with another,

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it is not necessary to prove the direct fact of adultery because such proof is rarely obtainable. The fact can be inferred from circumstances that lead to it by fair inference as a necessary conclusion. The circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. *Farnham* v. *Farnham*, (1925) 133 L T 320, Dist. (*Young, J.*) GIBBS *v.* GIBBS. **55 All. 597 = I.R. 1933 All. 359 = 143 I.C. 890 = 1933 A.L.J. 1108 = A.I.R. 1933 All. 427.**

———**S. 10**—*Adultery—Proof of.*

Though adultery can be proved by circumstantial evidence and the Court may presume adultery, when it is satisfied that a guilty attachment subsisted between the parties and that opportunity occurred when a guilty intercourse might with ordinary facilities have taken place, unless the circumstantial evidence is sufficiently strong, the inference as to adultery cannot be raised. 61 I.C. 238 and 62 I.C. 782, Ref. (*Shadi Lal, C.J. and Abdul Qadir, J.*) KALLAN *v.* KALLAN. **149 I.C. 911 = 6 R.L. 755 = A I.R. 1933 Lah. 728.**

———**S. 10**—*Adultery—Proof—Inference from circumstances.*

It is a fundamental rule that it is not necessary to prove the direct fact of the adultery. In every case almost, the fact is inferred from circumstances that lead to it by fair inference as a necessary conclusion, and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights. But the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion. (*Pullan, J.*) HEARSEY *v.* HEARSEY. **I. R. 1931 Oudh 325 = 132 I C. 773 = 14 O L.J. 11 = 8 O W.N. 168 = A.I.R. 1931 Oudh 259.**

———**S. 10**—*Adultery—Proof—Inference from conduct.*

It is no doubt extremely difficult, if not impossible, to prove the actual fact of adultery, but no sensible man familiar with the common course of human conduct would ever persuade himself that when a man turns away his wife and lives with another woman in the same room for days and months that their relations could be altogether innocent. Where therefore a woman shares a room with a stranger and her undue familiarity with him leads to the latter's wife being turned out of doors and the woman behaves indifferently towards her own husband, the circumstances throw a sinister right on her relations with the stranger, and any man of common sense would irresistibly come to the conclusion that she was living in adultery with him. (*Grille, J.C., Niyogi and Staples, A J.Cs.*) GOPI *v.* MT. HIRIYA. **31 N.L.R. 184 = 156 I.C 1008 = 8 R N. 10 = A I.R. 1935 Nag. 49 (S.B).**

———**S. 10**—*Adultery—Proof of—Miscarriage long after filing of divorce petition—Evidence of non access—Evidence Act* (1872), *S.* 112.

In a divorce suit filed by the husband on the ground of adultery, the miscarriage took place long after the filing of the petition, and the evidence of non-access was offered by the husband.

Held, that the evidence of the husband of non access was admissible against his wife. (*Young, King and Bennet, JJ.*) GERALD THOMAS COCKMAN *v.* MRS. OLGA MYRTLE COCKMAN. **56 All. 570 = 150 I C. 445 = 1934 A L.J. 1254 = 6 R A. 1099 = 4 A.W.R. 469 = A.I.R. 1934 All. 618 (S.B.).**

———**S 10**—*Adultery and cruelty—Deed of separation—Previous misconduct condoned—Cruelty prior to deed made ground of divorce petition—Sustainability.*

A deed of separation between a husband and wife contained the following clause: "No proceedings shall

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be taken by or an behalf of..... in respect of any misconduct or alleged misconduct previous to the date of these presents and any offence which may have been committed or permitted by either of them against he other is hereby condoned." The wife having filed a petition for dissolution of marriage grounded on allegation of adultery by the husband subsequent to the separation deed coupled with allegation of cruelty charged to have taken place prior to the execution of that deed.

Held, that the clause in the deed operated as an absolute release and not by way of conditional condonation and that cruelty antecedent to the deed could not be relied on. (*Rankin, C.J. and Costello, J.*) MIRIAM ALICE MONK *v.* WILLIAM MONK. **60 Cal. 318 = 6 I. R. (Cal.) 37 = 144 I.C. 804 = 37 C.W.N. 249 = A.I.R. 1933 Cal. 388.**

———**S. 10**—"*Desertion*"—*Meaning of.*

To constitute desertion, there must be a cessation of cohabitation and an intention on the part of the guilty party to desert the other. Where a husband brings a concubine into the house where his wife is living, and the wife has to leave the house in consequence, the husband, under the circumstances is guilty of deserting the wife, so as to constitute a good ground for divorce at her instance. (*Beasley, C.J. and King, J.*) ROI *v.* RASSINGA NAIK. **58 Mad. 684 = 7 R.M. 587 = 155 I.C. 553 = 1935 M W.N. 369 = 41 L.W. 534 = A.I.R. 1935 Mad 541 = 68 M.L.J. 606.**

———**S. 10**—*Dissolution of marriage—Grounds—Marriage with another woman with adultery.*

Bigamy with adultery is specifically defined in the Act as meaning adultery with the same woman with whom the bigamy was committed, but marriage with another woman with adultery is not defined. The definition contained in S 3 (8) merely deals with marriage with another woman which is defined as meaning marriage of any person being married to any other person during the life of the former wife, whether the second marriage shall have taken place within the Dominions of His Majesty or elsewhere. Therefore, if a man after such second marriage cohabits with such woman, the first wife is entitled to apply for dissolution of marriage just as she would have been entitled to apply if the husband would have been guilty of 'bigamy' with adultery. (*Currie, J.*) SAINAPATTI *v.* SAINAPATTI. **I R. 1932 Lah. 214 = 136 I C 262 = 33 P L R. 339 = 1932 Cr.C. 96 = A I R. 1932 Lah 116.**

———**S. 10**—*Domicile of parties—Finding necessary.*

Before granting a decree for divorce under S. 10, a clear finding as to domicile of parties should be arrived at, and where the petitioner has claimed divorce on the ground that her husband committed an unnatural offence upon her, there should be some evidence and a finding as to the unnatural offence alleged. (*Broadway, A C.J., Coldstream and Currie, JJ.*) J. S. *v.* F. J. S. **I R. 1932 Lah. 521 = 138 I C. 611 = 33 P.L.R. 726 = A.I.R. 1932 Lah. 468 (1) (S B.).**

———**S 10**—*Evidence of wife's adultery—Alleged birth of child after separation.*

Adultery requires direct proof either by that of eye-witnesses or irresistible inference and direct proof is required of the identity of persons charged with adultery. Where it is proposed to prove the alleged adultery by calling evidence as to the birth of a child, since the separation of the husband and the wife, the evidence should be directed to the maternity of the mother in relation to the child and the mere statement that a child has been found or seen living in the same house with the wife is not ordinarily sufficient to establish that that child is her child. (*Courtney-Terrell, C.J., Wort and*

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Fazl Ali, JJ.) SIMON LAKRA *v.* MT. SUGAN BAKHLA. **11 Pat. 627 = 140 I C. 561 (1) = I.R. 1933 Pat. 1 = A.I.R. 1932 Pat. 345 (S.B.).**

———**S. 10** - *Grounds of divorce —Fraud in bringing about marriage.*

That the marriage had been induced by some sort of fraud is no ground for divorce under the Indian Divorce Act. (*Courtney-Terrell, C.J., Fazl Ali and Agarwala, JJ.*) EMMANUAL SINGH *v.* KAMAL SARASWATI. **152 I.C 1007 = 7 R.P 301 = 16 Pat. L T. 102 = A.I.R. 1934 Pat. 670 (1) (F B).**

———**S. 10** —*Legal cruelty—Isolated acts of violence not sufficient.*

To constitute legal cruelty, there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. In order to establish cruelty against the husband, the wife must prove more than isolated acts of violence. A I. R. 1928 Oudh 114, Rel. on. (*Shadi Lal, C. J and Abdul Qadir J.*) KALLAN *v.* KALLAN. **149 I.C. 911 = 6 R L 755 A.I R. 1933 Lah. 723.**

———**S. 10**—*Marriage—Dissolution—Proof of adultery and cruelty necessary.*

In order that a wife can have a marriage dissolved, it is necessary that there should be proof of adultery and cruelty on the part of the husband. (*Shadi Lal, C.J. and Abdul Qadir, J.*) KALLAN *v.* KALLAN. **149 I C. 911 = 6 R.L. 755 - A I.R. 1933 Lah 728.**

———**S. 10**—*Petition for dissolution of marriage—What should be averred.*

As divorce affects the status of the parties, it is of importance that the necessary conditions to justify a decree for dissolution of marriage should be complied with. It is specifically laid down that certain facts must be averred and proved before a Court has jurisdiction to pass a decree for dissolution of marriage. Where there was no averment or direct evidence that the parties to the marriage were domiciled in India at the time when the petition was presented,

Held, that the omission would justify the Court in returning the petition (*Page, C.J., Das and Mya Bu JJ.*) MA MAW *v.* MAUNG YAW HAN. **11 Rang 68 = I.R. 1933 Rang 69 (1) 143 I C. 535 (2) - A I.R. 1933 Rang. 93.**

———**S 10**—*Petition by wife—Adultery and cruelty —Communication of venereal disease.*

The fact that a husband has communicated venereal disease to his wife is in law sufficient evidence of adultery It also amounts to legal cruelty (*Young, J.*) HARDLESS *v.* HARDLESS. **55 All 134 = 6 I.R (All) 172 - 145 I C. 845 = 1933 A.L.J. 14 = A I.R. 1933 All 56**

———**S. 10**—*Petition by wife — Cruelty — What amounts to —Evidence as to.*

Though cruelty in its popular sense is undoubtedly a ground for divorce, yet that is not the only kind of cruelty which will be a ground for divorce. There may be a case of cruelty in which either bodily injury has occurred or there may be cases in which the evidence is such as to lead to an inference of a reasonable apprehension that bodily injury would result; and in case of cruelty it is necessary that the evidence of the petitioner should be corroborated. (*Wort, J.*) CARROLL *v.* CARROLL. **13 Pat 129 = 154 I C. 113 - 7 R.P. 409 - 15 Pat L T. 353 = A.I R 1934 Pat. 475.**

———**Ss. 10 and 45**—*Proceedings by wife for divorce —Adulteress—Joinder of.*

In India, in proceedings for divorce instituted by a wife, a Court has no power to allow the alleged adulteress to be made a party and so to cross-examine the

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witnesses for the petitioner, give evidence and call witnesses herself. But in intervention proceedings, the person with whom the petitioner is said to have committed adultery may be called as a witness. (*Otter, J.*) SWAINE *v.* SWAINE. **10 Rang. 115 = I.R. 1932 Rang. 134 - 137 I.C. 426 = A I R. 1932 Rang. 73.**

———**Ss 10 and 16**—*Proof of adultery—Husband with gonorrhea.*

In a suit for dissolution of marriage, it was proved that the husband had contracted gonorrhea and had communicated it to the wife and that the husband was guilty of cruelty.

Held, that the husband was guilty of adultery and that with the charge of cruelty was sufficient for the wife to obtain a decree *nisi* for the dissolution of the marriage. (*Tek Chand and Monroe, JJ.*) PROMISE NAGLE *v.* MERVYN EDWARD NAGLE. **147 I.C. 626 (2) - 6 R L 413 = A.I R 1933 Lah. 507.**

———**S 10**—*Scope—Grounds of divorce—Personal law—Applicability.*

S. 10 of the Divorce Act sets out the grounds on which marriage may be dissolved by the Court. If the legislature had intended that other grounds and other methods of obtaining divorce should be available to the parties, one would expect a proviso saving the operation of the personal law. It cannot be supposed that the legislature, in dealing with marriages according to the Christian conception, left it open for such marriages to be affected by the personal law of one of the parties. A Mahomedan could not legally divorce his wife by talak, if she had remained a Christian, governed by and entitled to the protection of the Indian Divorce Act. (*Obiter.*) (*Blackwell and Broomfield, JJ.*) KHAMBATA *v.* KHAMBATA. **59 Bom 278 = 154 I.C 1075 = 7 R.B. 387 = 36 Bom. L R 1021 = A.I R. 1935 Bom. 5.**

———**S 10**—*Strict proof necessary though suit undefended*

Divorce suits when undefended are peculiarly difficult, because the Court is under the obligation of detecting for itself deficiencies, which there is no interested party to point out. That obligation is however imperative. Decrees for dissolution of marriage are not made without strict proof, and the fact that both parties are equally anxious to be divorced is in itself, a reason why the Judge should be strict as to proof. (*Ferrers, J.C.*) HALL *v.* HALL. **I R. 1933 Sind 132 - 143 I.C. 618 = A.I.R 1933 Sind 70**

———**S. 12**—*Admission of adultery—If can be acted on by Court—Corroboration—Nec vity.*

A confession or admission by one of the parties in a matrimonial suit has to be taken with great caution. It may be accepted as evidence of adultery without corroboration only in the most exceptional cases Usually the Court must demand corroboration of such an admission or confession. But if the Court is satisfied that there is no collusion in the case there is nothing to prevent the Court in law from acting on what in substance is a confession by one of the parties (*Wort, J.*) CARROLL *v.* CARROLL. **13 Pat 129 = 154 I C. 113 = 7 R P. 409 = 15 Pat L T. 353 = A.I R. 1934 Pat. 475.**

———**S. 12**—"*Collusion.*"

Collusion is an illicit secret understanding by which parties who are jointly furthering a common purpose assume the semblance of hostility. 36 Cal. 874, Rel. on. (*Ferrers, J.C.*) HALL *v.* HALL. **I R. 1933 Sind 132 = 143 I C. 618 = A.I.R. 1933 Sind 70.**

———**S. 14**—*Adultery of wife—Husband's conduct reprehensible—Grant of decree nisi*

In dealing with divorce cases, it should ever be remembered that the woman is the weaker vessel, that her

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habits of thought and feminine weakness are different from those of the man and that what may perhaps be excusable in the case of woman would not be excusable in the case of man. Where it is found that the woman has been guilty of adultery and that her adultery has resulted from the husband's conduct towards her, the Court should make allowance in treating her case with leniency. Where there is sufficient evidence to prove cruelty and adultery on the part of the husband, who deserts his wife without making any provision for maintenance of his wife and the wife who was living in her father's house after her desertion by the husband cohabits with a person living as a guest in the father's house, the conduct of the husband in deserting his wife and making no provision for her conduces greatly to the wife's adultery and it is a fit case in which the Court should exercise its discretion by granting to the wife a decree *nisi* under the provisions of S. 14 (*Milne, J.C.*) G. BOURKE *v.* R. V. BOURKE **I.R 1932 Sind 60=136 I.C. 764=A.I.R. 1932 Sind 18.**

——**S. 14**—*Condonation—Subsequent offence—Effect of.*

Condonation is not absolute, but is only conditional and if there is a subsequent matrimonial offence, then the condonation goes and the original offence is revived. (*Grille, J.C., Niyogi and Staples, A.J.Cs.*) GOPI *v.* MT. HIRYA **31 N.L.R 184=156 I.C. 1008=8 R.N. 10=A.I.R. 1935 Nag. 49 (S.B.).**

——**S. 14**—*Condonation—What amounts to.*

Condonation of matrimonial offences means the complete forgiveness of all such offences as are known to, or believed by, the offended spouse so as to restore between the spouses the *status quo ante*. Mere forgiveness is not condonation. Forgiveness is condonation when it results in completely restoring the offending party and is accompanied by cohabitation. (*Grille, J.C., Niyogi and Staples, A.J.Cs.*) GOPI *v.* MT. HIRIYA **31 N.L.R. 184=156 I.C. 1008=8 R.N. 10=A.I.R. 1935 Nag. 49 (S.B.).**

——**S. 14**—*Decree for dissolution of marriage cannot be made without recording evidence.*

Under the provisions of S. 14, Divorce Act, the Court has to be satisfied on evidence that the case of the petitioner has been proved and a decree for dissolution of marriage cannot be made merely on admissions without recording evidence. There should also be evidence of domicile, without which a District Judge cannot proceed to hear the petition for dissolution. A.I.R. 1930 Lah. 771 (S.B.); A.I.R. 1931 Lah. 1 (S.B.), Ref. (*Addison, Abdul Qadir and Monroe, JJ.*) TWISS *v.* TWISS. **I.R. 1933 Lah 313 (1)=143 I.C. 122 (1)=34 P.L.R 448=A.I.R 1933 Lah. 356 (1).**

——**S. 14**—*Decree for dissolution of marriage—Whether can be made on admissions alone.*

In a suit under the Divorce Act, the provisions of the Act must be strictly complied with and particularly a decree for dissolution of marriage cannot be made on admissions alone, without recording evidence. A.I.R. 1930 Lah. 771, Ref., 17 Bom. 624, Foll. (*Addison, Johnstone and Abdul Qadir, JJ.*) BARKAT *v.* MT. HAKAM BIBI. **12 Lah 266=I.R. 1931 Lah. 274-130 I.C. 402-32 P.L.R. 252=A.I.R. 1931 Lah. 1 (S.B.).**

——**S. 14**—*Decree nisi—Discretion of Court—Mode of exercise.*

Before passing a decree *nisi*, what the Court has got to see is not that the petitioner has given *prima facie* proof of his case but that the justice of the case demands that the decree should be pronounced. The facts on which the exercise of the discretionary power is sought

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should be set out in the petition. The Court should also consider that delay in filing the petition is a point against him. (*Courtney Terrell, C.J., Wort and Macpherson, JJ.*) ABBOTSFORD *v.* ABBOTSFORD. **6 I.R. (Pat.) 284=146 I.C. 798=15 Pat L.T. 151=A.I.R. 1934 Pat. 38 (F.B.).**

——**S. 14**—*Delay in presenting petition—Duty of Court to consider.*

Although the provisions of the Indian Limitation Act do not apply to suits or proceedings under the Indian Divorce Act, one of the first things which the Court should look to when a charge of adultery is preferred is whether there has been such delay as to lead to the conclusion that the petitioner has either connived at the adultery or was wholly indifferent to it. Poverty is almost always a sufficient excuse for delay, subject of course to the delay not being inordinate. (*Pereira, J.C., Lobo and O'Sullivan A.J.Cs.*) P. I. HIGHFIELD *v.* D. HIGHFIELD. **29 S.L.R 83-156 I.C. 247=7 R.S. 234-A.I.R. 1935 Sind 112 (F.B.).**

——**S. 14**—*Discretion of Court—Principles governing—Petitioner guilty of adultery—Interference by Court of appeal with discretion of trial Court.*

The Court (in India), for the purpose of determining whether it ought to exercise its discretion in favour of a petitioner who has been guilty of adultery, is bound to follow the general principles and rules laid down by the Court of appeal in *Wickins* v. *Wickins*, (1918) P. 265 and *Holland* v. *Holland*, (1918) P. 273. Though the Court should bear in mind the various matters which other Judges have thought well to take into consideration, it would be neither expedient nor legal for the Court to search among the various authorities for subsidiary tests by which the unfettered judicial discretion entrusted to it is to be limited and controlled. It is the duty of the Judge to exercise his own discretion in the matter and to decide as he deems fit, having regard to the circumstances of the case, whether he ought or ought not to grant the petitioner a divorce, notwithstanding that during the marriage the petitioner had committed adultery. Where the petitioner concealed from the Court the fact that she had committed adultery, in the proceedings for dissolution of marriage and during the intervention proceedings persistently, deliberately and foolishly denied that adultery ever took place and the trial Court had refused to grant dissolution to the petitioner.

Held, the Court of appeal would not interfere with the exercise of his discretion by the trial Judge. *Holland* v. *Holland*, (1918) P. 273, Foll. (*Page, C.J. and Mya Bu, J.*) SWAINE *v.* SWAINE. **10 Rang. 299=I.R 1932 Rang. 191=139 I.C 479=A.I.R. 1932 Rang. 172.**

——**S. 14**—*Dissolution of marriage—Discretion of Court—Considerations.*

In petitions for dissolution of marriage there is nothing in the Divorce Act as regards the exercise of the discretion of the Court, and in this matter the practice in the English Courts must be followed. There is no doubt that the discretion of Court in these matters ought to be used with care. The main consideration is the interest of the community at large. There is one ground however on which the discretion of the Court in invariably exercised and that is where the wilful neglect or misconduct of the respondent husband caused or conduced to his wife's adultery. Further there must be complete candour and disclosure on the part of the petitioner who wishes the Court to exercise its discretion in his or her favour. (*Young, J.*) NUGENT *v.* NUGENT. **57 All. 260=151 I.C. 827=4 A.W.R. 660-7 R.A. 221=A.I.R. 1934 All. 782.**

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———**S. 14**—*Divorce—Discretion of Court—Adultery by petitioner—Delay in seeking remedy—Effect.*

In a petition for divorce by the wife on the ground of her husband's adultery and cruelty, when she makes out her case, but admits herself having been guilty of adultery, the respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which, however, the respondent was himself in as serious degree responsible; and when it is found that it was the conduct of the husband (respondent) in forcing the wife to leave the home that has conduced to the adultery which she confesses, the respondent should not be allowed to take advantage of that.

Held, further, on the facts that a delay of three years was not, under the circumstances, unreasonable and should be condoned by the Court, and that discretion should be exercised in the wife's favour by granting the divorce, notwithstanding the delay and her admitted adultery. (*Wort, J.*) CARROLL *v.* CARROLL, **13 Pat. 129 = 151 I C. 113 = 7 R.P. 409 = 15 Pat.L.T. 353 = A.I.R. 1934 Pat. 475.**

———**S. 14**—*Duty of Court.*

Where proceedings for the dissolution of marriage on the ground of adultery are instituted promptly on the discovery and there is no collusion or connivance between the parties, a decree for the dissolution of the marriage should be pronounced. (*Monroe, J.*) FRUSHER *v.* FRUSHER **6 I R (Lah.) 145 = 145 I.C 974 (2) 34 P.L R. 893 = A I R. 1933 Lah. 255.**

———**S. 14**—*Duty of petitioner—Frankness.*

It is essential, as a matter of practice, in matrimonial cases that if a petitioner wishes the Court to exercise its discretion in his or her favour, he or she should make a frank disclosure of all the circumstances of the case. *Stuart* v. *Stuart*, (1930) P. 77 and *Apted* v. *Apted*, A.I R. (1930) P. 246, Ref. (*Costello, J.*) SMITH *v.* SMITH. **59 Cal. 915 - 141 I.C. 598 = I. R. 1933 Cal. 141 A I.R. 1933 Cal. 12.**

———**S. 14**—*Petitioner guilty of adultery—Discretion of Court - Cruelty of husband due to wife's adultery.*

The Court has a discretion to grant a decree to the wife in spite of her own adultery, having regard to the position and interest of the parties themselves, and of the children of the marriage, and public morality. Where, however, the ill treatment by the husband, as a result of which she had to leave her husband's society, was due to the adultery of the petitioner which the husband found out, *held*, it was not a fit and proper case for granting a decree to the petitioner. (*Costello, J.*) SMITH *v.* SMITH **59 Cal. 915 = 141 I.C. 598 = I.R. 1933 Cal 144 A.I R 1933 Cal. 12.**

———**S. 14**—*Points for consideration.*

In a divorce case, four points require consideration. They are (1) is the petitioner resident in India within the meaning of the Act; (2) has the petition been presented or prosecuted in collusion with either of the respondents? (3) has the petitioner been guilty of any such wilful neglect towards his wife as has conduced to the adultery; and (4) has there been adultery between respondent and co respondent. (*Reuvers, J.C.*) HALL *v.* HALL. **I R. 1933 Sind 132 = 143 I.C. 618 = A I.R. 1933 Sind 70.**

———**S. 14, Proviso**—"*Unreasonable delay*"—*Delay accounted for by honest efforts of dissuasion by petitioner.*

Where delay is accounted for by the honest efforts made by the petitioner to prevail on his spouse to abandon her evil ways, it would not be an unreasonable delay so as to deprive the petitioner of his legal right to secure a divorce. (*Grille, J.C., Niyogi and Staples, A.J.Cs.*) GOPI *v.* MT. HIRIYA. **31 N.L R. 184 = 156 I C. 1008 = 8 R N. 10 = A.I.R. 1935 Nag. 49 (S.B.).**

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———**Ss. 16 and 17**—*Cruelty, adultery and desertion by husband—Subsequent adultery by wife—Petition by wife—Discretion of Court*

Owing to the adultery, cruelty and desertion on the part of the husband, the wife was compelled to leave his house. Subsequently she committed adultery with another man whom she wanted to marry and filed a petition for divorce. The Judge viewed the case leniently and even though she was guilty of adultery granted a decree *nisi*.

Held, that the discretion exercised was proper and that the decree should be made absolute. (*Rupchand, J.C., Mehta and Lobo, A.J.Cs.*) BOUKRE *v* BOUKRE. **27 S.L.R. 322 = 6 I R. (Sind) 50 = 145 I.C. 829 = A. I.R. 1933 Sind 308.**

———**S. 16**—*Decree nisi—Intervener—Notice of intervener's application avoided by parties—Procedure.*

Where, after the passing of a decree *nisi*, a third party intervened alleging collusion and though notices and warrants were issued to the parties service was deliberately avoided.

Held, that the only course open to the Court was to dismiss the application for the dissolution of the marriage, to set aside the decree *nisi*, and direct that a complaint be instituted against the husband under S. 193, Penal Code. (*Jai Lal, J.*) DE SOUZA *v.* ELINO FRANK. **6 I.R. (Lah.) 88 = 145 I C. 253 A. I.R. 1933 Lah. 98.**

———**S 16**—*Intervener—Motive of—Materiality of.*

That the motive of the intervener was not to expose the conduct of the petitioner but only to obtain custody of the child is immaterial; if the charges of guilty conduct on the part of the petitioner are made out, the Court can refuse to make the decree absolute, irrespective of the motive prompting the intervention. (*Otter, J.*) SWAINE *v.* SWAINE. **10 Rang 115 = I.R. 1932 Rang. 134 = 137 I.C. 426 = A.I.R. 1932 Rang. 73.**

———**S. 16**—*Intervener, who may be.*

In India, any person, with the exception of the respondent and the co respondent and any person acting at the instance of either of these persons, may proceed by way of intervention proceedings. The mere fact of the relationship of the intervener to the respondent is not sufficient to disentitle intervention. (*Otter, J.*) SWAINE *v* SWAINE. **10 Rang. 115 = I R. 1932 Rang. 134 = 137 I.C. 426 = A.I.R. 1932 Rang. 73.**

———**Ss. 16 and 17**—*Relative scope and distinction—Jurisdiction of High Court under S. 17—Application by party—If necessary for confirmation of decree.*

The procedure instituted by S. 17 of the Divorce Act is a new procedure which has no parallel in the English law, and is specific in itself, and contains no saving clause of any kind applying any principles existing in any other country. The jurisdiction of the High Court to confirm the decree in a divorce suit, under S. 17 of the Act, arises immediately upon a reference by the District Judge, and to complete the jurisdiction it is not necessary that there should be any personal appearance of the petitioner before the High Court or that there should be a petition at all for the purpose. The fact that a guilty party has also put in a petition for confirmation of the decree, is immaterial to the question of the exercise of the High Court's jurisdiction and will not destroy that jurisdiction. There is a different between Ss. 16 and 17 of the Act, the term "decree *nisi*" is not used in S. 17, whereas it is used in the case of S. 16. (*Courtney*

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Terrell, C.J., Dhavle and Agarwala, JJ.) GALLIMORE *v.* ALICE GALLIMORE. **15 Pat 238=160 I.C. 156= 8 R.P. 341=16 Pat.L.T. 823=A.I.R. 1936 Pat. 15 (S.B).**

———**S. 16**—*Suppression of material facts by petitioner—Rescission of decree* nisi.

It is the duty of every petitioner to place the fact of his or her case most fully before the Court and on intervention a decree *nisi* may be rescinded if there is a failure to deal with the Court with the utmost good faith. (*Otter, J.*) SWAINE *v.* SWAINE **10 Rang. 115= I.R. 1932 Rang. 134=137 I C. 426=A I.R. 1932 Rang. 73.**

———**S. 17**—*Confirmation — Co-respondent must be impleaded before High Court also.*

The decree of the District Court cannot be confirmed by the High Court unless the co respondent who had been impleaded in the District Court is also impleaded in the High Court. (*Addison, Johnstone and Abdul Qadir, JJ.*). BARKAT *v.* MT. HAKAM BIBI. **12 Lah. 266=I.R 1931 Lah 274=130 I C. 402=32 P.L.R. 252=A I.R. 1931 Lah 1 (S B).**

———**S. 17**—*Decree absolute—Only innocent party can move High Court.*

Only the innocent party can move the High Court for a decree absolute under S. 17. The Court will not entertain an application to that effect from the guilty party. *Ousey* v. *Ousey*, 1 P. D. 56, Foll. (*Young, Thom and Bennet, JJ.*) A F. H. PUSHONG *v.* MRS. E O. PUSHONG. **57 All. 226 =150 I.C 543 (1)=7 R. A. 1 (1)=3 A W R. 820=1934 A L J. 1226=A.I.R. 1934 All. 624 (1) (S.B.).**

———**Ss. 17 and 20**—Decree of nullity passed by District Judge—Such decree can be confirmed by High Court before expiration of six months. *See* DIVORCE ACT, SS 20 AND 17. **36 P.L R. 137=A I.R. 1934 Lah 636 (S B.).**

———**S. 17**—*Discretion of High Court — Parties effecting settlement—Petition drawn — Application for confirmation whether can be renewed.*

Under S 17 the High Court has full power to confirm the decree *nisi* and an order not confirming it would amount to an order dismissing the suit. Where the parties mentioned before the High Court that the matter had been settled and the petitioner withdrew his application.

Held, that it was not open to him to renew his application at a later stage because the proceedings had terminated by reason of the withdrawal. (*Addison, Johnstone and Abdul Qadir, JJ.*) MR. A. *v.* MRS. A. **I.R. 1931 Lah. 667=132 I.C. 699=A.I.R. 1931 Lah. 577 (F B).**

———**S. 17**—*Dissolution of marriage—Essentials of—Parties must be Christians and must be domiciled in India at date of petition—Tests of domicile*

In order that the Court may have jurisdiction to grant a decree for dissolution of marriage, the parties must profess the Christian religion, and they must also be domiciled in India at the date of the presentation of the petition. The domicile of the wife is the same as that of the husband, and it is his domicile which has to be considered. The domicile of origin remains until it is changed and a domicile of choice is acquired, and the burden of proving a change of domicile is upon the person who asserts it. Where the domicile of origin of the husband is Indian, the only question is whether there is any evidence that domicile has been changed. But where the domicile of origin is not Indian, then it is necessary to ascertain whether there is any evidence that domicile had been charged in favour of an

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Indian domicile at the date of the presentation of the petition. Domicile depends on two things, the fact of residence and the intention to reside permanently. (*Beaumont, C.J., Broomfield and Barlee, JJ.*) ROOKE *v.* ROOKE. **58 Bom. 502=36 Bom.L.R. 492=150 I. C. 1136=7 R B. 37=A.I.R. 1934 Bom. 230 (S.B.).**

———**S. 17**—*Divorce proceeding—Proof of marriage —Onus.*

In proceedings for divorce taken out by the husband, the onus of proof of the marriage is on the husband and unless such proof of the marriage is forthcoming in strict form, the Court has no jurisdiction to enter into the matter. (*Courtney Terrell, C.J., Wort and Macpherson, JJ.*) ABBOTSFORD *v.* ABBOTSFORD. **6 I R. (Pat.) 284=146 I.C. 798=15 Pat.L T. 151=A.I.R. 1934 Pat. 38 (F.B.).**

———**S. 17**—*Husband living in adultery for long time—Decree* nisi—*Confirmation.*

Where the husband himself had been living for a number of years in a state of adultery with another woman, that fact in itself is a sufficient justification for the High Court not to exercise its discretion in the matter of confirmation of the decree *nisi* passed for dissolution of marriage, specially when the circumstances on which he relies in proof of his wife's misconduct, are highly improbable and fall considerably short of the high standard of proof required under the law. (*Agha Haidar, Mohan and Rangi Lal, JJ.*) MAHOMED ALI KHAN *v.* MT. ASO. **149 I.C 1009=6 R.L. 779 (1)=36 P.L.R. 66 -A.I.R. 1934 Lah. 334 (S.B.).**

———**S. 17**—*Scope—Decree* nisi—*Application for confirmation—Withdrawal—Proceedings whether can be reopened.*

Under S. 17, the High Court has full power to confirm or not to confirm the decree *nisi* and an order not confirming it would amount to an order dismissing the suit. The petitioner sued in the District Court for dissolution of his marriage with his wife. He was granted a decree and he then applied to the High Court for confirmation of the decree. Later on, he applied to the effect that his wife had agreed to come back to him and that he was willing to take her back and he prayed that the case should be consigned to the record room. The order passed was that the parties had settled their differences and the application for confirmation was withdrawn. On a later date, the petitioner applied once again for confirmation of the decree *nisi*.

Held, that though the order on the prior occasion merely stayed further proceedings, the parties meant thereby to have the matter finally disposed of and that the proceedings could not be re opened at the petitioner's instance. (*Johnstone and Abdul Qadir, JJ*) BINGE *v.* BINGE. **13 Lah. 47=33 P.L.R. 300=A.I.R. 1932 Lah. 279.**

———**S. 19**—*Annulment of marriage—Grounds—State of mind falling short of lunacy or idiocy.*

Any state of mind which falls short of lunacy or idiocy cannot be allowed to be a ground for annulment of a marriage. Persons differ from one another in the decree of intelligence possessed by them. It would be a dire calamity if it could be said as a matter of law that a marriage, entered into by a person who is neither a lunatic nor an idiot, is void, simply because one of the parties lacks in intelligence, although he is able to understand the nature of the bonds of matrimony into which he is entering. Want of consent as such does not find place in S. 19 as one of the grounds for declaring a marriage null and void. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v* ALFRED ROBERT JONES. **56 All. 428=1934 A.L J. 1127=153 I.C. 733=7 R.A 583= 3 A.W.R. 70=A.I.R. 1934 All. 273.**

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——**S. 19**—*Application for decree for nullity of marriage—Grounds—Impotence—Proof—Statement of husband—Corroboration.*

Where there is wilful refusal of sexual intercourse due to incapacity arising from nervousness or hysteria or from an invincible repugnance to the act of consummation and thus rendering the consummation impracticable a Court is justified in declaring such a marriage to be null and void on the ground of impotence. In a case of an application by *J* for nullity of his marriage with *K* on the ground of her impotence, *K* in her written statement admitted that the parties were married but that the marriage could not be consummated owing to an uncontrollable repugnance on her part to sexual intercourse with *J*. The only evidence in the case was the sworn testimony of *J* but there was the further fact of *K*'s failure to attend in person and her refusal to submit to medical examination though ordered.

Held, that corroboration was not necessary and that *J* was entitled to a decree absolute for the nullity of the marriage with *K*. 9 Lah. 116 and 16 Bom. 639, Relon. (*Bhide and Tapp, JJ.*) JAMES GRAY WILSON *v.* WILSON. **I.R. 1931 Lah. 316 = 130 I.C. 524 = 32 P.L.R. 159 = A.I.R. 1931 Lah. 245.**

——**S. 19**—*Consent to marriage—Question of fact.*

In a suit for declaration of a marriage null and void on ground of want of free consent among other grounds, the question of consent is one of fact and not of law. Hence an issue and evidence for it is necessary for decision. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428 153 I.C. 733 7 R A. 583 = 1934 A.L.J. 1127 = 3 A W R. 70 = A.I.R. 1934 All. 273.**

——**S. 19**—"*Idiot*"—*Meaning.*

The "idiot" in S. 19 must be read as a word used in its ordinary significance and means a person deficient in mental or intellectual faculty as to be incapable of ordinary acts of reasoning or rational conduct. The petitioner who has a licence to hold a gun for shooting, who goes about shooting, who rides a horse, who sometimes goes about fishing, who can compose a letter for himself and write it in a tolerably good hand, who reads books to pass time, who is invited to tea parties, who knows the nature of the transaction of marriage in which he entered with the opposite party and indeed who arranged for if with the Bishop cannot be called an idiot in the ordinary acceptance of the word.

Per *Sulaiman, C J.*—In order to find that a person is an idiot, it is not sufficient to find that he is a mere imbecile. One cannot be an idiot unless his faculties have not at all been developed and he has not acquired any appreciable intelligence. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428 = 153 I.C. 733 = 7 R A. 583 = 1934 A.L.J. 1127 = 3 A W.R 70 = A.I.R. 1934 All 273.**

——**S. 19 (3)**—*Idiocy—Evidence of—Sufficiency of.*

The Judge has to satisfy himself regarding the idiocy of a person. Doctor's opinion in such matters is not conclusive. It is at the most a guide. The mere fact that the person is feeble-minded and that he has the intelligence of a child of about eight or nine years of age is not sufficient to declare that person an idiot within the meaning of S. 19 (3) which classes lunatics and idiots together. An idiot in law means something more than this. (*Young, J.*) ALFRED ROBERT JONES *v.* MT. TITLI. **55 All. 185 = 6 I R. (All.) 11 = 144 I C. 906 = A I.R. 1933 All. 122.**

——**S. 19 (3)**—*Misrepresentation inducing consent to marry cannot upset marriage—Husband aged 54, feeble-minded—Incapable of giving consent*

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Misrepresentation inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. Such consent cannot be given by a child of nine years of age and consequently a person who, though 54 years old, is found by the Court to be very feeble-minded and to have the mentality of a child of nine years of age is incapable of giving his consent. (*Young, J.*) ALFRED ROBERT JONES *v.* MT. TITLI. **55 All. 185 = 6 I.R. (All.) 11 = 144 I.C. 906 = A.I.R. 1933 All. 122.**

——**S. 19 (3) and (4)**—*Comparison with cases under Ss. 4 and 5 of Christian Marriage Act (XV of 1872).*

The various grounds on which the Court can give a decree of nullity under the Divorce Act refer to cases where there has been a marriage validly performed Questions arise under Ss. 4 and 5, Christian Marriage Act, when the marriage has not been validly performed. There is a clear distinction between a decree of nullity of a valid marriage and a declaration that the marriage itself is illegal and void. There can therefore be no doubt that there is jurisdiction in the High Court to hear and decide questions under the Christian Marriage Act. 47 I C. 544, Rel. on; 13 Beng L.R. 109 and 12 Cal. 706 (F.B.), Ref. (*Young, J.*) ALFRED ROBERT JONES *v.* MT. TITLI. **55 All 185 = 6 I.R. (All.) 11 = 144 I.C. 906 = A I.R. 1933 All. 122.**

——**Ss 20 and 17**—*Decree of nullity of marriage—Confirmation by High Court before expiry of six months.*

Section 20 does not make the proviso to S. 17 applicable to the confirmation by the High Court of a decree of a nullity of marriage made by a District Judge. Such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. Apart from this the scheme of the Act generally shows that it makes a distinction between decrees for dissolution of marriage and decrees annulling a marriage. (*Daltp Singh, Monroe and Bhide, JJ.*) SAMUEL *v.* SAMUEL. **15 Lah 846 = 151 I.C. 471 = 7 R L. 140 = 36 P.L.R. 137 = A I R. 1934 Lah 636 (S.B).**

——**S. 22**—"*Cruelty.*"

To constitute "cruelty" there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. (*Kisch, J.*) A. JULIUS *v.* J. JULIUS. **I R 1932 Oudh 376 = 139 I C. 618 = 9 O. W.N. 447 = A.I.R. 1932 Oudh 231.**

——**S. 22**—"*Cruelty*"—*Imputation of misconduct to wife—If amounts to.*

A false imputation of misconduct made by the husband in the course of an acrimonious correspondence between himself and his wife is not sufficient to make out a case of cruelty justifying a decree for judicial separation, especially when there is no evidence that he made any such imputation against his wife to any third person and it is not even suggested that the wife has suffered any mental injury or injury to health by reason of such imputation. (*Srivastava and Zia-ul Hasan, JJ.*) AVIS KATHERINE NIBLETT *v.* ROBERT HOWARD NIBLETT. **10 Luck. 627 = 7 R.O. 378 = 153 I.C. 751 = 1935 O.W N. 103 = A.I.R. 1935 Oudh 133.**

——**S. 22**—*Decree for judicial separation - Subsequent resumption of cohabitation—Effect of.*

A decree for judicial separation and payment of alimony to the wife is annulled by subsequent resumption of cohabitation by the parties, and the wife cannot claim any rights under the decree even if the husband had executed an agreement that the decree ordering payment should remain in force and that she should have the right to live separate if she had any fresh grievance against him. *Haddon* v. *Haddon*, 18 Q.B.D.

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778 and 2 Rang. 163, Foll. (*Krish, J.*) JULIUS *v.* JULIUS. **9 O W.N. 49=I.R. 1932 Oudh 267--137 I.C. 737=A.I R. 1932 Oudh 142.**

———**S. 22**—*Desertion*—"*Reasonable cause*"—*False imputation of misconduct—It amounts to.*

A false imputation of misconduct made by the husband in a letter written by him to his wife during the period of desertion by her when his feelings were greatly exasperated on account of the attitude adopted by his wife, does not constitute "reasonable cause" for her deserting him, especially when during the period, the husband wrote to her several times asking her to return to him and offering to take her back without any conditions on either side but the wife persisted in her desertion. The husband, in such circumstances, is entitled to a decree for judicial separation, on the ground of desertion by his wife without reasonable cause. (*Srivastava and Zia ul-Hasan, JJ.*) AVIS KATHERINE NIBLETT *v.* ROBERT HOWARD NIBLETT. **10 Luck 627=7 R O. 378—153 I.C. 751=1935 O.W.N. 103=A I.R. 1935 Oudh 133.**

———**S. 22**—*Judicial separation—Ground for—Disagreement.*

The mere fact that the husband and wife cannot agree is not a sufficient ground for a judicial separation. 107 I.C 184, Ref (*Krish, J.*) A JULIUS *v* J. JULIUS. **I.R. 1932 Oudh 376=139 I.C. 618=9 O.W N. 447=A.I.R. 1932 Oudh 231.**

———**S. 23**—Petition by wife—Marriage and residence in Bombay—Subsequent residence outside—Last residence in Bombay—Petitioner also residing in Bombay at the time of presentation of petition—Jurisdiction of High Court *See* DIVORCE ACT, SS. 2 AND 3. **37 Bom L.R. 55=A.I R. 1935 Bom 121.**

———**S 32**—*Alimony—Quantum—Considerations.*

Where the husband is gaining his income by his own personal exertions, the Court as a general rule will not give the wife more than one third of his income as alimony, no matter how gross the misconduct of the husband has been. As a general rule, half of the husband's income is only allotted in those cases where a wife has on marriage brought the husband a considerable sum of money or other property. (*Nanavutty, J.*) J. L. QUIEROS *v.* H. P. QUIEROS **I.R. 1931 Oudh 323=132 I C 771--14 O L.J. 519=8 O.W N. 851=A I.R. 1931 Oudh 365.**

———**S. 34**—*Damages against co-respondent—Basis for determination*

Amount spent over marriage is the tangible basis for determining damages A successful petitioner is entitled to much more irrespective of the capacity of co-respondent to pay. (*Grille, J.C., Niyogi and Staples, A.J.Cs.*) GOPI *v.* MT. HIRIYA. **31 N.L.R. 184--156 I.C. 1008=8 R.N. 10--A I R 1935 Nag 49 (S.B).**

———**S 34**—*Damages — Quantum of—Factors for consideration.*

The matters that have to be considered in assessing the amount of damages, if any, to be awarded to a husband on proof of his wife's adultery with the co-respondent are well established. The object of the damages is in no sense punitive. The means of the co respondent have nothing to do with the question. The only questions that a Court can take into consideration are what loss the petitioner has sustained and whether or not such loss has been cast on the petitioner by the action of the co-respondent. In determining these questions, the Court must take into consideration the conduct of the husband and how far he may by his own conduct have contributed to his wife's wrong-doing. Where the evidence disclosed that the respondent left the petitioner's

DIVORCE ACT (1869), S. 37.

protection even prior to the appearance of the co-respondent on the scene, the loss of the petitioner's employment was in no way connected with the wrong of the co-respondent, in fact the acquaintance between the respondents originated in the sympathy of the co respondent to a helpless woman.

Held, that the petitioner was only entitled to nominal damages. (*Krish, J.*) ARTHUR JOHN MACKINLEY *v.* M.D. MACKINLEY. **7 Luck. 683=I.R. 1932 Oudh 269=137 I.C. 793=9 O.W.N. 362=A.I.R. 1932 Oudh 182**

———**S. 34**—*Decree for damages—When can be made against co respondent—Order regarding costs.*

The object of passing a decree for damages is to give the husband compensation for the loss which he has sustained. In order to determine what loss the petitioner has sustained by his wife's adultery, it is necessary to consider the circumstances of their married life from the beginning. When it appeared that from the very beginning of their life in India, the petitioner had thought time and again of means by which he might rid himself of his wife and it was further found that he had himself committed adultery with the woman and engineered her divorce from her first husband

Held, that this was not a case in which damages could be awarded to the petitioner against the co respondent.

Held, however, that the co respondent might be directed to pay the costs of the petitioner. (*Dalal, J.*) HEARSEY *v.* HEARSEY. **I R 1931 Oudh 325=132 I C 773--11 O L J. 11--8 O.W N. 168=A I.R. 1931 Oudh 259.**

———**S 36**—*Petition by wife dismissed—Appeal—Alimony pending appeal—Jurisdiction of Court to grant*

Where a petition by the wife for the dissolution of her marriage has been dismissed, the appellate Court has power to continue the order of alimony on the presentation of an appeal by her till the disposal of the appeal and till such time as the Court directs, unless the appellate Court considers that the conduct of the wife has been such as to disentitle her to an order of continuance *Butler* v. *Butler*, 62 L.T. 123 and *Jones* v. *Jones*, 26 L. T. 106, (*Jai Lal, J.*) Rel. PROMISE NAGLE *v.* MERVYN EDWARD NAGLE. **I R. 1933 Lah. 1=140 I.C. 503=33 P.L R. 1075=A.I R. 1933 Lah. 5.**

———**S. 37**—*Alimony—Powers of Court—Second or subsequent order for increase.*

Where a decree of judicial separation has been obtained by the wife, and the District Judge has made an order on the husband for payment to the wife of a monthly or weekly sum by way of permanent alimony, the Court has power to make a subsequent order increasing the amount of such alimony, if the circumstances are such as to justify an increase. (*Lord Russell of Killowen.*) ISWARAYYA *v.* SWARNAM ISWARAYYA. **58 I A 350 54 Mad 774=I R. 1931 P.C 252=133 I.C. 716--34 L W. 518 33 Bom L. R. 1402--1931 A.L.J 808--35 C W N. 1185--8 O W N. 980—A I. R. 1931 P.C. 234--61 M L J. 367 (P.C.).**

———**S. 37**—*Alimony — Subsequent misconduct—Effect.*

A wife, who was held to be innocent at the time of divorce, is not disentitled to alimony by her alleged misconduct after the divorce There is no rule that in granting maintenance to a wife who had obtained a divorce, the "*dum sola et casta*" clause should invariably be inserted. *Wood* v. *Wood*, (1891) P. D. 272 and *Lander* v. *Lander*, (1891) L. R P D. 161, Rel. on. (*Wild, J.C.*) LA FRENAIS *v.* LA FRENAIS. **25 S. L R 458=I R 1931 Sind 124=134 I.C. 380=A.I.R. 1931 Sind 112.**

DIVORCE ACT (1869), S. 37.

——**S. 37**—*Judicial separation at husband's instance—Alimony—Power of Court to grant.*

S. 37 gives the Court discretion to give an order for permanent alimony on any decree of judicial separation obtained by the wife, but it does not strictly negative the power of the Court to make similar provision for a wife against whom a decree of judicial separation has been passed at the instance of the husband. A decree of judicial separation does not dissolve the tie of marriage, and while the parties remain husband and wife, it is only fair and equitable that the husband should ordinarily contribute to the support of the wife. (*Srivastava and Zia-ul Hasan, JJ.*) AVIS KATHERINE NIBLETT *v.* ROBERT HOWARD NIBLETT. **10 Luck. 627 = 7 R O 378 = 153 I C. 751 = 1935 O.W.N. 103 = A.I.R 1935 Oudh 133.**

——**S. 42**—*Decree of judicial separation—Order as to custody of children—Considerations.*

It cannot be contended that in cases of judicial separation, the custody of daughters as a rule should be given to the mother in preference to the father. No hard and fast rule can be laid down in this matter. The paramount consideration must always be the welfare of the children. Where the father is held entitled to a decree of judicial separation and he has not been found guilty of any conduct which could disentitle him from the custody of his children and he holds a respectable position in life and is in a better position to give them a decent education and to provide and look to their upbringing and the mother's past conduct shows that if the children are left with her, she is sure to alienate their affections from the father, the Court would exercise a wise discretion in allowing the father who is in law natural guardian of his minor children to have their custody. (*Srivastava and Zia ul-Hasan, JJ.*) AVIS KATHERINE NIBLETT *v.* ROBERT HOWARD NIBLETT. **10 Luck. 627 = 7 R O. 378 = 153 I.C. 751 = 1935 O. W.N. 103 = A.I.R. 1935 Oudh 133.**

——**S. 43**—*Custody of children—Right to—No hard and fast rule—Interests of children, paramount consideration.*

It is no doubt true that *prima facie* the innocent party is entitled to the custody of the children of the marriage. But there is no hard and fast rule on the subject. The matrimonial offence which justified the divorce is not always sufficient to disentitle the mother to the custody of her daughter. The paramount consideration is the interests of the children.

Where the child of tender years has been living with her mother all along, the mother was extremely devoted to her, it would be a great shock for the child to be separated from the mother, the father was practically a stranger to the child, and the child could be better maintained by the mother than by the father.

Held, that the mother was entitled to custody of her daughter in preference to the father, though the former was the 'guilty' party. (*Kisch, J.*) ARTHUR JOHN MACKINLEY *v.* M. D MACKINLEY. **7 Luck 683 = I. R. 1932 Oudh 269 = 137 I.C. 793 = 9 O.W.N. 362 = A. I R. 1932 Oudh 182.**

——**S 45**—*Costs of suit—Unsuccessful appeal—Husband, if need be directed to pay.*

There is no practice which requires the Court to make the husband pay the costs of an unsuccessful appeal by an unsuccessful wife. (*Rankin, C.J. and Costello, J.*) MIRIAM ALICE MONK *v.* WILLIAM MONK. **60 Cal 318 = 6 I.R. (Cal) 37 = 144 I.C. 804 = 37 C.W.N. 249 = A.I.R. 1933 Cal 388.**

——**Ss 45 and 51**—*Evidence by affidavit—Court's power to allow.*

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In proceedings for divorce, the Court has power to allow evidence to be given by the petitioner and her witness by affidavit, by virtue of S. 45 of the Divorce Act, which makes the provisions of the Code of Civil Procedure applicable and also by virtue of S. 51 of the Act. (*Buckland, A.C J.*) IVA STONES *v.* JOSEPH STONES. **38 C.W.N. 969.**

——**Ss. 45 and 10**—Proceedings by wife for divorce—Joinder of adulteress—Court no power to allow. *See* DIVORCE ACT, SS 10 AND 45. **10 Rang. 115 = A.I R. 1932 Rang. 73.**

——**S 45**—*Suit for dissolution of marriage—Procedure—Issues—Issues for damages—Necessity for.*

The Divorce Act provides that the question of damages shall be ascertained by the Court and under S. 45 the procedure subject to the provisions of the Divorce Act is to be regulated by the C. P. Code. It is therefore incumbent on the Court in a suit for dissolution of marriage to frame issues and among those issues there should be an issue for damages. The Court should also state its grounds for assessing the damages at a particular figure. (*Ferrers, J.C., Aston and Mehta, A J Cs*) HAMILTON *v* HAMILTON. **I. R 1933 Sind 153 = 143 I.C. 829 (1) = A.I.R. 1933 Sind 134 (1).**

——**Ss 49 and 45**—*Right to apply—Girl of 19.*

The C. P. Code, by S. 45, Divorce Act, applies to petitions under the Divorce Act; and under the C. P. Code a next friend is not required over the age of 18. Therefore a girl over 19 is not a minor within the meaning of S. 49 and can file a petition under S. 49, Divorce Act. (*Young, J.*) GOODAL *v.* GOODAL. **55 All. 243 = 6 I R. (All.) 20 = 144 I.C. 960 = 1933 A.L.J. 168 = A.I.R. 1933 All. 135 (2).**

——**S. 61**—*Right of husband to prosecute adulterer under S 497, I. P. Code—Section, if bars.*

S. 61 of the Indian Divorce Act does not forbid an injured husband to prosecute and punish the alleged adulterer under S. 497 of the Penal Code, though he is entitled to relief under the Divorce Act. The use of the word "suit" in S. 61 indicates that what the section forbids is a civil suit for damages. (*Srivastava, J.*) W. J. PHILLIPS *v.* EMPEROR. **158 I.C. 6 (2) = 8 R O. 67 = 36 Cr.L J. 1298 = 1935 Cr.C. 1290 = 1935 O.W.N. 1015 = A.I.R. 1935 Oudh 506.**

DOCTRINE OP FACTUM VALET. *See* HINDU LAW—MARRIAGE.

DOMICILE.

See (*i*) CONFLICT OF LAWS—DOMICILE.
(*ii*) DIVORCE ACT, SS. 2 AND 17.
(*iii*) SUCCESSION ACT, SS. 9 AND 10.

DOMINANT AND SERVIENT OWNER.

See (1) EASEMENT.
(2) EASEMENTS ACT.

DONOR AND DONEE.

See (1) HINDU LAW—GIFT.
(2) MAHOMEDAN LAW—GIFT.
(3) T. P. ACT, S. 123, *etc.*

DOWER. *See* MAHOMEDAN LAW.

DRAIN.

See (1) EASEMENT, AND
(2) EASEMENTS ACT.

DRAWER. *See* NEGOTIABLE INSTRUMENTS ACT, SS. 7 AND 76 (5).

DURESS. *See* CONTRACT ACT, S. 16.

DUTY OF COURT.

See (1) CRIMINAL TRIAL.
(2) PRACTICE.

DWAMUSHYAYUNA ADOPTED SON. *See* HINDU LAW—SUCCESSION.

DYING DECLARATION. *See* EVIDENCE ACT, S. 32.

EARNEST MONEY.

See (1) CONTRACT — DEPOSIT AND EARNEST MONEY.
(2) CONTRACT ACT, S. 74.
(3) T. P. ACT, SS. 54 AND 55.

EASEMENT—Acquisition—Joint property—No easement can be acquired. *See* EASEMENTS ACT, S. 15. **56 Bom. 427 = A.I.R. 1932 Bom. 513.**

———*Acquisition—Pleadings.*

Whether the action be brought against the servient owner or stranger, a party cannot safely allege his right to an easement generally but should state specifically the manner in which he claims title to the easement whether by grant (actual or lost), prescription at Common Law or under the Prescription Act. Immemorial user, if relied on, should be specifically pleaded. Where, however, the plaint stated that the plaintiffs and their ancestors have been using the disputed land as a pathway for over 40 or 50 years, the fact that the words "immemorial user" were not used in the plaint is immaterial. (*Mitter, J.*) KUMAR MANMATHA NATH MITTER *v.* RAKHAL CHANDRA MANDAL **142 I.C. 458 = I.R. 1933 Cal. 291 = 56 C.L.J. 274 = A.I.R. 1933 Cal. 215.**

———Acquisition—Presumption of lost grant—Inference from long user. *See* EASEMENTS ACT, S. 15. **60 C.L.J. 321 = A.I.R. 1935 Cal. 253.**

———*Acquisition—Presumption of lost grant—Possession falling short of 20 years.*

The presumption of a lost grant cannot be made in respect of such possession, as cannot be characterised as immemorial, that is exceeding 20 years. Hence it is not open to a person who has proved only 18 years of user to acquire a right of easement, independently of the Easements Act or Limitation Act. 6 Cal. 394 (P.C.), Expl. (Case-law discussed.) (*Niyogi, A.J.C.*) SHEORAM *v.* KISAN. **31 N.L.R. 393 = 158 I.C. 344 = 8 R. N. 77 = 18 N.L.J. 261 = A.I.R. 1935 Nag. 205.**

———*Acquisition—Proof of animus—Presumption.*

In a case of disputed easement the question of animus in each case is one of fact. Where the owner of one property exercises certain rights of enjoyment over the property of another for the beneficial enjoyment of the former, he must be presumed to possess an animus which is manifestly to his advantage. (*Sen and Niamatullah, JJ.*) DWARKA *v.* RAM JATAN. **53 All. 16 = I.R. 1931 All. 83 = 128 I.C. 755 = 1930 A.L.J. 1537 = A.I.R. 1930 All. 877.**

———*Burden of proof—Right to cut trees on land of another—Claim by person who is neither tenant nor licensee—Custom.*

Plaintiff was the owner of a piece of land on which certain bamboo clumps stood. He sued the defendant for the price of certain bamboos cut by the defendant, alleging that there was an agreement under which the defendant would pay the price of timber cut (*i.e.*, bamboos cut by the defendant). The defendant was not a tenant of the plaintiff, nor was there any relationship between the parties. The defendant also disclaimed to be a licensee. His case was that there was a custom by which he claimed exclusive right in the timber; and he further denied having cut any timber during the plaint period. The lower Court, while disbelieving the case set up by the plaintiff, found that the defendant had been in adverse possession for over twenty years, dismissed the suit as barred by limitation, relying on an

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entry in the record of rights, describing the tenant as being in possession, twenty years ago or more.

Held, in second appeal, (1) that the failure of the plaintiff to establish the contract set up by him was not fatal, as the case set up was not inconsistent with his right to the trees as the owner of the land; (2) that there could not be any custom strictly so called to appropriate the trees unless the defendant were a tenant; and if there had been established anything in the nature of a custom, the right thereunder would amount to what in England was known as a *profit a prendre* and therefore an "easement" under S. 2 of the Limitation Act; and (3) that the onus of establishing the existence of an easement, and therefore a right to the trees, was on the defendant and that not having been discharged, plaintiff's claim should be allowed. (*Wort, J.*) JANGBAHADUR SINGH *v.* THITHAR SINGH. **155 I.C. 966 = 7 R.P. 653 = 16 P.L.T. 192 = A.I.R. 1935 Pat. 188.**

———*Customary rights—Immemorial user—Duty of Court to protect.*

When it is found that the inhabitants of a village have certain legal rights arising out of immemorial user of certain land as a village *go pat*, which they have never surrendered, the Courts are bound to defend and enforce such rights. (*Patterson, J.*) ALTABUDDIN KHA *v.* JOHAR ALI KAZI. **155 I.C. 75 = 7 R.C. 557 = 60 C.L.J. 213 = A.I.R. 1935 Cal. 201.**

———*Eaves—Over hanging eaves—Projection or pankh existing for 20 years—Removal—Actionability.*

If a projection or a pankh overhanging a neighbour's property be an integral part of the building to which it is attached so that its removal will injure the building, a title is obtained by adverse possession of 12 years to the column of air below it; in other words, the owner of the land over which it projects is not entitled to remove it. If, on the other hand, the projection is not an integral part of the building, but is a projection of the nature of eaves, intended for the preservation or safety of the building, then the person who has made it can obtain an easement only. (*Barlee, J.*) DAHYABHAI *v.* HIRALAL. **160 I.C. 62 = 8 R.B. 241 = 37 Bom.L.R. 939 = A.I.R. 1936 Bom. 3.**

———Extinction. *See* EASEMENTS ACT (1882), SS. 45 AND 47.

———Implied easement—Transfer of part of tenement by owner—Right to take night soil buckets through path at back. *See* EASEMENTS ACT, S. 13. **13 Rang. 748.**

———*Light and air—Enjoyment for 20 years in spite of erection of building—Acquisition of easement.*

Per *Rankin, C. J.*—It is in India quite a common thing for a room to have walls only and to be entirely open on one side. In such a case if light and air is enjoyed as of right for 20 years from adjoining premises, easement would arise. If the adjoining owner before the expiry of 20 years built a wall a foot away from the opening he would be entirely within his right and if the wall so built obstructed some of the light going into the room but by reason of an aperture in the wall admitted a quantity of light, the 20 years' enjoyment would give rise to an easement. (*Rankin, C.J. and Pearson, J.*) JOTINDRA MOHAN MITTER *v.* PROBODH KUMAR DUTT. **59 Cal. 260 = 138 I.C. 193 = I.R. 1932 Cal. 434 = 35 C.W.N. 963 = A.I.R. 1932 Cal. 249.**

———*Light and air—Obstruction—Right to sue.*

The law takes no notice of an obstruction which has its origin in the caprice or sentiment of the aggrieved party. It does not also concern itself with an obstruction which is trivial or immaterial. In order to amount

to a disturbance, the act complained of must have caused substantial damage; and the condition of substantial damage is satisfied by any obstruction which materially affects the comfortable or beneficial enjoyment of the dominant tenement or lessens its selling or letting value. (*Guha, J.*) GANGA CHARAN DHAR *v.* SATKARI LAL DEY. **I.R. 1931 Cal. 662 -133 I.C. 214 = 53 C.L.J. 604 = A.I.R. 1932 Cal. 113.**

———*Party wall—Joint owners—Hole made and light used for 20 years—Acquisition of easement.*

Where one of the joint owners of a party wall had made a hole therein and enjoyed light through the hole for more than 20 years.

Held, that he had acquired an easement and the other owner could not close the hole. (*Ja Lal, J.*) MAHOMED UMAR HAYAT KHAN *v.* MAHOMED ZAMAN. **142 I.C. 764 -I.R 1933 Lah. 266 = 33 P. L.R. 930 = A.I.R 1933 Lah. 28.**

———*Party wall—Raising height—Right of co-owners.*

Where a co-owner raises the height of a party wall with the consent or acquiescence of the other owner, the wall so raised is also joint unless the other co-owner has consented to the exclusive user of wall by the party raising it. 112 I.C. 520, Ref. to. (*Johnstone, J.*) JALAL DIN *v.* MEHRAJ DIN. **135 I.C 192 (1) = I.R. 1932 Lah. 64 (1) = 32 P.L.R 755 = A.I.R. 1932 Lah. 48 (1).**

———*Privacy—Acquisition of right.*

The law does not recognize the right of privacy unless it depends upon prescription, grant or local usage. 5 C.W.N. 147, Foll (*Rowland Sroope, JJ.*) KESHO SAHU *v.* MT. MUKTA KIMAN. **10 Pat 280 -I.R 1931 Pat. 323 (2) -133 I.C. 163 (2) - 12 Pat L.T 714 = A.I.R. 1931 Pat. 212.**

———*Profit a prendre*—Right to bamboos growing on another's land—Nature of right. *See* LIMITATION ACT, S. 2 (5). **16 P L T. 192 A.I.R. 1935 Pat 188.**

———*Proof—Circumstantial evidence—Long continued user—Presumption of lawful origin—Right in irrigation channel.*

A right of easement may well depend not on the terms of the grant but upon the circumstances under which it was made: The appellants claimed the right to take water necessary for the cultivation of a second crop on their lands from an irrigation channel belonging to the respondent and for that purpose to construct whenever necessary a *chappakattu* or temporary groyne. It was admitted that the second crops had been regularly grown for a long time, it was also shown that the channel in question was the only source of supply during the second crop season, and that this supply could have been utilised only by the erection of a *chappakattu*.

Held, that long continued user should be ascribed to a lawful origin, having regard to the probabilities and circumstances of the case The evidence of user was sufficient to raise the necessary presumption of an arrangement in favour of the appellants. (*Sir George Lowndes.*) VENKANNA *v.* SWETACHALAPATI RAMAKRISHA RANGA RAO BAHADUR. **58 I A 195 = 54 Mad. 427 -I.R. 1931 P.C. 120 -53 C.L.J. 499 -1931 M.W.N. 817 -33 Bom.L.R 929 -35 C.W.N 605 -131 I.C 312 -33 L W 716 -A.I.R 1931 P.C. 128 = 61 M.L.J. 1 (P C).**

———*Proof—Ineffectual opposition.*

Ineffectual opposition to the exercise of what is claimed to be a right (of easement) is evidence rather in support of the right than of its non-existence. (*Sir George Lowndes.*) VENKANNA *v.* SWETACHALAPATI RAMAKRISHNA RANGA RAO BAHADUR. **58 I.A. 195 = 54 Mad. 427 -I.R. 1931 P.C. 120 = 131 I.C. 312 =**

53 C.L.J. 499 = 1931 M.W.N. 817 = 33 Bom.L.R 929 = 35 C.W.N. 605 = 131 I.C. 312 = 33 L.W. 716 = A. I.R 1931 P.C. 128 = 61 M.L.J. 1 (P C.).

———*Right of burial—Acquisition by prescription.*

The right to bury or cremate the dead on land belonging to other persons cannot be acquired by prescription. (*Shadi Lal, C. J. and Monroe, J.*) KIRPA SINGH *v.* NABI BAKHSH. **I.R. 1932 Lah. 464 = 138 I.C. 325 = 33 P.L.R. 157 = A.I.R. 1932 Lah. 256.**

———*Right to cremate dead bodies—Acquisition by prescription.*

The right to cremate dead bodies cannot be acquired as an easement by prescription. But such a right can be acquired by dedication or by prescription, as a mode of acquisition or extinction of substantive or primary rights by a certain lapse of time, which mode has sometime been described as acquisitive prescription. (*Guha and Bartley, JJ.*) JOGESH CHANDRA ROY *v.* NIRANJAN DE. **159 I C. 383 = 8 R.C. 305 = 60 C.L J. 566 = 39 C.W.N. 387 = A.I.R. 1935 Cal 357.**

———Right to cut trees on land of another—Claim by person who is neither tenant nor licensee—Custom. *See* BURDEN OF PROOF—*Supra*. **A I R 1935 Pat. 188.**

———*Right to sit on the roof—Casual use of roof by members of fluctuating congregation—Right of easement.*

The mere fact that people attending some religious meetings in the plaintiff's house had been occasionally sitting outside on the open roof of the defendant's shop would not give a right of easement. That was a casual use which the members of a fluctuating congregation had been making from time to time of the defendant's roof and it cannot give the plaintiff any right of easement. (*Agha Haidar, J.*) HARNAM SINGH *v.* KISHAN SINGH. **157 I C. 1018 = 8 R.L. 169 = 37 P.L.R. 260 = A.I.R. 1935 Lah. 558.**

———*Right to support—Remedies of dominant owner—Damages—Right to—Cause of action*

If a plaintiff proves that owing to an attempted withdrawal of support, there is danger or apprehension of injury, he may under certain circumstances be entitled to an injunction. But if he claims damages, he must show that the right of support has been infringed; and that infringement takes place only as soon as and not until damage is sustained in consequence of the withdrawal of support. A relation as between cause and effect must be established before a decree for damages may be made (*Mukerji and S.K. Ghose, JJ.*) PRASANNA DEB RAIKAT *v.* THE DARJEELING HIMALAYAN RAILWAY COMPANY, LTD. **160 I.C 904 = 8 R C. 458 61 C.L.J. 503 = A.I.R. 1936 Cal. 37.**

———Right to support—Suit for injunction—Actual damage not necessary. *See* EASEMENTS ACT, S. 7, ILL. (*e*). **59 Cal. 363 = A.I.R. 1932 Cal. 542.**

———Right of way—Acquisition by prescription—Conditions—Enjoyment not capable of interruption—If confers right. *See* EASEMENTS ACT, S. 15. **60 C L.J. 412 = A I.R. 1935 Cal. 282.**

———*Right of way—Boatway in* khal *leading from public channel—Right of public—Interference—Evidence necessary.*

A long *khal* which begins from a public channel and extends for miles cannot as a matter of law be regarded to be a private boatway simply because it is not proved that the other terminus is at a public place. To so hold would lead to serious consequences The fact that one terminus is on a private land is only a circumstance which has to be considered along with the other evidence in the case. When there is other evidence, namely, entry in the record-of-rights as a part of a public highway, user by public for a long time, falsity

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of the case as to levy of tolls a prior judgment in favour of the public and against the same defendant upholding the existence of a public highway, the terminus of the *khal* on one side in a public highway (a river), and the length of the *khal* which is a long one passing over and beyond the defendant's land to a length of at least three or four miles, a Court is justified on such evidence in inferring a dedication, which is an inference of fact. (*R.C. Mitter, J.*) SAMARENDRA NATH SAHA ROY *v.* HARENDRA KUMAR SAHA. **157 I.C. 224 = 8 R.C. 87 = 39 C.W.N. 303 = 60 C.L.J. 556 = A.I.R. 1935 Cal 413.**

———*Right of way—Claim of the public—Passage leading from public place terminating on private land.*

The fact that a passage leading from a public place is not proved to terminate also at a public place is no reason for holding that it is not a public passage. Where it does not stop at the land of a private owner but proceeds further to a great distance, that is an important factor in support of the claim of the public, especially when it is not shown that it has terminated in private grounds. (*R.C. Mitter, J.*) SAMARENDRA NATH SAHA ROY *v.* HARENDRA KUMAR SAHA. **157 I.C. 224 – 8 R.C. 87 – 39 C.W.N. 303 = 60 C.L.J. 556 = A.I.R. 1935 Cal. 413.**

———*Right of way—Grant in general terms—Construction of—Right of passage for privy cleaner, if included.*

Where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purpose for which the access would be required at the time of the grant. Where by an award the defendants were given a general right of way to their house (without any restriction) over a court-yard belonging to the plaintiffs and subsequently they built a new privy in their house, the right of way granted to them includes a right of passage for scavengers to cleanse the new privy in the house of the defendants, and the general right of way cannot be fettered by implied restrictions. (*Patkar and Murphy, JJ.*) MANEKLAL *v.* MANEKLAL. **57 Bom 186 - 141 I.C. 686 - I.R. 1933 Bom. 120 = 34 Bom L.R. 1150 = A.I.R. 1932 Bom. 574.**

———*Right of way—Implied grant—Immemorial user of land as road—Extent and duration of grant—Inference.*

In the case of a claim to a right of way over land based on an implied grant inferred from immemorial user, in the absence of evidence to show that the dedication by the owner was of his entire proprietary interest in the land, or to show the extent of the grant, the grant or dedication must be taken to be only of the user of the lands for the purpose of the road and that the said grant or dedication would remain in force only so long as the land continues to be used as public roads. (*Nasim, Ali, J.*) BIR BIKRAM KISHORE MANIKYA *v.* CHAIRMAN, MUNICIPALITY, COMMILLA. **62 Cal. 692 = 163 I.C. 109 - 8 R.C. 693 = 39 C.W.N. 590 - 61 C.L.J. 182.**

———*Right of way—Presumption of dedication—Lands of private owner—Evidence necessary for inferring dedication—Long user—Effect of.*

When a public right of way is claimed over lands belonging to a private owner, it is not legitimate to presume from long user an intention to dedicate the lands for public use and then to examine the evidence adduced on behalf of the private owner to see if the presumption has been rebutted by him. The evidence must be examined as a whole and then the inference

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either in favour of or against the dedication must be drawn. It is wrong to deal with the evidence in compartments. (*R.C. Mitter, J.*) SAMARENDRA NATH SAHA ROY *v.* HARENDRA KUMAR SAHA. **157 I.C. 224 = 8 R.C. 87 = 39 C.W.N. 303 = 60 C.L.J. 556 = A.I.R. 1935 Cal. 413.**

———*Right of way—Severance of tenements—Grant of right of way—When implied.*

Where two tenements are severed, the grantee takes by an implied grant all quasi easements of an apparent and continuous nature. A right of way is not generally classed as a quasi easement of an apparent and continuous character. It is only when there is a formed road that the quasi-easement can be classed as one of an apparent and continuous nature. When there is no formed or defined roadway over the quasi-servient tenement at the time of the severance, there is no scope for the application of the doctrine of implied grant. (*Henderson and R.C. Mitter, JJ.*) DAKSHINA RANJAN CHOWDHURY *v.* SURENDRA LAL DAS GUPTA. **163 I.C. 56 = 8 R.C. 681 - 39 C.W.N. 1202 = A.I.R. 1936 Cal. 310.**

———*Water rights—Artificial channel—Right of riparian owners—Basis of.*

A riparian owner cannot claim an absolute right to use the water in an artificial channel just in the same way as he can claim with respect to a natural stream. The right must rest on prescription or grant from, or contract with, the owner of the land from which the water is artificially brought. (*Madhavan Nair, J.*) GHULAM MOHIDEEN KHAN SAHIB *v.* SECRETARY OF STATE. **157 I.C. 734 = 8 R.M. 159 = 1935 M.W.N. 665 = 41 L.W. 756 = A.I.R. 1935 Mad. 700.**

———Water rights—Right to take water from irrigation channel—Right to construct chappakkatu or temporary groyne—Acquisition by prescription. *See* EASEMENTS ACT, S. 7. **58 I.A. 195 = 54 Mad. 427 - 33 L.W. 716 = 61 M.L.J. 1 (P.C.).**

———*Water rights—Right to use water of tank—Extent of—Excavation of tank and increase of depth—Right if enlarged.*

A right to use the water of tank of a particular depth is not enlarged in consequence of excavation and increase in the depth of the tank made by the servient owner. When the original user was based upon a certain depth of water in the tank, and the depth is increased in consequence of the re excavation of it, the dominant owner should not be entitled to take water from the tank, so as to increase the burden on the subservient tenement. (*Jack and Nag, JJ.*) SHEIK FAKIR *v.* MOSLEM MANDAL. **155 I.C. 719 = 7 R.C. 614 = 60 C.L.J. 321 = A.I.R. 1935 Cal. 253**

EASEMENTS ACT (V OF 1882)—*If retrospective.*

The Act is not retrospective in its effect and its provisions were extended to United Provinces of Agra and Oudh by Act VIII of 1891. Neither the Indian Easements Act of 1882 nor the Amending Act VIII of 1891 can affect the rights which were acquired before 1891. (*Kendall and Kachhpal Singh, JJ.*) RAM BHAROSE *v.* BISHNATH PRASAD. **153 I.C. 692 7 R.A. 572 = 1934 A.L.J. 728 = 18 R.D. 353 = 4 A.W.R. 1198 = A.I.R. 1934 All. 336.**

———*Applicability in Bihar.*

The Easements Act does not apply to the province of Bihar; but the law relating to easements, which is the law of justice, equity and good conscience, is applicable, excepting in so far as there is any statute. (*Wort, J.*) JANGBAHADUR SINGH *v.* THITHAR SINGH. **155 I.C. 966 = 7 R.P. 653 = 16 Pat L.T. 192 = A.I.R. 1935 Pat. 188.**

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———*Applicability in Burma.*

Although the Easements Act does not apply to Burma, the Courts would have regard to the Act in considering questions of easements arising for consideration. (*Page, C.J. and Ba U, J.*) DAW GYAN *v.* U MAUNG MAUNG. **13 Rang.** 748 = **160 I.C. 796 = 8 R.R. 431 = A.I.R. 1936 Rang. 58.**

———*Construction—Bengal decisions—Value of.*

The Easements Act is not in force in Bengal and questions relating to licence arising in that province have to be decided with reference to the English law. So Bengal decisions cannot be relied upon as authorities in places, where the provisions of the Easements Act are applicable. (*Bisheshwar Nath and Smith, JJ.*) SHYAM LAL *v.* MUNNE. **8 Luck. 278 = I.R. 1933 Oudh 29 = 140 I.C. 889 = 9 O.W.N. 986 = A.I.R. 1933 Oudh 69.**

———**S. 2 (b)**—*Customary right.*

A custom in order to be valid must be ancient, invariable, reasonable and certain, whereas an easement need not be reasonable. (*Pollock, A. J. C.*) GANPAT *v* NARAYAN. **29 N.L.R. 85 = I.R. 1933 Nag. 97 = 142 I.C. 153 A.I.R. 1933 Nag. 74.**

———**Ss. 2 (b) and 15**—*Customary easement and customary right—Distinction between—Right of passage by villagers through another field to Government forest.*

A customary easement remains an easement and can exist only for the beneficial enjoyment of other land. It is merely appurtenant to the dominant heritage and cannot exist in gross. A right over property that exists in gross and not for the beneficial enjoyment of other property is not an easement, though it may be a customary right. Such rights exist independently of the Easements Act and are expressly excluded from its operation by S. 2 (*b*). Merely because the villagers have a right to graze in the *C* class forest land, they cannot be said to be occupiers of it, nor the claim to go through a particular field in order to reach the *C* class forest is a claim for the beneficial enjoyment of their houses in the abadi. A right of passage by the villagers through a particular field for going to the Government forest with their cattle is not an easement but a customary right. (*Pollock, A.J C.*) GANPAT *v.* NARAYAN. **29 N L.R. 85 = I.R. 1933 Nag. 97 = 142 I.C. 153 - A.I.R. 1933 Nag. 74.**

———**S. 2 (b)**—*Right of fishery in gross—Custom to support—Validity of.*

A claim to profits a *prendre* over the soil of another such as a right to fish without stint and for commercial purposes, which might lead to the destruction of the subject matter is a claim of right unknown to law and a custom, which may be alleged to support it, is bad and unreasonable. Though this principle is not, perhaps, applicable to the case of a right in gross (fishery) vested in the inhabitants of a particular village, the fact that the fish is to be taken for commercial purposes and the fact that under the custom alleged, any of the persons has the right to bring in as many others as he chooses on payment of a nominal fee are factors which stamp the custom with considerable uncertainty as regards the persons entitled to exercise the right and unreasonableness that stand in the way of its being pleaded as having created a right. Further, though the payment of a reasonable fee is not real objection to the validity of a custom if one such existed, the fact that the fee was paid per head of persons fishing was antagonistic to the idea of a customary right which must be a right enjoyable without leave and licence. (*Mukerji and Bartley, JJ.*) BRAJENDRA KISHORE ROY CHOWDHURY *v.* BAMA CHARAN KAIVARTA. **146 I C. 427 = 6 I.R. (Cal.) 223 = 37 C.W.N. 18 = A.I.R. 1933 Cal. 539.**

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———**Ss. 2 (b) and 60**—*Use of building as a mosque with consent of Zamindar—If a mere licence—Presumption of dedication from long user—Right to convert a* katcha *into a* pucca *building.*

Per *Bennet, J.*—The provisions of the Easements Act or of any part of Chap. VI in regard to licence do not apply where a Zamindar allows the Muhammadan population to use a building as a mosque. It is one of those cases which is excepted by S. 2. A finding that a mosque exists necessarily implies that there is no longer any question of easement or of licence. Under the Mahomedan Law the mosque is the property of God and not the property of the Zamindar. There is no need for a transfer such as is necessary for transfer of property and the consent of a Zamindar to the use of a building as a mosque is sufficient.

Per *Sulaiman, C.J.*—A right of worship may be acquired as a customary right which can be availed of by a large body of persons by virtue of such custom. It may also be claimed as a part of public right, which, of course, would be a right vested in an entire community. Under S. 2 of the Easements Act, these two classes of rights would be saved from the provisions of that Act. Where the Courts finds that a mosque or a temple has stood for a long time and worship has been performed in it by the public, it is open to the Court to infer that the building does not stand there merely by the leave or licence of the owner of the site, but that the land itself is a dedicated property and the site is a consecrated land, and is no longer the private property of the original owner. There is nothing legally objectionable in non-Muslim owners making a grant of a land to Muslims and in that way to enable them to build a mosque on such land. If the finding merely were that there is a right to perform worship on a piece of ground, there would, of course, be no right to to put up a *pucca* building on that land for such a purpose. But if the finding is that there is already a mosque or a temple on the land, though the structure is *katcha* the necessary inference would be that the site has become a consecrated and dedicated property ; and then there can be no objection to the building being converted into a *pucca* building. It is no longer the case of a mere licence which cannot be exceeded beyond the terms on which it was granted. (*Sulaiman, C.J and Bennet, J.*) MIRU *v.* RAM GOPAL. **58 All. 121 = 8 R.A. 59 = 1935 A.W.R. 1047 = 156 I. C. 942 = 1935 A.L.J. 1269 = A.I.R. 1935 All. 891.**

———**Ss. 4 and 15**—*Acquisition—User as "occupier" and as "owner"—If can be tacked on.*

S. 4 of the Easements Act shows that not merely the "owner" but even an "occupier" may acquire an easement and there is no *prima facie* reason why the enjoyment of a person as an "occupier" should not be tacked on under S. 15 to his enjoyment as "owner", if there is no interruption in his user. (*Varadachariar, J.*) CHINNASAMI GOUNDAN *v.* BALASUNDARA MUDALIAR. **40 L.W. 514 = 152 I.C. 216 = 7 R.M. 200 = 1934 M. W.N. 1042 = A.I.R. 1934 Mad. 575 = 67 M.L.J. 262.**

———**S. 4**—*Concession granted to villagers to enjoy—shamilat—Licence or easement.*

Easement necessarily connotes the existence of a dominant tenement and a servient tenement. Hence a concession given to villagers personally to enjoy the shamilat of another village is not a right of easement but a licence. (*Almond, J.C. and Mir Ahmad, A.J.C.*) SAYED GALUN SHAH *v.* NAWAB ALI. **152 I.C. 141 = 7 R.Pesh. 44 = A.I.R. 1934 Pesh. 96.**

———**S. 4**—*Easement preventing servient owner from ordinary use of land—If can be claimed.*

There is no easement known to law which gives exclusive and unrestricted use of a piece of land. Hence there

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can be no easement which would prevent the owner of the servient tenement from making ordinary use of his land, and is the easement demanded would entirely oust the owner of a holding, such an easement cannot be claimed. (*Dunkley, J.*) DAW TINT *v.* MAUNG KYWE. **154 I.C. 468=7 R.R. 305=A.I.R. 1935 Rang. 56.**

———**S. 4**—*Easement—Right of* "lagan" *attached to ghat.*

The right of "*lagan*" attached to the ownership of the front part of the "ghat" to use the back part under certain conditions is a right of easement and is enforceable against a purchaser, even if he had no notice of the right claimed. (*Dalal, J.*) BRIJ MOHAN DAS *v.* BHIKHUJI. **I.R 1931 All. 205=129 I.C. 717—1931 A.L.J. 267=A.I.R. 1931 All 207.**

———**S. 4**—Fishery—Customary right to—Right claimed on behalf of indefinite body—Unreasonable nature—Profit *a prendre* cannot be acquired by custom. *See* FISHERY. **61 Cal. 45=A.I.R. 1934 Cal. 461.**

———**S. 4**—*Infringement right of privacy—Occupier of house—If can maintain suit.*

Where a customary right of privacy is infringed, an occupier of a house has a right to maintain a suit under S. 4 of the Easements Act, even though he is not the owner. (*Su'aiman, C. J. and Bennet, J.*) NIHAL CHAND *v.* MT. BHAGWAN DEI. **159 I.C. 683=8 R.A. 495=1935 A.L.J. 1131=1935 A W R. 1109=A.I.R. 1935 All. 1002.**

———**S. 4**—*No easement—Exclusion of owner from land.*

The right which involves the total exclusion of the owner of the soil from its enjoyment, such exclusion not being physically necessary for user by person claiming it, cannot be claimed as an easement. (*Wild, J.C and Milne, A.J.C.*) JAMIATRAI MANJIMAL *v.* GOUMAL. **25 S.L.R. 257=I.R. 1931 Sind 34=130 I C. 546=A.I.R. 1931 Sind 1.**

———**S. 4**—*No easement—Right to water—Claim of ryotwari landholders against Government.*

The ordinary right of ryotwari landholders against Government to water sufficient to irrigate their fields is not an easement within the meaning of S. 4. It is an incident of ryotwari tenure, whether it be regarded as having a contractual or proprietary origin. (*Wallace and Krishnan Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793=I.R. 1931 Mad. 747=133 I.C. 507=33 L.W. 681=A.I.R. 1931 Mad. 284=61 M.L.J. 563.**

———**S. 4**—*Profit* a prendre—*Proof of.*

A right *in gross* or profit *a prendre* may be established by the same sort of evidence as is used to establish either a profit *a prendre* appurtenant or an easement in the ordinary sense of the word. 5 Cal. 945; 19 Cal. 544 and 14 C. L J. 572, Ref. (*Guha and Bartley, JJ.*) ARJUN KAIBARTA *v.* MANORANJAN DE BHOUMIK. **61 Cal. 45=151 I.C. 813=7 R.C. 175 (2)=A.I R. 1934 Cal. 461.**

———**Ss. 5 and 13**—*Continuous easement—Right to drain sewage.*

The right to drain latrine sewage on to a servient tenement is a continuous easement. (*Thom, Niamatullah and Bennett, JJ.*) BRIJ MOHAN LAL *v.* HAZARI LAL. **160 I.C. 879=8 R.A. 666=1935 A.W.R. 1513=1935 A.L.J. 1330=A.I.R. 1936 All. 90 (F.B.).**

———**S. 7**—*Percolating water—Diminution of supply—Breach of contract.*

Pandalai, J.—Though no one, not even the owner of the soil under which the water flows, has any property in the percolating water till it actually reaches a defined channel and though there is therefore no infringement of

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any right of property by appropriating such percolating water, yet it is possible for an owner to be guilty of a breach of contract, if by appropriating underground percolating water from his land, he causes diminution of a supply which he is obliged by law to maintain. (1897) A. C. 129, Rel. on. (*Wallace and Krishnan Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad 793=I.R. 1931 Mad. 747=133 I.C. 507=33 L.W. 681=A.I.R. 1931 Mad. 284=61 M.L.J. 563.**

———**S. 7**—*Percolating water — English rule—Applicability to India.*

The doctrine of percolating water flowing underground in undefined channels as settled by English decisions should not be applied to the water carried in the sandy bed of an Indian river in the dry months between monsoon to monsoon. Necessary modifications must be made in the English law of flowing water to make it applicable to the tropical countries. (Case-law referred to. (*Wallace and Krishnan Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI **54 Mad. 793=I.R. 1931 Mad. 747=133 I.C. 507=33 L.W. 681=A.I.R. 1931 Mad. 284=61 M.L.J. 563.**

———**S. 7**—*Percolating water—Right of property—Interference, if actionable.*

Pandalai, J.—As between owners of land no one has a right of property in water flowing underground in undefined and unknown channels by percolation. As a consequence of this, one owner has no right of action against another, who by sinking wells or by other works on his own land, draws off and appropriates the underground percolating water which would otherwise have flowed into his well or stream and makes it unavailable to him and this even when it is done from an improper motive or maliciously. But that other owner cannot go on his neighbour's land, dig there and take the underground water found there and justify his action because the water was running in undefined channels, as that would be trespass and be an actionable wrong. These things should be done on one's own property. *Chasemore* v. *Richards*, 7 H. L. R. 349, *Acton* v. *Blundell*, 12 M. L. W. 324; *Mayor, etc., of Bradford* v. *Pickles*, (1895) A. C. 587 and *Ballard* v. *Tomlinson*, 29 Ch. D. 115 at p. 125, Ref. (*Wallace and Krishnan Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793=I.R. 1931 Mad. 747=133 I C 507=33 L.W. 681=A.I.R. 1931 Mad. 284=61 M.L.J. 563.**

———**S. 7**—*Privacy—Acquisition of right.*

There is no inherent right to privacy and such a right, if it can arise at all, can arise only by prescription, grant or local usage. 5 C. W. N. 47 and 119 I. C. 833, Foll. (*Ross and Scroope, JJ.*) KESHO SAHU *v.* MT. MUKTAKIMAN. **10 Pat 280=I.R. 1931 Pat. 323 (2)=133 I.C. 163(2)=12 Pat. L T. 714=A.I.R. 1931 Pat 212.**

———**S. 7**—*Right to water—Construction of groyne—Acquisition by prescription.*

The right to take from an irrigation channel such water as may be reasonably required for the cultivation of a second crop of the customary character upon the suit land and for this purpose to construct, whenever necessary, a *chappakatu* or temporary groyne of the required length in the bed of the irrigation channel is not of too indefinite a character to be capable of acquisition by prescription. *Beaston* v. *Weate*, 5 El. & Bl. 986, Ref. (*Sir George Lowandes.*) VENKANNA *v.* SWETACHALAPATI RAMAKRISHNA RANGA RAO BAHADUR. **58 I.A. 195=54 Mad. 427=I.R. 1931 P.C. 120=131 I.C. 312=53 C.L.J. 499=1931 M.W.N. 817=33 Bom.L.R. 929=35 C.W.N. 605=33 L.W. 716=A.I. R. 1931 P.C. 128=61 M.L.J. 1 (P.C.)**

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———S. 7—*Right to water—Ryotwari tenant.*

A ryotwari tenant has no right of easement in respect of the water supply from a particular channel. (*Wallace and Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad 793=I.R 1931 Mad. 747=133 I C 507=33 L W. 681=A.I.R. 1931 Mad. 284=61 M L J. 563.**

———S. 7 (b)—*Defendant making aperture in his wall facing site of plaintiff—Plaintiff refused permission by Municipal Committee to raise wall obstructing aperture Suit for injunction—Proper relief.*

Defendant opened door and windows of his wall facing plaintiff's site. Plaintiff was refused permission by the Municipal Committee to construct a wall in front of the aperture. Thereupon plaintiff filed a suit for injunction for closing the door and windows. Injunction was granted by the lower appellate Court on the ground that the Municipal Committee had refused permission to build a wall.

Held, that that was not a legal ground for granting the injunction, that injunction was not the proper relief but that the threatened injury to plaintiff could be amply redressed by grant of pecuniary compensation. (*Tek Chand, J.*) KASHI NATH *v.* RAM JIWAN. **148 I.C. 224 6 R.L 520=A.I R. 1933 Lah. 847**

———S. 7 (b)—*Right to open apertures in wall—Limits of.*

Every owner has got the right to open apertures in his own wall and unless, by doing so, he invades the privacy of any other pre-existing and well-established right vested in his neighbour, the latter cannot force him to close the apertures. The neighbour's remedy is to build on his own land or otherwise obstruct the apertures. (*Tek Chand, J.*) KASHI NATH *v.* RAM JIWAN. **148 I.C. 224—6 R.L. 520 A.I.R 1933 Lah. 847.**

———S. 7, Ill. (e)—*Right to support—Infringement—Remedy—Injunction*

Where an act threatening danger to a person's land is such, that injury will inevitably follow, a Court may grant a perpetual injunction restraining the continuance of that act, even though no damage has actually occurred before institution of suit. Where therefore a plaintiff files a suit for injunction against the defendant who has cut down the land near the common boundary line, without leaving such a slope as would form an angle of repose adequate for the support of the portion of the plaintiff's land lying alongside the boundary line, the Court should grant the injunction if it is proved that if the cutting be left as it is, the bank of the cutting is bound to slip sooner or later, injury to the plaintiff's land will inevitably follow. *Patteson* v. *Gilford*, (1874) 18 Eq. 259 and 24 Cal 200, Relied on. (*Page, C. J. and Mya Bu, J.*) MINUS *v.* DAVEY. **11 Rang. 47—I R. 1933 Rang. 61 143 I C 292 A.I R 1933 Rang 18.**

———S. 7 Ill (e)—*Right to support—Nature and extent of.*

The right to the support of land in its natural state vertically by the subjacent strata and laterally by the adjacent soil, is a right to which the owner of the surface is of common right *prima facie* entitled. The right of an owner of land to the support from adjacent or subjacent soil if not that the substance supporting his soil shall not be removed, but that the enjoyment of his land be not disturbed by the removal of its support. English case law reviewed. (*Page, C. J. and Mya Bu, J.*) MINUS DAVEY. **11 Rang. 47=I.R 1933 Rang 61 =143 I.C. 292 A I.R. 1933 Rang. 18.**

———S. 7, Ill (e)—*Support to land in natural condition—Suit for injunction—Actual damage not necessary.*

Every landowner has a right to the support of his land in its natural state It is not an easement, it is a right of property. In a suit for injunction restraining the defendant from interfering with plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. (*Mitter, J.*) TAMLUK TRADING AND MANUFACTURING CO., LTD. *v.* NABADWIP-CHANDRA NANDI. **59 Cal. 363=I.R 1932 Cal. 488 =138 I C. 667=A.I.R. 1932 Cal. 542.**

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———S. 7, Ill. (h)—*Precarious supply of water—No right of easement.*

Where there has been no continuous and consistent use of the water by the owner of lands lower down, by the aid of which he could raise his crops and which could be deemed beneficial, in some years the water was insufficient and in some years it was excessive, he cannot be held to have obtained any prescriptive right to the supply of water in sufficient quantity. (*Beasley, C J. and Bardswell, J.*) AYYANNA *v.* SECRETARY OF STATE FOR INDIA **56 Mad 696—6 I R. (Mad) 110 =145 I.C 594—1933 M. W. N. 517—38 L. W. 208=A.I.R. 1933 Mad. 646=65 M.L J. 179.**

———S 7, Ills. (h) and (j)—*Riparian owners—Dam put up by upper owner—Suit for declaration and injunction by lower proprietor—Form of decree*

Plaintiffs as lower riparian proprietors sued the upper riparian proprietors complaining that the putting up of a dam by the defendants higher up interfered with the flow of water in the stream and claimed a declaration that the defendants had no right to use the water for irrigation, a direction for the demolition of the dam put by the defendants and for a permanent injunction prohibiting the defendants from ever putting up a dam across the river. The defendants in their written statement claimed that what they did was in the exercise of their riparian rights as upper owners and did not plead any special rights founded on contract, custom or prescription The lower appellate Court framed the injunction in the form, that the defendants are prohibited from putting up such a dam as will cause diminution to the flow of water to which plaintiffs would be entitled.

Held, that in the light of the rights declared by Ills. (*h*) and (*j*) of S. 7 of the Easements Act, the proper decree to be passed was to declare that the defendants are entitled to such rights in the stream as belong to an upper riparian owner and that they are not entitled to put up the dam complained of in the plaint, and to restrain them, their agents and servants by an injunction from interfering with the stream in such a way as to diminish materially the flow of the stream (*Varadachariar, J.*) SETHURAMALINGA AYVAR *v.* ANANDA PADAYACHI. **152 I C. 413 7 R.M 225=1934 M.W. N. 1099=A.I.R 1934 Mad. 583=40 L W. 373=67 M.L.J. 373.**

———S. 7 Ills. (j) and (h)—*Riparian rights—Upper and lower owners—Rights of.*

Under certain circumstances, and provided the flow of water in the stream is not materially prejudiced and interfered with, an upper riparian owner may have a right to divert water for the purposes of irrigation even by the putting up of a bund. (*Varadachariar, J.*) SETHURAMALINGA AYVAR *v.* ANANDA PADAYACHI. **152 I C 413=7 R.M 225=1934 M.W.N. 1099= A.I.R. 1934 Mad. 583=40 L.W. 373=67 M.L.J. 373.**

———S. 8—*Right to* lagan *in river ghat—Acquisition.*

The owner of a river ghat has the power to divest himself of a certain portion of his absolute right and create an easement on the back portion of the ghat in favour of the person to whom the front portion was sold. Thus the right to *lagan* may pass as an easement

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(*Dalal, J.*) BRIJ MOHAN DAS *v.* BHIKUJI. **I.R. 1931 All. 205=129 I C. 717=1931 A.L J. 267=A.I.R. 1931 All. 207.**

———**S. 10**—*Mortgagor—Right to create easement in mortgaged land.*

Mortgagor has no right to create any easement over the mortgaged land, to be detriment of the mortgagees without their consent. 85 P R. 1902, Rel. on. (*Bhide, J.*) JHANDU LAL *v.* MUNSHI RAM. **149 I C. 949 (2) =6 R.L 765=A.I R. 1934 Lah. 199.**

———**S. 12**—*Claimant of easement need not be owner of the property.*

Where a person is in possession of the property on behalf of the owner and enjoys the easement, he can claim easement under S. 12. (*Kendall, J*) NIHAL CHAND *v.* MT. BHAGWAN DEI. **151 I.C. 141--7 R.A. 94=A I.R. 1934 All. 527.**

———**S. 13**—*Applicability—Easement of necessity—Lands held under temple in lieu of services—Channel passing through temple lands—Right of grantees to flow of water.*

Plaintiffs were hereditary persons entitled to perform "Rudrajapam" in a temple and the two defendants were the trustee and manager of the said temple. It was alleged that certain lands were let to the ancestors of the plaintiffs as manyam for the services performed by them to the temple, and had been in their exclusive enjoyment for a long time, that they had a right of irrigation and drainage as an easement through certain kannis and a tunnel in a channel, but that the defendants obstructed the flow of water by removing the tunnel. They therefore prayed for a mandatory injunction to direct the defendants to restore the kannis and the tunnel Both the lower Courts found that the plaintiffs were entitled to the lands in question and that they had no other source of irrigation than kannis obliterated by the defendants.

Held that the facts found clearly warranted the application of the principle of S. 13 of the Easements Act. (*Varadachariar, J.*) MUTHALAGAPPA CHETTIAR *v.* NAVANEETHESWARA GURUKKAL. **158 I C. 987= 8 R M. 393=1935 M.W.N. 538=42 L.W. 183=A.I.R. 1935 Mad. 668=69 M.L J. 42.**

———**S. 13**—*Easement of necessity—What is.*

An easement of necessity is one without which the property retained upon a severance cannot be used at all, not one which is merely necessary to the reasonable enjoyment of that property. (*Dunkley, J.*) DAW TINT *v.* MAUNG KYWE. **154 I.C. 468=7 R.R. 305 - A I.R. 1935 Rang. 56.**

———**S. 13**--*Easement of necessity--Right of passage for sweeper.*

No easement of necessity can be granted unless the easement is necessary for the enjoyment of the property. Sweepers passing through residential houses would give rise to such a state of inconvenience as to make the houses for all practical purposes uninhabitable for people of ordinary decency and cleanly habits. Where plaintiff's houses were solely dwelling houses and the locality was one in which respectable people dwelt and the part over which the right of sweepers to carry buckets after cleaning plaintiff's latrine was claimed, was already being used by the sweepers who carried buckets from the defendant's latrine.

Held, that to compel the plaintiff to have his night-soil buckets carried out through the houses would destroy as residential dwellings the houses which were the properties sold by the original owner of the whole plot of land as dwelling-houses and as such it was an easement of necessity.

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Held further, that the hardship inflicted on the owner of the servient tenement was not very great, because the sweepers who served the plaintiff's latrines would only pass along the path already used to a great extent by the sweepers who cleaned defendant's latrine, and they would walk along the path with two buckets instead of only one. (*Bagley, J.*) DAW GYAN *v.* U. MAUNG MAUNG. **156 I.C. 775=8 R R. 46 - A.I.R. 1935 Rang. 127.**

[*Affirmed on appeal* 13 Rang 748 - A I R. 1936 Rang. 58.]

———**S. 13**—*Easement of necessity—Transfer of part of tenement by owner—Easements necessary to the enjoyment pass—Right to take nightsoil buckets through path at back—Implied easement.*

Where the owner of a tenement grants a part of the tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (or quasi-easements), or in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been used and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. Where the owner of three contiguous houses having a path running at the back used for the carriage of nightsoil buckets from the houses to the public road, sells one or more of them to others, it is obvious that there is a common intention on the part of the vendor and purchaser or purchasers that thereafter the night soilbuckets should be taken to the public road along the path at the back in the manner in which they were being taken before, and an implied easement to that effect results from and is ancillary to the conveyance of the houses. (*Page, C.J. and Ba U, J.*) DAW GYAN *v.* MAUNG MAUNG **13 Rang 748--160 I C 796 8 R.R 431= A.I.R 1936 Rang. 58.**

———**S. 13**--*Easement of necessity--Transfer of agricultural plots to tenant--Tenant's right to easements necessary for agricultural purposes.*

If for the enjoyment of the agricultural plots the possession of which has been transferred by the Zemindar to the tenant, it is necessary for the tenant to enjoy for agricultural purposes certain easements in the land of the village site which belongs to the Zemindar, under S 13 of the Easements Act, the tenant is entitled to those easements. (*Bennet, J.*) SARJU PRASAD *v.* SHYAM LAL **1934 A L J. 662 - 150 I C 1117 - 7 R. A. 84 - 3 A W.R 796 = A.I.R. 1934 All 802.**

———**S. 13 (b)**—*Transfer of land irrigated by water from transferor's tank--Rights of transferee.*

Transferee of the land is only entitled to the enjoyment of that easement right which existed when the transfer took place, in the absence of intention to show that more right was conferred by the grant. Right which the transferee of the lands gets under a deed of transfer is the right to take water to cultivate the lands as it is cultivated at the time of the grant and nothing more. Where the land is one crop land at the time of the grant, the transferee has the right of taking the water free only for the first crop cultivation, and if he takes any water for the second crop cultivation, he will in law be liable to compensate the Zemindar by making him payment for its use A.I R. 1917 P C. 42, Dist; A I R. 1924 Mad. 108; A I R. 1924 Mad 812 and A.I R. 1933 Mad 941, Ref. (*Madhavan Nair, J*) RAMASWAMI KAMYA NAICKER *v.* IRRULAPPA PILLAI. **160 I C. 471 8 R. M. 650=1935 M.W.N. 1065=A I.R. 1935 Mad. 995.**

———**S. 13 (c) and (d)**—*Applicability--Right to submerge adjacent lands—A question of right*

The proprietor of an estate constructed an irrigation tank. Subsequently the estate was partitioned into

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two estates but a considerable part of the tank bund and bed were kept in common: later on, the Court of Wards who had taken over the management of one of the estates conveyed lands including a portion of the tank bund to the plaintiff. The proprietors subsequently repaired the tank and the plaintiff apprehending submersion of his lands sued for an injunction to restrain the estate holders from doing so.

Held (per *Reilly, J.*), that the right to submerge the adjacent lands could not be claimed by the alienating proprietor as an easement falling under (*c*) and (*d*) of S. 13. (*Kumaraswami Sastri and Reilly, JJ.*) GAJAPATHI KRISHNA CHANDRA DEO *v.* RAJAH OF VIZIANAGARAM. **135 I.C. 349 = I.R. 1932 Mad. 93 = 1931 M.W.N. 23 - 33 L.W. 771 = A.I.R. 1931 Mad. 561 (2) = 60 M.L.J. 662.**

———**Ss. 13 (e) and 21**—*Grant of right of way in general terms—Right of passage for privy cleaner, if included—Construction of grant—Easement of necessity.*

The plaintiffs and defendants owned houses abutting a court-yard, the ownership of which was in dispute. By an award, the court-yard was declared to belong to the plaintiffs but the defendants were given a right of way over it for ingress to and egress from their house. The defendants subsequently constructed a new privy to their house and allowed the cleaner to pass through the court-yard. In a suit by the plaintiff,

Held, that (*i*) where a grant or way by a deed is in general terms, it should be liberally construed consistently with the surrounding circumstances of the case, without restriction to the use that was made of the way at the time of the grant and so the grant in the present instance included the right now claimed, (*ii*) even otherwise, the defendants were also entitled to the right now claimed as an easement of necessity. (Case-law Ref.) (*Patkar and Murphy, JJ.*) MANEKLAL *v.* MANEKLAL. **57 Bom. 186 - 141 I.C. 686 - I.R. 1933 Bom. 120 = 34 Bom.L.R. 1150 = A.I.R. 1932 Bom. 574**

———**S. 13 (f)**—*Continuous easement—Agricultural tank—Right to inundate lands by storing water—Partition between co-owners—Rights inter se.*

The suit tank was built about 1813 and it was inundating the lands in question till the breach in 1878. The plaintiff purchased a portion of the tank bed in 1899 from the Court of Wards which was managing one of the two estates, which as between them owned the entire tank. After the estate was handed over by the Courts of Wards to the Zemindar, he repaired the tank about 1910 as a result of which the tank bed belonging to the plaintiff was flooded. The plaintiff sought to restrain the owners of the two estates from making the repairs and to demolish the bund erected by the defendant.

Held, treating the right to inundate lands by storing water in irrigation tanks as an easement, the easement continued in favour of the defendant even though at the partition between the defendants predecessor and the vendor of the plaintiff, there was not reservation of the easement and the plaintiff had therefore no right to sue for damages or restrain the repairing of the bund unless there was any negligence in the repairs. Under the Indian Law no express reservation is necessary for the easement to continue in favour of the grantor. (*Kumaraswami Sastri and Reilly, JJ.*) GAJAPATHI KRISHNA CHANDRA DEO *v.* RAJAH OF VIZIANAGARAM. **135 I.C. 349 - I.R. 1932 Mad 93 = 1931 M.W.N. 23 - 33 L.W 771 = A.I.R. 1931 Mad. 561 (2) = 60 M.L.J. 662.**

———**S. 13 (f)**—*Lands not being contiguous—Right of drainage—Proof.*

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The case of a plaintiff who has merely acquired the right to discharge his water on to the intervening land and the case of a plaintiff who has acquired the right of carrying it across that intervening land and discharging it upon the land further away are quite different. In the former case he is not entitled to sue the person who is on the other side of the intervening land whereas in the latter he may be entitled to do so.

Held, that under the circumstances, the plaintiff was entitled to carry his water by means of a syphon sluice under the Government channel up to the boundary of the defendant's land and there discharge it into a channel over that land (*Beasley, C. J. and Bardswell, J.*) ARAVAMUDA AYYANGAR *v.* SRINIVASA CHETTIAR. **151 I.C. 1041 = 40 L.W. 483 = 7 R.M. 164 = 1934 M.W.N. 110 = A.I.R. 1934 Mad. 632.**

———**S. 15**—*Acquisition—Government land in occupation of person with limited right.*

S. 15 of the Easements Act insists on a period of 60 years user not merely when the easement is claimed as against the Government but over any property belonging to Government. The word "belongs" in the section should not be restricted to cases where possession and ownership continue to remain with the Government and the clause applies to cases where any person with a limited right is in occupation of land belonging to Government. (*Varadachariar, J.*) CHINNASAMI GOUNDAN *v.* BALASUNDARA MUDALIAR. **40 L.W. 514 = 152 I.C. 216 = 7 R.M. 200 = 1934 M.W.N. 1042 = A.I.R. 1934 Mad. 575 = 67 M.L.J. 262.**

———**S. 15**—*Acquisition by prescription—Animus.*

A person cannot acquire an easement unless he acts with the knowledge that it is a case of a dominant and a servient tenement and that he is exercising a right over property which does not belong to him. Where the defendant has consistently claimed ownership in the land, he cannot claim to have acquired an easement as the user has not been with the animus of enjoying the easement as such in the land of another. The question of immemorial user has nothing to do with it. (Case-law referred.) (*Baker, J.*) MARGHABHAI *v.* MOTIBHAI. **56 Bom 427 = I.R. 1932 Bom 503 = 139 I.C. 571 = 34 Bom L.R. 1015 = A.I.R. 1932 Bom. 513**

[R. 35 B.L.R. 144 (146).]

———**S. 15**—*Acquisition by prescription—Joint property—No easement can be acquired.*

User which is neither physically capable of prevention by the owner of the servient tenement nor actionable, cannot support an easement. This principle applies both to affirmative and negative easements. So long, therefore, as the two tenements were held in joint ownership, there can be no acquisition of an easement by prescription in favour of one tenement against the other. *Sturges* v. *Bridgman*, 11 C.D. 852; 28 Bom.L.R. 1000 and 19 Cal. 253. Foll. (*Baker, J.*) MARGHABHAI *v.* MOTIBHAI. **56 Bom. 427 = I.R. 1932 Bom. 503 = 139 I.C. 571 = 34 Bom L.R. 1015 = A.I.R. 1932 Bom 513.**

———**S. 15**—*Acquisition—Relief as to ownership of property—Whether inconsistent with easement.*

Beaumont, C.J.—There is no reason why if the owner of a piece of land proves that for 20 years he has in fact exercised a right of passing and re-passing over adjoining land *nec vi nec clam nec precario*, he should be unable to establish an easement of way over such adjoining land merely because when he exercised that right, he believed he had a right of ownership in the adjoining land, which right he was unable to establish in a Court of Law. (*Beaumont, C.J. and Rangnekar, JJ.*) TAMANBHAT *v.* KRISHTA CHARYA. **6 I.R. (Bom.) 33 = 144 I.C. 998 = 35 Bom.L.R. 144 = A.I.R. 1933 Bom. 122.**

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———**S. 15**—*Acquisition—User as "occupier" and as "owner"—If can be tacked on.*

S. 4 of the Easements Act shows that not merely the "owner" but even an "occupier" may acquire an easement and there is no *prima facie* reason why the enjoyment of a person as an "occupier" should not be tacked on under S. 15 to his enjoyment as "owner", if there is no interruption in his user. (*Varadachariar, J.*) CHINNASAMI GOUNDAN *v.* BALASUNDARA MUDALIAR. **40 L.W. 514=152 I.C. 216=7 R.M 200=1934 M.W.N. 1042=A.I.R. 1934 Mad. 575=67 M. L.J. 262.**

———**S. 15**—*Applicability—Specific grant.*

In a case not of prescriptive easement but of one arising from a grant, it is not necessary for the plaintiff to establish 20 years' exercise of the right of easement or its continuance till a time within two years before the institution of the suit. (*Niamatullah, J.*) HABIB ULLAH *v.* MT. GANESH DAI. **150 I.C. 601=7 R.A. 5=A.I.R. 1934 All 447.**

———**S. 15**—*Construction—Pathway—Right of way—Acquisition by prescription—Conditions.*

To support a claim to a prescriptive right of way over a pathway, the pathway must be enjoyed peaceably and openly as an easement without interruption for more than 20 years. It is not necessary that it should be used every moment to constitute enjoyment. Cessation of user is not an invariable indication of the obeyance of enjoyment of a right, that is, it is not inconsistent with the continuance of the enjoyment of the right. Cessation of user for a time while the right is being acquired does not stand on a different basis from that where the right has already been acquired by user for 20 years But an enjoyment physically incapable of interruption would not confer any right of easement by prescription. (*Mitter J.*) JOGESH CHANDRA ROY *v.* SACHCHANDA. **155 I.C 833=7 R.C. 633=60 C.L J. 412=A I.R 1935 Cal. 282.**

———**Ss. 15 and 2 (b)**—Customary easement and customary right—Distinction between—Right of passage by villagers through another field to Government forest not an easement but a customary right. *See* EASEMENTS ACTS, SS. 2 (*b*) AND 15. **29 N.L.R. 85=A.I.R. 1933 Nag. 74.**

———**S. 15**—*Drainage channel across public pathway—Owner of higher land discharging water through channel to lower land—User for over twenty years—Effect.*

Where an underground channel had been in existence between the lands of the plaintiff and defendant across a public pathway, for over twenty years to the knowledge of the public authorities, and the plaintiff had been accustomed to discharge the water from his land throught his channel on to the defendant's land, and it appeared that the channel was a pucca one constructed with brick and chunam covered over with stone and the public authorities not only did not object to it for all these 20 years, but actually approved of it as a public convenience.

Held, though an easement in the strict sense of the term may not have been acquired against the Secretary of State—the enjoyment having been short of 60 years—whether it is called an easement or licence or grant, the channel must be considered to have been used by the plaiutiff in a lawful manner, and that the plaintiff was entitled to maintain an action against the defendant when the latter interfered with the plaintiff's user of the channel. (*Krishnan Pandalai, J.*) GURUNAIDU *v.* KANAKAYYA. **152 I.C. 659=7 R.M. 265=1934 M. W.N. 597=40 L.W. 281=A.I.R. 1934 Mad. 543=67 M.L.J. 382.**

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———**S. 15**—*Evidence of long enjoyment—Court should view it as prescriptive right.*

Where there is evidence of long enjoyment in a particular way, it is the habit and duty of the Court, so far as it lawfully can, to clothe the fact with right. The plaintiff's case was held to rest on a prescriptive title. (*Wort, A.C J. and Kulwant Sahay, J.*) RADHAKISHEN *v.* SUNDAR MAL. **6 R.P. 431=148 I.C. 215=A.I.R. 1934 Pat. 11**

——**S. 15** — Fishery — Right in gross—Custom—Validity of—Payment of fee per head of persons fishing—Antagonistic to the idea of the right enjoyed without leave and license. *See* EASEMENTS ACT, S. 2 (*b*). **37 Cal.W.N. 18=A.I.R. 1933 Cal. 539.**

———**S. 15**—"*Interruption*"—*Meaning of.*

The term "interruption" refers to an adverse obstruction and not a mere discontinuance of user. (*Mitter, J.*) JOGESH CHANDRA ROY *v.* SACHCHANDA. **155 I.C. 833=7 R.C. 633=60 C.L J. 412=A.I.R. 1935 Cal. 282.**

———**S. 15**—*Light and air—Diminution by erection of building—Injunction—Grant of.*

The mere fact that the plaintiff possesses a prescriptive right to light and air on the property of the defendant is not by itself sufficient to justify the grant of an injunction for demolition of a wall or against closing a window. In order to pass such an order, it is necessary to show that the obstruction complained of amounts to an 'actionable nuisance'. Where the loss of light and air is substantial and pecuniary compensation cannot afford adequate relief, the Court may direct the defendant to reconstruct the building. (*Tek Chand, J.*) JAS KAUR *v.* BHAG DEVI **13 Lah. 806=I R 1932 Lah. 638=140 I.C. 238=33 P.L R 1015=A.I.R. 1933 Lah. 29.**

———**S 15**—*Lost grant—Presumption from immemorial user.*

It is open to the Court to infer a grant from immemorial user alone, when such user is open, as of right and without interruption. But a grant will not be inferred if the user may be explained in some other way than by a grant. (*Jack and Nag, JJ.*) SHEIK FAKIR *v.* MOSLEM MANDAL. **155 I C. 719=7 R.C. 614=60 C. L.J. 321=A I R 1935 Cal. 253.**

———**Ss. 15 and 16** — *Obstruction to ancient light—Remedy—Injunction or damages.*

Where the defendant obstructs the ancient light of the plaintiff by erecting a building and plaintiff sues for injunction to have the building demolished or for damages, the question whether an injunction shall issue or whether the plaintiff must be content with an award of damages must depend on the circumstances of each particular case. If it is clear that damages will afford adequate relief to the injured party and the defendant has not been guilty of any high handed action, or unneighbourly conduct, an award in damages is the appropriate remedy. If the property is still substantially useful to him, depreciation in value can be met by a decree for damages; but where the defendant's building deprives plaintiff to a very great extent of his best source of light and incidentally to a large extent of the beneficial use of his property, damages would not be adequate relief. (Case-law reviewed.) (*Leach, J.*) ELLERMAN ARRACAN RICE AND TRADING CO., LTD. *v.* PAZUNDHUNG BAZAR CO. LTD. **150 I.C. 252 (2)=6 R.R. 382=A.I.R. 1933 Rang. 351.**

———**Ss. 15 and 16**—*Obstruction to ancient light—When actionable.*

In order to constitute an actionable obstruction of ancient light, it is not sufficient that the light is less than

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before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind and in the case of business premises to prevent the plaintiff from carrying on his business as beneficially as before. The expression "carrying on the business beneficially" is not to be read as depending on the question whether or not the person carrying on the business is likely to lose a customer. The test is whether he would carry on the business less beneficially to himself, whether in discharging his duty to his customers on the one hand or in preserving his health and facility of transacting business on the other (*Leach, J.*) ELLERMAN ARRACAN RICE AND TRADING CO., LTD. *v.* PAZUNDAUNG BAZAR CO., LTD. **150 I C 252 (2) 6 R.R. 382 A I R 1933 Rang. 351.**

——**S. 15** —*Overhanging of trees—Right of owner of land.*

An owner or occupier of land has no right to allow his trees to overhang his neighbour's land, and he cannot acquire such a right by prescription (*Butler, J.*) PUTRAYA *v.* KISHNA GOPA. **40 L W. 639=152 I.C 579 1934 M W N. 1188 7 R.M. 255 A. I R. 1935 Mad 31 67 M L J 412**

——**S. 15** —*Period of twenty years—How calculated.*

In a case of a claim to a right of easement, the period of twenty years should end within two years of the suit. It is immaterial whether there was or was not a period of twenty years' user at some period beyond two years before the date of plaint. A period of twenty years' user in the fifteenth century, for instance, cannot have any bearing on a claim to easement (*Bennet, J.*) AKHTAR HUSAIN KHAN *v.* THE COLLECTOR OF DISTRICT, BAREILLY. **147 I C 272 6 R A. 452 1933 A.L J. 516 17 R D. 209 A I R 1933 All. 623.**

——**S. 15**—*Pleas of ownership and easement—Permissibility.*

No doubt as a rule, a plaintiff should not be allowed to put forward contradictory pleas, but the pleas of ownership and easement, though inconsistent, are not contradictory and can be put forward in the alternative. The important point to be considered in such a matter is the question *quo animo egerit* with reference to the user alleged by the plaintiff; in other words, if the plaintiff had used a way on an assertion of title of owner, he could not put forward such user in support of a right of easement. That view however does not prevent the putting forward of alternative pleas in a suit, though at the trial of the suit the character of the user and the question of *quo animo egerit* would have to be decided, and, if the user is proved, one plea would have to be affirmed and the other rejected. 34 Cal. 51 (F.B.), A.I.R. 1924 Cal. 369 and A I.R 1925 Cal 788, Rel. on ; 49 Mad 820 (F B), Ref (*Staples, A J. C.*) LAXMINARAYAN *v.* FAJJULAL **147 I C. 21 6 R.N. 114=29 N.L.R. 330 = A I.R. 1933 Nag. 257.**

——**S. 15**— *Prescription as between tenants of same landlord*

There cannot be a prescription by one tenant against another tenant of the same landlord. (*Wort, A C J and Kulwant Sahay, J.*) RADHAKISHEN *v.* SUNDAR MAL. **6 R P 431=148 I.C. 215 = A I R. 1934 Pat. 11.**

——**S 15** - *Right of ferry- Acquisition by prescription—Right to monopoly*

A person owning land on one bank of a river can acquire a right by easement which would entitle him to use the land belonging to another owner on the other side of the river for the purpose of embarking and disembarking passengers. There is, however, no law in this country which would entitle him to restrain competition. He cannot prevent the owner of the land on the other side of the river from starting a rival ferry which is run between lands owned by him on both banks of the river. In other words, there is no right to a monopoly. Such an exclusive right can be claimed only under a Crown grant. (*Sulaiman, C.J. and Rachhpal Singh, J.*) RAM SAKAL *v.* NAGESHAR. **57 All 757=157 I. C. 333=8 R.A. 161=16 L R. 190 (Rev.)=1935 A.L J. 444=1935 R. D. 133=1935 A.W R. 396—A.I R. 1935 All. 481.**

——**Ss. 15 and 34**—*Right to lateral support—Proof of imminent danger of substantial kind.*

A suit for perpetual injunction restraining the defendant from removing the necessary lateral support, to which the plaintiff's land is entitled, is a suit in the nature of a *quia timet* action and the plaintiff, in order to succeed, must prove imminent danger of a substantial kind, or that the apprehended injury, if it does occur, will be irreparable. Therefore excavation and removal of the earth on his own land by a defendant, without leaving sufficient support to the adjoining plaintiff's land to enable it to remain in its natural state, does not *per se* constitute an actionable invasion of the latter's right; and such an act to constitute a valid foundation for a claim by the adjoining plaintiff for damages must be coupled with actual damage or injury to his property. (*Page, C J and Mya Bu, J.*) MINUS *v.* DAVEY. **11 Rang 47—I.R. 1933 Rang 61=143 I. C. 292=A. I. R 1933 Rang 18**

——**Ss. 15 and 17**—*Right to pass dirty water on plaintiff's site—Immemorial user—Meaning of—Proper issues.*

In a suit for a perpetual injunction restraining defendant from passing dirty water on plaintiff's site, the lower Court framed an issue "Does the defendant prove immemorial user" and found it in the affirmative.

Held, that the term "time immemorial" had a connotation in English law which obviously could not be applicable to Indian society and circumstances, that the issues in such a case should have been, (*i*) Was the right of way in question peaceably, openly, and as of right, used by the plaintiff or those through whom he claims within two years of the institution of the suit? (*ii*) Is there evidence of enjoyment on the part of the plaintiff or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of S. 26, Limitation Act, or S. 15, Easements Act. (*Tyabji J.*) CHINTAMANRAO *v.* RAM CHANDRA. **56 Bom. 82=I.R. 1932 Bom. 347=137 I C. 881 34 Bom L R. 92 A.I.R. 1932 Bom 130.**

——**S. 15**—*Right to pass filthy water on to land of another—If can be acquired.*

A right of passing filthy water on to the land of another can be acquired as an easement. (*Beckett, J.*) TARAK NATH *v.* RAM NATH. **158 I.C. 361=A.I.R. 1935 Lah. 346.**

——**S. 15** —*Right of way—Limits how to be defined.*

One of the necessary conditions of a right of easement is that it must be certain. Where a right of way is claimed and allowed, the decree should state definitely the limits of the pathway. When the two *terminus* are known, the right to the way does not fail merely for want of a defined track between them and if the owner of the servient tenement does not point out the line of such way, the dominant owner must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set

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out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough and there are ruts in it and so forth. (*Fazl Ali, J.*) RAMHARY PAL *v.* NIDHI MAHANTY. **6 R.P. 473 = 148 I.C. 431 = A I.R. 1934 Pat. 420.**

——— **S. 15**—*Right of way—Plea of long user—Inference of lost grant may be drawn.*

The question of immemorial user or lost grant must be pleaded in every case before a person can be given relief on that head. Whether the action be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally, but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at Common law, or under the Act. Where the plaintiffs did allege circumstances, namely, the user by themselves and by their ancestors of the land as pathway for 40 or 50 years, the plaint may on a liberal construction be taken to have relied upon long user leading to an inference of lost grant. 6 Cal. 394 (P.C.), Ref. (*Mitter, J.*) MANMATHA NATH *v.* RAKHAL CHANDRA MANDAL. **I.R. 1933 Cal. 291 = 142 I.C. 458 = 56 C.L.J. 274 = A.I.R. 1933 Cal. 215.**

——— **S. 15**—*Right of way—User for a period of 20 years or more—If raises presumption of lost grant.*

The presumption of lost grant should not be made merely upon establishment of user for a period of 20 years or more. What has to be found as raising the presumption of lost grant is user from time immemorial although the period for which such user need be proved must depend on the facts and circumstances of each case. (*Mukerji, J.*) KAMINI KUMAR KAR *v.* GURU DOYAL DAS. **57 C L.J. 31.**

——— **S. 15**—*Scope.*

S. 15 only enacts one specific mode of acquiring a right of easement. Its effect is not to exclude or interfere with other modes of acquiring easements, *e.g.*, by grant, express or implied, at some distant period of time. 6 C. 394 (P.C.), Ref. (*Fyabji, J.*) CHINTAMANRAO *v.* RAM CHANDRA **56 Bom 82 = I R 1932 Bom 347 = 137 I C. 881 = 34 Bom. L R. 92 = A.I.R 1932 Bom 130.**

——— **S. 15**—*Use of pathway for 20 years—Property over which pathway lay belonging to Government—Suit to restrain temple trustees in possession of the property from interfering.*

The plaintiff as the owner of a certain survey number in a village sued to restrain defendants 1 and 2, who claimed to be trustees of a temple, from interfering with the plaintiff's use of a pathway across suit survey number and the Government also was impleaded as a party. The lower appellate Court found that the suit survery number belonged to the Government, who had allowed its use in favour of the temple. On the contention that though for want of 60 years, user the plaintiff had not acquired an easement as against the Government, he had by reason of 20 years user acquired a limited right which was sufficient to prevail as against any interest which private persons like defendants 1 and 2 might possess in that property.

Held, assuming the possibility of acquisition of an easement against the holder of a limited interest, the acquisition was possible only to the extent to which a grant might be possible within the terms of S 8 of the Easements Act and as no such grant by the temple would be possible having regard to the nature of its interest in the property, the plaintiff would not by 20 years, user acquire prescriptive right as against property which belonged to Government even to the extent of preventing defendants 1 and 2 from interfering with his user of the way.

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Held, also that though it might be a question, whether a mere stranger could obstruct another person in the exercise of even what might be called an inchoate right of easement, the position of the defendants 1 and 2 could not be compared to that of a mere stranger or a licensee. (*Varadachariar, J.*) CHINNASAMI GOUNDAN *v.* BALASUNDARA MUDALIAR. **40 L.W. 514 = 152 I.C. 216 = 7 R.M. 00 = 1934 M.W N. 1042 = A.I R. 1934 Mad 575 = 67 M L J. 262.**

——— **S. 15**—*User as of right—User on payment.*

Where a person makes a payment for the use of land, such user is by license and is not a user by right. (*Bennet, J.*) AKHTAR HUSAIN KHAN *v.* THE COLLECTOR OF DISTRICT, BAREILLY. **147 I.C 272 = 6 R A. 452 = 1933 A.L J. 516 = 17 R.D. 209 = A.I.R. 1933 All. 623.**

——— **S. 17 (a)**—*"Total destruction"—Rights of owner completely shut out.*

The phrase "tend to the total destruction" means such an interference as would render the dominant owner's rights largely inoperative. Where a person claims the right of user of a roof of the shop belonging to another and forming a terrace in front of his house to the exclusion of the owner of the roof, such claim as an easement would be obnoxious to S. 17 (*a*), as the owner would be prevented from using the roof and also from raising an upper storey or storeys on his property which will be a substantial destruction of his right as owner. 16 B 592, Rel. (*Wild, J. C. and Milne, A J. C.*) JAMIATRAJ MANJIMAL *v.* GOUMAL. **25 S.L R. 257 = I.R. 1931 Sind 34 = 130 I.C. 546 A.I.R. 1931 Sind 1**

——— **S. 18**—*Dominant owner—'Varsha' living in town—New door exposing to view his whole house—Privacy if invaded.*

Where the plaintiff is a 'varsha' living in a town and the defendant has opened a door which exposes the whole of the plaintiff's 'sahan' as well as the rest of the house to his view, there is an invasion of privacy. (*Kendall, J.*) NIHAL CHAND *v* MT BHAGWAN DEI. **151 I.C. 141 = 7 R.A. 94 = A I R. 1934 All. 527.**

——— **S. 18**—*Public path—Encroachment—Action for—Special damage—Proof of.*

Where it is alleged that there is a public pathway which has been infringed by the defendant, before the plaintiff can maintain an action for avoidance of the infringement, special damage must be proved. But where it is more or less a village pathway, wherein the residents on either side of the pathway and round about, may be considered to have a right acquired by long user of passing to and fro and this right is referable to a grant or agreement on the part of the zamindar, it is not necessary to prove any special damage and the residents of the neighbourhood can maintain an action for the avoidance of the obstruction, without proving any special damage. Even if a proof of special damage is necessary, a very small amount of inconvenience will entitle the plaintiff to the relief claimed. Case-law Ref. (*Baijnath, J.*) LOKNATH TEWARI *v.* JADUNANDAN TEWARI **149 I C. 874 (2) = 6 R A. 993 = A.I R 1933 All. 919.**

——— **S. 18**—*Right to bury dead bodies—Acquisition of—Presumption of lost grant.*

A right to bury a dead body is not an easement as contemplated by the Easements Act. Such a right cannot be acquired by prescription, though it can be acquired by grant or custom. When the origin of the right is peaceful, the Court can presume either a dedication on the part of the owners or a grant on their part,

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the origin of which is lost in antiquity. The question whether a plot of land is a graveyard or not is primarily a question of fact. (*Sulaiman, C. J. and Mukerji, J.*) SHEO RAJ CHAMAR *v.* MUDEER KHAN. **57 All. 166 = 6 R.A. 981 = 149 I.C. 797 = 3 A.W.R. 811 = 1934 A.L.J. 809 = A.I.R. 1934 All. 868.**

——**S. 18**—*Right of privacy.*

The right of privacy is an easement attached to land and not to a person. If there was a right of privacy existing in the house, it is not destroyed because the plaintiff herself has not always observed purdah. (*Kendall, J.*) NIHAL CHAND *v.* MT. BHAGWAN DEI. **151 I.C. 141 = 7 R.A. 94 = A.I.R. 1934 All. 527.**

——**S. 18**—*Right of privacy—Customary easement.*

A right of privacy is a customary easement and may be acquired in virtue of a local custom. (*Harries, J.*) TIKA RAM JOSHI *v.* RAM LAL SAH. **155 I.C. 1056 = 7 R.A. 1017 (2) = 1935 A.L.J. 432 = 1935 A.W.R. 322 = A.I.R. 1935 All 754.**

——**S. 18**—*Right of privacy in N.W.P.*

The law recognises the right of privacy in North Western Provinces, when established by custom and there are numerous cases in the Allahabad High Court in which such a right has been recognised without strict proof of the existence of a custom in the particular locality. (*Sulaiman, C. J. and Bennet, J.*) NIHAL CHAND *v.* MT. BHAGWAN DEI. **159 I.C. 683 = 8 R. A. 495 = 1935 A.L.J. 1131 = 1935 A.W.R. 1109 = A. I.R. 1935 All. 1002**

——**S. 18**—*Right of privacy—Suit relating to—Omission to allege customary right—If fatal.*

Where a plaintiff brings a suit claiming relief concerning his right of privacy, the omission on his part to allege the existence of a customary right of privacy is fatal to his case. (*Ganga Nath, J.*) PADUMAN DAS *v.* PARBATI. **155 I.C. 365 = 7 R.A. 921 = 1935 R.D. 210 = 1935 A.W.R. 477 = A.I.R. 1935 All. 649.**

——**S. 18**—*Right of public way over one's private property claimed—Such right must be established by cogent evidence.*

In the case of a right of public way over a person's private property, claimed by the members of the public at large, or a right of a limited class such as the inhabitants of a particular village, the customary period of the public right to the village path, a right which is sought to be established, must be proved by cogent evidence where the interests claimed conflict with those of a private owner. They must be proved by such degree of evidence as is representative of either the public at large or of the particular village or the smaller community alleged to have the right of user. To call three partisan witnesses who can in no sense be said to be representative of either the larger community of the general public or the smaller community of a particular village is no evidence whatever upon which a finding of public right or village custom can be found. (*Courtney Terrell, C. J. and Kulwant Sahay, J.*) BALGOBIND JHA *v.* LOKNATH JHA. **6 R.P. 483 = 148 I.C. 498 (1) = A. I.R. 1934 Pat. 30.**

——**S. 18**—*Scope—Trees—Right to project branches over neighbour's land—Acquisition by prescription.*

Under S. 18 of the Easements Act, there can be no customary easement of projecting the branches of trees growing on one's land over the land of another. No prescriptive right to keep the overhanging branches on one's neighbour's land can be acquired by the lapse of any number of years. (*Ganga Nath, J.*) HAKIMULLAH *v.* MUHAMMAD SAMIMULLAH. **156 I.C. 42 (1) = 7 R.A. 1051 = 1935 A.W.R. 849 = 1935 A.L.J. 963 = A.I.R. 1935 All. 750 (2).**

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——**Ss. 20 and 22**—*Applicability—Right of way—Contract.*

An owner of a large piece of land divided it into several plots for building purposes and sold them to different persons, reserving one part for himself and in each sale-deed, there was a covenant by which every purchaser bound himself to keep open a passage 15 feet wide for the common use of the other plot-holders. The defendants erected posts in the passage and reduced its width to 7 ft. In a suit by one of the other plot-holders, the lower Court applied S. 22 of the Act, considered 10 ft. width sufficient and granted a decree accordingly.

Held, an easement of way over another's land by virtue of an agreement is governed by S. 20 and not S. 22; the rights in this case were governed by the contract between the vendor and the purchaser, which should be given full effect to. English cases dealing with restrictive covenants held inapplicable to the present case where the right of way was defined both as to dimensions and direction. (*Baker, J.*) SHAMJI *v.* JAMNADAS. **55 Bom. 138 = I.R. 1931 Bom. 102 = 128 I.C. 886 = 32 Bom L.R 1425 = A I.R. 1931 Bom. 87.**

——**Ss. 21 and 13**, (e)—Grant of right by way in general terms—Construction of—Right of passage for privy cleaner if included—Easement of necessity. *See* EASEMENTS ACT, SS 13, CL (*e*) AND 21. **34 Bom. L R. 1150 = A.I R. 1932 Bom 574.**

——**Ss. 22 and 20**—Applicability—Right of way defined—Contract to be given effect to. *See* EASEMENTS ACT, SS. 20 AND 22. **55 Bom. 138 = A.I.R. 1931 Bom. 87.**

——**S 23**—*Additional burden—Question of fact—Finding by lower Court.*

Whether any particular user of the passage by the dominant owner does not impose any additional burden upon the servient heritage, is essentially a question of fact, on which a finding should always be had from the lower Courts 23 Bom. 595 and 50 Bom. 635, Relied on. (*Anantakrishna Ayyar, J.*) MAHOMED BEARI *v.* BADAVA BEARI. **I.R. 1931 Mad 405 = 130 I C 661 = 1931 M.W N. 631 = 34 L W. 369 = A.I.R. 1931 Mad. 128 = 61 M L.J. 58.**

——**S. 23**—*Additional burden—Residential house changed into godown—Passing of bullock carts.*

Where a house formerly used for residential purposes is used as a godown for storing, the use of bullock carts over the passage leading to the godown for carrying goods will throw additional burden on the servient tenement. 13 Cal. 136, Dist. (*Anantakrishna Ayyar, J.*) MAHOMED BEARI *v.* BADAVA BEARI **I R 1931 Mad. 405 = 130 I.C 661 = 1931 M W N. 631 = 34 L.W. 369 = A.I.R. 1931 Mad. 128 = 61 M.L J. 58.**

——**S. 23**—*Additional burden — Right of way to privy—Privy removed to a difference spot — No additional burden on servient heritage.*

The plaintiff obtained a decree declaring that his sweepar was at liberty to go through the lane on the defendant's land in order to clear the latrine situated in the plaintiff's premises. The privy was subsequently removed, by orders of the Municipality, to a different place on the plaintiff's land and the defendant contended that the plaintiff's easement was extinguished by the fact, that the dominant heritage had been destroyed and rebuilt on a different site.

Held, (*i*) that dominant heritage was not the privy, but the plaintiff's house within which it was enclosed; (*ii*) so the rebuilding of the privy had not the effect of extinguishing the easement under S. 45; (*iii*) the case

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was governed by S. 23 and as there was no additional burden imposed on the servient heritage and the sweeper entered and left the defendant's land at the same point as before, the rebuilding of the privy did not make the prior decree incapable of execution. (*Baker, J.*) YOSUF DAVID VARULEKAR *v.* MOSES SOLOMON TALKER. **135 I.C. 425=I R 1932 Bom. 73=33 Bom L.R. 1114=A.I.R. 1931 Bom. 490.**

———**S. 23**—*Right to flow of rain water—No right to flow of sullage water.*

The right of flow of rain water does not include in law the flow of all kinds of water, *e.g.*, sullage water. Passing of such water constitutes a nuisance and the servient owner has a cause of action against the dominant owner A.I.R. 1929 Cal 350 and *Philmore v Walford Rural District Council*, (1913) 2 Ch. 434, Rel. on. (*Nanavutty, J.*) BENI *v.* SEETAL DIN. **6 R.O. 545 149 I.C. 45=11 O.W.N. 657 A.I.R. 1934 Oudh 237.**

———**S. 23, Ill. (b)**—*Projection of eaves—Adverse possession.*

Though the projection of eaves resulting in discharge of rain water is an easement according to S. 23 Ill. (*b*) of the Easements Act, the mere projection of the eaves alone is not. The column of air occupied by a projection is not immovable property or any interest therein within the meaning of Art 144, capable of being acquired by adverse possession. 37 B. 491 and 21 Bom. L.R. 305, Ref. (*Pathak and Bajpai, JJ.*) CHHAGANLAL *v.* HEMCHAND. **I R 1932 Bom 396 138 I C. 458=34 Bom L R. 395 A.I.R. 1932 Bom 221.**

———**S 24, Ill (d)**—*Deviation from original way—When justified.*

Reading Ill (*d*) along with the S 24, it seems clear that the dominant owner is only entitled to deviate from the original way and pass over the adjoining land of the servient owner to such extent as may be really necessary to secure the full enjoyment of his easement. Where the original way is blocked only in its northern portion, there is no justification for any deviation in the southern portion, at a distance of over hundred feet from the original way. Such a diversion can hardly be considered reasonable (*Rhita, J.*) JHANDU LAL *v.* MUNSHI RAM. **149 I.C. 949 (2)=6 R L. 765=A.I R. 1934 Lah. 199.**

———**Ss. 28, 33 and 35**—*Action for damages or injunction—Elements to be proved—Substantial interference with physical comfort.*

In considering the question about the easement for light, Ss. 28, 33 and 35 have to be read together In such cases it is clear that damages may only be recovered if there has been substantial interference as described in Expl. 2, S. 33 and that an injunction can only be granted when compensation might be allowed under that section, that is, that both in the case of an action for damages or for an injunction *simpliciter*, it is necessary for the plaintiff to show conclusively that there has been substantial interference with the physical comfort, etc A. I. R. 1926 All 764; A. I. R. 1915 All. 151 and 42 Cal. 46 (P. C.), Rel. on. (*Mukerji and Young, JJ.*) MT. PANNA *v.* RAM SARAN. **55 All. 711=6 I.R (All) 115=145 I.C 530=1933 A.L.J. 1006=A I.R. 1933 All. 492.**

———**S. 28 (a)**—*Highway—Right of access to—Right of owner of land contiguous to a public highway.*

Obiter.—An owner of land which is contiguous to a public highway has a right of access to the highway from his land and *vice versa* at any point along the line of contact, whether the soil of the highway is vested in him or not. A road is not always a highaway. (*Raza, J.*)

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MAHOMED ABBAS *v.* JAHANGIR. **7 Luck. 530=I R. 1932 Oudh 218=137 I.C. 170=9 O.W.N. 159=A.I.R. 1932 Oudh 274.**

———**S. 28 (a)**—*Right of way—Extent of—Right to vary.*

A right of way imports the right of passing in a particular line and not the right of varying it at pleasure. A right of way of any one kind does not include a right of way of any other kind. The right of way appurtenant to the enclosure of a mosque can be used only for the purpose of passing to and from that enclosure, and the managers of the mosque cannot impose any additional burden on the adjoining lands by removing boundary walls or opening new passages from the enclosure of the mosque. If a man has power to make a way across another person's land, he must exercise his power in a reasonable manner and have due regard to the convenience of the servient owner so as to avoid inflicting on him needless and unreasonable injury. (*Raza, J.*) MAHOMED ABBAS *v.* JAHANGIR. **7 Luck. 530 I.R. 1932 Oudh 218 137 I.C. 170 9 O.W.N. 159 A.I.R. 1932 Oudh 274.**

———**S. 28 (c)**—*Light and air—Permanent injunction against building—Proof of substantial injury necessary.*

Where it appeared that the defendant's proposed building would merely cast a shadow on the plaintiff's wall and that it would not interfere with the plaintiff's enjoyment of light and air

Held, that the plaintiff's suit for an injunction restraining the defendant from erecting the building should be dismissed (*Tek Chand and Igha Haidar, JJ.*) HAKIM MAL TANI MAL *v.* V. E. EARLE. **12 Lah. 736 I R 1931 Lah. 376 131 I C. 104 32 P.L R. 371 A I R. 1931 Lah. 443**

———**S. 29**—*Gabled roof changed to pucca flat roof—Discharge of water doubled—Original easement destroyed*

Plaintiff altered the gabled roof of his house to a pucca flat roof. Formerly there was a right to sprinkle water on the whole length of the eaves on one side of the house The right to that easement was established. After the alteration the water of the whole roof was discharged through one hole on to the defendant's land.

Held, that change of this character completely destroyed the original easement, and it could not be said that there was any prescriptive right for the new condition of affairs and the burden has not been increased substantially (*Mukerji and Young, JJ.*) MT. PANNA *v.* RAM SARAN. **55 All. 711=6 I R. (All) 115=145 I.C 530=1933 A.L J. 1006 A.I.R. 1933 All. 492.**

———**Ss. 33 35 and 28**—Easement of light—Claim for injunction and damages—Substantial interference necessary. *See* EASEMENTS ACT (1882), SS. 28, 33 AND 33. **55 All. 711.**

———**S. 33**—*Light and air—Diminution whether actionable.*

The plaintiff sued for a mandatory injunction requiring the defendant to demolish his house so as not to block the windows in his rooms. The plaintiff relied on a mutual agreement which however merely stated that the defendant was not to close the windows in question and the other circumstances indicated that the parties could not have intended that the defendant would not erect any building at all.

Held, that the plaintiff was not entitled to the injunction as prayed for.

Held, further, that the plaintiff would not be entitled to damages unless on proof of such diminution of light and air as would be ordinarily necessary and in this

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connection the Court may take into account the other sources of light and air. (*Bhide, J.*) RATTAN CHAND *v.* LAL CHAND. **15 Lah 320 = 6 R.L. 415 = 147 I.C. 640 (2) = 35 P.L.R. 292 A.I.R. 1934 Lah. 240.**

——**Ss. 33 and 35**—*Light and air—Interference, when actionable—Plaintiff having other sources—Effect of.*

The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind. Where in a suit for a perpetual injunction, the lower appellate Court recorded a finding that if the ventilators opening into the verandah on the plaintiff's premises were to be closed by the action of the defendant in erecting a new building, the rooms of the plaintiff would become altogether dark and the light left would not be sufficient for ordinary purposes but that there was no actionable nuisance as there were other sources of light and air on the plaintiff's own premises which would keep the rooms in a habitable condition.

Held, that the plaintiff was entitled to the light and air through the ventilators in dispute because they were as much his property as his own premises and that he should not be made to give up his rights for the convenience of the defendant and that, therefore, the lower appellate Court was in error in not granting the injunction asked for. (*Agha Haidar, J.*) UMAR HAYAT KHAN *v.* MOHAMMAD ZAMAN. **159 I.C. 732 = 8 R. L. 421 – 37 P.L.R. 367 = A.I.R. 1935 Lah. 865.**

——**Ss. 33 and 35**—*Obstruction to light and air—Right to mandatory injunction.*

The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. The single question in these cases is whether the obstruction complained of is a nuisance. Where in a suit for a mandatory injunction against the defendant prohibiting him from obstructing the light and air passing through certain ventilators, it was found that even if those ventilators were closed, the courtyard of the plaintiff's house would receive plenty of light and air, there is no question of any nuisance being caused by the obstruction and the plaintiff is not entitled to any injunction. (*Agha Haidar, J.*) BAHRI KALLA RAM *v.* SHIV RAM. **7 R.L. 357 (2) = 152 I.C. 1060 (2) = 37 P.L.R. 34 = A.I.R. 1935 Lah. 79.**

——**Ss. 33 and 35**—*Water-supply—Cutting off—Cause of action—Proof of actual damage not necessary.*

When the whole of water supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount of diminution caused by the action of others or the precise amount of the particular damage caused by that diminution. Under such circumstances, the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage. 7 M.H.C.R. 60, Rel. on and 31 Mad. 171, Ref. (*Wallace and Krishnan Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793 = I.R. 1931 Mad. 747 133 I.C. 507 = 33 L.W. 681 = A.I.R. 1931 Mad 284 = 61 M.L.J. 563**

——**S. 35**—*"Disturb"—Meaning.*

The word "disturb" in S. 35 means "an illegal obstruction" or an obstruction in respect of which a suit would lie, *i.e.*, there must be a civil wrong before any injunction can be granted. 30 Bom. 319, Foll. (*Pandrang Rao, J.*) BHUSHANAM *v.* UMAPATHI MUDALIAR. **159 I.C. 888 = 8 R.M. 575 = A.I.R. 1935 Mad. 870.**

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——**S. 35**—*Easement — Disturbance—Injunction—Right to—Diminution of light and air to staircase and* deorhi *caused by erection of building—Injunction—Grant of.*

A staircase and *deorhi* are important portions of a building which is used as a human habitation and any appreciable diminution of light and air in either of them would affect the inhabitants injuriously and amount to a nuisance. (*Agha Haidar, J.*) BISHAN DAS *v.* BEHARI LAL. **157 I.C. 871 = 8 R.L. 155 (2) = A.I.R. 1935 Lah. 937.**

——**Ss. 35, 28 and 33**—Easement of light—Claim for injunction and damages—Substantial interference necessary. *See* EASEMENTS ACT, SS. 28, 33 AND 35. **55 All. 711.**

——**S. 35**—*Obstruction to light and air—Proposed wall by adjoining owner—Injunction—Grounds for.*

Where the quantity of light and air that would be left in *P's* house, if a wall was built by the owner of the adjoining house, would be enough for the comfortable use and enjoyment of it according to the ordinary requirements of the people, who live in that locality, though it would to some extent be an inconvenience and diminish to some extent the light and air that would be available if the wall was not built, the construction of the wall would not amount to a nuisance as would entitle *P* to an injunction. 42 C. 46 = 41 I.A. 180, Foll. (*Pandrang Rao, J.*) BHUSHANAM *v.* UMAPATHI MUDALIAR. **159 I.C. 888 = 8 R.M. 575 = A.I.R. 1935 Mad. 870.**

——**S. 35**—*Right of privacy—Interference with—Right to restrain—Premises already overlooked.*

To succeed in an action to restrain any interference with a right of privacy, a plaintiff must show not only that such a right of privacy exists by custom in the district in which the premises are situated but also that he has in fact enjoyed such a right and that it has been substantially or materially affected by the acts of the defendant. A contention that the opening of windows overlooking other premises cannot be restrained if such other premises are already overlooked from any parts of adjoining or neighbouring premises such as roofs, is not sound. (*Harries, J.*) TIKA RAM JOSHI *v.* RAM LAL SAH. **155 I C 1056 = 7 R.A. 1017 (2) = 1935 A.L.J. 432 – 1935 A.W.R. 322 = A I.R. 1935 All. 754.**

——**S 36**—*Wrongful obstruction of easement—Abatement—Right of dominant owner.*

Under S. 36, a dominant owner cannot himself abate a wrongful obstruction of an easement. (*Subhedar, A. J.C.*) RAMCHANDRA *v* SHANKARRAO. **I R. 1932 Nag. 71 – 138 I C. 38 = 33 Cr.L.J. 556 = 15 N.L.J. 28 = 1932 Cr.C. 433 = A I R. 1932 Nag. 83.**

——**S. 38, Expl. II**—*Right to store water and inundate land—Tank bund not repaired for over 30 years—Non-user—Effect of.*

Where the proprietor of an estate comprising a tank owned an easement of storing water and inundating the lands near by, the mere fact that the predecessors of the defendant in charge of the estate did not think it profitable to repair the tank bund and store water from 1878 to 1910 would not amount to an abandonment or implied release of the easement, so as to preclude the defendant from repairing the tank and storing water. (*Kumaraswami Sastr. and Reilly, JJ.*) GAJAPATHI KRISHNA CHANDRA DEO *v* RAJAH OF VIZIANAGA-

EASEMENTS ACT (1882), S. 43.

RAM. **135 I.C. 349=I.R. 1932 Mad. 93=1931 M.W. N. 23=33 L.W. 771=A.I R. 1931 Mad. 561 (2)=60 M.L.J. 662.**

———**S. 43**—*Reconstruction of building—No increase of burden—Continuity of easement.*

When a building has been pulled down, in which there was a right of light and air as regards certain windows, and a new building is constructed on the same site, if the windows placed in the new building can be substantially identified with the windows that existed in the former building, the right to light and air will remain and the easement will not be lost. 20 W.R. 185, Diss. From; *Scott* v. *Pole*, (1886) 31 Ch. D. 554; *Colls* v. *Home and Colonial Stores, Ltd.*, (1904) A.C. 179; 7 Cal. 145 and 33 Mad. 327, Ref. (*Staples, A.J.C.*) SHANKAR *v.* DATTATRAYA. **I R. 1931 Nag. 93=131 I.C. 429=A. I.R. 1931 Nag. 80.**

———**S. 45**—Alteration in place—Right of way to privy—Privy removed to a different spot—No additional burden imposed on the servient tenement—Easement not extinguished. *See* EASEMENTS ACT, S. 23. **33 Bom.L.R 1114=A.I R. 1931 Bom. 490.**

———**S. 45**—*Partial destruction of dominant heritage.*

Even if a door and a part of the house have collapsed, a right of easement already acquired by the plaintiff to use the adjoining lane, as a passage to the site of his house cannot be extinguished. (*Niyogi, A J C.*) SHEONARAYAN *v.* DINDAYAL. **27 N.L R. 213=I.R. 1931 Nag. 161=134 I.C. 673=A.I.R. 1931 Nag. 189.**

———**S. 47**—*Temporary non-user—Effect of.*

A right of easement acquired by the plaintiff to use the adjoining lane as a passage to his door is not extinguished by temporary non-user not amounting to abandonment. Where the door to which he had a right of way collapsed a few years before but was reopened before the date of obstruction by the defendant, the plaintiff has a right of action. *Cook* v. *Mayor of Bath*, L.R. 5 Ed. Cas. 177, Foll. (*Niyogi, A.J.C.*) SHEONARAYAN *v.* DINDAYAL. **27 N.L.R 213=I.R. 1931 Nag. 161=134 I.C. 673=A.I R. 1931 Nag. 189.**

———**S. 52**—*Demise and not merely license—Grant of exclusive right of occupation.*

If the effect of a deed which is to give the holder an exclusive right of occupation of a shop, although subject to certain reservations or to a restriction of the purpose for which it may be used, it amounts in law to a demise of the shop itself and not merely a license. The main test in such cases is that of exclusive possession. *Glenwood Lumber Co., Ltd.* v. *Phillips*, (1904) A.C. 405 and A.I.R. 1930 Bom. 165, Rel. on. (*King and Thom, JJ.*) BEHARI LAL *v.* CHHOTE. **149 I.C. 486 =6 R.A. 910=A.I R. 1933 All. 911.**

———**Ss 52 and 56**—*Licence—Nature of right.*

A licence is not annexed to the property in respect of which it is enjoyed, nor is it a transferable or heritable right, but is a right purely personal between grantor and licensee. Unless a different intention appears, it cannot even be exercised by the licensee's servants or agents. So where, on the death of the original licensee, his heirs continue in occupation, they are on no greater footing than tenants at-will. They are trespassers whose possession is adverse to the owner of the property. (*Curgenven and Bhashyam Ayyangar, JJ.*) CHINNAN *v.* RANJITHAMMAL. **54 Mad. 554=I.R. 1931 Mad. 511=131 I.C. 175=1930 M.W.N. 1242=33 L.W. 455=A.I R. 1931 Mad. 216=60 M.L.J. 709.**

[**Rel.** 30 N.L.R. 155 (164).]

———**S. 52**—*Licence—Plea, if sustainable.*

Where in a suit by reversioners to recover possession of a house which had been constructed by the widow 8 or 9 years before the date of suit, the defendant set up a plea of licence but it appeared that he was the general agent of the late widow and not an agricultural tenant to whom a plot of land for building house had been granted,

Held, that the plea of licence could not be sustained and the plaintiffs were entitled to succeed. (*Nanavutty, J.*) TAWAKKAL HUSSAIN *v.* MANZURUL HUSAIN. **I.R. 1931 Oudh 351=132 I.C. 799=8 O.W.N. 714.**

———**S. 52**—*Licence—Use of land as Sehan—Erection of structure for protecting cattle—If justified.*

The use of land as a Sehan does not justify the making of a structure on it for the purpose of protecting cattle. Where it is not established that the use of a Sehan was an easement of necessity or that an easement had been acquired, it amounts to a mere license under S. 52, Easements Act. (*Bennet, J.*) LACHMAN *v.* RATNAKAR SINGH. **153 I.C. 670=7 R.A. 546= A I.R. 1934 All. 836.**

———**S. 52**—License or lease—Agreement to occupy portion of railway land for construction of petroleum installation signed by both parties—Restrictions on mode of enjoyment and against subletting—Agreement terminable by short notice—Nature of agreement—Transaction not a mere license, but a lease. *See* STAMP ACT (1899), S. 2 (16) (*b*). **1933 A.L.J. 749=A.I.R. 1933 All. 735 (F B.).**

———**S. 52**—*License or lease—Recitals—Value of.*

In deciding whether a document amounts to a lease or is only a license, the recitals therein can never be conclusive; the Court has took to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties. (*Sulaiman, C. J., Mukerji and King, JJ.*) BURMAH SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD., *In the matter of*. **55 All. 874=6 I R. (All.) 145=145 I.C. 674=1933 A.L.J. 749=A.I.R. 1933 All. 735 (F.B.).**

———**S. 54**—*Licence—Grant by conduct—Erection of wall over another's wall—Inference.*

The wall of the upper storey of a house belonged to the plaintiffs, while the wall of the lower storey on which the upper wall rested belonged to the defendants. The upper wall was demolished by the defendants.

Held, that having regard to the fact that the defendants must have had knowledge of the construction of the wall and to the absence of any protest on their part it may be inferred that the wall was built either with the implied consent or without any protest on the part of the defendants and it amounted to an implied grant of licence by the defendants to the plaintiff to construct the wall of the upper storey on the wall of the lower storey. As the wall had been of permanent character and expenses had been incurred in its execution, the licence cannot be revoked by the defendants. (*Bennet, J.*) MAHOMED ABDUL JAMIL *v* MANZOOR AHMAD. **I.R. 1932 All. 250=136 I.C. 821=A I.R. 1932 All. 572.**

———**S. 56**—*House in city on site of landlord—Tenant's or licentee's right to transfer—Presumption.*

In cases of houses built in cities on the land belonging to landlord, there can be no presumption that the tenants or licensees have no power of transfer If the landlord contends that the tenant had no right to transfer the building which he had built and which he was occupying, it is for him to show, that under the terms of the license the right of the tenant was limited and it was expressly agreed that he would be incompetent to make a transfer or it was open to him to prove the existence of a custom prohibiting the right of transfer. So far as houses built by tenant in villages are concerned, the rights between the parties are different. A tenant build-

EASEMENTS ACT (1882), S. 56.

EASEMENTS ACT (1882), S. 56.

ing a house in a village site has only a right to occupy so long as the tenancy lasts or so long as he does not abandon the village. But the same principle cannot ayply to houses built in a city. 16 I.C. 353; A.I.R. 1929 All. 494, Ref; A.I.R. 1924 All. 825, Dist. (*Kendall and Rachhpal Singh, JJ.*) RAM BHAROSE *v.* BISHNATH PRASAD. **153 I C. 692=7 R A. 572=18 R.D 353=1934 A.L J. 728=4 A.W.R. 1198 - A.I.R. 1934 All 335.**

———**S. 56**—*Licensor calling upon Court to determine valiaity of transfer of license—Terms of license to be placed before Court.*

Before a licensor can call upon the Court to decide upon the rights of a licensee to transfer, the terms of the license must be placed before the Court by the licensor and then only it will be in a position to determine as to whether or not having regard to them the licensee had a right of transfer. (*Kendall and Rachhpal Singh, JJ.*) RAM BHAROSE *v.* BISHNATH PRASAD. **153 I C 692 -7 R.A. 572=18 R.D 353=1934 A L.J. 728 4 A.W R. 1198=A.I R. 1934 All. 336.**

—— —**S 59** *--License irrevocable--Transfer of interest by licensor—Effect.*

If the license has become irrevocable in the time of the licensor, the mere fact that he transfers his interest in the land would not extinguish the license. (*Sulaiman, C. J. and Mukerji, J.*) MATHURI *v* BHOLA NATH. **56 All. 975=149 I C 389 =6 R A. 897=1934 A.L.J. 698 4 A.W.R 1109 - A.I.R. 1934 All. 517.**

———**S. 59** *--Scope--Effect of words 'as such'—Licence granted by transferor--Transferee, if bound.*

The use of the words "as such" in S. 59 seems clearly to be intended to indicate that the transferee would not be in any worse position than the transferor. The result of the proviso is that if the grantor of the licence does not revoke it, it does not mean that the transferee cannot do so but the section cannot be construed as giving the transferee any better rights than were possessed by his transferor, much less to hold that the effect of the transfer is *ipso facto* to put an end to all previous licences The rule laid down by S. 59 is not independent of that laid down by S. 60. Transferee held bound by licence previously granted by transferor. 57 All. 91, Rel. on. (*Bisheshwar Nath, J.*) FAQIRAY MIAN *v.* BAIJNATH **7 Luck. 175=I R. 1931 Oudh 296=132 I.C. 536 14 O L J. 525=8 O W.N 728 -A.I R. 1931 Oudh 364.**

———**S. 60**—*Applicability -- Licence to remain in possession -- House built by licencee -- Revocation of licence*

S. 60 is inapplicable where the defendant's house cannot be said to have been built, acting upon the licence. Where it was merely a licence to remain in possession of the plot on which the defendant's predecessors in interest already dwelt, the fact that the defendant has built a house on the plot is no bar to the revocation of the licence. (*Kisch, J.*) MAHOMED ALI *v.* AHMAD HUSAIN. **I R. 1932 Oudh 357=139 I.C. 365=9 O.W.N. 568=A.I R. 1932 Oudh 264.**

———**S. 60**—*Construction — Bengal decisions—Value of.*

The Easements Act is not in force in Bengal and questions relating to license arising in that province have to be decided with reference to the English law. So Bengal decisions cannot be relied upon as authorities in places where the provisions of the Easements Act are applicable. (*Bisheshwar Nath and Smith, JJ.*) SHYAM LAL *v.* MUNNE. **8 Luck. 278=I.R. 1933 Oudh 29=140 I.C. 899=9 O.W.N. 986=A.I.R. 1933 Oudh 69.**

EASEMENTS ACT (1882), S. 60.

———**S. 60**—*Effect of.*

The rule laid down by S. 59 is not independent of that laid down by S. 60 and does not confer upon the transferee any higher rights than those possessed by the transferor. (*Bisheshwar Nath, J.*) FAQIRAY MIAN *v.* BAIJNATH. **7 Luck. 175=I.R 1931 Oudh 296=132 I.C. 536=14 O.L.J. 525=8 O.W.N. 728=A.I R. 1931 Oudh 364.**

———**S. 60**—*Licence—Grant of site to occupier.*

Where a site has been granted to an occupier for building a house, the case is governed in the absence of terms to the contrary by S. 60 of the Easements Act. (*Sulaiman, A.C.J. and Bajpai, J.*) NABI MAHOMED *v.* BHAGWAT PRASAD SHUKUL. **I.R 1931 All. 533 =132 I C. 565=1931 A.L J. 649=15 R.D. 560=12 L R 303 (Rev.)—A.I.R. 1932 All. 33.**

———**S 60** *--Licence—Revocation on compensation to licensee—Permissibility.*

The Act does not contain any provision allowing revocation of a license in a case where the licensee has executed a work of a permanent character on payment of compensation to the licensee. 98 I C. 814, Foll. (*Bisheshwar Nath and Smith JJ.*) SHYAM LAL *v.* MUNNE. **8 Luck 278=I R 1933 Oudh 29=140 I.C. 889=9 O.W.N. 986=A.I.R. 1933 Oudh 69.**

———**Ss. 60 and 62**—*Licensee putting up building of permanent character—Revocation of licence.*

Even though the Easements Act does not expressly apply to cases of licenses before the coming into force of the Act, the principles underlying Ch. 6 of the Act, being in consonance with justice equity and good conscience, may well be applied. Hence when an owner of land gives permission to another person to put up a building of a permanent character and he incurs expenses in the execution of such work, the licensor is by necessary implication estopped from revoking his permission so as to prejudice the licensee, whose position has been compromised in consequence. It would be inequitable, unjust and unfair to allow a licensor to order that the licensee should forthwith remove the work of a permanent character, which he has put up after incurring expenditure. In such an event, the transaction ceases to be a mere license revocable at will, but may in certain circumstances amount to a license coupled with a transfer of interest or, at any rate, a case where the licensee acting upon the license has executed a work of a permanent character and has incurred expenses in the execution so as to make the license irrevocable; so long as the construction subsists, the right to revoke it would be in abeyance. (*Sulaiman, C.J and Mukerji, J.*) MATHURI *v.* BHOLA NATH. **56 All. 975=149 I C. 389—6 R.A 897=1934 A.L J 698=4 A.W.R 1109 =A.I.R. 1934 All. 517.**

———**S. 60**—*Revocation of license—Power of administrator*

A person who has got letters of administration to the estate of the deceased must be regarded as taking the place of that deceased. Therefore any person, who on his own admission has entered upon the premises originally with leave and license of the deceased, must vacate the premises if the administrator so desires. For this purpose it is enough that the administrator has given some kind of notice. (*Baguley, J.*) MA GYI *v.* MAUNG TET. **151 I.C. 971=7 R.R 130 (2)=A.I.R. 1934 Rang. 291.**

———**S. 60**—*Scope—Lease of land—Stipulation that no one else should occupy house standing thereon without zemindar's permission—Transferee of share in materials of house—Right to occupy land—Suit for ejectment by zemindar—If barred.*

EASEMENTS ACT (1882), S. 60.

Plaintiff was the owner of a plot of land which the father of defendant No. 2 had taken on lease from the father of the plaintiff. The kabuliyat provided that no other person would be allowed to reside in the house standing thereon without the permission of the zemindar. The lessee having died, his daughter and son, the 2nd defendant succeeded; the former sold her share of the materials of the house to the plaintiff; while the latter sold his share of the same to defendant No. 1. In a suit by the plaintiff for partition of the share of the materials in the house purchased by him and for possession of the site after removal of the share of the materials purchased by defendant No. 1 from defendant No. 2.

Held, (1) that S. 60 of the Easements Act did not bar the suit, as no question of any licence arose, that defendant No. 2 had not transferred any right of residence to defendant No. 1, who had therefore no right to occupy the site, (2) that the sale-deed by defendant No. 2 to defendant No. 1, was only in respect of the materials in the house and not of any right or interest in the land which belonged to the zemindar. (*Ganga Nath, J.*) RAFIQ AHMAD *v.* MOHAMMAD SIRAJ HUSSAIN KHAN. **156 I.C. 48 = 7 R.A. 1050.**

———**S. 60**—Use of building as a mosque with consent of zemindar—If a mere license—Presumption of dedication from long user—Right to convert a *katcha* into a *pucca* building. *See* EASEMENTS ACT, S. 2 (*b*). **8 R. A. 59 = 156 I.C. 942 = A.I.R. 1935 All. 891.**

———**S. 60**—*Work of permanent character—Defendant need not prove that large sum had been actually spent.*

Where having regard to the nature of the constructions made probably after filling up a part of the ditch, the long period of its occupation, the dimensions of the house and the value of the structure, it was held that it was a work of a permanent character, in executing which the defendant's ancestors incurred expenses,

Held, it was not necessary for the defendant to show that a large sum of money had been actually spent in order to bring the case within the scope of the principle underlying S. 60.

Held, further, that even a mud house or kacha house may be a work of a permanent character. (*Sulaiman, C.J. and Mukerji, J.*) MATHURI *v.* BHOLA NATH. **56 All 975 = 149 I.C. 389 = 6 R.A. 897 = 1934 A.L.J. 698 = 4 A.W.R. 1109 = A.I.R. 1934 All. 517.**

———**S. 60**—*Work of permanent character—Incomplete building.*

It cannot be said that because the building has not been completed, therefore the work already executed is not of a permanent character. (*Bisheshwar Nath, J.*) FAQIRAY MIAN *v.* BAIJNATH. **7 Luck. 175 = I R. 1931 Oudh 296 = 132 I C 536 = 14 O.L.J. 525 = 8 O. W.N. 728 = A.I.R. 1931 Oudh 364.**

———**S. 60 (b)**—*Permanent work—Erection of upper wall.*

Held, that erection of an upper wall at a cost of Rs. 25 is a work of a permanent character and that a licence regarding the same could not be revoked. (*Bennet, J.*) MAHOMED ABDUL JAMIL *v.* MANZOOR AHMAD. **I.R. 1932 All. 250 = 136 I.C. 821 = A.I.R. 1932 All. 572.**

———**Ss. 60 (b) and 64**—*Permanent work executed—License irrevocable.*

Where the licensee has executed work of a permanent character, the license becomes irrevocable. To such a case S. 64 is inapplicable, and the grantor cannot revoke the license by paying compensation. (*Sulaiman, C.J. and King, J.*) MANZOOR AHMAD *v.* MAHOMED ABDUL JAMIL. **56 All. 207 = 1933 A.L.J. 1422 = 6 I.R. (All.) 210 = 145 I.C. 948 = A.I.R. 1933 All. 842.**

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (1907) S. 2.

———**S. 60 (b)**—*Permanent work—Residential house with tiled roof.*

A residential house, in which the licensee has been residing for a long number of years, is a work of a permanent character, in spite of its having a tiled roof which requires to be renewed from time to time. 28 All. 741, Foll. (*Bisheshwar Nath and Smith, JJ.*) SHYAM LAL *v.* MUNNE. **8 Luck. 278 = I.R. 1933 Oudh 29 = 140 I.C. 869 = 9 O W N. 986 = A.I.R. 1933 Oudh 69.**

———**S. 61**—*License—Inference of revocation.*

Where it was with the plaintiff's permission that the defendant committee put up a thatch on the chabutra adjoining a mosque to afford accommodation for the growing needs of the school within one portion of the mosque.

Held, that the position of the committee was no better than that of a licensee and that the defendants' attempt to build on the "chabutra", the plaintiff's protest, and the denial of his right followed by the institution of the suit, were circumstances which gave rise to the inference that the plaintiff revoked the license originally granted by him. (*Niamatullah, J.*) SYED AHMAD *v.* HAFIZ ZAHID HUSAIN. **4 A.W.R. 461 = 153 I.C. 1095 = 7 R.A. 667 = A.I R. 1934 All. 732.**

———**S. 62**—*License to reside in house—Revocation by landlord.*

Where the tenants are mere licensees occupying the house as an appurtenant to the holding, the license to reside must be deemed to be revoked under S 62, where the license is granted for a specific purpose and the purpose is abandoned or has become impracticable. (*Nanavutty, J.*) SURAJ BAKHSH SINGH *v.* BHUGGA. **8 Luck. 509 = 6 I R (Oudh) 7 = 144 I.C. 776 = 17 R. D. 718 = 14 L.R. 555 (Rev.) = 10 O.W N. 398 = A I. R. 1933 Oudh 302**

———**S. 62**—*Revocation—Transfer of property of licensor.*

A licensee is revoked by the transfer of property by the licensor. 108 R. R. 942, 150 E. R. 1543, Foll. (*Curgenven and Bhashyam Aiyangar, JJ.*) CHINNAN *v.* RANJITHAMMAL. **54 Mad 554 = I R. 1931 Mad. 511 = 131 I C. 175 = 1930 M.W.N. 1242 = 33 L.W. 455 = A.I R. 1931 Mad. 216 = 60 M.L.J. 709.**

———**S. 63**—*Licence—Revocation of—Notice of—Reasonable time.*

A licensee whose licence is revocable is entitled to reasonable notice of revocation. When the exercise of the rights conferred by the licence involves nothing beyond, it may be revoked the will of the licensor. But where the exercise of the rights has involved the licensee in obligations in other directions, which the immediate determination of the licence would disable him from fulfilling, the licence can only be determined after notice sufficient, in point of time, for the making of substituted arrangements. (*Lord Russell of Killowen*) CANADIAN PACIFIC RAILWAY CO. *v.* THE KING. **138 I.C. 292 = 36 L.W. 91 = I R. 1932 P C. 235 = A I R. 1932 P. C. 108 = 61 M.L.J 958 (P.C.).**

———**S. 64**—*Applicability—Work of permanent character.*

S. 64 applies to a case where there is not a work of a permanent character. (*Bennet, J.*) MAHOMED ABDUL JAMIL *v.* MANZOOR AHMAD. **I.R. 1932 All. 250 — 136 I.C. 821 = A I R. 1932 All. 572**

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II OF 1907), S. 2—*Preliminary notice to vacate—Subsequent order based on such notice—Legality.*

The preliminary notice served on a person requiring him to show cause as to why he should not vacate a

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house is wholly illegal and is clearly not a notice contemplated by the Act; so also the proceedings based on the notice and the orders passed thereon to the effect that the person proceeded against should discontinue the use of the house as a brothel are without jurisdiction. (*Cuming, J.*) KASHI BASHI SAHA *v.* EMPEROR. **137 I. C. 528 = I.R. 1932 Cal. 340 = 33 Cr.L.J. 475 = 35 C.W.N. 348 = 1932 Cr.C. 311 (2) = A.I.R. 1932 Cal. 369.**

EAST INDIA COTTON ASSOCIATION, By-law No. 74—*Construction—Default by seller—Courses open to buyer—Failure to adopt—Effect of.*

By-law 74 provides that on default by seller to tender a delivery order, the buyer may buy in the market or invoice back. This obligation only arises if he desires to take advantage of the default made by the seller. If he fails to exercise either of those options, then his remedies against the seller are gone. It does not mean that if the seller makes default, the buyer is bound to do certain things and if he does not do them, he is liable in damages to the defaulting seller. The result of so reading the by-law would be to give to a seller in default damages arising out of his own default. (*Beaumont, C.J. and Blackwell, J.*) MEENAKSHI MILLS, LTD. *v.* LINGLEY & CO. **58 Bom. 288 = 150 I.C. 49 = 6 R. B. 425 = 36 Bom L R. 28 = A.I.R. 1934 Bom. 107.**

EAVES *See* EASEMENT.

EJECTMENT.

See also (1) LANDLORD AND TENANT—EJECTMENT.

(2) LIMITATION ACT, ARTS. 142 AND 144.

———Building by stranger on the land of another—Conduct of owner giving rise to an inference of licence—The latter cannot eject the stranger without paying compensation. *See* EVIDENCE ACT, S. 115—ACQUIESCENCE. **27 N.L.R. 183 = A.I.R. 1931 Nag. 158.**

———*Co sharers—Right to single co-sharer to eject trespasser.*

Where the property in dispute consists of entire plots which may be cultivated, a co-sharer has a joint interest in all the entire plots and has a right to eject a trespasser who is holding them without any right and title. It is not necessary that all the co-sharers should join in such a suit. (*Sulaiman, A.C.J. and Baipai, J.*) SHEOTAHAL DUBE *v.* LAL NARAIN PRASAD CHAND. **I. R. 1931 All. 667 = 133 I.C. 427 = 16 R.D. 76 = A.I.R. 1931 All. 695 (1).**

———*Co sharers—Suit by some—Maintainability.*

It cannot be laid down as an inflexible rule of law, that in no case can a suit for ejectment by some of the co sharers be maintained without joining the other co-sharers as plaintiffs, even though they have been im pleaded as defendants. The answer to the question depends upon a variety of circumstances and the proper course is to investigate the facts in each particular case. (*Tek Chand, J.*) GANDA SINGH *v.* WALI RAM. **I.R. 1931 Lah. 777 = 133 I.C. 441 = 32 P.L R. 239 = A.I. R. 1931 Lah. 253.**

———Jus tertii—*Plea of.*

In an action for ejectment, the plaintiff is entitled to succeed solely on the strength of his prior possession and the defendant is not entitled to set up the right of a third party unless he claims under him and makes good that claim. (Case-law Ref.) (*Mahomed Noor and Dhavle, JJ.*) CHATURBHUJ SINGH *v.* SARADA CHARAN GUHA. **11 Pat. 701 = 141 I.C. 157 = I.R. 1933 Pat. 47 = 14 Pat.L.T. 509 = A.I.R. 1933 Pat. 6.**

[R. 13 P. 182 (189).]

EJECTMENT.

———Jus tertii—*Plea of—Title of third party already negatived.*

When a judgment has established the right to any property between two parties, it is not open to a third person to set up the right of that party whose title has been found against as against the successful party. Such cases form the exception to the rule of *res inter alios acta* (*Srivastava, J.*) AJODHIA PRASAD *v.* MUSAMMAT SANJHARI KUAR. **6 Luck. 710 = I.R. 1932 Oudh 372 = 139 I.C. 631 = 9 O.W.N. 813 = A.I.R. 1932 Oudh 342.**

———*Suit for—Appeal—Omission to implead landlord—Dismissal of appeal on that ground—Propriety.*

Where in a suit for ejectment by an occupancy tenant against alleged sub-tenants, the plaintiff impleaded the landlords as parties in pursuance of a direction of the appellate Court and the suit having been decreed, the defendants sub-tenants appealed but the landlords were not impleaded as parties, and the appellate Court dismissed the appeal on that ground.

Held, that the proper procedure was to pass an order under O. 41, R. 20, C.P. Code, adjourning the case and directing the landlords to be impleaded after payment of the expenses of the other side. (*Keane, S. M. and Oppenheim, J.M.*) KISHUN CHMARIA *v.* SOMARIA. **15 R.D. 291 = 12 L R. 96 (Cr.).**

———*Suit for—Averment of existence of contract of sale—If relevant defence—Law prior to T. P. Act, S. 53-A.*

S. 54, T. P. Act, expressly enacts that a contract for the sale of immovable property does not of itself create any interest in or charge on such property. There is therefore no room for the application of the English equitable doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate. Thus under the law applicable before the insertion of S. 53-A, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, was not relevant defence to an action of ejectment. If the contract is still enforceable the defendant may found upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part-performance will not avail him to any effect (*Lord Macmillan.*) PIR BUX *v.* MAHOMED TAHAR. **61 I.A. 388 = 58 Bom. 650 = 39 C.W.N. 34 = 1934 M. W.N. 1037 = 36 Bom.L R 1195 = 7 R.P.C. 60 = 151 I.C. 326 = 1934 A.L J. 912 = 4 A.W.R. 417 = 11 O.W. N. 1145 = 40 L.W. 492 = 18 R.D 469 = 60 C.L.J. 370 = 16 Pat.L T. 1 = A.I.R. 1934 P.C. 235 = 67 M.L.J. 865 (P.C.).**

———*Suit for—Claim for specific performance barred—Whether can be set up as defence.*

In answer to an action of ejectment, the defendant cannot plead and set up a claim to specific performance of a contract, when his right to enforce such contract by suit has become barred by limitation. (*Lord Thankerton.*) CURRIMBHOY & CO., LTD. *v.* CREET. **60 I.A. 297 = 60 Cal. 980 = 57 C.L J. 264 = 1933 A L J. 611 = I.R 1933 P.C. 15 = 141 I.C. 209 = 1933 M.W.N. 10 = 37 L W. 253 = 35 Bom.L.R. 223 = 37 C.W.N. 265 = A.I.R. 1933 P.C. 29 = 64 M.L.J. 103 (P.C.).**

[F. 61 I.A. 388 (396), R. 16 P.L T. 1 (6).]

———*Suit for—Confusion of boundaries by defendant—Right to decree.*

So long as the plaintiff is unable to identify the property from which he desires to eject the defendant, he is not entitled to a decree for partition and the Courts have no jurisdiction to grant the plaintiff's prayer in such a case unless some equity is superinduced by the

act of the parties or unless the defendant is shown to be a joint tenant or a tenant in common or a coparcener or an agent, trustee or one occupying a fiduciary position towards the plaintiff in respect to the land. This principle has, however, to be applied with reference to the special features of each case ; manifest injustice will be the result if this principle is confined strictly to these cases. Where in a case of confusion of boundaries, it was shown that the defendant obtained possession from the plaintiff's father and that the confusion was caused by the defendant's wrongful act, it was held the inability of the plaintiff to identify the property was no bar to his right to a decree. (*Madhavan Nair, J.*) APPAYYA BANGA *v.* KORAGA. **I.R. 1931 Mad. 259 (2) = 129 I. C. 451 (2) = 1931 M.W.N. 155 = 32 L.W. 957 = A.I. R. 1931 Mad. 19 = 60 M.L.J. 85.**

———*Suit for—Defendants who are proprietors building* kothas *on cremation ground—Proper frame of suit.*

Where the plaintiffs as the representatives of the Hindu inhabitants of the village sued the defendants, who were two of the proprietors, for their ejectment from the land in suit on the ground that it was part of area reserved as a cremation ground and that the defendants had no right to build *kothas*, on the area in suit thereby infringing the plaintiff's rights,

Held, that technically speaking, the plaintiff's suit for ejectment of the defendants, who were the village proprietors, was not properly framed and that the suit ought to have been for a mandatory injunction asking the Court to demolish the recently erected *kothas*, and that that object could easily be attained either by amending the plaint or giving the proper relief to the plaintiffs although it was not specifically asked for. (*Agha Haidar, J.*) NAND RAM *v.* JAI CHAND. **153 I.C. 968 = 7 R.L. 483 = 36 P.L.R 253 = A.I.R. 1934 Lah. 1009.**

———*Suit for—Defence of valid contract with vendor when available.*

Where the plaintiff's vendor and defendant had agreed in writing that the vendor would re-deliver certain property to the defendant, for which the defendant had paid the purchase-money, the defendant cannot set up that contract against the plaintiff's subsequent vendee in a suit for ejectment, where that contract was barred by limitation. The fact that the plaintiff's vendor had given the defendant a stamp paper after time had run. did not revive the contract. The argument that if a party has an effective contract which he can register and use as a bar to ejectment he will be given the relief set forth in *Walsh* v. *Lansdale*, (1882) 21 Ch. D. 9 may be available, provided his contract to re-deliver is still within limitation. (*Jackson and Butler, JJ.*) APPALA RAJU *v.* NAGANNA. **153 I.C. 16 = 7 R M. 326 = 40 L.W. 667 = 1934 M.W.N. 1324 = A.I.R. 1934 Mad. 583 (1).**

———*Suit for possession and rent—Title only and no tenancy proved—Right to damages.*

The plaintiff sued for possession of and rent. The defendant denied both title and tenancy. The lower Court held the plaintiff proved his title but that the defendant had not attorned to the plaintiff.

Held, the plaintiff was entitled to possession and damages for use and occupation of the house. 7 S.L R. 23, Foll. (*Wild, J.C. and Milne, A.J.C.*) MUNSHI ALLAHWARYO *v.* MT. BEGUM. **25 S.L.R. 266 = I R. 1931 Sind 143 = 134 I.C. 399 = A.I.R. 1931 Sind 145.**

———Suit for—Proof of title—Presumption as to possession—Open site—Effective possession not proved by either party—Effect—Plaintiff entitled to the decree for one-third portion of the plot, to which he had proved his title. *See* LIMITATION ACT, ART. 142. **54 Mad 622 = A.I.R. 1931 Mad. 644 = 61 M.L.J. 224.**

———*Suit for—What plaintiff must prove.*

Where the plaintiff has sued for ejectment of defendant 1, who according to him is in possession of the land by obtaining possession of it from *K*, with whom the plaintiff had settled the land, the plaintiff cannot succeed unless he proves a title in himself. Defendant 1 may have no title in the land. But he being in possession can retain his possession, though based upon no title against the whole world except the rightful owner. It is for the plaintiff to show that he is that owner. The defendant can defend his possession by impeaching the plaintiff's title. If the title claimed by the plaintiff is the settlement from the landlord and the title of the landlord is derived by virtue of the surrender from a raiyat, it is incumbent upon the plaintiff to prove a valid surrender by the raiyat and defendant 1 is entitled to show that the deed of surrender relied upon by the plaintiff was obtained by fraud or misrepresentation. (*Mohamad Noor, J.*) JAGATBANDHU DUTTA *v.* SHAYAM CHAND BHOLE. **6 I.R. (Pat.) 137 = 144 I.C. 946 = A.I.R. 1933 Pat. 446.**

———*Suit for—What plaintiff should prove.*

In a suit for ejectment the plaintiff must not only prove his title but also that he has been in possession within twelve years from the date of the institution of the suit and if it is found that the evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit, the plaintiff's suit must fail inasmuch as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. (*Agarwala, J.*) GUHI RAM SINGH CHAUDHURI *v.* ADALAT MAHATO. **6 I R. (Pat.) 262 = 146 I.C. 448.**

———*Trespasser—Donee from Hindu reversioner—Right to eject.*

Where a person professing to be the next reversioner makes a gift in favour of a school, which is in existence, and in the name of *X* who is one of the managers of the school, *X* is entitled to maintain a suit to eject one who is a pure trespasser. 38 I.C. 183, Dist. (*Mukerji and Bennet, JJ.*) SHANKAR LAL *v.* DAMODAR DAS. **I.R. 1931 All. 742 = 133 I.C. 790 = A.I.R. 1931 All. 450.**

———*Trespasser—Notice to quit—Suit filed before expiry of term—Maintainability*

Where a suit for ejectment was filed against a trespasser but a notice was served on him by way of abundant caution and as the settlement entry showed him to be a *Korfa* tenant,

Held, that the suit filed before the expiry of the term specified in the notice was not rendered incompetent, as it was found that the defendant was a mere trespasser. (*Mukerji, J.*) SITABUDDIN BISWAS *v.* BEHARI LAL MANDAL. **149 I.C. 678 = 6 R.C. 629 = 58 C.L J. 279 = A.I.R. 1934 Cal 134.**

———*Trespasser—Right of person having possessory title.*

Where certain persons who were in peaceable possession under colour of title were ousted by a trespasser and the former sued for ejectment of the latter, *held*, that the plaintiff's possessory title was sufficient to entitle them to a decree. (*Page, J.*) SATISH CHANDRA DE *v.* MADAN MOHAN JATI. **58 Cal. 29 = I.R. 1931 Cal. 618 = 132 I.C. 906 = A.I.R. 1931 Cal. 483 (2).**

[D. 61 Cal, 419 (423)]

———*Trespasser—Right of person having possessory title.*

EJECTMENT.

Possession is sufficient evidence of right as against a trespasser. The plaintiff who proved possession for five years is entitled to recover possession from the defendant who dispossessed him and who proved neither title nor prior possession. 23 C. 834 (P.C.), 1917 P.H.C. C. 164 and 26 Mad. 514, Foll. (*Madhavan Nair, J.*) NARAYANAPPA *v.* HANUMANTHAPPA. **135 I.C 910 = I R. 1932 Mad 238 · 35 L W. 142 = 1931 M.W.N. 487 A I R 1932 Mad. 32.**

——— *Trespasser—Suit against—Notice—Omission to give—Effect.*

Where the defendant is sought to be ejected as a trespasser, the failure to give notice will not prevent the plaintiffs from proceeding with the suit, though such failure may be material for the purpose of dealing with the question of costs. (*Rupchand Bilaram, A.J.C.*) TAYABALI *v.* PARPATIBAI. **26 S.L.R. 29 = I.R. 1932 Sind 106 · 139 I.C. 95 = A I R. 1932 Sind 73.**

ELECTION.

See (1) EVIDENCE ACT, S. 115.
(2) SUCCESSION ACT, S. 180
(3) T. P. ACT, S. 35.
(4) WILL.

———*Conduct of—Irregularities in—Election, if liable to be set aside.*

Before the Court will set aside a Bar Council election because of certain irregularities in the conduct of the election, it must be satisfied that the election was not an election in substance conducted under existing law according to the rules framed for the holding of the election. An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive in the conduct of the election, if the Court is satisfied that the result of the election was not and could not have been affected by those transgressions. (*Thom and Harries, JJ. and Rt. Hon'ble Sir Tej Bahadur Sapru*) BAR COUNCIL ELECTION, *In the matter of* **157 I C. 220 = 8 R.A. 145 = 1935 A.W R. 110 · A I.R. 1935 All 295.**

———*Conduct of—Personation—Gosha ladies—Purdah and franchise.*

Elections should be conducted without the possibility of personations. Two kinds of personations are possible. (1) where the person comes to vote claiming to be the person which he is not, (2) where *A* having voted once, comes again to vote calling himself *B*. Although Gosha ladies are entitled to all sympathy and protection which the law affords and such reasonable facilities as can be given by the authorities, purdah and franchise do not go very well together and it is impossible to conduct an election without some relaxation of the gosha system. (*Ramesam, O.C.J.*) BIJLI SAHIB BAHADUR *v.* MAHOMED ASAN MARACAIR. **6 I R. (Mad) 283 = 146 I.C 572 - 39 L W. 466 = A.I.R. 1934 Mad. 27.**

———*Election petition—New Act coming into force—Effect on pending proceeding.*

An election to the presidentship of a District Board was made in February, 1930. A petition was filed contesting the validity of the election on the ground that the person elected was disqualified to hold the office by virtue of his being a salaried officer within the meaning of S. 15 of the Madras Local Boards Act, 1920. During the pendency of the election petition, Madras Act XI of 1930 came into force.

Held (1) that S. 54 (2) of the Act XI of 1930 is not a declaratory provision so as to apply to an election held under the old Act of 1920. Meaning of declaratory enactment discussed. (2) That even assuming S. 54 is of a declaratory nature, the jurisdiction of the Court to deal with pending proceeding remains unaffected and the procedure prescribed by the second proviso to S. 54 (2) need not be pursued. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627 = I R. 1931 Mad 353 = 130 I C. 177 = 33 L.W. 168 = A I.R. 1931 Mad. 83 = 60 M. L J. 191.**

———*Election petition—Order of Election Commissioner—Illegality—Remedy*—Certiorari

When a Court, or similar authority, gives to itself a jurisdiction which it properly has not got, by taking an erroneous view of the law, a writ of *certiorari* will be issued, but there will be no writ if it makes a mistake in the law when acting in the exercise of a jurisdiction which it undoubtedly possesses. Thus an erroneous decision on the question whether a candidate is disqualified for election by reason of S. 49 of the Madras District Municipalities Act is no ground for ordering a writ if the lower Court had otherwise acted within the limits of its jurisdiction. Where, however, the Election Commissioner declares an election to be void on a ground not taken in the election petition, his action is one in excess of jurisdiction and a writ may be issued. (*Bardswell, J.*) SHANMUGA MUDALIAR *v.* SUBBARAYA MUDALIAR. **140 I.C 540 = I.R. 1933 Mad 21 = 37 L W. 162 = A.I R. 1933 Mad. 133 (2) = 63 M L J 932.**

———*Objection to election—Decision of District Judge—Revision—Mandalay Election Rules, Rr. 32 and 34.*

The District Judge acting under the Mandalay Election Rules and deciding an objection to an election acts as a *persona designata* and his decision cannot be interfered with in revision. (*Brown and Mosely, JJ.*) U BA PE *v.* U BA SHWE **11 Rang 1 = I.R. 1933 Rang 28 = 142 I.C 80 = A I.R. 1933 Rang. 41 (1).**

———Offences. *See* PENAL CODE (1860), S. 171 (*c*).

———*Remedy—Injunction restraining holding of election—Refusal to grant.*

Though a candidate for election to a Local Board like any one else has a right to pursue his legal remedies, whatever they may be, save in exceptional circumstances it is an abuse for a candidate, who for some reason is shut out, to make his pursuit of the remedies in the Civil Court a weapon for dislocating the electoral machinery and stopping an election. Unless in very extreme cases the Court cannot grant an injunction restraining the holding of an election at the instance of a candidate whose nomination has been rejected. (*Reilly, J.*) BALAJI RAO NAIDU, *In re* **I.R. 1932 Mad. 849 = 140 I.C. 441 = A.I.R 1933 Mad. 103.**

———*Rules for conduct of Elections (Madras), Rr. 19, 21 and 23—Circular directing gosha ladies to unveil, if identity challenged—Validity of.*

A circular issued by the Election Authorities that the Gosha ladies should unveil if their identity was challenged at the time of voting is not *ultra vires*. It is in consonance with Rr. 19, 21 and 23 which contemplate such a possibility. (*Ramesam, O.J.C.*) BIJLI SAHIB BAHADUR *v.* MAHOMED ASAN MARACAIR. **6 I R. (Mad.) 283 = 146 I.C. 572 = 39 L.W. 466 = A.I.R. 1934 Mad. 27.**

———Suit challenging — Temporary injunction — Ground for—Balance of convenience. *See* C. P. CODE, O. 39, R. 2. **29 N.L R. 278 = A.I.R. 1933 Nag. 193 (F.B).**

ELECTION OF RELIEFS. *See* PRACTICE—RELIEF.

ELECTION OF REMEDIES—Party taking proceedings by way of execution—If can subsequently proceed by suit. *See* C. P. CODE, S. 47 AND O. 21, R. 2. **62 Cal. 28.**

ELECTRICITY ACT (IX OF 1910), S. 2—*"Works"—Supply line, if included in—Supply lines, if belong to consumer.*

Supply line would be included in the word 'works' as defined in S. 2 of the Act, but from that it does not follow that the works belong entirely to the licensee. And the electric supply lines for which the consumer had paid need not necessarily belong to the consumer. (*Dalip Singh, J.*) DELHI ELECTRIC SUPPLY AND FRACTION CO., LTD. *v.* NARSI RAM. **158 I.C. 124 = 8 R.L. 179 = A.I.R. 1935 Lah. 510.**

———**S. 9 (2)**—*Prohibition against alienation—When comes into operation.*

The power to veto a mortgage or other alienation as contemplated by S. 9 (2) of the Electricity Act can only be exercised when the electric company concerned has submitted to the jurisdiction and control of Government by taking out a licence with regard to electricity. The taking out of such a licence is in the nature of a statutory condition precedent for Government control. (*Cunliffe, J.*) BUDHSING BALCHAND *v.* ARNHOLD & CO. **39 C.W.N. 1018.**

———**S. 21**—*Scope.*

S. 21 which speaks of regulating the relations with consumers has nothing to do with the charges to be made for energy supplied. The section which deals with the matter is S. 23. (*Suhrawardy and Graham, JJ.*) BURDWAN ELECTRIC SUPPLY CO. *v.* KUMUD KUMARI CHOWDHURY. **58 Cal. 1458 = 135 I.C. 721 = I.R. 1932 Cal. 129 = 35 C.W.N. 933 = A.I.R. 1932 Cal. 14.**

———**Ss. 21 (2) and 24**—*Power to cut off supply—Arrears due in respect of other premises—If a ground—Agreement giving such power—Validity.*

S. 24 of the Electricity Act authorizes the licensee to cut off supply only of that premises, the charge of which is in arrear. It does not authorize the discontinuation of supply to premises the charge of which has been paid off A clause in the agreement between the licensee and the consumer, empowering the licensee to discontinue the supply to certain premises for non-payment of charges of other premises of the consumer is inconsistent with S. 24 of of the Act and is *ultra vires* and unenforceable under S. 21 (2). And when the previous sanction of the Local Government for the insertion of such a condition, under S. 21 (2) of the Act, it is invalid and unenforceable. (*Nasim Ali, J.*) JOHN ERNEST EDWARD *v.* RAI JOGENDRA CHANDRA GHOSE BAHADUR. **62 Cal. 886 = 156 I.C. 727 = 8 R.C. 37 = 39 C.W.N. 526 = 61 C.L.J. 111 = A.I.R. 1935 Cal. 298.**

———**S. 23 (2)**—*Applicability—Consumer employing electrical machinery*—Bona fide *use of lamps for test to discover defect in machinery.*

A consumer of electricity employing electrical machinery is entitled within his own premises to use all reasonable tests which may be necessary to discover a defect. It is not obligatory on any one, whatever machinery he may happen to use to call in an expert on every occasion when something goes wrong. A man is entitled, if he is able, to remedy defects himself in his own plant. If, in the case of electric supply, it is a reasonable test for a consumer to use an electric lamp and he *bona fide* uses a lamp for this purpose without permission, S. 23 has no application nor is he guilty under S. 39 as his action does not amount to dishonest abstraction of the company's electric energy. (*Young, J.*) JWALA PRASAD *v.* EMPEROR. **151 I.C. 19 = 7 R.A. 113 = 35 Cr.L.J. 1274 = 1934 Cr.C. 415 = A.I.R 1934 All. 320.**

———**S. 23 (3)**—*Option of licensee—Effect of words "such other" in Cl. (c).*

ELECTRICITY ACT (1910), S. 37.

Per *Graham, J.*—S. 23 (3) seems to give the licensee the option of adopting any one of the three methods mentioned.

Per *Suhrawardy, J.*—The words "such other" in Cl. (*c*) of S. 23 (3) cannot be interpreted as preventing the Government from utilizing either of the two preceding methods with such modifications as they think fit. (*Suhrawardy and Graham, JJ.*) BURDWAN ELECTRIC SUPPLY CO *v.* KUMUD KUMARI CHOWDHURY. **58 Cal. 1458 = 135 I.C. 721 = I.R. 1932 Cal. 129 = 35 C.W.N. 933 = A.I.R. 1932 Cal. 14.**

———**S. 23 (3) (c)**—*Agreement between consumer and supplier—Sanction of Local Government—Enforceability—Charge for kilowatt and consumption—Whether amounts to double charge.*

The consumer and the supplier may enter into any agreement as to the charge for supply of energy subject to the limitation mentioned in S. 23. Where the rate agreed and sanctioned by Government was "7 As. per unit *plus* Rs. 5 per month per kilowatt of the rated capacity of the consuming devices installed, provided the combined charges shall not exceed the flat rate of 8 As. per unit.

Held, that the charges for actual consumption and kilowatt are two parts of the same method of charging and that even if they are different, it is *intra vires* of the Government to fix them under S. 23 (3) (*c*) The system adopted cannot be said to amount to a double system of charge and the consumer is bound to pay the charges as agreed. (*Suhrawardy and Graham, JJ.*) BURDWAN ELECTRIC SUPPLY CO. *v.* KUMUD KUMARI CHOWDHURY. **58 Cal. 1458 = 135 I.C. 721 = I.R 1932 Cal. 129 = 35 C.W.N 933 = A I R. 1932 Cal 14.**

———**S. 24**—*Powers under—Nature and extent of—Conditions of exercise.*

The power to discontinue supply to a premises is power even in addition to the rights to realize the arrears by a suit; and this statutory power should be exercised in good faith and reasonably, and only as a last resort after all the formalities laid down in the Act had been complied with (*Nasim Ali, J.*) JOHN ERNEST EDWARD *v.* RAI JOGENDRA CHANDRA GHOSE BAHADUR. **62 Cal. 886 = 156 I.C. 727 = 8 R C. 37 = 39 C.W.N. 526 = 61 C.L.J. 111 = A.I R. 1935 Cal. 298**

———**S. 37**—*R. 41 framed under—Obligation of consumer—Extent of.*

The obligation imposed by R. 41 of the Indian Electricity Rules, 1922, upon a consumer of electricity for domestic purposes is to take reasonable care to keep the electric apparatus on his premises in a safe condition. The rule does not impose upon him an absolute obligation to maintain electric supply lines under his control in a safe condition at all events and whether negligence is or is not proved, consumers are not to be treated as though they were experts in matters relating to electricity, and therefore to compel them to remedy defects in electrical installations on their premises which could not be discovered whatever might be the care they exercised would be to impose on them a duty which it might often be impossible for them to discharge. (*Page, C. J. and Mya Bu, J.*) DHANAL SOORMA *v.* RANGOON INDIAN TELEGRAPH ASSOCIATION, LTD. **13 Rang. 369 = 160 I.C. 245 = 8 R.R. 357 = A I.R. 1935 Rang. 401.**

———**S. 37**—*R. 106 framed under—If* ultra vires.

It is clear from the provisions of S. 37 of the Electricity Act that R. 106 was one which the Government of India had power to make and the necessity of a rule fixing responsibility for the integrity of the seals of the

ELECTRICITY ACT (1910), S. 37.

meter fixed on the consumer's premises is obvious. It is equally obvious that in case of a conviction under R. 106, although the breaking of a seal on a meter fixed on a consumer's premises is sufficient to render the consumer liable to a fine, the fine would be adopted to the circumstances of the case. (*Grille, O.J.C.*) RAGHUNATH RANADE *v.* EMPEROR. **151 I C. 1039 = 7 R.N. 77 = 36 Cr.L.J. 36 = 17 N.L.J. 140 = 1934 Cr.C. 1118 = A.I.R. 1934 Nag. 245.**

——**Ss. 37 and 38**—*Rules under—Validity can be canvassed.*

Validity of rules made and duly published by the Governor-General can be canvassed in a Court of Law. (*Mya Bu and Dunkley, JJ.*) ENG HOCK *v.* EMPEROR **12 Rang. 515 = 151 I.C. 632 = 7 R.R. 100 = 35 Cr.L.J. 1364 = 1934 Cr.C. 813 = A.I.R. 1934 Rang. 178.**

——**S. 37 (2) (f)**—*Power to make general rules—Effect—No immunity from local control—Public utility company.*

The power to make general rules for the whole of British India or any considerable part of it cannot make local control and the consideration of immediate local conditions unnecessary. Because in their licence the electric company are empowered to have a generating station somewhere within the limits of Madras, they are not free from the ordinary control of the local authority in respect of the steam boiler which they use to provide motive power for generation. (1881) 6 A. C. 193, Ref. Nor does the fact that it is a company of public utility with compulsory obligations to the public confer on it immunity from the control of the local authority. (1899) 2 Q. B 664; (1909) 1 K. B. 744; (1900) 82 L. T. 562, (1909) 2, K. B. 138; (1903) 88 L. T. 772, Ref. (*Reilly and Anantakrishna Aiyar, JJ.*) CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS, LTD. **54 Mad. 364 = I.R. 1931 Mad. 417 = 130 I.C. 721 = 1931 M.W.N. 73 = 33 L.W. 224 = A.I.R. 1931 Mad 152 = 60 M.L.J. 551.**

——**Ss. 37 (4), 44 and Electricity Rules (1922), R. 106**—*Validity of.*

R. 106 is unreasonable and repugnant to the general principles of law, and is in excess of the powers conferred by S. 37 (4). It is also inconsistent with the provisions of S. 44 of the Act. Consequently this rule is *ultra vires* of the Governor-General in Council and is therefore invalid. *Johnson* v. *Mayor Aldermen and Burgesses of Croydon*, (1885) 16 Q. B. D. 708, Appl. (*Mya Bu and Dunkley, JJ.*) ENG HOCK *v.* EMPEROR. **12 Rang 515 = 151 I C. 632 = 7 R.R. 100 = 35 Cr.L.J. 1364 = 1934 Cr.C. 813 = A.I.R. 1934 Rang. 178.**

——**S. 39**—*Burden of proof—Circumstantial evidence of offence*

S. 39 does not remove from the prosecution the burden of proving an offence against an individual. Such proof must naturally be circumstantial in character. Where the person charged is the lessee or owner of the house and the consumer of the electricity (that is, the person who is officially on the company's books as the consumer of the electricity in the particular house) and where there is a large and obvious erection on the roof of the house or in any part of the house, where it could not possibly escape the notice of the consumer and where in addition the person charged is the only person who would gain advantage from the theft of the electricity, the charge under S 39 is made out. (*Young, J.*) BANWARI LAL *v.* EMPEROR. **6 I R (All.) 344 = 35 Cr L J. 179 = 146 I.C. 814 = 1933 A L J 1175 = 14 L.R 422 (Cr.) = 1934 Cr.C 129 = A.I.R 1934 All 60.**

——**S. 39**—Consumer using electrical machinery—*Bona fide* use of lamps for test to discover defect in machinery—No offence under S. 39., *See* ELECTRICITY ACT, S. 23 (2). **A.I.R. 1934 All. 320.**

ELECTRICITY—Rules.

——**Ss. 39 and 50**—*Theft of electric energy—Persons authorized to prosecute.*

S. 39 of the Electricity Act creates an offence, and prosecution for the theft of electric energy can be instituted only by one of the persons mentioned in S. 50 of that Act. Where the prosecution is not instituted at the instance of the Government or an Electric Inspector, but by the Executive Officer of a Cantonment Board who are licensees for distribution of electric energy, the proceedings are liable to be quashed in the absence of evidence to show that the Executive Officer has authority from the Board to institute the proceedings, as he cannot be deemed to be an aggrieved person within the meaning of S. 50. (*Shadi Lal, C.J.*) DINA NATH *v.* EMPEROR. **155 I.C. 421 (1) = 7 R.L. 715 = 36 Cr.L.J. 736 = 35 P.L.R. 758 = A.I.R. 1935 Lah. 191 (1).**

——**S. 47**—*Electrical Rules* (1922), *Rr.* 37 *and* 107—*Licensee's obligation to maintain line in safe condition—Extent.*

The contention that if the consumer elects to take a supply of energy from the licensee's distributing main at any point outside his premises, and receives the supply through the licensee's meter, and thereafter it is conveyed through a line which has been constructed by the consumer and at his cost, the obligation to keep in a safe condition the line and works from the point of commencement of supply (*i.e.*, the meter) to the consumer's premises and also the line and works on the consumer's premises, is cast upon the consumer and not on the licensee cannot be accepted, for it runs counter to the object and effect of the Electricity Act. The licensee is not entitled by agreement with the consumer to release himself from the obligation to see that the lines, apparatus and works by which electricity is transmitted, so long as he retains control of them, are maintained in a safe condition, because this obligation is cast upon him not merely for the benefit of the consumer and the licensee, but also for the protection and in the interest of the public generally. Where therefore the licensee allows the stay wire in the road to be in an unsafe condition, the licensee fails to perform an obligation imposed upon him under the Act and is guilty of a breach of R. 37 and can be convicted under R. 107. But a conviction in the alternative under R. 107 and S. 47 however is not in accordance with law, for, the case falls neither under S. 236 nor S. 367 (3), Cr. P. Code. (*Page, C. J. and Mya Bu, J.*) RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. *v.* EMPEROR. **11 Rang. 162 = 6 I.R. (Rang.) 53 = 145 I.C. 710 = 34 Cr.L J. 1040 = 1933 Cr.C. 477 = A.I.R. 1933 Rang. 70.**

ELECTRICITY RULES. *See also* ELECTRICITY ACT, S. 37.

——*Rr.* 31 *and* 37—*Scope.*

Per *Mya Bu, J.*—The provisions of R. 31 deal with the point of commencement of supply of energy by the licensee to the consumer and not with the question of control over an electric line as a matter of fact. R. 31 is one of the rules relating to the conditions of supply, which is a matter of concern between the licensee and the consumer rather than a matter affecting the public; whereas R. 34 is one of the rules of precaution for the safety of the public. (*Page, C.J. and Mya Bu, J.*) RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. *v.* EMPEROR. **11 Rang. 162 = 6 I.R. (Rang.) 53 = 145 I C. 710 = 34 Cr.L.J. 1040 = 1933 Cr.C. 477 = A.I.R. 1933 Rang. 70.**

——*R.* 37—*Scope.*

Per *Mya Bu, J.*—R. 37 applies to all electric supply lines, and in considering whether the case is governed by R. 37 or not, it is unnecessary to determine whether the line in question is a service-line or not. Under R. 37 the

ELECTRICITY—Rules.

licensee is responsible that all electric supply lines under his control, even if they are on a consumer's premises, are maintained in a safe condition. In truth and in fact the consumer gets the use of the control of the electric current only when it reaches his switch and not as soon as it passes through the meter. (*Page, C. J. and Mya Bu, J.*) RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. *v.* EMPEROR. **11 Rang. 162=6 I.R. (Rang.) 53=145 I.C. 710=34 Cr.L.J. 1040=1933 Cr.C. 477=A.I.R. 1933 Rang. 70.**

———*Rule—R.* 62 (3) (a)—*Liability under—Civil rights.*

The civil rights of a person would not in any way protect him against criminal liability for his acts and omissions under R. 62 (3) (*a*) of the Indian Electricity Rules. He has every right to move against the Electric Supply Co. to have the wire removed from over his land, but the wire being where it is, he is not justified in law in effecting additions and alterations in his house making the aerial line running over land accessible otherwise than by the aid of a ladder or other special appliance. (*Varma, J.*) THAKUR PRASAD CHAUDHURY *v.* EMPEROR. **152 I.C. 11=7 R.P. 155=36 Cr.L.J. 21=15 Pat.L.T. 761=1934 Cr.C. 1131=A.I.R. 1934 Pat. 523.**

EMERGENCY POWERS ORDINANCE (II OF 1932)—*Validity.*

Ordinance (II of 1932), in so far as it attempts to deprive a Chartered High Court of its powers under the Government of India Act, is *ultra vires*. (*Obiter*). (*Ferrers, J.C. and Rupchand, A.J.C.*) EMPEROR *v.* MULCHAND CHOITHRAM. **26 S.L.R. 402=141 I.C. 533 (2)=I.R. 1933 Sind 59=34 Cr.L.J. 166=1932 Cr.C. 739=A.I.R. 1932 Sind 166.**

———**S. 1 (3)**—*Validity of.*

S. 1 (3) in so far as it provides that the Local Government may by notification direct that any of the provisions of the Ordinance shall come into force in any particular area, does not mean the Governor-General has delegated the right to make the law; the Governor-General is only providing how the law which he makes is to be administered. 4 Cal. 172 (P.C.). Ref. (*Beaumont, C.J. Broomfield and Nanavati, JJ.*) EMPEROR *v.* BALKRISHNA HARI. **57 Bom. 93=141 I.C. 720=I.R. 1933 Bom. 130=34 Cr.L.J. 199=34 Bom.L.R. 1523=1933 Cr.C. 1=A.I.R. 1933 Bom. 1 (S.B.).**

———**S. 2**—*Offence under—Sentence—Alteration of—Powers of superintendence of High Court.*

(*Held*, by *Beaumont, C. J. and Broomfield, J. Nanavati, J.*, dissenting) The powers of superintendence are certainly wide enough to enable the High Court to alter the sentence. But that should only be done when the High Court is satisfied that the Magistrate has erred on some point of principle. In a case of deliberate disobedience of the order made by an Officer of Government by a person belonging to the legal profession who did not express any regret for what he had done, the High Court will not interfere with the sentence passed by the Magistrate under the Emergency Ordinance on the ground of severity. (*Beaumont, C. J., Broomfield and Nanavati, JJ.*) EMPEROR *v.* BALKRISHNA HARI. **57 Bom. 93=141 I.C. 720=I.R. 1933 Bom. 130=34 Cr.L.J. 199=34 Bom.L.R. 1523=1933 Cr.C. 1=A.I.R. 1933 Bom. 1 (S.B.).**

———**S. 4**—*Order prohibiting accused from leaving particular place — Non compliance—Condonation—Disobedience of order—Government being party—Effect.*

In February, 1932, the accused was served with an order by which he was directed within eighteen hours of his leaving jail custody to report himself to the Police Sub-Inspector at Karmala and thereafter should not leave the limits of Karmala and that he should not without the permission of the District Magistrate enter the area comprised in Sholapur Taluka excepting Railway limits. Subsequently the accused wrote to the Jail Superintendent stating that he desired to go to Bombay and requesting him to ask the District Magistrate to modify the conditions in the order so as to enable him to go to Bombay. That request was refused but the Government did in fact allow the accused to go to Bombay on his release from jail. The accused then wrote a letter stating that he did not propose to obey the order directing him to go to Karmala and that he intended to present himself before the City Magistrate of Sholapur in breach of the order. The District Magistrate asked the accused to see him immediately and offer an explanation. The letter was handed over to the accused at the Sholapur Railway Station and the accused thereupon went to the District Magistrate's bungalow. At the interview he refused to go back to Karmala and was arrested.

EMERGENCY POWERS ORDINANCE (1932), S. 21.

Held, (1) that the order of the District Magistrate was sought to be carried out within the District of Sholapur and therefore it is valid, though the person against whom it is directed is outside the local limits of the authority making it. It can be served on the accused outside the district. (2) That the accused could not be said to have committed a breach of the order. Effect of Magistrate's order discussed. (*Beaumont, C. J. and Murphy, J.*) EMPEROR *v.* GULABCHAND HIRACHND. **I.R. 1933 Bom. 277=143 I.C. 622=34 Cr.L.J. 771=35 Bom.L.R. 185=1933 Cr.C. 460=A.I.R. 1933 Bom. 148.**

[**R.** 57 B. 690 (697).]

———**S. 4**—*Scope.*

The powers given by S. 4 are very wide. They authorize an order containing directions that the person addressed shall conduct himself in such manner abstain from such acts, or take such order with any property in his possession or under his control, as may be specified in the order. (*Ferrers, J. C.*) JETHMAL PARSRAM *v.* EMPEROR. **I.R. 1932 Sind 146=139 I.C. 777=33 Cr.L.J. 902=1932 Cr C. 554=A.I.R. 1932 Sind 107.**

———**Ss. 4 and 21**—*Sentences under—Effect of repeal of Ordinance.*

Sentences under Ss. 4 and 21 of Ordinance II are saved by Ordinance X of 1932 and continue in force. Even if they are not saved they can take effect in spite of the repeal of the Ordinance. (*Panckridge and Patterson, JJ.*) JOGENDRA CHANDRA ROY *v.* SUPERINTENDENT OF THE DUM DUM SPECIAL JAIL. **60 Cal. 742=I.R. 1933 Cal. 241 (2)=142 I.C. 204=37 C.W.N. 363=34 Cr.L.J. 291 (2)=1933 Cr.C. 361=A.I.R. 1933 Cal. 280.**

———**S. 21**—*First Class Magistrate—Fine imposed by—Limit of—Cr. P. Code (V of 1898), S. 32.*

Where a Magistrate of the First Class tries a case under the Ordinance as such Magistrate (and not as a Special Magistrate authorized under the Ordinance) he has no power to impose a fine greater in amount than that allowed by S. 32 of the Cr. P. Code, even though he was invested with the powers of a Special Magistrate under the Ordinance. (*Beaumont, C. J, Broomfield and Nanavati, JJ.*) EMPEROR *v.* RAMCHANDRA GANESH. **147 I.C. 574=I.R. 1933 Bom. 111=34 Cr.L.J. 162=34 Bom.L.R. 1676=1933 Cr.C. 122=A.I.R. 1933 Bom. 58.**

[**Expl.** 35 Bom L.R. 185 (197). **F.** 1934 L. 361.]

———**S. 21**—*Order served under S. 4 prohibiting taking part in meeting—Speech delivered to boycott British goods and enrol volunteers—Offence constituted.*

EMERGENCY POWERS ORDINANCE (1932), S. 28.

An order was served upon the petitioner by the District Magistrate under S. 4, sub-S. (1) prohibiting her from joining or taking part in any meeting of six or more persons in any public place within certain limits and in spite of the service of the notice on her, she made a speech to the persons numbering more than 100 asking the cloth merchants to close their shops and to boycott the British goods, and appealing to those present to enrol as recruits for the Congress

Held, that as it had not been shown that the boycott of British goods was the monopoly of the All-India Congress Committee no offence under S. 17 (1), Criminal Law Amendment Act, had been committed

Held however, that it was immaterial whether more than the prescribed number of persons assembled as a result of the invitation direct or indirect of the accused or whether she found a number of persons assembled and began to make a speech to them or whether persons collected on hearing her making a speech, in either case she must be held guilty of the offence of having taken part in a meeting in contravention of the terms of the notice served upon her. (*Jai Lal, J.*) VIDYA WATI *v.* EMPEROR. **141 I.C. 33 - I R 1933 Lah 51 = 34 Cr.L.J 87 34 P.L.R. 32 - 1932 Cr C. 919 = A.I.R 1932 Lah 613.**

——**S. 28**—*Conviction under—Act prejudicial to public safety—Express finding not necessary.*

The section does not require an express finding that the conviction was for an act prejudicial to the public safety or peace but it does require that the offence should be such an act. Under S. 47 unless an offence has been committed in furtherance of a movement prejudicial to the public safety or peace, no Court shall try the same, and the question whether the offence was or not of such a nature cannot be raised in any Court other than the Court trying the same. So the mere fact that the Court convicted the accused (under Ordinance V of 1932) shows that the Court was of opinion that it was such an offence. Where, moreover, the accused pleaded guilty in the trial Court, it involves an admission that the offence was one committed in furtherance of a movement prejudicial to the public safety. The fact that the Magistrate did not record in express terms a finding to that effect does not vitiate a sentence of fine passed by him. (*Jack and M. C. Ghose, JJ.*) PROBODH CHANDRA CHAKRAVARTY *v.* EMPEROR **60 Cal. 351 - 142 I C. 351 (2) - I.R. 1933 Cal. 273 = 34 Cr. L.J. 345 = 36 C.W N. 1158 - 1933 Cr C. 232 = A I.R. 1933 Cal 186.**

——**S. 28**—"*Present political movement*"—*Danger to public peace or safety—Judicial notice.*

The Court can take judicial notice of the fact that the 'present political movement" is in fact a movement prejudicial to the public safety or peace. (*Jack and M. C. Ghose, JJ.*) PROBODH CHANDRA CHAKRAVARTY *v.* EMPEROR. **60 Cal. 351 = 142 I.C. 351 (2) = I R. 1933 Cal. 273 = 34 Cr.L J. 345 = 36 C.W.N. 1158 = 1933 Cr.C. 232 = A.I.R 1933 Cal. 186**

——**S. 51**—*High Court—Powers of superintendence.*

On the question if, and how far, the High Court had powers of superintendence on the Courts established under the Ordinance,

Held, the powers of superintendence of the High Court were derived from three sources: (*i*) Ss. 435 and 439 of the Cr. P. Code. But it is competent to the G. G. to override the provisions of those sections, having regard to Ss. 72 and 65 of the Government of India Act. That he has done under S. 51 of the Ordinance. (*ii*) Cls. 27 to 29 of the amended Letters Patent. But Cl. 44 of the Letters Patent added by amendment make

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all provisions of the Lettres Patent subject to the powers of the G. G. incases of emergency under Ss. 71 and 72 of the Government of India Act. That power, again, is excluded by S. 51 of the Ordinance. (*iii*) S. 107 of the Government of India Act. That is an Act of the Imperial Parliament and cannot be controlled by the G. G. Under this section the High Court has powers of superintendence over all Courts for the time being subject to its appellate jurisdiction. The Special Courts established under the Ordinance are such Courts, because under S. 39 of the Ordinance, the High Court has power to hear appeals in certain cases. The High Court has, therefore, the power to entertain an application in revision from a conviction by the Special Courts constituted under the Ordinance. (*Beaumont, C. J., Broomfield and Nanavati, JJ.*) EMPEROR *v.* BALKRISHNA HARI. **57 Bom. 93 = 141 I.C. 720 = I.R. 1933 Bom. 130 = 34 Cr L.J. 199 = 34 Bom L R. 1523 = 1933 Cr.C. 1 = A.I R. 1933 Bom. 1 (S B).**

[**Cons.** 55 A. 1008 (1027). **F.** 57 B. 690 (695), 35 Bom.L.R. 185 (197). **R.** 60 C. 603 (611); 60 C. 618(623).]

——**S 51**—*Order under—Revision.*

Quaere.—Whether High Court can exercise its power of superintendence under S 107, Government of India Act, with respect to an order under Ordinance II of 1932. (*Panckridge and Patterson, JJ.*) MANMATHANATH KUNDU *v.* EMPEROR. **60 Cal. 851 = I R. 1933 Cal. 390 - 143 I.C 238 = 34 Cr.L J. 579 = 1933 Cr.C. 579 = A I R 1933 Cal. 401.**

——**S. 51**—*Sessions Judge—Power of revision.*

The phraseology of S. 51 is very wide, and that part of it which deprives other Courts of any jurisdiction of any kind in respect of any proceedings of any Court constituted under the ordinance, save as therein provided, has the effect of depriving the Sessions Judge of the right of calling for and examining the record under S. 435 and of referring the case for orders of the High Court under S. 438, sub S. (1). (*Panckridge and Patterson, JJ.*) MANMATHANATH KUNDU *v.* EMPEROR. **60 Cal. 851 = I R. 1933 Cal. 390 = 143 I.C. 238 - 34 Cr.L.J. 579 = 1933 Cr.C. 579 = A.I R. 1933 Cal 401.**

——**S. 51**—*Transfer of case to one Magistrate—Withdrawal of case and re-transfer to another—Validity.*

Where in a case falling under Ordinary II of 1932 the District Magistrate transferred the case in the first instance to a Sub-Divisional Magistrate and subsequently withdrew the case to his own file and then transferred the case to the file of another Sub divisional Magistrate and it appeared that the offence had been committed within the jurisdiction of the latter Magistrate.

Held, his action was an action as a Court and was in contravention of S. 51 and the Magistrate to whom the case was transferred had no jurisdiction to try the case. (*C. C. Ghose, A. C. J. and S. K. Ghose, J.*) ABU HOSSEIN MIA *v.* EMPEROR. **148 I.C. 800 = 35 Cr.L. J. 779 = 6 R C. 483 = 37 C.W N. 1048 = A.I.R. 1934 Cal 256.**

——**S. 52**—*Reference—Sind Judicial Commissioner's Court—Power to order rigorous instead of simple imprisonment.*

The terms of S. 52 are not equivocal and do not admit of any two interpretations. They do not allow the Judicial Commissioner's Court, whose powers are not co extensive with those of a Chartered High Court, any authority to convert a sentence of simple imprisonment passed under the Ordinance into one of rigorous imprisonment on a reference made by the District Magistrate. (*Ferrers, J.C. and Rupchand, A. J. C.*) EMPEROR *v.* MULCHAND CHOITHRAM. **26 S.L.R.**

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402=141 I.C. 533 (2)=I.R. 1933 Sind 59=34 Cr.L. J. 166=1932 Cr C. 739=A I R. 1932 Sind 166.

———**S. 57**—*Jurisdiction of District Magistrate—Order sought to be enforced within his limits.*

Where the order of the Magistrate under the Ordinance is sought to be enforced within the District over which he has jurisdiction, the order is perfectly valid. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* GULABCHAND HIRACHAND. **I.R. 1933 Bom. 277=143 I.C 622=34 Cr L J. 771=35 Bom L R. 185=1933 Cr C. 460=A I.R. 1933 Bom. 148.**

[**R.** 57 Bom. 690 (697).]

———**S. 63**—*Newspaper article describing Ordinances passed by Government as "hellish," "ghoulish", etc.—Offence, if constituted.*

The words "ghoulish", "tortures and "hellish" when applied in a newspaper article to Ordinances passed by the Government fall within the mischief which S. 63 is intended to repress. They stir up hatred against the Government established by law and therefore constitute an offence under S 63 (*Ferrers, J.C.*) JETHMAL PARSRAM *v.* EMPEROR. **I R. 1932 Sind 146 139 I. C. 777=33 Cr L J. 902=1932 Cr C. 554=A.I.R. 1932 Sind 107.**

———**S 63 (d).** *See* PRESS (EMERGENCY POWERS) ACT (1931), S. 4 (1).

ENCROACHMENT. *See* LANDLORD AND TENANT.

ENCUMBRANCE.

See (1) BENGAL TENANCY ACT, SS. 26-F AND 159.
(2) MADRAS ESTATES LAND ACT, S. 125

———Execution sale. *See* (1) C. P. CODE, O. 21. RR. 62 AND 66.
(2) EVIDENCE ACT, S. 115.

ENDORSEMENT.

See (1) NEGOTIABLE INSTRUMENT.
(2) NEGOTIABLE INSTRUMENTS ACT, S. 10 (1) 32, 35, 37, 38 AND 50, *etc.*
(3) TRANSFER OF PROPERTY ACT, S. 130

ENFRANCHISEMENT. *See* GRANT—INAM.

ENGLISH DECISIONS. *See* INTERPRETATION OF STATUTES.

ENGLISH LAW—Applicability to Burma—Law of Accretions *See* BURMA (LOWER) LAND AND REVENUE ACT (1876), SS 56 AND 18. **10 Rang 1 A.I.R. 1932 Rang. 27.**

———*Applicability of—Madras High Court—Ordinary Original Civil Jurisdiction.*

The law to be administered by the High Court in the exercise of its ordinary Original Civil Jurisdiction is that obtaining in the old Mayor's Court The words "justice and right" occurring in the charters relating to the Mayor's Court, the Recorder's Court and the Supreme Court are substantially similar to the words "justice, equity and good conscience" in Reg. II of 1802, which refers to Courts outside the limits of the Original Civil Jurisdiction of the High Court. In both cases the English Common Law should only be applied as nearly as the circumstances of the place and of the inhabitants should admit and not in its entirety. Rule of English Common Law as to need for proof of special damages in an action for damages for imputation of unchastity not applied. (*Beasley, C.J. and Cornish, J.*) NARAYANA SAH *v.* KANNAMMA BAI. **55 Mad 727=I.R. 1932 Mad. 901=140 I.C. 422=1932 M W.N. 563=35 L.W. 647=A.I.R. 1932 Mad. 445=62 M.L. J. 608**

———*Powers—Applicability to India.*

The English Law as to powers should not be applied to India. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

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———Privity of estate—Doctrine of—Applicability to India. *See* TRANSFER OF PROPERTY ACT (1880), S. 108 (*j*). **58 Bom. 327=A.I.R. 1934 Bom. 134 (F.B.)**

———Reference for construction of Indian Code—Not permissible. *See* PRACTICE. **54 All. 114=A.I.R. 1931 All. 183 (F.B.).**

ENGLISH MORTGAGE.

See (1) MORTGAGE.
(2) TRANSFER OF PROPERTY ACT, S. 58 (*c*).

ENHANCEMENT OF RENT.

See (1) BENGAL TENANCY ACT, SS. 6, 7, 29 AND 30, *etc.*
(2) LANDLORD AND TENANT.
(3) MADRAS ESTATES LAND ACT, SS. 24 AND 30.

ENHANCEMENT OF SENTENCE.

See (1) CR. P. CODE, SS 417 AND 439.
(2) PENAL CODE, S. 75

ENTICING AWAY MARRIED WOMAN. *See* PENAL CODE, SS 497 AND 498.

EQUITABLE ASSIGNMENT.

See (1) ASSIGNMENT.
(2) DEBTOR AND CREDITOR—ASSIGNMENT OF DEBT.
(3) TRANSFER OF PROPERTY ACT, SS. 130 137.

———Equitable doctrine—(English)—Case governed by Indian statute—No applicability. *See* INTERPRETATION OF STATUTES. **58 I.A 91=58 Cal. 1235—60 M L.J. 538 (P.C.).**

EQUITABLE ESTOPPEL.

See (1) ESTOPPEL
(2) EVIDENCE ACT, S. 115.

EQUITABLE MORTGAGE.

See (1) MORTGAGE.
(2) TRANSFER OF PROPERTY ACT, SS 58 (*f*) AND 59.
(3) REGISTRATION ACT, S. 17 (1) (*b*).

EQUITABLE SET OFF.

See (1) C. P. CODE O 8, R. 6.
(2) PRACTICE.

EQUITY. *See also* PRACTICE.

———*Right to equitable relief—Conditions.*

A plaintiff is not entitled to equitable relief unless he is himself prepared to behave in an equitable manner, (*Courtney-Terrell, C. J. and Agarwala, J.*) SAHEB LAL BHAGAT *v.* MOHAMMAD ISHAQUE. **154 I.C. 393=7 R P. 458=16 Pat.L.T. 12=A.I.R. 1935 Pat 59.**

EQUITY OF REDEMPTION. *See* TRANSFER OF PROPERTY ACT, SS 60 AND 91

ESCAPE FROM LAWFUL CUSTODY. *See* PENAL CODE, SS. 223-226.

ESCHEAT.

See (1) CROWN.
(2) HINDU LAW—CROWN.

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See also (1) BENAMI—ESTOPPEL.
(2) EVIDENCE ACT, SS. 115 AND 116.
(3) LANDLORD AND TENANT.
(4) MORTGAGE.
(5) TRANSFER OF PROPERTY ACT, S. 43.

———*Acceptance of benefit—Party receiving compensation under order of Court—Right to appeal against order.*

When a Court passes an order granting review of a case and restores the case on payment of compensation to the opposite party, the acceptance of such compensation by the latter does not take away his right to appeal

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from that order. (*Knox, S. M. and Grant, J. M.*) KANHAIYA LAL *v.* SUMERA. **1935 R.D. 466=1935 A.W.R. 1219.**

———*Admission in pleadings—Effect of in subsequent suit*

Statements made by a defendant in his written statement which are only admissions cannot create an estoppel as against him in a later suit instituted by him; and when the admissions are sufficiently explained, namely, that he was not aware of all the circumstances at the time he filed the written statement in the prior suit, the doctrine of estoppel cannot be invoked at all. (*Mukerji and S. K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAM CARAN RAMANUJ DAS. **63 Cal. 326=62 C.L.J. 153.**

———*Agreement settling disputes about property—Suppression by party—If can subsequently rely on it.*

Where, after an agreement has been entered into between certain parties in settlement of family disputes regarding some property, one of the parties deliberately keeps back the agreement in a litigation and thereby gets an adjudication on that basis, he is estopped from subsequently reviving the whole case and from pleading the true facts. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KARAN SINGH *v.* CHARAN SINGH. **18 R.D. 624=16 L.R. 40 (Rev.).**

———Alienation of khote land — Khot accepting "dhara" and "faida" from tenant— If can forfeit holding. *See* BOMBAY KHOTI SETTLEMENT ACT (1880). **36 Bom.L.R. 1253=A.I.R. 1935 Bom. 98.**

———Alienation opposed to public policy—Alienor or his representative not estopped from contesting the validity of the same. *See* RELIGIOUS OFFICE—ALIENATION. **67 M.L.J 759.**

———*Applicability of doctrine—Party not misled by any act or representation—If can rely on doctrine.*

The doctrine of estoppel cannot be invoked by a party who has not been misled in any way by any act or representation on the part of the party sought to be estopped. (*Nasim Ali, J.*) KUMAR PRATIVA NATH ROY *v.* BENODE BEHARI GHOSE. **162 I.C. 296—8 R.C. 588=61 C.L.J. 75=A.I.R. 1936 Cal. 181.**

———*Approbate and reprobate.*

A party who prevents the issue of adverse possession between him and another party being decided in a prior suit cannot be allowed to plead in a subsequent suit that adverse possession had become complete because the issue was not decided in the former suit. A party cannot both approbate and reprobate; and on this principle, a party cannot at one time be allowed to say that a question between him and another need not be decided, and at another time to say that because that question was not decided, the latter's claim is barred. Even if he is not estopped, the principle of approbation and reprobation will apply. (*Baker and Wadia, JJ.*) CHIDAMBARGAUDA *v.* CHANNAPPA. **153 I.C. 637=7 R.B. 251=36 Bom L.R. 694=A.I.R. 1934 Bom. 329.**

———Approbate and reprobate—Two decrees against same judgment-debtor by same decree-holder—Execution of the first—Application for reteable distribution in the second—Private sale by judgement-debtor—Deposit of amount of first decree by vendee—Acceptance by decree-holder and raising of attachment—Decree holder deemed to have waived the benefit of S. 64, C. P. Code —Private sale Valid—Decree-holder cannot approbate and reprobate. *See* C. P. CODE, S. 64. **13 Pat. 446.**

———*Approbate and reprobate—Claim that village not an "estate"—Subsequent plea that it is "estate" for purposes of jurisdiction—Maintainability.*

A party cannot both approbate and reprobate. Where a Zamindar claimed that a certain village was not an

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"estate" under the Madras Estates Land Act, he cannot subsequently turn round and say that the village is an estate and on the strength of that assertion to invoke the special jurisdiction of the Board of Revenue. In other words, he cannot at the same time blow hot and cold. (*Venkatasubba Rao J.*) ANNAPURNAMMAGARU *v.* RAJA OF VIZIANAGARAM. **157 I.C. 783=8 R.M. 164=41 L.W. 589=1935 M.W.N. 377=A.I.R. 1935 Mad. 367=68 M.L.J. 441.**

———*Approbate and reprobate—Decree for partition—Plaintiff taking possession of properties under—Subsequent appeal—Maintainability.*

A party who takes possession of the properties allotted to him under a decree in a suit for partition is not thereby precluded from preferring an appeal against the decree objecting to the propriety of the division. (*Madhavan Nair, J.*) AMMIRAJU *v.* KONDALARAYADU. **156 I.C. 987=8 R.M. 94=41 L.W. 218=1935 M.W.N. 227—A.I.R. 1935 Mad. 465=68 M.L.J. 255.**

———Approbate and reprobate—Doctrine of, not applicable—Valuation—C. P. Code S. 111 — Parties adopting notional value for suit. *See* C.P. CODE, S 111. **58 Cal. 66=A.I.R. 1931 Cal. 417.**

———*Approbate and reprobate*—Ex parte *decree—Setting aside on terms—Payment of costs to plaintiff's vakil Revision by plaintiff—If barred.*

A Court has no jurisdiction to set aside an *ex parte* decree apart from O. 9, R. 13, C. P. Code. Where a defendant applies to have the *ex parte* decree set aside about a year after he has knowledge of the decree, the application has to be dismissed. If the Courts sets the decree aside on terms on the ground that he has a good defence, that order is without jurisdiction. The mere fact that costs order to be paid as a condition are paid to the plaintiff's vakil cannot be regarded as an adoption of the order by the plaintiff, so as to bar a revision petition by him against that order. Such adoption of the order made without jurisdiction cannot have the effect of making the order ode which the Court is competent to pass. (*Cornish, J.*) NARAYANASWAMI AIYAR *v.* SUBRAMANIA PILLAI. **159 I.C. 1028=8 R.M 596=42 L.W. 762=1935 M.W.N. 1327=A.I.R. 1936 Mad. 49=69 M.L.J. 673**

———*Approbate and reprobate—Sale proclamation—Judgment debtors waiving objection to valuation and getting adjournments for payment—Application to set aside sale on the ground of under valuation—Estoppel.*

There was an express waiver by the judgment debtors of all objections about under-valuation. By their various petitions for adjournment taken expressly for payment of the decretal amount, they undertook not to make any objection regarding under-valuation and the Court was thereby induced to grant them adjournment after adjournment, without even insisting on part payments of the decretal dues.

Held, that the judgment-debtors must be held to be bound by that undertaking and were estopped from raising the questian of valuation. A.I.R. 1928 Pat. 25. Dist. (*Fazl Ali and Luby, JJ.*) NAGESHWAR PRASAD *v.* AMBIKA PRASAD **160 I.C. 886=8 R.P. 384 =A.I.R. 1935 Pat. 483.**

———*Approbate and reprobate—Suit for injunction to restrain disturbance of easement—Obstruction to light and air by contemplated building—Defendant undertaking to demolish building in case of plaintiff's success in suit—Plea in appeal that injunction should not be granted as building completed—If open.*

Where a plaintiff whose easement right to light and air is threatened by a proposed building by the

defendant promptly comes to Court and institutes a suit for an injunction to restrain the defendant from raising the bulding even before the defendant commences to build and on the defendant continuing to build in spite of the suit applies for a temporary injunction to restrain the continuance of the building, and the defendant gives an undertaking that if plaintiff succeeds in the suit he will demolish the portion of the building found to obstruct the passage of light and air, and the Court accepts that undertaking and observes that the building erected by the defendant would be at his risk, the defendant cannot be permitted to go back on his undertaking. It is not open to him at the stage of second appeal to plead that the injunction ought not to be granted, because the building has been already erected and that the plaintiff should only be awarded damages. (*Agha Haidar, J.*) BISHAN DAS *v.* BEHARI LAL. **157 I.C. 871 = 8 R L 155 (2) = A.I.R. 1935 Lah. 937.**

———*Conduct—Company—Transferee of shares—Insistence on registration of tranfer—Voting as transferee at meeting of shareholders—Subsequent denial of liability as contributory—Permissibility.*

Where a transferee of shares of a company not only assents to his name being in the register, but insists on his name being put there, and acts like a shareholder, voting as owner of the shares transferred in his name, he is estopped from going against the register and disputing his liability as contributory in proceedings for winding up. Although there may be dealings between him and his transferor which may give him an equity to call for an indemnity, that cannot be availed of by him as a shield to protect himself from liability. When he has been treated, and has acted, as shareholder, he cannot go back and deny his position. A man cannot be allowed to lie by while all appears to go well, and repudiate his acts when the day for meeting his liability arrives. (*Wadia, J.*) *In re* THE PENINSULAR LIFE ASSURANCE CO., LTD. **60 Bom. 297 = 160 I.C. 638 = 8 R.B. 272 = 37 Bom L.R. 904 = A.I.R. 1936 Bom. 24.**

———Consent decree—How far operates as. *See* COMPROMISE — CONSENT DECREE — BINDING NATURE OF. **1935 R.D. 259.**

———Election of reliefs—Claim against two defendants in the alternative—Decree againt one—If precludes claim for decree against other. *See* PRACTICE—RELIEF. **13 Rang. 186.**

———Election of reliefs—Claim against two defendants —Decree taken against one—Appeal claiming decree against the other—Competency. *See* PRACTICE—RELIEF. **13 Rang. 189.**

———Election of remedies—Party taking proceedings by way of execution—If can subsequently proceed by suit. *See* C. P. CODE, S. 47 AND O. 21, R. 2. **62 Cal. 28.**

———*Equitable estoppel—Basis and scope of the doctrine.*

Where *A* has built on land which he thought was his, but it was really that of *B*, who knowing of *A's* mistake encouraged him to build either directly or by abstaining from asserting his legal right, equity will intervene for the protection of *A*. This, sometimes, is alluded to as the doctrine of equitable estoppel. But the foundation upon which reposes the right of equity to intervene is either contract or the existence of some fact which the legal owner is estopped from denying. In the case put *B's* conduct is such that from it may be inferred of a contract on his part not to disturb *A* in the possession of the land, or it may amount to a statement by *B* that the land is *A's*. 26 I.A. 58, Ref. Where, however, there was no mistaken belief by the appellant as to the ownership of the land which, he knew, belonged to the Crown, still less was any such mistaken belief known to the Crown, and in fact the occupation by the appellant was a trespass which, by dint of toleration for some time, became an occupation by leave and licence, there is no basis for any equitable doctrine of estoppel and the Crown is entitled to revoke the licence and direct the removal of the superstructures erected by the appellant. (*Lord Russell of Killowen.*) THE CANADIAN PACIFIC RAILWAY COMPANY *v.* KING. **138 I.C. 292 = 36 L.W. 91 = I.R. 1932 P.C. 235 = A.I.R. 1932 P.C. 108 = 61 M.L.J. 958 (P.C.).**

———*Equitable estoppel—Doctrine of standing by.*

Even if the statement in *Chadwick* v. *Manning*, (1896) A.C. 238, that "silence is innocent and safe when there is no duty to speak" is not absolulely and for all purposes true, it is, at any rate, very necessary to take care, that persons are not landed in liability merely because they have not given information to some one over whose interests they have no duty to take care. There is no room for the application of the doctrine of estoppel by standing by, in the absence of some definite and particular conduct on the part of a person other than the mere fact that he had been impleaded as party. Where in a rent sale under B.T. Act a co-sharer landlord has been impleaded and has taken no part in the proceedings, there is no room for the doctrine of equitable estoppel by standing by. (*Rankin, C.J. and Mukerji, J.*) NIHARBALA DEBI *v.* SHASHADHAR RAY CHAUDHURI. **58 Cal. 358 = I.R. 1931 Cal. 855 = 134 I.C. 567 = A.I.R. 1931 Cal. 485 (2).**

———Essentials of—Clear and unambiguous representation—Necessity. *See* EVIDENCE ACT, S. 115. **11 O.W.N. 1571 = A.I.R. 1935 Oudh 121.**

———*Execution—Claim to attached property by legal representative—Dismissal on merits—Observation in judgment that suit was to be instituted—Suit on basis—Plea that suit was barred—If barred*—Res judicata.

The widow of a judgment debtor who was added in execution proceedings as his legal representative claimed the attached properties as belonging to her by an application purporting to be filed both under O. 21, R. 58 and under S. 47, C.P. Code. The Court dismissed the application on the merits and added: "I am not prepared to uphold the claim and refer the petitioner to a regular suit" and on the strength of that order the widow filed the suit",

Held, that the remark of the Judge, a gratuitous advice, asking the widow to file a regular suit, would not operate as *res judicata* or estop the other party from contending that the suit was barred under S. 47, C. P. Code, and that the vidow's only remedy was by way of an appeal against the dismissal of the application in execution proceedings 13 M.I A. 160, Foll.; A.I.R. 1925 All. 240, Dist. (*Varadachariar, J.*) MACHAMMA *v.* KANAKAMMA. **158 I.C. 410 = 8 R.M. 260 = 1935 M.W N. 785 = A I.R. 1935 Mad. 923.**

———*Execution—Execution sale—Objection to sale proclamation given up by judgment-debtor—Same objection in application to set aside sale—Maintainability.*

If the judgment-debtors have got an adjournment of a sale by giving up their objections to the sale proclamation, they will be estopped from raising the same objections in an application to set aside the sale when it has been concluded. 15 I.A. 171: 12 Mad 19 at 25 (P.C.), Rel. on. (*Pakenham Walsh, J.*) POTTA REDDI *v.* KARUPPA GOUNDAN. **155 I.C. 1013 = 7 R.M. 628 = 41 L.W. 121 = 1935 M.W.N. 125 = A.I.R. 1935 Mad. 150 = 68 M.L.J. 48.**

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———*Execution—Execution sale—Bidder in—Right to dispute title of purchaser.*

Where a shop had been sold in the execution sale and the defendant had made bids at the said sale, the defendant is not estopped from challenging the title of the purchaser. (*Dalip Singh, J.*) BHAGAT RAM *v.* NANAK SINGH. **154 I.C. 512=7 R.L. 578=A.I.R. 1934 Lah. 202.**

———Ex parte *decree set aside on payment of costs—Costs accepted by plaintiff's pleader—Revision filed on opening day—Plaintiff held not to have acquiesced in order setting aside decree.*

An *ex parte* decree was set aside without considering the contentions of the plaintiff on payment of costs. Plaintiff's pleader accepted the costs, but filed a revision on the opening day of the High Court.

Held, that in absence of anything on the record to show that the costs were taken by the plaintiff's pleader in token of acceptance of the validity of the order, the plaintiff could not be said to have acquiesced in the order for setting aside the *ex parte* decree. (*Mukerji and Thom, JJ.*) PUTTU SINGH *v.* VIDYA RAM. **153 I.C. 999 (1) 7 R.A. 661 (1)=A.I.R. 1934 All. 100.**

———Government—Grant by Government—Acts of Government Officers—Construction of grant by them—Government not estopped. *See* CROWN. **36 Bom.L.R. 761=A.I.R. 1934 Bom. 434.**

———Landlord and tenant—Occupancy ryot—Lease of permanent right by describing himself as ryot at fixed rate—Subsequent denial of heritable rights—Claim to eject under-ryot as trespasser—Maintainability. *See* BENGAL TENANCY ACT, S. 85. **61 C.L.J. 9=A.I.R. 1935 Cal. 706.**

———Landlord and tenant—Person accepting position as heir of tenant—Claim to statutory tenancy—If maintainable. *See* OUDH RENT ACT (1886), S. 3 (18). **18 R.D 715.**

———Minor. *See* EVIDENCE ACT, S. 115.

———*Mortgagor and mortgagee—Mortgagor—If can deny mortgagee's right to entire mortgage money—Purchaser of equity of redemption—If estopped from disputing title of assignee of mortgagee's right.*

It is not open to the mortgagor to dispute the title of the mortgagee and to say that although the mortgagee at the inception purported to deal with the whole of the mortgage-money, he was in reality not the owner or possessor of the entire mortgage-money. So far as the original mortgage transaction is concerned, as between the mortgagor and mortgagee, the principle of estoppel applies and comes into play.

Quaere,—Whether it is open to the purchasers of the equity of redemption to question the rights of the assignee of the mortgagee's right and contend that the mortgagee is not entitled to the entire mortgage money. (*Mitter and Patterson, JJ.*) BENGAL COAL COMPANY, LTD. *v.* SITARAM CHATTERJI. **159 I.C. 159=8 R.C. 283=61 C.L.J. 560=A.I.R. 1935 Cal. 666.**

———Mortgagor and mortgagee—Plea that mortgage is void—If open. *See* EVIDENCE ACT, S. 115. **11 O.W.N. 1571=A.I.R. 1935 Oudh 121.**

———Mortgagor and mortgagee—Prohibition by statute—Mortgage void under law—Mortgagor not estopped from pleading. *See* EVIDENCE ACT, S. 115. **11 O.W.N. 1571=A.I.R. 1935 Oudh 121.**

———*Mortgagor and mortgagee—Right to invoke doctrine—Party to fraud—If claim benefit of estoppel as against another party thereto—Suit on mortgage—Plea of sham and fraudulent transaction—Estoppel—Mortgagee also party to fraud—Effect.*

ESTOPPEL.

Where both parties to a deed know that it was executed for an immoral purpose or in contravention of statute or of public policy, neither of them will be estopped from proving those facts which render the deed void *ab initio*. In a suit on a mortgage by the mortgagee, the mortgagor-defendant pleaded that the mortgage sued on was a sham transaction not supported by consideration and a device to defeat a possible attachment of the properties by a creditor. The evidence in the case proved that the object of the mortgage deed was to defraud a third person and that the mortgagee was not only cognisant of, but was indeed a party to, that intended fraud.

Held, that the mortgagor was not under the circumstances estopped from pleading the real nature of the transaction against the mortgagee's claim upon the deed. (*Cornish and Stodart, JJ.*) ARUNACHALAM CHETTIAR *v.* RANGASWAMI CHETTIAR. **59 Mad. 289=8 R.M. 539 (2)=159 I.C. 729=42 L.W. 976=1935 M.W.N. 1304=A.I.R. 1936 Mad. 88=69 M.L.J. 788.**

———*Nature of rule—If a cause of action—Question of law.*

Estoppel is not a cause of action. It is a rule of evidence which comes into operation if a statement has been made by a defendant with the intention that the plaintiff should act upon the faith of that statement and the plaintiff does act upon the faith of that statement. The question of estoppel is not a pure question of law. (*Nasim Ali and Henderson, JJ.*) SUDHAMOYEE BASU *v.* BHUJENDRA NATH BISWAS. **8 R.C. 302=159 I.C. 370=A.I.R. 1935 Cal. 713.**

———*Nature in rule—Rule of evidence and not a source of title.*

Estoppel is a rule of evidence and not a source of title. A.I.R. 1925 Rang. 68 and A.I.R. 1935 Rang. 84, Foll. (*Dunkley, J.*) SAYA HMAN *v.* SAYA HLA. **160 I.C. 325=8 R.R. 366=A.I.R. 1935 Rang. 448.**

———*Prohibition of law—Plea, if open.*

Estoppel cannot be relied upon to defeat a prohibition in law on the ground of public policy. (*Beasley, C. J. and King, J.*) RAMAKRISHNAMMA *v.* VENKATASUBBIAH. **58 Mad. 389=153 I.C. 817=7 R.M. 377=1934 M.W.N. 1407=40 L.W. 918=A.I.R. 1935 Mad. 252—68 M.L.J. 46.**

———Question of law—Representation under erroneous view of legal rights—If operates as estoppel. *See* EVIDENCE ACT, S. 115. **42 L.W. 725=A.I.R. 1935 Mad. 1062.**

———Rule of—Scope of—Waiver—Distinction. *See* EVIDENCE ACT, S. 115. **68 M.L.J. 725 (P.C.).**

———Statute—No estoppel against—Statutory duty of the Court under S. 60, C. P. Code, to see that property not saleable should not be sold—Objection can by judgment-debtor before confirmation of sale—Maintainabilit. *See* C. P. CODE, S. 47—EXECUTING COURT. **1935 A.L.J. 1137.**

———*Vendor and purchaser—Purchase money retained by purchaser to pay decretal debt—Purchaser not precluded from questioning binding nature of debt.*

By the terms of a sale-deed executed by a widow and the reversioner, the purchaser retained a portion of the purchase-money to pay a decree-holder if the decree he had obtained against the widow was confirmed on appeal. In a suit by the decree-holder after the death of the widow.

Held, the retention of the purchase money was only in the nature of a reasonable precaution which involved no acknowledgment of the binding nature of the debt and that the purchaser was not estopped from contending that the debt was not binding on the reversion.

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(*Curgenven, J.*) SETHURAMA AYYAR *v.* VARADARAJA AYYAR. **136 I.C. 773=I.R. 1932 Mad. 309=35 L.W. 259=1931 M.W.N. 1282=A.I.R. 1932 Mad. 185.**

———Will—Legatee under—If can set up independent title. *See* WILL—BEQUEST. **18 N.L.J. 1.**

EUROPEAN BRITISH SUBJECT. *See* CR. P CODE, SS. 34-A AND 528-B.

EVICTION. *See* EJECTMENT.

EVIDENCE.

See also (1) CRIMINAL TRIAL—EVIDENCE.
(2) PRACTICE.

Admissibility.
Adoption.
Age.
Appreciation of Child. *See* WITNESS.
Circumstantial evidence.
Co-accused.
Commission Evidence.
Conduct.
Confession.
Credibility.
Criminal trial.
Cross examination.
Customary right. *See* PROOF.
De ben esse examination.
Document.
Duty of Court.
Eye witness.
Hearsay. *See* **Reputation.**
Husband or wife.
Identification.
Inadmissible evidence.
Intention.
Marriage.
Meaning of.
Medical certificate.
Ownership.
Photographs.
Presumption.
Privilege.
Proof.
Recital.
Record-of-rights.
Rejection of.
Relevancy.
Reputation.
Revenue documents.
Riwaj i-am.
Rule as to.
Secondary Evidence.
Spies.
Value of.
What is not.
Witness.

Admissibility.

———*Admissibility—Counter-affidavit by accused—Whether can be relied upon—Stamped with non judicial stamp.*

An application was put in for the transfer of a case, on the ground that the accused person had been seen coming out from the compound of the trying Magistrate. This fact was sworn by an affidavit. The accused person denied this statement by a counter-affidavit sworn by him and so also the trying Magistrate by his own statement relying also upon the counter-affidavit. A complaint under S. 193, was ordered to be drawn up against the complainant and objections were taken to this procedure.

Held, it is not certain whether such a counter-affidavit would be inadmissible, for the purpose of deciding whether a complaint ought to be made. It is doubtful whether such the trying Magistrate is entitled to take such a statement into consideration, when coming to a conclusion whether a complaint should be made or not. It is unwise to act upon it when the difficulty can be overcome by directing an enquiry such as is mentioned in S. 476, Cr.P. Code. The affidavit was rejected as being inadmissible in evidence, as it was stamped with non-judicial stamps, whereas the rules require Court-fee stamps. (*Lort Williams and S. K. Ghose, JJ.*) AMBIKA CHARAN DAS *v.* EMPEROR. **58 Cal. 1211=I.R. 1931 Cal. 438=131 I.C. 262=32 Cr.L.J. 674=53 C.L.J. 184=35 C.W.N. 690=1931 Cr.C. 408=A.I.R. 1931 Cal. 344.**

———*Admissibility—Documents of Government, unpublished—Entry in—Evidence by Government employee—Admissibility of—No primary or secondary evidence of entry.*

In a prosecution for perjury, part of the case for the prosecution was that the *kabuliyats* in question were forged documents as the cartridge papers on which they were written did not come into existence until long after 1909, the date of the *kabuliyats*. An Assistant in the Office of the Deputy Controller of Stationery, Calcutta, deposed to that effect. He did not base his knowledge on his own experience but on an entry in an unpublished record of Government in respect of which privilege was claimed and allowed. The witness was not prepared to let the Court or the lawyers see the entry.

Held, that the evidence of the witness was not admissible. (*Rankin, C.J. and C.C. Ghose, J.*) EMPEROR *v.* JAFFARUL HOSSAIN. **59 Cal. 1046=I.R. 1932 Cal. 448=138 I.C. 351=33 Cr.L.J. 599=36 C.W.N. 514=1932 Cr.C. 458=A.I.R. 1932 Cal. 468.**

———*Admissibility—Examination of arrested person by doctor—Absence of consent—Evidence of doctor as to search.*

The examination of an arrested person in hospital by a doctor not for the benefit of the prisoner's health but simply by way of second search is not provided for in the Cr. P. Code and in such a case the doctor may not examine the prisoner without his consent. The evidence of the doctor as to the search without the accused's consent is inadmissible. (*Lord Williams and S.K. Ghose, JJ.*) EMPEROR *v.* BHONDAR PRODHAN. **35 C.W.N. 1212=134 I.C. 1053=I.R. 1932 Cal. 13=33 Cr. L.J. 11=54 C.L.J. 499=1931 Cr.C. 753=A.I.R. 1931 Cal. 601.**

———*Admissibility*—Ex post facto *recital in deed—Oral statements of executant—Omission to examine executant.*

Where it was shown that the mortgagor did not execute the mortgage as manager and there was no evidence to show that the debt was contracted for legal necessity but the lower Court relied on a document executed by the coparceners after they had parted with all rights to property and also on statements made by the executant at the time of the execution of the deed.

Held, that the finding as to family necessity could not be supported.

Held, further, that the pieces of evidence relied on by the lower Court were inadmissible in evidence especially when the executant, who was alive had not been examined. (*Macnair, J.C.*) AMBIKA PRASAD *v.* GOURI SHANKAR. **141 I.C. 656=I.R. 1933 Nag. 78=15 N. L.J. 94=A.I.R. 1933 Nag. 383 (1).**

———Admissibility—Intention at variance with that expresssed—Proof of. *See* EVIDENCE ACT, S. 92. **1932 A.C. 715=63 M.L.J. 418 (P.C.).**

———*Admissibility — Local inspection—Statements made at.*

EVIDENCE—Admissibility.

Statements made at the local inspection are inadmissible and a Judge should not bring such statements into the case as evidence. No statement by any person is evidence unless given on oath in the witness-box. (*Grille, O.J.C. and Pollock, A.J.C.*) LOCAL GOVERNMENT *v.* MT. GUJI. **17 N.L.J. 189 = 1935 Cr.C. 339 = A.I.R. 1935 Nag. 69.**

———*Admissibility—Objection not raised—Effect.*

When a piece of evidence is irrelevant, the erroneous omission before the lower Courts to object to the admission of that evidence does not make that evidence relevant. 19 All. 76 (P.C.); 56 M.L.J. 88 (P.C.); 44 Bom. 192, Rel. on. (*Madhavan Nair, J.*) KRISHNASWAMI PATHAR *v.* RAMACHANDRA AYYAR. **135 I.C. 572 = I.R. 1932 Mad. 156 = 1931 M.W.N. 261 = A.I.R. 1931 Mad. 601.**

———*Admissibility—Objection not raised—Effect—Interference in appeal.*

It is settled law that the mere absence of formal proof of a document not objected to at the earliest opportunity will not be allowed to disturb the decision of the Court in final appeal. 34 C. 1059 (P.C.), Rel. on. (*Coldstream and Dalip Singh, JJ.*) ALI BAKSH *v.* NIAMATULLAH. **32 P.L.R. 470 = I.R. 1931 Lah. 978 (1) = 134 I.C. 770 (1).**

———*Admissibility—Objection raised in appeal—Sustainability.*

It is well established that where a fact has been erroneously allowed to be proved in a manner different from that which the law requires and no objection is taken in the Court of first instance; such objection cannot be taken later in appeal. This view is based on the principle that if objection is taken at the proper time to the receipt of certain evidence (not admissible in itself) owing to such evidence not being in the form prescribed by law, an opportunity can be afforded to the party producing such evidence to remedy the defect and satisfy the requirements of the law. 5 Q.B.D. 26, Ref. (*Shadi Lal, C.J. and Tapp, J.*) FAUJA SINGH *v.* ALLAH DITTA. **I.R. 1931 Lah. 842 (2) = 133 I.C. 874 (2) = 32 P.L.R. 696 = A.I.R. 1931 Lah. 722.**

———*Admissibility—Objection raised in second appeal—Sustainability.*

Where the parties fought out the case on the ground that the evidence adduced was not sufficient to prove a custom and the documentary and other evidence was not challenged in any manner,

Held, that it was not open to one party to contend in second appeal that the documents, etc., were not legally proved. 20 I.C. 162 Ref' (*Jai Lal, J.*) MANGAL SAIN *v.* PUNJAB SINGH. **I.R. 1931 Lah. 801 = 133 I.C. 625 = A.I.R. 1932 Lah. 130.**

———*Admissibility—Objection—Time for.*

Where certain *amalnamas* were admitted without objection during the proceedings before the Assistant Settlement Officer who ultimately held that the *khaviat* was non-resumable, it is not open to the other party to question their admissibility in evidence in a subsequent suit to resume the grant. 29 M.L.J. 307 (P.C.) and 34 C. 1059 (P.C.), Ref. (*Ross and Fazl Ali, JJ.*) LACHUMAN LAL PATHAK *v.* KAMAKSHYA NARAYAN SINGH. **I.R. 1931 Pat. 228 = 131 I.C. 788 = 12 Pat. L.T. 891 = A.I.R. 1931 Pat. 224.**

———*Admissibility—Objection—Waiver—Insufficiently stamped promissory note.*

There is no bar under any law preventing the Court from using a promissory note which is stamped with an one anna stamp instead of a two annas stamp as a piece of evidence supporting the plaintiff's case as to loan. Where such a document has been received in evidence in the trial Court without objection on the part of the defendant, the appellate Court will not interfere. (*C. C. Ghose and Pearson, JJ.*) ABINASH CHANDRA BOSE *v.* NAGENDRA NATH DUTT. **I.R. 1931 Cal. 863 = 134 I.C. 575 = 53 C.L.J. 254 = A.I.R. 1931 Cal 480.**

———Admissibility—Oral evidence as to partition—Witnesses not present at partition—Value of evidence of. *See* HINDU LAW—PARTITION. **155 I.C. 961.**

———Admissibility— Promissory note understamped and inadmissible—Proof of claim *aliunde*—Voucher executed contemporaneously containing all terms and forming record of transaction—Admissibility. *See* C.P. CODE, O. 6, R. 17. **39 C.W.N. 1235.**

———*Admissibility—Resolution of Law Committee of Municipality—Committee members not examined.*

The opinion expressed by the Law Committee of a Municipality by its resolution is not admissible in evidence when the members of the Committee have not been examined. (*Banerji King and Young, JJ.*) MUNICIPAL BOARD, BENARES *v.* KANDHIYA LAL. **54 All. 6 = I.R. 1931 All. 789 = 134 I.C. 21 = 1931 A.L.J. 757 = A.I.R. 1931 All. 499 (S.B.).**

———*Admissibility—Statement of Counsel.*

No statement of Counsel concerning relevant facts in the case can be accepted otherwise than in the witness-box. Such a statement is inadmissible. (*Grille, O.J.C. and Pollock, A.J.C.*) LOCAL GOVERNMENT *v.* MT. GUJI. **17 N.L.J. 189 = 1935 Cr.C. 339 = A.I.R. 1935 Nag. 69.**

———*Admissibility—Testing evidence by cross examination—Opportunity to exercise the right sufficient.*

It is enough for the purpose of making evidence admissible if the accused had an opportunity to cross-examine. If when that opportunity is given, he fails to exercise it, he is himself to blame and the evidence is not inadmissible for the reason that for some reason or other, he failed to exercise his right to cross-examine the prosecution witnesses at the proper moment. (*Mahadevayya, O.C.J.*) RAMASETHU IYER, *In re* **39 Mys. H.C.R. 581 = 12 Mys.L.J. 1.**

Adoption.

———*Adoption—Proof—Lapse of time—Inference.*

Where an alleged adoption was questioned after an interval of more than fifty five years,

Held, that the onus lies on the plaintiff to disprove adoption and although the defendant was bound to prove his title as adopted son, every allowance for the absence of evidence to prove such fact must be favourably entertained. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* THIRUNARAYANA PILLAI. **55 Mad. 40 = I.R. 1932 Mad. 767 = 139 I.C. 684 = 1932 M.W.N. 31 = 35 L.W. 73 = A.I.R. 1932 Mad. 198 = 62 M.L.J. 116.**

Age.

———*Age—Estimate by persons not having special means of knowledge.*

An approximate estimate of the age of a party made by third parties who might not have had any special means of knowledge is not of much value. (*Sulaiman, C.J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **56 All. 766 = 149 I.C. 781 = 6 R.A. 962 = 3 A.W.R. 529 = 1934 A.L.J. 318 = A.I.R. 1934 All. 406 (F.B.).**

———*Age—Statement of witness's age in criminal proceedings.*

In criminal proceedings the statement of a witness's age forms no part of his deposition and is not usually the statement of the witness himself, but an estimate of the Court. (*Macpherson and Agarwala, JJ.*) RAMGAHAN MISSIR *v.* MT. RAMDASI KUAR. **148 I.C. 413 = 6 R.P. 469 = A.I.R. 1933 Pat. 627.**

EVIDENCE—Appreciation of.

Appreciation of.

———*Appreciation of—Contradictory evidence—Mode of ascertaining truth.*

Where the evidence produced by one party is in direct conflict with the evidence produced by the other, the following tests may be applied for judging the veracity for the evidence. (1) The evidence which is consistent with a finding which is already established; (2) the comparative nearness in relationship of the witness; (3) the impartiality of the witnesses; (4) the inherent probability of their statements; (5) the impression created in the minds of the Judges by the demeanour of the witnesses in the box. (*Wazir Hasan, C.J. and Raza, J.*) HARI HAR PARTAB BAKSH SINGH *v.* BISHESHWAR BAKHSH SINGH. **9 Luck. 121=I.R. 1933 Oudh 247=144 I.C. 529=10 O.W.N. 1290=A.I.R. 1933 Oudh 197.**

———*Appreciation of—Evidence given four years after alleged conversation.*

Where evidence was given nearly four years after an alleged conversation, it is impossible to rely implicitly upon the recollection of witnesses as to conversations alleged to have taken place so long ago, when there is no documentary evidence of any kind to corroborate such recollection, and especially when documentary evidence is in direct contradiction thereof. (*Sir Lancelot Sanderson.*) BHARAT SPINNING AND WEAVING CO. *v.* MANILAL LALLUBAI. **157 I.C. 4=8 R.P.C. 14=1935 O.W.N. 863=37 Bom.L.R. 826=1935 M.W.N. 1182 =A.I.R. 1935 P.C. 175=69 M.L.J. 433 (P.C.).**

———*Appreciation of—Findings of Itria judge—Interference in appeal.*

According to well-established rules, great regard is to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him. On appeal the whole case including the facts are no doubt within the jurisdiction of the appellate Court. But generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has had an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credibility which attaches to one or other of conflicting witnesses. (*Raza and Smith, JJ.*) CHOTEY LAL *v.* MOHAMMAD AHMAD ALI KHAN. **8 Luck 315=6 I.R. (Oudh) 27=144 I.C. 983=10 O. W.N. 173=A.I.R. 1933 Oudh 128**

———*Appreciation of—Matters of common knowledge —Judicial notice.*

Evidence of the sources of common knowledge, if not of its extent, may perhaps be obtained by reference to a cyclopaedia and the lists of text books to be found but detailed information supplied from such sources requires usually to be established by experts. For example, the extent to which and the processes by which an accurate topographic plan can be produced from a pictorial delineation of a scene can hardly be said to be of common knowledge. (*Lord Merrivale.*) UNITED STATES SHIPPING BOARD *v.* "ST. ALBANS." **I.R. 1931 P.C. 163= 131 I.C. 771=A.I.R. 1931 P.C. 189 (P.C.).**

———*Appreciation of—Power of appellate Court.*

Where the rejection of a witness's evidence by the Trial Court Judge is solely based on the evidence, oral and documentary, placed before him; and he makes no comment on the demeanour of the witness or on his truthfulness apart from comments on the probabilities of the truth of the story actually told by him viewed in the light of the surrounding circumstances, the appellate Court is in as good a position to judge of the matter as the trial Court. (*Lord Thankerton.*) GOVIND PRASAD *v.* KUNWARANI BALA-KUNWAR. **6 R.P.C. 46=147 I.C. 326=39 L.W. 78=1934 A.L.J. 117= 35 P.L.R. 205=36 Bom.L.R. 232=59 C.L.J. 93= 3 A.W.R. 113=11 O.W.N. 132=1934 M.W.N. 249 =A.I.R. 1934 P.C. 12=66 M.L.J. 151 (P.C.).**

EVIDENCE—Co-accused.

———*Appreciation of—Statement of high Government officer—If entitled to special weight—Duty of Court.*

Even the statement of a high Government officer must, like the statements of other men, be subject to the infirmities of human nature, possibly to defects of recollection and observation; and a final appreciation and judgment of his testimony could and should not be made until all the evidence is on record and the arguments have been heard. The Court itself should appreciate the evidence and make such deductions as it thinks proper. It should not surrender its discretion or judgment to such Government officer. (*Davis, J. C.*) BAGOMAL *v.* EMPEROR. **29 S.L.R. 339=159 I.C. 687=8 R.S. 93=37 Cr.L.J. 152=1935 Cr.C. 1312=A.I.R. 1935 Sind 223.**

———*Appreciation of—Trial Court — Interference in appeal.*

When the issue is simple and the only question is which set of witnesses is to be believed, the verdict of the trial Court should not be lightly disregarded. 39 Bom. 386, Foll. (*Raza and Bisheshwar Nath, JJ.*) MANTHURA *v.* JAGMOHAN SINGH. **6 Luck. 546= I R. 1931 Oudh 292=132 I.C 532=14 O.L.J. 280= 12 L.R. 67 (Rev.)=8 O.W.N. 131=15 R.D. 80= A.I.R. 1931 Oudh 256.**

Circumstantial evidence.

———*Circumstantial evidence—Criminal case.*

In the definition of proof in the Evidence Act, no distinction is drawn between circumstantial and other evidence. In every case the Court should consider the whole matter before it and proceed with prudence before acting upon probabilities.

Held, on the facts, that the evidence disclosed grave suspicion of guilt, but that it did not raise that high degree of probability on which with due prudence a conviction for murder should be based. Conviction under S. 201 I.P. Code, substituted for that under S. 302. I.P. Code. (*Addison and Coldstream, JJ.*) MIRAN BAKSH *v.* EMPEROR. **I.R. 1931 Lah. 782=133 I.C. 446=32 Cr L.J. 1032=32 P.L R. 461=1931 Cr.C. 769= A.I.R. 1931 Lah. 529.**

———*Circumstantial evidence—Criminal case—Mode of appreciation.*

The principles to be followed in criminal cases based on circumstantial evidence are as follows: (1) The circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond all reasonable doubt and must be closely connected with the fact sought to be inferred therefrom; (2) in order to justify an inference of guilt the circumstances from which such an inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt (*Suhrawardy and Patterson, JJ.*) JAHURA BIBI *v.* EMPEROR. **129 I.C. 677=32 Cr.L J. 418=52 C L J. 417=35 C.W.N. 169=1931 Cr.C. 43=A I.R. 1931 Cal. 11.**

Co-accused.

———*Co-accused—Confession of—Admissibility.*

Where the confessions are voluntarily made by the accused, they must be received in evidence against themselves, and may furthermore be taken into consideration against their co-accused. (*Dunkley, J.*) MAUNG THA *v.* EMPEROR. **160 I.C. 292=8 R.R. 363=37 Cr L.J. 280=1935 Cr.C. 1266=A I.R. 1935 Rang. 491.**

EVIDENCE—Co-accused.

———*Co-accused—Confession of—Admissibility.*

Where an accused makes a confession trying to exonerate himself but inculpating other co-accused, such confession should be looked at with suspicion and should not be relied upon without sufficient corroboration. A. I. R. 1931 Rang. 235 Expl. (*Mosely and Mackney, JJ.*) PAW THA U *v.* EMPEROR. **160 I.C. 210 = 8 R.R. 347 = 37 Cr.L.J. 246 = 1935 Cr.C. 1298 = A.I.R. 1935 Rang. 512.**

———*Co-accused—Plea of guilty—Need for passing sentence before examining as witness.*

It is always desirable to pass a sentence completely, before calling an accused pleading guilty in a joint trial to give evidence against his co accused, so that the witness may give his evidence with a mind free of all corrupt influences, which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce. But this course is not essential. (*Lord Williams and S.K. Ghose, JJ.*) MAHOMED IUSUF *v.* EMPEROR. **58 Cal. 1214 = 131 I.C. 142 = 32 Cr.L.J. 667 = 35 C.W.N. 490 = 1931 Cr.C. 405 = A.I.R. 1931 Cal. 341.**

Commission evidence.

———*Commission evidence—Credibility—Estimate of appellate Court—Weight of.*

Where a person's evidence was taken on commission, the first appellate Court is in at least as good a position to appreciate its credibility as the trial Judge, and the Privy Council would naturally attach the greater weight to the former's estimate. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKAR JAHAN BEGAM. **59 I.A. 1 = 6 Luck. 556 = 1932 A.L.J. 663 = I.R. 1932 P.C. 81 = 136 I.C. 385 = 36 C.W.N. 137 = 35 L.W. 118 = 8 O.W.N. 1378 = 62 C.L.J. 326 = A.I.R. 1932 P.C. 13 = 62 M.L.J. 320 (P.C.).**

———*Commission evidence—Examination of witnesses—Irrelevant questions, deprecated.*

Protracted examinations of witnesses on commission with questions which are quite irrelevant to the suit, and only tend to swell the size of the record, must be deprecated. It is an abuse which enormously increases the cost of litigation without any corresponding benefit to the parties and it is clearly within the powers of the High Court to direct inquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals. (*Sir John Wallis.*) RAJ KUMAR SEN CHOWDHURY *v.* RAM SUNDAR SHAHA. **I.R. 1932 P.C. 54 = 136 I.C. 102 = 1932 A.L.J. 198 = 34 Bom.L.R. 526 = 55 C.L.J. 120 = 35 L.W. 409 = 1932 M.W.N. 584 = A.I.R. 1932 P.C. 69 = 62 M.L.J. 457 (P.C.).**

———*Commission evidence—Mode of admission.*

It is not necessary to tender the evidence taken on commission formally at a trial to make it evidence in the case. 36 Cal. 566, Ref. (*Mitter and M. C. Ghose, JJ.*) BROJENDRANATH GANGULY *v.* PROMATHA BHUSAN DEV. **I.R. 1933 Cal. 533 = 144 I.C. 462 = 58 C.L.J. 460 = 37 C.W.N. 666 = A.I.R. 1933 Cal. 412.**

Conduct.

———*Conduct—Inference from conduct of parties—Collusive suit.*

Where a Hindu son sued for cancellation of a simple mortgage effected by his father on the ground that the mortgage was without consideration and secondly that the consideration if any was immoral and all that the defendant was able to prove was that the plaintiff was living with his father and that the suit was instituted soon after the mortgagee sued to enforce his mortgage.

EVIDENCE—Credibility.

Held, that it could not be said on the facts that the suit was collusive. (*Bhide, J.*) MANHA SINGH *v.* KISHAN CHAND. **6 R.L. 408 = 147 I.C. 331 = A.I.R. 1935 Lah. 227.**

———*Conduct—Offence of rape—Consent of girl—Inference.*

Per *Walker, J.*—It is difficult to believe that a grown-up girl would have submitted to being carried about and raped without protesting especially when it appears that she was every now and then left by herself. (*Walker, J.*) NATHU *v.* EMPEROR. **I.R. 1931 Lah. 800 = 133 I.C. 560 = 32 Cr.L.J. 1041 (2) = 32 P.L.R. 98 = 1931 Cr.C. 641 = A.I.R. 1931 Lah. 401.**

Confession.

———*Confessions made to a Magistrate—Different classes—Evidentiary value.*

Confessions made to a Magistrate can be divided into five classes:—(1) Those recorded with all the formalities prescribed by Ss. 164 and 365 Cr. P. Code. (2) Those imperfectly recorded, but where the defect is cured by S. 533, Cr. P. Code. (3) Where the defect is not cured and the confession is proved by the testimony of the Magistrate. (4) Where the Magistrate refuses to record the confession of an accused person produced before him for that purpose, but hears it. (5) Where the accused appears before a Magistrate of his own accord and makes an oral confession. Confessions falling under (1) and (2) are recorded under great precautions and should, therefore, carry more weight than those falling under the remaining classes. A confession under class (2) would be less weighty, because some of the precautions prescribed by law were not observed. A confession under class (4) should have very little weight unless the Magistrate can explain to the entire satisfaction of the Court why he refused to act under Ss. 164 and 364, Cr. P. Code. The weight to be attached to a confession under class, (5) would depend entirely on the circumstances under which it is made. (*Young, C. J. and Rangi Lal, J.*) BAKHSHAN *v.* EMPEROR. **16 Lah. 912 = 161 I.C. 339 = 8 R.L. 721 = 37 Cr.L.J. 432 = 37 P.L.R. 869 = 1936 Cr.C. 205 (2) = A.I.R. 1936 Lah. 247.**

Credibility.

See COMMISSION EVIDENCE, *supra.*

———*Credibility—Statement given on oath.*

Where there is nothing to show that a statement is inherently improbable, it is wrong to hold that a statement given on oath is false, when not only it remains uncontradicted but when the opposite party who challenges it deliberately abstains from adducing evidence to the contrary. (*Venkatasubba Rao and Reilly, JJ.*) SIVASKANDARAJU BAHADUR *v.* SRI NRASIMHA PATTAMANI. **56 Mad. 356 = I.R. 1933 Mad. 392 = 144 I.C. 414 = 1933 M.W.N. 65 = 37 L.W. 188 = A.I.R. 1933 Mad. 225 = 64 M.L.J. 439.**

———*Credibility—Trial Court—Opinion as to credibility of witness.*

Where there is an irreconcilable difference between the evidence of the opposite parties and the trial Judge accepts the evidence of one party and rejects that of the other party so far as it is in conflict with that party's evidence, the Court of review should be slow to differ from the opinion of the trial Judge as to credibility, in respect that he has seen and heard the witnesses and should not differ without convincing reasons. (*Lord Thankerton.*) ARTHUR WIJETILAKA *v.* DON EDMUND RANASINGHE. **I.R. 1931 P.C. 273 = 134 I.C. 321 = A.I.R. 1931 P.C. 265 (P.C.).**

EVIDENCE—Criminal trial.

Criminal trial.

———*Criminal trial—Hostile witness—Admissibility of deposition.*

If a witness is called for the prosecution and subsequently declared hostile and cross-examined his evidence should not on that account be left out of account. His evidence must go to the jury with the rest of the evidence for them to decide what it was worth. (*Lort Williams and Mallick, JJ.*) WAHID ALI *v.* EMPEROR. **I.R. 1932 Cal. 454=138 I.C. 373=33 Cr.L.J. 604=36 C.W.N. 356=1932 Cr.C. 498=A.I.R. 1932 Cal. 523.**

———*Criminal trial—Suggestions by pleader to accused.*

Mere suggestions by a pleader or advocate for the accused do not amount to evidence unless they are either partly or wholly accepted by the witnesses for the prosecution. (*Lort Williams and S.K. Ghose, JJ.*) EMPEROR *v.* KARIMUDDI SHEIKH. **I.R. 1932 Cal. 592=139 I.C. 245=33 Cr.L.J. 725=36 C.W.N. 106=1932 Cr C. 318=A.I.R. 1932 Cal. 375.**

———*Criminal trial—Unsworn statement of witness—Use against accused in criminal trial.*

Apart from special cases, the unsworn statement of a witness, so far as the maker in his evidence does not confirm and repeat it, cannot be used against the accused at all as proof of the truth of what it asserts. This means not merely that it is in itself insufficient proof but that it cannot be so used at all. It cannot be coupled with probabilities which suggest that the witness was more likely to tell the truth on the former occasion than in the witness-box so as to go to the jury as part of the proof that what was then stated is true. (1910) 2 K.B. 496 and 1923 Cr. Ap. Ref. 77, Rel. on. (*Rankin, C.J., C.C. Ghose, Buckland, Suhrawardy and Cuming, JJ.*) PROFULLA KUMAR SARKAR *v.* EMPEROR. **58 Cal. 1404=I.R. 1931 Cal. 463=32 Cr.L.J. 768=131 I.C. 575=35 C.W.N. 731=53 C.L.J. 427=1931 Cr.C. 497=A.I.R. 1931 Cal. 401 (F.B.).**

Cross-examination.

———*Cross-examination of witness—Duty and function of Judge in obtaining and recording answers.*

It is the judicial function of a Judge to control the cross-examination of witnesses and to insist that the witnesses shall understand the question put before an answer is obtained or before an answer is recorded. (*Courtney-Terrell, C.J. and Luby, J.*) HARI LAL *v.* EMPEROR. **14 Pat. 225=156 I.C. 921=8 R.P. 43=36 Cr.L.J. 1026=16 Pat.L.T. 380=1935 Cr.C. 749=A.I.R. 1935 Pat. 263.**

De bene esse examination.

———De bene esse *examination—Delegation to Prothonotary or his associates—Bombay High Court—Practice—Special fee—Legality of.*

The *de bene esse* examination of the witnesses should ordinarily be held in Court and preferably before the Judge who is ultimately to hear and decide the suit. The Chamber Judge, however, has a discretion to delegate the work to the Prothonotary or one of his associates. The practice which has grown up in Bombay of the Prothonotary deputing one of his associates to do this work outside Court hours and charging a special fee from the parties therefor is binding on all parties, since it has been in existence for a long time and where they have acted on the faith of such practice, they cannot be allowed to question the legality of the fee so charged. (*Mirza, J.*) ABDULLA KAZIM *v.* OBAID ESSA. **I.R. 1932 Bom. 369=138 I.C. 323=34 Bom.L.R. 611=A.I.R. 1932 Bom. 405.**

EVIDENCE—Document.

Document.

———*Document—Document allowed in appeal merely because it was public document—Legality.*

Where the only reason given for admitting a document in appeal is that it is a public document but it relates to facts which the defendant is entitled to meet, the admission is illegal. A.I.R. 1931 P.C. 143, Ref. (*Vivian Bose, A.J.C.*) MT. SAROO MALI *v.* YESHWANT NARAYAN MALI. **150 I.C. 306=6 R.N. 283=A.I.R. 1934 Nag. 124.**

———*Document—Document inadmissible — Proof of admission in lieu of document—Permissibility.*

Where the admission in pleadings renders it unnecessary to produce evidence at all, objection cannot be taken to the admissibility of the superfluous evidence when and if produced. But where the evidence is all inadmissible from the start, a mere admission of execution of a document even supported by the admission of the existence of an agreement embodied in the inadmissible document, both admissions being answers to questions which should have been disallowed, does not debar a party from objecting to the document on the ground of want of registration or any evidence as to its contents. (*Harrison, J.*) BUDHA *v.* MAHOMED DIN. **I.R. 1932 Lah. 656=140 I.C. 430 (2)=33 P.L.R. 1073=A.I.R. 1933 Lah. 9.**

———*Document—Document not proved or accepted—Reference—Permissibility.*

A document which is not proved or accepted by the trial Court cannot be relied on in appeal merely because it throws doubt on certain entries in papers filed in the case. (*Knox, J.M.*) RAM LAL *v.* RAJA ANAND RAM. **13 L.R. 88 (Rev.)=16 R.D. 181.**

———*Documents—Motor Vehicles Registry—Entry in—Mode of proof.*

The proper way of proving an entry in the Register of Motor Vehicles would be either that the Register itself should be produced by a proper official or a duly authenticated copy of the material part of the Register placed before the Court. A mere statement by the Commissioner of Police made in answer to a letter written by the Corporation, without his being called or the register produced, cannot be accepted in proof of the ownership of a car. (*Costello, J.*) BAIJNATH SHAW *v.* CORPORATION OF CALCUTTA. **141 I.C. 248=I.R. 1933 Cal. 96=36 C.W.N. 1147=A.I.R. 1933 Cal. 178.**

———*Document—Summoning of documents in another case for specific purpose—User for different purpose—Permissibility.*

Legal practitioners should confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be before the Court for a specific purpose, *e.g.*, where the genuineness of a document on the record of another case, of which a certified copy is produced in the case, is denied and the record of that other case has to be summoned to formally produce the original and prove its genuineness, such record as a whole and its contents cannot be treated as evidence in the case for any purpose other than the one for which it has been summoned. (*Sen and Niamatullah, JJ.*) GAURI SHANKAR SHARMA *v.* THAKUR MEWA RAM. **I.R. 1931 All. 369=131 I.C. 513=A.I.R. 1931 All. 600.**

———*Document—Documentary evidence* ante litem motam*—Evidentiary value.*

Documentary evidence created long before any question arose is evidence which is entitled to great weight. Statements in prior guardianship proceedings taken into account on a question of minority. (*Mukerji and Bennet,*

EVIDENCE—Duty of Court.

JJ.) MT. KUNDAN BIBI *v.* MAGAN LAL. **I.R. 1932 All. 579 (2)=139 I.C. 718=A.I.R. 1932 All. 710.**

———*Document—Documentary evidence—Seal of Court when to be affixed.*

There are two stages relating to documents. One is the stage when all the documents on which the parties rely are filed by them in Court. The next stage is when the documents are proved and formally tendered in evidence, it is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved, then the seal of the Court is put on them giving certain details laid down by law, otherwise the documents are returned to the party who produced them with an endorsement thereon to that effect. It is not a proper procedure to put the seal of the Court immediately the document is filed into Court. (*Jai Lal, J.*) RAGHBIR SARAN *v.* RAM CHANDER. **13 Lah. 126=I.R 1931 Lah. 593=32 P.L.R. 482=132 I.C. 481=A.I.R. 1931 Lah. 546.**

Duty of Court.

See CROSS-EXAMINATION, *supra.*

———*Duty of Court—Court cannot lightly attribute to witnesses conspiracy and perjury.*

The Court is not entitled to attribute to the witnesses conspiracy and perjury, unless the story told by them, coupled with the surrounding circumstances is of itself so unnatural and improbable, that only one conclusion, *viz.*, conspiracy and perjury, is reasonably possible. (*Lord Thankerton.*) GOVIND PRASAD *v.* KUNWARANI BALA KUNWAR. **6 R P.C. 46=147 I.C. 326=39 L.W. 78=1934 A.L.J. 117=35 P.L.R. 205=36 Bom. L R. 232=59 C.L.J. 93=3 A.W.R. 113=11 O.W.N. 132=1934 M.W.N. 249=A.I.R. 1934 P.C. 12=66 M.L.J. 151 (P.C.)**

Eye-witness.

———*Eye-witness—Delay in coming forward—Value of testimony.*

The mere fact that an eye-witness does not come forward immediately an investigation is begun is not by itself in this country necessarily a sufficient ground for rejecting his testimony. (*Addison and Coldstream, JJ.*) MIRAN BAKSH *v.* EMPEROR. **I.R. 1931 Lah. 782=133 I.C. 446=32 Cr.L J. 1032=32 P.L.R. 461=1931 Cr.C. 769=A.I.R. 1931 Lah. 529.**

———*Eye-witness—Evidence disbelieved on several points—Conviction of murder, if can be based on.*

When in murder case the only eye witness to the occurrence has been disbelieved on several points, it is not safe to base a conviction on the evidence of such witness, especially when no motive for the murder has been made out. (*Nanavutty and Rachhpal Singh, JJ.*) BHAGWATI PRASAD *v.* EMPEROR. **151 I.C. 274=7 R.O. 99=35 Cr.L.J. 1265=11 O.W.N. 969=1934 Cr.C. 1159=A.I.R. 1934 Oudh 373.**

———*Eye-witness—Evidence of—Proof of motive.*

The proof of motive for a crime is not corroboration of the evidence of an eye-witness. (*Raza and Pullan, JJ*) DWARKA *v.* EMPEROR. **6 Luck. 475=I R. 1931 Oudh 199=131 I.C. 439=32 Cr.L J. 697=14 O.L J. 210=8 O.W.N. 107=1931 Cr.C. 241=A.I.R. 1931 Oudh 119.**

———*Eye witness—Rejection of deposition—Permissibility*

Mere verbal contradictions and discrepancies are not sufficient to discredit the clear and consistent testimony of eye-witnesses, which is also supported by the circumstantial evidence. The measures of stupidity of these witnesses, especially when they are villagers, is not the measure of their veracity and truthfulness. (*Nanavutty and Smith, JJ.*) RATAN LAL *v.* EMPEROR. **8 Luck. 570=6 I.R. (Oudh) 107=146 I.C. 381=35 Cr.L J. 45=10 O.W.N. 557=1933 Cr.C. 780=A.I.R. 1933 Oudh 333.**

EVIDENCE—Marriage.

Husband or wife.

———*Husband or wife—Evidence of—Divorce and matrimonial causes—Need for corroboration.*

There is a definite established practice in the Court for divorce and matrimonial causes in England, that the evidence of the husband or the wife alone is never to be accepted without corroboration either by witnesses or at least by strong surrounding circumstances. This salutary rule will be followed in India. (*Srivastava and Zia ul-Hasan, JJ.*) AVIS KATHERINE NIBLETT *v.* ROBERT HOWARD NIBLETT. **10 Luck. 627=7 R.O. 378=153 I.C. 751=1935 O.W.N. 103=A.I R. 1935 Oudh 133.**

Identification.

———*Identification of dead person—Circumstantial evidence.*

Where the heads had been cut off and only the trunks were available and the bodies had become swollen and decomposed at the time they were photographed, the evidence of witnesses who purport to identify the bodies without any distinguishing marks by a mere look at the photographs of the trunks which had decayed and bloated is not reliable. In such a case the identity should be judged only with reference to the surrounding facts if any. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) SRI RAMA BHATTACHAR *v.* GOVERNMENT OF MYSORE. **9 Mys.L J. 142.**

Inadmissible evidence.

———*Inadmissible evidence—Improper admission—Use of inadmissible evidence for collateral purpose—If a ground for reversal on appeal.*

Where an inadmissible document is admitted in evidence for a collateral purpose, namely, for doubting the evidence on the side of defendants and not for the purpose of basing the main finding in the suit, it cannot be said that the judgment is vitiated so as to justify reversal or interference on appeal. (*Dalip Singh and Bhide, JJ.*) KHUDA BAKHSH *v.* LAHORI MAL. **156 I.C. 15 (1)=7 R.L. 877 (1)=A.I.R. 1935 Lah. 560.**

Intention.

———*Intention—Proof of.*

The law looks as regards intention, to the natural result of a man's act and not to the condition of his mind. From a legal point of view, a person intends whatever he gives others reasonable grounds for supposing that he does intend. (*Raza and Bisheshwar Nath, JJ.*) EMPEROR *v.* PATAM. **I.R. 1932 Oudh 275=137 I.C. 817=33 Cr.L J. 536=9 O.W.N. 350.**

Marriage.

———*Marriage—Circumstances justifying presumption.*

Even though the connection between a man and a woman was at its inception adulterous, the presumption of a marriage arises in a case where it is established that the husband of the woman had divorced her and after that, they continued to live together, treated each other as husband and wife and were looked upon by others as such. (*Jai Lal, J.*) GURDIAL SINGH *v.* BHAGAT SINGH. **153 I.C. 241=7 R.L. 419=35 P. L.R. 532=A.I.R. 1934 Lah. 517.**

———*Marriage—Presumption from continuous living as man and wife.*

Continuous living as man and wife raises presumption of legal marriage and this presumption is greatly strengthened when they are described as man and wife in municipal papers. (*Young, J.*) MAHOMED JAN

EVIDENCE—Marriage.

KHAN *v.* MT. SUNDAR. **153 I.C. 855=7 R.A. 640=A.I.R. 1934 All. 884.**

———*Marriage—Widow living with another as man and wife.*

Where the evidence was that a widow after her husband's death lived with his first cousin as man and wife, had several by children him, and the two were together cultivating land and there was nothing to show that they were outcasted or their status as man and wife was repudiated.

Held, under the circumstances, it would not be justifiable to hold that there has not been a re-marriage. (*Drake Brockman, J. M.*) BINDESHWARI PRASAD *v.* BECHU SAITHWAR. **18 R.D. 417.**

Meaning of.

———*Meaning of—Witness not cross-examined.*

The Juristic conception of the term 'evidence' in the case of the oral testimony of witnesses is that the party against whom it is used has had the right and opportunity of cross-examining the witnesses. So long as the accused is not allowed the right and opportunity of cross examining the witnesses, any statements made by them can only be described as statements but cannot be dignified with the name of evidence. (*Bisheshwar Nath and Kisch, JJ.*) MAHOMED HUSAIN AGFAR MOHANI *v.* MIRZA FAKHRULLAH BEG. **140 I.C. 689=8 Luck. 135=I.R. 1933 Oudh 10=34 Cr.L.J. 58=9 O.W.N. 782=1932 Cr.C. 838=A.I.R. 1932 Oudh 298.**

Medical certificate.

———*Medical certificate—Evidentiary value of.*

It is not correct to hold that a doctor's medical certificate is sufficient evidence or corroborative evidence of other oral evidence in cases relating to the illness of a witness which causes that witness to be absent from Court on a particular date. There is nothing in the Evidence Act or outside it which makes such a certificate by itself evidence at all. (*Beasley, C. J. and Cornish, J.*) SARADA *v.* NHATTIYALA DEVAKI. **156 I.C. 143=7 R.M. 648=42 L.W. 22=1935 M.W.N. 760=A.I.R. 1935 Mad. 659.**

Ownership.

———*Ownership—Physical features.*

Where the disputed property is not situate within a block of villages belonging to the same proprietor and the village, within which it is sought to be included, is bounded by a river on one side, it cannot be said that its physical features exclude the possibility of the ownership of any other person. 20 Bom.L.R. 49 (P.C.), Dist. (*Sir Shadi Lal.*) TARAKDAS ACHARJI CHOUDHURY *v.* SECRETARY OF STATE. **156 I.C. 548=1935 O.W.N. 749=39 C.W.N. 994=42 L.W. 167=37 Bom.L.R. 638=37 P.L.R. 546=61 C.L.J. 491=16 Pat.L.J. 555=1935 M.W.N. 1075=A.I.R. 1935 P.C. 125=69 M.L.J. 171 (P.C.).**

Photographs.

———*Photographs—Value of as proof.*

The necessity for careful delimitation of the uses for which, upon mere production of them, photographs can be accepted as means a proof of matters of fact has often been judicially pointed out. A photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects and cannot be made properly available to establish the relative proportions of such objects except by evidence of personal knowledge or scientific experience to demonstrate accurately the facts sought to be established. *Reg.* v. *U.K.E. T. Co.*, (1862) 3 F. and F. 73 and *Hindson* v. *Ashby*, (1896) 2 Ch. 1. Ref. (*Lord Merrivale.*) UNITED STATES SHIPPING BOARD *v.* "ST. ALBANS". **I.R.**

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1931 P.C. 163=131 I.C. 771=A.I.R. 1931 P.C. 189 (P.C.).

Presumption.

See also MARRIAGE, *supra.*

———*Presumption—Omission to deny allegation—Inference.*

When an allegation is made by one party and not denied by the other party, it must ordinarily be presumed to be correct. (*Shadi Lal, C. J. and Abdul Qadir, J.*) KUNDAN LAL *v.* EMPEROR. **12 Lah. 623=I.R. 1931 Lah. 611=132 I.C. 515=32 Cr.L.J. 909=32 P.L.R. 498=1931 Cr.C. 697=A.I.R. 1931 Lah. 473.**

———*Presumption—Sale 30 years old—Parties to transaction dead.*

Where a sale has been made nearly 30 years before the suit is brought and all the parties to the transaction have died, it is impossible to expect full and detailed evidence of all the circumstances that gave rise to the transaction and presumptions are permissible to fill in the details which have been obliterated by time. A.I.R. 1920 P.C. 64, Appl. (*Pollock, A.J.C.*) BABHNAJI *v.* RATANLAL. **30 N.L.R. 192=6 R.N. 217=148 I.C. 1033=A.I.R. 1934 Nag. 106.**

———*Presumption—Transactions of even date—Inference as to interdependence.*

Whether or not two transactions are integral parts of the same transaction, connected and interdependent, or whether they are disconnected and dissociated, is in each case a question of fact which has to be ascertained from the evidence produced in the case and no question of legal presumption arises. The intervening period between the execution of the two documents may in some cases have a relevancy but there can be no irresistible presumption in favour of a mortgage from the mere fact that the two documents were executed on one and the same date. (*Sen and Niamatullah, JJ.*) RAMDAS RAE *v.* BRINDABAN RAM. **I.R. 1931 All. 207=129 I.C. 719=1931 A.L.J. 571=A.I.R. 1931 All. 113.**

Privilege.

———*Privilege—State and official papers—Privilege—South Australian Rules, O. 31, R. 14.*

The privilege regarding State papers cannot be asserted in relation to documents, the contents of which have already been published extent of privillege and manner of claiming the same indicated in a case from South Australia. (*Lord Blanesburgh.*) HENRY GREER ROBINSON *v.* STATE OF SOUTH AUSTRALIA. **35 C.W.N. 1121=1931 A.C. 704=34 L.W. 575=135 I.C. 625=I.R. 1932 P.C. 17=A.I.R. 1931 P.C. 254=61 M.L.J. 943 (P.C.).**

Proof.

———*Proof—Adultery.*

Where the slide taken by the Medical Officer containing a smear of the discharge from the penis of the person accused of adultery was shown to have contained spermotozoa and it was also proved that there was a whitish discharge known as leucorrhoea from the vagina of the woman,

Held, that the evidence was not conclusive proof that the two were caught "*in flagrante delicto*" in the very act of coitus. (*Bisheshwar Nath and Nanavutty, JJ.*) RATAN *v.* EMPEROR. **8 Luck. 301=I.R. 1933 Oudh 154=143 I.C. 55=34 Cr.L.J. 498 (2)=10 O.W.N. 7=1933 Cr.C. 279=A.I.R. 1933 Oudh 148.**

———*Proof—Customary right—Right of burial*—Ex parte *order of Municipality—Evidentiary value.*

Where the right to bury dead bodies at a particular place is claimed as a customary right by a community, an *ex parte* order of a Municipal Board obtained at the

EVIDENCE—Proof.

instance of some of the members of the community cannot be of much evidentiary value. (*Mukerjee and Bennet, JJ.*) FAIYAZ HUSAIN *v.* IMDAD ALI. **I.R. 1931 All. 535=132 I.C. 567.**

———*Proof—Distinction from* "prima facie" *case.*

A "*prima facie*" case only means that there is ground for proceeding, it is not the same thing as "proof" which comes later when the Court has to find whether the accused is guilty and is nothing but belief according to the conditions laid down in the Evidence Act. A Magistrate finding a *prima facie* case cannot therefore be said to believe the case to be true in the sense that the case is proved.

Per *Lort Williams, J.*—The evidence discloses a *prima facie* case, when it is such that if uncontradicted and if believed it will be sufficient to prove the case against the accused. (*Lort Williams and S.K. Ghose, JJ.*) SHER SINGH *v.* JITENDRANATH SEN. **59 Cal. 275=33 Cr.L.J. 3=134 I.C. 1045=36 C.W.N. 16=54 C.L.J. 253=1931 Cr.C. 759=A.I.R. 1931 Cal. 607.**

———*Proof—Tenancy—Oral evidence.*

A tenancy can be proved by documentary or oral evidence. (*Mitter, J.*) SUNDAR ALI *v.* NUR MAMUD. **155 I.C. 733=7 R.C. 618=60 C.L.J. 225=A.I.R. 1935 Cal. 202.**

———*Proof—Tenancy—Statement of* patwari *as to what landlord said—Value.*

The statement of the *patwari* that he heard the landlord say that a particular person had been admitted to tenancy can be used only for the purpose of contradicting the landlord while he is being cross examined and not for the purpose of proving the tenancy itself. (*Oakden, S.M. and Oppenheim, J.M.*) SHEO PRASAD LAL *v.* GUDAR AHIR. **15 R.D. 110=12 L.R. 12 (Rev.).**

———*Proof—Witnesses examined before arbitrator—Statements admitted in Court as evidence by consent—Validity.*

Where an arbitrator has examined witnesses and recorded evidence with due formality, it is open to the parties by consent to treat such statements as evidence and proceed with the case before the Court from the stage it had reached before the arbitrator. The consent in such a case relates to the manner in which the evidence has to be proved and not to the relevance of the evidence itself. (*Butler, J.*) RAMASWAMI NAIDU *v.* MEERA MUHAIDEEN ROWTHER. **151 I.C. 621=7 R.M. 131=1934 M.W.N. 1015=40 L.W. 356=A.I.R. 1934 Mad. 610=67 M.L.J. 358.**

Recital.

———*Recital—Deed not* inter partes.

A recital in a document to which a person is not a party is not evidence against him. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A.I.R. 1935 Cal. 368.**

———*Recital—Deed of sale—Ownership of adjacent properties.*

Where in describing the boundaries in a deed of sale relating to adjacent properties, the property in dispute is stated as part of the property belonging to a certain person, such statement as a piece of evidence is of course not conclusive but it may be taken into account. (*Tek Chand and Skemp, JJ.*) LAL SHAH *v.* NATHU SHAH. **37 P.L.R. 454.**

———*Recital—Evidentiary value against third party.*

In order to prove the claimant's title to certain property comprised in the cantonments as against the Government, recitals in mortgages executed by the claimant in favour of other persons without any other anterior title deeds are of no value. (*Sir George Lowndes.*) THE SECRETARY, CANTONMENT COMMITTEE, BARRACKPORE *v.* SATISH CHANDRA SEN. **57 I.A. 339=58 Cal. 858=33 L.W. 41=53 C.L.J. 1=33 Bom.L.R. 175=130 I.C. 616=1931 A.L.J. 249=I.R. 1931 P.C. 72=35 C.W.N. 173=1931 M.W.N. 41=34 P.L.R. 455=A.I.R. 1931 P.C. 1=60 M.L.J. 142 (P.C.).**

EVIDENCE—Relevancy.

———*Recital—Judgment not* inter partes*—Recital of written statement in—Admissibility.*

It is doubtful if the recital of a written statement in a judgment in a suit not *inter partes* can be admissible in evidence. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A.I.R. 1935 Cal. 368.**

———*Recital—Value.*

Recitals by themselves do not establish legal necessity, but they may be taken into consideration along with other evidence and circumstances in considering the truth of the matters to which they relate. The exact weight to be given to them is a matter upon which no rule can be laid down, but ordinarily the older the transaction, the greater the value of the recitals. 44 C. 186 (P.C.) and 43 M. 541 (P.C.), Ref. (*Bose, O.A.J.C.*) FULSING *v.* GANESH PRASAD. **I.R. 1931 Nag. 118=133 I.C. 390=14 N.L.J. 84=A.I.R. 1931 Nag. 147.**

Record-of-rights.

———*Record of rights—Entry in—Evidentiary value as to title to property.*

An entry in the record-of-rights is presumed to be correct, but the record-of rights by itself does not furnish any evidence on the question of title to the property dealt with in it, but it is proof of title in so far as title is based on possession. (*Mitter and B.N. Rau, JJ.*) RONALD DUNCAN CROMARTIC *v.* SRI SRI ISWAR RADHA DAMODAR JEW. **62 C.L.J. 10.**

———*Record-of-rights—Plot recorded as in deity's* khas *possession—Title of deity.*

Where in the Record-of-Rights the plot concerned was recorded as in the *khas* possession of the deity and nothing was proved to rebut the entry,

Held, that the title of the deity to the plot subsisted. (*Mukherjee and S.K. Ghose, JJ.*) INDIAN IRON AND STEEL CO. *v.* BARA GOPAL THAKUR. **158 I.C. 656=8 R.C. 207=A.I.R. 1935 Cal. 641.**

Rejection of.

———*Rejection of—Falsehood in part—Rejection* in toto*—Propriety.*

It is generally unsafe to apply the doctrine, *falsus in uno falsus in omnibus* to evidence of witnesses in India. Where the evidence is substantially correct, simply because there are deliberate falsehoods in it, it should not be totally rejected. (*Srivastava, J.*) CHHOTE LAL *v.* EMPEROR. **6 I.R. (Oudh) 122=146 I.C. 452=35 Cr.L.J. 58=10 O.W.N. 482=1933 Cr.C. 596=A.I.R. 1933 Oudh 269.**

Relevancy.

———*Relevancy—Dispute as to title to land—Possession and occupation of portions of disputed area.*

In questions of disputed ownership of land, occupation and possession of portions of the disputed area is not relevant evidence of title to the whole area, unless it can be reasonably attributed to a right to the whole area. Tho portions so occupied may be so numerous and so closely adjoining that they practically cover the whole area; or the occupation of a portion may be

EVIDENCE—Relevancy.

reasonably attributed to a right of ownership in a larger area. But that larger area must be defined; in other words, it must be attributable to an existing boundary. (*Lord Thankerton.*) OMANENE KOBINA FOLI *v.* CHIEF OBENG AKESSE. **151 I.C. 948=7 R.P.C. 81=40 L.W. 138=A.I.R. 1934 P.C. 185 (P.C.).**

———Relevancy—Suit for damages for assault in tort—Proof—Previous conviction or acquittal by Criminal Court—*See* TORT—ASSAULT. **68 M.L.J. 660.**

Reputation.

———*Reputation—Distinction between reputation and hearsay.*

If the evidence is of those persons who are living in the locality where the reputation is prevailing and people talk of their beliefs about him and who themselves believe in it, it is admissible. But if the evidence is of a man who does not know of the reputation himself but heard it from others, it will be hearsay. (*Mahomed Noor, J.*) FIRANGI RAI *v.* EMPEROR **I.R. 1933 Pat 209=143 I.C. 687=34 Cr.L.J. 643=14 Pat.L.T 482=1933 Cr.C. 520=A I.R. 1933 Pat. 189.**

Revenue documents.

———*Revenue documents—Proof of possession.*

Entries in revenue documents are not conclusive but their importance in a case for possession cannot be denied. (*Otter and Brown, JJ.*) MAUNG SIN *v.* MAUNG SO MIN. **8 Rang. 556=I. R. 1931 Rang. 79 =129 I.C. 511=A.I.R. 1931 Rang. 40.**

———Revenue documents—Revenue Survey Map—Lands shown as forming part of zemindari—If conclusive against Government. *See* BENGAL ALLUVION AND DILUVION ACT, SS. 3 AND 6. **39 C.W.N. 1000.**

———Revenue documents—Revenue Survey Map—Presumption of correctness. *See* EVIDENCE ACT, S. 87. **39 C W.N. 994=A.I.R. 1935 P. C. 125=69 M. L. J. 491 (P.C.).**

Riwaj-i am.

———Riwaj i-am—*Entry as to custom—Evidentiary value of—Manual of customary law—Value of.*

The *riwaj-i am* is a public record prepared by a public officer in discharge of his duties and under Government rules; and it is clearly admissible in evidence to prove the facts entered therein subject to rebuttal. So also, the Manual of customary law, published officially in accordance with the *riwaj i-am*, stands on much the same footing, as evidence of custom. (*Lord Thankerton.*) BASANT SINGH *v.* BRIJ RAJ SARAN SINGH. **62 I. A. 180=57 All. 494=37 P.L.R. 614=16 Pat L.T. 669= 37 Bom L.R. 805=1935 M.W.N. 768=1935 O W.N. 759=156 I. C. 864=1935 A.W.R. 879=8 R.P.C. 4= 1935 A.L.J. 847=39 C. W. N. 1057=42 L. W. 231= A.I.R. 1935 P.C. 132=69 M.L.J. 225 (P C.).**

Rule as to.

———*Rule as to—Failure to produce—Inference.*

The ordinary rule of evidence is that every disputed fact must be proved by the best evidence, and the consequential presumption is that the evidence which could be produced, and is not, would not be favourable to the party who withholds it. (*Ferrers, J.C. and Davis, A.J. C.*) *In re* P. M. GOPALA IYER. **158 I.C. 707=8 R.S. 54=1935 Cr.C. 1061=A.I.R. 1935 Sind 196.**

Secondary evidence.

———*Secondary evidence—Objection to admissibility—When to be taken.*

A document which is *per se* inadmissible in evidence can be objected to at any time. If, however, the objection relates to the method of proof, that is, if secondary evidence is sought to be put in instead of the original, the objection must be taken at the earliest point of time.

EVIDENCE—Value of.

If the document is not inadmissible *per se* and if secondary evidence is sought to be tendered, the right time to object is when the document is put in and not the time of the argument or the appellate stage. (*R.C. Mitter, J.*) DOL GOHONDA DAS *v.* MAKBUL SHEIKH. **162 I. C. 91=8 R.C. 560=61 C.L.J. 588=A.I.R. 1936 Cal. 164.**

Spies.

———*Spies—Evidence of—Need for careful scrutiny.*

The evidence of a person who associates himself with the accused without any criminal intention, with the sole object of entrapping the accused in order to detect an offence and thus acting as spy is legally admissible in evidence without corroboration. But some decree of disfavour attaches to the evidence of persons playing the role of a spy or informer. The line of discrimination between an accomplice and a spy is often a thin one. Their evidence must be carefully scrutinized and the weight to be attached to it must depend upon the character of each individual witness. (*Bisheshwar Nath, J.*) BHUNESHWARI PERSHAD *v.* EMPEROR. **6 Luck. 668 =I.R. 1931 Oudh 250=132 I C. 234=32 Cr.L.J. 860 =14 O. L. J. 438=8 O.W.N. 503=1931 Cr. C. 444= A.I.R 1931 Oudh 172.**

Value of.

See RECITALS, *supra.*

———Value of—Entry in a Rubakari prepared by the Collector—Entry as to status of tenant—If conclusive. *See* BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869), S. 38. **39 C.W.N. 1169=A.I R. 1935 Cal. 813.**

———*Value of—History of particular sect prepared by Extra Assistant Settlement Officer—No presumption of truth attached to it.*

A history of a particular sect prepared by an Extra Assistant Settlement Officer, during the second settlement, does not form part of the settlement record and has no presumption of truth attached to it, but may be of some value if it was prepared when there was no dispute. (*Addison and Currie, JJ.*) SHIROMANI GURDWARA PARBANDHAK COMMITTEE *v.* HARCHARAN SINGH. **154 I.C. 375=7 R.L. 555=A.I.R. 1934 Lah. 1.**

———*Value of—Informer—Testimony of—Need for caution.*

The evidence of an informer must be regarded with caution, whether his action has been promoted with revenge or by the more usual motive of reward. (*Weston.*) MILAP CHAND *v.* EMPEROR. **1935 A.M.L.J. 59.**

———*Value of—Irrigation* khasra *and maps—Object of.*

The obvious object of the village irrigation *khasra* and the corresponding map of the villages prepared at the time when canals were constructed in the District of Shahabad was to have a detailed record of the villages to be irrigated from the Government canals and the names of the holders of land who would take water and pay the canal rates. They may be relied on as evidence of the fact that the lands are held by the persons who are recorded therein as so holding them. (*Khaja Mohammad Noor and Dhavle, JJ.*) MATHURA SINGH *v.* RAMA RUDRA PRASHAD SINHA. **14 Pat. 824=162 I.C. 235=8 R.P. 522=16 Pat.L.T. 484=A.I.R. 1936 Pat. 231.**

———*Value of— Legislative Assembly— Reports of debates.*

The reports of debates in the Legislative Assembly can only be evidence of what was stated by the speakers in that Assembly, and are not evidence of any facts contained in the speeches. (*Lord Thankerton.*) GERALD LORD STRICKLAND *v.* CARMELO MIFSUD BONNICI. **153 I.C. 1=7 R.P.C. 103=1935 A. W. R. 440=1935**

EVIDENCE—Value of.

O.W.N. 327=37 P.L.R. 118=41 L.W. 665=A. I. R. 1935 P.C. 34 (P.C.).

———*Value of—Mere repetition—Prior statement—Use of.*

Mere repetition of a statement does not by itself prove its reliability; but when the Court finds from all the circumstances of the case, of which a previous similar statement is also one circumstance, that the statement bears the stamp of truthfulness, the Court will not hesitate to accept that statement as true. (*Varma and Rowland, JJ.*) EMPEROR *v.* LALJI RAI. **160 I C. 181=8 R P. 344=37 Cr. L J. 235=16 Pat. L. T. 730—1936 Cr.C. 6=A.I.R. 1936 Pat. 11.**

———Value of—Partition entries in Land Records Manual—If conclusive. *See* U. P. LAND RECORDS MANUAL—PARTITION ENTRIES. **1935 O. W. N. 406 —1935 R.D. 192.**

———*Value of—Piece of evidence—Probative value given by law—Extension to collateral matters.*

Where under a given rule of law, extreme evidential value is to be assigned to a given piece of evidence, the probative force of such piece of evidence cannot be extended to collateral matters. Where one fact is declared by law to be conclusive proof of another, the Court cannot allow evidence to be given in rebuttal. (*Sen and Niamatullah, JJ.*) PARABU NARAIN SINGH SAHEB BAHADUR *v.* JANG BAHADUR. **I.R 1931 All 395 (2) =131 I C. 555 (2)=15 R D. 505=12 L.R. 174 (Rev.) =1931 A.L.J. 360=A.I.R. 1932 All. 35.**

What is not.

———*What is not—Statement made by party to Court—Oath not administered.*

A statement of a party before Court but not on oath is only part of the pleading and not legal evidence. (*Tek Chand and Agha Haidar, JJ.*) MT. SUBAN *v.* MAHOMED KHAN. **35 P.L R. 99—A.I.R. 1934 Lah. 234.**

Witness.

See also CROSS-EXAMINATION, DUTY OF COURT AND EYE-WITNESS, *supra.*

———*Witness—Child of tender years—Duty of Judge—Admissibility of evidence.*

It is not likely for a boy of about seven years to distinguish between things heard by him and those which he has seen; and when there is a clear indication of inconsistent statements in his evidence, not much importance can be attached to it. It is not illegal to examine a witness of tender years, but it is important that the Judge should, as a precaution, ascertain in the first instance by means of a few simple questions, whether the intelligence of the child is such that it is capable of giving credible evidence; it is also desirable that the record of evidence should show that such a test has been in fact made. When it does not appear that any such attempt was made to test the capacity of the child witness to give his testimony, it is not safe to rely on the evidence of such a witness. (*Varma, J.*) RAMSAKHIA *v.* EMPEROR. **15 Pat L.T. 586=153 I. C. 922=7 R. P. 385=36 Cr.L.J. 447—1934 Cr. C. 1322=A. I. R. 1934 Pat. 651.**

———*Witness—Child—Value of evidence.*

Children are a most untrustworthy class of witness, for when of a tender age, they often mistake dreams for reality, repeat glibly as of their own knowledge, what they have heard from others and are greatly influenced by fear of punishment, by hope of reward and by desire of notoriety. (*Shadi Lal, C. J and Agha Haidar, J.*) ABBAS ALI SHAH *v.* EMPEROR. **I. R. 1933 Lah 355 =143 I.C. 479=34 Cr.L J. 606=34 P.L.R. 536=1933 Cr.C. 889=A I.R. 1933 Lah. 667.**

EVIDENCE—Witness.

———*Witness—Examination of party—Defendant as plaintiff's witness—Duty of Court.*

If a party appears as a witness on behalf of the opposing party, the Court should before proceeding to record his statement question him or his Counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness, the Court should point out to the party producing him and that ordinarily speaking the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness-box and subject himself to cross examination. If the party, however, insist on examining the opposite party as his own witness, the Court should be careful not to allow him to cross-examine his own witness, because unless the evidence is declared hostile, the party producing the witness has no right to cross examine his own witness (*Dalip Singh, J.*) PURAN SINGH RELU SINGH *v.* MATHRA DAS. **6 R L. 628=148 I C. 1040 —35 P.L.R. 28=A.I R. 1934 Lah. 126.**

———*Witness—Reckless statements—If can be relied on.*

When a witness makes a reckless statement which appears to be altogether false, the safest course is not to place any reliance on his evidence. (*Nanavutty and Rachhpal Singh, JJ.*) IMAMUDDIN *v.* EMPEROR. **10 Luck. 131=7 R O. 70=150 I C. 862=35 Cr L. J. 1154=11 O.W N. 950—1934 Cr. C. 1199=A I.R. 1934 Oudh 388.**

———*Witness—Right of to object to examination—Considerations—Witness a legal practitioner—If a ground for exemption.*

It is not open to a witness to resist the order of the Court to examine him on the ground that his interests are likely to suffer by such examination. The interests of justice and truth are the deciding factors, and if the Court holds that the examination of a certain witness is necessary for the decision of a case pending before it, it is not for the witnesses to object to it or resist the order. The fact that the witness happens to be a legal practitioner will not justify him in resisting the order of the Court, although he may urge that the examination will prejudice his interests. The question is not to be judged from the point of view of his individual interests. The examination of a witness depends not on his consent but on the decision of the Court. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys.L.J. 292=39 Mys H.C.R. 380.**

———*Witness—Testimony in previous suit disbelieved—Effect.*

Per *Agha Haidar, J.*—The mere fact that a witness is disbelieved in a previous trial on the same facts against the accused does not necessarily make his evidence in another proceeding on the same facts unreliable. (*Dalip Singh, J., on difference between Harrison and Agha Haidar, JJ.*) MAHLA SINGH *v.* EMPEROR. **I.R. 1931 Lah 282=130 I.C. 410=32 Cr.L J 522=32 P.L.R. 259=1931 Cr.C. 102=A.I.R. 1931 Lah. 38.**

———*Witness—Witness won over— Proof — Giving evidence against party summoning.*

The fact that a witness was cited on behalf of the defendants and his evidence went entirely to support the plaintiff's case does not entitle a Court to reject his evidence as that of a witness who had been "won over" by the plaintiff. (*Mukerji and Young, JJ.*) AMRIT KUNWAR *v.* GUR CHARAN SINGH. **6 R.A. 503=147 I.C. 591=13 A.W.R. 11=A I.R. 1934 All. 226.**

EVIDENCE ACT (I OF 1872)—Privilege. *See* EVIDENCE ACT (1872), SS. 123 AND 124.

———**S. 3** —" *Document* "—*Definition—Applicability to Press Emergency Powers Act.*

The definition of the word "document" in S. 3 of the Evidence Act and S. 29 of the I. P. Code, applies to the word as used in S. 2 (6) of the Press (Emergency Powers) Act, 1931. (*Baipai, J.*) SATYAWAN ACHARYA *v.* EMPEROR. **153 I C. 411=7 R.A. 496=36 Cr.L.J. 335=4 A.W.R. 488=1934 Cr.C. 1338= A.I.R 1934 All. 1031.**

———**S. 3**—"*Fact*"—*Meaning.*

The definition of fact does not restrict a fact to something which can be exhibited as a material object. Statements of prisoners while in police custody leading to discovery of material object held to be admissible as leading to discovery of relevant fact. (*Cornish, Burn and Lakshmana Rao, JJ.*) EMPEROR *v.* RAMANUJA AIYANGAR. **58 Mad. 642=158 I C. 764=8 R M. 331 =36 Cr.L.J. 1442 (2)=1934 M.W.N. 1479=42 L.W. 124=1935 Cr.C. 728=A.I.R. 1935 Mad. 528=68 M L.J. (Supp) 73 (F.B.).**

———**S. 3**—' Proved '—Loan to pardanashin ladies—Promissory note purporting to bear thumb-marks—Suit for recovery of loan — Circumstantial evidence that money given to the husband of one of them was used for the benefit of the ladies—Reasoning of the lower Court —Admissible under the definition of "proved" in S. 3 —They were bound to compensate the lender. *See* CONTRACT ACT, S. 70. **A.I.R. 1934 All. 390.**

———**S. 8**—*Absconding of accused—Relevancy.*

Though the mere fact that an accused person has absconded will not necessarily fix him with guilt, the fact is undoubtedly a piece of relevant evidence against him. (*Coldstream and Blunde, JJ.*) EMPEROR *v.* FATEH MAHOMED. **35 P.L.R. 740.**

———**Ss. 8, 25 and 26**—*Accused pointing out places—Evidence of police and eye-witnesses as to—Admissibility.*

Evidence of a Police Officer and of an eye witness, as to the pointing out of various places by the accused while in the custody of the Police-Officer, is inadmissible under Ss. 25 and 26 of the Evidence Act, nor can such evidence be treated as evidence of conduct under S. 8, apart from the accompanying statements. (*Nanavutty and Zia ul-Hasan, JJ.*) TURAB *v.* EMPEROR. **10 Luck. 281=152 I.C. 473=36 Cr L.J. 176=7 R O. 235=11 O W.N. 1383=1935 Cr.C. 14=A.I.R. 1935 Oudh 1.**

———**S. 8**—*Applicability—Person not party to transaction or called as witness—Conduct of, if relevant.*

The conduct of a person who has had no part in a crime and has not been called as a witness cannot be brought under S. 8 of the Evidence Act as being a relevant fact constituting motive or preparation. (*Gaille, Offg.J.C.*) BALA *v.* EMPEROR. **17 N.L.J. 274=1935 Cr.C. 364=A.I R. 1935 Nag. 81.**

———**S. 8**—*Charge of forgery of a sale deed—Statements made by accused before Registrar—Admissibility of.*

The first appellant was charged with having forged a sale-deed. The second accused was charged with having used the document as genuine when he presented it to the Sub-Registrar for compulsory registration.

Held, that the statements made by the accused before the Registrar to support the genuineness of the sale deed were relevant and admissible as explaining their conduct. (*Burn J.*) NATESA MOOPANAR *v.* EMPEROR. **1933 M.W.N. 96.**

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———**S. 8**—*Conduct of accused—Relevancy.*

Where the accused, who is charged under S. 411, I. P. Code, for dishonestly receiving a bullock knowing it to be stolen property, states to the police that he purchased it from a certain person and produces in support of his statement, a receipt which is found not to include the bullock and as to which there is evidence that he made an attempt to get it altered, the conduct of the accused can be taken into account to prove his guilty knowledge. (*Addison, J.*) MAHOMED *v.* EMPEROR. **155 I C. 260=36 Cr.L J. 697=7 R L. 674=1934 Cr. C. 1009=35 P.L.R. 738=A, I R. 1934 Lah. 695.**

———**S 8**—*Contemporaneous statement — Dissolution of partnership—Proof—Subsequent statement of partner —Admissibility.*

If a person is proving that he has retired from a firm, he is quite entitled to show that immediately after the date of retirement he wrote to the Bank and informed them that he had severed his connection with the firm and could not continue to guarantee its account. If he does that, any statement by him made at the time as the reason for his refusing to continue to guarantee is admissible to explain his conduct. (*Rankin, C.J. and Buckland, J.*) PRAMATHA CHANDRA KAR *v.* BHAGWANDAS MADANLAL. **59 Cal. 40=136 I.C. 529= I R. 1932 Cal. 209=54 C.L.J. 516=35 C.W.N. 705 =A.I.R. 1932 Cal. 236.**

———**S. 8**—*False charge of rape—Statements made at enquiry—Relevancy.*

Where the accused (a woman) is on her trial for making a false charge of rape, the fact that she made certain allegations, which she related in the course of an enquiry which she sought and demanded, is relevant. (*Grille O.J.C. and Pollock A.J.C.*) LOCAL GOVERNMENT *v.* MT GUJI. **17 N.L J. 189=1935 Cr.C. 339 =A.I.R. 1935 Nag 69.**

———**S. 8**—*Inference from conduct—Proof of joint acts of several persons.*

Where joint acts of several persons are sought to be proved, in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concered in the act. The principle applies not only to evidence relevant under S. 27 but also to that under S. 8 of the Act. (*Derbyshire, C.J., Mukherji and Costello, JJ.*) RAHIQUE-UD-DIN AHMAD *v.* EMPEROR. **62 Cal. 572=7 R.C 606 =36 Cr.L J. 808=155 I.C. 687=39 C.W.N. 368= 1935 Cr.C 241=A.I R. 1935 Cal. 184 (F.B).**

———**S. 8**—*Letter written by deceased for police protection—Admissibility.*

A letter written by the deceased some months before his death to the Commissioner of Police requesting police protection against apprehended assaults by the second accused is admissible in evidence under S. 8 of the Evidence Act as containing statements which accompany and explain the conduct of the deceased, such conduct being influenced by a fact in issue [the alleged intention of second accused to cause death of deceased, *cf.* S. 5, ill. (*a*)] and a relevant fact (second accused's ill will to deceased) 7 All. 385, Ref. (*Fawcett, J.*) EMPEROR *v.* MANCHANKHAN. **34 Bom.L.R. 1087.**

———**S. 8**—*Motive—Statement of deceased—Reference to motive of accused—Hearsay evidence—Admissibility.*

The motive for a crime is of course a relevant fact but can only be proved by admissible evidence. Where the statement of the deceased prior to her death is alleged to contain a reference to the motive of the accused it is not admissible under S. 32 (1) because it cannot be

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deemed to be a statement as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death nor is it admissible under S. 8 (1) where it is not shown to have accompanied or explained any act of the deceased. It cannot therefore be proved by hearsay evidence, by the testimony of a witness who heard her make the statement. (*Beasley, C. J. and Sundaram Chetty, JJ.*) VENKATASUBBA REDDI, *In re.* **54 Mad. 931 = 134 I.C. 1143 = I.R. 1932 Mad. 7 = 33 Cr.L.J. 51 (2) = 1931 M.W.N. 1177 = 34 L.W. 128 = 1931 Cr.C. 929 = A.I.R. 1931 Mad. 689 = 61 M.L.J. 608.**

———**S. 8**—Res gestae—*Statement before Police Officer Admissibility in evidence in later proceeding.*

In the course of an investigation into a case which was started on information lodged by the opposite party, the latter made a statement before a Police Officer who recorded it. The same was sought to be used against the opposite party in a later proceeding against him for offence under Ss. 192, 193 and 211, I. P. Code.

Held, that it was evidence of the *res gestae* and that it was not rendered inadmissible because of S. 162, Cr. P. Code. (*Lort Williams and S.K. Ghose, JJ.*) JOGESH CHANDRA ROY *v.* SURENDRA MOHAN ROY. **134 I.C. 1265 = 33 Cr.L.J. 60 = I.R. 1932 Cal. 49 = 35 C.W.N. 838 = 1931 Cr.C. 837 = A.I.R. 1931 Cal. 637.**

———**S. 8**—*Scope.*

What is relevant under S. 8 is the particular act upon the statement, and the statement and the act must be so blended together as to form a part of a thing observed by the witnesses and sought to be proved. Otherwise the statements are inadmissible. (*Niyogi and Staples, A.J.C.*) REGO *v.* EMPEROR. **29 N.L.R. 251 = I.R. 1933 Nag. 153 = 143 I.C. 17 = 34 Cr.L.J. 505 = 1933 Cr.C. 610 = A.I.R. 1933 Nag. 136.**

———**S. 8**—Statement of accused after arrest and during investigation giving false name—Admissibility. *See* CR. P. CODE, S. 162. **1935 Cr.C. 742 = A.I.R. 1935 Mad. 479.**

———**S. 8**—*Subsequent events—Relevancy of.*

To judge what the real state of a person's mind on a previous occasion was, the surrounding circumstances and subsequent events can be referred to. (*Wort and Scroope, JJ.*) GANESH PRASAD *v.* EMPEROR. **I.R. 1931 Pat. 173 = 130 I.C. 269 = 32 Cr.L.J. 478 = 1931 Cr.C. 148 = A.I.R. 1931 Pat. 52.**

———**Ss. 9, 11, 13 and 32**—*Recitals of boundaries—Documents between third parties—Admissibility*

Recitals of boundaries of other lands in documents between third parties are not admissible in evidence either as regards the description of the boundary or as to the nature of the land under the provisions of Ss. 9, 11, 13 or 32 of the Evidence Act, 1872. (Case-law exhausively referred to.) (*Doraswami Iyer, C. J. and Ramachandra Rao, J.*) BHARANI *v.* ABDUL KHADAR SAB. **10 Mys.L.J. 75.**

———**S. 10**—*Applicability—Proof of conspiracy.*

Before anything said, done or written by any one alleged member of a conspiracy can be used as evidence against another or against all, the Court must have reasonable ground for believing that the conspiracy between them existed, that is, an agreement among them that unlawful acts should be committed. (*Wallace and Jackson, JJ.*) MUKUNDALAL SIRCAR *v.* EMPEROR. **1930 M.W.N. 1264.**

———**Ss. 10 and 32 (3)**—*Confession of co-conspirator —Admissibility.*

A confessional statement made by a deceased conspirator after he had rendered himself liable to criminal prosecution is admissible in evidence against a co-

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conspirator under S. 10 of the Evidence Act, though not under S. 32 (3), when general evidence of the existence of a conspiracy has already been given. (*Guha and McNair, JJ.*) KUNJALAL GHOSH *v.* EMPEROR. **155 I.C. 261 = 7 R.C. 572 = 36 Cr.L.J. 678 = 38 C.W.N. 1015 = 1935 Cr.C. 40 = A.I.R. 1935 Cal. 26.**

———**S. 10**—*Conspiracy—Narrative of past acts—Admissibility—"Intention," meaning of.*

Narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention. The word "intention" implies that the act intended is in the future and the section makes relevant, statements made by a conspirator with reference to the future. The words "in reference to their common intention", mean in reference to what at the time of statement was intended in the future. The principles on which the section is based is that of agency, it cannot be said that one conspirator has any implied authority to make a confession after his arrest or even to give a description of past events to his co-conspirators. But if one conspirator proposed to another to start propaganda in furtherance of the object of the conspiracy and a pamphlet for the purpose, if the pamphlet contains an account of the attack on the police station, the prosecution is entitled to prove what that version was. The pamphlet would be admissible as a statement which he intended to publish in the future in reference to the common intention but not as a mere narrative of past events. It is permissible under S. 10 to prove what that propaganda was to be. (*Barlee, J.*) EMPEROR *v.* VAISHAMPAYAN. **55 Bom. 839 = 134 I.C. 1238 = 33 Cr.L.J. 76 = I.R. 1932 Bom 22 = 33 Bom.L.R. 1159 = 1932 Cr.C. 40 = A.I.R. 1932 Bom. 56.**

———**S. 10**—*Construction.*

"Anything said" would include the statements made, speeches delivered, or declarations made. Anything "done" must be some act done and not merely the intention or knowledge of the person. Anything written would include a manuscript, signed or unsigned, written by the person, and matter transcribed by him on a type writer. But a document, of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents as against the other accused. The fact of possession would be evidence to show that the conspirator, in whose possession it is found, had received and preserved it. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040 = 6 I.R. (All.) 65 = 145 I.C. 481 = 34 Cr.L.J. 967 = 14 L.R. 259 (Cr.) = 1933 A.L.J. 799 = 1933 Cr.C. 1202 = A.I.R. 1933 All. 690.**

———**S. 10**—*Document written by deceased—Reference to accused as conspirator—Admissibility of.*

A document written by a woman since deceased in which she described her conversations with a third person in which she said that he told her that among his revolutionary friends was the accused, to whom he was accustomed to turn for guidance, is admissible under S. 10, as the statement if proved is itself a relevant fact by virtue of S. 10. The statement by the writer is a relevant fact and being admissible under S. 10 is evidence against all the conspirators including the accused, to the effect that the third person made his statement concerning the accused. (*Panckridge, Ameer Ali and M. C. Ghose, JJ.*) EMPEROR *v.* SURIYA KUMAR SEN **6 R.C. 304 = 147 I.C. 32 = 35 Cr.L.J. 334 = 1934 Cr.C. 315 = A.I.R. 1934 Cal. 221 (F.B.).**

———**S. 10**—*Latter by one accused after arrest to another co-accused—Admissibility.*

The question whether a post card written by the accused after his arrest to another accused person is

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admissible in evidence depends on whether the provisions of S. 10 have been complied with. The fact that the accused was under arrest at the time when he caused the card to be written is not material, the document not being in the nature of a mere confession. (*Rankin, C. J. and Graham, J.*) ABDUL AZIZ *v.* EMPEROR. **I. R. 1932 Cal. 292=137 I.C. 317 (1)=33 Cr.L.J. 456 =1932 Cr.C. 576 (1)=A.I.R. 1932 Cal. 557.**

———**S. 10**—*Proof of conspiracy — Letters from foreign revolutionary to the accused.*

In order to establish that the accused were in correspondence with an individual going by the name of M. N. Roy in Berlin, it is not incumbent upon the prosecution to establish that any of the letters were, in fact, written by any particular M. N. Roy. It is enough to show that some person living in Berlin was in conspiracy with the accused and correspondence was passing between them. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I R. (All.) 65= 34 Cr.L.J. 967=145 I.C. 481=14 L.R. 259 (Cr.)= 1933 Cr.C. 1202=1933 A L.J. 799=A.I.R. 1933 All. 690.**

———**S. 10**—*Statements at the trial by conspirator— Admissibility of.*

S. 10 refers to things said or done by a conspirator in reference to their common intention. Any statement made by an accused person under S. 342 of the Cr. P. Code during the trial cannot be regarded as a statement by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy. 45 A. 323; A.I.R. 1929 M. 285; 38 C. 169, Foll. (*Bisheshwar Nath, J.*) KUNWAR SEN *v.* EMPEROR. **8 Luck. 286=141 I.C. 192=I.R. 1933 Oudh 33=34 Cr.L J. 124=9 O.W.N. 1136=1933 Cr.C. 168=A.I. R. 1933 Oudh 86.**

———**S. 11**—*Accused charged with criminal conspiracy and revolutionary activities — Newspapers containing accounts of revolutionary proceedings found in the possession of accused—Evidentiary value of.*

Copies of printed newspapers containing an account of some proceedings, found in possession of one accused, are evidence of the fact of the publication of such an account in that paper but are not by themselves evidence of the truth of the facts stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned 'highly probable or improbable.' (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I R. (All) 65=145 I.C 481=34 Cr.L J. 967=14 L.R. 259 (Cr.)=1933 A.L.J. 799=1932 Cr.C. 1202=A.I.R. 1933 All. 690.**

———**S. 11**—*Applicability — Deposition inadmissible under S. 32.*

Before a fact can be considered to be relevant under S. 11, it must be shown to be admissible. If the terms of a deposition made by a person since deceased do not fall within the purview of S. 32, the provisions of S. 11 will not avail to make such deposition evidence. (*Nanavutty and Zia-ul-Hassan, JJ.*) LATAFAT HUSSAIN *v.* ONKAR MAL. **10 Luck. 423=7 R.O. 272=152 I.C. 1042=11 O.W.N. 1589=A.I.R. 1935 Oudh 41.**

———**S. 11**—*Applicability and scope.*

S. 11, Evidence Act, deals with relevant facts. It applies only where the question is whether a fact is relevant, and not whether a particular method of proof is admissible under any provision of the Evidence Act. (*Wort, Khaja Mahomed Noor and Agarwala, JJ.*) SONEY LAL JHA *v.* DARBDEO NARAIN SINGH. **14 Pat. 461=155 I.C. 470=7 R P. 590=16 Pat.L.T. 199=A.I.R. 1935 Pat. 187 (F.B.).**

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———**Ss. 11 and 13** — *Applicability—Zemindar's* chitta *as regards lands held by tenants—Admissibility against third persons.*

A *chitta* prepared by a zemindar recorded the suit lands as being in possession of tenants. It was produced in Court and found to be genuine in a prior suit and was corroborated by a mass of oral and documentary evidence. Proof was also given by way of corroboration of collection papers for a series of years to show realization of rent from the persons recorded as tenants in the *chitta* and witnesses were also examined to prove such realization and the possession of the persons recorded as tenants.

Held, that the *chitta* was admissible in evidence as against third parties under S. 11 or 13 of the Evidence Act, though it cannot be brought in under S. 35 or 36, as it was not prepared by a public servant. (*R.C. Mitter, J.*) ABDUL KHALEQUE *v.* SUSIL CHANDRA CHAUDHURI. **39 C.W.N. 330.**

———**S. 11**—*Charge under Arms Act — Display of revolver on a former occasion—Relevancy of.*

Where the accused have been charged under the Arms Act for possessing arms and for conspiracy to commit a dacoity, the fact that one of the accused was seen showing a revolver to a companion, with whom it is alleged he was conspiring to commit a dacoity would be relevant under S. 11 as making the fact in issue—the possession of a revolver—highly probable. (*Panckridge and M.C. Ghose, JJ.*) SAROJ KUMAR CHAKRAVARTY *v.* EMPEROR. **59 Cal. 1361=I.R. 1932 Cal 667=139 I. C 873=33 Cr.L.J. 854=55 C.L.J. 439=1932 Cr.C. 464=A.I.R. 1932 Cal. 474.**

———**S. 11**—*Construction.*

The expression 'highly probable or improbable' is significant. It indicates that the connection between the facts in issue and the collateral facts sought to be proved must be immediate as to render the co existence of the two highly probable. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I.C. 481=14 L R 259 (Cr.)=34 Cr. L.J. 967=1933 A.L J. 799=1933 Cr.C. 1202=A.I. R. 1933 All. 690.**

———**S. 11**—*Date of death—Statement in application for probate—Person having special means of knowledge —Admissibility.*

Where the precise date of the death of the last holder is in question, a statement in a copy of the application for probate of his will that the deceased died on a particular date is admissible in evidence under S. 11, if not under S. 32 (5), where it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the application was filed about one year after the testator's death. 43 I.A. 256; 20 C. 758; 24 C. 265; 25 M. 183; 72 I.C. 986, Ref. (*Ross and Fazl Ali, JJ.*) LACHUMAN LAL PATHAK *v.* KAMAKSHYA NARAYAN SINGH. **I R. 1931 Pat. 228=131 I.C. 788=12 Pat. L.T. 891=A.I R. 1931 Pat. 224.**

———**Ss. 11. 13 and 43**—*Judgment not* inter partes— *Admissibility.*

Although at one time it was held that a judgment not *inter partes* could not be admitted in evidence under any circumstances, the tendency in recent years is to admit such judgments under certain circumstances and for limited purposes under S. 43, read with Ss. 11 and 13 of the Evidence Act. (*Patterson, J.*) HEM CHANDRA BHADURI *v.* PURNA CHANDRA SARKAR. **153 I. C. 134=7 R.C. 349=59 C.L.J. 320=A.I.R. 1934 Cal. 788.**

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———**Ss. 11, 9, 13 and 32**—Recitals of boundaries—Documents between third parties—Not admissible under Ss. 9, 11, 13 or 32, as regards description of the boundary or the nature of the land. *See* EVIDENCE ACT, SS. 9, 11, 13 AND 32. **10 Mys.L J. 75.**

———**S. 11**—*Statement not falling under S. 32—admissibility.*

There is a difference between the existence of a fact and a statement as to its existence. S. 11 makes the existence of facts admissible, and not statements as to such existence unless the fact of making that statement is itself a matter in issue. Hence if a statement does not fall within S. 32, it cannot be admissible even under S. 11. (*Sulaiman, C.J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **56 All. 766 = 149 I C. 781 – 6 R A. 962 = 3 A.W.R. 529 = 1934 A. L.J. 318 – A.I.R. 1934 All. 406 (F B.).**

———**S. 13**—*Applicability — Suit for assessment of rent—Plea of* nishkar—Kobala *of defendant—Recital of land as* nishkar—*Admissibility.*

In a suit by a landlord against the tenant for assessment of rent, the latter produced a *kobala* under which his predecessor in-interest purchased the plots in question and which described that the plots were *nishkar* lands.

Held, that the *kobala* was not admissible in evidence under S. 13 of the Evidence Act for the purpose of proving *nishkar*. (*R. C. Mitter, J.*) KANTA MOHAN MALLIK *v* BASUDEB GHORA. **39 C.W.N. 311.**

———**S. 13**—Applicability—Zamindar's *chitta* as regards lands held by tenants — Admissible in evidence against third parties under S. 11 or 13. *See* EVIDENCE ACT, SS 11 AND 13. **39 C.W N. 330.**

———**S. 13**—Certified copy of decree with two pedigrees—Statement in the decree that the pedigrees were filed is evidence as evidence of the course of proceedings in a suit under S. 13. *See* EVIDENCE ACT, SS. 32 (5), 13 AND 35—PEDIGREE. **56 All. 468 = 67 M.L.J. 274 (P C).**

———**S. 13**—*Claim of right—Recitals in deed of sale—Value.*

S. 18 of the B. T. Act is a rule of evidence which must necessarily apply to all proceedings taken after it came into force and it is applicable to the recitals in documents, though executed before this provision came into force. Hence recitals in sale-deed are not evidence of title and cannot be used to prove a grant. It is however permissible to use them, not as evidence of grant, but to show the nature of the title that was being asserted and as transactions relevant under S 13, Evidence Act, by which a right was claimed or asserted on some past occasion. (*Fazl Ali and Rowland, JJ.*) KESHAVA PRASAD SINGH *v* BRAHMDEV RAI. **13 Pat. 45 = 149 I.C. 1177 – 6 R.P. 699 = A I.R. 1933 Pat. 656.**

———**S. 13**—*Decision in custom case—Value of.*

A decision in a custom case is not a judgment *in rem*. It is only relevant under S. 13 of the Evidence Act as a judicial instance of the custom being recognized. It may be that, owing to faulty prosecution, one decision may be arrived at between certain parties while there may be another decision in a suit arising between other persons. (*Addison and Abdul Rashid, JJ.*) MT. JANAT BIBI *v.* GULAM HUSSAIN. **16 Lah. 307 = 155 I.C 212 = 7 R. L. 659 = 36 P.L.R. 256 = A.I R. 1934 Lah. 861.**

———**S 13**—*Deed not* inter partes—*Recitals in—Admissibility and weight of.*

In a suit for recovery of khas possession on establishment of title in respect of a strip of land and a narrow ditch on the border of his land and the homestead of the defendants, the latter relied on two documents, one

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of them being a conveyance by which they purchased their homestead and the other, a sale deed under which the defendants' predecessors-in-title purchased the homestead, which showed that the ditch was included in the said homestead

Held, that the deeds being title deeds in which a claim was made, or at least a right was asserted by the defendants and their predecessors in-title to the ditch in suit, were admissible in evidence under S. 13 of the Evidence Act; and the fact of absence of proof of possession in accordance with the recitals therein would not affect their admissibility but would affect only the weight to be attached to them. (*R. C. Mitter, J.*) RASIK LAL MUKUTI *v.* PRASANNA KUMAR SAHA. **60 C L J. 569 = A.I.R. 1935 Cal. 367.**

———**S. 13**—*Finding on issue in prior suit not operating as* res judicata *—Subsequent suit between same parties—Burden of proving that the finding is wrong.*

A finding on an issue in a former suit, which does not operate as *res judicata* by reason of the disposal of that suit in favour of the party against whom the finding was given, is admissible in evidence in a subsequent suit between the same parties, and the duty of proving that the finding was incorrect is on the party against whom the finding was given. (*Nanavutty, J.*) AZIMAN *v.* IBRAHIM BEG. **1935 O.W.N. 894 – A.I.R. 1936 Oudh 189.**

———**S. 13**—*Judgment not* inter partes—*Admissibility.*

Previous judgments not *inter partes* can under the present state of the law, be admitted in evidence under certain circumstances and for certain limited purposes, and though they do not operate as *res judicata*, they ought to be treated as pieces of evidence to be used for certain limited purposes and to be taken into consideration along with the other evidence. (*Patterson, J.*) HEM CHANDRA BHADURI *v.* PURNA CHANDRA SARKAR. **153 I.C. 134 – 7 R.C. 349 = 59 C.L.J. 320 = A. I R 1934 Cal. 788.**

———**S. 13**—*Judgment not* inter partes—*Admissibility.*

A judgment not *inter partes* mentioning that certain rights in respect of property have been claimed and recognized by the authorities concerned is admissible in a subsequent suit. (*Din Mohammad, J.*) MUTASADDI *v.* MT. LACHHMI. **A.I R. 1935 Lah. 179.**

———**Ss. 13 and 43**—*Judgments not* inter partes—*Admissibility.*

Judgments not *inter partes* can only be regarded as evidence of transactions but are not admissible as proof of title of the persons in whose favour they were passed. 58 I. A. 125, Ref. (*Rankin, C J. and Mitter, J.*) RADHU RAY *v.* RAJA JYOTI PRASAD SINGH DEO. **I R. 1932 Cal 714 = 140 I.C. 385 = 36 C.W.N. 866 = A.I.R. 1933 Cal. 21**

———**Ss. 13 and 43**—*Judgment not* inter partes—*Admissibility of.*

A judgment in which the purchase at a revenue sale by the plaintiff's predecessor is recited is admissible in evidence as evidence of a transaction within the meaning of S 13 of the Act, though the defendants were not parties thereto. 22 Cal 533, Foll. (*Mitter and S. K. Ghose, JJ.*) NANI LAL ROY *v.* PROLHAD CHANDRA KAIBARTA. **143 I C 179 = I R. 1933 Cal. 361 = 56 C L J. 369 = A I.R. 1933 Cal. 222**

———**Ss. 13 and 43**—*Judgment not* inter partes—*Admissibility—Reasons for judgment—Relevancy.*

A judgment not *inter partes* holding that a partition of a certain estate was proved is only admissible under the provisions of Ss. 13 and 43 as establishing a particular transaction in which the partibility of the estate was asserted and recognized. The reasons upon which

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the judgment is founded are no part of the transaction and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself, be relevant to prove partition in a subsequent suit. (*Sir George Lowndes.*) GOBINDA NARAYAN SINGH *v.* SHAM LAL SINGH. **58 I.A. 125 = 58 Cal. 1187 = I.R 1931 P.C. 145 = 131 I.C. 753 = 33 Bom L.R. 885 = 53 C.L.J. 333 = 35 C.W.N 521 = 1931 M W N. 435 = 33 L.W. 707 = A.I.R. 1931 P C. 89 = 61 M.L J. 9 (P.C.).**

[**R.** 30 C.W.N. 866 (868).]

——**S. 13**—*Judgment not* inter partes *deciding existence of custom—Relevancy*—Res judicata

Prior judgments not *inter partes*, deciding the question of the existence or non existence of a custom are relevant for the purpose of showing instances in which the right or custom was asserted or denied, but they cannot operate as *res judicata* against the defendant—he was not a party to any of the previous litigations. (*Sulaiman, C J. and Bennet, J.*) KALLU MAL *v.* GANESHI LAL. **1935 R D 572 = 160 I.C. 1098 = 8 R.A. 705 = 1935 A.W.R. 1427 = A.I R 1936 All. 119.**

——**S. 13**—*Judgment showing possession of one of the parties—Admissibility.*

A judgment which is not binding on one of the parties to a suit may be used under S. 13 of the Evidence Act as an instance when the possession of the other party over the plots in suit was challenged and found to be proved. (*Nanavutty and Zia ul-Hasan, JJ.*) SHER BAHADUR SINGH *v.* SRI MADHO PRASAD SINGH. **11 Luck 209 = 155 I.C. 1087 = 7 R O. 634 = 1935 O. W.N. 674 = A.I R 1935 Oudh 394.**

——**Ss 13 and 35**—*Order of President, Union Board—Recital in—Admissibility.*

A recital in the order of a President of a Union Board is not admissible under S. 35 or S. 13 in evidence, unless such President has been examined with regard to the fact mentioned in his order. 45 Mad. 332, Ref. (*Jackson, J.*) DORAISAMI NAIDU *v.* KANNIAPPA CHETTI. **I R 1931 Mad 558 = 32 Cr.L J 767 = 131 I C. 654 = 1931 M.W.N. 366 = 1931 Cr C. 551 = A.I R. 1931 Mad. 487.**

——**S 13**—*Previous judgments recognizing custom—Admissibility of.*

Judgments in other cases on the point of custom are admissible in evidence under S. 13, only as instance in which the custom in question was judicially recognized, but are not conclusive. (*Addison and Bhide, JJ.*) MT. JATAN *v.* JIWAN SINGH. **14 Lah. 630 = I R. 1933 Lah 471 = 144 I.C. 454 = 34 P.L.R. 753 = A.I. R 1933 Lah. 553**

——**S 13**—*Prior judgments—Admissibility.*

Where in a prosecution for counterfeiting trade mark certain previous proceedings in the Civil Court relating to the exclusive right of the complainant were referred to and the judgments in the prior case of the trial and appellate Courts which found that the complainant had no exclusive right in the main features of the design of his label were filed, *held*, that the judgments were relevant under S. 13 as a particular instance in which the right claimed in the criminal case was claimed and was disputed. (*Kisch J.*) PALLI RAM *v.* EMPEROR. **I.R. 1931 Oudh 381 = 134 I.C. 477 = 32 Cr.L J 1177 = 8 O.W.N. 827 = 1931 Cr C. 637 = A.I.R. 1931 Oudh 277.**

——**S. 13**—*Recital as to boundary of land—Document not* inter partes.

A recital in a document as to the boundary of a certain land is not admissible in evidence as against persons who are not parties to the document. (*Abdul Rashid, J.*) DAULAT SHAH *v.* BISHAN DAS. **154 I.C. 662 = 7 R.L. 588 = A.I.R. 1934 Lah. 750.**

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——**Ss. 13, 9, 11 and 32**—Recitals of boundaries—Documents between third parties—Not admissible. *See* EVIDENCE ACT, SS. 9, 11, 13 AND 32. **10 Mys. L.J. 75.**

——**S. 13**—*Recital as to boundaries—Document between third parties—Use as corroborative evidence.*

A recital regarding boundaries in a document executed between strangers to the suit relating to lands adjoining the suit lands and in which the suit land is referred as a boundary is not admissible under S. 13 but may be admissible if the executant is called and deposes to the boundary, to corroborate him under S. 157 or if he is dead, under S. 32. (*Dhavle, J.*) RAMNANDAN PRASAD *v.* LALEY TILAKDHARI LAL. **6 I.R. (Pat.) 215 = 145 I.C. 944 (2) = A I R 1933 Pat 636.**

——**S. 13**—*Recital in a deed—Admissibility against third parties.*

A recital in a deed of gift executed by the husband in favour of his wife stating that a certain sum had been fixed as dower at the time of marriage, is not evidence against third parties as to the dower having been fixed at the time at that sum or any other sum. (*Tek Chand, J.*) GANGA RAM *v.* MST. AMIR JAN. **37 P L.R. 777.**

——**Ss. 13 and 11**—*Recitals in deed—Extent of admissibility.*

The reital in the zarpeshgi deed describing the land as zirat is not inadmissible in evidence. It can be used for a limited purpose of showing how the lands were dealt with by the admitted landlord (*e.g*, giving land in zarpeshgi as bakasht). If the Judge gives a higher value to it, his decision on the fact is in no way affected. (Case-law discussed) (*Mahomed Noor, J.*) THAKUR KURMI *v.* LALJI MISSIR. **150 I.C. 884 = 7 R.P. 31 = A.I.R. 1934 Pat. 81.**

——**S 13**—*'Right'—Meaning.*

The word 'right' in S. 13 means incorporeal right and cannot possibly refer to any question of ownership of property in contradistinction to incorporeal rights. (*Wort and James, JJ.*) RAM KISHUN *v.* NIRANJAN PANDE. **12 Pat 285 = 6 I.R. (Pat.) 145 = 145 I.C. 223 = 14 Pat L T. 575 = A I R. 1933 Pat. 285.**

——**S 13**—Scope—Dispute as to custom Settlement proceedings—Statements by witnesses—Admissibility. *See* EVIDENCE ACT, S. 33. **153 I C 708 = 7 R A. 552 = 1935 A L.J. 235 = 18 R.D. 635 = 4 A.W R. 1208 = A.I.R. 1935 All 187.**

——**S. 13**—*Subsequent judgments—Admissibility.*

Apart from Ss. 40 to 42, it is doubtful if S. 13 covers previous judgments, but it certainly will not cover judgments subsequent to the matter under investigation ; in both the clauses of the section it is the past tense that is used. (*Dhavle, J.*) JHINGUR RAUT *v.* EMPEROR. **I R. 1931 Pat. 481 = 134 I.C. 625 = 32 Cr.L.J. 1224 = 12 Pat L.T. 647 = 1931 Cr.C. 914 = A.I.R. 1931 Pat. 386.**

——**Ss. 13 and 32**—*Suit for rent—Plea of holding rent free—Sale deeds between third parties—Recitals in—Admissibility.*

In a suit for assessment of fair and equitable rent, the defendants pleaded that the holding was rent free and in support relied upon sale deeds containing recitals to the effect that the predecessors in interest of the executants of the *kabalas* were holding with *nishkar* right.

Held, such recitals were inadmissible and could not be used in evidence against the plaintiff, who was no party to them. (*Mitter, J.*) JAGATDWIPTENDRANARAYAN BHUP *v.* BILASH RAY AGARWALA. **59 Cal. 454 = I R. 1932 Cal. 375 = 137 I.C. 860 = A.I R. 1932 Cal. 427.**

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——**S. 13**—*Title deed—Admissibility.*

In a suit for a declaration against the landlord that plaintiff has a rent-free title to the land, a kabala, which is a title deed of plaintiff is admissible in evidence, at least to explain the nature of his possession. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMJI MISSER. **149 I.C. 979=6 R.P. 677=A.I.R. 1933 Pat. 685.**

——**S. 13**—*Transaction — Question as to property being secular or* debuttar*—Mortgagor by predecessor of party dealing with property as secular—Relevancy—Evidentiary value.*

The father of the plaintiff who was suing as a *shebait* in respect of certain property which he alleged was *debuttar* had in 1904 executed a mortgage deed in favour of the defendant, which contained an assertion to the effect that the property in dispute was secular property and had been partitioned as far back as 1839.

Held, the document was evidence under S. 13 of the Evidence Act as against the plaintiff who was claiming in the character of a *shebait*, as evidence of a transaction by plaintiff's father dealing with the property as secular, partible property, although the evidentiary value may be very slight. (*Mitter and B.N. Rau, JJ.*) RONALD DUNCAN CROMARTIE *v.* SRI SRI ISWAR RADHA DAMODAR JEW. **62 C.L.J. 10.**

——**S. 13 (a)**—*Deed of partition—Mokurari right in tenancy—Whether can be proved.*

S. 13 (*a*) only refers to the admissibility of any transaction by which a right is asserted. A deed of partition would be admissible in order to establish the right to effect the partition, because by that deed the right to partition the property was asserted. It would be a far-fetched application of the section to say that if in a deed of partition between two persons, rights are alleged with reference to the property which either has or has not any reference to the right to partition, these allegations should be considered as a transaction by which the right is asserted. Where a deed of partition contains a recital that the lands in schedule were held by the descendants in Mokarrari Kayemi interest, such a deed is not admissible in evidence for the purpose of establishing a Mokarrari right in the tenancy. (*B.B. Ghose and N.K. Bose, JJ.*) NARENDRA NATH MONDAL *v.* SANNYASI CHARAN DAS. **I.R. 1932 Cal 350=137 I.C. 658=54 C.L.J. 353=A.I.R. 1932 Cal. 398.**

——**Ss. 14 and 15**—*Charge of gambling in a club—Evidence that on previous occasion club was used as common gaming house—Admissibility.*

The fact that on a previous occasion the premises of the club had been raided and that certain persons said to be members of that club had been found there at the time and subsequently convicted under the Gambling Act is quite irrelevant to show that, when on a subsequent occasion the same premises were raided and other persons were found with gaming instruments, these persons were engaged is unlawful gaming. (*Mackney, J.*) BOON CHIN *v.* EMPEROR. **157 I.C. 798=8 R.R. 110=36 Cr.L.J. 1228=1935 Cr.C. 934=A.I.R. 1935 Rang. 233.**

——**S. 14**—*Conduct of accused—Views held by accused—Relevancy of.*

A Court has no concern with the justice or otherwise of the claims of the accused or with the rectitude of his political views, but the Court may take cognizance of the fact that he does hold certain views; for as a guide to his conduct and intentions these views are most relevant consideration. (*Thom, J.*) MANABENDRA NATH ROY *v.* EMPEROR. **148 I.C. 833=6 R.A. 772=35 Cr.L.J. 768=1933 Cr.C. 833=A.I.R. 1933 All. 498.**

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——**S. 14**—*Evidence of previous convictions—Admissibility.*

Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence, is admissible *aliunde* it should not be excluded. Such evidence is admissible, not as evidence of character but as evidence to prove habit and association. (*Nanavutty, J.*) BENI MADHO *v.* EMPEROR. **9 Luck. 22=6 I.R. (Oudh) 209=10 O.W.N. 688=146 I.C. 1064=35 Cr.L.J. 273=1933 Cr.C. 976=A.I.R. 1933 Oudh 355.**

——**Ss. 14 and 15**—*Similar transactions—Admissibility.*

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible, if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Per Lord Chancellor in (1894) A.C. 57. So evidence of similar transactions may be admissible as evidence of intention or knowledge but not evidence that the accused committed the offence with which he is charged. That is, where the intention of the accused in a relevant fact, evidence of similar transactions both prior and subsequent to the alleged offence is admissible as evidence of intention. It is incumbent on the prosecution to establish the offence by proof *aliunde* before calling into aid, by the application of Ss. 14 and 15 of the Evidence Act, evidence of similar transactions both prior and subsequent to the alleged offence, for the purpose of its being taken into consideration as a piece of relevant evidence in proving the knowledge or intention of the accused, if such knowledge or intention is a relevant fact, in proving the offence with which he is charged. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) SITARAMACHAR *v.* THE GOVERNMENT OF MYSORE. **8 Mys L.J. 385.**

——**S. 15**—*Applicability—Accused charged under S.* 409, *Penal Code—Plea of* bona fide *payment to wrong persons under misapprehensions—Evidence of other transactions of conversion of money to personal use.*

When an accused charged under S. 409, Penal Code, pleaded that the payments were made *bona fide* to wrong persons under misapprehension and the prosecution tried to let in evidence of other transactions in which the accused had appropriated sums of money out of fund entrusted to his own use.

Held, that S. 15, Evidence Act, had no application to the case and that such evidence would merely show general dishonesty and as such would be in relevant and inadmissible for rebutting the accused's defence of *bona fide* payments to wrong persons. Rule as to proof of similar acts for establishing systematic conduct stated. (*Panckridge and Patterson, JJ.*) LLOYD *v.* EMPEROR. **I.R. 1933 Cal. 250=142 I.C 274 (2)=34 Cr. L.J. 294=1933 Cr.C. 197=A.I.R. 1933 Cal. 136.**

——**S. 15**—*Suit for rent—Defendant producing receipts to prove payment—Evidence that in similar other suits he produced forged receipts—Admissibility.*

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It is a well-known rule of law that evidence of similar but unconnected facts is not admissible to prove a fact in issue. If in a suit for arrears of rent, the defendant produces certain receipts to prove payment of the amounts alleged to be due from him and when they are denied by the plaintiff, does not attempt to prove them, evidence of witnesses that in similar suits filed by them, the defendant produced forged receipts by way of defence and never attempted to establish them when they were denied, is not admissible to prove that the receipts are forged. (*Allsop, J.*) KEDAR NATH *v.* EMPEROR. **157 I.C. 557=36 Cr.L J. 1199=8 R. A. 214=1935 A.W.R. 628=1935 A. Cr.C. 128=1935 A. L J. 493=1935 Cr.C. 546=A.I.R. 1935 All. 521.**

———**S. 16, Ill. (b) and S. 114, Ill. (f)**—*Registered letter correctly addressed and posted not coming back—Presumption.*

Where it is proved that a registered letter was correctly addressed and posted, but did not come back to the sender, the Court would be justified in presuming that the letter reached its destination and was duly received by the person to whom it was addressed, even though his signature on the acknowledgment slip is not proved. (*R. C. Mitter, J.*) RAJANI SUTRADHAR *v.* BAIKUNTHA CHANDRA SAHA. **39 C.W.N. 1041.**

———**S. 17**—*Admission—Binding nature—Presumption as to truth—Weight of.*

An admission is the best evidence against the party making the same, and unless it is shown that it is untrue and is made under circumstances which does not make it binding on the party, must be presumed to be true. The weight of the admission increases with the knowledge and deliberation of the speaker or the solemnity of the occasion on which it is made. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N 861.**

———**S. 17**—*Admission in document—Proof of, by proof of document.*

Where in a document executed by a woman there was an admission and the fact that she made that statement was relevant in a suit in which the document was proved.

Held, that the admission should also be held to be proved even though the woman was not examined. (*Dalip Singh, J.*) UMAR-UD DIN *v.* GHULAM MOHAMMAD. **160 I.C. 751=8 R.L. 587=A.I.R. 1935 Lah. 628.**

———**S. 17**—*Erroneous admission—Withdrawal.*

A decree-holder making an erroneous admission in an application accompanied by an affidavit, is entitled to retract that admission. A.I.R. 1923 All. 575 and A.I.R. 1928 Lah. 726, Ref. (*Johnstone, J.*) SITA RAM *v.* PIR BAKHSH. **I.R. 1931 Lah. 278=130 I.C. 406=32 P.L R. 413=A.I.R. 1931 Lah. 6.**

———**S. 18**—*Admission by agent—Binding nature.*

An admission alleged to have been made by one person on behalf of another is not binding on the latter, unless it is proved that the former was really authorised to make that admission on behalf of the latter. (*Wort and Fazl Ali, JJ.*) PURNIMA DEBYA *v.* NAND LAL OJHA. **11 Pat. 50=I R. 1932 Pat. 113=136 I.C. 577=12 Pat.L.T. 582=A.I.R. 1932 Pat. 105.**

———**S. 18**—*Admission by one partner—Evidence against firm.*

Under S. 18 of the Evidence Act, an admission by one partner made in a representative capacity would be evidence against the firm. If in a suit against a partnership for damages for infringement of trade mark, one of the partners admits the infringement but disputes the claim for damages, the admission will bind the other

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partners. (*Hilton, J.*) THOMAS BEAR & SONS, LTD. *v.* RULIA RAM. **6 R.L. 599=148 I.C. 763=A I.R. 1934 Lah. 625.**

———**S. 18**—*Admission—Statement of person alleged to act in collusion with another.*

There is no rule of evidence under which the statement of one person can be regarded as the admission of another person, merely on the allegation that the two are in collusion. (*Kendall, J.*) MOTI RAM *v.* SRI LAL. **151 I.C. 261=7 R.A. 126=18 R.D. 178=15 L.R. 183 (Rev.)=3 A.W.R. 489=A.I.R. 1934 All. 684.**

———**S. 18**—*Admission—Third parties, if bound.*

An admission made by one of the defendants in his statement as a party before the framing of the issue that he was acting on behalf of the main partnership in certain transactions while binding on him, is not admissible against the other defendants. (*Tekchand and Tapp, JJ.*) GANESH DAS *v.* DHALU RAM. **I.R. 1931 Lah. 519 (2)=132 I.C. 7 (2)=12 L.L. J. 187.**

———**S. 18**—*'Agent'—Admission by witness.*

In a suit against the defendants as members of a partnership, which was referred to a commissioner, the first defendant was examined by the second defendant as his witness and he deposed that the second defendant was admitted to the benefits of the partnership.

Held, that an admission could only be given in evidence against the party making it and not against any other party and the only exceptions to the rule are laid down under Ss. 18 to 20 of the Evidence Act, that a person called by a party as his witness cannot be deemed to be his 'agent' within the meaning of S. 18 and that the admission of the first defendant could not be proved against the second defendant, also because when the first defendant was examined before the commissioner, he had ceased to be the manager of the joint family as a partition was effected between the first defendant on the one hand and the second and third defendants on the other. (*Beaumont, C. J. and Rangnekar, J.*) PARBHUDAS *v.* LALLUBHAI. **I.R 1932 Bom. 340=137 I.C. 710=34 Bom.L.R. 35=A.I R. 1932 Bom. 117.**

———**S. 18**—*Co-defendants—Admission by one—If binds others.*

An admission or a confession of judgment made by one of several defendants is no evidence against another defendant. (*R. C. Mitter, J.*) KANTA MOHAN MALLIK *v.* MAKHAN SANTRA. **39 C.W.N. 277.**

———**Ss. 18 and 21**—*Co-plaintiffs—Admission by one—Effect and value of.*

An admission made by one plaintiff is not conclusive against his co-plaintiff; but it is certainly of considerable evidentiary value against him. (*Harries, J.*) TIRKHA RAM *v.* MURARI LAL. **158 I.C. 109=8 R. A. 285=1935 R.D. 283=1935 A.W.R. 735=A.I.R. 1935 All. 720.**

———**S. 18**—*Joint tenants—Admission by one—Admissibility against others.*

An admission is ordinarily admissible in evidence against the party making it or his privies. But in the case of joint contractors or joint owners, an admission made by one will be admissible against the others, if the admission relates to the subject-matter of the suit and if it is made by the declarant in his character of a person jointly interested with the others against whom it is tendered as evidence. In the absence of either of these two conditions, an admission by one joint tenant is not admissible against his co tenant. (*R. C. Mitter, J.*) KANTA MOHAN MALLIK *v.* MAKHEN SANTRA. **39 C.W.N. 277.**

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———**S. 18**—*Offer to accept smaller sum—If an admission as to amount due.*

Where a person offers to accept a smaller amount as a matter of compromise, that offer is not an admission as to the proper amount due to him. (*Lord Tomlin.*) CHANDRIKA PRASADA *v.* B.B. AND C. I. RAILWAY CO. **151 I.C. 945=39 C.W.N. 552=1935 A.W.R. 459=1935 O.W.N. 379=7 R.P.C. 151=1935 R.D. 165=61 C.L.J. 147=37 Bom.L.R. 390=16 L.R. 250 (Rev.)=41 L.W. 617=1935 M.W.N. 434=37 P.L.R. 331=A.I.R. 1935 P.C. 59=68 M.L.J. 552 (P.C.).**

———**S. 18**—"*Proceeding*"—*Meaning.*

"The proceeding" mentioned in S. 18 refers to the proceeding in which the matter stated by the party is an issue or is relevant to the issue and not to the proceeding, if any, in which the statement has been made. Hence an admission by person as a witness in a former proceeding is admissible in a subsequent proceeding to which he is a party, if such admission is an issue or is relevant to the issue in the subsequent proceeding. (*Page, C.J. and Mya Bu, J.*) PATEL *v.* EMPEROR. **6 I.R. (Rang.) 113=146 I.C. 653=35 Cr.L.J. 131=1933 Cr.C. 1123=A.I.R. 1933 Rang. 292.**

———**S. 18**—*Prosecution under S.* 498, *I. P. Code—Statement of father of accused made to third person—Admissibility.*

In a prosecution under S. 498, I.P. Code, a statement by an Honorary Magistrate who appeared as a witness that the father of the accused came to him and asked him to effect a compromise admitting that the girl was with the accused and offering a certain amount to the girl's husband, is not admissible in evidence. (*Middleton, J.C.*) GULZAMAN KHAN *v.* EMPEROR. **158 I.C. 483=8 R. Pesh. 59=36 Cr.L.J. 1442 (1)=1935 Cr. C. 452=A.I.R. 1935 Pesh. 73.**

———**S. 18**—*Statement of opinion by counsel—Effect.*

The plaintiffs were of equal status and were entitled to pre-empt. The Counsel for plaintiffs stated that as they were (the plaintiffs) members of a joint Hindu family, they were entitled to pre empt one half of the property.

Held, that the statement of the plaintiff's pleader amounted to merely an opinion on a point of law which was not binding on the plaintiff. (*Mukerji, J.*) KAMTA PRASAD MISIR *v.* CHAIT NARAIN SINGH. **154 I.C. 168=7 R.A. 697=A.I.R. 1934 All. 531.**

———**S. 18**—*Statement by previous Mahant—Successor or worshipper, if bound.*

The Mahants of Dera Prithi Saheb are nothing more than custodians or managers. A chela must first be nominated by the Mahant and then confirmed in the appointment on the Mahant's death by the Bhekh or fraternity. Consequently statements made by previous Mahants cannot be regarded as admissions binding on the present incumbent of the office. Worshippers are not bound by the admissions of previous Mahants. (*Broadway and Johnstone, JJ.*) RAM PARSHAD *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR **12 Lah 497=135 I.C. 657=I.R. 1932 Lah. 113=32 P.L.R. 910=A I R. 1931 Lah. 161.**

———**S. 19**—*Master and servant—Statement by servant—Admissibility against master—"Occupies such position"—Meaning of.*

A statement made by a servant is admissible in evidence against his master under S. 19 of the Evidence Act, both for the purpose of deciding whether he is a servant and also as regards his liability as such servant. "Occupying the position" of a servant does not involve as an essential ingredient, acting in the course of his employment. (*Ameer Ali, J.*) M. E. MOSES *v.* SHAIK BAKRIDHONE CHOUDHURY. **39 C.W.N. 736.**

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———**S. 20**—*Statement of referee under—If conclusive.*

Where parties to a suit and their Counsel expressly make a statement agreeing to abide by the statement of a particular person, the statement by such a nominee of the parties, though only an admission under S. 20 of the Evidence Act, is as conclusive and effectual as an admission made by the parties, the effect of which is to prevent them from resiling from the same. (*Nanavutty and Zia-ul Hasan, JJ.*) ABDUL RAHMAN *v.* KALLOO KHAN. **7 R.O 362=153 I.C. 608=1935 O.W.N. 15=A.I R. 1935 Oudh 118.**

———**S. 21**—*Accused pointing out window by which they entered and committed dacoity—Admission can be proved.*

Where an accused charged with having committed dacoity points out a window by which the dacoits effected their entrance into the house in which they committed the offence, the admission can be proved as against the person making it under S. 21. 45 Cal. 557 and A.I.R. 1929 Lah. 794, Foll. (*Bhide and Currie, JJ.*) SUCHA SINGH *v.* EMPEROR. **142 I.C. 699 (2)=I.R. 1933 Lah. 241=34 Cr.L J. 379=34 P.L.R. 405=1932 Cr. C. 626=A.I R. 1932 Lah. 488.**

———**S. 21**—*Admission to be considered as a whole.*

If the Court wishes to proceed upon the admission of a party, it should consider the admission as a whole or reject it altogether. (*Fazl Ali and James, JJ.*) KALI CHARAN SINGH *v.* HIRDAI NARAIN. **154 I.C. 948=7 R P. 504=A.I.R. 1935 Pat. 24.**

———**S. 21**—*Admission to be taken as a whole.*

If a party wishes to have a statement made by the opposite party treated as an admission, the whole of the statement must be taken into consideration. It is not open to him to split up the statement and pick out the portion which may be favourable to him and ignore the rest. 59 M.L.J. 283 (P.C.), Rel. (*Tek Chand, J.*) FAKIR KHAN *v.* ISMAIL KHAN. **14 Lah. 218=I.R. 1933 Lah. 101=141 I.C. 264=34 P.L R. 149=A.I. R. 1933 Lah. 179.**

———**S. 21**—*Admission—To be taken as a whole.*

If the plaintiff wants to rely on the defendant's admission he must take it as a whole, and not pick out a portion of it. (*Srivastava, J.*) DARSHAN SINGH *v.* BALDEO SINGH. **151 I.C. 297=7 R.O. 115=11 O. W N. 579 and 1367=A.I.R. 1934 Oudh 370 (1).**

———**S. 21**—*Admission—Binding nature of—Pardanashin.*

An admission is no doubt a very good piece of evidence, and ordinarily it would be taken as binding upon a party unless the party making it can explain it away. But an admission made in a document by a pardanashin lady is not conclusive or binding on her. (*Nasim Ali, J.*) BHOLANATH CHATTOPADHAYA *v.* MRITYUNJOY CHATTOPADHAYA. **153 I.C. 532=7 R.O. 286=59 C.L.J. 532=A.I R. 1934 Cal. 851.**

———**S. 21**—*Admissions—Evidentiary value of.*

Admissions are always evidence against a party who made them but they are evi lence which vary very much in value according to circumstances and the Court is quite at liberty to reject them, if it is satisfied from other circumstances that they are untrue. (*Nanavutty and Zia-ul-Hassan, JJ.*) LATAFAT HUSSAIN *v.* ONKAR MAL. **10 Luck. 423=7 R O. 272=152 I.C. 1042=11 O.W.N. 1589=A.I.R. 1935 Oudh 41.**

———**S 21**—*Admission—No other evidence—Admission to be taken as a whole.*

Where there is no evidence against a man connecting him with an offence except his own statement or ad-

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mission, that admission must either be taken as a whole against him or not be taken into consideration at all. (*Dalip Singh, J.*) FAQIR MAHOMED *v.* EMPEROR. **I.R. 1932 Lah. 431 = 138 I.C. 217 = 33 Cr.L.J. 570 = 33 P.L.R. 287.**

———**S. 21**—*Admission—Presumption.*

A party on whom the initial onus is cast, by proving an admission by the opposite party shifts the onus because what a party himself admits to be true may reasonably be presumed to be so. It is then for him to rebut this presumption and unless and until that is satisfactorily done, the fact admitted must be taken to be established. (*Tek Chand and Abdul Rashid, JJ.*) MT. ABADI *v.* MUMTAZI UD-DIN. **153 I C. 393 = 7 R.L 428 = 35 P.L.R. 578 = A.I.R. 1934 Lah. 662.**

———**S. 21**—*Admission—Presumption.*

An admission against the interest of the party making it must be regarded as true until it is clearly proved to be untrue. (*Tek Chand and Coldstream JJ.*) MT. SADIQA BEGAM *v.* ATA ULLAH. **I.R. 1933 Lah 491 = 34 P. L.R. 788 (2) = 144 I.C. 497 = A.I.R. 1933 Lah. 885.**

———**S. 21**— *Admission — Presumption — Effect on burden of proof.*

An admission shifts the onus of proof, because what a man admits to be true must reasonably be presumed to be so. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346 = 159 I C. 98 = 8 R.C. 257 = 60 C.L.J. 477 = A.I.R. 1935 Cal. 368.**

———**S. 21**—*Admission in previous litigation that certain property has been mortgaged—Admissibility.*

There is considerable doubt as to the correctness of the view that in a suit for possession by plaintiff against the defendant, the admission by the defendant in a prior litigation that the property has been mortgaged to plaintiff is inadmissible and cannot be considered. (*Addison and Din Mohammad, JJ.*) DAULAT SHAH *v.* BISHAN DAS. **159 I.C. 385 (1) = 8 R L. 391 (1) = 37 P.L.R. 296 = A.I.R. 1935 Lah. 279 (1).**

———**S. 21**—*Admission in prior suit—Subsequent suit not* inter partes*—Admissibility.*

A statement made in plaint in a prior suit, to which the plaintiff in a subsequent suit was not a party, admitting payment made is against the interest of the person making it and can be used in evidence against him in the subsequent suit. (*Dalip Singh and Abdul Qadir, JJ.*) AMAR NATH *v.* KALLA RAM. **6 R.L. 359 = 149 I.C. 217 = 35 P.L.R. 463 = A I.R. 1934 Lah. 527.**

———**S. 21**—*Admission—Statement to be taken as a whole.*

To treat the admission of defendant that he executed the pro note, but to divorce it from his statement that the note was discharged except for Rs. 10, that this payment was endorsed and that the suit was time barred would be contravening the principle that an admission in pleading cannot be so dissected and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. (*Walsh, J.*) SUNDARA RAJALI *v.* GOPALA THEVAN. **150 I.C. 132 = 6 R.M. 697 = 39 L.W. 34 = A I.R. 1934 Mad 100.**

———**S. 21**—*Confessions—Admissibility.*

Confessions like other admissions are relevant evidence under the Evidence Act unless they are rendered inadmissible by some circumstance or circumstances which the Act declares to be of an invalidating nature. Examples of such circumstances are to be found in Ss. 24, 25 and 26 of the Act. Where they do not exist, the confession is admissible. (*Waller and Krishnan Pandalai JJ.*) ARUNACHALA REDDI, *In re.* **55 Mad. 717 = I.R. 1932 Mad. 552 = 138 I.C. 240 = 1932 M.W. N. 644 = 33 Cr.L.J. 586 = 1932 Cr.C. 504 = 35 L.W. 607 = A.I R. 1932 Mad. 500 = 62 M.L.J. 680.**

EVIDENCE ACT (1872), S. 24—Confession.

———**S. 21**—*Confession—Admissibility in evidence.*

Under S. 21 a confession being a species of admission would be relevant and can be proved against the accused unless it can be shown that there is some provision of law, which excludes the proof of such a confession. (*King and Bajpai, JJ.*) SIDHESHWAR NATH *v.* EMPEROR. **56 All. 730 = 152 I.C. 174 = 7 R.A. 280 = 36 Cr.L.J. 45 = 1934 A.L.J. 178 = 3 A.W.R. 459 = 1934 Cr.C. 421 = A.I.R. 1934 All. 351.**

———**Ss. 21 and 13**—*Document containing admission by third party—Use of.*

A document containing the admission of third persons cannot be used as an admission against the parties but the document is admissible in evidence as proof of the fact mentioned therein, as evidence of the transaction if it could be shown that it was executed in due course of business to settle disputes between the parties. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MT. JASODA KUER *v.* PUNIT SINGH. **6 R.P. 300 = 146 I.C. 937 (2) = A.I.R. 1934 Pat. 48.**

———**S. 21**—*Document effecting fraudulent preference—Admissibility.*

The document effecting a transfer by the insolvent which is attacked as being a fraudulent preference is admissible in a proceeding by the Official Receiver to set aside the transfer under S. 21 for the purpose of seeing what was the *prima facie* intention of the insolvent whether pressure was brought by some of the creditors for payment to them. (*Banerji and King, JJ.*) KASHI NATH *v.* OFFICIAL RECEIVER. **135 I. C. 117 = I.R. 1932 All. 5 = 1931 A.L.J. 26 = A I.R. 1931 All. 142 (2).**

———**S. 21**—*Statement of deceased—Admissibility regarding family custom.*

A deposition of a person in a suit to which he was not a party is, in a subsequent suit, in which he is a party, evidence against him and against those who claim under or from him.

Held, that the statement of the plaintiff's deceased father as to the exclusion of the daughters from inheritance by custom may be admitted in evidence. (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL UR RAHMAN. **8 Luck. 445 = 150 I.C. 282 = 6 R.O. 629 = 10 O.W.N. 268 = A.I.R. 1933 Oudh 246.**

———**S. 23**—*Negotiations between parties with a view to settlement—Admissions made during such negotiations—Admissibility.*

Negotiations conducted between parties with a view to a settlement must be held to have been conducted "without prejudice." In such circumstances, it is not open for one of the parties to give evidence of an admission made by another. If negotiations are to result in a settlement, each side must give away a certain amount. If one of the parties offers to take something less than what he later claims he is legally entitled, such must not be used against him, otherwise persons could not make offers during negotiations with a view to a settlement. (*Harries and Rachhpal Singh, JJ.*) SHIBCHARAN DAS *v.* GHULAB CHAND CHHOTEYLAL **160 I.C. 76 = 8 R.A. 567 = 1935 A.W.R. 1486 = A.I.R. 1936 All. 157.**

———**S. 24—Confession.**

ACCEPTANCE IN PART.
ADMISSIBILITY OF.
REJECTION OF.
TEST OF TRUTH.
TO BE TAKEN AS A WHOLE.
VOLUNTARY CHARACTER OF.

EVIDENCE ACT (1872), S. 24—Confession—Acceptance in part.

Duty of Court.
Duty of Jury.
Duty of Prosecution.
Extra Judicial Confession.
Inducement or Threat.
No Confession.
Person in Authority.
Retracted Confession.
Scope.

Acceptance in part.

———S. 24—*Confession—Acceptance in part—Partly false—Relevancy.*

Even when a part of the confession is found to be false, the entire confession should not be rejected simply for that reason. If sufficient grounds exist, that part that charges the prisoner may be believed while that which is in his favour may be rejected. (*Raza and Bisheshwar, Nath, JJ.*) DURGA *v.* EMPEROR. **I.R. 1931 Oudh 230=132 I.C. 70=32 Cr.L.J. 830=14 O.L.J. 303=8 O.W.N. 247.**

———S. 24—*Confession—Acceptance in part—Part found to be false—Entire confession need not be rejected.*

The entire confession of an accused need not be rejected merely because part of it has been found to be false, and if sufficient grounds exist, the portion of the confession that charges the prisoner with guilt may be believed, while that which is in his favour may be rejected if the evidence on the record justifies the Court in doing so. (*Nanavutty and Smith, JJ.*) EMPEROR *v.* SHANKAR. **6 R.O. 514=149 I.C. 69=35 Cr.L.J 894=1934 Cr.C. 673=11 O.W.N. 636=A.I.R. 1934 Oudh 222.**

Admissibility of.

———S 24—*Confession—Admissibility of*

Where the confession was made voluntarily and had been corroborated by the circumstance leading to the discovery of the dead body of the deceased,

Held, that the confession was admissible in evidence. (*Bisheshwar Nath and Nanavutty, JJ.*) BHUWAR *v.* EMPEROR. **9 O.W.N. 1191.**

———S. 24—*Confession—Admissibility of—Part of the confession true—Duty of Court.*

In considering the question of the admissibility of a confession, the first thing to be considered is whether it is relevant or not. If it is not relevant owing to the existence of circumstances mentioned in S. 24 of the Evidence Act, it cannot be admitted in evidence either against the person confessing or against the other persons accused in the case. It does not matter how many true facts are mentioned in it. The question is not, in the first instance, whether it is true or false; what has to be considered is whether it was voluntary or was caused by some inducement. Where part of the confession is true, the Judge has to consider whether the confession can be used as evidence, if it was caused by some inducement. (*Kendall, J.*) SARJU *v.* EMPEROR. **156 I.C. 357=7 R.A 1066=36 Cr.L.J. 925=1935 A.W.R. 937=1935 A.L.J. 960=1935 A. Cr.C. 197=1935 Cr.C. 1046=A.I.R. 1935 All. 882.**

———Ss. 24 and 154—*Confession—Admissibility of—Confession by accused—Subsequent grant of pardon—Withdrawal of pardon—Examination as witness.*

After the confession of an accused was recorded, pardon was tendered to him, and he was examined as witness for the prosecution witness. He denied all knowledge of the occurrence and also did not seem to recollect anything about the confession. His examination was therefore stopped by the Magistrate and the pardon withdrawn. But he was not tried jointly with the other accused and was examined as a prosecution witness in the Sessions Court. There also he denied all knowledge of the circumstances relating to the offence charged and made serious allegations against the police. He was declared hostile and cross examined and for the purpose of contradicting him, the confession made by him was read over to him,

Held, that the prosecution was not justified in reading the confession which he retracted and which according to him was not voluntary. (*Guha and Nazim Ali, JJ.*) NAYEB SHANA *v.* EMPEROR. **61 Cal. 399=38 C.W.N. 659=152 I C. 44=7 R.C. 225 (2)=35 Cr. L.J. 1479=1934 Cr.C. 929=A.I.R. 1934 Cal. 636.**

EVIDENCE ACT (1872), S. 24—Confession—Rejection of.

———S. 24—Confession—Admissibility of—Confession made under hope of pardon—Precautions under S. 164, Cr. P. Code, not taken—Confession is not inadmissible and cannot be excluded. *See* CR. P. CODE, S. 164—ADMISSIBILITY. **A.I.R. 1933 Lah. 987.**

———S. 24—*Confession—Admissibility of—Recording of confession—Irregularities.*

Where the confession was recorded on a Sunday and at the house of the Magistrate and the Magistrate while certifying and stating on oath as a witness that he satisfied himself, that the accused was making a statement voluntarily, did not record the questions and answers put and it was further objected that the evidence was recorded in English though made in Urdu,

Held, that the irregularities in recording the confession did not render it inadmissible.(*Harrison and Dalip Singh, JJ.*) ABDUL GHANI *v.* EMPEROR. **I.R. 1931 Lah. 727=133 I C. 55=32 Cr.L.J. 985=1931 Cr.C. 1067=A.I R. 1931 Lah 763.**

———S. 24—*Confession—Admissibility of—Statement to Police Officers as to weapon of murder.*

A statement made by an accused person to a Police Officer that he committed the murder with a particular weapon is not admissible in evidence. (*Nanavutty and Thomas, JJ.*) CHHUTKAO *v.* EMPEROR. **153 I.C. 52=7 R.O. 281=36 Cr.L.J. 246=11 O.W.N. 1540=1935 Cr.C. 75=A.I.R. 1935 Oudh 33.**

Rejection of.

———S. 24—*Confession — Rejection of—Confession made in the hope of pardon.*

Where a confession is positively proved by the record of Magistrate that it was voluntary, the mere fact that the accused confessed in the hope of pardon will not justify its rejection as being improperly induced, in the absence of the evidence to suggest that any Police Officer or other person in authority did or said anything which could possibly be construed into holding out a hope of pardon. 8 Lah 230, Ref. (*Coldstream and Jai Lal, JJ.*) EMPEROR *v.* SHER SINGH. **I.R 1933 Lah. 361=143 I.C. 499=34 Cr.L.J. 598=34 P.L.R. 704=1933 Cr.C. 632=A.I.R. 1933 Lah. 388.**

———Ss. 24 and 80—*Confession—Rejection of—Duty of Court.*

A confession duly recorded by a Magistrate, with the prescribed certificate appended to it, may under S. 80 of the Evidence Act, be presumed to be voluntary and as such admissible, but this is subject to the restrictions contained in S. 24 of the Evidence Act. To justify a rejection of a confession a lesser degree of probability would be necessary, because instead of the word "proved," the legislature has used the word "appear", in S. 24. Before deciding whether a confession was voluntary or not the judge has to carefully consider all the circumstances and come to a decision whether those circumstances justify a well-founded conjecture, which may be sufficient for excluding it from evidence. (*Guha and Nasim Ali, JJ.*) NAVAB SHANA *v.* EMPEROR. **61 Cal. 399=38 C.W.N. 659=152 I.C. 44=7 R.C.**

EVIDENCE ACT (1872), S. 24—Confession—Test of Truth.

225 (2) = 35 Cr.L.J. 1479 = 1934 Cr.C. 929 = A.I.R. 1934 Cal. 636.

Test of truth.

———S. 24—*Confession—Test of truth.*

A true confession made by a person who takes part in a murder invariably adds something to the knowledge already possessed by the Investigating Officer and that is the greatest test of its truth. (*Raza and Pullan, JJ.*) MATA DIN *v.* EMPEROR. **I R. 1931 Oudh 244 = 132 I.C. 228 = 32 Cr.L J. 854 = 14 O.L J. 320 = 8 O.W.N. 228 = 1931 Cr.C. 438 = A.I.R. 1931 Oudh 166.**

To be taken as a whole.

———S. 24—*Confession—To be taken as a whole.*

A confession of an accused person must be taken into account as a whole. (*Abdul Rashid and Rangi Lal, JJ.*) MT. PATHANI *v.* EMPEROR. **152 I.C. 1077 = 36 Cr.L J. 247 = 7 R.L. 361 = 35 P.L.R. 559 = 1934 Cr.C. 999 = A.I.R. 1934 Lah. 673.**

———S. 24—*Confession—To be taken as a whole.*

Where there is no other evidence to show affirmatively that any portion of the exculpatory statement in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. (*Mears, C.J. Sulaiman, Boys, Young and Kisch, JJ.*) EMPEROR *v.* BALMAKUND. **52 All 1011 = I R 1931 All. 130 = 129 I.C. 258 = 32 Cr.L J 362 = 1930 A.L.J. 1481 = 14 O.L.J. 83 = 12 L.R. 33 (Cr) = 1931 Cr. C. 1 = A.I.R. 1931 All. 1 (F. B.).**

———S. 24—*Confession—To be taken as a whole.*

If the Court takes into consideration the confession of an accused, in the absence of any evidence showing that any portion of it is false, it can only accept or reject it as a whole and cannot pick and choose and accept only the inculpatory element, while rejecting the exculpatory element as incredible or false. (*Din Mahomed, J.*) MAHOMED SHAFI *v.* EMPEROR. **153 I.C. 19 (1) = 7 R.L. 372 = 36 Cr.L J. 281 = 35 P.L.R. 659 = 1934 Cr.C. 945 = A.I R. 1934 Lah. 620.**

———S. 24—*Confession—To be taken as a whole.*

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in a confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible. But it is not in every case, whether there was other evidence besides his confession against him or not, that every statement made by him in his confession must be accepted as true, when the exculpatory part of it can be and is shown to be unreliable. (*Cunliffe and Dunkley, JJ.*) SANLAYDO *v.* EMPEROR. **147 I.C. 49 = 35 Cr.L.J. 262 = 1933 Cr.C. 919 = A.I.R. 1933 Rang. 204.**

———S. 24—*Confession—To be taken as a whole.*

The confession of an accused, if it is to be the sole basis of a conviction, should be taken in its entirety. (*Bhide and Currie, JJ.*) FAZAL HUSSAIN *v.* EMPEROR. **I.R. 1933 Lah. 345 = 143 I.C. 362 = 34 Cr.L.J. 584 = 1933 Cr.C. 887 = A.I.R. 1933 Lah. 665.**

———S. 24—*Confession—To be taken as a whole.*

Where the confession of the accused is the only evidence against him, it must be taken as a whole and nothing can be read into it which is not contained there. 39 Cal. 855 and A.I.R. 1931 All. 1 (F.B.), Ref. (*Walsh, J.*) SANTHANAKRISHNA CHETTY, *In re.* **147 I.C. 46 = 6 R M. 325 = 35 Cr.L J. 331 = 1933 Cr.C. 9 (2) = 38 L.W. 979 = A.I R. 1933 Mad. 888 (2) = 65 M.L.J. 837.**

EVIDENCE ACT (1872), S. 24—Confession—Voluntary character of.

———S. 24—*Confession—To be taken as a whole.*

The admissions by the accused must be taken as a whole. (*Young, J.*) MAN SINGH *v.* EMPEROR. **I. R. 1933 All. 426 = 144 I.C. 383 = 34 Cr.L J. 765 = 14 L.R 109 (Cr.) = 1933 A.L.J. 581 = 1933 Cr.C. 664 = A.I.R. 1933 All. 401.**

———S. 24—*Confession—To be taken as a whole.*

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element, while rejecting the exculpatory element as inherently incredible. A.I.R. 1931 All. 1 (F.B.), Foll. (*Agha Haidar, J.*) BANTA SINGH *v.* EMPEROR. **I.R. 1933 Lah. 171 = 142 I.C. 20 = 34 Cr.L.J. 318 = 34 P. L.R. 349 = 1933 Cr.C. 352 = A.I R. 1933 Lah. 232.**

———S. 24—*Confession—To be taken as a whole.*

A confession is not defined in the Evidence Act but it has been judicially interpreted as meaning an admission made, at any time by a person charged with a crime stating, or suggesting the inference, that he committed that crime. The statement should however be considered as a whole. It would not be right to take isolated portions of it and to consider whether any of them, regarded separately, amounts to an admission of guilt or not. (The first information report by Police Sub-Inspector held to be confession and rejected as being inadmissible in evidence.) (*Ba U, J.*) EMPEROR *v.* NGA SAN WIN. **147 I.C. 60 = 6 R.R. 140 = 35 Cr.L.J. 248 = 1933 Cr.C. 1284 = A.I.R. 1933 Rang. 326.**

———S. 24—*Confession—To be taken as a whole—Scope of the rule.*

It is not an infallible rule of practice that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole, and cannot accept only the inculpatory element, while rejecting the exculpatory element as inherently incredible. A.I.R. 1931 All. 1, Ref. (*Fraser, J.C. and Saaduddin, A.J C.*) ABDUL HAMID *v.* EMPEROR. **I. R. 1933 Pesh. 34 = 144 I.C. 160 = 34 Cr.L.J. 804 = 1933 Cr.C. 589 = A.I.R. 1933 Pesh. 38.**

———S. 24—*Confession—To be taken as a whole—Use of part and rejection of rest—Permissibility.*

When the Court disbelieves the evidence of the eye-witnesses and proceeds to convict the accused solely on his own statement, the statement must be taken in its entirety. It is not open to the Court to rely on the incriminating part of it only and to exclude from consideration the exculpatory part thereof, when there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false. (*Young, C.J. and Abdul Rashid, J.*) SHER GUL *v.* EMPEROR. **156 I.C. 529 = 7 R.L. 918 = 36 Cr.L.J. 966 = 37 P.L.R. 492 = 1935 Cr.C. 1001 = A.I.R. 1935 Lah. 671.**

Voluntary character of.

———Ss. 24 and 26—*Confession—Voluntary character of—Mere presence of Magistrate—If evidence of—Confession recorded without enquiry as to circumstances under which it is made—Admissibility.*

There is no difference between a confession recorded under S. 164, Cr. P. Code, and an oral confession, in the precaution to be taken in ensuring that the confession is voluntarily made. The correct position is that whenever a Magistrate receives a confession from an accused in custody, he must be satisfied of its voluntary character. The mere presence of the Magistrate would not *ipso facto* make it voluntary. Where the accused was already under arrest when the Sub-Magistrate was

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sent for and was in the hands of a number of police officers, and the Magistrate under orders of the Deputy Superintendent of Police, an officer superior in rank to the Sub Magistrate, took the accused about 10 yards away from the Deputy Superintendent, but not otherwise apart, and without any enquiry whatever into the circumstances in which the confession was to be made, proceeded to record the confession.

Held, that the influence exerted by the Sub-Magistrate's presence was not sufficient to come to the conclusion that the confession was voluntary and therefore it was inadmissible as evidence under S. 26, Evidence Act. 52 C. 67 (F.B.) and A.I.R. 1925 All. 627, Ref. (*Curgenven and Cornish, JJ.*) KRISHNA IYER, *In re* **157 I C. 297=8 R M. 137=36 Cr.L.J. 1107=1935 M.W N. 82=1935 Cr.C. 742=A.I.R. 1935 Mad. 479.**

———**S. 24**—Confession—Voluntary character of—Presumption. *See* RETRACTED CONFESSION, *infra*. **A I.R. 1934 Oudh 418.**

Duty of Court.

———**S. 24**—*Duty of Court.*

The Judge with whom the responsibility lies for acting upon the confession, should satisfy himself by putting searching questions to such witnesses as had anything to do with the confession The first question that ought to strike every judge is: "Why the accused made the confession"? It is important to ascertain from those in whose custody the accused was, the circumstances in which the question of confession first arose, how the accused expressed his willingness to be placed before the Magistrate and his readiness to make a confession. Similar questions arise as regards retraction. It is only if circumstances make it reasonable to believe that the accused voluntarily made the confession and agreed to make it before the Magistrate, that an inquisitive mind can be satisfied. (*Pullan and Niamatullah, JJ.*) NASIR *v.* EMPEROR. **55 All. 91=I.R. 1933 All. 170=34 Cr.L.J. 489=143 I.C. 67=1932 A L J. 1125=13 L R. 157 (Cr.)=1933 Cr C. 42=A I.R. 1933 All 31.**

[R 56 A 302 (312) (F.B.).]

———**S. 24**—*Duty of Court—Admissibility of confession—Duty of jury to accept whether it should be accepted.*

It is for the Judge to decide for himself whether *prima facie* the confession of the acoused appears to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible, he must exclude it from the consideration of the jury. It is not the province of jury to decide the question of admissibility of evidence. On the other hand, if the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the evidence as admissible does not necessarily mean that it is true and it is for jury to make up their minds whether they should accept the confession, and in doing so, they should naturally be guided to a large extent by their opinion on the question whether the confession was voluntary or not. (*Panckridge and M.C. Ghose, JJ.*) BALDEO BIN *v.* EMPEROR. **I.R 1933 Cal. 310=142 I.C. 639=34 Cr.L J. 369 (2)=1933 Cr.C. 233=A.I.R. 1933 Cal 187.**

———**S. 24**—*Duty of Court—Confession—Admissibility of Confession induced by threat or promise*

Where the confession was taken at extraordinary length throughout a considerable number of days and it described in the giratest possible detail a whole series of crimes which had been committed and it further appeared that the confession was probably induced by some threat or promise,

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Held, that the confession should not be admitted in evidence till there was a thorough enquiry that it had been made voluntarily. (*Lort Williams, Bartley and Henderson, JJ.*) KALICHARAN HALDAR *v.* EMPEROR. **6 I.R. (Cal.) 152=145 I.C. 863=34 Cr.L.J. 1087=1933 Cr.C. 1495=A.I.R. 1933 Cal. 835 (F B.)**

———**S. 24**—*Duty of Court — Confesseion not properly recorded.*

Where the Magistrate has not put the necessary preliminary questions to the accused with a view to satisfy himself that his statement was voluntary, the irregularity can be cured under S. 533 of the Cr. P. Code, provided the omission has not injured the accused in his defence on the merits. In other words, the Court is enabled under S. 533 to take evidence to prove that the confession was "duly made", *i. e.*, in accordance with Ss. 164 and 364. If the questions were not put at all, the confession is not "duly made". But it is not necessarily irrelevant. The Court may satisfy itself that there was no inducement or threat and so fulfil the requirements of S. 24, Evidence Act. It may have to take evidence to satisfy itself on this point. The weight to be attached to it depends on the facts of each case. (*Sulaiman, C.J., Kendall and Young, JJ.*) MAHOMED ALI *v.* EMPEROR. **56 All 302=147 I.C. 390=6 R.A. 467=35 Cr L J. 385=1934 Cr C. 145 (2)=A I.R. 1934 All. 81=1933 A.L J. 1551 (F.B.).**

———**S. 24**—*Duty of Court—Defence impeaching validity.*

When once the voluntary character of a confession is challenged by the defence, the Judge should make a thorough enquiry to see whether in fact the confession was voluntary. (*Lort Williams, Bartley and Henderson, JJ.*) KALICHARAN HALDAR *v.* EMPEROR. **6 I.R. (Cal.) 152=145 I.C. 863=34 Cr L J. 1087=1933 Cr.C. 1495=A.I.R. 1933 Cal. 835 (F.B.).**

———**S. 24**—*Duty of Court—If bound to accept confession* in toto.

Where the conviction does not solely rest on a confession but rests on the dying declaration and circumstantial evidence also, the Court is not bound to accept the confession *in toto*. (*Almond, J.C. and Mir Ahmad, A.J.C.*) JUMMA KHAN *v.* EMPEROR. **156 I.C 6=7 R. Pesh. 113=36 Cr.L.J. 914=1935 Cr.C. 357 (2)=A I.R. 1935 Pesh 59.**

———**S. 24**—Duty of Court—To carefully scrutinize the confession and decide whether it is reliable and trustworthy. *See* RETRACTED CONFESSION *infra*. **A I R. 1934 Oudh 418.**

Duty of jury.

———**S. 24**—Duty of jury—Confession—Duty to decide whether it should be accepted. *See* DUTY OF COURT, *supra*. **A.I R. 1933 Cal. 187.**

Duty of prosecution.

———**S. 24**—*Duty of prosecution — Confession—Conviction based on—Proof required.*

Where the main foundation for the conviction is the confession alleged to have been made by the accused, there are three things which the prosecution must establish: (*a*) that a confession was made, (*b*) that evidence of it can be given, and (*c*) that it is true. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) BHOJO *v.* EMPEROR. **29 S.L R. 1=152 I.C. 1032=36 Cr.L.J. 223=7 R.S. 106=1934 Cr.C. 1274=A.I.R. 1934 Sind 172.**

Extra-judicial confession.

———**S. 24**—*Extra-judicial confession—Confession to jail warder.*

A confession alleged to have been made by the accused in jail to the warder in the absence of any evidence on

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the part of the prosecution to prove it was read to the accused and acknowledged by him to be correct is of absolutely no evidentiary value against the accused who made it or the co-accused. (*Wallace and Jackson, JJ.*) CROWN PROSECUTOR *v.* PAKRISWAMI. **1930 M.W.N. 1249.**

———**S. 24**—*Extra-judicial confession — Confession before villagers—Evidentiary value.*

If is true that evidence afforded by extra-judicial confessions must be received with care and caution but there is no reason why it should not be believed when it is clear, consistent and convincing. The evidence of an admission of guilt to villagers may be as strong evidence against an accused person as a confession before a Magistrate. It requires no corroboration. The Court has to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses. 5 O.W.N. 698, Rel. on. (*Razz and Smith, JJ.*) MUNNU *v.* EMPEROR. **I.R. 1931 Oudh 426=32 Cr. L.J. 45=134 I.C. 1018 =8 O.W.N. 1062=1931 Cr. C. 994=A.I.R. 1931 Oudh 415.**

———**S. 24**—*Extra-judicial confession—Exact words to be ascertained*

Where an attempt is made to rely upon an extra-judicial confession, every precaution should be taken to ascertain as exactly as possible the very words which were used by the prisoner, who is supposed to have confessed. (*Ferrers, J.C. and Mehta, A.J.C.*) SULTAN *v.* EMPEROR. **28 S.L.R. 285=151 I.C. 984=36 Cr. L.J. 62=7 R.S.74=1934 Cr.C. 960=A.I.R. 1934 Sind 119.**

———**S. 24**—*Extra judicial confession—Value of.*

Though extra judicial confessions have to be received with care and caution, there is no reason why they should not be believed when they are clear, consistent and convincing. (*Mahadevayya, O.C.J. and Shankara narayana Rao, J.*) RAMAPPA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 73=39 Mys H.C.R. 320.**

———**S. 24**—*Extra-judicial confession—Value of, against co-accused.*

The weight of an extra-judicial confession of an accused person against his co-accused is not very great and could only be taken into account if it is adequately corroborated. Where the only corroboration is the evidence of eye-witnesses who cannot be implicitly relied upon, in view of the possibility of a genuine mistake on their part, there is room for doubt and the co accused is entitled to the benefit of that doubt. (*Abdul Rashid and Blacker, JJ.*) RAMZAN *v.* EMERROR. **157 I.C. 1054=8 R.L. 171=36 Cr.L.J. 1305=37 P.L.R. 345**

———**S. 24**—*Extra judicial confession alleged to have been make to another convict in jail—Value of.*

When the case against the accused depends on circumstantial evidence, the evidence should be so strong as to point unmistakably to the guilt of the accused. Where in support of the circumstantial evidence, an extra-judicial confession was admitted in evidence, alleged to have been made in jail to another person who at that time had been convicted of several offences and was then undergoing imprisonment and who, after his release, was trying to regain the favour of the police,

Held, that little, if any, importance should be attached to his evidence or to the extra-judicial confession alleged to have been made to him. 9 C.W.N. 274, Ref. (*Kaza and Kisch, JJ.*) HAWALDAR SINGH *v.* EMPEROR. **7 Luck. 623=I.R. 1932 Oudh 199=137 I.C. 63=33 Cr L.J. 379=9 O.W.N. 170=1932 Cr.C. 879=A.I.R. 1932 Oudh 324.**

Inducement or threat.

———**S. 24**—Inducement—Confession partly true, caused by some inducement—Duty of Judge to consider whether it could be used as evidence. *See* CONFESSION —ADMISSIBILITY OF, *supra*. **A.I.R. 1935 All. 882.**

EVIDENCE ACT (1872), S. 24—Threat.

———**S. 24**—*Inducement—Person in authority—Superior officer—Confession by subordinate officer—Validity.*

If a superior officer holds out some inducement to a subordinate and then any confessional statement is made by that subordinate, it cannot be used against him in a subsequent prosecution. Where a post office clerk begged of his superior to be saved if he disclosed everything and the latter having promised to help him, the accused made a confession,

Held, that the confession was procured by inducement held out by a person in authority. (*Rankin, C.J. and Costello, J.*) BHAGABATI CHARAN PATRA *v.* EMPEROR. **60 Cal. 719=6 I.R. (Cal) 175=145 I.C. 962=1933 Cr.C. 1054=34 Cr.L.J. 1187=A.I.R. 1933 Cal. 614.**

———**S. 24**—*Inducement or threat—A question for the Court.*

S. 24 leaves it entirely to the Court to form its opinion as to whether the inducement, threat or promise held out in any particular case was sufficient to lead the accused to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing. Where the manager of a company said to the accused who had committed the offences of embezzlement and falsification of accounts, that it would be in his interest if he made a clean breast of the whole affair and gave the substance of what he (accused) told him in writing and insisted on having something in writing from the accused the same day and the accused complied with the demand,

Held, that the manager did hold out a sort of inducement and threat to the accused and the accused had reason to believe that he would gain by making the confession. (*Rupchand and Mehta, A.J.Cs.*) EMPEROR *v.* ATJURSING. **26 S.L.R. 191=I.R. 1932 Sind 87 (2)=138 I.C. 618=33 Cr.L.J. 650=1932 Cr. C. 284=A.I.R. 1932 Sind 64.**

———**S. 24**—*Inducement or threat—Confession—Expression "you had better tell the truth."*

The expression "you had better tell the truth" has always been held to import a threat or promise unless the words are qualified in some manner. The words do not mean mere exhortation to tell the truth, for the accused had already been questioned by the police. The words are susceptible of the interpretation that the accused was told that it would be better for him if he told the truth and that amounts to an inducement. (*Currie and Abdul Rashid, JJ.*) HASMAT KHAN *v.* EMPEROR. **15 Lah 856=152 I.C. 998=36 Cr.L.J. 211=7 R.L. 348=37 P.L.R. 25=1934 Cr.C. 643=A.I.R. 1934 Lah. 417.**

———**S. 24**—*Threat—Confession—Admissibility of—Confession made under threat.*

The question whether the words used were intended to convey to the accused an inducement, etc., must depend on the surrounding circumstances, in which those words were used. The burden is on the prosecution to prove that the confession was not improperly induced. The accused was brought to *K.B.* who was a person in authority at the same place where he was encamped with the police party. *K.B.* pointed out the policemen to the accused and reminded him that the police were there and told him "you speak the truth."

Held, that although the accused may not strictly speaking have been in the custody of the police at that time, the words used by *K.B.* were not intended merely to convey a warning to the accused that he should speak

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the truth, but intended to convey to the accused that if he did not speak the truth, it will be worse for him. The Crown has not discharged the burden that the confession was not improperly induced and the extra-judicial confession should be excluded from consideration. (English Case law referred.) (*Rup Chand and Lobo, A. J.Cs*) MOR PHALAI *v.* EMPEROR. **28 S.L.R. 5 = 147 I.C. 1033 = 6 R.S. 175 = 35 Cr.L.J. 527 = 1933 Cr. C 1542 = A.I.R. 1933 Sind 409.**

No confession.

———**S. 24**—*No confession.*

A statement of a man who takes particular care at every stage to show that he did not take part in the offence does not amount to a confession. (*Harries and Kachhpal Singh, JJ.*) SHYAM LAL *v.* EMPEROR. **156 I.C. 978 = 8 R.A. 71 = 36 Cr.L.J. 1086 = 1935 A.W.R. 48 = 1935 A.Cr.C. 1.**

———**S. 24**—*No confession—Confession made under police threat—Retracted subsequently.*

A confession by an accused to a Magistrate who did not record it or administer any of the necessary warnings or adopt any of the safeguards, made after the police had threatened him and retracted at the earliest possible moment after the accused got out of the influence of the police is inadmissible and insufficient in itself to base a conviction. This confession is not a confession at all. (*Beaeley, C. J. and Bardswell, J.*) MALA PEDDAVADU *v.* EMPEROR. **1933 M.W.N. 723.**

———**S. 24**—*No confession—Making of counterfeit coin—Evidence regarding—Admissibility.*

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by S 24, 25 or 26. (*Bennet, J.*) BRIJ NANDAN *v.* EMPEROR. **I.R. 1931 All. 602 = 133 I.C. 154 = 32 Cr.L.J. 1006 = 1931 Cr.C. 9 = A.I.R. 1931 All. 9.**

———**S. 24**—*No confession—Person not in custody—Statement made—Charge made subsequently—Effect of statement.*

Where a statement made by a person who at the time was not an accused but subsequently became one, is itself in no way connects him with the crime charged, and it was tendered in evidence against him, it must be treated in the same way as if he had been an accused at the time he made it. The statement is admissible under the general rule as an admission and is in no way a confession. (*Harrison and Dalip Singh, JJ.*) ABDUL GHANI *v.* EMPEROR. **I.R. 1931 Lah. 727 = 133 I.C. 55 = 32 Cr.L.J. 985 = 1931 Cr.C. 1067 = A.I.R. 1931 Lah. 763.**

Person in authority.

See also INDUCEMENT OR THREAT.

———**S. 24**—*Person in authority—Confession made after being in police custody—Same forwarded to Police Officers—Value.*

Where the recording Magistrate handed over the confessing accused to the investigating Police Officer, who was in attendance outside his room and recorded the confession after he had been with the Police Officer for a few minutes and the Magistrate also made the confessions over to the Police Officers instead of forwarding the same to the Magistrate who may inquire into the same.

Held, that the procedure adopted was mistaken and objectionable. The mere fact that the Police Officer testifies to the voluntary nature of the statement made is not sufficient. (*Agha Haidar, J.*) INDAR DATT *v.* EMPEROR. **I.R. 1931 Lah. 557 = 132 I.C. 185 = 32**

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Cr.L.J. 818 = 1931 Cr.C. 648 = A.I.R. 1931 Lah. 408.

———**S. 24**—*Person in authority—Honorary Magistrate acting as zaildar.*

An Honorary Magistrate who is also a zaildar is a person in authority within the meaning of S. 24. (*Currie and Abdul Rashid, JJ.*) HASHMAT KHAN *v.* EMPEROR. **15 Lah. 856 = 152 I.C. 998 = 36 Cr.L.J. 211 = 7 R.L. 348 = 37 P.L.R. 25 = 1934 Cr.C. 643 = A.I.R. 1934 Lah. 417.**

———**S. 24**—*Person in authority—Meaning.*

There is no statutory definition of the words "person in authority; but it is well settled that the words have reference to a person who has authority to interfere in the matter under inquiry. The section excludes a confession procured by inducement, threat or promise having reference to the charge only when the inducement, threat or promise is sufficient to give the accused person reasonable grounds for supposing that by making it he would gain any advantage or avoid any evil in reference to the proceedings against him. When the inducement, etc., is by a person who has no power to interfere in the matter under inquiry, it is not reasonable for the accused to suppose that he will benefit by confessing Generally speaking, a "person in authority" is one who is engaged in the apprehension, detention or prosecution of the accused or one who is empowered to examine him. (*Courtney-Terrell, C. J., Scroope and Agarwala, JJ.*) SANTOKHI BELDAR *v.* EMPEROR. **12 Pat. 241 = I.R. 1933 Pat. 139 = 142 I.C. 474 = 34 Cr.L.J. 349 = 14 Pat.L.T. 82 = 1933 Cr.C. 404 = A.I.R. 1933 Pat. 149 (S.B.).**

———**S. 24**—*Person in authority—Manager of company.*

A manager of the local branch of a limited company is a person in authority within the meaning of S. 24 and confession made by a clerk in the company who is being tried for embezzlement is not admissible in evidence. 9 B. H. C. R. 358, Rel. on. (*Rupchand and Mehta, JJ.*) EMPEROR *v.* ATTURSING. **26 S.L.R. 191 = I.R. 1932 Sind 87 (2) = 138 I.C. 618 = 33 Cr.L.J. 650 = 1932 Cr.C. 284 = A.I.R. 1932 Sind 64.**

———**S. 24**—"*Person in authority*"—*Test—Mukhis.*

A person in authority must be a person who stands in such relations to the accused as to imply some power of control or interference in regard to his prosecution. The belief of an accused that that the persons to whom he made a confession were "persons in authority" is not sufficient to bring them within the term. The test is: Had the person authority to interfere with the matter? Whether a certain person is a person in authority would largely depend upon the circumstances of each particular case. Mukhis to whom confession was made by accused were held to be not persons in authority. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) BHOJO *v.* EMPEROR. **29 S.L.R. 1 = 36 Cr.L.J. 223 = 7 R.S. 106 = 152 I.C. 1032 = 1934 Cr.C. 1274 = A.I.R. 1934 Sind 172.**

———**S. 24**—*Person in authority—Zemindars connected with investigation.*

Where zemindars are directly connected with the investigation by the direction of the police and are asked to make inquiries, to get a clue as to who were the persons who had committed the offence and one of them was pursuing his investigation independently. He told the accused that he would get him a pardon from the Sub-Inspector of Police. He was in touch with the police and acting directly under their directions. A confession made before him must be discarded as there was inducement offered to the accused to make the confession and it proceeded from a person in sufficient

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authority. (*Milne, J.C. and Aston, A.J.C.*) NAWAT KAMAL *v.* EMPEROR. **I.R. 1932 Sind 81=138 I.C. 614=33 Cr.L.J. 641=1932 Cr.C. 196=A.I.R. 1932 Sind 55.**

Retracted confession.

———**S. 24**—*Retracted confession—Admissibility.*

A retracted confession is inadmissible in evidence, unless it is proved by the prosecution that it was duly made and was voluntary. (*Nanavutty and Smith, JJ.*) DAULAT RAM *v.* EMPEROR. **8 Luck 518=35 Cr L J. 10=6 I.R. (Oudh) 129=146 I.C. 465=10 O.W.N. 466=1933 Cr.C. 698=A.I.R. 1933 Oudh 315.**

———**S. 24**—*Retracted confession—Admissibility.*

No doubt a retracted confession can be admitted into evidence against the person who made it, but at the same time the Court cannot act upon such a confession, unless it is satisfied of its truth. (*Smith and Allsop, JJ.*) ITWARI *v.* EMPEROR. **147 I.C. 113=6 R.O. 226=35 Cr.L.J. 303=10 O.W.N. 923=1933 Cr.C. 1317=A.I.R. 1933 Oudh 432.**

———**S 24**—*Retracted confession—Admissibility.*

Where the confession was presumably true and made voluntarily, *held*, that it was admissible though retracted. (*Waller and Krishnan Pandalai, JJ.*) ARUNACHALA REDDI, *In re.* **55 Mad. 717=I.R. 1932 Mad. 552=138 I.C. 240=33 Cr.L.J. 586=35 L.W. 607=1932 Cr C. 504=1932 M.W.N. 614=A.I.R. 1932 Mad. 500=62 M.L J. 680.**

———**S 24**—*Retracted confession—Admissibility and value of.*

A confession made by an accused person can be used in evidence against him though retracted, provided it is true. But the Court has to be satisfied that the confession is worthy of credit. Where the confession is such that it is difficult to accept it as true, and there is also no independent evidence to corroborate it, it would be unsafe to use the confession (*Srivastava, Nanavutty and Rachhpal Singh, JJ.*) BHIKHARI *v.* EMPEROR **7 R O. 44=150 I.C 819=35 Cr.L J. 1113=11 O.W. N. 851=1934 Cr.C. 1228=A.I.R. 1934 Oudh 405.**

———**S. 24**—*Retracted confession—Conviction if can be based on.*

There is nothing in law to prevent a Court from convicting an accused person upon a confession which has been subsequently retracted, provided the Court is convinced that the statement is voluntary and true. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) RAMA *v.* GOVERNMENT OF MYSORE. **12 Mys L.J 353=39 Mys H C.R. 996.**

———**S. 24**—*Retracted confession—Corroboration.*

If it be established that the confession is a voluntary one and was not given under the influence of any inducement or promise so as to make it inadmissible under S. 24, Evidence Act, then legally a conviction could be sustained solely on it; but ordinarily a Court expects some corroboration in the case of a retracted confession, not as a requirement of the law but as an act of prudence. (*Jai Lal, J.*) MARTIN *v.* EMPEROR. **151 I.C. 924=7 R.L. 225=35 Cr.L.J. 1453=1934 Cr.C. 172=A.I.R. 1934 Lah. 89.**

———**S. 24**—*Retracted confession—Corroboration.*

Where in case of an alleged poisoning of husband by wife, the wife retracted her confession which was voluntary and various articles stained with the poison were recovered in the viscera and vomits of the deceased.

Held, there was sufficient corroboration. (*Abdul Qadir and Rangi Lal, JJ.*) MT. AISHAN BIBI *v.* EMPEROR. **15 Lah. 310=152 I C. 206=7 R.L 263=36 Cr.L J. 14=37 P.L.R 67=1934 Cr.C. 330=A.I.R. 1934 Lah 150 (2).**

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———**S. 24**—*Retracted confession—Corroboration.*

A retracted confession can no doubt be legally acted upon and made a basis of the conviction of the maker thereof, if it bears the ring of truth. But a Court of justice should by way of caution look for corroboration from independent quarters in order to be satisfied that it is true. Thus the one test of the genuineness and the truth of the confession is the corroborative evidence led by the prosecution in support of that confession and if the corroboration consists of disinterested witnesses or of such important circumstances as are sufficient in themselves to prove the connection of the accused with the crime, a Court of Law would be perfectly justified in believing the confession to be true. But if there is no corroboration at all or very little independent corroboration or if the corroboration is in such particulars only as do not connect the accused at all with the commission of the offence, then a Court in spite of the confession would be justified in giving the accused person the benefit of doubt, if he retracts the confession at the earliest possible opportunity. (*Din Mahomed, J.*) NAHNUN *v.* EMPEROR. **151 I.C. 716=7 R.L. 198=35 Cr.L J. 1390=36 P.L.R. 2=1934 Cr.C. 1025=A.I.R. 1934 Lah. 715.**

———**S. 24**—*Retracted confession—Corroboration.*

It is a rule of practice (though not of law) that a retracted confession requires corroboration. (*Ferrers, J. C and O'Sullivan, A.J.C.*) BHOJO *v.* EMPEROR. **29 S L.R. 1=36 Cr L J. 223=7 R.S. 106=152 I.C. 1032=1934 Cr.C. 1274=A.I R. 1934 Sind 172.**

———**S. 24**—*Retracted confession—Corroboration.*

Though it is not a rule of law that an accused cannot be convicted upon a confession if he has retracted it, it is very necessary as a rule to make certain before acting on it, that corroborative evidence supports the confession. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) BHABANANDA BANERJEE *v* EMPEROR. **6 I.R. (Cal.) 183=146 I.C. 186=34 Cr.L.J 1222=57 C.L J. 213=1933 Cr C. 1249=A I R. 1933 Cal 747 (S.B.).**

———**S. 24**—*Retracted confession—Evidence against co-accused.*

A retracted confession of a co-accused to the effect that he was present at the commission of a murder by his co-accused and that he himself took no part in it, cannot be used in evidence against either. (*Nanavutty and Thomas, JJ.*) CHHUTKAO *v.* EMPEROR. **153 I C. 52=7 R O 281=36 Cr L J. 246=11 O.W.N. 1540=1935 Cr.C. 75=A I.R. 1935 Oudh 33.**

———**S. 24**—*Retracted confession—Evidentiary value.*

A retracted confession must always be most carefully scrutinized and the Court should be most cautious in relying upon it. It is not cancelled out but the Court is put upon inquiry as to its value, its voluntary character and the probability of its being true. As a general rule, a retracted confession requires corroboration of some kind, although as a matter of law corroboration is not necessary at all. But the amount of corroboration which the Court will look for depends on the circumstances of the particular case and sometimes very slight corroboration will suffice. (*Murphy and Broomfield, JJ.*) EMPEROR *v.* KRISHNA BABAJI. **6 I.R. (Bom.) 39=145 I.C. 133=34 Cr.L J. 896=35 Bom.L.R. 371=1933 Cr.C. 653=A.I.R. 1933 Bom. 230.**

———**S. 24**—*Retracted confession—Evidentiary value.*

It does not necessarily follow because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, that therefore the confession is to be rejected. The credibility of such a confession is in such a case a matter to be decided by the Court,

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according to the circumstances of each particular case and if the Court is of opinion that such a confession is true, the Court is bound to act so far as the person making it is concerned upon such belief. 20 All. 133, Rel. on. (*Raza and Smith, JJ.*) NANHEY *v.* EMPEROR. **I.R. 1931 Oudh 412=134 I C. 876=33 Cr.L. J. 16=8 O.W N. 1033=1931 Cr C. 996=A.I.R. 1931 Oudh 412.**

——**S. 24**—*Retracted confession—Evidentiary value.*

A retracted confession may be used against the man who has made it; but its value as a piece of evidence against another accused is almost *nil*. Unless there is satisfactory evidence which would support the confession, no Court would be justified in basing a conviction on the strength of a retracted confession. (*Harries and Rachhpal Singh, JJ.*) SHVAM LAL *v* EMPEROR. **156 I.C. 978=8 R.A 71=36 Cr L J. 1086=1935 A.W. R. 48=1935 A.Cr C. 1.**

——**S. 24**—*Retracted confession—Evidentiary value of—Sufficiency for conviction.*

A retracted confession may form the basis of a conviction without any corroborative evidence. But every case of this kind must be decided upon its own circumstances and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with a crime, the Judge is bound to act, so far as that prisoner is concerned, on that confession, which he believes to be true. (Case-law referred.) (*Coldstream and Jai Lal, JJ.*) EMPEROR *v.* SHER SINGH. **I R 1933 Lah. 361=34 Cr.L.J. 598=34 P.L R. 704=143 I.C. 499=1933 Cr C. 632 =A.I.R. 1933 Lah 388.**

[**F.** 35 P.L.R. 349 (354). **R** 36 P L.R. 2 (4).]

——**S. 24**—*Retracted confession—Evidentiary value—Sufficiency for conviction against co accused.*

Where a confession is voluntary and true, even though it is subsequently restracted, it is sufficient in itself for the conviction of the accused making the same, even if there be no corroborative evidence in support of it, but such confession is not legally sufficient to justify the conviction of the co-accused unless it is sufficiently corroborated by other evidence. (*Nanavutty, J.*) BENI MADHO *v.* EMPEROR. **I.R 1933 Oudh 181=143 I C. 555=34 Cr.L J 595=10 O.W.N. 405=1933 Cr.C. 605=A I R. 1933 Oudh 263.**

——**S. 24**—*Retracted confession—Necessity for corroboration.*

In order that a retracted confession may be acted upon, it should be corroborated in material particulars by credible independent evidence and the confession itself must be voluntary and true. (Case-law Ref.) (*Rupchand, J.C. and Lobo, A.J.C.*) EMPEROR *v.* KHAIRMAHOMED. **6 I R (Sind) 57=146 I C. 180= 35 Cr L.J. 17=1933 Cr.C. 1043=A.I.R. 1933 Sind 313 (2).**

——**S. 24**—*Retracted confession—Necessity for corroboration.*

It is rule of prudence which requires that a retracted confession which is generally always open to suspicion shall not be acted upon to the prejudice of the accused unless it is corroborated by reliable and independent evidence to a material extent and also in material particulars. (*Barlee and Wadia, JJ.*) EMPEROR *v.* HOUSABAI. **56 Bom. 542=140 I.C. 740=I.R. 1933 Bom. 30=34 Cr.L.J. 73=34 Bom L R. 1240=1932 Cr.C. 785=A I.R. 1932 Bom. 553.**

——**S. 24**—*Retracted confession—If sufficient basis for conviction.*

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When a grown up man in the full possession of his senses chooses to confess his crime, he could be legally convicted on his own confession, even if it be subsequently retracted. (*Nanavutty and Zia-ul-Hasan, JJ.*) MATHURA *v.* EMPEROR. **155 I.C. 527=7 R.O. 602 =36 Cr.L.J. 767=1935 O.W.N. 561=1935 Cr.C. 791=A.I.R. 1935 Oudh 354.**

——**S. 24**—*Retracted-confession — Recording by Magistrate—Statement by accused that he made it voluntarily—Value.*

Where a Magistrate before recording the confession of an accused takes every precaution to protect his interests, namely, warns him against the risk that he was going to incur in making a confession and obtains from him a clear statement that he had not been put in fear or received any inducement and then the accused makes a deliberate confession of the crime, the confession, though subsequently retracted, in the absence of proof that it was forced out of the accused by torture or of a satisfactory explanation as to how he came to make it, if he was not guilty, is admissible in evidence. (*Raza and Bisheshwar Nath, JJ.*) DURGA *v.* EMPEROR. **I.R. 1931 Oudh 230=132 I.C. 70=32 Cr L.J. 830=14 O L.J. 303=8 O.W.N. 247.**

——**S. 24**—*Retracted confession — Sufficiency for conviction.*

If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. (*Pullan and Niamatullah, JJ.*) NASIR *v.* EMPEROR. **55 All. 91=I.R. 1933 All. 170=143 I.C. 67 =34 Cr.L J. 489=13 L.R. 157 (Cr.)=1933 Cr.C. 42 =1933 A L J. 1125=A.I.R. 1933 All. 31.**

——**S. 24**—*Retracted confession — Sufficiency for conviction.*

The retracted confession of an accused, if voluntary and true, should be acted upon by the Court and so far as the accused making the same is concerned, is sufficient for his conviction. 9 O.W.N. 96, Foll. (*Raza and Bisheshwar Nath, JJ.*) EMPEROR *v.* PARAGI. **I.R. 1932 Oudh 391=139 I.C. 756=38 Cr. L.J. 929=9 O.W.N. 321.**

——**S. 24**—*Retracted confession — Sufficiency for conviction.*

The retracted confession of an accused, if true, is sufficient for the conviction of the accused, even if there is no corroborative evidence. (*Raza and Bisheshwar Nath, JJ.*) MUSAHEB ALI *v.* EMPEROR. **I R. 1932 Oudh 253 (2)=137 I C. 665=33 Cr.L.J. 502=9 O. W N. 327=1932 Cr C. 876=A.I.R 1932 Oudh 321.**

——**S. 24**—*Retracted confession — Sufficiency for conviction.*

It is well settled, that a Court may convict an accused person on his own uncorroborated confession which has subsequently been retracted, provided that the Court is satisfied that the confession was made voluntarily and that it is true in fact. But, the Court is bound to take into consideration, the confession as a whole and not only a part of it. (*Ferrers, J.C. and Rupchand, A.J.C.*) KHIMJI KHETSI *v.* EMPEROR. **8 R S, 20= 156 I.C. 972=16 Cr.L.J. 1037.**

——**S. 24**—*Retracted confession — Sufficiency for conviction.*

If the Court is of opinion that a confession made by the accused but subsequently retracted by him is true, it is bound to act upon such belief, so far as the person making the confession is concerned. A conviction is not therefore bad for the reason that it is based on such a confession. (*Mahadevayya, O. C. J. and Ramachandra Rao. J.*) CHINNAGA *v.* GOVERNMENT OF MYSORE. **11 Mys.L.J. 407=39 Mys.H.C.R. 550.**

EVIDENCE ACT (1872), S. 24—Retracted confession.

———**S. 24**—*Retracted confession — Sufficiency for conviction.*

A Court is at liberty to base a conviction on the retracted confession of the accused, if it thinks, that it has a ring of truth about it. But it should be very slow to base a conviction upon such a confession, which is not corroborated by any other satisfactory evidence, which does not impress the Court and which does not explain any strong motive for the crime. (*Nanavutty and Rachhpal Singh, JJ.*) IMAMUDDIN *v.* EMPEROR. **10 Luck. 131=7 R.O. 70=150 I C. 862=35 Cr L J. 1154=11 O.W N. 950=1934 Cr.C. 1199=A.I R. 1934 Oudh 388.**

———**S. 24**—*Retracted confession — Sufficiency to base conviction—Voluntary nature—Presumption.*

If a retracted confession bears the stamp of truth, the Court may base a conviction on the strength of it, but the greatest caution is necessary in such cases. When a confession is made by an accused person after he has been given an opportunity to think over this position, the Court may draw the presumption that it was voluntarily made. But that does not relieve the Court from its duty of carefully considering the nature of the confession and the value to be attached to it. It should very carefully scrutinize the confession and then decide for itself whether it is reliable and trustworthy When the Court finds that the confession is not true, and is made with the sole object of implicating others without any intention to implicate himself, it cannot be acted upon by the Court and a conviction cannot be based on it. (*Rachhpal Singh and Thomas, JJ.*) SHEORATAN *v.* EMPEROR. **10 Luck. 151=7 R O. 109=35 Cr.L. J. 1290=151 I.C 298=11 O W.N. 1012=1934 Cr C. 1279=A.I.R. 1934 Oudh 418.**

———**S. 24**—*Retracted confession—Value.*

Where a confession is neither voluntary nor true and is subsequently retracted, it is not sufficient for the conviction of the maker especially on a capital charge of murder. (*Srivastava and Nanavutty, JJ.*) GHIRRAO *v.* EMPEROR. **6 I.R. (Oudh) 53 145 I.C 470=34 Cr.L J. 1009=10 O.W.N. 1108—1933 Cr C. 592=A.I.R. 1933 Oudh 265.**

———**S. 24**—*Retracted confession—Value of.*

Where a confession of the accused is confused in its composition and shows intrinsically that it is not a confession imposed on him by a Police Officer anxious to obtain evidence against the accused or other person and he does not allege that the confession was extorted from him by torture, it can be relied on so far his own actions on the date in question are concerned, even though it was retracted and there is no other evidence against him except his own confession. (*Dalip Singh and Currie, JJ.*) JAHANGIRI LAL *v.* EMPEROR. **7 R.L. 58=150 I.C. 1056=35 Cr.L J. 1180=1935 Cr.C. 396=A.I.R. 1935 Lah. 230.**

———**S. 24**—*Retracted confession—Value of.*

There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that the confession is retracted; nor is it an inflexible rule, that a retracted confession cannot be accepted as evidence of guilt without independent corroboration. The use to be made of it is a matter rather of prudence than of law. (Case-law ref.) (*Makadevayya and Ramachandra Rao, JJ.*) GOVERNMENT OF MYSORE *v.* BASAPPA GOWDA. **10 Mys.L.J 304.**

———**S. 24**—*Retracted confession—Value of.*

A retracted confession is of very little evidentiary value and before it is acted upon, a Court of justice must be satisfied that it is corroborated by other reliable evidence. (*Shadi Lal, C.J. and Agha Haidar, J.*) SHANGARA RAM *v.* EMPEROR. **I.R. 1932 Lah. 695=140 I.C. 194=33 Cr.L.J. 935=33 P.L.R. 691=1932 Cr. C. 721=A.I.R. 1932 Lah. 557.**

EVIDENCE ACT (1872), S. 24—Scope.

———**S. 24**—*Retracted confession—Value of.*

The fact that the accused was in police custody before and after making the confession and that as soon as he was produced before the committing Magistrate he availed himself of the very first opportunity he had, to retract the confession is a circumstance which considerably discounts the value of the confession. (*Raza and Bishesh-war Nath, JJ*) EMPEROR *v.* MAQBOOL AHMAD KHAN. **7 Luck. 511=I.R. 1932 Oudh 383=139 I. C. 751=33 Cr.L.J. 920=9 O.W.N. 3=1932 Cr.C. 872=A.I.R. 1932 Oudh 317.**

———**S. 24**—*Retracted confession—Value of.*

The evidentiary value of a retracted contession is very little and it is a rule of practice, as also a rule of prudence, that it is not safe to act on a retracted confession of an accused person, unless it is corroborated in material particulars. (*Mears, C.J. and Sen, J.*) EMPEROR *v.* SHAMBHU. **54 All. 350=I R. 1932 All. 102=135 I.C. 838=1932 A.L.J. 162=33 Cr.L J. 201=13 L.R. 48 (Cr.)=1932 Cr.C. 226=A.I R. 1932 All. 228.**

[**R.** 36 P.L.R. 2 (3, 4); 10 Luck. 150 (160).]

———**S. 24**—*Retracted confession—Value of—Sufficiency for conviction.*

The retracted confession of an accused, where there is nothing to show it was other than voluntary and true, can be acted upon by the Court and is sufficient for the conviction of the accused making it. (*Raza and Kisch, JJ*) EMPEROR *v.* RAM SAHAI. **I R. 1932 Oudh 381=139 I C. 736=33 Cr L J. 812=9 O.W N. 96=1932 Cr C. 188=A.I.R. 1932 Oudh 115.**

[**R.** 9 O.W.N. 321 (325).]

Scope.

———**Ss 24, 25, 26 and 27**—*Scope—Discovery of articles—Statement leading to—Admissibility.*

The protection given to an accused person by Ss. 24, 25 and 26 of the Evidence Act should not be dependent upon the ingenuity of the Police Officer or the folly of the accused in composing the sentence which contains the information. Under cover of S. 27, Court should not allow the discovery of ordinary articles like lathis, knives and clothes, to be introduced so as to admit what are practically confessions to the police. The discovery referred to ought to be of a fact which is directly connected with the crime apart from the statement itself. (*Pollock, A.J.C.*) PHULUA *v.* EMPEROR. **31 N.L.R. 256=161 I.C. 8=37 Cr.L.J. 460=8 R N. 207=18 N. L.J. 116=1936 Cr C. 130=A.I.R. 1936 Nag. 23.**

———**S. 25**—*Chaukidar—Confession made to private individual in presence of—Admissibility of.*

Although a chaukidar is a Police Officer within the meaning of S. 25 a confession made to private individual in his presence is admissible, where it is not shown that the chaukidar has in any way influenced the accused who is not in custody, to make a confession and where he (chaukidar) has taken no part in bringing about the confession of the accused. (*Nanavutty and Smith, JJ.*) EMPEROR *v.* SHANKAR. **6 R.O. 514=149 I.C. 69=1934 Cr.C. 673=35 Cr.L.J 894=11 O.W.N. 636=A.I R. 1934 Oudh 222.**

———**S. 25**—*Chaukidar—Confession to—Admissibility.*

A confession to a chaukidar is not a confession to a policeman within the meaning of S. 25. (*Young and Collister, JJ.*) GHUNNAI *v.* EMPEROR. **6 R A. 530=147 I.C. 630=35 Cr L.J. 448=1934 A L.J. 143=3 A.W.R. 419=1934 Cr.C. 190=A.I.R. 1934 All. 132.**

———**S. 25**—*Confession made by accused during investigation under S. 174 Cr. P. Code—Admissibility.*

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The confession under S. 25 need not be a confession of the crime which the Police Officer is at the moment investigating. If *A* says to a Police Officer 'I noticed *B* murdering *X* while I was murdering *Z*,' his confession that he murdered *Z* cannot be proved. (*Jackson, J.*) KODANGI *v.* EMPEROR. **135 I.C. 590 (1)=33 Cr.L.J. 173=I.R. 1932 Mad. 174 (1)=1931 M.W.N. 1138=34 L.W. 858=1932 Cr C. 4=A I R. 1932 Mad. 24=61 M.L.J. 860.**

———**S. 25** —*Confession made to crowd of people—Policeman as one of crowd—Validity of confession.*

Even if a policeman happens to be a member of a crowd of villagers and a confession was made to the villagers at large, the mere fact that a policeman happened to be present in the crowd would not make the confession inadmissible in evidence. (*Young and Collister, JJ.*) GHUNNAI *v.* EMPEROR. **6 R A. 530=147 I.C. 630=35 Cr.L.J. 448=1934 A.L.J. 143=3 A.W.R. 419=1934 Cr.C. 190—A.I R. 1934 All. 132.**

———**S. 25**—*Confession made to* mukhia —*Admissibility.*

A *mukhia* is not a Police Officer for the purpose of S. 25 of the Evidence Act and a confession made to him is not barred by that section. (*Bennet, J.*) RAM CHARAN *v.* EMPEROR. **155 I C. 119=7 R.A. 894=36 Cr L.J. 636 1935 A.L.J. 478=16 L.R. 34 (Cr.)=1935 A. Cr.C. 92=1935 A.W.R. 388—1935 Cr.C. 567=A.I R. 1935 All. 549**

———**S 25**—"*Confession*"—*Every statement to police is not.*

Every statement made to the police by an accused person is not a confession and statements which are not of an incriminating nature are admissible. (*Ferrers, J. C. and Aston, A.J.C.*) MISRI *v.* EMPEROR. **151 I C. 437 =7 R S 52—35 Cr L.J. 1332=1934 Cr C. 825=A I.R. 1934 Sind 100.**

———**S. 25**—*Confession—First information by accused to police—Admission of guilt in—Admissibility.*

If the first information of an offence is given by the accused to a Police Officer, and that information admits his own guilt, it is 'confession', which cannot be proved under S. 25 of the Evidence Act. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* HARNAM KISHA. **59 Bom. 120=154 I.C. 621=7 R B. 353—36 Cr.L J. 539=36 Bom.L.R. 1117=1935 Cr. C. 27—A.I.R. 1935 Bom. 26.**

———**S. 25**—*Confession to lambardar and sufedposh—Admissibility.*

An extra-judicial confession made by the accused to a lambardar and a sufedposh cannot be admitted in evidence (*Shadi Lal, C.J. and Hilton, J.*) MUSTAFA *v.* EMPEROR. **153 I.C 203=7 R.L. 399 (1)—36 Cr.L. J. 304—35 P.L.R. 359.**

———**Ss 25 and 27**—*Confession by accused to police—Admissibility.*

An admission by the accused to the police in case of theft must be disregarded, unless property is recovered as a result of such confession. (*Grille, Offg. J.C.*) EMPEROR *v.* BHUJBAL. **160 I C. 413—37 Cr.L J. 292=8 R.N. 186 (2)=18 N.L J. 140.**

———**S. 25**—*Confession to police by person subsequently accused—Admissibility of.*

The statement of witnesses to the police in the course of an investigation can only be used for only one purpose, *i.e.*, as mentioned in the provisos to S. 162, Cr. P. Code. They cannot be used as evidence in order to convict the author of that statement. In order to amount to a confession within the meaning of S. 25 of the Evidence Act, it is not necessary that it should embody a direct or unequivocal admission of guilt. Nor is it necessary that definite accusation should have been formulated or pending against the person concerned at the time of his making the statement. The fact that the statement was made in the course of the investigation which led to his being subsequently accused of an offence is enough to bring the matter under S. 25. The test is the position of the person when it is proposed to prove the admission, not his position at the time when he is alleged to have made it. A confession made to a Police Officer is, therefore, absolutely inadmissible in evidence without any limitation or qualification. (*Mahadevayya, J.*) RUDRAPPA *v.* GOVERNMENT OF MYSORE. **11 Mys.L J. 438.**

———**Ss. 25 and 26**—"*Confession*"—*Writings taken down for comparison.*

Writings taken down from the accused by the police during investigation for purpose of comparison with that on a disputed document are not "confessions" within the meaning of Ss. 25 and 26. (*Wadia, J.*) EMPEROR *v.* RAMRAO MANGESH. **56 Bom. 304=I.R. 1932 Bom. 423=138 I C. 708—33 Cr.L J. 666=34 Bom.L.R. 598=1932 Cr C 572=A I.R.1932 Bom. 406.**

———**S. 25**—*Excise Inspector—Confession made before—Admissibility.*

S. 25 was intended to apply to Police Officers and Police Officers alone and not to persons who are provisionally and for a limited purpose only invested with some of the powers of Police Officers. A confession made before an Excise Inspector who under the Dangerous Drugs Act (II of 1930) not only has the power to arrest and search but has also been invested by the Local Government with the powers of an officer in charge of a police station for the investigation of an offence under that particular Act is admissible in evidence. (Case-law discussed) (*Courtney-Terrell, C.J., Fazl Ali and Agarwala, JJ.*) RADHA KISHUN-MARWARI *v.* EMPEROR. **12 Pat. 46=34 Cr L J. 1=I.R. 1932 Pat. 299=140 I C. 283=13 Pat.L.T. 627 =1932 Cr.C. 765=A.I.R. 1932 Pat. 293 (S B.).**

———**S. 25**—*Excise Inspector—Confession made to—Admissibility.*

An Excise Inspector is a 'Police Officer' for purposes of S. 25 of the Evidence Act and an admission of guilt made before the Excise Officer is not, on principle, distinguishable from a similar statement made before a Police Officer. It comes within the spirit of S. 25 and is inadmissible in evidence against the accused. 51 B. 18, Foll. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) CHANNAPPA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 74.**

———**S. 25**—*Excise Inspector—Police Officer.*

An Excise Inspector is not a Police Officer within the meaning of S. 25 of the Evidence Act and a confession made to him is admissible in evidence. 35 C.W.N. 601, Not Foll. (*C. C. Ghose, A.C.J. and Pearson, J.*) MATILAL KALOWAR *v.* EMPEROR. **I.R. 1932 Cal. 706 (1) =140 I.C. 257=34 Cr.L J. 21=36 C.W.N. 163=1932 Cr.C. 107=A.I.R. 1932 Cal. 122.**

———**S. 25**—*Excise Inspector—Statement made to—Presence of Police Officer—Effect.*

Where it appeared that the Excise Inspector put some questions to the accused and that the latter made an admission of guilt in his statement.

Held, that the admission did not amount to a confession made to a Police Officer, even though Police Officers were also present at the time it was made. (*Sundaram Chetty, J.*) MAHALAKSHMAYYA *v.* EMPEROR. **1932 M.W.N. 453.**

———**Ss. 25 and 155**—*Excise Officer—Confession of accomplice to—Maker examined as witness—Use of confession to impeach his credit.*

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A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and *a fortiori* that it is inadmissible as a piece of substantive evidence in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court, under the provisions of S. 155. (*Patterson and Guha, JJ.*) KERATALI *v.* EMPEROR. **61 Cal. 967=150 I.C. 980 (2)=7 R.C. 49=35 Cr.L.J. 1178=38 C.W.N. 1005=1934 Cr.C. 905=A.I.R. 1934 Cal. 616.**

———**S. 25**—*Excise Officer—Police Officer.*

Per *Full Bench: Costello, J., dissenting.*—An Excise Officer, who, in the conduct of investigation of an offence against the Excise, exercises the powers conferred by the Code of Criminal Procedure upon an officer in charge of a Police Station for the investigation of a cognizable offence, is a Police Officer within the meaning of S. 25, Evidence Act. The legislature in using the term "Police Officer" in S. 25 did not intend to exclude from its meaning Excise Officers exercising powers of detection and investigation of crimes committed against Excise Laws. (Case-law discussed.) (*Mukerji, Costello, Mallik, Jack and S. K. Ghose, JJ.*) AMIN SHARIFF *v.* EMPEROR. **61 Cal. 607=7 R.C. 9=150 I.C. 561 (2)=35 Cr.L.J. 1071=59 C.L.J. 555=38 C.W.N. 930=1934 Cr.C. 841=A.I.R. 1934 Cal. 580 (F.B.).**

———**S. 25**—*Excise Officer, if Police Officer.*

Officers of the Excise Department are Police Officers for the purpose of S. 25. (*Gruer, A. J. C.*) RAMKARAN SINGH *v.* EMPEROR. **154 I.C. 341=7 R.N. 161=36 Cr.L.J. 511=1935 Cr.C. 80=A.I.R. 1935 Nag. 13.**

———**S. 25**—*Excise Officer—Statement made to—Admissibility.*

Per *Obiter.*—By virtue of the special powers conferred under the Bengal Excise Act, an Excise Officer is a Police Officer within the meaning of S. 25 and a confession made to him is inadmissible in evidence. (*Lort Williams and S. K. Ghose, JJ.*) IBRAHIM AHMED *v.* EMPEROR. **58 Cal. 1260=131 I.C. 113=32 Cr.L.J. 640=1931 Cr.C. 414=35 C.W.N. 601=A.I.R. 1931 Cal. 350.**

[Rel. 1935 N. 13 (14).]

———**S. 25**—*Excise Sub-Inspector—Admission to—Admissibility.*

An admission of the accused to the Excise Sub-Inspector is inadmissible under S. 25. (*Staples, A. J. C.*) RAJMAL OSWAL *v.* EMPEROR. **150 I.C. 1144=7 R.N. 51 (1)=35 Cr.L.J. 1233=1934 Cr.C. 568 (2)=A.I.R. 1934 Nag. 136.**

———**S. 25**—*No confession — Evidence regarding making of counterfeit coin—Admissibility.*

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by S. 24, 25 or 26. (*Bennet, J.*) BRIJ NANDAN *v.* EMPEROR. **I.R. 1931 All. 602=133 I.C. 154=32 Cr.L.J. 1006=1931 Cr.C. 9=A.I.R. 1931 All. 9.**

———**S. 25**—"*Police Officer.*"

The term "Police Officer" has not been defined anywhere but there can be no doubt that S. 1, Police Act, is not exhaustive and the term is wide enough to include not only the persons enrolled under the Police Act, but also such persons as the Police Officers of the Indian States and possibly a police patel of the Bombay Presidency. The term "Police Officer" should not be read in any strict technical sense but in its more popular and comprehensive meaning, which connotes nothing more or less than a "member of the police force." 1 Cal. 207, Rel. on. (*Courtney-Terrell, C.J., and Fazl Ali and Agarwala, JJ.*) RADHA KISHUN MARWARI *v.* EMPEROR. **12 Pat. 46=34 Cr.L.J. 1=I.R. 1932 Pat. 299=140 I.C. 283=13 Pat.L.T. 627=1932 Cr.C. 765=A.I.R. 1932 Pat 293 (S.B.).**

[Cons. 61 C. 607 (620, 645, 652, 659) (F.B.). **R.** 1934 P. 256 (257).]

———**S. 25**—*Police Officer—Political Muharrir Oghi.*

A political Muharrir Oghi is a Police Officer within the meaning of S. 25 and hence no statement made before him by an accused person by way of confession is admissible in evidence. (*Fraser, J.C. and Saadudin, A.J.C.*) ABDUL HAMID *v.* EMPEROR. **I.R. 1933 Pesh. 34=144 I.C. 160=34 Cr.L.J. 804=1933 Cr.C. 589=A.I.R. 1933 Pesh 38.**

———**S. 25**—"*Police Officer*"—*Sub-Divisional Magistrate is not.*

The term "Police Officer" has not been defined anywhere and must be taken not in any technical sense but in its more popular meaning. Hence in common parlance and among the generality of people, a Sub-Divisional Magistrate cannot be taken to be a Police Officer. He is a member not of the Police Service but of the Provincial Civil Service, and much of his work is judicial. (*Courtney-Terrell, C. J. and Dhavle, J.*) SRIKANT DAS *v.* EMPEROR. **150 I.C. 991=7R.P. 49=35 Cr.L.J. 1217=1934 Cr.C. 526=A.I.R. 1934 Pat. 256.**

———**S. 25**—*Recording of confession—Partial record—Propriety.*

Where the accused, after murdering his wife, ran to the police station and made a statement confessing his guilt and the lower Court recorded that statement up to the point where the accused said he cut his wife, omitting that portion as inadmissible under the statute,

Held, the proper course for the Court would have been not to have recorded the statement at all. "This case brings out very clearly the absurdity of the statutory slur under which Judges labour in this country. The statute in effect lays down that a Judge is incapable of appraising the worth of a confessional statement made to the police—a function which in every other civilised country is left to the judiciary." (*Jackson and Cornish, JJ.*) GURUSWAMY CHETTY *v.* EMPEROR. **1931 M.W.N. 725.**

———**S. 25**—*Recording of confession—Safeguards under S. 162, Cr. P. Code, not followed—Evidentiary value of confession.*

A confession recorded by an Excise Officer without the safeguard that are prescribed by S. 162, Cr.P. Code, is not of much evidentiary value. (*Lort Williams and S.K. Ghose, JJ.*) IBRAHIM AHMED *v.* EMPEROR. **58 Cal. 1260=131 I.C. 113=32 Cr.L.J. 640=35 C.W.N. 601=1931 Cr.C. 414=A.I.R. 1931 Cal. 350.**

———**S. 25**—*Report by accused at police station containing confession—Admissibility.*

Accused made a report at the police station that he had killed the deceased. The prosecution relied on this for his conviction.

Held, that the test for deciding whether the report is or is not admissible in evidence is whether it is or is not in the nature of a confession, *i.e.*, whether it supports any inference as to the guilt of the appellant and is relied upon as such, and that as it was relied upon by the prosecution as an admission of the very criminal act with which the appellant was charged and

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for no other purpose it must be held to be inadmissible in evidence. (Case-law discussed). (*Bhide and Currie, JJ.*) GODHA WARYAM *v.* EMPEROR. **6 I.R. (Lah.) 260 = 146 I.C. 648 = 35 Cr.L.J. 143 = 34 P.L.R 1000 = 1933 Cr.C. 1287 = A.I.R 1933 Lah. 899.**

——**Ss. 25 and 30**—*Scope.*

Statement of an accused made at the police station against the co-accused is inadmissible and cannot be used as evidence as against the co accused. (*Jai Lal, J.*) KALA SINGH *v.* EMPEROR. **6 I.R. (Lah.) 159 = 146 I.C. 27 = 34 Cr.L.J. 1175 (2) = 34 P.L.R. 259 = 1933 Cr.C. 312 = A.I.R. 1933 Lah. 167.**

——**S. 26**—*Chaukidar—Extra judicial confession—Statement before village chaukidar—Admissibility.*

Under S. 26 only if the confessing accused is not in the custody of the police can any confession made by him to any third person be admissible in evidence. Where the evidence of the prosecution witnesses went to prove that the extra judicial confession itself showed that the accused was in the custody of the village chaukidar when he admitted his guilt before certain villagers.

Held, that the confession was not admissible in evidence. (*Bisheshwar Nath and Nanavutty, JJ.*) EMPEROR *v.* PANCHAM. **8 Luck. 410 = I.R. 1933 Oudh 208 = 143 I.C 846 = 34 Cr.L.J. 653 = 10 O.W.N. 348 = 1933 Cr.C. 379 = A.I.R. 1933 Oudh 192.**

[D. 11 O W.N. 636 (644)]

——**S. 26**—*Chaukidar—Police Officer.*

A chaukidar is held to be a Police Officer; hence a confession to him by accused after arrest by the former is irrelevant. (*Srivastava and Allsop, JJ.*) JANGLI *v.* EMPEROR. **6 R.O. 384 = 148 I.C. 475 = 35 Cr.L.J. 664 = 11 O.W.N. 119 = 1934 Cr C. 99 = A.I.R. 1934 Oudh 19.**

——**S. 26**—*Confession to Honorary Magistrate—Admissibility.*

In the Punjab, Honorary Magistrates exercise their powers under Cr. P. Code and a confession made to such persons, is hit at by S. 26. (*Currie and Abdul Rashid, JJ.*) HASHMAT KHAN *v.* EMPEROR. **15 Lah. 856 = 152 I C. 998 = 36 Cr.L J. 211 = 7 R.L 348 = 37 P.L.R. 25 = 1934 Cr.C. 643 = A.I.R. 1934 Lah. 417.**

——**S. 26**—*Confession made to persons taking part in investigation—Contradictory and discrepant statement by such persons.*

Accused confessed his guilt to some persons who were taking part in the investigation; but they were not able to give out the exact confession made by the accused and their evidence was contradictory and discrepant,

Held, that even if the confession was legally admissible and not barred by S. 26, Evidence Act, it would not be safe to base a conviction on such confession, and that as a rule of judicial prudence, it should be corroborated.

Held, further, that the mere existence of a slight motive was not sufficient corroboration. (*Harrison and Dalip Singh, JJ.*) ALLAH DITTA *v.* EMPEROR. **6 R.L. 514 = 148 I.C. 205 = 35 Cr.L J. 623 = 35 P.L R. 335 = 1934 Cr.C. 21 = A.I.R. 1934 Lah. 8.**

——**S 26**—Confession—Mere presence of Magistrate—Accused under arrest and in the hands of Police Officers—No enquiry as to circumstances under which it is made—Inadmissible as evidence. *See* EVIDENCE ACT, SS. 24 AND 26. **A I R. 1935 Mad. 479.**

——**S. 26**—*Confession—Statement at the dock—Admissibility.*

A statement made by the accused at the dock before the Magistrate, if it amounts to a clear confession is certainly admissible in evidence against the accused; its value is not discounted by the fact that the accused was

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at that time in the custody of the police. (*Wallace and Jackson, JJ.*) CROWN PROSECUTOR *v.* PAKRISWAMI. **1930 M.W.N. 1249.**

——**S. 26**—*Confession made to Sub-Magistrate—Presence of policeman—Admissibility.*

Where the accused has made a statement to the Sub-Magistrate confessing his guilt and there was no irregularity in the manner of taking the confession, the mere fact that a policeman in charge of the sub jail who was not one of the investigating police was also present at the time of the interview does not make the confession inadmissible. (*Jackson and Cornish, JJ.*) RAYALUGADU *v.* EMPEROR. **1931 M.W.N. 723.**

——**S 26**—*Custody—Meaning.*

There must be two things in order to amount to "custody". First, there must be some limitation imposed upon the liberty of the confessor. Second, such limitation must be imposed either directly or indirectly by the police. The crucial test is whether at the time when a person makes an extra judicial confession he is a free man or his movements are controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. (*Ferrers, J. C. and Mehta, A J.C.*) PHARHO *v.* EMPEROR. **26 S L R 302 = 141 I.C. 392 (2) = 34 Cr.L.J. 147 = I.R. 1933 Sind 49 = 1932 Cr.C. 810 = A.I.R. 1932 Sind 201.**

——**S. 26**—*'Custody'—Meaning—Accused entrusted to* mashirs *during investigation—Confession to* mashirs *—Admissibility.*

The Sub Inspector of Police handed over the accused to the custody of certain *mashirs* with instructions that they should not be allowed to escape and also with instructions to ascertain from the accused the facts of the case. They were under close supervision under police instructions.

Held, that confessions made by the accused to the *mashirs* at that stage should be left out of account as having been made while under police custody. Test as to 'custody' laid down. (*Milne, J. C. and Rupchand A.J.C.*) HAROON *v.* EMPEROR. **141 I C. 215 = I.R. 1933 Sind 33 (2) = 34 Cr.L.J 129 = 26 S.L.R. 1 = 1932 Cr.C. 685 = A.I.R. 1932 Sind 149.**

——**S. 26**—*Inducement—When vitiates confession.*

Under S. 26 a bare possibility of an inducement having been offered is not sufficient ground for holding that a confession is irrelevant. It is only when it appears to the Court that the confession has been made as a result of some inducement held out by a person in authority that it becomes irrelevant. (*Currie and Abdul Rashid, JJ.*) HASHMAT KHAN *v.* EMPEROR. **15 Lah. 856 = 36 Cr.L.J. 211 = 7 R.L 348 = 37 P.L. R. 25 = 152 I.C. 998 = 1934 Cr.C. 643 = A.I.R. 1934 Lah. 417.**

——**S. 26**—*"Magistrate"—If includes one in Native State.*

There is no reason to believe that S. 26, Evidence Act, does not include a Magistrate in a Native State. A Magistrate in a Native State is an officer who would come within the definition of "Magistsate" in the General Clauses Act, S. 3 (31). (*Ferrers, J. C. and Aston, A.J.C.*) MAHOMED BUX *v.* EMPEROR. **151 I. C. 311 (2) = 7 R.S. 50 = 35 Cr.L.J. 1328 = 1934 Cr.C. 828 = A.I.R. 1934 Sind 103.**

——**S. 26**—*Magistrate, Third Class, of Indian State—Confession made before—Admissibility of.*

Where every other formality under S. 164, in respect of a confession is complied with, the mere fact that the Magistrate before whom the confession was made was only a Magistrate of Third Class of an Indian State does not make it inadmissible in evidence. The officer

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before whom the confession is made is a Magistrate within the meaning of S. 26, Evidence Act; and Magistrates of foreign nationality are not excluded from the scope of Cr. P. Code. A.I.R. 1929 Mad. 487 and 22 Bom. 235, Foll. (*Young and Bennet, JJ.*) EMPEROR *v.* HULASI. **I.R. 1933 All. 392=144 I.C. 157=34 Cr.L J. 704=1933 Cr C. 488=A.I.R. 1933 All. 286.**

———**S. 26**—*No confession—Making of counterfeit coin—Evidence regarding—Admissibility.*

A confession is an admission by an accused person in a criminal case. The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by S. 24, 25 or 26. (*Bennet, J.*) BRIJ NANDAN *v.* EMPEROR. **I.R. 1931 All. 602=133 I.C 154=32 Cr.L J. 1006=1931 Cr.C. 9=A I.R. 1931 All. 9.**

———**S. 26**—*Oral confession before Honorary Magistrate—Admissibility.*

An oral confession made before an Honorary Magistrate is admissible under S. 26, Evidence Act, even though it has not been recorded according to S. 164, Cr. P. Code. (*Bhide and Currie, JJ.*) ALLAH BAKHSH *v.* EMPEROR. **6 I.R. (Lah) 313=146 I C. 1061=35 Cr.L J. 288=35 P.L.R. 115=1933 Cr.C. 1411=A.I.R. 1933 Lah. 956.**

———**S. 26**—*Oral confession to Magistrate—Admissibility.*

The oral confession to a Magistrate would clearly be admissible in evidence under the provisions of S. 26, Evidence Act, and cannot be affected by the provisions of S. 164, Cr. P. Code, which refer only to confessions which are recorded, and not to oral confessions. (*Smith and Allsop, JJ.*) ITWARI *v.* EMPEROR. **147 I C. 113=35 Cr L.J. 303=6 R.O. 226=10 O.W.N. 923=1933 Cr C. 1317=A.I.R. 1933 Oudh 432.**

———**S 26**—*Oral confession made to Magistrate while in police custody—Admissibility of.*

The only condition on which S. 26 insists is that a confessional statement made by an accused person while in police custody should be made in the presence of a Magistrate. Where a Magistrate, to whom certain oral confessions were made by the accused, did prepare a memorandum of what was stated to him by the accused in order to help him to remember the things said to him, if he has to prove confession orally made to him, even though the confession was not recorded as such.

Held, that the oral confession was admissible under S. 26. (*Abdul Qadir and Monroe, JJ.*) RAM SINGH *v.* EMPEROR. **6 I.R. (Lah.) 155 (2)=145 I.C. 1029=34 Cr L.J. 1164=34 P.L.R. 896=1933 Cr.C. 772 (2)=A.I.R. 1933 Lah. 513 (2).**

———**S. 26**—*Oral confession to Magistrate soon after arrest—Admissibility.*

An oral confession made to a Magistrate soon after arrest when the police could scarcely have any opportunity to bring pressure upon the accused is admissible in evidence under S. 26. (*Bhide and Currie, JJ.*) MATI RAM BHOJA RAM *v.* EMPEROR. **147 I.C. 692=6 R.L 423=35 Cr.L.J. 455=35 P.L.R. 201=1933 Cr.C. 1513=A.I R. 1933 Lah. 998.**

———**S. 26**—*Oral confession made to Magistrate—Validity.*

If a confession is made to a Magistrate himself, then that confession is obviously made "in the immediate presence of the Magistrate" and the requirements of S. 26 are satisfied. (*King and Baipai, JJ.*) SIDHESHWAR NATH *v.* EMPEROR. **56 All. 730=1934 A.L J. 178=152 I.C. 174=7 R.A. 280=36 Cr.L J. 45=3 A.W.R. 459=1934 Cr.C. 421=A.I.R. 1934 All. 351.**

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———**S. 26**—*Oral confession—Proof.*

Oral confessions made to the Magistrate can be proved under S. 26. A I. R. 1930 Lah. 534, Foll. (*Bhide and Currie, JJ.*) SUCHA SINGH *v.* EMPEROR. **142 I C 699 (2)=I.R. 1933 Lah. 241=34 Cr.L J. 379=34 P.L.R. 405=1932 Cr.C. 626=A.I R. 1932 Lah 488.**

[R. 35 P L.R. 201 (202).]

———**S. 26**—*Police investigation—Magistrate present—Evidence of Magistrate—Admissibility.*

Where a Magistrate simply accompanies a police Officer while the Police Officer is making the investigation, the evidence of the Magistrate as to what happened is not admissible under S. 26 (*Niamatullah and Bennet, JJ.*) MT. GAJRANI *v.* EMPEROR. **I R. 1933 All. 414=144 I.C. 357=34 Cr.L J. 754=14 L.R. 162 (Cr.)=1933 A.L.J. 1617=1933 Cr.C. 664=A.I. R. 1933 All. 394.**

———**S. 26**—*'Police Officer'—Confession to fellow prisoners—Presence of policeman guarding lock-up.*

Where the accused in judicial lock-up made a confession to fellow prisoners, the policeman whose duty it was to guard the lock up was present,

Held, that his presence did not make the confession inadmissible as accused was in magisterial custody as opposed to police custody. (*Abdul Qadir and Rangi Lall, JJ.*) IMAM DIN *v.* EMPEROR. **151 I.C. 894=7 R.L. 219=35 Cr.L.J. 1432=1934 Cr.C. 142=A.I. R. 1934 Lah. 75.**

———**S. 26**—*Presence of Court constable—Value of confession.*

The mere fact that the Court constable was allowed to remain present while the accused were making their confessions before the Magistrate does not involve the total exclusion of the confessions from evidence, but it certainly detracts from their evidentiary value. It cannot carry any weight as against any of the other accused except themselves. (*Mahomed Noor and Luby, JJ.*) BARNABAS *v* EMPEROR. **152 I.C. 275=7 R P. 163=36 Cr.L.J. 12=15 Pat L.T. 711=1934 Cr.C, 1243=A.I.R. 1934 Pat 586.**

———**Ss 26 and 27**—*Statement of accused not made voluntarily recorded after discovery of facts—Admissibility.*

The contents of a mahazar in so far as they are statements made by the accused, when such statement is not voluntary, and the statements leading to the discovery of facts, were recorded after the discovery, apparently by getting the accused to repeat the information which he had given at an earlier stage and which had been acted upon, are inadmissible in evidence under Ss. 26 and 27, Evidence Act. The evidence of the statements made earlier, if at all, is relevant under S. 27. (*Curgenven and Cornish, JJ.*) KRISHNA AIYAR, *In re.* **157 I.C. 297=8 R.M. 137=36 Cr.L.J. 1107=1935 M.W.N. 82=1935 Cr.C. 742=A.I.R. 1935 Mad. 479.**

———**S. 26**—*Statement when under custody—Statements made to daroga.*

Statements made by the accused to the daroga, showing the place in the jungle where the occurrence in question, *viz.*, taking away a female child and having sexual intercourse with her, took place, cannot be admitted in evidence they being in the nature of a confession made to a Police Officer while in custody. S. 27 has no application and would not make the statements admissible. (*C. C. Ghose and Panckridge, JJ.*) RAMANI MOHAN DE *v.* EMPEROR. **I.R. 1933 Cal. 482=143 I.C. 797=34 Cr.L.J. 638=1933 Cr.C. 223=A.I.R. 1933 Cal. 146.**

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———**S. 27**—*Accused under detention as suspect—Statement leading to discovery of murdered body—Admissibility.*

Where the accused was under detention as a suspect Shamil Taftish (he was formally arrested after the body was exhumed) when he made a statement about the burial of the body of a murdered person and pointed out the manure heap wherefrom the body was discovered directly in consequence of that statement, such statement is admissible. 9 Lah. 671, Ref. (*Coldstream, J.*) NAWAB DIN *v.* EMPEROR. **I.R. 1933 Lah. 412 (1)=144 I.C. 12=34 Cr L J. 683=34 P.L.R 637=1933 Cr.C. 769=A.I.R. 1933 Lah. 516.**

———**S. 27**—*Applicability—Fact previously discovered by police.*

S. 27 of the Evidence Act permits as much information to be admitted in evidence "as relates distinctly to the fact thereby discovered". If a fact has been previously discovered by the police the section would not apply. (*Young, C.J. and Addison, J.*) CHARAGH DIN *v.* EMPEROR. **153 I.C. 228=7 R.L 411=36 Cr.L.J. 313=36 P.L.R. 40=1934 Cr.C. 1121 (2)=A.I.R. 1934 Lah. 786.**

———**S. 27**— *Applicability — Non discovery of incriminating matter.*

S. 27 of the Evidence Act has no application when nothing in connection with the crime is discovered as a result of the information given by the accused. (*Raza and Pullan, JJ.*) DWARKA *v.* EMPEROR. **6 Luck. 475=I.R. 1931 Oudh 199 -131 I.C. 439=32 Cr.L.J. 697=14 O.L.J. 210=8 O.W.N. 107=1931 Cr.C. 241=A.I.R. 1931 Oudh 119.**

———**S. 27**—*Applicability—Several accused charged of theft merely restoring property—No statement made by any one of them—Value of evidence.*

Where a number of accused are charged of theft and all that the evidence shows is that all the accused went together with the Police Officer and took out the property from the place where it was buried at one and the same time, but there is no evidence to show that before they took out the property they or any one of them said where it was buried, the stolen property taken out by them from the place where it was hidden cannot be said to be discovered in consequence of the information given by them within S. 27, and the fact that all the accused go together and take out the property has no value against any one of them. 10 S.L.R 7, Ref. (*Rupchand and Milne, A.J.Cs.*) DITO *v.* EMPEROR. **135 I.C. 267=33 Cr. L.J. 106=I.R. 1932 Sind 27=1931 Cr C. 525=A.I.R. 1931 Sind 154.**

———**S. 27**—Applicability—Statement made to daroga—Accused showing the place of occurrence—Not admissible—S. 27 not applicable. *See* EVIDENCE ACT, S. 27. **A.I.R 1933 Cal. 146.**

———**Ss. 27 and 8** — Articles produced by several accused jointly—Inference from conduct—Evidence—Nature of and mode of leading. *See* EVIDENCE ACT, S. 8. **39 C.W.N. 368.**

———**S. 27**—*Confession to Honorary Magistrate — Admissibility.*

A confession of guilt made by an accused person to an Honorary Magistrate is admissible in evidence against him when the evidence shows that the Magistrate was not deputed by the police to question the accused but was only asked to summon the accused and to ascertain the truth from him. (*Broadway and Monroe, JJ.*) ATA MAHOMED *v.* EMPEROR. **33 P.L.R. 217=I.R. 1932 Lah. 504=138 I.C. 497=33 Cr.L.J. 632=1932 Cr.C. 326=A.I.R. 1932 Lah. 261.**

———**S. 27**—*Confession otherwise irrelevant — Admissibility.*

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S. 27 does not operate to make admissible in evidence a confession which would be otherwise irrelevant under S. 24. S. 27 would make admissible only that part of the confession in consequence of which a fact deposed to was discovered. (*Currie and Abdul Rashid, JJ.*) HASHMAT KHAN *v.* EMPEROR. **15 Lah. 856=36 Cr.L.J. 211=7 R L. 348=37 P.L.R. 25=152 I.C. 998=1934 Cr.C. 643=A.I.R. 1934 Lah. 417.**

———**S. 27**—*"Custody"—Meaning—Suspected offender not in custody—Statement by—Admissibility.*

For the purposes of S. 27 of the Evidence Act the word 'custody' does not necessarily mean detention or confinement, but submission to custody by word or action under S. 46 (1), Cr. P. Code, may be taken to amount to custody. Where the accused, who was suspected after the first report had been made, made a statement and pointed out the dead body to the police and his name was subsequently mentioned in the second report.

Held, that he accused was not in police custody at the time he made the statement nor was he an accused person in the light of the first information report and that the statement preceding the recovery of the dead body was consequently not admissible under S. 27. (*Abdul Qadir, J.*) JALLA *v.* EMPEROR. **I.R. 1931 Lah. 365=131 I.C. 93=32 Cr.L J. 650=32 P.L.R. 347=1931 Cr.C 534=A.I.R. 1931 Lah. 278.**

[**F.** 15 L. 310 (313).]

———**S. 27**—*Custody of police—Person suspected and treated as accused.*

Where a person had been suspected from the beginning itself and was treated as accused person and was not kept under much restraint as he could hardly have absconded.

Held, that he was in custody of police and statements leading to discovery of things were admissible. (*Abdul Qadir and Rangi Lal, JJ.*) MT. AISHAN BIBI *v.* EMPEROR. **15 Lah. 310=152 I.C. 206=36 Cr.L.J. 14=37 P.L.R. 67=7 R.L. 263=1934 Cr.C. 330=A.I.R. 1934 Lah. 150 (2).**

———**S. 27**—*Custody of Police Officer—Self-accusation before Police Officer.*

When a person states that he has done certain acts which amounts to an offence he accuses himself of committing the offence, and if he makes the statement to a Police Officer as such, he submits to the custody of the officer within the meaning of S. 46 (1), Cr. P. Code, and is then in the custody of a Police Officer within the meaning of S. 27, Evidence Act. (*Courtney-Terrell, C. J., Scroope and Agarwala, JJ.*) SANTOKHI BELDAR *v.* EMPEROR. **12 Pat. 241=I.R. 1933 Pat. 139=142 I.C. 474=34 Cr.L J. 349=14 Pat.L.T. 82=1933 Cr.C. 404=A.I.R. 1933 Pat. 149 (S.B.).**

———**S. 27**—*"Fact"—Meaning—Statements of accused while in police custody—Proof of relevant fact.*

The accused was tried and convicted for an offence under S. 302, I. P Code, The prosecution case was that the deceased, a woman who was living with the accused, had been strangled to death by him. It was alleged that on the next morning the accused bought a coir mattress, from a shop, had it carried to his house by a cooly woman and put the dead body in a parcel made of that mattress and sent the parcel by railway. While in the custody of the police the accused made certain statements with reference to the purchase of the coir mattress. The statements made by the accused while in the police custody were otherwise corroborated by the evidence of the prosecution witnesses and the entire evidence formed the basis of the conviction.

Held, that the statements made by the accused amounted to confessions, but they were rendered admissible in law because they led to the discovery of a

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relevant fact, namely, the purchase of the coir mattress by the accused. Meaning of the word "fact" in S. 27, Evidence Act, discussed. (*Cornish, Burn and Lakshmana Rao, JJ.*) EMPEROR *v.* RAMANUJA AIYENGAR. **58 Mad. 642=158 I.C. 764=8 R.M. 331=36 Cr L.J. 1442 (2)=42 L.W. 124=1934 M.W.N. 1479=1935 Cr.C. 728=A.I.R. 1935 Mad. 528=68 M.L.J. (Supp.) 73 (F.B.).**

———**S. 27**—*Information by more than one accused—First person as informant.*

The Sub-Inspector called the three accused persons one after the other and all of them said the same thing, that some of the stolen articles were at particular places and some of them were later on discovered.

Held, that the only person who gave information leading to the discovery was the first accused. 1931 M. Cr. C. 123, Foll.

Semble:—In a suitable case it is possible to ascribe to more than one accused the information which leads to discovery under S. 27. (*Krishnan Pandalai, J.*) RANGIAH CHETTI *v.* EMPEROR. **1932 M.W.N. 113.**

———**S. 27**—"*Police custody*"—*Meaning—Police surveillance, if sufficient.*

The expression 'police custody' in S. 27 does not necessarily mean formal arrest. It also includes some form of Police surveillance and restriction on the movements of the persons concerned, by the police. (*Coldstream and Jai Lal, JJ.*) GURDIAL SINGH *v.* EMPEROR. **I R. 1932 Lah 578=33 Cr.L.J. 756=139 I.C. 429=33 P.L.R. 826=1932 Cr.C. 915=A.I.R. 1932 Lah. 609.**

[Rel 8 Luck. 410 (418)]

———**S. 27**—*Police custody—What amounts to.*

Where a Police Officer, although he arrested a person charged with being in possession of cocaine after the finding of the cocaine with him, interviewed the accused and was with him for a considerable time and walked with him to the place where the accused pointed out the spot where the cocaine might be found.

Held, that the accused was in police custody at the time when he made the statement as to the spot where the cocaine could be found and his statement was admissible under S. 27. (*Pearson and M. C. Ghose, JJ.*) SUDAM CHANDRA BAG *v.* EMPEROR. **I.R. 1933 Cal. 494=144 I.C. 74=34 Cr.L.J. 675=1933 Cr.C. 225=A.I.R. 1933 Cal. 148.**

———**S. 27**—*Retracted confession—Hatchet found in a place accessible to others—Corroborative value of.*

A hatchet was produced three days after the murder and from a place which was accessible to others. The accused was not the only person who was alleged to have taken part in the murder, but admittedly there were three persons concerned in it and the confession which itself was not voluntary and true was also retracted.

Held, that taking into consideration all the circumstances of the case, the production of the hatchet by the accused from a place, which was accessible to others as well, had very little or no corroborative value on the charge of his being one of the murderers, and that he was entitled to the benefit of a reasonable doubt. (*Rupchand, J C. and Lobo, A. J. C.*) EMPEROR *v.* KHAIRMAHOMED **6 I.R. (Sind) 57=35 Cr L J. 17=146 I.C. 180=1933 Cr C. 1043=A.I R. 1933 Sind 313 (2).**

———**S. 27**—*Scope.*

The general rule that statements made by accused persons to the police in the course of an investigation cannot be proved does not affect the special exception to that rule remaining in force by force of S.27. Statements admissible under that section can still be proved: but all other statements of accused persons made to the police in the course of an investigation are shut out. (*Reilly, Anantakrishna Ayyar Sundaram Chetty, JJ.*) SYAMO MAHA PATRO *v.* EMPEROR. **55 Mad. 903=I.R. 1932 Mad. 338=33 Cr.L.J. 418=137 I.C. 9=1932 M.W N. 305=35 L.W. 705=1932 Cr.C. 355=A.I.R. 1932 Mad. 391=62 M.L.J. 742 (F.B.).**

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———**S. 27**—*Scope—Incriminating statement by accused leading to a discovery—Admissibility.*

Where the accused has made a statement of a self-incriminating nature, in consequence of which a discovery was made, only so much of the statement as relates to that fact is admissible but not the rest of the incriminating statement. But the protection given to the accused by Ss. 24, 25 and 26 should not be dependent on the ingenuity of the Police Officer or the folly of the prisoner in composing the sentence which conveys the information. On the other hand the statement made to the Police Officer cannot be garbled so as to be rendered absolutely innocuous to the prisoner and removed entirely from the nature of a confessional statement. 10 Lah. 283 (F.B.). Ref. to. Where the accused had made a statement to the police to the effect that he had put the corpse of the victim in a colliery mine and in consequence of this information, the dead body was found in the place indicated, *held*, the statement was receivable in evidence. 34 C.W.N. 106, Comm. upon. (*Fazl Ali and Scroope, JJ.*) SONARAM MAHTON *v.*, *v.* EMPEROR. **10 Pat. 153=I.R. 1931 Pat. 237=131 I.C. 797=32 Cr.L J 792=12 Pat L.T. 481=1931 Cr.C. 385=A I R. 1931 Pat. 145.**

[Rel.] 31 N.L.R. 256 (259).]

———**S. 27**—*Scope—Statements by accused persons—Cr. P. Code (V of 1898), S. 162.*

In regard to statements made by accused persons the Cr. P Code does not in S. 162, as amended by Act XVIII of 1923, alter the provisions of S. 27, Evidence Act. There is no contradiction in the two sections as S. 162 does not apply to statements by accused persons. (*Young and Bennet, JJ.*) EMPEROR *v.* FAUJDAR. **55 All. 463=6 I R. (All) 43=144 I C. 1021 (2)=34 Cr.L.J. 875=1933 A L J. 1518=14 L. R. 153 (Cr)=1933 Cr.C. 746=A.I.R. 1933 All. 440.**

[R. 1934 R. 78 (80)]

———**S. 27**—*Scope—Statement by accused to police—Admissibility.*

S. 27 of the Evidence Act makes admissible only statements by an accused person to the Police as a consequence of which facts are discovered. This does not mean that any statements made by an accused person antecedent to the discovery are admissible. (*Weston, J. C.*) RAM SAHAI *v.* EMPEROR. **1935 A M L J. 32.**

———**S. 27**—*Self-incriminating statement—Admissibility.*

Where the accused makes a statement, that he and another accused hid the ornaments belonging to the person, who was murdered in a particular place, the statement is admissible under S. 27. (*Beasley, C.J. and Reilly, J.*) NARAYANA *v* EMPEROR. **56 Mad. 231 143 I.C. 46=I R. 1933 Mad. 261=34 Cr.L J. 481=1932 M W.N 801=37 L.W. 220=1933 Cr.C. 289=A.I.R. 1933 Mad. 233=64 M.L J. 88.**

———**S. 27**—*Statement of accused leading to discovery of fact—Admissibility.*

It is a generally accepted principle that only that part of the statement of an accused person which leads to the discovery of any fact by the police is admissible in evidence and no more. (*Mehta. A J.C.*) GHANDALAL KALIDAS *v.* EMPEROR. **28 S.L.R. 41=154 I.C. 1038=7 R S. 181=36 Cr L J. 704=1934 Cr.C. 1261=A. I.R 1934 Sind 159.**

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———**S. 27**—*Statement of accused to police—Admissibility—Cr. P. Code, S.* 162.

S. 162, Cr. P. Code, applies to the statements of persons examined as witnesses by the police in the course of an investigation and not to the statement of an accused person. Where the accused who is charged under S. 411, I. P. Code, for dishonestly receiving a bullock knowing it to be stolen property, states to the police that he purchased it from a certain person, his statement, although not barred under S. 162, Cr. P. Code, would not be admissible under S. 27 of the Evidence Act, if it is held to be of the nature of a confession as to his being in possession of the bullock, if no material fact is discovered in consequence of the information received. (*Addison, J.*) MAHOMED *v.* EMPEROR **155 I.C. 260 = 36 Cr L J. 697 = 7 R.L. 674 = 35 P.L.R. 738 = 1934 Cr.C. 1009 = A.I.R. 1934 Lah. 695.**

———**S. 27**—*Statements not directly bearing upon discovery—Admissibility of.*

Only statements which directly bear on the discovery of property are admissible under S. 27 and that confessional statements not directly bearing upon the discovery are inadmissible. Two guns said to have been used in dacoity and taken on loan by two accused were, on information given by the accused that they used them in the dacoity, recovered from persons who were both licence holders and held licence covering the guns re covered from them.

Held, it could not by any stretch of imagination be held that there was any discovery in the case of these guns within the meaning of S. 27, 10 Lah. 283, Foll. (*Staples, A.J.C.*) BALA HUDDAR *v.* EMPEROR. **148 I. C. 157 = 6 R.N. 167 = 35 Cr.L.J. 594 = 1933 Cr.C. 936 = A.I.R. 1933 Nag. 252.**

———**S. 27**—*Statement—Extent of admissibility—Compound statement—Relating to dacoity.*

S. 27 is both in form and in substance, a proviso to the preceding sections. The fact discovered within the meaning of the section must be some concrete fact to which the information directly relates. If an accused gives information to the police in a from which divides the information under several heads, that which directly leads to the discovery will be admissible and the other heads will not be. If on the other hand, he makes a compound statement, the Judge, before he records it as evidence or leaves it to the jury, should divide the sentence into what are really its component parts and only admit that part which has led to the discovery of the particular fact. If the accused said: "I will produce the share I received in such and such a dacoity", the facts that there was a dacoity, that the accused took part in it and that he got part of the property are not admissible but the statement, as to where the property is, will be. 14 B. 260 (F. B.), Ref. (*Beaumont, C.J. and Broomfield, J.*) EMPEROR *v.* GANU CHANDRA. **56 Bom. 172 = I.R. 1932 Bom. 232 = 137 I.C. 174 = 33 Cr.L.J 396 = 34 Bom.L.R. 303 = 1932 Cr.C. 328 = A.I.R. 1932 Bom. 286.**

[**R.** 36 Bom.L.R. 384 (385).]

———**S. 27**—*Statements—Extent of admissibility—Statements of four persons.*

When statements are made by four persons to the same effect leading to the discovery of some fact, only the statement made by the first individual and only so much of it as related distinctly to the fact discovered can be admitted. The statements of the others cannot be used in evidence. (*Rankin, C. J. and C. C. Ghose, J.*) DURLAV NAMASUDRA *v.* EMPEROR. **59 Cal. 1040 = 36 C.W.N. 373 = 1932 Cr.C. 266 = I.R 1932 Cal. 417 = 138 I.C. 116 = 33 Cr.L.J. 546 = A.I.R. 1932 Cal. 297.**

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———**S. 27**—*Statement having indirect effect—Admissibility.*

Only statements bearing directly on the recovery of property are admissible. Where therefore *A* stated that he handed on the property to *B* and *B* stated that he handed on to *C* and *C* to *D* and *D* to *E*, and recovery was made from *E*, the statements of *A*, *B*, *C*, *D* have no direct bearing on the recovery of the property, although they may have had an indirect bearing in giving the police a fresh starting point for investigation and they cannot be admitted. (*Grille, J, C.*) MAGANLAL BAGDI *v.* EMPEROR. **30 N.L.R. 269 = 150 I.C. 623 = 7 R.N. 10 = 35 Cr.L.J. 1097 = 1934 Cr.C. 276 = A.I.R. 1934 Nag 71.**

———**S. 27**—*Statement leading to discovery made before arrest—Admissibility.*

Rankin, C. J.—S. 27 is not a mere proviso to S. 26. It cuts down the operation of Ss. 24 and 25 as well. Though it begins with proviso, S. 27 is an independent section and it repeats some of the conditions mentioned in S. 26. Redrafting of Ss. 24 to 27 is recommended *Ghose, J.*— S. 27 is one of those sections which controls the earlier sections, namely Ss. 24, 25 and 26. A statement made to the police by the accused prior to his arrest when he was not in police custody is not admissible in evidence, though something is discovered as a result of it. (*Rankin, C. J. and C. C. Ghose, J.*) DURLAV NAMASUDRA *v.* EMPEROR. **59 Cal 1040 = I.R. 1932 Cal. 417 = 138 I.C. 116 = 33 Cr.L.J. 546 = 36 C.W.N. 373 = 1932 Cr.C. 266 = A.I.R. 1932 Cal. 297.**

———**S. 27**—*Statement leading to discovery of property—Admissibility.*

Where an accused person offers to indicate the place where stolen property is concealed, and takes the Police Sub-Inspector to the spot, namely, a locked room, and after entering the same retrieves the property from underneath a pile of firewood in the presence of the Sub-Inspector, such statement is admissible in evidence under S. 27 of the Evidence Act. (*Grille, J. C.*) BALIRAM *v.* EMPEROR. **162 I.C. 779 = 37 Cr L.J. 718 = 8 R.N. 285 (2) = 18 N.L J. 342.**

———**S. 27**—*Statement leading to discovery—Statement containing other information—Admissibility of—Extent of.*

Although a series of statements may be made as if in one sentence to the Police Officer, the Court should dissect them and admit only such portion of that statement as directly led to the discovery of the thing. If a single statement contains more information than is contemplated by S. 27, the whole statement is not admissible but only the particular information which led to the discovery. Where the accused told the police that the throat was cut with a knife which was washed and kept on a paniara of the mori in the kitchen only the latter portion and not the former is admissible under S. 27. (*Kania, J.*) EMPEROR *v.* SALVE. **151 I.C. 883 = 7 R.B. 93 = 35 Cr.L.J. 1444 = 36 Bom.L.R. 384 = 1934 Cr.C. 886 = A.I.R. 1934 Bom. 233.**

———**S. 27**—*Statement to police—Discovery of dead body by independent means—Admissibility of statement.*

Even where the accused is the first person to inform the Police Sub-Inspector about the presence of a dead body in the well, it cannot be said that the body was discovered in consequence of that information within the meaning of S. 27, where the body in the well was in fact discovered by some one else, before the statement of the accused though not to the knowledge of the police. (*Agha Haidar and Rangi Lall, JJ.*) HAR NARAIN *v.* EMPEROR. **152 I.C. 565 = 7 R.L. 290 =**

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36 Cr.L.J. 189=35 P.L.R. 203=1934 Cr.C. 545=A.I.R. 1934 Lah. 313.

——**S. 27**—*Strict construction—Statement as to weapon with which murder was committed—Admissibility.*

Per *Smith, J.*— S. 27 must be construed strictly and the statement that the hatchet produced was the one with which the murder was committed should not be allowed to come in evidence as it did not lead to the discovery of the hatchet.

Per *Allsop, J.*—The witness should as far as possible depose to the actual words used by the accused person, and if the words are, for instance, "the hatchet with which the murder was committed is in a nala, there is no reason why the words" with which the murder was committed," should be left out of the sentence in which the necessary information is given. If it was the intention of the legislature that words of this kind should be omitted, it is difficult to understand why the words "whether it amounts to a confession or not" should have been included in S. 27, because it is hard to conceive of any case where a bare statement that a certain article was in a certain place or in the possession of a certain person would amount to a confession at all. If all that a witness can prove is that the accused person said that a certain article was in a certain place that would amount to little more, if anything, than saying that the article was discovered in consequence of information given by the accused. (*Smith and Allsop, JJ.*) KHITALI *v.* EMPEROR. **6 I R (Oudh) 190=35 Cr.L. J. 192=146 I.C. 905=10 O.W.N. 937=1933 Cr.C. 1277=A.I R. 1933 Oudh 404.**

——**Ss. 28 and 80**—*Confession containing memorandum under S.* 164 (3) *of Cr. P. Code Regulation—Proof of.*

When a confessional statement contains a memorandum as required under S. 164, Cl. (3) of the Cr. P. Code, a presumption arises that all the formalities have been performed and it is admissible without further proof. When the confession is tendered in the Sessions Court, it proves itself under S. 80 of the Evidence Act without calling upon the Magistrate who recorded it. 89 I.C. 897; 53 Cal. 350; 119 I.C. 193; 119 I.C. 325 and 120 I.C. 257, Foll. (*Srinivasa Iyer, O. C. J. and Mahadevayya, J.*) PADMAMMA *v.* GOVERNMENT OF MYSORE. **10 Mys.L J. 385.**

——**S. 29**—*Effect of S.* 164, *Cr. P. Code—Statement not duly recorded—Admissibility.*

The provisions of S. 164 do not affect the provisions of S. 29, Evidence Act, and therefore a confession cannot be excluded from evidence as irrelevant merely because all the provisions of S. 164 were not carefully complied with. (*Smith and Allsop, JJ.*) KHITALI *v.* EMPEROR. **6 I R (Oudh) 190=146 I.C. 905=35 Cr.L.J. 192=10 O.W.N. 937=1933 Cr.C. 1277=A. I.R. 1933 Oudh 404.**

——**Ss. 29 and 26**—*Statements by accused to Magistrate when produced by police for remand—Admissibility of.*

Statements made by the accused to a Magistrate when produced by the police for purposes of remand are admissible. 55 M. 711 and A.I.R. 1933 All. 440, Ref. (*Dunkley, J.*) NGA PO DWE *v.* EMPEROR. **6 R.R. 265=148 I.C. 1002=35 Cr.L.J. 823=1934 Cr.C. 401 =A.I R. 1934 Rang 78.**

——**S. 29**—*Voluntary confession—Failure to administer caution—Admissibility of confession.*

A confession is proved to have been made voluntarily is not inadmissible merely because the accused was not warned by the Magistrate that he was not bound to make such confession. The provisions of S. 164, Cr. P. Code, are in this respect in conflict with those of S. 29 of the Evidence Act but on a question of the admissibility of a particular piece of evidence, it is the Evidence Act that prevails. 31 A. 592 (F.B.), Ref. (*Waller and Krishnan Pandalai, JJ.*) VELLAMOONJI GOUNDAN, *In re.* **55 Mad. 711=I.R. 1932 Mad. 459=137 I.C. 863=33 Cr.L.J. 526=1932 M.W.N. 449=35 L.W. 542=1932 Cr.C. 412=A.I.R. 1932 Mad. 431=62 M.L.J. 559.**

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——**S. 30**—*Applicability—Proceeding under S.* 110, *Cr. P. Code.*

There is no reason to hold that S. 30 of the Evidence Act may not be applied to a case where there is a proceeding under S. 110, Cr. P. Code, against a number of persons, one of whom has made a confession implicating other persons, whose conduct is also the subject of an enquiry. (*Bennet, J.*) RICHPAL SINGH *v.* EMPEROR. **57 All. 312=7 R.A. 405=36 Cr.L J. 198=152 I.C. 881=1934 A.L.J.1170=4 A.W.R. 42=15 L.R. 153 (Cr.)=1934 Cr.C. 1246=A.I.R. 1934 All. 927.**

——**S. 30**—*Approver—Evidence of—Corroboration by confession of co-accused.*

Obiter.—Though the confession of a co-accused is by itself of too weak a character to found a conviction of the other co-accused on it alone, where such co accused has struck to it throughout the trial and has paid the penalty by receiving the punishment without filing an appeal, it can be used to strengthen the evidence of the accomplice by corroboration of some facts of the story told by him. Where the evidence of the approver is in conflict with the confession of the accused, that portion of the evidence of the approver may be rejected as unreliable; and where the evidence of the approver is in conformity with the confession of the co-accused, it may be deemed to receivecorroboration to that extent and may justify the conviction of the other accused. (*Nanavutty, J.*) BENI MADHO *v.* EMPEROR. **9 Luck. 22=6 I.R. (Oudh) 209=146 I.C. 1064=35 Cr.L.J. 273=10 O.W.N. 688=1933 Cr.C. 976=A.I.R. 1933 Oudh 355.**

——**S. 30**—*Approver—Evidence of—Rejected against one accused—Use against others.*

Where the evidence of the approver is eliminated as against one of the accused whose name has been falsely substituted by the approver, the whole fabric must fall to the ground and it should not be accepted even against the other accused, though to some extent it is corroborated by independent testimony. (*Tek Chand, J.*) EMPEROR *v.* RAI SINGH NARAIN SINGH. **6 I.R. (Lah.) 254=146 I.C 665=35 Cr.L.J 137=34 P.L. R. 1010=1933 Cr C. 1116=A.I.R. 1933 Lah. 871.**

——**S 30**—*Approver—Evidence of—Use against co-accused—Corroboration—Strict proof.*

There is no rule of law which prevents the evidence of an approver from being corroborated by the confession of a person, who is being tried jointly with the accused for the same offence, implicating both himself and the accused. This principle would apply even where both the approver and the confessor subsequently retract their statements. The Court however should scrutinize such corroboration with great care. (*Otter and Baguley, JJ.*) NGA NYEIN *v.* EMPEROR. **11 Rang. 4=I.R. 1933 Rang. 29=142 I.C. 87=34 Cr.L.J. 286=1933 Cr.C. 452=A.I.R. 1933 Rang. 57.**

——**S. 30**—*Co accused -- Confession of—Admissibility.*

The confession of a co accused can be treated as evidence against an accused person in British India. The words "may take into consideration" mean may treat as evidence. The weight that is to be attached to it as evidence against the accused, however, depends on the

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circumstances of the particular case. Nor is there any provision in the Act to the effect that the confession of one co-accused implicating the accused cannot be corroborated by the confession of another co accused which also implicates the accused. The English law on the point is different but cannot be resorted to in construing the relevant sections of the Evidence Act. 4 Cal. 492, Ref. (*Page, C.J., Mya Bu and Baguley, JJ.*) AUNG HLA *v.* EMPEROR. **9 Rang. 404=135 I.C. 849=33 Cr.L J. 205=I.R. 1932 Rang. 65=1931 Cr C. 875=A.I.R 1931 Rang. 235.**

[**F** 11 R. 4 (7); 143 I.C. 142; 144 I.C. 829 (830) (R.) **Not F.** 146 I.C. 701 (703) (N.) **R.** 146 I.C. 303 (304) (N.) **Dist.** 62 C. 819 (825, 831) **F.** 62 C. 238 (247).]

———**S. 30**—*Co accused — Confession of—Admissibility.*

A confession made by one accused may be used against his co-accused only in this way if there is evidence against the other accused concerned, then the confession may, if it thinks fit, be taken into consideration as a reason for believing the truth of that evidence, but nothing supplied in the confession alone can be used as evidence against the accused who has not made it. (*Reilly, C. J. and Shankaranarayana Rao, J.*) SANNA HUDUGA *v.* GOVERNMENT OF MYSORE. **13 Mys L J. 69=39 Mys H C.R. 1189.**

———**S. 30**—*Co accused — Confession of—Admissibility against another.*

When an accused person in his statement or confession imputes the commission of an offence to his co-accused but does not implicate himself as fully and substantially as he does his co-accused, the said statement cannot be used as evidence against the co-accused. (*Mears, C.J. and Sen, J.*) EMPEROR *v.* SHAMBHU. **54 All. 350=I R 1932 All 102=135 I.C. 838=33 Cr.L J. 201=1932 A L J. 162=13 L R. 48 (Cr.)=1932 Cr C. 226=A I.R 1932 All. 228.**

[**R** 11 O.W.N. 1012 (1019).]

———**S. 30**—*Co-accused — Confession of—Admissibility—Conditions.*

This section introduces a departure from the ordinary rule relating to the admissibility of evidence and must be strictly construed. Before any statement made by one of the accused persons tried jointly with the others can be taken into consideration against such others, it must fulfil two conditions: (*a*) it must be a confession of guilt affecting himself equally with the others; and (*b*) it must be proved against those persons who are jointly tried with him. The word "proved" means proved before the prosecution case comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial. (*Din Mahomed, JJ.*) NAWAB *v.* EMPEROR. **159 I.C. 381=37 Cr L. J 75=8 R L 383=1935 Cr.C 31=A.I.R. 1935 Lah. 35.**

———**S 30**—*Co accused—Confession of—Conviction on basis of—Legality.*

It would be far too dangerous to consider that a confession of a co-accused amounts to evidence against a person. It is not so stated under S. 30 of the Evidence Act and it has long been settled law that a conviction cannot be based on the confession of a co-accused. (*Dilip Singh and Currie, JJ.*) JAHANGIRI LAL *v.* EMPEROR. **7 R L 58=150 I C. 1056=35 Cr L J. 1180=1935 Cr C. 396=A.I.R. 1935 Lah 230.**

———**S. 30**—*Co accused — Confession of—Corroboration—Necessity for.*

The confession of a co-accused stands even on a lower footing then that of the evidence of an accomplice, as it is not a statement on oath and cannot be tested by cross-examination; and it cannot therefore be accepted without material corroboration connecting the accused with the crime. 4 Cal. 483 and 43 B. 739, Ref. (*Bhide and Currie, JJ.*) ALLAH BAKHSH *v.* EMPEROR. **6 I.R. (Lah) 313=146 I.C. 1061=35 Cr.L J. 288=35 P.L. R. 115=1933 Cr.C. 1411=A.I.R. 1933 Lah. 956.**

———**S. 30**—*Co-accused—Confession by during trial—Admissibility.*

The language of S. 30 of the Evidence Act does not justify a distinction between a confession made by an accused person before the trial and in the course of the trial. A confession made before the Court even at the close of the case for the prosecution can, therefore, be said to be a confession "proved" within the meaning of that section. This being so, it could legally be taken into consideration, that is to say, used as evidence. A.I.R. 1930 Bom. 354 and 134 I.C. 686, Foll.; 45 A 323; 54 M. 788 and A.I.R. 1929 Mad. 285, Not foll. (*Young, C.J. and Rangi Lal, J.*) DIAL SINGH *v.* EMPEROR. **16 Lah 651=161 I C. 898=37 Cr.L.J. 508=8 R.L 814=37 P.L R. 806=1936 Cr.C. 258=A.I.R. 1936 Lah. 337.**

———**S. 30**—*Co accused — Confession of — Material corroboration.*

The confession of a co-accused as against another accused is derived from a tainted source, as is the evidence of an approver, and it is therefore open to grave suspicion; further it is not subjected to cross-examination, and for that reason also it should not be regarded as evidence of any value against another accused who is tried jointly for the same offence unless it is supported by some material corroboration upon which reliance can be placed. (*Mya Bu and Brown, JJ.*) MI HEIN *v.* EMPEROR. **6 I R. (Rang.) 11=144 I C. 829=34 Cr L.J. 835=1933 Cr.C. 720=A.I.R. 1933 Rang 134.**

———**S. 30**—Co accused—Confession of — Statement exculpating himself and implicating accused—Admissibility. *See* CR. P. CODE, S. 162. **155 I.C. 258=A.I. R. 1935 Nag. 125 (2).**

———**S. 30**—*Co accused—Confession of—When may be taken into consideration.*

Before the confessions made by a co-accused can be taken into consideration there must be tolerably clear and reliable evidence tending to prove the crime. The Court is not bound to take the confession into consideration against the co-accused but it may do so if the substantive evidence is reliable enough to indicate the commission of the crime. (*Niyogi and Staples, A.J. Cs.*) HIRA *v.* EMPEROR. **6 I R (Nag.) 60=146 I. C 17 (2)=34 Cr L.J. 1141=16 Nag L.J. 129=1933 Cr.C. 933=A.I.R. 1933 Nag. 249.**

———**S. 30**—*Co accused—Evidence of— Admission of —Procedure.*

It is always desirable to pass a sentence completely before calling upon an accused pleading guilty in a joint trial to give evidence against his co accused, so that the witness may give his evidence with a mind free of all corrupt influences which the fear of impending punishment and the desire to obtain immunity to himself at expense of the prisoner might otherwise produce. But this course is not essential. (*Lort Williams and S. K. Ghose, JJ.*) MUHAMMAD IUSUF *v.* EMPEROR. **58 Cal 1214=131 I.C. 142=32 Cr L.J. 667=35 C.W.N. 490=1931 Cr.C. 405=A.I.R. 1931 Cal. 341.**

———**S. 30**—*Co-accused—Evidence of one—Admissibility against other.*

The evidence of one party cannot be received as evidence against another party unless the latter has had an opportunity of testing it by cross-examination. All evidence taken whether in examination or cross examination is common to all the parties. (*Doraiswami Iyer, C.J., Mahadevayya and Ramachandra Rao, JJ.*) SUB-

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———**S. 30**—*Co-accused — Exculpating statement—Admissibility against co accused.*

A statement before the Court of the co accused, where it is depreciating his own guilt, is a statement seeking to clear himself at the expense of the accused and as such is inadmissible under S. 30. (*Guha and Nazim Ali, JJ.*) JOGENDRA NATH BANERJI *v.* EMPEROR. **152. I.C. 924=36 Cr.L.J. 194=7 R.C. 328=1934 Cr.C. 1110=A.I.R. 1934 Cal. 724.**

———**S. 30**—*Co accused—Retracted confession—Conviction based on—Legality.*

Where a case for murder was instituted against two persons on the strength of the confession of the co-accused, supplemented by circumstantial evidence ; and the so-called confession was retracted and further was of exculpatory nature and was not recorded until more than four months after the arrest of the co accused,

Held, that very great doubt existed as to its genuineness and the conviction based on such evidence was bad in law. (*Middleton, J. C. and Mir Ahmad, A. J. C.*) KHANIZAMAN *v.* EMPEROR. **157 I.C. 229=8 R. Pesh. 15=36 Cr L J. 1146.**

———**S. 30**—*Co accused—Retracted confession of—Sufficiency for conviction.*

The confession of an accused person may no doubt be taken into consideration under S. 30 of the Evidence Act, but that is not tantamont to saying that such confession is to take the place of proof. The confession of a co accused is even worse in value than the sworn testimony of an accomplice and if it is necessary that the latter testimony should be corroborated independently both as to the crime and as to the criminal it is still more necessary that the confession of a co accused should be so corroborated. And when that confession in retracted, it has no value at all as against the co accused. (*S. K. Ghose and Khuntkar, JJ.*) KASIMUDDIN *v.* EMPEROR. **62 Cal. 312=154 I. C. 273=7 R.C. 440 (2) =36 Cr.L J. 485=39 C.W N. 27=1934 Cr C. 1368 =A I.R. 1934 Cal. 853.**

———**S. 30**—*Co accused—Retracted confession of one—Sufficiency for conviction of co-accused.*

A retracted confession carries practically no weight as against a person other than maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. Where not only did the confessing accused retract their confession but when pardons are offered to two of them with a view to their giving evidence as accomplices, they refused to accept such pardon.

Held, that the value of the evidence of the confessions as against the other co accused was much weakened and that the question, as to whether the confessions of the confessing accused afforded sufficient corroboration of one another to justify the convictions of the co-accused was one which required careful consideration. 28 Cal. 689, Foll.; 38 Cal. 559, Ref. (*Dunkley, J.*) NGA PO HLAING *v.* EMPEROR. **6 I.R. (Rang.) 89=35 Cr.L.J. 39=146 I.C. 303 (2)=1933 Cr.C. 1139=A I.R. 1933 Rang. 320.**

———**S. 30**—*Co-accused—Statement of—Value.*

The statement of a co-accused can be considered when judging the case against any person. Such evidence has, however, very little value, and though it may come in as a link in the chain, it cannot form the basis of a conviction. (*Middleton, J. C. and Kazi Mir Ahmad, A.J.C.*)

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———**S. 30**—*Confession—Acceptance in part.*

Where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element, while rejecting the exculpatory element as inherently incredible 52 All. 1011, Foll. (*Shadi Lal, C.J. and Agha Haidar, J.*) JUMMA *v.* EMPEROR. **141 I C. 40=I.R. 1933 Lah. 55=34 Cr L J. 94=33 P.L. R. 511=1932 Cr.C. 584=A.I.R. 1932 Lah. 438.**

———**S. 30**—*Confession during trial—Admissibility of.*

It is permissible for the Court to consider a confessional statement made by an accused person as a confession proved within the meaning of S. 30 whether made before the trial or during the trial, provided that it is recorded according to law. 45 A. 323, Diss. from ; 6 Bom. 124, Dist ; 23 Mad. 151, Foll. (*Staples, A.J C.*) GANPAT *v.* EMPEROR. **27 N.L.R. 163=I R. 1931 Nag. 174=134 I C. 686=32 Cr. L.J. 1222=1931 Cr. C. 830=A.I.R. 1931 Nag. 169.**

———**S. 30**—*No confession—Self exculpatory statement.*

Where a certain number of accused are jointly tried for the theft of certain property and one of the accused denies that he was guilty of the offence and states that the theft was committed by another accused who brought to him certain pieces of cloth as his share which he refused to take, the statement cannot be treated as a confession of an offence so that any part of it might be used against the other accused who was being tried for the same offence. (*Rupchand and Milne, A. J. Cs.*) DITO *v.* EMPEROR. **135 I C. 267=33 Cr.L.J. 106=I. R. 1932 Sind 27=1931 Cr.C 525=A.I R. 1931 Sind 154.**

——— **S. 30**—"*Proved*"—*Meaning of.*

The word "proved" in the section means proved before the case for the prosecution comes to an end, either proved in the course of the prosecution case or proved in some proceeding previous to the trial. So a confession by one accused made from the dock implicating himself and the other accused cannot be taken into consideration by the Court and such confession cannot be made the basis of the conviction of the other accused. 45 All. 323, Foll. (*Beasley, C. J. and Sundaram Chetty, J.*) MARUDAMUTHU PADAYACHI, *In re*. **54 Mad. 788=I.R. 1931 Mad. 845=134 I. C. 63=32 Cr. L. J. 1099=31 L.W. 162=1931 M.W.N. 886=A.I R. 1931 Mad. 820 =61 M.L J. 358.**

[D. 55 M. 903 (934) **Diss.** 16 Lah. 651 (652).]

———**S. 30**—*Retracted confession—Admissibility of against co-accused.*

A confession, merely because it has been retracted, does not become inadmissible in evidence against a co-accused, although its evidentiary value is thereby considerably diminished. But before a statement made by an accused person is treated as evidence against a co-accused, it must amount to a confession of the very crime with which he and the co accused are charged, and for that purpose, where the sole evidence in the case is the confession, the Court is bound to take into consideration the confession as a whole and not only a part of it. (*Ferrers, J.C. and Rupchand, A.J C.*) KHIMJI KHETSI *v.* EMPEROR. **8 R. S. 20=156 I. C. 972=36 Cr.L J. 1037.**

———**S. 30**—*Retracted confession of one accused—Sufficiency for conviction of co accused.*

Retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused but where such

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confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other men falsely and his story fits in exactly with the facts known and is corroborated sufficiently by material evidence against co accused, the evidence is admissible and is a strong piece of evidence against the co-accused. (*Raza and Bisheshwar Nath, JJ.*) MUSAHEB ALI *v.* EMPEROR. **I R. 1932 Oudh 253 (2) = 137 I.C. 665 = 33 Cr.L J. 502 = 9 O.W.N. 327 = 1932 Cr.C. 876 = A.I.R. 1932 Oudh 321.**

———**S. 30**—*Retracted confession of co accused—Value of.*

A confession which has been retracted must be viewed with suspicion. But if it is considered to have been a voluntary confession and substantially true, it can be admitted into evidence and used against its maker. If it is considered to be such a confession as substantially implicates its maker in regard to the crime with which he and the co accused are charged, it can be used also against the co-accused. But even then it can carry no weight, except where it is substantially corroborated by good evidence from other sources. (*Mahomed Noor and Luby, JJ.*) BARNABAS *v.* EMPEROR. **152 I C. 275 = 7 R P. 163 = 36 Cr.L J. 12 = 15 Pat. L. T. 711 = 1934 Cr.C. 1243 = A.I.R. 1934 Pat. 586.**

———**S. 30**—*Retracted confession of accused—Value of against co accused.*

The retracted confession of an accused has really little or no evidentiary value against a co-accused but it can be taken into consideration along with other evidence against that accused. (*Nanavutty and Zia-ul Hasan, JJ.*) MATHURA *v.* EMPEROR **155 I.C. 527 = 7 R.O. 602 = 36 Cr.L J. 767 = 1935 O W.N. 561 = 1935 Cr.C. 791 = A I.R. 1935 Oudh 354.**

———**S. 30**—*Retracted confession—Use against co-accused.*

If the confession is voluntarily made, it is admissible in evidence against the person making and may be taken into consideration even as against the other accused though retracted. (*Dunkley, J.*) NGA PYAUNG *v.* EMPEROR. **6 R R. 273 = 148 I.C. 1064 = 35 Cr. L. J. 863 = 1934 Cr.C 213 = A.I.R. 1934 Rang. 30.**

———**S 30**—*Retracted confession—Use against co-accused.*

The evidence of a retracted confession is admissible against a co-accused but it is practically of no value unless there be independent corroboration. In other words that case must be to all intents and purposes complete without the retracted confession of the co accused before it can be used and that confession may almost be described as superfluous or useless. (Case-law reviewed.) (*Harrison, J.*) SURJAN SINGH *v.* EMPEROR. **I.R. 1932 Lah 203 = 136 I C. 27 = 33 Cr L J. 251 = 33 P.L.R. 602 = 1932 Cr.C. 378 = A I.R. 1932 Lah. 298.**

———**S. 30**—*Retracted confession—Value.*

The law on subject of retracted confessions is contained in S. 30 and the definition of proof in S. 3 of the Act. A retracted confession is evidence and there is no provision in S. 30 by which a confession is to be receivable in one way against one person and in another way against another. The use to be made by a Court of a confession whether retracted or not is a matter of procedure rather than law the business of the Court being to make up its mind in accordance with the dictates of commonsense whether it is safe to believe the confession or not. 29 All. 434 and 30 P.R. 1914 (Cr.), Foll. (*Addison and Coldstream, JJ.*) MT. AIMNA *v.* EMPEROR. **I.R. 1931 Lah. 321 = 130 I.C. 641 = 32 Cr L J. 579 = 1931 Cr.C. 316 = A.I.R. 1931 Lah. 196.**

EVIDENCE ACT (1872), S. 30.

———**S. 30**—*Retracted confession—Value.*

Where, except that the accused has chosen to admit his own guilt, there is nothing in the confession, which is of any value in evidence, the confession when subsequently retracted is not sufficient in itself to justify the conviction of the person making it. (*Raza and Pullan, JJ.*) EMPEROR *v.* NARAIN. **6 Luck. 582 = I.R. 1931 Oudh 184 = 131 I.C. 72 = 32 Cr.L.J. 630 = 8 O. W N. 31 = 14 O.L.J. 94 = 1931 Cr.C. 211 = A.I R. 1931 Oudh 83.**

———**S. 30**—*Retracted confession—Value of, against co accused.*

Although a confession by a co-accused is evidence under S. 30 of the Evidence Act, it is the testimony of an accomplice who has not even been cross-examined; and it is a well-established rule of practice, that it is unsafe to accept such tainted testimony so long as it is not corroborated in material particulars. This is more so when such an accomplice has not adhered to his statement. (*Ferrers, J. C. and Rupchand, A. J. C.*) KHIMJI KHETSI *v.* EMPEROR. **8 R.S. 20 = 156 I.C. 972 = 36 Cr.L J. 1037.**

———**S. 30**—*Retracted confession—Value against co-accused.*

Where a confession is made 14 days after arrest by the police but is retracted at the earliest opportunity before the trial Magistrate, its evidentiary value is negligible as against the co-accused. (*Agha Haidar J.*) KULDIP CHAND *v.* EMPEROR. **153 I.C. 139 = 7 R.L. 332 (2) = 36 Cr.L.J. 300 (2) = 37 P.L.R. 132 = A.I.R. 1934 Lah. 718.**

———**S. 30**—*Retracted confession—Value of as against co-accused.*

Whatever value might be attached to the retracted confession of an accused person, its value against a co-accused is exceedingly weak and cannot be made the basis of a conviction unless it is materially corroborated. In considering this question, the point to be considered is whether the confession bears the stamp of truth. When it does not, and the confessor is a young man of about 20 years who takes particular care through the confession not to incriminate himself in any manner—so much so that it is no confession at all—and does not say anywhere that he himself committed any offence, it would be unsafe altogether to use a confession of this kind against the co-accused or to base a conviction it. It would be different in the case of a confession in which an accused person has admitted his own part in a crime; but when the confession incriminates only others and a studious attempt is made by the confessor to show that he took absolutely no part in the crime and to explain that his presence was only due to ertreaties or threats of the co-accused, the Court will not be justified in placing any reliance on the confession as against the co accused. (*Rachhpal Singh and Thomas, JJ.*) SHEORATAN *v.* EMPEROR. **10 Luck. 151 = 151 I C. 298 = 7 R.O. 109 = 35 Cr.L.J. 1290 = 11 O W.N. 1012 = 1934 Cr.C. 1279 = A.I.R. 1934 Oudh 418.**

———**S. 30**—*Retracted confession—Value—Corroboration by accomplice's evidence.*

The evidentiary value to be attached to a retracted confession would depend upon the facts and peculiar circumstances of a case. To argue that good corroboration of such evidence can be found in the evidence of an approver is to say that one tainted evidence gains strength from another tainted evidence. (*Agha Haidar, J.*) INDAR DATT *v.* EMPEROR. **I.R. 1931 Lah. 537 = 1931 Cr.C. 648 = 132 I.C. 185 = 32 Cr.L.J. 818 = A.I.R. 1931 Lah. 408.**

EVIDENCE ACT (1872), S. 30.

——S. 30—*Scope.*

S. 30 creates an exception to the fundamental principles of the Criminal Law and as such must be strictly construed in favour of an accused person. (*Beasley, C. J. and Sundaram Chetty, J.*) MARUDAMUTHU PADAYACHI. *In re.* **54 Mad. 788 = I.R. 1931 Mad. 815 = 134 I.C. 63 = 32 Cr.L.J. 1099 = 34 L.W. 162 = 1931 M.W.N. 886 = A.I.R. 1931 Mad. 820 = 61 M.L.J. 358.**

——Ss. 30 and 25—*Scope.*

Statement of an accused made at the police station against the co accused is inadmissible and cannot be used as evidence as against the co-accused. (*Jai Lal, J.*) KALA SINGH *v.* EMPEROR. **6 I.R. (Lah.) 159 = 146 I.C. 27 = 34 Cr.L.J. 1175 (2) = 34 P.L.R. 259 = 1933 Cr.C. 312 = A.I.R. 1933 Lah. 167.**

——S. 30—*Statement at the trial—Admissibility against the co accused.*

S. 30 applies only to statements made before and proved at the trial and not to statements made by some of the co accused in the course of the trial under S. 342 of the Cr. P. Code But statements made before the trial, *e.g.*, under S. 164 of the Cr. P. Code are admissible. (*Bisheshwar Nath, J.*) KUNWAR SEN *v.* EMPEROR. **8 Luck. 286 = 141 I.C. 192 = I.R. 1933 Oudh 33 = 34 Cr.L.J. 124 = 9 O.W.N. 1136 = 1933 Cr.C. 168 = A.I.R. 1933 Oudh 86**

——S. 31—*Admission—Effect on burden of proof.*

In a partition deed executed between one *M* and his brother, it was stated that the properties standing in the name of *P*, son of *M*, were *P's* self-acquired properties. In a later agreement between the defendants, sons of *P*, after the latter's death and *P's* brother's son the plaintiff and others, the defendants admitted that the properties standing in the name of the father *P* "were and are in ijmail." In a suit by plaintiff for partition, defendants claimed that the properties standing in the name of their father *P* were his self-acquisitions and should therefore excluded from partition.

Held, that this admission by the defendants shifted the burden on to them of showing that the said properties were the self acquisitions of their father *P*, for what a man has admitted to be true must reasonably be presumed to be true. The admission, however, was not conclusive and might be shown to be wrong or be shown to have been made under circumstances which would not make it binding on the persons making the same. (*Mitter and B. N. Rau, JJ.*) TRAILOKYA NATH DAS *v.* KENARAM DAS. **163 I.C. 663 = 9 R.C. 51 = 61 C.L.J. 551.**

——S. 31—*Admissions—Presumption of truth.*

Where in a written statement by the managing member of a Mahomedan family, he admitted that certain properties standing in his name belonged to all the members of the family, the admission must be presumed to be true until it is explained or until it is shown to be untrue. 29 A. 184 (P.C.), Ref. (*C. C. Ghose and Mitter, JJ.*) AMINADDIN MUNSHI *v.* TAJADDIN. **59 Cal. 541 = I.R. 1932 Cal. 515 = 138 I.C. 761 = A.I.R. 1932 Cal. 538.**

——S. 31—*Admission—Value.*

An admission is not conclusive but is only a piece of evidence which should be weighed against other evidence. (*Shadi Lal, C. J. and Walker, J.*) SADA *v.* JALLU. **I.R. 1931 Lah. 896 = 134 I.C. 128 = 32 P.L.R. 248 (2) = A.I.R. 1932 Lah. 126.**

——S. 31—*Admission—Value.*

An admission made by a party is a very strong proof against him and the fact admitted must be taken to be true unless the person making the admission explains that it was made under circumstances which does not make the admission binding on him. Inference as to partition drawn from admission of parties. (*Mitter, J.*) SHEIKH SIRAJUDDIN *v.* JOHUR JAN BEWA. **I.R. 1931 Cal. 888 = 134 I.C. 888 = 53 C.L.J. 222.**

EVIDENCE ACT (1872), S. 32—Boundaries.

——S. 31—*Admission—Value—Mistake of party making admission—Proof.*

Express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him ; but he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person and those claiming under him and that transaction but as to third parties he is not bound. L.R 34 I.A. 27, Foll. (*Harari, C. J. and Raza, J.*) ABDUL KAREEM *v.* RASHIDUDDIN. **131 I.C. 903 = 8 O.W.N. 306 = A.I.R. 1931 Oudh 246.**

——S. 32.

Admission of statement.
Boundaries.
Conspiracy.
Date of death.
Death of executant.
Discharge of professional duty.
Dying declaration.
Family custom.
Horoscope.
Local usage.
Opinion.
Ordinary course of business.
Pedigree.
Recitals.
Relationship.
Scope.
Statement after controversy.
Statement against interest.
Statement not falling under.
Value of evidence.
Will.

Admission of statement.

——S. 32—*Admission of statement—Procedure.*

Before statements can be admitted under S. 32 it must be proved that the makers of these statements are either dead or for any other reason are not available as witnesses. (*Page, C.J. and Mya Bu, J.*) KARAPAYA SERVAI *v.* MAYANDI. **147 I.C. 414 = 6 R.R. 164 = A.I.R. 1933 Rang. 212.**

Boundaries.

See also DEATH OF EXECUTANT, *infra.*

——Ss. 32, 9, 11 and 13—Boundaries—Recitals of —Documents between third parties—Not admissible. *See* EVIDENCE ACT, SS. 9, 11, 13 AND 32. **10 Mys. L.J. 75.**

——S. 32 (3)—*Boundaries—Deed not* inter partes—*Recitals in as to boundaries—Admissibility.*

A statement of boundaries in a document of title between third persons who are dead at the time the statement is sought to be put in evidence is admissible in evidence under S. 32 (3) of the Evidence Act, only if it is shown (1) that at the time the statement was made it was contrary to the interests of the maker, and (2) it was contrary to the interests of the maker, and (2) that at the time it is sought to be used it is a statement of a relevant fact. (*Wort, Khaja Mahomed Noor and Agarwala, JJ.*) SONEY LAL JHA *v.* DARBDEO NARAIN SINGH. **14 Pat. 461 = 155 I.C. 470 = 7 R.P. 590 = 16 Pat. L. T. 199 = A.I.R. 1935 Pat. 167 (F.B.).**

EVIDENCE ACT (1872), S. 32—Conspiracy.

Conspiracy.

———**Ss. 32 (3) and 10**—*Conspiracy—Admission by deceased member—Admissibility against other members.*

Although under S. 32 (3) of the Evidence Act, a confession made by a deceased conspirator after he had rendered himself liable to criminal prosecution is now admissible, yet when general evidence of the existence of a conspiracy of which the deceased was a member has been given, there can be no doubt that such a statement is admissible under S. 10 of the Act. (*Guha and Mc Nair, JJ.*) KUNJALAL GHOSH *v.* EMPEROR. **155 I.C. 261 - 7 R.C 572 = 36 Cr L J. 678 = 38 C.W N. 1015 = 1935 Cr.C. 40 = A I.R. 1935 Cal. 26.**

Date of death.

———**S. 32 (5)**—Date of death—Statement in application for probate—Person having special means of knowledge—Admissible under S. 11 if not under S. 32 (5). *See* EVIDENCE ACT, S. 11. **12 Pat. L.T. 891 = A.I.R. 1931 Pat. 224.**

Death of executant.

———**S. 32**—*Death of executant—Statement in another document as to boundaries—Admissibility.*

A recital regarding boundaries in a document executed between strangers to the suit relating to lands adjoining the suit lands and in which the suit land is referred as a boundary is not admissible under S. 13 but may be admissible if the executant is called and deposes to the boundary to corroborate him under S. 157, or if he is dead under S. 32. (*Dhavle, J.*) RAMNANDAN PRASAD *v.* LALEY TILAKDHARI LAL. **6 I.R. (Pat.) 215 = 145 I.C. 944 (2) = A.I.R. 1933 Pat. 636.**

Discharge of professional duty.

———**S. 32 (2)**—*Discharge of professional duty—Police diary—Statements recorded in—Admissibility.*

In the course of an investigation into the offence of dacoity a Police-officer, made entries in his diary as regards statements made by certain villagers. The Police officer was subsequently murdered and the diary was sought to be used in evidence.

Held, that the entries made in the discharge of professional duties by the Police-officer were admissible under S. 32 (2) of the Evidence Act and that S. 162, Cr. P. Code, did not prohibit their use. (*Young and Baj pai, JJ.*) EMPEROR *v.* ABDUL AZIZ. **140 I.C. 578 = I.R. 1933 All. 16 = 34 Cr.L.J. 109 = 1932 A.L.J. 301 = 1932 Cr C. 562 = A I R. 1932 All. 442.**

Dying declaration.

———**S. 32**—*Dying declaration—Acceptance in part—Permissibility.*

Once a declaration falls under S. 32 it becomes relevant evidence and the Court must judge of the weight of that evidence on exactly the same principles as those upon which it acts in judging of the weight of other types of evidence. Of course the Court has always to bear in mind that a declaration admissible under S. 32 is not made on oath and is not the subject of cross-examination and therefore it is a weaker type of evidence than the evidence given by a witness in the witness-box and if a judge thought that part of a dying declaration was deliberately false, it is no doubt very improbable that in practice he would act on the other part of the declaration, at any rate without very definite corroboration. But it cannot be said, that because it transpires that something in a dying declaration is false, therefore the whole declaration must necessarily be disregarded. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* AKBARALI KARIMBHAI. **58 Bom. 31 = 6 I.R (Bom.) 157 = 146 I.C. 548 = 35 Cr.L J. 109 = 1933 Cr.C. 1583 = 35 Bom.L.R. 1021 = A.I.R. 1933 Bom 479 (2).**

EVIDENCE ACT (1872), S. 32 (1)—Dying declaration.

———**S. 32**—*Dying declaration—Conviction—If can be based on.*

It is not safe to base a conviction on the dying declaration of the deceased, when the other evidence in the case is tainted and has to be rejected. (*Srivastava, Nanavutty and Rachhpal Singh, JJ.*) BHIKARI *v.* EMPEROR. **7 R O. 44 = 150 I C. 819 = 35 Cr L.J. 1113 = 11 O.W N. 851 = 1934 Cr.C. 1228 = A.I.R. 1934 Oudh 405.**

———**S. 32**—*Dying declaration—Corroboration when necessary.*

There is no rule of law which requires that a dying declaration should not be acted upon unless it is corroborated; but the evidential value of a declaration relevant under S. 32 varies very much in accordance with the circumstances in which it is made. A dying declaration may be relevant under S. 32 although the man who makes it does not expect to die Generally speaking, however, a declaration relevant under S. 32 but not made by one in immediate expectation of death and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* AKBARALI KARIMBHAI. **58 Bom. 31 = 35 Cr.L J 109 = 6 I.R. (Bom.) 157 = 146 I.C. 548 = 35 Bom.L.R. 1021 = 1933 Cr.C. 1583 = A.I.R. 1934 Bom. 479 (2).**

———**S. 32**—*Dying declaration—Statements as to cause of death—No knowledge of impending death.*

A statement made by a person who is dead, as to the cause of his death is admissible in evidence even though he was not aware that he was dying when he made it. It is, of course, for the Court to consider in each case what value is to be attached to such a statement. The Indian Legislature deliberately departed from the corresponding English law on the subject. (*Young, C.J. and Rangi Lal, J.*) INYAT KHAN *v.* EMPEROR. **16 Lah. 589 = 158 I.C. 336 = 36 Cr.L.J. 1335 = 37 P.L. R. 705 = 1935 Cr.C. 92 = A.I.R. 1935 Lah. 94.**

———**S. 32**—*Dying declaration—Transaction resulting in death—Informant to police—Pursuit of dacoits—Death—Oral statements made before death—Admissibility of.*

The words "as to any of the circumstances of the transaction which resulted in his death" are wide. Where the deceased informed the police about the contemplated dacoity and while pursuing the dacoits was shot dead by them and the whole thing happened within a few hours, the oral statements made by the deceased from the time of informing the police to the time of his death as well as his dying declaration, are relevant under S. 32 of the Evidence Act. (*Bisheshwar Nath and Kisch, JJ.*) LEKHA SINGH *v.* EMPEROR. **140 I.C. 892 = I R. 1933 Oudh 26 = 33 Cr.L.J. 101 = 9 O. W.N. 977 = 1933 Cr.C. 93 = A.I.R. 1933 Oudh 53.**

———**S. 32 (1)**—*Dying declaration—Admissibility—Authorization of Magistrate under S. 164, Cr. P. Code, if material.*

Statements made by persons murdered as to the cause of their death are admissible where the cause of their death comes into question. The question whether the Magistrate who recorded the statements was empowered under S. 164 is immaterial. (*Addison and Abdul Qadir, JJ.*) RAHMAN *v.* EMPEROR. **I.R. 1931 Lah. 885 = 134 I.C. 117 = 32 Cr L J. 1118 = 33 P.L R. 8 = 1932 Cr.C. 94 = A.I R. 1932 Lah. 14.**

———**S. 32 (1)**—*Dying declaration—First information report containing—Admissibility.*

The first information report when it contains a dying declaration is admissible in evidence under S. 32 (1). (*Harrison and Abdul Qadir, JJ.*) GAJJAN SINGH *v.*

EVIDENCE ACT (1872), S. 32 (1)—Dying declaration.

EMPEROR. **135 I.C. 608=I.R. 1932 Lah. 124=33 Cr L.J. 183=1931 Cr.C. 167=A.I.R. 1931 Lah. 103.**

———S. 32 (1)—*Dying declaration—Motive for murder—Admissibility.*

The motive for a crime is of course a relevant fact but can only be proved by admissible evidence. Where the statement of the deceased prior to her death is alleged to contain a reference to the motive of the accused, it is not admissible under S. 32 (1) because it cannot be deemed to be a statement as to the cause of her death or as to any of the circumstances of the transaction which resulted in her death nor is it admissible under S. 8 (1) where it is not shown to have accompanied or explained any act of the deceased. It cannot therefore be proved by hearsay evidence, by the testimony of a witness who heard her make the statement. (*Beasley, C.J. and Sundaram Chetty, J.*) VENKATASUBBA REDDI, *In re.* **54 Mad. 931=134 I.C. 1143=33 Cr L.J. 51=1931 M.W.N. 1177=34 L.W. 128=1931 Cr.C. 929=A.I.R. 1931 Mad. 689=61 M.L.J. 608.**

[F. 29, N.L.R. 251 (262, 263).]

———S. 32 (1)—*Dying declaration—Oral—Proof.*

The deceased had received numerous and very serious injuries on his head and it was very doubtful whether under such circumstance he would have been able to utter even a single word. There was no definite opinion of the doctor as to whether deceased would have been then able to speak.

Held, that the evidence of the prosecution witnesses in respect of the alleged oral dying declaration of the deceased should be discarded. (*Nanavutty and Smith, JJ.*) RATAN LAL *v.* EMPEROR. **8 Luck. 570=6 I.R. (Oudh) 107=146 I.C. 381=35 Cr.L.J. 45=10 O.W.N. 557=1933 Cr.C. 780=A.I.R. 1933 Oudh 333.**

———S. 32 (1)—*Dying declaration—Proof—Record by doctor in the presence of his compounder—Admissibility.*

A statement made by a deceased person relating to the facts leading to his death and recorded by the doctor who attended on the deceased at the time of his death in the presence of his compounder is admissible under Cl. (1) of S. 32 as a written record of verbal statements. If the person who reduced it into writing is examined as a witness, there can be no objection to the admissibility of the record and the fact that it was not read over to he deponent or certified by him to be correct does not make it inadmissible. 8 Cal. 211, 67 I.C. 577, Not Foll; 49 Cal. 358; 36 Cal. 659; 7 Lah. 91, Foll. (*Beasley, C.J. and Walsh, J.*) KRISHNAPPA NAICKEN *v.* EMPEROR. **54 Mad. 678=135 I.C. 337=33 Cr.L.J. 115=I.R. 1932 Mad. 81=1931 M.W.N. 167=33 L.W. 348=1931 Cr.C 478=A.I.R. 1931 Mad. 430=60 M.L.J 404.**

———S. 32 (1)—*Dying declaration—Record by Magistrate—Corroboration by Medical Officer—Admissibility of declaration.*

A dying declaration may be verbal or written. Nodding head and making signs to questions put together with the questions have been held to be verbal statements. If written, the precise statement made should be proved either by the person who recorded it or by some one who heard it. If a statement is recorded by a Magistrate, his mere signature is insufficient to make that statement admissible in evidence; there must be direct proof that such statement was made. So the record of the dying declaration by a Magistrate is admissible when the Magistrate was examined at the trial and the District Medical Officer who attended on the deceased also deposed about the substantial correspondence between the record and the dying statements. 7 All. 385; 49 C. 600; 49 C. 358; 6 C.W.N. 72; 7 Lah. 91; 52 C. 446, Ref. (*Doraisami Iyer, C.J. and Sreenivasa Iyer, J.*) ABDULLA *v.* ABDUL GAFFAR. **9 Mys.L.J. 10.**

EVIDENCE ACT (1872), S. 32 (1)—Dying declaration.

———S. 32 (1)—*Dying declaration—Record of—Magistrate's duty.*

The recording of a dying declaration which may subsequently be produced as evidence in a Court of justice is a grave and solemn proceeding. Unauthorized persons should not be permitted to crowd round when the declaration is being made. It is the bounden duty of the Magistrate to take every possible step to ensure that no influence is brought to bear on the declarant and that he is not prompted or aided in any way in making his statement. The proceeding should be so conducted that the declarant is as free from personal influence in emitting his declaration as he would be if he were giving evidence in a Court of Law. (*Thom and Kisch, JJ.*) NEM SINGH *v.* EMPEROR. **152 I.C. 741=7 R.A. 373=4 A.W.R. 5=36 Cr L J 152=15 L.R. 114 (Cr.)=1934 Cr C. 1167=A.I.R. 1934 All. 908.**

———S. 32 (1)—*Dying declaration — Scope—Statements by deceased long before death—Admissibility of.*

The transaction resulting in death which is contemplated in S. 32 cannot possibly mean any fact or series of facts which have no direct and organic relation to death. The fact of death is the *res gestae*, the main fact and only those circumstances which constitute or accompany this main fact can be regarded as forming part of the transaction. The incidents therefore must be intimately connected with the immediate cause of death, *viz.*, the injury which results in death, and such facts as are within the knowledge of the injured person intimately and immediately connected with the injury, are primarily contemplated in the section. Statements made by the deceased long before the actual incident of murder are inadmissible under S. 32 (1). (Case law discussed.) (*Niyogi and Staples, A.J.C.*) REGO *v.* EMPEROR. **29 N.L.R. 251=I.R. 1933 Nag. 153=143 I.C. 17=34 Cr L J. 505=1933 Cr.C. 610=A.I.R. 1933 Nag. 136.**

———S. 32 (1)—*Dying declaration—Stage at which it should be made.*

The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. (*Suhrawardy and Mallik, JJ.*) UPENDRA NATH TA *v.* EMPEROR. **129 I.C. 676=32 Cr.L.J. 416=52 C. L.J. 425.**

———S. 32 (1)—*Dying declaration—Trial for robbery—Death remotely caused as result of injuries caused by robber—Statement before death regarding circumstances of robbery—If relevant.*

In a trial for robbery, statement of a person before death regarding the circumstances of robbery is relevant under S. 32 (1) even though death was caused remotely by the wounds received at robbery. (*Dunkley, J.*) NGA BA MIN *v.* EMPEROR. **159 I.C. 1032=37 Cr. L J. 205=8 R.R. 309=1935 Cr.C. 1205=A.I.R. 1935 Rang. 418.**

——— S. 32 (1)—*Dying declaration—Value of.*

Usually a dying declaration which records the very words of the dying man unassisted by interested persons is most valuable evidence, but the value of a dying declaration altogether disappears when parts of it have obviously been supplied to the dying man by other persons, whether interested parties or police officers. As "touched up" dying declaration has no value. (*Monroe and Abdul Rashid, JJ.*) DIAL SINGH *v.* EMPEROR. **153 I.C. 810=36 Cr.L.J. 127=7 R.L. 461=36 P.L.R. 24=1934 Cr.C. 1126=A.I.R. 1934 Lah. 805.**

EVIDENCE ACT (1872), S. 32 (1)—Dying declaration.

———**S. 32 (1)**—*Dying declaration — Value—Opportunity for coaching.*

Where the case for the prosecution depends upon the death-bed statement of a man who was admittedly kept back from hospital in order to be instructed about his statement and it is also shown that his statement regarding witnesses to the occurrence was false, his declaration cannot be relied upon for convicting the accused named by him. (*Wallace and Jackson, JJ.*) PICHUMMA NAIDU *v.* EMPEROR. **1930 M.W.N. 1211**

Family custom.

———**S. 32 (4)**—*Family custom—Statement of ancestor contained in will—Admissibility.*

An admission by an ancestor contained in a will as to the existence of a custom of exclusion of daughters from inheritance, is admissible under S. 32 of the Evidence Act, where the statement is made before any controversy arises. (*Srivastava and Zia-ul-Hasan, JJ.*) SHAMZUNNISSA *v.* ALI ASGHAR. **159 I.C. 780 = 8 R.O. 205 = 1935 O.W.N. 1376 = A.I.R. 1936 Oudh 87**

———**S. 32 (4)**—*Family custom—Statements of deceased persons—Admissibility.*

Statements of deceased persons as to the existence of a family custom are admissible in evidence under S. 32 (4). (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL-UR-RAHMAN. **8 Luck 445 = 150 I.C 282 = 6 R.O. 629 = 10 O.W.N. 268 = A.I.R. 1933 Oudh 246.**

Horoscope.

———**Ss. 32 (5) and 159**—*Horoscope — Admissibility to prove age.*

A horoscope prepared by a person who is dead is admissible in evidence under S. 32 (5) of the Evidence Act, in proof of age. Even if it may not be relied on as a probative document in itself, it can be used for refreshing the memory under S. 159. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 133 = 39 Mys H.C.R. 406.**

———**S. 32 (5)**—*Horoscope — Horoscope prepared by astrologer—Admissibility.*

A horoscope prepared *ante litem motam* by an astrologer, dead at the time of suit, whose handwriting had been proved by a near relation of his, and who used to prepare horoscopes for others in the village and consequently must be taken to have special means of knowledge of the date of birth of a party is admissible under S. 32 (5). (*Mitter and Bartley, JJ.*) NIRMALA NALINI DEVI *v.* KAMALABALA DASSI. **142 I.C. 36 = I.R. 1933 Cal. 219 = 36 C.W.N. 838 = 56 C.L.J. 253 = A.I.R. 1933 Cal. 51.**

Local usage.

———**S. 32 (4)**—*Local usage regarding deep stream boundary rule—Evidence of—Statements made to witness by deceased residents of village.*

Where the question related to the local usage relating to the deep stream boundary rule, one of the witnesses who was the Ziladar for 36 years stated that such custom prevailed from time immemorial, that he was told about it by the former Sarabarakar and a tenant, both of them since dead,

Held, that such evidence was admissible under S. 32, Cl. 4. (*Niamatullah and Bennet, JJ.*) RAM SUBHAG RAI *v.* SHEO SAHAI RAI. **6 I.R. (All.) 339 = 146 I.C. 795 = 17 R.D. 252 = 14 L.R. 172 (Rev.) = A.I.R. 1933 All. 376.**

Opinion.

———**S. 32 (4)**—*Opinion—Opinion of mahant based on oral tradition—Admissibility.*

EVIDENCE ACT (1872), S. 32 (5)—Pedigree.

S. 32 (4) allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge. In the case of the Mahants, even if they may have had knowledge by means of oral tradition handed down from Mahant to Chela, the opinion would be relevant but not particular facts. (*Broadway and Johnstone, JJ.*) RAM PRASAD *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **12 Lah. 497 = 135 I.C. 657 = I.R. 1932 Lah. 113 = 32 P.L.R. 910 = A.I.R. 1931 Lah. 161.**

Ordinary course of business.

———**Ss. 32 (2) and 34**—*Ordinary course of business—Account books—Entry in them by deceased person—Corroboration—Necessity for.*

Though an entry in books of account when relevant only under S. 34 requires corroboration, no corroboration is needed if the same becomes admissible under S. 32 (2). 28 Bom. 194; 16 C.L.J. 24; 63 I.C. 946; 55 Cal. 1167, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) MANICKCHAND JOHARI MALL *v.* PARAKAJI. **9 Mys. L.J. 337.**

———**Ss. 32 (2) and 34**—*Ordinary course of business—Account books—Writer alive but not called—Admissibility.*

Where the writers of the account books produced by a plaintiff are alive and in his service, but are not examined by him, the books cannot be said to have been duly proved as required by law, and are inadmissible in evidence. (*Nanavutty and Zia-ul-Hasan, JJ.*) GAJENDRA SHAH *v.* SHANKAR BUX SINGH. **152 I.C. 468 = 7 R.O. 229 = 11 O.W.N. 1323 = A.I.R. 1935 Oudh 16.**

———**Ss. 32 (2) and 35**—*Ordinary course of business—Report of process peon who is dead—Admissibility.*

Report submitted by a process peon who is dead regarding service of notice is admissible under S. 32 (2) and S. 35. (*Fazl Ali and Rowland, JJ.*) LALL *v.* RAJKISHORE NARAIN SINGH. **13 Pat. 86 = 147 I.C. 101 = 6 R.P. 333 = 15 Pat.L.T. 407 = A.I.R. 1933 Pat. 658.**

———**S. 32 (2)**—*Ordinary course of business—Zemindari papers.*

The Zemindari papers can be used as independent evidence, provided they are brought within S 32 (2) of the Evidence Act by showing that the persons who prepared them are dead or cannot be found, etc., but the weight to be attached to them must depend on circumstances. (*Mahomed Noor and Dhavle, JJ.*) CHATURBHUJ SINGH *v.* SARADA CHARAN GUHA. **11 Pat. 701 = 141 I.C. 157 = I.R. 1933 Pat. 47 = 14 Pat L.T. 509 = A.I.R. 1933 Pat. 6.**

Pedigree.

See also RELATIONSHIP, *infra.*

———**S. 32 (5)**—*Pedigree—Admissibility.*

Pedigree table relied on in a suit of 1864 was held to be not admissible under S. 32, Evidence Act. (*Dalip Singh and Abdul Qadir, JJ.*) JAGNAHAR SINGH *v.* SADHU RAM. **15 Lah. 688 = 149 I.C. 943 = 6 R.L. 762 = 36 P.L.R. 503 = A.I.R. 1934 Lah. 283 (2).**

———**Ss. 32 (5), 13 and 35**—*Pedigree—Certified copy of decree with two pedigrees—Both pedigrees are admissible.*

Where certified copies of the decree and of two pedigrees found with it are produced, the Court may presume that the two pedigrees found with the decree were the two pedigrees filed in the suit. Both pedigrees should have been admitted as pedigrees filed by the respective parties to the suit and not as evidence o relationship under S. 32.(5). The statement in the

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decree that the pedigrees were filed is evidence under S. 35 as an entry in a public record, or under S. 13, as evidence of the course of proceedings in a suit. (*Lord Blanesburgh.*) COLLECTOR OF GORAKHPUR *v.* RAM SUNDAR MAL. 61 I.A. 286=56 All. 468=40 L. W. 217=38 C W N. 1101=15 Pat.L.T. 531=60 C.L J. 67=36 Bom.L R 867=1934 M.W.N. 751=7 R.P.C. 1=150 I.C. 545=11 O W.N. 889=4 A.W.R 46=1934 A.L.J. 779=A.I.R. 1934 P.C. 157=67 M.L.J. 274 (P.C.)

———S. 32 (5)—*Pedigree—Inam enquiry—Statements of vakil—Admissibility.*

A statement put in during the inam enquiry by a vakil on behalf of certain inamdars though not signed by them may be presumed to be authorized by the members of the family for whom the vakil signed and is admissible under S. 32 as evidence of the geneological table contained therein. 19 Cal. 219 (P.C.) and 25 All. 143 (P.C.). Ref. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. 55 Mad. 40=I.R. 1932 Mad. 767=139 I.C. 684=1932 M.W.N. 31=35 L W. 73=A.I.R. 1932 Mad. 198=62 M.L.J. 116.

———S. 32 (5)—*Pedigree—Mode of proof.*

It is the duty of the party producing a witness on the question of pedigree to elicit from him, if it is a fact, that he heard from a person deceased, so as to fulfil the requirements of S 32 (5). (*Niamatullah and Rachhpal Singh, JJ.*) MT. CHUNNA KUNWAR *v.* LALA MUKAT BEHARI LAL. 151 I.C. 338=7 R A. 140=A.I.R. 1934 All. 117.

———S. 32 (5)—*Pedigree—More than* 30 *years old—Signatories dead—If admissible.*

A pedigree filed for purposes of preparation of khewat more than 30 years before, when there was no controversy in respect of it, is admissible under S. 32 (5) when all the signatories to it are dead. A. I. R. 1929 Oudh 129 and A. I. R. 1931 P. C. 45, Rel. on (*Srivastava and Rachhpal Singh, JJ.*) MAHADEO SINGH *v.* SURAJ BALI SINGH. 148 I C. 1041=6 R.O. 493=A.I.R. 1934 Oudh 210.

———S. 32 (5)—*Pedigree—Proof—Essentials—Admissibility.*

Before a pedigree said to have been prepared by a deceased member of the family can be admitted in evidence under S. 32 (5) it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence. It is only a pedigree which had been subjected to investigation many years prior to the institution of the litigation, in which it was questioned and which had been previously relied upon by competent authorities and which is supported by oral evidence, that can safely be accepted as correct. Practice of manufacturing horoscopes in india referred to. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAZA SAIYID MAHOMED SAADAT ALI KHAN. 136 I C. 642=I.R. 1932 Oudh 130=8 O.W N. 349=A.I.R. 1931 Oudh 177.

———S 32 (5)—*Pedigree—Statements made after controversy—Admissibility.*

Statements of persons who are dead are inadmissible under S. 32 (5) of the Evidence Act, if they are made after the controversy about the pedigree had arisen. (*Kisch and Baipai, JJ.*) BARKAT ULLAH *v.* NISAR HUSAIN. 1935 A.W.R. 1197.

———S. 32 (6)—*Pedigree—Bard—Value of evidence.*

It is the business of a mirasi, who is a hereditary family bard, to acquaint himself with the details of the family history, whose glories he recounts in song on

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ceremonial occasions and the fact that he must speak from hearsay does not render his evidence valueless, where pedigree is to be proved. (*Lord Macmillan.*) ABDUL GHAFUR *v.* MT. HUSSAIN BIBI. 58 I.A. 188=12 Lah. 336=I.R. 1931 P.C 68 (2)=130 I.C. 612 (2)=33 L.W. 434=1931 M.W.N. 373=32 P.L. R. 186=8 O W.N. 653=33 Bom L R. 420=53 C.L.J. 213=14 O.L.J. 512=A.I.R. 1931 P.C. 45=60 M.L.J. 583 (P.C.).

———S. 32 (6)—*Pedigree—Evidence of* Hardwar purohit.

Held, that the evidence of *a Hardwar purohit* is valuable on a question of a family pedigree. (*Shadi Lal, C.J. and Tapp, J.*) FAUJA SINGH *v.* ALLAH DITTA. I.R. 1931 Lah. 842 (2)=133 I.C. 874 (2)=32 P.L.R. 696=A.I R. 1931 Lah. 722.

———S. 32 (6)—*Pedigree—Hearsay evidence.*

Under the English law the admission of hearsay evidence in pedigree cases is confined to the proof of the pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. The Indian law is not so strict as laid down in S. 32. (*Sulaiman, C.J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH 56 All 766=3 A.W.R. 529=6 R A. 962=149 I.C 781=1934 A.L.J. 318=A I.R. 1934 All. 406 (F.B.).

———S. 32 (6)—*Pedigree—Mahomedans—Practice of showing eldest son on right side—Inference.*

Where the family indicated in the pedigree is not a family governed by the custom of primogeniture in the descent of property, there can be no motive in the preparation of the pedigree to place the name of the first born as the first on the right hand side and in the absence of sufficient material on record, there would be no justification for the inference that a pedigree of a family of similar status would be invariably prepared on a plan of descent by primogeniture. The eldest son is generally shown on the right side in the Mahomedan pedigrees but that was not an invariable practice. The practice of so showing the eldest son is borrowed from English system and was not followed in ancient pedigrees. (*Hasan, C.J. and Raza, J.*) ABDUL KAREEM *v.* RASHIDUDDIN. 131 I.C. 903=8 O.W N. 306=A.I.R. 1931 Oudh 246.

———S. 32 (6)—*Pedigree—Proof—Documentary and oral evidence—Relative value.*

The point of view with which the decision of the question whether a certain pedigree relied on by the plaintiff has been proved should be approached is that if the documentary evidence on which the plaintiff relies is found to be reasonable explicit and reliable, the oral evidence which consists mainly of the depositions of the members of the family should also be accepted as trustworthy, being consistent with the documentary evidence. On the other hand, if the documentary evidence is not of the character mentioned above, the oral evidence must be treated as wholly inconclusive. (*Hasan, C. J. and Raza, J.*) ABDUL KAREEM *v.* RASHIDUDDIN. 131 I.C. 903=8 O.W.N. 306=A.I.R. 1931 Oudh 246.

———S. 32 (6)—*Pedigree — Proof—Statements by deceased member made* ante litem motam*—Admissibility.*

In question of pedigree, the statement of deceased members of the family made *ante litem motam* before there was anything to throw doubt upon them, are evidence to prove pedigree. And such statements by deceased members of the family may be proved not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them,

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or did anything that amounted to showing that they recognized them. If any member of the family, as a person who presumably would know all about the family, had stated such and such a pedigree that evidence would be receivable, its weight depending upon other circumstances *Sturla* v. *Freccia*, (1880) 5 A. C. 623, Foll. (*Lord Macmillan.*) ABDUL GHAFUR *v.* MT. HUSSAIN BIBI. **58 I.A. 188 = 12 Lah. 336 = I R. 1931 P C 68 (2) = 130 I.C 612 (2) = 33 L.W. 434 = 1931 M W.N. 373 = 32 P.L R. 186 = 8 O.W N. 653 = 14 O L J 512 = 33 Bom L.R. 420 = 53 C L.J. 213 = A.I R. 1931 P C. 45 = 60 M L J. 583 (P.C.).**

[Rel. 1934 O. 210 (211).]

Recitals.

———S. 32—*Recitals in subsequent deed of gift—Admissibility.*

The recital in a deed of gift to the effect that the executant and her husband had made a gift of certain properties to the daughter as stridhanam at the time of her marriage and that she was executing a formal conveyance in pursuance of the oral directions of her husband is admissible in proof of the earlier gift, in a case covered by S. 32. (*Ramesam, J.*) APPASAMI PILLAI *v.* RAMU TEVAR. **136 I C. 340 = I.R. 1932 Mad. 292 = 34 L.W. 776 = A I.R. 1932 Mad. 267 = 61 M L J. 887.**

———S. 32—*Recitals—Suit for rent—Plea of holding rent free—Sale deeds between third parties—Recitals in—Admissibility.*

In a suit for assessment of fair and equitable rent, the defendants pleaded that the holding was rent free and in support relied upon sale deeds containing recitals to the effect that the predecessors-in interest of the executants of the *Kabalas* were holding with *mukhar* right.

Held, such recitals were inadmissible and could not be used in evidence against the plaintiff who was no party to them. (*Mitter, J.*) JAGATDWIPTENDRANARAYAN BHUP *v.* BILASH RAY AGARWALLA **59 Cal 454 = I.R. 1932 Cal. 375 = 137 I.C. 860 = A I.R. 1932 Cal 427.**

———Ss. 32 (3) and 7—*Recitals—Deed—Recital that land is bounded by property of another—Title of third party—Admissibility.*

Ordinarily recitals in a deed are not evidence against third parties. A recital in a deed does not therefore in any way recognize the title to the property by merely reciting that the property, the subject-matter of the deed, is bounded on one side or the other by property over which some other person purports to exercise proprietary rights. The statement in the deed to the effect that the land is bounded on the north, south, east or west by the property of another person can by no stretch of language be brought within S. 32 (3), or S. 32 (7). (*Wort, J.*) HARI AHIR *v.* SRI SANGHAT CHACHA. **152 I C. 829 = 7 R.P. 257 16 Pat L.T. 197 = A.I.R. 1934 Pat. 617 (2).**

———S. 32 (7)—*Recitals—Deed of adoption—Admissibility—Validity of adoption in question.*

Where the validity of an adoption made by a person who had two aurasa sons afflicted with leprosy is in question the statement contained in the registered deed of adoption setting out that fact as the basic ground for the adoption is admissible in evidence under S. 32, Cl. 7. (*Sundaram Chetty, J.*) NAGAMMAL *v.* SANKARAPPA NAIDU. **54 Mad. 576 = I.R. 1931 Mad. 473 = 131 I. C. 9 = 1931 M.W N. 501 = 33 L.W. 269 = A.I.R. 1931 Mad. 264 = 61 M.L J 19.**

Relationship.

———S. 32 (5)—*Relationship—Declaration made post litem motam—Admissibility.*

EVIDENCE ACT (1872), S. 32 (5)—Relationship.

Declarations as to the existence of relationship by blood are inadmissible in evidence if made *post litem motam*. In order to be admissible they must be made *ante litem motam* which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy concerning the subject-matter of declaration. Declarations made in the obvious interest of the declarant will generally speaking be rejected. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 = I.R. 1932 Oudh 130 = 8 O.W. N. 349 = A.I R. 1931 Oudh 177.**

———S. 32 (5)—*Relationship—Genuine petition of appeal—Admissibility.*

A copy of genuine petition of appeal produced from the Government Secretariat, even though it may not bear the signature or thumb mark of the party, is admissible in evidence, but a statement made in it by the appellant in his own interest about his alleged relationship with a certain person cannot be admitted as relevant and admissible in evidence unless such statement has been brought home to appellant as his own. *Shrewsbury Peerage Case*, 7 H. L. C. 1 and 25 All. 143, Ref. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 = I.R. 1932 Oudh 130 = 8 O.W.N. 349 = A.I.R. 1931 Oudh 177.**

———S. 32 (5)—*Relationship— Muhammadan marriage—Evidence of—Statement of deceased person—Admissibility of.*

A statement by a deceased person that there was a marriage between him and a certain woman is admissible in evidence for the purpose of proving the legitimacy of his children under the provisions of S. 32, sub S. (5) as a statement as to marriage. The doctrines of Mahomedan Law do not exclude evidence of this nature and the Evidence Act applies. (*Mukerji, A C.J and Bennet, J.*) ZAMIN ALI *v.* MT. AZIZUNNISSA. **55 All. 139 = I R. 1933 All 432 = 144 I C. 433 = 1933 A L J. 483 = A.I.R. 1933 All. 329.**

———S. 32 (5)—*Relationship—Proof.*

For the purpose of proving relationship, statements of deceased relatives, servants, and dependants of the family are admissible, and in every instance it is a question of fact as to whether the person who made the statement had special means of knowledge. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad. 40 = I.R. 1932 Mad. 767 = 139 I.C. 684 = 35 L.W. 73 = 1932 M.W.N. 31 = A.I. R. 1932 Mad. 198 = 62 M L J. 116.**

———S 32 (5)—*Relationship—Statement as to age of adopted son by adoptive mother—Admissibility.*

A statement made as regards age is tantamount to a statement as to the existence of relationship, and therefore the statement made by the adoptive mother as regards the age of the boy, although it would not show her own relationship with him, is admissible. An adoptive mother who sees the boy at the time of the adoption, and who would in all probability have made inquiries about him, is a person who must be deemed to have special means of knowledge within the meaning of S 32 (5). (*Sulaiman, C.J., Young and King, J.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **56 All 766 = 3 A.W.R. 529 = 6 R A. 962 = 149 I.C. 781 = 1934 A.L.J. 318 = A.I R. 1934 All. 406 (F.B.).**

———S. 32 (5)—*Relationship—Statement by deceased person—Special means of knowledge—Proof of.*

Proof of special means of knowledge in the person making a statement as to existence of relationships between persons is a pre-requisite to the admission of

EVIDENCE ACT (1872), S. 32 (5)—Relationship.

evidence under S. 32 (5) and this proof must be given by the party who wishes to give such evidence according to S. 104 of the Evidence Act. (*Doraswami Iyer, C.J. and Mahadevayya, J.*) BHADRAVVA *v.* BASAPPA. **10 Mys.L J. 88.**

———**S. 32 (5)**—*Relationship—Statement of witness as to relationship between two persons—Admissibility.*

The statement of a witness on the question of relationship can be admissible either under S. 32 (5) or S. 50. If any particular statement does not fall within the purview of one or the other of these provisions, it should be ruled out as inadmissible. Where the statement relates to the existence of relationship between two persons, one or both of whom could not have been seen by the witness, it cannot be presumed that he heard of the relationship from his own deceased ancestor. Where therefore the statement of witness giving the pedigree is found to be inadmissible under S. 32 (5), but he deposes to facts which establish such treatment as is contemplated by S. 50, it should be admitted to that extent. (*Niamatullah and Rachhpal Singh, JJ.*) MT. CHUNNA KUNWAR *v.* LALA MUKAT BEHARI LAL. **151 I.C. 338 = 7 R A. 140 = A.I.R. 1934 All. 117.**

———**S. 32 (5)**—*Relationship—Statement of witness—Effect in later proceeding.*

The statements of witnesses in a prior suit regarding the adoption of a party cannot be admitted in evidence in the subsequent suit in respect of the same question of adoption as they cannot be said to have been made before the question in dispute was raised. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad. 40 = I.R 1932 Mad. 767 = 139 I.C. 684 = 35 L W. 73 = 19 32 M.W.N. 31 = A.I. R. 1932 Mad. 198 = 62 M.L.J. 116.**

———**S. 32 (5) and (6)**—*Relationship—Entries in books of priests containing pedigree—Value of.*

Entries in the books of the priests at a place of pilgrimage showing the pedigree of both parties right up to a common ancestor are admissible in evidence under S. 32 of the Evidence Act, but such entries should be accepted with care. The production of books before the trial Court is essential, and the probative value of such entries is considerably reduced, if they are not placed before the trial Judge. (*Almond, J C. and Mir Ahmad, A J.C.*) ACHARAJ RAM *v.* GANESH DAS. **7 R. Pesh. 28 = 151 I.C. 622 = A.I.R. 1934 Pesh. 78.**

Scope.

———**S 32**—*Scope.*

S. 32 provides an exception to the general rule that evidence must be given in Court by witnesses. (*Addison and Abdul Qadir, JJ.*) RAHMAN *v.* EMPEROR **I.R. 1931 Lah. 885 = 32 Cr.L J. 1118 = 134 I C. 117 = 33 P.L R. 8 = 1932 Cr C. 24 = A I.R. 1932 Lah. 14.**

Statement after controversy.

———**S. 32 (7)**—*Statement after controversy—"Instances"—Statements of deceased persons.*

S. 48 read with S. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under S. 32 are not admissible under S. 48 or under S. 32 (7). Statements cannot be called instances (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL-UR RAHMAN. **8 Luck. 445 = 150 I C 282 = 6 R O. 629 = 10 O.W.N 268 = A. I.R. 1933 Oudh 246.**

Statement against interest.

———**S. 32 (3)**—*Statement against interest—Deed of adoption—Attestation by aurasa sons—Deed containing statement about the leprosy being cause of adoption—Admissibility.*

EVIDENCE ACT (1872), S. 32 (6) and (7)—Value of Evidence.

Where the validity of an adoption made by a person who had two aurasa sons suffering from leprosy is in question, the fact of the natural sons having attested the deed of adoption, is admissible in evidence, as they may be deemed to have acquiesced in the truth of the statement in the deed of adoption, viz, the necessity of adoption by reason of the two aurasa sons being lepers, the statement being against their pecuniary interest. (*Sundaram Chetty, J.*) NAGAMMAL *v.* SANKARAPPA NAIDU. **54 Mad. 576 = 131 I C. 9 = I.R. 1931 Mad. 473 = 1931 M.W N. 501 = 33 L.W. 269 = A I.R. 1931 Mad. 264 = 61 M.L.J 19.**

———**S. 32 (3)**—*Statement against interest—Statement exposing person making it to criminal prosecution—Divorce proceeding—Letter written to petitioner by co respondent admitting adultery—Admissibility.*

In a divorce suit filed in India by the husband on the ground of adultery, a letter written to him by the co-respondent who lives in England admitting adultery with the respondent, is admissible in evidence under S. 32, Cl. (3), Evidence Act, as the admission of adultery would have exposed him to a criminal prosecution. (*Young, King and Bennet, JJ.*) GERALD THOMAS COCKMAN *v.* OLGA MYRTLE COCKMAN. **56 All. 570 = 150 I C. 445 = 6 R A 1099 = 4 A.W.R. 469 = 1934 A.L.J 1254 = A.I R. 1934 All. 618 (S B.).**

———**S 32 (3)**—*Statement against interest—Statement of liability.*

A statement in a sale deed by the executant that he was liable for a particular amount is admissible under S. 32 (2) as a statement made against the pecuniary or proprietary interest. A.I.R. 1926 Pat. 255, Ref. (*Pollock, A.J.C.*) BABHNAJI *v.* RATANLAL. **30 N.L. R. 192 = 6 R N. 217 = 148 I.C. 1033 = A.I.R. 1934 Nag. 106.**

Statement not falling under.

———**S. 32**—*Statement not falling under—Admissibility*

There is difference between the existence of a fact and a statement as to its existence. S. 11 makes the existence of facts admissible, and not statements as to such existence unless the fact of making that statement is itself a matter in issue. Hence if a statement does nor fall within S. 32, it cannot be admissible even under S. 11. (*Sulaiman, C J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **56 All. 766 = 3 A.W.R 529 = 6 R.A. 962 = 149 I C. 781 = 1934 A.L.J. 318 = A.I R. 1934 All. 406 (F.B.).**

Value of evidence.

———**Ss 32 49, and 60**—*Value of evidence—Test of.*

The value of the evidence admissible under Ss. 32, 49 and 60 depends on the character of the witnesses who depose to what they heard from deceased persons and also on the character of the deceased and whether they were expressing their own opinion or merely repeating hearsay. 23 All. 37 (P C.), Foll. (*Aston, A. J C.*) MULCHAND *v.* DEVIGIR. **150 I.C. 266 = 6 R S. 265 = A.I.R. 1933 Sind 213.**

———**S. 32 (6) and (7)**—*Value of evidence—Documentary evidence—Cumulative effect.*

Where each of the items of documentary evidence relied upon do not prove a fact in issue in the slightest degree and have no evidentiary value in advancing a particular case, the cumulative effect of all the mass of such evidence would be *nil* and of no evidentiary value. Rule applied to proof of a pedigree table. 5 O.W.N. 992. Dist. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 = I R 1932 Oudh 130 = 8 O.W.N 349 = A.I. R. 1931 Oudh 177.**

EVIDENCE ACT (1872), S. 32 (7)—Will.

Will.

——Ss. 32 (7), 33 and 158—*Will—Deceased attestors—Statements before Sub Registrar—Admissibility of.*

Statements made before the Sub-Registrar by the deceased attestors to a will are admissible under S. 32 (7) taken with S. 158, but not under S. 33 of the Evidence Act. The statement of a deceased attestor regarding the executant's admission is contained in the document by reason of the attestation. It falls under S. 32 (7). (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

——S. 33—*Actual cross examination by adverse party not necessary.*

S. 33 does not require it for a deposition to be admissible, that the adverse party should have actually exercised his right to cross examine the witness. It is enough if he had the opportunity to cross examine on the occasion. 8 C.W.N. 838, Ref. (*Macpherson and Dhavle, JJ.*) GAURI DUTT MARWARI *v.* DOWRING **13 Pat. 735 = 151 I C. 683 = 7 R.P. 111 = A.I.R. 1934 Pat. 413.**

——S. 33—*Applicability—"Any person authorized by law to take it"—Collector deciding dispute in mutation proceedings under S. 40, U. P. Land Revenue Act—Evidence given by witness in such proceedings—Admissibility in subsequent suit.*

Even though the enquiry held by the Collector in deciding a dispute in mutation proceedings under S. 40 of the U. P Land Revenue Act may not strictly speaking, be a judicial proceeding, the Collector holding the enquiry and deciding the dispute is certainly a person authorized by law to take evidence within the meaning of S. 33 of the Evidence Act. S. 33 therefore applies to a statement made by a witness in such proceedings; and the statement is admissible in a subsequent suit between the parties in the Civil Court. (*Sulaiman, C.J. and Bennet, J.*) MAHENDRA SINGH *v.* SHANKAR DAYAL SINGH. **159 I.C. 903 = 8 R.A. 525 = 1935 R.D. 567 = 1935 A.W.R. 1422 = A.I.R. 1936 All. 124.**

——S. 33—*Applicability—"Judicial proceedings"—Settlement proceedings—Evidence taken in—Admissibility as to custom alleged.*

Settlement proceedings before a Settlement Deputy Collector are not judicial proceedings within the meaning of S. 33, Evidence Act, so as to make statements made therein as to the existence of a custom admissible in a subsequent civil suit between the parties. But the statements cannot at the same time be excluded. Though they may not be admissible as evidence of the custom, they can be looked into to assess the value of the Deputy Collector's report and order. These latter are admissible under S. 13, Evidence Act, as recognizing a custom in dispute. (*Niamatullah and Collister, JJ.*) KRISHNA DUTT DUBE *v.* AHMADI BIBI. **57 All. 588 = 153 I.C. 708 = 7 R A. 551 = 1935 A.L.J 235 = 4 A.W.R. 1208 = 16 L.R. 140 (Rev.) = 18 R D. 635 = A.I.R. 1935 All 187.**

——S. 33—*'Cannot be found'—Absconding witness.*

Where it appeared that the witness who was related to the accused and gave material evidence before the Magistrate was absconding and the Sessions Judge recorded his deposition before the Magistrate as part of the evidence in the case, *held*, that the procedure was permitted by S. 33. (*Suhrawardy and Patterson, JJ.*) ABBAS MANDAL *v.* EMPEROR. **I R. 1931 Cal. 503 = 131 I C. 855 = 32 Cr L J. 810 = 35 C.W.N. 143 = A.I. R. 1931 Cal. 473.**

——S. 33—*'Cannot be found'—Proof—Statement of Public Prosecutor, if sufficient.*

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The Sessions Judge, before transferring the deposition of a witness in the Court of the committing Magistrate to his own record, ought to take evidence and record proceedings and, if as a result of the evidence thus taken, he arrives at the judicial decision that the witness could not be found or his presence could not be secured without an amount of delay or expense, which under the circumstances of the case the Court considers unreasonable, he can bring his former deposition on the record. But if the Sessions Judge transfers the statement of the witness to the record of the Sessions case simply because the Public Prosecutor makes a statement before him that the witness could not be found, the procedure is contrary to law and wholly irregular and the deposition of the witness thus brought on the record cannot be treated as evidence. (*Shadi Lal C.J. and Agha Haidar, J.*) INDAR *v.* EMPEROR. **I.R. 1931 Lah 131 = 129 I C 195 = 32 Cr.L J. 256 = 31 P.L.R. 1021 = 1930 Cr C. 1217 = A.I.R. 1930 Lah. 1041.**

——S. 33—*Charge for sexual offence—Evidence of woman injured—Corroborative evidence.*

In cases arising out of sexual matters, when charges are made against a man by a woman, it is dangerous to convict upon her evidence. The jury should require corroboration of her story, before they bring in a verdict of 'guilty'. The kind of corroboration required must be independent evidence. The statement of a witness that he saw the girl coming out of the house of the accused weeping may be relied on as corroboration (*Lort Williams and M.C. Ghose, JJ.*) NUR AHMED *v.* EMPEROR. **35 C.W.N. 108.**

——S. 33—De novo *trial—Previous evidence—Admissibility.*

A witness who had been brought from Calcutta and examined on two different occasions, one before framing of the charge and again after framing of the charge, was cross-examined and re-examined in great detail, so that there could be no doubt that all that could be get out of this witness had been got out of him. The complainant was not a man of means, to bring such witness again from Calcutta, for the *de novo* trial must have been a very heavy drain on his purse. Moreover, there could be delay in securing the attendance of such a witness.

Held, that the difficulty and expense involved in calling this witness were sufficient to make such evidence admissible under S. 33. 6 All. 224, Dist. (*Mackney, J.*) J. G. G. FERNANDEZ *v.* EMPEROR **160 I C. 215 = 37 Cr.L J. 256 = 8 R R. 352 = 1935 Cr.C. 1258 = A.I.R. 1935 Rang. 484.**

——S 33—*Enquiry before Coroner—Statement of witness subsequently dead—Admissibility during trial.*

The inquiry before the Coroner, although it may be a judicial proceeding is not a proceeding between the prosecutor and the accused and therefore the deposition of a witness taken in an enquiry before the Coroner cannot in the event of the death of the witness, be taken into account at the trial before the High Court. (*Beaumont, C J.*) EMPEROR *v.* MAHOMED YUSUF **6 I.R. (Bom.) 156 (1) = 146 I C. 544 = 35 Cr L J. 106 = 1933 Cr. C. 1553 = 35 Bom.L R. 1020 = A.I R. 1933 Bom. 479 (1).**

——S. 33—*Evidence at previous trial—Admissibility.*

The deposition of a witness, who had died and whom the accused had an opportunity to cross examine in the previous trial, is admissible in a *de novo* trial. Case-law discussed. (*Walsh, J.*) MUTHIAH PILLAI *v.* EMPEROR. **I R. 1932 Mad. 641 = 139 I.C 203 = 33 Cr.L J. 738 = 1932 M.W.N. 857 = 37 L.W. 134 = 1932 Cr.C. 589 = A.I.R. 1932 Mad. 559.**

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———**S. 33**—*Judicial proceeding—Court trying suit beyond its pecuniary jurisdiction—Evidence taken in—Admissibility of.*

No proceeding is a 'judicial proceeding' within the meaning of the section if it is conducted by a Court which has no jurisdiction to undertake it. Where the Munsif, after the examination of a witness, returned the plaint on the ground that the value of the subject matter was above its pecuniary jurisdiction, the evidence of the witness so examined is not admissible in evidence in the subsequent trial before the Sub-Judge even though the witness died in the interval and so could not be examined afresh. 20 M.L.J. 726, Diss. from; 7 L. 396, Foll.; 3 M. 48 and 38 C. 639, Ref. to. (*Curgenven and Bhashyam Ayyangar, JJ.*) SANKAPPA RAI *v.* KERAGA PUJARY. **54 Mad. 561 = I.R. 1931 Mad. 618 = 132 I.C. 122 = 33 L.W. 419 = A.I.R. 1931 Mad. 575 = 61 M.L.J. 120.**

[**Rel.** 1933 M.W.N. 197 (198).]

———**S. 33**—*Oral evidence—No opportunity to cross-examine—Evidence not admissible.*

A deposition on which there was no opportunity at all to cross examine, is not admissible under S. 33. (Case-law disc.) (*Walsh, J.*) SUNDARA RAJALI *v.* GOPALA THEVAN. **150 I.C. 132 = 6 R.M. 697 = 39 L.W. 34 = A.I.R. 1934 Mad. 100.**

———**S. 33**—*Proceedings* inter partes—*Admissibility in later proceeding—Consent of parties.*

If both parties to a suit, with a view to save delay and expense, agreed to the admission of evidence of witnesses in former proceedings between them, especially when the party who had the right to object waived his objection and did not feel he was prejudiced thereby, the admissibility of such evidence ought not to be questioned in the appellate Court. 43 Mad. 609 (F.B.); 30 Bom. 109 and 46 All. 815, Foll. (*Doraisami Iyer, C.J. and Rama Rao, J.*) BHAGAWANJI *v.* RAJA SAMPANGI RAMA SHETTY. **9 Mys L.J. 1.**

———**S. 33**—*Prosecution witness not cross examined before charge—Not traceable for further cross-examination—Admissibility of his evidence.*

The accused has a right to cross-examine a prosecution witness before the charge is framed against him and if he has failed to do so, not only had he the opportunity but he had the right of cross-examining the witness, and the action of the Court in treating the evidence of any such witness under S. 33 is justified, when it is found impossible to produce him for further cross-examination under the provisions of S. 256, Cr. P. Code. (*Grille, J.C.*) GURUDIN *v.* EMPEROR. **31 N L.R. 276 = 154 I.C. 369 = 7 R.N. 164 = 36 Cr.L.J. 578 = 1935 Cr.C. 77 (2) = A I R. 1935 Nag. 8.**

———**S. 33**—"*Representative in interest*"—*Meaning.*

It may be true that the phrase "representative in interest" is not for all purposes synonymous with the expression "persons claiming under" in S. 11 of the Code of Civil Procedure. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad 40 = I R 1932 Mad. 767 = 139 I C. 684 = 35 L.W 73 = 1932 M.W.N. 31 = A.I.R. 1932 Mad. 198 = 62 M L J. 116.**

———**S. 33**—*Statement before Magistrate—Admission before Sessions Judge.*

The statement made by a person before a committing Magistrate can be transferred to the record of the Sessions Judge only if the person is examined as a witness before the Sessions Judge. His statement will be admissible under S. 33, Evidence Act, only if the Judge holds that the witness was incapable of giving evidence before him. (*Jai Lal and Bhide, JJ.*) EMPEROR *v.* NATHA SINGH. **6 R.L. 361 = 147 I.C. 234 = 35 Cr. L.J. 349 = 35 P.L.R. 75 = 1934 Cr.C. 447 = A.I.R. 1934 Lah. 212.**

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———**S. 33**—*Statement by witness—Admissibility in subsequent suit.*

The statement by a witness who produces certain papers in suit to contest a notice of ejectment to the effect that his ancestor was a *thekadar*, is admissible in evidence under S. 33 of the Evidence Act, in a subsequent suit in which the same dispute is involved. (*Srivastava and Nanavutty, JJ.*) SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* TIRBENI PRASAD. **11 Luck. 35 = 154 I.C. 965 = 7 R.O. 523 = 1935 R.D. 171 = 1935 O.W.N. 387 = A.I.R. 1935 Oudh 289.**

———**S. 33**—*Witness examined in committing Court but not appearing in Sessions Court—Deposition, if admissible.*

Where in a case under S. 366, Penal Code, the horoscope of the girl was produced to show that the girl was below 16 years of age and the person, preparing the horoscope was examined in the committing Court and he admitted that the horoscope was prepared by him but he did not appear in the Sessions Court though summoned, and it was alleged that he did not get the summons,

Held, that it was not open to the prosecution to invoke S. 33, Evidence Act, and the Sessions Judge was right in refusing to admit evidence given in the lower Court. (*Guha and Bartley, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* FORHAD. **153 I.C. 493 = 7 R C. 381 = 36 Cr.L.J. 364 = A.I.R. 1934 Cal. 766.**

———**S. 33, Prov. (1)**—*Object*—"*Representative in interest*"—*Meaning.*

The person who is called by Prov. (1) a "representative in interest" of another is a person who was a party to the first proceedings. The first proviso requires that the party to the first proceeding should have represented in interest the party to the second proceeding in relation to the question in issue in the first proceeding to which "the facts which the evidence states" were relevant. It covers not only cases of privity in estate and succession of title, but also cases where both the following conditions exist: *viz.*, (1) the interest of the relevant party to the second proceeding in the subject-matter of the first proceeding, is consistent with and not antagonistic to the interest therein of the relevant party to the first proceeding, and (2) the interest of both in the answer to be given to the particular question in issue in the first proceeding is identical. There may be other cases covered by the first proviso; but if both the above conditions are fulfilled, the relevant part to the first proceeding in fact represents in the first proceeding the relevant party to the second proceeding, in regard to his interest in relation to the particular question in issue in the first proceeding, and may grammatically and truthfully be described as a representative in interest of the party to the second proceeding. (Scope of proviso discussed.) (*Lord Russell.*) KRISHNAVVA SURYA RAO BAHADUR *v.* VENKATA KUMARA MAHIPATHI SURYA RAO. **60 I.A. 336 = 57 Mad. 1 = 6 I R. (P.C.) 12 = 1933 A.L.J. 1039 = 38 L.W. 409 = 1933 M.W.N. 1191 = 38 C.W N. 1 = 35 Bom.L.R. 1076 = 15 Pat.L.T. 1 = 58 C.L J. 305 = 145 I.C. 216 = A.I.R. 1933 P.C. 202 = 65 M.L.J. 479 (P.C.).**

———**Ss. 34 and 32 (2)**—*Account books—Admissibility.*

Books of account, if no balances have been struck in them may be inadmissible under S. 34, but they are however admissible under S. 32 (2) as entries or memoranda, made by persons who are dead, in books

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kept in the ordinary course of business. (*Pollock, A.J. C.*) BABHNAJI *v.* RATANLAL. **30 N.L.R. 192=6 R. N. 217=148 I.C. 1033=A.I.R. 1934 Nag. 106.**

——**S. 34**—*Account books—Admissibility of—Balances should be properly struck.*

An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly and in the ordinary course of business. The account books in which balances are not struck for six days running is not therefore a document which would inspire confidence in a Court of justice. (*Addison and Agha Haidar, JJ.*) UTTAM CHAND ISHAR DAS *v.* HAKIM MAHOMED SHARIF. **33 P.L.R. 168=137 I.C. 44=I R. 1932 Lah. 278 (2)=A.I.R. 1932 Lah. 417.**

——**S. 34**—*Account books—Corroborative evidence—Books of respectable firm—Rejection—Reasons to be given.*

The account books by themselves cannot prove the transaction as they are mere corroborative evidence. But where they are spoken to by a witness, the Judge should give some reason why any suspicion should attach to them. It is hardly proper to stigmatise the books of a respectable firm as books which it is not difficult to fabricate without coming to a specific finding that the books produced were as a matter of fact fabricated and without giving reasons therefor. (*Kulwant Sahay, J.*) DAMRI CHAUDHURY *v.* NATHUNI MIA. **I.R. 1933 Pat. 151 (2) 142 I.C. 463=14 Pat.L.T. 61—A I.R. 1933 Pat. 145.**

——**S. 34**—*Account books—Entry in by agent—Relevancy.*

Entries in account books are relevant as admissions against the party, even when the entries are written by his agent. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

——**Ss. 34 and 32 (2)**—*Account books—Entries in—Entries made by deceased person—Corroboration—Necessity for.*

Though an entry in books of account when relevant only under S. 34 requires corroboration, no corroboration is needed if the same becomes admissible under S. 32 (2). 28 Bom. 294; 16 C.L.J. 24; 63 I.C. 946; 55 Cal. 1167, Ref. (*Rama Rao and Srinivasa Iyer JJ.*) MANICKCHAND JOHARI MALL *v.* PARAKAJI. **9 Mys. L.J. 337.**

——**S. 34**—*Account books—Entries—Proof of.*

In order to obtain a decree on the basis of entries in books of account, it is not sufficient merely to prove that the books are correct and have been regularly kept in the course of business, but the entries must also be proved unless the necessity for such proof is removed by the admission of the opposite party. A.I.R 1922 Lah. 338; A I.R. 1924 Lah. 540, A I.R. 1927 Lah. 903; 23 W.R. 390 (P.C.) and A.I.R 1914 Lah. 67, Ref. (*Addison and Agha Haidar, JJ.*) BAHADUR SINGH *v.* PADAM CHAND-ASA RAM. **I R. 1933 Lah. 159—141 I.C 655 34 P.L.R. 46=A I.R. 1933 Lah. 384.**

——**S. 34**—*Account books—Entries in—Value of—Plea of fraud.*

P was purchaser of debts due to *D* from *N N* alleged that *D* had swindled *N* of Rs. 10,000. *P* relied on entries in the account books of *N* showing Rs. 8,203 15 6 due to *D*. It was proved that fraud of some sort had been committed, but *N* was unable to prove that *D* was guilty of fraud. The Counsel for *N* urged that since fraud had been committed, the entries in the account books should be taken as gratuitous admissions made under a mistake which could be withdrawn at any time.

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Held, that these entries must be regarded as correct, until it was established that they were made as a result of any misrepresentation or fraud committed by *N*. (*Tek Chand and Abdul Rashid, JJ.*) MAHOMED BAKHSH *v.* RAWALPINDI CLUB, LTD. **A.I.R. 1935 Lah. 222.**

——**S. 34**—*Account books—Evidence by itself—Sufficiency of.*

Mere reliance on account books without any sworn testimony in support of it or supported by sworn testimony which is unreliable, is not sufficient to establish the claim, but where the plaintiff produces account books and deposes that they are regularly kept and are correct, and he is not cross examined on the point, his testimony supported by the account books is legally sufficient to establish his claim. (*Bhide, J.*) JAGAT SINGH RAI *v.* JAGAT SINGH. **6 I.R. (Lah.) 64=145 I.C. 157=A.I R. 1933 Lah. 212.**

——**S. 34**—*Account books—Nakal Bahi.*

As the entries in the Nakal Bahi are not totalled or balanced and there is no reckoning and no account, the Nakal Bahi is not an account book at all and the entries therein are not admissible in evidence. 10 N.L.R. 44, Foll. (*Subhedar, A J.C.*) BADRINARAYAN *v.* BANSIDAR. **150 I.C. 748 (2)=7 R.N. 25—16 N L.J. 282.**

——**S. 34**—*Account books—Need for corroboration.*

On a plain reading of S. 34 of the Evidence Act, a plaintiff cannot get a decree on his books of account only, unsupported by other evidence. (*Mir Ahmad, A. J.C.*) FAIZ MUHAMMAD PIR BAKHSH *v.* MUHAMMAD ZAMAN KHAN **157 I C 52—8 R. Pesh. 7.**

——**S. 34**—*Account books—Sufficiency of evidence.*

If in addition to the production by the plaintiff of account books regularly kept in the course of business, there is evidence of witnesses who prove a number of items claimed by the plaintiff, the requirements of S. 34 of the Evidence Act are fulfilled and there is sufficient evidence to charge the defendant with liability. (*Jai Lal and Monroe, JJ.*) NANAK CHAND BAIJ NATH *v.* PARMESHRI DAS **35 P.L.R. 539.**

——**S .34**—*Accounts—Entries in—Proof—Personal knowledge of witness—Inference.*

In a suit on a balance of account, the plaintiff supported her case by the production of bahis and by the evidence of her munib stated that the defendants used to send goods to plaintiff and also used to purchase goods, through the plaintiff, that the transaction used to be entered in the *bahi* and that the suit was for balance due under such an account.

Held, that the matter was left in doubt whether the witness was speaking from personal knowledge or without personal knowledge and that the defendant not having chosen to cross-examine the witness, the plaintiff should be given the benefit of doubt and the evidence taken to be tendered on personal knowledge and the plaintiff's suit should have been decreed. (*Boys and Sen, JJ.*) MT. HAR DEI *v.* KISHUN **I.R. 1931 All. 756=133 I C. 900=1931 A.L.J. 946=A.I R. 1932 All. 60.**

——**S. 34**—*Entry in Siaha—Admissibility in evidence—Conditions.*

An entry in a Siaha which is a copy of the accounts would be admissible in evidence if regularly kept, but the law specifically states that of itself it shall not be considered to be sufficient evidence to charge any person with liability. If a person bases his case on the entry, he should produce the person who made it in order that the other party might have an opportunity of cross-examining him and ascertaining the circumstances in which it was made and the reasons why signature was

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not obtained for the same. (*Keane, S.M. and Oppenheim, J.M.*) BHAGWAT PRASAD SINGH *v.* PRASAD. **15 R.D. 401.**

———**S. 34**—"*Kept in regular course of business*"—*Day-book entered after four months.*

A day-book, which has been entered after four months from the happening of an event and the rough notes of which are not available is not a document which can be held to have been kept in the regular course of business. These remarks apply *a fortiori* to a ledger which is prepared from such a day book. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ARJAN SINGH BHAJAN SINGH *v.* SURJAN SINGH. **155 I.C. 1006=7 R. Pesh. 106=A.I.R. 1935 Pesh. 44.**

———**S. 34**—"*Regularly kept*"—*Meaning of.*

A book of account may be said to be regularly kept although the book is not entered up from day to day or from hour to hour, as the transactions take place. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———**S. 34**—"*Regularly kept*"—*Meaning of—Account books shown to contain incorrect entries—Admissibility of.*

The words "regularly kept" are not synonymous with "correctly kept". They only mean that the account books should be kept in accordance with a certain fixed method or in some customary form. The term "regularly kept" has reference to the system of book-keeping, rather than to the truth or correctness of the entries in the account books. Where the books show that the dealings of the firm were as a rule entered from day to day in the day-book, they contain daily totals of the debit and credit entries and a cash balance is struck every day and the entries in the day-books are posted up in the ledger, the mere fact that it contains some minor mistakes cannot make it inadmissible, though the defects may affect its value. (*Hasan, C.J. and Bishesh war Nath, J.*) GULAB HALWAI *v.* BHAGWAN DASS. **I.R. 1932 Oudh 329=138 I.C. 716=9 O.W.N. 532=A.I.R. 1932 Oudh 225.**

———**S. 35.**

Birth register.
Death register.
Guardianship certificate.
Judgment and decree.
Municipal record.
Official record.
Police record.
Record-of-custom.
Record-of-rights.
Reports of officers.
Revenue records.
School register and certificate.
Survey records.
Vaccination register.

Birth register.

———**S. 35**—*Birth register—Age—Proof of—Entry in* Hathchita *of* Chaukidar—*Admissibility.*

The *Hathchita* of the *Chaukidar* containing the date of birth of a person is admissible in evidence to prove the age of a person though the entry was made by the *defadar*, the *chaukidar* being illiterate. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MADHO SARAN SINGH *v.* MANNA LAL. **149 I.C. 129=6 R.P. 563=14 Pat.L.T. 441=A.I.R. 1933 Pat. 473.**

———**S. 35**—*Birth register—Evidentiary value of—Entries in records of educational institutions.*

It is very common to make out a person entering a school to be younger in age than he is, in order not to be too old for government employment when his education

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is completed and for other reasons. Therefore the mere entry of the date in the records of educational institutions does not seem to be sufficient to rebut the very strong evidence afforded by a birth register (*Addison and Agha Haidar, JJ.*) MAHOMED HASSAN *v.* SAFDAR MIRZA. **14 Lah. 473 - I.R. 1933 Lah. 396=144 I.C. 45=34 P.L.R. 820=A.I.R. 1933 Lah. 601.**

———**S. 35** - *Birth register—Municipal record.*

Under S. 35, the Municipal register in which births and deaths are registered is admissible in evidence as it is kept by a public servant in the discharge of his duties. (*Nanavutty and Rachhpal Singh, JJ.*) JAI BHAGWAN *v.* GUTTOO. **6 R.O. 395=148 I.C. 418=11 O.W.N. 416=A.I.R. 1934 Oudh 167**

———**S. 35**—*Birth register—Relevancy as to proof of age—Admissibility.*

A birth register is receivable and relevant under S. 35 of the Evidence Act as evidence of age, and no further evidence is necessary, as the register itself would establish the date of birth of the person whose age is in question. (*Wort, J.*) NANHAK LAL *v.* BAIJNATH AGARWALA. **160 I.C. 116 37 Cr.L.J. 227=8 R.P. 334=16 Pat.L.T. 629 -1935 Cr.C. 1175=A.I.R. 1935 Pat. 474.**

Death register.

———**S. 35**—*Death register—Entry in—Admissibility to prove religion.*

Entries in a death register are at best reliable only with regard to the date of death and the fact of death. It is not safe to rely on them for the purpose of proving the religion of a particular person, in a case in which there is much conflicting evidence as to his religion. (*Varadachariar, J.*) GURUSAMI NADAR *v.* IRULAPPA KONAR **155 I.C. 708 - 7 R.M. 603=40 L.W. 502=1934 M.W.N 1197=A.I.R. 1934 Mad. 630=67 M.L.J. 389.**

Guardianship certificate.

———**S. 35**—*Guardianship certificate.*

A guardianship certificate does not fall under S. 35 because it does not contain any entry in any public or other official book, register or record, as there is no rule requiring District Judge to maintain any such official book, register or record. (*Sulaiman, C.J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **56 All. 766=3 A.W.R. 529=6 R.A. 962=149 I.C. 781=1934 A.L.J. 318=A.I.R. 1934 All. 406 (F.B.).**

Judgment and decree.

———**S. 35**—Decree—Certified copy of decree with two pedigrees—Statement in the decree that the pedigrees were filed is evidence under S. 35 as an entry in a public record. *See* EVIDENCE ACT, SS. 32 (5), 13 AND 35—PEDIGREE **56 All. 468=67 M.L.J. 274 (P.C.).**

———**S. 35**—*Judgment—Admission in—Statement and reasoning in judgment—Admissibility.*

The statement in a judgment between the parties, reciting that the defendant in the suit admitted a particular fact in evidence is not admissible under S. 35 of the Evidence Act, because it is only secondary evidence of the admission in question; in order to make it admissible there must be proof that primary evidence is not available. The reasoning in the judgment is also inadmissible. The precise words of an admission are necessary. (*Walsh, J.*) NARASAVVA *v.* VEERAVVA. **154 I.C. 753=7 R.M. 489=40 L.W. 810=A.I.R. 1935 Mad 268.**

———**S. 35**—*Judgment—Oral admission recorded in—Admissibility.*

Where a deposition of a witness had been recorded in the ordinary way, that record and not an abstract of the evidence in the judgment is the proper evidence of the statement. But where the Court has acted upon an oral

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admission and recorded it in its judgment which constitutes the only official record of it, it is admissible in evidence under S. 35. 60 M.L.J. 13 and 45 M. 332, Dist.; A.I.R. 1925 M. 1019, Appl. (*Curgenven, J.*) SUBBARAYA CHETTIAR *v.* SELLAMUTHU ASARI. **I.R. 1933 Mad. 237=142 I.C. 548=A.I.R. 1933 Mad. 184.**

———**S. 35**—*Judgment—Recital in—Matter mentioned incidentally—Admissibility in different case.*

A recital in a judgment of a matter only incidentally mentioned cannot be evidence, of what is there said in another case. 56 Cal. 1003 (P.C.), Rel. on. (*Addison, J.*) BHUPA *v.* JAI CHAND. **135 I.C. 202=I.R. 1932 Lah. 74=32 P.L.R. 763=A.I.R. 1932 Lah. 50.**

Municipal record.

See also BIRTH REGISTER, *supra.*

———**S. 35**—*Municipal record—Khasra paimash of Municipality—Value of, as record of title.*

The khasra paimash is not a record of title but a mere record of survey and carries with it no presumption of correctness, so far as the question of ownership is concerned. A Municipality is generally interested more in the assessment of tax than in the determination of ownership and for its purposes, an occupier is as good as an owner. Moreover in the preparation of documents like khasra paimash, a Municipality is concerned more with the measurements of the buildings with a view to safeguard its own interests against any encroachment on the public streets than in the ascertainment of the title of persons owning such buildings. (*Bhide and Din Mahomed, JJ.*) KARTAR SINGH *v.* MT. MEHR NISHAN. **16 Lah. 313=155 I.C. 1064=7 R.L. 826=A.I.R. 1934 Lah. 885.**

Official record.

———**S. 35**—*Official record*—Butwara *record.*

The *Butwara* record is not conclusive evidence but merely evidence under S. 35 of the Evidence Act as an official record. It is very weak evidence when it conflicts with the record-of-rights. (*Mallik and Jack, JJ.*) BENODA CHARAN CHAKRAVERTY *v.* RAMANI KISHORE CHAKRAVERTY. **60 Cal. 302=151 I.C. 749 (2)=7 R.C. 162=38 C.W.N. 268=A.I.R. 1934 Cal. 488.**

———**S. 35**—*Official record—Entries as to relationship.*

Where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of the section. The family pedigrees which accompanied a statement by certain members of the family in an inam inquiry of 1865 and two of which were enclosures to reports by the Collector to the Board of Revenue under the Court of Wards Act are relevant and admissible under S. 35 in a later proceeding. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad. 40=I.R. 1932 Mad. 767=139 I.C. 684=35 L.W. 73=1932 M.W.N. 31=A.I.R. 1932 Mad 198=62 M.L.J. 116.**

———**S. 35**—*Official record—Entry in order sheet that notice has been served—Presumption.*

Any entry in the order sheet that notice has been served does not constitute conclusive evidence of the factum of service but there is no presumption that the entries are false and it is for the person, is he so asserts, to prove that the notice stated in the order sheet to have been served on him was in fact not served. (*Fazl Ali and Rowland, JJ.*) LALL *v.* RAJKISHORE NARAIN SINGH. **13 Pat. 86=147 I.C. 101=6 R.P. 333=15 Pat.L.T. 407=A.I.R. 1933 Pat. 658.**

———**S. 35**—*Official record—Knowledge of public officer—Necessity.*

EVIDENCE ACT (1872), S. 35—Record of rights.

An entry in an official record is admissible if it states a relevant fact. It is not necessary for the admissibility of the entry, that it should relate to a fact known to the public officer recording it. (*Ferrers, J. C. and Rupchand, A. J. C.*) MT. SHAMUL *v.* DOST MAHOMED KHAN. **27 S.L.R. 101=150 I.C. 279=6 R.S. 262=A.I.R. 1933 Sind 317.**

Police record.

———**S. 35**—*Police record—Census for levy of punitive tax—Value of, as record of title.*

The police department when taking a census of the houses for the purposes of levying the punitive tax is merely interested in recording the names of the occupants from whom they could levy the contribution. Their record, therefore, carries with it no presumption of correctness so far as the question of ownership is concerned. (*Bhide and Din Mahomed, JJ.*) KARTAR SINGH *v.* MT MEHR NISHAN. **16 Lah. 313=155 I.C. 1064=7 R.L. 826=A.I.R. 1934 Lah. 885.**

———**S. 35**—*Police record—Entry in public record—Admissibility.*

An entry in a report made at a police station and recorded by a public servant is a relevant fact under S. 35. Such an entry is admissible in evidence even if the person who made it is alive and not called as a witness. (*Kisch, J.*) ABHERAJ SINGH *v.* GAYA SINGH. **135 I.C. 387=I.R. 1932 Oudh 35=8 O.W.N. 1228=A.I.R. 1932 Oudh 137.**

———**S. 35**—*Police record—First information report—Admissibility of—Extent of.*

A first information report taken down by a police-officer amounts to an entry in an official record stating a fact in issue and made by a public servant in the discharge of his official duty and falls within the scope of S. 35 of the Evidence Act and is a relevant fact. But it is not a substantive piece of evidence and is no evidence of the existence of the facts which it mentions. It can be used merely by way of corroboration or contradiction and not any further. The reports do not prove themselves but they have to be tendered under one or other of the provisions of the Evidence Act and the usual course for the prosecution is to tender them as corroboration under S. 157 of the Evidence Act. (*Mahadevayya, O. C. J.*) BABU *v.* GOVERNMENT OF MYSORE. **11 Mys L.J. 475 39 Mys.H.C.R. 75.**

Record of custom.

———**S. 35**—Record of custom—Local custom—Panna Lal's Book on—Admissibility in evidence. *See* CUSTOM (U.P.) **A.I.R. 1934 All. 984.**

———**S. 35**—Record of custom—*Riwaj-i-am*—Entries as to custom—Evidentiary value of. *See* CUSTOM (PUNJAB)—RIWAJ-I-AM. **A.I.R. 1935 Lah 434.**

———**S. 35**—*Record of custom—Village note—Entry in—Custom.*

The evidence of custom contained in the village note regarding the right of tenant to the timber of trees in his holding is admissible under S. 35 and the question of its probative value is one of fact. (*Courtney-Terrell, C. J. and James, J.*) BIDY PRASAD SINGH *v.* SURKHUR MAHTON. **I.R. 1931 Pat. 494=134 I.C. 638=12 Pat.L.T. 302=A.I.R. 1931 Pat. 263.**

Record of rights.

———**S. 35**—*Record of rights—Entries as to valuation in—Admissibility of.*

As the law does not require valuation to be given in the register of record of-rights, the entries as to valuation are irrelevant and therefore inadmissible under S. 35. 47 I.C. 1 (P.C.), Rel. on. (*Subhedar, A. J. C.*)

EVIDENCE ACT (1872), S. 35—Revenue records.

NAMDEO SHANKAR *v.* RAMRAO MAROTI. **6 I.R. (Nag.) 77=146 I.C. 152=A.I.R. 1933 Nag. 310.**

Revenue records.

——**S. 35**—*Revenue record—Abadi khasra—Admissibility.*

Under S. 35 of the Evidence Act, in order that a document may be admissible, it is not necessary that a public servant should be compellable by legislative enactment to discharge the duty of preparing or keeping it. Accordingly, the abadi khasra is admissible in evidence, although S. 33 (2) of the Land Revenue Act does not provide for the preparation of a khasra for the abadi. (*Zia-ul-Hasan, J.*) PHAKKAR *v.* PRAGI. **10 Luck. 659=154 I.C. 570=7 R.O. 479=1935 R.D. 108=1935 O.W.N 230=A.I.R. 1935 Oudh 268.**

——**S 35**—*Revenue records*—Fards Bachh—*Value.*

Fards Bachh are records of the acts of public officers, as under S. 151, Land Revenue Act, a *patwari* shall be deemed, for the purposes of the Evidence Act, to be a public officer having the custody of a public document, which any person has a right to inspect. It being his obvious duty to record *Bachh* documents, they are relevant facts within the meaning of S. 35 of the Evidence Act, while the papers can be proved under S. 76 of that Act by production of a certified copy. Where the papers have been put in the trial Court and received in evidence, they cannot be objected to in appeal. (*Addison, J.*) MALIK MAHOMED *v.* KHUSHI RAM **I.R. 1931 Lah. 494=131 I.C. 638=32 P.L.R. 508=A.I.R. 1931 Lah. 605.**

——**S. 35**—*Revenue records—Khasra Girdawaris.*

The Khasra Girdawaris are public documents and are made relevant by S. 35, Evidence Act. (*Hilton, J.*) MAHOMED DIN *v* FATEH DIN. **151 I.C 786 (1)=7 R.L. 208 (1)=35 P.L.R. 405=A.I.R. 1934 Lah. 698.**

——**S. 35**—*Revenue records*—Mouzawari *Register*—*Entries in.*

The entry in the *Mouzawari* Register in which the Barrackpore Cantonment was entered as a *mehal* "khas sircar," meaning 'in the possession of Government' is admissible to prove the title to the land, when that is in dispute in proceedings under the Land Acquisition Act. (*Sir George Lowndes.*) THE SECRETARY, CANTONMENT COMMITTEE, BARRACKPORE *v.* SATISH CHANDRA SEN. **57 I.A. 339=58 Cal. 858=33 L W. 41=53 C.L J. 1=33 Bom.L R. 175=130 I C. 616=I.R 1931 P C. 72=1931 A L J. 249=35 C.W.N. 173=34 P.L R. 455=1931 M.W.N. 41=A.I.R. 1931 P.C. 1=60 M.L.J. 142 (P.C.).**

——**S. 35**—*Revenue records—Settlement entries—Correctness.*

It would be very unsafe to reject the settlement entry on the *a priori* arguments advanced against its correctness. (*Keane, J. M.*) RAM NATH KOHAR *v.* RAM SEWAK. **15 R.D. 103=12 L R. 17 (Rev.).**

——**S. 35**—*Revenue records—Settlement papers—Entries—Value.*

Summary settlements have not the same value as a regular settlement. A presumption arising from entries in a regular settlement cannot therefore be rebutted by entries in an earlier summary settlement. (*Johnstone, J.*) SADDU *v.* MANI RAM. **I.R. 1931 Lah. 589=132 I.C. 397=31 P.L.R. 1024=A.I.R. 1931 Lah. 139.**

Reports of officers.

——**S. 35**—*Reports of officers of Government—Official documents—Value of.*

EVIDENCE ACT (1872), S. 35—Survey records.

The reports of Government officers and official documents containing opinions on the private rights of parties are not to be regarded as having judicial authority. But being reports of public officers made in course of duties, they are entitled to great consideration so far as they supply information of official proceedings and historical facts and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them and the proceedings of the Government founded on them. (*Mahomed Noor and Agarwala, JJ.*) MUKTAKESHI PATRANI *v.* MIDNAPUR ZAMINDARY CO., LTD. **13 Pat. 517=156 I.C. 136=7 R.P. 691=A.I.R. 1935 Pat. 33.**

School register and certificate.

——**S. 35**—*School register and certificate—Admissibility.*

Transfer certificates duly prepared according to authority or admissible in evidence Copies of school registers of admissions are admissible in evidence and entries therein can be relied on to prove the date of birth and age of the pupil concerned. (*Staples, A. J. C.*) LILADHAR BANIA *v.* MABIBI. **149 I.C. 660=6 R N. 239=16 N.L.J. 232=A.I R. 1934 Nag. 44.**

——**S. 35**—*School register—Entries in—Admissibility to prove age.*

Entries in a school register are admissible in evidence under S. 35 of the Evidence Act, to prove the age of the school boy concerned. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 133=39 Mys.H C. R. 406.**

——**S. 35**—*School register—Entry in—Admissibility to prove date of birth.*

Where there is an official duty cast upon any officer or minister to make an entry and in pursuance of such duty, he duly makes an entry in his register, such entries are admissible in evidence. Thus since the C. P. Education Manual directs that in the case of a pupil admitted a recognized school for the first time, the date of birth shall be ascertained from the parent or guardian in writing and entered in the admission register and consequently there is a duty imposed on the schoolmaster to enter the age of all pupils he admits in his register, such entry is admissible in evidence to prove the age of a person. (*Staples, A.J.C.*) MANICKCHAND *v* KRISHNA. **28 N.L R. 127=I.R. 1932 Nag. 128=140 I.C. 66 (2)=A.I.R. 1932 Nag. 117.**

——**S. 35**—School register—Entries as to age in—Value of. *See* VACCINATION REGISTER, *infra.* **A.I. R. 1934 Cal. 766.**

——**S. 35**—*School register—Entry of date of birth—Admissibility.*

Where the question is as to the age of a person, the entry of the date of his birth in the school register is admissible under S 35, the entry being in a public register stating the fact in issue and made by a public servant in the discharge of his official duties. (*Nanavutty and Zia ul-Hasan, JJ.*) LATAFAT HUSSAIN *v.* ONKAR MAL. **10 Luck. 423=7 R.O. 272=152 I.C. 1042=11 O.W.N. 1589=A.I.R. 1935 Oudh 41.**

Survey records.

——**S. 35**—*Survey records—Discrepancy between Gangetic survey map and later cadastral survey map—Procedure.*

The Gangetic survey cannot be very strong evidence of possession and cannot have the same value as evidence of title as the revenue survey map. Hence where there is conflict between the Gangetic survey map and a later cadastral survey map, the cadastral survey map must be given preference. (*Fazl Ali and Rowland,*

EVIDENCE ACT (1872), S. 35—Survey records.

JJ.) RADHA KISHUN *v.* SHYAM DAS. **13 Pat. 51 = 149 I.C. 1095 = 6 R.P. 685 = 15 Pat.L.T. 28 = A.I.R. 1933 Pat. 671.**

———**S. 35**—*Survey records—Entry in—Presumption of actual possession*

Where the lands are cultivable and definite acts of possession such as tilling, sowing and reaping the crop, etc., can be exercised over them, the presumption of actual possession raised by the survey entry would be stronger than where the land is wholly unfit for cultivation. But it does not necessarily follow that the land which is covered with sand or water is wholly incapable of possession or such lands must in all cases be regarded as no man's land. Value of survey maps as evidence pointed out. Boundaries in cadastral survey taken into account in determining a question of title. (*Fazl Ali and Rowland, JJ.*) RADHA KISHUN *v.* SHYAM DAS. **13 Pat. 51 = 149 I.C. 1095 = 6 R.P. 685 = 15 Pat.L.T. 28 = A I.R. 1933 Pat. 671.**

———**S. 35**—*Survey records—Entry in—Value of.*

The entry in a survey record or *khewat* raises a presumption that the particulars recorded therein were right but such presumption may be rebutted. (*Sir Lancelot Sanderson.*) KUMAR KAMAKHYA NARAIN SIHGH *v.* ABHIMAN SINGH. **61 I A. 323 = 13 Pat. 589 = 39 C.W N. 41 · 150 I.C. 807 = 4 A.W.R. 229 = 11 O.W.N. 1025 = 7 R P C 18 = 1934 A L J. 793 = 1934 M W N. 870 = 15 Pat. L.T. 555 = 18 R.D. 423 (2) = 40 L.W. 342 = 60 C.L.J. 153 = A.I.R. 1934 P.C. 182 = 64 M.L J. 450 (P.C.).**

———**S. 35**—*Survey records*—Thak *surveys—Statements in—Evidentiary value of.*

Thak surveys were made for revenue purposes, and the statements made therein used to be signed by the agents of the parties concerned, and are valuable evidence. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346 = 159 I C. 98 = 8 R C. 257 = 60 C.L J. 477 — A.I.R. 1935 Cal. 368.**

Vaccination register.

———**S. 35**—*Vaccination register—Entries as to age in—Entries in school register—Value of.*

The accused were charged under S. 366, Penal Code. The prosecution, to prove that the girl was below 16 years of age produced certain inoculation and vaccination registers and her school register and the evidence was that the entries therein related to a girl who was said to be the girl concerned and that the age as entered in the registers was given by her father The Judge in charging the jury directed them that the people who made the entries in the registers did not know the ages they recorded so that these documents would be no evidence at all unless somebody knowing the age gave it, in which case they would corroborate him if he spoke to the age himself.

Held, that S. 35 of the Evidence Act only lays down that such entries, when they state a fact in issue or relevant fact, are themselves relevant that is, are among the class of facts which the law allows to be proved and when the Judge admitted the entries and put them before the jury, his comment on their importance did not amount to a serious misdirection as the weight to be attached to them was purely a question for the jury to decide. (*Guha and Bartley, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* FORHAD. **153 I C. 493 = 7 R C. 381 = 36 Cr.L.J. 364 = A.I.R. 1934 Cal. 766.**

Miscellaneous.

———**S. 35**—*Accounts—Unsigned entry in Siaha—Evidence as to payment of rent.*

EVIDENCE ACT (1872), S. 35.

An entry in Siaha (copy of accounts) which has not been signed by the landlord is not sufficient evidence to prove payment of rent by the tenant. 14 R. D. 93, Foll. (*Keane, S. M and Oppenheim, J M.*) BHAGWAT PRASAD SINGH *v* PRASAD. **15 R D. 401.**

———**S. 35**—*Depositions in heirship inquiry—Admissibility as substantive evidence.*

The depositions of witnesses in an heirship inquiry under S. 71 of the Bombay Land Revenue Code are inadmissible as substantive evidence relating to title but they might be used as corroborating or contradicting the witnesses examined in the case. (*Patkar and Murphy, JJ.*) BAYAVA *v.* PARVATEVA. **I.R. 1933 Bom. 300 = 144 I.C. 442 = 35 Bom.L.R. 118 = A.I.R. 1933 Bom. 126.**

———**S. 35**—*Enquiry by Registrar under S. 41 (2), Registration Act—Summary of evidence—Admissibility.*

R. 72 of the Madras Registration Rules requires the Registrar to place on record a summary of the evidence taken by him when enquiring under S. 41 (2), Registration Act, into the execution of a will or authority to adopt. This summary would be admissible, *quantum valeat*, under S. 35, Evidence Act. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

———**S. 35**—*Opinion of public officer—Inquiry under S. 202, Cr. P. Code or O. 26, C. P. Code.*

The words "an entry" in S. 35 of the Evidence Act, are not intended to apply to the opinions of public officers based on or inferences drawn from the allegations made before them in the course of inquiries conducted under S. 202, Cr. P. Code or under O. 26, C. P. Code, but is confined only to such statements of facts in issue or relevant facts as are made by the public officers concerned in the course of their official duty and are required to be entered in any book, register or record intended for the purpose. Such opinions cannot be considered sufficient to prove the truth of the assertions made therein, without the test of cross-examination. (*Bhide and Din Mohammad, JJ.*) GHANAVA *v.* MEHTAB. **16 Lah 377 = 155 I.C. 1040 = 7 R. L. 822 = 37 P.L.R. 519 = A I.R. 1934 Lah. 890.**

———**S. 35**—*Order of President of Union Board—Admissibility of recital—President not examined.*

A recital in the order of a President of a Union Board is not admissible under S. 35 or 13 in evidence, unless such President has been examined with regard to the fact mentioned in his order. 45 Mad. 332, Ref. (*Jackson, J.*) DORAISWAMI NAIDU *v.* KANNIAPPA CHETTI. **I.R. 1931 Mad. 558 = 131 I.C. 654 = 32 Cr.L.J. 767 = 1931 M W.N. 366 = 1931 Cr.C. 551 = A.I.R. 1931 Mad. 487.**

———**Ss. 35, 159 and 161**—*Panchnamas containing confession, how to be used.*

No doubt an entry in any public record stating a relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by the law is itself a relevant fact. But where panchnamas contain confession which cannot be given in evidence because of S. 26, the proper way of dealing with a panchnama containing such an entry is to place it into the hands of a witness and to allow him to use it to refresh his memory. If he finds in it anything of which evidence can lawfully be given, he may give such evidence in the ordinary way; but the document itself should be excluded. 11 I. C. 613; 5 S.L.R. 31; 4 S. L. R 38 and 10 S. L. R. 7, Rel. on. (*Ferrers, J.C. and Aston, A.J.C.*) BALCH PIRWALI *v.* EMPEROR. **6 I.R. (Sind) 8 = 144 I.C. 772 = 34 Cr.L J. 848 = 1933 Cr.C. 722 = A.I.R. 1933 Sind 220.**

EVIDENCE ACT (1872), S. 35.

———**S. 35**—*Report of Commissioner appointed by Court—Mode of proof.*

A Commissioner appointed by a Court with special directions to make a particular enquiry into the particular facts of a case is not a person performing "a duty specially *enjoined* by the law of his country in which such book, register or record is kept." There is no duty enjoined upon a Commissioner by the law of his land to prepare any book, register or record within the meaning of S. 35 of the Evidence Act, and his report is a private document, which like any other private document, could be proved only by examining the writer of that report as a witness in the case. (*Nanavutty, J.*) IBRAHIM BEG *v.* AZIMAM. **1935 O.W.N. 1388 = A.I.R. 1936 Oudh 192.**

———**S. 35**—*Report of process peon who is dead—Admissibility.*

Report submitted by a process peon who is dead regarding service of notice is admissible under Ss. 32 (2) and 35. (*Fazl Ali and Rowland, JJ.*) LALL *v.* RAJ KISHORE NARAIN SINGH. **13 Pat. 86 = 147 I C. 101 = 8 R. P. 333 = 15 Pat. L. T. 407 = A. I. R. 1933 Pat. 658.**

———**Ss. 35 and 36**—Zemindar's *chitta* as regards lands held by tenants—Admissibility as against third parties. *See* EVIDENCE ACT, SS. 11 AND 13. **39 C.W.N. 330.**

———**S. 36**—*Rennels map—Reliability of.*

Rennel's map, though correct with reference to the course of the rivers, cannot be preferred, in a matter regarding the direction of villages to the investigations of a commissioner appointed for the purpose; for the method adopted for ascertaining village was by gun and sound—an extremely unscientific method, which makes reliance upon it difficult for the purpose of ascertaining the true direction of villages. (*Mitter and S. K. Ghose, JJ.*) NANI LAL ROY *v.* PROLHAD CHANDRA KAI BARTA. **143 I C. 179 = I.R. 1933 Cal. 361 = 56 C.L.J. 369 = A.I.R. 1933 Cal. 222.**

———**S. 36**—Thak *maps—Evidentiary value of.*

Thak maps have been held to be good evidence of the state of things at the date of the permanent settlement in the absence of evidence to the contrary. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346 = 159 I.C. 98 = 8 R.C. 257 = 60 C.L.J. 477 = A.I. R. 1935 Cal. 368.**

———**Ss. 40 to 43** — *Civil Court judgments* inter partes—*Finding as to possession—Subsequent criminal prosecution for offences under Ss.* 143, 379 *and* 109 *of the Penal Code—Finding of Civil Court, not conclusive on possession.*

A finding regarding possession of the land in dispute contained in previous judgments in Civil Courts, even though *inter partes* is by no means conclusive on the question of possession, in a subsequent criminal prosecution for offences under Ss. 143, 379 and 109 of the Penal Code. It is only a piece of relevant evidence, the weight of which it is for the jury to decide. (*Lort Williams and S. K. Ghose, JJ.*) TRAILOKYANATH DAS *v.* EMPEROR. **59 Cal. 136 = I.R. 1932 Cal. 275 = 33 Cr.L.J. 441 = 137 I.C. 163 = 1932 Cr.C. 262 = A.I.R. 1932 Cal. 293.**

———**S. 40**—*Decree against minor passed* ex parte—*Gross negligence of guardian—If amounts to fraud—Right of minor to challenge collaterally.*

Gross negligence of a guardian *ad litem* amounts to fraud and affects the proper representation of the minor defendant and thus takes away the jurisdiction of the Court to pass a decree, because a Court cannot pass a decree against a minor, unless he is properly represented by a guardian. Such a decree passed *ex parte* does not bind the minor or operate as *res judicata* and can be collaterally challenged by him and is not a bar to a subsequent suit for other relief. The party against whom the decree is sought to be used can in the subsequent suit itself show that the decree cannot operate as *res judicata*, as it was obtained by fraud. The *ex parte* decree is relevant under S. 40 of the Act. It is not necessary that it should be formally set aside before relief can be got in the subsequent suit. (*K'haja Mohammad Noor and Dhavle, JJ.*) MATHURA SINGH *v.* RAMA RUDRA PRASAD SINHA. **14 Pat. 824 = 162 I. C. 235 = 8 R.P. 522 = 16 Pat L.T. 484 = A.I.R. 1936 Pat. 231.**

———**S. 40** — *Judgment in proceeding under S* 9, *Specific Relief Act—Admissibility in later suit.*

The decision in prior proceedings under S. 9, Specific Relief Act, is admissible in evidence in a later suit for possession between the same parties. (*Jack and Nag, JJ.*) HRIDAYA NATH ROY *v.* PROBODH CHANDRA KHAN. **60 Cal. 1171 = 37 C W.N. 1148 = 147 I.C. 747 = 6 R.C. 353 = 57 C.L.J. 549 = A.I.R. 1933 Cal. 923.**

———**Ss. 40 and 42**—*Previous judgment—Use.*

The actual decision and the findings arrived at in a previous judgment cannot be used as evidence to decide the points which are at issue in a different case except in cases coming under Ss. 40 to 42. (*James and Agarwala, JJ.*) RAMPAREKHA PANDE *v.* MT. RAMJHARI KUER. **149 I.C 1158 = 6 R P. 693 = A.I R. 1933 Pat. 690.**

———**Ss 40 to 43**—*Relevancy of judgment—Suit for damages for defamation — Dismissal of—Subsequent criminal trial for defamation — Relevancy of Civil Court judgment.*

Where a criminal prosecution for defamation and a civil suit for damages were pending against the appellant and the Civil Court dismissed the suit for damages, the judgment of the Civil Court is a judgment *in personam* and is not admissible in evidence under Ss. 40 to 43 of the Evidence Act in the subsequent criminal trial. 41 B. 1, Diss. (*Waller and Krishnan Pandalai, JJ.*) RAMANAMMA *v.* APPALANARASAYYA. **55 Mad. 346 = I.R. 1932 Mad. 300 = 136 I.C. 348 = 33 Cr.L.J. 307 = 1931 M.W.N. 1305 = 35 L.W. 176 = 1932 Cr.C. 184 = A.I.R. 1932 Mad. 254 = 62 M.L.J. 230.**

———**Ss. 40 and 42**—*Scope — Judgment not falling within Ss.* 40 *to* 42—*Relevancy.*

The Evidence Act itself does not draw a distinction between a judgment which is not *inter partes* and a judgment which is *inter partes*, except where the judgment is clearly *res judicata*. A judgment other than a judgment referred to in Ss. 40 to 42 may be admissible to prove that a right was asserted or denied under S. 13 of the Evidence Act or to explain or introduce facts in issue or to explain the history of the case. But there is no provision in the Evidence Act which would warrant the view that the actual decision or the findings arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case. Such a decision may by virtue of the specific provisions operate as *res judicata* or be relevant as a pronouncement on matters of public nature, but otherwise it is no better than a mere opinion expressed on the issues involved in a particular case and the Evidence Act is clear that 'opinion' will be relevant in those cases only which are specifically referred to in the Act and in no others. Case-law discussed. (*Wort and Fazl Ali, JJ.*) PURNIMA DEBYA *v.* NAND LAL OJHA. **11 Pat. 50 = I.R. 1932 Pat. 113 = 136 I.C. 577 = 12 Pat.L.T. 582 = A. I.R. 1932 Pat. 105.**

EVIDENCE ACT (1872), S. 41.

——**S. 41**—*Applicability—Declaration in suit under S. 42, Specific Relief Act—If judgment* in rem.

A declaration made by a District Court not exercising matrimonial jurisdiction, in a suit under S. 42 of the Specific Relief Act, that the plaintiff in that suit was no longer the wife of the defendant, does not operate as a judgment *in rem*, to which S. 41 of the Evidence Act will apply, having regard to the terms of S. 43 of the Specific Relief Act and the illustration to it. (*Blackwell and Broomfield, JJ.*) KHAMBATA *v.* KHAMBATA. **59 Bom. 278=154 I.C. 1075=7 R.B. 387=36 Bom.L.R. 1021=A.I.R. 1935 Bom. 5.**

——**S. 41**—*Foreign judgment—Admissibility.*

The section applies to the foreign judgments of a competent Court no less than to domestic judgments. Secunderabad is for the purpose of insolvency a foreign Court and an order of adjudication passed by the Court at Secunderabad is operative in British India. (*Curgenven and Bhashyam Ayyangar, JJ.*) OFFICIAL RECEIVER OF SECONDERABAD *v* LAKSHMINARAYANA. **54 Mad. 727=I.R. 1931 Mad. 649=132 I.C. 297=33 L.W. 562=1931 M.W.N. 444=A.I.R. 1931 Mad. 474=61 M.L.J. 774.**

——**S. 41**—*Judgment* in rem—*Decision in suit for restitution of conjugal rights.*

A suit for restitution of conjugal rights is purely a private suit between two persons. No one else has any right to intervene in the matter and the judgment in such a suit cannot possibly be treated as a judgment *in rem*. (*Das and Brown, JJ.*) MA PO KHIN *v.* MA SHIN. **11 Rang 198=148 I.C. 67=6 R.R. 199 (1)=A.I.R. 1933 Rang. 250.**

——**S. 41**—*Judgment* in rem—*Declaration of title to "specific thing" when conclusive.*

In order that declaration of title to a specific thing should have the conclusive character as against the whole world, it is not enough to show that under the judgment of the Insolvency Court one has become entitled to a specific thing, but his title to such a thing must have been declared not as against any specified person but absolutely. A decree declaring that *A* is entitled to a debt is not an absolute declaration but only made against a specified person; so it is not conclusive proof of title to a debt. 33 I.C. 798, Not Foll. (*Beasley, C.J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **54 Mad. 601=I.R. 1931 Mad. 537=131 I.C. 817=1931 M.W.N. 774=34 L.W. 282=A.I.R. 1931 Mad. 441=61 M.L.J. 229 (S.B.).**

[R. 36 Bom.L.R. 1236 (1241.)]

——**S. 41**—*Judgment* in rem — *Finding of fact—Binding nature.*

Though it be necessary as a step to make a declaration which will operate *in rem* to find a fact, that finding will not bind third parties in subsequent proceedings. 7 W.R 338, Foll. (*Beasley, C.J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **54 Mad. 601=I.R. 1931 Mad 577=131 I. C. 817=1931 M. W. N. 774=34 L. W. 282=A.I.R. 1931 Mad. 441=61 M.L.J. 229 (S.B.).**

——**S. 41**—*Judgment* in rem—*Order in prior insolvency proceedings not* inter partes—*Finality—If conclusive.*

After the sale in execution of certain property, the judgment-debtor was declared insolvent on petition presented and admitted prior to the sale. The receiver took proceedings under S. 4 of the Provincial Insolvency Act alleging that the sale was attended with fraud, but the Court found that there was no fraud. Some years later, the insolvent together with a creditor again applied under S. 4 of the Provincial Insolvency Act for a declaration that the execution sale was invalid and contended that the executing Court had no jurisdiction to sell by reason of S. 52 of the Provincial Insolvency Act. The latter contention, though raised in the prior proceedings by the receiver, was not dealt with by the Judge in insolvency.

Held, that under S. 41 of the Evidence Act, the prior decision, being a final order or judgment of a competent Court in insolvency had the effect of a judgment *in rem*, and could not be disturbed by subsequent applications, though not between the same parties; that the receiver not having taken any steps to appeal from the order made against him, and the execution purchaser having been left in possession for some years, it was not right that the purchaser should be prejudiced either on behalf of the insolvent or on behalf of the creditors by a fresh attempt to set aside the sale which took place long ago after a previous attempt had failed. (*Courtney Terrell, C.J. and Agarwala, J.*) BANSI RAM *v* ANANDI RAM MOHAN. **155 I C. 734=7 R.P. 615=A.I.R. 1935 Pat. 273.**

EVIDENCE ACT (1872), S. 41.

——**S. 41**—*Judgment* inter partes—*Whether operates* in rem.

A judgment *inter partes* in a heirship proceeding is not a judgment *in rem* so as to be binding on a stranger. (*Patkar and Murphy, JJ.*) BAYAVA *v.* PARVATEVA. **I.R. 1933 Bom. 300=144 I.C. 442=35 Bom. L.R. 118=A.I.R. 1933 Bom. 126.**

——**S. 41**—"*Legal character*"—*Meaning.*

"Legal character" means something equivalent to status. The legal character assigned to a person announces to all the world what the legal status of the person in question is. The meaning of "legal character" must be narrowly construed, for it must be remembered that an action *in rem* is not an action against a thing but an action availing against all the world. 7 W. R. 338; 39 Mad. 80 and A.I.R. 1927 Mad. 526, Ref. (*Beasley, C. J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **54 Mad. 601=I.R. 1931 Mad 577=131 I.C. 817=1931 M.W.N. 774=34 L.W. 282=A.I.R. 1931 Mad. 441=61 M.L.J. 229 (S.B.).**

——**S. 41**—"*Legal character*"—*Declaration of right as creditor.*

The judgment of insolvency Court declaring a person as creditor of the insolvent does not confer any "legal character" on him within the meaning of S. 41, and hence the declaration does not operate as a judgment *in rem*. A I.R. 1924 Mad. 662, Rel. on; 39 Mad. 80; A.I.R. 1916 P.C. 78; 16 Mad. 380, Cons. (*Beasley, C. J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU. *In the matter of.* **54 Mad. 601=I.R. 1931 Mad. 577=131 I. C. 817=1931 M. W.N 774=34 L.W. 282=A. I. R. 1931 Mad. 441=61 M L.J. 229 (S.B.).**

——**S. 41**—*Order in lunacy—Binding nature of.*

Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41 of the Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. (*Krishnan Pandalai, J.*) SUBBA NAICKER *v.* SOLAIAPPA NAICKER. **56 Mad. 904=1933 M.W. N. 514=147 I. C. 479=6 R.M. 347=38 L.W. 135=A. I. R. 1933 Mad. 624=65 M.L.J. 279.**

——**S. 41**—"*Specific thing*"—*Right to recover debt.*

A right to recover a debt or a chose-in-action cannot be deemed to be a "specific thing". (*Beasley, C.J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **54 Mad. 601=**

EVIDENCE ACT (1872), S. 42.

I.R. 1931 Mad. 577=131 I.C. 817=1931 M. W. N. 774=34 L.W. 282=A.I.R. 1931 Mad. 441=61 M. L.J. 229 (S.B.).

———**S. 42**—'Pakki Adat' Proof of usage. *See* CONTRACT—PAKKI ADAT. **A.I.R. 1935 Sind 38.**

———**S. 42**—*'Public nature'—'Judgment relating to wakf property.*

In the case of wakf, as soon as the property is dedicated, it loses its private character altogether and at once acquires a public character and consequently any right claimed thereto will be a public right. The matter of wakf, therefore, is a matter of public importance within S. 42 of the Evidence Act. Consequently a previous judgment relating to such property is relevant in a suit bearing on the property though not between the same parties to find out the history of the transaction and the intention of the executant of the document *i.e.*, that the house was to be treated as wakf. It is no doubt true that it is not conclusive proof of that which it states but it can be used to add to the probative value of the evidence led in the suit. (*Bhide and Din Mahomed, JJ.*) MISBAHUDDIN *v.* VIDYA SAGAR. **156 I.C. 268=7 R.L. 886=36 P.L.R. 106=A.I.R 1935 Lah. 64.**

———**S. 43**—*Criminal case—Reference to judgment in another case—Permissibility.*

The judgment in another case in which the accused were involved is not material for deciding the case against them. (*Pakenham Walsh, J.*) AZIZ KHAN SAHAB *v.* EMPEROR. **1932 M.W.N. 862.**

———**S. 43**—*Criminal Court—Case of trespass—Finding in—Relevancy in subsequent suit in Revenue Court involving question of possession.*

A finding by a Criminal Court in a case of criminal trespass, that a party is entitled to bring a case of trespass is distinctly relevant in a subsequent suit in a Revenue Court involving the question as to the possession of land; but such a finding is not necessarily conclusive. (*Drake Brockman, S. M. and Knox, J. M.*) SIS RAM *v.* RAM DIYA. **1935 R.D. 148.**

———**S. 43**—*Judgment of Criminal Court—Relevancy in subsequent civil suit.*

A judgment not *inter partes* is irrelevant under S. 43 of the Evidence Act. A judgment in a Criminal Court cannot be received in evidence in a civil case to establish the truth of the facts upon which it is founded. The Civil Court should come to a determination on the evidence taken by it as to the facts alleged, even though the same facts might have been found by the Criminal Court. 23 Cal. 610, Ref. (*Ramachandra Rao, J.*) AYYANNA *v.* ACHANNA. **10 Mys L.J. 248.**

———**S. 43**—*Judgment not* inter partes—*Admissibility and use of.*

Under S. 43, Evidence Act, read with Ss. 11 and 13, judgments not *inter partes* can be rightly admitted in evidence and used for certain limited purposes and taken into consideration along with the other evidence in the case. But they do not operate as *res judicata*; nor can the basis of the judgments be discussed. (*Patterson, J.*) HEM CHANDRA BHADURI *v.* PURNA CHANDRA SARKAR. **153 I.C. 134=7 R.C. 349=59 C.L.J. 320=A.I.R. 1934 Cal. 788**

———**Ss. 43 and 13**—*Judgments not* inter partes—*Admissibility.*

Judgments not *inter partes* can only be regarded as evidence of transactions but are not admissible as proof of title of the persons in whose favour they were passed. 58 I. A. 125, Ref. (*Rankin, C. J. and Mitter, J.*) RADHU RAY *v.* RAJA JYOTI PRASAD SINGH DEO. **I. R. 1932 Cal. 714=140 I.C. 385=36 C.W.N. 866=A.I.R. 1933 Cal. 21.**

EVIDENCE ACT (1872), S. 44.

———**S. 43**—*Judgment not* inter partes—*Proof of partition—Findings and reasons—Admissibility.*

A judgment not *inter partes*, holding that a partition of a certain estate was proved is only admissible under the provisions of Ss. 13 and 43 as establishing a particular transaction in which the partibility of the estate was asserted and recognized. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded nor can any finding of fact there come to, other than the transaction itself be relevant to prove partition in a subsequent suit. (*Sir George Lowndes.*) GOBINDA NARAYAN SINGH *v.* SHAMLAL SINGH. **58 I.A. 125=58 Cal. 1187=I.R. 1931 P. C. 145=131 I. C. 753=33 Bom. L. R. 885=53 C.L J. 333=35 C.W.N. 521=1931 M.W.N. 435=33 L. W. 707=A. I. R. 1931 P. C. 89=61 M. L. J. 9 (P.C.).**

[R. 36 C.W.N 866 (868.)]

———**Ss 43 and 13**—*Judgment not* inter partes—*Relevancy of.*

A judgment, in which the purchase at a revenue sale by the plaintiff's predecessor is recited, is admissible in evidence as evidence of a transaction within the meaning of S. 13 of the Act, though the defendants were not parties thereto. 22 C. 533, Foll. (*Mitter and S.K. Ghose, JJ.*) NANI LAL ROY *v.* PROLHAD CHANDRA KAIBARTA. **143 I.C. 179=I.R. 1933 Cal. 361=56 C.L J. 369=A.I.R. 1933 Cal. 222.**

———**Ss. 43, 13 and 11**—*Previous judgment in main suit—Admissibility in subsequent execution proceedings.*

Where the question of the genuineness of a transfer by the judgment debtor to his children was directly in issue in the original civil suit, and the issue was contested very strongly, the fact that the contest was decided against the judgment-debtor becomes relevant in the enquiry in the execution proceedings under S. 13 and under S. 11. (*Baguley and Mackney, JJ.*) VEDNATH SINGH *v.* MAHOMED. **154 I.C. 123=7 R.R. 264=A.I.R. 1934 Rang. 212.**

———**S. 43**—*Suit for malicious prosecution—Judgment of Criminal Court—Evidentiary value of.*

In a suit for damages for malicious prosecution, the judgment of the Criminal Court can only be used to establish the fact that an acquittal has taken place, as a fact in issue in the civil suit. The grounds upon which that acquittal was based are inadmissible. 9 Bom.L.R. 1134 and 50 A. 713, Foll. (*Curgenven and Sundaram Chetty, JJ.*) VENKATAPATHI *v.* BALAPPA. **56 Mad. 641=I R. 1933 Mad. 335=143 I.C. 825=1933 M.W. N. 1304=37 L.W. 623=A.I.R. 1933 Mad. 429=65 M L.J. 146.**

———**S. 44**—*Objection to jurisdiction—Delay—Party, if precluded.*

Per *Sulaiman, J.*—The plea that a decree passed by a Native State Court was made without jurisdiction is open to the objector under S. 44 and can be raised at any stage of the proceedings, unless there is a bar of *res judicata* or any rule of equitable estoppel against him. Mere delay in raising it cannot itself be a fatal objection when a fresh execution is sought. (*Sulaiman and Niamatullah, JJ.*) SHEO TAHAL RAM *v.* BINAEK SHUKUL. **53 All. 747=136 I.C. 353=I.R. 1932 All. 177=1931 A.L.J. 653=A.I.R. 1931 All. 689.**

———**S. 44**—*Scope—Irregular orders of Courts—Avoidance.*

S. 44 empowers Courts to ignore orders issued by Courts without authority. (*Patkar and Barlee, JJ.*) KESHAVLAL SAKHIDAS *v.* AMARCHAND. **57 Bom. 456=148 I.C. 116=6 R B. 272=35 Bom.L.R. 630=A.I.R. 1933 Bom. 398.**

EVIDENCE ACT (1872), S. 45.

——**S. 45**—*Alterations in promissory note—Opinion obtained by Court as to date of stamp—Admissibility of.*

In a suit on a handnote, the defendant pleaded alterations in the note. The suit was decreed. In appeal, the Court obtained a written opinion as to the date of stamp affixed and used it for giving judgment in favour of defendant.

Held, that the opinion, not having been formally proved and the plaintiff not having been given an opportunity of cross examining the person giving the opinion thereon, ought not to have been taken in evidence, and the finding of the Judge based upon the opinion contained in that letter must be discarded. (*Mahomed Noor and Dhavle, JJ.*) RAM AUTAR SHUKUL *v.* BALDEO SHUKUL. **11 Pat. 782=140 I.C. 895=I.R. 1933 Pat. 37=A.I.R. 1932 Pat. 352.**

——**S. 45**—*Doctor's opinion regarding age—Value of.*

It cannot possibly be said that a doctor's opinion on the point of a person's age is not entitled to any greater weight than that of any other person. (*Smith, J.*) NASRULLAH *v.* EMPEROR. **6 R.O. 310=147 I.C. 759 (2)=35 Cr.L.J. 498=10 O.W.N. 1274=1934 Cr.C. 86=A.I.R. 1934 Oudh 32.**

——**S. 45**—*Expert evidence—Data.*

Where the so-called "expert witnesses" give no data in support of their opinions, their evidence should be rejected. A.I.R. 1924 Lah. 548, Foll. (*Tek Chand and Waller, JJ.*) PRIBHU DIYAL *v.* SECRETARY OF STATE. **135 I.C 183=I.R. 1932 Lah. 55=33 P.L.R. 1100=A.I.R. 1931 Lah. 364.**

——**S. 45**—*Expert evidence—Desirability—Illiterate man denying execution.*

Where the defendant is illiterate and the genuineness of a paper said to have been executed by him in dispute and the decision of the question depends upon the genuineness of the finger-print, the parties should be allowed, if they want, to examine experts. (*Mahomed Noor, J.*) TASADUQ HUSSAIN *v.* BASAWAN RAI. **I.R. 1933 Pat. 78=141 I.C. 767=A.I.R. 1933 Pat. 159.**

——**S. 45**—*Expert evidence—Results of opinions.*

Depositions of expert witnesses as to the result of their opinions, and as to the effect of them, do not come within the domain of expert evidence at all. (*Lord Atkin.*) FLORENCE A. DEEKS *v.* H. G. WELLS. **I.R. 1933 P.C. 111=142 I.C. 815=37 L.W. 314=1933 A.L.J. 893=A.I.R. 1933 P.C. 26=64 M.L.J. 193 (P.C.).**

——**S. 45**—*Expert evidence—Value of.*

An expert witness, however impartial he may wish to be, is likely to be unconsciously prejudiced in favour of the side which calls him. The mere fact of opposition on the part of the other side is apt to create a spirit of partnership and rivalry, so that an expert witness is unconsciously impelled to support the view taken by his own side. Besides, it must be remembered that an expert is often called by one side simply and solely because it has been ascertained that he holds views favourable to its interests (*Tek Chand, J.*) DIWAN SINGH *v.* EMPEROR. **I.R. 1933 Lah. 446=144 I.C. 331=34 Cr.L.J. 735=35 P.L.R. 719=1933 Cr.C. 819=A.I.R. 1933 Lah. 561.**

——**S. 45**—*Expert's opinion—Basis of—Duty to place before Court.*

The opinion of an expert by itself may be relevant but would carry little weight with a Court unless it is supported by a clear statement of what he noticed and on what he based his opinion. The expert should, if he expects his opinion to be accepted, put before the Court all the materials which induced him to come to his conclusion, so that the Court although not expert, may form its own judgment on those materials. The mere mention that certain kind of tests known as Binet and Simon tests were applied and certain results were obtained, might be relevant as a piece of evidence but would not be conclusive. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428=153 I.C. 733=7 R.A. 583=1934 A.L.J. 1129=8 A.W.R. 70=A.I.R. 1934 All. 273.**

——**S. 45**—*Finger print expert—Execution proved by—Want of consideration—Onus.*

The evidence of handwriting expert has often been found to be faulty, but so far as finger-prints are concerned, it has never so far been found that two finger-prints can be identical in all respects. Hence, where the execution of an entry is proved by evidence of thumb impression expert, the burden of proving want of consideration is on the executant. (*Abdul Rashid, J.*) GANGA SAHAI BHAGMAL *v.* MOLAR. **155 I.C. 799=7 R.L. 770=36 P.L.R. 477=A.I.R. 1935 Lah. 147.**

——**S. 45**—*Finger print expert—Thumb impression—Opinion of expert—Need for corroboration.*

It cannot be laid down as a rule of law that it is unsafe to base a conviction on the uncorroborated testimony of a finger-print expert. The true rule seems to be one of caution, that is to say, that the Court must not take the expert's opinion for granted, but it must examine his evidence in order to satisfy itself that there can be no mistake and the responsibility is all the greater when there is no other evidence to corroborate the expert. (Case-law discussed.) (*Lort Williams and S.K. Ghose, JJ.*) HARENDRA NATH SEN *v.* EMPEROR. **I.R. 1931 Cal. 639=133 I.C. 111=32 Cr.L.J. 1001=54 C.L.J. 107=35 C.W.N. 863=1931 Cr.C. 593=A.I.R. 1931 Cal 441.**

——**S. 45**—*Handwriting expert—Conviction based on the evidence—Propriety.*

To base a conviction upon the evidence of an expert in handwriting is as a general rule very unsafe. (*Agha Haidar, J.*) INDAR DATT *v.* EMPEROR. **I.R. 1931 Lah. 537=132 I.C. 185=32 Cr.L.J. 818=1931 Cr. C. 648=A.I.R. 1931 Lah. 408.**

——**S. 45**—*Handwriting expert — Evidence of—Court to form its own opinion.*

A Court is not to surrender its own opinion to that of experts, who are called before it, but with such help as the experts can afford, the Court must form its own opinion on the subject in hand. (*Page, C. J., Mosely and Ba U, JJ.*) *In the matter of* U, AN ADVOCATE. **13 Rang. 518=156 I.C. 582=8 R.R. 18=36 Cr.L. J. 961=A.I.R. 1935 Rang. 178 (S.B.).**

——**Ss. 45 and 46**—*Handwriting expert—Identity of handwriting in issue—Magistrate whether can refuse to record evidence of handwriting expert.*

A Magistrate should not refuse to record the evidence of handwriting expert, where the question of identity of hand-writing is in issue, as the evidence of an expert in the matter of handwriting has been made admissible and relevant. It is not the duty or even the function of a Magistrate to decide beforehand whether relevant evidence if produced would influence his opinion one way or the other. That is a matter which should be settled only after the evidence has been recorded and read in the case. Moreover it is not only the Magistrate who is concerned in the matter but the appellate Court also has to consider whether the evidence does or does not affect the case before it. (*Jai Lal, J.*) RAM

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NARAIN SHARMA *v.* EMPEROR. **I.R. 1932 Lah. 581 =139 I.C. 508=33 Cr.L.J. 761=33 P.L.R. 811= 1932 Cr.C. 619=A.I.R. 1932 Lah. 481.**

———**S. 45**—*Handwriting expert—Opinion of—Mode of tendering—Waiver of objection.*

Where the lower Court had based its decision on the opinion of the handwriting expert, though he had not given sworn testimony in support of the report,

Held, that the objection to the evidence being received could not be taken for the first time in revision. (*Bhide, J.*) KARAM DIN *v.* ATA MAHOMED. **150 I.C. 357 =6 R.L. 856 (1)=35 P.L.R. 109=A.I.R. 1934 Lah. 230.**

———**S. 45**—*Handwriting expert—Testimony of—Duty of Court.*

Where the genuineness of the signature of a testatrix, in a will, is in dispute, a Court must never surrender its will or independence of judgment to an expert, but must, in all cases in which expert evidence is adduced before it, after giving it such weight as it thinks such evidence deserves, make up its own mind upon the issue, in respect of which the expert testimony has been given. (*Page, C.J. and Ba U, J.*) MOOSA GOOLAM ARIFF *v.* KHOO SOO EE. **157 I.C. 82=8 R.R. 75.**

———**S. 45**—*Haulage contractor—Opinion on tyres—Value of.*

It is ridiculous to say, that a haulage contractor, who owns several lorries and has been in business for 16 years, and also fits a large quantity of tyres for other companies, could not be described as an expert on the quality, wear and usage of tyres merely because he had not seen the process of manufacture. (*Mosely, J.*) GLOBE AUTOMOBILE CO. *v.* K. A. K. MASTER. **157 I.C. 12=8 R.R. 81.**

———**S. 45**—*Hindu Law texts—Interpreters of—Admissibility of evidence.*

The evidence of translators or interpreters of Hindu Law texts is not admissible. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R. (Pat.) 17=145 I.C. 1 =14 Pat.L.T. (Sup.) 1=A.I.R. 1933 Pat. 306.**

———**S. 45**—*One expert contradicted by another—Value of evidence.*

Where several experts give the evidence expected in favour of the parties by whom they were called it can carry little weight, for one expert is contradicted by the other (*Tek Chand and Coldstream, JJ.*) MT. SADIQA BEGAM *v.* ATA ULLAH. **I.R. 1933 Lah. 491=34 P. L.R. 788 (2)=144 I.C. 497=A.I.R. 1933 Lah. 885.**

———**S. 45**—*Opinion of expert—Value of—Signature in language which expert cannot read or write.*

Where an expert gives his opinion on a signature, the fact that he cannot read or write the language in which such signature is made must detract from the value which would otherwise be attached to his evidence. And though it may be of value as corroboration of direct evidence or evidence afforded by surrounding circumstances, it is hardly in itself sufficient to warrant a conviction. (*Allanson and James, JJ.*) RAMSEWAK SAHU *v.* EMPEROR. **1933 Cr.C. 1259=A.I.R. 1933 Pat. 559.**

———**S. 45**—*Opinion of Imperial Serologist—Value.*

The Imperial Serologist is a highly responsible officer and a duly qualified scientist who would never venture to give any definite opinion on a question, unless he has the fullest scientific data in support of his conclusion. His opinion therefore is entitled to great weight. (*Srivastava and Nanavutty, JJ.*) GHIR RAO *v.* EMPEROR. **6 I.R. (Oudh) 53=145 I.C. 470=10 O.W. N. 1108=34 Cr.L.J. 1009=1933 Cr.C. 592=A.I.R. 1933 Oudh 265.**

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———**S. 45**—*Report of expert—Expert not cited as witness—Admissibility of report.*

Where the expert is not examined and the other party has had no opportunity of cross-examining him, the report of the expert cannot be admitted in evidence (*Mahomed Noor, J.*) TASADUQ HUSSAIN *v.* BASAWAN RAI. **I.R. 1933 Pat. 78=141 I.C. 767=A.I.R. 1933 Pat. 159.**

———**S. 45**—*Thumb impression expert—Report of—Admissibility—Procedure.*

If a Court wishes to admit in evidence a report of a thumb impression expert, then the Court should insist on the production of the expert as a witness in the case, in order that his examination and cross-examination be conducted in open Court and unless this is done, the report does not by itself become evidence in the case. (*Bajpai, J.*) BHUREY SINGH *v.* KARAN SINGH. **1935 A.W.R. 76=A.I.R. 1935 All. 142.**

———**S. 45**—*Typed documents—Experts evidence as to peculiarities in typing—Power of Court to draw its own conclusion.*

No doubt S. 45 makes no reference to typewriters, but evidence as to the fact that the typewriters used in the typing of the various exhibits have certain defects which are clear from the typing of these exhibits is evidence of the fact which can be competently given by an expert who has had an opportunity of examining the documents, though the Court is entitled to draw its own conclusion as to the source and authorship of the documents from the whole evidence in the case. (*Thom, J.*) MANABENDRA NATH ROY *v.* EMPEROR. **148 I.C. 833=6 R.A. 772=35 Cr.L.J. 768=1933 Cr.C. 833= A.I.R. 1933 All. 498.**

———**S. 45**—*Typed documents—Machine used for typing two letters—Identity of—Expert opinion, not conclusive*

The opinion of an expert to the effect that one document has been type-written on the same machine as another document is not admissible under S. 45 of the Evidence Act. The Court may ask the witness to explain points in favour of the view whether the two documents have or have not been typewritten on the same machine, but must come to its own conclusion and treat such assistance as an expert opinion—a relevant fact in itself. The identity of the machine on which the two letters have been typewritten would not by itself show that the writer of the two is one and the same person. That conclusion can only be drawn from additional evidence, internal evidence afforded by the document, or external circumstances, on the continuity of the correspondence passing between the sender and the addressee (*Sulaiman, C. J., and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I.C. 481=1933 A.L.J. 799=34 Cr.L. J. 967=14 L.R. 259 (Cr.)=1933 Cr.C. 1202=A.I.R. 1933 All. 690.**

———**S. 45**—*Typed documents — Opinion of expert that document has been typewritten on same machine as another—Admissibility.*

The opinion of an expert that one document has been typewritten on the same machine as another document is not admissible under S. 45 of the Evidence Act. The Court may ask the witness points in favour of the view whether the two documents have or not been typewritten on the same machine, but must come to its own conclusion and not treat such assistance as an expert opinion—a relevant fact in itself. (*Harries and Rachhpal Singh, JJ.*) BACHCHA BABU *v.* EMPEROR. **155**

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I C. 369 = 7 R A. 908 = 36 Cr L J. 684 = 1935 A W. R. 1 = 1935 A.Cr.C. 26 – 1935 Cr.C. 214 = A.I R. 1935 All. 162.

———S. 46—*Expert evidence—Whether conclusive.*

The opinion of an expert should not ordinarily be accepted as conclusive to prove the facts deposed to by him and a conviction for forgery cannot be sustained merely on the evidence of a handwriting expert. (*Jai Lal, J.*) PRABH DIAL *v.* EMPEROR. **I.R. 1932 Lah. 492 138 I.C. 368 – 33 Cr.L.J. 593 (1) = 33 P.L R. 697 = 1932 Cr C. 628 (1) = A.I.R. 1932 Lah. 490 (1)**

———S. 46—*Expert opinion—Admissibility—Requisites.*

The opinions or conclusions of skilled persons are certainly receivable by way of proof in point of fact but the witness must have made a special study of the subject or acquired a special experience therein. *Folkes* v. *Chadd*, 3 Dougl. 157 and *Reg.* v. *Silvertock*, (1894) 2 Q. B. 766, Ref. (*Lord Merrivale.*) UNITED STATES SHIPPING BOARD *v.* "ST. ALBANS". **I.R. 1931 P C. 163 = 131 I.C. 771 = A.I.R. 1931 P.C. 189 (P.C.).**

———S. 46—*Government expert—Citation—Punjab Government, Home-Judicial, Letter No. 276—Effect.*

Letter No. 276 Home—Judicial of the Punjab Government does not have the effect that the expert should never be called. It merely says that the expert should not be called unnecessarily. Handwriting expert directed to be examined. (*Harrison and Dalip Singh, JJ.*) NAWAZISH ALI KHAN *v.* DHARAM SINGH. **I R. 1932 Lah. 324 = 137 I.C. 224 = 33 P.L.R. 76 = A.I.R. 1932 Lah. 202.**

———S. 47—*Finger print expert—Opinion of—Conviction based solely on—Propriety.*

The question of the identity of the thumb-mark is a question of fact and the evidence of the expert is only a guide to the discretion of the Court. It is not safe, however, to base a conviction on the uncorroborated testimony of a finger print expert. The expert's opinion must not be taken for granted but the Court must examine the evidence in order to satisfy itself that there can be no mistake and the responsibility is all the greater when there is no other evidence to corroborate the expert. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) NARANÄPPA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 444.**

———S. 47—*Person unable to read and write—Capacity to prove handwriting.*

It is not impossible for a person unable to read and write certain characters to know and to recognize and prove the handwriting of another in those particular characters, if he had had the occasion to see the latter write. (*Niamatullah, J.*) RAM CHANDRA *v.* JAITHMAL. **4 A.W.R. 676 = A.I.R. 1934 All 990.**

———S. 47—*Proof of handwriting—Evidence—Sufficiency.*

The only witness examined to prove a particular letter to be in the handwriting of the accused *H* stated: "I have no writing of *H* with me. I have no correspondence with him. From a single letter I would not be able to identify the handwriting of any person. I was not particularly friendly with *H*".

Held, that the evidence was hardly sufficient under S. 47 of the Evidence Act to prove that the letter was in the handwriting of *H*. (*Grille, J.C. and Subhedar, A. J.C.*) HEMRAJ LODHI *v.* RAM CHARAN LODHI. **1934 Cr.C. 898 = A I.R. 1934 Nag. 204.**

———S. 48—*Custom—General evidence.*

Where any question of right or custom is to be decided, opinions of persons who would be likely to know of its existence are admissible in evidence under S. 48.

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(*Raza and Srivastava, JJ.*) HUBRAJI *v.* CHANDRABALI UPADHIYA. **6 Luck. 519 = I.R. 1931 Oudh 161 = 130 I.C. 849 = 8 O.W.N. 6 = 14 O.L.J. 66 = A.I. R. 1931 Oudh 89 (2).**

———S. 48—*Family custom — Statement of living witness—Value.*

A living witness may state his opinion on the existence of a family custom and may state as grounds thereof, information derived from deceased person but it must be the expression of independent opinion based on hearsay and not repetition of hearsay. The weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL-UR-RAHMAN. **8 Luck. 445 = 150 I.C. 282 = 6 R.O. 629 = 10 O.W.N. 268 = A. I.R. 1933 Oudh 246.**

———S. 48—*Statements of deceased—Admissibility.*

S. 48 read with S. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under S. 32 are not admissible under S 48 or under S. 32 (7). Statements cannot be called instances. (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL UR-RAHMAN. **8 Luck. 445 = 150 I.C. 282 = 6 R.O. 629 = 10 O.W.N. 268 = A.I.R. 1933 Oudh 246.**

———S. 48 *Usage—Proof—Oral evidence.*

Where a usage is set up for the payment of interest on Hundis at a rate exceeding 6 per cent. per annum after dishonour and all that the Court has to ascertain is the rate of interest fixed by usage, the evidence of three persons familiar with that usage is quite sufficient particularly when it stands uncontradicted on the record (*Tek Chand and Monroe, JJ.*) HAR NARAIN SAHIB RAM *v.* BIHARI LAL CHARANJI LAL. **13 Lah. 800 = 142 I.C. 729 = I.R. 1933 Lah. 251 = 34 P.L.R. 92 = A.I.R. 1932 Lah. 582.**

———Ss. 49 and 60—*Value of evidence—Test of.*

The value of the evidence admissible under Ss. 32, 49 and 60 depends on the characters of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. 23 All. 37 (P C.), Foll. (*Aston, A.J.C.*) MULCHAND *v.* DEVIGIR. **150 I.C. 266 = 6 R.S. 265 = A.I.R. 1933 Sind 213.**

———S 50—*Evidence of marriage.*

The evidence of witnesses, that a certain man and a woman were regarded as man and wife by the members of the community, does not come within the purview of S. 50, not being an opinion, expressed by conduct as to existence of such relationship, of any person who as a member of the family or otherwise has special means of knowledge on the subject, and there is no other statutory provision under which the evidence can be let in to prove marriage. (*Sen and Allen, JJ.*) LAKHMI CHAND *v.* MT. ANANDI. **I.R. 1933 All. 335 = 143 I.C. 815 = 1932 A L.J. 208 = A.I.R. 1933 All. 130.**

———S. 50—Relationship—Statement of witness regarding treatment—Admissible. *See* EVIDENCE ACT, S. 32 (5)—RELATIONSHIP. **A.I.R. 1934 All. 117.**

———S. 51—*Chemical Examiner—Report of—Contents of.*

It is not enough for the Chemical Examiner merely to state his opinion. He must state the grounds on which he arrives at that opinion. As the Chemical Examiner merely tenders a report and he does not appear and give evidence, it is extremely desirable that his report should be full and complete and take the place of evidence

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which he would give if he were called to Court as a witness. (*Niamatullah and Bennet, JJ.*) MT. GAJANI *v.* EMPEROR. **I.R. 1933 All. 414 = 144 I.C. 357 = 14 L R. 162 (Cr.) = 34 Cr.L J. 754 = 1933 A.L J. 1617 = 1933 Cr.C. 664 = A.I.R. 1933 All 394.**

———**S. 51**—*Opinion of—Excise Sub-Inspector as expert—Duty to ascertain grounds of his opinion*

No doubt the Excise Sub-Inspector is an expert in his own department, and is able to distinguish liquors, but the Court should under S. 51 ascertain the grounds on which his opinion is based, so as to test it. (*Gruer, A.J.C.*) RAMKARANSINGH *v.* EMPEROR. **154 I.C. 341 = 7 R.N.161 = 36 Cr. L J. 511 = 1935 Cr.C. 80 = A.I.R. 1935 Nag. 13.**

———**S. 54**—*Evidence of bad character—When admissible—Prior conviction.*

In criminal proceedings evidence that an accused person has a bad character is inadmissible unless evidence has been given that he has a good character, in which case it becomes admissible. But S. 54 does not apply to cases in which the bad character of any person is itself a fact in issue. If the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved *aliunde* the evidence of bad character is admissible. Evidence of previous conviction or the evidence that a man has been bound over under the preventive sections is admissible not as proof of bad character but as evidence to prove habit and association. (*Nanavutty, J.*) BENI MADHO *v.* EMPEROR. **9 Luck. 22 = 35 Cr L.J. 273 = 6 I.R. (Oudh) 209 = 146 I.C. 1064 = 10 O.W N. 688 = 1933 Cr.C. 976 = A.I.R. 1933 Oudh 355.**

———**S. 54**—*Evidence of character—Relevancy.*

Where the complainant stated that the accused came to him, complained to him of his making reports to the police and then attacked him and to corroborate history and give support to the prosecution case, the prosecution let in evidence by a police-officer that the first accused was under police surveillance.

Held, that the evidence was hopelessly inadmissible, and that, though no objection was taken in the trial Court, it was the duty of the trial Magistrate to refuse to admit such evidence. (*Wort, J.*) PHEKAN SINGH *v.* EMPEROR. **I.R. 1931 Pat. 369 (2) = 133 I C. 449 (2) = 32 Cr.L.J. 1025 = 12 Pat.L.T. 471 = 1931 Cr.C. 793 = A.I.R. 1931 Pat. 345.**

———**S. 54**—*Evidence of character—Relevancy in criminal cases—Duty of Court.*

It is not permissible or proper for a Magistrate to elicit or record evidence damaging to the character of the accused in a criminal trial, by examining the witness himself. Such evidence, besides being inadmissible under S. 54 of the Evidence Act, is likely to cause prejudice to the accused. The recording of such irrelevant and inadmissible evidence is by itself sufficient to warrant a transfer of the case to some other Court. (*Weston,.*) BRIJ NIWAS DAS *v.* ABDUL HAKIM. **1935 A.M.L.J 63.**

———**S. 54**—*Scope.*

Under S. 54 if evidence is otherwise relevant it is not rendered inadmissible merely because it shows bad character or the commission of offences other than the offence with which the accused is charged. (*Panckridge and M. C. Ghose, JJ.*) SAROJ KUMAR CHAKRAVARTY *v.* EMPEROR. **59 Cal. 1361 = I.R. 1932 Cal. 667 = 139 I C 873 = 33 Cr L J. 854 = 55 C.L.J. 439 = 1932 Cr.C. 464 = A.I.R 1932 Cal. 474.**

———**S. 55**—*Evidence of character—Admissibility in civil suit.*

Evidence under S. 55 about the character of a person is relevant in connexion with the amount of damages in civil cases. At the same time only general evidence of character or reputation can be given and not for instance, evidence of a particular conviction. A. I. R. 1923 Lah. 225, Ref. (*Staples, A. J. C.*) SAMRATHMAL MARWADI *v.* EMPEROR. **141 I.C. 438 = 34 Cr. L.J. 154 = I.R. 1933 Nag. 63 = 1932 Cr.C. 863 = A.I. R. 1932 Nag. 158.**

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———**S. 57**—*Custom—Power of Court to take judicial notice.*

When a particular custom is of general prevalence and is commonly recognized, it is open to a Court to take judicial notice of such custom having the force of law under S. 57 of the Evidence Act, and it is therefore not necessary that there should be evidence produced in each case to establish such a custom. (*Sulaiman, C. J. and Bennet, J.*) NIHAL CHAND *v.* MT. BHAGWAN DEI. **159 I.C. 683 = 1935 A.W.R. 1109 = 8 R.A. 495 = 1935 A L J. 1131 = A.I.R. 1935 All. 1002.**

———**S. 57**—*Personal knowledge of the Judge—Reference—Permissibility.*

A Court can take judicial notice of matters of universal notoriety, its general knowledge of daily life. A Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer. He cannot therefore import into a case his knowledge of the previous conduct of the accused. 38 Cal. 153 and 36 Mad. 168, Ref (*Rupchand Bilaram and Milne, A. J. Cs.*) SHAMBHURAM *v.* EMPEROR. **25 S.L.R. 213 = I.R. 1931 Sind 92 = 132 I.C. 476 = 32 Cr L J. 923 = 1931 Cr.C. 719 = A.I.R. 1931 Sind 127.**

———**S. 57**—*"Present political movement"—Danger to public safety—Judicial notice of.*

The Court can take judicial notice of the fact that "the present political movement" is in fact a movement prejudicial to the public safety or peace. (*Jack and M. C. Ghose, JJ.*) PROBODH CHANDRA CHAKRAVARTY *v.* EMPEROR. **60 Cal 351 = 142 I.C. 351 (2) = I.R. 1933 Cal. 273 = 34 Cr.L.J. 345 = 36 C.W.N. 1158 = 1933 Cr C. 232 = A.I.R. 1933 Cal. 186.**

———**S. 57 (9)**—*Public holidays — Notification in Gazette—Judicial notice.*

The Court is bound to take notice of any public holidays notified in the Official Gazette and a party is entitled to presume that the Court would take such notice thereof. (*Tek Chand, J.*) GYAN SINGH *v.* BUDHA. **14 Lah. 240 = 149 I C. 958 = I.R. 1932 Lah. 668 (2) = 34 P.L.R. 540 = A I.R. 1933 Lah. 558.**

———**S. 58**—*Admission of mortgage in written statement—Proof of loss of original or contents of certified copy—If necessary.*

Where defendants, who were the mortgagors, in the written statement admitted the mortgage, it is not necessary for the plaintiff to render formal evidence either to prove the loss of the original deed or to prove the contents of the certified copy. (*Hilton and Din Mohammad, JJ.*) BAHADUR SHAH *v.* MULK RAJ. **A.I.R. 1934 Lah. 898.**

———**S. 58**—*Applicability—Party admitting document but pleading its invalidity for want of registration.*

The provisions of S. 58, Evidence Act, cannot be used to bind the party who has made an admission of the genuineness of a document, when such admission is accompanied by a legal plea that the contract and the other facts mentioned in that document could not be relied upon by the opposite party owing to the provisions of the statutory law relating to registration. (*Fraser, J.C.*) BASHESHAR NATH *v.* MIAN FEROZ SHAH. **A.I.R. 1935 Pesh. 12.**

———**S. 58**—*Promissory note insufficiently stamped—Admission of execution by defendant—Effect*

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In spite of waiver of proof by an admission under S. 58 of the Evidence Act, a note or other instrument insufficiently stamped cannot be acted upon or decree given upon it, unless apart from the note, there is an independent cause of action for the loan (*Krishnan, Pandalai, J.*) ACHUTARAMANNA *v.* JAGANNADHAN. **1933 M.W.N. 663=I.R. 1933 Mad. 55=140 I.C. 833=37 L.W. 157=A.I.R. 1933 Mad. 117=64 M.L.J. 79.**

———**S. 58**—*Promissory note—Suit on—Defendant admitting execution and pleading discharge—Promissory note subsequently discovered to be insufficiently stamped—Objection to suit—Sustainability.*

In a suit on a promissory note, the defendant admitted execution in his written statement and pleaded discharge but at the time of argument he discovered a legal objection to the maintainability of the suit on the ground that the stamp affixed to the note had not been cancelled as required by S. 12 of the Stamp Act and raised the objection that the note was inadmissible in evidence.

Held, that having regard to S. 58 of the Evidence Act the fact that the note was inadmissible became immaterial on account of the admission and therefore the plaintiff was entitled to maintain the suit.

Held, further, that having regard to S. 36 of the Stamp Act the admissibility of the document could not be reopened on account of the document not having been duly stamped. (*Anantakrishna Aiyar, J.*) ALI MANE SAHIBA *v.* SUBBARAYUDU. **I.R. 1932 Mad. 730=139 I.C. 486=1932 M.W.N. 793=36 L.W. 470=A.I.R. 1932 Mad. 693=63 M.L.J. 303.**

———**S. 58, Proviso**—*Object—Effect of—O. 12, R. 6, C. P. Code—Judgment in accordance with admission—Discretion*

The rule contained in O. 12, R. 6, C.P. Code, that the Court has a discretion to pass a judgment or order on the basis of an admission is supported by S. 58, Proviso of the Evidence Act. (*Hasan, C.J. and Bisheshwar Nath, J.*) BHAGWAN DIN TEWARI *v.* SHEORAJ. **I.R. 1931 Oudh 348=132 I.C. 796=14 O.L.J. 462=8 O.W.N. 762=A.I.R. 1931 Oudh 321 (2).**

———**S. 60**—*Prosecution deposing to what another told them—That other person not examined—Admissibility of evidence.*

Where, on a charge of plying a car for hire without permit, the constables only deposed to what a passenger told them (and that passenger was not examined).

Held, such evidence was excluded by S. 60 of the Evidence Act. (*Burn, J.*) ANNAMUTHU PILLAI *v.* EMPEROR. **1933 M.W.N. 1424.**

———**S. 60**—*Statements of deceased—Admissibility.*

S. 48 read with S. 60 requires that the person who holds the opinion should be called as a witness. Statements made by deceased persons after the controversy had arisen and therefore inadmissible under S. 32 are not admissible under S. 48 or under S. 32 (7). Statements cannot be called instance. (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL-UR-RAHMAN. **8 Luck. 445=150 I.C. 282=6 R.O. 629=10 O.W.N. 268=A.I.R. 1933 Oudh 246.**

———**Ss. 60, 49 and 32**—*Value of evidence—Test of.*

The value of the evidence admissible under Ss 32, 49 and 60 depends on the characters of the witnesses who depose to what they heard from deceased persons and also on the characters of the deceased and whether they were expressing their own opinion or merely repeating hearsay. 23 All. 37 (P.C.), Foll. (*Aston, A. J. C.*) MULCHAND *v.* DEVIGIR. **150 I.C. 266=6 R.S. 265=A.I.R. 1933 Sind 253.**

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———**S. 63**—*Discretion of trial Court—Interference.*

The question whether secondary evidence was in any case rightly admitted depends largely on the discretion of the Judge of first instance and his conclusion should not be overruled by the Court of appeal except in a very clear case of miscarriage. 19 I. A. 78; 5 Bom. L. R. 708, Foll. (*Beaumont, C. J. and Baker, J.*) VISVANATH *v.* RAHIBAI. **55 Bom. 103=I.R. 1931 Bom. 117=128 I.C. 901=32 Bom.L.R. 1385=A.I.R. 1931 Bom. 105.**

———**S. 63**—*Register containing copies—Admissibility.*

A register containing copies made directly from the originals is legally admissible in evidence in proof of them. (*Hasan, C. J. and Bisheshwar Nath, J.*) CHANDRANI KUER *v.* SHEO NATH. **6 Luck. 619=I.R. 1931 Oudh 273=132 I.C. 337=14 O.L.J. 34=8 O.W.N. 194=A.I.R. 1931 Oudh 146**

———**S. 65**—*Admission of copy—Absence of objection—Effect.*

A document, which is not relevant to the issues, even if admitted without objection by the opposite party must be discarded by the appellate Court: on the other hand, if it is relevant to an issue but cannot be admitted unless certain conditions are first complied with, as for instance, the proof of loss of the original if the document is a copy, then the absence of an objection by the opposite party to the admission of the document, must be deemed to be tantamount to an admission of the existence of those circumstances and the document becomes admissible. (*Jai Lal and Skemp, JJ.*) BADRUL ISLAM ALI KHAN *v.* MT. ALI BEGUM. **16 Lah 782=158 I.C. 465=8 R L. 251=A.I.R. 1935 Lah. 251.**

———**S. 65**—*Document—Lost in Court — Secondary evidence.*

Where a document is produced in Court and tendered in evidence and exhibited, the Court is responsible for its safe keeping; and if it is lost the party must be given another chance of producing a copy or giving secondary evidence of contents. (*Dalip Singh, J.*) RAM SINGH *v.* PAT RAM. **6 I.R. (Lah.) 26=144 I.C. 812 (1)=34 P.L.R. 657=A.I.R. 1933 Lah. 782 (1).**

———**S. 65**—*Document in plaintiff's possession—Right of defendant to lead secondary evidence.*

Where in a suit by a reversioner challenging an alienation by a widow, the vendee is unable to produce a bahi belonging to a previous creditor to prove legal necessity due to its being in possession of the plaintiff, who happens to be the heir of the creditor, the vendee cannot be blamed for the non production of the bahi and the proper course is to allow the vendee to lead secondary evidence as to the existence of the alleged previous debt. (*Tek Chand, J.*) SANT SINGH *v.* HARDIT SINGH. **6 I.R. (Lah.) 211=146 I.C. 350=34 P.L.R. 929=A.I.R. 1933 Lah. 945.**

———**S. 65**—*Documents suppressed by plaintiff — Secondary evidence of contents—Permissibility.*

Where the plaintiff has suppressed the documents in his possession, he could not be permitted to establish their contents by secondary evidence. (*Curgenven and Sundaram Chetty, JJ.*) SIVASUBRAMANIA THEVAR *v.* ZAMINDAR OF SINGAMPATTI. **I.R. 1933 Mad. 364=144 I.C. 27=1933 M.W.N. 672=37 L.W. 672=A.I.R. 1933 Mad. 451=64 M.L.J. 676.**

———**S. 65**—*Income-tax return and assessment.*

An income-tax return is not a public document or a public record of a private document within S. 74 and so S. 65 does not apply. The order of assessment may be a public document but in view of S. 54 of the Income-tax Act which prohibits the disclosure of the original, no

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one is entitled to have a certified copy thereof under S. 76 of the Evidence Act, and only certified copies so obtained are made admissible in evidence under S. 77. (*Beaumont, C.J. and Rangnekar, J.*) DEVIDATT *v.* SHRIRAM. **56 Bom. 324 = I.R. 1932 Bom. 245 = 137 I.C. 381 = 34 Bom.L.R. 236 = A.I.R. 1932 Bom. 291.**

———**S. 65**—*Letters of conspirators intercepted — Copies of—Admissibility.*

The copies of the letters from the accused to his co-conspirators which were intercepted and re posted are admissible in evidence. The addressees to whom the original letters were re-posted being the accused's associates in the conspiracy, it is not necessary that the prosecution should go through the formalities of making a formal application to his associates to produce the original letters in order that they might be used as evidence against the accused. (*Thom, J.*) MANABENDRA NATH ROY *v.* EMPEROR. **148 I.C. 833 = 6 R.A. 772 = 35 Cr.L.J. 768 = 1933 Cr.C. 833 = A.I.R. 1933 All. 498.**

———**S. 65**—*Mortgage deed for amount over Rs. 100 —Secondary evidence—Proof by—Permissibility.*

In the case of a mortgage for over Rs. 100 which requires registration, it cannot be held to be proved, when the deed itself is not produced, and the secondary evidence given about it is altogether tainted. (*Knox, S.M. and Grant, J.M.*) SHARIF *v.* ILAHI KHAN. **1935 R.D. 579.**

———**S. 65**—*Record room burnt in Mutiny—Register of Sarsikan papers in Manbhum Collectorate—Proof by certified copies thereof.*

A copy transcribed from a copy of an original document but not compared with the original is not secondary evidence of the original. The Purulia record room was burnt during the Mutiny of 1857 and the plaintiff in a suit for declaration of his talabi brahmatter rights to a certain mauza had produced in evidence certain certified copies prepared from a register of Sarsikhan papers in the Manbhum Collectorate.

Held, that in the above circumstances, the register now available in the Manbhum Collectorate was to be treated as the original document and the entries therein could be proved by certified copies thereof which the plaintiff had produced. (*Macpherson and Dhavle, JJ.*) RAJENDRA NARAYANA SINGH DEO *v.* BIHARI LAL CHAKRAVARTY. **11 Pat. 569 = I.R. 1932 Pat. 185 = 138 I.C. 419 = A.I.R. 1932 Pat. 157.**

———**S. 65**—*Secondary evidence—Admissibility.*

Where a party fails to prove that the original of the document was lost, secondary evidence of its contents is not admissible. (*Kisch, J.*) ABHERAJ SINGH *v.* GAYA SINGH. **135 I.C. 387 = I.R. 1932 Oudh 35 = 8 O.W.N. 1228 = A.I.R. 1932 Oudh 137.**

———**S. 65**—*Secondary evidence — Admissibility — Decision by trial Court — Interference by appellate Court.*

When a party fails to produce a document in Court, it may be because he does not wish to produce it or he has really lost it. Before secondary evidence of a document is produced in Court, it is essential for a party to show that the document has been lost; and when this onus has not been discharged and the Judge of first instance decides the first point as to the admissibility of secondary evidence, his conclusion should not be overruled except in a case of miscarriage. 19 Cal. 438, Foll. (*Mackney, J.*) MAUNG BA U *v* DAW KHA. **160 I.C. 701 = 8 R.R. 412 = A.I.R. 1935 Rang. 502.**

———**S. 65**—*Secondary evidence—Admission of—Discretion of trial Court—Interference in appeal with.*

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Where secondary evidence has been admitted by the trial Court without objection, the appellate Court cannot reject such evidence on the ground that no reason has been given for such admission. 19 Cal. 438 (P.C.), Expl., A.I.R. 1915 P.C. 111, Foll (*Addison and Agha Haidar, JJ.*) MAHOMED HASSAN *v.* SAFDAR MIRZA. **14 Lah. 473 = I.R. 1933 Lah. 396 = 144 I.C. 45 = 34 P.L.R. 820 = A.I.R. 1933 Lah. 601.**

———**S. 65**—*Secondary evidence—Copy of list attached to plaint filed in Revenue Court—Admissibility.*

It is doubtful whether a copy of a list attached to a plaint obtained from some record in the Revenue Court is admissible in evidence. (*Pullan, J.*) BHAGWATI PRASAD *v.* MARJAD SINGH **I.R. 1931 Oudh 107 = 129 I.C. 331 = 7 O.W.N. 1079 = 14 R.D. 664 = A.I.R. 1931 Oudh 136.**

———**S. 65**—*Secondary evidence—Erroneous admission —Objection raised in appeal—Sustainability.*

Where secondary evidence which is inadmissible has been erroneously admitted without objection in the Court of first instance, such objection cannot be taken later in appeal. (*Shadi Lal, C.J. and Tapp, J.*) FAUJA SINGH *v.* ALLAH DITTA. **I.R. 1931 Lah. 842 (2) = 133 I.C. 874 (2) = 32 P.L.R. 696 = A.I.R. 1931 Lah. 722**

———**S. 65**—*Secondary evidence—When admissible.*

Secondary evidence should not be allowed unless the circumstances are a sufficient justification under the Evidence Act, for reception of secondary in lieu of primary evidence. (*Dhavle, J.*) RASDHARI LAL *v.* NAND LAL MAHTON. **148 I.C. 444 = 6 R.P. 476 = A.I.R. 1933 Pat. 468.**

———**S. 65 (b)**—*Secondary evidence of mortgage— Admission in* Wajib-ul arz.

Where in a suit for redemption, it is proved that in *wajib ul-arz*, predecessors in title of the defendants admitted in writing the existence, condition and also the contents of the original, there is no difficulty in the proof of the mortgage, as the rule of law that is applicable to the case is S. 65(*b*) of the Evidence Act. (*Sulaiman, C.J. and Mukerji, J.*) BHAIRON PRASAD *v.* ABALAK SINGH. **6 R.A. 835 = 148 I.C. 1172 = 3 A.W.R. 537 = A.I.R. 1934 All. 529.**

———**S. 65 (c)**—*Loss of original—Proof—Hearsay evidence of search—Admissibility.*

In order to show that search has ben made for a document, so as to let in secondary evidence to prove its contents on the ground that it is lost, hearsay evidence of the answers given by persons who were likely to have it in their custody ought to be received. (*R. C. Mitter, J.*) DOL GOVINDA DAS *v.* MAKBUL SHEIKH. **162 I.C. 91 = 8 R.C. 560 = 61 C.L.J. 588 = A.I.R. 1936 Cal. 164.**

———**S. 65 (c), 90 and 91, Expl. (3)**—*Scope— Dispute as to custom of transfer of houses—Proof of custom—Certified copies of registered sale-deeds and mortgage deeds—Admissibility.*

When the point in issue between the parties to a suit is whether there is a custom of the transfer of houses in a particular village, it is open to the party relying on the custom to prove the custom by citing instances before the Court of transactions in which the custom was asserted or recognized as well as particular instances in which such custom was claimed or recognized. The fact that certain sale-deeds or mortgage deeds were executed and duly registered and each contained assertions of the existence of the right of transfer, would be, in itself, admissible, quite independent of the fact whether the genuineness of the signature on the originals of those deeds has been formally proved or not. When there are

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a large number of documents to be produced, it would be difficult to produce or prove them within a reasonable time and a strict adherence to the technical proof of the originals would be contrary to the spirit of S 65 of the Evidence Act. Certified copies may therefore be produced and admitted in proof, even without accounting for the absence of the originals. (*Sulaiman, C. J. and Bennet, J.*) KALLU MAL *v.* GANESHI LAL. **160 I.C. 1098=8 R.A. 705=1935 R.D. 572=1935 A.W.R. 1427=A.I.R. 1936 All. 119.**

——**S. 65 (c)**—*Secondary evidence—Documents not produced by opposite party.*

Where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under S. 65 (*c*) and S. 66, Proviso (2). (*Beaumont, C. J. and Blackwell, J.*) NARSIDAS *v.* RAVISHANKAR. **I.R. 1931 Bom. 107=128 I.C. 891=32 Bom.L.R. 1435=A.I.R. 1931 Bom. 33**

——**S. 66, Proviso**—Secondary evidence—Admissibility—Documents not produced by opposite party after notice. *See* EVIDENCE ACT, S. 65 (*c*). **32 Bom.L.R. 1435=A.I.R. 1931 Bom. 33.**

——**S. 67**—*Applicability—Thumb marks.*

Thumb marks are not exempt from the provisions of S. 67. (*Pakenham Walsh, J.*) RAMANEMMA *v.* BASAVAYYA. **151 I.C. 990=7 R.M. 162 (2)=1934 M.W.N. 443=40 L.W. 277=A.I.R. 1934 Mad. 558.**

——**S 67**—*Authorship of document—Inference of—Identity of machines used for typing.*

The identity of the machine on which two letters have been typewritten would not by itself show that the writer of the two is one and the same person. Such a conclusion may be drawn from additional evidence, *e.g.*, internal evidence afforded by the document, or external circumstances, or the continuity of the correspondence passing between the sender and the addressee. (*Sulaiman, C. J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I.C. 481=34 Cr. L.J. 967=14 L.R. 259 (Cr.)=1933 A.L.J. 799=1933 Cr.C. 1202=A.I.R. 1933 All. 690.**

——**S. 67**—*Document executed by marksman—Signature of attesting witness—Effect.*

All that S. 67 requires is that the writing or the signature of the executant should be proved to be his writing or his signature. In the case of a signatory that has to be proved either by means of a witness who saw the person write and was present necessarily when he did write, or if such a person is not available by calling somebody who is familiar with the handwriting of the executant and who proves that it is his handwriting. Where the executant is a marksman, the latter alternative is not available. The signature of the attesting witness having been proved will in such a case be evidence of everything on the face of the document and that he saw the executant make his mark. (*Beasley, C.J. and Butler, J.*) PONNUSWAMI GOUNDAN *v.* KALYANASUNDARA AYYAR. **57 Mad. 662=149 I.C. 571=6 R.M. 618=39 L.W. 571=1934 M.W.N. 384=A.I.R. 1934 Mad. 365=66 M.L.J. 712.**

——**S. 67**—*Execution of document—Question of fact.*

The execution or authorship of a document is a question of fact and may be proved like any other fact. (*Sulaiman, C. J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I.C. 481=34 Cr L J. 967=14 L.R. 259 (Cr.)=1933 A.L.J. 799=1933 Cr.C. 1202=A I R. 1933 All. 690.**

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——**S. 67**—"*Sign*"—*Meaning.*

The definition of "sign" in the General Clauses Act, S. 3 (52), has no application to the term "sign" as used in S. 67, Evidence Act. (*Bennet, J.*) MT. SHAHZADI *v.* BENI PRASAD. **154 I.C. 405=7 R.A. 753=A.I.R. 1934 All. 390.**

——**S. 68 (as amended by Act XXXI of 1926)**—*Amendment, if retrospective.*

Quære.—If the amendment to S. 68 by Act XXXI of 1926 is retrospective? (*Curegenven and Sundaram Chetty, JJ.*) MUTHURAMAN CHETTIAR *v* SUBRAMANIAN CHETTIAR. **I.R. 1933 Mad. 373=144 I.C. 89=A.I.R. 1933 Mad. 612.**

——**S. 68**—*Attesting witness—Scribe.*

A writer of a deed who has not signed it as witness but has as a matter of fact been a witness of execution is a competent attesting witness. (*Ferrers, J. C. and Rupchand A.J.C.*) GHANSHAM SINGH TIRATH SING *v.* MAHOMED YACOOB. **6 I.R. (Sind) 75=146 I.C. 694=A.I.R. 1933 Sind 257.**

——**S. 68**—*Construction and scope—Mortgage suit—Denial of execution and attestation—Proof of execution and attestation—Necessity.*

Where the attestation of a mortgage deed is specifically denied by the defendants in their written statement and a distinct issue is raised on the point, it is incumbent on the plaintiff to prove the attestation of the document according to law. If any of the defendants to a mortgage suit denies that any of the alleged executants of the mortgage bond executed the deed, the plaintiff is bound to produce one of the attesting witnesses at least to prove the execution of the document. (*Syed Nasim Ali, J.*) EBRAHIM MONDAL. *v.* AKSHAY KONAR. **62 C.L.J. 25=40 C.W.N. 151.**

——**S. 68**—*Deed of relinquishment—Proof of.*

A deed of relinquishment is not a document required by law to be attested; so it can be proved by the unchallenged evidence of the alleged writer thereof. (*Oppenheim, S. M. and Drake Brockman, J. M.*) RAGHURAJ SINGH *v.* ORI AHIR. **14 L.R. 466 (Rev.) 17 R.D. 637.**

——**S. 68**—*Document required by law to be attested—Document failing as mortgage—Personal covenant—Admissibility.*

A document which purports to be a mortgage but is not a mortgage owing to non compliance with the provisions of S. 59 of the Transfer of Property Act regarding attestation is not a document which is required by law to be attested within the meaning of S. 68 of the Evidence Act and is admissible to prove the personal covenant to pay therein which is not required by law to be attested. 32 M. 410=19 M.L J. 584 (F. B.), Foll. (*Beasley, C J. and Curgenven, J.*) VENKATA JAGANNATHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=135 I.C 17=I R 1932 Mad 49=33 L.W. 95=A.I.R. 1931 Mad. 140=60 M.L J. 56.**

——**Ss. 68 and 69**—*Hypothecation bond—Proof of—Attesting witness summoned but examination impossible.*

Where in spite of the best efforts of the plaintiff, the attesting witness could not be served with summons and by the time of the appeals the witness was dead.

Held, that whether under the amendment to S. 68 or S. 69, it was open to the plaintiff to prove the document by other means. His own evidence in the circumstances would be sufficient to prove the document. (*Curgenven and Sundaram Chetty, JJ.*) MUTHURAMAN CHETTIAR *v.* SUBRAMANIAN CHETTIAR. **I.R. 1933 Mad. 373=144 I.C. 89=A I.R. 1933 Mad. 612.**

——**S. 68**—*Mortgage sued upon as simple money bond—Proof of attestation—Necessity for.*

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A document, not registered, but purporting to be mortgage, can be proved without calling one of the attesting witnesses, when it is sued on as a bond and not as a mortgage. 32 Mad. 410, Ref. (*Ferrers, J. C. and Rupchand, A.J.C.*) GHANSHAM SINGH TIRATH SING *v.* MAHOMED YACOOB. **6 I.R (Sind) 75=146 I.C. 694=A.I.R. 1933 Sind 257.**

———**S. 68**—*Non-compliance—Other evidence—Admissibility.*

Other evidence under S. 71 cannot be admitted where the provisions of S. 68 have not been complied with. (*Mukerji and Bennet, JJ.*) BANWARI LAL *v.* GOPI NATH. **I.R. 1931 All. 397=131 I.C. 557=1931 A.L.J. 342=A.I.R. 1931 All. 411.**

———**S. 68**—*Person identifying executant before registration authorities—Attesting witness—Acknowledgment from the executant of his signature.*

The change in the meaning of the word "attested" effected by S. 2 of Act XXVII of 1926 as amended by Act X of 1927 is retrospective in operation and the person who identifies the executant of a document before Sub-Registrar can be an attesting witness within the meaning of S. 68, if before the signs the documents as an identifying witness he receives a personal acknowledgment from the executant of his signature. A. I. R. 1929 Mad. 1 (F.B.), Foll. (*Subhedar and Pollock, A. J. Cs.*) MT. CHUNNIBAI *v.* GIRDHARI LAL. **30 N.L.R 62 150 I.C. 1007=7 R.N. 33=16 N.L.J. 319=A.I.R. 1934 Nag. 1.**

———**S. 68**—*Proof of attestation—Validity of deed admitted.*

It is unnecessary to prove due attestation where the validity of the deed of gift has not been specifically denied on the ground, that it had not been attested in the manner required by law. (*King and Collister, JJ.*) AZIZUNNISSA *v.* SIRAJ HUSAIN. **1934 A. L. J. 817=152 I. C. 146=7 R.A. 268=3 A. W. R. 302=A. I. R. 1934 All. 507.**

———**S. 68**—*Registered document—Execution not specifically denied—Proof by attesting witness not necessary.*

Where the execution of a registered document is not specifically denied by the party against whom it is sought to be put in as evidence, it is not necessary for the admissibility of such document that the execution should be proved by the surviving attesting witnesses. (*Currie, J.*) GOBINDA *v.* CHANAN SINGH. **147 I.C. 847=6 R.L. 453=A.I.R. 1933 Lah. 378.**

———**S 68**—*Will by a Christian—Proof of—Attesting witness available—Failure to call—Apprehension of his turning out hostile, no excuse.*

The will of a Christian being a document which under S. 63 of the Succession Act is required to be attested, if there is at least one witness alive, subject to the process of Court and capable of giving evidence, it cannot be used as evidence until he has been called to prove its execution. The section is mandatory and the apprehension that the witness, if called, will prove hostile is no excuse for not calling him. 63 I.C. 266; 31 C.W.N. 215 and A.I.R. 1925 All. 56, Foll. (*Madhavan Nair, J.*) PEDA MANIKYAM *v.* VANTABATTINA PERIGADU. **135 I.C. 532=I.R. 1932 Mad. 116=34 L.W. 663=A.I.R. 1932 Mad. 148.**

———**S. 68, Proviso**—*Effect—Proof of attestation* aliunde, *not dispensed with.*

The proviso to S. 68, Evidence Act, only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed under S. 59, T. P. Act. A.I.R. 1929 Pat. 422, Diss. from (*Page, C.J. and Mya Bu, J.*) R. M. A. R. M CHETTIAR FIRM *v.* U. HTAW. **11 Rang. 26=I.R. 1933 Rang. 22=141 I.C. 700=A.I.R. 1933 Rang. 6.**

[R. 1934 R. 278 (279).]

———**S. 68, Proviso**—*Effect—Rule as to examination of marginal witness.*

If any of the defendants to a suit denies that any of the alleged executants executed the deed, the plaintiff must produce one of the marginal witnesses to prove the document. (*Mukerji and Allen, JJ.*) RADHA BALLAB *v.* DEOKI NANDAN. **I.R 1932 All 609=140 I.C. 115=1932 A.L J. 207=A.I.R. 1932 All. 320.**

———**S. 68—Proviso**—*Registered document—Proof of—Attesting witness—Examination of—Not necessary*

In the case of a registered document, the execution of which is not denied, it is not necessary to call an attesting witness to prove it. (*Oppenheim, S. M. and Walton, J.M.*) DASAI *v.* SHEO DEO. **14 L.R. 57 (Rev.)=17 R.D. 70.**

———**S 68—Proviso**—*Retrospective.*

The proviso to S. 68 added by Act **XXXI** of 1926 is retrospective in its operation. 57 M. L. J. 588, Ref. (*Sundaram Chetty, J.*) SOMASUNDARAM CHETTIAR *v.* MUTHIRULAPPA PILLAI. **147 I C. 464=6 R. M. 345=1933 M. W. N. 141 (2)=37 L.W. 677=A. I. R. 1933 Mad. 432.**

———**(as amended by Act XXXI of 1926), S. 68, Proviso**—*Retrospective effect.*

It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case. Proviso to S. 68 of the Evidence Act held to be inapplicable to a case disposed of before it took effect. (*Mukerji and Bennet, JJ.*) BANWARI LAL *v.* GOPI NATH. **I.R. 1931 All. 397=131 I.C. 557=1931 A.L.J. 342=A.I.R. 1931 All. 411.**

———**S. 68—Proviso**—*Scope of.*

S. 68 merely provides a special rule relating to the proof of documents required to be attested. The new proviso to that section is merely an exception to that special rule. It is not intended to override the general provisions of the law as to the proof of documents relied upon by the parties. (*Jai Lal, J.*) KARTAR SINGH *v.* DIDAR SINGH. **149 I.C. 1109 (1)=6 R.L. 803=A.I.R. 1934 Lah. 282.**

———**S. 68, Proviso**—*Scope—Attesting witness—When to be called.*

Under S. 68 of the Evidence Act, as it now stands, it is not necessary to prove or to produce a marginal witness unless the mortgage deed is specifically denied. The section contemplates a distinction between the position when execution is not admitted and the position when execution is specifically denied. (*Allsop, J.*) JHILLAR RAI *v.* RAJ NARAIN RAI. **156 I.C. 45=7 R A. 1036=1935 A.L.J. 1072=1935 A.W.R. 759=1935 R.D 310=A.I.R. 1935 All. 781.**

———**S. 69**—*Requirements of section.*

Where the mortgagor, the mortgagee and all the attesting witnesses, had died before the institution of the suit on the mortgage, and the only evidence which the mortgagee produced to prove due execution of the mortgage deed was that of the son of the mortgagee who stated that the executant signed in his presence and that of the attesting witnesses, and the witness also identified the signatures of the attesting witness; but he did not say that they had signed in his presence.

Held, that all the requirements of S. 69 of the Evidence Act were made out. (*Niamatullah, J.*) BHAIRON SINGH *v.* GANGA NARAIN. **157 I.C. 693=8 R.A. 231=1935 A.W.R. 542=A I R. 1935 All. 527.**

———**S. 71**—*Attesting witness—Other evidence—When admissible.*

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The evidence which was tendered to prove the mortgage deed consisted firstly in calling a witness *B*. He was one of three persons whose signatures appeared on the deed of mortgage as attesting witnesses. But when *B* was called, he said that the executant had not put her thumb-impression on the mortgage deed in his presence and that he merely put his signature on the mortgage deed as the *kavinda* of the lady asked him to do so. The plaintiff also tendered his own evidence to the effect that the lady put her thumb-impression on the mortgage deed in his presence and in the presence of two other attesting witnesses. But the plaintiff did not state that those attesting witnesses made their signatures in the presence of the lady.

Held, that the evidence of *B* and of the plaintiff was not sufficient for the purpose of S. 3 of the T. P. Act.

Held, further, that the plaintiff's evidence was not admissible under S. 71, because the plaintiff had not complied with S. 68 of the Evidence Act. (*Mukerji and Bennet, JJ.*) BANWARI LAL *v.* GOPI NATH. **I.R. 1931 All. 397=131 I.C. 557=1931 A.L.J. 342=A.I.R. 1931 All. 411.**

———**S. 71**—*Non compliance with S. 68—Admissibility of other evidence.*

Other evidence under S. 71 cannot be admitted where the provisions of S. 68 have not been complied with. (*Mukerji and Bennet, JJ.*) BANWARI LAL *v.* GOPI NATH. **I.R. 1931 All. 397=131 I.C. 557=1931 A.L.J. 342=A.I.R. 1931 All. 411.**

———**S. 73**—"*Any person.*"

The words "any person present in Court" include the accused. (*Wadia, J.*) EMPEROR *v.* RAMRAO MANGESH. **56 Bom. 304=I.R. 1932 Bom. 423=138 I.C. 708=33 Cr.L.J. 666=34 Bom.L.R. 598=1932 Cr.C. 572=A.I.R. 1932 Bom. 406.**

———**S. 73**—*Applicability*—"*Any person*"—*If includes an accused.*

Obiter: *Lort Williams, J.*—There is considerable doubt as to whether S. 73 refers to an accused person at all. A.I.R. 1927 Cal. 17, Ref.

Per *Jack, J.*—S. 73 does include an accused person. A.I.R. 1924 Rang. 115; A.I.R. 1932 Bom. 406, Rel. on. (*Lort Williams and Jack, JJ.*) KISHORI KISHORE MISHRA *v.* EMPEROR. **156 I.C. 396=7 R.C. 700=36 Cr.L.J. 921=39 C.W.N. 986=1935 Cr.C. 459=A.I.R. 1935 Cal. 308.**

———**S. 73**—*Caution.*

A comparison of handwriting as a mode of proof is often hazardous and inconclusive and as a method of proving disputed handwriting it is accepted by the Court with great caution. (*Wadia, J.*) EMPEROR *v.* RAMRAO MANGESH. **56 Bom 304=I.R. 1932 Bom. 423=138 I.C. 708=33 Cr L.J. 666=34 Bom.L.R. 598=1932 Cr.C. 572=A.I.R. 1932 Bom. 406.**

———**S. 73**—*Comparison of handwriting—Conviction based upon.*

It is not quite safe to come to the conclusion that the document is a forgery, particularly in a criminal case, on a mere comparison of the signatures alone. It is at best a hazardous and inconclusive test. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) NARANAPPA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 444.**

———**S. 73**—*Comparison of handwriting by Judge—Propriety.*

A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive and especially when it is made by a Judge in the privacy of his own sitting room without such guidance as might be derived from the arguments of Counsel and the evidence of experts. (*Nanavutty and Zia ul Hasan, JJ.*) LATAFAT HUSSAIN *v.* ONKAR MAL. **10 Luck. 423=7 R.O. 272=152 I.C. 1042=11 O.W.N. 1589=A.I.R. 1935 Oudh 41.**

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———**S. 73**—*Comparison of handwriting—Mode of—Writing taken from accused by the police during investigation.*

There is no objection in law to a Judge directing the accused in Court to write on slips of paper for the purpose of comparing his handwriting with that on the deed or document in question, and it is not irregular for a Judge to permit such writings taken from the accused during the course of the police investigation being shown to the jury, as such writings form part of the investigation and do not amount to confessions within the meaning of Ss. 25 and 26 of the Evidence Act or to 'statements' within the meaning of S. 63 of the Bombay City Police Act of 1902. 1 Pat. 242, Diss.; 30 C.W.N. 373; 46 M. 715; 6 Pat. 305; 6 Pat. 623 and 50 M. 462, Foll. (*Wadia, J.*) EMPEROR *v.* RAMRAO MANGESH. **56 Bom 304=I.R. 1932 Bom. 423=138 I.C. 708=33 Cr.L.J. 666=34 Bom.L.R. 598=1932 Cr.C. 572=A.I.R. 1932 Bom. 406.**

———**S. 73**—"*The Court*"—*Taking of signature for comparison—Procedure—Power of enquiring Magistrate to delegate to another.*

Obiter.—S. 73 means that where the accused is in Court, the Judge presiding in that Court may there and then ask him to write something for the purpose of enabling the Court to compare his writing with some other writing, and that the procedure of delegating to another Magistrate, not sitting as a Court, to take such a writing from the accused when the accused is not in Court nor standing his trial in Court does not come within the provisions of the section. (*Lort Williams and Jack, JJ.*) KISHORI KISHORE MISHRA *v.* EMPEROR. **156 I.C. 396=7 R.C. 700=36 Cr.L.J. 921=39 C.W.N. 986=1935 Cr.C. 459=A.I.R. 1935 Cal. 308.**

———**S. 73**—*Onus.*

The onus of proving the genuineness of the signature in a deed or document in a criminal proceeding lies on the party impeaching it, *viz.*, the Crown and not as in a civil suit in which the onus lies on the party setting up the deed or document and asserting its validity. (*Wadia, J.*) EMPEROR *v.* RAMRAO MANGESH. **56 Bom. 304=I.R. 1932 Bom. 423=138 I.C. 708=33 Cr L J. 666=34 Bom.L.R. 598=1932 Cr.C. 572=A.I.R. 1932 Bom. 406.**

———**S. 73**—*Signature—Comparison with admitted signature—Powers of Court.*

A comparison of signature by Courts as a mode of ascertaining the genuineness or otherwise of a disputed signature should be used with great caution. As a mode of proof, it is hazardous and inconclusive especially when made by one not conversant with the subject and without the guidance of Counsel and the evidence of experts. But there is nothing to prevent a Court, having these considerations in mind, from instituting a comparison and forming its own conclusions. 49 Cal. 35; 37 Cal. 467; 53 Cal. 372, Ref. to. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) MARULAPPA *v.* VENKATA NARASIMHACHAR. **9 Mys.L.J. 66.**

———**Ss. 74 and 80**—*Confessions of accused—Certified copies of—Admissibility.*

Certified copies of confessions by accused would be admissible under S. 74 of the Evidence Act as evidence to prove the act of the Magistrate recording the confession. Where there are no irregularities and the statement was taken in accordance with law, then under S. 80 of the Evidence Act, there would be a further presumption that the circumstances under which it was stated to

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have been taken, were true. The copies would not be sufficient to prove the identity of the accused. (*Sulaiman, C.J., Kandall and Young, JJ.*) MAHOMED ALI *v.* EMPEROR. **56 All. 302=147 I.C. 390=6 R. A. 467=35 Cr.L J. 385=1933 A.L J. 1551=1934 Cr. C. 145 (2)=A.I.R. 1934 All. 81 (F.B.).**

———**Ss. 74 and 77**—*Depositions of witnesses—Proof.*

Though certified copies of depositions in a prior proceeding are public documents, if they are not certified copies, they must be proved properly for their being admitted in evidence. (*Page, C.J. and Mya Bu, J.*) KARAPAYA SERVAI *v.* MAYANDI. **147 I.C. 414=6 R.R. 164=A.I.R. 1933 Rang. 212.**

———**S. 74**—*Income-tax return.*

An income tax return is not a public document or a public record of a private document within the meaning of S. 74 and so S. 65 of the Act does not apply. (*Beaumont, C.J. and Rangnekar, J.*) DEVIDATT *v.* SHRIRAM. **56 Bom. 324=I.R. 1932 Bom. 245=137 I.C. 381=34 Bom.L.R. 236=A I.R. 1932 Bom. 291.**

———**S. 74**—*Letter to Collector forwarding proceedings of public meeting.*

A letter addressed to the Collector by the president of a public meeting forwarding the proceedings of that meeting is not a public document within the meaning of S. 74 and is inadmissible in evidence. (*C. C. Ghose and Mitter, JJ.*) COLLECTOR OF DACCA *v.* RAI SARAT KISHORE BOSE BAHADUR. **143 I.C. 367=I R. 1933 Cal. 412=55 C.L J. 558=A.I.R. 1933 Cal 312.**

———**S. 74**—Petition of appeal—Production from Government Secretariat—Statement in it about relationship not admissible unless the statement is brought home to him. *See* EVIDENCE ACT, S. 32 (5) —RELATIONSHIP. **8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———**S. 74**—*Public document—Judgment of Court.*

A judgment of a Court is a public document within the meaning of S. 74. (*Young, J.*) LADLI PRASAD ZUTSHI *v.* EMPEROR **53 All. 724=I.R. 1931 All. 487=132 I C 327=32 Cr.L J. 864=12 L.R. 59 (Cr.) =1931 A.L.J. 405=1931 Cr C. 620=A.I.R. 1931 All. 364.**

———**S. 74**—*Public document—Preliminary order under S. 144, Cr. P. Code—Police report and reference from Health Officer referred to therein—Copies of—Right of accused to.*

On the refusal of a Magistrate to furnish the petitioner with copies of a reference from Health Officer and a police report referred to by him in the preliminary order passed by him under S. 144 of the Cr. P. Code.

Held, that the police report was treated as a complaint and submitted in discharge of a duty enjoined by law on the police-officer concerned and that the petitioner was entitled to a copy thereof; that the reference by the Health Officer, however, formed part of correspondence between two officers which culminated in the submission of the report under S. 144, Cr. P. Code, that it could not properly be held to be a public document under S. 74 of the Evidence Act and that the petitioner was not entitled to a copy thereof. (*Shankaranarayana Rao, J.*) BASAPPA *v.* GOVERNMENT OF MYSORE. **39 Mys.H.C.R. 172=12 Mys. L.J. 197.**

———**S. 74**—Roznamcha *of police station house containing information of offence—If public document—Proof by production of copy—Permissibility.*

The *Roznamcha* of a police station house, where a complainant gives information of an offence, makes a report of it, is not a public document, and cannot be proved by the production of a copy. (*Grille, J. C.*)

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AJODHYA PRASAD *v.* MT. TARABAI. **163 I.C. 382=9 R.N. 3=18 N.L.J. 333.**

———**S. 74 (1) (3)**—*Executive officers—Schoolmasters, if.*

Where the government of a country or of a State undertakes the education of boys and girls, and employs officers for that purpose, such officers are "executive officers" within the meaning of S. 74 (1) (3) of the Evidence Act. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys. L J. 133=39 Mys. H.C.R. 406.**

———**S. 74 (2)**—*Applicability—Document registered under S. 33 (1), Registration Act—Proof by private copy—Permissibility.*

Where a power of-attorney was executed before and authenticated by the Sub-Registrar under S. 33 (1) of the Registration Act and he did not keep a copy of the original,

Held, that it was open to a party to prove the document by a private copy and that S. 74 (2) of the Evidence Act was not applicable to such a case. (*Sulaiman, A.C.J. and Bajpai, J.*) BISHEN SARUP *v.* ABDUL SAMAD. **136 I.C. 273=I.R. 1932 All. 161=1931 A. L J. 666=A.I R. 1931 All. 649.**

———**S. 76**—Faids Bachh—*Evidentiary value.*

Faids Bachh are records of the acts of public officers as under S. 151, Land Revenue Act, a *patwari* shall be deemed for the purposes of the Evidence Act to be a public officer having the custody of a public document which any person has a right to inspect. It being his obvious duty to record *Bachh* documents, they are relevant facts within the meaning of S. 35 of the Evidence Act, while the papers can be proved under S 76 of the Act by production of a certified copy. Where the papers have been put in the trial Court and received in evidence, they cannot be objected to in appeal. (*Addison, J.*) MALIK MAHOMED *v.* KHUSHI RAM. **I.R. 1931 Lah. 494=131 I.C. 638=32 P L.R. 508=A.I R. 1931 Lah. 605.**

———**S. 76**—*Judgment—Who can apply for copy.*

The right of a member of the public to demand a copy of a judgment is limited by S. 76 to "a person who has a right to inspect the document". The right of a person to inspect a judgment therefore must be looked from outside the Evidence Act.

Held, that every member of the public can inspect a judgment in a criminal case. (*Young, J.*) LADLI PRASAD ZUTSHI *v.* EMPEROR. **53 All. 724=I R. 1931 All 487=132 I C 327=32 Cr.L J. 864=12 L R. 59 (Cr.)=1931 A L J. 405=1931 Cr.C. 620=A.I.R. 1931 All 364.**

———**S. 77**—*Khasra Girdawaris—Proof of, by production of certified copies.*

The Khasra Girdawaris are public documents and are properly proved by the production of certified copies, as is allowed by S. 77, Evidence Act. (*Hilton, J.*) MAHOMED DIN *v.* FATE DIN. **151 I.C. 786 (1)=7 R.L. 208 (1)=35 P.L R. 405=A.I R. 1934 Lah. 698.**

———**S. 78**—*Newspaper extract—Admissibility,*

An extract from a newspaper about a Government Notification is inadmissible in evidence. A copy of the Government Gazette should be produced. (*Meares, C.J. and Sen, J.*) MOTI LAL NEHRU *v.* EMPEROR. **I R. 1931 All 171=129 I. C 443=1930 A.L.J. 1535=32 Cr.L.J. 311=1931 Cr.C. 12=A.I.R. 1931 All. 12.**

———**Ss. 80 and 28**—*Confession containing memorandum under S. 164 (3) of the Cr. P. Code Regulation—Presumption—Proof of.*

When a confessional statement contains a memorandum as required under S. 164, Cl. (3) of the Cr. P.

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Code, a presumption arises that all the formalities have been performed and it is admissible without further proof. When the confession is tendered by the Sessions Court, it proves itself under S. 80 of the Evidence Act without calling upon the Magistrate who recorded it. 89 I.C. 897; 53 C. 350, 119 I.C. 193; 119 I.C. 325 and 120 I.C. 257, Foll. (*Sreenivasa Iyer, O.C.J. and Mahadevayya, J.*) PADMAMMA *v.* GOVERNMENT OF MYSORE. **10 Mys.L.J. 385.**

——**S. 80**—*Confession—Presumption that it is voluntarily made—Onus of disproving voluntariness.*

Where confessions are recorded strictly in accordance with law, the usual presumption arises under the provisions of S. 80, Evidence Act, that the confessions are voluntarily made. The burden is on the accused of showing that their confessions are not voluntarily made. (*Dunkley, J.*) MAUNG THA KA DO *v.* EMPEROR. **160 I C. 292 = 37 Cr.L.J. 280 = 8 R.R. 363 = 1935 Cr.C. 1266 = A I.R. 1935 Rang. 491.**

——**S. 80**—*Depositions—Mode of proof.*

Depositions are matters required by law to be reduced to the form of a document within the meaning of S. 91, Evidence Act, and the only way they can be proved is under the provisions of S. 80 of the same Act, and this is only when they are taken in accordance with law. (*Panckridge and M.C. Ghose, JJ.*) EUSUF ALI *v.* EMPEROR. **I R. 1933 Cal. 312 = 142 I.C. 653 = 34 Cr.L J. 430 - 1933 Cr.C. 236 = A.I R. 1933 Cal. 190.**

——**S. 80**—*Dying declaration before Magistrate—Admissibility.*

A dying declaration before a Magistrate and recorded by him his "evidence" and can be admitted without proof under S. 80. (*Bennet, J.*) SURAJ BALI *v.* EMPEROR. **56 All. 750 = 36 Cr L.J. 65 = 152 I.C. 249 = 7 R. A. 320 1934 Cr C. 418 - A.I.R. 1934 All. 340.**

——**S. 80**—*Presumption as to confession—If subject to S. 24.*

Though under S. 80, Evidence Act, a confession duly recorded by a Magistrate with the prescribed certificate appended to it, may be presumed to be voluntary and as such admissible, such admissibility is subject to the restrictions imposed by S. 24. (*Guha and Nazim Ali, JJ.*) NAVEB SHANA *v.* EMPEROR. **61 Cal. 399 = 38 C.W N. 659 = 152 I.C. 44 - 7 R.C. 225 (2) = 35 Cr.L J. 1479 = 1934 Cr C. 929 = A.I.R. 1934 Cal. 636.**

——**S. 80**—*Scope—Confession—Absence of evidence to show that it was made by the accused—Admissibility—Presumption as to person making statement—If can be raised.*

A confession or statement purporting to have been made by an accused person cannot be admitted or put on the record as evidence for the prosecution when there is no evidence to prove that the accused is the man who made it. S. 80 of the Evidence Act allows certain presumptions to be set up in regard to such a statement or confession, but it does not permit of any presumption that the person making the statement is the person accused in the case under trial. But though such a statement is not properly proved for the prosecution, the accused is entitled to make use of the statement as showing that the story he tells in the committing Magistrate and the Sessions Court in mitigation of his act was told by him very soon after the occurrence. (*Reilly, C.J. and Sreenivasa Rao, J.*) CHAMA *v.* GOVERNMENT OF MYSORE. **13 Mys.L J. 248 = 40 Mys. H.C.R. 242**

——**S. 80**—Scope—Statements recorded by Magistrate under Ss. 164 and 512, Cr. P. Code—Presumption of genuineness—Proof Examination of recording magistrate—If essential. *See* CR. P. CODE, SS. 164 AND 512. **16 Pat, L.T. 730.**

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——**S. 81**—*Copy of Gazette—Notification under Unlawful Instigation Ordinances, 1930—Proof.*

Where a copy of Gazette Notification is produced for the first time before the High Court in revision from an order of conviction under S 3, the High Court can presume its genuineness under S. 81, Evidence Act, and can hold the production of it in the High Court sufficient even if it had not been tendered in evidence before. A.I. R. 1925 Lah. 299, Foll. (*Abdul Qadir, J.*) NANAK CHAND *v.* EMPEROR. **I.R. 1931 Lah. 977 = 134 I.C. 769 = 32 Cr L.J. 1227 = 1931 Cr.C. 529 = A.I.R. 1931 Lah. 273.**

——**S. 83**—*Cadastral survey map—Value.*

Entry in a cadastral survey map has presumptive value against landlord of a neighbouring estate. (*Fazl Ali and Rowland, JJ.*) RADHA KISHUN *v.* SHYAM DAS. **13 Pat. 51 = 149 I C. 1095 = 6 R.P. 685 = 15 Pat L.T. 28 = A.I.R. 1933 Pat. 671.**

——**S. 83**—*Entries in survey map and khewat.*

Entries in survey map and khewat carry a presumption of correctness. (*Rowland, J.*) MAHOMED HABIBUDDIN *v.* MAHOMED WAEZUL HAQ. **149 I.C 758 = 6 R.P. 649 = A.I.R. 1933 Pat. 555 (2).**

——**S. 83**—*Rennel's map—Reliability of.*

Rennel's map, though correct with reference to the course of the rivers, cannot be preferred in a matter regarding the direction of villages to the investigation of a Commissioner appointed for the purpose; for the method adopted for ascertaining village was by gun and sound—an extremely unscientific method, which makes reliance upon it difficult for the purpose of ascertaining the true direction of villages. (*Mitter and S. K. Ghose, JJ.*) NANI LAL ROY *v.* PROLHAD CHANDRA KAI BARTA. **143 I C. 179 - I R. 1933 Cal. 361 = 56 C.L.J. 369 = A I R. 1933 Cal. 222.**

——**S. 83**—*Survey map—Presumption of actual possesson.*

Where the lands are culturable and definite acts of possession such as tilling, sowing and reaping the crop, etc., can be exercised over them, the presumption of actual possession raised by the survey entry would be stronger than where the land is wholly unfit for cultivation. But it does not necessarily follow that the land which is covered with sand or water is wholly incapable of possession of such lands must in all cases be regarded as no man's land. Value of survey may as evidence pointed out. Boundaries in cadastral survey taken into account in determining a question of title. (*Fazl Ali and Rowland, JJ.*) RADHA KISHUN *v.* SHYAM DAS. **13 Pat 51 = 149 I.C. 1095 = 6 R P. 685 = 15 Pat. L. T. 28 = A.I.R. 1933 Pat. 671.**

——**S. 87**—*Revenue map—Presumption of correctness.*

The Revenue Survey is conducted by a public officer in the exercise of his statutory authority, and he must have given an opportunity to all the persons interested in the proceedings to make their claims and to produce their evidence in support thereof. The maps thus prepared after due inquiry are presumed to be correct, unless they are shown to be wrong. (*Sir Shadi Lal.*) TARAKDAS ACHARJI CHOUDHURY *v.* SECRETARY OF STATE. **39 C.W.N. 994 = 1935 O W N. 749 = 42 L. W. 167 = 37 Bom.L.R 638 = 37 P.L.R. 546 = 16 Pat. L T. 555 = 61 C.L.J. 491 = 1935 M.W.N. 1075 = 156 I.C. 548 = A.I.R. 1935, P.C. 125 = 69 M.L.J. 171 (P.C).**

——**S. 88**—*Telegraphic message—Original not in handwriting of sender—Presumption.*

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Where a telegram relied on by the prosecution is supported by the production of the telegraphic message delivered to a prosecution witness and found at his house, it can be considered along with the other evidence in the case. But S. 88 is a bar to making any presumption as to the person by whom the message was handed in for transmission when the original has not been proved to be in the handwriting of the alleged sender. (*Rowland and Agarwala, JJ.*) RAGHUNATH PANDE *v.* EMPEROR. **I.R. 1933 Pat. 176 = 142 I C 809 (2) = 34 Cr.L J. 421 = 13 Pat.L.T. 802 = 1933 Cr. C. 249 = A.I.R. 1933 Pat. 96.**

——**S. 89**—*Unstamped copy of instrument—Secondary evidence—Presumption regarding original being stamped.*

Where a party produces an unstamped copy of an instrument by way of secondary evidence, the Court may in the absence of contrary evidence presume that the original was stamped. English decisions on the point considered. (*Beasley, C. J. and Cornish, J.*) ROKIABI SAHIBA *v.* ABDUL WAHAB SAHIB. **1932 M.W.N. 432.**

——**Ss. 90 and 114**—*Ancient documents—Non-production of original—Power of Court to presume genuineness from proved facts.*

In the case of ancient documents, the original of which has been lost, it would be impossible to adduce any direct evidence of their execution and therefore for considerations of justice and equity, it is necessary to invoke every legitimate presumption which can be reasonably raised upon the facts and circumstances of the particular case. Although no presumption of law can be made under S. 90 as regards the genuineness of such documents, yet the Court can make a presumption of fact al out their genuineness under S. 114, if such presumption is justified by the proved facts and circumstances of the case. 62 I.A. 180 = 69 M.L.J. 225 (P C) Disc. (*Srivastava and Zia ul-Hasan, JJ.*) SHAMZUNNISSA BIBI *v.* ALI ASGHAR. **159 I.C. 780 = 8 R. O. 205 = 1935 O.W.N. 1376 = A.I.R 1936 Oudh 87.**

——**S. 90**—*Ancient document—Presumption of due execution and attestation as to—Registrar signing endorsement—If purports to attest*

S. 90 of the Evidence Act simply says that the Court may presume in the case of a document executed or attested that it was duly executed or attested by the persons by whom it purports to be executed or attested. But when a Registrar makes his endorsement on the back of a document, he is simply carrying out his statutory duties under the Registration Act and makes the signature *alio intuitu* and is not purporting to attest the document. The Registration Act does not require the Registrar to affix his signature to the endorsement in the presence of the executant. And though the endorsement shows that the Registrar received from the executant a personal acknowledgment of his signature, in the absence of evidence that the Registrar signed in the presence of the executant, no presumption can possibly be made under S. 90 of the Evidence Act that the signature of the Registrar was affixed in the presence of the executant or that the document was duly attested, even if the document is over 30 years old. (*Roy, J.*) NILIMA BASU *v.* JOHAPLAL SARKAR. **61 Cal. 525 = 151 I C. 1063 = 7 R.C. 216 = 38 C.W.N. 753 = A.I R 1934 Cal. 772.**

——**S. 90**—*Ancient documents—Recitals in—Probative value.*

Repeated assertions of title in ancient documents being mere recitals are no evidence, of what is there recited, though actual possession in conformity therewith would constitute a *prima facie* title. (*Mitter and S.K. Ghose, JJ.*) NANI LAL ROY *v.* PROLHAD CHANDRA KAIBARTA. **143 I C. 179 = I.R. 1933 Cal. 361 = 56 C.L. J. 369 = A.I.R. 1933 Cal. 222**

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——**S. 90**—*Applicability—Copies of documents.*

The presumption under S. 90 of the Evidence Act in regard to documents thirty years old arises, in the case of copies as well as of originals. (*Nanavutty and Zia-ul-Hasan, JJ.*) GIR HAR SAROOP *v.* BHAGWAN DIN. **152 I.C. 861 = 7 R.O. 250 = 11 O.W N. 1435 = A.I.R. 1935 Oudh 96.**

——**S. 90**—*Applicability — Document written by licensed stamp vendor 55 years ago.*

Where a document is written 55 years ago by a licensed stamp vendor and comes out from proper custody, it can claim the benefit of S. 90, Evidence Act. (*Bhide and Din Mohammad, JJ.*) KARTAR SINGH *v.* MT. MEHR NISHAN. **16 Lah. 313 = 155 I.C. 1064 = 7 R.L. 826 = A.I R. 1934 Lah. 885.**

——**S. 90**—*Applicability—Imami letters—Presumption in the case of.*

Under S. 90, what the Court may presume is that the signature and every other part of a document, which purports to be in the handwriting, of a particular person is that in person's handwriting. In the case of imaginary persons like Imams, there can be no question of signatures and handwriting and an attempt to apply S. 90 to such documents as Imami letters is merely futile. 15 N.L.R. 192, Ref. (*Staples, A. J. C.*) MANSOORALI *v.* TAIYABALI MAHOMED ALI. **157 I. C. 302 = 8 R N 42 = A.I R. 1935 Nag. 156.**

——**S. 90**—*Applicability—Production of copy—Presumption as to original—If can be drawn.*

S. 90 of the Evidence Act clearly requires the production before the Court of the particular document in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted as secondary evidence under S. 65 of the Act, the signatures authenticating the copy may, if the document is produced from proper custody and is over thirty years old, be presumed to be genuine. But the production of copy will not be sufficient to justify the presumption of a due execution of the original under S. 90. (*Lord Thankerton.*) BASANT SINGH *v.* BRIJ RAJ SARAN SINGH. **62 I A. 180 = 57 All. 494 = 37 P L R. 614 = 16 Pat L T. 669 = 37 Bom.L R. 805 = 1935 M.W.N. 768 = 156 I.C. 864 = 1935 A W.R. 879 = 8 R P C 4 = 1935 A L J. 847 = 39 C W N. 1057 = 42 L W. 231 = A.I.R. 1935 P.C. 132 = 69 M.L J. 225 (P.C.).**

——**S. 90**—*Discretion of Court—Raising of presumption as to document—Interference on appeal.*

The raising of a presumption under S. 90 of the Evidence Act as to the genuineness of a document is a matter which is eminently within the discretion of the trial Court; and in the absence of valid reasons an appellate Court will not interfere with the exercise of the discretion. (*Nanavutty and Zia ul Hasan, JJ.*) GIR HAR SAROOP *v.* BHAGWAN DIN. **152 I C. 861 = 7 R. O. 250 = 11 O.W N. 1435 = A.I R. 1935 Oudh 96.**

——**S. 90**—*Discretion of Court—Shankalapnamahs.*

It is not compulsory upon any Court before whom a document purporting or proved to be thirty years old is produced to presume that the said document is genuine. The section only gives a discretion to the Court that if under the circumstances established in a case it considers proper to raise such presumption, it can do so. The Courts should be very careful about raising any presumption under S. 90 in favour of old deeds of shankalap which are produced practically for the first time during the trial of suits in which under-proprietary rights are set up on the basis of those deeds. (*Wazir*

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Hasan, C. J. and Raza, J.) RAM NARESH SINGH *v.* CHIRKUT **8 Luck. 18 = I.R. 1932 Oudh 309 = 138 I.C. 513 = 9 O.W.N. 379 = A.I.R. 1932 Oudh 227.**

———**S. 90**—*Discretion of trial Court—Interference in appeal.*

When a document has once been admitted in evidence under S. 90 by the trial Court, the appellate Court is, as a rule, slow in interfering with the discretion of the trial Court. It is only when that discretion has been, on the face of it, perversely exercised, that an appellate Court would eliminate the document from consideration. *(Addison and Agha Haidar, JJ.)* KHAZAN SINGH *v.* MT. LACHHMI. **I R. 1933 Lah. 169 = 34 P.L.R. 356 = 142 I C. 13 = A.I.R 1933 Lah. 347.**

———**S. 90**—*Discretion of trial Court—Interference by appellate Court.*

The raising or not of a presumption under S. 90 as to the genuineness of a document is a matter for judicial discretion; and the Court must apply its mind in each case to the question whether it is a proper case to raise such presumption. When the lower Court does not exercise a proper judicial discretion, in raising the presumption of the genuineness of a document, ordinarily it is not proper for the appellate Court to overrule the discretion of the trial Court; but where it is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption. A.I.R. 1929 Pat. 51 and 13 I.C 120, Ref. *(Iqbal Ahmad and Kisch, JJ.)* MT. GOMTI *v.* MEGHRAJ SINGH. **6 I R. (All) 34 = 145 I.C. 147 = 1933 A.L J. 907 = A.I. R. 1933 All. 443**

———**S. 90**—*Discretion of trial Court—Interference by appellate Court.*

The raising of a presumption under S. 90 of the Evidence Act as to the genuineness of a document is a matter entirely within discretion of the trial Court, and an appellate Court ought not to interfere if the reasons given by the trial Court are not *prima facie* unsound; but where it is constrained to do so, the party producing the document should be given an opportunity of supporting the presumption as to the genuineness of the document. *(Nanavutty, J.)* RADHE KISHUN *v.* BASDEO LAL. **8 R O. 12 = 156 I.C. 983 = 1935 O.W.N. 845 = A.I.R. 1935 Oudh 482.**

———**S. 90**—*Document bearing name of alleged executant by pen of another—Presumption.*

There is no doubt that a document bearing the name of the alleged executant by the pen of another is a document purporting to have been executed by the executant to which, therefore, S. 90 of the Evidence Act would apply, and such a document can be presumed to have been duly executed by him, which includes the presumption as to the authority of the person signing for him. *(Sulaiman, C.J. and Mukerji, J.)* BHAIRON PRASAD *v.* ABALAK SINGH **3 A.W.R 537 = 6 R.A. 835 = 148 I.C. 1172 = A.I R. 1934 All. 529.**

———**S. 90**—*Due execution and attestation—Applicability to copy.*

Per *Bench.*—The presumption arising under S. 90 as to the due execution and attestation of a document 30 years old is equally applicable to the copies as to the originals, when the copy is proved to be a true copy of the original. *(Niyogi and Staples, A J.Cs.)* GOPI NATH MAHARAJ *v.* MOTI CHIWA. **30 N.L R. 155 = 6 R N. 188 = 148 I.C 561 = A.I R. 1934 Nag. 67.**

[Overr. 62 I.A 180 (189) (P.C.)].

———**S. 90**—*"Duly executed and signed"—Meaning—Execution of deed by pardanashin lady—Presumption.*

The words "duly executed and attested" in S. 90 merely mean execution and attestation according to the formalities prescribed by law. The question whether the document has been explained to the executant and whether she has fully understood the import and effect of it is hardly a question of execution. Where therefore a plaintiff founds his title on a sale-deed executed by a pardanashin lady, he must establish by positive evidence that the documeht was sufficiently explained to her and was understood by her, this being not a matter which can be pursued under S. 90 of the Evidence Act. *(Raza and Smith. JJ.)* RAJESHAR BALI *v.* HAR KISHEN BALI. **147 I C. 313 = 6 R O. 259 = 10 O.W. N. 147 = A.I.R. 1933 Oudh 170 (2).**

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———**S. 90**—*Presumption as to execution—Applicability to marksman.*

When a presumption as to a document having been executed by a person whose name occurs in the body of the document arises, it is for the other party to rebut the presumption by placing materials in their possession before the Court. The presumption of execution of the document extends to this also: that the mark put on the same indicated that the document was signed by the executant by a sort of symbolic writing, which is to be taken to be the signature in the absence of proof to the contrary. *(Guha and M. C. Ghose, JJ.)* SHAILENDRANATH MITRA *v.* GIRIJABHUSHAN MUKHERJI. **58 Cal. 686 = I.R. 1931 Cal. 744 = 133 I.C. 696 = A.I.R. 1931 Cal. 596.**

———**S. 90**—Presumption—Mortgage deed thirty years old—Attestation—Presence of mortgagor and attestors at one and the same time and signatures in the presence of each other—If can be presumed. *See* T. P. ACT, SS. 3 AND 59. **37 Bom L R. 913.**

———**S. 90**—*Presumption under—Nature and scope of.*

Deeds, if more than thirty years old, may be presumed to be genuine; but it does not mean that deeds, which do not bear any signature or mark, can be deemed to have been executed by the persons by whom they are alleged to have been executed: nor can it be presumed that they were in fact executed by persons possessed of the requisite authority. *(Wazir Hasan, C. J. and Raza, J.)* RAM NARESH SINGH *v* CHIRKUT. **8 Luck. 18 = I R. 1932 Oudh 309 = 138 I.C.513 = 9 O. W.N. 379 = A.I.R. 1932 Oudh 227.**

———**S. 90**—*Presumption under—Raising of—Discretion—Interference on appeal.*

Ordinarily an appellate Court would be slow to interfere with the discretion exercised by a lower Court in the matter of raising presumptions under S. 90 of the Evidence Act, but the discretion allowed by the section is a judicial discretion to be exercised on sound legal principles, and after due regard to all the evidence and circumstances. Where the trial Court has exercised its discretion arbitrarily without due consideration of all the relevant facts and circumstances of the case, the appellate Court will be constrained to hold that the discretion has not been properly exercised and will interfere. *(Srivastava and Nanavutty, JJ)* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* TIRBENI PRASAD. **11 Luck. 35 = 154 I.C. 965 = 7 R O. 523 = 1935 R.D. 171 = 1935 O.W.N. 387 = A.I R. 1935 Oudh 289.**

———**S. 90**—*Presumption as to seal in document—"Signature"—If includes seal.*

S. 90 of the Evidence Act makes no provision for any presumption in regard to seals on a document; nor can a seal be regarded as a signature within the meaning of S. 3 (52) of the General Clauses Act. *(Srivastava and Nanavutty, JJ.)* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* TIRBENI PRASAD. **11 Luck. 35 = 154 I.C. 965 = 7 R.O. 523 = 1935 R.D. 171 = 1935 O.W.N. 387 = A.I.R. 1935 Oudh 289.**

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———**S. 90**—*Scope—Question of possession—Raising of presumption.*

S. 90 does not contain any restriction, that a presumption should not be drawn thereunder if the person claiming title under the document in question is out of possession or has not actually signed or thumb marked the document himself. As regards the question of possession it is for the Court to decide in each case whether the custody from which the document is produced is or is not proper and if it considers the custody to be proper, it can raise the presumption. Where the lower Court draws the presumption after considering the circumstances of the case, the High Court will not interfere in second appeal. (*Bhide, J.*) IMAM DIN *v.* NATHA SINGH. **I.R. 1931 Lah. 920 = 134 I.C. 296 = 32 P.L. R. 626 = A I.R. 1932 Lah. 43.**

———**S. 90**—*Will—No presumption regarding disposing mind.*

Where a person executes a will and deposits it with the Registrar and the endorsement by the Registrar shows that the will was so deposited by the executant on being identified by two persons, a presumption under S. 90 as to execution arises. The presumption however does not cover the question of disposing mind. (*Dalip Singh, J.*) SHANKAR DAS *v.* MT. DHAN DEVI. **6 I.R. (Lah.) 78 = 145 I.C. 241 = A.I.R. 1933 Lah. 53.**

———**S. 91.**

Admissibility of external evidence.
Agreement.
Applicability.
Assignment.
Compromise.
Construction.
Decree.
Effect.
Hand-note.
Lease.
Marriage contract.
Mortgage.
Negotiations
Partition.
Promissory note.
Receipt.
Sale.
Scope.
Secondary evidence.

Admissibility of external evidence.

———**S. 91**—*Admissibility of external evidence—Implied promise to pay—Proof.*

Where there is no bar from the existence of a promissory note which is not sufficiently stamped, there is no reason why the terms of the promise to pay should not be held to be proved by evidence. Those terms may either be proved in such a case by oral evidence or by circumstantial evidence. Where the defendant desired that money should be lent to his friend and the defendant approached the plaintiff who lent money to the defendant on his acknowledging that he received it.

Held, such circumstances gave rise to an implied promise to repay the loan. (*Bennet, J.*) GANESH PRASAD SINGH *v.* BECHU SINGH. **6 R.A. 537 = 147 I.C. 443 = 3 A.W.R. 555 = A.I.R. 1934 All. 271.**

Agreement.

See also SECONDARY EVIDENCE, *infra.*

———**S. 91**—*Agreement—Oral evidence — Admissibility.*

Where the terms of an agreement have been reduced to the form of a document no evidence about the terms of the agreement is permissible except the document itself or secondary evidence of its contents. (*Keane, S.M. and Oppenheim, J.M.*) SRI DURGA DEBIJI *v.* BADRE PRASAD. **15 R.D 399.**

———**S. 91**—*Agreement — Relinquishment of exproprietary right—Oral evidence—Admissibility.*

Where an agreement to relinquish exproprietary rights, which should be in writing and registered was not so executed.

Held, that oral evidence was not admissible regarding the agreement. (*Oakden, S.M. and Oppenheim, J.M.*) RAM NATH BUX SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, KATESAR ESTATE. **15 R.D. 91 = 12 L.R. 1 (Rev.).**

Applicability.

———**Ss. 91 and 92**—*Applicability.*

Ss. 91 and 92 only apply when the document on the face of it contains or appears to contain all the terms of the contract. (*Beaumont, C. J. and Rangnekar, J.*) CHIMANRAM *v.* DIVANCHAND. **56 Bom. 180 = I.R. 1932 Bom. 270 = 137 I.C. 478 = 34 Bom.L.R. 26 = A.I.R. 1932 Bom. 151.**

Assignment.

———**S. 91**—*Assignment—Deed unregistered — Evidence to prove contents—Admissibility.*

No evidence is admissible under S. 91, Evidence Act, to prove the contents of an unregistered deed of assignment, in respect of the share of the assignor in certain estates. (*Murphy and Sen, JJ.*) NEMTULLA *v.* SAFIABU. **156 I.C. 779 = 8 R.B. 30 = 37 Bom.L.R. 82 = A.I.R. 1935 Bom. 208.**

Compromise.

———**S. 91**—*Compromise—Landlord and tenant—Ejectment suit—Not stamped or registered—Decree merely dismissing suit—Admissibility of compromise.*

Where in a suit for ejectment the defendants claimed occupancy rights and as a result of the compromise between the parties, the suit was merely dismissed.

Held, that the compromise, not being stamped or registered, was not admissible except in so far as it was embodied in the decree, that the dismissal of the suit may be taken to mean that the tenant was to remain in possession without disturbance but that the compromise was not admissible in evidence to prove the recognition of occupancy rights. (*Drake Brockman, J.M.*) SUKHDEO TEWARI *v.* RAM PRIT. **14 L.R. 513 (Rev.) = 17 R.D. 660.**

Construction.

———**S. 91**—*Construction—"In proof of such matter"—If includes disproof of it.*

Where the parties had arranged that an endorsement of payment should be made on a promissory note in order to attract the provisions of S. 20 of the Limitation Act, it is a matter that is required by that section to be reduced to the form of a document and no evidence is admissible under S. 91 of the Evidence Act in proof of such matter except the document itself, namely, the endorsement. The term "in proof of such matter" must carry with it the term "in disproof of it," because if evidence were to be admitted on one side, it would have to be admitted on the other. Therefore, a Court which allows evidence to prove that the payment had not been made, violates the provisions of S. 91 of the Evidence Act. (*Kendall, J.*) RAMBOHOR MISIR *v.* CHATURGHUN RAI. **154 I.C. 1070 = 7 R.A. 866 = 1935 A.L.J. 304 = 4 A.W.R. 1342 = A.I.R. 1935 All. 58.**

Decree.

———**S. 91**—*Decree — Ambiguity — Oral evidence—Admissibility.*

In order to explain a decree, one can look at the judgment and at the pleadings. Where however the

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point of doubt is not determinable from them the Court may permit oral evidence to be adduced, in order to correct the misleading descriptions in the decree. (*Dalip Singh, J.*) ALLAH BAKHSH *v.* PUNJAB AND SIND BANK, LTD. **6 R.L. 355=147 I.C. 23=35 P. L.R. 20=A.I.R. 1934 Lah. 181.**

Effect.

——**S. 91**—*Effect.*

S. 91 is an absolute bar to the production of any oral evidence to prove the terms of a contract which has been reduced to writing and if the written contract is inadmissible in evidence, a suit to enforce it must fail. Rule applied in the case of insufficiently stamped promissory note. (*Shadi Lal, C. J. and Rangi Lal, J.*) SOHAN LAL NIHAL CHAND *v.* RAGHU NATH SINGH. **153 I.C. 1076=7 R. L. 507=37 P.L.R. 494=A.I.R. 1934 Lah. 606.**

Hand note.

——**S. 91**—*Hand-note insufficiently stamped—Oral evidence—Rate of interest—Proof—Permissibility.*

If a hand-note, evidencing the transaction of the loan, be inadmissible in evidence for want of proper stamp, the transaction can be proved by other evidence independent of the hand note. But evidence as regards the rate of interest cannot be given independently of the hand-note and under such circumstances no interest can be allowed. (*Kulwant Sahay, J.*) BALBHADRA SINGH *v.* BHAGWAT PANDE. **147 I.C. 706=6 R.P. 369=A.I.R. 1933 Pat. 584 (1).**

——**S. 91**—*Hand-note not admissible—Evidence of loan—Admissibility.*

It is a well established principle of law that every loan carries with it a contract to repay and if a hand-note which forms the evidence of the transaction, cannot be accepted in evidence for some reason or other, there is nothing in law to prevent the plaintiff from giving other evidence as regards the loan and if he can satisfy the Court as regards the truth of his version there is no reason why a decree should not be made in favour of the plaintiff. (*Jwala Prasad and Kulwant Sahay, JJ.*) ABDUL MAHOMED KHAN *v.* MAHANANDA UPADHYAYA. **11 Pat. 135=13 Pat.L.T. 52=I.R. 1931 Pat. 397=133 I.C. 685=A.I.R. 1931 Pat. 293.**

[R. 12 P. 862 (865)].

——**S. 91**—*Hand-note—Suit on—Independent evidence of loan—Hand-note whether can be referred to.*

Where a hand note is not in favour of any particular individual nor even in favour of bearer it is not admissible in evidence as a hand-note but the suit if so framed can be tried as one for loan independent of the note and the writing can be used as evidence of the loan irrespective of its being or not being a promissory note as defined in the Negotiable Instruments Act. (*Mahomed Noor, J.*) TASADUQ HUSSAIN *v.* BASWAN RAI. **I.R. 1933 Pat. 78=141 I.C. 767=A.I.R. 1933 Pat. 159.**

——**S. 91**—*Hand-note—Suit on original transaction—Admission of oral evidence.*

When a cause of action for money is once complete and the debtor then gives a hand-note to the creditor for payment of the money at a future time, the creditor, if the note is inadmissible, may always sue for the original consideration and parol evidence can be allowed of the transaction. (*Wort, Ag.C.J., Kulwant Sahay and Fazl Ali, JJ.*) DAMOO KHAN *v.* AGHA ARSHAD KHAN. **12 Pat. 862=6 I.R. (Pat.) 267 (2)=146 I.C. 471=14 Pat.L.T. 651=A.I.R. 1933 Pat. 575 (F.B.).**

Lease.

——**S. 91**—*Lease—Landlord and tenant—Permanent lease—Unregistered rent note—Plea of permanent tenancy by tenant—Entry in record of rights—Admissibility.*

If the rent note is one that requires registration and has not been registered, it is inadmissible not only to prove the terms of the contract but also to prove the fact that it contained all the terms of the contract. There is no bar, therefore, under S. 91 to the reception of other evidence consisting of an entry in the record of rights to prove the nature of the tenancy. (*Beaumont, C.J. and Barlee, J.*) DATTO SHIVRAM GOSAVI *v.* BABASAHEB MALHAR. **58 Bom. 419=150 I.C. 555=7 R.B. 1=36 Bom.L.R. 359=A.I.R. 1934 Bom. 194.**

——**S. 91**—*Lease—Oral lease—Auction—Highest bid accepted—Alleged subsequent agreement in writing varying terms of tenancy—Admissibility of.*

The plaintiff's lands were leased by public auction in March, 1921 for a period of seven years. The defendant's bid was the highest and he deposited a portion of the amount before the selling officer, the balance to be paid in yearly instalments. The defendant continued in possession for about four years and the plaintiff brought the present suit for delivery of possession alleging that the lease in favour of the defendant was a yearly lease and for that purpose relied on the auction list, a muchalika executed by the defendant a day after the auction and an agreement dated 15th June, 1921, for showing that the original lease was superseded by a later lease in writing.

Held, that as it was an agricultural lease, it could be made orally, that the oral lease became complete on the acceptance by the selling officer of the defendant's bid, that the document which came into existence subsequently did not supersede the oral lease, that the auction list and muchalika having been suppressed by the plaintiff, he could not be permitted to establish their contents by secondary evidence and that the plaintiff was not entitled to the relief prayed for. (*Curgenven and Sundaram Chetty, JJ.*) SIVASUBRAMANIA THEVAR *v.* ZAMINDAR OF SINGAMPATTI. **I.R. 1933 Mad. 364=144 I.C. 27=1933 M.W.N. 672=37 L.W. 672=A.I.R. 1933 Mad. 451=64 M.L.J. 676.**

——**S. 91**—*Lease—Want of registration—Oral evidence to prove relationship of parties—Admissibility.*

Where a document purported to be an agreement by which the defendants agree to vacate the houses in which they were then living and to construct their buildings on another part of the land and as regards the site they agreed to vacate the half of it and on account of this relinquishment they agreed to pay rent at Rs. 2 instead of at Rs. 4 and they further stipulated that in the event of their not making the above changes by a certain date the plaintiff should have the right to eject them.

Held, that the document was compulsorily registrable.

Held, further, that the relationship between the parties could not be proved by oral evidence apart from the deed. (*Hilton, J.*) MAHOMED DIN *v.* SARDARA. **6 R.L. 576=148 I.C. 558 (1)=A.I.R. 1934 Lah. 743 (1).**

Marriage contract.

——**S. 91**—*Marriage contract—Document not signed by parties to contract—Memo. written by third person containing terms of marriage—Marriage and terms can be proved by oral or documentary evidence.*

Where a contract of marriage is not signed by either of the contracting parties but is in the nature of a memo. prepared by a nikah-khwan belonging to the Shariah Department of Musal, it is open to one of the parties to prove by other oral or documentary evidence that he or she had been married and also the terms.

EVIDENCE ACT (1872), S. 91—Marriage Contract.

EVIDENCE ACT (1872), S. 91—Mortgage

(*Abdul Rashid, J.*) MT. AIMNA *v.* LAKHMI CHAND. **154 I.C. 979 = 7 R.L. 624 = A.I.R. 1934 Lah. 705.**

Mortgage.

———**S. 91**—Mortgage—Equitable mortgage—Memorandum evidencing deposit of title-deeds not registered—Oral evidence as to deposit—Admissibility. *See* REGISTRATION ACT, S. 17 (1) (*d*). **61 C.L.J. 473.**

———**S 91**—*Mortgage—Oral evidence—Admissibility—Deed clear and unambiguous.*

Where the mortgage deed is clear and unambiguous and actually applies to existing facts, parol evidence is inadmissible. (*Young and Thom, JJ.*) SHUJAATMAND KHAN *v.* GOVIND BEHARI. **6 R.A. 529 = 147 I.C. 633 = A.I.R. 1934 All. 100 (2).**

———**S. 91**—*Mortgage—Oral proof of—Admissibility.*

Where a mortgage deed is alleged to have been executed and registered, oral evidence to prove the transaction is inadmissible. (*Oppenheim, S.M. and Walton, J. M.*) TILAKDHARI SINGH *v.* SUKHRAJ KOERI. **14 L.R. 148 (Rev.) = 17 R.D. 241.**

———**S. 91**—*Mortgage—Proof of—Mortgage deed not registered—Other evidence of title—Admissibility of.*

Where a mortgage had been made of an occupancy holding by the plaintiff's father, and the defendant's predecessor was put in possession of the mortgaged property, and the plaintiff offered to pay the amount due on the mortgage and sought delivery of possession. The mortgage-deed however was not registered.

Held, that although the unregistered deed was not receivable in evidence, and although other evidence also was not admissible to prove the nature of the transaction, nevertheless the plaintiff was not debarred from proving his title to the holding, independently of that document. A.I.R. 1928 All. 641; 47 I.C. 852 and A.I.R. 1927 All. 311, Ref. (*Sulaiman, Ag.C.J. and Bajpai, J.*) HALKA *v.* NANNHON. **I.R. 1932 All. 628 = 140 I.C. 42 = 1932 A.L.J. 101 = A.I.R. 1932 All. 259.**

Negotiations.

———**S. 91**—*Negotiations—Verbal negotiations leading to contract—Admissibility.*

Verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not admissible in evidence as provided by S. 91, because where there is an express promise, an implied promise cannot be inferred. 28 C. W. N. 70, Foll. (*Mears, C.J., Mukerji and Young, JJ.*) NAZIR KHAN *v.* RAM MOHAN. **53 All. 114 = I.R. 1931 All. 627 = 133 I.C. 307 = 1931 A.L.J. 64 = A.I.R. 1931 All. 183 (F.B.).**

Partition.

———**S. 91**—*Partition—Bahi entry regarding partition unregistered—Admissibility.*

In a suit brought in 1927 for declaration that a certain property had fallen to the plaintiff by virtue of a partition, the plaintiff relied on a bahi entry of 1912 in support of the partition which was held to be inadmissible in evidence for want of registration.

Held, that oral evidence was admissible to prove the factum of partition, that the bahi entry can be looked into for ascertaining the nature of plaintiff's possession, that the date of the entry was not a term in the partition within the meaning of S. 91 and that it was admissible to prove plaintiff's adverse possession from that date. A.I.R. 1919 P.C. 44 and A.I.R. 1923 Lah. 495, Rel. on; 98 I.C. 940, Ref. (*Bhide, J.*) PUNJAB NATIONAL BANK, LTD. *v.* MATHRA DAS. **I.R. 1933 Lah. 374 = 143 I.C. 634 = 34 P.L.R. 1033 = A.I.R. 1933 Lah. 194.**

———**S. 91**—*Partition — Deed unregistered — Oral evidence—Admissibility.*

EVIDENCE ACT (1872), S. 91—Promissory Note.

When the deed of partition is inadmissible for want of registration, S. 91 of the Evidence Act does not preclude proof by oral evidence of the fact of division. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) SIDDAMMA *v.* CHENNABASAPPA. **12 Mys L.J. 236.**

———**S 91**—*Partition—Oral evidence of—Admissibility of.*

A partition is not required by law to be effected by a document and so S. 91 of the Evidence Act would not bar oral evidence in regard to partition. (*Staples, A.J.C.*) MUNNALAL *v.* NARAYAN. **144 I.C. 312 = I.R. 1933 Nag. 228 = A.I.R. 1933 Nag. 270.**

———**S. 91**—*Partition—Unregistered partition deed—Fact of partition—Proof by oral evidence.*

Although an unregistered partition-deed may not be admissible to prove the terms contained therein, still the fact of partition can be proved by oral evidence. A. I. R. 1928 Rang. 196 and 41 Bom. 466, Rel. on. (*Ba U, J.*) MAUNG KHIN *v.* MAUNG BA. **6 I.R. (Rang.) 63 = 145 I.C. 833 = A.I.R. 1933 Rang. 249.**

Promissory note.

———**S. 91**—*Promissory note—Applicability of the section.*

S. 91 applies only when the instrument in writing which contains the matter necessary to cause it to be a promissory note, also contains the terms of the contract. (Case-law Ref.) (*Macnair, J.C. and Subhedar, A.J.C.*) LALBAHADUR SINGH RAJPAL SINGH *v.* SHEIKH GULAMYASIN. **29 N.L.R. 131 = 6 I.R. (Nag.) 21 = 144 I.C. 745 = A.I.R. 1933 Nag. 57 (2).**

———**S. 91**—*Promissory note—Claim on debt—Proof of terms—Permissibility.*

A suit on a promissory note cannot be converted into one on the debt, where the loan and the debt are contemporaneous and there is no question of any definite anterior liability apart from the note If the plaintiff is allowed to fall back on the theory of an implied debt, he will have to prove the very terms contained in the instrument, and to permit him to do so would be in the teeth of S. 91, Evidence Act. (*Varadachariar and Burn, JJ.*) CHOCKALINGAM CHETTIAR *v.* PALANIAPPA CHETTIAR. **58 Mad. 261 = 155 I.C. 184 = 7 R.M. 553 = 42 L.W. 979 = 1934 M.W.N. 1261 = A.I.R. 1935 Mad. 23 = 67 M.L.J. 595.**

———**S. 91**—*Promissory note—Contemporaneous consideration—Note being inadmissible—Suit on original consideration—Maintainability.*

In the case of a promissory note given for contemporaneous consideration, if the note becomes inadmissible, a suit cannot be maintained on the original consideration. (*Krishnan Pandalai, J.*) CHANDRASEKARAM PILLAI *v.* SRINIVASA PILLAI. **I.R. 1932 Mad. 831 = 140 I.C. 193 = 1932 M.W.N. 1260 = 37 L.W. 723 = A.I.R. 1933 Mad. 71.**

———**S. 91**—*Promissory note—Debt and promissory note being contemporaneous—Promissory note being insufficiently stamped—Conversion of suit into one on original consideration—Permissibility.*

Where the debt and the execution of the promissory note are contemporaneous, the debt can be proved only by the note and where it is insufficiently stamped the plaintiff cannot apply by amendment to convert his suit into one on the original consideration. (*Reilly and Anantakrishna Aiyar, JJ.*) GURA SAHU *v.* KRISHNAMMA. **I.R. 1932 Mad. 658 = 139 I.C. 361 = 36 L.W. 432 = A.I.R. 1932 Mad. 687.**

———**S. 91**—*Promissory note inadmissible—Independent evidence of loan—Admissibility.*

In spite of the provisions of S. 91 of the Evidence Act it is open to the party who has lent money on terms

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recorded in a promissory note which turns out to be inadmissible in evidence for want of proper stamp duty, to recover his money by proving orally the advance of the loan. Oral evidence to prove, terms of the contract however, is inadmissible. A.I.R. 1924 Cal. 452 and 46 A. 95 (P.C.), Dist.; 53 A. 844 (F.B.), Diss. (*Wazir Hasan, C.J., Srivastava and Raza, JJ.*) KUNWAR BAHADUR *v.* SURAJ BAKHSH. **7 Luck. 666=I.R. 1932 Oudh 348=139 I.C. 298=9 O.W.N. 585=A.I.R. 1932 Oudh 235 (F.B).**

———**S. 91**—*Promissory note — Inadmissibility — Receipt as basis of suit.*

Where the transaction of loan is not independent of the promissory note which is inadmissible in evidence, a suit cannot be filed to recover the amount on the basis of a receipt acknowledging payment of a certain sum because the receipt does not contain any promise to pay. (*Niamatullah, J.*) CHAUDHURI KARAN SINGH *v.* LAL SINGH, **I R. 1932 All. 610=140 I.C. 117 (1)=A.I.R. 1933 All. 109.**

———**S. 91**—*Promissory note—Insufficiently stamped —Admissibility of note—Suit on loan.*

Ill. (*b*) to S. 91, Evidence Act, could not have been intended to abrogate or annul the well-settled rule of English law, that a negotiable instrument operates only as a conditional discharge. The effect of the illustration is only to exclude all proof other than the instrument itself. But that does not mean that the original debt is superseded by the instrument which, in its very essence, is only a conditional payment. In the case of an invalid note, there is not even that conditional payment. Even where the loan is not antecedent to and independent of the promissory note, but contemporaneous with it, the lender can, when the note turns out to be invalid as being insufficiently stamped, fall back upon the original contract, express or implied, arising from the loan. (*Venkatasubba Rao, J.*) CHINNAYYA NAIDU *v.* SRINIVASA NAIDU. **156 I.C. 250=7 R.M. 665—A.I.R. 1935 Mad. 206=67 M L.J. 912.**

———**S. 91**—*Promissory note—Insufficiently stamped —Evidence of loan—Admissibility.*

When money is lent on a promissory note and the promissory note is inadmissible, it is not open to the plaintiff to recover his money by proving orally the terms of the contract. It is only when the debt is separable from the promissory note that the debt could be proved, although the promissory note was inadmissible in evidence. 53 All. 114 (F.B.), Foll. (*Banerji and King, JJ.*) DHONKAL SINGH *v.* HARBANSLAL. **I.R. 1933 All. 391=144 I.C. 130=A.I.R. 1933 All. 280.**

———**S. 91**—*Promissory note—Insufficiently stamped —Loan and note contemporaneous—Evidence of loan—Admissibility.*

Even where the alleged loan and the promissory note are contemporaneous, and the promissory note is inadmissible in evidence for want of proper stamp under S. 35, Stamp Act, the plaintiff can prove the loan transaction only apart from the defective instrument, there being no intention to deliver the money gratuitously or in satisfaction of any obligation. 29 Mad. 111; 38 M. 660; 53 A. 114, not foll. (Case law discussed.) (*Macnair, J.C. and Subhedar, A.J.C.*) LAL BAHADUR SINGH RAJPAL SINGH *v.* SHEIKH GULAM YASIN. **29 N.L.R. 131=6 I.R. (Nag.) 21=144 I.C. 745=A.I.R. 1933 Nag. 57 (2).**

———**S. 91**—*Promissory note—Insufficiently stamped —Proof of debt.*

If the debt is separable from the promissory note, the transaction being truly independent of it and not part of the transaction of the promissory note, the debt can be proved, although the promissory note not admissible in evidence; but if it is part and parcel of the same transaction the debt cannot be separately proved. (*Sulaiman, C.J. and Harries, J.*) GHULAM MURTAZA *v.* FASIH-UN-NISA BIBI. **57 All. 434=152 I.C. 370=7 R.A. 330=1934 A.L.J. 1185=4 A.W.R. 754=A.I.R. 1935 All. 129.**

———**S. 91**—*Promissory note insufficiently stamped— Proof of loan by oral evidence.*

There is nothing in S. 91 which prevents the plaintiff from proving by evidence other than the promissory note, which is not admissible as being unstamped, that he did advance the loan. (*Wazir Hasan, C.J. and Allsop, J.*) BHIRGU DATT *v.* GAYA PRASAD. **9 Luck. 267=6 I.R. (Oudh) 176=146 I.C. 751=10 O. W.N. 1271=A.I.R. 1934 Oudh 57.**

———**S. 91**—*Promissory note—Proof of oral contract of loan.*

Where money is lent on terms contained in a promissory note given at the time of the loan, the promissory note and the lending being part and parcel of the same transaction, the lender suing to recover money so lent must prove the terms of the promissory note. If for any reason, such as the absence of a proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note in view of the provisions of S. 91. He cannot recover the money by proving orally the terms of the contract. Distinction between cases where the promissory note represents the transaction and cases where it is passed as collateral security pointed out. (Case-law discussed. (*Mears, C.J., Mukerji and Young, JJ.*) NAZIR KHAN *v.* RAM MOHAN. **53 All. 114=I.R. 1931 All. 627=133 I.C. 307=1931 A.L.J. 64=A.I.R. 1931 All. 183 (F.B.).**

———**S. 91**—*Promissory note—Renewal—Later note insufficiently stamped—Suit on old note—Bar.*

The plaint as originally brought was based on a promissory note of 1925. Subsequently however the plaint was amended and the suit was based on an earlier promissory note of 1922. It appeared that the later note was not properly stamped and was therefore inadmissible in evidence. It was further shown that the later note was merely in renewal of liability under the original note and there was an endorsement of discharge to that effect.

Held, that S. 91 of the Evidence Act was not a bar to the suit of the plaintiff based on the earlier transaction, which was distinct and separate from the execution of the later note. (*Mukerji and Bennet, JJ.*) SALIG RAM *v.* RADHAY SHIAM. **I.R. 1931 All. 830=134 I.C. 254=1931 A.L.J. 522=A.I.R. 1931 All. 560.**

———**S. 91**—*Promissory note—Suit for money due under—Plaintiff if can rely on ancillary receipt.*

Where a party institutes a suit for the recovery of money due upon the basis of a promissory note he must produce that promissory note or give a satisfactory explanation as to why he is unable to produce it. If there is a satisfactory explanation of the absence of the promissory note, then in justice and in equity he is entitled to rely upon a relative and ancillary document such as a receipt which formed part of the same document upon which both the promissory note and the receipt were inscribed. But where he is concealing the promissory note from the Court, and withholding from the Court information which the Court is entitled to have in a consideration of the dispute between the parties, he is not entitled to rely upon any such relative and ancillary document as the receipt which relates the promissory note. The party having recourse to law to enforce a

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liability against another party must produce the best evidence available. If a party is unable to produce the best evidence he must give some satisfactory explanation of his inability. Courts should refuse to exercise their powers in favour of a litigant who is deliberately concealing important material and relevant information. (*Thom and Kisch, JJ.*) MIRZA MURAD BEG *v* SHIPLEY. **151 I.C. 123=7 R.A. 91=A.I.R. 1934 All. 837.**

———**S. 91**—*Promissory note—Suit on—Instrument not duly stamped—Proof of loan.*

If the whole of the terms of the agreement under which the loan is made are embodied in a promissory note, no evidence can be adduced in proof of the terms of the contract except the document itself; and if the promissory note is not duly stamped and is inadmissible, the suit of the creditor must fail, because he is not in a position to prove the debt. But a promissory note is given *prima facie* only as conditional payment; and when so given and taken and that term is not set out therein, the instrument does not contain all the terms of the agreement of the loan; and therefore S. 91 of the Evidence Act does not apply. Even if the handing over of the money and the giving of the promissory note are simultaneous or part of the same transaction, it does not necessarily follow that the promissory note is the sole repository of the terms of the agreement or that the lender cannot recover upon proof of the original consideration. It is not the time when, but the terms upon which, the loan is made that matters. The Court in each case must ascertain the terms of the agreement upon which the loan was made. (*Page, C.J., Baguley, Sen, Leach and Dunkley, JJ.*) MAUNG CHIT *v.* ROSHAN N M. A. KAREEM OOMER & CO. **12 Rang. 500=152 I.C. 1038=7 R.R. 184=A.I.R. 1934 Rang. 389 (F.B.).**

Receipt.

———**Ss. 91 and 92**—*Receipt—Evidence that receipt was fictitious—Admissibility.*

S. 91 or 92 of the Evidence Act does not bar evidence to show that a certain receipt was a fictitious document in the sense that no money was paid. (*Bennet, J.*) HUKUM CHAND *v.* SHIMBU NATH. **158 I.C. 1121=8 R.A. 376=1935 A.W.R. 197=1935 R.D. 89=A.I.R. 1935 All. 346 (1).**

Sale.

———**S. 91**—*Sale—Prior oral agreement— Proof apart from deed of sale—Permissibility.*

Other evidence of the transaction apart from the sale deed is not admissible Thus a prior oral agreement should be taken as merged in the sale transaction and therefore cannot be proved. (*Shadi Lal, C. J. and Hilton, J.*) DIWAN SINGH *v.* GURBACHAN SINGH. **I.R. 1932 Lah. 289=137 I.C. 41=33 P.L.R. 227=A.I.R. 1932 Lah. 276.**

———**Ss. 91 and 92**—*Sale—Sale-deed—Amount of consideration, and acknowledgment of its receipt—If terms of contract—Right to produce oral evidence that consideration is less.*

Per *Full Bench.*—The amount of sale consideration is a term of a deed of sale. When the terms of a deed of sale have been proved according to S. 91 of the Evidence Act, no evidence of any oral agreement or statement shall be admitted as between the parties to the deed of sale or their representatives for the purpose of contradicting, varying, adding to, or subtracting from the amount of sale consideration. But the acknowledgment of receipt of the whole or part of the sale consideration in a deed of sale is not a term of the deed of sale but a mere statement of fact; and oral evidence

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may be given to show that the amount acknowledged or any part of it was not received.

Per *Bennet and Harries, JJ.* (*Sulaiman, C. J., contra*).—Where one party tenders oral evidence to prove that the amount acknowledged or any part of it was not received, this does not give the other party a right to produce evidence of any oral agreement or statement that the amount of sale consideration was less than what is entered in the deed of sale. 36 All. 537, overruled. (*Sulaiman, C.J., Bennet and Harries, JJ.*) MOHAMMAD TAQI KHAN *v.* JANG SINGH. **58 All. 1=156 I.C. 362=7 R.A. 1067=1935 A.L.J. 560=1935 A.W.R. 658=A.I.R. 1935 All. 529 (F.B.).**

———**S. 91**—*Sale—Unregistered sale-deed—Evidentiary value.*

Not only can an unregistered sale-deed not be received as evidence of any transaction affecting the property but also it cannot be treated as if it were merely a document creating a right to obtain another document and therefore exempt from registration under S. 17 (2) (*v*). It cannot therefore be made the basis of a suit for specific performance as if it were merely a document creating a right to obtain another document. (*Shadi Lal, C. J. and Hilton, J.*) DIWAN SINGH *v.* GURBACHAN SINGH. **I.R. 1932 Lah. 289=137 I.C. 41=33 P.L.R. 227=A.I.R. 1932 Lah. 276.**

Scope.

———**S. 91**—*Scope—Document evidencing contract—Existence of—Onus of proof.*

If there was a document evidencing the contract between the parties then that and that alone is the respository of the terms of the contract between the parties and all else is reduced to silence. But the onus lies on the party who asserts the existence of such document to satisfy the Court of its existence. A.I.R. 1923 P.C. 50 Foll. (*Braund, J.*) U SIN *v.* U TUN SI. **160 I.C. 314=8 R.R. 372=A.I.R. 1935 Rang. 473.**

Secondary evidence.

———**S. 91**—*Secondary evidence—Agreement—Document inadmissible for want of registration—Admissibility.*

Secondary evidence of an agreement contained in a document which is inadmissible in evidence for want of registration is not admissible, as that would be in violation of S. 91 of the Evidence Act. (*Lord Atkin.*) PRATAPSINGH MOHOLALBHAI *v.* KESHAVLAL HARILAL SETALWAD. **62 I.A. 23=59 Bom. 180=39 C.W.N. 440=61 C.L.J. 42=37 Bom.L.R. 315=1935 A.L.J. 242=153 I.C. 700=1935 A.W.R. 180=41 L.W. 210=7 R.P.C. 123=1935 M.W.N. 97=1935 O.W.N. 118=A.I.R. 1935 P.C. 21=68 M.L.J. 339 (P.C.).**

———**S. 92.**

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Agency.

——**S. 92**—*Agency—Contract—Evidence of agency.*

Parol evidence tendered by plaintiffs for the purpose of showing that one of the parties to the contract had acted as agents for them (plaintiffs) in making the contract, and that therefore the plaintiffs were entitled to enforce the contract on behalf of such party as against the other, is admissible. (*Wild, J. C. and Rupchand, A. J. C.*) LADHOMAL *v.* CHANDUMAL RATAN CHAND. **25 S L.R. 91 = I.R. 1931 Sind 36 = 130 I.C. 548 = A.I.R. 1931 Sind 4.**

——**S. 92**—*Agency—Promissory note in name of agent—Oral evidence to prove whether it is in his name personally or as agent of certain firm—Admissibility.*

Where a promissory note is executed in favour of a person and such person is the agent of a firm at the time of execution of the note, oral evidence to show whether the promissory note is executed in his name personally or as agent of firm is admissible. A.I.R. 1935 Rang. 81, Rel. on. (*Mosely and Dunkley, JJ.*) R. V. BANERJEE, OFFICIAL RECEIVER *v.* S. M. N. AHMED. **158 I C. 570 = 8 R R. 186 = A.I R. 1935 Rang. 327.**

Agreement.

——**S. 92, Proviso (4)**—*Agreement—Registered sale deed—Unregistered agreement to re-convey of same date—Suit for specific performance of—Admissibility of agreement.*

Plaintiff executed a sale deed to the defendant which was registered. On the same date the defendant executed an agreement to re-convey the properties to the plaintiff which was not registered. The sale-deed itself did not contain any reference to the agreement. Plaintiff having sued for specific performance of the agreement, objection was raised to the use of the unregistered agreement under S. 92, proviso (4) of the Evidence Act.

Held, the claimant under the option of re-purchase affirmed the original transaction as a sale, and merely sought to enforce a covenant for re-conveyance and was not asking the Court to treat the transaction as a mortgage by way of conditional sale, and that consequently no objection under S. 92 (4) of the Evidence Act could arise. (*Varadachariar, J.*) CHINNAKKAL *v.* CHINNATHAMBI GOUNDAN. **152 I.C. 634 = 7 R.M. 267 = 1934 M.W N. 1122 = 40 L.W. 646 = A.I.R. 1934 Mad. 703 = 67 M.L J. 635.**

Ambiguity.

——**S. 92**—*Ambiguity—Wrong description of name in deed—Admission of parol evidence.*

Parol evidence is admissible to prove that the name of the creditor was through mistake put down as *K* instead of *R* in a deed containing acknowledgment of liability. The case is one of latent ambiguity. (*Wazir Hasan, C. J. and Srivastava, J.*) AIJAZ HUSAIN *v.* RAM SARUP. **I.R. 1931 Oudh 155 = 130 I.C. 347 = 7 O.W.N. 1195 = A.I.R. 1931 Oudh 54.**

EVIDENCE ACT (1872), S 92—Condition precedent

Applicability.

——**S. 92**—*Applicability—Presentation of petition—Proof by oral evidence.*

Oral evidence can be given by the petitioner, suing *in forma pauperis*, to prove that he was personally present when the petition was presented by his counsel or that he himself presented the petition, and that a note contrary to that by the Judge is wrong. (*Jai Lal, J.*) MT. JIWAN *v.* UMAR DIN. **151 I.C. 370 (1) = 7 R.L. 119 (2) = 36 P.L.R. 100 = A.I.R. 1934 Lah. 452 (1).**

Arbitration.

——**S. 92, Proviso 4**—*Arbitration — Registered agreement referring matter to arbitration—Oral agreement modifying terms of reference—Proof—Permissibility.*

A registered agreement referring the disputes between the parties was executed and under it five persons were appointed as arbitrators. At the meeting however one of them was absent and thereupon the parties orally agreed that the remaining four arbitrators should proceed with the case and dispose of the matter.

Held, that proof of the oral agreement was hit at by S. 92, proviso (4). (*Sulaiman Ag. C.J. and Allen, J.*) BHIM SEN *v.* TARA CHAND. **I.R. 1932 All. 54 = 135 I C. 230 = 1931 A.L.J. 1087 = A.I.R. 1932 All. 154.**

Bond.

——**S. 92**—*Bond—Description of person as principal debtor—Proof that he is surety—Permissibility.*

Under S. 92 it is not open to the obligee of a bond to prove that the position of one of three persons described in the bond as principal debtor was that of a surety for the remaining two principal debtors. (*Subhedar and Staples, A J Cs.*) NANDLAL CHOGALAL *v.* SURAJMAL GANGARAM. **28 N.L.R. 325 = I.R. 1932 Nag. 88 = 138 I.C. 879 = A.I.R. 1932 Nag. 62.**

Condition precedent.

——**S. 92, Proviso (3)**—*Condition precedent—Lease—Evidence of payment of "avakasam"—Admissibility.*

The consideration for a lease is the rent to be paid and the payment of the "'*avakasam*" a kind of premium or renewal fee paid by the tenant to the landlord, is clearly in the nature of a condition precedent, evidence as to which is permitted by proviso 3 to S. 92 Evidence Act. (*Beasley, C.J. and King, J.*) DAMODARAN NAIR *v.* ACHUTHAM NAIR. **157 I.C 1040 = 41 L.W. 318 = 1935 M.W.N. 193 = A.I.R. 1935 Mad. 190 = 68 M L J. 648.**

——**S. 92, Proviso (3)**—*'Condition precedent'—Meaning—Written agreement for maintenance—Contemporaneous oral stipulation for chastity—Admissibility.*

A condition precedent within the meaning of proviso (3) to S. 92 is a condition, without the fulfilment of which there is in effect no written agreement at all and no contractual obligation of any description. 6 C. 433; 7 M. 19; 45 Bom. 1155; 52 C. 077, Ref. to. In a suit brought by the plaintiff to recover maintenance due under an annuity bond executed by the defendants, the latter sought to prove a contemporaneous oral agreement that the plaintiff should continue chaste in order to entitle her to maintenance.

Held, the bond having been acted upon for some time, the oral agreement could not be said to be a condition precedent to the operation of the written agreement within the meaning of the proviso and so was not admissible in evidence. (*Patkar and Broomfield, JJ.*) SHIVLAL *v.* BAI SANKLI. **I.R. 1931 Bom. 332 = 132 I.C. 444 = 33 Bom.L.R. 490 = A.I.R. 1931 Bom. 297.**

——**S. 92, Proviso (3)**—*Condition precedent—Money advanced on execution of promissory note and on*

EVIDENCE ACT (1872), S. 62—Condition precedent.

certain conditions previously agreed upon—Proof of circumstances in repudiation of his liability.

Though S. 120, Negotiable Instruments Act, precludes the maker of promissory note from denying the validity of the note, where money is not advanced as a simple loan unconditionally upon the promissory note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability. (*Tek Chand and Coldstream, JJ.*) BACHAN SINGH *v.* DHARAM ARTH BANK. **I.R. 1933 Lah. 340 = 143 I.C. 348 = 34 P.L.R. 470 = A.I.R. 1933 Lah. 456.**

———**S. 92, Proviso (3)**—*Condition precedent—Promissory note—Oral evidence, that note was to come into effect only on the happening of a certain contingency—Admissibility.*

A plea of an oral arrangement that a contract is to come into effect only on the happening of a certain contingency is a legal plea falling under S. 92, Proviso (3) of the Evidence Act. That is distinct from a postponement of repayment of money due under a pro-note. In a suit on a promissory note it is therefore open to the defendant to plead in defence and to prove by oral evidence that the real consideration was the construction by the plaintiff of a sluice which, not having been sanctioned, was not constructed, and that consequently he was not liable under the promissory note. (*Pakenham Walsh, J.*) SATYANARAYANA *v.* ANJANEYULU. **157 I.C. 278 = 8 R.M. 144 = 41 L.W. 298 = 1935 M.W.N. 405 = A.I.R. 1935 Mad. 310.**

———**S. 92, Proviso (3)**—*Condition precedent—Suit on promissory note—Oral contemporaneous agreement held not to create condition precedent.*

Where in a suit on promissory note the promisor, alleged that although he did execute the note, there was an oral contemporaneous agreement binding a third party to act in a certain way after the promisor had spent money on a contemplated litigation, that circumstances prevented the third party from fulfilling the obligation he had undertaken and therefore there was a condition precedent attaching to the obligation under the pro-note.

Held, that Proviso 3, S. 92, did not apply. The condition was in no sense precedent to the obligation but subsequent to the obligation and the promisor was debarred from leading evidence on the oral contemporaneous agreement alleged by him. 25 Cal. 401, Foll. (*Harrison and Addison, JJ.*) JAIMAL RAM *v.* NAND LAL. **I.R. 1932 Lah. 499 = 138 I.C. 371 = 33 P.L.R. 712 = A.I.R. 1932 Lah. 549.**

Consideration.

———**S. 92**—*Consideration—Deed—Recital as to consideration—Oral evidence varying—Admissibility.*

A bond recited that the consideration for the transaction was the price of 100 bags of sugar sold; oral evidence was sought to be given to show that the real consideration was payment of cash, and the untrue recital was made in the document according to a custom prevailing in the locality.

Held, that the oral evidence was admissible, whether the custom alleged may or may not be true, to prove what is the real consideration underlying the promise made by the defendant to pay the amount mentioned in the deed. (*Rupchand, A.J.C.*) GANGARAM SHEWARAM *v.* MALLIK NUR AHMED. **28 S.L.R. 266 = 153 I.C. 635 = 7 R.S. 140 = A.I.R. 1935 Sind 48.**

———**S. 92**—Consideration—Kabuliyat—Oral evidence—Admissibility. *See* DEED—CONSIDERATION—PROOF. **62 Cal. 346 = 60 C.L.J. 477 = A.I.R. 1935 Cal. 368.**

EVIDENCE ACT (1872), S. 92—Consideration.

———**S. 92**—*Consideration—Promissory note—Real nature of—Proof of—Permissibility.*

A promissory note was executed by defendant in favour of the plaintiff mentioning cash consideration, though no cash had actually passed.

Held, the plaintiff was not barred from proving, that in fact he executed the note in consideration of plaintiff's withdrawal of a civil suit against his friend. It does not amount to proof of an inconsistent agreement. A.I.R. 1922 All. 213, Dist. (*Niamatullah, J.*) HARBANS DUBE *v.* SITA RAM. **6 I.R. (All.) 313 = 146 I.C. 607 = 1933 A.L.J. 1364 = A.I.R. 1933 All. 576.**

———**S. 92**—*Consideration—Promissory note—Renewed note in consideration of debt due under prior note—Oral evidence to prove original absence of part of consideration—Admissibility.*

In a suit on a promissory note executed in respect of the amount due under a prior promissory note plus the amount of costs incurred in a suit on the prior promissory note, the defendant is entitled to adduce evidence to prove that he had paid some amount towards the prior note and that to that extent his liability under the renewed note should be proportionately reduced. S. 92 is not a bar to the consideration of this question. (*Varadachariar, J.*) BALASUBRAMANIA CHETTIAR *v.* VENKATRAMA CHETTIAR. **154 I.C. 579 = 7 R.M. 453 = 40 L.W. 706 = 1934 M.W.N. 1382 = A.I.R. 1935 Mad. 253 = 67 M.L.J. 650.**

———**S. 92**—*Consideration—Promissory note—Want of consideration—Proof—Onus.*

In a suit on a promissory note, it is open to the defendant to plead that the promissory note executed by him was executed in certain circumstances and was without consideration. The onus, of course, lies on the defendant to establish that he received no consideration and if he succeeds in displacing the apparent tenor of the promissory note as regards consideration and the plaintiff cannot fall back upon any other case, the suit must be dismissed. (*Niamatullah, J.*) RAM JASH GOSHAIN *v.* MARKANDE PATHAK. **4 A.W.R. 964 - 153 I.C. 611 = 7 R.A. 543 = A.I.R. 1934 All. 1068.**

———**S. 92, Proviso (1)**—*Consideration—Failure—Proof.*

Where it is recited in the document sued on that consideration was paid in cash, it is open to the defendant to plead want of consideration. (*Jai Lal and Abdul Qadir, JJ.*) GOKAL CHAND *v.* HARCHARAN DAS. **I.R. 1931 Lah. 870 = 134 I.C. 102 = 32 P.L.R. 577.**

———**S. 92, Proviso (1)**—*Consideration—Nature—Proof—Permissibility.*

The consideration mentioned in a document is not one of the terms of the document but it is the recital of a fact which can be contradicted or varied under Proviso (1) to the section. 3 Bom. 159; 11 Cal. 486, Foll. (*Suhrawardy and Jack, JJ.*) NABIN CHANDRA CHAKRAVARTHI *v.* SHONA MALA GHOSE. **I.R. 1931 Cal 696 = 133 I.C 568 = 35 C.W.N. 279 = A.I.R. 1932 Cal. 25.**

———**S. 92, Proviso (1)**—*Consideration—Promissory note—Evidence showing that amount of loan is less than that stated—Admissibility.*

It is always open to one of the parties to show that he has not received the sum actually stated in the promissory note to have been lent, and such evidence is expressly rendered admissible by reason of the proviso 1 of S. 92 of the Evidence Act (*Harries and Rachhpal Singh, JJ.*) SHIBCHARAN DAS *v.* GHULAB CHAND CHHOTEYLAL. **160 I.C. 76 = 8 R.A. 567 = 1935 A.W.R. 1486 = A.I.R. 1936 All. 157.**

EVIDENCE ACT (1872), S. 92—Consideration.

———**S. 92, Proviso (1)**—*Consideration—Recital in document that consideration has passed—Evidence of absence of consideration—Admissibility—Burden of proof.*

The recital in a bond or in a promissory note that consideration has passed amounts only to an admission of the fact, and like any other admission may be disproved as being incorrect. The admission no doubt throws the burden of proof on the party whose admission it is, to prove that the admission is wrong, but nonetheless it is open to the party to prove that his own admission is in fact incorrect Proof of absence of consideration for a document in suit does not amount to varying the terms of the contract and in no way militates against the main provision of S. 92 of the Evidence Act and in any case, proviso No. 1 clearly allows such evidence to be adduced. (*Sulaiman, C.J. and Mukherji, J.*) GANGA DWAR CHAUBEY *v.* TILAK DHARI RAO **6 R.A. 826 = 148 I C. 1124 = A I.R. 1934 All. 496.**

———**S 92, Proviso (1)**—*Consideration—Recital of—Evidence contradicting—Alleged agreement to pay consideration on contingency—Admissibility.*

Where one party alleges that the recital regarding payment of consideration is not true and that in fact no consideration was paid or received and the other sets up an agreement that consideration was not to be paid until the happening of a particular contingency, the agreement does not contradict, vary, add to or subtract from the terms of the contract. So S. 92 does not apply. Even if the recital is taken not as a recital of fact but as the recital of a term of the contract and the agreement is looked upon as supplementing it, the other party is entitled to give evidence for the purpose of showing what the real nature of the transaction was. (Case law discussed.) (*Mukerji and Guha, JJ.*) IRFAN ALI LASKAR *v.* JOGENDRA CHANDRA DAS PATNI. **59 Cal. 1111 = 143 I.C. 241 = I R 1933 Cal. 383 = 36 C W.N. 451 = A.I.R. 1932 Cal. 708.**

Decree of Court.

———**S. 92**—*Decree of Court.*

A decree is an adjudication by a Court of the rights of the parties litigating before it; it is not an act of the parties but an act of the Court, and derives its binding force or validity from the authority of the Court and not from any agreement or contract between the parties. Hence a decree or its terms cannot be varied or modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot by their agreement alone vary or modify the terms of the decree, whether the agreement be oral or written. S. 92 has therefore no application to decrees. 50 Mad. 897 = 53 M.L. J. 533; S.A.No 62 of 1920 and 58 M.L.J. 542, Overr. (*Beasley, C. J., Cornish and Pandrang Row, JJ.*) PAPAMMA *v.* VENKAYYA. **58 Mad. 994 = 42 L W. 365 = 1935 M W.N 906 = 158 I.C. 187 = 8 R.M. 232 = A.I.R. 1935 Mad. 863 = 69 M.L J. 451 (F B.).**

———**S. 92**—*Decree of Court—Adjustment of—Oral evidence—Admissibility—"Instrument."*

An adjustment of a decree can be proved by oral evidence. S. 92 of the Evidence Act is no bar to the setting up of an oral agreement varying or adjusting a decree in a particular way. The section only applies to dispositive documents between contracting parties and a decree is not an instrument between parties, in the sense in which that expression is used in the section. (*Broomfield, J.*) KALVANJI DHANA *v.* DHARAMSI DHANA & CO. **157 I.C. 646 = 8 R B. 74 = 37 Bom L.R. 230 = A.I.R. 1935 Bom. 303.**

———**S. 92**—*Decree of Court—Agreement not to execute decree against certain judgment-debtor—Admissibility.*

EVIDENCE ACT (1872), S. 92—Document not intended to be acted upon.

An agreement not to execute a decree against a particular judgment-debtor does not vary its terms. The agreement pleaded is not one to which all the parties to the decree are parties but only some of them and S. 92 does not apply. 27 Mad 368 and 48 M L.J. 280, Foll. (*Beasley, C. J., Cornish and Pandrang Row, JJ.*) PAPAMMA *v.* VENKAYYA. **58 Mad. 994 = 42 L.W. 365 = 1935 M.W.N 906 = 158 I.C. 187 = 8 R M. 232 A.I.R. 1935 Mad. 860 = 69 M.L J. 451 (F.B).**

———**S. 92**—*Decree of Court—Consent decree.*

It is doubtful whether evidence is admissible in the case of consent decree to explain the ambiguity. A.I.R. 1927 Mad. 911, Ref. (*Walsh, J*) GANAPATHY IYER *v.* SUBRAMANIA IYER. **I.R. 1933 Mad. 374 = 144 I. C. 95 = A.I R. 1933 Mad. 516.**

———**S. 92**—Decree of Court—Execution of decree—Judgment-debtor pleading satisfaction of decree by decree-holder's acceptance of smaller sum—Oral evidence—Admissibility. *See* C.P. CODE, O. 21, R. 2. **A. I R. 1935 Mad 424.**

———**S 92**—*Decree of Court—Oral adjustment—Admissibility.*

An oral adjustment of a decree can be proved in bar of execution. The words "as between the parties to such instrument" suggests that the section applies only to the "dispositive" documents between the contracting parties. 44 All. 258 and 50 Mad 897, Diss.; A I.R. 1929 All. 79; 6 Rang. 573; A.I.R. 1926 Cal. 643, Foll. (*Doraswami Iyer, C. J. and Sreenivasa Iyer, J.*) MADIAH *v* SEETHARAMA VARADA IYER & SONS. **9 Mys.L.J. 203.**

———**S. 92**—*Decree of Court—Oral agreement varying terms—Admissibility.*

An oral agreement between the parties to a decree varying the terms of the decree can be proved and the proof of it is not barred by S. 92 as the section only refers to dispositive instruments. 24 I C. 391 and A.I. R. 1926 Cal. 643, Foll; 44 A. 258 and 50 M. 897, Not Foll. (*Wild, J C. and Milne, A. J. C.*) HOTCHAND TOLARAM *v* PREM CHAND **25 S.L R 279 = I.R. 1931 Sind 70 = 131 I.C. 710 = A.I R. 1931 Sind 42.**

———**S. 92**—Decree of Court—Orala greement varying the terms thereof not barred by the section. *See* C. P. CODE, O. 21, R. 2. **14 Lah. 668 = A.I.R. 1933 Lah. 806.**

Discharge.

———**S. 92**—*Discharge—Mortgage—Payment and acceptance of smaller sum—Proof of—Permissibility.*

The discharge of a mortgage debt by the payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement. 53 Mad 127, Foll. (*Reilly and Anantakrishna Ayyar, JJ.*) SUPPAN CHETTY *v* YEGNANARAYANA AYYAR. **I.R. 1932 Mad. 285 = 136 I.C. 317 = 34 L.W. 921 = A.I.R. 1932 Mad 141.**

Document not intended to be acted upon.

———**S. 92**—*Document not intended to be acted upon—Proof—Permissibility.*

Although evidence to vary or modify the terms of an agreement in writing is not admissible, oral evidence is admissible to prove that an agreement in writing was in fact no agreement at all but was only a sham or nominal transaction, not intended to be operative. It is therefore open to a widow to prove that an agreement purporting to provide for her maintenance was never intended to be given effect to or acted upon but was in fact brought about with the sole object of securing an acknowledgment from her of the undivided status of her

EVIDENCE ACT (1872), S. 92—Document not intended to be acted upon.

husband by the insertion of a recital to that effect as a preamble to the deed of maintenance. (*Curgenven and Sundaram Chetty, JJ.*) THIAGARAJA MUDALIAR *v.* VEDATHANNI. **141 I C. 456 = I R 1933 Mad. 137 = 36 L.W. 817 = A.I.R. 1933 Mad. 48 = 63 M.L.J. 707.**

———**S. 92, Proviso (1)**—*Document not intended to be acted upon*—Kabuliyat—*Oral evidence—Admissibility—Evidence of conduct—Relevancy.*

The fact that an instrument registered or unregistered, was not intended to be acted upon from the very beginning is a fact which comes within proviso (1) of S. 92, Evidence Act, and can be proved by direct oral evidence or by indirect or circumstantial evidence furnished by the conduct of the parties. Cases where the defence taken is that there has been contemporaneous oral agreement, varying the terms of an instrument, or a subsequent oral agreement varying the terms of a contract or grant required by law to be in writing, or of a registered instrument, are essentially different from cases where the defence is that the instrument was never intended by the parties to be acted upon. The fact that the parties never meant to act upon a *kabuliyat* may be inferred from that fact that rent was never paid at the *kabuliyat* rate but at a lower rate. (*R. C. Mitter, J.*) SATYENDRA NATH ROY CHOWDHURY *v.* PARAMANANDA HALDAR. **39 C.W.N. 888.**

Family arrangement.

———**S. 92**—*Family arrangement—Beneficiary under deed of.*

S. 92 has no application to a person who is not a party to a deed of family arrangement though it may be that the arrangement or agreement makes provision for his maintenance. The analogy of sale-deeds and mortgage deeds is not a sound one. (*Raza and Bishesheswar Nath, JJ.*) HAR NARAIN DAS *v.* BIBI RUP KUAR. **I.R. 1932 Oudh 299 = 138 I.C. 128 = 9 O.W.N. 291 = A.I.R. 1932 Oudh 168.**

Fraud.

———**S. 92**—Fraud—Signature of executant obtained by misrepresentation—Evidence admissible. *See* INTEREST, *infra.* **61 Cal. 344 — A.I.R. 1934 Cal. 564.**

Gift.

———**S. 92**—*Gift—Gift in favour of wife—Fictitious nature—Proof by husband—Permissibility.*

Where a husband admits that he executed a deed of gift in favour of his wife but alleges that he had no intention of giving away the property and that in short he had no *animus contrabandi* when he executed the deed of gift evidence to prove such a defence is admissible and does not violate the provisions of S. 92. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 = I.R. 1932 Oudh 130 = 8 O.W.N 349 = A I R 1931 Oudh 177**

———**S. 92**—Gift—Oral evidence of intention—Inadmissible. *See* DEED—CONSTRUCTION. **A.I R. 1934 Rang. 129.**

Intention of parties.

———**S. 92**—Intention of parties—Deed styled 'deed of partition of inheritance'—Construction—Will or gift—Oral evidence of intention inadmissible. *See* DEED—CONSTRUCTION—WILL OR GIFT. **A I.R. 1934 Rang. 129.**

——— **S. 92**—*Intention of parties—Evidence to prove the secret, at variance with the expressed intention—Admissibility of—Rule and exceptions stated—Deed of absolute sale—Mortgage by purchaser—Evidence by vendor that sale was a sham transaction—Hong Kong Land Registration Ordinance* (1844), *S.* 4.

EVIDENCE ACT (1872), S. 92—Intention of parties.

The cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases, where, for example, the evidence supplements but does not contradict the terms of the deed, where the provisions of the deed leave the question doubtful, whether merely a mortgage and not an out and out sale was intended or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual mis statement of fact. Apart from such cases, however, the general rule is that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of the words to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. In 1917, the respondent, who was the owner of certain leasehold properties executed a deed by which, in consideration of a sum of $16,000 the payment of which was acknowledged, he assigned his right, title and interest in the properties in favour of his son and another as joint tenants. The deed contained all the covenants usually inserted in a sale deed. It was duly attested, stamped *ad valorem* on the amount of the purchase-money and registered under the Hong Kong Registration Ordinance. On 7th March, 1929, the appellant advanced $25,000 to the son of the respondent on the security of his interest in the undivided moiety of the property, having searched the register at the Land Office and satisfied himself of the sufficiency of the security offered. On the 28th March, 1929, the respondent brought the present suit for a declaration that the mortgage was not binding on the property. He gave evidence to the effect that the deed of assignment was "an elaborate make believe," that it was not intended to confer any beneficial interest at all on his son, that the other purchaser under the deed was himself under a different name, that the consideration was never paid and that the deed was only executed by him to mark the properties so that in case of his death the properties might be handed to his son later on. It was however, no part of his case that there was any resulting trust created in his favour.

Held, that the evidence of the respondent was in direct contradiction to the express terms of the written instrument and was therefore inadmissible. (*Lord Blanesburgh.*) TSANG CHUEN *v.* LI PO KWAI. **1932 A.C. 715 = I R. 1932 P C. 317 = 139 I C. 891 = 1932 A.L J. 971 = 36 L W. 761 = A I.R. 1932 P.C. 255 = 63 M L J. 418 (P. C.).**

———**S. 92**—*Intention of parties—Lease in name of one member—Proof that it was for entire joint family—Permissibility.*

Where it appears that a lease was taken on behalf of a joint family, the fact that only the name of one member appears in the deed is immaterial. S. 92 is no bar to the other members asserting their rights by showing that the lease was in fact on behalf of the entire joint family. (*Sulaiman, A C.J. and Baipai, J.*) RAGHUNATH TEWARI *v.* BUDHOO RAM TEWARI. **I.R. 1931 All. 753 (2) = 133 I.C. 897 (2) = A.I.R. 1932 All. 112.**

———**S. 92**—*Intention of parties—Sanad in stereotyped form—Prior correspondence—Admissibility of.*

When most of the Sanads are in a stereotyped form which, however, in a particular case correctly express

EVIDENCE ACT (1872), S. 92—Interest.

the intention of the parties, the terms of the settlement as embodied in the correspondence can be looked into. (*Baker and Divatia, JJ.*) BASVANT GOWDAPPA *v.* ABASALLI. **150 I.C. 635 = 7 R.B. 8 = 36 Bom.L.R. 158 = A.I.R. 1934 Bom. 145.**

Interest.

See also WAIVER, *infra.*

——**S. 92**—*Interest—Account book—Striking of balance—Proof of independent agreement.*

The absence of mention of an agreement to pay interest in a balance struck in the creditor's book does not debar him from proving an agreement to pay interest independently and by oral evidence. The balance struck in the creditor's book is not such a formal document, in which all the conditions of the transaction are usually entered or are expected to be entered. (*Jai Lal, J.*) KHAIRATTI SHAH *v.* DIWAN SINGH. **141 I.C. 190 = I.R. 1933 Lah. 66 = 34 P.L.R. 508 = A.I.R. 1932 Lah. 652.**

——**S. 92**—*Interest—Clear language—Oral evidence—Admissibility.*

Extraneous oral evidence is inadmissible especially when the terms of the bond are clear. The parties must be presumed to know the difference between interest on interest and compound interest and if they deliberately chose to use one expression, they cannot be permitted to prove that they meant the other. (*Niyogi, A.J.C.*) BHADU *v.* GANPATI. **I.R. 1931 Nag. 39 = 130 I.C. 103 = A.I.R. 1931 Nag. 25.**

——**S. 92**—*Interest — Mortgage — Stipulation for compound interest—Agreement by mortgagee not to enforce—Oral evidence of—Admissibility—Fraud.*

Where, in a suit on mortgage bonds which stipulated for payment of compound interest, the defendant alleged that at the time of the execution of the bonds, he was persuaded to sign them only on the plaintiffs promising not to enforce that stipulation.

Held, that such evidence was inadmissible under S. 92. Evidence would be admissible under the first proviso to show that the signature to the document was obtained by fraud at the inception *e.g.*, that the plaintiffs had always intended to enforce the stipulation and obtained the defendant's signature by means of a misrepresentation of fact, namely, their intention at the time of signature. But evidence that plaintiffs, at some later date, sought to enforce the stipulation is not evidence sufficient to prove that they had such an intention when the document was signed. (Case law disc.) (*Lort Williams and M. C. Ghose, JJ.*) MAHESH CHANDRA SHAHA *v.* ANANDA CHANDRA SHAHA. **61 Cal 344 = 151 I.C. 511 = 7 R.C. 141 = A.I.R. 1934 Cal. 564.**

——**S. 92, Proviso (4)**—*Interest—Promissory note—Mention of rate of interest—Subsequent oral agreement to reduce the rate—Admissibility.*

Where the agreed rate of interest is stated in the promissory note, it forms part of the contract between the parties, and as the promissory note is required by law to be in writing, evidence of a subsequent oral agreement between the parties reducing the rate of interest is inadmissible by reason of S. 92 of the Evidence Act and Proviso (4) thereto. (*Harries and Rachhpal Singh, JJ.*) SHIBCHARAN DAS *v.* GHULAB CHAND CHHOTEY LAL. **160 I.C. 76 = 8 R.A. 567 = 1935 A.W.R. 1486 = A.I.R. 1936 All. 157.**

Lease.

See also CONDITION PRECEDENT, *supra.*

——**S. 92**—*Lease—Memorandum of lease—Formal document contemplated in future—Memorandum, if admissible.*

EVIDENCE ACT (1872), S. 92—Mistake.

Where a memorandum was executed in the form of a letter and it was shown that it did not contain all the terms of the lease and that a lease containing the terms was contemplated in future.

Held, that the letter did not attract the provisions of S. 92 of the Evidence Act or S. 49 of the Registration Act. (*Broadway and Bhide, JJ.*) SUNDAR SINGH *v.* RAM SARAN DAS. **14 Lah. 137 = 142 I.C. 754 = I.R. 1933 Lah. 269 = 33 P.L.R. 323 = A.I.R. 1933 Lah. 61.**

——**S. 92**—*Lease—Registered lease—Oral evidence of rescission—Admissibility.*

In a suit for recovery of rent for five years, alleged to be due from the defendant under a registered lease, the execution of the registered lease was admitted by the defendant, but he alleged that he had never taken possession of the land and that there was rescission of the lease.

Held, that oral evidence to prove the rescission of the registered lease was inadmissible. (*Jai Lal, J.*) MANGLADHA SHAH *v.* ABDUL GHANI. **6 I.R. (Lah.) 71 = 145 I.C. 176 = A.I.R. 1933 Lah. 278.**

——**S. 92, Proviso (2)**—*Lease—Collateral agreement—Lessee's right of pre-emption—Proof of.*

A lessee under a registered lease wanted to prove an oral agreement regarding his preferential right to purchase the leased property if it was brought for sole. The lease was silent on the point.

Held, that under S. 92, evidence of such a collateral contract, if there were such, would not be excluded, though it would be strange to omit such a condition, if it had been agreed. (*Lord Wright.*) JEHANGIR SHA POORJI TARAPOREWALA *v.* SAVARKAR. **1933 A.L.J. 321 = 17 R.D. 392 = I.R. 1932 P.C. 255 = 138 I.C. 774 = 36 L.W. 450 = 34 Bom L.R. 1609 = 9 O.W.N. 817 = A.I.R. 1932 P.C. 231 = 63 M.L.J. 408 (P.C.).**

——**S. 92, Proviso (4)**—*Lease—Registered lease deed—Oral agreement regarding additional area—Proof—Permissibility.*

Where the lessees under a registered lease deed contend that they were cultivating an additional area by virtue of an oral agreement.

Held, that evidence of a simultaneous oral agreement was barred by S. 92 and that evidence about subsequent oral agreement was not admissible under Proviso (4) to that section. (*Smith, S.M. and Oppenheim, J. M.*) MANIZA BANUA *v.* JHABBUA SINGH. **15 R.D. 576 = 12 L.R. 336 (Rev.).**

Mistake.

——**S. 92, Proviso (1)**—*Mistake caused by innocent misrepresentation—Evidence as to—Admissibility.*

The plaintiffs agreed to sell to the defendants sixty bars of silver. There was a note of the contract in the plaintiff's books in the following terms: "Sold silver bars sixty to *D* deliverable on May 30" signed by a broker on behalf of the defendants. The defendants' case was that the broker affixed his signature on the innocent misrepresentation of the plaintiffs that the note contained all the material terms of the contract, that in fact it did not so contain, that the terms were that the silver was to be of the quality known as 999, that the purchase price was to include the Customs duty and that the plaintiffs should get drawback certificates from the Customs.

Held, that such evidence was admissible under the first proviso to S. 92. (*Beaumont, C. J. and Rangnekar J.*) CHIMANRAM *v.* DIVANCHAND. **56 Bom. 180 = I.R. 1932 Bom. 270 = 137 I.C. 478 = 34 Bom.L.R. 26 A.I.R. 1932 Bom. 151.**

——**S. 92, Proviso (1)**—*Mistake—Mortgage deed—Omission of term—Evidence to prove—Admissibility.*

EVIDENCE ACT (1872), S. 92—Mortgage.

Where a plaint makes no claim for rectification regard ing the rate of interest contained in the mortgage instrument, the Proviso (1) to S. 92 of the Evidence Act does not empower a plaintiff suing on an unambiguous, unreformed and registered deed to lead evidence to show that by a mistake a term has been omitted from the deed, unless the mistake is such a one as would found a claim for rectification or cancellation, and in such case the evidence will have to be tested by the same standards of equity and the claim will be open to the same equitable defences as though the action claimed rectification. The burden of proof is heavily on the person seeking rectification and an effective bar to his claim is laches on his part. The fact that terms of an instrument as they stand are so unusual as to show that the document cannot mean what it says, is not any ground for adding terms to an unambiguous deed. (*Wallace and Stone, JJ.*) SAYAMMA *v.* VENKATA REDDI. **54 Mad 973 = I.R. 1932 Mad. 24 = 134 I C. 1208 = 1931 M W.N. 906 = 34 L.W. 266 = A.I.R. 1931 Mad. 785 = 61 M.L.J. 437.**

Mortgage.

See also MISTAKE, VARIATION OF TERMS AND WAIVER.

———**S. 92**—*Mortgage—Contract embodied in deed—Prior correspondence—Admissibility of.*

Where the contract between the parties has been embodied in a mortgage-deed, letters between the parties written several months before the completion of the mortgage are inadmissible in evidence to contradict, vary or add to the terms. They constitute only evidence of negotiation between the parties. (*Shadi Lal, C.J. and Abdul Rashid, J.*) PUNJAB NATIONAL BANK, LTD., LAHORE *v.* ARORA. **149 I.C. 1124 = 6 R L. 807 = A I.R. 1933 Lah. 1024.**

———**S. 92**—*Mortgage—Equitable mortgage—Mortgagee acting as agent of mortgagor—Letter by—Not the bargain between the parties.*

A mortgagee with deposit of title-deeds was acting as an agent of his mortgagor in arranging a loan for the mortgagor. At the same time he was also acting as agent of the mortgagee; but as agent of the mortgagor he sent a letter to the mortgagor containing the scope and the particulars of the security.

Held, that the document did not contain the bargain between the parties to the mortgage subsequently, effected but was only one sent by agent of the mortgagor, that it did not require registration and that extraneous evidence was admissible to prove the scope of the security. (*Sen, J.*) VILLA *v.* PETLEY. **6 R.R. 245 = 148 I.C. 721 = A.I.R. 1934 Rang 51.**

———**S. 92**—*Mortgage—Intended sale of mortgaged property to mortgagee—Settlement as to money due under mortgage—Proof of.*

Where the mortgagor intends to sell his property to the mortgagee, there is nothing in law to prevent the parties from coming to a settlement, for the purposes of determining the amount of sale consideration, as to what is the amount of money which would be due to the mortgagee under the deed of mortgage when accounts are taken on an agreed basis. It was open to the mortgagee as a part of the sale consideration to calculate interest on the amount of the mortgage-money secured by the deed of mortgage at the lower rate of interest rather than at the higher, both being provided for in the deed of mortgage. In the settlement of accounts on the basis of the deed of mortgage, there is no attempt to contradict the provisions of S. 92. (*Wazir Hasan, C. J. and Allsop, J.*) HARI KISHEN DAS *v.* NAZIR HASAN. **151 I.C. 531 = 7 R.O. 130 (2) = 11 O.W.N. 254 = A.I.R. 1934 Oudh 115.**

EVIDENCE ACT (1872), S. 92—Nature of transaction.

———**S. 92**—*Mortgage—Oral agreement varying contract—Proof—Contract as between co-mortgagors.*

When the terms of a mortgage contract are reduced as required by law to writing, an oral agreement varying its terms cannot be admitted in evidence.

Semble.—If the mortgagors have undertaken certain obligations, as for instance that the severally owned items of the hypotheca shall be rateably liable, one mortgagor can no more set up an oral agreement against his fellow mortgagor for the purpose of varying the terms of the document than he could as against his mortgagee. (*Jackson, J.*) MUTHUKUMARASWAMI MUDALIAR *v.* GOVINDA PADAYACHI. **I.R. 1932 Mad. 359 = 137 I.C. 285 = 1932 M W.N. 168 = 35 L.W. 145 = A.I.R. 1932 Mad. 218.**

———**S. 92**—*Mortgage—Possessory mortgage—Proof as to document giving rise only to simple mortgage—Permissibility.*

Where the document is in terms a possessory mortgage evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties is inadmissible under S. 92 (*Sir George Lowndes.*) FEROZ SHAH *v.* SOHBAT KHAN. **60 I A. 273 = 14 Lah. 466 = I.R. 1933 P C. 183 = 38 L.W. 68 = 1933 M.W.N. 755 = 37 C W.N. 993 = 35 Bom.L.R. 877 = 58 C L.J. 52 = 1933 A.L.J. 1193 = 143 I.C. 659 = 10 O.W.N. 797 = 35 P.L R. 1 = A I.R. 1933 P.C. 178 = 65 M.L J. 150 (P.C.).**

———**S. 92**—*Mortgage — Proof that document was different—Permissibility.*

Where a document is on the face of it a registered mortgage deed, it is not open to any of the parties to plead or to lead oral or circumstantial evidence to show that the transaction was other than what it appears to be. (*Jai Lal, J.*) MILKHI RAM *v.* GUJAR MAL. **141 I.C. 494 (1) = I.R. 1933 Lah 130 = 33 P.L R. 974 = A.I.R. 1933 Lah. 104.**

———**S. 92**—*Mortgage—Verbal agreement changing time and mode of payment—Admissibility.*

The rate of interest and the time and mode of repayment of the principal are material and essential parts of a deed of mortgage. No alterations in these terms, as contained in the registered deed, can be validly made except by a registered document. Therefore oral evidence regarding a verbal agreement, whereby the time of repayment is extended and the mode of repayment is changed, ought to be excluded. (*Dunkley, J.*) MAUNG BA KYAW *v* NANIGRAM JAGANATH. **13 Rang. 22 = 154 I.C. 189 = 7 R R. 272 = A.I.R. 1934 Rang 316.**

———**S. 92, Proviso (2)**— *Mortgage — Subsequent* gistbundi *receipt—Mode of discharge provided—Admissibility.*

Where a *kistbundi* receipt executed subsequent to the mortgage deed merely recited that a certain amount was payable on a certain date and the mode on which that instalment was to be paid and it appeared that there was no term in the mortgage deed directing the payment in a particular way.

Held, that the *kistbundi* was admissible under proviso (2) of S. 92.

Held, further, that even if the *kistbundi* had the effect of stopping the running of interest under the mortgage deed it did not extinguish the debt but merely indicated the mode of payment and was therefore not hit at by S. 92 Proviso 4. (*Suhrawardy and Graham, JJ.*) SASI BUSHAN DAS *v.* RAM CHANDRA DAS. **135 I. C. 871 = I.R. 1932 Cal. 167 = 35 C.W.N. 861 = A.I.R. 1932 Cal. 136.**

Nature of transaction.

———**S. 92**—*Nature of transaction—Registered usufructuary deed—Evidence of conduct to prove that*

EVIDENCE ACT (1872), S. 92—Nature of transaction.

transaction was only contract of collateral security—Admissibility.

It is open to the Courts to go behind the apparent terms of a registered document and to hold that what purports to be a mortgage with possession can, by the subsequent conduct and intention of the parties, be shown in fact not a mortgage with possession, but a contract merely hypothecating the land by way of collateral security. (*Fraser, J.C. and Sadduddin Khan, A. J. C.*) GOPI CHAND *v.* MAHOMED UMAR. **160 I.C. 134=8 R Pesh. 100=A.I.R. 1935 Pesh. 176.**

——**S. 92, Proviso (4)**—*Nature of transaction—Applicability—Evidence to show how transaction was treated by parties.*

A document purporting to be a sale-deed was presented for registration. The executant denied that he had executed a sale-deed, and stated that he had merely agreed to execute a mortgage deed. After some dispute the parties agreed that the transaction should be treated as a mortgage and made statements to the Sub-Registrar, who recorded the terms of the mortgage agreed to by the parties and registered the document as a mortgage deed.

Held, that Proviso 4 to S. 92 did not prevent the successor in-interest of the executant from proving that the transaction entered into between the parties was really a mortgage and not a sale, as he was not producing any evidence to prove any subsequent oral agreement to recind or modify a contract which had been registered. (*Shadi Lal C.J. and Broadway, J.*) GANGA *v.* PHOGA. **6 I.R. (Lah.) 125 (1)=145 I.C 697 (1)=A.I.R. 1933 Lah. 318.**

Negotiations.

——**S. 92**—*Negotiations — Agreement reduced to writing—Proof of preliminary negotiations to vary—Admissibility of.*

S. 92 enacts that when the terms and the conditions of a transaction have been reduced to writing either by agreement of parties or by requirement of law, no oral evidence shall be admitted to contradict, vary, add to, or subtract from, its terms. It is not permissible under the Evidence Act or the English Law to contradict or vary the express or unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations. In determining the question whether the writing is or is not complete, the writing as well as the degree of formality of the document have to be considered and the burden of proving want of completeness is always on the party who alleges it (*Mahadevayya, O.C.J.*) MANJAPPA *v.* SEETHARAMAIYA. **12 Mys.L.J. 11.**

Oral agreement.

See also INTEREST AND LEASE, *supra.*

——**S 92 Proviso (1)**—*Oral agreement—Gift of share of property in consideration of monthly payment—Oral agreement to pay profits in consideration of immediate possession—Admissibility.*

The plaintiff and his brothers enjoyed the property by turns of five years each. The plaintiff's turn was from 1919 to 1924. In 1923, he executed a deed of gift of his share to his brother who in turn executed a deed of settlement promising to pay him Rs. 12 a month from 1924. The plaintiff brought the suit for recovery of the profits for the year 1923-1924, alleging an oral agreement by his brother to pay the profits of the one year of his unexpired term.

Held, that the oral agreement as to the apportionment of the income prior to 1924 was a matter on which the deed of settlement was silent and was not inconsistent with its terms and that evidence of such an agreement

EVIDENCE ACT (1872), S. 92—Oral agreement.

was admissible. (*Baker, J.*) BIBI FAKRUBIBI *v.* SAIYAD MAHOMEDMIYA. **I.R. 1932 Bom. 468=139 I.C. 221=34 Bom.L.R. 971.**

——**S. 92, Proviso (2)**—*Oral agreement—Owner of sir land creating mortgage—Subsequent sale of equity of redemption—Oral agreement to give possession of exproprietary land to vendee—Admissibility of.*

Where a *sir* land had been mortgaged by the proprietor who afterwards sold the equity of redemption, he cannot be allowed to give oral evidence of a separate agreement to give up exproprietary rights. (*Oppenheim, S.M.*) PARTAP TEWARI *v.* BECHAN TEWARI. **14 L.R. 425 (Rev.)=17 R.D. 500.**

——**S. 92, Proviso (3)**—*Oral agreement—Separate oral agreement that executant should be treated only as surety—Admissibility.*

The words "any obligation" in the third proviso to S. 92 mean any obligation whatever under the contract, and not some particular obligation which the contract may contain. The parties may not vary a written statement, but they may show that they never came to an agreement at all and that the signed paper was never intended to be record of the terms of the agreement, for they never had agreeing minds ; or they may show that a written contract, which has no date, was not intended to operate from its delivery but from a future uncertain period; or they may show that the parties never intended to be an agreement until a condition precedent was fulfilled. But where a contract embodied in a compromise is executed by several persons *prima facie* undertaking liability in unqualified terms, the proviso does not contemplate a division or splitting up of the contract, as that would be to vary the contract as a whole. So an understanding that no obligation would ever arise upon the agreement or an agreement that some of the executants would be liable only as sureties is not provable under the proviso. 8 C.W.N. 101 ; 5 Rang 168 ; 45 M.L.J. 91, Foll. (*Mukerji and Mallik, JJ.*) RADHA KISSEN CHAMARIA *v.* DURGA PRASAD CHAMARIA **59 Cal. 106=143 I.C. 159=I.R. 1933 Cal. 348 (2)=A.I.R. 1932 Cal. 328.**

[F. 59 C. 1111 (1119). R. 35 P.L.R. 239 (260).]

——**S. 92, Proviso (4)**—*Oral agreement—Agreement that registered sale shall be null and void until vendee executes agreement of re purchase—Permissibility of proof by oral evidence.*

An alleged agreement that a registered deed of sale should be null and of no effect until the agreement of re-purchase has been executed by the vendee cannot be proved under the provisions of Proviso (4), S. 92, Evidence Act, and oral evidence in regard to any such agreement ought to be entirely excluded. (*Das and Dunkley, JJ.*) VEERAPPA CHETTIYAR *v.* KO BA KIN. **148 I.C. 195=6 R.R. 203=A.I.R. 1933 Rang 310.**

——**92, Proviso (4)**—Oral agreement—Modifying terms of reference to arbitration—Not Permissible. *See* ARBITRATION *supra.* **A.I.R. 1932 All. 154.**

——**S. 92, Proviso (4)**—*Oral agreement—Mortgage deed—Subsequent oral agreement between co-mortgagors—Admissibility.*

A distinct oral agreement between co-mortgagors that they will not be rateably bound, made subsequent to the execution of the mortgage-deed should, in order to be admissible under the fourth proviso to S. 92, be reduced to writing. (*Jackson, J.*) MUTHUKUMARASWAMI MUDALIAR *v.* GOVINDA PADAVACHI **I R 1932 Mad. 359=137 I C. 285=1932 M.W.N. 168=35 L.W 145 =A.I.R 1932 Mad. 218**

——**S. 92, Proviso (4)**—*Oral agreement to take less than what is due under promissory note—Admissibility.*

EVIDENCE ACT (1872), S. 92—Partition.

Oral evidence to prove an agreement to take less than what is due under a promissory note is not admissible. The criterion does not lie in whether the subsequent agreement is by law required to be in writing, but it lies in whether the original contract, grant or disposition of property the terms of which the subsequent oral agreement is to rescind or modify, is by law required to be in writing. (*Mya Bu and Baguley, JJ.*) MA ON BAW *v.* V. E. P. R. CHETTYAR FIRM. **156 I.C. 743=8 R.R. 37=A.I.R. 1935 Rang. 188.**

Partition.

——**S. 92**—*Partition—Deed unregistered — Oral evidence—Admissibility.*

When there has been a partition effected by a deed which is unregistered, oral evidence is not admissible to prove the terms of the partition, although only the bare fact of partition may be proved by such oral evidence. (*Ba U, J.*) MAUNG PE *v.* U TUN HLAING. **157 I.C. 974=8 R.R. 130.**

Partnership.

——**S. 92 Proviso (4)**—*Partnership — Registered agreement—Subsequent agreement modifying—Payment made—Evidence of—Admissibility.*

Where a partnership is formed in 1921 between *P* and *D* to carry on certain business and under the terms of the contract which are reduced to writing and registered, the partnership is to continue for five years, oral evidence to prove that the partnership had, in spite of the terms in the contract, been dissolved in June 1922 and *P* was paid his share of the assets is admissible. It is not excluded by S. 92, Proviso (4). (*Jackson J.C.*) NURUL HASAN *v.* IMAMBUX. **136 I.C. 874=I.R. 1932 Nag. 34=14 N.L.J. 179=A.I.R. 1932 Nag. 42.**

Promissory note.

See also AGENCY, CONSIDERATION AND ORAL AGREEMENT *supra.*

——**S. 92**—*Promissory note—Executant—Evidence to show he executed it as surety—Admissibility.*

Under S. 92, it is not open to a person to lead oral evidence to prove that he signed a promissory note merely as a surety, when on the face of it it appears that he executed it as a debtor. 8 C.W.N. 101, 5 Rang. 168, A.I.R. 1923 Rang. 15; A.I.R. 1924 Rang 360; 24 M.L. J. 91, Foll. (*Rangnekar, J.*) KHUMAJI GAJAJI & CO. *v.* CAMAJI. **6 R.B. 284=148 I.C. 260=35 Bom.L.R. 1197=A.I.R. 1934 Bom. 39.**

——**S. 92**—*Promissory note—Executant—If can show, he signed as surety.*

One of the executants of a promissory note cannot be allowed to let in evidence to the effect that he signed the promissory note only as a surety 59 Cal. 106, Rel, on; 8 C.W.N. 101 and 101 18 I. C. 696, Ref. (*Harrison and Agha Haidar, JJ.*) ABDUL HAMID KHAN *v.* PUNJAB NATIONAL BANK. **147 I C. 785=6 R.L. 449=35 P. L.R. 259=A.I.R. 1933 Lah. 965.**

——**S. 92**—*Promissory note—Executant—If can show, he signed as surety.*

In a suit on a promissory note, it is not open to one of the executants to prove that to the knowledge of the plaintiff he is only a surety and that he is discharged from liability as a surety as, by reason of the plaintiff's conduct, he is deprived of the security against the other executant Exceptions allowed by the Courts of Chancery in England to the rule of law enacted in India under S. 92 of the Evidence Act should not be given effect to in this country. (*Madhavan Nair, J.*) VENKATAKRISTNAYYA *v.* KARNEDAN KOTHARI. **1935 M.W.N. 525=42 L.W. 24=8 R.M. 59=156 I.C. 827=A.I R. 1935 Mad. 643.**

EVIDENCE ACT (1872), S. 92—Third parties.

——**S. 92**—*Promissory note — Inadmissibility—Relief on original consideration—Permissibility.*

Plaintiff lent in 1288 Rs. 20,000 to *D*, and two others. In 1291 she lent a sum of Rs. 5,000 to *D*, to re-pay a portion of the original loan and *D* executed a promissory note for Rs. 5,000. In a suit on the promissory note, plaintiff alleged that cash consideration was paid on the date of execution of the note. The promissory note proved to be inadmissible for non-cancellation of the stamp and the cash consideration was not only not proved, but plaintiff"s agent admitted that nothing was paid on the date of execution of the pro-note. Thereupon the plaintiff tried to fall back on the loan of Rs. 20,000.

Held, that the plaintiff could not do that and that the suit should be dismissed. (*Das and Braon, JJ.*) MA SHWE HPAW *v.* DWA HPAW. **6 I.R. (Rang.) 42=145 I.C. 378 (2)=A.I.R. 1933 Rang. 161.**

Receipt.

——**S. 92**—*Receipt—Practice of sending receipts in advance.*

In India, the practice of applying for payment of a debt by sending a receipt for the money is by no means unknown and is in fact referred to in Ill. (*i*) to S. 92 of the Evidence Act. (*Kulwant Sahay and Rowland, J.*) SRIPAT SING *v.* NARESH CHANDRA BOSE. **I.R. 1932 Pat. 278=140 I.C. 104=13 Pat. L.T. 545=A.I.R. 1932 Pat. 332.**

Release.

——**S 92. Proviso (4)**—*Release—Mortgage—Oral release by mortgagee of one item—Agreement with purchaser of item before purchaser—Admissibility.*

There is no law in India whereby a release of mortgage should be in writing and registered. A contract of release between the mortgagor and the mortgagee may require writing under S. 92 (4) of the Evidence Act and may require registration under the Registration Act. But the case is different when the contract to release is between the mortgagee on the one hand and a stranger who purchases the property released after the contract. Such an oral release is valid. (*Ramesam and Stone, JJ.*) MUNUSWAMY MUDALIAR *v.* GOVINDARAJA CHETTIAR **58 Mad. 371=153 I.C. 668=7 R.M. 369=40 L W. 942=A.I R. 1935 Mad. 113=68 M.L.J. 91.**

Scope.

——**S. 92**—*Scope.*

Notwithstanding S. 92, evidence can be given to show that there was really no transaction in existence which has been recorded in the document. (*Tek Chand and Monroe, JJ.*) RAM LAL *v.* DHIAN SINGH. **6 I.R. (Lah) 122=145 I.C. 689=A.I.R. 1933 Lah. 222.**

——**S. 92**—*Scope.*

The Court in considering whether oral evidence can be given or not has to look to the Evidence Act and the equitable considerations which have influenced the English Courts in like cases have no application in this country. (*Rangnekar, J.*) KHUMAJI GAJAI & CO *v.* DAMAJI. **6 R.B. 284=148 I.C. 260=35 Bom. L.R. 1197=A.I.R. 1934 Bom. 39.**

Third parties.

——**S. 92**—*Third parties.*

S. 92 does not apply when the question arises between third parties to the agreement in respect to its construction. (*Baker and Divatia, JJ.*) BASVANT GOWDAPPA *v* ABASALLI. **150 I.C. 635 7 R B. 8=36 Bom.L.R. 158=A.I.R. 1934 Bom 145.**

——**S. 92**—*Third parties—Registered lease—Allegation by third party that it was a sale—Evidence to prove —Admissibility.*

EVIDENCE ACT (1872), S. 92—Third parties.

S. 92 of the Evidence Act is no bar to a person not a party to the transaction giving evidence to show that the transaction was not really what it purports to be. (*S. K. Ghose, J.*) TROILOKYA NATH GHOSE *v.* JAJNESWAR PAL. **152 I.C. 933—7 R.C. 334=38 C.W.N. 1004=A.I.R. 1934 Cal. 821.**

———**S. 92**—*Third parties—Sale deed—Oral evidence by person not party to it—Admissibility.*

A person not party to a sale deed nor the representative in interest of any party thereto can let in oral evidence to establish that it was not executed with knowledge and consent of another as mentioned in sale deed. (*Dunkley, J.*) MAUNG HYANE *v.* MAUNG AUNG NYUN. **156 I.C. 162—7 R.R. 380—A.I.R. 1935 Rang. 122.**

Variation of terms.

———**S. 92, Proviso (4)**—*Variation of terms—C. I. F. contract—Permissibility.*

A C. I. F. Contract is not required by law to be in writing. If it is not registered, it can be legally varied by an oral agreement modifying its terms. (*Broadway, C.J. and Abdul Qadir, J.*) DURGA DATT JAGAN NATH *v.* WOOD & COMPANY OF DELHI. **I.R. 1933 Lah. 198=142 I.C. 413—34 P.L.R. 266=A.I.R. 1933 Lah. 453.**

———**S. 92, Proviso (4)**—*Variation of terms—Joint mortgage—Oral agreement by which mortgagee agreed to release co-mortgagor on payment of her share—Admissibility.*

The plaintiff along with others had jointly mortgaged her share in the ancestral property before partition. After partition she built a house on the property mortgaged. The mortgagee claimed the house as accession to the mortgage. The mortgagor relied on an agreement whereby the mortgagee orally agreed to release her as she had paid him her share of the mortgage debt.

Held, that as under the mortgage joint liability had been created the mortgage security was indivisible. Therefore any agreement between a co-mortgagor and mortgagee in derogation of the security was inadmissible in evidence being one to vary the terms of the original agreement. (*Mosely, J.*) MA TIN SHWE *v.* ALAGAPPA CHETTIAR **157 I.C. 126—8 R.R. 80—A.I.R. 1935 Rang. 197.**

———**S. 92, Proviso (4)**—Variation of terms—Mortgage deed—Subsequent *kathbundi* receipt—Mode of discharge provided—Permissible. *See* MORTGAGE, *supra*. **35 C.W.N. 861.**

———**S. 92, Proviso (4)**—*Variation of terms—Pronote—Oral agreement as to mode of payment—Proof of.*

An oral agreement by the executant of a promissory note that, instead of money being paid, payment shall be made in the form of a transfer of land is not in itself satisfaction, but an agreement modifying the terms of the original contracts, by substituting payment by means of a transfer of immovable property for payment in cash. Proviso (4) to S. 92 debars the proof of any such agreement by means of oral evidence. A.I.R. 1920 Bom. 115; A.I.R. 1919 Mad. 833, Rel. on.; A.I.R. 1928 Rang. 141, Expl. and Dist. (*Dunkley, J.*) NACHIAPPA CHETTYAR *v.* THEIVANAI. **151 I.C. 398=7 R.R. 68—A.I.R. 1934 Rang. 228.**

Waiver

———**S. 92**—*Waiver—Mortgage deed—Stipulation for default rate of interest — Subsequent oral agreement waiving default—Proof—Permissibility.*

A mortgage deed provided for interest at 7½ per cent. per annum on the principal amount. It further provided that the mortgagor should pay interest at 9 per cent. per annum in case the mortgagor committed default either in the regular amount of interest or in the repayment of the principal amount at the end of two years. The mortgagor committed default and the question as to the interest payable was raised in a proceeding for apportionment of the compensation amount for the land acquired. The mortgagor pleaded a subsequent oral agreement whereby the mortgagee agreed to waive the default rate of interest both for the past and for the future. He also alleged that payments had been made in pursuance of the alleged agreement and that the entire claim for interest had thus been discharged.

Held, that S. 92 of the Evidence Act was no bar to the plea of discharge in pursuance of the agreement being raised as a defence, because there was no variance of the original contract but a mere remission of part of the debt when it became payable and the arrangement is put forward merely as a promise of grace imposing no legal obligation; to probabilize the alleged acceptance of a lesser rate of interest. The arrangement pleaded was such as that specified in S. 63 of the Contract Act and was admissible as evidence of actual remission and full satisfaction, though not as evidence of a binding agreement to waive his rights. "There is nothing to prevent proof of actual waiver of past breaches, whether or not that is in pursuance of a promise to waive or not. A promise of grace to waive future breaches may be proved but, not being binding, is of no value unless performance has been actually waived. A binding agreement to waive future performance cannot be proved." 58 M.L.J. 503, Appr.; 52 M.L.J. 224, Expl.; 26 M. 195; 27 M. 368, 30 M. 231; 42 M. 42 (F.B.), 44 B. 55 and 55 M.L.J. 1. Ref. to. (*Wallace and Stone, JJ.*) VAIDYANATHA RAO *v.* KANDAPPA CHETTY. **54 Mad. 889=I.R. 1931 Mad. 644=132 I.C. 292=33 L.W. 517=A.I.R. 1931 Mad. 636=61 M.L.J. 556.**

EVIDENCE ACT (1872), S. 94.

———**S. 93**—*Consent decree—Construction—Admissibility of evidence.*

A consent decree is still a contract which must be construed as such although it has the sanctity of a judgment. Only under one set of circumstances could the parties be allowed to give evidence as to what a consent decree meant or to give evidence to assist the Court in coming to their conclusion; and that would be where there is a latent ambiguity. If ambiguity is on the face of the document itself, evidence is not admissible to enable Courts to construe it. Hence where a Court has any difficulty as to what the decree means either by reason of an ambiguous sentence or an apparent contradiction arising out of that, no evidence is admissible. (*Wort, J.*) JAHURI LAL *v.* KANDHAI LAL. **156 I.C. 302—7 R.P. 703—A.I.R. 1935 Pat. 123.**

———**S. 93**—*Patent ambiguity—Meaning of—Extraneous evidence*—"Sir *lands*"—*If ambiguous.*

If there is any patent ambiguity in a document, extraneous evidence is altogether forbidden under S. 93 of the Evidence Act. And when the language is plain and unambiguous it is not permissible to produce other evidence to show that there was a different intention on the part of the executant. The words "*sir* lands" in a document are not at all ambiguous and there no fresh evidence is admissible to show that what was meant was not *sir* lands but *sir* rights. Per *Sulaiman, C. J.* (*Sulaiman, C.J. and Bennet, J.*) DHANPATTI *v.* BADRI SINGH **156 I.C. 53=7 R.A. 1031=1935 A.W.R. 753=1935 R.D. 303 (2)=A.I.R. 1935 All. 729.**

———**Ss. 94 and 95**—*Sale deed—Language plain—Mistake in boundaries—Area described corrected—Extrinsic evidence—Admissibility.*

EVIDENCE ACT (1872), S. 95.

When the language used in a sale deed is plain in itself, and applies accurately to existing facts, though the boundaries do not correctly describe the plots sold evidence is not admissible to show that the language is used in a peculiar sense or to show that it was not meant to apply to such facts, when the area sold is correctly described (*Rangi Lal, J.*) MT. RAM RAKHI *v.* GAURI SHANKER. **6 R.L. 855=150 I.C. 363=36 P.L.R. 61.**

———**S. 95**—*Receipt for money received—Meaning of —Evidence to explain—Admissibility.*

The question as to whether a document does or does not contain an acknowledgment is a question of interpretation and rules of evidence applicable to other deeds are applicable to a receipt for money So where just prior to the expiration of three years from the date of the previous promissory note, the defendant executed another receipt for the amount already received, evidence is admissible to show that the receipt referred to the original consideration. (*Hazan, C. J. and Bisheshwar Nath, J.*) BEBU RAM CHAUBE *v.* SHEO HARAKH TEWARI. **8 Luck. 195=141 I.C. 298=I R. 1933 Oudh 52=9 O.W.N. 1024=A.I.R. 1933 Oudh 80.**

———**S. 95**—*Security bond— Construction— Order directing security—Reference to—Permissibility.*

The rule that a security bond must be strictly construed according to its own terms is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, S. 95, Evidence Act, allows a reference to antecedent circumstances. Thus where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing the security to be given. A. I. R. 1932 P.C. 131, Rel. on ; A. I. R. 1917 P. C. 23 and A. I. R. 1929 P.C. 34, Ref. (*Jack and Bartley, JJ.*) MOHENDRA NATH BANERJEE *v.* SATISH CHANDRA CHOUDHURY BAHADUR. **61 Cal. 890=150 I.C. 985 (2)= 7 R.C. 51=A.I.R. 1934 Cal. 569.**

———**S. 97**—*Applicability—Sale-deed—Ambiguity in language—Conflict between description and boundaries of property sold—Extrinsic evidence—Applicability.*

In construing a document, the document must be taken as a whole, and if there is inconsistency between two parts of it, the case is one of ambiguity to which S. 97 of the Evidence Act will apply. Where, therefore, the language of a sale-deed, so far as the boundaries are concerned indicates that the whole of a grove is sold, but another part of it referring to the survey number and area indicates that only part of it is sold, evidence is clearly admissible to show whether it was meant that the deed should convey the whole of the grove or only part of it. (*Niamatullah, J.*) BANAPHAL SINGH *v.* NOOR MAHOMMED. **155 I.C 634=7 R.A. 962=1935 A.L J 664=1935 R D. 263=1935 A.W.R. 715=A.I.R. 1935 All. 662.**

———**S. 97**—*Deed of transfer—Identification of property—Admissibility of evidence—Test.*

If the wording of the deed is sufficiently specific to identify the property under transfer beyond reasonable doubt, no question of taking further evidence arises, even though part of the description may be inaccurate, such as the area of the property or the survey number assigned to it. On the other hand, if the description cannot be made to apply to any known property in all its details, but can be made to apply either to one or other of two known properties by eliminating part of the description, then further evidence may be taken to determine which property has actually been transferred. (*Beckett, J.*) JHANDA *v.* MAHAN SINGH. **158 I.C. 571=8 R.L. 281.**

EVIDENCE ACT (1872), S. 101.

———**S. 101**—*Allegation in plaint—Onus of proof.*

Where a plaintiff comes to Court with certain allegations it is for him to establish those facts and the affirmative proposition contended for by the plaintiff cannot be established by showing that the witnesses who deposed to a contradictory negative proposition on behalf of the defendants are not reliable. (*Bisheshwar Nath and Nanavatty, JJ.*) ANAND BAHADUR SINGH *v.* DEPUTY COMMISSIONER, BARABANKI. **I R. 1933 Oudh 184=143 I.C. 568=10 O.W N. 412=A.I.R. 1933 Oudh 242.**

———**S. 101**—*Appeal—Error of lower Court —Onus on appellant.*

In appeal, the onus of proving that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to equal possibilities of the judgment on either the one side or the other being right, he has not succeeded. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **150 I.C 330=6 R.O. 635=10 O.W.N. 201= A.I.R 1933 Oudh 142.**

———**S. 101**—*Benami—Onus of proof.*

Where property is purchased in the name of a person, the onus of proving that such person is only a benamidar and that his name was entered not with the idea of conferring any title on him is on him who makes such allegation. (Case-law Ref.) (*Das and Dunkley, JJ.*) MA KHATUN *v.* MA BI BI. **149 I.C. 654=6 R.R. 304= A.I R. 1933 Rang. 393.**

———**Ss. 101 and 102**—*Consideration— Document alleging receipts of payments—Third party denying consideration—Onus.*

Though as between parties to a document the admission or proof of execution would shift the onus on to the party denying consideration, yet a person who is not a party to the document in question cannot be held liable on alleged receipts of payments unless there is evidence to prove that the money was actually paid. (*Dalip Singh and Sale, JJ.*) SUKHA NAND *v.* MT. SHIV DEVI. **157 I.C. 787=A.I.R. 1935 Lah. 14.**

———**Ss. 101 and 102**—Consideration—Sale-deed—Failure of consideration—Burden of proof. *See* DEED —SALE-DEED—FAILURE OF CONSIDERATION. **A.I. R. 1934 Pesh. 123.**

———**S. 101**—*Fraud—Burden of proof.*

It is a well-settled principle of law that those who allege fraud must prove it. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R (Pat) 17=145 I.C. 1=14 Pat.L T. (Sup.) 1=A.I.R. 1933 Pat. 306.**

———**S. 101**—*Fraud—Knowledge of party defrauded —Onus.*

Once fraud is established, the burden of proof is on the decree-holder or the auction purchaser, as the case may be, of establishing that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute fraud at a time which is too remote to allow him to make the application. (*Mitter, J.*) RAMIZADDIN BASAR *v.* NAIMADDI BASAR. **I R. 1933 Cal. 391= 143 I.C. 284=56 C.L J 570 A.I R 1933 Cal. 339.**

———**S. 101**—*Landlord and tenant—Dispute as to existence of tenancy—Initial onus is on tenant.*

The initial onus ordinarily lies on the tenant where the existence of tenancy is in dispute. (*Niamatullah and Bennet, JJ.*) RIKHDEO RAI *v.* GANGA PRASAD PANDE. **6 I.R. (All.) 395=146 I.C. 1002=14 L R. 632 (Rev.)=17 R D 772=A.I.R. 1933 All. 825.**

———**S. 101**—*Landlord and tenant—Ejectment—Suit for—Plea of permanent occupancy—Onus.*

EVIDENCE ACT (1872), S. 101.

The burden of proving a plea of permanent occupancy right in a suit for ejectment is on the tenant. 47 M. 337 (P.C.), Ref. (*Anantakrishna Aiyar, J.*) GOPALA KUDVA *v.* JUVAPPA KAMTHI. **I.R. 1931 Mad. 721 = 133 I.C. 369 = 1930 M.W.N. 874 = 35 L.W. 400 = A. I.R. 1931 Mad. 577.**

———**Ss. 101 to 104**—*Limitation—Acknowledgment saving limitation—Burden of proof.*

Per *Sulaiman, Ag. C. J.*—The onus lies on the creditor to prove that the acknowledgment to pay a money debt was made within time; and it would be contrary to the provisions of Ss. 101 to 104 of the Evidence Act to require that the burden lies on the defendant who acknowledged the liability. (*Sulaiman, Ag. C. J. and Niamatullah, J.*) ABDUL RAFIQ *v.* BHAJAN. **53 All. 963 = I.R. 1932 All. 296 = 137 I.C. 243 = 1932 A.L.J. 77 = A.I.R. 1932 All 199.**

———**S. 101**—*Limitation—Defendant thinking that suit is barred by limitation—It is for defendant to establish facts that lead to support his plea.*

Where any question of an action being barred by limitation arises and if the defendant contends that the action is so barred, it is necessary in the circumstances of the case, having regard to the manner in which the plaintiff brings his claim, for the defendant to establish such facts as would show that the action is in fact barred by limitation. (*Wort, J.*) PADHUM LAL *v.* TRIBENI SINGH. **154 I.C. 1043 = 7 R.P. 518 = A.I. R. 1934 Pat. 44.**

———**S. 101**—*Negative allegation—Proof of—Onus.*

The general rule of evidence is that if in order to make out a title it is necessary to prove a negative, the party who avers it must prove the title. In some cases this allegation, negative in form, is made by the plaintiff, in others by way of defence. The rule applicable to all cases is that where a claim or defence rests upon a negative allegation the one asserting such claim or defence is not relieved of the *onus probandi* by reason of the form of the allegation or the inconvenience of proving a negative. (*Guha and Bartley, JJ.*) HEM CHANDRA GANGOPADHYA *v.* MATI LAL GANGOPADHYA. **60 Cal. 1253 = 149 I.C. 177 = 6 R.C. 524 = 37 C.W.N. 1174 = 58 C.L.J. 85 = A.I.R. 1934 Cal. 68.**

———**S. 101**—*Objection to onus—Party accepting burden of proof in trial Court—If can complain in appeal.*

When a party accepts the burden of proof laid on him by the Court below and undertakes to discharge it but fails to do so, he cannot in appeal turn round and say that he has not been fairly treated in the matter of burden of proof. (*Sale, J.*) BISHAMBAR DAS *v.* TELU RAM. **A.I.R. 1934 Lah. 1019 (2).**

———**S. 101**—*Onus immaterial—All available evidence brought on record.*

It would be idle to attach great importance to the question of onus, when all the available evidence has been brought on the record and the parties have fought out their case on all possible grounds. (*Almond, J. C. and Mir Ahmad, A. J. C.*) CHUNI LAL *v.* RADHA DEVI. **153 I.C. 71 = 7 R.Pesh. 62 = A.I.R. 1934 Pesh. 134.**

———**S. 101**—*Onus immaterial—Entire evidence before Court.*

When the entire evidence is once before the Court, the debate as to onus of proof is purely academical and this is more so at the appellate stage. Question as to burden of proof as to necessity in the case of widow's alienation held not to arise. (*Guha and Bartley, JJ.*) DEBENDRA NATH SARMA *v.* NAGENDRA NATH DUTT. **60 Cal 1158 = 149 I.C. 522 = 6 R.C. 602 = 58 C.L.J. 181 = 37 C.W.N. 1001 = A.I.R. 1933 Cal. 900.**

———**S. 101 et seq**—*Onus a material—Evidence fully adduced.*

The question of burden of proof loses its importance where the decision does not wholly rest on it and the parties have in fact adduced full evidence at their disposal. A.I.R. 1925 Cal. 61 and A.I.R. 1929 Lah. 249, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) THIMMIAH *v.* VENKAPPA. **10 Mys. L.J. 67.**

———**S. 101**—*Onus immaterial—Evidence given by both parties.*

Where both parties have given evidence, the question of onus is immaterial. (*Agha Haidar, J.*) MOTI RAM *v.* OFFICIAL RECEIVER. **153 I.C. 997 = 7 R.L. 493 = 37 P.L.R. 487 = A.I.R 1934 Lah. 936 (2).**

———**S. 101**—*Onus immaterial—Evidence produced by both sides.*

The burden of proof shifts as the evidence is developed and when both the parties produce their evidence the question on whom initially the onus lay ceases to be of much importance because the Court would be at liberty to draw such reasonable inferences as to the fact in issue from the evidence offered by both parties. (*Niyogi and Grille, A.J.Cs.*) BHANJI *v.* GOVIND. **29 N.L.R. 298 = 149 I.C. 1200 = 6 R.N. 264 = A.I.R. 1933 Nag. 379.**

———**S. 101**—*Onus immaterial—Whole evidence before Court.*

It is not necessary to enter upon a discussion of the question of onus, where the whole of the evidence in the case is before the Court and it has no difficulty in arriving at a conclusion in respect thereof. (*Sir Lancelot Sanderson.*) MAHOMED ASLAM KHAN *v.* FEROZE SHAH. **59 I.A. 386 = 13 Lah 687 = I.R. 1932 P.C. 258 = 138 I.C. 770 = 36 L.W. 441 = 37 C.W.N. 71 = 9 O.W.N. 882 = 34 P.L.R. 55 = 1933 A.L.J. 491 = 56 C. L.J. 330 = A.I.R. 1932 P.C. 228 = 63 M.L.J 694 (P.C.)**

———**Ss. 101 and 103**—*Rules governing burden of proof.*

The difficulty as to the placing of burden of proof arises from the fact that the terms "burden of proof", and what is sometimes termed "*onus probandi*" are sometimes confused. When issues have been framed on the pleadings and the preliminary examination of the parties, if they have been examined, the case rests at a certain point at which, if no further evidence is led, one party has got to lose. On that party is the "*onus probandi*," sometimes called the "right to begin," That party has to make out a *prima facie* case which, if unrebutted, will ensure success for him. When, however, all evidence on both sides has been recorded, a second state is reached and this is where the point of view of the Judge comes in and it is necessary to find where is the burden of proof. To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what proposition of fact or of law the parties were at variance. (*Bagulay, J.*) MAUNG PE *v.* C.T.M.N. R. CHETTIAR FIRM. **6 I.R. (Rang.) 47 = 145 I.C. 413 = A.I.R 1933 Rang. 211.**

———**S. 101**—*Shifting of onus—Thumb mark of party proved—Onus of non payment—Both sides leading evidence—Onus immaterial.*

If the thumb mark on the receipt is proved to be that of the plaintiff, the burden of proving non-payment shifts to him, and if both parties have led evidence, it is not important on whom the onus lies to begin with. (*Hilton, J.*) RAMJI LAL *v.* DEBI SAHAI **152 I.C. 240 = 7 R.L. 273 = 35 P.L.R. 462 = A.I.R. 1934 Lah. 542.**

———**S. 101**—*Succession—Exclusion of sister from inheritance—Onus of proof.*

EVIDENCE ACT (1872), S. 101.

Where the right of sisters is challenged on the ground that they are excluded in the presence of collaterals, the onus of proving the existence of collaterals lies on those who challenge the sister's right. (*Rasa and Smith, JJ.*) MAHABIR SINGH *v.* MT. RADHA. **150 I.C. 533=7 R. O. 27=10 O.W.N. 424=A I.R. 1933 Oudh 231.**

———S. 101—*Will—Execution—Onus on propounder.*

Where a will is propounded, the *onus probandi* is on the party who propounds the will. He must prove that the will was duly executed and that it was in existence at the date of the death of the testator. (*C. C. Ghose and S.K. Ghose, JJ.*) JOTINDRA NATH ROY CHOWDHURY *v.* RAJ LAKSHMI DEBI. **6 I.R. (Cal.) 97=145 I.C. 338=57 C.L J. 8=A.I.R 1933 Cal. 449.**

———S. 101—*Wrong view as to onus—Interference in second appeal.*

If the Judge's finding is determined only by the question of burden of proof, or on a one sided examination of the evidence due to the view taken about the burden of proof, then the finding stands in need of revision; but if the evidence and circumstances on both sides are duly considered, the question of the burden of proof is of very little importance. (*Gruer, A.J.C.*) PANDURANG *v.* TUKARAM. **152 I.C. 441=7 R.N. 103=A.I.R. 1934 Nag. 253.**

———S. 102—*Consideration—Receipt for money borrowed—Denial.*

Where a person passes a receipt in favour of another for money borrowed from him, the burden of proving that the money borrowed did not belong to that person lies heavily on the debtor. (*Macnair, J.C.*) PATIRAM *v.* SADASHEO. **I.R. 1931 Nag. 107=132 I.C 459=A.I.R. 1931 Nag.97.**

———S. 102—*Hand-note—Execution and Consideration—Onus of proof.*

When the execution of a hand-note is admitted, the onus of proving that no consideration passed is thrown entirely on the defendant. But where the defendant only admitted he put in his signature and thumb mark on some other document, the onus of proving the execution of the hand-note sued upon is on the plaintiff. (*Courtney Terrell. C J. and Macpherson, J.*) CHULHAI LAL DASS *v.* KULDIP SINGH. **I.R. 1931 Pat. 488=134 I. C. 632=12 Pat.L.T. 231=A.I.R. 1931 Pat. 266.**

———S. 102—*Hand-note—Execution—Nature of proof.*

Where the execution of the hand-note sued upon is denied by the defendant, the onus that rests on the plaintiff of proving due execution comprises proof of not merely the identity of the thumb impression but that it was put in after the document had been written and completed. There is no difference in the application of this rule between cases where the signature or thumb-impression on the document sued upon is admitted by the defendant or proved by the plaintiff. Very slight evidence apart from the identity of the impression may suffice to prove the plaintiff's case but the fact remains the onus is still on him. 35 I.C 56; 5 Rang. 527, Ref. (*Fazl Ali and Scroope, JJ.*) RAMLAKHAN SINGH *v.* GOG SINGH. **I.R. 1931 Pat. 491=134 I.C. 635=12 Pat.L.T. 233=A.I.R. 1931 Pat. 219.**

———S. 102—*Marriage—Validity—Burden of proof.*

Per *Sulaiman, C.J.*—The burden would lie on any party who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed, the marriage itself was void. (*Sulaiman, C. J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428=153 I.C. 733=7 R.A. 583=1934 A.L.J. 1129=3 A.W R. 70=A.I.R. 1934 All. 273.**

EVIDENCE ACT (1872), S. 103.

———S. 102—*Pardanashin lady—Transaction with.*

It is for the person claiming the benefit from the disposition of property by the pardanashin lady to establish affirmatively that it was substantially understood by the lady and was really her free and intelligent act. If she is illiterate it must have been read over to her : if the terms are intricate, they must have been adequately explained, and her degree of intelligence will be a material factor, but independent legal advice is not in itself essential. A. I. R. 1925 P.C. 204, Foll. (*Sir George Lowndes.*) RAMANAMMA *v.* VIRANNA. **I.R. 1931 P C. 129=1931 M.W.N. 609=1931 A.L J. 544=33 Bom.L.R. 960=54 C L J 183=131 I.C. 401=35 C. W N 633=33 L.W. 757=A.I.R. 1931 P.C. 100=61 M.L J. 94 (P C.).**

———S. 102—*Setting aside transfer—Onus.*

When a plaintiff comes to Court and says that the transfer he made was not really meant to operate as a transfer, the burden of proof is initially on him to show that his allegation is right, for in the absence of any evidence on either side, the plaintiff's suit would fail. (*Mukerji and Young, JJ.*) AMRIT KUNWAR *v.* GUR CHARAN SINGH. **6 R.A. 503=147 I.C. 591=3 A. W.R. 11=A.I.R. 1934 All. 226.**

———S. 103—*Consideration—Sale deed—Vendor admitting receipt of full consideration—Rebuttal—Onus.*

Where the vendor admits receipts of full consideration in the sale-deed, the burden lies heavily on him to explain the admission and prove non-receipt of consideration. 29 All. 184 (P.C.), Foll. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546=I.R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840=A.I.R. 1931 Lah. 419.**

———S. 103—*Copyright—Infringement — Certificate of registration and books—Value of entries.*

Where in a case of infringement of copyright the complainant produces his certificate of registration and the book published at the time, and he further testified that the book is not the same as that produced by his father, the onus lies on the defence to show that matter contained in the complainant's book was also contained in the previous book. (*Bennet, J.*) EMPEROR *v.* SHEO CHARAN LAL. **I.R. 1931 All. 433=131 I.C. 865=32 Cr.L.J. 814=12 L.R. 54 (Cr.)=1931 A.L.J. 304=1931 Cr.C. 609=A.I.R. 1931 All. 353.**

———S. 103—*Exception to general law—Person claiming—Onus.*

Where a party claims an exception to the general provision of the law, the onus lies on him to prove that the exception applies. 52 Cal. 121 and 29 All. 292, Ref. (*Cunliffe, O.C.J. and Baguley, J.*) MAUNG SEIN BA *v.* MAUNG KYWE. **12 Rang. 55=150 I.C. 667=7 R. R. 2=A.I.R. 1934 Rang. 90.**

———S 103—*Possession—Suit for—Person in possession denying title of plaintiff's vendor—Onus.*

Where a suit by a purchaser of property for possession is contested by the person in possession on the ground that plaintiff's vendor had no title to the property, the onus is on plaintiff to prove that his vendor owned the suit property. (*Baguley, J.*) ARUNACHALAM CHETTIAR *v.* KO TU MAUNG. **6 I.R. (Rang.) 100=146 I.C. 445=A.I.R. 1933 Rang. 174.**

———Ss. 103 and 106—*Specific performance—Agreement to sell immovable property—Subsequent registered sale—Right of first vendee to specific performance—Onus.*

EVIDENCE ACT (1872), S. 103.

By an agreement, dated 26th November, 1926, the defendant No. 1 agreed to sell certain immovable property to the plaintiff. On the 22nd December, 1926, the defendant No. 1 sold the property to the respondent by a registered sale-deed.

Held, in a suit by the plaintiff for specific performance of the agreement of 26th November, 1926, (1) that although under S. 54 of the Transfer of Property Act, the plaintiff's agreement for sale did not of itself create any interest in or charge on the property, he was entitled, under S. 27 (*b*) of the Specific Relief Act, to enforce the agreement against the subsequent transferee of the property; (2) that under S. 27 (*b*) of the Specific Relief Act (as read with Ss. 103 and 106 of the Indian Evidence Act), the burden of proof primarily lay on the later transferee to bring himself within the exception in S. 27 (*b*) and to establish (*a*) payment of his money, (*b*) his good faith, and (*c*) absence of notice to him of the original contract. (*Lord Thankerton.*) BHUP NARAIN SINGH *v.* GOKHUL CHAND MAHTON. **61 I.A. 115 = 13 Pat. 242 = 1934 A.L.J. 291 = 59 C.L.J. 139 = 1934 M.W.N. 206 = 36 Bom.L.R. 421 = 147 I.C. 1134 = 38 C.W.N. 393 = 6 R.P.C. 108 = 3 A.W.R. 410 = 39 L.W. 363 = 11 O.W.N. 330 = 15 Pat.L.T. 67 = A.I.R. 1934 P.C. 68 = 66 M.L.J. 255 (P.C.).**

[R. 15 PLT 469 (473).**]**

———S. 103—*Succession to estate—Proof of relationship.*

When a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male holder, but also, *prima facie*, that no nearer heirs are alive. Where the Court cannot arrive at that conclusion on the evidence of the plaintiff, either because he is not in a position to speak on the subject or because his evidence is manifestly untrue, it should be satisfied by other credible evidence that no nearer heir exists before the defendant is called upon to substantiate his definite case that he is a nearer heir. Where both parties have adduced evidence, the question of onus loses all importance and the Court should record a definite finding as to whether the defendant is the nearer heir. The question may assume some importance where the Court has to reject the evidence adduced on either side as absolutely untrustworthy. In such a case the plaintiff's title can prevail only if the Court is in a position to find not only that he is related to the last male holder as he alleges, but also that no nearer heir is alive. (*Niamatullah and Rachhpal Singh, JJ.*) MT. CHUNNAKUNWAR *v.* LALA MUKAT BEHARI LAL. **151 I.C. 338 = 7 R.A. 140 = A.I.R. 1934 All. 117.**

———S. 105—*Applicability—Onus on accused.*

It is for the accused to prove the facts essential for the purpose of bringing his case within any of the exceptions. (*Mya Bu and Brown, JJ.*) NGA BASHIN *v.* EMPEROR. **I.R. 1933 Rang. 109 = 144 I.C. 420 = 34 Cr.L.J. 783 1933 Cr.C. 732 = A.I.R. 1933 Rang. 142.**

———S. 105—*Charge of murder—Plea of private defence—Burden of proof.*

Where on a charge of murder, the accused chooses to plead the right of private defence of person and property, the burden of proving the existence of circumstances bringing his case within one of the several exceptions in the Penal Code, or within any special exception of that Code must lie upon him, and under S. 105 of the Evidence Act, the Court is bound to presume the absence of such circumstances. (*Srivastava and Nanavutty, JJ.*) RAMESHWAR *v.* EMPEROR. **10 Luck. 718 = 154 I.C. 697 = 7 R.O. 488 = 36 Cr.L.J. 534 = 1935 O.W.N. 311 = 1935 Cr.C. 582 = A.I.R. 1935 Oudh 281.**

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———S. 105—*Criminal trial—Burden of proof.*

The burden of proof in a criminal trial is always on the prosecution, and it is only shifted on to the accused in so far as the latter may set up the existence of circumstances bringing his case within any of the exceptions. The mere fact that the defence theory is rejected will not prove the guilt of the accused. (*Nanavutty and Smith, JJ.*) BINDA *v.* EMPEROR. **152 I.C. 85 = 7 R.O. 177 = 35 Cr.L.J. 1489 = 11 O.W.N. 1224 = 1934 Cr.C. 1348 = A.I.R. 1934 Oudh 485.**

———S. 105—*Criminal trial—Plea of insanity—Burden of proof.*

Where a person accused of an offence pleads insanity, the burden of proving that he was of unsound mind at the time when he commited the offence charged, lies heavily upon him. (*Nanavutty, J.*) ONKAR DUTT NIGAM *v.* EMPEROR. **153 I.C. 780 = 7 R.O. 386 = 36 Cr.L.J. 392 (2) = 1935 O.W.N. 53 = 1935 Cr.C. 228 = A.I.R. 1935 Oudh 143.**

———S. 106—*Defendant intermixing his articles with those of plaintiff—Proportion of intermixture—Burden of proof.*

Where the defendant intermixes his articles with those of the plaintiff, it is within the knowledge of the defendant as to what proportion of the articles was the property of the plaintiff and what proportion was his property and he, being a wrongdoer, the burden of proving that proportion lies upon him and if he fails to discharge that burden, it must be presumed as against the defendant that the whole of the articles was the property of the plaintiff and must be taken as the measure of the plaintiff's loss. (*Courtney-Terrell, C.J and Agarwala, J.*) SITARAM SYAM NARAIN *v.* ISWARI CHARAN SARANGI. **13 Pat. 762 = 151 I.C. 942 = 7 R.P. 142 = 15 Pat.L.T. 702 = A.I.R. 1934 Pat. 492.**

———S. 106—*Party having special knowledge—Refusal to go into witness box—Inference.*

Where a party does not go into the witness-box to support his allegations regarding facts which are within his special knowledge, there arises a strong presumption against him. (*Tek Chand and Coldstream, JJ.*) DAULAT RAM *v.* HARDHIYAN SINGH. **I.R. 1932 Lah 502 = 138 I.C. 525 = 33 P.L.R. 207.**

———S. 106—*Party having knowledge—Duty to appear before Court.*

It is the duty of a party who has certain facts relating to his case within his personal knowledge to appear before the Court at a very early stage of the case as a witness and to give evidence relating to those facts and submit himself cross examination by the other side. (*Broadway and Agha Haidar, JJ.*) MAHOMED AHTRAM ULLAH KHAN *v.* DELHI MOTOR AND FURNITURE WORKS. **I.R. 1932 Lah. 616 = 139 I.C. 712 = 33 P.L.R. 906 = A.I.R. 1933 Lah. 243.**

———S. 106—*Railway Company—Loss of goods in transit—Proof of time of loss.*

The moment the default of the bailee is established and the responsibility falls to be determined under S. 161, Contract Act, the burden shifts on to him to prove that the loss, for which he is sought to be made responsible by the bailor occurred prior to the commencement of default on his part. When the goods are solely under the control of the bailee the fact as to when loss, destruction or deterioration occurred is a matter specially within his knewledge and therefore the burden of proving that the loss occurred at a particular time and not subsequently must be on him. (*Iqbal Ahmad, J.*) SECRETARY OF STATE FOR INDIA *v.* KESHO PRASAD SHEO PRASAD. **I.R. 1932 All. 561 = 139 I.C. 381 = 1932 A.L.J. 788 = A.I.R. 1932 All. 584.**

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———**S 106**—*Scope.*

S. 106 of the Evidence Act (relating to the burden of proving fact especially within the knowledge of any person) only applies to parties to the suit. (*Lord Thankerton.*) MAHABIR SINGH *v.* ROHINI RAMANADHWAJ PRASAD SINGH. **I.R. 1933 P.C. 49 = 1933 M.W.N. 357 = 142 I.C. 220(2) = 57 C.L.J. 222 = 37 L.W. 521 = 35 Bom. L.R. 500 = 37 C.W.N. 657 = A.I.R. 1933 P.C. 87 = 64 M.L.J. 413 (P.C.).**

———**S. 106**—*Suit for mesne profits—Burden of proof.*

In a suit for mesne profits, it the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Courts sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that, more might have been received. 47 M. 800 and 24 All. 475, Ref. (*Venkatasubba Rao and Reilly, JJ.*) DHANARAJAGERJI *v.* PARTHASARATHY RAYANIM VARU. **57 Mad 49 = 148 I.C. 356 = 6 R. M. 470 = 38 L.W. 714 = 1933 M.W.N. 1182 A.I.R. 1933 Mad. 825 = 66 M.L.J. 263.**

———**S. 106**—*Unlawful association—Membership of—Cessation of—Proof—Presumption.*

Where a person is charged with having been a member of an association declared unlawful by the Government under the Criminal Law Amendment Act, the burden of proof is not on the accused to prove he discontinued his membership. It is for the prosecution to prove he continued to be a member even subsequent to the notification by Government. The Act imposes no obligation on the member to do anything specific to terminate the membership and so there is no question of there being anything especially within the knowledge of the accused. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* SHRIPAD RAMCHANDRA. **55 Bom. 484 = I.R. 1931 Bom. 235 = 130 I.C. 27 = 32 Cr.L.J. 472 = 33 Bom L.R. 90 = 1931 Cr.C. 177 = A.I.R. 1931 Bom. 129.**

———**S. 108**—*Common catastrophe—Two brothers dying in same catastrophe—No presumption.*

Where two brothers die in the same catastrophe and it is not known as to who died first there is no presumption either of survivorship or of contemporaneous death In such cases the plaintiff must prove his assertion. Two brothers died in a fire and the widow of one of them sought to succeed to the entire properties on the ground that her husband being the younger of the two must be deemed to have survived the other.

Held, there was no such presumption in the absence of direct evidence and that the onus of proving it lay upon her. (Case-law referred.) (*Nanavutty and Smith, JJ.*) MT. NEKSI KUAR *v.* MT. JWALA KUAR **9 Luck. 461 = 6 R O. 431 = 148 I.C 781 = 11 O.W.N. 267 = A.I.R. 1934 Oudh 101**

[**R.** 10 Luck. 92 (F.B.)]

———**S. 108**—*Mahomedan Law—Rights of inheritance of missing person—Presumption of Mahomedan Law—Applicability of the Evidence Act.*

The presumption of Mahomedan Law that as regards property coming to a missing person by inheritance he must be deemed to have died at the date of his disappearance is not a rule of substantive law but only a rule of evidence only and as such must be taken to have been superseded by the provisions of the Evidence Act. 7 All. 297 and 47 All. 673 Rel. on. (*Srivastava, J.*) AZIZUL HASAN *v.* MAHOMED FARUQ. **9 Luck. 401 = 6 R O. 327 = 147 I C. 973 = 10 O.W.N. 1254 = A.I.R 1934 Oudh 41.**

———**S. 108**—*Presumption of death—Circumstances justifying inference.*

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Where the entry in the khewat showed that a person was unheard of and there was other evidence to show that the person had not been heard of for 40 years, *held*, that the presumption as to death could be drawn. (*Hasan, C.J. and Bisheshwar Nath, J.*) TIRATHPATTI *v.* RANJIT SINGH. **6 Luck. 407 : I.R. 1931 Oudh 140 = 130 I.C. 124 = 7 O.W.N. 1120 : 14 R.D. 672 = A I.R. 1931 Oudh 40.**

———**S. 108**—*Presumption of death—Extent—Factum of death at particular time—Proof.*

Under S. 108 a presumption arises under certain circumstances as the death of a person, but there can be no presumption that the said person was dead at a particular time. Where in order to succeed in a suit it is necessary for a person to establish that a particular person was dead at a particular time, he has to prove the factum of his death at the said time by affirmative evidence either direct or circumstantial. (*Sulaiman, Ag.C. J. and Sen, J.*) JANGI SINGH *v.* GUDRI SINGH. **I.R. 1932 All. 625 (1) : 140 I.C. 12 = 1932 A.L.J. 175 = A.I.R. 1932 All. 365.**

———**S. 108**—*Presumption of death—Nature and extent.*

Where a person has not been heard of for seven years when the suit was instituted, S. 108 comes into operation and raises a presumption that at the institution of the suit he was dead but no presumption arises as to his date of death which should be proved in the same way as any other relevant fact. 5 Pat 312 (P.C.), Rel. on; 1 Lah. 554, Overr. (*Broadway, Dalip Singh and Johnstone, JJ.*) PUNJAB *v.* NATHA **12 Lah. 718 : I.R. 1931 Lah. 857 = 133 I.C 889 = 32 P.L.R. 704 = A.I.R. 1931 Lah. 582 (F B.)**

[**Ref. and Dis.** 10 Luck 92 (F.B.).]

———**S. 108**—*Presumption of death—Nature of—Death at any particular point of time—No presumption of—Burden of proof.*

Though where a man has not been heard of for seven years, there is a presumption that he is dead, there is no presumption that he died or was dead at any particular point of time. At what time within that period he died is not a mattter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right, to the establishment of which that fact is essential. Where, in a suit for possession of certain lands, the plaintiff alleged that the suit property belonged to two brothers, one of them *R* had not been heard of for over seven years and that the plaintiff was his nearest reversioner,

Held, that it was incumbent on the plaintiff to prove by oral and documentary evidence at what particular time *R* died, when succession opened out to him, and that at that particular time when succession opened out to him, he (the plaintiff) was the nearest reversioner. 5 Pat. 312 (P.C.); 110 E.R. 724; A.I.R. 1931 Oudh 101; 34 A. 36, 45 A. 466; A.I.R. 1932 All. 365; 54 Cal. 186, 47 B. 451; 37 M. 440; 12 Lah. 718 and A.I.R. 1927 Nag. 104, Ref. and Foll. in order of reference. (*Smith, Nanavutty and Rachhpal Singh, JJ.*) RAM KALI *v.* NARAIN SINGH. **10 Luck. 92 : 6 R O. 594 : 149 I.C. 632 = 11 O.W.N. 793 = 18 R.D. 399 15 L.R. 511 (Rev.) : A.I.R. 1934 Oudh 298 (F B).**

———**S. 108**—*Presumption of death—Scope of.*

Under S. 108, it is not permissible for a Court to raise a presumption that a certain person died at a particular time anterior to the proceedings in which the question of his death was in issue. The presumption can arise only in respect of the fact of his being dead or alive at the time of those proceedings. If a person has not been heard of for seven years, there is a presump-

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tion of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claimed a right to the establishment of which that fact is essential. (*Thomas, J.*) BISHNU SHAH *v.* SHEO GOVIND. **155 I.C. 954=8 R.O. 52 - 1935 O.W.N. 977 - A.I.R. 1935 Oudh 448.**

———**S. 108**—*Suit to recover possession—Death of prior holder—Party to fix it within 12 years of suit.*

Where a person sues to recover property from an alienee on the footing that the previous holder had not been heard of for more than seven years and was presumably dead.

Held, that the suit is governed by Art. 144 of the Limitation Act and that the plaintiff should prove that the last holder must have died within 12 years of the suit. (*Bhide, J.*) MEHAR KHAN *v.* SAKHI MAHOMED **I.R. 1931 Lah. 865 - 134 I.C. 97 - 33 P.L.R. 237 - A.I.R. 1932 Lah. 45.**

———**S. 109**—*Construction—"Have been acting as such"—Single instance—If sufficient.*

A person who obtains a decree for rent against another and realises the rent under it can be presumed to be the landlord of that other person. The words "have been acting as such" in S. 109 of the Evidence Act would be applicable even when there is only one single instance proved. This would therefore be sufficient to bring about the relationship of landlord and tenant so as to throw the onus of proving the contrary on the other party. (*Walsh, J.*) NARASAYYA *v.* VEERAYYA. **154 I.C 753 = 7 R.M. 489 40 L.W. 810 = A.I.R. 1935 Mad. 268.**

———**S. 109**—*Principal and agent—Cessation of relationship—Onus of proof.*

Where there is an admission that the parties stood in the relation of principal and agent, the burden of proving that they have ceased to stand to each other in that relationship is on the party who alleges such cessation of relationship. (*Tek Chand, J.*) HIRA WAZIR *v.* MOHAMMAD ALI. **157 I.C. 815 - A.I.R. 1935 Lah. 49.**

———**S. 110**—*Applicability—Suit against Government for declaration of title by person in possession of land—Burden of proof—Berar Land Revenue Code, S. 41 (1)—Effect of.*

S. 110 of the Evidence Act applies even in a case to which Government is a party. S. 41 (1) of the Berar Land Revenue Code is not meant to lay down a rule as to burden of proof at variance with that in S. 110, Evidence Act. It is open to a defendant in a suit for declaration of title by a person claiming ownership and possession to rely on S. 41 of the Berar Land Revenue Code in proof of his title to the land in suit by showing initially that it formed part of a public road within the last 60 years; it will then be for the plaintiff to show either that his title rested on a lost grant or that he had acquired title by adverse possession for over 60 years. (*Subhedar, A.J.C.*) GOVIND RUPCHAND PATIL *v.* SECRETARY OF STATE FOR INDIA. **31 N.L.R. 232 = 155 I.C. 264 = 7 R.N. 175 = 18 N.L.J. 201 - A.I.R. 1935 Nag. 163.**

———**S. 110**—*Dispute as to title to land—Person building on it and remaining in possession—Presumption of title of as against ostensible owner.*

Where a person makes a costly building on a site and remains in possession thereof for a considerable length of time, the presumption is that he had a right to build on the land in preference to one who is the ostensible owner. (*Fazl Ali and Rowland, JJ.*) ZINDA RAM

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MADAN LAL *v.* RAMRUP DAS. **157 I.C. 309 = 8 R.P. 103 = 16 Pat L.T. 367 = A.I.R. 1935 Pat 231.**

———**S. 110**—*Ownership of well—Presumption from possession—If rebutted by its user by public.*

Where the defendants who are in possession of a well have from time to time asserted their claim to the property as owners, the mere user of the well by the public is not sufficient to rebut the presumption of ownership, or to raise a further presumption that the defendants are trustees of the said property. User is evidence of dedication to the public, but the question whether such evidence is sufficient or not must depend upon the particular facts of each case, and where user is equally consistent with the defendants being owners of the property and such user being in the nature of an easement, the ordinary presumption which arises under S. 110 cannot be said to have been rebutted by the evidence of user. (*Ferrers, J.C. and Rupchand, A.J.C.*) HEMRAJ TOTARAM *v.* ALLAHDINO ABDULLAH. **156 I.C. 892 = 8 R.S. 17 = A.I.R. 1935 Sind 133.**

———**S. 110**—*Presumption of ownership—Long possession.*

Under S. 110 the plaintiff's long possession affords an initial presumption of his ownership. The mere fact that the defendant claimed rent could not defeat the presumption of title arising in the plaintiff's favour from the fact that the plaintiff had possession when the suit was instituted. (*Hilton, J.*) CHAMPAT *v.* TOTI RAM. **150 I.C. 17 = 6 R.L. 831 = 36 P.L.R. 64 = A.I.R. 1934 Lah. 324.**

———**S. 111**—"*Active confidence*"—*Interpretation.*

The words "active confidence" in S. 111 indicate that the relationship between the parties must be such that the one is bound to protect the interest of the other; in order that the law may be really protective, the words should receive a wider interpretation. (*Mukerji and M.C. Ghose, JJ.*) BENOY KRISHNA SADHUKHAN *v.* PANCHANAN SADHUKHAN. **159 I.C. 133 = 8 R.C. 275 = 40 C.W.N. 45 = 62 C.L.J. 99 = A.I.R. 1935 Cal. 671.**

———**S. 111**—*Applicability—Will—Application for probate—Propounder taking benefit under will—Good faith—Onus of proof.*

The language of S. 111 of the Evidence Act applies to the case of wills. In an application for probate by the propounder who takes a benefit under the will, the onus of proving good faith of the transaction is on the propounder. It is for him to remove any suspicion with reference to the execution of the will and with reference to the due understanding of the will by the executant. When what has been elucidated in the cross-examination of the propounder does not disclose any circumstance showing that he actively participated in the matter of execution of the will or in giving instruction in connection with the contents of the will, the burden of proof must be held to have been discharged by the propounder, especially when there is no evidence tendered by the opposing party, which might show that any undue influence was exercised on the executant of the will. (*Mitter and Patterson, JJ.*) NANDA LAL GANGULI *v.* DASARATHI MUKHERJI. **100 I.C. 71 = 8 R.C. 394 (2) = 61 C.L.J. 304 = A.I.R. 1936 Cal. 15**

———**S. 111**—*Burden of proof—Gift to person standing in fiduciary relationship—Onus.*

Where a gift is executed to a person standing in a fiduciary relationship to the donor, the donee is bound to establish the good faith of the transaction. For this, the donee may prove that the donor had independent advice or that the fiduciary relation had ceased for so long that the donor was under no control or influence

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whatever by showing existence of other circumstances sufficient to prove good faith. 52 I.A. 342=47 A. 703 (P. C.), Foll. (*Mukerji and M.C. Ghose, JJ.*) BENOY KRISHNA SADHUKHAN *v.* PANCHANAN SADHUKHAN. **159 I.C. 133=8 R.C. 275=40 C.W.N. 45=62 C.L J. 99=A.I.R. 1935 Cal. 671.**

———**S. 111**—*Person in position of active confidence—Burden of proving* bona fides *of transaction is on him.*

Where the person holds position of active confidence over the other party to a transaction, the onus of proving the *bona fides* of the transaction is heavily on him. (*Jai Lal and Monroe, JJ.*) LEKH RAJ *v.* MT. MEHTAB KAUR. **147 I.C. 968=6 R.L. 475=35 P L.R. 244=A I.R. 1933 Lah. 861.**

———**S. 111**—*Presumption in case of parda woman—Applicability to every illiterate woman.*

A pardanashin lady, by reason of her seclusion behind the parda, and by reason of the fact that ordinarily she does not have recourse by reason of the said custom to take advice from outside independent agency is presumed to be one, against whom the person that enters into any transaction with her is deemed to be in active confidence. There is no reason why that presumption should be extended to every illiterate and ignorant woman, unless upon the evidence placed upon record, her position is proved to be one which is really similar to a position which a purdanashin lady occupies. Unless that is done, there is no warrant for the presumption that in the case of every woman who is illiterate and ignorant, the presumption must be in her favour. 20 C. W.N. 638, Ref. (*Doraiswami Iyer, C. J.*) LAKSHMI BAYAMMA *v.* RAMCHANDRA RAO. **10 Mys. L.J. 217.**

———**S. 111**—*Relation of active confidence—Donor and donee—Burden of proving good faith.*

Even where the lady donor is not a strict pardanashin woman in the sense necessary to attract the application of the rule that protects pardanashin women, still when it is established that a transferee is in the active confidence of the transferor, S. 111 applies, whatever the condition of the transferor may be. Where out of the three donees, who were brothers, two were the mukhtyars of the lady donor and one of them was managing her estate and was her principal mukhtyar.

Held, that he was in a position of active confidence and that it was for him and his brothers to establish the good faith of the deeds of gift in their favour. A.I.R. 1929 Lah. 309, Ref. (*Jackson, A. J. C.*) VITHAL *v.* NARAYAN. **I.R. 1931 Nag. 131=134 I.C. 259=A. I.R. 1931 Nag 69.**

———**S. 111**—*Undue influence—Onus of proof.*

Where the fact of undue influence was not seriously disputed, the burden lies on him who desires to show that no undue influence was used and the transaction was made in good faith. (*King and Collister, JJ.*) AZIZUNNISSA *v.* SIRAJ HASAIN. **3 A W.R. 302=1934 A L.J. 817=152 I.C . 146=7 R.A. 268=A.I.R. 1934 All. 507.**

———**S. 112**—"*Access.*"

The word "access" means no more than opportunity of intercourse and does not imply actual cohabitation. (*Sir George Lowndes.*) KARAPAYA SERVAI *v.* MAYANDI. **12 Rang. 243=3 A.W.R. 319=1934 M.W.N. 199=38 C.W.N. 427=11 O.W.N. 229=1934 A. L.J. 250=59 C.L.J. 126=36 Bom.L.R. 394=6 R.P. C. 77=147 I C. 891=39 L.W. 244=A.I.R. 1934 P. C. 49=66 M.L.J. 288 (P.C.).**

———**S. 112**—"*Access*"—*Meaning.*

The word "access" means sexual intercourse and nothing short of it and not merely n opportunity for sexual intercourse. (English cases discussed.) (*Venkata-*

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subba Rao, J.) JAGANNATHA MUDALI *v.* CHINNASWAMI CHETTI. **55 Mad. 243=136 I.C. 36=I.R. 1932 Mad. 244=1931 M.W.N. 755=34 L.W. 424=A.I.R. 1932 Mad. 39=61 M.L.J. 878.**

[F. 66 M.L.J. 279 (281, 282)]

———**S. 112**—"*Access*," *meaning.*

The word "access" in S. 112 means actual sexual intercourse. A.I.R. 1934 Mad. 310, Foll. (*Dalip Singh, J.*) UMAR UD-DIN *v.* GHULAM MOHAMMAD. **160 I.C. 751=8 R.L. 587=A.I.R. 1935 Lah. 628.**

———**S. 112**—"*Access*"—*Meaning of—Non access—Physical incapacity of husband to procreate—If amounts to—Proof of incapacity.*

"Access" in S. 112 of the Evidence Act means effective access Physical incapacity on the part of the husband to procreate, if established, amounts to non-access within the meaning of S. 112 of the Evidence Act. But to brand a child born to a wife in a lawful wedlock with illegitimacy on this ground of non access, it would be necessary to prove, first, the precise age of the husband at the date of conception, and secondly to negative the possibility of premature virility at that age owing to precocious development. When there is no evidence on which it is possible to arrive at a finding as to the precise age of the husband at the date of conception, non-access based on the alleged incapacity of the husband cannot be held to be made out. (*Sir John Wallis.*) BHAGWAN BAKHSH SINGH *v.* MAHESH BAKHSH SINGH. **159 I.C. 325=8 R.P.C. 70=1936 M.W.N. 15=43 L.W. 7—38 Bom L R. 1=40 C.W. N. 360=38 P.L.R. 177=1935 O.W.N. 1261=1935 A.W.R. 1395=A.I.R. 1935 P.C. 199=69 M.L.J. 868 (P.C.).**

———**S. 112**—*Burden of proof.*

The burden of showing that parties to marriage had no access to each other at any time when child could have been begotten is on the person challenging legitimacy of the child. (*Sir George Lowndes.*) KARAPAYA SERVAI *v.* MAYANDI. **12 Rang. 243=3 A.W.R. 319=1934 M.W.N. 199=38 C.W.N. 427—11 O W.N. 229=1934 A.L J. 250=59 C L J. 126=36 Bom.L.R. 394=6 R.P.C. 77=147 I.C. 891=39 L.W. 244=A. I.R. 1934 P C. 49=66 M.L J. 288 (P.C.).**

———**S. 112**—*Claim against alleged putative father of her children by married woman—No proof of non-access by husband—Order for maintenance not sustainable.*

Where a married woman claimed maintenance from the petitioner on the ground that he was the putative father of her minor children.

Held, that as the evidence did not establish non-access to the woman of her own husband who lived in the vicinity, no order for maintenance can be passed. (*Burn, J.*) ANGANA ASARI *v.* NATARAJAN. **1932 M.W N. 1217.**

———**S. 112**—*Filiation proved—Presumption of legitimacy.*

Apart from S. 112 of the Evidence Act, where a child establishes the possession of filiation, *i. e.*, his parentage has been acknowledged by his parents and accepted by habit and repute, a presumption of legitimacy should be made in favour of the child. 10 Lah. 725 (P.C.) and A.I.R. 1927 Mad. 733, Foll. (*Abdul Qadir, J.*) KISHEN SINGH *v.* SADHU. **6 I R. (Lah.) 183=146 I.C. 198=34 P.L.R. 914=A.I.R. 1933 Lah. 520.**

———**S. 112**—*Illegitimacy—*"*Access*"*, meaning of—Nature of presumption under the section, explained.*

It is open to a party, who disputes a child's legitimacy, to prove that in point of fact such access did not take place between them, as by the laws of nature is necessary for the man to be in fact the father of the

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child; in other words, it is not the opportunity of access that matters but sexual intercourse.

There are two presumptions, one rebuttable, the other irrrebuttable. First, there is a presumption to start with, in favour of the legitimacy of a child born during wedlock, in other words, there is a presumption that the husband had intercourse with the wife at the time the child must have been conceived. But this is a rebuttable presumption and evidence may be adduced to show that there was in fact no access, that is to say, no sexual intercourse. The second presumption is this, if sexual intercourse be proved, the law will not permit an enquiry whether the husband or some other man was more likely to be the father of the child, the presumption to be drawn here becomes an irrebuttable one.

Where the fact, that the husband and wife continued to live near each other and in the same village, proved of course that there were opportunities of access, the circumstances based upon credible evidence that the child, whose legitimacy was disputed was born three years after a so-called divorce effected between the parents by a panchayat consequent upon a suspicion of unchastity of the mother, would make it extremely improbable that they had sexual intercourse and the presumption of legitimacy arising from the birth of the plaintiff during wedlock would thereby be rebutted. (*Venkatasubba Rao, J.*) SAMUEL *v.* ANNAMMAL. **149 I.C. 100 = 6 R. M. 599 = A.I.R. 1934 Mad. 310 = 66 M.L J. 279.**

———**S. 112**—*Legitimacy—Question as to—Evidence of impotence—Admissibility.*

Quaere.—Whether on an issue as to the legitimacy of a person, under S. 112 of the Evidence Act, evidence of impotence is admissible. (*Sir George Lowndes.*) KRISHNAYYA RAO *v.* SURYA RAO BAHADUR GARU **157 I.C 881 = 37 Bom.L.R. 852 = 1935 O.W.N 1055 = 8 R.P.C. 53 = 42 L.W 267 = 40 C.W.N. 1 = 1935 M.W.N. 1216 = A.I.R 1935 P.C. 190 = 69 M.L.J. 388 (P.C.).**

———**S. 112**—*Non access — Burden and nature of proof.*

S. 112 lays a heavy burden on the contesting defendants of proving or 'showing' non-access but such proof is not different from any other species of proof under the Act, namely, 'when after considering the matters before it, the Court either believes' that there was non access, "or considers its existence so probable that a prudent man ought in the circumstances of the particular case to act upon the supposition that it exists." It is not necessary—in fact it is not possible in most cases—for a party to prove a negative by positive evidence. The wife had been, for some years prior to the birth of the child the paternity of which was in question, living apart from her husband in a village about 9 miles from the place of her husband's residence. She was living with her paramour. Her husband used occasionally to go to that village to buy cattle. The lower Court held that non-access had not been made out.

Held, that the evidence was sufficient to prove non-access and that the lower Court erred in holding that non-access cannot be proved, so long as the parties were within reasonable distance of each other, unless there was the evidence of a witness available who can account for every minute of the party's time. Such proof would practically be impossible.

Held, further, that in a case of disputed legitimacy there is nothing contrary to law in the mother of the child, whose paternity is denied, in giving evidence as to access or non access by her husband (*Wallace and Stone, JJ.*) MAYANDI ASARI *v.* SAMI ASARI. **55 Mad. 292 = 135 I.C. 580 = I.R. 1932 Mad. 164 = 1931 M.W N. 1278 = 34 L.W. 884 = A.I.R. 1932 Mad. 44 = 61 M L.J. 874.**

[F. 66 M.L.J. 283 (285, 286).]

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———**S. 112**—*Non-access—Proof—Circumstances from which it can be inferred—Conduct of parties—Hindu husband and wife—Non-performance of* gauna (*consummation*) *ceremony—Parties living separately and not as husband and wife—Husband and his family repudiating wife and her child—Inference.*

In dealing with a question of non-acces, under S. 112 of the Evidence Act, in the case of a child marriage among Hindus, much depends on the question whether the case presented on either side is reconcilable with the established customs and usages of Hindus as regards child marriages. Plaintiff claimed to be the legitimate son of one C.S. The defendants denied that he was a legitimate son of C.S. It was proved that the families of the plaintiff's alleged father and mother were about 20 miles distant from each other ; that the *gauna* (consummation) and *thauna* ceremonies were not performed, because the plaintiff's mother was discovered to be pregnant as the result of an illicit connection, that C.S. and his family repudiated the plaintiff's mother and never acknowledged the plaintiff as the son of C.S., and that both plaintiff and his mother continued to reside in the latter's father's house and never went to the village of C S. It was also neither proved nor suggested that the husband C.S. could have had intercourse with the wife before the *gauna* ceremony, which would never have been permitted by the respective families and was practically rendered impossible by the fact that the husband and wife lived in villages far apart from one another.

Held, that the defendants had sufficiently discharged the onus of proving non-acces under S. 112 and that the plaintiff could not be held to be the legitimate son of his mother's husband, C S. (*Sir John Wallis.*) BHAGWAN BAKSH SINGH *v.* MAHESH BAKHSH SINGH. **159 I C. 325 = 8 R.P.C. 70 = 1935 O.W.N. 1261 = 38 Bom.L.R. 1 = 43 L.W. 7 = 1936 M.W.N. 15 = 40 C. W.N. 360 = 38 P.L.R. 177 = 1935 A.W.R. 1395 = A.I. R. 1935 P.C. 199 = 69 M.L.J. 868 (P.C.).**

———**S. 112**—*Non access—Proof—Husband's evidence —Sufficiency of.*

Per *M. C. Ghose, J.*—The evidence of the husband alone is not sufficient to prove non-access. It must be proved by evidence other than that of the husband. (*Costello, M.C. Ghose and Henderson, JJ.*) JOSEPH ANTHONY SWEENNY *v.* MERCY BEATRICE CATHERINE SWEENNY. **62 Cal. 1080 = 39 C.W.N. 1047**

———**S. 112**—*Parties residing at reasonable proximity —Child begotten during this period—Legitimacy of.*

The parties to marriage were in touch with each other, were residing for a short period in reasonable proximity, the wife being in the house of a relative of the husband. There was nothing to suggest that she was unfaithful or that the parties were on terms of personal hostility.

Held, the burden was on the defendant to establish that the plaintiff's father and mother 'had no access to each other at any time when he *could have been* begotten' that if the plaintiff could have been begotten during this period, his legitimacy was undeniable. (*Sir George Lowndes.*) KARAPAVA SERVAI *v.* MAYANDI. **12 Rang. 243 = 3 A.W.R. 319 = 1934 M.W.N. 199 = 38 C.W.N. 427 = 11 OW.N. 229 = 1934 A L.J. 250 = 59 C.L.J. 126 = 36 Bom.L.R 394 = 6 R.P.C. 77 = 147 I.C. 891 = 39 L.W. 244 = A.I.R. 1934 P.C. 49 = 66 M.L.J. 288 (P.C.).**

———**S. 112**—*Presumption of legitimacy—Onus of proof—Rule—Proof of marriage—Necessity.*

A legal presumption in favour of legitimacy will arise only if it is proved that there was a valid and lawful

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marriage between the parents of the person whose legitimacy is in question. But the burden of proving such a lawful marriage is on the person who claims to be legitimate, and if he does not establish that, he cannot rely on the presumption so as to shift the burden of proving the contrary on to those who allege illegitimacy. (*Nanavutty and Thomas, JJ.*) RAM NATH *v.* DESRAJ SINGH. **10 Luck. 499 = 153 I.C 349 = 7 R.O. 322 = 1935 O.W.N. 25 = A.I.R. 1935 Oudh 80.**

———**S. 112**—*Presumption of legitimacy—Rebuttable nature.*

The fact that child is born in lawful wedlock is "conclusive proof" that it is the legitimate son of its mother's husband. This, however- is not irrebuttable but it can yield only to positive proof of want of access. If that access is proved, the presumption rebuttable in the first instance becomes at once irrebuttable. (*Venkatasubba Rao, J.*) JAGANNATHA MUDALI *v.* CHINNASWAMI CHETTI. **55 Mad. 243 = 136 I.C. 36 = I.R. 1932 Mad. 244 = 1931 M.W.N. 755 = 34 L.W. 424 = A.I.R. 1932 Mad. 39 = 61 M.L.J. 878.**

———**S. 112**—*Presumption of legitimacy—Rebuttal—Non-access—Proof—Adultery of wife.*

The effect of S. 112 is this: there is a presumption and a very strong one, though a rebuttable one, that a child born in lawful wedlock is the legitimate child of the mother's husband. When once access or intercourse by the husband is proved, no evidence will be allowed to show that the child is not the child of the husband, that is to say, the presumption to be drawn becomes an irrebuttable one. But the Court has in each case to weigh the evidence and answer the question: has that presumption been rebutted by proper evidence that such access did not take place between the husband and the wife at the time when the child must have been conceived, as by the laws of nature is necessary for the man to be in fact the father of the child? This is essentially a question of fact and must be dealt with as any other question of fact is. 61 M. L. J. 874, Foll. Where the parents married in 1897, but the wife deserted the husband in three months thereafter and lived with a paramour near her husband's village and the evidence was that all through she had been living with the paramour and there had been no kind of access between the husband and the wife, it was held that the presumption as to the legitimacy of a son born in 1901 was, in the circumstances, rebutted, (*Venkatasubba Rao, J.*) SIVAKAMI AMMAL *v.* KOOLYANDI CHETTIAR. **149 I.C. 953 = 6 R.M. 661 = A.I.R. 1934 Mad 318 = 66 M.L.J. 283.**

———**S. 112**—*Scope—Divorce proceedings on ground of adultery of wife—Proof of non access—Evidence by husband—Admissibility—Rule in* Russel *v.* Russel—*Applicability in India.*

There is a presumption in law that the child of a married woman was begotten by her husband and neither a husband nor a wife is permitted, with the possible object or possible result of proving that a child born to the wife during wedlock is not the child of the husband, to give evidence showing or tending to show that they did not have sexual relations with each other at the time when the child could have been conceived. This rule as enunciated in *Russel* v. *Russel* is applicable not only to cases in which the legitimacy of the child is directly in issue, but also in proceedings instituted in consequence of adultery. The rule excludes evidence by the husband on the point of non access; though non-access can, however, be proved by evidence *aliunde*. The law is the same in India as in England; and the wording of S. 112 of the Evidence Act in in no way conflicts with the rule of law as enunciated in *Russel* v. *Russel*. (*Costello, M. C. Ghose and Henderson, JJ.*) JOSEPH ANTHONY SWEENNY *v.* MERCY BEATRICE CATHERINE SWEENNY. **62 Cal. 1080 = 39 C.W.N. 1047.**

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———**S. 112**—*Scope—Proof of non-access and not impossibility of access is necessary.*

S. 112 merely requires proof to the satisfaction of the Court that the parties had no access to each other; not that there was no possibility of access. A finding that there was no access is a pure finding of fact. *Poulett Peerage*, (1903) A.C. 395, Rel. on. (*Vivian Bose, A.J. C.*) MT. SAROO MALI *v.* YESHWANT NARAYAN MALI. **150 I.C. 306 = 6 R.N. 283 = A.I.R. 1934 Nag. 124.**

———**S. 114**—*Accomplice—Evidence—Value of—Corroboration.*

The evidence of an accomplice is always open to suspicion and has to be scrutinised extremely carefully in every detail. Before it can be accepted it must be corroborated by independent evidence connecting the accused or tending to connect him with the crime. Such independent evidence need not, however, be direct; it is sufficient if it is circumstantial. (*Kendall, J.*) GORAKH NATH *v.* EMPEROR. **152 I.C. 934 = 7 R.A. 421 = 36 Cr.L.J. 205 – 4 A.W.R. 1288 = 1935 Cr.C. 51 = A.I.R. 1935 All. 86.**

———**S. 114**—*Alibi—Evidence of—If most important and conclusive would be produced by accused or his relatives at once.*

Per *Young and Collister, JJ. in Order of Reference.*—It is impossible to believe that alibi evidence consisting of oral and documentary evidence of very great strength and conclusiveness and in possession of accused's near relatives would not have been produced at once by the accused or his relatives and would have been concealed till the defence evidence stage in Sessions trial. (*Sulaiman, C.J., Young and King, JJ.*) EMPEROR *v.* SHEO JANAK PANDE. **56 All. 354 = 6 R.A. 443 = 147 I.C 238 = 35 Cr.L.J. 364 = 15 R L. 49 (Cr.) = 1933 A L J. 1573 = 1934 Cr.C. 59 = A.I.R. 1934 All 27 (F B.).**

———**S. 114**—*Approver—Evidence of—Caution needed in accepting.*

The evidence of an approver must be regarded with great caution, because it is evidence given under inducement of pardon, and the approver under such circumstances is anxious to give evidence incriminating other persons who are accused. (*Weston, J.C.*) RAM SAHAI *v.* EMPEROR. **1935 A.M.L.J. 32.**

———**S. 114**—*Common course of events—Entry in public document.*

Under S. 114 the Court may presume that an entry in a public record made by a public servant was properly made (*Kisch, J.*) ABHERAJ SINGH *v.* GAYA SINGH. **135 I C. 387 = I.R. 1932 Oudh 35 = 8 O.W. N. 1228 = A.I.R. 1932 Oudh 137.**

———**S. 114**—*Conflicting presumption—Effect of—Duty of court.*

Conflicting presumptions neutralise each other and leave the case at large to be determined solely on the evidence given. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———**S. 114**—*Continuity of state of things—Presumption backwards—Permissibility.*

The rule of evidence is in favour of presuming the continuity of things shown to exist at a prior date. There is no rule of evidence by which one can presume backwards. (*Mitter and McNair JJ.*) MANMATHA NATH HALDAR *v.* GIRISH CHANDRA ROY. **153 I.C. 170 = 7 R.C. 356 = 38 C.W.N. 763 = A.I.R. 1934 Cal. 707.**

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———**S. 114**—*Criminal trial—Continuity of state of things—Member of assembly—Assembly declared unlawful.*

No presumption can be made that a state of things that once existed continued to exist, when that would militate against the fundamental presumption of law in favour of innocence. So merely because a person is shown to have been a member of an assembly before it was declared unlawful, he cannot be presumed to have continued as a member thereof after it was declared unlawful, because the initial presumption of law is in favor of innocence. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* SHRIPAD RAMCHANDRA. **55 Bom. 484 = I.R. 1931 Bom. 235 = 130 I.C. 27 = 32 Cr L J. 472 33 Bom L.R. 90 = 1931 Cr.C. 177 = A.I R. 1931 Bom. 129.**

———**S. 114**—*Criminal Trial—Discovery of articles belonging to murdered person—Inference.*

It is not correct to say that the Court is not entitled to draw the inference that the accused committed a murder or was present when it was committed when the accused is found in possession of the property proved to have been in the possession of the murdered person at the time of the murder or is able to point out the place or places where such property is concealed and admits having concealed such property and fails to give any explanation for the possession of those goods or their disposal or such an explanation as can reasonably be accepted.

Held, on the evidence, that the accused took part in the murder of the deceased. (*Beasley, C.J and Reilly, J.*) NARAYANA *v.* EMPEROR. **56 Mad. 231 = 143 I. C. 46 = I.R. 1933 Mad. 261 = 34 Cr.L.J. 481 = 37 L. W. 220 = 1932 M.W.N. 801 = 1933 Cr.C. 289 = A.I.R. 1933 Bom. 26 = 64 M.L.J. 88.**

[**Diss.** with ref. to portions. 35 P.L.R. 132 (135). **R.** 1933 M.W.N. 242 (243).]

———**S. 114**—*Criminal Trial—Recovery of blood-stained articles from accused—Inferences.*

If an article stained with human blood is recovered from the possession of, or a place pointed out by, the accused, the case against him becomes very strong and he has to explain away that point. But where the prosecution fails to establish, which it is its duty to do, that the stains on the articles are stains of human blood, the Court would not be justified in drawing an inference that the stains are of human blood. No such presumption can be drawn against the accused. (*Nanavutty and Rachhpal Singh, JJ.*) IMAMUDDIN *v.* EMPEROR. **10 Luck. 131 = 7 R.O. 70 = 150 I.C. 862 = 35 Cr.L J. 1154 = 11 O.W.N. 950 = 1934 Cr C.1199 = A.I.R. 1934 Oudh 388.**

———**S. 114**—*Criminal trial—Discovery of blood-stained cloth in house of accused—Presumption.*

The fact that cloths with blood-stains are discovered in the house of the accused in a murder trial does not entitle the Court to make any presumption against the accused as to his guilt or as to the stains being of human blood, though the cloths admittedly belonged to the decreased. If the prosecution proves that any stain of human blood is found on the cloths, the accused might be called on to explain the fact, but when the prosecution failed and there was no evidence to prove that the stains were of human blood, the Court is wrong in making a presumption. (*Nanavutty and Rachhpal Singh, JJ.*) BHAGWATI PRASAD *v.* EMPEROR. **151 I.C. 274 = 7 R O. 99 = 35 Cr.L.J. 1265 = 11 O.W.N. 969 = 1934 Cr C. 1159 = A.I.R. 1934 Oudh 373.**

———**S. 114**—*Criminal trial—Unlawful association —Presumption of continued membership after declaration by Government—Propriety.*

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It is not right to presume from the fact that a man is a member of an association when it is lawful, that he continues to be a member after it is declared unlawful. This is not a matter of presumption; there must be evidence of continuing membership. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* DHARMANAND KOSAMBI. **I.R. 1931 Bom. 303 = 32 Cr.L.J. 725 = 131 I C. 475 = 33 Bom. L.R. 333 = 1931 Cr.C. 347 = A.I.R. 1931 Bom. 203.**

———**S. 114**—*Discharge of obligation—Presumption of fact—Mortgage deed endorsed by mortgagee as fully satisfied—Presumption of satisfaction.*

Under S. 114 there is presumption that when an instrument of obligation is in the hands of the obligor, the obligation has been discharged. The presumption is stronger when the instrument of obligation bears an indorsement of full satisfaction made by the mortgagee himself. Anybody dealing with the mortgagor would be perfectly justified in acting on the footing that the debtor gained the document in a perfectly honest manner by discharging his obligation. The creditor who puts the debtor in that position by his failure to take the necessary precautions against the risk of fraud being committed by the latter must bear the consequence of his own negligence. (*Niyogi, A J.C.*) RANGAPPA GANGAPPA *v.* SYED IMAMUDDIN. **30 N.L.R 196 = 154 I.C. 904 = 7 R.N. 170 = A.I.R. 1934 Nag. 29.**

———**S. 114**—Evidence Act—Document — Ancient documents—Non-production of original — Power of Court to presume genuineness from proved facts. *See* EVIDENCE ACT, S. 90. **159 I.C. 780 = 1935 O.W.N. 1376.**

———**S. 114**—*Document—Execution—Admission of execution on blank paper—Inference.*

Where it is shown either by proof or admission that the thumb impression on the suit hand note is that of the defendant but the defendant alleges that he put in his impressiono nly on a blank piece of paper, no presumption of any kind can be raised in favour of the plaintiff under this section. Even assuming it is one of those cases contemplated by the section, the section is only permissible and not mandatory; the Court may having regard to the circumstances and to the evidence let in to rebut the plaintiff's case, refuse to raise any such presumption. 50 All. 145, Dist. (*Fazl Ali and Scroope, JJ.*) RAMLAKHAN SINGH *v.* GOG SINGH. **I.R. 1931 Pat. 491 = 134 I.C. 635 = 12 Pat. L.T. 233 = A.I.R. 1931 Pat. 219.**

———**S. 114**—*Document—Unstamped copy of instrument—Secondary evidence—Presumption as to original being stamped.*

Where a party produces an unstamped copy of an instrument by way of secondary evidence, the Court may in the absence of contrary evidence presume that the original was stamped. (English decisions on the point considered.) (*Beasley, C.J. and Cornish, J.*) KOKIA BI SAHIBA *v.* ABDUL WAHAB SAHIB. **1932 M.W.N. 432.**

———**S. 114**—*Effect.*

The effect of S. 114 is to make it perfectly clear that courts of justice are to use their own common sense and experience in judging the effect of particular facts and they are to be subjected to no technical rules whatever on the subject. (*C. C. Ghose, A.C.J. Costello and Mallik, JJ.*) SARAT CHANDRA DHUPE *v.* EMPEROR. **151 I.C. 473 = 7 R.C. 133 = 35 Cr.L.J. 1335 = A.I.R. 1934 Cal. 719 (F.B.).**

———**S. 114**—*Husband and wife—Property in wife's name—Benami—No presumption of.*

The mere fact of marriage raises no presumption with regard to any property standing in the name of a wife

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that the beneficial interest must be in her husband. Before any such presumption can arise there must be some evidence adduced to indicate that the property did not really belong to the wife, but in fact to the husband though standing in the name of the wife. (*Costello, J.*) SHIB KUMARI DASSI *v.* SUBUDHI TATWANI. **140 I. C. 678 = I.R. 1933 Cal. 24 = A.I.R. 1932 Cal. 829.**

——**S. 114**—*Judicial acts — Court's proceedings — Presumption as to legality.*

A presumption arises under S. 114 as to legality and corrrectness of a Court's proceedings. Where a Judge signs a decree, the presumption is that he has satisfied himself that it had been prepared in accordance with the judgment. (*Raza and Allsop, JJ.*) RAGHUBIR SINGH *v.* RANI RAJESHWARI DEVI. **9 Luck. 90 – 6 I.R. (Oudh) 102 = 146 I.C. 310 = 10 O.W.N. 884 = A.I.R. 1933 Oudh 466.**

——**S. 114**—*Judicial acts—Delivery of symbolical possession by Court—Presumption as to formalities having been complied with.*

It must be assumed that a process issued by the Court and accepted by it as having been duly served was served in the manner provided by law with all the formalities laid down for the service thereof and the burden of proving that the formalities were not complied with is on the defendant. Where the report states that symbolical possession was delivered, in the absence of anything to the contrary it may be taken that the requisites as to fixation of warrant had been complied with. (*Addison, J.*) CHAJJU *v.* KIRPA RAM. **I.R. 1931 Lah. 533 = 132 I.C. 181 = 31 P.L.R. 1001.**

——**S. 114**—*Judicial acts—Service of notice—Presumption—Extent.*

The decision of the Privy Council in *Jitendra Nath Ghose* v. *Man Mohan Ghose*, 57 I.A 214, seems to lay down that in the absence of evidence to the contrary it has to be presumed that the procedure laid down by Ss. 12 and 13. B. T. Act was duly followed and that proper statutory notice was given of the encumbrances and execution sales. The decisions of Indian Courts such as 32 C. 1107 may have to be reconsidered in view of the pronouncement of the Judicial Committee. Presumption as to due service of notice under S. 69 of the Bengal Embankment Act, 1882, considered. (*Mitter and Pearson, JJ.*) SASI SEKHAR SEN BISWAS *v.* MAHARAJA BIR BIKRAM KISHORE **59 Cal. 255 – I.R. 1932 Cal. 270 = 137 I.C. 147 = 35 C.W.N. 1239 = A.I.R. 1932 Cal. 267.**

——**S. 114**—*Judicial record—Record made by Judge—Correctness—Presumption.*

There is a presumption under S. 114 of the Evidence Act in favour of the correctness of the record by a Judge in the judicial record. Where the appearance of a legal practitioner had been noted by the Judge in his own handwriting but the legal practitioner denied his appearance, such denial being neither supported by the record nor proved by any independent evidence,

Held, that both on principle and authority it is the record made by the presiding Judge that is conclusive on the point and not what the practitioner chooses to state after four years. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) B. SRINIVASA IYENGAR, *In the case of.* **12 Mys.L J. 311 = 39 Mys H.C.R 461.**

——**S. 114**—*Legitimacy—Presumption—Failure to prove marriage.*

Where there is no evidence of marriage, legitimacy cannot be inferred by mere presumptions. (*Milne, J. C. and Rup-hand, A.J.C.*) KARAMALISHAH *v.* HUSSAINALISHAH. **26 Sind L.R. 111 = I.R. 1933 Sind 19 = 140 I.C. 724 = A.I.R. 1932 Sind 137.**

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——**S. 114** — *Mortgage—Attestation — Presumption regarding witnesses signing after mortgagor.*

Where there is nothing to suggest that the attesting witnesses signed after the mortgagor, the Court can rely on the presumption under S. 114 of the Evidence Act and hold that they signed after the mortgagor. (*Jack, J.*) RADHANATH CHAKRABARTY *v.* NAGENDRANATH CHAKRABARTI. **I.R. 1931 Cal. 879 = 134 I.C. 767 = 53 C L J 586 = A.I.R. 1931 Cal. 806.**

——**S. 114**—*Official acts—Notification under Local Boards Act—Validity—Presumption.*

An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so. When therefore a rice mill is notified under S. 193 (1), Local Boards Act, it must be taken that the President of the Panchayat Board issued the notification in conformity with the law and cannot be said to be invalid. A.I.R. 1924 Mad. 375, Rel. on. (*Walsh, J.*) PRESIDENT, UNION BOARD, ALANDUR *v.* BALAKRISHNA REDDIAR. **I.R. 1932 Mad. 594 (1) = 138 I.C. 583 (1) = 33 Cr.L J. 655 (1) = 1932 M.W. N. 720 = 1932 Cr C. 512 = A.I.R. 1932 Mad. 508.**

——**S. 114**—*Official acts—Presumption regarding—Presenting document to Sub Registrar.*

There is a presumption in law that all official acts are regularly performed and when a document is accepted by the Sub Registrar as duly presented, there is an initial presumption that the document was duly presented and that the person presenting it was duly authorized to do so. (*Bhide, J.*) MAHOMED CHIRAGH *v.* FATTA. **15 Lah. 694 = 6 R L. 519 = 148 I.C. 209 = 36 P.L R. 525 = A.I R. 1934 Lah. 452 (2).**

——**S. 114**—*Party not giving evidence—Inference.*

The petitioner not giving evidence though he was the best informed person about the matter, may be taken as an indication that he could say nothing convincing to support his case. (*Addison and Monroe, JJ.*) PURAN DAS CHELA *v.* KARTAR SINGH. **151 I.C. 32 = 7 R L. 104 = 36 P.L.R. 280 = A.I.R. 1934 Lah. 398.**

——**S 114**—*Party not giving evidence—Matter within party's knowledge—Inference.*

Failure of party coming forward with a case to give evidence on matters within his knowledge, ought to be a weighty factor, when the value of the case put forward on his behalf is appraised. (*Addison and Monroe, JJ.*) BISHAN DAS *v.* GURBAKHSH SINGH. **6 R.L. 526 = 148 I C. 45 = A.I R. 1934 Lah 63 (2).**

——**S 114**—*Party not giving evidence—Suit for breach of contract—Defendants denying any knowledge of contract—Defendants not going into witness-box—Inference.*

Where in a suit for damages for breach of a contract the defendants totally deny any knowledge of the contract on which the plaintiff bases his suit, it cannot be said that there were any facts peculiarly within the defendants' knowledge and yet they had failed to go into the witness-box to depose those facts; and no adverse inference can be drawn therefrom. (*Bhide, J.*) KANHAYA LAL BISAKHI RAM *v.* BISHEN DAS MEWA RAM. **149 I.C. 1119 = 6 R L. 801 = A.I.R. 1934 Lah. 59.**

——**S. 114**—*Presumptions of fact—Duty of Court to have regard to known facts.*

In making presumptions of facts from evidence, a Judge or a jury should always have regard to all the known facts of the case. To attempt to isolate a particular fact or group of facts from surrounding circumstances and to discuss the logical inference is out of place in a judicial decision. (*Beasley, C.J. and Reilly, J.*) NARAYANA *v.* EMPEROR. **56 Mad. 231 = 143 I.C 46 = I.R. 1933 Mad. 261 = 37 L.W. 220 = 34 Cr.L.**

EVIDENCE ACT (1872), S. 114.

J. 481 – 1932 M.W.N. 801 = 1933 Cr.C. 289 = A.I.R. 1933 Mad. 233 = 64 M.L.J. 88.

———**S. 114**—*Presumption—Inference—Distinction.*

A presumption and an inference are two different things and should not be confused with each other. (*Lort Williams and Jack, JJ.*) ISTAHAR KHONDKAR *v.* EMPEROR. **62 Cal. 956 = 162 I.C. 927 = 37 Cr L J. 701 – 8 R.C. 665 = 39 C.W N. 620.**

———**S. 114**—*Religion—Child born in India—Presumption regarding religion and status*

A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status. 14 M I.A. 309, Foll. (*Nanavutty J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SADAAT ALI KHAN. **136 I.C. 642 = I R. 1932 Oudh 130 = 8 O.W.N. 349 = A.I. R. 1931 Oudh 177.**

———**S. 114**—*Witness—Discharge of duty—Presumption regarding.*

The presumption that a particular witness has discharged his duty properly is a presumption which the jury 'may make' and not one which they 'must make'. The Evidence Act makes no such presumption that 'a witness should be believed when deposing on oath.' (*Rankin, C.J., Graham and Mallik, JJ.*) EMPEROR' *v.* TAZEM ALI. **58 Cal. 1095 = 135 I.C. 727 = 33 Cr L J. 196 = I.R 1932 Cal. 135 = 1931 Cr.C. 1060 = A.I R. 1931 Cal. 796.**

———**S. 114, Ill. (a)**—*Criminal trial—Offence under S. 243, I. P. Code—Discovery of counterfeit coins—Presumption.*

Where certain silver pieces of the size of a rupee were found along with counterfeit rupees, all bearing the same year and it was shown that all the coins were concealed under *bhusa* in a locked room, of which the accused had the key.

Held, that S. 114 of the Evidence Act created a presumption of guilt against the accused and that he was liable to be convicted under S. 243, I.P.Code. (*Raza and Smith, JJ.*) EMPEROR *v.* SANGRAM. **I R. 1933 Oudh 167 = 143 I.C. 152 = 34 Cr.L.J. 545 (2) 9 O.W.N. 1198 – 1933 Cr.C. 113 = A.I.R. 1933 Oudh 85.**

———**S. 114, Ill. (a)**—*Criminal trial—Person found with stolen property—Presumption.*

Where a person is found in possession of stolen property shortly after it was stolen, the Court may presume under S. 114, Ill. (*a*), Evidence Act, that he is a thief; the presumption however is not to be made invariably. A Sessions Judge cannot therefore expunge the charge under S. 379, without going into evidence (*Niamatullah, J.*) EMPEROR *v.* ZAHIR NAT. **150 I C. 558 = 7 R A. 4 – 35 Cr.L.J. 1092 = 1934 Cr.C. 524 – A I R. 1934 All. 455 (2).**

———**S 114, Ill (a)**—*Criminal trial—Possession of jewels of murdered person—Inference from.*

The possession by an accused person of jewels belonging to a murdered person, if unexplained, is presumptive evidence that he was the murderer as well as the thief. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) RAMA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 353 39 Mys H.C R. 996.**

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen goods.*

A man who is in possession of stolen goods soon after the theft may be presumed to be either the thief or has received the goods knowing them to be stolen unless he can account for his possession. In order that this presumption may be raised there must be possession by the person against whom it is to be raised of recently stolen goods. Mere physical relation arising from the possession of the object is insufficient to amount to possession which connotes control over the object possessed. The possession of the stolen property should be exclusive as well as recent. 6 Bom. 731, Rel. on. (*Mya Bu, J.*) RAJALINGAM *v.* EMPEROR. **149 I C. 31 = 6 R.R. 300 = 35 Cr.L.J. 994 = 1934 Cr.C. 512 = A.I.R. 1934 Rang. 80.**

EVIDENCE ACT (1872), S. 114, Ill. (a).

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen goods—Explanation by the accused—Onus of proof.*

Under S. 114, Ill. (*a*), Evidence Act, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen unless he can account for their possession. If he so gives an account of his possession which may reasonably be true, though the jury may not be convinced of its truth, he must be acquitted, because the burden of proving guilty knowledge is always on the Crown. The onus never passes to the accused. (*Lort Williams and Jack, JJ.*) DAUD SHAIK *v.* EMPEROR. **62 C L.J. 257 = 40 C W N. 159.**

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen goods—'Soon after theft'—Duration of period—Test.*

It is not possible to lay down any maximum period which will apply to all cases of possession of stolen property. The jury can decide, having regard to the nature of the articles, whether they were recovered soon after the offence. (*Pakenham Walsh, J.*) AZIZ KHAN SAHIB *v.* EMPEROR. **1932 M.W N 862.**

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen property*

When a man is found to be in possession of stolen property, he is only presumed to have committed theft or knowingly received stolen property. The presumption does not extend to the offence of house-breaking under S. 457 of the Penal Code. (*Doraisami Iyer, C. J. and Rama Rao, J.*) VENKATASWAMY *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 25.**

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen property after six months—Presumption.*

Where six months after theft, some of the stolen goods are found in the possession of the accused, it is not possible to rely upon the presumption in Ill. (*a*), S. 114, owing to the length of time which elapsed between the theft and the finding of the goods in the possession of the accused. The most that can be said is that it is suspicious that this man should have been found in possession of goods. (*Lort Williams and Jack, JJ.*) JAGNARAIN TEWARI *v.* EMPEROR. **158 I.C 840 = 8 R C. 219 = 36 Cr.L.J. 1466 – 1935 Cr.C. 1072 = A.I.R. 1935 Cal. 680.**

———**S. 114, Ill (a)**—*Criminal trial—Possession of stolen property after nine months—Presumption.*

The possession of stolen property even if accompanied by a failure to give an account as to how such possession was acquired, raises only a probable presumption and not a strong presumption of knowledge. 11 C. 160, Rel. Where, therefore, a missing animal is traced to the possession of a person charged with an offence under S 411, I. P. Code, about nine months after its loss, the accused cannot be said to be in possession of stolen goods soon after the theft, and if nothing else is brought home against the accused, the presumption should not be applied. (*Dhavle, J.*) SUCHIT AHIR *v.* EMPEROR. **I.R. 1931 Pat. 208 = 130 I.C. 800 = 32 Cr. L J. 614 = 12 Pat L.T 350 = 1931 Cr.C. 205 = A.I.R. 1931 Pat. 85.**

———**S. 114. Ill. (a)** – *Criminal trial—Possession of stolen property—Proof*

In order to justify a presumption of guilt under S. 114, Ill. (*a*), the possession of the accused in respect of pro-

EVIDENCE ACT (1872), S. 114, Ill. (a).

perty proved to have been stolen must be definitely established. The stolen property consisted of 19 head of cattle and the only evidence for the prosecution was that the cattle were found in an open place not enclosed by hedge or covered by any roof, but it was not definitely proved how far away from the accused's house they were found.

Held, that the possession of the stolen cattle had not been so brought home to the accused as fairly to raise the presumption justified by Ill. (*a*) to S. 114 and the accused was therefore entitled to the benefit of doubt. (*Ferrrs, J. C. and Rupchand, A.J.C.*) GUL SHERU *v.* EMPEROR. **141 I.C. 537=I.R. 1933 Sind 58=34 Cr.L J. 163=1932 Cr.C. 795=A.I.R. 1932 Sind 180.**

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen properties—Stolen properties produced by accused—Presumption.*

Where the accused produced from his own house two items of stolen property and from a hole in the ground near his own house produced two other items.

Held, that the presumption may be drawn under S. 114 Ill. (*a*) of the Evidence Act, that the accused dishonestly received the stolen properties knowing them to be stolen, though it could not be presumed that he was actually concerned in the burglary. (*Burn, J.*) PUBLIC PROSECUTOR *v.* KUDIMBATCHA ROWTHEN. **1933 M.W. N. 325.**

———**S. 114, Ill. (a)**—*Criminal trial—Possession of stolen things—Inference as to guilt.*

Where the accused was found in possession of the stolen property a couple of hours after the commission of the burglary.

Held, that Ill. (*a*) to S. 114 of the Evidence Act applied and the accused could be convicted under S. 457, I. P. Code. (*Nanavutty, J.*) JAI NARAIN *v.* EMPEROR. **I.R. 1933 Oudh 207=143 I.C. 835=34 Cr.L J. 649 (1)=10 O.W.N. 47=1933 Cr.C. 238=A.I.R. 1933 Oudh 117.**

———**S. 114, Ill. (a)**—*Criminal trial—Presumption as to dacoity—If can be presumed from possession of stolen goods.*

The provisions of S. 114, Ill. (*a*) of the Evidence Act, do not entitle the Court to presume the knowledge of dacoity or dacoits which is required for a conviction under S. 412, Penal Code, merely from the fact of possession of recently stolen goods. The evidence relating to the concealment of the stolen goods is sufficient to prove guilty knowledge, and a presumption can be made that the accused received the goods knowing them to be stolen. (*Lort Williams and Jack, JJ.*) ISTAHAR KHONDKAR *v.* EMPEROR. **62 Cal. 956=162 I.C. 927=37 Cr.L.J. 701=8 R.C. 665=39 C W.N. 620.**

———**S. 114, Ill (a)**—*Discretion of Court—Drawing presumption.*

The presumption under S. 114 is only discretionary with the Court having due regard to the circumstances of the case. It does not mean that if a man is in possession of goods soon after theft, the accused must prove affirmatively that he came by the goods innocently. If the accused gives any explanation which in the opinion of the jury may possibly be true although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused, just as in any other criminal case. 52 Cal. 223; 11 Cr. App., R. 45, Ref. (*Lort Williams and S K. Ghose, JJ.*) BHUPNATH MANDOL *v* EMPEROR. **35 C W.N. 291 =33 Cr.L.J 40=I.R. 1932 Cal. 31 (2)=134 I.C. 1071 (2)=1931 Cr.C. 801=A.I R. 1931 Cal. 617.**

[Appr. 56 A. 250 (253).]

———**S. 114, Ill. (a)**—*Presumption under—Nature and effect of—Rebuttal.*

EVIDENCE ACT (1872), S. 114. Ill. (b).

The presumption under S. 114, Ill. (*a*) of the Evidence Act is one of fact and is rebuttable—where the complainant, whose cycle has been stolen, admits that the accused was a cycle repairer and that the same had been left at his shop by a third person, it shows that the accused is in lawful custody of the cycle as bailee and was not in possession knowing it to be stolen. (*Niyogi, A.J.C.*) PALTOORAM *v.* EMPEROR. **18 N.L.J. 237.**

———**S. 114, Ill. (a)**—*Presumption under—Rebuttal of.*

In the circumstances mentioned in S. 114, Illus. (*a*), Evidence Act, the Court may draw a presumption and may act upon it if the accused cannot account for his possession, but this illustration does not mean that the burden of proof is shifted on the accused. If the accused gives any explanation which in the opinion of the jury may possibly be true although they do not necessarily believe it, then the Crown cannot rely upon the presumption and must prove the guilt of the accused just as in any other criminal case. (*Baipai, J.*) HORI LAL *v.* EMPEROR. **56 All 250=148 I.C. 141=6 R.A. 649= 35 Cr.L.J. 621=1933 A.L.J. 1534=1933 Cr.C. 1523 =A.I.R. 1933 All. 893.**

———**S. 114, Ill. (b).** *See also* EVIDENCE ACT, 1872, S. 133.

———**S. 114, Ill. (b)**—*Accomplice—Accessory after the fact—Witness to crime not giving information—Value of evidence of.*

The evidence of a person who, on her own showing, became an accessory after the commission of a murder and the disposal of the corpse is virtually that of an accomplice, and requires very careful scrutiny and corroboration in material particulars before it can be accepted and made the basis of a conviction for murder. A person stating that he saw the commission of a murder but not giving any information thereof cannot be said to be an accomplice, but his evidence is not free from suspicion. (*Nanavutty and Zia ul-Hasan, JJ.*) TURAB *v.* EMPEROR. **10 Luck 281=152 I C. 473 =7 R.O. 235=11 O.W.N. 1383=36 Cr.L.J. 166= 1935 Cr. C. 14=A.I.R. 1935 Oudh 1.**

———**S. 114, Ill. (b)**—*Accomplices—Bribe—Persons negotiating—Evidence of—Value of.*

Persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices and it is highly unsafe to base a conviction under S. 161 of the Penal Code on their testimony without independent corroboration. (*Tek Chand, J.*) MANGAL SAIN *v.* EMPEROR. **147 I C. 557=6 R.L. 417=35 Cr.L.J. 452=34 P.L.R. 836.**

———**Ss. 114, Ill. (b) and 133**—*Accomplice—Conviction on evidence of—Justification—Corroboration—Necessity for—Prosecution for unnatural offence—Conviction on evidence of complainant boy alone—Sustainability—Fact of other boys visiting accused—If corroboration.*

In a prosecution for an offence under S. 377, I. P. Code, the complainant, a boy, who is found to have been a willing party, must be regarded as an accomplice; and it is not therefore safe to convict the accused on the evidence of the complainant boy, unless his evidence is corroborated in material particulars. Though the law does not require such corroboration, as a matter of prudence there ought to be no conviction without such corroboration except in very exceptional cases. The fact that other boys like the complainant had been seen visiting the accused in his room does not amount to corroboration within the meaning of the rule, nor would such fact be evidence against the accused. Where the lower appellate Court affirms a conviction without this

EVIDENCE ACT (1872), S. 114, Ill. (b).

aspect of the case being present in its mind, namely, the the necessity for corroboration, the conviction cannot safely be allowed to stand and the High Court will in revision set the conviction aside. (*Lort Williams and Jack, JJ.*) BAL MUKUNDO SINGH *v.* EMPEROR. **61 C.L.J. 583=39 C W.N. 1051.**

——**Ss. 114 Ill. (b) and 133**—*Accomplices in different stages of crime—If mutually corroborative.*

Where an approver spoke to the incidents connected with the murder and the other approver spoke to the incidents connected with the subsequent disposal of the body in order to conceal the offence.

Held, that (1) the fact that they were accomplices in two different categories of crime does not free their evidence from the taint attached to the evidence of an accomplice; (*ii*) the evidence of one approver cannot be taken as corroboration of the evidence of another approver and the evidence of an accomplice should be corroborated in material particulars by independent evidence, which is free from the taint attached to the evidence of an accomplice. (*Sundaram Chetty and Pakenham Walsh, JJ.*) VENKATARAMANNA *v.* EMPEROR. **149 I.C 964—6 R.M. 663=35 Cr L J. 1040=40 L.W. 237=1933 M.W.N. 1129=1934 Cr.C. 472—A.I.R. 1934 Mad. 248—67 M.L J. 74.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Cases of bribery—Corroboration—Necessity.*

The rule of the Court which requires corroboration of the evidence of an accomplice as against each accused applies with very little force to a case in which the accused is charged with extorting a bribe from other persons. The objections usually arising to the evidence of an accomplice do not really apply where the alleged accomplice, that is, the person paying the bribe, is not a willing participant in the offence, but is really a victim of that offence. In bribery cases the persons who pay the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about it. It is not possible to expect absolutely independent evidence about the payment of a bribe. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* PAPA KAMALKHAN. **59 Bom. 486=156 I.C. 615 (2)=36 Cr.L.J. 968=8 R.B. 2=37 Bom.L.R. 366=1935 Cr. C. 655 (2)—A.I.R. 1935 Bom. 230.**

——**S. 114, Ill (b)**—*Accomplice's evidence—Uncorroborated—Conviction.*

On the one hand a conviction founded on the uncorroborated evidence of one or more accomplices alone is valid in law but on the other hand the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. To let the evidence of approvers go to a jury without giving them proper warning is a misdirection. For a Judge, to withdraw consideration of the guilt or innocence of the accused from the jury by telling them that a conviction cannot be based upon uncorroborated testimony of an approver would be no less a misdirection and directly contrary to the statute. The Judge is bound to caution the jury and to advise them that generally speaking the natural presumption for them to make is that the evidence of the approvers is unreliable though they are not compelled in law to act on the presumption. Nature of corroboration required pointed out. (*Rowland and Dhavle, JJ.*) EMPEROR *v.* WAJID SHEIKH. **147 I.C. 1160=6 R. P. 402=A.I.R. 1933 Pat. 500.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Conviction—If can be based on—Independent corroboration—Necessity—Corroboration by other accomplice evidence—Sufficiency.*

EVIDENCE ACT (1872), S. 114. Ill. (b).

Per *S. K. Ghose, J.*—It is unsafe to rely on the testimony of an accomplice without independent corroboration, both as to the crime and as to the identity of the criminal. It has been held in some cases that it is not illegal to base a conviction on the uncorroborated testimony of an accomplice or upon such testimony if it is corroborated by other accomplice evidence. But that is not tantamount to saying that independent corroboration is not necessary, or that the corroboration of one tainted evidence by another tainted evidence is independent corroboration. Merely because a particular thing is not illegal is no reason for doing that particular thing; the question is what is just and proper. The duty of the Court is not merely to record a conviction that is not illegal, but it must record a conviction that is properly based. The rule of law requiring an independent corroboration is a rule of caution applying to all accomplice evidence. That rule is expressly confirmed in India by S. 114, Ill. (*b*) of the Evidence Act, while in England it is based on principles derived from the judicial experience of ages. The qualification to Ill. (*b*) of S. 114 only points out that in a particular case there may be circumstances showing previous concert among accomplices to be highly improbable, which may lessen the degree of independent corroboration required. But these circumstances have themselves to be proved by independent evidence, and it does not make the rule of caution inapplicable. The fact that the accomplice giving evidence has been convicted already is a matter which may not be left out of account, but the fact remains that an accomplice is an accomplice, and he ought to be corroborated by other evidence.

Per *Henderson, J.*—A rule of law is not the same thing as a rule of prudence. The rule of law contained in S. 114 Ill. (*b*) of the Evidence Act only says that an accomplice is to be corroborated in material particulars. That is not the same thing as to say that he is to be corroborated by a witness who is not himself an accomplice. It is opposed to all common sense to lay down that in a case in which the rule of prudence does not apply, the Court is precluded from acting on evidence which it believes to be true, though it is evidence given by an accomplice. But in order that the evidence of accomplices may be safely relied on as mutually corroborative, the Court must have the guarantee that they were not acting in concert or that they had no opportunities of consultation or that there was no bargain between them and the prosecution to the effect that they might be dealt with leniently if they agreed to give evidence. (*S. K. Ghose and Henderson, JJ.*) BIMAL KRISHNA BISWAS *v.* EMPEROR. **62 Cal. 819=163 I. C. 566=9 R.C. 30=37 Cr.L.J. 840=39 C.W.N. 761.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration.*

Where an accomplice is coerced and threatened into submission to commit an offence he is not a criminal of the basest kind. The corroboration necessary to establish his credit will be less than if his complicity in the offence had been voluntary and spontaneous. (*Ferrers, J. C. and Mehta, A. J. C.*) MAHOMED PANAH *v.* EMPEROR. **150 I.C. 917=7 R.S. 33=35 Cr.L.J 1170=1934 Cr.C. 737 (2)=A.I.R. 1934 Sind 78 (2).**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration.*

Though the evidence of an approver may in certain circumstances be sufficient to corroborate the evidence of another approver, still the evidence of an accomplice must be regarded with suspicion. (*Brown and Ba U, JJ.*) NGA AUNG PA *v.* EMPEROR. **6 I.R. (Rang.)**

EVIDENCE ACT (1872), S. 114, Ill. (b).

32=145 I.C. 251=34 Cr.L.J. 929=1933 Cr.C. 641 =A.I.R. 1933 Rang 116.

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration.*

The confessional statement of an accomplice is accepted only with great caution and after the closest scrutiny and is not accepted against any individual person unless it is sufficiently and satisfactorily corroborated. Although it is not illegal to convict on a uncorroborated statement of an accomplice there is a consensus of opinion that a conviction on the uncorroborated statement of an accomplice is rarely justifiable. The evidence of corroboration must be independent testimony which affects the accused by connecting or attempting to connect him with the crime. (*Raza and Bisheshwar Nath, JJ.*) DURGA *v.* EMPEROR. **I.R. 1931 Oudh 230=132 I.C. 70=32 Cr.L.J. 830=14 O. L.J. 303=8 O.W.N. 247.**

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration.*

It is seldom safe to base a conviction upon the statement of accomplices unless there is independent evidence to corroborate it in the material particulars. (*Bisheshwar Nath, J.*) GAYA PRASAD *v.* EMPEROR. **6 Luck. 658=I.R 1931 Oudh 353=134 I.C. 401=32 Cr.L.J. 1184=14 O L.J. 199=8 O.W.N. 517—1932 Cr.C. 592=A.I.R. 1932 Oudh 251 (2).**

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration.*

An approver is a man of the very lowest character who has thrown to the wolves his erstwhile associates and friends in order to save his own skin. And by this betrayal he has purchased his liberty, he is a criminal himself and his evidence must be received with very great deal of caution, if not suspicion. It should also be noted that the approver can easily substitute an innocent man for the person who was actually participating with him in a particular crime. That danger must be guarded against and the prosecution must prove not only that the approver had an accomplice but his accomplice was as a matter of fact the accused persons and no other. Furthermore his evidence must be corroborated in important and material particulars (*Agha Haidar, J.*) INDAR DATT *v.* EMPEROR. **I R. 1931 Lah 537 =132 I C. 185=32 Cr.L J. 818=1931 Cr.C. 648= A.I R. 1931 Lah. 408**

———S. 114 Ill. (b)—*Accomplice's evidence—Corroboration.*

The testimony of an accomplice is doubtless tainted evidence. Though a conviction on the uncorroborated testimony of an approver is not illegal, it is however unsafe to convict in the absence of independent corroborative evidence sufficient to show not merely that the crime was committed but that it was committed by the accused. *The King* v. *Baskerville*, (1916) 2 K.B. 658 at 667, Ref (*Beasley, C J. and Sundaram Chetty, J.*) VENKATASUBBA REDDI, *In re.* **54 Mad 931=1931 M.W.N 1177=134 I.C. 1143=34 L W. 128=33 Cr. L J. 51=1931 Cr.C. 929=A.I.R. 1931 Mad. 689= 61 M L J. 608.**

[Rel. 1933 M.W.N. 1129 (1137).]

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration.*

Evidence of an accomplice cannot be accepted without material corroboration. (*Mallik and S. K. Ghose, JJ.*) SURENDRA NATH GOSWAMI *v.* EMPEROR. **I R. 1932 Cal. 273=137 I C. 179=33 Cr.L J. 357=54 C.L.J. 470=1932 Cr.C. 320=A I.R. 1932 Cal. 377.**

———S. 114, Ill (b)—*Accomplice's evidence—Corroboration by confessional statements.*

EVIDENCE ACT (1872), S. 114, Ill. (b).

Obiter.—Though the confession of a co accused is by itself of too weak a character to found a conviction of the other co-accused on it alone, where such co-accused has stuck to it throughout the trial and has paid the penalty by receiving the punishment without filing an appeal, it can be used to strengthen the evidence of the accomplice by corroboration of some facts of the story told by him. Where the evidence of the approver is in conflict with the confession of the accused, that portion of the evidence of the approver may be rejected as unreliable; and where the evidence of the approver is in conformity with the confession of the co-accused it may be deemed to receive corroboration to that extent and may justify the conviction of the other accused. (*Nanavutty, J.*) BENI MADHO *v.* EMPEROR. **9 Luck. 22=6 I.R. (Oudh) 209=146 I.C. 1064=35 Cr.L.J. 273=10 O. W.N. 688=1933 Cr.C 976=A.I R. 1933 Oudh 355.**

———S. 114, Ill. (b)—*Accomplice — Evidence of—Corroboration -Duty of Court hearing evidence.*

It is a salutary rule that the evidence of an accomplice (or approver) should be corroborated. It is essential that the Court which has to estimate the value of the evidence of an approver should bear in mind that salutary rule. When the trial takes place before a Judge and jury, it is the duty of the Judge to warn the jury that it is unsafe to act upon the uncorroborated evidence of an accomplice. Similarly, where the trial takes place before a Court which is a Judge of both law and facts, that Court should rightly and properly warn itself that it is unsafe to act on such testimony. The question whether the evidence of an approver or accomplice has been sufficiently corroborated is, however, largely a matter for the Court which is trying the case. (*Costello, Panckridge and M.C. Ghose, JJ.*) MOTILAL ROY *v.* EMPEROR. **39 C.W.N. 754.**

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration of evidence of approver.*

Evidence of the accomplice can be used for the purpose of corroborating the evidence of the approvers. A. I. R. 1931 Rang. 235, Rel. on. (*Dunkley, J.*) MAUNG THA KA DO *v* EMPEROR. **160 I.C. 292=37 Cr L J. 280=8 R R. 363=1935 Cr.C. 1266=A.I.R. 1935 Rang. 491.**

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration—Identity of accused.*

Not only should the evidence of an accomplice be corroborated but it must also be corroborated with regard to the identity of the accused. (*Niyogi and Staples, A.J Cs*) MALLU MARHETA *v.* EMPEROR. **6 I.R. (Nag) 93=146 I.C. 701=35 Cr.L.J. 213=16 Nag L J. 186=1933 Cr C. 1451=A.I.R. 1933 Nag. 352**

———S. 114, Ill. (b)—*Accomplice's evidence—Corroboration—Nature of.*

The evidence of one or more accomplices may strengthen the evidence against another; but the evidence of one accomplice cannot be treated as "corroboration" of the evidence of another. Such corroboration must be by independent evidence. 9 Rang. 404, Not foll. (*Niyogi and Staples, A.J.Cs.*) MALLU MARHETA *v.* EMPEROR. **6 I R. (Nag) 93=146 I C. 701=35 Cr. L J. 213=16 N.L J. 186=1933 Cr C. 1451=A I.R. 1933 Nag 352**

———S 114, Ill. (b)—*Accomplice's evidence—Corroboration—Nature of.*

S. 114, Ill. (*b*) provides that the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars and the material particulars must implicate the accused in order that the corroboration may be such as is intended by the section.

EVIDENCE ACT (1872), S. 114, Ill. (b).

(*Lort Williams and McNair, JJ.*) SHIBADAS DAW *v.* EMPEROR. **6 R.C. 399=147 I.C 1172=35 Cr.L. J. 551=37 C.W.N. 934=1934 Cr. C. 165=A.I.R. 1934 Cal. 114.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration—Nature of.*

The statement of the approver or the retracted confession of an accused cannot be made the basis of conviction unless they are corroborated sufficiently by material evidence against the co-accused. The corroboration necessary to give effect to the testimony of an accomplice against an accused person must be with regard to circumstances showing that the particular accused was connected with the crime. 8 O.W.N. 1240, Ref. (*Raza and Bisheshwar Nath, JJ.*) EMPEROR *v.* MAQBOOL AHMAD KHAN. **7 Luck. 511=I.R. 1932 Oudh 383=139 I.C. 751=33 Cr.L J. 920=9 O.W.N. 3=1932 Cr.C. 872—A.I.R. 1932 Oudh 317.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Nature of corroboration required.*

The corroboration in respect of an accomplice's evidence must be with regard to the circumstances showing that the particular accused was connected with the crime. (*Hasan, C.J. and Bisheshwar Nath, J.*) JAI SINGH *v.* EMPEROR. **136 I.C. 321=33 Cr.L J. 287=I.R. 1932 Oudh 113=8 O.W.N. 1240=1932 Cr.C. 43=A.I.R. 1932 Oudh 11.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Nature of corroboration required pointed out.*

The evidence necessary for corroboration is independent testimony which affects the accused by connecting or tending to connect him with the crime. "The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime; but it must be evidence which tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused." (1916) 2 K.B. 658. Per Lord Reading, C.J. (*James, J.*) DHAJU MANDAL *v.* EMPEROR. **I.R. 1933 Pat. 187=34 Cr.L.J. 476=146 I.C. 934=1933 Cr.C. 261—A.I.R. 1933 Pat. 112.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration necessary.*

Though, as a matter of law, the uncorroborated evidence of an accomplice is sufficient to support a conviction as a matter of policy, it is generally unsafe to rely on such evidence alone. The force of the presumption to be drawn varies as the malice to be imputed to the deponent. (*Ferrers, J. C. and Mehta, A. J. C.*) MAHOMED PANAH *v.* EMPEROR. **150 I.C. 917 7 R. S. 33=35 Cr.L.J. 1170=1934 Cr.C. 737 (2)=A.I.R. 1934 Sind 78 (2).**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration—Need for.*

It is the invariable practice of the Court not to convict a person on the uncorroborated statement of an accomplice. Where the accused was named by two of the dacoits who confessed, and there was no other corroborative evidence.

Held, that their statements are the statements of accomplices and it cannot be said therefore that the case against the accused has been proved by legal evidence, and he is entitled to an acquittal. (*Kendall, J.*) KUNJI *v.* EMPEROR. **156 I.C. 902=16 L R. 57 (Cr.)=36 Cr.L.J. 1029=1935 A.W.R. 941=1935 A. Cr.C 199=8 R.A. 54=1935 A.L.J. 959.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Need for corroboration—Co-accused—Testimony of.*

EVIDENCE ACT (1872), S. 114, Ill. (b).

It is a definite rule of prudence that the evidence of an accomplice should not be acted upon unless it is corroborated as against the particular accused in material respects. The same caution is necessary in the case of the testimony of one of the accused who pleaded guilty, was convicted and sentenced and then put into the witness-box as against his co accused. (*Beaumont, C. J. and Nanavati, J.*) EMPEROR *v.* ALLISAB RAJESALE. **141 I C. 347=34 Cr.L.J. 136=I.R. 1933 Bom. 76 (2)=34 Bom.L.R. 1453=A.I.R. 1933 Bom. 24.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration required—Nature and extent of.*

It is a well established rule of practice, practically amounting to a rule of law, to require corroboration of the statement of an accomplice connecting the accused person with the crime; but corroboration is not required in all details. The evidence in corroboration must be independent which affects the accused by connecting or tending to connect him with the crime. "The corroboration need not be direct evidence that the accused committed the crime, it it is sufficient if it is merely circumstantial evidence of his connection with the crime." It is not also necessary that it should relate to the actual commission of the crime. What is necessary is, corroboration in material particulars which will satisfy the Court of the truth of the story related by the accomplice in so far as it implicates the accused. (*Bhide, J.*) HARI RAM *v.* EMPEROR **15 Lah. 673=155 I C. 197=7 R L. 652—36 Cr.L.J. 673—36 P.L.R. 488=1935 Cr.C. 193=A.I.R. 1935 Lah. 125.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Corroboration—When not required.*

The evidence of an accomplice is admissible and conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice. But the presumption allowed by Illus. (*b*), S. 114, that an accomplice is unworthy of credit unless he is corroborated in material particulars, has become a rule of practice of almost universal application. This rule cannot however override the statutory provision. It is neither wise nor feasible to convert what was in its origin and is under the Act a cautionary rule of practice into an artificial rule of law. The principal reasons for holding that an accomplice is unworthy of credit are as follows: (1) because an accomplice is likely to swear falsely in order to shift the fault from himself; (2) because an accomplice, as a participator in crime, and consequently an immoral person is likely to disregard the sanctity of an oath; and (3) because he gives his evidence under the promise of a pardon or in the expectation of an implied pardon, if he discloses all he knows against those with whom he acted criminally, and this hope would lead him to favour the prosecution. Therefore in a case where these reasons are absent, there would generally be no objection whatsoever to convict an accused person on the uncorroborated testimony of an accomplice. The question as to whether corroboration is necessary, and, if so, to what extent is a question to be decided on the facts of each particular case. Much depends on the nature of the offence, the extent of the complicity of the witness in it and the circumstances under which the accomplice makes his statement. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) CHETUMAL REKUMAL *v.* EMPEROR. **28 S L.R. 336=154 I C. 937=7 R.S. 178=36 Cr.L.J. 608=1934 Cr.C. 1392=A.I.R. 1934 Sind 185.**

——**S. 114, Ill. (b)**—*Accomplice's evidence—Value.*

There is no hard and fast rule that a conviction cannot be supported which proceeds on the uncorroborated

EVIDENCE ACT (1872), S. 114, Ill. (b).

testimony of an accomplice. It is for the Court to consider in each case whether the maxims given in the illustration to S. 114 do or do not apply to the particular case before them. It must be remembered that all persons coming technically within the category of accomplices can not be treated as precisely on the same footing (*Roulana and Agarwala JJ.*) RAGHUNATH PANDE *v.* EMPEROR. **1 R 1933 Pat. 176 = 142 I.C 809 (2) = 34 Cr.L J 421 = 13 Pat L.T. 802 = 1933 Cr.C. 249 = A.I.R. 1933 Pat. 96.**

——— **S. 114, Ill (b)**—*Accomplice's evidence—Value.*

The evidence of an accessory and an accomplice has to be accepted with very great caution. (*Srivastava and Nanavutti, JJ.*) CHHERAO *v.* EMPEROR. **6 I R. (Oudh 53 = 145 I.C. 470 = 34 Cr.L.J 1009 = 10 O. W.N. 1108 = 1933 Cr.C. 892 = A.I R. 1933 Oudh 265**

——— **Ss. 114, Ill. (b) and 133**—*Accomplice—Person aiding in disposal of stolen property.*

A person who knowingly aids in the disposal of stolen property is an accomplice. (*Pakenham Walsh, J.*) MAVUTHALAYAN, *In re*. **58 Mad 86 = 155 I.C. 74 = 36 Cr L.J. 633 = 40 L.W. 873 = 1934 M.W N. 1140 = 1934 Cr.C. 1400 (2) = A.I.R. 1934 Mad. 721 = 67 M.L J. 693.**

——— **Ss. 114, Ill. (b) and 133**—Accomplice's testimony—Necessity for corroboration. *See* EVIDENCE ACT, S. 133 **9 Luck. 355 = A I.R. 1934 Oudh 90.**

——— **S. 114, Ill. (b)**—*Accomplice—Who is.*

An "accomplice" is one who is a guilty associate in crime or who sustains such a relation to the criminal act that he could be charged jointly with the accused. It is not every participation in a crime which makes a party an accomplice in it so as to require his testimony to be confirmed. A thief who sells stolen property to a receiver would be an accomplice in the offence of receiving stolen property. (*Peirers, J.C. and O'Sullivan, A.J.C.*) CHETUMAL REKUMAL *v.* EMPEROR. **28 S.L.R. 336 = 154 I.C. 937 = 7 R S 178 = 36 Cr.L J. 608 = 1934 Cr C. 1392 = A.I R. 1934 Sind 185.**

——— **S. 114, Ill. (b)**—*Accomplice—Who is—Evidence of—Corroboration—Necessity.*

In a trial for murder, the wife of the deceased made a statement to the police several days after the event, to the effect that the accused throttled the deceased in a quarrel which arose on account of the fact that he discovered the accused and herself in the act of misconduct and that she helped the accused to dispose of the body because he threatened to kill her if she did not.

Held, that the woman would not be an accomplice, but whether she was an accomplice or not, it would be unsafe to rely on her evidence unless corroborated in some material particulars. (*Niyogi and Pollock, A.J Cs.*) NANHU BADHI *v.* EMPEROR. **163 I C. 460 = 9 R.N. 5 = 37 Cr.L.J. 846 (2) = 18 N L.J. 327.**

——— **S. 114, Ill (b)**—*Approver—Corroboration—Evidence of wife of deceased, who was a consenting party to the murder—If sufficient.*

The wife of a murdered man, who knew all about the proposal to murder her husband, and was a consenting party to the commission of the crime is in the position of an accomplice, and her evidence should not therefore be accepted either as corroboration of the approver's evidence or as sufficient, apart from independent corroboration, to justify a conviction. (*Rangi Lal and Abdul Qadir, JJ.*) ALI MAHOMED *v.* EMPEROR **154 I C. 224 = 36 Cr.L J. 491 = 7 R L. 529 = 1934 Cr C. 349 = A I R. 1934 Lah. 171.**

——— **S. 114, Ill. (b)**—*Approver's evidence—Corroboration.*

EVIDENCE ACT (1872), S. 114, Ill. (b).

The corroboration falls under two heads: (1) general corroboration, and (2) special corroboration connecting each of the accused with the offence. The first shows or is meant to show that the man is truthful and has a good memory. With regard to the second, it is settled law that an additional corroboration is required connecting the accused individually with the actual commission of the offence. Prudence requires that the connexion of each individual with the crime should be proved and corroborated by independent evidence, the real point being that precautions must be taken against the possibility of substitution. A story may be meticulously true in every detail with the all important exception that the name of *A* has been inserted instead of the name of *B*. The correctness of the story is not affected by the all-important change. It is unsafe to convict a person on the uncorroborated testimony of an approver who is no better than the ordinary run of such men.

Held, on the evidence, that there was not sufficient corroboration of the approver's evidence in a case of conspiracy. (*Harrison and Dalip Singh, JJ.*) RANBIR SINGH *v.* EMPEROR. **I R. 1932 Lah. 195 = 136 I C. 19 = 33 Cr L J. 242 = 33 P.L.R. 241 = 1932 Cr.C. 248 = A.I.R. 1932 Lah. 204.**

[R. 15 L. 673 (677').]

——— **S. 114, Ill. (b)**—*Approver's evidence—Corroboration.*

There is no bar to the conviction of an accused person even on the uncorroborated testimony of an approver if the Court is fully satisfied about its truth. But the testimony of an approver being usually of a tainted character, the Courts as a matter of prudence insist generally on some material corroboration thereof in so far as it implicates the accused person. The extent of corroboration will however vary with the circumstances of each case. If the approver's evidence appears on the whole to be reliable and he has no motive for implicating an accused falsely, the corroboration required will be comparatively less. (*Bhide and Tapp, JJ.*) SHER JANG *v.* EMPEROR. **32 Cr L J. 684 = I R. 1931 Lah 405 = 131 I.C. 277 = 1931 Cr.C. 298 = A. I.R 1931 Lah. 178.**

——— **S. 114, Ill. (b)**—*Approver's evidence—Corroboration.*

The rule that a conviction should not be based on the uncorroborated testimony of an approver is not strictly a rule of law but a rule of practice dictated by prudence. The nature and degree of corroboration must necessarily vary with the particular circumstances of each case.

Held, on the facts that a comperatively small amount of corroboration was sufficient. (*Bhide and Tapp. JJ.*) MANAK CHAND *v* EMPEROR. **I.R. 1931 Lah. 785 = 133 I C 545 = 32 Cr L J. 1036 = 32 P.L.R. 792 = 1932 Cr C. 73 = A I.R. 1932 Lah. 73.**

——— **S. 114, Ill. (b)**—Approver's evidence—Corroboration. *See* EVIDENCE ACT, S. 133. **9 Rang. 404 = A.I R. 1931 Rang 235.**

——— **S. 114, Ill. (b)**—*Approver's evidence—Corroboration—Case of criminal conspiracy.*

The rule as to corroboration of approver's evidence is equally applicable in a case where there are more than one accomplice and even though the charge may be difficult of proof Corroboration is not required of every act ascribed to the conspirator and it need not be sufficient by itself to prove the guilt of the man. It is sufficient if in some circumstance there is independent evidence implicating the accused, which would enable the Court to rely upon the general truth of the approvers' evidence or of the confessions of the co-accused. Where in a case of conspiracy to manufacture arms and ammunition and to kill Europeans, the only evidence of

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corroboration was the discovery of certain maps and documents in a house which was the centre of conspiracy and it was further shown that the accused used to frequent the place but no bombs, etc., were discovered in that place.

Held, there is no independent corroboration implicating the accused which the Court requires to rely and act upon the evidence of the approvers and the accomplice and so the conviction on the evidence of the approvers and the accomplice cannot be sustained. (*Rankin, C. J., Pearson and S. K. Ghose, JJ.*) AMBICA CHARAN ROY *v.* THE EMPEROR. **35 C.W.N. 1270 = 33 Cr.L. J. 19 = I.R. 1932 Cal. 33 = 134 I.C. 1121 = 1931 Cr.C. 977 = A.I.R. 1931 Cal. 697.**

———**S. 114, Ill. (b)**—*Approver's evidence—Corroboration—Evidence of confession accused—Sufficiency to convict co-accused.*

Where the evidence of an approver is principally on the question of conspiracy and where that evidence is sought to be corroborated by the evidence of the confessing accused, it amounts to this, that one tainted piece of evidence is sought to be corroborated by another tainted piece of evidence and its evidentiary value as against the co-accused is practically nil and it would not justify the conviction of a co-accused. 33 C.W.N. 58, Rel. on. (*Agha Haidar, J.*) INDAR DATT *v.* EMPEROR. **I.R. 1931 Lah. 537 = 132 I.C. 185 = 32 Cr.L. J. 818 = 1931 Cr.C. 648 = A.I.R. 1931 Lah. 408.**

———**S. 114, Ill. (b)**—*Approver's evidence—Corroboration—Identity of accused.*

Corroboration ought to consist of some circumstance that affects the identity of the person accused. (*Rankin, C.J., Pearson and S.K. Ghose, JJ.*) AMBIKA CHARAN ROY *v.* THE EMPEROR. **35 C.W.N. 1270 = 134 I.C. 1121 = 33 Cr.L J. 19 = I.R. 1932 Cal. 33 = 1931 Cr.C. 977 = A.I.R. 1931 Cal 697.**

———**S 114, Ill. (b)**—*Approver's evidence—Corroboration—Necessity.*

The evidence of an approver is naturally and properly regarded with suspicion, he being a person under the very strongest temptation to tell the story wanted of him; and except under very exceptional circumstances, his evidence as a rule should not be accepted as sufficient unless well corroborated. If it is well corroborated and there are no other reasons to doubt it, it may sometimes be accepted as truthful and trustworthy. But if it is clear from the records and from his own statements that he is an untruthful person, the question of corroboration does not arise. His evidence must be put out of consideration entirely. (*Reilly, C.J. and Sankaranarayana Rao, J.*) VISHAKANTE GOWDA *v.* GOVERNMENT OF MYSORE. **13 Mys L.J. 81 = 40 Mys.H.C.R. 27.**

———**S. 114, Ill. (b)**—*Approver's evidence—Corroboration—Recovery of identifiable ornaments.*

It is not safe to convict a person on the uncorroborated testimony of an approver. The recovery of articles which are very common and which are not capable of a definite identification is no corroboration but the recovery of identifiable ornaments will be sufficient. (*Abdul Qadir, J.*) KARTARA *v.* EMPEROR. **155 I.C. 305 = 7 R L 687 = 36 Cr.L.J. 702 = 35 P.L.R. 436 = 1934 Cr.C. 810 = A I.R. 1934 Lah. 525.**

———**S. 114, Ill. (b)**—*Approver's evidence—Corroboration required.*

Where in a case of murder there is considerable suspicion but not sufficient evidence to connect the accused with the crime, the accused cannot be convicted on the basis of the approver's evidence unless it is corroborated in material particulars. (*Doraswamy Iyer, C. J. and Mahadevayya, J.*) VENKATAGIRIAPPA *v.* GOVERNMENT OF MYSORE. **11 Mys. L.J. 239.**

EVIDENCE ACT (1872), S. 114, Ill. (b).

———**S. 114, Ill. (b)**—*Approver's evidence—Corroboration—Retracted confession of co-accused.*

The rule of law is well-established that a conviction cannot ordinarily be based on the mere uncorroborated testimony of an approver; and the testimony of an approver which is itself tainted cannot be held to be sufficiently corroborated by a retracted confession of a co-accused. (*Bhide, J.*) KANSHI RAM *v.* EMPEROR. **15 Lah. 491 = 153 I.C. 383 = 7 R L. 425 (2) = 36 Cr. L.J 383 (2) = 36 P.L.R. 346 = 1934 Cr.C. 1253 = A.I. R. 1934 Lah. 873.**

———**S 114, Ill. (b)**—*Approver's evidence—Need for corroboration—Corroborative evidence interested—Conviction not justified.*

The evidence of the approver should be corroborated by reliable evidence in material details against each of the accused. Where the evidence of the prosecution witnesses who attempted to support the testimony of the approver as to the movements of the accused is not convincing and in some respects is interested, they being inimical to the accused, the conviction should be set aside. (*Coldstream and Jai Lal, JJ.*) ARJAN *v.* EMPEROR. **147 I.C. 1231 = 6 R.L. 492 = 35 Cr.L J. 583 = 34 P.L.R. 2.**

———**S 114, Ill, (b)**—*Approver's evidence—Corroboration—Testimony of his wife.*

It is not safe to convict upon the uncorroborated evidence of an approver and the testimony of his wife who is obviously interested in supporting his story which had procured his pardon cannot be regarded as independent corroboration of the approver's evidence. (*Coldstream and Jai Lal, JJ.*) SULTAN *v.* EMPEROR. **142 I.C. 823 = 34 Cr.L J. 450 = I.R. 1933 Lah. 273 = 33 P.L. R. 13.**

———**S. 114, Ill. (b)**—*Approver's evidence—Nature of corroboration necessary.*

The evidence of the approver should be corroborated by independent evidence connecting each of the accused with the crime. A retracted confession may be good corroborative evidence against the person who made it, though not against the other co-accused. (*Coldstream and Jai Lal, JJ.*) GEHNA *v.* EMPEROR. **I.R. 1932 Lah. 294 = 137 I.C. 95 = 33 Cr.L.J. 414 = 33 P.L.R. 16 = 1932 Cr C 179 = A.I.R. 1932 Lah 180.**

———**S. 114, Ill. (b)**—*Approver's evidence—Need for corraboration—Conspiracy case.*

There is no rule of law in India which prevents a Court from convicting on the sole evidence of an approver, but, adopting the practice which has for many years been followed in England, no Court in this country will convict an accused person upon such evidence unless it is corroborated by some independent testimony. This salutary rule of practice is particularly necessary in cases of conspiracy to commit crimes where the crime of criminal conspiracy is established the moment an agreement between the accused persons to commit such crimes is proved. Evidence of a mere agreement can easily be concocted or manufactured, hence the need of independent testimony by way of corroboration is manifestly essential. The evidence of one approver cannot amount to corroboration of the evidence of another as the fact that a witness is an approver creates suspicion in the mind of the Court and that suspicion cannot be removed by merely calling another approver. (*Harries and Rachhpal Singh, JJ.*) BACHCHA BABU *v.* EMPEROR. **155 I C 369 = 7 R A. 908 = 36 Cr.L J. 684 = 1935 A. Cr C. 26 = 1935 A.W.R. 1 = 1935 Cr.C. 214 = A.I.R. 1935 All. 162.**

———**S. 114, Ill. (b)**—*Approver's evidence—Rule as to corroboration.*

EVIDENCE ACT (1872), S. 114, Ill. (b).

The evidence of an accomplice should not be acted upon unless corroborated as against the particular accused in material respects and that rule should be applied however little reason there was to doubt the approver's story. It is no doubt not necessary that the evidence corroborating the story of an approver or an accomplice should be evidence with directly connects the accused with the offence. But there must be some evidence which tends to show that the story of an approver or accomplice is true in so far as it relates to the accused. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* SHANKARSHET. **58 Bom. 40=147 I.C. 25=6 R.B. 181=35 Cr.L.J. 317=35 Bom.L.R. 1040=1933 Cr.C. 1586=A.I.R. 1933 Bom. 482.**

———**S. 114, Ill. (b)**—*Approver's evidence—Value.*

The evidence of an approver, who is a criminal himself and a man of the lowest character, must be taken with a good deal of caution if not suspicion. The prosecution must prove not only that the approver had an accomplice but his accomplice was as a matter of fact, the accused person and no other. Furthermore, his evidence must be corroborated in important and material particulars so as to make it reasonably certain that it was the accused who had actually committed the offence in view of the elements of corroboration. (*Agha Haidar, J.*) AMAR NATH *v.* EMPEROR. **I.R. 1931 Lah. 815=133 I.C. 639=32 Cr.L.J. 1049=1931 Cr.C. 646=A.I.R. 1931 Lah. 406.**

———**S. 114, Ill. (b)**—*Approvers—Mutual corroboration.*

Where there are two approvers they cannot as a matter of judicial prudence be held to corroborate each other when they had ample time to consult each other before they became approvers and also had opportunity of consultation after surrender to the police. (*Dalip Singh, J.*) PARBHU *v.* EMPEROR. **6 I.R. (Lah.) 212=146 I.C. 364=35 Cr L J. 79=34 P.L.R. 639=1933 Cr.C. 1409=A.I.R. 1933 Lah 946.**

———**S. 114, Ill. (b)**—*Approver's statement—Corroboration.*

The statement of an approver by itself should not be considered to be sufficient for the conviction of an accused person, until and unless it has been corroborated by some extrinsic evidence. (*Middleton, J. C. and Kazi Mir Ahmad, A.J.C.*) NAZAM DIN *v.* EMPEROR. **6 R. Pesh. 47=148 I.C. 8=35 Cr.L.J 719=1934 Cr.C. 381=A.I.R. 1934 Pesh. 11.**

———**Ss. 114, Ill. (b) and 133**—*Approvers statement—Unconvincing and uncorroborated—Not sufficient for conviction—Cr. P. Code* (1898), *Ss.* 337 *and* 339.

When the statement of the approver is itself unconvincing and is not corroborated by other evidence, it is quite unsafe to convict the accused and the accused should be given the benefit of doubt. (*Bhide and Currie, JJ.*) GUJAR SINGH *v.* EMPEROR. **155 I.C. 149=7 R.L. 643=36 Cr.L.J. 671=1934 Cr.C. 39=A.I.R. 1934 Lah. 21.**

———**S. 114, Ill. (b)**—*Approver's testimony—Corroboration.*

It is a rule of practice, which has acquired the sanctity of a rule of law, that no conviction should be based on the testimony of an approver unless it is corroborated in material particulars by independent evidence connecting each of the culprits with the commission of the crime. (*Shadi Lal, C. J. and Abdul Rashid, J.*) MANGAL SINGH *v.* EMPEROR. **150 I C. 21=6 R.L. 829=35 Cr.L.J. 1046=36 P.L.R. 121=1934 Cr.C. 565=A.I R. 1934 Lah. 346.**

———**Ss. 114, Ill. (b) and 133**—Approver's testimony—Corroboration—Principles—Accomplice, who is. *See* EVIDENCE ACT, S. 133. **A.I.R. 1934 Cal. 678.**

EVIDENCE ACT (1872), S. 114, Ill. (b).

———**S. 114. Ill. (b)**—*Approver's testimony—Nature of corroboration necessary.*

That there is some probability of truth in the testimony of the approver is not sufficient for the purpose of convicting all the co-accused, unless the corroboratory evidence is such as serves to identify each of the accused with the offence. (*Beaumont, C. J. and Broomfield, J.*) EMPEROR *v.* GANU CHANDRA. **56 Bom. 172=I.R. 1932 Bom. 232=137 I.C 174=33 Cr.L.J. 396=34 Bom.L.R. 303=1932 Cr.C. 398=A.I.R. 1932 Bom 286.**

[R. 146 I.C 701 (704.)]

———**S. 114, Ill. (b)**—Approver's testimony—Nature of corroboration necessary for conviction. *See* EVIDENCE ACT, S. 133. **34 P.L R. 866.**

———**Ss. 114, Ill. (b) and 133**—*Approver's testimony Necessity for corroboration.*

No conviction can be based on the uncorroborated testimony of an approver. This rule of practice should not be departed from on the ground that the approver has no enmity against the accused or that his statement was a very detailed one. (*Abdul Rashid, J.*) SHIB DHAN *v.* EMPEROR. **6 I.R. (Lah.) 139 (2)=145 I.C. 752=34 Cr.L.J. 1129=34 P L.R 660=1933 Cr.C. 1111=A I.R. 1933 Lah. 838.**

———**S. 114, Ill. (b)**—*Approver's testimony—Need for corroboration.*

The rule of prudence that no conviction should be based on the testimony of an approver unless it is corroborated in material particulars connecting the accused with the commission of the crime has acquired the sanctity of a rule of law. Even in cases where the approver otherwise appears to be a satisfactory witness, it is unsafe to base the conviction solely on his testimony, unless his testimony is corroborated by independent evidence in some material particulars. In a charge of murder, the fact that the deceased was last seen alive in the company of the accused and the approver, is a strong circumstance which corroborates the testimony of the approver. (*Young, C. J. and Abdul Rashid, J.*) ATA MAHOMMED *v.* EMPEROR. **157 I.C. 626=8 R.L. 127=36 Cr.L.J. 1202=37 P.L.R. 271.**

———**S. 114, Ill. (b)**—*Approver's testimony and retracted confession of co-accused—Sufficiency for conviction.*

If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. (*Pullan and Niamatullah, JJ.*) NASIR *v.* EMPEROR. **55 All. 91=I.R. 1933 All. 170=34 Cr.L.J. 489=143 I.C. 67=1932 A L.J. 1125=13 L.R. 157 (Cr.)=1933 Cr.C. 42=A.I.R. 1933 All. 31.**

———**S. 114, Ill. (b)**—*Co-accused—Prosecution withdrawn—Corroboration of statement.*

The co accused against whom the charge has been unconditionally withdrawn is a more reliable witness than the accomplice who is examined under conditional pardon, although proper corroboration is necessary in cases of both. 25 Bom. 422, Rel. on. (*Pearson and M. C. Ghose, JJ.*) SUDAM CHANDRA BAG *v.* EMPEROR. **I.R 1933 Cal. 494=144 I C. 74=34 Cr.L. J. 675=1933 Cr.C. 225=A.I.R. 1933 Cal. 148.**

———**S. 114, Ill. (b)**—*Person seeing murder but not giving information—Testimony of—Value of.*

The evidence of a person who has seen a murder committed, but does not give any information thereof may or may not be better than that of an accomplice, but the truth of the story told by him is not above suspicion. A. I.R. 1928 Lah. 391, Rel. on. (*Nanavutty and Smith JJ.*) SUNDAR LAL *v.* EMPEROR. **9 Luck. 687=148 I.C. 1045=6 R O. 482=11 O.W.N. 661=35 Cr.L.J. 836=1934 Cr.C. 868=A.I.R. 1934 Oudh 315.**

EVIDENCE ACT (1872), S. 114, Ill. (b).

———**Ss. 114, Ill. (b) and 133**—*Retracted confession of co-accused—Necessity for independent corroboration.*

Although there can be a conviction on the retracted confession of a co-accused, there must not only be corroboration on material particulars, but the corroboration must come from independent witnesses and not from the tainted evidence of an accomplice. (*Mallik and Remfry, JJ.*) KASHEMALI *v.* EMPEROR. **I.R. 1932 Cal. 709 = 140 I.C. 379 = 34 Cr.L.J. 23 = 36 C.W.N. 874 = 1933 Cr.C. 26 = A.I.R. 1933 Cal. 6.**

[Rel. 1933 M.W.N. 1129 (1138).]

———**S. 114, Ill. (b)**—*Retracted confession—Material corroboration.*

Though a retracted confession is no doubt admissible evidence against a co-accused, a conviction on such confession alone even if legal, could only be justified in the rarest of cases. It should be supported by some material corroboration upon which reliance can be placed. (*Brown, J.*) NGA LU MIN *v.* EMPEROR. **I.R. 1933 Rang. 57 = 34 Cr.L.J. 558 = 143 I.C. 142 = 1933 Cr.C. 524 = A.I.R. 1933 Rang. 73.**

———**S. 114, Ill. (b)**—*Retracted confession—Value against co-accused.*

A retracted confession carries practically no weight as against a person other than the maker; it is not made on oath, it is not tested by cross-examination, and its truth is denied by the maker himself, who has thus lied on one or other of the occasions. The very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath. Where not only did the confessing accused retract their confession, but when pardons were offered to two of them, with a view to their giving evidence as accomplices, they refused to accept such pardon.

Held, that the value of the evidence of the confessions as against the other co-accused was much weakened and that the question, as to whether the confessions of the confessing accused afforded sufficient corroboration of one another to justify the convictions of the co-accused, was one which required careful consideration. 28 Cal. 689, Foll.; 38 Cal. 559, Ref. (*Dunkley, J.*) NGA PO HLAING *v.* EMPEROR. **6 I.R. (Rang.) 89 = 35 Cr.L.J. 39 = 146 I.C. 303 (2) = 1933 Cr.C. 1139 = A.I.R. 1933 Rang. 320.**

———**S. 114, Ill. (b)**—*Spy—Evidence of—Corroboration, if necessary.*

The evidence of person who associates with the accused with the sole object of entrapping the accused detects an offence and thus acting as spy is legally admissible in evidence without corroboration. But some degree of disfavour attaches to the evidence of persons playing the role of a spy or informer. Their evidence must be carefully scrutinized and the weight to be attached to it must depend upon the character of each individual witness. (*Bisheshwar Nath, J.*) BHUNESHWARI PERSHAD *v.* EMPEROR. **6 Luck 668 = I.R. 1931 Oudh 250 = 132 I.C. 234 = 32 Cr.L.J. 860 = 14 O.L.J. 438 = 8 O.W.N. 503 = 1931 Cr.C. 444 = A.I.R. 1931 Oudh 172.**

———**S. 114, Ill. (c), Expl**—Negotiable instrument—Presumption as to consideration. *See* NEGOTIABLE INSTRUMENTS ACT, S. 118. **A.I.R. 1935 Lah 599**

———**S. 114, Ill. (c) and Negotiable Instruments Act, S. 118**—*Difference between—Nature of presumption raised—Quantum of consideration, if can be presumed.*

The difference between S. 114, Ill. (*c*) of the Evidence Act and S. 118 of the Negotiable Instruments Act is this, that, under the first, the Court has a discretion to make the presumption or not, whereas, under the second, the Court is bound to start with the presumption; but once the presumption is made, there is no difference between the two cases in the manner of displacing the presumption or disproving the presumed fact. Neither section justifies any presumption as to the quantum of consideration as distinguished from the mere existence of consideration. (*Varadachariar and Burn, JJ.*) NARASAMMA *v.* VEERRAJU. **58 Mad. 841 = 1935 M.W.N. 528 (2) = 160 I.C. 768 = 8 R.N. 716 = 42 L.W. 321 = A.I.R. 1935 Mad. 769.**

———**S. 114, Ill. (d)**—*Continuity of a state of things—Presumption—Nature of—If operates backwards.*

There is a presumption that a state of things found to exist at a particular point of time continues, but there is no rule of evidence by which one can presume backwards. A.I.R. 1934 Cal. 707, Foll. (*Derbyshire, C.J. and R.C. Mitter, J.*) HEMENDRA NATH ROY CHOUDHARY *v.* JNANENDRA BASANNA BHADURI. **63 Cal. 155 = 159 I.C. 1101 = 8 R.C. 388 = 40 C.W.N. 115 = 62 C.L.J. 49 = A.I.R. 1935 Cal. 702.**

———**S. 114, Ill. (d)**—*Criminal trial—Theft of revolver in October—Revolver found with accused in following May—Presumption.*

A revolver stolen in October was found with the accused in the following month of May.

Held, that though it was not possible to say that the distance of time between October and May was so short that a presumption of guilt should necessarily arise, yet as the accused was not able to account for the possession of an article not easily obtained in market overt without due caution, the Court was entitled to presume that the accused was either a thief or a retainer of stolen goods knowing them to be stolen. (*Bajpai, J.*) KEOTI *v.* EMPEROR. **6 I.R. (All.) 135 = 145 I.C. 609 = 34 Cr.L.J. 1018 = 14 L.R. 63 (Cr.) = 1933 A.L.J. 523 = 1933 Cr.C. 761 = A.I.R. 1933 All. 461.**

———**S. 114, Ill. (d)**—*Insolvent—Receipt of large sums of money shortly after adjudication—Presumption—Conviction under S. 69, Provincial Insolvency Act.*

Where the insolvent was proved to have received certain sums of money within seventeen days after his adjudication, the Court may, under S. 114 of the Evidence Act, presume that the source of the trade which brought those sums into the insolvent's hands consisted of undisclosed assets in his possession at the time of the adjudication and a conviction based on such presumption is not bad in law. (*Curgenven, J.*) RAMACHANDRA NAIDU *v.* EMPEROR. **1931 M.W.N. 1312.**

———**S. 114, Ill. (e)**—*Judicial acts—Attachment—Compliance with formalities of—Presumption.*

Where there is ample evidence that the land was attached, in the absence of direct evidence to the contrary, it must be presumed that all the necessary formalities, including the fixing of a copy of the order of attachment in the Collector's Office, were duly complied with and that the attachment was validly made. (*Lord Tomlin.*) MAHOMED AKBAR KHAN *v.* MIAN MUSHARAF SHAH. **61 I.A. 371 = 15 Lah. 836 = 60 C.L.J. 261 = 39 C.W.N. 89 = 151 I.C. 221 = 7 R.P.C. 51 = 40 L.W. 396 = 11 O.W.N. 1158 = 18 R.D. 475 = 36 P.L.R. 285 = 4 A.W.R. 398 = A.I.R. 1934 P.C. 217 = 67 M.L.J. 611 (P.C.)**

[F. 1935 A.L.J. 390.]

———**S. 114, Ill. (e)**—*Judicial acts—Attachment by Court—Regularity—Presumption.*

Where the objection urged by a party against a sale held under an order of Court is that the attachment under which the sale was held was irregular, the onus lies on him to show that the proceedings of the attaching Court were vitiated in any manner, as the presumption, unless rebutted, is that all the formalities required by law have been duly taken. (*Addison and Din*

EVIDENCE ACT (1872), S. 114, Ill. (e).

Mohammad, JJ.) BANKUAR *v.* RICHHPAL. **37 P. L.R. 53.**

———**S. 114, Ill (e)**—*Judicial acts—Attachment proved—Validity—Presumption.*

When it is proved that an attachment has been made, in the absence of any evidence to the contrary, it ought to be presumed that the attachment was validly made and all the necessary formalities, such as are required under O. 21, R. 44, C. P. Code, were complied with. (*Ganga Nath, J.*) ARJUN *v.* EMPEROR. **157 I.C. 178 (2)=8 R.A. 128=36 Cr.L.J. 1094 (2)=1935 A.L.J. 390=1935 A.W.R. 512=1935 A Cr.C. 114=1935 Cr. C. 493=A I.R. 1935 All. 436.**

———**S. 114, Ill. (e)**—*Judicial acts—Order of attachment—Validity presumed.*

Where there was no positive evidence that the attachment was not effected in accordance with law and such a contention was not raised in the lower Court,

Held, that the Court should give effect to the presumption regarding the regularity of official's acts and proceed on the view that there was a valid attachment duly effected. (*Mukerji and Mitter, JJ.*) C. L. KIERNANDER *v.* BENI MADHAB KHETTRI. **58 Cal. 598=I R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

———**S. 114, Ill. (e)**—*Judicial acts—Presumption as —Process returned served.*

The presumption that official acts were rightly carried out applies to the return of a process under O. 21, R. 22, C. P. Code, as duly served so that the burden of proving that the record is wrong lies heavily on the judgment-debtor. (*Mukerji and Guha, JJ.*) J. C. GALSTAUN *v.* SYED MAHOMED HUSAIN. **140 I C. 732=I R. 1933 Cal. 26=36 C.W N. 242=A I.R. 1932 Cal. 627.**

———**S. 114, Ill. (e)**—*Judicial acts—Suit to set aside decree for fraud—Allegation of fraudulent endorsement of refusal of service—Burden of proof.*

Where the case of the plaintiff is that the defendant "had obtained a fraudulent *ex parte* decree by having got up a false endorsement of refusal of service," there is a presumption under S. 114 (*e*) of the Evidence Act that proceedings held and accepted by the Court are regular and true and the burden of proof is on the party asserting the contrary. (*Doraswami Iyer, C.J. and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys. L.J. 151.**

———**S. 114, Ill. (e)**—*Judicial acts—Suit to set aside decree on the ground of fraud—Plea of non-service of summons—Burden of proof.*

There is a presumption under S. 114, Ill. (*e*) of the Evidence Act that proceedings held and accepted by the Court are regular and true and so a party who asks that certain proceedings in Court should be set aside on the ground of fraud or irregularity and alleges that the processes were not executed as they purport to have been must prove his allegations. (*Mahadevayya and Ramachandra Rao, JJ.*) RANGAPPA *v.* MOODLAPPA. **10 Mys.L.J. 233.**

———**S. 114, Ill. (e)**—*Judicial acts—Warrant—Presumption.*

It may be presumed that official acts are regularly performed and a warrant once signed and issued remains actually in existence until such time it is known to have been destroyed. (*Harrison and Dalip Singh, JJ.*) EMPEROR *v.* KALU. **I.R. 1933 Lah. 402=144 I.C. 67=34 Cr.L J. 679 (2)=1933 Cr.C. 304=A.I.R. 1933 Lah. 159.**

———**S. 114, Ills. (e) and (f)**—*Official acts—Books of Collectorate—Entries as to arrears of revenue—Presumption as to correctness.*

EVIDENCE ACT (1872), S. 114, Ill. (e).

Where the books of the Collectorate show that the estate is in arrears the relevant entries therein may be presumed to be correct under S. 114 having regard to Ills. (*e*) and (*f*). 50 Cal. 243, Ref. (*Mukerji and Guha, JJ.*) SRI SRI RADHA GOBINDA DEB THAKUR *v.* GRIJA PRASANNA MOOKERJEE. **59 Cal. 186=136 I.C. 129=I.R. 1932 Cal. 177=35 C.W.N. 912=A.I. R 1932 Cal. 153.**

———**S. 114, Ill. (e)**—*Official acts—Circular by a public servant stating that it was made on the authority of the superior officer—Presumption.*

Where the election officer issued a circular to the polling officers stating that it was issued under the directions of the Election authority.

Held, that the statement as to the directions by Election authority must be presumed to be correct and that it was for those who challenged the truth of the statement to show it is false. (*Ramesam, Off C.J.*) BIJLI SAHIB BAHADUR *v.* MAHOMED ASAN MARACAIR. **6 I.R. Mad. 283=146 I.C. 572=39 L.W. 466=A.I.R. 1934 Mad. 27.**

———**S. 114, Ill. (e)**—*Official acts—Entry in* jamabandi—*Presumption.*

The entry in the *jamabandi* in the year following the partition to the effect that the field was joint, while other fields have been recorded in the separate names of the parties raises a very strong presumption that the field was kept joint. (*Staples, A.J.C.*) MAHARAJ SAI *v.* KARAR NATH. **29 N.L.R. 272=6 I R. (Nag.) 34=144 I.C. 948=A.I.R. 1933 Nag. 130.**

———**S. 114, Ill. (e)**—*Official acts—Entries in* jamabandi—*Presumption regarding—Evidence of adverse possession.*

No general rule as regards a presumption to be drawn from entries in *jamabandis* can be laid down. Each case must be considered on its own facts. Thus if it were simply a case of whether one man or the other was in possession, it might be presumed that the *jamabandi* entry supporting one man's possession is correct. Where, however, the assertion is only by the party in possession, effect can be given to the same only from the date when the record was drawn up. (*Bhide and Currie, JJ.*) SOHAWA SINGH *v.* KESAR SINGH. **13 Lah. 432=I. R. 1932 Lah. 715=140 I C. 474=33 P.L.R. 771=A. I.R. 1932 Lah. 586.**

———**S. 114, Ill. (e)**—*Official acts—Government notification—Proof of publication.*

Though ordinarily it may be presumed that a Government notification purporting to have been published in a Gazette of a certain date, was in fact so published, yet where the interval between the issue of a notification and action taken on it is so short as, *e.g.*, a night, a Court might require stricter proof that all the formalities requisite to the act of notifying, or, in other words, publishing the notification, had actually been carried out. (*Beaumont, C. J. and Murphy, J.*) EMPEROR *v.* BALKRISHNA. **55 Bom. 356=I.R. 1931 Bom. 257=130 I.C. 577=32 Cr.L.J. 572 (2)=33 Bom.L. R. 82=1931 Cr.C. 180=A.I.R. 1931 Bom. 132.**

———**S. 114, Ill. (e)**—*Official acts—Nature of presumption.*

Official acts may be presumed to have been regularly performed but such presumption cannot supply deficiency in the proof. (*S. K. Ghose, J.*) CHAIRMAN, HOOGHLY-CHINSURA MUNICIPALITY *v.* KESHAB CHANDRA PAL. **I.R. 1933 Cal. 395=143 I.C. 285=34 Cr.L.J. 549=56 C.L J. 583=1933 Cr.C. 419=A.I.R. 1933 Cal. 347.**

———**S. 114, Ill. (e)**—*Official acts—Order applying Part VI of Bengal Tenancy Act to a Municipality—No presumption of promulgation.*

EVIDENCE ACT (1872), S. 114, Ill. (e).

Where under an act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. So before a prosecution can succeed on a charge of the accused having failed to take out a licence for selling meat, it must prove that the order applying Part VI of Bengal Tenancy Act to the Municipality in question was promulgated under the provisions of S. 222 of the Bengal Municipal Act. This cannot be presumed under S. 114 (*e*) of the Evidence Act, which covers only alleged irregularities in the method and manner—and not the factum—of publication. 53 Cal. 718, Rel. (*Jack, J.*) KHURSHID CHIK *v.* RANIGANJ MUNICIPALITY. **I.R. 1932 Cal. 558=139 I C 134=36 C. W.N 823=1932 Cr.C. 860=A.I.R. 1932 Cal. 833.**

———**S. 114, Ill. (e)**—*Official acts—Police party consisting of several senior officers—Proper choice of search witnesses—Presumption.*

Where in the police party were several senior officers of police and the witnesses for search were chosen,

Held, that it must be presumed that the witnesses have been properly chosen. (*Mackney, J.*) BOON CHIN *v.* EMPEROR. **157 I.C. 798=8 R.R. 110=36 Cr L.J. 1228=1935 Cr.C. 934=A I R. 1935 Rang. 233.**

———**S. 114, Ill. (e)**—*Official* acts—Proof of opinion of Local Government Recital in notification. *See* BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930) S. 3 (2). **62 Cal. 1041.**

———**S. 114, Ill. (e)**—*Official acts — Registration under S. 23-A of Registration Act—Presumption that it was in time.*

The presumption of law is that all official acts are properly performed. It is for the Registrar before whom the re-presentation was made under S. 23-A of the Registration Act to satisfy himself that the re-presentation was made within the proper time and if he proceeded to register the document, the presumption is that he was so satisfied. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W. N. 1148.**

———**S. 114, Ill. (e)**—*Official acts—Scope of presumption.*

The real meaning of ill. (*e*), S. 114, is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise any presumption that an act was done of which there is no evidence and the proof of which is essential to the case raised. 32 Cal. 1107 and 8 Pat. 1, Ref. (*Mya Bu and Dunkley, JJ.*) KUMARI CHOUDHURY *v.* RAJ KUMAR GHOSE. **151 I.C. 337=7 R.R. 63=A.I.R. 1934 Rang. 207.**

———**S. 114, Ill. (e)**—*Official acts—Survey papers not finally published—Admissibility.*

The papers of a survey which do not reach the stage of final publication are not altogether inadmissible in evidence even though the weight to be attached is a different matter. The presumption of correctness cannot apply to such papers until final publication but the presumption arising from the circumstances that official duties are taken to have been regularly performed applies. (*Dhavle, J.*) RASDHARI LAL *v.* NAND LAL MAHTON. **148 I.C. 444=6 R.P. 476=A.I.R. 1933 Pat. 468.**

———**S. 114, Ill. (e)**—*Scope— Order sanctioning prosecution—Documents referred in— Identity—Presumption as to—Extent of.*

EVIDENCE ACT (1872), S. 114, Ill. (g).

The Court should not presume that the documents referred to in the order of sanction by the Governor-General were the documents in question and that they were duly forwarded by the Governor-General and reached the complainant through the usual channel, unless there be any indication on the face of the questioned documents to show that they were the annexures to the order of sanction. In the absence of any such indication it would be a violent presumption to raise that these were the documents mentioned in the order sanctioning prosecution. (*Subhedar, A.J.C.*) DIWAN SINGH *v.* EMPEROR. **155 I.C. 450=7 R N. 176=36 Cr.L.J. 744—1935 Cr C. 418=A.I.R. 1935 Nag. 90.**

———**S. 114, Ill. (f)**—*Common course of business—Lawyer sending letter purporting to be instructed by client—Presumption.*

When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption, until the contrary is proved, that the letter is written under instructions. (*Baguley, J.*) HAMIDA BI *v.* ABDUL GAFFAR. **6 I.R. (Rang.) 25=144 I.C. 996 =A.I.R. 1933 Rang. 147.**

———**S. 114, Ill. (f)**—*Common course of business—Registered letter returned by Post Office as refused—Presumption.*

The question whether where a registered letter is returned by Post Office as refused, a presumption can be drawn as to due delivery or service of the letter by post must depend on particular circumstances of each case. Though it is open to the Court under S. 114 (*f*) to presume that the common course of business has been followed, it cannot hold that the posting of the letter proves delivery as it is a matter of common knowledge, that postal servants are not always diligent. (*Brown and Mya Bu, JJ.*) MA ME SHIN *v.* R. M. R. M. N. CHETTYAR FIRM. **6 I R. (Rang.) 97=146 I.C. 422 =A.I.R. 1933 Rang. 76.**

———**S. 114, Ill. (f)**—Common course of business—Registered letter sent by post correctly addressed and not coming back—Presumption. *See* EVIDENCE ACT, SS.16, ILL. (*b*) AND 114, ILL. (*f*). **39 C.W.N. 1041.**

———**S. 114, Ill. (g)**—*Accounts—Defendant suppressing them—Presumption.*

If a defendant either suppresses his accounts or has falsified them, the Court will presume everything most unfavourable to him consistent with the established facts. (*Curgenven and Pandrang Row, JJ.*) CHIDAMBARAM CHETTIAR *v.* AYYAPPA CHETTIAR. **155 I.C. 1059=7 R.M. 629=1935 M.W.N. 572=41 L.W. 104 =A.I.R. 1935 Mad 152=69 M.L.J. 558.**

———**S. 114, Ill. (g)**—*Accounts—Non-production of both sides—No adverse inference.*

Where the non-production of accounts on either side is plausibly explained, no inference can be drawn against either one side or the other from that circumstance. (*Raza and Smith, JJ.*) MT. BOOTA *v.* GUR PRASAD. **6 I.R. (Oudh) 81=146 I.C. 31=10 O.W.N. 827=A. I.R. 1933 Oudh 412.**

———**S. 114, Ill. (g)**—*Account books—Non-production of—Presumption.*

Where in a suit for damages for infringement of copyright, even after a notice, the defendant fails to produce his account book, there is a fair presumption that the account books have been deliberately suppressed by the defendants in order to conceal the actual profits raised by the sale of the books, and the Court is entitled to assume that the entire stock of copies of books published had been sold by the defendants and the sale proceeds appropriated by them. (*Sulaiman, C. J. and Thom, J.*) EDUCATIONAL BOOK DEPOT *v.* DR.

EVIDENCE ACT (1872), S. 114, Ill. (g).

RABINDRANATH TAGORE. **55 All. 564=148 I.C. 127=6 R.A. 642=1933 A.L.J. 791=A.I.R. 1933 All. 474.**

———**S. 114, Ill. (g)**—*Criminal complaint—Naming of witnesses—Prosecution not calling—Inference.*

The fact that certain persons are named in the first information report as being witnesses of the occurrence complained about does not make it necessary for the prosecution to call any one of them. Nor does it give rise to the presumption under S. 144, Ill. (*g*) of the Evidence Act. The only witnesses whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge. The mere statement of the complainant that some one was a witness of the occurrence is not conclusive. (*Lort Williams and S. K. Ghose, JJ.*) GIRISHCHANDRA NAMADAS *v.* EMPEROR. **58 Cal. 1335=I.R. 1932 Cal. 123=135 I.C. 443=33 Cr.L.J. 135=1932 Cr.C. 103—A.I.R. 1932 Cal. 118.**

———**S. 114, Ill. (g)**—*Criminal trial — Prosecution omitting to summon witness—Inference.*

Before the prosecution launches any case, they ought to be satisfied of the truth of the case which they are going to place before the Court. Consequently, it is absurd to expect the prosecution to call witnesses who will speak against that case. If the prosecution find that a number of those who are present will not support the prosecution case, they must make up their minds whether they are truthful witnesses or not. If they come to the conclusion that they are truthful witnesses, they ought to withdraw the prosecution forthwith. If, on the other hand, they come to the conclusion that they are not truthful witnesses, there is no obligation for the prosecution to call them. Practically speaking, therefore, the prosecution ought to call those witnesses, who, they think, will support the prosecution case and no others. If the witnesses who are prepared to speak against that case are respectable witnesses who ought to be believed, then the prosecution ought to withdraw the case. It is quite useless to pursue a case and then call a whole series of witnesses who are going to speak against it. On the other hand if the defence comes to the conclusion that the witnesses are witnesses of truth who ought to have been called, then it is the duty of the defence to call them. Hence simply because the prosecution does not call certain witnesses, the Court need not raise the presumption under S. 114, Ill. (*g*) when the absence of the witnesses is explained properly. (*Lort Williams and McNair, JJ.*) BHUBAN BIJAY SINGH *v.* EMPEROR. **60 Cal. 1361=35 Cr.L.J 33=6 I.R. (Cal.) 210=146 I C. 378=37 C.W.N. 1098=1933 Cr.C. 964=A.I.R. 1933 Cal. 600.**

———**S. 114, Ill. (g)**—*Defendant withholding evidence—Inference.*

When the defandant in a suit withholds the best evidence in the case, an inference adverse to his case must be drawn. (*Mitter and B. N. Rau, JJ.*) TRAILOKYA NATH DAS *v.* KENA RAM DAS. **163 I.C. 663=9 R.C. 51=61 C.L.J. 551.**

———**S. 114, Ill. (g)**—*Failure of party to produce account—Other evidence available—Procedure.*

Where a person fails to produce the accounts in his possession showing the amount of expenses he has incurred which fact is proved by other evidence, one would be justified in presuming from the non-production of such account that he was exaggerating the expenses incurred by him; but simply because of this non-production one could not be justified in coming to the conclusion that no expenses had been proved. (*Niamatullah and Rachhpal Singh, JJ.*) SAJJAD HUSAIN *v.* MAHOMED SAYID

EVIDENCE ACT (1872), S. 114, Ill. (g).

HASEN. **154 I.C. 434=7 R.A. 759=3 A.W.R. 263=A.I.R. 1934 All. 71.**

———**S. 114, Ill. (g)**—*Failure of party to produce documents and accounts—Effect of.*

Where the defendant was required to produce vouchers given to his servants for purchases made by him from the plaintiff, and the defendant, without denying the receipt of vouchers, stated that they could not be found on search, and did not produce them or his accounts.

Held, under the circumstances, that their non-production established the correctness of the plaintiff's counterfoils. It is an inversion of sound practice for a party to suit to withhold from Court evidence in their possession which would throw light on the state of facts on which he relies. (*Srivastava and Smith, JJ.*) SHAH MAHOMED KHAN *v.* AHMAD ALI KHAN. **153 I.C. 987=7 R. O. 417=11 O.W.N. 880=A.I.R. 1935 Oudh 171.**

———**S. 114, Ill. (g)** — *Fishing application for discovery—Non production of title-deeds—Inference.*

No presumption can be made against the defendant from their non-production of their title deeds in response to a fishing application by the plaintiffs for discovery, which did not disclose any materials to support their claim. (*Ross and Fazl Ali, JJ.*) SOMESHWARI PRASAD NARAIN DEO *v.* MAHESHWARI PRASAD NARAIN DEO. **10 Pat. 630=135 I.C. 85=I.R. 1932 Pat. 5=13 Pat.L.T. 347 and 405=A.I.R. 1931 Pat. 426.**

———**S. 114, Ill. (g)**—*Material witness summoned but not examined—Adverse inference, if justified.*

Where a material witness for the prosecution was summoned but not examined at the trial, the failure to examine him justifies the inference that the witness, if examined, would have deposed against the prosecution. (*Shadi Lal, C.J.*) TAJ MAHOMED *v.* EMPEROR. **15 Lah. 407=107 I C. 100=29 Cr.L.J. 212=36 P.L.R. 527=A.I.R. 1928 Lah. 125.**

———**S. 514, Ill. (g)**—*Non-production of document—Party not in possession of document—Inference.*

When a party is not in possession of a document, its non-production by him or on his behalf, does not necessarily raised the presumption that if produced it would not support his case. It is a matter for comment. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A.I.R. 1935 Cal. 368.**

———**S. 114, Ill. (g)**—*Non production of document by party—Opposite party not calling for such document—Presumption—If arises.*

A litigant is perfectly entitled to refrain from producing any documents which he considers irrelevant, and no inference as to the contents therefore can be drawn from the mere non-production, especially when he is not called upon to produce them by the other side. If the latter is dissatisfied, it is for him to apply for an affidavit of documents and to obtain production and inspection of all that might appear to him in such affidavit to be relevant and proper. Where he does not choose to so apply, neither he, nor the Court at his request, is entitled to draw any inference adverse to the party omitting to produce the documents. (*Saunders, J.*) GHELA PANCHAN & CO. *v.* MANGTULAL BAGARIA. **7 R.P. 450=154 I.C. 48.**

———**S. 114, Ill. (g)**—*Non-production of evidence by party in possession of same—Inference.*

In a case under S. 408, Penal Code, the complainant did not specify the particular items, in respect of which

EVIDENCE ACT (1872), S. 114, Ill. (g).

breach of trust was committed and the dates on which they had been committed on the ground that the time between the first and last of such dates did not exceed one year. It was contended by the accused that it covered more than a year. The complainant, though he was in possession of the account books and papers relating to these, did not produce them.

Held, that it was a legitimate inference that if they had been produced, they would not have supported the allegation made by complainant that the defalcation covered a period of only one year. (*Saunders, J.*) DEONARAIN SINGH *v.* EMPEROR **6 R P. 484 = 148 I C. 519 = 35 Cr L J. 693 = 15 Pat.L.T. 647 = 1934 Cr. C 288 = A I R 1934 Pat 132.**

———S. 114, Ill (g)—*Omission to call material witnesses—Inference.*

The omission on the part of the party to call material witnesses raises the inference that the evidence of those witnesses, if it had been procured, would have been unfavourable. (*Mya Bu and Dunkley, JJ.*) U PO SHIN *v.* EDWARD. **150 I.C. 898 = 7 R.R. 20 = A I.R. 1934 Rang 139.**

———S. 114, Ill. (g)—*Party purposely withholding documentary evidence—Inference.*

Where documents which could throw light on the real state of things are purposely withheld by a party, the irresistable conclusion is that they would go against him and support the case of the opposite party. (*Guha and Lodge, JJ.*) RAJANI KANTA RAY *v.* KAILASH CHANDRA SHAHA. **62 C.L.J. 225.**

———S. 114, Ill. (g)—*Party withholding evidence—Adverse inference—When permissible.*

In order to entitle the Court under S. 114, Ill. (*g*) to draw inferences unfavourable to the person withholding evidence, the opposite party must satisfy the Court that such evidence was in existence and could be produced. (*Lord Thankerton.*) MAHABIR SINGH *v.* ROHINI RAMANADHWAJ PRASAD SINGH. **I.R. 1933 P.C. 49 = 1933 M.W N. 357 = 57 C.L J. 222 = 37 L W. 521 = 37 C W.N. 657 = 35 Bom L R. 500 = 142 I.C. 220 (2) = A I.R. 1933 P.C. 87 = 64 M.L.J. 413 (P C.).**

———S. 114. Ill. (g)—*Presumption from withholding of evidence—Scope of.*

Ill. (*g*), to S. 114 of the Evidence Act says that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. The section does not, in all cases, make it obligatory on the Court to act on such a presumption, because a particular case may be such that notwithstanding that there is an intentional non-production, other circumstances may be present upon which such intentional non-production may be justifiable on some reasonable grounds or may be attributable to some justifiable cause. The illustration itself says that the Court shall also have regard to other facts in considering whether the maxim does or does not apply to any particular case. But where no other cause is apparent or proved, the Court will be entitled to rely on such presumption. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v* PRAVAGKUMARI DEBEE. **61 Cal. 711 = 154 I.C. 479 = 7 R.C. 459 = A.I.R. 1935 Cal. 39.**

———S. 114, Ill. (g)—*Scope.*

No presumption of S. 114, Ill. (*g*) arises if there is no evidence that the document could be produced. (*Lord Thankerton.*) RAMAYYA *v.* LAKSHMINARAYANA. **61 I.A. 177 = 57 Mad. 443 = 6 R.P.C. 117 = 148 I.C. 327 = 3 A.W.R. 566 = 11 O W N. 468 = 38 C W.N. 669 = 1934 M W.N. 386 = 59 C.L.J. 434 = 1934 A.L.J. 402 = 39 L W. 329 = A.I.R. 1934 P.C. 84 = 67 M.L.J. 1 (P.C.).**

EVIDENCE ACT (1872), S. 115.

———S. 114, Ill. (h)—*Criminal trial—Refusal of accused to answer questions—Inference.*

Although the prosecution has to be judged on its own merits, an accused person cannot defeat the ends of justice by merely refusing to answer questions. The Court may draw such inferences from the accused's refusal to answer questions as it thinks just according to S. 342, Cr. P. Code and S. 114, Ill. (*h*), Evidence Act. (*Bhide and Tapp, JJ.*) SHER JANG *v.* EMPEROR. **I R. 1931 Lah. 405 = 131 I.C. 277 = 32 Cr.L.J. 684 = 1931 Cr.C. 238 = A.I.R. 1931 Lah. 178.**

———S. 114, Ill. (i)—*Discharged mortgage deed—Presumption of time of payment.*

Where the mortgagor has produced the mortgage-deed with the stamps punched in the ordinary way, such production would raise a presumption that it had been paid up, but it would not help to prove that it had been paid before a particular date. 29 Cal. 334 (P.C.), Rel. on. (*Baguley, J.*) SARA UPDHAVA *v.* S. R. M. M. A. FIRM. **I.R. 1933 Rang. 90 = 144 I.C. 175 = A.I.R. 1933 Rang. 61 (2).**

———S. 114, Ill. (i)—*Effect—Suit for recovery of money on lost agreement—Defendant producing agreement alleging its discharge—Presumption.*

In a claim for recovery of the money on the basis of the lost agreement, the defendant produced the agreement, and alleged that the obligation had been discharged. The Court placed the onus on the plaintiff to show that the agreement was lost and not discharged.

Held, that the onus was wrongly placed as the presumption under S. 114, Ill. (*i*) would be a piece of evidence in defendant's favour, but it did not shift the onus of proof which was on the defendant to show that he had discharged his obligation. 30 I.C. 258, Ref. (*Walker, J.*) JAGAN NATH *v.* AMIRA. **I.R. 1931 Lah. 943 (2) = 134 I.C. 495 (2) = A.I.R. 1931 Lah. 299 (1)**

———S. 114, Ill. (i)—*Pro-note produced by obligor—Presumption—Strength of.*

The strength of the presumption which might be raised when the document creating obligation is produced by the obligor varies in different circumstances. As indicated by Ill. (*i*), when the document creating an obligation is in the hands of the obligor there is a presumption that the obligation has been discharged, if the contest is between the creditor and the debtor. But the presumption has much less force when raised between the debtor and the purchaser of the debt than when raised between the original creditor and the debtor. The presumption is strong when the debtor produces the instrument of obligation with an endorsement of payment on it (*Niyogi and Grille, A.J.C's.*) BHANJI *v.* GOVIND. **29 N.L.R. 298 = 149 I.C. 1200 = 6 R.N. 264 = A.I.R. 1933 Nag. 379.**

———S. 115.

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Acquiescence.
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Estoppel by deed.
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Acceptance of benefit.

———*See also* CHANGE OF POSITION AND DIFFERENT CAPACITY, *infra*.

———**S. 115**—Acceptance of benefit—Arbitration—Party accepting and acting on award—If estopped from contesting validity. *See* ARBITRATION—AWARD. **A.I.R. 1935 Sind 235.**

———**S. 115**—*Acceptance of benefit—Compromise decree—Money paid under—Party repudiating other terms—Permissibility.*

Where at the time of actual execution an agreement was arrived at between the parties to the effect that a certain amount was to be paid then and there, the balance to be paid in cash at a later date and the remaining amount would be registered with certain trustees who had been appointed by the judgment-debtor to pay off their creditors and on that amount the decree-holder was to receive rateable distribution from the trustees and the spot cash was paid then and there, *held*, that it was not open to the decree-holder to repudiate the other terms. (*Tek Chand, J.*) THE BOMBAY CO., KARACHI *v.* ROSHANDAS RADHAKISHEN. **35 P.L.R. 315=A.I.R. 1934 Lah. 423.**

———**S. 115**—*Acceptance of benefit—Costs payable under Judge's order—Acceptance without protest—Effect of.*

Per *Lort Williams, J.* (*Ghose, J.*, contra)—Where an amendment of plaint is allowed by the Judge on payment of costs, the acceptance of the costs by the defendant without protest precludes him from contesting the validity of the order. (*Lort Williams and M. C. Ghose, JJ.*) RENENDRA MOHAN TAGORE *v.* KESHAB CHANDRA CHANDA. **61 Cal. 433=150 I.C. 982=7 R.C. 47=38 C.W.N. 488=A.I.R. 1934 Cal. 554.**

Acquiescence.

———**S. 115**—*Acquiescence—Accretions—Former grantees acquiescing in fresh grants by Government of accretions—Subsequent grantees not estopped.*

The fact that some of the earlier grantees acquiesced in fresh grants being made by the Government of lands which they might have claimed for themselves as accretions does not estop subsequent grantees from claiming accretions. The accretions were totally different from those claimed by the subsequent grantees and the non-claimer by them cannot have any adverse effect upon the rights claimed by the subsequent grantees. (*Sir George Lowndes.*) SECRETARY OF STATE *v.* FOUCAR & CO., LTD. **61 I.A. 18=12 Rang. 136=38 C.W.N. 337=39 L.W. 271=18 R.D. 107=3 A.W.R. 281=11 O.W.N. 217=59 C L J. 269=1934 M.W.N. 212=6 R.P.C. 64—147 I.C. 657=A.I.R. 1934 P.C. 17=66 M L J. 239 (P.C.).**

EVIDENCE ACT (1872), S. 115—Acquiescence.

———**S. 115**—*Acquiescence—Acquiescence in ignorance of rights.*

If a person ignorant of his right acquiesces in the acts of others with regard to the rights of the property belonging to him, such acquiescence, cannot be taken as estoppel, because no estoppel can arise from ignorance of law regarding his rights. A.I.R. 1926 Rang. 131, Foll. (*Mosely and Dunkley, JJ.*) M. S. CHETTYAR FIRM *v.* KALIAMMA. **161 I.C. 221=8 R.R. 456=A.I.R. 1935 Rang. 423.**

———**S. 115**—*Acquiescence—Acquiescene in illegal and invalid objection.*

Acquiescence in an invalid and illegal objection does not bind the plaintiff or prevent him from exercising his right. (*Aston, Ag. C.J.*) NARAINDAS TULSIDAS *v.* KARACHI MUNICIPALITY. **27 S L.R 371=147 I.C. 345=6 R.S. 142=A.I.R. 1933 Sind 258.**

———**S. 115**—*Acquiescence—Building by stranger—Conduct of owner giving rise to an inference of licence.*

If the person, who built on the land, knew of the ownership, no act on the part of the owner would cause that person to believe that he was the owner, no act or omission of the true owner then makes it inequitable for him to assert his legal rights But if the person who built on it had strong reason to believe that the owner intended to allow him to enjoy the fruits of his expenditure, but remained wilfully passive in order to profit by a belief which knew to be mistaken, then the Court of equity will not allow the owner to assert his title over the land to the detriment of the stranger who built on the land. Where the land in dispute was one of the *abadi* sites in a malguzari village ordinarily given on licence to persons residing in the village, and the defendant openly built first a shed and then a house on a site to which the malguzar with full knowledge of his proceedings offered no objection, the defendant is justified in believing that the owner acquiesced in the building. The latter cannot eject the defendant without paying compensation. (*MacNair, Offg. J.C.*) SHAIKH DHUNNOO *v.* SETH SHEOLAL **27 N.L.R 183=I.R. 1931 Nag. 180=134 I.C. 852=A.I.R. 1931 Nag. 158.**

———**S. 115**—*Acquiescense—Ignorance of legal rights—Effect of.*

Acts of acquiescence cannot estop a party when he is ignorant of his legal rights and when he does not deliberately allow another to suffer detriment by suppressing knowledge of his rights or by abstaining from asserting his legal rights. (*Wardsworth, J.*) SANKARAN NAMBI *v.* NANGEELI AMMA. **161 I.C. 682=8 R.M. 846=42 L. W. 725=1935 M.W.N. 1265=A.I.R. 1935 Mad. 1062=70 M.L.J. 592.**

———**S. 115**—*Acquiescence—Land belonging to plaintiffs—Road constructed by defendants thereon under the* bona fide *impression of permission—Plaintiffs keeping quiet—Effect of.*

For a defence of acquiescence to be successful it is only necessary that the defendant should have acted in good faith believing that he had a valid right to the act in question and that, the plaintiff knowing that the defendant was under this mistaken belief should have

EVIDENCE ACT (1872), S. 115—Acquiescence.

abstained from doing anything to prevent the defendant spending money in doing that act. So where the defendant constructed a road on a land which belonged to the plaintiffs in the *bona fide* belief that he had their permission to do so and the plaintiffs kept quiet all the time, the doctrine of acquiescence prevents the plaintiffs from maintaining a suit for possession. It is not necessary in such a case that the defendant should have been unaware of that the land belonged to the plaintiffs. (*Srivastava, J.*) MAHMUDUL HAQ KHAN *v.* WAQFUL AULAD. **9 Luck. 538=6 R.O 381 (2)=148 I.C. 186 =11 O.W.N. 379=A.I.R. 1934 Oudh 178.**

———**S. 115** — *Acquiescence — Notice of assessment under Municipal Act—Failure to raise objection — Effect.*

Where notice of assessment is given to the assessee but he does not reply to it nor raise any objection within the time prescribed in the notice, that assessment becomes final even if it might have been successfully objected to in time. It is not proper for the assessee not to raise an objection within the time prescribed in the notice and then plead when prosecuted in Criminal Courts that the assessment is not correct. (*Pakenham Walsh, J.*) JAYARAM NAIDU, *In re.* **I.R. 1932 Mad. 563 (2)=138 I.C. 378=1932 M.W.N. 1220=33 Cr. L.J. 601=1932 Cr.C. 663=A.I.R. 1932 Mad. 564.**

———**S. 115**—*Acquiescence—Proceeding under O. 21, R. 58, C. P. Code—Decree holder omitting to plead that proceeding ought to be under S. 47, C. P. Code—Estoppel.*

If in a proceeding under O. 21, R. 58, C. P. Code, the decree-holder omits to raise the plea that the proceeding ought to be under S. 47, C. P. Code and not under O. 21, R. 58, he is not thereby estopped from pleading that in defence in a regular suit filed under O. 21, R. 63. (*Kendall, J.*) PADAM PRASAD *v.* SAMBHU DAYAL. **153 I.C. 851=7 R.A. 641=A.I.R. 1934 All. 699.**

Admission.

See also REVERSIONER, *infra.*

———**S. 115**—*Admission—Compromise—Party accepting liability to pay under proprietary rent before Settlement Officer—Estoppel.*

Where in a suit filed by the plaintiff for a declaration that the defendant is bound to pay the under-proprietary rent fixed in respect of the plots in suit, it was found that the parties had entered into a compromise before the Assistant Settlement Officer whereby the plaintiff accepted his liability for the payment of the under proprietary rent through his general agent.

Held, that the plaintiff was estopped from denying his liability to pay the under proprietary rent in respect of the land in suit and that he, after entering into a compromise with the defendant could not now turn round and saddle the defendant with the payment of the under proprietary rent. (*Nanavutty and Thomas, JJ.*) MANZOOR HUSAIN *v.* DAWAR ALI. **155 I.C. 295=7 R.O. 577=1935 O.W.N. 537=R.D. 247=A.I.R. 1935 Oudh 409.**

———**S. 115**—Admission—Point of law—No matter of estopped. *See* QUESTION OF LAW *infra.* **A.I.R. 1932 Pat. 267.**

Approbate and reprobate.

———**S. 115**—Approbate and reprobate. *See also* ESTOPPEL.

———**S. 115**—*Approbate and reprobate—Conduct—Property purchased in name of woman with her Stridhana—Her husband executing will with reference to such property and appointing wife as executrix—Wife approbating will and accepting office of executrix—Her heirs, if can seek to claim that property as her stridhanam.*

EVIDENCE ACT (1872), S. 115—Benamidar.

Certain property was purchased in the name of a woman with her Stridhanam. The husband treated it as his absolute property and executed a will in respect of such property appointing his wife as his executrix. She approbated the will in the teeth of opposition to it and accepted the office of executrix and thereby waived any right which she might have in the property bequeathed.

Held, that she could not approbate and reprobate, and as such her heirs could not be heard to say that the properties which the testator disposed of by that will were really the properties of their mother, whom they claim to succeed as Stridhanam heirs. (*Wadsworth, J.*) LAKSHMIDEVAMMA *v.* KESAWARAO. **159 I.C. 943=A.I.R. 1935 Mad. 1066.**

Attestation.

See also CONDUCT, *infra.*

———**S. 115**—*Alienation.*

Where an attesting witness is present at the transaction and attests the deed having heard its contents, he is estopped from challenging the rights of the transferee. 20 Cal. 296 (P.C.), Rel. on. (*Mahomed Noor, J.*) BHAGWAT RAI *v.* GORAKH RAI. **150 I.C. 765=7 R. P. 19=A.I.R. 1934 Pat. 93.**

———**S. 115**—*Attestation—Effect of.*

The signing of a deed as a witness does not by itself amount to a knowledge of its contents and does not estop anybody from taking position to the contrary, unless it is positively shown that he knew the contents of the document at the time of signing it. 49 Cal. 334 (P.C.), Rel. on. (*Shadi Lal, C.J. and Abdul Qadir, J.*) HAVELI SHAH *v.* KALIAN SINGH. **6 I.R. (Lah.) 136 =145 I.C. 746=A.I.R. 1933 Lah. 703.**

———**S. 115**—*Attestation—Effect of—Alienation by widow.*

The attestation by the reversioner of an alienation by the widow cannot be taken as presumptive proof of necessity where the document contained no recital of the purpose for which the money was required. No question of estoppel can arise against his son. (*Curgenven and Sundaram Chetty, JJ.*) SATYANARAYANA *v.* VENKANNA. **6 I.R. (Mad.) 138=147 I.C. 862=1933 M.W.N 1301=38 L.W. 230=A.I.R. 1933 Mad. 637 =65 M.L.J. 282.**

———**S. 115**—*Attestation—Effect of—No notice of contents.*

Attestation does not involve the witness in any knowledge of the contents of the deed, nor fix him with notice of its provisions. 44 Cal. 186 (P.C.) and 49 Cal. 234 (P.C.), Rel. on. (*Tek Chand and Monroe, JJ.*) FAZAL HUSAIN *v.* JIWAN SINGH. **14 Lah. 369= I.R. 1933 Lah. 86=141 I.C. 454=34 P.L.R. 196= A.I.R. 1933 Lah. 551.**

———**S. 115**—*Attestation—When amounts to estoppel.*

Although mere attestation of a deed does not necessarily import consent, it is possible that an attestation may take place in circumstances which would show that the witnesses did in fact know of the contents of the deed and that their attestation was obtained for the purpose of its evidencing their consent to the transaction. In such circumstances, they and their representatives in interest are estopped from questioning the deed. (*Srivastava and Zia-ul-Husan, JJ.*) CHANDRA NATH *v.* DASRATH. **10 Luck. 652=154 I.C. 563=7 R.O. 481 =1935 O.W.N. 222=A.I.R. 1935 Oudh 257.**

Benamidar.

———**S. 115**—*Benamidar—True owner when bound.*

It is estoppel alone which can prevent the true owner from disputing the acts of his benamidar. (*Mitter, J.*) BINDUBASHINEE DEBI *v.* KASHINATH BHATTA

EVIDENCE ACT (1872), S. 115—Change of position.

CHARYA. **58 Cal. 1371=I.R. 1932 Cal. 113=135 I.C. 433=A.I.R. 1932 Cal. 167.**

Change of position.

———**S. 115**—*Change of position.*

There is do estoppel unless the other party has changed his position on the faith of the representation. (*Walsh, J.*) VENKATARAMA CHETTY *v.* ANGATHAVAMMAL. **6 I.R. (Mad.) 220 (2)=146 I.C. 204=38 L.W. 896=A.I.R. 1933 Mad. 471.**

———**S. 115**—*Change of position—Acquisition of land by payment of compensation to claimant in* 1906—*Suit for refund and claimant's title challenged in* 1922.

In the land acquisition proceedings of 1906 and the notification preceding it, the Government had acted on the assumption that the land belonged to the claimant and there was nothing to indicate they were going to set up their own title to it. Compensation was paid to the claimant in pursuance of the decree of the High Court in 1912. In a suit brought in 1922 alleging that the Government was itself entitled to the land all along and that the alleged claimant had no title,

Held, that the Government was estopped from claiming title to the land on its own account. If the claim had been made in 1906, the defendant would have been in a better position to defend his possession and title and so the Government could not be allowed to contradict their previous representation on which the defendant had acted to his detriment. (*Beaumont, C.J. and Broomfield, J.*) SECRETARY OF STATE *v.* TATVASAHEB YESHWANTRAO. **56 Bom. 501=I.R. 1932 Bom. 571=140 I.C. 171=34 Bom L.R. 791=A.I.R. 1932 Bom. 386.**

———**S 115**—*Change of possion—Family arrangement—Mahomedan wife renouncing rights of inheritance—Binding nature of arrangement.*

Where a Mahomedan husband executed a deed of maintenance in favour of his wife and charged the same on property to be inherited by his grandson after his death and the wife also executed a deed of relinquishment renouncing her claim to dower and inheritance and it appeared that the husband had 14 days previously executed a will by which he had conveyed a share of the estate to the grandson,

Held, that the wife could not subsequent to the testator's death turn round and impeach the arrangement come to during his lifetime. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **150 I.C. 330=6 R.O. 635=10 O W.N. 201=A.I.R. 1933 Oudh 142.**

———**S. 115**—*Change of position—Lessor applying for mutation after expiry of theka—Thekadar stating that theka had expired and continuing in possession under different title—Lessor getting mutation struck off—Plea of rights as thekadar—Estoppel.*

Where on expiry of the term of a theka, the lessor applied for mutation but subsequently came to an agreement with the thekadar which stated that the theka had expired and that the thekadar and his heirs had no longer any right, and the lessor acting on this representation got his mutation application struck off and allowed the thekadar to continue in possession under a different title.

Held, that the lessor's position was altered to his prejudice and that the thekadar was definitely estopped from pleading any rights as thekadar or tenant of the lessor. (*Kisch and Bajpai, JJ.*) MAKUND SWARUP *v.* KISHUN CHAND SINGH. **157 I.C. 261=8 R A. 152=1935 A.W.R. 235=1935 R.D. 111=A.I.R. 1935 All. 382.**

———**S. 115**—Change of position not established—Party not suffering any detriment—Estoppel cannot be

EVIDENCE ACT (1872), S. 115—Conduct.

claimed. *See* QUESTION OF LAW, *infra* **A.I.R. 1935 Mad. 1062.**

———**S. 115**—*Change of position—One of two sisters borrowing to finance litigation—The other obtaining her share in such litigation—Latter, if estopped from questioning the mortgage securing the loan.*

The mere fact that one of two sisters may in some measure have benefited from the loan taken by the other in that she obtained her share of the property in the course of the litigation which may have been partly financed from the money so borrowed, is no reason for preventing her from questioning the mortgage by which the loan was secured, when it is not shown that she attempted to deceive or did deceive anybody, so as to induce him to change his legal position. (*Niamatullah and Allsop, JJ.*) CHHATTAR SINGH *v.* MT. HUKUM KUNWAR. **1935 A.W.R. 1213=1935 R.D. 495=1936 A.L.J. 395.**

———**S 115**—*Change of position—Representation—Should have been acted upon.*

In order to sustain the plea of estoppel it must be proved that the defendants, relying on the declaration made by the plaintiffs, were misled to act to their detriment in such a manner as they would not otherwise have done. (*Tek Chand, J.*) FAKIR KHAN *v.* ISMAIL KHAN. **14 Lah. 218=I.R. 1933 Lah. 101=141 I.C. 264=34 P.L.R. 149=A.I.R. 1933 Lah. 179.**

———**S. 115**—*Change of position—Return of income of assessee signed and verified by unauthorized agent—Returns of preceding years signed by same agent or by some mukhtar of assessee—Estoppel.*

Where a return of income of an assessee filed under S. 22 (2) of the Income-tax Act is signed and verified by an unauthorized agent, the fact that the returns of the preceding years were signed by the same agent or by some other manager or mukhtar of the assessee is not sufficient to substantiate a plea of estoppel. Even assuming that the assessee had knowledge of the filing of the return in question, the income-tax authorities cannot be said to have changed their position to their detriment on account of any implied representation on the part of the assessee about the authority of the agent to sign and verify the return, and in the circumstances, no question of estoppel can arise. (*Srivastava and Ziaul-Hasan, JJ.*) COMMISSIONER OF INCOME-TAX, C.P. and U.P., *In the matter of* **155 I.C 180=7 R.O. 564=1935 O.W.N. 490=A.I.R. 1935 Oudh 305.**

Conditions.

———**S. 115**—Conditions—Estoppel. *See* PLEADINGS, *infra*. **A.I.R. 1932 All. 643.**

[R. 1934 A. 75 (76).]

Conduct.

See also CHANGE OF POSITION AND LANDLORD AND TENANT, *infra*.

———**S. 115**—*Conduct—Adoption made under settlement deed—Validity of adoption—Party bringing about the settlement and the adoption, if can question.*

A certain Chetty died leaving his widow and his mother. There were disputes between the mother-in-law and the daughter-in-law and a settlement was brought about by one *X*, under which both the widow and the mother were each to take a boy in adoption and *X* was to bring about these adoptions, *X* was to manage the properties and hand them over to the adopted sons. The widow never made any adoption but the mother adopted the plaintiff whose adoption was brought about by *X*, *X* died and the plaintiff sued his heirs for accounts. It was argued for the defendants that the suit was not maintainable by the plaintiff as his adoption was not valid.

Held, that *X* having got possession of the properties under the settlement deed, he could not be heard to

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argue that he was not bound to deliver the properties to the plaintiff, adopted under the same document and that therefore the defendants were estopped from raising any question as to the validity of the adoption.

Held, further, that the position of *X* was that of a trustee and not of a gratuious bailee and that the defendants were liable to account on that footing. (*Ramesam and Stone, JJ.*) SHANMUGAM *v.* ANNAMALAI CHETTIAR. **7 R.M. 315=153 I.C. 102=A. I.R. 1935 Mad. 141.**

——**S. 115**—*Conduct—Adoption—Widow acting in pursuance of power contained in will and adopting boy—Representation and conduct—Change of position—Will found invalid as such—Widow estopped from questioning validity of adoption.*

Where in 1913 the widow made an adoption, executed a registered deed of adoption in which she recited that her husband gave her permission to adopt a boy in a will written before his death and registered and requested the natural father of the adopted boy in pursuance of that permission to give that boy in adoption, and for several years the adopted boy and his natural relatives had acted on that footing,

Held, that though the document which conferred the power to adopt on the widow was declared by the Privy Council to be invalid as a will and so not properly registered, the widow was in the circumstances estopped from urging the invalidity of the adoption and recovering the properties from him. 34 All 398 (P.C.), Rel. on.

Per *Ramesam, J.*—The estoppel does not convert an invalid adoption to a valid adoption. The invalidity in law remains. The estoppel does not validate what is otherwise an invalid adoption under the law. It is only a disability operating against the widow and preventing her from recovering the property by urging an invalid adoption. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W. N. 1148.**

——**S. 115**—*Conduct—Buddhist wife omission to make any claim in husband's property but attesting mortgage deed and paying interest—Estoppel.*

A Burmese wife refrained from making any claim in her husband's payin property but referred to it as her husband's property and attested the mortgage deed, and made payment of interest thereon.

Held, her conduct was definitely calculated to induce the mortgagee to believe that she had no interest whatsoever in the land and that she cannot subsequently come forward and claim that she has an interest in the mortgaged property and that the decree obtained by the creditor is inoperative against that interest. (*Mackney, J.*) MA SHIN *v.* N.R.M.K.N.R.M. FIRM. **154 I.C. 1061=7 R R. 330=A.I.R 1935 Rang. 17.**

——**S 115**—*Conduct—Change of position—Owner of railway allowing railway to deal with third persons—Repudiation of liability—Estoppel.*

If the owner of the railway allows the railway represented by its manager to deal with third persons as a legal entity and to enter into a contract on that footing, he cannot, when a suit is brought on such contract, assert his position as the proper party, nor can the railway administration repudiate its liability to be sued. If a railway administration could enter into a contract through its manager, there is no justification for holding that it cannot be sued through the same agency. (*Niamatullah and Rachhpal, JJ.*) GAEKWAR BARODA STATE RAILWAY *v.* HABIB ULLAH. **56 All 828=153 I C 824=7 R A 611=1934 A.L.J. 1093=3 A W R. 621=A.I R. 1934 All. 740.**

——**S. 115**—*Conduct—Conditions of estoppel by conduct—Purchaser from limited owner—When protected—T. P. Act, S. 41.*

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The rule of estoppel is based on the doctrine that a person cannot both approbate and reprobate in respect of the same matter to the prejudice of another. To raise the bar of estoppel there are three essential conditions: (1) a representation, act or omission by the party against whom the bar is pleaded; (2) this must influence the conduct of the party affected thereby in such a way that the true or real position cannot be ascertained in spite of due diligence; (3) the position of the party affected must in consequence have been changed to his detriment in a manner which could not otherwise have happened. In the case of a purchase from or claim through a limited owner, the purchaser or person claiming must be deemed to be aware of the exact nature of the legal rights of the owner, quite apart from any act or omission on the part of others, and therefore the question of estoppel by conduct cannot possibly arise in such a case. There is no estoppel where the truth is accessible, and a party is not actually misled and has not been induced by the other party to do something which is detrimental to his interest. (*Ramchandra Rao and Shankaranarayana Rao, JJ.*) KEMPIAH *v.* RENGA. **13 Mys L.J. 61=39 Mys.H.C.R. 1119.**

——**S. 115**—*Conduct—Decree-holder inducing judgment-debtor to pay decretal amount—If estopped from questioning that decree.*

A party having by his conduct induced the other party to make an immediate payment of the decretal amount, and having entered into an engagement with him which makes it impossible for him to question the decree, is estopped from acting contrary to his undertaking. (*Fazl Ali and James, JJ.*) BHIRGUNATH PRASAD SINGH *v.* MT. ANNAPURNA DAI. **153 I.C. 1098=7 R.P. 404=A.I.R. 1934 Pat. 644.**

——**S. 115**—*Conduct—Decree for rent—Anterior agreement not to execute decree—Execution by decree-holder taken and payment made by judgment-debtor to avert sale—Subsequent suit by judgment-debtor for injunction.*

A decree for rent was passed. An anterior agreement before the passing of the decree that the decree holder could not execute the decree on certain conditions was also proved. But the decree-holder executed the decree and in order to avert the sale, the judgment debtor made payments. Subsequently he sued for injunction restraining the decree-holder from executing the decree.

Held, that there was no estoppel operating against the plaintiff and the payments made by him could not amount to waiver of his rights sought to be enforced in the suit, as they must be taken to be involuntary and made under compulsion of law. (*Guha and Bartly, JJ.*) HARENDRA NATH BASAK *v.* GOPAL CHANDRA BASU. **62 Cal 421=156 I.C 445=7 R.C. 714=39 C.W.N. 512=A.I.R. 1935 Cal. 177.**

——**S 115**—*Conduct—Estoppel by—Application of doctrine.*

If a person having a right and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of that act.

Two brothers, *B* & *V*, were enjoying certain property jointly as tenants in-common. *B* before his death, by will gave his share of property to his daughter *M* for life and after her death to his grandson *P*, *V* died leaving behind his son *A*. A suit by *M* for recovery of her share of property against *D* was compromised, the compromise deed being in the handwriting of *P*, and under the

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decree passed in terms of compromise, *M* was given her share in all family lands except in one which was wholly given to *D*. A suit was subsequently brought by *P* on the basis of the will for recovery of his half share in the land wholly given to *D*. It was admitted that *D* knew the contents of the will.

Held, that there was no act infringing upon *P's* rights as remainderman, so there was no question of estoppel against *P* and he is not estopped from claiming land merely because he managed the litigation of *M* and brought about the compromise and that it could not be implied that *M* represented interests in remainder in the previous litigation. *Savage* v. *Foster*, 88 E.R. 299; 4 Cal.I. J. 198; *De Bussche* v. *Alt*, 8 Ch. D. 286 and *Hunsden* v. *Chayney*, 23 E.R. 703, Dist. (*Ramesam, J.*) BALASURYA BHEEMARAJU *v.* MRUTYANJAYUDU. **131 I.C. 669 = 1931 M.W.N. 302 = A.I.R. 1931 Mad. 354.**

———**S. 115**—*Conduct—Estoppel by conduct—Grant—Acceptance as Kadim Inam—Acquisition of benefit of lower judi—Plea of non-Kadim—If open.*

An agreement between the Government a grantee under a sanad was based on the assumption that the lands granted were Kadim Inam. The grantee let the Government by his conduct to believe that he accepted the assumption and obtained the benefit of a lower judi.

Held, that the grantee was estopped from contending that the lands were not Kadim Inam. (*Wadia, J.*) SECRETARY OF STATE FOR INDIA *v.* RAJARAM. **155 I.C. 763 = 7 R.B. 465 = 36 Bom.L.R. 1055 = A.I.R. 1935 Bom. 47.**

———**S. 115**—*Conduct—Execution—Judgment-debtor inducing decree-holder to agree to postponement of sale—Subsequent objection to execution.*

Where in the execution of a decree, the judgment-debtors induce the decree holders to agree to postponement of sale, in order that they might have an opportunity of paying the decretal amount, they cannot be allowed to turn round afterwards and put in a delayed application raising an objection against the execution. (*Henderson and Khundkar, JJ.*) FATTEH KUMAR SINGH *v.* KISHEN CHAND. **160 I.C. 86 = 8 R.C. 398 = A.I.R. 1935 Cal. 816.**

———**S. 115**—*Conduct—Omission to object—Arbitration—Clause for reference to voidable contract—Contract treated as valid and reference and award made—Subsequent avoidance of contract—Estoppel.*

B signed an indent addressed to *N* containing an arbitration clause. According to this clause, a reference was signed on 30th November, 1930 by *A* and *B*. But on the filing of the award, *B* objected that there was no submission clause between the parties and as such the award was bad and without jurisdiction as *A* was only an agent in the contract and as such was not personally liable and could not personally enforce the contract, much less the submission clause.

Held, that the contract was voidable at the option of *B* and that having failed to exercise the option, and referred the dispute between him and *A* to arbitration and taken his chance of an award in his favour, was estopped from alleging that it was improperly procured; that even if original contract was void, there was a dispute with regard to the submission clause and the agreement dated 30th November, 1930, which was a valid submission entered into by *B* with knowledge that *A* was not an agent, clothed the arbitrators with authority and that therefore the objection must fail (*Aston, A. J.C.*) RAMDAS TOPANDAS & SON *v.* KODANMAL. **148 I.C. 372 = 6 R.S. 193 = A.I.R. 1933 Sind 207.**

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———**S. 115**—*Conduct—Owner of property clothing third person with apparent ownership—Third party disposing of property—Estoppel against transferee in good faith.*

If the owner of a property clothes a third person with an apparent ownership of property and right of disposition thereof, he is estopped from asserting his title against a person to whom such third party has disposed of the property and who took it in good faith and for value. *A*, who died leaving him surviving a widow *B*, and an adopted son *C*, bequeathed certain premises along with other property to *B*. Later *C* falsely alleging that the premises had been assigned by *A* to him in consideration of a sum of money, got the assignment registered in the Land Registry. It was found by the Courts below that *B* had full knowledge of the false transaction and thus *B* was responsible for procuring the premises to be conveyed into the name of *C* as on sale to him by *A* and entries to that effect being made in the Land Registry. Subsequently *C* contrived to mortgage the premises with *D* for a big sum of money. *C* had previously made a statutory declaration which was entered in Land Registry that the title-deeds were lost. On default in payment of interest the mortgagee put the premises for sale by auction and they were purchased by one *E*. Later *B* obtained letters of administration with the will of *A* annexed thereto, in respect of *A's* estate and she issued a writ against *E* claiming as administratrix declaration that the premises were vested in her, the mortgage of *D* was null and void and *E* had no title to the premises purchased by him.

Held, that it was an ill-founded claim. *B* had authorized the creation of the deed of assignment to *C* and its entry in the Land Registry. The mortgagee *D*, from whom *E* derived his title, acted upon *B's* statement as *B* intended he should and advanced money on the faith of it. *B* was therefore estopped from asserting as against *E* that *C* was not the owner of the premises as a purchaser for value from *A*. Title of *E* as against *B* was unimpeachable. A.I.R. 1932 P.C. 255; *Rimmer* v. *Webster*, (1902) 2 Ch. 163, Rel. on. (*Lord Russell.*) LI TSE SHI *v.* PONG TSOI CHING. **43 L.W. 12 = 159 I.C. 794 = 8 R.P.C. 114 = 1936 A.L.J. 111 = 1936 A.W.R. 207 = A.I.R. 1935 P.C. 208 (P.C.).**

———**S. 115**—*Conduct—Part of mortgaged property sold—Mortgagee's agent agreeing to sale and accepting sale proceeds in reduction of indebtedness—Mortgagee if estoppel from denying that vendee has purchased land free from mortgage.*

Where the mortgagee's agent raised no objection to sale of part of the mortgaged property for its full value to the respondent and accepted the whole of the proceeds in reduction of the indebtedness of mortgagor and then furnished a list of debts due by the mortgagor in which the mortgage was not mentioned.

Held, that by these acts the agent of the mortgagee gave the respondent the impression that he was prepared to allow them to purchase this land free of any claim under his mortgage, and that they purchased the land on the understanding that they were buying it free from encumbrances and that, therefore, the mortgagee was estopped from setting up that the land sold to the respondent was subject to his mortgage. (*Dunkley, J.*) R. M. P. A. L. CHETTIAR FIRM *v.* KO MAUNG GALE. **13 Rang. 346 = 156 I.C. 707 = 8 R.R. 34 = A.I.R. 1935 Rang. 191.**

———**S. 115**—Conduct—Person obtaining adjournment of Court sale on condition of his depositing amount—Validity of condition—Estoppel. *See* C. P. CODE, O. 21, R 69. **41 L.W. 192 = A.I.R. 1935 Mad. 295.**

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———**S. 115**—*Conduct—Plaintiff permitting a wooden platform to be placed before his shop—If estopped from objecting to erection of building.*

Where a previous lessee from the Municipal Committee placed a platform in front of the plaintiff's shop with his permission and a subsequent lessee erected a building in front of the plaintiff's shop, it cannot by any means be said that the plaintiff is estopped from objecting to this building because he allowed the previous lessee to place a movable wooden board in front of his shop. (*Rangi Lal, J.*) MUNICIPAL COMMITTEE, MULTAN *v.* ABDUL GHAFUR. **155 I.C. 951=7 R.L. 801=A.I.R.1934 Lah. 900.**

———**S. 115**—*Conduct—Plea of illegal act—Competency.*

The Court will presume that a party has acted honestly and intended to act honestly and no one is allowed in a Court of justice, in order to escape from liability, to put forward a plea that what he is doing is illegal. The rule is clear that when a man may have acted rightly or wrongfully, he cannot be heard to say for his own benefit that he acted wrongfully. (*Remfry, J.*) *In the Goods of* TARUNKUMAR GHOSH. **62 Cal. 114=157 I.C. 975=A.I.R. 1935 Cal. 509.**

Consent decree.

———**S. 115**—*Consent decree—Party when can resile.*

A party to a consent decree which the Court had jurisdiction to pass is estopped from going behind the terms to which he has voluntarily submitted, on the ground that the decree was wrongly passed, for example on the ground that that a partnership was not registered as a company. A consent decree can be annulled only when the Court has been misled by fraud, or misrepresentation with regard to the consent of the party seeking to avoid the decree. (*Mehta, A. J. C.*) ALLAHBUX PINDOK *v.* SAINDAD. **26 S.L.R. 395=141 I.C. 290=I.R. 1933 Sind 41=A.I.R. 1933 Sind 29.**

Cross estoppel

———**S. 115**—*Cross estoppel.*

The conduct of the plaintiffs in applying for execution of the decree in terms of the award was a clear indication by them that they accepted the award, and it was in consequence of that conduct that the defendants altered their position by delivering possession of the portion awarded to the plaintiffs which they would not otherwise have done and thus the plaintiffs have been affected by estoppel. The defendants were as much estopped by their conduct in not raising the plea in the Court below and in not asserting in that Court that plaintiff 1 could not execute the decree during the pendency of her appeal, and thus putting plaintiff 1 to her election.

Held, it was a case of cross estoppel and that estoppel against estoppel doth put the matter at large and that therefore it was not open to the defendant to plead that there was a waiver of the right of the plaintiff to challenge the decree by way of appeal. (*Rupchand, A. J. C.*) JETHIBAI *v.* CHABILDAS **162 I.C. 274=1 R.S. 168=A.I.R. 1935 Sind 142.**

———**S. 115**—*Cross estoppel—Which of the competing estoppels to prevail.*

Per *Bisheshwar Nath, J.*—Where the case is one of two competing estoppels, one arising out of the execution of the mortgage, under which the mortgagee was estopped from denying the title of his mortgagor, and the other estoppel by record arising out of the judgment in the previous suit, which in effect decides that the mortgagor has no title because the gift in his favour was invalid, the latter estoppel ought to prevail. In the words of Lord Coke estoppel against estoppel

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setteth the matter at large. (*Hasan, C. J. and Bisheshwar Nath, J.*) RAM UDIT *v.* RAM SAMUJH. **7 Luck. 73=I.R. 1931 Oudh 369=134 I.C. 465=8 O.W.N. 809=A.I.R. 1931 Oudh 263.**

Different capacity.

———**S. 115**—*Different capacity—Minor taking benefits under ekrarnama wrongfully alienating wakf properties—Right to sue for wakf properties as mutawalli.*

Though by reason of having accepted certain benefits under an ekrarnama wrongfully disposing of properties belonging to a wakf, a minor may be estopped from questioning the validity of the ekrarnama in his personal capacity, it does not preclude him in the capacity of mutawalli to sue for the recovery of the properties of the endowment wrongfully disposed of under the ekrarnama. (*Mukerji and Bartley, JJ.*) SYED ZAINUDDIN HOSSEIN *v.* MOULVI MAHOMED ABDUR RAHIM. **140 I.C. 799=I.R. 1933 Cal. 46=36 C.W.N. 972=58 C. L.J. 259=A.I.R. 1933 Cal. 102.**

Election.

———**S. 115**—*Election—Principle stated—Voluntary act necessary—Deposit by mortgagor—Withdrawal by creditor of mortgagee despite mortgagee's protest—Right of mortgagee to deny validity of deposit.*

The rule that where a person accepts a benefit under the order of a Court he is precluded from challenging the order is only a special phase of the rule that a party cannot, either in course of a litigation or in dealing in *pais*, occupy inconsistent positions: upon that rule election is founded. Where a man has an election between several inconsistent courses of action, he will be confined to that which he first adopts: the election, if made with the knowledge of facts, is in itself binding. But the election must be, however, a voluntary act, not forced upon him by circumstances over which he had no control and notwithstanding his protest. So where in execution of a mortgage decree, the mortgagor made a deposit of the amount in Court and though the mortgagee was persistently denying the validity of the deposit and in spite of the protest of the mortgagee, a creditor of the mortgagee attached the deposit and withdrew the same.

Held, that the mortgagee was not precluded from disputing the validity of the deposit. (*Mitter and Bartley, JJ.*) ASIA KHATUN *v.* NURJAHAN KHATUN. **59 Cal 1464=142 I.C. 125=I.R. 1933 Cal. 236=36 C.W.N. 955=A.I.R. 1933 Cal 39.**

Equitable estoppel

See also ESTOPPEL AGAINST STATUTE, *infra.*

———**S. 115**—*Equitable estoppel—Applicability—Rent sale—Co sharer landlord standing by—Effect.*

Even if the statement in *Chadwick* v. *Manning*, 1896 A. C. 238 that "silence is innocent and safe when there is no duty to speak" is not absolutely and for all purposes true, it is, at any rate, very necessary to take care that persons are not landed in liability merely because they have not given information to some one over whose interests they have no duty to take care. There is no room for the application of the doctrine of estoppel by standing by in the absence of some definite and particular conduct on the part of a person other than the mere fact that he had been impleaded as party. Where in a rent sale under B. T. Act a co-sharer landlord has been impleaded and has taken no part in the proceedings, there is no room for the doctrine of equitable estoppel by standing by. (*Rankin, C. J. and Mukerji, J.*) NIHARBALA DEBI *v.* SHASHADHAR RAY CHAUDHURI. **58 Cal. 358=I.R. 1931 Cal. 855=134 I.C. 567=A.I.R. 1931 Cal. 485 (2).**

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———**S. 115**—*Equitable estoppel—Building by lessee—No formal document of lease—Effect.*

Where under a verbal agreement by the plaintiff for the grant of a permanent lease to the defendant, the defendant entered into possession and erected costly structures and though the parties agreed that the lease should be one for five years, renewable at the end of that period, no formal lease was ever executed, in a suit by the plaintiff for ejecting the defendant.

Held, on the facts of the case, there was no equitable estoppel against the plaintiff, the structures having been erected by the defendant "not by reason of any encouragement or abstention on the part of the plaintiff but by reason of the agreement which he was then entitled to enforce against the plaintiff" and the enforcement of which had by the time of the present suit become barred by limitation. (*Lord Russell of Killowen*) ARIFF *v.* JADUNATH MAJUMDAR. **58 I.A. 91 = 58 Cal. 1235 = I.R. 1931 P.C. 154 = 131 I.C. 762 = 33 Bom.L.R. 913 = 53 C.L.J. 359 = 8 O.W.N. 739 = 15 R.D. 354 = 1931 M.W.N. 480 = 33 L.W. 586 = 35 C.W.N. 550 = A.I.R. 1931 P.C. 79 = 60 M.L.J. 538 (P.C.).**

———**S 115**—*Equitable estoppel—Essentials—Execution—Deposit of money into Court—Subsequent objection to decree.*

In order to amount to an equitable estoppel, there must be some representation made by one party which is acted upon by the other to his detriment. Where the decree of a Native State Court was sought to be executed on transfer in a British Indian Court and the judgment-debtor deposited a certain sum and took time but he raised an objection to the validity of the decree when it was sought to be executed after a fresh transfer,

Held, that the judgment debtor was not estopped from raising the objection by reason of the earlier deposit.

Per *Sulaiman, J.*—If there was anything to show that the extention of time was as a result of an agreement between the decree-holder and judgment debtor, it may be said that the agreement is binding. (*Sulaiman and Niamatullah, JJ.*) SHEO TAHAL RAM *v* BINAEK SHUKUL. **53 All 747 = 136 I.C. 353 = I.R. 1932 All. 177 = 1931 A.L.J 653 = A.I.R. 1931 All. 689**

———**S. 115**—*Equitable estoppel—Void lease—Tenant putting up structures* bona fide—*Right to value thereof.*

Where the defendant was shown to have acted under an inoperative deed and it appeared he was led into the belief that he had obtained a permanent tenancy in the land and he had spent money in raising permanent structures on it.

Held, that the plaintiff who had encouraged the defendant's acts was equitably estopped from recovering the property except on payment of the value of the structures to the defendant. (*Mukerji, J.*) BADAL CHANDRA SADHU KHAN *v.* DEBENDRA NATH DEY. **6 I.R. (Cal.) 162 = 145 I C 892 = 58 C.L.J. 325 = 37 C.W.N. 473 = A.I.R. 1933 Cal. 612.**

Essentials of estoppel.

———**S 115**—*Essentials of estoppel.*

In order to attract the doctrine of estoppel, there must be representation of a fact and on the faith of that representation, an act must be done. These two factors *prima facie* attract that doctrine. It would not be applied if the real state of facts, which is at variance with the facts represented, be known by the party pleading estoppel. It would not be applied also to defeat a statutory enactment on the principle that there is no estoppel against statute. Where a representation of a fact was made by the transferee that the tenancy was an occupancy holding, and the petitioners acted on the faith

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of that representation by making the application for pre-emption and it was not pleaded, nor was there any proof or a finding that the said applicants knew that the tenancy was not an occupancy holding, and there was no statutory provision which would be defeated by allowing estoppel to operate.

Held, that it was not open to the opposite party to plead or prove in these proceedings that the tenancy was governed by the Transfer of Property Act. (*R.C. Mitter, J.*) MOHINI MOHAN MITRA *v.* RADHA SUNDARI DASI. **39 C.W.N. 1014 = A.I.R. 1935 Cal 481.**

———**S. 115**—*Essentials of estoppel—Alternative remedies open—Pursuance of one remedy—Effect.*

There can be no estoppel except when one person has by his declaration, act or omission intentionally caused or permitted another person to believe a certain thing to be true and to act upon such belief. Where a person who had a right either to object under R. 58 or 100 of O. 21, C. P. Code, chose the latter course,

Held, there was no room for the applicability of the doctrine of estoppel. (*Addison, J.*) MAHOMED HAYAT *v.* GULAM NABI. **32 P.L.R. 390 = 132 I.C. 201 (2) = A.I.R. 1931 Lah. 598.**

Estoppel against statute.

———**S. 115**—Estoppel against statute. *See* AGRA TENANCY ACT (1926), S 266—CO-SHARERS. **1935 R D. 69.**

———**S. 115**—*Estoppel against statute.*

There can be no estoppel against legislature. Where a member of an agricultural tribe offered to place certain land at the disposal of the Official Receiver to be sold by him but subsequently refused to do so and relied on the exemption under S. 16 of the Punjab Land Alienation Act, *held*, that he was not estopped from setting up the plea available to him under the statute. (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah 367 = I R. 1931 Lah. 291 = 130 I.C. 419 = 31 P.L.R. 842 = A.I.R. 1930 Lah. 1034.**

———**S 115**—*Estoppel against statute.*

There can be no estoppel against a clear injunction of a statute. Where the promissory note is invalid as contravening the provisions of S. 25 of the Paper Currency Act, even the endorser of the note is not estopped from questioning its validity. 44 Mad. 187, Rel. on. (*Rankin, C. J. and Buckland, J.*) H. V. LOW & CO., LTD. *v.* SUDHANNA KUMAR CHAKRAVARTI. **58 Cal. 1453 = 135 I C 288 = I.R. 1932 Cal. 96 = 35 C.W N. 587 = A.I.R. 1931 Cal. 791 (1).**

———**S. 115**—*Estoppel against statute.*

There can be no estoppel against the statute. (*Courtney Terrell, C.J., Wort and Agarwala, JJ.*) UCHIT LAL MISSER *v.* RAGHUNANDAN TEWARI. **14 Pat. 52 = 153 I.C. 183 = 7 R P. 306 = 15 Pat. L.T. 661 = A.I.R. 1934 Pat 666 (F.B.).**

———**S. 115**—*Estoppel against statute.*

The rule is well established that the principle of estoppel cannot override the provisions of a statute. (*Raza, Srivastava and Smith, JJ.*) HAKIM HUSAIN *v.* MUSHTAQ HUSAIN. **6 I.R. (Oudh) 136 = 146 I.C. 482 = 10 O W.N 1330 = 18 R D. 15 = 15 L R. 42 (Rev) = A.I R. 1933 Oudh 542 (F B.).**

———**S. 115**—*Estoppel against statute—Application for membership to Co operative Society—Bye laws—Invalidity of—Right of member to raise.*

Where a person applies to be admitted as a member of a Co-operative Society in accordance with its bye-laws if the bye-laws or some of them are invalid for the reason that they were in excess of the statute under which they were framed, the member or his legal representative is not, by reason of having entered into a

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contract with reference to such bye laws, precluded from challenging the validity of those bye laws, because there can be no estoppel against statute. (*Mitter and McNair, JJ.*) BARISAL CO OPERATIVE CENTRAL BANK, LTD. *v.* BINOY BHUSAN GUPTA. **151 I.C. 165=7 R. C. 79=38 C.W.N. 459=A.I.R. 1934 Cal. 537.**

———**S. 115**—*Estoppel against statute—Equitable estoppel.*

The plea of equitable estoppel cannot be taken against the provisions of a statute. When the Act states that enhancement of rents of non occupancy tenants can be effected only by means of a registered agreement, the principle of estoppel cannot be allowed to override such a specific provision. (*Sulaiman, C.J. and Rachhpal Singh, J.*) JAI SRI SINGH *v.* PARBU NARAIN SINGH. **152 I.C. 508=7 R.A. 353=18 R.D 590=1935 A.L.J. 21=4 A.W.R. 997=A.I.R. 1935 All. 127.**

———**S. 115**—*Estoppel against statute—Registration Act* (1908), *S.* 32.

A deed was not properly registered, being presented for registration by an agent not properly authorized. It was pleaded against the executants that they represented that the person presenting had such authority and as such were estopped from disputing validity of registration.

Held, that express provisions of the Registration Act not having been complied with, there can be no estoppel. (*Sir Lancelot Sanderson*) DOLTIE KARAN *v.* LACHMI PRASAD SINHA. **58 I.A. 58=10 Pat. 481=8 O.W. N. 548=33 L.W. 596=131 I.C. 321=I.R. 1931 P C. 97=33 Bom L R. 434=35 C W.N. 354=1931 M.W. N. 241=53 C.L.J. 198=1931 A L.J. 489=14 O L.J. 403=12 Pat.L.T. 543=A I.R. 1931 P C. 52=60 M. L J. 441 (P.C.).**

———**S. 115**—*Estoppel against statute—Void mortgage—Mortgagor, if estopped from pleading.*

A party cannot, by representation, any more than by other means, raise against himself an estoppel in such a way as to give rise to a state of things which he is legally incompetent to create. When, therefore, a mortgage is void under the law, there is no rule of estoppel which prevents the mortgagor from pleading and proving the fact of the mortgage being void. (*Nanavutty and Thomas, JJ.*) GAURA DEI *v* MOHAMMED YASIN ALI KHAN. **10 Luck. 361=7 R.O. 352=153 I.C. 585=11 O.W.N. 1571=A.I.R. 1935 Oudh 121.**

Estoppel by deed.

———**S. 115**—*Estoppel by deed.*

The doctrine of estoppel by deed in its technical sense cannot be said to exist in India. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546=I R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840=A.I.R. 1931 Lah. 419.**

Estoppel in pais.

———**S. 115**—*Estoppel* in pais—*Circumstances giving rise to it—Proof.*

Estoppel *in pais* is a rule of evidence, and the circumstances giving rise to an estoppel may be proved by evidence of any kind. (*Mosely and Dunkley, JJ.*) R. M. A. R. L. CHETTYAR FIRM *v.* MAUNG PO KYAW. **158 I.C. 492=8 R.R. 172=A.I.R. 1935 Rang. 279.**

Fraud.

———**S. 115**—*Fraud—Ignorance of rights—Relevancy of motive of person making representation—Defendant's predecessor-in title guilty of concealed fraud—Right to plead estoppel.*

Though the existence of estoppel does not depend on the motive or knowledge of the matter on the part of the person making the representation and in that way it does not matter if the plaintiff's intention in making the representation was fraudulent or was due to mistake or misapprehension, so long as the defendant was misled, the doctrine cannot be invoked by the defendant claiming from her husband, through whose concealed fraud the plaintiff was kept in ignorance of his real rights, and was in consequence induced to execute a release of all his claims. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v.* PROBODH CHANDRA SARKAR. **143 I.C 402=I.R. 1933 Cal. 425=36 C.W N. 758=55 C.L J. 420=A.I.R. 1933 Cal. 253.**

Inconsistent pleas.

———**S. 115**—Inconsistent pleas—Blowing hot and cold *See* ESTOPPEL—APPROBATE AND REPROBATE. **68 M.L J. 441.**

———**S. 115**—*Inconsistent pleas—Consent order—Party resiling from—Permissibility.*

Where in the prior proceedings the parties proceeded on a consent order and property passed to one party as a result of such order and in a later proceeding the other party sought to attack the foundation of the previous order,

Held, that the party was estopped from going behind the transaction and saying that the very foundation of the order was erroneous. (*Tek Chand and Tapp, JJ.*) MT. UMRAO BIBI *v.* RAM KISHEN. **13 Lah. 70=I.R. 1932 Lah. 379=137 I.C. 820=33 P.L.R. 1003=A.I. R. 1932 Lah. 281.**

———**S. 115**—*Inconsistent pleas—Execution proceeding—Nature of property—Prior statement of judgment-debtor—Binding effect.*

Where in execution proceedings the decree holders applied for the sale of the property as non-ancestral and the judgment-debtors made an application stating that the property attached was the ancestral property of the judgment debtors from generation to generation,

Held, that in a suit for possession of property which was sold as ancestral property the judgment-debtors are estopped from pleading that the property was not ancestral. (*Niamatullah and Bennet, JJ.*) MAHABIR PRASAD *v.* RAGHUNATH SARAN. **150 I.C. 141—6 R. A. 1043=3 A.W.R. 718=A.I R. 1934 All. 430.**

———**S. 115**—*Inconsistent pleas—Order obtained by party in his own favour—Plea of invalidity of that order in another suit—Permissibility.*

As between the same litigants one party cannot defeat the claim of the other by a plea negativing a contention advanced by him successfully in a former suit. A party who has obtained an order of the Court and has succeeded under it, cannot after he has enjoyed a benefit under that order say that it was valid for one purpose and invalid for another. (*Ferrers, J.C. and Rupchand, A J.C.*) SALAMATMAL *v.* MT. NURKHATUN. **I.R. 1933 Sind 166=144 I.C. 50=A.I.R. 1933 Sind 119.**

———**S. 115**—*Inconsistent pleas—Plea in Civil Court raised successfully—Contrary plea in Revenue Court.*

A party cannot put forward a plea in a Revenue Court in direct contravention of a plea which was raised by him and found in his favour in a prior civil litigation in respect of the same property. (*Oppenheim, S.M. and Walton, J.M.*) MAHOMED RISHAD SHAHID HUSAIN *v.* MAHOMED HUSAIN. **14 L.R. 281 (Rev.)=17 R. D. 404.**

Judgment.

———**S. 115**—*Judgment—Prior revenue proceeding—Appellant's claim negatived—Subsequent suit for declaration—Estoppel.*

In a previous *durusti jamabandi* case, *G's* claims to succeed to the occupancy holding had been negatived. The Court then held that the rival *A* was in possession and as his rights had not been questioned by the landlords, it was not necessary to decide his status. In a

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subsequent suit by *G* for a declaration that he was a co-occupancy tenant with *A*,

Held, that though the decision did not operate as *res judicata* against the landlords, *G* was estopped from raising his claim again. (*Oppenheim, S.M. and Walton, J.M.*) AKBAR KHAN *v.* HAIDER. **14 L.R. 224 (Rev.) = 17 R.D. 322.**

Jurisdiction of Court.

———S. 115—*Jurisdiction of Court—Conduct—Respondent in appeal asking for costs—Subsequent objection to jurisdiction—Estoppel.*

The conduct of a respondent in an appeal in asking for security for costs does not estop him from thereafter contending that the Court had no jurisdiction to entertain the appeal. (*Pandrang Row, J.*) KUPPUSWAMI CHETTY *v.* AYYAMMAI AMMAL. **1935 M.W.N. 552 = 8 R.M. 79 = 156 I.C. 916 = A.I.R. 1935 Mad. 723.**

———S. 115—*Jurisdiction of Court—Effect of estoppel—Whether can confer jurisdiction.*

Per *Sulaiman, Ag C.J.*—The principle of estoppel cannot be allowed to defeat the provisions of a statutory enactment which affects the jurisdiction of a Court, as a party cannot by its admission or previous conduct confer jurisdiction on a Court where none exists. (*Sulaiman, A.C.J., Boys and Banerji, JJ.*) MAHABIR SINGH *v.* NARAIN TEWARI. **54 All. 25 = I.R. 1931 All. 812 = 134 I.C. 236 = 1931 A.L.J. 715 = A.I.R. 1931 All. 490 (F.B.).**

[R. 9 Luck. 435 (451) (F.B.).]

———S 115—Jurisdiction of Court—Execution sale—Party consenting—Failure to issue notice under O. 21, R. 22, C. P. Code—Jurisdiction of the Court to order sale cannot be disputed. *See* WAIVER, *infra*. **11 Rang. 79.**

———S 115—*Jurisdiction of Court—Representation—Person filing suit in certain Court and judgment passed—Estoppel from pleading that that Court has no jurisdiction.*

Where a person institutes a suit in a certain Court and a judgment is pronounced, he is estopped from pleading that that Court has no jurisdiction to pass the decree in the suit. He cannot be allowed to question the legality of the decree which he himself obtained. (*Mya Bu and Dunkley, JJ.*) K. B. WALKER *v.* GLADYS P. WALKER. **158 I.C. 547 = 8 R.B. 179 = A.I.R. 1935 Rang. 284**

Landlord and tenant.

See also EQUITABLE ESTOPPEL, *supra*.

———S. 115—*Landlord and tenant — Admission to tenancy—Repudiation—Permissibility.*

The mere attestation at settlement or mere enhancement of rent may not create estoppel but the cumulative effect of attestation, enhancement, fixation and realization of rent is otherwise. Where the landlord had by his own acts made a person responsible for the old rent, the enhanced rent and the extra rent, and could have sold his property if the rent had fallen into arrears, he cannot turn round and deny the title of the tenant or urge that his name had been wrongly recorded. (*Oakden, S. M. and Keane, J.M.*) JUMNA *v.* CHIRANJU LAL. **15 R.D. 254.**

———S. 115—*Landlord and tenant—Conduct inconsistent with contract—Landlord not estopped by.*

In order that a tenant may raise the plea of estoppel as against his landlord, there should be a representation believed in by the tenants and in the second place it must be a case consistent with the document under which the tenancy was created. Where the alleged representation was contrary to the terms of the document between the parties,

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Held, that the plea of estoppel was not available. (*Rankin, C.J. and Pearson, J.*) SARADA SUNDARI *v.* RANJANI KANTA MANDOL. **149 I.C. 1019 = 6 R.C. 668 = 37 C.W.N. 643 = A.I.R. 1933 Cal. 682.**

———S. 115—*Landlord and tenant—Conduct—Lessee disclaiming under-proprietary right in kabuliat—Landlord granting lease on basis of—Claim by lessee's successors to under-proprietary rights—Estoppel.*

Where the conduct of a landlord in granting leases was influenced by the representations intentionally made by the lessees in a kabuliat that they had no under-proprietary right in the suit property, and thereby changed his position and granted them leases as *theckadars*, all the conditions requisite for an estoppel by conduct under S. 115 of the Evidence Act are satisfied, and their successors are thereby estopped from claiming under-proprietary rights. (*Srivastava and Nanavutty, JJ.*) SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* TIRBENI PRASAD. **11 Luck. 35 = 154 I.C. 965 = 7 R.O. 523 = 1935 R.D. 171 = 1935 O.W.N. 387 = A.I.R. 1935 Oudh 289.**

———S. 115—*Landlord and tenant—Conduct—Patta describing grantor as raiyat at fixed rate and conferring heritable right on grantee—Representatives of grantor accepting patta and basing claim for rent on it—Claim to treat heirs of grantee as trespassers—Estoppel.*

Where a patta describes the status of the grantor as a raiyat at fixed rate and on that footing a heritable right is conferred on the grantee and the representatives of the grantor accept the patta and base their claim for rent on it, they cannot subsequently go back upon the grant and treat the heirs of the grantee as trespassers. 48 C. 783 (F.B.), Appl. (*R. C. Mitter, J.*) RAIJADDI SHAIKH *v.* SARJAN BISWAS. **159 I.C. 611 = 8 R.C. 330 = 61 C.L.J. 9 = A.I.R. 1935 Cal. 706.**

———S. 115—*Landlord and tenant—Conduct—Permanent tenancy—Claim by tenancy—Acceptance of rent at uniform rate—Effect of.*

The acceptance by the landlord of rent at uniform rate does not by itself raise any estoppel against the landlord because there is no representation thereby that it would confer permanent tenancy on the lessee. (*Beaumont, C.J. and Barlee, J.*) DATTO SHIVRAM GOSAVI *v.* BABASAHEB MALHAR. **58 Bom. 419 = 150 I.C. 555 = 7 R.B. 1 = 36 Bom.L.R. 359 = A.I.R. 1934 Bom. 194.**

———S. 115—*Landlord and tenant—Conduct—Proceedings by proprietor against a person as statutory tenant—Subsequent proceedings against him as lessee of proprietary rights—Estoppel.*

Where after the failure of the proceedings taken by the proprietor against a person as a statutory tenant, proceedings are taken against him as lessee of proprietary rights, no question of estoppel arises if he is in no way misled by the institution of the earlier proceedings. (*Drake Brockman, S.M.*) RAM DAYAL *v.* NEPAL SINGH. **1935 R.D. 232 = 1935 A.W.R. 594.**

———S. 115—*Landlord and tenant—Estoppel—Mere delay whether amounts to.*

In a suit for ejectment of a tenant on the basis of forfeiture, something more than mere delay is required to enable the defendants to succeed on the ground of estoppel or waiver. (*Costello and Jack, JJ.*) PROKASH CHANDRA DAS *v.* RAJENDRA NATH DAM. **58 Cal. 1359 = 135 I.C. 296 = I.R. 1932 Cal. 104 = 35 C.W.N. 823 = A.I.R. 1932 Cal. 221.**

———S. 115—*Landlord and tenant—Ineffectual lease—Ejectment of lessee.*

Where the lease granted by one co-sharer confers no right upon the lessee, there is nothing to prevent the

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grantor from joining the other co-sharers to eject the lessee who is found to possess no right in respect of the land in dispute. (*Pullan and Niamatullah, JJ.*) PANCHANAN BANERJI *v.* ANANT PRASAD PANDEY. **54 All. 738 = I.R. 1932 All. 637 = 140 I C. 204 = 1932 A.L.J. 477 = 16 R D. 409 = A.I.R. 1932 All. 457.**

———**S. 115**—*Landlord and tenant—Mistaken description of land in suit—Effect as against person making mistake.*

Where the landlord included a plot in the exproprietary holding in prior suits brought against the tenant for recovery of the rent of that holding and such inclusion was the outcome of a mistake and the tenant was not in possession of that holding in those years, the misdescription cannot estop the landholder from denying the status of the person claiming rights on the basis of such misdescription. Misdescription regarding ex proprietary holding held to be immaterial. (*Smith, S. M. and Oppenheim, J.M.*) GANPAT RAI *v.* RAGHUBIR SINGH. **15 R.D. 577 = 12 L.R 326 (Rev.).**

———**S. 115**—*Landlord and tenant—Permission to build—Ejectment of tenant.*

Where the landlord accepted *nazrana* and permitted the tenant to build upon the land,

Held, he was estopped from ejecting the tenant on the ground that there was no registered deed. (*Walton, J. M.*) DEVA DAS *v.* SHEO RATAN SINGH. **16 R D. 518.**

———**S. 115**—*Landlord and tenant—Recognition of status of tenant.*

One of the objects of estoppel is to prevent the reopening of arrangements which have been acted upon and which after a long acceptance may be difficult to prove. Where a person had been in long enjoyment as co tenant to the knowledge of the zemindar who also sued him as co-tenant, *held*, that the zemindar was estopped from disputing the status of the tenant. (*Oakden, S M. and Smith, J.M.*) HASHMAT ALI *v.* WALI MAHOMED. **15 R.D. 39.**

———**S. 115**—*Landlord and tenant—Tenants recorded as occupancy tenants by order of Collector and treated as such for over 28 years—Subsequent suit for declaration that they were only statutory tenants—Maintainability.*

Where, with the consent of the then zemindar, the respondents had been entered as occupancy tenants by order of Collector and they had for over 28 years enjoying the status of occupancy tenants and been treated as such,

Held, that it was not open to the present zemindar to try to upset the arrangements made 28 years back and sue for a declaration that the respondents were not occupancy but only statutory tenants. (*Walton, J. M.*) GIRWAR SINGH *v.* REWA. **14 L.R. 135 (Rev.) = 17 R.D. 174.**

Minor.

See also DIFFERENT CAPACITY, *supra.*

———**S. 115**—Minor — Conduct—Pre-emption suit—Minor sons of vendor impleaded and represented by guardian *ad litem*—Pre-emptor given possession on payment of amount—Subsequent suit by minor challenging sale as not being for legal necessity—Estoppel. *See* C. P. CODE, S. 11, EXPL. IV. **A.I R. 1935 Lah. 489.**

———**S. 115**—*Minor — Fraudulent misrepresentation of age—Suit on contract—Estoppel.*

Where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on the contract, the infant is not estopped from setting up infancy. 21 Bom. 198; 41 Bom. 480; 46 Bom. 137, Overr.; 30 Cal. 539 (P.C.); 9 Lah. 701 (F.B.); 38 Mad. 1071; 55 M.L.J. 88 (P C.), Rel. (*Beaumont, C. J., Murphy and Broomfield, JJ.*) GADIGEPPA BHIMAPPA *v.* BALANGOWDA. **55 Bom. 741 = 135 I. C. 161 = I.R. 1931 Bom. 49 = 33 Bom.L.R. 1313 = A.I.R. 1931 Bom. 561 (F.B.).**

[F. 139 I.C. 718 (721).]

EVIDENCE ACT (1872), S. 115—Mortgagor and mortgagee.

———**S. 115**—*Minor—Fraudulent representation as to age—Binding nature.*

An infant is not estopped from setting up the plea of his infancy, where he has fraudulently represented that he is of age and thereby induced another to enter into a contract with him. (*Mukerji and Bennet, JJ.*) MT. KUNDAN BIBI *v.* MAGAN LAL. **I.R. 1932 All. 579 (2) = 139 I C. 718 = A.I R. 1932 All. 710.**

———**S. 115**—*Minor—Minor vendor—No fraud by vendor—If estopped from pleading minority.*

Where by using due diligence the vendee could have found out the age of the vendor and where as a matter of fact the vendee knew that a guardian had been appointed for the vendor and no fraud was committed on the vendee,

Held, the vendee was not entitled to the return of consideration and the vendor was not estopped from pleading his minority at the time of the transaction. A.I R. 1928 Lah. 609 (F B.), Ref. (*Dalip Singh and Abdul Qadir, JJ.*) UMAR DIN *v.* ABDUL HAQ. **150 I.C. 968 = 7 R.L 36 (1) = A I.R. 1934 Lah. 304 (1).**

———**S. 115**—*Minor—Promissory note by—Misrepresentation about age—Estoppel.*

A suit based on a promissory note executed by a minor should be dismissed as the contract embodied in the note is clearly void. It is well settled that there is no estoppel at all in a case of this kind and the fact that the money was received by the minor by fraudulent misrepresentation about his age does not estop him from raising the plea of minority. (*Pandrang Row, J.*) RANGA RAO *v.* SAIT CHOWGMAL VARADICHAND & CO. **152 I.C. 262 = 7 R.M. 208 = 1934 M.W.N. 672 = 40 L.W. 261 = A.I.R. 1934 Mad. 560 = 67 M.L. J. 257.**

Mistake.

———**S. 115**—*Mistake—Misdescription in enhancement proceedings—Landlord not precluded from contesting occupier's status.*

Where in enhancement proceedings relating to a holding, the landlord, misled by the patwari's entry, described the tenant as also the tenant of an adjacent piece of fallow land, he is not, on that account, precluded from contesting the status of the occupier and from bringing a suit that the defendant was not a tenant of the fallow land. (*Oppenheim, S.M. and Walton, J.M.*) ADITYA NARAIN SINGH BAHADUR *v.* BHOLA MISRA. **14 L.R. 68 (Rev.) = 17 R.D 62.**

Mortgagor and mortgagee.

———**S. 115**—*Mortgagor and mortgagee—Judgment-debtor agriculturist, mortgaging house to decree holder—Non liability to attachment—Estoppel.*

Where the judgment-debtors who are agriculturists have caused or permitted the decree-holder to believe that their houses could be sold if the original debt was not paid, by mortgaging the same to the decree holder, they are estopped from raising the question that the house is not liable to attachment under S. 60, C. P. Code. (*Young, C. J. and Din Mohammad, J.*) CHITTAR MAL *v.* MT. RAM DEVI. **A.I.R. 1935 Lah. 164 (1).**

———**S. 115**—*Mortgagor and mortgagee—Mortgagee agreeing to sale of portion of mortgaged property free of mortgage—Sale proceeds accepted by him—Assignee of mortgagee, if can assert that property is still part of security for mortgage debt.*

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Where a mortgagee agrees to a sale of portion of mortgaged property free of mortgage and accepts the sale proceeds and appropriates them to the discharge of unsecured debts due by mortgagors to him, he is estopped from denying that such property is no longer part of the security for the mortgage-debt and equally so his assignee. Evidence to prove that he is so estopped is not barred by S. 92, Evidence Act. (*Mosely and Dunkley, JJ.*) R. M. A. R. L. CHETTYAR FIRM *v.* MAUNG PO KYAW. **158 I.C. 492=8 R.R. 172=A.I.R. 1935 Rang. 279.**

———**S. 115**—*Mortgagor and mortgagee—Mortgagee—Assertion of title as proprietor.*

Where a person admits his character as mortgagee in a civil suit it is not given to him subsequently in a revenue suit to plead that he was not mortgagee but a proprietor. (*Oakden, S.M. and Smith, J.M.*) RAM NARESH SINGH *v.* DULSINGAR SINGH. **15 R.D. 94 =12 L.R. 11 (Rev.).**

———**S. 115**—*Mortgagor and mortgagee—Representation—Mutwalli executing mortgage of wakf property—If estopped from denying its validity.*

Where, in a usufructuary mortgage deed, the recital states that the plaintiff is mutwalli of the wakf, the property of which is the subject-matter of the mortgage and the document is acted upon and possession is transferred and sums of money are received by the plaintiff, the document amounts to a representation that the plaintiff as mutwalli is competent to make that transfer and he is, therefore, estopped from denying its validity. (*Bennet and Baipai, JJ.*) AFZAL HUSAIN *v.* CHHEDI LAL. **57 All. 727=155 I.C. 791=7 R.A. 981=1935 A.L.J. 217=1935 A.W.R. 275=A.I.R. 1935 All. 792.**

———**S. 115**—*Mortgagor and mortgagee—Sale of property in execution—Objection by mortgagor to its saleability.*

Where the mortgagor has himself mortgaged the property, representing to the mortgagee that he has the power to mortgage and that the property is such that could be mortgaged, he is estopped from derogating from his own grant and from pleading that his representation, on which the mortgagee advanced the money, is incorrect. But it cannot be rightly said that he is likewise estopped from objecting to the Court selling the property. (*Niamatullah and Rachhpal Singh, JJ.*) TAHIRI HASSAN *v.* CHANDER SEN. **58 All. 98=157 I.C. 511=8 R.A. 190=1935 A.W.R. 867=A.I.R. 1935 All. 678.**

No estoppel.

———**S. 115**—*No estoppel—Absence of—Representation.*

Where there is no representation by a person, the plea of estoppel cannot be invoked against him. (*Mitter, J.*) SHEIKH SIRAJUDDIN *v.* JOHUR JAN BEWA. **I.R. 1931 Cal. 888=134 I.C. 888=53 C.L.J. 222.**

———**S. 115**—*No estoppel—Compromise between co-tenants—Matter revived by one—Other, not estopped from pleading true fact.*

The law of estoppel will not be invoked in favour of a party who comes to Court with dirty hands. Where a suit between two co-tenants one of whom claims to be a sole tenant is compromised, and one of them subsequently goes behind it and revives the matter, the other will not be estopped from pleading the true facts. (*Oppenheim, S.M.*) NANNHE *v.* SHARFUDDIN. **18 R.D. 507.**

———**S. 115**—*No estoppel—Grant of license for particular purpose—Refusal of license for different purpose.*

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The mere fact, that a corporation has granted license under certain chapters of a Municipal Act, does not preclude it from refusing to grant a different license under some other provisions of the Act. (*Pearson and Jack, JJ.*) CORPORATION OF CALCUTTA *v.* SUMENIA BEWA. **136 I.C. 638=I.R. 1932 Cal. 395 (2)=35 C.W.N. 831=A.I.R. 1932 Cal. 269.**

———**S. 115**—*No estoppel—Mutation proceeding—Offer to be bound by oath—Decree passed on basis of oath—Reopening of matter in Civil Court.*

Where in mutation proceedings arising out of a disputed succession, one of the parties stated before the Collector that if the other swore by the Holy Book that according to Mahomedan Law the former had no right, a judgment might be given against him and that he shall not seek any further remedy, and the oath having been so taken, a decree was made.

Held, that the facts did not give rise to a plea of estoppel being raised as against a suit subsequently filed in the Civil Court by the person, who made the offer in the prior proceeding. (*Sulaiman, C.J., Mukerji and Thom, JJ.*) ABBAS KHAN *v.* MAHOMED ALI. **151 I.C. 793=15 L.R. 185 (Rev.)=7 R.A. 208=1934 A.L.J. 92=3 A.W.R. 362=18 R.D. 181=A.I.R. 1934 All. 300.**

———**S. 115**—*No estoppel—Party not misled.*

Where a judgment-debtor paid certain sum of money towards the debt due and it appeared that he sent a letter along with the payment but there was nothing to show that the decree-holder was misled into thinking that the letter was written and signed by the judgment debtor himself.

Held, that the judgment-debtor was not estopped from denying his having written the letter. (*Rankin, C.J., C.C. Ghose, Buckland, Suhrawardy and Mukerji, JJ.*) AMAR KRISHNA CHOWDHURY *v.* JAGAT BANDHU BISWAS. **59 Cal. 760=I.R. 1931 Cal. 922=134 I.C. 922=35 C.W.N. 1192=54 C.L.J. 201=A.I.R. 1931 Cal. 719 (F.B.).**

None if truth known.

———**S. 115**—*None if truth known.*

There is no estoppel when the true state of affairs is known. (*Courtney-Terrell, C.J. and Khaja Mahommad Noor, J.*) BANSIDHAR DHANDHANIA *v.* HAZARI RAM MARWARI. **I.R. 1933 Pat. 198=143 I.C. 542=14 Pat L.T. 189=A.I.R. 1933 Pat. 210 (2).**

———**S. 115**—*None if truth known.*

Where, in spite of the fact that the holding was recorded in the *khewat* in the names of the brothers and their mother and that all the three joined in executing a mortgage in favour of the plaintiff, the latter knew or could have known by the exercise of ordinary diligence, that the mother had really no interest, the mortgagee cannot invoke the principle of estoppel. The plaintiff reversioner of the brothers is not estopped from denying the title of the defendant to the property recorded in the name of the mother and purchased by the predecessor-in-title of the defendant (mortgagee), as it cannot be said that the mortgagee was, in any way, by the act, omission or declaration of the brothers misled into the belief that the mother had a proprietary interest in the share recorded in her name. (*Iqbal Ahmad and Kisch, JJ.*) LACHMAN SINGH *v.* THE COLLECTOR OF MORADABAD. **6 I.R. (All.) 361=146 I.C. 873=14 L.R. 168 (Rev.)=17 R.D. 178=A.I.R. 1933 All. 641.**

[Comm. 11 O.W.N. 1097 (1101).]

———**S. 115**—*None if truth known.*

When the party who claims the benefit of the estoppel himself knows what the true facts are, it cannot be said that he was led by any act of another to think that some

EVIDENCE ACT (1872), S. 115—None if truth known.

thing was true and to act on that belief. No question of estoppel arises in such a case. (*Agarwala and Saunders, JJ.*) RAJIB NAIN LAL *v.* MT. BINDESHWARI DAI. **15 Pat. L.T. 596**

———**S. 115**—*None if truth known.*

There is no estoppel when the truth is apparent on the face of the record. (*Beckett, J.*) BALMOKAND *v.* SMALL TOWNS COMMITTEE, TALAGANG. **A.I.R. 1935 Lah. 960.**

———**S. 115**—*None if truth known—Essentials of estoppel—Party not misled—Truth may be pleaded.*

"Justice and equity require no more than that a party to an instrument should be precluded from contradicting it to the prejudice of another person, when that other person or the person through whom the other person claims has been induced to alter his position by virtue of the instrument but when the question arises between the parties or representative of the parties who at the time of the execution of the instrument were aware of its intention and object and who have not been induced to alter their position by its execution, justice would more surely be obtained by allowing any party whether he be plaintiff or defendant to show the truth" The above view in 1 All. 403 is in conformity with the general principle of estoppel as laid down in S. 115 and recitals in a deed do not form an exception to that rule. When the parties to the sale-deed knew full well that the property belonged to the joint family, the vendee though a party to the sale deed is not prevented from showing the real nature of the sale transaction, from denying the title of the vendor and pleading that the property really belonged to the joint Hindu family and that the sale was on behalf of joint family, though it was executed only by one of its members in whose name the property stood. No question of any prejudice to either party arises, when the truth is known to both. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546 = I.R. 1931 Lah. 804 = 133 I.C. 628 = 32 P.L.R. 840 = A.I.R. 1931 Lah. 419.**

———**S. 115**—*None if truth known—Estoppel—Conditions—Belief and acting on representation—Necessity.*

One of the essentials of an estoppel based on representation is that the party concerned must have believed the representation made and acted on the faith of that belief. Hence, if the party to whom the representation is made knows the truth and does not believe the representation to be true, he cannot be said to have acted on the faith of the representation and there can be no estoppel in such a case. (*Srivastava, C. J. and Zia ul-Hasan, J.*) SHIAM LAL *v.* MATA DIN. **151 I.C. 576 = 7 R.O. 143 = 11 O.W.N. 1097 = A.I.R. 1934 Oudh 460.**

———**S. 115**—*None if truth known — Temporary arrangement for mutual convenience.*

Where both parties are perfectly aware of the circumstances and merely make a temporary arrangement for their mutual convenience, no estoppel arises. (*Kendall, J.*) DEOTA DIN SINGH *v.* RAJ NARAIN SINGH. **6 R.A. 545 = 147 I.C. 715 = 17 R.D. 1048 = 14 L.R. 864 (Rev.) = A.I.R. 1934 All. 75.**

Parties and privies.

See also REVERSIONER, *infra.*

———**S. 115**—*Parties and privies—Litigation about properties—Party giving up right and assuring other party—Latter carrying on litigation and securing property—Heirs of former, if estopped from claiming.*

Plaintiff's predecessor assured the defendants in a prior litigation that he did not wish to participate in the costs of that litigation and that he would not take his share in the property in dispute. Acting on that representation the defendants carried on that litigation and secured the property for themselves. Neither the plaintiff's predecessor nor any of his other co sharers come forward to claim any share in the property.

Held, the plaintiff was estopped from putting forward any claim to the property. (*Fazl Ali, J.*) TILAK RAI *v.* PARGASH RAI. **152 I.C. 823 = 7 R.P. 258 = A.I.R. 1935 Pat. 21.**

EVIDENCE ACT (1872), S. 115—Plea of estoppel.

———**S. 115**—*Parties and privies—Mortgage admitted by some creditors—Official Receiver not bound by.*

The Official Receiver is not bound by the admission of the validity of a mortgage executed by the insolvent to some of his creditors; nor is he precluded on that account from applying under S. 54 to have it annulled as a fraudulent preference. (*Tek Chand, J.*) SUNDAR SINGH *v.* BAKSHI SHIV RAM. **6 I.R. (Lah.) 25 = 144 I.C. 772 = 34 P.L.R. 436 = A.I.R. 1933 Lah. 354.**

———**S. 115**—*Parties and privies—Possession as life tenant under will—Estoppel from denying title of remainderman—Applicability of rule—Son entering into possession after father's death without any title.*

Although, if a person went into possession of properties in pursuance of the directions contained in a will conferring a life-estate on him he may be estopped from denying the title of the remainderman, a person who entered into possession after his father's death without any title at all cannot be affected by any estoppel to which his father might have been subject because his father had nothing to pass to him and he took nothing through his father. The mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purpose of the rule of estoppel laid down in *Board v. Board*, (1882) 9 Q.B.D. 48. (*Lord Tomlin.*) NISAR ALI KHAN *v.* MAHOMED ALI KHAN. **59 I.A. 268 = 7 Luck. 324 = 1932 A.L.J. 691 = 9 O.W.N. 614 = 36 C.W.N. 937 = 36 L.W. 146 = 56 C.L.J. 36 = 34 Bom.L.R. 1299 = I.R. 1932 P.C. 197 = 137 I.C. 539 = A.I.R. 1932 P.C. 172 = 63 M.L.J. 336 (P.C.).**

Pleadings.

———**S. 115**—*Pleadings—Estoppel as between defendants—Conditions.*

In order to operate as estoppel under S. 115 three conditions must be fulfilled: (1) there must be a representation made by the opposite party with a view to cause belief; (2) the representation should have been believed under circumstances that its falsity could not be ascertained in spite of due diligence; and (3) actions arising out of such belief. There can be no estoppel where truth is accessible. Again there can be no estoppel in the absence of representation or conduct amounting to such. So also, there can be no estoppel where a party is not misled and has not been induced to do something detrimental to his interest owing to the actions of the other party. A pleading by two sets of defendants against the suit of another person to defeat his claim does not amount to an estoppel as between them. 13 M.I.A. 551 (P.C.), Foll. and 1 All. 403, Ref. (*Mears, C. J. and Sen, J.*) RAM SINGH *v.* BALDEO PRASAD. **I.R. 1932 All 444 = 138 I.C. 552 = 13 L.R. 225 (Rev.) = 16 R.D. 450 = 1932 A.L.J. 605 = A.I.R. 1932 All. 643.**

Plea of estoppel.

———**S. 115**—*Plea of estoppel—Burden of proof.*

Per *Niamatullah, J.*—The plea of estoppel ordinarily rests on a question of fact, namely, whether the persons sought to be estopped "intentionally caused or permitted another person to believe such a thing to be true and to act upon such belief". In general, the person pleading estoppel was to establish that in consequence of representation or conduct of the person against whom

EVIDENCE ACT (1872), S. 115—Plea of estoppel.

estoppel is pleaded he was induced to act in a particular manner. (*Sulaiman and Niamatullah, JJ.*) SHEO TAHAL RAM *v.* BINAEK SHUKUL. **53 All. 747=136 I.C. 353=I.R. 1932 All. 177=1931 A.L.J. 653=A.I.R. 1931 All 689.**

———**S. 115**—*Plea of estoppel—Estoppel affecting only one of plaintiffs—Other plaintiffs are not estopped.*

A plea of estoppel affecting only one of the plaintiffs does not affect the others. (*Rupchand, A.J.C.*) JETHIBAI *v.* CHABILDAS. **162 I.C. 274=8 R.S. 168=A.I.R. 1935 Sind 142.**

———**S 115**—*Plea of estoppel—Specific pleadings necessary.*

In order to sustain the plea of estoppel, which is a mixed question of fact and law, there should be distinct pleadings by the defendants stating the facts on which an estoppel could be founded. (*Subhedar, A.J.C.*) KANHAILAL *v.* BHAIYALAL. **149 I C. 1031=6 R N. 259=16 N.L.J. 248=A.I.R. 1934 Nag. 51.**

———**S. 115**—*Plea of estoppel—When to be raised—Plea raising mixed question of fact and law urged for first time in appeal—Permissibility.*

Where the plea of estoppel was not raised in the trial Court or covered by the issues but was urged for the first time before the lower appellate Court after the case had been remanded to it by the High Court,

Held, that the question was not one purely of law to be decided on facts apparent on the record but was one which if raised at the proper time would have necessitated further investigation and that therefore the lower Court was not justified in allowing it to be raised at the appellate stage. (*Tek Chand, J.*) FAKIR KHAN *v.* ISMAIL KHAN. **14 Lah. 218=I.R. 1933 Lah. 101=141 I.C. 264=34 P.L.R. 149=A.I R. 1933 Lah. 179.**

Pre-emption.

———**S. 115**—*Pre-emption—Co-pre emptors—Right of some barred by estoppel—Effect on other co pre-emptors.*

The mere fact that a co-pre-emptor is found to have acquiesced in a sale before the pre-emption suit, and is consequently estopped from pre-empting, does not disqualify the other pre-emptor, who has not acquiesced in the same way. Such an estoppel under S. 115 of the Evidence Act merely operates as a bar to the suit and does not necessarily extinguish the right. The right of pre emption exists, but the remedy is barred. 97 I. C. 340, Rel. on. (*Sulaiman and Young, JJ.*) SURAJ PRASAD *v.* OUDH BEHARI. **I. R 1931 All. 425=131 I.C. 681=1931 A.L.J. 204=A.I.R. 1931 All. 216.**

Promissory note.

———**S. 115**—*Promissory note—Satisfaction at maturity—Note nevertheless left with payee and endorsed by him—Estoppel of maker.*

An estoppel does not arise against the maker of a promissory note, by the mere fact that after discharge by satisfaction at or after maturity of the note by him, "the piece of paper" or "waste paper" which once had but has lost its negotiable quality is left with the payee and he passes it off on others as if it were still a negotiable instrument. The case would be different if the payment or satisfaction takes place before maturity, when the instrument is current; in the case of a promissory note payable on demand, before demand. (*Krishnan Pandalai, J.*) VENKANNA *v.* SUBBAYYA. **I.R. 1933 Mad. 78=141 I.C. 136=1933 M.W.N. 1201=37 L.W. 117=A.I.R. 1933 Mad. 300=64 M. L.J. 241.**

Question of law.

———**S. 115**—*Question of law—Admission.*

An admission on a point of law is not an admission of a thing so as to make the admission a matter of estoppel

EVIDENCE ACT (1872), S. 115—Recitals.

within S. 115. "It is not the case of a person who knows or must be deemed to know the real state of things, creating by his representation a belief in the mind of a person who does not know the real state of things; for, quite apart from any representation made by the plaintiff, the defendant must be deemed to have known what his legal rights were." 21 All. 285, Foll. (*Courtney Terrell, C.J. and Fazl Ali, J.*) BIMALABALA SINHA *v.* DEB KINKAR GHOSH. **140 I.C 687=I.R. 1933 Pat 15=A.I.R. 1932 Pat 267.**

———**S. 115**—*Question of law—No estoppel.*

The question of the proper construction to be placed on a deed is one of law and there can be no estoppel by a pleading of law inasmuch as the other side must be presumed to know what the law is. (*Srivastava, J.*) ABDUL QAVI *v.* MAHBOOB ALI. **6 Luck. 382=I.R. 1931 Oudh 83=129 I.C. 163=7 O.W.N. 1052=A.I. R. 1931 Oudh 133.**

———**S. 115**—*Question of law—Representation.*

Representations on matters of law cannot constitute any basis for estoppel. (*Varadachariar and Burn, JJ.*) MUTHUSWAMI AYYAR *v.* LOGANATHA MUDALI. **1935 M.W.N. 267=41 L.W. 364=A.I.R. 1935 Mad. 404.**

———**S. 115**—*Question of law—Representation—Repudiation of right to property under erroneous view of law—Error common to both parties—Estoppel—Right to claim when no change of position.*

A representation by a person, who repudiates his title to certain properties under the influence of an erroneous view of his legal rights, concerning the legal effect of a clause in a will, cannot estop him from contending, after which error is common to both parties, he has discovered his legal error, that on a true interpretation of the will he has title to the properties, because there can be no estoppel on a point of law. Nor can estoppel be extended by inference to properties not covered by the representation. A party who does not establish that he has suffered any detriment as a consequence of the representation cannot claim the benefit of estoppel. (*Wadsworth, J.*) SANKARAN NAMBI *v.* NANGEELI AMMA. **161 I.C. 682=8 R. M. 846=42 L.W. 725=1935 M.W.N. 1265=A.I.R. 1935 Mad. 1062=70 M. L.J. 592.**

———**S. 115**—*Question of law—Valuation of suit—Estoppel.*

The question as to what is the proper basis for the valuation of a suit under O. 21, R. 63 of the C. P. Code by an unsuccessful claimant, whether it is the amount of the decree sought to be executed or the value of the property sought to be proceeded against, is one of law and a party who has acted in the lower Court on one basis is not precluded from maintaining the contrary in the appellate Court. (*Mukerji, Ag. C. J., King and Niamatullah, JJ.*) MOOL CHAND MOTILAL *v.* RAM KISHEN. **55 All. 315=I.R. 1933 All. 215=143 I.C. 275=1933 A.L.J. 222=A.I.R. 1933 All. 249 (F.B.).**

Recitals.

———**S. 115**—*Recitals—Binding nature on parties—No effect on third party.*

When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party and the intention is to be gathered from construing the instrument. The recital however cannot operate as against a third party. (*Wort, J.*) LACHMAN LAL *v.* MUNSHI MAHTON. **149 I.C. 734=6 R.P. 641=A.I.R. 1933 Pat. 708 (2).**

———**S. 115**—*Recitals — Insurance policy reciting payment of premium—Estoppel against company.*

EVIDENCE ACT (1872), S. 115—Representation.

A policy began by stating that *A* had paid the company a certain sum by way of premium.

Held, that the existence of these words in the policy does not prevent the company from asserting that the premium was not in fact paid. (*Mackney, J.*) U SAN DUN *v.* NEW ZEALAND INSURANCE CO., LTD. **153 I.C. 387=7 R R. 213=A.I.R. 1934 Rang. 343.**

Representation.

See also CHANGE OF POSITION, CONDUCT, MORTGAGOR AND MORTGAGEE, AND QUESTION OF LAW, *supra*.

———**S.115**—*Representation—Agent—Binding nature.*

The defendant divorced his wife by a valid *talak* on 21-7-1919, and requested the Kazi to communicate it to the plaintiff, his wife. The Kazi informed her on 24 8-1919 but stated by mistake that the *talak* was dated 21-8-1919 instead of 21-7-1919. The plaintiff's suit for deferred dower was filed on 25 7-1922, more than three years from the real date of the *talak*.

Held, the defendant was estopped from showing that the date of the *talak* was earlier than 21-8-1919. He had constituted the Kazi as his agent, and a representation made by an agent is as effectual for the purpose of estoppel as it it had been made by a principal. (*Venkatasubba Rao, J.*) KATHIYUMMA *v.* UROTHEL MARAKKAR. **I.R. 1931 Mad. 727=133 I.C. 375=1931 M.W.N. 570=A.I.R. 1931 Mad. 647.**

———**S. 115**—*Representation—Deed of absolute sale attested and registered—Mortgage by purchaser—Evidence by vendor to prove sale was a sham transaction.*

In 1917, the respondent who was the owner of certain properties executed a deed of absolute sale in favour of his son and another as joint tenants. It acknowledged the payment of the consideration and was duty attested, stamped and registered. On 7th March, 1929, the appellant advanced a loan to the son of the respondent on the security of his interest in the undivided moiety of the property, having searched the register at the Land Office and satisfied himself with the sufficiency of the security offered. On the 28th March, 1929, the respondent brought the present suit for a declaration that the mortgage was invalid and inoperative as in spite of the ostensible sale, he had never intended to convey any beneficial interest to his son and that the sale was only a "make-believe".

Held, that registration being under the law in Hong Kong, a means whereby the title to immovable property may be easily traced and ascertained, the respondent was by his registration of the memorial of deed of assignment, estopped as against the appellant who took his mortgage in reliance on that memorial from denying its correctness in any essential particular, apart altogether from any question of fraud or ulterior purpose on the part of the respondent. (*Lord Blanesburgh.*) TSANG CHUEN *v.* LI PO KWAI. **1932 A.C. 715=139 I.C. 891=I.R. 1932 P.C. 317=1932 A.L.J. 971=36 L.W. 761=A.I.R. 1932 P.C. 255=63 M.L.J. 418 (P.C.).**

———**S. 115**—*Representation—Essentials of estoppel by.*

In order that there may be an estoppel by representation, there must be a deception which led the party claiming the estoppel to entertain a false belief about a question of fact and which also led him, on the faith of that belief, to change his legal position. (*Allsop, J.*) MOHAMMAD MUSA *v.* QASIM HUSAIN. **155 I.C. 1063=1935 A.W.R. 766=7 R.A. 1025=1935 A.L.J. 964=1935 R.D. 316=A.I.R. 1935 All. 739.**

———**S. 115**—*Representation — Execution sale—Failure to object—Implied representation acted on—Party whether can resile.*

EVIDENCE ACT (1872), S. 115—Representative.

Where certain members of a Hindu joint family, who were fully aware that the suit mortgages had been attached and put to sale in execution, did not raise any objection to the attachment or sale,

Held, that the conduct of the members constituted a clear representation to the decree-holder and auction-purchasers that they had no objection to the sale and that they could not sue to set aside the sale. (*Bishesh-war Nath and Nanavutty JJ.*) SADDHA SINGH *v.* MANGAL SINGH. **I.R. 1933 Oudh 139=142 I.C. 860=10 O.W.N. 58=A.I.R. 1933 Oudh 166.**

———**S. 115**—*Representation — Legitimacy—Treatment of defendants as members of family—No representation acted upon by defendants—Plaintiff not estopped from questioning legitimacy.*

Where in a suit the plaintiffs challenged the legitimacy of the defendants, the lower Court found that the plaintiffs were estopped on the ground that the defendants had been treated as or admitted to be members of the family on various occasions.

Held, that such treatment and admissions were not representations on which estoppel could be based when it was not suggested that the defendants acted on them to their detriment. (*Tek Chand and Monroe, JJ.*) SUKHDEV SINGH *v.* MATHRA SINGH. **I.R. 1933 Lah. 215=142 I.C. 606=34 P.L.R. 115=A.I.R. 1933 Lah. 412.**

———**S. 115**—*Representation—Nature of.*

To found an estoppel, the representation must be in respect of an existing thing and must be clear and unambiguous. (*Nanavutty and Thomas, JJ.*) GAURA DEI *v.* MOHAMMAD YASIN ALI KHAN. **10 Luck. 361=7 R.O. 352=153 I.C. 585=11 O.W.N. 1571=A.I.R. 1935 Oudh 121.**

———**S. 115**—*Representation—Necessity for—Facts known to both parties—Estoppel.*

There is no estoppel, when there is no representation by the party sought to be estopped, which leads the other party to change his position, and when the true facts are known to both parties. (*Grille, Offg. J.C. and Pollock, A.J.C.*) MAHANGUSINGH *v.* JHUMAKLALSINGH. **161 I.C. 43=8 R.N. 209=18 N.L.J. 110.**

———**S. 115**—*Representation—When effective to raise estoppel.*

Unless the act which the plaintiff did to his own prejudice is referable to the defendant's representation, no estoppel arises. (*Ameer Ali, J.*) T.A. HURST *v.* SHYAMSUNDARLAL KHANDELWAL. **61 Cal. 64=151 I.C. 334=7 R.C. 107=A.I.R. 1934 Cal. 441.**

Representative.

———**S. 115**—"*Representative*"—*Meaning.*

The term "representative" in S. 115 of the Evidence Act is not limited to a gratuitous transferee or to a subsequent transferee for value with notice. It includes a *bona fide* assignee for value without notice of the circumstances cseating an estoppel. (*Sundaram Chetty and Pandrang Row, JJ.*) SIVARAO *v.* SUBBARAO. **6 R.M. 506=148 I.C. 612=1934 M.W.N. 316=39 L.W. 431=A.I.R. 1934 Mad. 302=66 M.L.J. 563.**

———**S. 115**—*Representative—Compromise between rival shebaits of idol—Succeeding shebait—If estopped—Reciprocal character of estoppel.*

Though a shebait becomes such on his appointment as such by a previous shebait, he does not in fact claim through his predecessor in office as in the case of inheritance, and therefore he cannot be bound or estopped by a compromise by which his predecessor might be bound. A compromise in a suit between two rival shebaits of an idol would create an estoppel as against

EVIDENCE ACT (1872), S. 115—Representative.

them. But that cannot create an estoppel as against a succeeding shebait, who impeaches the title of one of the prior rival shebaits, relying on his own undisputed title as lawfully created shebait. Estoppel is reciprocal. (*Mukerji and S.K. Ghose, JJ.*) GOBINDA RAMANUJA DAS MOHUNT *v.* MOHUNT RAM CHARAN RAMANUJ DAS. **63 Cal. 326=62 C.L J. 153.**

———**S. 115**—*Representative—Purchaser of mortgaged property in execution sale—Right to deny validity of mortgage.*

A purchaser of mortgaged property at a sale in execution of a decree is a representative of the mortgagor and is estopped from denying the validity of the mortgage if the mortgagor himself could not be permitted to deny its validity. 36 All. 141, Foll. (*Mukerji and Bennet, JJ.*) SARJU PRASAD *v.* KAREEM ULLAH. **I R. 1932 All. 572=139 I.C. 695.**

———**S. 115** — *Representative — Representative-in-interest—Knowledge of prior owner—Effect.*

Where a plea of estoppel is raised, a person is bound by the previous knowledge of the former owner. (*Oakden, S.M and Smith, J.M.*) SARJU SINGH *v.* SHRI RADHIKA PRASAD. **15 R.D. 43.**

Reversioner.

———**S. 115**—*Reversioner—Admission—Reversionary right—Admission in prior suit—Effect in later proceeding.*

One *V* died and was succeeded by his mother *A*. On *A's* death plaintiff's son claimed the estate as *A's* adopted son against the 1st defendant and this claim was compounded by means of a deed of indenture to which the 1st defendant and the plaintiff both in his private capacity and also as guardian of his minor son were parties. In the deed the plaintiff admitted that the 1st defendant is the nearest reversioner to the estate of the deceased. In a suit by the plaintiff claiming as the nearest reversioner as against the 1st defendant.

Held, the plaintiff's conduct in entering into the agreement constituted a clear and unqualified admission on his own behalf of the 1st defendant's title and estops him from raising his claim in the present suit. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad. 40=I.R. 1932 Mad. 767=139 I.C. 684=1932 M.W.N. 31=35 L. W. 73=A.I.R. 1932 Mad. 198=62 M.L.J. 116.**

———**S. 115**—*Reversioner—Deed executed by Pardanashin lady—Execution but not understanding admitted—Effect.*

Where the ancestor of a reversioner had admitted the execution of a sale-deed by a Hindu widow who was a pardanashin lady but her knowledge and understanding of the document was nowhere admitted.

Held, that the reversioner was not estopped from pleading want of proper understanding of the transaction by the executant. (*Raza and Smith JJ.*) RAJESHAR BALI *v.* HAR KISHEN BALI. **150 I C. 346=6 R.O. 639=10 O.W.N. 147=A.I.R. 1933 Oudh 170 (2).**

———**S. 115**—*Reversioner— Parties and privies—Alienation by Hindu widow—Agreement between widow and reversioner—Relinquishment of claim by reversioner to properties retained by widow—Son of reversioner—No estoppel against.*

The facts that the reversioner to the estate of a widow's husband had received some items of property from the widow in consideration of relinquishing his reversionary right to the remainder, and that his son himself inherited those items which the father had received, could not operate as estoppel against the son from questioning the subsequent alienation by the widow in favour of others. (*Curgenven and Sundaram Chetty, JJ.*) SATYANARAYANA *v.* VENKANNA. **6 I.R. (Mad.) 138=145 I.C. 862=1933 M.W.N. 1301=38 L.W. 230=A.I R. 1933 Mad. 637=65 M.L.J. 282.**

EVIDENCE ACT (1872), S. 115—Silence.

———**S. 115**—*Reversioner—Silence — Mortgage by Hindu widow—Presence of reversioner—Effect of.*

Where during the execution of a mortgage by a Hindu widow the reversioners were shown to have been present and made no protest.

Held, that such mere silence did not create an estoppel. (*Grille, A. J. C.*) KANCHEDILAL *v.* KANHAI. **28 N.L R. 227=I.R. 1932 Nag. 147=140 I.C. 390=A.I.R. 1932 Nag 165.**

Scope.

———**S. 115**—*Scope.*

Estoppel is nothing more than a rule of evidence. The law of India and England is the same as regards estoppel. (*Wort, J.*) LACHMAN LAL *v.* MUNSHI MAHTON. **149 I.C. 731=6 R.P 641=A.I.R. 1933 Pat. 708 (2).**

———**S. 115**—*Scope—Benefit under—Person claiming—Duty to make enquiry into truth of representation—T. P. Act, S. 41.*

A person claiming the benefit of a general estoppel under S. 115 of the Evidence Act cannot be placed on exactly the same footing as a person who obtains a transfer from an ostensible owner and claims protection under S. 41, T. P. Act. S. 41, T.P Act, no doubt, deals with a branch of estoppel; but S. 115, Evidence Act, does not impose on the person acting on the faith of a representation made to him the same duty of making inquiries into the truth of the representation as is imposed on a transferee from an ostensible owner by S. 41, T. P. Act. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) SHIAM LAL *v.* MATA DIN. **151 I.C. 576=7 R. O. 143=11 O.W.N. 1097=A.I.R. 1934 Oudh 460.**

———**S. 115**—Scope—Effect of estoppel—Rule of evidence—Plaintiff assisted in a cause of action. *See* WAIVER, *infra*. **62 I.A. 100=13 Rang. 256=68 M. L.J. 725 (P.C.).**

Silence.

See also REVERSIONER, *supra*.

———**S. 115**— *Silence—Auction sale — Mortgagee present—No mention of his mortgage—Estoppel.*

Mere silence cannot operate as an estoppel against a person unless there is a duty cast upon him to disabuse another person of some error or misapprehension, under which he is acting. It is a well known principle of law that at an auction-sale, the auction purchaser purchases only the right, title and interest of the judgment-debtor. If a person, who is not a party to the decree and at the time of the auction-sale has an outstanding title in himself in the shape of a prior mortgage, it is not his duty to proclaim from the house tops, while the auction-sale is going on, so as to warn the intending bidders that he holds a mortgage over the property. It is the duty of the decree-holder and perhaps to a certain extent of the judgment debtor to see that the sale proclamation contains the necessary particulars given in O. 21, R. 66, C. P. Code. If there is an omission and a mortgage charge is omitted, then the mere fact that the holder of that mortgage was present at the time of the auction sale would not debar him afterwards from maintaining an action on his mortgage, as there is no duty cast upon him to speak and make mention of his mortgagee. (*Agha Haidar, J.*) RADHE LAL *v.* KISHORE LAL. **157 I.C. 811=8 R.L. 141=37 P.L. R. 301=A.I.R. 1935 Lah. 527.**

———**S. 115**—*Silence—Omission to set up outstanding when debt paid—No estoppel.*

Where with the last of a series of payments made within two years from an order under S. 19 of the U.

EVIDENCE ACT (1872), S. 115—Vendor and purchaser.

P. Court of Wards Act, the Collector sends a letter intimating to the mortgagee that the entire debt has been paid off, no duty lies upon the mortgagee to inform the Collector that a portion of the debt yet remained unpaid His omission to do so does not estop him from claiming the benefit of the proviso contained in sub-S. (3), S. 19. No duty of giving information should be thrusted on a party in respect of a matter which has been equally within the cognizance of both parties. (*Lord Thankerton.*) KISHORI LAL *v.* COLLECTOR OF ETAH. **6 R.P.C. 125 = 148 I C. 546 = 38 C.W.N. 344 = A.I R. 1934 P.C. 83 (P.C.).**

Vendor and purchaser.

———S. 115—*Vendor and purchaser—Plea of land not being transferable—If estoppel.*

A transferor cannot be permitted to succeed in a suit for recovery of possession of lands transferred by him on the plea that the land was non transferable under the law. (*Das and Allanson, JJ.*) RAM CHARAN SINGH *v.* TILKU CHAUDHURY. **12 Pat L.T 351.**

———S. 115—*Vendor and purchaser—Representation—Sale of goods—Goods not according to contract—Delivery nevertheless taken by purchaser and acts of ownership exercised—Effect of.*

Where it was found that some of the goods mentioned in the advice by the vendor were not in accordance with the contract but the purchasers did not trouble themselves at the time either to inspect or take delivery, but subsequently took delivery of small portions out of the goods appropriated for them and exercised acts of ownership thereon, without any indication of their objection, "their conduct amounted to a representation that they would not repudiate the appropriation on the ground that some of the goods were packed before the date of contract and the sellers acted upon this representation by continuing to hold the goods." The purchasers are therefore estopped from resisting the seller's claim for price of the goods on the ground that they did not correspond to the contractual description. (*Beaumont, C. J. and Mirza, J.*) PRANLAL BHAICHAND *v.* MANECKJI PETIT MANUFACTURING CO., LTD. **140 I.C. 610 = I.R. 1933 Bom 3 = 34 Bom. L R. 1252 = A.I.R. 1933 Bom. 46.**

Void transaction.

———S. 115—*Void transaction—Transfer for immoral object—Parties not estopped—Right of transfer to recover property.*

If the object of a transfer of property is immoral, for example, where the transfer is for future cohabitation and as a reward for past cohabitation, the transfer is void and the transferor retains the title in himself and would ordinarily be entitled to recover the property on the ground that the title has not passed from him. But the principle of equity enunciated in *Ayerst* v. *Jenkins*, L.R. 16 Eq. 275 would prevent the Court from giving aid to a person guilty of immoral conduct to recover the property on the ground of public policy. (*Patkar and Barlee, JJ.*) SABAVA YELLAPPA *v.* YAMANAPPA SABU. **149 I.C 464 = 6 R B. 380 = 35 Bom.L.R. 345 = A.I.R. 1933 Bom. 209**

Waiver.

———S. 115—*Waiver—Alternative pleas taken in defence—Abandonment of one—Subsequent suit based thereon—Maintainability.*

In the previous suit on a contract of guarantee, the sureties had pleaded: (*i*) that their liability only arose after the mortgaged properties had been proceeded against, and (*ii*) if the instrument of guarantee was not capable of such a construction, it had been modified by a subsequent oral agreement. The latter plea was abandoned at the trial; the former was found against and a decree passed. In a subsequent suit for rectification of the instrument of guarantee,

Held, that having elected to take their chance of succeeding upon the terms of the instrument of guarantee as it stood, they were estopped from reagitating the question on the basis of the very ground, which they had waived on the former occasion. (*Costello, J.*) PHILLIPS *v.* MITCHELL. **59 Cal. 985 = 141 I C. 50 = I.R. 1933 Cal. 76 = A.I R. 1932 Cal. 889.**

EVIDENCE ACT (1872), S. 115—Waiver.

———S. 115—*Waiver—Conduct—Jurisdiction of Court.*

Where a rule has been enacted solely for the protection of judgment-debtors and their estates and not on grounds of public policy or in the interest of the public generally, the person in whose favour the rule operates may by his conduct debar himself from the right of insisting upon its enforcement. The appellant, although he was fully aware of all the steps that were taken from time to time in connexion with the sale of the refinery in these execution proceedings, neither in the District Court nor in the High Court ever suggested that the Court had no jurisdiction to order the sale by reason of the failure to issue a notice to him under O. 21, R. 22, and by consenting to the sale of the refinery that had been ordered by the Court upon the terms set out in the consent order, which terms were duly carried out, and by applying to the District Court for a postponement of the sale the appellant was precluded by his own conduct from thereafter disputing the jurisdiction of the Court to order the sale, to which he had consented upon the ground, that the prescribed notice had not been issued to him under O. 21, R. 22, C. P. Code. (*Page, C. J. and Mya Bu, J.*) BIMALANANDAN PRASAD *v.* THE UNITED REFINERIES, LIMITED **11 Rang. 79 = I R. 1933 Rang. 57 (2) = 143 I.C. 299 = A.I.R. 1933 Rang. 52.**

———S. 115—*Waiver—Conduct—Plaintiff executing decree and also filing appeal—No waiver of the right to challenge the decree by way of appeal—Na estoppel.*

To attract the applicability of the plea of estoppel *in pais*, two conditions must be fulfilled. In the first place, the representation, whether by words spoken or written or by conduct upon which the estoppel is founded, must be clear and unambiguous. And in the next place, there must be proof that such representation was acted on by the person to whom it was made. The defendants had admitted the right of plaintiff 1 to maintenance, and had consented to maintenance being allowed to her pending the suit. The plaintiffs were claiming a higher right than that admitted by the defendants. During the pendency of the suit, by the consent of parties, an order was passed that defendant should pay plaintiff 1 certain amount every month by way of maintenance. The defence set up was found to be true and a decree for maintenance was passed. Plaintiff 1 applied for execution of the order for maintenance passed by the trial Court and also appealed from the decree. The defendants contended that she was estopped from filing the appeal.

Held, that if plaintiff 1 sought execution of the decree of the trial Court, her act in doing so was in no sense productive of any change in the situation of the defendants. Moreover the execution application which was granted was the third application; and it recited the fact of appeal in express terms; that under the circumstances instead of the conduct of the plaintiff being an act amounting to a waiver of the right of the plaintiffs to challenge the decree by way of appeal, there was clear notice to the defendants that execution was being sought pending appeal and subject to what the appellate Court

EVIDENCE ACT (1872), S. 115—Waiver.

might decide and as such plaintiff was not estopped. (*Rupchand, A.J.C.*) JETHIBAI *v.* CHABILDAS. **162 I. C. 274=8 R S. 168=A.I R. 1935 Sind 142.**

———**S. 115**—*Waiver—Distinction between waiver and estoppel.*

Estoppel and waiver are entirely different. There is no such thing as estoppel by waiver. Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action; or in other words, by preventing a defendant from asserting the existence of some fact the existence of which would destory the cause of action. Estoppel is a rule of evidence. A statement or representation, to ground an estoppel, must be clear and unambiguous. Waiver on the other hand is contractual and may constitute a cause of action; it is an agreement to release or not to assert a right. (*Lord Russell of Killowen.*) DAWSONS BANK, LTD. *v.* NIP PON MENKWA KABUSHIKI PAISHA. **62 I.A. 100=13 Rang. 256=155 I C. 1=1935 A.L.J. 593=1935 A.W R. 630=1935 O.W.N. 599=1935 M.W.N. 442=61 C. L.J. 239=41 L.W. 764=7 R.P.C. 181=37 P.L R. 323=37 Bom L.R. 544=39 C.W.N. 657=A.I.R 1935 P.C. 79=68 M L.J. 725 (P.C)**

———**S. 115**—*Waiver—Evidence of—Notice of suit by reversioner on plaintiffs in possession—No action taken by plaintiffs—Effect of.*

Appellants who had purchased a portion of land from a widow applied for mutation which was objected to by *S* and *M*, who claimed as representing the entire proprietary body of the village, the lands left by the husband of the widow. Before the mutation was allowed in the name of the appellants, *S* and *M* filed a suit as representing the entire proprietary body claiming the land by reversion and they filed an application required under O. 1, R. 8. Notice of this was sent to appellants but they did not take any steps to be made parties. This suit was decreed and in a suit for partition, the appellants objected to their portion being included in the land to be partitioned and they were referred to a separate suit.

Held, that their inaction on receipt of notice cannot be regarded as waiver of their exclusive claims to the land and that as they were openly asserting their exclusive right to the knowledge of *S* and *M*, they were not estopped from bringing this suit. (*Shadi Lal, C.J. and Broadway, J.*) SHEO CHAND *v.* BHOLA. **147 I. C. 228=6 R.L. 365=35 P.L.R. 67=A.I.R. 1933 Lah. 546.**

———**S. 116**—*Applicability.*

Where a person accepts another as his landlord he cannot deny the latter's title. (*Smith, J.*) BHATTACHARJI *v.* ISHTIAQ HUSSAIN KHAN. **I.R. 1933 Oudh 205=143 I.C. 838=10 O.W.N. 48=A.I.R. 1933 Oudh 129.**

———**S. 116**—*Applicability—Estoppel of licence.*

Where defendant 1 came into possession of certain coal mining lands as a licensee of the plaintiff and subsequently defendant 2 as assignee of and claiming through defendant 1 entered into possession,

Held, that the possession of the land by both the defendants must be attributed to the possession given to defendant 1 by the plaintiff and that they were both barred under S. 116 of the Evidence Act from questioning the plaintiff's title to those lands until they had surrendered possession thereof again to him. (*Lord Thankerton.*) CURRIMBHOY & CO., LTD. *v* CREET. **60 I.A. 297=60 Cal. 980=I.R. 1933 P.C 15=141 I. C. 209=1933 M.W.N. 10=37 C W.N. 265=37 L.W. 253=35 Bom L.R. 223=57 C.L.J. 264=1933 A.L.J. 611=A.I.R. 1933 P.C. 29=64 M.L.J. 103 (P.C.).**

EVIDENCE ACT (1872), S 116.

———**S. 116**—*Applicability—Lessee taking lease from persons with or without title—Estoppel.*

A lessee, who takes leases from persons who have title as well as from those who have no title, is precluded under S. 116, Evidence Act, from disputing the title of the lessor who put him in possession, without first restoring possession. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARBANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L J. 477=A.I.R. 1935 Cal 368.**

———**S. 116**—*Applicability—Tenant not put into possession—Denial of title—Surrender of possession prior to—Necessity.*

For the application of the principle of estoppel contained in S. 116, Evidence Act, it is not necessary that the tenant should have been put actually into possession by the landlord. It is sufficient if, being already in possession, he passes a rent note to the landlord acknowledging that a new tenancy has arisen. Once the relation is established, the tenant is estopped; and before he can deny the title of the landlord, he must first openly surrender possession to the landlord. When a party executes a kabuliyat and obtains possession thereunder of certain lands, he is estopped from denying the title or seisin of his grantor by pleading that he is only a benamidar for another. (*Wadia, J.*) KRISHNARAO RAGHUNATH *v.* GHAMAN GHAMA. **155 I C 249 (2)=7 R B. 418=36 Bom.L R. 1074=A I.R. 1935 Bom. 144.**

———**S. 116**—*Construction—"At the beginning of the tenancy"—Meaning of.*

The words, "at the beginning of the tenancy," in S. 116 of the Evidence Act ought not to be construed in a limited way; the words mean the time when the tenant was let into possession. A new tenancy may begin though the tenant has been in possession prior to that. It may begin by the grant of a lease by the landlord or by the tenant attorning to a new landlord. The distinction between a case in which the tenant is let into possession by the person whose title he seeks to deny and that in which the person whose title he denies did not let him into possession is that in the former the estoppel is complete, that is, the tenant cannot deny the landlord's title so long as the tenancy continues, while in the latter, the estoppel is not complete in the sense that the tenant may evade it by showing circumstances which would vitiate the agreement between him and his landlord. It is not an exception to the rule in S. 116, but is only an application of the ordinary principles of law which are in no way affected by the section. Estoppel exists in both clauses of cases ; but in the second class the tenant has necessarily to show, in order to escape the estoppel, that he executed the lease under misrepresentation, coercion or fraud which would vitiate the contract. (*Wort, J.*) BADRUDDIN KHAN *v.* BHAGLOO KOERI. **153 I C. 759=7 R.P. 381=15 Pat.L T. 519=A.I.R. 1934 Pat. 555.**

———**S. 116**—*Denial of landlord's title—Permissibility.*

The rule of law is firmly established that a tenant who has been let into possession cannot deny his landlord's title however defective it may be so long as he has not openly restored possession by the surrender to his landlord. The same principle applies between a lessee and sub-lessee. No tenant can set up *jus tertii* in a third person in answer to a suit by the person, who let him into possession. But where the true owner ejects the tenant from the possession of the land, the tenancy ceases and after eviction, the tenant can attorn to the true owner and set up his title in answer to a suit by the landlord who let him into possession. 37 All. 557

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(P.C.), Ref. to. (*Shadi Lal, C.J.*) BARKATULLAH *v.* KALE KHAN. **I.R. 1932 Lah. 559 = 139 I.C. 46 = 33 P.L.R. 799 (2).**

——**S. 116**—*Effect.*

A tenant who has been let into possession cannot deny his landlord's title, however defective it might be so long as he has not openly restored possession by surrender to his landlord. Similarly a lessee is estopped during subsistence of his lease from questioning the title of his lessor. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJAH SAIYID MAHOMED SAADAT ALI KHAN **136 I C. 642 = I.R. 1932 Oudh 130 = 8 O.W. N. 349 = A.I.R. 1931 Oudh 177.**

——**S. 116**—*Effect.*

It is not open to tenants who have been let into possession (or his successors) to dispute the landlord's title, at the commencement of the tenancy on any ground whatever, without first surrending possession. (*Bhide, J.*) BELI *v.* BELI RAM. **154 I.C. 52 = 7 R.L. 512 = 37 P.L.R 153 = A.I.R. 1934 Lah. 445.**

——**S. 116**—*Essentials of estoppel.*

Where the tenant was already in possession and was not let into possession by the lessor and the lease was shown to have been obtained by fraud and misrepresentation,

Held, that the tenant was not estopped from denying the landlord's title. (*Bhide, J.*) NIKKA SINGH *v.* ALLAH BAKHSH. **I.R. 1932 Lah. 623 (1).**

——**S. 116**—*Estoppel of lessee.*

A lessee cannot dispute his lessor's title so long as he remains in possession under an agreement which he has made with them. (*Lord Tomlin.*) CHANDRIKA PRASADA *v.* B. B. AND C. I. RY. CO. **1935 A.W.R. 459 = 1935 O.W.N. 379 = 154 I.C. 945 = 39 C.W.N. 552 = 7 R.P.C 151 = 37 Bom.L.R. 390 = 41 L.W. 617 = 1935 M.W.N. 434 = 1935 R.D. 165 = 16 L R. 250 (Rev.) = 37 P.L R. 331 = 61 C.L.J. 147 = A.I R. 1935 P.C. 59 = 68 M.L.J. 552 (P.C.).**

——**S. 116**—*Estoppel of tenant—Ignorance of facts—Effect of.*

Where persons executing a lease deed are not let into possession of the property by the landlord but they were in possession long before they signed the lease, which was done under pressure, under a mistake and in ignorance of facts relating to the landlord's title, the execution of the lease does not raise any estoppel against person executing the lease. (Case-law considered.) (*Mya Bu and Dunkley, JJ.*) U PO SHIN *v.* EDWARD. **150 I.C. 898 = 7 R.R. 20 = A.I.R. 1934 Rang. 139.**

——**S. 116**—*Estoppel of tenant—Nature.*

A tenant who is let into possession by the landlord is estopped from pleading the landlord's want of title at the time of the lease, even after the expiry of the term so long as he has not surrendered possession. A decree for possession obtained by a third party against the landlord in a former litigation, in which the tenant also was a defendant does not have the effect of extinguishing the landlord's rights or of terminating the tenancy in the absence of new arrangement between the third party and the tenant or of attornment. (*Krishnan Pandalai and Curgenven, JJ.*) KRISHNA RAO *v.* MUNGARA SANYASI. **55 Mad. 601 = I R. 1932 Mad. 477 = 138 I.C 34 = 1932 M.W.N. 87 = 35 L.W. 288 = A.I R. 1932 Mad. 298 = 62 M.L.J. 313.**

——**S. 116** — *Estoppel of tenant— Termination of tenancy —Operation of estoppel.*

A tenant who had been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. The tenant's estoppel operates even after the termination of the tenancy, even though the tenant, the defendant is sued as a trespasser. 37 All. 557, Ref. (*Mallik and Jack, JJ.*) CHARUBALA BASU *v.* GERMAN GOMEZ. **152 I.C. 212 = 7 R.C. 254 = 59 C.L J. 66 = A.I.R. 1934 Cal. 499.**

——**S. 116** —*Mortgage by certificated guardian of minor without Court's permission—Suit by minor to avoid mortgage—Mortgagee, if estopped from challenging minor's title to property.*

Where a mortgage is executed by the mother of a minor as her certificated guardian and the minor brings a suit not on the basis of the mortgage deed but rather seeks to avoid the mortgage basing her case on the provisions of Ss. 29 and 30 of the Guardians and Wards Act on the ground that the mortgage was executed without the permission of the Court, the mortgagee is not estopped from challenging the minor's right to the property. (*Nanavutty, J.*) RAJANA *v.* MUSAHEB ALI. **11 Luck. 82 = 155 I.C. 23 = 7 R.O. 547 = 1935 O.W.N. 423 = A.I.R. 1935 Oudh 387.**

——**S. 116**—*Mortgage—Title of mortgagor—Mortgagee estopped from denying.*

The sons of a benamidar mortgagor transferred their rights under the mortgage on the death of their father and the transferee sued for redemption. The mortgagee denied the right of the mortgagor and consequently of the transferee.

Held, that on the analogy of S. 65 (*a*) of the T. P. Act, he was estopped from taking this plea, that the benamidar was a trustee for the real owner, which virtually amounted to a denial of title, and that even if such a plea was open a suit by a benamidar mortgagor for redemption was maintainable. 29 C.L.J. 434 and 45 Cal. 909 (P.C.), Rel. on. (*Sundaram Chetty, J.*) MAHOMED SHERIFF SAHIB *v.* SYED KASIM SAHEB. **6 I.R. (Mad) 33 = 145 I.C. 230 = 38 L.W. 266 = 1933 M.W. N. 642 = A I.R. 1933 Mad. 635.**

——**S. 116**—*Scope—Assignee of tenant — Estoppel against.*

S. 116 which enacts the rule of estoppel of a tenant is not exhaustive of all principles of estoppel as between landlord and tenant. The basis of the principle is the fact of the letting of the tenant into possession which creates the estoppel. If a tenant consents to give up possession to a party claiming title adverse to the landlord's title, that party is estopped at the tenant would have been from disputing the landlord's title. (*Mukerji, J.*) AJITULLA *v.* BILATI BIBI. **137 I.C. 556 = I.R. 1932 Cal. 321 = 35 C.W.N. 652 = 54 C.L.J. 151 = A.I.R. 1932 Cal. 383 (2).**

——**S. 116**—*Scope*—Kabuliyat *by manager of Hindu joint family—Disclaimer of proprietary rights—Claim by other members to under proprietary rights—Estoppel.*

Where a suit for ejectment was contested by the manager of a joint Hindu family (defendant) on the ground of his being an under-proprietor, but the parties later on compromised and the defendant executed a *kabuliyat* which expressly stated that during the period of the lease or after the expiry thereof the lessee or his representatives shall have no claim to the proprietary right regarding any plot of land except the lessee's right, the other members of the family are estopped from setting up any under-proprietary rights. (*Srivastava and Nanavutty, JJ.*) SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR *v.* TIRBENI PRASAD. **11 Luck 35 = 154 I.C. 965 = 7 R.O. 523 = 1935 R.D. 171 = 1935 O.W.N. 387 = A.I.R. 1935 Oudh 289.**

——**S. 116**—*Scope—Landlord and tenant—Denial of title—Estoppel—Basis of doctrine.*

S. 116 of the Evidence Act deals with instances of estoppel by agreement based on permissive enjoyment,

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The estoppel of a tenant is founded upon a contract between him and his landlord. The section rests on the principle that a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346 = 159 I.C. 98 = 8 R.C. 257 = 60 C.L.J. 477 = A.I.R. 1935 Cal. 368.**

———**S. 116**—*Scope—Person already in possession continuing in such possession by executing lease—Plea of* "jus tertii".

The question as to whether the words "at the beginning of the tenancy" occurring in S. 116 refer to the commencement of the particular lease or contract between the tenant and the landlord or whether they refer to the beginning of the occupation of land by the tenant or by the person through whom he claims is not free from doubt, but the better view is to hold that the section relates also to tenancies other than those in which the tenant was first let into possession. The principle is the same whether a man was let into possession or whether he has continued in such possession by specific agreement between himself and his landlord. Therefore, a person who has been in possession before the execution of a lease by him, is bound by that lease and is estopped from challenging the title of his landlord unless he can prove that he executed the lease under any fraud, misrepresentation or mistake, nor can he set up any "*jus tertii*," in favour of a third person, until and unless he gives up his tenancy (*Nanavutty, J.*) RAMZANI *v.* BANSIDHAR. **154 I.C. 1029 = 7 R O. 538 = 1935 R.D. 202 = 1935 O.W.N 449 = A I.R. 1935 Oudh 385.**

———**S. 116**—*Tenant—Denial of landlord's title—Permissibility.*

Where the tenant is evicted by a person having a title paramount and entitled to immediate possession or under threat of eviction by such a person, the tenant attorns to the claimant, the tenant is not precluded from denying the landlord's title. But where the tenant, on finding that a rival claimant was successful in certain proceedings relating to other properties, attorned to him voluntarily, the general rule applies and the tenant is estopped from denying the landlord's title. (*Venkatasubba Rao, J.*) VALIA MAHOMED *v.* SAVAKUTTI KOYI. **147 I.C. 1218 = 6 R.M 425 = 1934 M.W.N. 38 = 39 L.W. 116 = A.I.R. 1934 Mad. 197 = 66 M.L J. 355.**

———**S. 116**—*Tenant let into possession and undertaking to pay rent and execute* Kabuliyat—*Denial of title—Estoppel.*

Per *Henderson, J.*—In a suit for ejectment, it was found that the defendant was let into possession by the plaintiff's father and promised to pay rent and execute a *kabuliyat*; and though he executed a document, he eventually refused to register it.

Held, the defendant was estopped from denying the plaintiff's title without surrendering possession. (*Mukerji and R.C. Mitter, JJ.*) KONAULLA *v.* BEPIN CHANDRA GUPTA. **62 C.L J. 205.**

———**S. 116**—*Termination of tenancy—Applicability of rule of estoppel.*

While under S. 116 of the Evidence Act a tenant during the continuance of the tenancy is estopped from denying that at the beginning of the tenancy, his landlord had any title to the demised premises, it is open to a tenant in a suit for recovery of rent to show that the title of his landlord has expired or been legally determined. Thus where an ouster by title paramount or an attornment thereto is alleged it is not the title of the landlord at the beginning of the tenancy which is being impeached by the raising of such a defence and that rule of estoppel laid down in S. 116 no longer operates as a bar, Such a defence is permissible without a tenant having to surrender possession as is ordinarily necessary before the lessee can deny the lessor's title. (*Tapp, J.*) RAM RAKHA MAL *v.* MUNNA LAL MAIDHAN. **I.R. 1931 Lah. 829 = 133 I.C. 653 = 32 P.L.R. 338 = A.I.R. 1931 Lah. 243.**

EVIDENCE ACT (1872), S. 122.

———**S. 116**—*Under-tenant — Ejectment decree against lessee at the instance of the lessor—Whether binding upon under-tenant.*

A decree in ejectment passed against a lessee at the instance of a lessor is not only binding upon the lessee but also upon his sub-tenants, provided they have no rights independent of the right of their lessor in the demised premises. An under tenant is bound by the estoppel against his lessor under S. 116. He is estopped from denying the title of the original landlord or setting up any title of his own proceedings in execution of a decree for ejectment passed against the tenant, having come into possession under that tenant. (*Suhrawardy and Graham, JJ.*) SHEIKH YUSUF *v.* JYOTISH CHANDRA BANERJEE. **59 Cal. 739 = 137 I.C. 139 = I.R. 1932 Cal. 267 = 35 C.W N. 1132 = 54 C.L J. 493 A.I.R. 1932 Cal. 241.**

———**S. 116**—*Verbal lease for more than one year—Tenants in possession—Liability for rent—Invalidity of lease—Effect of.*

Before the plaintiffs purchased the suit land, they made a verbal arrangement with the defendants according to which the latter were to become tenants for the period 1328 to 1334 at an annual rent. The defendants did not pay the rent but remained in possession and when sued, they contended that the verbal lease was invalid by reason of S. 107 of the T. P. Act and S. 17 of the Registration Act.

Held, that the defendants were estopped by their conduct from denying the relationship of landlord and tenant. A verbal lease for more than one year accompanied by delivery of possession is valid for the first year and as the defendants continued in possession they were tenants holding over within the meaning of S. 116, T. P. Act, and cannot escape payment for the years during which they were in possession. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) ALAUDDIN AHMAD *v.* AZIZ AHMAD. **6 R.P. 501 = 148 I.C. 684 = A.I.R. 1934 Pat. 369.**

———**S. 118** —*Accused—Competency to testify.*

An accused person is "competent to testify" within S. 118 of the Evidence Act but he is incompetent to be a witness for an oath cannot be administered to him. (*Page, C.J., Baguley and Ba U, JJ.*) EMPEROR *v.* NGA PO MIN. **10 Rang. 511 = 141 I.C. 89 = I R. 1933 Rang. 14 = 34 C.L.J. 121 = 1932 Cr.C. 932 = A I.R. 1932 Rang. 190 (F.B.).**

———**S. 118**—Child as witness—Duty to administer oath—Omission, if curable. *See* OATHS ACT, S. 6. **1935 A.L.J. 618 = A.I R. 1935 All. 579.**

———**S 118**—*Respectable and reliable witness—Relationship to party.*

Unless there is something shown against the witness his evidence should not be discarded merely because he is related to the party when he is a man, who *prima facie* must be regarded as respectable and reliable. (*Baguley, J.*) TAN SAN MAR *v.* U. KYA ZIN. **6 I.R (Rang.) 38 = 145 I.C 330 = A.I.R. 1933 Rang. 162.**

———**S 122**—*Scope and object of section.*

The prohibition under S. 122 is based on the ground that the admission of testimony relating to communica-

EVIDENCE ACT (1872), S. 123.

tions between husband and wife is likely to disturb the peace of family and weaken the feeling of mutual confidence. The prohibition is not confined to cases where the communication sought to be given out in evidence is of a strictly confidential character but it is extended to all communications of whatever nature which was between husband and wife. (*Patkar and Barlee, JJ.*) EMPEROR *v.* RAMCHANDRA. **148 I C. 553 = 16 R B. 307 = 35 Cr.L J 747 = 35 Bom L.R. 174 = 1933 Cr.C. 465 = A.I.R 1933 Bom. 153.**

——**S. 123.** *See also* EVIDENCE ACT (1872), S. 162 AND CR. P. CODE, (1898), S. 337.

——**S. 123**—*Applicability — Demi official letters addressed to private contractor.*

Where letters addressed by the head of a department reach the addressee, those letters would not be unpublished documents within the meaning of S. 123, Evidence Act, and the Court would be entitled to see the documents and decide under S. 162 as to their admissibility. (*Dalip Singh, J.*) MEHTAB SINGH *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1933 Lah. 377 = 143 I.C. 685 = A.I.R. 1933 Lah. 157.**

——**S 123**—*State and official documents—Scope of privilege—Powers of Court—South Australian Rules, O. 32, R. 14 (2).*

The privilege in respect of official and state documents from production in Court is a narrow one, most sparingly to be exercised. It is not confined to public official documents of a political or administrative character, but its foundation being that the information cannot be disclosed without injury to the public interests, it cannot be applied further than the attainment of that object may require. The privilege, therefore, cannot be asserted in relation of documents the contents of which have already been published. The circumstance that the documents are confidential or official is alone no reason for their non-production. Nor is the fact that the production of documents might in a particular litigation prejudice the case of the Crown or assist that of the other side any overriding reason for their non-production. The Court has always in reserve the power to call for the production, and to enquire into the nature of the documents for which the privilege is claimed and to require some indication of the nature of the injury to the State which would follow their production. The Court is also entitled to prescribe in any particular case the manner in which the claim for privilege shall be made if the claim is to be allowed. It may, if so advised, be content with the unsworn statement of a responsible Minister; it may accept a formal affidavit from him or, if necessary call for an affidavit sufficiently full and indicative of that his mind has been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for. In a proper case, the Court has also the power, notwithstanding a certificate from a Minister of State claiming protection, to inspect the documents for which the privilege is set up in order to see whether the claim is justified, provided, of course, that such power be exercised so as not to destroy the protection of the privilege in any case in which it is found to exist. Their Lordships considered it an appropriate case for the Court to exercise his power of inspection where the documents for which the privilege was claimed came into existence with reference to the commercial and contractual activities of the State and were the documents of a Department which had since been disbanded.

[Note.—The rules stated herein may, as regards India, require to be qualified in view of S. 162 of the Indian Evidence Act.] (*Lord Blanesburgh.*) HENRY GREER ROBINSON *v.* STATE OF SOUTH AUSTRALIA. **135 I.C. 625 = I.R. 1932 P.C. 17 = 34 L.W. 575 = 35 C.W.N. 1121 = 1931 A.C. 704 = A.I.R 1931 P.C. 254 = 61 M.L.J 943 (P.C.).**

EVIDENCE ACT (1872), S 124.

——**S. 123**—*Unpublished official record—Entry in—Deposition by Government assistant regarding—Admissibility.*

In a prosecution for perjury, part of the case for the prosecution was that the *kabuliyats* in question were forged documents, as the cartridge on which they were written did not come into existence until long after 1909, the date of the *kabuliyats*. An assistant in the Office of the Deputy Controller of Stationery, Calcutta, deposed to that effect. He did not base his knowledge on his own experience but on an entry in an unpublished record of Government in respect of which privilege was claimed and allowed. The witness was not prepared to let the Court or the lawyers see the entry.

Held, that the evidence of the witness was not admissible (*Rankin, C J. and C.C. Ghose, J.*) EMPEROR *v.* JAEFARUL HOSSAIN. **59 Cal. 1046 = I.R. 1932 Cal. 448 = 138 I.C. 351 = 33 Cr L.J. 599 = 36 C.W.N 514 = 1932 Cr.C. 458 = A.I R. 1932 Cal. 468.**

——**S. 123**—*Unpublished official records—Production of—Head of the department—Finality of decision.*

Where a Committee appointed by the Government to make certain enquiries, recommended to the Government that the minutes of its proceedings containing self-incriminating evidence of certain witnesses shall be exempt from publication and the Government ordered accordingly.

Held, that as the appointment, establishment and functions were all defined and regulated by the Government themselves, the head of the Department concerned was the Government themselves, and that the permission for the production of those documents which were called for at the instance of a litigant was withheld by the competent authority.

Held further, that the statements of witnesses though not specifically exempted from publication by the order of Government, were included in the minutes of proceedings referred to therein. For the purpose of S. 123, the Court cannot be invited to discuss the question if a particular document falls within the description of "an unpublished official record." The decision of the public officer concerned is final on that question. Whether the evidence referred to in a document should be permitted to be given or withheld. The question whether a particular record in the possession of Government relates to 'affairs of state' after it has been so declared by Government is not open to controversy in Court. 8 Q B. 255; 48 C. 304; A I R. 1930 Mad. 342, Foll. (*Doraisami Iyer, C J. and Srecnivasa Iyer, J.*) GARUDACHAR *v.* ABBAS KHAN. **8 Mys L.J. 474 = 35 Mys H.C.R. 447.**

——**S 124**—*Applicability—Departmental enquiry by Railway—Confidential report in—If privileged.*

A confidential report submitted as the result of a confidential inquiry held under the orders of a railway officer to enable him to take departmental action, is a privileged document falling within the purview of S. 124 of the Evidence Act. Nor is such a document admissible under any section of the Evidence Act. (*Rupchand Bilaram, A. J. C.*) EMPFROR *v.* MIR MAHOMED SHAH **28 S L.R. 274 = 153 I C. 651 = 7 R.S. 142 = 36 Cr L J. 412 = A.I.R. 1935 Sind 50.**

——**S 124**— *Applicability — Police investigation under Bombay District Police Act* (1890)*—Information given by an Excise Inspector at the request of the Police —Privilege.*

During a police investigation under S. 51 of the Bombay District Police Act, *K*, an Excise Inspector,

EVIDENCE ACT (1872), S. 124.

in reply to enquiries by the police wrote a latter stating what he knew of an alleged offence under S. 296, Penal Code.

Held, that *K* for the purpose of the case must be considered to be a private person, that he was not a person *to* whom the communication was made, he was the person *by* whom it was made and that the letter did not fall under S. 124 of the Evidence Act. (*Patkar and Barlee, JJ.*) BARJORJI FRAMJI BHARUCHA, *In re*. **I.R. 1932 Bom. 521=139 I C. 628=33 Cr L.J. 797=34 Bom.L.R. 258=1932 Cr.C. 300=A.I.R 1932 Bom. 196.**

———**S. 124**—*Scope—Privilege—Prejudice to public interests—Jurisdiction of Court and of public officer.*

There are two matters involved in S. 124 of the Evidence Act, (1) whether a particular document for which privilege is claimed falls within it, *i e.*, whether the document is a communication made to a public officer in official confidence; (2) whether the public interest would suffer by its disclosure. The first question is for the Court to decide and as for the second, the public officer is the sole Judge as to whether by its disclosure public interests would suffer. (*Venkatasubba Rao, J.*) VYTHILINGA PANDARASANNADHI *v* SECRETARY OF STATE. **159 I C. 577 (1)=8 R.M. 515=41 L.W. 472=1935 M.W.N. 273=A.I.R. 1935 Mad. 342 (1)=68 M.L.J. 396**

———**S. 126**—*Client's consent—Failure by client to claim privilege while being cross examined.*

A failure on the part of a client to claim privilege when he is under cross examination does not amount to "express consent" given by him to his legal adviser to disclose a communication which is otherwise privileged under the section. (*Ferrers, J. C. and Rupchand, A.J C.*) BHAGWANI CHOITHRAM *v.* DEOORAM **27 S.L.R. 72=I.R. 1933 Sind 126=143 I.C 345=34 Cr L J. 562=1933 Cr.C 173=A.I.R. 1933 Sind 47.**

———**S. 126**—*Crown case—Communication between prosecutor and attorney.*

Communications between a prosecutor in a Crown case and his attorney are not privileged. 12 Beng. H. C. R. 249, Rel. on. (*Ferrers, J. C. and Rupchand, A. J. C.*) BHAGWANI CHOITHRAM *v.* DEOORAM. **27 S L R 72=I.R. 1933 Sind 126=143 I C. 345=34 Cr L.J. 562=1933 Cr.C. 173=A.I.R. 1933 Sind 47.**

———**S. 126**—*Doctor—Privilege.*

There is no protection afforded by the Evidence Act to a doctor as such. It is his duty to assist the Court in every way possible and to disclose to the Court all the information in his possession relevant to the matter in issue. (*Young, J.*) HARDLESS *v.* HARDLESS. **55 All. 134=6 I.R. (All) 172=145 I C. 845=1933 A.L.J. 14=A.I.R. 1933 All. 56.**

———**S. 126**—*Pleader and client—Confidential communication—Privilege—Principles applicable.*

There is no privilege to communications made before the creation of the relationship of pleader and client. Where two persons have a dispute about a claim made by one of them upon the other and both seek the help of a pleader and one of them makes a statement to the pleader, the statement so made to the pleader by one of the parties is admissible. The test is whether the communication is made to the witness in his character of legal advisor. Further, in order to attract S. 126 the communication by the party to his pleader must be confidential (*Guha, J.*) KALIKUMAR PAL *v* RAJKUMAR PAL. **58 Cal. 1379=I.R. 1932 Cal. 204=136 I.C. 476=A.I.R 1932 Cal. 148.**

———**S. 126**—*Privilege—Draft prepared by muktear.*

The draft prepared by a muktear of some statements made by the complainant which, with some alterations,

EVIDENCE ACT (1872), S 126.

were meant to be incorporated in a petition of complaint to be presented to the Court is a privileged document. (*Mallik and Patterson, JJ.*) MIAJAN BISWAS *v.* EMPEROR. **143 I.C. 682=I.R. 1933 Cal. 461=34 Cr.L. J. 622=37 C.W.N. 68=1933 Cr.C. 25=A.I R. 1933 Cal. 5.**

———**S 126**—*Privilege not lost by presence of friends.*

The mere presence of friends of clients specially when such friends occupy more or less the same position as he himself, does not destroy the privilege although it may be evidence of the communication not having been made in confidence. (*Ferrers, J. C. and Rupchand, A. J. C.*) BHAGWANI CHOITHRAM *v.* DEOORAM. **27 S.L.R. 72=I.R. 1933 Sind 126=143 I.C. 345=34 Cr.L J. 562=1933 Cr.C. 173=A I R. 1933 Sind 47.**

———**S. 126**—*Protection under—If extends to production of documents.*

S. 126 does not refer to the production of documents which are in the possession of a legal advisor but to stating the contents or conditions of any of the documents with which he has become acquainted in the course and for the purpose of his employment. The protection in this section does not, therefore, refer to the production of documents, as against which the client himself is not protected. (*Sulaiman, C. J and Mulla, J.*) GANGA RAM *v.* HABIB ULLAH. **159 I.C. 521=37 Cr.L J. 113=8 R A. 458=1935 A L.J. 1176=1935 A.W R. 1152=1935 A.Cr.C. 261=1936 Cr.C. 233 (2) =A.I.R. 1936 All. 212.**

———**S. 126**—*Scope of privilege.*

The privilege afforded to a legal advisor under S. 126 is of a very limited character. It protects only such communications as are made to the legal advisor in confidence in the course and for the purpose of his employment. And if the communication is not made in confidence then communication is in no sense privileged. 3 Bom. 91 and 18 Bom. 203, Rel. on. (*Ferrers, J.C. and Rupchand, A. J. C.*) BHAGWANI CHOITHRAM *v.* DEOORAM. **27 S.L R. 72=I R 1933 Sind 126=143 I.C 345=34 Cr L.J. 562=1933 Cr.C. 173=A.I.R. 1933 Sind 47.**

———**S. 126**—*Scope—Things observed in course of employment*

S. 126 is not restricted only to oral communications made to the pleader by the client, but extends also to facts observed by the pleader in the course of and for the purpose of his employment and he is not bound to disclose them without the consent of the client. (*Shadi Lal, C.J.*) HAKAM *v.* EMPEROR. **152 I C. 164=36 Cr.L J. 31=7 R.L 261=1934 Cr.C 507=A.I.R. 1934 Lah. 269.**

———**S. 126, Proviso 2**—*Applicability—Offence or fraud not committed during "employment."*

Where there is no allegation that so long as his employment continued, the pleader observed any fact showing that an offence or fraud had been committed but the offence or fraud, if any, having been committed after his employment ceased, the Prov. 2 to S. 126 does not come into play. (*Ferrers, J. C. and Rupchand. A. J. C.*) BHAGWANI CHOITHRAM *v.* DEOORAM. **27 S L R. 72=I R. 1933 Sind 126=143 I C. 345=34 Cr.L J. 562=1933 Cr C. 173=A.I.R. 1933 Sind 47.**

———**S. 126, Proviso 2**—*Privilege—Charge of fraud—Proof.*

There must be a definite charge of fraud and something to support the charge before the claim of privilege can be overruled; and the legal practitioner can then be rightly compelled to answer the question with regard to the condition of the document at the time that it was in his possession. (1901) A.C. 196, Rel. on. (*Baguley, J.*)

EVIDENCE ACT (1872), S. 132.

SARA UPDHAYA *v.* S. R. M. M. A. FIRM. **I.R. 1933 Rang. 90 = 144 I.C. 175 = A.I.R. 1933 Rang. 61 (2).**

——**S. 132**—"*Compelled to answer question.*"

The compulsion referred to in S. 132 of the Evidence Act is something more than being put in the witness box, and being sworn to give evidence, but such compulsion may be express or implied. It is difficult to draw a distinction between compulsion express and implied. In every case compulsion is express although it may be couched in different words, and may give intimation to the witness that he is bound to answer not only the question which he has objected to but every other question which may on a particular point be put to him. An intimation of that nature might relieve the witness of objecting to every question which is put to him and which exposes him to an action, but before he can be said to have been compelled to answer a question, he must object to answer such question, or at any rate, the very first question on the same point so as to invite the attention of the Court to apply its mind to the question and decide whether he is to be compelled to answer the same or not. Hence where there was no averment much less proof that the applicant made any protest express or implied or that he was compelled to answer by the Court expressly or impliedly except the fact that he was put on his oath and put certain question to which he answered,

Held, that the applicant was not entitled to the protection of S. 132 of the Evidence Act. (*Ferrers, J. C. and Rupchand, A.J.C.*) GHANSHAMDAS GIAN CHAND *v.* NENUMAL. **28 S L.R 251 = 152 I.C. 346 = 36 Cr. L.J. 78 = 7 R.S. 85 = 1934 Cr C. 955 = A.I.R. 1934 Sind 114.**

——**S 132, Proviso**—*Applicability.*

A defamatory statement is not protected when the witness has not objected to answering it ; unless a person objects to any question the answer to which is likely to incriminate him, he cannot be said to have been compelled to give such answer. 50 B. 162 (F. B.) and 52 M. 432, Ref. (*Sreenivasa Iyer, J.*) RAMACHANDRA RAO *v.* MAHOMED ABBAS KHAN. **10 Mys L J. 421.**

——**S. 132, Proviso.**—*Protection of witness—Need for objection.*

A witness is not protected by the proviso to S. 132 in cases, where he has not objected to answering the question put to him. (*Smith, J.*) RAM DAYAL *v.* EMPEROR. **6 I.R. (Oudh) 119 = 146 I C. 438 = 35 Cr L J. 71 = 10 O.W.N. 735 = 1933 Cr.C. 1048 = A.I R. 1933 Oudh 370.**

——**S. 132, Proviso**—*Scope—Witness—Answer to question put by Court in criminal case—Defamation charge in respect of—Witness, if protected.*

A witness is not protected by the proviso to S. 132 of the Evidence Act in case where he had not objected to answering the question put to him. But when the question, the answer to which had laid open the witness to a criminal prosecution under S. 500, I. P. Code, had been put by the Court itself in a criminal trial, the Court having considered it relevant and pertinent for the decision of the case, the witness must be deemed to have been compelled to answer the question, and the witness is entitled to the benefit of the proviso to S. 132. (*Nanavutty and Thomas, JJ.*) JAGANNATH *v.* EMPEROR. **10 Luck. 169 = 151 I C. 435 = 7 R O. 123 = 35 Cr.L J. 1316 = 11 O W N. 1075 = 1934 Cr.C. 1197 = A.I.R. 1934 Oudh 386.**

——**S 133**—'*Accomplice*'.

An accomplice includes one who poses as an accomplice and his evidence requires corroboration. (*Panckridge and M. C. Ghose, JJ.*) GOLAM ASPHIA *v.*

EVIDENCE ACT (1872), S. 133.

EMPEROR. **I.R. 1932 Cal. 336 = 137 I.C. 497 = 33 Cr. L.J. 477 = 1932 Cr.C. 264 = A.I.R. 1932 Cal. 295.**

——**S. 133**—Accomplice—Complainant in prosecution for unnatural offence shown to be willing party—Evidence of—Conviction based on without corroboration—Sustainability. *See* EVIDENCE ACT, SS. 114, ILL (*a*) AND 133. **39 C.W N. 1051.**

——**S. 133**—*Accomplice—Connection with offence.*

Accomplices are those who are in some way or other connected with the offence in question. (*Mya Bu, J.*) YACOOB *v.* EMPEROR. **6 I.R. (Rang). 85 = 146 I.C. 240 = 34 Cr.L.J. 1255 = 1933 Cr.C. 804 = A.I.R. 1933 Rang. 199.**

——**S. 133**—*Accomplice—Corroboraeive evidence—Principles applicable.*

The principles as to the necessity of corroborative evidence in the case of an accomplice as laid down in *King* v. *Baskerville*, (1916) 2 K.B. 658, are equally applicable in India. (Rules stated.) (*Ferrers, J.C. and Rupchand Bilaram, A.J.C.*) KHAIRATIRAM *v.* EMPEROR. **I.R. 1932 Sind 49 = 136 I.C. 753 = 33 Cr.L. J. 324 = 1932 Cr C. 540 = A.I R. 1932 Sind 100.**

——**S. 133**—Accomplices in different stages of crime —If mutually corroborative. *See* EVIDENCE ACT, SS 114, ILL. (*b*) AND 133. **1933 M.W.N. 1129.**

——**S. 133**—Accomplice — Evidence of. *See also* EVIDENCE ACT, 1872, S. 114, ILL. (B).

——**S. 133**—*Accomplice—Evidence of.*

Evidence of an accomplice cannot be accepted without material corroboration. (*Malik and S.K. Ghose, JJ.*) SURENDRA NATH GOSWAMI *v.* EMPEROR. **I.R. 1932 Cal. 273 = 137 I.C. 179 = 33 Cr L.J. 357 = 54 C.L.J. 470 = 1932 Cr.C. 320 = A.I.R 1932 Cal. 377.**

——**S 133**—*Accomplice—Evidence of—Appreciation of—Necessity for corroboration—Duty of Court.*

In a jury trial, it is the duty of the Judge to point out to the jury the position in law affecting the evidence of accomplice and to tell them that they may convict, if they choose on his evidence alone; but that owing to the circumstances in which the evidence is given, it is, generally speaking, very dangerous to act upon it unless they find corroborative evidence which implicates the accused person. If such a warning has been given and nevertheless the jury choose to convict the accused in the absence of such corroborative evidence, the conviction will not generally be quashed. In a case where a Judge is sitting without a jury, he must apply the same rule by treating himself as a jury. If, therefore, those factors are not present to his mind, and if there is not sufficient corroborative evidence implicating the accused, then the conviction ought to be set aside. (*Lort Williams and McNair, JJ.*) SHIBADAS DAW *v.* EMPEROR. **6 R C. 399 = 147 I C. 1172 = 35 Cr.L J. 551 = 37 C.W.N. 934 = 1934 Cr C 165 = A.I R. 1934 Cal. 114.**

——**S. 133**—Accomplice's evidence—Corroboration. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **8 O W.N. 247.**

——**S. 133**—*Accomplice—Evidence of—Corroboration by evidence of another accomplice.*

It cannot be laid down that in no circumstances can the evidence of one accomplice be regarded as corroborating another accomplice. There is no law that the evidence of an accomplice cannot be used as the basis of a conviction; but there is a very wise practical rule that the evidence of an accomplice should not be accepted as sufficient unless it is corroborated. That is a practical rule of common sense. But it does not follow from this that, when there are a large number of accomplices giving evidence independently, the fact that they support each other adds nothing to the strength of their testimony. (*Reilly, C.J. and Shankaranarayana Rao, J.*)

EVIDENCE ACT (1872), S. 133.

NAGAPPA *v.* GOVERNMENT OF MYSORE. **40 Mys. H.C.R. 399 = 13 Mys L.J. 516.**

———**S. 133**—Accomplice—Evidence of—Corroboration—Nature of. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **A.I.R. 1934 Cal. 114.**

———**S. 133**—Accomplice—Evidence of—Corroboration—Nature of. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **7 Luck. 511 = A.I.R. 1932 Oudh 317**

———**S. 133**—Accomplice—Evidence of—Corroboration—Necessity—Duty of Court in considering evidence. *See* EVIDENCE ACT, S. 114—ACCOMPLICE. **39 C.W.N. 754.**

———**S. 133**—Accomplice — Evidence of—Lack of corroboration—Conviction — Propriety of. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **54 Mad. 931 = A.I.R. 1931 Mad. 689 = 61 M L J. 608.**

———**S. 133**—*Accomplice—Evidence of—Nature of corroboration necessary.*

Where a conviction is based on the evidence of an accomplice it is necessary for the trying Magistrate to consider exactly how far he is corrobarated in material particulars affecting each individual person among those convicted. (*James, J.*) DHAJU MANDAL *v.* EMPEROR. **I.R. 1933 Pat. 187 = 146 I. C. 934 = 34 Cr.L. J. 476 = 1933 Cr.C. 261 = A I.R. 1933 Pat. 112.**

———**S. 133**—*Accomplice—Evidence of—Necessity for caution.*

The evidence of an accomplice must always be received with the greatest possible caution, and if there is any fear in the witness's mind that failure to establish the case for the prosecution will result in his own prosecution, it is not likely to lead to truthful evidence being given by such a witness. (*Lort Williams and Jack, JJ.*) ABDUL MAJID *v.* EMPEROR **157 I C 840 = 8 R C. 132 = 36 Cr L J. 1248 = 39 C.W.N. 1082 = 1935 Cr C. 865 = A.I.R. 1935 Cal. 473.**

———**S. 133**—Accomplice—Evidence of—Need for corroboration. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **34 Bom.L R. 1453.**

———**S. 133**—*Accomplice—Evidence of—Value.*

The statement of an accomplice, is of course subject to suspicion, but in certain cases, it is of great value in evidence and should not be completely discarded. But such a statement unless supported by reliable evidence of another kind to corroborate it, is not sufficient in itself to form the basis of a conviction. (*Kendall, J.*) MOHAN LAL *v.* EMPEROR. **154 I.C 812 = 7 R.A. 801 = 36 Cr.L J. 569 = 1935 A L J 479 = 1935 A Cr.C. 107 = 1935 A.W.R. 457 = 1935 Cr C. 511 = A.I R. 1935 All. 477.**

———**S. 133**—*Accomplice—Evidence of—Value.*

'While it is not illegal to base a conviction on the uncorroborated testimony of an accomplice witness, as a general rule it is unsafe to do so and Courts as a matter of procedure and practice require material corroboration of the accomplice's tainted testimony'. 6 Mys.L.J. 419, Ref. to. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) NEELAPPA *v.* THE GOVERNMENT OF MYSORE. **9 Mys.L J. 57.**

———**S. 133**—Accomplice—Evidence of—Value. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **142 I.C. 809 (2) = A.I R. 1933 Pat. 96.**

———**Ss. 133 and 114 (b)**—Accomplice—Testimony of —Necessity for corroboration. *See* EVIDENCE ACT, SS. 114, ILL. (*b*) AND 133. **9 Luck. 355 = A.I.R. 1934 Oudh 90.**

———**S. 133**—*Accomplice—Who is—Person cognizant of crime or not disclosing its commission.*

A witness who happens to be cognizant of a crime, or who makes no attempt to prevent it, or who does not disclose its commission is not an accomplice, though it may not be possible to place much reliance on the evidence coming from such a person. It leads to confusion of thought to treat him as practically an accomplice and then apply the rule as to his credibility instead of judging his credibility by a careful consideration of all the particular facts of the case affecting the evidence (*Guha, Nasim Ali and Khundkar, JJ.*) HAFIJUDDI *v.* EMPEROR. **38 C.W.N. 777 = 151 I.C. 486 = 7 R.C. 136 = 35 Cr.L J. 1357 = 1934 Cr.C. 1045 = A.I.R. 1934 Cal. 678.**

EVIDENCE ACT (1872), S. 133.

———**S. 133**—Accomplices—Who are—Illegal gratification to public servant—Persons negotiating—Evidence of—Value of. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **34 P.L.R. 836.**

———**S. 133**—*Approver's confession induced by motive to save woman with whom he had a liaison—Value of his testimony.*

Though the mere circumstance that the motive of an approver in making a confession was to save a woman with whom he had a liaison from the trouble of remaining in the custody of the police should not induce the Court to reject his testimony as unreliable, it must necessarily put it on caution to seek for better corroboration of his testimony than it would otherwise have done. Courts must exercise great caution if there are circumstances which indicate inducement or pressure, which is not recognized by law was brought to bear on the culprit to compel him to make a confession. Inducement by means of promise of pardon is an instance of inducement permitted by law. (*Jai Lal, J.*) BIMAL PERSHAD JAIN *v.* EMPEROR. **6 R L. 588 = 148 I.C. 745 = 35 Cr.L.J. 752 = 1934 Cr.C. 914 = A.I. R. 1934 Lah. 583.**

———**Ss. 133 and 114, Ill. (b)**—*Approver—Corroboration—Principles—Accomplice, who is.*

The testimony of an approver requires corroboration in material particulars both in the matter of the circumstances of the crime and also in the matter of the identification of the accused with the crime The corroboration must be independent of the accomplice; the evidence of one accomplice cannot corroborate that of another; the evidence of either requires corroboration before it can be acted upon. But a person who happens to be cognizant of a crime or who makes no attempt to prevent it, or who does not disclose its commission is not an accomplice; it leads to confusions of thought to treat him as practically an accomplice. There is no warrant in law to justify the proposition that the evidence of such a person should only be relied on to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to his testimony and that depends on all the facts and circumstances of the particular case. (*Guha, Nasim Ali and Khundkar, JJ.*) HAFIJUDDI *v* EMPEROR. **151 I. C. 486 = 7 R.C. 136 = 35 Cr L.J. 1357 = 38 C.W.N. 777 = 1934 Cr C 1045 = A.I.R. 1934 Cal. 678.**

[Not appr. 62 Cal. 238 (246)]

———**S. 133**—Approver — Corroborative evidence interested—Conviction not justified. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **34 P.L R. 2.**

———**S. 133**—Approver—Evidence of—Corroboration. *See* EVIDENCE ACT, S. 144, ILL. (*b*). **32 Cr.L.J. 684 = A I R. 1931 Lah. 178.**

———**S. 133**—*Approver—Evidence of—Corroboration —Direct evidence, if necessary.*

To justify conviction on an approver's evidence the corroboration need not be direct evidence that the accused committed the crime. Where in a murder case the Court finds that the approver's story as to the accused taking part in the crime was true and further found that there was general corroboration.

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Held, that the production of certain ornaments of the deceased by the accused was sufficient corroborative evidence. (*Abdul Qadir and Monroe, JJ*) SHER SINGH *v.* EMPEROR. **14 Lah. 111=I.R. 1932 Lah. 679=33 Cr.L.J. 916=140 I.C. 19=34 P.L.R. 285=1932 Cr.C 913=A.I R. 1932 Lah. 621.**

[**R.** 15 L. 673 (675, 679, 680).]

———**S. 133**—*Approver—Evidence of—Corroboration—Evidence of another approver.*

(1) An accused person can legally be convicted upon the uncorroborated evidence of an approver; (2) Whether an accused person should or should not be convicted upon such evidence is left to the prudence and good sense of the tribunal after considering all the circumstances of the case; (3) *Prima facie* the evidence of an approver, being tainted evidence, is unworthy of credit unless it is corroborated in some material particulars tending to show that the accused committed the offence with which he is charged; (4) It is for the Court to determine in the particular circumstances of each case whether the "matter" before it tending to corroborate the evidence of the approver (which may or may not be evidence strictly so called and as defined in the Evidence Act) is worthy of credence, and is sufficiently reliable to be treated as evidence against the accused, and acted upon; (5) The evidence of an approver may be corroborated by the evidence of another approver, or by the confession of a person who is being tried jointly with the accused for the same offence implicating both himself and the accused, (6) It is the duty of the Court to scrutinize with care such corroboration as that mentioned in (5), but whether it is to be treated as evidence against the accused or not is to be determined by the Court having regard to the circumstances of the case. (Case-law referred to.) (*Page, C.J., Mya Bu and Baguley, JJ.*) AUNG HLA *v.* EMPEROR. **9 Rang. 404=135 I C 849=33 Cr L. J. 205=I.R. 1932 Rang. 65=1931 Cr.C. 875=A I R. 1931 Rang. 235.**

[**F.** 11 R. 4 (7); 62 C. 238 (247); 143 I.C. 142; 144 I. C. 829 (830) (R.). **Not F.** 146 I.C. 701 (703) (N.). **R.** 146 I.C. 303 (304) (R.). **Expl.** 62 C. 819 (825, 831).]

———**S. 133**—*Approver—Evidence of—Corroboration—Extent.*

The testimony of the approver must be corroborated by independent evidence circumstantial or other, not only regarding the occurrence but also connecting the accused with the crime. 6 Mys.L.J. 419, Foll. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) SRIRAMA BHATTACHAR *v.* GOVERNMENT OF MYSORE. **9 Mys L.J. 142=36 Mys H.C.R. 30.**

———**S. 133**—Approver—Evidence of—Corroboration—Retracted confession. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **A.I R 1932 Lah. 180.**

———**S. 133**—*Approver—Evidence of—Corroboration—Testimony of his wife.*

It is not safe to convict upon the uncorroborated evidence of an approver and the testimony of his wife who is obviously interested in supporting his story which had procured his pardon cannot be regarded as independent corroboration of the approver's evidence. (*Coldstream and Jai Lal, JJ.*) SULTAN *v.* EMPEROR. **33 P.L.R. 13.**

———**S. 133**—Approver—Evidence of—Nature of corroboration necessary. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **56 Bom. 172=A.I R. 1932 Bom. 286.**

———**S. 133**—*Approver—Evidence of—Rule as to corroboration.*

It is not imperative that in every case, there should be corroboration of the approver's evidence though it is generally desirable to have such corroboration. (*C. C. Ghose, A. J. C., Costello and Mallik, JJ.*) SARAT CHANDRA DHUPE *v.* EMPEROR. **151 I.C. 473=7 R. C. 133=35 Cr L.J. 1335=A.I.R. 1934 Cal. 719 (F.B.).**

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———**S. 133**—*Approver—Evidence of—Sufficiency for conviction.*

If there is no other reliable evidence in corroboration, the evidence of the approver, coupled with the retracted confession of a co-accused, is not sufficient for conviction. (*Pullan and Niamatullah, JJ.*) NASIR *v.* EMPEROR. **55 All. 91=I.R. 1933 All. 170=143 I.C. 67=34 Cr.L.J. 489=1932 A.L.J. 1125=13 L.R. 157 (Cr.)=1933 Cr C. 42=A.I.R. 1933 All. 31.**

———**S. 133**—*Approver—Evidence of—Sufficiency for conviction.*

It is an ordinary and well-recognized rule of practice that a conviction ought not to be based on testimony of the approver unless it is corroborated in material details not only with regard to the general story narrated by him but also with regard to the complicity of each accused. This rule is not rendered inapplicable by the personal conduct and antecedents of the approver or by the absence of motive on his part or on the part of the investigating agency to implicate individual accused. (*Jai Lal, J.*) BIMAL PERSHAD JAN *v.* EMPEROR. **6 R L. 588=148 I.C. 745=35 Cr.L J. 752=1934 Cr. C 914=A.I R. 1934 Lah. 583**

———**S. 133**—Approver—Mutual corroboration. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **A.I.R. 1933 Lah. 946.**

———**S. 133**—Approver—Testimony of—Nature of corroboration necessary for conviction. *See* EVIDENCE ACT, S. 144, ILL. (*b*). **34 P.L.R. 866.**

———**S. 133**—*Confession of co-accused—Corroboration of accomplice's evidence.*

The approver's tainted testimony cannot ordinarily be deemed to have received the corroboration which human experience and conduct require from the confessional statement of a co-accused so as to comply with the rule laid down in S. 114 (*b*), Evidence Act, and justify the conviction of the other co-accused against whom there is no other evidence except the testimony of the approver and the incriminating statement of a confessing accused. But where besides the confession of the co-accused, the evidence of the approver is amply corroborated by other evidence, the conviction of other accused cannot be said to be illegal. (*Nanavutty, J.*) BENI MADHO *v* EMPEROR. **9 Luck 22=35 Cr L.J. 273=6 I.R. (Oudh) 209=146 I C. 1064=10 O.W.N. 688=1933 Cr.C. 976=A.I.R. 1933 Oudh 355.**

———**S. 133**—*Corroboration—Identity of accused.*

Not only should the evidence of an accomplice be corroborated but it must also be corroborated with regard to the identity of the accused. (*Niyogi and Staples, A. J. Cs.*) MALLU MARHETA *v.* EMPEROR. **6 I.R. (Nag.) 93=146 I C. 701=35 Cr.L J 213=16 N.L.J. 186=1933 Cr.C. 1451=A.I.R. 1933 Nag. 352.**

———**S. 133**—*Corroboration—Nature.*

Where the first statement required corroboration from an independent source, such corroboration could not be sought in the evidence of an accomplice recorded in the Sessions Court. Corroboration must be had from independent sources, and if such corroboration could not be had, then the first statement was not corroborated at all and that being so, ordinarily it would be very unsafe to act on the first statement which was not corroborated. (*C. C. Ghose and Panckridge, JJ.*) RAMANI MOHAN DE *v.* EMPEROR. **I R. 1933 Cal. 432=143 I C 797=1933 Cr C. 223=34 Cr L J. 638=A.I.R. 1933 Cal. 146.**

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———**S. 133**—Corroboration—Necessity for independent evidence. *See* EVIDENCE ACT, S. 114, ILL. (*b*). **A I.R. 1933 Nag. 352.**

———**S. 133**—*Corroboration—Necessity for—Nature of.*

Corroborative evidence should be taken by the Court in case of the evidence of an accomplice, though legally no such corroboration is necessary. It must be evidence which implicates the accused, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the accused committed it. The nature of corroboration necessarily varies according to the particular circumstances of the offence charged. The corroboration need not be such as to confirm the accomplice in every detail of the crime, nor need it be by direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime. (1916) 2 K. B. 658, Foll. (*Bhide and Tapp, JJ.*) DALIP SINGH PARJA SINGH *v.* EMPEROR. **148 I C. 379 = 6 R L 547 = 35 Cr.L J. 641 = 1933 Cr.C. 394 = A I R. 1933 Lah. 294.**

———**S. 133**—*Effect.*

S. 133 should be read with S. 114, Ill (*b*). It is a rule of general practice resting on wide human experience that an accomplice as *particeps criminis* is an immoral person and his testimony is generally tainted. When he gives evidence under a promise of pardon, he may naturally be expected to favour the prosecution. The effect of S. 133 is that in very exceptional cases if the Court is satisfied that the presumption of the untrustworthiness attaching to accomplices in general is rebutted by special circumstances, the Court can accept the uncorroborated testimony of the accomplice. But the established practice of all the Courts in England as well as in India is ordinarily to require corroboration of the evidence of an accomplice in regard to material particulars. (*Hasan C.J. and Bisheshwar Nath, J.*) IA-SINGH *v.* EMPEROR. **136 I C. 321 = 33 Cr.L.J 287 = I.R. 1932 Oudh 113 = 8 O.W.N. 1240 = 1933 Cr.C. 43 = A I.R. 1932 Oudh 11.**

[**F.** 7 Luck. 511 (516)]

———**Ss 133 and 114, Ill (b)**—Retracted confession of co-accused—Necessity for independent corroboration. *See* EVIDENCE ACT, SS. 114, ILL. (*b*) AND 133. **36 C.W.N. 874.**

———**S. 133**—*Retracted confession of co-accused—Value of.*

Retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused but where such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other men falsely and his story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co-accused, the evidence is admissible and is a strong piece of evidence against the co-accused. (*Raza and Bisheshwar Nath, JJ*) MUSAHEB ALI *v.* EMPEROR. **I R. 1932 Oudh 253 (2) = 137 I.C. 665 = 33 Cr L J 502 = 9 O.W.N. 327 = 1932 Cr.C. 876 = A.I R. 1932 Oudh 321.**

[**R.** 143 I.C. 555 (557).]

———**S. 133**—*Scope—Accomplice—Evidence of—Corroboration—Necessity—Nature of.*

In spite of S 133 of the Evidence Act, the rule of practice that an accused person ought not to be convicted on the uncorroborated testimony of an accomplice has become virtually equivalent to a rule of law. But that proposition is subject to various qualifications, and it cannot be held that in no circumstances can the evidence of an accomplice corroborate the evidence of another. Correct legal position pointed out. 9 Rang. 404, 427, Foll. (*Costello, Bartley and Henderson, JJ.*) NIRMALJEFBAN GHOSH *v.* EMPEROR. **62 Cal. 238 = 157 I C. 387 = 8 R.C. 106 = 36 Cr.L.J. 1115 = 39 C.W.N. 744 = 1935 Cr.C. 889 = A.I.R. 1935 Cal. 513 (S B.).**

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———**S. 134**—*Offence under S. 193, I. P. Code—Proof—More than single witness, if necessary.*

The English Common Law rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a safe guide for the Indian Courts which are bound by the statute law. Under S. 134 of the Evidence Act, no particular number of witnesses is required in any case for the proof of any fact. This rule applies to a prosecution for an offence under S. 193, I. P. Code. (*Kendall, J.*) ARJUN SINGH *v* EMPEROR. **53 All. 598 = I R. 1931 All. 402 (2) = 131 I.C. 594 (2) = 32 Cr.L.J. 780 = 12 L.R. 50 (Cr.) = 1931 Cr.C. 618 = A.I R. 1931 All. 362.**

———**S. 134**—*Scope—Conviction based solely on evidence of complainant—Validity of.*

It is not correct to say that in no case should a conviction be given on the strength of the testimony of a single witness. It is the function of a Judge to arrive at a decision in civil or criminal cases, by *weighing* evidence and not by *counting* the number of witnesses examined by a party. It is the quality and not the quantity of the evidence that ought to influence the decision of a case and it is upon this fundamental maxim that S. 134 of the Evidence Act is based. It follows therefore that the testimony of a single witness, if believed, is sufficient to prove or disprove any fact and there is nothing in law to fetter the discretion of the Judge in this respect. Each case has to be judged according to its own peculiar circumstances and a conviction upon the statement of the complainant alone cannot be said to be illegal. (*Mahadevayya, O. C. J.*) NANJA *v.* GOVERNMENT OF MYSORE. **11 Mys.L J. 468 = 39 Mys. H C R. 141.**

——— **S 135**—*Cross examination of prosecution witnesses—Order—Pleader of accused desiring to cross-examine witness before complainant—Procedure.*

Where at the trial the prosecution witnesses who had been summoned were present in Court as also the complainant and though the accused for certain reasons of his own wanted to cross examine the witnesses before the complainant, the Court insisted on the complainant being examined first on the ground that his state of health necessitated that course.

Held, that the Magistrate should have acceded to the request of the pleader of the accused and directed the cross examination of the witnesses before the complainant. (*Panckridge and Patterson, JJ.*) MOOSA HAJI ABDUL SHAKOOR *v.* EMPEROR. **I.R. 1933 Cal. 274 = 142 I C. 479 = 34 Cr L J 347 = 37 C.W.N. 288 = 1933 Cr.C 235 = A I R 1933 Cal. 189.**

[**D.** 1934 N. 209 (211).]

———**S. 135**—*Order of examination—Witnesses summoned for* de novo *trial—Cr. P. Code, S.* 350.

Where the witnesses are not summoned at the instance of the accused for cross-examination, but are summoned for examination in a *de novo* trial, the order in which these witnesses are to be examined in chief rests at the discretion of the prosecution. A.I.R. 1933 Cal. 189, Dist (*Grille, J. C.*) SHEIKH IBRAHIM *v.* EMPEROR. **152 I.C. 236 = 36 Cr.L J. 41 = 7 R.N. 80 = 1934 Cr.C 980 = A.I.R. 1934 Nag. 209.**

———**S. 135**—*Witness present during examination of previous witness—Power of Court to exclude the witness—C. P. Code, S.* 151.

The universal practice in the Court, in India is that witnesses should be called in one by one and that no witness who is to give evidence should be present when

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the deposition of a previous witness is being taken. S. 135 of the Evidence Act does not state what the Court is to do in case its directions for the order in which witnesses should appear are broken. There is, however, power for this purpose in S. 151, C. P. Code. The presence of a witness during the examination of the previous witness may well be termed an abuse of the process of the Court and therefore under S. 151, the Court has inherent power to prevent that abuse by ordering that that witness should not be heard. (*Bennet, J.*) LALMANI *v.* BEJAI RAM CHAUDHARI. **1934 A.L.J. 750 = 152 I.C. 30 = 7 R.A. 313 = 3 A.W.R. 790 = A.I.R. 1934 All. 840.**

———**S. 136**—*Documentary evidence—Question of admissibility—Decision necessary before affixing seal of Court.*

There are two stages relating to documents. One is the stage when all the documents on which the parties rely are filed by them in Court. The next stage is when the documents are proved and formally tendered in evidence, it is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved, then the seal of the Court is put on them giving certain details laid down by law, otherwise the document are returned to the party who produced them with an endorsement thereon to that effect. It is not a proper procedure to put the seal of the Court immediately the document is filed into Court. (*Jai Lal, J.*) RAGHBIR SARAN *v* RAM CHANDER. **13 Lah. 126 = I.R. 1931 Lah. 593 = 32 P.L.R. 482 = 132 I.C. 481 = A.I.R. 1931 Lah. 546.**

———**S. 137**—*Unfinished testimony when admissible.*

No general rule can be laid down in respect of unfinished testimony. If it is substantially complete and the witness is prevented by sickness or death or other causes (mentioned in S. 33) from finishing his testimony, whether *viva voce* or by deposition, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected. (*Tek Chand, J.*) DIWAN SINGH *v.* EMPEROR. **I.R. 1933 Lah 441 = 34 Cr.L.J. 735 = 34 P.L.R. 719 = 144 I.C. 331 = 1933 Cr.C. 819 = A.I.R. 1933 Lah. 561.**

———**S. 145**—*Admission by party in previous proceeding—Mode of use.*

An admission made by a party in a previous proceeding must be put to that party under S. 145 before it is used against him in a subsequent case. (*Abdul Rashid, J.*) DAULAT SHAH *v* BISHAN DAS. **154 I.C. 662 = 7 R.L. 588 = A.I.R. 1934 Lah. 750.**

———**S. 145**—*Deposition of witness—Contradiction—Duty of Court to afford opportunity to explain.*

Per *Agha Haidar, J.*—It is not the duty of a Court of justice to scrutinize the evidence which a witness has given on oath before the Court and to compare it with some previous statement of his and then to try to find out if there are any discrepancies between the two with a view to discredit him. It is unfair to the witness to seek to discredit him by referring to statements which he has made on some previous occasion without pointedly drawing his attention to them and giving him an opportunity of explaining them. (*Harrison and Agha Haidar, JJ.*) MAHLA SINGH *v.* EMPEROR. **I.R. 1931 Lah. 282 = 130 I.C. 410 = 32 P.L.R. 259 = 32 Cr.L.J. 522 = 1931 Cr.C. 102 = A.I.R. 1931 Lah. 38.**

———**S. 145**—*Document used to contradict witness—Mode of use.*

A document which is used to contradict a witness must be put to the witnesses. Simply because the witness does not go into the witness-box, the Court is not entitled to break the law and admit such document.

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(*Wort, J.*) GAJADHAR TEWARI *v.* NAND LAL. **150 I.C. 841 = 7 R.P. 23 = A.I.R. 1934 Pat. 55 (2).**

———**S. 145**—*Effect—Prior statement of witness used in corroboration—Permissibility.*

The provisions of S. 145 relate to cross-examination as to previous statements in writing but does not militate in any way against such previous statements being used by way of corroboration of statements put in under S. 288, Cr. P. Code, which are substantive evidence in the case before the Court of Sessions. (*Guha and Bartley, JJ.*) MANARALI *v.* EMPEROR. **60 Cal. 1339 = 147 I.C. 1203 = 6 R.C. 411 = 35 Cr.L.J. 567 = 37 C.W.N. 1066 = 58 C.L.J. 66 = 1934 Cr.C. 169 = A.I.R. 1934 Cal. 124.**

———**S. 145**—*Former statements of witness—Mode of use.*

It is an elementary rule of evidence that if former statements made by a witness are to be used for the purposes of contradiction, he must be confronted with those statements and be given an opportunity of explaining any apparent discrepancies. So also, only those portions of the statements with which he has been confronted should be proved or relied upon for the purpose of contradiction. (*Middleton, J.C. and Almond, A.J.C.*) GOVERNMENT ADVOCATE *v.* MUQADDAR SHAH. **158 I.C. 974 = 1935 Cr.C. 1118 = A.I.R. 1935 Pesh. 148.**

———**S. 145**—*Non compliance with—Effect of.*

In the civil case of damages for false and malicious prosecution, the statements made by various witnesses at the trial were compared with the statements which they had made in the criminal proceedings, but the provisions of S. 145, Evidence Act, were entirely ignored. The statements made in the criminal trial were not properly proved, and the witnesses did not have their attention drawn in cross-examination to the particular points in which their evidence in the civil trials differed from the statements which they had made in giving evidence before the Magistrate.

Held, that the trial has been conducted wrongly throughout and that the case should be re-tried *ab initio*. (*Baguley, J.*) ABDUL GAFOOR *v.* KALICHARAN. **152 I.C. 425 = 7 R.R. 155 = A.I.R. 1934 Rang. 273.**

———**S. 145**—*Non compliance with—Testimony in Court and statement during investigation—Disparity between—Value of testimony.*

The statement of a witness recorded by the investigating police-officer in his special police diary is not evidence at all, nor is the investigating police-officer bound to record in full all that a witness may tell him. The statement of a witness taken down by a police-officer in his diary cannot be utilised in the same way as the sworn testimony of a witness recorded by the committing Magistrate. Where the Sessions Judge has not complied with the provisions of S. 145 of the Evidence Act, he is not justified in discrediting the testimony of the prosecution witnesses on the ground that they made different statements before the thanadar in the course of the police investigation. (*Srivastava and Nanavutty, JJ.*) EMPEROR *v.* SITAL. **6 R.O. 488 = 148 I.C. 1059 = 35 Cr.L.J. 843 = 1934 Cr.C. 680 = 11 O.W.N. 568 = A.I.R. 1934 Oudh 229.**

———**S. 145**—*Previous statement made by party—Mode of use.*

A previous statement made by a party cannot be made legal evidence in the case and used against him as an admission by merely filing an attested copy of that statement, without putting it to the party concerned. (*Bhide and Din Mahomed, JJ.*) SECRETARY OF STATE *v.* AKBAR SHAH. **155 I.C. 819 = 7 R.L. 771 = A.I.R. 1934 Lah. 753.**

EVIDENCE ACT (1872), S. 145.

———**S. 145**—*Previous statement of witness in writing —Proof of.*

A previous statement made by a witness in writing cannot be proved, if his attention was not called to those parts of the writing, which are to be used for the purpose of contradicting him. (*Bennet, J.*) SAMUEL JOHN *v.* EMPEROR. **160 I.C. 162 = 37 Cr.L J. 247 = 8 R.A. 570 = 1935 A.W R. 1071 = 1935 A.Cr C. 222 = 1935 A.L.J. 1079 = 1935 Cr.C. 1181 = A.I.R. 1935 All. 935.**

———**Ss. 145 and 146**—*Question to test veracity of witness—Letter alleged to have been written by witness —Question relating to—Admissibility—Proper custody, not necessary to be proved.*

There is nothing in the Evidence Act to show that a document, which is meant to contradict a witness or impeach his credit, must come from proper or legitimate custody. So a question to the prosecution witness in cross-examination with reference to the contents of a latter alleged to have been written by him to another asking the latter to depose to a certain effect cannot be disallowed on the ground that it had not been proved to have come from proper custody. (*Subhedar, A.J.C.*) EMPEROR *v.* RAJARAM. **6 I.R. (Nag.) 66 (1) = 146 I.C. 83 = 36 Cr.L.J. 1162 = 16 N.L.J. 198 = 1934 Cr. C. 151 = A.I.R. 1934 Nag. 35.**

———**S. 145**—*Statements of eye-witness to police— Contradiction of—Mode of—Cr. P. Code, S. 162.*

If in the course of a trial for murder the defence discovers that statements made in the police report and diary are untrue, the proper method of establishing it would be to apply for the copies of those statements in accordance with the pocedure laid down in S. 162 of the Cr. P. Code and then cross examine the witnesses who made those statements under S. 145 of the Evidence Act. If instead of adopting that course the defence endeavoured to establish the point by asking the witness at the end of his cross-examination, whether he made the statement to the police, the question is not admissible under S. 162, Cr. P. Code. (*Bennet and Baipai, JJ.*) RAM BHAROSEY *v.* EMPEROR. **148 I.C. 913 = 35 Cr.L J. 762 = 6 R.A 821 = 14 L.R. 184 (Cr.).**

———**S. 145**—*Statements of witnesses to Excise Inspector—Use of—Right of accused.*

The accused are not entitled to copies of statements made by witnesses to the Inspector of Excise at his enquiry but they are entitled to use the original statements under S. 145 of the Indian Evidence Act and the statements should be sent for under S. 94, Cr. P. Code, if they are required by the accused. (*Lakshmana Rao, J.*) MICHAEL *v.* EMPEROR. **1933 M.W.N. 1270.**

———**Ss 145 and 157**—*Statement made to headman —Admissibility.*

A headman cannot examine witnesses on oath in the course of an inquiry in a criminal case. The statement made to headman can only be used in the manner provided for in Ss. 145 and 157, Evidence Act. (*Ba U, J.*) MI CHOKE *v.* EMPEROR **I R. 1933 Rang. 105 = 144 I.C. 369 = 34 Cr.L.J. 781 = 1933 Cr.C. 644 = A.I R. 1933 Rang. 119.**

———**S 145**—Statement made to police by complainant different from that in complaint—Prior statement— Admissibility to contradict later statement in complaint. *See* CR. P. CODE, S 154. **18 N.L.J. 289.**

———**S. 145**—*Statements of witness to police—Admissibility.*

Statements made by a witness to the police in the course of the investigation of a case can never be used to corroborate the witness's evidence; and if the written record of what a prosecution witness has said to the police is to be used to contradict him under S. 162, Cr.P. Code, it must be proved and used in accordance with S. 145 of the Evidence Act. The Court should not transgress the provisions of S. 162 of the Cr. P. Code. (*Beasley, C.J. and Reilly, J.*) NARAYANA *v.* EMPEROR. **56 Mad 231 = 143 I.C. 46 = I.R. 1933 Mad. 261 = 34 Cr L J. 481 = 1932 M W.N. 801 = 37 L.W. 220 = 1933 Cr.C. 289 = A.I.R. 1933 Mad. 233.**

———**S 145**—*Statement of witness to police—Contradiction—Procedure—Cr. P. Code, S.* 162.

What is intended by S 145 of the Evidence Act is that a witness should be informed of the part of his statement which is to be used to contradict him and he should be given an opportunity of explaining what he meant by that portion of his statement. Where a witness had made a long statement to the police and the only question put to him by the defence was whether a particular exhibit was his state. ent, it was quite impossible for the witness to understand what portion of it would be used for contradicting him and the defence did not adopt the procedure required by law laid down by S. 145 of the Evidence Act and by S. 162 of the Cr. P. Code. (*Bennet, J.*) RAGHURAJ SINGH *v.* EMPEROR. **152 I C. 873 = 36 Cr L J. 188 = 7 R.A. 406 (2) = 4 A. W.R. 1 = 15 L R. 157 (Cr.) = 1934 Cr C. 1258 = A.I.R. 1934 All. 956.**

———**Ss. 145 and 155**—*Statements of witness to police-officers—Right to copy of.*

Where it is sought to prove that the witness in the box has been trying to improve his version upon what he stated to the police-officers on prior occasions, the proper procedure is for the Magistrate to summon the police-officer to produce the originals of the statements said to have been made by the witness. The complainant is not entitled to have copies of them as a matter of right. The witness can be confronted with the originals and if he repudiates them, the officer may be examined and the statements proved. (*Burn, J.*) PAKKIRI PADAYACHI *v.* EMPEROR. **1933 M.W.N. 919.**

———**S. 145**—*Statement of witness to police—Mode of use at inquiry or trial—Omissions in statement, whether can be relied on—Cr. P. Code, S.* 162.

A statement made by a witness to the Police in an investigation under S. 162 Cr. P. Code, cannot be used during an inquiry or trial, in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the police. The statement may be used in the manner laid down by S. 145, Evidence Act, only to show that the witness is contradicting something he has said before A.I.R. 1926 Pat. 20, Foll. (*Burn, J.*) PONNUSAMI CHETTI, *In re.* **56 Mad. 475 = I.R. 1933 Mad. 299 = 143 I.C. 424 = 34 Cr L.J. 582 = 1933 M.W.N. 90 = 37 L.W. 441 = 1933 Cr.C. 555 (2) = A.I.R. 1933 Mad. 372 (2) = 64 M.L.J. 519.**

———**S. 145**—*Statements of witness before police and Magistrate—Contradiction—Procedure.*

Where when a witness's statement differed from his statement to the Magistrate, the method adopted was to call the attention of the witness to the discrepancy between the two statements and to exhibit the deposition recorded by the Magistrate to prove the discrepancy,

Held, that the procedure was in accordance with S. 145. Practice in Patna Courts indicated. (*Agarwala and Rowland, JJ.*) EMPEROR *v.* NAJIBUDDIN. **147 I.C. 142 = 6 R.P. 339 = 35 Cr L J. 379 = 14 Pat.L.T. 543 = 1933 Cr.C. 1350 = A.I.R. 1933 Pat. 589.**

———**S. 146**—*Witness—Cross-examination—Prior statement put for purpose of contradiction.*

The statement of the *patwari* that he heard the landlord say that a particular person had been admitted to tenancy can be used only for the purpose of contra-

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dicting the landlord while he is being cross-examined, and not for the purpose of proving the tenancy itself. (*Oakden, S.M. and Oppenheim, J.M.*) SHEO PRASAD LAL *v.* GUDAR AHIR. **15 R.D. 110=12 L.R. 12 (Rev.).**

———**S. 148**—*Scope—Section, if modified by S.* 155 (3).

Per *Agha Haidar, J.*—S. 155, Cl. (3) does not render nugatory the clear and explicit provisions of S. 145 and in fact takes for granted the existence and binding effect of those provisions. (*Dalip Singh, J., on difference between Harrison and Agha Haidar, JJ.*) MAHLA SINGH *v.* EMPEROR. **I R. 1931 Lah. 282=130 I.C. 410=32 Cr.L.J. 522—32 P.L.R. 259=1931 Cr.C. 102=A.I.R. 1931 Lah. 38.**

———**S. 154**—*Applicability—Witness retracting statement.*

The power given by S 154 is a discretionary one and will not be reviewed by the appellate Court, provided there was some material on which such discretion can be exercised. The mere fact however that a witness does not adhere to or subsequently makes a statement different from his previous statement does not of itself justify the employment of the power given by S. 154. (*Otter and Baguley, JJ.*) NGA NYEIN *v.* EMPEROR. **11 Rang. 4=I.R. 1933 Rang. 29—142 I.C. 87=34 Cr.L.J. 286=1933 Cr.C. 452=A.I.R. 1933 Rang. 57.**

[R. 30 N.L.R. 55 (57).]

———**S. 154**—*Contradiction by previous statement of witness—Conditions of.*

A witness can, under S. 154, Evidence Act, be contradicted by his previous statements, but before that can be done, it must be shown that the previous statements were really his voluntary statements. If they were not voluntary, it may be that his present statements are true. When it does not appear that the witness unexpectedly turned hostile, it is not a proper exercise of discretion under S. 154 for the Judge to allow him to be cross-examined especially when the object of such cross examination is to introduce his retracted confession in evidence. (*Guha and Nasim Ali, JJ.*) NAVEB SHANA *v.* EMPEROR **61 Cal. 399=38 C.W.N. 659=152 I.C. 44=7 R C. 225 (2)=35 Cr.L.J. 1479—1934 Cr C. 929 =A.I.R. 1934 Cal. 636.**

———**S. 154**—*Evidence of hostile witness—Value—Principles applicable.*

(*i*) The evidence of a witness treated as 'hostile' need not be rejected; (*ii*) Such evidence need not be rejected so far as it is in favour of the party calling the witness; and (*iii*) It need not also be rejected so far as it is in favour of the opposite party. (Case-law elaborately discussed.) (*Rankin, C.J., C. C. Ghose, Buckland, Suhrawardy and Cuming, J.*) PROFULLA KUMAR SARKAR *v.* EMPEROR. **58 Cal. 1404=I.R. 1931 Cal. 463=32 Cr.L.J. 768=35 C.W.N. 731=131 I C 575=53 C. L J. 427=1931 Cr.C. 497=A.I.R. 1931 Cal. 401 (F.B.).**

———**S. 154**—"*Hostile*"—*Meaning—Leave to cross-examine—Veracity of witness.*

In order to obtain leave to cross-examine, all that is necessary is that the witness's testimony should have been adverse to the party calling him and that the value of the witness's testimony is to be judged in the light of the results of such cross-examination. It is unreasonable that the good or bad faith of a witness instead of being judged by the test of cross-examination should be held to be prejudged by the mere fact that cross-examination is permitted. Meaning of the word 'hostile' discussed. (*Dhivle and Rowland, JJ*) EMPEROR *v.* HARADHAN. **6 I.R. (Pat.) 310 (2)=35 Cr.L.J. 240=146 I.C. 993 (2)=14 Pat.L T. 494=1933 Cr.C. 1166=A.I.R. 1933 Pat. 517.**

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———**S. 154**—*Hostile witness—Cross-examination of—Discretion of Court—Principles governing.*

The right to permit cross-examination is one for the discretion of the Court, and the discretion has to be exercised judicially and is not confined to those cases only where the witness is simple enough to display an obviously hostile attitude. Further it is impossible to expect direct evidence that a witness has been won over, but where he makes a statement in favour of the accused directly contrary to a previous statement against the accused, it may be reasonably inferred that he has been won over and it is desirable that his veracity should be tested by cross-examination. (*Pollock, A.J C.*) MOHAN BANJARI *v.* EMPEROR. **30 N L.R. 55=147 I C. 1122 =6 R N. 159=35 Cr.L.J 577—1933 Cr C. 1577=A. I.R. 1933 Nag. 384.**

———**Ss 154 and 155**—*Hostile witness—Cross-examination by party summoning witness—Permission of Court, if necessary.*

Before a party calling a witness can cross examine him, it is not necessary that the witness should first of all be declared hostile. In this respect S. 154 of the Indian Evidence Act gives an unqualified discretion to the Judge quite apart from any question of the hostility or otherwise of the witness. It is, however, necessary before the procedure of S. 154 can be adopted, either for permission of the Court to be obtained or for it to be given by the Court without its being sought. Such permission should be signified, if not in words, by some other action of the Court indicating its permission during the cross-examination of the witness by the party calling him. (*Beasley, C.J. and Cornish, J.*) AMMATHAYAR AMMAL *v* THE OFFICIAL ASSIGNEE OF MADRAS. **56 Mad 7=I.R. 1933 Mad. 464=144 I C 629—37 L W. 233=A.I R. 1933 Mad. 137=64 M.L.J. 208.**

———**S. 154**—*Hostile witness—Discretion of Court.*

The discretion allowed by S. 154, Evidence Act, should not be exercised without sufficient reason, and the reason should be stated; because, by offering a witness, a party is held to recommend him as worthy of credence, and so it is not in general open to him to test the witness's credit or impeach his truthfulness. (*Mahomed Noor and Luby, JJ.*) EMPEROR *v.* SUAR GOLA. **7 R.P. 289=152 I C 1021=36 Cr L J 262=1934 Cr.C. 1189=16 Pat L.T. 95=A.I R. 1934 Pat. 533.**

———**S. 154**—*Hostile witness—Permission to cross-examine—Principles governing.*

The circumstances in which a witness may be cross-examined by the party calling him are not laid down in S. 154, which leaves the matter entirely to the discretion of the Court. The mischief begins when the grant of permission itself is considered to be equivalent to an adjudication or to an expression of opinion by the Court adverse to the veracity of the witness, instead of being treated merely as a permission to test the veracity of a witness, a permission which can hardly be refused when any witness called by the prosecution makes an unexpected statement adverse to the case of the prosecution. (*Rowland, J*) SACHCHIDANAND PRASAD *v.* EMPEROR. **6 I.R. (Pat.) 130=144 I C. 936=34 Cr.L. J. 892=14 Pat.L.T. 580—1933 Cr.C. 1030=A.I.R. 1933 Pat. 488.**

———**S. 154**—*Hostile witness—Who is.*

The mere fact that a witness before the Sessions Court make statements, relating to a part of the prosecution case different from that made by him before the committing Magistrate does not necessarily make him a hostile witness. (*Guha and Nasim Ali, JJ.*) NAYEB

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SHANA *v.* EMPEROR. **61 Cal. 399 = 38 C.W.N. 659 = 152 I.C. 44 = 7 R.C. 225 (2) = 35 Cr.L.J. 1479 = 1934 Cr.C. 929 = A.I.R. 1934 Cal. 636.**

———**S. 154**—*Hostile witness—Witness discredited on one point—Evidence whether can be taken into account on another point.*

Where a witness turns hostile and is cross-examined by the party calling him, the evidence of such a witness need not be rejected *in toto*. It is a question for the Judge to decide whether in spite of the witness having been discredited on one point his testimony may be considered on another. (*Beasley, C.J. and Cornish, J.*) AMMATHAVAR AMMAL *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **56 Mad. 7 = I R. 1933 Mad. 464 = 144 I.C. 629 = 37 L W. 233 = A.I R. 1933 Mad. 137 = 64 M.L.J. 208.**

———**S. 154**—*Witness, when hostile—Discretion of Court.*

Under S. 154 the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. The section does not lay down that a witness must be declared hostile before he can be cross-examined and it leaves the matter entirely in the discretion of the Court. (*Pollock, A.J.C.*) MOHAN BANJARI *v.* EMPEROR. **30 N.L.R. 55 = 147 I.C 1122 = 6 R N. 159 = 35 Cr.L J. 577 = 1933 Cr.C. 1577 = A.I.R. 1933 Nag. 384.**

———**Ss. 155 and 25**—*Confession of accomplice to Excise Officer—Maker examined as witness—Use of confession.*

A confession by an accomplice to an Excise Officer is inadmissible as a piece of substantive evidence as against the other accused, even if the latter had been tried along with the maker and *a fortiori* that it is inadmissible as a piece of substantive evidence in a separate proceeding against the other accused. But where the maker is examined as a witness on behalf of the other accused, it is admissible for the purpose of impeaching his credit in respect of the later statement made by him in his evidence in Court, under the provisions of S. 155. (*Patterson and Guha, JJ.*) KERATALI *v.* EMPEROR. **61 Cal. 967 = 150 I C. 980 (2) = 7 R.C. 49 = 35 Cr.L.J. 1178 = 38 C.W.N. 1005 = 1934 Cr.C. 905 = A.I R. 1934 Cal. 616.**

———**S. 155**—*Effect of S.* 162 (1), *Cr. P. Code.*

S. 162 (1), Cr. P. Code, modifies S. 155. So far as the latter section permits the prosecution to impeach the credit of his own witness by proof of a former statement made to an investigating officer and inconsistent with the testimony of the witness given at the trial, it is by implication repealed by S. 162 (1). (*Agarwala and Rowland, JJ.*) EMPEROR *v.* NAJIBUDDIN. **147 I C. 142 = 6 R.P. 339 = 35 Cr.L J. 379 = 14 Pat.L.T. 543 = 1933 Cr.C. 1350 = A.I.R. 1933 Pat. 589.**

———**S. 155**—*Previous statement—Use for purpose of contradiction—Procedure.*

If a party wants to rely on a previous statement of a person who has gone into the witness-box, in order to contradict him, it is the duty of such person to put that statement to the party or the witness and to give him an opportunity to explain it. (*Mukerji and Young, JJ.*) AMRIT KUNWAR *v.* GUR CHARAN SINGH. **6 R.A. 503 = 147 I.C. 591 = 3 A.W.R. 11 = A.I.R. 1934 All. 226.**

———**Ss. 155 and 157**—Scope—Test identification during police investigation—Evidence of—Admissibility. *See* CR. P. CODE, S. 162. **39 C.W.N. 488 = 1935 Cr.C. 462 = A.I R. 1935 Cal 311.**

———**S. 155 (3)**—*Effect—Provisions of S.* 145, *if modified.*

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Per *Agha Haidar, J.*—S. 155, Cl. (3) does not render nugatory the clear and explicit provisions of S. 145 and in fact takes for granted the existence and binding effect of those provisions. (*Dalip Singh, J., on difference between Harrison and Agha Haidar, JJ.*) MAHLA SINGH *v.* EMPEROR. **I.R. 1931 Lah. 282 = 130 I.C. 410 = 32 Cr L.J. 522 = 32 P.L R. 259 = 1931 Cr.C. 102 = A.I.R. 1931 Lah. 38.**

———**S. 155 (3)**—*Eye witnesses—Credibility of evidence—Contradiction by testimony of other prosecution witnesses.*

Where two accused are alleged to have strangled a person to death and some of the prosecution witnesses say that the eye witnesses at the spot immediately after the offence was committed did not implicate one of the accused as having helped to strangle the deceased, their evidence can be used under S. 155 (3) to impeach the credit of the eye-witnesses. (*Addison and Coldstream, JJ.*) NANAK *v.* EMPEROR. **I R. 1931 Lah. 967 = 134 I.C. 583 = 32 Cr.L J. 1205 = 1931 Cr.C. 309 = A.I.R. 1931 Lah. 189.**

———**S 155 (4)**—*General immorality—Evidence of—Nature of*

The sub-section refers to such evidence as that her general reputation was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men. It is not enough to show that she ran away with a man once or twice, or that she had on specific occasions done something immoral. (*Lort Williams and Mallik, JJ.*) WAHID ALI *v.* EMPEROR. **I.R. 1932 Cal. 454 = 138 I.C. 373 = 33 Cr L J. 604 = 36 C.W.N. 356 = 1932 Cr. C. 498 = A.I.R. 1932 Cal. 523.**

———**S. 157**—*Dispute as to title—Statement of witness—Recital of boundaries in document not* inter partes *—Admissibility.*

Where in a dispute about the ownership of a piece of land, the lower Court granted the plaintiff a decree on the strength of the statement made by a witness on the box which was corroborated by a recital in a mortgage bond between two strangers to the suit about the boundaries of the suit property,

Held, that such recital was not evidence and as the document was not produced by that witness, his testimony could not be relied on. 8 Lah. 651, Foll.; A.I.R. 1927 Cal. 230, Dist. (*Broadway, J.*) RAM DAS *v.* MAYA DITTA. **6 I R. (Lah.) 181 = 146 I.C. 192 = 34 P.L.R 917.**

———**S. 157**—*Effect of S.* 162 (1), *Cr. P. Code.*

S. 162 (1), Cr. P. Code, by enacting that no statement made to a police-officer nor any record thereof shall be used " for any purpose at any enquiry or trial" repeals by implication S. 157 of the Evidence Act so far as concerns statements made by a police-officer in the course of an investigation. (*Agarwala and Rowland, JJ.*) EMPEROR *v.* NAJIBUDDIN. **147 I.C. 142 = 6 R.P. 339 = 35 Cr L J. 379 = 14 Pat.L.T. 543 = 1933 Cr.C. 1350 = A.I.R. 1933 Pat. 589.**

———**S. 157**—*First information report—Admissibility of.*

The first information report is not a substantive piece of evidence. It can be used merely by way corroboration or contradiction and not any further. It is inadmissible for proving that the facts stated therein are correct. It cannot be used to contradict other witnesses who are unanimous on a particular fact. 23 A.L.J. 14; A.I.R. 1930 M. 632 and A.I.R. 1928 Lah 507, Ref. (*Rata and Kisch, JJ.*) GAJADHAR *v.* EMPEROR. **7 Luck. 552 = I.R. 1932 Oudh 195 = 137 I.C. 79 = 33 Cr.L.J. 381 = 9 O.W.N. 32 = 1932 Cr.C. 162 = A.I R. 1932 Oudh 99.**

[**Rel.** 30 N.L.R. 262 (264).]

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——**S. 157**—*Recital as to boundaries—Corroborative evidence.*

A recital regarding boundaries in a document executed between strangers to the suit relating to lands adjoining the suit lands and in which the suit land is referred as a boundary is not admissible under S. 13 but may be admissible if the executant is called and deposes to the boundary, to corroborate him under S. 157, or if he is dead, under S. 32. (*Dhavle, J.*) RAMNANDAN PRASAD *v.* LALEY TILAKDHARI LAL. **6 I.R. (Pat.) 215 = 145 I.C. 944 (2) = A.I.R. 1933 Pat. 636.**

——**S. 157**—Scope—Former statement admitted under—Use of as substantive evidence—Legality. *See* Cr. P. CODE, S. 164. **152 I.C. 832 = A.I.R. 1935 Pat. 19.**

——**S. 157**—*Statements as to cause of death—Evidentiary value.*

Where a girl who had mixed aconite in cooked food and served the same on her near relatives, two of whom died, was granted a pardon and she made statements before the doctor and the Magistrate as to the circumstances under which the aconite was administered,

Held, that her statements were admissible in evidence under S. 157. (*Rankin, C.J., Mullick and Guha, JJ.*) EMPEROR *v.* AMODE ALI SIKDAR. **58 Cal 1228 — I.R. 1931 Cal. 896 (2) = 33 Cr L J. 79 = 134 I C. 896 (2) = 35 C.W.N. 573 = 1931 Cr.C. 1021 = A.I.R. 1931 Cal. 757.**

——**S. 157**—*Statement made to headman—Admissibility.*

A headman cannot examine witnesses on oath in the course of an inquiry in a criminal case. The statement made to headman can only be used in the manner provided for in Ss. 145 and 157, Evidence Act. (*Ba U, J.*) MI CHOKE *v.* EMPEROR. **I.R. 1933 Rang. 105 = 144 I.C. 369 = 34 Cr L.J. 781 = 1933 Cr.C. 644 = A.I.R. 1933 Rang. 119.**

——**S. 157**—*Statement said to have been made by A to B—A examined as witness—No question to A about the statement—Statement of A to B is inadmissible.*

Where a person has been examined as a witness, a statement said to have been made by him to another is not admissible when no question is put to the witness as to whether the particular statement had been made to such other person. (*Ferrers, J.C. and Aston, A.J.C.*) MISRI *v.* EMPEROR. **1934 Cr.C. 825 — 151 I C. 437 = 7 R.S. 52 = 35 Cr L J. 1332 = A.I.R 1934 Sind 100**

——**S. 157**—Statement of witness before committing Magistrate admitted under S. 288, Cr. P. Code—Corroboration—Statements under S. 164—Admissibility. *See* CR. P. CODE, S. 164. **16 Pat.L T. 730.**

——**Ss. 158 and 159**—*List of stolen things given by informant—Admissibility of.*

Per *Coldstream, J.*—A list of the stolen things given to supplement the first information report is admissible and can be referred to under S. 158 and proved under S. 159, Evidence Act. The fact that a copy of such a list had been given to the Police would not affect the admissibility of the informant's list. (*Abdul Qadir, J., on difference between Coldstream and Jai Lal, JJ.*) AMRIT LAL *v.* EMPEROR. **148 I.C. 400 — 6 R.L. 550 = 35 Cr L.J. 654 = 1933 Cr.C. 1503 — A.I.R. 1933 Lah. 987.**

——**Ss. 158, 32 (7) and 33**—*Will—Deceased attestors—Statement before Sub-Registrar—Admissibility of.*

Statement made before the Sub-Registrar by the deceased attestors to a will are admissible under S. 32 (7) taken with S. 158, but not under S. 33 of the Evidence Act. Under S. 158, even prior statements of deceased persons can be admitted both for contradiction and corroboration. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M. W N. 1148.**

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——**Ss. 159 and 160**—*Applicability - Dying declaration—Reference by witness—Permissibility.*

If it is merely a question of a man refreshing his memory, the document itself is not tendered in evidence and the witness merely gives evidence in the ordinary way after reading what has been written. To such a case S. 159 applies. But where the witness says in so many words that he does not recollect the facts recorded by him in the statement but is sure that they were correctly recorded, then S. 160 applies and the document itself may be tendered in evidence. In either case the fact that the declaration was not read over to the deponent and admitted by law to be correct does not affect the admissibility of the record, though where such a procedure has been adopted, it would certainly enhance the value of the statement. 7 Lah. 91, Ref. to. (*Beasley, C.J. and Walsh, J.*) KRISHNAPPA NAICKER *v.* EMPEROR **54 Mad. 678 — 1931 M.W N. 167 = 135 I.C. 337 = 33 Cr.L.J. 115 = I R. 1932 Mad. 81 = 33 L.W 348 = 1931 Cr C. 478 = A.I.R. 1931 Mad. 430 = 60 M.L J 404.**

——**S. 159**—*Horoscope—Admissibility.*

A horoscope is admissible in evidence in the proof of age, and though it may not be relied on as a probative document in itself, it can be used by a witness for the purpose of refreshing his memory under S. 159 (*Mahadevayya, C.J. and Shankaranarayana Rao, J*) LAS BABA *v* GOVERNMENT OF MYSORE. **12 Mys L.J. 133 = 39 Mys H C R. 406.**

——**Ss. 159 and 161**—*Panchnamas containing confession, how to be used.*

No doubt an entry in any public record stating a relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by the law is itself a relevant fact. But where panchnamas contain confession which cannot be given in evidence because of S. 26, the proper way of dealing with a panchnama containing such an entry is to place it into the hands of a witness and to allow him to use it to refresh his money. If he finds in it anything of which evidence can lawfully be given, he may give such evidence in the ordinary way; but the document itself should be excluded. 11 I.C. 613; 5 S.L.R. 31; 4 S I.R. 38 and 10 S.L R. 7, Rel. on. (*Ferrers, J.C. and Aston, A.J C*) BALOCH PIRWALI *v.* EMPEROR. **6 I.R. (Sind) 8 = 144 I C. 772 = 34 Cr L.J. 848 = 1933 Cr.C. 722 = A.I.R. 1933 Sind 220.**

——**Ss. 159 and 160**—*Police investigation—Admissions made by accused in presence of Magistrate—Memorandum made by Magistrate—Oral evidence of Magistrate—Admissibility of—Use of memorandum—Permissibility*

Where during the investigation of a criminal case, a Magistrate is associated with the investigating officer, and in the presence of such Magistrate the accused points out places alleged to be connected with the crime and makes admissions which do not lead to the discovery of any fact and the Magistrate does not record the admissions in accordance with the provisions of S. 164 of the Code of Criminal Procedure, but makes a memorandum of the conduct and admissions of the accused, the oral evidence of the Magistrate is admissible to prove the admissions of the accused. Ordinarily the written memorandum of the Magistrate is not admissible though the Magistrate under the provisions of S. 159 of

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the Evidence Act can refresh his memory when under examination by referring to the memorandum. In such a case, the memorandum must be shown to the adverse party and the witness may be cross examined on it. Where the Magisirate has, however, no specific recollection of the facts themselves but he is sure that the facts were correctly recorded in the document he can testify to facts mentioned in his memorandum, and both the testimony of the witness and the contents of the memorandum are admissible under S. 160 of the Evidence Act, the two being the equivalent of a present positive statement of the witness affirming the truth of the memorandum. The fact that the Magistrate is empowered to record the confession of an accused person under S. 164 of the Cr. P. Code would not affect the question of the admissibility of such evidence. (*Addison, Coldstream and Jai Lal JJ.*) ABDULLA *v.* EMPEROR. **14 Lah. 290=6 I.R. (Lah.) 109=145 I.C. 467=34 Cr.L.J. 1025 (2)=34 P.L.R. 612=1933 Cr.C. 902=A.I.R. 1933 Lah. 716 (F.B.).**

———**S. 159**—*Witness—Refreshing memory.*

A witness who professes to prove something spoken by another is expected to repeat in the witness-box what the latter had actually stated. He can, of course, refresh his memory by referring to any writing made or any notes taken down by him at the time when the speech was made. He can also use such writing or note to corroborate his oral testimony. In some cases it is open to a witness merely to refer to a document and to say that it contains a correct statement of what happened in his presence but in that case he must depose that he is unable to state by memory what happened as owing to a lapse of time and other circumstances he has forgotten it and further that he correctly recorded it. (*Jai Lal, J.*) JAGAN NATH LUTHRA *v.* EMPEROR. **I.R. 1931 Lah. 934=134 I.C. 486=32 Cr.L.J. 1172 =1932 Cr.C. 17=A.I.R. 1932 Lah. 7.**

———**Ss. 160 and 159**—Applicability—Dying declaration— Reference by witnesses— Permissibility. *See* EVIDENCE ACT, SS. 159 AND 160. **54 Mad. 678= 60 M.L.J. 404.**

———**S. 162.** *See* EVIDENCE ACT (1872), SS. 123 AND 124.

———**S. 162**—*Public document—Claim of privilege—Reasonableness—Decision of Court.*

The privilege claimable in respect of official and confidential documents is a narrow one and is based on the principle that the information contained in official documents cannot be disclosed where the disclosure would not be in public interest. The circumstance that the documents are confidential or official is by itself no reason for their non-production and the Court is always entitled to summon them and to examine how far the privilege claimed is reasonable and is justified. (*Shankaranarayan Rao. J.*) KARIGOWDA *v* GOVERNMENT OF MYSORE. **11 Mys.L.J. 171.**

———**S. 164**—*Applicability.*

Panckridge, J.—"I am by no means convinced that S. 164 applies to criminal proceedings". (*Panckridge and M.C. Ghose, JJ*) SHAM DAS KAPUR *v.* EMPEROR. **142 I.C. 57=I.R. 1933 Cal 214=34 Cr.L J. 283=36 C.W.N. 1127=1933 Cr.C. 108=A.I.R. 1933 Cal. 65.**

———**S. 164**—*Failure of accused to produce documents for inspection—Effect of—Right to use in defence.*

S. 164 does not contemplate the production of documents for inspection. What it contemplates is that one party should call upon another—in Court—to produce a document of which the first party has given the other notice to produce. It does not give him any right at any stage of the case to call upon his opponent to produce the document and use it or not as he sees fit. So the failure of the accused to produce certain documents for the inspection of the complainant does not deprive him of the right to use those documents as material for his defence or to put them to the complainant in cross-examination. (*Panckridge and M.C. Ghose, JJ.*) SHAM DAS KAPUR *v.* EMPEROR. **142 I.C. 57=I.R. 1933 Cal. 214=34 Cr.L.J. 283=36 C.W.N. 1127= 1933 Cr.C. 108=A.I.R. 1933 Cal. 65.**

EVIDENCE ACT (1872), S. 167.

———**S. 165**—*Object.*

Under S. 165 the Court cannot order the production by a party of any document or thing, no matter how irrelevant, into Court, unless the object of the order is to obtain 'indicative evidence' which may lead to discovery of relevant evidence or to obtain proof of any relevant fact in any matter then before the Court. (*Pakenham Walsh, J.*) KRISHNA AYYAR *v* BALAKRISHNA AYYAR. **57 Mad 635=6 R.M. 433=148 I C. 79=39 L.W. 179=A.I.R. 1934 Mad. 199 (2)= 66 M.L.J. 498.**

———**S. 165**—*Power of Judge under—Mode of exercise.*

The power of the Judge under S. 165 of the Evidence Act cannot be exercised for the purpose of introducing evidence in contravention of the law, namely, S. 162, Cr. P. Code. 42 C.L.J. 528, Rel. on. (*Lort Williams and S.K. Ghose, JJ.*) RAHIJADDI *v.* EMPEROR, **58 Cal 1009=35 C W N. 317=I.R. 1931 Cal. 543= 132 I.C. 159=32 Cr.L.J. 841=1931 Cr.C. 253= A.I R. 1931 Cal. 189.**

———**S. 165**—*Power under—Mode of exercise.*

The power under S. 165 should not be used for the purpose of eliciting what the law expressly and deliberately forbids being admitted. For instance it should not be used for proving a confession made to the police which is shut out by S. 25 of the Evidence Act or a confession made while in police custody except as mentioned in S 27. Nor should it be used for eliciting a statement which S. 162, Cr. P. Code, expressly forbids from being used for any purpose at any enquiry or trial In respect of any offence under investigation at the time when such statement was made. (*Waller and Krishnan Pandalai, JJ.*) PULLAMMA *v.* EMPEROR. **1932 M.W.N. 625.**

———**S. 167**—*Acceptance of inadmissible evidence—No ground for new trial, if other evidence available to support finding.*

The acceptance of inadmissible evidence is not a ground to set aside a judgment or grant a new trial, if there is other evidence upon which the finding could be arrived at. And the High Court can in second appeal see whether there is such other evidence justifying the decision, and if there is such evidence, it cannot order a new trial. (*Wort, J.*) GAJADHAR TEWARI *v.* NANDLAL. **150 I.C. 841=7 R.P. 23=A.I.R. 1934 Pat. 55 (2).**

———**S. 167**—*Admission of document without objection—Objection in revision that writer was not called—Maintainability.*

A document was proved in the trial Court by a person who had obtained it from the writer and admitted in evidence, without the writer being examined and no objection was raised to such admission.

Held, the non-examination of the writer would not make it inadmissible and the objection in revision had no weight. (*M. C. Ghose, J.*) LADURAM HIRALAL *v.* SECRETARY OF STATE. **153 I C. 867=7 R.C. 404= 59 C.L.J. 467=A.I.R. 1934 Cal. 334.**

EVIDENCE ACT (1872), S. 167.

———**S. 167**—*Applicability—Case tried at High Court Criminal Sessions—Review under Cl. 26, Letters Patent—Sufficiency of other evidence to support conviction.*

S. 167 of the Evidence Act is applicable to a case tried by a jury at the High Court Criminal Sessions and it is open to the High Court when exercising its power of review under Cl. 26 of the Letters Patent to decide whether the evidence properly received at the trial is sufficient to sustain the conviction. (*Cornish, Burn and Lakshmana Rao, JJ.*) RAMANUJA AIYANGAR *v.* EMPEROR. **159 I.C. 240 = 42 L.W. 140 = 37 Cr.L.J. 64 = 8 R.M. 476 = 1935 M.W.N. 5 = 1935 Cr.C 1049 = A.I.R. 1935 Mad. 793 = 68 M.L.J. (Supp.) 93 (F.B.).**

———**S. 167**—*Applicability—Inadmissible evidence—Other evidence being sufficient to sustain conviction—Procedure.*

The accused was tried and convicted for an offence under S. 302, I. P. Code. While in the custody of the Police, the accused made certain statements with reference to an article purchased for disposing of the dead body. The statements made by the accused while in police custody were otherwise corroborated by the prosecution witnesses and the entire evidence proved the basis of the conviction. Subsequently objection was taken to the admissibility in evidence of the statements made by the accused.

Held, that the statements amounted to confessions but were rendered admissible because they led to the discovery of a relevant fact.

Held, further, that assuming that the evidence consisting of the prisoner's statements should have been excluded, the other evidence in the case was sufficient to sustain the conviction. (*Cornish Burn and Lakshmana Rao, JJ.*) EMPEROR *v.* RAMANUJA AIYANGAR. **58 Mad. 642 = 158 I.C 764 = 8 R.M. 331 = 36 Cr.L.J. 1442 (2) = 1935 M.W.N 1479 = 42 L.W. 124 = 1935 Cr.C 728 = A.I.R. 1935 Mad. 528 = 68 M.L.J. (Supp.) 73 (F.B.).**

——**S. 167**—*Applicability—Second appeal.*

S. 167 of the Evidence Act applies to second appeals on the civil side or cases tried by a jury on the criminal side; and not to first appeals where the facts are a matter for decision of the appellate Court. (*Wort, J.*) BHABENDRA CHANDRA ROY *v.* AJODHYA CHATTERJI. **154 I.C. 727 = 7 R.P. 482 = A.I.R. 1934 Pat. 605.**

———**S. 167**—*Conviction partly based on inadmissible evidence—Legality—Interference by High Court.*

Where the lower Court relied on certain statements which were inadmissible in evidence under S. 162, Cr. P. Code, but there was a large volume of other evidence supporting the conviction.

Held, that the admission of the evidence and the reference to it in the learned Judge's charge are not facts which, in view of S. 167 of the Evidence Act, would justify the High Court in interfering with the decision, in view of the fact that the Judge's charge apart from this flaw was a fair one. (*Murphy and Broomfield, JJ.*) EMPEROR *v.* MIR MAZARALI. **57 Bom 400 = 6 I.R. (Bom) 25 = 144 I.C. 985 = 34 Cr.L.J. 870 = 35 Bom L.R. 474 = 1933 Cr.C. 678 = A.I.R. 1933 Bom. 266.**

———**S. 167**—*Decision based on inadmissible evidence—Criminal appeal—Interference.*

Where notice has been issued for enhancement at the time of admission of the appeal by the accused, the appellant is entitled on the evidence to show that he is innocent. If the conviction is not correct on the evidence, the appellant will be entitled to an acquittal. If, on the other hand, the evidence is sufficient for conviction it is not necessary for the Court to send the case for re trial even though there may be misdirection or admission of irrelevant evidence as the Court can accept the verdict of the jury under S. 167, Evidence Act, unless the Court is of opinion that it is difficult to arrive at any conclusion on the evidence and that it is necessary or desirable that a re-trial should be ordered. (*Patkar and Barlee, JJ.*) EMPEROR *v.* RAMCHANDRA. **148 I.C. 553 = 6 R.B. 307 = 35 Cr.L.J. 747 = 35 Bom.L.R. 174 = 1933 Cr.C. 465 = A.I.R. 1933 Bom. 153.**

EXCISE ACT.

———**S. 167**—*Evidence of character—Improper admission—Illegality.*

Improper admission of evidence of character of the accused goes to the very root of the administration of criminal justice and where it appears that such evidence has influenced the Magistrate's consideration of the other evidence in the case, the conviction should be set aside. (*Wort, J.*) PHEKAN SINGH *v.* EMPEROR. **I.R. 1931 Pat. 369 (2) = 133 I.C. 449 (2) = 32 Cr.L.J. 1025 = 12 Pat.L.T. 471 = 1931 Cr.C. 793 = A.I.R. 1931 Pat. 345.**

———**S. 167**—Inadmissible evidence—Admission of—Finding arrived at independently—If vitiated. *See* C. P. CODE, S. 100. **39 C.W.N 311.**

———**S. 167**—*Scope.*

Where a trial Court convicts an accused on the evidence part of which has been wrongly admitted and the Sessions Court excluding the wrongly admitted evidence upholds the conviction on the remaining evidence and the trial has taken a course substantially different from that contemplated by the law by the admission of a large body of inadmissible evidence, the case is outside the purview of S. 167 and should be sent back for re-trial. (*Panckridge and Patterson, JJ.*) LLOYD *v.* EMPEROR. **I.R. 1933 Cal. 250 = 142 I.C. 274 (2) = 34 Cr. L.J. 294 = 1933 Cr.C. 197 = A.I.R. 1933 Cal. 136.**

———**S. 167**—*Scope—Improper admission of evidence—When a ground for reversal.*

Under S. 167 of the Evidence Act, the improper admission of evidence is not itself a ground for reversing a decision, if it appears to the Court before which the objection is raised, that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision. (*Wort, Khaja Mihomed Noor and Agarwala, JJ.*) SONEY LAL JHA *v.* DARBDEO NARAIN SINGH. **14 Pat. 461 = 155 I.C. 470 = 7 R.P. 590 = 16 Pat.L.T. 199 = A.I.R. 1935 Pat. 167 (F.B.).**

———**S. 167**—*Some evidence inadmissible—Remand, if proper.*

If there is sufficient evidence upon which a case could be completely decided, the appellate Court is precluded by S. 167, from remanding the case for re-hearing. The question is not whether the Judge would or would not believe the evidence other than the inadmissible evidence, but whether it was possible for him to come to such conclusion as he did in the absence of that inadmissible evidence. (*Wort, J.*) HARI AHIR *v.* SRI SANGHAT CHACHA. **152 I.C. 829 = 7 R.P. 257 = 16 Pat L.T. 197 = A.I.R. 1934 Pat. 617 (2).**

EXAMINATION OF ACCUSED.

See (1) CR. P. CODE, SS. 164, 342 AND 364.
(2) CRIMINAL TRIAL—EVIDENCE.

EXAMINATION OF WITNESS.

See (1) CR. P. CODE, S. 256.
(2) CRIMINAL TRIAL—EVIDENCE.
(3) EVIDENCE.
(4) EVIDENCE ACT, SS. 132-153.

EXCHANGE.

See TRANSFER OF PROPERTY ACT, S. 118.

EXCISE ACT

See (1) BENGAL EXCISE ACT (1909).
(2) BIHAR AND ORISSA EXCISE ACT (1915).

EXCISE ACT.

(3) BURMA EXCISE ACT (1917).
(4) MADRAS ABKARI ACT (1886).
(5) PUNJAB EXCISE ACT (I OF 1914).
(6) U. P. EXCISE ACT (1910).

EXCLUSIVE POSSESSION.

See (1) CO SHARER.
(2) HINDU LAW—JOINT FAMILY—POSSESSION.

EXCOMMUNICATION.

See (1) CASTE DISABILITIES REMOVAL ACT.
(2) C. P. CODE, S. 9.

EXECUTING COURT.

See (1) C. P. CODE, SS. 39, 41 AND 47.
(2) EXECUTION—EXECUTING COURT.

EXECUTION.

See also (1) C. P. CODE, S. 47 AND O. 21.
(2) DECREE.

Agreement.
Agriculturist.
Application for.
Attachment.
Benamidar.
Compromise.
Conflicting decrees.
Death of decree holder.
Decree.
Equitable execution.
Executability of decree.
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Jurisdiction.
Liability.
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Merger of interest.
Minor.
Mortgage decree.
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Order in.
Partial execution.
Procedure.
Refund.
Rent decree.
Res judicata.
Revival
Right to sale
Satisfaction of decree.
Security bond.
Miscellaneous.

Agreement.

———*Agreement prior to decree—If can be set up in execution—Right to sue for injunction against decree-holder.*

A case of an agreement anterior to the passing of a decree could not be allowed to be set up in a proceeding for execution of a decree; but there cannot be any bar to a party asking for relief by way of an injunction to restrain the decree holder from putting in execution the decree, if the decree-holders committed by breach of their obligation under an anterior agreement. (*Guha and Bartley, JJ.*) HARENDRA NATH BASAK *v.* GOPAL CHANDRA BASU. **62 Cal. 421 = 156 I.C. 445 = 7 R.C. 714 = 39 C.W.N. 512 = A.I.R. 1935 Cal. 177.**

———*Agreement to evade—Validity of.*

An agreement providing that one of the parties should assist the other in carrying on a litigation commenced by the other and help him to evade or delay the execution of a decree passed against him, is contrary to public policy. (*Bennet and Bajpai, JJ.*) NAND KISHORE *v.* KUNJ BEHARI LAL. **6 I.R. (All.) 162 = 145 I.C. 756 = 1933 A.L.J. 85 = 17 R.D. 325 = A.I.R. 1933 All. 303.**

Agriculturist.

———*Agriculturist—Permanent mortgage created—Validity.*

Ordinarily in the case of a decree against an agriculturist, resort should not be had to a mortgage for the purpose of satisfying the decree if other means or remedies are available, for instance, possession of movable property or a temporary alienation where such a measure would be sufficient to satisfy the decree. Where however the circumstances are such that satisfaction of the decree can only be claimed by a permanent mortgage, the executing Court will be justified in taking that step and the High Court will not interfere with its exercise of discretion. (*Tapp, J.*) BHAGAT RAM HUKAM CHAND *v.* KARAM DIN. **I.R. 1931 Lah. 1006 = 134 I.C. 798 = 32 P.L.R. 643.**

———*Agriculturist—Plea of.*

It is open to the judgment-debtor to plead that he is an agriculturist within the Dekkhan Agriculturists' Relief Act in execution proceedings and that execution proceedings in respect of agricultural lands should be transferred to Collector under Sch. III, C. P. Code, read with Rr. 19 and 20 of Sind Judicial Commissioner's Court Rules. A.I.R. 1925 Sind 49, Rel. on. (*Wild, J.C., Aston and Rupchand, A.J.Cs.*) DEUMAL RACHANDMAL *v.* FIRM OF LAL CHAND. **25 S.L.R 475 = I.R. 1931 Sind 97 = 133 I.C. 65 = A.I.R. 1931 Sind 97 (F.B.).**

Application for.

———Application for. *See also* DECREE *infra.*

See also (1) C. P. CODE, S. 47 AND O. 21, R. 11.
(2) LIMITATION ACT, ART. 181.

———*Application for—Amendment so as to defeat limitation—Permissibility.*

An amendment of an application for execution should not be permitted so as to defeat the law of limitation. (*O'Sullivan, A.J.C.*) MT. MEMOO MAHOMED ISMAIL *v.* MAHOMED SIDIK PIR MAHOMED. **159 I.C. 807 = 8 R.S. 101 = A.I.R. 1935 Sind 26.**

———*Application for—Application against dead man—Effect.*

The rule, that when a suit is filed against a dead person it is a nullity, does not apply to execution proceedings. (*Mitter and M.C. Ghose, JJ.*) ABDUS SATTAR *v.* MOHINI MOHAN DAS. **149 I.C. 1024 = 6 R. C. 681 = 37 C.W.N. 679 = A.I.R. 1933 Cal. 684.**

———*Application for—Application before date mentioned in decree—Irregularity—If can be condoned.*

Where the actual date of the application for execution is earlier than the earliest date which the decree has provided for, but the opposite party files his counter only subsequent to the date, the Court has got discretion to condone on irregularity of this character, if no prejudice is caused to the opposite side as it amounts to little more than a mere technicality. (*Curgenven and Pandrang Row, JJ.*) VENKATARENGA RAYANIM GAR *v.* MAHANT PRAYAG DOSS JEE VARU. **A.I.R. 1935 Mad. 118.**

———*Application for—Date erroneously stated in decree—Mistake of Court—Relief.*

Where a decree was by mistake dated 16th February, 1929, instead of 11th February and the decree-holder being misled thereby, applid for execution on the 15th February, 1932, *held, actus curiae neminem gravabit* and that the decree ought to be regarded as having been passed on the 16th February, 1929. (*Jack, J.*) NALINI KANTA RAY *v.* KAMARADDI. **141 I.C. 114 (1) = I.R. 1933 Cal. 82 = 56 C.L.J. 185 = A.I.R. 1933 Cal. 239.**

EXECUTION—Application for.

———*Application for—Dismissal—Failure to appeal—Fresh application—Bar.*

Where an execution application is dismissed as being barred by limitation it is the duty of the defeated party to prefer an appeal. He cannot question its legality in subsequent proceedings before the same Court by means of another application for execution. (*Jai Lal, J.*) MAKHAN SINGH *v.* WADAWA SINGH. **6 R.L 682 = 149 I.C. 430 = A.I.R. 1934 Lah. 763.**

———*Application for—Fresh application or revival of old—Test.*

If a fresh application for execution is put in claiming different reliefs from the old, the latter application cannot be held to be revival of the old application. For determining whether an execution application is a continuation of the old application, the test is always whether in substance the execution application claims the same reliefs as claimed in the old application. (*Dalip Singh, J.*) KIDAR NATH *v.* TAJ MAHOMED KHAN. **15 Lah. 208 = I.R. 1933 Lah 428 = 144 I C. 259 = 34 P.L.R. 685 A.I R. 1933 Lah. 3.**

———*Application for—Omission to state names of persons interested in decree—Procedure.*

It is nowhere laid down that the omission on the part of a decree-holder to state in his application the names of all the persons who are interested in the decree is such a defect as would invalidate execution proceedings. It is in the discretion of the Court to give notice to the other decree holder or to the judgment-debtor to raise an objection that sufficient steps have not been taken to safeguard the interests of the other decree holders where they themselves have not made any complaint. 31 P.L.R. 290, Ref (*Abdul Qadir, J.*) NASIRUDDIN *v.* DOST MAHOMED. **14 Lah. 212 = I R. 1932 Lah. 573 = 139 I.C. 151 = 33 P.L.R. 549 = A.I.R. 1933 Lah. 655.**

———*Application for—Order on—Construction of—Execution merely kept on file and not disposed of.*

One of the prayers contained in the execution application was that if the decree holder was allowed a proportionate share in the sale proceeds under S. 73, the application may be allowed to subsist for the realization of the balance of the decretal amount The order of Subordinate Judge passed on this application opened with the sentence "the request of the decree-holder is to be granted." The operative part of the order ran as follows : The case be filed at present as the decree has already been sent to the Deputy Commissioner, Sitapur, for rateable distribution . . . . . The decree-holder will legally have no right to present another application for execution."

Held, that the use of the words "at present" in the first sentence quoted above indicated that the Subordinate Judge did not intend to dispose of the application finally and completely by means of that order, (*Srivastava and Smith, JJ.*) AHMAD MIRZA BEG *v.* RANI ABADI BEGAM. **6 R O. 415 = 148 I.C. 451 = 11 O.W N. 126 = A.I.R. 1934 Oudh 92.**

———*Application for—Simultaneous applications for execution of same decree—Maintainability.*

There is nothing in law to prevent simultaneous applications in execution of the same decree and it is perfectly lawful for the decree-holder to ask that a second piece of property should be attached before the proceedings in execution upon the first piece of property has been brought to a conclusion. (*Mya Bu and Dunkley, JJ.*) U NYO *v.* U PO HLAING. **149 I.C. 98 = 6 R.R. 279 = A.I.R. 1934 Rang. 101.**

———*Application for—Simultaneous execution.*

Ordinarily execution cannot be carried on simultaneously in different districts. (*Baguley and Mackney, JJ.*)

EXECUTION—Decree.

MUTHURAMAN CHETTYAR *v.* IMPERIAL BANK OF INDIA. **153 I.C. 684 (2) = 7 R.R. 231 = A.I.R. 1934 Rang. 231.**

Attachment.

———Attachment—Attachment of non-saleable property—Effect of. *See* C. P. LAND ALIENATION ACT, S. 16. **31 N.L.R. 239 = 156 I.C. 65 = A.I.R. 1935 Nag. 133.**

Benamidar.

———*Benamidar—Right to continue proceeding.*

A benamidar is entitled to continue execution proceedings. (*Srivastava and Pullan, JJ.*) RAGHUBANSA *v.* THE DEPUTY COMMISSIONER. **I.R. 1931 Oudh 151 = 130 I C. 343 = 7 O.W.N. 1203 = A I R. 1931 Oudh 69 (1).**

Compromise.

———*Compromise—Enforcement in execution proceeding.*

Where there is an adjustment in respect of a money decree and the party agreeing to pay a certain amount under the adjustment fails to do so, the other party can enforce the terms of the adjustment in execution. (*Murphy and Nanavati, JJ.*) SHIVAPPA DANDAPPA *v.* GURPADAPPA. **I.R. 1933 Bom. 214 = 142 I.C. 220 (1) = 35 Bom.L R 91 = A.I R. 1933 Bom. 100.**

[F. 37 Bom L.R. 230 (233).]

———*Compromise—Time fixed for payment of decree amount—Extension of time—Need for consent of parties.*

Where a compromise is made between the judgment-debtor and the decree-holder to the effect that on payment of the judgment debt within a prescribed period the sale should stand cancelled while upon failure to make such payment the sale shall stand confirmed, the Court has no power to extend the time fixed for payment except by consent of the parties concerned. (*Mahadevayya and Ramachandra Rao, JJ.*) NANJUNDA RAO *v.* PUTTU SAMI SETTY. **11 Mys.L.J. 157 = 38 Mys.H.C.R. 350.**

Conflicting decrees.

———Conflicting decrees—Which to prevail. *See* C. P. CODE, S. 11. **155 I.C. 726 (2) = 7 R.N. 199 = A.I.R. 1935 Nag. 122.**

Death of decree-holder.

———*Death of decree holder—Legal representative—Right to continue execution.*

Where pending an application for execution of a decree the decree-holder dies, it is open to his heir and legal representative to continue the execution proceedings provided he applies to the Court and obtains an order under O. 21, R. 16. He need not be compelled to resort to a separate proceeding. 50 Mad. 1, Foll.; 34 C. W. N. 437, Ref. (*Madgavkar and Murphy, JJ.*) KACHARABHAI LEHRABHAI *v.* KACHARABHAI VADILAL. **I.R. 1931 Bom. 528 = 134 I C. 720 = 33 Bom. L.R. 818 = A.I R. 1931 Bom. 423.**

Decree.

———*Decree—Decree, if binding—Decree passed in one capacity—Resistance in different capacity—Permissibility.*

A decree obtained against a person in one capacity can be resisted by him in another capacity. Hence a decree passed against a person in his individual capacity is not binding on him in the capacity of a shebait. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727 = 149 I.C. 809 = 6 R.P. 652 = 14 Pat.L T. 258 = A.I.R. 1933 Pat. 250.**

———*Decree—Decree not to be varied—Decree against guardian—Evidence to show the debtor was managing member of family.*

EXECUTION—Decree.

Where a suit leaves the matter in doubt as to the capacity which the defendant occupied against whom the claim was made, the omission may be supplied by adducing evidence in execution, which ought more properly to have formed part of the record of the suit; still less where the capacity, that of a guardian, is expressly stated. It is therefore not open to the decree-holder or his transferee to prove in execution that the property mortgaged was in fact family property and the judgment-debtor was in fact manager of the family when he mortgaged it. (*Curgenven, J.*) RAMASWAMI CHETTIAR *v.* ANKAPPA MUDALI. **6 I.R. (Mad.) 116 =145 I.C. 694=A.I.R. 1933 Mad. 175.**

———*Decree—Satisfaction of—Execution application settled and dismissed—Decree not thereby satisfied.*

It is competent to the judgment-creditor to agree to the release of the judgment-debtor, to agree to the security bond being cancelled, or to agree to the prohibitory order on garnishee being discharged without agreeing that his decree has been fully satisfied. The mere fact that the execution application was marked as settled and dismissed, the bond cancelled and the prohibitory order discharged does not mean that the decree has been satisfied. (*Aston, A. J. C.*) SHIVALDAS MOHANDAS *v.* LALCHAND. **6 I. R. (Sind) 104=146 I.C. 961=A.I.R. 1933 Sind 305.**

———*Decree—Superseding decree—Effect of separate proceeding—Need for express order cancelling decree.*

Pending execution proceedings the judgment-debtor executed a promissory note in favour of a third person in satisfaction of the decree. The promisee obtained a decree on the note, but meanwhile the High Court held in another proceeding that the original decree holder had no right to execute the decree and that a rival claimant was entitled to the decree. The promisee decree-holder having sought execution,

Held, that his decree was not superseded by the High Court's order and that the execution application was competent. (*Madhavan Nair, J.*) SUBRAMANIAH *v.* CHENCHIAH. **143 I C. 283=I.R. 1933 Mad. 100 =1932 M.W.N. 1108=37 L.W. 652.**

Equitable execution.

———Equitable execution—Appointment of receiver. *See* C. P. CODE, O. 40, R. 1 AND S. 51.

———Equitable execution—Appointment of receiver—Power of Court to give directions as to disbursement of moneys collected. *See* C. P. CODE, O. 40, R. 1. **69 M. L J. 534.**

———*Equitable execution — Maintenance decree—Decree holder's liability for Court-fee—Appointment of receiver for—No power of Court.*

Where a widow sued *in forma pauperis* to recover from her co-widow possession of certain property and the suit ended in a compromise by which the defendant agreed to pay to the plaintiff a certain monthly allowance by way of maintenance, and the same was charged on the house and the Government sued to recover the Court-fees by attachment of the house out of which the maintenance was recoverable.

Held, that the Court had no power to order equitable execution against the property because that would be frustrating the order for maintenance, which was exempt from attachment under S. 60.

Held, further, that even if the Court had the power to appoint a receiver in respect of the maintenance allowance, the facts of the case did not justify such appointment. (*Beaumont, C.J. and Murphy, J.*) SECRETARY OF STATE FOR INDIA *v.* SOMI **57 Bom. 507=6 I.R. (Bom.) 153=146 I.C. 340=35 Bom.L.R. 615=A.I. R. 1933 Bom. 350.**

EXECUTION—Executability of decree.

Executability of decree.

———*Executability of decree—Charge—Enforcement.*

A decree creating a charge can be executed by sale without a fresh suit or even a fresh attachment. 33 M. L J. 601, Foll. (*Reilly and Anantakrishna Ayyar, JJ.*) BUCHAYYA *v.* SRIRAMAMMA. **33 L. W. 559=I.R. 1931 Mad. 479=131 I C. 15=A.I.R. 1931 Mad. 603 (1).**

———*Executability of decree—Compromise decree—Agreement by defendant to pay rent every month—Decree in terms.*

The question whether a decree is executable has to be settled primarily upon the form or language of the decree itself. The test to ascertain whether a decree is executable is whether there is a direct and definite order to a definite person to do or to refrain from doing a definite thing. When the decree contains directions to certain persons to pay certain amounts of money on certain dates, it cannot be contended that it is unexecutable. In a suit for possession of godowns with past and future mesne profits, there was a compromise under which it was agreed that the plaintiff was not to get possession, but that the defendants should acknowledge him as landlord and pay the arrears and future ground-rent at certain rates every month in perpetuity, and a decree was passed in terms of the compromise petition.

Held, that it was not beyond the competence of the Court to pass a decree in such terms; that it was not merely a declaratory decree; and that the decree was indisputably executable in form. (*Curgenven, J.*) LAKSHMI NARAYANA *v.* SURYANARAYANA. **40 L.W. 668=152 I.C. 515=7 R M. 237=1934 M.W.N. 1267=A.I.R. 1934 Mad. 680=67 M.L J. 494.**

———*Executability of decree—Declaratory decree with direction to recover money.*

A declaratory decree does not become executory merely because there is a direction in it that the money could be recovered by execution. (*Almond, J. C. and Kazi Mir Ahmad, A.J.C.*) KHAN MAHOMED NAWAZ KHAN *v.* SHIVA RAM SINGH. **151 I.C. 235=7 R. Pesh. 16=A.I.R 1934 Pesh, 64.**

———Executability of decree—Decree against Hindu widow—Suit on promissory note—Loan contracted for estate expenses—Plaint praying for relief against her properties—Executability against estate. *See* HINDU LAW—WIDOW. **68 M.L.J. 643.**

———*Executability of decree—Decree executable or only declaratory—Test.*

The test to see whether a decree is an executable one or is merely declaratory is whether there is a direct order against any one or whether the decree merely declares rights and obligations on the part of any one. After sale of attached property, the judgment debtor preferred objection that the decree was void and could not be executed. Parties had referred their dispute to arbitration out of Court. An award was delivered in pursuance thereof which effected mortgage of judgment-debtor's property of one house for Rs. 3,000 to be paid by the mortgagee-decree holder; the mortgage was to be with possession for a period of a year and a half to be counted from the date of the award. Arrangement as regards repayment of mortgage-money was also laid down. The award was filed and a decree was passed in corporating the terms of the award. Mortgagee decree-holder took out execution of this decree and prayed for recovery of his mortgage-money with certain item due for rent by sale of the mortgaged property.

Held, that the decree was merely declaratory of the rights and obligations of the parties and was not capable of enforcement in execution proceedings. A.I.R. 1930

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Lah 110, Rel. on. (*Middleton, J. C. and Saaduddin, A.J.C.*) HUKUM CHAND *v.* LOKINDA RAM. **6 I.R. (Pesh.) 24 = 146 I.C. 1094 = A.I.R. 1933 Pesh. 83.**

———*Executability of decree— Decree for specific performance—Direction for execution of* Khobala *by Court—Enforcement.*

A decree for specific performance directed the defendants to execute a *Kobala* in plaintiff's favour within a month and provided that in default the Court should execute a *Kobala* of sale. The only limitation imposed on the decree-holders was the one under the law prescribing the time within which the decree must be put into execution. The plaintiffs had taken the necessary steps to have the sale executed but the defendants defaulted and thereupon the plaintiff applied to the Court.

Held, that the application was maintainable irrespective of the question whether the plaintiffs had deposited the amount within a period of one month. (*Guha and Bartley, JJ.*) KHORSHED ALI BEPARI *v.* PROBHAT CHANDRA DAS. **6 I R (Cal) 78 (2)—145 I C. 183 =37 C.W.N. 190 - A.I R 1933 Cal. 496.**

———*Executability of decree— Direction regarding accounts.*

A suit for a permanent injunction was dismissed but the Court modified the decree as follows: "It is declared that the plaintiff's gumasthas are entitled to prepare and should be allowed opportunity of preparing independent accounts which the defendant's gumasthas should countersign if correct."

Held, that the decree embodies a direction though the word 'injunction' is not used. It is more than a mere declaration; it imposes a duty one that can be enforced on the defendant's gumasthas to countersign the accounts in a certain event and is executable and the plaintiff's only remedy is to apply under O. 21, R. 32, C. P. Code. (*Venkatasubba Rao and Reilly, JJ.*) DHARMAKARTHA OF TIRUMALI *v.* PRAYAG DOSS JEE VARU. **1932 M W.N 1059.**

———*Executability of decree—Parties agreeing that money due shall be realized by execution—Effect of.*

Parties by agreement can arrange their own procedure and give jurisdiction to the Court to adopt that procedure and where the parties have agreed that money due shall be realized by execution, the Court has jurisdiction to proceed by way of execution. (*Costello and Lort Williams, JJ.*) DINENDRA MALLICK *v.* PRADYUMNA KUMAR MULLICK. **62 Cal. 28 = 158 I.C. 1074 = 8 R. C. 241 - A.I R. 1935 Cal. 596.**

———*Executability of decree—Partition decree—Final determination of rights.*

By a compromise petition in a partition suit it was agreed that the shares should be decided by the Court, and that certain named arbitrators should proceed to allot the properties by metes and bounds. This was done and it was accepted by all parties. Pending these proceedings, one of the defendants died and a dispute arose among them as to the proportion in which the deceased's share was to be divided. Then a deed of settlement was drawn up to which all the members alive were parties and which dealt with not only the share of the deceased member but also all other matters outstanding between them. After this a final decree for partition was passed. Subsequently the decree in the partition suit was sought to be executed.

Held, that there was nothing to be executed and that it must be deemed to have been satisfied. (*Courtney-Terrell, C. J. and Saunders, J.*) GOPI NATH *v.* GOPAI JI. **147 I C. 389 = 6 R.P. 352 = A.I.R. 1933 Pat. 625 (2).**

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———*Executability of decree — Portion of decretal rights devolving on judgment debtor—Effect of.*

Where subsequent to a decree a portion of the rights to which the decree relates, devolves either by inheritance or otherwise upon the judgment-debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*. And the remaining portion can be executed. 10 All. 570, Rel. on; 9 Cal. 482 (P.C.) and 61 P.R. 1910, Ref. (*Rup Chand, J. C. and Lobo, A J.C.*) MT. GHULAM FATMA *v.* ABDUL AZIZ. **27 S.L R. 411 = 149 I.C. 608 = 6 R.S. 225 = A.I.R. 1933 Sind 371.**

———*Executability of decree—Preliminary and final decrees—Appeal from preliminary decree—Compromise—Fresh final decree necessary for execution.*

Where a preliminary decree, on which the final decree sought to be executed is based, is modified by a compromise entered into in an appeal by the parties and accepted and incorporated in a decree by the High Court, the final decree is no longer executable and a fresh final decree must be obtained A I.R. 1926 Lah. 534, Rel. on. (*Dalip Singh, J.*) MEWA SINGH *v.* TARA SINGH. **6 I.R. (Lah) 251 (1) = 146 I C. 597 (1) = 34 P L.R. 998 = A.I R. 1933 Lah. 859 (2).**

———*Executability of decree—Scheme decree—Directory clause in scheme of management.*

The clauses in a decree in the portion not embodying the scheme, which are otherwise capable of being executed, do not cease to be executable, merely because the decree also embodies a scheme of management. But any provision inserted in the part of the decree containing the scheme is *prima facie* inexecutable although in form it is directory. (*Venkatasubba Rao and Reilly, JJ.*) RAMACHARYULU *v.* NARASIMHA SURYANARAYANA. **1933 M.W.N. 183.**

———*Executability of decree—Suit for rent—Suit filed against two persons—Death of one before decree.*

Where a suit for rent is brought against two tenants and one of them dies before a decree is passed, the decree is not executable against the surviving tenant as a rent decree but it can be executed as a money decree. (*Fazl Ali, J.*) RAMANAND SINGH *v.* DAMODAR PRASAD. **I.R. 1933 Pat 191 = 143 I C. 64 = 14 Pat. L T. 144 - A I.R. 1933 Pat. 195.**

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———*Executing Court—Application to—Security for mesne profits furnished as a condition for stay—Realization of mesne profits—No separate suit necessary.*

Where, as a condition for stay, security for mesne profits had been ordered and furnished, the decree-holder can realise the profits by an application to the executing Court. No separate suit is necessary. (*Bhide, J.*) MT. KARAM BIBI *v.* MEHR ALI KHAN. **I.R. 1933 Lah. 502 = 144 I.C. 553 = A.I.R. 1933 Lah. 876.**

———*Executing Court—Duty of — Application for execution taken out prematurely—Plea that application was taken in bad faith—Summary disposal without affording opportunity to prove bad faith—If justified—Revision.*

A decree provided that the defendant should pay the decretal amount "in three years from to-day." The decree-holder applied for execution about a year after the date of the decree. The judgment-debtor pleaded that the execution was premature and was an attempt to practise fraud upon the Court, and made *mala fide* to annoy the judgment-debtor and to bring pressure on him. The executing Court disposed of the case summarily without giving the judgment debtor any opportunity to prove his allegations:

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Held, that the executing Court ought to have given the judgment-debtor an opportunity to prove his allegation, and in so refusing to give him such an opportunity, it failed to exercise its jurisdiction, and the order was therefore revisable by the High Court in revision. (*Niyogi, A J.C.*) DHANOOJI *v.* ADKOOJI. **162 I.C. 860 = 8 R.N. 289 = 18 N.L.J. 309.**

———Executing Court - Duty of—Claim for rateable distribution—Decree to be taken as it stands. *See* C. P. CODE, S. 146. **A.I.R. 1935 Cal. 738.**

———*Executing Court—Duty of—Conflicting descriptions of property in decree—Duty to ascertain correct description.*

In a case of conflict between two descriptions of property, the subject-matter of a decree, it is the duty of the executing Court to ascertain, by a reference to the record or other evidence, to which description the decree was intended to apply. (*Srivastava, J.*) MANZOOR-UDDIN *v.* RAM LAL **10 Luck. 416 = 153 I.C. 49 (2) = 7 R O. 283 = 11 O.W. N. 1524 = A.I.R. 1935 Oudh 39.**

———*Executing Court—Duty of—Decree altered by agreement as to mode of payment—Duty to give effect to compromise.*

Where a decree is altered, by agreement of the parties with respect to the mode of payment, the Court executing the decree is bound to give effect to the compromise and a decree-holder is entitled to proceed on the terms of the compromise, which was executable as a decree. (*Costello and Lort Williams, JJ.*) DINENDRA MALLICK *v* PRADYUMNA KUMAR MALLICK. **62 Cal. 28 = 158 I.C. 1074 = 8 R.C. 241 = A.I.R. 1935 Cal 596.**

———Executing Court—Duty of—Decree holder applying to attach land as belonging to judgment-debtor—Mutation in favour of third person—Court, if can decline to attach. *See* C. P. CODE, O. 21, R. 17 (4). **152 I.C. 1028 = A.I.R. 1935 Lah. 114.**

———*Executing Court— Duty of— Duty to assist decree-holder*

The fact that the judgment-debtor is absconding cannot be treated as absolving the executing Court from the duty of assisting the decree holder in the manner provided by law in the execution of his decree. (*James and Agarwala, JJ.*) KIRTYANAND SINGH BAHADUR *v.* BANARSI PRASAD CHAUDHURY. **I.R. 1933 Pat. 225 = 144 I C. 255 = 14 Pat.L.T. 271 = A.I.R 1933 Pat. 248 (1).**

———*Executing Court—Duty of—Inclination towards judgment-debtor.*

The tendency of the Court to be inclined more towards judgment debtor than towards the decree holder disapproved. (*Vivian Bose, A.J.C.*) SHYAM-SHANKAR *v.* NATHURAM. **150 I.C. 95 = 6 R.N. 271 = A.I.R. 1934 Nag. 140.**

———*Executing Court—Duty of—Objection that sale of property sought to be sold is prohibited.*

A Court is not bound to refuse to hear evidence which is offered to show that the property is one the sale of which is prohibited. The Court must ascertain the truth of the allegation that it has no jurisdiction to sell the property, which it is required to sell. (*Niamatullah and Rachhpal Singh JJ.*) TAHIR HASAN *v.* CHANDER SEN. **58 All. 98 = 157 I.C. 511 = 8 R.A. 190 = 1935 A.W.R. 867 = A I.R. 1935 All. 678.**

———Executing Court—Duty of—Partition decree—Damage caused to property allotted—Assessment of damages. *See* C. P. CODE, S. 47. **68 M.L.J. 277.**

———*Executing Court—Duty of—Question whether decree is right or wrong.*

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It is not the duty of the executing Court to consider whether the decree is right or wrong. (*Nasim Ali and Henderson, JJ.*) ABED HOSSAIN *v.* ABDUL RAHAMAN. **63 Cal. 92 = 158 I.C. 567 = 8 R.C. 198 = A.I.R. 1935 Cal. 631.**

———*Executing Court—Duty of—Reference to pleadings—Scope of decree.*

It is the duty of the Court executing a decree to interpret it and to find out what the decree has really granted and for this purpose the Court is entitled to refer to the pleadings and ascertain to what extent the decree can be executed. (*Macpherson and Khaja Mahomed Noor, JJ.*) BHUDARAM MARWARI *v.* UDAI NARAYAN. **135 I C. 96 = I R. 1932 Pat. 16 = 12 Pat L T. 741 = A.I R. 1932 Pat. 12.**

———*Executing Court—Jurisdiction to attach and sell property—Test.*

The jurisdiction of the Court to attach and sell property depends upon the fact whether it has got jurisdiction over the property, and the test will be whether the suit in respect of that property can be entertained by that Court. (*Mahomed Noor and Saunders, JJ.*) KUNJA LAL SAHU *v* SAGAR MAL PURAN MAL. **157 I.C. 754 - 8 R.P. 160 = A I R. 1935 Pat. 468.**

———Executing Court—Jurisdiction of—Decree for damages for physical injury—Decree directing prospective damages to be determined in execution. *See* DAMAGES. **4 A.W.R. 1441 = A.I.R. 1935 All. 186.**

———*Executing Court—Jurisdiction—Dispute between decree holder and* shahna—*Authority to decide.*

An execution Court has no jurisdiction to decide a dispute between the decree holder and his *shahna*. It can only be decided in a regular suit brought for the purpose. (*Bennet, J.*) BABU LAL *v.* HUKAM SINGH. **152 I C 932 = 7 R A. 426 - 4 A.W.R. 1253 = 1935 A. L J. 78 = A.I R. 1935 All. 102.**

———*Executing Court—Limitation—Power of transferee Court to consider question of limitation—Decision by Court transferring—If binding.*

A Court to which a decree has been transferred for execution is entitled to go into the question of limitation when the Court transferring the decree has decided the question of limitation without giving the judgment-debtor an opportunity of being heard (*Grille, J C.*) HANUMANLALA KALAR *v.* SHEONARAYAN SONAR. **31 N.L R. 333 = 156 I.C. 114 = 7 R N. 220 = A I.R. 1935 Nag. 131.**

———*Executing Court—Objection as to place of suing—If can be raised.*

In view of the provisions of S. 21, C. P. Code, an objection as to the place of suing should be taken at the earliest possible moment. The question cannot be raised in an appellate or revisional Court and still less in a Court executing the decree. (*Almond, A J C.*) MIAN ZIAUDDIN *v.* SECRETARY OF STATE. **158 I C 363 = 8 R Pesh 54 - A.I R. 1935 Pesh 142.**

———*Executing Court—Powers of— Adjustment—Executory contract whether can be given effect to*

The function of a Court executing the decree is confined within narrow limits, and it cannot be given effect to a contract of adjustment, which is of an executory character. The judgment debtor may have recourse to some remedy to enforce the contract but he cannot plead it as a bar to execution proceedings. (*Shadi Lal, C.J. and Broadway, J.*) BAKSHI RAM VARMA *v.* DES RAJ. **I.R. 1931 Lah 654 = 132 I C. 670 = 32 P. L R 365 = A.I.R. 1931 Lah. 608.**

———*Executing Court — Powers of — Adjustment uncertified—Recognition—Prosecution for fraudulent execution.*

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The executing Court is prohibited from recognizing an uncertified adjustment or payment of the decree by the provisions of O. 21, R. 2, C. P. Code. But this does not prevent the Court from enquiring into or recognizing the alleged adjustment, for holding an enquiry under S. 476 of the Cr. P. Code, and sanctioning a prosecution under S. 210, I. P. Code, for the fraudulent execution of a decree. 10 Bom. 288; 16 Cal. 126; 9 Mad. 101; 4 Mad. 325, Foll. (*Carr, J.*) MEYAPPA CHETTYAR *v.* U TUN HLA. **9 Rang. 104=I.R. 1931 Rang. 201=132 I.C. 713=A.I.R. 1931 Rang. 148.**

——*Executing Court—Powers of—Appealability of order in execution.*

An execution Court can only go into the question of the validity of the decree which is before it for execution upon questions of jurisdiction, namely, pecuniary, territorial or personal jurisdiction. The question as to whether an appeal is competent or not to a higher Court cannot be gone into in the execution proceedings. (*Mukerji and Guha, JJ.*) SARAT CHANDRA GHATAK *v.* JOY SANKAR ROY CHOUWDHURY. **I.R. 1931 Cal. 784=134 I.C. 80=35 C.W.N. 332=A.I.R. 1931 Cal. 546.**

——*Executing Court—Powers of—Award—Decree based on award—Objection on ground of want of valid reference—Sustainability.*

Where a dispute between a company and two others was referred to arbitration and a decree was based on the basis of the award but an objection was taken in execution on the ground that the parties had not agreed to be bound by the procedure under the Arbitration Act,

Held, (1) that the decree was not on the face of it a nullity, (2) that in any case the objection was not one which could be entertained by the executing Court. (*Bhide, J.*) CHANAN DEVI *v.* PUNJAB NATIONAL BANK. **I.R. 1932 Lah. 693=140 I.C. 180=A.I.R. 1933 Lah. 46.**

——*Executing Court—Powers of—Award decree allowing instalments—Power to grant relief by allowing further instalments.*

Where there is an award decree allowing instalments and allowing compound interest, the award cannot be interfered with by the Court, unless there are grounds for setting it aside. After the award had been made rule of the Court, the Court executing the decree can grant no relief to the agriculturist not even by allowing further instalments. (*Ferrers, J.C. and Rupchand, A.J.C.*) GANGA RAM *v.* ALI MOHAMMAD. **157 I.C. 331—8 R.S. 32=A.I.R. 1935 Sind 140.**

——*Executing Court—Powers of—Award—Going behind decree—Invalid decree.*

Where a reference to arbitration was made at the instance of one of two partners and an award was given and it was made a rule of Court,

Held, on objection by the appellant, that he was not a party to the reference, even if the decree was a nullity, the executing Court could not question it and go behind it. The matter cannot be raised in execution. 5 Lah. 54, Relied on. (*Johnstone, J.*) DIWAN CHAND *v.* PUNJAB NATIONAL BANK, LTD., SIALKOT. **I.R. 1931 Lah. 798=133 I.C. 558=A.I.R. 1932 Lah. 291.**

——*Executing Court—Powers of—Award—Jurisdiction of Court that filed award—Power to go into*

It is open to the Executing Court to which an award is sent for enforcement, to go into the question whether the award could legally be filed and enforced as a decree under S. 15 of the Arbitration Act. (*Bhide and Rangi Lal, JJ.*) ASMATULLAH *v.* FORBES, FORBES, CAMPBELL & CO., LTD., KARACHI. **152 I.C. 135 (2)=7 R. L. 248=35 P.L.R. 482=A.I.R. 1934 Lah. 652.**

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——*Executing Court—Powers of—Award passed by Registrar of Co operative Societies—Validity of—Enquiry into.*

The executing Court must consider the question whether the person sought to be proceeded against in execution is or is not a member of Co-operative Society or a person claiming under him, because if he is a stranger the award of the Registrar of Co operative Societies is as against him a nullity. 4 P. L. J. 240, Ref. (*James and Agarwala, JJ.*) HARIDASI GHOSH *v.* MOTIHARI TOWN CO-OPERATIVE SOCIETY. **6 R.P. 503=148 I.C. 730=15 Pat L.T. 111=A.I.R. 1934 Pat. 145 (2).**

——*Executing Court—Powers of—Court-fee—Power to collect deficit court-fee—Court-Fees Act (VII of 1870), S. 11—Power to determine right to recover amount so paid from the judgment-debtor.*

S. 11 of the Court-Fees Act casts a duty on the executing Court to collect the deficit Court-fee when it finds that execution is sought for the recovery of an amount over and above what was claimed in the plaint. The power of the executing Court in this behalf does not depend on any direction in the final decree. The executing Court has also the power to determine whether this amount should be borne by the decree holder himself or can be recovered by him from the judgment-debtors as costs relating to execution. (*Sundaram Chetty and Pakenham Walsh, JJ.*) LAKSHMANAN CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **57 Mad. 303=6 I.R. (Mad.) 149=145 I.C. 946=1933 M.W.N. 1116=38 L.W. 572=A.I.R. 1933 Mad. 787=65 M.L.J. 526.**

——*Executing Court—Powers of—Decree for maintenance—Claim for arrears.*

When a decree for maintenance at a certain rate has been passed, the execution Court must execute the decree according to the terms of the original decree and the decree holder is entitled to recover all the arrears of maintenance from the date of the decree till the application for execution is made, although it may be for more than twelve years. (*Patkar and Broomfield JJ.*) CHAMAVA RACHAVA *v.* IRAVA SANGAVA. **33 Bom. L.R. 1082=134 I.C. 1153=I.R. 1932 Bom. 33—A.I.R. 1931 Bom. 492.**

——*Executing Court—Powers of—Decree for mesne profits—Apportionment of liability of defendants.*

When a decree for mesne profits which is made against various sets of people possessing different interests in the land is sought to be put in execution, it is open to the Court to apportion the amount leviable from each of the defendants. (*C.C. Ghose and Pearson, JJ.*) KALIDAS RAKSHIT *v.* KESHABLAL MAJUMDAR. **58 Cal. 1040=I.R. 1932 Cal. 2=134 I.C. 1042=A.I.R. 1931 Cal. 788.**

——*Executing Court—Powers of—Decree for mesne profits—Silence as to interest—Power of Court to award.*

Where a decree of Court which awards mesne profits under R. 12 of O. 20 of the C. P. Code, is silent as to interest, it is not open to the executing Court to fix the rate of interest and to execute the decree allowing interest. 53 M.L.J. 619, Disappr.; 27 Cal. 951 (P.C.), Cons.

Per *Reilly, J.*—The question whether the executing Court can grant interest on mesne profits depends on the intention of the decree, which if the decree is not expressed clearly, should be ascertained by interpretation. Even if the decree is "silent as to interest" in the sense that the word "interest" does not appear in it, nevertheless, if by the use of the expression "mesne profits" combined with a reference to a rate of income or in any other way, the decree indicates that interest is

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awarded, the executing Court must give it and no rate of interest being mentioned, should give it at the Court rate of 6 per cent. "Silence", however, so complete that there is no indication at all that any interest has been awarded would itself be an indication that interest has been refused. (*Beasley, C.J., Kamesam, Reilly, Anantakrishna Ayyar and Sundaram Chetty, JJ.*) PANKUNNI MENON *v.* RAMAN MENON. **54 Mad. 955=34 L W 305=135 I.C. 305=I.R. 1932 Mad. 65=1931 M.W.N. 576=A.I.R. 1931 Mad. 650=61 M L J. 596.**

[R. 55 M. 975 (981).]

———*Executing Court—Powers of—Decree for specific performance on contract for sale—Grant of possession.*

Incidental to the relief to which a plaintiff is entitled in a decree for specific performance arising on a contract for sale, the Court has a right to grant possession of the property. A contract for sale includes not only the execution of the necessary document but also putting the vendee in possession of the property. Therefore if there is an omission in the plaint, or in the decree about possession, the executing Court is not debarred from granting the plaintiff possession of the property. 38 Mad. 698, Diss.; 5 Pat. L. J. 314, Foll. (*Wort and Mahomed Noor, JJ.*) ATAL BEHARY ACHARYA *v.* BARADA PRASAD BANERJI. **I R. 1931 Pat 209—131 I.C. 529=12 Pat.L.T. 636=A.I.R. 1931 Pat 179.**

———*Executing Court—Powers of—Dekkhan Agriculturists' Relief Act—Disallowance of compound interest.*

There is no provision in the Dekkhan Agriculturists' Relief Act which empowers the Court to disallow compound interest in execution proceedings. (*Ferrers, J.C. and Rupchand, A.J.C.*) GANGA RAM *v.* ALI MOHAMMAD. **157 I.C. 331=8 R.S. 32—A.I.R. 1935 Sind 140**

———*Executing Court—Powers of—Dekkhan Agriculturists' Relief Act (XVII of 1879), S. 15-B.*

Per *Baker, J.*—When a decree has been passed by a Court where the Dekkhan Agriculturists' Relief Act does not apply and transferred for execution to another Court where the Act is in force, it is not open to the executing Court to grant instalments to the defendants under S. 15-B of that Act, on the ground that they are agriculturists. (Case-law discussed.) (*Baker and Nanavati, JJ.*) RAMLAL HARIRAM *v.* RATANLAL. **136 I.C. 504=I.R. 1932 Bom. 200=33 Bom L R. 1466—A.I R. 1932 Bom. 99.**

———*Executing Court—Powers of—Enquiry as to existence of debt—Permissibility.*

The purchaser of an usufructuary mortgage debt, whether or not he be also the decree-holder, cannot get anything more from the executing Court than his sale certificate. Consequently no occasion can arise for the executing Court to adjudicate on the question of the subsistence of the debt, whatever powers it may have in the case of a decree-holder auction purchaser to do so. (*Curgenven, J.*) SINNA PILLAI *v.* KARUPPATI ALLA PICHAI. **I R 1932 Mad 614=138 I C. 819=1932 M.W.N. 282=35 L.W. 257=A.I.R. 1932 Mad. 283.**

———*Executing Court—Powers of—Equitable relief—Compromise decree—Default clause.*

Held (on a difference of opinion between Jai Lal and Agha Haidar, JJ.).—In the case of a decree based upon a compromise, where a decree-holder agrees to accept payment of a smaller sum than what is actually due from a judgment-debtor in discharge of his claim against him and this sum is to be paid in instalments on specified dates and it is stipulated that in default of payment of any instalment as agreed, the whole amount

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originally due shall become recoverable, the executing Court has the power to go behind the decree and give the same equitable relief that the Court enforcing the agreement embodied in the compromise decree could give. The question whether a default has or has not taken place is one of fact to be decided on the facts of each case. Similarly it depends on the facts, if time was of the essence of the contract. As a result of the default, the judgment-debtor has to pay a larger amount but where the decree-holder is merely withdrawing a concession and the amount claimed by him does not exceed what was due to him there is no equitable ground for treating the sum as a penalty and refusing to enforce its payment. (*Bhide, J.*) JAWALA RAM *v.* MATHRA DAS. **I R. 1931 Lah 628=132 I.C. 580=32 P.L R. 945=A.I.R 1931 Lah. 696.**

[Appl. 33 P.L.R. 1026 (1027). Appr. 55 A. 334 (343).]

———*Executing Court—Powers of—Executability of decree.*

Though the executing Court is not entitled to go behind the decree, it has nevertheless the power to see whether the decree is capable of execution. (*Bhide, J.*) BUKKAN SINGH *v.* DISTRICT BOARD, LUDHIANA. **14 Lah. 230=I.R. 1933 Lah. 6—140 I.C. 533=34 P.L.R. 546=A.I.R. 1933 Lah. 41**

———*Executing Court—Powers of—Executability of decree—Land not transferable by statute—Sale in execution—Power to refuse—Punjab Alienation of Land Act (XIII of 1900), S. 16.*

The executing Court cannot ignore the plain provisions of S. 16 of the Punjab Alienation of Land Act and order the sale of the property of a member of the agricultural tribe in execution, even though a decree has been obtained against him. (*Addison and Agha Haidar, JJ.*) THAKAR DAS *v.* ROSHAN DIN. **I R. 1933 Lah. 161=141 I.C. 634=34 P.L.R 523=A.I R. 1933 Lah. 397.**

[R. 35 P.L.R. 400 (401).]

———*Executing Court—Powers of—Jurisdiction of Court passing decrees.*

Even if it is possible in a regular suit to question the validity of an award passed by the Registrar of Co operative Societies on the ground that the award, being in the nature of a mortgage decree, was one not contemplated by R. 14 of the Rules framed under the Co-operative Societies Act, the executing Court cannot, on that account, refuse to execute it, because it cannot be said that the award was not on its face one passed without jurisdiction. (*Pakenham Walsh, J.*) VELAYUDA MUDALI *v.* CO-OPERATIVE RURAL CREDIT SOCIETY, ULAKOTTAI. **57 Mad. 426=148 I C. 1098=6 R M. 567=1933 M.W.N. 1398=38 L W. 880=A.I.R. 1934 Mad. 40=66 M.L J. 90.**

———*Executing Court—Powers of—Jurisdiction of Court passing the decree—Disputed question of fact striking at—Power to go into.*

When there is no want of jurisdiction apparent on the face of the decree, the party in execution cannot raise a disputed point of fact which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter. 28 M. 84, 45 M. 620; 43 All. 547, Dist. (*Pakenham Walsh, J.*) RANGA AYYAR *v.* SUNDARARAJA IYENGAR. **I R. 1933 Mad. 235=1933 M W N. 187=37 L W. 358=142 I C. 643=A.I.R. 1933 Mad 362.**

———*Executing Court—Powers of—Jurisdiction of Court passing decree—Final decree providing for mesne profits though preliminary decree silent—Binding nature.*

Though where a preliminary decree has either intentionally or inadvertently omitted to direct an enquiry

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into mesne profits, the final decree cannot award mesne profits or direct an enquiry into the same. Yet where in a partition suit, a final decree has been passed directing such an enquiry and the decree has become final, the judgment debtor having taken no steps to revise it or vacate it, it is not open to the executing Court to refuse to execute the decree, there being no question of want of jurisdiction. 1931 M.W.N 586, Ref. (*Cornish, J.*) BAPA LAKSHMAMMA *v.* KOTESWARA RAO. **1931 M. W.N. 846.**

———*Executing Court—Powers of—Jurisdiction of Court passing decree—Power to go into.*

The transferee Court has no jurisdiction to go into the question of jurisdiction of the original Court to pass the decree. (*Dalip Singh, J.*) PRAN NATH *v.* FIRM OF MAHA DYAL-PREM CHANDAR. **I.R 1932 Lah. 500 (1)=138 I.C. 376—33 P.L.R. 725—A I.R. 1932 Lah. 601.**

———*Executing Court—Powers of—Jurisdiction of Court passing decree—Power to question.*

Where a Munsif was incompetent to pass the final decree, firstly, because he did not possess the necessary pecuniary powers and secondly, because he lacked inherent jurisdiction inasmuch as the so called preliminary decree had been passed by the Subordinate Judge, and the case had never been transferred to the Munsif's Court, and further because the compromise decree was in fact a final decree, which had completely decided the suit, the decree passed by the Munsif is a mere nullity because he lacked inherent jurisdiction to take cognizance of the matter and that, in such a case, the executing Court can go into the question of the validity of the decree, *i.e.*, as to lack of inherent jurisdiction and refuse to execute it. (Case-law reviewed.) (*Srivastava, Nanavutty and Smith, JJ.*) RAM NARAIN *v.* LALA SURAJ NARAIN. **9 Luck. 435=6 R O 368=147 I C. 1209=11 O.W.N. 169=A.I.R. 1934 Oudh 75 (F.B.).**

———*Executing Court—Powers of—Jurisdiction of Court passing the decree—Power to question.*

Where, after the decree-holder had been put into possession of the mortgaged property, the judgment debtors objected to the order for possession and prayed for redelivery of possession, on the ground that the decree was granted without jurisdiction, the mortgage bond having been invalid under the law of the Central Provinces and incapable of registration,

Held, that the executing Court was no more entitled to go behind the decree and say that on the mortgage the Court had no jurisdiction to pass the decree because the mortgage was invalid than it would have the right to say that the mortgage was invalid because as a matter of fact, it had not been properly executed. (*Courtney-Terrell, C.J. and Kulwant Sahay J.*) NILMONI DORA *v.* RIPUMANDAN GOUNTIA. **6 R.P. 617 (1)=149 I. C. 457 (1)=A.I.R. 1934 Pat 426.**

———*Executing Court—Powers of—Jurisdiction of Court passing decree—Refusal to execute decree on ground of nullity.*

An execution Court can refuse to execute a decree on the ground of its being a nullity in the sense that it is not a decree at all in the eye of law either for want of inherent jurisdiction to pass it or for any other reason; and it is only when the lack of jurisdiction is such to make the decree *coram non judice*, a mere nothing, that it can be treated as a mere nullity and disregarded by the executing Court. (*King, C.J., Srivastava and Zia-ul-Hasan, JJ.*) SHEO BEHARI LAL *v.* MAKRAND SINGH. **11 Luck. 187=155 I C 759=7 R.O 619=1935 O W.N. 654=A.I.R. 1935 Oudh 358 (F.B.).**

———*Executing Court—Powers of—Jurisdiction of Court passing decree—Suit cognizable by Revenue Court, instituted in Civil Court—Objection to jurisdiction disallowed—Defendant, if can raise same point over again in execution department.*

A suit which under the Agra Tenancy Act was cognizable by the Revenue Court alone was filed in the Court of the Munsif. An objection was taken that the suit was not cognizable by the Civil Court but it was disallowed and the claim was decreed. No appeal was preferred to the District Judge nor was any further remedy sought from the High Court. Objection was again raised in execution that the Civil Court had no jurisdiction to entertain the suit at all.

Held, it would be contrary to the spirit of the provisions in S. 47, C. P Code, to allow the execution Court to go behind the finding of the Civil Court and reopen the question and determine afresh that the Court decided the question wrongly and, therefore, improperly usurped jurisdiction. It is, therefore, not open to the defendant to raise the question of jurisdiction again in the execution department. (*Sulaiman, C J., Mukerji and King, JJ.*) CANTONMENT BOARD *v.* KISHAN LAL. **6 R.A. 933—149 I C. 636=1934 A L J. 409 18 R D. 275=15 L R. 326 (Rev.)=3 A.W.R. 721=A.I.R 1934 All. 609 (F B).**

———Executing Court—Powers of—Madras Hindu Religious Endowments Act—District Judge acting under S. 70 (2) of the Act—Power to examine merits of demand. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 70 (2). **68 M.L J. 200.**

———*Executing Court—Powers of—Mortgage decree.*

A Court executing a mortgage decree will not in execution department enter into the complicated question as regards the nature of the title of the mortgagor. For instance, a Court executing a mortgage decree is not entitled to decide whether the property, which the mortgagor got after the execution of the mortgage deed, can be sold in execution of a mortgage decree. It will look into the mortgage decree and if it finds that the property sought to be sold is specified therein, then its plain duty will be to execute the decree leaving the parties to have their rights determined separately by institution of a separate suit. (*Harries and Rachhpal Singh, JJ.*) ABDUL AHAD *v.* BRIJ NARAIN RAI. **153 I.C. 984=7 R.A 653=1935 A L.J. 214=1935 A.W R. 87=A. I.R. 1935 All. 269.**

———*Executing Court—Powers of—Mortgage decree—Property acquired by mortgagor* pendente lite *—Question as to non-liability—Whether can be raised.*

When it is not open to the judgment-debtor to prevent the passing of a final decree in a mortgage suit, in respect of property acquired by him *pendente lite* under a paramount title, he should not be allowed to be heard in the execution department and prevent the sale of the property covered by the decree passed against himself. (*Sulaiman, A.C.J. and Banerji, J.*) SAHU NAND KISHORE *v.* DHANPAT RAI. **I.R. 1931 All. 758=133 I.C. 902=A I.R. 1932 All 49.**

———*Executing Court—Powers of—Mortgage decree—Rateable distribution among properties.*

Where the question of splitting up the mortgage debt as among the several properties is refused by the decree, the executing Court has no power to decide the question of rateable distribution. (*Ross and Scroope, JJ.*) RAMGHULAM SINGH *v.* JANKI NATH. **14 Pat.L.T. 371.**

———*Executing Court—Powers of—Mortgage decree for sale—Objection on ground of inalienability of properties as being service inam—Maintainability.*

In execution of a mortgage decree for sale of certain properties, an objection by the judgment-debtor that the properties constitute an *Acharyapurusha* service inam,

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inalienable according to law, and therefore should not be sold is one relating to the execution of the decree and can therefore be raised and decided. The executing Court, having the power to decide such a question, is not incompetent to decide it, simply because the question requires the taking of evidence. (*Pandrang Rew, J.*) SRIRANGACHARIAR *v.* ANNAMALAI CHETTIAR. **156 I.C. 331=7 R M 688=1935 M.W.N. 348=41 L.W. 485=A.I.R. 1935 Mad. 647.**

———*Executing Court—Powers of—Mortgage decree—Order of sale—Court passing decree defining—Executing Court if bound.*

It is well settled that a Court which passes a mortgage decree may in certain circumstances and having regard to the equities of the case, prescribe the order in which the mortgaged properties are to be sold. It is also true that an executing Court may in certain exceptional cases, where equities demand it, prescribe the order in which the mortgaged properties are to be sold. But once the Court passing the mortgage decree has definitely laid down the order in which the mortgaged properties are to be sold, the executing Court cannot ignore the original decree and proceed to sell the properties in a different order, in spite of the objections of decree-holder as well as some of the judgment debtors. (*Adami and Fazl Ali, JJ.*) MEHDATUNNISSA BEGAM *v.* SEWAK RAM. **12 Pat. 77=I R 1933 Pat. 183=142 I.C. 865=14 Pat.L.T. 593=A.I.R 1933 Pat. 161.**

———*Executing Court—Powers of—Power to amend application by receiving fresh list of properties.*

Even after an execution application is registered, the Court has jurisdiction to allow the amendment of the application or the filing of a supplemental list of properties if the list is given within the period of limitation. 17 Cal. 631 (F.B.), Dist.; A.I.R. 1932 Cal. 766, Appr. (*Henderson and Mitter JJ.*) PIRAMAL *v.* BASANTI DAS. **158 I.C. 556=8 R.C. 194=A.I.R. 1935 Cal 614.**

———*Executing Court—Powers of—Power to go behind decree.*

No doubt when a decree is ambiguous, reference to the pleadings is permissible, but the executing Court is to take the decree as it stands. In a decree for payment of money, the judgment-debtor cannot seek to prove that he was sued only in his capacity as a member of the joint Hindu family and was besides a minor, when the debt was contracted by the manager of the family and that in the circumstances he was not personally liable; to entertain such objections in the face of a clear decree directing payment of certain sum is tantamount to allowing the case to be reopened on its merits. (*Bhide, J.*) DASONDHI MAL DINA NATH *v.* PIRTHU RAM. **15 Lah. 326=152 I C 190=7 R L. 262=37 P.L R 62=A.I.R. 1934 Lah 115 (2).**

———*Executing Court—Powers of—Power to go behind decree.*

Where the decree is free from ambiguity, the executing Court is bound to execute it, whether it is right or wrong. (*Shadi Lal, C. J. and Broadway, J.*) GHANAYA LAL *v.* PUNJAB NATIONAL BANK, LTD., LAHORE. **14 Lah 6=I R. 1932 Lah. 440=138 I C 249=34 P.L.R 376=A.I.R. 1932 Lah 534.**

———*Executing Court—Powers of—Power to go behind decree—Consent decree—Objection in execution by ex parte defendant—If can be required into*

A consent decree passed without recording evidence as against an *ex parte* defendant may be liable to be set aside on appeal, but is not a nullity; and an executing Court cannot, therefore, go behind it and enquire into the 'objection' raised by such *ex parte* defendant to its execution against him. (*Weston.*) SHANKER LAL *v.* ALLA NOOR. **1935 A.M.L J. 49.**

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———*Executing Court—Powers of—Power to go behind decree—Decree against Hindu father and sons generally without restriction of sons' liability—Liability of sons' personal property.*

Where a decree is obtained against a Hindu father, the sons being not parties to the suit, the decree can be executed against his sons to the extent of the family property in their hands. Where a decree is obtained against a Hindu father and his sons, then the Courts must restrict the decree, as far as the sons are concerned, to their interest in the family property. Where, however, the decree is not so restricted and is passed against the father and sons, it is capable of being executed against the property of the sons whatever the nature of it or against the sons personally and the executing Court cannot go behind it. 10 Pat. 305, Diss. (*Rangnekar, J.*) SHANKARNARAYAN *v.* KIKHAVDAS. **I R 1932 Bom. 478=139 I.C. 205=34 Bom.L R. 941=A.I R. 1932 Bom. 483.**

———*Executing Court—Powers of—Power to go behind decree—Decree in contravention of S. 16, Punjab Alienation of Land Act.*

The proposition that an executing Court is not ordinarily entitled to go behind the decree is well-established. But an executing Court cannot sell land belonging to a member of a notified agricultural tribe in any circumstances, in view of the mandatory provisions of S. 16 of the Punjab Alienation of Land Act, even though a decree has been obtained against him. 34 P. L. R. 523, Foll. (*Bhide, J.*) AHMAD DIN *v.* GHULAM RASUL. **151 I.C 730=7 R L. 202=35 P L R. 400=A.I.R. 1934 Lah. 609 (1).**

———Executing Court—Powers of—Power to go behind decree—Decree *ex parte*—Omission to produce Succession Certificate—Objection in execution—Maintainability—Power to reopen the decree. *See* SUCCESSION ACT S. 214 **16 Pat L T. 99=A.I R. 1935 Pat. 143.**

———*Executing Court—Powers of—Power to go behind decree—Decree wrongly prepared—Procedure.*

A Court executing a decree must take the decree as it stands and cannot go behind it, unless the Court which passed it, had no jurisdiction to pass it and the decree is a mere nullity or incapable of execution. If the decree appears to have been wrongly prepared, it must be corrected by the Court which passed it. But that does not entitle the executing Court to go behind the decree. (*Srivastava and Nanavutty, JJ.*) JUGAL KISHORE *v.* SATYA NARAIN SHUKLA. **10 Luck 508=7 R O 350=153 I.C. 506=1935 O.W.N. 17=A I R. 1935 Oudh 57.**

———*Executing Court—Powers of—Power to go behind decree—To disallow interest awarded by decree.*

The executing Court has no power to go behind the decree. Where the decree clearly stated that the decree-holder was entitled to interest from the date of decree to the date of realization, the executing Court has no power to deprive the decree-holder of his right either on account of the smallness of the amount or on the ground that the decree holder was a wealthy landlord and the defendant a poor minor. (*Courtney-Terrell C. J. and Fazl Ali, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMJIWAN SAHU **I R 1932 Pat 209=139 I.C. 127 (2)=13 Pat L.T. 343=A.I R. 1932 Pat. 237.**

———*Executing Court—Powers of—Power to go behind decree—Execution of amended decree—Propriety of amendment—No power to question.*

It is not within the province of the Court executing the decree to question as to whether or not the amendment was properly made. Its duty is confined to execution only, and if it finds that an application for execution has been made within three years from the date of

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the amended decree, then its duty is to proceed with the execution. (*Rachhpal Singh, J.*) NAROTTAM DASS *v.* ATUL CHANDRA. **150 I.C. 947=7 R.O. 76=11 O.W.N. 814=18 R.D. 396=A.I.R. 1934 Oudh 289.**

———*Executing Court—Powers of—Power to go behind decree—Final decree in mortgage suit passed on application made beyond limitation—If nullity—Power of execution Court to refuse execution.*

An executing Court can only question such decrees as have been made without jurisdiction. An order made in erroneous exercise of jurisdiction is not the same thing as one made without jurisdiction. The former is only voidable but the latter is void When a Court is seized as a mortgage suit, it can pass orders on an application for final decree even though such application has been made beyond three years from the date of the preliminary decree. The mere fact that it overlooks the bar of limitation or acts wrongly in not applying it will not make the final decree without jurisdiction. Limitation is only a question of procedure and not one of jurisdiction, and a wrong decision, whether express or implied, on a question of limitation does not oust the jurisdiction of the Court. The final decree passed by the Court in such a case is not a nullity ; and the executing Court cannot refuse to execute it on that ground. It is not entitled to go behind the decree and investigate the question whether the application upon which it is made was time-barred. (*Fazl Ali and Luby, JJ.*) HARLAL KAMTI *v.* JHARI. **15 Pat. 51 -159 I.C. 248=8 R.P. 263=16 Pat.L.T. 744=A.I.R. 1936 Pat. 93.**

———*Executing Court—Powers of—Power to go behind decree—Inquiry into legality of decree.*

An executing Court cannot go behind the decree but must carry out its terms. When once a decree is made against certain property, it is no longer possible for the judgment-debtor in execution to contend that the property cannot be sold in execution Nor can the executing Court inquire into the legality of the decree Matters which could and should have been agitated in the suit cannot be allowed to be raised for the first time in execution. (*Murphy and Macklin, JJ.*) TATYA GOUDA RANOJI *v.* MOHODIN SULTAN **154 I.C 642 =7 R.B. 360=36 Bom L.R. 1231=A I.R. 1935 Bom. 95.**

———Executing Court—Powers of—Power to go behind decree—No power ordinarily to go into the question whether the decree is collusive or not—Question of *lis pendens* raised—Decision of lower Court not interfered with. *See* C. P. CODE, O. 21, R. 102 **16 Pat L. T. 220 A.I.R. 1935 Pat. 230.**

———*Executing Court—Powers of—Power to go behind decree—Omission to prove vote right in suit—Right to agitate in execution.*

The executing Court has no jurisdiction to go behind the decree and alter or revise it. When the decree for final partition gave the respondent actual possession, and the appellant failed to prove his *jote* right in the trial Court, he cannot agitate the matter in the execution Court. (*Lort Williams and M C. Ghose, JJ.*) SHAH ABDUL HAMID *v.* PRAKASH CHANDRA NANDI. **152 I.C. 764—7 R.C. 313=38 C.W N. 832=A.I.R 1934 Cal. 793.**

———*Executing Court—Powers of—Power to go behind decree—Plea as agriculturist under Punjab Alienation of Land Act, 1900—Whether can be raised in execution.*

Where a decree orders the sale of certain property for the realization of a debt, the objection that the judgment-debtor is an agriculturist and that the property cannot be sold in execution proceedings by virtue of the provisions of the Punjab Alienation of Land Act cannot

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be raised for the first time in execution proceedings and the executing Court cannot go behind the decree. (*Tek Chand, J.*) GANESH DAS *v.* GANGA SINGH. **I.R. 1932 Lah. 393=138 I.C. 60=33 P.L.R. 632=A.I.R. 1932 Lah. 529.**

———*Executing Court— Powers of— Power to go behind decree—Question of jurisdiction.*

A Court to which a decree has been transferred must take the decree as it stands and is not entitled to question the validity of the decree, upon the ground that the decretal Court had no jurisdiction, territorial, personal or pecuniary to pass it. 10 Bom. 65 ; 10 I.C. 532 ; 44 Cal. 627, Rel. on ; 8 Rang. 544, Overr. (Case-law discussed.) (*Page, C.J., Heald, Carr, Mya Bu and Sen, JJ.*) S. A. NATHAN *v.* S. R. SAMSON. **9 Rang. 480—135 I C. 65=I.R. 1932 Rang. 17=A.I.R. 1931 Rang. 252(F.B.).**

[**R.** 35 P.L.R. 400 (401), 35 P.L.R. 482 (488, 489); 1934 L 117 (118); 1934 R. 197 (198); 14 L. 230 (232); 140 I.C. 533. **Rel** 60 C. 191 (196), 140 I.C. 180 (181). **F.** 10 R. 71 (72).]

———*Executing Court—Powers of—Power to go behind decree—Question as to proper representation of lunatic.*

The executing Court cannot go behind the decree. It can inquire whether the Court as evidenced on the face of the decree by seal and signature was a properly constituted Court competent to pass the decree, but having satisfied itself of the competence, it cannot go into the question whether it is a decree which the Court ought to have passed. It cannot therefore inquire if the defendant was a lunatic and unrepresented, at the time of the decree and if the decree was on that account invalid. 44 Cal. 627, Foll. (*Jackson, J.*) GOVINDAN NADAR *v.* NATESA PILLAI. **135 I.C. 314=I R 1932 Mad. 74=34 L W. 806—A I.R. 1932 Mad. 7=61 M.L J. 520.**

[**F.** 1932 M.W.N 1317 (1319). **Appr.** 58 M. 752 (759), 68 M L.J. 318.]

———*Executing Court—Powers of—Power to go behind decree—Relief against penalty—Compromise decree.*

S. 74, Contract Act, does apply to a compromise decree and it is open to a Court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. (Case-law discussed.) 46 All 571, Overr. (*Mukerji, Ag C J., King and Niamatullah, JJ.*) MOHIUDDIN *v.* KASHMIRO BIBI. **55 All. 334=I.R. 1933 All 117=142 I C. 419=1933 A.L.J. 132=A.I.R. 1933 All. 252 (F B.)**

———Executing Court—Powers of—Power to go behind decree—Suit by minors with father as next friend —Suit dismissed with costs—Execution of decree for costs against father. *See* C. P. CODE, S. 47—EXECUTING COURT—POWERS OF. **1935 A.W R. 266=A I.R. 1935 All. 359**

———*Executing Court—Powers of—Power to sell—Injunction restraining sale of part of property—Sale of remainder.*

Where an order of injunction is issued to an executing Court restraining the sale of a certain share of a property claimed by a plaintiff in a suit, there is no objection in principle to the executing Court proceeding with the sale of the remaining part of that property. (*Lort Williams and Nazim Ali, JJ.*) SHA CHANDRA BHOOSHAN RAY *v.* PRAMATHANATH RAY. **61 Cal. 568=152 I C. 35=7 R.C. 225 (1)=A.I.R. 1934 Cal. 781.**

———*Executing Court—Powers of—Probate duty—Collection of probate duty.*

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It is not the business of the executing Court to collect probate duty when an application is made by the executor for executing a decree obtained by the deceased. It is the duty of the Probate Court and Revenue Authority under the Succession Act. (*B. B Ghose and N. K. Bose, JJ.*) NILKANTA GHOSAL *v.* RAM CHARAN ROY. **114 I.C. 495=55 C.L.J. 82=A.I.R. 1928 Cal 835.**

———Executing Court — Powers of— Property not alienable—Decree directing sale of property of agriculturist in contravention of law—Objection in execution—Maintainability. *See* PUNJAB ALIENATION OF LAND ACT, SS. 16 AND 21-A. **A.I.R. 1935 Lah. 443.**

———*Executing Court—Powers of— Property not alienable—Execution sale—Objection under Special Act.*

Where the sale is ordered by the decree, an objection cannot be taken before the executing Court that the property is not alienable under the Punjab Alienation of Land Act. (*Addison, J.*) SURJAN *v.* TEGH BAHADUR SINGH. **131 I C. 229=I.R. 1931 Lah. 389=A.I.R. 1931 Lah. 545.**

———*Executing Court—Powers of—Refusal of execution—Irregularity in passing decree—Refusal to permit execution—Permissibility.*

The executing Court must execute the decree as it finds; it and cannot refuse to execute it on the ground that there was some irregularity committed in the suit before it was passed. Thus it cannot refuse execution on the ground that the decree-holder had died before the final decree was passed and that the final decree was passed in favour of his heirs after the suit had abated. The decree being one passed against living persons is not a nullity and they are bound by it so long as it is not set aside and the executing Court cannot refuse execution of the same. (*Sulaiman, A. C. J. and Bajpai, J.*) THAKUR PRASAD *v.* KANHYA LAL BHARGAVA. **I.R 1931 All. 623=133 I.C. 303=A.I.R. 1931 All. 746.**

———*Executing Court—Powers of—Refusal of execution—Partition decree not drawn up on judicial stamp.*

Where a partition decree is not drawn up on a stamp paper, there is no decree at all and the executing Court can refuse execution as there is nothing for the Court to act upon. The fact that in such a case the party has mistakenly furnished Court-fee stamp and the Court mistakenly permitted the decree to be drawn up is immaterial The question whether a decree exists or not is a necessary preliminary to an application for execution. (*Dalip Singh, J.*) DILBAGH RAI *v.* MT. TEKA DEVI. **I.R. 1932 Lah. 157=135 I.C 685=33 P.L.R. 343=A.I.R. 1932 Lah 249.**

———*Executing Court—Powers of—Relief to judgment-debtor—Hypothecation of a decree for a larger sum with decree-holder—Judgment debtor not entitled to apply for excess—Remedy.*

Where the judgment-debtor has hypothecated with the judgment-creditor a decree in his favour, which is for a greater amount than the decree against him, and the judgment creditor neglects to execute the decree so entrusted to him by way of hypothecation, the judgment-debtor is not entitled to ask the executing Court, in execution proceedings of the decree against him, to award him the full amount of the decree in his favour. The Court can only decide whether or not the judgment-creditor is bound to give credit to the extent of his decree and the Court cannot award to the judgment-debtor the excess of his decree over that of the judgment-creditor. The remedy of the judgment-debtor is only by way of a separate suit. (*Middleton, J. C. and Saaduddin, A.J.C.*) PUNJAB NATIONAL BANK, LTD. *v.* JAGGU LAL. **148 I.C. 643=6 R. Pesh. 52=A.I.R. 1933 Pesh. 79.**

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———*Executing Court—Powers of—Subsequent events—Whether can be looked into.*

Where a decree-holder purchased the tenure of the darpatnidar in Court auction and the Sepatnidars later applied to be restored to possession but before the hearing, the decree holder annulled the sepatni by notice under S. 167, B. T. Act.

Held, that the Court should take notice of the subsequent events and should have dismissed the application. Duty of Court in such matters indicated. (*Jack and Mitter, JJ.*) PRIYAMBADA DEBI *v.* BHOLANATH BASU. **60 Cal. 685=8 I.R. (Cal) 129=145 I.C. 663=37 C.W.N. 339=A.I.R. 1933 Cal. 534.**

———*Executing Court— Powers of— Validity of decree.*

In a suit under S. 92, C. P. Code, the decree may direct the payment of money or delivery of property to the new trustees and in any event the validity of such directions in the decree cannot be questioned by the executing Court. (*Beasley, C.J. and Pakenham Walsh, J.*) VARADIAH CHETTY *v.* NARASIMHALU CHETTY. **54 Mad. 345=I.R. 1931 Mad 112=134 I.C. 60=1931 M.W.N. 586=33 L.W. 149=A.I.R. 1932 Mad. 41=60 M.L J. 173.**

[**R.** 61 M.L.J. 904 (906). **Rel.** 1931 M.W.N. 846 (847).]

———*Executing Court — Powers of— Validity of decree—Compromise decree—Right to question.*

The terms of a compromise even though they are beyond the scope of the suit if embodied in a decree are executable and the executing Court cannot question the same. Where in a money suit on a promissory note, the plaintiff prayed for relief against the family assets in the hands of the sons of the executant but by the terms of a compromise embodied in the decree the plaintiff got personal relief against the sons.

Held, that the validity of such compromise decree could not be questioned on the execution side. (*Pakenham Walsh, J.*) GOVINDA NATTAR *v.* MURUGESA MUDALIAR. **I.R. 1932 Mad. 612=138 I.C. 786=1932 M.W.N. 623=36 L.W. 476=A.I.R. 1932 Mad. 557.**

———*Executing Court—Powers of—Validity of decree—Decree against dead man—Objection to execution.*

A decree passed against a dead person is a nullity and objection on that score can be taken in the executing Court. (*Addison and Din Mahomed, JJ.*) RADHA KISHAN SOHAN LAL *v.* BIHARI LAL ARA NAND. **17 Lah. 32=159 I.C. 212=37 P.L.R. 501=A.I.R. 1935 Lah. 439.**

———*Executing Court—Powers of—Validity of decree—Enquiry into—Defendant alleged to be lunatic at the trial.*

The Court executing the decree must take the decree as it stands, and has no power to go behind the decree or entertain an objection as to the legality or correctness of the decree on the ground, that one of the defendants in the suit was a lunatic at the time of the institution of the suit and trial, where there is nothing in the pleadings or other documents forming the record in the suit, on the face of them, to indicate that fact. 53 Cal. 166, Expl.; 54 C.L.J. 523, Ref.; 9 Rang. 480, Foll. (*Costello, J.*) KALI CHARAN SINGHA *v.* BIBHUTI BHUSAN SINGHA. **60 Cal. 191=36 C.W N. 1120=142 I.C. 60=I.R. 1933 Cal. 210=57 C.L J. 390=A.I.R. 1933 Cal. 85.**

[**R.** 9 Luck. 435 (447) (F.B.).]

———*Executing Court—Powers of—Validity of decree—Case of jurisdiction.*

Once a cause is converted into a matter under the Indian Arbitration Act, the inherent jurisdiction of the Court of general jurisdiction possessed over it is

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curtailed, and the Court cannot pass a decree superseding the award made between the parties. In such a case it is open to the executing Court to treat the decree as a nullity and allow the parties to proceed with execution on the basis of the award. Limits of executing Court's power to question validity of decree laid down. 53 Cal. 166 (F.B.), Cons. (*Mukerji and Guha, JJ.*) RABINDRA NATH CHAKRAVARTI *v.* JANENDRA MOHAN BHADURI. **58 Cal 1018=136 I.C 463=I R 1932 Cal 194=35 C W.N 537=A I R 1932 Cal 9.**

[**Cons** 9 Luck. 435 (444, 445, 453) (F.B.). **Rel.** 35 P.L.R. 482 (487).]

———*Executing Court—Powers of—Validity of decree—Question of jurisdiction.*

It is not open to an executing Court to question the validity of a decree on the ground that the Court which made the decree had not pecuniary jurisdiction to make it. (*Addison and Coldstream, JJ.*) GHULAM MAHOMED *v.* FAZAL NISHAN. **13 Lah. 25=I R. 1931 Lah. 756=133 I.C. 276=33 P.L.R. 30.)=A.I.R. 1932 Lah. 289.**

[**Doubt. and Not F.** 35 P.L.R. 482 (488). **R.** 35 P. L.R. 400 (401); 9 Luck. 435 (452) (F.B.); 1934 L. 117 (118).]

———*Executing Court—Powers of—Validity of decree—Want of jurisdiction and erroneous exercise of it—Distinction.*

An executing Court cannot question the decree sought to be executed except on the score of patent want of jurisdiction but want of jurisdiction is a very different matter from the erroneous exercise of it. So where the Court recorded a compromise decree under O. 23, R. 3 and though a term of the compromise related to property not in question in the suit, yet as it was the consideration of the compromise and so intimately connected with it, the Court had jurisdiction to record the compromise, and the executing Court has no power to question the validity of the decree. 53 C. 166 (F.B.), Ref. (*Madgavkar, J.*) BAJIRAO *v.* SAKHARAM. **I.R. 1931 Bom. 322=132 I.C. 434=33 Bom.L.R. 463=A.I.R. 1931 Bom. 295.**

———Executing Court—Powers of—Validity of decree—Power to enquire into. *See* C. P. CODE, S. 47—EXECUTING COURT. **A I.R. 1934 Lah. 623.**

———*Executing Court—Powers of—Validity of decree—Power to enquire into*

The fact of the Court having no jurisdiction to pass a decree ought to appear on the face of the decree or must be capable of being gathered without the necessity of an enquiry into facts; else the executing Court has no power to question or investigate the validity of the decree. (*Niyogi and Grille, A.J.C's.*) LAXMAN *v.* DHAMORI CO-OPERATIVE CREDIT SOCIETY. **I R. 1933 Nag. 122=142 I.C 487—A.I.R. 1933 Nag. 211.**

———*Executing Court—Powers of—Validity of decree—Power to question—Compromise decree.*

An executing Court has no power to discuss the validity of the terms of the decree which it is ordered to execute. The objection that one of the terms of a compromise decree was "outside the scope of the suit" is therefore not one for the executing Court to consider. If the Court had no power to pass the decree, the matter should have been raised either by way of review or by way of appeal, but the executing Court cannot go behind it. (*Courtney-Terrell, C.J. and Saunders, J.*) MAHOMED ISMAIL *v.* BIBI SHAIMA **13 Pat. 17=151 I.C. 368 (2)=7 R P. 79=A.I.R. 1934 Pat. 203.**

———*Executing Court—Powers of—Validity of decree—Power to question—Decree against minor not represented by guardian* ad litem—*Minor, if can question its validity in execution.*

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An executing Court can within certain limits question the validity of a decree, where the question of jurisdiction is principally involved. The provisions of R. 3 of O. 32 as to the appointment of a guardian *ad litem* for a minor defendant, are imperative and if a minor is sued without a guardian *ad litem* and a decree is passed against him, that decree is a nullity and cannot be enforced against him, and the minor can question the validity of the decree, on the ground of his non representation, in the execution proceedings. This dismissal of appeal preferred by the minor against such decree cannot have the effect of validating the decree against him. (*Grille, J.C. and Sahdeb, A.J.C.*) RADHAKISAN *v.* BHAGWANDAS. **159 I.C. 951=8 R.N. 150=31 N L R. 403=A.I.R. 1935 Nag. 235.**

———Executing Court—Powers of—Validity of decree—Right to question—Limits of. *See* C. P. CODE, O. 21, R. 7. **A.I.R. 1932 Cal. 380.**

———*Executing Court—Powers of—Variance of decree.*

An executing Court must execute, the decree if valid and executable, and cannot alter or vary it in execution. But an executing Court, which refuses to sell property, the sale of which has been decreed under O. 34 does not merely interpret the decree but interferes with it. (*Coldstream and Bhide, JJ.*) SHIV DAS SINGH *v.* KARAM CHAND AND SONS. **15 Lah 772=153 I.C. 772=7 R L. 457=37 P.L R. 36—A I.R. 1934 Lah 438.**

———*Executing Court—Powers of—Variance of decree—Addition to decree—Permissibility.*

The Court executing the decree can only construe the decree on what appears on the face of it and on the pleadings and documents filed in the case. Where therefore a decree is passed in respect of a certain survey number, the decree-holder cannot, in execution proceedings, apply that another survey number should also be sold along with the one mentioned in the decree, on the ground that being a woman she did not at the time of suit know the exact numbers of the property mortgaged to her, which had been described by mere boundaries, in the mortgage on which the decree was based. (*Pevers, J.C. and Rupchand, A J.C.*) MOHANBAI PARMANAND *v.* HIROMAL HOLOMAL. **I R. 1933 Sind 176 (2)—144 I.C. 245=A.I.R. 1933 Sind 130.**

———*Executing Court—Powers of—Variance of decree compromise—Fixing new dates for payment.*

An execution Court has no power to alter or vary the decree under execution and to substitute a new decree for it. A mere consent of parties cannot confer such a jurisdiction on the executing Court. Where the compromise arrived at between decree holder and judgment-debtor fixes new dates of payment or delivery of property, it alters the time of satisfaction and therefore varies the decree. It is not a mere case of postponement of execution, which the Court under special circumstances recognized by the Code of Civil Procedure can order. It is in effect the substitution of a new decree in place of the old decree, which new decree will itself become capable of execution. It is the duty of the execution Court not to entertain any application for the payment of the amount of the decree by instalment, if made after the expiry of the period prescribed by Art. 175, Limitation Act, even though the decree-holder is agreeable to it. The legislature has not intended that the Court has always an inherent power to accept a compromise whereby the parties have agreed that the decretal amount should be paid in instalments. (*Sulaiman, Mukerji and Boys, JJ.*) GOBARDHAN DAS *v.* DAU DAYAL. **54 All. 573=I R. 1932 All. 467=138 I.C. 583 (2)=13 L.R. 199 (Rev.)=1932 A.L J. 365=16 R.D 293=A.I.R 1932 All. 273 (F.B.)**

[**Rel.** 1933 A.L.J. 724 (727); 10 Luck. 208 (225).]

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———*Executing Court—Powers of—Variance of decree—Power to amend decree.*

An executing Court cannot go behind the decree but where the executing Court and the Court which passed the decree are one and the same, the Court can amend the decree in the course of the execution. 60 Cal. 753, Foll. But where the decree of the first Court is confirmed or reversed, it is superseded by the decree of the appellate Court and the only Court that can amend the decree thereafter is the appellate Court. 32 All. 295 (P.C.), Rel. on. (*Nasim Ali and Henderson, JJ.*) HEMANTA KUMAR GHOSE *v.* RAJENDRA MONDAL. **63 Cal. 181=158 I.C. 436=8 R C. 186=62 C.L.J. 79=39 C.W N. 1295=A.I.R. 1935 Cal. 619.**

———Executing Court—Powers of—Variance of decree—Power to make decree payable by instalments. *See* C. P. CODE, O. 20, R. 11. **A.I.R. 1934 Rang. 197.**

Instalment decree.

———*Instalment decree—Default clause—Enforceability.*

Where a decree is payable in instalments and on default of any one instalment, the decree holder is entitled to execute decree for the whole amount, the question whether circumstances alleged by a party from which the Court is asked to infer a waiver, exist or not, is a question of fact, but whether from the facts, if proved, waiver can be inferred, is a question of law. A decree was payable in instalments and on default, the decree-holder was entitled to execute the decree for the whole amount. He applied for execution of the whole amount on default of the first instalment but pending execution received the amounts due for the first and second instalments.

Held, that the decree-holder was entitled to execute the decree for the whole amount and that there was no waiver of this right by acceptance of the instalments pending the execution for the whole amount. (*Hilton, J.*) PIRBHU LAL ABHE RAM *v.* KEHRI. **150 I.C. 704=7 R.L 14=A.I.R. 1934 Lah. 425.**

———*Instalment decree—Execution in respect of instalments not barred—Permissibility.*

In the case of an instalment decree, it is open to the decree-holder to execute such of the instalments which are not time barred. 109 I.C. 272, Foll. (*Dalip Singh, J.*) GOPI RAM JAITHU RAM *v.* RAMJI DAS SRI KRISHAN DAS. **I.R. 1932 Lah. 339 (1)=137 I.C. 292=33 P.L R. 30.**

———*Instalment decree—Security bond charging property—Sale without attachment—Validity*

A money decree was passed and the Court allowed payment by instalments, the judgment-debtor having given security of certain property which was charged for the payment of the instalments. The judgment-debtor having committed default in payment, the decree-holder proceeded to sell the property charged under the security bond without attaching it.

Held, that no attachment was necessary before sale. (*Wort and Varma, JJ.*) KRISHNA PRASAD *v.* PRATAP NARAYAN CHOUDHRY. **13 Pat. 387=153 I.C. 321=7 R.P. 331=15 Pat.L.T. 754=A.I.R. 1934 Pat. 608.**

Jurisdiction.

———Jurisdiction—Abolition of Court having jurisdiction—Execution application filed in wrong Court—Subsequent conferment of jurisdiction—Court not bound to dismiss it. *See* C. P. CODE, S. 37. **57 Mad. 795=66 M.L.J. 492.**

———*Jurisdiction—Court in* M *sitting in* P—*Decree passed by—Pending suit, Sub-Court established at* D *in district* M—*Application for execution—Jurisdiction of Court in* M *sitting at* P.

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A suit was instituted by the appellants in 1911 in the Court of the Subordinate Judge at *M*, who at that time sat at *P*, for possession of certain lands situated in the subdivision of *D* and for mesne profits The suit was decreed but an appeal by the respondents to the High Court was successful and the judgment of the High Court was affirmed by the Privy Council. The suit was accordingly dismissed with costs. In 1931, the respondents, the present decree-holders, applied for execution in the Court of the Subordinate Judge of *M* sitting at *P* and sought to sell in execution lands situated in subdivision of *P*. By a notification in 1917, a Subordinate Judge's Court at *D* in the District of *M* was established and the local limits of the executive subdivision of *D* were fixed as the local limits for his jurisdiction. Further it declared that the local limits of the executive subdivision of *D* ceased to be included in the local limits of the Subordinate Judge of *P* with effect from 31st October, 1917.

Held, that the effect of the notification issued under the Bengal, Agra and Assam Civil Courts Act (XII of 1887) was not to transfer the jurisdiction of the Court sitting at *P* to the Court sitting at *D*, but to divide between two individuals the jurisdiction of the Subordinate Judge in the District of *M*, and in this case the suit was begun in the Court of the Subordinate Judge at *M*, and that the mere fact that, for administrative purposes the Court of the Subordinate Judge was now divided between the Subordinate Judge and an Additional Subordinate Judge, and that a certain class of business or an area has been allotted to the Additional Subordinate Judge, did not make the Court of the Subordinate Judge sitting at *P* any the less the Court of the Subordinate Judge of *M*, nor did it prevent it from executing the decree. 42 M. 821 and 35 C. W. N. 77, Foll. (*Courtney-Terrell, C. J. and Saunders, J.*) CHANDMAL MARWARI *v.* RAJA SHIBA PRASAD SINGH. **13 Pat. 21=155 I.C. 769=7 R.P. 622=15 Pat L.T. 513=A I.R. 1934 Pat. 192.**

———*Jurisdiction—Decree by Additional Munsif—Application for execution to first Munsif.*

The Court of an Additional Munsif is a Court of the Munsif. The Court of an Additional Munsif who may happen to be sent to a district in a particular year is not necessarily the same Court as the Court of the Additional Munsif deputed to the same area in other years. For the purpose of execution of the decree, which the Additional Munsif pronounced, his Court is the Court of the first Munsif, for he is then trying suits appertaining to the area which was comprised in the territorial jurisdiction of the latter Court. The application for execution of a decree of Additional Munsif to the Court of first Munsif is made in accordance with law and saves limitation. (*Courtney-Terrell, C J. and Saunders, J.*) MANOGI LAL SAH *v.* JOG SAH. **13 Pat. 5=151 I.C. 375=7 R.P. 85 (1)=15 Pat.L.T. 215=A.I.R. 1934 Pat. 199 (1).**

———*Jurisdiction—Decree transferred for execution—Certificate of transferee Court not received—Application to Court which passed decree—Competency.*

An application to the Court which passed the decree for execution of a decree which had been transferred for execution to some other Court, is not incompetent merely because the certificate of the transferee Court is not received. When the execution by the transferee Court has terminated, the execution having been dismissed on part-satisfaction, and when no execution proceedings are pending anywhere, the Court which passed the decree is a proper Court to execute the decree. (*Mukerji, A. C. J. and Guha, J.*) RAJANI KANTA PATTADAR *v.*

EXECUTION—Jurisdiction.

KAZI SAIYED GOLAM MAHIUDDIN. **154 I. C. 731 = 7 R C. 520 = 60 C.L.J. 461 = 39 C.W.N. 129 = A.I.R. 1935 Cal. 99.**

———*Jurisdiction — Mortgage decree — Subsequent change of the territorial jurisdiction—Proper Court for execution.*

Where after a mortgage decree is passed, the jurisdiction of Court is altered in such a way that the mortgaged property comes within the jurisdiction of another Court, the proper Court to which an application for execution has to be presented is the Court which passed the decree, whether it has power to order sale of the property situated within the jurisdiction of another Court or not. An execution application presented to the Court to which the jurisdiction over the mortgaged property is transferred is not one made to the proper Court. (*K. S. Menon, J.*) PALANI VELU *v.* SOMASUNDARAM PILLAI. **158 I C 811 = 8 R M. 357 = 1935 M.W N. 1116 = 42 L.W. 856 = A.I R. 1935 Mad. 935 = 69 M.L J. 466.**

———Jurisdiction—Plea of want of jurisdiction raised unsuccessfully in suit—Objection, if again open by judgment-debtor. *See* OBJECTION, *infra*. **A.I.R. 1933 All. 751 (2).**

Liability.

———*Liability—Decree for sale of specified properties in suit against father and sons—Objection by sons in execution—Competency of.*

Defendant No. 1 mortgaged his right to ⅛ share in an allowance charged on certain specific immovable properties. The sons of the first defendant were subsequently impleaded as defendants Nos 3 to 5 on the ground that they were also entitled to the said ⅛ share jointly with the father. The mortgage was found to be for family necessity and a decree was passed. In execution, the sons contended that their share in the allowance could not be proceeded against and secondly that the security was not saleable.

Held, that as the sons were parties to the suit, they were not entitled to challenge the validity of the decree; their proper remedy was to prefer an appeal. Secondly, as the decree was one for sale in respect of specified properties, no question as regards the saleability of those properties could be taken in execution. (*Mukerji and Guha, JJ.*) TRIPATI PRAKAS NANDY *v.* BISESWAR LAL MARWARI. **I.R. 1932 Cal. 451 = 138 I.C. 380 = 55 C L.J. 114 = A.I.R. 1932 Cal. 517.**

———Liability—Hindu sons—Decree against father and sons without any restriction of liability. *See* HINDU LAW—JOINT FAMILY. **34 Bom.L.R. 941 = A.I.R. 1932 Bom. 483.**

———*Liability—Transferee from judgment debtor—Execution of decree against.*

The mere fact that a transferee from the judgment-debtor takes up the position of a representative of the judgment-debtor bound by the decree does not entitle the decree-holder to proceed against him in execution.

Semble: In a suitable case the Court may have power, even apart from the provisions of O. 22, R. 10, C. P. Code, of adding a party for the purposes of execution or of allowing an execution to proceed against a legal representative or a transferee (*Mukerji and Guha, JJ.*) HEM CHANDRA BANNERJEE *v.* ANNAPURNA DEBI. **I.R. 1932 Cal. 386 = 138 I C. 64 = 36 C.W.N. 93 = A.I.R. 1932 Cal. 423.**

———*Liability—Transferee of property after decree of first Court making original defendants liable—Decree affirmed on appeal—Transferee, though party, not made liable.*

EXECUTION—Merger of interest.

In a suit for arrears of assessment and cess, a decree was passed against the tenants, defendants 1 and 2, by the trial Court. When an appeal by one of them was pending, the defendants sold their interest to the appellant who got himself impleaded and contested the appeal. The appeal and a second appeal by him failed and the decree of the first Court was confirmed. The plaintiff tried to execute the decree against the appellant.

Held, that the decree capable of execution was the decree of the first Court; that was only against defendants 1 and 2 only; that as the appellant transferee had not been made liable under the decree and the executing Court had no power to go behind the decree, it could not be executed against the appellant. (*Baker, J.*) ISHVAR SANGAPPA *v.* RAMRAO. **I R. 1932 Bom. 473 — 139 I C. 215 = 34 Bom.L.R. 948 = A I.R. 1932 Bom. 462.**

Limitation.

———Limitation — Application for execution—Rent decree—Adjustment by agreement. *See* B. T. ACT, SCH. III, ART. 6. **39 C.W.N. 1036.**

———*Limitation—Application for payment of the decretal money by instalment—Application filed after time—Court entertaining same—Effect.*

Although the Court should not entertain an application for payment of the decretal money by instalment under O. 20, R. 11, if made after the expiry of six months from the date of decree, the order if actually passed on such a time-barred application is not a nullity. Just as a decree passed in a suit which is time-barred is binding on the parties, so an order for payment by instalment is binding on the judgment-debtor. It must be assumed that the Court by oversight decided the question of limitation wrongly. But a wrong decision, whether express or implied on a question of limitation does not oust the jurisdiction. Limitation is a question of procedure and not one of jurisdiction. 26 All. 522, Rel. on; A.I.R. 1924 Lah. 342, Not Foll. (*Sulaiman, Mukerji and Boys, JJ.*) GOBARDHAN DAS *v.* DAU DAYAL. **54 All 573 = I R. 1932 All 467 = 138 I C. 583 (2) = 13 L.R. 199 (Rev.) = 1932 A.L.J. 365 = 16 R D. 293 = A.I.R. 1932 All. 273 (F.B.).**

———Limitation—*Ex parte* decree—Application within three years dismissed for default—Subsequent application after limitation held not continuation of former and barred by limitation. *See* CHOTA NAGPUR TENANCY ACT (1908), S. 181. **A.I.R. 1934 Pat. 237.**

———Limitation—Plea of—Not raised—Order for execution made—Judgment-debtor precluded from raising that plea at a subsequent stage in execution proceedings. *See* OBJECTION, *infra*. **A.I.R. 1933 Cal. 855.**

———Limitation—Stay until further orders—No further orders passed—Re-hearing and appeal—Execution application filed subsequently—No bar. *See* LIMITATION ACT, ART. 181. **58 Cal. 1113.**

Merger of interest.

———*Merger of interest—Personal decree against heirs of mortgagor—Decree holder subsequently inheriting share—Effect.*

A decree-holder obtained a decree under O. 34, R. 6, C. P. Code, against the heirs of the mortgagors and sought to recover the same from out of the assets of the deceased in their hands. The decree-holder subsequently inherited her husband's share which was liable for the debts.

Held, that the inheritance did not render her liable for the entire decree debt but the decree amount was proportionately decreased. (*Sulaiman, Ag. C. J. and*

EXECUTION—Minor.

Young, J.) ASIA BIBI *v.* MALIK AZIR AHMED. **54 All. 448 = I.R. 1932 All. 262 = 137 I.C. 50 = 1932 A. L.J. 230 = A I.R. 1932 All. 704.**

Minor.

———*Minor—Sufficiency of representation—Decree against father and uncle—Death of father—Minor, if sufficiently represented by uncle.*

A decree was passed against a minor's father and his paternal uncle as trespassers and not against them as managers of joint family or as representing the properties of the joint family, nor was directed against the joint family properties. In the course of execution, the father died.

Held, that in execution of such decree. the paternal uncle could not in law sufficiently represent the interests of the minor. A.I.R 1929 Mad. 275 and 36 M.L.J 106, Dist. (*Madhavan Nair and Jackson, JJ.*) KOTAVVA *v.* RADHAKRISHNAMURTI. **6 I R. (Mad.) 260 = 146 I.C. 372 = 38 L.W. 588 = A.I.R. 1933 Mad. 833.**

Mortgage decree.

———*Mortgage decree—Construction of—Substance of transaction to be looked into—Sale under mortgage decree—Defect in description—Effect of.*

In execution proceedings the Court will look at the substance of the transaction, and will not be disposed to set aside an execution upon mere technical grounds when they find that it is substantially right. 6 I.A 233 (P.C.), Appl. The description of the mortgaged property set out in the plaint, from which the descriptions set out in the preliminary decree and the final decree were copied, was taken from the sale certificate and the agent who filed the suit was not aware at the time, and apparently not till he was about to file his application for sale, that the wooden house mentioned in the sale certificate was no longer in existence and the buildings mentioned in the application for sale had sprung upon the land.

Held, that it did not make any difference whether the buildings set out in the application for sale were themselves part of the property originally mortgaged or whether the wooden house was demolished and the buildings set out in the application for sale, were built after the creation of the mortgage, because in either case, the applicant was entitled to have the buildings, mentioned in the application for sale, sold under the decree. (*Mya Bu, J.*) BALA BISWAS *v.* BANK OF CHETTINAD, LTD. **A.I.R. 1935 Rang. 522.**

———*Mortgage decree—Decree for costs.*

Ordinarily costs must be included in the amount due on the mortgage and the property must be sold for the total amount and the decree for costs cannot be executed separately as a personal decree against the mortgagor. (*Dalal, J.*) KANNU LAL *v.* BHAGWAN DAS. **I R. 1931 All. 186 = 129 I.C. 554 = A.I.R. 1931 All 124.**

———*Mortgage decree—Sale—Purchase by decree-holder and symbolical delivery—Partition suit between mortgagors—Receiver in—Appointment prior to sale—Right of mortgagee to possession on discharge of receiver.*

A mortgagee-decree-holder purchased the mortgaged properties in execution sale under his decree and obtained symbolical possession. But before the actual sale took place, there was a partition suit among the mortgagors-defendants, in which a receiver was appointed in respect of the mortgaged and other properties; and after that suit was disposed of, the Receiver was directed to hand over possession back to the mortgagors-defendants. The mortgagee purchaser contended that he was entitled to possession.

EXECUTION—Objection.

Held, that the sale and delivery to the mortgagee-purchaser having taken place subsequent to the date of the receiver taking possession of the properties, the Court was justified in directing restoration of possession to the mortgagors from whom the receiver had taken possession. (*Madhavan Nair, J.*) MURAHARI REDDI *v.* CHANRAYA GOUNDAN. **156 I.C. 724 = 8 R.M. 45 = 1935 M.W N. 603 = 41 L.W. 760 = A.I.R. 1935 Mad. 624 = 68 M.L.J. 620.**

Objection.

———*Objection of—Agreement not to execute decree—If can be pleaded in bar of execution.*

Agreement not to execute the decree against a particular judgment-debtor can be pleaded in execution and the executing Court can determine whether the agreement is true. A I.R. 1931 Mad. 339, Rel. on. (*Beasley, C.J., Cornish and Pandrang Row, JJ.*) PAPAMMA *v.* VENKAYYA. **58 Mad 994 = 1935 M.W.N. 906 = 42 L.W. 365 = 158 I C. 187 = 8 R M. 232 = A.I.R. 1935 Mad. 860 = 69 M.L.J. 451 (F.B.).**

———*Objection—Co judgment debtors — Objection to execution—Who can make.*

Where the decree is a joint one, any one of the judgment-debtors may object to the execution, although for the time being his personal property has not been attached. (*Mukerji and Bennet, JJ.*) ANANDA KRISHNA *v.* KISHAN DEVI. **53 All. 496 = I.R. 1931 All 513 = 132 I.C. 417 = 1931 A.L.J. 228 = A.I R. 1931 All. 377.**

———*Objection—Compromise of proceeding—Subsequent assertion of independent title by legal representative.*

The respondents obtained a money decree against *A* who died subsequently after the decree, when the judgment-creditors took out execution of their decree. They took it out against the appellant as a representative of *A*. Notice was issued to him and he entered into an agreement with the decree holders. A sum of money was paid to the appellant who in turn allowed the sale to be adjourned for 6 months after which the sale was to be held once again without fresh proclamation. When execution was again prosecuted, the appellant objected and set up an independent title in himself by survivorship and not by inheritance.

Held, that the appellant had by his conduct disentitled himself to raise the objection that he was raising. 3 O.W.N. 241, Rel. on. (*Hasan, C.J. and Kisch, J.*) KUAR BAHADUR SINGH *v.* KALKA PRASAD. **I.R. 1931 Oudh 240 = 132 I.C. 80 = 14 O.L.J. 244 = 8 O.W.N. 339.**

———*Objection—Decree for maintainance to wife—Objection to payment raised in execution—Sustainability.*

Where a decree in unconditional terms orders maintenance to be paid by a husband to a wife, on an application by her for execution of the decree the husband cannot raise an objection that she had by her conduct forfeited her right to maintenance. Such an objection can be raised only by a separate suit. (*Mahadevayya, O. C.J. and Ramachandra Rao, J.*) YELAMMA *v* YELLAPPA. **11 Mys.L.J. 183.**

———*Objection—Judgment-debtor's sons—Non appearance of objector—Whether amounts to waiver.*

In the course of execution of a decree, certain land was attached. Subsequently the judgment-debtor died and his sons objected to the attachment on the ground that the land was ancestral. When the objections came on for hearing, the objectors were not present and the Court granted a lease of the land in favour of the decree-holder for 15 years. The objectors then applied for setting aside

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the *ex parte* order but by that time possession had been delivered to the lessee,

Held, that the order granting the lease was illegal since the property was ancestral land.

Held, further, that the mere non appearance of the objectors did not have the effect of having the objections waived by them. (*Bhide, J.*) ISHAR *v.* DURGA DAS. **I.R. 1932 Lah. 652 (1).**

——Objection—Plea based on S. 43 and R. 22, Co-operative Societies Act—Maintainability when not raised in suit. *See* CO-OPERATIVE SOCIETIES ACT, S. 43 AND R. 22. **39 C.W.N. 363**

——*Objection—Plea based on S. 153, Companies Act not raised in suit.*

The omission of a party, to raise at the original trial a plea to the effect that a creditor is bound under S. 153, Companies Act, by an arrangement between the company and its creditors made under that section, is not fatal to such a degree as to bar its being raised in execution proceedings. An order passed under S. 153 is a judgment *in rem* and is on a different footing from agreements which the parties have an option to enforce or not and which they can plead by way of defence or not as they deem fit. (*Hilton, J.*) HARGOPAL *v.* PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE. **153 I C 119 (2) 7 R L. 387 (1) - 35 P.L.R 521 A.I R 1934 Lah 515 (1).**

——Objection—Plea by debtor that decree was barred and incapable of execution—When to be taken—Objection after sale in execution—Maintainability. *See* LIMITATION ACT, ART. 181. **159 I C. 248 = 16 Pat. L.T. 744 = A I.R. 1936 Pat. 93.**

——*Objection—Objections by debtor—Plea of want of jurisdiction raised unsuccessfully in suit, if again open.*

An objection by a judgment-debtor regarding want of jurisdiction of the Court trying the suit which was raised unsuccessfully in the suit may still be taken in the course of execution proceedings. (*Niamatullah and Rachhpal Singh, JJ.*) SARABJIT PRATAP BAHADUR *v.* INDERJIT PRATAP BAHADUR. **147 I C. 874 6 R A 552 - 14 L. R 413 (Rev) - 17 R D 571 A.I R. 1933 All 751 (2).**

——*Objection—Plea of limitation—Whether can be raised at late stage.*

Where a decree-holder applies for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation does not do so and an order for execution by attachment is made on the application, the judgment debtor is precluded from raising that plea at a subsequent stage in the execution proceedings. (*Mitter and M.C. Ghose, JJ.*) LALIT MOHAN ROY *v.* SARAT CHANDRA SAHA. **149 I C 1017 = 6 R.C. 670 - 37 C.W.N. 752 = A I.R. 1933 Cal 855.**

——Objection—Plea of satisfaction of decree—Maintainability—Satisfaction not reported to Court passing decree or recorded—Effect. *See* C.P. CODE, O. 21, R. 2 (*m*). **39 C.W.N. 961.**

——*Objection—Validity of decree—Estoppel—Judgment debtor depositing money and taking time—Subsequent objection.*

In order to amount to an equitable estoppel there must be some representation made by one party which is acted upon by the other to his detriment. Where a decree has been passed by a Native State Court and the judgment-debtor deposited a certain sum in an executing Court in British India and took time but he raised an objection to the validity of the decree when it was sought to be executed after a fresh transfer.

Held, that the judgment-debtor was not estopped from raising the objection by reason of the earlier deposit.

EXECUTION—Refund.

Per *Sulaiman, J.*—If there was anything to show that the extension of time was as a result of an agreement between the decree-holder and judgment-debtor it may be said that the agreement is binding. (*Sulaiman and Niamatullah, JJ.*) SHEO TAHAL RAM *v.* BINAEK SHUKUL. **53 All. 747 = 136 I.C 353 = I R 1932 All. 177 = 1931 A.L.J. 653 = A.I.R. 1931 All. 689.**

Order in.

——*Order in—Binding nature—Execution proceeding of rival decree-holder.*

One decree-holder is not a party to the execution proceedings of a rival decree holder and therefore orders passed in such execution proceedings should in no way bind him. (*Bennet, J.*) BRIJ RATAN DAS *v.* RAM GOVIND PANDE. **151 I.C. 266 = 7 R.A. 122 = 3 A.W.R. 606 = A.I R. 1934 All. 652.**

Partial execution.

——*Partial execution—Permissibility.*

Usually there cannot be a separate or piecemeal execution of a decree, except where there are distinct reliefs such as possession and costs, which may be executed separately. Where there is only one homogeneous relief such as money or costs, execution should be taken out for the whole sum due If however an application for execution of part of the sum due is made, the judgment-debtor should raise an objection to such an application at once, and if he fails to do so, the execution of part of the decretal amount will not be invalid nor can the judgment-debtor be heard in a subsequent application for execution to say that the application is incompetent as being only for a part of the decree. In other words O. 2, R. 2, C. P. Code, does not apply to applications for execution. (*Staples, A J C.*) SETH CHHUNILAL *v.* GULABCHAND. **28 N.L R 77 = I.R. 1932 Nag. 132 = 110 I.C. 120 (2) = A.I.R 1932 Nag. 89.**

Procedure.

——*Procedure—Purchaser of undivided share—Remedy of.*

The proper remedy of a purchaser in execution of the undivided share of a Mahomedan is by way of a partition suit and his mistaken application for delivery in execution is no bar to the suit. 29 Mad. 294 and 28 M.L.J. 642. Foll. (*Reilly, J.*) MOHAIDEEN ABDUL KADIR *v.* CHIDAMBARAM CHETTIAR. **1931 M.W.N. 1176.**

Refund.

——*Refund—Purchase money—Purchaser deprived of his right by third party—Right to compensation.*

The auction-purchaser is only entitled to a refund when the sale is set aside under R. 92 of O. 21. There is no warranty of title as regards Court sales and therefore the purchaser cannot, when he loses the property under a decree passed in favour of a third party, claim a refund of the purchase-money. (*King and Thom, JJ.*) SAHU DEPUTY SHANKAR *v.* MANGAL SEN. **54 All. 948 = 143 I C. 429 = I.R. 1933 All. 249 = 1932 A.L.J 1007 = A.I.R. 1933 All. 63.**

——*Refund—Refunding of excess—Person entitled to priority—Suit for refunding of amount from person not entitled to receive it.*

Just as a person claiming rateable distribution can compel any person to refund the assets that he has received to which he was not entitled, so also a person who is entitled to priority can successfully maintain a suit for refund of the assets against a person, who is not entitled to receive the assets, until the person claiming the priority has been paid off. (*Abdul Rashid, J.*) MUKHI RAM *v.* ATMA RAM. **150 I.C. 961 = 7 R.L. 40 = A.I.R. 1934 Lah. 478.**

EXECUTION.

Rent decree.

———*Rent decree—Attachment of property outside tenure in arrear—Legality.*

The attachment, in execution of a rent decree, of property outside the tenure in arrear is not illegal. (*Jack and Khundkar, JJ.*) PRAFULLA NATH TAGORE *v.* PARUK. **154 I.C. 98=7 R.C. 435=59 C.L.J. 452 =A.I.R. 1935 Cal. 13.**

———*Rent decree—Execution petition for sale of tenure —Decree holder, if bound to describe tenure after description in particular record-of-rights—Power of executing Court to order insertion of description or to dismiss petition for failure to do so.*

There is no law which makes it incumbent upon the decree holder to describe in his execution petition the nature of the tenure sought to be sold or to describe it necessarily according to the record of-rights. The record-of-rights is no doubt presumed to be correct. But an executing Court cannot force a landlord decree-holder to accept the record-of-rights on pain of having his execution petition dismissed and thereby of losing his right to realize the rent. The question of the status of a particular tenure is not for the rent Court to decide. It is one to be decided by a Civil Court in a properly framed suit. The only object of describing the nature of the tenure is to give information to intending purchasers. For that purpose it is enough if the sale proclamation mentions the two entries (when there are two conflicting entries) or if it mentions that the tenure is of one description according to the decree holder and of another according to the judgment-debtor, leaving it to the future purchaser to have the matter settled in the Civil Court one way or another. It is not necessary or proper for the executing Court to go further. It has no power to order the decree-holder to amend his petition by inserting a description given in a former description and to dismiss the petition on his failure to do so. (*Mohammad Noor, J.*) PRATAP UDAI NATH SAHI DEO *v.* NAND KUMAR LAL. **156 I.C. 474=8 R.P. 3 =16 Pat.L.T. 622=A.I.R. 1935 Pat. 400.**

———*Rent decree—Execution against property other than tenure in arrear—Jurisdiction of executing Court to direct.*

A Court executing a rent decree has no jurisdiction to refuse execution of the decree against the property of the judgment-debtor other than the tenure in arrears or to direct that the decree-holder must proceed in the first instance against the tenure in arrears. An order passed by the executing Court directing the decree-holder to proceed against the tenure in arrears within 7 days and dismissing the execution for non-compliance with that order is wrong and insupportable and is liable to be set aside in revision. (*Guha and Bartley, JJ.*) RANI KANAK PROVA DEBI *v.* ABDULLA AKURJI. **157 I.C. 676—8 R.C. 125 (1)=61 C.L.J. 91=A.I.R. 1935 Cal. 544.**

———*Rent decree—Suit to declare null and void and for injunction—Order allowing execution against tenure in arrears and staying further proceedings—Dismissal of execution and withdrawal of attachment—Propriety.*

In a suit to declare that certain rent decrees were null and void and for an injunction restraining the execution of those decrees, an order was passed to the effect that the decree holders could proceed to execute the decrees against the tenures in arrears only and that further proceedings would be stayed. Thereafter in the execution case pending before the Court, the Court passed an order dismissing the execution case and withdrawing the attachment,

Held, the Court was not entitled to dismiss the execution case entirely and withdraw the attachment, unless

EXECUTION—Right to.

the judgment-debtor gave security for the alleged amount of his share in the decretal debt and the order of the Court cannot be justified. (*Jack and Khundkar, JJ.*) PRAFULLA NATH TAGORE *v.* PARUK. **154 I.C. 98=7 R.C. 435=59 C.L.J. 452=A.I.R. 1935 Cal. 13.**

Res judicata.

———*Res judicata*—Proceedings in execution—Applicability of *res judicata*. *See* C. P. CODE, S. 11.

Revival.

———Revival—Application for delivery of possession dismissed for statistical purposes—Effect of—Subsequent application—If continuation of first application or separate application. *See* LIMITATION ACT, ART. 180. **42 L.W. 375=A.I.R. 1935 Mad 803 (F.B.).**

———*Revival—Later application—When treated as in continuation or for revival of prior one.*

It is well established that an application for execution of a decree may be treated as one, in continuation or for revival of a previous application for execution, similar in scope and character, the consideration of which had been interrupted by objections and claims subsequently proved to be groundless or had been suspended by reason of an injunction or like obstruction. (*Henderson and R. C. Mitter, JJ.*) KRISTO KAMINI DEBI *v.* GIRISH CHANDRA MONDAL. **63 Cal. 57= 162 I.C. 654=8 R.C. 628=39 C.W.N. 1030=A.I.R. 1936 Cal. 239.**

———*Revival—Order "striking off" execution petition —Effect of—Subsequent application—If continuation.*

An order directing an execution application "to be struck off the file" is not an order sanctioned by any rule or by the Code. A.I.R. 1926 Mad 453 and A.I.R. 1927 All. 16, Foll. It is merely an order made quite irregularly for statistical purposes and therefore subsequent proceedings in execution are to be deemed as merely a revival or continuation of those earlier ones which are irregularly stopped by being "struck off." (*Beasley, C. J., and Cornish, J.*) JAGANNADHO *v.* HARIHAR MAHAPATRO. **158 I.C. 829=8 R.M. 356=1935 M. W.N. 969=A.I.R. 1935 Mad. 885.**

———*Revival—Stay of execution and consequent "striking off"—Effect—Application for revival after removal of stay—Necessity for—Duty of Court.*

Where an execution case is still pending but cannot be proceeded with by reason of an injunction and has been "struck off the file," or is removed by an order which does not terminate it finally but has the effect of only removing it from the list of pending cases, there is no warrant for holding that the decree-holder is bound to apply for revival of the said proceedings after the removal or discharge of the injunction. It is also the duty of the Court to have in sight all undisposed cases and, when the bar is removed, to direct the party to take the necessary steps for further progress of the case. (*Henderson and R. C. Mitter, JJ.*) KRISTO KAMINI DEBI *v.* GIRISH CHANDRA MONDAL. **63 Cal. 57=162 I.C. 654=8 R.C. 628=39 C.W.N. 1030 =A.I.R. 1936 Cal. 239.**

Right to.

———*Right to—Assignee of decree.*

The original decree-holder assigning his rights under a decree has a right to execute his decree, unless and until his name is removed and replaced by the name of the assignee. (*Ferrers, J.C. and Rupchand, A.J.C.*) SALAMATMAL *v.* MT. NURKHATUN. **I.R. 1933 Sind 166=144 I.C. 50=A.I.R. 1933 Sind 119.**

———*Right to—Award giving mortgagee right to proceed against any property—Right to execute against properties other than that mortgage.*

EXECUTION—Right to.

A suit to enforce a mortgage was settled by arbitration, and in the award and the decree which followed thereon, the decree holder was given the choice of realizing the amount due either from the mortgaged lands or any other immovable property of the judgment-debtor.

Held, that the decree-holder was within his rights in proceeding against the property other than that which had been originally mortgaged. (*Tek Chand, J.*) HANS RAJ *v.* RAM RAKHI. **147 I.C. 117 (1)=6 R.L. 338 (1)=A.I.R. 1933 Lah 831.**

———*Right to—Board of Control created by decree.*

Where a scheme constituted a Board of Control for a temple and conferred upon it the right of calling upon the trustees to submit budgets of receipts and expenditure and to remit the collections, the Board, though itself a creation of the decree, may yet be regarded as a decree holder entitled to enforce the decree. A decree-holder need not be a party to the decree. It is enough if the decree confers some rights enforceable under the decree upon some persons mentioned in it. (*Ramesam and Cornish, JJ.*) VYTHILINGA PANDARASANNADHI *v.* THE BOARD OF CONTROL, SRI THEAGARAJASWAMI DEVASTHANAM, TIRUVARUR. **35 L.W. 22=136 I.C. 771=I.R. 1932 Mad. 307=61 M.L.J. 904.**

———*Right to—Decree obtained by alleged adopted son—Adoption found invalid—Right of widow of last male owner to execute.*

If a Hindu female, such as a widow or daughter, suing on behalf of an estate to recover property represents the ultimate male heirs entitled to the estate, they are bound by the litigation and they can take the benefit of it. But there is no principle which can avail the widow of the last male owner to enable her to execute the decree wrongly obtained by a person claiming to be the adopted son of the last male owner but whose adoption was subsequently found to be invalid. (*Ramesam and Cornish, JJ.*) SUNDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

———Right to—Joint application—Withdrawal of one—Right of others to continue. *See* C.P. CODE, O. 21, R. 10. **1935 A.W.R. 98=A.I.R. 1935 All. 402.**

———*Right to—Prior application in respect of principal and costs—Later application regarding interest—Bar—Waiver.*

When a judgment-creditor has obtained a decree for principal and interest to date of payment and costs and has applied for execution and has executed it in respect of the principal and costs and subsequently puts in a fresh application for interest only—a prayer omitted in the prior application—the application is not sustainable.

Per *Beaumont, C.J.*—If a person having a right to recover a certain sum under a decree asks the Court to enforce that decree for a less sum, he must be taken to waive his right to levy execution for the balance. (*Beaumont, C.J. and Murphy, J.*) PANAJI GIRDHARLAL *v.* KATANCHAND HAJARIMAL. **57 Bom. 468=6 I.R. (Bom.) 150=146 I.C. 343=35 Bom.L.R. 620=A.I.R. 1933 Bom. 364.**

———Sale.

ABSENCE OF ATTACHMENT.
BINDING NATURE.
COMMISSION TO AUCTIONEER.
CONFIRMATION.
DELIVERY OF POSSESSION.
ENCUMBRANCE.
JURISDICTION.
MINOR.
MORTGAGE DECREE.
OBJECTION.

EXECUTION—Sale—Confirmation.

PURCHASER'S RIGHTS.
RECEIVER.
SETTING ASIDE.
STAY OF.
VALIDITY OF.
WHAT PASSES.
WHEN COMPLETE.
MISCELLANEOUS.

Absence of attachment.

———*Sale—Absence of attachment—Effect.*

The absence of an attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. (*Niamatullah and Bennet, JJ.*) MAHABIR PRASAD *v.* RAGHUNATH SARAN. **150 I.C. 141=(1933) A.L.R. 1043=3 A.W.R. 718=A.I.R. 1934 All. 430.**

———*Sale—Absence of attachment—Effect.*

Obiter.—A sale in execution which is not preceded by an attachment of the property sold is a mere irregularity and does not render the sale null and void. (*Shankaranarayana Rao and A. S. R. Chari, JJ.*) ARASA HANUMANTHA GOWDA *v.* VENKATRAMANIAH. **14 Mys.L.J. 27=40 Mys.H.C.R. 430.**

Binding nature.

———*Sale—Binding nature—Prohibition against transfer—Sale subject to superior proprietor asserting his right.*

A Court in execution has the power to sell any right and interest possessed by the judgment-debtor which the judgment-debtor himself is competent to sell. If a judgment-debtor in the absence of an objection by the taluqdar is competent to sell his interest in such land by a private sale, there is no reason why, under similar circumstances, the same interest should not be liable to sale by means of execution proceedings. Sale of *qabzadari* land in execution upheld. (*Bisheshwar Nath and Kisch, JJ.*) GAYA PRASAD *v.* BENI MADHO. **7 Luck 111=I.R. 1931 Oudh 376=134 I.C. 472=8 O.W.N. 785=15 R.D. 412=A.I.R. 1931 Oudh 352.**

Commission to auctioneer.

———*Sale—Commission to auctioneer—Order regarding—Interference by High Court.*

The High Court has ample power under S. 107, Government of India Act, read with S. 151, C. P. Code, to interfere with an order of the executing Court as to the commission payable to an auctioneer in an execution sale. (*Abdul Rashid, J.*) BELI RAM *v.* LAL SHAH. **161 I.C. 246=8 R.L. 703=A.I.R. 1935 Lah. 956.**

———*Sale—Commission to auctioneer—Property sold subject to mortgage—No commission on mortgage amount is to be given.*

Where the actual right which is sold is the equity of redemption and the mortgagee's bid for Rs. 180 is successful, the commission to the Court auctioneer is to be paid on Rs. 180 only and not also on the mortgage charge. A valuable right in property had already passed to the auction-purchaser prior to the sale by virtue of the mortgage and it is only the additional right valued at Rs. 180 which passed to him by virtue of the sale. A revision is competent against an order allowing commission on the total amount of charge and Rs. 180. (*Middleton, J.C.*) BHAG CHAND *v.* MT. REBUNNISSA. **149 I.C. 1126=6 R.Pesh. 75=A.I.R. 1934 Pesh. 29 (1).**

Confirmation.

———Sale—Confirmation—Compromise postponing—Default of judgment-debtor — Fresh application for

EXECUTION—Sale—Confirmation.

confirmation not necessary. *See* C. P. CODE, O. 23, R. 2. **57 Bom. 616 = A.I.R. 1933 Bom. 358.**

———*Sale — Confirmation — Third party's interest intervening — Adjustment between decree-holder and judgment-debtor—Effect.*

When once a sale has been effected, a third party's interest intervenes and the Court cannot refuse to confirm the sale on the ground that the decree-holder and the judgment debtor say that the decree has been satisfied out of Court. (*Tek Chand and Coldstream, JJ.*) GULAB SINGH BHAGWAN SINGH *v.* KISHEN SINGH MAN SINGH. **15 Lah 801 = 6 R L. 683 = 149 I.C. 445 = 35 P.L.R. 375 = A.I.R. 1934 Lah. 508.**

Delivery of possession.

———*Sale—Delivery of possession by amin—Position of judgment-debtor continuing in possession.*

When once the amin puts the auction-purchaser in possession and the formalities of law are complied with, the delivery is complete and thereafter the possession of the judgment debtor or any persons becomes that of a trespasser. (*Mahadevayya, O.C.J.*) SADA ANANTHAPPA *v.* HEMANNA. **11 Mys L.J. 388 = 39 Mys. H.C.R. 184.**

———*Sale—Delivery of possession—House in occupation of debtor—Mode of delivering actual possession—Procedure.*

In order to effect delivery of actual possession of an inhabited house, it is necessary to eject the former occupier. Such delivery of possession is not a mere formal act which can be done by beating a drum and putting up a notice. (*James, J.*) RAM JANAM SINGH *v.* MOHAN LAL AHIR. **155 I.C. 908 = 7 R.P. 635 = 36 Cr.L.J. 860 (1) = 16 Pat.L.T. 361 = 1935 Cr.C. 985 = A.I.R 1935 Pat. 355.**

Encumbrance.

———*Sale—Encumbrance — Purchaser—Rights in—Encumbrance found by first Court and noticed by decree-holder—Payment of mortgage amount by auction purchaser— Suit by judgment debtor for refund of amount paid to mortgagee against decree-holder and auction purchaser.*

A decree-holder, in execution of his decree, brought the house of the judgment debtor to sale mentioning an encumbrance on the property which was found by the first Court but about which nothing was stated by the Appellate Court or High Court. The auction purchaser paid off the mortgage The judgment-debtor thereupon brought a suit against the decree holder and the auction-purchaser for return of the money paid to the mortgagee by the auction-purchaser on the ground that the mortgage was time-barred.

Held, that as the decree-holder was faced with the finding of the trial Court that there was a subsisting mortgage which had never been challenged subsequently, he did not act improperly in notifying the execution Court of the encumbrance and that he was not to blame; that as regards the auction-purchaser he had purchased the right, title and interest of the judgment-debtor which the Court thought to be only the equity of redemption, there was no connection between him and the mortgagor and that the debtor was not entitled to demand the amount of the mortgage from him. 27 All 97, Not Foll. (*Dalip Singh, J.*) DULLA *v.* SANDHI. **147 I.C. 762 = 6 R.L. 445 = A.I.R. 1933 Lah. 830.**

Jurisdiction.

———*Sale—Jurisdiction—Want of—Failure to object—Effect.*

Where an execution sale is wholly without jurisdiction, the fact that the judgment-debtor failed to raise an objection when notice was issued to him is immaterial.

EXECUTION—Sale—Purchaser's Rights.

(*Wazir, C.J. and Bisheshwar Nath, J.*) HARI SARAN DAS *v.* PYARE LAL. **8 O.W.N. 927 = I.R. 1931 Oudh 394 = 134 I.C. 602 = A.I.R. 1931 Oudh 398.**

Minor.

———*Sale—Minor—Decree against adult and minor defendants—Execution taken only against adult members and sale of their share fixed*—Locus standi *of minor member to challenge order.*

Where a decree is passed against adult members and minor members represented by their guardian but execution is taken only against the adult members and the sale of their share is fixed and ordered to be held, the minor member has no *locus standi* to object to the order on the ground that share in excess of what belongs to the adult members has been ordered to be sold. His remedy is only to have the sale set aside with regard to the excess. (*Mir Ahmad, A.J.C.*) PARMANAND BHAGAT RAM *v.* KISHAN CHAND BOOTA MAL. **154 I.C. 471 = 7 R. Pesh. 84 = A.I.R. 1935 Pesh. 5.**

———Sale—Minor—Proceedings against—Absence of representation by guardian—Sale—It void. *See* MINOR —EXECUTION PROCEEDINGS. **61 C.L.J. 322.**

Mortgage decree.

———*Sale —Mortgage decree—Order of properties to be sold—Power of Court—Adjustment of equities.*

A mortgagee decree-holder has not an unfettered right to sell the property at his sweet will and pleasure in any order that he chooses. Upon equitable considerations, the Court which has to execute the final decree may and ought to prescribe the order in which the mortgaged properties are to be sold ; when the question as to which of the properties has to be sold first comes up before the Court the solution of the question will depend upon a determination of the equities between the holders of the properties. (*Sen and Niamatullah, JJ.*) GHASI RAM *v.* RAM DIAL. **I.R. 1931 All. 551 (2) = 132 I.C. 807 (2) = 1931 A.L J. 1007 = A.I.R. 1931 All. 657.**

———*Sale — Mortgage decree—"Order for sale"—Preliminary decree in mortgage suit.*

"The date on which the Court ordered the property to be sold" is the date on which the Court executing the decree directs that the property should be sold and not the date on which a preliminary decree in the mortgage suit is passed. (*Young and Kuchhpal Singh, JJ.*) LAIQ RAM *v.* HAR PRASAD. **6 R A. 624 = 147 I.C. 1201 = 3 A.W.R. 579 = A.I.R. 1934 All. 253.**

Objection.

———*Sale—Objection — Judgment-debtor omitting to object on ground that property is inam—Effect.*

A judgment debtor who is aware of the sale proceedings and who does not make any objection prior to the sale, cannot, after it, be allowed to raise an objection to the attachment and sale on the ground that the property is inam property and is not liable to attachment and sale under S. 60, C. P. Code. (*Gruer, A.J.C.*) DEVI PRASAD *v.* SAYED WAZIRUDDIN. **31 N L.R. 217 = 156 I.C. 995 = 8 R.N. 5 = A I.R. 1935 Nag. 30.**

Purchaser's rights.

———*Sale—Purchaser's rights.*

An auction sale carries no guarantee of title and no guarantee of any other kind and if the auction-purchaser purchases rights which have been included in the sale improperly he must restore possession and must pursue such remedies as the law allows him against those persons who are to blame for it. (*Courtney Terrell, C.J. and Agarwala, J.*) MT. KABUTRI *v.* RAM PRASHAD SAHU **155 I.C. 225 = 7 R.P. 568 = 15 Pat L.T. 829 = A.I.R. 1934 Pat. 683.**

———*Sale—Purchaser's rights—Assignment in favour of plaintiff not valid as regards minor's share—Suit by*

EXECUTION—Sale—Purchaser's Rights.

plaintiff—Minor and mother—Assignor parties to—Mother appointed guardian ad litem *of minor—Sale—Auction-purchaser's rights not affected.*

A mortgage debt belonging to a Mahomedan mother and her minor daughter was fraudulently assigned by the mother to *C*, without any benefit or necessity. *C* sued to recover the debt, making the mother and daughter parties thereto. The mother was appointed guardian *ad litem* of the minor but both remained *ex parte* at the trial. *C* obtained a decree and, in execution, the property was purchased by *D*. The minor brought the present suit for recovery of her share of the mortgage money by the sale of the hypotheca in the possession of *D*.

Held, that *D* was a *bona fide* third party purchaser who was not bound to enquire into the title of *C* or the validity of the assignment in his favour, inasmuch as both the mother and minor were parties to the suit; that the mere fact that the mother has executed an assignment of the minor's interests also could not be treated as sufficient for holding that the interests of the mother were adverse to that of the minor and *D* would have been perfectly justified in believing that the question if the mother's interest was adverse to that of the minor would have been considered by the Court, when it appointed the mother as the guardian *ad litem* of the minor and that the appointment was made in a regular and proper way; that, in any event, the minor having been a party to the suit was precluded from questioning the validity of the sale. The decree was voidable at the instance of the minor and as there was no specific prayer in the present suit to set it aside, the sale could not be impeached (*Sundaram Chetty, J.*) KANNUSAMI CHETTI *v.* RAHIMAT AMMAL. **147 I C 83=6 R M 314 38 L.W. 539 - A I.R. 1933 Mad. 806 - 65 M L. J. 548.**

——*Sale Purchaser's rights — Prohibitory order against judgment debtor—Protection of court auction purchaser.*

Where, after the Court sale and before its confirmation, the judgment debtor was shown to have leased the property and realized a portion of the rent and thereupon the purchaser applied for a prohibitory order against the judgment-debtor and tenant as regards the paying and receiving of rent,

Held, that though the prohibitory order could not be issued under S. 47 or O. 21, R. 46, it could be passed under S. 151 as the ends of justice required the same. (*Broadway J.*) ABDUL GHANI *v.* SIMLA PANKING AND INDUSTRIAL CO., LTD., SIMLA. **I.R. 1932 Lah 180 - 136 I C. 4 - 33 P.L R. 435 = A I.R 1932 Lah. 295.**

———*Sale Purchaser's rights - Relation back—Date of sale and not confirmation.*

In the case of an execution sale, the purchaser's title relates back to the date of the sale and not to the date of its confirmation. (*Mukerji and Witter, JJ.*) C L. KIERNANDER *v.* RENIMADHAB KHEITRI **58 Cal 598 = I R. 1931 Cal 849 = 134 I.C. 561 = A I R 1931 Cal. 763.**

———*Sale—Purchaser's rights—Rights of—Right to growing crops when accrues*

The right to the growing crops passes by the sale of the land in the absence of an express provision to the contrary, and in the case of a Court sale, the right to the possession of the crops accrues from the date of the delivery of possession of the land. 13 Mad 15 and A. I R. 1919 Cal 588, Rel. on (*Patterson and Guha, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BAGIRATH MAHTO **61 Cal 991 = 38 C.W.N. 954 = 151 I.C. 662 = 7 R C. 147 = 35**

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Cr.L.J. 1367 = 59 C L.J. 482 = 1934 Cr.C. 908 = A.I.R. 1934 Cal 610.

———Sale—Purchaser's rights—Right to question mortgage on property sold. *See* C. P. CODE, O. 21, RR. 62 AND 66. **11 O.W.N. 1475 = A.I.R. 1935 Oudh 23.**

———*Sale—Purchaser's rights—Same property attached and sold by two Courts—C. P. Code, S.* 63.

When the same property is sold in an execution by two different Courts the sale by the Court which attached later but sold first is valid unless it was done with the knowledge of the prior attachment. When a property has been sold by a Court having jurisdiction to do so, there is nothing left which can be sold again by another Court. The second purchaser has therefore absolutely no title to the property. (*Mahomed Noor and Luby, JJ.*) MUKHRAM PANDEY *v.* ARJUN MISSIR. **13 Pat. 765 = 7 R P. 275 = 152 I.C. 902 = A.I.R. 1934 Pat. 511.**

———*Sale—Purchaser's rights—Subsequent adjustment between judgment debtor and decree holder—Effect on rights of third party purchaser*

A settlement between the decree holder and the judgment-debtor subsequent to the execution sale cannot have the effect of extinguishing the right of the third party auction purchaser. (*Shadi Lal, C. J.*) SALIA NAND *v.* JHANGI RAM. **I R 1932 Lah. 271 (2) - 137 I C. 735 (2) = 33 P L R. 146 = A I R 1932 Lah. 238.**

Receiver.

———*Sale—Receiver—Omission to get special leave—Validity of sale to receiver—Application to set aside sale second appeal.*

Where a receiver of Court does not obtain special leave to bid at an execution sale, a sale in his favour is void and an application to have it set aside falls under S. 47, C P.Code and therefore a second appeal lies from an order disposing of the application (1908) 1 Ch. 546, Ref. (*Mukerji and Guha, JJ.*) JITESWARI DASSI *v.* SUDHA KRISHNA MUKHERJEE. **59 Cal 956 - I R. 1932 Cal 606 - 139 I C. 186 = 36 C.W.N 125 = 55 C L J. 85 - A.I.R 1932 Cal. 672.**

[Appr. and Foll. 68 M.L.J. 597.**]**

Setting aside.

———*Sale—Setting aside—Absence of attachment—Sale if nullity—Attachment before appointment of guardian for minor defendant—Sale in pursuance of—If liable to be set aside.*

Even if there be no attachment at all, an execution sale will not be set aside merely for want of it. Still less can the fact, that attachment had been made before a guardian was appointed for a minor defendant, make any difference. (*Suhrawardy and K. S. Menon, JJ.*) VENGU CHETTI *v.* VALJEE KANJEE & CO **159 I C. 762 = 1935 M.W.N. 1303 = 42 L.W. 943 = A.I R 1936 Mad. 99 - 69 M.L.J. 862**

——— *Sale—Setting aside—Compromise — Agreement by judgment debtor to pay within stated time—Extension of time—Power of Court.*

When, in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise was made between the decree holder and the judgment-debtor, that on payment of the judgment-debt within a prescribed period, the sale should stand cancelled while upon failure to make such payment the sale should stand confirmed, time is of the essence of the agreement and the Court has no power to extend the time fixed for payment (*Srinivasa Iyer, J.*) PUTTAYYA *v.* THIMMARANGAYYA. **9 Mys. L J. 461.**

———*Sale—Setting aside—Fraud of decree-holder—Knowledge of party defrauded—Burden of proof.*

Once fraud is established, the burden of proof is on the decree holder or the auction-purchaser, as the case

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may be, of establishing that the person injured by his fraud and suing to recover the property has had clear and definite knowledge of those facts which constitute fraud at a time which is too remote to allow him to make the application. (*Mitter, J.*) RAMIZADDIN BASAR *v.* NAIMADDI BASSAR. **I.R. 1933 Cal. 391 = 143 I.C. 284 – 56 C.L.J. 570 = A.I.R. 1933 Cal. 339.**

———Sale—Setting aside—Fraud—Meaning of—Sale for inadequate price—If evidence of fraud. *See* C. P. CODE, O. 21. **155 I.C. 228 = A.I.R. 1935 Pat. 242.**

———*Sale—Setting aside—Material irregularity—Order for sale—Receiver appointed by same Court in respect of same property in another suit—Receiver aware of above order, applying for adjournment so that he may pay decree debt—Subsequent sale—Validity—Omission to get leave of Court—If fatal.*

A sale of certain property was ordered in execution of a decree. The same Court in another suit appointed the receiver over the properties which were being brought to sale in pursuance of the orders of the Court. After his appointment, the receiver put in an application to the same Court for permission to pay Rs. 1,000 towards the decree debt In this application, he described himself as the receiver and he asked that the sale might be stayed for the purpose of enabling him to make that payment towards the decree debt. That application was granted and there was subsequently an adjournment of the sale for one week. The sale then took place and after it applications were made by the judgment-debtor and the receiver to have the sale set aside upon the grounds that previous leave of the Court for the sale had not been obtained as it should have been in view of the fact that a receiver had been appointed and, secondly, that the receiver was not made a party to the sale proceedings.

Held, that knowing him to be the receiver, having ordered the sale and having allowed the sale to go on, subject of course only to a short adjournment, it could not be said that the executing Court was unaware of the appointment of the receiver and in ignorance allowed the sale to go on. With full knowledge of the facts, the executing Court allowed the sale to go on. It was thus quite unnecessary for any formal application to be made to that Court for leave for the execution to proceed. Nor can the receiver be heard to say under these circumstances that he should have been joined as a party to the execution proceedings. He was fully aware of the sale. All he asked for was an adjournment for a short time for a certain purpose. He never objected to the sale going on without his being made a party and never asked to be made a party and hence the sale should not be set aside on these grounds. (*Beasley, C. J. and Cornish, J.*) SOMASUNDARAM CHETTIAR *v.* PARIMALA KANDAR. **157 I.C. 379 = 8 R M 145 = 1935 M.W.N 738 = 42 L.W. 590 = A.I.R. 1935 Mad. 697.**

———*Sale—Setting aside—Mortgage suit—Refund of poundage.*

Where a Court sale of properties in a mortgage suit is set aside on the ground that there was no valid final decree, the Court has no power to direct a refund of the poundage paid. The most that could be done in such a case would be to give a certificate to the party that the case is a fit one for a refund and leave it to the revenue authorities to comply with it. That is no more than recommendation. (*Curgenven, J.*) VEERARAGHAVULU NAIDU *v.* CHENGALAMMA. **149 I.C. 1191 = 6 R M. 672 = 1934 M.W.N. 641 = 39 L.W. 762 = A.I.R. 1934 Mad. 409 = 67 M.L.J. 99.**

———Sale—Stting aside — Notification of sale—Material error or misdescription—Non-disclosure of road

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alignment scheme—Effect. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. 27, R. 35. **39 C.W.N. 897.**

———*Sale—Setting aside—Property not mortgaged included in proclamation of sale by error—Judgment-debtor failing to rectify error—Effect on right to recover such property and to set aside sale.*

Where property not included in the mortgage security is erroneously included in the notification of sale, but the judgment-debtor, despite notice, does not appear and take steps to rectify the error, and the property is sold,

Held, that mere abstention on the part of the judgment debtor to rectify such a mistake does not give the decree holder any right to sell property not included in the deed of mortgage or debar the judgment-debtor from claiming to have the sale set aside and to recover such property. (*Buckland, A.C.J.*) PROTIVA SUNDARI DEBI *v.* SARDA CHARAN GOHO. **155 I.C. 848 = 7 R.C. 634 = 38 C.W.N. 996 = A.I.R. 1935 Cal 15.**

Stay of.

———Sale—Stay of—Undertaking given in another suit—Right of decree holder to enforce indemnity clause. *See* C. P. CODE, S. 145—APPLICABILITY. **1932 A.L.J. 1060 = A.I.R. 1932 All. 68.**

Validity of.

———*Sale—Validity of—Adjudication of judgment-debtor pending suit—Non-joinder of Official Receiver—Effect of.*

A widow sued her husband's brother and his son for maintenance. Soon after filing the suit, the former was adjudicated insolvent The plaintiff took time to consider what was to be done under the circumstances; but chose to continue with the suit as such without impleading the Official Receiver and a decree was obtained making future maintenance a charge on certain property. In execution of the decree, she tried to bring the property to sale, whereupon the Official Receiver intervened and objected.

Held, that as execution was sought without leave of Court in respect of property which had already vested in the Official Receiver, and as leave was necessary under S. 28 (2) of the Provincial Insolvency Act, the proceedings were invalid as against the Official Receiver, in so far as he represented the estate of the insolvent, but that otherwise they were valid. 25 Mad 406 and *Wood* v. *Surr*, 19 Beav. 551, Ref.; 54 C. 595 (P.C.), Dist. (*Pandalai, J.*) PONNUTHAYE AMMAL *v.* OFFICIAL RECEIVER, COIMBATORE. **6 I.R. (Mad.) 262 = 146 I.C. 417 = 38 L.W. 762 = A.I.R. 1933 Mad. 858 = 65 M.L.J. 833.**

———*Sale—Validity of—Decree against father—Death of father pending execution—Minor's mother brought on record as legal representative but minor not impleaded.*

A decree was obtained against the minor's father and on the death of the father, execution was taken and the widow was brought on record as his legal representative, but the minor was not brought on record; and a sale was held in execution of the decree.

Held, that the sale should not be set aside merely on the ground that the minor was not brought on record; he would have been represented only by the widow as his guardian. 6 I. A. 233, Ref. (*Madhavan Nair and Jackson, JJ.*) KOTAYYA *v.* RADHAKRISHNAMURTI. **6 I.R. (Mad.) 260 = 146 I.C. 372 = 38 L.W. 588 = A.I.R. 1933 Mad. 833.**

———*Sale—Validity of— Legal representative not brought on record.*

Where persons, who are proper but not necessary parties to the suit, are impleaded but their legal representatives are not brought on record in execution of the

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decree, the omission is mere irregularity which does not vitiate the sale held in execution. Merely because they are added as parties in the suit, they do not become necessary parties to the execution proceedings. (*Wort and Kulwant Sahay, JJ.*) LALDHARI PRASAD *v.* NILKANTH PRASAD SINGH. **13 Pat. 10=6 I.R. (Pat.) 241=146 I.C. 155=15 Pat.L.T. 211=A.I.R. 1933 Pat. 640 (2).**

———*Sale—Validity of—Petition describing minor as major.*

One of the judgment-debtors who was in fact a major was described as a minor in execution proceedings.

Held, that as between the decree-holder and the other judgment-debtor, it was only an irregularity which did not make the sale, held in execution, a nullity, and that it was the duty of the party himself when he attained majority to inform the Court to take necessary action. (*Wort and Kulwant Sahay, JJ.*) LALDHARI PRASAD *v.* NILKANTH PRASAD SINGH. **13 Pat. 10=6 I.R. (Pat) 241=146 I.C. 155=15 Pat.L.T. 211=A.I.R. 1933 Pat 640 (2).**

———*Sale—Validity of—Property belonging to another sold as property of judgment debtor.*

Where certain property sold was shown in the bid sheet to be the property exclusively belonging to the judgment-debtors, but at the time of the sale, the title to the property sold was not in the judgment-debtor but in another.

Held, that the sale was a nullity. (*Sir John Wallis*) KEDAR NATH GOENKA *v.* MUNSHI RAM NARAIN LAL. **62 I.A. 224=14 Pat. 611=39 C.W.N. 1121=1935 O.W.N. 800=157 I.C. 485=16 Pat.L.T. 589=42 L.W. 279=37 P.L.R. 621=37 Bom.L.R. 794=8 R.P.C. 34=1935 A.L.J. 1147=1935 A.W.R. 1326—1935 M.W.N. 841 A.I.R. 1935 P.C. 139 (P.C.).**

———*Sale—Validity of—Property of persons not parties—Minor's conduct after attaining majority.*

The Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceedings to set them aside. But void sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Where a minor, who was not bound by a sale, received the surplus sale proceeds after attaining majority towards the satisfaction of a decree against him.

Held, that the sale may be taken to have been ratified (*Mitter and M.C. Ghose, JJ.*) MIDNAPUR ZAMINDARY CO., LTD. *v.* ABDUL ZALIL MIA. **60 Cal. 753 -6 I.R. (Cal) 245=146 I.C. 658=37 C.W.N. 500=A.I.R. 1933 Cal. 627.**

———Sale—Validity of—Receiver—Omission to get special leave—Void. *See* SALE—RECEIVER. **59 Cal. 956.**

———*Sale—Validity of—Sale by Tahsildar and not by collector—Sale held in contravention of R. 11, Ch. 12 M. Vol. I.*

Where a sale was conducted by the Tahsildar and not by the collector as laid down in Rule 11.

Held, Rule 11 in Ch. 12 M., Vol. I, has not the force of law and a sale conducted in contravention of it cannot be held to be illegal. (*Ranga Lal, J.*) LAL CHAND *v.* CENTRAL BANK OF INDIA, LTD., AMRITSAR. **A.I.R. 1935 Lah. 992.**

———*Sale—Validity of—Stay ordered by executing Court—Sale held by bailiff in ignorance of order.*

Where certain property was sold by auction in execution by the bailiff in ignorance of an *ex parte* order of stay of sale passed by the executing Court,

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Held, that the sale was a nullity.

Semble.—The case is different, where the lower Court allows a sale to proceed in ignorance of the appellate Court's order of stay of sale under O. 41, R. 5. (*Bagulay and Mosely, JJ.*) MA TI *v.* MA THIT. **11 Rang. 410=147 I.C. 700=6 R.R. 173=A.I.R. 1933 Rang. 416.**

———Sale—Validity of—Transmission of a decree made without notice to guardian of minor defendant and without appointment of guardian—Execution sale by transferee Court—If nullity. *See* C. P. CODE, S. 39. **69 M.L.J. 862.**

What passes.

———*Sale—What passes—Certificate sale—Reconveyance of sold property—Effect.*

What is sold in execution of a certificate sale is the right, title and interest of the judgment-debtors, and when the same is reconveyed to them by a deed, the judgment debtors regain what was lost to them on account of the sale. (*Muhammad Noor and Agarwala, JJ.*) DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH. **14 Pat. 518=155 I.C. 213=7 R.P. 557—16 Pat.L.T. 713=A.I.R. 1936 Pat. 200.**

———*Sale—What passes—Decree against Hindu widow—What passes under sale.*

Where what is sold at an auction sale is "the right, title and interest of the widow," the sale may be of the widow's interest or the entire interest. The Court should in such a case consider what was liable to be sold and what in fact was sold. If for instance the property attached and sold is described "as the share of the plaintiff as widow" only the limited interest of the widow will pass Where a Hindu widow defends or institutes a suit on behalf of the estate, the decree is binding on the estate and a sale in execution thereof may be taken to be of the entire estate. (*Ameer Ali, J.*) NAGENDRABALA DASEE *v.* PANCHANAN MOURIE. **60 Cal. 1236 -149 I.C. 1053=6 R.C. 689=A.I.R. 1934 Cal. 162.**

———Sale—What passes—Sale of Zamindari—Details of encumbrances mentioning mortgaged mortgages—Absence of mention in sale certificate—Inference. *See* DEED—CONSTRUCTION—SALE CERTIFICATE. **1935 O.W.N. 365=A.I.R. 1935 Oudh 304.**

When complete.

———Sale—When complete—Acceptance of bid—If sufficient—Deposit of 25 per cent.—If essential. *See* LIMITATION ACT, ART. 166. **A.I.R. 1935 Pesh. 160.**

Miscellaneous.

———*Sale—Applications for—Priority.*

Where there are rival decree-holders and applications for sale, in order to claim priority it is necessary as a physical fact that one sale should take place before the other sale and the criterion on which execution application was made first is the natural criterion to adopt. (*Mukerji and Bennet, JJ.*) MUZAFFARNAGAR BANK, LTD. *v.* HAFIZUDDIN **I.R. 1932 All. 491 (1)=138 I.C. 686=A.I.R. 1933 All. 10.**

———*Sale—Government Notification No. 576/1 A-93—Applicability.*

The U.P. Government Notification No. 576/1 A-93 of 26th March, 1932, is not applicable to those cases in which the sale has already taken place in pursuance of order passed by the Court in execution before the date on which the notification came into force. 8 Luck. 504 and 147 I.C. 613, Dist.; 4 All, 116, Ref. (*Srivastava and Rachhpal Singh, JJ.*) BASANT LAL *v.* MAHOMED NAWAB ALI KHAN. **9 Luck. 554=6 R.O. 417=148 I.C. 464=11 O.W.N. 411=A.I.R. 1934 Oudh 143.**

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———*Sale—Rule of* caveat emptor—*Applicability.*

The ordinary rule of *caveat emptor* applies in the case of auction sales under the orders of Courts. (*Addison, J.*) MAHOMED HAYAT *v.* GULAM NABI. **32 P.L.R. 390 = 132 I.C. 201 (2) = A.I.R. 1931 Lah. 598.**

———*Sale—Zamindari property—Sale of portion.*

Where the property to be sold is zamindari property, any fractional share can be sold without impairing the value of that property. (*Mukerji and Bennet, JJ.*) MAHOMED SAID KHAN *v.* MAHOMED ABDUS SAMI KHAN. **I.R. 1932 All. 487 = 138 I.C. 612 = A.I.R. 1932 All. 664.**

Satisfaction of decree.

———Satisfaction of decree—Execution application settled and dismissed—Decree not thereby satisfied *See* DECREE, *supra.* **A.I.R. 1933 Sind 305.**

———Satisfaction of decree—Plea of—Maintainability—Satisfaction not reported to Court passing decree or recorded—Effect. *See* C. P. CODE, O. 21, R. 2 (*iii*). **39 C.W.N. 961.**

Security bond.

———*Security bond—Execution in favour of Court—Enforcement.*

A security bond executed in favour of the Court is enforceable in execution. There need be no assignment to the person for whose benefit the bond is intended. (*Mitter and Henderson, JJ.*) RAJENDRA CHANDRA SARKAR *v.* BIPIN CHANDRA SAHA. **60 Cal. 1298 = 149 I.C. 339 = 6 R.C. 569 = 37 C.W.N. 973 = A.I.R. 1934 Cal. 64.**

Miscellaneous.

———*Miscellaneous—Powers of Court—Correction of mistake in decree.*

Where in a suit for ejectment a decree was passed but the pre settlement numbers were given instead of the current numbers and the Court directed the party to amend the same, but meanwhile he had lost his appeal, but later on he preferred a further appeal and therein succeeded, and thereafter applied for execution giving the correct numbers

Held, that there being no doubt about the identity of the land, execution could be proceeded with. (*Keane, S. M. and Oppenheim, J.M.*) NAGESHAR PRASAD SINGH *v.* ZAMAN MUSALMAN. **15 R.D. 210 = 12 L.R. 61 (Rev.).**

———*Miscellaneous—Proclamation of sale—Valuation of properties—Principles—Encumbered properties.*

It is not a correct method of valuing heavily encumbered properties by taking their value in an unencumbered state and simply deducting therefrom the amount of the encumbrances. (*Henderson and Mitter, JJ.*) PIRAMAL *v.* BASANTI DAS. **158 I.C. 556 = 8 R.C. 194 = A.I.R. 1935 Cal 614.**

EXECUTION OF DOCUMENT.

See (1) DEED—EXECUTION.
(2) WILL—EXECUTION.

EXECUTION SALE.

See (1) C. P. CODE, S. 47, AND O. 21, RR. 89 TO 92.
(2) EXECUTION—SALE.
(3) MORTGAGE.

EXECUTOR.

See (1) SUCCESSION ACT (1925), SS 211, 213, 233, 244, 307, 311, 332, 368, *etc.*
(2) WILL.

———*Decree against—Subsequent revocation of probate—Effect of*

The validity of a decree against a person as executor of the will and legal representative of the estate of *K* to whom probate had been granted is not affected by the subsequent revocation of the probate. It is binding on the estate and on all the heirs of *K*. 35 C. 955; *Hewson v. Shelly*, (1914) 2 Ch. D. 13 and *Allen v. Dundas*, 3 T. R. 125, Ref. (*Page, C.J. and Mya Bu, J.*) MA THEIN *v.* NEPPAN. **9 Rang. 360 = I.R. 1931 Rang. 270 (2) = 133 I.C. 494 = A.I.R. 1931 Rang. 283.**

———*Duty of—Directions of testator to be carried out.*

Executors are bound to carry out the direction of the will. It is unseemly on their part to obtain probate of a will and then, instead of acting as ministers of the will of the testator, turn against his wishes and try to act in contravention of the directions of the testator. (*Tyabji, J.*) BALKRISHNA *v.* VINAYAK. **I.R. 1932 Bom. 518 = 139 I.C. 594 = 34 Bom.L.R. 113 = A.I.R. 1932 Bom. 191.**

———Executor *de son tort*—Who is. *See* SUCCESSION ACT, S. 203. **62 Cal 120.**

———*Executor* de son tort—*Appropriation of amounts—Rule—Power to remit amount due to deceased and give preference to his own dues.*

If no express appropriation be made by either the debtor or the creditor, it may be implied or presumed that payments to and drawings against a running account are to be attributed to the earliest items on the opposite side of the account. But as between trustees and their beneficiaries and as to every person in a fiduciary character, the rule is modified, and so long as the trustee has money standing to his account, drawing by him will be attributed to his own money, the trust being intact. An executor *de son tort* or an executor or trustee has no right to remit any part of the amount, that is legitimately due to the beneficiary and give preference to that extent towards satisfaction of his own dues. An executor *de son tort*, or even an executor or trustee has no right to remit any part of the amount that is legitimately due to the deceased and give preference to that extent towards satisfaction of his own dues. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711 = 154 I.C. 479 = 7 R.C. 459 = A.I.R. 1935 Cal. 39.**

———*Executor* de son tort—*Damages for non delivery of live stock—Right to deduction.*

If a rightful executor or administrator brings an action of trover or trespass against the executor *de son tort*, the latter may give in evidence in mitigation of damages, payments made by him in the rightful course of administration. As regards live-stock, which have been delivered by an executor *de son tort*, he is entitled to some deduction for their maintenance, as the maintenance and upkeep of live-stock is in due course of administration. But where live-stock has not been delivered and for the non-delivery of which no explanation has been offered, the executor *de son tort*, from the moment of conversion becomes a wrong doer and the owner would be entitled to the full value of the animal in trover, without any deduction for the feeding. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711 = 154 I.C. 479 = 7 R.C. 459 = A.I.R. 1935 Cal. 39.**

———*Executor* de son tort—*Liability to account.*

An executor *de son tort* is not liable for a general account unless he has received all the assets left by the deceased. He has no right to retain them from the moment he is a wrongdoer and the beneficiary is, therefore, entitled to them as they were on that date, irrespective of what may have happened to them thereafter, and whether their loss, if any, was due to his negligence or not. He cannot, however, be regarded as a person who is necessarily a wrongdoer; nor is his possession necessarily wrongful at its inception. His intentions, in respect of the acts attributed to him, must be taken into

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account to determine when the conversion took place and as on what date liability is to be fastened on him. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAVAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Executor* de son tort—*Mode of accounting—Interest on deduction.*

All payments made by an executor *de son tort*, for which he will get deduction, must be credited against the principal amount due from him and they should bear interest at a reasonable rate as from the dates on which they were made. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAVAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Executor* de son tort—*Payment of debt by—Validity.*

Where an executor *de son tort* really acts in the character of executor and out of the assets in his hands makes a payment in satisfaction of a debt from the deceased, to a person who at the time might reasonably suppose that he had authority to act as executor, such payment is valid and binding upon the person who afterwards becomes the rightful administrator. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAVAG KUMARI DEBEE. **61 Cal. 711=154 I C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Executor* de son tort—*Payment of income-tax on sums realized—Right of deduction.*

An executor *de son tort* is entitled to get a deduction of income tax paid by him, on the unrealized income of the deceased realized afterwards by him. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAVAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R C. 459=A.I R. 1935 Cal. 39.**

———*Executor* de son tort—*Realization of debt by—Liability for interest not realized.*

Where a debt carries interest the principal and the interest payable thereon forms the entire debt. And if what an executor *de son tort* does in connection with the debt does, in fact or in law, amount to its realization, he is liable even for such interest as is not actually realized by him. (*Mukerji and S.K. Ghose JJ.*) SHIVAPRASAD SINGH *v.* PRAVAG KUMARI DEBEE. **61 Cal 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Liability of—Wilful default—Burden of proof—Unauthorized investment of moneys.*

Wilful default can only be decreed against an executor in respect of something which he could have received but for his wilful default or neglect, and such default or neglect must be proved by the party alleging it. The party who alleges the default has to prove clearly and affirmatively at least one act of wilful default to the satisfaction of the Court, before the Court can take action in that behalf. It has also to be shown that the estate has suffered loss or damage, and that such loss or damage is due to the wilful default or neglect of the executor. An executor who invests money belonging to the estate in an unauthorized or hazardous investment is liable for the loss arising therefrom. (*Wadia, J.*) MAHOMED HUSSEIN *v.* AISHABAI. **155 I.C. 334=7 R.B. 426=36 Bom.L R. 1155=A.I.R. 1935 Bom. 84.**

———*Misappropriation of money—Power of Court to check—Order in interlocutory proceedings.*

Where, pending actual proceedings in the suit for administration, the executors who were also residuary legatees were shown to have helped themselves to the money of the estate and they did not cease doing so even after exhibition had been made of the risky condition of the estate,

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Held, that the executors were guilty of a breach of trust and that the Court could in interlocutory proceedings order them to bring back into Court the money in their hands or order them to furnish security for that amount. (*Rankin, C.J. and Mitter, J.*) GOBARDHANDAS *v.* GOPALDAS MODI. **60 Cal. 30=149 I.C. 743=6 R.C. 626=A.I.R. 1933 Cal. 286.**

———*Powers of—Borrowing for benefit of estate—Right of creditor against estate.*

Where an executrix executed promissory notes as such executrix and it appeared the loans were taken for the benefit of the estate and the creditor impleaded all the parties and applied for a decree binding the estate.

Held, that the only right which the creditor could claim was the right to be subrogated to the right of the executrix to be indemnified out of the estate to the necessary extent. It is consequently necessary that the right of the executrix to the indemnity is established before the creditor can be subrogated to such a right. (Case law elaborately discussed.) (*Mukerji and Guha, JJ.*) MANIN CHRNDRA NANDI *v.* SUDHIR KRISHNA BANERJEE. **136 I.C. 893=I.R. 1932 Cal. 245=35 C.W.N. 850=53 C.L.J. 589=A.I.R 1932 Cal. 182.**

———*Powers of—Lease for ninety nine years with option of purchase to lessee.*

An executor stands in the position of a trustee for the parties beneficially entitled to the estate. His primary duty is to realize the assets and to administer the estate in the best way possible. The validity of transaction entered into by the executor depends on the answer to the question, whether it was reasonably necessary for the due administration of the estate of the deceased. Having regard to the provisions of S. 36 of the Trusts Act and S. 307 of the Succession Act, the executor has no power to grant a lease for ninety-nine years with an option to the lessee to purchase the reversion in the demised premises or any part thereof at any time during the said period. *Oceanic Steam Navigation Co.* v. *Sutherberry*, (1880) 16 Ch. D. 236 and 22 B. 1, Ref. (*Wadia, J.*) MAHOMED HUSSEIN *v.* BAI AISHABAI. **141 I.C. 734=I.R. 1933 Bom. 142=34 Bom.L.R. 1365=A.I.R. 1932 Bom. 604.**

———*Powers of—Power to release debt.*

An executor, administrator or trustee who desires to avoid liability for a debt released by him must show that he has acted honestly and reasonably, in which case only can be fairly claim to be excused. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAVAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Powers of—Will executed prior to Hindu Wills Act (XXI of 1870).*

In the case of a will executed before the Hindu Wills Act came into force, the mere appointment of an executor did not cause any property to vest in him and if as an executor he was entitled to hold the property, he held it only as manager. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I R. 1932 Cal. 540=138 I.C. 882=55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

———*Sale to wife—Onus—Suspicion.*

Trustees expose themselves to great peril in allowing their own relatives to interfere in any matter connected with the execution of the trust; for the suspicion which the circumstance is calculated to excite is one which it would require a very strong case to remove. Therefore, in the case of sale by a trustee or an executor to his wife, the Court will seek to be certain, by vigilant scrutiny, of the true nature of such a transaction, because one can readily see that the close relationship between

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husband and wife may, unless the nature of the transaction is explained, give rise to the not unnatural inference that the husband was truly the party intervening in the case, and that not without benefit to himself. *Burrell* v. *Burrell*, (1915) S.C. 333, Foll. (*Lord Thankerton.*) ACHI THAYARAMMAL *v.* BALKIS NACHIAL. **I.R. 1931 P.C. 173=131 I.C. 781=14 O.L.J. 357=34 L.W. 740=8 O.W.N. 330=A.I.R. 1931 P.C. 68=61 M.L.J. 456 (P.C.).**

———*Vesting of estate—Date of—Relation back.*

The view adopted by the Calcutta High Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate which belonged to the testator at the time of his death ; or in other words, that the vesting takes place on the taking of probate, but relates back to the time of the testator's death and to the estate which then belonged to him. 22 Cal. 788 ; 25 Cal. 103 and 33 Cal. 116, Ref. (*Mukerji and Guha, JJ.*) GOPAL LAL CHANDRA *v.* AMULIYA KUMAR SUR. **59 Cal. 911=142 I.C. 747=I.R. 1933 Cal. 313=A.I.R. 1933 Cal. 234.**

———*Will authorizing majority to act—Right of minority to sue against the wish of the majority.*

The will of deceased declared that the trustees were to act by majority and also laid down that trustees were to act by resolution passed at the meeting of the Board or by circulation of resolutions signed by them. The majority of trustees were in favour of compromising a claim and opposed to the filing of a suit, and no fraud or collusion on the part of the majority was established.

Held, that the minority of trustees or executors had no right against the wish of the majority to file a suit and involve the estate in a risk of heavy loss for costs. *Luke* v. *Smith Kesinton Hotel & Co.*, (1879) 11 Ch. D. 121 ; 34 Mad. 406 ; 29 Mad. 302 ; 5 C.L.J. 527 ; 24 All. 226 and 26 Cal. 409, Dist. (*Aston, A.J.C.*) GORDHANDAS MADANLAL *v.* BHAGWANDAS RAMPERSAD. **150 I.C. 476=7 R.S. 9=A I R. 1933 Sind 232.**

EX PARTE DECREE. *See* C. P. CODE, O. 9, RR. 7 AND 13.

EXPERT EVIDENCE. *See* EVIDENCE ACT, SS 45 AND 46.

EXPERT OPINION. *See* EVIDENCE ACT, SS. 45, 46 AND 47.

EXPLOSIVES ACT (IV OF 1884)—*Rules under Rr. 3 and 10*—"*Explosives*"—"*Throw downs*" *and Chinese crackers whether included.*

Under the amendment to Rr. 3 and 10 under the Explosives Act, even "throw downs" and Chinese crackers are "explosives". (*Wallace, J.*) SEENAPPA CHETTY, *In re.* **I.R. 1932 Mad. 317 (1)=136 I C. 781 (1)=33 Cr.L.J. 364=1932 M.W.N. 424=35 L.W. 315=1932 Cr.C. 312 (2)=A I.R. 1932 Mad. 320.**

———*Sale of* phatakas—*Licence, if necessary.*

Quaere—Whether a licence for the sale of *patakhas* is required under the Explosives Act. (*King, J.*) KIFAYAT ULLAH KHAN *v* EMPEROR **53 All. 226=I.R. 1931 All 290=130 I C. 626=32 Cr.L.J. 564=12 L.R. 42 (Cr.)=1930 A.L.J. 1467=1931 Cr.C. 33=A.I.R. 1931 All. 17.**

———**S. 7and Rr. 35 and 3**—*Applicability*—Phatakas.

Phatakas are not explosives within the meaning of the Explosives Act but are toy fireworks and as such exempt from R. 35, Explosive Rules 8 P.R. 1910 (Cr.), Foll. (*Ferrers, J C. and Aston, A. J. C.*) PRITAMDAS CHELLARAM *v.* EMPEROR. **6 I R. (Sind) 34=145 I.C. 621=34 Cr.L J. 1046=1933 Cr.C. 535=A.I.R. 1933 Sind 171.**

———**S. 7 and R. 35**—*Finding' of lower Courts regarding* phataka—*High Court—Powers of.*

EXPLOSIVE SUBSTANCES ACT (1908), S. 4 (b).

Where neither the trial Court nor the appellate Court personally inspected a *phataka* in order to come to a finding that it was not a toy-work, the High Court in revision refused to be bound by the concurrent finding of fact arrived at by the two Courts and on a personal inspection came to a different finding that the *phataka* was a toy-work and not a firework within the meaning of R. 35. (*Ferrers, J.C. and Aston, A.J.C.*) PRITAMDAS CHELLARAM *v.* EMPEROR. **6 I R. (Sind) 34=145 I.C. 621=34 Cr.L J. 1046=1933 Cr.C. 535=A.I.R. 1933 Sind 171.**

———**S. 8**—"*Occupier*"—*Meaning of—Manager appointed by owner to be in charge—Penal Code, S.* 176.

"Occupier" in S. 8 of the Explosives Act means a person in actual occupation of the premises and in control of the operations in progress there. The person who is obliged under the section to give notice of the accident is the individual who is actually on the spot and in charge of the factory. An "occupier" therefore may include either the owner if he is in actual possession, or in a case where the owner has appointed a manager and put him in charge of the factory, such manager. Both the owner and the manager cannot, in such a case, be regarded as occupiers. The conviction of the owner in such a case is not therefore sustainable under S. 176, I. P. Code. (*Niyogi, A J. C.*) GOPAL AMBADAS *v.* EMPEROR. **163 I C. 400 (1)=9 R.N. 2=37 Cr L J. 839=18 N.L.J. 235.**

EXPLOSIVE RULES (1914), R. 35—*Toy fireworks.*

R. 35 is not applicable to toyfire works. (*Lakshmana Rao, J.*) ADINARAYANA *v.* EMPEROR. **1930 M.W.N. 1261.**

EXPLOSIVE SUBSTANCES ACT (IV OF 1908)—*Gramophone needles—Whether lethal weapon.*

A gramophone needle can scarcely be regarded as a lethal weapon. (*Ferrers, J.C. and Rupchand, A.J.C.*) KHIMJI KHETSI *v.* EMPEROR. **8 R S. 20=156 I C. 972=36 Cr.L.J. 1037.**

———**S. 4**—*Offence under—Proof—Presence of mansal stains on wearing apparel.*

It cannot be said from the presence of mansal stains on a man's wearing apparel that he either made or had in his possession or under his control an explosive substance with intent by means thereof to endanger life or cause serious injury to property in British India and conviction under S. 4 (*b*) of the Explosive Substances Act is not under those circumstances sustainable. (*Agha Haidar, J*) INDAR DATT *v.* EMPEROR. **I R. 1931 Lah. 537=132 I.C. 185=32 Cr.L.J. 818=1931 Cr C. 648=A.I.R. 1931 Lah. 408.**

———**S 4 (b)**—"*Possession*"—*Meaning.*

Possession must be conscious and intelligent possession and not merely the physical presence of the accused in proximity or even in close proximity of the offending object. These are the important elements which go to make up an offence under S. 4 (*b*) of the Explosive Substances Act. A.I R. 1928 Lah. 272, Rel. on. (*Agha Haidar, J.*) KULDIP CHAND *v.* EMPEROR. **153 I.C. 139=7 R L. 392 (2)=36 Cr.L J. 300 (2)=37 P.L.R. 132=A I.R. 1934 Lah. 718.**

———**S. 4 (b)**—*Use of bombs against police—Conspiracy—Preparation of test bomb—Offence.*

Where in pursuance of a scheme to use bombs against the police, the accused was shown to have made a bomb apparently to use it for a test or experiment,

Held, that the accused was guilty under S. 4 (*b*). (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) BHABANANDA BANERJEE *v.* EMPEROR. **6 I R. (Cal.) 183=146 I.C. 186=34 Cr L.J. 1232=57 C L J. 213=1933 Cr.C. 1249=A.I R. 1933 Cal. 747 (S.B.).**

EXPLOSIVE SUBSTANCES ACT (1908), Ss. 4 (b) and 5.

——Ss. 4 (b) and 5—*Sanction under S. 4(b)—Charge and conviction under S. 5—Legality—Cr. P. Code, Ss. 236 and 237.*

The fact that sanction of the Local Government is obtained only for a prosecution under S. 40 (*b*) of the Explosive Substances Act does not make an alternative charge under S. 5 and conviction thereon illegal. It is competent to the Sessions Judge under S. 236, Cr. P. Code, to frame a charge under S. 5 as well. Even if no charge has been framed under S. 5, the accused can well be convicted under S. 5, by reason of the provisions of S. 237, Cr. P. Code. (*Bajpai, J.*) NATHU RAM *v.* EMPEROR. **57 All. 398 = 153 I.C. 147 = 7 R.A. 448 = 36 Cr.L.J. 266 = 16 L.R. 17 (Cr.) = 4 A.W.R. 672 = 1934 A.L.J. 1088 = 1934 Cr.C. 1302 (2) = A.I.R. 1934 All. 982.**

——S. 5—*Possession of explosive substances—Burden of proof—Accused assisting in discovery—Inference.*

The accused person had pointed out and was a mere tool for disclosing the existence of some explosives from places of which he had no exclusive possession.

Held, that it was for the prosecution to show that from the facts it could be inferred that these articles were in control and possession of the accused. 18 P.R. 1917, Ref. (*Abdul Qadir, J.*) AMRIK SINGH *v.* EMPEROR. **I.R. 1931 Lah. 332 = 130 I.C. 652 = 32 Cr. L.J. 585 = 32 P.L.R. 150 = 1931 Cr.C. 114 = A.I.R. 1931 Lah. 50.**

——S. 6—*Offence under—Ingredients.*

Under S. 6 of the Explosives Substances Act, the intention to procure, counsel, aid, abet or to be accessory to the commission of an offence is a necessary ingredient. Ordinarily, it is the primary intention of the accused that must be taken into consideration in determining his guilt. (*Jai Lal, J.*) BIMAL PERSHAD JAIN *v.* EMPEROR. **6 R.L. 588 = 35 Cr.L.J. 752 = 1934 Cr.C. 914 - 148 I.C. 745 = A.I.R. 1934 Lah. 583.**

——S. 7—*Sanction for prosecution—When to be obtained.*

Under S. 7 of the Explosive Substances Act, it is not necessary that the sanction of the Local Government for a prosecution under the Act should be obtained before taking cognizance of the case or enquired into by the committing Magistrates. Sanction obtained when the case proceeds to trial in the Sessions Court is sufficient (*Bajpai, J.*) NATHU RAM *v.* EMPEROR **57 All. 398 = 153 I.C 147 = 7 R.A. 448 = 36 Cr.L.J. 266 = 16 L.R. 17 (Cr.) = 4 A.W.R. 672 = 1934 A.L.J. 1088 = 1934 Cr.C. 1302 (2) = A.I.R. 1934 All. 982.**

EXPROPRIETARY TENANCY.

See (1) AGRA TENANCY ACT, SS. 79 AND 116.
(2) LANDLORD AND TENANT.

EXPUNGING FROM RECORD.

See (1) C. P. CODE S. 151.
(2) CRIMINAL TRIAL—EXPUNGING REMARKS.
(3) PRACTICE—HIGH COURT.

EXTENSION OF TIME

See (1) C. P. CODE, SS. 148 AND 151, AND O. 34, R. 4.
(2) LIMITATION ACT, S. 5.

EXTINCTION OF TENANCY. *See* C. P. TENANCY ACT, SS. 12 AND 25.

EXTINGUISHMENT OF OCCUPANCY RIGHTS.

See (1) AGRA TENANCY ACT (1926), SS. 99, 107 (3) AND 197.
(2) BENGAL TENANCY ACT, SCH. III.

EXTINGUISHMENT OF RIGHT.

See (1) LIMITATION ACT, S. 28.
(2) MERGER.
(3) T. P. ACT, S. 101.

EXTORTION. *See* PENAL CODE S. 387.

EXTRADITION ACT (1903), S. 7.

EXTRADITION—*When allowed—Offences for which it can be demanded.*

The policy of extradition law is to secure offenders guilty of only grave crimes and not purely local crimes or slight offences. The act complained of must be a "crime" according to the criminal law of both countries; and no person should be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as of the State which demands extradition. The word "crime" denotes something more than a mere breach of a legal rule. (*Mahadevayya, C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) VENKATARANGAIENGAR *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 328 = 39 Mys. H.C.R. 485 (F.B.).**

EXTRADITION ACT (XV OF 1903)—*Applicability—British Indian subjects committing offences outside British India.*

The Indian Extradition Act or the British Foreign Jurisdiction Act has no application to a case where British Indian subjects resident within the ordinary original jurisdiction of the High Court commit offences outside British India. (*Rankin, C. J. and Pearson, J.*) SASADHAR ACHARJYA, *In the matter of.* **136 I.C 598 = I.R. 1932 Cal 230 = 33 Cr L.J. 322 = 35 C.W.N. 1082 = A.I.R 1932 Cal. 229.**

——Construction and scope of.

The provisions of the Indian Extradition Act are meant to insure that the arrest and detention of persons alleged to have committed offences outside British territory should conform to a certain procedure, and the sections of the Act dealing with that procedure must be construed strictly in favour of the subject. (*S. K. Ghose and Henderson, JJ.*) SANTABIR LAMA *v.* EMPEROR. **62 Cal 399 = 155 I.C. 537 = 7 R.C. 598 = 36 Cr.L.J. 794 = 39 C.W.N. 285 = 1935 Cr. C. 156 = A.I.R. 1935 Cal. 122.**

——Ss. 7 and 8—*Applicability and scope—Offence under S. 395, I.P. Code—Procedure—Magistrate, if bound to report to Local Government.*

S. 7 (2) of the Extradition Act prescribes the way in which warrants in connection with an extradition offence referred to in S. 7 (1) shall be executed. In the case of a warrant under S. 395, I. P. Code, the offence being an extradition offence, S. 7 (2) applies. S. 8 does not apply to the case, because that section does not distinctly specify that the procedure laid down therein is for an extradition offence. It only provides that in either of these cases the Magistrate, if he feels inclined to do, may report the case to the Local Government. (*Varma J.*) MADAN SAHU *v.* EMPEROR. **153 I.C. 580 = 7 R.P. 355 = 36 Cr.L.J. 375 = 15 Pat.L.T. 493 = 1934 Cr.C. 1210 (2) = A.I.R. 1934 Pat. 553.**

——S. 7—*Scope—Warrant in disregard of—Legality—High Court's power to quash proceedings.*

Before a Political Agent in a Native State can legally issue a warrant under S. 7 of the Extradition Act, these conditions have to be satisfied: (1) the offence must be an extraditable one, that is, one of those mentioned in the first Schedule to the Act; (2) the accused must not be an European British subject; and (3) the offence must have been committed by the accused in the territory of the Native State concerned. Unless all these three conditions are fulfilled, the issue of a warrant by the Political Agent is unauthorized, and the arrest in pursuance of such warrant illegal. In such a case the High Court has power to interfere and quash the proceedings under its powers under S. 491, Cr. P. Code and to order the arrested person to be set at liberty. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) A.W. GOULTER *v.* EMPEROR.

EXTRADITION ACT (1903), S. 7.

160 I.C. 115=8 R.S. 120=37 Cr.L.J. 312=1935 Cr. C. 1307=29 S.L.R. 60=A.I.R. 1935 Sind 244.

———S. 7—*Treaty between East India Company and Nepal, Art. V—Discretion of Government in respect of surrender of subjects.*

Art. V of the Treaty of the East India Company with Nepal does not exclud the operation of S. 7 of the Extradition Act. The Act does not take away the discretion of the respective Governments in respect of surrender of subjects. (*James and Agarwala, JJ.*) MOONGA LAL KEOT *v.* EMPEROR. **12 Pat 347—6 I R. (Pat.) 151 =145 I.C. 274=34 Cr L J 932=14 Pat.L T. 537= 1933 Cr C. 787=A.I R 1933 Pat. 295.**

———S 7—*Warrant addressed to District Magistrate —Endorsement to police—Arrest—Interference by High Court.*

The Extradition Act does not authorize the District Magistrate himself to inquire into the legality, much less the propriety of the warrant and then to refuse to execute it on the ground that in his opinion the warrant had been wrongly issued. The endorsement of the District Magistrate on the extradition warrant forwarding it to the Superintendent of Police or the arrest made under the directions of the Superintendent of Police would therefore not be any proceeding of an inferior Criminal Court and would merely be an executive act, and the High Court would therefore not have jurisdiction to interfere with the proceeding on the revisional side. (*Sulaiman, C. J. and King, J.*) SANDAL SINGH *v.* DT. MAGISTRATE AND SUPERINTENDENT, DEHRA DUN. **56 All. 409=1934 A.L.J. 556=151 I.C. 279= 7 R.A. 128 (2)=35 Cr L.J. 1296=4 A.W.R. 1526= 1934 Cr.C. 214=A.I.R. 1934 All. 148.**

———S. 7—*Warrant—Legality—Conditions.*

Under S. 7 there are three conditions precedent for the issue of a legal warrant: (1) the offence must be an extradition offence, that is, one of those given in Sch. 1, Extradition Act, (2) the accused must not be a European British subject and (3) the offence must have been committed or must be supposed to have been committed by the accused in the territories of the State. Without all these three conditions being fulfilled, the Political Agent would have no authority to issue a warrant for the arrest of any person, who has either escaped into or is in British India, and the arrest of such a person in pursuance of such a warrant would be equally illegal. (*Sulaiman, C. J. and King, J.*) SANDAL SINGH *v.* DT. MAGISTRATE AND SUPERINTENDENT, DEHRA DUN. **56 All 409=1934 A.L.J. 556=151 I C. 279=35 Cr.L.J. 1296=4 A W.R. 1526=7 R.A. 128 (2)=1934 Cr.C. 214=A.I R. 1934 All. 148.**

———S. 7 (1)—*Particulars in warrant—Compliance with law.*

Where the applicant was clearly well defined to ensure identity and the place at which and the authority to whom delivery was to be made were also mentioned and also the Court of the Magistrate in which the initial complaint was pending.

Held, that the warrant was not wanting in particulars required by law to be stated. (*Wazir Hasan, C. J. and Raza, J.*) BAIJ NATH *v.* EMPEROR. **I.R. 1931 Oudh 386=134 I C. 594=32 Cr L.J. 1243=8 O.W.N. 933 =1931 Cr.C. 826=A.I R. 1931 Oudh 394.**

———S. 8 A—*Extradition of British subject—Warrant issued to District Magistrate—Reference to Local Government.*

If the person whose extradition is sought is a British subject in whose favour the discretion under the Treaty might possibly be exercised by the Local Government he should raise the point before the District Magistrate who would then refer the matter for the orders of the Local Government. (*James and Agarwala, JJ.*) MOONGA LAL KEOT *v.* EMPEROR. **12 Pat. 347=6 I. R. (Pat.) 151=145 I.C. 274=34 Cr L.J. 932=14 Pat. L.T. 537=1933 Cr.C. 787=A.I.R. 1933 Pat. 295.**

———S. 8 A—*Scope—Discretion under—Failure to report—If illegal.*

It is discretionary with the Magistrate under S. 8-A of the Extradition Act to report the matter to the Local Government. If he is inclined to hold an enquiry, he may do so, and then, if he thinks fit, may report the matter to the Local Government. The failure to report does not make the procedure of the Magistrate illegal. (*Varma, J.*) MADAN SAHU *v.* EMPEROR. **153 I.C. 580=7 R P. 355=36 Cr.L.J. 375- 15 Pat.L.T. 493= 1934 Cr C. 1210 (2)=A.I R. 1934 Pat. 553.**

———S. 10—*Applicability and scope—Arrest and detention—Procedure—Conditions of legality—Cr. P. Code, S.* 491.

A Magistrate has power to issue a warrant under S. 10 of the Extradition Act when neither a warrant nor a requisition has been received. But an essential ingredient of that procedure is that there must be a warrant. When that procedure is not followed, and when the arrest is effected on nothing except the order of a Magistrate, such arrest is illegal. Even if the arrest were by the police on their own responsibility, the provision in S. 23 must be followed and the detention must be made subject to the restrictions laid down by S. 10, otherwise the arrest and detention would be illegal and the person arrested and detained must be released on an application made by him under S. 491, Cr P. Code. (*S. K. Ghose and Henderson, JJ.*) SANTABIR LAMA *v.* EMPEROR. **62 Cal. 399=155 I.C. 537=7 R C. 598=36 Cr.L.J. 794=39 C.W.N. 285=1935 Cr.C. 156=A.I R. 1935 Cal. 122.**

———S. 10—*Scope—Contravention of—Effect— Detention for more than 2 months without sanction—Legality.*

Persons who are proceeded against under S. 10 of the Extradition Act cannot be detained in prison for more than two months without the sanction of the Local Government. That is the effect of S. 10 (3). When no extension has been asked for or obtained from the Local Government under sub-S. (3), the continued detention of the persons arrested becomes illegal and they are therefore entitled to be discharged from custody, on their applying for a writ in the nature of *habeas corpus* (*Wart and Fazl Ali, JJ.*) SURAJ NARAYAN JHA *v.* EMPEROR. **158 I.C. 981=8 R.P. 233=36 Cr.L.J. 1500=16 Pat.L.T. 551=1935 Cr.C. 1063=A I.R. 1935 Pat. 419.**

———S. 18—*Treaty with Nepal, Art. V—"Neither Government shall be bound to surrender"—Meaning.*

The Extradition Act is the law of the land, not so far as the third chapter is concerned to be applied for this or that country by Order in Council or by any special means. If some special procedure has been arranged by treaty, S. 18 provides that it may be followed; but if the Government should choose to exercise the powers given by the Act, no Municipal Court could interfere on the ground that the Government had undertaken to act otherwise by treaty. The words "shall not be bound" in Art. V of the Treaty between the East India Company and Nepal mean that each Government retains a right to exercise its discretion in the matter of the surrender of its subjects. (*James and Agarwala JJ.*) MOONGA LAL KEOT *v.* EMPEROR. **12 Pat. 347=6 I.R. (Pat.) 151=145 I.C. 274=34 Cr.L.J. 932=14 Pat.L.T. 537=1933, Cr.C. 787=A.I.R. 1933 Pat. 295.**

EXTRADITION ACT (1903), S. 18.

EXTRADITION ACT (1903), S. 22 (3).

——**S. 22 (3)**—*Rules framed under—Effect.*

Rules made under S. 22 (3) by the Governor-General in Council and published in the *Gazette of India* must be treated as if they are sections enacted by the Act itself. (*Wazir Hasan, C.J. and Raza, J.*) BAIJNATH *v.* EMPEROR. **I.R. 1931 Oudh 386=134 I.C. 594=32 Cr.L.J. 1243=8 O.W.N. 933=1931 Cr.C. 826=A.I.R. 1931 Oudh 394.**

——**S. 23**—*Applicability—Arrest without warrant.*

S. 23 of the Extradition Act refers only to cases of persons arrested under S. 54, Cl. 7 of the Cr. P. Code, that is, persons arrested not only without a warrant but also without an order from a Magistrate. (*S. K. Ghose and Henderson, JJ.*) SANTABIR LAMA *v.* EMPEROR. **62 Cal. 399=155 I.C. 537=7 R.C. 598=36 Cr.L.J. 794=39 C.W.N. 285=1935 Cr.C. 156=A.I.R. 1935 Cal. 122.**

EXTRAORDINARY JURISDICTION OF HIGH COURT.

See (1) LETTERS PATENT OF HIGH COURTS.
(2) JURISDICTION.

EXTRA TERRITORIAL JURISDICTION.

See (1) CR. P. CODE, S. 188.
(2) PENAL CODE, S. 4.

EXTRINSIC EVIDENCE. *See* EVIDENCE ACT, S. 92.

FABRICATING FALSE EVIDENCE. *See* PENAL CODE, S. 192, 193 AND 465.

FACTORIES ACT (XII OF 1911)—*Amendment of Act—Desirability pointed out.*

The Factories Act is carelessly and loosely drawn. It is a penal statute and its term should be clear and definite. It is necessary that several of its provisions should be suitably amended. (*Lort Williams and Mallik, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ANDREWS. **59 Cal. 519=54 C.L.J. 538=I.R. 1931 Cal. 881=134 I.C. 881=35 C.W.N. 1108=1931 Cr.C. 839=A.I.R. 1931 Cal. 639.**

——*Construction—Principles.*

The provisions of the Factories Act have to be construed in favour of the employee and strictly against the employer; and the Act, which is enacted for the benefit of the employee, should not be used merely for the purpose of harassing the employer. (*Guha and McNair, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* H. E. WATSON. **152 I.C. 566=7 R.C. 292=38 C.W.N. 1008=1934 Cr.C. 1104=A.I.R. 1934 Cal. 730.**

——*Prosecution under—Management acting in good faith—Launching of prosecution as test case—Propriety of.*

Where the authorities themselves are doubtful about the applicability of certain provisions of the Act, but the management act reasonably and show a genuine desire to meet any complaint and to rectify irregularities, and there is no absence of good faith, the launching of a test case in respect of technical infringements of the provisions of the Act is uncalled for, in view of the trivial character of the charges. (*Guha and McNair, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* H.E. WATSON. **152 I.C. 566=7 R.C. 292=38 C.W.N. 1008=1934 Cr.C. 1104=A.I.R. 1934 Cal. 730.**

——**S. 2 (2)**—*'Employed' in the factory—Meaning.*

According to the definition given in S. 2 (2) of the Act, a person who works in a factory, whether for wages or not, in any of the ways enumerated in that clause, shall be deemed to be employed in that factory. Where therefore it is shown that certain persons were engaged in the factory in one of those ways, it must be presumed they were 'employed' in the factory. (*Costello, J.*) RAM DIT MALL *v.* EMPEROR. **61 Cal. 332=151 I.C. 763=7 R.C. 173=35 Cr.L.J. 1401=38 C.W.N. 801=1934 Cr.C. 786=A.I.R. 1934 Cal 546.**

FACTORIES ACT (1911), S. 22.

——**Ss. 2 (2), 28, 29 and R. 59**—*Scope—Persons employed in the factory—Who are.*

It is not correct to say that the Factories Act affects only manual workers. The question whether a particular worker comes within the definition clauses of S. 2 of the Factories Act which are of a very wide application, and in whose case an exception could be claimed under S. 29, has to be settled by the Inspector of Factories, who is the constituted authority under the law to express the opinion whether that person holds a position of supervision or management, or is employed in a confidential capacity, as mentioned in S. 29, R. 59, and framed under the Act. All persons, not strictly coming within the exceptions, contemplated by S. 29 and those in whose cases there is no "opinion" of the Inspector entitling the manager to claim exemption, as contemplated by S. 28 are to be deemed as persons employed in the factory. The clauses in S. 2 are of very wide application. (*Guha and McNair, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* H.E. WATSON. **152 I.C. 566=7 R.C. 292=38 C.W.N. 1008=1934 Cr.C. 1104=A.I.R. 1934 Cal. 730.**

——**Ss. 2 (2) (d) and 41 (h), Rule 35**—*Breach of R. 35—Putting ginned cotton into bojhas—Men engaged in—Omission in the register—Work connected with the factory—Meaning of.*

The accused who was manager of a cotton ginning factory was charged with a breach of R. 35, in that five men were working in the factory though their names were not shown in the attendance register. Those men were engaged in putting ginned cotton into what were called bojhas or akhas and they were engaged for that work not by the owner of the factory but by the merchants who owned cotton.

Held, that putting it into bales and having it pressed must be considered work connected with the manufacturing process within the meaning of S. 2 (2) (*d*) and the fact that those labourers were employed by the merchants who owned the cotton and not by the factory owner did not make any difference and that the accused was therefore guilty of an offence under S. 41 (*h*). (*Staples, A.J.C.*) LOCAL GOVERNMENT *v.* NUSARWANJI. **I.R. 1933 Nag. 195=143 I.C. 772=1933 Cr.C. 1065=A.I.R. 1933 Nag. 283.**

——**S. 2 (3) (a)**—*Scope.*

S. 2 (3) (*a*) is intended not to cover merely individual business in any premises but is intended to denote any premises as a composite whole with a central source of power, *i.e.*, either steam, water, or other electrical or mechanical power. (*Patkar and Murphy, JJ.*) JAICHAND *v.* VITHAL BAJIRAO. **57 Bom. 150=I.R. 1933 Bom. 250=142 I.C. 630=35 Bom.L.R. 83=1933 Cr.C. 257 (2)=A.I.R. 1933 Bom. 109.**

——**S. 22**—*'Employed' in a factory—Meaning of.*

Persons who are actually engaged in work in a factory in any of the ways enumerated in S. 2 (2) of the Factories Act, must be presumed to be employed in the factory. (*Costello, J.*) RAM DIT MULL *v.* EMPEROR. **61 Cal. 332=151 I.C. 763=7 R.C. 173=35 Cr.L.J. 1401=38 C.W.N. 801=1934 Cr.C. 786=A.I.R. 1934 Cal. 546.**

——**Ss. 22, 36 and 41**—*Offence under—Elements of.*

The act prohibited by S. 22 consists in employing persons on a Sunday (1) without giving them a compensation holiday, and (2) without giving notice to the Inspector and putting up a notice in the place mentioned

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in S. 36. Mere failure to put up notice of Sunday work is not an offence. A manager may be convicted under S. 41 (*a*) read with this section if he employs any person on a Sunday without fulfilling all these conditions; if he violates even one of them, the offence is complete; but if he violates all of them the offence is still only one offence. (*Burn, J.*) VENKATARATNAM, *In re*. **159 I.C. 422=37 Cr.L.J. 104 (1)=1935 M.W.N. 326=41 L.W. 497=1935 Cr.C. 390=A.I.R. 1935 Mad. 301.**

———**S. 26**—*Extra work not done in or about factory—Prohibition of section if applies.*

Where the manager of an ice factory had fixed only 7½ hours a day for employee but it appeared that persons who had finished their work used to take ice to ships in the docks, when required.

Held, that the extra work was not work done in or about the factory and that it did not fall within the prohibitory provisions of the Act. (*Lort Williams and Mallik, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ANDREWS. **59 Cal. 519=54 C.L.J. 538=I.R. 1931 Cal. 881=134 I.C. 881=35 C.W.N. 1108=1931 Cr.C. 839=A.I.R. 1931 Cal. 639.**

———**Ss. 26, 36 and 41 (a)**—*Failure to comply with S. 36 not by itself a breach of S. 26.*

Failure to comply with S. 36 would not in itself amount to a breach of S. 26 or justify the conviction under S. 41 (*a*). (*Broomfiled and Divatia, JJ.*) EMPEROR *v.* NANUBHAI. **58 Bom. 137=6 R.B. 235=147 I.C. 1154=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 Cr.C. 205=A.I.R. 1934 Bom. 43.**

———**S. 26**—*Object of.*

The main object of S. 26 is not to ensure that the manager and no one else should fix the hours, but that the hours should be fixed and regular. Hours of employment are to be fixed; they are not to be subject to sudden or casual alteration at anyone's discretion or caprice. (*Broomfiled and Divatia, JJ.*) EMPEROR *v.* NANUBHAI. **58 Bom. 137=6 R.B. 235=147 I.C. 1154=35 Cr.L.J. 542=35 Bom.L.R. 1167=1934 Cr. C. 205=A.I.R. 1934 Bom. 43.**

———**S 26**—*Power of changing working hours cannot be exercised by Manager after mill starts working.*

The Manager and he alone can change the working hours on complying with the conditions stated in S. 36 (3) of the Act, but that power of change cannot be exercised by the Manager after the mill starts working on the period fixed by him. Any change subsequently made therein could not be covered by the change in the standing orders as contemplated by S. 36 (3), but would be an unauthorized departure from the fixed period on at particular day. Although the hours fixed on the night in question were 12-30 A.M. to 5-30 A.M. the mills stopped working for about 15 minutes on account of a breakdown and the manager extended the closing hour to 5-45 A.M. and issued an order to that effect and informed the workmen and the Inspector of Factories of that change and its reason.

Held, that the accused must be convicted under S. 41 (*a*). (*Broomfield, and Divatta, JJ.*) EMPEROR *v.* NANUBHAI. **58 Bom. 137=6 R.B. 235=147 I.C. 1154=35 Cr L.J. 542=35 Bom.L.R. 1167=1934 Cr. C. 205=A.I R. 1934 Bom. 43.**

———**S. 26**—*Scope—Changing system of "specified" hours—Legality.*

A continuously changing system of hours "specified" is something altogether different from what is contemplated by a fixation of special hours. The former course is not permitted by S. 26. (*Lort Williams and Mallick,*

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JJ.) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* ANDREWS. **59 Cal. 519=54 C.L.J. 538=I.R. 1931 Cal. 881=134 I.C. 881=35 C.W.N. 1108=1931 Cr.C. 839=A.I.R. 1931 Cal. 639.**

———**S. 33 (2) and (3)**—*Manager's absence from duty not notified—Liability for infringement.*

Where the person, who is charged with offences under the Factories Act, was absent from his duties as manager at the time when the alleged infringements of the Act took place, he cannot be prosecuted for infringements of the Act which took place during his absence, although the absence was not notified to the authorities as required by law, for which non-compliance the occupier could be held liable. (*Guha and McNair, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* H. E. WATSON. **152 I.C. 566=7 R.C. 292=1934 Cr.C. 1104=38 C.W. N. 1008=A.I.R. 1934 Cal. 730.**

———**S. 35**—*Construction—Duty to keep employment register—Time sheet in lieu of—Sufficiency.*

S. 35 of the Factories Act is mandatory, and it makes the position clear that in the absence of an order by the Inspector, one register in Form G, of all persons employed and of the hours and nature of their employments must be kept. It cannot be supplemented by a time-sheet. (*Guha and Mc Nair, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* H. E. WATSON. **152 I.C. 566=7 R.C. 292=38 C.W.N. 1008=1934 Cr.C. 1104=A.I.R. 1934 Cal. 730.**

———**Ss. 35 and 41 (h)**—*Employment register—'Up to date'—Meaning of.*

In order that the employment register can properly be said to be up to date, it is necessary that it should contain, day by day, the names of the persons employed in the factory, their hours of work and the nature of their employment. Even where the register contains entries day to day but it does not contain all the particulars required by S. 35, it could not be said to be up to date within the meaning of S. 41 (*h*) of the Act. (*Costello, J.*) RAMDIT MALL *v.* EMPEROR. **61 Cal. 332=151 I.C. 763=7 R.C. 173=35 Cr.L.J. 1401=38 C.W.N. 801=1934 Cr.C. 786=A.I.R. 1934 Cal. 546.**

———**S. 41**—*Complaint by Inspector—Evidentiary Value of.*

To lodge a complaint is not to give evidence upon which a Court can act. The complaint is in the nature of an indictment. The averments in the complaint must be established and properly proved by evidence and the matter must not be dealt with as if the complaint had the sanctity of affidavit-evidence or even something in the nature of a deposition. Before any one can be convicted on charges formulated in a complaint all those charges must be fully and properly proved in accordance with the procedure and the law of evidence applicable to criminal charges. (*Costello, J.*) COTTON *v.* EMPEROR. **6 R C. 597=149 I C. 450=35 Cr L.J. 996=1934 Cr C. 861=A I.R. 1934 Cal. 604.**

———**Ss. 41 and 34**—*Joint liability of occupier.*

The "occupier" which by the definition clause includes the Managing Agent is liable under S. 41 jointly and severally along with the manager. And they could be jointly tried. (*Scroope, J.*) AGARWALA *v.* EMPEROR. **I.R. 1932 Pat. 65=136 I C. 289=33 Cr.L.J. 274 (2) =13 Pat.L.T. 252=1932 Cr.C. 414=A.I.R. 1932 Pat. 188.**

———**S. 41**—"*Occupier.*"

The word "occupier" in general means a person who occupies the factory either by himself or his agent. He

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may be an owner, he may be a lessee or even a mere licensee, but he must have the right to occupy the property and dictate how it is to be managed. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* JAMSHEDJI NASERWANJI. 55 Bom. 366=I.R. 1931 Bom. 410 (1)=133 I.C. 826=32 Cr.L.J. 1063 (1)=33 Bom L. R. 309=1931 Cr.C. 564=A.I.R. 1931 Bom. 308.

———S. 41—*Prosecution under—Nature of evidence necessary.*

When prosecutions under the Factories Act are instituted they should be properly launched and properly conducted and proper evidence should be given in support of the complaint lodged by the Inspector of Factories. Where the prosecution has been conducted in a solvenly and unsatisfactory manner and it was impossible upon the evidence before the Magistrate to find out whether the defendant held a responsible position in the company and whether their premises were a factory within the meaning of the Act,

Held, that the conviction could not be sustained, though having regard to the written statement and the evidence of the defendant, it was necessary and desirable in the interests of justice that the Crown should have another opportunity of proving those matters satisfactoril. (*Costello, J.*) COTTON *v.* EMPEROR. 6 R C. 597=149 I.C. 450=35 Cr.L.J. 996=1934 Cr.C. 861 A.I.R 1934 Cal. 604.

———S. 41 (a)—*Occupier—Meaning of—Mukaddam—Duties of—Joint trial with manager—Validity of.*

The word "occupier" denotes a person who is either a proprietor or otherwise entitled to be in possession of the factory and control its working. He may or may not actually occupy the building and even if he carries on the work through an agent he does not cease to be the occupier. He cannot therefore be any ony who is a mere servant charged with specific duties either in regard to the control of the machinery, workmen or office. A mukaddam is really a foreman of the operatives and a servant of the factory. He is neither a managing agent nor a person authorized to represent the occupier. He cannot therefore be regarded as an occupier or manager. He cannot be tried jointly with the manager for an offence under S. 41 (*a*) of the Act but can be tried under S. 42 (1) on the complaint of the manager. (*Niyogi, A.J.C.*) EMPEROR *v.* NARAYAN. 29 Nag. L.R. 72=6 I.R. (Nag.) 7=144 I.C. 693=34 Cr.L.J. 821=1933 Cr.C. 342=A.I.R. 1933 Nag. 100.

———S. 41 (a)—*Owner—Liability of—Factory in the control of manager.*

Even if the accused, who is the owner of a factory, shows that he knows nothing about the management of the factory and that he has left the whole conduct of its affairs to a manager appointed by him for the purpose, he is not free from the liability imposed on him by S. 41 (*a*) of the Factories Act. (*Beaumont, C. J. and Murphy, J.*) EMPEROR *v.* JAMSHEDJI NASERWANJI MODI. 55 Bom 366=I.R. 1931 Bom 410 (1)=133 I.C. 826=32 Cr.L.J 1063 (1)=33 Bom. L.R. 309=1931 Cr.C. 563=A.I.R. 1931 Bom 308.

———S. 41 (h)—*Applicability—Employment register—When "up-to date"—Omission of names of certain employees—Effect.*

In order that the employment register of a factory can properly said to be up to date, it must clearly contain day by day the names of the persons employed in the factory, their hours of work and the nature of their employment. Even if there are entries in it relating to certain dates, if those entries do not contain all the particulars required by S. 35 of the Act, if cannot be said to be up-to-date. Where, therefore, the employment register did not contain any entry at all in respect of certain dates, the register is not up to-date and the matter falls within the purview of S. 41 (*h*) of the Factories Act. (*Costello, J.*) RAM DITT MULL *v.* EMPEROR. 61 Cal. 332=151 I.C. 763=7 R.C. 173=35 Cr.L.J. 1401=38 C.W.N. 801=1934 Cr.C. 786=A.I.R. 1934 Cal. 546.

———Ss. 41 (h) and 41 (j)—*Offences under—Joint trial.*

Offences under Ss. 41 (*h*) and 41 (*j*) of the Factories Act are offences of the same kind within the meaning of S. 239 (*c*) of the Cr. P. Code. (*Scrope, J.*) AGARWALA *v.* EMPEROR. I.R. 1932 Pat. 65=136 I.C. 289=33 Cr L J. 274 (2)=13 Pat L T. 252=1932 Cr. C. 414=A I.R 1932 Pat. 188.

———Ss 52 and 26—*Applicability.*

S. 52 does not in any way govern S. 26. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* NANUBHAI. 58 Bom. 137=6 R B 235=147 I.C. 1154=35 Cr L J. 542=35 Bom L R. 1167=1934 Cr.C. 205=A.I.R. 1934 Bom. 43.

FACTUM VALET—Doctrine of. *See* HINDU LAW—MARRIAGE.

FAIR COMMENT. *See* (1) PENAL CODE, S. 499.
(2) TORTS—DEFAMATION.

FALSE EVIDENCE. *See* PENAL CODE, SS. 191, 192, ETC.

FAMILY ARRANGEMENT.—

See also (*i*) DEED — CONSTRUCTION — FAMILY ARRANGEMENT.
(*ii*) HINDU LAW — FAMILY ARRANGEMENT.
(*iii*) MAHOMEDAN LAW—FAMILY ARRANGEMENT.

———*Arrangement acted on for long period—Party whether can reside.*

Where a maintenance arrangement has been acted upon for a long period of time one of the parties cannot be allowed to repudiate the same. (*Aston, A. J. C.*) JASODABAI *v.* DHARAMDAS THAWERDAS. 26 S.L.R. 184=142 I.C. 271=I.R. 1933 Sind 86=A.I.R. 1932 Sind 186.

———*Binding character.*

When a family arrangement has been entered into or acquiesced in by all the persons interested in the family property, and has been carried into effect, then none of the persons who consented thereto may thereafter be heard to repudiate that arrangement or to set up that it is not binding in law. (*Dunkley, J.*) MA KYAW *v.* DAW KYE U. 159 I C. 798=8 R R. 284=A.I.R. 1935 Rang. 355.

———Construction—Provision for maintenance—Personal liability. *See* HINDU LAW—FAMILY ARRANGEMENT 9 O.W.N. 291=A I.R. 1932 Oudh 168.

———*Essentials—Compromise effected to avoid long litigation.*

A compromise entered into in order to avoid a long litigation and the creation of a further burden on the family property by a Hindu widow, with the next reversioner acknowledging his right to the inheritance after her death, he on his side binding himself not to alienate the property during her lifetime can rightly be held to be a family settlement. (*Wazir Hasan, C.J. and Raza, J.*) JAGDAMBA BUX SINGH *v.* BADRI PRATAB SINGH. 8 Luck. 586=6 I.R. (Oudh) 46=145 I.C. 352=10 O. W.N. 493=17 R.D. 379=A.I.R. 1933 Oudh 322.

———*Essentials for validity.*

The arrangement must be one concluded with the object of settling a *bona fide* dispute, arising out of conflicting claims to property, which was either existing at

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the time or was likely to arise in future. *Bona fides* is the essence of its validity and from this, it follows that there must be either a dispute or at least an apprehension of a dispute, a situation of contest which is avoided by a policy of giving and taking. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C. 882=55 C L J. 205=A.I.R. 1932 Cal. 600.**

[F. 55 C.L.J. 283 (297)]

———*Test of validity*—Bona fides.

A family arrangement to be valid and operative must be one concluded with the object of settling a *bona fide* dispute arising out of conflicting claims to property, which was either existing at the time or was likely to arise in future. *Bona fides* is the essence of its validity. There must be either a dispute or at least an apprehension of a dispute, a situation of contest which is avoided by a policy of giving and taking, or else all transfers or surrenders will pass under a cloak of family arrangement. (*Mukerji and Guha, JJ.*) JOGES CHANDRA KHASNAVIS *v.* PRASANNA KUMAR MAJUMDAR. **I.R. 1932 Cal. 594=139 I.C. 250=55 C.L.J. 283=A I. R. 1932 Cal. 664.**

———*Test of validity—Provision for maintenance*—Bona fide *settlement of claim.*

It is a wrong principle of law to test the validity of an agreement by having recourse to the expedient of finding out whether the claims of the parties to that agreement were good. The true test is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the family settlement. Where the differences between the parties were adjusted by means of a compromise and the result of the arrangement was that the defendants were given possession of a portion of the property, in lieu of maintenance and it appeared that the arrangement was come to with a view to maintain amity and peace in the family,

Held, that the adjustment satisfied all the requirements of a family settlement. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAJPATI *v.* PARBATI. **I.R. 1933 Oudh 229=144 I.C. 283=10 O.W.N. 336=A.I.R. 1933 Oudh 295.**

———*Validity of.*

Under the guise of a family arrangement, a party can not enter into a transaction which he is not under the law competent to do and which is beyond his disposing power. 41 C.L.J. 341, Ref. (*Mukerji and Bartley, JJ.*) SYED ZAINUDDIN HOSSEIN *v.* MOULVI MAHOMED ABDUR RAHIM. **140 I. C 799=I.R. 1933 Cal 46=58 C. L. J. 259=36 C. W. N. 972=A.I R. 1933 Cal. 102.**

———*Validity of—Essentials to.*

The parties to a family arrangement must be persons who have a right in the property in regard to which the arrangement is made and there must be mutuality among them in the arrangement so as to make the arrangement binding on all of them. 51 All. 79, Foll. (*Mya Bu and Dunkley JJ.*) TAUNG MIN *v.* RAM KUMAR RAM. **151 I. C. 101=7 R. R. 40=A. I. R. 1934 Rang. 176.**

———*Validity of—Existence of dispute—Consideration—Necessity for.*

The existence of a dispute or the assertion of a claim to any property is not essential for the creation of a family arrangement. Where an arrangement has been arrived at between certain members of the family, that is designed to promote peace and goodwill among certain of its members, this by itself is a good consideration to support the transaction. It is well established that, in cases family arrangement, Courts will not scan too closely the quantum of consideration. (*Sen and Allen, JJ.*) LATIF JAHAN BEGAM *v.* MAHOMED NABI KHAN. **I.R. 1932 All. 288=137 I. C. 231=1932 A.L.J. 9=A.I.R 1932 All. 174.**

———*Validity of—Pre existing rights based on family custom—Arrangement in recognition of—Custom not proved—Effect on arrangement.*

A family arrangement based on a family custom is one in recognition of pre-existing rights. The fact that the custom alleged is not established or is abandoned, does not affect the validity of the arrangement. To make the arrangement valid, it is enough if there were disputes which were settled on the basis of a *bona fide* belief in the existence of the custom. (*Srivastava, C.J. and Thomas, J.*) BHAGAT *v.* MADHO PRASAD. **151 I C. 452=7 R.O. 127=11 O.W.N. 1071=A.I.R. 1934 Oudh 462.**

FAMILY SETTLEMENT. *See also* FAMILY ARRANGEMENT.

———Conditions of validity—Invalid gift by Mahomedan to sons and their families—If can take effect as family settlement. *See* MAHOMEDAN LAW—WAKF. **13 Rang 679=156 I.C. 1038.**

———*Validity—Test of.*

The strength or validity of the claims of the parties cannot be made the basis for determining the validity of the family settlement. 116 I C. 59, Rel. on. (*Srivastava, J.*) AZIZUL HASAN *v.* MAHOMED FARUG. **9 Luck. 401=6 R O. 327—147 I.C. 973—10 O.W. N. 1254—A.I R. 1934 Oudh 41.**

FATAL ACCIDENTS ACT (XIII OF 1855)—*Liability for damages under — Motor-car—Accident causing death—Mortgagee without possession of car—If liable—"Owner"—Who is—Deed—Construction.*

Under a document in writing, a motor-car was sold to defendant for Rs. 1,000 paid by him to one *K* and was transferred in his name in the police records. *K*, who borrowed the amount, agreed to pay the defendant back, the said sum of Rs. 1,000 in monthly instalments of Rs. 100. *K* himself having possession of the car and plying it for hire as belonging to himself; on repayment of the entire amount of Rs. 1,000, the defendant was to have the car re-transferred in the name of *K*, in the police records. There was an accident, while the car was being driven, while under the control of *K*, which resulted in the death of a person. The representatives of the latter sued the defendant for damages under the Fatal Accidents Act.

Held, on a construction of the document as a whole, that the defendant was not the owner of the car, but only a mortgagee with limited rights of ownership; nor could it be said that *K* was a servant of the defendant; and that consequently the defendant was not liable in damages for the death of the deceased. (*Wadia, J.*) GOOLBAI MOTABHAI *v.* PESTONJI COWASJI. **159 I.C 363=8 R B. 190—37 Bom.L.R. 410=A.I.R. 1935 Bom. 333.**

———Measure of damages — Sentimental damages—Loss of prospective pecuniary advantage. *See* TORT. **A.I R. 1935 Mad. 322.**

———*Murder of husband — Compensation to young wife—Considerations—Possibility of remarriage.*

In awarding compensation to a young wife for the murder of her husband, the Court should take into account the possibility of the widow, remarrying and thus absolving her deceased husband's estate from liability to maintenauce. (*Alan Broadway, Offg. C. J. and Bhide, J.*) MAHOMED *v.* MUSSAMMAT MARYAM. **I.R. 1932 Lah. 176=135 I.C. 794=32 P.L.R. 866=A.I.R. 1932 Lah. 146.**

FATAL ACCIDENTS ACT (1885), S. 1.

———**S. 1**—*Compensation—Basis.*

In assessing compensation under the Act, the proper criterion is the value of the pecuniary benefits to be reasonably expected, had the deceased not died. (*Coldstream and Dalip Singh, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MT. RATAN KALI. **I.R. 1932 Lah. 435 (2) = 138 I.C. 239 = 33 P.L.R. 271 = A.I.R. 1932 Lah. 355.**

———**S. 1**—*Compensation—Funeral expensese.*

Funeral expenses and expenses alleged to have been incurred in the Police Court cannot be recovered in an action under the Act. (*Roy, J.*) PENHEIRO *v.* MINNEY. **61 Cal. 480 = 151 I.C. 680 = 7 R.C. 154 = 38 C.W.N. 520 = 59 C.L.J. 221 = A.I.R. 1934 Cal. 655**

———**S. 1**—*Death not directly caused by accident—Liability for damages.*

Under Act XIII of 1855, in order that damages may be claimed, it is sufficient if a person by his wrongful act neglect or default, shall have caused the death of another person. These words do not mean that death must be the direct result of the injury caused. Damages may be claimed, where the death was due to the injury caused by the striking having become septic. (*Addison and Agha Haidar, JJ.*) SARDARA *v.* CHARAN SINGH. **6 I.R. (Lah.) 31 (1) = 144 I.C. 820 = 34 P.L.R. 656 = A.I.R. 1933 Lah. 770.**

———**S. 1**—*Plaint—Averments in.*

A plaint in a suit under the Act has to be very carefully drawn and should give full particulars of the person or persons, for whom or on whose behalf the action has been brought and of the nature of the claim, in respect of which damages are sought to be recovered. (*Roy, J.*) PENHEIRO *v.* MINNEY. **61 Cal. 480 = 59 C.L.J. 221 = 151 I.C. 680 = 7 R.C. 154 = 38 C.W.N. 520 = A.I.R. 1934 Cal. 655.**

———**S. 1**—"*Representative*"—*Meaning of.*

The word "representative" in the Act has a special meaning of its own. It has not the same meaning as "legal representative" in the C. P. Code. It means and includes all or any of the persons for whose benefit a suit under the Act could be maintained. It is not a surplusage in the case of Europeans and Eurasians and where there is no executor or administrator, the wife and children are entitled to maintain the action. (*Roy, J.*) PENHEIRO *v.* MINNEY. **61 Cal. 480 = 38 C.W.N. 520 = 151 I C. 680 = 7 R.C. 154 = 59 C.L.J. 221 = A.I.R. 1934 Cal. 655.**

———**S. 1**—"*Representative*"—*Meaning of—If means "legal representative".*

The word 'representative' in the Fatal Accidents Act has not the same meaning as the expression as "legal representative" as defined in the C. P. Code. It does not mean only executor or administrator, but includes all or any of the persons for whose benefit a suit can be brought under the Act. (*Wadia, J.*) GOOLBAI MOTABHAI *v.* PESTONJI COWASJI. **159 I.C. 363 = 8 R.B. 190 = 37 Bom.L.R. 410 = A.I.R. 1935 Bom. 333.**

———**S. 1**—*Suit for the benefit of wife only—Children joined as plaintiffs but agreeing to forego their claims—Frame of suit, if correct.*

If all the persons, for whose benefit the suit should have been brought are the plaintiffs and no further action can be brought in respect of the same subject-matter of the complaint, the purpose of the Act is served. So a suit by the wife and children is in order even if it is expressed to be for the benefit of the wife alone, where the children have agreed to forego their claim to compensation. (*Roy, J.*) PENHEIRO *v.* MINNEY. **61 Cal. 480 = 151 I.C. 680 = 7 R.C. 154 = 38 C.W.N. 520 = 59 C.L.J. 221 = A.I.R. 1934 Cal. 655.**

———**Ss. 1 and 2**—*Suit under—Cause of action—"Loss"—Meaning of.*

The cause of action for a suit under the Fatal Accidents Act is the loss resulting to the plaintiffs from the death of the deceased; and "loss" means the loss of pecuniary benefit, which the plaintiffs would have got from the deceased if he had not died, *e.g.*, his pecuniary savings from his income, his contributions to the family for maintenance and education, and the assistance that he would have continued to give for the maintenance of the family, all of which are estimable in terms of money. The age of the deceased, his expectation of life, the condition of his health, and his habits are matters to be considered. The action is purely compensatory, and plaintiffs are entitled to compensation in respect of their reasonable expectation of the value of the services of the deceased which have been lost to them for ever. (*Wadia, J.*) GOOLBAI MOTABAI *v* PESTONJI COWASJI. **159 I.C. 363 = 8 R.B. 190 = 37 Bom.L.R. 410 = A.I.R. 1935 Bom 333.**

———**S. 3**—*Frame of suit under—Particulars.*

The plaint in a suit under the Fatal Accidents Act should not only give full particulars of the person or persons for whose benefit or on whose behalf the suit is brought, but also the particulars of the nature of the loss for which damages are claimed. (*Wadia, J.*) GOOLBAI MOTABAI *v.* PESTONJI COWASJI. **159 I.C. 363 = 8 R.B. 190 = 37 Bom.L.R. 410 = A.I.R. 1935 Bom. 333.**

———**S. 3 and C. P. Code, O. 33, R. 5**—*Pauper application for leave to sue under Fatal Accidents Act—Particulars of beneficiaries not specified—Rejection.*

An application for leave to file a suit, under the Fatal Accidents Act, *in forma pauperis*, which does not state the full particulars of the beneficiaries as required by S. 3 of the Fatal Accidents Act, is liable to be rejected. (*Malik and Patterson, JJ.*) RIVERS STEAM NAVIGATION CO. *v.* HIRALAL DE. **38 C.W.N. 553 = 59 C.L.J. 394 = A.I.R. 1934 Cal. 712.**

———**S. 3**—*Plaint—Contents of—Particulars.*

The failure to give particulars of all the beneficiaries in a suit for a claim under the Fatal Accidents Act is defective in form. (*Mallik and Patterson, JJ.*) RIVER STEAM NAVIGATION CO., LTD. *v* KHANTA KUMARJ BANIK. **38 C.W.N. 551 = 59 C.L.J. 391 = A.I.R. 1934 Cal. 632.**

FERAE NATURAE. *See* ANIMALS—*Ferae naturae.*

FERRY.

See also (1) BENGAL FERRIES ACT (1885).
(2) BURMA FERRIES ACT (1898).

———*Franchise of ferry—Incidents—Extent of right of public—Alteration of* terminii.

Franchise of ferry is in a sense a right of the public to be carried from one terminus of a public highway across the river to the terminus of another; in other words the passage accross the river is a continuation of a public highway. Without the right of way to the river bank, the franchise cannot exist. Special circumstances like the state or progression of the tides, the condition of the weather or season of the year or changes in the bed of the river may require that either terminus should be veriable. To this should be added the changes in the bed of the river itself necessitating alteration of the terminus. (*Wort, Ag. C. J. and Kulwant Sahay, J.*) KIRTYANAND SINGH BAHADUR *v.* DEONANDAN PRASAD. **148 I.C. 1101 = 6 R.P. 533 = 14 Pat.L.T. 761 = A.I.R. 1933 Pat. 533.**

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———*Limits of—Proof—Name of ghat.*

A ferry may be named from a village in whose neighbourhood it is, though actually the starting point of the ferry may be in another village. Hence the mere name of the ghat, coupled with evidence as to the situation of the village, is not sufficient, in the absence of definite evidence of the ferry ghat being located at a particular point, to prove the existence of any definite point from which the ferry starts or at which it terminates. (*Rowland, J.*) ABDUL GHANI *v.* EMPEROR. **6 I.R. (Pat.) 278=146 I.C. 605=35 Cr.L.J. 128=14 Pat.L.T. 720=1933 Cr.C. 1365=A.I.R. 1933 Pat. 603.**

———*Owner of bank of river—Rival ferry granted by Government—Relative rights.*

The general right of the owner of the land on either bank of a river to establish a ferry for profit must give way, if it comes in competition with the grantee of the Government who has previously enjoyed a monopoly under his grant. The fanchise of a ferry is not necessarily an appurtenant to land but when a right of ferry is claimed as appurtenant to certain villages, the grant of such right by the crown would not be destroyed by mere non-user without waiver nor by the running of an opposite ferry. The franchise would continue so long as the grant continues and until the person who sets an opposite ferry could show a Crown grant or give evidence from which a Crown grant should be presumed, the cause of action would remain. Nature of ferry rights in India discussed. 18 C. 652, Foll. (*Pullan and Niamatullah, JJ.*) DHANPAT PANDEY *v.* PASPUT PRATAP SINGH. **53 All. 764=135 I.C. 545=I.R. 1932 All. 81=1931 A.L.J. 424=12 L.R. 231 (Rev.) =15 R.D. 441=A I.R. 1931 All. 587.**

———Right of—Acquisition by prescription—Right to monopoly. *See* EASEMENST ACT, S. 15. **1935 A.L.J. 444=1935 R.D. 133=1935 A.W.R 396=A.I.R. 1935 All. 481.**

FIDUCIARY RELATIONSHIP.

See (1) EVIDENCE ACT, S. 111.
(2) CONTRACT ACT, S. 16.
(3) TRUSTS ACT.

FINDING OF FACT. *See* C. P. CODE, S. 100.

FINGER PRINT EXPERT. *See* EVIDENCE ACT, SS. 45 AND 47.

FIRE INSURANCE. *See* INSURANCE.

FIRM.

See (1) C. P. CODE, O. 21, RR. 49, 50 AND O. 30.
(2) CONTRACT ACT, SS. 239-266.

FIRST INFORMATION REPORT.

See (1) CR. P. CODE, SS. 154-160.
(2) CRIMINAL TRIAL.

FISHERY.

See (1) ADVERSE POSSESSION.
(2) BURMA FISHERIES ACT (1905).

———*Claim to—Burden of proof—Tidal and navigable river.*

Title to an exclusive fishery in a tidal, navigable river can be established by proving an express grant or by giving evidence that a grant though not capable of being produced will be presumed. Where the original grants are not forthcoming, resort must be had to secondary evidence of them or to the inference of legal origin to be drawn from long user. Where the plaintiff claims such a right, the burden is on him to show that the fishery has come to him under a valid and effectual grant from the Crown, which has been sustained by the continuous use and enjoyment of himself and his co sharers and his predecessors. 11 C. 434, Ref. (*Mitter and S. K. Ghose, JJ.*) MANI LAL ROY *v.* PROLHAD CHANDRA KAIBARTA. **143 I.C. 179=I.R. 1933 Cal. 361=56 C.L.J. 369=A.I.R. 1933 Cal. 222.**

———*Customary right to—Proof of—Right claimed on behalf of indefinite body—Reasonableness of.*

In a suit for declaration of the plaintiff's rights to fishery and damages, it was found that the plaintiffs had a valid title derived from the grantee of an exclusive fishery from the Crown. The defendants, however, asserted they had a customary right to catch fish in the plaintiff's jalkar without paying rent. The evidence was that a large number of fishermen (defendants) caught fish, singly or in batches. Sometimes the plaintiffs realized rents and ocaasionally sued them successfully for rents or damages but owing to the vastness of the tract, most of them escaped payment of rents or tolls.

Held, that as a matter of law, the defendants could not be said to have established a customary right to fish; even if such a custom had been established, it was unreasonable since according to it, there would be no limitation to the number of persons entitled to enjoy it and an unlimited number of persons would appropriate the profits of private property, leaving nothing to the owner and further the subject-matter of the right would soon become exhausted. On the last ground, a profit *a prendre* cannot be acquired by custom. (*Guha and Bartley, JJ.*) ARJUN KAIBARTA *v.* MANORANJAN DE BHOUMIK. **61 Cal. 45=151 I.C. 813=7 R.C. 175 (2)=A.I.R. 1934 Cal. 461.**

———Customary right to—Right in gross—Validity of—*See* EASEMENTS ACT, S. 2 (*b*). **37 C.W.N. 18.**

———*Exclusive right to— Tidal navigable river—Inference of legal origin from long user.*

A legal origin for an exclusive right of fishery claimed in portions of a tidal navigable river by the fisherman of one village, can be inferred from immemorial user. This legal origin may be either a grant or a regulation as evidenced by custom, under which fishermen of the village have been exclusively catching fish in the disputed places. (*Nasim Ali, J.*) CHANDRANATH DAS *v.* PUSHKARACHANDRA DAS. **62 Cal. 800=161 I.C. 986=8 R C. 556=A.I.R. 1936 Cal. 165.**

———*Exclusive right to—Wrongful appropriation—Limitation.*

A suit for damages for the wrongful appropriation by the defendants of the fish in certain waters to which the plaintiffs are exclusively entitled is governed by Art. 49 of Limitation Act and damages for three years can be claimed. (*Guha and Bartley, JJ.*) ARJUN KAIBARTA *v.* MANORANJAN DE BHOUMIK. **61 Cal. 45=151 I. C. 813=7 R C. 175 (2)=A.I.R. 1934 Cal. 461.**

———Jalkar *right—Grant of* mauza—Jalkar *as part of* mouza.

Where the *Jalkar* appertains to a *mauza* it is not necessary that a deed of settlement referring to the *mouza* should expressly convey the *Jalkar* right. (*Mitter, J.*) KUMAR KRISHNA NANDY CHOUDHURY *v.* LOKENATH MOOKERJEE. **59 Cal. 344=137 I.C. 279=I R. 1932 Cal. 287=35 C.W.N. 1256=A.I.R. 1932 Cal. 300.**

———*River shifting course—Channel formed by diversion of water—Owner's right to follow—Conditions.*

Where a several fishery is claimed by a private individual in a natural stream, the right claimed can be only over navigable rivers or those portions of a river which are navigable. A grant can confer on the person to fish only in natural water-courses and not in those made by the hand of man. There is difference between the case of a river shifting from its old bed, leaving there sheets of water having a regular connection with the new main channel, and the gase where a river divides itself, the volume of its waters still flowing

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down its old bed and the new channel is a non-navigable channel passing through the lands of private persons. In the former case, the sheets of water in its old bed will still be subject to the right of fishery of the persons having several fishery as long as the connection is maintained with the flowing river and that connection is not merely occasional due to an exceptional flood caused by a heavy rainfall or other temporary cause. In the latter case, the owner of fishery rights will have a right of fishing in the new channel only if the channel is navigable and not otherwise, as in the case of a river changing its course and bed and taking a new course, the extra channel formed is a new bed. (*R. C. Mitter, J.*) ZERMAN GOMEZ *v.* MAHIMA CHANDRA KAIBARTA. **62 Cal. 409=156 I.C. 515=7 R.C. 721=39 C W N. 380=A.I.R. 1935 Cal 399.**

———*Several Fishery — Plaintiff having several fishery—Current from plaintiff's river introduced by District Board to non-navigable 'done—Blind stream becoming flowing channel—Rights of riparian proprietors unaffected.*

Where the current from the plaintiff's river who had a several fishery was introduced by an artificial excavation by the District Board into a done which was a blind stream and not navigable.

Held, that the riparian proprietors from whom the defendants claim to have derived the right to fish in the done in question, who undoubtedly held the done when a 'blind stream' as their territorial fishery, have still their right unaffected when the done was converted into a flowing channel by the act of the District Board as the flowing channel is a non navigable one, and that the plaintiff can have also no right in the done as the current from the plaintiff's river was there introduced by an artificial excavation. (*R. C. Mitter, J.*) ZERMAN GOMEZ *v.* MAHIMA CHANDRA. **62 Cal. 409=156 I.C. 515=7 R C. 721=39 C.W.N. 380=A.I.R. 1935 Cal 399.**

———*Several fishery—Right to be founded upon grant of Government—Right of Government to fishery—Navigability of channel—Shifting course.*

A several fishery in India as elsewhere must be founded upon a grant from the Government and the river need not flow over the land of the Government. The right of the Government to the fishery does not depend upon its ownership of the soil but upon navigability of the stream. There is no difference whether the change in course is gradual or sudden and the grantee from the Government can follow the shifting channel of the navigable river, and his right to fish therein is not affected by the said channel passing over the lands of a private person. 42 Cal. 409 (P.C.), Foll. (*R. C. Mitter, J.*) ZERMAN GOMEZ *v.* MAHIMA CHANDRA KAIBARTA. **62 Cal. 409=156 I.C. 515=7 R.C 721=39 C W.N. 380=A.I.R. 1935 Cal. 399.**

FLOATING CHARGE.

See (1) COMPANIES ACT, S. 109.
(2) TRANSFER OF PROPERTY ACT, S. 100.

FOOD ADULTERATION.

See (1) BENGAL FOOD ADULTERATION ACT (VI OF 1919).
(2) BIHAR AND ORISSA FOOD ADULTERATION ACT (II OF 1919).
(3) PENAL CODE, S. 273.

FORECLOSURE. *See* C. P. CODE, O. 34, RR. 2 AND 3.

FOREIGN COURT.

See (1) C. P. CODE, S. 13.
(2) JURISDICTION.

FOREIGN GOVERNMENT.

See ACT OF STATE.

FOREST ACT (1878), S. 45.

FOREIGN JURISDICTION ACT (1890)—*Applicability—British Indian subjects committing offences outside British India.*

The Indian Extradition Act or the British Foreign Jurisdiction Act has no application to a case where British Indian subjects resident with the original jurisdiction of the High Court commit offences outside British India. (*Rankin, C. J. and Pearson, J.*) SASADHAR ACHARJYA, *In the matter of.* **136 I.C. 598=I.R. 1932 Cal. 230=33 Cr.L.J 322=35 C.W.N. 1082=1932 Cr.C. 177=A.I.R. 1932 Cal. 229.**

———*Civil Court constituted by Order in Council—Power to attach before judgment movable property in foreign State.*

A Civil Court constituted by Order in Council under the Foreign Jurisdiction Act is not competent to attach before judgment movable property of a defendant British subject which is in a foreign State. (*Broadway and Abdul Qadir, JJ.*) MELA MAL *v.* BISHEN DAS. **13 Lah. 206=I R. 1931 Lah. 1014=134 I.C. 822=32 P.L.R. 645=A.I R 1931 Lah. 723.**

FOREIGN SUBJECT. *See* CONFLICT OF LAWS.

FOREST. *See* (1) BURMA FORESTS ACT (1902).
(2) MADRAS FOREST ACT (1882).

FOREST ACT (VII OF 1878), S. 26—*Person in party beating up game in reserved forest—If guilty of offence.*

The word 'hunt' implies motion, a chase and a pursuit. Hence any person who is one of the party beating up game in a reserved forest in this fashion is a member of the hunt, and even though he himself may not be within the prohibited area he is guilty of the offence along with the rest of the hunt. (*Bose, A. J. C.*) JAGANNATHA RAO DANI *v.* EMPEROR. **1935 Cr.C. 111=A.I.R. 1935 Nag. 23.**

———**S. 26 (1) (i)**—*Mere carrying of loaded gun by licensed person through reserve forest—No offence.*

Accused who had license for a gun was going along the District Board road running through a reserve forest with the gun loaded. On this he was convicted under S. 26 (1) (*i*).

Held, that from the mere fact that accused was carrying a loaded gun it did not follow that he was going with intention of shooting

Held, further, that what is made penal is not the intention to shoot but actual shooting itself and that unless the accused was alleged to have been found shooting or hunting in the forest he could not be convicted. (*Iqbal Ahmad, J.*) BALBIR SINGH *v.* EMPEROR. **6 I.R. (All) 153=145 I C. 735=34 Cr.L J. 1050=14 L.R. 348 (Cr.)=1933 A.L J. 704=1933 Cr C. 1009=A I.R. 1933 All. 630.**

———**S. 26 (1) (i)**—*"Shoots"—Meaning.*

The word "shoots" means "discharges a fire-arm or other weapon". It does not mean going for shooting. (*Wild, C. J. and Aston, A. J. C.*) GUHRAM *v.* EMPEROR. **25 S.L.R. 217=I R. 1931 Sind 121=134 I.C. 377=32 Cr.L.J. 1140=1931 Cr.C. 921=A.I.R. 1931 Sind 156**

———**S. 45**—*Applicability—Timber embedded in river.*

The case of timber found embedded in the bed of a river is covered by the provisions of S. 45. (*Suhrawardy and Graham, JJ.*) RAM RANJAN MALLIK *v.* SECRETARY OF STATE. **59 Cal. 21=I.R. 1931 Cal. 692=133 I.C 564=A I.R. 1931 Cal. 430.**

———**S. 45**—*Object of the Act—Vesting of rights in Government.*

The object of the Act is to regulate the rights of owners in drift and stranded timber and not to deprive them of those rights; the Act does not divest the owner

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of, or transfer to the Government, any right therein, and compliance by Government with the conditions laid down in the Act is obligatory. 24 Cal. 504 (P. C.), Foll. (*Suhrawardy and Graham, JJ.*) RAM RANJAN MALLIK *v.* SECRETARY OF STATE. **59 Cal. 21 = I.R. 1931 Cal. 692 = 133 I.C. 564 = A.I.R. 1931 Cal. 430.**

FORFEITURE. *See* (1) CONTRACT ACT, S. 74.
(2) LANDLORD AND TENANT.
(3) LEASE.
(4) T. P. ACT, S. 111 (G).

FORGED DOCUMENT. *See* PENAL CODE, S. 471.

FORGERY. *See* PENAL CODE, SS. 463, 465, 467, 468, 469, *etc.*

FORMA PAUPERIS. *See* C. P. CODE, O. 33 AND O. 44.

FORM OF JUDGMENT. *See* CR. P. CODE, S. 367.

FRAUD—*Burden of proof.*

It is a well-settled principle of law that those who allege fraud must prove it. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F.A. SAVI. **12 Pat. 359 = 6 I.R (Pat.) 17 = 145 I.C. 1 = 14 Pat L.T. (Sup.) 1 = A I.R. 1933 Pat. 306.**

———*Burden of proof.*

In all cases of fraud which is not capable of proof by direct evidence, the Courts have to fall back upon inferences to be drawn from circumstances established by evidence. The party alleging fraud is nevertheless bound to establish it by cogent evidence, and suspicion cannot be accepted as proof. Unless therefore the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. (*Niamatullah and Allsop, JJ.*) DEHRA DUN TRAMWAY, CO. *v.* HANSRAJ. **58 All. 342 = 159 I.C. 977 = 8 R.A. 537 = 1935 A.W.R 1189 = A I.R. 1935 All. 995.**

———*Compromise decree—Suit to set aside—Issue.*

In a suit to set aside a compromise decree in a partition suit on the ground of fraud, the only issue for the Court is to see if the plaintiff has or has not established the allegation of fraud. The question whether the division effected by the decree was unequal or worked hardship on the plaintiff is not germane to the suit. (*Courtney Terrell, C. J. and Fazl Ali, J.*) MAHABIR TEWARY *v.* CHHATHU TEWARY. **11 Pat 613 = I.R. 1932 Pat 154 = 137 I.C. 700 = 13 Pat.L.T. 197 = A.I.R. 1932 Pat. 170 (2).**

———*Criminal prosecution—What must be proved*

In cases where fraud is alleged, it is absolutely essential that there should be clear evidence of intention to defraud or to cheat before the opposite party ought to be allowed to be harassed by a criminal prosecution. (*Lort Williams and S. K. Ghose, JJ.*) PASHUPATI BANERJI *v.* MAHARAJKUMAR NRIPENDRA NARAYAN SINGHA. **I.R 1931 Cal 805 = 134 I.C. 309 = 32 Cr. L.J. 1133 = 53 C.L.J. 457 = 1931 Cr.C. 604 = A I.R. 1931 Cal. 452.**

———*Decree*—Ex parte *decree—Suit for setting aside—Maintainability.*

A regular suit is maintainable to have an *ex parte* decree set aside on the ground of extensive fraud. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys.L.J. 151 = 37 Mys. H.C.R. 378.**

———*Decree*—Ex parte *decree—Suit to set aside—Fraud of co defendant, if sufficient.*

The plaintiff brought a suit to set aside an *ex parte* decree passed against him and another in favour of the first defendant. He alleged that in that suit, the plaintiff (the first defendant herein) and the second defendant, the only contesting party in the prior suit had colluded and fraudulently consented to a decree operating to the prejudice of the present plaintiff.

Held, that the plaintiff having remained *ex parte*, he could not have been defrauded in any way by the first defendant; that if the second defendant in the previous suit had by means of any representation induced the plaintiff to remain *ex parte* and fraudulently consented to a decree, the first defendant was not responsible for it and so the *ex parte* decree could not be set aside. (Case-law discussed.) (*Doraisami Iyer, C.J. and Mahadevayya, J.*) HANUMANTHA RAO *v.* SUBBAIYA CHETTY. **10 Mys.L.J. 359 = 37 Mys.H.C.R. 330.**

———*Decree—Setting aside suit—Decree on award.*

A suit lies to set aside a decree passed on the basis of an award, on the ground that the decree had been obtained by fraud. And if the consent of a party to arbitration proceedings is obtained by fraud and if he is kept ignorant of the real nature of those proceedings, no distinction can be made between decrees based on awards and ordinary decrees. (*Bhide and Din Mahomed, JJ.*) MT. PURAN DEVI *v.* DILA RAM. **16 Lah. 340 = 156 I.C. 518 = 7 R.L. 911 = 37 P.L.R. 422 = A.I.R. 1934 Lah. 794.**

———*Decree—Suit to set aside—Burden of proof.*

There is a presumption under S. 114, Ill. (*e*) of the Evidence Act that proceedings held and accepted by the Court are regular and true and so a party who asks that certain proceedings in Court should be set aside on the ground of fraud or irregularity and alleges that the processes were not executed, as they purport to have been must prove his allegations. (*Mahadevayya and Ramachandra Rao, JJ.*) RANGAPPA *v.* MOODLAPPA. **10 Mys.L.J. 233 = 37 Mys H C.R. 450.**

———*Decree—Suit to set aside—Decree obtained in suit upon mortgage already discharged.*

To bring a suit upon a discharged mortgage bond is to commit a fraud upon the Court and such fraud is extrinsic to the proceedings in the suit brought on such mortgage bond. Therefore a suit by a person aggrieved by the decree to declare the decree, so far as he is concerned, null and void and to have it set aside is maintainable. (*Dunkley, J.*) KO SU YA *v.* N. N. K. P. L. CHETTIAR FIRM. **152 I.C. 486 = 7 R.R. 158 = A I.R. 1934 Rang. 286.**

———*Decree—Suit to set aside—Nature of fraud necessary for.*

In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court and that if it is not proved, he cannot succeed whether the original claim against him was true or false. 10 I.C. 905, Foll. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys.L.J. 151 = 37 Mys.H. C.R. 378.**

———*Decree — Suit to set aside — Non service of summons on defendant.*

If a plaintiff in an action gives a wrong address of the defendant, and takes no part in serving the summons on the defendant, the giving of the wrong address by itself would not prevent the defendant from appearing before the Court to defend the suit. The plaintiff cannot under those circumstances be charged with having deliberately suppressed the service of summons or having obtained an *ex parte* decree by fraud, even though he might have had some cause for suspecting that the service effected on the defendant might not have been good service. (*Roy, J.*) TARUNANGANATH BANERJI *v.* PREMNARAYANLAL RAIZADA. **60 Cal. 98**

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=I.R. 1933 Cal. 468=143 I.C. 710=A.I.R. 1933 Cal 274.

———*Decree—Suit to set aside—Particulars of fraud to be specified.*

In a suit to set aside a decree on the ground that it was obtained by fraud, the plaintiff is bound to specify in his plaint, the facts which constitute the fraud in a clear and definite manner. In order to entitle the plaintiff to succeed, the fraud alleged must be satisfactorily established and it must be proved how, when, where and in what way the fraud was committed, since a prior judgment cannot be upset on general allegations of fraud or collusion. (*Mahadevayya and Ramachandra Rao, JJ.*) RANGAPPA *v.* MUDLAPPA. **10 Mys.L.J. 233=37 Mys H.C R. 450.**

———*Essentials—Intention to deceive and cause damage.*

Fraud in respect of creditors involves an element of loss or injury of a substantial character and not merely inconvenience caused by delay in the realization of what is due. In order to constitute fraud, there must be an intention to deceive ; there must also be damage to the party deceived and fraud without damage gives no cause of action. (*Sundaram Chetty, J.*) SUBBARAYA NAICKER *v.* VENKATESA NAICKER. **150 I C. 381=6 R.M. 717=39 L.W. 357=A.I R. 1934 Mad. 252.**

———*Execution sale—Fraud of decree-holder—Knowledge of party defrauded—Burden of proof.*

Once fraud is established, the burden of proof is on the decree holder or the auction purchaser, as the case may be of as establishing that the person injured by his fraud and suing to recover the property, has had clear and definite knowledge of those facts which constitute fraud at a time which is too remote to allow him to make the application. (*Mitter, J.*) RAMIZADDIN BASAR *v.* NAIMADDI BASAR. **I. R. 1933 Cal. 391=143 I.C. 284=56 C.L J. 570=A.I.R. 1933 Cal. 339.**

———*Finding of fraud—Evidence.*

Where no plea of fraud was properly raised on the pleadings, the case was never opened as a case of fraud and no suggestion of fraud made during the examination of witnesses, the Court is not justified in arriving at a finding of fraud (*Lord Tomlin.*) MALAYAN TOBACCO DISTRIBUTORS, LTD. *v.* THE UNITED KINGDOM TOBACCO CO., LTD. **150 I.C. 229=39 L W. 755=7 R.P.C. 11=A.I.R. 1934 P.C. 167=66 M.L J. 588 (P.C.).**

———Fraud on Registration Law—Inclusion of item not intended to be conveyed—Executant whether can resile from deed. *See* REGISTRATION ACT (1908), S. 28. **55 Mad. 507=63 M.L.J. 77.**

———Fraud upon Statute. *See* BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930). **61 Cal. 197=A I.R. 1934 Cal 259.**

———*Mortgage suit—Mortgagor omitting to mention existence of attaching decree-holder.*

Where the mortgagor who is aware of the decree and an order of attachment obtained by a party, fails to bring those facts into certain proceedings relating to consent decree in a mortgage suit, his conduct cannot be held to be fraudulent. (*Mukerji and Mitter, JJ.*) C. I. KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal 598=I R 1931 Cal. 849=134 I.C. 561=A.I R. 1931 Cal. 763.**

———*Party to fraud—Right to resile from transaction.*

A transfer which is merely colourable and made with the intention of defrauding creditors can be set aside by the transferor at any time before the fraud has actually taken place. But where the fraudulent purpose has been carried out, it is not open to a plaintiff to recover in view of his own fraud. (*Bennet, J.*) MANGAL SEN *v.* BAKHTAWAR SINGH. **I.R. 1932 All. 68=135 I.C. 244.**

FRAUD.

———*Plea of—Precision necessary.*

General allegations of fraud, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud, of which any court can take notice ; where the plaintiff seeks relief on the ground of fraud, he is bound to specify in his plaint the facts, which constitute the fraud and when one kind of fraud is charged, another kind of fraud cannot, upon the failure of proof, be substituted for it. 35 I.C. 339, Foll. (*Doraiswami Iyer, C.J and Mahadevayya, J.*) BYRAPPA *v.* BYRAPPA. **10 Mys L.J. 151=37 Mys. H.C.R. 378.**

———*Plea of—Precision and particularity.*

The Court will not allow allegations of fraud to be made lightly or otherwise than with the utmost precision and particularity and above all promptly. (*Lort Williams, J.*) CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA *v.* IMPERIAL BANK OF INDIA. **60 Cal. 262=149 I.C. 903=6 R.C. 652=1933 Cr.C. 502=A.I.R. 1933 Cal. 366.**

———*Plea of—Suit for possession on basis of sale deed—Plea by defendant that it was executed to defraud pre-emptor—Pre emptor defrauded—Suit, if liable to be dismissed.*

Where the plaintiff sues for recovery of possession of a certain property setting up a document of transfer executed by defendant in favour of plaintiff's predecessor and alleging that possession has not been delivered to him on the basis of the document, it is open to the defendant to plead that the document is not supported by consideration and that it was executed in order to defraud a possible pre-emptor who was actually defrauded. On proof of the defendant's arguments, if it is found that the parties to document were *in pari delicto*, the plaintiff should be non-suited. (*Baipai, J.*) NAWAB SINGH *v.* DAI JIT SINGH. **155 I C. 928=7 R.A. 995=1935 A.W.R. 643=1935 A.L.J. 627=A.I.R. 1935 All. 799.**

———*Pleading—Precision necessary.*

If fraud is relied upon for the purpose of vacating a decree, the fraud must be specifically pleaded and proved. (*Rupchand, A.J.C.*) SHAGANLAL *v* HARIRAM TILOOMAL. **147 I.C. 528=6 R S. 163=A.I.R. 1933 Sind 304.**

———Proceedings—Service of notice—Order passed invalid. *See* AGRA TENANCY ACT (1926), SS. 99 AND 230. **A.I.R. 1935 All. 499.**

———*Proof—Circumstantial evidence.*

Circumstantial evidence is not only sufficient but, in many cases, is the only proof that can be adduced to establish fraud. Charges of fraud and collusion must no doubt be proved by those who make them, by established facts or inference legitimately drawn fram those facts taken together as a whole. Suspicions and surmises and conjectures are not permissible substitutes for those facts or those inferences, but that by no means requires that the very puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. 28 C.W.N. 327 (P.C.), Rel. on. (*Raza and Bisheshwar Nath, JJ.*) MANTHURA *v.* JAG MOHAN SINGH. **6 Luck. 546=I.R. 1931 Oudh 292=132 I C. 532=14 O.L.J. 280=12 L.R. 67 (Rev.)=8 O.W.N. 131=15 R.D. 80=A.I.R. 1931 Oudh 256.**

FRAUD.

———*Proof—Circumstantial evidence.*

Fraud being always secret in its working, it is seldom possible for a party to adduce direct evidence in proof of it. It is open to the Court to infer fraudulent intention from circumstantial evidence. (*Hasan, C.J. and Bisheshwar Nath, J.*) AJODHIA PRASAD *v.* SITA RAM. **I.R. 1931 Oudh 421=134 I.C. 1013=8 O.W. N. 1126=A I.R. 1931 Oudh 405.**

———Proof—Nature of evidence necessary. *See* PENAL CODE, S. 463. **A.I.R. 1933 Lah. 308.**

———*Proof—Non service of summons.*

The mere fact that summonses were not served is not necessarily a fraud ; if, on the other hand, it is shown that there was any deliberate suppression of summonses particularly to give effect to any fraudulent scheme, then such suppression of summonses would be fraud. (*Mahadevayya and Ramachandra Rao, JJ.*) RANG APPA *v.* MOODLAPPA. **10 Mys L J. 233=37 Mys H. C.R. 450.**

———*Proof—Person making charge to file affidavit.*

When serious charges of fraud are made, the facts must be sworn to by the person who alleges them. The method of getting some subordinate to take the responsibility of making serious charges of fraud, which may afterwards turn out to be false, is a practice which should not be allowed. (*Lort Williams and S. K. Ghose JJ.*) PASHUPATI BANERJI *v.* MAHARAJKUMAR NRIPENDRA NARAYAN SINGHA. **I.R. 1931 Cal. 805 =134 I C. 309=32 Cr L J. 1133=53 C.L.J. 457= 1931 Cr.C. 604=A I.R. 1931 Cal. 452**

———Suit to recover damages—Action of pure tort and one based on contract—Distinction between *See* TORTS —FRAUD. **A I.R. 1932 Mad. 583=62 M.L.J. 154.**

———*Will—Execution under fraudulent representation—Validity.*

Where a will was procured by means of false and fraudulent representation that a large amount of debt was owing by the testatrix to the propounder and the fraudulent misrepresentation vitally affected the judgment of the testatrix, it must be annulled. (*Mukerji and Mitter, JJ.*) NABAGOPAL SARKAR BAHADUR *v.* SARALABALA MITTER. **6 I.R. (Cal.) 218=146 I.C. 414=57 C.L J. 71=A I.R. 1933 Cal. 574.**

FRAUD ON CREDTIORS.

See (1) FRAUDULENT TRANSFER.
(2) T. P. ACT, S. 53.

FRAUDULENT PREFERENCE.

See (1) PRESIDENCY TOWNS INSOLVENCY ACT S. 56.
(2) PROVINCIAL INSOLVECY ACT, SS. 37 AND 54.
(3) T. P. ACT, S. 53.

———*Creditor acting in good faith without notice—If material.*

If the preferring of the creditor is the substantial or dominant motive of the debtor, good faith on the creditor's part is immaterial. The fact that the creditor has no knowledge of the debtor's intent to prefer him will not save the transaction, if the debtor's guiding or main motive is to give preference to the creditor. (*Venkatasubba Rao, J.*) GANGAPPA *v.* OFFICIAL RECEIVER OF BELLARY. **159 I.C. 541=8 R.M. 514=41 L.W. 358=1935 M.W.N. 316=A.I.R. 1935 Mad. 300.**

———Essentials—Dominant intention to prefer—Necessity—Debtor executing mortgage with a view to get further loan from creditor. *See* PROVINCIAL INSOLVENY ACT, S. 54. **41 L.W. 358=1935 M.W.N. 316= A.I R. 1935 Mad. 300.**

FRONTIER CRIMES REGN. (1901). S. 29.

FRAUDULENT TRANSFER.

See (1) BENAMI.
(2) T. P. ACT, S. 53.

———*Sale deed—Part consideration to discharge prior mortgage—Charge in respect of.*

Where a sale deed executed by a judgment-debtor is found to be invalid as against a decree-holder, the Court will, however, give a charge to the vendee in respect of a prior mortgage debt which he has discharged in pursuance of such sale deed. (*Pakenham Walsh, J.*) SUPPAN ASARI *v.* ALIMA BIBI. **155 I.C. 17=7 R.M. 539=40 L.W. 685=1934 M.W.N. 845=A I R. 1934 Mad. 587=67 M.L J. 585.**

FREIGHT.

See (1) RAILWAY.
(2) RAILWAYS ACT.

FRONTIER CRIMES REGULATION (III OF 1901), S. 7—*Construction—Applicability—S.* 337 (2) (a), *Cr. P. Code, not modified.*

The Frontier Crimes Regulation being a penal law, it must receive a construction which is favourable to the accused. Cl. 2 (*a*), S. 337, Cr. P. Code, confers a privilege on the accused of being tried by a superior Court and this privilege cannot be lightly taken away. Until and unless the wording of S. 7 Frontier Crimes Regulation, specifically takes away this privilege, a Court cannot, either by presumption or assumption, hold that an accused person has been deprived of it. S. 4 applies only to proceedings and trials under the regulation and does not modify the provisions of S. 337, Cr. P. Code, for the Frontier Province generally as regards trials held under the Cr. P. Code. (*Saaduddin, A. J. C.*) PUBLIC PROSECUTOR *v.* MUQARRAB. **I.R. 1933 Pesh. 1=141 I.C. 881=34 Cr L.J. 212=1933 Cr.C. 145=A.I.R. 1933 Pesh. 3.**

———**Ss. 8 and 10**—*Deputy Commissioner's orders on incomplete inquiry by Jirga—Suit in Civil Court—Maintainability.*

The inquiry by the Jirga was incomplete in respect of some of the most material points in dispute. The Deputy Commissioner, instead of postponing his final order till further inquiry had been made and findings recorded by the Jirga, accepted the findings given by the Jirga on some issues and wound up his order with the remark that "orders with respect to other issues will be passed, as soon as they are considered by the Jirga."

Held, that it is clear that this order of the Deputy Commissioner did not and could not amount to a decree It was merely an interlocutory order passed by him accepting the findings of the Jirga. A Civil Court is debarred from entertaining a suit only when the Deputy Commissioner, having referred the dispute in respect of the property in question to a Jirga, and the Jirga recorded a finding thereon, has either remanded the case so to the Jirga for a further finding or has referred the case to a second Jirga or has passed a decree in accordance with the finding of the Jirga or of not less than three fourths of the members thereof. (*Tek Chand and Agha Haidar, JJ.*) DREHAH KHAN *v.* BAHADUR KHAN. **15 Lah. 460=151 I.C. 514=7 R.L. 150=36 P.L R. 353=A.I.R. 1934 Lah. 338.**

———**S. 29**—*Offence under—Joint trial along with offence under S.* 19, *Arms Act—Procedure.*

The mere fact that an offence is created by the Frontier Regulation and for which the punishment is provided by the Regulation, does not make the trial for that offence, a trial under the Regulation. Hence the trial for the offence under S. 29, Frontier Crimes Regulation, is governed by the Cr. P. Code, and an order of

FRUSTRATION.

conviction is appealable. Accused was convicted at one trial of offences punishable under S. 19, Frontier Crimes Regulation, and S. 19, Arms Act. He was sentenced to three years' rigorous imprisonment upon each count and the sentences were consecutive.

Held, that even though the Magistrate acted under the authority given by S. 59 of the Regulation as regards the offence under S. 29, still the procedure was governed by Cr. P. Code, that the joinder of charges was proper and the whole order of sentence was appealable. 4 J.R. Cr. 13, Diss. from; 19 P.R. 1901 (Cr.), Ref. (*Middleton, J.C. and Saaduddin, A.J.C.*) AKBAR *v.* EMPEROR. **147 I.C. 180 = 35 Cr.L.J. 399 = 1933 Cr.C. 1445 = A.I.R. 1933 Pesh. 90.**

FRUSTRATION. *See* CONTRACT ACT (1872). S. 56.

FUGITIVE OFFENDERS ACT (1881), Ss. 14 and 19—*Order for extradition—Appeal.*

Every order under S. 14 relating to a prisoner whose return is sought is merely an order under S. 19 and an appeal lies to the High Court. (*Ramesam and Gurgenven, JJ.*) MAHOMED NAINA MARIKAYAR *v.* AHMAD MARAKAIR. **57 Mad 259 = 6 R M 396 = 147 I.C. 929 = 35 Cr.L.J. 511 = 1933 M.W N. 1481 = 38 L.W. 987 = 1934 Cr C. 55 = A.I R. 1934 Mad. 55 = 66 M.L. J. 383.**

——**S. 19**—*Appeal under—Powers of Appellate Court—Power to direct taking of additional evidence.*

In an appeal under S. 19 of the Act, the appellate Court has the power to direct the taking of additional evidence. The Act does not define the powers which an appellate Court may exercise in this behalf and so it may be inferred that it may act in accordance with the normal procedure by which it is governed in the exercise of its appellate criminal jurisdiction. (*Ramesam and Gurgenven, JJ.*) MAHOMED NAINA MARIKAYAR *v.* AHMAD MARAKAIR. **57 Mad. 259 = 6 R M. 396 = 147 I.C. 929 = 35 Cr.L.J. 511 = 1933 M.W N. 1481 = 38 L.W. 987 = 1934 Cr C. 55 = A.I.R. 1934 Mad. 55 = 66 M L J. 383.**

——**S. 19**—*Powers of Court—Scope of.*

Magistrates to whom prisoners are brought under S. 14 are *not* entitled to decide whether the issue of the warrant for the apprehension of the prisoner was or was not justifiable on the evidence. They can only act under S. 19 if the case appears to be trivial or if the Magistrate considers the application not made *bona fide*, not made in the interest of public justice or for some other reason of that kind. (*Burn, J.*) MOHAMAD NAINA MARACAIR *v.* BAVA SAHIB MARACAIR. **6 I.R. (Mad.) 25 = 144 I C. 896 = 34 Cr.L J. 883 = 1933 M. W N. 324 = 37 L W 735 = 1933 Cr.C. 799 = A.I R. 1933 Mad. 503 (1) = 65 M L J. 56.**

FULL BENCH.

See (1) PRACTICE—FULL BENCH.
(2) PRACTICE—HIGH COURT.

FURTHER ENQUIRY.

See (1) C. P. CODE, O. 41, RR. 23 AND 25.
(2) CR. P. CODE, SS. 203 AND 437.

FUTURE INTEREST. *See* T. P. ACT, O. 34.

GAMAL LANDS (MYSORE). *See* LAND TENURE—GAMAL LANDS (MYSORE).

GAMBLING.

See (1) BOMBAY GAMBLING ACT (1887).
(2) BURMA GAMBLING ACT (1899).
(3) PUBLIC GAMBLING ACT (1867).

GARNISHEE. *See* C. P. CODE, O. 21, R. 41 (*c*).

GAZETTE. *See* EVIDENCE ACT, S. 81.

GENERAL CLAUSES ACT (1897), S. 3.

GENERAL CLAUSES ACT (X OF 1897), S. 3 (vii)—"*British India*"—*Quetta, if included in.*

Quetta does not form part of "British India," as defined in S. 3 of the General Clauses Act. It is what is known as an "administered area". (*Ferrers, J. C. and Rupchand, A. J. C.*) DEV SAMAJ COUNCIL, LAHORE *v.* AMRITLAL MOTILAL. **28 S.L R. 54 = 155 I C. 677 = 7 R S. 200 = A.I.R. 1934 Sind 123.**

——**S. 3 (20)**—*Good faith—Meaning.*

Per *Sen, J.*—Good faith as defined in S. 3 (20) is equivalent to honesty of dealing and does not entail upon the auction-purchaser the necessity of searching the registry. Even if there were facts indicative of negligence in investigating title, that by itself is not predicative of lack of *bona fides*. (*Sularman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334 = I R. 1931 All. 497 = 132 I.C. 401 = 1931 A.L.J. 273 = A.I R. 1931 All. 277 (F.B).**

——**S. 3, (21) and (40)**—"*The Government*"—*Whether includes British Government.*

The expression "the Government" in S. 3, Cl. 21 means the Government of India and in Cl. 40, it means the Local Government; but does not include the British Government. (*Rupchand, J. C. and Mehta A. J. C.*) JERAMDAS KISHENDAS *v.* EMPEROR. **28 S L R 27 = 153 I.C. 60 = 36 Cr.L J. 240 = 7 R.S. 117 = 1934 Cr C. 821 = A.I R. 1934 Sind 96.**

——**S. 3, (21) and (40)**—"*Shall include*"—*Meaning*

The expression "includes" or "shall include," is used in interpretation clauses in two senses. The ordinary and general sense in which it is used is to enlarge the meaning of the words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. This expression is also susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expression defined. It may be equivalent to "mean and include" and in that case it may afford an exhaustive explanation of the meaning, which for the purposes of the Act must invariably be attached to those words or expression. The expression in S. 3, Cls. (21) and (40) is used in the restricted sense as equivalent to mean and include. (*Rupchand, J. C. and Mehta, A. J C.*) JERAMDAS KISHENDAS *v.* EMPEROR. **28 S L R. 27 = 153 I.C. 60 = 36 Cr L J. 240 = 7 R.S. 117 = 1934 Cr. C. 821 = A I R. 1934 Sind 96.**

——**S. 3 (25)**—*Applicability—Suit under S. 9, Specific Relief Act—Decree granting standing crops—Legality.*

The definition of immovable property in S. 3 (25) of the General Clauses Act applies to the Specific Relief Act, which contains no definition of the term. Standing crops are therefore immovable property and not "mesne profits"; consequently in a suit under S. 9, Specific Relief Act, a decree granting standing crops is not illegal. (*Pakenham Walsh, J.*) APPANNA *v.* KRISHNAMMA. **153 I C 332 = 7 R.M 349 = 40 L W. 922 = 1934 M.W.N. 1375 = A.I R. 1935 Mad. 134.**

——**S. 3 (25)**—"*Benefit to arise out of land*"—*Mortgage.*

A mortgage is not a "benefit to arise out of land" within the meaning of S. 3, Cl. (25) which does not define immovable property but states it shall include benefits to arise out of land and certain other things.

GENERAL CLAUSES ACT (1897), S. 3 (25).

(*Rankin, C. J. and C. C. Ghose, J.*) IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, LTD. **58 Cal. 136=131 I.C. 689=53 C.L.J. 269=I.R. 1931 Cal. 481=34 C.W.N. 605=A.I.R. 1931 Cal. 223.**

[**Appl.** 66 M.L.J. 380 (382). **Expl. and Appl.** 62 I. A. 115.]

———**S. 3 (25)**—"Immovable property"—Fruit trees—Mortgage—Intention—Mortgagee to remain in possession and enjoy the fruits—Trees not to be cut—Trees, immovable property or interest in immovable property. *See* T. P. ACT, S. 59. **54 All. 437.**

———**S. (3) (25)** —"*Immovable property*"—*Interest of mortgagee.*

The interest of the mortgagee in the mortgaged property is manifestly a "benefit to arise out of land," and is therefore itself immovable property. (*Page, C. J., Mya Bu, Sen, Ba U and Dunkley, JJ.*) V. E. R. M. N. C. T. CHETTYAR *v.* A. R. A. R. R. M. CHETTYAR FIRM. **12 Rang. 370=151 I.C. 519=7 R.R. 79=A. I R. 1934 Rang. 250 (F B.)**

[**R.** 12 R. 432 (435); 12 R. 690 (697).]

———**S. 3 (25)**—Immovable property—Suit regarding—Applicability of Sale of Goods Act—Provisions of Special Act like Sale of Goods Act cannot overrule General Clauses Act except where it specially applies. *See* SALE OF GOODS ACT, (1930) S. 2 (7). **9 Rang. 13=A.I.R. 1931 Rang. 109.**

———**S. 3 (25)**—"*Land*"—*Trees, if included.*

Though trees are immovable property, there is no presumption that whenever the word "land" is used in an enactment, the trees standing thereon are included. (*Macnair, J. C. and Pollock, A. J. C.*) KISHENLAL MAHESHR *v.* PAIKU KUNBI. **I.R. 1933 Nag. 93=29 N.L.R. 1=142 I.C. 147=16 N.L.J. 1=A.I.R. 1933 Nag. 53.**

———**S. 3 (25)**—"*Standing timber.*"

Standing timber which has to be cut down and removed is movable property. (*Sulaiman, A C. J., Mukerji and Boys, JJ.*) RAJ BALAMGIR, *In the matter of.* **I.R. 1931 All. 605=133 I.C. 157=1931 A.L.J. 608=A.I.R. 1931 All 392 (F.B.).**

———**S. 3 (52)** —*Applicability—T. P. Act, S* 3—"*Signed the instrument*"—*Meaning of.*

S. 3 (52) of the General Clauses Act applies to the T. P. Act, and there is nothing in the subject or context which would prevent the words "signed the instrument" in S. 3, T. P. Act (XXVII of 1926), being taken to be governed by the definition of "sign" in the General Clauses Act. A marksman can therefore be a valid attestor to a gift deed. (*Beasley, C. J. and King, J.*) NAGAMMA *v.* VENKATARAMAVYA. **58 Mad. 220=154 I.C. 777=7 R M. 497=40 L.W. 937=A.I.R. 1935 Mad. 178 (2)=68 M.L.J. 191.**

———**S. 3 (52)**—Signature—If includes seal. *See* EVIDENCE ACT, S. 90. **1935 O.W.N. 387=A.I.R. 1935 Oudh 289.**

———**S. 3 (53)**—'*Son*' *as including adopted son.*

Where the personal law of the parties permits adoption, the word 'son' will include an adopted son. Minor adopted son of deceased held to be a "dependent" and therefore entitled to compensation under S. 2 (1) (*d*) of the Workmen's Compensation Act, 1923. (*Currie, J.*) DEVI DITTA, *In re.* **12 Lah. 50=135 I.C. 48 (1)=I.R. 1932 Lah. 32 (1)=32 P.L.R. 213=1931 Cr.C. 527=A.I.R 1931 Lah. 661.**

———**S. 6**—*Agreement executed when old Act was in force—Repeal of old Act—Effect of.*

An agreement executed when Act II of 1901 was in force is not affected by the repeal of that Act. A document takes effect from the date of its execution, not of its attestation or registration. (*Oakden, S.M. and Smith J.M.*) HAR PRASAD *v.* MEHIN. **14 L.R. 108 (Rev.)=17 R.D. 83.**

GENERAL CLAUSES ACT (1897), S. 10.

———**S. 6**—Applicability — Temporary statute. *See* SPECIAL POWERS ORDINANCE (X OF 1932), S. 17. **37 P.L.R. 19=A.I.R. 1935 Lah 188.**

———**Ss. 6 and 30**—Applicability to temporary ordinances. *See* GENERAL CLAUSES ACT, SS. 30 AND 6. **1933 A.L.J. 875=A.I.R. 1933 All. 669 (F.B.).**

———**S. 6**—*Effect—Agra Tenancy Acts,* 1901 *and* 1926—*Applicability.*

Legal proceedings were started in 1925 for enhancement of rent but the status of the tenant was determined only in 1930.

Held, that Act II of 1901 and not Act III of 1926 will apply. Effect of S 6, General Clauses Act considered. (*Oppenheim, J M. and Keane, S.M.*) SAFDAR HUSAIN *v.* SYED NAZIM. **15 R.D. 757=12 L.R. 351 (Rev.)**

———**S. 6 (c)**—*Amending Act—Vested rights not modified.*

A lease conferring a tenancy for life in 1910 which is valid under the Act before amendment is not rendered invalid on account of the subsequent amendment of the Act. S. 6 (*c*) of the General Clauses Act relied on. (*Oppenheim, J.M.*) BANSIDHAR *v.* SADHU SINGH. **15 R. D. 710.**

———**S. 8 (a)**—*Amending Act—Effect on pending action.*

The provision of S. 109, B. T Act, as it stood before its amendment by Act IV of 1928 conferred a substantive right on the other party The amended section cannot be said to take retrospective effect so as to validate a pending action which would otherwise be barred under the old section. (*Suhrawardy and Graham, JJ.*) GOSTA BEHARI PRAMANIK *v.* NAWAB BAHADUR OF MURSHIDABAD. **136 I C. 606=I R. 1932 Cal. 238=35 C.W.N. 1147=A.I.R. 1932 Cal 207.**

———**S. 9**—Applicability—Construction of decree. *See* DECREE—CONSTRUCTION. **A.I.R. 1935 Lah. 291.**

———**S. 10**—*Applicability—Application under S.* 54 *of the Provincial Insolvency Act* (1920).

S. 10 of the General Clauses Act does not apply to an application under S. 54 of the Provincial Insolvency Act, though the same result is achieved by S. 4 of the Limitation Act. (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH MALABAR. **150 I.C. 339=6 R.M. 710=39 L.W. 449=1933 M.W.N. 1049=A.I.R. 1934 Mad. 294.**

———**S. 10**—Applicability—Insolvency petition by creditor—Act of insolvency committed beyond three months—Period expiring during vacation—Presentation on reopening day—Validity. *See* PROVINCIAL INSOLVENCY ACT, S. 9(1) (*c*). **69 M.L J. 283 (F.B.).**

———**S. 10**—*Applicability—Review application.*

S. 10 refers only to limitation. An act is to be taken as done in due time if done on the next day afterwards on which the Court or office is opened. But no question of due time arises in the case of a review application, as no time-limit is prescribed for it The section does not say that an application presented after the vacation is to be taken as presented at the beginning of the vacation, so that the period of vacation should not count at all. It merely says that although the period has been exceeded, the application must still be taken to be in due time. Hence a review application filed with only half the Court-fee on the reopening day but after 90

GENERAL CLAUSES ACT (1897), S. 24.

days is not properly stamped and applicant cannot claim to exclude the vacation. (*Gruer, A.J.C.*) TRIMBAK *v.* NARAIN. **31 N.L.R. 260=8 R.N. 29=157 I.C. 178 (1)=A.I.R. 1935 Nag. 164.**

——**S. 24**—*Burma Municipal Act (III of 1898) S. 142 (r)—Repeal by Act I of 1931 and re enactment of same in S. 124 (a)—Effect on bye laws made under repealed enactment.*

Where the accused, who had kept in their compound a larger number of cattle than they were permitted to do under the bye-laws framed under S. 142 (*r*) of the Municipal Act, were acquitted by the Magistrate on the ground that by S. 10 of Act I of 1931, S. 142 (*r*) had been deleted, with the result that the bye-laws were no longer in force.

Held, that S. 9 of Act I of 1931, re enacted the provisions of S. 142 (*r*) in S. 124 (*a*) of the Act and though no fresh bye laws had been made under S. 124 (*a*), the bye-laws made under S. 142 (*r*) should be deemed to have been made under the re enacted provisions under S. 24 of the General Clauses Act and so in force throughout and the acquittal of the accused was erroneous. (*Page, C.J. and Mya Bu, J.*) EMPEROR *v.* KARAPAN. **11 Rang. 532=6 R R. 241=148 I.C. 616=35 Cr.L.J. 735=1934 Cr.C. 78=A.I.R. 1934 Rang. 12.**

——**S. 26**—*Applicability.*

Where an act, for the abetment of which conviction takes place, is not a separate offence under the Penal Code but is an offence exclusively under the Salt Act, S. 26 of the General Clauses Act is inapplicable. (*Wazir Hasan, C.J. and Pullan, J.*) MOHANLAL SAKSENA *v.* EMPEROR. **128 I.C. 221=32 Cr.L.J. 104=7 O.W.N. 895=1930 Cr.C. 1161=A.I.R. 1930 Oudh 497.**

——**S. 26**—*Application.*

S. 26 has no application if the offences are distinct. (*Walsh, J.*) PRESIDENT, PANCHAYAT BOARD, VELGODE *v.* CHINNA VENKATA REDDI. **I.R 1932 Mad. 585=138 I.C. 491=36 L.W. 429=33 Cr.L.J. 629=1932 M.W.N 860=1932 Cr.C. 525=A.I.R. 1932 Mad. 537.**

——**S. 26**—*Carrying contraband salt—Bombay Salt Act (II of 1890), S. 48 (c)—Criminal Law Amendment Act (XIV of 1908), S. 17 (1)—Conviction under.*

The accused was found with two boxes containing contraband salt and belonging to an association declared unlawful by the Government of Bombay. He was convicted under S. 47 (*c*) of the Bombay Salt Act of being in possession of contraband salt and also of an offence under S. 17 (1) of the Criminal Law Amendment Act for assisting the operations of an unlawful association.

Held, the accused could not be convicted under two different enactments for the same act. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* BHOGILAL CHIMAN LAL. **I.R. 1931 Bom. 457=134 I.C. 345=32 Cr.L.J. 1145=33 Bom.L.R. 648=1931 Cr.C. 895=A.I.R. 1931 Bom. 409.**

——**S. 26**—*General and Special Acts—Offences under—Intention of legislature.*

Where an act is punishable under a special law and also under a general statute, the offender can be proceeded with under either or both but cannot be punished twice for the same act. Where there is nothing in the Special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it. (*Mears, C.J. and Sen, J.*) JOTI PRASAD GUPTA *v.* EMPEROR. **53 All. 642=136 I.C. 91=33 Cr.L.J. 236=I.R. 1932 All. 139=1931 A.L.J. 986=1932 Cr.C. 27=A.I.R. 1932 All. 18.**

[**R.** 1932 A.L.J. 519 (520).]

GENERAL CLAUSES ACT (1897), S. 26.

——**S. 26**—*Madras District Municipalities Act (V of 1920), S. 300 and R. 11 (1) Two notices substantially same — Non compliance—Second conviction—Validity.*

When the petitioner has been convicted for disobeying a previous notice to produce child for vaccination, he cannot once more be convicted on the same facts under the same sub section for failure to comply with a second notice to discontinue his breach of the previous notice. (*Pandalai, J.*) SUBRAMANIA IYER *v.* EMPEROR. **I. R. 1931 Mad. 492=131 I.C. 156=32 Cr.L.J. 662=1930 M.W.N. 907=33 L.W. 133=1931 Cr.C. 285=A.I.R. 1931 Mad. 181=60 M.L.J. 299.**

——**S. 26**—*Offences under S. 295 of U. P. Municipalities Act and under S. 353, I. P. Code—Conviction for both on same facts—Legality.*

A person can be convicted on the same set of facts for the offences under S. 295 of United Provincial Municipalities Act and under S. 352, I. P. Code, since they are two different offences and not the "same offence" within the meaning of S. 26 of the General Clauses Act. A trial under these two sections will be competent under S. 235 (2), Cr. P. Code. (*Collister, J.*) CHHOTE LAL *v.* EMPEROR. **160 I.C. 1089=8 R.A. 702=37 Cr.L.J. 382=1936 A.L.J. 427=1935 A.W.R. 1318=1935 A.Cr.C. 292=1936 Cr.C. 100=A.I.R. 1936 All. 74.**

——**S. 26**—*Penal Code, S. 64—Sentence of imprisonment in default of fine—Legality.*

S. 64, I. P. Code, read with S. 26, General Clauses Act, make it clear that the Court may impose a sentence of imprisonment in default of payment of fine imposed for breach of a statutory rule, such as the necessity for taking out a licence under S. 391, Calcutta Municipal Act. (*Cuming, J.*) U. K. MITRA *v.* CORPORATION OF CALCUTTA. **58 Cal. 1293=136 I.C. 465=33 Cr. L.J. 303=I.R. 1932 Cal 193=35 C.W.N. 865=A.I.R. 1932 Cal. 63.**

——**S. 26**—*Possession of stolen revolver without licence—Charges under S. 411, Penal Code (XLV of 1860) and S. 19, Arms Act (XI of 1878)—Conviction for—Propriety of.*

Where the accused was found in possession of a stolen revolver without licence, there is no legal bar to his being charged and convicted for two offences, one under S. 411 of the Penal Code and the other under S. 19 of the Arms Act. The offence under the latter section is the possession of a revolver without licence; that under the former is the possession of an article knowing it to be stolen. It is immaterial that the article in both cases happens to be a revolver. (*Bajpai, J.*) REOTI *v.* EMPEROR. **6 I.R. (All) 135=145 I.C. 609=34 Cr. L.J. 1018=14 L.R 63 (Cr)=1933 A.L.J. 523=1933 Cr.C. 761=A.I.R. 1933 All. 461.**

——**S. 26**—*Scope and effect of.*

S. 26 does not act as a bar to trial or conviction but merely as a bar to duplicated punishment. Where a second trial results in a sentence of imprisonment or transportation, the provisions of S. 26 can be complied with merely by the direction that such imprisonment or transportation shall run concurrently with that imposed in the previous case; in the case of a death sentence, there can be no question of a concurrent sentence, for the sentence itself automatically cancels the previous sentence of imprisonment. (*Middleton, J. C. and Saaduddin, A.J.C.*) ARSALA KHAN *v.* EMPEROR.

GENERAL CLAUSES ACT (1897), S. 27.

155 I.C. 287=7 R. Pesh. 101=36 Cr.L.J 813=1935 Cr C. 191=A.I.R. 1935 Pesh. 18.

———**S. 27**—*Presumption under—Posting of letter—Rebuttal.*

S. 63, Income tax Act, is to be read along with S. 27, General Clauses Act. The words "unless the contrary is proved" in S. 27 refer both to the service and the time. Consequently when a notice has been posted. properly addressed and prepaid and in a registered cover. the presumption raised even as regards the service is not conclusive but is rebuttable. (*Mukerji and Bennet, JJ.*) L. C. DESOUZA, *In the matter of* **54 All. 548=I.R. 1932 All. 359=138 I.C. 70=1932 A.L.J. 409=A.I. R. 1932 All. 374.**

———**Ss. 30 and 6**—*Applicability—Temporary ordinances.*

No doubt the General Clauses Act would certainly be applicable to the two Ordinances 2 and 10 of 1932, but S. 6 is applicable to case where a previous Ordinance has been "repealed" by a subsequent Ordinance or by a subsequent Act and would not necessarily apply to a case where a temporary Ordinance automatically expires after the period, during which it is in operation, is over. Hence although S. 30 makes the Act applicable to the Ordinances, S. 6 has no application to such temporary Ordinances. A.I.R. 1933 Cal. 280, Dist. (*Sulaiman, C. J., Mukerji and King, JJ.*) BANS GOPAL *v.* EMPEROR. **55 All. 961=6 I.R. (All.) 141=145 I.C. 680=34 Cr.L.J. 1030=1933 A.L.J. 875=1933 Cr.C. 1181=A I R. 1933 All. 669 (F.B.).**

GESTATION. *See* EVIDENCE ACT, S. 112.

GHATWALI TENURE,

See (1) CHOTA NAGPUR TENANCY ACT (1908), SS. 64 (3), 67 AND 77.
(2) LAND TENURE—GHATWALI TENURE

GIFT.

See (1) BUDDHIST LAW (BURMESE)—DEATHBED GIFT.
(2) DEED—CONSTRUCTION.
(3) HINDU LAW—GIFT.
(4) MAHOMEDAN LAW—GIFT.
(5) T. P. ACT, 1882, SS. 122-128.

———*Construction*—Bona fides *and fictitious nature.*

In order to test the nature of gift, *i. e.*, whether it is fictitious or otherwise, surrounding circumstances contemporaneous with the gift and subsequent conduct of the parties concerned is the best guide (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIVID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I R. 1932 Oudh 130=8 O.W.N. 349=A I.R 1931 Oudh 177.**

———*Construction—Gift of jungle without exception of trees—No mention of land—Gift is of timber, not land.*

Where according to a deed of gift, a jungle without exception of any tree is gifted away, and there is no mention of land upon which the jungle stood, it means that what was gifted away was the timber of the jungle and not also the land upon which the jungle stood. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIVID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I R. 1931 Oudh 177.**

———*Ineffective transfer—Intention of parties.*

Where a gift of certain occupancy land was made on 15th April, 1929, and the same was revoked on 25th April, 1929, and it appeared that there was no change in the situation during the interval, thougd there were crops on the land,

Held, that there was no effective transfer by way of gift (*Keane, S.M. and Oppenheim, J. M.*) MAHOMED

GOSAVIS.

HASAN KHAN *v.* JANG BAHADUR SINGH. **15 R. 295=12 L.R. 105 (Rev.).**

———Subscription for specific purpose—Purpose becoming impossible—Suit for refund of amount paid—Limitation—Suit governed by Art. 120. *See* LIMITATION ACT, ART. 120. **A.I.R. 1934 Oudh 329.**

———*Validity of—Gift of land for specific charitable purpose—Performance of purpose rendered impossible—Effect of.*

Where a land is given not with a general charitable intention but for a specific charitable purpose, and the performance of that purpose is rendered impossible, the gift becomes a nullity. In short such a gift is a conditional one, and it becomes a good charitable gift upon the condition being performed. If the performance of the condition is rendered impossible, the gift never really takes effect and the donees are not entitled to the property. (*Harries and Rachhpal Singh, JJ.*) HARISH CHANDRA *v.* HINDU DHARAM SEWAK MANDAL. **161 I C. 507=8 R.A. 745=1935 A.W.R. 1523=1936 A.L.J. 448=A.I.R. 1936 All. 197.**

———*Validity of—Gift to unregistered association.*

Where under a gift to an unregistered association, the property is to be handed over to a person for the use of the association, the gift is a valid one. (*Kendall, J.*) MAHABIR *v.* ANJUMAN WAZIFATUL MUSLIMIN. **158 I.C 762=8 R.A. 332=1935 A.L J. 1086=1935 A. W.R. 1054=A.I.R. 1935 All 872.**

———*Validity of—Suit to set aside as benami—Circumstances for consideration—Burden of proof.*

In order to determine the question of the validity or invalidity of the deed or gift, which is attacked as benami and colourable, it is of assistance to consider the surrounding circumstances, the position of the parties and their relation to another, the motives which could govern their actions and their subsequent conduct. The onus of proof rests upon the party impeaching the deed. 30 A. 258 (P C.), Ref. (*Lord Macmillan*) MANMOHAN DAS *v.* RAM DEI. **I R. 1931 P.C. 317=134 I.C. 669=8 O.W N. 936=33 Bom.L.R. 1251=1931 M.W.N. 931=1931 A L J. 550=35 C W.N. 925=34 L.W. 7=A.I.R. 1931 P.C. 175 (P.C.).**

GOOD FAITH.

See (1) PENAL CODE, S. 52.
(2) PROVINCIAL INSOLVENCY ACT, S. 53.
(3) SPECIFIC RELIEF ACT, S. 27.
(4) T. P. ACT, SS. 41, 43 AND 53.

GOODS.

See (1) CONTRACT ACT, SS. 76, 123.
(2) SALE OF GOODS ACT (1930).

GORAKHPUR GORAITS ACT (1919), S. 4 (3)—*Scope and effect.*

The effect of S. 4 (3) is that a person admitted to tenancy as a non occupancy tenant should be treated as a lessee and that he does not acquire occupancy rights by the efflux of the period of lease. He does not become a trespasser after the said period so as to be ejected by a civil suit. (*Dalal, J.*) KHADERU CHAMAR *v.* SRI NATH PANDE. **I.R. 1931 All. 185 129 I.C. 553=15 R D. 162=12 L.R. 35 (Rev.)=A.I.R. 1931 All 198.**

GOSAVIS—*Law governing.*

Gosavis are included in the category of Wanaprasthas. Some of them have adopted the custom of marriage and Gharbari Gosavis form a part of this sect. They are governed by the ordinary laws of inheritance under Hindu Law, unless custom is proved to the contrary. (*Jeevan Yar Jung Bahadur and Bishehwar Nath, JJ.*) GANESHGEER *v.* PARVATI BAI. **142 I.C. 70.**

———*Succession—Right of one sect to succeed to another.*

GOVERNMENT.

The question whether the Gosavis of one sect will be the heirs of Gosavis of other sect or not and the relationship *inter se* will depend upon the proof of custom. (*Jevan Yar Jung Bahadur and Bisheshwar Nath, JJ.*) GANESHGEER *v.* PARVATI BAI. **142 I.C. 70.**

GOVERNMENT

See (1) ACT OF STATE.
(2) CROWN.
(3) CROWN GRANT.
(4) GOVERNMENT OF INDIA ACT.
(5) GRANT—CROWN GRANT.
(6) SECRETARY OF STATE.

GOVERNMENT OF INDIA ACT (1915) (5 and 6 Geo. V, C. 61) (as amended in 1919), Ss. 29, 29 A and 30—*Contract by Official Receiver—Liability of Secretary of State.*

The liability of the Secretary of State on contract is limited to contracts laid down in Ss. 29, 29-A and 30. A contract by an Official Receiver to take on lease certain premises for the benefit of the insolvent does not come under any of the sections in Part 3 and as such does not involve the Secretary of State in any liability. (*Mukerji and Bennet, JJ.*) RAM SHANKAR *v.* SECRETARY OF STATE. **54 All. 879 = I R. 1932 All. 574 = 139 I.C. 701 = 1932 A.L.J. 842 = A.I.R. 1932 All 575.**

——**S. 30**—*Contract on behalf of the Secretary of State—Absence of formal deed—Effect—Contract on behalf of the Government in the Education Department—Authority to enter into.*

S. 30 of the Government of India Act, though it does not expressly lay down that a contract is to be by a formal document, provides that a contract must be on behalf of and in the name of the Secretary of State in Council. That provision makes it necessary that the contract should be evidenced by a formal document in the nature of an indenture or deed to which the Secretary of State in Council is a party. Such a contract cannot be entered into or evidenced by mere correspondence. As regards contracts by the Government of Bombay in the Educational Department, the only person authorised to enter into a contract is the Director of Public Instruction. The Secretary to the Government in the Educational Department has no authority to enter into a contract, so as to make it binding on the Government. (*Mirza, J.*) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* SECRETARY OF STATE **58 Bom. 660 = 7 R B. 185 = 152 I.C. 947 = 36 Bom. L.R. 568 = A.I.R 1934 Bom. 277.**

——**S. 32**—*Liability of Secretary of State in respect of Acts of State.*

Apart from commercial transaction of the Secretary of State, there are only three exceptions in respect of which he could be made liable although the Acts may be Acts of State. These three exceptions are: (*a*) trespass to immovable property, (*b*) an obligation imposed by a statute, and (*c*) where it can be shown that benefit has resulted to Government from a tort of its servants (*Mirza, J.*) MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* SECRETARY OF STATE. **58 Bom. 660 = 7 R B. 185 = 152 I C. 947 = 36 Bom L R. 568 = A.I.R. 1934 Bom. 277.**

——**S. 32**—*Management of plaintiff's estate by Court of Wards—Negligence and mismanagement—Loss due to—Suit against Secretary of State—Maintainability.*

A suit does not lie against the Secretary of State for India in Council in respect of an act of a subordinate in connection with the exercise of sovereign or governmental power. Though the Secretary of State may be charged with liability in respect of the mercantile dealings of the Government or on the basis of contract entered into with another, the management of the Court of Wards does not fall within any of such categories, and a suit is not maintainable against the Secretary of State for India, at the instance of a disqualified proprietor to whom the estate had been subsequently restored, claiming accounts and damages for loss caused by the negligence and mismanagement of the manager of the Court of Wards during the management of the plaintiff's estate. Case-law exhaustively discussed. (*Rankin, C. J. and C.C. Ghose, J.*) SECRETARY OF STATE FOR INDIA *v.* SRI GOBINDA CHAUDHURI. **59 Cal. 1289 = 140 I.C. 856 = I.R. 1933 Cal. 58 = 55 C.L J. 542 = 36 C.W.N. 606 = A.I.R. 1932 Cal. 834.**

[**Appl.** 37 C.W.N. 957 (961, 962). **R** 57 M. 857, (881)]

——**S. 32 (4)**—*Government official—Personal liability of.*

No official of Government executing any contract on behalf of the Secretary of State in Council shall be personally liable in respect thereof. (*Addison, J.*) N.W. RY. ADMINISTRATION *v.* N.W. RY. UNION, LAHORE. **14 Lah. 330 = 148 I.C. 49 = 6 R.L. 493 = 34 P.L.R. 975 = A.I.R. 1933 Lah. 203.**

——**S. 49**—Notification by the local Government in the Gazette—Whether duly authenticated—Signed by the Additional Secretary to the Government. *See* BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930), S. 3 (2). **62 Cal. 1041.**

——**(as amended in 1918), S. 52 B (2)**—*Rules made by Governor acting with Ministers—Validity of—Enquiry into—Competency.*

The validity of the rules made by the Governor acting with his Ministers under S. 176 (2) (*i*), C. P. Municipalities Act, conferring jurisdiction on Judges of Civil Courts as Civil Courts to decide election disputes cannot under S. 52 B be questioned in any legal proceedings on the ground that they do not relate to a transferred subject, and the authority have no power to confer jurisdiction on Civil Courts, as the powers of Civil Courts are included in the provincial subject of administration of justice, which is a reserved and not a transferred subject. (*Macnair, J.C., Jackson and Subhedar, A.J.Cs.*) NILKANTHRAO *v.* JAGNATH. **27 N.L.R. 61 = I.R. 1931 Nag. 88 = 131 I.C. 424 = A.I.R. 1931 Nag. 82 (2) (F.B.).**

——**S. 55**—*Delegation of powers to Local Government—Validity of.*

The delegation of powers to the Local Government to declare that associations are to be deemed to be unlawful is not *ultra vires*. (*Jai Lal, J.*) MATHRA DAS *v.* EMPEROR. **6 I.R. (Lah.) 160 = 146 I.C. 25 = 34 Cr.L J. 1178 = 34 P.L.R. 923 = 1933 Cr C. 631 = A I.R. 1933 Lah. 387 (2).**

——**Ss. 64 and 129-A**—*Legislative Assembly—Electoral Rules, Rr. 12 (6) and 48 -Candidate elected but resigning—Resignation accepted before oath under R. 24—Refund of deposit refused—Suit if barred.*

A candidate deposited Rs. 500 on 16th June 1930 under R. 12 (1), and was elected on 26th June 1930. Three days later, he sent in his resignation, and it was accepted on 2nd July 1930. He did not make either the oath or affirmation prescribed by R. 24. He demanded a refund of his deposit which was refused. In a suit to recover the deposit,

Held, that his application for refund having been refused by the authorities and he having been told that the rules do not entitle him to it, it was open to the candidate to obtain a decision from the Governor-General

GOVT. OF INDIA ACT (1915), S. 67 (2) (b).

under R. 48; and so long as the Governor-General did not refuse to give a decision, the Courts would decline to interfere. (*Vivian Bose, A. J. C.*) THAKURDAS GUJRATHI *v.* SECRETARY OF STATE. **30 N.L.R. 255 = 149 I.C. 103 = 6 R.N. 219 = A.I.R. 1934 Nag. 126.**

———**S. 67 (2) (b)**—*Sanction of Governor-General—Changes introduced in Select Committee—Child Marriage Restraint Act*, 1929, *if* ultra vires.

Where in a prosecution for a Hindu child marriage the accused pleaded that the Act was *ultra vires*, as it did not have the sanction of the Governor-General as it came out of the Select Committee.

Held, that so far as the Hindus were concerned the changes introduced in the Select Committee were not such as to render inadequate the previous sanction accorded by the Governor-General or the introduction of the Bill unlawful. (*Macpherson, J.*) MT. JALSI KUAR *v.* EMPEROR. **6 I R. (Pat.) 248 = 146 I.C. 298 = 35 Cr.L J. 20 = 14 Pat. L T. 438 = 1933 Cr C. 1027 = A.I.R. 1933 Pat. 471.**

———**S. 68**—*Bill introduced with Governor General's sanction—Amendments made by Select Committee—Fresh sanction, if necessary.*

Where a bill is introduced in the legislature with the sanction of the Governor General, merely because in the Select Committee several material amendments are made, the sanction of the Governor-General need not be obtained once again before the amendments are discussed and adopted. (*Tek Chand, J.*) JOTY PARSHAD *v.* AMBA PARSHAD. **154 I.C. 476 (1) = 7 R.L. 577 (1) = 36 Cr.L.J. 559 = A.I.R. 1934 Lah. 136 (1).**

———**S. 72**—"*Emergency*"—*Jurisdiction of High Court.*

The question whether an emergency exists or not within the meaning of this section is one of fact which the Court may enquire into. But inasmuch as the Governor-General may be in possession of facts which he may not be willing, or be compelled, to disclose, all that the courts can do is to enquire whether there is evidence from which the Governor-General may reasonably conclude that an emergency exists. (*Beaumont, C. J., Madgavkar and Blackwell, JJ.*) EMPEROR *v.* CHANNAPPA SHANTIRAPPA. **55 Bom. 263 = I.R. 1931 Bom 196 = 129 I.C. 596 = 32 Cr.L.J. 403 = 32 Bom.L.R. 1613 = 1931 Cr.C. 65 = A.I.R. 1931 Bom. 57.**

———**S. 72**—*Ordinance—Operation of—Viceroy, the sole Judge.*

The Governor-General who is the sole repository of the power of promulgating Ordinances is the only Judge as to whether or not the provisions of an Ordinance can or cannot be made operative by reference to an original statute or otherwise. (*C. C. Ghose, Costello and Remfry, JJ.*) ANANDA BAZAR PATRIKA, *In the matter of.* **60 Cal 408 = I.R. 1932 Cal. 675 = 140 I.C. 5 = 33 Cr.L J 839 = 37 C.W.N. 104 = 1932 Cr.C. 754 = A.I.R. 1932 Cal. 745 (S.B.).**

———**S. 72**—*Ordinance—Validity—Omission to recite emergency.*

If there are omissions in an Ordinance, it must be open to the Governor General to repair the omissions by means of an amending Ordinance. It is not necessary to recite the original emergency if the later Ordinance is merely an amending Ordinance. (*C. C. Ghose, Costello and Remfry, JJ.*) ANANDA BAZAR PATRIKA. *In the matter of.* **60 Cal. 408 = I.R. 1932 Cal. 675 = 140 I.C. 5 = 33 Cr.L.J. 839 = 37 C.W.N. 104 = 1932 Cr.C. 754 = A.I.R. 1933 Cal. 745 (S.B.).**

[F. 37 C.W.N. 166 (171).]

———**S. 72**—*Powers of the Governor-General—Emergency—Existence of—Ordinance—Necessity for—Jurisdiction to decide.*

GOVT. OF INDIA ACT (1915), S. 72.

Under S. 72 of the Government of India Act, which authorizes the Governor-General in cases of emergency to promulgate Ordinances for the peace and good Government of British India, the Governor General alone is to be the sole Judge of whether the state of emergency exists and whether the Ordinance conduces to the peace and good government of British India, as contemplated by the section. His judgment is not subject to review by the Courts. The power given to the Governor-General by S. 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is only to be used in extreme cases of necessity where the good government of India demands it. (*Viscount Dunedin*) BHAGAT SINGH *v.* EMPEROR. **58 I.A. 169 = 12 Lah. 280 = 35 C.W.N. 646 = I.R 1931 P.C. 143 = 33 Bom.L.R. 950 = 32 Cr.L J. 727 = 131 I.C. 415 = 53 C.L.J. 383 = 8 O.W.N. 846 = 1931 A.L.J. 448 = 14 O.L.J. 540 = 34 L.W. 57 = 32 P.L.R. 658 = 1931 M.W.N. 601 = 1931 Cr.C. 521 = A.I.R. 1931 P. C. 111 = 61 M.L J. 279 (P.C.).**

[R. 34 Bom.L.R. 1523 (1547) (S.B.); 60 C. 364 (374); 37 C.W.N. 166 (168); 61 C. 197 (208); Rel. 59 C. 1440 (1449).]

———**S. 72**—*Power to extend operation of Ordinance conferred on Local Government—Validity of.*

The Governor General and he alone, has the power to promulgate an ordinance, which is a form of emergency legislation. He can also provide that it shall come into operation at such time or in such areas as may be determined by the Local Government or some third party. By so doing, he is not delegating the right to make a law; he is merely providing how the law which he makes is to be administered. 4 Cal. 172 (P. C.) Rel. (*Beaumont, C. J. Broomfield and Nanavati, JJ.*) EMPEROR *v.* BALKRISHNA HARI. **57 Bom. 93 = 141 I C 720 = I.R. 1933 Bom. 130 = 34 Cr.L.J. 199 = 34 Bom.L.R. 1523 = 1933 Cr.C. 1 = A.I.R. 1933 Bom. 1 (S.B.).**

———**S. 72**—*Promulgation of Ordinance—Statement of reasons unnecessary.*

It is not in any way incumbent on the Governor-General as a matter of law to expound the reasons which induce him to promulgate an Ordinance under S. 72. (*Viscount Dunedin.*) BHAGAT SINGH *v.* EMPEROR **58 I.A. 169 = 12 Lah. 280 = 35 C.W.N. 646 = 33 Bom L.R. 950 = I.R. 1931 P.C 143 = 32 Cr. L.J. 727 = 131 I.C. 415 = 53 C.L J. 383 = 14 O.L.J. 540 = 34 L.W. 57 = 32 P.L.R. 658 = 8 O.W.N. 846 = 1931 A.L.J. 448 = 1931 M.W.N. 601 = 1931 Cr. C. 521 = A.I.R. 1931 P.C. 111 = 61 M.L.J. 279 (P.C.).**

———**S. 72**—*Repetition of ordinance—Special Powers Ordinance (X of 1932), S. 77—Validity.*

The same conditions, which may at one time create an emergency, may, whether they continue or disappear, be regarded as again creating an emergency. There is nothing in S. 72 which may be construed as indicating that an Ordinance, which, under it, is to remain in force for six months, cannot be repeated. And hence S. 77, Special Powers Ordinance X of 1932, is not *ultra vires*. Whether at any time there is a state of emergency or not, is a matter entirely for the Governor-General to judge. (*Rankin, C. J., Mukherji and Mitter. JJ.*) ANUKUL CHANDRA PARIHAL, *In re.* **142 I.C. 225 = I.R. 1933 Cal. 257 = 34 Cr.L J. 316 = 1933 Cr.C. 359 = A.I.R. 1933 Cal. 278 (S.B.).**

———**S. 72**—*Sentences under special ordinance—Termination.*

It is not the intention of the Parliament in limiting the duration of an ordinance to six months to limit also

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the sentences of imprisonment that might be imposed under any such ordinance to sentences that would expire with the expiry of the ordinance. There is nothing in S. 72 to justify such a conclusion although no such proviso may have been inserted in the ordinance. (*Panckridge and Patterson, JJ.*) JOGENDRA CHANDRA ROY *v.* SUPERINTENDENT OF THE DUM DUM SPECIAL JAIL. **60 Cal. 742 = I.R. 1933 Cal. 241 (2) = 142 I.C. 204 = 34 Cr.L.J. 291 (2) = 37 C.W.N. 363 = 1933 Cr.C. 361 = A.I.R. 1933 Cal. 280.**

———**S. 79**—*Local legislature—Power to pass laws affecting jurisdiction and powers of High Court.*

Per *Bennet, J.*—The local legislature has power (with previous sanction) to pass laws affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, 1919, the Letters Patent or the Codes. Hence S. 19 (*f*), U. P. District Boards Act, is not *ultra vires* of the legislature. (*Mukerji and Bennet, JJ.*) MASOOD ALI KHAN *v.* ALI AHMAD KHAN. **55 All. 1008 = 147 I.C. 148 = 6 R.A. 403 = 1933 A.L.J. 971 = A.I.R. 1933 All. 764.**

———**S. 80 (3) (a)**—"*New tax*"—*Meaning.*

The words "new tax" in S. 80 (3) (*a*) are wide enough to cover the case of a tax which has been newly or recently imposed. (*Jai Lal and Agha Haidar, JJ.*) GANPAT RAI *v.* DISTRICT BOARD, SARGODHA. **I.R. 1931 Lah. 878 = 134 I.C. 110 = 33 P.L.R. 135 = A.I.R. 1932 Lah. 87.**

———**(as amended by the Amending Act of 1916), S. 84**—*Scope and construction—Local law affecting prerogative of Crown passed prior to* 1915—*Validity—City of Bombay Municipal Act* (1888)—*If* ultra vires.

S. 84 of the Government of India Act of 1915, taken in conjunction with S. 2 of the Amending Act of 1916, has undoubtedly the effect of validating not only future Acts of legislative authorities in India, but also past acts, *i.e.*, acts of local legislatures passed prior to 1915. The City of Bombay Municipal Act of 1888 is not therefore invalid or *ultra vires* the local legislature merely because of the fact that it affects the prerogative of the Crown. (*Beaumont, C. J. and Rangnekar, J.*) SECRETARY OF STATE *v.* MUNICIPAL CORPORATION OF BOMBAY (NO. 1). **59 Bom. 681 = 158 I.C. 151 = 8 R.B. 113 = 37 Bom L.R. 499 = A.I.R. 1935 Bom. 347.**

———**S. 96 B**—*Civil Services (Classification, Control and Appeal) Rules, R.* 55—*Breach of in dismissing servant—Damages—Assessment.*

A person in the civil service of the Crown in India holds office during His Majesty's pleasure. He has however a right of action against the Crown if he is removed from service without a full enquiry complying with R. 55 of the Civil Services (Classification Control and Appeal) Rules. In order to assess the damage it must be seen what his position would have been if he had been replaced in his position as he was before his removal. If it is a certainty that he would be removed from his appointment even if an enquiry strictly following R. 55 were to be held, the damages which he is entitled to for the failure to follow the provisions of that rule must be nominal. (*Page, C. J. and Baguley, J.*) SECRETARY OF STATE *v.* D'ATTAIDES. **12 Rang. 556 = 154 I.C. 212 = 7 R.R. 285 = A.I.R. 1934 Rang. 381.**

———**S. 96-B**—*Civil Services (Classification, Control and Appeal) Rules, R.* 55—*Object and effect of.*

The object and effect of S. 96 B of the Government of India Act and R. 55 of the Civil Services (Classification Control and Appeal) Rules is that while the Crown reserves to itself the right of dismissal at pleasure

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it is provided, in order to prevent high-handed action on behalf of its agents, that the Crown should only exercise its right of dismissal at pleasure, after the servant concerned has obtained the benefit of an enquiry into the circumstances in respect of which the Crown might or might not exercise its right of dismissal. For plain dismissal or removal from the service of the Crown *per se* the servant has no right of action against the Crown. He has, however, a right of action if he is removed without the provisions of R. 55 having substantially been complied with. (*Page, C. J. and Baguley, J.*) SECRETARY OF STATE *v.* D'ATTAIDES. **12 Rang. 556 = 154 I.C. 212 = 7 R.R. 285 = A.I.R. 1934 Rang. 381.**

———**S. 96-B**—*Civil Services (Classification, Control and Appeal) Rules, R.* 55—*G. circular No.* 49 *of* 1930 *of Government of Burma—Infringement of—Right of action.*

G circular No. 49 of 1930 of the Government of Burma is merely a circular pointing out to Government officers the way in which they are to proceed in all cases to which R. 55 of the Civil Services (Classification, Control and Appeal) Rules applies. It has no statutory basis and the infringement of its provisions does not give to any person any right of action. (*Page, C. J. and Baguley, J.*) SECRETARY OF STATE *v.* D'ATTAIDES. **12 Rang. 556 = 154 I.C. 212 = 7 R.R. 285 = A.I.R. 1934 Rang. 381.**

———**S. 96 B**—*Dismissal of servant—Damages for remarks made by officer.*

In view of the opening words of S. 96 B of the Government of India Act, a person in the Civil Service of the Crown can have no cause of action against the Crown for wrongful dismissal or wrongful removal. Nor can he claim damages for any remarks made by any official in connection with the dismissal. The damages for wrongful dismissal of a servant cannot include compensation for the manner of the dismissal, for his injured feelings, or for the loss he may sustain from the fact that the dismissal of itself makes it more difficult for him to obtain fresh employment, 1909 A.C. 488, Ref. to. (*Page, C. J. and Baguley, J.*) SECRETARY OF STATE *v.* D'ATTAIDES. **12 Rang. 556 = 154 I.C. 212 = 7 R.R. 285 = A.I.R. 1934 Rang. 381.**

———**S. 96 B**—*Fundamental Rules and Civil Service Regulations—Applicability—Port office clerk at Bassein—Right to enquiry on suspension.*

The Local Government have been regarding Port office clerks at Bassein as coming under the Fundamental Rules and the Civil Service Regulations. A head clerk who had served for many years on the footing that these rules applied to him, is entitled to the benefits given to persons in the Civil Services of the Crown in India, and if he is placed under suspension on certain charges, he is entitled to the benefit of an enquiry as laid down in the rules drafted under S. 96 B of the Government of India Act. (*Page, C. J. and Baguley, J.*) SECRETARY OF STATE *v.* D'ATTAIDES. **12 Rang. 556 = 154 I.C. 212 = 7 R.R. 285 = A.I.R. 1934 Rang. 381.**

———**S. 96 B**—*Right of Crown to dismiss civil servants.*

S. 96-B of the Government of India Act has not taken away from the Crown the right to dismiss its civil servants at its pleasure which existed before its enactment. 57 C. 231, Foll. (*Beasley, C. J. and Bardswell, J.*) RANGACHARI *v.* SECRETARY OF STATE FOR INDIA. **57 Mad. 857 = 154 I.C. 884 = 7 R.M. 505 = 40 L.W. 146 = A.I.R. 1934 Mad. 516 = 67 M.L.J. 123.**

———**S. 96-B**—*Tenure of civil servant—Recruitment under Government of India Rules.*

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Where a contract with a civil servant was made under the authority of the Government of India Rules, which were presumably made under the delegated authority by the Secretary of State-in-Council, the tenure of his office is not at His Majesty's pleasure, but is regulated by the terms of the rules under which he was recruited and served. 57 M. 857, Diss. From. (*Dalip Singh and Bhide, JJ.*) HARI RAM *v.* SECRETARY OF STATE FOR INDIA. **158 I.C. 996 = 8 R L. 328 = 37 P.L.R 780 = A.I.R. 1936 Lah. 282.**

——**S. 96-B (1)**—*Rules* 13 *and* 15—*Dismissal of officer by a person subordinate to the appointing authority—Officer already on invalid pension—Suit for declaration of wrongful dismissal and for damages—Maintainability against Secretary of State—Pensions Act, S.* 6.

A Police Sub-Inspector was first discharged on an invalid pension but was afterwards dismissed, with the consequence of his pension being withdrawn for misconduct prior to discharge. He sued the Secretary of State for a declaration that he was not liable to removal after his retirement and for damages.

Held, that though the dismissal of the Sub-Inspector by the Deputy Inspector-General, an authority lower in rank than the Inspector General by whom he was appointed, was not in accordance with the words of S. 96-B (1) of the Government of India Act, still the whole section being governed by its opening words "subject to the provisions of this Act and the rules made thereunder", the dismissal would not be contrary to the statute in so far as there was a new rule framed under the Act giving a Deputy Inspector-General power to dismiss as well as appoint a Sub Inspector. The dismissal could not be considered from the point of view of its having been a breach of contract with reference to S. 96 B (1). The dismissal had rather to be viewed as part of the order by which he had been deprived of his pension The damages prayed for, for the breach of contract set up, could only be for the loss of pension and the Sub-Inspector was debarred by the Pensions Act from bringing any suit that might affect his right to the pension. (*Beasley, C. J. and Bardswell, J.*) RANGACHARI *v.* SECRETARY OF STATE FOR INDIA. **57 Mad. 857 = 154 I.C. 884 = 7 R.M. 505 = 40 L. W. 146 = A.I.R. 1934 Mad. 516 = 67 M.L.J. 123.**

——**S. 96-B (1) and R. 14**—*Officer dismissed without enquiry—Right of suit—Public servants enquiries Act, S.* 25.

A Reader in the Government Press, was dismissed from service without any enquiry. He sued the Secretary of State for damages for wrongful dismissal.

Held, he had no right of action, as R. 14 framed under the Government of India Act, imposing formalities like enquiry before dismissal of a civil servant was specifically without prejudice to the provision of the Public Servants Inquiries Act, S. 25, which says, "Nothing in this Act shall be construed to affect the authority of the Government for suspending or removing any public servant without an enquiry under this Act." When that was the case, it was not possible to say that the Government or the authority to whom it delegated its power in the matter could not, with reference to R. 14, dismiss its civil servants without any enquiry. That one was doing work, as a reader in a press, which could have been done by a private person did not make him any the less a public servant or limit the right of Government to dismiss him at its pleasure. The statutory rules gave him no right of suit, and the general rule was that no remedy could be taken but the particular remedy prescribed by the statute. (*Beasley, C.J. and Bardswell, J.*) RANGACHARI *v.* SECRETARY OF STATE FOR INDIA. **57 Mad. 857 = 40 L.W. 146 = 154 I.C. 884 = 7 R.M. 505 = A.I.R. 1934 Mad 516 = 67 M.L.J. 123.**

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——**S 96-B (2)**—*Power of dismissal—Limitation.*

In British India the general power, based on public policy allowing Government to dismiss their servants without giving any reason why they should be dismissed, is slightly fettered under the Statutory Rules—Tenure of Government servants. (*Cunliffe, J.*) J. A. D. NAYAGAM *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **9 Rang. 18 = I R. 1931 Rang. 311 = 134 I.C. 743 = A.I.R. 1931 Rang. 103.**

——**S. 96-B (2)**—*Rules under—Rule* 14—*Dismissal of Government servant—Finding of Civil Court as to guilt—Further departmental enquiry if, necessary.*

Under Statutory Rule 14 made under S. 96 B (2) regarding dismissal of a Government servant, if a Civil Court holds in a civil action that a Government servant has made a fraudulent claim and a false declaration in respect of that action, it is not necessary that in order to justify his dismissal there should be a further departmental enquiry. The finding is sufficient by itself for dismissal. (*Cunliffe, J.*) J. A. D. NAYAGAM *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **9 Rang. 18 = I.R. 1931 Rang. 311 = 134 I.C. 743 = A.I.R. 1931 Rang. 103.**

——**S 96-B (2)**—*Rules under—Rule* 14—"*Judicial trial*"—*Meaning.*

"Judicial trial" includes all trials held before a competent Court and is not limited to criminal trial. (*Cunliffe, J.*) J. A. D. NAYAGAM *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **9 Rang. 18 = I.R. 1931 Rang. 311 = 134 I.C. 743 = A.I.R. 1931 Rang. 103**

——**S. 101 (4)**—*Constitution of High Court—Absence of requisite proportion due to temporary vacancy—Additional and officiating Judges—Whether the proviso to the rule applies.*

At least in practice, the proviso to S. 101 has been interpreted so far as meaning that the Chief Justice must be a Barrister Judge and that one-third of the total strength of the permanent Judges including the Chief Justice must be Barristers, and one-third must be members of the Indian Civil Service. The proviso does not in express terms apply to Additional Judges, for it excludes them. *A fortiori*, the proviso does not apply to Officiating Judges appointed by the Local Government. So there is no defect at all if the Officiating Chief Justice happens to be a non-Barrister or an Officiating Judge a non-Barrister or non-Civilian Judge in place of Barrister or Civilian Judge, who has either retired or gone on short leave. There is a distinction between the constitution of a High Court which consists of one Chief Justiceship and a fixed number of Puisne Judgeships and the actual group of individual Judges, who for the time being constitute the High Court. If the constitution itself were altered and a Judgeship were abolished, which would disturb the requisite proportion, there would certainly be a defect in the constitution But if there be a temporary vacancy caused by the retirement, resignation or going on leave of a Chief Justice or Permanent Judge, the constitution, would not be illegal. The mere fact that a vacancy caused by the retirement of a Judge has not been filled up and there is no longer the requisite proportion (one-third) of the Barrister Judges, does not render the High Court illegally constituted so as to deprive the subsisting Judges of their ordinary jurisdiction. (*Sulaiman, C. J. and Baipai, J.*) ADITYA NARAIN SINGH *v.* TULSHI PRASAD NARAIN SINGH. **7 R.A. 190 = 151 I.C. 565 = 1934 A.L.J. 941 = 4 A.W. R. 81 = A.I.R. 1934 All. 979.**

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———**S. 101 (4)**—*Constitution of High Court—Absence of requisite proportion due to vacancy—Effect.*

S. 101, cl. (4) no doubt provides that at least one-third of the Judges of the High Court shall be Barristers. But this does not mean that if on account of certain reasons a vacancy occurs, the other Judges of the High Court shall be deemed incompetent to carry on the work of the High Court till the vacancy has been filled up. (*Mukerji and Bennet, JJ.*) BHAGWAN KUNWAR *v.* GULAB KUNWAR. **4 A.W.R. 79 = A.I.R. 1935 All. 322.**

———**S. 106**—*High Court's Original Criminal Jurisdiction—Modification by ordinance—Power of Governor-General.*

S. 106 of the Government of India Act leaves the definition of the High Court's Original Criminal Jurisdiction to be made by the Letters Patent and the High Court derives a particular Original Criminal Jurisdiction from Cl. 22, Letters Patent. It is within the power of the Indian Legislature to alter and amend the Letters Patent and consequently within the Ordinance making power of the Governor-General under the Government of India Act. (*Rankin, C.J. and Ameer Ali, J.*) AMAR CHANDRA *v.* EMPEROR. **60 Cal. 814 = I.R. 1933 Cal. 259 = 142 I.C. 310 = 34 Cr.L.J. 320 = 1933 Cr.C. 500 = 37 C.W.N. 481 = A.I.R. 1933 Cal. 364.**

———**S. 107**—*Applicability—Order under S. 51, Emergency Powers Ordinance*, 1932.

Quaere.—Whether High Court can exercise its power of superintendence under S. 107, Government of India Act, with respect to order under Ordinance II of 1932. (*Panckridge and Patterson, JJ.*) MANMATHANATH KUNDU *v.* EMPEROR. **60 Cal 851 = I.R. 1933 Cal. 390 = 143 I.C. 238 = 34 Cr. L.J. 579 = 1933 Cr.C. 579 = A.I.R. 1933 Cal. 401.**

———**S. 107**—*Board of Revenue—Order under Madras Estates Land Act, S. 172—Revision—Maintainability.*

Held, (*Sundaram Chetty, J., dissenting*) : The Revenue Officer when making a settlement of rents under Chapter XI of the Madras Estates Land Act is not a Civil Court. So the Board of Revenue when directing the revision of his proceedings under S. 172 is also not a Civil Court and the High Court cannot either under S. 115 C. P. Code or S. 107, Government of India Act, revise an order made or purported to be made under S. 172. (*Beasley, C. J., Ramesam, Reilly, Ananthakrishna Aiyar and Sundaram Chetty, JJ.*) RAJA OF MANDASA *v.* JAGANNAVAKULU. **55 Mad. 883 = I.R. 1932 Mad. 859 = 140 I. C. 331 = 1932 M.W.N. 350 = 36 L.W. 292 = A.I.R. 1932 Mad. 612 = 63 M.L.J. 450 (F.B.).**

———**S. 107**—Civil Court—District Judge hearing election petition—U. P. District Boards Act—Ss. 18 and 19.—Judge presiding as *persona designata*—High Court has no power of appeal revision or superintendence. *See* U. P. DT. BOARDS ACT (1922) SS. 18 AND 19 **1933 A.L.J. 671 = A.I.R. 1933 All. 764**

———**S. 107**—Competency of revision—Conviction by Union Bench under Bengal Village Self Government Act (1919). *See* CR. P. CODE S. 439. **59 Cal. 1080.**

———**S. 107**—*Court—District Magistrate acting under Press (Emergency Powers) Act (XXIII of 1931).*

The District Magistrate acting under Press (Emergency Powers) Act (XXIII of 1931) is not a Court but an executive officer, and therefore not subject to the High Court's power of superintendence. (*Courtney Terrell, C. J., Mahomed Noor and Varma, JJ.*) MURALI MANOHAR PRASAD *v.* EMPEROR. **13 Pat. 547 = 6 R.P. 669 = 35 Cr L.J. 1022 = 149 I.C. 841 = 15 Pat.L.T. 291 = 1934 Cr.C. 720 = A.I.R. 1934 Pat. 344 (F B.).**

———**S. 107**—*Discretionary order—Order refusing amendment of plaint—Interference.*

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It cannot be laid down as an inflexible rule that a discretionary order cannot be interfered with in revision. When amendment of the plaint was applied for, before the trial began, but the Court refused the same, though plaintiff had good grounds,

Held, in revision, that the amendment should be allowed subject to any order for costs, that may be made by the lower Court. (*C.C. Ghose, Ag. C. J. and S. K. Ghose, J.*) LOKE NATH MUKHERJEE *v.* ABANI NATH MUKHERJEE. **149 I.C. 923 = 6 R.C. 660 = 37 C.W.N. 1093 = A.I.R. 1934 Cal. 102.**

[R. 38 C.W.N. 1146 (1153).]

———**S. 107**—District Judge acting under Bengal Municipal Court—If Court subject to appellate jurisdiction of High Court—Order rejecting election petition on the ground that petitioner has no *locus standi*—High Court's power to revise. *See* BENGAL MUNICIPAL ACT, SS. 36 TO 44. **39 C.W.N. 971.**

———**S. 107**—District Judge refusing certificate under S. 41, Punjab Courts Act—Power of High Court to direct him to do so. *See* PUNJAB COURTS ACT, S. 41. **A I.R. 1935 Lah. 592.**

———**S. 107**—*Election petition—District Judge hearing—Revision from—U. P. District Boards Act (X of 1922), S. 18.*

A District Judge hearing an election petition under S. 18 of the District Boards Act (1922) is not a Civil Court but *persona designata*, even though he has the powers and privileges of a Civil Court; and hence he is not under the superintendence of the High Court under S. 107, Government of India Act. Case law discussed. (*Mukerji and Bennet, JJ.*) MASOON ALI KHAN *v.* ALI AHMAD KHAN. **55 All 1008 = 147 I C. 148 = 16 R. A. 403 = 1933 A.L.J. 971 = A.I.R. 1933 All. 764.**

———**S 107**—*Ends of justice—Statutory body acting in contravention of Act—Interference.*

The High Court is responsible for the administration of justice in the province and in cases of obvious infringement of the laws of the land by subordinate tribunals, it can always interfere in the interests of justice and in cases where the jurisdiction conferred on the Courts by the Act of Parliament has been flagrantly violated. Panchayat's action in contravention of S. 26, Punjab Village Panchayats Act, interfered with (*Agha Haidar, J.*) KUNDAN LAL *v.* RAM CHAND. **15 Lah. 80 = 6 R.L. 317 = 146 I.C. 1050 = 35 P.L.R. 140 = A.I. R. 1934 Lah. 156.**

———**S 107**—*Erroneous order ejecting third party in possession—Setting aside.*

A Court had appointed a Receiver of suit properties. It passed an order of ejectment against an occupant of the premises though neither party had a present right to remove him. It was advisable in the circumstances of the case not to eject him.

Held, that the order of ejectment having been passed with jurisdiction, though wrongly, was not open to revision under S. 115, but could be interfered with under S. 107, Government of India Act. (*Tapp, J.*) LALTA DEVI *v.* BALKISHAN CHOPRA. **6 I.R. (Lah.) 199 = 146 I.C. 258 = A.I.R. 1933 Lah. 327.**

———**S. 107**—*Interlocutory Order—Interference—Other remedy open.*

The High Court should not interfere under S. 107 with any interlocutory order when the plaintiff has a remedy by way of appeal. (*Dalip Singh, J.*) MEHTAB SINGH *v.* SECRETARY OF STATE. **I.R. 1933 Lah. 377 = 143 I.C. 685 = A.I.R. 1933 Lah. 157.**

———**S. 107**—*Interlocutory order—Revision.*

No doubt High Court only interferes in revision with interlocutory orders in cases, where refusal to interfere

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will cause irreparable loss or damage of some kind, yet such a revision is more under S. 107, Government of India Act, than under S. 115, C. P. Code. (*Mya Bu and Baguley, JJ.*) MAUNG PYU *v.* MA GYI. **6 I.R. (Rang.) 109=146 I.C. 615=A.I.R. 1933 Rang. 263.**

———**S. 107**—*Land Acquisition Collector—If a "Court"—Refusal to refer to civil court—Revision.*

The Land Acquisition Collector is not a "Court" within the meaning of S. 107, Government of India Act or S 115, C. P. Code; but his act in refusing to make a reference under S. 18, Land Acquisition Act, is a judicial act, consequently, though S. 115, C. P. Code, may not technically apply, there being no remedy outside the chartered High Courts. The High Court has power to revise such an order. (*Jack and Khundkar, JJ.*) LEAH ELIAS JOSEPH SOLOMON *v.* H. C. S. STORK. **61 Cal 1041=153 I.C. 938=7 R.C. 411=38 C.W N. 844=60 C.L.J. 184=A.I.R. 1934 Cal. 758.**

———**S. 107**—*Legal Practitioners Act—Order under—Interference—"In furtherance of justice".*

It is a little difficult to understand what exactly is included within the words "in furtherance of justice" but the High Court cannot interfere when it is a question weighing the evidence Where the District Judge refused to accept the Sub-Judge's report and declare certain persons as touts and thereupon the Bar Association moved the High Court in revision, *held*, that the order of the District Judge was not so obviously wrong as to call for interference in revision. (*Dalip Singh, J.*) EMPEROR *v.* MEHR SINGH. **I R. 1931 Lah. 866=134 I.C. 98=32 Cr.L.J. 1129=31 P L.R. 1003=1931 Cr.C. 162 (2)=A.I.R. 1931 Lah. 98 (2).**

———**S. 107**—*Legal Practitioner's Act (XVIII of 1879). S. 36—Order under—Revision by High Court.*

The High Court in the exercise of its power of general superintendence over all Courts subjects to its appellate jurisdiction can, under S. 107 of the Government of India Act, revise orders made by Subordinate Court under S. 36 of the Legal Practitioners Act. 27 Cr.L.J. 476; 21 A. 181; 45 A. 676; 4 C.W.N. 36; 11 C.L.J. 513 and 6 Pat. 567, Ref. (*Rangnekar, J.*) MAGANBHAI NATHABHAI *v.* DINKARRAO. **140 I.C. 553=56 Bom. 577=34 Cr.L.J. 47=I R 1933 Bom 14=34 Bom L. R. 1281=1932 Cr. C. 864=A.I.R. 1932 Bom. 596.**

———**S. 107**—*Limits of High Court's powers of superintendence—Right of appeal lost by special period of limitation—Interference.*

Where a person failed to prefer an appeal within the special period of limitation allowed by Ordinance II of 1932 but he had a good case on the merits,

Held, that the High Court could interfere with the conviction by virtue of its powers of superintendence under S. 107. Limits of the High Court's powers under S. 107 discussed. (*Rankin, C. J. and Pearson, J.*) MANMATHA NATH BISWAS *v.* EMPEROR. **60 Cal. 618=I.R. 1933 Cal. 246=142 I.C. 280=34 Cr.L J. 299=37 C.W.N. 201=1933 Cr C. 193=A.I.R. 1933 Cal. 132.**

———**S. 107**—*Mixed question of fact and law—Interference.*

The question whether a Government pleader and Public Prosecutor in the mofussil is a 'salaried officer under Covernment' within the meaning of S. 13 of the Madras Local Boards Act of 1920 is a mixed question of fact and law, with which the High Court cannot interfere in revision. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627=I R. 1931 Mad. 353=130 I.C. 177=33 L. W. 168=A.I.R. 1931 Mad. 83=60 M.L.J. 191.**

———**S. 107**—Order of executing Court regarding commission payable to auctioneer—Interference. *See* EXECUTION—SALE IN. **A.I.R. 1935 Lah. 956.**

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———**S. 107**—*Order passed under S. 476, Cr. P. Code—Interference.*

An order passed under S. 476, Cr. P. Code, by a Civil or Revenue Court can be revised by the High Court under S. 107 of the Government of India Act, though not under S. 439, Cr. P. Code. 40 Cal. 477 and 7 P.L.T. 199, Ref. (*Dhavle, J.*) JAGGANNATHA ACHARYA GOSWAMI *v.* RAJAGOPALACHARI. **135 I. C. 513=33 Cr.L.J. 147=I.R. 1932 Pat. 33=12 Pat. L.T. 671=1931 Cr.C. 999=A.I.R. 1931 Pat. 411.**

———**S. 107**—Order setting aside award of arbitrator—Lower Court failing to carry out previous directions of High Court in hearing objections to award—Interference by High Court. *See* C P. CODE, S. 115—AWARD. **1935 A.L.J. 309=1935 A.W.R. 244=A.I R. 1935 All 519.**

———**S. 107**—*Order of Special Judge—Interference.*

The High Court can in the exercise of its powers under S. 107 set aside the order of a Special Judge passed in an appeal against the decision of the Settlement Officer. (*C. C. Ghose and Pearson, JJ.*) GOCOOL CHANDRA LAW *v.* NISTARINI GHOSE. **58 Cal. 1013=I.R. 1931 Cal. 889=134 I.C. 889=35 C.W.N, 336=A.I.R. 1931 Cal. 553.**

———**S. 107**—*Order staying second suit—Revision.*

An order staying a second suit under the inherent jurisdiction of the Court to avoid the risk of conflicting rulings may, if the risk be groundless, be revised under S. 107. (*Dalip Singh, J.*) BEHARI LAL *v.* SARDARI LAL. **I.R. 1933 Lah 73=141 I.C. 186=34 P.L.R. 123=A.I.R. 1933 Lah. 605.**

———**S. 107**—*Order under S. 108, B. T. Act, 1885—Interference.*

Whether an appeal lies or not from an order passed under S. 108 of Bengal Tenancy Act, the High Court can, in exercise of its powers of superintendence under S. 107 of the Government of India Act, set aside such order. (*C. C. Ghose and Pearson, JJ.*) KUMAR GOCOOL CHANDRA LAW *v.* NISTARINI GHOSE. **58 Cal. 1013=I.R. 1931 Cal. 889=134 I.C. 889=35 C. W.N. 336=A.I R. 1931 Cal. 553.**

———**S. 107**—Powers of High Court—Case not covered by S. 253, Agra Tenancy Act. *See* AGRA TENANCY ACT (III OF 1926), S. 253. **1935 A.L.J 357=1935 R.D. 131=1935 A.W.R. 374=A.I R. 1935 All. 514.**

———**S. 107**—*Powers of High Court—Scope and nature of.*

The High Court has jurisdiction to interfere under S. 107 to prevent grave and irreparable injustice and its powers of superintendence under that section are not merely administrative but are also judicial. A.I.R. 1921 Cal. 30 (F. B); A.I.R. 1928 Pat. 111 and A.I.R. 1930 Lah. 889, Ref. (*Tek Chand, J.*) GANESH DASS SHANKAR LAL *v.* ASA NAND RADHE SHAM. **I.R. 1933 Lah. 497=144 I.C. 515=34 P.L.R. 781=A.I. R. 1933 Lah. 259.**

———**S. 107**—*Powers of superintendence—Nature and extent of—"Courts subject to appellate jurisdiction"—Meaning of—Appeal from Special Courts in limited cases—Powers of superintendence not similarly circumscribed.*

The Government of India Act, being an Act of the Imperial Parliament, cannot be controlled, and the powers conferred by S. 107 cannot be taken by the G.G. under S. 51 of the Emergency Powers Ordinance (II of 1932). The Special Courts eseablished under the Ordinance are "Courts subject to its appellate jurisdiction" because under S. 39 of the Ordinance, the High Court has power to hear appeals in certain cases. If there is a right of appeal in *any* case to the High Court, then the High Court can exercise the right of superin-

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tendence in respect of *all* matters, and not merely those matters in respect of which a right of appeal is given. The fact that the G. G. acting under S. 106 of the Government of India Act and the Letters Patent could have excluded all appellate Jurisdiction of the High Court in respect of Courts constituted under the Ordinance has no relevancy in considering the question of the existence of the power of superintendence, where in fact a limited power of entertaining appeals has been conferred under S. 39 of the Ordinance on the High Court, assuming—(but by no means deciding, in fact the contrary has been often held)—that if the appellate powers of the High Court had been totally excluded, the powers of superintendence would also have been similarly abrogated. (*Beaumont, C. J., Broomfield and Nanavati, JJ.*) EMPEROR *v.* BALKRISHNA HARI. **57 Bom. 93 = 141 I C. 720 = I R. 1933 Bom 130 = 34 Cr.L.J. 199 = 34 Bom L.R. 1523 (S.B.) = 1933 Cr.C. 1 = A.I.R. 1933 Bom. 1.**

[**Cons.** 55 A. 1008 (1027). **F** 57 A. 690 (695); 35 Bom.L.R. 185 (197). **R.** 60 C. 603 (611); 60 C. 618 (623).]

———**S. 107**—*Power of superintendence—Scope of—Special tribunal—Decision to be final—Effect of.*

Per *Bennet, J.*—The local legislature has power (with previous sanction) to pass laws affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, 1919, the Letters Patent, or the Codes. (*ii*) The powers of superintendence under S. 107, Government of India Act, 1919, depends on appellate power and can also be affected by laws of the local legislature. (*iii*) Where a special tribunal is created by an Act of the local legislature or of the Indian legislature to determine rights created by that Act, and that Act states that the decision of the tribunal shall be final, there is no interference with the rights of appeal, superintendence, or revision of the High Court, because the High Court never had such rights over that tribunal. (*Mukerji and Bennet, JJ.*) GULAM NIZAMUDDIN *v.* AKHTAR HASAIN KHAN. **55 All. 1008 = 147 I C. 148 = 6 R.A. 403 = 1933 A.L.J. 971 = A.I R. 1933 All. 764.**

———**S. 107**—Powers under—If affected by Bengal Village Self-Government Act (1919). *See* C. P. CODE, S. 115. **38 C.W.N. 986 = A.I.R 1934 Cal. 666.**

———**S. 107**—*Proceeding under Bombay Special (Emergency) Powers Act, 1932—Interference.*

The special Courts under the Bombay Special (Emergency) Powers Act fall within the purview of the superintendence of the High Court under S 107, Government of India Act. The High Court will however interfere only if considerations of justice require it to do so Hence S. 29 of the Emergency Powers Act is no bar to the High Court entertaining a petition for the quashing of proceedings taken under the Act. (*Baker and Broomfield, JJ.*) KRISHNARAO RAMCHANDRA, *In re.* **57 Bom. 690 = 6 I.R. (Bom) 170 = 35 Cr.L. J. 230 = 146 I.C 688 = 35 Bom.L R. 845 = 1933 Cr.C. 1173 = A.I.R. 1933 Bom. 409.**

———**S. 107**—Rent Court in Chota Nagpur—Decision of—High Court's jurisdiction to interfere. *See* CHOTA NAGPUR TENANCY ACT, S. 218. **A.I R. 1935 Nag. 417.**

———**S. 107**—*Revisional jurisdiction.*

It is the privilege and prerogative of the High Court once a record is before it and it is found that the order passed is erroneous and so erroneous as manifestly to amount to an injustice, to exercise its power of superintendence to revise such order, or set it aside and direct such further proceedings to be taken as justice may require. A I.R 1920 Pat. 568, Foll. (*Adami and Fazl Ali, JJ.*) MEHDATUNNISSA BEGAM *v.* SEWAK RAM. **12 Pat. 77 = I.R 1933 Pat. 183 = 142 I.C. 865 = 14 Pat.L.T. 593 = A.I.R. 1933 Pat. 161.**

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———**S 107**—*Scope of power—Refusal of Court below to allow question put to witness—Interference.*

The power of superintendence conferred on the High Court under S. 107 does not empower it to interfere with or set right the order of a Subordinate Court on the ground that such order has proceeded on an error of law or an error of fact. The High Court is not, therefore, competent to interfere with the refusal of the Court below to allow certain questions to be put to the witness, on the ground that the Court has erred in law in disallowing such questions. (*Sulaiman, C. J., Niamatullah and Rachhpal Singh, JJ.*) MUKAND LAL *v.* GAYA PRASAD. **57 All. 977 = 156 I.C. 805 = 8 R A. 37 = 1935 A.W.R. 654 = 1935 A.L J. 549 = A. I.R. 1935 All. 599 (F.B).**

———**S. 107**—*Sentence—Interference with—Principle governing.*

(*Held* by *Beaumont, C.J. and Broomfield, J., Nanavati, J. dissenting*):—The powers of superintendence are certainly wide enough to enable the High Court to alter the sentence. But that should only be done when the High Court is satisfied that the Magistrate has erred on some point of principle. In a case of deliberate disobedience of the order made by an officer of the Government by a person belonging to the legal profession who did not express any regret for what he had done, the High Court will not interfere with the sentence passed by the Magistrate under the Emergency Ordinance on the ground of severity. (*Beaumont, C. J., Broomfield and Nanavati, JJ.*) EMPEROR *v.* BALKRISHNA HARI. **57 Bom 93 = 141 I C. 720 = I.R. 1933 Bom 130 = 34 Cr.L J. 199 = 34 Bom.L R. 1523 = 1933 Cr.C. 1 = A.I.R. 1933 Bom. 1.**

———**S. 107**—*Subordinate Court—Calcutta Improvement Trust Tribunal.*

In dealing with the acquisition of property, the Calcutta Improvement Trust Tribunal is acting as a 'Court' under the Land Acquisition Act and under S. 115, C P Code, as well as under S 107 of the Government of India Act, the High Court is entitled to interfere with the order passed by the President of the Tribunal (*Costello and Jack, JJ.*) ADHAN KUMAR MITRA *v.* SRI SRI ISWAR RADHA MADAN MOHAN JIU. **I R. 1932 Cal 610 = 139 I.C. 180 = 36 C.W.N. 370 = A.I R. 1932 Cal 660.**

———**S. 107**—*Subordinate Court—District Court acting under S. 198 of the Bombay City Municipality Act, 1925—High Court—Powers of revision.*

Per *Patkar, J.*—"The District Court exercising judicial function in accordance with the procedure laid down in the Land Acquisition Act according to sub-Ss. (3) and (4) of S. 198 of the Bombay Municipalities Act of 1925 is a Subordinate Court under S. 107 of the Government of India Act, if not under S 115 of the C. P. Code"

Per *Broomfield, J.*—"The District Court is subject to the revisional jurisdiction of the High Court even under S 115, C.P.Code. 40 Bom 509, Doubt : 38 Mad. 594; 44 I A. 261; 3 Rang. 560 (F.B); 50 Mad. 121, Ref. (*Patkar and Broomfield, JJ.*) SHOLAPUR MUNICIPALITY *v.* TULJARAM. **55 Bom. 544 = I R 1932 Bom. 24 (2) = 33 Bom.L R. 1067 = 134 I.C. 1240 (2) = A.I. R. 1931 Bom 582**

[**D.** 35 Bom.L R 80.]

———**S. 107**—Transfer of suits—Jurisdiction of High Court—Appeal. *See* LETTERS PATENT (ALLAHABAD.) CL. 10. **156 I.C. 43 = A.I R. 1935 All. 750 (1).**

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———**S. 107**—*Village Panchayat Court—Conviction by Revision.*

No revision lies under the Cr. P. Code from the conviction of a Panchayat Court. *Vide* S. 77 (2) of Village Courts Act. It can only be revised under S. 107 of the Government of India Act. (*Burn, J.*) ARULAPPA CHETTY *v.* EMPEROR. **1933 M.W.N. 728.**

———**S. 107 (e)**—*Power of High Court to levy Court-fees on Original Side appeals—Letters Patent (Rangoon), Cl. 35—Notification purporting to be under S. 107—Legality.*

S. 107 of the Government of India Act does not authorize the High Court to impose Court-fees on appeals in cases dealt with by the Court in the exercise of its ordinary civil jurisdiction. The section only refers to Courts which are subordinate to the High Court. The Original Side of the High Court is not a Subordinate Court but is an intergral part of the High Court itself. But the High Court has full power to regulate its procedure under Cl. 35 of the Letters Patent (Rangoon) and the power to make regulations for procedure necessarily includes imposition of fees and the collection of them. Where the High Court issues a notification for the levy of Court fees in respect of cases coming before the Original Side and appeals arising therefrom, it undoubtedly intends to exercise the powers vested in it and the fact that the notification purports to be made pursuant to the provisions of S. 107 (*c*) of the Government of India Act does not make any difference as to its legality as it is the operative part of the notification which matters. (*Leach, J.*) MAUNG BA THAW *v.* M.S.V.M. CHETTIAR **13 Rang. 156 = 159 I.C. 1060 = 8 R.R. 323 = A.I.R. 1935 Rang. 460.**

———**S. 114**—*Acting Advocate-General—Right of pre-audience—Bar Councils Act (XXXVIII of 1926), S. 8 (4).*

By virtue of S, 114 of the Government of India Act, 1915, and the Bar Councils Act, 1926, S. 8, sub-S. (4) as amended by the Amending Act, XIII of 1927, the Acting Advocate General is entitled, as much as the Advocate-General, to a right of pre-audience over all other Advocates in respect of all business whether for the Crown or of a private nature. (*Beaumont, C.J., Rangnekar and Barlee, JJ.*) *In re* PRE AUDIENCE OF THE ACTING ADVOCATE-GENERAL. **136 I.C. 793 = I.R. 1932 Bom. 213 = 33 Bom L.R. 1500 = A.I.R. 1932 Bom. 71 = (F B.).**

———**S. 124**—*Detenu imprisoned under Ordinance—Alleged 'misdemeanour' of oppression—Enquiry into—Powers of High Court.*

Assuming that the High Court will entertain a complaint by a detenu under the Ordinance for the misdemeanour of oppression, without a complaint, there is no method by which, or principle on which, the High Court can hold a supplementary enquiry as to the legality of the subject is detention. Nor can the High Court order a release before the main criminal proceedings are concluded in which the vital question is whether the detention is or is not illegal. (*Ameer Ali and M.C. Ghose, JJ.*) PRATUL CHANDRA MITRA *v* COMMANDANT HIJLI DETENTION CAMP. **61 Cal 197 = 59 C. L J. 115 = 38 C.W.N. 299 = 1934 Cr C 387 = 151 I.C. 1028 = 7 R.C. 201 (2) = 35 Cr.L.J. 1466 = A.I.R. 1934 Cal. 259.**

———**S. 124**—*Scope—Complaints of misdemeanour—Power of High Court to entertain.*

The Act confers no new jurisdiction but the supreme Court by virtue of S. 14 of 13 Geo. III, C. 63 had jurisdiction to entertain complaints of misdemeanour in the same manner as the Court of King's Bench in England and such jurisdiction has descended to the High Courts. (*Ameer Ali and M.C. Ghose, JJ.*) PRATULCHANDRA MITRA *v.* COMMANDANT, HIJLI DETENTION CAMP. **61 Cal 197 = 59 C.L J. 185 = 38 C.W.N 299 = 151 I.C. 1028 = 7 R.C 201 (2) = 35 Cr L.J. 1466 = 1934 Cr.C. 387 = A.I.R. 1934 Cal. 259.**

———**S. 129 A and 64**—Legislative Assembly—Electoral Rules—Rr. 12 (6) and 48—Candidate elected but resigning—Resignation accepted before oath under R. 24—Refund of deposit refused — Governor-General not refusing to give decision—Suit barred. *See* GOVERNMENT OF INDIA ACT, SS. 64 AND 129-A. **30 N.L R 255 = A.I.R. 1934 Nag. 126.**

GOVERNMENT OF INDIA ORDINANCE (V OF 1930)—*Effect—Offence under S. 188, I.P. Code—Provisions of S. 195, Cr. P. Code—Compliance, if dispensed with.*

Ordinance No. 5 of 1930 and the notification thereunder making the offence under S. 188, Penal Code, cognizable and non bailable does not get rid of the requirements imposed by S. 195, Cr. P. Code. It is not possible to say that merely by making an offence under S. 188, cognizable and non bailable, the necessity has been dispensed with of having a complaint in such a case by the superior of the public servant whose order has been disobeyed. (*Rankin, C.J. and Mallick, J.*) LACHMI DEVI *v.* EMPEROR. **58 Cal. 971 = I.R. 1931 Cal. 369 = 130 I.C. 241 = 32 Cr.L.J. 511 = 53 C.L.J. 461 = 35 C.W N. 257 = 1931 Cr C 154 = A.I.R. 1931 Cal. 122.**

GOVERNMENT SERVANTS CONDUCT RULES, FUNDAMENTAL R. 52—*Government servant accepting private job during leave—Allowances paid to servant—Refund of.*

Where a Government servant, who is granted leave and who has been drawing allowance during such leave period, accepts a private job during the period of leave, unless the order granting leave is revoked by the Government dating from the breach of the rule, allowance already paid cannot be refunded. (*Jackson and Pakenham Walsh, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAM NARAYAN SARMA. **I.R. 1933 Mad. 145 = 141 I.C. 538 = 1933 M.W.N. 947 = 37 L.W. 71 = A.I.R. 1933 Mad. 173 = 65 M.L.J 143.**

GOVERNMENT SERVICE—*Senior grade clerk in District Offices—Appointment by selection and not by seniority.*

An appointment in the senior grade of clerks in District Offices is a selection post. The junior clerks are not entitled to succeed by right; on the other hand, the direct appointment of persons with superior qualifications is definitely encouraged. So junior grade clerk has no right of appeal on account of refusal of promotion because he has not been appointed to the post of a senior clerk. (*Irving, F.C.*) ABDUL GHANI *v.* RAM CHANDRA MANGAL **11 Lah. L.T. 139.**

———*Suspension of servant—Drunkenness.*

Where the Naib Tahsildar was proved to have got himself drunk and been guilty of improper conduct towards a lambardar whom he compelled to purchase liquor,

Held, his conduct called for an order of suspension from his office and reduction into the bottom of the list of permanent Naib Tahsildars (*Irving, F C.*) HARSHARAN SINGH *v.* EMPEROR. **11 Lah L T. 132.**

GRAMA NATHAM. *See also* LAND TENURE.

———*Incidents of—Right of Revenue authorities—Public user—Effect of—Burden of proof.*

According to the common law of the country the control and ownership of *grama natilam* is vested in the

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revenue authorities. The fact that the public used it for communal purposes without protest from Government does not show that the land does not belong to Government. Such user is always understood to be permissive on the part of Government and Government has the right at any time to appropriate it for any special public purpose or grant it to an individual for building purposes. It is necessary, therefore, for the plaintiff who seeks to limit the ordinary rights of Government in regard to any part of it to establish the limitation by clear proof of a grant or of title by adverse possession. 4 M.L.T. 440, 56 M.L.J. 38 and 1929 M. W. N. 143, Ref. (*Madhavan Nair, J.*) SECRETARY OF STATE FOR INDIA *v.* PRESIDENT, UNION BOARD, TANKU. **1931 M.W.N. 973.**

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Abandonment.
Confiscation.
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Darkhast grant.
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Forfeiture.
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Maintenance grant
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Muafi.
Presumption.
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Abandonment.

——*Abandonment—Non-payment of revenue.*

Although non-payment of revenue is a very important factor for consideration, it is not necessarily by itself sufficient proof of the intention to abandon land. 18 Cal. 290 and 41 Cal. 683, Ref. (*Otter, Brown and Das, JJ.*) FOUCAR & CO., LTD *v.* SECRETARY OF STATE. **10 Rang. 1=I.R. 1932 Rang. 106=137 I.C. 409=A. I.R. 1932 Rang. 27.**

Confiscation.

——*Confiscation—Absence from chak—Effect of.*

The grant was made in 1915 and the applicant acquired occupancy rights in 1922. He had a residential house in the chak according to his station in life ("but was absentee from the chak").

Held, although residence was technically essential, the circumstances did not warrant the confiscation of the whole grant and that a fine of Rs. 100 was sufficient, 3 P.R. 1914 (Rev.), Ref. (*Sheikh Ashghar Ali, F.C.*) CHUHAR KHAN *v.* EMPEROR. **11 Lah. L.T. 155 (2)**

AND

MANSABDAR KHAN *v.* EMPEROR. **11 Lah. L.T. 154.**

Construction.

See also CROWN GRANT, *infra.*

——*Construction—Acts or statements of grantee or his successor—Evidence of conduct.*

The acts or statements of the grantee or his successor may be relevantly taken into account as to the interpretation of the original grant; while the method in which the property has been treated in the administrative records may also throw light on the same problem. These things are not conclusive but are circumstances

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worthy of consideration. (*Addison and Monroe, JJ.*) RAM KISHAN *v,* BUR SINGH. **15 Lah. 270=151 I.C. 738=7 R.L. 185=36 P L.R. 442=A.I.R. 1934 Lah. 39.**

——Construction—Grant of percentage of Government assessment—Subsequent substitution of fixed annual sum—If legal. *See* BOMBAY SUMMARY SETTLEMENT ACT (VII OF 1863). **61 I.A. 190=58 Bom. 306=66 M.L.J. 614 (P.C.).**

——*Construction—Grant of village by Government partly in inam, and partly in farm—Exception of Abkari revenue—Rights of grantee—Royalty on earth, stone and tree—Right to.*

By a kowl dated 20th April, 1831, the British Government granted to the plaintiff's ancestor a village partly in inam and the remainder in permanent khoti, *i.e.*, lease subject to certain exception stated in the kowl itself. The kowl recited that the village was given in farm (khoti) together with a free grant of the arable uncultivated land (osik') land in the village, that the village is given without the Abkari revenue and provided *inter alia.* (i) "In the village some lands are uncultivated and trees are barren. And Government has rights over the said lands and trees and over the income thereof. Out of the same Government has retained some right mentioning the same in this kowl. Except that right the whole right has been granted to you. You should go on enjoying the same." (ii) "This kowl will not prejudice the rights of any one who may have in respect of the land or in respect of any (other) item "Bab" in the said village. And it should be clearly noted that this kowl will not enable you to exercise rights in respect of the items ("kalams") over which Government has no right at present. You will be entitled to exercise rights only in respect of those items ("kalams") over which the government has right and which are given in writing in this kowl (lease)."

Held, that the grant was of the whole village itself. Rice land once cultivated but subsequently given up or cultivable but uncultivated land being given in inam, and the remainder of the village, which means every part of it except the arable uncultivated land, being given in farm; and that the Abkari revenue alone was excepted, that the grant was of all revenues derivable from the village including profession tax and capitation tax, except Abkari, and not merely the agricultural revenue, and that the plaintiff was entitled to a royalty on the earth, stone and trees, which belonged to the Government before the grant. (*Murphy and Divatia, JJ.*) SECRETARY OF STATE *v.* FAREDOON. **154 I.C. 278 =7 R.B. 308=36 Bom.L.R. 761=A.I.R. 1934 Bom. 434.**

——Construction—Implied grant of land for purpose of roadway—Extent and duration of grant—Inference. *See* EASEMENT—IMPLIED GRANT. **39 C.W.N. 590.**

——*Construction*—Istimrari mukarari—*Meaning of.*

The words '*istimrari mukarari*' in a grant do not *per se* convey an estate of inheritance.

Held, on the evidence that the grant was for the lives of the grantees. (*Wort and Fazl Ali, JJ.*) KAMAKHYA NARAIN SINGH *v.* RAMRAJ SINGH. **147 I.C. 452 (2)=6 R.P. 355=14 Pat.L T. 663=A.I.R. 1933 Pat. 715.**

——*Construction—Istimrari mukarari right—Sanad by Crown granting such right—Land included in Zamindari—Grantees, if subordinate to Zemindar.*

Although a mukarrari interest is generally regarded as not co-ordinate with but subordinate to the Zamindari interest, where the grant of land included in a Zamindar is made not by the Zamindar but by the Crown itself

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prior to such inclusion, and there is nothing in the grant to show that the grantees are to be regarded as subordinate to the Zamindar, the mere fact that they are described in the grant as mukarraridars does not necessarily imply a subordinate status. (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH. **14 Pat. 70=157 I.C. 433=8 R. Pat. 121=A.I.R. 1935 Pat. 306.**

———*Construction—"M"—Meaning of—Not necessarily mauza.*

In construing a grant of a village in the absence of any evidence on the point it would be unsafe to act on a mere surmise that "M" stands for mauza. 52 M. 453, Dist. (*Madhavan Nair, JJ.*) KONDAPPA NAIDU *v.* MAHALAKSHMAMMA. **6 I.R. (Mad.) 100=145 I.C. 588 (2)=A.I.R. 1933 Mad. 194.**

———*Construction—Rent-free grant.*

A grant where it is provided that revenue shall be a charge on other property, and that the grantee shall not be allowed to transfer the property, must be taken as a rent-free grant and it is impossible to declare the grantee absolute owner, with a right of transfer and liable to payment of revenue, (*Drake Brockman, S.M. and Knox, J.M.*) KAMTA PRASAD *v.* LAL BAHADUR. **1935 R.D. 87=1935 O.W.N. 219.**

———Construction — Sajjadanishin— Gift of income and gift of variable residence —No gift of specific share of rent or profits or of corpus—Assignment of income, not always assignment of corpus. *See* MAHOMEDAN LAW—WAKF. **11 Pat. 288=A.I.R. 1932 Pat. 33.**

———*Construction—Sanad by Mahomedan ruler to Hindu Goshain—Gift land with temple, revenue free—"Generation after generation and descent after descent"—If personal or religious endowment.*

A Mahomedan ruler of Oudh granted a sanad to a Hindu Goshain under which the grantee and his heirs were given five *pucca* bighas of waste land, with a temple on it, free of Government revenue and free of all other dues, "generation after generation and descent after descent," so that the grantee and his heirs may continue to remain in possession of the land and construct a house on it and other buildings and "should with contentment and devotion remain engaged in praying for His Highness"

Held, that the sanad conferred a revenue-free grant upon the Goshain in his personal capacity and was not a religious endowment for the temple (*Naavutty and Zia ul Hasan, JJ.*) GIR HAR SAROOP *v.* BHAGWAN DIN. **152 I.C. 861=7 R.O. 250=11 O.W.N. 1435=A.I.R. 1935 Oudh 96.**

———*Construction—Sanad providing for performance of service by and enjoyment by grantee, sons and grandsons*—Kabuliyat *by grantee reciting liability for service and payment of rent—Stipulation to surrender possession on default in payment or removal from service—Conditional or burdened with service.*

A grant of a village was made in 1852. The sanad of the grantor recited that the village was granted as *baiswan* (jagir) for reciting daily one chapter of Sribhagwat before Sri Saligram and that the grantee, his sons and grandsons should make the recitation and enjoy the village, including jup, kup (wells), boundary limits, trees, fisheries, etc. In 1856, the grantee executed a *kabuliyat* to the grantor, stating that he had been granted the village in lieu of service and that he had to pay Rs. 12-15-0 in cash every year, that he would pay the same in instalments, and that if the rent fell into arrear or in case of his removal from service, he would give up possession of the village,

Held, that the two documents must be read together, and that on a true construction the grant was not one

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burdened with service, but that the performance of service was to be continued as a condition of the grant, and that on cessation of service, the grant would be resumable. (*Sir Lancelot Sanderson.*) KUMAR KAMAKHYA NARAIN SINGH *v.* ABHIMAN SINGH. **61 I.A. 323=13 Pat. 589=39 C.W.N. 41=1934 M.W.N. 870=7 R.P.C. 18=150 I.C. 807=4 A.W.R. 229=11 O.W.N. 1025=1934 A.L.J. 793=15 Pat. L.T. 555=18 R.D. 423 (2)=40 L.W. 342=60 C.L.J. 153=A.I.R. 1934 P.C. 182=67 M.L.J. 450 (P.C.).**

———*Construction — Shet-sanadi inam—Kadim or Jodi.*

An inamdar was granted in 1902 by the Government under S. 15 of the Bombay Hereditary Offices Act, a Sanad under which the grantee agreed to pay the Government a fixed annual jodi in lieu of service in respect of certain lands which had been granted to his ancestors granted as inam for shet-sanadi service. In 1920, Government discontinued the service and ordered full assessment. The grantee contended that the lands were originally granted for police duties, that they were Jadid inams, and that he was entitled to receive the full assessment levied on the lands after the discontinuance of service, as against the Government.

Held, that the lands were Kadim lands and not Jadid inam lands, and that they were so treated in fixing the judi permanently at the time of the Sanad in 1902. (*Wadia, J.*) SECRETARY OF STATE FOR INDIA *v.* RAJARAM. **155 I.C. 763=7 R.B. 465=36 Bom.L.R. 1055=A.I.R. 1935 Bom. 47.**

———Construction—*Tassalinama* by Government in respect of barren and uncultivated land in 1862 — Grantee to settle and reclaim entire village and retain same as *pukka asami*—Reservation of power to revoke in case of failure to reclaim all lands—Nature of rights of grantee—Status of—If mere tenant-at-will or permanent tenant. *See* LANDLORD AND TENANT—PERMANENT TENANCY. **1935 R.D. 402=A.I.R. 1935 All. 974.**

Crown grant..

See also SUCCESSION, *infra.*

———*Crown grant—Construction—Conduct of Government officers—Estoppel.*

A grant is to be construed by its own terms and not by the previous or subsequent conduct of the parties. Mistaken acts on the part of Government officers would not work as an estoppel against Government, as the Crown would not be bound by such acts. (*Murphy and Divatia JJ.*) SECRETARY OF STATE *v.* FAREDOON. **154 I.C. 278=7 R.B. 308=36 Bom L.R. 761=A.I.R. 1934 Bom. 434.**

———*Crown grant—Construction—Grant of village by Government with all lands—Foreshore, if included—Khajan land—Presumption—'Osik land.'*

The presumption in the case of foreshore is that the Crown is entitled to the foreshore between high and low watermark, but the presumption can be rebutted by the terms of a grant. Where the grant consisted of a whole village itself, including 'osik' land in it, not expressly excepting the foreshore, and the foreshore consisted not merely of stone and sandy tract, but of lands which had been regarded and assessed as "Khajan" and revenue-bearing land, and the grant conferred on the grantee all the rights of revenue possessed by the Government in the village.

Held, that the conclusion was irresistible that the whole of the foreshore in the village was included in the express words of the grant and that the foreshore fell within the class of "osik" in the grant, and lands comprised in the foreshore can be made the subject of

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grant. (*Murphy and Divatia, JJ.*) SECRETARY OF STATE *v.* FAREDOON. **154 I.C. 278=7 R.B. 308=36 Bom.LR. 761=A.I.R. 1934 Bom. 434.**

Darghast grant.

———*Darkhast grant—Amended rule—If applies to previous grants.*

The rules of the darkhast grant are not rules of procedure nor do they stand on the same footing as rules of procedure regulating Courts of Law, to the extent of applying to the former the presumption against retrospective operation and hence an amended rule will not take in previous grant as well. If a grant was made once on certain conditions, the fact that from a later date, grants are to be made on different conditions could not be pressed into service for changing the conditions of the original grant. (*Cornish and Varadachariar, JJ.*) ABBOY NAIDU *v* SECRETARY OF STATE. **159 I.C. 1071 8 R.M. 599 = 1935 M.W.N. 1117=A.I.R. 1935 Mad. 1069=69 M.L.J. 795.**

———*Darkhast grant — Cancellation—Amended rule of 1921.*

The Collector's opinion will satisfy the rule regarding cancellation of darkhast grants as amended in 1921, only in cases where he himself cancels the darkhast, but, in cases where the Board exercised that power, it is the Board that must be satisfied as to the existence of the necessary grounds. (*Cornish and Varadachariar, JJ.*) ABBOY NAIDU *v.* SECRETARY OF STATE. **152 I.C. 1071 8 R.M. 599 1935 M.W.N. 1117=A.I.R. 1935 Mad. 1069 69 M.L.J. 795.**

———*Darkhast grant—Power of revocation.*

The darkhast grant is a conditional grant subject to a power of revocation in the grantor which can be exercised at any time if the grant is found to have been obtained in contravention of the conditions laid down in these rules. This power of revocation is certainly a vested substantive right. (*Cornish and Varadachariar, JJ.*) ABBOY NAIDU *v.* SECRETARY OF STATE. **159 I.C. 1071—8 R.M. 599=1935 M.W.N. 1117=A.I.R. 1935 Mad. 1069 69 M.L.J. 795.**

———*Dharkhast grant—Setting aside — Powers of Civil Court.*

If the grant of land on darkhast by an authority competent to make such grant is proved to have been made, such a grant cannot be set aside by a Civil Court on proof of mere irregularities in the procedure adopted and when there is no question of fraud or want of jurisdiction. 18 M. 434 and 32 M. 300, Ref. (*Sundaram Chetty, J.*) ARUMUGAM PILLAI *v.* VELLACHAMI MANNADY. **1932 M.W.N 1292.**

Forfeiture.

———*Forfeiture — Allowance conditional on grantee "continuing faithful subject of the British Government" —Grantee joining the Indian National Congress—Effect of.*

The plaintiff was a hereditary Desai and held lands and cash allowances under a sanad of 1864 which contained the condition, 'that the said holders and their heirs shall continue faithful subject of the British Government." The plaintiff joined the Indian National Congress in 1895, was president of the Congress Committee in 1921 and subscribed to the Congress creed changed by the Nagpur Congress in 1920, *viz.*, the object of attainment of Swaraj by all legitimate and peaceful means, which, as explained by the Congress, included the boycott of schools, courts, methods of making India economically independent, etc. In 1922, the plaintiff's sanad was forfeited ; in a suit by the plaintiff to declare the forfeiture illegal,

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Held, that if a man became an active member of a body the object of which was to bring the British Government of India to an end, whether by violent or non-violent means and to substitute for it a national Government, he cannot be said to be faithful to the British Government and that the forfeiture was not illegal. (*Beaumont C. J. and Broomfield, J.*) NARSINGHRAO *v.* SECRETARY OF STATE FOR INDIA **I.R. 1932 Bom. 402=138 I.C. 530=34 Bom L.R. 453=A.I.R. 1932 Bom. 226.**

Inam.

———Inam—*See also* MAINTENANCE GRANT AND SERVICE GRANT, *infra.*

———*Inam—Agraharam land— Enfranchisement—Procedure.*

Where an Agraharam land is in possession of several owners, before the Government is entitled to levy an assessment upon the whole Agraharam, the share of each owner must be localized. The remedy of the Government to enforce the right which they undoubtedly have of imposing the new assessment is, if they cannot make the Agraharamdars agree as to the portions liable to the new assessment, to take steps by filing a kind of interpleader suit making all the Agraharamdars parties in which it could be determined which owner should be liable to this new burden and in what shares. There is no limitation for enfranchisement; and Civil Courts cannot call in question an enfranchisement order (*Ramesam, O. C. J. and Venkatasubba Rao, J.*) THIRUVENKATACHARYULU *v.* SECRETARY OF STATE. **57 Mad. 501=154 I.C. 990=7 R M. 523=1934 M. W.N. 221=39 L.W. 216=A I.R. 1934 Mad. 147= 66 M.L.J. 715.**

———*Inam—Assignment of revenue before British Rule—Rights of owner.*

Prior to the introduction of the British Revenue System, a grant of an assignment of revenue by the ruler carried with it such powers of control that the assignee practically became the owner of the land. (*Addison and Currie, J.*) KAHAN DASS *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. **154 I.C. 357=7 R.L. 548—A I.R. 1934 Lah. 68.**

———*Inam — Desabandham inam— Alienability— Right to question on alienation—Estoppel.*

Lands burdened with a desabandham service, which is service of a public nature, are inalienable being opposed to public policy, and cannot be sold in execution of a decree against the inamdar; nor is the latter estopped from questioning the validity of the alienation, because the prohibition against alienation is a legal prohibition on grounds of public policy. (*Beasley, C. J. and King, J.*) RAMAKRISHNAMMA *v.* VENKATASUBBIAH. **58 Mad. 389=153 I.C. 817=7 R M 377=40 L.W. 918 =1934 M.W.N. 1407=A.I.R. 1935 Mad. 252=68 M L.J. 46.**

———*Inam—Devadayam—Meaning—Grant burdened with service.*

The use of the word "devadayam" in a grant does not necessarily import that the grant is made to the temple Where a grant contains the clause that it is to be confirmed to party so long as he continues the performance of the service, it is a grant to the party burdened with service and not to the deity even though the word "devadayam" is used. (*Venkatasubba Rao, J.*) SAMI AYYANGAR *v.* VENKATARAMANA AYYANGAR. **150 I.C. 156=6 R.M. 702=39 L.W. 513=A I.R. 1934 Mad. 381.**

———*Inam—Extent of—Inam register stating extent in putties and acres—Actual acreage found to be much larger—Boundaries correctly described in Pechu accounts—Grant of village or only of specified acreage.*

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The extent of Gudimala Khandriga (a part of the village of Rameswaram in Godaveri District) was stated in the bhuband accounts of the village prior to 1858, to be 70 odd putties. In 1860 when the grant of the inam was confirmed, the extent was specified in the Inam Registers both in putties and in acres, *viz*, 70 odd putties or 560·75 acres. From at least 1860, the temple was in possession of the whole of Gudimala Khandrika and paid only Rs. 20 as quit rent for the entire inam. In the re-survey and re-settlement of 1901, the extent of the khandrika was in fact found to be 1837·40 acres. In 1917, the Board of Revenue resolved that the extent of the inam settled on the temple was only 560·79 acres and that for the excess, full assessment should be levied.

Held, that having regard to the boundaries of the inam specified in the statements of the kulkarni in 1859 the Inam Register prepared about 1860, the *pechu* accounts of 1866 confirmed by the Inam Commissioner in 1872, what was settled as inam was the whole village of gudimala khandrika and not only 560·79 acres and that the excess was not subject to full assessment. (*Sir Dinshah Mulla.*) SECRETARY OF STATE FOR INDIA *v.* MALLAYYA. **I.R. 1932 P.C. 297 = 139 I.C. 546 = 36 L.W. 525 = 56 C.L.J. 341 = A.I.R. 1933 P.C. 238 = 63 M.L.J. 649 (P.C.).**

———*Inam—'Major' and 'Minor'—'Khandrika'—Meaning of.*

Technically, a major inam is a whole village or more than one village, and a minor inam is something less than a village. A khandrika means a small hamlet. It is a large block of land granted as inam, less than a village, but much larger than an ordinary inam. (*Sir Dinshah Mulla.*) SECRETARY OF STATE FOR INDIA *v.* MALLAYYA. **I.R. 1932 P.C. 297 = 56 C.L.J. 341 = 139 I.C. 546 = 36 L.W. 525 = A.I.R. 1932 P.C. 238 = 63 M.L.J. 649 (P.C.).**

———*Inam—Mokasa prior to settlement partly for police services and partly for personal services due to zamindar on kattubadi—Government enfranchised their portion—Kattubadi Payable remained the same.*

The mokasa was held from before permanent Settlement partly for police services and partly for personal services due to the zamindar and on payment of kattubadi to him. The Government enfranchised their portion not demarcated by metes and bounds, but the undivided half of the mokasa area which was held for police services.

Held, that the relation between the zamindar and the mukhasadar was left intact and was in no way affected The kattubadi payable remained the kattubadi payable after the enfranchisement. (*Krishnan Pandalai, J.*) VENKATACHALAPATHI RAO *v.* GOPALA KRISHNAYYA. **6 R.M. 390 = 147 I.C. 756 = 39 L.W. 65 = A.I.R. 1934 Mad 46.**

———*Inam—Nature of—Grant of soil or revenue only.*

In order to ascertain the effect of a grant, resort must be had to the terms of the grant itself and to the surrounding circumstances. Where the sanad of the British Government (confirming the original grant by the Mogul Emperor which was not forthcoming) mentioned that the 'villages' should be continued to the family of the Dasai, the grazing fees, water cess, compensation for land acquired, permission to take earth from the land should all be enjoyed by him.

Held, that the grantee was the owner of the soil, though the word "ammal" was once used in connection with the plaintiff's grant and not a mere grantee of the royal share of revenue. (*Baker, J.*) NARAYAN BALAKRISHNA *v.* SHIVSHANKARDAS. **I.R. 1932 Bom. 495 = 139 I.C. 258 = 34 Bom.L.R. 959 = A.I.R. 1932 Bom. 493.**

———*Inam—Nature of—Personal or religious.*

The ancestors of the plaintiffs were in receipt of an allowance from the Government of Holkar and as it was inadequate, the suit village was granted to them by a sanad which stated as follows "Taking into consideration the learning and piety of the applicants and that the amount of the annual allowance does not serve the purpose of the subsistence of your family and the expenses of the festival, and recognising that you are dependants of the Sarkar from old, it appears meritorious and desirable that for the provision of your expenses, with the annual allowance, a village should be granted in charity as a new inam."

Held, that as it was nowhere stated in the sanad that the purpose of the grant was the maintenance of the festivals nor was any stipulation made as to the portion of the income if any, which should be allocated to the festivals as distinct from the expenses of the family, it was a personal grant and not one for the support of any religious institution and that it was alienable by the holder. (*Baker and Nanavati, JJ.*) DATTATRAYA PANDURANG *v.* LAKSHMAN MAHADEV. **136 I.C. 161 = I.R. 1932 Bom. 145 = 33 Bom.L.R. 1418 = A.I.R. 1932 Bom. 15.**

———*Inam—Pre-British grant as remuneration for services—Status of grantee.*

Where the inam was granted in pre British period to the ancestor of the present holder as remuneration for service as a Kazi.

Held, that even if the grant meant an assignment of revenue and not of land, it was capable of being regarded as an alienated land within the meaning of S. 4 (17), Berar Land Revenue Code, 1896, and S. 2 (2) of the Berar Land Revenue Code, 1928; and as the grant had been confirmed under R. 4 of the Berar Inam Rules, the grantee was a superior holder with an interest in the land and not a mere licensee. (*Niyogi and Grille, A. J. C.s.*) SHAFKAT HUSSAIN *v.* COLLECTOR OF AMRAOTI. **I.R. 1933 Nag. 108 = 142 I.C. 364 = A.I.R. 1933 Nag. 208.**

———*Inam—Sharakati inam—Person holding under inamdar—Stipulation for payment of rent in kind—Enforceability after settlement.*

The plaintiffs were inamdars of the sharakati village of Anjur and were grantees of the revenue only. In April, 1838, a sanad was issued to them which gave them the entire management of the village with a condition that they should recover the full land revenue and pay Government a lump sum for their share. The system of farming was later changed and the inamdar continued to pay ⅓ of the actual recoveries. The plaintiffs leased certain *khar* lands in the village on Mafi Istava terms. Subsequently there was default in payment of assessment and the lands were sold subject to the conditions of the kowle. The alienee sold his interest to the defendants and they paid rent for some time and later on relinquished the tenancy. The plaintiffs having sued them to recover rent.

Held, (1) that the defendants had acquired the right of a permanent tenant under the kowle and the payment agreed upon was rent and not assessment ; (2) that the defendants being tenants, S. 217 of the Bombay Land Revenue Act did not apply to them ; (3) the tenants continued to be tenants in spite of the relinquishment and in spite of the entry of their names in Government records as khetadars they were bound to pay rent in kind and the landlord could not claim anything more. (*Patkar and Murphy, JJ.*) NILAJI MOROBA *v.* NAGIN-

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DAS. **149 I.C. 293 (2)=6 R.B. 361=35 Bom.L.R. 150=A I.R. 1933 Bom. 168.**

———*Inam—Village having cultivating tenants—Presumption regarding kudivaram rights.*

The fact of having been cultivating tenants in the village prior to the grant of the land by the zamindar does not raise a presumption of fact that the zamindar had not the kudivaram right there was no presumption either way as to the inclusion or non inclusion (in the grant) of the kudiwaram right, and that accordingly the grant did not include that right. 41 M. 1012, Rel., 52 M. 453 (P.C.), Dist. (*Lord Thankerton.*) RAMAYYA *v.* LAKSHMINARAYANA. **61 I A. 177=57 Mad. 443 =38 C.W.N. 669=1934 M.W.N. 386=59 C L.J. 434 =1934 A.L.J. 402=6 R.P C. 117=148 I C. 327=3 A.W R. 566=11 O.W N. 468=39 L.W. 329=A.I.R. 1934 P.C. 84=67 M L J. 1 (P.C)**

Jagir.

See also RESUMPTION, *infra.*

———*Jagir—Grant of land revenue—Exemption from attachment.*

In the case of grant of land revenue in a *jaghir*, the property is not exempt from attachment either under S. 11 of the Pensions Act or under S 60, C. P. Code, (*Curgenven, J.*) RAMA RAO *v.* SRINIVASIAH. **I.R. 1932 Mad. 449=137 I.C. 799=1932 M W.N. 202=35 L W 395=A.I.R. 1932 Mad. 417.**

———*Jagir—Jagodih estate.*

Villages forming the Jagodih estate are not an ordinary jagir of the Raj resumable on failure of the direct male line of the grantee and are a shamilat or shikmi taluk of the Ramgarh estate as recorded in the Khewat or record of rights of the zamindari, made under the Chota Nagpur Tenancy Act, 1908. (*Sir John Wallis.*) CHARU CHANDRA GHOSE *v.* KUMAR KAMAKHYA NARAIN SINGH. **58 I.A. 17=10 Pat. 284=1931 M. W.N. 65=33 L W. 121=130 I.C. 620=12 Pat L.T. 337=I.R. 1931 P.C. 76=52 C.L J. 512=35 C.W.N. 201=A.I R. 1931 P.C. 5=60 M.L.J. 245 (P.C.).**

Lakheraj

———"*Lakheraj*"—*Meaning of—Right of Zemindar to grant revenue free grant.*

The meaning of the term "lakheraj" is not very clear. It may mean either a revenue free grant or a rent-free grant, and although the right to make revenue-free grants belonged to the Crown the Zemindars made many alienations which are revenue free grants. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A I. R. 1935 Cal 368.**

———*Lakheraj—Mineral rights — Invalid lakheraj grant—Property situate within Zemindari—Subsoil-rights.*

The title to the underground rights in the case of an invalid lakheraj grant which has not been resumed by the Government—the right to such resumption having become extinguished by lapse of time—vests in the lakherajdar who holds under the invalid grant, and not in the Zemindar, although the property is situate within the Geographical limits of the Zemindar's estate. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A.I.R. 1935 Cal 368.**

Maintenance grant.

See also MUAFI, *infra.*

———*Maintenance grant by Government—Nature of estate taken by Hindu brothers.*

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Prima facie a gift to a member of a Hindu joint family is his separate property and will only become joint family property when it descends to his sons unless he himself has made it joint family property by throwing it into the common stock. Where there was nothing in the terms of the maintenance grants to two brothers to suggest that the Government intended to make a grant to the joint family.

Held, that the grant conferred an estate of inheritance on the brothers. (*Sir John Wallis.*) BAHU RANI *v.* RAJENDRA BAKHSH SINGH. **60 I.A. 95=8 Luck. 121=I.R. 1933 P.C. 38=142 I.C. 3=37 L W. 396= 10 O.W.N. 253=37 C.W.N. 464=1933 M W.N. 286 =35 Bom L.R. 490=1933 A.L.J. 445=A.I.R 1933 P.C. 72=64 M L J. 555 (P.C.).**

———*Maintenance grant—Heritable but non-transferable interest—Exemption from attachment and sale.*

Where a *taluqdar* grants heritable but non transferable rights in property for the purpose of maintenance, the restriction on the right of transfer must be deemed to be intended for the benefit of the *taluqdar* and his heirs. If the grantee transfers the property voluntarily, the transfer is not void *ab initio* but is only voidable at the instance of the *taluqdar* or his heirs. If a judgment-debtor, in the absence of an objection by the *taluqdar*, is competent to sell his interest in the land by a private sale there is no reason why under similar circumstances the same interest should not be liable to sale by means of execution proceedings. (*King, C.J. and Smith, J.*) MT. BHAGWATI *v.* RAGHUBAR DAYAL. **158 I.C. 710 =8 R.O. 118=1935 O.W.N. 1134=A.I.R. 1936 Oudh 76**

———*Maintenance grant — Inam— Construction — Grant to claimant and heirs.*

Under the inam certificate the Mauza Lakshanwadi was "for personal maintenance continued to claimant, his descendants and co-sharers in perpetuity."

Held, the grant to the claimant was for personal maintenance to be continued to claimant, his lineal descendants and co sharers, and not to claimant and his lineal descendants subject to the obligation or maintaining the co-sharers. (*Sir John Wallis.*) SAHEBRAO *v.* JAIWANTRAO. **60 I.A. 231=29 N.L R 210=57 C. L.J. 519=38 L.W. 37=35 Bom.L.R. 816=I.R. 1933 P C. 161=143 I.C. 437=A.I.R. 1933 P.C. 171=65 M.L.J. 154 (P.C.)**

———*Maintenance grant—Inam — Performance of services—Resumability of grant.*

The general rule is that where land is burdened with service it is ordinarily resumable by the grantor; but where the grant is that of an offence to which is annexed as remuneration of that office the enjoyment of land then the grant may be resumed on the failure of the holder of the land to perform the duties of the office or on his ceasing to represent the office. Where certain items of property were granted to the defendant's ancestor towards his maintenance, the only condition being the performance of certain ritual observances which are ordinarily performed by Brahmins.

Held, that the grant was not resumable for non-performance of services. (*Beaumont, C.J and Murphy, J.*) SAKHARAM NARAYANBHAT *v.* POORNANAND SARASWATI SWAMI **6 I.R (Bom.) 144=146 I C. 329=35 Bom.L R. 625=A.I.R. 1933 Bom. 377.**

———Maintenance grant—"*Tribka* tenure"—If indicates grant for life only. *See* LAND TENURE—*Tribka* TENURE. **39 C.W.N. 98=A I.R. 1935 Cal. 261.**

Minerals.

———*Minerals—Claim by grantee.*

If a claimant to sub-soil rights holds under the Zemindar or by a grant emanating from him, even though his

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tenure may be permanent, heritable and transferable, he must still prove the express inclusion of the subsoil rights. 58 I.A. 125, Foll. (*Lord Russell of Killowen.*) JAGAT MOHAN NATH SAH DEO *v.* PRATAP UDAI NATH SAH DEO. **10 Pat. 877 = 134 I.C. 1073 = 34 L. W. 763 = 54 C.L.J. 416 = 8 O W.N. 991 = A.I.R. 1931 P.C. 302 = 61 M.L.J. 532 (P.C.).**

———*Minerals—Claim by grantee—Onus.*

If a claimant to subsoil rights holds under the Zemindar or by a grant emanating from him, even though his power may be permanent, heritable and transferable, he must still prove the express inclusion of the subsoil rights in his grants. 61 M.L.J. 9 (P. C.), Foll. (*Lord Macmillan.*) H. V. LOW & CO. *v.* RAJA BAHADUR JYOTI PROSAD SINGH DEO. **58 I.A. 392 = 135 I C. 632 = 59 Cal 699 = I.R. 1932 P.C. 24 = 1931 A.L.J. 1112 = 33 Bom.L.R. 1544 34 L.W. 853 = 54 C.L.J. 366 = 35 C.W.N. 1246 = A.I.R. 1931 P.C. 299 = 61 M.L J. 699 (P.C.).**

———*Minerals*—Jamabrit *grant.*

In the case of a grant of a village on *Jamabrit* tenure, nothing short of express words will convey the mineral rights therein. (*Lord Macmillan.*) NAGESHWAR BUX ROY *v.* BENGAL COAL CO. **58 I A. 29 = 10 Pat. 407 = I.R. 1931 P.C 59 130 I.C. 315 = 33 Bom.L.R. 425 = 12 Pat.L.T. 251 = 15 R.D 194 = 53 C.L.J. 81 = 1931 A L.J. 537 = 35 C.W.N. 265 = 1931 M W.N. 121 = 33 L.W. 162 = 53 C.L.J. 487 = A.I.R. 1931 P.C. 186 = 60 M.L.J. 183 (P.C.).**

———*Minerals—Inam—Right of inamdar to.*

In the case of inams in the Madras Presidency the inamdar has no right to minerals. (*Ramesam and Venkatasubba Rao, JJ.*) VENKATA KRISHNAMARAJU *v.* SURYANARAYANARAJU. **57 Mad. 460 = 151 I.C 129 = 7 R M 89 = 39 L.W. 304 = A.I.R. 1934 Mad. 373 = 67 M.L.J. 544.**

———Minerals—Right to—Invalid lakheraj grant—Property situate within Zemindari—Subsoil rights vest in the lakherajdar, and not in Zamindar. *See* LAKHERAJ, *supra.* **62 Cal. 346 = A.I R 1935 Cal. 368.**

———*Minerals—Rights of putnidar.*

Subsoil rights will pass under a putni as in the case of other permanent, heritable and transferable tenures created by a Zemindar, only when granted in express terms and such words of general import that may be found in a grant as for example "with all rights" are not by themselves sufficient to pass those rights to the putnidar. 56 Cal. 1 (P.C.); 45 Cal. 87 (P.C.) and 61 M. L. J. 9 (P. C.), Foll. (*Sir George Lowndes.*) BHUPENDRA NARAYAN SINHA BAHADUR *v.* RAJESWAR PRASAD. **58 I.A 228 = 59 Cal. 80 = I R. 1931 P.C. 194 = 132 I.C 610 = 54 C.L J. 137 = 1931 M W.N. 865 = 33 Bom L R. 1273 = 35 C W N. 870 = 1931 A.L. J. 566 = 34 L.W. 1 = A.I.R. 1931 P C. 162 = 61 M L.J. 632 (P.C.).**

Muafi.

———*Muafi—Exemption from revenue.*

A 'muafidar' is not necessarily though in fact he often is, the owner of the land exempted from the payment of revenue. (*Harrison and Addison, JJ.*) ABDUL HAQ *v.* SHIROMANI GURDWAR PARBHANDHAK COMMITTEE. **14 Lah 156 = I.R 1932 Lah 474 = 138 I.C. 387 = 33 P.L R. 730 = A I R. 1932 Lah. 513.**

———*Muafi—Maintenance grant not subject to conditions—Alienation by holder — Resumption—Right of Government.*

A muafi grant made for the maintenance of the grantee and not subject to any conditions is liable to be resumed when the grantee makes a perpetual alienation

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of it. The Government has jurisdiction to resume the grant, when the territory in question was transferred permanently to and is under the administration of the Government. A sub grant made by the muafidar is to be distinguished from one made by the Government. (*Gordon, K. M.*) SETH LALCHAND, *In re.* **17 N.L.J. 167.**

Presumption.

———*Presumption—Lost grant—Presumption of—Rent-free grant—Inference from long possession.*

In proper cases, the presumption can be legitimately raised that a rent free claim was based upon a grant which is lost, though care must always be taken to see, in these cases, that long possession is clearly established to have been enjoyed under a definite claim of right in such a manner that, in the circumstances, it was likely to have attracted the notice of the person whose rights are adversely affected by such a claim. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMJI MISSER. **149 I.C. 979 = 6 R P. 677 = A.I.R. 1933 Pat. 685.**

———Presumption—Lost grant—Presumption of when applicable. *See* UNDER ADVERSE POSSESSION—ACQUISITION OF TITLE. **A.I.R. 1933 Pat 175.**

———*Presumption—Non-assessment for several years—No inference of revenue-free grant.*

The right vested in the Crown to levy a tax is a prerogative right. Government are not bound to levy assessment every year on all the lands over which they have power to levy assessment. There may be very good reasons why Government for a long period think it undesirable to assess a particular piece of land and it would be altogether unreasonable to presume that because Government have not for many years assessed particular land therefore that land has been granted free from liability to assessment. (*Beaumont, C. J. and Wadia, J.*) COLLECTOR OF BOMBAY *v.* KAMALAVAHOOJI **154 I.C. 861 = 7 R.B. 378 = 36 Bom.L.R. 297 = A.I R. 1934 Bom. 162.**

Resumption.

See also SERVICE GRANT, *infra.*

———*Resumption—Cancellation of concession—No retrospective effect to.*

Whatever may be decided about the matter of resumption, there is no case for giving retrospective effect to it. When a fresh monetary burden is to be imposed, whether it be new taxation, a cut in pay, the cancellation of an exemption, or concession, or any similar matter, it is an accepted canon that in the absence of special reasons to the contrary, restrospective effect should not be given to it. (*Gowan, K. M.*) MT. SITABO BAI, *In re.* **16 N.L.J. 272.**

———*Resumption—Grant for life of incumbent and on his death to his male issue—Right of widow.*

Where the original grant was made "for life of incumbent and on his death at quarter jama to his male issue", and on the death of the incumbent his widow claimed that she was only the surviving half of her deceased husband and so she was not in fact a successor but the original grantee himself,

Held, that for the purposes of the revenue law she was a successor and that owing to the limitation in the terms of the grant it was liable to be resumed. (*Gowan, K. M.*) MT. SITABO BAI, *In re.* **16 N.L.J. 272.**

———*Resumption—Grant for life of incumbent and to "male issue"—Construction.*

Where a grant was made "for life of incumbent and on his death at quarter Juma to his male issue".

Held, that the phrase must be interpreted literally and at each death the grant will only pass to a natural descendant in the male line of the original grantee.

GRANT—Resumption.

Held also, that the widow was not entitled to retain the grant on the ground that she was the surviving half of her husband or that she was entitled to adopt a son who would succeed her under the terms of the grant. (*Gowan, K. M.*) MT. MOHINIBAI, *In re*. **16 N.L.J. 175.**

———*Resumption—Grant of office and grant of land burdened with service—Distinction between.*

In the case of a grant of an office to be remunerated by the use of land, the land will *prima facie* be resumable. On the other hand, in the case of a grant of land burdened with service, *prima facie* it will not be resumable, but the terms of the grant or the circumstances in which it was made may establish a condition of the grant that it was resumable. The onus is on the grantor to make out such a condition. 13 M.I.A. 438, Rel. on. The original grant did not in terms grant any office but only granted six items, the first of which was land. The original grantee was only 13 years old, too young to render any service. The service had been subsequently commuted into a cash payment. The son of the original grantee sold it to the father of the present holder who was recognized by the grantor.

Held, it was in fact a grant of land, not resumable, but intended to be heritable and transferable and permanent at any rate as long as service or its equivalent in money was forthcoming. (*Lord Atkin.*) LAKHAMGOUDA *v.* BASWANT RAO. **I.R. 1931 P.C. 224 132 I.C. 736 34 L.W. 87 1931 M.W.N. 1081 35 C.W.N. 721 33 Bom L.R. 974 53 C.L.J. 544 A.I.R. 1931 P.C. 157 61 M.L.J. 449 (P.C.).**

[**R.** 35 Bom.L.R. 625 (627, 629)]

———*Resumption—Jagir—Grant in favour of three persons jointly—Death of one without heirs—Resumability of his share.*

Where the original grant of a jagir was made in favour of three persons jointly and the plaintiff, who claimed to resume one third of the jagir on the death of one of the grantees without heirs, only proved a general custom to resume on the failure of male heirs.

Held, that unless the plaintiff proved as custom of resumption of a share on the death of any one of the tenants, the jagir was not resumable so long as there was a male heir in the direct line of any of the original grantees. (*Wort and Fazl Ali, JJ.*) KAMAKHYA NARAIN SINGH *v.* KILRAN CHANDRA MUKERJI. **I.R. 1932 Pat. 211 139 I.C. 143 13 Pat.L.T. 264 A.I.R. 1932 Pat. 195.**

Rights of grantee.

———*Rights of grantee—Estate of grantee—Grantor's rights passing.*

Ordinarily a grantor is not competent to confer on the grantee a better title than he himself possesses. The decision in 20 Cal 708, should be treated as dealing with exceptional circumstances. (*Guha and Bartley, JJ.*) ANNADACHARAN NAIYA *v.* KUMAR MANMATHA NATH MITRA. **150 I C 30 6 R.C. 794 57 C.L.J. 509 A.I.R. 1934 Cal 51.**

———*Rights of grantee—Grant by Municipal Committee in Central Provinces without assessment.*

Where there is reasonable proof that land was given out by a Municipal Committee (or Government since cession in 1899) without assessment and no rent has been paid for the land, it should be presumed that no rent was intended to be levied and the right transferred was freehold. (*Nelson, K.M.*) DAJI GANGARAM KHAHATE, *In re*. **14 Nag L.J. 13 (Rev.).**

———*Rights of grantee—Sardeshmuki right—Two per cent. of Diwan Dast—Survey and revision survey—Right of grantee to the percentage on increased revenue.*

GRANT—Service grant.

By a sanad dated 1704 the Chief of Bavda was granted by the Maharaja of Satara, the Sardeshmuki right, *i.e.*, the right to collect Government dues in certain villages and to take two per cent. of the collections. This right was recognized and continued by the British Government. In 1889 the basis of payment was permanently fixed at the average five years' receipts, by way of commutation, the Government collecting the revenue directly. Subsequently there were survey and revision survey by which the revenue rose but the amount received by the plaintiff remained unaltered. The plaintiff sued for a declaration that he was entitled to two per cent. on the actual revenue and not merely on the old assessment.

Held, that the provisions of the Bombay Summary Settlement Act (VII of 1863) did not apply to the fixing of the basis of payment, that he was under the sanad granted two per cent. on the Diwan Dast, which is the Government assessment, whatever it might be, and that he was, therefore, entitled to a decree (*Baker and Nanavati, JJ.*) PARASHRAM MADHAVRAO *v.* SECRETARY OF STATE. **I.R. 1932 Bom 539 139 I.C. 796 34 Bom. L.R. 129 A.I.R. 1932 Bom. 319.**

[**Affirmed**, but decree directed to be amended, 61 I.A. 190 (P.C.).]

Service grant.

———*Service grant—Baswan or jagir for daily recitation of Srimad Bhagwat—Resumption on discontinuance of service.*

Appellant's ancestor granted in 1852 to the ancestor of the respondent a village as *baswan* or jagir for daily reciting one chapter of Srimad Bhagwat before the God Saligram. The service having been discontinued in 1919 appellant sued to resume the village.

Held, on a construction of the grant that the grant was not one burdened with service, but that the performance of the service was a condition of the grant, and that on discontinuance of the service, the appellant became entitled to resume possession of the village in question. (*Sir Lancelot Sanderson*) KUMAR KAMAKHYA NARAIN SINGH *v.* ABHIMAN SINGH. **61 I.A. 323 13 Pat. 589 39 C W N. 41 1934 M W N. 870 150 I C. 807 4 A.W.R. 229 11 O W N 1025 7 R P C. 18 1934 A.L J. 793 15 Pat L T 555 18 R D. 423 (2) 40 L.W. 342 60 C L.J. 153 A.I. R. 1934 P C. 182 67 M.L J. 450 (P.C.)**

———*Service grant—Commutation—Amount of cash payment.*

The amount of the *nokriansha* or payment in lieu of service is not at the uncontrolled discretion of the grantor. It should be reasonable. Where the parties had, for over 50 years, adopted the amount of assessment from time to time as the amount payable in lieu of service, *held*, the measure was correct under the circumstances. (*Lord Atkin.*) LAKHAMGOUDA *v.* BASWANTRAO. **I.R. 1931 P.C. 224 132 I C. 736 34 L.W 87 1931 M.W N. 1081 35 C.W.N. 721 33 Bom L.R. 974 53 C.L.J. 544 A.I.R. 1931 P.C. 157 61 M L.J. 449 (P.C.).**

———Service grant—Grant of land on service tenure to raiyat to cultivate himself and grant to tenure-holder with right to collect rents—Distinction between—Effect on raiyats' customary rights. *See* B. T. ACT, S. 181. **61 I A 93 13 Pat 254 66 M L.J. 298 (P.C.).**

———*Service grant—Inam—Grant to individual burdened with service—Dismissal of office holder—Resumption of inam.*

When it has to be decided whether the grant was to a named individual or to the incumbent of an office the question is one of intention. If the intention appears

GRANT—Service grant.

clearly that it was a particular individual or a particular family that was intended to be benefited, the grant must be construed to be a personal grant, the fact that incidentally the temple receives some benefit in the shape of the service to be performed there can make no difference. Where the named person has been dismissed for neglect of duties, the newly appointed office holder or the temple cannot have any right to recover the inam. The Government may resume the inam the condition of the grant having been broken and in its discretion make it over to the temple. (*Venkatasubba Rao, J.*) SUBRAMANYA ODUVAR *v.* SRIVAIKUNTAM KAILA SANATHASWAMI KOIL. **150 I C 1115=7 R.M. 67=1934 M.W.N. 94=39 L.W. 389-A.I.R. 1934 Mad. 258 (2).**

———*Service grant—Police service tenures—Incidents of—Alienability.*

Jagirs and tenures in the estate of Pachet in Manbhum were police service lands—the services being renderable to Government; and so long as the tenures were service tenures for the performance of police duties, it was necessary that succession should be by lineal primogeniture, and impartibility and inalienability should be the incidents attached to them. (*Mahomed Noor, J.*) RAM PRASAD SINGH *v.* MOHAN MANDAL. **7 R.P. 25=150 I.C. 784=A.I R. 1934 Pat. 524.**

———Service grant prior to T. P. Act—Failure to render service and repudiation of grantor's title—Forfeiture—Grantor's right to resume grant—Act showing intention to resume grant—If essential *See* T. P. ACT, S. 111 (g). **42 L.W. 362=A.I.R. 1935 Mad. 948.**

———*Service grant—Resumption—Grants earlier than Permanent Settlement—Right to resume—Deed of relinquishment—Effect of.*

A zamindar resumed certain lands which were granted to the ryots in lieu of certain services which they were to render to the villagers in general and not to the zamindars personally. The grants were not made subsequent to the Permanent Settlement nor were the lands included in the assets of the zamindari at the time of the settlement. At the time of the resumption the ryots had also executed relinquishment deeds in favour of the zamindar.

Held, that the zamindar alone without concurrence of the villagers had no right to resume the lands.

Held, further, that the relinquishment deeds executed in favour of the zamindar alone were not valid and enforceable in law, and so they would make no difference with regard to the right of resumption by the zamindar who had originally no right to resume. S A. Nos. 1405 and 1406 of 1924, Rel. and 40 M L J. 466, Dist. (*Madhavan Nair, J.*) POLADARI GADU *v.* RAJAH OF VIZIANAGARAM. **I R. 1931 Mad. 364=130 I C. 188=33 L.W. 201=A.I.R. 1931 Mad. 43.**

———*Service grant—Resumption—Grant to* pujaris *in lieu of wages—Neglect of duty—Grantee willing to perform duties—Procedure.*

In a suit brought by certain idols against the *pujaris*, it was found that the ancestor of the defendants was appointed priest or *pujari* of the idols, that certain properties were made over to him to meet the daily and occasional expenses of the worship of the idols out of the usufruct, there should be no wages or salary attached to his office but that he should be able to remunerate himself out of the usufruct and would generally act under the supervision of the idol's shebaits. The plaintiffs (idols) claimed resumption of those lands on the ground of neglect of their duties by the defendants and also a declaration that a permanent lease granted by the defendants was not binding on the plaintiffs.

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Held, that having regard to the object of the grant, *viz.*, to provide for the proper worship of the idols and for the remuneration of the *pujari*, it was a grant in lieu of wages and resumable; that as the defendants were willing to faithfully carry out their duties, and to provide for the expenses of the worship out of the usufruct of the lands, they should be allowed a *locus penitentiae* and to continue in their office as *pujari*; and that the plaintiffs were entitled to a declaration that the alienation was not binding on them. (*Rankin, C. J. and C. C. Ghose, J.*) SRFE SRFE JAGANNATH JEW THAKUR *v.* ANANTA ADIKARY. **142 I.C. 105=I R. 1933 Cal. 233=36 C.W.N. 899=A.I R. 1933 Cal. 44.**

———*Service grant—Resumption—Right of tenants against service tenure-holder—Continuance.*

When a service tenure is resumed, any right the tenants may have acquired against the service tenure-holder comes to an end and is not available against the grantor. 39 M.L.J. 629, Ref. (*Waller and Jackson, JJ.*) SADASIVARAYUDU *v.* VENKATASWAMI. **I R. 1932 Mad. 401 (2)=137 I.C. 496=35 L.W. 356=A.I.R. 1932 Mad 289=62 M.L J. 598.**

———*Service grant—Sale of zamindari—Right of vendee to recover possession of village granted to third persons and not resumed.*

The sale of a mere zamindari may not cover the right to resume and to recover possession of a village granted to third persons in return for service, not in possession of the vendor and as to which no order of resumption had been passed. (*Ramesam and Madhavan Nair, JJ.*) ALAKH NARAYAN GAJAPATHIRAJ *v.* CHINNA JOGUDU. **I.R. 1933 Mad. 238=142 I.C. 711=A.I.R. 1933 Mad. 221.**

———*Service grant—Service discontinued—Liability to be resumed or assessed with rent.*

Where land had been granted in perpetuity but the grant was subject to the burden of a service, namely, the repairing of a bund, and the landlord had made the performance of the service impossible by converting the tank into agricultural lands, the landlord cannot put an end to the tenure and resume the land, or claim that the land be assessed with rent. (*Fazl Ali and Luby, JJ.*) AMARENDRA KRISHNA GHOSH *v.* LAHABAT MAHTON. **15 Pat. 46=158 I C 621 (2)=8 R.P. 203=17 Pat L.T. 191=A I R 1935 Pat. 504.**

———Service grant—Shet Sanadi inam—Kadim or Jodi. *See* CONSTRUCTION, *supra*. **36 Bom.L.R. 1055.**

Shrotriem.

———*Shrotriem.*

A shrotriem grant may be a grant of kudivaram as well as melwaram. What it includes in a particular case depends on the terms of the grant and the surrounding circumstances. (*Madhavan Nair, J.*) KONDAPPA NAIDU *v.* MAHALAKSHMAMMA. **6 I R. (Mad.) 100=145 I.C. 588 (2)=A.I.R. 1933 Mad. 194.**

Succession.

———*Succession—Grant of land by Crown—Rule of succession at variance with ordinary law—Power of grantee to impose.*

The Crown has power to grant or to transfer lands, and by the grant or on transfer, to limit in any way it pleases the descent of such lands. But a subject who takes the grant has no right to impose on the land or other property any limitation of descent which is at variance with the ordinary law of descent applicable in his case. (*Nasarutty and Zia-ul-Hasan, JJ.*) SAKINA BEGAM *v.* SHAHAR BANO BEGAM **10 Luck. 443=153 I.C. 42=7 R.O. 303=11 O.W.N. 1608=A.I.R. 1935 Oudh 62.**

GRANT—Succession.

———*Succession* — Putraputradhi *grant in Ranchi District—Descent—Rule of lineal primogeniture.*

The *lex loci* of the Ranchi District is one of primo geniture not only in the family and offshoots of the Maharaja of Chota Nagpur himself but also in all the jagirs of the District. In the Chota Nagpur estate a *putraputradhi* tenancy is impartible, is governed by the rule of lineal primogeniture and continues so long as there exists any lineal male descendant of the grantee or grantees with Khorposh to the widow of the last surviv ing male holder. (*Macpherson and Agarwala, JJ.*) TIKAIT RUP RAJ RAI *v.* TIKAIT PERMANAND RAI. **12 Pat. 859 = 148 I.C. 183 = 6 R.P. 424 = A.I.R. 1934 Pat. 95.**

Title.

———*Title—Claim to mauza as forming part of permanent by settled estate—Plea of lakheraj—Onus.*

The plaintiff in a suit claimed that a certain mauza belonged to him as appertaining to his permanently settled estate. The defendant on the other hand assert ed that it was the lakheraj debuttar of an idol.

Held, the burden would lie on the plaintiff of show ing that the mauza was included in the Mal assets of the estate at the date of the Permanent Settlement, in other words, that it fell within his regularly assessed estate. But when there is some admission of the defendant to the effect that the mauza is within the plaintiff's revenue paying estate, the onus is shifted on to the defendant. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal 346 = 159 I C 98 = 8 R C. 257 = 60 C.L.J. 477 = A.I.R 1935 Cal. 368.**

Validity.

———*Validity—Grant bad in part.*

The grant must be treated as a whole, and, if a part is bad, the whole is bad. (*Lord Alness.*) SECRETARY OF STATE *v.* ANANT KRISHNAJI. **61 I.A. 70 = 58 Bom 111 = 1934 A.L J 162 = 36 Bom L.R. 242 = 3 A.W.R. 468 = 59 C.L J. 98 = 38 C.W.N. 505 = 6 R.P. C. 61 (2) = 147 I C. 321 = A.I.R. 1934 P.C 9 = 66 M. L.J. 164 (P.C.).**

———*Validity—Minor irregularity (Berar).*

The grant in 1896 of a site in Berar Civil Station cannot at this distance of time be treated as invalid be cause of a minor irregularity (*Nelson, R. M.*) *In the matter of* MITRA SAMAJ CLUB, AKOLA. **16 Nag.L. J. 25.**

GRATUITOUS ACT. *See* CONTRACT ACT, SS. 69 AND 70.

GRATUITY. *See* C. P. CODE S, 60.

GRAVE AND SUDDEN PROVOCATION. *See* PENAL CODE, S. 300, EXCEPTION (1).

GRAVEYARD. *See* LANDLORD AND TENANT.

GRAZING RIGHTS.

See (1) CUSTOM (PUNJAB)—COMMON LAND.
(2) LANDLORD AND TENANT.

GRIEVOUS HURT. *See* PENAL CODE, S. 325.

GROSS NEGLIGENCE. *See* TORTS—NEGLIGENCE.

GROUNDS FOR REMAND. *See* C. P. CODE, S. 151 AND O. 41, RR. 23 AND 25.

GROUNDS FOR REVIEW. *See* C. P. CODE, O. 8, R. 47.

GROUNDS FOR TRANSFER.

See (1) C. P. CODE, S. 24.
(2) CR. P. CODE, S. 526.

GROVE.

See also (1) AGRA TENANCY ACT (III OF 1926), SS. 3 (15), 14 19, 37 185 186, 197 AND 271.
(2) LANDLORD AND TENANT—GROVE.
(3) LEASE.

———*Cutting trees—Liability to ejectment—Occupancy rights—Proof of.*

In a suit to eject the defendants on the ground that the land was the grove of the defendants which they had cut down and in consequence become non occu pancy tenants thereof, the defendants pleaded they had acquired occupancy rights.

Held, that the burden is on the defendants to show that they have acquired occupancy rights in the land before they planted the grove, that they had failed to prove that they had cultivated for twelve years before they planted the grove and so they were only non-occupancy tenants liable to ejectment (*Walton, J. M.*) TOTA RAM *v.* RANI HARESH MUKHI DASI. **14 L. R 160 (Rev.) = 17 R D. 207.**

———*Hindu widow—Alienation of share in grove—Right of alienee to obtain mutation.*

Where a Hindu widow transfers her rights in certain grove, the transferee is entitled to hold for her life time and mutation can be effected for that limited purpose. (*Oakden, S.M. and Keane, J. M.*) BHULAI UPADHIA *v.* BHAGWANTA. **15 R D. 151 = 12 L.R 25 (Rev.).**

———*Holder of—Grove ceasing to be such—Liability to ejectment.*

Even though the grove ceases to be a grove, the land holder is not entitled to enter upon the land and dispos sess the tenant otherwise than in accordance with the process of law. The grove-holder becomes under S. 197 (*a*) of the Agra Tenancy Act a non occupancy tenant in the land entitled to remain there till the end of the agri cultural year under the proviso to S. 99. If before that date he is dispossessed by the landlord, he is entitled to compensation for damage done. (*Oppenheim, S.M. and Walton, J M.*) RAM CHANDRA SINGH *v.* CHHABILE SINGH. **14 L.R 210 (Rev.) = 17 R D. 344.**

———*Rights of holder—Trees of spontaneous growth.*

Trees of spontaneous growth remain the property of the grove-holder even after the grove ceases to be a grove. (*Oppenheim, S.M and Walton, J.M.*) RAM CHANDRA SINGH *v.* CHHABILE SINGH. **14 L.R. 210 (Rev.) = 17 R.D. 344.**

———*What is not.*

Where the land which was formally a grove contain ed only six mango trees and some self sown *babuls*, *held*, that it was no longer a grove. (*Oppenheim, S. M and Walton, J.M.*) RAM CHANDRA SINGH *v.* CHHABILE SINGH. **14 L.R. 210 (Rev.) = 17 R.D 344.**

GROVE HOLDER. *See* AGRA TENANCY ACT (1926), SS. 121, 191, 196 AND 197.

GROWING CROPS.

See (1) GENERAL CLAUSES ACT, S. 3 (25).
(2) T. P. ACT, S. 3.

GUARANTEE.

See (1) CONTRACT ACT (1872), SS. 126, 127 AND 128.
(2) SURETY.

GUARDIAN.

See (1) C. P. CODE, O. 32.
(2) MINOR.

See also (1) GUARDIAN AND WARDS ACT.
(2) BUDDHIST LAW (BURMESE)—GUARDIANSHIP.
(3) HINDU LAW—GUARDIANSHIP.
(4) MAHOMEDAN LAW—GUARDIANSHIP.

GUARDIAN AND WARD.

———*Acquiescence of guardian—If binding on ward.*

A minor is not bound by any acquiescence on the part of his guardian, though it may be a piece of evidence against him (the minor). (*Sir Dinshah Mulla.*) NANDAMANI ANANGA BHIMA DEO *v.* SUSEELA MALA PATTA MAHADEVI. **I.R. 1933 P.C. 7=37 C W.N. 237=37 L.W. 57=10 O.W.N. 89=56 C.L J. 522=141 I.C. 1=A.I R. 1933 P.C. 20=64 M.L.J. 1 (P C.).**

———*Admission by Collector as officer of Court of Wards—If binding on minor.*

The balance of authority is in favour of the view that an admission made by a guardian of a ward or by the Collector as an officer of the Court of Wards will not necessarily bind the minor. (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH. **14 Pat. 70=157 I.C. 433=8 R.P. 121=A.I.R. 1935 Pat. 306.**

———*Alienation by guardian—Invalid sanction of Court—Claim for damages.*

Apart from any personal covenant personally binding on him, a guardian selling the property of his minor ward is not personally liable for damages to the vendee, if the latter is deprived of the whole or part of the property in consequence of the permission of the District Judge conferring authority on the guardian to transfer being found to be invalid. If the guardian has expressly or by necessary implication agreed to indemnify the vendee, in his personal capacity, wholly apart from his capacity as guardian of the minor whose interest he represents, he would be liable.

Held, that the suit document did not include a personal covenant on the part of the pardanashin lady who executed it. (*Niamatullah and Bennet, JJ.*) MAIDA *v.* KISHAN BAHADUR SINGH. **56 All. 997=151 I C. 820=7 R.A. 223=1934 A.L.J. 350=3 A.W.R. 706 =A.I R. 1934 All. 645.**

———*Alienation by guardian—Major portion applied for binding purpose—Transaction, if can be upheld.*

Where the mother, acting as guardian of her minor sons, sold a piece of land for Rs. 600 and out of that paid a debt of Rs. 400 incurred by the father of the minors.

Held, that the sale was binding on the minors, as the preponderance of the purchase money was for a binding purpose, namely the payment of the debt. In such cases, the question depends on the discretion of the Court as to what proportion should be found to be binding, in order to constitute the sale binding as a whole (*Curgenven, J.*) THANGAVELU *v.* NARAYANA PADAYACHI. **I R. 1933 Mad. 204 (1)=142 I.C. 152 (2)=1933 M.W.N. 622=A I.R. 1933 Mad. 352.**

———*Appointment of guardian—Father—Immorality of.*

The question whether the father is fit to be the guardian of his child is a question of fact. By reason of his natural love to his child, all possible allowance should be made in his favour. His immorality is not decisive to show that he is unfit. 46 A. 706, Ref (*Mahadevayya, J.*) MUNIYAMMA *v.* MUNISAMAPPA. **10 Mys.L.J. 156.**

———*Appointment of guardian—Hindu joint family—Infant member—Inherent jurisdiction of High Court*

The High Court can, in the exercise of its inherent jurisdiction under Cl. 17 of the Letters Patent (and apart from the Guardian and Wards Act, 1890), appoint a guardian of an infant coparcener in an undivided Mitakshara family and the father was appointed as guardian of the person and property of his minor sons. 54 Bom. 75; 50 Cal. 141 and 50 All. 709, Foll.; 25 All. 407 (P.C.) and 53 All. 190, Dist. (*Costello, J.*) BIJAYAKUMAR SINGH BUDER, *In re.* **59 Cal. 570=**

GUARDIAN AND WARD.

I.R. 1932 Cal. 523=138 I.C. 739=A.I.R. 1932 Cal. 502.

———*Arbitration—Powers of guardians—Reference to arbitration.*

A guardian has the power to make a reference to arbitration on behalf of the minor. 19 Cal. 334, Rel.; 39 Cal. 232, Dist. (*Kulwant Sahay and Macpherson, JJ.*) RAMAUTAR SAH *v.* LANGAT SINGH. **130 I.C. 810=13 Pat.L T. 101=A I R. 1931 Pat. 92.**

———*Arbitration—Powers of guardian—Reference to arbitration—Binding nature on minor.*

A reference to arbitration made by a properly constituted guardian in good faith and for the benefit of the minor binds him. Reference to arbitration upheld. (*Bhide and Tapp, JJ.*) MOHAN SINGH *v.* MT. GUR DEVI. **12 Lah. 767=I R 1931 Lah. 498=131 I.C. 738=33 P.L.R. 196=A.I R. 1931 Lah 728.**

———*Arbitration—Validity of reference—Mother not appointed guardian—Power to refer dispute.*

Where a Burmese mother referred a dispute to arbitration on behalf of herself and her minor sons but it appeared that she was never appointed guardian.

Held, that the reference and the award were invalid and not binding on the minors. 5 Rang. 186 (P.C.), Rel. on. (*Baguley, J.*) V K. N. K. CHETTYAR FIRM *v.* MA THAUNG SHWE. **I.R. 1933 Rang. 35=142 I. C. 189.**

———*Contract by guardian—Personal liability of ward.*

Although a guardian can under certain circumstances sell or charge his ward's estate or property, he cannot bind him personally by a simple contract debt nor can he bind his estate except by a document purporting to bind it This principle applies even to a case where the promissory note was executed by the guardian (appointed by the Court) after obtaining sanction from Court and the amount was utilised for the benefit of the minor. 11 Bom. 551 (P.C.) and 20 Bom. 61, Foll. (*Rangnekar, J.*) KESHAO MADHAVRAO *v.* BALAJI VASUDEO. **141 I.C. 492=I R. 1933 Bom. 97=34 Bom.L.R. 996=A.I.R. 1932 Bom. 460.**

[R. 145 I.C. 350 (351). **Rel.** 34 Bom.L.R. 1001 (1004).]

———*Contract by guardian—Promissory note by guardian—Personal liability of ward.*

A promissory note executed by the certificated guardian for goods supplied to the shop owned by the minor does not impose a personal liability on the minor and the creditor is not entitled to recover the amount from the minor or his estate. 11 Bom. 551 (P.C.); 20 Bom. 61; 34 Bom.L.R. 996, Foll. (*Baker, J.*) SHANKAR VAMAN *v.* NATHU KRISHNA. **141 I.C. 498=I.R. 1933 Bom. 107=34 Bom.L R. 1001=A.I.R. 1932 Bom. 480.**

———*Custody of minor—Rights of guardian—Remedy for restoration of custody of minor—Application under S. 25, Guardian and Wards Act—Bar of suit.*

The only remedy of a guardian seeking the restoration of the custody of his minor ward is by way of an application under S. 25 of the Guardian and Wards Act; a separate suit is not maintainable for the purpose. 26 All. 594; 38 Mad. 807 (P.C.), Ref; 42 Mad. 647, Foll. (*Page, C. J. and Sen, J.*) SHAHDEO *v.* MAHARAJ. **9 Rang. 569=136 I.C. 831=I.R. 1932 Rang. 81=A.I.R. 1932 Rang. 4.**

———*Debt binding on minor—Decree against minors' estate.*

A decree can be passed against a minor's estate on a contract entered into by his guardian in a case, in which the estate would have been liable for the obligation

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ncurred by the guardian under the personal law to which the minor is subject. 42 M 185, Foll. (*Waller and Krishnan Pantalai, JJ.*) MEENAKSHISUNDARAM CHETTY *v.* RANGA AYYANGAR. **I.R 1932 Mad 672 =139 I C. 333 =35 L W. 397=A.I.R. 1932 Mad. 696.**

———*Debt by guardian—Promissory note—Binding nature of—Personal liability not imposed on minor.*

Though a debt incurred on behalf of a minor for necessary purposes of the minor or a covenant to pay a debt so incurred can be enforced against the property of the minor, a guardian cannot impose an unconditional personal liability on the minor by executing a promissory note on his behalf because any qualification of the promise contained in a promissory note such as that it is only to be enforced against a minor if necessity binding on the minor be shown is wholly foreign to the idea of a negotiable instrument. 42 Mad. 185 (F.B.) and 54 M 163, Dist.; 35 L.W. 397, Diss. From. (*Reilly and Coumsh, JJ.*) SWAMINATHA ODAYAR *v.* NATESA AYYAR. **56 Mad 879=6 I R (Mad) 119=145 I C 716=1933 M.W N. 121=38 L.W. 430=A I R. 1933 Mad. 710 (2)=65 M L J. 350.**

[Overruled. 58 Mad. 735 (740, 741) (F.B.).]

———De facto *guardian—Alienation by—Mahomedan minor—Setting aside—Equities.*

Where a sale by the *de facto* guardian of a Mahomedan minor is set aside, the purchaser is entitled to compensation to the extent to which the consideration for the sale has been used for the benefit of the minor or his estate. 7 Lah. 35, Foll. (*Doraswami Iyer, C. J., Rima Rao and Srecnivasa Iyer, JJ.*) KVTHAYAN BAVEE *v.* HANUFA BEE. **9 Mys L J. 196 (F.B.).**

———De facto *guardian—Alienation by—Validity—Suit to set aside—Limitation.*

A *de facto* guardian has no authority under the Burmese Buddhist Law to deal with the property of the minor and therefore a conveyance executed by him acting as guardian of the minors, is void and not merely voidable. The suit by the minors, for possession of property thus conveyed is governed by Art 144 and not by Art. 44. 34 All. 213 (P.C.) and 45 C. 878 (P.C.), Relied on. (*Carr, J.*) RANJA KHAN *v.* MA CHIT. **I. R. 1931 Rang. 278=134 I.C. 214=A.I.R 1931 Rang. 178.**

———De facto *guardian — Burmese Buddhist—Power to dispose of the property of the ward.*

A *de facto* guardian of a Burmese Buddhist cannot bind the ward's estate. Unless a guardian is appointed by the Court and gets permission from that Court to dipose of the property of the ward, he cannot part with or encumber in any way the property of the ward. (*Baguley, J.*) MAUNG THIN MAUNG *v.* MA SAW SHIN. **11 Rang 193=6 I R. (Rang.) 125=146 I.C. 922=A I.R. 1933 Rang. 83.**

———De facto *guardian—Executor acting as guardian of testator's minor sons—Debts incurred by—Liability of estate.*

Where a person was not only appointed an executor under a will, but he was also acting as a *de facto* guardian of the minor sons of the testator and carried on business of the deceased for the benefit of the family and incurred debts therefor.

Held, that though the will be held invalid, inasmuch as the executor was acting as *de facto* guardian of the minors, and the debts were incurred by him for their benefit, they were binding on the estate of the deceased. (*Madhavan Nair, J.*) THIRUNAVUKKARASU PANDARAM *v.* PURUSHOTTAM LAKSHMIDAS & CO. **159 I.C.**

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266=8 R.M. 479=1935 M W.N. 1136=A.I R. 1935 Mad 890.

———*De facto* guardian—Indian Christian—Alienation by—Void. *See* GUARDIAN AND WARD—INDIAN CHRISTIAN, *infra*. **60 M.L.J. 695.**

———*De facto* guardian—Position of—Expenses incurred during minority—His right to sue, during minority. *See* LIMITATION ACT, ART. 61. **37 P.L. R 246=A.I.R. 1935 Lah. 437.**

———De facto *guardian—Power to acknowledge debts.*

A *de facto* guardian has no power to acknowledge a debt so as to bind a minor. (*Beasley, J. C. and Bardswell, J.*) GOMATHI AMMAL *v.* AVU AMMAL. **56 Mad. 954=6 I.R. (Mad.) 208=146 I.C 49=1933 M.W N 365=38 L.W. 321=A I.R. 1933 Mad. 686 =65 M.L J. 355.**

———De facto *guardian—Powers of—Hindu Law.*

Held by the Full Bench (*Beaumont, C.J. dissenting*). —The *de facto* guardian of a minor can validly sell the property of the minor to a third person for legal necessity. *Hanumanpersaud's* case relied on, 49 B. 576, Over. (Case Law exhaustively discussed.) (*Beaumont, C. J., Pitkar and Barlee, JJ.*) TULSIDAS *v.* RAISINGJI. **57 Bom 40=141 I C 17—I.R. 1933 Bom 53=34 Bom.L R. 1483=A.I R 1933 Bom. 15 (F.B.).**

[R. 36 Bom L.R. 738 (754), 11 O.W.N 1236 (1247).]

———*Disqualified proprietor—Decree* ex parte *against such proprietor and his minor sons—Binding nature of —Omission to name one of the minor sons in decree—Effect.*

When an *ex parte* decree is passed against a disqualified proprietor, who is of age but whose estate is under the management of the Court of Wards, and against three of his minor sons all of whom are represented by the Court of Wards, the mere fact that the name of one of the minor sons is not given in the decree, will not make the decree any the less binding on the minors, if it is otherwise good. It is enough for the purpose of making the decree binding on the minor sons, to sue the father alone as he fully represents the estate. (*Khaja Mohammad Noor and Dhavle, JJ.*) MATHURA SINGH *v.* RAMA RUDRA PRASHAD SINHA. **14 Pat. 824=162 I.C. 235=8 R P. 522=16 Pat.L.T. 484—A.I.R. 1936 Pat. 231.**

———*Disqualified proprietor*—Ex parte *decree against —Gross negligence of guardian* ad litem—*Effect—Right to avoid decree—Minor and disqualified proprietor—Distinction.*

The principle of English law, which has been applied in India on the ground of justice, equity and good conscience to afford protection to infants, can be extended also to disqualified proprietors, whose estates are managed by the Court of Wards. There is no reason to differentiate between the two cases. A Ward of the Court is as much helpless as a minor; rather he is in a worse position than the latter. Gross neglect by the manager of the Court of Wards acting as guardian *ad litem* for the disqualified proprietor, which results in an *ex parte* decree being passed against him, entitles such disqualified proprietor to get the same relief as he would have got if he had been a minor. (*Khaja Mohammad Noor and Dhavle JJ.*) MATHURA SINGH *v.* RAMA RUDRA PRASHAD SINHA. **14 Pat 824=162 I.C. 235=8 R. P. 522=16 Pat L.T. 484=A I.R 1936 Pat. 231.**

———*Indian Christian*—de facto *guardian—Alienation by—Validity of—Suit to set aside—Limitation Act, Art. 44—Applicability.*

A sale by the *de facto* guardian of an Indian Christian minor is absolutely void and a suit to set it aside is not governed by Art. 44 of the Limitation Act. (*Madhavan*

Nair, J.) SUNDARA NADAN *v.* ANNAMMAL. **I.R. 1931 Mad. 616=132 I.C. 120=1931 M.W.N. 415=33 L.W. 615=A.I.R. 1931 Mad. 529=60 M.L.J. 695.**

———*Manager of infant's properties—Relationship of guardian and ward, if constituted.*

Where the will contained a clause to the effect that the properties of the infant should remain in management of a certain named person until the infant attained majority,

Held, that the provision did not constitute the manager, guardian of the infant. (*Mukerji and Guha, JJ.*) MAHARAJA SIR MANINDRA CHANDRA NANDI *v.* SUDHIR KRISHNA BANERJEE. **136 I.C. 893=I.R 1932 Cal 245=35 C.W.N. 850=53 C.L.J. 589=A.I.R. 1932 Cal. 182.**

———*Minor attaining majority—Execution application filed by* quondam *guardian—Ratification by ex-minor.*

A *quondam* guardian cannot make an application for execution on behalf of the minor who has attained majority without a power-of attorney. If, however, the minor ratified the act, it is valid. A.I.R. 1929 Lah. 478, Appl. (*Shadi Lal, C. J. and Broadway, J.*) GHANAYA LAL *v.* MADHO PRASAD **135 I.C. 207 (2)=I.R. 1932 Lah. 79 (2)=32 P.L.R. 290=A.I.R. 1931 Lah. 600.**

———*Mortgage by guardian being invalid—Personal covenant—Liability of minor's estate.*

Where the guardian of a minor executed a mortgage which was found to be invalid and unenforceable as such for want of proper attestation, the personal covenant contained in the deed can be enforced against the estate of the minor of the liability was one binding on the minor under the Hindu Law. 42 Mad. 185=36 M.L.J. 29 (F.B.). Foll. (*Beasley, C.J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=33 L.W. 95=135 I.C. 17=I.R. 1932 Mad. 49=A.I.R. 1931 Mad. 140=60 M.L.J. 56.**

[**Appr.** 35 L.W. 397 (398). **D.** 56 M. 879 (883).]

———*Negligence of guardian—Liability for loss to minor*

Where the omission of the guardian to invest the minor's property in trust securities as directed by S. 20 of the Trusts Act and to file proper accounts was the main cause of the loss caused to the minors though the action of others also partly caused the loss.

Held, that the guardian and his surety were liable for the whole loss sustained by the minors. (*Aston, A J.C.*) RADHAKISHEN *v.* SECRETARY OF STATE. **27 S.L.R. 142=I.R. 1932 Sind 37=136 I.C. 517=A.I.R. 1932 Sind 181.**

———*Negligence of guardian — Order passed by Revenue Court—Right of minor to avoid.*

A right to avoid a judgment on the ground of undue influence or fraud just as much as a right to avoid a contract on those grounds is a substantive right because the binding character of the transaction itself is impugned. It is not a mere matter of procedure or rule of evidence. It therefore exists independently of S. 44 of the Evidence Act. There is nothing in S. 44 or S. 2, Evidence Act, which precludes the plaintiffs from proving that a judgment previously obtained had been obtained by negligence of the guardian. The real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there is such an order, if the guardian does not properly represent him, the decree would not be

binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him, if he is sufficiently represented and his interests are well protected. Even where a guardian has been formally appointed, but he is grossly negligent in his duties, he ceases to represent the minor properly and effectively, and the result is the same as if no proper guardian had been in existence. It is the duty of the Court to see that the guardian appointed is a proper person who would safeguard the interest of the minor. If therefore the guardian ceases to take any interest in the case or is grossly negligent so as to sacrifice the interest of the minor, it cannot be said that the minor is still properly represented in the litigation. Wilful and wanton neglect on the part of the guardian disqualifies him. This also therefore appears to be a basis on which the avoidance of a decree against the minor can be allowed. (*Sulaiman, Boys and Sen, JJ.*) MT. SIRAJ FATIMA *v.* MAHOMED ALI **54 All. 646=I.R. 1932 All. 418=138 I.C. 465=16 R.D. 327=1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.).**

[**Disc.** 16 P.L.T. 484 (495, 498).]

———*Powers of guardian—Right to institute suit—Delegation.*

A suit was instituted by the general attorney of a minor principal's guardian, without the guardian's knowledge and permission, both on his own behalf and for the minor's guardian, professedly as the guardian's authorized agent.

Held, that the minor not being fully represented, the judgment cannot be conclusive as against him. (*Sulaiman and Kendall, JJ.*) RAM DAS *v.* DWARKA DAS. **I.R. 1931 All. 91=128 I.C. 763=A.I.R. 1930 All 875.**

———*Statutory guardian—Doctrine of mutuality—Applicability of.*

Quaere.—Whether the doctrine of mutuality does not apply to statutory guardians. (*Krishnan Pandalai, J.*) DOMBRU PANDA *v.* SRI RAMACHANDRA DEO. **1933 M.W.N. 818.**

———*Statutory guardian—Guardian of lunatic—Power to impose personal liability on ward.*

Quaere.—Whether a guardian acting on behalf of a lunatic is competent to make any covenant imposing a personal liability upon his ward. (*Raza, Nanavutty and Smith, JJ.*) MAQBOOL AHMAD *v.* DINGA PRASAD. **9 Luck. 51=6 I.R. (Oudh) 17=144 I.C. 931=10 O.W.N. 653=A.I.R. 1933 Oudh 352 (F.B.).**

———*Suit against minor—Guardian allowing* ex parte *decree to be passed—Validity of decree.*

The petitioners (plaintiffs) sued three brothers to recover some money due in respect of a deposit made with their deceased father. The 1st defendant was a major and the other two were minors. Plaintiffs applied for the appointment of a guardian proposing first the mother and on her declining, the brother (the 1st defendant), who agreed to act as guardian and was appointed accordingly. In the suit, he took time to file the written statement but afterwards did not at all make a defence either for himself or on behalf of his minor brothers and the suit was decreed *ex parte*. On the allegation that the 1st defendant had failed in his duties as a guardian and that accordingly the mother had applied to be made a guardian and at the same time application was made to set aside the *ex parte* decree.

Held, that the finding of the lower Court that the 1st defendant had betrayed his trust as guardian in not having filed a written statement and leaving the hearing to proceed *ex parte*, was sufficient to bring the case within the terms of O. 9, R. 13, C. P. Code. (*Curgenven, J.*) KATHA SAWMY CHETTIAR *v.* RAMACHANDRAN.

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57 Mad. 1069=150 I.C. 779=7 R M. 31=39 L.W. 653=A.I R. 1934 Mad. 428=66 M.L J. 683.

[Rel. 68 M.L J. 692, **F.** 41 L.W. 654.]

GUARDIAN AND WARDS ACT (VIII OF 1890) AND CRIMINAL PROCEDURE CODE, S. 491 *—Applicability—Mahomedan wife—Application for custody of minor child from husband—Procedure.*

A Mahomedan wife, divorced by her husband, who seeks to recover custody of a child of about 4 years, as its lawful guardian under the Mahomedan Law, from her husband should seek her remedy not under S. 491, Cr. P. Code, but under the Guardian and Wards Act, which is a special Act dealing with a special subject, *i.e*, the subject of minors. When the remedy under the Guardian and Wards Act is open, the High Court will not exercise its discretionary power under S. 491, Cr. P. Code, which is only a general power in the nature of a *Habeas corpus*. (*Bennet, J.*) HAIDARI BEGAM *v.* JAWAD ALI. **154 I.C. 638=7 R.A. 783=36 Cr L.J. 554=1934 A L J. 946=4 A.W.R. 1406=1935 Cr C. 36=A I.R. 1935 All. 55.**

———S. 4 (2)—*"Guardian."*

The word "guardian" is used in a very wide sense and does not necessarily mean a guardian duly appointed or declared by Court. Any person who has the care of the person of the minor is a guardian of the person and any person who has the care of the property of the minor is a guardian of the property within the meaning of the Act. (*Sulaiman, A.C J. and Sen J.*) SIDDIQ UNNISSA BIBI *v.* NIZAM UDDIN KHAN. **54 All 128=I. R. 1932 All. 307=137 I.C. 219 1932 A L J. 21=A.I.R. 1932 All. 215.**

———S. 4 (2)—*Minor daughter of a Mahomedan living with her maternal grandmother—Father, if guardian.*

The word "guardian" as defined in S. 4 (2) of the Guardian and Wards Act, is a very wide term and must include a father, who is admitted on all hands and in every system of a law to be the natural guardian of his children; and the word "care" in the definition of guardian, includes the constructive custody of the father though the child is residing with another person (in this case her maternal grandmother). Where the plaintiff, a Mahomedan, sent his minor daughter along with his wife to the house of his mother in-law and after the death of the wife there, the daughter continued to live with the maternal grandmother for nine years, still, the father is the guardian of the minor as she is in his constructive custody. (*Srivastava, Thomas and Zia ul-Hasan, JJ.*) GHURAN *v.* RIAZ AHMAD. **158 I.C 581=8 R.O. 109=1935 O.W.N. 1096=A.I.R. 1935 Oudh 492 (F.B).**

———S. 4 (2)—*Person in possession of minor's share by virtue of will.*

A person holding the property of the minor's share by virtue of a certain alleged will must be deemed to have been a person having the care of the minor's property and therefore within the definition of guardian in S. 4 (2). (*Hilton, J.*) NAR SINGH DAS *v.* HEM RAJ. **154 I C. 710=7 R L. 602 (1)=A.I.R. 1934 Lah. 323.**

———S. 4 (3)—*"Ward"—Meaning of*

"Ward" as defined in S. 4 (3) is wide enough to include every minor who has a guardian, even though the guardian may not be appointed under the Act. (*Srivastava, Thomas and Zia-ul-Hasan, JJ.*) GHURAN *v.* RIAZ AHMAD. **158 I.C. 581=8 R.O 109=1935 O. W.N. 1096=A.I.R. 1935 Oudh 492 (F B.).**

———S. 7—*Appointment of guardian—Discretion of single Judge of the High Court—Interference in appeal.*

Where a guardian for a minor is appointed by a single Judge in exercise of his discretion, though an appeal is competent from his order, the fact that the making of the order is a matter of discretion is a good ground for refusing to exercise the appellate jurisdiction, unless the appellant succeeds in establishing a strong case, such as would justify interference in appeal. 71 I.C. 824 and 21 M.L J. 1, Rel. on, (*Shadi Lal, C.J. and Abdul Qadir, J.*) MT. PREM KAUR *v.* BANARSI DAS. **14 Lah. 804=6 I.R. (Lah.) 11 (2)=144 I.C. 672=35 P. L R. 98=A.I.R. 1933 Lah. 881.**

———Ss. 7, 8 and 39 (h)—*Appointment of guardian—Guardian residing out of jurisdiction.*

There is nothing in the Guardian and Wards Act which debars a Court from appointing a guardian who is not residing within the jurisdiction of the Court to which an application is made. Under S. 7 a Court will appoint a guardian whenever it is satisfied, that it is for the welfare of the minor that an order should be made. S. 39, Cl. (*h*), does not imply that a person applying for appointment must be residing within the jurisdiction of the Court to which the application is made. What Cl. (*h*) means is that in certain cases, ceasing to live within the jurisdiction of the Court which made the order of appointment may be ground for the removal of the guardian from his office and no more. The only duty cast on the Court under the Act is to appoint the best person to act as guardian regardless of his place of residence. A.I.R. 1914 All. 541, Expl. (*Niamatullah and Kachhpal Singh, JJ.*) BENI PRASAD *v.* MT. PARWATI. **56 All. 20=147 I.C. 217=6 R A 429=1933 A.L.J. 1333=A.I.R. 1933 All. 780.**

———S. 7—*Appointment of guardian—Wishes of respected.*

A young step-mother made an application to have herself appointed as guardian of her step son on the ground that he wanted to contract marriage which she did not consider desirable. The step-son was sufficiently grown up to form an intelligent opinion about his own interests. He did not desire any guardian to be appointed. Moreover the Court apprehended that her appointment as guardian would ensue in further complications.

Held, that under the circumstances no sufficient grounds had been made out for forcing a guardian on the step-son. (*Bisheshwar Nath, J.*) JANAK DULARI *v.* GANGA DEI. **I R. 1931 Oudh 388=134 I.C. 596 (1)=14 O.L.J. 351=8 O.W.N. 529=A.I.R. 1931 Oudh 326.**

———S 7—*Appointment of Society or its Secretary as guardian—Invalid.*

The Guardian and Wards Act contemplates only the appointment of an individual as guardian. The appointment of a Society or its Secretary as such as guardian is invalid. The Secretary may however be appointed in his individual capacity. (*Mukerji and Mitter, JJ.*) SYDNEY HUGH MCSWEENEY *v.* MARGARET ARBUTHNOT. **I.R. 1931 Cal 588=132 I.C 636=54 C.L J. 512=35 C.W.N. 158=A.I.R. 1931 Cal. 563.**

———S. 7—*Hindu minor—Guardian for—Appointment of—Adoptive mother or natural father.*

It is true from the standpoint of Hindu Law, the adoptive mother has a preferential right to the guardianship. But the welfare of the minor is the paramount consideration for the Court. Where after the death of adoptive father, the relations between the adoptive mother and the natural father had become strained and the boy, who was intelligent enough to understand the situation, expressed a preference to his natural father.

Held, that in the circumstances the discretion exercised by the lower Court in appointing the natural father should not be disturbed. (*Sundaram Chetty and Pakenham Walsh, JJ.*) RATHNAMMAL *v.* GOVINDASWAMI MUDALIAR. **147 I.C. 724=6 R.M. 387=39 L.W. 85=1933 M.W.N. 1293=A.I.R. 1934 Mad. 44.**

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———**Ss. 7 and 19**—*Hindu minor—Guardian of person of minor—Application by Hindu father for order appointing him—Maintainability.*

An application by a Hindu father for an order appointing him guardian of the person of his minor son does not lie, because S. 19 prohibits the Court making such appointment. Moreover, an order under S. 7 is not necessary. A Hindu father is the lawful guardian of his minor children, and a declaration by a Court cannot increase his powers in that respect. (*Leach, J.*) VENKATESWARAN *v.* SARADAMBAL. **13 Rang. 590 = 160 I.C. 878 = 8 R.R. 442 = A.I.R. 1936 Rang. 67**

———**S. 7**—*Proper person—Resident out of British India.*

It is against intention of the Act that any one residing out of British India should be appointed guardian of the person of a minor, as the Court cannot exercise its proper control over such a guardian. 22 M.L.J. 68, Foll. (*Reilly and Ananthakrishna Ayyar, JJ.*) SUBBARATNAMMAL *v.* SESHACHALA NAIDU. **54 Mad. 758 = I.R. 1931 Mad. 672 = 132 I.C. 320 = 1931 M.W.N. 768 = 33 L.W. 619 – A.I.R. 1931 Mad. 478 = 60 M.L.J. 615.**

———**S. 7**—*Removal of guardian—Appeal or revision.*

Where a guardian is removed under S. 7 of the Act on the appointment by the Judge of another person as guardian, no appeal nor any revision petition lies against the order. (*Hilton, J.*) NAR SINGH DAS *v.* HEM RAJ. **154 I.C. 710 = 7 R.L. 602 (1) = A I R. 1934 Lah. 323.**

———**Ss. 7 and 8**—*Third party—Application for appointment of guardian—Minor's right to fund disputed—Procedure.*

Where a person with whom a certain fund was deposited on behalf of a minor filed an application to Court under S. 7 to appoint a guardian for the minor in respect of the said fund and the Court decided in the face of opposition that the minor's natural father should be appointed guardian with direction for deposit of the amount in a Bank the interest alone being payable to the guardian,

Held, that original petition would be deemed to be under S. 8 (*b*) of the Act and the Court had power to appoint a guardian in spite of the denial of the minor's right to the fund.

Held, further, that the Court could order their investment of the amount in dispute but that it acted wrongly in directing payment of interest to the guardian while the minor's title to the fund was in dispute. (*Sundaram Chetty and Pakenham Walsh, JJ.*) THIRUVENKATA SAMI NAIDU *v.* RANGANATHAN CHETTIAR. **6 R.M. 504 (2) = 148 I.C. 595 = 39 L.W. 400 – A.I.R. 1934 Mad. 496 = 66 M.L.J. 310.**

———**S. 7 (1)**—*Interlocutory order—Refusal of application to be appointed guardian—Appeal*

An interlocutory order passed at an intermediate stage of the proceedings refusing the application of a party to be appointed guardian of a minor's property, as being unfit, the proceedings being kept pending, is not a final order within the purview of S. 7 (1) or S. 47 (*a*), so as to be appealable. (*Mukerji and S. K. Ghose, JJ.*) MIR ABI MAHAMMAD AHASAN *v.* ABU NASAR MAHAMMAD EUSUF ALI. **155 I.C. 65 = 7 R.C. 559 = 38 C.W.N. 1083 = A.I.R. 1935 Cal. 223.**

———**S. 8**—*Appointment of guardian—Need for formal application by person to be appointed.*

In the case of the appointment of a guardian for a minor, it is necessary there should be a formal application by the person who is sought to be appointed. (*Johnstone, J.*) JAHANDAD KHAN *v.* KHAN SAHIB SARDAR HASHIM KHAN. **I.R. 1931 Lah. 424 = 131 I.C. 296 = 12 Lah L J. 307 = A.I.R. 1931 Lah. 212.**

———**S. 8**—*Minor girls—Persons alleging they were his illegitimate daughters—No right to claim to be guardian.*

An application by a cousin of two minor girls for his appointment as their guardian was objected to by another who alleged that the girls were his illegitimate children by the wife of another man.

Held, that the objector had no legal or moral right to claim to be the guardian of the minors and he is a stranger to the minors and that the cousin should be appointed guardian. 29 All. 210, Dist. (*Nanavutty, J.*) MAHABIR *v.* RAGHUBAR. **I R 1933 Oudh 245 (1) = 144 I.C. 382 (1) – 10 O.W.N. 635 = A.I.R. 1933 Oudh 312.**

———**S. 9**—*Jurisdiction—Girl for the most part resident in Ratnagiri—Husband at Poona.*

Residence is a matter of fact and not a matter of presumption. Where a girl was for the most part resident with her parents in Ratnagiri district and only for a few months had lived with her husband at Poona, it is the Ratnagiri Court that has jurisdiction to entertain an application for the appointment of a guardian for the girl. (*Baker and Broomfield, JJ.*) LAKSHMAN MORSHET *v.* GANCARAM NARAYAN. **140 I.C. 571 = I.R. 1933 Bom. 17 = 34 Bom.L.R. 1293 = A.I.R. 1932 Bom. 592**

———**S. 9 (1)**—*"Ordinarily resides"—Meaning—Residence for one year with mother—If sufficient.*

Where a minor, for whom a guardian of the person is sought to be appointed has been residing with his mother for about a year in a particular place, that place should for purposes of S. 9 (1) of the Guardian and Wards Act, be deemed to be the place where the minor ordinarily resides. The fact that the minor's paternal grandfather has ancestral lands at some other place will not make the latter place his ordinary residence (*Jai Lal, J.*) UTTAM SINGH *v.* THAKAR SINGH. **157 I.C. 941.**

———**S. 10**—*Absence of application by person appointed—Jurisdiction to appoint person other than applicant.*

Though a Judge is not authorized by law to appoint a guardian in the absence of an application for such appointment, once an application is filed under S. 10 of the Guardian and Wards Act, the jurisdiction of the Judge comes into play, and it is open to him as a result of the enquiry, to appoint a person other than the applicant as guardian, provided such person has intimated his willingness to act as guardian. No doubt it would be more in conformity with law that such willingness is communicated to the Court in the form of an application in accordance with S. 10. But the absence of such application by the appointee is no bar to the jurisdiction of the Court to appoint him. (*King and Iqbal Ahmad, JJ.*) NAROTTAM *v.* TAPESRA. **57 All. 208 = 4 A.W.R 309 = 6 R A. 953 = 149 I C. 708 = 1934 A.L.J. 652 = A.I.R. 1934 All. 849.**

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———**S. 10**—*Appointment of guardian—Person suggested by objector's counsel and consented to by the counsel for the petitioner—No application by—Validity of appointment.*

Where the name of a third party was suggested by the counsel for the objector and consented to by the counsel for the petitioner and the Court accordingly appointed him as a guardian, the fact that there was no proper application under S. 10 by the third party to be appointed as guardian does not invalidate the appointment. A.I.R. 1928 Lah. 458, Dist. (*Bhide, J.*) NARSINGH DAS *v.* HEM RAJ. **I.R. 1933 Lah. 419 = 144 I.C. 173 = 34 P.L.R. 17 = A.I.R. 1933 Lah. 220.**

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———**Ss. 10, 11 and 17**—*Scope—Application for appointment of guardian—Appointment of non applicant—Jurisdiction.*

The absence of an application by the person appointed as guardian is not a ground which invalidates his appointment. Once an application is made in accordance with the provisions of S. 10 of the Guardian and Wards Act for the appointment of a guardian for a minor, and notices of the application are sent to the interested persons under S. 11 and such persons avail themselves of the opportunity and appear in Court and adduce all the evidence they have in the enquiry, the Court can appoint such person, as guardian of the minor, who in its opinion, in accordance with the provisions of S. 17 of the Act, should be appointed. In the absence of a definite provision in the Act to the effect that the Court has no jurisdiction to appoint as guardian a person who has not applied under S. 10, the objection on that ground is at best a technical one and cannot be given effect to. (*King and Iqbal Ahmad, JJ.*) NAROTAM *v.* TAPESRA. **57 All. 208 = 6 R. A. 953 = 149 I.C. 708 = 1934 A.L.J. 652 = 4 A.W.R. 309 = A.I.R. 1934 All. 849.**

———**S. 10 (1) (k)**—*Cause for application—Mitakshara minor—Proof of separate property.*

Under S. 7 the welfare of the minor is the thing to be regarded and it cannot be to the welfare of a minor to appoint a guardian of his property until the court is satisfied that there is some separate property to which the minor is entitled. No lengthy enquiry, it is true, is intended by the Act but unless the applicant can show, in the case of a Mitakshara minor, that the latter has some separate property, the cause for making the application would not appear, and there would hardly be any *bona fides* in the application. (*Mukerji and Guha, JJ.*) BANAMALAI PATRA *v.* ARJUN SEN. **I.R. 1932 Cal. 688 = 140 I.C. 198 = 36 C.W.N. 769 = 55 C.L.J. 358 = A.I.R. 1932 Cal. 730.**

———**S. 11**—*Object and scope of.*

The object of S. 11 is to give an opportunity to all the persons interested in the minor of being heard before an order appointing a guardian is passed. (*King and Iqbal Ahmad, JJ.*) NAROTAM *v.* TAPESRA. **57 All. 208 = 6 R.A. 953 = 149 I.C. 708 = 1934 A.L.J. 652 = 4 A.W.R. 309 = A.I.R. 1934 All. 849.**

———**S. 12**—*Application for appointment of guardian—Temporary injunction—Order for—Disobedience to—Powers to commit for.*

Quaere:—Whether a proceeding for the appointment of a guardian can be treated as a suit or a proceeding to restrain the other party from committing a breach of contract or other injury of any kind within the meaning of O. 39, R. 2 read with S. 141, C. P. Code, so as to confer jurisdiction on the Court to commit the other party for alleged disobedience to an order for temporary injunction passed therein. 2 Cal. W. N. 521, Ref. (*Mitter and S.K. Ghose, JJ.*) BASANTA KUMAR DAS *v.* NAGENDRA NATH PAL. **I.R. 1932 Cal. 304 = 137 I.C. 425 = A.I.R. 1932 Cal 719.**

———**S. 12 (1)**—*Injunction restraining marriage—Disobedience—Punishment.*

Under S. 12 (1) the Court has the power to pass interim orders for the protection of the person or property of a minor. Thus it can pass an order by way of injunction for the protection of a female minor against an unsuitable marriage. Such an order should issue under O. 39, R. 2 (1) read with S. 141, C. P. Code and disobedience of the same is punishable under sub R. (3) of O. 39, R. 2. (*Subhedar, A. J. C.*) DEOKISAN *v.* ASARAM. **28 Nag.L.R. 332 = 141 I.C. 170 = I.R. 1933 Nag. 40 = A.I.R. 1933 Nag. 62.**

GUARDIAN AND WARDS ACT (1890), S. 17.

———**S. 14 (2)**—*Residence of minor not determinable—Jurisdiction.*

Where the minors ordinarily resided cannot be found out as both parties claim that the minors resided with them, the matter should be heard by the Court, where it is alleged the minors have property. (*Dalip Singh, J.*) MAHOMED AFZAL *v.* ABDUL HAKIM. **154 I.C. 478 = 7 R.L. 575 (1) = A.I.R. 1934 Lah. 208 (1).**

———**S. 17**—Appointment of guardian—Wishes of minor acted on—Application by step-mother — No ground for forcing guardian on step-son. *See* GUARDIAN AND WARDS ACT, S. 7. **8 O.W.N. 529 = A.I.R. 1931 Oudh 326.**

———**S. 17**—*Appointment of guardian of person—Considerations—Sister of minor appointed—Society for Protection of Children in India directed to co-operate with guardian.*

The sister of the minor applied to be appointed guardian of his person and property. The minor who was aged 14 opposed this and it appeared that after her appointment, the minor attempted to commit suicide. It did not, however, appear that his conduct was due to ill treatment by the sister. There being no other relatives the court revoked the order of appointment and directed the Society for Protection of Children in India to visit the boy at his sister's house.

It was necessary to have a guardian appointed for the person of the minor and under the circumstances of the case, the sister was the only proper person to be appointed guardian, the Society being authorized at the same time to visit the boy and look after his interests in consultation with the guardian and the Society cannot be appointed as guardian of minor's property as the Secretary's Office must, of necessity, be liable to change so far as the personnel was concerned. (*Mukerji and Guha, JJ.*) ASHALATA RAY *v.* SOCIETY FOR THE PROTECTION OF CHILDREN IN INDIA. **I.R. 1930 Cal. 755 = 126 I.C. 707 = 51 C.L.J. 272 = 58 Cal. 15 = A.I.R. 1930 Cal. 397.**

[**F.** 35 C.W.N. 158 (160).]

———**S. 17**—Jurisdiction of Court under—Appointment of non-applicant. *See* GUARDIAN AND WARDS ACT, SS. 10, AND 11. **A.I.R. 1934 All. 849.**

———**S. 17**—*Mahomedan father—Buddhist wife—Appointment as guardian—Difference in religion.*

An application for being appointed as guardian of his child by a Mahomedan father should be decided in the discretion of the Court after due consideration of the matters set out in S. 17. The child being a child of a Mahomedan marriage, the Mahomedan Law on the subject should in the exercise of that discretion, receive due consideration at the hand of the Court, but the Mahomedan Law need not necessarily govern the application. Where a Mahomedan divorces his Buddhist wife with a three months' old female child who is brought up in her mother's religion for nine years afterwards, the mother having married a Buddhist, it is in the interests of the child that the mother should remain the guardian. The facts that the father is comparatively more well to do and able to maintain and educate the child and had given maintenance to the child who had never seen him do not override the consideration of the minor's interests. (*Cunliffe and Dunkley, JJ.*) MA JULI *v.* MOOLA EBRAHIM. **6 I.R. (Rang.) 68 = 145 I.C. 843 = A.I.R. 1933 Rang. 201.**

———**S. 17**—*Mahomedan minor children—Mother not of good character and marrying a Hindu Jat—Competency.*

Where the mother of the minors, who were Mahomedans and of the age of 11, 9 and 8, was not of good character and had married a Hindu Jat.

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Held, it is in the interest of the minors to be brought up in the religion of their Mahomedan father and the children are not so young that they cannot be separated from the mother. (*Dalip Singh, J.*) MT. BIBI *v.* MT. BIBI. **149 I.C. 973 (1)=6 R.L. 772 (2)=A.L.R. 1934 Lah. 287 (2).**

———**S. 17**—*Mahomedan—Minor girls—Mother not of good character and marrying a Hindu—Competency to be guardian.*

Where the mother of two Mahomedan girls five and a half and two and a half years of age did not appear to be of good character and had married a Hindu,

Held, the mother was not a proper person to have custody of the minors, but the girl of two and a half years was too young to be separated from her mother. (*Dalip Singh, J.*) MT. AISHAN *v* BARKAT ALI. **151 I.C. 322 (1)=7 R.L. 119 (1)=A.L.R. 1934 Lah. 291 (1).**

———**S. 17** — *Mother—Appointment as guardian of person and property of minor—Objection on ground of minor being member of joint family—Procedure.*

X was appointed guardian of the person and property of her son. Against this appointment the appellant appealed on the ground that the minor and he were members of a joint Hindu family and, as such, no guardian could be appointed in law. The question whether they really were members of joint family or not was in dispute in another suit in which *X* represented the minor as his guardian.

Held, that the circumstances justified the appointment of *X* as guardian. (*Mukerji and Bennet, JJ.*) BRIJ GOPAL *v.* MT. BHAPIBAI. **137 I.C. 343=1931 A.L.J. 333 (1)=I.R. 1932 All. 322 (1).**

———**S. 17**—*Personal law—Disqualification under—Effect—Mahomedan minor girl—Second marriage of mother—Appointment of grandfather.*

Under the Mahomedan Law a mother is disqualified from guardianship of her minor daughter where she re-marries a man who is not related to the minor within prohibited degrees. S. 17 does not interfere with this rule and in such a case the paternal grandfather of the minor can be appointed guardian of the person and property of the minor. (*Abdul Qadir, J.*) MEHRAJ BEGAM *v.* YAR MAHOMED. **I R 1932 Lah 418=138 I C. 148=33 P.L.R 678=A.I.R. 1932 Lah. 493.**

———**Ss 19 and 25**—*Application by father for custody of minor—Procedure.*

As long as the father of the minor is alive and is not proved to be unfit to be guardian of the minor, the Court cannot make an order appointing him or any-body else as guardian. But it can order the person who has custody of the minor to hand the minor to the custody of the father. The proper procedure for the father is to apply under S. 25 and not to ask for declaration under S. 19. (*Harries and Rachhpal Singh, JJ.*) GOVIND SINGH *v.* RAM PRASAD. **158 I C 911=8 R A. 344=1935 A W.R. 1019=1935 A.L.J. 1016=A. I.R. 1935 All. 838.**

———**S. 19**—*Effect of—Father not guardian according to personal law.*

S. 19 does not make a father the guardian of the person of a minor girl, when he is not already her natural guardian under the personal law applicable to the minor. The Act is not intended to interfere with the personal law of minors. (*Beckett, J.*) MT. GANGA DEVI *v.* NARSHING DAS. **A.I.R. 1935 Lah. 25.**

———**S. 19**—Guardian of person of minor—Application by Hindu father for order appointing him—Maintainability. *See* GUARDIAN AND WARDS ACT, S. 7. **13 Rang. 590.**

———**S. 19**—*Scope—Competition between husband and wife.*

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The language of the section obviously implies that when any of the three contingencies mentioned in the sub-clauses exist there is no authority in the Court to appoint or declare a guardian of the person of the minor at all; that is to say, the jurisdiction of the Court conferred upon it by S. 17 to appoint or declare a guardian is ousted, where the case is covered by S. 19. The section means not only that in the presence of the husband or the father, no one else should be given preference, when either of them is fit to be appointed the guardian, but on its language, it even ousts the jurisdiction of the Court altogether and prevents it from appointing even the husband or the father as the guardian when both of them are not unfit to the guardian. The legislature did not intend to settle the competition that may arise under the personal law governing the minor between the husband and the father of the minor. (*Sulaiman, A.C.J. and Sen, J.*) SIDDIQ UN-NISSA BIBI *v.* NIZAM UDDIN KHAN. **51 All. 128=I R. 1932 All. 307=137 I.C. 219=1932 A L.J. 21=A.I.R. 1932 All. 215.**

———**S. 19**—*Unfitness of father—Mere change of religion, if sufficient.*

The mere fact that the father has changed his religion does not amount to unfitness within the meaning of S. 19. Where the father is alive and able to provide for the welfare of his children no guardian can be appointed. (*Harrison and Addison, JJ.*) HARI CHAND *v.* GHULAM RASUL. **14 Lah. 176=I.R. 1932 Lah. 522 (1)=138 I.C. 685 (2)=33 P.L.R. 419=A.I.R. 1932 Lah. 385.**

———**S. 24**—*Marriage of minor girl—Application for sanction—Material considerations*

The application of the guardian mother disclosed that her minor daughter was about 17 years of age, that she herself wanted to marry *R*, that *R* was a man of the same brotherhood as the girl and bore a good moral character, that he was 28 years of age, that he was well to do and that although his first wife was alive she had been ailing for some time, and that as she never gave birth to a child, she herself wanted that her husband should take a second wife. The District Judge disallowed the application on the sole ground that *R* had a wife living.

Held, that before disposing of the application the District Judge should take into consideration the following fact, *viz.*, that the Hindu Law allowed a Hindu to take in marriage more than one wife, that the Judge should have considered each and every one of the grounds given in the application on its own merits, that the minor being over 17 years of age might be treated a a major under the Hindu Law and that the Majority Act had no application to a question of marriage. (*Mukerji, Ag. C.J. and Thom. J.*) MT. BHAGWATI *v.* DISTRICT JUDGE OF ALIGARH. **6 I R. (All.) 293=146 I.C. 480=1933 A.L J. 1188=A.I.R. 1933 All. 480.**

———**S. 25**—*Applicability—Application by father against wife—Wife and child living with father-in law—Remedy.*

Petitioner, who lived with his wife and minor child in the house of his father in-law for nearly two years and thereafter lived apart, called upon the wife to come with the child and live with him, but the latter refused. The petitioner having applied under S. 25 for custody of his minor child.

Held, that the father as the natural guardian of his minor child was entitled to apply under S. 25 of the Act; that the minor must be deemed to be in the constructive custody of the petitioner and that the refusal of the wife to go and live with him with the child was in

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law a removal of the child from the custody of the petitioner.

Held further, that an application under S. 25, and not a suit was the proper remedy of the petitioner. (*Wadia, J.*) NOSHIRWAN *v.* SHAROSHBANU. **151 I. C. 1037 = 7 R B. 98 = 58 Bom. 724 – 36 Bom L.R. 668 = A.I.R. 1934 Bom. 311.**

———**S. 25**—Application by father for custody of minor—Procedure. *See* GUARDIAN AND WARDS ACT, S. 19. **A.I.R. 1935 All. 838.**

———**S. 25**—*Application by father of illegitimate child—Competency.*

For the purposes of S. 25 of the Guardian and Wards Act, it is not really necessary that the applicant should be a lawful guardian under the personal law. The application can be made by any person having the care of the person of the minor. The father of an illegitimate son who had the care of his person has, therefore, a *locus standi* to maintain a petition under the section. The petition must be decided on equitable considerations, the sole criterion for decision being the welfare of the minor. (*Bhide, J.*) MT. PREM KAUR *v.* BANARSI DAS. **15 Lah. 630 = 156 I.C. 87 = 7 R.L. 859 = 35 P.L R. 677 = A.I.R. 1934 Lah. 1003.**

———**S. 25**—*Application by husband for custody of minor wife—Considerations.*

The leading principle in dealing with a minor under the Guardian and Wards Act is to look to the interests of the minor himself. If those interests are not affected in any way, it then may be considered whether any other person has, under the law to which the minor is subject, certain rights of custody or so forth. But those rights in other persons cannot be enforced unless the well-being of the minor is not affected by such enforcement. Where the husband was found to have ill-treated his minor wife and the girl was living quite happy with her father,

Held, that it was not to the interests of the minor that she should be given into the custody of her husband and as such, his application for the same should be rejected. (*Allsop, J.*) MT. SHYAMA *v.* SHANKAR. **158 I.C. 421 = 8 R.A. 297 = 1935 A.W R 966 = 1935 A.L J. 1014 = A.I.R. 1935 All. 840.**

———**S. 25**—*Application under—Right to make—Mahomedan father.*

Where a minor girl was allowed by her father to reside with her maternal grandmother, the latter is only the custodian of the girl by the leave and license of the father and the constructive custody is still with the father. If the grandmother had no right of *hizanat* and no right to guardianship, her refusal to return the girl to the father on being demanded to do so, amounts to 'removal from the custody of the guardian' and the father is competent to apply under S. 25. (*Sulaiman, A.C.J. and Sen, J.*) SIDDIQ-UN-NISSA BIBI *v.* NIZAM UDDIN KHAN. **54 All 128 = I.R. 1932 All. 307 = 137 I.C. 219 = 1932 A L J. 21 = A.I.R. 1932 All. 215.**

[R. 58 B. 724 (728).]

———**S. 25**—*'Custody'.*

The meaning of the word 'custody' is not confined to the physical or actual custody of the minor. Even if the ward is in the actual custody of another person with the permission of the guardian, he or she would be under the guardian's constructive custody. (*Sulaiman, A. C. J. and Sen, J.*) SIDDIQ-UN-NISSA BIBI *v.* NIZAM UDDIN KHAN. **54 All. 128 = I.R. 1932 All. 307 = 137 I.C. 219 = 1932 A.L.J. 21 = A.I.R. 1932 All. 215.**

———**S. 25**—*"Custody"—Meaning of.*

"Custody" in S. 25 includes the actual as well as the constructive custody of the minor, and the section is not

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limited to the powers of enforcing the guardian's right to the extreme case of an actual leaving or removal. A ward in the actual custody of another person with the permission of the guardian is deemed to be in the constructive custody of the guardian, and the refusal of the person in actual custody to hand over the minor to the guardian amounts to a removal of the minor from the constructive custody of the guardian within the meaning of S. 25 of the Act. (*Wadia, J.*) NOSHIRWAN *v.* SHAROSHBANU. **58 Bom. 724 = 151 I.C. 1037 = 7 R. B. 98 = 36 Bom L R. 668 – A.I.R. 1934 Bom 311.**

———**S. 25**—*Exclusive jurisdiction—Remedy of guardian seeking restoration of custody of minor—Bar of suit.*

The only remedy of a guardian seeking the restoration of the custody of his minor ward is by way of an application under S. 25, a separate suit is not maintainable for the purpose. 26 All. 594, 38 Mad. 807 (P.C.), Ref.; 42 Mad. 647, Foll. (*Page C.J. and Sen, J.*) SHAHDEO *v.* MAHARAJI. **9 Rang. 569 = 136 I.C. 831 I.R. 1932 Rang. 81.**

———**S. 25**—*Father—Right to custody of minor children—Circumstances disentitling him to relief.*

Where it appeared that the father had been tried of serious charges in relation to his treatment of his children and though he had been acquitted of criminal prosecution, his conduct was otherwise reprehensible.

Held, that he was disentitled from claiming custody of the minor children, who were residing in a convent. (*Mukerji and Mitter, JJ.*) SYDNEY HUGA MCSWEENEY *v.* MARGARET ARBUTHNOT. **I.R. 1931 Cal. 588 = 132 I.C. 636 = 35 C.W.N 158 = A I.R. 1931 Cal. 563.**

———**S. 25**—*Guardian—Meaning of.*

"Guardian" in the Guardian and Wards Act means a person having the care of the person of a minor or of his property or both and is used in a wide sense. It does not necessarily mean a guardian duly appointed or declared by the Court, but includes a natural or even a *de facto* guardian. (*Wadia, J.*) NOSHIRWAN *v.* SHAROSHBANU. **58 Bom. 724 = 151 I.C. 1037 = 7 R.B. 98 = 36 Bom.L.R. 668 A.I.R. 1934 Bom. 311.**

———**S. 25**—*Hindu girl in custody of mother in-law after husband's death—Order for delivery to father—Legality.*

Under Hindu Law, the father of a minor girl ceases to be the guardian of her person as soon as she is married. On the death of her husband, this right does not revive in favour of the father, but devolves upon the husband's relations. Where therefore at the time of the application under S. 25 by the father, the girl was in custody of her natural guardian, the mother in-law, it cannot possibly be said that she had been removed from lawful custody, and the order for the delivery of the minor to her father under S. 25 is illegal. (*Beckett, J.*) MT. GANGA DEVI *v.* NARSHING DAS. **A.I.R. 1935 Lah. 25.**

———**S. 25**—*Hindu minor girl—Father's application for custody—Power of Court to refuse—Considerations—Welfare of minor.*

A Hindu father is the natural guardian of his children during their minority, and has *prima facie* a paramount right to their custody, and must be given such custody unless he is unfit or there are other circumstances. But the welfare of the minor child is a very important matter for consideration and the interests and welfare of the minor are sometimes even paramount to the rights of the father. A minor girl about one year old, was on her mother's death taken to live with her maternal uncles with the consent of her father who took a second wife and had by her four children. She

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remained with her uncles ever since until she was 13 years of age and was fondly brought up and well-cared for by her uncles and grandmother. The father did not show the slightest interest in her welfare till then, but suddenly applied for her custody under S. 25 of the Guardian and Wards Act. The minor girl showed her preference clearly in favour of remaining with her uncles, and it also appeared that the petition made by the father was not *bona fide* but out of spite and grudge against the maternal uncles.

Held, that the minor girl of 13 years was capable of forming a good opinion on the matter and that the interests and welfare of the minor demanded that she should remain where she was and the father's petition should be refused. (*Beasley, C. J. and King, J.*) PONNIAH ASARI *v.* SUPPIAH ASARI. **158 I.C. 95 = 41 L.W. 400 = 1935 M.W.N. 214 = A.I.R. 1935 Mad. 363 = 68 M.L.J. 213.**

———**S. 25**—*Minor child—Father's right to custody—Discretion of Court—Considerations—Delay in applying—Effect.*

The father is the natural guardian of his minor child and has a right to claim custody of the child, but such right can be defeated if the Court thinks it better in the minor's interests to leave him in another's custody. In determining the minor's welfare, the question whether the application for custody is *bona fide* or not should be considered. If it is not *bona fide*, that is a reason for not disturbing the existing custody. The Court may in that connection take into account the failure on the part of the father to take steps over a long period to get custody of the minor. Another consideration is whether he is a fit person for the minor to be returned to. The fact that the father ill-treated the minor's mother and was about to marry a second wife will also count against him, especially when his application is belated, made after the lapse of a long time. (*Beasley, C. J. and Cornish, J.*) CHINNA SAMBAYYA *v.* RUDRAPPA. **158 I.C. 99 = 8 R.M. 223 = 41 L.W. 789 = A.I.R. 1935 Mad. 568 = 1935 M.W.N. 482 = 68 M.L.J. 662.**

———**S 25**—*Minor staying with maternal grandmother—Refusal of access to father—If amounts to removal from father's custody.*

Where a minor daughter living with her maternal grandmother is not allowed to go to her father's house and the father is not even allowed to see or approach her, the minor must be deemed to have been removed from the custody of her father, the *de jure* guardian of her person. (*Srivastava, Thomas and Zaidi Hasan, JJ.*) GHURAN *v* RAIZ AHMAD. **158 I.C. 581 = 8 R.O. 109 = 1935 O.W.N. 1096 = A.I.R. 1935 Oudh 492 (F.B.).**

———**S. 25**—*Natural father and mother living separately—Right to custody of child.*

Natural father of a child consented to the mother retaining the child during its infancy. The mother separated from the father before birth of the child and lived with another man as his wife. On her death, the natural father applied for the custody of the child. The natural father was a man of good character.

Held, that he was entitled to apply for and obtain the custody in preference to the other man with whom the mother lived as wife after separation from the natural father and that the child must be deemed to have been in his custody at the time of its birth. 39 Mad. 608; 49 A. 332, Ref.; 40 Bom. 600, Diss. From. (*Page, C.J. and Sen, J.*) MAUNG ZAW *v.* MAUNG HLA DIN **12 Rang 161 = 149 I.C. 1045 = 6 R.R. 355 = A.I.R. 1934 Rang. 49 (1).**

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———**S. 25**—*Petition by father for custody of minor girl—Minor living with grand-parents for several years—Considerations.*

Although, according to Hindu Law, a father is the natural guardian of his children during their minority and has, therefore, a paramount right to the custody of his children, yet each case must depend upon its own circumstances and the right of the father is liable to be defeated where it is shown that it is better in the interests of the minor and for its welfare that it should remain where it is. If a minor girl has for many years from a tender age lived with grandparents or other near relatives and has been well cared for, and during that time, the minor's father has shown a lack of interest in the minor, these are circumstances of very great importance and bear both upon the question of the interests and welfare of the minor and on the *bona fides* of the petition by the father for the custody of his minor girl. (*Beasley, C. J. and King, J.*) MUTHUSWAMI CHETTIAR *v.* MUTHUSWAMI MOOPANAR. **156 I.C. 430 = 7 R.M. 696 = 41 L.W. 190 – 1935 M.W.N. 412 = A.I.R. 1935 Mad. 195.**

———**S. 25**—*Removal from custody of guardian—Female relation entitled to custody.*

Any person who has the care of the person of the minor is a 'guardian' of the person; so if a female relation is under the Mahomedan Law entitled to the custody of the minor and not disqualified in any way and the minor is actually in her custody, it cannot be said that she has left or has been removed from the custody of the guardian having the care of the person of the minor. (*Sulaiman, A. C. J. and Sen, J.*) SIDDIQ-UN-NISSA BIBI *v.* NIZAM UDDIN KHAN. **54 All. 128 = I.R. 1932 All. 307 = 137 I.C. 219 – 1932 A.L.J. 21 = A.I.R. 1932 All. 215.**

———**S. 25**—*Scope.*

Quaere.—Whether S. 25 was intended to apply to the case of a person who has not been declared or appointed a guardian under the provisions of the Act. (*Mukerji and Mitter, JJ.*) SYDNEY HUGH MCSWEENEY *v.* MARGARET ARBUTHNOT. **I.R. 1931 Cal 588 = 132 I.C. 636 = 35 C.W.N. 158 = A.I.R. 1931 Cal. 563.**

———**S. 27**—*Applicability*—De facto *guardian.*

S. 27, Guardian and Wards Act, applies to guardians recognized by the law, whether or not they have been appointed guardians under the Guardian and Wards Act. It does not and was not intended to confer any power upon a person who without any lawful authority in that behalf has usurped the position of a guardian, or has taken upon himself the care of the property of a minor. (*Page, C. J. and Baguley, J.*) DAWSONS BANK, LTD. *v.* MA MAY. **153 I.C. 627 (2) = 7 R.R. 225 = 12 Rang. 656 = A.I.R. 1934 Rang. 335.**

———**S. 27**—*Contract by guardian—Simple contract debt—Personal liability of ward.*

A promissory note executed by the certificated guardian for goods supplied to the shop owned by the minor does not impose a personal liability on the minor and the creditor is not entitled to recover the amount from the minor or his estate. (*Baker, J.*) SHANKAR VAMAN *v.* NATHU KRISHNA. **34 Bom L.R. 1001 = 141 I.C. 498 = I.R. 1933 Bom. 107 = A.I.R. 1932 Bom. 480.**

———**S. 29**—*Five years' lease granted by guardian—Power of Court to cancel.*

Where a guardian granted a five years' lease of certain land belonging to the minor and the transaction was approved by the minor and his relatives and was duly communicated to the Court but subsequently on the application of a third party the Court cancelled the prior lease and directed a fresh auction.

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Held, that the first lease granted was within the competency of the minor and that the Court's order cancelling the same was made without jurisdiction. (*Jai Lal, J.*) BISHAMBAR DAS *v.* SARDARI LAL. **31 P.L.R. 984=12 L L J. 167=132 I.C. 203=A.I.R. 1930 Lah. 1017.**

———**Ss. 29 and 30**—*Guardian appointed by Court—Mortgage by—Validity of.*

A mortgage executed on behalf of a minor by a guardian appointed by the Court under the Guardian and Wards Act which is supported by consideration and is binding on the minor is not void but only voidable and it can be avoided only on the condition of restoring the benefit received under the mortgage. 22 M. 280, Foll. (*Madhavan Nair and Jackson, JJ.*) PERIA KARUPPAN CHETTY *v.* KANDASAMI CHETTY. **1933 M.W.N. 791.**

———**Ss. 29 and 31**—*Scope—Sanction for loan—Subsequent cancellation—Lender advancing loan during continuance of sanction—If affected.*

Where the Court passes an order authorizing the guardian of a minor to raise a loan on the security of minor's estate, the lender is entitled to trust that order and rely on it and is not bound to inquire as to the expediency or necessity of the loan. The subsequent cancellation of the order of sanction after the money has been advanced cannot make any difference in the rights of the lender. (*Wort and Varma, JJ.*) RAMDEN PRASAD SINGH *v.* SHEONANDAN MAHASETH. **14 Pat. 410 156 I.C. 885=8 R P. 39=16 Pat L.T. 135=A.I R. 1935 Pat. 225.**

———**S. 29 (b)**—*Applicability of.*

Where the contract for the benefit of a minor is entered into not by the guardian but by the Court, S. 29 (*b*) has no application. (*Tek Chand and Skemp, JJ.*) BHAGWAN DAS *v.* GHULAM MOHAMMAD. **159 I.C 1019—A.I R 1935 Lah. 863.**

———**S. 30**—*Permission obtained by fraud—Transfer, if void—Setting aside by minor after attaining majority—Limitation.*

A permission obtained by a certified guardian by a fraudulent misrepresentation is a nullity but a transfer made in pursuance thereof is only voidable. Where the minor sues after attaining majority to set aside the transfer the suit is governed by Art. 44 and not Art. 144 of the Limitation Act. (*Pullan and Niamatullah, JJ.*) RAM CHARITTER *v.* SURAJ TELI. **53 All 738—136 I.C. 71=I R. 1932 All 119=1931 A.L.J. 997=A I. R. 1932 All. 108.**

———**S. 30**—Sanction of Court under—Effect of—If conclusive as to necessity—Alienation to creditor—Onus of proof. *See* MINOR—ALIENATION BY GUARDIAN. **155 I.C 81—15 Pat.L.T. 787=A I.R. 1935 Pat. 74.**

———**Ss 31, 33 and 43**—*Lease without permission—Power to cancel—Power to deal with minor's property.*

The District Judge cannot exercise judicial authority in relation to third persons in proceedings under the Guardian and Wards Act. It the lease executed by the guardian is voidable, the same not having been executed with the permission of the District Judge, the latter has no power to cancel it in the sense that the lease becomes inoperative by force of that order. Any question as regards the validity of the lease is to be determined by a competent Court in a regular suit. There is no provision in the Guardian and Wards Act which empowers the District Judge to exercise disposing power over the minor's property under the management of a lawful guardian. It is the function of the guardian to deal with the property of the minor and to administer it. The guardian may obtain the advice of the District Judge under S. 33. The District Judge may also make an order under S. 43 regulating the conduct or proceeding of any guardian appointed or declared by the Court. But he cannot deal with the minor's property and do every thing which the guardian might do. Besides cancelling an instrument executed by the latter, he has no power to declare that the cancellation of the lease already executed is to take effect from a certain date and that it shall be valid till that date arrives (*Niamatullah, J.*) KUNDAN LAL *v.* BHAGWATI SARAN. **57 All. 485=1934 A.L.J. 1208=153 I.C. 348—7 R A. 486=4 A.W.R. 893=A.I R. 1934 All. 1043.**

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———**S. 31**—*Mortgage by guardian of Hindu minor—Mortgage not complying with terms of order of District Judge—Binding character—Onus.*

In ordinary cases it is for the transferee to prove that a loan taken by a guardian of the Hindu minors who constitute a joint family was for the purpose of family necessity. But once the loan is taken with the sanction of the District Judge, the burden of proof would change, and if the minors come to avoid the transfer, then it will be for them to show that the transfer is not binding upon them. Where, however, the mortgagees, fully knowing the terms of the order of the District Judge under which the guardian has been permitted to take a loan, grant the loan without complying with the terms of such order, it is not open to them to claim any benefit which they would have been entitled to otherwise because of the sanction given to the guardian. In such circumstances, the mortgagees, in order to establish the fact that the mortgage deed is binding on the minors, have to show that the loan was taken for family necessity. (*Rachhpal Singh, J.*) RAM BHAJAN KASODHAN *v.* MATBAR RAM. **152 I.C 503=7 R.A. 349=4 A.W.R 983=A.I.R. 1935 All. 41.**

———**S. 32**—*Third party—Application for investment of minor's money—Sustainability.*

An application under S. 43 (1) of the Act can be made only by a person interested in the minor. Where a stranger filed an application under S. 43 of the Act praying that a loan might be ordered to be given out of the minor's funds on a first mortgage of immovable properties and notices were issued to the personal guardian, the outstandings guardian and the immovable properties guardian or the minor and though the several guardians opposed the petition the Court ordered the grant of the loan.

Held, that the order was one regulating the conduct or proceedings of the guardian appointed by the Court, as contemplated in S. 43, against which an appeal would lie to the High Court under S. 47 (1) of the Act.

Held, further, that the petitioner was not a person interested in the minor and consequently had no *locus standi* to make the application under S. 43 (1). (*Sundaram Chetty and Pakenham Walsh, JJ.*) GNANAMBAL AMMAL *v.* VADIVELU PILLAI. **57 Mad. 712=6 R M. 502=148 I.C 583=39 L.W. 349=1934 M.W.N. 19=A.I R. 1934 Mad 207=66 M.L.J. 351.**

———**S. 33**—*Applicability—Five years' lease granted by guardian—Power of Court to cancel.*

Where a guardian granted a five years' lease of a certain land belonging to the minor and the transaction was approved by the minor and his relatives and was duly communicated to the Court but subsequently on the application of a third party the Court cancelled the prior lease and directed that fresh bids for the lease be obtained.

Held, that the first lease granted was within the competency of the guardian, and the lease given by him was a completed and binding lease of the ward's land and the Court's order cancelling the same was made without

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jurisdiction. (*Jai Lal, J.*) BISHAMBAR DAS *v.* SARDARI LAL. **31 P.L.R. 984=12 L.L.J. 167=132 I.C. 203=A.I.R. 1930 Lah. 1017.**

———**S. 33**—*Certificated guardian — Reference to arbitration—Omission to get sanction of Court—Award and decree passed thereon—Right to minor to avoid.*

A Mahomedan mother who had been appointed guardian of her minor child by Court referred a dispute in which the minor was interested to arbitration, without having obtained the previous sanction of the District Judge. When the award was filed in Court permission was obtained from the Court, that the award should be filed inasmuch as it was for the benefit of the minor but there again the mother acted as guardian *ad litem*. The minor sued after attaining majority to avoid the decree passed by Court on the basis of the award.

Held, that the mother's reference to arbitration without the necessary sanction of Court rendered the award and decree voidable at the instance of the minor and the latter could sue to have same set aside within three years of attaining majority. (*Sulaiman and Young JJ.*) SAIDUNNISSA *v.* RUQYA. **53 All. 428=I.R. 1931 All. 249=130 I.C. 201=1931 A.L.J. 170=A.I.R. 1931 All. 307.**

———**S. 33**—Court's powers under—Power to dispose of minor's property. *See* GUARDIAN AND WARDS ACT, SS. 31, 33 AND 43. **A.I.R. 1934 All. 1043.**

———**S. 33**—*Directions by Court—Effect of—Contract by guardian with permission of Court—Minor not personally bound.*

The directions of Court under S. 33 do not impose a liability on a minor where none existed. The effect of the sanction under sub Cl. (3) of S. 33 is that it raises a statutory presumption of a faithful performance by the guardian of a duty cast upon him and protects him as regards his own liability either under his bond or in general to the Court or as against the minor. The sanction does not, however, have the effect of making the minor personally bound by a contract by the guardian which does not purport to charge the minor's estate. (*Rangnekar, J.*) KESHAV MADHAV RAO *v.* BALAJI VASUDEO. **34 Bom.L.R. 996=141 I.C. 492=I.R. 1933 Bom. 97=A.I.R. 1932 Bom. 460.**

[**R.** 145 I.C. 350. **Rel.** Bom L.R. 1001 (1004).]

———**S. 34**—*Lease by guardian—Benami nature—Order for deposit of rent—Regular suit or summary remedy.*

The guardian of a minor gave on lease a plot of land belonging to a minor to his brother-in law. The Court held that the lessee was a benamidar for the guardian and called on the latter to deposit the lease money in Court.

Held, that the claim against the guardian could be sustained only on the basis of a contract or a *quasi* contract and such a claim could be enforced by a regular suit and not by a summary remedy. (*Shadi Lal, C. J.*) ARUR SINGH *v.* GUR BAKHSH SINGH. **I.R. 1932 Lah. 178=136 I.C. 2=33 P.L.R. 437=A.I.R. 1932 Lah. 272.**

———**S. 34**—*Power of Court to require guardian to pay fixed sum at stated intervals.*

There is no provision of law, which allows a Court to require the guardian to pay into Court a fixed sum at stated intervals without regard to the question whether this is in excess of the balance shown on the guardian's account or is within it. (*Beckett, J.*) SURAIN SINGH *v* BALWANT KAUR. **160 I.C. 564=8 R.L. 563=A.I.R. 1935 Lah. 931.**

———**S. 34 (c)**—*Scope—Order for maintenance of minor's dependent—Binding character of.*

GUARDIAN AND WARDS ACT (1890), S. 35.

An order passed in respect of maintenance of a dependant of a minor is one passed under S. 34 (*c*) and being of a temporary nature is not binding when the minor attains majority. (*Middleton J. C.*) MAHOMED *v.* MT. WAHAB JAN. **159 I.C. 819=37 Cr.L.J. 197=1935 Cr.C. 1163=A I.R. 1935 Pesh. 174.**

———**S. 34 (d)**—*Powers of Court—No accounts furnished by guardian—Direction to pay such balance as may be found due by the Court.*

The view that the Court can call on the guardian to pay such balance as the Court may find to be due, if the accounts are not furnished, is more correct than that of certain authorities which limit the power of the Court to such balance is the guardian may or may not show. 46 All. 458, 7 Pat. 144, Foll. (*Tapp, J.*) CHANAN SINGH *v.* MT. HAR KAUR. **I R. 1933 Lah. 147=141 I.C. 590=34 P.L.R. 549=A.I.R. 1933 Lah. 484.**

———**S. 34 (e)**—*Guardian appointed by Court—Powers—Right to borrow for marriage of wards and their sister.*

Although under the Hindu Law money borrowed for the purposes of the marriage of a member of a Hindu family must be regarded as borrowed for legal necessity, yet when a guardian has been appointed by the Court, the powers of such guardian with regard to incurring liabilities on behalf of the ward are limited. Such guardian is incompetent to borrow money for the purpose of the marriage of one of his wards and their sister dependant on them, without the permission of the Court in view of S 34 (*e*). 20 Bom. 61, Ref to. (*Kisch, J.*) RAM NATH PRASAD *v.* UDERAJ SINGH. **135 I.C. 702=I R. 1930 Oudh 62=8 O.W.N. 1146=A.I.R. 1931 Oudh 403 (2).**

———**S 35**—*Assignment of bond—Liability of surety—Fixation of—If necessary.*

An order by the District Court fixing the liability of the surety is not called for and not necessary before the Court can assign the bond to the minor or any other guardian of his, appointed by the Court. There is no provision in the Act for the surety being a party to any proceedings in which accounts may be taken and no provision by which the surety can appeal against the order of the District Court fixing his liability. (*Mukherji and Niamatullah, JJ.*) KANHAIYA LAL *v.* MAHADEI. **I.R. 1932 All. 97=135 I.C. 833=1932 A L J. 47=A.I.R. 1932 All. 177.**

———**S. 35**—*Public or official record—Certificate of guardianship—Admissibility.*

A certificate of guardianship is not a public or official record within the meaning of S 35 and is therefore not admissible in evidence. (*Sulaiman and Young, JJ.*) SAIDUNNISA *v.* RUQYA. **53 All 428=I.R. 1931 All. 249=130 I.C. 201=1931 A.L.J. 170=A.I.R. 1931 All. 307.**

———**S. 35**—*Scope.*

What S. 35 apparently contemplates is that an entry should have been made by an officer whose duty it is to make such an entry after having been satisfied as to its correctness. (*Sulaiman and Young, JJ.*) SAIDUNNISSA *v.* RUQYA **53 All. 428=I R. 1931 All 249=130 I.C. 201=1931 A.L J. 170=A.I.R. 1931 All. 307.**

———**S. 35**—*Scope—Suit for rendtion of accounts—Maintainability against legal representatives of guardian*

The principle underlying S. 36 is one of universal application and can be applied even to a case where the guardian is not appointed by the Court. The minors are therefore entitled to maintain a suit for rendition of accounts against the legal representative of the guardian. The fact that the minors have entered into a

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compromise with one of the legal representatives cannot in any way deprive them of the right of bringing a suit for rendition of accounts against the others. (*Abdul Rashid, J.*) ALLAH DAD KHAN *v.* MAHOMED HABIB ULLAH KHAN. **153 I.C. 1093=7 R.L. 508=37 P.L.R. 475=A.I.R. 1934 Lah. 410.**

——**S. 39**—*Proper person—Non resident.*

Per *Obiter.*—S. 39 seems to suggest that a Court should not appoint a person who is resistent outside its jurisdiction as guardian. (*Mukherji and Guha, JJ.*) ASHALATA RAY *v.* SOCIETY FOR THE PROTECTION OF CHILDREN IN INDIA. **58 Cal. 15=I R. 1930 Cal. 755=126 I.C. 707=51 C.L.J. 272=A.I R. 1930 Cal. 397.**

——**Ss. 39 (h), 7 and 8**—Person residing out of jurisdiction—Appointment as guardian—No bar ceasing to reside within the jurisdiction may be a ground for removal of guardian. *See* GUARDIAN AND WARDS ACT, SS. 7, 8 AND 39 (*h*). **1933 A.L J. 1333=A.I.R. 1933 All. 780.**

——**Ss 40 and 41 (4)**—*Removal of guardian—Discharge from liabilities — Refusal—Accounts not passed—Directing the guardian to pay money into Court—Legality.*

The mere fact that a guardian is discharged from the office of guardianship under S. 40 does not mean that he must also be discharged from his liabilities under S. 41 (4). Where the court has not found that the accounts put in by him are correct, it may refuse to discharge him but it has no power to compel him to pay any amount into Court on behalf of the minor. (*Addison, J.*) FAKIR MAHOMED *v.* MT. BHARI. **I.R. 1932 Lah. 179=136 I.C. 3=33 P.L.R. 441=A I R. 1932 Lah. 306.**

——**S. 41**—*Application of discharge on ground of majority—Effect of order.*

In an application by the guardian for a discharge on the ground of majority, it is not necessary for the Court to declare the minor to have attained majority. The Court, when it accepts the fact that the minor has attained majority does not make any order under the Act, which would be final and not liable to be contested by suit or otherwise. It is open to the minor to show that he had not attained the age of majority on that date in spite of the orders passed by the Judge. (*Sulaiman, C. J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **6 R.A. 962=149 I C. 781=1934 A.L.J. 318=A I R. 1934 All. 406 (F.B.).**

——**S 41**—*Government Promissory Notes carrying interest at 3½ per cent.—Order against guardian for restoration—Rate of interest.*

Where the guardian is ordered to restore certain Government Promissory Notes belonging to the ward, he can only be charged with interest at 3½ per cent., the interest which the ward would have got if those notes had been duly handed over to her. (*Mitter and McNair, JJ.*) HEERALAL CHAKRABUTTY *v.* MANASHAMOYEE DEVI. **152 I.C 1073=38 C.W.N. 438=7 R.C. 343=A.I.R. 1934 Cal. 520.**

——**Ss 41 and 43**—*Guardian required to continue periodical payments—Appealability of order.*

Where a guardian has been required to continue the fixed periodical payments which the Court required him to make as a condition of being appointed guardian, and it is because he is unwilling to comply with this condition that he refuses to act as guardian, the requisition is not an order under S. 41, but one under S. 43 and as such is appealable (*Beckett, J.*) SURAIN SINGH *v.* BALWANT KAUR. **160 I.C. 564=8 R.L. 563=A.I R. 1935 Lah. 931.**

——**S. 41**—"*In his possession or control*"—*Meaning of.*

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The words "in his possession or control" should not be taken in the narrow sense as being actually in possession of guardian or in his control, but in the sense that he has power of disposition over it. It does not mean that if the guardian has converted the Government Promissory Notes of his ward and disposed of the property or proceeds, no order can be made against him under S. 41. (*Mitter and McNair, JJ.*) HEERALAL CHAKRABURTY *v.* MANASHAMOYEE DEVI. **152 I.C. 1073=7 R.C. 343=38 C.W.N. 438=A.I.R. 1934 Cal. 520.**

——**S. 41**—*Property of ward not taken possession of by the guardian—Order for restoration.*

Though it may be the duty of the guardian, as soon as he was appointed as such, to take possession of the ornaments of the ward from whomsoever they were with, and his failure to do so is a great dereliction of duty, where, however, it is proved he had never obtained possession of those ornaments, no order can be made udder S. 41 directing him to restore such property. (*Mitter and McNair, JJ.*) HEERALAL CHAKRABURTTY *v.* MANASHAMOYEE DEVI. **152 I.C. 1073=38 C.W.N. 438=7 R.C. 343=A.I.R. 1934 Cal. 520.**

——**S. 41** — *Scope—"Guardian"—If limited to guardian appointed by Court—Assumption of superintendence by Court of Wards—Effect on right of guardian appointed by instrument.*

S. 41 is not confined to the case of a guardian appointed by the Court. The word "guardian" in that section refers not merely to a guardian appointed or declared by the Court, but also to other guardians, including guardians appointed by instruments. Under S. 41 (*b*), the rights of a person who claims to be the legally constituted guardian of a minor come to an end, when the Court of Wards assumes superintendence. (*Srivastava, J.*) DEPUTY COMMISSIONER, GONDA *v.* MOHAMMAD SHIKOH. **10 Luck. 141=7 R.O. 40=150 I.C. 706=35 Cr.L.J. 1108=11 O.W.N. 803=1934 Cr.C. 1203=A.I.R. 1934 Oudh 392.**

——**S. 41**—*Termination of guardianship—Subsequent order for restoration of property—Power of Court.*

An order for delivery of specific properties, to wit, Government Promissory Notes can be made against the guardian on an application made even after the termination of the guardianship by reason of the ward having attained majority. 5 C.W.N. 207, Dist. (*Mitter and McNair, JJ.*) HEERALAL CHAKRABURTTY *v.* MANSHAMOYEE DEVI. **152 I,C. 1073=7 R.C. 343—38 C.W.N. 438=A.I.R. 1934 Cal. 520.**

——**S. 41 (3)**—*Scope—Court whether can direct guardian to pay money.*

Under S. 41 (3) the guardian is liable to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. But the Court has no power to compel the guardian to pay any sum found due from the guardian after the enquiry.

Per *Curiam.*—It cannot be said if the deceased guardian's accounts are wrong, the Court can compel the representative of the guardian to pay into Court any sum found due after an investigation. (*Jonhstone, J.*) SADHU SINGH *v.* MEHAR SINGH. **I.R. 1931 Lah. 347=130 I.C. 779=31 P.L.R 965=A.I R. 1931 Lah. 68.**

——**S. 41 (4)**—*Discharge of guardians—Examination of accounts—Regular suit as the proper procedure.*

A Court should not hold an enquiry under the Act into the correctness of the accounts put in or determine what amount was really due by the guardian to the minor as the whole scheme of the Act provides, for matters of the

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kind being disposed by a suit by the minor or next friend against the guardian and not by way of proceedings under the Act. (*Addison, J.*) FAKIR MAHOMED *v.* MS. BHARI. **I.R. 1932 Lah. 179=136 I.C. 3=33 P.L.R. 441=A.I.R. 1932 Lah. 306.**

[D. 34 P.L.R. 549 (550).]

———**S. 43**—*Lease by guardian—Benami nature—Order for deposit of rent—Regular suit or summary procedure.*

The guardian of a minor gave on lease a plot of land belonging to a minor to his brother-in-law. The Court held that the lessee was a *benamidar* for the guardian and called on the latter to deposit the lease money in Court.

Held, that the claim against the guardian could be sustained only on the basis of a contract or a *quasi* contract and such a claim could be enforced by a regular suit and not by a summary remedy. (*Sadi Lal, C.J.*) ARUR SINGH *v.* GUR BAKSH SINGH. **I.R. 1932 Lah. 178=136 I.C. 2=33 P.L.R. 437=A.I.R. 1932 Lah. 272.**

———**S. 43**—*Marriage of female ward—Powers of Court—Procedure.*

It is not the function of the District Judge to act as a match-maker for the female ward, much less on the application of the guardian of the property of the ward to select a particular bridegroom and force him upon the minor against the wishes of the minor and her step mother, who is appointed guardian of the person of the minor. The natural guardian or the guardian appointed by Court for the person of the minor should apply to the Court for sanction, in granting which the wishes of the minor, where the minor is old enough to form an intelligent preference, cannot be ignored. (*Patkar and Tyabji, JJ.*) SALUBAI *v.* KESHAV RAO. **56 Bom. 71=I.R. 1932 Bom. 319=137 I.C. 732 (2)=34 Bom.L.R. 83=A.I.R. 1932 Bom. 156.**

———**S. 43**—Scope—Power of Court to make order in relation to third persons. *See* GUARDIAN AND WARDS ACT, SS. 31, 33 AND 43. **A.I.R. 1934 All. 1043.**

———**Ss. 43 to 45**—*Applicability—Injunction order against threatened injury to minor.*

Ss. 43 to 45 have no application to cases where interim orders in the form of injunctions restraining persons from causing injury to the persons or property of minors are issued by the Court. (*Subhedar, A.J.C.*) DEOKISAN *v.* ASARAM. **28 Nag.L.R. 332=141 I.C. 170=I.R. 1932 Nag. 40=A.I.R. 1933 Nag. 62.**

———**S. 43 (1)**—Third party—Application for investment of minor's money—Order made against guardian's wishes—Applicant not a person interested in the mind—No *locus standi* to apply under S. 43 (1). *See* GUARDIAN AND WARDS ACT, S. 32. **57 Mad. 712=A.I.R. 1934 Mad. 207=66 M.L.J. 351.**

———**S. 47**—*Order appointing guardian and demanding security—Appeal—Revision.*

It is doubtful if an order appointing a guardian is appealable at the instance of the guardian on the ground that the security demanded from him by that order is excessive; but in any case, revision would lie. (*Dalip Singh, J.*) MT. SUGHRA BEGAM *v.* ABDUL GHANI. **34 P.L.R. 333=149 I.C. 250=6 R.L. 661 (2)=A.I.R. 1934 Lah. 232.**

———**S. 47**—*Order calling on guardian to pay balance due—Appeal.*

No appeal lies from an order calling on the guardian to pay such balance, as the Court may find to be due from him. (*Tapp, J.*) CHANAN SINGH *v.* MT. HAR KAUR. **I.R. 1933 Lah. 147=141 I.C. 590=34 P.L.R. 549=A.I.R. 1933 Lah. 484.**

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———**S. 47 (a)**—Interlocutory order—Refusal of application to be appointed guardian—Appeal. *See* GUARDIAN AND WARDS ACT, S. 7 (1). **38 C.W.N. 1083.**

———**S. 47 (1)**—*Order directing marriage of minor—Appeal.*

Quaere.—If an order directing the marriage of a minor ward is appealable under S. 47 (*1*), read along with S. 43, sub-S. (*1*) and Ss. 24, 25 and 26. If it does not fall under S. 43, the High Court may exercise its revisional jurisdiction by treating the appeal as a revisional application. (*Patkar and Tyabji, JJ.*) SALUBAI *v.* KESHAV RAO. **56 Bom. 71=I.R. 1932 Bom. 319=137 I.C. 732 (2)=34 Bom.L.R. 83=A.I.R. 1932 Bom. 156.**

———**S. 47 (1)**—*Scope—Order for recovery of money from guardian—Appeal.*

An order entitling award to recover a sum of money from his guardian is not an order regulating the conduct or proceedings of a guardian or settling a matter in difference, etc., within the meaning of S. 47 (*1*) and is, therefore, not open to appeal. (*Ziaul Hasan, J.*) GHAZANFAR HUSAIN *v.* RAHMAT HUSAIN. **154 I.C. 17=7 R O. 457 (1)=11 O.W.N. 1625=A.I.R. 1935 Oudh 180.**

———**S. 47 (1)**—Third party—Application for investment of minor's money—Order made against wishes of guardian—Order contemplated in S. 43—Appeal lies to the High Court. *See* GUARDIAN AND WARDS ACT, S. 32. **57 Mad 712=66 M.L.J. 351.**

———**S. 48**—*Hindu minor girl—Marriage brought about by mother—Legal guardian's consent not obtained—Validity of marriage.*

There is nothing in the Guardian and Wards Act to prevent a Hindu husband from maintaining a suit in the Civil Court for a declaration that the minor was his lawfully wedded wife. There is nothing in the Act to suggest that the marriage of a minor girl by the natural guardian (mother of the girl) without the approbation or consent of the certificated guardian is null and void. (*Boys and Sen, JJ.*) RAM HARAKH *v.* JAGAR NATH. **53 All 815=I.R. 1931 All. 609=133 I.C. 289=1931 A L.J. 816=A.I.R. 1932 All. 5.**

———**S. 49**—*Scope—Guardianship proceedings started by stranger—Right to recover costs of litigation from minor—Suit against minor—Maintainability.*

There is no law which entitles a person to start a litigation for the appointment of guardian of a minor and then later on call upon the minor to recoup him of the cost of litigation. S. 49 of the Guardian and Wards Act gives the Court ample powers to order who should bear the cost of the litigation. If he carries on the litigation honestly for the benefit of the minor concerned, it is open to him to ask the Court to allow him the costs from the minor's estate. When he does not do that, a suit by him for recovery of the amount of costs from the minor will in no circumstances be maintainable. (*Khaja Mohammad Noor and Saunders, JJ.*) RAMDAS *v.* RAM BABU. **158 I.C. 25=8 R.P. 170=16 Pat.L.T. 649=A.I.R. 1936 Pat. 194.**

GUILTY—Plea of.

See (1) CR. P. CODE, S. 271.
(2) CRIMINAL TRIAL.

GUZARA. *See* LAND TENURE.

HABEAS CORPUS. *See also* CRIMINAL PROCEDURE CODE, S. 491.

———Application for writ in the nature of—Persons arrested under Extradition Act—Detention in prison for more than 2 months—Absence of sanction of Local Government—Legality of detention—Right to be discharged *See* EXTRADITION ACT, S. 10. **16 Pat.L.T. 551=A.I.R. 1935 Pat. 419.**

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———*Detention under the Bengal Criminal Law Amendment Act*, 1930—*Reasonable grounds for belief—Enquiry into—Powers of Court.*

Where the executive claims to detain a subject under statutory powers, it must satisfy the Court that the circumstances, in which the statute lays down that such powers can be exercised, in fact exist. But in the case of a detention under the provisions of the Criminal Law Amendment Act, S. 2 (1) of which provides that the opinion of the Local Government whether or not there were reasonable grounds for making an order under the section should be conclusive, the Court has no power to go behind the order of detention and enquire into the sufficiency of the grounds for making the order of detention. 58 I.A 169, Foll.; (1931) A.C. 662, Dist. (*Panckridge and M.C. Ghose, JJ.*) PRAMILA GUPTA *v.* W. S. PRENTICE. **59 Cal 1440=I.R. 1932 Cal. 455=138 I.C. 358=33 Cr.L.J. 609=36 C.W.N. 669 =1932 Cr.C. 460=A I R. 1932 Cal. 470.**

HABITUAL OFFENDER. *See* CR. P. CODE, S. 110.

HALAI MEMONS—*Law governing.*

The Halai Memons of Kathiawar are governed by the Hindu Law in respect of succession and inheritance. 43 Bom. 647 and 47 Bom. 146, Ref. (*Das, J.*) AISHA BEE BEE *v.* NOOR MOHAMAD. **10 Rang. 461=I.R. 1932 Rang. 218=140 I.C. 143=A.I.R. 1932 Rang. 179.**

HANDWE RAJ—Status of. *See* LAND TENURES—GHATWALI TENURE. **14 Pat. 70.**

HANDWRITING. *See* EVIDENCE ACT, SS. 45, 47 AND 73.

HANDWRITING EXPERT. *See* EVIDENCE ACT, S. 45.

HAQUQ IHTRAFI. *See* PUNJAB TENANCY ACT (1887), S. 4 (12).

HEARSAY EVIDENCE.

See (1) EVIDENCE.
(2) EVIDENCE ACT.

HEIRS. *See* HINDU LAW—SUCCESSION.

HEREDITARY OFFICE.

See (1) BOMBAY HEREDITARY OFFICE ACT.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) MAHOMEDAN LAW—RELIGIOUS ENDOWMENT AND RELIGIOUS OFFICE.
(4) MADRAS HEREDITARY VILLAGE OFFICERS ACT (1895).
(5) MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (1927), S. 73.
(6) T. P. ACT (1882), S. 6.

HIBA BIL-EWAZ *See* MAHOMEDAN LAW—GIFT

HIDDEN TREASURE. *See* TREASURE TROVE ACT (1878.)

HIGH COURT.

See (1) C.P. CODE, S. 115.
(2) CR. P. CODE, SS. 439, 526, 561, ETC.
(3) CRIMINAL TRIAL.
(4) GOVERNMENT OF INDIA ACT, S. 107.
(5) JURISDICTION.

HIGH COURT OF JUDICATURE, JAMMU AND KASHMIR—*Order constituting High Court, para.* 7 (b)—*Interpretation.*

The provisions of para. 7 (*b*) of the order constituting the High Court does not grant an appeal from the order of Revenue Commissioner where one is forbidden by the Land Revenue Regulation. Para. 7 (*b*) merely prescribes the procedure as to how an appeal from the Judge of High Court and Revenue Commissioner, when it does lie, should be heard. Where a second appeal is dismissed by the Revenue Commissioner, there is no third appeal, as the same is forbidden under the proviso to S. 11 of the Land Revenue Regulation. (*Dalal, C.J. and Sawhney, J.*) DHUND RAM LACHMAN DAS *v.* JAGISHWARI. **37 P.L R. J. and K. 1.**

HIGHWAY—*Dedication*—Cul de sac—*Private land becoming public street—Proof.*

Before private land can become a public street or passage, it must be made so by statute or be dedicated specifically by the owner to the use of the public or there must be circumstances from which such dedication can be presumed. Dedication may be inferred from user by the public but it is difficult, if not impossible, to establish a public right of way over a *cul de sac* by evidence of user alone without proof that public money has been spent on it. A public highway must *prima facie* lead from one public place to another. A *cul de sac* may be a public highway, but its dedication will not be presumed from mere public user without evidence of expenditure on the place in dispute for repairs, lighting or other matters by the public authority. (English cases discussed.) (*Lort Williams and S. K. Ghose, JJ.*) JATINDRA NATH BORAT *v.* THE CORPORATION OF CALCUTTA. **58 Cal. 1124=I R. 1931 Cal. 390=130 I C. 870=32 Cr.L.J. 590=1931 Cr.C. 585=35 C.W. N. 397=A.I.R. 1931 Cal. 433.**

———*Essentials of*—Cul de sac—*Land with access from public place at one end only—If highway—Long user and maintenance at public expenses—Inference.*

It is not an invariable rule that a public highway must be a thoroughfare in the sense that it must begin from and end in a public place. That is no doubt usual in most cases, but is not a *sine qua non*. There is no rule that a *cul de sac* cannot be a public highway, If there is access from a public place at one end only, there is no reason why a piece of ground could not, on that ground, be a public place, if the evidence supports the case of its dedication to public use. In the case of a *cul de sac*, the mere fact of long user will not justify the Court to infer dedication. The Court would require some additional evidence to support the claim of the public The fact that the *cul de sac* has been maintained and repaired at public expense is a very cogent piece of evidence. (*R.C. Mitter, J.*) SAMARENDRA NATH SAHA ROY *v.* HARENDRA KUMAR SAHA. **157 I.C. 224=8 R.C. 87 =39 C.W.N. 303=60 C L.J. 556=A.I.R. 1935 Cal. 413.**

———Exercise of right on—Nuisance, what constitutes —Right of police and Magistrate to regulate traffic. *See* RELIGIOUS PROCESSION. **53 All. 484=A I.R. 1931 All. 341.**

———*Obstruction—Right of action—Owners of houses abutting on highway—Special damage—It to be proved —English Law—Applicability—.*

The question of frontage for owners of houses abutting on a public highway means a great deal; and if anything is done by a Municipal Committee, or any one in whom such highway vests, which interferes with the rights of the owners in respect of the highway or tends to diminish the comforts of the occcupants of the houses, the owners have a right of action against the committee or other person so interfering without proving special damage. The principle of English Law requiring proof of special damage in such cases does not apply to India. (*Young, C.J. and Din Mahomed, J.*) MUNICIPAL COMMITTEE OF DELHI *v* MAHOMED IBRAHIM. **16 Lah. 517=37 P L.R. 753=152 I.C. 850=7 R.L. 335=A I R. 1935 Lah. 196.**

———*Obstruction—Right of action—Special damage.*

The rule of English Common Law has been applied in India as a rule of equity justice and good conscience

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that no action can be maintained by one member of the public for the obstruction of a highway without proof of special damage. 9 M. 463; 3 Cal. 20 (F.B.); 2 Bom. 457; 2 Bom. 469; 23 C.W.N. 91; 26 C.W.N. 587, Foll. (*Wort, J.*) MAHOMED DIN MIAN *v.* MT. ATIRAJU KUER. **10 Pat. 568=I.R.1931 Pat. 383= 133 I.C. 463=12 Pat.L.T. 885=A.I.R. 1931 Pat. 418.**

[D. 14 P.I.T. 361 (363). **Not. F.** 60 G. 1003 (1005.)]

———*Obstruction—Right of action—Special damage —Immediate access to private property—Blocking of.*

The rule requiring special damage in cases of obstruction to a public highway is qualified in cases where the plaintiff complains of an interference with his beneficial enjoyment of property thereby. A right of immediate access from private property to public highway or *vice versa* is a private right distinct from the rights of the owner of the property to use the highway itself as one of the public, the violation or infringement of which would furnish a cause of action in respect of an obstruction on the public way, without any further proof of special damage. 9 M. 463; 7 C.P.L.R. 97 (Civ); 2 B. 257. Dist; 2 N.L.R. 110, 10 A. 553 , 3 C. 20, 22 C. 551; 33 A. 287, Ref.; *Lyon v. Fishmongers' Co.*, 1 A.C. 662 and 46 A. 573, Foll. (*Niyogi, A.J.C.*) SHEONARAYAN *v.* DINDAYAL. **27 N.L.R. 213=I.R. 1931 Nag. 161= 134 I.C. 673=A.I.R. 1931 Nag. 189.**

HIGHWAY—*Obstruction—Right of action—Special damage not established—Proper Procedure—Representative suit.*

The predecessor-in interest of the plaintiff made a grant of certain lands for construction of roads for the use of the public, reserving the right to resume them when they would be no longer required for purposes of roads. Roads were thereafter constructed on those lands and were being used by the public. The defendant let out portions of these roads to the other defendants for the construction of certain huts. In a suit by the plaintiff for removal of the obstruction and for restoration of the lands to their former condition for the purposes of the road, *held*, the plaintiff would be hit by S. 91 of the Code of Civil Procedure, as the acts committed by the defendants amount to public nuisance. He, being one of the members of the public, is equally affected by the obstruction with other members of the public. He has suffered no special damage, His claim is not in respect of a wrong to him individually. He is one of the numerous persons affected by the obstruction and therefore, having the same interest in the matter. Consequently, the proper course for him was to bring a representative suit in conformity with the provisions of O. 1, R. 8 C. P. Code. (*Nasim Ali J.*) BEER BIKRAMKISHORE *v.* CHAIRMAN, COMILLA MUNICIPALITY **62 Cal. 692=39 C.W.N. 590=61 C L.J. 182=163 I.C. 109=8 R C. 693.**

———*Obstruction—Suit for removing—Plaintiff, if need prove special damage.*

In the case of an obstruction to a public highway, a member of the public can maintain a suit for removal of the encroachment without proving special damage. Difference between Indian and English Law pointed out. (*Mallik and Jack, JJ*) MANDA KINEE DEBEE *v.* BASANTAKUMAREE DEBEE. **60 Cal. 1003=147 I.C. 811=6 R.C. 364=A.I.R. 1933 Cal 884.**

[Rel. 16 L. 517 (527-528.) **R.** 62 C. 692 (699).]

———*Procession—Public right of.*

It is the inherent right of every set or community to conduct civil or religious processions attended with music through public streets, so that they do not interfere with

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the customary use of such streets by the general public and subject always to such directions as the Magistrate may lawfully give to prevent obstructions of the thoroughfare or breaches of public peace. It is a natural right established by law and does not require any custom to support it. Mere non-user of it for any length of time or occasional opposition or obstruction will not extinguish the right and it lies on the party, that opposes the exercise of such right to prove some law or custom having the force of law which will enable them to override the natural right. 5 M. 304; 6 M. 203; 26 M. 376; 24 C. 524; 16 Mys.C.C.R. 35; 23 Mys.C.C.R. 133; 47 A. 151 and 27 Mys.C.C.R. 98, Ref. (*Doraswami Iyer, C.J.*) VENKATAPPA *v.* MUNISWAMI. **10 Mys.L.J. 258.**

———Procession, religious—Right of members of one community to conduct—Limitations. *See* RELIGIOUS PROCESSIONS. **53 All. 484=A.I.R. 1931 All. 341.**

———*Procession—Right to conduct—Celebration of Ramlila by Hindus—Right of any other community to object on ground that it is an innovation.*

Every Hindu has a right to celebrate the Ramlila at any place, where those occupying or having the use of it have no objection to its performance. As regards the right to take out a procession, the position is not materially different. It is open to the Hindus to conduct a procession from one particular place to another through public thoroughfares subject to such restrictions or conditions as may lawfully be imposed by those responsible for public peace and tranquillity. The right is not one which is dependant for its enforcement on the previous exercise of it. The members of any other community or sect cannot, therefore, arrogate to themselves the right to object on the sole ground that it is an innovation. (*Niamatullah, J.*) JAFAR HUSAIN *v.* PEAREY LAL. **156 I C. 595=8 R.A. 5 =36 Cr L.J. 955=1935 A.L.J. 821=1935 A.W.R. 674=A.I.R. 1935 All 575.**

———*Procession—Right to go with music—Natural right, unless taken away by custom or order.*

The right to go in procession with music on marriage and religious occasions is a natural right inherent in every subject of the State, which must be given effect to unless it is shown that it has been taken away by some order or custom having the force of law. 2 M. 140 ; 5 M. 304; 26 M. 376, 32 M. 478, Foll (*Doraiswami Iyer, C. J. and Sreenivasa Iyer, J*) MADHAVA RAO *v.* THIRUKAPPA. **9 Mys L J. 417.**

———*Rash driving—Driving on wrong side.*

On a straight and open road, a speed of thirty miles cannot necessarily and of itself be described as an excessive and rash speed. (*Smith and Allsop, JJ.*) RAM SEWAK *v* EMPEROR. **6 I.R. (Oudh) 79=146 I.C. 28 =34 Cr L J. 1154=10 O.W.N. 823=1933 Cr.C. 1275 =A I.R. 1933 Oudh 391.**

———*Rash driving—Driving on wrong side.*

It is not always necessarily rash and negligent to drive on the wrong side of the road. Much would depend upon other conditions. (*Smith and Allsop, JJ.*) RAM SEWAK *v* EMPEROR. **6 I.R. (Oudh) 79=146 I.C. 28=34 Cr.L.J. 1154=10 O.W.N. 823=1933 Cr.C. 1275= A.I.R. 1933 Oudh 391.**

———*Rash driving—Motor car—Causing death—Nature of offence.*

A person driving a motor car is under a duty to control that car ; he is *prima facie* guilty of negligence if the car leaves the road and dashes headlong into a tree, and it is for the person driving the car to explain the circumstances under which the car came to leave the road. Those circumstances may be beyond control and may exculpate him but in the absence of such circumstances

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the fact that the car left the road is evidence of negligence on the part of the driver. Accused found guilty under S. 304-A, I.P.Code. (*Bardswell, J.*) RATNAM MUDALIAR *v.* EMPEROR. **6 R.M. 498 = 148 I.C. 573 = 35 Cr.L.J. 691 = 1934 Cr.C. 405 = 39 L.W. 344 = 1934 M.W.N. 102 = A.I.R. 1934 Mad. 209 = 66 M.L.J. 318.**

———Right of public—Exposure of wares in the highway—Crowd—Detriment to traffic—Customary right—Defence of—Sustainability. *See* BOMBAY DISTRICT POLICE ACT (1890), S. 61 (*f*). **33 Bom.L.R. 663.**

———*Right of public to use—Permanent injunction restricting—Propriety of.*

The public generally has the right to use a public thoroughfare and a Court is not justified in restricting that general right by the issue of any permanent injunction to any particular individual. And where religious processions are taken out under license from the authorities, it is for the authorities to impose such conditions as may be deemed necessary for the safeguarding of the public peace and the freedom of every individual to use the public thoroughfares without any improper obstruction. (*Broadway, J.*) CHANDAN *v.* GHULAM RASUL SHAH. **I.R. 1933 Lah. 395 = 144 I.C. 39 = A.I.R. 1933 Lah. 344**

———*Rules of road—Duty of motorist.*

Motorists are not the only persons who owe a duty of care; others also have a responsibility and must conform to the ordinary usages of the road. (*Viman Bose, A.J.C.*) EMPEROR *v.* HOMNARAIN. **30 N.L.R. 317 = 8 R.N. 186 = 148 I.C. 541 = 35 Cr.L.J. 696 = 1934 Cr.C. 272 = A.I.R. 1934 Nag. 65.**

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Ante-adoption agreement.

———*Adoption — Ante adoption agreement — Absolute disposition in favour of the adoptive mother in lieu of maintenance—Validity.*

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A gift of a small portion of the family property absolutely to the adoptive mother in lieu of her claim for maintenance under an ante adoption agreement is not invalid. 50 M. 508 (P.C.); 56 M.L.J. 41, Ref. (*Sundaram Chetty, J.*) SEETHIAH *v.* MUTYALU. **I.R. 1931 Mad. 380=130 I.C. 460=1930 M.W.N. 1011=33 L.W. 86=A.I.R. 1931 Mad. 106.**

———*Adoption—Ante-adoption agreement—Adoptee, a major, bound by.*

An adopted son who, at the time of adoption, was of full age and deliberately consented to an arrangement by which on adoption he was to get no more than half the property of his adoptive father, is bound by that agreement. 54 I.A. 248, Dist.; 40 B. 688, Foll. (*Beaumont, C.J. and Broomfield, J.*) PANDURANG SAKHARAM *v.* NARMADABAI. **56 Bom. 395=I.R 1932 Bom. 564=140 I.C. 200=34 Bom.L.R. 1209=A.I.R 1932 Bom 571.**

[F. 58 B. 234 (237, 242, 244).]

———*Adoption—Ante adoption agreement by adoptive mother with natural father of adoptee—Validity.*

Though the real ground on which an ante-adoption agreement can be validated is custom, such agreements between the adoptive mother and natural father have been recognized as valid by Indian Courts apart from the question of custom. A.I.R. 1927 P. C. 139 and A. I. R. 1918 Cal. 395, Foll. (*Derbyshire, C.J. and R.C. Mitter, J.*) HEMENDRA NATH ROY CHOWDHURY *v.* JNANENDRA PRASANNA BHADURI. **63 Cal. 155=159 I.C 1101=8 R.C. 388=40 C.W.N. 115=62 C.L.J. 49=A.I.R. 1935 Cal. 702.**

———*Adoption—Ante-adoption agreement—Agreement between natural father and adoptive mother—Effect on adoptee—If can create life-estate in favour of adoptive mother.*

An agreement executed between the natural father of the adoptee and the adoptive mother with regard to the adoption, cannot in itself create any life-estate in favour of the adoptive mother ; nor can it in any way estop the adopted son because he does not claim through his father. There can be no question that the son was benefited by it. (*Henderson, J.*) JANANADA PRASANNA BHADURI *v.* HEMENDRA NATH ROY CHOWDHURY. **60 C.L.J. 391=A.I.R. 1935 Cal. 228.**

———*Adoption—Ante-adoption agreement — Arrangement embodied in a will executed by adoptive father—Disposition in favour of widow—Right of adopted son.*

A Hindu adopted a son subject to the condition that the adoptive father *P* would continue in exclusive possession of the whole property during his lifetime. This condition along with certain others relating to the disposition of property after the adoptive father's death were embodied in a will executed by him, on the eve of adoption. *P* during his lifetime parted with the bulk of her property leaving a small portion in the possession of his widow. This property was claimed by the plaintiff as in his capacity as the adopted son of *P*. The suit was resisted on the ground that under the terms of the will, the plaintiff was only entitled to possession subject to good behaviour towards the adoptive mother.

Held, *P*, as a member of the coparcenary, was incompetent to make a valid disposition of the co parcenary property so as to come into effect after his death, to the prejudice of the plaintiff, who by adoption became entitled to all the rights of a co-parcener in the family. *P's* will could have no validity since co-parcener's power of alienation which is founded on his right to partition dies with him so as to vest his interest by survivorship in his co-owner. At the moment of a co-parcener's death, there remains nothing upon which his

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will can operate. So the plaintiff's rights as a son were not prejudiced by *P's* will in any way. The conditions as to good behaviour of the plaintiff after *P's* death must also lapse along with the will, as the will itself was void and inoperative. (*Niyogi, A.J.C.*) MST. SARUPA *v.* KORAT. **18 N.L.J. 32=160 I.C. 632=8 R.N. 192.**

———*Adoption—Ante adoption agreement—Bequest to widow and daughter—Consent of natural father—Effect.*

When an adoption is made prior to disposition by will taking effect, the rights following from the adoption take precedence of the disposition. An arrangement made for the benefit of the widow, however, which is consented to by the natural father before the adoption can be enforced on the ground of custom. Thus a bequest of the movables and outstandings to the widow by the person making the adoption is valid, though a similar disposition in favour of his daughter may not be valid. 50 Mad. 508 (P.C.), Cons. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) RAMIAH *v.* MAHALAKSHMAMMA. **I.R. 1932 Mad. 269=136 I.C. 205=35 L.W. 30.**

———*Adoption—Ante-adoption agreement—Disposition of properties in favour of adopter's dependents—Ratification by adopted son—Binding nature of.*

A disposition by way of bequest by a Hindu of portions of the family property in favour of his deceased brother's widow for life with remainder absolutely to her daughter can be ratified by, and if ratified will be binding on, the adopted son, when it is found that this and other dispositions of the family property were made in pursuance of an arrangement made by the adoptive father with the natural father of the boy, whom he wished to adopt, in consideration of the adoption and it is also found that the adopted son has ratified all the other dispositions forming part of the same arrangement and has not questioned the disposition in dispute for a period of more than twenty years after attaining majority. The decision in *Krishnamurti* v. *Krishnamurti*, 50 Mad. 508 (P.C.), only lays down that a disposition beyond certain limits is invalid as against the adopted son who cannot be bound by the doctrine of "approbate and reprobate". But it is independent of the question of ratification and the rule enunciated in *Ramaswami Aiyan* v. *Venkatarama Aiyan*, 2 M. 91 (P.C.), still holds good that invalid dispositions by an adoptive father at the time of the adoption and in consideration of it may become binding on the adopted son, if he subsequently ratifies them. The arrangement between the adoptive father and the natural father disposing of the father's family property is "void" against the adopted son; it is not an agreement *funditu null* incapable of producing any legel result; it is still so far capable of legal results as to be capable of ratification, when the adopted son comes of age. Ratification in this connection need not necessarily be accompanied by all the ingredients of a valid contract between the adopted son and the party benefited by the invalid disposition. Any act, amounting to an election on his part to hold it good, is sufficient for the purpose. (*Waller and Krishnan Pandalai, JJ.*) SUBRAMANIA CHETTIAR *v.* SANKARA VELAYUDHAM CHETTIAR. **55 Mad. 408=135 I.C. 903=1931 M.W.N. 1169=34 L.W. 689=I.R. 1932 Mad. 231=A.I.R. 1931 Mad. 804=62 M.L.J. 479.**

———*Adoption — Ante-adoption agreement— Family arrangement—Adopted son a major—Agreement to pay certain amount to grand-daughter of adoptive mother—Grand-daughter, if entitled to enforce contract.*

The defendant, who was a major at the time of his adoption by grandmother of the plaintiff, agreed to pay

HINDU LAW—Adoption—Ante adoption agreement-

certain amount to the plaintiff on her attaining majority After the death of the widow, the plaintiff sued to recover the amount.

Held, that the defendant would be bound by the agreement made by him on adoption, he being a major at the time, and if the suit had been brought by the person with whom the agreement had been made, the suit would succeed. As plaintiff was not a party to the contract, she could not sue unless a trust was created in her favour or a family settlement was arrived at under which she could claim. There was no trust here and no family settlement, as the plaintiff who was only the daughter's daughter had no right in the family property, not even a right of maintenance and unless the parties to the family arrangement had an interest in the property, it could not be a family arrangement. 40 Bom. 668, Dist. (Case-law Ref.) (*Baker and Divatia, JJ.*) VITHAL LAXMAN *v.* YAMUTAI SHRIDHAR. **58 Bom. 234=150 I.C. 847=7 R.B. 18=36 Bom. L.R. 144=A.I.R. 1934 Bom. 121.**

———*Adoption — Ante adoption agreement—Validity of.*

An arrangement at the time of adoption by which a portion of the adoptive father's estate is given to the adoptive widow is valid but if any portion of the estate is given to any person other than the widow, it would not bind the adopted son. 50 M. 508 (P.C.), Foll. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

Applicability of law of.

———*Adoption — Applicability of law of—Cutchi Memons—Onus.*

The Mahomedan Law by which Cutchi Memons are governed except in the matter of succession and inheritance does not recognise adoption as a mode of filiation. The presumption is that, as a necessary consequence of conversion to Mahomedanism, the law of adoption recognized by Hindu Law and usage has been abandoned by them. Those who allege that the usage of adoption obtains among them should prove it. (*Doraswamy Iyer, C.J. and Rama Rao, J.*) ELIA SAIT *v.* DHARANAYYA. **10 Mys. L.J. 33.**

Cancellation.

———*Adoption — Cancellation — Right of adoptive parents.*

An adopted son can forfeit his rights by unfilial conduct in certain circumstances. In default of such forfeiture, however, once adopted, he must remain adopted, and the adoption cannot be cancelled at will by the adoptive parents. (*Das and Brown, JJ.*) MA CHIT SU *v.* KYAW MAUNG. **6 I.R. (Rang.) 10=144 I.C. 821=A.I.R. 1933 Rang. 128.**

Ceremonies.

———*Adoption—Ceremonies—"Giving in adoption"—Secular act of gift completed by father or mother—Physical act of giving child in religious ceremony—Whether can be performed by delegate.*

As regards "giving in adoption", it is the established law, (1) that the father or in his absence, the mother of the boy and no other person possesses the legal right of giving him in adoption, (2) that the expression "giving in adoption" only means "decision to give in adoption" by the exercise of the discretion of accepting the proposal of the adoptive father, to give the boy in adoption to him, and (3) that the performance of the formal act of physical delivery of the boy may be delegated by his parents to suitable persons, but not the power of decision to give away the boy in adoption. All that the law thus requires is that the secular act of gift should be completed by the father or mother, but the physical act of giving the child in religious ceremony of adoption may be vicariously performed by a delegate. 7 Mad. 548 and 8 Bom.H.C R. 244, Ref. (*Subhedar and Pollock, A.J. Cs.*) MT. CHUNNIBAI *v.* GIRDHARI LAL. **30 N.L.R. 62=150 I.C. 1007=7 R.N. 33=16 N.L.J. 319=A.I.R. 1934 Nag. 1.**

HINDU LAW—Adoption—Effect of.

Dancing girl.

———*Adoption—Dancing girl—Validity.*

It there be a custom among dancing girls of adopting a girl and if it be proved that the adoption was not to promote prostitution but to wean the girls away from prostitution and settle them in married life, such an adoption is valid. 11 M. 393; 12 M. 214 and 19 M. 127, Rel. on. (*Anantakrishna Ayyar, J.*) SHANMUGAM PILLAI *v.* KRISHNAVENI. **1931 M.W.N. 288.**

Daughter.

———*Adoption—Daughter.*

The adoption of a daughter is not recognized in Hindu Law. (*Addison and Bhide, JJ.*) *In the matter of* MUNSHI RAM. **12 Lah. 658=I.R. 1931 Lah. 394=131 I C. 234=32 P.L.R. 341=A.I R. 1931 Lah. 399.**

———*Adoption—Daughter—Validity.*

An adoption of a daughter is not known to Hindu Law. (*Tek Chand and Din Mahomed, JJ.*) RAM PIARI *v.* SHIV RAM. **151 I.C. 667=7 R.L. 158 (2)=35 P.L.R. 700=A.I.R. 1934 Lah. 659 (2).**

Dwamushyayana adopted son.

———*Adoption—Dwamushyayana adopted son—Succession to Rights of natural and adoptive mother.*

In the case of succession to all unmarried *dwamushyayana* adopted son, the adoptive mother and the natural mother inherit equally as co-heiresses. (*Patkar and Murphy, JJ.*) BASAPPA DANDAPPA *v.* GURLINGAWA. **57 Bom. 74=I.R. 1933 Bom 245=142 I.C. 634=35 Bom.L.R. 75=A.I.R. 1933 Bom. 137.**

Effect of.

See also ISSUE OF ADOPTEE, *infra.*

———*Adoption—Effect of—Adoption of coparcener—Loss of interest in coparcenary property.*

On adoption, the adopted person loses all right and interests in the property of his natural father. Similarly, a coparcener, on his adoption by another, loses all his interest in the coparcenary property. (*Ganga Nath, J.*) LALLAJEE *v.* RAM DAYAL. **8 R.A. 647 (1)=1935 A.W.R. 1485=160 I.C. 623=A.I.R. 1936 All 77.**

———Adoption—Effect of—Adoption by husband in association with one wife—Right of wife not associated to succeed to adopted son. *See* HINDU LAW—SUCCESSION. **69 M.L J. 632.**

———*Adoption—Effect of—Extinction of rights in natural family—Continuance of adoptee's name in mutation register—Effect of.*

A member of an undivided Mithakshara family completely loses his right in the coparcenary property as soon as he is given away in adoption into another family; so where after his adoption he has neither been in possession nor in receipt of the profits of the property, the mere continuance of his name on the mutation register does not justify the inference that he was in adverse possession of his original share in his natural family. Mere inaction on the part of the brother in possession, in having the name of the adopted brother removed from the mutation register, after the latter's adoption, could not be construed to mean, that, in spite of the adoption the former still continued to hold the other eight annas share in the village for and on behalf of the

HINDU LAW—Adoption—Effect of.

adopted brother. (*Subhedar, A.J.C.*) MANJU BAI *v.* GULAB RAO. **29 N.L.R. 187=I.R. 1933 Nag 120=142 I.C. 493=A.I.R. 1933 Nag. 202.**

———*Adoption—Effect of—Fiction of civil death and new birth in the adoptive family—Limits of.*

The fiction of adoption operating as civil death in the natural family and new birth in the adoptive family has been extended both ways to the extent that the adopted son is to be treated as having been born from his birth in the adoptive family and as having never been in his natural family. But both ways, the fiction cannot be literally applied. If the Upanayanam is performed in the natural family, it is not annulled on account of the adoption. The natural tie, so far as the prohibition of marriage is concerned, is not annulled and the natural relationship is recognized for the purpose of prohibiting marriages within the sapinda relationship in the natural family. The issue born to a man before adoption, remains in the natural family and does not go with the father in the adoptive family. Lastly, adoption, it is true, dates back to the date of the death of the adoptive father but the rights of the adopted son come into existence on the date of his adoption for purposes of limitation. (*Patkar and Birlee, JJ.*) BAI KESARBA *v.* SHIVSANGJI. **56 Bom. 619=142 I.C. 253=I.R. 1933 Bom. 197=34 Bom.L.R. 1332=A.I.R. 1933 Bom 654.**

[**R.** 57 B. 74 (80). **Reversed.** 62 I.A. 161; 68 M. L.J. 343 (P.C.).]

———*Adoption—Effect of—Property vested in adoptee as sole surviving member of joint family—If divested.*

The effect of an adoption is to cut off all connection with the natural family, *viz.*, the gotra, riktha (wealth or heritage), pinda (funeral oblation) and swadha (shraddha, etc.). If a person is possessed of self-acquired property at the time of adoption or of property inherited from his maternal grandfather in his natural family, his right to that property is not in any way affected by the adoption and he continues to be the owner of such property even after his adoption. But when a son is given in adoption by the mother after the father's death, the son loses all the rights he may have acquired to the property of his natural father, including the right to property which has become exclusively vested in him before the date of adoption, as the sole surviving member of the family. 29 M. 437 and 40 B. 429, Fol. 47 B. 542 and 56 C. 1135, Dist. (*Patkar and Barlee, JJ.*) BAI KESARBA *v* SHIVSANGJI. **56 Bom. 619=142 I.C. 253=I.R 1933 Bom. 197=34 Bom L.R. 1332=A.I.R. 1932 Bom. 654.**

[**Reversed** 62 I.A. 161; 68 M.L.J. 340 (P.C.)]

———*Adoption—Effect of—Renunciation of rights of inheritance.*

According to the Mitakshara Law a person who has been validly adopted cannot renounce that state. But it is open to him to renounce his right to the inheritance in which case the inheritance would go to the next heir. (*Rankin, C.J. and C. C. Ghose, J.*) LUNKURN RAMPOORIA *v.* BIRJI. **57 Cal 1322-I R. 1931 Cal. 378=130 I.C. 250=A.I.R. 1931 Cal 219.**

Estoppel.

———Adoption--Estoppel against widow—Estoppel does not convert invalid adoption to a valid adoption—Disability operating against her and preventing her from recovering the property by urging invalid adoption. *See* EVIDENCE ACT, S. 115—CONDUCT. **1933 M.W.N. 1148.**

Illatom.

———*Adoption—Illatom—Burden of proof—Status and proprietary rights, a matter of contract.*

HINDU LAW—Adoption—Issue of adoptee.

The practice of illatom adoption among the Reddys, Kapus and Kammas of the Madras Presidency, though opposed to the strict rules of Hindu Law, has nevertheless been recognized as valid by custom. The object is temporal, not spiritual. Since it is a departure from the Hindu Law, it lies upon the party claiming to override the provisions of Hindu Law to strictly substantiate his claim. To constitute a person an illatom, a specific agreement is necessary. It is not sufficient merely to show he lived in his father-in law's house, assisted his widow or managed the properties. Further, even where an illatom adoption has taken place, it does not as a matter of fact (law?) follow that in every case the adopted son takes the place of the natural son in every respect. What his rights should be in regard to the properties of his father in-law is a matter of agreement between the parties and has to be set up and proved in each case. 4 Mad. 272; 26 I. C. 54, affirmed in 42 Mad. 805; A.I.R. 1930 Mad. 883; 29 I.C. 54 and 13 I.C. 866, Ref. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) SIDDA REDDI *v.* SUBBAMMA. **10 Mys.L.J. 352=37 Mys.H.C.R. 320.**

———*Adoption—Illatom—Status and rights of—Descendants of—Right to collateral succession in preference to reversioners.*

An illatom son in-law is not a coparcener with his father. He is not thus on the same footing as a son born. The existence of an aurasa son does not preclude the possibility of an illatom adoption It is scarcely accurate to speak of an illatom son-in law as an adopted son in any sense; and the analogy of sonship cannot be carried to the extent of importing into this relationship, all the incidents attached to recognized sonship under the Hindu Law. The descendants of an illatom son-in law cannot, therefore, claim, as a matter of law and apart from proof of custom, rights of collateral inheritance in preference to the reversioners of the last male-holder of an estate. (*Varadachariar, J.*) MUTHALA REDDIAR *v.* SANKARAPPA REDDIAR. **154 I C. 424=7 R.M 425=40 L.W. 724=A.I.R. 1935 Mad. 3 (2)=67 M.L.J. 706.**

Invalid adoption.

———*Adoption—Invalid adoption—Reverter to natural family.*

If an adoption is invalid the adopted son does not acquire any rights in adoptive family or forfeit his rights in the natural family. The adopted son who is *sui juris* at the time of the invalid adoption is not on that ground disentitled to claim his rights in the natural family. (*Mukherji and Mitter, JJ.*) SAJANISUNDARI DASI *v.* JOGENDRACHANDRA SEN. **58 Cal. 745-I.R. 1931 Cal. 677=133 I.C. 325=A.I.R. 1931 Cal. 591.**

Issue of adoptee.

———*Adoption—Issue of adoptee—Effect of adoption—No change of family.*

When a married Hindu having a son is given in adoption, the son does not, like his father, lose the gotra and rights of inheritance in the family of his birth and does not acquire the gotra and a right of succession to the property of the new family. Where, therefore, the holder of an impartible estate (who has only a daughter) was adopted into another family, the daughter remains in the original family and is entitled to succeed to the properties acquired by her father out of the income of the estate. 33 Bom. 669 and 49 Bom. 520, Foll. (*Patkar and Barlee, JJ.*) BAI KESARBA *v.* SHIVSANGJI. **56 Bom. 619=142 I.C. 253=I.R. 1933 Bom. 197=34 Bom.L.R. 1332=A.I.R. 1932 Bom. 654.**

HINDU LAW—Adoption—Kritrima form.

Kritrima form.

———*Adoption*—Kritrima *form—Incidents—Proof of nature of adoption.*

In the *kritrima* form of adoption, the consent of the adoptee is necessary. The Hindu Law does not prescribe any age of majority, so all that is necessary is that the adoptee should be acquainted with the merit of performing the obsequies to his adopter and with the sin of omitting them and this is achieved when a boy attains his years of discretion. A minor who has attained years of discretion can be adopted in the *kritrima* form if the parents of the minor consent to the adoption. Such an adoption can be made by the husband or wife, or jointly by both. The *kritrima* adoption is made with the express object that the adoptee should perform the exequial rites of the adopter and that he should inherit the properties of the adopter. When the word 'kartaputra' is used by people in Mithila, it may be taken to refer to *kritrima* and not *dattaka* adoption.

Held, on the evidence, that the adoption was in the *kritrima* and not in the *dattaka* form (*Kulwant Sahay and Macpherson, JJ.*) LALITHA PRASAD CHAUDHURY *v.* SARNAM SINGH. **149 I.C. 491=6 R.P. 602=14 Pat.L.T. 27=A.I.R. 1933 Pat. 165.**

———*Adoption*—Kritrima *form—Not known in Punjab.*

The *Kritrima* form of adoption is not known in the Punjab and for all practical purposes is confined to Behar and the West Coast of India. A.I.R. 1924 Lah. 457, Ref. (*Addison and Agha Haidar, JJ.*) SHIV DEV *v.* DWARAKA DAS. **147 I.C. 499=6 R.L. 399=A.I.R. 1933 Lah. 1050.**

———*Adoption* — Kritrima *form—Proof of—Oral evidence—Nature and sufficiency of.*

Kritrima adoption can be made without executing any document and no particular kind of evidence is necessary to establish it. But when the only evidence adduced in support of such an adoption is oral, it requires to be examined with particular care and in the light of probabilities and must be found to be free from suspicion and suppression of materials, before it can be acted upon, the necessity of such clear and satisfactory evidence as will remove all suspicion of fraud and dispel all doubt as to its truth is all the greater in the absence of a contemporaneous record either in a deed of adoption or in entries of expenses in the family accounts. A.I.R. 1931 P. C. 84, Rel. on. (*Wort and Dhavle, JJ.*) KAMLA PRASAD MURLI MANOHAR. **13 Pat. 550=7 R P. 190=152 I.C. 446=15 Pat.L.T. 715=A.I.R. 1934 Pat. 398.**

Proof.

———*Adoption—Proof.*

Where in answer to a claim by a Hindu widow to recover her deceased husband's estate, the defendant relies on his adoption by the deceased, the adoption must be established by clear and satisfactory evidence free from all suspicion of fraud and so consistent and probable as to leave no occasion for doubt of its truth. The necessity for evidence of this unimpeachable character is all the greater in the absence of any contemporaneous record of the adoption either in a deed of adoption or by entries in family accounts which ought to have been forthcoming. 44 Cal. 201 (P. C.), Ref. to. (*Sir John Wallis.*) PADMALAV ACHARIYA *v.* FAKIRA DEBYA **35 C.W.N. 465=53 C.L.J. 292=I. R. 1931 P.C. 150=131 I.C. 758=33 Bom.L.R. 904=12 Pat.L.T. 563=33 L W. 477=8 O.W.N. 700=1931 M.W N. 561=A.I.R. 1931 P.C. 84=60 M.L.J. 619 (P.C.).**

HINDU LAW—Adoption—Right to give in.

———*Adoption—Proof—Entries in books maintained under rules of Education Department.*

The entries on the conduct book maintained by primary school authorities, entries in application forms for admission in High School, and monthly progress reports, all admittedly maintained under the rules of the Education Department are relevant as evidence of the conduct of the parties proving or disproving the fact of adoption. 4 I.C. 1045, Ref. (*Sunhedar and Pollock, A.J.Cs.*) MT. CHUNNIBAI *v.* GIRDHARI LAL. **30 N.L.R. 62=150 I.C. 1007=7 R N. 33=16 N.L.J. 319=A.I.R. 1934 Nag. 1.**

———*Adoption—Proof—Lapse of time—Effect.*

Where an alleged adoption was questioned after an interval of more than fifty-five years.

Held, the onus lies on the plaintiff to disprove the adoption and although the defendant was bound to prove his title as adopted son, every allowance for the absence of evidence to prove such fact must be favourably entertained (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad. 40=1932 M.W.N. 31=35 L. W. 73=I.R. 1932 Mad. 767=139 I.C. 684=A.I.R. 1932 Mad. 198=62 M.L.J. 116.**

———*Adoption—Proof—Onus—Admissions.*

The onus of proving an adoption is initially on the party asserting it but proof of admissions by the opposite party shifts the onus on the principle that what a party himself admits to be true may reasonably be presumed to be true and until the presumption is rebutted, the fact admitted must be taken to be established. (*Lakshmana Rao, J.*) PICHA PILLAI *v.* KATHAPERUMAL PILLAI. **6 R. M. 566=148 I.C. 1073=1934 M.W.N. 594=39 L.W. 518=A.I.R. 1934 Mad. 356**

Qualification of adopter.

———*Adoption—Qualification of adopter.*

A person cannot adopt unless he is married. (*Oppenheim, S.M.*) MAHESH BHARTI *v.* PERSHADI LAL. **14 L.R. 438 (Rev.)=17 R.D. 582.**

Rights of adopted son.

———*Adoption—Rights of adopted son—Adoption by widower—Right of adoptee to inherit the estate of his adoptive mother's father.*

The adopted son of a Hindu, whose only wife had died before his adoption, becomes the son of that wife, entitled to inherit her father's property. 49 Mad. 941, Affirm. (Case-law reviewed.) (*Ramesam, Anantakrishna Aiyar and Cornish, JJ.*) SOUNTHARAPANDIAN AIYANGAR *v.* PERIAVEERU THEVAN. **56 Mad. 759=6 I.R. (Mad.) 88 (2)=145 I.C. 534 (2)=1933 M. W.N. 1061=38 L.W. 45=A.I.R. 1933 Mad. 550=65 M.L.J. 58 (F.B.).**

———Adoption—Rights of adopted son—Properties to be taken by adopted son after widow—Interest of adopted son—Vested interest—Relinquishment of by him—Validity. *See* HINDU LAW—WILL—VESTED INTEREST. **59 Cal. 859.**

———Adoption—Rights of adopted son—Surrender by widow prior to adoption—Gift by widow jointly with next reversioner to stranger—Validity. *See* HINDU LAW—WIDOW—SURRENDER. **58 Bom. 521.**

Right to give in.

———*Adoption—Right to give in—Delegation of—Permissibility.*

The father or in his absence the mother of the boy and no other person possesses the legal right of giving him in adoption. The expression "giving in adoption"

HINDU LAW—Adoption—Right to make.

only means "decision to give in adoption" by the exercise of the discretion of accepting the proposal of the adoptive father to give the boy in adoption to him. The performance of the formal act of physical delivery of the boy may be delegated by his parents to suitable persons but not the power of decision to give away the boy in adoption. (*Subhedar and Pollock, A.J.Cs.*) MT. CHUNNIBAI *v.* GIRDHARILAL. **30 N.L.R. 62 =150 I.C. 1007=7 R.N. 33=16 N.L J. 319=A.I.R. 1934 Nag. 1.**

———*Adoption—Right to give in—Widow—Only son.*

A Hindu widow can before her re-marriage give her only son in adoption. The fact that her husband's consent was not procured for such giving does not matter. 30 C. 965 and 29 N.L R. 57, Ref. (*Staples, A. J.C.*) BAHORE *v.* LOOKAIN. **28 N.L.R. 52=I.R. 1932 Nag. 49=137 I.C. 94=A.I.R. 1932 Nag. 69.**

Right to make.

———*Adoption—Right to make—Grandmother succeeding to grandson—Adoption to husband.*

Where a Hindu died leaving a widow and a son, and that son died leaving a son who died subsequently and thereupon the widow purported to adopt a son to her husband,

Held, that the adoption was invalid. (*Rangnekar and Broomfield, JJ.*) PANDURANG HANMANTRAO *v.* YESUBAI. **6 I.R. (Bom.) 118=145 I.C. 769=35 Bom.L.R. 775=A.I R. 1933 Bom. 355.**

———*Adoption—Right to make—Mother—Estate vesting on son's death in daughter-in-law—Consent of daughter-in-law, immaterial.*

Where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived, even if the son's widow consents to the adoption. The third exception to the general rule stated in *Payapa's case* (23 Bom. 327) is correct: "When the adoption takes place with the full assent of the party, in whom the estate has vested by inheritance, the adoption is validated by such content." But that principle is applicable only where that power is still there without any occasion for its exercise. If, however, the power has been once extinguished, it is gone for ever and cannot be validated by the consent of any body. 26 Bom. 526 (F.B.), Foll. (*Beaumont, C.J. and Murphy, J.*) SANGANGAUDA *v.* HANMANT GAUDA. **55 Bom. 699=136 I.C. 500=I.R. 1932 Bom. 196=33 Bom L. R. 1225=A.I.R. 1932 Bom. 8.**

[**F.** 57 B. 1 (16, 36, 38.)]

———*Adoption—Right to make—Nihang Gosains.*

A Nihang Gosain cannot make a valid adoption. (*Oppenheim, S.M.*) MAHESH BHARTI *v.* PERSHADI LAL. **14 L.R 438 (Rev.)=17 R.D. 582.**

———*Adoption—Right to make—Person with leper sons.*

The main purpose of adoption is the due performance of obsequial ceremonies and the oblations of food and water given in sraddhas and such other rites for the benefit of the adopter's soul and the perpetuation of his lineage. If the existence of a son incompetent to perform such religious ceremonies and sacrifices is treated as a bar to an adoption, one of the aforesaid main purposes which necessitate an adoption becomes frustrated. Capacity to inherit and capacity to perform obsequial ceremonies are not the same thing and a person who is excluded from inheritance as disqualified heir may nevertheless be competent to perform obsequial ceremonies and the existence of such a son may be held to be a bar to an adoption by the father. But the existence of a son who is not only disqualified for inheritance but also incompetent to perform the aforesaid ceremonies should be deemed to bear only the semblance of a son and is no bar to an adoption by the father, who can very well be treated as sonless for the purpose of making an adoption. So the father of two sons who were afflicted with a virulent and loathsome form of ulcerous leprosy is competent to adopt. Texts reviewed. 46 Bom. 455, Diss. (*Sundaram Chetty, J.*) NAGAMMAL *v.* SANKARAPPA NAIDU. **54 Mad. 576=I.R. 1931 Mad. 473=131 I.C. 9=1931 M.W.N. 501=33 L.W. 269=A.I.R. 1931 Mad. 264=61 M.L.J. 19.**

HINDU LAW—Adoption—Validity of.

Setting aside.

———*Adoption—Setting aside—Effect of—Endowment created by adopted son.*

Where an adoption is proved to be invalid, a deed of endowment executed by the adopted son dedicating property to an idol is also invalid. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727 =149 I C. 809=6 R.P. 652=14 Pat.L.T. 258=A.I. R. 1933 Pat. 250.**

Validity of.

See also ADOPTION—WIDOW.

———*Adoption—Validity of—Adoption of boy after Upanayanam—Telugu Districts.*

It is not illegal among Brahmins of the Andhra country to adopt a boy after his Upanayanam, where he is of the same gotram. (The decision in 9 M. 148 is not confined to Tamil Districts.) (*Krishnan Pandalai, J.*) KAMAYYA BHUKTA *v.* CHINA SOORANNA. **148 I.C. 488=6 R.M. 494=1933 M.W.N 149 (2)=39 L.W. 68=A.I.R. 1934 Mad. 48=66 M.L.J. 37.**

———*Adoption—Validity of—Adoption of daughter's son—Custom—Deshastha Smarthas in Dharwar.*

Under the general Hindu Law, the adoption of a daughter's son is invalid, unless sanctioned by custom. There is a custom amongst the Deshastha Smartha Brahmins in Dharwar District by which such an adoption is recognized as valid. (*Beaumont, C.J. and Baker, J.*) SUNDRABAI HANMANTRAO *v.* HANMANT GURUNATH. **56 Bom. 298=I.R. 1932 Bom. 582= 140 I.C. 235=34 Bom.L.R. 802=A.I.R. 1932 Bom. 398.**

———*Adoption—Validity of—Estate governed by lineal primogeniture—Only son adopted away—Estate inherited by third party—Right of mother to adopt another boy.*

The holder of an impartible talukdari estate governed by the custom of lineal primogeniture was adopted into another family and the estate passed to his paternal cousin as the nearest heir. His mother thereafter purported to adopt a boy to her husband.

Held, that the mother could not adopt a son to her husband as he was not the last full owner, and that the adoption was also invalid as it had the effect of divesting the estate vested in a third person and not in herself. (*Patkar and Barlee, JJ.*) BAI KESARBA *v.* SHIVSANGI. **56 Bom. 619=142 I.C. 253=I.R. 1933 Bom. 197=34 Bom.L.R. 1332=A.I.R. 1932 Bom. 654.**

[**Reversed.** 62 I.A. 161=59 Bom. 360=68 M.L.J. 340 (P.C.) or 701. **R.** 57 Bom. 74 (80).]

———*Adoption—Validity of—Lameness of adopted boy —Sudras.*

Per *Curiam*.—There is considerable doubt as to what degree of lameness is a bar to adoption even among the higher castes and whether it is a bar at all among

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Sudras. Validity of adoption cannot be challenged on such ground. (*Oakden, S. M.*) BHAGWAN *v.* JANGALIA. **15 R.D. 247.**

———Adoption—Validity of—Plurality of adoptions (Cochin State). **20 Coch. L R. 456=142 I.C. 771 (F.B.).**

———Adoption—Validity of—Sanction of Government not necessary (Cochin State). **20 Coch. L.R. 456=142 I.C. 771 (F.B.).**

What constitutes.

———*Adoption—What constitutes.*

It is the act of adoption and not the adoption deed that confers the status of an adopted son. (*Beaumont, C.J. and Baker, J.*) VISHVANATH *v.* KALIBAI. **55 Bom. 103=I.R. 1931 Bom. 117=128 I.C. 901=32 Bom.L.R. 1385=A.I.R. 1931 Bom. 105.**

Adoption—Widow.

See also ADOPTION—RIGHT TO MAKE.
ASSENT OF SAPINDAS.
AUTHORITY.
BOMBAY SCHOOL.
CAPACITY TO TAKE.
DUTY TO ADOPT.
MOTIVE.
POWER TO ADOPT.
RIGHT TO GIVE IN. *See* HINDU LAW—ADOPTION —RIGHT TO GIVE IN.
VALIDITY.

Assent of Sapindas.

———*Adoption—Widow—Assent of sapindas*—Bona fides—*Presumption.*

When assent necessary to make an adoption valid is given by a person who is competent to give it, the presumption is that it was given *bona fide.* Where corrupt motive is alleged with regard to the action of one giving such assent, the question to be considered is: Is there any basis in a particular case for inferring that such person was actuated by any corrupt or improper motives in the giving of his assent? If his assent was procured by payment of any money consideration to him, it would certainly be tainted with corruption. But where no such suggestion has been made, the mere fact that in giving the assent to the adoption, his son would be benefited, cannot be twisted for the purpose of showing that the motive for giving the consent is an improper one. (*Sundaram Chetty and Pandrang Rao, JJ.*) SOLAIMALAI KONE *v.* SOKKAMMAL. **153 I.C. 1049 —7 R.M 397=40 L.W. 559=A.I.R. 1934 Mad. 567 =67 M.L.J. 618.**

———*Adoption—Widow—Assent of sapindas—Duty of sapindas in according or refusing—Capricious refusal by one—Adoption in disregard of—Validity—Consent of sapinda whose son is adopted—Sufficiency.*

In giving or withholding their consent to a proposed adoption by a Hindu widow, it is the duty of the sapindas, who are to be regarded as a family council, the natural guardians of the widow and the protectors of her interests, to form an honest and intelligent judgment on the advisability or otherwise of the proposed adoption in and with reference to, the widow's branch of the family. Where one of two sapindas, whose consent is sought, refused to consent to the adoption, being actuated by purely personal motives, his dissent may be disregarded; and if the only other sapinda in the same degree accords a *bona fide* consent, the adoption made with such consent is valid. The mere fact that the proposed adoptee happens to be a son of the consenting sapinda is no ground for holding that he is

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disqualified from asserting to the adoption. (*Sir George Lowndes.*) KRISHNAYYA RAO *v.* SURYA RAO BAHADUR GARU. **157 I.C. 881=37 Bom. L.R. 852 =1935 O.W.N 1055—8 R.P.C. 53=42 L W. 267= 40 C.W.N. 1=1935 M.W.N. 1216=A.I.R. 1935 P.C. 190=69 M.L.J. 388 (P.C.).**

———*Adoption—Widow—Assent of sapindas—Exercise of discretion.*

Where not only did the nearest reversioner give his consent to the adoption when sought for by the widow, but the opinion of the near relations including some of the dayadis also was taken.

Held, that in giving the assent there was conscious exercise of discretion by the nearest reversioner. (*Sundaram Chetty and Pandrang Rao, JJ.*) SOLAIMALAI KONE *v.* SOKKAMMAL. **153 I.C. 1049=7 R. M. 397=40 L.W. 559=A.I.R. 1934 Mad. 567=67 M.L J. 618.**

———*Adoption—Widow—Assent of sapindas—Formalities for obtaining.*

A letter sent by a Hindu widow to her husband's sapinda stating that she was anxious to adopt a son to her late husband and that she intended to adopt a particular person (named in that letter) and requesting the sapinda's permission to the said adoption is a sufficient compliance with the requirements of the Madras Law. (*Sir George Lowndes.*) KRISHNAYYA RAO *v.* SURYA RAO BAHADUR GARU. **157 I.C. 881 =37 Bom.L.R. 852=1935 O.W.N. 1055=8 R.P.C. 53=40 C.W N. 1=1935 M.W N. 1216=42 L W. 267 =A.I.R. 1935 P.C. 190=69 M.L.J 388 (P.C.).**

———Adoption—Widow—Assent of sapindas—Form and sufficiency of. **20 Coch. L.R. 456=142 I.C. 771 (F.B.).**

———*Adoption—Widow—Assent of sapindas—Husband's daughter by predeceased wife, if need be consulted.*

Where a Hindu widow desires to make an adoption it is obligatory on her to consult the nearest sapindas, but if their consent is capriciously withheld, it is not necessary that a family council should be held to consider the propriety of the adoption, or that the reversioners should be consulted in the order of the degree of relationship to the deceased husband or even that all the reversioners should be consulted. All that is necessary is that there should be such evidence of consent as would show that the widow in making the adoption was not acting improperly or capriciously or from a corrupt motive. If she is able to show that there was a preponderance of opinion among the reversioners in favour of the adoption she must be taken to have done all that is required under the law to make the adoption valid. A widow making an adoption to her deceased husband is not bound to consult her husband's daughter by a predeceased wife. (*Madhavan Nair and Jackson, JJ.*) BRAHMA SASTRI *v.* SUMITRAMMA. **57 Mad. 411= 151 I.C. 200=7 R.M 98=39 L.W. 133=1934 M.W. N. 127=A.I.R. 1934 Mad. 191=66 M.L J. 577.**

———*Adoption—Widow—Assent of Sapindas—Minor Sapinda—If consent necessary.*

A minor is incapable of forming a judgment in a matter, where conscious discretion is to be exercised, and therefore his consent to an adoption need not be sought for, though he is a sapinda whose assent would be requisite if he were a major. (*Sundaram Chetty and Pandrang Rao, JJ.*) SOLAIMALAI KONE *v.* SOKKAMMAL. **153 I.C. 1049=7 R M. 397=40 L.W. 559= A.I.R. 1934 Mad. 567=67 M L.J. 618.**

———*Adoption—Widow—Assent of sapindas—Nature and sufficiency of—Intention to divide the estate—Effect on adoption.*

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In support of an adoption by a Hindu widow it was alleged that her husband shortly before his death called his agnates together, and pointing out that his wife who was pregnant might give birth to girl, asked them to be so kind, if one of them should be blessed with a son to give that boy in adoption so that his line may be perpetuated. Twenty years after the death of her husband, the agnates executed a deed of authority and in pursuance of that the widow adopted a boy. At the time of adoption, there was living a son born to the daughter of the deceased by his first wife. At the time of the adoption, the ancestral estate amounted to nearly 51 acres, but within seven years of that, *i.e.*, when the adoptee became of age there were left only 7 acres, the rest having been alienated to the natural father and other relations of the adoptee.

Held, that apart from the incredibility of the story recited in the deed of authority to adopt, the motives of the parties were corrupt and capricious, that the adoption was really intended to enable the widow to dispose of the property and that it was therefore invalid. (*Stone and Pandrang Row, JJ.*) MANGAMMA *v.* RAMANAMMA. **42 L.W. 805=69 M.L.J. 602.**

———*Adoption—Widow—Assent of sapindas—Not given* bona fide*—Validity of adoption.*

An adoption made by a widow with the authority of the *gnatis* whose authority is not given *bona fide* for the purpose of getting a boy adopted to the deceased so that there might be some one to perform the ceremonies for the deceased and protect the inheritance, but simply to enable the widow to divide her deceased husband's property amongst various relations, is invalid, because the motives of the parties are corrupt and capricious. (*Stone and Pandrang Row, JJ.*) MANGAMMA *v.* RAMANAMMA. **42 L.W. 805=69 M.L.J. 602.**

———*Adoption—Widow—Assent of sapindas—Refusal based on selfish motives.*

The refusal of the reversioner to consent to the adoption on the ground that his own reversionary interest in the property of the deceased would be prejudiced is improper and may be disregarded. 2 M. 270; 39 M. 77, A.I.R. 1927 M. 733, Ref. (*Krishnan Pandalai, J.*) KAMAYYA BHUKTA *v.* CHINA SOORANNA. **148 I C. 488=6 R M. 494=1933 M.W.N. 149 (2)=39 L.W. 68=A.I.R. 1934 Mad. 48=66 M.L J. 37.**

———*Adoption—Widow—Assent of sapindas—Refusal of consent by nearest sapindas for improper reasons—Consent of next sapindas—Sufficiency of.*

Where the consent of the nearest sapindas is refused for corrupt and improper reasons, the consent of the agnates next in order is sufficient for an adoption by the widow. (*Curgenven and Sundaram Chetty, JJ.*) RAMANUJA CHARYULU *v.* NARASAMMA. **1933 M. W.N. 1118.**

———*Adoption—Widow—Assent of sapindas—Specification of boy to be adopted.*

Where a Hindu widow applied for the consent of her husband's nearest *gnati* for her making an adoption and he consented to her adopting "any boy whom she may like either from among agnates or from sagotrajas for performance of religious rites. . . . . .

Held, that the authority was not invalid as being too general. (*Madhavan Nair and Jackson, JJ.*) BRAHMA SASTRI *v.* SUMITRAMMA. **57 Mad. 411=151 I C. 200=7 R M. 98=39 L.W. 133=1934 M.W.N. 127=A.I.R. 1934 Mad. 191=66 M.L.J. 577.**

———*Adoption—Widow—Assent of sapindas—Nearest sapinda—Sufficiency.*

For purpose of adoption, the consent of the nearest sapinda, even if he be one, is sufficient. (*Sundaram Chetty and Pandrang Rao, JJ.*) SOLAIMALAI KONE *v.* SOKKAMMAL. **153 I.C. 1049=7 R.M. 397=40 L. W. 559=A.I R. 1934 Mad. 567=67 M.L.J. 618.**

———*Adoption—Widow—Assent of sapindas—To be independent.*

In order that the consent of the sapindas may enable a widow to adopt a son to her husband, it must be an independent consent, given in the exercise of a judgment uninfluenced by extraneous considerations; in particular, if that judgment is affected by a belief that the husband has himself given an authority to adopt, a consent so procured will not be independent and will not avail to render valid an adoption made in pursuance of it. 26 M. 627 and 30 M. 50 (P.C.) Rel. on. (*Curgenven and Sundaram Chetty, JJ.*) RAMANUJA CHARYUDU *v.* NARASAMMA. **1933 M.W.N. 1118.**

Authority.

———*Adoption — Widow — Authority—Construction of—Boy to be chosen by executors— Boy approved by only one of four executors—Adoption of—Validity of.*

Where a will provided that "after my death the aforesaid executors (four in number) shall be competent to choose a boy from a good family in the brotherhood and have him adopted by my wife on my behalf", and the widow adopted a boy with the approval of only one of the executors,

Held, that the adoption was invalid, all the executors not having joined in the chice. 39 Bom. 441 (P.C.), Dist.; 27 Cal. 996, Ref. (*Harrison and Addison, JJ.*) BAIJ NATH *v.* RATTAN LAL. **14 Lah. 345=I.R. 1933 Lah. 77=141 I.C. 196=33 P.L.R. 1028=A.I.R. 1933 Lah. 70.**

———*Adoption—Widow—Authority — Construction—Prohibition against* Khandan*—Effect of.*

A will which authorized a widow of the testator to adopt contained a prohibition against the adoption of "any son of the relations of her family" (*Khandanirishtadaran*). He gave express directions to give a preference in adoption, to his own brother's son. She adopted her brother's daughter's son.

Held that the word *Khandan* was used by the testator in a general sense as applying to blood relations of the ladies named that the boy adopted fell within the prohibited clause and that the adoption was invalid. The view of the High Court that in the case of a Hindu his '*khandan*' consists of his lineal ascendants and descendants and his collaterals in the male line, and that sisters and daughters after marriage are transplanted from the family and acquired the lineage or gotra of their husbands and the adopted son is not a '*khandanirishtadar*' of the widow, was disaproved as the effect of such a construction would be to prohibit the adoption of agnates of the testator's own family. (*Lord Thankerton.*) KALAWATI DEVI *v.* DHARAM PRAKASH. **60 I.A. 90=55 All. 78=I.R. 1933 P.C. 41=142 I.C. 1=1933 A.L.J. 260=1933 M. W.N. 276=37 C.W.N. 485=35 Bom L R. 487=57 C.L.J. 237=37 L.W. 534=A.I.R. 1933 P.C. 71=64 M.L.J. 427 (P.C.).**

———*Adoption—Widow —Authority—Madras Presidency—Implied authority to adopt—When to be inferred.*

Under the Mitakshara Law prevalent in the Presidency of Madras, the authority to adopt conferred on a widow need not be express. It may be implied. But to imply such authority wherever it is desirable or to infer an authority always from the fact of a prior adoption is not permissible. No, such authority can be implied from circumstances showing that the husband would

have given such authority if he considered all the contingencies that might arise. It cannot be laid down as a rule of law that whenever a husband adopts a son and afterwards the boy dies, his widow has implied authority to adopt another boy. (*Ramesam and Stone, JJ.*) NAVANEETHAKRISHNA MARUDAPPA THEVAR *v.* COLLECTOR OF TINNEVELLY. **160 I.C. 647=8 R. M. 674=1935 M.W.N. 1001=42 L.W. 875=A.I.R. 1935 Mad. 1017=69 M.L.J. 632.**

———*Adoption—Widow—Authority—Power to adopt—Construction.*

The first plaintiff's husband left a will by which he authorised his wife to adopt a boy "whom my wife and mother may acting together select. * * * If they disagree, they shall take each a half of my entire properties absolutely."

Held, the authority should be strictly pursued, the consent or permission of the mother was a condition precedent to the exercise of the wife's power of adoption and the adoption made by the wife against the will and without the permission of the mother was invalid. The contingency of disagreement occurred as soon as the adoption was made and the vesting clause came into operation at that moment and therefore the alienations made by the mother of her share of the properties subsequent to the adoption were valid and could not be set aside by the first plaintiff. 59 M.L.J. 615 (P.C.), Foll.; 59 M.L.J 621 (P.C.) Ref. (*Sundaram Chetty, J.*) JANAKIRAMAYYA *v.* VENKATALAKSHMAMMA. **1931 M.W.N. 473.**

———*Adoption—Widow—Authority—Will expressly refusing—If amounts to implied prohibition of adoption after testator's death—Bombay School.*

A testator gave all his properties for charity if he should have no issue born of his body (which event happened). "For that reason," he continued, "I am not going to adopt a son. I am not going to give authority to make an adoption to my wife or anybody else." After his death, his wife adopted a son who claimed to succeed to the watan property which the testator was not competent to dispose.

Held, that the will only stated testator's intention not to adopt or authorize adoption, that it could not be construed as an implied prohibition against an adoption which would not prevent his dispositions in favour of charity from taking effect, and that the adoption made after his death (which in Bombay, requires no authority) was valid as regards watan property. (*Beaumont, C. J. and Broomfield, J.*) VITHAGOUDA LINGAPPA *v.* SECRETARY OF STATE. **I.R. 1932 Bom. 585=140 I.C. 242=34 Bom L.R. 818=A.I.R. 1932 Bom. 442.**

Bombay School.

See also WIDOW—AUTHORITY.

———*Adoption—Widow—Bombay School—Assent of sapindas—If necessary.*

Under the law of adoption as prevalent in the Bombay Presidency and Gujrat, consent of both the husband and the kinsmen is dispensed with 49 C. 1, Ref. (*Wort and Fazl Ali, JJ.*) JIWAN BEAS *v.* MT. INDRA KUAR. **151 I.C. 699 -7 R.P. 117=A.I.R. 1934 Pat. 260.**

———*Adoption—Widow—Bombay School—Assent of sapindes not necessary.*

In the Mahratta country of the Bombay Presidency, where the authority of the Mayukha is predominant, a Hindu widow may, though not expressly authorized by her husband, and whether he was at the time of his death separate or joint, adopt a son to him without the consent of his kinsmen or surviving coparceners. 6 Bom. 498 and 50 Bom. 468, Overr.; 5 Bom. H. C. A. C. 181 and 49 Cal. 1 Foll.; 12 M. I. A. 397 and 1 Mad. 69, Dist. (*Sir Dinshah Mulla.*) BHIMABAI *v.* GURUNATHGOUDA. **60 I.A. 25=57 Bom. 157=37 L.W. 81=1933 M.W.N. 1=56 C.L.J. 542=35 Bom L.R. 200=1933 A.L.J. 363=I.R. 1933 P.C. 1=141 I.C. 9=37 C.W.N. 210=10 O.W.N. 27=A.I.R. 1933 P.C. 1=64 M.L.J. 34 (P.C.)**

[**Rel** 35 Bom. L.R. 775 (779). **D.** 1934 N. 183 (1).]

———*Adoption—Widow—Bombay School—Extinction of coparcenery—Subsequent adoption by widow.*

An adoption by the widow of a coparcener, to be valid must be made during the subsistence of the coparcenery. If she adopts after the extinction of the coparcenery, *i. e.*, after the death of the last surviving coparcener, when the estate devolves by inheritance from him upon his heirs, the adoption is not valid. 14 Bom. 463, Ref. (*Sir Dinshah Mulla.*) BHIMABAI *v.* GURUNATHGOUDA. **60 I A. 25=57 Bom 157=37 L.W. 81=1933 M.W.N. 1=56 C.L.J. 542=35 Bom. L R. 200=1933 A.L.J. 363=I.R. 1933 P.C. 1=141 I.C. 9=37 C.W.N. 210=10 O.W.N. 27=A.I.R. 1933 P.C. 1=64 M.L J. 34 (P.C.).**

———*Adoption—Widow—Bombay School—Motive, if material—Consent of kinsmen—Necessity—Divesting of estate already vested.*

A widow in the Bombay Presidency may adopt a son to her deceased husband, although by so doing she would defeat an estate other than her own. Her power of adoption does not depend on the question of vesting or divesting of the estate. The purpose of an adoption being to secure the continuance of the line, a widow in whom the estate is not vested can make a valid adoption to her husband, when the natural son has left no son to continue the line nor a widow capable of adopting. A widow who has no authority from her husband may adopt a son to him without the consent of his kinsmen the validity of an adoption cannot be impugned on the ground that she acted from an improper motive and not with a view to confer spiritual benefit upon her husband. Her discretion is unfettered and her choice unrestricted. (*Sir Shadi Lal.*) VIJAYSINGJI CHHATRASINGJI *v.* SHIVASANGJI BHIMSANGJI **62 I.A. 161=59 Bom. 360=39 C.W.N. 682=1935 A L.J. 690=61 C.L.J. 336=7 R.P.C. 207=37 Bom.L.R. 562=42 L.W. 1=1935 A.W.R. 843=1935 O.W.N. 645=155 I.C. 493=1935 M.W.N. 534=A.I.R. 1935 P C. 95=68 M.L.J. 701 (P.C.).**

———*Adoption—Widow—Bombay School—Power to adopt.*

Under the Bombay School of Hindu Law, a widow has in herself power to adopt subject only to such restriction if any as may have been imposed upon her by her husband. (*Sir George Lowndes.*) JAGANNATH RAO DANI *v.* RAMBHAROSA. **60 I.A. 49=29 N L.R. 94=I R. 1933 P.C. 24=141 I C. 520 (2)=37 C.W N. 321=1933 M W N. 117=16 N.L.J. 50=35 Bom.L. R. 230=37 L.W. 349=57 C.L.J. 51=1933 A.L J. 486=A.I.R. 1933 P.C. 33=64 M.L.J. 142 (P.C.).**

———*Adoption—Widow—Bombay School—Power to adopt—Power of—Authority of husband.*

A widow of a Hindu governed by the Bombay School can make a valid adoption to her husband without the express authority of her husband. A wife is governed by her husband's law. (*Niyogi and Staples, A. J. Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042=8 R.N. 105=18 N.L.J. 1.**

———*Adoption—Widow—Bombay School—Rule that adoption should only be made to the last male-holder.*

With reference to the rule that an adoption can only be made to the last male owner, there is a difference in

the Bombay Presidency between the power of adoption by a widow in a joint family and that by a widow of a separated member or a person who is not a member of a joint family. The rule does not apply to co-parcenary property, as a widow in a joint family can adopt with the authority of her husband till the joint family subsists and before the death of the last surviving co-parcener leaving a widow to continue the line by adoption. In the case of a separated member, the rule that an adoption can be made to the last male-holder is modified so as to allow adoption by a mother succeeding as heir to her son who died without leaving any heir except herself or an adoption by a grandmother where the estate has passed directly from her husband to her grandson and has devolved on her directly from the grandson without the intervention of any other heir. The rule has been applied even in cases where the adopting widow has got the estate vested in her by inheritance as in the case of a grandmother, when the estate has not gone directly from her husband to the grandson and come back directly to her or a step-mother or a widow of a gotraja sapinda but the adoption was held invalid on the ground that the power of adoption came to an end and became incapable of being revived. The question in each case is whether the power of adoption is in abeyance or merely suspended or is at an end and has become incapable of being revived. 22 B. 551 (F.B.); 23 B. 327; 28 Bom.L.R. 1188; *ibid.* 1254; *ibid.* 1446; 30 Bom.L.R. 859; 19 B. 331; 44 B. 207, 48 B. 559; 26 B. 526; 52 B. 393; 32 B. 499, 33 Bom.L.R. 1225, Ref. (*Patkar and Tyabji, JJ.*) SHIVAPPA RUDRAPPA *v.* RUDRAVA CHANBASAPPA. **57 Bom. 1=142 I C. 164=I R. 1933 Bom. 181=34 Bom.L.R. 539=A.I.R. 1932 Bom. 410.**

Capacity to take.

———*Adoption—Widow—Capacity to take—Widow being minor—Requisites of valid adoption.*

The primary requisite for the validity of an adoption by a minor widow is that she is of an age to comprehend the nature of the adoption as to its spiritual import and as to its effect on her civil rights, and her act is the result of a deliberate choice based upon complete information respecting her rights and the disinterested advice of her elders. Neither the spiritual benefit nor the legal rights and obligation can flow from an adoption unless there is gift and acceptance. Among all classes, gift and acceptance are indispensable to the validity of the adoption. The essence of the adoption lies in the secular act of giving and receiving; if so, the adoption must be judged in the light of those legal considerations, which arise in case of any secular form of gift. Acceptance of the gift of a person inviolves the surrender of civil rights by the accepting widow. It is therefore analogous to the acceptance of an onerous gift and if such a gift is accepted by one who is a minor, a heavy burden lies on the person who derives benefit from it, of proving that the minor was fully informed of the nature and effect of the acceptance of the gift and that the act was the result of a spontaneous desire or the disinterested advice of elders. The widow when she made the adoption was 15 years 11 months 5 days old. The widow's father who acted as her guardian executed the adoption deed but was indebted to the father of the adopted son. He was however withheld from the witness-box. The widow's mother-in-law was all along challenging the adoption. The father of the adopted boy was appointed his guardian under somewhat suspicious circumstances.

Held, that under the circumstances the adoption could not be held to be valid. 7 Bom.H,C.R. App. 1; 13 Mad. 214; 40 Mad. 925; 46 B. 307; A.I.R. 1922 Bom. 218; 6 Cal. 381 (P.C.); 39 B. 441 (P.C.); 24 Bom 218; 12 Bom. H.C.R. 281; 9 Mad. 391 and 1 Mad. 69, Ref.; 15 W.R. 548 and 1 Cal. 289, Dist. (*Niyogi, A. J. C.*) BHIMRAO *v.* MT. GANGABAI. **27 N.L R. 291=I.R. 1931 Nag. 81=131 I.C. 417=A.I.R. 1931 Nag. 74.**

———*Adoption—Widow—Capacity to take—Widow of tender years.*

In the case of an adoption by an infant Hindu widow, (in the present case, fifteen years old) the conscience of the Court has to be satisfied that she was acting as a free agent, and further that she understood and was made to realize what difference it would make to her position from a temporal point of view if she made the adoption. That the widow has reached the age of discretion and attained sufficient maturity of understanding is not sufficient for the plaintiff setting up an adoption by her to discharge the onus resting on him. 7 B H.C.R. App. 1, 24 Bom.L.R. 726, Foll (*Rangnekar, J.*) MALLANGOUDA *v.* DUNDAPAGOUDA. **I.R. 1932 Bom. 515=139 I.C. 602=34 Bom.L R. 1009=A.I.R. 1932 Bom. 529.**

Duty to adopt.

———*Widow—Duty to adopty—Husband's direction, if compulsory.*

That adoption is not a compulsory religious duty is obvious from the fact that a widow is, notwithstanding her husband's directions, not bound to adopt. 7 M.I.A. 169, 7 Cal. 288 and 33 I.A. 55, Rel. on. (*Niyogi, A.J. C.*) BHIMRAO *v.* MT. GANGABAI **27 N.L.R. 291=I.R. 1931 Nag. 81=131 I.C. 417=A.I.R. 1931 Nag. 74.**

Motive.

———*Adoption—Widow—Motive.*

An adoption made by a widow, if it is otherwise valid, is not rendered invalid by the mere fact that it is made with a wrong motive or spitefully and maliciously so many years after her husband's death to defeat the claim of the reversioners. (*Niyogi and Staples, A. J. Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C 1042=8 R.N. 105=18 N.L.J. 1.**

———*Adoption—Widow—Motive—How far relevant.*

In the absence of authority by the husband to adopt the consent of the nearest sapinda will be enough to uphold an adoption. If the consent of the sapinda was obtained under circumstances which show that he gave the consent with a view to benefit himself or if the facts show that the widow was making the adoption to defeat the interest of this or that sapinda and not to promote the spiritual welfare of her husband, then the motives of the parties are said to be 'corrupt and capricious' and the adoption is invalid. 12 M.I.A. 397; 1 Mad. 174; 51 Mad. 893 (F.B.), Foll. (*Madhavan Nair and Jackson, JJ.*) KANDASWAMI GOUNDAR *v.* CHINNAMMAL. **6 I.R. (Mad.) 254=146 I C. 346=1933 M.W.N. 335=37 L.W. 729=A.I.R. 1933 Mad. 540 (2).**

Power to adopt.

———*Adoption—Widow—Power to adopt—Absence of sapindas.*

Even where consent of sapindas is necessary for a widow to adopt, the widow has the same unrestricted power to adopt, as her husband had in his lifetime, if there are no sapindas living at the time of adoption. (*Das and Dunkley, JJ.*) APPALSWAMY *v.* MOOSALAYA. **12 Rang. 22=147 I.C. 716=6 R.R. 172=A. I.R. 1933 Rang. 334.**

———*Adoption—Widow—Power to adopt—Death of co-widow in whose favour she has released her interest.*

A widow after the death of her senior co-widow is competent to make an adoption to her husband even

HINDU LAW—Adoption—Widow.

after releasing her interest in the properties in favour of that co-widow. There is no self effacement in such release. (*Sundaram Chetty and Pandrang Rao, JJ.*) SOLAIMALAI KONE *v.* SOKKAMMAL. **153 I.C. 1049 = 7 R.M. 397 = 40 L.W. 559 = A.I.R. 1934 Mad. 567 = 67 M.L.J. 618.**

———*Adoption—Widow—Power to adopt—Determination of last surviving owner leaving widow—Authority of another widow in the joint family—Adoption by junior widow subsequent to adoption by senior widow—Validity of.*

In the event of the last surviving owner of the property leaving a widow to continue the line by means of an adoption, the power of adoption of any other widow in the joint family is extinguished and will never afterwards be revived. (Case law and the principles underlying them analysed and exhustively discussed by Tyabji J.) Chennappa and Rudrappa were undivided brothers. Chennappa died on 5th January, 1914, leaving instructions with Rudrappa to give his senior widow *R* a share of the properties and authorizing *R* to adopt a son. Rudrappa died on April, 26, having in pursuance of his brother's instructions made an oral will giving his own widow *K* a half-share and the widows of his deceased *R* (the senior) and *N* (the junior) the other half. On May 13, 1914, all the widows came together and divided the properties; *K* took one-half and *R* and *N* one fourth each. On May 15, *K* adopted *S* and *R* adopted *C* and on May 20, *N* adopted *M*. In a suit by *S* impeaching the validity of the adoptions of *C* and *M*,

Held, (*i*) that the instructions left by Chennappa did not amount to a partition as they contained no clear and unequivocal intimation to that effect;

(*ii*) that though the power to adopt given to *R* could have been exercised by her during the lifetime of Rudrappa, it could not be exercised after Rudrappa left a widow to continue the line. The fact that the adoption by *R* divested the estate of none else except herself did not validate the adoption because "the test as to the validity of an adoption is not merely whether the adoption does or does not divest the estate of any other person but also involves the question whether the power of adoption of the widow is merely suspended or is at an end and has become incapable of being revived." The power to adopt having, in the present case, come to an end on the death of Rudrappa, was incapable of being revived. (46 C. 749, Doubt.).

(*iii*) That the adoption of *M* was invalid in any event as an adoption made by a junior widow after the senior widow had made an adoption to their husband ;

(*iv*) That though the partition as between the widows would not be binding on the plaintiff (*S*), the oral will of Rudrappa which, on a proper construction, conferred an absolute estate on the widows of Chennappa, was binding on the plaintiff as having been made by his father prior to his adoption. (*Patkar and Tyabji, JJ.*) SHIVAPPA RUDRAPPA *v.* RUDRAVA CHANBASAPPA. **57 Bom. 1 = 142 I.C. 164 = I.R. 1933 Bom. 181 = 34 Bom.L.R. 539 = A.I.R. 1932 Bom. 410.**

———*Adoption—Widow—Power to adopt—Divesting of estate already vested.*

In a joint Hindu family which has ceased to exist, a widow who succeeds direct to the last male holder retains her power of adoption in tact; but if she succeeds on the termination of an intermediate estate, her power of adoption comes to an end as soon as the estate vests in the immediate heir other than herself. An adoption by such a widow is invalid and cannot operate to divest the heir of the last surviving coparcener who has succeeded already to the full ownership of the property.

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(*Grille, Offg. J.C.*) MST. KASHI *v.* GOPALDAS. **159 I.C. 84 = 8 R.N. 117 = 18 N.L.J. 81.**

———*Adoption—Widow—Power to adopt—Divesting of estate already vested—Validity.*

One *Bh.* had three sons *B*, *S* and *T*; the father and sons formed a joint Hindu family. *T* died first without leaving any heir. Subsequently *B* died leaving a widow. Thereafter *Bh.* died and still later *S* died leaving his widow. The widow of *B* (the elder son) having adopted a son.

Held, that the adoption was invalid as the estate which had already vested in *S's* widow could not be divested. (*Shingne, J.*) VISHNU BABU SHINDE *v.* LAKSHMI SAKHARAM SHINDE. **158 I.C. 1085 = 8 R.B. 154 = 37 Bom.L.R. 193 = A.I.R. 1935 Bom. 182.**

———*Adoption—Widow—Power to adopt—Extinction—Disruption of joint family.*

The extinction of the joint family does not put an end to the widow's power to adopt. The true test of the principle defining the limit to the exercise of the widow's power to adopt is to be sought not in the rule of divesting or otherwise of an estate but in the rule that requires the continuance of a person to perform all the requisite religious services. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) PANYAM *v.* RAMALAKSHMAMMA. **55 Mad. 581 = I.R. 1932 Mad. 520 = 138 I.C. 170 = 1932 M.W.N. 23 = 35 L.W. 182 = A.I.R. 1932 Mad. 227 = 62 M.L.J. 187.**

[D. 56 B. 619 (652)]

———*Adoption—Widow—Power to adopt—Extinguishment.*

Where a Hindu dies leaving a widow and a son and that son dies leaving his own widow, the former widow has no power to make a valid adoption on the death or re marriage of the second widow. (*Pollock, A.J.C.*) VITHOBA *v.* AMRITA. **150 I.C. 1032 = 7 R.N. 44 = 17 N.L.J. 57 = A.I.R. 1934 Nag. 183 (1).**

———*Adoption—Widow—Power to adopt — Second adoption after death of first adoptee—Competency.*

A widow's authority to adopt is not extinguished by the mere fact that her first adopted son attained ceremonial competence before death; the power of adoption under the husband's authority is not exhausted at the death of the son first adopted by the widow A.I.R. 1933 P.C. 155, Foll. (*Guha and Lodge, JJ.*) SASANKA BHUSAN CHOWDHURY *v.* GOPI BALLAV MONDAL. **159 I.C. 437 = 8 R.C. 313 = A.I.R. 1935 Cal. 716.**

———*Adoption—Widow—Power to adopt—Termination of.*

In construing a document it is the duty of the Court to ascertain intention from the words used in a document and the surrounding circumstances are to be looked into merely with the object of ascertaining the real intention of the executant from the words used by him. Where a husband had authorized his wife aged 13 or 14 to adopt in accordance with the opinion or advice of his father who died later.

Held, that the power to adopt ceased to have effect after the father's death. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727 = 149 I.C. 809 = 6 R.P. 652 = 14 Pat.L.T. 258 = A.I.R. 1933 Pat. 250.**

———*Adoption—Widow—Power to adopt—Termination—Death of son wifeless and issueless—Revival of power—Test of validity of adoption.*

The vesting of the property on the death of the last holder in some one other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, by inheritance, cannot

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be in itself the test of the continuance or extinction of the power of adoption. No doubt the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end, but the mere birth of a son does not do so. This is not based upon a question of vesting or divesting of property. The true reason is that where the duty of providing for the continuance of the line for spiritual purposes which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson or to the son's widow, the mother's power is gone. But if the son dies sonless and unmarried, the duty will still be upon the mother, and the power in her which was necessarily suspended during the son's lifetime will revive. Meaning of the expression "full legal capacity to continue the line" considered.

Quaere:—Whether in order to bring the mother's power of adoption to an end, it is essential that the son's widow should herself be clothed with the power of adoption. (*Sir George Lowndes.*) AMARENDRA MAN SINGH *v.* SANATAN SINGH. **60 I.A. 242=12 Pat. 642=37 C.W.N. 938=14 Pat L.T. 399=38 L. W. 1=1933 M.W.N. 769=57 C.L.J. 593=1933 A. L.J 710=35 Bom.L.R. 859=I.R. 1933 P.C. 168= 143 I.C. 441=A.I.R. 1933 P.C. 155=65 M.L J. 203 (P.C.).**

[R. 1934 N. 183 (1). **F.** 62 I.A. 161=68 M.L.J. 707 (P.C.).]

Validity.

———*Adoption —Widow —Validity —Adoption by, after estate vests in another.*

An adoption made by the widow of a sole surviving coparcener of a Hindu family after the estate has become vested in a step-brother who was separated from the last male holder is not invalid. But it will not have the effect of divesting the estate already vested in the step-brother. (*Broomfield and Macklin, JJ.*) SHANKAR *v* RAMRAO. **60 Bom. 89=8 R B. 226= 159 I.C. 697=37 Bom.L R. 786=A.I.R. 1935 Bom. 427.**

———*Adoption—Widow—Validity—Arrangement for discharge of widow's debts—If invalidates adoption made with sapinda's consent.*

An adoption made by a Hindu widow is not invalidated by reason of the fact that the widow making the adoption stipulates that the adopted son should discharge her debts or that an arrangement is entered into between the adopting widow and the adopted son by which the widow takes a portion of the estate for discharging the debts and the adopted son takes the rest of the estate freed from the obligation to pay the debts. (*Sir George Lowndes.*) KRISHNAYYA RAO *v.* SURYA RAO BAHADUR GARU. **157 I C. 881=37 Bom.L R. 852=1935 O W.N. 1055=8 R.P C. 53= 40 C.W.N. 1=1935 M.W.N. 1216=42 L.W. 267=A. I.R. 1935 P.C 190=69 M.L.J. 388 (P.C.).**

———*Adoption—Widow—Validity—Junior widow*

An adoption made by a junior widow after the senior widow had made an adoption to their husband is invalid. (*Patkar and Tyabji, JJ.*) SHIVAPPA RUDRAPPA *v.* RUDRAVA CHANBASAPPA. **57 Bom. 1= 142 I.C. 164=I.R. 1933 Bom. 181=34 Bom.L.R. 539=A.I.R. 1932 Bom. 410.**

Miscellaneous.

———*Adoption—Miscellaneous—Change of name of adoptee—Necessity.*

Where the adopter and adoptee are Sagotris it is not necessary either under law or custom to change the name of the adoptee at adoption. The change in name is undoubtedly necessary if they belong to different

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Gotras. (*Subhedar and Pollock, A.J.C.*) MT. CHUNNIBAI *v.* GIRDHARI LAL. **30 N.L.R. 62=150 I.C. 1007=7 R.N. 33=16 N.L.J. 319=A.I.R. 1934 Nag. 1.**

Alienation.

See (1) HINDU LAW—DAUGHTER—ALIENATION.
(2) ,, GUARDIANSHIP.
(3) ,, JOINT FAMILY.
(4) ,, RELIGIOUS ENDOWMENT.
(5) ,, WIDOW.

Ancestral business.

See HINDU LAW—(1) JOINT FAMILY.
(2) WIDOW.

Antecedent debt.

See HINDU LAW—(1) DEBTS.
(2) JOINT FAMILY — ALIENATION.

Applicability.

———*Applicability— Aryasamaj faith — If distinct from Hinduism.*

Prima facie it would seem to appear that Aryasamaj faith cannot be regarded as a new religion entirely distinct from Hinduism in the same way as Christianity or Islam would be. (*Sulaiman, C.J. and Bennet, J.*) GANGA SARAN SINGH *v.* MT. SIRTAJI KUER. **160 I.C. 321=8 R.A. 592 (2)=1935 A.L.J. 1174=1935 A.W.R. 1111=A.I.R. 1935 All. 924.**

———Hindu Law—Applicability—Bedi Khatries of Montgomery in the Punjab—If governed by Hindu Law or custom—Exclusion of daughter by collaterals. *See* CUSTOM (PUNJAB)—APPLICABILITY. **A.I.R. 1935 Lah. 434.**

———*Applicability—Converts—Native Christians in Mysore—Adoption—If allowable.*

The Indian Succession Act (X of 1865) does not apply to Indian Christians resident in the Mysore State, as all Native Christians residing in the Mysore State have been exempted from the operation of the Act by a notification of 1868. Therefore, the Hindu Law, except so far as it may be inconsistent with their new religion, generally will continue to apply to Native Christians resident in Mysore. Adoption is not in any way inconsistent with the tenets of the Christian faith and therefore the presumption is that the Hindu Law of adoption is applicable to the Native Christians of Mysore. (*Shankaranarayana Rao and A S.R. Chari, JJ.*) KIRITAPPA *v.* ARALAPPA. **13 Mys.L.J. 302=40 Mys.H. C.R. 267.**

———*Applicability - Cutchi Memons.*

In respect of succession and inheritances only and no further, the Cutchi Memons are governed by the Hindu Law. 47 Bom. 369 and 41 Bom. 181, Foll. (*Dorasawami Iyer, C. J. and Rama Rao, J.*) ELIA SAIT *v.* DHARANAYYA. **10 Mys L.J. 33.**

———*Applicability*—Gaur *Brahmins of village Badli Delhi Province.*

Gaur Brahmins of village Badli, Delhi Province, are governed by their personal law, namely, Hindu Law and not by customary law. (*Addison, J.*) MT. BHAGWANI *v.* SITA RAM. **I R. 1931 Lah. 926=134 I.C. 302=32 P.L.R. 284=A I.R. 1931 Lah. 491.**

[R. 33 P.L.R. 257 (259)]

———*Applicability—Gosavis.*

Gosavis are included in the category of Wanaprasthas. Some of them have adopted the custom of marriage and Gharbari Gosavis form a part of this sect. They are governed by the ordinary laws of inheritance under Hindu law unless custom is proved to the contrary. (*Jeevan Yar Jung Bahadur and Biseshwarnath, JJ.*) GANESHGEER *v.* PARVATHI BAI. **142 I.C. 70.**

HINDU LAW—Applicability.

———*Applicability—Halai Memons of Kathiawar.*

The Halai Memons of Kathiawar are governed by the Hindu Law in respect of succession and inheritance. 43 Bom. 647 and 47 Bom. 146, Ref. (*Das, J.*) AISHA BEE BEE *v.* NOOR MAHOMED. **10 Rang. 461 = I.R. 1932 Rang. 218 = 140 I.C. 143 = A.I.R. 1932 Rang. 179.**

———*Applicability— Halai Memons of Kathiawar settled at Nadiad in Kaira District—Law as to succession and wills.*

Halai Memons hailing from Morvi in Kathiawar and settled in Nadiad in the Kaira District are governed, in matters of inheritance and succession and in the making of wills, by the Hindu Law and not by the Mahomedan Law. (*Murphy and Wadia, JJ.*) ADAMBHAI *v.* ALLARAKHIA. **159 I.C. 199 = 8 R.B. 170 = 37 Bom L.R. 686 = A.I R. 1935 Bom. 417.**

———*Applicability—Hindu inheriting property from Mahomedan father—Property, if ancestral.*

Where the father is a Hindu, the Hindu Law applies to the nature of the property inherited by him from his Mahomedan father and this would be ancestral property in which his Hindu sons would have a vested right. Even if one of the sons is a Mahomedan his rights are preserved by Caste Disabilities Removal Act (XXI of 1850). The fact that some of the Hindu sons remain joint with their father does not exclude the separated son if the separation takes place after he acquires a vested interest in his share by reason of the death of his grandfather. (*Wild, J. C. and Aston, A.J. C.*) SHAMSUDDIN *v.* CHATOMAL. **I.R. 1931 Sind 139 = 134 I.C. 395 = A.I.R. 1931 Sind 143.**

———*Applicability—Jains.*

Jains are governed by Hindu Law except in so far as such Law is varied by custom. (*Staples, A. J. C.*) SUGANDHABHAI *v.* KESARBAI. **141 I.C. 182 = I.R. 1933 Nag. 44 = 15 N.L J. 51 = A.I.R. 1932 Nag. 162**

———*Applicability—Jains.*

Jains are governed by Hindu Law, except in so far as a custom to the contrary may be established by cogent evidence (Case-law referred.) (*Tek Chand and Monroe, JJ.*) MT. LADO *v.* BANARSI DAS. **14 Lah. 95 = I.R. 1932 Lah. 611 = 139 I.C. 721 - 33 P.L.R. 801 = A.I.R. 1932 Lah. 546.**

———*Applicability* — Jati Vaishnava — *Change in religion if effected.*

By becoming a *Jati Vaishnava*, a Hindu does not change his religion; he is still a believer in all the deities of the Hindu pantheon, though he worships one of them more than any other. The real test as to whether a *Vaishnava* ceases to be a Hindu and is incapable of inheriting to a Hindu ancestor is to be found in the applicability to his case of the Caste Disabilities Removal Act of 1850. (*Suhrawardy and Graham, JJ.*) NALINAKSHA MAJHI *v.* RAJANI KANTO DAS. **58 Cal. 1392 = 54 C.L.J. 61 = 134 I.C. 1272 = I.R. 1932 Cal. 56 = 35 C W.N. 726 = A.I.R. 1931 Cal. 741.**

———*Applicability—Jats of Delhi—Law applicable— —Agricultural custom—Adoption by widow of orphan of different gotra—Validity.*

Hindu Jats of the Delhi district are presumably governed by the Customary Law and not by the Hindu Law. It is not correct to say that the application of Customary Law is limited to agricultural village communities among the Jats. Customary Law presumably applies to every Jat of the district. According to the Customary Law applicable to the Hindu Jats of Delhi, an orphan can be validly adopted ; as also a person of different gotra from that of the person adopting. The fact that the *riwaj-i-am* contains an entry to the effect

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that the parties should be of the same gotra does not make the adoption invalid, because the statement in the entry is only a recommendation. (*Lord Thankerton.*) BASANT SINGH *v.* BRIJ RAJ SARAN SINGH. **62 I.A. 180 = 57 All. 494 = 37 P.L.R. 614 = 16 Pat.L.T. 669 = 37 Bom. L.R. 805 = 1935 M.W.N. 768 = 156 I.C. 864 = 1935 O.W N. 759 = 1935 A.W.R. 879 = 8 R.P.C. 4 = 1935 A.L.J. 847 = 39 C.W.N. 1057 = 42 L.W. 231 = A.I.R. 1935 P.C. 132 = 69 M.L.J. 225 (P.C.).**

———*Applicability—Kayasthas—Not a Sudra subcaste.*

A Kayastha cannot be called a Sudra simply because at sometime or another either his father or his ancestor or ancestors chose to call themselves by the epithet "Das". A.I.R. 1927 Pat. 145, Rel. on. (*Aston, A. J. C.*) RATANCHAND REWACHAND *v.* ANANDBAI. **6 I.R. (Sind) 41—145 I.C. 777 = A.I.R. 1933 Sind 53.**

———*Applicability—Law applicable to a Hindu— Special custom—Burden of proof—Kurmi Mahtons of Chota Nagpur.*

Where the plaintiffs, Kurmi Mahtons of Chota Nagpur, admitted that though they were aboriginals, they had become Hindus, had adopted the Hindu religion and were governed by the Hindu Law of succession and inheritance and also alleged a special custom under which the daughters and their sons were excluded from succession.

Held, once a party is shown to be a Hindu, it will be presumed that he is governed by the Hindu Law of succession and the burden of proving a special custom at variance with the Hindu Law is on the party setting up such a custom. 51 M. I. Foll. (*Jwala Prasad and Kulwant Sahay, JJ.*) GANESH MAHTO *v.* SHIB CHARAN MAHATA. **11 Pat. 139 = I.R 1931 Pat. 325 = 133 I.C. 165 = 12 Pat.L.T. 513 = A.I.R. 1931 Pat. 305.**

———*Applicability—Migration— Law applicable — Presumption.*

A Hindu migrating from his original place of residence to another must be presumed to carry his personal law with him and the members of his family would be governed by that law unless it can be shown that the emigrant renounced his personal law in favour of the *lex loci*. Such a renouncement of the personal law and the adoption of the *lex loci* has to be proved and cannot be presumed. (*Niyogi and Staples, A.J.Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042 = 8 R.N. 105 = 18 N.L.J. 1.**

———*Applicability—Migration — Persons practising same custom after migration—Presumption.*

Where persons after their migration continue to adopt customs of the place from where they have migrated, the presumption is that they are governed by the law which prevailed in their original place at the time of migration, unless they prove that they have adopted the customs obtaining in the place of migration. 46 All. 192, Ref. (*Wort and Fazl Ali, JJ.*) JIWAN BEAS *v.* MT. INDRA KUAR. **151 I.C. 699 = 7 R.P. 117 = A.I.R. 1934 Pat. 260.**

———*Applicability—Migration—Presumption.*

Where a family originally governed by the Mitakshara law migrated to another place, the presumption is that the family carried with it its laws and customs as to succession and family relations. 12 M. I. A. 81 and 50 C. 370, Ref. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859 = I.R. 1932 Cal. 540 = 138 I.C. 882 = 55 C.L.J. 205 = A.I.R. 1932 Cal. 600.**

———*Applicability—Migration—School of law—Presumption—Midnapore District—Evidence in rebuttal— Sufficiency of.*

HINDU LAW—Applicability.

A family settled in Midnapore is presumed to be governed by the Dayabhaga. Where, however, it is proved that the family was Barui by caste and migrated from the District of Balasore, the impurity of mourning lasts for ten days and Sradh is performed on the eleventh day after death. widow marriage is recognized, as amongst the Baruis of Orissa and it speaks and writes Uriya.

Held, that the evidence was sufficient in a summary enquiry such as a proceeding for guardianship contemplates, to rebut the presumption where there was nothing to indicate that the family had adopted the law of the place of migration. The family must be held to be governed by the Mitakshara. (*Mukerji and Guha, JJ.*) BANAMALI PATRA *v.* ARJUN SEN. **I.R. 1932 Cal. 688=140 I.C. 198=36 C.W.N. 769=55 C.L.J. 358=A.I.R. 1932 Cal. 730.**

———*Applicability—Mundaris of Ranchi District.*

The term 'Hindu' can safely be applied to all those who claim to be Hindus and are regarded by the society surrounding them to be Hindus. 8 M.I.A. 400, Ref. The Mundaris of Ranchi District (Bihar and Orissa) are Hindus. (*Courtney Terrell C.J. and Khaja Mahomed Noor, JJ.*) DOMAN SAHU *v.* BUKA. **I.R. 1931 Pat. 273=132 I.C. 353=12 Pat.L.T. 105=A.I.R. 1931 Pat. 198.**

———*Applicability—Nambudris of Malabar.*

The Nambudris of Malabar are governed by the Hindu Law as laid down in the Mitakshara, except so far as it is shown to have been modified by usage or custom having the force of Law. (*Madhavan Nair and Reilly, JJ.*) THATHAMANGALATH *v* KRISHNA NAMBOODRIPPAD. **57 Mad. 725=151 I.C. 49=7 R.M. 75=39 L.W. 370=A.I.R. 1934 Mad. 286=67 M.L.J. 511.**

———Applicability—Partnership—Stranger associated with joint family in trade—Governed more by Contract Act than by Hindu Law. *See* JOINT FAMILY—BUSINESS. **A.I.R. 1933 All. 311.**

———*Applicability—Punjab—Brahmans of Pandori Mehtawan of Hoshiarpur taluk, Hoshiarpur District—Law applicable regarding alienation.*

The Brahmans of Pandori Mehtawan, in the Hoshiarpur Tahsil of the Hoshiarpur District are governed by Hindu Law and not agricultural custom in matters of alienation. Principles governing applicability of customary law discussed. (*Bhide, J.*) HIRA SINGH *v.* UDHO RAM. **I.R 1931 Lah. 890 (2)=134 I.C. 122 (2)=32 P.L.R. 629=A.I.R. 1932 Lah. 57.**

———Applicability—Rajputs in Berar—Law of succession—Benares School. *See* SUCCESSION, *infra*. **30 N.L.R. 322=A.I.R. 1934 Nag. 59.**

———*Applicability—Sikhs.*

The Sikhs are presumed to follow the Hindu Law and the members of a Sikh family, even though living in a town are presumed to be a joint Hindu family. (*Coldstream and Jai Lal, JJ.*) BHAGWAN SINGH & CO. *v.* BAKHSHI RAM. **149 I.C 556=6 R.L. 705=A.I.R. 1933 Lah. 494.**

———*Applicability—Sikhs.*

In the absence of any proof of any custom, Sikhs are governed by Hindu Law. (*Bhide and Din Mahomed, JJ.*) SOHAN LAL *v.* ISHAR SINGH. **16 Lah. 320=155 I.C. 255=7 R.L. 666=A.I.R. 1934 Lah. 800.**

Ascetic.

———*Ascetic—Asceticism not* per se *civil death—Proof of renunciation necessary.*

In order that the adoption of asceticism may operate as civil death and have the effect of opening the succession to his property, it is necessary to show absolute abandonment by him of all secular property and a complete and final withdrawal from earthly affairs. The mere fact that he has gone through the necessary ceremonies, by which he became a *sanyasi*, is no proof of renunciation of worldly affairs, especially in a case where before becoming a *sanyasi*, he executed a will which was to take effect from the date of his death and not from the date of his renunciation and which provided that during his lifetime he would retain control of his property. (*Baker, J.*) PARSHOTTAM DAHYABHAI *v.* BESAIBHAI CHUTHABHAI. **I.R 1932 Bom. 556=139 I.C. 809=34 Bom.L.R. 852=A.I.R. 1932 Bom. 459.**

HINDU LAW—Civil death.

Benami.

———Benami—Property in name of wife—Presumption of benami. *See* HINDU LAW—MARRIAGE. **A.I.R. 1932 Cal. 829.**

———*Benami—Property standing in wife's name—Presumption—Burden of proof.*

In the case of Hindu family, there is no presumption that what stands in the name of the wife belongs to the husband. The husband has to make out that the source of the purchase-money for the property was his own fund and the amounts advanced under the debt bonds were his, just as any one who sets up a case of benami has to prove it by satisfactory evidence. In so doing, he has to rebut the initial presumption in her favour ordinarily arising from the admitted fact of the documents standing in her own name. (*Curgenven and Sundaram Chetty, JJ.*) PERAMATHAL *v.* CHINNAPPAYAN. **1933 M.W.N. 474.**

Business.

See HINDU LAW:
(1) JOINT FAMILY.
(2) WIDOW.

Caste.

———*Caste—Person claiming to be of regenerate class—Burden of proof—Tests to be applied.*

When a Hindu claims to belong to one of the regenerate classes, the burden is incumbent on him to substantiate his plea by evidence. The mere fact therefore that a person styled himself as a Maratha Deshmukh or bore the surname of Chavhan would by no means be conclusive to show that he was a Kshatriya. The tests for determining the question are: (1) the consciousness of the caste; (2) its customs, and (3) the acceptance of that consciousness by the other castes. (*Niyogi, A.J.C.*) MT. JIJIBAI *v.* ZABU. **30 N.L.R 18=150 I.C. 679=7 R.N. 21=A.I.R. 1933 Nag 274.**

———*Castes—Sudras—Lodhas.*

Lodhas are Sudras. (*Oakden, S.M.*) BHAGWAN *v.* JANGALIA. **15 R. D. 247.**

Charity.

See HINDU LAW:
(1) RELIGIOUS ENDOWMENT — DEDICATION and (2) WIDOW—ALIENATION.

Civil death.

See also HINDU LAW—ASCETIC.

———*Civil death—What amounts to—Renunciation.*

Renunciation in order to amount to civil death must be a complete and final withdrawal from earthly affairs. A person who gives up all connection with worldly affairs and all right to property, but who subsequently resiles from that attitude and returns to live with the family cannot be held to have renounced the world or to be deemed civilly dead. A man does not become civilly dead merely because he leaves his family and property. It is necessary that he should enter into a religious order, so as to make it certain that he will not change his mind and return to his family. There is no order open to a Sudra. (*Beaumont, C.J. and Barlee, JJ.*) KRISHNAJI SHIVAJI *v* HANMARADDI. **58 Bom. 536.**

HINDU LAW—Civil death.

=153 I.C. 800=7 R.B. 265=36 Bom.L.R. 814=A.I.R. 1934 Bom. 385.

———Civil death—Adoption—Fiction of Civil death in Natural family and new birth in the adoptive family. *See* HINDU LAW—ADOPTION—EFFECT—OF. **56 Bom. 619=A.I.R. 1933 Bom. 654.**

Conversion.

———*Conversion—Convert to Christianity—Law applicable in matters of succession.*

A Hindu convert to Christianity, who dies a Christian is governed by the Indian Succession Act in matters of succession and cannot elect to be governed by the Hindu Law of inheritance. (*Raza and Smith, JJ.*) DWARKA NATH SINGH *v.* RAJ RANI. **I.R. 1931 Oudh 408=134 I.C. 872=8 O.W.N. 1198=A.I.R. 1932 Oudh 85.**

———*Conversion—Hindu convert to Christianity—Marriage with Christian—Reconversion to Hinduism and marriage with Hindu—Validity—Sense of the community.*

A Hindu by birth became a convert to Christianity and married a Christian woman, but subsequently ceased to live with her as husband and wife. He got himself reconverted to Hinduism and married another woman who too was a convert to Hinduism. There was evidence of prevalence of unions among the members of the community to which he belonged without much regard to their religious beliefs or opinions and conversion and reconversion among them were a simple affair. There was no evidence that any particular expiatory ceremonies are observed amongst them. The Smrithi writers have prescribed no particular expiatory ceremonies in the matter of changing their religion. The community regarded the reconverted couple as husband and wife and their issue as legitimate.

Held, that in view of these circumstances and having regard to the sense of the community which was prepared to treat the couple as man and wife, the couple must be regarded as having become Hindus at the time of the marriage, which must be regarded as valid. (*Varadachariar, J.*) GURUSAMI NADAR *v.* IRULAPPA KONAR. **150 I.C. 708=7 R.M. 603=40 L.W. 502=1934 M.W.N. 1197=A.I.R. 1934 Mad. 630=67 M.L.J. 389.**

———*Conversion—Law applicable—Right of manager to contract debts—Whether continues after conversion.*

Upon the conversion of a Hindu to Christianity the Hindu Law ceases to have any continuing obligatory force upon the convert and he may either renounce the old law or abide by it. It is a question of fact whether he continues to abide by those rules. The right of the managing member of a joint family to contract debts or to alienate joint family property so as to bind the other members cannot be applied to a family of non-Hindus, though the right already vested in a member before the conversion cannot be taken away by reason of such conversion. Where plaintiff sued defendants 1 and 4 on a promissory note executed by defendants 2 and 3 who were the sons of defendant 1 and it was stated that though Christians the 1st defendant and his sons had been living jointly as members of one family but not as members of a Hindu joint family but that it was not known when the members of the family became converts and there was no proof that the family continued to adopt the incidents of a Hindu joint family.

Held, that the law applicable to Hindu joint family was not applicable so as to render the non-executants liable on the note. (*Sundaram Chetty and Pandurang Row, JJ.*) MUHAMMAD ALIYAR ROWTHER *v.* GNANA AMMAL. **150 I.C. 91=6 R.M. 684=39 L.W. 551=A.I.R. 1934 Mad. 327=66 M.L.J. 671.**

HINDU LAW—Daughter.

———Conversion — Native Christians in Mysore—Adoption if allowable. *See* HINDU LAW—APPLICABILITY. **40 Mys.H.C.R. 267.**

Custom.

See also HINDU LAW:
(1) IMPARTIBLE ESTATE.
(2) SUCCESSION.

———*Custom—Bhag property in Broach—Exclusion of daughter—Burden of proof.*

According to the special custom of succession to bhagdari property, the daughters and sisters are excluded from succession by male pitrais. This custom is so universal in the Broach district that it is incumbent on the party who alleges that the custom does not exist in a particular village, to prove it. 5 B. 482, Foll. (*Patkar and Barlee, JJ.*) BAI MANCHA *v.* TRIBHOVAN LALLUBHAI. **I.R. 1932 Bom. 459=139 I.C. 28=34 Bom.L.R. 385=A.I.R. 1932 Bom. 434.**

———*Custom—Onus.*

When a party relies on a custom as establishing an exception to the general law, the burden is upon him to establish the custom. The custom proved must be both ancient and invariable, and the evidence by which it is established must be clear and unambiguous. (*Beaumont, C.J. and Baker, J.*) SUNDRABAI HANMANTRAO *v.* HANMANT GURUNATH. **56 Bom. 298=I.R. 1932 Bom. 582=140 I.C. 235=34 Bom.L.R. 802=A.I.R. 1932 Bom 398.**

———*Custom—Succession—Collaterals at the time of widow's death.*

The custom based on the principles of Hindu Law gives the succession to the collaterals at the time of the widow's death and not at the time of the death of her husband. 4 O.W.N. 770 and 26 O.C. 223, Foll. (*Bisheshwar Nath and Nanavutty, JJ.*) TAFAZZUL HUSAIN *v.* BAKHSHISH HUSAIN. **141 I.C. 670=I.R. 1933 Oudh 69=9 O.W.N. 1171.**

——— *Custom — Succession — Reversioners excluding daughters—Burden of proof.*

Under the Hindu Law clear proof of usage will outweigh the written text of the law. It is open to a party to prove and allege a tribal or family custom modifying the Hindu Law as regards reversioners excluding daughters and their issue from succession, It is for the party alleging such a custom to prove the same. (*Addison and Agha Haidar, JJ.*) LADHA RAM *v.* MT. VIRAN BAI. **I.R. 1932 Lah. 583=139 I.C. 375=33 P.L.R. 424=A.I.R. 1932 Lah. 452.**

Dancing Girl.

See HINDU LAW.
(1) ADOPTION.
(2) SUCCESSION.

Daughter.

See HINDU LAW.
(1) ADOPTION.
(2) SUCCESSION.
(3) STRIDHANAM.

———*Daughter — Alienation — Necessity — Mother's sradh.*

A daughter inheriting her father's property may alienate a portion of it for defraying the expenses of her mother's sradh. 36 Cal. 753, Foll. (*Suhrawardy and Jack, JJ.*) NABIN CHANDRA CHAKRAVARTHI *v.* SHONA MALA GHOSH. **I.R. 1931 Cal. 696=133 I.C. 568=35 C.W.N. 279=A.I.R. 1932 Cal. 25.**

———*Daughter—Alienation—Necessity — Son's marriage.*

A daughter of a Hindu succeeding to his property can alienate it for raising money to perform her son's marriage, her husband, *i.e.* (the boy's father) being too poor to meet the expenses. 50 M.L.J. 221 and 58 M.L.J. 127,

HINDU LAW—Daughter.

Diss (*Venkatasubba Rao, J.*) MALLAYYA *v.* BAPI REDDI. **135 I.C. 715=35 L.W. 134=I.R. 1932 Mad. 203=1931 M.W.N. 808=A.I.R. 1932 Mad. 28=62 M.L.J. 39.**

[R. 57 M. 772 (774,)]

———*Daughter—Alienation—Power to alienate joint estate.*

One of two daughters holding an estate jointly cannot alienate any part of that estate, whether there is necessity or not, so as to bind her sister or the other reversioners. (*Niamatullah and Allsop, JJ.*) CHHATTAR SINGH *v.* HAKUM KUNWAR. **1935 A. W.R. 1213=1935 R.D. 495.**

———*Daughter—Alienation—Validity of—Portion of consideration not binding—Decree.*

Where an alienation of certain properties was made by the daughter for Rs. 400 and it was found that the consideration to the extent of Rs. 75 was not binding on the estate, *held*, that the sale should be upheld but that the alienee should be directed to refund Rs. 75 which, till payment, should be charged on the properties. 49 All. 149 (P.C.), Ref. (*Madhavan Nair, J.*) SUBRAMANYA AYYAR *v.* KUPPUSWAMI AYYAR. **1933 M.W.N. 182.**

———*Daughter—Debts—Payment of debts of mother—Doctrine of pious obligation.*

Under the Hindu Law there is no pious obligation on the part of the daughter to discharge the debts of her deceased mother. (*Sulaiman and Young, JJ.*) MAKKHAN LAL *v.* MT. SARDAR KUNWAR. **I.R. 1932 All. 311=137 I.C. 193=A.I.R. 1932 All. 555.**

———*Daughter—Decree against—Sale in execution—Quantum of interest conveyed—Nature of debt—Relevancy of.*

Where there is no other record available except the judgment and the sale certificate which can throw light on the question whether the daughter in the proceedings against her represented the inheritance or not, it is legitimate to turn to the nature of the debt to decide what passed at the sale. 34 Mad. 188 and 51 M.L.J. 73, Foll. (*Venkatasubba Rao, J.*) MALLAYYA *v.* BAPI REDDI. **35 L.W. 134=135 I.C. 715=I.R. 1932 Mad. 203=1931 M.W.N. 808=A.I.R. 1932 Mad. 28=62 M.L.J. 39.**

———Daughter—Gift to widowed daughter—At partition equally with sons—Life interest. *See* HINDU LAW—GIFT. **69 M.L.J. 320**

———*Daughter—Right of residence—Mortgagee when protected.*

The right of residence of a Hindu daughter is a right to a provision for residence and is included in the general right of maintenance and like the right of maintenance is an equitable and not a legal right. Notice of the claim for residence is not sufficient to affect the rights of the mortgagee unless it is proved that he was not a *bona fide* mortgagee for value within the meaning of S 39. (*Rupchand and Mehta, A. J. Cs.*) TULSIDAS KESHAV DAS *v.* HANIFABAI. **26 S.L.R. 269=I.R. 1932 Sind 83=138 I.C. 655=A.I.R. 1932 Sind 162.**

Debts.

See also (1) HINDU LAW—DAUGHTER.
(2) HINDU LAW—JOINT FAMILY—ALIENATION.
(3) HINDU LAW—JOINT FAMILY—BUSINESS.
(4) HINDU LAW—JOINT FAMILY—COPARCENER.
(5) HINDU LAW — RELIGIOUS ENDOWMENT.
(6) HINDU LAW—WIDOW.
ADOPTIVE MOTHER.
ANTECEDENT DEBT.

HINDU LAW—Debts.

AVYAVAHARIKA.
DAMDUPAT.
FATHER.
GRAND FATHER.
GREAT-GRAND FATHER.
HUSBAND.
IMMORAL OR ILLEGAL DEBT. *See* FATHER, *supra*.
INTEREST.
MANAGER OF JOINT FAMILY.
MOTHER.
PRE-PARTITION DEBTS.
REVERSIONER.
RIGHTS OF CREDITOR.
TRADE DEBT.
WIDOW.

Adoptive mother.

———*Debts — Adoptive mother — Binding purpose—Onus of proof.*

Where the adoptive mother of a minor borrowed money pledging some jewels as security for the loan, in a suit instituted to enforce the liability of the minor regarding the loan, the plaintiff would have to show, besides proving the truth of the loan, that the amount was really borrowed for legal and justifiable purposes as would bind the minor and that the debt had been kept alive at the date of the suit by any payments or acknowledgments recognized by law. The fact that the lender took certain jewels as security for the loan would render it unlikely that he would have cared to make an enquiry about the necessity for the loan. When the case put forward on the plaintiff's side as regards the purposes of the loan in question had not been made out, the only conclusion was that the onus of proof which lay on him remained undischarged. (*Sundaram Chetty and Pandrang Rao, JJ.*) VALLIAPPA CHETTIAR *v.* MARUDA PANDIAN PILLAI. **152 I.C. 299=7 R.M. 210=1934 M.W.N. 1076=40 L.W. 270=A.I.R. 1934 Mad. 549=67 M.L.J. 258.**

Antecedent debt.

———*Debts—Antecedent debt — Grandfather's debt—Binding nature on grandson.*

A debt incurred by a grandfather in a Mitakshara family can be an antecedent debt as against the grandsons and is binding as such. (*Raza and Smith, JJ.*) GURU DIN SINGH *v.* RAMESHWAR BAKHSH SINGH. **142 I.C. 303=9 O.W.N. 1063=I.R. 1933 Oudh 105=A.I.R. 1933 Oudh 102.**

———*Debts—Antecedent debt—Unascertained sum of money.*

An unascertained sum of money can be an antecedent debt. 44 M. 214, Ref. (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom. 36=I.R. 1932 Bom. 323=137 I.C. 717=34 Bom.L.R. 55=A.I.R. 1932 Bom. 136.**

———*Debts—Antecedent debt—What is not — Settlement of partnership accounts—Mortgage for amount found due.*

The plaintiff and first defendant were partners. On a settlement of accounts, a sum of Rs. 3,800 was found due from the defendant who executed a mortgage bond for that amount. It was held that the debt was not an independent or antecedent debt so as to bind the sons of the first defendant, as prior to the settlement and the bond there was no relationship of debtor and creditor between the parties and although there was an interval of a few days between the entries in the day book and the execution of the bond, the whole process was a single transaction. (*Curgenven and Cornish, JJ.*) THIRUNAVUKARASU CHETTY *v.* MUTHUKRISHNAN. **1931 M.W.N. 467.**

HINDU LAW—Debts.

Avyavaharika.

———*Debts*—Avyavaharika.

The expression *avyavaharika* refers to a debt which is not supportable as valid by legal arguments and on which no right can be established in the creditor's favour in a Court of justice. 37 M. 458, Foll. (*Niyogi and Grille, A. J. Cs.*) RAJESHWAR *v.* MANGNIRAM. **I.R. 1933 Nag. 100=142 I.C. 242 (2)=29 N.L.R. 107=15 N.L.J. 159=A.I.R. 1933 Nag. 89.**

———*Debts*—Avyavaharika—*Breach of trust.*

If a person was entrusted with a box for safe custody by his brother, he stands in the position of a trustee to the latter. If he made away with the contents of the box, the liability to make good the loss is highly moral and lawful which can be enforced, on his death, against his legal representatives. It is not an *avyavaharika* debt. (*Wazir Hasan, C. J. and Raza, J.*) BRIJ NATH SHARGHA *v.* LAKSHMI NARAIN KAUL. **8 Luck. 35=I.R. 1932 Oudh 228=137 I.C. 217=9 O.W.N. 239=A.I.R. 1932 Oudh 165.**

———*Debts*—Avyavaharika—*Fine.*

A fine imposed as a result of criminal trial is an *avyavaharika* debt or a debt for a cause repugnant to good morals. (*Wazir Hasan, C. J. and Bisheshwar Nath, J.*) SAID AHMAD *v.* RAJA BARKHANDI MAHESH PRATAB NARAIN SINGH. **8 Luck. 40=I.R. 1932 Oudh 339=139 I.C. 64=9 O W.N. 253=A.I.R. 1932 Oudh 255.**

———*Debts*—Avyavaharika—*Trade debts.*

Trade debts are not *avyavaharika.*

The term *avyavaharika* has been given a variety of definitions, some of them mutually conflicting: "improper'," "not sanctioned by law or custom", "not supportable as valid by legal arguments." But the definition of the term in 32 B. 348 as "unusual" or "a debt which the father ought not as a decent and respectable man to have incurred or which can be attributable to his failings, follies or caprices" is too wide to be accepted. (Case-law discussed.) (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom. 36=I.R. 1932 Bom. 323=137 I.C. 717=34 Bom.L.R. 55=A.I.R 1932 Bom. 136.**

[R 56 B. 595 (610); F. 36 Bom. L.R. 625 (627, 628, 631.)]

Damdupat.

———*Debts—Damdupat — Rule of applicability—Original debtor a non-Hindu.*

The rule of Damdupat applies when the original debtor and his assignee at the time of the enforcement of the contract are both Hindus. The rule operates partially, that is, up to the date of assignment when the original debtor is a Hindu and the assignee a non-Hindu. The rule does not apply at all when the original debtor is a non-Hindu even though the assignee is a Hindu. 23 N. L. R. 104; 18 Bom. 227; 21 Bom. 38; 21 Bom. 85 and 35 Bom. 199, Ref. (*Niyogi. A.J.C.*) NARAYAN *v.* PURUSHOTTAM. **27 N.L.R. 144=I.R. 1931 Nag. 164=134 I.C. 676=A.I.R. 1931 Nag. 144.**

———*Debts—Damdupat—Text—Interpretation of.*

In a case governed by the rule of Damdupat, the Court cannot legally allow any interest *pendente lite* if it exceeds the principal remaining due at the date of suit The words "moolvriddhi Durgunawadhavati" in the commentary of Kulluka do not refer to the original principal but only to the principal due when the arrears of interest accrue. 20 Bom. 611 and 1 Mad.H.C.R. 5, Foll. (*Macnair. J.C. and Subhedar, A.J.C.*) MAROTIRAO *v.* MANKUEWARBAI. **27 N.L.R. 312=I.R. 1931 Nag. 146=134 I.C. 274=14 N.L.J. 109=A.I.R. 1931 Nag. 161.**

HINDU LAW—Debts.

Father.

COMMERCIAL DEBT.
DECREE AGAINST.
IMMORAL OR ILLEGAL DEBT.
INSOLVENCY of.
MORTGAGE DEBT.
PRE-PARTITION DEBT.
RIGHT OF SON TO QUESTION.
SON'S LIABILITY.
SPECULATIVE TRANSACTION.
SURETY DEBT.
TIME BARRED DEBT.

Commercial Debt.

———*Debts—Father—Commercial debts—Pious obligation of sons—Family business—Implied authority to contract debts*—Badni *transactions—Debts incurred in the course—Liability of sons.*

The manager of a joint Hindu family has an implied authority to contract debts for the ordinary purposes of the business carried on by the family, and has power to incur debts for the business in speculative (*badni*) transactions as well. Such debts cannot be said to be immoral. The pious obligation of the sons to pay off their father's debts extends to commercial debts. When speculative debts are incurred by the father in *badni* transactions, and the other members of the family are his sons, the estate is open to be taken in execution of a decree for payment of such debts, unless the debts are proved to be immoral or illegal. (*Young, C.J. and Abdul Rashid, J.*) PIRTHI SINGH JOWALA PARSHAD *v.* MAM CHAND. **16 Lah. 1077=38 P.L.R. 143=156 I C. 539=7 R.L. 916=A.I.R. 1935 Lah. 761.**

Decree against.

———*Debts—Father—Decree against—Debt incurred for personal benefit—Liability of entire coparcenery property.*

The law is clear that when the father has contracted a debt even for his own personal benefit, the creditor may obtain a money decree against the father alone, and may enforce the decree by attachment and sale of the entire co-parcenery property including the son's interest therein. 46 All. 95 (P.C.), Rel, on. (*Shadi Lal, C.J. and Walker, J.*) SARDARI LAL *v.* BHARAT NATIONAL BANK, LTD. **12 Lah. 495=130 I.C. 836 (2)=32 P.L.R. 744=A.I.R. 1931 Lah.716.**

———*Debts—Father — Decree against — Execution against entire property.*

Where the debt is not incurred for illegal or immoral purposes, the execution creditor is entitled to sell the whole of the estate in satisfaction of the judgment obtained against the father alone. The mere fact that in the proclamation of sale only the right, title and interest of the judgment-debtor are ordered to be sold would not prevent the whole interest from passing. (*Sulaiman and Young, JJ.*) SARJU PRASAD *v.* RAM SARAN LAL. **I.R. 1931 All. 536=132 I.C. 568=1931 A.L.J. 400=A.I.R. 1931 All. 541.**

———*Debts—Father—Decree against — Execution against joint family property.*

Where a simple money decree is passed against Hindu father under O. 34, R. 6, C. P. Code, the property of the joint family including the shares of the sons can be attached and sold in execution, unless it is shown that the debt in respect of which the decree was made was incurred for illegal or immoral purpose. (*Raza and Kisch, JJ.*) SHAMSHER BAHADUR SINGH *v.* SURAJ DIN. **135 I.C. 891=I.R. 1932 Oudh. 75=8 O.W.N. 1021.**

———*Debts— Father — Decree against—Execution against sons—Right of sons to impeach mortgage debt.*

HINDU LAW—Debts.

If the managing coparcener is the father and the reversioners are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt. The sons who impeach a mortgage effected by the father cannot succeed in a declaratory suit without showing that the debt of the father was tainted with immorality. 46 All. 95 (P.C.), 47 All. 122 and 116 I C. 182, Ref. (*Coldstream and Johnstone, JJ.*) MUNI LAL *v.* GIAN SINGH. **32 P.L.R. 709=134 I.C. 1120=I.R. 1932 Lah. 16=A.I.R. 1931 Lah. 717.**

———*Debts—Father—Decree against—Sons bound.*

The existence of a decree against the father which he is bound to satisfy is *prima facie* sufficient to hold that the debt is binding on the sons, in the absence of proof of illegality or immorality in the transaction leading up to it. The question, whether in a sale, held in execution of the decree against father, the whole of the estate including son's share or only the father's coparcenary interest passes to the purchaser, must be determined from the language of the execution and sale proceedings. (*Rowland, J.*) BHEKAN NATH MISSER *v.* GULAB CHAND SETH. **6 I R. (Pat.) 190=145 I.C. 570=A.I.R. 1933 Pat. 552.**

Immoral or illegal debt.

———*Debts—Father—Immoral or illegal debt—Burden of proof.*

The burden is on the son to prove that the debts were contracted for immoral purposes and that the creditors had notice of it. But proof of general immoral conduct on the part of the father is not sufficient for the purpose: the connection between the debts and the immoral habits must be definitely established 50 A. 1, Ref. (*Niyogi and Grille, A. J. Cs.*) RAJESHWAR *v.* MANGNIRAM. **I.R. 1933 Nag. 100=142 I.C. 242 (2)=29 N.L.R. 107=15 N.L J. 159=A I.R. 1933 Nag. 89.**

———*Debts—Father—Immoral or illegal debt—Burden of proof.*

The rule of law is firmly established that the onus lies on the son to prove that the debts contracted by the father where tainted with immorality. (*Rangi Lal, J.*) CHURANJI LAL *v.* OM PARKASH **35 P.L.R. 608.**

———*Debts—Father — Immoral or illegal debt—Burden of proof—Suit by sons to declare debts no binding—Application for temporary injunction—Considerations for the Court.*

In a suit by the sons for partition and declaration that the debts incurred by the father were illegal and immoral and so not binding, the sons applied for a temporary injunction to stop the sale threatened by some of the creditors. In such a suit, the burden of proving the illegal and immoral nature of the debts is on the sons and unless they make out a fairly strong *prima facie* case, they have no right to claim an injunction. It is difficult for the Court in such a case, if the application is pressed, to pass an order on the application without to a certain extent prejudging the case. (*Findlay, J.C. and Staples, A.J.C.*) VITHAL *v.* DAWOO. **127 I.C. 345=I.R. 1930 Nag. 345=A.I.R. 1931 Nag. 106.**

———*Debts—Father—Immoral or illegal debt—Burden of proof*

In a suit by Hindu sons to set aside an alienation effected by their deceased father, on the ground that the debts in respect of those transactions were incurred for immoral purposes, it is of no avail to the plaintiffs to show that their deceased parent was addicted to vicious habits, unless it be established that the particular debts which are attacked are connected with those habits and were incurred with the object of indulging in them. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) DEVENANDAN PRASAD SINGH *v.* HARIHAR PRASAD SINGH. **153 I.C. 1032=7 R.P. 392=A.I.R. 1935 Pat. 140.**

HINDU LAW—Debts.

———*Debts—Father—Immoral or illegal debt—Criminal breach of trust—Sale of family property to avoid prosecution—Binding nature.*

Where money became payable as a result of a criminal breach of a trust on the part of the father and a sale of family properties was affected for having the matter settled.

Held, that the debt was not lawful and that the sale by the father was not binding on the son. (Case law discussed. (*Bhide and Currie, JJ.*) WIDYA WANTI *v.* JAI DAYAL. **13 Lah. 356=I.R. 1932 Lah. 697=140 I.C. 220=33 P.L.R. 874=A.I.R. 1932 Lah. 541.**

———*Debts—Father—Immoral or illegal debt—Criminal misappropriation—Son's liability.*

Under Hindu Law, a son is not liable to pay the debts of his father, if the liability arises from a criminal act, *i.e.*, an act for which the father may or may not have been successfully prosecuted but which can be presumed or proved to be criminal on the evidence on record. Where a father, who being appointed a guardian of a minor's property misappropriated a sum of money, the liability being a direct consequence of an act of the father amounting to criminal misappropriation, the son would not be liable to pay the debt so incurred. 43 Bom. 612; 6 All. 234; 48 All. 9, Foll.; 16 M. 99; 31 M. 161; 31 M. 472 ; 19 M.L.J 759, Ref. to. (*Patkar and Barlee, JJ.*) BAI MANI *v.* USAFALI BHUDAR. **136 I.C. 173 (2)=I.R. 1932 Bom. 157 (2)=33 Bom L.R. 130=A.I.R. 1931 Bom. 229.**

———*Debts — Father—Immoral or illegal debt—General evidence of—Relevancy of.*

The illegality or immorality on the part of the father, when pleaded by the son, should relate to the particular transaction in question. The evidence of the father's immorality or extravagance or profligacy, without any evidence of the connection between the particular loan and the immoral expenditure, is not pertinent and relevant. 14 B. 320; 15 I.A. 99; 36 B. 68, Foll. (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom. 36=I R. 1932 Bom. 323=137 I.C. 717=34 Bom.L.R. 55=A.I.R. 1932 Bom. 136.**

———*Debts—Father—Immoral or illegal debt—Proof.*

No doubt, a presumption can be drawn that a debt has been raised for an immoral purpose, if it is proved that at the time of raising the money, the borrower was living a licentious life, beyond his means, indulging in drink and debauchery, and that at the same time, he was without any business or occupation upon which the money might legitimately have been spent. But where the evidence is too indefinite to justify a finding that the father led a licentious life and still less supports any direct connection between the alleged immorality and the loan, the loan incurred by the father must be held to be binding on the estate in the hands of the son. (*Shadi Lal, C. J. and Hilton, J.*) RAM NARAIN SINGH *v.* HARBANS SINGH. **153 I.C. 23=7 R.L. 390=35 P.L.R. 661=A I.R. 1934 Lah. 685.**

———*Debts—Father—Immoral or illegal debt—Proof*

It is incumbent on the sons to prove that the debts were incurred by the father for immoral purposes. A connexion between the debt and the alleged immorality must be proved. (*Bhide and Din Mahomed, JJ.*) SOHAN LAL *v.* ISHAR SINGH. **16 Lah. 320=155 I. C. 255=7 R.L. 666=A.I.R. 1934 Lah. 800.**

———*Debts—Father—Immoral or illegal debt—Proof of—Evidence of subsequent immorality irrelevant.*

Where an alienation by a Hindu father of ancestral property is challenged on the basis of immorality the only point relevant to such dispute is the character of

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the alienor at the time when the alienation in question was made. Any evidence relating to his alleged immorality several years after that date cannot have any bearing on the issue. Every debt of an immoral person cannot be presumed to be immoral and it is a settled proposition of Hindu Law that in order to escape liability for a particular debt of the father, the son has to establish direct connection between the debt and the immorality. (*Tek Chand and Monroe, JJ.*) MT. CHANDO *v.* RADHE SHAM. **34 P.L.R. 201=147 I.C. 63=A.I.R. 1933 Lah. 363 (2).**

———*Debts—Father—Immoral or illegal debt—Right of creditor to proceed against father's share in ancestral property.*

In a joint Hindu family, if there is a money decree against the father and if the property is ancestral, the sons can only recover their share of the property, if they prove that the debt was contracted by their father for immoral or illegal purposes. But the creditor can proceed against the father's share because the share of a coparcener can be seized and sold in execution of a decree against him for his separate debt. (*Addison, J.*) LAL CHAND NEBH RAJ *v.* JOTI MALIK. **I.R. 1931 Lah. 744 (1)=133 I.C. 120 (1)=32 P.L.R. 204=A.I.R. 1931 Lah. 312.**

———*Debts—Father—Immoral or illegal debt—Son's liability—Suit for moneys entrusted to father as Secretary of School Committee—Father guilty of criminal breach of trust—No evidence as to what portion represented his misappropriation.*

A committee of management of a school left certain moneys in the hands of its Secretary who was the head of a joint undivided Hindu family. After his death the committee sued the sons claiming to be paid from the property left to them by their father and also out of the joint family property in their hands. It was found that the father was guilty of criminal breach of trust but there was no evidence as to what part of the amount due represented his criminal misappropriation. There was however a letter written by the father before his death admitting his liability to account a certain sum named therein.

Held, that in the absence of any affirmative evidence as to the extent of the father's misappropriation, the admission contained in his letter must be taken as the extreme measure of the amount for which the sons could in the suit claim immunity and that 'with regard to the balance of the amount found due, the burden was upon the sons to show that, with respect to that liability of their father's they were not under a pious duty to discharge it. (*Lord Blanesburgh.*) TOSHANPAL SINGH *v.* DT. JUDGE OF AGRA. **61 I A. 350=7 R.P.C. 39=56 All 548=39 C.W.N. 145=16 Pat L.T. 25=60 C. L.J. 518=151 I.C. 33=11 O.W.N. 1124=40 L. W. 420=1934 A L.J. 925=4 A.W.R. 405=A.I.R. 1934 P. C. 238=68 M.L.J. 1 (P.C.).**

Insolvency of.

———*Debts—Father—Insolvency of—Sons' shares—Liability of.*

Where the debts incurred by an insolvent are not alleged to have been tainted with immorality, the shares of the sons of the insolvent in the ancestral property are liable to discharge the debts of the father although the property is ancestral. 48 All. 400; 49 Mad. 849, Rel.on. (*Staples, A.J.C.*) LALJI *v.* BANSIDAR. **147 I.C. 539=6 R.N. 126=30 N.L.R. 112=A I.R. 1933 Nag. 373**

Mortgage debt.

———*Debts—Father—Mortgage debt by father acting for himself and minor sons—Transfer by sons on attaining majority to satisfy mortgage debt—No ratification.*

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Where a father for himself and his minor sons executes a mortgage of the family property the mere fact the sons on attaining majority transfer the property for the purpose of raising funds to satisfy the entire mortgage debt does not amount to ratification of the transaction at least so much of it as was voidable at their instance, so as to estop them from putting the mortgagee to proof of legal necessity. (*Macnair, J. C. and Subhedar, A. J. C.*) MAROTIRAO *v.* MANKUWARBAI. **27 N.L R. 312=I.R. 1931 Nag. 146=134 I.C. 274=14 N.L.J. 109=A.I.R. 1931 Nag. 161.**

———*Debts—Father — Mortgage debt—Found to be invalid — Simple money decree—Execution against mortgaged property.*

In the absence of legal necessity or other justifying cause, the father cannot, no doubt, alienate or charge family property and the sons can have the alienation set aside. But the sons are bound to pay the debts of the father, unless tainted with immorality, and the holder of a simple money decree against the father can attach the entire joint family property in execution of that decree. Where, therefore, in a suit on a mortgage executed by the father, the sons successfully impeach the mortgage and a simple money decree is passed against the father, the decree is binding on the father and can be executed by attachment of the joint family property belonging to him and the sons. O. 34, R. 14, C.P. Code, is no bar to the decree-holder obtaining satisfaction of his decree by attachment and sale of the property covered by the mortgage deed. (*Niamatullah, J.*) HURMAT SINGH *v.* GANGA NARAIN. **157 I.C. 1010=8 R.A. 241=1935 A.W.R. 431=A.I.R. 1935 All. 507.**

———*Debts—Father—Mortgage debt—Mortgage decree against father—Sale of coparcenary property.*

The basic principle of the Hindu law that it is the pious duty of the sons to pay off the farher's debts if they have not been incurred for immoral purposes stands absolutely apart from the restrictions placed by Hindu Law on the power of alienation by the 'karta' of a joint Hindu family. The pious duty of the sons to pay the father's debts will override all the other considerations, which concern the general power of 'karta'. Therefore in proposition No. 2 in 1924 P.C. 50, by the word 'debt', their Lordships meant all debts and not purely unsecured money transactions. Hence in a case where the father raises a debt (whether it be secured or unsecured), the coparcenary property belonging to the joint family consisting of the father and his sons can be brought to sale for the discharge of the debt irrespective of the procedure, that is to say, whether it is sold in execution of a simple money decree or under a mortgage decree under O. 34, C.P. Code. The only objection the sons can take to it is that the debt is tainted with immorality. (*Almond, J.C. and Mir Ahmad, A.J.C.*) SHIV DAS *v.* KIRPAL SINGH. **7 R. Pesh. 21=151 I.C. 570=A.I.R. 1934 Pesh. 84.**

———*Debts — Father—Mortgage debt — Subsequent ration—Liability of family property.*

A mortgage debt which is contracted by the father and which is binding on the whole family may be realized by sale of the entire joint family property. The mere fact that later on there was a separation would not exempt the joint property from the liability to pay this debt of the father, when no provision is made at the time of the partition to pay off this debt. But the creditor is not entitled to proceed against the personal and separate properties of the sons, which have not come to them as a result of the partition. (*Sulaiman, C.J. and Thom, J.*) TRIBENI PRASAD *v.* BISHAMBHAR NATH. **149 I.C. 988=6 R.A. 1009=A.I.R. 1934 All. 212.**

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———*Debts—Father—Mortgage debt—Suit against sons and grandsons—Enforcement of decree against estate.*

In the case of a joint Hindu family, the sons, grandsons and great-grandsons are liable to pay the debts of their father, grandfather and great-grandfather, even if the debts were contracted for his own benefit, provided they were contracted neither for unlawful nor illegal purposes. The liability however is not a personal one but extends only to the extent of the joint family property. But where a suit on a mortgage executed by the father, against the sons and grandsons, was decreed only against the estate of the father in the hands of the sons but it was dismissed as against the grandsons.

Held, that the interest of the grandsons in the joint family property could not be attached and sold in execution of the decree and that S. 53, C.P. Code, could not help the decree-holder in this case, as no decree has been passed against the grandsons. (*Raza and Nanavutty, JJ.*) RAJA BAKHSH SINGH *v*, RAJA RAM. **I.R. 1933 Oudh 242 = 144 I.C. 397 = 10 O.W.N. 629 = A.I.R. 1933 Oudh 309.**

Pre-partition debt.

———*Debts—Father — Pre-partition debt — Decree against father alone after partition—Execution against sons after father's death—Right of creditor—C.P. Code, S. 53.*

(Per *Khaja Mohammad Noor and Agarwala, JJ. Wort, J.*, contra).—A creditor who obtains a decree against a Hindu father for simple money debts, in a suit to which the sons are not parties, subsequent to a partition between the father and his sons, cannot execute that decree against the properties allotted to the sons at the partition. He has to institute a suit against the sons also to enforce his claim for the money against the sons as well. S. 53, C.P. Code, does not apply to such a case. (*Wort, Khaja Mohammad Noor and Agarwala, JJ.*) ATUL KRISHNA ROY *v.* LALA NANDANJI. **14 Pat. 732 = 157 I.C. 53 = 8 R.P. 69 = 16 Pat.L.T. 393 = A.I.R. 1935 Pat. 275 (F.B.).**

———*Debts—Father — Pre-partition debt — Decree against in respect of—Son's liability—Pious obligation.*

In a suit in which the sons have been impleaded, the property which has fallen to their share in partition may be attached in execution of the decree for a pre partition debt of their father which is binding on them; but when the sons have not been so impleaded and the decree is against the father only, property allotted to them on partition cannot be proceeded against in execution of the decree against the father, though the decree had been made prior to the partition. (*Walsh, J.*) BAPIRAJU *v.* SREERAMULU. **152 I.C. 459 = 7 R.M. 231 = 40 L.W. 588 = 1934 M.W.N. 1097 = A.I.R. 1934 Mad. 662.**

———*Debts—Father—Pre-partition debt kept alive by father's acknowledgment after partition.*

The sons are liable for a debt on a promissory note executed by the father before partition and kept alive by endorsement of part-payment of the debt made by the father subsequent to partition. 41 M. 136, Dist. (*Beasley, C.J. and Bardswell, J.*) MUNISAMI GOUNDAN *v.* KUTTI MOOPAN. **56 Mad. 833 = 6 I.R. (Mad) 55 (2) = 145 I.C. 404 = 1933 M.W.N. 955 = 38 L.W. 325 = A.I.R. 1933 Mad. 708 = 65 M.L.J. 311.**

———*Debts—Father—Pre-partition debt—Liability of shares allotted to sons and wife.*

Where subsequent to a money decree passed against the father in respect of a debt incurred by him on his own behalf and not as karta of his family, a *bona fide* partition takes place, the share of the sons is liable to be attached and sold in execution of the decree by

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reason of their pious obligation to meet the debts of their father, but not the share allotted to the wife. (*Srivastava and Smith, JJ.*) PUTTU LAL *v.* PARBATI. **157 I.C. 636 = 8 R.O. 27 = 1935 O.W.N. 907 = A.I.R. 1935 Oudh 443.**

———*Father—Debts—Pre-partition debt—Partition without provision for father's debts—Right of creditor, if affected—Insolvency of father—Right of receiver to proceed against son's share.*

If the members of a joint Hindu family governed by the Mitakshara law choose to divide the family property and to separate without making any arrangement for the payment of the family debts, a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt, the debt being one which it is the pious duty of the sons and grandsons to pay. The receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition. (Case-law considered.) 50 All. 137, Overr. (*Sulaiman, A.C.J., Mukerji, Banerji, Young and Bennet, JJ.*) BANKEY LAL *v.* DURGA PRASAD. **53 All. 868 = 135 I.C. 139 = I.R. 1932 All. 27 = 1931 A.L.J. 917 = A.I.R. 1931 All. 512 (F.B.).**

[**F.** 14 L. 399 (403); **R.** 1934 A. 212 (213); **Disc.** 14 P. 732 (F.B.); **D.** 13 P. 785 (788); **Appl.** 57 A. 176 (193, 196) (F.B.).]

———*Debts—Father—Pre-partition debt — Personal debts incurred by father—Liability of sons after partition.*

Hindu sons, who have become divided from their father by partition, are liable during their father's life time for the latter's simple money debts incurred by him before partition and remaining unsatisfied. (*Wort Khaja Mohammod Noor and Agarwala, JJ.*) ATUL KRISHNA ROY *v.* LALA NANDANJI. **14 Pat. 732 = 157 I.C. 53 = 8 R. Pat. 69 = 16 Pat.L.T. 393 = A.I.R. 1935 Pat. 275 (F.B.).**

———*Debts—Father—Pre-partition debts—Pious obligation—Extent of.*

Sons are under a pious obligation to pay the pre-partition debts of the father, provided the debts are not tainted with illegality or immorality and further this pious obligation is enforceable only to the extent of the joint family property in the hands of the sons and the father's creditor is not entitled to proceed against the persons or separate properties of the sons. (*Iqbal Ahmad and Kisch, JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **55 All. 283 = 1933 A.L.J. 550 = 149 I.C. 181 = 6 R.A. 852 = A.I.R. 1933 All. 235.**

———*Debts—Father—Pre partition debt—Son's liability.*

The son is liable for the pre-partion debt of the father even after partition, but if he was not a party to the suit, a separate suit would have to be brought to enforce the liability. Where however a son takes property not by survivorship, but as heir to his father, then he will be a legal representative of the father after his death and as such, will be liable to the extent of the property received from his father, (*Staples, A.J.C.*) MAROTI VITHOBA KALAR *v.* ANRAJ KASTURCHAND MARWADI. **154 I.C. 302 = 7 R.N. 154 = A.I.R. 1935 Nag. 11.**

———*Debts—Father—Pre-partition debts—Son's liability.*

The property which is allotted to a Hindu son on a partition is, in a case overned by the Mitakshara, liable for the pre-partition debts, not illegal or immoral, of his father. 51 M. 361; 53 All. 868; 6 Luck. 597; 52 Bom. 376 and 1931 Sind 84, Foll. (*Tek Chand and Monroe, JJ.*) JAWAHAR SINGH *v.* PARDUMAN SINGH.

14 Lah. 399=I.R. 1933 Lah. 119=141 I.C. 424=34 P.L.R. 291=A.I.R. 1933 Lah. 116.

[**Disc.** 14 Pat. 732 (F.B.)]

———*Debts—Father—Pre-partition debts—Son's liability in execution.*

A creditor obtained a decree against the father and attached certain properties but the father died before the properties were sold. In execution, the son contended he was divided from the father and so his properties were not liable. The debt was incurred prior to partition, for the marriage of the son and the son had agreed in the deed of partition to discharge that debt.

Held, that the properties in the hands of the son could be proceeded against in execution. 51 M. 361 (F.B.), Ref. (*Srinivasa Iyer, J.*) SURYANARAYANA SETTY *v.* SUBBARAYA. **10 Mys.L.J. 8.**

Right of son to question.

———*Debts—Father—Right of son to question.*

A Hindu son would in general have the right of questioning the nature of the father's debt either in execution or in a separate suit and after the insertion of S. 53 in the new Code of Civil Procedure, the question can be raised by a son after decree. But it is subject to the qualification that he was in existence at or before the time when the decree against the father was passed. 13 Cal. 21 (P.C.), Ref. (*Ramesam, O. C. J. and Cornish, J.*) THAVASIMUTHU NADAR *v.* THAVASIMUTHU NADAR **135 I.C. 571=I.R. 1932 Mad. 155=1931 M.W.N. 1023=A.I.R. 1931 Mad. 824.**

Son's liability.

———*Debts—Father—Son's liability.*

The liability of the son to pay the debts of the father arises even during the lifetime of the father. 43 B. 612 and 51 I.A. 129, Foll. (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom. 36=I.R. 1932 Bom. 323=137 I.C. 717=34 Bom L.R. 55=A.I.R. 1932 Bom. 136.**

———*Debts—Father— Son's liability.*

The liability of son, grandson and great-grandson to pay the debts of their ancestors is not a personal one. (*Addison and Agha Haidar, JJ.*) DEVI DASS *v.* JADA RAM. **15 Lah. 50=147 I.C. 227=6 R.L. 368=35 P.L.R. 80=A.I.R. 1933 Lah. 857.**

———*Debts—Father—Son's liability—Adjustment of partnership account signed by father.*

In a suit based on an adjustment of a partnership account signed by the father, the sons are liable only to the extent of the joint family property and cannot be held personally liable. (*Addison and Beckett, JJ.*) BULAQI DAS *v.* LAL CHAND. **36 P.L.R. 104=155 I.C. 752=7 R.L. 769=A.I.R. 1934 Lah. 865.**

———*Debts—Father—Son's liability—Basis of.*

The liability imposed on a son, to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary, if not a salutary counter-balancing proviso, to the principle that the son from the moment of his birth acquires, along with the father an interest in joint family property. (*Iqbal Ahmad and Kisch, JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **55 All. 283=149 I.C. 181=6 R.A. 852=1933 A.L.J. 550=A.I.R. 1933 All. 235.**

———*Debts—Father—Son's liability—Creditor's right not co-extensive with father's right of alienation.*

The measure of the creditor's right, to recover the father's debts by attachment and sale of the interest of the sons in the family properties, is not the father's right to sell that interest for the payment of his debt, but is the pious obligation of the sons, which is controlled, not by the father's power to alienate that interest, but only by the conditions that the debt should not be

tainted with immorality and that it can be realized only from the joint ancestral property in the hands of the son and not from his separate property. (Case-law discussed.) (*Iqbal Ahmad and Kisch, JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **55 All. 283=149 I.C. 181=6 R.A. 852=1933 A.L.J. 530=A.I.R. 1933 All. 235.**

[**Foll.** 37 Bom. L.R. 288; **Appr.** 57 A. 176 (F.B.)]

———*Debts—Father—Son's liability—Death of father during lifetime of grandfather—Sons are liable for debts of father to extent of joint family property in their hands even though father dies during lifetime of grandfather—C.P. Code* (1908), *S.* 53.

The sons are under a pious obligation to pay their father's debt to the extent of the family property in their hands. And this obligation is not taken away simply because their father dies in the lifetime of their grandfather. Hence the sons' share can be attached and sold in execution of a decree obtained against them as representatives of their father. 48 All. 245, Diss. from 33 Bom. 39 and 13 Lah. 255, Rel. on. (*Addison and Agha Haidar, JJ.*) DEVI DASS *v.* JADA RAM. **15 Lah. 50=147 I.C. 225=6 R.L. 368=35 P.L.R. 80=A.I.R. 1933 Lah. 857.**

[**Appr.** 57 A. 176 (193) (F.B.).]

———*Debts—Father—Son's liability—Debt for purposes of family—Self acquired property of son—Liability.*

If a loan is taken by the *Karta* of a joint family for the purposes of the family, the members of the family are bound to pay the loan to the extent of the joint family property. The son has a further liability. He is liable, even if the loan be not for purposes of the family or either advanced without making proper enquiries, so long as the debt is not tainted with immorality. But in both cases, the liability is limited to the extent of the family assets in the hands of the member or the son, as the case may be. Even the son is not personally liable. A decree-holder against the father cannot therefore proceed against the self acquired property of the son unless he can show the son was himself a party to the original contract of loan or had ratified or adopted it. 10 Pat. L. T. 373, Diss from. (*Courtney-Terrell, C.J. and Khaja Mahomed Noor, J.*) SUKHDEO PRASAD NARAYAN SINGH *v.* MADHUSUDAN PRASAD NARAYAN SINGH. **10 Pat. 305=I.R. 1931 Pat. 295=132 I.C. 871=12 Pat. L.T. 75=A.I.R. 1931 Pat. 177.**

[**Diss.** 34 Bom, L.R. 941 (943); **Rel.** 12 P.L.T. 741; 13 P. 7 (9); **R.** 12 P.L.T. 613 (614)]

———*Debts—Father—Son's liability—Execution of promissory note for business purposes.*

Where the father, who was conducting a business, executed a promissory note in the firm name, and the note was subsequently sued upon.

Held, that the plaintiffs were entitled to a decree as against the undivided sons to the extent of the joint family property in their possession. (*Grille, A. J. C.*) RADHAKISAN *v.* MANOHARDAS. **I.R. 1932 Nag. 78=138 I.C. 168=15 N.L.J. 5.**

———*Debts—Father—Son's liability—Extent.*

The liability of the son under the Hindu Law in respect of a decree passed against him for his father's debts is limited to the assets of the joint family in his hands. No personal decree can be passed against the son for the father's debts. 2 Pat. L. T. 396 and 12 Pat. L. T. 75, Foll. (*Rowland, J.*) BAIJNATH PRASAD *v.* BANWARI LAL. **I.R. 1931 Pat. 448=134 I.C. 160=12 Pat. L.T. 613.**

———*Debts—Father—Son's liability—Extent and nature of.*

A son, as a member of a joint Hindu family, is liable for the debts incurred by the Karta of the family if he

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has derived benefit therefrom. Secondly, a son is liable for the debts of his father, even if he has not derived benefit therefrom on the ground of the pious obligation to pay the debts of his father, and can only resist liability if he can show that such debts were incurred for immoral purposes. But in neither case can the son be made personally liable for the debts, but only can be made liable to the extent of the estate coming into his possession. (*Courtney-Terrell, C.J. and Saunders, J.*) BISSESSOR RAM *v.* RAMAKANT DUBEY. **13 Pat. 7 = 151 I.C. 379 = 7 R. P. 81 = 15 Pat.L.T. 571 = A.I.R. 1934 Pat. 187.**

———*Debts—Father—Son's liability—If personal.*

For a debt incurred by a manager or Karta of a Joint Hindu family within his authority, the co parcenery property is liable provided that the debt was incurred for legal necessity of the family or at any rate, if the creditor makes *bona fide* inquiries at the time of advancing the loan as to the existence of the necessity. The liabiltiy of the son is somewhat larger. It is his pious duty to discharge all debts of his father, necessity or no necessity, provided they are not immoral or illegal but this duty to pay is limited to the extent of assets in his hands. No sons under the Hindu or any system of law is personally liable for his father's debts even if he had the benefit thereof, unless he was party to the contract or loan or took upon himself its personal liability. (*Macpherson and Khaja Mahomed Noor, JJ.*) BHUDARA MARWARI *v.* UDAI NARAYAN. **135 I.C. 96 = I.R. 1932 Pat. 16 = A.I R. 1932 Pat. 12 = 12 Pat.L.T. 741.**

[**Rel.** 13 P. 7 (9).]

———*Debts—Father—Son's liability—Joint family consisting of father, son and uncle—Liability of undivided share of son for father's debts.*

The son in a joint family consisting of father, son and uncle, is under a pious obligation to pay the debt incurred by the deceased father and the share of the son in the joint family, that is, his undivided interest in the family estate, can be attached and sold in order to pay the debt incurred by the father. (*Sulaiman, C. J., King and Bajpai, JJ.*) CHHOTEY LAL *v.* GANPAT RAI. **57 All. 176 = 150 I.C. 411 = 6. R.A. 1084 = 3 A. W.R. 765 = 1934 A.L.J. 483 = A.I R. 1934 All. 590 (F.B).**

———*Debts—Father—Son's liability—Joint family consisting of members other than father and son.*

Under S. 160 of the Companies Act a son is liable as a legal representative of his father as a contributory in due course of administration only to the extent of the separate property of his father, in which no other person had any interest in the lifetime of the father when the joint family is constituted by members other than father and sons. The son's share in joint family property is not liable under the doctrine of pious obligation as the doctrine applies in cases where the family consists of only father and sons. Extent of son's liability for father's debts under varying circumstances discussed. (*Mukerji. A.C.J. and Young, J.*) U. P. OIL MILLS *v.* JAMNA PRASAD. **55 All. 417 = I.R. 1933 All. 329 = 143 I.C. 762 = 1933 A.L J.233 = A.I.R. 1933 All. 334.**

[**Diss. Appr.** 57 A. 176 (207) (F.B).]

———*Debts—Father—Son's liability—Minor sons—Existence of grandfather manager as bar.*

The interest of the minor grandsons is not liable for the personal debt of the father when their grandfather is alive and is the manager of the estate and represents them to the outside world. A.I.R. 1924 P. C. 50, Foll.; A.I.R. 1917 P.C. 61, Ref. (*Sulaiman and Young, JJ.*) AJODHIA PRASAD *v.* DATA RAM. **I.R. 1931 All. 225 = 1931 A.L.J. 104 = 130 I.C. 1 = A.I.R. 1931 All. 131.**

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———*Debts—Father—Son's liability—Partition.*

The sons cannot escape their liability for the debts of the father either by claiming or effecting a partition. 43 C. 1041; 79 I.C. 884, Ref. (*Findlay, J.C. and Staples, A.J.C.*) VITHAL *v.* DAWOO. **I.R. 1930 Nag. 345 = 127 I.C. 345 = A.I.R. 1931 Nag. 106.**

———*Debts—Father—Son's liability—Pious obligation—Scope of.*

Every Hindu son is under a religious obligation to discharge his father's debts, provided they are not illegal or immoral, irrespective of the fact whether the father is or is not the manager of the joint family or whether the joint family is or is not composed of persons other than the father and the sons. A.I.R. 1931 All. 512 (F.B.) and A.I.R. 1933 All. 235, Rel. on. (*Curgenven and Sundaram Chetty, JJ.*) VIRAYYA *v.* PARTHASARATHY APPA RAO. **57 Mad. 190 = 149 I. C. 188 = 6 R.M. 609 = 1933 M.W.N. 821 = 38 L.W. 436 = A.I.R. 1933 Mad. 690 = 65 M.L.J. 417.**

[**F.** 57 A. 176 (199, 204) (F.B).]

———*Debts—Father—Son's liability—Pious obligation of son—Nature and extent of liability—Rights of creditor.*

A Hindu son is under a pious obligation to pay his father's debts which are not tainted with illegality or immorality. It is a duty which arises even in the father's lifetime and is incumbent not only on the son and grandson, but also on the great-grandson, and can be enforced. As long as a father remains undivided, a creditor can proceed against the interest of the son in the joint family property for the personal debts of the father not contracted for an illegal or immoral purpose. He can, during the father's lifetime, enforce his claim by a decree against the entire family property. A subsequent suit can be maintained against the sons, if they have not been impleaded in the previous suit against the father in respect of the same debt. The son's liability is, however, not a personal liability. It is limited to the son who is joint with the father and it is limited to his interest in the co-parcenary property, and it subsists so long as the liability of the father subsists. It would cease on the debt becoming time barred against the father. It is not a joint or a joint and several liability as understood in English Law. At the same time a suit cannot be filed against the son alone. The pious obligation of the son also extends to commercial debts of the father which are valid and binding on the father, even though the trade may have been started by the father. But a Hindu son is not under any liability to pay his father's debts which are of a character falling within one or other of the exceptions recognized by the ancient smrities; that is, he is not compellable to pay "sums due by the father for spirituous liquors, for losses at play, for promises made without any consideration, or under the influence of lust or wrath, or sums for which he is a surety or for an unpaid fine or an unpaid toll," or for any other debt which comes under the expression "*Avyavaharika*". (*Wadia, J.*) MULCHAND HEMRAJ *v.* JAIRAM DAS CHATURBHUJ. **37 Bom.L.R. 288 = 159 I.C. 911 = 8 R.B. 232 = A.I.R. 1935 Bom. 287.**

———*Debts—Father—Son's liability—Plea of necessity not proved—No alternative plea of enquiry put forward by creditor—Relief not open on that basis in second appeal.*

Where in a suit for partition by a son against the father and his creditor, the creditor had only pleaded that the debt was binding as having been expended for necessary purposes and that plea was held not proved, he cannot in second appeal be allowed to support the binding nature of the debt by reason of having made due enquiry or the pious obligation of the sons, because

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that would involve questions of fact not tried by the lower Courts, the question of due enquiry in the former case, and that of illegality or immorality of the decree in the latter. (*Curgenven, J.*) THAYAMMAL *v.* SANKARANARAYANA PILLAI. **6 I.R. (Mad.) 276=146 I. C. 535=1933 M.W.N. 159=31 L.W. 734=A.I.R. 1933 Mad. 836.**

———*Debts—Father—Son's liability—Provident fund amount paid to son on death of father—Provident Funds Act (XIX of 1925), Ss. 3 (2) and 4 (1).*

The provident fund amount which stood to the credit of the deceased judgment-debtor at the time of his decease and which, on his decease, was paid over to his minor son as his dependant, cannot be deemed to have devolved on the son by right of inheritance. It vests by statute. It cannot therefore be regarded as the assets of the deceased depositor in the hands of his son and cannot be proceeded against for the realisation of a decree debt due by the father. 46 C. 962, Foll. (*Sundaram Chetty and Pakenham Walsh, JJ.*) THAJ MAHOMED SAIB *v.* BALAJI SINGH. **57 Mad. 440=39 L.W. 186=148 I.C. 491=6 R.M. 493=A.I.R. 1934 Mad. 173=1933 M.W.N. 1473=66 M.L.J. 207.**

——— *Debts—Father—Son's liability—Provision made at partition.*

If at the time of the partition there is an honest division of the net assets only, after making full provision for the payment of all the just debts of the father, it is difficult to hold that the sons have not discharged their pious obligation. If the sons have provided for the payment, it ought to be as good as their actual discharge. There being no charge or lien on account of the simple debts, it would be against all principles of equity, justice and good conscience and certainly not authorized by any known Hindu Law text, if the sons were to be called upon to pay the debts a second time. (*Sulaiman, A. C. J., Mukerji, Banerji, Young and Bennet JJ.*) BANKEY LAL *v.* DURGA PRASAD. **53 All. 868=135 I.C. 139=I.R. 1932 All. 27=1931 A. L.J. 917=A.I.R. 1931 All. 512 (F.B.).**

———*Debts—Father—Son's liability—Scope of.*

Every Hindu son is under a pious obligation to discharge his father's debts which are neither illegal nor immoral, irrespective of the fact whether the joint family is or is not composed of persons other than the father and sons, and irrespective of the fact whether the father is or is not the manager of the joint family. (*Iqbal Ahmad and Kisch, JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **56 All. 283=149 I.C. 181=6 R.A. 852=1933 A.L.J. 550=A.I.R. 1933 All. 235.**

Speculative transaction.

———*Debts—Father—Speculative transaction.*

Where a Hindu father engaged himself with another to finance a litigation carried on by the latter and to share in the profits in the event of success but eventually suffered loss thereby, the transaction is purely speculative and cannot bind the joint family or its members. 1932 A.L.J. 714 (P.C.) and 1932 A.L.J. 895 (F.B.), Rel. (*Bennet and Baipai, JJ.*) NAND KISHORE *v.* KUNJ BEHARI LAL. **6 I.R. (All.) 162=145 I.C. 756 =1933 A.L.J. 85=A.I.R. 1933 All. 303.**

———*Debts—Father—Speculative transaction—Liability of son.*

Where by entering into house transactions, the father loses and incurs debts, howsoever the transactions may be characterised as speculative, they cannot be brought within the meaning of an illegal or immoral debt. It follows that the debt is a burden on the ancestral estate, the discharge of which cannot be evaded by the son even during father's lifetime. (*Fraser, J.C.*) PARKASH LAL *v.* BASANT LAL. **A.I.R. 1935 Pesh. 152.**

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Surety debt.

———*Debts—Father—Surety debt for appearance or confidence—Liability of sons.*

Under the Mitakshara the liability of the surety himself exists for the payment of the debts, where the surety is for appearance, for confidence or for payment; the liability of the son exists in the case of surety for payment, but the liability of the grandsons for the payment of the debt incurred as surety does not exist. But if the surety for appearance or for confidence had bound himself after taking pledge, then his sons also must pay the debt incurred by becoming surety, from the property taken in pledge. 28 Bom. 408, Expl. and Diss. from. (Texts discussed.) (*Sulaiman, C. J. and Rachhpal Singh, J.*) DWARKA DAS *v.* KISHAN DAS. **55 All. 675=147 I C. 1048=6 R.A. 603=1933 A.L.J. 1459 =A.I.R. 1933 All. 587.**

———*Debts—Father—Surety debt—Binding nature.*

It is settled law in the Allahabad High Court that ordinarily a son is liable for the surety debt of his father unless it is shown that the debt is tainted with immorality (*Pullan and Niamatullah, JJ.*) TULSHI PRASHAD *v.* DIP PRAKASH. **I R. 1931 All 529 (2)= 53 All. 695=132 I C. 561 (2)=1931 A.L.J. 559= A.I.R. 1931 All. 631.**

———*Debts—Father—Surety debt—Father standing surety for judgment-debtor—Liability of sons.*

A Hindu father executed a surety bond undertaking that a judgment-debtor for whom he stood surety would file an insolvency petition within one month.

Held, the undertaking amount to a guarantee for confidence or honesty, and that the sons were not liable under the bond. (*Beasley, C. J. and King, J.*) LAKSHMINARAYANA *v.* HANUMANTHA RAO. **58 Mad. 375=154 I.C. 431=7 R M. 426=1935 M.W. N. 4=41 L.W. 25=A.I.R. 1935 Mad. 144=68 M.L. J. 528.**

———*Debts—Father—Surety debt—Hypothecation of family property—Validity.*

A debt incurred personally by a father in a joint Hindu family for being surety for payment of money, as distinguished from a debt for being surety for appearance or for honesty of another, is binding under the Hindu Law upon the sons, but a mere hypothecation of the joint family property for the purposes of securing a debt cannot be enforced against the joint family property unless it can be shown in some manner that the hypothecation was for legal necessity or for antecedent debt. Where, therefore, in an appeal filed by a certain person, the father executes a security bond hypothecating the family property for costs that might be awarded against him, the hypothecation is invalid and cannot be enforced against the son. (*King, C. J. and Zia-ul-Hasan, J.*) SATROHAN SINGH *v.* UMADUTT. **157 I.C. 663=8 R.O. 41=1935 O.W.N. 936=A.I.R. 1935 Oudh 455.**

———*Debts—Father—Surety debts—Liability of sons.*

Hindu sons are liable for the debts incurred by their father on standing surety to make good the payment of money lent to another person. (*Murphy and Sen, JJ.*) SHAMRAO KESHAV *v.* SHANTARAM. **158 I.C. 1059= 8 R.B. 150=37 Bom.L.R. 123=A.I.R. 1935 Bom. 174.**

———*Debts—Father—Surety debts—Liability of sons.*

Of the four classes of surety-debts referred to by Vrihaspati, while a son is liable to pay debts contracted by a father on account of his standing surety for payment of money lent or for delivery of goods, he is not bound to pay debts incurred by father by being surety for the appearance or for the honesty of another. 23 Bom. 454; 26 All. 611; 4 Pat. L. J. 309; 86 I. C. 791,

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Ref. to; 39 Cal. 862, Dist. (*Fazl Ali and James, JJ.*) GOVINDA CHANDRA DAS *v.* HAYAGRIBA UPADHAYA. **13 Pat.L.T. 473=10 Pat. 94=138 I.C. 414=I.R.1932 Pat. 181=A.I.R. 1932 Pat. 162.**

———*Debts—Father—Surety debt—Liability of sons.*

Under the Mitakshara Law, a son is bound by the obligation incurred by a father for surety debt for payment, though the debt is not one for necessity or family benefit. (*Srivastava and Zia-ul-Hasan, JJ.*) MALAK CHAND *v.* HIRA LAL. **157 I.C. 945=8 R.O. 47=1935 O.W.N. 1005=A.I.R. 1935 Oudh 510.**

———*Debts—Father—Surety debts of father—Son's liability.*

If the surety is merely a surety for appearance of the judgment-debtor, the sons are not liable under Hindu Law and the fact that the judgment-debtor is dead will be an added reason for their release from debt of their father. But if the surety is one for payment of the debt itself, the death of the judgment-debtor is immaterial aind the sons would be liable. (*Wort, J.*) DHIR NARAIN CHAND *v.* SHIVA SAHAY CHAUDHURY. **154 I.C. 858=7 R.P. 490=A.I.R 1935 Pat. 127.**

———*Debts—Father—Surety debts—Surety for judgment-debtor filing insolvency petition—Son's liability.*

A surety debt, which is not either immoral or illegal, is one which the sons are bound to pay unless it is one for honesty or appearance and the obligation undertaken that the judgment-debtor would file an insolvency petition being outside any of the four undertakings enumerated in the texts, namely, for appearance, for confidence, for payment and for delivering the assets of the debtor, should be held as one binding on the sons. (*Pakenham Walsh, J.*) HANUMANTHA RAO *v.* VENKATAKRISHNAYYA. **6 I.R. (Mad.) 297=146 I. C. 634=38 L.W. 653=A.I.R. 1933 Mad. 817=65 M L.J. 609.**

Time-barred debt.

———*Debts—Father—Time-barred debts acknowledged by father—Son's liability.*

The sons are under a pious obligation to pay the time-barred debts acknowledged by their fathers. A. I. R. 1924 All. 551, Foll. (*Iqbal Ahmad and Kisch, JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **55 All. 283 =1933 A.L.J. 550=149 I.C. 181=6 R.A. 852=A.I. R. 1933 All. 235.**

———*Debts—Father—Time-barred debt by—Suit against son—Limitation.*

If, on the date of suit, a suit against the Hindu father on a promissory note executed by him would have been barred, *a fortiori* it is barred as against the son. 33 M. 308; 5 Pat. 746 and 23 M. 292, Foll.; 23 All. 206, Not foll. (*Beaumont, C.J. and Murphy, J.*) LAKSHMAN *v.* MAHABLESHWAR. **135 I C. 804=I.R. 1932 Bom. 116=33 Bom.L.R. 1234=A.I.R. 1931 Bom. 542.**

Grand father.

———*Debts—Grandfather—Decree—Execution against family property with grandsons.*

A decree passed against the estate of *D*, the deceased grandfather of the defendants for a promissory note executed by him, can be executed against the joint family property in the hands of the grandsons as legal representatives of the deceased *D*. (*Rangnekar, J.*) CHAMPAKLAL *v.* RAYACHAND. **34 Bom.L.R. 1005=141 I.C. 509 (2)=I.R. 1933 Bom. 106=A.I.R. 1932 Bom. 522.**

———*Debts—Grandfather—Execution against joint family manager—Other members if bound.*

Where in respect of a debt contracted by the grandfather, which was not shown to be illegal or immoral, execution was taken out against the manager of the joint family.

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Held, that the execution proceeding was binding on the other members. (*Raza and Smith, JJ.*) GURU DIN SINGH *v.* RAMESHWAR BAKHSH SINGH. **9 O. W.N. 1063=142 I.C. 303=I.R. 1933 Oudh 105=A. I.R. 1933 Oudh 102.**

———Debts—Grandfather—Grandson's liability not personal. *See* DEBTS—FATHER. **A.I.R. 1933 Lah. 857.**

———*Debts—Grandfather—Partition of joint family property—Execution decree—Liability of joint family property in the hands of grandson.*

After partition of joint family property between *X* and his grandson *Y*, plaintiff brought a suit against a firm of which *X* was member and obtained a decree for recovery of debt against *X*. The debt was neither illegal nor immoral. In the suit *Y* also was attempted to be held liable as a partner in the firm but his name was afterwards struck off from the list of partners. After *X* died, plaintiff applied for execution against *Y* as legal representative and sought to attach property that had come to *Y* at partition.

Held, that, notwithstanding the partition, the joint family property which came into the hands of *Y* continued to be liable for the debt of *X*. 51 M. 361; 52 B. 376, Rel. on.

Held, further, that dismissal of suit against *Y* qua partner in the firm was no bar to his being made liable in execution proceedings as legal representative of the deceased judgment-debtor. (*Rupchand and Milne, A.J.Cs.*) RADHA KRISHIN SOLARAM *v.* JAMANDAS RADHOMAL. **25 S.L.R. 374=I R. 1931 Sind 130=134 I.C. 386=A.I.R. 1931 Sind 84.**

———*Debts—Grandfather—Pious obligation of grandson.*

The grandson is under a pious duty to discharge the debts of his father and if in proceedings in which the infant grandson was well represented by the other older members of the family, the properties of the joint family were brought to sale in execution of a decree for such debts, the interest of the grandson in the joint family property must be deemed to have passed out of the joint family under the sale and he cannot recover these properties unless he can show that the debts were contracted for immoral purposes and the alienee had notice of the same. (*Doraswami Iyer, C.J. and Srinivasa Iyer, J.*) LANKE HANUMANTHIAH *v.* RAMAYYA. **9 Mys. L.J. 455.**

———*Debts—Grandfather—Renewal of barred debts—Liability of grandsons.*

It is open to a Hindu father or grandfather to pass a promissory note for a time barred debt, and such a note constitutes a binding contract under S. 25 (3) of the Contract Act which can be enforced against him and after his death against his sons or grandsons. (*Rangnekar, J.*) CHAMPAKLAL *v* RAYACHAND. **141 I.C. 509 (2)=I.R. 1933 Bom. 106=34 Bom.L.R. 1005=A I.R. 1932 Bom. 522.**

———*Debts—Grandfather—Surety debts—Liability of grandson.*

Grandson is not liable for a surety debt of his grandfather, unless the grandfather has received consideration for the debt. (*Almond, J. C.*) LYALLPUR BANK, LTD. *v.* MEHR CHAND. **153 I C. 78=7 R. Pesh. 66—A.I.R. 1934 Pesh. 132.**

Great grandfather.

———Debts — Great-grandfather — Great grandson's liability not personal. *See* DEBTS—FATHER. **A.I.R. 1933 Lah. 857.**

———*Debts—Great-grandfather—Liability of great-grandsons.*

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The great-grandsons of a Hindu are liable under a contract made by their great grandfather; in this respect there is no difference between the grandsons and great-grandsons. (*Khaja Mahomed Noor and Saunders, JJ.*) RAMJI DAS *v.* MAHAMAYA PRASAD SINGH. **161 I.C. 478=8 R.P. 452=16 Pat.L.T. 789=A.I.R. 1936 Pat. 158.**

Husband.

———Debts—Husband—Duty of widow to pay out of income—Limits—Mortgage to pay off interest—Validity. *See* HINDU LAW—WIDOW — ALIENATION. **A.I.R. 1932 Mad. 257.**

———*Debts—Husband—Payment from out of estate—Widow's right being subsidiary.*

A creditor, who has a decree against the assets of a deceased Hindu, can attach and sell the property in execution although that would have the effect of depriving the widow of future profits 19 All 235, Ref. (*Boys and Young, JJ.*) MAJHLI DULAIYA *v.* MUNNA LAL. **I.R. 1932 All. 636=140 I.C. 292=1932 A.L.J. 562=A.I.R. 1932 All. 571.**

———*Debts—Husband—Powers of widow—Not bound to discharge husband's debt from income.*

There is no rule of law that it is the duty of the widow to discharge the debt of her deceased husband from the income of her property. 18 I.C. 953, Rel. on. (*Madhavan, Nair, J.*) RAMASAMY PADAYACHY *v.* THIRUVENGADA PADAYACHY. **6 I.R. (Mad.) 64=145 I.C. 407=A.I.R. 1933 Mad. 163.**

———*Debts—Husband—Right of widow's maintenance—Subject to payment of husband's debts—Debts of other co parceners—Distinction.*

When the husband of a widow claiming a right of maintenance or residence, makes an alienation of his property or incurs debt, his widow is not entitled to claim maintenance out of the property transferred or attached in execution of a decree, unless such property has already been charged with her maintenance. Debts contracted by a Hindu take precedence over the maintenance of his widow as a charge on the estate. Therefore a purchaser of property sold to discharge debts of a husband has a good title against a widow who seeks to charge the estate with her maintenace (unless this has been already done) or who claims a right of residence therein. The case is however different if the debts are those of another co-parcener such as a son or brother of the widow's deceased husband. In that case the widow would be entitled to enforce her right of residence against property sold to pay off the debts, unless it were proved that they had been incurred for family necessity. (*Addison, J.*) JAMIAT RAI *v.* MT. MALAN. **13 Lah. 41=33 P.L.R. 311=I.R. 1931 Lah. 734=133 I.C. 62=A.I.R. 1931 Lah. 718.**

[**Rel.** 36 P.L.R. 75 (76).]

———*Debts—Husband—Suretyship debts—Surety by husband for honesty of another—Liability of widow.*

The test to determine whether the suretyship is for payment or for honesty is whether the act gives rise to the liability of a civil nature on the one hand or criminal or tortious on the other. Surety for the loss which arises from misconduct, namely, dishonesty of the servant cannot imply a civil liability on the part of the surety to compensate for the loss and therefore not a surety of payment. Any liability incurred by the surety in consequence of dishonesty of the principal debtor (in this case misappropriation of his master's money) cannot therefore be enforced against his widow. (Case-law referred.) (*Niyogi, A.J.C.*) SADASHEO KRISHNARAO *v.* SADASHIV RAMCHANDRA. **I.R. 1933 Nag. 198=144 I.C. 54 (2)=A.I.R. 1933 Nag. 162.**

———Debts—Husband—Widow not bound to discharge out of the income of his estate. *See* HINDU LAW—

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WIDOW—ALIENATION. **1931 M.W.N. 969.**

Interest.

———*Debts—Interest—Father's debt—High rate of interest—Necessity for—Onus—Relief to son.*

Per *Patkar, J.*—The antecedent debt of the father occupies the same place as necessity in the case of an alienation by the father of joint family property. If the antecedent debt does not carry compound interest at quarterly rests, the question as to the power of the father to alienate joint family property not only to the extent of the antecedent debt but also to the extent of compound interest with annual rests will resolve itself into the question whether it was necessary for the father to stipulate for compound interest with annual rests, while encumbering the joint family property for an antecedent debt. So to this limited extent the question of necessity falls to be considered. The onus is on the lender to prove that the necessity demanded borrowing on such terms. In the absence of evidence that the money could not be raised at less interest and if it appears that the interest charged is in excess of commercial rates, the lender must be considered not to have discharged the onus. In such a case, the Court has the power to relieve the joint estate from the burden of excessive rate of interest. (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom. 36=I.R. 1932 Bom. 323=137 I.C. 717=34 Bom.L.R. 55=A.I.R. 1932 Bom. 136.**

Manager of joint family.

———*Debts—Manager of joint family — Partition without provision to pay binding debts—Right of creditor—Insolvency of principal members—Right of receiver.*

Held by the *Full Bench.*—Where a simple money debt binding on the entire family remains unpaid and the members of the family enter into a partition without making any provision for the payment of the family debt, the creditor may enforce payment of his debt by proceeding against properties received by partition by the several members of the family. It is open to the receiver in the case of insolvency of the principal members of the family to seize the property received by the other members of the family not declared insolvent, to pay the family debts.

Per *Mukerji, J.*—It is not open to the receiver in the case of insolvency of principal member of the family to seize the property, received by the other members of the family not declared insolvent, to pay the family debts. The receiver may proceed by suit in the proper Court for establishment of the liability of the non-insolvent members and on recovering a decree may proceed by way of execution. (*Sulaiman, A. C. J., Mukerji, Banerji, Young and Bennet, JJ.*) BANKEY LAL *v.* DURGA PRASAD. **53 All. 868=135 I.C. 139=I.R. 1932 All. 27=1931 A.L.J. 917=A.I.R. 1931 All. 512 (F. B.).**

[**Appl.** 57 A. 176 (F.B.). **Disc.** 16 P.L.T. 393 (F.B.) **R.** 1934 A. 212.]

Mother.

———*Debts—Mother — Debt incurred for funeral expense of father—Biding nature.*

A debt incurred by the mother for performing the funeral obsequies of the father is binding on the son. (*Bisheshwar Nath and Nanavutty, JJ.*) BECHU SINGH *v.* BALDEO PRASAD. **6 I.R. (Oudh) 25=145 I.C. 180=10 O.W.N. 188=A.I.R. 1933 Oudh 132.**

Pre-partition debt.

See HINDU LAW—DEBTS—(1) FATHER.
(2) GRANDFATHER.
(3) MANAGER OF JOINT FAMILY.

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Reversioner.

———Debts—Reversioner—Funeral and Sradh expenses of widow of last male-holder. *See* HINDU LAW—REVERSIONERS—LIABILITY. **A.I.R. 1935 All. 698 (F.B.).**

Rights of creditor.

———*Debts—Rights of creditor—Priority over right of maintenance of wife and children.*

The debts contracted by a Hindu governed by the Mitakshara take precedence over the right of maintenance of his wife or minor children. (*Tek Chand and Monroe, JJ.*) JAWAHAR SINGH *v.* PARDUMAN SINGH. **14 Lah. 399=I.R. 1933 Lah. 119=141 I.C. 424=34 P.L.R. 291=A.I.R. 1933 Lah. 116.**

Trade debt.

———Debts — Trade debts — Avyavaharika. *See* DEBTS—AVYAVAHARIKA, *supra*. **56 Bom. 36.**

Widow.

———*Debts—Widow—Hand-note for debt incurred for paying arrears of rent and maintenance—Liability of reversioners.*

When a widow executes a hand-note, she incurs only a personal obligation which the reversioners are not liable to discharge, although the debt might have been incurred by her for paying arrears of rent and for her maintenance. (Case law) explained. (*Saunders, J.*) BARAMDEO SINGH *v.* LAL BAHADUR SAH. **149 I.C. 152=6 R.P. 585=15 Pat.L.T. 583=A.I.R. 1934 Pat. 216.**

Family arrangement.

———*Family arrangement — Ancestral property or self-acquired property—Transfer of property to legitimate and illegitimate issue jointly.*

P, a Sudra governed by the Benares School of Hindu Law, had one legitimate daughter and seven illegitimate sons. His property was self-acquired. He executed an indenture, by which he retained some property for himself and his daughter and transferred the remaining property absolutely to his sons. By the terms of the deed, his sons personally covenanted to discharge the debts af *P* and not to make any claim on the property retained by *P* and that they as would, between themselves, continue as an undivided family, etc. The sons later on partitioned the estate and the plaintiff, a son of one of the seven illegitimate sons of *P* was born after the partition and sued for a declaration that the intenture was binding on the parties thereto, that they had no right to partition the estate and that he was entitled to a share of the properties as a coparcener.

Held, the indenture embodied a family arrangement which affected an out-and-out transfer to the sons as joint owners, it was not a gift, the terms of the covenant were inconsistent with the notion of a coparcenary, the sons were competent by mutual consent to divide the properties among themselves and the plaintiff had no right as a coparcener to impugn the partition ; or to claim any interest in those properties. (*Page, C.J. and Das, J.*) PACKIRISWAMY PILLAY *v.* DORASWAMY PILLAY. **9 Rang. 266=I.R. 1931 Rang. 209=132 I.C. 817=A.I.R. 1931 Rang. 216.**

———*Family arrangement — Binding nature of—Compromise by* de facto *guardian of minor.*

Where, disputes having arisen between the members of a family, a compromise is entered into and a certain person is admittedly a minor at the date of the compromise, if the fact remains that the compromise entered into is not in any way to the detriment of that person, the compromise so made admittedly for the benefit of the minor will not be invalid merely because it is entered into by a *de facto* guardian unless that person establishes

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that the compromise is not to her advantage. (*Harrison and Agha Haidar, JJ.*) KARAM DEVI *v.* CHUNI LAL. **I R 1933 Lah. 477=144 I.C. 465=34 P.L.R. 756=A.I.R. 1933 Lah. 419.**

———Family arrangement—Binding nature entered into by a father—Binding nature on sons. *See* HINDU LAW—JOINT FAMILY—FATHER. **A.I.R. 1931 Lah. 289 (2).**

———*Family arrangement—Binding nature—Ladies in possession of family property—Arrangement between them and reversioner—Latter agreeing to recognize adoption and obtaining consideration.*

Where a dispute arose out of the claim of certain ladies, who were in possession of family property, that a certain person could legally be adopted and a reversioner agreed to settle the dispute and accepted consideration for recognizing the adoption, he and his heirs are bound by the arrangement which is in the nature of a family arrangement. Accordingly if the reversioner happens to be the nearest reversioner when the succession opens upon the death of the ladies, he cannot set up his rights as a reversioner. (*Niamatullah and Allsop, JJ.*) CHUNNU LAL *v.* SWAMI PRASAD. **157 I.C. 14=8 R.A. 137=1935 A.L.J. 326=1935 A.W.R. 255=A.I.R. 1935 All. 418.**

———*Family arrangement—Binding nature—Necessity of registration—Unregistered arrangement acted upon for long time.*

A family arrangement if it is in fact reduced to the form of a document, requires registration if it affects property of the value of over Rs. 100 ; but where it has been fully given effect to and acted upon for a long time as a final partition of the property, the parties thereto are bound by it, even though it was not registered. 42 Cal. 801 (P.C.) and 46 Mad. 919, Rel. on. (*Addison and Bhide, JJ.*) RAM LAL *v.* MT. SITA BAI. **14 Lah. 635=I R. 1933 Lah. 462=144 I.C. 396=34 P.L.R. 741=A.I.R. 1933 Lah. 648 (2).**

———*Family arrangement—Binding nature—Stranger in possession of property as trustee and not as member of family—Arrangement entered into by.*

Where a person occupied the position of a trustee in respect of a property and had no personal interest in it,

Held, he could not claim to be a member of the family which owned the prperty in respect of which there was any dispute and that any arrangement entered into by him in respect of such property could not be described as family arrangement. (*Jai Lal and Monroe, JJ.*) LEKH RAJ *v.* MT. MEHTALE KAUR. **147 I.C. 968=6 R.L. 475=35 P.L.R. 244=A.I.R. 1933 Lah. 861.**

———*Family arrangement—Compromise of disputed rights—Test.*

"When the question arises whether the transaction was really a relinquishment of a *spes successionis* or a *bona fide* compromise of disputed rights, the best thing to do would be to look at the substance of the transaction apart altogether from any form which might have been given to it. If in substance the transaction is found to be only a dealing with the *spes successionis*, then, of course, it cannot be recognized and cannot form the basis of any binding obligation. But if, on the other hand, the substance of the transaction is found to be a *bona fide* settlement between the parties, then in spite of the fact that the same transaction might be represented in one of its aspects as dealing with *spes successionis*, it is none the less a real compromise of disputed rights." Observations in 49 M.L. J. 296, approved. Where there are disputes between parties, one setting up a will and the other denying its genuineness, it will not be consistent with authority to look upon a settlement between the parties as amounting to a transfer of right by one

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party in favour of the other, it must rather be viewed as a partial recognition on each side of the antecedent right asserted by the other. (*Varadachartar, J.*) ARUNACHALATH AMMAL *v.* ESAKKI AMMAL. **152 I.C. 341 (2)=1934 M.W.N 816=7 R.M. 213=40 L. W. 241=A.I.R. 1934 Mad. 552=67 M.L.J. 463.**

———Family arrangement—Condition —Parties to it should have an interest with property. *See* HINDU LAW—ADOPTION — ANTE-ADOPTION AGREEMENT. **58 Bom. 234=A.I.R. 1934 Bom. 121.**

———*Family arrangement—Construction—Provision for maintenance—Personal liability.*

Where a deed of family arrangement provided for payment of maintenance to some members from the "*riayasat taluqa*" as distinguished from the allowances to certain other members in respect of which, it was stated the holder of the estate would be liable, the deed does not create a personal liability on the holder in respect of the maintenance. It is only a charge on the income of the estate. If, however, the holder was in possession of the entire taluqa and enjoyed its income without paying the maintenance amounts, he must, to the extent of those amounts, be regarded as a debtor and personally liable to pay. (*Raza and Bisheshwar Nath, JJ.*) HAR NARAIN DAS *v.* BIBI RUP KUAR. **I.R. 1932 Oudh 299=138 I.C. 128=9 O.W.N. 291=A.I.R. 1932 Oudh 168.**

———*Family arrangement—Deed securing benefit to widow—Benefit not expressed to be for maintenance and not qualified by any condition—Condition of continued chastity, if may be implied.*

Two brothers forming a joint Hindu family executed a document which provided that on the death of one of the brothers, his widow should have a right to the profits in a moiety of the joint family property with an estate equivalent in some respects to that of a widow of a sonless and separated Hindu, but that the widow was to have no right either to the possession or to the partition of the property which was to remain in the possession and management of the surviving brother. There was no mention nor any indication in the document, that the estate which was intended to be granted to the widow was in lieu of maintenance. There was no clause in the document providing for the defeasance of the estate upon the happening of subsequent unchastity.

Held, that the estate granted to the widow was anomalous in character and not a maintenance grant or widow's estate and there being no express or implied condition restricting her rights in that respect, it was not open to the surviving coparcener to import a condition of continued chastity as a requisite to her rights under the deed. (*Sen and Allen, JJ.*) LAKHMI CHAND *v.* MT. ANANDI. **I.R 1933 All. 335=143 I.C. 815=A. I.R. 1933 All. 130.**

———*Family arrangement—Gift of joint family property—Award—Restrictive clauses tying property in perpetuity from generation to generation—Validity.*

Where from certain restrictive clauses in an award it appears that the intention is to have the certain properties owned by a joint Hindu family tried in perpetuity from generation to generation, the restrictive clauses are repugnant to Hindu Law as they create a perpetuity and are a clog on alienation and are not sanctioned by the provisions of Ss. 10, 13 and 14, T. P. Act. 24 Cal. 589 and 15 C W.N. 66, Dist. (*Havelwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C 694=8 R.S. 127 =A.I.R. 1935 Sind 235.**

———*Family arrangement—Partition between widow and undivided brother of deceased owner—Right of alienation to the widow—Self-acquired property of owner—Absolute estate taken by widow—Stridhan.*

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Where by a deed of partition of the self-acquired properties of the deceased owner between his widow on the one hand and his divided brother and nephew on the other, certain properties worth Rs. 1,133 with a liability to maintenance of another widow were allotted to the brother and nephew and the latter bound themselves not to dispute any alienation that might be made by the widow.

Held, that the widow took an absolute estate in the properties allotted to her, and it formed part of her stridhan and so the plaintiffs as grand-daughter of the widow were entitled to succeed to the property in preference to the reversioners. A there was a dispute between the parties as to the title relating to the properties standing in the name of the brother and nephew, and as the document evidences a family arrangement which settled the dispute between the parties, it was binding on them. When there is a settlement of a dispute or a family arrangement, it must be construed as a settlement of the dispute between the parties in whom there is presumed to be an antecedent title of some kind. 1 I.A. 157, Ref. (*Patkar, A.J.C. and Murphy, J.*) VATSALABAI *v.* VASUDEV. **136 I.C. 177=I.R. 1932 Bom. 161=33 Bom.L.R. 1483= A.I.R. 1932 Bom. 83.**

———*Family arrangement—Validity—Essentials for.*

The arrangement must be one concluded with the object of settling a *bona fide* dispute, arising out of conflicting claims to property, which was either existing at the time or was likely to arise in future. *Bona fides* is the essence of its validity and from this, it follows that there must be either a dispute or at least an apprehension of a dispute, a situation of contest which is avoided by a policy of giving and taking. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C. 882 =55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

[**F.** 55 C.L.J. 8 (15).]

———*Family arrangement—Validity of—Requisites for.*

Family arrangement is founded on the assumption that there was some antecedent title of some kind between the parties and the agreement acknowledges and defines what that title was. Such an arrangement very often follows disputes amongst the members of the family, but it is not necessary that these disputes should be necessarily founded upon just claims. All that is necessary is that each party must intend to press his claims to the property by litigation or otherwise, and the fact, that the claim of one of the parties might if pressed in a Court of Law prove unfounded, will not invalidate a family arrangement if it is otherwise brought about in good faith. (*Sen and Baipai, JJ.*) JAMNA PRASAD *v.* MT. DURGA DEI. **I.R. 1933 All. 352=144 I.C. 33= A.I.R. 1933 All. 138 (2).**

———*Family arrangement—Validity—Test of*—Bona fides.

A family arrangement to be valid and operative must be one concluded with the object of settling a *bona fide* dispute arising out of conflicting claims to property, which was either existing at the time or was likely to arise in future. *Bona fides* is the essence of its validity. There must be either a dispute or at least an apprehension of a dispute, a situation of contest which is avoided by a policy of giving and taking, or else, all transfers or surrenders will pass under a cloak of a family arrangement. (*Mukerji and Guha, JJ.*) JOGES CHANDRA KHASNAVIS *v.* PRASANNA KUMAR MAJUMDAR. **I.R. 1932 Cal. 594=139 I.C. 250=55 C.L.J. 283=A.I.R. 1932 Cal. 664.**

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Firm.

See HINDU LAW—JOINT FAMILY—BUSINESS AND TRADING PARTNERSHIP.

Gift.

———Gift—Ancestral property—Gift to son in-law—Effect—Ceases to be ancestral. *See* OUDH ESTATES ACT, SS. 13, 14 AND 15. **11 O.W.N. 1626=A.I.R. 1935 Oudh 156.**

———*Gift—Construction—Absolute estate conferred on each of daughters by opening clauses—Concluding clause that if any of daughters die issueless, surviving daughters to be absolute proprietress in equal shares—Nature of estate.*

Where the first part of a document of gift conferred an absolute estate on three daughters but the concluding clause mentioned that if any daughter out of the three dies issueless, the surviving daughters shall in equal shares be the absolute porprietresses of the properties.

Held, that the document must be read as a whole; the earlier clause, if considers by itself, would in fact confer an absolute interest, but the three daughteis were alive at the date when the deed came into operation. The donor did not intend that the property should go to another family but should continue as long as possible in the hands of her daughters and the survivors of them and it could not have been in contemplation that either of the daughters would be at liberty so to dispose of her share of the property in her lifetime as to defeat the intention expressed in the last clause. Hence they took only the life-estate. (*Courtney-Terrell, C. J. and Dhavle, J.*) MT. RAMESHWAR KUER *v.* SHIOLAL UPADHAYA. **14 Pat. 640=156 I.C. 33=7 R.P. 677=16 Pat L.T. 245=A.I.R. 1935 Pat. 401.**

———*Gift—Construction—Daughter—Words importing absolute estate—Conditions restricting alienation and succession—Validity of.*

A lease executed by a Raja in favour of his daughter ran as follows: "I grant you *mirash taluk*, by fixing Rs. 2,926 as the sardar rent thereof for your maintenance without selami, out of my affection for you. You and your sons born of your womb and the sons born of their loins in succession and the daughters born of your womb, shall continue to enjoy . . . with right of transfer by sale and gift . . . according to the terms written below". Then followed certain restrictive conditions and a defeasance clause. Subsequently the Raja executed two more deeds very much in the same terms in favour of his daughter but in these two deeds she was expressly constituted 'malik'.

Held, the word 'malik' in the last two leases and the words of gift in the first lease conferred on the daughter an absolute estate not cut down into a life-estate by any of the conditions that followed. 49 I.A. 1; 57 I. A. 291, Ref. (1) The condition that the taluks should not in any case pass to the heirs of the daughters of the grantee was an attempt to alter the legal course of succession to an absolute estate and therefore void. *Tagore case.* L.R. I.A. Supp. 47, Ref. (2) The next condition that neither the grantee not her heirs should transfer the taluks by way of gift except to a limited extent was more consistent with an attempt to restrict the powers of an absolute owner than an intention to enlarge the powers of a life-tenant. It was repugnant to the absolute estate and so void. 24 I.A. 76, Ref. (3) The condition conferring on the grantor a right of pre-emption in case the grantee should transfer the lands for consideration implied a power of sale and did not negative it and was inconsistent with the notion of an estate for life. (4) The clause providing for a reversion to the grantor in case of an indefinite failure of male issue of the grantee was void. 9 M. I. A. 123, Ref. (5)

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The condition as to the continued residence of the grantee in a particular place was not binding. (*Sir Dinshah Mulla.*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270=I.R. 1931 P.C. 296=59 Cal. 142=134 I.C. 648=34 L.W. 51=8 O.W.N. 944=33 Bom.L.R. 1257=1931 M.W.N. 989=54 C.L.J. 393=1931 A.L.J. 555=35 C.W.N. 903=A.I.R. 1931 P.C. 179=61 M.L.J. 501 (P.C.).**

[Disc. 16 P.L.T. 245.]

———*Gift—Construction—Malik.*

The word "malik" imports full proprietary rights, unless there is something in the context to indicate an intention to the contrary. 49 I.A. 1 and 57 I.A. 291, Ref. (*Sir Dinshah Mulla.*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270=59 Cal. 142=I.R. 1931 P.C. 296=134 I.C. 648=34 L.W. 51=8 O.W.N. 944=33 Bom.L.R. 1257=1931 M.W.N. 989=54 C.L.J. 393=1931 A.L.J. 555=35 C.W.N. 903=A.I.R. 1931 P.C. 179=61 M.L.J. 591 (P.C.).**

———*Gift — Construction — Repugnant clause and defeasance clause—Distinction—Absolute estate—Gift over—Validity.*

"The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void. But where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative." 63 M.L.J. 911, applied. If the gift over is to take effect, the terms of the bequest taken as a whole must not confer an absolute estate on the first donee; for if the further interests are given merely after or on termination of the first donee's interest, the absolute interest is not cut down and the further interest will fail. (*Courtney-Terrell, C. J. and Dhavle, J.*) RAMESHWAR KUER *v.* SHEO LAL UPADHATYA. **14 Pat. 640=156 I.C. 33=7 R.P. 677=16 Pat.L.T. 245=A.I.R. 1935 Pat. 401.**

———*Gift — Executory gift — Limited estate—Indication of—Gift over on the death of the grantee.*

A Hindu, no doubt, may give property by way of executory gift upon an event which is to happen, if at all, immediately on the close of a life in being and in favour of a person born at the date of the gift and such a gift over may be a sufficient indication that only a life-estate to the first taker was intended. 9 M.I.A. 123, Ref. (*Sir Dinshah Mulla,*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270=59 Cal. 142=I.R. 1931 P.C. 296=134 I C. 648=34 L.W. 51=8 O.W N. 944=33 Bom.L.R. 1257=1931 M.W.N. 989=54 C.L.J. 393=1931 A.L.J. 555=35 C.W.N. 903=A.I.R. 1931 P.C. 179=61 M.L.J. 501 (P.C.).**

[F. 34 Bom.L.R. 1506 (1510); 63 M.L.J. 911 (914).]

———*Gift—Formalities — Delivery of possession—Donor, guardian of donee.*

Under the Hindu Law, no writing is necessary for a gift but the gift must be accompanied by delivery of the subject of the gifts from the donor to the donee. The mere registration of the deed of gift is not delivery of possession. Where the donor is guardian of the donee, the Court should presume that the continuous possession of the subject of gift by the former is realiy for the benefit and in trust for the latter. Where there is clear evidence of intention on the part of the donor to make

over the property to the donee and there is no trace or evidence of intention of any kind to revoke the gift and the donor continued to manage the property and there is nothing to show that he was not doing so for the donee, it is a fair presumption that he was acting on behalf of the donee and the fact that there was no actual transfer of possession is immaterial. 3 C.L.R. 247, 39 M.L.J. 263 (P.C.), Foll. (*Milne, A.J.C.*) VALJI DAYABHAI *v.* VIRJI TULSIDAR. **I.R. 1931 Sind 132 = 134 I.C. 388 = A.I.R. 1931 Sind 186.**

———*Gift—Nature of estate—Gift to daughter—Properties given to widowed daughter at partition equally with sons—Interest taken—If absolute or limited.*

Where a Hindu father at the time of partition allots to his daughter, who had become a widow at the age of eleven and had been living with him ever since, certain immovable properties equal in extent to that of his sons—the arrangement not being embodied in any document—the fact that the daughter was given the same extent of lands as the sons would, in the absence of direct evidence one way or the other, go to show that she was given only a life-interest and not an absolute interest. Even the texts of Hindu Law which recognize the gift of a share to a daughter at the time of partition only proceed on the footing that the daughter takes a qualified and not an absolute interest in the properties allotted. (*Vardacharlar, J.*) DORAVYA *v.* MANGAMMA. **158 I.C. 611 = 8 R.M. 288 = 1935 M.W.N. 829 = 42 L.W. 336 = A.I.R. 1936 Mad. 130 = 69 M.L.J. 320.**

———*Gift—Nature of estate—Gift to daughter-in-law for maintenance.*

A Hindu conveyed by deed certain property to his daughter in-law for her support and maintenance. The daughter-in-law was to remain absolute owner (*malik mustakil*) of the property under the deed.

Held, that the deed conferred upon the donee an absolute estate in the property and not one which determined with her life. (*Lord Blanesburgh.*) RAI BISHUNATH PRASAD SINGH *v.* RANI CHANDRIKA PRASAD KUMARI. **60 I.A. 56 = I.R. 1933 P.C. 48 = 142 I.C. 6 = 37 L.W. 407 = 35 Bom L.R. 341 = 55 All. 61 = 1933 M.W.N. 239 = 57 C.L.J. 115 = 1933 A.L.J. 347 = 37 C.W.N. 417 = A.I.R. 1933 P.C. 67 = 64 M.L.J. 302 (P.C.).**

[**D.** 58 C.L.J. 499 (501).]

———Gift—Settlement deed—Construction—Absolute gift of shebaitship—Limitation of line of heirs—Validity. *See* DEED—CONSTRUCTION—GIFT. **61 Cal. 106 = A.I.R. 1934 Cal. 379.**

———*Gift—Validity—Gift of ancestral property to daughter's son*

A grandfather cannot make a gift of ancestral property in favour of his daughter's son. 9 M. 273, Ref. (*Madhavan Nair, J.*) SRIDHARA RAO *v.* SRINIVASA RAO. **39 L.W. 88 = 6 R.M. 395 (2) = 147 I.C. 936 = 1933 M.W.N. 1288 = A.I.R. 1934 Mad. 81.**

Guardianship.

ADOPTION.
ALIENATION.
CLAIM TO.
COMPROMISE.
DEBT.
DEFACTO GUARDIAN. *See* ALIENATION AND COMPROMISE, *supra.*
DE JURE GUARDIAN.
ILLEGITIMATE CHILD.
JOINT FAMILY.
MINOR WIFE.
MOTHER.

NATURAL GUARDIAN. *See* SETTLEMENT, *infra.*
POWERS OF.
SETTLEMENT.

Adoption.

———*Guardianship—Adoption—Adoptive mother or natural father—Preferential right to guardianship—Test of.*

It is true from the standpoint of Hindu Law, the adoptive mother has a preferential right to the guardianship. But the welfare of the minor is the paramount consideration for the Court. Where, after the death of adoptive father, the relations between the adoptive mother and the natural father had become strained and the boy who was intelligent enough to understand the situation expressed a preference to his natural father,

Held, that in the circumstances the discretion exercised by the lower Court in appointing the natural father should not be disturbed. (*Sundaram Chetty and Pakenham Walsh, JJ.*) RATHNAMMAL *v.* GOVINDASWAMI MUDALIAR. **39 L.W. 85 = 147 I.C. 724 = 6 R.M. 387 = 1933 M.W.N. 1293 = A.I.R. 1934 Mad. 44.**

———*Guardianship—Adoption*—De jure *guardian—Natural father of adopted son.*

Under the Hindu Law, the *de jure* guardians are either the parents or a testamentary guardian and no other can be *de jure* guardian unless appointed by Court. So the natural father of an adopted son cannot be regarded as a *de jure* guardian even when the adoptive parents are not available, unless he is so appointed by Court. 38 M. 1125, Appr.; 44 B. 742; 55 I. A. 139; 50 M. 508 (P.C.), Ref. (*Ramesam, J.*) PURUSHOTTAMA RATHO *v.* BRUNDAVANA DASS. **I.R. 1931 Mad. 773 = 133 I.C. 773 = 1931 M.W.N. 417 = 33 L.W. 664 = A.I.R. 1931 Mad. 597 (2).**

[**R.** 1932 M.W.N. 1193 (1195).]

Alienation.

———*Guardianship—Alienation*—De facto *guardian—Alienation for expenses incurred.*

According to Hindu Law, a *de facto* guardian can alienate the minor's property and recoup himself for the expenses incurred by him on behalf of the minor. (*Dalip Singh and Bhide, JJ.*) PIARE LAL *v.* LAJJIA RAM. **17 Lah. 78 = 159 I.C. 203 = 37 P.L.R. 246 = A.I.R. 1935 Lah. 437.**

———*Guardianship—Alienation*—De facto *guardian—Mortgage for benefit of minor's estate—Binding nature.*

It is firmly established that a *bona fide* encumbrance made by the *de facto* guardian of a Hindu minor for the benefit of the estate and with due regard to the minor's interests cannot be impeached by the minor on attaining majority, on the mere ground that the guardian who purported to act on his behalf was not a legal guardian under the Hindu Law or a guardian appointed under the Guardian and Wards Act. (*Tek Chand and Agha Haidar, JJ.*) KUNDAN LAL *v.* BENI PERSHAD. **13 Lah. 399 = I.R. 1932 Lah. 296 = 137 I.C. 115 = 32 P.L.R. 861 = A.I.R. 1932 Lah. 293.**

———*Guardianship—Alienation*—De facto *guardian—Power to dispose of reversionary interest of minor.*

Though the powers of a *de facto* guardian under Hindu Law are wider than under other systems, he has no power to dispose of a reversionary interest of the minor, though this may seem to be a prudent step at the time when it is taken. (*Beckett, J.*) RAM NATH *v.* SANT RAM. **160 I.C. 180 = 8 R.L. 504 = A.I.R. 1935 Lah. 820.**

———*Guardianship—Alienation*—De facto *guardian—Power to sell property for necessity.*

Held, by the Full Bench (*Beaumont, C.J., dissenting*) —The *de facto* guardian of a minor can validly sell the

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property of the minor to a third person for legal necessity. *Hanoomanpersaud's* case, relied on. 49 Bom. 576, Overr. (Case-law exhaustively discussed.) (*Beaumont, C. J., Patkar and Barlee, JJ.*) TULSIDAS JESINGHBHAI *v.* RAISINGJI. **57 Bom. 40=141 I.C. 17=I.R. 1933 Bom. 53=34 Bom.L.R. 1483=A.I.R. 1933 Bom. 15 (F B.).**

[**R.** 36 Bom.L.R 738 (754); 11 O.W.N. 1236 (1247).]

———*Guardianship—Alienation*—De facto *guardian—Setting aside.*

A minor can ignore an alienation by a *de facto* guardian and can bring a suit within 12 years. Where the alienation is made by a person who pretends to be a guardian, though he is not the real guardian, he is only an intermeddler just for the purpose of the transaction. (*Mahadevayya and Ramchandra Rao, JJ.*) NARANA BHATTA *v.* LAKSHMINARASAMMA. **11 Mys L.J. 56.**

———*Guardianship—Alienation*—De facto *guardian—Validity.*

Though a Hindu minor is entitled to ignore the alienation by a *de facto* guardian for purposes of limitation, the transaction is not, however, void because if the alienation was for justifiable necessity, they may be upheld wholly or partially. 1930 M.W.N. 939; 1928 M.W.N. 602, Ref. (*Ramesam, J.*) PURUSHOTTAMA RATHO *v.* BRUNDAVANA DASS. **I.R. 1931 Mad. 773=133 I.C. 773=1931 M.W.N. 417=33 L.W. 664=A.I.R. 1931 Mad. 597 (2).**

———*Guardianship—Alienation — Guardian—Mortgage for necessity—Subsequent sale without necessity—Suit by minor sons—Validity of sale—Repayment of consideration.*

Where a widow, acting as guardian of her minor sons, executed a mortgage of the family property for necessity and subsequently sold the properties for Rs. 500 out of which the mortgage amount of Rs. 330 was paid off, but no evidence was available to show way Rs. 170 more was required by the widow, the case is not covered by the rulings of the Privy Council in 52 M.L.J. 720; 53 M L.J. 300; 53 M L.J. 786; 57 M.L.J. 7. In the present case the mortgage was for a period of five years and there was therefore no pressure to sell the properties within a few months from the date of the mortgage. Though there was necessity for the earlier mortgage, there was no necessity for the subsequent sale. Secondly the widow was not in possession of the property as her husband's heir but as guardian of her minor sons. These two circumstances distinguish the present case from the Privy Council cases. The sale was therefore set aside on repayment by the sons of the amount which was applied to discharge the mortgage. (*Baker, J.*) PANDHARINATH *v.* RAMCHANDRA. **I.R. 1931 Bom. 274=130 I.C. 594=33 Bom.L.R. 104=A I.R. 1931 Bom. 157.**

———*Guardianship—Alienation—Guardian— Mother acting as guardian of minor sons—Sale by—Validity—Burden of proof.*

It is incumbent on an alienee from a Hindu widow acting as guardian of her minor sons to satisfy the Court that there was some pressure on the estate which made it necessary that the particular property should be sold or that at any rate he made reasonable inquiries and satisfied himself that this was so. When he does not show that, and when on the other hand it is shown that there was no *bona fide* inquiry at all, the alienation is not valid and binding on the minors. (*Broomfield, J.*) KONDAJI *v.* DAGADU. **157 I.C. 592=8 R.B. 72=37 Bom L R. 225=A.I.R. 1935 Bom. 259.**

———*Guardianship—Alienation—Guardian — Personal decree against—Minor's property—Liability of.*

On a mortgage executed by defendant 1 for himself and as guardian of his minor brother defendant 2, the

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mortgagee obtained a decree for sale but as the mortgaged property was sold under a decree on a prior mortgage, he applied for a personal decree against defendants 1 and 2. Such a decree was passed against defendant 1 and not against defendant 2. The mortgagee then applied to proceed against the remaining family property of the mortgagors, in execution of his personal decree on the ground that the decree was in substance and in effect against defendant 1 as family manager and accordingly a personal decree passed against him in that capacity would enable the decree-holder to get access to the whole family property.

Held, that if no supplementary decree under O. 34, R. 6, C. P. Code, which is in effect a money decree, has been passed against a minor, such a decree passed against his guardian in his individual capacity could not have any effect in rendering the minors property liable. (*Curgenven, J.*) RAMASWAMI CHETTIYAR *v.* ANKAPPA MUDALI. **6 I.R. (Mad.) 116=145 I.C. 694=A.I.R. 1933 Mad. 175.**

———*Guardianship—Alienation—Guardian—Validity as against minor coparceners—Necessity—Onus of proof—Duty of alienee—Prior mismanagement of estate—Relevancy of.*

A person claiming title under an alienation from a guardian of an infant must prove that there is actual necessity for it, that is, such pressure on the estate as would justify the act of the guardian; he can also protect himself by proof of *bona fide* inquiry, and when the fact of such inquiry is established the real existence of an alleged sufficient and reasonably accredited necessity is not a condition precedent to the validity of his title. When a legal necessity has been established, that is not affected by the previous mismanagement of the estate. (*Weston, J.*) PREM SUKH *v.* BANSI DHAR. **1935 A.M. L.J. 24.**

———*Guardianship— Alienation—Guardian — Mortgage by unenforceable for want of proper attestation—Personal covenant—Enforceability.*

Where the guardian of a minor executed a mortgage which was found to be invalid and unenforceable as such for want of proper attestation, the personal covenant contained in the deed can be enforced against the estate of the minor, if the liability was one binding on the minor under the Hindu Law. 42 Mad. 185—36 M.L.J. 29 (F.B.), Foll. (*Beasley, C. J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=33 L.W. 95=135 I.C 17=I.R. 1932 Mad. 49=A.I.R. 1931 Mad. 140=60 M.L.J. 56.**

[**Appr.** 35 L.W. 397 (398). **D.** 56 M. 879 (883).]

———*Guardianship—Alienation—Mother—Major portion applied for binding purpose—Transaction, if can be upheld.*

Where the mother acting as guardian of her minor sons sold piece of land for Rs. 600 and out of that paid a debt of Rs. 400 incurred by the father of the minors,

Held, that the sale was binding on the minors as the preponderance of the purchase-money was for a binding purpose, namely the payment of the debt. In such cases the question depends on the discretion of the Court as to what proportion should be found to be binding in order to constitute the sale binding as a whole. (*Curgenven, J.*) THANGAVELU *v.* NARAYANA PADAYACHI. **I.R. 1933 Mad. 204 (1)=142 I C. 152 (2)=1933 M.W.N. 622=A.I.R. 1933 Mad. 352.**

———*Guardianship—Alienation—Mother — Necessity—Expenses of marriage of daughter.*

A mortgage executed by the mother, acting as the *de facto* guardian, to raise money for the expenses of the marriage of the daughter, is supported by legal

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necessity. (*Hasan, C.J. and Raza, J.*) SHEO GOBIND *v.* RAM ADHIN. **8 Luck. 182=140 I.C. 556 =I.R. 1933 Oudh 1=9 O.W.N. 945=A.I.R. 1933 Oudh 31.**

———*Guardianship—Alienation—Mother—Necessity—Proof of—Recitals—Evidentiary value of—Old transaction.*

When a sale-deed executed by a widow nearly 20 years before recited that it was made for discharging the debts incurred for the expenses of the funeral ceremony of her husband, the original vendee had since died, and it was not shown by the plaintiff seeking to set it aside that the consideration was anything but reasonable or that his mother could have had any motive for making a false recital.

Held, that the recital was clear evidence of a representation of necessity to the purchaser and that, taken with other circumstances, was sufficient evidence of necessity to support the transaction. 44 Cal. 186 (P.C.) and 22 Mys. C.C.R. 166, Foll. (*Doraswami Iyer, C.J. and Rama Rao, J.*) SUBBANNA *v.* NARASIMHA BHATTA. **9 Mys.L.J. 287.**

———*Guardianship—Alienation—Mother — No necessity—Right of minor sons to question—One son omitting to question—Other minor son, if barred.*

Where a mother effects an alienation without legal necessity, her minor sons can question the same. The right to do so being personal, the omission of one of them on attaining majority to question the alienation does not prevent another minor son from impeaching it. The fact that the elder brother had acted as manager does not affect this right. (*Niyogi, A.J.C.*) SITARAM *v.* MANIK RAO. **15 N.L.J. 87.**

———*Guardianship—Alienation—Setting aside—Alienation not for necessity—Liability of minor to recoup benefit.*

Where it is found that the alienation was not for valid necessity, even when the minor is benefited not exactly from the alienation, but from subsequent events following the alienation and to which the alienation contributed, he is not in equity obliged to recoup the benefit before setting aside the alienation. (*Dalip Singh, J.*) BHULLA *v.* MIHAN SINGH. **I.R. 1933 Lah. 365 (1) =143 I.C. 482=34 P.L.R. 539=A.I.R. 1933 Lah. 103.**

Claim to.

———*Guardianship—Claim to—Relatives other than parents—Appointment by Court.*

The claims of relatives to the guardianship of a minor stand upon quite a different footing from those of parents. The nearest paternal relatives have no legal right to the immediate custody of a child on the death of its parents. In the absence of father or mother or a guardian appointed by the father, the selection of a guardian for a Hindu minor is to be made by the Court as it represents the ruling power. Mother-in law of minor acting as guardian treated as intermeddler. (*Mahadevayya and Ramachandra Rao, JJ.*) NARANA BHATTA *v.* LAKSHMINARASAMMA. **11 Mys.L.J. 56.**

Compromise.

———Guardianship—Compromise by *de facto* guardian —No detriment to minor—Valid. *See* HINDU LAW—FAMILY ARRANGEMENT. **A.I.R. 1933 Lah. 419.**

Debt.

———Guardianship—Debt—Adoptive mother—Liability of minor. *See* HINDU LAW—DEBTS. **67 M.L.J. 258.**

———*Guardianship — Debt—Guardian—Necessity—Liability of minor.*

The guardian of a Hindu infant has the power to mortgage or even sell the estate of the minor for the necessities of the estate or for the benefit of the estate. He has also the power to contract loans on behalf of the minor. Apart from the personal liability of the guardian, where the loan was taken for the necessities of the estate, the creditor is entitled, in a suit based on the consideration, to proceed against the estate of the minor, though the latter is in no event personally liable. (*Khaja Mahomed Noor and Dhavle, JJ.*) SUCHIT CHAUDHURI *v.* HARNANDAN SINGH. **12 Pat. 112=142 I.C. 38=I.R. 1933 Pat. 106=13 Pat L.T. 655=A.I.R. 1933 Pat. 29.**

———*Guardianship — Debt—Mother — Renewal of promissory note of father—Validity.*

A mother acting as legal guardian of her minor son is competent to enter into a new contract, renewing certain debts (one of them borrowed by the deceased father of the minor and the other by the mother for performing the general obsequies of the father) binding on the minor's estate. (*Bisheshwar Nath and Nanavutty, JJ.*) BECHU SINGH *v.* BALDEO PRASAD. **6 I.R. (Oudh) 25=145 I.C. 180=10 O.W.N. 188=A.I.R. 1933 Oudh 132.**

———*Guardianship—Debt—Promissory note by guardian on behalf of minor—Binding nature of—Liability of minor's estate.*

Though a debt incurred on behalf of a minor for necessary purposes of the minor or a covenant to pay a debt so incurred can be enforced against the property of the minor, a guardian cannot impose an unconditional personal liability on the minor by executing a promissory note on his behalf. An essential feature of a promissory note is the creation of an unconditional personal liability and such a liability cannot be imposed on the minor because any qualification of the promise contained in a promissory note such as that it is only to be enforced against a minor, if necessity, binding on the minor be shown is wholly foreign to the idea of a negotiable instrument. 42 M. 185 (F.B.) and 54 M. 163, Dist.; 35 L.W. 397, Diss. from. (*Reilly and Cornish, JJ.*) SWAMINATHA ODAYAR *v.* NATESA AYYAR. **56 Mad. 879= 6 I.R. (Mad.) 119=145 I.C. 716=1933 M.W.N. 121 =38 L.W. 430=A.I.R. 1933 Mad. 710 (2)=65 M. L.J. 350.**

[**Overr.** 58 M. 735 (740, 742) (F.B.)]

De jure guardian.

———Guardianship—*De jure* guardian in Hindu Law. *See* HINDU LAW—GUARDIANSHIP— ADOPTION. **A.I.R. 1931 Mad. 597 (2).**

Illegitimate child.

———*Guardianship—Illegitimate child—Mother or father.*

There is no authority to sustain the proposition that under Hindu Law the mother is the lawful guardian of her illegitimate child in preference to the father. If the obligation to maintain gives a right to custody, the father on whom the obligation falls under Hindu Law should *prima facie* have a preferential right. Where however the mother was a concubine who lived with the father for a number of years, the ordinary rule giving the father the rights of guardianship would prevail. (*Bhide, J.*) MT. PREM KAUR *v.* BANASI DAS. **15 Lah. 630=156 I.C. 87=7 R.L. 859=35 P.L.R. 677= A.I.R. 1934 Lah. 1003.**

Joint family.

———*Guardianship—Joint family—Application for appointment—Mitakshara minor—Proof of separate property—Guardian and Wards Act (VIII of 1890), S. 10 (1) (k).*

Unless the applicant for the appointment of guardian can show, in the case of a Mitakshara minor, that the latter has some separate property, the mere allegation to

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that effect is not sufficient for allowing the application. 40 B. 513, Ref. (*Mukerji and Guha, JJ.*) BANAMALI PATRA *v.* ARJUN SEN. **I.R. 1932 Cal. 688=140 I.C. 198=36 C.W.N. 769=55 C.L.J. 358=A.I.R. 1932 Cal. 730.**

———*Guardianship—Joint family—Appointment of guardian to the minor sons of a joint family—Application to authorize guardian to raise loan.*

Though the High Court has inherent jurisdiction to appoint the father as the guardian of the minors' property including their interest in the joint family estate, it will not, however, entertain an application by the guardian for permission to raise a loan on mortgage or pass an order which would absolve the purchaser from any further obligation to make enquiries as to the reality or otherwise of the alleged necessity or deprive the minor of his right, if any, to challenge the transaction when he comes of age. The guardian and the mortgagee (or purchaser) should enter into the transaction on their own responsibility. 25 B. 353, Ref. (*Kania, J.*) DATTATRAYA GOVIND HALDANKAR, *In re.* **56 Bom. 519=34 Bom. L.R. 1156=141 I.C. 697=I.R. 1933 Bom. 118=A.I.R. 1932 Bom. 537.**

———*Guardianship—Joint family—Appointment of—Guardian—Joint family consisting of adults and minors.*

So long as the family is joint, no guradian can be appointed. The appointment of a certified guardian therefore implies that *ipso facto* the minor members are being separated from the adult members. (*Mukerji and Bennet, JJ.*) JAGANNATH PRASAD *v.* CHUNNILAL. **I.R. 1933 All. 326=143 I.C. 706=1932 A.L.J. 1110=A.I.R. 1933 All. 180.**

———*Guardianship—Joint family—Appointment of—Guardian—Minor co-parcener—Inherent power of Court.*

The High Court can, in the exercise of its inherent jurisdiction under Cl. 17 of the Letters Patent (and apart from the Guardian and Wards Act, 1890), appoint a guardian of an infant coparcener in an undivided Mitakshara family. 54 B. 75; 50 C. 141 and 50 A. 709, Foll.; 25 A. 407 (P.C.) and 53 A. 190, Dist. (*Costello, J.*) BIJAY KUMAR SINGH BUDER, *In re.* **59 Cal. 570 =I.R. 1932 Cal. 523=138 I.C. 739=A.I.R. 1932 Cal. 502.**

———*Guardianship—Joint family—Brother—Mother's right of custody—Guardianship of property.*

So far as the custody of a minor is concerned no doubt mother is the natural guardian in preference to the brother but where it concerns the estate of a joint family, the eldest member of the family karta, would be the guardian so long as his interest does not clash with that of the minor. The appointment of a brother who happens to be the eldest member of a joint family as guardian of his minor brother is not therefore invalid. (*Havliwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C. 694=8 R S. 127=A.I.R. 1935 Sind 235.**

———*Guardianship—Joint family consisting of one adult and minors—Mitakshara—Power of former to appoint guardian for minors.*

The only adult coparcener of an undivided Hindu Mitakshara family cannot validly appoint by will or otherwise a trustee guardian or manager of the coparcenary property of the minor coparceners during their minority. (*Beaumont, C.J., Rangnekar and Divatia, JJ.*) BRIJBHUKANDAS DAMODARDAS *v.* GHASHIRAM MULCHAND. **59 Bom. 316=155 I.C. 12=7 R.B. 412=37 Bom L.R. 1=A I.R. 1935 Bom. 124 (F.B.).**

———*Guardianship—Joint family—Major copareners—Power of Court to appoint guardian of property of minor coparceners—One coparcener attaining majority—Effect.*

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Where a joint Hindu family consists of coparceners who are all minors, the coparceners forming one group, the Court has jurisdiction to appoint a guardian of the property of that group as a whole; but when subsequently, one of the groups arrives at the age of majority, the guardianship of the person appointed by the Court ceases *ipso facto* and the Court is bound to hand over the joint family property to the adult coparcener as *karta* of the joint family, notwithstanding that other coparceners are minors. It is not open to the Court to appoint the major coparcener as guardian of the property of the minor coparceners. (*King, C.J.*) CHANDRAPAL SING *v.* SARABJIT SINGH. **16 Luck. 67=154 I.C. 855=7 R.O. 513=1935 O.W.N. 368=A. I.R. 1935 Oudh 334.**

———*Guardianship—Joint family—Minor members of—Attainment of majority by one member—Effect of—Alienation by him on attainment of majority.*

It is contrary to the Hindu Law that there should be a guardian certified by the Judge for a joint Hindu family where there is an adult member. So on the attainment of adult status by one of the minors, for whom a guardian had been appointed, *ipso facto* the guardianship terminates. One of such minors on attainment of majority would be competent to execute a mortgage for legal necessity on behalf of himself and on behalf or his minor brother notwithstanding the fact that the guardian still continued to be recorded as a certified guardian appointed by the District Judge (*Mukerji and Bennet, JJ.*) JAGANNATH PRASAD *v.* CHUNNI LAL. **1932 A.L.J. 1110=I.R. 1933 All. 326=143 I.C. 706=A.I.R. 1933 All. 180.**

Minor wife.

———*Guardianship—Minor wife—Right of husband to guardianship.*

The husband of a minor girl is her lawful gurdian under the Hindu Law and is entitled to require her to live with him, however young she may be, unless there is a custom enabling the wife to live with her parents until she attains puberty. 24 Mad. 255, Ref. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) LAKSHMANACHARI *v.* SUBBAMMA. **39 Mys. H.C.R. 198=12 Mys. L.J. 180.**

Mother.

———*Guardianship—Mother—Effect of re-marriage.*

Under Hindu Law the mother is, after the father, the natural and legal guardian of her children and she does not lose her right by remarriage in cases when such re-marriage is recognized as valid by custom. To such cases S. 3, Art. XVI of 1856, was obviously not intended to apply. And even under the Act, the mother is not considered to be physically dead and may, in appropriate cases, be appointed as guardian, though not in her own natural right, but where it is for the welfare of the minor to do so. 1 L. 146 and 38 Cal. 862, Ref. (*Tek Chand, J.*) RAM LABHAI *v.* DURGA DAS. **15 Lah. 28=35 P.L.R. 30=147 I.C. 19=6 R.L. 351=A.I.R. 1933 Lah. 817.**

———Guardianship—Mother—Right of custody—Preference to brother. *See* GUARDIANSHIP—JOINT FAMILY—*supra.* **A.I.R. 1935 Sind 235.**

Powers of.

———*Guardianship — Powers of guardian—Reference to arbitration—Direction empowering arbitrator to give portion of entire property for charity—Legality.*

Where the sole motive of a guardian of a minor in a joint Hindu family in referring a matter to arbitration is to end the dispute as to whether certain property is joint or separate and the matter is referred to a personal friend of the family, the intention being to preserve the properties in the family by way of family settlement and

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the guardian empowers the arbitrator to give a portion of the properties to charity out of the whole joint family and not out of the minor's share alone, the direction as to charity does not vitiate the reference. The guardian in giving power to arbitrator acts *bona fide* for the benefit of his family including the minor and does not exceed his authority. (*Haveliwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C. 694=8 R.S. 127=A.I.R. 1935 Sind 235.**

Settlement.

———*Guardianship—Settlement—Natural guardian—Settlement in favour of adoptive mother in lieu of maintenance.*

A settlement executed by the natural father of a minor in favour of his adoptive mother by which a small portion of the family properties was given to her absolutely in lieu of her claim to maintenance is a valid disposition of the minor's property and within the competence of the natural guardian. Nor can it be subsequently questioned by the minor. 23 M. L. J. 638, Ref.; 49 M. L. J. 317, Not foll. (*Sundaram Chetty, J.*) SEETHIAH *v.* MUTYALU. **I.R. 1931 Mad. 380=130 I.C. 460=1930 M.W.N. 1011=33 L.W. 86=A.I.R. 1931 Mad 106.**

Illegitimate children.

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(1) GUARDIANSHIP.
(2) JOINT FAMILY.
(3) MAINTENANCE.
(4) PARTITION.
(5) SUCCESSION.

———Illegitimate sons—No right by birth in joint family. *See* JOINT FAMILY — CONSTITUTION OF. **9 Rang. 266=A.I.R. 1931 Rang. 216.**

Impartible estate.

———*Impartible estate—Accretions—Lands purchased out of income.*

The income of an ancestral impartible estate is not affected by its origin but is the absolute property of the holder of the estate. So where certain vanta lands were acquired out of the income of the impartible talukdari estate, they do not form part of the talukdari estate in the absence of proof of any blending of the corpus of the vanta lands with the talukdari estate. 29 I.A. 82 and 50 I. A. 1, Ref. (*Pathak and Barlee, JJ.*) BAI KESARBA *v.* SHIVSANGJI. **56 Bom. 619=142 I.C. 253=I.R. 1933 Bom 197=34 Bom L.R. 1332=A.I.R. 1932 Bom. 654.**

[Reversed on another point. 62 I.A. 161=68 M.L. J. 701 (P.C.).]

———*Impartible estate—Accretions—Succession to.*

The income from impartible property belongs to the owner and acquisitions from that income follow the ordinary rule of succession, unless the facts show that the owner intended to incorporate that property with the impartible estate. 29 C. 433 (P. C.); 38 All. 552 (P. C.) and 2 Pat. 319 (P.C.), Foll. (*Ross and Fazl Ali, JJ.*) SOMESHWARI PRASAD NARAIN DEO *v.* MAHESHWARI PRASAD NARAIN DEO. **10 Pat 630=135 I.C. 85=I.R. 1932 Pat. 5=13 Pat.L.T. 347 and 405=A I R. 1931 Pat 426.**

———*Impartible estate—Accretions—Test of—Incorporation of other property with the impartible estate—Moveables and income of estate.*

It is competent to the holder of an ancestral impartible estate, to incorporate as an accretion to the estate other immovable property belonging to him. The self-acquired property so incorporated with an ancestral impartible estate is impressed with all the incidents which attach to an ancestral impartible estate, and therefore passes with the estate by survivorship. Whether any such property has in fact been incorporated with the

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impartible estate depends upon the intention of the holder. The crucial test is, did the holder add his other properties to the impartible estate with the intention of incorporating them, with that estate? But neither movable property nor the income of an ancestral impartible estate can be incorporated with the estate. (*Sir Dinshah Mulla.*) SHIBA PRASAD SINGH *v.* RANI PRAYAG KUMARI DEBI. **59 I.A. 331=59 Cal. 1399=34 Bom L R. 1567=I.R. 1932 P.C. 263=9 O.W.N 691=138 I.C. 861=56 C.L.J. 92=36 C.W.N. 1046=36 L.W. 266=1932 M.W.N. 923=1932 A.L.J. 919=13 Pat L T. 659=A.I.R. 1932 P.C. 216=63 M.L J. 196 (P.C.).**

———*Impartible estate — Adoption of holder into another family—Effect of—Right of mother to adopt another—Lands acquired out of income—Succession to.*

The holder of Ahima, an impartible Talukdari estate, died in 1899 leaving his wife, *D* 2 and his son *D*-1. The estate was inherited by *D*-1 who had a wife *D* 4 and a daughter, *D*-5. In 1915, *D* 1 was given in adoption to the Bhimaria family. In 1917, the mother (*D*-2) adopted *D* 3. In 1918, the plaintiff who was the step brother of *D*-1 brought a suit, claiming to succeed to the estate at the nearest heir, in accordance with the custom of lineal primogeniture which governed the estate. A custom of exclusion of females was also proved.

Held, that (*i*) by virtue of his adoption, *D*-I lost all his rights in the Ahima estate which had vested in him before his adoption ; the plaintiff as the next eldest male heir was entitled to succeed to the estate; (*ii*) with reference to certain vanta lands acquired by *D* 1 out of the income of the estate, they were his absolute property which he was competent to alienate. The undisposed of residue of those lands were inherited by the daughter, who unlike the wife, of the adoptee, remained in the original family; (*iii*) the adoption of *D*-3 was invalid, as it had the effect of divesting the estate that had on the adoption of *D*-1, become vested in the plaintiff. (*Patkar and Barlee, JJ.*) BAI KESARBA *v.* SHIVSANGJI. **56 Bom. 619=142 I.C. 253=I R. 1933 Bom. 197=34 Bom L.R. 1332=A.I.R. 1932 Bom. 654.**

[Reversed on another point. 62 I.A. 161=68 M.L. J. 701 (P.C.).]

———*Impartible estate—Alienation by Zemindar—Suit for setting aside—Finding that estate was undervalued—Finding as to necessity for actual sale price—Duty of Court—Proper decree.*

Where, in a suit by a widow and the adopted son of a deceased Zemindar to set aside an alienation by the latter on the ground of want of necessity, it is found that the property is sold at a gross under value, though the actual sale price was applied towards discharging prior mortgages on the property, the sale cannot stand but must be set aside *in toto* subject to the condition, that the plaintiffs should pay the alienee the actual sale price paid by him. The Court has no jurisdiction to make a new bargain between the parties, to split the properties and to compel the alienee to accept part of the properties arbitrarily assigned to him. Nor is it competent for the Court to hold or direct an enquiry as to how much of the property, if sold, would property fetch the price actually paid by the alienee. (*Lord Blanesburgh.*) NAGAPPA CHETTIAR *v.* BRAHADAMBAL AMMAL. **62 I.A 70=58 Mad. 350=39 C W.N. 709=1935 A.W.R. 435=1935 O.W.N. 336=1935 M W.N. 288=154 I.C. 972=7 R.P.C. 165=1935 A.L.J. 603=61 C.L.J. 221=41 L.W. 581=A.I.R. 1935 P.C. 62=68 M.L J. 452 (P.C.).**

———Impartible estate—Custom—*Aunha* estate near Oudh—Not impartible by custom. *See* CUSTOM—IMPARTIBILITY. **68 M.L.J. 448 (P.C.).**

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———*Impartible estate—Custom — Succession—Chandrapur—Padampur.*

The Chandrapur-Padampur zamindari is not impartible, and does not descend to a single heir according to the rule of primogeniture. (*Lord Blanesburgh.*) BIRENDRANATH SINGH *v.* MIRTUNJAI SINGH. **6 R.P.C. 133=148 I.C. 770=39 L.W. 718=A.I.R. 1934 P.C. 100=66 M.L.J. 504 (P.C.).**

———*Impartible estate—Joint family—Jointness and separation—Burden of proof—Remoteness of common ancestor or separation in worship—Effect of.*

In order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressed or implied on behalf of the junior members of the family to give up their chance of succession to the impartible estate. It is incumbent upon a claimant to an impartible estate to establish only a notional jointness, with the burden on the opposite party to show a definite renunciation of their right to succession. The burden lies heavily on the opposite side to establish that the estate was held as the separate property of the Raja and that a separation had been brought about by an intention express or implied on the part of the junior branch to relinquish their right to succession to the impartible estate, whenever a succession opened. Mere remoteness of the common ancestor or the separation in worship does not imply any intention on the part of the junior members to give up their right of succession to the estate. Withdrawal by the Raja from social inter course with a junior branch may be regarded in the same way, A.I.R. 1932 P.C. 216 and A.I.R. 1928 P.C. 68, Rel. on. (*Lord Blanesburgh.*) COLLECTOR OF GORAKHPUR *v.* RAM SUNDAR MAL. **61 I.A. 286=56 All. 468=40 L.W. 217=38 C.W.N. 1101=15 Pat. L.T. 531=7 R. P. C. 1=60 C.L.J. 67=36 Bom L.R. 867=1934 M.W.N. 751=150 I.C. 545=11 O.W.N. 889=4 A.W.R. 46=1934 A.L.J. 779=A.I.R. 1934 P.C. 157=67 M.L.J. 274 (P.C.).**

———*Impartible estate—Joint family—Separation—Evidence of.*

Both in the case of an ordinary joint undivided Hindu family and in the case of an ancestral impartible estate, to constitute separation there must be a clear and unambiguous declaration by a member of his intention to separate himself from the family. The separation must be a complete separation in worship, in food and in estate, and it is not sufficient to show a separation merely in food and worship. In order to establish that in a Hindu family governed by the Mitakshara an ancestral impartible estate has ceased to be joint family property for the purpose of succession, it is necessary to prove an intention, express or implied, on the part of the junior members of the family, to renounce their right of succession to the impartible estate. (*Sir Dinshah Mulla.*) SHIBA PRASAD SINGH *v.* RANI PRAYAG KUMARI DEBI. **59 I.A. 331=59 Cal. 1399=34 Bom L.R. 1567=I.R. 1932 P.C. 263=9 O.W.N. 691=138 I.C. 861=56 C.L.J. 92=36 C.W.N. 1046=36 L.W. 266=1932 M.W.N. 923=1932 A.L.J. 919=13 Pat.L.T. 659=A.I.R. 1932 P.C. 216=63 M.L.J. 196 (P.C.)**

———*Impartible estate— Joint family—Separation—Evidence.*

Separate residence and separate messing may be some of the indicia by which the joint character or otherwise of a family may be ascertained. But in the case of members of a wealthy family possessed of impartible property, they are not only inconclusive but of little evidential value. A member of such a family does not cease to be a member, unless he has expressly or by necessary implication renounced his right of succession

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to the estate. (*Niamatullah and Bennet, JJ.*) MAHARAJ KUMAR OF VIZIANAGRAM, *In re.* **6 R.A. 884—56 All. 1009=1934 A.L.J. 1237=149 I.C. 306=A.I.R. 1934 All. 818.**

———*Impartible estate—Junior members—Maintenance—Nature of.*

The right of a junior member of an ancestral impartible zamindari to receive maintenance from the Zamindar is not a creature of custom but it is an incident of joint family property, which has been left untouched by custom. (*Beasley, C.J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* ZAMINDAR OF CHEMUDU. **57 Mad. 1023=40 L.W. 487=1934 M.W.N. 770=151 I.C. 926=7 R.M. 153=A.I.R. 1934 Mad. 608=67 M.L.J. 306 (F.B.).**

———*Impartible estate—Junior members—Rights of—Attachability in execution.*

A junior member in an impartible estate under the Hindu Law has no interest in the corpus of the estate, but has only a right to maintenance. Nor has he a right to any specific share of the profits. His right is a purely personal right and cannot be attached in execution as it is inalienable. The right to receive profits in future, unless it is incidental to the ownership in the property, is incapable of being sold like the right to receive maintenance. (*Niyogi, A.J.C.*) RAMCHANDRA PAPU HALBI *v.* SUKHDEO MARWADI. **31 N.L.R. 239=156 I.C. 65=7 R.N. 212=A.I.R. 1935 Nag. 133.**

———*Impartible estate—Junior members—Status of.*

In the case of a joint Hindu family possessed of an ancestral impartible Raj, every son acquires by birth a right to the estate and becomes a member of the family with the holder of the estate. But for the custom of impartibility, a junior member would be entitled to all the rights of a member of a joint family, which the Hindu Law gives him including the right to demand partition and to participate in the enjoyment of the income of the estate. The custom does not supersede the general law, so far as his status is concerned, though his right to demand partition and to participate in the income of the estate is taken away. Where he is entitled by custom to maintenance out of the income of the estate, he is to that extent entitled to participate in the enjoyment of the undivided estate. (*Niamatullah and Bennet, JJ.*) MAHARAJ KUMAR OF VIZIANAGRAM, *In re.* **56 All. 1009=1934 A.L.J. 1237=6 R.A. 884=149 I.C. 306=A.I.R. 1934 All. 818.**

———*Impartible estate—Separation of one member—Partition—If ceases to be joint family property.*

In order to establish that an impartible estate has ceased to be joint family property for the purposes of succession, it is necessary to prove an intention expressed or implied on the part of the junior members of the family to give up their chance of succession to the impartible estate and no such intention can be presumed from the mere fact that the members of the family had exercised their right of partition over their partible property. 55 I.A. 114, Foll. (*Patkar and Broomfield, JJ.*) SAHEBGOUDA *v.* BASANGOUDA. **I.R. 1931 Bom. 431=133 I.C. 847=33 Bom L.R. 580=A.I.R. 1931 Bom. 378.**

[F. 56 B. 619 (647)]

———*Impartible estate—Succession—Joint family—Rule of survivorship—Applicability of.*

In the case of an ancestral impartible estate, there is from the very nature of the preperty no right of partition, and the holder has the power to alienate it *inter vivos* or by will. But for purposes of succession the estate, though impartible must be considered as coparcenary property and the rule of survivorship applicable to ancestral property applies.

HINDU LAW—Impartible estate.

Held, accordingly, that in a joint family governed by the Mitakshara, on the death intestate of the last holder of an ancestral impartible estate descendible by the rule of lineal primogeniture, the selection of a successor was to be determined by survivorship, and that the senior member of the family took the estate by survivorship. (*Sir Dinshah Mull.*) SHIBA PRASAD SINGH *v.* RANI PRAVAG KUMARI DEBI. **59 I A. 331=59 Cal. 1399=34 Bom.L.R. 1567=I R. 1932 P.C. 263=9 O. W.N. 691=138 I.C. 861=56 C.L.J. 92=36 C W.N. 1046=36 L.W. 266=1932 M.W.N. 923=1932 A.L J. 919=13 Pat.L.T. 659=A.I.R. 1932 P.C. 216=63 M.L.J. 196 (P.C.).**

[F. 65 M.L.J. 479 (489); 60 I.A. 336 (351) (P.C.).]

———*Impartible estate—Succession—Joint family—Rule of survivorship—Right of.*

Although other rights which a coparcener acquires by birth in joint family property do not exist in regard to ancestral impartible property, the birth right of the senior member to take by survivorship remains. 59 I. A. 331=59 C. 1339=63 M.L.J. 196 (P.C.), Foll. (*Lord Russell of Killowen.*) SRI RAJAH RAVU SRI KRISHNAYYA RAO *v.* RAJAH OF PITTAPUR. **57 Mad. 1=60 I.A. 336=6 I.R. (P.C.) 12=1933 A.L. J. 1039=38 L.W. 409=1933 M.W.N. 1191=38 C.W. N. 1=35 Bom.L.R. 1076=58 C.L.J. 305=145 I.C. 216=15 Pat.L.T. 1=A.I R. 1933 P.C. 202=65 M.L. J. 479 (P.C.).**

———*Impartible estate—Succession—Joint family—Survivorship—Eldest member of senior branch.*

The impartible estate in a joint Hindu family governed by the Mitakshara passes by survivorship from one line to another according to primogeniture and devolves not on the member nearest in blood but on the eldest member of the senior branch. 48 I.A. 195, Foll. (*Patkar and Broomfield, JJ.*) SAHEBGOUDA *v.* BASANGOUDA. **I.R. 1931 Bom. 431=133 I.C. 847=33 Bom L.R. 580=A.I.R. 1931 Bom. 378.**

———Impartible estate—Suit as heir for possession against defendant alleged to be in wrongful possession —If an administration suit. *See* UNDER ADMINISTRATION. **61 Cal. 711.**

———*Impartible estate—Widow in possession—Savings by—Character of—Right to dispose of.*

Savings made by a widow holding an impartible estate, out of the income of the estate, remain at her disposal absolutely; and in the absence of anything done by her to show that she treated the accumulations as part of her husband's estate, she can validly dispose of the same by will. (*Ramesam and Stone, JJ.*) NAVANEETHAKRISHNA MARUDAPPA THEVAR *v.* COLLECTOR OF TINNEVELLY. **1935 M.W.N. 1001=160 I. C. 647=8 R.M. 674=42 L.W. 875=A.I.R. 1935 Mad. 1017=69 M.L.J. 632.**

Insolvency.

See also HINDU LAW—JOINT FAMILY.

———Insolvency—Father—Liability of sons' shares. *See* HINDU LAW—DEBTS—FATHER. **A.I.R. 1933 Nag. 373.**

———Insolvency—Father—Right of receiver to proceed against sons share with recourse to a suit. *See* HINDU LAW—DEBTS—FATHER. **A.I.R. 1931 All. 512 (F.B.).**

Joint Family.

ADVERSE POSSESSION.
ALIENATION.
ANCESTRAL PROPERTY.
BUSINESS.
CONSTITUTION OF.
COPARCENER.
DEBT.

HINDU LAW—Joint family.

FATHER.
GUARDIANSHIP, *See also* HINDU LAW—GUARDIANSHIP.
ILLEGITIMATE SON.
IMPARTIBLE ESTATE.
INSOLVENCY.
JOINT ACQUISITION.
JOINT FAMILY PROPERTY.
JOINTNESS.
JOINT PROPERTY.
JOINT TENANCY.
LIABILITY.
MAINTENANCE. *See* HINDU LAW—MAINTENANCE.
MANAGER.
MINOR.
PRESUMPTION.
RELEASE.
RENUNCIATION.
REPRESENTATION. *See* FATHER AND MANAGER, *supra.*
SELF ACQUISITION.
SEPARATE PROPERTY.
SON'S RIGHT.
SUIT AGAINST.
TRADING PARTNERSHIP.
WIFE.
WILL.

Adverse possession.

———*Joint family—Adverse possession—Manager—Possession on behalf of third party.*

Where to the knowledge of the junior member of a joint Hindu family, the manager is in possession of certain property on behalf of another person, such possession is adverse to the joint family. 42 M.L.J. 364, Expl. (*Ramesam, J.*) NARAYANASWAMI AYYAR *v.* THANDAVESA AYYAR. **1931 M.W.N. 889.**

Joint Family—Alienation.

BENEFIT TO ESTATE.
COPARCENER.
DUTY OF LENDER.
DUTY OF VENDEE.
EXCHANGE.
FATHER.
GIFT. *See* FATHER, *supra* AND MANAGER, *infra.*
INVALIDITY.
MANAGER.
MORTGAGE.
NECESSITY.
RIGHTS OF ALIENEE.
SETTING ASIDE.

Benefit to estate.

———*Joint family—Alienation—Benefit to estate—Alienation by father—Scattered items sold and a compact share purchased.*

Where the father sold fractional shares in three scattered villages for an adequate price and with the pro ceeds purchased a compact share in one village which was more productive than the properties sold, *held*, that the transaction was for the benefit of the estate. (*Niamatullah and Rachhpal Singh, JJ.*) MARKANDEY SINGH *v.* BADAN SINGH. **147 I.C. 517=6 R.A. 493 =1933 A.L.J. 1247=A.I.R. 1933 All. 568.**

———*Joint family—Alienation—Benefit to estate—Augmenting means of livelihood of family.*

Augmenting the means of livelihood of the family, unless speculative or risky, must be taken to be beneficial to the family. (*Mohammad Noor and Luby, JJ.*) LALJI SINGH *v.* MUCHKUND SINGH. **154 I.C. 97=7 R.P. 418=A.I.R. 1934 Pat. 699.**

HINDU LAW—Joint family.

———*Joint family—Alienation—Benefit to estate—Burden of proof—Proof that alienor is manager.*

It is the duty of a person who sets up the plea that the alienation made by a member of a joint family was for family benefit and binding on the family, to prove all the elements essential for an alienation for family benefit. It is for him to allege and prove that the alienor was the manager. (*Srivastava and Zia-ul Hasan, JJ.*) MALAK CHAND *v.* HIRA LAL. **157 I.C. 945=8 R.O. 47=1935 O.W.N. 1005=A.I.R. 1935 Oudh 510.**

———*Joint family—Alienation—Benefit to estate—Meaning.*

Obiter.—The expression "benefit of the estate" as used with regard to circumstances justifying an alienation by a limited owner cannot be precisely defined but it may be taken as including the preservations of the estate from extinction, its defence against hostile litigation, its protection from inundation, and similar circumstances. A.I.R. 1917 P.C. 33, Rel. on. Therefore benefit, in which no idea of protection or preservation but only an idea to improve so as to increase the income is included, would not be sufficient by itself to make the transaction binding on the reversioner. (*Mukherji and S. K. Ghose, JJ.*) MOHAMMAD ALI KHAN *v.* KANAILAL. **159 I.C. 767=8 R.C. 350=A.I.R. 1935 Cal. 625.**

———*Joint family—Alienation—"Benefit to estate"—Meaning of—Sale for higher price than market value—If justified.*

The term "benefit to estate", as justifying an alienation by a Hindu manager of the property of a minor, does not mean or include every transaction which is advantageous or which a prudent owner would carry out in connection with his own estate. Nor is the term confined to a transaction which of a character to protect or preserve the property of the minor. The manager of a minor under the Hindu Law is not entitled to sell the minor's property merely for the purpose of enhancing the value of his property or for increasing the minor's income. The question whether a transaction is for the benefit of the estate or not involves the consideration of something more than merely whether the purchase price paid is a good price; it involves the further question of what is to be done with the purchase-money. A sale by a widow, the mother and guardian of her minor son, of his property worth Rs. 600 for Rs. 900, cannot be justified merely because the price got is greater than the price which would normally be got in the market. When there is no satisfactory evidence of the manner in which the purchase-money is to be dealt with, a sale of that character cannot be justified. (*Beaumont, C.J., Murphy, and Wadia, JJ.*) HEMRAJ DATTUBUVA *v.* NATHU RAMU. **59 Bom. 525=157 I.C. 406=8 R B. 66=37 Bom.L.R. 427=A.I.R. 1935 Bom. 295 (F.B.).**

———*Joint family—Alienation—Benefit to estate—Purchase of mortgagee rights in family property.*

To repurchase or acquire mortgagee rights in the estate of a separated brother can never be for the benefit of the family. (*Harrison and Addison, JJ.*) HANS RAJ *v.* KHUSHAL SINGH. **14 Lah. 162=I.R. 1932 Lah. 517=138 I.C. 642=33 P.L.R. 472=A.I.R. 1932 Lah. 420.**

———*Joint family—Alienation—Benefit to estate—Sale on ground that property does not fetch interest.*

One member of a joint Hindu family cannot on the ground that the family property is not fetching any interest alienate it and appropriate the proceeds to his own use This is not an act of good management of the family property. (*Dalal, C.J. and Sahwny, J.*) DAULAT RAM ISHAR DAS *v.* JAI CHAND. **37 P.L.R. J. & K. 25.**

HINDU LAW—Joint family.

———*Joint family—Alienation—"Benefit to estate"—Transactions capricious and reckless—Purchase by manager.*

Although the purpose of a transaction may be to enlarge or improve the estate, an act undertaken in a capricious and reckless manner without proper calculation of its consequences in the spirit, of wild speculation cannot be termed a "benefit" to the estate. A transaction, by way of purchase entered into by a manager by which out of the total purchase-money of Rs. 29,000 he paid Rs. 6,610 out of the joint family funds and a liability of Rs. 22,390 was burdened on the joint family property with a further obligation to pay interest and compound interest in it set aside as being highly imprudent and reckless. (*Niyogi and Grille, A.J.Cs.*) NARAYANRAO *v.* MULCHAND. **29 N.L.R. 41=I.R. 1933 Nag. 70=141 I.C. 494 (2)=A.I.R. 1933 Nag. 109.**

———*Joint family—Alienation—Benefit to estate—Transfer of family property for purchase of new property nearer home.*

It is now settled that a transaction entered into by the manager of a joint Hindu family to be binding on the other members need not be one which the manager is compelled to enter into as a defensive measure in order to protect the family property. There may be cases in which a transaction is so advantageous that any prudent person would certainly enter into it and in these circumstances, such a transaction would be binding upon the family as a whole. But this principle should not be extended too far. It must not be supposed that the managing member of a joint Hindu family is entitled to transfer the family property merely because he thinks that the transfer will be for the benefit of the family. Something more than that is required to make the transaction binding upon the family. It must be a transaction arising out of a situation of which no prudent person acting as manager could fail to take advantage. The manager is not entitled to speculate with the family property even if he does so in good faith believing that his conduct of affairs will ultimately be of advantage to the family. Accordingly he cannot transfer family property for the purpose of purchasing new properties nearer home even though he may hope to make a certain income out of such properties. (*Niamatullah and Allsop, JJ.*) RAJ SINGH *v.* KISHAN LAL. **159 I.C. 66=8 R A. 387=1935 A.L.J. 464=1935 A.W.R. 356=A.I R. 1935 All. 299.**

Coparcener.

———*Joint family—Alienation—Co-parcener—Administration by Collector under Sch. III, para. 11, C. P. Code—Right of junior member to alienate.*

A junior member of a Hindu joint family cannot be allowed to deal with family property which has been placed in charge of the Collector under para. 11 of Sch. III, C. P. Code. (*Sulaiman and Young, JJ.*) SARJU PRASAD *v.* RAM SARAN LAL. **I.R. 1931 All. 536=132 I.C. 568=1931 A.L.J. 400=A.I.R. 1931 All. 541.**

———*Joint family—Alienation—Co-parcener—Alienation of undivided share—Validity of—Punjab.*

In the Punjab it is not open to a co-parcener to alienate his undivided share in joint family property under Hindu Law without the consent of other co-parceners and if he alienates joint family property, the alienation is liable to be set aside as a whole. (*Bhide, J.*) RALLA RAM *v.* ATMA RAM. **14 Lah. 584=150 I.C. 184=6 R.L. 833=34 P L R. 113=A.I.R. 1933 Lah. 343.**

———*Joint family—Alienation—Co parcener—Alienee from—Equity of—Priority over subsequent alienee.*

An alienee from a co parcener cannot be said to be entitled to any specific property of the joint family. He

has only an equity to have the alienated lands allotted to the share of alienor-co-parcener in order that in the partition decree the land may be given to him as far as possible prior purchasers or incumbrancers are, as far as possible, entitled to priority but not as a matter of right. It is only an equity and the question how and where the equity should be invoked in aid of a party must depend upon equitable considerations, which again must depend on the circumstances of each case. This equity of the prior purchaser cannot be defeated by a collusive sale by the coparcener of his interest in those properties to another person. If in a suit by the subsequent alienee, the prior alienee was not allowed to be impleaded, the latter is entitled to sue for a declaration that the decree obtained by the subsequent alienee was collusive and should be set aside. (*Patkar, J.*) GURLINGAPPA SHIVAPPA *v.* SABU RAMAPPA **I.R 1931 Bom. 310=131 I.C. 886=33 Bom L.R. 141=A.I.R. 1931 Bom. 218.**

———*Joint family—Alienation—Co-parcener—Alienee from—Working out rights.*

A purchaser from one co-parcener of his individed share in a specific part of the family estate cannot take possession of his purchase except by a partition of the whole estate The vendee cannot claim his remedy in any other way, as for instance, by a suit for partition of a specific property. The alienee of a specific property has an equitable right to have that property assigned to him if it can be done without injustice to the other coparceners. (*Grille, J C. and Pollock, A. J. C.*) GANPATRAO *v.* KANHAYALAL. **30 N L.R. 29=149 I C 349=6 R.N. 225=A.I.R. 1934 Nag 132.**

———*Joint family—Alienation—Coparcener—Alienee's share—Determination of*—Obiter.

Obiter:- On an alienation by a co-parcener, the calculation for determining the share falling to the purchaser should be as at the date of the alienation and not at the date of the suit. (*Vivian Bose, A.J C.*) RAMKISAN AMBADAS MAHESARI *v.* DAMODAR. **150 I.C. 111=6 R.N. 276=A.I.R. 1934 Nag. 108.**

———*Joint family—Alienation—Coparcener—Coparcener alienating specific item of joint family property—Right of alienee—Suit by alienee for possession and mesne profits—Maintainability—Remedy of alienee.*

An alienee from a coparcener of a joint Hindu family is, under the Hindu Law, in some respects in a worse position than a tenant in-common. He cannot, for instance, claim joint possession or enjoyment of his vendor's share, irrespective of the wishes of the other coparceners. His complete rights, if any, must be worked out only in a suit for a partition, where the equities between the parties have to be worked out. An alienee of a specific item of family property from a coparcener is not entitled to sue for possession of that item or for past or future mesne profits. (*A. S. R. Chari and Sreenivasa-Rao, JJ.*) KRISHNASWAMI IYENGAR *v.* VENKATAMMA. **14 Mys L.J. 16=40 Mys. H.C R. 415.**

———*Joint family—Alienation— Co-parcener—Joint tenants—Alienation by one without the consent of the other—Effect of—Alienation with consent—Distinction.*

One coparcener or joint tenant cannot destroy the right of survivorship of another joint tenant by alienating any portion of the joint estate but where the alienation is made by the one with the concurrence of the other, the alienation is perfectly valid. There is also a distinction between a case where the surviving joint tenant brings a suit for possession against an alienee of the other joint tenant and a case where the suit is brought by the reversioners after the death of the joint tenants. In the latter case, the question of transfer for legal necessity by a holder of the life estate in order to pay off a just

debt by alienating a portion of the estate, becomes pertinent, 33 C. W. N. 39 (P. C.), Ref. (*Suhrawardy and Jack, JJ.*) NABIN CHANDRA CHAKRAVARTHI *v.* SHONA MALA GHOSE. **I.R 1931 Cal. 606=133 I.C. 568=35 C.W.N. 279=A.I.R. 1932 Cal. 25.**

———*Joint family—Alienation—Co-parcener—Junior member*—Karta *being disqualified to transfer—Consent to alienation by junior—Effect.*

A junior member of a family cannot alienate family property. Where the eldest member is absent, a junior member may become the *karta* in his place and in that contingency may be equipped with the authority of the karta. The mere fact, that the *karta* who was under a disqualification regarding power to transfer consented to the alienation by the junior member, is immaterial. (*Sulaiman and Young JJ.*) SARJU PRASAD *v.* RAM SARAN LAL. **I R. 1931 All. 536=132 I C. 568=1931 A.L J. 400=A.I.R. 1931 All. 541.**

———*Joint family—Alienation—Co parceners—Mortgage by adult coparceners—Debts due by adults—Minor represented by uncle—Minor not liable for debts—If bound by mortgage.*

The adult members of a joint Hindu family executed a deed of mortgage to pay off business debts due by themselves. One of them, who, however, did not allege himself to be the *karta* or manager of the family, executed the deed in the capacity of guardian of his minor nephew as well, although the minor had no concern with the debts and was not legally liable to discharge them

Held, that the mortgage deed was not binding on the minor co-parcener, and that the mere fact that all the adults joined in the alienation is not proof legal necessity. (*Nanavutty and Thomas, JJ.*) KRISHNA KUMAR *v.* GOPAL DAS HAR NARAIN DAS. **151 I.C. 1066=7 R.O. 166=11 O.W N. 1236=A I.R. 1934 Oudh 475.**

———*Joint family—Alienation—Coparcener—Mortgage by coparcener — Subsequent partition and allotment of mortgaged item to mortgagor and others—Decree against non mortgagors—If can be passed.*

Where property subject to an equitable mortgage created by one coparcener of a joint Hindu Mitakshara family is subsequently allotted at a partition to the mortgagor jointly with another coparcener, who is not a mortgagor, the shares being left undefined and undetermined, the mortgagee is not entitled to a decree on his mortgage as against the non-mortgagor and his interest in that property. (*Guha and Bartley, JJ.*) RAKHAL DAS CHATTOPADHYA *v* INDUBALA BASU. **161 I.C. 512=8 R.C. 529=61 C.L.J. 473=A.I.R. 1936 Cal. 125.**

———*Joint family—Alienation — Coparcener—Mortgage by subsequent devolution of entire family property by survivorship—Denial of necessity for mortgage—Estoppel.*

The rule that a grantor cannot derogate from his own grant is of universal application, and there is nothing in the Hindu Law which makes it inapplicable to transfers of joint family property. A coparcener who executes a mortgage of joint family property and who subsequently becomes solely entitled to the entire family property by right of survivorship is estopped from denying the validity of the mortgage, and he cannot avail himself of the right of the other coiparceners to challenge it on the ground of want of legal necessity. (*Iqbal Ahmad and Collister, JJ.*) BHARAT SINGH *v.* JEOBODH LAL. **7 R.A. 19=150 I.C. 745=1934 A.L.J. 593=4 A.W. R. 289=A.I.R. 1934 All. 891.**

———*Joint family—Alienation—Coparcener (Benares School)—Mortgage of his share not for family necessity*

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and decree obtained by mortgagee—Death of mortgagor before execution—Right of mortgagee to put up mortgaged share for sale.

Even though a member of a joint Hindu family governed by the Mitakshara as interpreted in Benares School is powerless to alienate his portion of the joint family property, still where a member mortgages his share not for family necessity and the mortgagee obtains a decree on such mortgage, he can put up the share mortgaged for sale, even though the mortgagor dies before execution. The decree being a mortgage decree an attachment is unnecessary as there is already a charge upon the property, even before the mortgagor's death. The other members of the joint family cannot restrain the mortgagee decree holder by an injunction from proceeding to sell the mortgaged property. 3 Cal. 198 (P.C.) and 5 Cal. 148 (P.C.), Rel. on. (*Wort, J.*) RASH BEHARI SINGH *v.* JAIPERGASH PANDE. **6 R.P. 322=146 I C. 1037=A I.R. 1934 Pat. 21.**

———*Joint family—Alienation — Coparcener— Purchase from—Right to sue for mesne profits.*

The purchaser from a coparcener, being in no better position than his vendor, cannot sue for mesne profits in respect of the period between the date of his purchase and the date of his suit for partition. But a coparcener suing for partition is entitled to have the coparcenary divided as at the date of the suit and the person in possession must account for the share of the profits of the property allotted from that date as they came into his hands to the extent that he is not entitled to waste or make away with the coparcenary property between that date and the date of the final partition although he is in rightful possession thereof, and his duty to take charge of the property continues until the actual delivery of possession of the property allotted To this extent only is he liable to account for profits Such accounting, however, is a matter to be considered in the partition suit and should be claimed if at all by a purchaser from a coparcener in his suit for partition. A separate suit for mesne profits is not available to such purchaser after the decree for partition. (*Courtney-Terrel, C J. and Agarwala, J.*) NAND KISHORE PRASAD SINGH *v.* PARMESHWAR PRASAD SINGH. **153 I.C. 232=7 R.P. 319=A.I.R. 1935 Pat. 80.**

———*Joint family—Alienation—Coparcener—Right of alienee to recover mesne profits.*

Where the brothers of a Hindu family had become divided in status and were enjoying the profits in definite shares, without, however, a division of the property by metes and bounds, a purchaser of the undivided share of one of the brothers is entitled to claim mesne profits from the other members in possession thereof. (*Madhavan Nair and Jackson, JJ*) SIVARAMAMURTHI *v.* VENKAYYA. **57 Mad. 667=148 I.C. 1086=6 R.M. 565=39 L.W. 498=1934 M.W.N 340=A I.R. 1934 Mad. 364=66 M.L J. 561.**

———*Joint family — Alienation—Coparcener—Right to transfer undivided share under Mitakshara in Bengal and N.-W. Provinces.*

An undivided member of a joint Hindu family cannot, under the Mitakshara law as administered in Bengal and N.-W. Provinces, sell, mortgage or otherwise transfer his undivided share in the ancestral estate for his own benefit without the consent of his coparceners. (*Khaja Mohammad Noor and Varma, JJ.*) MAHINDRA OJHA *v.* SITARAM OJHA. **155 I C. 827=7 R.P. 627=16 Pat.L.T. 377=A I.R. 1935 Pat 349.**

———*Joint family—Alienation—Coparcener—Speculative litigation—Mortgage, if binding on family.*

Where money is raised by a member of the family by mortgage, even if he be the head of the family for a

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speculative litigation which is to the benefit of the family only in case of its success, it cannot be said that the mortgage is created for family necessity and a decree passed thereon is not binding on the other members of the family. (*Mukerji and Bennet, JJ.*) PATESHWARI PRASAD PAL *v.* JAI KARAN. **136 I.C. 381=I.R. 1932 All. 206=1931 A.L J. 882=A.I R. 1931 All. 748.**

———*Joint family—Alienation — Coparcener—Validity of alienation.*

Where a property of a joint Hindu family is mortgaged by one of the members (save and except by the head of the family for antecedent debt or proved necessity of the joint family), the general law is that the mortgage is not valid at all even to the extent of the mortgagor's interest. (*Raza and Srivastava, JJ.*) PUTTOO LAL *v.* RAGHUBIR PRASAD. **9 Luck. 237=147 I.C. 540=6 R.O. 276=10 O.W.N. 1166=A.I.R. 1933 Oudh 535.**

———*Joint family—Alienation — Coparcener—Who can avoid.*

An alienation made by a member of a joint Hindu family is voidable at the option of the other members thereof, or any one of them, but it cannot be impeached by the alienor himself or by any transferee who has not acquired by transfer or prescription the interest, in the property alienated, of the entire joint family. (Case-law reviewed.) (*Sen and Niamatullah, JJ*) MADAN LAL *v.* CHIDDU. **53 All. 21=I R. 1931 All. 125=128 I. C. 829 -1930 A.L J. 1528=A.I.R 1930 All. 852.**

Duty of lender.

———*Joint family—Alienation—Duty of lender to see to actual application of money given for family legal necessity.*

It is not the duty of the creditor to see that money raised for legal necessity of the family is actually spent on the objects for which it was taken. His duty ends when he, after making an honest and reasonable enquiry, satisfies himself that the necessity exists. (*Mohamad Noor and Luby, JJ.*) LALJI SINGH *v.* MUCHKUND SINGH. **154 I.C. 97=7 R.P. 418=A.I.R. 1934 Pat. 699.**

Duty of vendee.

———*Joint family—Alienation—Duty of vendee — Necessity—Purchaser if bound to see to application of money.*

Where in case of sale by manager of a joint Hindu family a portion of the consideration is not proved to have been paid for legal necessity, the real question is whether the sale itself was justified by legal necessity and when the purchaser acts in good faith and after due inquiry and is able to show that the sale itself was justified by legal necessity, he is under no obligation to show the application of the surplus over and above the amount found to have been required for necessary purposes. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546=I R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840=A.I R. 1931 Lah. 419.**

———*Joint family—Alienation—Duty of vendee—Sale by father for benefit of estate.*

The law is clear that a Hindu father may alienate ancestral property both for legal necessity and for the benefit of the family. There is no difference between a sale for legal necessity and a sale for the benefit of the family *qua* the question of the use to which the money is put. In case of the benefit of the family, all that the vendee has to do is to see whether at the time a real intention exists to employ the money in such methods as are likely to be for the benefit of the family. Where the father and other relatives of the family had joined in a scheme of selling its unprofitable property in small plots and building houses with the money so acquired so

as to make it a source of income to the family, but owing to certain delays that took place, the father, who was a young man at the time, found himself in possession of a large sum of money and he proceeded to squander a portion of it, at any rate, in riotous living,

Held, that the vendees could not be held responsible for the untoward result and all they had to consider was whether the representation made to them at the time was a *bona fide* one, and that in the circumstances of the case, they could *bona fide* come to that conclusion on what was then the evidence before them. (*Dalip Singh and Abdul Qadir, JJ.*) KHEM CHAND *v.* JASWANT RAI. **6 R.L. 648=149 I.C. 46=A.I.R. 1934 Lah. 615.**

Exchange.

———Joint family—Alienation—Exchange deed executed by manager if defeasible. *See* AGRA PRE-EMPTION ACT, S. 20. **A.I.R. 1931 All. 211 (2).**

———*Joint family—Alienation—Exchange by father or manager—Other members of family—Right to challenge.*

A deed of exchange executed by a father or manager is liable to be challenged by the other members of the family if it was not executed for legal necessity or for the benefit of the estate. (*Sulaiman, A.C.J. and Banerji, J.*) BALZOR SINGH *v.* RAGHUNANDAN SINGH. **54 All. 85=I.R. 1932 All. 285 (2)=137 I. C. 191=1932 A.L.J. 33=A.I.R. 1932 All. 548.**

Father.

See also HINDU LAW.

(1) JOINTFAMILY — ALIENATION—SETTING ASIDE.

(2) DEBTS.

———*Joint family—Alienation—Father — Antecedent debt.*

All antecedent debts included in the mortgage must be held to constitute valid necessity. They need not be independent of mortgage security. (*Bhide and Din Mahomed, JJ.*) SOHAN LAL *v.* ISHAR SINGH. **16 Lah. 320=155 I.C. 255=7 R.L. 666=A.I.R. 1934 Lah. 800.**

———*Joint family—Alienation—Father—Antecedent debts—Absence of legal necessity—Binding nature.*

Debts incurred by a Hindu father are binding on his minor sons, though not for legal necessity, if they are antecedent to a mortgage executed by him and are not immoral. When the sons who impeach such debts do not proceed further than making a vague allegation that they are immoral or illegal, but there is nothing to connect them with any acts of immorality or illegality, and it is found that the debts are probably the result of extravagance, the debts and the mortgage passed to pay off those debts are binding on the sons. (*Murphy and Divatia, JJ.*) CHHOTABHAI *v.* DADHABHAI. **152 I. C. 715=7 R.B. 166=36 Bom.L.R. 738=A.I.R. 1935 Bom. 54.**

———*Joint family—Alienation—Father— Antecedent debt—Alienation of property to discharge—Validity.*

A Hindu father can sell or mortgage not only his own interest but also the interest of his sons, grandsons and great-grandsons in coparcenary property to pay an antecedent debt which was not immoral or illegal. To constitute an antecedent debt, it is not necessary that the creditor and the alienee should be different persons. What the law requires is that the debts must be independent of the alienation and not a part of the same transaction. (*Shadi Lal, C.J. and Rangi Lal, J.*) IQBAL SINGH *v.* JASMER SINGH. **15 Lah. 715=153 I.C. 862=7 R.L. 464=35 P.L.R. 215=A.I.R. 1934 Lah. 296 (2).**

———*Joint family—Alienation—Father— Antecedent debt—Barred debt.*

A mortgage created to pay a time-barred debt is valid. As the Hindu Law does not recognize limitation, the time-barred debt is a valid antecedent debt within the meaning of Hindu Law. (*Mohamad Noor and Luby, JJ.*) LALJI SINGH *v.* MUCHKUND SINGH. **154 I.C. 97=7 R.P. 418=A.I.R. 1934 Pat. 699.**

———*Joint family—Alienation—Father— Antecedent debt—Barred debt, if can constitute.*

A time-barred debt constitutes a valid antecedent debt if it has not been incurred for any illegal or immoral purpose. (*Srivastava, J.*) PARMANAND MISIR *v.* GUR PRASAD. **157 I.C. 567=8 R.O. 25=1935 O.W.N. 892=A.I.R. 1935 Oudh 500.**

———*Joint family—Alienation—Father— Antecedent debt—Barred debt, if constitutes.*

A time-barred debt constitutes a valid antecedent debt binding on the son for the purpose of supporting an alienation by the father of the ancestral joint property of the family, provided the debt was legally recoverable from the father, *e.g.*, under S. 25 (3), Contract Act, were he alive. (*Grille, J. C. and Pollock, A. J. C.*) VISHWANATH *v.* SHANKATGIR GURU MOTIGIR. **30 N.L.R. 331=153 I.C. 115=7 R.N. 122=A.I.R. 1934 Nag. 264.**

———*Joint family—Alienation— Father—Antecedent debt—Debt due under prior mortgage.*

A previous mortgage debt can be held to be an antecedent debt for the purpose of a subsequent sale of the family property by the father, if it is truly antecedent and not part of the sale. (*Addison and Din Mohammad, JJ.*) GOPAL DAS *v.* TOPAN DAS. **16 Lah. 624=163 I.C. 706=9 R.L. 38=37 P.L.R. 712.**

———*Joint family— Alienation—Father—Antecedent debt—Debt due under prior mortgage.*

A debt due under a prior mortgage is an antecedent debt which would justify an alienation by the father or grandfather so as to be binding on his minor son or grandson. (*Broomfield and Wadia, JJ.*) JAGADISH PRASAD *v.* AMBASHANKAR. **152 I.C. 405=7 R.B. 138=36 Bom.L.R. 625=A.I.R. 1934 Bom. 324**

———*Joint family— Alienation—Father—Antecedent debt—Debt not yet due and payable.*

Where the father of a joint family has alienated joint family property for an antecedent debt, *i.e.*, a debt dissociated in time and fact from the sale itself, and the property has passed to the alienees, the joint family cannot recover except upon proof that the debt was for immoral or illegal purposes. The phrase 'antecedent debt' includes a mortgage debt which is no yet payable and it is not essential for the application of this doctrine that the debt should have become payable and should have been paid by the alienee, *i.e.*, the alienee in order to succeed need not have paid the full consideration and discharged the antecedent debt. 46 A. 95 (P.C.), Rel. (*Wallace, J.*) SUBBARAYULU CHETTIAR *v.* RATNAM AYYAR. **34 L.W. 982=A.I.R. 1931 Mad. 615.**

———Joint family—Alienation—Father—Antecedent debt—High rate of interest—Necessity for—Onus—Relief to son—Duty of lender. *See* HINDU LAW—DEBTS—INTEREST. **56 Bom. 36=A.I.R. 1932 Bom. 136.**

———*Joint family—Alienation—Father—Antecedent debts— Meaning of.*

When the debts incurred by a father or grandfather of a joint Hindu family are advanced long before a mortgage executed by him and quite independently of the mortgage, and there is no connection between the debts and the mortgage except that the mortgage was executed to secure payment of the debts which already existed, and it further appeared that at the time the debts were incurred there was no intention of securing them by a mortgage deed,

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Held, that the debts were antecedent not only in time but also in fact, and were sufficient to support a mortgage of family property, although the mortgagee happens to be the original creditor himself. (*Broomfield and Wadia, JJ.*) JAGADISHPRASAD *v.* AMBASHANKAR. **152 I.C. 405=7 R.B. 138=36 Bom.L.R. 625=A.I.R. 1934 Bom. 324.**

———*Joint family—Alienation—Father—Antecedent debt—Meaning of.*

When the manager of a Hindu joint family is the father of the family, he may alienate the family property to satisfy a personal debt of his own, provided that the debt is an antecedent debt and was not incurred for immoral purposes. A debt may be antecedent even though associated with the alienated property, if it is not connected with the actual transaction of which it forms the consderation. (*Fraser, J.C. and Saaduddin, A.J.C.*) DHIYAN SINGH *v.* SANT SINGH. **A.I.R. 1934 Pesh. 118.**

———*Joint family—Alienation—Father—Antecedent debts—Necessity for—Need for proof.*

In the case of alienations made by father, in the absence of a finding that an alienor has been recklessly extravagant or has been wantonly wasting his property, the vendee is not required to prove that previous debts whether owing to himself or to third persons which have been paid out of the sale consideration were contracted fot necessary purposes. He has only to prove the existence of such debts and once that is established and it is not proved that they have been incurred for immoral or illegal purposes, their payment becomes a valid necessity sufficient to support the sale. (*Rangi Lal, J.*) AKKU *v.* ALI AKBAR. **155 I.C. 179=7 R.L. 648=A.I.R. 1934 Lah. 837.**

———*Joint family — Alienation — Father—Antecedent debt—Partial necessity—Decree—Form of.*

A mortgage was executed by the father for Rs. 5,000 out of which Rs. 3,500 were utilised for the satisfaction of antecedent debts, the balance for a purpose personal to the father.

Held, that the decree in a suit by the son should give him liberty either to redeem the whole property on payment of Rs. 3,500 or his own share only (*i.e.*, a half of it) on payment of a half of Rs. 3,500. (*Niyogi and Grille, A.J.Cs.*) RAJESHWAR *v.* MANGNIRAM. **29 N.L.R. 107=I.R. 1933 Nag. 100=142 I.C. 242 (2)=15 N.L.J. 159=A.I.R. 1933 Nag. 89.**

———*Joint family—Alienation—Father—Antecedent debt—Sale for debts not illegal or immoral—No proof of legal necessity—Validity of sale.*

Where a sale-deed was executed by the father for Rs. 2,000 to pay off a mortgage for Rs. 500 and a promissory note debt for Rs. 421, and it was not shown that the two debts were incurred for any legal necessity,

Held, that so long as it was not proved that the two prior debts were tainted with illegality or immorality, they were antecedent debts which justified the sale. 46 A. 95 (P.C.); 46 A. 301 and 47 A. 795 (P.C.), Foll. (*Barker, J.*) SHANKER NARAYAN *v.* TUKARAM. **I.R. 1932 Bom. 595=140 I.C. 256=34 Bom L.R. 808=A.I.R. 1932 Bom. 438.**

———*Joint family — Alienation—Father—Binding nature.*

There is no general presumption that the debt contracted by the father is beneficial to the family and binding on the sons; the benefit and necessity will have to be established by the creditor. The mere fact that the alienation of the joint family property was by the father even though he was at the time a sole adult male member of the family is not by itself sufficient to prove that it was made for the benefit of the family.

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(*Sreenivasa Iyer, Offg. C.J. and Ramachandra Rao, J.*) SEETHARAMUSA *v.* BIDARE THIMMAPPA. **10 Mys.L.J. 448.**

———*Joint family — Alienation — Father—Binding nature.*

Under Hindu Law a father's alienation cannot be attacked, if it is made to pay off antecedent debts or to raise money for legal necessity. The sons have pious duty to pay their father's debts if they were not immoral or illegal and the whole of the family property can be sold in execution of a decree passed on the basis of such debts. If the sons contend that the debts were raised for immoral purposes, it is incumbent on them to prove a clear connection between the debts and the alleged immorality. It is not sufficient to prove that the debtor was a person of immoral character. (*Hilton and Rangi Lal, JJ.*) NAWAB *v.* SARDAR SINGH. **158 I.C. 102=A.I.R. 1935 Lah. 176.**

———*Joint family—Alienation—Father—Mortgage—Binding nature on son—General charge of immorality.*

Where an alienation be way of mortgage is made by Hindu father in respect of family property for payment of his antecedent debt and the alienation is challenged by his son as being tainted with immorality, the onus is on the son to establish by evidence that the debts in question were incurred by the father for immoral purposes. The burden of proof is not discharged by establishing a general charge of immorality but there must be sufficient evidence to connect the particular cases of expenditure directly with the acts of immorality alleged. (*Lord Macmillan.*) SHYAM NARAIN SINGH *v.* SURAJ NARAIN PANDEY. **I.R. 1933 P.C. 19=141 I.C. 509 (1)=37 C.W.N. 293=10 O.W.N. 137= 1933 M.W.N. 138=37 L.W. 277=57 C.L.J. 49=34 P.L.R. 175=35 Bom.L.R. 301=A.I.R. 1933 P.C. 38=64 M.L.J. 148 (P.C.).**

———*Joint family — Alienation—Father—Gift of ancestral property—Validity—Law in Oudh.*

In the province of Oudh, it is now settled law that the alienation of joint ancestral property by the manager of a joint Hindu family is void *ab initio* unless it is made for legal necessity or in lieu of an antecedent debt. No question of legal necessity or antecedent debt arises in the case of a gift. It follows, therefore, that a gift of joint ancestral property by the father during the minority of his son is absolutely void and ineffectual. (*King, C.J. and Zia-ul-Hasan, J.*) GAYA RAM SAHU *v.* BISHNATH. **156 I.C. 711=7 R.O. 675=1935 O.W.N. 777.**

———*Joint family—Alienation — Father—Gifts to daughters.*

A father in a Mitakshara joint family is competent to make reasonable gifts to his daughters and such gifts will be binding on the other coparceners. (*Kumaraswami Sastri and Reilly, JJ.*) KAMAKRISHNA AYYAR *v.* PARAMESWARA AYYAR. **1931 M.W.N. 215.**

———*Joint family — Alienation—Father — Gift to daughter for life of small portion in consideration of love and affection—Validity.*

A Hindu father under the Mitakshara Law has no power to make a gift of even a small portion of the joint family lands to his daughter, for her maintenance, for her life, on the ground that she looked after him in his old age and that he had great love and affection for her. (*Rangnekar, J.*) JINNAPPA *v.* CHIMMAVA KRISHNAPPA. **59 Bom. 459=159 I.C. 207=8 R.B. 173=37 Bom.L.R. 484=A.I.R. 1935 Bom. 324.**

———*Joint family — Alienation — Father—Gift to stranger—Binding nature.*

Where a joint family consists of a father and a son, a gift of the family properties by the father is void *in toto*

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and the son is entitled to recover the properties and not merely to recover only his share in a properly framed suit for partition. (*Lakshmana Rao, J.*) PICHA PILLAI *v.* KATHIAPERUMAL PILLAI. **6 R.M. 566=148 I.C. 1073=1934 M.W.N. 594=39 L.W. 518=A.I.R. 1934 Mad. 356.**

——*Joint family — Alienation — Father—Gift to stranger—Validity—Onus.*

Under Hindu Law a father has no power to make a gift of the joint family property in favour of a stranger There is no law requiring a member of the joint family who is in possession of such property to sue to set aside the gift, and his failure to do so does not render the gift valid and binding on him. If the donee sues for possession it is for him to establish the validity of the gift on which he relies and not for the coparcener in possession to prove its invalidity. (*Coldstream and Bhide, JJ.*) RIASAT ALI *v.* IQBAL RAI. **16 Lah. 659=157 I.C. 75=8 R L. 74 (2)=37 P.L.R. 846=A.I.R. 1935 Lah. 827.**

——*Joint family—Alienation—Father—Immorality of debts—Onus of proof.*

When the alienor is the father of the contesting plaintiff, an alienation effected for the father's antecedent debts, whether for necessity or not, will also be valid provided the debts were not of an immoral character. If the debts are alleged to be immoral the burden of proving that the debts were of such character will lie on the contesting plaintiff. There must be evidence in such cases to connect the debt directly with the alleged immorality. (*Coldstream and Bhide, JJ.*) RAJ KISHORE *v.* MADAN GOPAL. **13 Lah. 491=143 I C. 249=I.R. 1933 Lah. 322=33 P.L R. 829=A I.R. 1932 Lah 636**

——*Joint family—Alienation—Father—Immorality of father—General allegation in plaint—Sufficiency.*

A general charge of immorality is not permitted in a pleading. The immorality must be pleaded with particularity, in a suit by the son impeaching the alienation by a Hindu father, the pleading must show with precision how exactly it came about at the particular time that the particular money was needed and used for the particular immorality charged. The duty of the Judge is to have the whole of the general paragraph struck out. (*Mears, C. J. and Sen, J.*) JAGDISH NARAIN *v.* HAZARI LAL. **I R. 1932 All. 671 (1)=140 I C. 535=1932 A.L J. 309=A.I.R. 1932 All. 467.**

——*Joint family—Alienation—Father—Legal necessity—Assumption how far permissible.*

The doctrine that the existence of legal necessity may be assumed from a representation to, and an enquiry made by the money-lender who acted in good faith in lending money to the father works fairly in practice, having regard to the difficulties which a money-lender has in many cases, in ascertaining the truth or as to the existence or otherwise of legal necessity ; but it should not be unduly extended so as to warrant an assumption that if an enquiry has been made, the money-lender could have discovered just those facts which would have convinced him of the existence of the necessity and could not have discovered some others which would have shown otherwise. (*Sen and Niamatullah, JJ.*) GAURI SHANKAR SHARMA *v.* THAKUR MENA RAM. **I.R. 1931 All. 369=131 I.C. 513=A.I.R. 1931 All. 600.**

——*Joint family—Alienation—Father or managing member—Gift for pious purposes.*

Under Hindu Law a father or any managing member has power to alienate ancestral immovable property by way of gift within reasonable limits for pious purposes only. (*Tapp and Walker, JJ.*) KARAM SINGH *v.* SURENDER SINGH. **135 I.C. 180=I.R. 1932 Lah. 52=A.I.R. 1931 Lah. 289 (2).**

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——*Joint family—Alienation—Father—Mortgage.*

The father of a joint Hindu family is entitled to mortgage joint family property to pay antecedent debts which are not tainted with immorality. (*Niamatullah and Bennet, JJ.*) BANKEY LAL *v.* MT. RAM PIARI. **147 I.C. 224=6 R.A. 441=1933 A.L.J. 1399=A.I.R. 1933 All. 659.**

——*Joint family—Alienation—Father—Mortgage—Antecedent debt—Prior mortgage debt—If constitutes.*

A prior mortgage debt would be an antecedent debt within the principle of the Hindu Law, when paid off by a subsequent mortgage document executed by a Hindu father. (*Anantakrishna Ayyar and Cornish, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA AYYAR. **153 I C. 1013=7 R M. 392=1934 M.W.N. 321=40 L.W. 576=A.I.R. 1935 Mad. 121.**

——*Joint family—Alienation—Father—Mortgage—Business debt—Not binding on minor members.*

Money borrowed by the father as manager of joint Hindu family governed by the Mitakshara law, for the purpose of a business which is not ancestral is not for legal necessity and a mortgage granted as security for such a loan is not binding on the minor members of such family. (*Subhedar, A. J. C.*) WAMAN RAMBHAN MARATHE *v.* MAULADINA AYUB. **30 N L.R. 237=150 I.C. 121=6 R N. 277=A.I.R. 1934 Nag. 155.**

——*Joint family—Alienation — Father—Mortgage by father not for family necessity—Right of mortgagee to personal decree against father and in execution to bring entire family estate to sale.*

Where a Hindu, who is the manager of a joint family consisting of himself and his sons, alienates joint property, not for family necessity or for payment of a just antecedent debt, the mortgage *qua* mortgage is not binding on the sons, but it is open to the mortgagee in spite of a declaration obtained by the sons that the mortgage was not binding on them, to obtain a personal decree against the father under O. 34, R 6 of the C. P. Code, and, in execution of that decree, bring the entire family estate, including the mortgaged property to sale unless, of course, the sons are able to show that the debt in question was tainted with immorality or illegality. (*Tek Chand and Monroe, JJ.*) JOWALA DAS *v.* WAZIR CHAND. **149 I.C. 515=6 R.L. 701=A.I.R. 1933 Lah 768.**

——*Joint family—Alienation—Father—Mortgage by father to purchase other lands or for investment on othi—Validity.*

A Hindu father is not entitled to sell or mortgage family properties for the purpose of purchasing other lands for the family, in the absence of special circumstances to justify the same ; nor is he entitled to borrow money on the security of family properties for the purpose of investing the borrowed money on the *othi* of some other properties. (*Anantakrishna Ayyar and Cornish, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA AIYAR. **153 I C. 1013=7 R.M. 392=40 L.W. 576=1934 M.W.N. 321=A.I.R 1935 Mad. 121.**

——*Joint family—Alienation — Father—Mortgage—Necessity—Proof required—Family business.*

To sustain an alienation the facts represented to the alienee must, if true, not only justify the loan, but where family business is existing they must also show that the money was required for that business; without such proof of necessity for the loan, such loan cannot be made a charge on the family property. (*Hilton and Rangi Lal, JJ.*) RAMAN MAL *v.* NATHU MAL. **153 I.C. 1010=7 R.L. 496=37 P.L.R. 471=A.I R. 1934 Lah. 895.**

——*Joint family—Alienation—Father—Mortgage—Right of later Court auction-purchaser to contest validity.*

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Where a joint family consists of father and sons, an auction purchaser at a sale held in execution of a simple money-decree against the father, of a part of joint family property which has passed one of the family, being in his possession by virtue of the auction sale, can impeach a mortgage of that part of the property made by the father on the ground of want of legal necessity, and defend his possession and resist the suit brought by the mortgagee for the sale of the property in satisfaction of an invalid mortgage. 15 All. 339, Rel. on ; 35 All. 353, Cons. (*Sen and Niamatullah, JJ.*) MADAN LAL *v.* CHIDDU. **53 All. 21 = I.R. 1931 All. 125 = 128 I.C. 829 = 1930 A.L.J. 1528 = A.I.R. 1930 All. 852.**

[Rel. 1932 A.L.J. 1110 (1114).]

———*Joint family—Alienation—Father—Mortgage by—Subsequent partition—Suit on mortgage—Sale—Right of auction purchaser to possession.*

A father had created a charge on joint family property. Subsequently, a partition was effected and the family was disrupted. The partition although specifying the shares of the various members was not a partition by mates and bounds. A suit was brought on the mortgage and decreed. The mortgaged property was brought to sale and when the auction purchaser sought to get possession of the property bought by him, he was resisted by the sons.

Held, the property having been joint at the time of the mortgage, the mortgagee's rights were not affected in any way by the partition and that the sons were not entitled to resist the auction-purchaser unless they proved that the debt incurred by their father was illegal or immoral. 8 B. 481, Foll. (*Broadway and Coldstream, JJ.*) HEM RAJ *v.* BASHESHAR DAS. **14 Lah. 22 = I.R. 1933 Lah. 245 (2) = 142 I.C. 693 = 34 P.L.R. 306 = A.I.R. 1933 Lah. 253.**

———*Joint family—Alienation—Father—Mortgage by—Suit on—No proper representation of son's interest—Son's right of redemption not lost.*

The real criterion of representation is whether the joint family was represented and substantial justice has been done. Where therefore in a suit on a mortgage against the father, if the father not only omits to take part in the suit but in declining to redeem, does grave injury to the family property in ignoring the interest of the son, the right of the son to bring a suit for redemption is not barred. (*Grille, A. J. C.*) ANANDA PANDURANG *v.* UTTAMRAO. **29 N.L.R. 77 = 6 I.R. (Nag) 12 = 144 I.C. 521 = A.I.R. 1933 Nag. 44 (2).**

———*Joint family — Alienation—Father— Necessity for major portion—Mortgage—Sons, if bound regarding remaining portion of debt.*

The principle that if a sale deed is found to have been executed for necessity and the bulk of the consideration consists of antecedent debt or was justified by family necessity, it should not be set aside because no legal necessity in respect of minor portion of the sale price has been proved, does not apply to the case of a mortgage inasmuch as the father can borrow the precise amount required to meet the family necessity. If more is borrowed, the other members are not liable to that extent. 5 O.W.N. 836, Rel. on. (*Raza and Kisch, JJ.*) MISRI LAL *v.* BHAWANI DIN. **8 O.W.N. 1002 = 134 I.C. 1089 = I.R. 1932 Oudh 1.**

———*Joint family—Alienation—Father—Necessity—Plea that alienation might have been avoided.*

Where minors suing to recover property alienated by father of joint family cannot impeach the necessity for, or the nature of the alienation, it is not open to them to plead that the family necessity might have been relieved in some other way and that it was neither a prudent

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nor necessary act of the father to alienate. 31 All. 176 ; 5 Cal. 148 and 13 Cal. 21, Rel. on. (*Wallace, J.*) SUBBARAYULU CHETTIAR *v.* RATNAM AYYAR. **34 L.W. 982 = A.I.R. 1931 Mad. 615.**

———*Joint family—Alienation—Father—Necessity—Proof—Recitals.*

The recital in a deed is clear evidence of representation it makes and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. (*Rangi Lal, J.*) AKKU *v.* ALI AKBAR. **155 I.C. 179 = 7 R.L. 648 = A.I.R. 1934 Lah. 837.**

———*Joint family — Alienation — Father —Powers wider than manager.*

The manager of a joint family has powers to alienate for value joint family properties so as to bind the interest of both adult and minor coparceners of the property, provided that the alienation is made for a legal necessity or for the benefit of the estate. When the manager of a joint Hindu family sells joint family properties, the purchaser is bound to inquire into the necessity for the sale and the burden lies on him to prove either that there was a legal necessity in fact or that he made proper and *bona fide* inquiry as to the existence of such necessity and did all that was reasonable to satisfy himself as to the existence of such necessity. A Hindu father as such has even wider power of alienating coparcenary property, that is to say, he has powers which no other coparcener has ; for he may sell or mortgage ancestral property including the interest of his sons and grandsons therein, provided that the debt was an antecedent debt and was not incurred for immoral or illegal purposes. (*Fazl Ali and James, JJ.*) KALICHARAN SINGH *v.* HIRDAI NARAIN. **154 I.C. 948 = 7 R.P. 504 = A.I.R. 1935 Pat. 24.**

———Joint family — Alienation — Father— Property inherited from uncle—Son's right to question. *See* HINDU LAW—JOINT FAMILY — ANCESTRAL PROPERTY. **11 O.W.N. 1351.**

———*Joint family—Alienation — Father—Ratification by sons.*

Where joint family property is sold by father and sons and the vendee is asked to pay off a mortgage debt contracted by the father alone out of the sale proceeds, the sons cannot challenge the binding nature of the debt as they must be deemed to have admitted it as binding when they arranged to pay it off. (*Madhavan Nair and Jackson, JJ.*) PALANIAPPA CHETTIAR *v.* SUBRAMANIA AIYAR. **150 I.C. 176 = 6 R.M. 706 = 1934 M.W.N. 682 = 39 L.W. 131 = A.I.R. 1934 Mad. 185.**

———*Joint family—Alienation — Father—Sale deed attested by eldest members of family—Suit by grandchildren as nominal plaintiffs—Collusion — Proof of necessity.*

One *M*, who was blind and deaf on account of old age, alienated some property for paying some old debts. The deed was attested by *R* (one of his sons) and *B* (his grandson) who were eldest members of the family and heads of their respective branches, which were entitled to nearly one half of the joint family properties. They were *M's* right-hand men and borrowed practically all the money which had been disallowed by the High Court. *R* and *B* did not go into the witness-box. In suit by the children of *R* and *B* practically at the end of the limitation.

Held, that *R* and *B* were in a better position than any one else to say whether the money was applied for the necessary purposes of the family, They had allowed their children to figure as plaintiffs and got themselves

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impleaded as defendants. The suit was a collusive suit, and that the conduct of *R* and *B* afforded ample corroboration of the other evidence that the sale was effected for necessary family purposes. 48 All. 518 (P.C.) and 53 M.L.J. 786 (P.C.), Ref. (*Sir John Wallis.*) JAGANNATH *v.* SHRI NATH. **61 I.A. 150=56 All. 123 =1934 A.L.J. 950=3 A.W.R. 379=38 C.W.N. 421= 39 L.W. 295=11 O.W.N. 291=1934 M.W.N. 296= 59 C.L.J. 167=36 Bom L.R. 416=6 R.P.C. 97=147 I.C. 903=A.I.R. 1934 P.C. 55=66 M.L.J. 321 (P.C.)**

———Joint family—Alienation—Father—Sale of family property by—Minor son's right to pre-empt. *See* PRE-EMPTION—RIGHT TO. **156 I.C. 15 (1)=A.I.R. 1935 Lah. 560.**

———*Joint family—Alienation — Father—Son born prior to alienation—Right to question validity of alienation.*

A son born after the alienation of the family property by his father cannot question the validity of that alienation, if the father was at the time of the alienation the only member of the family, or if there being other members, they had consented to and so validated the alienation. Mayne, 7th Edn., S. 342; 33 All. 283; 38 All. 126; 34 Cal. 372, Ref. to. (*Wallace and Krishnan Pandalai, JJ.*) CHANDRAMANI PRUSHTI *v.* JAMBESWARA RAYAGARU. **135 I.C. 367=I.R. 1932 Mad. 111=1931 M.W.N. 263=34 L.W. 598=A.I.R. 1931 Mad. 550.**

———Joint family—Alienation—Father — Suit for partition—Settlement and will executed prior to service of notice on son—Valid. *See* HINDU LAW-PARTITION —SUIT FOR. **A.I.R. 1931 Mad. 278.**

———*Joint family—Alienation—Father—Validity of alienation—Test of.*

It is within the competence of a Hindu father to alienate the joint family estate where the transaction is for the benefit of the estate and is such as a prudent owner would have made with the knowledge that was available to him at the time. The transaction need not be of a defensive nature. A.I.R. 1928 All. 454 (F.B.) and A.I.R. 1932 All. 632 (F.B.), Foll. (Case-law discussed.) (*Niamatullah and Rachhpal Singh, JJ.*) MARKANDEY SINGH *v.* BADAN SINGH. **147 I.C. 517=6 R.A. 493 =1933 A.L.J. 1247=A.I.R. 1933 All. 568.**

———*Joint family—Alienation—Father — Validity—Portion of consideration not for necessity.*

A debt not for necessity, though it forms only a small portion of the consideration, should not be allowed to burden the land in the absence of any proof as to necessity. (*Bhide and Din Mohomed, JJ.*) SOHAN LAL *v.* ISHAR SINGH. **16 Lah. 320=155 I.C. 255=7 R.L. 666=A.I.R. 1934 Lah. 800.**

Invalidity.

———*Joint family—Alienation — Invalidity—Necessity or benefit—Payment of time-barred debt of father—Minor members, if bound.*

Where a joint Hindu family consists of major and minor brothers, the alienation of the joint ancestral property during the minority of some of the members of the family for the payment of a time-barred debt due from the deceased father is unjustified as being neither for the benefit of the family nor supported by legal necessity. (Case-law discussed.) (*Sen and Niamatullah, JJ.*) GUNNI *v.* DAL CHAND. **53 All. 923=I.R. 1931 All. 659=133 I.C. 419=1931 A.L.J. 765=A.I.R. 1931 All. 717.**

Manager.

See ALIENATION — BENEFIT TO ESTATE AND NECESSITY.

———*Joint family — Alienation—Manager—Alienation for maintenance of a member.*

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The managing member of a Hindu family can alienate absolutely a reasonable portion of the family property to his brother's widow in lieu of her claim for maintenance. 1912 M.W.N. 99, Ref. (*Sundaram Chetty, J.*) SEETHIAH *v.* MUTYALU. **I.R. 1931 Mad. 380 =130 I.C. 460=33 L.W. 86=1930 M.W.N. 1011= A.I.R. 1931 Mad. 106.**

———*Joint family—Alienation—Manager — Bar of limitation against one—Whether binds the rest.*

In the case of alienation by manager or guardian of minors, the bar of limitation as against one member does not affect other members if such other members have a right to impeach alienation. A.I.R. 1926 P.C. 16, Foll. (*Banerji and King, JJ.*) KAMTA RAI *v.* RANI JADURAJ KUNWARI. **I.R. 1931 All. 603=133 I.C. 155=A.I.R. 1931 All. 398.**

———*Joint family — Alienation — Manager — Legal necessity—Marriage expenses of members.*

Debts incurred by the manager of a joint family for meeting the expenses of the marriage of the members of the family constitutes legal necessity justifying an alienation by the manager by way of mortgage. (*D.N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING. **62 Cal 733=161 I.C. 595=8 R.C. 533=61 C.L.J. 593=A.I.R. 1936 Cal. 116.**

———*Joint family— Alienation— Manager — Mortgage by high rate of interest—Necessity—Burden of proof.*

It is incumbent upon those who support a mortgage by the manager of a joint Hindu family to show not only that there was necessity to borrow, but that there was necessity to borrow at some such high rate of interest and upon some such terms as are contained in the document. (*Wort and Varma, JJ.*) KAMTA PRASAD *v.* DURGA DAT AWASTHI. **155 I.C. 961=7 R.P. 655 =A.I.R. 1935 Pat. 368.**

———*Joint family—Alienation—Manager—Mortgage —Alienee discharging prior mortgage—Legal necessity for mortgage not proved—Effect.*

S, the managing member of a joint Hindu family of which the plaintiffs were the coparceners, mortgaged certain family property under a possessory mortgage in favour of *M* in 1905 and the defendant, who was a subsequent mortgagee from *S* got possession of that property by redeeming the mortgage of *M*. Plaintiffs brought a suit to eject defendant in 1926.

Held, that the defendant was entitled to claim the rights of a prior mortgagee in respect of the said property, though legal necessity in his favour had not been established and the plaintiffs could not claim to eject him from the said property when they were out of possession of it since 1905 and had never cared to question the validity of the mortgages executed by *S*. 16 C.W.N. 119, Appl. (*Raza and Nanavutty, JJ.*) RAM KISHAN LAL *v.* MAHOMED BAQAR KHAN. **I.R. 1931 Oudh 271=132 I.C. 271=8 O.W.N. 222=A.I.R 1931 Oudh 144 (2).**

———*Joint family—Alienation—Manager—Mortgage —Binding nature—Burden of proof.*

It is well-settled that the authority of *Kartas*, to borrow on the security of family property is a limited one and that in the case of a loan to them the burden of proof in the first instance rests on the lender to show that both the borrowing and the terms were within the authority which *Kartas* can exercise. (*Raza and Smith, JJ.*) SURAJ BAKHSH SINGH *v.* KEDAR NATH. **7 Luck. 505=135 I.C. 379=I.R. 1932 Oudh 27=8 O.W.N. 1090=A.I.R 1932 Oudh 66.**

———*Joint family—Alienation—Manager—Mortgage debt—Suit to enforce—Personal liability—Dayabhaga Law.*

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In the case of the managing members of a Dayabhaga family, an implied consent may be presumed from the very fact that they were entrusted with the management of the family estate by the other members of the family. Where the debt is incurred for a joint family purpose the joint family and not the managing member becomes liable for it. Where a person sues on a mortgage executed by the manager he cannot convert the suit as one on the debt ignoring the mortgage (*Mukerji and Mallick, JJ.*) SUKHADA KANTA BHATTACHARJEE *v.* JOGINI KANTA BHATTACHARJEE. **60 Cal. 1197=149 I.C. 878=6 R.C. 647=37 C.W.N. 1087=58 C.L.J. 135=A.I.R. 1934 Cal. 73.**

———*Joint family—Alienation—Manager—Mortgage—Duty of lender*—Bona fide *enquiry—Real existence of necessity not necessary.*

If the lender acted honestly and with due caution and made reasonable enquiries, which led him to believe that a sufficient and real necessity for the borrowing of the money for the purpose of the family business did exist, the real existence of the necessity is not a condition precedent to the validity of his charge, nor is he bound to see to the application of the money. 6 M. I. A. 393, Foll. (*Sir Lancelot Sanderson.*) RAM KRISHNA MURAJI *v.* RATAN CHAND. **58 I.A. 173=I.R. 1931 P.C. 197=53 All. 190=1931 M.W.N. 733=34 L.W. 175=1931 A.L.J. 458=132 I.C. 613=35 C.W.N. 841=33 Bom.L.R. 988=53 C.L.J. 561=A.I.R. 1931 P.C. 136=61 M.L.J. 665 (P.C.).**

[**Rel.** 15 L. 9 (13 **R.** 36 Bom.L.R. 474 (476).]

———*Joint family—Alienation—Manager—Mortgage by manager—High rate of rent—Necessity for—Onus of proof—Power of Court to reduce rate—Security ample—Delay in bringing suit—If justify reduction.*

Those who support a mortgage of joint family property by the manager must prove not only that there was necessity to borrow the principal, but also that it was not unreasonable to borrow at the high rate of interest and upon the terms provided by the mortgage. If the rate of interest is exorbitantly high, and the security is ample, the Court can properly infer that it was unnecessarily high and can make a decree allowing a reduced rate. Where a mortgage deed provided 18 per cent. interest with nine monthly rests, as the security was ample the High Court in view of the long delay in bringing the suit, held that simple interest at 18 per cent per annum would be amply sufficient to compensate the mortgagee for the interest that he should get on the principal amount of the mortgage and allowed only that rate up to the date fixed for payment and 6 per cent. after that date. (*D.N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING. **62 Cal. 733=161 I.C. 595=8 R.C. 533=61 C.L.J. 593=A.I.R. 1936 Cal. 116.**

———*Joint family—Alienation—Manager—Mortgage by manager—Necessity proved only for part of consideration—Alienee not making enquiry as to necessity—Transaction, if be upheld as a whole.*

Where in the case of a mortgage executed by the manager of a joint Hindu family, for Rs. 12,000, justifying necessity is proved only in respect of about Rs. 7,692, and the Court finds there was no such necessity for the balance, the mortgage transaction cannot be upheld in its entirety. The Court cannot presume legal necessity for the balance of consideration when there is no evidence to prove that the lender made any *bona fide* enquiry as to necessity. In a case of sale, before it can be upheld, two elements must co exist, (1) the purchaser had made a *bona fide* enquiry; (2) and that the sale is justified by legal necessity. Their Lordships of the Privy Council have laid down that where there has been a *bona fide* enquiry by the purchaser as to the existence of legal necessity and if the entire consideration is not applied to the necessary purposes, the purchaser is not bound to enquire as to the application of the money and is protected if he has made an enquiry only as to the existence of legal necessity. (*D.N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING **62 Cal. 733=161 I.C. 595=8 R.C. 533=61 C.L.J. 593=A.I.R. 1936 Cal. 116.**

———*Joint family—Alienation—Manager—Mortgage by manager—Part necessity made out—Validity—Mortgage if bound to see to application of money.*

Quaere.—Whether the principle of Hindu Law that a purchaser from the manager of a joint family who acts in good faith and after due enquiry, and is able to show that the sale is justified by legal necessity, is under no obligation to inquire into the application of any surplus and is, therefore, not bound to make repayment of such surplus to members of the family challenging the sale. applies to the case of a mortgagee from the manager. (*D.N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING. **62 Cal. 733=161 I.C. 595=8 R.C. 533=61 C.L.J. 593=A.I.R. 1936 Cal. 116.**

———*Joint family—Alienation—Manager—Mortgage—Necessity— Benefit — Satisfaction of pre emption decree.*

The rule is that the family property is for the support of those who are in existence, those who are in the womb, and those who are not yet begotten, and therefore the property cannot be disposed of by the father without the consent of his sons. The same rule applies when the manager is not the father. He must have the consent of all other members of the family, in order to transfer the same, or there must be benefit to the estate by the transaction. It cannot be said that money required by the manager of a joint Hindu family, in order to pay the pre emption money and costs for the acquisition of fresh property, is in all cases without legal necessity or benefit to the family estate, and is therefore always outside the authority of the father. Nor can it be laid down, on the other hand, that every manager is entitled to borrow money in order to acquire fresh property by pre-emption. The answer to the question must depend on the special circumstances of each case. When satisfied that the acquisition was not speculative, but in the best interests of the family and for its benefit as well as for the benefit of the family estate, which an ordinary prudent manager would make, it would be open to a Court to hold that the transaction is binding on the other members of the family, even though it is nothing but the raising of a loan on a mortgage of family property for the sake of satisfying the pre-emption decree.

Semble :—Benefit to estate does not necessarily mean that the transaction must be of a defensive nature. (*Sulaiman, C.J., Mukerji and King, JJ.*) AMRAJ SINGH *v.* SHAMBHU SINGH. **55 All. 1=I.R. 1932 All. 653=140 I.C. 509=1932 A.L.J. 895=A.I.R. 1932 All. 632 (F.B.).**

[**R.** 1933 A.L.J. 85 (89); 1933 A.L.J. 1247 (1250, 1252).]

———*Joint family—Alienation—Manager—Mortgage, —Necessity—Consent of adult coparceners.*

Where a mortgage by the manager is for the benefit of the family and for debts binding on it, no question of a minor coparcener's separate representation arises. Another adult member's action in acting for him is superfluous. The question of guardianship of a minor coparcener is irrelevant, when there is a joint Hindu family with a managing member. The mere fact of consent by the adult members of the family is not

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enough. For although such consent may be sufficient to supply any lacuna that may exist in the evidence of legal necessity, that fact alone cannot supply the evidence of legal necessity when there is no evidence of legal necessity on the record Lender's duty to inquire pointed out. (*Vivian Bose, A.J.C.*) LAXMANPRASAD *v.* RAMDAS. **6 R.N. 204=30 N.L.R. 228=148 I.C. 771=A.I.R. 1934 Nag. 56.**

———*Joint family—Alienation—Manager—Mortgage—Necessity—Proof.*

Where it was shown that the mortgagor did not execute the mortgage as manager and there was no evidence to show that the debt was contracted for legal necessity but the lower Court relied on a document executed by the coparceners after they had parted with all rights to property and also on statements made by the executant at the time of the execution of the deed,

Held, that the finding as to family necessity could not be supported.

Held, further, that the pieces of evidence relied on by the lower Court were inadmissible in evidence, especially when the executant, who was alive had not been examined. (*Macnair, J.C.*) AMBIKA PRASAD *v.* GOURI SHANKAR. **141 I.C. 656=I.R. 1933 Nag. 78=15 N.L.J 94 -A.I.R. 1933 Nag. 383 (1).**

———*Joint family—Alienation—Manager—Mortgage by—Necessity for terms—Burden of proof.*

In the case of a mortgage made by the manager of a joint Hindu family, the mortgagee must show the necessity not only for the loan but also for the rate and the terms contained in the mortgage. (*Wort and Varma, JJ.*) MARKANDA PANDIT *v.* BIDYANATH JETHI. **158 I.C 731=8 R P 209=A.I.R. 1935 Pat 499.**

———*Joint family—Alienation—Manager—Mortgage—New business for benefit of family—Binding nature of mortgage.*

It is not necessary for purpose of binding the joint family property that the loan should be incurred for the purpose of an ancestral business. Where the slender resources of the family were not sufficient and the manager supplemented the same by what was earned as hire of camel for carrying loads and he mortgaged certain family properties for purchasing camel.

Held, that the manager acted in prudent and reasonable manner for the benefit of the family and that the mortgage was binding on the other members. 50 All. 969 (F.B.), Ref. (*Sulaiman, A.J.C. and King, J.*) MAHESH PRASAD *v.* JAGANNATH CHOUBE. **I R. 1931 All 652=133 I C. 412=1931 A.L J 1066=A.I.R. 1931 All. 743 (2).**

———*Joint family—Alienation—Manager—Mortgage—Rate of interest—Reasonableness—Onus—Discretion of Court*

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family, to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate and upon some such terms and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand especially when the security is ample. Order of lower Court reducing rate of interest from 13 annas per cent. per mensem compoundable yearly to 13 annas per cent per mensem simple, affirmed. 41 All. 571 (P.C.), Rel. on. (*Raza and Kisch, JJ.*) MISRI LAL *v.* BHAWANI DIN. **8 O.W N. 1002=134 I.C. 1089=I.R. 1932 Oudh 1.**

———*Joint family—Alienation—Manager—Mortgage—Rule of interest—10 per cent. if excessive.*

In Oudh a rate of 12 per cent. per annum is looked upon as a normal rate even in cases where the security is

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abundant. 20 O.C. 318, Ref. (*Raza and Smith, JJ.*) SURAJ BAKHSH SINGH *v.* KEDAR NATH. **7 Luck. 505=135 I.C. 379=I R. 1932 Oudh 27=8 O.W.N. 1090=A.I.R. 1932 Oudh 66.**

———*Joint family—Alienation—Manager—Mortgage—Renewal of old mortgage on favourable terms—Binding nature.*

The manager of a Hindu joint family cannot be said to act imprudently in renewing an old mortgage on more favourable terms instead of allowing the properties to be sold for realisation of the sum due on the old mortgage. In the case of such an alienation it is not necessary for the lender to inquire as regards the previous management. It is sufficient to justify the loan if there is a need to borrow money. (*Courtney Terrell, C.J. and Kulwant Sahay, J.*) MADHO SARAN SINGH *v.* MANNA LAL. **149 I C. 129=6 R P. 563=14 Pat.L.T. 441=A.I R. 1933 Pat. 473.**

———*Joint family—Alienation—Manager—Mortgage—Small portion of debt not binding—Procedure.*

Where the amount found not for necessity (Rs. 300) forms only a small portion of the total consideration (Rs. 5,000) and there is no doubt that the mortgagee was justified in advancing the rest, the whole mortgage must be upheld. (*Vivian Bose, A J.C.*) LAXMANPRASAD *v* RAMDAS. **6 R.N. 204=148 I.C. 771=30 N L.R. 228=A.I.R. 1934 Nag. 56.**

———*Joint family—Alienation—Manager—Necessity—Burden of proof.*

The manager of a joint undivided Mitakshara family cannot alienate or burden the estate *qua* manager except for purposes of necessity. The burden of proving the necessity for the alienation is on the alienee or lender. (*D.N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING. **62 Cal. 733=161 I.C. 595=8 R.C. 533=61 C L.J. 593=A.I.R. 1936 Cal. 116.**

———*Joint family—Alienation—Manager—Necessity—Decree debt based on compromise.*

An alienation by a manager of a family for discharging a decree debt based on a compromise which has been certified by the Court to be for the benefit of the minor members is for a valid necessity. (*Fazl Ali and James, JJ.*) KALICHARAN SINGH *v.* HIRDAI NARAIN. **154 I.C. 948=7 R.P. 504=A.I.R. 1935 Pat. 24.**

———*Joint family—Alienation—Manager—Necessity—Enquiry by alienee—Nature and scope of.*

In order that an alienation by the manager of the joint family property, be binding on the family, the alienee must prove that he had (*a*) acted honestly, and (*b*) made reasonable and *bona fide* inquiry as to the existence of the alleged necessity. If both these conditions are fulfilled, the alienation will be binding on all the members of the family, regardless of the fact that the alleged necessity has not really existed or that the money raised on the transaction has not been used by the manager on some other proper purpose. As to the nature and scope of the inquiry, it must be made from one who is in a position to know and from an independent source, and not from one who is interested in upholding the manager. Hence if the alienee fails to prove proper inquiry on his part, alienation cannot be upheld. (*Tek Chand and Bhide, JJ.*) GIRDHARI LAL *v.* MEHR DIN. **A.I.R. 1935 Lah. 42.**

———*Joint family—Alienation—Manager—Necessity—Minors bound.*

A manager of a joint Hindu family is fully competent to bind the minor members of the family by a contract for sale of immovable property belonging to the family provided the contract is for legal necessity. (*Iqbal*

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Ahmad, J.) RAM CHANDRA *v.* MT. DHAPO. **A.I.R. 1934 All. 68.**

———*Joint family—Alienation—Manager—Necessity—Onus of proof—Representations by manager—Value of.*

The onus of proving that an alienation made by a manager of a joint Hindu family is valid and supported by necessity is on the lender. And for this the representations made by the borrower are evidence which can be used to corroborate the recitals in the deed. In such cases it is enough if the alienee proves that antecedent debts were due. He need not further prove that they could not be paid without entering into this transaction. (Case-law referred.) (*Fazl Ali and Rowland, JJ.*) DWARKA RAM *v.* BAKSHI PARNAW PRASAD SINGH. **14 Pat. 595=156 I.C. 859=8 R.P. 27=16 Pat.L.T. 613=A.I.R. 1935 Pat. 178.**

———*Joint family—Alienation—Manager—Need or benefit of the family.*

The manager of a joint Hindu family has power to alienate the family property in case of need or for the benefit of the family. 6 M.I.A. 393 (P.C.), Rel. on. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546=I.R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840=A I.R. 1931 Lah. 419.**

———*Joint family—Alienation—Manager—Powers of gift—Transaction, if void or voidable.*

The karta is authorized to gift a small portion of the joint family property for religious purposes without the consent of the coparceners and even against their objection to it. But even where the gift is for other purposes and consists of a large portion of the property, the transaction is voidable only at the instance of other coparceners and a stranger to the family has no right to intervene even if the karta has exceeded his authority to deal with the property for family purposes. On this point there is no distinction between sales and mortgages on the one hand and gifts on the other. 45 All. 654 and 153 P.R. 1883, Foll.; A.I.R. 1930 Lah. 223; A.I.R. 1924 All. 51 and A.I.R. 1928 All. 476, Rel. on; A.I.R. 1929 All. 865, Diss. from. (*Tek Chand and Abdul Rashid, JJ.*) IMPERIAL BANK OF INDIA, JULLANDAR *v.* MT. MAYA DEVI. **16 Lah. 714=159 I C. 474=8 R.L. 399=37 P.L.R. 831=A.I.R 1935 Lah. 867.**

———*Joint family—Alienation—Manager—Powers of—Permanent lease—Lease declared invalid—Position of lessee—Liability to ejectment.*

Though the manager of a joint family has no power to grant a perpetual lease and such a lease has been, at the instance of the other members of the family, declared null and avoid, it does not follow that the lessee is on that account liable to be ejected by the other members. It is within the competence of the manager to grant an ordinary lease in the ordinary course of management of the property and the position of the lessee, notwithstanding the invalidity of the permanent lease, remains that of a tenant and not that of a trespasser. A.I.R. 1928 All. 617, Foll. (*Iqbal Ahmad and Kisch, JJ.*) TAPESAR SINGH *v.* CHHABI AHIR. **6 I.R. (All) 363=146 I.C. 870=14 L R. 230 (Rev.)=17 R.D. 185=A I.R. 1933 All. 631.**

———*Joint family — Alienation—Manager — Prior debt incurred by grandfather and father—Mortgage executed by uncles to discharge—Binding nature of.*

It is the privilege of the father alone to burden the family estate by a mortgage to discharge an antecedent debt, which must be debt of his own. A manager of the family, who is not the father, cannot bind the estate merely by discharging a pre-existing debt of the family. So a mortgage executed by two uncles of the plaintiff to discharge a pre-existing debt incurred by the grandfather and father is not binding on the estate without proof of legal necessity. 46 All. 95 (P.C.), Appl.; 46 All. 295, Expl. (*Mukerji, A.J.C., King and Niamatulla, JJ.*) CHIRANJI LAL *v.* BANKEY LAL. **55 All. 370=I.R. 1933 All. 104=142 I.C. 333=1933 A.L.J. 123=A.I.R. 1933 All. 273 (F.B.).**

[R. 1934 A. 557 (558)]

———Joint family—Alienation—Manager—Right of heir of the surviving member to challenge. *See* HINDU LAW—REVERSIONER. **A.I R. 1934 Oudh 246.**

———*Joint family—Alienation—Manager—Transfer by alienee to third person—Suit by minor members of family—Defence of S. 41, Transfer of Property Act, not sustainable.*

A manager of a joint Hindu family consisting of some minors alienated the ancestral house without any necessity. The alienee transferred it to third persons, who, in a suit by minors for setting aside the alienation, pleaded S. 41 of the T. P. Act.

Held, that the original alienee was not the ostensible owner of the said ancestral family house with the consent express or implied of the persons interested in the said ancestral house, inasmuch as the minors who had an interest in the said house, did not and could not by reason of the disability of infancy give their consent. Therefore the minors were not prevented by the terms of S. 41 from alleging that the deed of alienation by the manager was merely a sham transaction and that the alienee had no authority to transfer the said house. (*Sir Lancelot Sanderson.*) SHANKAR *v.* DAOOJI MISIR. **58 I.A. 206=53 All. 293=33 Bom.L.R. 1000=1931 M.W.N. 679=132 I.C. 602=34 L.W. 119=1931 A. L.J. 373=35 C.W.N. 693=54 C L.J. 24=I.R. 1931 P.C. 186=A.I R. 1931 P.C. 118=61 M L.J. 212 (P.C.).**

———*Joint family—Alienation—Manager — Validity of—Right of third party to question.*

An alienation by the Karta of a joint Hindu family is not void but only voidable at the instance of the members of the family. If they accept the alienation, no third party has any right to challenge it. Where therefore the mortgage executed by the manager has not been impeached by the other members, it is valid and can be held to form a good part of the consideration for the sale in favour of the mortgagee. Its validity cannot be questioned on the ground of absence of legal necessity by a subsequent purchaser of the same properties. (*Dalip Singh, J.*) JASWANT RAM *v.* JASSU RAM. **6 I.R. (Lah) 300=146 I.C. 990=34 P.L.R. 1061=A. I.R. 1933 Lah. 737.**

Mortgage.

See also ALIENATION—FATHER AND MANAGER.

———*Joint family—Alienation—Mortgage—Proof.*

When a mortgage of a joint family property is challenged, the Court can consider the consideration for such mortgage, if it consists of several parts, by dealing separately with the several parts instead of considering it as a whole. (*Fazl Ali and Rowland, JJ.*) NAWAL KISHORE PRASAD SINGH *v.* GANGA PRASAD SINHA. **147 I.C. 1070=6 R P. 395=A.I.R. 1933 Pat. 680.**

Necessity.

See also ALIENATION—FATHER AND MANAGER.

———Joint family—Alienation—Necessity—*Bona fide* enquiry by lender—Real existence of necessity not necessary. *See* JOINT FAMILY ALIENATION—MANAGER. **58 I.A. 173=53 All. 190=61 M.L.J. 665 (P.C.).**

———*Joint family—Alienation — Necessity—Burden of proof—When rule applicable.*

The rule that a vendee who was also the previous mortgagee so far as certain items are concerned, is seized

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with peculiar knowledge, and it is for him to show that necesssity existed for those items applies only if the plaintiff is entitled to challenge the alienations. (*Harrison and Agha Haidar, JJ.*) MUKAND SINGH *v.* WAZIRUDDIN. **149 I.C. 506=6 R.L. 696=A.I.R. 1933 Lah. 359.**

———Joint family—Alienation—Necessity—Compound interest—Duty of lender. *See* DEBTS—INTEREST. **56 Bom. 36=A.I.R. 1932 Bom. 136.**

———*Joint family—Alienation—Necessity—Criminal prosecution of senior member—Costs incurred in defence.*

The term 'legal necessity' is not capable of precise definition. If the head of a joint family or for the matter of that, any member of a joint Hindu family is accused of a serious criminal charge, the costs incurred in his defence should be regarded as incurred for family necessity. The result of the prosecution, if he has ultimately been convicted, ought not to be allowed to affect the question if the costs should or should not be regarded as incurred for legal necessity. When the manager of a joint family is being prosecuted for a serious criminal charge, it is a period of distress for the whole family such as would justify a mortgage of the family property by a coparcener. So family property may be charged with a debt incurred for the purpose on defending members of a family in a criminal case. If so far as the consideration of the mortgage was borrowed for prosecuting the defence of a coparcener, it was far legal necessity but as regards the sum required for payment of the fine imposed on him, it cannot be treated as one for legal necessity. (*Wazir Hasan, C.J. and Bisheshwar Nath, J.*) SAID AHMAD *v.* RAJA BARKHANDI MAHESH PRATAB NARAIN SINGH. **8 Luck. 40=I.R. 1932 Oudh 339=139 I.C. 64=9 O.W.N. 253=A.I.R. 1932 Oudh 255.**

[**Rel.** 14 I.C 683 (684) (o).]

———*Joint family—Alienation—Necessity—Defence in criminal case.*

The defence of a member of a joint family in a criminal charge is regarded among the Hindus as a pious and necessary act in order to remove the stigma of disgrace upon the whole family consequent upon the conviction of one member. The question whether there existed legal necessity for raising the loan cannot be made to depend upon the result of the trial, and in such a time of distress, it is open to even a junior member of the family to alienate a portion of the joint family property. (*Razi and Smith, JJ.*) SITLA BAKHSH SINGH *v.* MT. RAM RAJI. **I.R. 1933 Oudh 191=143 I.C. 683=10 O.W.N. 550=A.I.R. 1933 Oudh 289.**

———*Joint family—Alienation—Necessity—Defence in criminal case.*

A mortgage debt incurred for the purpose of defending a member of a joint Hindu family against a criminal charge is a debt binding on the whole family. (*Agarwala, J.*) MURLI MANDHAR *v.* BINDESWARI PRASAD. **149 I.C. 756=6 R.P. 651=A.I.R. 1933 Pat. 708 (1).**

———*Joint family—Alienation—Necessity—Defence of property.*

Money spent in securing the release of movable property of joint family from seizure constitutes legal necessity. (*Agarwala, J.*) MURLI MANDHAR *v.* BINDESWARI PRASAD. **149 I.C. 756=6 R.P. 651=A.I.R. 1933 Pat. 708 (1).**

———*Joint family—Alienation—Necessity—Enquiry as to—Duty of mortgagee—No right to ask the Court to take up that responsibility.*

It is the duty of a purchaser or a mortgagee to enquire and satisfy for himself that a necessity has arisen or such circumstances are there, as would entitle in law the manager to enter into the proposed transaction on behalf of the joint family and which would be binding on minor members of the family. It is not proper for a purchaser or a mortgagee to cast that obligation of making the enquiries on the Court and contend that unless the Court sanctions the transaction he will not enter into the same. (*Kania, J.*) DATTATRAYA GOVIND HALDANKAR, *In re.* **56 Bom. 519=141 I.C. 697=I.R. 1933 Bom. 118=34 Bom L.R. 1156=A.I.R. 1932 Bom. 537.**

———*Joint family—Alienation—Necessity—Existence of—Inquiry by lender—Scope of.*

As regards necessity, for a mortgage of family property executed by a coparcener, it matters not whether there was any representation at the time; it matters not whether an enquiry was made at the time by the lender, if in fact the necessity existed, although proof of inquiry disposes of the question of necessity. It seems quite irrelevant to ascertain what was the statement made at the time, if necessity at the time is established. If a statement had been made at the time and if proper and *bona fide* inquiry had been made, the lender is excused from establishing that there was in fact family necessity. There was no duty cast upon the lender to ascertain who was not a member of the joint family. (*Wort, J.*) LACHMAN LAL *v.* MUNSHI MAHTON. **149 I.C. 734=6 R.P. 611=A.I.R. 1933 Pat. 708 (2).**

———*Joint family—Alienation—Necessity—Father acknowledging debt due from his father—Mortgage by him to pay such debt.*

Where a father acknowledges a debt due from his father as a personal debt and a decree is passed against him on the basis of this acknowledgment, the payment of such a debt is a clear legal necessity of the family, and a mortgage executed by him for the purpose is therefore binding upon his sons. (*Dalal, C.J. and Sawhny, J.*) RATTAN LAL *v.* S. SURINDER SINGH. **37 P.L.R. J. & K. 27.**

———*Joint family—Alienation—Necessity—Legitimate expenses of temple.*

The legitimate expenses of a temple would constitute legal necessity. (*Grille, J.C.*) PREMDAS *v.* SHEOPRASAD **152 I.C. 362=7 R.N. 96=A.I.R. 1934 Nag. 222.**

———*Joint family—Alienation—Necessity—Major portion of consideration proved to be for legal necessity.*

Where a legal necessity is satisfactorily proved to the extent of Rs. 4,500 out of the consideration for sale (Rs. 5,000), that is enough to justify the sale. (*Broomfield and Wadia, JJ.*) HANMANTAPPA *v.* DUNDAPPA. **151 I.C. 1043=7 R.B. 100=36 Bom.L.R. 474=A.I.R. 1934 Bom. 234.**

———*Joint family—Alienation—Necessity—Marriage expenses of member of joint family.*

The expenses of the marriage of a member of a joint Hindu family are legitimate expenses and the joint family property is liable for the same. (*Tek Chand and Agha Haidar, JJ.*) TOLA RAM *v.* KOTU RAM. **158 I.C. 458=37 P.L.R. 339.**

———*Joint family—Alienation—Necessity—Meaning of—Payment of Government revenue—Expenses for daily worship in temple.*

Necessity does not mean actual compulsion, but the kind of pressure which the law recognises as serious and sufficient. The incurring of legal expenses for establishing a valuable right and the paying off of the revenue due to the Government are necessities recognized by the law. Similarly in the case of a Hindu temple, an alienation for the payment of sums required for the daily worship is valid. (*Venkatasubba Rao and Curgenven,*

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JJ.) VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR **I R. 1933 Mad. 442 = 144 I.C. 584 = A.I.R. 1933 Mad. 639.**

———*Joint family— Alienation — Necessity—Mortgage.*

It is the universal practice in mortgage suits that every item of consideration has to be scrutinised. The essential difference between a suit to enforce a mortgage and a suit to set aside a sale is that in the former case the lender has to prove what amount is justly due to him and in the latter case the question is whether the sale should stand or not. (Case-law referred.) (*Fazl Ali and Rowland, JJ.*) DWARKA RAM *v.* BAKSHI PARNAW PRASAD SINGH. **14 Pat. 595 = 156 I.C. 859 = 8 R.P. 27 = 16 Pat.L.T. 613 = A.I.R. 1935 Pat. 178.**

———*Joint family—Alienation—Necessity—Proof—Alienee making enquiries—Small portion of consideration not expended for legal necessity.*

Where it is established that the mortgagee of joint family property has made enquiries and was satisfied that the money was actually required and was expended for a legal necessity (marriage in the family), the fact that a small and unsubstantial portion of the consideration was not expended for legal necessity will not make the mortgage invalid, especially when it is shown that the lender made enquiries as to that amount from the members of the family, who are the only persons competent to give information about the matter. The fact that no enquiry is made of third persons is immaterial. (*Wort and Varma, JJ.*) KAMTA PRASAD *v.* DURGA DAT AWASTHI. **155 I.C. 961 = 7 R.P. 655 = A.I.R. 1935 Pat 368.**

———*Joint family—Alienation—Necessity—Proof of—Execution by all adult members—Effect of.*

Quaere : Whether the fact that all the adult members of a joint Hindu family joined in the execution of a deed of transfer can by itself be sufficient evidence of legal necessity, when there is no other evidence of necessity on the record. (*Pakenham Walsh, J.*) VENKATANARASIMHAM *v.* SUBBA RAO. **147 I C 694 = 6 R M. 389 = 1933 M.W.N. 950 = A I.R. 1933 Mad 867.**

———*Joint family—Alienation— Necessity—Proof—Mortgage must prove necessity for every portion of mortgage debt.*

If a substantial portion of a debt secured by a mortgage is proved for legal necessity, there is no presumption in law that the remaining portion of the debt, which constitutes a small part of the entire debt, was also borrowed for legal necessity. In suit for sale of the family property for realization of mortgage debts, it is not therefore permissible to relieve the mortgagee from the burden of proving legal necessity for every item of the mortgage debt and no assumption, in the absence of positive proof, can be made that any portion of the mortgage debt, however small it may be, was incurred for family necessity. (*Iqbal Ahmad and Bajpai, JJ.*) DURGA PRASAD SINGH *v.* LACHMI NARAIN. **153 I.C. 859 = 7 R.A. 637 = A.I.R. 1934 All. 789.**

———*Joint family—Alienation—Necessity—Proof of—Recitals.*

Any general recitals in mortgages or deeds of sale with regard to the existence of legal necessity for any alienation are not of themselves evidence of such necessity without substantiation by evidence *aliunde*. Indeed, it is obvious, that if such proof were permitted, the rights of the coparceners in a joint Hindu family who are entitled to question the propriety or validity of any alienation, could always be defeated by the insertion of carefully prepared recitals. Different considerations arise in the case of an ancient alienation, having regard to the great lapse of time, since the transaction took

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place. It will not be reasonable to expect such full detailed evidence as to the state of things which gave rise to the alienation in question as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are permissible to fill in the details which have been obliterated by time. (*Raza and Srivastava, JJ.*) PUTTOO LAL *v.* RAGHUBIR PRASAD. **9 Luck. 237 = 147 I.C 540 = 6 R.O. 276 = 10 O.W.N. 1166 = A.I R. 1933 Oudh 535.**

——— *Joint family—Alienation—Necessity—Starting new business—Need for enquiry by alienee.*

Where the alienee proved through one of his witnesses that the alienors said that they were going to open a business but otherwise there was no evidence to show that any shop was opened or was in contemplation and it was not shown that the alienee made any enquiry or had any grounds or a *bona fide* belief that the money was required for starting a business,

Held, that necessity had not been proved. (*Coldstream and Bhide, JJ.*) RAJ KISHORE *v.* MADAN GOPAL. **13 Lah. 491 = 143 I.C. 249 = I.R. 1933 Lah. 322 = 33 P.L.R. 829 = A.I.R. 1932 Bom. 636.**

———*Joint family—Alienation—Necessity—Suit to set aside alienation after many years—Strict proof not possible.*

It is a general principle that after the lapse of a period of years, a vendee cannot be expected to produce strict proof of necessity.

All four brothers sold some ancestral property in 1912. The vendee lived in a town distant from the vendor's village. He died and his sons were moving about owing to service. The family of the vendors was all along heavily indebted. A son of one of the brothers brought a suit in 1926 after his cousins were already barred from suing.

Held, that the alienation must must be deemed to have been for necessity. (*Harrison and Addison, JJ.*) HAZARA *v.* DINA. **6 I.R. (Lah.) 273 = 146 I.C. 829 = 34 P.L.R. 1025 = A.I.R 1933 Lah. 796.**

Rights of alienee.

———*Joint family—Alienation—Rights of alienee—*Bona fide *transferee of joint family property—Not subject to rights of Hindu widow.*

The rights of a Hindu widow to residence and maintenance would be defeated by those of a *bona fide* transferee for value (and this inculdes both a purchaser and mortgagee) even with notice of her claim if the property was transferred in order to pay debts (not incurred for immoral purposes) of her husband or his father or grandfather or for the benefit of the undivided family. In order to affect his rights, it is necessary that he should have notice not merely of the existence of a right of maintenance but of the existence of a charge actually created by any decree or order and binding on the estate. (Case-law discussed.) (*Aston, A.J.C.*) TAYABALI *v.* LILABAI. **27 S.L.R. 289 = 149 I.C. 617 = 6 R.S. 230 = A.I.R. 1934 Sind 14.**

———*Joint family—Alienation—Rights of alienee—Mortgage by brothers—No legal necessity—Mortgage subject to mother's rights of maintenance.*

Where there is no evidence to show that the mortgage debt raised by the three sons was raised for the benefit of the family or any other necessary purpose, the mortgage must be taken to have been made subject to the rights of residence and maintenance which the mother had in the family estate. (*Tek Chand and Monroe, JJ.*) SHAMBU DAYAL *v.* MT MUNNI. **6 I.R. (Lah.) 37 = 144 I.C 961 = 34 P.L.R. 294 = A.I.R. 1933 Lah. 496.**

———*Joint family—Alienation—Rights of alienee—Right to impeach mortgage by judgment debtor.*

An auction purchaser in execution can challenge the validity of a previous mortgage by the judgment-debtor

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whose interest he had acquired, whether he is the manager or only a member of the joint family. On the other hand, a private transferee from the debtor is not entitled to do so. 15 A. 339 and 53 A. 21, Foll. (*Mukerji and Bennet, JJ.*) JAGANNATH PRASAD *v.* CHUNNILAL. **143 I.C. 706=I.R. 1933 All. 326=1932 A.L.J. 1110=A.I.R. 1933 All. 180.**

———*Joint family—Alienation—Rights of alienee—Rights in specific property transferred by all members—Right of one alienee to sue others for partition.*

When all the members of a joint family have parted with their rights in a specific property of the family, questions between the alienees of the several members are not questions between coparceners and the cases which hold that alienees from coparceners have only a right to sue for partition and to take such property as is allotted to them have no application to the case. One of the alienees can therefore sue the other alienees for partition of the specific property. 34 M. 269, Ref. (*Krishnan Pandalai, J.*) SURANNA *v.* SUBBARAVUDU. **147 I.C. 680=6 R.M. 379=1933 M W.N. 823=38 L.W. 952=A.I.R. 1933 Mad. 871=65 M.L.J. 769.**

———Joint family—Alienation—Right of alienee—Suit between alienees from different members of joint family—Maintainability. *See* HINDU LAW—PARTITION—PARTIAL PARTITION. **65 M.L.J. 696.**

———*Joint family—Alienation—Rights of alienee—Suit by one alienee for partial partition against another—Maintainability.*

As between members of a joint family, no suit for partition lies. But a member or members of a joint family may sue an alienee from a member of the joint family for his or their share of the property alienated without suing for a general partition. In so doing, they affirm the sale by the other member or members but the real basis of the rule is that as the rule against partial partition is a rule for the protection of the joint family against being harassed by multiplicity of suits at the instance of alienees from recalcitrant members. They can waive the benefit of it and bring a suit to separate themselves from the undesirable stranger. Similarly the rule against partial partition does not apply to a suit by an alienee from one member against another alienee from another member of the joint family, irrespective of the consideration as to who is the prior alienee in point of time. The right of the one alienee to sue the other follows as a corollary of the right of one member to sue the alienee for partial partition. So one alienee is entitled to bring a suit against the other for partition of those items in respect of which the contending parties to the suit are tenants in common. (*Ramesam and Cornish, JJ.*) KANDASWAMI GOUNDAN *v.* VENKATRAMA GOUNDAN. **6 I.R. (Mad) 210=146 I.C. 64=1933 M W.N. 1110=38 L W. 498=A.I.R. 1933 Mad. 774=65 M.L.J. 696.**

———*Joint family—Alienation—Rights of alienee—Suit for partition—Mode of working out rights.*

Where an alienee from a Hindu coparcener sues the other members of the family for partition, the alienee's right to the property must be worked out and his share must be ascertained as on the date of his suit for partition and not as on the date of the alienation in his favour. 35 Mad. 47, Ref.; 14 Mad. 408, Rel. (*Jackson and Mockett, JJ.*) MUTHUKUMARA SITHAPATHIAR *v.* SIVANARAVANA PILLAI. **56 Mad. 534=I.R. 1933 Mad. 73=37 L.W. 19=1933 M W.N. 199=141 I.C. 122=A.I.R. 1933 Mad. 158=64 M.L.J. 66.**

Setting aside.

———*Joint family—Alienation—Setting aside—After-born son—Right of.*

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The right to challenge an alienation is a personal right which does not pass to other sons on the death of those entitled in their own right to do so. A son subsequently born therefore cannot avail himself of the privilege which belongs to his brothers, as it is personal to them. His interests are limited to those of the family at the date of his birth: and since the family estate was then burdened with a mortgage, he can only get it subjet to that burden. 5 N.L.R. 181, Rel. on; A.I.R. 1921 Lah. 34; A.I.R. 1922 All. 342 and 33 All. 654, Expl. and Dist. (*Vivian Bose, A.J.C.*) SAMKISAN AMBADAS MAHESARI *v* DAMODAR. **150 I C. 111=6 R.N. 276=A.I.R. 1934 Nag 108.**

———*Joint family—Alienation—Setting aside—Gap between son in existence and subsequently born son—Right of latter to impeach alienation.*

Where there are gaps between the death of the son, who was in existence at the time of the alienation and the birth of the subsequently born son challenging that alienation, and the gaps are not bridged over either by the fact that the subsequently born son had been begotten or any reversioner, being shown to have been in existence the subsequently born son cannot challenge the alienation merely in virtue of his elder brother having been in existence at the time of the alienation though he died in the following year. So no subsequently born son can possibly challenge the alienation, as the alienation had become indefeasible and absolute. (*Harrison and Agha Haidar, JJ.*) MUKAND SINGH *v.* WAZIRUDDIN. **149 I.C. 506=6 R.L. 696=A.I.R. 1933 Lah. 359.**

———*Joint family—Alienation—Setting aside—Mesne profits prior to suit—Right of sons to.*

Mesne profits are profits which a person in wrongful possession did or might with ordinary diligence receive. An alienation by the manager of a joint family consisting only of himself and his two minor sons, is not void but only voidable at the instance of the sons. The possession of the alienee is not wrongful till the sons sue to have it set aside and the sons are not entitled to mesne profits from the alienee except from the institution of the suit. 46 M. 815 and 48 B. 468, Ref. (*Doraswami Iyer, C. J. and Sreenivasa Iyer, J.*) NAGAIAH *v.* MUNIA. **11 Mys.L.J. 422=38 Mys.H.C.R. 379.**

———*Joint family — Alienation — Setting aside—Powers of—Right of after born son to challenge—Limitation.*

An alienation of joint family property made by a father, there being no male issue in existence at the date of the alienation, is valid though made without legal necessity. Such an alienation cannot be objected to by a son born after the date of alienation on the ground that it was made without legal necessity. But the alienation made by a father who has sons then living, the alienation not being one for legal necessity or for payment of an antecedent debt, is invalid if made without their consent. Such an alienation may be set aside not only at the instance of those sons but at the instance of any son born after the date of alienation, unless it was ratified by them before his birth. The cause of action in a suit to set aside the father's alienation arises when the alienee takes possession of the property. The period of 12 years is therefore to be counted from that date. That is the material date not only as regards the suit of a son in exintence at that date, but also the suit of a son not in existence at that date. The subsequent birth of the latter does not create a fresh cause of action or a new starting point from which limitation should be reckoned. (*Ganga Nath, J.*) RAM DEO KURMI *v.* RAM RATHI. **157 I.C. 668=8 R.A. 219=1935 A.W.R. 923=1935 A.L.J. 946=A.I.R. 1935 All. 742.**

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———*Joint family—Alienation—Setting aside—Property sold in execution of mortgage decree against father—Declaratory suit by son.*

A son of a Hindu mortgagor sued for a declaration that a mortgage-deed, on the basis of which a decree had been obtained by the mortgagee and the mortgaged property had been sold, was not binding on the family because there was no legal necessity for the transaction. The suit was instituted before possession of the property could be delivered to the auction-purchaser, who was the mortgagee decree-holder himself, but after the sale was confirmed,

Held, that the plaintiff could not succeed without showing that the debt of the father was incurred for immoral or illegal purposes. 47 A. 122, Foll. (*Sulaiman, C. J. and Rachhpal Singh, J.*) JAHAN SINGH *v.* HARDAT SINGH. **57 All. 357=152 I.C. 487=1934 A.L.J. 1018=7 R.A. 340=4 A.W.R. 727=A.I.R. 1935 All. 247.**

———*Joint family—Alienation—Setting aside—Right of son born subsequent to alienation.*

A person who was not born on the date of the father's alienation is not entitled to question its validity. (*Sreenivasa Iyer, Offg. C. J. and Ramachandra Rao, J.*) SEETHARAMUSA *v.* BIDARE THIMAPPA. **10 Mys.L.J. 448.**

———*Joint family—Alienation—Setting aside—Suit by son—Relief as to cancellation of deed.*

Where, in a suit by a Hindu son, it is found that a mortgage executed by his father is not supported by consideration, the Court may pass a decree for the cancellation of the mortgage and not merely declare that the mortgage shall not affect the plaintiff's right. (*Bhide, J.*) MAHNA SINGH *v.* KISHANCHAND. **6 R.L. 408=147 I.C. 331=A.I.R. 1935 Lah. 227.**

———*Joint family—Alienation—Setting aside—Suit by after born son to set aside—Limitation—Cause of action—Another son existing at time of alienation—Effect—Limitation Act, S. 6.*

A Hindu effected three alienations in 1900, 1903 and 1904, long before the plaintiff, his son, who was born in 1906. There was an elder son who was born in 1898 but who died a minor and unmarried in 1911. Plaintiff sued in 1926 to set aside the alienations and claimed the benefit of S. 6, Limitation Act.

Held, that the plaintiff, who was not born at the time of the alienations, had no cause of action to institute the suit; his birth would not create a fresh cause of action or a new starting point of limitation Nor could he avail himself of the privileges given by S. 6 of the Limitation Act. The right claimed by him to set aside the alienations is a right which he has in himself as a member of the joint Hindu family. He could not also claim to be entitled to take advantage of the extended period of limitation as legal representative of his deceased elder brother under S. 6 (3) of the Limitation Act. (*Madhavan Nair, J.*) UDAYAMUTHIER *v.* SHUNMUGAM CHETTIAR. **156 I.C. 83=7 R.M. 638=1935 M.W.N. 304=41 L.W. 610=A.I.R. 1935 Mad 431.**

Ancestral property.

———*Joint family—Ancestral property—Distinction between that and joint family property—Incidents—Mitakshara and Dayabhaga—Distinction.*

The two notions of joint ancestral property and joint family property are distinguishable. There must have been a nucleus of joint family property before joint ancestral property can come into existence, because "ancestral" connotes descent and therefore pre-existence. But it is not true that there can be no joint family property without a pre existing nucleus. One of the incidents of joint ancestral property is that where it is known or admitted that some at least of the property of a joint family has come down to them, the presumption is that the whole property is ancestral and any member alleging the contrary will have to prove his self acquisition. The same presumption applies also in joint family property—as distinguished from joint ancestral property. So far as the incident of the two classes of property relating to the presumption of jointness under the Hindu Law is concerned, there is no distinction in principle between Mitakshara and Dayabhaga. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———Joint family—Ancestral property—Hindu inheriting property from Mahomedan father—Property ancestral—His Hindu sons have right by birth. *See* HINDU LAW APPLICABILITY. **A.I.R. 1931 Sind 143.**

———*Joint family—Ancestral property—Property gifted by father, if.*

The property in the hands of a son, if it was a gift to him by his fathers, is not necessarily ancestral. (*Jai Lal, J.*) GOBIND RAM *v.* GOPI CHAND. **130 I.C. 963=7 R.L. 36 (2)=36 P.L.R. 214=A.I.R. 1934 Lah. 397.**

———*Joint family—Ancestral property—Property inherited from maternal grandmother.*

property inherited by a person from his mother's maternal grandmother after the death of his mother is not ancestral. (*Addison, J.*) SANTU *v.* ABHE SINGH. **I.R. 1931 Lah. 875=134 I.C. 107=32 P.L.R. 557=A.I.R. 1931 Lah. 708.**

———*Joint family—Ancestral property—Property inherited from maternal grandfather.*

Obiter.—Property inherited from a maternal grandfather is ancestral in the hands of the daughter's son. (Case-law discussed.) (*Jai Lal and Abdul Qadir, JJ.*) BALDEO SAHAI *v.* RAM CHANDER. **13 Lah. 126=I.R. 1931 Lah. 593=132 I.C. 481=32 P.L.R. 482=A.I.R. 1931 Lah. 546.**

———*Joint family—Ancestral property—Property inherited from uncles—Son's rights in.*

Property inherited by a Hindu from a collateral relation, *i.e.*, uncle, is not ancestral property; consequently his own descendants are not coparceners in it with him. And when such property is alienated, the sons of the alienor, cannot challenge it. (*Nanavutty and Zia-ul-Hasan, JJ.*) SITA RAM RASTOGI *v.* BALAK RAM DUBE. **152 I.C. 461=7 R.O. 227=11 O.W.N. 1351=A.I.R. 1935 Oudh 13.**

———*Joint family—"Ancestral property"—Self-acquired property of father.*

In Hindu Law the term "ancestral" in its technical sense can apply only to property belonging to the grandfather and his ascendants in the male line. But the self-acquired property of the father is not "ancestral property" in the hands of the son, until it reaches the hands of the son's son. But so far as the son is concerned, it is not joint family property, and the son is competent to alienate his individual interest therein. (*Wazir Hasan, C.J. and Bisheshwar Nath, J.*) BAIJNATH *v.* MAHARAJ BAHADUR. **8 Luck. 28=I.R. 1932 Oudh 277=137 I.C. 814=9 O.W.N. 221=A.I.R. 1932 Oudh 158.**

Business.

See JOINT FAMILY—MANAGER.

———*Joint family—Business—Alienation—Business started by father—Mortgage of family property for augmenting stock of business—Binding nature on sons.*

The sole member of a family started a cloth business and subsequently sons were born to him. About fourteen years after the business was started and while the sons were minors the father borrowed money by effect-

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ing a mortgage of the family properties for the purpose of increasing the stock of cloth. In a suit on the mortgage the sons questioned its binding nature.

Held, that the question whether the alienation was or was not justified should be determined on the circumstances under which the loan was raised. Case remanded for finding on the question if the alienation was a prudent act of management. 25 A.L.J. 599 (P.C.), Ref. to. (*Sulaiman and Young, JJ.*) RAJ KUMAR *v.* MOHAN LAL. **I.R. 1931 All. 440=131 I.C. 872=1931 A.L.J. 219=A.I.R. 1931 All. 253.**

———*Joint family — Business—Ancestral business and new business—Distinction between.*

The distinction between an ancestral business and one started after the death of the ancestor as a source of partnership is this: in the one case, the relations result by operation of law from a succession on the death of an ancestor to an established business with its benefits and obligations, while in the other they rest ultimately on contractual arrangement between the parties. The inherited business does not lose its character of an inherited business by mere division among the co-sharers. (*Mitter and Henderson, JJ.*) BARADA PROSAD SAHA *v.* KRISHNA CHANDRA SAHA. **151 I.C. 268=7 R.C. 98=38 C.W.N. 33=A.I.R. 1934 Cal. 414.**

———*Joint family—Business—Arrangement to convert into limited company as trading concern—If void.*

Obiter (Per *Mitter, J.*)—A transaction by which for purposes of better management of the joint family properties the constitution of joint Hindu Mitakshara family is sought to be changed into a private limited company of a trading concern to whom all the properties should be assigned is not altogether void, on the ground that it alters the whole constitution of a joint family. (*D.N. Mitter and Henderson, JJ.*) BAJPAI ESTATE, LTD. *v.* KARALAI CHARAN SARMA. **61 C.L.J. 84.**

———*Joint family—Business by a coparcener—Presumption—Other member taking interest in business—Inference.*

The mere fact that a person takes a sympathetic and intelligent interest in the business carried on by his brother is not sufficient to raise presumption that the business is a joint family business so as to make the former liable for the business debts. This is so becaues there is no presumption that a business carried on by one who is a member of a joint family is the joint family business. (*Harrison and Dalip Singh, JJ.*) FAQIR CHAND GUR NARAIN *v.* SALIG RAM. **I.R. 1931 Lah. 764=133 I.C. 284=32 P.L.R. 151=A.I.R. 1931 Lah. 429.**

———*Joint family — Business — Business by elder brother—No presumption that younger brother was his partner.*

The mere fact that a person is the younger brother of the person carrying on business and that they constituted a Hindu joint family raises no legal presumption that the former is a partner in a business carried on under the names of his father and elder brother. The onus of proving it is on the person alleging that the younger brother was a partner in the firm to be a partner. (*Tapp, J.*) CHANDU LAL RATI RAM *v.* MOLU MAL BENARSI DAS. **I.R. 1933 Lah. 134=141 I.C. 500=34 P.L.R. 166=A.I.R. 1933 Lah. 68.**

———*Joint family—Business carried on by member—If joint.*

A member of a joint undivided Hindu family can make separate acquisition of property, for his own benefit by carrying on business and unless it can be shown that the business grew from joint family property or that the earnings were blended with the joint family

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estate, they remain free and separate. Where a business is carried on by one member with the joint exertion of another member of the family, but there is nothing to indicate that the exertion or labour contributed by the member was as a partner or a person having pecuniary or proprietary interest in the business, the business cannot be regarded as a joint family business. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Joint family—Business carried on by one member—If joint family business—Presumption.*

Under the Hindu Law, where the family is joint, there is a presumption that the property which it possesses is joint family property; but there is no presumption that a business carried on by one member is joint family business. There is no presumption either that a business carried on by one member in partnership with a stranger is joint family business. (*Nanavutty and Thomas, JJ.*) KRISHNA KUMAR *v.* GOPAL DAS HAR NARAIN DAS. **151 I.C. 1066=7 R.O. 166=11 O.W.N. 1236=A.I.R. 1934 Oudh 475.**

———*Joint family—Business carried on by one member—Partnership with stranger—Presumption as to.*

There is no presumption in Hindu Law that a business carried on by a member of a joint family is joint family business, nor that all the other coparceners are partners in that business. There is also no presumption that a business carried on by a member of a joint family in partnership with a stranger is joint family business. (*Wadia, J.*) MULCHAND HEMRAJ *v.* JAIRAMDAS CHATURBHUJ. **159 I.C. 911=37 Bom.L.R. 288=8 R.B. 232=A.I.R. 1935 Bom. 287.**

———*Joint family—Business—Debts—Father—Mortgage to provide for one of his sons to start new business—Validity.*

The manager of a joint Hindu family, whether governed by the Mitakshara or by the Dayabhaga, has no authority to impose upon a minor member the risk and liability of a new business started by him; that the manager is father of the minor makes no difference. Hence a father cannot bind the joint family estate in order to provide money for one of his sons to start a new business and the mortgage for such purposes must be held to be wholly invalid and under the Mitakshara law; it does not pass the share even of the alienating coparcener. (*Young, C.J. and Abdul Rashid, J.*) GURMUKH SINGH *v.* SHIV RAM. **17 Lah. 53=157 I.C. 416=8 R.L. 107=A.I.R. 1935 Lah. 482.**

———*Joint family—Business—Debts incurred for business—Liability for—Participation in profits.*

Apart from any question of pious obligation of the sons, the existence of which, during the lifetime of the father, is not recognized in Mysore, where the family has throughout participated in the profits of and really derived benefit from the trade, for which money in question was used, its members cannot be consistently allowed after a length of time to repudiate the transaction merely because for one reason or other, it has fallen now on bad days. 34 B. 72, Ref. (*Rama Rao and Sreenivasa Iyer, JJ.*) M. V. SUBRAMANYA SETTY *v.* THE BANK OF MYSORE, BANGALORE CITY. **9 Mys.L.J. 102.**

———Joint family — Business—Debts incurred by father for business purposes—Liability of sons. *See* HINDU LAW—DEBTS—FATHER—SON'S LIABILITY. **138 I.C. 168=15 N.L.J. 5.**

———Joint family—Business—Debt incurred by father for—Mortgage—Not binding on minor members. *See* JOINT FAMILY—ALIENATION—FATHER. **30 N.L.R. 237.**

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———*Joint family—Business—Debts incurred in manager's own name—Presumption as to the borrowing being for the family business.*

Where the *karta* of a Hindu trading family borrows money on promissory notes executed in his own name and not in the name of the firm, there is no presumption that the borrowing was for the purposes of the joint family business and the lender must prove that the money was required for the family business. (*Lord Thankerton.*) ABDUL MAJID KHAN *v.* SARASWATIBAI. **61 I A. 90=30 N.L.R 60=17 N.L J. 1=36 Bom.L.R. 225=3 A.W.R. 38=15 Pat L.T. 99=1934 M.W.N. 4=6 R.P.C. 48=147 I.C. 1=38 C.W.N 201=35 P. L.R. 10=10 O.W.N. 1281=1934 A.L.J. 79=58 C L. J. 548=39 L.W. 72=A.I.R. 1934 P.C. 4=66 M.L.J. 65 (P.C.).**

[**R.** 38 C.W.N. 1146 (1150, 1151).]

———*Joint family—Business—Debt incurred for new business—Liability of minor members.*

Debt incurred by the manager of a joint Hindu family, even if he be the father, is not binding upon the interest of minor members in joint family property, when it is incurred for the purposes of a new business started by him as manager. Such a debt cannot be held to have been incurred for legal necessity. (*Hilton and Rangi Lal, JJ.*) NAWAB *v.* SARDAR SINGH. **158 I.C. 102=A.I.R. 1935 Lah 176.**

———*Joint family—Business—Debts incurred for—Shares of minor sons—Liability of.*

A debt contracted by the father and manager in the normal course of carrying on the joint family trade is binding on all the members including minors to the extent of the family properties. 49 C. 560; 24 C.W.N. 938 and 34 A. 135, Ref. (*Rama Rao and Srenivasa Iyer, JJ.*) M. V. SUBRAMANYA SETTY *v.* THE BANK OF MYSORE, BANGALORE CITY. **9 Mys.L J. 102.**

———*Joint family—Business—Debts—Liability of other members—Extent of.*

In a Hindu joint family partnership, if debts are contracted by the manager of the partnership, other members are liable only to the extent of their share in the joint property but not personally. The other members do not become personally liable merely by reason of having taken an active part in the partnership business. (*Dalip Singh, J.*) MURARI LAL *v.* GHUDHUMAL. **147 I.C. 590 (1)=6 R.L. 407=34 P.L.R. 967=A.I. R. 1933 Lah. 1018 (1).**

———*Joint family—Business—Debts—Manager—Ancestral family business—Debts incurred in—Mortgage when binding on minor coparcener's interest in family property.*

The manager of a joint Hindu family, carrying on an ancestral family business for the benefit of the joint family, has authority to borrow money, if such borrowing is necessary for a legitimate and proper purpose of the family business (*e.g.*, for paying of debts incurred in connection with the business) and to secure the same by mortgaging the joint family property. The charge so created is binding on the family property, including the interest of the minor coparceners therein. (*Sir Lancelot Sanderson.*) RAM KRISHNA MURAJI *v.* RATAN CHAND. **58 I.A. 173=53 All. 190=1931 M. W.N. 733=34 L.W. 175=I.R. 1931 P.C. 197=1931 A.L.J. 458=132 I.C. 613=35 C.W.N. 841=33 Bom. L.R. 988=53 C.L.J. 561=A.I.R. 1931 P.C. 136=61 M L.J. 665 (P.C.).**

[**Rel.** 15 L. 9 (13).]

———*Joint family—Business—Debt—Manager—Implied authority to contract debt.*

Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the existence of the family. (Case-law referred.) (*Addison and Agha Haidar, JJ.*) MT. CHAMPA *v.* OFFICIAL RECEIVER, KARACHI. **15 Lah. 9=149 I.C. 693=6 R.L. 738=36 P.L.R. 450=A.I.R. 1933 Lah. 901.**

———Joint family—Business—Debt—Mortgage by father—Proof required—Necessity. *See* HINDU LAW —JOINT FAMILY—ALIENATION—FATHER. **A.I.R. 1934 Lah. 895.**

———*Joint family—Business—Debts—Personal liability of passive member.*

Where a firm is constituted of two members of a joint family but one of them is merely a passive member and does not take any part in the business or evince any particular interest in it, he is not personally liable for the debts of the firm. He is liable only to the extent of his interest in the joint family property. It does not matter even if the family carries on business by lending money after the Chettiar custom. (**Baguley, J.**) NACHIAPPA CHETTYAR *v* RAMAN CHETTYAR. **157 I.C. 786=8 R R. 113=A.I.R. 1935 Rang. 227.**

———*Joint family—Business—Debts—Priority over widow's right of residence or maintenance.*

Where the debts in question are ordinary commercial debts incurred in running the family business, they must be held to have been raised for necessary purposes, and as such have priority over the right of residence or maintenance of the widow. (*Tek Chand and Abdul Rashit, JJ.*) MST. BISHNI *v.* UTTAM CHAND. **158 I C 861=8 R.L. 319 (2)=37 P.L R. 142=A.I.R. 1935 Lah. 533.**

———*Joint family—Business—Debts—Sons—Personal liability.*

Where it is found that the debt was incurred by the father in connection with the joint family business and that the sons were benefited by the loan, the sons are personally liable and not merely to the extent of joint family property in their hands. (*Jwala Prasad, A.C. J. and James, J.*) DALIP NARAYAN SINGH *v.* RAGHUNANDAN PRASAD. **I.R. 1932 Pat. 111 (2)= 136 I.C. 447 (2)=13 Pat.L.T. 160=A.I.R. 1932 Pat. 184.**

———Joint family —Business — Debts — Speculative transactions—Implied authority of manager to contract. *See* HINDU LAW—DEBTS—FATHER. **A.I.R. 1935 Lah. 761.**

———*Joint family—Business—Debts—Trade debts—Liability of son.*

The sons under the Hindu Law are liable to pay the debts incurred by the father in respect of trade transactions even though the trade may be started by the father himself. 52 B. 376 and 49 M. 211, Foll. (*Patkar and Tyabji, JJ.*) BAL RAJARAM *v.* MANEKLAL. **56 Bom. 36=I.R. 1932 Bom. 323=137 I.C. 717=34 Bom.L.R. 55=A.I.R. 1932 Bom. 136.**

[**F.** 36 Bom.L.R. 625 (627, 628, 631)]

———*Joint family—Business—Firm bearing names of father and son—Presumption that father is member of firm.*

Where a firm bears the names of the father and the son, the initial presumption is that the father is a member of the firm and it is for him or his representatives to disprove that presumption. (*Jai Lal and Skemp, JJ.*) KALU SINGH SUNDAR SINGH *v.* RAM LAL. **155 I.C. 294=7 R.L. 685=36 P.L.R. 492=A.I.R. 1935 Lah. 194 (1).**

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———*Joint family—Business—Joint family business—Adjudication of—Shares of minors—Liability—Right of widow to maintenance, not entitled to priority.*

Where a joint family trading business has been adjudicated insolvent and its debts are due to the fall of the rate of exchange and other extraneous causes, the whole property of the family can be sold in order to pay off these debts, and the shares of the minor coparceners are also liable, while the right of widow to maintenance and residence must be postponed to the payment of these debts. (*Addison and Agha Haidar, JJ.*) MT. CHAMPA *v.* OFFICIAL RECEIVER, KARACHI. **15 Lah. 9=149 I C. 693=6 R.L. 738=36 P.L.R. 450=A.I.R. 1933 Lah. 901.**

———*Joint family—Business—Joint family business—Business carried on by three out of four undivided brothers—No evidence of separation of the one brother nor any evidence of participation in profits—Business, if a joint family business or a partnership business.*

A joint family firm under the Hindu Law is a special form of partnership, the members of which must be the entire family or the entire members of any branch thereof. Rights of members in such a firm are rights arising out of their membership in the family and not by contract. There may be cases where all the members of a family or a branch thereof are adults when it is open to them to regulate their relationship by contract; but it is not open to some alone of the members of a joint family to enter into a partnership and impress upon it the characteristics of a joint family firm to the exclusion of others. *N* had 4 sons, *K*, *R*, *S* and *V*, but from 1895 carried on a business only with three of them, keeping out his eldest son *K*. In 1912, *N* retired and the three sons carried on the business under a partnership deed of 1913. *R* died in 1924, leaving his infant son. The business was carried on as before; certain properties were purchased out of the profits of the business—not in the name of the joint family but in the name of *S*, *V* and the infant son. There was on the one hand no evidence of a separation of *K* from the joint family, on the other hand, he had never participated in the profits of the business. In 1929 the firm were adjudicated insolvents and on an application taken out by the Official Assignee for a declaration that the business was a joint family business and the share of the minor was as well liable for the debts of the business.

Held, that it was not a joint family business, but an ordinary partnership business of *R*, *S* and *V*, that the minor was entitled to a third share of the profits as against the Official Assignee. (*Reilly and Burn, JJ.*) OFFICIAL ASSIGNEE OF MADRAS *v* NEELAMBAL AMMAL. **147 I.C. 417=6 R M. 339=1933 M.W N. 957=38 L.W. 792=A.I R. 1933 Mad. 920=65 M.L. J. 798.**

———*Joint family—Business—Joint family property—Different businesses by father and sons but no evidence of separation.*

Where a Hindu family consisting of father and sons has different businesses run by father and the sons but each is helped by others and there is no evidence of separation, all the earnings are the joint earnings of the family. (*Addison and Agha Haidar, JJ.*) HARJAS RAI ARJAN DAS *v.* HANS RAJ. **6 I.R. (Lah.) 232=146 I.C. 513=34 P.L R. 983=A.I.R. 1933 Lah. 150.**

———*Joint family—Business—Joint or separate—Money lending business.*

On the question whether a money-lending business started in 1839 and managed by the eldest of four brothers (Mahratta Brahmins of Berar) was a joint family business or the separate business of the eldest son, their Lordships held that assuming to begin with, it was a joint business, there was ample evidence to show that after the death of second and third brothers, the surviving brothers were separate and had separate business. It is difficult to explain the action of a brother in opening another business except on the footing that the two brothers were thenceforth to carry on business separately. (1901) I.L.R. 25 Mad. 149; 11 M.L.J. 353, Ref. to. (*Sir John Wallis.*) GOVINDRAO *v.* RAJABAI. **58 I.A. 106=35 C.W.N 438=27 N.L.R 131=14 N.L J. 56=33 Bom.L.R. 442=33 L.W. 439=130 I.C. 673=I R. 1931 P.C. 81=53 C.L.J. 313=A.I R. 1931 P.C. 48=60 M.L.J. 386 (P.C.).**

———*Joint family — Business — Manager—Decree against—Minor member—Personal liability.*

A minor member of a Hindu family having a joint family business is not personally liable under a decree obtained on a pro-note executed by the managing member of the family for the purposes of family business. His liability only extends to his interests in the joint family property. 2 Lah. 159, Foll. (*Kulwant Sahay and Macpherson, JJ.*) JWALA PRASAD *v.* BHUDA RAM. **10 Pat. 503=I.R. 1931 Pat. 452=134 I.C. 420=12 Pat.L.T. 707=A.I.R. 1931 Pat. 328.**

———*Joint family—Business—Manager entering into partnership with stranger—Other members, if partners.*

Where the managing member of a non trading joint Hindu family enters into a partnership with a stranger, the other members of his family (specially if they are minors at the time) do not *ipso facto* become partners in the business so as to clothe them with all the rights and obligations of a partner as defined in the Indian Contract Act (now the Indian Partnership Act, 1932). In such a case the family, as a unit, does not become a partner, but only such of its members as in fact enter into a contractual relation with the stranger. The partnership so constituted will be governed by the Act. (*Sir Lancelot Sanderson.*) PICHAPPA CHETTIAR *v.* CHOCKALINGAM PILLAI. **1934 A L J. 895=1934 38 C.W.N. 1185=60 C.L.7. 136=M.W.N. 828=36 Bom.L.R. 976=15 Pat.L.T. 655=7 R.P.C. 23=150 I C. 802=11 O.W.N. 984=4 A.W.R. 116=40 L.W. 256=36 P.L.R. 225=A.I.R. 1934 P.C. 192=67 M.L. J. 366 (P.C.).**

[**F.** 68 M.L.J. 251 (254).]

———*Joint family—Business—Manager—"New business"—Mortgage for opening* modi *shop by* Teli *family—Binding nature.*

Where the manager of a joint Hindu family, belonging to the *Teli* class, which was embarrassed circumstances, executed a mortgage of family property for the purpose of opening a *modi* or grocer's shop to supplement the family income for the maintenance of the family,

Held, that the ordinary business of a *Teli* family being the carrying on of business like that of a *modi*, carrying or opening of a grocer's shop was by no means a luxury or a speculative transaction and the mortgage executed for that purpose was within the powers of the manager and binding the family, including minor members. (*Dhavle, J.*) JAI SAHU *v.* HADIBANDHU BEHERA. **150 I.C. 355=A.I R. 1934 Pat. 462.**

———*Joint family—Business — Manager—Powers of—Power to incur debts for carrying on business—Sale or mortgage—Discretion of manager.*

The power of a manager to carry on a family business necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business and the manager has authority to raise money not only to discharge debts arising out of the family business, but also money needed to carry it on. It

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is a matter for his decision whether the money necessary should be raised by mortgage or by a sale, and whether it is better to raise money to continue a business which latterly had not been profitable, or to close it down ; it would be unreasonable to expect a lender or purchaser to investigate a question of that kind. 58 I.A. 173 ; 21 All. 71; 54 I.A. 211. Rel. on. (*Broomfield and Wadia, JJ.*) HANMANTAPPA *v.* DUNDAPPA. **151 I.C. 1043 = 7 R.B. 100 = 36 Bom.L.R. 474 = A.I.R. 1934 Bom. 234.**

———*Joint family — Business—Manager—Power to start new business—Liability of other members for debt incurred.*

The father or any other manager of a joint Hindu family, both under the Mitakshara and the Dayabhaga, has no authority to impose on the minor coparceners the risk and liabilities of a new business started by him. Equally he cannot impose any such liability upon the adult members. The separate property of any other member of the family is not liable for the debts of such business unless the adult member sought to be made liable for such debts has given his consent, express or implied, to the carrying on of that business, or the transaction giving rise to the liability has been subsequently ratified. (*Wadia, J.*) MULCHAND HEMRAJ *v.* JAIRAM DAS CHATURBHUJ. **159 I.C. 911 = 8 R.B. 232 = 37 Bom.L.R. 288 = A.I.R. 1935 Bom. 287.**

———*Joint family—Business—Manager starting new business—Liability of minor members—"Ancestral business."*

Where a Hindu father starts a new business in partnership with a stranger and dies leaving no debts and thereafter, his eldest son continues the business in partnership with the stranger and incurs debts thereby, his minor brother's interest in the family property is not liable for the debts. On the death of the father, there was a dissolution, and the business carried on by the eldest son has only to be regarded as a new business started by him, and his minor brother not being a contractual party, connot be bound by it.

Quaere:—Whether the business started by the father can be "ancestral business," as regards his sons. (*Varadachariar and Burn, JJ.*) KRISHNASWAMI AIYAR *v.* RAMANADHAN. **156 I.C. 418 = 7 R.M. 694 = 41 L. W. 224 = 1935 M.W.N. 20 = A I.R. 1935 Mad. 314 = 68 M.L.J. 251.**

———*Joint family—Business—Minor—Personal liability—Active participation in business on attaining majority.*

When the members of a joint Hindu family trade together as partners of a firm, they are all personally liable for the debts of that firm. But a minor member of a joint family is not personally liable for the debts of the partnership, if on attaining majority he dissociates himself from the business of the family but if on attaining majority he expressly ratifies the contracts of the firm or if he proceeds to take an active part in its business, then he is personally liable as a partner for the debts of the firm. The question, if he took an active part is one of fact. If, for instance, the member does the work of the shop for a firm which actually bears his name as one of the partners, he must be deemed to have accepted his position as a partner in the joint family business. (*Kulwant Sahay and James, JJ.*) BENARES BANK, LTD. *v.* KRISHNA DAS. **I.R. 1932 Pat. 196 = 139 I.C. 83 = 13 Pat.L.T. 271 = A.I.R. 1932 Pat. 206.**

———*Joint family—Business—Mortgage in favour of one of brothers—Mortgagor selling property to mortgagee's brother—Mortgage, if discharged.*

Defendant 2, the vendee of the mortgaged property, and the plaintiffs in whose names the mortgage-deed

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was, were members of the joint family and their business was also joint. There were circumstances to infer safely that the money advanced to the mortgagor in this case came from joint funds and to infer that the property transferred by the mortgagor to one of the brothers only meant transfer of such property to the joint family of all the brothers who were admittedly living jointly,

Held, that the mortgage was fully discharged by the sale deed and a suit on the mortgage by the brother in whose favour it was executed was not maintainable. (*Ganga Nath, J.*) SUNDAR LAL *v.* RAHAT ALI KHAN. **157 I.C. 1099 = 8 R A. 262 (2) = 1935 A.W. R. 954 = 1935 A.L.J. 990 = A I R. 1935 All. 770.**

———Joint family — Business—New business for benefit of family—Mortgage by manager—Binding on other members. *See* JOINT FAMILY—ALIENATION—MANAGER. **A.I.R. 1931 All. 743 (2).**

———*Joint family—Business—New business started by father as manager—Debt incurred in—Liability of minor's interest.*

Business started by the father as manager of the family cannot be said to be ancestral so as to render the minor's interest in the joint family property liable for the debt incurred for the business. 49 Cal. 560 (P.C.), Rel. (*Sir Dinsha Mulla.*) BENARES BANK, LTD. *v.* HARI NARAIN. **59 I.A 300 = I.R. 1932 P.C. 220 = 137 I.C. 781 = 36 C W N. 826 = 36 L.W. 56 = 9 O.W.N. 599 = 1932 M.W.N. 788 = 13 Pat.L.T 491 = 54 All. 564 = 34 Bom.L.R. 1079 = 1932 A L J 714 = 55 C.L.J. 583 = A.I.R. 1932 P.C. 182 = 63 M.L.J. 92 (P C).**

[**Disc**, 55 A. 1 (13, 20, 24) (F.B.). **R.** 1933 A.L.J. 85 (89) ; 1933 A.L.J. 1247 (1250). **F.** 37 Bom. L.R. 288 (295) ; 68 M.L.J. 251 (253).]

———*Joint family—Business—New business started by Karta—Mortgage for—Binding nature.*

The karta of a joint Hindu family has no power to bind the minor members of the family, even if they be his sons, by starting a new business; and a new business started by him will not justify him to mortgage joint family property for the purpose of carrying on such business. Such a mortgage cannot be held to be one for legal necessity binding on the family. (*Kulwant Sahay, J.*) MOTI SAHU *v.* DWARKA MAHTO. **7 R P. 32 = 150 I C. 881 = 15 Pat.L.T. 686.**

———*Joint family—Business—Newly started—Manager—Money borrowed by manager—Alienation for, if justified.*

It has always been settled law that money borrowed for the purposes of an ancestral family business is *per se* a good justification for alienation of family property. In such a case the presumption is that the carrying on of the ancestral business is necessary and no further enquiry on the part of the creditor is required. On the other hand, the mere fact that money has been required for a business newly started by a manager or a father is not in itself sufficient to justify an alienation of the family property. But, if in addition thereto, it could be shown that there was either a pressure or necessity to continue that business, as it was the mainstay of the family or that the particular transaction was at the time beneficial to the family and the family estate, the transaction would be supported but, of course on the latter ground. The question whether the transaction was for such benefit or not is a question of fact depending on the circumstances of the case, and it is for the Court to decide whether it was so beneficial and was such as an ordinary prudent manager would have entered into in the interest of the family. (*Sulaiman, C. J., Thom and Rachhpal Singh, JJ.*) RAM NATH *v.* CHIRANJI LAL.

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57 All. 605=155 I.C. 136=7 R.A 880=1935 A.W R. 145=1935 A.L.J. 177=A.I.R. 1935 All. 221 (F.B.).

———*Joint family—Business—Partnership—Stranger associated with joint family in trade.*

Where a stranger is associated with the members of a joint Hindu family in a business whose capital is derived from the property of the joint family and the stranger, the rights and liabilities are determined more by the Contract Act than by the Hindu Law. (*Bajpai, J.*) MANGU LAL GANGA CHARAN *v.* MUNNI LAL. **I.R. 1933 All 361=144 I.C. 76=A.I.R. 1933 All. 311.**

———Joint family—Business—Presumption as to jointness. *See* JOINT FAMILY—PRESUMPTION. **32 P.L.R. 577.**

———*Joint family—Business—Right to sue.*

The manager of a joint family business can maintain a suit against debtors in his own name without joining all the other coparceners and a member other than the manager can also bring a suit upon a contract provided that the contract sued upon was entered into by him in his own name but in other cases one member of a joint family cannot alone sue on behalf of the family. The manager can sue in his representative capacity or the suit must be filed by all the coparceners. (*Sreenivasa Iyer, J.*) JAWARMALL WAGHAJEE *v.* HAZARIMALL BHIMARAJ. **8 Mys.L J. 441.**

———*Joint family—Business started by father and grandfather—Debts incurred in respect of—Binding nature on minors.*

A Hindu father and his two sons, one of whom had a minor son, started in or about 1917 a ginning factory. For the purpose of financing the ginning factory the plaintiff advanced in 1920 various sums amounting to Rs. 21,808. For that sum and for Rs. 2,516 8 0 which was due under a prior mortgage, and for Rs. 549 6 3, being cash advanced at the time, the father and the sons executed to the plaintiff in 1922 a deed of mortgage. In a suit on the mortgage for the principal and interest due,

Held, that though the business started by the father and sons was not and could not be regarded as ancestral so far as the minor son of one of the sons was concerned, yet since the greater portion of the consideration for the mortgage except the sum actually advanced at the time of the mortgage consisted of antecedent debts which were neither immoral nor avyavaharika, the mortgage must be held to be binding on such minor grandson except to the extent of the amount which was the amount of cash advanced at the time of the mortgage and was not antecedent and independent of mortgage. (*Broomfield and Wadia, JJ.*) JAGADISHPRASAD *v.* AMBASHANKAR. **152 I.C. 405=7 R.B. 138=36 Bom L.R. 625=A.I.R. 1934 Bom 324.**

———*Joint family—Business started by junior member—Debts of—Liability of manager of joint family.*

The manager of a joint family is not liable for a debt incurred by a junior member, who is not the manager, for a newly started business unless it can be shown beyond doubt that he himself was also managing the business. Even a manager cannot bind the other members for debts not incurred for family necessity. The principle applies in a far greater decree where the debts are incurred by a junior member of the family, who is not alleged or shown to be the manager. (*Pakenham Walsh, J.*) THIMMAYYA *v.* VITTOBA RAO. **156 I.C. 463=8 R M. 9=41 L.W. 389=1935 M.W.N. 232=A.I.R. 1935 Mad. 290.**

Constitution of.

———*Joint family—Constitution of—Creation by contract.*

Coparcenary in a joint Hindu family, except in the case of an adoption comes into existence as the result of the birth of a coparcener and cannot be created by contract or in any other way. 8 M.I.A. 400 at 420, Ref. (*Page, C.J. and Das, J.*) PACKIRISWAMY PILLAY *v.* DORASWAMY PILLAY. **9 Rang. 266=I.R. 1931 Rang. 209=132 I.C. 817=A.I.R. 1931 Rang. 216.**

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———*Joint family—Constitution of — Single male member and widows of coparceners—Status.*

Even when the family is reduced to a single male member, there is still a joint family, at any rate, where there are a number of widows and other persons entitled to maintenance from him. (*Beasley, C. J., Ramesam and Cornish, JJ.*) VEDATHANNI *v.* COMMISSIONER OF INCOME TAX, MADRAS. **56 Mad. 1=I R. 1932 Mad. 817=140 I.C. 17=1932 M.W.N. 1139=36 L. W. 536=A.I R. 1932 Mad. 733=63 M.L J. 542 (F.B)**

[Appr. 59 B. 618 (622).]

Coparcener.

See JOINT FAMILY—ALIENATION AND DEBT.

———*Joint family—Coparcener—Buildings erected by one member on joint property—Right to compensation for improvement.*

A coparcener erecting a building at his own cost on the joint homestead of the family cannot claim compensation for it. It is unjust to permit one co-tenant at his pleasure to charge another co-tenant with improvement he may not have desired. In such a case the improver stands as a mere volunteer and cannot, without the consent of his co-tenant, lay the foundation of charging him with the improvements. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W N. 861.**

———*Joint family—Coparcener—Debt contracted by deceased—Liability of heirs to the extent of assets.*

Where a suit is instituted against the heirs of a deceased member of a joint Hindu family, for loan advanced to the latter, the actual existence of the assets of the deceased need not be proved for the passing of the decree against the heirs. A decree can be passed against them to the extent of the assets of the deceased that may be found in their possession. If no assets can be found, it is clear that nothing can be realised from them, but that is no ground for dismissing the suit. (*Kulwant Sahay, J.*) JAINARAIN SINGH *v.* DINA SINGH. **147 I.C. 138=6 R.P. 338=A.I.R. 1933 Pat. 605.**

———*Joint family—Coparcener—Debt—Hand-note executed by—Liability of brother.*

Where the plaintiff wants to make not the executant of a hand-note but his brother liable for the debt it is for him to prove that it was for family necessity ; otherwise the brother is not liable at all. (*Varma, J.*) JADUNATH SAHU *v.* NILAMANI SAHU **154 I.C. 540=7 R.P. 474=16 Pat L.T. 278=A.I R. 1935 Pat. 51.**

———*Joint family—Coparcener—Debts—Junior member—Binding nature—Proof of benefit—Onus.*

The mere fact that the father and his two sons form a joint family, in the absence of any definite evidence that they carried on business together or had any family business, is not sufficient to saddle the father and his elder sons for the debts incurred by the other son; and in the absence of any evidence that there existed any joint family business, the onus is on the creditor to prove that the contract entered into by one of the members was to the benefit of the joint family. (*Harrison and Addison, JJ.*) SHAM DAS *v.* JOWAHIR MAL KISHORE CHAND. **I R. 1932 Lah. 671.**

———Joint family—Coparcener —Debt— Pro-note by elder brother—Suit and decree against elder brother—Execution against interest of younger brother—Right of creditor. *See* C. P. CODE, S. 53. **68 M.L.J. 104.**

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———*Joint family—Coparcener—Debt—Suit on promissory note executed by coparcener—Death of maker—Continuance of suit.*

If the maker of a promissory note has died before suit, the only person who can be sued upon the note is his legal representative. In such a suit, if the surviving coparceners are the legal representatives, they will be liable on the note; if they are not the legal representatives but have been impleaded with the legal representative they will be liable upon the Hindu Law liability if the liability of the legal representative upon the note is established. (*Cornish, J.*) SESHAYYA *v.* SANJIVARAYUDU. **150 I.C. 885=7 R M. 36=1934 M.W.N. 16=39 L W. 579=A.I.R. 1934 Mad. 350=67 M.L.J 393.**

———*Joint family—Co parcener—Decree against some—Evidence in subsequent suit to prove that judgment-debtors were sued in representative character.*

Where a decree is obtained against some members of a joint Hindu family, it can be proved by evidence in the subsequent suit, other than the proceedings in a previous suit that the judgment-debtors were sued in a representative capacity for debts which bound a family. (*Bose, A.J.C.*) MADHODAS HIRALAL *v.* GANGABAI. **31 N.L R 352=154 I.C. 333=7 R.N. 159=A.I.R. 1935 Nag. 14.**

———*Joint family—Coparcener — Decree against—Execution sale—Partition proceedings—Final decree for partition passed—Court to take notice of partition decree—Ascertained interest of the coparcener to be proclaimed for sale.*

During the pendency of a partition between the three branches of a joint Hindu family, a creditor of *A*, one of the members secured the attachment of his undivided interest in execution of a money decree against him and the Court ordered the sale of the same. Subsequently on a final decree in the partition suit being passed, lots were allotted to each branch of the family and the members of the branches other than that to which *A* belonged filed an application to raise the attachment from the lots which fell to their shares.

Held, that having regard to the facts in the partition suit *A's* share could not be ordered to be sold in the manner in which it was done; the proper course having regard to terms of O. 21, R. 66, was to take notice of the events in the partition suit and proclaim for sale the ascertained interest of *A* which in the partition suit had been allotted to his share as the result of the final decree. The language of O. 21, Rr. 59 and 63 did not prevent the Court from taking notice of the facts as they occurred in the partition suit. (*Shingne, J.*) SOMESHWAR RAJARAM *v.* MANILAL. **I.R. 1932 Bom. 306=137 I C. 603 (2)=34 Bom.L.R. 206=A.I.R. 1932 Bom. 210.**

———*Joint family — Coparcener — Interest of—Attachment before judgment—Effect of.*

An attachment before judgment of a coparcener's interest, when not followed by a decree during the said coparcener's lifetime does not operate to defeat the right of survivorship. 17 Mad. 144, Foll.; 26 M.L.J. 517 and 49 M. L J. 616, Ref. (*Pantalai, J.*) MUTHAVA CHETTIAR *v.* LAKSHMANAN CHETTIAR. **136 I.C. 778 =I.R. 1932 Mad. 314=1931 M.W.N. 1015=34 L.W. 1001.**

———*Joint family—Coparcener — Mesne profits — Right to claim.*

So long as the family is joint, there is no right in any coparcener to claim any specific share in immovable property or its income and no claim for mesne profits is ordinarily maintainable in such a case.

Semble:—If a coparcener is wrongfully excluded from enjoyment of the family property, he may be entitled to

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claim mesne profits. (*Bhide, J.*) JAI KISHEN DAS *v.* PASHORI LAL. **I.R. 1932 Lah. 358=137 I.C. 775= 33 P L.R. 570=A.I.R. 1932 Lah. 448.**

———*Joint family—Coparcener—Power to give discharge of family debt.*

In the case of a joint Hindu family, it is only the manager who can bind the family in such thing such as discharge of a debt. A discharge given by any other member of the family is not therefore a valid discharge binding on the family. (*Baker and Rangnekar, JJ.*) UMAKANT BALAKRISHNA *v.* MARTAND KESHAV. **6 I R. (Bom) 59=145 I.C. 164=35 Bom.L.R. 388=A. I.R. 1933 Bom. 245.**

———Joint family—Coparcener—Pro-note in favour of deceased coparcener—Suit by surviving coparcener on —Maintainability. *See* NEGOTIABLE INSTRUMENTS ACT, S. 68. **37 Bom L.R. 405=A.I.R. 1935 Bom. 343.**

———*Joint family—Coparcener—Promissory note in favour of—Suit by surviving member—Maintainability without assignment or endorsement.*

A promissory note was executed by the defendant in favour of one of two brothers, undivided members of a joint Hindu family. After the death of the promisee the surviving brother and the widow of the deceased entered into an arrangement of partition under which it was provided that the debt in question, as also other debts of the family, should be collected and divided equally between the two. In a suit by the surviving brother against the defendant for his half share of the debt, and for payment of the other half to the widow of the deceased, who was also impleaded as a defendant.

Held, that the suit was maintainable and the plaintiff could recover his share of the debt, as the plaintiff was always the owner of a half-share of the debt, and required no assignment or endorsement. When a note is taken in the name of a member of a joint Hindu family, the whole family existing at the time of suit can recover the amount, as the debt belongs to the family. In such a case, the suit is really based on the debt and not on the instrument.

Held, further, that the widow of the deceased, who inherited the other half, never having been a co-plaintiff and never having applied in the lower Court for being made a co plaintiff, could not recover her half-share. Nor could a decree be granted for that portion in favour of the plaintiff, the two being tenants-in common. (*Ramesam and Cornish, JJ.*) GOPALU PILLAI *v.* KOTHANDARAMA AYYAR. **57 Mad. 1082=153 I.C. 916=7 R.M 378=40 L.W. 110=A I.R. 1934 Mad. 529=67 M.L J. 843.**

———*Joint family—Coparcener—Rights of—Enjoyment of income—Maintenance.*

In the case of a Hindu undivided family, all the members have an interest in the income of the family and are entitled as of right to enjoy it. The fact that by reason of certain disqualifications, such as certain diseases or sex, certain members are unable to claim the rights of fully participating coparceners does not affect their inherent right to be maintained out of the joint income. But when there is no joint property and no joint income there is no such right except in the case of aged parents, wife and minor children. (*Courtney Terrell, C.J. and Agarwala, J.*) COMMISSIONER OF INCOME-TAX, B. & O. *v.* MAHARANI LAKSHMIBAI SAHEBA. **14 Pat. 313=154 I C. 866=7 R.P. 497= 16 Pat.L.T. 171=A.I.R. 1935 Pat. 8.**

———*Joint family—Coparcener—Suretyship transaction by—Binding character.*

A junior member of joint Hindu family cannot bind the other adult members by entering into a suretyship

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transaction which is in its nature risky and of speculative character; and such a transaction cannot be regarded as one for family benefit or binding on the family. (*Srivastava and Zia-ul Hasan, JJ.*) MALAK CHAND *v.* HIRA LAL. **157 I C. 945=8 R.O. 47=1935 O.W.N. 1005=A.I.R. 1935 Oudh 510.**

——*Joint family—Coparcener — Transaction by, without necessity—If can be ratified.*

A transaction entered into by a junior member of a joint Hindu family, without any legal necessity, and not for the benefit of the joint family, being entirely void and not merely voidable, there cannot be any ratification of it by the other members. (*Srivastava and Zia ul-Hasan, JJ.*) MALAK CHAND *v.* HIRA LAL. **157 I.C. 945=8 R.O 47=1935 O.W.N. 1005=A.I.R. 1935 Oudh 510.**

——*Joint family—Coparcener—Undivided interest of—Liability to attachment.*

The undivided interest of a coparcener in a specific property can be attached and sold. (*Addison and Agha Haidar, JJ.*) HARJAS RAI ARJAN DAS *v.* HANS RAJ. **6 I R. (Lah.) 232=146 I.C. 513=34 P.L.R. 983=A. I.R. 1933 Lah, 150.**

Debt.

See also (*i*) HINDU LAW—DEBT.
(*ii*) ,, JOINT FAMILY—COPARCENER AND MANAGER.

——Joint family—Debts—Manager—Partition without provision to pay binding debts—Right of crediter. *See* HINDU LAW—DEBTS. **53 All 868=A.I.R. 1931 All. 512 (F.B.).**

——Joint family—Debts—Partition without provision to pay binding debt—Right of creditor—Insolvency of principal members—Right of receiver. *See* HINDU LAW—DEBTS—MANAGER. **53 All. 868=A.I.R. 1931 All. 512 (F B.).**

Father.

See also (*i*) HINDU LAW—DEBTS.
(*ii*) ,, ,, JOINT FAMILY—ALIENATION AND WILL.

——*Joint family—Father — Decree against—Debt tainted with immorality—Liability of joint property.*

Where a person holds a money decree against the father for a debt borrowed for an immoral purpose and both the father and the son are alive, there is no bar against the attachment of the father's interest in the joint property in execution of the decree which has been obtained against him. On the other hand, the son's share must be free from attachment as the debt of the father is tainted with immorality. (*Sulaiman, C.J. and Ganga Nath, J.*) VISHWANATH PRASAD PATHAK *v.* PRAKASH CHANDRA. **153 I.C 502=7 R A. 513=4 A.W.R. 1483=A.I R. 1935 All. 278 (1).**

——*Joint family — Father — Decree against—Executability against sons.*

If the managing member of a joint undivided family governed by the Mitakshara law is the father and the other members are the sons, the father may by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt. The sons however should be given an opportunity to show that the debt was incurred for an immoral purpose so as to bind the sons. (*Mitter, J.*) ASHUTOSH BASU *v.* GOWRI SANKAR SAHA. **149 I.C. 650=6 R.C. 611=57 C.L.J. 580 =A.I R. 1934 Cal. 118.**

——*Joint family—Father—Decree against—Execution against sons—Limitation.*

An application against the sons for execution of a decree for costs obtained against the father is governed by Art. 183 of the Limitation Act and the obligation of the sons to pay the decree continues so long as the execution is commenced within twelve years of the date of the decree. 28 Mad. 466, Not Foll. (*Wort and Fazal Ali, JJ.*) SRI CHANDRA CHUR DEO *v.* MT. SHYAM KUMARI. **11 Pat. 445=I R. 1932 Pat. 229=139 I. C. 397=13 Pat. L.T. 719=A.I.R. 1932 Pat. 261.**

——*Joint family—Father—Decree against—Execution—Interest of sons not sold.*

M's share in the joint family property was attached in execution of a decree against him in respect of his personal debts. His three sons objected to the attachment, whereupon the decree holder stated to the Court that he had attached only the right, title and interest of *M* and that the objectors (*M's* sons) had no concern with it. Accordingly the Court ordered that the rights and interest of the judgment-debtor without specification of shares should be sold and that the objections be allowed to that extent. The rights and interest of *M* were thereafter sold and purchased by decree-holder's son,

Held, that in view of the above facts the decree-holder's son could not claim to have purchased at auction sale the entire interest of *M* and his three sons in the joint family property on the ground that the entire estate was liable for father's debts, as only the right and interest of *M* was put up for sale and purchased by the auction-purchaser. (*Sulaiman and Young, JJ.*) AJODHIA PRASAD *v.* DATA RAM. **I.R. 1931 All. 225=1931 A.L.J. 104=130 I.C. 1=A.I.R. 1931 All. 131.**

——*Joint family—Father—Decree against father and sale in execution—Suit by son challenging decree—Decree that son's share is not liable to be sold—Appeal—Death of son (respondent)—Effect—If decree infructuous.*

Appellant obtained a decree against the father of the respondent and in execution of that decree purchased some of the family properties in Court sale. The respondent and his father constituted a joint Hindu family. Respondent filed a suit and obtained a declaration that the decree obtained by the appellant was not binding on his half-share of the properties in the family. Pending an appeal by the appellant, respondent (minor son) died, and his mother was brought on record as his legal representative. Appellant conteded that the decree had become infructuous by the death of ths plaintiff-respondent and that his appeal should be allowed.

Held, that though it was imperative on the appellant to implead the legal representatives of the minor son when he seeks a reversal of the decree, and though his legal representatives are entitled to be heard in support of the decree, on the merits, the person who alone could have the benefit of the decree appealed from having died, the decree had become infructuous or nugatory, the appeal ought to succeed on that ground. The decree merely conferred immunity on the son's share in the family property against the adverse effects of the decree against the father; but with the death of the son, his interest in the joint family property ceased to exist. Therefore any declaration with reference to that interest was meaningless. (*Niamatullah and Rachhpal Singh, JJ.*) RAMSARUP *v.* JAGDISH NARAIN. **153 I.C. 356 =7 R.A. 484=4 A.W.R. 867=1934 A.L J. 933= A.I.R. 1934 All. 1029.**

——Joint family—Father (watandar)—Decree against father and his minor sons—Sale in execution—Life interest of minors can be attached and sold. *See* BOMBAY HEREDITARY VILLAGE OFFICES ACT (1874) SS. 5 AND 10. **58 Bom. 273.**

——*Joint family—Father—Decree against—Liability of sons—Decree against father and sons—Liability of separate property of sons.*

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Where a decree is obtained against a Hindu father, the sons being not parties to the suit, the decree can be executed against his sons to the extent of the family property in their hands. Where a decree is obtained against a Hindu father and his sons, then, the Courts must restrict the decree, as far as the sons are concerned, to their interest in the family property. Where, however, the decree is not so restricted and is passed against the father and sons, it is capable of being executed against the property of the sons whatever the nature of it or against the sons personally, and the executing Court cannot go behind it. 10 Pat. 305, Diss. (*Rangnekar, J.*) SHANKAR NARAYAN *v.* RIKHAVDAS. **I.R. 1932 Bom. 478=139 I.C. 205=34 Bom.L.R. 941=A.I.R. 1932 Bom. 483.**

———*Joint family—Father—Decree against—Sale in execution—Right of son to joint possession—Mys. C.P. C. Regulation (III of* 1911), *O.* 21, *Rr.* 100 *and* 101.

Where in execution of a money decree against the father, properties in the joint possession of father and son were sold in execution, the son is entitled to joint possession with the purchaser as a person in possession on his own account within the meaning of R. 101 of O. 21, Mys. C.P.C. Regulation, particularly in view of the fact that the pious obligation of the son to pay his father's debts is not recognized in Mysore during the father's lifetime 17 B. 718, Not Foll.; 3 Mad. 81; 18 C. W.N. 695; 53 I.C. 599 and 68 I.C. 174, Foll. (*Draswami Iyer, C.J.*) UDDANDA SETTY *v.* NANJI GOUDA. **9 Mys.L.J. 303.**

———*Joint family—Father—Family arrangement—Binding nature on sons.*

A family arrangement entered into by a father is binding on his minor sons provided the transaction is for the benefit of the family generally as for example, one which tends to the preservation of the family property to the peace or security of the family and the avoiding of family disputes and litigation or saving of the honour of the family. *T*, his son *G* and *G's* two sons *H* and *K* constituted a joint family. On *T's* death *G* and his two sons of *H* continued to be joint. *H* executed a deed of release by which he purported to relinquish in favour of *G* and *K* his share in the joint property, in consideration of his being exempted from any liability for the debts due by the family. Sons of *H* (*M* and *S*) were minors at the time of the execution of the deed. On the same date *G* executed a deed of gift transferring to his grandsons *M* and *S* half portion of a house. Both documents were registered on the same date

Held, that the deed of release executed by *H* could not be registered as a family arrangement or settlement so as to be binding on his sons. A.I.R. 1930 All. 687 Rel. on. (*Tapp and Walker, JJ.*) KARAM SINGH *v.* SURENDAR SINGH. **135 I.C 180=I.R. 1932 Lah. 52 =A.I.R. 1931 Lah. 289 (2).**

———*Joint family—Father—Power to execute trust deed—Benefit of minor.*

It cannot be laid down as a general rule that in no case can a Hindu father in a joint family delegate any of his powers in the management of the family property. There might conceivably be a number of circumstances in which benefit to the family itself may require that he should himself abstain from exercising, and should delegate, some of his powers for that purpose, as for example, when the father is extravagant and thereby incurs large debts. Necessity or benefit to the minor has been regarded as a more important consideration than technical want of authority of an alienor, *e.g.*, under the Hindu Law, even a *de facto* guardian of a minor can validly sell the property of the minor to a third person for legal

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necessity. Where a Hindu father who was found to be extravagant and incurring debts, executed a deed of trust to third persons, under which he gave up all his rights in the family property for the benefit of his minor sons then existing and to be born in future, and entrusted the family property to the possession and management of the trustees who were to pay up all the family debts by selling or mortgaging any of the family properties, maintain all the family members and incur suitable expenses for the marriage of the daughter, etc., the trust to be in existence till his death, after which the property was to be handed over to the minor sons,

Held, that the trust deed did not violate the provisions of Hindu Law, since the beneficiaries under it were the executant's family, his son, wife and daughter who were provided for by it, and that there was nothing inherently invalid in the trust deed which the father and manager had authority to execute. (*Murphy and Divatia, JJ.*) CHHOTABHAI *v.* DADABHAI. **152 I.C 715=7 R.B. 166=36 Bom.L.R. 738=A.I.R. 1935 Bom 54.**

———*Joint family—Father—Release by—Subsequent decree against—Liability of minor son's share—Rights of creditors.*

Under the Hindu Law, the only course open for the protection of minor members of a joint family from the effects of the misdeeds of their father or other elder coparcener, is either to bring about a partition or to secure a release from the misbehaving member on paying him a sum of money towards his share in the family properties. Such a transaction is no doubt open to attack by the creditors of the person who is thus separated and the creditors can insist that it must be carefully scrutinised. A release executed for an inadequate consideration may not be binding on the creditors. But the release is not on that account wholly inoperative or other than *bona fide*. Nor does the person executing it continue to be in a state of non division with his minor son so as to make the minor son liable for debts contracted by him after that date or to make the minor's share liable to be proceeded against in execution of decree obtained against him, in suits instituted after such release to which the minor son has not been made a party. (*Varadachariar and Burn, JJ.*) VEERAPPA CHETTIAR *v.* ANNAMALAI CHETTIAR. **156 I.C. 439=7 R M 699=41 L W. 431=1935 M.W.N. 190—A.I.R. 1935 Mad. 316=68 M.L J. 157.**

———*Joint family—Father—Representation in suit and execution proceedings.*

Where a house belonging to an agriculturist passes out of his hands by reason of an execution sale there having been no intervention on his part at the time when the house was attached he cannot challenge the validity of the sale at a later stage by a separate action. Where the father's debt is binding on the sons, the latter are bound by the consequences of the execution proceedings in which the father must be deemed to have represented the entire family consisting of himself and his sons. (*Sen and Niamatullah, JJ.*) SABHA RAM *v.* KISHAN SINGH **52 All. 1027=I.R. 1931 All 686=133 I.C. 478=1930 A L J. 1599=A.I.R. 1931 All. 112.**

———*Joint family—Father—Representation in suit—Failure to take possible plea—Minor whether bound.*

The mere failure by a father to take a possible plea will not entitle his minor son in a subsequent suit to plead that he had not been properly represented in the previous one. (*Jackson, A.J C*) MADHORAO *v.* HIRA LAL. **I.R 1932 Nag 80=138 I.C. 161=15 N.L.J. 1 =A I.R. 1932 Nag. 90.**

———Joint family — Father — Settlement and will executed by—Partition suit filed—Summons not served on son—Settlement and will valid. *See* PARTITION—SUIT FOR. **55 Mad. 558=63 M.L.J. 37.**

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———*Joint family—Father—Suit against—Minor son's shares—Attachment of—Permissibility.*

In a suit against the father, it is open to the creditor to have the entire family property attached before judgment, including the share of the minors, even though the latter were not impleaded as parties to the suit. (*Paken ham Walsh, J.*) GUNNAM NAIDU *v.* CHENDRI NAIDU. **6 I.R. (Mad.) 271=146 I.C. 516=1933 M.W.N. 139 =38 L.W. 803=A.I.R. 1933 Mad 839=65 M.L.J. 752.**

Illegitimate son.

———*Joint family—Illegitimate sons—Coparcenery —Right of survivorship.*

On the death of the father, the illegitimate children form a coparcenery with the legitimate children and the ordinary right of survivorship would also apply in favour of the illegitimate children, subject to the limitation that they would be entitled only to a half-share on partition. 4 B. 37, Foll.; 46 M. 167, Ref. (*Baker and Nanavati, JJ.*) SAKHARAM SATU *v.* SHAMRAO. **I R 1932 Bom 290=137 I.C. 572=34 Bom.L.R. 191=A.I R. 1932 Bom. 234.**

———*Joint family—Illegitimate son—Joint family property—Right to partition—Gift of specific property by father to illegitimate son—Effect of.*

A Sudra Hindu had three sons by his lawfully wedded wife and three sons by his concubine. In 1903 he executed a gift deed in favour of his mistress and the illegitimate sons conveying absolutely some lands and a house, described as his self-acquired property, for their maintenance. On the death of the putative father, one of the illegitimate sons brought a suit for partition of the joint family property against the legitimate sons.

Held, that the deed of gift did not amount to a partition and was not intended to extinguish the right of the illegitimate sons to claim a share in the ancestral property after the death of the putative father. (*Baker and Nanavati, JJ.*) SAKHARAM SATU *v.* SHAMRAO. **I.R. 1932 Bom 290=137 I.C. 572=34 Bom.L R. 191 =A I R. 1932 Bom 234.**

[Rel. 64 M.L.J. 500 (501)**]**

———*Joint family—Illegitimate sons—No right by birth.*

Legitimate sons in ununidivided Hindu family governed by the Mitakshara at birth become coparceners with their father in the ancestral property of the family; but illegitimate sons never can acquire at birth or in any other way a right coparcenary with their father. (*Page, C.J. and Das, J.*) PACKIRISWAMY PILLAY *v.* DORA SWAMY PILLAY. **9 Rang. 266=I.R. 1931 Rang. 209 =132 I C. 817=A I.R. 1931 Rang. 216.**

Impartible estate.

See also HINDU LAW—IMPARTIBLE ESTATE.

——— Joint family—Impartible estate—Rule of survivorships. *See* HINDU LAW—IMPARTIBLE ESTATE. **59 I.A. 331=59 Cal. 1399=63 M.L J. 196 (P.C).**

Insolvency.

See TRADING PARTNERSHIP. *infra.*

———*Joint family—Insolvency—Application by some of the members—Effect.*

An application for insolvency by some of the members of a joint Hindu family does not *ipso facto* result in the insolvency of all the members of the family. 6 Lah. 1 (P.C.), Rel. on (*Bhide, J.*) ASA NAND *v.* BISHAN SINGH. **131 I C. 345=A.I.R. 1931 Lah. 125.**

———*Joint family — Insolvency — Coparcener—If effects severance—Purchaser of share from Official Receiver—Date from which mesne profits can be claimed.*

The filing of an insolvency petition by a member of a Hindu joint family does not involve a severance of the joint status of the family. The purchaser of the undivided share of a coparcener from the Official Receiver does not thereby become a tenant-in common with the other members of the family; and he is only entitled to mesne profits, in the absence of proof of exclusion, from the date of the plaint in the suit for partition and not from the date of his purchase. (*Beasley, C. J. and Madhavan Nair, J.*) VENKATARAYUDU *v.* SIVARAMAKRISHNAYYA. **58 Mad. 126=153 I.C. 368=7 R.M. 346=40 L.W. 552=1934 M.W.N. 864 (2)= A.I.R. 1934 Mad. 676=67 M.L.J. 486.**

———Joint family—Insolvency—Coparcener—Receiver —Power to sell shares of sons, *See* INSOLVENCY. **15 Pat. L.T. 502.**

———*Joint family—Insolvency—Coparcener—Sale of his right, title and interest—Remedy of purchaser— Partition.*

Where one of the coparceners of a joint Hindu family becomes insolvent, the Official Receiver can sell the right, title and interest of such coparcener in the joint family property and the purchaser's remedy is to compel partition as against the other co sharers. The actual shares of the coparceners of other members in the family need not be determined at the time of sale by the Official Receiver but can be determined at time of partition. 3 Cal. 198, Ref. (*Bhide, J.*) NATHU MAL *v.* DINA NATH. **6 I.R (Lah.) 282 (1)=146 I.C. 840 =34 P.L.R. 1032=A.I R 1933 Lah. 651.**

———*Joint family—Insolvency — Father—Adjudication as insolvent—Prior attachment of entire joint family property by creditor—Rights of Official Receiver.*

On the insolvency of the father of a joint Hindu family, it is only his own share of the family property that vests in the Official Receiver. The shares of his sons do not vest in the Official Receiver. With respect to those shares, what vests in the Official Receiver is only the father's power of disposal. Where the entire property belonging to the judgment debtor and his sons had been attached before the judgment-debtor was adjudicated as an insolvent and the petition for adjudication was presented after the date of the attachment, it follows that the father's power of disposal of the sons' shares had been destroyed by the existing attachment of those shares; and the Official Receiver has no power to deal with the sons' shares by reason of the order of adjudication or to appropriate the sale proceeds accruing from the sale of the sons' shares. 51 Mad. 342, Foll. and 51 Mad. 417, Ref. (*Madhavan Nair, J.*) OFFICIAL RECEIVER, COIMBATORE *v.* ARUNACHALAM CHETTIAR. **I.R 1931 Mad. 399=130 I.C. 479=33 L.W. 607=A.I.R. 1931 Mad. 118.**

———*Joint family—Insolvency—Father—Attachment of son's interest in execution of decree passed against father and son—Subsequent insolvency of father— Son's interest in the family property—If vests in the Official Receiver in insolvency.*

There can be no difference in principle between a case where the son's interest is made liable in an action brought on a contract entered into by the father and one where the son's interest is made liable in an action brought on the son's own contractual liability. In the first case the decree makes the son's interest liable by reason of the pious obligation of the son under the Hindu Law to discharge his father's debts. His liability in that case is not contractual, but it is nevertheless a liability, and a liability imposed upon him by law and is one which places him subject to certain exceptions and safeguards in the position of person responsible in the eye of the law for his father's debts as if he had himself contracted. In either case after an attachment has been made of the interest of the son in the family property,

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the father's right to alienate that property is gone; and once that right is gone, the power of the law to transfer that right to the Official Receiver in insolvency, on the father's insolvency, is gone too, because there is nothing to transfer. (*Stone and Pandrang Row, JJ.*) OFFICIAL RECEIVER, EAST GODAVARI, RAJAHMUNDRY *v.* IMPERIAL BANK OF INDIA. **59 Mad. 296=8 R.M. 862=161 I C. 726=1936 M.W N. 510=43 L.W. 35 =A.I R. 1936 Mad. 193=69 M.L.J. 898.**

———*Joint family—Insolvency—Father— Partition suit —Son's liability for father's debts—Jurisdiction of insolvency Court to decide question as to binding nature.*

The effect of the son's severance of the joint status prior to his father's insolvency is that the father's power which on his insolvency vests in the Official Assignee to sell the son's interest in the family property in liquidation of the father's debts no longer exists. A suit for partition puts an end to such right. The fact that the Hindu Law imposed on the sons a liability for his father's debts does not make him in any way a debtor of the insolvent father. Where the binding nature of the debt is questioned by the son, the question cannot be decided by the insolvency Court behind the back of the son. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHY PILLAI *v.* SUNDARAMURTHI PILLAI **55 Mad. 558 = I.R. 1932 Mad 532=138 I C. 225=35 L.W. 592= A.I.R. 1932 Mad 381=63 M.L J. 37.**

———Joint family—Insolvency—Father—Prior attachment of property—Receiver's right to sell sons' shares. *See* PROVINCIAL INSOLVENCY ACT, S. 28 (3). **156 I.C. 205=A.I.R. 1935 Mad. 427.**

———Joint family—Insolvency — Father—Right of Official Receiver over undivided son's share. *See* PROVINCIAL INSOLVENCY ACT, 1920, S. 28. **53 All. 239 =A.I.R. 1931 Mad. 118 (F B.).**

———Joint family—Insolvency—Joint family business —Adjudication of—Shares of minors—Right of widow to maintenance. *See* JOINT FAMILY—BUSINESS. **A.I. R. 1933 Lah. 901.**

———*Joint family—Insolvency—Manager—Suit on promissory note executed by manager—Maintainability against other coparceners.*

After the adjudication of the managing member of a joint Hindu family, a creditor filed a suit on a promissory note executed by the managing member. It was dismissed as against the insolvent and the Official Receiver but decreed as against the other members of the joint family. It was contended that the suit was not maintainable against the other members also as, on the insolvency of the managing member, the power to sell the whole of the family property to discharge the debts of the family vested in the Official Receiver as "the property of the insolvent".

Held, that the creditor was not resorting to any property, or trying to interfere with the power, vested in the Official Receiver and the suit, which was only directed against the shares of the other members, was maintainable (*Krishnan Pandalai, J.*) CHINNA VEERIAH *v.* GURIVI REDDI. **6 R.M. 541=148 I C. 831=39 L.W. 347=1934 M.W.N. 622=A.I.R. 1934 Mad. 223=66 M.L J. 277.**

———Joint family—Insolvency—Principal members of family—Insolvent—Right of receiver to seize the property of the other members—Partition—No provision for debt. *See* HINDU LAW—DEBTS. **A.I.R. 1931 All 512 (F.B.).**

———Joint family—Insolvency—Son—Debts of father —Adjudication of son, on account of his liability to pay those debts out of the family properties—Not allowed. *See* INSOLVENCY- HINDU JOINT FAMILY. **A.I.R. 1931 Mad. 788=61. M.L.J. 518.**

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Joint acquisition.

———*Joint family—Joint acquisition—Acquisitions made by partnership without reference to nucleus of joint family property—Presumption.*

When there is ancestral property by means of which other property may have been acquired, then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. But before the property in possession of one member can be presumed to be joint family property, it is necessary to establish the existence of a nucleus of joint family property. Where the two brothers formed members of a joint family, there was some nucleus of joint family property but the plaintiff's case is not that the acquisition was made out of that nucleus but by a partnership started on a joint contribution of the specific amounts by each of the two partners, no question of rights as under the Hindu Law itself arises. 33 All. 677; 33 C. W. N. 435, Rel. on. (*Mukerji and Nag, JJ.*) ASHUTOSH MUKHERJEE *v.* TARAPADA MUKHERJEE. **150 I.C. 292=6 R C. 813=58 C.L.J. 372=A.I.R. 1934 Cal. 308.**

———*Joint family—Joint acquisitions—Partition between father and his brothers—Dyer's business allotted to father—Sons joining in business—Sons married at family expense—Joint lodging and mess—Property acquired by joint exertions.*

F, his father and two brothers worked as dyers. *F* separated about 1896 from the family. At the time he had two sons, *S* and *R*. *S*, who was 20 years old, used to work with *F* and *R* joined when he was about 10 years old, *i.e.*, about 1906. In 1907 they purchased a house for Rs. 1,150. At the partition in 1896 there was handed over to *F* the plant of a dyer's business and that business had proved unexpectedly lucrative. The sons were all living and messing together. They were married at the expense of the family. For the services that he rendered he received nothing in the nature of wages. In a suit by *R* for partition,

Held, that the property, if not the outcome of a nucleus of the joint family property was at least acquired by the joint exertions of *F*, *S* and *R*, and was joint family property. The younger son did contribute such labour as he was able to afford. The quantum of labour which he had contributed is not the decisive factor. (*Ferrers, J C. and Aston, A. J. C.*) ROCHIRAM TOLARAM *v.* RIJHUMAL **149 I.C. 1081=6 R.S. 251=A.I.R. 1933 Sind 301.**

———*Joint family—Joint acquisitions—Property purchased and standing in the name of one member— Claim by brother on the ground of joint acquisition— Onus of proof.*

When a party asserts that a particular item of property purchased and appearing in the name of his brother was acquired jointly by him and his brother out of joint funds, the burden is on him to prove it. The mere fact that the brothers were joint in mess, cannot lead to the conclusion that the property is joint when the other circumstances are against it. Where the claimant withholds the relevant documents relating to the transaction and has failed to assert his right or title to a share in the property for a long time, either against his brother or against any party interested to deny his title, the conclusion is irresistable that he has no right or interest in the property. (*Guha and Lodge, JJ.* RAJANI KANTA RAY *v.* KAILASH CHANDRA SHAHA **62 C L.J. 225.**

Joint family property.

See also SELF-ACQUISITION, *infra.*,

———*Joint family—Joint family property—Acquisition with joint family property.*

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Acquisitions resulting from the joint family property from the ventures of some of the members merge in the joint family property. (*Middleton, J. C. and Saaduddin, A.J.C.*) MALIK PARTAP SINGH *v.* HARKISHAN SINGH **147 I.C 1037=35 P.L.R. 260=6 R. Pesh. 42=A.I.R. 1933 Pesh. 85.**

———*Joint family—Joint family property—Ancestral property used for the recovery of non-ancestral property.*

Property *X* was acquired by a member of joint family in the right of a collateral. It was burdened with a liability for the payment of Rs. 1,800. Property *Y* was admittedly ancertral property, recovery of which was made conditional on payment of Rs. 3600. To raise these two amounts and to pay off some previous debts, he mortgaged both the properties for a sum of Rs.9,000.

Held, that property *X* also should the deemed to be joint family property. (*Wazir Hasan, C.J. and Raza, J.*) BALRAM CHAND *v.* RADHEY LAL. **I.R. 1932 Oudh 312=9 O.W.N. 376=138 I. C. 490=A.I.R. 1932 Oudh 219.**

———Joint family—Joint family property—Businesses run by father and sons—Each helped by others. *See* JOINT FAMILY—BUSINESS. **A.I.R. 1933 Lah. 150.**

———Joint family—Joint family property—Distinction between that and ancestral property—Mitakshara and Dayabhaga. *See* JOINT FAMILY—ANCESTRAL PROPERTY. **38 C.W.N. 861.**

———*Joint family—Joint family property—Evidence—Entry in revenue records.*

The entry of the names of particular members of a joint family in revenue records, as being proprietors of the property, does not lead, by any means, to the inevitable conclusion that the property is not the property of the joint family to which they belong. This is very often a mere matter of form. (*Wazir Hasan, C.J. and Allsop, J.*) JOT SINGH *v.* JANGU SINGH. **6 I.R. (Oudh) 205=146 I C. 1005=17 R.D. 943—10 O.W.N. 1021=A I.R. 1933 Oudh 482.**

———*Joint family—Joint family property—Exclusion from—Suit by excluded members for declaration and injunction only—No prayer for possession—Maintainability of suit.*

A suit by the plaintiffs for a declaration to the effect that they were entitled, along with the defendants, their brothers, to the entire property left by their father as members of a joint Hindu family and further asking for a perpetual injunction against the defendants to the effect that they should allow the plaintiffs to retain joint possession in equal shares of the entire property of which a list was appended to the plaint is not competent where the plaintiffs are clearly not in possession and the defendants are keeping them out of possession. The plaintiffs ought to use for recovery of possession of the land either by a suit for joint possession or for possession of their share by partition. (*Broadway and Monroe, JJ.*) ATMA RAM *v.* GODHU RAM. **14 Lah. 306=I.R 1933 Lah. 124=34 P.L.R. 5 and 235=141 I.C. 409=A.I.R. 1933 Lah 712.**

———*Joint family—Joint family property—Gift of life interest by father—Remainder to vest in father—Birth of sons subsequent to gift—Remainder, if joint family property of father and sons.*

A father who is sole owner of a property before the birth of sons can transfer any part of the family property to any one by sale or gift and the sons can acquire an interest by birth in such property, as remain in the family at the time of their birth. Hence where a father who has got ancestral property gives to his wife a life-estate by gift and the remainder continued to be vested in the donor after the gift, subsequently sons are born to him, the interest in such remainder is joint family property belonging to the father and the sons. As each son was born, he took an interest by birth. (*Niamatullah, J.*) SUMERA *v.* MORMUKAT. **157 I.C. 256=8 R.A. 150=1935 A.W.R. 846=A.I.R. 1935 All. 632.**

———*Joint family—Joint family property—Nucleus—Absence of—Nature of property acquired—If joint family property.*

The law is well settled to the effect that where there is no nucleus of ancestral property or where there is no nucleus of joint property possessed by the members of the family, any acquisition of a particular member cannot be treated as joint family property in which other members of the family have a right to share.

Per *Mukerji, J.*—The word "joint" implies, though not necessarily, possession of some property which may be regarded as owned by all the members of the family. The word "undivided" need not necessarily carry any such idea. (*Mukerji and Bennet, JJ.*) SWARATH DHOBI *v.* GHURKI. **53 All. 603=I.R. 1931 All. 367=131 I.C. 255=1931 A.L.J. 332=A.I.R. 1931 All. 313.**

———*Joint family—Joint family property—Nucleus—Nature of and presumption from.*

There is a presumption that a Hindu family is joint and undivided. But there is no presumption that a joint family is possessed of joint property or that a particular item of property is joint family property as having been acquired with the aid of family funds. Where it is proved or admitted that a joint family possessed such nucleus as could lead to the acquisition in question, the acquisition may be presumed to belong to the joint family, having been acquired with the aid of the nucleus. But the mere existence of a nucleus, however small or insignificant, is not enough. It has to be shown that the nucleus was of such a character that it could be reasonably expected to lead to the acquisition of the property alleged to be joint family property. (*Niamatullah and Collister, JJ.*) SURAJ KUMAR *v.* CHANDRA KALA. **152 I.C. 541=7 R.A. 354=4 A. W.R. 699=A.I.R. 1935 All. 67.**

———*Joint family—Joint family property—Nucleus proved—Character of later acquisitions.*

The mere existence of proved nucleus does not justify a conclusion that all later acquisitions were made with the help of that. The sufficiency or otherwise of such a nucleus can and should be gone into by Courts. 111 I. C. 596, Rel. on. (*Bhide and Tapp, JJ.*) HARI SINGH *v.* GURBAKHSH SINGH. **I.R 1931 Lah. 773=133 I.C. 437=32 P.L.R. 450=A.I.R. 1931 Lah. 593.**

———*Joint family—Joint family property—Nucleus—Purchases made—Inference.*

In the case of a joint family, where there is a nucleus of joint property, the initial presumption is that the property acquired in the name of any member belongs to the joint family. The presumption is however rebuttable. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546=I.R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840=A.I.R. 1931 Lah 419.**

———*Joint family—Joint family property—Onus of proof—Presumption.*

In a suit to enforce against a Hindu son a mortgage executed by his father the question, whether the property mortgaged was the father's ancestral property was neither raised by the pleadings nor in the issues,

Held, that there being no presumption that a family, because it is joint, possesses joint property, the onus was on the defendant (the son) to allege and prove that the

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property in suit was joint family property. (*Sir Dinshah Mulla.*) KAI SHADI LAL *v.* LAL BAHADUR. **I.R. 1933 P.C. 104=142 I.C. 739=35 Bom.L.R. 308 =1933 A.L.J. 339=37 L W. 480=57 C L.J. 152= 1933 M.W.N. 174=37 C.W.N. 420=A.I.R. 1933 P. C. 85=64 M.L.J. 298 (P.C.).**

———*Joint family—Joint family property—Presumption.*

There is no presumption that because a Hindu family is joint, it is possessed of joint property also. It lies upon the person who alleges a certain property to be joint family property to show that there was a nucleus around which the property accumulated. Where, in a suit on a mortgage executed by the father of the defendant describing the properties, as his separate properties, the defendant contended they were joint ancestral properties, the burden of proving they were ancestral is on him and no presumption can be made that they were ancestral from the mere fact that father and son remained joint. 12 I.C. 770; 56 M.L.J. 435 (P.C.) and 64 M.L.J. 298 (P.C.), Ref. (*Srivastava and Raza, JJ.*) MATA DIN *v.* RAM SUCHIT. **6 R.O. 324=147 I.C. 971—10 O.W.N. 1080.**

———*Joint family—Joint family property—Presumption as to—Applicability under Dayabhaga.*

The presumption of Hindu Law that while a family remains joint, all properties, including acquisitions made in the name of individual members, are joint property does not apply to a family consisting of father and sons under the Dayabhaga system of Hindu Law. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Joint family—Joint family property—Presumption as to, from jointness—Father and son.*

From the mere fact that a Hindu father and his son are joint in food and worship, it cannot be presumed that they hold joint family property. It is for the plaintiff (lender) who asserts it to show that the family possessed some joint or ancestral property from which the presumption could be drawn that all the property possessed by the family is joint family property. (*Wadia, J.*) KAMALAKANT GOPALJI *v.* MADHAVJI VAGHJI. **59 Bom. 573=158 I.C 145=8 R B. 109=37 Bom.L.R. 405=A.I.R. 1935 Bom. 343.**

———*Joint family—Joint family property—Presumption—Dayabhaga law—Jointness — Self-acquisition—Proof.*

If two or more sons of a father governed by the Dayabhaga system of Hindu Law succeed to ancestral property or without possessing such property, live jointly after their father's death and acquire properties in joint names and during such state of living, other properties are acquired in the names of other members of the family, it is for such members to show that they are their self-acquisitions. There is a presumption in favour of jointness in respect of all properties acquired during joint living, when there is proof of a nucleus of ancestral property or of the existence of joint family property; and this presumption has got to be displaced by the member who alleges the property to be his separate or self-acquired property. The strength of the presumption in either case varies with the circumstances of each individual case. In some cases it may be easily displaced. For instance, where ancestral property or other joint property is shown to be inconsiderable, and the property acquired by an individual member is of considerable value, and it is shown that the earnings of that member were large, the presumption is at once displaced or rebutted. Possession of joint estate, however slight, leads to a presumption that all properties of the family, including a business carried on, started and carried on

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by a member, are joint. The burden is on him to establish that the business was not a joint business. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Joint family—Joint family property—Presumption—House built by one of the members.*

If one of the members of joint family builds a house, in the absence of any evidence about the house being built with the separate income of such member, the presumption arising from the existence of an adequate nucleus of joint family property must be that the house is the property of the joint family. (*Srivastava and Zia-ul-Husan, JJ.*) MALAK CHAND *v.* HIRA LAL. **157 I.C. 945=8 R.O. 47=1935 O.W.N. 1005=A.I.R. 1935 Oudh 510.**

———*Joint family—Joint family property—Presumption—Property acquired by joint labour.*

The normal state of every Hindu family is joint, and in the absence of proof of division, such is the legal presumption. But there is no presumption that a joint family owned any joint property or that it had a family nucleus. It is equally well established that there is no presumption that property acquired by a member of a joint family is joint property, unless it can be traced to any family nucleus, admitted or proved, and the burden is on the party who asserts that the property is not self-acquired but joint. Where, however, during the period of more than 10 years preceding the suit, the plaintiff assisted defendants 1 and 2 in their trade and all the properties in their possession have been acquired by the joint labour of all the three brothers,

Held, the properties must be presumed to be joint. (Cases ref.) (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KARIYANNA *v.* RANGIAH. **12 Mys. L.J. 61=39 Mys.H.C.R. 643.**

———*Joint family—Joint family property—Proof.*

Where it appeared that it was not unusual in the family for property to be acquired by some members or to be in the possession of some members, although all the members in the family had a joint interest in it and the other evidence disclosed that the family had continued joint.

Held, that the suit property was joint family property. (*Addison and Hilton, JJ.*) SITA RAM *v.* BAIJ NATH. **33 P.L.R. 132=I R. 1932 Lah. 283 (2)=137 I C. 92 =A.I.R. 1932 Lah. 217.**

———*Joint family—Joint family property—Property acquired after loss of entire family property—Nature.*

It is no doubt true that so long as a family remains joint, any property standing in the name of a junior member will be presumed to be joint family property. But such a presumption is liable to be rebutted. The question is always one of fact. Where the family after having lost all the property separated into two branches and started on their new career without any uncleus of family property.

Held, that the burden must lie on the party who asserted that it was joint family property to prove the same. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) GUTTAYAPPA *v.* HALAPPA. **11 Mys. L.J. 281 =39 Mys.H.C.R. 371.**

———*Joint family—Joint family property—Property acquired by manager—Nucleus.*

Where there was a common purse and only one member represented the family until his death and when in possession of certain property acquired by a deceased member, the manager acquired certain other property, the property of the deceased member constitutes a nucleus of joint family property and the subsequent acquisition may also be presumed to be joint family property. (*Bisheshwar Nath and Smith, JJ.*) DE-

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LASI *v.* BHAGWAN DIN. **I.R. 1933 Oudh 6=140 I.C. 592=9 O.W.N. 950=A I.R. 1933 Oudh 27.**

———*Joint family—Joint family property—Rebuilding joint family house—Presumption.*

Where the son and the father are owners of a house as members of a joint family, and expenditure is incurred later either by the son or father for rebuilding the house, it will be presumed that he threw the money into the joint funds, unles there was an intention of the person who spent the money to keep the superstructure separate from site. (*Almond, J.C. and Mir Ahmad, A. J.C.*) CHUNI LAL *v.* RADHA DEVI. **153 I.C. 71=7 R. Pesh. 62=A I.R 1934 Pesh. 134.**

———Joint family—Joint family property—Undivided share of less than Rs. 100 in value—Sale of—Registration—Necessity for. *See* T. P. ACT (1882), S. 54. **144 I.C. 919.**

———*Joint family—Joint family property—What constitutes—Defendant's money kept by plaintiff with his own—Purchase made by plaintiff, if defendant's property.*

If there is no question of joint family between parties, the fact that the defendant's earnings were kept by the plaintiff with his own earnings would not make the coffers of the plaintiff the coffers of a joint Hindu family nor even the coffers of people who are partners in any venture. From the mere fact that the defendant's earnings are kept with the plaintiff, it would not follow as a matter of law that any purchase made by the plaintiff would also be the defendant's property. Either the family must be joint or the parties must be in the position of partners so that the act of one may be the act for all the partners and it must be further shown that in purchasing the property the plaintiff was acting as a partner of the defendant. (*Mukerji and King, JJ.*) PARBHU LAL *v.* BADRI. **57 All. 77=6 R A. 889=149 I.C. 315=3 A.W R. 611=A.I R. 1934 All. 719.**

———*Joint family—Joint family property—What is.*

Where there is nucleus of ancestral property and the members of the joint Hindu family acquire property with the help of that nucleus, such property becomes joint family property. Even if there is no nucleus, but, if the members of a joint family acquire property by joint labour and throw it into a common stock, then such property becomes joint family property also. (*Sen and Bajpai, JJ.*) JAMNA PRASAD *v.* MT. DURGA DEI. **I.R. 1933 All. 352=144 I.C. 33=A.I.R. 1933 All. 138 (2).**

Jointness.

See also JOINT FAMILY—PRESUMPTION.

———*Joint family—Jointness—Proof—Firm—Use of member's name—Effect.*

The mere use of a name of a brother to a firm of a person does not prove that the brothers are joint. Where the name of the brother was given by a person to his firm, but the evidence showed that the person and his brother had separate khatas (accounts), and that the widow mother still lived separately and was in possession of the properties of her husband

Held, that the family was separated and not joint. (*Niamatullah and Bennet, JJ.*) BANSI DHAR KUNJI LAL *v.* LALTA PRASAD. **56 All. 912=3 A.W.R. 822=150 I.C. 433=1934 A.L.J. 393=6 R.A. 1104=A.I R. 1934 All. 543.**

Joint property.

———*Joint family—Joint property—Brothers living together and acquiring property by joint sale-deed—Law of survivorship—If applicable.*

In the absence of proof of ancestral property in the hands of brothers, the mere fact that they lived together and acquired property by a joint sale-deed will not prove such jointness as would result in the application of law of survivorship, unless it is also proved that they had thrown their acquisitions into a joint stock so as to constitute a joint Hindu family. (*Mukerji, J.*) GAURI SHANKER *v.* GOPAL DAS. **151 I.C. 388=7 R.A. 161=3 A.W.R. 763=A.I.R. 1934 All. 701.**

———*Joint family—Joint property — Earnings of members—Blending—Evidence of.*

Association by a member, sharing in the joint estate, of his separate earnings with the income of another member of the family would be sufficient evidence of their being blended. (*Mitter and MacNair, JJ*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Joint family—Joint property — Joint family property—Distinction between the two.*

The rule of Hindu Law, under which a son acquires an interest by birth in joint family property is limited to cases in which the joint family property consists of ancestral property or its augmentation ; but the same incidents would attach to the property which is not ancestral property but is acquired by the joint efforts of members of a joint Hindu family, if they dealt with it as "joint family property" and not merely as "joint property", between which a distinction is drawn, the latter being such as is known to English law under which though the rule of survivorship is applicable, the sons cannot take an interest by birth. (*Niamatullah and Allsop, JJ.*) MAGAN LAL *v.* KRISHNA BIBI. **153 I.C. 1068=7 R A. 670=1935 A.W.R. 301=1935 A. L J. 729=A.I.R. 1935 All 303.**

———Joint family—Joint property—Sudra—Transfer of-self acquired property to illegitimate sons as jointly as absolute owners. *See* HINDU LAW — FAMILY ARRANGEMENT. **9 Rang. 266=A.I.R. 1931 Rang. 216.**

Joint tenancy.

———*Joint family—Joint tenancy—Comparison with.*

Though in some respects there is a resemblance between a Mitakshara coparcenery and an estate in joint tenancy, yet they materially differ in many respects. To say that the sons hold as joint tenants subject to the incident of survivorship is very different from saying that they hold it as coparcenery property without the right of alienating their share. (*Wazir Hasan, C. J. and Bisheshwar Nath, J.*) BAIJNATH *v* MAHARAJ BAHADUR. **8 Luck. 28=I R. 1932 Oudh 277=137 I.C. 814=9 O.W.N. 221=A.I.R. 1932 Oudh 158.**

———*Joint family—Joint tenancy—Principle of.*

The principle of joint tenancy is unknown to Hindu Law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara Law which under that law passes by survivorship. (*Sir John Wallis.*) BAHU RANI *v.* RAJENDRA BAKHSH SINGH. **60 I.A. 95=8 Luck. 121=35 Bom.L R. 490=1933 A.L J. 445=I.R. 1933 P C. 38=142 I.C. 3=10 O.W N. 253=37 L W. 396=37 C.W.N 464=1933 M W .N. 286=A I.R. 1933 P.C. 72=64 M.L.J. 555 (P.C.).**

Liability.

———Joint family—Liability—Decree against—Father manager for accounts—Remuneration treated as that of family property—Joint family property of other members liable. *See* JOINT FAMILY—MANAGER. **13 Pat. 510.**

Manager.

See also JOINT FAMILY—ALIENATION AND BUSINESS.

———*Joint family—Manager— Acknowledgment of debt by—Effect of.*

A payment by a managing member of joint Hindu family saves limitation of the whole debt. (*Mitter, J.*)

HINDU LAW—Joint family.

ANNADA CHARAN *v.* JHATU CHARAN. **158 I.C. 512 =8 R.C. 190=A I.R. 1935 Cal. 648.**

———*Joint family—Manager—Acquisitions by—Joint family property.*

The *karta* of a joint Hindu family cannot acquire property to the exclusion of the other members, nor can he, along with some of the members, do so to the exclusion of others. Whatever he acquires is for the benefit of the whole family. The manager is in a position of trust and so his financial dealings are on behalf of the joint family. All property acquired by him especially when he had not any funds other than the joint family funds with which to commence his financial operations and acquisitions, are joint family property. (*Middleton, J C. and Saaduddin, A.J.C.*) MALIK PARTAP SINGH *v.* HARKISHAN SINGH. **147 I.C. 1037=6 R.Pesh. 42=35 P.L.R. 260=A.I.R. 1933 Pesh. 85.**

———Joint family—Manager—Arbitration—Authority to refer to. *See* ARBITRATION—REFERENCE TO.

———*Joint family—Manager—Arbitration—Manager authorising coparcener to make reference to—Reference by coparcencer—Validity.*

Where a *karta* of a joint Hindu family authorises one of the coparceners who is also managing member of the joint family firm, to refer certain dispute between the parties to the arbitration of particular individual, such coparcener can make a valid reference so as to bind the other coparceners. (*Abdul Rashid, J.*) NAWAL KISHORE *v.* SARDAR SINGH. **158 I.C. 1035=8 R. L. 336=37 P.L.R. 572=A.I.R. 1935 Lah. 667.**

———*Joint family— Manager — Arbitration — Reference to.*

The father-manager is competent to refer to arbitration disputes relating to the joint property. (*Beaumont, C. J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595=I.R. 1932 Bom. 545=139 I.C. 820=34 Bom L R 862=A I.R. 1932 Bom. 498.**

———Joint family—Manager—Authority to refer to arbitration. *See* ARBITRATION—REFERENCE.

———Joint family—Manager—Compromise by—Major members acquiescing—They cannot litigate the same point again. *See* C. P. CODE, S. 11, EXPL. 6. **A.I.R. 1934 Pat. 617 (1).**

———*Joint family—Manager—Compromise—Manager recorded tenant—Suit by landlord—Minor members—If to be impleated—Compromise between landlord and recorded tenant—Minor members—If bound.*

It is sufficient for a landlord, in a suit between landlord and tenant, to proceed against the recorded tenant; and when such tenant happens to be the *karta* of a joint Hindu family, he may be proceeded against even without expressly describing him as the *karta*, so as to bind the entire family. If the landlord and such tenant enter into a compromise in the suit, that will be binding on the other members of the family including minors, who are represented by the tenant-defendant, and the fact that no leave of the Court is obtained for the compromise will not make it otherwise than binding on the minors. The landlord is not bound to implead the minors to his suit. (*Dhavle, J.*) MADHUSUDAN MAHANTY *v.* NOROTHAM BARIK. **154 I C 849=7 R.P. 495=16 Pat L.T. 122=A I.R. 1935 Pat. 206.**

———*Joint family—Manager— Compromise—Power to compromise suits.*

It is part of the ordinary business of the *karta* of a family and a father's position with regard to his son is certainly no less, to compromise suits. If a member wishes to set aside a contract made by the *karta* or by his father, it is at least necessary to show that the compromise or contract was of an imprudent character and not such as to benefit the family. Where the compromise itself is not assailed on its merits, the mere fact that the plaintiffs were at the time of the compromise minors is not a ground for setting aside the compromise on a mere proof of that fact. (*Courtney Terrell, C. J. and Kulwant Sahay, J.*) PATHAL SINGH *v.* SEOBACHAN SINGH. **6 R.P. 400=147 I.C. 1145=A.I.R. 1934 Pat. 283.**

HINDU LAW—Joint family.

———*Joint family—Manager—Contract by—Specific performance against minor member.*

A contract entered by the manager of a joint Hindu family for himself and on behalf of a minor coparcener can be specifically enforced against the minor coparcener, if it is proved that it was made for family necessity or for the benefit of the minor. (*Sulaiman, C. J. and Rachhpal Singh, J.*) MT. DHAPO *v.* RAMCHANDRA. **57 All. 374=154 I.C. 235=7 R.A. 723=4 A.W.R. 574=1934 A L.J. 1028=A.I.R. 1934 All. 1019.**

———*Joint family—Manager — Debts contracted by —Minor's liability—Extent of.*

In the case of a debt contracted by the manager of a joint Hindu family for family necessity, one of the members of which is a minor, only the minor's share in the joint family property and not his separate property is liable for the debt and the decree is not executable against him personally. His separate property is liable only if it is proved that he has ratified the debt on attaining majority. (*Tek Chand and Coldstream, JJ.*) KARAM CHAND *v.* RAM LAL. **6 I.R. (Lah.) 143=145 I.C. 846=A.I.R. 1933 Lah. 543.**

———*Joint family—Manager — Debt — Hand-note executed by—Liability of other members.*

Where a hand note is executed by the *karta* of a joint Hindu family, and if a suit as framed is based entirely upon the hand-note, no person other than the signatory of the hand-note can be made liable. And if the suit is framed on the original transaction and not on the hand-note, even then no decree can be made against the other members of the family without a finding that the loan was for the benefit of the family. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) JIBACH MAHTOSH *v.* SHIB SHANKER CHAUDHRY **147 I C. 1065=8 R.P. 396=15 Pat.L.T. 100=A.I.R. 1933 Pat. 687.**

[**F.** 16 P.L.T. 117 (118).]

———*Joint family—Manager — Debt—Necessity—Loan at high rate of interest not necessary—Court's power to reduce rate.*

Where it is proved that it was not necessary for the manager or member of a joint Hindu family to have contracted a loan at a high rate of interest, the Court has the power to reduce the same and award interest at a reasonable rate. (*Srivastava and Rachhpal Singh, JJ.*) HARIHAR BAKSH SINGH *v.* LACHHMAN SINGH. **9 Luck. 657=149 I.C. 543=6 R.O. 567 (2) =11 O W.N. 559=A I R. 1934 Oudh 246.**

———*Joint family — Manager—Debt—Promissory note by manager—Creditor's right to sue other members on the loan.*

A promissory note by the *karta* of a joint Hindu family though signed by him in his own name and not as *karta* or manager of the family business, is equally consistent either with a borrowing by the *karta* for his own individual purpose or a borrowing for the purposes of the joint family and the joint family business. It is therefore open to the creditor to sue on the promissory note and alternatively on the consideration impleading also the members of the family other than the executant, on the allegation that the debt was incurred for the purposes of the family or the family business. Whether he will succeed ultimately on such a claim is

entirely a different matter. (*Nasim Ali and Khundkar, JJ.*) INDUBALA DASSI *v.* LAKSHMI NARAYAN GANGULY. **155 I.C. 1109=7 R.C. 673=60 C.L.J. 91=38 C.W.N. 1146=A.I.R. 1935 Cal. 102.**

———*Joint family — Manager — Debt—Promissory note by the manager—Liability of other members.*

Where a debt on a promissory note has been incurred by the head of the joint family for its benefit, the members, who are not contracting parties or who cannot be treated as such parties by their conduct or who do not subsequently ratify such a contract, cannot be held personally liable. Their liability for the debt is to the extent of their shares in the family property. (*Addison and Din Mohammad, JJ.*) MUFSADI LAL *v.* SAKHIR CHAND. **17 Lah. 311=161 I.C. 91=8 R.L. 669=38 P.L.R. 654—A.I.R. 1935 Lah. 735.**

———*Joint family—Manager—Debt—Promissory note executed by manager—Liability of other members.*

Where a managing member of a joint Hindu family borrows money on a promissory note as manager, the other members of the family are liable; and the principle of non liability of undisclosed principal will not apply. (*Agarwala, J.*) TIKAM CHAND CHAUDHURY *v.* SUDARSAN TRIGUNAIT. **I.R. 1933 Pat. 230=144 I.C. 325=14 Pat.L.T. 623=A.I.R. 1933 Pat. 263.**

———*Joint family—Manager—Debt—Promissory note executed by the manager—Liability of other members.*

The rule that, in order to make a person liable on a promissory note, the liability must appear on the face of the document does not apply to promissory notes executed by the managing member of a joint Hindu family and if it is established that liability was incurred by the manager of the family for the benefit of the family or for family business, then it is not open to the other members of the family to plead that as their names did not appear in the note and it was not specified that the liability was incurred for the purposes of or on behalf of the joint family, they are not liable. Their liability follows from the authority of the managing member to make the other members liable for the contracts made by him for the benefit of the family or for carrying on legitimate business of the family A.I.R. 1918 P.C. 146; A.I.R. 1925 Cal. 1153; A.I.R. 1928 Lah. 722 and A.I.R. 1924 All. 8, Ref. (*Coldstream and Jai Lal, JJ.*) BHAGWAN SINGH & CO. *v.* BAKHSHI RAM. **149 I.C. 556=6 R.L. 705=A.I.R. 1933 Lah. 494.**

———*Joint family—Manager—Debt—Promissory note executed by manager—Suit against other members—Maintainability.*

The mere consideration that it would be difficult, if not impossible, for all the members of the joint family to join in the execution of promissory note cannot defeat the provisions of S. 27 of the Negotiable Instruments Act A suit therefore based on a promissory note executed by the manager of the joint family is not tenable against the other members of the joint family. (*Niyogi, A.J.C.*) MOTILAL *v.* PUNJABI. **29 N.L.R. 312=I.R. 1933 Nag. 242=144 I.C. 411=A.I.R. 1933 Nag. 160.**

———*Joint family—Manager—Decree against—Enforceability against interests of junior members.*

A decree passed against the managing member of an undivided Hindu family in respect of a liability incurred within the scope of his authority is enforceable against the interest of the junior members in the family property, even though they had not been made parties to the suit, but such members are not precluded from contesting the authority of the manager or the nature of the debt, and this they may do either in the course of execution proceedings or in a suit of their own. There is no presumption that a debt contracted by the manager

of Hindu family was contracted for family purposes and this fact must be proved by evidence. The mere circumstance that it had not been disclosed in the course of proceedings in the original suit against the managing member that the debt had been raised for family necessity, or that the decree does not show on the face of it that the judgment-debtor had been sued in his capacity as manager is not fatal to the right of the decree-holder to proceed against the entire family property. It is not the frame of the suit or the form of the decree which is conclusive of the matter, the essential point is whether in fact the debt, which is the basis of the decree, had been raised by the judgment-debtor within the scope of his authority as the manager and for the purposes of the family. This question of fact can be determined finally only after the junior members have had proper opportunity of being heard, either in the execution proceedings, or in a separate suit specially brought for the purpose. But if after hearing the junior members, the finding is that the debt satisfies the "touch-stone of necessity" and is therefore binding on them their interest in the property will be held to have passed at the sale, as effectively as if they had been made parties to the original suit. (*Tek Chand and Din Mahomed, JJ.*) JAI KISHEN *v.* RAM CHAND. **157 I.C. 739=A.I.R. 1935 Lah. 1.**

———*Joint family—Manager — Decree debt—Subsequent separation—Discharge of decree by one member—Claim for contribution.*

Where the members of a joint Hindu family were liable for a decree debt against the manager and after separation one of the members was proceeded against and he executed a mortgage in lieu of the decree debt and sued the other members for contribution.

Held, that the right to contribution could not arise so long as the members were joint and that the cause of action arose only when the mortgage was executed. (*Sulaiman, A.C.J. and Bajpai, J.*) SAT KOHNA PRASHAD TEWARI *v.* BHARATH PRASAD MAN TEWARI. **I.R. 1931 All. 836=134 I.C. 452=1931 A.L.J. 651=A.I.R. 1931 All. 652.**

———*Joint family—Manager—Denial of landlord's title by—If binds whole family.*

A manager of a joint Hindu family represents the whole family, and denial by such manager of the title of the landlord binds the whole family. (*Broomfield and Wadia, JJ.*) RACHOTAPPA *v.* KONHER ANNARAO. **59 Bom. 194=155 I.C. 516=7 R.B. 433=36 Bom.L.R. 1083=A.I.R. 1935 Bom. 41.**

———Joint family—Manager—Entering into partnership with manager of another family—Families, if partners. *See* PARTNERSHIP—JOINT HINDU FAMILY. **39 C.W.N. 357.**

———Joint family—Manager—Liability to account for past dealings. *See* HINDU LAW — PARTITION—ACCOUNTS. **A.I.R. 1935 All. 594.**

———*Joint family—Manager—Liability — Purchase of new property by—Mortgage of such property and other family property to vendor to supply consideration—Mortgage found not binding on family—Personal decree.*

Where in order to supply consideration for the purchase of new property, the manager mortgages to the vendor the property purchased and also other family property, and in a suit on the mortgage, the mortgage is found not binding upon the family, the manager is under a personal liability to pay the price of the property which he purchased and there is no reason why a personal decree should not be passed against him for that amount. (*Niamatullah and Allsop, JJ.*) RAJ SINGH *v.* KISHAN LAL. **159 I.C. 66=8 R.A. 387=**

HINDU LAW—Joint family.

1935 A.W.R. 356=1935 A.L.J. 464=A.I.R. 1935 All. 299.

———*Joint family—Manager—Powers of—Sale of family property and purchase of fresh property—Minor taking share—Not entitled to repudiate.*

A manager of a joint Hindu family has no power to bind the minor members by a contract for the sale of joint family property, and a claim for specific performance of such contract would not ordinarily be allowed. But where the manager does this in order to acquire fresh property, and the minor takes a share in the property so acquired, he cannot repudiate the contract. (*Sulaiman, C.J. and Collister, J.*) SOHAN LAL *v.* ATAL NATH. **56 All. 142=148 I.C. 229=6 R.A. 656=1933 A.L.J. 1584=A.I.R. 1933 All. 846.**

———Joint family—Manager—Power to start new business. *See* JOINT FAMILY—BUSINESS. **A.I.R. 1935 Bom. 287.**

———*Joint family—Manager—Preliminary decree for accounts against—Liability of family property.*

In a suit for accounts against the manager of a joint Hindu family, who acted as *tahsildar* and agent of a Zemindar, for rents collected and business carried on by him, a preliminary decree was passed. Pending appeal against that, he died and the surviving members, his sons and grandsons were impleaded and a final decree also was passed, the appeal against the preliminary decree having been dismissed. Rejection being taken on appeal from the final decree that the family property in the hands of the survivors should not be made liable under the decree.

Held, that no objection to the preliminary decree could be taken at that stage; and that the deceased and his sons and grandsons, having been a joint family and the work and remuneration of the deceased having been treated and enjoyed as those of the joint family, the property of the joint family was liable.

Held, further, that the suit was not an action in tort, and the decree merely directed that the family shall return to the plaintiff what they have taken without accounting for it. (*Dhavle and James, JJ.*) PADMA CHARAN NAIK *v.* ASHUTOSH CHANDRA MITRA. **13 Pat. 510=6 R.P. 701=150 I.C. 56=A.I.R. 1934 Pat. 439.**

———*Joint family—Manager—Representative capacity—Appointment of guardian to minor impleaded as party.*

The principle that the manager of a joint family represents the whole family does not apply to a case where a minor member is impleaded as such, but no attempt is made to get a guardian appointed for him. If the plaintiff does not choose to sue the manager alone, but also impleads the minor member in his individual capacity it is his duty to get proper guardian appointed for him. If this procedure has not been followed, the decree obtained in the suit cannot bind the minor. (*Sulaiman and Young, JJ.*) CHANDI PRASAD MISIR *v.* BALAJI MISIR. **53 All. 427=I.R. 1931 All. 192=129 I.C. 560=1931 A.L.J. 152=A.I.R. 1931 All. 136 (1).**

[Rel. 11 O.W.N. 1236 (1254).**]**

———*Joint family—Manager—Representative capacity of father as manager in suit.*

It is competent to the father of a joint Hindu family in his capacity of managing member of the family to represent his sons and other members of his family in a suit. Where, therefore, a suit to which the father was a party was referred to a referee and a decree was passed on the statement of the referee, the sons are bound by the decree in the absence of collusion, fraud or misrepresentation. (*Ganga Nath, J.*) DHARUP RAJ MISIR *v.* RAM AUDHESH MISIR. **157 I.C. 928=8 R. A. 238=1935 A.L.J. 693=1935 A.W.R. 540=A.I. R. 1935 All. 452.**

HINDU LAW—Joint family.

———*Joint family—Manager—Representative capacity in suit.*

A decree against a manager of a joint family is binding on other members of the family, who are not parties to the suit, in respect of debts incurred by the manager, if the manager is sued in his representative capacity as manager of the family, but there must be something on the record to show that he is sued as manager and not merely in his personal capacity. A decree against the manager in his personal capacity will not bind other members of the family, who are not parties to the suit, even in respect of debts incurred for family purposes. (*Staples, A.J.C.*) BHAGWAN *v.* RAMDAYAL. **30 N. L.R. 248=6 R.N. 202=148 I.C. 768=A.I.R. 1934 Nag. 88.**

[D. 31 N.L.R. 352 (355.)**]**

———*Joint family—Manager—Representative capacity*—Hundi *executed for business—Liability of other members.*

A suit on a *hundi* does not need to be brought against all the members of a joint Hindu family. The fact that the managing member of a business executed the *hundi* sued on does not prove that the liability was a separate one. (*Sen and Niamatullah, JJ.*) GAURI SHANKAR SHARMA *v.* THAKUR MEWA RAM. **I.R. 1931 All. 369=131 I.C. 513=A.I.R. 1931 All 600.**

———*Joint family—Manager—Representative capacity—Right to maintain suit—Reference to arbitration.*

The sole adult member can as *karta* maintain a suit on a mortgage executed in favour of the family and where the minor members have been added as *pro forma* defendants it is open to the manager to exempt the latter from the suit and after the Court does so, refer the matter to arbitration. (*Sulaiman, A.C.J. and Niamatullah, J.*) RAJA RAM *v.* GOPI NATH. **I.R. 1931 All. 656=133 I.C. 416=A.I.R. 1931 All. 721.**

———*Joint family—Manager—Representative capacity—Right to sue alone.*

The manager of a joint Hindu family may sue or be sued as representing the family in respect of a transaction entered into by him as manager of the family or in respect of joint family properties. It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager. Where, however, it is necessary to safeguard the interests of the defendants to do so, the defendant may apply to have other members of the family also brought on record. (Case law analytically reviewed.) (*Shingne, J.*) MADHGOUDA BABAJI *v.* HALAPPA BALAPPA. **58 Bom. 348=151 I.C. 370 (2)=7 R.B. 60=36 Bom.L. R. 327=A.I.R. 1934 Bom. 178.**

———*Joint family—Manager—Representative capacity—Suit on behalf of family—Suit, if need be by manager as such.*

It is not necessary that the manager must sue as such in order to bind or to be capable of suing on behalf of the joint family. It is sufficient if he is the manager and in fact sues on behalf of the family. (*Harrison and Dalip Singh, JJ.*) RAM KISHAN *v.* GANGA RAM. **12 Lah. 428=I.R. 1931 Lah. 740=133 I.C. 116=32 P. L.R. 199=A.I.R. 1931 Lah. 559.**

———*Joint family—Manager—Settlement for maintenance—Decree against manager—Property settled whether liable to be sold.*

The manager of a joint Mistakshara family is under a legal obligation to maintain all members of the family, their wives and children. A transaction by which the manager sets apart a portion of the joint family pro-

perty for the maintenance of his wife is a settlement for consideration, the consideration being the discharge of the legal obligation, and cannot be treated so far as the wife's interests are concerned as purely a partition. The personal liability of the manager cannot therefore prevail against such settlement even though subsequent to the time of incurring the liability and the property so set apart cannot be sold in execution of a mortgage decree against the manager. 6 O.W.N. 689, Dist. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAJ KUER *v.* DIN DAYAL. **135 I.C. 195 = I R. 1932 Oudh 79 = 8 O.W.N. 499 = 14 O.L.J. 165 = A.I.R. 1931 Oudh 325.**

Minor.

See JOINT FAMILY—BUSINESS, MANAGER AND SUIT AGAINST.

———Joint family—Minors—Appointment of guardian —Application to authorise guardian to raise loan. *See* HINDU LAW—GUARDIANSHIP—JOINT FAMILY. **56 Bom. 519 = A.I R. 1932 Bom. 532.**

———*Joint family—Minor—Decree against—Form.*

Where a decree is passed against the members of a joint Hindu family, in case of minor defendants no personal decree can be passed against them, only the decree can be executed against their interest in the coparcenary property. (*Lal Lal and Abdul Qadir, JJ.*) GOKAL CHAND *v.* HARCHARAN DAS. **I.R. 1931 Lah. 870 = 134 I.C. 102 = 32 P.L.R. 577.**

———Joint family—Minor—Liability of—Debts contracted by manager. *See* JOINT FAMILY—MANAGER. **A.I.R. 1933 Lah 543.**

———Joint family—Minor—Liability—Decree against manager for family business *See* JOINT FAMILY—BUSINESS. **10 Pat 503.**

———Joint family—Minor —Liability of minor's share —Release by father—Subsequent decree against father. *See* JOINT FAMILY—FATHER. **68 M.L.J. 157.**

———Joint family—Minors—Minor co-parceners as some of the defendants—Suit partly contested and partly non-contested — Costs—Special provision in regard to—Liability only in respect of their interest in coparcenary property—No personal liability *See* C. P. CODE, S. 35. **18 N.L.J. 323.**

———*Joint family—Minor—Reference to arbitration on behalf of—Power of mother.*

The Hindu mother has no power on behalf of her minor son to refer disputes relating to the joint family property to arbitration, in the absence of an order of Court.

(*Held, however*, no objection to the validity of the award could on that score be taken by the father, who as the other party to the reference was, for his part bound by it). (*Beaumont, C.J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595 = I.R. 1932 Bom. 545 = 139 I.C. 820 = 34 Bom.L.R. 862 = A.I.R. 1932 Bom. 498.**

———Joint family—Minor — Specific performance against—Contract by manager. *See* JOINT FAMILY—MANAGER. **A.I.R. 1934 All. 1019.**

———Joint family — Minor—Suit against——Minor impleaded as a party along with manager—Necessity of guardian to bind the minor. *See* HINDU LAW—JOINT FAMILY—MANAGER. **53 All 427 A.I.R. 1931 All. 136 (1).**

Presumption.

———*Joint family—Presumption.*

It is well settled that while it must be presumed that a Hindu father and his sons are members of a joint family, no presumption can be made that a family, because it is joint, possesses joint property or any property. It is only when it is established or admitted that a Hindu family living in commensality possesses joint property that the further presumption arises that all the property they are possessed of is joint. (*Tek Chand and Tapp, JJ.*) GANESH DAS *v.* DHALU RAM. **I.R. 1931 Lah. 519 (2) = 132 I.C. 7 (2) = 12 L L.J. 187.**

———*Joint family—Presumption—Presumption as to jointness.*

The presumption in the case of a Hindu family is that it is joint. Where a business is carried on by the family, it can also be presumed to be joint. (*Jai Lal and Abdul Qadir, JJ.*) GOKAL CHAND *v.* HARCHARAN DAS. **I.R. 1931 Lah. 870 = 134 I.C. 102 = 32 P.L.R. 577.**

———*Joint family—Presumption—Presumption as to jointness—Application to members three or four degrees removed from ancestor.*

The presumption of jointness as between members of a family is weakened when applied to members of the family, who are three or four degrees removed from the common ancestor. (*Wort and James, JJ.*) MUNA MAHTO *v.* RAGHUNATH MAHTO. **I.R. 1933 Pat. 167 = 142 I.C. 610 = 14 P.L.T. 93 = A.I.R. 1933 Pat. 153.**

———*Joint family—Presumption—Presumption as to jointness—Family consisting of father and sons.*

Where there is no evidence of any separation having taken place amongst a Hindu family consisting of a father and sons, there is a strong presumption of their being joint. (*Srivastava and Zia ul-Hasan, JJ.*) MALAK CHAND *v.* HIRA LAL. **157 I.C. 945 = 8 R. O. 47 = 1935 O.W.N. 1005 = A.I.R. 1935 Oudh 510.**

———*Joint family—Presumption—Presumption as to jointness—Father and son.*

There is a presumption that the members of a Hindu family are members of a joint and undivided family which is the normal state of a Hindu family, and this presumption is strengthened when the relationship of the members is that of father and son. (*Wadia, J.*) MULCHAND HEMRAJ *v.* JAIRAMDAS CHATURBHUJ. **159 I C. 911 = 8 R.B. 232 = 37 Bom.L.R. 288 = A.I.R. 1935 Bom. 287.**

———*Joint family—Presumption—Presumption as to jointness—Rebuttal.*

Where two brothers who originally formed a joint Hindu family resided at different places for about 10 or 11 years and carried on business, and there was nothing whatsoever to show that either of them had any part of share in the business of the other and further a contract which was originally taken jointly was subsequently taken in the name of one alone, it was held that all these circumstances sufficiently rebutted the initial presumption of jointness. (*Dalip Singh and Abdul Qadir, JJ.*) HARI CHAND *v.* MT. AMAR KAUR. **6 R.L. 587 = 148 I.C. 737 = A.I.R. 1934 Lah. 511.**

———*Joint family—Presumption—Presumption as to jointness—Separate entries in names of branches—Inference of separation—If justified—Onus of proof.*

Jointness in the case of a Hindu family must be presumed until the contrary is proved The burden of proving jointness is not on the party asserting the same. The fact that certain small plots of property are separately entered in the names of two branches of the family is not sufficient to show that there was separation. Such separate entries cannot rebut the presumption of Hindu Law relating to jointness or prove separate possession by the branches or members of the family, which admittedly was joint originally. (*Knox, S.M. and Grant, J.M.*) RAM NATH *v.* SHIVA DATTA NATH TEWARI. **1935 R.D. 485.**

———*Joint family—Presumption—Presumption as to jointness—Separate entries in revenue records—Effect.*

Separate entries of names in the revenue records by themselves are not sufficient to rebut the presumption of

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Hindu Law relating to jointness. (*Keane, S.M. and Oppenheim, J.M.*) MAN MOHAN NATH TEWARI *v.* RAM DHANI NATH. **16 R.D. 286.**

———*Joint family — Presumption — Presumption as to jointness—Separation of one member—Presumption as to the rest—Mortgagee from a member seeking decree against other members also—Allegation of separation—Burden of proof.*

Where one member has separated from the others, the presumption that the family is joint disappears, but at the same time no contrary presumption arises that the other members have separated. In such circumstances, the question whether they are members of a joint Hindu family or not is a question dependent on proof. Where, however, a plaintiff-mortgagee from one member seeks to obtain a decree not only against the mortgagor but also the other members of the family who are not parties to the deed of mortgage alleging that the members of the family are separate and that the mortgagor is absolute owner of the property mortgaged, the burden rests on the plaintiff to prove the alleged separation, as it is an elementary principle that nobody can deprive another of property unless he can establish his own absolute title thereto and if he is a transferee he must establish not only the validity of his transfer but the title of his transferor. (*Niamatullah and Allsop, JJ.*) RAJ SINGH *v.* KISHAN LAL. **159 I.C. 66=8 R.A. 387=1935 A.L.J. 464=1935 A.W.R. 356=A.I.R. 1935 All. 299.**

Release.

———Joint family—Release—Release by father—Subsequent decree against—Liability of minor's shares—Rights of creditors. *See* JOINT FAMILY—FATHER. **68 M.L.J. 157.**

Renunciation.

———*Joint family — Renunciation—Coparcener—Effect.*

One coparcener cannot renounce his interests except in favour of all the coparceners. If he renounces in favour of one or more of them the renunciation enures to the benefit of all the coparceners and not for the sole benefit of the coparceners in whose favour the renunciation is made. 16 All. 369; 9 Bom.L.R. 595 and A.I.R. 1927 P.C. 224, Ref. (*Tapp and Walker, JJ.*) KARAM SINGH *v.* SURENDAR SINGH **135 I.C. 180=I.R. 1932 Lah. 52=A.I.R. 1931 Lah. 289 (2).**

———*Joint family—Renunciation—Father renouncing his share—Rights of sons—No relinquishment.*

The right which the son in a joint Hindu family takes at his birth in ancestral property is wholly independent of his father. He does not claim through the father and a transfer by a father of his own interest in the ancestral property cannot affect the interest of the son in the property. A renunciation of his share in the ancestral property by the father cannot therefore operate as the relinquishment of the rights of his sons, as they are wholly independent of the right of the father. (*Tapp and Walker, JJ.*) KARAM SINGH *v.* SURENDAR SINGH. **135 I.C. 180=I.R. 1932 Lah. 52=A.I.R. 1931 Lah. 289 (2).**

Self-acquisition.

See also JOINT FAMILY PROPERTY.

———*Joint family—Self-acquisition—Admission by son of joint rights therein—Burden of proving it as separate property.*

If in a joint family consisting of father and son, the son has got self acquired property, the onus of proving that such property is thrown into the common stock lies on the person who alleges such property to be part of joint family property; but where the son himself admits in a mortgage deed executed by him and his father, in respect of ancestral property and this property, that such property is in their possession and enjoyment as of right and this admission is not explained by him, the onus is shifted on to him to show that such property is not thrown into the common stock. 29 All. 244 and 40 All. 159 (P.C.), Dist. (*Walsh, J.*) VISWASUNDARA RAO *v.* PALLAMARAJU. **I.R. 1933 Mad. 418=144 I.C. 513=A.I.R. 1933 Mad. 565 (2).**

———*Joint family—Self acquisition—Amalgamation with the joint estate—Onus—Property separately acquired by member.*

If it is shown that property has been acquired as a separate estate by a member of a joint family, and if it is alleged that he has chosen thereafter to amalgamate that separate estate with the joint estate, it is for the person so alleging to show that there was an unequivocal intention on the part of the person who acquired the property to amalgamate it with the joint estate. Where there is a nucleus, the presumption is that the property has been acquired with its aid and is therefore joint family property. (*Wazir Hasan, C.J. and Allsop, J.*) JOT SINGH *v.* JANGU SINGH. **6 I.R. (Oudh) 205=146 I.C. 1005=17 R.D. 943=10 O.W.N. 1021=A.I.R. 1933 Oudh 482.**

———*Joint family — Self-acquisition— Burden of proof in partition suit—Dayabhaga law.*

In a suit for partition by a member of a joint Hindu family governed by the Dayabhaga school, if the plaintiff establishes that the parties form members of a joint Hindu family, a family joint in food, worship and estate with all its implications in law—then the burden of proof would be on the defendant who claims them as self-acquisitions of showing that any acquisition made, even if it stands in his own name was his self-acquisition. But the initial burden of proving that there was a family joint in estate is on the plaintiff. It is not enough for him to show living in commensality and joint worship. It must further be shown that there was nucleus of ancestral property which has descended and which was sufficient for the purchases of properties claimed as joint or there was joint family estate even if there was no nucleus of ancestral property. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Joint family—Self-acquisition—Gains of science—Clerk's savings.*

Education up to the Entrance Pass is a very ordinary education and a clerk who started life on Rs 15 a month, even though he might rise to Rs. 250 a month, cannot be said to be a member of profession or occupation requiring special training. Any saving from his pay cannot be regarded as "gains of science". (*Addison and Hilton, JJ.*) JAI DAYAL *v.* NARAIN DAS **136 I.C. 270 (2)=I.R. 1932 Lah. 222 (2)=32 P.L.R. 854=A.I.R. 1932 Lah. 127.**

———*Joint family—Self-acquisition—Joint property showing into common stock—Burden of proof.*

The burden of proving that a member of a joint Hindu family threw his self-acquired property into the common stock lies on the person making the assertion, and this burden can only be discharged by proof of the fact that the owner of the property clearly expressed an intention to abandon his separate and exclusive rights in the property in favour of the members of the joint family. The intention may be expressed by words, or may be inferred by the manner in which the profits of the property were dealt with. The mere fact that a certain person associated with himself his son and grandson in the execution of a mortgage deed is not by itself sufficient to justify the inference that he has abandoned his exclusive rights to the property in favour

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of the joint family consisting of himself, his son and grandson. (*Thom and Iqbal Ahmad, JJ.*) GOVIND PRASAD *v.* SHANTI SWARUP. **155 I.C. 1106=7 R. A. 1023=1935 A.L.J. 797=1935 A.W.R. 722=A.I. R. 1935 All. 778.**

———*Joint family—Self-acquisition—No nucleus—Presumption.*

Where there was no nucleus of joint family property from which the property in question could have been purchased, the onus is on the sons who allege that it was acquired partly from their earnings to prove their allegation. (*Milne, A. J. C.*) VALJI DAYABHAI *v.* VIRJI TULSIDAR. **I.R. 1931 Sind 132=134 I.C. 388 =A.I.R. 1931 Sind 186.**

———*Joint family—Self acquisitions—Onus of proof —Joint family property—Proof.*

It cannot be laid down as a proposition of law that when it is shown that a Hindu father was possessed of some ancestral property, all his subsequent acquisitions must be presumed to be joint family property. The correct legal position is that the party alleging that the property held by an individual member is joint family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. Then only the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. 97 I.C. 632, Ref. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) RAMIAH *v.* MAHALAKSHMAMMA **I.R. 1932 Mad. 269=136 I.C. 205=35 L W. 30.**

———*Joint family—Self-acquisition—Onus—Nucleus —Presumption of joint family property—Rebuttal.*

There is no presumption that every joint family possesses property. Where the question is, whether an item of property in the name and possession of a member of a joint family is his own self-acquired or family property, the initial burden of proof is on the party setting up that it is family property, to show the existence of ancestral or joint family nucleus. Where the existence of such nucleus is proved and it is such as would reasonably be taken to have contributed to the acquisition in question or the acquisition is ordinarily traceable to such nucleus, it would be presumed to be joint family property, unless it is affirmatively shown by the other side that the source of the purchase-money was altogether different and quite independent of the family nucleus, or that such nucleus was incapable of contributing anything to the purchase. (*Sundaram Chetty, J.*) SATCHIDANANDAM *v.* SUBBARAZU. **1930 M.W.N. 1016.**

———*Joint family—Self acquisition—Onus of proof —Nucleus proved.*

Where it is proved that a Hindu joint family had a nucleus of joint property, the onus lies heavily on the party pleading self acquisition to prove the same. (*Addison and Bhide, JJ.*) TULSI RAM *v.* NARAIN DAS. **I.R. 1931 Lah. 397=131 I.C. 237=31 P.L.R. 952=A.I.R. 1931 Lah. 113 (1).**

———*Joint family—Self-acquisition—Presumption— Applicability to Insurance policy.*

Ordinarily in the case of a joint Hindu family possessing property, the onus of proof that certain property is self-acquired and not joint is upon the person asserting it. But in the case of an insurance policy the presumption would not hold good. In the absence of proof that the policy was taken out for the benefit of the family and that premia were paid out of joint family funds, the presumption is that the policy was taken out as a personal policy for the benefit of the personal heirs of the accused. (*Staples, A. J. C.*) SUGANDHABAI *v.* KESARBAI. **141 I.C. 182=I.R. 1933 Nag. 44=15 N.L.J. 51=A.I.R. 1932 Nag. 162.**

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———*Joint family—Self-acquisition—Proof.*

The normal presumption about every Hindu joint family is that it is joint. It is permissible to show that a certain item is self acquisition. The mere fact that one member is excluded from sharing in the profits is no evidence of its being the self acquisition of the other member. (*Middleton, J.C. and and Saaduddin, A.J.C.*) JAGGANNATH *v.* DHARAM CHAND. **6 R. Pesh. 31=147 I.C. 307=A.I.R. 1935 Pesh. 53.**

———*Joint family—Self-acquisition—Proof—Rebuttal.*

There is no provision in Hindu Law preventing a member of a Hindu joint family from acquiring property for himself independent of the joint family. If he acquires such property he is also competent to transfer it or deal with it in any way he likes. If however an adequate nucleus is proved, any acquisitions made by a member of the joint family must be presumed to be joint property unless the acquirer can displace the presumption by proving that the property had been acquired out of his separate income. (*Bisheshwar Nath and Nanavutty, JJ.*) LADDHA SINGH *v.* MANGAL SINGH **I.R. 1933 Oudh 139=142 I.C. 860=10 O.W.N. 58=A.I. R. 1933 Oudh 166.**

———*Joint family—Self-acquisition—Proof of—Recital in deed of gift and will—Value of.*

Recitals in a will or a deed of gift are not themselves evidence that the property is self-acquired. But where the question depends upon the intention and conduct of the person who acquired it, such statements are of very great weight. 27 Mad. 288, Ref. (*Milne, A. J. C.*) VALJI DAYABHAI *v.* VIRJI TULSIDAR. **I.R. 1931 Sind 132=134 I.C. 388=A.I R. 1931 Sind 186.**

———*Joint family— Self-acquisition — Proof of— Recital in will.*

The recital in a will of a Hindu testator to the effect that certain property was self-acquired is admissible as a piece of evidence in considering the question whether that property was self-acquired or ancestral. 27 Mad. 228, Not Foll.; 58 M.L.J. 245 (P.C.), Rel. on. (*Sundaram Chetty, J.*) SATCHIDANANDAM *v.* SUBBARAZU. **1930 M.W.N. 1016.**

———*Joint family—Self-acquisition— Self acquired property left by will by father—Property in the hands of son—Nature of.*

Under Hindu Law, self-acquired property left by will by the father to his son is to be deemed to be the self-acquired property of the son *qua* his own sons. (*Jai Lal and Monroe, JJ.*) KISHEN CHAND *v.* PUNJAB SINDH BANK, LTD., AMRITSAR. **152 I.C. 905=7 R. L 342=35 P.L.R. 476=A.I.R. 1934 Lah. 534.**

———*Joint family—Self-acquisition—Throwing into common stock—Dayabhaga law.*

Under the Dayabhaga school of Hindu Law there cannot be a joint family consisting of the father and the sons. The sons may acquire separate property having no concern with the joint family property. Also, brothers living in commensality are not members of the family so as to enable the brothers to claim the self-acquisition of a brother in more affluent circumstances as acquisition of a joint family unless those other brothers proved that they had also contributed to this acquisition of the property claimed by them as acquisition of the joint family. Self-acquired property may however be thrown into the joint stock but it is necessary in such a case to prove a clear intention to waive separate rights. Where no nucleus of joint property is admitted or proved, the onus is on the party asserting that the property was not the self-acquired property of an individual member of the family.

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(*Guha and Bartley, JJ.*) HEM CHANDRA GANGOPADHYA *v.* MATI LAL GANGOPADHYA. **60 Cal. 1253 =149I.C. 177=6 R.C. 524=37 C.W.N. 1174=58 C. L.J. 85=A.I.R. 1934 Cal. 68.**

———*Joint family—Self-acquisitions—Throwing into the common stock—Evidence as to.*

Before a property purchased by a Hindu coparcener can be regarded as joint family property, it has to be shown that the property was acquired by the joint labours of the members of the family, when it is shown that there was no ancestral property. The fact that at a partition between the acquirer and his brothers, the former allowed the latter a share in that property would not convert it into joint family property inevitably and for all purposes so as to entitle his sons to claim partition against him. (*Beasley, C.J. and King J.*) RAJAGOPALA NAIDU *v.* SESHAYYA NAIDU. **157 I.C. 505 =1935 M.W.N. 565=41 L.W. 545=A.I.R. 1935 Mad. 368.**

———*Joint family—Self-acquisition—Throwing into the common stock—Principles—Properties acquired—Joint family property—Dayabhaga law.*

In joint families consisting of several brothers under the Dayabhaga school of Hindu Law, where the income from the ancestral property is small, it often happens that one or two brothers, who earn considerably contribute from their earnings to the upkeep of the families of the others, whose earnings are small ; but this circumstance alone cannot lead to an inference that the brothers contributing wanted to make their acquisitions a part of the common stock. The acquisitions would remain their own. But where such earnings of one are put into the hands of one coparcener and are mixed up with his funds and joint properties are being acquired in the names of both members, there can be no doubt that the properties so acquired are joint family properties. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Joint family—Self-acquisition—Throwing into common stock—Proof.*

Where the allegation is that certain properties purchased separately by members of joint Hindu family have been thrown into common stock, the evidence to support such an allegation must be sufficiently strong. Case of blending held on the evidence to be made out. (*C.C. Ghose and Patterson, JJ.*) PARESH CHANDRA DATTA *v.* AMARESH KUMAR BOSE. **I.R. 1931 Cal. 846=134 I.C. 542=53 C.L.J. 264=A.I.R. 1931 Cal 666.**

Separate property.

———*Joint family—Separate property—Blending of —Burden of proof—Conversion into joint property.*

Where the incidents of possession of the property are the same whether the tenancy is in common or joint, the onus of establishing a clear intention to waive the separate rights to the property is upon the party who asserts that the property, originally acquired in severalty, was converted into joint property. A.I.R. 1929 Cal. 636 and A. I. R. 1925 Mad. 303, Ref. (*Curgenven and Cornish, JJ.*) KRISHNASWAMI SASTRIGAL *v.* AVAYAMBAL AMMAL. **I.R. 1933 Mad. 254=142 I.C. 721 =A.I.R. 1933 Mad. 204.**

———*Joint family—Separate property—Blending—Proof of.*

The mere fact that moneys used to be sent regularly and constantly by the earning member for meeting the requirements of the family does not mean that the earnings were blended into the common stock. (*Mukerji and Nag, JJ.*) ASHUTOSH MUKERJEE *v.* TARAPADA MUKERJEE. **150 I.C. 292=6 R.C. 813=58 C.L.J. 372=A.I.R. 1934 Cal. 308.**

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———*Joint family—Separate property—Burden of proof.*

Once it is held that the family was joint and that there was a nucleus of joint ancestral property then it is for the party who asserts that a certain property is his exclusive property to prove that fact. 15 I.A 134 and 3 O.W.N. 40, Ref. (*Nanavutty, J.*) MADHO TEWARI *v.* MATA DIN TEWARI. **149 I.C. 244=6 R.O. 540= 11 O.W.N. 528=A.I.R. 1934 Oudh 293.**

———*Joint family—Separate property—Burden of proof—Purchase in name of one member—Inference.*

There is no presumption, under Hindu Law that a joint family possesses joint property, but once it is admitted or proved that a family is joint and possesses joint family property, the presumption of law is that all the property they are possessed of is joint. If any member claims any portion of the property as his separate property, the burden of proof lies upon him to show that it was acquired by him, in circumstances which would constitute it as his separate property. The mere fact that it was purchased in his name and that there are receipts in his name respecting it, does not render the property his separate property, for all that is perfectly consistent with the notion of its being joint. 3 M.I.A. 229 (P.C.), Foll. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546= I.R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840= A.I.R. 1931 Lah. 419.**

———*Joint family—Separate property—Gift of bulk of property by husband—Allowance reserved to wife—Avoidance of bequest by wife—Mithila law.*

Under the Mithila law, the wife is not a coparcener with her husband. She cannot sue to avoid her husband's bequest of the bulk of his separate property and reserving only a small allowance to her and possibly made without her consent. Hindu Law texts reviewed (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R. (Pat.) 17=145 I.C. 1=14 Pat.L.T. (Sup.) 1=A.I.R. 1933 Pat. 306.**

———*Joint family—Separate property—Gift to members individually.*

When properties are given as a gift to the members of a joint family individually, such properties become separate properties in the hands of the donees and pass to the legal heirs of the latter on their death and not to ther other donees by right of survivorship, unless the members had before their death voluntarily thrown the properties into the joint stock with the intention of abandoning all separate claims thereto. 26 Bom. 445 and 49 Mad. 98, Ref. (*Srinivasa Iyer and Mahadevayya, JJ.*) SIDDAIYA *v.* SANNAMMA. **9 Mys.L.J. 435.**

———*Joint family—Separate property — Gift by stranger to members of joint family but expressed to be made in favour of each of them individually—Donees take as tenants in-common.*

Where a deed of gift executed by a person in favour of the defendants stated as follows:—"Out of you *G* is my brother-in-law, *P* is my nephew and *R* is the son of my another nephew. Therefore out of affection I bear towards you, I have conveyed to you the immoveable property described in the schedule below worth Rs. 10,000 and I have delivered possession of the same to you now alone. Therefore, from this date forwards, you and your heirs should enjoy permanently the said property with absolute rights with water, trees, stones, treasure and hidden treasure standing thereon. But I, my heirs and my relations have nothing to do with the same. I shall get the pattas for the said land transferred in your name when you desire. You yourself should pay Sirkar cists payable on the said land. *G*, out of you

should keep the said property in his possession till his death and preserve the said property without causing any damage to it. One need not raise any dispute with the other in respect of the same. This is the dakhal (conveyance) deed of immovable property executed and given with my consent."

Held, that the deed should be construed as a whole ; since the gift was made by a person who was in the position of a stranger to the donees and stated to be made in favour of each one of them, and further the donees and their heirs were asked to enjoy the properties, the donor intended, the donees to take the properties as tenants-in-common even though they were members of a joint family and even though it was stated that the 1st defendant. was to keep possession till his death. (*Madhavan Nair and Jackson, JJ.*) VENKAYAMMA *v.* GANGAYYA. **149 I.C 335=6 R M. 634=1933 M.W.N. 1310=38 L.W. 779=A.I.R. 1934 Mad. 16=65 M.L J. 703.**

———*Joint family —Separate property — Holding recorded as the tenancy of one member—Presumption.*

Where one man recorded as the tenant of a holding and the family possesses other lands over which the names of representatives of various branches are definitely recorded, the presumption would be, in the absence of strong proof to the contrary that the holding was the holding of the recorded tenant alone and not of him in a representative capacity. (*Drake Brockman, S.M.*) KAMTA PRASAD *v.* BINI MADHO PRASAD SINGH. **14 L.R. 634 (Rev.).**

———*Joint family —Separate property—Lease to one of three brothers—If lease to whole family.*

A lease granted to one of three brothers constituting a joint Hindu family, the counterpart being executed by that brother only, is not a lease necessarily to the joint family. It cannot be inferred that the landlord gave the land to all the three. There is nothing to prevent him from giving the land to one of them only, even if he is joint with the other two. The fact that all the three are joint does not warrant the inference that the lease was granted to the whole family. (*Oppenheim, S.M. and Drake Brockman, J M.*) MATA BADAL *v.* BHAGWATI DIN. **18 R D. 715= 16 L.R. 111 (Rev.).**

———*Joint family—Separate property—Maintenance grant by Government to two brothers.*

Prima facie a gift to a member of a Hindu joint family is his separate property and will only become joint family property when it descends to his sons, unless he himself has made it joint family property by throwing it into the common stock. Where there was nothing in the terms of the maintenance grants to two brothers to suggest that the Government intended to make a grant to the joint family,

Held, that the grant conferred an estate of inheritance on each of the brothers Property granted to one of the two brothers and his heirs would clearly be taken by him as his separate property and the fact that the grant was made to the two brothers and their heirs is not a sufficient reason for placing a different construction upon the grant or holding that it was intended that they should take as members of a joint family. (*Sir John Wallis*) BAHU RANI *v.* RAJENDRA BAKSH SINGH. **60 I.A. 95=8 Luck 121=I R. 1933 P C. 38=142 I C. 3=37 L.W. 396=37 C.W.N. 464=1933 M.W.N. 286=10 O.W N. 253=35 Bom.L.R 490=1933 A.L J. 415=A.I.R.1933 P C 72—64 M.L.J. 555 (P.C.).**

———*Joint family—Separate property—One member engaged in business—Earnings—Character of—Onus of proving it is joint family property.*

A member of a joint undivided family can make separate acquisition of property and when such a member is engaged in business, unless it can be shown that the business grew from joint family property or that the earnings were blended with the joint family estate, they remain free and separate. The onus of proving that it is joint family property lies on those who assert it. A.I R. 1929 P.C. 1 and 19 W.R. 356, Rel. on. (*Davies, J.C. and Rupchand Bilaram, A.J.C.*) ANANDRAM NAWALMAL *v.* RAJARAM MOTIRAM. **159 I.C. 131=8 R.S. 870=A.I R. 1935 Sind 201.**

———*Joint family—Separate property—Optional payments by Yajamans to priest.*

In U. P. the income received as amounts paid by Yajamans at their discretion either by way of charity or by way of remuneration for personal services rendered by the priest is his personal property and not the property of his joint family. (*Sulaiman, C.J. and Mukerji, J.*) HANSO PATAK *v.* HARMANDIL PATAK. **56 All. 1026=1934 A.L.J. 1197=7 R A. 104=151 I.C. 11=A.I. R. 1934 All. 851**

———*Joint family— Separate property— Property alleged to have been thrown into common stock—Proof of—Collection of co-sharer's rents, not sufficient.*

Where certain properties gifted to the members of a joint family individually had been shown to be properties held by them as tenants-in-common, the defendants contesting the claim to a separate share by an undivided member, must show by satisfactory evidence that the properties had been treated as joint familiy properties. Treatment of the properties as joint family properties by some of the members would not affect the separate claim to his share of them by another member, a son for instance in his case, so far as he was concerned. Mere management, assuming it went beyond the collection of rents, etc., of the properties following a course that existed before and was adopted as a convenient family arrangement, is not sufficient enough to discharge the burden that lay upon the defendants to show that he treated the gift properties as joint family properties and thereby waived his separate claim to them and the gift properties had lost their original character of separate property. (*Madhavan Nair and Jackson, JJ.*) VENKAYAMMA *v.* GANGAYYA. **149 I.C. 335=6 R.M. 634=1933 M.W N. 1310=38 L.W. 479=A.I.R. 1934 Mad. 16=65 M L J. 703.**

———*Joint family—Separate property—Property inherited from uncle—Throwing into common stock—Proof.*

The property inherited by certain members of a joint family from their uncle is "separate property" in the hands of the heirs. The heirs can, of course, throw the inherited property into the joint stock but that should be decided on the circumstances of each case. (*Coldstream and Bhide, JJ.*) RAJ KISHORE *v.* MADAN GOPAL. **13 Lah. 491=143 I.C 249=I.R. 1933 Lah. 322=33 P.L R. 829=A I.R. 1932 Lah. 636.**

———*Joint family — Separate property—Waiver—Burden of proof—Conversion into joint property.*

Where an adopted son alleges that the properties existing at the time of the death of his adoptive father had all been acquired by them with their joint efforts with the aid of the separate property of the adoptive father, he must establish that his adoptive father abandoned all separate claims to the properties which he possessed at the time of his adoption and subsequently treated them and the properties acquired with their aid as joint family properties belonging to himself and the adopted son. A clear intention to waive his separate right must be established and will not be inferred from acts which may have been done merely from kindness or affection. It is impossible to infer from the fact that the adoptive father associated his son with his business

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whose share in the actual management grew with the advancing age of the father, that the father and son became joint owners of the entire properties originally belonging to the father and those acquired with their aid. (*Niamatullah and Allsop, JJ.*) MAGAN LAL *v.* KRISHNA BIBI. **153 I.C. 1068=7 R.A. 670=1935 A.L.J. 729=1935 A.W.R. 301=A.I.R. 1935 All. 303.**

Son's right.

———*Joint family—Son's right—Pronote in father's name—Suit by son when father alive—Maintainability.*

A suit by a Hindu son on a promissory note passed in his father's name is not maintainable during his father's life-time, as he is not the holder of the note, in the absence of proof of renunciation by the father amounting to civil death. (*Beaumont, C.J. and Barlee, J.*) KRISHNAJI SHIVAJI *v.* HANMARADDI. **58 Bom. 536 =153 I.C. 800=7 R.B. 265=36 Bom.L.R. 814=A. I.R. 1934 Bom. 385.**

———*Joint family—Son's right—Son in* ventra sa mere—*Right to avoid will by father—Mortgage by mother before birth—Binding nature.*

By his will a Hindu provided that if a son were born to him (his wife being then pregnant) he would be the owner of the entire property and that if no male child was born, his wife and mother should take the property. The testator died before the birth of the son and his widow executed a mortgage in consideration of a small cash advance and three hundies alleged to have been executed by her husband.

Held, that the after born son was not bound by the will, that his rights had accrued when he was *in ventra sa·mere* and that he could avoid the mortgage even though it had been effected to discharge debts binding on him. (*Mukerji and Bennet, JJ.*) ALKHU RAM *v.* RAMAN LAL. **I.R. 1932 All. 482=138 I.C. 624 (2)= A.I.R. 1933 All. 7.**

Suit against.

———*Joint family—Suit against—Minor defendant —Absence of guardian* ad litem—*If bound by decree— Capacity of manager to represent.*

In a suit against a joint Hindu family, the manager as a rule represents the whole family. But this principle does not apply to a case where a minor coparcener is impleaded as such, but without a guardian *ad litem* being appointed by the Courts. The decree in such a case does not bind the minor. (*Nanavutty and Thomas, JJ.*) KRISHNA KUMAR *v.* GOPAL DAS HAR NARAIN DAS. **151 I.C. 1066=7 R.O. 166=11 O.W.N. 1236=A.I.R. 1934 Oudh 475.**

———*Joint family—Suit against—Widow, if necessary party.*

In order to enable a creditor of the family to follow the property in the hands of a member of the family, the binding nature of the debt must be proved in the presence of that particular member and the decree must be against him. Either he should be a party to the suit or be legally represented therein. Where the family is joint, a widow having no special right to any particular property is not a necessary party. Her right of maintenance does not make her a necessary party. The position however becomes entirely changed when the family separates. The right of the widow to whom property has been separately allotted is no longer to receive maintenance, which could have been defeated by the creditor by bringing the family property to sale. Now she being in possession of a specific portion of the family property, she is entitled to retain it unless its liability to be taken away is established against her. (*Mahomed*

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Noor and Luby, JJ.) MT. PRABHAWATI KUER *v.* RAM SARAN LAL. **13 Pat. 785=152 I C. 691 (2)= 7 R.P. 233=15 Pat L T. 751=A.I R. 1934 Pat 538.**

Trading partnership.

See also JOINT FAMILY—BUSINESS.

———*Joint family—Trading partnership—Adjudication of—Liability of minor members as partners and as sons.*

A joint family (consisting of two fathers and several sons, some adults and some minors) along with a stranger constituted a trading partnership which was adjudicated insolvent. The minors contended that their shares in the ancestral property were not liable to discharge the debts of the firm. It was proved that the property (including the shares of minors) had been mortgaged by the fathers, for a debt of the joint family as a partner in the firm and thus treated as a part of the assets of the firm.

Held, (*a*) that as a result of the adjudication of the firm, all the assets of the firm vested in the receiver. The fact that the minors have not and cannot be adjudicated insolvent would not affect the vesting—in the receiver—of the entire assets of the firm including their shares in the family property, which had become part of the firm's assets. Their shares in the property which was mortgaged for a debt of the firm cannot be saved except by showing that the debts incurred by the father were immoral; (*b*) that, though as partners the minors were under no personal liability and no property of theirs, which was not the property of the firm, could be touched by the receiver, their liability as sons of their fathers extended to all such debts as were not shown to be immoral. (*Macpherson and Dhavle. JJ.*) BHOLA PRASAD *v.* RAMKUMAR MARWARI. **11 Pat. 399= I R 1932 Pat. 205=139 I.C. 13=14 Pat.L.T. 63= A.I.R. 1932 Pat. 231.**

Wife.

———*Joint family—Wife—Mithila Law—Whether becomes a coparcener—Right to demand partition*

The qualified right of a wife to receive a share equal to that of a son her husband chooses to make an equal division of his self-acquisition or chooses or is forced by the sons to divide the ancestral property does not constitute her a coparcener of the husband she is not entitled as a matter of right to demand partition from her husband at her own discretion. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F.A. SAVI. **12 Pat 359=6 I.R. (Pat.) 17=145 I.C. 1=14 Pat. L.T (Supp.) 1=A.I.R. 1933 Pat. 300.**

Will.

See SON'S RIGHT, *supra.*

———*Joint family—Will—Consent of other members.*

A member of a joint Hindu family cannot, without the consent of the other members of the family, dispose of his interest nor create a charge over the family property by will. Case law Disc. (*Sulaiman, C. J and King, J.*) BABU SINGH *v.* MT. LAL KUER. **147 I.C. 637 (2)=6 R.A. 525=1933 A.L.J. 1547=A.I.R. 1933 All. 830.**

———*Joint family — Will—Coparcener—Disposition of interest in joint family property in favour of unborn person with consent of other members.*

Although a will by a member of a joint Hindu family of his co sharers interest is not a valid devise, where there had been a consent of the co sharers, an agreement for the devolution of the interest after the death of the co-sharers, though not in strict accordance with the rules of Hindu Law, is binding and operative. To such a case the rule prohibiting a bequest in favour of an unborn person of the rule against a conditional grant of future

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interest in perpetuity in favour of person unborn would be inapplicable. A. I. R. 1926 P. C. 54; 9 B. L. R. 377 (P. C.) and 16 Cal. 71 (P. C.), Ref. (*Sulaiman, C. J. and King, J.*) BABU SINGH *v.* MT. LAL KUER. **147 I.C. 637 (2)=6 R A. 525=1933 A.L.J. 1547=A.I R. 1933 All. 830.**

———*Joint family—Will — Coparcener—If void or voidable.*

A coparcener governed by Hindu Law has power to sell or mortgage ancestral property under certain circumstances and an alienation made by him is only voidable. It may therefore be validated by the consent of the co. parceners concerned. A will of ancestral property however stands on a different footing. It cannot be validated even with the consent of the coparceners, the reason being that a will speaks from the date of the testator's death and the title of the coparceners by survivorship vesting in them at the moment of his death, there remains nothing upon which the will can operate. (*Bhide, J.*) RADHA RAM ASARAM *v.* GANGA RAM. **159 I.C. 227=8 R.L. 362=A.I.R. 1935 Lah. 661.**

———*Joint family—Will—Coparcener—Oral directions—Bequest with the consent of the other coparcener—Validity.*

Obiter.—A bequest made by a member of a joint family by which a portion of the family property appertaining to his share was given to his wife absolutely in satisfaction of her claim for maintenance is a valid disposition, if assented to by the other remaining coparcener. 27 M.L.J. 485; 40 M. 1122; 48 A. 313 (P.C.), Rel. on. (*Sundaram Chetty, J.*) SEETHIAH *v.* MUTYALU. **I.R. 1931 Mad. 380=130 I.C. 460=1930 M.W.N. 1011=33 L.W. 86=A I.R 1931 Mad. 106.**

———*Joint family—Will—Father executing — Right of after born son to question.*

Where a Hindu executed a will while he was sonless disposing of family property and subsequently sons were born,

Held, that the property passed by survivorship and that the will was of no effect. (*Harrison and Addison, JJ.*) MT. LALITA DEVI *v.* ISHAR DAS. **14 Lah 178=I.R. 1932 Lah. 394=138 I.C. 58=33 P.L R. 478=A.I.R. 1933 Lah. 544.**

———*Joint family—Will—Father—Sons if bound.*

A Hindu father in a copaicenary estate cannot dispose of the joint estate by will and apart from its invalidity it does not alter the position or affect the rights of his sons as regards their share in ancestral property. (*Tapp and Walker, JJ.*) KARAM SINGH *v.* SURENDAR SINGH. **135 I.C 180=I.R. 1932 Lah. 52=33 P.L.R. 1095=A I.R. 1931 Lah. 289 (2).**

———Joint family—Will—Father—Suit for partition—Settlement and will executed prior to service of notice on sons—Valid. *See* HINDU LAW—PARTITION—SUIT FOR. **A.I.R. 1931 Mad. 278.**

Limited owner.

———*Limited owner—Alienation—Necessity—Mortgage—Rate of interest.*

Where a limited owner executes a mortgage the creditor must show that not only was there a legal necessity for borrowing but also that it was necessary to borrow at that rate. (*Mukerji and Bennet, JJ.*) RAM DAYAL *v.* AMINUDDIN. **I.R. 1931 All 631=133 I. C. 311=1931 A.L.J. 29=A.I.R. 1931 All. 203.**

———*Limited owner—Powers of—Compromise in good faith—Binding nature of.*

A compromise made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner will bind the estate quite as much as a decree on contest. (*Venkatasubba Rao and Curgenven, JJ.*)

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VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR. **I.R. 1933 Mad. 442=144 I.C. 584=A.I.R. 1933 Mad. 639.**

Maintenance.

AMOUNT OF.
CHILDREN.
CLAIM FOR.
CONCUBINE.
ILLEGITIMATE SON.
IMPARTIBLE ESTATE.
JOINT FAMILY.
SON'S DAUGHTER.
STEP-MOTHER.
UNCHASTITY. *See* WIDOW AND WIFE, *infra.*
WIDOW.
WIDOWED DAUGHTER-IN-LAW.
WIFE.

Amount of.

———*Maintenance — Amount of — Alteration in—Amount fixed by agreement.*

Where a son executes an agreement in favour of his mother promising to pay her every year a certain amount as maintenance, the amount so fixed is not necessarily binding for all time, but can be altered by the Court, if circumstances so require. In fixing the amount of maintenance, regard must be had to the value of the whole estate, the needs of the remaining members of the family and the condition of the person for whom maintenance has to be fixed. (*Jai Lal and Skemp, JJ.*) MT. BHAGWANTI *v.* MANI RAM SHAH. **157 I.C. 768=37 P.L.R. 278=A.I.R. 1935 Lah. 543.**

Children.

———Maintenance—Children—Legal obligation. *See* MAINTENANCE—WIFE. **14 Pat. 313=A.I.R. 1935 Pat. 8.**

———Maintenance—Children — Right of—Right of creditor. *See* MAINTENANCE—WIFE. **14 Lah. 399=A.I.R. 1933 Lah. 116.**

Claim for.

———*Maintenance—Claim for—Claim provable in insolvency—Provincial Insolvency Act* (1920), *S.* 34.

A claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. (*Addison and Agha Haidar, JJ.*) MT. CHAMPA *v.* OFFICIAL RECEIVER, KARCHI. **15 Lah. 9=149 I.C. 693=6 R L. 738=36 P.L.R. 450=A.I.R. 1933 Lah. 901.**

Concubine.

———*Maintenance — Concubine* — Avaruddha stree—*Requisites for claim to maintenance.*

In the case of an *avaruddha stree* (or permanent concubine), the right to maintenance is established provided the concubinage is permanent until the death of the paramour and sexual fidelity to him is preserved. It is not necessary for her to show that she was recognised by the family of the deceased or that his relationship with her was known to the family. 50 B. 604 (P.C.), Rel. on. (*Beaumont, C.J. and Blackwell. J.*) DAYAVATI RAMCHANDRA *v.* KESARBAI. **150 I.C. 488=7 R.B. 4=36 Bom.L.R. 61=A.I.R. 1934 Bom. 66.**

Illegitimate son.

———*Maintenance — Illegitimate son — Irrelevant consideration.*

In fixing the amount of maintenance for an illegitimate son, the fact that the illegitimate daughter of the putative father against whom maintenance is claimed is herself not leading a virtuous life or that the illegitimate son has a large family to support, is an irrelevant

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consideration and cannot be relied upon to increase the amount of maintenance. (*Patkar and Broomfield, JJ.*) CHAMAVA RACHAYA *v.* IRAYA SANGAVA. **33 Bom. L.R. 1082=I.R. 1932 Bom. 33=134 I.C. 1153=A.I.R. 1931 Bom. 492.**

———*Maintenance — Illegitimate son — Quantum of maintenance.*

An illegitimate son born of an adulterous connection is not entitled to maintenance higher in amount than the share of the income, to which he would have been entitled, if he had been an illegitimate son entitled to inherit. (*Patkar and Broomfield, JJ.*) CHAMAVA RACHAYA *v.* IRAYA SANGAVA. **33 Bom.L.R. 1082 =I.R. 1932 Bom. 33=134 I.C 1153=A.I.R. 1931 Bom. 492.**

———*Maintenance—Illegitimate son—Sudra—Status of—Right to past maintenance—Charge on family property.*

The illegitimate son of a Sudra by a continuous concubine has the status of a son. He is a member of the family. The share of the inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son. Where the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands but he is entitled as a member of the family to maintenance out of that property. His position in this respect is analogous to that of widows and disqualified heirs, to whom the law allows maintenances because of their exclusion from inheritance and from a share on partition. The Court may award not only future but also past maintenance so far as it is not barred by the law of limitation and may direct the same to be secured by a charge on joint family property. (Case law reviewed.) (*Sir Dinshah Mulla.*) VELLAIYAPPA CHETTY *v.* NATARAJAN. **58 I.A. 402=55 Mad. 1=55 C.L.J. 451=35 C W.N 1278=34 L.W. 589=33 Bom.L.R. 1526=134 I.C. 1084=1931 A.L.J. 1123=8 O.W.N. 1039=1931 M W.N. 848=A I.R. 1931 P.C. 294=61 M.L.J. 522 (P.C.).**

Impartible estate.

———Maintenance—Impartible estate—Junior member—Nature of right. *See* HINDU LAW—IMPARTIBLE ESTATE. **57 Mad. 1023=67 M.L.J. 306 (F.B.).**

Joint family.

———Maintenance—Joint family—Right of members of to be maintained to the extent of their interest in the joint income. *See* MAINTENANCE—WIFE. **14 Pat. 313=A.I.R 1935 Pat. 8.**

Son's daughter.

———*Maintenance—Son's daughter — Liability of heirs.*

The property of a Hindu passing into the hands of his heirs after his death is liable for the maintenance of his pre-deceased son's daughter until she marries. (*Harrison and Dalip Singh, JJ.*) RAM LABHAYA *v.* MT. NIHAL DEVI. **131 I.C. 351=A.I.R. 1931 Lah. 127.**

Step-mother.

———*Maintenance—Step-mother—Step-sons inheriting only occupancy fields—Liability of.*

Where the step sons are in enjoyment of income on account of property though non transferable, *e.g.*, occupancy fields which belonged to their father, it is equitable that they should be legally bound to devote a due proportion of that income to the maintenance of the step-mother or the dependants of their father. In such circumstances a personal decree should be passed against the step-sons. 9 N.L.R. 137, Expl. (*Macnair, J.C.*) GHANARAJ *v.* MT. TAPI BAI. **29 N.L R 103=I.R. 1933 Nag. 107=142 I.C. 274 (1)=A I.R. 1933 Nag. 57 (1).**

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Widow.

———*Maintenance—Widow—Amount of maintenance —Principles of assessment.*

In fixing the maintenance of a Hindu widow, the Court should award such sum as would enable her to live with the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime, and neither on too penurious or miserly nor on too extravagant a scale. (*Lord Macmillan*) RANJANI KANTA PAL *v.* SAJANI SUNDARI DASSYA **61 I.A. 29=61 Cal. 221=35 P.L R. 303=1934 M.W N. 172 =6 R P.C. 54=147 I.C. 438=39 L.W. 177=1934 A L J. 166=36 Bom.L.R. 230=59 C L J. 53=3 A. W.R. 109=11 O.W.N. 128=38 C W.N. 262=A.I.R. 1934 P C. 29=66 M.L J. 148 (P.C.).**

———*Maintenance—Widow—Amount paid voluntarily by brother—Whether constitutes "means."*

Under the Hindu Law, a widow claiming maintenance claims it on the basis of her position in life and the position of the estate having regard also to her means. But a voluntary payment, for example, by her brother, which may be stopped any moment cannot strictly be described as her "means". (*Wort and Kulwant Sahay, JJ.*) BAHURIA SARASWATI KUER *v.* BAHURIA SHEORATAN KUER. **12 Pat. 869=149 I.C. 738=6 R.P. 637=15 Pat.L.T. 372=A.I.R. 1934 Pat. 99.**

———*Maintenance—Widow—Arrears—Discretion of Court to award at lesser rate.*

It is open to the Court to award arrears of maintenance at some rate less than that fixed for the current maintenance. (*Curgenven and Sundaram Chetty, JJ.*) VENKATARATNAMMA *v.* SEETHARATNAM. **I.R. 1932 Mad. 529=138 I.C. 237=35 L.W. 611=A.I.R. 1932 Mad. 408.**

———*Maintenance—Widow—Arrears—Right to claim*

A Hindu widow must satisfy the Court that she was in want before she can obtain a decree for arrears of maintenance. The question of maintenance does not stand on the same footing as the question of arrears of maintenance. In the latter case the widow must adduce *prima facie* evidence of wrongful withholding of arrears. (*Mukerji and Bennet, JJ.*) JAMWATI *v.* MAHARANI. **I.R. 1931 All. 193=129 I.C. 705= 1930 A.L.J. 1433=A.I.R. 1931 All. 227.**

———*Maintenance—Widow—Arrears—Suit to recover.*

Where the Court grants payment of the maintenance allowance from the date of the suit, the arrears prior to that date are exigible and the widow should receive a certain sum for the prior period (*Raza and Smith, JJ.*) HAR PARTAB SINGH *v.* RAGHURAJ KUAR. **149 I.C. 683=6 R.O. 598=A.I.R. 1933 Oudh 550.**

———*Maintenance—Widow—Charge—Decree or agreement—Nature of agreement.*

The maintenance of a Hindu widow is not a charge on her husband's estate unless it is fixed and charged on such estate by decree or agreement. The agreement, in order to create a charge, must be such as to make a property security for the payment of the maintenance, thereby creating an interest in the property. (*Suhrawardy and Graham, JJ.*) MOHINI DEBI *v.* PURNA SASHI GUPTA. **I.R. 1932 Cal. 411=138 I.C. 24= 36 C.W.N. 153=55 C.L J. 198=A.I.R. 1932 Cal. 451.**

———*Maintenance—Widow—Charge on specific property—Date fixed by agreement for annual payment— Death of widow before date of payment—Heirs whether entitled to recover proportionate amount.*

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Where a Hindu widow, in whose favour the head of her husband's family had executed an agreement charging certain specific family property to pay her maintenance at a certain rate on a particular date in each year for the previous year died some time before the date for payment of that year's maintenance, and her heirs sued for recovery from out of the property the proportionate amount of maintenance due after the last payment till the date of her death,

Held, that the widow's right to maintenance accrued from day to day, that it was not altered by the fixing of a date for the annual payment and the plaintiffs were therefore entitled to recover. (*Krishnan Pandalai, J.*) RANGAPPAYA AITHALA *v.* SHIVA AITHALA. **57 Mad. 250=6 I.R. (Mad.) 172=145 I.C. 961=1933 M.W.N. 1000=38 L.W. 394=A.I.R 1933 Mad. 699 =65 M.L J. 410.**

———*Maintenance—Widow—Decree against husband whether bars claim against his heirs.*

A widow as such has right of residence in the family house and of being maintained out of the family funds and this right is a recurring right and a previous decree against the husband is not a bar to her claiming this right against the heirs of her deceased husband. The cause of action of the widow on the death of the husband is distinct from the cause of action she had against her husband during his lifetime. 3 Bom. 415 (P.C.), Rel. on. (*Jai Lal, J.*) MT. SHAM DEVI *v.* MOHAN LAL. **15 Lah 591=152 I.C. 606=7 R L. 291=36 P.L.R. 333=A.I.R 1934 Lah. 167.**

———*Maintenance — Widow — Decree—Preferential right of creditor.*

Where a decree was passed under O. 34, R. 6, C. P. Code, against a Hindu widow and the next reversioner to whom she had surrendered the estate, as legal representatives of the deceased mortgagor and it appeared that the widow subsequently entered into a maintenance agreement with the reversioner and a decree was passed by which maintenance was charged on the property in his possession.

Held, that the maintenance decree in the hands of the widow did not constitute assets so as to be rendered liable to be attached and sold in execution of the mortgage decree.

Semble.—There is nothing to prevent the mortgagee from proceeding to attach the coppus of the property itself and selling it claiming priority even as against the maintenance claim of the widow. (*Sulaiman and Young, JJ.*) RAM SRI *v.* NARAYAN SINGH **I R. 1931 All. 150=129 I.C. 374=A.I R. 1931 All. 368.**

———*Maintenance — Widow—"Guzara" village—Income to be taken into account in fixing allowance and property to be charged.*

Where landed property is bestowed on a person by a way of maintenance grant (guzara) from generation to generation, the only restricting condition being that the grantee or his successors had no power to transfer the same to any one other than the owner of the estate, the grant must be taken into account in fixing allowance of widow in grantees family as also in deciding what property is to be charged with it, since the income from the guzara villages clearly formed in the past, and still forms, part of the income of the estate. (*Raza and Smith, JJ.*) HAR PARTAB SINGH *v* RAGHURAJ KUAR. **149 I.C. 683=6 R.O. 598=A.I R. 1933 Oudh 550.**

———*Maintenance—Widow—Illness—No ground for increased rate.*

Sick persons like healthy persons must live in accordance with their means. Hence merely because a widow

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entitled to maintenance out of joint family funds is sick, she is not entitled to a disproportionate payment out of such funds and such sickness should not be a ground for increasing maintenance. (*Aston, A.J.C.*) MATUBAI RAMJI *v.* JERAM RAMJI. **147 I C. 256=6 R.S. 137=A.I R. 1933 Sind 292.**

———*Maintenance—Widow—Joint family property dissipated by widow prior to suit—Claim for maintenance.*

Where a Hindu widow suing for maintenance is proved to be in possession of joint family property when she files the suit, it is the duty of the Court to compel her to satisfy her demand, so far as it can be satisfied first out of the property in her hands, before she can come upon the rest of it in the hands of the other members of the joint family. The same principle is applicable where she ought to have in her hands joint family property, which however is not available at the date of suit, having been dissipated by her on purposes not binding on the joint family. Where such property would have been sufficient to provide her with maintenance at the rate decreed, she had no cause of action to sue for maintenance. (*Wallace and Stone, JJ.*) SRINIVASA AIYAR *v.* AMMANI AMMAL. **I.R. 1931 Mad. 869=134 I.C. 981=34 L.W. 489=A.I.R. 1931 Mad. 668=61 M.L J. 381.**

———*Maintenance—Widow—Joint family property—Possession of portion of—Right of decree-holder against joint family.*

A Hindu widow has a right to hold a portion of the joint family estate of which she is in possession in lieu of maintenance as long as she is entitled to maintenance. On her death or if she ceases to be entitled to maintenance as a Hindu widow, the right to hold the estate would terminate. Subject to her right to hold the estate, it is open to a person who has obtained a simple money decree against the members of the joint family to bring the property to sale. (*Mukerji and Bennet, JJ.*) RAM KUNWAR *v.* AMAR NATH. **54 All. 472=I.R. 1932 All 393=138 I.C. 363=1932 A.L.J. 267=A.I.R. 1932 All. 361.**

———*Maintenance—Widow—Liability of family property for.*

Unless there is a charge, the family property is in no way liable for widow's maintenance. In fact without a charge, the widow's right is one of an indefinite character which is enforceable only like any other liability. (*Addison and Agha Haidar, JJ*) MT. CHAMPA *v.* OFFICIAL RECEIVER, KARACHI. **15 Lah 9=149 I C. 693 =6 R L. 738=36 P L.R 450=A.I.R. 1933 Lah. 901.**

———*Maintenance—Widow—Payment of husband's debts—Distinction between debts of husband and those of other coparceners.*

Where the husband of a widow claiming a right of residence or maintenance, makes an alienation of his property or incurs a debt, his widow is not entitled to claim maintenance out of the property transferred or attached in execution of a decree, unless such property has already been charged with her maintenance. Debts contracted by a Hindu take precedence over the maintenance of his widow as a charge on the estate. Therefore a purchaser of property sold to discharge debts of a husband has a good title against a widow who seeks to charge the estate with her maintenance (unless this has been already done) or who claims a right of residence therein. The case is however different if the debts are those of another coparcener such as a son or brother of the widow's deceased husband. In that case the widow would be entitled to enforce her right of residence against property sold to pay off those debts unless it were proved that they had been incurred for family

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necessity. (*Addison, J.*) JAMIAT RAI *v.* MT. MALAN. **13 Lah.41=I.R. 1931 Lah. 734=133 I.C. 62=33 P.L.R. 311=A I R. 1931 Lah. 718.**

[**Rel.** 36 P.L.R. 75 (76).]

———*Maintenance—Widow—Quantum.*

The maintenance of the widow does not depend on the sweet will of her husband but the Courts in fixing maintenance have to consider the circumstances of the estate and the wishes of the husband. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F.A. SAVI. **12 Pat. 359=6 I.R. (Pat.) 17=145 I.C. 1=14 Pat.L.T. (Supp) 1=A.I.R. 1933 Pat. 306.**

———*Maintenance—Widow—Rate—Circumstance to be considered.*

The widow proved that she had no source of income and her father and brother were in indigent circumstances. The family to which the husband belonged was shown to be very rich, the members being to be millionaires. The lower Court however granted maintenance to the widow at Rs. 20 per mensem because the members of the family seldom engaged servants and cooked their own food.

Held, that the widow should be enabled to live with the same degree of comfort and reasonable luxury as the other members and that the maintenance should be fixed at Rs. 80 per month. 8 Pat. 840, Rel on. (*Mukerji and Mitter, JJ.*) SAJANISUNDARI DASI *v* JOGENDRACHANDRA SEN. **58 Cal. 745=I.R. 1931 Cal. 677=133 I.C. 325=A.I R. 1931 Cal. 591.**

[**Affirm.** 61 I.A. 29 (P.C.).]

———*Maintenance—Widow—Rate fixed by agreement—Power of Court to alter.*

Where the income of the family property is considerably reduced subsequent to an agreement executed in favour of a Hindu widow fixing her rate of maintenance, it is open to the Court to reduce it in view of the altered circumstances of the family. (*Zia ul-Hasan, J.*) SHEO MANGAL SINGH *v.* BODHI KUAR. **159 I C. 356=8 R.O. 180=1935 O.W.N. 1249=A.I.R. 1936 Oudh 60.**

———*Maintenance—Widow—Rate of maintenance.*

A widow should be enabled to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime, and if there is a change in the circumstances of family, it must be taken into consideration Frugal living cannot be enforced on the widow by the surviving coparceners. (Case-law referred.) (*Aston, A. J. C.*) MATUBAI RAMJI *v.* JERAM RAMJI. **147 I C. 256=6 R.S. 137=A.I.R. 1933 Sind 292.**

———*Maintenance—Widow—Rate maintenance—Reduction of—Improvement of widow's financial position.*

There is no basis for the principle that where a widow has received a certain rate of maintainance from the family but subsequently improved her financial condition either by her own efforts or by the generosity of others, she is liable to have the allowance reduced. (*Krishnan Pandalai, J.*) SUNDARI AMMAL *v.* VENKATARAMA SASTRIAL. **149 I.C. 265=6 R M. 617=39 L W. 676=A.I.R. 1934 Mad. 314=66 M.L.J. 680.**

———*Maintenance— Widow— Residence apart from husband's relations—Whether operates as disqualification.*

A Hindu widow is not bound to reside with the relations of her husband, nor have the relations any right to compel her to live with them and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family, or leaving her husband's residence, from any other cause than unchaste or improper purpose. The rule draws no distinction between self-acquired property and the ancestral property, and the investigation of the sufficiency of reasons that lead the widow to remove herself are not material for the decision of the question of her title to maintenance. (*Raza and Smith, JJ.*) HAR PARTAB SINGH *v.* RAGHURAJ KUAR. **149 I.C. 683=6 R.O. 598=A.I.R 1933 Oudh 550.**

———*Maintenance— Widow—Residence apart from husband's relatives—Whether operates as disqualification.*

A Hindu widow is not bound to reside with the relatives of her husband. She does not forfeit her right to maintenance merely on account of her going and residing with her family or leaving her husband's residence from any other cause than unchaste or improper purposes. 8 Pat. 840, Appl. (*Mukerji and Mitter, JJ.*) SAJANISUNDARI DASI *v.* JOGENDRACHANDRA SEN. **58 Cal. 745=I R. 1931 Cal. 677=133 I.C. 325=A.I R 1931 Cal. 591.**

[**Affirm.** 61 I.A. 29 (P.C.).]

———*Maintenance—Widow—Right as against divided members of family not taking husband's property.*

Where the widow of a coparcener sues for maintenance after there has been a partition, she cannot enforce her right against any of the surviving coparceners except those who have taken her husband's share. If her right to relief against the family property is limited to the value of her husband's share and that share has already been defined and separated, it would be idle to give her relief against any of the coparceners other than those who have succeeded to that share and no other share is liable. 27 M. 45 and 35 M. 147, Ref. (*Waller and Jackson, JJ.*) NARASIMHAN *v.* VENKATASUBBAMMA. **55 Mad. 752=I.R. 1932 Mad 438=137 I.C. 749=1932 M.W.N. 286=35 L.W. 513=A.I.R. 1932 Mad. 351=62 M L.J. 433**

———*Maintenance—Widow—Right based on contract—Notification.*

Where a widow is able to establish that her right to maintenance rests on a valid and binding contract and not merely on her status as a Hindu widow, the Courts will give effect to the intentions of the parties in accordance with the terms of the contract. The amount agreed on cannot be varied in such a case merely because the circumstances have changed. The Court may, however, in all appropriate cases grant equitable relief to the party undertaking the obligation. (*Aston, A J C.*) JASODABAI *v.* DHARAMDAS THAWERDAS. **26 Sind L R. 184=142 I.C. 271=I.R. 1933 Sind 86=A I.R. 1932 Sind 186.**

———*Maintenance—Widow—Right of—Enforceability against* bona fide *transferee of property.*

The general right of a Hindu widow for maintenance out of the joint family property which has not ripened into a charge on any specific property cannot avail as against a *bona fide* transferee fer value, unless the transferee takes with notice of an intention on the part of the transferor to defeat the claims of the maintenance holder, as provided by S. 39 of the T. P. Act. as it stood before the amendment of 1929. (*Varadachariar and Burn, JJ.*) KAVERI AMMAL *v.* SUBBA AYYAR. **152 I C. 709=7 R M. 271=1934 M.W.N. 1311=40 L. W. 678=A I R. 1934 Mad. 734.**

———*Maintenance—Widow—Rights of—If can alienate corpus.*

There is no rule of Hindu Law which requires that a widow should be content with a bare or what is termed "starving" maintenance; on the contrary, she has a right to alienate the corpus, if without doing so she cannot maintain herself properly, by which is meant live in

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decent comfort. A.I R. 1926 Mad. 1122 and 464, Ref. (*Venkatasubba Rao. J.*) VENKATACHALA PADAYACHI *v.* VELAYUDHA PADAYACHI **161 I.C. 103(2)=8 R.M. 776=1935 M.W.N. 871=A.I.R. 1935 Mad. 701.**

———*Maintenance—Widow—Right of—Notice to* bona fide *purchaser must be of charge actually created—T.P. Act* (1882), *S.* 39.

In order to affect a *bona fide* purchaser for value of family property with notice, he must have notice not merely of the existence of a right of maintenance; which term includes the right of residence also, but of the existence of a charge actually created and binding on the estate. Where therefore a purchaser of an ancestral house belonging to the joint Hindu family is a *bona fide* transferee for value and there is an absence of any charge created and binding on the estate, the transferee would not be affected with notice; his right would be paramount to that of the widow. A.I.R. 1932 Sind 162, Foll. (*Aston, A.J C.*) TAVABALI MANDAVIWALA *v.* LILABAI. **27 S.L.R. 289=149 I.C. 617=6 R.S. 230 =A.I.R 1934 Sind 14.**

———*Maintenance—Widow —Right of residence.*

An order for maintenance may be made which is exclusive or inclusive of a provision for the widow's separate residence. Where a widow is permitted by the Court to occupy rooms in her late husband's dwelling-house, the maintenance awarded will not include a provision for her room rent. In such a case ejectment from the family dwelling-house will give her a cause of action for asking the Court to supplement her maintenance by an order for residence in the family dwelling house. (Case-law referred.) (*Aston, A.J.C.*) MATUBAI RAMJI *v.* JERAM RAMJI. **147 I.C. 256=6 R.S. 137=A.I.R. 1933 Sind 292.**

———Maintenance—Widow—Right of — Subject to payment of husband's debt. *See* HINDU LAW—DEBTS —HUSBAND. **A.I.R. 1931 Lah. 718.**

———*Maintenance—Widow—Right to—Nature of—Liability of husband and of his estate under Mitakshara.*

A Hindu widow's right of maintenance arises by marriage. It is not a matter of contract. It exists during the husband's lifetime and continues after his death. It is an obligation attached upon his person and remains the same after his death. Though the estate of a deceased Hindu governed by the Mitakshara law may be under an obligation for the maintenance of his widow, it does not follow that a simple creditor of the widow who has paid her money for maintenance can insist on getting possession of and on retaining the estate till the amount due to him is paid off. The position of a person advancing money to a widow for her maintenance during her lifetime or spending money for her funeral expenses after her death, is no better than that of an unsecured creditor. He has no lien. He can only sue the heirs and obtain a decree for the amount due to him. (*Sulaiman, C.J. Harries and Rachhpal Singh, JJ.*) MT NANDRANI *v* KRISHNA SAHAI. **57 All. 997=156 I.C. 23=7 R.A. 1043=1935 A L.J 715=1935 A.W.R. 887=A.I.R. 1935 All. 698 (F.B.).**

———*Maintenance—Widow—Suit against her husband's brother—Jointness of family denied—Will by deceased father in-law set up—Interim maintenance—Application for.*

In a suit by a widow against her husband's brother for maintenance, the defendant contended that the family was not joint and that the father-in-law (of plaintiff) having left a will, he was under no legal obligation to maintain the plaintiff. Pending suit, an application was filed under S. 151, C. P. Code, for interim maintenance.

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Held, that having regard to the conflict of decisions on the question of the widow's right to maintenance where a will has been left by the father-in-law, she could not be allowed interim maintenance at a rate greater than that allowed in the will. (*Aston, A.J C.*) DEVALBAI *v.* DEWANDAS BHAMBLOMAL. **I.R. 1933 Sind 172=144 I.C. 65=A.I.R. 1933 Sind 351.**

———*Maintenance—Widow—Suit to recover arrears—Interest whether can be awarded.*

A Hindu widow recovering arrears of maintenance is not entitled to interest thereon. To such a case the Interest Act does not apply. The Court can however award interest on the amount decreed from the date of suit till realisation. (*Wort and Kulwant Sahay, JJ.*) BAHURIA SARASWATI KUER *v.* BAHURIA SHEORATAN KUER. **12 Pat. 869=149 I.C. 738=6 R. P. 637=15 Pat.L.T. 372=A.I.R. 1934 Pat. 99.**

———*Maintenance — Widow — Unchastity— Claim under agreement.*

Under Hindu Law unchastity disentitles a widow from recovering maintenance, and this is so even where such maintenance has been commuted for a lump sum by an agreement and it was payable in instalments and she claims the past the instalment due under the agreement. 7 Bom. 84; 9 Bom. 108; 17 Mad. 392; 15 A. 382; 17 C. 674; 19 Mad. 6, Rel. on; 34 Bom. 278; 39 Mad. 658; 26 A 321, Dist. (*Madgavkar, J.*) KISANJI *v.* LAKSHMI. **135 I.C. 477=I R. 1932 Bom. 93=33 Bom.L.R. 510 =A.I.R. 1931 Bom. 286.**

———*Maintenance — Widow — Unchastity — Claim under agreement.*

The contention that a Hindu widow cannot recover maintenance under the Hindu Law if she is unchaste does not hold good where the widow sues under a specific agreement and not in her capacity as a widow. (*Patkar and Broomfield, JJ.*) SHIVLAL *v.* BAI SANKLI. **I R. 1931 Bom. 332=132 I.C. 444=33 Bom.L R. 490=A.I R. 1931 Bom. 297.**

———*Maintenance — Widow — Unchastity—Grant of special estate in lieu of maintenance—No divestment owing to subsequent unchastity.*

The right to maintenance of a Hindu widow belonging to a joint family is conditional upon continued chastity. This right is not affected by the fact that the widow has obtained a decree declaring her right to maintenance or that there has been an agreement between the widow and the male coparceners to pay her a certain amount by way of maintenance.

Held, however on the facts, that the estate conferred on the widow was one of a special nature and was not liable to divestment upon the ground of subsequent unchastity because the instrument creating the right did not provide for that contingency. The rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance applies even where that right is secured to her by an agreement in writing. (*Sen and Allen, JJ.*) ANANDI *v.* LAKSHMI CHAND. **143 I C. 815=1932 A.L.J. 208=I.R. 1933 All. 335=A.I.R. 1933 All. 130.**

———*Maintenance—Widow— Unchastity — Unchaste widow subsequently reforming herself—Starving maintenance.*

A Hindu widow who becomes unchaste but subsequently reforms herself is entitled to what is called starving allowance from the persons who are in possession of the estate which was jointly held by them and the deceased husband of the widow. An amount of Rs. 15 was allowed as bare maintenance where estate was yearly paying Rs. 3,500 as land revenue. (*Niamatullah and Rachhpal Singh, JJ.*) RAM KUMAR DUBE *v.* MT BHAGWANTA. **56 All. 392=6 R.A.**

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750=148 I.C. 625=1934 A.L.J. 120=A.I.R. 1934 All. 78.

———*Maintenance—Widow—Unchastity—Widow receiving income of estate by agreement—If forfeits it by subsequent unchastity.*

It is true that the right of a Hindu widow to maintenance is conditional upon her leading a life of chastity and she loses that right if she becomes unchaste. But the right to receive maintenance is very different from a vested estate in property. Under the Hindu Law, a widow having inherited a widow's estate is not liable to forfeit it by reason of her subsequent unchastity. Where, therefore, a widow was given an income of an estate for her lifetime specially created for her by the two brothers and the agreement between them was embodied in a document and there was no provision in the document, making chastity a condition of the enjoyment by her of the estate bestowed upon her,

Held, that she did not forfeit it by reason of her subsequent unchastity. (*Sir Shadi Lal,*) LAKHMI CHAND *v.* MT. ANANDI. **62 I.A. 250=57 All. 672=42 L.W. 461=1935 O.W.N. 984=157 I.C. 869=8 R.P.C. 60 =37 Bom.L.R. 849=1935 A.L.J. 1163=1935 M. W. N. 1132=1935 A.W.R. 1061=1935 R.D. 994=39 C. W.N. 1223=A.I.R. 1935 P.C. 180=69 M.L.J. 380 (P.C.).**

Widowed daughter-in-law.

———*Maintenance — Widowed daughter-in-law—Grounds for granting arrears—Non payment coupled with refusal.*

Non-payment of maintenance, coupled with the refusal of the right to maintenance, is sufficient to justify the award of arrears of maintenance. Where in a suit by daughter in-law, against persons succeeding to the property of her father in-law, for arrears of maintenance and future maintenance, the defendants admitted the right of the plaintiff, but offered only Rs. 10 per mensem as maintenance and considering the status of the family, the amount was wholly inadequate and unreasonable and the plaintiff originally contended that she was entitled to the whole property,

Held, that the offer was as good as refusal of the right of maintenance and the plaintiff was entitled to arrears of maintenance for 12 years and was not debarred from claiming them merely because she originally contended that she was entitled to the whole property. 24 Mad. 147 (P.C.), Rel. on. (*Harrison and Dalip Singh, JJ.*) RAM LABHAYA *v.* MT. NIHAL DEVI. **131 I.C. 351=A.I.R. 1931 Lah. 127.**

———*Maintenance — Widowed daughter in-law — Liability of the father-in-law, his heirs and devisees under his will—Nature of.*

A father-in-law who is not possessed of ancestral property is not legally bound to maintain his widowed daughter-in-law. She has no claim against his self-acquired property. But the father-in-law is under a pious or moral obligation to maintain his widowed daughter-in-law, which ripens into a legal and binding obligation on the heirs, who inherit the property of the father-in-law. This legal obligation is as much binding on the sons and heirs as on the devisees under a will executed by the father-in-law. 25 Bom. 263, Not Foll.; 11 All. 194 (F.B.), Foll. (*Staples, A.J.C.*) MT. LAXMIBAI *v.* SAMBHA. **27 Nag.L.R. 347=I.R. 1932 Nag. 22=136 I.C. 230=A.I.R. 1932 Nag. 11.**

[R. 144 I.C. 65 (s).]

———*Maintenance—Widowed daughter in-law—Right against assets of father-in-law.*

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The widowed daughter-in-law is entitled to maintenance out of the ancestral property and also the self-acquired property of the father-in-law inherited by his heirs but not out of the self-acquired property of the father-in law disposed of by him by way of gift. (*Patkar and Murphy, JJ.*) BHAGIRATHIBAI *v.* DWARKABAI. **I.R. 1933 Bom. 293=144 I.C. 4=35 Bom.L.R. 44= A.I.R. 1933 Bom. 135.**

———*Maintenance—Widowed daughter-in-law—Right against her husband's brothers—Nature of.*

Under the Hindu Law the father-in-law has a moral obligation to maintain the widow of his deceased son, but that obligation, when transmitted to his sons on his death become, in their persons, a legal liability, the measure of which is restricted to the amount of the estate to which they have succeeded from their father. (*Lord Macmillan.*) RAJANI KANTA PAL *v.* SAJANI SUNDARI DASSYA. **61 I.A. 29=61 Cal. 221=35 P. L.R. 303=1934 M.W.N. 172=6 R.P.C. 54=147 I.C. 438=39 L.W. 177=1934 A.L.J. 166=36 Bom.L.R. 230=59 C.L.J. 53=3 A.W.R. 109=11 O.W.N. 128 =38 C.W.N. 262=A.I.R. 1934 P.C. 29=66 M.L.J. 148 (P.C.).**

———*Maintenance—Widowed daughter-in-law—Self-acquired property of father-in-law bequeathed to his wife.*

The theory of a moral obligation on the part of a father-in-law to maintain out of his self-acquired property the widow of his predeceased son ripening into a legal obligation when that property is inherited by his heirs has no application when the self-acquired property of the father-in law is bequeathed by will to his own widow. (*Middleton, J.C. and Saaduddin, A.J.C.*) MT. BABO *v.* MT. BOLO. **I.R. 1933 Pesh. 27=143 I.C. 657=A.I.R. 1933 Pesh. 61.**

Wife.

———*Maintenance—Wife—Agreement between husband and wife—Enforceability.*

An agreement by which the husband bound himself to pay monthly maintenance to his wife, at any rate where both parties thought she had a possible claim to maintenance, is legal and enforceable and not contrary to public policy. 28 Cal. 751, Dist. (*Macnair, J.C.*) MT. INDIRA BAI *v.* MAKARAND. **27 N.L.R. 281= 135 I.C. 406=I.R. 1932 Nag. 6=A.I.R. 1931 Nag. 197.**

———*Maintenance—Wife—Amount of maintenance.*

The amount of maintenance allowable to a wife depends upon a number of circumstances, the amount of free estate, the past life of the married parties, their social status and standard of expenditure. Maintanance of wife fixed at Rs. 15 per mensem. (*Krishnan Pandalai and Sundaram Chetty, JJ.*) SOBHANADRAMMA *v.* VARAHALAKSHMI NARASIMHASWAMI. **57 Mad. 1003=7 R.M. 48 (2)=150 I.C. 797=1934 M.W.N. 273=39 L.W 667=A.I.R. 1934 Mad. 401= 67 M.L.J. 712.**

———*Maintenance—Wife—Arrears of maintenance—Demand if necessary.*

The claim to maintenance is a legal right; a demand and refusal is not necessary to create the right. The only legal answer to such a claim is either abandonment or waiver. The discretion of the Court is generally exercised in adjusting the rate at which the arrears have been awarded or by limiting the period by reference to the doctrine of implied abandonment. Where the wife lived with her father, who was in affluent circumstances and did not claim maintenance from her husband for quite a long time and the husband had no property,

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Held, that it was a proper case to award arrears from the date of demand. (*Krishnan Pandalai and Sundaram Chetty, JJ.*) SOBHANADRAMMA *v.* VARAHALAHSHMI NARASIMHASWAMI. **57 Mad. 1003=7 R.M. 48 (2)=150 I.C. 797=1934 M.W N. 273=39 L.W. 667=A.I.R. 1934 Mad. 401=67 M.L. J. 712.**

———*Maintenance—Wife—Children—Rights of creditor—Priority.*

The debts contracted by a Hindu governed by the Mitakshara take precedence over the right of maintainance of his wife or minor children. (*Tek Chand and Monroe, JJ.*) JAWAHAR SINGH *v.* PARDUMAN SINGH. **14 Lah. 399=I.R. 1933 Lah 119=141 I.C. 424=34 P.L.R. 291=A.I.R. 1933 Lah. 116.**

———*Maintenance—Wife—Determination of amount—Husband marrying another wife, if ground for showing indulgence to him.*

Where a husband has deliberately forsaken his young wife and she files a suit for maintenance, the fact that the husband has married another wife is no ground for showing any indulgence to him in determining the amount of maintenance;

Held, that maintenance of Rs. 30 per month ordered to be paid to wife by husband who was a teacher earning Rs. 100 was not excessive but proper. (*Tek Chand and Abdul Rashid, JJ.*) MT. LAJWANTI *v.* BAKHSHI RAM. **A.I.R. 1935 Lah. 110.**

———*Maintenance—Wife—Gift by husband—Binding nature on creditors of husband.*

The right of maintenance of the wife is not a charge on the husband's estate. She has in fact merely a claim against the estate which does not ripen into a charge until the maintenance is fixed and made a charge upon the whole or any portion of the estate by a decree or agreement. Where property is transferred with the intention of defeating her right of maintenance, then her rights against the property in the hands of the transferee will be regulated by the provisions of S. 39, T. P. Act. Where a Hindu husband who was on cordial terms with his wife made a gift of his property to his wife in order to provide for her maintenance, *held*, that the wife could not be regarded as a creditor, and that the transfer in her favour could not take effect as against the claims of the husband's creditors. (*Hasan, C.J. and Bisheshwar Nath, J.*) BRIJ RAJ KUER *v.* RAM DAYAL. **7 Luck. 411=I R. 1932 Oudh 17=135 I.C. 369=8 O.W.N. 1291=A.I.R. 1932 Oudh 40.**

———*Maintenance—Wife—Minor Children—Widow—Rights of—If dependent on the existence of joint property.*

Even where a joint family has no property but what has been self-acquired, the maintenance of aged parents, wife and minor children is imperative. The legal obligation of a Hindu to maintain his wife and children is the same as that of a non-Hindu. He is bound to maintain them out of his own property and income. In the case of other dependants, there is no legal obligation to maintain them at all, in the case of a non-Hindu or a separated Hindu; but in the case of an undivided Hindu family, a member is entitled to be maintained to the extent of his or her interest in the joint income, a widow being entitled to not more than what her deceased husband could have claimed. (*Courtney-Terrell, C.J. and Agarwala, J.*) COMMISSIONER OF INCOME TAX B AND O. *v.* MAHARANI LAKSHMIBATI SAHEBA. **14 Pat 313=154 I.C. 866=7 R.P. 497=16 Pat.L.T. 171=A.I.R. 1935 Pat. 8.**

———*Maintenance—Wife—Nature of right.*

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The right which a Hindu wife has for maintenance and residence during her husband's life, is a matter of persenal obligation, independent of the possession by the husband of any property ancestral or self-acquired. (*Shadi Lal, C.J. and Rangi, Lal, J.*) MT. LACHHMI *v.* MOHAN LAL **152 I C. 123=7 R.L. 246 (1)=36 P. L.R. 75=A.I.R. 1934 Lah. 444 (1).**

———Maintenance—Wife—Right against husband—Nature of—If merely personal—Distinction between rights of wife and widow. *See* C. P. CODE, S. 16 (*d*). **42 L.W. 647=A.I.R. 1935 Mad. 1043.**

———*Maintenance—Wife—Right to separate maintenance—Husband taking second wife—If a ground.*

The mere fact that the husband marries a second wife is not a sufficient reason under the Hindu Law for the wife to depart from the husband's house and claim separate maintenance. (*Tek Chand and Abdul Rashid, JJ.*) UDE SINGH *v.* MST. DAULAT KAUR. **16 Lah. 892=158 I C 223=8 R.L. 193=37 P.L.R. 864=A.I. R. 1935 Lah. 386.**

———*Maintenance—Wife—Separate living as bar.*

Where a wife leaves her husband's house without his permission but subsequently comes back and offers to live with him his refusal to do so entities her to demand separate maintenance from him. (*Krishnan Pandalai and Sundaram Chetty, JJ.*) SOBHANADRAMMA *v.* VARAHALAKSHMI NARASIMHASWAMI. **57 Mad. 1003=7 R.M. 48 (2)=150 I.C. 797=1934 M.W.N. 273=39 L.W. 667=A.I.R. 1934 Mad. 401=67 M. L.J. 712.**

———*Maintenance—Wife—Suit for—Delay in filing suit—If fatal.*

Mere delay the part of a Hindu wife in bringing a suit for maintenance against her husband does not justify its dismissal. (*Tek Chand and Abdul Rashid, JJ.*) UDE SINGH *v.* MST. DAULAT KAUR. **16 Lah. 892=158 I. C. 223=8 R.L. 193=37 P.L.R. 864=A.I.R. 1935 Lah. 386.**

———*Maintenance—Wife — Unchastity—Effect of—Revival of right to maintenance on cessation of unchastity.*

The claim of a wife for maintenance is a recurring right which may be in abeyance during her unchastity and may revive on the cessation of this disqualification. 39 Mad. 658 and A.I.R. 1924 Cal. 364, Rel. on. (*Jai Lal and Abdul Rashid, JJ.*) MT. SHIBBI *v.* JODH SINGH. **14 Lah 759=148 I.C. 479=6 R.L. 567=34 P.L.R. 1082=A.I.R 1933 Lah. 747.**

———*Maintenance—Wife—Voluntarily living apart from husband.*

Where there is no evidence that the wife was forced to live away from her husband the Court. cannot award maintenance to a wife voluntarily living apart. (*Wort and Kulwant Sahay, JJ.*) BAHURIA SARASWATI KUER *v.* BAHURIA SHEORATAN KUER. **12 Pat. 869=149 I.C. 738=6 R.P. 637=15 Pat.L.T. 372=A.I. R. 1934 Pat. 99.**

———*Maintenance—Wife—Wife's claim to separate maintenance—Desertion by husband—Physical violence by husband if to be proved—Delay—Effect of.*

A wife who has been abandoned and deserted by her husband is entitled to claim separate maintenance under the Hindu Law; it is not necessary to prove cruelty or repeated physicial violence to sustain the claim. Nor does mere dalay in bringing a suit for maintenance justify its dismissal. (*Tek Chand and Abdul Rashid, JJ.*) UDE SINGH *v.* MST. DAULAT KAUR. **16 Lah. 892=158 I.C. 223=8 R.L. 193=37 P.L R. 864=A.I. R. 1935 Lah. 386.**

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Manager.

See HINDU LAW.
(1) DEBTS.
(2) JOINT FAMILY.
(3) PARTITION.

Marriage.

See also HINDU LAW—RE-MARRIAGE.

———Marriage—Brother's right to arrange for sister's marriage. *See* PENAL CODE, S. 366. **1935 A.Cr.C. 200=1935 A.W.R. 939=A.I.R. 1935 All. 920.**

———*Marriage—Expenses—Maternal uncle effecting marriage of niece—Right to recoup expenses from father's estate.*

Where the paternal relatives refused to incur the expenses for the marriage of the girl and thereupon the maternal uncle who was also the legally appointed guardian effected the marriage *bona fide*, *held*, that he was entitled to recoup himself from the estate of the girl's father in the hands of the collaterals of the father. (*Dalip Singh, J.*) KHAN CHAND *v.* RAUSHAN DAS. **I.R. 1932 Lah. 174=135 I.C. 782=32 P.L.R. 886=A.I.R. 1932 Lah. 129.**

———*Marriage—Expenses—Sister's marriage—Liability for expenses.*

Though the duty of giving the sister in marriage devolves upon the brother in the absence of the father and paternal grandfather, its expenses are chargeable only upon the paternal estate in his hands ; they do not extend to his other properties. (Texts discussed and case law considered.) (*Bose, O.A.J.C.*) FULSING *v.* GANESH PRASAD. **I.R. 1931 Nag. 118=133 I.C. 390=14 N.L.J. 84=A.I.R. 1931 Nag. 147.**

———*Marriage*—Factum valet—*Mother bringing about marriage—Consent of legal guardian not obtained.*

Where a Hindu marriage has been brought about without force or fraud and has been celebrated in due form according to the customary rituals the same cannot be annulled on the ground that the mother performing the marriage had not obtained the consent of the girl's uncles, who had been appointed guardian under the law. To such a case the application of the doctrine of *factum valet* is an absolute and not a discretionary rule of law. Conditions for applicability of doctrine of *factum valet* laid down. (Texts and case-law reviewed.) (*Boys and Sen, JJ.*) RAM HARAKH *v.* JAGAR NATH. **53 All. 815=I.R. 1931 All. 609=133 I.C. 289=1931 A.L.J. 816=A.I.R. 1932 All. 5.**

———*Marriage—Form of—Asura form—Essentials of—Present of jewel to bride by bridegroom's father at betrothal—Effect of.*

According to the custom prevailing in a community a jewel was presented by the bridegroom's father and placed on the bride's neck at the time of the betrothal ceremony. The form or value of the said jewel was never the subject of a bargain but left to the pleasure of the bridegroom's father.

Held, that the present could in on sense be regarded as "bride price" or "parisam", and the marriage was therefore in an approved form and not in Asura form. The distinctive feature of the Asura form of marriage, according to the texts of Manu as well as the decided cases, is the giving of money or money's worth to the bride's father for *his benefit* or as *consideration* for his giving the girl in marriage. (*Varadachariar and Burn, JJ.*) KAILASANATHA MUDALIAR *v.* PARASAKTHI VADIVANNI. **58 Mad. 488=1935 M.W.N. 249=159 I.C. 845=8 R.M. 557=41 L.W. 336=A.I.R. 1935 Mad. 740=69 M.L.J. 142.**

———*Marriage — Gotra — Meaning of—Term as applied to Brahmins and Kshatriyas.*

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The gotras of the Brahmins are defined as being the various branches descended from the different Rishis. There is, therefore, in theory at any rate, a blood connection between such descendants. Amongst Kshatriyas and Vaishyas, on the other hand, the gotra was that of the family purohit and there is, therefore, no link of blood between such disciples and the idea of the gotra amongst these two latter castes is that of congregations as opposed to families. (*Harrison and Dalip Singh, JJ.*) SRI KRISHEN *v.* SHAM SUNDAR. **I.R. 1933 Lah. 181=142 I.C. 211=34 P.L.R. 207=A.I.R. 1933 Lah. 585.**

———*Marriage—Karao marriage.*

Karao marriages can be made only with caste women and not with non-caste women. (*Mukerji and Bennet, JJ.*) BALRAJ SINGH *v.* JAI KARAN SINGH. **I.R. 1931 All. 744=133 I.C. 792=A.I.R. 1931 All. 407.**

———*Marriage—Presumption.*

There is an established presumption that marriages are performed, especially in the case of respectable Hindus, in the Brahma form. (*Wort and Dhavle, JJ.*) KAMLA PRASAD *v.* MURLI MANOHAR. **13 Pat 550=152 I.C. 446=7 R.P. 190=15 Pat.L.T. 715=A.I.R. 1934 Pat. 398.**

———*Marriage—Property in name of wife—Presumption of benami.*

The mere fact of marriage raises no presumption with regard to any property standing in the name of a wife that the beneficial interest must be in her husband. Before any such presumption can arise there must be some evidence adduced to indicate that the property did not really belong to the wife, but in fact to the husband though standing in the name of the wife. (*Costello, J.*) SHIB KUMARI DASSI *v.* SUBUDHI TATWANI. **140 I.C. 678=I.R. 1933 Cal. 24=A.I.R. 1932 Cal 829.**

———*Marriage— Re-marriage—Low class women—Ceremonies.*

For re-marriages of women among low class people very little ceremony, if any, is apparently required. The giving of the woman to the future husband, his taking and living with her as his wife after feasting some of the biradri appears to be ample ceremony to effect a marriage. (*Young, J.*) MAHOMED JAN KHAN *v.* MT. SUNDAR. **153 I.C. 855=7 R.A. 640=A.I.R. 1934 All. 884.**

———*Marriage — Restitution of conjugal rights—Suit for, by husband—Defence—Actual cruelty need not be established—Fraud in getting himself married—Effect of.*

Suits for restitution of conjugal rights are not contemplated by Hindu Law proper. Such suits have been allowed on the analogy of similar suits in England which were dealt with originally in ecclesiastical jurisdiction. There is no stringent rule that in every case, unless actual cruelty is established, the husband is entitled to a decree for restitution of conjugal rights. Whether he is so entitled or not must be decided after a consideration of all the circumstances of the case. What is sought in such a suit is an equitable relief and equitable considerations cannot be ignored when they are in favour of the Hindu wife. The equitable relief sought in a suit for restitution of conjugal rights is not to be granted to a person who has himself been guilty of fraud and has acquired his right to apply for it by means of such fraud. Where in a suit for restitution of conjugal rights by a husband against his wife it was found that the marriage itself was brought about by a fraudulent misrepresentation by the husband that he was a bachelor,

Held, that the husband was not entitled to the relief sought for by him. (*Pandrang Rao, J.*) RUKMANI

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AMMAL *v.* T. R. S. CHARI. **157 I.C. 968=8 R.M. 183=1935 M.W.N. 869=42 L.W. 702=A.I.R. 1935 Mad. 616=69 M.L.J. 210.**

———*Marriage—Restitution of conjugal rights—Suit by husband—Defences open—Cruelty—Proof of repeated violence—If necessary—Desertion by husband—Effect of.*

One of the grounds on which a suit by a Hindu husband for restitution of conjugal rights can be successfully resisted by the wife is desertion of the latter by the former for a long period and continued disregard of his marital obligations towards her. It is not necessary for the wife to prove continued and repeated physical cruelty to successfully resist the suit. The Court in each case will consider, the entire conduct of the parties, and if it finds that the husband has been guilty of continued neglect and desertion of his wife, and that the suit has been instituted *mala fide*, it will dismiss his suit. (*Tek Chand and Abdul Rashid, JJ.*) UDE SINGH *v.* MST. DAULAT KAUR. **16 Lah. 892=158 I C. 223=8 R.L. 193=37 P.L.R. 864=A.I.R. 1935 Lah. 386.**

———*Marriage—Validity of—Adi-Dravida woman marrying sudra.*

Where an Adi-Dravida woman who was married to a Hindu of the Sudra caste, applied under S. 488, Cr. P. Code, for maintenance on behalf of herself and her child.

Held, that the marriage was valid under the Hindu Law and the wife would be entitled to maintenance, on proof of neglect and refusal to maintain on the part of the husband. (*Anantakrishna Ayyar, J.*) MANICKAM *v.* POONGAVANAMMAL. **6 R M. 555=148 I.C. 921=39 L.W. 439=35 Cr.L.J. 852=1934 M.W.N. 185=1934 Cr.C. 609=A.I.R. 1934 Mad. 323=66 M.L.J. 543.**

———Marriage—Validity of—Hindu convert to Christianity—Marriage with Christian—Reconversion to Hinduism and marriage with another Hindu. *See* HINDU LAW—CONVERSION. **67 M.L.J. 389.**

———*Marriage — Validity of— Marriage between Bahmin male and Sudra woman of* jati vaishnava *sect.*

A marriage between a Brahmin male and Sudra woman, both belonging to the *jati vaishnava* sect is valid and the children born of such a marriage are legitimate. (*Suhrawardy and Graham, JJ.*) NALINAKSHA MAJHI *v.* RAJANI KANTO DAS. **58 Cal. 1392=134 I.C. 1272=54 C.L.J. 61=35 C.W.N. 726=A.I.R. 1931 Cal. 741.**

———*Marriage—Validity of—Inter-marriage between Arya Samaj and Brahmo Samaj.*

As neither the Arya Samaj nor Brahmo Samaj observe caste, an inter-marriage between them is valid. (*Aston, A.J.C.*) RATANCHAND REWACHAND *v.* ANANDBAI. **6 I.R. (Sind) 41=145 I.C. 777=A.I.R. 1933 Sind 53.**

———*Marriage—Validity of—Marriage by Hindu male with Christian woman in England—Validity.*

Where a Hindu male marries a Christian woman in England in Christian form, it is a valid Christian marriage in spite of the Indian domile of the husband. (*Currie, J.*) SAINAPATTI *v.* SAINAPATTI. **I.R. 1932 Lah. 214=136 I.C. 262=33 P.L.R. 339=1932 Cr.C. 96=A.I.R. 1932 Lah. 116.**

———*Marriage—Validity of—Marriage between Rajput male and Sudra female—Punjab.*

According to the ancient Hindu Law, a marriage between a Rajput male and a Sudra female is valid but in comparatively recent times such marriages have fallen into disuse as they began to be looked upon with dis favour but there is no prohibition against them. The tendency of the Courts appears to be to recognize such marriages as valid and this tendency is consistent with the ordinary rule that unless clearly proved to the contrary the decision should be in favour of legality of connection between man and woman specially if the intention of the parties was to treat it as a marriage. In the Punjab generally and in the Kangra and the adjoining districts specially the people have retained the old Aryan rules and habits more than elsewhere and it is for this reason that anuloma marriages between the different main castes have been recognized as valid, both by custom and according to the personal law of the parties. The Kanaits must be treated as a class of Rajputs of a lower order and even if they be treated as Sudras, being undoubtedly Hindus, a marriage between a Kanait woman and a Rajput male must be held to be valid, both by custom and under the Hindu Law. (*Jai Lal, J.*) SURAIN CHAND *v.* INDAR. **151 I.C. 508=7 R. L 146=37 P.L.R. 330=A.I.R. 1934 Lah. 550.**

———*Marriage—Validity of — Rajputs—Ceremonies up to* sinduram *performed.*

Among Rajputs who are high caste Hindus if all the essential ceremonies are performed up to *sinduram* the marriage is valid. (*Macpherson, J.*) MT. JALSI KUAR *v.* EMPEROR. **6 I.R. (Pat.) 248=146 I.C. 298=35 Cr.L J. 20=14 Pat.L.T. 438=1933 Cr.C. 1027=A.I. R. 1933 Pat. 471.**

———*Marriage—Validity of—Sagotra marriage—Waish Aggarwals—Custom.*

The custom of sagotra marriages amongst the Waish Aggarwals is a well-established and recognized custom and although it may not be approved by a certain section of that community, it carries with it no sort of stigma or evil consequences. The issue of such marriages is perfectly legitimate and the bond is recognized on all sides. (*Harrison and Dalip Singh JJ.*) SRI KRISHEN *v.* SHAM SUNDAR. **I.R. 1933 Lah. 181=142 I C. 211=34 P.L.R. 207=A.I.R. 1933 Lah. 585.**

———*Marriage—Validity of—Sudras—Katar (or sword) marriage—Validity of.*

Among Sudras a marriage in the Katar form (in which the bride is given to the bridegroom's sword or dagger in place of to the bridegroom) is not a valid marriage, in the absence of proof that the ordinary ceremonies of a Hindu marriage were performed, and the issue of such a connection is not legitimate. (*Lord Thankerton.*) RAMSARAN SINGH *v.* THAKUR MAHABIR SEWAK SINGH. **61 I.A. 106=6 R P.C. 71=39 L.W. 198=3 A.W.R. 247=11 O.W.N. 187=36 Bom. L.R. 262=38 C.W.N. 511=59 C.L.J. 341=17 N.L. J. 31=1934 M.W.N. 304=147 I.C. 667=A.I.R. 1934 P.C. 74=66 M.L.J. 114 (P.C.).**

———*Marriage—Validity of—Use of force to bring about marriage—Effect.*

Per *Sen, J.* (*Obiter*).—In a country where marriage by capture was recognized, it may be open to question whether force by itself vitiates marriage. It may further be doubted whether a marriage begun by force but solemnized by the performance of Shastraic rituals including *saptapati* could be avoided in a Court of Law. (*Boys and Sen, JJ.*) RAM HARAKH *v.* JAGAR NATH. **53 All. 815=I.R. 1931 All. 609=133 I.C. 289=1931 A.L.J. 816=A.I.R. 1932 All. 5.**

Minority.

See also HINDU LAW—GUARDIANSHIP, JOINT FAMILY AND PARTITION.

———Minority—Minor—Arbitration—Reference to, by manager and mother—Binding nature. *See* ARBITRATION—REFERENCE TO.

HINDU LAW—Mother.

Mother.

See also HINDU LAW.
(1) GUARDIANSHIP.
(2) PARTITION—FEMALE SHARER.
(3) SUCCESSION.

———Mother—Residence—Right of—Mother being donee and joint executant of mortgage- Right, if survives. *See* HINDU LAW—WIDOW—RESIDENCE. **A.I.R. 1932 All. 676.**

Partition.

ACCOUNTS.
AGREEMENT
ALIENEE.
ARBITRATION.
BURDEN OF PROOF.
COMMON PROPERTIES.
DECLARATION OF INTENTION.
DECREE FOR.
DISQUALIFIED MEMBER.
EVIDENCE OF.
FEMALE SHARER.
ILLEGITIMATE SON.
INTEREST.
MANAGER'S LIABILITY.
MANAGER'S RIGHT.
MESNE PROFITS.
MINOR.
MODE.
PARTIAL PARTITION.
POWER OF FATHER.
PRESUMPTION.
PROOF.
PROVISION FOR DEBT.
PROVISION FOR MAINTENANCE.
PROVISION FOR MARRIAGE EXPENSES.
REMEDY.
RE-UNION.
RIGHT TO.
SEPARATION OF ONE MEMBER.
SEVERANCE OF STATUS.
SHARES.
SUBSEQUENTLY BORN SON.
SUIT FOR.
TRADING FAMILY.
WIDOWS.

Accounts.

———*Partition—Accounts—Liability of manager to account subsequent to suit.*

Ordinarily in a partition suit brought by an adult member of a joint family, the division in status may be presumed, in the absence of anything to the contrary, to have taken place from the date on which the suit is instituted. The assets available for division will be those which the joint family possessed on that date, and the manager will not liable for back accounting. But subsequent to the date of suit, the members are only tenants-in-common and so the managing member is strictly bound to account for all receipts and expenses and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate and the net income after deduction of such expenses will have to be divided equally between him and the plaintiff. (*Doraiswamy Iyer, C. J. and Ramachandra Rao, J.*) HONNIAH *v.* ERAIYA. **10 Mys.L.J. 129=37 Mys.H.C.R. 395.**

———*Partition—Accounts—Manager's liability to account for past dealings.*

It is settled law that, in the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family, a coparcener seeking partition is not entitled to call upon the manager to account for his past dealings with the family property. The coparcener is entitled only to an account of the joint family property as it exists on the date he demands partition. (*Thom and Iqbal Ahmad, JJ.*) SUKH DEO *v.* BASDEO. **57 All. 949=157 I.C. 1013=7 R.A. 244=1935 A.L.J. 582=1935 R.D. 229=1935 A.W.R. 581=A.I.R. 1935 All. 594.**

———*Partition—Accounts—Outstandings.*

Though the son is not entitled at the time of partition to an account from his father as manager so long as it is shown that the moneys were spent by him, yet an account may be ordered of the outstandings proved as remaining to be collected and of the cash in the family representing any outstandings already collected at the time of partition. (*Kumaraswami Sastri and Reilly, JJ.*) RAMAKRISHNA AYYAR *v.* PARAMESWARA AYYAR. **1931 M.W.N. 215.**

Agreement.

———Partition— Agreement by coparceners to keep properties joint and not divide—Validity—Person not party to—Right to impeach—Rule against perpetuity. *See* T. P. ACT, S. 14. **62 C.L.J. 71.**

———*Partition—Agreement between two coparceners not to exercise right of partition for a certain time—Validity of.*

An agreement between two coparceners for consideration not to exercise their right to partition for a certain time or until a certain event or for their lives is not valid. (*Reilly and Burn, JJ.*) ARUMUGHA CHETTY *v.* RANGANATHAM CHETTY. **57 Mad. 405=6 I.R. (Mad.) 308=146 I.C. 1057=38 L.W. 736=1933 M.W.N. 1177=A.I.R. 1933 Mad. 847=65 M.L.J. 741.**

———*Partition—Agreement not to divide certain properties—Enforceability.*

Where a compromise followed up by a decree provided that the properties which formed the subject-matter of the suit should be divided and further provided that certain other items not included in the suit should be kept joint for over.

Held, that the stipulation as to keeping the properties joint formed the consideration for the compromise and was enforceable in law. (*Mallik and Jack, JJ.*) JYOTISH CHANDRA NARAYAN CHOUDHURY *v.* RADHIKA CHANDRA NARAYAN. **60 Cal. 1078=149 I.C. 150=6 R.C. 520=37 C. W.N. 1018=58 C.L.J. 322=A.I.R. 1933 Cal. 892.**

Alienee.

———Partition—Alienee from coparcener of share in particular property—Right of—Suit for partition of that item alone—Maintainability. *See* PARTITION—PARTIAL PARTITION. **39 C.W.N. 1044.**

———*Partition—Alienee—Mortgagee from coparcener—Suit for partition.*

A mortgagee from a coparcener in a Hindu joint family who has got a right to possession under the deed of mortgage is entitled to maintain a suit for partition and possession. (*Murphy and Nanavati, JJ.*) MOTI MEGHAJI *v.* AMARCHAND. **I.R. 1933 Bom. 305=144 I.C. 456=35 Bom.L.R. 132=A.I.R. 1933 Bom. 121.**

Arbitration.

———*Partition—Arbitration—Award—Unequal partition made by arbitrator on moral Considerations.*

On a reference to arbitration for the settlement of disputes and the partition of joint family property, the arbitrator made an unequal partition. He gave the bulk of the property to the son and allowed the father a small monthly allowance, in view of the fact that the

father had been for some time squandering the property and incurring debts.

Held, that the arbitrator should have made the award on the basis of the legal rights of the parties and not on moral considerations, that the award was not, however, void from its inception but only voidable, and that not having been attacked on that ground, the award had become final and binding on the parties. (*Beaumont, C. J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595 = I.R. 1932 Bom. 545 = 139 I.C. 820 = 34 Bom.L.R. 862 = A.I.R. 1932 Bom. 498.**

———*Partition—Arbitration—Joint family property partitioned by award—Partition not challenged by minors—Decree-holders against minors have no right to challenge award.*

Where the minor members of a quondam joint Hindu family do not claim their rights in the family property, nor do they claim to set aside an award under which a partition of the joint property was effected and possession given more than 12 years before the present suit, but on the contrary they acquiesce in the partition of the family property when they come of age, in a suit brought by a rightful owner for a declaration that no portion of a certain shop is liable to sale in execution of the decree obtained by the decree-holders against the quondam minors, it is not open to the decree-holders to challenge the award on the ground that the minors not having been parties to the reference to arbitration the award was invalid. (*Bennet, J.*) LALJI SAHAI *v.* PARSOTTAM AHIR. **153 I.C. 678 = 7 R.A. 563 = 4 A. W.R. 459 = A.I.R. 1934 All. 687 (1).**

———*Partition—Arbitration—Reference to effect.*

A reference to arbitration to settle the terms of partition would operate to effect a partition. 50 C. 74 (P.C.), Foll. (*Beaumont, C. J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595 = I.R. 1932 Bom. 545 = 139 I.C. 820 = 34 Bom.L.R. 862 = A.I.R. 1932 Bom. 498.**

Burden of proof.

———*Partition—Burden of proof.*

A family once joint is presumed to retain that status unless it is shown to have become divided and those who allege that the members of a joint Hindu family had separated must prove that there was a separation at some material time. 9 M.I.A. 543; 11 M.I.A 369; A.I.R. 1925 P.C. 132 and A.I.R. 1927 P.C. 52, Ref. (*Mahadevayya J.*) PAPANNA *v.* NARASIAH. **10 Mys. L.J. 261 = 37 Mys.H.C.R. 219.**

———*Partition—Burden of proof—Separation of one member—Dayabhaga law.*

Under the Dayabhaga school of Hindu Law, any one setting up a previous partition must prove that fact, *i.e.*, the burden is on him to prove that there has been a disruption of the joint family. This rule is not altered by reason of an admission made by a coparcener of separation of one member. Separation of one member under the Dayabhaga school does not constitute separation of all. (*Mitter and Patterson, JJ.*) GOURHARI SABHASUNDAR *v.* SHYAMA SUNDARI SABHASUNDAR. **153 I.C. 1055 = 7 R.C. 418 = 38 C.W.N. 977 = A.I.R. 1934 Cal. 824.**

———*Partition—Burden of proof—Family property in the name of female member—Burden of proof.*

In a suit for partition, the burden of proof is on the plaintiff to show that a land standing in the name of a female member of the family was really purchased *benami* in her name for some ulterior purpose such as depriving the plaintiff of his rights and if that burden is not discharged, it is unnecessary to examine the defendant's case. 33 C. L.J. 201, Ref. (*Ramesam, O.C.*

J. and Cornish, J.) PARVATAMMA *v.* SUBBAYYA. **55 Mad. 202 = 135 I.C. 457 = I.R. 1932 Mad. 137 = 34 L.W. 704 = A.I.R. 1932 Mad. 144.**

Common properties.

———*Partition—Common properties—All common properties not included—Effect of.*

A suit for partition of common properties, and not joint properties, is not liable to be dismissed on the ground that the suit did not include all the common-properties available for partition. 46 M. 844, Ref. (*Tapp, J.*) THAKAR SINGH *v.* SANT SINGH. **I.R. 1933 Lah. 143 = 141 I.C. 567 = 34 P.L.R. 567 (2) = A. I.R. 1933 Lah. 465.**

Declaration of intention.

———*Partition—Declaration of intention—Instructions to undivided brother to give a share to wife whether amount to.*

Instructions given by a deceased coparcener prior to his death to his undivided brother to give his eight-annas share of the properties to one of his wives and also authorizing her to adopt a son without any other indication of an intention to that effect, cannot be construed as amounting to an unequivocal and unambiguous declaration of an intention to separate. (*Patkar and Tyabji, JJ.*) SHIVAPPA RUDRAPPA *v.* RUDRAVA CHANBASAPPA. **57 Bom. 1 = 142 I.C. 164 = I R. 1933 Bom. 181 = 34 Bom.L.R. 539 = A.I.R. 1932 Bom. 410.**

———*Partition—Declaration of intention—Separation—Intention not real or abandoned—Sufficiency of.*

A mere notice of an intention to separate, when such intention is not real or is abandoned soon after, which is only in the nature of a threat, does not suffice to effect severance in status. (*Bhide, J.*) PHANGAN SINGH *v.* HUKAM SINGH. **I.R. 1933 Lah. 96 = 141 I.C. 434 = 34 P.L.R. 293 = A.I.R. 1933 Lah. 588.**

———*Partition—Declaration of intention—Sufficiency of—Living jointly with the other members—Separation.*

It is well settled that a member of a joint family may effect a separation in status by giving a clear and unmistakable intimation by his acts or declarations of a fixed intention to become separate, even though he goes on living jointly with the other members of the family, and there is no division of property. 58 I.A. 220 (P.C.) Ref. to. (*Sir John Wallis.*) RAMASRAY PRASAD CHOUDHARY *v.* BABUYEE RADHIKA DEVI. **159 I.C. 335 = 16 Pat L.T. 851 = 1935 O.W N. 1268 = 1936 A L J. 20 = 1936 A.W.R. 72 = 8 R.P.C 87 = 43 L.W 172 = 38 Bom.L.R. 120 = 40 C.W.N. 385 (P.C)**

———*Partition—Declaration of intention—Unequivocal intimation of intention—No separation in residence, food, etc.—Effect.*

A separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co sharers of his desire to sever himself from the joint family; though the separation was only a separation in interest and is not followed by any separation in residence, food or worship or any actual division of assets. 35 A. 80 (P.C); 43 C. 1031 (P.C.); 39 A. 496, Foll. (*Sir George Lowndes.*) BAL KRISHNA *v.* RAM KRISHNA. **53 I.A. 220 = 53 All. 300 = 132 I.C. 733 = 1931 M.W.N. 793 = I.R. 1931 P.C. 221 = 54 C.L J. 131 = 33 Bom.L.R. 1280 = 1931 A.L.J. 499 = 34 L.W. 13 = 35 C.W.N. 815 = A.I.R. 1931 P.C. 154 = 61 M.L.J. 362 (P.C.).**

[R. 34 P.L.R. 293 (294); 57 B. 1 (9, 19).]

Decree for.

———*Partition—Decree for—Liberty to apply—Scope of—Application to set aside fund for temple—Permissibility.*

HINDU LAW—Partition.

Liberty to apply means liberty to carry out the provisions of the decree. Under the guise of such a liberty in a partition suit, a notice of motion cannot lie for the purpose of asking the Court to set aside a fund for the maintenance and upkeep of a temple, when there is no endowment or trust created in its favour or mentioned in the decree. (*Wadia, J.*) BANSILAL *v.* GOVINDLAL. **140 I.C. 819=I.R. 1933 Bom. 45=34 Bom.L.R. 733 =A.I.R. 1932 Bom. 439.**

Disqualified member.

———*Partition—Disqualified member—Severance in status—Coparcener of unsound mind—Intention to separate expressed by guardian.*

A member of a joint family who is a minor or of unsound mind is incapable of giving expression to an effective intention to separate; but such intention can be expressed by his guardian and has the legal effect of bringing about disruptions of the joint family, provided the Court is of opinion that it is to the benefit of the minor or the person of unsound mind to separate. Once the Court has recorded a finding to that effect, the separation follows as a matter of law and is not dependent on the fact of the share of the minor or the person of unsound mind being actually separated by metes and bounds. (*Thom and Iqbal Ahmad, JJ.*) RAM NARAIN SAHU *v.* MAKHNA. **8 R.A. 18=156 I.C. 736 =1935 A W.R. 936=A.I.R. 1935 All. 875.**

Evidence.

See also PROOF, *infra.*

———*Partition—Evidence of.*

Mere separate residence and following distinct allocations cannot in themselves create a disruption of a joint Hindu family. (*Middleton, J.C. and Saaduddin, A.J. C.*) MALIK PARTAP SINGH *v.* HARKISHAN SINGH. **147 I.C. 1037=6 R. Pesh. 42=35 P.L.R. 260=A.I. R. 1933 Pesh. 85.**

———*Partition—Evidence of—Intention of parties—Cesser of commensality.*

Partition is a question of intention and all that the law requires is that the intention should be clearly and unequivocally expressed whether it is by explicit declaration or by conduct. Though mere cesser of commensality or separate enjoyment of distinct portions of the properties or separate definement of shares in revenue or survey paper or mere proof of separate transactions entered into by the coparceners with strangers will not be conclusive to prove separation in estate, it does not, however, follow that even though all these elements may be present in a case and no matter what special significance any of these various elements may have having regard to the facts of a particular case, they can under no circumstances be sufficient to prove separation. Cesser of commensality, though always it may not be conclusive may yet be a decisive factor in determining the intention of the parties, in the circumstances of a particular case. 54 I.A. 413; 14 M.I.A. 412 and 31 C. 262, Ref. (*Wort and Fyzl Ali, JJ.*) PURNIMA DEBYA *v.* NAND LAL OJHA. **11 Pat. 50=I.R. 1932 Pat. 113=136 I.C. 577=12 Pat.L.T. 582=A.I.R. 1932 Pat. 105.**

———*Partition—Evidence of—Partition deed—Subsequent conduct—Relevancy of.*

If a deed of partition is unequivocal in its language and the intention of the parties is clear from it, it is not necessary to prove acts in support of the deed. 50 A. 615, Foll. (*Jackson, J.C.*) TIKKILAL *v.* GULABCHAND. **27 Nag.L.R. 343=136 I.C. 233=I.R. 1932 Nag. 25 =A.I.R. 1932 Nag. 15.**

———*Partition—Evidence of—Separate alienations and business.*

HINDU LAW—Partition.

Where no partition is proved, the initial presumption is that the family is joint. Where separate alienations are made by the brothers with each other's consent they cannot prove any disruption of the family. Similarly the mere fact that the two brothers carried on separate business is not in any way inconsistent with their being members of a joint family. (*Coldstream and Bhide, JJ.*) RAJ KISHORE *v.* MADAN GOPAL. **13 Lah. 491 =143 I.C. 249=I.R. 1933 Lah. 322=33 P.L.R. 829= A.I.R. 1932 Lah. 636**

———*Partition—Evidence of—Severance of status.*

Where an alleged partition deed talks of the separate character of the businesses carried on by some of the members of the family, that does not imply a disruption of joint family. (*Mukerji and Niamatullah, JJ.*) CHOKHEY LAL MURLIDHAR *v.* COMMISSIONER OF INCOME-TAX. **A.I.R. 1932 All. 471.**

Female sharer.

———*Partition—Female sharer—Allotment of share to wife, mother or grandmother—Wife, mother or grandmother, when become owner thereof.*

Under the Mitakshara Law, the mother or the grandmother is entitled to a share when sons or grandsons divide the family estate between themselves, but she cannot be recognized as the owner of such share until the division is actually made as she has no pre-existing right in the estate except a right of maintenance. She cannot claim a share upon a mere severance of the joint status of the family. There is no difference in this respect between the rights of a wife and those of a mother or grandmother. Where, therefore, a preliminary decree in a partition suit is not carried out and no actual division of the joint family property is made, the wife does not become the owner of the share mentioned therein, (*Sir Lancelot Sanderson*) PRATAP MULL *v.* DHANABATI BIBI. **63 I.A. 33=63 Cal. 691=1936 A.L.J. 89=43 L.W. 177=1936 M.W.N. 5=17 Pat. L.T. 45=38 Bom.L.R. 323=1935 A.W.R. 1517= 159 I.C. 1080=62 C.L.J. 453=40 C.W.N. 193=19 N.L.J. 1=1936 O.W.N. 1=A.I.R. 1936 P.C. 20 =70 M.L.J. 296 (P.C.).**

———Partition—Female sharer—Daughter—Properties given to widowed daughter at partition equally with sons—Interest taken—Life estate. *See* HINDU LAW—GIFF. **69 M.L.J. 320.**

———*Partition—Female sharer—Mother—Partition between one son and grandson by deceased son—Mother's right to share.*

In the case of a partition between a son and a grandson, being the son of a deceased son, the mother is entitled to a share. It is immaterial whether she is the stepmother of the living or deceased son. She is entitled to a share equal to that of each of her husband's son. The property is to be divided after making provision for the maintenance of other widows in the joint family. 34 All. 505, Dist.; 50 All 532 and 38 All. 83, Rel. on. (*Niamatullah and Bennet, JJ.*) RAM PEARI *v.* HARI DUTT. **6 I.R. (All.) 347=146 I.C. 810=A.I.R. 1933 All. 562.**

———*Partition—Female sharer—Mother—Quantum of share.*

When a suit is brought by the son for partition during the lifetime of the father, the mother is entitled to a share. That share is equal to that of a son but from that share must be deducted the value of any stridhan received by her as a gift from her father-in law or her husband, 5 C. 845; 32 Cal. 234; 52 All. 596; 17 Bom. 271 and 31 Bom. 54, Foll. (*Patkar and Nanavati, JJ.*) HUSHENSAB RAJESAB *v.* BASAPPA PURA-

HINDU LAW—Partition.

DAPPA. **140 I.C. 736=I.R. 1933 Bom. 27=34 Bom. L.R. 1325.**

———*Partition—Female sharer — Wife's right to share.*

On a partition between her husband and his son, the wife is entitled to a share equal to that of a son, and to hold and enjoy her share separately even from her husband, though she cannot herself demand a partition. (*Costello and Lort Williams, JJ.*) DHANABAPI BIB. *v.* PROTAPMULL AGARWALLA. **61 Cal 1056=154 I.C. 655 (2)=7 R.C. 514=38 C.W.N. 1045=A.I.R. 1935 Cal. 131.**

Illegitimate son.

———Partition—Illegitimate son—Suit for partition against legitimate son. *See* HINDU LAW—SUCCESSION—ILLEGITIMATE SON. **64 M.L.J. 500.**

Interest.

———*Partition—Interest—Outstandings collected by manager—Right of members to claim interest on.*

There is no foundation, either legal or equitable, for the giving of interest to one member of a joint Hindu family who sues for partition, upon outstandings collected by the manager but not invested by him. (*Stone and Varadachariar, JJ.*) YASOBADRA NAINAR *v.* SAMANTHABADRAN. **59 Mad. 154=160 I.C. 602=8 R.M. 673=1935 M.W.N. 1169=42 L.W. 674=A.I.R. 1936 Mad. 12=70 M.L.J. 311.**

———Partition—Interest—Trading family—Interest from date of suit to decree—Plaintiff's right to. *See* PARTITION—TRADING FAMILY. **40 L.W. 619.**

Manager's liability.

See also ACCOUNTS, *supra.*

———*Partition—Manager's liability—Cultivation of family lands—Partition proceedings.*

A manager or other member of a joint Hindu family in possession of the family lands is not under any legal obligation to the other members of the family to do anything by way of cultivating of such lands pending partition proceedings. (*Stone and Varadachariar, JJ.*) YASOBADRA NAINAR *v.* SAMANTHABADRAN. **59 Mad. 154=160 I.C. 602=8 R.M. 673=1935 M.W.N. 1169=42 L.W. 674=A.I.R. 1936 Mad. 12=70 M.L.J. 311.**

Manager's right.

———*Partition—Manager's right—Income-tax paid by manager—Right to claim credit for—Excessive assessment owing to non-production of accounts—Liability for.*

Where the manager of a joint Hindu family who is in possession of the account books, fails to submit an income tax return and to produce the account books and in consequence renders himself liable to a penal assessment, he cannot at a partition claim credit for entire amount of the income-tax paid by him. He can only get credit for such sum as he would have had to pay if he had acted in a reasonable manner. (*Stone and Varadachariar, JJ.*) YESOBADRA NAINAR *v.* SAMANTHABADRAN. **59 Mad. 154=160 I.C. 602=8 R.M. 673=1935 M.W.N. 1169=42 L.W. 674=A.I.R. 1936 Mad. 12=70 M.L.J. 311.**

Mesne profits.

———Partition—Mesne profits—Person in possession—Accounting for mesne profits. *See* JOINT FAMILY—ALIENATION—COPARCENER. **A.I.R. 1935 Pat. 80.**

Minor.

See also DISQUALIFIED MEMBER, *supra.*

———*Partition—Minor—Right to ask for partition through next friend.*

HINDU LAW—Partition.

It is competent in Hindu law to partition family property, although one of the coparceners may be a minor. Where the father had admittedly squandered a considerable part of the property, the minor is entitled, through his next friend, to ask for a partition of family property. (*Beaumont, C. J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595=I.R. 1932 Bom. 545=139 I. C. 820=34 Bom.L.R. 862=A.I.R. 1932 Bom. 498.**

———*Partition—Minor—Suit for partition by minor represented by mother—Death of minor pending—Right of minor's legal representative to continue suit.*

Where the plaintiff was a minor and his mother on his behalf filed a suit for partition against the other members of the joint family to which he belonged, and during the pendency of the suit, before the preliminary decree had been passed, the minor died, and the question in dispute revolved on the points whether the suit abated on the death of the minor plaintiff and whether it was open to his legal representatives to proceed with the trial and obtain a decree on showing that when the partition suit was instituted, it was for the benefit of the minor,

Held, that the suit did not abate in such a case but that the Court should proceed with the trial of the suit; and if it should come to the conclusion on the evidence that the suit as instituted was for the benefit of the minor, it should pass a decree, the benefit of which will go to the legal heirs of the deceased minor; hence the mother could bring herself on record and ask for a decision on the issue whether the suit would be for the benefit of the minor. 41 Mad. 442, A.I.R. 1930 Mad. 486, Appr. (*Ramesam, Anantakrishna Iyer and Cornish, JJ.*) RANGASAYI *v.* NAGARATHNAMMA. **57 Mad. 95=6 I.R. (Mad.) 227=146 I C. 269=1933 M.W.N. 1324=38 L.W. 676=A.I.R. 1933 Mad. 890=65 M. L.J. 630 (F.B.).**

———*Partition—Minor—Suit for partition—Separation—Date of—Date of suit or date of decree.*

Per *Agarwala, J.*—When a partition suit instituted by a Hindu minor is decreed, the partition is effective from the date when the suit was instituted. (*Wort, Khaja Mohammad Noor and Agarwala, JJ.*) ATUL KRISHNA ROY *v.* LALA NANDANJI. **14 Pat. 732=157 I.C. 53=8 R.P. 69=16 Pat.L.T. 393=A.I.R. 1935 Pat. 275 (F.B.).**

———*Partition—Minor—Suit—Severance in status—Death of plaintiff—Right of heirs to continue.*

The rule that the institution of a suit for partition of joint Hindu family property effects a severance of the joint status is not applicable to a suit on behalf of a minor, for, in such a suit, it is for the Court to determine whether a decree for partition will be beneficial to the minor; and where a minor plaintiff dies during the pendency of the suit, his legal representatives are not entitled to continue the suit. (*Murphy and Divatia, JJ.*) CHHOTABHAI *v.* DADABHAI. **152 I.C. 715=7 R.B. 166=36 Bom.L.R. 738=A.I.R. 1935 Bom. 54.**

Mode.

———*Partition—Mode.*

Partition should be effected with due regard to the possession of the parties. (*Addison and Hilton, JJ.*) JAI DAYAL *v.* NARAIN DAS. **32 P.L.R. 854=136 I.C. 270 (2)=I.R. 1932 Lah. 222 (2)=A.I.R. 1932 Lah. 127.**

———*Partition—Mode—Property alleged to be debutter but not proved to be so.*

Where there is no evidence of dedication of the Puja or Thakur dalan by the Original owner for

the purposes of worship of the idol, and it is found that the dalan is used as Thakur bari or Thakur mondop *i.e.*, as a place where the family deity is used to be worshipped, this property should not be excluded from partition. The proper order to make would be this: Let the Thakur or Puja dalan and the attached verandah be divided if none of the three parties to the partition suit is willing to take exclusive possession of the Thakur dalan by paying to the other parties the proportionate share of the value. If they so agree, then let the Thakur dalan be given to the Party who would pay the proportionate share of the value to the other co-sharers. If they cannot agree, the property must be divided along with the other properties. In the event of either all the three parties or any two of them being willing to take exclusive possession of the Thakur dalan and the attached verandah, let the dalan and the verandah be given to him who will pay the highest value. (*Mitter, J.*) SACHINDRA KUMAR *v.* HEM CHANDRA. **35 C.W.N. 151=I.R. 1931 Cal. 608=132 I.C. 688=A.I.R. 1931 Cal. 573.**

Partial partition.

———*Partition—Partial partition—Admission of partition of some of joint family properties—Presumption is whole property has been partitioned.*

When persons, who are admittedly members of a joint Hindu family and own joint property, admit partition of some of the family property, the presumption is that the whole of the property has been partitioned and it is for the person who alleges that the property which was once joint, still remains to be the joint property of the family, to prove this fact. 109 I.C. 714; A.I.R. 1932 Mad. 207; A.I.R. 1918 Lah. 366, Rel. on. (*Jai Lal, J.*) KANSHI RAM *v.* DUNI CHAND. **154 I.C. 684=7 R. L. 595=A.I.R. 1934 Lah. 707.**

———*Partition—Partial partition—Intention of parties.*

A partition of a portion of the joint family property does not necessarily result in a disruption of the joint family irrespectively of the intention of the parties concerned. Where however such intention was proved and also that an actual partition of a substantial portion of the property, *held*, that in the absence of evidence it could not be said that parties intended to continue joint with respect to the property which was not yet partitioned (*Bhide and Tapp, JJ.*) MOHAN SINGH *v.* MT. GUR DEVI. **12 Lah. 767=I.R. 1931 Lah. 498=131 I.C. 738=33 P.L.R. 196=A.I.R. 1931 Lah. 728.**

———*Partition—Partial partition—Permissibility.*

The rule is firmly established that where a suit for partition is brought by one co-sharer against the other co-sharers, it should embrace the whole family property. The exceptions governing this rule held to be inapplicable to the facts of the case. (*Shadi Lal, C. J. and Walker, J.*) SHIV DYAL *v.* RAM JIWAYA. **12 Lah. 574=131 I.C. 209=32 P.L.R. 376=A.I.R. 1931 Lah. 603.**

———*Partition—Partial partition—Presumption.*

The separation of one member of a Hindu joint family does not give rise to a presumption of partition of the remaining members also. The question is one of partition and has to be proved as any other fact. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) KEMPALAKKIAH *v.* LAKSHMA SETTY. **10 Mys.L.J. 42=37 Mys.H.C.R. 263.**

———*Partition — Partial partition — Presumption against.*

When a partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties. 32 M. 191; 26 I.A. 514; 31 I.C. 674, Ref. (*Wort and Fazl Ali, JJ.*) PURNIMA DEBYA *v.* NANDLAL OJHA. **11 Pat. 50=I.R. 1932 Pat. 113=136 I.C. 577=12 Pat.L.T. 582=A.I.R. 1932 Pat. 105.**

———*Partition — Partial partition—Presumption—Burden of proof.*

When it is admitted or proved that a partition has already taken place, the presumption is that it has been a complete partition and it lies upon a person alleging that family property in the exclusive possession of one of the members of the family after such partition is liable to be partitioned, to make good his allegation by proof. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) KUMARAPPA CHETTI *v.* VANANGAMUDI VELUVATTI THEVER. **55 Mad. 483=I.R. 1932 Mad. 413=137 I.C. 616=35 L.W. 35=1931 M.W.N. 1323=A.I.R. 1932 Mad. 207=62 M.L.J. 141.**

[**Rel.** 1934 L. 707 (708).]

———*Partition — Partial partition—Presumption—Character of undivided portion.*

Where there is a partial partition of the joint family property, there is no presumption that the rest of the property remains joint or that the joint family was put an end to and that with regard to the undivided property the members of the family hold as tenants-in-common and not as coparceners. Once it has been proved that a partial partition has taken place, it remains a question to be decided by evidence, what was intended with respect to the undivided portion of the property. (*Harrison and Addison, JJ.*) SHAH DEV SINGH *v* LAJWANTI KUER. **I.R. 1932 Lah. 479=138 I.C. 401=33 P.L.R. 747=A.I.R. 1932 Lah. 550.**

———*Partition—Partial partition—Rule against—Exception to.*

The rule that every partition suit shall embrace all the joint family property is subject to certain qualifications. When certain property which should have been divided between father and his sons was in the hands of a stranger who was setting up an adverse title thereto, a second suit for the partition of that property is not barred. 7 Bom. 272 and 23 Bom. 597, Foll. (*Wild, J. C. and Aston, A. J. C.*) SHAMSUDDIN *v.* CHATOMAL. **I.R. 1931 Sind 139=134 I.C. 395=A.I.R. 1931 Sind 143.**

———*Partition—Partial partition — Separation in status—Inference.*

Where two brothers effected a partition of their properties at one place and entered into possession of their respective shares but it appeared that they held certain other properties jointly, *held*, that the jointness regarding the other properties did not militate against their having put an end to their joint status as members of a Mitakshara joint family. Principles governing division in status applied. (*Mukerji and Guha, JJ.*) AMRITA LAL BAISYA *v.* PRATAB CHANDRA CHAKRABARTY. **I.R. 1931 Cal. 417=130 I.C. 897=52 C.L.J. 492=A.I.R. 1931 Cal. 144.**

———*Partition — Partial partition — Suit between alienees from different members of joint family—Maintainability.*

As between members of a joint family, no suit for partial partition lies. But a member or members of a joint family may sue an alienee from a member of the joint family for his or their share of the property alienated without suing for a general partition. In so doing, they affirm the sale by the other member or members but the real basis of the rule is that as the rule against

partial partition is a rule, for the protection of the joint family against being harassed by multiplicity of suits at the instance of alienees from recalcitrant members, they can waive the benefit of it and bring a suit to separate themselves from the undesirable stranger. Similarly the rule against partial partition does not apply to a suit by an alienee from one member against another alienee from another member of the joint family, irrespective of the consideration as to who is the prior alienee in point of time. The right of the one alienee to sue the other follows as a corollary of the right of one member to sue the alienee for partial partition. So one alienee is entitled to bring a suit against the other for partition of those items in respect of which the contending parties to the suit are tenants in-common. (*Ramesam and Cornish, JJ.*) KANDASWAMI GOUNDAN *v.* VENKATRAMA GOUNDAN. **6 I.R. (Mad.) 210=146 I.C. 64=1933 M.W.N. 1110=38 L.W. 498=A.I.R. 1933 Mad. 774=65 M.L.J. 696.**

———*Partition—Partial partition—Suit for—Maintainability.*

A suit for a partition of a portion only of the family property is not maintainable. (*Bhide, J.*) PHANGAN SINGH *v.* HUKAM SINGH. **I.R. 1933 Lah. 96=141 I.C. 434=34 P.L.R. 293=A.I.R. 1933 Lah. 588.**

Power of father.

———*Partition—Power of father—Deed of transfer by father in favour of third person—If can effect.*

No doubt the father in a Hindu family has power to effect a partition between himself and his sons and an unequivocal expression of an intention to separate amounts to a partition. At the same time a partition cannot be effected by the father executing a deed of transfer in favour of a third person and an expression of intention to separate or even an actual attempt to effect a partition in such a deed, will not amount to partition. A partition must be effected before the transfer and cannot be effected by the transfer itself. (*Staples, A. J. C.*) LAXMINARAIN SHEONATH *v.* TRIMBAK. **31 N.L.R. 151=7 R.N. 146=153 I.C. 552=A.I.R. 1934 Nag. 278.**

———*Partition—Power of father—Family consisting of father and lunatic son—Partition effected by father—Validity as against after-born son of lunatic son—If effects severance in status—Declaration of intention to coparceners—Necessity.*

When a Hindu father brings about a division between himself and his sons, such an act is done in the exercise of a special power, which he has under the texts of Hindu Law, and is independent of the doctrine of severance of status among coparceners generally by a declaration of intention to become divided. The father's power comprises two things: (1) division between himself and his sons; (2) divisions between the sons *inter se*. Whether or not in the latter case there may be a mere division of status at the father's choice, the possibility of a severance of status in the former case may be recognized, for the father need not take a share for himself. Although there can be no partition as against future coparceners except through living coparceners, it cannot be said that a disqualified son such as a lunatic is not in any sense a coparcener. There is a dormant coparcenership in him and there is no reason why the possibility of such a severance of status, as would put an end to the right of succession by survivorship, should be denied. Where, therefore, after a partition effected by a father between himself and his lunatic son, the latter's wife, being *enceinte* at the time of the father's death, gives birth to a son, the partition, though it cannot be upheld as a partition of specific shares, certainly

effects a severance in status between the father and the lunatic son. The latter and his son are therefore entitled to a division of properties into equal shares and to delivery of one share to themselves. (*Varadacharıar and Burn, JJ.*) VENKATESWARA PATTAR *v.* MAN KAYAMMAL. **160 I.C. 624=8 R.M. 696=1935 M.W.N. 1271=42 L.W. 955=A.I.R. 1935 Mad. 775=69 M.L.J. 410.**

———*Partition—Power of father—Father effecting partition—Consent of sons immaterial—Equal shares to be allotted.*

According to Hindu Law it is competent to a father to make a partition of the joint property during his lifetime, even without the consent of his sons and the partition so made binds the sons. This rule is however subject to the proviso that on partition, such son takes a share equal to that of the father. (*Shadi Lal, C. J. and Walker, J.*) SHIV DVAL *v.* RAM JIWAYA. **12 Lah. 574=131 I.C. 209=32 P.L.R. 376=A.I.R. 1931 Lah. 603.**

Presumption.

———*Partition — Presumption—Separation proved—Plea that some property continues to be joint—Burden of proof.*

If it is proved or admitted that a partition has already taken place, the burden of proof lies upon him who alleges that a portion of the family property is still joint property. There is a presumption as to jointness, but once separation is proved, there is no presumption that certain properties continued to remain joint. (*Thomas, J.*) MULAIM SINGH *v.* PULJHARI. **1935 O.W.N. 233=1935 R.D. 106.**

Proof.

See also EVIDENCE, *supra.*

———*Partition—Proof—Evidence of subsequent conduct—Relevancy.*

If the evidence as to the actual fact of separation is not conclusive, evidence as to subsequent conduct is not only relevant but most valuable, as it can materially assist the Court in coming to a conclusion upon the issue whether or not separation took place as alleged. On the other hand, if the evidence called to prove actual separation is clear and unambiguous, then evidence as to subsequent conduct inconsistent with actual separation cannot affect the issue, unless it establishes an actual re-union after the proved separation. (*Harries, J.*) RAGHUNATH SAHAI *v.* KUNJ BEHARI LALL. **158 I.C. 430=8 R.A. 301=1935 A.L.J. 1180=1935 A.W.N. 1122.**

———*Partition—Proof—Oral evidence—Witnesses not actually present—Sufficiency.*

The matter of partition or separation is often a question of reputation and notoriety and can be proved by the oral evidence of witnesses who are competent to give evidence of the facts. The mere fact that they were not present at the time when the partition took place is not a sufficient ground to disregard their evidence. (*Wort and Varma, JJ.*) KAMTA PRASAD *v.* DURGA DAT AWASTHI. **155 I.C. 961=7 R.P. 655=A.I.R. 1935 Pat. 368.**

———*Partition—Proof—Residence at different places*

Where the wife and family of a coparcener lived in the family house but he lived at another place managing the property of his relations,

Held, that his separate residence did not prove disruption of the joint family. (*Bisheshwar Nath and Nanavutty, JJ.*) SADDHA SINGH *v.* MANGAL SINGH. **I.R. 1933 Oudh 139=142 I.C. 860=10 O.W.N. 58=A.I.R. 1933 Oudh 166.**

HINDU LAW—Partition.

———*Partition—Proof—Separate enjoyment for long period—Inference.*

The severance of joint status is a matter of individual volition. It may be effected by agreement Where possession of different portions of joint family property by different coparceners can only be explained by assuming that there has been either a formal partition by metes and bounds or tacit agreement to separate, the Court is justified in assuming that partition has been effected in one way or the other, although owing to lapse of time it is impossible to prove by definite evidence how and when it had happened. And the onus of proving that the property is joint lies on the coparcener who alleges it. (*Rangnekar and Broomfield, JJ.*) LINGANGOUDA *v.* SANGANGOUDA. **6 I.R. (Bom.) 120=145 I.C. 780=35 Bom.L.R. 779=A.I.R. 1933 Bom. 386.**

———*Partition—Proof—Separate holding of property for cultivation purposes.*

The mere fact that certain members of the family are in possession of certain portions of the property cannot by itself prove separation. If some of the members are given certain lands for cultivation in order to meet their pocket expenses, such possession cannot afford any evidence of separation. (*Bisheshwar Nath and Nanavutty, JJ.*) SADDHA SINGH *v.* MANGAL SINGH. **I.R. 1933 Oudh 139=142 I.C. 860=10 O.W.N. 58=A.I.R. 1933 Oudh 166.**

———*Partition—Proof—Separation in residence, mess and business.*

When the members of a Hindu family are separated in residence and separate in mess and are carrying on business at separate places far distant from each other and one of them actually carries on business privately in the ancestral home on his own account, there is ample proof of disruption of the family. (*Dalip Singh and Abdul Qadir, JJ.*) LAL CHAND *v.* PUNJAB NATIONAL BANK, LTD. **6 R.L. 597=148 I.C. 766=A.I.R. 1934 Lah. 555.**

Prv ision for debt.

———*Partition—Provision for debt—Absence of arrangement for discharge of debts—Effect.*

Per *Wort and Khaja Mohammad Noor, JJ.*—Simply because at the time of a family partition no arrangement is made for payment of the family debts it cannot be said that the partition is necessarily not *bona fide*. For a partition to be *mala fide* or dishonest, it must be shown that it was made with a view to defeat the claim of the creditors. The members of a joint Hindu family are entitled to come to an honest arrangement to divide the assets, leaving it later on for them to contribute towards the payment of the debts. It may be that the debts have not become payable or ready money may not be available to pay the debts at once. (*Wort, Khaja Mohammad Noor and Agarwala, JJ.*) ATUL KRISHNA ROY *v.* LALA NANDANJI. **14 Pat. 732=157 I.C 53=8 R P. 69=16 Pat.L.T. 393=A.I.R. 1935 Pat. 275 (F.B.).**

———*Partition—Provision for debt*—Bona fide *partition—Absence of provision—Right of creditor.*

A *bonafide* partition can only mean a partition which is not only fair with regard to the shares of the members of the family, but is *bona fide* as regards the creditors also. For the partition to be *bona fide*, either all the existing debts of the father, which are not tainted with illegality or immorality, should be discharged before the division of the property takes place, at any rate, adequate arrangements for their payment should be made. Where no provision is made for payment of debts, the creditor can proceed against the shares of the divided sons to enforce the debts binding on the joint family. (*Sulaiman, A.C.J., Mukerji, Benerji, Young and Bennet, JJ.*) BANKEY LAL *v.* DURGA PRASAD. **53 All 868=135 I.C 139=I R. 1932 All. 27=1931 A.L.J. 917=A.I.R. 1931 All. 512 (F.B.).**

[**R.** 1934 A. 212 (213); **F.** 14 L. 399 (403); **Disc.** 14 Pat. 732 (F.B.).]

———*Partition—Provision for debts—Father's debts—Partition suit.*

In a suit for partition, provision must be made for the payment of the father's debts and the rest of the property must be divided. A decree cannot be made to the effect that whenever creditors proceed against the son in the first instance the son will be entitled to contribution from the father. This kind of accounting between father and son in respect of pre-partition debts cannot be allowed. The proper course is to give a direction for paying off all debts binding on the son and for division of the balance. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHI PILLAI *v.* SUNDARAMURTHY PILLAI. **55 Mad. 558=138 I.C. 225=I.R. 1932 Mad. 532=35 L.W. 592=A.I.R. 1932 Mad. 381=63 M.L. J. 37.**

———*Partition—Provision for debt—Nominal transaction—No provision to pay father's debt nor father allotted larger share.*

A partition took place between the father and his minor sons. The father at the time was heavily indebted. All the immovable property allotted to the father was immediately mortgaged for its full value. No arrangement whatever was made for the division of the family debts, nor a larger share was allotted to the father on partition to enable him to satisfy his personal debts, for which the sons would become liable.

Held, the partition was nominal, and was only entered into to defeat the rights of creditors. (*Grille, A.J.C.*) NARAYAN KUNBI *v.* RAMKISAN. **I R. 1933 Nag. 221=144 I.C. 229=A.I.R. 1933 Nag. 103.**

Provision for maintenance.

———*Partition — Provision for maintenance—Mother.*

A provision for the maintenance of the mother is obligatory and binding on the share of the sons at the time of partition. 57 M. L. J. 826 (F.B.) Ref. to. (*Kumaraswami Sastri and Reilly, JJ.*) RAMAKRISHNA AYYAR *v.* PARAMESWARA AYYAR. **1931 M.W.N. 215.**

Provision for marriage expenses.

———*Partition—Provision for marriage expenses—Expenses of marriage of unmarried coparcener—Anticipatory provision—If to be made in suit.*

There is no obligation on the joint family, after severance of the joint status has been effected, in respect of the future marriage of a coparcener who is unmarried at the time of the severance, and a partition decree need not therefore contain an anticipatory provision for the marriage expenses. The fact that the partition suit is instituted by an alienee of a coparcener's share from the Official Receiver and not by the coparcener himself does not make any difference. (*Beasley, C.J. and Madhavan Nair, JJ.*) VENKATARAYUDU *v.* SIVARAMAKRISHNAYYA. **58 Mad. 126=153 I.C. 368=7 R.M. 346=40 L.W. 552=1934 M.W.N. 864 (2)=A.I.R. 1934 Mad. 676=67 M.L.J. 486.**

———*Partition—Provision for marriage expenses—Coparcener's marriage—Scope of the ruling in* 45 *M* 489.

The ruling in *Ramalinga Annavi's* case, 45 M. 489 (P. C.) is no authority for the proposition that prospective

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marriage expenses should not be allowed to a coparcener at the time of partition. (*Rupchand and Mehta, A.J.Cs.*) LEKHRAJ THADHARAM *v.* VISHINDAS WADHURAM. **27 S.L.R. 96=6 I.R. (Sind) 32=145 I.C. 465=A.I.R. 1933 Sind 260.**

Remedy.

———*Partition—Remedy—Joint property—Possession of whole land by one sharer—No denial of the right of others—Procedure.*

Where one co-owner is in possession of the entire joint property without denying the title of the other co-owners, the real remedy of the latter is to sue for partition and not for damages for wrongful possession. (*Rankin, C. J. and C. C. Ghose, J.*) RADHAKANTA PAL *v.* MANOMOHINEE PAL **60 Cal. 292=I.R. 1933 Cal. 523=144 I.C. 193=A.I.R. 1933 Cal. 397.**

Re-union.

———*Partition—Re union*—Onus probandi.

After a complete partition between members of a joint Hindu family, the burden of proving that there was a subsequent re-union rests upon the party relying on such re-union. (*Lord Thankerton.*) BABU *v.* OFFICIAL ASSIGNEE, MADRAS. **61 I A. 257=57 Mad. 931=36 Bom.L.R. 858=60 C.L J. 50=4 A.W.R. 441=6 R.P.C. 160=150 I.C. 1=40 L.W. 80=1934 A.L J. 600=1934 M.W.N 717=38 C.W.N. 1018=A.I.R. 1934 P.C. 138=67 M.L.J. 167 (P.C.).**

———*Partition—Re-union—Proof of.*

The mere fact that the parties lived together or managed their affairs jointly is not sufficient to prove re-union. Once partition is proved, the presumption is against re-union and re-union must be definitely proved. Mere joint transactions after partition will not by themselves prove re-union, specially when some tenancy fields and the money-lending business were not partitioned. (*Staples, A.J.C.*) MAHARAJ SAI *v.* KEDAR NATH. **144 I.C. 948=6 I.R. (Nag.) 34=29 N.L.R. 272=A. I.R. 1933 Nag. 130.**

———*Partition—Re-union—Succession after—Brother—Separated uterine brother—Right to inherit in preference to re-united father.*

Where in a joint Hindu family consisting of father and three sons, one of the sons, after a partition, again re-unites with the father, and subsequently dies, the uterine brother even if not re united, is entitled to succeed to the property falling to his share on partition in preference to the re-united father. 33 Mad. 165, Ref. (*Hasan, C.J., Raza and Pullan, JJ.*) BINDRA *v.* MATHURA. **6 Luck. 456=I.R. 1931 Oudh 153=130 I.C. 345=8 O.W.N. 1=14 O.L.J. 58=A.I.R. 1931 Oudh 17 (F.B.).**

———*Partition—Re-union—Validity—Conditions.*

Para. 2 of S. 9, Ch. II, Mitakshara, makes clear that the parties to a re-union must have been parties to the original partition. When para. 3 states: "that cannot take place with any person indifferently, but only with a father, a brother or a paternal uncle," it is intended to place a further restriction within a still narrower limit than that prescribed by para. 2. The express mention of the father, brother and paternal uncle is restrictive and not merely illustrative. Therefore, a re-union, although established in fact, is inoperative in law, unless the parties to it are within the class of relationship to which re-union is limited under the Mitakshara and they are also parties to the original partition. (*Lord Thankerton,*) RAM NARAIN *v.* PAN KUER. **62 I.A. 16=14 Pat. 268=37 Bom.L.R. 144=60 C.L.J. 544=7 R.P.C 133=1935 M.W.N. 92=37 P.L.R. 199=39 C.W.N. 265=16 Pat.L.T.**

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57=1935 O.W.N. 201=153 I.C. 705=41 L.W. 151=1935 A.L.J. 270=1935 A.W.R. 82=A.I.R. 1935 P.C. 9=68 M.L.J. 139 (P.C.).

Right to.

———*Partition—Right to—Deed by co-parcener transferring share—Deed intended to protect tranferor from creditors—If bars claim to partition.*

Plaintiff, an improvident young man of loose character, who had embarked on a career of extravagance and reckless borrowing, was induced by his father and father-in-law to assign his share in the joint family properties in favour of his father-in-law for a nominal consideration. The deed was intended not to deprive him of his property, but to save it from his creditors, and it was found that it did not extinguish his interest in the joint family estate.

Held, that plaintiff was still a coparcener in the joint property and was not precluded from claiming partition. (*Sir Shadi Lal.*) RAMAKRISHNA AIYAR *v.* PARAMESWARA AIYAR. **1935 O.W.N. 547=1935 A.W.R. 651=41 L.W. 659=155 I.C. 385=61 C.L.J. 257=7 R.P.C. 200=1935 M.W.N. 508=A.I.R. 1935 P.C. 92=68 M.L J. 612 (P.C.).**

——*—Partition—Right to—Right to take by survivorship—If a condition precedent.*

It cannot be held that there is no right of partition at all where there can be no right to take by survivorship. Cases of succession by survivorship in the case of impartible estates furnish an instance of exceptions. (*Varadachariar and Burn, JJ.*) VENKATESWARA PATTAR *v.* MANKAYAMMAL. **160 I.C. 624=8 R.M. 696=1935 M.W.N. 1271=42 L.W. 955=A.I.R. 1935 Mad. 775=69 M.L.J. 410.**

Separation of one member.

———*Partition—Separation of one member—Effect.*

Where one of the sons separates from the family, there is a disruption of the joint family and it ceases to be so. (*Broadway and Abdul Qadir, JJ.*) MT. MANGLAN *v.* HIRA SINGH. **135 I.C. 44=I.R. 1932 Lah. 28=32 P.L.R. 712=A.I.R. 1931 Lah. 675 (2).**

———*Partition—Separation of one member—Effect on the remaining coparcener—Presumption.*

When one coparcener separates from others, the remaining copurceners can remain joint among themselves; and they can do so without any special agreement among themselves. The question whether the remaining coparceners remained joint or whether they separated has to be proved as a question of fact in each case. (*King and Thom, JJ.*) PIYARE LAL *v.* CHUNNI LAL. **143 I.C. 456=I.R. 1933 All. 261=1932 A.L.J. 1018 A.I.R. 1933 All. 103.**

———*Partition—Separation of one member—Effect on remaining members.*

If some of the members of a joint family separate, it does not follow necessarily that there is separation as amongst the members who continue to be joint. If the latter continue to be joint, that fact may be inferred from their conduct and surrounding circumstances. When a member of a joint family separates, the remaining coparceners without any special agreement among themselves may continue to be coparceners and enjoy as members of a joint family the property remaining after such partition of the family property. The question whether or not the remaining members continued joint or separate is to be determined by evidence in the case. 52 I. C 83, Foll. (*Patkar and Broomfield, JJ.*) SAHEBGOUDA *v.* BASANGOUDA. **I.R. 1931 Bom. 431=133 I.C. 847=33 Bom.L.R. 580=A.I.R. 1931 Bom. 378.**

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———*Partition—Separation of one member—Effect on status of others.*

Where one member of a joint family has separated, there is no presumption that the others continue joint ; but it does not follow as a matter of law they become separate either. It is a question of intention, a question of fact, and a concurrent finding on that matter arrived at by the Courts in India will not be interfered with by the Board. 30 C. 725 (P.C.); 4 Lah. 305 (P.C.); 30 C. 231 ; 48 Mad. 254 (P.C.), Ref. (*Sir George Lowndes.*) BAL KRISHNA *v.* RAMKRISHNA. **58 I.A. 220=53 All. 300=132 I.C. 733=1931 M.W.N. 793=I.R. 1931 P.C. 221=54 C.L.J. 131=33 Bom.L.R. 1280=1931 A.L.J. 499=34 L.W. 13=35 C.W.N. 815=A.I.R. 1931 P.C. 154=61 M.L.J. 362 (P.C.).**

[**Expl.** 38 C.W.N. 977 (980); **R.** 1932 A.L.J. 1018 (1019); 9 O.W.N. 950 (953).]

———*Partition—Separation of one member—Effect on the status of others.*

A presumption of complete separation does not arise in all cases when there has been separation of one or more members and no definite agreement is necessary on the part of the remaining members to continue to be a joint family. Their status is a question of fact. 48 Mad. 254 (P.C.) and 50 Bom. 815, Foll. (*Jackson, J.C.*) TIKKILAL *v.* GULABCHAND. **27 Nag.L.R. 343=136 I.C. 233=I.R. 1932 Nag. 25=A.I.R. 1932 Nag. 15.**

———*Partition—Separation of one member—Effect on status of others.*

The intention to separate communicated by one co-sharer to other co sharers does not raise a presumption that the other co-sharers became separate *inter se.* Ample time for consideration must be allowed; if such time has elapsed and shares have been defined with a view to allotment to the several coparceners, than in the absence of any evidence of agreement, it may perhaps be inferred that there was separation. But the intention to separate evidenced by the plaint in a suit by one member does not render it necessary for the other members of the joint family to prove that at the time of the institution of the suit, they agreed to remain re-united. They must ordinarily be considered to be taking time for consideration while the suit was in progress, and the decree for partition proves the nature of their eventual decision. It is not necessary for the plaintiff to show that the other coparceners had come to a definite agreement soon after they learnt of the institution of the suit either show that the others also were decided at the time of the institution of the suit or render it necessary for them to show that at the time of the institution of the suit, they agreed to remain united. 5 Lah. 92 (P.C.); 30 C. 725 (P.C.); 4 Lah. 350 (P.C.) and 48 M. 254 (P.C.), Ref. (*Macnair, J.C. and Subhedar, A.J.C.*) SHRAWAND DULYA *v.* SURAJ PRASAD. **I.R. 1931 Nag. 129=134 I.C. 257=14 N.L.J. 65=A.I.R. 1931 Nag. 141.**

———*Partition—Separation of one member—Status of others.*

The separation of one brother raises no presumption either that there was a separation amongst the other brothers or that the latter remained joint. Whether the remaining brothers have remained joint or not is a question of intention, which has to be determined on the facts of each case. (*Bisheshwar Nath and Smith, JJ.*) DELASI *v.* BHAGWAN DIN. **140 I.C. 592=I.R. 1933 Oudh 6=9 O.W.N. 950=A.I.R. 1933 Oudh 27.**

———*Partition—Separation of one member—Status of remaining members—Presumption,*

The general principle is that every family governed by Mitakshara school of law is presumed to be joint unless the contrary is proved but if one member of the family separates from others, this presumption is destroyed and there is no presumption that the separation was partial and was confined only to the member separating himself and that the remaining members of the family remained united. It is, however, open to the remaining members to continue to remain united or re-united but this can be only by virtue of an express or implied agreement between them and such an agreement, if pleaded, must be proved like any other fact. In other words, where proof of an express agreement to remain joint or to re-unite is wanting, such an agreement may be implied from the conduct of the non separating coparceners, if the conduct points to the conclusion that, notwithstanding the separation of the outgoing coparcener, they intend to remain joint. But in the absence of proof of an express or implied agreement to that effect, the presumption is that each coparcener is separated from the other. There is, however, no presumption that there was a separation between one coparcener and his descendants. (*Thom and Iqbal Ahmad, JJ.*) RAM NARAIN SAHU *v.* MAKHNA. **8 R.A. 18=1935 A.W.R. 996=156 I.C. 736=A.I.R. 1935 All. 875.**

———*Partition—Separation of one member—Subsequent general partition—Shares of branches—Quantum of—Deduction of share of separated member from the share of his branch.*

In a Mitakshara jonit Hindu family comprising several branches, if a member of one branch separates from the coparcener, and takes away his share at a partition effected for the purpose, while all the other members continue to live in jointness as before,—at a subsequent partition among all the branches, deduction should be given for the share withdrawn by the one member at the earlier partition in the share to be allotted to his branch. The subsequent partition should not be made *rebus sic standibus* as at the time of such subsequent partition. 5 M. 362 and 57 M.L.J. 685 (F.B.), Foll.; 39 B. 734, Not foll. (*Doraswami Iyer, C.J., Sreenivasa Iyer and Mahadevayya, JJ.*) SADASHIVA RAO SAHUJEE *v.* SUBBARAO SAHUJEE. **10 Mys. L.J. 49=37 Mys.H.C.R. 77 (F.B.).**

Severance of status.

See also EVIDENCE OF AND MINOR *supra* AND SUIT FOR, *infra.*

———*Partition—Severance of status—Institution of suit—Effect of.*

The mere institution of a suit for possession of property by partition by a member of a joint Hindu family causes a disruption of the family. (*Middleton, J.C. and Saaduddin, A.J.C.*) MALIK PARTAP SINGH *v.* HARKISHAN SINGH. **147 I.C 1037=6 R. Pesh. 42=35 P.L.R. 260=A.I.R. 1933 Pesh. 85.**

———*Partition—Severance of status—Institution of suit for partition—Effect of.*

Partition, according to the Mitakshara school of Hindu Law is a severance of the joint status and a matter of individual volition. A definite and unequivocal indication of his intention by a member of a joint family to separate himself and enjoy his share in severalty is all that is necessary. It is immaterial whether the other members consent. The intention to separate may indicate either by explicit declaration or by conduct; the institution of a suit for partition is a sufficient indication. Although a decree in the suit is necessary for working out the shares, the status becomes separate on the assertion of the right to separate, whether the suit proceeds to judgment or not. (*Costello and Lort Williams, JJ.*) DHANABATI BIBI *v.* PROTAPMULL AGARWALLA. **61 Cal. 1056=154 I.C. 655 (2)=7 R.C. 514=38 C.W.N. 1045=A.I.R. 1935 Cal. 131.**

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———*Partition—Severance of status—Statement by coparcener in deed of transfer executed by him—If constitutes severance.*

The statement by a member of a joint Hindu family in a deed of transfer executed by him to a stranger specifying his share in the family property as half and that he is separate from the other coparceners will not itself constitute separation and make the deed valid, which is otherwise invalid. There may be cases in which from statements of separation in the deed of transfer itself, an inference of fact may be drawn that there was a partition. But a mere statement in the deed that the transferor has got a specific share will not constitute separation as a matter of law. (*Khaja Mohammad Noor and Varma, JJ.*) MAHINDRA OJHA *v.* SITARAM OJHA. **155 I.C. 827=7 R.P. 627=16 Pat.L.T. 377=A.I.R. 1935 Pat. 349.**

Shares.

———*Partition—Shares—Acquisition by co-sharer of distinct property—Right to double share.*

In a partition under Hindu Law, the joint property is divisible equally; but a co-sharer who acquires a distinct property with the aid only of the joint funds is entitled to a double share in that property. The rule, however, has no application when the self-acquisition has been blended with the common stock. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W.N. 861.**

———*Partition—Shares—Doctrine of double share—Applicability.*

The doctrine of a double share on partition is applicable where at the foundation there was an acquisition out of joint funds, but the means of acquisition drawn from the joint funds was of little consideration while the personal exertions are considerable. The doctrine has no application where there has been no common funds which even went to start or implement the business. (*Mukerji and Nag, JJ.*) ASHUTOSH MUKERJEE *v.* TARAPADA MUKERJEE. **150 I.C. 292=6 R.C. 813=58 C.L.J. 372=A.I.R. 1934 Cal. 308.**

Subsequently born son.

———*Partition—Subsequently born son—Right to question partition.*

It is an ordinary incident of Hindu Law that when partition is effected between two brothers and these brothers have minor sons, each brother represents his branch consisting of himself and his sons. If it were not so, no partition would be effected so long as there are minors living in the family. So a partition effected in 1890 between two brothers cannot be questioned by a son born in 1905. No fresh cause of action is created by his birth as his father represented the line before his birth. (*Sen and Bajpai, JJ.*) JAMNA PRASAD *v.* MT. DURGA DEI. **I.R. 1933 All. 352=144 I.C. 38=A.I.R. 1933 All. 138 (2).**

Suit for.

———*Partition— Suit for between two branches—Heads of branches as parties.*

Where the suit is not for partition of the properties between all the alleged coparceners *inter se* but what is prayed for is a division between the two branches of the family.

Held, that to such a suit the really necessary parties were the heads of each branch of the family and that it was not obligatory on the plaintiff to implead all the members of the two branches. (*Tek Chand and Johnstone, JJ.*) BISHAMBAR DAS *v.* KANSHI PARSHAD. **13 Lah. 483=141 I.C. 45=I.R. 1933 Lah. 54=33 P.L.R. 842=A.I.R 1932 Lah. 641.**

HINDU LAW—Partition.

———*Partition—Suit for—Conveyance of his interests executed by the son—Weak-minded wastrel—Validity of—Onus of proof.*

In a suit for partition, the plaintiff who had recently attained majority sought to set aside a conveyance executed by him in favour of his father-in-law purporting to convey his interest in the family properties for a nominal consideration on the ground of coercion an undue influence. It was proved that the plaintiff was a weak-minded wastrel. 'Under the circumstances, it was held the onus was heavily on the defendants (the father and father-in law) to show that the plaintiff executed the deeds with full knowledge of his rights and with free consent. (*Kumaraswami Sastriar and Reilly, JJ.*) RAMAKRISHNA AYYAR *v.* PARAMESWARA AYYAR. **1931 M.W.N. 215.**

———*Partition—Suit for—Division in status—Date of.*

When a suit for partition is filed, the filing of the suit effects a severance of the family, subject to the condition that the suit is proceeded with. If the suit is withdrawn, there is no severance, but if the suit is ultimately decreed, whatever the interval of time may be, the date of severance is the date of plaint. 35 All. 80; 39 All. 497; 48 M. 465 and 50 M. 866, Foll. (*Ramesam, O.C. J. and Cornish, J.*) THAVASIMUTHU NADAR *v.* THAVASIMUTHU NADAR. **135 I.C. 571=I.R. 1932 Mad. 155=1931 M.W.N. 1023=A.I.R. 1931 Mad. 824.**

———*Partition—Suit for—Inadvertent omission to include one item—Fresh suit—Maintainability.*

Even after decree has been passed in a suit for partition of family property, a subsequent suit may be brought in respect of some portion of the property which had inadvertently been omitted in the former suit. (*Grille, A.J.C.*) GAPULAL *v.* GAJASA. **I.R. 1932 Nag. 74=138 I.C. 186=15 N.L.J. 15=A.I.R. 1932 Nag. 92.**

———*Partition—Suit for—Parties to—Grandsons.*

In a suit for partition instituted by a member of a joint Hindu family, the grandsons may be proper parties, but they are not necessary parties if their interests are represented in the suit by their father. (*Tapp, J.*) THAKAR SINGH *v.* SANT SINGH. **I.R. 1933 Lah. 143=141 I.C. 567=34 P.L.R. 567 (2)=A.I.R. 1933 Lah. 465.**

———*Partition—Suit for—Properties claimed as joint acquisitions—Failure to prove—Finding of blending—Decree, if can be passed on basis of finding.*

When the plaintiff in a partition suit claims that the properties have been acquired with the joint exertions and earnings of all the members, and the Court finds against the claim, but finds on the evidence, that there was blending of the separate earnings and properties were purchased out of the mixed fund so as to make the properties so purchased joint, there is nothing to prevent the Court from decreeing partition on the footing that the properties are joint by reason of the blending. (*Mitter and McNair, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS **38 C.W.N. 861.**

———*Partition—Suit for—Severance of status—Time—Settlement and will executed prior to service of notice—Validity.*

The mere filing of a suit for partition does not necessarily effect a final severance in status, for a plaintiff may withdraw his declaration of intention and then no severance is effected but when notice of suit is served on the defendants the severance of the joint family status must be deemed to continue from the presentation of the plaint. Hence, where a father after instituting a suit

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for partition against his son, but before the son is served with summons, settled some portion of his half share of the property on his daughters and simultaneously executes a will and thereafter dies during the pendency of the suit, the settlement and will are valid. 78 I.C. 256, Foll.; 35 A. 80; 28 M.L.J. 423; 39 M. 159; 43 C. 1031; 45 Mad. 489; 48 M. 254; 48 Mad. 465; 50 Mad. 866; 50 C. 84; 39 A. 496 and 52 Mad. 845, Ref. (*Madhavan Nair, J.*) RAMA AYYAR *v.* MEENAKSHI AMMAL. **I.R. 1931 Mad. 452=1931 M.W.N. 527=33 L.W. 384=130 I.C. 756=A.I.R. 1931 Mad. 278.**

Trading family.

———*Partition—Trading family—Interest from date of suit to decree—Plaintiff's right to—Nature of claim.*

When the patties to a suit for partition belong to a Hindu trading family, the presumption is that the money of the family is always invested, and so the plaintiff in such a suit is entitled to interest from the date of plaint to the date of the decree. The plaintiff's claim is not strictly for interest, but for a portion of the income of the family between the date of suit and the decree, though by accident the income is in the shape of interest. (*Ramesam and Curgenven, JJ.*) ANNAMALAI CHETTY *v.* PALANIAPPA CHETTIAR. **155 I.C. 151=7 R.M. 547=40 L.W. 619=A.I.R. 1935 Mad. 266.**

Widows.

———Partition — Widows — Co-widows — Partition between—Rights of the survivor. *See* WIDOWS—CO-WIDOWS. **A.I.R. 1935 Oudh 296.**

Perpetuity.

———Perpetuity—Rule against perpetuities—Arrangement tying up property from generation to generation—Invalid. *See* T. P. ACT, S. 14. **A.I.R. 1935 Sind 235.**

Religious endowment.

See also ADVERSE POSSESSION AND HINDU LAW—SANYASI.
ALIENATION.
CONSTRUCTION.
DEBT.
DEDICATION.
DEVOLUTION OF OFFICE.
DHARMAKARTHA.
IDOL.
MAHANT.
MANAGEMENT.
MANAGER.
MATATHIPATHI.
MATH.
PRIVATE TRUST.
PUBLIC TRUST.
SHEBAIT.
TEMPLE.
TRUSTEE.
WAKF BY HINDU.

Alienation.

———*Religious endowment—Alienation—Alienation by shebait—Avoidance by successor.*

Property dedicated to a religious use is inalienable and the objection may be raised by a successor to the shebaitship. 60 I.A. 124, Rel. on. (*Mukerji and S. K. Ghose, JJ.*) NARAYAN CHANDRA *v.* BHUBAN MOHINI. **38 C.W.N. 15=151 I.C. 954=A.I.R. 1934 Cal. 244.**

———*Religious endowment—Alienation—Alienation by trustee—Validity of—Duty of lender.*

If the lender makes proper inquiries and acts honestly, he is protected, although it turns out that in point of fact there was no real necessity. So a pledgee of temple property who advances money to avert a sale in execution of a decree is not bound to go further back beyond the decree to ascertain whether the Court was right in giving the decree, having given it, in putting up the property for sale. (*Venkatasubba Rao and Curgenven, JJ.*) VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR. **I.R. 1933 Mad. 442=144 I.C. 584=A.I.R. 1933 Mad. 639.**

HINDU LAW—Religious Endowment.

———*Religious endowment — Alienation—Debutter property.*

Debutter property can be transferred in certain circumstances, *e.g.*, (1) where such transfer is allowed by custom; (2) where such transfer is made by one of the shebaits to a co-shebait; and (3) where all co-shebaits combine to make a transfer to a stranger. Therefore where the dedication is a proper dedication and the property is debutter and is never treated by the shebaits as secular property, a transfer not coming within the above exceptions to a stranger of such property is void. (*M.C. Ghose, J.*) ANNADAPROSAD ADAK *v.* MIHILAL ADAK. **152 I.C. 518=7 R.C. 283=59 C.L.J. 514=A.I.R. 1934 Cal. 650.**

———*Religious endowment — Alienation—Duty of lender—Enquiry—Loan by trustee—Pledgee advancing money to avert sale in execution—No duty to enquire in to merits of decree.*

If the lender makes proper inquiries and acts honestly, he is protected, alothough it turns out that in point of fact there was no real necessity. So a pledgee of temple property who advances money to avert a sale in execution of a decree is not bound to go further back beyond the decree to ascertain whether the Court was right in giving the decree, or having given it, in putting up the property for sale. (*Venkatasubba Rao and Curgenven, JJ.*) VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR. **I.R. 1933 Mad. 442=144 I.C. 584=A.I.R. 1933 Mad 639.**

———*Religious endowment — Alienation — Math—Alienation by Mahant—Validity during his lifetime—Avoidance of transfer—Limitation.*

Where a mahant alienates property appertaining to the math without any legal necessity, the alienation is not void but is good, though good only to the extent of creating an interest in the math property which endures during his tenure of office with the result that the alienee's adverse possession of the property commences when the alienating Mahant ceases to be Mahant by death or otherwise. In this respect there is no distinction in principle between a disposition purporting to be a grant of a permanent lease and a grant by way of absolute sale. (*Lord Russell of Killowen.*) RAM CHARAN DAS *v.* NAURANGI LAL. **60 I.A 124=12 Pat. 251=57 C.L.J. 229=37 L.W. 512=35 Bom L.R. 530=I. R. 1933 P. C. 56=10 O. W. N. 455=17 R.D 754=142 I.C. 214=14 Pat L.T. 185=1933 M.W.N. 272=1933 A.L.J. 327=37 C.W.N. 541=A.I.R. 1933 P.C. 75=64 M.L.J. 505 (P.C.).**

[**F.** 62 I.A. 47=68 M.L.J. 499 (P.C.); **R.** 38 C.W.N. 15 (23).]

———*Religious endowment — Alienation—Mortgage for necessity—Decree for sale.*

It is not an inflexible rule that the property belonging to a temple is not liable for sale in pursuance of a mortgage. Where the property mortgaged did not represent the original endowment but was acquired by the temple piecemeal as a commercial investment for the purposes of increasing its resources, there is no necessity for safeguarding the particular property for the perpetual use of the temple at the expense of the mortgagee who has advanced money on security and for legal necessity and there can be a decree for sale of the mortgaged property. (*Grille, J.C.*) PREMDAS *v.* SHEO PRASAD.

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31 N.L.R. 113=152 I.C. 362=7 R.N. 96=A.I.R. 1934 Nag. 222.

———*Religious endowment—Alienation—Necessity—Daily worship of temple.*

Money borrowed for keeping up the daily worship of the temple is for an actual and existing necessity even though the shortage of money is due to bad management. (*Venkatasubba Rao and Curgenven, JJ.*) VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR. **I.R. 1933 Mad. 442=144 I.C. 584=A.I.R. 1933 Mad. 639.**

———*Religious endowment—Alienation—Necessity—Payment of previous mortgages.*

The satisfaction of previous mortgages in order to prevent sale of the property constitutes legal necessity. A.I.R. 1926 (P.C.) 112, Rel. on. (*Grille, J. C.*) PREMDAS *v.* SHEOPRASAD. **152 I.C. 362=31 N.L.R. 113=7 R.N. 96=A.I.R. 1934 Nag. 222.**

———*Religious endowment—Alienation—Necessity—Proof of—Recitals.*

The recitals in a document executed 40 years ago can be treated as cogent evidence of the correctness of the statements made therein (*Grille, J. C.*) PREMDAS *v* SHEOPRASAD. **152 I.C. 362=7 R.N. 96=31 N.L.R. 113=A.I.R. 1934 Nag. 222.**

———*Religious endowments — Alienation—Palas of Kalighat temple—Attachment in execution—Validity.*

Where by custom the pala of an endowment was transferable among a limited class of heirs.

Held, that the palas were attachable in execution. (*Mitter and Henderson, JJ.*) HARIDAS HALDAR *v.* CHARU CHANDRA SIRKAR. **60 Cal. 1351=147 I.C. 924=6 R.C. 377=37 C.W.N. 978=58 C.L.J. 239=A.I.R. 1933 Cal. 757.**

———*Religious endowment — Alienation—Perpetual lease—Math—Presumption of necessity.*

A perpetual lease which was granted several years back by the then manager was recognized and treated as valid by the subsequent matathipathis.

Held, that the presumption as to necessity of the transaction could be permitted, even though the grant did not contain any recital as to necessity. (Case-law Disc.) (*Venkatasubba Rao, J.*) RAMAN THIRUMUMPU *v.* KARUNAKARA MENON. **1933 M.W.N. 79=147 I.C. 735=6 R.M. 386=38 L.W. 843=A.I.R. 1933 Mad. 852.**

———*Religious endowment—Alienation — Permanent lease by Mathathipathi—Validity of—Math.*

Where the head of a math grants a permanent lease of immovable property with which the math is generally endowed, the lease is good for the lifetime of the grantor. It is not void *ab initio* and the grantor himself cannot sue to avoid it. 44 M. 831, Foll. 26 L.W. 202, Diss. From. (*Beasley, C.J. and Bardswell, J.*) SRI CHIDAMBARA SIVAPRAKASA PANDARA SANNADHI *v.* MANICKAM PILLAI. **6 I.R. (Mad.) 206=146 I.C. 52=37 L.W. 628=1933 M.W.N. 344=A.I.R. 1933 Mad. 481=64 M.L.J 577.**

———*Religious endowment — Alienation—Temple—Manager—Power to grant perpetual lease.*

Although ordinarily the manager cannot grant a perpetual lease of temple property, he possesses, in special and unusual circumstances, the power of making such a grant in other words, the alienation will be upheld, if some imperative necessity is proved. (*Venkatasubba Rao, J.*) RAMAN THIRUMUMPU *v.* KARUNAKARA MENON. **1933 M.W.N. 79=147 I.C. 735=6 R.M. 386=38 L.W. 843=A.I.R. 1933 Mad. 852.**

Construction.

———*Religious endowment—Construction—Grant to managers burdened with services or grant to shrine itself.*

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The shrine of Jivanram Swamy was endowed with certain properties under an ancient grant subsequently confirmed by a sanad of the British Government in 1862. The property was mentioned as Devasthan property; name of the holder was entered as Jivanram Swami, manager Govindbhat: "the lands shall be continued for ever as endowment of property of Jiwanram Swamy on condition that the managers shall continue faithful subjects and pay Rs. 37-10 yearly as *judi*."

Held, that it was a grant not to the managers or vahivatdars coupled with the obligation to make certain payments or render certain services to the shrine—but it was a grant to the idol or rather the shrine itself and that under the ordinary law, the properties were inalienable. (*Baker and Broomfield, JJ.*) NARAYAN BALWANT *v.* DATTATRAYA RAMACHANDRA. **141 I.C. 103=34 Bom.L.R. 1469=I.R. 1933 Bom. 59=A.I.R. 1933 Bom. 26.**

Debt.

———Religious endowment—Debt—Shebait—Power to incur. *See* SHEBAIT, *infra*. **A.I.R. 1933 Mad. 639.**

Dedication.

———*Religious endowment—Dedication—Bequest of immovable property to wife and son—Provision that one-fourth of income to be spent over a temple—Charge in favour of temple, if created.*

Where by a will, a Hindu testator bequeaths all his immovable property to his wife and minor son, providing therein that one fourth of the income of that property should be spent over a certain temple, the will creates a charge in favour of the temple. (*King, C.J. and Zia ul-Hasan, J.*) PARSHADI LAL *v.* BRIJ MOHAN LAL. **159 I.C. 117=8 R.O. 159=1935 O.W.N. 1217=A.I.R. 1936 Oudh 52.**

———*Religious endowment—Dedication—Burden of proof—Tests.*

In the absence of any evidence to prove that a certain institution, for which the character of a Math is claimed is actually engaged in religious or charitable work, the institution can neither be regarded as a religious or charitable institution, nor its property as a religious or charitable endowment. The burden must be laid on the Mahant of proving that the property in his possession has been dedicated to the institution before it can be treated as *res extra commercium*. The dedication may be established either by production of a written instrument of endowment or by circumstantial evidence such as the mode of appropriation of the income, the entries in the revenue records pertaining to the lands and the title under which the accounts are kept. The test which should apply to such cases are these: Was the institution subservient to the Mahant or was the Mahant subservient to the Math? Was the Mahant under a legal obligation to apply the income of the property in his possession solely to the purposes of the institution or was it discretionary with him to do so? Whether the plaintiff was only a manager of the institution and administering its property as its agent or he was himself the owner, who, to justify his profession as an ascetic devoted at his discretion a fraction of the income to the purposes of the Math, the decision would depend on the nature of the answers which, in view of the evidence it is incumbent on the plaintiff to lead, could be given to the aforesaid questions. (*Niyogi, A.J.C.*) GANESHGIR GOSAI *v.* FATEHCHAND BANIA. **31 N.L.R. 282=157 I.C. 212=8 R.N 30=A.I.R. 1935 Nag. 114.**

———*Religious endowment—Dedication—Charitable bequest—Nature of dedication—Gift of property or income—Trust.*

The testatrix began by giving all her movable property and certain items of immovable property absolute-

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ly to her brother and then she gave the remaining properties which she named in trust for the performance of the charitable purposes set out in the will. She emphasised her intention of making a complete dedication by saying that the immovable properties had been reserved for charitable purposes and directed that the income only should be expended on charities. The will did not contain a list of expenses or specify the amount of income fixed for performing the charities.

Held, that the properties themselves were dedicated to charity and were held in trust that the gift was not subject to the burden of performing the charities and that the properties could not be alienated except for objects binding on the trust. 8 M.I.A. 66 and 43 All. 291, Ref. (*Wallace and Cornish, JJ.*) KANDASAMI PILLAI *v.* MUNISAMI MUDALIAR. **I R 1932 Mad. 435 = 137 I.C. 707 = 1932 M.W.N. 321 = 35 L.W. 350 = A.I.R. 1932 Mad. 589.**

———*Religious endowment —Dedication —Complete dedication—Direction to spend surplus on charitable purposes.*

Per *Rankin, C.J.*—A direction that the shebait shall spend any surplus income on certain charitable objects or pious acts is not uncommon in Hindu debutters, and does not make the dedication incomplete. (*C. C. Ghose, Mukerji, Mitter, Guha and M. C. Ghose, JJ.*) MONOHAR MUKERJEE *v.* BHUPENDRA NATH MUKERJEE. **60 Cal. 452 = 141 I C. 544 = I R. 1933 Cal. 115 = 53 C L.J. 468 = 37 C.W N. 29 = A.I.R. 1932 Cal. 791 (F.B.).**

———*Religious endowment —Dedication—Construction of deed—Property not conveyed but only charge created.*

Where the deed of endowment provided that after the expense of religious worship and ceremony had been met, the surplus income was to be invested in tenanted houses for the production of still greater revenue and the sole purpose mentioned as the ultimate destination of the fund was the bulding of a house or houses in which the settlor's descendants or some of them may reside.

Held, that the properties were charged for the purposes mentioned but were not absolutely dedicated to the endowment. (*Rankin, C.J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SHREE SHREE ISHWAR BHUBANESHWARI THAURANI. **60 Cal 54 = 6 I.R. (Cal) 20 = 144 I.C. 792 = A.I.R. 1933 Cal. 295.**

———*Religious endowment—Dedication—Endowment in favour of Sri Ram Chanderji Maharaj—Validity.*

An endowment in favour of one of the Gods of the Hindu panthcon, *viz.*, Sri Ram Chanderji Maharaj, is not void under the Hindu Law. 33 All. 793 and 46 C. 951, Cons. (*Sen and Bennet, JJ.*) BANKEY LAL *v.* PEARE LAL. **53 All. 710 = I.R. 1932 All. 285 (1) = 137 I C 187 = A.I.R. 1932 All. 244 (2).**

———*Religious endowment—Dedication—Essentials.*

The dedication of property to a deity is not a sacrament, but a secular act like a gift of property by one person to another. In the case of religious and charitable gifts, not the acceptance but only the act of donation that is essential, *i.e.*, the essential element is the renunciation of the donor of his propery and not the acceptance of it. All that is involved in dedication is the divesting of ownership. That can be done by a clear expression of intention to dedicate the property and to renounce ownership coupled with acts showing appropriation of the income of the property to the purposes of the endowment. (*Niyogi and Staples, A.J Cs.*) RAM SWAROOP *v.* THAKUR RAMCHANDRAJI. **31 N. L R. 188 = 157 I.C. 17 = 8 R.N. 12 = A.I.R. 1935 Nag. 35.**

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———*Religious endowment—Dedication—Evidence of —Presumption when no mention of private trust in deed of endowment.*

In the case of a deed of trust with reference to a Hindu temple, the presumption is in favour of a public dedication, when there is nothing contrary to such a presumption and when there is no mention of a private or family trust, even though the deed does not in terms declare it is a public trust. (*Staples, A. J. C.*) GAYA PRASAD *v.* BHARGAVA. **I.R. 1933 Nag. 246 = 144 I.C. 506 = A.I.R. 1934 Nag. 48.**

———*Religious endowment—Dedication—Evidence of —Succession from guru to chela—Presumption from.*

Even though there is no direct evidence of dedication, there is a presumption that an institution has been dedicated to religious uses from the fact of succession being from guru to chela to the exclusion of natural heirs. (*Addison and Agha Haidar, JJ.*) SUNDAR SINGH *v.* NARAIN DAS. **35 P.L.R. 619 = 155 I.C. 396 = 7 R.L. 706 = A.I.R. 1934 Lah. 920.**

———*Religious endowment—Dedication—Interference —Thakurdwara built out of public subscriptions.*

Where the thakurdwara was shown to have been built out of public subscriptions and it was later on dealt with as wakf.

Held, that the thakurdwara was public. (*Shadi Lal, C. J. and Hilton, J.*) LACHHMAN DAS *v.* ARYA PRITINIDHI SABHA, PUNJAB. **I.R. 1932 Lah. 455 (2) = 138 I.C. 309 = A.I.R. 1932 Lah. 603.**

———Religious endowment—Dedication—Math—Proof —Essentials. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **31 N.L.R. 282 = A.I.R. 1935 Nag. 114.**

———*Religious endowment—Dedication—Nature and extent.*

The settlor had executed a deed of *wakf* by which he dedicated his entire properties for the service and worship of five deities. He appointed five persons named therein as managers and mutawallis with the reservation that he in his lifetime and his wife after him should be the first manager. Then the deed recited the objects upon which the income was to be expended which *inter alia* included the maintenance of worship, festivities and other religious and charitable purposes. Then followed a clause by which he was to get his personal expenses, the expenses of his family and the marriage expenses of his daughter out of the estate, according to their position in life. He also reserved the right of appointing managers during his lifetime. Subsequent to the execution of the deed, though the *sangalp* and *samarpan* ceremonies were formally performed, the settlor, instead of applying for mutation of names in favour of the deities, applied for registration of his own name. The net income of the property was Rs. 5,300 while the objects of the trust involved an expenditure of only Rs. 1,700. There was no change in the manner of expenditure and the settlor sometime later executed a second deed making further provision for his possible descendants.

Held, under the circumstances, the deed only created a charge on the property for the service and worship of the deities and not an out and out dedication. (*Ross and Dhavle, JJ.*) BHEKDHARI SINGH *v.* SRI RAMCHANDERJI. **10 Pat. 388 = 136 I.C. 290 = I R. 1932 Pat. 66 = 13 Pat.L.T. 331 = A.I.R. 1931 Pat. 275.**

———*Religious endowment—Dedication—Proof of.*

No writing is necessary to create an endowment except when it is created by a will; no trust is required, even in the case of a dedication to an idol, which cannot itself physically hold lands; it is not necessary, though

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it is usual to vest the land in trustees, nor is it necessary that there should be any express words of gift to the idol. All that is necessary for the validity of a deed of endowment is that the executant should divest himself of the property; whether he has done so or not is to be determined by subsequent acts and conduct. 46 M. 300 and 12 Bom. 247, Ref. (*Baker and Nanavati, JJ.*) MARUTI RAMRAO *v.* MALLAPUR SHRI GOPAL KRISHNA. **I.R. 1932 Bom. 376=138 I.C. 433=34 Bom.L.R. 415=A.I.R. 1932 Bom. 305.**

———*Religious endowment—Dedication—Proof.*

A will provided as follows "each and every other of my property wherever situate shall form of constitute the debutter estate of Iswar Linga therein my heirs or legal representatives shall have no right or title. The Malik of the said properties shall be the said Iswar Linga. None shall have power to make a gift or sale or create encumbrances thereon or in any manner alienate the same. Acts, if any, so done shall be rejected at law." The will further provided that the properties dedicated should be burdened with certain charges necessary for the maintenance of the ancestral deity.

Held, that there was a valid dedication to the family idol by means of the will. (*Graham and Mitter, JJ.*) CHERAG ALI SARKAR *v.* NAWAB KHAJI HABIBULLA. **I.R. 1931 Cal. 807=134 I.C. 311=53 C.L.J. 421=A.I.R. 1931 Cal. 782.**

———*Religious endowment—Dedication—Proof of—Public user, if sufficient.*

The essential ingredient which constitutes a gift of movable or immovable property in the Hindu Law is the *sankalp* and the *samarpan* whereby the property is completly given away and the owner completely divests himself of the ownership of the property. The fact that a dharamsala was built by a person in accordance with the wishes of his predecessor, without express dedication to the public and without *sankalp* and *samarpan* does not make such dharmasala a public trust, and proof of user would not be sufficient to establish dedication; where on the other hand, the evidence was to the effect that the owner kept the keys of the building and permission to use it was obtained from him, it must be held to be a private institution. (*Addison and Agha Haidar, JJ.*) CHANDU LAL *v* RAMPAT MAL. **I.R. 1933 Lah. 135=141 I.C. 523=34 P.L.R. 105=A.I.R. 1933 Lah. 189.**

[**R.** 36 P.L.R. 13 (19, 20).]

———*Religious endowment—Dedication—Proof of—Use of family property for temple for a number of years.*

Where there is nothing to show that any particular property or any fund had been at any times set apart for the maintenance of the temple or that any trust or endowment had been created by the founder, the mere use of a portion of the joint family funds for a number of years for purposes of a temple under a sort of family arrangement cannot establish a dedication to charity (*Widia, J.*) BANSILAL *v.* GOVINDLAL. **I.R. 1933 Bom. 45=140 I.C. 819=34 Bom.L.R. 733=A.I.R. 1932 Bom. 439.**

———*Religious endowment — Dedication — Property passing from guru to chela—Presumption.*

The fact that the properties passed always from guru to chela to the exclusion of blood relations affords a strong presumption of the existence of a religious institution the members of which renounce worldly affairs. (*Coldstream and Hilton, JJ.*) NIHAL CHAND *v.* NARAIN DAS. **36 P.L.R. 162=155 I.C. 620=7 R.L. 603=A.I.R. 1934 Lah. 949.**

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———*Religious endowment — Dedication — Property subject to a charge and not a trust in favour of charities.*

In determining whether the will of a Hindu gives the testator's estate to an idol subject to a charge in favour of heirs or makes the gift to the idol a charge upon the estate, there is no fixed rule depending upon the use of particular terms in the will; the question depends upon the construction of the will as a whole. A will provided that the testator's sister shall enjoy the immovable property and from its income shall expend annually certain quantities of paddy and of cash towards the upkeep of the specified ceremonies and charities and shall give the testator's wife a certain quantity of paddy for maintenance and contained the following clause: 'In this manner my sister and her male heirs and their descendants from generation to generation shall defray the aforesaid expenses and take the balance of the income for themselves'.

Held, that the will bequeathed the property to the sister subject to the charges specified, and did not create a trust. (*Curgenven and Cornish, JJ.*) KRISHNASWAMI SASTRIGAL *v.* AVAYAMBAL AMMAL. **I.R. 1933 Mad. 254=142 I.C. 721=A.I.R. 1933 Mad. 204.**

———*Religious endowment—Dedication—Real or illusory—Test of.*

The tests of a *bona fide* or a nominal endowment are how did the founder treat this property, or how have his descendants treated it as the income of the endowed lands been continuously applied to the object of dedication? It is incorrect to presume that because a nominal endowment has once been made it is to be regarded an an endowment for ever In order to establish the case of a real, *bona fide* endowment, it must be established that an absolute grant was in the first place made with the intention that the profits should be applied for the services of the idol, that the profits have since been so applied and that the members of the family of the founder have not treated the property as one, the profits of which were mainly intended to be applied for their benefit. The grantor should have completely divested himself of every portion of the endowed property and for this purpose the evidence of the actions of the party after the deed of dedication can legitimately be gone into as determining the question whether there has been a real dedication. 3 W.R. 142; 18 W.R. 399; 15 C. W. N. 126; 4 P.L.J. 533; 42 A. 395; 43 A. 291 (P.C.); 5 Pat.L.T. 305; 6 Pat. 259 (P.C.); 17 C. 498 (P.C.), Ref. (*Ross and Dhavle, JJ.*) BHEKDHARI SINGH *v.* SRI RAMCHANDERJI. **10 Pat. 388=136 I.C. 290=I.R. 1932 Pat. 66=13 Pat. L.T. 331=A.I.R. 1931 Pat. 275.**

[**R.** 36 P.L.R. 13 (19); 34 P.L.R. 105 (109) **D.** 8 Luck. 266 (277).]

———*Religious endowment — Dedication—Shebaitship carried on by turns by two branches of family—Will by head of one branch—Provision that in a certain event all his properties should be devoted to worship of idols—If absolute dedication or only as regards his turn of worship—Succession to properties and shebaitship—Right of members of other branch.*

The ancestor of the plaintiffs and defendants founded an endowment for the worship of the family idols sometime prior to 1846, and by an *ekrarnama* of that year, 1846, certain properties were charged with the worship of the idols. The arrangement was that the two branches of the family, through whom the plaintiffs and the defendants respectively claimed should get their shares in proportion of 10 As. and 6 As. and that they must pay the

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expenses of the *debsheba* and religious ceremonies, etc. Shortly after this, there was a division of the rights of shebaitship or right of worship and *palas* or turns of worship were established, one branch agreeing to worship the idol during 19 days of the month and the other for 11 days on the month. This arrangement went on for about 70 years, when the head of one of the branches executed a will, by which he directed, *inter alia*, that in a certain event his entire properties should be devoted to the *debsheba* of the idols, if there was any surplus after meeting the revenue charges, and if there was a further surplus, the money should be devoted for the purpose or certain charitable institutions and a hospital.

Held, (1) that there was no absolute dedication of the properties to the idols, but that the intention of the testator was that the money should be devoted for carrying on his turn of worship only, without any provision for the turn of worship of the other branch of the family, and to hold otherwise would be to disregard the state of things existing at the time the testator made the will; (2) that the succession to the properties and to the shebait ship of the testator must follow the line of succession of the heirs of the testator; and the other branch had no right or claim to succeed as against the heirs of the testator. (*D. N. Mitter and Patterson, JJ.*) RAI SUNDARI DASYA *v.* BENODE BEHARY SAHA. **163 I. C. 595 = 9 R.C. 38 = 39 C.W.N. 1264.**

———*Religious endowment — Dedication—Termination by consent of adult members of family—Validity.*

There is no warrant in Hindu Law for the proposition that at any particular time by consent of all the parties then interested in the endowment, a dedication can be set aside. Much less can such a thing be done by means of a bargain between the adult members, the female and minor members not joining. (*Rankin, C.J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SHREE SHREE ISWAR BHUBANESHWARI THAKURANI. **60 Cal. 54 = 6 I.R. (Cal.) 20 = 144 I.C. 792 = A.I.R. 1933 Cal. 295.**

———*Religious endowment—Dedication—Validity—* Sankalp *and* samarpan *ceremonies, if essential.*

The ceremonies of *Sankalp* and *samarpan* are not the essential and indispensable ingredients of creation of an endowment in the absence of which there can be no valid dedication. The performance of the ceremonies is only the evidence of intention manifested by the dedicator and will have to be considered along with other items of the evidence to find whether the dedication was real or illusory. (*Niyogi and Staples, A.J.Cs.*) RAM SWAROOP *v.* THAKUR RAMCHANDRAJI. **31 N L.R. 188 = 157 I.C. 17 = 8 R.N. 12 = A.I.R. 1935 Nag. 35.**

———*Religious endowment—Dedication—When complete—Ceremonies, if necessary.*

Under Hindu Law, as administered in British Indian Courts, the performance of any religious ceremony of *sankalp* and *samarpan* is not legally essential for the creation of a trust for public or religious purposes though sometimes such a ceremony is performed. So long as there is a clear and unequivocal mainfestation of intention to create a trust and there is a formal divesting of the ownership in the property on the part of the donor and vesting of the same in another or even in the donor himself as a trustee, that is to say, so long as there is a clear change in the tenure of the property with the intention on the part of the donor to devote it to religious or public purposes, dedication thereof must be deemed to be complete. (*Jai Lal and Monroe, JJ.*) PREM NATH *v.* HARI RAM. **154 I C. 229 = 7 R L. 531 = 16 Lah. 85 = 36 P.L.R. 13 = A.I R. 1934 Lah. 771.**

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———*Religious endowment—Dedication—What constitutes—Subsequent conduct of parties.*

The mere execution of a deed, although it may purport on the face of it to dedicate property to an idol, is not enough to constitute a valid endowment. It is necessary to the validity of a deed of endowment that the executant should divest himself of the property dedicated. Whether he has done so or not is to be determined by the subsequent acts and conduct of the party or parties For instance, if the profits of a certain dedicated property are appropriated by the executant to his own use and not spent for the worship of the idol and his subsequent dealings with the property show that he did not intend to create an endowment, the dedication will be held to be inoperative and the property cannot be treated as debutter, *i.e.*, as belonging to the idol. Where, however, the subsequent acts and conduct of the parties show that as a matter of fact, the profits of the property have been utilised in the performance of the *debsheba* in accordance with the rules laid down in the deed of dedication, a contrary conclusion may be drawn. The mere fact that the members of the settlor's family are nominated shebaits and that they are to be remunerated out of the income of the property is no ground for holding that the dedication is not real, provided that the remuneration is reasonable having regard to the income of the property. The question whether the dedication is a complete or partial one, may be decided on the construction of the document. The question in such a case is, whether any beneficial interest is reserved to any person and if so, what is the nature and extent of the beneficial interest so reserved? Is it a mere charge or trust in favour of the idol or whether the property alleged to have been dedicated is property which is descendible to the heirs of the settlor? If it is the latter, it is only a partial dedication. (*C. C. Ghose, A.C.J. and Mitter, J.*) SREE SREE ISWAR LAKSHMI JANARDAN JIU *v.* KHITISH CHANDRA SINGHA. **I R. 1932 Cal. 372 = 137 I.C. 864 = 55 C.L.J. 26 = A.I.R. 1932 Cal. 419.**

Devolution of office.

See also DEDICATION *supra* AND MATHS *infra*.

———*Religious endowment—Devolution of office—Mahant—Suit for declaration of title as mahant and recovery of possession—Points to be proved.*

In a suit by the plaintiff for a declaration of his title as mahant, the succession to which is electoral and recovery of possession of the properties from the defendant, it is incumbent on the plaintiff to prove, first that he was a duly initiated and perfected *chela* of the late mahant and, secondly that he had been duly elected and installed in the place of his *guru*. His suits fails if he does not establish that he was elected or if, though a *chela*, his *Birja-hom* had not been validly performed by the deceased and still more if he was neither a perfected nor an initiated *chela* of the deceased. (*Macpherson and Khaja Mahomed Noor, JJ.*) BRAHMADEO BHARTHI *v.* RAMANAND BRAHMA CHARI. **141 I.C. 775 = I.R. 1933 Pat. 82 = 13 Pat L.T. 757 = A.I.R. 1933 Pat. 70.**

———*Religious endowment—Devolution of office — Math—Mahant—Succession—Nomination by will.*

Succession to the office of mahant is regulated by custom. Ordinarily, in the absence of proof of a custom negativing such a right, the mahant has the power to nominate his successor either by a will or by a written declaration. (Mulla's Hindu Law, 6th Ed., pp. 474 and 477; 11 B. 514, Ref.) (*Baker, J.*) HARIDAS *v.* RAMDAS. **I.R. 1931 Bom. 121 = 128 I.C. 905 = 32 Bom.L.R. 1381 = A.I.R. 1931 Bom. 79.**

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———*Religious endowment—Devolution of office—Math—Succession—Practice in other institutions of the same order.*

In dealing with succession to a math the prevailing practice in a large number of maths of the same order may be considered. (*Pullan and Niamatullah, JJ.*) RAGHUNATH DAS *v.* GANESH DAS. **I.R. 1932 All 401=138 I.C. 406=1932 A.L.J. 615=A.I.R. 1932 All. 603.**

———Religious endowment — Devolution of office—Shebaitship—Absolute gift of—Limitation of time of heirs—Validity. *See* DEED—CONSTRUCTION—GIFT. **61 Cal. 106=A.I.R. 1934 Cal. 379.**

———*Religious endowment—Devolution of office—Shebaitship—Alteration of line by founder.*

Where the founder has laid down a line of succession, he should not be allowed to alter it unless he has reserved the right to do so The arrangement has to shebaitship should in such a case be treated as an integral part of the endowment.

Per *S. K. Ghose, J.*—Where the shebaitship is vested in the founder and his heirs, they may interfere in the management for the benefit of the deity. But those powers are subject to limitations which may be imposed by custom or by the founder's own dispositions.

Per *Mukerjee, J.*—Such rights of supervision and control as the founder, in the absence of express reservation, may have in respect of the endowment, can only be exercised for the benefit of the endowment and cannot extend to an alteration in the order of succession to shebaitship unless through the intervention of Court and except for good cause shown. (*S. K. Ghose and Mukerjee, JJ.*) NARAYAN CHANDRA *v.* BHUBAN MOHINI. **38 C.W.N. 15=151 I.C. 954=A.I.R. 1934 Cal. 244.**

———*Religious endowment—Devolution of office—Shebaitship—Office limited to "pisran"—Gift to deity.*

A document executed by the founder of a religious endowment ran as follows: "First of all the Government revenue having been paid through me and after me through my sons, heirs, representatives, the entire produce thereof shall be spent on daily puja .. .. . and the other necessary items and feeding sadhus, saints and Brahmins by me as the sevak and after my death by my sons, heirs, representatives. My heirs and representatives shall have on no account any right to sell the said mauza dedicated to the said temple. I and after me my sons, heirs and representatives shall take care of all the things mentioned above, sadar and mofusil, appertaining to the said mauza and the temple." The document was written in Urdu and the words which repeatedly occurred in it were "pisran, warisan kayam mokamian," meaning sons, heirs and representatives, respectively.

Held, that there was no question of an estate of inheritance. There was a gift out and out to the deity and the office of the shebait was to devolve in accordance with the intention of the donor so far as could be gathered from the document. The use of the word "pisran" indicated that the founder preferred male descendants to occupy the office of the shebait; in their absence, the shebait was to be chosen from the heirs, and lastly from among the legal representatives of the donor. The grandson of the donor was therefore entitled to a declaration that he was the sole shebait of the deity as against a female descendant of the donor who claimed to be a co shebait. 4 B.L.R. 103 and A.I.R. 1926 Bom. 309, Ref.; A.I.R. 1932 Pat. 265, Affir. (*Courtney Terrell, C. J. and Fazl Ali, J.*) BIMALABALA SINHA *v.* DEB KINKAR GHOSE. **I.R. 1933 Pat. 15=140 I.C. 687=A.I.R. 1932 Pat. 267.**

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———*Religious endowment—Devolution of office—Shebaitship—Provision for succession of eldest in male line—Validity.*

Under the Hindu Law, a rule laid by the founder of a *debutter* for succession to the office of shebait would be invalid, if it provides for the office to be held by some one among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritance. Consequently a clause in a will providing for the succession of the eldest in the male line is invalid, as it excludes some of the founder's heirs according to Hindu Law. (*Costello and Lort Williams, JJ.*) LAL BEHARY DHUR *v.* THE ADMINISTRATOR-GENERAL OF BENGAL. **155 I.C. 1071=7 R.C. 670=39 C.W.N. 46=A.I.R. 1935 Cal. 284.**

———*Religious endowment—Devolution of office—Shebaitship—Rules governing — Estate unknown to Hindu Law—Applicability of rule in Tagore case—Provision in will for succession of senior to the exclusion of other heirs—Validity of—Heirs not in existence on date of will.*

The founder of a Hindu debutter is competent to lay down rules to govern the succession to the office of shebait subject to the restriction that he cannot create any estate unknown and repugnant to Hindu Law. The person succeeding to the shebaiti under such rules is a grantee or donee of property and his right to succeed to the office is subject to the rule that a gift cannot be made by a Hindu to a person not in existence at the time of the gift. (2) The rules for succession to the office of shebait are rendered invalid, if they provide for the office to be held by some among the heirs of the founder to the exclusion of others, in a succession differing from the line of Hindu inheritence. (3) The rule laid down in *Tagore* case prohibiting a Hindu from creating a line of succession unknown to Hindu Law applies as well to the appointment of a shebait of a family thakur. A.I.R. 1925 Cal 442, Overr. (4) As regards persons not in existence in the founder's lifetime, a direction cannot be validy given by the founder in his will that the person senior in age among the heirs of the first shebait should succeed to the office of shebait A I.R. 1925 Cal. 225, Appr. (5) The provision in a will to the effect that the eldest male member of testator's family should be sole shebait is in law ineffectual to entitle the senior male member of the family to the office, if he was not in existence until after the testator's death. (Case law discussed.) (*C. C. Ghose, Mukerji, Mitter, Guha and M.C. Ghose, JJ.*) MONOHAR MUKERJEE *v.* BHUPENDRA NATH MUKHERJEE. **60 Cal. 452=37 C.W.N 29=141 I.C 544=I.R. 1933 Cal. 115=56 C.L.J. 468=A.I.R. 1932 Cal. 791 (F.B.).**

[**E.** 60 C. 706 (710): **Rel.** 61 C. 393 (395, 398). **R.** 58 C.L.J. 445 (453); 61 C. 106 (110, 113); 38 C.W.N. 15 (19, 20).]

———*Religious endowment—Devolution of office—Shebaitship—Succession—Nomination by holder—Prescribing devolution at variance with law—Legality.*

The office of shebait is a kind of property and not merely an office, and the rules laid down in the case of *Tagore v. Tagore*, 9 B. L. R. 377 apply to it. Thus though the settlors may provide for succession to the office, they must not in so doing attempt to create an estate unknown to Hindu Law, and a provision that the succession is to be held by certain heirs of the founder to the exclusion of others in a line contrary to the Hindu law of inheritanse is invalid. Where the settlors appointed themselves as shebaits in the first instance and they were given the power to appoint their successors and in default their spiritual guides or in the case of their death

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the eldest male child of the settlor was to act and the deed further provided that such eldest male child could appoint his successor,

Held, that the settlors attempted to provide for succession to the office of shebait partly by way of gift and partly by way of inheritance and that the latter part was invalid because it was contrary to law. (*Lort Williams, J.*) KANDARPAMOHAN GOSWAMI *v.* AKSHAY CHANDRA BASU. **60 Cal. 706=58 C.L.J. 445=6 R.C. 785=A I.R. (Cal.) 199=146 I.C. 312= A.I.R. 1933 Cal. 529.**

[**Reversed.** 61 C. 106.]

———*Religious endowment — Devolution of office— Shebaitship — Succession to—Perpetual succession of eldest male lineal descendant of last shebait—Succession opposed to Hindu Law—Invalidity of clause—Reversion of succession to heirs of testator.*

A testator created a religious endowment by his will and provided as follows for the devolution of the shebaitship. "I appoint my sons *K* and *R* to be shebaits of the Thakurs and I direct that upon the death, retirement or refusal to act of any of them or any of the future shebaits, the then next eldest male lineal descendant of *K* or *R* shall act as shebait it being my intention that the eldest for the time being in the male line of my said sons *K* and *R* shall always remain as joint shebaits and in the event of the death or refusal to act of any shebait the then next male member of the branch to which the shebait dying or refusing belonged shall act as shebait in his place and stead." Both *K* and *R* died shortly after the testator and on a dispute arising about the right to succeed to the shebait ship.

Held, that on a proper construction of the will there was no absolute gift to the heirs of *R* and *K* or to their next eldest lineal male descendant. On the contrary, a perpetual succession was sought to be established whereby on the death, retirement or refusal to act of the eldest male lineal descendant for the time being either of the two original shebaits, the next eldest male lineal descendant was to succeed to the shebaitship. Cl. 11 could not be considered as an independent gift to the persons who happened to answer the description of the eldest male lineal descendant of the original shebaits at the time of their death. The clause attempted to lay down a line of succession not permissible under the Hindu Law and was therefore invalid. Both the shebaits appointed by the will being dead, the shebaitship devolved upon the heirs of the testator and not upon the sons of the deceased shebaits. (*Panckridge, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* LALBIHARI DHAR. **61 Cal. 393=152 I.C. 710=7 R. C. 309=A.I.R. 1934 Cal. 629.**

———*Religious endowment — Devolution of office—* Shebaitship*—Trust in favour of idols—Deed of endowment silent as to succession—Founder's heirs—Right of —Accretion to endowment by dedication made subsequently by another—Line of succession.*

In the absence of a provision in the deed creating an endowment as to the succession to the *shebaitship*, the *shebaitship* follows the line of heirs of the founder. But the same rule does not always apply as an absolute rule where there is an accretion to *debutter* properties either by some other member of the family or by a stranger The circumstances of each case must be considereded. When there has been a division of the turn of worship, it would be just that the *shebaitship* should follow the line of heirs of the person making the subsequent dedication. (*D. N. Mitter and Patterson, JJ.*) RAI SUNDARI DASYA *v.* BENODE BEHARY SAHA. **163 I. C. 595=9 R.C. 38=39 C.W.N. 1264.**

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Dharmakartha.

———*Religious endowment—Dharmakartha—Duties— Filing useless appeal—Liability for costs.*

Where a dharmakartha files a second appeal on a question of fact which has been decided against him in both the lower Courts and the second appeal is dismissed he is personally liable for the costs of the second appeal. (*Curgenven, J.*) PANCHAKSHARI *v.* VENKATARATNAM. **58 Mad 160=150 I C 87=6 R.M. 688= 40 L.W. 22=1934 M W.N. 1178=A.I.R. 1934 Mad. 430=67 M.L.J. 209**

Idol.

———*Religious endowments — Idol — Doctrine of perpetual minority — Adverse possession of debtor property.*

The doctrine that an idol is a perpetual minor is an extravagant doctrine contrary to the decision of the Privy Council in such cases as 37 Cal. 885. It is open to shebaits or any person interested in an endowment to bring a suit to recover the idol's properties for debutter purposes. Strong facts may be necessary in order to establish adverse possession in any case in which there is a reasonable possibility that the possession is being held under the idol's title ; but where a non-shebait is holding property in open derogation of the trust, a plea of adverse possession can be sustained. (*Rankin, C. J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SREE SHREE ISHWAR BHUBANESHWARI THAKURANI. **60 Cal. 54=6 I.R. (Cal.) 20=144 I.C. 792=A.I.R. 1933 Cal. 295.**

———*Religious endowment—Idol—If necessary party in suit by shebait.*

Where a shebait is suing in his representative capacity, it is not necessary to have the idol as a party. (*Varma, J.*) KUNJA BEHARI *v* MOHIT SINGH **152 I C. 241 (1)=7 R P. 157=A.I.R. 1934 Pat. 531.**

———Religious endowment—Idol—Limitation against —Theory of perpetual minority — Correctness of— Minority effecting limitation is that of shebait, and not of the idol. *See* LIMITATION ACT, ART. 144— DEBUTTER PROPERTY. **A.I.R. 1932 Mad. 328=62 M.L.J. 496.**

———*Religious endowment—Idol— Representation— Contest to establish individual rights.*

In a contest to establish individual rights and to eject worshippers as trespassers, demanding also demolition of the building, the result may vitally affect the interests of the idol and it is therefore in the interests of all concerned that the idol should appear by disinterested next friend appointed by the Court. A.I.R. 1925 P.C. 139, Foll. (*Lord Tomlin.*) KANHAIYA LAL *v.* HAMID ALI. **60 I.A. 263=8 Luck. 351=38 C.W.N. 151 =146 I.C. 1044=1933 M.W.N. 816=10 O.W.N. 622 =58 C.L.J. 443=38 L.W. 994 =A.I.R. 1933 P.C. 198 (1)=65 M.L.J. 811 (P.C.).**

———*Religious endowment—Idol—Right to sue— Trust in favour of idol—Trust denied by defendants'* possession.

The plaintiffs, as persons interested in the affairs of a temple, brought the suit to have certain properties in the possession of the defendants restored for the benefit of the idol. They alleged that the land was purchased by the predecessor in-title of the defendants for the benefit of the idol, though the land did not stand in the name of the idol nor was there any sale deed in its name nor any other document to prove dedication. The de-

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fendant denied the trust and claimed that the land belonged to themselves. The defendants contended that the plaintiffs had no right to sue.

Held, that where the very existence of the property of the idol was disputed, somebody should be appointed or allowed to represent the interest of the idol as against the interest of those persons who were in possession adversely to the temple and that it would not be in consonance with ordinary notions of justice or equity, that a person who comes forward not on his own behalf but on behalf of the charitable or religious foundation should be non-suited, on the ground that he had no power or legal position to represent the idol.

Held also that cases relating to the reverter of the trusteeship to the heirs of the founder had no application to a case of disclaimer of the trust itself by the heirs of the founder. (*Baker and Nanavati, JJ.*) MARUTI RAMRAO *v.* MALLAPUR SHRI GOPAL KRISHNA. **I.R. 1932 Bom. 376=138 I.C. 433=34 Bom.L.R. 415=A.I.R. 1932 Bom. 305.**

Mahant.

See also ALIENATION AND DEVOLUTION OF OFFICE *supra* AND MATH, *infra.*

———*Religious endowment—Mahant—If can be a married man.*

There are married and unmarried Bairagis and Bairagis can hold property in their own right. There is no prohibition in the Shastras against the marriage of a Bairagi. Where according to the custom of the institution it is for the mahant to appoint his successor, the fact that the successor is a married man is no bar to his taking over office of the mahant. (*Addison and Din Mahomed, JJ.*) HARI DAS *v.* RAJA RAM. **157 I.C. 993=8 R.L. 165=A.I.R. 1935 Lah. 545.**

———*Religious endowment—Mahant—Position and powers of—If 'trustee'—Fiduciary obligation—Powers over property of Math.*

A Mahant or the head of a Math is not a "trustee" in the sense in which that term is understood in English law. The only law as to a Mahant and his office, functions and duties, is to be found in custom and practice, which is to be proved by testimony. But though a Mahant is not a trustee, in the English sense, he is, in view of the obligations and duties resting on him, answerable, as a trustee in the general sense, for the proper administration of the institution of which he is the head. The existence of a very wide discretion in the Mahant as to the application of the income of the Math or *asthal* is by no means inconsistent with a fiduciary obligation so to manage the property of the Math that the objects for which the Math exists shall be effectively served. (*Fazal Ali and Rowland, JJ.*) KESHO DAS *v.* AMAR DASJI. **14 Pat. 379=156 I.C. 1099=8 R.P. 62=16 Pat.L.T. 35=A.I.R. 1935 Pat. 111.**

———*Religious endowment—Mahant—Position of—Right to math property—Presiding Mahant installing new Mahant on Gaddi—Transfer of Math property—Need for registered document.*

A Mahant is in the position of a trustee of the Math property and the property appertaining to the Math vests not in the Mahant personally, but in the institution, and when a Mahant succeeds he cannot claim the Math property as his personal belonging, but merely as an appurtenance to his office. The property remains throughout the property of the institution, and when a new Mahant is installed, there is no transfer of the property to him by gift or otherwise, but he assumes the office, which entails the management of the property

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appertaining to the Math. Consequently there is no need to execute a written and registered document under S. 123 of the T. P. Act. (*Kendall and Iqbal Ahmad, JJ.*) SATNAM SINGH *v.* BAWAN BHAGWAN SINGH. **157 I.C. 540=4 A.W.R. 1079=A.I.R. 1935 All. 198**

———*Religious endowment—Mahant—Right to resign.*

There is nothing in the nature of the office of a Mahant which would prevent a Mahant from resigning his office, if he wished to do so. (*Kendall and Iqbal Ahmad, JJ.*) SATNAM SINGH *v.* BAWAN BHAGWAN SINGH. **157 I.C. 540=4 A.W.R. 1079=A.I.R. 1935 All. 198.**

———*Religious endowment—Mahant—Whether can be sued in representative capacity.*

There is nothing to prevent a Mahant being sued in his representative capacity. (*Grille, J.C.*) PREMDAS *v.* SHEOPRASAD. **152 I.C. 362=7 R.N. 96=31 N.L. R. 113=A.I.R. 1934 Nag. 222.**

Management.

———*Religious endowment— Management—Heirs of founder—Right of management.*

On the death of the appointed trustees the heirs of the founder are entitled to right of management, of the trust properties when it is not inconsistent or opposed to the purpose of the founder. That right is not lost by reason of any previous conduct of the heir which is not proved to be such as would prevent the vesting of the right of management of the religious endowment, on him, or her as the heir of the endowment. 30 W.R. 396; 17 C. 3 ; 31 I.A. 203 ; 50 C. 292, Foll. (*Patkar and Barlee, JJ.*) KASHINATH *v.* GANGUBAI. **I.R. 1931 Bom. 213=129 I.C. 741=32 Bom.L.R. 1687=A.I.R. 1931 Bom. 170.**

[D. 34 Bom.L.R. 415 (420) **R.** 33 Bom.L.R. 1285 (1289).]

———*Religious endowment— Management—Transfer of right of trustee—Validity.*

A trustee is not entitled to transfer the right of management vested in him to another during his lifetime or if he proposed to change from one sect to another, to carry with him the property of an institution belonging to his former sect. (*Kulwant Sahay and Macpherson, JJ.*) KAMALAKHAN TIWARI *v.* RAMLAGAN GOSAIN. **148 I.C. 809=6 R.O. 442=14 Pat. L.T. 415=A.I.R. 1933 Pat. 449.**

Manager.

See also ALIENATION, *supra.*

———*Religious endowment—Manager—Manager* de facto*—Right to sue.*

Where a person is in peaceful possession of the properties of an idol, and manages them, he is the *de facto* manager and though he has not been appointed manager in accordance with the terms of the endowment, he is competent to file a suit against a lessee for possession when he claims the property as belonging to the idol. (*Agarwala and Saunders, JJ.*) SRI RADHA KRISHNAJI *v.* RAMESHWAR PRASAD SINGH. **152 I.C. 302=7 R.P. 183=A.I.R 1934 Pat. 584.**

———*Religious endowment—Manager—Right to act as —No bar by sex.*

Sex is no bar to a woman acting as the manager of a religious endowment in the absence of any usage to the contrary. 3 B.H.C.R. (A.C.J.) 75 ; 44 M. 205, Foll. (*Patkar and Barlee, JJ.*) KASHINATH *v.*

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———*Religious endowment—Manager—Right to part of usufruct.*

Per *Mukerji, J.*—The idea of a manager or custodian of the idol or its endowed property having a right to a part of its usufruct, far from being repugnant to the Hindu notion of a religious endowment, is but a normal feature of it. (*C. C. Ghose, Mukerji, Mitter, Guha and M. C. Ghose, JJ.*) MANOHAR MUKERJEE *v.* BHUPENDRA NATH MUKHERJEE. **60 Cal. 452=141 I.C. 544=I.R. 1933 Cal. 115=56 C.L.J. 468=37 C.W.N. 29=A.I.R. 1932 Cal. 791 (F.B.).**

Matathipathi.

See also ALIENATION, *supra.*

———*Religious endowment*—Matathipathi—*Status and rights of—If mere trustee—Math.*

A *matathipathi* is not a mere trustee in respect of the property of the *math*, but has a beneficial interest in it. He has a right to possession of the *math* building, has a right to reside in the *math*, and he has a right to be maintained out of the income of the *math*. It is also inaccurate to say that a *matathipathi* is in exactly the same position as a *dharmakarta* of a temple. (*Reilly, C.J. and Sreenivasa Rao, J.*) BALAKRISHNA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 228=40 Mys.H.C.R. 277.**

Math.

See also ALIENATION, DEDICATION AND MAHANT, *supra.*

———*Religious endowment—Math with idol*—Sanyasi, *head of property held or acquired by—Nature of—Presumption.*

Although there are some differences between debutter property and property dedicated to a math, where the math is an idol installed in it, property appertaining to a math, whether dedicated to the idol or not, is not the personal property of the head of the math ; and when the holder or Mahant is not only a *sanyasi* but also a celibate, the property is utterly incapable of passing to natural heirs. The fact that the holder executes a *hibanama* in which he describes the math as his math carries little weight ; the math with the idol cannot be his personal property. The presumption in the case of a mahant who is a *sanyasi* and a celibate, having no family of his own, and who is free from all worldly attachments, is that the property held or acquired by him is so held or acquired on behalf of the math to which his life is entirely devoted. A presumption of the same kind would arise in respect of the property subsequently acquired by such celibate Mahant. (*Dhavle and James, JJ.*) SUSIL CHANDRA SEN *v.* GOBIND CHANDRA DAS. **6 R.P. 705=150 I.C. 61=A.I.R. 1934 Pat. 431.**

———*Religious endowment — Maths — Kabirpanthi foundations in Bihar—Nature of bhagtahi maths.*

The Kabirpanthi foundations are not temples but maths, the object of which generally is the promotion of religious knowledge and the imparting of spiritual instruction to the disciples and followers of the math. There may be idols connected with maths but the worship of them is a secondary matter. In Bihar an important organisation is the Dhananti math in Saran. They have Sadhus and chelas and no worship is done in the maths except the reading by the Mahant from the scriptures is included in the term. Distinction between *Bhagtahi* and *Satkabir* maths pointed out. Dotia araria held to be a *bhagtahi* math. (*Kulwant Sahay and Macpherson, JJ.*) RAMLAKHAN TIWARI *v.* RAMLAGAN GOSAIN. **14 Pat.L.T. 415=149 I.C. 156=6 R.P. 573=A.I.R. 1933 Pat. 449.**

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———*Religious endowments—Math—Mahant not duly installed—Right to maintain suit to recover Math property.*

A person who, though not duly installed, is in fact managing the affairs of a Math and has been treated as its Mahant by all the persons interested therein, has a right to maintain a suit for the benefit of the Math to recover property which belongs to it and which is wrongly held by persons who are in no better position than trespassers. (*Sir Shadi Lal.*) MAHADEO PRASAD *v.* KARIA BHARTHI. **62 I.A. 47=57 All. 159=153 I.C. 1100=7 R.P.C. 135=1935 M.W.N. 162=41 L.W. 291=39 C.W.N. 433=61 C.L.J. 122=37 Bom.L.R. 333=1935 O.W.N. 247=1935 A.W.R. 186=1935 A.L.J. 678=37 P.L.R. 311=A.I.R. 1935 P.C. 44=68 M.L.J. 499 (P.C.).**

———*Religious Endowment—Math—Mahant in possession of property—Presumption that property belongs to Math.*

When certain property is found to be held by a person who occupies the office of Mahant of a Math, there is no presumption that the property belongs to the Math. The mere fact that a Mahant is an ascetic does not exclude the possibility of his possessing personal property. (*Niyogi, A. J. C.*) GANESHGIR GOSAI *v.* FATEHCHAND BANIA. **31 N.L.R. 282=8 R.N. 30=157 I.C. 212=A.I.R. 1935 Nag. 114.**

———*Religious endowment — Maths — Parent and subordinate organisations—Devolution of office—Rules applicable.*

Simply because two Maths are related as parent and subordinate maths it does not necessarily follow that both follow some customs. It must be established by evidence of practice that the subordinate math follows the customs prevailing in the parent math or in the organisation of which both are a part. When the chela of a mahant of a subordinate math in Dhananti organisations succeeds his deceased guru he must be installed by the mahant of the superior math. Where there is no chela of the late mahant, the Mahant of the superior math is entitled to appoint a chela from his own or a subordinate math and to be in possession of the math and its property for a reasonable time until he was so appointed to the vacancy. There is no absolute lapse to the superior math. (*Kulwant Sahay and Macpherson, JJ.*) RAMLAKHAN TIWARI *v.* RAMLAGAN GOSAIN. **14 Pat.L.T. 415=149 I.C. 156=6 R.P. 573=A.I.R. 1933 Pat. 449.**

———*Religious endowment — Math — Presiding Mahant installing new Mahant on Gaddi—Power to turn him out.*

When once a presiding Mahant duly installs a new Mahant on the Gaddi and confers on him the office of Mahant, he has no authority to turn him out for any reason whatever. (*Kendall and Iqbal Ahmad, JJ.*) SATNAM SINGH *v.* BAWAN BHAGWAN SINGH. **157 I.C. 540=4 A.W.R. 1079=A.I.R. 1935 All. 198.**

Private trust.

———*Religious endowment—Private trust—Future shebait—Right to maintain suit on behalf of idol.*

A *de facto* shebait has got certain rights and is competent to act on behalf of the idol in certain matters. In the case of a member of the family with a prospec-

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tive right to be the future *shebait* he is entitled to see that the dedicated property is in no way affected by any unlawful act of any *shebait*. He can maintain a suit to have it declared that the alienations by the actual shebait are unauthorized do not affect the title of the idol. (*Suhrawardy and Graham, JJ.*) GIRIS CHANDRA SAW *v.* UPENDRA NATH GIRIDAS. **35 C W N. 768=135 I.C. 273=I.R. 1932 Cal. 81=A.I.R. 1931 Cal 776.**

———*Religious endowment — Private trust—Idol—Representation by next friend—Permissibility.*

Where in the case of a private religious trust in which no member of the public could intervene and the founders' living relatives were expressly excluded by the deed itself and it further appeared that the *shebait* will not bring a suit against himself charging himself with mismanagement and misappropriation of the debutter estate and income.

Held, that the idol may, under those circumstances, appear in a suit by a disinterested next friend appointed by the Court. 52 C. 809, Cons. (*Lort Williams, J.*) SHARATCHANDRA SHEE *v.* DWARKANATH SHEE. **58 C. 619—I.R. 1931 Cal. 767=133 I.C. 815=A.I.R. 1931 Cal. 558.**

———*Religious endowment—Private trust—Right of member of family to sue—Alienation—Right to challenge.*

In the case of public and charitable endowment any person who is in any way interested in the trust is entitled to maintain a suit for a declaration that alienations made by the trustee are not binding on the trust. Similarly a person interested in a private trust as a member of the family for whose spiritual benefit the worship of the idol was established should be entitled to maintain a suit of this nature. (*Agarwala and Saunders, JJ.*) SRI RADHA KRISHNAJI *v.* RAMESHWAR PRASAD SINGH. **152 I.C. 302=7 R.P. 183=A.I.R. 1934 Pat. 584.**

———*Religious endowment—Private trust—Whether can be put an end to by consent.*

In the case of a private religious trust the members of the family who have an interst in it may agree to put an end to the trust and appropriate the debutter property. 2 C. 341, Rel. on. (*Lort Williams, J.*) SHARATCHANDRA SHEE *v.* DWARAKANATHA SHEE. **58 Cal 619=I.R. 1931 Cal. 767=133 I.C. 815=A.I.R. 1931 Cal. 558.**

Public trust.

———*Religious endowment—Public trust—Essentials of.*

To constitute a valid public trust or endowment there must be proof of a grant with the intention that the profits should be utilised for the services of idol or temple and that the founder or the members of his family had not treated the property as their own private property. The real criterion of a public temple is proof of performance of the ceremony of *Prasad utsarga*, which betokens the relinquishment of private rights of the founder and dedication to the idol. (*Nanavutty and Zia-ul Hasan, JJ.*) GIR HAR SAROOP *v.* BHAGWAN DIN. **152 I.C. 861=7 R.O. 250=11 O.W.N. 1435=A.I.R 1935 Oudh 96.**

———*Religious endowment—Public trust—Private temple—Conversion into public—Evidence of—User by public.*

Before a private temple can be converted into a public endowment, very strong and cogent evidence is needed to prove the fact. User to so convert it, must be

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unfettered and unrestricted by any act on the part of the owners of the temple, *i.e.*, the owners must allow the general public the free use of the temple at all hours of the day and night without let or hindrance, and the offerings made to the idol should be utilised for the upkeep of the temple, and not for the personal benefit of the owners. (*Nanavutty and Zia-ul-Hasan, JJ.*) GIR HAR SARUP *v* BHAGWAN DIN. **152 I C. 861=7 R. O 250=11 O.W.N. 1435=A.I.R. 1935 Oudh 96.**

Shebait.

See also ALIENATION AND DEVOLUTION OF OFFICE *supra.*

———Religious endowment—Shebait—*De facto* shebait —Future shebait—Private endowment—Right to maintain suit on behalf of idol. *See* PRIVATE TRUST, *supra.* **A.I.R. 1931 Cal. 776.**

———*Religious endowment — Shebait — Hereditary office—Acceptance of office, if necessary.*

A man is not born responsible as a shebait merely because his father held that office and he does not become a shebait against his will, if he has never accepted the office of shebait, nor acted as a bailiff or a trustee of deity. He may be treated as an outsider and for all purposes a stranger. His possession is not tainted in any way by a fiduciary relationship by subsisting between him and the idol, and is adverse against the idol. (*Rankin, C.J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SHREE SHREE ISHWAR BHUBANESHWARI THAKURANI. **60 Cal. 54=6 I.R. (Cal.) 20=144 I.C 792=A I.R. 1933 Cal. 295.**

———*Religious endowment—Shebait—Mine belonging to deity—Claim for royalty of raisings—Suit by one of four shebaits—Maintainability.*

Where the claim for the royalties of the raisings of the coal is concerned solely with the property of the family deity in the mine, and the plaintiff is merely interested in it as shebait, one of them cannot competently sue for his share in the idol's interests. 41 I.C. 837, Ref. (*Lord Alness.*) BARABONI COAL CONCERN, LTD. *v.* GOKULANANDA MOHAN THAKUR. **61 I A. 35=61 Cal. 313=3 A.W R. 193=11 O.W.N. 225=18 R D. 112=59 C L.J. 257=1934 A L J. 295=36 Bom L R. 390=1934 M W.N. 300=6 R P C. 85=147 I C. 884=39 L W. 291=38 C W.N. 325=A.I.R. 1934 P.C. 58=66 M.L.J. 399 (P.C.).**

———*Religious endowment—Shebait—Office of.*

Per *Rankin, C.J.*—The office of shebait is hereditary and it is regarded in Hindu Law as immovable property. (*C. C. Ghose, Mukerji, Mitter, Guha and M. C. Ghose, JJ.*) MONOHAR MUKERJEE *v.* BHUPENDRA NATH MUKHERJEE. **60 Cal 452=141 I C 544=I R. 1933 Cal. 115=56 C.L J. 468=37 C.W.N. 29=A I.R. 1932 Cal. 791 (F.B.).**

———*Religious endowment—Shebait—Partition of the right of*—Palas *or turns of worship—Legality of.*

Shebaitship or the right of worship of idols can be made the subject of partition. The righ to worship by turns or *palas* is well established. (*D N. Mitter and Patterson, JJ.*) RAI SUNDARI DASVA *v.* BENODE BEHARY SAHA. **163 I.C. 595=9 R.C. 38=39 C.W.N. 1264.**

———*Religious endowment—Shebait—Position of.*

Per *Mukerji, J.*—Shebaitship in its true legal conception involves two ideas; the ministrant of the deity and its manager; it is not a bare office but an office together with certain rights attached to it. A shebait's position towards the debutter property is not similar to that in

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England of a trustee towards the trust property; it is only that certain duties have to be performed by him which are analogous to those of trustees. (*C.C. Ghose, Mukerji, Mitter, Guha and M.C. Ghose. JJ.*) MONOHAR MUKERJEE *v.* BHUPENDRA NATH MUKERJEE. **60 Cal. 452=141 I.C. 544=I.R. 1933 Cal. 115=56 C.L.J. 468=37 C.W.N. 29=A.I.R. 1932 Cal. 791 (F.B.).**

———*Religious endowment—Shebait — Position of —Termination of worship and managership—Office at an end.*

A shebait is a mere manager of an idol and not a trustee though by courtesy he is called a trustee. He has got no vested interest in the debutter property and merely being a manager he ceases to be a shebait when he ceases to manage the property, and carry on the worship of the idol. He has no right of property transferable or heritable as such. The property belongs to the idol which is a juristic person. 48 I.A. 302; Rel. on. (*Suhrawardy and Jack, JJ.*) HUBAN MOHAN KOLEE *v.* NARENDRA NATH KONWAR. **135 I.C. 96=I.R. 1932 Pat. 16=35 C.W.N. 478=A.I.R. 1932 Pat. 62.**

———*Religious endowment—Shebait—Power to incur debt.*

The power of the shebait of an idol's estate to incur debts is analogous to that of the manager of an infant heir. The power can only be exercised in case of need or for the benefit of the estate. The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance is the thing to be regarded. The test is: Is the debt in the particular instance one that a prudent owner would incur in order to benefit the estate? If the answer is in the affirmative, a *bona fide* lender is not affected by the precedent mismanagement of the manager. The lender of course cannot support a charge grounded on a necessity, which his own wrong has helped to cause Unless therefore he is shown to have acted *mala fide*, the lender will not be affected, though it be proved that with better management the necessity in question would not have arisen. 2 I.A. 145 (P.C.) and 6 M.I.A. 393 (P.C.), Rel. on. (*Venkatasubba Rao and Curgenven, JJ.*) VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR. **I.R. 1933 Mad. 442=144 I.C. 584=A.I.R. 1933 Mad. 639.**

———*Religious endowment—Shebait—Right to office —Who can sue to establish right.*

A right to an office or a share in a hereditary office must be asserted by the person claiming it and it is not open to a worshipper to assert such a right on behalf of another person. Where a person who had no immediate right to the office sued to establish that his father had the right to the office.

Held, that the suit was not maintainable. (*Rankin, C.J. and Pearson, J.*) MADAN MOHAN DHUR *v.* THACOOR SREE SREE NETI GOUR JEW. **147 I.C. 1247=6 R.C. 421=37 C.W.N. 801=A.I.R. 1934 Cal. 30.**

———*Religious endowment—Shebait—Right to relinquish office.*

A shebait is competent to relinquish or resign his office or abdicate in favour of his co-shebait or successor in office. (*Suhrawardy and Graham, JJ.*) GIRISCHANDRA SAW *v.* UPAENRA NATH GIRIDAS. **135 I.C. 273=I.R. 1932 Cal. 81=35 C.W.N. 768=A.I.R. 1931 Cal. 776.**

———*Religious endowment — Shebait—Transfer of office—Relinquishment under compromise.*

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A shebaitship cannot be transferred for a consideration. But the relinquishment of the right to the office made under a deed of compromise may be held valid. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F.A. SAVI. **12 Pat. 359=6 I.R. Pat. 17=145 I.C. 1=14 Pat.L.T. (Supp.) 1=A.I.R. 1933 Pat. 306.**

Temple.

See also ALIENATION AND MANAGER, *supra.*

———*Religious endowment—Temple—Adverse acts of priest—Temple property, if altered.*

The adverse acts of a priest of a temple cannot alter the nature of the property attached to the temple. (*Shadi Lal, C.J. and Hilton, J.*) LACHHMAN DAS *v.* ARYA PRITINIDHI SABHA, PUNJAB. **I.R. 1932 Lah. 455 (2)=138 I.C. 309=A.I.R. 1932 Lah. 603.**

———*Religious endowment—Temple—Idol not in its place—Building used as private property—Effect.*

A temple is still a temple even if the building is used as private property and there is no idol therein. (*Shadi Lal, C.J. and Hilton, J.*) LACHHMAN DAS *v.* ARYA PRITINIDHI SABHA, PUNJAB. **I.R. 1932 Lah. 455 (2) =138 I.C. 309=A.I.R. 1932 Lah. 603.**

———*Religious endowment—Temple—Private temple can become public temple.*

An alleged private temple may have become or may be on the verge of becoming a public temple. Mere oral evidence that the temples are private even of respectable witnesses supported by Government records and other evidence is not conclusive. A.I.R. 1924 P. C. 44, Rel. on. (*Aston, A.J.C.*) MULCHAND *v.* DEVI GIR. **150 I.C. 266=6 R.S. 265=A.I.R. 1933 Sind 213.**

———Religious endowment—Temple—Private temple —Conversion into public—Evidence of—User by public. *See* PUBLIC TRUST, *infra.* **A.I.R. 1935 Oudh 96.**

———*Religious endowment—Temple—Public temple —Essentials.*

There is no presumption that any particular temple is public or private; whether it is public or private depends on facts proved in each case. The mere fact that offerings were received in a case where there was a deed creating a private endowment would not be sufficient to alter the private nature of the endowment. But where a temple is held by professed ascetics in succession from gurus to chelas the zemindari which belongs to the temple has been purchased by the gurus in the name of the deity, subscriptions are received from the public to maintain the temple, the public visiting the temple can perform darshan and it is open to any one visiting the temple to make an offering, the temple is a public endowment. (*Mukerji and Bennet, JJ.*) SAHDEO DAS *v.* RAJA RAM. **143 I.C. 95=I.R. 1933 All. 178=1932 A.L.J. 886=A.I.R. 1932 All. 708.**

———*Religious endowment — Temple— Public or private—No documentary evidence—Indicia illustrated —Karachi Kali temple.*

Where there is no documentary evidence of any trust and the origin of the temple goes back to hoary antiquity, all that the Court has to rely on are "indicia". All castes of the Hindu public had for long been freely using the Kalankote temple, Karachi. There was no evidence of any member being debarred from using it. Many Hindu communities had been supporting the temple by fixed lagas until a few years ago. The evidence of respectable witnesses showed that in public repute it was a public temple. It was shown in Government records as "temple of the goddess Kali Kalankote per Devigiri Motigir".

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Held, that it was a public temple. (Case law discussed. (*Aston, A.J.C.*) MULCHAND *v*, DEVIGIR. **150 I.C. 266=6 R.S. 265=A.I.R. 1933 Sind 213.**

———*Religious endowment — Temple— Public or private—Presumption in Malabar as regards temples —Nature of temple to be established on evidence.*

In the greater part of the Madras Presidency where private temples are practically unknown, the presumption is that temples and their endowments form public charitable trusts. But no such presumption exists in case of temples situated in Malabar. For the prevailing impression in Malabar is that the Nair temples are private. However the decision whether a temple in Malabar can be regarded as a public temple really depends on the inferences to be derived from the evidence as to the way in which the temple endowments have been dealt with and the evidence as to the public user of the temples. When therefore the karnavan of a once powerful tarwad is found in management of seven temples in the neighbourhood of the tarwad house, the inference would appear to be that the temples were founded and endowed by his predecessors. (*Sir John Wallis.*) KOMAN *v.* ACHUTHAN NAIR. **61 I.A. 405 =58 Mad. 91=60 C.L.J. 344=39 C.W.N. 518=7 R. P.C. 55=40 L.W. 428=4 A.W.R. 425=11 O.W.N. 1150=1934 M.W.N. 1055=151 I.C. 329=A.I.R. 1934 P.C. 230=67 M.L.J. 788 (P.C.).**

———*Religious endowment — Temple— Public or private—Test.*

One of the tests to determine whether an endowment is a private family endowment or a public endowment is to consider whether the founder or all the members of the family could divert the income of the endowed property to their own private use or to any purpose other than that expressed in the deed of endowment. Under the express terms of the deed, the income could not be diverted in any event and at any time, but was to be used for all time to the purpose of maintaining the services in the temple. The founder had diverted himself completely of his interest in the property and had transferred it to the temple and the images therein. It must be treated to be of a public nature. (*Kulwant Sahay and James, JJ.*) RAM PRASAD GUPTA *v.* RAM KISHUN PRASAD. **11 Pat. 594=I.R. 1932 Pat. 178 =138 I.C. 331=13 Pat.L.T. 256=A.I.R. 1932 Pat. 177.**

———*Religious endowment — Temple — Public or private—Test of distinction.*

There is no hard and fast rule or conclusive test to determine if a temple is private or public. The main charactertistic of a public temple is that it is intended for the use of the public at large or at any rate, an indeterminate, though restricted class of the Hindu community generally. On the other hand, private temples are intended for the worship of the family or other god by members of the family of the donor exclusively. Though the public can be allowed access even to a private temple in such a way as to exclude any idea of its being a public institution, such access is only by sufferance. But in the case of a public temple the public is entitled to the privilege of worship therein as a matter of right. Where the temple was built in another place removed from the residential houses of the testator who made a complete dedication of a portion of his property in its favour, the public had free access to the temple for purpose of worship and made offerings in kind and money and a shrine had been built within the temple by a stranger to the family, *held*, that the temple was dedicated to the public.

Held, also the existence or construction of a *samadhi* in memory of religious persons within the precints of the temple was rather an indication of the temple being

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public than otherwise. 2 O.L.J. 259; 3 O.W.N. 645; 1915 M.W.N. 842; 20 A.L.J. 789, Ref. to. (*Bisheshwar Nath and Smith, JJ.*) PREMO *v.* SHEO NATH. **8 Luck. 266=9 O.W.N. 966=I.R. 1933 Oudh 22=140 I.C. 896=A.I.R. 1933 Oudh 22.**

[**R.** 10 O.W.N. 1435 (1449).]

———*Religious endowment—Temple— Remuneration of archakas by share of offerings—Validity—If alienation of trust property.*

An arrangement by which archakas in a temple are remunerated by a share of the offerings and collections is quite a well known practice and cannot be regarded as invalid as being an alienation of trust property or as being entered into by a person with the limited powers of a trustee. Such an arrangement is not by any means detrimental to the interests of the institution. When such an agrrangement has been in vogue for a long time and sanctioned by usage, Courts will not be justified in setting aside the same. (*Varadachariar and Burn, JJ.*) SRI MAHANT PRAYAG DOSS JEE VARU *v.* GOVINDACHARLU **157 I.C. 547=41 L.W. 63=1935 M.W.N. 59=A.I.R. 1935 Mad. 220=68 M.L J. 295.**

———*Religious endowment—Temple—Temple maintained by ancestor —Liability of descendants to support idol.*

In the absence of any endowment or creation of a trust by the ancestor, there is no legal obligation on the descendants to support the idols in a temple though the temple might have been maintained by the ancestor, especially after the severance of the joint status except by consent of the parties. 5 W.R. 29, Ref. (*Wadia, J.*) BANSILAL *v.* GOVINDLAL. **34 Bom.L.R. 733= I.R. 1933 Bom. 45=140 I.C. 819=A.I.R. 1932 Bom. 439.**

Trustee.

See also ALIENATION AND MANAGEMENT, *supra*.

———*Religious endowment — Trustee — De facto trustee—Suit for recovery of trust properties—Right to maintain.*

A *de facto* trustee can maintain a suit to recover trust properties whether he actually had prior possession or not. A.I.R. 1926 Mad. 1066; 1913 M.W.N. 181; 63 I. C. 171 and 51 M. L. J. 598, Ref. (*Ramesam, J.*) APPASAMI PILLAI *v* RAMU TEVAR. **136 I.C. 340= I.R. 1932 Mad. 292=34 L.W. 776=A.I.R. 1932 Mad. 267=61 M.L.J. 887.**

———*Religious endowment—Trustee — Fitness for trusteeship—Person denying trust.*

Where the daughter of the founder of the trust had denied the existence of any public trust, claimed title by adverse possession to part of the trust property and had been mainly responsible for the mismanagement of the trust which necessitated the suit, *held*, she ought not to be included in the Board of trustees. (*Bisheshwar Nath and Smith, JJ.*) PREMO *v.* SHEO NATH. **8 Luck. 266=9 O. W.N. 966=I R. 1933 Oudh 22= 140 I.C. 896=A.I.R 1933 Oudh 22.**

———*Religious endowment—Trustee— Powers of— Purchase of provisions on credit.*

The conduct of a trustee in purchasing provisions on credit is not necessarily wrongful. 60 M.L.J. 90, Ref. (*Venkatasubba Rao and Curgenven, JJ.*) VENKATARAMAN *v.* SIVAGURUNATHA CHETTIAR. **I.R. 1933 Mad 442=144 I.C. 584=A.I.R. 1933 Mad. 639.**

———Religious endowment—Trustee—Trusteeship—Reverter to the heirs of the founder—No application to the case of disclaimer of the trust by the heirs of the founder. *See* IDOL, *supra*. **A.I.R. 1932 Bom. 305.**

Wakf by Hindu.

———*Religious endowment—Wakf by Hindu—Charge for expenses of idol—Right to surplus.*

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Where a property has been dedicated by a Hindu to a certain idol and it is directed that "whatever may be saved after defraying the expenses of the temple, etc., and the pay of the servants, shall be used by his legal heirs to meet their expenses" and the expenditure of the temple would be small, it may be presumed that the intention of the testator was that the heir should take it subject to a charge for the performance of religious worship. A.I.R. 1921 P.C. 20, Foll (*Addison and Bhide, JJ.*) RIKHI KESH *v.* MELA RAM. **I.R. 1931 Lah. 411=131 I.C. 283=32 P.L.R. 304=A.I.R. 1931 Lah. 170.**

Religious office.

———*Religious office—Definition of office.*

To constitute an office it is essential so have some duties attached to it which the office-holder will be under a legal obligation to perform, the non-performance of which will be visited with penalties. (*Madhavan Nair, J.*) CHITTI BABU MUDALIAR *v.* VENKATASUBBA MUDALIAR. **143 I C. 104=I.R. 1933 Mad. 269 (2) =1932 M W.N. 1090=A.I.R. 1933 Mad. 264.**

———*Religious office—Priest*—Yajman vritti—*Nature—Delegation of duties—Permissibility.*

A *yajman vritti* primarily denotes an obligation imposed on the *purohit* or family priest to perform certain religious rites the performance of which carries with it certain emoluments. It is not immovable property. There is nothing in the Hindu Law to prevent the temporary delegation by a *purohit* of such duties to his own relative who is in no way unfit to perform such duties during such time as he cannot personally attend to them, especially if the *yajmans* do not object to such delegation. There is a broad distinction between delegation of duties which is not objected to and a permanent alienation of personal servies against the wishes of the *yajmans*. (*Rupchand and Milne, A. J. C.*) KODULAL *v.* BEHARILAL. **25 S L R. 451=I.R. 1932 Sind 71=131 I.C. 136=A.I.R. 1932 Sind 60.**

Remarriage.

See also HINDU LAW.

(1) MARRIAGE.
(2) STRIDHANAM—SUCCESSION.
(3) WIDOW.

———Re-marriage--Effect of — Mother—Guardianship. *See* HINDU LAW—GUARDIANSHIP—MOTHER. **A.I.R. 1933 Lah. 817.**

———Re-marriage—Mother—Guardianship—Effect of re-marriage. *See* HINDU LAW — GUARDIANSHIP—RIGHT TO. **A.I.R. 1933 Lah. 817.**

Reversioner.

See also HINDU LAW.

(1) DEBTS—WIDOW.
(2) WIDOW — ALIENATION, DECREE AGAINST AND SURRENDER.

———Reversioner -- Alienation by widow—Binding nature. *See* HINDU LAW (1) REVERSIONER—ESTOPPEL AND (2) WIDOW—ALIENATION.

———Reversioner—Consent to alienation by widow. *See* HINDU LAW—WIDOW—ALIENATION—CONSENT OF REVERSIONERS.

———*Reversioner—Decree against for costs—Heir of reversioner—Liability.*

Where pending an appeal by a Hindu widow, she died and the next reversioner was substituted in her place and a decree for costs passed against him, it can be executed against the legal representatives of the reversioner, even though they are not in possession of of any of the personal assets of the widow. (*Kulwant Sahay and Khaja Mahomed Noor, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BENI MADHO SINGH. **11 Pat.**

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430=I.R. 1931 Pat. 457=134 I.C. 425=12 Pat.L. T. 701=A.I.R. 1931 Pat. 422.

———*Reversioner—Election—Purchase from widow after opening of reversion—Election to hold transfer good—Inference.*

Where after the reversion opened the reversioner repurchased an item of property which had been alienated by the widow and it was further proved that he did not discriminate in any way between the effect of his act on that item and the rest of the property.

Held, that the re-purchase amounted to an election to hold the deed of alienation comprising the several items good. (*Waller and Krishnan Pandalai, JJ.*) SUBBARAGHAVA RAO *v.* ADINARAYANA RAO. **1932 M.W.N. 491.**

———*Reversioner—Estoppel—Agreement between widow and a reversioner—Relinquishment of claim by reversioner to properties retained by widow—Son of reversioner—No estoppel against.*

The facts that the reversioner to the estate of a widow's husband had received some items of property from the widow in consideration of relinquishing his reversionary right to the remainder, and that his son himself inherited those items which the father had received, could not operate as estoppel against the son from questioning the subsequent alienation by the widow in favour of others. (*Curgenven and Sundaram Chetty, JJ.*) SATYANARAYANA *v.* VENKANNA. **6 I. R. (Mad.) 138=145 I.C. 862=1933 M.W.N. 1301= 38 L.W. 230=A.I.R. 1933 Mad. 637=65 M.L J. 282.**

———Reversioner—Estoppel—Alienation by widow—Attestation—No estoppel. *See* WIDOW—ALIENATION —NECESSITY. **10 Pat. 352.**

———*Reversioner--Estoppel—Alienation by widow—Compromise between presumptive reversioner and alienee—Effect of—Right of reversioner to challenge alienation subsequently—Estoppel.*

"It is possible for presumptive reversioners even before the succession opens by a sufficient act of affirmation to do something which disables them from questioning alienation after they are *in titulo*." 42 M. 523 (P.C.), Ref. Where the paternal uncle of the last male-holder and his son as the presumptive reversioners to the estate brought a suit to set aside the alienation made by the widow and compromised the dispute with the alienee by which the uncle acting on his own behalf and on behalf of his minor son (the plaintiff) executed a sale deed in respect of half of the property in favour of the alienee and subsequently after the death of the widow and the opening of his succession, the plaintiff brought a suit to set aside the alienation,

Held, (1) that the plaintiff cannot under S. 43 of the T. P. Act be allowed to set up his title; (2) that he was bound by the act of affirmation of his father in having compromised the dispute with the alienee and having purported to sell one half of the property to him. (*Krishnan Pandalai, J.*) VELLAYAMMAL *v.* PALANIANDI AMBALAM. **1933 M.W.N. 341=147 I C. 381 =6 R.M. 333=38 L.W. 955=A.I.R. 1933 Mad. 856 =65 M.L J. 772.**

———Reversioner—Estoppel—Consent to alienation —Gift by widow. *See* HINDU LAW — WIDOW—ALIENATION. **15 Pat.L.T. 596.**

———Reversioner—Estoppel—Gift by widow—Consent of the next reversioner. *See* HINDU LAW—WIDOW—ALIENATION. **55 Bom. 46.**

———*Reversioner—Estoppel—Long lease by widow—Knowledge of reversioner—If creates estoppel.*

Where a reversioner sued for declaration that certain lease for a long term executed by widow was not binding

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on him and for possession of the property and the plea of estoppel of the defendant rested upon two facts, namely, that there was a notice-board put upon the property which showed that the land was to be sub-let, and that the building was being openly constructed and the reversioner had knowledge of such construction,

Held, that these facts without anything more did not create any estoppel as against the reversioner. (*Mukerji and S.K. Ghose, JJ.*) MOHAMMAD ALI KHAN *v.* KANAILAL. **159 I.C. 767=A.I.R. 1935 Cal. 625.**

———Reversioner — Estoppel—Taking benefit under compromise by widow. *See* HINDU LAW—WIDOW—COMPROMISE **10 Pat. 352.**

———Reversioner—Estoppel—Will by widow—Invalid bequest—Consent of reversioner—Legatee's name recorded in record-of rights—Third party advancing loan to legatee—Estoppel of reversioner. *See* HINDU LAW—WIDOW—WILL. **27 N.L.R. 283=A.I.R. 1931 Nag. 194.**

———*Reversioner—Liability—Ancestral business continued by widow—Debts contracted for—Liability of general assets.*

Quaere.—Whether in the absence of a specific charge trade debts properly incurred by a widow for the purposes of a business to which she has succeeded as the heirs of her deceased husband, are recoverable after her death out of the assets of the business or the entire reversionary estate. (*Mitter and Henderson, JJ.*) BARODA PROSAD SAHA *v.* KRISHNA CHANDRA SAHA. **38 C.W.N. 33=151 I.C. 268=A.I.R. 1934 Cal. 414.**

———Reversioner—Liability—Decree against daughters for arrears of rent accrued due after death of last male-holder—Liability not attaching to reversion unless the decree-holder brings the tenure itself to sale under the special provisions of Bengal Tenancy Act. *See* C. P. CODE, S 50. **A.I.R. 1935 Cal. 713.**

———*Reversioner—Liability — Widow's arrears of rates and taxes—Liability to pay.*

The arrears of municipal rates and taxes payable in respect of properties held by a deceased Hindu widow are charged on the properties in the hands of the reversioners and the municipality can recover the same from out of the said properties. (*C. C. Ghose and Pearson, JJ.*) RAJLAKSHMI DASSI *v.* CORPORATION OF CALCUTTA. **I.R. 1931 Cal. 747=133 I.C. 699=35 C.W.N. 341=A.I.R. 1931 Cal. 557.**

———*Reversioner — Reversionary estate — Death of reversioner pending litigation—Right of his sons to continue suit or appeal as heirs*

A reversionary estate is not kind of heritable estate which descends from father to son. Where a reversioner sued to recover possession of certain property on the death of the last female holder and also raised an alternative contention that the gift by the widow in favour of her daughters and their husbands was invalid, and the suit having been dismissed, the plaintiff's sons got themselves impleaded and continued the appeal.

Held, that the sons could fight the appeal as their father's heirs and that they could not claim on the basis of their alleged right as reversionary heirs. 22 All. 33 (F. B.), Ref. (*Pullan, J.*) HAR LAL SINGH *v.* HARI SINGH. **I.R. 1931 All. 431=131 I.C. 687=A.I.R 1931 All. 630 (2).**

———*Reversioner—Right of—Claim for estate on death of limited owner—Latter mixing up both absolute and limited estates—Right of reversioner to a charge on existing assets.*

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Where a woman in possession of properties as limited owner and also of other properties as an absolute owner deals with them indifferently, mixes them and inverts them as she likes, a reversioner, claiming the limited estate on the death of the limited estate-holder, need not necessarily trace that estate into any particular form of existing assets and in the absence of clear evidence that such estate had ceased to exist, presumption is that it continues; he will be entitled to a charge on the existing assets for the value of such estate. 10 M L.T. 313 and A.I.R. 1933 P.C. 148, Foll. (*Walsh and Varadachariar, JJ.*) VENKATASUBBA SASTRI *v.* SANKARAN. **161 I.C. 800=8 R.M. 873=A.I.R. 1935 Mad. 977.**

———*Reversioner—Liability — Funeral and Sradh expenses of widow of last male-holder.*

The funeral expenses as well as the expenses of Sradh ceremonies of the mother and the widow of the deceased last male-holder are in the nature of legal charges. They are a legal obligation on the estate which the reversioners get. If a person is obliged to defray those charges, then the estate of the last male-holder is liable for them. The reversioners who inherit the estate should pay such expenses out of the estate. A person who expended money on funeral expenses of the mother of the last male-holder cannot claim any charge or lien in respect of those expenses and cannot resist the claim of the reversioners for possession. (*Sulaiman, C J., Harries and Rachhpal Singh, JJ.*) MT. NANDRANI *v.* KRISHNA SAHAI. **57 All. 997=156 I.C. 23=7 R.A. 1043=1935 A.L.J. 715=1935 A.W.R. 887=A.I.R. 1935 All. 698 (F.B.).**

———*Reversioner — Liability — Person incurring medical and funeral expenses of mother of last male-holder—Right to lien against reversioners.*

According to the Mitakshara School of Hindu Law, if a person is obliged to spend money for the medical treatment and for the funeral obsequies of the mother of the last male-holder of the estate, it is open to him to sue the heirs and obtain a decree. Such expenses are defrayable out of the estate being in the nature of legal charges. But he cannot improve his position by getting possession of the estate unlawfully and then claiming a lien over it and so resist the claim of the reversioners for possession until the money spent by him is paid. (*Sulaiman, C.J., Harries and Rachhpal Singh, JJ.*) MT. NANDRANI *v.* KRISHNA SAHAI. **57 All. 997=156 I.C. 23=7 R.A. 1043—1935 A.L.J. 715=1935 A.W.R. 887=A.I.R. 1935 All. 698 (F B).**

———Reversioner—Right of—Mortgage by widow—Right to redeem. *See* HINDU LAW—WIDOW—ALIENATION—MORTGAGE. **9 Mys.L.J. 297.**

———*Reversioner—Right of—Right of remote reversioners to protect estate—Preferring appeal to Court.*

The ultimate reversioners have a right to demand that the estate be kept free from waste and free from danger during its enjoyment by a widow or other owner for life. They can appeal to the Court for the true conservation and just administration of the property. KAILASH CHANDRA DAS *v.* KANCHANI DASYA. **149 I.C. 616=6 R.C. 609=58 C.L.J. 240=A.I.R. 1934 Cal 136.**

———Reversioner—Right to challenge—Title acquired by widow by adverse possession. *See* HINDU LAW—WIDOW—ADVERSE POSSESSION. **A.I.R. 1934 Lah. 270.**

———*Reversioner—Right to challenge alienation by joint family manager.*

Not only the coparceners of a joint Hindu family can challenge the alienation made by the manager thereof, but the surviving members having died, the reversioners have a right to challenge the alienation, if it was not

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really binding on the family. 47 All. 490 Rel, on. (*Srivastava and Rachhpal Singh, JJ.*) HARIHAR BAKHSH SINGH *v.* LACHHMAN SINGH. **149 I.C. 543 =9 Luck. 657=11 O.W.N. 559=A.I.R. 1934 Oudh 246.**

———Reversioner— Right to challenge — Widow—Gift to daughter's sons of last male-holder—Daughter waiving her right—Collaterals in fifth degree—No right to challenge. *See* HINDU LAW—WIDOW—ALIENATION—GIFT. **A.I.R. 1935 Lah. 985.**

———*Reversioner—Right to sue—Adverse possession against widow—Starting point*

Where there has been no decree against the Hindu widow or other act in law in the widow's lifetime depriving the reversionary heir of his right to possession on the widow's death, the possession of another person adverse to the widow is not adverse to the reversioner whose cause of action accrues only on the death of the widow. 26 I.A. 71 and 31 Bom.L.R. 891 (P.C.). Ref. (*Patkar and Barlee, JJ.*) BAI MANCHHA *v.* TRIBHOVAN LALLUBHAI. **I.R. 1932 Bom 459=139 I.C. 28 =34 Bom.L.R. 385=A.I.R. 1932 Bom. 434.**

———Reversioner—Right to sue—Alienation by widow—Nearest reversioner not taking steps to avoid—Suit by presumptive reversioner for declaration of right—Maintainability. *See* SPECIFIC RELIEF ACT, S. 42. **16 Pat.L.T. 236=A.I.R. 1935 Pat. 256.**

———*Reversioner—Right to sue—Right of distant reversioner.*

Where the females representing an estate have rendered themselves incapable of safeguarding the rights of the reversioners, a distant reversioner may institute a suit to safeguard his interest. 5 All. 532, 8 All. 492 and 6 Cal. 764, Ref. (*Mukerjee and Young, JJ.*) JAIMALA KUNWAR *v.* COLLECTOR OF SAHARANPUR. **55 All. 825=149 I.C. 704=1933 A.L.J. 1512=A.I.R. 1934 All. 4.**

———*Reversioner—Right to sue—Rights of prospective reversioners—Suit to establish—Maintainability.*

Per *obiter*.—A suit by the prospective reversioner to put the Hindu widow into possession is not a very hopeful form of suit. Neither is the Court obliged to entertain a suit by one reversioner against another to settle in the widow's lifetime their respective claims to the succession upon the hypothesis that both would survive the widow. (*Rankin, C. J. and Pearson, J.*) MADAN MOHAN DHUR *v.* THACOOR SREE SREE NETAI GOUR JEW. **147 I.C. 1247=6 R.C. 421=37 C.W.N. 801=A.I.R. 1934 Cal. 30.**

———*Reversioner—Right to sue—Waste by life-estate holder—Remote reversioner whether can sue.*

Under the Hindu Law the person entitled to challenge any acts of waste or alienation by a life-tenant like a Hindu mother is the next presumptive reversioner on the date of the suit. By operation of Act II of 1929 sisters and sisters' sons obtained a precedence in the order of succession over a distant collateral. The latter is not therefore entitled to sue unless he satisfies the Court that the nearest reversioner has colluded with the life-tenant or has otherwise done acts precluding him from maintaining an action. (*Mears, C. J. and Sen, J.*) BANDHAN SINGH *v.* DAULATA KUAR. **I.R. 1932 All. 400=138 I.C. 389=1932 A.L.J. 384=A.I.R. 1933 All. 152.**

———*Reversioner—Suit by—Decree against widow—That property is not liable to attachment and sale—Maintainability.*

An attachment itself gives no cause of action for a suit by reversioners, inasmuch as no title passes in virtue of the attachment, nor is any charge created upon

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the property. A suit therefore by the reversioners for a declaration that the property in widow's possession is not liable to attachment and sale in execution of a decree against the widow is premature as it is possible that the property attached will never be actually put up to sale or that nothing more than the widow's interest in the property will be sold. 34 Cal. 853 and A.I.R. 1923 All. 161, Dist.; A.I.R. 1929 Lah. 90 and A.I.R. 1920 Nag. 202, Rel. on. (*Pollock, A. J. C.*) RATAN SINGH *v.* ANANT SINGH. **6 I.R. (Nag.) 75 (2)=146 I.C. 113=A.I.R. 1933 Nag. 258.**

———*Reversioner—Suit by—Maintainability—Decree against widow—Declaration that it is void.*

A suit by reversioner for a declaration that the decree obtained against a Hindu widow is null and void need not be brought in a representative capacity. 38 Mad. 406 (P.C.) and 44 All. 19, Rel. on. (*Pollock, A. J. C.*) RATAN SINGH *v.* ANANT SINGH. **6 I.R. (Nag.) 75 (2)=146 I.C. 113=A.I.R. 1933 Nag. 258.**

———*Reversioner—Suit by—Relationship—Onus.*

In a suit by the reversioners, the onus lies on the reversioners to prove their relationship with the deceased and it is on them to show that the entries in the books of a priest on which they rely are of a reliable character and should be depended upon in declaring them to be his reversioners. (*Almond, J. C. and Mir Ahmad, A. J. C.*) ACHARAJ RAM *v.* GANESH DAS. **7 R. Pesh. 28=151 I.C. 622=A.I.R. 1934 Pesh. 78.**

———*Reversioner—Suit by—Suit for declaration—Death of widow* pendente lite*—Suit withdrawn without permission of Court—Subsequent suit for possession—Maintainability.*

A suit brought by the reversioners for a declaration that a charge on the estate created by the widow was not binding on them, was, on the death of the widow pending suit, withdrawn by them on the ground that they proposed to institute a suit for possession but no permission of Court, as required by O. 23, R. 1, was obtained. They brought the present suit for possession of the property left by the widow praying also that the charge may be declared invalid.

Held, that the first suit for declaration was brought by the plaintiffs on behalf of all the reversioners but the second suit was instituted only by those persons in whom the estate had vested after the death of the widow and who claimed possession on their own behalf, the causes of action in the two suits were therefore quite different; where the causes of action are different, the subject-matters in the two suits cannot be identical and that the second suit was not barred. 39 Mad. 987, Foll.; 21 Cal. 265; 4 O. W. N. 110, Rel. on. (*Shadi Lal C. J. and Abdul Qadir, J.*) ALI MAHOMED *v.* KARIM BAKHSH. **15 Lah. 1=6 I.R. (Lah.) 32=144 I.C. 864=34 P.L.R. 805=A.I.R. 1933 Lah. 948.**

———*Reversioner—Suit by—Suit for possession—Property in possession of devisee of heir-at law entitled to limited estate—Burden of proving that heir obtained property not as heir but donee or devisee.*

Where property is in the possession of the last full owner till very shortly before his death and after his death it is found in the possession of the very person who would have taken as heir at-law for a limited estate and the reversioner sues to recover possession of the same from a person claiming under a will from the heir, the onus of proving that the heir-at law did not take the property as heir but obtained it by a gift or will from the last full owner would undoubtedly lie upon the devisee so claiming. (*Walsh and Varadachariar, JJ.*) VENKATASUBBA SASTRI *v.* SANKARAN. **161 I.C. 800 =8 R.M. 873=A.I.R. 1935 Mad. 977.**

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———*Reversioner—Suit by—Suit to set aside widow's alienations—Burden of proof.*

In a suit by the reversioner to set aside an alienation by the widow as unjustifiable, it is incumbent on the plaintiff to satisfy the Court that he is the nearest heir or reversioner and that his claim is superior to that of any other person. 40 M. 654; 52 M.L.J. 155; A.I.R. 1929 Oudh 129, Ref. (*Ramchandra Rao and Shankaranarayana Rao, JJ.*) VENKATARAMAYYA *v.* SUBRAMANYA SASTRI. **12 Mys.L.J. 32=39 Mys.H.C.R. 137.**

———*Reversioner—Suit by—Suit to set aside alienation—Limitation.*

A suit by a reversioner to challenge an alienation by the female limited owner is a representative one and it follows that if there is at the date of the alienation, a reversioner who is competent to challenge it, but fails to do so within the period of limitation, the result is binding on the whole body of reversioners, whether minors or otherwise. A.I.R. 1927 Mad. 216; 41 Mad. 659 and 6 Lah. 405, Rel. on; 8 Lah. 711, Dist. (*Addison and Bhide, JJ.*) GAJINDAR SINGH *v.* BALWANT KAUR. **149 I.C. 696=6 R.L. 734=A.I.R. 1933 Lah. 524.**

———*Reversioner—Suit by—Suit to impeach alienation by widow—Appointment of receiver—Permissibility.*

In a suit brought by a reversioner impeaching the alienation made by the widow of a share of the estate, it is legal to appoint a receiver but only under exceptional circumstances. Where the property is being managed by a third person who has been trying for a long number of years to obtain the property by fair means or foul and who is expected to make as much profit out of the estate as he possibly can, thus prejudicing the rights of the reversioner, and waste is proved, a receiver may be appointed and the third party being an alienee outright of a certain share of the estate from the widow is liable to be ousted just as much as the widow. (*Sen and Baipai, JJ.*) JAMNA PRASAD *v.* MT. DURGA DEI. **I.R. 1933 All. 352=144 I.C. 33=A.I.R. 1933 All. 133 (2).**

———Reversioner—Suit by—Surrender by widow—Adverse possession against widow—Suit by reversioner for possession during her lifetime against the person in possession—Limitation—Liberty to file suit after the death of widow. *See* HINDU LAW—WIDOW—SURRENDER. **A.I.R. 1935 Mad. 664.**

———*Reversioner—Surrender—Essentials.*

A reversioner can surrender or release his rights but the surrender or release, to be valid, must be executed to the next in succession. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAYA PILLAI. **I.R. 1931 Mad. 705=133 I.C. 193=1931 M.W.N. 8=A.I.R. 1931 Mad. 505.**

Sanyasi.

See also HINDU LAW—ASCETIC.

———*Sanyasi—Child initiated as disciple—If Nihang, sanyasi or grihast goshain.*

Where a certain person, who was married and lived the life of a worldly man and was possessed of property, was initiated by his guru as a disciple when he was about 10 months old when a shaving ceremony took place, and the essential ceremonies necessary for the initiation of a person as a Nihang including the *Viraja homam* were not performed he had not reached the years of discretion when he could understand the full significance of *mul muntras* and of the fact that he was irrevocably renouncing the world.

Held, that the mere circumstance that he was buried was not sufficient to show that he had become a Sanyasi or a Nihang and that every circumstance pointed in favour of his being a grihast goshain. (*Sulaiman, C. J. and Baipai, J.*) JAGARNATH GIR *v.* SHER BAHADUR SINGH **57 All. 85=153 I.C. 1078=7 R.A. 679=1935 A.L.J. 150=1935 A.W.R. 218=A.I.R. 1935 All. 329.**

———Sanyasi—Head of math—Property held or acquired by—Nature of. *See* HINDU LAW—RELIGIOUS ENDOWMENT—MATH. **A.I.R. 1934 Pat. 431.**

———*Sanyasi—Order of*—Nihangi Baisnab.

A *Nihangi Baisnab* is a celibate sanyasi without any worldly attachment, quite unlike the *grihastha* or house-holder class of *Mahants*, found outside the Dasnamis of Sankaracharya or unlike the Puris and other five classes and half out of the Dasnamis who mix freely in the business of the world and carry on trade and often accumulate property. (*Dhavle and James, JJ.*) SUSIL CHANDRA SEN *v.* GOBIND CHANDRA DAS. **6 R.P. 705=150 I.C. 61=A.I.R. 1934 Pat. 431.**

Schools of law.

———*Schools of law—Mithila school—Law applicable.*

The law of the Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. Rights of a wife under Mithila law discussed. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R. Pat. 17=145 I.C. 1=14 Pat.L.T. (Supp.) 1=A.I.R. 1933 Pat. 306.**

———*Schools of law—Mithila school—Law is generally that of Mitakshara.*

The law of a Mithila school is the law of the Mitakshara except in a few matters in respect of which the law of the Mithila school has departed from the law of the Mitakshara. A.I.R. 1925 P.C. 280, Foll. (*Wort and Dhavle, JJ.*) KAMLA PRASAD *v.* MURLI MANOHAR. **13 Pat. 550=152 I.C. 446=7 R.P. 190=15 Pat L.T. 715=A.I.R. 1934 Pat. 398.**

Self-acquisition.

See HINDU LAW.
(1) JOINT FAMILY.
(2) SUCCESSION.

Sister.

See also HINDU LAW—SUCCESSION.

———Sister—Marriage expenses of—Liability of brother—Charge on paternal estate. *See* HINDU LAW—MARRIAGE. **A.I.R. 1931 Nag. 147.**

Step-mother.

See HINDU LAW—MAINTENANCE AND SUCCESSION.

Stridhanam.

See also HINDU LAW.
(1) FAMILY ARRANGEMENT.
(2) WIDOW—NATURE OF ESTATE.

———*Stridhanam—Saudayika—Bequest by maternal grandfather.*

The gift or bequest from a maternal grandfather, having the essential attribute of a gift from relations or affectionate kindred, falls within the class of stridhan called saudayika, of which the wife can make a gift without reference to her husband. (Definitions of the word "saudayika", textual and judicial, enumerated.) (*Patkar and Murphy, JJ.*) VENKARADDI *v.* HANMANTGOWDA. **57 Bom. 85=34 Bom.L.R. 1144=I.R. 1933 Bom. 123=141 I.C. 682=A.I.R. 1932 Bom. 559.**

———*Stridhanam—"Saudayika"—Nature and incidents.*

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"Saudayika" is a term applied to gifts made to a woman at, before or after marriage, by her parents and their relations or by her husband and his relations. In other words, it means gifts from relations as distinguished from gifts from strangers. A woman has absolute power of disposal over her Saudayika Stridhan, even during coverture. She may dispose it of by sale or by gift, or by will or in any other way she pleases, even without the consent of her husband. (*Mears, C. J. and Sen, J.*) EMPEROR *v.* SAT NARAIN. **53 All. 437 = I.R. 1931 All. 309 = 1931 A.L.J. 201 = 130 I.C. 693 = 32 Cr.L.J. 576 = 1931 Cr.C. 425 = A.I.R. 1931 All. 265.**

[R. 57 B. 85 (90).]

———*Stridhanam—Succession — Dayabhaga school—Preference of brother's son over step-daughter's son.*

Under the Dayabhaga law, a brother's son is entitled to succeed to a woman's ayautuka stridhanam in preference to a step-daughter's son. Rule as to exclusion of half-blood by full-blood discussed. (*Mukerji and Guha, JJ.*) KRISHNA BIHARI DATTA *v.* SAROJINEE DASEE. **147 I.C. 473 = 37 C.W.N. 613 = 6 R.C. 337 = 60 Cal. 1061 = A.I.R. 1933 Cal. 858.**

———*Stridhanam—Succession — Dayabhaga school—Sister's son not an heir.*

Under the Dayabhaga law a sister's son is not an heir to the stridhanam property of a woman nor is a sister's son's son in-law a person in the line of heirs. Neither of them can contest an application for letters of administration with her will annexed. (*Mitter and Henderson, JJ.*) SATISH CHANDRA SIRCAR *v.* HARIDAS MITRA. **149 I.C. 1034 = 38 C.W.N. 98 = 6 R.C. 684 = A.I.R. 1934 Cal. 399.**

———*Stridhanam—Succession — Mithila school—No definite rule—Rule of Mitakshara prevails—Sister's son not entitled to preference to husband's sapindas.*

No definite rule departing from the Mitakshara has been laid down in the Mithila books. Hence succession to stridhana property of a female dying leaving no son, daughter, daughter's daughter or daughter's son is governed by the rule in Mitakshara. And so a sister's son of the deceased lady is not entitled to succeed in preference to her husband's sapindas. All texts of authorities examined in detail by Dhavle, J. 12 Cal. 348. Foll. (*Wort and Dhavle, JJ.*) KAMLA PRASAD *v.* MURLI MANOHAR. **13 Pat 550 = 152 I.C. 446 = 7 R.P. 190 = 15 Pat.L.T. 715 = A.I.R. 1934 Pat 398.**

———*Stridhanam—Succession—Property inherited by female—Estate taken.*

A female inheriting stridhan property does not get an absolute interest in it. (*R. C. Mitter, J.*) MAHENDRA NARAYAN ROY *v.* DAKSHINA RANJAN ROY CHOUDHURY. **160 I.C. 870 = 61 C.L.J. 537 = A.I.R. 1936 Cal. 34.**

———*Stridhanam — Succession — Property inherited from mother—Sister's son and husband's heirs—Preference.*

Property inherited by a woman from her mother is her absolute property, and on her death without issue, would pass to her sister, and in default of the sister, to the sister's sons, in preference to the heirs of her husband. Mutation must therefore be ordered in favour of the sister's sons. (*Oppenheim, S. M. and Drake Brockman, J. M.*) KRISHNA MURARI MISIR *v.* RAM KHELAWAN MISIR. **1935 R.D 59.**

———*Stridhanam — Succession — Re-marriage of Hindu widow—Sons by the two husbands—Priority.*

In the case of succession to the stridhan of a Hindu widow who re-marries, the son by the second husband does not inherit to the exclusion of the son by the first husband. They take it equally. (*Baker and Rangnekar, JJ.*) BAPU APPA *v.* KASHINATH. **150 I.C. 837 = 7 R.B. 17 = 36 Bom.L.R. 140 = A.I.R. 1934 Bom. 113 (1).**

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———*Stridhanam—Succession—Step-mother—Right to stridhan of step-daughter.*

A wife under the Hindu Law, is a sapinda of her husband; on the death, therefore, of a step-daughter inheriting her mother's stridhan for her life, the property reverts to the next of Kin (Sapinda of her father) and her step-mother (father's wife) is entitled to succeed to it. (*Muhammad Noor and Agarwala, JJ.*) DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH. **14 Pat. 518 = 16 Pat.L.T. 713 = 155 I.C. 213 = 7 R.P. 557 = A.I.R. 1936 Pat. 200.**

———*Stridhanam—What is—Property acquired by adverse possession.*

Property acquired by a Hindu female whether during coverture or widowhood by adverse possession becomes her stridhanam and should descend to the stridhanam heirs (*Raza and Srivastava, JJ.*) HUBRAJI *v.* CHANDRABALI UPADHIYA. **6 Luck. 519 = I.R. 1931 Oudh 161 = 130 I.C. 849 = 8 O.W.N. 6 = 14 O.L.J. 66 = A.I.R. 1931 Oudh 89 (2).**

———*Stridhanam—What is—Property acquired by woman out of her own exertions.*

Property purchased by a woman out of money earned by her own exertions is her stridhana property, and such property goes in the first place to her unmarried daughters. (*Das, J.*) MUMUMMA *v.* KRISHNA. **147 I.C. 736 = 6 R.R. 178 (1) = A.I.R. 1933 Rang. 347.**

———Stridhanam—What is—Acquisitions by widow—No presumption that property was purchased from out of savings of her husband's estate—Independent means possessed by widow. *See* HINDU LAW—WIDOW—ACQUISITIONS BY. **18 N.L.J. 267.**

———*Stridhanam — What is — Daughter holding mother's stridhan properties—Accumulations from—If part of the estate—Death of one daughter—Right to heirs of deceased to such accumulations—Analogy of Hindu widow—If applicable.*

A Hindu woman, born in a rich family, owned considerable properties as her stridhan. She died leaving two daughters, a son and her husband. The properties were being managed by the husband and then by the son, who made various purchases out of the incomes which accrued out of the properties. But the daughters, both during and after their minority, were never in possession, the management continuing with the father and afterwards with the son. Subsequently one of the daughters died

Held, that the accumulations or the properties acquired by the income of the properties did not form part of the main estate, but would be taken by the daughters in equal shares, and when one of the daughters died, her share would not lapse to the other by survivorship, but would be inherited by her heirs. Whatever reason or justification—historical or sacerdotal—might exist for looking with disfavour on a widow's right to dispose of her surplus income or transmit the same to a line of heirs different from her husband's, the same considerations need not be extended to the case of a daughter inheriting her mother's stridhana properties. The doctrine of 'reverter' may well be limited to the original estate and proved accretions to it. (*Varadachariar and Burn, JJ.*) KAILASANATHA MUDALIAR *v.* PARASAKTHI VADIVANNI. **159 I.C. 845 = 58 Mad. 488 = 8 R.M. 557 = 1935 M.W.N. 240 = 41 L.W. 336 = A.I.R. 1935 Mad. 740 = 69 M.L.J. 142.**

———*Stridhanam — What is—Daughter—Property obtained under compromise in suit against reversioner.*

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Where a daughter who is not an heir and not entitled to inherit under a custom gets property by compromising with a reversioner who is entitled to such property, the property so obtained is her stridhanam to which her daughters alone are entitled to the exclusion of her sons. (*Raza and Smith, JJ.*) RAJESHAR BALI *v.* HAR KISHEN BALI. **147 I.C. 313 = 6 R.O. 639 = 10 O.W.N. 147 = A.I.R. 1933 Oudh 170 (2).**

———*Stridhanam—What is—Property purchased out of income of property settled in lieu of maintenance.*

Where a Hindu widow makes purchases of properties from the income of the property, which was settled upon her in lieu of her maintenance, the properties become her stridhanam and she is competent to transfer them by law. (*Zia ul-Hasan, J.*) RAM DAS *v.* RAM SEWAK TEWARI. **155 I C. 781 = 7 R.O. 623 = 1935 O.W.N. 596 = A.I.R. 1935 Oudh 362.**

Succession.

See also HINDU LAW.
(1) PARTITION AND RE-UNION.
(2) STRIDHANAM AFTER BORN HEIR. *See* RIGHT TO SUCCEED, *infra.*
BANDHUS.
BURDEN OF PROOF.
CROWN.
CUSTOM.
DANCING GIRL.
DATE FOR DETERMINING HEIR.
DAUGHTER.
DAYABHAGA SCHOOL.
DISQUALIFICATION.
DWAMUSHYAYANA ADOPTED SON.
FEMALE HEIRS.
GOTRAJA SAPINDAS. *See* SAPINDAS, *infra.*
ILLATOM.
ILLEGITIMATE CHILDREN.
LAW APPLICABLE.
LIABILITY OF LAW.
MOTHER.
PRIMOGENITURE
RIGHT TO SUCCEED.
SAMANODAKAS.
SAPINDAS.
SELF-ACQUIRED PROPERTY.
SISTER.
SON IN LAW.
STEP-BROTHER.
STEP-MOTHER.
WANAPRASTHAS.
WORDS.

Bandhus.

———*Succession—Bandhus—Atma bandhus—Priority—Father's sister's son and maternal uncle—Preference—Test—Doctrine of spiritual benefit.*

Among Atma bandhus governed by the Mitakshara Law, the rule of succession to be observed is that in each clauss propinquity should be the governing factor, and if that fails to guide the Court, and only then, the Court should apply the rule based on spiritual efficacy or the offering of oblations. As between the maternal uncle and father's sister's son, the former is the preferential heir. (*Ramesam and Stone, JJ.*) NAVANEETHAKRISHNA MARUDAPPA THEVAR *v.* COLLECTOR OF TINNEVELLY. **1935 M.W.N. 1001 42 L W. 875 = 160 I.C 647 = 8 R.M. 674 = A.I.R. 1935 Mad. 1017 = 69 M L J. 632**

———*Succession—Bandhus—Bandhus on mother's side—Preference.*

Because under Mitakshara, mother is regarded as nearer heir to her son than the father. The preference awarded to the mother cannot be extended to bandhus on her side of the family. 12 M.I.A. 448. The preference of the mother to the father in respect of succession to the property of the son under the Mitakshara does not extend to bandhus on the mother's side. (*Sir George Lowndes.*) JOTINDRA NATH ROY *v.* NAGENDRA NATH ROY. **58 I A. 372 = 59 Cal. 576 = 135 I.C. 637 = 1931 A.L.J. 1009 = 34 L.W. 465 = 1931 M.W.N. 978 = 33 Bom L.R. 1411 = 35 C.W.N. 1153 = 8 O.W.N. 1011 = A.I.R. 1931 P.C. 268 = 61 M.L.J. 442 (P.C.).**

———*Succession— Bandhus— Classes mentioned in Mitakshara, if exhaustive—Meaning of Pitri bandhus and Matru bandhus.*

The three classes of bandhus mentioned in the Mitakshara cannot be added to. The last male-owner's father's father's daughter's son's daughter's sons are not his heritable bandhus. A heritable bandhu cannot be lower than the common ancestor's daughter's grandson or the common ancestor's son's great grandson, that is, there should be no great grandmother in the line on either side of the common ancestor.

Per *Sulaiman, J.*—The words *pitri* and *matri* in describing bandhus are used in an adjective sense. They mean the person's bandhus through the father or mother. The words cannot mean that a cognate who is the father's bandhu or the mother's bandhu though not a bandhu of the propositus is an heir. The father's mother's mother's father and the mother's mother's mother's father are not included as heritable bandhus. (*Sulaiman, Mukerji and Young, JJ.*) GAJADHAR PRASAD *v.* GAURI SHANKAR. **54 All. 698 = I.R. 1932 All. 448 = 138 I.C. 561 = 1932 A.L.J. 533 = A.I.R. 1932 All. 417 (F.B.).**

———*Succession—Bandhus—Father's half sister's son and mother's sister's son—Preference.*

Under the Benares School of the Mitakshara the father's half sister's son takes the inheritance in preference to the mother's sister's son. The rule of preference of the whole-blood to the half-blood is not material in deciding the propinquity of rival bandhus, not descended from a common ancestor. (*Sir George Lowndes.*) JOTINDRA NATH ROY *v.* NAGENDRA NATH ROY. **58 I A. 372 = 59 Cal. 575 = 135 I C. 637 = 35 C.W.N. 1153 = 8 O.W.N. 1011 = 34 L.W. 465 = 1931 M.W.N. 978 = 1931 A.L J. 1009 = 33 Bom.L.R. 1411 = A.I.R. 1931 P.C. 268 = 61 M.L J. 442 (P.C.).**

[F. 60 I.A. 189 (194) (P.C.).]

———*Succession— Bandhus— Maternal uncle and father's sister's son—Preferential rights of the latter.*

Under Hindu Law, a maternal uncle cannot succeed to the property of the propositus in preference to the father's sister's son. (*Shadi Lal, C.J. and Abdul Qadir, J.*) RAM NATH *v.* DUNI CHAND. **153 I.C. 131 (1) = 7 R.L. 390 = 35 P.L.R. 519 = A.I.R. 1934 Lah. 622 (2).**

———*Succession—Bandhus—Preference—Rules under Mitakshara—Daughter's daughter's son and sister's son—Priority—Spiritual benefit—Applicability.*

In cases of bandhu succession under the Mitakshara, among Atma bandhus, one's own descendants should be preferred to the father's descendants, and the father's descendants to those of the grandfather. Consequently, the daughter's daughter's son excludes the sister's son. Though the principle of spiritual benefit may be resorted to even under the Mitakshara, it should not be applied so as to defeat the rule that the nearer line excludes the more remote. (*Ramesam and Curgenven, JJ.*) KALIMUTHU PILLAI *v.* AMMAMUTHU PILLAI. **58 Mad. 238 = 153 I.C 107 = 7 R M 311 = 40 L.W. 376 = 1934 M W.N. 820 = A.I.R. 1934 Mad. 611 = 67 M.L.J. 503.**

HINDU LAW—Succession.

———*Succession—Bandhus—Tests of propinquity.*

The primary test in questions of inheritance among bandhus is propinquity in blood. As between bandhus who are in an equal degree of propinquity to the propositus, those who are related *ex parte paterna* are preferred to those related *ex parte materna*. But a safer test of the measure of propinquity where the degree of blood relationship furnishes no certain guide, is the doctrine of spiritual benefit, the inheritance going to him, whose funeral oblations confer most spiritual benefit on the propositus. 13 M.I.A. 373 and 16 Mad. 23, Ref. (*Sir George Lowndes.*) JOTINDRA NATH ROY *v.* NAGENDRA NATH ROY. **58 I A. 372=59 Cal. 576=135 I.C. 637=35 C W.N. 1153=34 L.W. 465=1931 M W.N. 978=1931 A L J. 1009=33 Bom.L R. 1411=8 O.W.N. 1011=A.I.R. 1931 P.C. 268=61 M.L.J. 442 (P.C.).**

[**Cons.** 69 M.L.J. 632 (650; 652; 661) **R** 57 B. 74 (78).]

Burden of proof.

———*Succession—Burden of proof—Claim by nearest collaterals.*

In a suit where the plaintiffs claim to succeed to the estate of a deceased Hindu as his nearest collaterals, the mere fact that are the nearest male collaterals of the deceased would not in itself be sufficient to show that they are the next heirs. It is incumbent on them to prove that the deceased has not left any nearer heir, such as a daughter or a daughter's son who would exclude the plaintiffs even if they happen to be the nearest male collaterals. (*Sulaiman, C. J. and Bennet, J.*) MAHENDRA SINGH *v.* SHANKAR DAYAL SINGH. **1935 R.D. 567=1935 A.W.R. 1422=159 I.C. 903=A.I R. 1936 All. 124.**

———*Succession—Burden of proof—Proof of relationship.*

Where a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male-holder, but also *prima facie*, that no nearer heirs are alive. Where the Court cannot arrive at that conclusion on the evidence of the plaintiff, either because he is not in a position to speak on the subject, or because his evidence is manifestly untrue, it should be satisfied by other credible evidence that no nearer heir exists, before the defendant is called upon to substantiate his definite case that he is a nearer heir Where both parties have adduced evidence, the question of onus loses all importance and the Court should record a definite finding as to whether the defendant is the nearer heir. The question may assume some importance where the Court has to reject the evidence adduced on either side as absolutely untrustworthy. In such a case the plaintiff's title can prevail only if the Court is an a position to find not only that he is related to the last male holder, as he alleges, but also that no nearer heir is alive. (*Niamatullah and Rachhpal Singh, JJ.*) MT. CHUNNA KUNWAR *v.* LALA MUKAT BEHARI LAL. **151 I.C. 338=7 R.A. 140=A.I.R. 1934 All. 117.**

Crown.

———*Succession—Crown—Nature of right.*

The Crown's right to come in accrues as soon as it is shown that that there is no one in existence who comes in the line of heirs under the Hindu Law. A person cannot claim preferential right over the Crown merely because he is a blood relation. (*Mitter and Henderson, JJ.*) SATISH CHANDRA SIRCAR *v.* HARIDAS MITRA. **149 I.C. 1034=6 R.C. 684=38 C.W.N. 98=A.I R. 1934 Cal. 399.**

Custom.

See also DANCING GIRL AND PRIMOGENITURE, *infra.*

HINDU LAW—Succession.

———*Succession—Custom—Collaterals—Determination of.*

The custom based on the principles of Hindu Law gives the succession to the collaterals at the time of the widow's death and not at the time of her husband. 4 O. W.N. 770 and 26 O.W.N 223, Foll. (*Bisheshwar Nath and Nanavutty, JJ.*) TEFAZZUL HUSAIN *v.* BAKHSHISH HUSAIN. **141 I.C. 670=9 O.W.N. 1171=I.R. 1933 Oudh 69.**

———Succession—Custom—Custom at variance with Hindu Law—Burden of proof—Granduncle and grandmother — Preference. *See* CUSTOM (PUNJAB) — SUCCESSION. **157 I.C. 950 (1).**

———Succession — Custom—Custom of exclusion of sons by widow—Validity—Proof. *See* CUSTOM—PROOF. **4 A.W.R. 712.**

Dancing girl.

———*Succession—Dancing girl—Custom — Married sister and unmarried niece—Preference.*

The members of the dancing girl caste are governed in matters of succession not by the ordinary Hindu Law, but by caste custom and usage. In the case of the dancing girl community in Palamcottah in Tinnevelly District, which is a small body, under a custom which is well-recognized, as niece (sister's daughter) who is *dasi* excludes a daughter who is married, in the case of succession to a dancing girl who dies issueless. (*Beasley, C.J. and King, J.*) SHANMUGATHAMMAL *v.* GOMATHI AMMAL. **152 I.C. 1070=1934 M.W.N. 1201 (2)=40 L.W. 743=7 R.M. 307=A.I.R. 1935 Mad. 58=67 M.L.J. 861.**

Date for determining heir.

———*Succession—Date for determining heir—Widow in possession of property—Act II of* 1929.

Where a widow is in possession of her husband's estate as a limited owner, the question whether certain persons are heirs under Act II of 1929 depends on the date of the death of the widow and not on the date of the death of the last male holder. In such cases the question is not whether Act II of 1929 is retrospective. (Cases referred.) (*Courtney-Terrell, C.J.*) CHULHAN BARAI *v.* MT. AKLI BARAINI. **150 I.C. 1039=7 R P. 68=15 Pat.L T. 707=A.I R. 1934 Pat. 324.**

Daughter.

———Succession—Daughter—Adoption of holder into another family — Land acquired out of income — Daughter of adoptee entitled to succeed. *See* HINDU LAW — IMPARTIBLE ESTATE. **A.I.R. 1932 Bom. 654.**

———*Succession—Daughter—Daughter in the womb—Right to succeed.*

The theory of a son being in existence at the time of conception can also be extended to the case of a daughter claiming rights of inheritance. Posthumous daughter held entitled to succeed. (*Patkar and Murphy JJ.*) BAYAVA *v.* PARVATEVA. **I R 1933 Bom 300=144 I.C. 442=35 Bom L.R. 118=A.I.R 1933 Bom. 126.**

———*Succession — Daughter — Exclusion of rich daughter by poor.*

The rule of preference as to a poor daughter excluding a rich daughter applies only as between daughters and not as between one daughter and another daughter's son. (*Bennet, J.*) BHAGELU SINGH *v.* MT. MURTI KUER. **I R. 1932 All. 71=135 I.C. 247=A.I R. 1932 All. 326**

———*Succession—Daughter—Preference as between.*

Daughters do not inherit until the widow is dead. As between daughters, the unmarried exclude the married daughters. (*Hasan, C.J. and Raza, J.*) SHEO GOBIND

HINDU LAW—Succession.

v. RAM ADHIN. **8 Luck. 182=140 I.C. 556=9 O.W. N. 945=A.I.R. 1933 Oudh 31.**

———*Succession—Daughter—Preferential right of poor daughter—Sons whether can plead.*

Where in a case of succession among daughters the poor daughter does not put forward her preferential claim, it is not open to her son to agitate the same. (*Bennet, J.*) BHAGELU SINGH *v.* MT. MURTI KUER. **I R. 1932 All. 71=135 I.C. 247=A.I.R. 1932 All. 326.**

———*Succession — Daughter—Preferential right of unmarried over married daughter.*

Under the Hindu Law of inheritance, the unmarried daughter takes in preference to the married daughter. (*Patkar and Murphy, JJ.*) BAVAVA *v.* PARVATEVA **I.R. 1933 Bom. 300=144 I.C. 412=36 Bom.L R. 118 =A.I.R. 1933 Bom. 126.**

———*Succession—Daughter — Unchastity—Living as mistress of a person—If excluded.*

Under the Hindu Law, unchastity in a daughter excludes her from inheritance, and a Hindu female who lives with a man as his mistress is guilty of unchastity in the legal sense so as to exclude her from inheritance to her father's estate. (*Henderson, J.*) BHABA KANTA PACHANI *v.* KERPAI CHUTIA. **154 I.C. 760=7 R.C. 522=38 C W.N. 1095=A I.R. 1935 Cal. 144.**

Dayabhaga school.

———*Succession — Dayabhaga school — Doctrine of spiritual benefit.*

Even among those who are entitled to offer pindas, preference is given to such heirs as are entitled to offer a larger number of pindas or to a greater number of ancestors than others. Even according to the Dayabhaga School of Hindu Law under which the right of inheritance is mainly based on the doctrine of spiritual benefit, it cannot be applied consistently in all cases in cases of females succeeding to males, in the case of a chela succeeding to a guru or in the case of samanodakas. The doctrine of spiritual benefit or offering of funeral oblations is not the only test of heirship. Propinquity or proximity of birth is the principle underlying the order of succession but the capacity for conferring spiritual benefit is also taken into consideration along with it according to the Bengal School. The question of the capacity to offer funeral cakes becomes important when it has to be considered in connection with the claims of rival competitors to heirship and in determining the order of succession. In other words it is a key to the order of succession but not to inheritance. It is on the failure of nearest heirs, that the question of spiritual benefit really arises. (*Suhrawardy and Graham, JJ.*) NALINAKSHA MAJHI *v.* RAJANI KANTO DAS. **58 Cal. 1392=54 C.L J. 61= 134 I.C. 1272=I.R. 1932 Cal. 56=35 C W.N. 726= A.I.R. 1931 Cal. 741.**

———*Succession—Dayabhaga school*—Jati Vaishnava —*Doctrine of spiritual benefit—Failure to offer pindas, if material.*

There is no authority for the proposition that, if an heir does not or refuses to offer pindas to his ancestor, he is not entitled under the Hindu Law to succeed to him. The right to inherit is based not on offering *pinda*, but on the capacity to offer it. *Jati Vaishnavas* may not observe caste and Sradh and offer pindas. But there is nothing to prevent them from offering oblations to a Hindu ancestor. Therefore they can inherit under the Hindu Law. (*Suhrawardy and Graham, JJ.*) NALINAKSHA MAJHI *v.* RAJANI KANTO DAS. **58 Cal. 1392=54 C.L.J. 61=134 I C. 1272=35 C.W.N. 726= I.R. 1932 Cal 56=A.I.R. 1931 Cal. 741.**

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Disqualification.

———*Succession—Disqualification — Congenital deafness and dumbness—Right of the heir of disqualified person to inherit.*

A person, who is deaf and dumb from his birth and whose disease is incurable, is in law excluded from inheritance. The disqualification of a person to inherit implies that the person so disqualified does not in law exist and consequently he cannot transmit anything to his own heir. The disqualification is not merely personal but affects his heirs also. 32 Bom. 275, Dist. 48 Bom. 569 (P.C.), Foll. (*Jwala Prasad and Wort, JJ.*) MT. BUDHA KUER *v.* MT. SAHODRA KUER. **11 Pat. 35=I.R. 1931 Pat. 290=132 I.C. 866=12 Pat. L.T. 489=A.I.R. 1931 Pat. 367.**

———*Succession — Disqualification — Lunacy — Mitakshara school — Supervening disqualification— Effect of.*

Under the Hindu Law governed by Mitakshara a congenital disqualification may prevent property arising by birth, but a disqualification (such as lunacy) that supervenes later will merely cause a suspension of the right of a coparcener thus afflicted by disqualification to a share upon a partition and for the rest leave the coparcenery interest in tact. Therefore his right as a coparcener is not so affected by the supervening disqualification as to prevent him from taking the whole estate by survivorship after the death of his brother. The coparcenary right of *R*, to the estate that came into existence at birth, subsisted all through, although one component part of it—the right to obtain a share on partition—would have been incapable of enforcement, if after his madness, the other coparcener *J* had attempted partition. From the time of her madness onwards, whenever it may have supervened, *R* still continued to be a coparcener, though without the right to take a share upon partition during the continuance of his disability. Upon the death of the other coparcener *J*, *R* would be the only member of the coparcenary left and there being then no question of partition, he would take the whole estate. 10 All. 272; 6 Bom. 616 and 33 Bom. 482, Dist.; 43 M. 464, Rel. on.

Per *Dhavle J.*—The Dayabhag view that a disqualified member (such as a lunatic) may be regarded as dead is inconsistent with the Mitakshara doctrine of property by birth, taken with the absence of any authority in the Mitakshara itself showing that the entire right by birth is destroyed by a supervening disability. (*Wort and Dhavle, JJ.*) MT. DILRAJ KUARI *v.* RIKHESWAR RAM DUBE. **13 Pat. 712=151 I C. 419=7 R.P. 91 =15 Pat.L.T. 479=A.I.R. 1934 Pat. 373.**

Dwayamushyayana adopted son.

———*Succession*—Dwayamushyayana *adopted son—Rights of natural and adoptive mother on his death.*

In the case of succession to an unmarried *dwayamushyayana* adopted son the adoptive mother and the natural mother inherit equally as co-heiresses. (*Patkar and Murphy, JJ.*) BASAPPA DANDAPPA *v.* GURLINGAWA. **57 Bom. 74=I R. 1933 Bom. 245=142 I.C. 634=35 Bom.L.R. 75=A.I.R. 1933 Bom. 137.**

Female heirs.

———*Succession—Female heirs—Brother's daughter— Mitakshara School.*

The brother's daughter does not come in at all as heir under the Mitakshara school of Hindu Law. She has consequently no *locus standi* to continue a suit as the heir of her uncle. (*Jai Lal and Abdul Qadir, JJ.*) MT. GUR KAUR *v.* MT. BHAGAN. **I R. 1931 Lah. 907 (1)=134 I.C. 203 (1)=32 P.L.R. 369.**

———*Succession—Female heirs—Father's sister and paternal uncle's widow—Priority.*

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The widow of a paternal uncle is entitled under the Hindu Law to succeed in preference to the father's sister. (*Murphy and Sen, JJ.*) RAGHUNATH *v.* LAKSHMIBAI. **59 Bom. 417=157 I C. 658=8 R.B. 78=37 Bom.L.R. 150=A.I.R. 1935 Bom. 298.**

Illatom.

———Succession—Illatom—Descendants of—Right of collateral succession in preference to reversioners of last male-holder. *See* HINDU LAW— ADOPTION—ILLATOM. **67 M.L J. 706.**

Illegitimate children.

———*Succession—Illegitimate children—Illegitimate daughter—Sudras.*

Among the Sudras an illegitimate daughter is not an heir of her father. The Hindu Law recognizes an affiliation of an illegitimate daughter to her mother but not to her father A.I.R. 1921 Bom. 137, Foll. (*Mukerji and Bennett, JJ.*) BALRAJ SINGH *v.* JAI KARAN SINGH. **I.R. 1931 All. 744=133 I.C. 792=A.I.R. 1931 All. 407.**

———*Succession—Illegitimate children—Illegitimate son*—Dasiputra—*Right to inherit—Conditions of.*

Per *Courtney-Terrell, C. J.*—"The relationship between a *sudra* and his *dasi* in order to give rights and succession to their offspring must be of a permanent and exclusive character. The object of this regulation is . . . to make certain that the offspring are in fact the offspring of the father so nearly as the circumstances of life will allow such a hypothesis to be accepted . . . . Provided that the relationship was permanent and intended to be permanent during the period covering the conception and birth of the children, the relationship is permanent and exclusive for the purpose for which such permanence and exclusiveness is required, that is to say, to prove the paternity of the children." (*Courtney Terrell, C.J. and Khaja Mahomed Noor, J.*) DOMAN SAHU *v.* BUKA. **I.R. 1931 Pat. 273=132 I.C. 353=12 Pat.L.T. 105=A.I.R. 1931 Pat. 198.**

———*Succession—Illegitimate children—Illegitimate son*—Dasiputra—*Right to inherit—Essentials of.*

In a suit by a *dasiputra* or illegitimate son for possession of certain property on the ground of inheritance from his deceased father, it is sufficient to show that the concubine was in the sole keeping of the deceased and the connection lasted till the death of the paramour and that the son was not the fruit of adulterous connection. It is not necessary that the woman should be an unmarried woman. She may be a widow or a common prostitute. It does not matter also if the connection is in the beginning adulterous. The only condition is that the illegitimate son should not be the fruit of adulterous intercourse. 1 Bom. 97; 48 Cal. 643 (F.B.); 39 Mad. 136 (F.B.); 41 Mad. 44; 40 Bom. 369; 24 Bom.L.R. 1009, Rel. on. (*Patkar and Broomfield, JJ.*) TUKARAM KRISHNA *v.* DINKAR NISBAT. **I R. 1931 Bom. 307=131 I.C. 883=33 Bom L.R. 289=A I.R. 1931 Bom 221.**

———*Succession—Illegitimate children—Illegitimate son*—Dasiputra—*Son of Sudra male and Brahmin female—Rights of.*

The son born of a Sudra male and a Brahmin female, kept as a permanent and continuous concubine, is not a *dasiputra*; and he is not, therefore, entitled under the Hindu Law, to any share in his father's property. (*Divatia, J.*) RAMCHANDRA *v.* HANAMNAIK. **60 Bom. 75=160 I C 99=8 R B. 243=37 Bom L.R. 920=A.I.R. 1936 Bom. 1.**

———*Succession—Illegitimate children—Illegitimate son*—Dasiputra—*Status of.*

The illegitimate son of a Sudra by a continuous concubine has the status of a son. He is a member of the family. The share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son. Where the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in thier hands but he is entitled as a member of the family to maintenance out of that property. His position in this respect is analogous to that of widows and disqualified heirs to whom the law allows maintenance because of their exclusion from inheritance and from a share on partition. (Case-law reviewed.) (*Sir Dinshah Mulla.*) VELLAIYAPPA CHETTY *v.* NATARAJAN. **58 I.A. 402=55 Mad. 1=55 C.L.J. 451=8 O.W.N. 1039=35 C.W N. 1278=34 L.W. 589=33 Bom L.R. 1526=134 I.C. 1084=1931 A L.J. 1123—1931 M.W.N. 848=A.I.R. 1931 P.C. 294=61 M.L.J. 522 (P.C.).**

[D. 64 M.L.J. 500 (501). **R.** 1933 M W.N. 701 (703).]

———*Succession—Illegitimate children—Illegitimate son—Death of male owner leaving widow and illegitimate son—Death of widow leaving daughter's son and illegitimate son—Right to succeed.*

Where on the death of a Sudra leaving behind him his widow and his illegitimate son by a permanently kept concubine, each of them took a half-share of the estate of the deceased and the widow died subsequently, leaving a daughter's son and the illegitimate son surviving her, the latter is not entitled to a further moiety in the widows's half-share. The illegitimate son is only entitled to a moiety of his father's estate in such circumstances, so long as the widow, daughter or daughter's son exists. The doctrine of reverter on the death of a Hindu widow has no application to the present case. (*Reilly and Anantakrishna Aiyar, JJ.*) KARUPPAYEE AMMAL *v.* RAMASWAMI PANDIYA NAYAKKAR. **55 Mad. 856=I.R. 1932 Mad. 421=137 I.C 645=1932 M W.N. 589=35 L.W. 638=A.I.R. 1932 Mad. 440=62 M.L.J. 698.**

———*Succession—Illegitimate children—Illegitimate sons—Sudra—Share of—Suit for partition against legitimate sons—Maintainability.*

The illegitimate son of a Sudra has no right by birth but receives what he does according to his father's pleasure; but on the death of his father leaving no collaterals, he becomes a coparcener and is entitled to a moiety of a son's share for which he can maintain a suit for partition against the legitimate sons and other descendants. The share of the illegitimate son is not confined to the self-acquired property of the father; it extends to all the property in the hands of the father, self-acquired or ancestral. (Case-law discussed.) (*Curgenven and Sundaram Chetty, JJ.*) RAJU THAMBIRAN *v.* ARUNAGIRI THAMBIRAN. **I.R. 1933 Mad. 229 (2)=142 I.C. 597=1933 M.W.N. 632=37 L.W. 462=A.I.R 1933 Mad. 397=64 M.L.J. 500.**

———*Succession—Illegitimate children — Right of sister to succeed to brother.*

Under the Hindu Law, where a woman has two illegitimate children, a son and a daughter, the daughter is entitled to succeed to the son as his sister. (*Shingne, J.*) DATTATRAYA TATYA *v.* MATHA BALA. **58 Bom. 119=149 I C. 821=6 R.B 391=35 Bom. L.R. 1131=A.I.R. 1934 Bom. 36.**

Law applicable.

———*Succession—Law applicable—Rajputs in Berar—Benares school.*

Questions of succession must be determined by the personal law of the individual whose succession is in

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question and not by the law of his domicile. It is only when nothing else is known about a man except that he lived in a certain place that the *lex loci* is applied. It is a measure of last resort, and even then is applied only because it is assumed that his personal law is the law which prevails in that place. The Rajputs in Berar, therefore, in the absence of anything to the contrary, are governed by the Benares and not by the Bombay school. (*Viviun Bose, A.J.C.*) KASAMSHA CHIRAGSHA *v.* BABANRAO SHAMRAO **30 N.L.R. 322=6 R.N. 171 =148 I.C. 188=A.I.R. 1934 Nag. 59.**

Liability of heir.

———*Succession—Liability of heir—Marriage expenses of predeceased son's daughter—Property liable.*

The property of a Hindu passing into the hands of his collateral heirs after his death is liable for the reasonable marriage expenses of the last holder's granddaughter who was the daughter of his pre-deceased son, as he (the last holder) would have been liable for the expenses. (*Harrison and Dalip Singh, JJ.*) RAM LABHAYA *v.* MT. NIHAL DEVI. **131 I.C. 351=A. I.R 1931 Lah. 127.**

Mother.

———*Succession—Mother—If heir to illegitimate son.*

Under Hindu Law a mother succeeds to her illegitimate son, as such succession is not only in consonance with the scheme of inheritance under the Mitakshara law but is also in accordance with the principles of justice, equity and good conscience. (*Sulaiman, C.J. and Bajpai, J.*) JAGARNATH GIR *v.* SHER BAHADUR SINGH. **57 All. 85=153 I.C. 1078=7 R A. 679= 1935 A L.J. 150=1935 A.W.R. 218=A.I.R. 1935 All. 329.**

Primogeniture.

———*Succession—Primogeniture—Burden of proof.*

The burden of proving that the custom of primogeniture governs a Hindu family, lies on the person who sets up the custom. He must show that it obtains in a sufficient number of families of similar status to his own to allow of the presumption that it also obtains in his family. (*Findlay, J.C. and Prideaux, A.J.C.*) MUKUNDRAO *v.* RAGHUNATHRAO. **17 N.L J. 118.**

Right to succeed.

———*Succession—Right to succeed—After-born heir - Avoidance of alienation made during interval.*

The rule that an after born heir is entitled to take as if he was alive when succession opened is applicable not only to sons but to other heirs under the Hindu Law. Such an heir can avoid an alienation by the person holding the property during the interval even though the purchase was made *bona fide*. (*Mitter, J*) KHAGEN DRANATH GHOSE *v.* MONMOTHO NATH MANNA. **38 C W.N. 90=59 C.L.J. 86=151 I C. 992=7 R.C. 196=A I.R. 1934 Cal. 469.**

———*Succession—Right to succeed — Dayabhaga—Vaishnavas are Hindus and can inherit to their Hindu maternal grandfather.*

A Vaishnava does not renounce the Hindu religion and is still within the Hindu communion, though he does not follow all the ritual of the orthodox Hindu religion. A Vairagi of the Vaishnava sect is not incapable of succeeding under the Hindu Law. Act 21 of 1850 does not apply to his case and the Hindu Law does not inflict on him forfeiture of right of inheritance. A Vaishnava is still a Hindu and is entitled to succeed to a Hindu ancestor, professing the orthodox creed. 35 Cal. 721; 4 C.W.N. 473 and 1 W.R. 209, Ref. (*Suhrawardy and Graham, JJ*) NALINAKSHA *v.* RAJANI KANTO. **58 Cal. 1392=54 C.L J. 61=134 I.C 1272=35 C.W.N. 726=I.R 1932 Cal. 56=A.I.R. 1931 Cal. 741.**

HINDU LAW—Succession.

Samanodakas.

———*Succession — Samanodakas—Collaterals beyond fourteen degrees.*

Collaterals must be within fourteen degrees of the propositus to be entitled to succeed to property left by him as the meaning of the word samanodaka cannot be extended to beyond fourteen degrees of the deceased. (*Razi and Smith, JJ.*) MAHABIR SINGH *v.* MT. RADHA. **150 I C. 533=7 R.O. 27=10 O.W.N. 424= A.I.R 1933 Oudh 231.**

———*Succession—Samanodakas—Relationship extends from eighth to fourteenth degrees and not beyond.*

According to the Mitakshara School of the Hindu Law, Samanodakas include only those agnates whose relationship to the deceased extends from the eighth to the fourteenth degree, and in the absence of any such agnate the estate devolves upon his bandhus. (*Sir Shadi Lal.*) ATMARAM ABHIMANJI *v.* BAJIRAO JANRAO. **62 I.A. 139=1935 A.L.J. 816=31 N.L.R. 398=37 P.L.R. 319=7 R.P.C. 198=37 Bom.L.R. 553=155 I C. 330=41 L.W. 613=1935 A.W.R. 648 =39 C.W.N. 646=61 C.L.J. 251=1935 M.W.N. 484 =1935 O W N. 572=A.I.R. 1935 P.C. 57=68 M.L.J. 673 (P.C.).**

Sapindas.

———*Succession—Sapindas—Bhinnagotra sapindi—Degree of relationship.*

The sapinda relationship ceases in the case of bhinnagotra sapinda with the fifth degree from the common ancestor 42 Cal. 384 (P.C.) Rel. on. (*Tek Chand and Johnstone, JJ.*) RAM PARSHAD *v.* IDU MAL. **I.R. 1931 Lah. 890 (1)=134 I.C. 122 (1).**

———*Succession — Sapindas — Gotraja sapindas—Brother's great grandson and father's brother's grandson—Preference—Spiritual benefit.*

In a competition between the brother's great-grandson and the father's brother's grandson of the propositus the latter is a nearer heir than the former on the application of the doctrine of spiritual benefit, and is entitled to succeed in preference to t e former. Brother's "son" among the gotraja sapindas does not include brother's great-grandson (*Varadachariar and Burn, JJ.*) VENKATESWARA RAO *v.* AUDINARAYANA. **58 Mad. 323 =154 I.C. 923=7 R M 517=40 L.W. 929=1935 M. W.N. 73=A.I.R. 1935 Mad. 129=69 M.L.J. 256.**

———*Succession—Sapindas—Gotraja sapinda—Who is.*

In order to quality as a male agnate or gotarajasapinda of the propositus, the plaintiff must satisfy two conditions, *viz.*, (*a*) that he is of the same gotra or as it may be expressed, of a common patriarchal stock, and (*b*) that he is a sapinda of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males. In the absence of challenge on this point proof by the plaintiff that he was a sapinda of the propositus will be sufficient to raise a presumption that he was also gotraja, but if that be challenged, it is for the plaintiff to prove the identity of gothra also. (*Lord Thankerton.*) DULAHIN JADUNATH KUAR *v.* BISHESHAR BAKHSH SINGH. **59 I.A. 173=1932 A.L.J. 532=36 C.W.N. 1073=56 C.L J. 204=1932 M W.N. 1037=I.R. 1932 P.C. 145 =136 I.C. 747=9 O.W.N. 478=A.I.R. 1932 P.C. 142=63 M.L.J. 287 (P.C.).**

———*Succession—Sapindas—Grandfather's grandson —Right to succeed in preference to brother's grandsons.*

The grandfather's grandson has a preferential right of succession over the brother's grandsons of a separated Hindu Table in Dr. Gour's Hindu Code approved. 24 All. 128, Ref. (*Mukerji and Bennet, JJ.*) RAM

HINDU LAW—Succession.

SUMERAN DAS *v.* KODAI DAS. **I.R. 1931 All. 555 = 132 I.C. 811 = A.I.R. 1932 All. 117.**

———*Succession—Sapindas—Sapinda gotraja relationship—Proof—Presumption.*

In order to qualify as a male agnate, or gotraja-sapinda of the propositus a person must satisfy two conditions, namely, (*a*) that he is of the same gotra, or, as it may be expressed, of a common partiarchal stock, and (*b*) that he is a sapinda of the deceased, connected by blood through a common ancestor, the connexion being traced through males. Where a person proves that he is a sapinda, he cannot have the benefit of the further presumption that he is also a gotraja if the opposite party challenges its correctness. The word "Gotraja" which literally means born in the same gotra is a term indicative of relationship and gotraja-sapindas are persons who are descended from one paternal stock. If a person's title to inherit as a gotraja-sapinda is challenged on the ground of difference between his and the gotra of the propositus, not only should he prove the identity of the gotra or community of the family, but also that the continuity of the line of descent from the common ancestor downwards is not broken by an adoption of any person in his line into another gotra or family; in other words, he should prove a subsisting title. (*Wazir Hasan, C.J. and Raza, J.*) HARI HAR PARTAB BAKSH SINGH *v.* BISHESHWAR BAKHSH SINGH. **I.R. 1933 Oudh 247 = 144 I.C. 529 = 10 O.W.N. 1290 = A.I.R. 1933 Oudh 197.**

———*Succession—Sapindas—Sapindas of same degree—Exclusion of half blood by full blood.*

As between sapindas in the same degree of descent from the common ancestor, those of the half-blood are excluded by those of the whole blood. The exception is not confined to the case of brothers of the propositus only and therefore as between parternal uncles of the propositus, the whole blood will exclude the half-blood. (*Sir George Lowndes.*) GARUDAS *v.* LALDAS. **60 I. A. 189 = 29 N.L.R. 204 = 57 C.L.J. 313 = 1933 M.W. N. 557 = I.R. 1933 P.C. 144 = 14 Pat.L.T. 365 = 1933 A.L.J. 774 = 142 I.C. 807 = 37 C.W.N. 637 = 35 Bom. L.R. 595 = 37 L.W. 772 = A I.R. 1933 P.C. 141 = 64 M.L.J. 660 (P.C.).**

———*Succession—Sapindas—Sapindaship.*

Sapindaship under the Mitakshara law arises from the community of corporal particles and is not dependent on the right to participate in the offering of funeral oblations; the latter may be of importance in settling the order of preference of heirs in the same class, but is not relevant in a question of exclusion from a class of heirs. (*Lord Thankerton.*) DULAHIN JADUNATH KUAR *v.* BISHESHAR BAKHSH SINGH. **59 I.A. 173 = 1932 A.L.J. 632 = 36 C.W.N. 1073 = 56 C.L.J. 204 = 1932 M.W.N. 1037 = I.R. 1932 P.C. 145 = 136 I.C. 747 = 9 O.W.N. 478 = A.I.R. 1932 P.C. 142 = 63 M.L. J. 287 (P.C.).**

———*Succession—Sapindas— Succession to widow—Husband's brother's son and brother's son's sons—Preferential right—Half blood, if excluded by full blood.*

Where a Hindu widow died leaving the nearest relatives of her husband are her husband's brother's son and another brother's son's sons.

Held, (1) that the brother's son and another brother's sons did not inherit simultaneously; since the brother's grandson stands one degree below the brother's son, they cannot be joint heirs unless the doctrine of representation is extended to the case; (2) that the brother's son was the preferential heir; and (3) that the brother's son, though of half blood, excluded the brother's grandson though of full blood. (*Subhedar, Niyogi and Staples, A.J.Cs.*) NILKANTH *v.* NARAYAN. **28 N L.R. 58 = I R. 1932 Nag. 81 = 138 I.C. 721 = A.I.R. 1932 Nag. 79 (F.B.).**

HINDU LAW—Succession.

Self-acquired property.

———*Succession—Self-acquired property.*

Under Mitakshara law the self-acquired property of a male Hindu passes on his death, to his sons, grandsons, whose fathers are dead, as joint tenants, and is coparcenary property in the hands of such sons, grandsons and great-grandsons so succeeding. 30 Mad. 348, Ref. (*Pollock, A.J.C.*) SHEODINLAL *v.* NARAYANDAS. **30 N.L.R. 88 = 148 I.C. 237 = 6 R.N. 178 = A.I.R. 1933 Nag. 387.**

———*Succession—Self acquired property— Perferential right of undivided sons.*

On the death of a Hindu father leaving self-acquired property, his undivided sons succeed to such property to the exclusion of a divided son. 32 M. 377, Foll. (*Waller, and Krishnan Pandalai, JJ.*) NARASIMHA RAO *v.* NARASIMHAM. **55 Mad. 577 = I.R. 1932 Mad. 448 = 137 I.C. 765 = 1932 M.W.N. 200 = 35 L.W. 475 = A.I. R. 1932 Mad. 361 = 62 M.L.J. 436.**

Sister.

———*Succession—Sister—Benares school— Right to succeed.*

It is a recognized principle of the Benares school of Hindu Law that no female can inherit to a male unless she is expressly named as an heir in the texts. And under the Mitakshara, a sister is not in the line of heirs at all and has no right of succession in the property of her deceased husband. (*Tek Chand and Agha Haidar, JJ.*) JANG BIR *v.* MT. JAMNA. **12 Lah. 534 = 32 P.L. R. 798 = 135 I C. 593 = I.R. 1932 Lah. 129 = A.I.R. 1932 Lah. 37.**

———*Succession—Sister— Bombay Presidency — Preferential right over brother's widow.*

The object of the Inheritance Amendment Act was to legalise the position of certain heirs including the sister and it was not intended to change for the worse the position which the sister holds in the Bombay Presidency,

Held, that the sister was the preferential heir to the brother's widow. (*Baker and Rangnekar, JJ.*) SHIDRAMAPPA *v.* NEELAVABAI. **57 Bom. 377 = 6 I.R. (Bom.) 20 = 144 I.C. 925 = 35 Bom.L R. 397 = A.I.R. 1933 Bom. 272.**

———*Succession—Sister—Daughter and sister—Exclusion of daughter by custom.*

Where a male owner of property dies leaving both a daughter and a sister, the two latter are according to ordinary principles on a different footing and it cannot be said that where daughters are excluded by custom there is any necessary implication in the nature of things that sisters also are excluded. (*Raza and Smith, JJ.*) MAHABIR SINGH *v.* MT. RADHA. **150 I.C. 533 = 7 R.O. 27 = 10 O.W.N. 424 = A.I.R. 1933 Oudh 231.**

Son-in-law.

———Succession—Son-in-law. *See* OUDH ESTATES ACT, Ss. 13, 14 AND 15. **11 O.W.N. 1626 = A.I.R. 1935 Oudh 156.**

Step-brother.

———*Succession—Step-brother—Dayabhaga school—Right to succeed.*

Under the Dayabhaga law in the absence of brothers the step-brother comes in the next line of succession to the brother's property. (*Jack and Mitter, JJ.*) SUSILA SUNDARI DASI *v.* BISHNUPADA DE. **60 Cal. 636 = 6 I.R. (Cal.) 253 = 146 I.C. 641 = 37 C.W.N. 329 = A.I. R. 1933 Cal. 622.**

HINDU LAW—Succession.

Step-mother.

———*Succession—Step mother—Maternal uncle and step-mother—Preference—Co wives—Adoption by husband in association with one—Right of wife not associated to succeed to adopted son.*

When a person having two wives adopts a boy associating with him one of the wives only in the act of adoption, and the adopted boy subsequently dies and is succeeded by his adoptive mother, on the death of the adoptive mother, the wife who was not associated in the act of adoption has only the status of a step mother and not that of a postponed mother, and she is not consequently entitled to succeed in preference to the maternal uncle of the adopted boy. (*Ramesam and Stone, JJ.*) NAVANEETHAKRISHNA MARUDAPPA THEVAR *v.* COLLECTOR OF TINNEVELLY. **1935 M.W.N. 1001 = 160 I.C. 647 = 8 R.M. 674 = 42 L.W. 875 = A.I.R. 1935 Mad. 1017 = 69 M L J. 632.**

Wanaprasthas.

———*Succession—Wanaprasthas—Rule of succession.*

Wanaprasthas are governed by the same rule of succession as are applicable to Sanyasis. Guru Chelas and Guru Bhais become heirs. (*Jeevan Yar Jung Bahadur and Bisheshwarnath, JJ.*) GANESHGEER *v.* PARVATHI BAI. **142 I.C. 70.**

Words.

———*Succession—Words—'Agnate'.*

The term "agnate" is not a term of art in the English legal system: in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males. (*Lord Thankerton.*) DULAHIN JADUNATH KUAR *v.* BISHESHAR BAKHSH SINGH. **59 I.A. 173 = I.R. 1932 P.C. 145 = 9 O.W.N. 478 = 1932 A.L.J. 632 = 36 C.W N. 1073 = 56 C.L.J. 204 = 1932 M.W. N. 1037 = 136 I.C. 747 = A.I.R. 1932 P.C. 142 = 63 M.L.J. 287 (P.C.).**

———*Succession—Words—*'Dayadi'*—Meaning.*

The word '*Dayadi*' is equivalent to agnatic heir. Ghose, Hindu Law, referred to. 1 Mad. 69 (P.C.), Foll. (*Curgenven and Cornish, JJ.*) RAMAKRISHNA PILLAI *v.* TIRUNARAYANA PILLAI. **55 Mad. 40 = I.R. 1932 Mad 767 = 139 I.C. 684 = 1932 M.W.N. 31 = 35 L W. 73 = A.I.R. 1932 Mad. 198 = 62 M.L.J. 116.**

———*Succession—Words—*"Vamsastha"*— Meaning—Daughter's son—If included.*

According to the ordinary rule of succession under the Hindu Law, the word "vamsastha" includes a daughter's son. The word is very different from "heir" or "agnatic relation", and has a much wider meaning. It means a man belonging to the family. (*Venkatasubba Rao, J.*) SOMASUNDARAM PILLAI *v.* KANAKASABHAI PILLAI. **157 I.C. 602 = 41 L.W. 473 = 1935 M.W.N. 286 = A.I.R. 1935 Mad. 327 = 68 M.L.J. 354.**

Texts.

———*Texts—Absence of—Justice, equity and good conscience—Applicability.*

In the absence of clear text and authority, the Court can decide a point of Hindu Law by applying the principles of justice, equity and good conscience. (*Sulaiman, C.J. and Bajpai, J.*) JAGARNATH GIR *v.* SHER BAHADUR SINGH. **57 All. 85 = 153 I.C. 1078 = 7 R. A. 679 = 1935 A L.J. 150 = 1935 A.W.R. 218 = A.I.R. 1935 All. 329.**

———*Texts—Construction—Meaning of 'sapinda'.*

It is a rule of construction of Hindu Law that a word once used in one sense is to be taken to mean the same thing throughout the book. The word 'sapinda' in the chapter on inheritance has the same meaning as in the chapter on Achar in Yjanavalkya Smriti. (*Sulaiman, C.J., Mukerji and Young, JJ.*) GAJADHAR PRASAD *v.* GAWRI SHANKAR. **54 All. 698 = I.R. 1932 All. 448 = 1932 A.L.J. 533 = 138 I.C. 561 = A.I.R. 1932 All. 417 (F.B.).**

HINDU LAW—Trading family.

———*Texts—Dattaka Mimamsa—*" Prathigrahithriya-matha"*—Interpretation of.*

The phrase "*prathigrahithriyamatha*" in Dattaka Mimamsa, S. 6, verse 50, is used in the sense of an adoptive mother and not in its etymological sense. Simply because the verse uses the word "*Prathigrahithri*" in attempting to exclude the natural ancestors, it cannot be inferred that the receiving mother only can be the adoptive mother and no other. (*Ramesam, Anantakrishna Aiyar and Cornish, JJ.*) SOUNTHARAPANDIAN AIYANGAR *v.* PERIYAVEERU THEVAN. **56 Mad. 759 = 6 I R. (Mad.) 88 (2) = 145 I.C. 534 (2) = 1933 M. W.N. 1061 = 38 L.W. 45 = A.I.R. 1933 Mad. 550 = 65 M.L J. 58 (F.B.).**

———*Texts—Interpretation — Conflict between text-writers and commentators.*

In the event of a conflict between the ancient text-writers and the commentators, the opinion of the latter should be accepted. (*Sir Shadi Lal.*) ATMARAM ABHIMANJI *v.* BAJIRAO JANRAO. **62 I.A. 139 = 1935 A.L.J. 816 = 31 N.L.R. 398 = 37 P.L R. 319 = 7 R.P. C. 198 = 37 Bom L.R. 553 = 155 I C. 330 = 41 L.W. 613 = 1935 A.W.R 648 = 39 C.W.N. 646 = 61 C.L.J. 251 = 1935 M.W.N. 484 = 1935 O.W.N. 572 = A.I.R. 1935 P.C. 57 = 68 M.L.J. 673 (P.C.).**

———*Texts—Mayukha.*

The Mayukha is a commentary to the Mitakshara and nothing more. It does not declare new law but merely explains the prevailing law before it was written. (*Wort and Fazl Ali, JJ.*) JIWAN BEAS *v.* MT. INDRA KUAR. **151 I.C. 699 = 7 R.P. 117 = A.I R. 1934 Pat. 260.**

———*Texts—Mayukha and Kaustubha.*

The Mayukha and Kaustubha are paramount authorities in Bombay and Gujarat. No distinction is drawn between the two in the Bombay school, the one being considered complementary to the other. 12 M.I.A. 397, Ref. (*Wort and Fazl Ali, JJ.*) JIWAN BEAS *v.* MT. INDRA KUAR. **151 I.C. 699 = 7 R.P. 117 = A.I.R. 1934 Pat. 260.**

———*Texts—Vijnaneshvara's comment on Yajnavalkya 2-140 interpreted.*

Per *Dhavle, J.*—Vijnaneshvara's comment on Yajnavalkya, 2-140, taken with what he says on the next verse also, ought to be confined to vibhaga in the sense of division or partition without extending it to cases where there is no question of partition at all. (*Wort and Dhavle, JJ.*) MT. DILRAJ KUARI *v.* RIKHESWAR RAM DUBE. **13 Pat. 712 = 151 I.C. 419 = 7 R.P. 91 = 15 Pat.L.T. 479 = A.I.R. 1934 Pat. 373.**

———*Texts—Viramitrodaya—Authoritativeness.*

The Viramitrodaya is a commentary which generally follows and maintains the doctrines of Mitakshara. That is an authority which is inferior to that of the Mitakshara and should only be invoked where the Mitakshara itself leaves some points doubtful. 33 Cal. 371, Foll. (*Hasan, C.J., Raza and Pullan, JJ.*) BINDRA *v.* MATHURA. **6 Luck. 456 = I.R. 1931 Oudh 153 = 130 I.C. 345 = 8 O.W.N. 1 = 14 O.L.J. 58 = A.I.R. 1931 Oudh 17 (F.B.).**

Trading family.

See HINDU LAW.

(1) PARTITION.

(2) JOINT FAMILY—TRADING PARTNERSHIP.

HINDU LAW—Widow.

Unchastity

See HINDU LAW.
(1) MAINTENANCE—WIDOW AND WIFE.
(2) SUCCESSION—DAUGHTER.

Widow.

See also HINDU LAW—ADOPTION AND DEBTS.
ACCRETIONS.
ADVERSE POSSESSION AGAINST.
ADVERSE POSSESSION BY.
ALIENATION.
BUSINESS.
COMPROMISE.
CO WIDOWS.
DEBTS.
DECREE AGAINST.
MAINTENANCE. *See* HINDU LAW—MAINTENANCE.
MOVABLE PROPERTY.
NATURE OF ESTATE.
POWERS OF.
RE MARRIAGE.
REPRESENTATION OF ESTATE.
RESIDENCE.
SETTLEMENT.
SUCCESSION CERTIFICATE.
SURRENDER.
WILL.
MISCELLANEOUS.

Accretions.

———*Widow—Accretions—Accretion to husband's estate—Proof of intention.*

Where a widow acquires certain property by pre-emption from the savings of her husband's estate and treats the property so acquired as one with the property received from her husband, it is to be presumed that she intended the property so acquired to be treated as an accretion to her husband's estate. If the widow seven years after the acquisition gifts the property so acquired along with the property of the husband to one who is not the heir of the husband, it does not disprove the widow's intention to make an accretion to the estate of the husband. Therefore a person suing as a reversionary heir for a declaration that a deed of gift made by a widow is void as against him is entitled to a decree to the extent of the whole property gifted. (*Pullan and Niamatullah, JJ.*) BHARDSA SHUKUL *v.* MANBASI KUER. **54 All. 1014=143 I.C. 259=I.R. 1933 All. 205=1932 A.L.J. 875=A.I.R. 1932 All 690.**

———*Widow—Accretions—Acquisitions by widow—If accretions to ancestral estate or stridhan—Rule as to.*

Where a Hindu widow in possession of her husband's estate, purchases new property in her name, and it is shown that she has means of her own from which the purchase price could come out, there is no justification for presuming that the property was purchased from out of the savings of the husband's estate in her possession so as to form an accretion to it. The fresh acquisitions in such cases must be deemed to be her self-acquisition, and as such her *stridhan*. (*Subhedar, A.J.C.*) KALURAM *v.* SHAMRAO. **163 I. C. 562=9 R.N. 6=18 N. L.J. 267.**

———*Widow—Accretions—Savings from income—If form part of the estate—Intention—Burden of proof.*

A Hindu widow has got an absolute right over the income of the estate, and if she acquires any property from the saving of that income, it is optional with her to keep the property separate from the estate or mix it up with it. In the absence of an intention to the contrary on her part, the property would not form part of her husband's estate., The onus of proving that it was not

HINDU LAW—Widow.

treated by her as her separate property is on those who allege the same. (*Muhammad Noor and Agarwala JJ.*) DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH. **14 Pat. 518=155 I.C. 213=7 R.P. 557=16 Pat.L.T. 713=A.I.R. 1936 Pat. 200.**

———*Widow—Accretions—Savings out of maintenance allowance—Succession.*

Savings by a widow out of the maintenance given to her by the late absolute owner is not an accretion to the property but her absolute property going to her heirs because whatever may not be consumed may be disposed of by her as she likes. 28 Mad. 1 (F.B.), Rel. on. The *obiter dictum* in 10 Cal. 324 (P.C.) regarding a Hindu widow's power of disposition of income of her husband's property, at her disposal, has more than been counter-balanced by the decision of their Lordships in 20 Cal. 433 (P.C.). (*Guha, J.*) BANKIM BEHARY MAITI *v.* PRABODH CHANDRA MAITY. **151 I.C. 290 (1)=7 R C. 105 (1)=A.I R. 1934 Cal. 284.**

———*Widow—Accretions—Unrealised past profits due under decree.*

A Hindu widow who shows no inclination to realise the past profits awarded to her by a decree of Court must be taken to have intended to leave those mesne profits with her husband's estate, and the heir succeeding to the estate is therefore entitled to execute the decree in respect of the mesne profits as well as the other property dealt with by the decree. (*Murphy and Sen, JJ.*) RAGHUNATH *v.* LAKSHIMIBAI. **59 Bom. 417=157 I.C. 658=8 R.B. 78=37 Bom.L.R. 150=A.I.R 1935 Bom 298.**

Adverse possession against.

———*Widow—Adverse possession against—Divesting of widow's estate by surrender or re-marriage—Effect on reversioner.*

In cases of surrender or divesting of the widow's estate on re-marriage, adverse possession against the widow continues during her life and the reversioner who obtains the estate cannot be in a better position than the widow herself and the adverse possession against her can be relied on by the person in possession against the reversioner. Therefore a suit for possession during the lifetime of the widow by a reversioner of an estate surrendered to him by her, against the person who has been in adverse possession of the estate for more than 12 years, is barred under Art. 144, Lim. Act, and the reversioner cannot maintain the suit during the lifetime of the widow. But he is at liberty to file a suit within 12 years after the death of widow. (*Ramesam and Stone, JJ.*) RAMAYYA *v.* SUBBA RAO. **157 I.C. 1100=A.I.R 1935 Mad. 664.**

Adverse possession by.

See also ADVERSE POSSESSION—LIMITED OWNER.
———Widow—Adverse possession by—Adverse possession of first husband's property after re-marriage—Title to a widow's estate—Devolution of the property. *See* HINDU LAW—WIDOW—RE-MARRIAGE. **7 Luck. 320.**

———*Widow—Adverse possession by—Forfeiture by re-marriage—Subsequent possession.*

Where upon re marriage a Hindu widow forfeits her husband's estate, her possession thereafter of the estate is not in the capacity of a widow; and she may acquire an absolute title therein by prescription after the lapse of the requisite period from the date of her re marriage. 11 Lah. 424, Foll.; 5 Lah. 192 (P.C.), Dist. (*Bhide, J.*) HASSU *v.* IBRAHIM. **I R 1933 Lah. 114=141 I.C. 399=34 P.L.R. 225=A.I.R. 1933 Lah. 218.**

———*Widow—Adverse possession by—Nature of estate acquired.*

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If a widow takes possession of property as a trespasser and remains in possession for more than twelve years, she acquires an absolute estate. (*Abdul Rashid, J.*) KHEM CHAND *v.* KRISHAN KUMAR. **152 I.C. 773 = 35 P.L.R. 494 = A.I.R. 1934 Lah. 633.**

———*Widow—Adverse possession by—Nature of title acquired.*

It is no doubt true that a Hindu widow is not a life-renter but has a widow's estate in her deceased husband's estate and if possessing as widow, she possesses adversely to any one as to certain parcels she does not acquire the parcels as stridhan but she makes them good to her husband's estate. But where the widow never possessed as widow any property whatsoever, in taking adversely property left by her husband, she would take adversely to herself and not make good to her husband's estate. (*Dalal, C. J. and Abdul Qayoom, J.*) D. LAKHMI CHAND *v.* R. LAKHMI CHAND. **37 P.L.R. J.& K. 30.**

———*Widow—Adverse possession by—Title—Right of reversioners.*

The mere fact that a Hindu woman holds property need not necessarily imply that she holds it for her benefit. She may hold it on behalf of her husband's estate or on behalf of her son's estate. Where she does not hold for herself but for the benefit of her husband's estate, she by adverse possession matured in favour of her husband's heirs an estate in the property. (*Mukerji and Bennet, JJ.*) SHANKAR LAL *v.* DAMODAR DAS. **I.R. 1931 All. 742 = 133 I.C. 790 = A.I.R. 1931 All. 450.**

———*Widow—Adverse possession by—Title acquired as owner—Transfer by way of gift—Right of reversioner to question.*

When a Hindu widow who has no right to a widow's estate in certain properties obtains possession and holds them without any arrangement with the real heirs, she should be held to take the property as absolute owner. And a gift made by her of the property so held cannot be impugned by the reversioner. (*Shadi Lal, C. J. and Rangi Lal, J.*) MUKH RAM *v.* MT. SUNDAR. **150 I.C. 108 = 6 R.L. 824 = 36 P.L.R. 90 = A.I.R. 1934 Lah. 270.**

Alienation.

See also HINDU LAW.
(1) REVERSIONER—ESTOPPEL.
(2) WIDOW—MOVABLE PROPERTY.
ALIENATION AFTER RE MARRIAGE.
CHARITABLE OR RELIGIOUS PURPOSE.
CONSENT OF REVERSIONER.
CO WIDOW.
DISCHARGE OF HUSBAND'S DEBT.
DISCHARGE OF PERSONAL DEBT.
DUTY OF ALIENEE.
DUTY OF COURT.
EFFECT OF RE-MARRIAGE.
EFFECT OF SURRENDER.
GIFT.
LEASE.
MORTGAGE.
NECESSITY.
POWERS OF.
REVERSIONER.
RIGHT OF ALIENEE.
RIGHT TO AVOID.
SETTING ASIDE.
SPIRITUAL BENEFIT.
VALIDATION.
VALIDITY.

HINDU LAW—Widow.

Alienation after re-marriage.

———*Widow—Alienation—Alienation after re-marriage—Purchaser paying debts, binding on estate—Suit by reversioner—Purchaser to be reimbursed amounts paid.*

Where a Hindu widow after her re-marriage sells the property of the first husband for discharging certain debts due from the estate of the first husband and the purchaser has paid such debts, the reversioner before claiming the property must reimburse the purchaser to the extent of the debts binding on the estate. (*Courtney-Terrell, C. J.*) DHANU MAHTON *v.* AJODHIYA PRASAD SINGH. **150 I.C. 893 = 7 R.P. 34 = A.I.R. 1934 Pat. 327.**

Charitable or religious purpose.

———*Widow—Alienation—Charitable and pious purpose—Dispositions for.*

The dispositions made by a Hindu widow for pious or charitable purposes must be clearly distinguished from her alienations for purely worldly purposes. While she has indisputable power in respect of the former, she has none in respect of the latter, unless legal necessity exists. If the disposition is proved to have been made for a pious or charitable purpose, it is incumbent on the party impeaching it to prove its impropriety, but if the alienation is for a worldly purpose, the onus is on the person seeking to affirm it of proving the justifying necessity. The pious or charitable gifts are valid, and secular alienations are invalid, unless respectively the contrary is proved. The widow does not, however, enjoy an unlimited power of disposition even for pious and charitable purposes. The validity of such dispositions must be judged in the light of considerations of prudence and propriety. (*Niyogi, A.J.C.*) VISHWANATH GOVIND *v.* NARAYAN. **31 N.L.R. 18 (Supp.) = 158 I C. 454 = 8 R.N. 83 = 18 N.L.J 239 = A.I.R. 1935 Nag. 217.**

———*Widow—Alienation—Charitable or pious purpose—Dedication of property—Validity.*

A Hindu widow is entitled to dedicate only a small portion of the property for pious or charitable purpose on some appropriate occasion.

Held, that a dedication by the widow of one-third of the entire estate to an idol was invalid. (*Kulwant Sahay and Khaja Mohammed Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727 = 149 I.C. 809 = 6 R.P. 652 = 14 Pat. L. T. 258 = A.I.R. 1933 Pat. 250.**

———*Widow—Alienation—Charitable or religious purposes.*

For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, the Hindu widow has a larger power of disposition than that which she possesses for purely worldly purposes. 44 All. 503 (P.C.), 43 C. 574; 43 All. 463, 4 Lah. 336, Ref, to. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352 = I.R. 1931 Pat. 417 = 134 I.C. 129 = 12 Pat.L.T. 521 = A.I.R. 1931 Pat. 442.**

———*Widow—Alienation—Charitable or religious purposes—Dedication of property—Validity.*

Any charitable act performed by a widow conduces to the spiritual benefit of her husband and no distinction can be drawn between gifts which are supposed to conduce to the spiritual welfare of her husband and those that redound to her own benefit. A widow's disposition for a charitable or religious purpose must, therefore, be upheld even in absence of a tangible proof of intention to confer spiritual benefit of the husband unless it appears to be reckless, improvident and extravagant.

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A.I.R. 1916 Cal. 792, Foll.; 4 All. 482; A.I.R. 1921 All. 109 and 178, Diss. from. (*Niyogi, A.J.C.*) VISHWANATH GOVIND *v.* NARAYAN. **31 N.L.R. 18 (Supp.) = 158 I.C. 454 = 8 R.N. 83 = 18 N.L.J. 239 = A.I.R. 1935 Nag. 217.**

———*Widow—Alienation—Charitable or religious purpose—Gift of reasonable portion of husband's property—Validity.*

A Hindu widow has power to make a gift at her own will of a reasonable portion of her husband's property for what she considers to be religious and charitable, apart from the obligatory duty to make donations at the time of the performance of necessary ceremonies such as obsequies of the deceased husband or auspicious occasions like marriage. 8 M.I.A 529 (P.C.) and A.I.R. 1922 P.C. 261, Rel. on. (*Niyogi, A.J.C.*) VISHWANATH GOVIND *v.* NARAYAN. **31 N.L.R. 18 (Supp.) = 158 I.C. 454 = 8 R.N. 83 = 18 N.L.J. 239 = A.I.R. 1935 Nag. 217.**

———*Widow—Alienation—Charitable or religious purposes—Legal necessity need not be proved.*

It is only with reference to temporal purposes that an alienation by a Hindu widow should be grounded upon legal necessity. As regards religious or charitable purposes done for the good of her husband's soul, she has larger power of disposition. An alienation by the widow by way of mortgage for raising money for the excavation and consecration of a tank and construction of a temple is valid without proof of necessity or express direction of her husband. 43 C. 574; 7Pat.L.T. 821, Foll.; 8 M.I.A. 529, Ref. (*Jwala Prasad and James, JJ.*) RAM SURAT MAHTON *v.* HITANANDAN JHA **10 Pat. 474 = I.R. 1931 Pat. 425 = 134 I.C. 137 = 13 Pat.L.T. 108 = A.I.R. 1931 Pat. 330.**

[Rel 30 N.L.R. 306 (309).]

———*Widow—Alienation—Charitable and religious purposes—Powers of—Extent of.*

An usufructuary mortgage for a temporary period of 1 bigha and 4 cottahs only for raising money required for religious and charitable purposes by a widow who inherited 12 bighas from her husband is reasonable in extent and within the powers of a Hindu widow. 43 C 574, Ref. (*Jwala Prasad and James, JJ.*) RAM SURAT MAHTON *v.* HITANANDAN JHA. **10 Pat. 474 = I.R. 1931 Pat. 425 = 134 I.C. 137 = 13 Pat.L.T. 108 = A.I.R. 1931 Pat. 330.**

Consent of reversioner.

———*Widow—Alienation—Consent of reversioners—Effect.*

A widow's transfer of her estate in excess of her powers is only voidable and not void; and it binds a reversioner who assents to the alienation. (*Shadi Lal, C.J. and Coldstream, J.*) BARKHURDAR SHAH *v.* SAT BEHARI. **132 I.C. 881 = 36 P.L.R. 371 = I.R. 1931 Lah. 705 = A.I.R. 1931 Lah. 677.**

———*Widow—Alienation—Consent of reversioner—Effect of.*

A reversioner's consent does not by itself operate to validate an alienation by a Hindu widow but is only presumptive evidence that the alienation was proper. But the value of a consent and its effective results must be measured by reference to all the circumstances of the case. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352 = I.R. 1931 Pat. 417 = 134 I.C. 129 = 12 Pat.L.T. 521 = A.I.R. 1931 Pat. 442.**

———*Widow—Alienation—Consent of reversioner—Effect of.*

It is not correct to say that an alienation by a Hindu widow can be binding on the reversioners only if the act amounts to a surrender of her estate, or if there is legal necessity or if the transferee makes *bona fide* enquiries and is satisfied as to the existence of the necessity, even if in fact there is no necessity. Nor can it be said that the only effect of consent of a presumptive reversioner is to raise a presumption of necessity. If the actual reversioner on the death of the widow is not the one who gave his consent, the alienation will bind him only in the three cases mentioned above. But if he was the consenting reversioner, such consent has to be regarded as an effective election by him and the alienation is binding on him. Where, however, the consenting reversioner who becomes the actual reversioner is a female, the next reversioner will not be bound unless there is proved legal necessity or due enquiries as to its existence. (*Mitter, J.*) KUNJA BEHARI BASU *v.* RASIK LAL. **157 I.C. 846 = 39 C.W.N. 474 = A.I.R. 1935 Cal. 495.**

HINDU LAW—Widow.

———*Widow—Alienation—Consent of reversioner—Gift.*

Where an alienation by way of gift by a Hindu widow of property forming part of her husband's estate is consented to by the next presumptive male reversioner, who receives consideration for giving such consent or has benefited by the transaction, the transaction is binding on the consenting reversioner and persons claiming through him if he succeeds to the estate after the death of the widow. (*Raza and Smith, JJ.*) BABU SINGH *v.* RAMESHWAR BAKHSH SINGH. **7 Luck. 360 = I.R. 1932 Oudh 65 = 135 I.C. 881 = 8 O.W.N. 1400 = A.I.R. 1932 Oudh 90.**

———Widow—Consent of reversioner—Gift—Validity against actual reversioner. *See* HINDU LAW WIDOW—GIFT. **55 Bom. 46 = A.I.R. 1931 Bom. 100.**

———*Widow—Alienation—Consent of reversioner—No right to dispute transaction—Election.*

The reversioner, who consents to an alienation, whether it be an alienation without necessity or a deed of gift, is precluded from disputing the validity of the transaction. Equally so are persons precluded from disputing the transaction, who claim through that reversioner and who thus stand in his shoes. (*Patkar and Baker, JJ.*) BABURAO LAKSHMAN *v.* TUKARAM KUNDALIKA. **131 I.C. 660 = 33 Bom.L.R. 235 = A.I.R. 1931 Bom. 208.**

———Widow—Alienation—Consent of reversioner—Perpetual lease—Right of actual reversioner to challenge. *See* HINDU LAW—WIDOW—ALIENATION—LEASE. **1934 A.L.J. 632.**

———*Widow—Alienation—Consent of reversioner—Presumption—Necessity.*

In the case of an alienation effected by the widow the burden of proving legal necessity is on the alienee but where the sale is made with the concurrence of the next reversioner, it must be presumed that there was legal necessity for the alienation. (*Niyogi, A.J.C.*) SHANKAR *v.* SHEIKH HUSSAIN. **140 I.C. 597 = I.R. 1933 Nag. 3 = 15 N.L.J. 31.**

———*Widow—Alienation—Consent of reversioner—Presumption—Necessity—Proof of—Nature of.*

In the case of transfer made by a Hindu widow in possession of her husband's estate, the burden of proving legal necessity can be discharged by the transferee either by proving that there was pressing necessity for the transfer or such necessity as is recognized as lawful by Hindu law or by proving that the alienation was made by the widow with the consent of the whole body of persons constituting the reversion. An exception to this rule is furnished by cases in which the alienation is made by the widow, not with the consent of the entire body of reversioners but with the consent of only the nearest reversioner. In such cases the consent of the

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nearest reversioner affords presumptive proof of the fact that the alienation itself was justified by legal necessity but that is a rebuttable presumption. Once that initial presumption is rebutted, there is no presumption that all or any of the items of consideration for the alienation were for justifiable purposes. (*Iqbal Ahmad and Bajpai, JJ.*) INDARJIT SINGH *v.* JADDU. **55 All. 157=I.R 1933 All. 375=144 I.C. 108=1933 A.L.J. 42=A I.R. 1933 All. 169.**

———*Widow—Alienation—Consent of reversioner subsequent—Gift—Effect.*

Whether consent is given at the time of or after the gift, from the point of view of the widow's competency, there is no difference between her voluntary transfers and those for consideration Even after the widow's death, the donee's possession being peaceful is perfectly lawful and if the reversioner does not sue to disaffirm the gift, donee's possession can mature into prescriptive title. (*Niyogi, A.J.C.*) SHESHRAO *v.* MANSARAM. **28 N.L.R 102—I.R. 1932 Nag. 106=139 I.C. 379=A.I.R. 1932 Nag. 103.**

———*Widow—Alienation—Consent of reversioner—Transfer to daughters and by the daughters to strangers—Validity.*

Where the widow alienates all her property in favour of her daughters and her daughters transferred the same in favour of strangers and distributed the consideration amongst themselves, the two transfers cannot be deemed to be one transaction amounting to a transfer by the widow with the consent of reversioners. The alienation is, in law as in fact, one made by the reversioners during the lifetime of the widow and as such, would not convey any interest in the property to the purchaser. 50 A. 75 (P.C.), Dist. (*Patkar, J.*) GOVINDAPRASAD *v.* SHIVLINGA. **I.R. 1931 Bom 177=129 I.C. 577=32 Bom.L.R. 1482=A.I.R. 1931 Bom. 107.**

Co-widow.

———*Widow—Alienation—Co-widow—Alienation by co-widow after partition without consulting the other—Validity.*

Each of the co-widows after partition between them can deal as she pleases with her own lifetime interest, but she cannot alienate any part of the corpus of the estate so as to prejudice the rights of the survivor or a future reversioner. If they act together can they burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the rights of survivorship by burdening or alienating any part of the estate. Accordingly a transfer made by a co-widow without even asking for the concurrence of the other cannot be binding on the latter even to the extent to which it is made for legal necessity. (*Srivastava and Thomas, JJ.*) GAYA DEI *v.* TULSHA DEI. **10 Luck. 587=154 I.C. 125=7 R.O. 440=1935 O.W.N. 168=A I.R. 1935 Oudh 296.**

———*Widow—Alienation—Co widow—Validity.*

Where the negotiations for the sale were made by both the co-widows acting jointly and the sale has been made in order to pay-off debts for which the non executing co-widow was partly at least responsible, the sale is valid if it is for legal necessity. A.I.R. 1928 P.C. 251, Rel. on. (*Pollock, A.J.C.*) BABHNAJI *v.* RATANLAL **30 N L.R. 192=6 R N. 217=148 I.C 1033=A.I.R. 1934 Nag. 106.**

Discharge of husband's debt.

———*Widow —Alienation — Discharge of husband's debts—Duty of widow to pay out of income—Limits——Mortgage to pay-off interest—Validity.*

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It cannot be laid down as a proposition of law that a Hindu widow is not entitled to alienate property belonging to her husband for the purpose of paying interest on debts due by him. The question is essentially one of fact depending on the circumstances of the particular case. Ordinarily the widow is expected to pay such interest from out of the income and where she has not so acted, her conduct and that of the creditor may require scrutiny. Where however such conduct is shown to be *bona fide*, a mortgage effected by the widow for discharging the interest payable on the husband's estate should be upheld. 1913 M W.N. 275 and 1914 M. W.N. 488, Con. (*Jackson and Pakenham Walsh, JJ.*) SUBBAYYA *v.* VENKATA HANUMANTHA BHASKARA RAO. **I R. 1932 Mad. 386=137 I.C 400=1932 M.W.N. 293=35 L.W. 93=A I.R. 1932 Mad. 257.**

———*Widow — Alienation — Discharge of husband's debt incurred during minority.*

A debt contracted by a minor is void *ab initio* and is not legally recoverable from him. Such a debt contracted by a Hindu minor would not constitute a justifiable necessity for an alienation by his widow in order to pay off the debt. (*Nanavutty and Thomas, JJ.*) BAJRANG SINGH *v.* GOBIND PRASAD. **11 Luck. 11=154 I C. 841=7 R O. 507=1935 O.W.N. 354=A.I R. 1935 Oudh 373.**

———*Widow — Alienation — Discharge of husband's debt—Mortgage.*

Where a Hindu widow was in receipt of an annual income of only Rs. 200 and had in her hands only about Rs. 600 when she was called upon to pay her husband's debt of Rs 2,845, a mortgage executed by her in order to pay off the debt is justified. (*Curgenven and Cornish, JJ.*) THIRUVENGADAM PILLAI *v.* GNANASAMBANDAM PILLAI **136 I.C. 43=I R. 1932 Mad. 251=1931 M W.N. 969=A.I.R. 1932 Mad. 97 (2).**

———*Widow — Alienation — Discharge of husband's debt—Mortgage—High rate of interest—Necessity—Burden of proof.*

If a Hindu widow executes a mortgage carrying a high rate of interest to pay off the debts of her husband, the burden of proving legal necessity for the loan at such a high rate, lies on the mortgagee. If the mortgagee adduces no evidence to show the circumstances in which the widow was obliged to borrow at that rate, the estate of her husband is not bound to pay the stipulated interest, and a fair rate will be the rate at which her husband's debts were contracted. (*Niamatullah and Allsop, JJ.*) CHHATARPALI *v.* KALAP DEVI. **160 I.C. 617=8 R.A. 636=1935 A.W.R. 1351=A.I.R. 1936 All. 50.**

———*Widow—Alienation—Discharge of husband's debt—Duty to pay off debts from the income—Mortgage of husband's estate.*

A widow is not bound to discharge her husband's debts out of the income of his estate ; but she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognized in favour of the alienee ; if there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debt, or the alienee, after reasonable enquiry, *bona fide* believed that the alienation was necessary, he will be protected. So a mortgage by a Hindu widow is justified if she was pressed to discharge the debt and it is apparent, that if she did not, the property was liable to be brought to sale in execution of the decree. (*Curgenven and Cornish, JJ.*) THIRUVENGADAM PILLAI *v.* GNANASAMBANDAM PILLAI. **136 I.C. 43=I.R. 1932 Mad. 251=1931 M. W.N. 969=A.I.R. 1932 Mad. 97 (2).**

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———*Widow—Alienation — Discharge of husband's time-barred debt—Validity against reversioners.*

A Hindu widow is competent to alienate the property inherited by her from her husband in order to pay off a debt due by him, though barred by limitation, so as to bind the reversionary heirs of her husband. (*Niamatullah and Collister, JJ.*) TULSHI PRASAD *v.* JAG MOHAN LAL. **152 I C. 92=7 R.A 249=1934 A.L J. 1163=4 A.W R. 649=A.I.R. 1934 All. 1048.**

Discharge of personal debt.

———*Widow—Alienation—Discharge of personal debts —Debts not shown to be of her husband.*

Per *Niyogi, A. J. C.*, in Order of Reference.—In the absence of definite evidence that the debts were borrowed by the widow's husband, it must be held that they were her own debts. In such a case a Hindu widow cannot transfer anything more than her life-interest in the property to discharge her personal debts. (*Niyogi and Pollock, A.J.Cs*) KAUSHILYA *v.* GHANSHAM SINGH. **30 N.L.R 175=150 I.C. 358=6 R.N. 284 =A.I R. 1934 Nag. 89.**

———*Widow—Alienation—Discharge of personal debt —Mortgage.*

When a widow makes a mortgage of property in her possession in lieu of the debt professedly due from her, she is merely mortgaging her own life-interest and there are without any prejudice to the ultimate reversioner. (*Sulaiman, C.J and Thom, J.*) RAM NAYAK *v.* MT. RUP KALI. **154 I.C. 401=7 R.A 750=A.I.R. 1934 All. 557.**

———*Widow—Alienation—Discharge of personal debt, time barred—Necessity—What alienee must show.*

In order to prove legal necessity the alienee should show that the debts were subsisting enforceable in law, at the time of the alienation. Where a widow transfers property in payment of time barred debts incurred by herself though they were binding on the estate at the time, there was no pressure on the estate at all, and she was under no personal obligation to pay up the time-barred debt. Alienations made by her to discharge such debt do not come within the definition of legal necessity. (*Sulaiman and Young, JJ.*) MAKKHAN LAL *v.* MT. SARDAR KUNWAR. **I.R. 1932 All. 311=137 I.C. 193=A.I.R. 1932 All. 555.**

Duty of alienee.

See also MORTGAGE AND NECESSITY, *infra.*

———*Widow—Alienation—Duty of alienee.*

An alienee from a Hindu widow can resist a suit for setting aside that alienation, if he can show that he made proper enquiries before concluding the alienation, even if there is no actual necessity proved for the same. But when the alienee does not make any enquiries as to the existence of any necessity, he is not protected. (*Murphy, A. C. J. and Macklin, J.*) CHIMANLAL *v.* NATVARLAL. **155 I C. 7=7 R B. 415=37 Bom L R. 62=A. I.R. 1935 Bom. 131.**

Duty of Court.

———*Widow—Alienation—Duty of Court—Question of legal necessity and* bona fide *inquiry are quite separate —Court not bound to decide both issues, if parties raise only one of them.*

In cases of alienation by a widow, the question of legal necessity and that relating to *bona fide* inquiry are separate; and if the parties or their pleaders press only one of the issues, the Court is not bound to decide the other also. (*Wort, J.*) LALDHARI TEWARI *v.* JHANI TEWARI. **157 I C. 470=8 R.P. 156 (2)=16 Pat.L.T. 666=A.I.R. 1935 Pat. 351.**

HINDU LAW—Widow.

Effect of re marriage.

———Widow—Alienation—Effect of re-marriage. *See* HINDU WIDOWS' RE-MARRIAGE ACT (1856), S. 2. **34 L.W. 967=1931 M.W.N. 1257.**

Effect of surrender.

See also WIDOW—SURRENDER *infra.*

———*Widow—Alienation—Effect of surrender—Right of reversioner to challenge alienation at once.*

When a Hindu widow, who has made an alienation of her deceased husband's estate in excess of her powers, subsequently makes a *bona fide* surrender of her estate to the nearest reversioner, the reversioner may challenge the alienation at once. (Case law discussed.) (*D. N. (Mitter and Narsing Rau, JJ.*) RAM KRISHNA PRODHAN *v.* KOUSALYA MANI DASI. **158 I.C. 925=8 R C. 221 (2)=40 C.W.N. 208=62 C.L.J. 490=A.I. R. 1935 Cal. 689.**

Gift.

———*Widow—Alienation—Gift—Absence of necessity —Validity of—Donee from widow—Right to redeem mortgage by last owner.*

A transfer made by a Hindu widow or a Hindu mother, even though altogether without necessity, is only voidable and not void. It can only be set aside at the instance of the next reversioner entitled to the estate. So where the plaintiff, a donee of equity of redemption from a widow who subsequently died, sued to redeem a mortgage over the properties, the mortgagee has no *locus standi* to resist the claim of the person who on the face of it had a perfectly good title to equity of redemption, granted by the widow. The only person who would dispute the validity of such a grant was the reversioner. 24 I.A. 164; 45 Bom. 195; Foll. (*Srivastava, J.*) AJODHIA PRASAD *v.* MT. SANJHARI KUAR. **6 Luck. 710=I.R. 1932 Oudh 372=139 I.C. 631= 9 O.W N. 813=A.I.R. 1932 Oudh 342.**

———*Widow—Alienation—Gift—Alienee if can defeat reversioner's right by alienation.*

Where a widow executed a deed of gift in favour of her daughter and the daughter mortgages the property, she has no Hindu widow's estate in the property which she alienated and the deed of gift is not a case of acceleration. A transferee from a Hindu widow has no right whatsoever to alienate the property so held, in such a way has to defeat the reversioners. No plea of legal necessity can arise in such a case. (*Niamatullah and Collister, JJ.*) BHAGWATI PRASAD *v.* MUSRI LAL. **153 I.C. 220=7 R.A. 468=1935 A.L.J. 119=4 A.W. R. 990=A I.R. 1934 All 1009.**

———*Widow—Alienation—Gift in commemoration of husband's visit to Benares—Validity.*

A gift by a widow in commemoration of her husbands visit to Benares must be upheld as being within her competence on ground of its being a pious act, if it relates to a reasonable portion of her husband's property. What fraction is reasonable is not easy to determine. It is difficult to dogmatise on a matter which has to be considered in relation to various circumstances other than the mere ratio of the fraction gifted to the entire property. Each case has to be determined on its peculiar facts. Gift of 25 acres out of 188 held to be in no way an illegitimate exercise of the widow's power of alienation. 37 Cal. 1, Rel. on. (*Niyogi, A. J. C.*) VISHWANATH GOVIND *v.* NARAVAN. **31 N.L R. 18 (Supp.)=158 I.C. 454=8 R.N. 83=18 N.L J 239=A.I.R. 1935 Nag. 217.**

———*Widow—Alienation—Gift—Consent of the next reversioner—Effect of—Validity against actual reversioner.*

HINDU LAW—Widow.

An alienation by a Hindu widow otherwise than for legal necessity is permitted where the consent of the whole body of reversioners who would be interested in disputing the transaction has been obtained for the reason that the consent of such persons affords presumptive proof of necessity. This rule is limited to transfers for consideration and cannot appropriately be extended to voluntary transfers by way of gift, where there is no room for the theory of legal necessity. So where the widow makes a gift of the property in favour of a stranger (son-in-law) with the consent of the nearest reversioner (her daughter) the alienation may be binding on the consenting reversioner either on the ground of estoppel or election but not on the ultimate reversioner. Case law discussed. (*Patkar, J.*) TUKARAM *v.* YESU **55 Bom. 46=I.R. 1931 Bom. 191=129 I.C. 591=32 Bom L R. 1463=A.I.R. 1931 Bom. 100.**

[**D.** 28 N.L.R. 102 (105). **Comm.** 58 B. 521 (527, 531, 535).]

———Widow—Alienation—Gift—Consent of presumptive reversioner—Effect. *See* HINDU LAW—WIDOW—ALIENATION—CONSENT OF REVERSIONER. **7 Luck 360.**

———*Widow—Alienation—Gift—Consent of reversioner—Effect of—Estoppel.*

In a litigation between a Hindu widow and her husband's brother's heirs, a compromise was entered into which, *inter alia*, recited that the widow in consideration of the services rendered to her by R. N. in the litigation and arrears of salary due to him, sold him a village. A sale-deed was executed by her and the heirs of her husband's brothers the same day. Her three daughters executed an *ekrarnama* agreeing to the terms of the compromise. The widow having died, two of the daughters impeached the sale to R. N. and sued for possession of the property on the ground of absence of legal necessity. It was found as a fact that nothing was due to R. N. by the widow and that the so-called sale was only a gift.

Held, that the alienation, by way of gift, was invalid and inoperative against the daughters; that the consent of the daughters only raised the presumption, that the alienation was one which a widow with a life-estate could validly make; that on the finding that the alienation was a gift, rebutted the presumption as there could be no necessity for a gift.

Held further, that there was no question of estoppel, as it could not be said that the daughters by any act of theirs led R. N. to think that something was true and to act on that belief, himself having known what the true facts were.

Held also, that there was neither ratification nor acquiescence. (*Agarwala and Saunders, JJ.*) RAJIB NAIN LAL *v.* MT. BINDESHWARI DAI. **15 Pat.L.T. 596.**

———*Widow—Alienation—Gift to daughter during marriage—Validity.*

It is competent to a widow of the Mitakshara school to make a valid gift of the immovable property of her husband to her daughter on the occasion of the daughter's marriage, and such a gift is binding on the reversioners. The limitation on the validity of the gift, is that it must be of a reasonable portion of the property. The gift may be made to the girl or to her husband. The question what is reasonable on these occasions, is a question of fact, which has to be decided with due advertence to all the circumstances of the case. Ordinarily, it must approximate to not more than a fourth of the father's estate, but it is the ordinary and not the invariable rule, since there may be cases justifying a much larger expenditure. (*Raza and Allsop, JJ.*) BRIJ MOHAN SINGH *v.* MT. RACHHPAL KUAR. **147 I.C. 210=6 R.O. 253=10 O.W.N. 934=A.I.R. 1933 Oudh 426.**

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———*Widow—Alienation—Gift to daughter's sons of last male-holder—Collaterals in fifth degree—If can challenge.*

Where a widow of a last male-holder who has succeeded to the properties gifts them to the daughter's sons of such male-holder, the collaterals in the fifth degree can have no right to challenge it. The only person aggrieved by the gift is daughter of such holder, who is the heir presumptive, and if she has waived her right, or for some other reason, does not wish to challenge the gift, this does not improve the position of the collaterals, who are remoter heirs than the donees. (*Tek Chand, J.*) MT. CHINTO *v.* THEBU. **A.I.R. 1935 Lah. 985.**

———*Widow—Alienation—Gift as dowry—Validity of*

Gift of a portion of property to son-in-law by a widow at the time of her daughter's marriage as dowry is valid. 5 Pat. 646, Ref. (*Wort, J.*) AMULYA KRISHNA GHOSH *v.* PUTUMANI DEBI. **151 I.C. 962=7 R.P. 147=A. I.R. 1934 Pat. 62.**

———Widow—Alienation—Gift—Reversioner's subsequent consent—Effect. *See* HINDU LAW—WIDOW—ALIENATION—CONSENT OF REVERSIONER. **28 N.L. R. 102=A.I.R. 1932 Nag. 103 & 7 Luck. 360=A.I.R. 1932 Oudh 90.**

———*Widow—Alienation—Gift—Suit by reversioner for declaration that the deed is void—Maintainability.*

A deed of gift by a Hindu widow could not be held to be evidence of alienation for value for purposes of necessity; and hence it is certainly void after the death of the widow; but a suit by a reversioner for a pure declaration to that effect ought to be dismissed. 17 A. L.J. 536, Rel. on. (*Mukerji and Allen, JJ.*) RAGHUNAIH BARAIE *v.* JAINARAIN BARAIE. **I.R. 1932 All. 284=137 I.C. 145=1932 A.L.J. 99=A.I.R. 1932 All 661.**

[**R.** 1934 A. 469 (471).]

Lease.

———*Widow—Alienation—Lease perpetual—Consent of presumptive reversioners—Effect—Right of actual reversioners to challenge.*

A Hindu widow executed a perpetual lease to her brother's son without any premium, the intention of the lady being to make a permanent document out of natural love and affection for him. The entire body of the presumptive reversioners consented to the lease. In a suit for possession of the properties by the actual reversioners after the death of the widow.

Held, that the document was not supported by consideration and was for all practical purposes a deed of gift that the reversioners who were alive at the time of the widow's death were entitled to challenge the transaction, notwithstanding that the entire body of presumptive reversioners consented to the lease at the time. (*Bajpai, J.*) RAM RATAN LAL *v.* GANGOTRI PRASAD. **4 A.W.R. 770=152 I.C. 19=7 R.A. 317=1934 A.L.J. 632 A.I.R 1935 All. 73.**

———*Widow—Alienation—Lease—Permanent lease—Validity of.*

A widow may in the exercise of her power of management grant leases of property belonging to the estate; but she has no power to grant a permanent lease or a lease for a long term so as to bind the reversion unless it is justified by legal necessity or it is for the benefit of the estate or made with the consent of the next reversioners. Where therefore, all that appeard from the recitals in the permanent lease granted by her was that it was a prudent and profitable transaction in view of the difficulties of recovering rent from the sub tenants.

but there was nothing to show that the amount raised thereby was required by her or that the lease was unavoidable. *held*, that the lease was invalid. (*Pollock, A. J.C.*) MT. IMRAT BAI *v.* MT. PHULA. **149 I.C. 687=6 R.N. 245=16 N.L.J. 390=A.I.R. 1934 Nag. 103.**

———Widow—Alienation—Lease—Widow in possession as heir to son—Lease for 15 years for considera tion—If operative beyond lifetime—Death of widow during term—Dispossession by reversioners—Right to compensation from widow's private assets. *See* T. P. ACT, S, 108 (*c*). **69 M.L.J. 461.**

———*Widow—Alienation—Lease for 99 years to secure yearly sum for herself and to discharge prior mortgage not for necessity—Intention to spite reversioners—If validates against latter.*

Where a widow executed a lease for a term of 99 years and her motive in so doing was firstly merely to secure for herself a yearly sum of Rs. 100 as rent and to deprive the reversioners of the property itself for such a long period in lieu of a like amount yearly and possibly also for a further term of 99 years in lieu of rent at such rate as would be found to be the prevailing rate at the time of the renewal and secondly to satisfy a mortgage which was not supported by justifying necessity,

Held, that the transaction was not binding on the reversioner but that in equity, the lessee should be compensated for improvements effected on the land which were inseparable from land. 33 C 842 ; 6 M.I.A. 393 ; 6 Cal. 843 ; 13 C.W.N. 201 ; 1914 P.C 128 and 1922 P.C. 356, Ref. (*Mukerji and S. K. Ghose, JJ.*) MOHAMMAD ALI KHAN *v.* KANAILAL. **159 I C. 767 =8 R.C. 350=A.I.R. 1935 Cal. 625.**

Mortgage.

See also NECESSITY AND VALIDITY, *infra.*

———*Widow—Alienation— Mortgage— Decree on — Subsequent suit by reversioners to set aside mortgage—Necessity—Onus of proof.*

In a suit by the reversioners to set aside a mortgage executed by a Hindu widow, the mortgagee having already obtained a decree on foot of the mortgage against the widow in a competent Court, the burden of proving legal necessity for the alienation is on the alienee. It is not for the reversioners to prove that the decree was not fairly and properly entertained. It is not also necessary for the reversioners to sue for setting aside the decree and judgment before suing to set aside the mortgage. The principal test is to see whether the alienee derives title from the holder of the limited interest or life tenant. If the claim is based on an alienation by the widow or on a contract by her the onus must be on the alienee to show legal necessity. (*Nanavutty and Thomas, JJ.*) BAJRANG SINGH *v.* GOBIND PRASAD. **11 Luck. 11=154 I C 841=7 R.O. 507=1935 O.W. N. 354=A.I.R. 1935 Oudh 373.**

———*Widow—Alienation—Mortgage— High rate of interest—Necessity—Onus.*

It is incumbent on those who support a mortgage by a Hindu widow or other limited owner to show not only that there was legal necessity to borrow but also that it was not unreasonable to borrow at a high rate of inte rest and upon the terms stipulated in the deed in ques tion. (*Nanavutty and Thomas, JJ.*) BAJRANG SINGH *v.* GOBIND PRASAD. **11 Luck. 11=154 I.C. 841=7 R.O. 507=1935 O.W.N. 354=A I.R 1935 Oudh 373.**

———*Widow—Alienation — Mortgage— Reversioner's right to redeem—Special circumstances.*

Though the reversioner cannot ordinarily sue to redeem the property mortgaged by the widow for the reason that he has no present interest therein, still in a

case where the conduct of the widow is such as to raise the apprehension that the property would never be redeemed or would be altogether lost to a transferee, the reversioner has the right to redeem and save the property for the estate. 36 Mad. 426 and 44 Mad. 951, Ref. (*Doraswami Iyer, C. J. and Rama Rao, J.*) THIM-MAPPA *v.* KEROJI. **9 Mys.L.J. 297.**

Necessity.

See CONSENT OF REVERSIONER *supra.*

———*Widow—Alienation—Necessity—Ancient alienations—Rule regarding presumptions.*

It is well settled that when a long period has elapsed between an alienation and the suit to set it aside, presumptions are permissible to fill in the details which have been obliterated by time. This rule, which says that detailed evidence may be dispensed with, applies not only where there are recitals in the deeds but also in other cases. Where it appeared that the widow was driven to alienate the properties for the purpose of maintaining herself, and the suit to set aside the alienation was instituted more than fifty years after at a time when all the parties to the deed had died,

Held, that the rule that presumptions can be made to fill in gaps was applicable in order to sustain the alienation. (*Venkatasubba Rao and Curgenven, JJ.*) KUMARASAMI MUDALIAR *v.* NARAYANASAMI. **I. R. 1932 Mad 786=139 I.C. 766=1932 M.W.N. 850 =36 L.W. 186=A.I.R. 1932 Mad. 762.**

———*Widow—Alienation—Necessity—Defending criminal case.*

Where a widow launches criminal proceedings and also has to defend in other cases in order to protect the estate, alienation made by her to meet such expenses is binding on the estate. The question whether there was legal necessity for the raising of the loan cannot be made to depend on the result of the trial. (*Walsh, J.*) KRISHNA AIYAR *v.* MUTHULAKSHMI AMMAL. **150 I.C. 1437=7 R.M. 69=39 L.W. 701=A.I.R. 1934 Mad. 169=66 M.L.J. 342.**

———*Widow—Alienation—Necessity—Duty of alienee.*

Though the alienee from the Hindu widow is not bound to see to the application of the loan, the fact that the money was in fact so spent would go a long way to establish the truth of the allegation as to necessity. (*Mukherji and S. K. Ghose, JJ.*) MOHAMMAD ALI KHAN *v.* KANAILAL. **159 I.C. 767=8 R.C. 350=A. I.R. 1935 Cal. 625.**

———*Widow—Alienation—Necessity—Duty of alienee —Discharge of prior mortgage debt—Recitals in deed.*

The mere fact that the mortgage in suit by a widow is a renewal of a previous mortgage or mortgages would not be sufficient to discharge the burden on the alienee to prove due inquiry as to necessity unless it is a case of an antecedent debt of a father. At the same time it would seem to be very hard on a transferee if he is called upon to pursue the inquiry and go back to a long period when evidence as to the existence of the necessity would have perished. If there are some recitals in the deed, then on the recital coupled with the fact of the long lapse of time and other circumstances, the Court may presume that necessity had existed. (*Sulaiman, C.J. and Thom, J.*) RAM NAYAK *v.* MT. RUP KALI. **154 I.C. 401=7 R. A. 750=A.I.R. 1934 All. 557.**

———*Widow— Alienation— Necessity— Expenses of thread and marriage ceremonies of daughter's son.*

Where a Hindu widow sold a parcel of the estate for debts contracted for family expenses and the thread and marriage ceremonies of her daughter's son, *held*, her pious duty for her husband's satisfaction is to honour the daughter's son and that inasmuch as she acted with piety

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and in consonance with prevalent notions of the Hindus and as there was no suggestion of undue extravagance, there was sufficient justification for the sale, even though the daughter's sons were not so indigent as to be dependent upon their grandmother and it could not be said that her giving them that help was an act of compelling necessity. 44 A. 503, Rel. on. (*Jackson and Butler, JJ.*) VENKATASUBBA ROW *v.* ANANDA ROW. **57 Mad. 772=155 I C. 79=7 R M. 545=1934 M W.N. 536=39 L.W. 690=A.I.R. 1934 Mad. 432=67 M.L. J. 204.**

———*Widow—Alienation—Necessity—Half of the consideration found binding—Suit by reversioner—Method of working out equities.*

In a suit by the reversioners for setting aside an alienation by the widow, it was found that out of the total consideration of Rs. 1,774-8-0 only a sum of Rs. 806-10-6 was found to be for binding purposes. The Subordinate Court gave a finding that according to this proportion, out of 1 acre 75 cents alienated, 79½ cents may be held to have been sold for binding purposes. The High Court directed the alienees to retain 79½ cents of the property in consideration of the entire sum of Rs. 1,774 and held that they were not entitled to any refund. 44 Mad. 605, Foll. (*Ananthakrishna Ayyar, J.*) MAHALAKSHMAMMA *v.* TIRUPURASUNDARAMMA. **I R 1931 Mad. 710=133 I.C. 198=33 L.W 339=1931 M.W.N. 142=A.I.R. 1931 Mad. 538=60 M.L.J. 478.**

———*Widow—Alienation—Necessity — Inadequacy of price if material.*

While it is correct to say that transfer by a Hindu widow for legal necessity and for adequate price is binding on the reversioner, it does not necessarily follow that a sale otherwise justified must under all circumstances be set aside if it can be shown that the price fetched was not adequate. Circumstances might make it absolutely necessary for the widow to sell her husband's property even for an inadequate price. Each case must depend on its own circumstances. If the necessity for the sale of the property was so great that the husband's property must be sold and if under circumstances then existing it was not possible for her to obtain the full value of the property which had to be sold and she could not get more than what is considered to be an inadequate price, the sale would nevertheless be valid. Sale upheld. (*Pullan and Niamatullah, JJ.*) NAUNITA KUNWAR *v.* MULLO. **136 I.C. 372=I.R 1932 All. 196=1931 A.L J. 440=A.I R. 1931 All. 653.**

———*Widow— Alienation—Necessity— Marriage of daughter's daughter.*

A Hindu widow has power to effect an alienation of her husband's estate for meeting the expenses of the marriage of her daughter's daughter. The marriage of the grand-daughter constitutes a legal necessity justifying the alienation. It is not by virtue of her relationship to the girl that she has any power, but because she is fulfilling a legal or moral obligation which would have affected the deceased owner. The duty of marrying a relation under the Hindu Law does not depend upon the question whether that relation is next in succession. (*Manroe, J.*) JAIRAM *v.* BHAGAT RAM **159 I.C. 205=8 R.L 358 (2)=A I R. 1935 Lah. 410.**

———*Widow — Alienation — Necessity — Marriage expenses—Expenses for marriage of unmarried daughters and sisters of deceased.*

The marriage of unmarried daughters and sisters of the deceased and customary presents on such an occasion are legal necessity. (*Raza and Allsop, JJ.*) BRIJ MOHAN SINGH *v.* MT. RACHHPAL KUAR. **147 I.C.**

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210=6 R.O. 253=10 O.W.N. 934=A.I.R.1933 Oudh 426.

———*Widow—Alienation — Necessity— Mortgage — Duty of lender to inquire.*

Where a loan is advanced to a Hindu widow for legal necessity, the lender is not bound to ascertain how the necessity for the loan has been brought about. Even if it be found that the necessity arose owing to her mismanagement of the estate in her hands, the lender is entitled to recover the loan unless it is shown that he acted *mala fide*. And where the necessity for the loan is apparent, the lender is not even required to make any particular inquiry about it.

Held, that a mortgage executed in order to protect property from execution sale is valid. (*Raza and Smith, JJ.*) RAJESHAR BALI *v.* HAR KISHEN BALI. **147 I C. 313=6 R O. 259=10 O.W.N. 147=A.I.R. 1933 Oudh 170 (2).**

———*Widow—Alienation—Necessity—Onerous agreement whether binding on reversioner.*

An agreement entered into by a widow with a creditor to pay interest on interest already due is not binding on the reversioner. (*Wazir Hasan, C. J. and Allsop, J.*) BAKHTAWAR SINGH *v.* CHANDIKA SINGH. **150 I C. 276=6 R.O 626=A.I.R. 1933 Oudh 487.**

———*Widow—Alienation—Necessity—Part of consideration supported by necessity—Conditional decree upholding alienation.*

Where a widow alienated property for Rs. 500 and it appeared that the alienation was supported by legal necessity only to the extent of Rs. 310

Held, that the Court could uphold the alienation on condition of the alienee paying the reversioner the sum of Rs. 190, the portion of the consideration for which legal necessity was not proved. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) BASAPPA *v.* SUBBIAH. **11 Mys.L J. 146.**

———*Widow— Alienation—Necessity—Part only of consideration supported by necessity—Validity of alienation—Test.*

An alienation will not be invalidated merely on the ground that part only of the consideration of an alienation by a Hindu widow is found to be supported by necessity. The true criterion in all cases, be it sale or mortgage, is whether the transaction itself is justified by legal necessity and not whether a certain arithmetical proportion exists between the good and the bad portions of the consideration. 49 All. 149 (P.C.); 43 M. 541 (P.C.); 8 Lah. 597 (P C.); 51 All. 430 (P.C.), Foll. (*Bose, Offg A.J.C.*) FUL SINGH *v.* GANESH PRASAD. **I R. 1931 Nag 118=133 I.C. 390=14 N.L.J. 84=A.I.R. 1931 Nag 147.**

———*Widow—Alienation—Necessity— Partial necessity—Alienation in favour of reversioner—Conditional decree.*

Where a widow transfers the estate of her deceased husband to the next reversioner for consideration and only a part of the consideration is utilized for legal necessity, the transaction can be set aside at the instance of the other reversioners not unconditionally but on terms, they being required to pay to the extent of the consideration used for legal necessity. (*Mitter and Edgley, JJ.*) SANTI KUMAR PAL *v.* MUKUNDA LAL MONDAL **62 Cal 204=156 I.C. 209=7 R C 691=39 C.W.N. 226=60 C L.J. 404=A I R. 1935 Cal. 20.**

———*Widow—Alienation—Necessity—Partial necessity—Bulk of consideration for necessity—Setting aside of transfer.*

If the bulk of the consideration for a transfer by a widow is proved to have been for legal necessity, the-

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transfer cannot be set aside. (*Niyogi, A.J.C.*) SHANKAR *v.* SHEIKH HUSSAIN. **140 I.C. 597=I.R. 1933 Nag. 3=15 N.L.J. 31.**

———*Widow—Alienation—Necessity— Partial necessity—Conditional decree for possession.*

Where in a suit by the reversioner to recover possession of property transferred by the widow it is found that a certain portion of the consideration was for legal necessity it is open to the Court to pass a decree for possession in favour of the reversioner conditional on payment of the amount found to be good. (*Sulaiman, A. C. J. and Bajpai, J.*) JAGARNATH SINGH *v.* DAMODAR SINGH. **I.R. 1931 All. 681=133 I.C. 473 =1931 A.L.J. 603=16 R.D. 106=A.I.R. 1932 All. 37.**

———*Widow—Alienation— Necessity—Partial necessity—Decree—Form of.*

If any amount of the consideration for the sale effected by the widow is found to be for legal necessity, the reversioners must, as a condition precedent to the declaratory decree prayed for, repay that amount to the vendee, when they became entitled to the possession of the property after the death of the widow. (*Iqbal Ahmad and Bajpai, JJ.*) INDARJIT SINGH *v.* JADDU. **55 All. 157=I.R 1933 All. 375=144 I.C. 108=1933 A.L.J. 42=A.I.R. 1933 All. 169.**

———*Widow—Alienation—Necessity—Partial necessity—Mortgage—Part of consideration used for payment of land revenue—Sufficiency— Absence of enquiry by lender—Effect.*

The mere fact that a portion of one of the items of consideration for a mortgage executed by a Hindu widow is proved to have been utilised for payment of land revenue overdue is not by itself sufficient to support legal necessity for the loan, when there is no evidence that the mortgagee or lender made any enquiry before advancing the amount as to the necessity for the loan or as to the actual pressure, if any, on the estate. (*Subhedar, A.J.C.*) KALURAM *v.* SHAMRAO. **163 I.C. 562=9 R.N. 6=18 N.L.J. 267.**

———*Widow—Alienation — Necessity— Payment of canal dues.*

Under the Northern Canal and Drainage Act unpaid canal dues are recoverable by the Collector from the persons liable as if it was an arrear of land revenue. Canal dues therefore stand on the same footing as land revenue for the question of legal necessity in the case of a widow's alienation. (*Mukerji and Bennet, JJ.*) TULSHI PRASAD *v.* MATHURA PRASAD. **I.R. 1931 All. 736=133 I.C. 624=1931 A.L.J. 528=A.I.R. 1931 All 449 (1).**

———*Widow — Alienation—Necessity— Pilgrimage expenses—Widow not in possession but in receipt of maintenance.*

A widow, who is not herself in possession of the estate but is merely receiving maintenance out of it, cannot claim to recover from the estate the expenses which she has incurred by reason of her pilgrimage for the spiritual benefit of her husband, who was not the last holder of the estate. 36 B. 88; 34 M. 288; 43 C. 574; 49 I A. 383; 30 Bom. L.R. 685 and 46 All. 822, Dist. (*Baker, J.*) RAMABAI NILKANTHRAO *v* DATTATRAYA BALAJI. **135 I.C 491=I R. 1932 Bom. 107=33 Bom L.R. 1244=A.I.R. 1931 Bom 497.**

———*Widow—Alienation—Necessity—Presumption of —Attestation by reversioner.*

The attestation by the reversioner of an alienation by the widow, cannot be taken as presumptive proof of necessity where the document contained no recital of the purpose for which the money was required. (*Curgenven and Sundaram Chetty, JJ.*) SATYANARAYANA *v.* VENKANNA. **6 I.R. (Mad) 138=145 I.C. 862=1933 M.W.N. 1301=38 L.W. 230=A.I.R. 1933 Mad. 637 =65 M.L.J. 282.**

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———*Widow—Alienation — Necessity—Proof of attestation by reversioner—Effect of.*

The attestation by a presumptive reversioner of the widow's alienation only raises a presumption of legal necessity; but it would not by itself either create estoppel or imply consent. 44 C. 186 (P.C.), Ref. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352=I.R. 1931 Pat. 417=134 I.C. 129=12 Pat.L.T. 521=A.I.R. 1931 Pat. 442.**

———*Widow—Alienation— Necessity—Proof of enquiry—Recitals—Value of.*

The principle that where a long time has elapsed from the date of alienation, the recitals are *prima facie* evidence of enquiry by the lender does not apply to a case where (1) although the witnesses to the transaction are not available, documentary evidence in the shape of collection papers are still available but have been withheld by the lender; (2) the probabilities are inconsistent with the recitals; (3) the recitals appear to have been made with an ulterior purpose and not as representing the truth. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v* LALA RAM SANKAR RAY. **59 Cal. 859=I.R 1932 Cal 540=138 I.C. 882=55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

———*Widow—Alienation—Necessity—Proof — Mortgage—Recitals in deed—Value*

Recitals in a deed of sale or mortgage with regard to the existence of legal necessity for any alienation by a Hindu widow are not in themselves evidence of such necessity without substantiation by evidence *aliunde*. But though the onus lies upon the legal representatives of the transferee to prove the necessity for the alienation when it is challenged after a considerable time full and detailed evidence cannot be expected and in such circumstances, presumptions are permissible to fill in details which have been obliterated by time. Further it is not absolutely necessary for a transferee to establish the actual existence of family necessity or to show that the money advanced by him was utilised for such purposes. It is only necessary that a representation should have been made to the purchaser that such necessity existed and that he should have acted honestly and made proper inquiry to satisfy himself of its existence The recital in the document is clear evidence of such representation and if the circumstances are such as to justify a reasonable belief that an inquiry would have confirmed its truth, then when actual proof of inquiry has become impossible, the recital coupled with such circumstances would be sufficient to support the deed. Each case must in this connection be governed by its own circumstances. Effect of recital in mortgage deed as to payment of Government revenue considered. (*Razi and Smith, JJ.*) RAJESHAR BALLI *v.* HAR KISHEN BALI. **147 I C. 313=6 R.O 259=10 O.W N. 147=A I.R. 1933 Oudh 170 (2).**

———*Widow—Alienation— Necessity—Proof — Recitals in deed.*

The onus of proving legal necessity for a transfer by a Hindu widow lies on the person taking benefits under the transfer. When however the entire evidence is before the Court, the debate as to onus of proof is purely academical. Where the property was yielding a sufficient income for the support of the widow and the other members of the family and the transferee was shown to have been fully acquainted with the circumstances of the family and the deed of transfer contained false recitals as to necessity.

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Held, that the alienation could be avoided by the reversioners. Test as to legal necessity laid down and value of recitals in deed discussed. (*Guha and Bartley, JJ.*) DEBENDRA NATH SARMA *v.* NAGENDRA NATH DUTT. **60 Cal. 1158=58 C.L.J. 181=149 I.C. 522=6 R.C. 602=37 C.W.N. 1001=A.I.R. 1933 Cal. 900.**

———*Widow—Alienation—Necessity—Proof—Sale—Representations as to debts made at the time of the deed—Sufficiency.*

In a suit regarding an absolute sale by a Hindu widow the only thing proved by the alienee was that there was a representation at the time of the execution of the deed of sale (22 years before suit) that there were debts incurred for the purpose of the husband's *sradh* and certain legal proceeding. No *bona fide* enquiry by the alienee was established; nor was even a suggestion made of any enquiry having been made. It was not also shown that the persons who might prove the debts where no longer alive.

Held, that it could not be assumed that it was not possible to prove the existence of debts by evidence after the lapse of 22 years and that the representation made at the time of the deed was not enough to uphold the validity of the sale and to defeat the claim of the reversioners. (*Henderson, J.*) NAGENDRA NATH BISWAS *v.* KRIPANATH BHATTACHARJEE. **154 I.C. 408=7 R.C. 448=60 C.L.J. 40=A.I.R. 1935 Cal. 94.**

———*Widow— Alienation— Necessity—Proof of—Transfer by widow.*

In the case of a sale by a widow stricter proof of necessity is required than in the case of a male proprietor. (*Addison and Bhide, JJ.*) GAJINDAR SINGH *v.* BALWANT KAUR. **149 I.C. 696=6 R.L. 734=A.I.R. 1933 Lah. 524.**

———*Widow—Alienation—Necessity— Protection of estate—Money raised by mortgage—Validity.*

Where a Hindu widow defended her title to certain property against trespassers and the Court having passed a decree in her favour conditional on payment of a certain amount, she mortgaged certain property and raised money to pay off the said amount.

Held, that the mortgage was executed for legal necessity. (*Raza and Bisheshwar Nath, JJ.*) BISHESHAR *v.* NANHU. **I.R. 1931 Oudh 343=132 I.C. 791=14 O.L.J. 204=8 O.W.N. 185.**

———*Widow — Alienation — Necessity— Rebuilding house which has fallen by flood.*

Where a widow spends a small sum of money to rebuild a house which has fallen down owing to floods, the purpose is fully justified and the amount borrowed is for legal necessity. (*Sulaiman, C. J. and Thom, J.*) RAM NAVAK *v.* MT. RUP KALI. **154 I.C. 401=7 R.A. 750=A.I.R. 1934 All. 557.**

———*Widow—Alienation—Necessity—Recitals in ancient document—Value.*

The recitals as to necessity in an ancient document is clear evidence of the representation to the vendee and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual inquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. Recitals as to discharge of debt and marriage of daughter relied on in upholding alienation by widow. 48 Cal. 186 (P.C.). Appl. (*Reilly and Anantakrishna Ayyar, JJ.*) MEENAKSHI AMMAL *v.* VENKATARAMA AYYAR. **1932 M.W.N. 128.**

———*Widow—Alienation —Necessity—Recitals in deed —Evidentiary value.*

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In the case of an alienation by a limited owner, in so far as the question is whether the vendee made inquiries as to the necessity for the loan and what representations the vendor or others made to him, where both the vendor and vendee are dead, and the transaction is an ancient one, evidence will not be usually available on this point, unless possibly the evidence of some other person from whom the vendee made inquiries. In the absence of any such evidence the recitals in the document can be relied upon. (*Walsh, J.*) KRISHNA AYYAR *v.* MUTHULAKSHMI AMMAL. **150 I.C. 1137=7 R.M. 69=39 L.W. 701=A.I.R. 1934 Mad. 169=66 M.L.J. 342.**

———*Widow — Alienation — Necessity — Recitals—Mortgage thirty years old—Recital of payment of land-revenue—Presumption.*

Recitals by themselves do not establish legal necessity, but they may be taken into consideration along with other evidence and circumstances in considering the truth of the matters to which they relate. The exact weight to be given to them is a matter upon which no rule can be laid down, but ordinarily the older the transaction, the greater the value of the recitals. 44 C. 186 (P.C.) and 43 M 541 (P.C.), Ref. Where a mortgage by a Hindu widow executed thirty years before contained a recital that the money was required for payment of land revenue, and the widow was in exceptional difficulties on account of famine, the widow being dead at the time of the suit, the money was presumed to be required for payment of land revenue. (*Bose, O.A.J.C.*) FULSING *v.* GANESH PRASAD. **I.R. 1931 Nag. 118=133 I.C. 390=14 N.L.J. 84=A.I.R. 1931 Nag. 147.**

———*Widow—Alienation — Necessity—Partial necessity—Small portion of consideration not for necessity.*

Where a widow sold a house belonging to her deceased husband for consideration which the Court found was adequate price and binding on the estate except in respect of a small portion that went to discharge interest on the debts, and the reversioner attacked the sale.

Held, that the sale should be upheld in entirety, for the portion of the price not taken for legal necessity formed such a small ratio to the entire consideration that it might be left out of account. 49 All. 149 (P.C.); 53 M L.J. 300 (P.C.), Foll. (*Venkatasubba Rao and Curgenven, JJ.*) JAGANNADAM *v.* VIGHNESWARUDU. **55 Mad. 216=I.R. 1931 Mad. 858=134 I C 810=34 L W. 551=1931 M.W.N. 965=A.I.R. 1932 Mad. 177=61 M.L J. 507.**

———*Widow—Alienation—Necessity—Test.*

If an alienation by a Hindu widow was made in the exercise of a reasonable discretion and could be justified as the act of a prudent manager, the objection that there was no compulsion from without and that the necessity was not imminent, should not be allowed to prevail. (*Venkatasubba Rao and Curgenven, JJ.*) JAGANNADHAM *v.* VIGHNESWARUDU. **55 Mad. 216=I R. 1931 Mad. 858=134 I.C. 810=34 L.W. 551=1931 M. W. N. 965=A.I.R. 1932 Mad. 177=61 M.L.J. 507.**

Powers of.

———*Widow—Alienation—Powers of.*

A Hindu widow's estate is not a life estate but it is an estate of inheritance to herself and to the heirs of her husband. While in the enjoyment of the estate, the power of a Hindu widow to alienate the property for a term which does not exceed her lifetime is not absolute. She may give, sell or transfer the estate for her own life ordinarily, but this sale or gift is liable to be questioned by the reversioners, if by her voluntary act she causes her death. (*D. N. Mitter and Narsing Rau, JJ.*) RAM KRISHNA PRODHAN *v.* KOUSALYA MANI DASI.

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158 I.C. 925=8 R.C. 221 (2)=40 C.W.N. 208=62 C.L.J. 490=A.I.R. 1935 Cal. 689.

———*Widow—Alienation—(Bombay school)—Powers of—Movables obtained on partition with the sons.*

With respect to movables obtained by the mother on a partition with her sons, she has, in the Bombay school of law, the same unrestricted powers of disposal as she has over movables acquired by inheritance. (Case law discussed.) (*Tyabji, J.*) CHAMANLAL *v.* BAI PARVATI. **58 Bom. 246=150 I.C. 854=7 R.B. 26=36 Bom. L.R. 152=A.I.R. 1934 Bom. 151.**

Reversioner.

See also RIGHT TO AVOID, *infra.*

———Widow—Alienation—Reversioner — Election to hold transfer good. *See* HINDU LAW—REVERSIONER —ELECTION. **A.I.R. 1932 M.W.N. 491.**

———Widow—Alienation—Reversioner — Grant of under-tenancy without legal necessity—Transaction *bona fide*—Reversioner whether can avoid. *See* B. T. ACT. S. 85. **37 C.W.N. 333=A.I.R. 1933 Cal. 610.**

Right of alienee.

———*Widow—Alienation—Rights of alienee—Death of widow—Title of alienee as against all persons not reversioners.*

The estate of a Hindu widow is not a life estate. It is not an estate terminable on the death of the widow. If she makes a gift or alienation otherwise than for necessity, neither the gift nor the alienation is void. The transaction may be useless against the reversioner but as against all persons other than the reversioners, the gift or alienation is perfectly valid and the donee or alienee can maintain an action against the person resisting him provided he is not a reversioner and provided there is no question of limitation. It is true that the reversioner may elect to treat it as valid or set aside the transaction but it is not open to a third person to raise a plea that such a gift is void merely because it may have been but not so treated by the reversioner. If the reversioner chooses to remain silent, nobody else can question it and it remains valid. 25 C. 1 (P. C.); 34 C. 329 (P. C.); 14 C. W. N. 106; 2 Pat. 217, Rel.; 1 C. L. J. 408; 105 I. C. 329; 52 C. 108, Dist.; 46 M. L. J. 560, Not foll. (*Ramesam, J.*) APPAVU NAICKEN, *In re.* **I.R. 1931 Mad. 119=128 I.C. 695=32 L.W. 592=1930 M.W.N. 939=A.I.R. 1931 Mad. 377=60 M.L. J. 488.**

[**R.** 36 Bom.L.R. 474 (480).]

Right to avoid.

See also REVERSIONER, *supra.*

———*Widow—Alienation—Right to avoid—Devolution of right on heir of reversioner.*

The reversioner's right to avoid alienations by a Hindu widow devolves on his heir. Where the reversioner died four or five years after the death of the widow and long before his right to recover possession of the property could be barred by limitation it is open to the reversioner's daughter, succeeding him as heir to challenge the alienations. 2 Pat. 217; 16 I. C. 634, Dist. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352=I.R. 1931 Pat. 417=134 I.C. 129=12 Pat.L.T. 521=A.I.R. 1931 Pat. 442.**

Setting aside.

———*Widow—Alienation—Setting aside—Suit by adopted son during lifetime of widow.*

The adopted son can sue even during the lifetime of widow to set aside the alienation made by her, and need not wait till the death of the widow, as a reversioner has to do. (*Sundaram Chetty and Pandrang Rao, JJ.*) SOLAIMALAI KONE *v.* SOKKAMMAL. **153 I.C. 1049=7 R M. 397=40 L.W. 559=A.I.R. 1934 Mad. 567=67 M.L J. 618.**

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———*Widow—Alienation—Setting aside—Suit barred—Right to question—Validity of alienation.*

Where the right of the reversioner to sue for a declaration that an alienation by the widow is not binding is barred by limitation, it is not open to him to get over the bar of limitation indirectly by showing that the mortgage in discharge of which the widow sold the property was a fictitious transaction. 11 I. C. 392; 14 A. W. N. 137 and 58 M.L.J. 417, Foll. (*Curgenven and Cornish, JJ.*) THIRUVENGADAM PILLAI *v.* GNANASAMBANDAM PILLAI. **136 I.C. 43=I.R. 1932 Mad. 251=1931 M.W.N. 969=A.I.R. 1932 Mad. 97 (2).**

Spiritual benefit.

———*Widow—Alienation—Spiritual benefit—Building temple.*

The act of building a temple, no doubt, confers spiritual benefit upon the husband as well as upon the widow, but only a reasonable portion of the property should be alienated for that purpose; a widow cannot alienate the whole of the property of her deceased husband for such a purpose. Such an act would clearly be to the prejudice of the reversioners. A mortgage of the entire estate for such a purpose cannot therefore be justified. (*Staples, A.J.C.*) MT. DHELA KURMI *v.* MT. AHIMAN. **30 N.L.R. 305=6 R.N. 257=149 I C. 992=A.I.R. 1934 Nag. 153.**

———*Widow—Alienation—Spiritual benefit of husband—Right to expend for—Extent of.*

It is true that widows are entitled to spend something for acts which might conduce to the spiritual welfare of the husband and in this respect their powers are greater than in mundane matters of legal necessity but it should not be out of all proportion regard being had to the extent of the total property that came into their possession. (*Sen and Bajpai, JJ.*) JAMNA PRASAD *v.* MT. DURGA DEI. **I.R. 1933 All. 352=144 I.C. 33=A.I.R. 1933 All. 138 (2).**

———*Widow—Alienation—Spiritual benefit of husband—Spiritual welfare of widow—Alienation for it, if valid.*

An endowment of a part of her husband's properties made by a widow in favour of the deities of a temple can be valid only if it is made for the spiritual welfare of her husband. The alienation for such purposes must be "within proper and reasonable limits" and if the dedication be of nearly 5/6ths of the properties inherited by her from her husband, it cannot be deemed to be within proper and reasonable limits. Further an endowment made by her in contemplation of her own spiritual welfare is not valid. 42 Bom. 136, Ref. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352=I.R. 1931 Pat. 417=134 I.C. 129=12 P.L.T. 521=A I.R. 1931 Pat. 442.**

———*Widow—Alienation—Spiritual benefit—Pilgrimage by widow—Sikh Jats.*

According to the religious notions of Sikh Jats, pilgrimage by a widow is not necessarily considered beneficial to the soul of a deceased husband. (*Addison and Bhide, JJ.*) GAJINDAR SINGH *v.* BALWANT KAUR. **149 I.C. 696=6 R L. 734=A.I.R. 1933 Lah. 524.**

———*Widow—Alienation — Spiritual benefit—When justifies alienation.*

The question of spiritual benefit as justifying an alienation by a Hindu widow arises only if the alienation is made in order that spiritual benefit may be conferred in the future ; and where the spiritual benefit (if any) has become complete before the alienation takes place, the question does not arise for consideration. In the absence of evidence to show that any debts were incurred or actually contracted for purposes of spiritual

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benefit, the alienation cannot be upheld. (*Murphy, A.C.J. and Macklin, J.*) CHIMANLAL *v.* NATVARLAL. **155 I.C. 7=7 R.B. 415=37 Bom.L.R. 62=A.I.R. 1935 Bom. 131.**

Validation of.

———Widow—Alienation—Validation of by surrender to thenext reversoner. *See* HINDU LAW—WIDOW—SURRENDER. **A.I.R. 1932 Bom. 430.**

Validity.

———*Widow—Alienation — Validity — Absence of necessity—Validity against strangers to the reversion.*

A Hindu widow is the owner of her husband's property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death, and her alienation is not absolutely void but is only *prima facie* voidable at the election of the reversionary heir. There can be no question that an alienation by a Hindu widow even without legal necessity is valid as against strangers to the reversion and that such questions as those of legal necessity and the adequacy and the passing of the consideration can only be raised by a limited class of parties and not by such strangers. (*Macpherson and Dhavle, JJ.*) BIPAT MAHTON *v* KULPAT MAHTON. **13 Pat. 182=153 I.C. 439=7 R.P. 345=A.I.R. 1934 Pat. 498.**

———*Widow—Alienation—Validity during her lifetime—Mortgage.*

One *H* who was the absolute owner of certain Zamindari and house property, executed a registered will, and made a wakf of part the property in favour of one kanya Pathshala and bequeathed the remaining to one Mt. *B*, widow of his nephew. With regards to the interest bequeathed to Mt. *B*, the will set out the line of succession and constituted the widow the maik of the property with the only restriction that she had no power to transfer her share in Zamindari estate; her successors however were to hold the share absolutely and only on extinction of the line of succession, the property bequeathed to her was to revert to the wakf. *B* mortgaged part of the property bequeathed including Zamindari share, by simple mortgage. The administrator filed a suit for declaration that the mortgage deed did not affect the property comprised therein so as to prejudice the rights of reversion to the wakf.

Held, (1) that the administrator of the pathshala had no right to challenge the mortgage in question, (2) that in the absence of anything to show that the mortgage had in any way interfered with the administration of the estate the declaration could not be granted, and (3) at any rate the mortgage was valid and subsisting during the lifetime of Mt. *B*. (*Wazir Hasan, C. J. and Raza, J.*) DAYA SHANKAR *v.* MAHOMED IBRAHIM KHAM. **147 I.C. 957=6 R O. 319=10 O W N. 1181=A I R. 1933 Oudh 555.**

———*Widow—Alienation—Validity—Property allotted in lieu of maintenance.*

The widow's right to maintenance is a personal right and as such inalienable. But where property has been given to a widow of a Hindu joint family in lieu of maintenance, the transfer of such property by her is valid and effective during her lifetime. (*Sen and Niamatullah, JJ.*) DHUP NATH *v.* RAM CHARITRA. **54 All. 366=143 I C. 65 (1)=I.R. 1933 All. 176=A I R. 1932 All. 662.**

———*Widow—Alienation—Validity—Void or voidable.*

An alienation by a Hindu widow is not void, but voidable. (*Miller, J.*) KUNJA BEHARI BASU *v.* RASIK LAL SEN. **157 I.C. 846=39 C.W.N. 474=A.I.R. 1935 Cal. 495.**

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Business.

———*Widow—Business — Carrying on husband's business—Debt incurred for—Liability of reversioners.*

If a Hindu widow, as heir of her deceased husband, carries on his business and incurs debts for the purposes of that business on promissory notes or hundis, the reversioners are bound to pay the debts out of the assets inherited by them after the death of the widow. (*Kania, J.*) POPAT VIRJI *v.* DAMODAR JAIRAM. **155 I C. 711=7 R B. 457=36 Bom.L R. 844=A.I.R. 1934 Bom. 390.**

———*Widow—Business — Continuance of ancestral business by widow—Right to borrow.*

A trade or business belonging to the husband is heritable by the widow and she is entitled to carry it on. She can raise money not only for the payment of debts incurred in the course of such business but also for the purpose of carrying on the business. The power of the widow to borrow is the same as that of the manager of a joint family. (*Mitter and Henderson, JJ.*) BARADA PROSAD SAHA *v.* KRISHNA CHANDRA SAHA. **151 I.C. 268=7 R.C. 98=38 C.W.N. 33=A.I.R. 1934 Cal. 414.**

Compromise.

———*Widow — Compromise — Binding nature — Presumptive reversioner, a party to compromise—Legal effect of—Device to divide the estate.*

A *bona fide* settlement of disputes will bind the actual reversioner even though he may not be a party to it. Even where the then presumptive reversioner is a party to the compromise, it is, however, an element to be taken into consideration in deciding how far it was *bona fide*, that it was a "family settlement which was prudent and reasonable under the circumstances." The binding character of a compromise is also based on the assumption that there was an antecedent title of some kind in the parties and that the agreement acknowledges and defines what that title is. But such considerations can hardly apply to an agreement between the widow and the presumptive reversioner by which they purported to divide the estate and create absolute rights for themselves because so long as the widow is alive, the reversioner has nothing to assign or relinquish or bargain with. 45 C. 590 (P.C.); 45 B. 1167; 22 C. 354; 3 Pat. L. J. 83; 47 M. 181 (P.C.), Ref. to. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352=I.R 1931 Pat. 417=134 I.C. 129=12 Pat L.T. 521=A.I.R. 1931 Pat. 442.**

———*Widow—Compromise—Binding nature—Reversioner taking benefit under—Estoppel.*

The mere fact that the actual reversioner took some benefit under a compromise by the widow is no evidence of election on his part to affirm the compromise or family settlement. 50 I.A. 239, Ref. (*Ross and Dhavle, JJ.*) THAKUR PRASAD *v.* MT. DIPA KUER. **10 Pat. 352=I.R 1931 Pat. 417=134 I.C. 129=12 Pat.L.T. 521=A I.R. 1931 Pat. 442.**

———*Widow—Compromise—Dispute as to will—Shebaitship given to legatee—Validity.*

A shebaitship is nothing but an office and if under a compromise in respect of a disputed will the office is given to the legatee of the bulk of the properties and who was to manage the estate, a *bona fide* compromise entered into by the widow cannot be said to be unjust or improper. Where her right to the shebaitship was doubtful an abandonment of a suit by her for the shebaitship without any personal gain for herself, in favour a man who was in possession as a shebait, and who would at any rate have been entitled to the shebaitship after her death, even if she had succeeded

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in the suit is valid. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I R.(Pat.) 17=145 I.C. 1 =14 Pat. L.T.(Supp.) 1=A I.R. 1933 Pat. 306.**

———*Widow—Compromise — Validity—Reversioner when bound - Arrangement conferring absolute estate on widow—Effect.*

A compromise entered into between the widows of two Hindu coparceners, under which each of them was given the powers of a full owner over her share of the properties dealt with, goes beyond the capacity of the widows, as under the Hindu Law, they are only limited owners. Such a compromise does not in any way enlarge the estate or benefit it; its only effect is to increase the powers of the widows themselves adversely to the reversioners. Consequently, it is not valid and binding on the reversioners. A compromise to be valid and binding on the reversioners must be a settlement of a *bona fide* dispute, or must be entered into for the benefit of the estate in a matter where the widows represent the estate. (*Murphy, A.C.J. and Macklin, J.*) CHIMANLAL *v.* NATVARLAL. **155 I C. 7=7 R.B. 415=37 Bom.L.R. 62=A.I.R. 1935 Bom. 131.**

Co widows.

See also HINDU LAW—WIDOW—ALIENATION.

———Widow—Co-widow—Alienation after partition without consulting the other—Validity. *See* HINDU LAW —WIDOW—ALIENATION. **A.I.R. 1935 Oudh 296.**

———*Widow—Co widows—Partition between—Rights of the survivor.*

A mere partition between two co-widows, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her lifetime. (*Srivastava and Thomas, JJ.*) GAYA DEI *v.* TULSHA DEI. **10 Luck. 587= 154 I.C. 125=7 R.O. 440=1935 O.W.N. 168=A.I.R. 1935 Oudh 296.**

———*Widow—Co-widows—Partition of estate—Relinquishment of right of survivorship—Effect on succession.*

Two co-widows or life-tenants succeeding to an estate may, under the Hindu Law, divide their life tenancy and hold portions of the estate separately if they like, and such an arrangement will continue till their life. They may thus convert the joint estate into estates held in severalty. Either of them may relinquish her right of survivorship in that portion of the estate which is held by the other. In that case, if one of them dies, her estate will not revert to the other, but will go to her own heirs as if it were her *stridhan*; and if she alienates any portion of it, the alienee will continue in possession till the death of the last survivor. The other widow who has relinquished her right of relationship cannot question the succession or alienation. Inevitably, therefore, the succession will not open until the last survivor is dead. (*Muhammad Noor and Agarwala, JJ.*) DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH. **14 Pat 518=16 Pat.L.T. 713=155 I.C. 213 =7 R.P. 557=A.I R 1936 Pat. 200.**

Debts.

———*Widow—Debts—Duty to pay-off interest from income.*

A widow or other limited heir has absolute power of disposal over the income of the property inherited by her. She is not bound to make any savings and may spend the whole income just as she likes and though she is bound to pay-off interest on the debts when there is a sufficient surplus, it is not incumbent on her to apply any part of the income to the payment of the corpus.

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18 M. 113 and 1913 M.W.N. 275, Rel. (*Venkatasubba Rao and Curgenven, JJ.*) JAGANNADHAM *v.* VIGNESWARUDU. **55 Mad. 216=I.R. 1931 Mad. 858=134 I C. 810=34 L.W. 551=1931 M.W.N. 965=A.I.R. 1932 Mad. 177=61 M L.J. 507.**

———*Widow—Debts—Loan for maintenance—Binding nature.*

Where the income available from her husband's estate is insufficient for reasonable needs, a widow can borrow money for her own maintenance and for performing the ceremonies which may properly be performed by a Hindu widow, for example performing Sradh ceremony of her husband, pilgrimage for spiritual benefit of her husband, etc., and those are legal necessities. (*Macpherson and Agarwala, JJ.*) NARAYAN SAHAY *v* HIKAYAT MIAN. **149 I.C. 746=6 R.P. 633=A.I.R. 1933 Pat. 666.**

Decree against.

———*Widow—Decree against—Binding character on reversioner.*

In order that a decree passed against a widow may be binding on the reversioner, it is necessary to show that there was a contest as regards title to the property. (*Suhrawardy and Costello, JJ.*) GAURI SHANKAR PODDAR *v.* GURUPADA HALDAR. **I R. 1931 Cal. 577=132 I.C. 625=35 C.W.N. 66=A.I.R. 1931 Cal. 511.**

———*Widow—Decree against—Binding nature of.*

Where money is lent to a Hindu widow on her personal security, a decree for such a debt and a sale of property which she inherited from her husband, in execution of such decree binds only the widow's estate, notwithstanding that the original debt may have been incurred for legal necessity. (*Kendall, J.*) KISHAN DEVI *v.* CHAND MAL. **3 A W.R. 293=151 I.C. 30 =7 R.A. 109=A.I.R. 1934 All. 423.**

———*Widow—Decree against—Binding nature of.*

Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir. A.I.R. 1923 P.C. 249, Foll. (*Sir George Lowndes.*) MUNNI BIBI *v.* TIRLOKI NATH. **58 I A. 158=53 All. 103=I.R. 1931 P.C. 182=132 I.C. 598=1931 A.L. J. 453=33 Bom L R. 979=53 C L J. 552=1931 M. W.N. 742=34 L.W. 459=35 C.W.N. 661=A.I.R. 1931 P.C. 114=61 M.L J. 196 (P.C.).**

———*Widow—Decree against—Binding nature on reversioner.*

Where a mortgage executed by a Hindu widow was found to be for legal necessity, in a suit filed by the reversioners during her lifetime and subsequently the mortgagee sued and foreclosed the mortgage, *held*, that the foreclosure decree was binding on the actual reversioners. (*Mukerji and Bennet, JJ.*) HARPAL SINGH *v* RAM PALTAN SINGH. **I.R. 1931 All. 218=129 I.C. 730=1930 A.L.J. 1597.**

———*Widow—Decree against—Binding nature on reversioners.*

An *ex parte* decree against a Hindu widow is binding on the reversioners if the decree has not been obtained unfairly or improperly. (*Guha and Bartley, JJ.*) DEBENDRA NATH SARMA *v.* NAGENDRA NATH DUTT. **60 Cal. 1158=58 C.L J 181=149 I C. 522 =6 R.C. 602=37 C.W N. 1001=A.I R. 1933 Cal. 900.**

———*Widow—Decree against—Binding nature on reversioner.*

A decree fairly obtained in a suit against the widow in her capacity as the holder of the estate of her husband

is binding upon the succeeding heir. Hence where in a suit by a widow, a finding of fact as to whether certain adoption was valid or not, is fairly and honestly fought out and so far as the question of adoption was concerned, the widow was representing the estate, as otherwise she had no capacity whatsoever to challenge adoption, a subsequent suit by a reversioner on the death of the widow is barred by the rule of *res judicata*. (*Mohammad Noor and Luby, JJ.*) DINANATH JHA *v.* SABUJ LAL CHAUDHURI. **153 I.C. 1102=7 R.P. 406=A.I.R. 1934 Pat. 696.**

———*Widow—Decree against—Executability against reversioners—Decree against widow not as representative of the estate.*

In the absence of any evidence to show that the act of dispossession was made by the widow, or the decree of mesne profits in respect of that act was passed against her, as representing her husband's estate, the decree cannot be executed against the reversioners succeeding to the husband's estate, unless they are shown to be in possession of the personal assets of the widow. (*Kulwant Sahay and Khaja Mahomed Noor, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BENI MADHO SINGH. **11 Pat. 430=I.R. 1931 Pat 457=134 I.C. 425=12 Pat.L.T. 701=A.I.R. 1931 Pat. 422.**

———*Widow—Decree against—Execution—Sale of property—What passes.*

Where what is sold at an auction sale is 'the right, title and interest of the widow', the sale may be of the widow's interest or the entire interest. The Court should in such a case consider what was liable to be sold and what in fact was sold. If for instance the property attached and sold is described 'as the share of the plaintiff as widow', only the limited interest of the widow will pass. Where a Hindu widow defends or institutes a suit on behalf of the estate, the decree is binding on the estate and a sale in execution thereof may be taken to be of the entire estate. (*Ameer Ali, J.*) NAGENDRABALA DASEE *v.* PANCHANAN MOURIE. **60 Cal. 1236=149 I.C. 1053=6 R.C. 689=A.I.R. 1934 Cal. 162.**

———*Widow—Decree against—If* res judicata *against reversioners.*

In carrying on litigation regarding her husband's estate, a Hindu widow represents the estate, and the decree obtained against her is binding upon the reversioners, provided the litigation is honest and is fairly conducted. The rule of *res judicata* as laid down in S. 11, C. P. Code, is not strictly applicable but the principle applies so as to bind the reversioners. The question will be whether the estate was properly represented by her. (*Mukammad Noor and Agarwala, JJ.*) DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH. **14 Pat. 518=155 I.C. 213=7 R.P. 557=16 Pat L.T. 713=A.I.R. 1936 Pat. 200.**

———*Widow—Decree against—Liability of estate in the hands of reversioners.*

A creditor who had lent money to a Hindu widow on pro-notes executed by her for "estate expenses" sued on the notes and claimed relief on the liability of the defendant's properties. He obtained a decree and sought execution against her husband's estate in her hands. The widow died, and the reversioner who appeared as her legal representative objected to this.

Held, that on the frame of the suit, which could be looked into for the purpose of ascertaining the creditor's intention, the plaintiff had given an indication of his intention to make the estate liable, and that the decree could be executed against the estate. (*Curgenven and King, JJ.*) MARUDANAYAKAM PILLAI *v.* SUBRAMANIAN CHETTIAR. **158 I.C. 216=8 R.M. 243=1935 M.W.N. 601=41 L.W. 783=A.I.R. 1935 Mad. 425=68 M.L.J. 643.**

———*Widow—Decree against—Creditor—If entitled to proceed against purchaser of the properties of the widow.*

In considering if the holder of a money decree against the widow is entitled, on her death, to proceed against the reversion, the binding nature of the debt or liability is alone not a sufficient test. The frame of the suit is an important, if not the decisive factor. So where in a simple money suit against the limited owner only, there was no indication that the creditor intended to look beyond the interest of the limited owner whom, in fact, he thought to be the absolute owner, he is not entitled to proceed, on the death of the widow against a purchaser of the properties of the widow. 52 M.L.J. 426 (P.C.), Foll. (*Curgenven, J.*) SETHURAMA AYYAR *v.* VARADARAJA AYYAR. **136 I.C. 778=I.R. 1932 Mad. 309=35 L.W. 253=1931 M.W.N. 1282=A.I.R. 1932 Mad. 185.**

———Widow—Decree against—Sale of estate for arrears of cess—What passes. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT. **13 Pat. 297.**

———*Widow—Decree against—Suit to recover lost property of husband—Dismissal — Decree for costs against—Personal liability—Estate, if bound.*

Two Hindu widows, along with their other co-sharers sued to regain a portion of their husband's property which was lost on account of a revenue sale. They had a good ground to have the sale set aside, but lost the suit on account of a technical defect. A decree for costs and mesne profits was passed against them.

Held, that the decree could be executed against the estate of their husband and that the widows could not be personally liable. (*Muhammad Noor and Agarwala, JJ.*) DULHIN PARBATI KUER *v.* BAIJNATH PRASAD NARAIN SINGH. **14 Pat. 518=155 I.C. 213=7 R.P. 557=16 Pat.L.T. 713=A.I.R. 1936 Pat. 200.**

Maintenance.

See HINDU LAW—MAINTENANCE.

Moveable property.

———*Widow—Moveable property—Powers of the widow—Moveable and immoveable property—No distinction between.*

Moveable property stands on the same footing as immoveable property so far as the rights of the widow to deal with the corpus is concerned and she is liable to render an account to the reversioner of the amount of debts due to the deceased husband at the time of his death which have been realized by her The reversioner is entitled that the entire moveable property should be kept in tact for him or her, the widows being entitled only to the usufruct. (*Sen and Baipai, JJ.*) JAMNA PRASAD *v.* MT. DURGA DEI. **I.R. 1933 All. 352=144 I.C. 33=A.I.R. 1933 All. 138 (2).**

Nature of estate.

———*Widow—Nature of estate—Absolute estate—Bequest conferring—Subsequent clause for gift over—Effect of.*

If an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after, or on the termination of, that donee's interest, his absolute interest is not cut down and the further interests fail. Where from the fact that the testator constituted the legatees (who were Hindu widows) "maliks" of his property after him with full powers of alienation, his intention was clearly to confer an absolute estate on them and a subsequent clause providing for a gift over is inoperative and ineffective to

cut down the absolute estate. (*Tek Chand and Monroe, JJ.*) PARTAP CHAND *v.* MT. MAKHNI. **14 Lah. 485=I R. 1933 Lah. 521=144 I.C. 651=34 P.L.R. 73=A.I.R. 1933 Lah. 365.**

———*Widow—Nature of estate—Bombay School—Absolute estate—Compromise with adopted son—Death of son and his heirs—Subsequent devolution of property on mother as heir of her adopted son—Will—Validity of.*

By a compromise with her adopted son, a widow was given a life-interest in certain immoveable property and an absolute interest in certain moveables. After her, the adopted son, was to take possession of the property. But the adopted son, then his wife and then his child, all died during the lifetime of the adoptive mother who as the ultimate heir of her son, got the properties and made a will in favour of the defendants. In a suit by the plaintiff as the nearest reversioner to the last male owner (the husband of the widow) for the declaration that the will was invalid,

Held, that the adopted son had a vested interest, transferable and heritable, that on his death that vested interest passed to his heirs and as the widow herself was the last heir of her son (the others having predeceased her) she became the full owner competent to dispose of the property by will. (*Baker and Nanavati, JJ.*) PARSHOTTAM BECHARDAS *v.* KESHAVLAL. **56 Bom. 164=I.R. 1932 Bom. 299=137 I.C. 561=34 Bom.L.R. 186=A.I.R. 1932 Bom. 213.**

———*Widow—Nature of estate—Absolute estate—Property given by father-in-law.*

Where certain properties were given to the widow of a deceased son by the karta of a joint Hindu family after separation in the family and what was given was the share which the karta got on partition.

Held, that the burden was on the party alleging it to prove that what was given was only a widow's estate and not an absolute estate. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RAMJI SAHAY *v.* GOPALJI. **6 I.R. (Pat.) 205=145 I.C. 790=14 Pat. L.T. 224=A.I.R. 1933 Pat. 428.**

———*Widow—Nature of estate—Decree against husband—Execution against rents accruing due since his death.*

The nature and extent of a widow's estate may be material where the question arises between her and the reversioners, but there can be no widow's estate, where the question is whether the property once belonging to her husband is part of his estate or is part of the widows estate which itself implies an estate carved out of the husband's estate. It continues to be the husband's estate while it is in possession of the widow who represents it. Therefore any rents which have accrued due since the death of the husband by the tenants holding immoveable property once belonging to him must be considered to be part of his estate and as such liable to be attached in execution of a decree obtained against her husband since deceased. The widow is entitled to such rents as representative of her late husband and not in her own right and as part of her personal estate. (*Niamatullah and Allsop, JJ.*) PHOOL KUNWAR *v.* NIKHI RAM. **57 All 714=153 I.C. 865=7 R.A. 645=1935 A.L.J. 230=1935 A W.R. 93=A I.R. 1935 All. 261.**

———*Widow—Nature of estate—Will by husband—Limited power of disposition—Devolution after her life indicated widow's estate.*

Where in a will certain properties were conveyed to the wife of the testator who was described as 'malik dakhalikar' (owner in possession) and 'uttaradgikarini' but no power of absolute disposition was given and on the other hand, only a power to sell a portion of the properties for payment of the testator's debts was provided for and it was further provided that on her death, the adopted son, if any, or if there be no adoption then the daughter would take the properties, the widow gets only a widow's estate and not an absolute estate. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C 882=55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

———Widow—Nature of estate—Partition between widow and undivided brother of deceased owner—Self-acquired property of owner—Absolute estate taken by widow—Stridhan. *See* HINDU LAW—FAMILY SETTLEMENT. **33 Bom.L.R. 1483.**

———*Widow—Nature of estate—Properties given to widows under family settlement—No presumption of limited estate.*

The ordinary presumption under Hindu Law that a female donee or legatee takes only a limited estate is not applicable where she is given properties under a compromise or a family settlement. The nature of her estate must be determined from the terms of the deed, the circumstances under which the compromise is arrived at and the subsequent conduct of the parties; but the presumption of limited estate does not apply where females have obtained estates under a family settlement or after an adjudication by Court of disputed claims as between them and a male member of the family in which each of them claimed the entire estate. There is nothing to prevent a female from acquiring an absolute estate under a compromise or a family settlement. In the case of a family settlement, it cannot be said that it is a case of a grant by a Hindu male to a Hindu female. Similarly in the case of a compromise, it cannot be said that one party alone makes a grant in favour of the other. In such a case both parties make grants in favour of each other. In dealing with the terms of a compromise, there can be no presumption that a limited estate was granted to the widows. (*Smith and Rachhpal Singh, JJ.*) ADYA SHANKAR TEWARI *v.* CHANDRAWAT. **10 Luck. 35=150 I.C. 519=7 R.O. 17=11 O.W.N. 736=A.I.R. 1934 Oudh 265.**

———*Widow—Nature of estate—Test of—Property claimed through husband and through others—Distinction between.*

Where a Hindu widow takes the property to which she is not entitled to succeed under Hindu law, the question, whether she acquires a limited estate or an absolute estate depends on the question of fact whether she claimed to take the property through her husband or not. If she has taken as a widow, through her husband, she acquires by prescription only a limited estate of a Hindu widow and does not obtain an absolute estate. It is a question of fact in each case, whether the widow claimed to take through her husband and so limited her claim to a claim for a widow's estate, in which case she would prescribe for the benefit of her husband's estate or whether there is no evidence that she so limited her claim, in which case she will take an absolute estate. But if there is no evidence that she has so limited her claim, to a widow's estate, she takes an absolute estate as stridhana. (Case-law Ref.) (*Mukerji and Bennet, JJ.*) DUNGAR SINGH *v.* MT. MAID KUNWAR. **147 I.C. 220=6 R.A. 432=A.I.R. 1933 All. 822.**

Powers of.

See also MOVABLE PROPERTY, *supra.*

———*Widow—Powers of—Decree obtained by alleged adopted son—Adoption found invalid—Right of widow to execute that decree.*

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If a Hindu female such as a widow or daughter suing on behalf of an estate to recover property represents the ultimate male heirs entitled to the estate, they are bound by the litigation and they can take the benefit of it. But there is no principle, which can avail the widow of the last male owner to enable her to execute the decree wrongly obtained by a person claiming to be the adopted son of the last male owner but whose adoption was subsequently found to be invalid. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

———*Widow—Powers of—Power to make Raiyati Settlement.*

Ordinarily a Hindu widow in due course of management of her husband's estate is entitled to make raiyati settlement provided that the transaction is *bona fide* and is not intended to defraud the reversioners, or does not in any way depreciate substantially the value of her husband's property. 2 Pat. 177, Dist. (*Macpherson and Khaja Mahomed Noor, JJ.*) BISWANATH MISSIR *v.* RAM PRASAD TEWARI. **10 Pat. 572=I.R. 1931 Pat. 385=133 I.C. 673=13 Pat L.T. 129=A.I.R. 1931 Pat. 389.**

Re-marriage.

———*Widow—Re marriage — Adverse possession of first husband's property—Effect of—Devolution of the property.*

A title acquired under S. 28 of the Limitation Act, through adverse possession by a widow, who claims and holds a widow's estate, inures to the estate of her deceased husband and it descends upon her death accordingly. Where a Hindu widow became a convert to Mahomedanism, married a Mahomedan and continued to hold the properties of her former Hindu husband.

Held, that the effect of the re-marriage was to cause a forfeiture of her rights in the estate of her first husband, that her possession thereafter was unlawful but that the re-marriage in the absence of any assertion of absolute ownership or change in the manner of her possession could not enlarge her estate into an absolute one. The effect of continued possession for over twelve years after her re-marriage was only to perfect her title to a widow's estate which inured to the estate of her Hindu husband and on her death devolved to his next reversioner. 51 I.A. 171, Rel.; A.I.R. 1925 All. 369; A.I.R. 1927 All. 274; A.I.R. 1929 Lah. 327 and 11 Lah. 424, Foll (*Hasan, C.J. and Bisheshwar Nath, J.*) PARBATI *v.* RAM PRASAD. **7 Luck. 320=141 I.C. 831=I.R. 1933 Oudh 88=10 O.W.N. 21=A.I.R. 1933 Oudh 92.**

———Widow—Re-marriage—Alienation after—Purchaser paying debts, binding on estate—Purchaser to be reimbursed amount paid. *See* HINDU LAW—WIDOW—ALIENATION. **A.I.R. 1934 Pat. 327.**

———Widow—Re-marriage—Effect on prior alienation—Right of reversioner to possession of property. *See* HINDU LAW—WIDOW—ALIENATION. **1931 M.W.N. 1257=34 L W. 967.**

———*Widow—Re-marriage— Re-marriage according to Aryasamajic faith—Forfeiture.*

The re-marriage of a Hindu widow according to the Aryasamajic faith which permits such re-marriages, does not involve a forfeiture of her widow's estate in the absence of proof that among Aryasamajists there is a rule or customary law that a Hindu widow re marrying loses her husband's estate. (*Sulaiman, C. J. and Bennet, J.*) GANGA SARAN SINGH *v.* MT. SIRTAJI KUER. **1935 A.L J. 1174=1935 A.W.R. 1111=160 I.C. 321=8 R A 592 (2)=A.I.R 1935 All. 924.**

———*Widow—Re-marriage—Suit by reversioners—Cause of action.*

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A widow, who was in possession of her husband's property, re married in 1913. The reversioners brought a suit for recovery of possession in 1931 alleging that she had denied their rights to the property in 1925 and that the denial gave them a fresh cause of action.

Held, that the cause of action arose in 1913 when she forfeited her interest, that the denial did not give a fresh cause of action and that the suit was barred by time. (*Tek Chand and Agha Haidar, JJ.*) MT. SATTAN *v.* MT. SABAN. **147 I.C. 636=6 R.L. 411 (2)=A.I.R. 1933 Lah. 1043 (2).**

Representation of estate.

———*Widow— Representation of estate—If interests in remainder under a will also bound by result of litigation—Compromise by widow—Reversioner, if bound.*

Under a will executed by a tenant in-common, his wife got a share for life and after her, his daughter. After his death, his wife sued for the recovery of her share from the brother of her husband and the suit was ultimately compromised as a result of which certain properties were given up by the widow. The daughter subsequently sued for the recovery of those properties to which she was entitled under the will.

Held, the widow did not in the previous litigation and she could not represent the interests in remainder and therefore the daughter was not bound by the compromise therein. 9 M.I.A. 539, Expl; 4 C. 342, Dist. (*Ramesam, J.*) BALASURYA BHEEMARAJU *v.* MRUTYANJAYUDU. **131 I.C. 669=1931 M.W.N. 302=A.I.R. 1931 Mad. 354.**

Residence.

———*Widow—Residence—Maintenance and residence in family house—Right to—Surrender by widow of property allotted to her at partition.*

It is no doubt true that on the death of her husband, the widow has a right to reside in the family dwelling-house which cannot be sold by her sons without necessity so long as the family remains joint. But where a partition has been effected and on partition certain properties are actually allotted to the widow in full satisfaction of her rights in the joint family estate, she ceases to have any rights of residence in the family dwelling-house or to realise maintenance out of the other properties which remain with the sons. These rights cannot possibly be revived by her subsequently surrendering voluntarily the properties allotted to her to the sons for immediate partition among them and coming to an arrangement with some of them for giving her a cash allowance. Thenceforward her only remedy is to enforce the right to recover this allowance against these sons personally and not against any of the properties which had ceased to be joint. (*Tek Chand and Abdul Rashid, JJ.*) MST. BISHNI *v.* UTTAM CHAND. **158 I.C. 861=8 R.L. 319 (2)=37 P.L.R. 142=A.I.R. 1935 Lah. 533.**

———*Widow—Residence—Mother—Right of—Mother being donee and joint executant of mortgage—Right if survives.*

Defendant 1 mortgaged a certain house in favour of plaintiff and subsequently made a gift of the same to his mother. Later on defendant 1 executed a second mortgage along with the son over the same property in favour of plaintiff. The mortgages having been sued on, the mother claimed a right of residence.

Held, that the Court should not pass a joint decree for the two sums claimed, but the decree should be split up showing the separate sums payable.

Held, further, that it was open to the parties to the second mortgage to pay off the amount in respect of the second mortgage and the mother could enforce as

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against the auction-purchaser in execution of the first mortgage a right to reside in a suitable portion of the house having regard to the nature of the property and her requirements. The right of residence was not impaired by reason of the gift or the mortgage executed by the son. (*Mukerji and Bennet, JJ.*) KISHUN PIYARI *v.* GOPAL NARAIN. **1932 A.L.J. 795=143 I.C. 303=I.R. 1933 All. 219=A.I.R. 1932 All. 676.**

———*Widow—Residence—Residence in family house—Nature of right.*

The law nowhere lays down that a wife should be residing in the same house with her husband; if she is living in a house provided by her husband or if such a house is available to her, but with the consent, express or implied, of her husband she is not actually residing in it, she must for the purpose of exercising her right of residence in the family house after the death of her husband be deemed to be residing with him. (*Jai Lal, J.*) MT. SHAM DEVI *v.* MOHAN LAL. **15 Lah 591=152 I.C. 606=7 R.L. 291=36 P.L.R. 333=A.I.R. 1934 Lah. 167.**

———*Widow—Residence—Right of—Nature and limits.*

A Hindu widow's right to residence in the ancestral house can be defeated only by an alienation of the property for some family necessity. The question should be decided in such a case as to the accommodation actually required by the widow for her residence in consonance with her status and requirements. (*Jai Lal and Abdul Quadir, JJ.*) BASAKHI MAL *v.* MT. SANTO. **I.R. 1931 Lah. 883=134 I.C. 115=32 P.L.R. 888=A.I.R.1932 Lah. 141.**

———Widow—Residence—Right of—Nature of—If transferable—Attachment and sale in execution—Legality. *See* C. P. CODE, S. 60. **69 M.L.J. 317.**

Settlement.

———*Widow—Settlement—Prevention of litigation—If binds reversioner.*

A Hindu widow in possession of her husband's estate is competent to enter into a valid compromise binding the reversioners so as to prevent injurious litigation. Where a widow in possession of husband's estate entered into settlement so as to avoid the possibility of litigation between the members of the family and the settlement was very beneficial to daughters who would have taken the estate in course of time.

Held, that the settlement was binding on the daughters. A.I.R. 1915 Cal. 629 Ref. (*Niamatullah and Allsop, JJ.*) SAJJANPAL SINGH *v.* MT. HARNARAINI KUNWAR. **157 I.C. 192=8 R.A. 129=1935 A.L.J. 695=1935 A.W.R. 442=A.I.R. 1935 All. 285.**

Succession certificate.

———*Widow—Succession certificate—Application for succession certificate in respect of her husband's estate—Grant—If to be subject to conditional.*

A Hindu widow who applies for a succession certificate in respect of her husband's assets is entitled to the grant of it unconditionally. The fact that there are reversioners to the estate is no ground for imposing conditions on the grant. The Court ought to grant certificates to persons lawfully entitled to them and not go out of its way to make it difficult for them to obtain them. (*Agarwala and Saunders, JJ.*) BADRI NARAIN SAHU *v.* LACHMINIA. **152 I.C. 803=7 R.P. 256=A.I.R. 1935 Pat. 10.**

Surrender.

———*Widow—Surrender—Alienation prior to—Effect on.*

The logical consequence of the doctrine of surrender which means a self-effacement of the widow and amounts

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to civil death and complete extinguishment of the title of the widow in her husband's estate is that all prior alienations in excess of her powers are liable to be challenged immediately on her civil death just as they could be impeached after she had died. From the date of the surrender, the reversioner gets the property freed from any alienation in excess of the powers of the Hindu widow as if she had died. Those who deal with limited owner take a certain amount of risk. The object of Hindu Law is to prevent improper alienations by the widow or other limited owner. The alienee who deals with a limited owner without any inquiry as to necessity takes a risk in case of surrender by the widow which has the same effect as her death. (*D. N. Mitter and Narsing Rau, JJ.*) RAM KRISHNA PRODHAN *v.* KOUSALYA MANI DASI. **158 I.C. 925=40 C.W.N. 208=62 C.L.J. 490=8 R.C. 221 (2)=A.I.R. 1935 Cal. 689.**

———*Widow—Surrender—Alienations prior to—Effect of on validity.*

A Hindu widow who makes an alienation of a portion of her husband's estate does not thereby become incapable of exercising the right of surrender on the ground that she cannot in such a case put the surrenderee in possession of the *entire* estate of her husband. The true principle is that wherever any portion of what was once the estate of her husband has ceased legally to belong to it by reason of an alienation for a justifiable purpose binding upon the estate, the conception of the *entirety* of the estate to be surrendered must reasonably be applied only to the *existing estate*. In such a case there is no question of the widow retaining any benefit for herself. (*Varadachariar, J.*) RAMAYYA *v.* BAPANAMMA. **160 I.C. 368=8 R.M. 625=42 L.W. 790=A.I.R. 1936 Mad. 16.**

———*Widow—Surrender—Alienation prior to—Right of surrenderee to impeach.*

Where a Hindu widow absolutely surrenders her estate to the nearest reversioner, the latter cannot challenge any transaction entered into or alienation effected by the widow prior to the surrender, during the widow's lifetime. (*Fazl Ali and Rowland, JJ.*) BASUDEO MANDAR *v.* BAIDYANATH MANDAR. **156 I.C 774=8 R.P. 23=A.I.R. 1935 Pat. 175.**

———Widow—Surrender of bhaoli lands to landlord—Suit by reversioner impeaching validity—Maintainability in the absence of landlord *See* PRACTICE—PARTIES. **A.I.R. 1935 Pat. 175.**

———*Widow—Surrender—Daughter taking mother's stridhanam absolutely—Surrender by, under mistaken belief that she has only a limited estate—Transfer by surrenderee to* bona fide *purchaser—Claim by daughter's daughter to possession—Sustainability.*

A Hindu daughter who was given an absolute estate in her mother's stridhanam property which her mother devised to her under a will surrendered it voluntarily under the mistaken belief that she had only a limited estate in the property. The surrenderee then sold the property to a stranger who was a *bona fide* purchaser for value. The daughter of the surrenderer subsequently claimed to recover possession of the estate on the ground that the estate taken by her mother was not a limited estate which could be surrendered, but an absolute estate.

Held, that as against a *bona fide* purchaser for value any one claiming through the surrenderer cannot get back the property. (*Ramesam and Stone, JJ.*) CHALAPATHI RAO *v.* RANGANAYAKAMMA. **156 I.C. 128=7 R.M. 646=41 L.W. 541=A.I.R. 1936 Mad. 305.**

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———*Widow—Surrender to daughter and daughter's son—Nature and effect of—Liability for debts—T. P. Act, S.* 128.

A surrender by a Hindu widow in favour of her daughter (who is the next reversioner) and the daughter's son is not a valid surrender and cannot be given effect to as such; it can be regarded only as a transfer by way of gift. The entire property being transferred to them, they become in law universal donees under S. 128 of the T. P. Act, and are consequently liable to pay even the personal debts of the widow. (*Niyogi, A.J.C.*) DAVARAM *v.* BHIMABAI. **18 N L J. 179.**

———Widow—Surrender—Divesting of widow's estate by—Adverse possession against widow—Effect on reversioner. *See* HINDU LAW—WIDOW—ADVERSE POSSESSION AGAINST. **A.I.R. 1935 Mad. 664.**

———*Widow—Surrender—Doctrine applies to surrender to daughter.*

The basis of the doctrine of surrender is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. There is therefore no difference between surrender to a daughter and surrender to the nearest male reversioner. Where, therefore, a widow made a surrender of her estate in 1884 in favour of her daughter who died in 1894, the right of the male reversioners to sue arises on the daughter's death and is barred under Art. 141 of the Limitation Act if brought more than twelve years thereafter, though in time if the computation is made from the subsequent death of widow. 46 All. 59, Appr. (*Sir John Wallis.*) SITANNA *v.* VIRANNA. **61 I.A 200 = 57 Mad. 749 = 38 C.W.N. 697 = 59 C.L.J. 354 = 1934 M.W.N. 414 = 36 Bom.L.R. 563 = 15 Pat.L.T. 497 = 6 R.P.C. 142 = 1934 A L.J. 433 = 3 A.W.R. 729 = 11 O.W N. 596 = 39 L W. 607 = 148 I.C. 828 = A.I R. 1934 P.C. 105 = 67 M.L.J. 20 (P.C).**

———*Widow—Surrendr—Doctrine—Basis of.*

It is not correct to say that the whole doctrine of surrender and consequent acceleration of the reversioners has no basis in Hindu Smritis but has been evolved by Courts of justice on general principles of jurisprudence. (*D. N. Mitter and Narsing Rau, JJ.*) RAM KRISHNA PRODHAN *v.* KOUSALYA MANI DASI. **158 I.C. 925 = 40 C.W.N. 208 = 62 C.L.J. 490 = 8 R.C. 221 (2) = A I.R.1935 Cal. 689.**

———*Widow—Surrender to female heir—Validity.*

A widow can accelerate the succession to her husband's estate by relinquishing to his reversionary heir, the whole or the whole less than what is necessary for her maintenance, although the heir to whom the estate is transferred is a female and consequently takes a life-estate only. (*D. N. Mitter and Narsing Rau, JJ.*) RAM KRISHNA PRODHAN *v.* KOUSALYA MANI DASI. **158 I.C. 925 = 40 C.W.N. 208 = 62 C.L.J. 490 = 8 R.C. 221 (2) = A.I R. 1935 Cal. 689.**

———*Widow—Surrender—Gift by jointly with next reversioner to stranger—Subsequent adoption—Effect on validity.*

A deed of gift by a Hindu widow of her husband's entire estate jointly whith her sole surviving daughter in favour of a third person is a perfectly valid transaction, and a son subsequently adopted by the widow cannot by a suit set aside the transaction. The transaction can be regarded as a surrender by the widow to the daughter who is the next reversioner plus a gift by the latter; and is valid as against the adopted son. 10 C. 1102 (F.B.); 46 I.A. 72, Foll.; 32 Bom.L.R. 1453, Diss. from. (*Broomfield and Wadia JJ.*) YESHWANTA *v.* ANTU.

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58 Bom. 521 = 36 Bom.L.R. 671 = 154 I.C. 252 = 7 R.B. 299 = A.I.R. 1934 Bom. 351.

———*Widow—Surrender—Gift by widow and daughter in favour of husband of another daughter.*

An alienation by a widow of her deceased husband's estate held by her may be validated, if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation, provided it is *bona fide.* Where it is made with the consent of the next reversioner, it can be in favour of a stranger. The surrender by the widow of the whole of her husband's property with the consent of her daughter, the next reversioner (a full owner), in favour of the husband of her other deceased daughter is prefectly valid and binding on the son subsequently adopted by the widow. 42 M. 523 (P.C.); 42 M. 25 and 47 B. 678, Rel. and foll. (*Baker, J.*) ANTU NAVAJI *v.* YESHVANT BALA. **I.R. 1932 Bom. 597 = 140 I.C. 258 = 34 Bom.L.R. 811 = A.I R. 1932 Bom. 430.**

———*Widow—Surrender of holding—Relinquishment in favour of landlord—Effect—Central Provinces Tenancy Act* (1920), *S.* 89.

The surrender of a holding to the Malguzar by a Hindu widow cannot be considered a *bona fide* effacement having the same effect as the actual or civil death of the widow. (Case-law discussed.) (*Macnair, J.C., Jackson and Niyogi, A. J. C's.*) PREM NARAYAN *v.* JHADO. **27 N L.R. 186 = I.R 1931 Nag. 113 = 133 I.C. 385 = A.I.R 1931 Nag 129 (F.B.).**

———*Widow—Surrender—Surrender of holding—Reversioner—Remedy of—Right to possession.*

There is a considerable difference between the surrender of a holding to the landlord and the surrender of the estate to the next reversioner. In the former case, the widow cannot be considered effaced till her natural death takes place and the reversioner, who successfully challenges surrender, is only entitled to a decree for a declaration that he is entitled to possession on the death of the widow and not to immediate possession. 21 N.L. R. 62, Overr. (*Macnair, J.C., Jackson and Niyogi, A.J.Cs.*) PREM NARAYAN *v.* JHADO. **27 N.L.R. 186 = 133 I.C. 385 = A I R. 1931 Nag. 129 (F.B.).**

[R. 30 N.L.R. 175 (181 182)]

———*Widow—Surrender—Nature and effect of—Retention of her rights by the widow—Validity of transaction as surrender.*

The widow can at any time relinquish her estate—this having the effect of accelerating the estate of the next heir. The rule originated with the idea of a retirement from the world, or existinction of desire for property, which is tantamount to civil death The widow may withdraw her life estate and destry her own rights so as to accelerate the succession and vest the estate in the then next heir in the same way as if she were dead at the time of the surrender or relinquishment, in favour of the reversioner. Where, however, there was no complete relinquishment of the widow's estate, her connection with the estate inherited by her from her husband was fully retained by her, leaving only the management of the estate in the hands of the then reversioner and in fact the *solenamah* in question contained a clause for resumption by the widow of the management in certain circumstances, the transaction cannot be said to amount to a surrender. (*Mukerji and Guha, JJ.*) JOGES CHANDRA KHASNAVIS *v.* PRASANNA KUMAR MAJUMDAR. **I.R. 1932 Cal. 594 = 139 I.C. 250 = 55 C.L.J. 283 = A.I.R. 1932 Cal. 664.**

———*Widow—Surrender—No reservation of any interest to her nominee—Reversioner paying sum just adequate for widow's maintenance—Validity.*

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Where a widow surrendered the whole of her interest in the properties including the properties which were at the time in the adverse possession of third parties, and did not reserve any interest which she had inherited from her son nor did she reserve any interest to any of her nominees and the reversioner paid to the widow's daughter's son a sum which was just adequate for the widow's maintenance,

Held, that the surrender by the widow under the circumstances was *bona fide* and was not liable to be questioned on any ground. (*Ramesam and Stone, JJ.*) RAMAYYA *v.* SUBBA RAO. **157 I.C. 1100=A.I.R. 1935 Mad. 664.**

———*Widow—Surrender—Partial surrender—Validity.*

The surrender by a widow must be of the whole estate in order to be valid. When the widow has surrendered all her lands to her daughters but has not parted with the house and movables, the surrender is partial and invalid. 46 I.A. 72, Ref. (*Patkar, J.*) GOVINDPRASAD *v.* SHIVLINGA. **I.R. 1931 Bom. 177=129 I.C. 577=32 Bom.L.R. 1482=A.I.R. 1931 Bom. 107.**

———*Widow—Surrender—Provision for maintenance of widow—Device to decide the estate.*

An arrangement by which the widow conveyed the whole of her property in favour of her daughters and the daughters purported to reconvey a substantial portion of the same property to the widow for her maintenance savours of a device to divide the estate, and cannot be considered to be a reasonable provision for maintenance of the widow. 42 M. 854 (F.B.); 47 B. 678, 46 I.C. 259, Dist. (*Patkar, J.*) GOVINDPRASAD *v.* SHIVLINGA. **I.R. 1931 Bom. 177=129 I.C. 577=32 Bom.L.R. 1482=A.I.R. 1931 Bom. 107**

[**R.** 56 B. 410 (422, 424).]

———*Widow—Surrender—Surrender in favour of minor—Validity.*

There is no rule which prevents a surrender being made in favour of a minor reversioner. (*Varadachariar, J.*) RAMAYYA *v.* BAPANAMMA. **160 I.C. 368 =8 R.M. 625=42 L.W. 790=A.I.R. 1936 Mad. 16.**

———*Widow—Surrender—Transfer to reversioner for consideration—Validity.*

Where a Hindu widow transfers for consideration by way of sale, the entire property of the husband to the next reversionary heir or to one of the reversionary heirs, the other reversionary heir not objecting and a major portion of the consideration passes to the widow, the transaction cannot be supported as having the same effect as a surrender. The idea of surrender by a widow in favour of the next reversioner is based on religious considerations. In order that the reversionary heir may acquire good title by surrender, there must be self-effacement of the widow; in other words, there must be something in the nature of civil death of widow, the extinction of her right in her deceased husband's estate, a circumstance which would happen if she were dead. It is in this view that the theory of surrender is supported under the Hindu Law. The surrender must be *bona fide* surrender and not a device to divide the estate between the widow and the reversioner, (*Mitter and Edgley, JJ.*) SANTI KUMAR PAL *v.* MUKUNDA LAL MONDAL. **62 Cal. 204=156 I.C. 209=7 R.C. 691=39 C.W.N. 226=60 C.L.J. 404=A.I.R. 1935 Cal. 20.**

———*Widow—Surrender—Validity of.*

Under Hindu Law as well as Customary Law a "life-tenant" holding property can no doubt surrender the estate and accelerate the succession of the next heir, but she can do so only if she completely effaces herself and relinquishes the entire estate to him. 17 P.R. 1902 and

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8 I.C. 558, Foll. (*Tex Chand, J.*) CHIRAGH *v.* GUL MAHOMED. **6 I.R. (Lah.) 218=146 I.C. 395= 34 P.L.R. 925=A.I.R. 1933 Lah. 279.**

———*Widow—Surrender — Validity — Conditions—Motives irrelevant.*

The motives operating on the mind of a Hindu widow when she surrenders her estate are not relevant in deciding the question whether the surrender is valid. The only two conditions for a valid surrender are: first, a surrender, must be of the surrenderer's whole interest in the estate in favour of the nearest reversioner or reversioners at the time of alienation and, secondly, it must be no device to divide the property between the lady and the reversioner, it being equally fatal to the transaction whether the benefit is directly taken by the lady or by her nominees, subject of course to the proviso that the giving of a small portion to the surrendering widow for her maintenance is unobjectionable. But there is no warrant for importing a third and further condition, namely, that the motives operating on the mind of the widow must be of a religious or spiritual character. (*Venkatasubba Rao, J.*) SUBBALAKSHMI AMMAL *v.* NARAYANA AYYAR. **58 Mad. 150=40 L.W. 196=1934 M.W.N. 932=152 I.C. 391=7 R.M. 220 (2)=A.I.R. 1934 Mad. 535=67 M.L.J. 179.**

———*Widow — Surrender — Validity—Insignificant part of estate left out—Effect of.*

Though a surrender should be of the entire estate held by the widow, a surrender to the reversioners is none the less a valid surrender if the property left out forms only an insignificant part of the estate and the terms of the deed of surrender substantially indicate an intention to convey the entire estate of the widow. A.I.R. 1928 Bom. 26, Foll (*D.N. Mitter and Narsing Rau, JJ.*) RAM KRISHNA PRODHAN *v.* KOUSALYA MANI DASI. **158 I.C. 925=8 R.C. 221 (2)=40 C.W.N. 208=62 C.L.J. 490=A.I.R. 1935 Cal. 689.**

———*Widow—Surrender—Validity of—Property in possession of alienees—Chances of having sale set aside —Omission to include in surrender, if material.*

The surrender by a widow, to be valid, must, no doubt, be of the entire property; *i.e.*, the surrender must be of the entire property then in the possession and enjoyment or control of the family. Even if some property has been left out by inadvertence, it may be repaired by a subsequent surrender. It cannot be the case in respect of properties that have been alienated away and are in possession of strangers that a widow surrendering her rights is required to mention all possible causes of action about them at the risk of finding her act invalid. (*Krishnan Pandalai and Curgenven, JJ.*) KRISHNAVENAMMA *v.* HANUMANTHA RAO. **6 I.R. (Mad.) 313=146 I.C. 1093=1933 M.W.N. 1010= 38 L.W. 773=A.I.R. 1933 Mad. 860.**

———*Widow—Surrender—Validity—Reservation for maintenance of widow and her daughter-in-law—Maintenance charged on particular property.*

By a deed of surrender executed in favour of her daughter, the widow made a provision for the maintenance (for life) of herself and her daughter-in-law by raising crop in particular survey numbers.

Held, that though a surrender by a widow of her estate as part of a *bona fide* compromise is not rendered objectionable merely by a stipulation that the widow is to retain a small part of the estate for maintenance, the surrender in the present case was invalid because (*i*) the reservation of a right of maintenance was not only for the widow but for a third party, *viz.*, her daughter-in-law; and (*ii*) neither the widow nor the daughter-in-law was entitled to a right of maintenance out of particular survey numbers. 42 M. 543 (P.C.);

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47 C. 466 (P.C.); 48 C. 100 (P.C.); 5 P. 290 (P.C.) and 47 B. 678, Ref.; 42 M. 854 (F.B.), Doubt. (*Beaumont, C.J. and Broomfield, J.*) GANGADHAR NARAYAN *v.* PRABUDDHA VASUDEO. **56 Bom. 410=I.R. 1933 Bom. 47=140 I C. 884=34 Bom.L.R. 1223=A.I.R. 1932 Bom. 625.**

Will.

———*Widow—Will—Invalid bequest — Consent of reversioners — Legatee's name entered in record-of-rights—Third party advancing loan to legatee—Estoppel of reversioners.*

Though a bequest by the widow of property inherited from her husband is invalid, yet where the next reversioners consented not only to the will but to the getting of the legatee's name entered in the record-of-rights and a third person has on the faith thereof advanced a loan to the ostensible owner, *i.e.*, the legatee, the reversioners are estopped from asserting their own title to the prejudice of the stranger. (*Niyogi, A.J.C.*) TEJMAL *v.* SAWAJI. **135 I.C. 407=I.R. 1932 Nag. 7=27 N.L.R. 283=A.I.R. 1931 Nag. 194.**

———*Widow—Will—Right to make — Consent of reversioner.*

A Hindu widow is incompetent to make a testamentary disposition of the property which devolves on her from her husband and the consent of the next reversioners cannot make a will by her valid. 55 Cal. 918 & 6 Pat. 788, Foll.; 5 Bom. 48 (P.C.), Rel.; 35 All. 337 (P.C.) and 48 All. 313 (P.C.), Dist. (*Niyogi, A.J.C.*) TEJMAL *v.* SAWAJI. **135 I.C. 407=I.R. 1932 Nag. 7=27 N. L.R. 283=A.I R 1931 Nag. 194.**

———*Widow—Miscellaneous—Savings by, from income —Rule as to—Applicability to the case of life tenant*

The rule as to savings by a Hindu widow from the estate inherited by her from a male propositus cannot be safely applied to the case of the powers of a life-tenant. (*Wazir Hasan, C.J. and Smith, J.*) HARI SARAN DAS *v.* HAR KISHEN DAS. **6 R.O. 648=150 I.C. 425=11 O.W.N. 917=A.I.R. 1934 Oudh 337.**

Wife.

———Wife—Mithila Law—Whether becomes a coparcener. *See* HINDU LAW—JOINT FAMILY. **A.I.R. 1933 Pat. 306.**

Will.

See also (1) JOINT FAMILY—COPARCENER AND WILL.
(2) WIDOW—NATURE OF ESTATE AND WILL.

———*Will—Absolute estate—Subsequent restriction of alienation—Validity of.*

Where in a deed of gift or will an absolute estate of inheritance is created in favour of a person, any subsequent clause which purports to restrict that interest is invalid, and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. The rule is the same even if the restriction is for limited period only. A Hindu testator declared in a will that his three sons were his heirs and were absolute owners, in equal shares, of his movable and immovable properties. But in a subsequent clause of the will, he tried to restrict their power of alienation and partition in respect of immovable properties until the youngest of them had attained majority.

Held, that this restriction is clearly repugnant to the absolute estate created in the earlier part of the will and is therefore invalid. (*Tek Chand and Monroe, JJ.*) UMRAO SINGH *v.* BALDEV SINGH. **14 Lah 353=I.R. 1933 Lah 371=143 I.C. 615=34 P.L.R. 665=A.I.R. 1933 Lah. 201.**

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———Will — Construction. *See also* WILL—CONSTRUCTION.

———*Will—Construction—Bequest contrary to Hindu Law—Exclusion of adopted son—Validity.*

A direction on a will excluding an adopted son from inheriting is void as it is contrary to the principles of Hindu Law. A will by a maternal grandfather excluding a son adopted by his daughter from succession would be contrary to the principles of Hindu Law and is therefore void. The position after the death of the daughter will be the same as if there had been an intestacy and the property will devolve according to the ordinary rules of inheritance. The adopted son will therefore succeed. (*Niyogi and Staples, A.J.Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042=8 R.N. 105=18 N.L.J. 1.**

———*Will—Construction—Bequest contrary to Hindu Law—Property to devolve on one person and his line, on failure of that line, to another and his line and so on—Series of absolute estates—Invalidity of.*

The testator provided that after the life of his wife, the property should go to his daughter and grand daughter and those in her line; if that line failed, to his grandson and his line; if that again failed, to his son's son's daughter and her line; and then his nephew and his line and then his niece and her line. In a suit by the nephew,

Held, (1) that even if it were construed as conferring an absolute estate in favour of the several legatees subject to defeasance on the happening of a subsequent event, the event should happen if at all immediately on the close of a life in being and the gift over must be in favour of some person in existence at the date of the gift or at the death of the testator, as the case may be, otherwise the gift over is void and the first donee takes an absolute estate Further the defeasance being an indefinite failure of a male issue in the line, the defeasance clause was void as it was not a valid executory gift. 9 M.I.A. 123 and 58 I.A. 270, Ref.; (2) that the intention of the testator was, however, that there should be successive absolute estates and estates in tail male in respect of each of the legatees mentioned in the will. That was an attempt to create a state of inheritance not recognised by Hindu Law; (3) that under the will, the grandson took an absolute estate and the subsequent provisions were invalid. (*Patkar and Nanavati, JJ.*) AMBALAL HARGOVIND *v* AMBALAL SHIVLAL. **34 Bom L.R 1506=I R. 1933 Bom. 66=141 I C. 327=A.I.R. 1933 Bom. 34.**

———*Will—Construction—Bequest to daughters.*

There is no presumption in regard to a daughter that in every case she takes less than what would be taken by a male. When there are words conveying an absolute estate, they could not be cut down by any supposed presumption, such presumption only arising when the document is uncertain or ambiguous. The testator gave life-estates to his two widows. If (as it happened) they did not exercise the power of adoption, the testator provided "that all the properties shall vest in my two daughters."

Held, that the will conferred an absolute estate on the daughters. (*Guha and M.C. Ghose, JJ.*) PROVABATI DEBYA *v.* SOROJINI DEVI. **36 C.W.N. 1015=142 I. C. 95=I.R 1933 Cal. 229=A.I.R. 1933 Cal. 72.**

———*Will—Bequest to daughter and after her life to her sons—Estate taken by daugther.*

A will by a Hindu, bequeathing properties to his daughter, and directing that after her lifetime her sons were to be entitled to the properties confers on the daughter only a life-estate and not an absolute estate.

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(*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) GUNDAPPA *v.* NARASAMMA. **12 Mys.L.J. 378=39 Mys.H C.R. 871.**

———*Will—Construction—Bequest to daughter's sons as members of joint family—Estate taken.*

The principle of I L.R. 25 Mad. 678 (P.C.) applies only to a case of succession and not to a devise by a maternal grandfather. A devise by a maternal grandfather in favour of several sons of one daughter living as members of joint family therefore passes the property to them as tenants-in-common and such property becomes their self-acquired property. The presumption of ancestral property does not arise where the devise is by a person other than the father of the donees. (Case-law discussed.) (*Ramesam and Curgenven, JJ.*) THAMBIREDDI SESHUREDDI *v.* MALLAREDDI. **158 I. C. 878=8 R.M. 370=1935 M.W.N. 1111=42 L.W. 422=A.I R. 1935 Mad. 852.**

———*Will—Construction—Bequest to daughter's sons —"Paida"—If includes adopted son.*

A Hindu testator directed in his will that if his daughter had sons, they would inherit all the property, but that if she had no sons, the surviving near relations in his family should succeed after the death of his daughter.

Held, that the word पैदा (*paida*) would refer only to a natural son and not to an adopted son and that the testator must be deemed to have intended only that his property should pass to his daughter's natural sons and not to an adopted son, although the testator cannot be held to have prohibited an adoption as he would have no power to do so. (*Niyogi and Staples, A. J. Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042=8 R.N. 105=18 N.L.J. 1.**

———*Will—Construction—Bequest to daughter—Life-estate—Grant for maintenance.*

Where in a will making a gift of certain properties to the daughter of the testator, the purpose of the grant is stated to be the maintenance of the grantee, that is a *prima facie* indication that the grant was intended to be only for her life. This conclusion is strengthened in a case, where no words of inheritance are used, no dispositive power is given and on the other hand, provision is expressly made, to whom the property would go on her death. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I C. 882=55 C.L J. 205=A.I.R. 1932 Cal. 600.**

———*Will—Construction—Bequest to members of joint family—Family itself not made unit or donee—Gift is not to family but to members individually.*

Where a gift is to the individual members of a family and equal shares are given to them and not to the family itself as a unit and as donee, it is not a gift to family but to the devisees individually. 23 Cal. 670, Rel. on ; 62 I.C. 814, Dist. (*Ramesam and Curgenven, JJ.*) THAMBIREDDI SESHUREDDI *v.* MALLAREDDI. **158 I.C. 878=8 R.M. 370=1935 M.W.N. 1111=42 L.W. 422=A.I.R. 1935 Mad. 852.**

———*Will—Construction—Bequest to "my sister and her male heirs and their descendants"—Nature of estate taken.*

Except in a case, where the donees in the absence of any testamentary disposition would have taken the property as ancestral property, they would take as tenants-in-common, unless a contrary intention is shown by the testator. If the property was in terms given to a joint Hindu family, the family will take it with all the incidents of ancestral or joint family property ; but if the gift is not to a joint family but to members of it individually, they would take it in severalty. Even in a case where a life estate is interposed, the property will be taken by the eventual donees as tenants-in-common and not as joint tenants. 49 Mad. 98 and 27 Mad. 300 (F. B.), Foll. (*Curgenven and Cornish, JJ.*) KRISHNASWAMI SASTRIGAL *v.* AVAYAMBAL AMMAL. **I R. 1933 Mad. 254=142 I.C. 721=A.I.R. 1933 Mad. 204.**

———*Will—Construction—Bequest to two sisters—Prohibition against partition—Provision for benefit of their sons after death of both—Forfeiture of one's interest on alienation—Nature of estate conferred—Right of sons.*

Where property is bequeathed to a female, a power to alienate is an essential incident of absolute interest in property. If no such power is conferred upon the donees, but there is a prohibition against partition and a provision for the benefit of their sons, the whole scheme of the will is that the property should remain in tact after the death of the donees for the benefit of their sons as the heirs of the testator. If one of the donees forfeited her interest, the other would get the whole. The sons should not come in, until both sisters are dead or excluded from the property. (*Addison, J.*) MT. BASANT KAUR *v.* MT. GULAB DEVI. **148 I.C. 443=6 R.L. 568=A.I.R. 1933 Lah. 583.**

———*Will—Construction—Bequest to widow—Absolute or limited estate.*

There is no presumption that a Hindu testator intended to confer only a limited estate on his widow. Where a testator devised to his widows half his properties which "they shall be entitled to and take the same."

Held, that the widows got an absolute estate under the will. Principles applicable in construction of Hindu wills stated. (*Ramesam and Cornish, JJ.*) KRISHNASWAMI AYYAR *v.* RAMACHANDRA RAO. **40 L.W. 302=153 I C. 1005=7 R.M. 387=A.I.R. 1934 Mad. 646=67 M.L.J. 821.**

———*Will—Construction—Bequest to widows and then to daughter—Gift over to daughter's sons—Provision that if daughter had no sons, the surviving near relation in his family should be heirs—Validity*

A Hindu executed a will in 1890 shortly before his death, and directed that after the death of his two wives, his daughter should inherit all his property as well as any that his wives might acquire. If the daughter had sons, they would become owners of the whole property, but if she had no sons, the surviving near relations in his family would be the heirs after the death of his daughter. His daughter became a widow in 1908 and had no issue. One of his widows died in 1897 and the other in 1918. In 1923 his daughter adopted a son.

Held, (1) that the gift in favour of the daughter's sons was invalid as it was a bequest to unborn persons ; (2) that the bequest to the surviving relations in the testator's family was void as being vague and indefinite ; and (3) that even if the testator intended to exclude an adopted son, such a direction would be void as being contrary to the principles of Hindu Law, and that the adopted son therefore succeeded to the estate to the exclusion of the reversioners, as if there had been an intestacy. (*Niyogi and Staples, A. J. Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042=8 R N. 105=18 N.L.J. 1.**

———*Will — Construction — Bequest to widows as 'maliks'—Provision for subsequent devolution of estate—Absolute estate.*

If an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after, or on the termination of, that

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donee's interest, his absolute interest is not cut down and the futher interests fail. Where from the fact that the testator constituted the legatees (who were Hindu widows) "maliks" of his property after him with full powers of alienation, his intention was clearly to confer an absolute estate on them, a subsequent clause providing for a gift over is inoperative and ineffective to cut down the absolute estate. (*Tek Chand and Monroe, JJ.*) PARTAP CHAND *v.* MT. MAKHNI. **14 Lah. 485 = I.R. 1933 Lah 521 = 144 I.C. 651 = 34 P.L.R. 73 = A I.R. 1933 Lah. 365.**

[**Disc.** 16 P.L.T. 245 (251).]

———*Will—Construction—Bequest to wife.*

A Hindu testator directed that certain property should be enjoyed by hir mother during her lifetime and that after her death his son and wife should enjoy it. It futher provided that 12 annas out of it should be given to his son and 4 annas to his wife.

Held, that the bequest to the wife was in the same words as that to the son and that the former took an absolute estate in the property bequeathed. (*Patkar, J.*) NAGASI *v.* ANANDJI **35 Bom.L.R. 952 = 147 I.C. 770 = 6 R.B. 219 = A.I.R. 1933 Bom. 445.**

———*Will—Construction—Bequest to wife—Absolute or limited estate—"Power to make sale or gift for valid reasons."*

Where the testator provided in paragraph 1 of his will that his wife "shall become the owner and possessor in absolute right having equal and same powers as myself with full powers to make sale or gift for valid reasons". Para. 4 provided for subsequent devolution of the properties in the event of the widow failing to make an adoption.

Held, that the intention of the testator was not to create an absolute interest in favour of the widow with unrestricted powers of transfer but to enable her to enjoy the properties for her life with powers to alienate the same or portion thereof, if there be any legal necessity for such alienation. (*Nasim Ali, J.*) ANNADA SUNDARI GUPTA *v.* RATAN RAM DEB. **149 I C. 824 = 6 R.C 635 - 58 C L.J. 499 = A.I.R. 1934 Cal. 370.**

———*Will—Construction—Bequest to wife—Full ownership in movables according to law—Estate taken—Bequest by implication.*

A testator by his will provided: "on my demise my wife shall become full (absolute) owner of my entire movable properties according to law, consequently there is no necessity for any will in respect of the same also. The copyright to my books is reckoned among movable properties".

Held, (1) that there was no gift by implication of the copyright in the books by reason of the recital with regard to the position of the wife in law, that the copyright did not pass under the will to the widow, and therefore she had in the copyright no more than a Hindu widow's interest, as on intestacy, the testator having categorically and unequivocally stated that he did not intend to touch the movables by his will; (2) that the Court could not take upon itself the task of deciding what the testator's real intention was. (*Costello and Lort Williams, JJ.*) SATISH CHANDRA MUKHERJEE *v.* NILADRI NATH MUKHERJEE. **39 C.W.N. 237 = 160 I.C 124 = 8 R.C. 403 = A.I.R. 1935 Cal. 788.**

———*Will—Construction—Bequest to wife—Grant of absolute right—Gift over to named person—Validity.*

A Hindu testator provided in his will: "After my death, my wife *P*, enjoying with all powers of alienation by gift, exchange or sale the movable and immovable properties belonging to me....shall herself discharge the debts payable by me....I have hereby given full authority to the said *P* for effecting sales, etc., after my death....If after the alienations that may be made by my wife....there may be any property movable or immovable left at the time of her death the same shall be taken after her death by *N*."

Held, *P* took an absolute estate under the will, but if she did not dispose of the property during her lifetime or by will, the property would pass to *N*, and that the bequest to him was not therefore void for repugnancy or uncertainty. (*Stone and Pakenham Walsh, JJ.*) THAVALAI ACHI *v.* KANNAMMAL. **156 I.C. 846 = 8 R.M. 67 = 1935 M.W.N. 562 = 41 L.W. 604 = A.I.R. 1935 Mad. 704 = 68 M.L.J. 707.**

———*Will—Construction—Bequest to wife—Legatee to take in case no son born of her—Power to will or gift in favour of descendants of specified person—Power to adopt son from among such descendants—Prohibition against will or gift to any other person—Construction—Estate taken—Power to mortgage, sell or lease—If conferred—Absolute estate, if conferred.*

A Hindu *talugdar* of Oudh who had made an irrevocable declaration under S. 10 of the Oudh Settled Estate Act (1900), executed a will bequeathing all his property to the son who might be born from his wife *M* but if no son were born to her, the property was to go to *M* as owner or *malik*. He authorised *M* to make a will in favour of any descendant of *RS*. He also gave her power to adopt a son from among the descendants of *RS* or to make a gift of the property to such a person, but he directed that *M* had no power to make a gift or will in favour of any other person. The testator died without any son being born to him from *M*.

Held, (1) that *M* took an absolute estate in the properties and not merely a life-estate as Hindu widow; (2) that though the testator purported to cut down *M's* absolute power of bequest or gift, there was no attempt to cut down her power of making other transfers, such as sales, mortgages, or leases, and according to the principle of "*expressio unius est exclusio alterius*." *M's* power to make such transfers was not restricted; (3) that the existence of these powers of bequest and gift, though restricted, was inconsistent with the notion of a life-estate; (4) that the power of adoption conferred on *M* was not inconsistent with the notion an absolute estate. (*King, C.J. and Zia-ul-Hasan, J.*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **10 Luck. 606 = 153 I C. 878 = 7 R O. 409 = 1935 O.W.N. 68 = A.I.R. 1935 Oudh 198.**

———Will—Construction—Bequest to wife—Limited power of disposition—Devolution after her life indicated—Widow's estate taken. *See* HINDU LAW—WIDOW—NATURE OF ESTATE. **59 Cal. 859 = A.I.R. 1932 Cal. 600.**

———*Will—Construction—Clear language.*

One cardinal principle in the construction of wills is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. 24 Cal. 304, Ref. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859 = I.R. 1932 Cal. 540 = 138 I.C. 882 = 55 C.L.J. 205 = A.I.R. 1932 Cal. 600.**

———*Will—Construction—Bequest to woman—Estate taken—"Malik"—Presumption of absolute estate—Express power of alienation—Necessity.*

The word "malik" in a will executed by a Hindu imports full proprietary rights, unless there is something in the context to qualify it. The mere fact that the donee or legatee happens to be a Hindu woman does not displace the presumption of absolute ownership implied by the use of the word "malik". It is not necessary that the power of alienation should be expressly

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conferred on the legatee. (*King, C.J. and Zia-ul-Hasan, J.*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **10 Luck. 606=153 I.C. 878=7 R.O. 409=1935 O.W.N. 68=A.I.R. 1935 Oudh 198.**

———*Will—Construction—Gift over "in the event of any sons dying without leaving male issue him surviving"—Death issueless, at any time and not merely in testator's lifetime—Succession Act, Ss.* 131 *and* 124.

The testator, a Hindu governed by the Dayabhaga Law, executed a will, bequeathing the whole of his residuary estate to his sons in the manner following:—"I devise and bequeath the whole of my estate—in trust for such of my sons as shall be living at my death—and also for the son or sons of such of my sons as shall then be dead (such son or son taking the share their or his father would have taken hereunder, had they or he been then alive)—equally as tenants in-common and the said sons or sons of my sons taking equally *per stirpes* as tenants-in-common, but nevertheless in the event of any sons or sons' son, dying without leaving lineal male issue, him surviving, the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law". The testator died in 1904, leaving his widow and two sons *S* and *A* him surviving. The elder son *S* died in 1930 intestate without any male issue, but leaving him surviving his widow (the plaintiff) as his sole heiress under the Dayabhaga Law and an infant daughter. The plaintiff thereupon brought the present suit against the surviving son *A*, claiming that on a true construction of the will, her husband *S* had become absolutely entitled to his equal half share of the residuary estate, and that on his death intestate, his half share devolved upon herself as sole heiress.

Held (negativing the plaintiff's contention) that, on a true construction of the will as a whole, S. 131 and not S. 124 of the Indian Succession Act, 1925, was applicable and that the half-share of *S*, on his death without male issue, passed under the gift over to the younger son *A* (the defendant). The words "dying without leaving lineal male issue him surviving" are *prima facie* to be construed in their literal significance as referring to death at any time, and not merely in the lifetime of the testator. The question is one entirely of intention and though this rule of interpretation will yield to any sufficient intention to a contrary effect to be found in the language of the will taken as a whole, there was in the will in dispute no indication of a contrary intention sufficient to displace the *prima facie* meaning of the words used in that clause. (*Lord Blanesburgh.*) INDIRA RANI *v.* AKHOY KUMAR. **59 I.A. 419=60 Cal. 554=37 L.W. 1=1933 A L J. 382=14 Pat.L.T. 101=35 Bom.L R. 211=I.R. 1932 P.C. 327=140 I.C. 433=56 C.L J. 423=9 O.W.N. 1113=1932 M.W.N. 1301=37 C.W.N. 153=A.I.R. 1932 P.C. 269=64 M.L J. 48 (P.C.).**

———*Will—Construction—Gift over—Validity.*

Within certain limits it is competent to a Hindu to provide for the disfeasance of a prior absolute estate contingently upon the happening of a future event. Where the relevant clauses of the will were the following: "The children which may be born to me shall after my lifetime enjoy with all rights, the properties in Schedules A and B, mentioned below after my lifetime. Till such children attain majority, the aforesaid *K* (plaintiff) himself is to act as executor, and when the minors attain majority, he is to deliver the aforesaid properties. If the aforesaid minors should happen to die or if no children should be born, the aforesaid *K* . . . . . shall take them with all rights and enjoy the same."

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Held, that gift over clause could not be read in any sense other than as referring to the death of the children during their minority and that the gift over was valid. (*Varadachariar, J.*) KANNIAH NAIDU *v.* MANICKAM PILLAI. **154 I.C. 433=7 R.M. 430=41 L.W. 100=1935 M.W.N. 618=A.I.R. 1935 Mad. 86=68 M.L.J. 144.**

———*Will—Construction—Rules of—Reference to other wills—Propriety of.*

It is always dangerous to construe a will by the construction of more or less similar words in a different will, which was adopted by a Court in another case. The question in each case is what was the paramount intention of the testator as expressed in the will taken as a whole (*Nasim Ali, J.*) ANNADA SUNDARI GUPTA *v.* RATAN RAM DEB. **149 I.C. 824=6 R.C. 635=58 C.L.J. 499=A.I.R. 1934 Cal. 370.**

———Will—Construction—Trust for charities or only a charge on estate. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **A.I.R. 1933 Mad. 204.**

———*Will—Construction—Will in English language—Rigid construction of the language to be avoided.*

Wills of people speaking a different tongue, trained in different habits of thought, and brought up under different conditions of life, though executed in the English language and character, must not be interpreted by the application to them of a too rigid construction of the English language. This rule must be particularly borne in mind if it appears that a rigid construction would lead to consequences operating to confer benefits outside the scope of or directly opposed to the scheme of distribution intended by the testator. (*Lord Blanesburgh*) INDIRA RANI *v.* AKHOY KUMAR. **59 I.A. 419=60 Cal. 554=37 L.W. 1=14 P.L.T. 101=1933 A.L J. 382=35 Bom L R 211=I.R. 1932 P.C. 327=9 O.W.N. 1113=56 C.L.J. 423=1932 M.W.N 1301=37 C.W.N. 153=140 I.C 433=A I.R. 1932 P. C. 269=64 M.L.J. 48 (P.C.).**

———*Will—Contingent interest, vested interest and* spes successionis—*Meaning of.*

An estate or interest is vested, as distinguished from contingent, either when enjoyment of it is presently conferred or when its enjoyment is postponed, the time of enjoyment will certainly come to pass; in other words an estate or interest is vested when there is an immediate right of present enjoyment or a present right of future enjoyment. An estate or interest is contingent, if the right of enjoyment is made to depend upon some event or a condition, which may or may not happen or be performed, or if in the case of a gift to take effect in the future, it cannot be ascertained in the meantime, whether there will be any one to take the gift; in other words, an estate or interest is contingent, when the right of enjoyment is to accrue, on an event which is dubious or uncertain. And as regards certainty, the law does not regard as uncertain the event of a person attaining a given age or of the death of somebody beyond which his enjoyment is postponed; because if he lives long enough, the event is sure to happen. A *spes successionis* is merely an expectation or hope of succeeding to property, a chance or possibility which may be defeated by an act of somebody else. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C. 882=55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

———*Will—Oral will—Proof of—Nature of evidence necessary.*

Only the clearest and most cogent proof should be accepted of a nuncupative will. He, who rests his title on it, is bound to prove with the utmost precision, the

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words on which he relies, with every circumstance of time and place The propriety of the contents of the alleged oral will does not make it any the less necessary for the Court to be on its guard and to scrutinise closely the evidence of execution. 62 M.L.J. 23 (P.C.), Ref. (*Curgenven and Sundaram Chetty, JJ.*) RAMANUJA CHARYULU *v.* NARASAMMA. **1933 M.W.N. 1118.**

———*Will—Religious endowment—Life estate and estate of inheritance—Words of description and words of inheritance.*

A Hindu by his will appointed his sons *K C* and *R C* as shebaits of a Thacoor and directed that upon the death, retirement or refusal to act of any of them or any of the future *shebaits*, "the then next eldest male lineal descendants of *K C* or *R C* shall act as *shebait*" in place of the deceasad or retiring or refusing *shebait*, "it being my intention that the eldest for the time being in the male line of my sons *K C* and *R C*, shall always remain as joint *shebaits*", etc. *K C* and *R C* died leaving *L* and *N* as their eldest sons besides others.

Held, that the testator did not intend to give either *K C* or *R C*, an estate of inheritance or an absolute estate, but at most only a life estate; that the words "eldest male lineal descendant," could be construed, so far as they affected *L* and *N*, only as words of description and not as words of inheritance, and that *L* and *N* took independent life estate, as persons who happened to answer the description of eldest male lineal descendants of *R C* and *K C*. (*Costello and Lort Williams, JJ.*) LAL BEHARY DHUR *v.* THE ADMINISTRATOR-GENERAL OF BENGAL. **156 I C. 1071 = 7 R.C. 670 = 39 C.W N. 46 = A.I R. 1935 Cal 284.**

———Will—Religious endowment—Provision to office of shebait—Provision for succession of eldest in male line—Invalid. *See* HINDU LAW—RELIGIOUS ENDOWMENT. **A.I.R. 1935 Cal. 284.**

———Will—Religious endowment—Succession to office of shebait. *See* HINDU LAW—RELIGIOUS ENDOWMENT. **39 C.W.N. 1264 = 61 Cal. 393 = A.I.R. 1935 Cal. 284.**

———*Will—Sonless Hindu—Power to bequeath ancestral property—Customary law of Kumaun.*

Under the Mitakshara Law, a Hindu, who has no issue, is competent to make a will in respect of ancestral property. In this respect, the customary law of Kumaun is in agreement with the Hindu Law. (*Thom and Rachhpal Singh, JJ.*) ALMU SAH *v.* KUNDAN SAH. **147 I C. 826 = 6 R.A. 572 = 1933 A.L.J. 1366 = A.I R. 1933 All 916.**

———*Will—Validity—Separate though ancestral property—No issue but adoption authorised.*

Where the deceased had no male descendant at the date of the will and the properties were not coparcenary properties but separate though ancestral, he cannot be said to be incompetent to make a will in respect of them, simply for the reason that he was governed by the Mitakshara law. Nor can it be said that because an adoption by the widow after the testator's death was in contemplation and was authorised by the testator, the validity of the disposition by the will is in any way affected; for the will speaks at the date of the testator's death and the property is carried away, before the adoption takes place. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY **59 Cal. 859 = I.R. 1932 Cal. 540 = 138 I.C. 882 = 55 C.L J. 205 = A. I.R. 1932 Cal 600.**

———*Will—Validity—Uncertainty of object—Bequest for* dharmath, *Dharamsala and Sanskrit education.*

Where a testator bequeathed property for *dharmath*, a *dharamsala* and Sanskrit education,

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Held, that the bequest for *dharmath* was void for uncertainty and as the remaining bequests were joined with the bequest for *dharmath* and as the trustees could apply the funds to any one of the objects, the entire bequest was rendered invalid on account of their co-relation with the bequest for *dharmath* even though the other two bequests individually are valid bequests. Though the conjunctive word 'and' is used, the three objects of the trust must be read disjunctively as it is left to the discretion of the trustees, to apply the trust funds as they may think proper, and it is left to the trustees to apply them to all the three objects or to one or two of them and in such proportion as they may desire. (*Jai Lal and Abdul Rashid, JJ.*) BRIJ LAL *v.* NARAIN DAS. **35 P.L.R. 11 = 6 R. Lah. 303 = 146 I.C. 1013 = 14 Lah. 827 = A.I.R. 1933 Lah. 833.**

———*Will—Validity—Vague and indefinite bequest—Bequest to relations generally.*

A general bequest in favour of relations of the testator who may be alive at a future time is void under the Hindu Law as being vague and indefinite. (*Niyogi and Staples, A.J.Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042 = 8 R N. 105 = 18 N.L.J. 1.**

———Will—Vested interest—Meaning of. *See* WILL—CONTINGENT INTEREST, VESTED INTEREST, AND SPES SUCCESSIONIS, *supra*. **59 Cal. 859 = A.I.R. 1932 Cal. 600.**

———*Will—Vested interest or* spes successionis—*Properties to be taken by adopted son after widow—Interest of adopted son—Relinquishment—Validity of.*

A will provided as follows: "After my death, my widow being in possession as owner of all properties shall administer and enjoy the same and having re paid all my debts (for which she can sell a portion of the properties), she will be competent to adopt. On the death of my widow, my adopted son,—if adopted—will get all the properties. During the lifetime of my widow, the adopted son will get an allowance of Rs. 20 a month from my widow."

Held, that though the estate remained vested in the widow till her death and the adoption of a son did not divest her of the estate, the interest of the adopted son was nevertheless a vested interest in the remainder capable of being transferred under the law—and not a mere *spes successionis*. So, if the adopted son had, for valuable consideration, agreed to forego his right to some of those properties and convey an absolute title therein to the widow of the testator, the deed would be operative both as a relinquishment and as creating an estoppel. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859 = I.R 1932 Cal. 540 = 138 I.C. 882 = 55 C.L.J. 205 = A I.R. 1932 Cal. 600.**

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See also HINDU LAW.

(1) FAMILY ARRANGEMENT.
(2) GIFT.
(3) PARTITION.
(4) STRIDHANAM.
(5) WIDOW—NATURE OF ESTATE.
(6) WILL.

———*Women's property—Life estate—Property allotted to mother-in law for maintenance.*

Where in a dispute between a Hindu widow and her mother in-law, an award was made which recited that the property left by the deceased should be taken by his widow except for a moiety, which should be allotted to the mother in-law in lieu of her maintenance, and the latter having died, the reversioners sued for recovering possession of the same.

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Held, the widow was willing to forego part of the estate for the period of the lifetime of her mother in-law, it was only a maintenance grant for life and that the mother in-law obtained only a limited estate in the property allotted to her and the reversioner's suit was not maintainable. (*Suhrawardy and Costello, JJ.*) GAURI SHANKAR PODDAR *v.* GURUPADA HALDAR. **I.R. 1931 Cal. 577 = 132 I.C. 625 = 35 C.W.N. 66 = A.I.R 1931 Cal. 511.**

———*Women's property—Mother—Right in property inherited.*

The rights of a woman succeeding to property as a mother are exactly the same under the Hindu Law as those of one succeeding as a Hindu widow. (*Raza and Allsop, JJ.*) BRIJ MOHAN SINGH *v.* MT. RACHHPAL KUAR. **147 I.C. 210 = 6 R.O. 253 = 10 O.W.N. 934 = A.I.R. 1933 Oudh 426.**

HINDU LAW OF INHERITANCE (AMENDMENT) ACT (II OF 1929)—*If retrospective.*

The Hindu Law of Inheritance (Amendment) Act (II of 1929) is not retrospective and cannot therefore, be applied to determine the succession which opened out in 1921. (*Bennet, J.*) KANHAIYA LAL *v.* MT. CHAMPA DEVI. **153 I.C. 545 = 7 R.A. 536 = 4 A.W.R. 1458 = A.I.R. 1935 All. 203.**

———*Object—Position of sister.*

The Inheritance (Amending) Act was designed not only to give a sister a higher position in the order of succession than she previously held in provinces where she was already an heir but also to constitute her an heir even in provinces, where she was not previously an heir according to the prevailing view of Hindu Law. (*Raza and Smith, JJ.*) MAHABIR SINGH *v.* MT. RADHA. **150 I.C. 533 = 7 R.O. 27 = 10 O.W.N. 424 = A.I.R. 1933 Oudh 231.**

———*Operation—Not retrospective—Scope of its application.*

The Act is not retrospective. It is intended to apply only to cases of Hindu intestate males who died after the passing of the Act. It does not apply to a case of a Hindu who died before the Act, even though because of the intervention of a life-estate, the succession opened after the passing of the Act. 13 Lah. 178 and 1930 A. L.J 384, Diss.; A I.R. 1933 Lah. 777, Appr. (*Sundaram Chetty and Pakenham Walsh, JJ.*) KRISHNA CHETTIAR *v.* MANICKKAMMAL. **1933 M.W.N. 1404 = 57 Mad. 718 = 147 I.C. 1139 = 39 L.W. 73 = 6 R.M. 417 = A.I.R. 1934 Mad. 138 = 66 M.L.J. 70.**

———*Scope.*

Act II of 1929 is not retrospective and a sister is not an heir where the Hindu male through whom she claims died before the passing of the Act. (*Dalip Singh, J.*) MT. JANKI *v.* MT. SATTAN. **6 I.R. (Lah.) 243 (1) = 146 I.C. 511 (1) = 34 P.L.R. 964 = A.I.R. 1933 Lah. 777 (1).**

———*Widow in possession—Date for determining succession.*

Where a widow is in possession of her husband's estate as a limited owner, the question whether certain persons are heirs under Act II of 1929 depends on the date of the death of the widow and not on the date of the death of the last male-holder. In such cases the question is not whether Act II of 1929 is retrospective. (Cases referred.) (*Courtney-Terrell C.J.*) CHULHAN BARAI *v.* MT. AKLI BARAINI. **150 I.C. 1039 = 7 R.P. 68 = 15 Pat.L.T. 707 = A.I.R. 1934 Pat. 324.**

———**S. 2—"*Sister*".**

The word "sister" in S. 2 does not include a half sister either uterine or consanguine. (*Sulaiman, C.J., Mukerji and King, JJ.*) RAM ADHAR *v.* MT. SUDESRA. **6 I.R. (All.) 117 = 145 I.C. 529 (1) = 1933 A.L.J. 680 = A.I.R. 1933 All. 491 (F.B.).**

HINDU TRANSFERS & BEQUESTS ACT (1921).

———**S. 2—"*Sister*"—*It includes half sister.***

The word "sister" as used in S. 2 must be interpreted according to the plain meaning of the word in the English language, which ordinarily means a sister of the full blood. (*Srivastava, J.*) KABOOTRA *v.* RAM PADARATH. **11 Luck. 148 = 155 I.C. 94 = 7 R.O. 553 = 1935 O.W.N. 545 = A.I.R. 1935 Oudh 332.**

———**S. 2—*Sister in Bombay—Right if modified by Act.***

The object of the Inheritance Amendment Act was to legalise the position of certain heirs including the sister and it was not intended to change for the worse the position which the sister holds in the Bombay Presidency.

Held, that the sister was the preferential heir to the brother's widow. (*Baker and Rangnekar, JJ.*) SHIDRAMAPPA NILAPPA UJALAMBE *v.* NEELAVABAI CHANBASSAPPA. **57 Bom. 377 = 6 I.R. (Bom.) 20 = 144 I.C. 925 = 35 Bom.L.R. 397 = A.I.R. 1933 Bom. 272.**

———**S. 2—*Sister—Right to succeed to mother's estate.***

A sister is an heir and is entitled to succeed to the estate inherited by mother, as such, after her death. (*Iqbal Ahmad and Kisch, JJ.*) RAM TAWAKAL TEWARI *v.* MT. DULARI. **154 I.C. 412 = 7 R.A. 756 = A.I.R. 1934 All. 469.**

———**S 2—*Sister's son—Preferential right over collateral—Act taking effect during pendency of litigation—Effect.***

K gifted certain property inherited from her son to her daughter's son. In April, 1925, the reversioners obtained a decree to the effect that the gift did not affect the reversioner's rights. The donee preferred an appeal and during its pendency Act II of 1929 came into force. The donor being alive,

Held, that the suit should be dismissed because under the new Act the donee was entitled to succeed *K* in preference to the plaintiffs.

Semble:—Had *K* died before the Act came into force the position would have been different. (*Harrison and Tek Chand, JJ.*) SHIB DAS *v.* NAND LAL. **13 Lah. 178 = I.R. 1932 Lah. 454 (1) = 138 I.C. 291 = 33 P.L.R 423 = A.I.R 1932 Lah 361.**

[Diss. 57 M. 718 (724). Rel. 15 P.L.T. 707 (711).]

———**S. 3 (a)—*Sisters—Exclusion from inheritance—Custom.***

A custom in its legal sense is some established practice at variance with the general law The practice by which sisters were excluded from inheritance in Oudh is merely in accordance with Hindu Law as interpreted there and hence it is not a special custom within the meaning of S. 3 (*a*) of Act II of 1929 so as to exclude sisters from inheritance after the passing of the Act. (*Raza and Smith, JJ.*) MAHABIR SINGH *v.* MT. RADHA. **150 I.C. 533 = 7 R.O. 27 = 10 O.W.N. 424 = A.I.R. 1933 Oudh 231.**

HINDU TEMPLE. *See* HINDU LAW—RELIGIOUS ENDOWMENT.

HINDU TRANSFERS AND BEQUESTS ACT (VIII OF 1921)—*Effect of, on Hindu Wills Act—Applicability of S.* 100, *Succession Act* (1865), *if taken away.*

Whatever may be the reason for the omission of S. 100, Succession Act (1865) (corresponding to S. 113 of Succession Act of 1925) from Act VIII of 1921, the express declaration in S. 2, Hindu Wills Act, making S. 100 applicable to Hindu wills in the City of Madras cannot be held to have been taken away by reason of snch omission. This will be carrying the doctrine of repeal by implication far beyond its legitimate limits. (*Beasley, C.J. and Varadachariar, J.*) KUPPUSWAMI

HINDU TRANSFERS & BEQUESTS ACT (1921).

PILLAI *v.* JAYALAKSHMI AMMAL. **58 Mad. 15=154 I.C. 537=7 R.M. 439=40 L.W. 570=1934 M.W.N. 488=A.I.R. 1934 Mad. 705=67 M.L.J. 525.**

———*Will—Bequest void under Succession Act—If validated.*

A bequest in a will which is void under S. 100, Succession Act (1865), is not validated by Act VIII of 1921. This Act does not cure or prevent the invalidity. (*Beasley, C. J. and Varadachariar, J.*) KUPPUSWAMI PILLAI *v.* JAYALAKSHMI AMMAL. **58 Mad. 15=154 I.C. 537=7 R.M. 439=40 L.W. 570=1934 M.W.N 488=A.I.R. 1934 Mad. 705=67 M.L.J. 525.**

HINDU WIDOWS' RE-MARRIAGE ACT (XV OF 1856)—*Applicability—Widow already entitled to re-marry.*

The Act was intended to render re marriage valid and to legalize the legitimacy of children. It conferred a benefit on those who could not re-marry but at the same time imposed a restriction on them. It was not intended to deprive those who already possessed the right to re-marry, of whatever rights they enjoyed in their deceased husband's properties. (*Sulaiman, C.J., Mukerji and King, JJ.*) BHOLA UMAR *v.* MT. KAUSILLA. **55 All. 24=I R. 1933 All. 1=140 I.C. 631=1932 A.L.J. 941=A.I.R. 1932 All. 617 (F.B.).**

———**S. 2**—*Alienation by widow—Subsequent re-marriage—Effect of.*

An alienation by a Hindu widow of the property of her deceased husband for purposes not binding on the estate ceases to be effective on her re marriage, even if such re marriage be permitted by the custom of her caste and the next reversioner is entitled, on her re-marriage, to possession of the property as against the alienee. The effect of the section is this—that, on the re-marriage of the widow, the next heirs shall succeed to the husband's property, which must be his property unaffected by any alienation which the widow could make but which would bind not the husband's estate but only her own interest in it. The intention of the section is that a Hindu widow who marries a second time shall no longer derive any benefit from her first husband's estate but that the benefit of that estate shall go to the next reversioner. There is no analogy as regards the rights of the alienee between surrender and re-marriage. (1911) 1 M.W.N. 82, Foll.; 8 C.L.J. 542, 26 Mad. 143 and 19 Cal. 289, Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) VIJIARAGHAVA PILLAI *v.* PONNAMMAL. **4 L.W. 967=1931 M.W.N. 1257=135 I.C. 573=I.R. 1932 Mad. 157=A.I.R. 1932 Mad. 120=62 M.L.J. 131.**

———**S. 2**—*Applicability — "Any widow"—Widow embracing Mahomedanism and marrying Mahomedan —If forfeits estate.*

The expression "any widow" in S. 2 of the Act includes all widows who being Hindus became widows and is wide enough to cover the case of such a widow re marrying a Hindu or a member of another religion. A Hindu widow who therefore becomes a convert to Mahomedanism and then marries a Mahomedan forfeits whatever interest she has in her husband's property. S. 2 would apply to her notwithstanding her renunciation of faith and subsequent marriage with a non-Hindu. (*Murphy and Sen, JJ.*) RAGHUNATH *v.* LAKSHMI BAI **59 Bom. 417=157 I.C. 658=8 R.B. 78=37 Bom.L.R. 150=A.I.R. 1935 Bom 298.**

———**S. 2**—*Applicability—Re-marriage permitted by custom.*

A Hindu widow, when she re marries loses the estate which she had inherited from her deceased Hindu husband even though, in the particular sect to which she belongs, the re-marriage of a widow is permitted.

HOLDING OUT.

(*Varma, J.*) NAWAB SINGH *v.* GAURI SHANKAR MAHTO. **154 I.C. 875=7 R.P. 502=A.I.R. 1935 Pat. 58.**

———**S. 2**—*Marriage by custom—Forfeiture of estate.*

S. 2 does not apply to the case of those widows who are entitled under the custom of their caste to re-marry and are not bound to take advantage of the provisions of the Act. Accordingly, there is no forfeiture of the Hindu widow's estate on re-marriage under the Act in such a case nor can such forfeiture ensue as a matter of equity as it is against natural justice. The proof of mere custom of re-marriage would not be sufficient to involve forfeiture under the Hindu Law and that it would be necessary for the party claiming that the estate has been forfeited on account of re marriage to prove that there is a custom of such forfeiture in such a contingency. (Case-law discussed.) (*Sulaiman, C.J., Mukerji and King, JJ.*) BHOLA UMAR *v.* MT. KAUSILLA. **55 All. 24—140 I.C. 631=1932 A.L.J. 941=I.R. 1933 All. 1=A.I.R. 1932 All. 617 (F.B.).**

———**S. 3**—*Effect of re-marriage on mother's right of guardianship.*

Under Hindu Law the mother is, after the father, the natural and legal guardian of her children and she does not lose her right by re marriage in cases when such re-marriage is recognised as valid by custom. To such cases S. 3 was obviously not intended to apply. And even under the Act, the mother is not considered to be physically dead and may, in appropriate cases, be appointed as guardian though not in her own natural right, but where it is for the welfare of the minor to do so. 1 Lah. 146 and 38 Cal. 862, Ref. (*Tek Chand, J.*) RAM LABHAI *v.* DURGA DAS. **15 Lah. 28=35 P.L.R. 30=147 I.C. 19=6 R.L. 351=A.I.R. 1933 Lah. 817.**

HINDU WILLS ACT (XXI OF 1870)—*Will prior to Act—Executor—Powers of.*

In the case of a will executed before the Hindu Wills Act came into force, the mere appointment of an executor did not cause any property to vest in him and if, as an executor, he was entitled to hold the property, he held it only as a manager. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C. 882=55 C.L.J. 205=A I.R. 1932 Cal 600.**

———**Ss. 2 and 3**—*Scope and effect of.*

The combined effect of Ss. 2 and 3 of the Hindu Wills Act is that a disposition permitted by the Succession Act may be invalidated, but a disposition invalid under the Succession Act cannot be validated by any rule of Hindu Law. (*Beasley, C.J. and Varadachariar, J.*) KUPPUSWAMI PILLAI *v.* JAYALAKSHMI AMMAL. **58 Mad. 15=154 I.C. 537=7 R.M. 439=40 L.W. 570=1934 M.W.N. 488=A.I.R. 1934 Mad. 705=67 M.L.J. 525.**

HIRE PURCHASE.

See (1) CONTRACT—HIRE PURCHASE.
(2) DEED—CONSTRUCTION.

HISSEDARI KASHT. *See* PUNJAB TENANCY ACT (1887), S. 15.

HOLDER. *See* NEGOTIABLE INSTRUMENTS ACT (1881), SS. 8, 37 AND 78.

HOLDING.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, SS. 105-117.

HOLDING OUT.

See (1) PRINCIPAL AND AGENT—HOLDING OUT.
(2) HUSBAND AND WIFE.

HOLDING OVER.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) T. P. ACT, SS. 106, 107, 110, 111 (h) AND 116, ETC.,

HONG KONG LAND REGISTRATION ORDINANCE (1844), S. 4—Deed of absolute sale—Mortgage by purchaser—Evidence by vendor to show that sale was "make believe", inadmissible. *See* EVIDENCE ACT, S. 92. **1932 A C. 715=63 M.L J. 418 (P.C.).**

HONOURABLE ACQUITTAL. *See* CR. P. CODE, S. 258. **61 Cal. 168=A.I.R. 1933 Cal. 800.**

HONORARY MAGISTRATE. *See* CR. P. CODE, S. 15.

HOROSCOPE. *See* EVIDENCE ACT, S. 32.

HOSTILE WITNESS. *See* EVIDENCE ACT, S. 154.

HOUSE BREAKING. *See* PENAL CODE, SS. 445 AND 457, ETC.

HOUSE TRESPASS. *See* PENAL CODE, SS. 442, 448 AND 457, ETC.

HUNDI. *See* NEGOTIABLE INSTRUMENTS.

HURT. *See* PENAL CODE, SS. 319—338.

HUSBAND AND WIFE—*Advancement—Presumption of—Shares in joint name of husband and wife.*

Per *curiam.*—If a husband enters any shares in the names of himself and his wife, then it is an advancement for the benefit of the wife, absolutely if she survives her husband. Hence on the wife's survival, such shares are her absolute property and not the property of her deceased husband. In an application for probate, the wife then is not liable to pay court-fees either on the whole or the half of the value of the shares and the shares are not required by law to be set forth in the annexure of the form referred to in S. 19-I of the Court Fees Act. (English cases considered.) (*Wazir Hasan, C.J. and Nanavutty, J.*) DEPUTY COMMISSIONER, LUCKNOW *v.* AIKMAN. **9 Luck. 370=6 R. O. 387=148 I C. 247=11 O.W.N. 78=A.I R. 1934 Oudh 72.**

———*Desertion—Doctrine of constructive desertion.*

The party who intends to bring cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. The husband may live in a place and make it impossible for his wife to live there, though it is she and not he that actually withdraws; and that state of things may be desertion of the wife. *Pulford* v. *Pulford*, 1923 P. 18, Ref. (*Ba U and Dunkley, JJ.*) MG. SAN MYINT *v.* MA THEIN NWE. **150 I.C. 317=6 R.R. 388=A.I R. 1933 Rang. 374.**

———*Divorce—Decree for judicial separation and payment of maintenance—Subsequent resumption of cohabitation—Effect of.*

A decree for judicial separation and payment of alimony to the wife is annulled by subsequent resumption of cohabitation by the parties and the wife cannot claim any rights under the decree even if the husband had executed an agreement that the decree ordering payment should remain in force and that she should have the right to live separate if she had any fresh grievance against him. *Haddon* v. *Haddon*, 18 Q. B. D. 778 and 2 Rang. 163, Foll. (*Kisch, J.*) JULIUS *v.* JULIUS **I.R. 1932 Oudh 267=137 I.C. 737=9 O.W.N. 49=A.I.R. 1932 Oudh 142.**

———*Divorce—Jurisdiction—Mysore Courts—Christian British subject.*

Courts in Mysore have no jurisdiction to make decrees for dissolution of marriage or for judicial separation in respect of Christian British subjects. **3 Mys.C.C.R. 78,** Foll. (*Rama Rao and Sreenivasa Iyer, JJ.*) KENT *v.* KENT. **9 Mys.L.J. 269.**

HUSBAND AND WIFE.

———*Gratuitous transfer to wife—Presumption.*

Where a transaction is between a husband and wife and there is no consideration passing towards the husband from the wife who takes the transfer, the presumption is that property does not pass. The onus is on the transferee to show that title passed under the transfer. (*Mukerji and Young, JJ.*) AMRIT KUNWAR *v.* GUR CHARAN SINGH. **6 R.A. 503=147 I.C. 591=3 A. W.R. 11=A.I.R. 1934 All. 226.**

———*Holding out—Representation as to title of wife to property—Husband bound.*

A Burmese husband allowed his wife and children to hold themselves out as the sole owners of the properties and to deal with them as if they were such owners The wife and children mortgaged the properties and the mortgagee acted in good faith and without notice of the title of the husband.

Held, the husband could not impugn the mortgage. (*Ba U and Dunkley, JJ.*) MAUNG PO SEIN *v.* MA MYIT. **6 I.R. (Rang.) 138=146 I.C. 1073=A.I.R. 1933 Rang. 361.**

———*Maintenance—Suit by wife—Maintainability—Christian British subjects—Jurisdiction to order maintenance apart from judicial separation.*

Though the Mysore Courts have no jurisdiction to make decrees for dissolution of marriage or for judicial separation in respect of Christian British subjects domiciled in England, still the Courts have jurisdiction to entertain a suit for maintenance only. The duty of the husband to maintain his wife and children is a natural and legal duty, owed by the husband not only to his wife and children but also to the State. Where the wife having obtained a decree *nisi* and also an order for alimony in the English Court could not however execute same, and the remedy at law has thus proved ineffective, the Indian Court as a Court of Equity has jurisdiction to decree separate maintenance independent of a proceeding for divorce or separation, though the residence of the parties within its jurisdiction may be of a temporary character. 38 Bom. 615, Dist. *Le Mesurier* v. *Le Mesurier*, (1897) A.C. 517, Ref. (*Rama Rao and Sreenivasa Iyer, JJ.*) KENT *v.* KENT. **9 Mys.L J. 269.**

———*Marriage—Consent to—Misrepresentation—Not sufficient to nullify marriage—Absence of consent alone sufficient*

Misrepresentation inducing consent to marry cannot upset a marriage. The position in law is that the party imposed upon must be deceived to such an extent that there is in reality no consent at all to the marriage. Such consent cannot be given by a child of nine years of age and consequently a person who, though 54 years old, is found by the Court to be very feeble-minded and to have the mentality of a child of nine years of age is incapable of giving his consent. (*Young J.*) ALFRED ROBERT JONES *v.* MT. TITLI. **55 All. 185=6 I.R. (All) 11=144 I.C. 906=A.I.R. 1933 All. 122**

———*Marriage by Hindu male with Christian woman in England—Validity.*

Where a Hindu male marries of a Christain woman in England in Christian form, it is a valid Christian marriage in spite of the Indian domicile of the husband. (*Currie, J.*) SAINAPATTI *v.* SAINAPATTI. **I.R 1932 Lah. 214=136 I C. 262=33 P.L R. 339=1932 Cr.C. 96=A.I R. 1932 Lah. 116.**

———*Presumption of advancement—Applicability in India.*

The principle of English Law that when property is purchased in the name of a wife or a deposit is made in the wife's name, it would be presumed that the purchase or deposit was intended for her advancement does not

hold good in India. A fixed deposit was in the following terms: "Mr. and Mrs. H repayable to either or survivor." There was no evidence of any gift of his interest by the husband to the wife.

Held, that Mrs. H. was not entitled to more than a half of the money deposited with the Bank. 23 A.L.J. 662 (P.C.), Rel. on. (*Mukerji and Bennet, JJ.*) T. C. PAUL *v.* NATHANIEL GOPAL NATH. **I.R. 1931 All. 541=132 I.C. 573=1931 A.L.J. 417=A.I.R. 1931 All 596.**

———*Restitution of conjugal rights—Application by husband—Immoral relations with mistress continuing.*

Where the longstanding immoral relations between the husband and his mistress continue and the mistress lives in a house provided by the husband adjacent to his dwelling-house, the injury to the feelings of the wife from the continuance of such connection would be very considerable and the husband is not entitled to a decree for restitution of conjugal rights unless and until he can give the Court reason to believe that his intimate connexion will cease if his wife returns to his house. 8 All. 78 and 13 All. 126, Ref. (*Macnair, J.C.*) MT. SITA KUMBHAR *v.* DEBIDIN KUMBHAR. **I.R. 1933 Nag. 98=142 I.C. 151=29 N.L.R. 178—15 N.L.J. 147=A.I.R. 1933 Nag. 5.**

———*Restitution of conjugal rights—Decree for—Failure to find independent livelihood no ground for refusing decree.*

Failure on the part of the husband to find an independent livelihood for self and wife is not a matrimonial fault and is no ground for refusing him a decree for restitution of conjugal rights (*Maung Ba, J.*) MA HTA *v.* AYE MAUNG. **I.R. 1931 Rang 240 (1)=133 I.C. 96 (1)=1931 Cr.C. 352=A.I.R. 1931 Rang. 111 (1).**

———*Restitution of conjugal rights—Defence—Husband marrying second wife and accusing first wife of unchastity.*

A husband is entitled under the Hindu Law to marry a second wife and the marriage would not be a ground for his first wife's refusing to live with him. Nor is the fact that the husband accused her of unchastity a sufficient ground for refusing to pass a decree in his favour for restitution of conjugal rights. (*Allsop, J.*) MST. KISHEN DEI *v.* MANGAL SEN. **158 I.C. 1016=8 R. A. 361=1935 A.W.R. 994=A.I.R. 1935 All. 927.**

———*Restitution of conjugal rights—Finding as to cruelty—Duty of appellate Court to examine evidence afresh.*

Although ordinarily the appellate Court should be most reluctant to take a view contrary to that held by a trial Judge on any finding based on evidence of witnesses, still where such finding refers to the existence or otherwise of legal cruelty in a suit for restitution of conjugal rights, it is the duty of the appellate Court to examine the evidence afresh, and satisfy itself that the finding of the Court below is correct. (*Sulaiman, C.J. and Thom, J.*) MT. ANIS BEGAM *v.* MALIK MAHOMED ISTAFA WALI KHAN. **55 All. 743=148 I.C 26=6 R.A. 664 =1933 A.L.J. 1079=A.I.R. 1933 All. 634.**

———*Restitution of conjugal rights—Proof of cruelty.*

When the question is of the husband's cruel treatment towards his wife, evidence of a large number of witnesses cannot be expected to be forthcoming, and much will depend on the statement of the wife corroborated by the circumstantial evidence, particularly when the cruelty is alleged to have taken place inside the house of her husband. (*Sulaiman, C.J. and Thom, J.*) MT. ANIS BEGAM *v.* MALIK MAHOMED ISTAFA WALI KHAN. **55 All. 743=148 I.C. 26=6 R.A. 664=1933 A.L.J. 1079 =A.I.R. 1933 All. 634.**

———*Restitution of conjugal rights—Previous enjoyment not necessary.*

The restitution of conjugal rights can be granted even if conjugal rights have not at a previous time been enjoyed. (*Macnair, J. C.*) MT. VITHI *v.* PAIKU TELI. **I.R. 1933 Nag. 222=29 N.L.R. 173=144 I. C. 226=A.I.R. 1933 Nag. 186.**

———*Restitution of conjugal rights—Suit by husband—Maintainability—Cr. P. Code (V of 1898), S. 488—Order for maintenance by consent—If a bar.*

A consent order under S. 488 of the Code of Criminal Procedure is, as such, no bar to a suit by the husband for restitution of conjugal rights unless, indeed, the husband had consented not merely to the order for maintenance but that in all circumstances the wife should live apart from him. (*Curgenven and Bhashyam Aiyangar, JJ.*) GURUVAPPA CHETTI *v.* THAVARAMMAL. **54 Mad. 558=I.R. 1931 Mad 527=131 I.C. 463=1931 M.W.N. 364=33 L.W. 423=1931 Cr. C. 546=A.I.R. 1931 Mad. 482=60 M.L.J. 433.**

———*Restitution of conjugal rights—Suit against Hindu minor wife—Dismissal—Fresh suit not barred.*

The dismissal of a Hindu husband's suit for restitution of conjugal rights against the minor girl aged 9 will not prevent him from bringing a fresh suit claiming for the same relief at the proper time when the girl has attained her puberty and is in a position to be sensible of her mental relations. (*Boys and Sen, JJ.*) RAM HARAKH *v.* JAGAR NATH. **53 All 815=I.R. 1931 All. 609=133 I.C. 289=1931 A.L.J. 816=A.I.R. 1932 All. 5.**

———*Restitution of conjugal rights—Suit for—Reference to arbitration—Permissibility.*

It is not competent to the Court to delegate to arbitrators the question whether or not a claim for the custody of a wife should be decreed, such question, especially when either party is a minor, being entirely one for the discretion of the Court. 37 P.R. 1895, Foll. (*Broadway, J.*) NATHU *v.* SARNUN. **I.R. 1933 Lah. 424 (1)=144 I.C. 179 (1)=34 P.L.R. 282=A. I.R. 1933 Lah. 532 (1).**

———*Validity of marriage—Law governing.*

The forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the *lex loci contractus*, that is, the law of the place where the marriage ceremony is performed; (2) on marriage, the wife automatically acquires the domicile of her husband; (3) the status of spouses and their rights and obligations arising under the marriage contract are governed by the *lex domicilli*, that is, by the law of the country in which for the time being they are domiciled [8 A.C. 43 and (1930) P. 217]; (4) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract and are governed by the *lex domicilli*. (*Beaumont, C.J.*) KHAMBATTA *v.* KHAMBATTA. **149 I C. 1232=6 R B. 417=36 Bom.L.R. 11=A.I.R. 1934 Bom. 93.**

———*Wife—Implied authority of.*

A wife has an implied authority to pledge the credit of her husband for necessaries and this implied authority is not taken away or diminished by reason of her husband's insanity. Such authority is, however, limited to necessaries. She has no power to acknowledge a debt due from her husband. (*Beasley, C.J. and Bardswell, J.*) GOMATHI AMMAL *v.* AVU AMMAL. **56 Mad. 964=6 I R (Mad.) 208=146 I.C. 49=1933 M.W.N. 365=38 L W. 321=A.I.R. 1933 Mad. 686=65 M.L. J. 355.**

HUSBAND AND WIFE.

———*Wife not happy on account of presence of husband's relation in house and not being allowed to visit her people as she likes—If amounts to ill-treatment.*

Where the wife was not happy because of the presence of husband's relation in the house and also because her husband did not permit her to visit her people as frequently as she desired.

Held, that these were not sufficient reasons for coming to the conclusion that there was any ill treatment of the wife by the husband. (*Pandrang Row, J.*) RUKMANI AMMAL *v.* T.R.S. CHARI. **157 I C. 968 = 8 R.M. 183 = 42 L.W. 702 = 1935 M.W.N. 869 = A.I.R. 1935 Mad. 616 = 69 M.L.J. 210.**

HYDERABAD CIVIL PROCEDURE CODE (ACT III OF 1323, FASLI)—*Legal representative—Status of plaintiff questioned—Procedure.*

Where the status of the plaintiff as the legal representative is not admitted, an issue should be framed in the suit itself as regards the status of the legal representative on which the parties may have sufficient opportunity to adduce evidence. (*Jeevan Yar Jung Bahadur and Biseshwar Nath, JJ.*) GANESHGEER *v.* PARVATHI BAI. **142 I.C. 70.**

———**S. 71**—*Applicability—Application to file award.*

The application to file an award is not a plaint and S. 71 (O. 7, R. 10 of British C. P. Code) is not applicable thereto. (*Nawab Jeevan Yar Jung Bahadur, Nawab Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) MADHAV PERSHAD *v.* MEER HASAN ALI. **143 I C. 535 (1) (F.B.).**

———**Ss. 160 and 127**—Ex parte *decree—Application to set aside—Order setting aside decree in part—Validity of.*

There is no provision in law to set aside an *ex parte* order in part. Ordinarily the *ex parte* decree will be set aside *in toto* when there are sufficient and proper reasons for doing so. However, under S. 160, C. P. Code, if the defendant admits the claim of the plaintiff in part the Court has got powers to pass the order or judgment it deems proper without waiting for the disposal of any other question. But this applies only when the case is pending. In a case where a judgment has been given *ex parte* and an application to set it aside is presented, the Court cannot act under S. 160, C. P. Code. (*Nawab Jeevan Yar Jung Bahadur, Nawab Samad Nawaz Jung Bahadur and Rai Biseshwar Nath, JJ.*) KANHAYYA PERSHAD *v.* GOPIKISHEN RAM DAYAL. **143 I.C. 29 (F.B.).**

———**S. 262**—*S. 48 of Br. Cr. P. Code (V of 1908)—Compromise in execution proceedings—Payment by instalments—Default clause—Default—Application for execution, to be treated as one in continuation.*

During the execution proceedings a compromise was arrived at between the parties whereby it was agreed that the property should continue to remain under attachment and the judgment-debtor should pay the decretal amount in certain instalments, and that in default of any one instalment, the decree-holder was entitled to recover the whole sum by sale of the property attached and that the file be kept pending in execution. On the basis of the compromise a decree was passed, judgment-debtor committed default and the decree-holder applied for execution.

Held, that if the period during which the injunctions passed in execution were in force was excluded, the application was within twelve years from the date of the decree ; that the present application could not be deemed a fresh one or one in execution of the new decree. (*Giri Rai and Asgar, JJ.*) BALKISHENGIR *v.* AHMED KHAN. **142 I.C. 26.**

HYD. LIM. ACT (1322), Art. 67.

———**S. 286**—*Applicability.*

S. 286 relates only to the Court which passed the decree and does not apply where an application is made in the Original Side of the High Court to stay the execution of a decree passed by the City Civil Court. (*Nawab Jeevan Yar Jung Bahadur, Nawab Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) NASIRUDDIN GHALIB *v.* KRISHNAJEE. **144 I. C. 49 (F.B.).**

———**Ss. 524 and 644**—*Decree of City Civil Court—Application for stay in the Original Side of the High Court—Powers of High Court.*

Where in a suit to set aside a decree passed by the City Civil Court instituted in the Original Side of the High Court, an application was made to stay the execution of the decree of the City Court.

Held, that as it was not proved that any property in dispute was to be sold wrongfully in execution of the decree, there was no case for an injunction under S. 524 but that the High Court could, under S. 644 of the Code, order stay of execution on furnishing of security. (*Nawab Jeevan Yar Jung Bahadur, Nawab Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) NASIRUDDIN GHALIB *v.* KRISHNAJEE. **144 I C. 49 (F.B.).**

HYDERABAD CONTRACT ACT (VI OF 1316 FASLI), S. 213—*Duty of agent.*

The agent is not only responsible to send the accounts and the amount when the goods are sold but is also bound to legally satisfy the principal that he acted with reasonable diligence and skill and in the interest of his principal. (*Jeevan Yar Jung and Biseshar Nath, JJ.*) MEER MAHBOOB ALI *v.* SRI RAM. **142 I C. 428.**

HYDERABAD EVIDENCE ACT (II OF 1313 FASLI), S. 63—*Proof of document—Mode of.*

S. 60 says that as far as possible a document is to be proved by the attesting witnesses But if it is not possible to do so, or if the document is unattested, it may be proved by other evidence. " Execution " does not mean only subscribing signature to a document. (*Nazir Yar Jung Bahadur, Asgar Yar Jung Bahadur and Giri Rao, JJ.*) VARAL KISTAYYA *v.* DINSHAWJI DADABHOY. **144 I.C. 224.**

HYDERABAD LEGAL PRACTITIONERS RULES (1333 FASLI), Ss 5 (a) and 6 (7)—*Application to file award—Pleader's fees.*

Pleader's fees should not be awarded on an application to file an award as in a regular suit. Under S. 6 (7) the fees should be assessed by the Court. (*Nawab Jeevan Yar Jung Baharur, Nawab Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) MADHAV PERSHAD *v.* MEER HASAN ALI. **143 I C. 535 (1) (F.B).**

HYDERABAD LIMITATION ACT (II OF 1322 FASLI), S. 5—Applicability—Stamp reference to High Court. *See.* HYDERABAD STAMP ACT (IV OF 1331), S. 43.

———**Arts. 67, 77 and 78**—*Commission agent for purchase and sale of cotton—Suit for accounts—Starting point of limitation—Refusal to render accounts.*

In a suit by the principal against the defendant who was employed by him as a commission agent for the purchase and sale of cotton,

Held, that the plaintiff not having accepted the accounts furnished by the defendants, the suit was one for accounts governed by Art. 76 and that limitation began to run from the date of refusal to render accounts or the day when the plaintiff stopped the defendant from selling the goods or when they were sold and the price was received by the defendant. (*Jeevan Yar Jung and*

HYD. LIM. ACT (1322), Art. 158.

Biseshar Nath, JJ.) MEER MAHBOOB ALI *v.* SRI RAM. **142 I.C. 428.**

———**Arts. 158 and 159**—*Sale by receiver—Application for possession by purchaser—Limitation.*

Under the directions of the Court, the Receiver sold the property to the respondent on 25th Dai, 1331 Fasli. An application by the purchaser for possession was filed on the 15th Dai, 1334 Fasli. It was consigned to records as the file was with the Receivers, Subsequently another application was filed on the 2nd Farwardi, 1335 Fasli in the form of a memo.

Held, that Art. 158 would be applicable only when the property is sold by the Court; that the application was governed by Art. 159; that the second application was not a fresh application and whether Art. 158 or 159 applied, it was in time, limitation being reckoned from 15th Dai, 1334 Fasli. (*Jeevan Yar Jung Bahadur, Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) LATIFUDDIN VALLABHDAS. **144 I C. 342 (F.B.).**

HYDERABAD NEGOTIABLE INSTRUMENTS REGULATION (V OF 1318 FASLI), S. 118—*Execution—Presumption of consideration.*

Where the execution of the promissory note is proved and it has been so found concurrently by two Courts, the presumption under S. 118 arises that the consideration has passed to the defendant so long as there is no evidence to the contrary. (*Nawab Samad Nawaz Jung Bahadur, J.*) YENKA *v.* MUHAMMAD IBRAHIM. **142 I.C. 202 (1).**

HYDERABAD STAMP ACT (IV OF 1331 FASLI), S. 43 (*Corresponding to S. 45 of British Indian Act*)—*Case referred to High Court—Bar of limitation.*

When the case has been referred to the High Court, there is no occasion to consider the bar of limitation or condoning of the delay and the reasons for condonement. The period of three months fixed in S. 43 relates to the proceedings before the Chief Controlling Authority and S. 5 of the Hyderabad Limitation Act (II of 1322 corresponding to S. 5 of the British Indian Act) is not applicable to such proceedings. (*Nawab Jeevan Yar Jung Bahadur, C.J., Nawab Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) SHAHABAD CEMENT CO. *v.* H. E. H. THE NIZAMS GOVERNMENT. **143 I.C. 591 (F.B.).**

———**Art 29 (a) and (b)**—*Distinction between—Debenture trust deed—Possession not given or agreed to be given.*

The difference between Cls. (*a*) and (*b*) of Art. 29 depends on the tenor and contents and upon the intention of the parties to the documents. The former clause will be applicable when the possession of any part of the property mortgaged is given by the mortgagor or agreed to be given to the mortgagee. If neither possession is given nor agreed to be given the latter clause will be applicable. A debenture trust deed executed by a limited company by which the company did not deliver or agree to give possession is governed by Cl. (*b*), though the mortgagees were entitled to possession in the event of default in the payment of debt. (*Nawab Jeevan Yar Jung Bahadur, C.J., Nawab Samad Nawaz Jung Bahadur and Rai Biseshar Nath, JJ.*) SHAHABAD CEMENT CO. *v.* H. E. H. THE NIZAMS GOVERNMENT. **143 I.C. 591 (F.B.).**

HYDERABAD SUCCESSION CERTIFICATE ACT (III OF 1307, FASLI), S. 16—*Application for revocation of succession certificate—Appeal.*

The section confers a right of appeal only from an order granting the application for revocation and not when the application is refused. The appropriate remedy against such an order is not appeal but the

INCOME-TAX.

High Court can interfere in revision. (*Nawab Jeevan Yar Jung Bahadur, Nawab Samad Nawaz Jung Bahadur and Rai Besheshar Nath, JJ.*) RAMACHANDRAM *v.* SEETAMMA. **143 I.C. 883 (1) (F.B.).**

HYPOTHECATION.

See (1) CONTRACT ACT, SS. 172 AND 178.
(2) MORTGAGE — MOVABLES.
(3) TRANSFER OF PROPERTY ACT, SS. 58 AND 100.
(4) MOVABLES.

IDOL. *See* HINDU LAW—RELIGIOUS ENDOWMENT

ILLATOM. *See* HINDU LAW—ADOPTION.

ILLEGAL CONSIDERATION. *See* CONTRACT ACT, S. 23.

ILLEGAL CONTRACT. *See* CONTRACT ACT, S. 23.

ILLEGAL GRATIFICATION. *See* PENAL CODE, S. 161.

ILLEGALITY. *See* C. P. CODE, SS. 100 AND 115.

ILLEGAL OBJECT. *See* CONTRACT ACT, S. 23

ILLEGITIMACY.

See (1) CR. P. CODE, S. 488.
(2) EVIDENCE ACT, S. 112.
(3) HINDU LAW—ILLEGITIMATE CHILDREN.
(4) MAHOMEDAN LAW.

IMMORAL CONTRACT. *See* CONTRACT ACT, S. 23—PROSTITUTION.

IMMORAL DEBT. *See* HINDU LAW—DEBT.

IMMOVEABLE PROPERTY.

See (1) CR. P. CODE, SS 144—147.
(2) GENERAL CLAUSES ACT, S. 3 (25).
(3) T. P. ACT, S. 3.

IMPARTIBLE ESTATE. *See* HINDU LAW—IMPARTIBLE ESTATE.

IMPERIAL BANK OF INDIA ACT (XLVII OF 1920)—*Suit by—Grant of instalments spreading over six months—Permissibility—C. P. Code*, 1908, *O.* 20, *R.* 11.

O. 20, R. 11, is not in any way controlled by the provisions of the Imperial Bank of India Act (XLVII of 1920) which limit the power of the Bank in the matter of advancing loans for a period exceeding six months. The Courts are not therefore precluded from granting instalments in proper cases simply because such a course would postpone realisation of the dues by the plaintiff (Imperial Bank) for over six months. (*Subhedar and Pollock, A.J.Cs.*) KISHENLAL *v.* IMPERIAL BANK OF INDIA. **6 I.R. (Nag.) 106 (2)=146 I.C. 1046=16 N.L J. 78=A.I.R. 1933 Nag. 330.**

IMPLIED CONTRACT. *See* CONTRACT ACT, SS. 9, 69 AND 70.

IMPOSSIBILITY OF PERFORMANCE. *See* CONTRACT ACT, S. 56.

IMPRISONMENT. *See* PENAL CODE, SS. 53-75.

IMPROVEMENT.

See (1) B. T ACT.
(2) MADRAS ESTATES LAND ACT, SS. 13 (3) 26 (3).
(3) T. P. ACT, S. 51.

INAM. *See* GRANT—INAM.

INCOME TAX—*Accounts—Entry in—Presumption of good faith of assessee.*

The normal presumption is in favour of good faith and not of bad faith on the part of the assessee. To start with, the assessee is entitled to the presumption that an entry in his accounts is made in the ordinary course and

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not with an intention to conceal the real income. (*Mahadevayya, O.C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) COMMISSIONER OF INCOME-TAX, MYSORE *v.* BANK OF MYSORE, LTD. **12 Mys. L.J. 245=39 Mys. H.C.R. 772.**

——Deductions—Fees for Directors. *See* INCOME-TAX ACT (1922), S. 10 (2) (*ix*).

——*Profits—Computation—System recognized by taxing authority—Subsequent refusal to accept—Propriety.*

Where a system of accountancy has been adopted by an assessee and recognized by the income-tax authorities in previous years as correct, and on that basis a particular item has been allowed as deductible in the computation of the profits in previous years, the income-tax authority will not be justified in subsequent years to turn round and refuse to accept that system of accountancy; a party cannot both approbate and reprobate at the same time. (*Mahadevayya, O.C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) COMMISSIONER OF INCOME-TAX, MYSORE *v.* BANK OF MYSORE, LTD. **12 Mys. L.J 245=39 Mys H C.R. 772.**

INCOME-TAX ACT (XI OF 1922)—*Appeal to Privy Council—Application for Leave—Deduction of time,*

The Commissioner of income-tax preferring an application for leave to appeal to the Privy Council is entitled in computing limitation to deduct the period taken for obtaining copies of the judgment. (*Rankin, C.J. and Pearson, J.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 Cal. 251=I.R. 1932 Cal. 588=139 I.C. 236=36 C.W.N. 127=A.I.R. 1932 Cal. 587.**

——*Appeal to the Privy Council—Case under the Act—Application for leave to appeal to Privy Council—Limitation.*

An application for leave to appeal to the Privy Council in a case under the Income-tax Act is governed by Art. 179 rather than by Art. 181 of the Limitation Act and the date of the judgment is the starting point of limitation. (*Rankin, C.J. and Pearson, J.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO **59 Cal. 251=I R. 1932 Cal. 588=139 I.C. 236=36 C.W.N. 127=A.I.R. 1932 Cal. 587.**

——*Claim allowed in one year—If binds Income-tax Officer next year.*

The fact that in a previous year an Income tax Officer had allowed a certain claim does not bind the Income-tax Officer in a subsequent year. (*Jai Lal, Dalip Singh and Skemp, JJ.*) SHER SINGH NATHU RAM *v.* COMMISSIONER OF INCOME-TAX PUNJAB. **154 I.C. 191=7 R L 527=A.I.R 1935 Lah. 81 (S B.).**

——*Construction—English statute—Decisions on—Relevancy of.*

The English and Indian Income-tax Acts not being *in pari materia*, decisions of the English Courts are not, as a rule, useful guides on the construction of the Indian enactment. (*Sir George Lowndes.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 I.A. 206=59 Cal. 1343=I.R. 1932 P.C. 156=1932 M.W.N. 618=9 O.W N. 515=55 C L J. 386=36 C.W N. 653=34 Bom L R. 1033=1932 A L J. 588=36 L W. 63=136 I C. 742=A.I.R. 1932 P C. 138=63 M.L.J. 124 (P.C.).**

[R. 13 P. 661 (685) (S.B.).]

——*"Income"—Meaning of.*

The word "income" is not defined in the Act. It connotes a periodical monetary return "coming in" with some sort of regularity or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. (*Sir George Lowndes.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 I A. 206=59 Cal. 1343=34 Bom L.R. 1033=1932 A.L J. 588=36 L.W. 63=I.R. 1932 P.C. 156=1932 M.W.N. 618=9 O.W.N. 515=55 C.L.J. 386=36 C.W.N. 653=136 I.C. 742=A.I.R. 1932 P.C. 138=63 M.L.J. 124 (P.C.).**

[Expl. 12 R. 521 (529); **R.** 13 P. 661 (688) (S.B.); 12 R. 477 (481).]

——*Income tax Manual—Value.*

Per *Tek Chand, J.*—The Income-tax Manual merely contains departmental instructions for administering the Act and is not an authoritative interpretation of the statute which is binding on Courts. (*Addison, Tek Chand, Jai Lal Dalip Singh and Agha Haidar, JJ.*) CHHUNNA MAL SALIG RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1931 Lah. 433=131 I.C. 193=32 P.L.R. 517=A.I R. 1931 Lah 320 (2) (F B.).**

——*Income-tax Manual, R. 25—Mandatory provisions.*

Rule 25 is of a mandatory character. It provides the only manner in which the income, profits and gains of Life Assurance Companies can be determined. It does not give any discretion to the assessing officer to depart from its provisions and to have recourse to the other provisions of the Income-tax Act for the purpose of determining and assessing the income, profits and gains of a Life Assurance Company (*Jai Lal and Agha Haidar, JJ.*) LAXMI INSURANCE CO., LTD., LAHORE *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 757=136 I.C. 725=I.R. 1932 Lah. 261=33 P L.R. 357=A.I.R. 1931 Lah. 441.**

——Interpretation. *See* INTERPRETATION OF STATUTES.

——*Interpretation—Decisions on Imperial Income-tax Code—Application.*

The invocation of Imperial Income-tax Code and of decisions pronounced upon it is apt to be very misleading in the interpretation of Indian Income tax legislation which is framed on other and fortunately much simpler lines. (*Lord Macmillan.*) BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME-TAX, CALCUTTA. **60 I A. 196=60 Cal. 1029=1933 M.W N. 553=37 C. W N. 885=57 C.L.J 503=1933 A.L J. 641=35 Bom.L.R. 811=I.R. 1933 P.C. 127=143 I.C 145=37 L.W 775=A.I.R. 1933 P.C. 145=65 M.L J. 285 (P C.).**

——**(as amended)**—*Procedure—Annexure of legal opinions to petition—Propriety.*

It is not proper for the Income tax Officer to ask the assessee to produce opinions of legal practitioners in support of his contention. Where such opinions are annexed by the assessees to their petitions the proper course is for the tribunal to state that the petitions cannot be received until the statements as to opinions are removed. (*Courtney Terrell, C. J. and Fazl Ali, J.*) MAHARAJADHIRAJ OF DHARBHANGA *v.* COMMISSIONER OF INCOME-TAX. **12 Pat. 5=I.R. 1933 Pat. 232=144 I.C. 354=14 Pat.L T. 171=A.I R. 1933 Pat 123**

——**S. 1 (2) (vii)**—*Obsolescence—Question of fact.*

The question whether a particular machinery has become obsolete is one of fact. 13 I. C. 205, Rel. on. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) SHEWDAYAL JAGANNATH JAGANNATH BINJRAJ, *In the matter of.* **58 Cal. 985=I R. 1931 Cal. 782=134 I C. 78=35 C.W N. 314=A.I R. 1931 Cal. 599.**

——**S. 2**—*Agricultural income—Pro note in lieu of rent with interest—Interest earned—Whether assessable.*

Ss. 61 and 187 (2), Madras Estates Land Act, only apply if a suit is brought directly on the liability of

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the raiyat to pay rent. But where the raiyat, in lieu of arrears of rent plus interest thereon executes a promissory note in favour of the zamindar, those sections have no application and the income by way of interest earned by the zamindar is not agricultural income and is therefore taxable under the Income tax Act. (*Beasley, C. J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* INUGENTI RAJAGOPALA VENKATA NARASIMHA. **55 Mad. 830=I.R. 1932 Mad 543 (1)=138 I.C. 289 (1)=36 L.W. 17=1933 M.W.N. 1012=A.I.R. 1932 Mad. 436=63 M.L J. 20 (S.B.).**

———**S. 2**—"Agricultural income"—Sale of estate—Annuity reserved in sale deed—Taxability. *See* INCOME-TAX ACT, SS. 2 (1), 3, 4, 6, 7 AND 12. **69 M.L J. 190 (P.C.).**

———**Ss. 2 and 4**—*Usufructuary mortgage—Mortgagee in position of landlord with tenants—Income from rents and other payments by tenants is agricultural income and hence exempt from taxation.*

The assessee lent money on two bonds, the first a zarpeshgi lease with a usufructuary mortgage and the second a thicca lease both being interdependent. The bonds provided for annual appropriations against the principal advanced and for expenses and for a yearly profit of the lender. If at the end of 15 years the whole of the principal was not paid off, the lessee-mortgagee was to continue in possession until total liquidation of the debts. The amount to be appropriated as the profits of the assessee was sought to be taxed as profits of a money-lending business,

Held, that the assessee being in the position of a landlord with respect to the actual cultivating tenants within the meaning of the term under the B. T. Act the income derived from the lands must be agricultural income within the meaning of the Income-tax Act and was therefore exempt from taxation. (*Courtney-Terrell, C. J., Kulwant Sahay and James, JJ.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH **13 Pat. 336=6 R.P. 412=147 I.C. 1236=15 Pat.L.T. 85=A.I.R. 1934 Pat. 178 (S.B.).**

Affirm. 62 I.A. 215=14 Pat. 623=69 M.L.J. 474 (P.C.).]

———**S. 2 (1)**—'*Agricultural income*'—*Income from fishery—Exemption from assessment.*

Where income derived by a Zamindar from the lease of the right to fish in a number of tanks and connected supply channels in the Zamindari the water in which was used for agricultural purposes, was assessed to income-tax and it was contended that income from the fisheries was exempt from the assessment to income-tax on the grounds that they were not so assessable under the terms of the sanad granted to the Zamindar and that the said income was agricultural income especially in view of the definition of rent in S. 3 (11) (*b*) of the Madras Estates Land Act.

Held, (1) that following Privy Council ruling in **57 I. A. 228**, it must be held that the inclusion of income from fisheries in the assets of the Zamindari in fixing the peishkush was by itself no ground for claiming exemption from assessment under the Indian Income-tax Act (2) the right to fishery may be an interest in the immovable property but that does not lead to the conclusion that income from leasing the right to catch fish in a tank is agricultural income within the meaning of the Income-tax Act. 51 Cal. 504; 54 Cal. 863 (F.B.) and 3 Pat. 470, Ref. S. 3 (11) (*b*) of the Madras Estates Land Act cannot assist the petitioner because it only extends the procedure prescribed in the said Act for the recovery of arrears of land rent

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to the recovery of sums payable by a ryot on account of fishery rents. (*Beasley, C. J., Anantakrishna Aiyar and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* SEVUGA PANDIA THEVAR. **56 Mad. 251=140 I.C. 450=1932 M W.N. 1207=36 L.W. 719=I.R. 1933 Mad. 1=A.I.R. 1932 Mad. 757=63 M.L. J. 634 (F.B.).**

———**Ss. 2 (1) and 4 (3) (viii)**—"*Agricultural income*"—*Maintenance allowance charged on land.*

An allowance which a *talukdar* agreed to pay to his younger brother and his heirs for their maintenance, though secured by a charge on the *taluqa*, cannot be regarded as "agricultural income" within the purview of S. 2 (1) read with S. 4 (3) (*viii*) of the Income tax Act. (*Srivastava and Zia-ul Hasan, JJ.*) LAL SURESH SINGH OF KALAKANKAR, *In the matter of*. **158 I.C. 810=1935 O.W.N. 1143.**

———**Ss. 2 (1), 3, 4, 6, 7 and 12**—*Applicability and construction—"Income"—"Agricultural income"—Sale deed—Covenant in — Amount payable annually to vendor by vendee for vendor's life—Assessability to income tax.*

The assessee, the owner of an estate, conveyed the greater portion of his estate for valuable consideration, and obtained in exchange from the vendee (1) a covenant to pay his debts, (2) a sum of cash for the expenses of his daughter's marriage and other urgent necessities, and (3) a covenant to pay him a life annuity of Rs. 2,40,000, payable in six equal instalments, with interest at 12 per cent. per annum on any overdue instalment. The assessee having objected to the assessment of the sum of Rs. 2,40,000 to income-tax,

Held, (1) that the annual payment covenanted for under the document was not 'agricultural income," within the meaning of the Income-tax Act; (2) that the sum in question was not a capital sum or price of the sale, but was "income," taxable under S. 12 (1) of the Act; (3) that the word "income" under S. 12 (1) was not limited by the words "profits" and "gains" and that anything which could be properly described as income was taxable under the Act unless expressly exempted. (*Lord Russell of Killowen.*) GOPAL SARAN NARAIN SINGH *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **62 I.A. 207=14 Pat. 552=1935 A.L. J. 925=39 C.W.N. 1093=1935 A.W.R. 1030=37 Bom L R. 817=1935 M.W N. 806=156 I C. 856=1935 O.W.N. 810=16 Pat.L T. 531=8 R.P.C. 1=42 L.W. 243=A.I.R 1935 P.C. 143=69 M.L.J. 190 (P.C.).**

———**S. 2 (1) (a)**—"*Agricultural income*"—Sabape *loans.*

Loans made on the *sahape* system are loans made in cash at the beginning of the cultivating season and repayable in paddy at harvest time. They are transactions between a lender and a borrower and the mere fact that the lender happened to be the landlord of the borrower is *nihil ad rem*. So the excess in value of the paddy received by the assessee over the cash lent by him to the cultivators is not "agricultural income" within the meaning of that term in S 2 (1) (*a*). (*Page, C.J., Das and Baguley, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* HAJEE CASSIM TAYOOB SURTY. **10 Rang. 77=I.R. 1932 Rang. 87=137 I.C. 56=A.I.R. 1932 Rang. 19 (S.B).**

———**S. 2 (1) (a)**—*Source of income—Maintenance allowance payable out of property.*

The maintenance allowance obtained by a widow under a compromise though derived from an agricultural estate is not agricultural income within the meaning of S. 2 (1) (*a*), and hence is not exempt from income-tax under Ss. 4 (3) and 8. (*Smith and Allsop, JJ.*)

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RANI SALTANAT BEGAM, *In the matter of.* **9 Luck. 115=6 I R. (Oudh) 153=146 I.C. 651=10 O.W.N. 1003=A.I.R. 1933 Oudh 475.**

———**Ss. 2 (1) (a) and 4 (3)**—*Loan advanced by money lender on* zarpeshgi *lease with usufructuary mortgage*—Thika *profits, if agricultural income.*

The mortgagee who carried a money-lending business advanced a loan and the transaction was embodied in indentures. One of these was described as a *zarpeshgi* lease with usufructuary mortgage. "The mortgagee lessee was to be in possession of the properties, and, in his relation to the cultivators of the soil he stood in the position of landlord, dealing directly with them and collecting the rents. He had moreover to pay the Government revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears, to sue for enhancement or for ejectment and was able to settle lands with raiyats and tenants in all the properties; in fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in her khas possession."

Held, that the thika profits which formed part of the rents were agricultural income within the meaning of S. 2, (1) (*a*) and as such were exempt from assessment.

Held, further, that the fact that the recipient was a money-lender did not matter, as the business of money-lending may bring in an income which is exempt from income tax on the ground that it is derived from agricultural land. The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, (*Lord Macmillan*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **62 I.A. 215=14 Pat. 623=42 L.W. 464=16 Pat.L T. 609=1935 O.W.N. 1022=8 R.P.C. 25=1935 M.W.N. 839=1935 A.W.R. 1042=39 C.W.N. 1255=1935 A.L.J. 978=157 I.C. 289=A.I.R. 1935 P.C. 172=69 M.L.J. 474 (P.C.).**

———**S. 2 (1) (b) (2)**—"*Process ordinarily employed by a cultivator*"—*Meaning explained—Cotton ginning is not essential to make cotton fit to be taken to market.*

The process "ordinarily employed by a cultivator must mean one in ordinary use amongst cultivators generally. The Income-tax Act so far as agricultural income is concerned only relieves the producer from liability to income-tax so long as he is a *bona fide* agriculturist carrying on that business in the ordinary course of good husbandry. Where cotton is first ginned and then sold in market, then although it may be distinctly advantageous even from the mere point of view of transport to do so it cannot be said that ginning is essential in order to enable the produce to be fit to be taken to market. (*Findlay, J.C. and Macnair, A.J.C.*) SHEOLAL RAMLAL *v.* COMMISSIONER OF INCOME TAX, C.P. **I.R. 1932 Nag. 101=139 I.C. 316=A.I R. 1932 Nag. 61.**

———**S. 2 (1) (b) and (2)**—*Profits earned by ginning cotton and selling it in market—Such profits are assessable.*

The Income-tax Officer is entitled to calculate profits on the cotton which is the agricultural produce of the assessee's own villages where he gets it ginned in the ginning factory before he takes it to market for sale, and assess tax on such profits under the Act. (*Findlay, J.C. and Macnair, A.J.C.*) SHEOLAL RAMLAL *v.* COMMISSIONER OF INCOME-TAX, C. P. **I.R. 1932 Nag. 101=139 I.C. 316=A.I.R. 1932 Nag. 61.**

———**Ss. 2 (4) and 42**—*Meaning of words 'business' and 'business connection'.*

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The definition of the word 'business' in S. 2 (4) is not exhaustive and does not restrict the meaning of 'business connection' in S. 42 to such definition. All that is necessary is that there should be a business in British India and a connection between a non-resident person or company and that 'business' and that non resident person or company has earned an income through such connection. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTRALASIA, LTD. **57 Bom 519=35 Bom.L.R. 896=147 I.C. 370=6 R. B. 199=A.I.R. 1933 Bom. 427.**

———**S. 2 (6)**—*Unregistered company — Thirteen constituent firms composed of more than twenty persons —Liability to assessment to income tax.*

A company which is not registered under the Companies Act, although it is a partnership of thirteen unregistered firms composed in turn of individual members the aggregate number of whom exceeds twenty, is liable to assessment to income tax on its profits. (*Jai Lal and Agha Haidar, JJ.*) GOPALJI CO. *v.* THE COMMISSIONER OF INCOME-TAX. **32 P.L.R. 335=A.I.R. 1931 Lah. 376.**

———**S 2 (12)**—'*Principal Officer*'—*Official Liquidator of Company.*

The Official Liquidator of a Company can be treated as its principal officer and if he is managing the business of the Company he comes within the definition of principal officer under S. 2 (12), (*Mukerji and Young, JJ.*) COMMISSIONER OF INCOME-TAX *v.* OFFICIAL LIQUIDATOR, AGRA SPINNING AND WEAVING MILLS CO., LTD **56 All. 685=152 I.C. 183=7 R.A. 288=1934 A.L J. 221=3 A.W.R. 356=A.I.R. 1934 All. 170.**

———**S. 2 (14) and rules under S. 59, R. 2**—*Application for registration by agent of partner—Validity.*

It is essential that an application for registration should be signed by at least one of the partners of the firm. An application made in that behalf by an agent of the partners would not comply with the statutory rules prescribing the manner in which registration is to be effected and the registration by the Income-tax Officer of such an application would be *ultra vires* and void. (*Page, C.J. and Das, J.*) NACHIAPPA CHETTYAR *v.* SECRETARY OF STATE. **11 Rang. 380=149 I.C. 845=6 R.R 327=A.I.R. 1933 Rang. 229.**

———**S. 2 (14)**—*Application for registration as a firm—Letters between partners silent on material terms —Procedure.*

Where the assessees applied to be registered as a firm on the basis of certain letters which passed between the partners and which did not sufficiently indicate if the senior partner had accepted all the terms proposed by the junior members,

Held, that the proper course was to direct the parties to write another letter clearing up all ambiguity and to allow it to be treated as part of their original application and made in good time. (*Rankin, C.J., C. C Ghose and Buckland, JJ.*) HARIDAS PREMJI *v.* COMMISSIONER OF INCOME TAX, BENGAL. **I.R. 1932 Cal. 633=139 I.C. 497=A.I.R. 1932 Cal. 409 (S B.).**

———**S 2 (14)**—*Registration of firm—Instrument, if need be complete.*

It cannot be said that it is implied that a complete instrument only is intended to be valid for registration under S. 2, that is an instrument which does not require supplementing by other evidence but contains in itself the complete agreement constituting the partnership and by itself solely operates to create the partnership. It is not impossible that a firm should be constituted under an agreement, although the agreement has not been

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executed by all the partners. (*Rankin, C. J., C.C. Ghose and Buckland, JJ.*) RAMLAL MURLIDHAR, *In re*, **58 Cal. 1005=134 I.C. 1056=I.R. 1932 Cal. 16=A.I.R 1931 Cal. 682 (S.B.).**

——**S. 2 (14)**—*'Registered firm'—Firm for division of profits.*

The assessee inherited from her father a sum of Rs. 5 lacs which she invested in shares producing a large income. She applied to the Income-tax Officer for registration of what she called an instrument of partnership which only purported to show that the respective shares of the lady and her three minor children were as specified but did not show what the business of the firm was, what the assets were or what the profits were derived from.

Held, that there could not be any such firm or partnership under S. 239, Contract Act, and so it could not be registered. (*Beaumont, C.J. and Rangnekar, J.*) BAI SAKINABOO, *In re*. **I.R. 1932 Bom. 345=137 I.C. 903=34 Bom. L.R 100=A.I.R. 1932 Bom.116.**

——**S. 2 (15)**—"Total income"—If includes unrealised decree. *See* INCOME TAX ACT, S. 13. **1935 A.L.J. 374=A.I.R. 1935 All. 378.**

——**S. 3**—*"Association of individuals"—Group of co-heirs—Guardian carrying on business with combined resources—Unit of assessment.*

The term "association of individuals" in S. 3 has no technical meaning. It merely means a group when the properties of a number of individuals are put together and one business is carried on with the combined resources (for instance by a guardian on behalf of several minors having distinct and specified shares in the properties) it is open to the Income tax Officer to regard it as one business carried on by an association of individuals within the meaning of S. 3 and make a single assessment on the guardian as representing that association. He is not bound to assess each minor separately. It may be different of course if no business is carried on and the trustee or guardian is merely in receipt of the income on behalf of the beneficiaries or minors. (*Beasley, C. J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* SALDANHA. **55 Mad. 891=I.R. 1932 Mad. 507=138 I.C. 1=1932 M.W.N. 575=35 L.W. 735=A.I.R. 1932 Mad. 378=62 M.L.J. 600 (F B.).**

——**S. 3**—*"Association of individuals"—If includes trustees.*

Per *Jai Lal and Skemp, JJ.*—The expression "association of individuals" in S. 3 includes cases of all trustees and does not exclude cases where the beneficiary is not a living person and as such the income of a newspaper and press run by trustees in the hands of the trustees, is liable to be assessed. (*Young, C.J., Addison and Tek Chand, JJ.*) TRIBUNE PRESS *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **16 Lah. 829=37 P. L.R 888=158 I.C. 306=A.I.R. 1935 Lah. 570 (F.B.).**

——**Ss. 3 and 14 (1)**—*Claim to exemption from tax—Onus of proof.*

The burden is no doubt on the revenue authorities to show that income which is sought to be taxed is income which is rendered liable to tax by the statute; but the onus of showing that a particular class of income is exempted from taxation lies on the assessee. In a case where the revenue authorities have discharged the onus which lay on them by showing that the assessee is in receipt of income, S. 3 of the Income tax Act renders that liable to taxation, it is for the assessee then to prove that the income which he is in receipt of is exempted from taxation by the Act. For the purposes of S. 14

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(1) of the Act, what the assessee has to show (1) that he is a member of a Hindu undivided family, and (2) that he receives the income in question as a member of the family. (*Courtney-Terrell, C.J., Khaja Mahommed Noor and Agarwala, JJ.*) VISHESWAR SINGH *v.* COMMISSIONER OF INCOME TAX, B. & O. **14 Pat. 785=156 I.C. 116=7 R.P. 685=16 Pat.L.T. 351=A.I.R. 1935 Pat. 342 (S.B.).**

——**S. 3**—*"Company"—Company in liquidation.*

A company which has gone into liquidation is a "company" within the meaning of S. 3 and the Official Liquidators can be assessed as representing the company. (*Mukerji and Young, JJ.*) COMMISSIONER OF INCOME-TAX *v.* OFFICIAL LIQUIDATOR, AGRA SPINNING AND WEAVING MILLS CO., LTD. **56 All. 685=152 I C. 183=7 R.A. 288=1934 A.L.J. 221=3 A.W.R. 356=A.I.R. 1934 All. 170.**

——**Ss. 3 and 4**—*Company—Insurance company—Foreign income—Liability to assessment.*

In the case of a non-resident income which neither accrues nor arises nor is received within British India may be liable to tax under the combined operation of Ss. 3, 4 & 42, that is to say, a non resident may be liable to tax in respect of sources of income, which would not be liable to tax in the case of a resident. In the case of insurance company limited by guarantee having head office outside British India and branch offices in various places including Bombay, profits derived from the investment of moneys representing profits derived from participating policies are profits or gains accruing or arising to the assessee company, directly or indirectly, though or from a business connexion or property in British India. There is no distinction in principle between the case of goods acquired in British India by an agent in British India, and sent to the principal resident outside British India and there sold at a profit, and the case of moneys collected by an agent in British India and sent to the principal outside British India and there invested by him at a profit. Profits made by an insurance company outside British India on premiums of participating policies collected and sent by its branches in India by investment outside India are profits or gains which are liable to tax in India. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME TAX BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTRALASIA, LTD. **57 Bom. 519=35 Bom.L.R. 896=147 I.C. 566=6 R.B. 209=A.I.R. 1933 Bom. 427.**

——**S. 3**—*'Firm'—Meaning of.*

A firm for the purposes of the Income-tax Act is a collective term for a number of persons who enter into partnership with one another. (*Addison and Sale, JJ.*) LAHORE ICE FACTORIES ASSOCIATION, LAHORE *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **A.I.R. 1935 Lah. 100.**

——**Ss. 3 and 10 (2) (iii) and Explanation**—*Fund registered as company—Capital consisting of recurring subscriptions—"Guaranteed interest" thereon, if taxable as profits—Subscriptions, if borrowed capital.*

The Madura Hindu Permanent Fund was incorporated as a limited company under the Companies Act, 1882. Its objects were stated to be (*a*) to enable persons to save money; (*b*) to invest their savings in landed property and Government Promissory Notes; (*c*) to secure loans at favourable rates of interest and to grant loans on sound securities. The capital of the Fund was contributed by two classes of subscribers at the rate of Re. 1 per mensem per share, the A class subscriber for 45 months, the B class subscriber for 84 months. At the end of the period, the former was paid off Rs. 50, the latter Rs. 102-8-0, and the account was closed. The

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amount so paid to the subscribers in excess of their subscriptions was called "guaranteed interest" which the fund claimed to be entitled to deduct from its income in computing its taxable profits. It was assumed for the purpose of the reference that the transactions of the fund were confined to its members though the rules provided for loans also to non-subscribers and to registered Co operative Societies.

Held, (*i*) that the ruling in *Styles'* case had no application to the case and the guaranteed interest was part of the profits; but (*ii*) that the fund was not really a company, the amount of recurring subscriptions paid periodically by the shareholders or subscribers was not share capital or borrowed capital as ordinarily understood. It was something different from both, but in view of the explanation to S. 10 (2) (*iii*) of the Income-tax Act, it should be deemed a borrowing of capital. It partook the nature of a loan on which the fund contracted to pay a fixed interest which, not being in any way dependent on the earning of profits, could be deducted from the profits and gains of the Association under S. 10 (2) (*iii*) of the Act. 47 M. 1 and 3 I. T. C. 385, Disc. (*Beasley, C.J., Ramesam, Sundaram Chetty, Pakenham Walsh and Burn, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* THE MADURA HINDU PERMANENT FUND, LTD. **56 Mad. 415=I.R. 1933 Mad. 348=143 I.C. 894=1933 M.W.N. 296=37 L.W. 379=A.I.R. 1933 Mad. 347=64 M.L.J. 260 (F.B.).**

[D 58 M. 8 (13).]

——**S. 3**—*'Income'—Allowance received by Lord Bishop of Lucknow from foreign fund.*

An allowance received by the Lord Bishop of Lucknow as such from the Colonial Bishopric Fund in England is an income within the meaning of S. 3. (*Mukerji and Sen, JJ.*) C.J.G. SOUNDERS *In re.* **54 All. 223=I.R. 1932 All 275=137 I.C. 84=1931 A.L.J. 1107=A.I.R. 1932 All. 151.**

——**S. 3**—*Income—Money received on behalf of another.*

When the Act by S. 3 subjects to charge "all income" of an individual, it is what reaches the individual as income which it is intended to charge. Where, therefore, a decree of the Court charges the assessee's whole resources with a specific payment to his step-mother, it to that extent diverts his income from him, and directs it to his step mother; to that extent what he receives for her is not his income. It is not a case of the application by the assessee of part of his income in a particular way; it is rather the allocation of a sum out of his revenue before it becomes income in his hands. (1901) A. C. 26, Expl. (*Lord Macmillan.*) BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME-TAX, CALCUTTA. **60 I.A. 196=60 Cal. 1029=1933 M.W.N. 553=37 C.W.N. 885=57 C.L.J 503=1933 A.L.J. 641=35 Bom.L.R. 811=I.R. 1933 P.C. 127=143 I.C. 145=37 L.W. 775=A.I.R. 1933 P.C. 145=65 M.L.J. 285 (P.C.).**

[D. 13 P. 197 (199) (S.B.); 37 Bom.L.R. 126 (129).]

——**S. 3**—*Maintenance amount—Liability to tax.*

Quaere.—Where the estate in the hands of the son is charged with the maintenance of the step-mother, whether the step mother is liable under the Act to assessment in respect of the payments received by her? (*Lord Macmillan.*) BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME TAX, CALCUTTA. **60 I.A. 196=60 Cal. 1029=1933 M.W.N. 553=37 C.W.N. 885=57 C.L.J. 503=1933 A.L.J. 641=35 Rom.L.R. 811=I.R. 1933 P.C. 127=143 I.C. 145=37 L.W. 775=A.I.R. 1933 P.C. 145=65 M.L.J. 285 (P.C.).**

——**S. 3**—*Partnership between Hindu joint family and a firm—If can be formed.*

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No partnership can legally be constituted between a firm and an association of a joint Hindu family. (*Niamatullah and Bennet, JJ.*) PARBHU LAL PEAREY LAL *v.* COMMISSIONER OF INCOME TAX, U.P. **157 I.C. 116=8 R.A. 101=1935 A.W.R. 329=1935 A.L.J. 554=A.I.R. 1935 All. 523.**

——**S. 3**—*Profits—Meaning—Life Insurance Company—Sums paid to policy holders as profits—Assessability to income tax.*

The sum of money allocated by a Life Insurauce Company for distribution amongst the participating policy holders must be considered to be a portion of the profits of the company and as such assessable to income tax not an expenditure incurred solely for earning the profits within the meaning of S. 10 (2) (*ix*).

Per *Bhide, J.*—The "profits of a business" mean the net proceeds of the concern after deducting the necessary outgoings, without which those proceeds could not be earned, and the net proceeds must be taken to be the basis for the assessment of income tax, irrespectively of their subsequent application or allocation. (*Addison and Bhide, JJ.*) BHARAT INSURANCE CO., LTD., LAHORE *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 704=32 P.L.R. 960=I.R. 1931 Lah. 701=132 I.C. 861=A.I.R. 1931 Lah. 739.**

[**Affirm.** 61 I.A. 41 (P.C.).]

——**S. 3**—*Scheme of taxation—Liability to tax in the year of assessment upon income of previous year.*

Obiter.—The scheme of taxation under the Income-tax Act, 1922, is a definite departure from the system prevailing under the previous Income-tax Act of 1918. By S. 3 of the Act of 1922, the tax to be charged for any year is in respect of income of the previous year. The intention of S. 3 is not to treat the income of the previous year merely as a measure of the unascertained income of the year of assessment, but to tax the assessee in the year of assessment upon the income received by him in the previous year. (*Sir George Lowndes.*) COMMISSIONER OF INCOME-TAX, U. P. *v.* TEHRI GARHWAL STATE. **61 I.A. 1=56 All. 1=3 A.W.R. 97=11 O.W.N. 151—36 Bom. L.R. 257=59 C.L.J. 115=1934 M.W.N. 161=6 R.P.C. 56—38 C.W.N. 314=1934 A.L.J. 165=39 L.W. 278 147 I.C. 434=A.I.R. 1934 P.C. 34=66 M.L.J. 127 (P.C.).**

——**S. 3**—*Trust—Liability of trustee to assessment—Currimbhoy Ebrahim Baronetcy Act (IV of 1913).*

In cases of trust not covered by Ss. 40 to 43 of the Act, the person liable to assessment is neither the trustee nor the beneficiary as such but the person in actual receipt and control of the income which it is sought to reach. If the beneficiary receives the income or profits, he is liable to be assessed; if the trustee receives and controls them, he is primarily so liable. *Williams* v. *Singer*, (1921) 1 A. C. 65, Ref. But the trustees of Currimbhoy Ebrahim Baronetcy, having been created a Corporation sole by their Act, constituted an 'individual' within the meaning of S. 3 and a taxable unit and as a matter of convenience may be assessed to income-tax and super-tax. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* TRUSTEES OF THE SIR CURRIMBHOY EBRAHIM. **33 Bom L.R. 1549=136 I.C. 488=I.R. 1932 Bom. 184=A.I.R. 1932 Bom. 106.**

[**Affirm.** 61 I.A. 209 (P.C.)]

——**S. 3**—*Unregistered company—Thirteen constituent firms having more than twenty persons—Liability to be assessed to income-tax.*

The fact that in S. 3 the legislature drew a distinction between a company and a firm or other association of individuals clearly shows that the provisions of the Act do not prevent an association formed for the

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purpose of doing business from being made liable to income-tax on the profits even if it has not been registered in accordance with the law relating to the incorporation of companies. A so-called company which was not registered and which consisted of thirteen constituent firms having more than twenty persons held liable to be assessed to income-tax. (*Jai Lal and Agha Haidar, JJ.*) GOPALJI CO. *v.* THE COMMISSIONER OF INCOME-TAX. **32 P.L.R. 335 = A.I.R 1931 Lah. 376.**

——**S. 4**—"*Accruing or arising*"—*Interpretation.*

The words "accruing or arising" merely refer to the connexion between the income and the country in question and they do not explain what is or is not income. (*Niamatullah and Bennet, JJ.*) JAGMANDAR DAS VAISH, *In re.* **57 All. 737 = 156 I.C. 939 = 8 R.A. 62 = 1935 A.L.J. 374 = 1935 A.W.R. 520 = A.I.R. 1935 All. 378.**

——**S. 4**—*Assessee buying property mortgaged by him—Profits or gains are deemed to have arisen from date of confirmation of sale.*

Where the profits or gains arising to the assessee from the buying of the property mortgaged to him are taxable, such profits or gains must be deemed to have arisen from the date of the confirmation of the sale. (*Lord Macmillan.*) RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **60 I.A. 133 = 12 Pat. 305 = I.R. 1933 P.C. 86 = 37 C.W.N. 570 = 14 Pat.L.T. 237 = 1933 M.W.N. 429 = 35 Bom.L.R. 536 = 37 L.W. 691 = 142 I.C. 446 = 57 C.L.J. 294 = 1933 A.L.J. 564 = A.I.R. 1933 P.C. 101 = 64 M.L.J 544 (P.C.).**

——**S. 4**—*Assessee purchasing mortgaged property—Price for which assessee bids is market value.*

When an assessee purchases with the permission of the Court property which is mortgaged to him, the price which he bids for the property is the market value. (*Lord Macmillan.*) RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **60 I.A. 133 = 12 Pat. 305 = I.R. 1933 P.C. 86 = 37 C.W.N. 570 = 14 Pat.L.T. 237 = 1933 M.W.N. 429 = 35 Bom.L.R. 536 = 37 L.W. 691 = 57 C.L.J. 294 = 1933 A.L.J 564 = 142 I.C. 446 = A.I.R. 1933 P.C 101 = 64 M.L.J. 544 (P.C.).**

——**S. 4**—*Business profits arising abroad—Assessee carrying business and residing in India—Liability to tax—Test—Contracts settled by payment of differences and not actual delivery—Effect.*

S. 4 of the Income-tax Act deals with the place where the profits accrue or arise and not the place where the person who is the ultimate source of profit resides or carries on business. The fact that profits arising under contracts made abroad depend on the exercise in British India of knowledge, skill and judgment on the part of the assessee and upon instructions emanating from British India cannot involve that the profits accrue or arise in British India, when they are not received in British India. Assessee had a business of his own in Bombay and also did business on foreign exchange. He sent orders by telegram from Bombay to his broker at foreign places, and the latter executed the orders as a broker on behalf of the assessee, and on the transactions being put through, informed the assessee of the same. In most of the contracts, no actual sale and purchase or delivery of articles took place, there being only payment of differences. The assessee, as a result of these transactions, earned a large amount of profits, which were not brought into or received in British India, but they were sought to be assessed on the ground that they accrued or arose in British India.

Held, that it made no difference in law whether the contracts of sale and purchase were followed, or intended to be followed, by actual delivery of commodities or whether the contracts were intended to be closed and were closed, by corresponding contracts of sale and purchase, so as to result merely in payment of differences: that the profits did not accrue or arise in British India and were not therefore taxable. (*Beaumont, C. J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* CHUNILAL B. MEHTA. **57 Bom. 719 = 159 I.C. 413 = 37 Bom. L.R. 753 = A.I.R. 1935 Bom. 423.**

——**S. 4**—*Coal mine—Mortgage and lease in favour of same person—Portion of royalty to be applied in liquidation of mortgage debt—Entire royalty is income.*

The proprietor of a coal mine mortgaged it to a company. On the same day, he executed a lease of the mine to the same company at a royalty. A minimum sum of Rs. 8,000 was to be paid to the proprietor and the balance was to be applied by the mortgagees in liquidation of their mortgage debt.

Held, that the whole of the royalty payable, and not merely the sum of Rs. 8,000, which actually came to the lands of the mortgagor, should be treated as income of the assessee. (*Courtney Terrell, C.J., Kulwant Sahay and James, JJ.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* MANAGER, KATRAS ENCUMBERED ESTATE. **13 Pat. 197 = 6 R.P. 398 = 147 I.C. 1101 = 15 Pat.L.T. 11 = A.I.R. 1934 Pat. 116 (S.B.).**

——**Ss. 4 and 10**—*Construction—Income, profits or gains—Meaning—Assessee paying part of profits to third party under contract—If exempted.*

Assessees, who were the agents of a company, received as such agents the sum of Rs. 97,000 odd as profits in the year of assessment. Out of this sum they paid away Rs. 19,000 odd to certain third parties under an agreement. Assessees claimed exemption in respect of this sum of Rs. 19,000 odd, which they contended were not income, profits or gains under S. 4 of the Income-tax Act.

Held, that the sum could not be deducted and that they were liable to be assessed to income tax on the whole amount of Rs. 19,000 odd. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* MACDONALD & CO. **156 I.C. 274 = 7 R.B. 497 = 37 Bom.L.R. 126 = A.I.R. 1935 Bom. 197.**

——**S. 4**—Co-operative Society—Interest on securities and income from land—If exempt from taxation as "profits" under Government of India Notification, dated 12 8 1925. *See* INCOME-TAX ACT (1922), S. 60. **11 Rang. 521 = A.I.R. 1934 Rang. 27 (S.B.).**

——**S. 4**—*Income from land—Exemption from income-tax.*

Per *Kulwant Sahay, J.*—If the income is derived from land used for agricultural purposes as rent or revenue then such income is exempt from assessment. The income cannot be made taxable unless and until it can be brought strictly within the letter of the law. (*Courtney Terrell, C.J., Kulwant Sahay and James, JJ.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **13 Pat. 336 = 6 R.P. 412 = 147 I.C. 1236 = 15 Pat.L.T. 85 = A.I.R. 1934 Pat. 178 (S.B.).**

——**S. 4**—'Income"—Moneys received under use and occupancy policies. *See* BRITISH COLUMBIA TAXATION ACT (1924), SS. 2 AND 48 (3). **A.I.R. 1932 P.C. 121 = 63 M.L.J. 348 (P.C.).**

——**S. 4**—'*Income*' *and* '*profits*'—*Distinction between.*

In the wide sense, 'income' when contrasted with 'capital' means and includes not only income in its strict meaning, but also profits and gains. But in the strict sense, "income" as contrasted, not with 'capital' but with 'profits' or 'gains' means a periodical monetary return

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coming in, and accruing to the assessee independently, and not as the nett proceeds, of a business carried on by the assessee as defined in S. 2 (4). In this sense 'income' connotes incomings without regard to outgoings. Profits are "the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of carrying those receipts." (*Page, C. J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* BENGALEE URBAN CO OPERATIVE CREDIT SOCIETY LTD. **11 Rang. 521=6 R.R. 237=148 I.C. 633=A I.R. 1934 Rang. 27 (S.B.).**

——**S. 4**—*"Interest arising or accruing"—Substitution of a new mortgage for an existing debt—Arrears of interest outstanding on previous mortgage, whether deemed realised when new mortgage granted—Interest not taxable until mortgage realised by sale of property in execution of mortgage decree.*

A mortgagee, carrying on a money-lending business, accepted a new mortgage in July, 1904, for a capital sum representing the principal and arrears of interest then due under a previous mortgage of 1894, thereby discharging the old mortgage. The mortgagee's accounts, kept on a cash basis, did not show the arrears of interest as realised in the year 1904. In December, 1917, the mortgagee obtained a decree on the mortgage of July 1904, and in execution thereof, the mortgaged property was purchased by the mortgagee-decree holder himself (with the permission of the Court) in November 1924, and January, 1925, and the sales confirmed by the Court in December, 1925.

Held, that for purposes of assessment to income-tax, the interest must be deemed to have been received and realised by the mortgagee, not when the new mortgage of 1904 was granted, nor at the date of the Court-sale, but on the date when the sale was confirmed by the Executing Court under O. 21, R. 92, C. P. Code. The transaction of 1904, was in effect the substitution of a further and better security for the old, and the mortgagee did not by virtue of that transaction receive payment then and there of the arrears of interest outstanding on the previous mortgage, and he was not therefore liable to be taxed on this sum as being income received when the new mortgage was granted; the sum representing the arrears of interest (though after 1904 secured by the new mortgage) continued to retain its character as such down to the time of the judicial sales, and when the mortgagee as the result of the judicial sales received payment in account of the sum due under the mortgage of July, 1904, he then recevied payment for the first time of the arrears of interest included in that sum.

Held, accordingly, that the sales having been confirmed and become absolute in December, 1925, the mortgagee was liable to pay income-tax for the year 1926 1927 on the arrears of interest as being profits or gains of his money-lending business in the previous year, 1925-1926. 5 T.C. 159; 14 T.C. 22 and 1933 A.C. 139, distinguished judgment of the High Court, 9 Pat. 48, Affir. (*Lord Macmillan.*) RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **60 I.A 133=12 Pat. 305=I.R. 1933 P.C. 86=37 C.W.N. 570=14 Pat.L.T. 237=1933 M.W.N. 429=57 C.L.J. 294=1933 A.L.J. 564=35 Bom. L.R. 536=37 L.W. 691=142 I.C. 446=A.I.R. 1933 P.C. 101=64 M.L.J. 544 (P.C.).**

[**R.** 36 P.L.R. 199 (201); 12 R. 483 (491).]

——**S. 4**—*Moneys raised by borrowing and remitted to another branch—Borrowed money paid out of mixed funds—Remittance, if out of profits or capital.*

On the 15th January, 1927 the Saigon branch of the petitioner's business, which had considerable accumulated profits but only a small cash balance in hand, in response to an urgent demand from the Rangoon branch raised a sum of money by borrowing from local money-lenders and remitted it to Rangoon. Within a few days the Saigon branch paid off the loans out of the mixed funds of the business before the return of the loan from Rangoon. The amount was assessed to income tax and on a case directed to be stated,

Held, that as the profits of the Saigon business were more than enough to cover the remittance made, the presumption was that the payment was liable to be assessed to income tax. (*Beasley, C.J., Ramesam and Cornish, JJ.*) V.V. R. FIRM *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **I R. 1932 Mad. 630=139 I. C. 173=36 L.W. 165=1932 M W N. 902=A.I.R. 1932 Mad. 573=63 M.L J. 227 (F.B.).**

——**S. 4**—*Mortgagee decree-holder purchasing property with permission of Court—Amount of purchase-money in excess over principal and expenses—Whether interest realized and taxable.*

When a mortgagee decree holder, with the permission of the Court, bids for and purchases the mortgaged property at a judicial sale, under O. 21, R. 72 (2), C. P. Code, to the extent, that the purchased price exceeds the principal sum due and the expenses incurred for the sale there is a realization of interest, *i.e.*, a payment of interest and this amount can be taxed. (*Lord Macmillan.*) RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **60 I. A. 133=12 Pat. 305=I R. 1933 P C 86=37 C.W.N. 570=14 Pat. L.T. 237=57 C L J. 294=1933 A L.J. 564=1933 M W.N. 429=35 Bom L R. 536=37 L. W. 691=142 I.C. 446=A.I.R. 1933 P.C. 101=64 M. L.J. 544 (P.C.).**

——**Ss. 4 and 42**—*Profits accruing in British India but earned elsewhere—Assessability.*

The tax is charged on profits "accruing, arising or received" in British India. It is immaterial if the work was done and money spent abroad to earn it. So a non-resident company assessed under S. 42 in respect of a business in which the manufacture of a commodity takes place in a foreign country and the sale thereof takes place in British India, is not entitled, in computing the profits and gains of such business, to make a deduction representing the proportion of profits earned by manufacture in the country of origin. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) PORT SAID SALT ASSOCIATION, *In re*. **59 Cal. 1226=I.R 1932 Cal. 316=137 I.C. 340=55 C.L.J. 182=36 C.W.N. 563=A.I.R. 1932 Cal. 626 (S.B.).**

——**S. 4**—*"Source".*

Per *Courtney Terrell, C.J.*—The source of the income must be considered in its proximate rather than in its ultimate significance. (*Courtney-Terrell, C.J., Kulwant Sahay and James, JJ.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **13 Pat. 336=6 R.P. 412=147 I.C. 1236=15 Pat L T. 85=A.I.R. 1934 Pat. 178 (S.B.).**

[**Affirm.** 16 P.L.T. 609.]

——**Ss 4, 6 and 12**—*Transfer of entire property by assessee—Transferee to pay off debts and annuity to transferor—Annuity, if taxable.*

The assessee was the owner of a landed estate known as the "nine annas Tikaraj Raj." He had contracted heavy debts. He executed a deed by which he transferred his entire interest in that estate to the transferee. The consideration for the transfer was the payment by the transferee of the transferor's debts amounting to a considerable sum, the further payment by her the expenses of the marriage of the daughter of the transferor and a life annuity of Rs. 2,40,000. It was contended

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by the assessee that the life annuity payments must be considered as payment by instalments of a capital purchase sum and secondly, that the payment should be considered as derived from the estate and therefore exempt from taxation under S. 4 as agricultural income.

Held, (1) that an owner of capital might exchange it for an income which was taxable, or for another form of capital which was not taxable and the question whether what was obtained in exchange should be considered as taxable depended upon the nature of the transaction in the particular case. (Per *Full Bench*) (2) that the annuity cannot be considered as "revenue derived from land which is used for his agricultural purposes." (3) By *Courtney-Terrell, C.J. and Varma, J.* (*Khaja Mohamad Noor, J.* contra) that in spite of the use of the word annuity, the sum in question was not capital but was income and was so taxable, and it was immaterial that it was the "price" of the property transferred. *Foley* v. *Fletcher*, 3 H. and N. 769; *Minister of National Revenue* v. *Spooner*, (1933) A.C. 684; *Secretary of State* v. *Scobble*, (1903) A.C. 299, Expl. (*Courtney-Terrell, C.J., Mohamad Noor and Varma, JJ.*) COMMISSIONER OF INCOME-TAX *v.* GOPAL SARAN NARAIN SINGH. **13 Pat. 661 = 151 I.C. 477 = 7 R.P. 97 = 15 Pat.L.T. 325 = A.I.R. 1934 Pat. 384 (F.B.).**

[Affirm. 62 I A. 207 = 14 Pat. 552 (P.C.).]

——**S. 4 (1)**—*Compensation for determination of agency—Description, as commission—Whether assessable to income-tax.*

Where an agency is not for fixed period, compensation received by the company as agents of a business concern for determination of the agency, such compensation not being commission in lieu of notice, does not lose its character of capitalised value of future annual taxable income merely by reason of the fact that it is described as commission for the year of receipt. The measure of such compensation for the loss of the agency is no test of its character as between capital or income. It is only in exceptional circumstances that anything is to be gained by considering whether the agent would have enforced a claim for damages and whether he could thereby have detained the same amount of compensation for loss of agencies is a receipt in respect of a capital asset in the nature of good-will. Also it does not become an *ex gratia* payment merely because the principal has been generous. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) SHAW WALLACE & CO., *In the matter of*. **58 Cal. 1153 = I R. 1931 Cal. 899 = 134 I.C. 899 = 35 C.W.N. 361 = A.I.R. 1931 Cal. 676.**

[Affirm. 59 I.A. 206 = 59 C. 1343 (P.C.).]

——**S. 4 (1)**—*Construction and scope—Profits accruing or arising in British India—Taxability—Receipt in British India—If condition precedent—Residence in British India of recipient of profits—If essential.*

The words "accruing or arising" in S. 4 (1) of the Income tax Act extend the scope of the Act to income which may not be received in British India; and if moneys are earned by carrying on a business by exercising a profession in British India, liability to tax cannot be avoided by arranging that the moneys are to be paid outside India. The question to be determined is the place where the profits accrue or arise, and not the place where the business in which the profits are earned is carried on or where the assessee resides. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* CHUNILAL B. MEHTA. **59 Bom. 719 = 159 I.C. 413 = 37 Bom.L.R. 753 = A.I.R. 1935 Bom. 423.**

——**S. 4 (1)**—*Foreign income—Lord Bishop of Lucknow—Allowance received in London—Liability to assessment.*

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The Lord Bishop of Lucknow who drew a salary from the Government of India also received a certain annual allowance from the Colonial Bishopric Fund, London. The sum was payable in London and the payment was gratuitous and was one made to the incumbent of the office of Lord Bishop, Lucknow.

Held, that the income "accrued" or "arose" in British India because it became payable on account of the assessee being in British India and was consequently assessable to income-tax. (*Mukerji and Sen, JJ.*) C.J.G. SOUNDERS, *In re*. **54 All. 223 = I R. 1932 All. 275 = 137 I C. 84 = 1931 A.L.J. 1107 = A.I.R. 1932 All. 151.**

[R. 12 R. 477 (482).]

——**S. 4 (1)**—*Income accruing in British India—Assessees acting as agents at Bombay for a company at Indore—Commission paid in fact at Indore—Test of assessability.*

The assessees were a firm carrying on business in Bombay and acting as general agents for a company at Indore. By the terms of the agreement between them, the agents were entitled to a commission on sales effected by them and to retain that commission out of the proceeds. But as a matter of fact, all the proceeds were sent to Indore by the Bombay firm and the commission was paid only at Indore. On a question arising whether the commission was "money arising or accruing in British India", *held*, that the fact that the commission might have been segregated and paid in British India indicated that the income accrued in British India and was assessable accordingly. The income being commission upon sales made in Bombay, does accrue or arise in British India, and none the less so, because as a matter of practice between the parties, it is paid in Indore, and the ultimate right to it arises under an agreement made in Indore. 32 Bom.L.R. 671, Dist. (*Beaumont, C.J. and Barlee, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* SARUP CHAND HUKUM CHAND. **55 Bom 231 = I.R. 1931 Bom. 345 = 132 I. C. 505 = 33 Bom.L.R. 382 = A.I.R. 1931 Bom. 236.**

——**S. 4 (2)**—*Dissolution of partnership—Interest on capital paid to outgoing partner—If profits assessable to income tax.*

On dissolution of a partnership an outgoing partner has the right to receive not as in the case of a shareholder in winding up a company only a share of the assets; but to receive payment of his profits, profits which were his before dissolution and do not cease to be his on dissolution. The amount of interest on capital which he receives is received by him as payment of profits and not as capital and as such is assessable to income tax. 69 M.L.J 401 = A.I.R. 1934 Mad. 633, reversed. (*Lord Atkin.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* MUTHUKARUPPAN CHETTIAR. **62 I A. 203 = 58 Mad. 881 = 156 I.C. 671 = 42 L.W. 159 = 7 R.P.C. 229 = 1935 O.W.N. 807 = 1935 A L J. 863 = 1935 A. W.R. 978 = 39 C.W N. 1089 = 37 Bom.L.R. 815 = 1935 M.W.N. 761 = A I.R. 1935 P.C. 117 = 69 M.L.J. 187 (P.C.).**

——**S. 4 (2)**—*Foreign business—Income 'received' in British India—Railway company working in French territory—Receipt of profits in British India—Liability to assessment.*

It is enough for the purpose of liability to assessment if the profits of a business carried on by the assessee are received in British India and the place where the business is carried on is not material. The Pondicherry Railway Company worked the railway in the French territory but they had an office at Trichinopoly in British India where the agent received the gross proceeds of the line from that place; the agent transmitted the net profits to the London office.

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Held, the income in question was 'received' in British India and liable to be assessed to income-tax. (*Lord Macmillan.*) PONDICHERRY RAILWAY CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **58 I.A. 239 = 54 M. 691 = I R. 1931 P.C. 203 = 132 I C. 619 = 1931 M W N. 701 = 34 L W. 234 = 33 Bom.L R. 1263 = 54 C.L.J. 381 = 35 C.W N. 895 = 1931 A.L J. 481 = A.I R. 1931 P.C. 165 = 61 M.L.J. 251 (P.C.).**

[F. 37 Bom.L.R. 126 (129).]

———S. 4 (2)—*Foreign business—Income not accruing in British India—Dividends received out of British India from companies registered in England.*

Dividends received outside British India from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in S. 2 (6) of the Act and assessed to income-tax in British India, are not to be taken into account as part of the total income of the assessee for the purposes of the income-tax assessment. (*Beaumont, C. J. and Murphy, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* MAJOR K. C. GOLDIE. **55 Bom. 734 = 33 Bom L R. 776 = 136 I.C. 170 = I.R. 1932 Bom. 154 = A.I.R. 1931 Bom. 420.**

———S. 4 (2)—*Foreign business—Profits received in British India from—Liability to assessment—Mere book entries—Effect.*

The assessees, a Hindu undivided family had a certain business in Calcutta. They had also business at *M* and *I* in Cooch Behar, outside British India. It was found that the foreign business made remittances to Calcutta which exceeded remittances to them from Calcutta. In the book the matter was treated as though the remittances to Calcutta were carrying interest. There were also certain book entries regarding payment to a person by the Cooch Behar business on behalf of the Calcutta firm.

Held, that the excess moneys received in Calcutta were profits of business brought into British India and consequently assessable.

Held, however, that the money paid to the party cannot be considered to be profits brought into British India. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) MULTANCHAND JOHURMULL, *In re*. **58 Cal. 999 = I.R. 1931 Cal. 937 = 134 I.C 937 = A.I.R. 1931 Cal. 727 (S.B.).**

———S. 4 (2)—*Foreign money lending business—Properties taken in discharge of debts—Rentals from—Assessability.*

Per *Beasley, C.J. and Burdswell, J., Cornish, J., dissenting*:—The rentals derived from properties taken over in discharge of debts in the course of foreign money-lending business and treated as assets of that business can be assessed as part of the profits of that business when remitted to British India under S. 4 (2) of the Act. (*Beasley, C.J., Cornish and Burdswell, JJ.*) A. S. P. L V. R. RAMASWAMY CHETTIAR *v.* COMMISSIONER OF INCOME TAX, MADRAS. **57 Mad. 22 = 148 I.C. 645 = 39 L.W. 19 = 6 R M. 509 = 1933 M.W. N. 1362 = A.I.R. 1934 Mad. 59 = 65 M.L.J. 849 (F.B.).**

———S. 4 (2)—*Partnership—Retirement of partner—Payment of share of capital and profits—Assessability.*

On the retirement of a partner an account was taken of the capital and profits of the firm and his share of the capital and profits was paid out to the outgoing partner,

Held, there was a dissolution by the retirement and on such dissolution the capital and profits became consolidated, and consequently no portion of the amount reserved by the retiring partner was assessable to income-tax as profits. The fact there was no stoppage of business does not make any difference, because after the retirement, the business becomes a new firm in the eye of the law. (*Beasley, C.J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* MUTHUKARUPPAN CHETTIAR. **40 L.W. 509 = 155 I.C. 705 = 7 R M. 602 (2) = 1934 M.W.N. 807 = A.I.R. 1934 Mad. 633 = 67 M.L J. 401 (F.B.).**

———S. 4 (2)—*Profits received in British India—Foreign business having two funds—One alone being taxed—Remittance to British India—Presumption.*

Where there are two funds in the assessee's foreign business, one of which has already been subjected to income tax in British India and another which is still liable to income-tax, it may be reasonable to presume that a remittance made to British India was out of the fund that had already been taxed. That, however, is not an irrebuttable presumption and where the book entries of the assessee himself show that the whole of the fund which had been subjected to income-tax was invested with the constituents of the assessee's firm and so remained at the time when the remittance in question was made to British India so that the remittance could not possibly have been a part of that fund, the presumption if any, in favour of the assessee is rebutted and the general presumption applies, namely, that the remittance was out of profits liable to be taxed. (*Beasley, C. J., Sundaram Chetty and Burn, JJ.*) MEYYAPPA CHETTIAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **36 L.W. 873 = 1932 M.W.N. 1282 = 141 I.C. 330 (2) = I.R. 1933 Mad. 116 = A.I.R. 1933 Mad. 14 = 63 M.L.J. 796 (F B.).**

———S. 4 (2)—*Receipt of foreign profits—What amounts to—Debts due in India—Discharge by hundis issued and payment out of India—Money so paid—If taxable as "received" in India.*

Assessee was carrying on money-lending business in Tinnevelly and also in Penang. Deposits made with him in his Tinnevelly shop were repaid by him by means of hundis on his Penang shop, and the moneys having been paid at Penang, the payments were recorded in the Penang folio of the Tinnevelly books and in the Tinnevelly folio of the Penang books. The profits in Penang were sufficient to cover the payments made.

Held, that what the assessee did was to use in British India moneys available to him in Penang, and this amounted to a receipt in India by him of gains made outside India and were therefore taxable under S. 4 (2) of the Income tax Act. It is not necessary that there should be an actual transfer of the money and the receipt thereof in India to constitute "receipt" under S. 4 (2). (*Madhavan Nair and King, JJ.*) SUBRAMANIAN CHETTIAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **59 Mad. 171 = 43 L.W. 124 = 159 I.C. 787 = 1935 M W.N. 1191 = A I.R. 1932 Mad. 282 = 69 M L J. 844 (F.B.).**

———S. 4 (2)—*Remittance from branch outside British India—Amount less than remittance from British India—Income tax Officer, if may assume that it represents profits in such branch.*

Under certain circumstances it is open to the Income-tax Officer to assume that the amount remitted to British India from the branch of the business outside British India represents profits made in such branch, in spite of the fact that the total amount of such remittances is less than what has been sent from British India to such branch. 5 I.T.C. 55, Rel. on. (*Jai Lal and Skemp, JJ.*) SONA RAM *v.* INCOME-TAX COMMISSIONER. **161 I C. 491 = 8 R L. 763 = A.I R. 1935 Lah. 727.**

———S 4 (3) (1)—*Religious or charitable purposes—Meaning.*

For the purposes of construing the words "religious or charitable purposes" in the Income tax Act, it is

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quite unnecessary to investigate the meanings of the words in the particular system of jurisprudence that may be followed by the assessee. The proper rule in the case of such a general Act is to construe it according to the jurisprudence of the country wherein it was drafted. 1891 A.C. 531, Rel. on (*Broadway, Dalip Singh and Tapp, JJ.*) UMAR BAKHSH *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **12 Lah. 725=33 P.L.R. 349=I.R. 1931 Lah. 657=132 I.C. 689=A.I.R. 1931 Lah. 578 (F.B.).**

———**S. 4 (3) (i)**—*Religious or charitable purposes—Mahomedan wakf—Income of property spent wholly for maintenance of family—Exemption from assessment.*

Where a Mussalman executed a wakfnama and directed that the property should be in his possession as manager and that he could spend the income according to his wishes for the maintenance of himself and his family and also for religious or charitable purposes and the deed further conferred a similar right to his heirs,

Held, that the property cannot be said to be in trust wholly for religious or charitable purposes and the income was assessable to income tax while it was spent wholly for the maintenance of the assessee and his children. (*Broadway, Dalip Singh and Tapp, JJ.*) UMAR BAKSH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB **12 Lah. 725=33 P.L.R. 349=I.R. 1931 Lah. 657=132 I.C. 689=A.I.R. 1931 Lah. 578 (F.B.).**

———**S. 4 (3) (i)**—"*Trust for charitable purposes*"—*Trust to maintain press and newspaper—Profits to be entirely applied to ensure its permanency.*

By the will executed by the founder of a trust, the committee of trustees was asked to maintain a press and newspaper in an efficient condition and the profits therefrom were to be utilised for improving the said newspaper and placing it on a footing of permanency. The paper was not supplied free to the public but was sold to the public at the same rate as other papers and advertisements were also charged for.

Held (per *Full Bench*).—That the newspaper and press were not held under trust for any charitable purpose or any other object of general public utility within the meaning of S. 4 (3), Income-tax Act, and, as such income therefrom was liable to income-tax.

Per *Tek Chand, J.*, contra.—The press and newspaper were held under trust for charitable purposes within the meaning of S. 4 (3) and as such income therefrom was exempt from income-tax. A trust of a public character, in which no immediate or ultimate personal benefit of any kind is reserved to any individual, created with the object of founding and maintaining a paper, which conveys news and opinions on matter of general interest to the public discusses matters of public interest, and educates the minds of its readers on lines, which the founder considered to be beneficial to the public at large, is a trust for "the advancement of an object of general public utility." The fact that the newspaper is not supplied free to the poor and the needy, or that it is not sold to the public at cost price, would not be material as no part of the income or profit eventually passes into private pockets. (*Young, C.J., Addison and Tek Chand, JJ.*) TRIBUNE PRESS *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **16 Lah. 829=158 I.C. 306=37 P. L.R. 888=8 R.L. 219=A.I.R. 1935 Lah. 570 (F. B.).**

———**S. 4 (3) (v)**—*Accumulated balance in the Provident Fund—Assessability—Government employees—Officers of the Court of Wards.*

Under S. 4 (3) (*v*) of the Act, the accumulated balance at the credit of a subscriber to a Provident Fund to which the Provident Funds Act of 1897 applies is exempt from income-tax. That Act was repealed and partially re-enacted by the Provident Funds Act, 1925 and it applies [Cl. (2) of S. 2] to any Government Provident Fund "constituted by the authority of Government for any class of its employees." The officers of the Court of Wards fall within the class of Government employees and the accumulated balance at the credit of the manager of the Court or Wards in the Bettiah Raj Estate as a subscriber to the Provident Fund is exempted from taxation. (*Courtney-Terrel, C.J. and Dhavle, J.*) RUTHERFORD *v.* COMMISSONER OF INCOME TAX, BIHAR AND ORISSA. **10 Pat. 315=I.R. 1931 Pat. 360=133 I.C. 360=12 Pat.L.T. 384=A.I.R. 1931 Pat. 451.**

[Rel. 69 M.L.J. 611 (F.B.).]

———**S. 4 (3) (v)**—*Injuries—Meaning.*

The word 'injuries' in Cl. (*v*) of S. 4 (3) denotes personal injuries and none other. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* PANCHAPAKESA AIYAR. **I.R. 1932 Mad. 398=137 I.C. 507=1932 M.W.N. 664=35 L.W. 777=A.I.R. 1932 Mad. 424=62 M.L.J. 656 (F.B.).**

———**S. 4 (3) (v) and (vii)**—Applicability—Government servant—Compulsory retirement—Compensation amount—Liability to assessment. *See* INCOME TAX ACT, S. 6. **A.I.R. 1932 Mad. 424=62 M.L.J. 656 (F.B.).**

———**S. 4 (3) (v) and (vii)**—*Commuted pension—Assessability.*

A capital sum received by the Manager of the Court of Wards in commutation of the whole of his pension falls within S. 4 (3) (*iv*) and is exempt from taxation. That paragraph makes no distinction between pensions which may be demanded as of legal right and those which are granted voluntarily and between those payable by Government and those payable by any private body or individual. In deciding if the payment is pension or a gratuity, the Court has to look into the real nature of transaction and the fact that it is called by one name in the Government letter is not conclusive. But the amount is not exempt under S. 4 (3) (vii) as such payment must be considered to have 'arisen from' his occupation. 56 C. 211, Foll. (*Courtney-Terrel, C.J. and Dhavle, J.*) RUTHERFORD *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **I.R. 1931 Pat. 360=133 I.C. 360=10 Pat. 315=12 Pat L.T. 384=A.I.R. 1931 Pat. 451.**

———**Ss. 4 (3) (v) and 7 (1)**—*Officers' Retiring Fund—Company allotting regularly to such fund out of profits—Amount and interest apportioned between officers admitted to such fund in proportion to salaries and to be paid on retirement in lump sum—Assessability.*

During the period of assessee's employment the company was paying him a monthly salary as well as a half-yearly cash bonus out of its profits, and income-tax was being collected on these amounts. The company had constituted an Officers' Retiring Fund and made rules for its management. The company allotted every half-year out of its profits a certain sum to the credit of this fund and invested the same; the amount together with the interest earned was apportioned between such of its officers as were admitted to the benefits of the fund in proportion to their salaries and the amounts credited to each officer where shown in a separate pass book given to him. The company undertook to pay the amount lying to the credit of an officer to him on his leaving its service after having previously served continuously and satisfactorily for a certain period, and in the event of his death, whether during or after the said period of service, to his legal representatives. In the event of an officer leaving the company's service or being dismissed

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before completing the said period of service, he was to have no claim whatever to the amount lying to his credit in the fund, and the same was to be apportioned to the credit of other officers then in the employ of the company. The last rule declared the right of the directors of the company to decide in their discretion which of the officers shall be eligible for the benefits of the fund, and to make any alteration or addition to the rules, and that the director's decisions on these points and also as to the meaning of the rules and on all other matters connected with the fund of its administration shall be final and conclusive. The amount received by the assessee on his retirement out of this fund was sought to be assessed.

Held (per *Cornish and Pandrang Row, JJ., Beasley, C.J.*, contra).—The payment to the assessee on his retirement from the company's service was in substance and in truth the payment of a lump sum in lieu of pension, *i.e.*, in consideration of his past services. It was not of the nature of a periodical return ; it was a unique receipt not to be repeated. It was not a source from which periodical monetary returns could come in so far as the employee was concerned. The only return he could expect was a single payment on retirement and that the receipt of the lump sum in question was not income and as such not assessable. (Case-law referred.)

Per *Beasley, C.J.*—This amount must be regarded as sums set apart periodically, that is to say, half-yearly, by the Company in respect of present services rendered by the assessee as an addition to salary under S. 7 (1) of the Act. Instead of being actually paid then they were allowed to accumulate and were paid to him in a lump sum on his retirement and, being accumulations of sums credited to him for present services, the fact that they were paid to him at the end of his service in a lump sum did not make any difference and as such they were assessable. (*Beasley, C.J., Cornish and Pandrang Row, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v* FLETCHER. **59 Mad. 216 = 158 I.C. 895 = 8 R.M. 879 = 42 L.W 812 = 1935 M W.N. 749 = A.I.R. 1935 Mad. 953 = 69 M.L.J. 611 (S.B.).**

———S. 4 (3) (vii)—*Applicability.*

(*Obiter* per *Pandrang Row, J.*)—Cl. 7, S. 4 (3) can apply only when the receipt is not by way of addition to the remuneration of an employee. (*Beasley, C.J., Cornish and Pandrang Row, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* FLETCHER. **59 Mad. 216 = 158 I.C. 895 = 8 R.M. 379 = 42 L.W. 812 = 1935 M.W.N. 749 = A.I.R. 1935 Mad. 953 = 69 M.L.J. 611 (S.B.).**

———S. 4 (3) (vii)—*Compensation for loss of agency —Whether taxable.*

Compensation received by a company as agent of a business concern for determination of the agency, is a receipt arising from business and consequently, if income, it would be taxable under S. 10 as being an income from business, or at least under S. 12 as being income from other sources. The circumstance that it is casual or non-recurring does not exempt it from taxation under S. 4 (3) (*vii*). (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) SHAW WALLACE & CO., *In the matter of.* **58 Cal. 1153 = I.R. 1931 Cal. 899 = 134 I. C. 899 = 35 C.W.N. 361 = A.I.R. 1931 Cal. 676.**

[Affirmed 59 I.A. 206 = 59 C. 1343 (P.C.).]

———S. 4 (3) (vii)—*Money lender—Assignment of mortgage to—Decree on—Purchase of mortgaged properties in satisfaction of decree—Subsequent sale for profit—Profits, if exempt from tax.*

The assessee, a professional money-lender got an assignment of a mortgage from another, sued on the mortgage and having obtained a decree for a large amount, took possession of the mortgaged properties in satisfaction of the decree. Later on he sold the properties for cash and made a large profit out of the transaction. On the net profits being assessed to income-tax, the assessee claimed exemption under S. 4 (3) (*vii*) of the Income-tax Act, on the ground that the transaction was not one in the course of his business, but an isolated venture, speculative and casual in nature.

Held, that though at the inception, the mortgage loan was not actually advanced by the assessee, the subsequent advance of an amount for getting an assignment of the mortgagee's rights was certainly a venture coming within the generally recognised ambit of the money-lending business and could not be deemed to be so disconnected with the profession of a money lender as to take it out of the category of business carried on by the assessee. The fact that a particular transaction in money-lending business was speculative did not take it out of its category. Moreover though it was an isolated transaction, speculative in character it was not essentially different in nature from the assessee's other transactions, and it could not be said that it was not entered upon as a matter of bussiness. Hence, the profits derived were in respect of a transaction connected with his money-lending business and liable to taxation. (*Beasley, C. J., Ramesam and Sundaram Chetty, JJ.*) SUBRAMANIA CHETTIYAR *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **58 Mad. 105 = 40 L.W. 318 = 151 I C. 502 = 7 R.M. 125 = 1934 M. W.N. 778 = A I.R. 1934 Mad. 539 = 67 M.L J. 247 (F.B.).**

———S. 4 (3) (vii)—*"Receipts arising from business".*

The expression "receipts arising from business" in Cl. (*vii*) means "receipts arising from the *carrying on* of business." 56 C. 211, Disappr. (*Sir George Lowndes*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 I.A. 206 = 59 Cal. 1343 = 34 Bom.L R. 1033 = 1932 A.L J. 588 = 36 L.W. 63 = I.R. 1932 P.C. 156 = 1932 M.W.N. 618 - 9 O W. N. 515 = 55 C.L J. 386 = 36 C.W N. 653 = 136 I.C. 742 = A I.R. 1932 P.C. 138 = 63 M.L J. 124 (P.C.).**

———S 4 (3) (vii)—*Receipt of casual nature—Assessee financing an appeal—Additional sum received by him on appeal being successful.*

The assessee entered into an agreement with one *X*, who was a party to an appeal pending in the High Court, whereby the assessee undertook to supply funds for the conduct of the appeal, in consideration of *X* returning the sums advanced to him together with a certain additional amount in case the appeal was decided in favour of *X*. The assessee financed the litigation and *X* won his appeal. The Income-tax department assessed the additional sum received by the assessee to income-tax. It was contended for the assessee that under the above circumstances the additional sum cannot be considered to be income, profit or gain from business within the meaning of S. 4 (3) (*vii*) of the Income-tax Act, and that it is an income of a casual nature and should be deemed to have been exempted by the aforesaid section. Overruling the contention,

Held, that though there was an element of speculation in the transaction, it cannot be gainsaid that the transaction was one of loan from which the lender expected to derive considerable pecuniary profit, and so the transaction, amounted to business within the meaning of S. 10 of the Income-tax Act. (*Niamatullah, J.*) GAYA PRASAD AND CHHOTELAL, *In the matter of.* **57 All. 740 = 154 I C. 963 = 7 R A. 838 = 1935 A.W.R. 518 = 1935 A.L.J. 405 = A.I R. 1935 All. 495.**

———S. 4 (3) (vii) and (viii)—*Royalties for preparing bricks—Assessability.*

Royalties for preparing bricks are assessable to income-tax. On the assessee's land there was a quantity

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of earth suitable for brick-making. He granted licences to brick-makers to erect brick kilns upon the land, to take away brick earth and use it for making bricks. The assessee charged fees at certain rates for the licenses.

Held, the income was not of a casual or non-recurring nature, or agricultural income; it could not be considered as in the nature of a capital sale of the assets of the assessee and that it was assessable to income tax. (*Courtney Terrell, C.J. and Dhavle, J.*) MAHARANI JANKI KUER *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **10 Pat. 275=13 Pat. L T. 14=I.R. 1931 Pat. 310=133 I C. 38=A.I R. 1931 Pat. 264.**

——**S. 4 (3) (vii)**—*Speculation in stocks and shares —Evidence of intention.*

A man may either buy shares or securities with the object and intention of making a gain from the sale when those shares or securities have risen to a higher price or he may purchase the shares or securities with the intention of keeping his capital safe and receiving meanwhile a certain amount of dividend or interest. The intention must be deduced from acts and from the circumstances of the case. It is only in the former case that the profits are taxable and the losses deductible. (*Niamatullah and Bennet, JJ.*) GANGA SAGAR, *In the matter of.* **151 I.C. 247=7 R.A. 117=3 A.W.R. 178=1934 A.L.J. 61=A.I.R. 1934 All. 370.**

——**S. 4 (3) (vii)**—*Transaction of loan—Agreement to pay portion of consideration realised on sale of property—Money received whether come under profits.*

The assessee who was a tin mine owner and worker lent certain sums of money to *W* to enable him to work a tin area. Subsequently he again advanced a loan to *W* in order to enable the latter to do certain work and sell the mine and *W* executed an agreement by which he agreed to pay the assessee a third of the consideration which might be realised by the sale.

Held, that the transaction was a private venture and not part of the assessee's business and was a receipt of a casual nature under S. 4 (3) (7) and not profits or gains under S. 10 or S. 12 (3). (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* MILNE. **11 Rang. 454=148 I.C. 98=6 R R. 197 =A.I R. 1934 Rang. 4 (S.B.).**

——**Ss. 4 (3) (vii), 6 (vi) and 12**—*Employee's gratuity—Termination of service on insolvency of employer—Payment of gratuity by stranger—Assessability.*

Assessee who was in the service of Company *A*, as a purser, was afterwards taken into the service of Company *B*, who had at some time acted as agent of Company *A*. There was an understanding, but no formal or legal contract, that assessee would be paid a gratuity on termination of service if the same was satisfactory. The fund, however, was entirely at the disposal of the Company *B*. The Company, however, went into liquidation and the assessee lost his employment as well as the gratuity. But a stranger who was interested in the Companies *A* and *B* paid the assessee the gratuity which he would have received if Company *B* had not become insolvent. Income tax was claimed on this amount under Ss. 6 (*vi*) and 12 of the Income tax Act.

Held, that the sum in question was not income derived from "other sources" under S. 6 (*vi*) or "salary" under S. 7 (1), and was not assessable to income-tax under S. 6, S. 7 or S. 12 of the Act; that the amount was not a receipt arising from the exercise of an occupation by the assessee, but was of a causal and non recurring nature, and was consequently exempt from income-tax under S. 4 (3) (*vii*). (*Page, C.J., Baguley and Ba U, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* JOHNSTONE. **12 Rang. 477=152 I.C. 986=7 R.R. 182=A.I.R. 1934 Rang. 377 (S.B).**

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——**S. 4 (3) (viii)**—*Agricultural income—Maintenance allowance charged on land.*

The maintenance allowance obtained by a widow under a compromise though derived from an agricultural estate is not agricultural income within the meaning of S. 2 (1) (*a*), and hence is not exempt from income tax under S. 4 (3) (*viii*). (*Smith and Allsop, JJ.*) RANI SALTANAT BEGAM, *In the matter of.* **6 I.R. (Oudh) 153=146 I.C. 651=10 O.W.N. 1003=A.I.R. 1933 Oudh 475.**

——**S. 4 (3) (viii)**—*Agricultural income—Maintenance received by junior member of Hindu family possessed of impartible Raj.*

Where the maintenance allowance received by a junior member of a Hindu family possessed of an impartible Raj, is not received by him as a member of an undivided Hindu family, his source is not the original source through which the estate received the money and his immediate source is the bounty or gift by the estate, in which case it cannot be considered to be agricultural income and cannot be exempt from income tax under S. 4 (3) (*viii*) of Income-tax Act. (*Niamatullah and Bennet, JJ.*) MAHARAJ KUMAR OF VIZIANAGARAM, *In re.* **56 All. 1009=6 R.A. 884=1934 A.L.J. 1237 =149 I.C. 306=A.I.R. 1934 All. 818.**

——**S. 4 (3) (viii)**—Agricultural income—*Sabape* loans. *See* INCOME-TAX ACT (XI OF 1922), S. 2 (1) (*a*). **10 Rang. 77=A.I.R. 1932 Rang. 19 (S.B.).**

——**S. 4 (3) (viii)**—*Applicability—Income from fisheries.*

Income from fisheries in tanks and supply channels in a Zamindari is not agricultural income so as to be exempt from assessment under S. 4 (3) (*viii*). (*Beasley, C.J., Anantakrishna Iyer and Cornish, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* SEVUGA PANDIA THEVAR. **56 Mad. 251=I R 1933 Mad. 1 =140 I.C. 459 -36 L.W. 719=1932 M W.N. 1207= A.I.R. 1932 Mad. 757=63 M.L J. 634 (F.B.).**

——**S 6**—*Compensation amount—Payment by Government after compulsory retirement—Liability to assessment as salary.*

The assessee who was an Assistant Engineer in Government service was compulsorily retired four years before his retiring age. He along with others similarly compulsorily retired, presented memorials to the Government of India and the Secretary of State setting forth their grievances and this resulted in an order by which the assessee was to receive as compensation (1) a lump sum equivalent to two thirds of the difference between the amount received by him in pension from the date on which he was discharged to the date of attaining 55 years of age and the amount he would have received in pay had he been retained in service up to that date, and (2) with effect from his 55th birthday the pension which he would have received had he remained in service up to that day. The income-tax authorities sought to assess a sum received by the assessee under head (1) of the order to income-tax.

Held, that the assessee had been treated for purposes of remuneration as if he had remained in Government service and the amount received by him was therefore taxable as salary under S. 6. 56 Cal. 211, Ref. to. (*Beasley, C J., Ramesam and Cornish, JJ*) THE COMMISSIONER OF INCOME-TAX, MADRAS *v.* PANCHAPAKESA AIYAR. **I.R. 1932 Mad. 398=137 I C. 557=1932 M.W.N 664=35 L.W. 777=A I R. 1932 Mad. 424=62 M.L.J. 656 (F.B.).**

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———**S. 6**—*Construction.*

Per *Courtney Terrell, C.J.*—The words "profits" and "gain" in S. 6 are an amplification and not a limitation upon the word "income." The words "other sources" indicate that anything which can properly be described as income is taxable unless expressly exempted (*Courtney Terrell, C.J. Mahomed Noor and Varma, JJ.*) COMMISSIONER OF INCOME-TAX *v.* GOPAL SARAN NARAIN SINGH. **13 Pat. 661=151 I C. 477 =7 R.P. 97=15 Pat.L.T. 325=A.I.R. 1934 Pat. 384 (F.B.).**

———**S 6** — Maintenance charge — Assessment to income-tax—No exemption under Ss. 7 and 12. *See* INCOME TAX ACT, S. 7. **60 I A. 196=60 Cal. 1029= 65 M.L.J. 285 (P.C.).**

———**Ss. 6, 12 and 4**—Transfer of entire property by assessee—Tranferee to pay off debts and annuity to transferor—Annuity if taxable. *See* INCOME TAX ACT, SS. 4, 6 AND 12. **13 Pat. 661=A.I.R. 1934 Pat. 384 (F.B.).**

———**S. 6 (iv)**—Mutual Insurance Company — Premiums paid by policy holders—Assessability. *See* INCOME-TAX ACT (XI OF 1922), S. 10. **55 Bom. 637=A.I.R. 1931 Bom. 448.**

———**Ss. 6 (iv) and 10**—Mutual Insurance Company —Contributions entirely by members — Assessability. *See* INCOME-TAX ACT, SS. 10 AND 6 (*iv*). **56 Bom. 119=A.I R 1932 Bom. 104.**

———**Ss. 6 (vi) 12 and 4 (3) (vii)**—Scope—Employee's gratuity — Employer's insolvency — Payment of stranger—Sum not assessable under S. 6, 7 or 12—Exempt from income-tax under S. 4 (3) (*vii*). *See* INCOME-TAX ACT, SS. 4 (3) (*vii*), 6 (*vi*) AND 12. **12 Rang. 477=A.I.R. 1934 Rang. 377 (S.B.).**

———**S. 7**—*Lease in favour of father and son—Arrangement between them for management—After deducting all expenses including allowances, net income to be divided proportionately—Whole allowance granted to son—If assessable as salary.*

An arrangement was entered into between *A* and his son *B* for the management of his estate consisting of a lease granted to *A* by Government and in which the son had a share. It was agreed that the management of the estate was to rest in the father, that the son was entitled to a residence in the estate and manage it under the directions of his father. The father had absolute right to fix his own as well as his son's allowance and that the son was to receive his allowance only if he actually resided in the estate. The father was not bound to reside there permanently and that after deducing the expenses including allowances, the income was to be divided between them in a certain proportion. The Income-tax Officer assessed the whole of the allowance granted to the son to tax as salary within the meaning of S. 7, Income-tax Act.

Held, that the son was entitled to treat that part of his income as agricultural which he received as of right by virtue of the ownership of his share; and that only the surplus could be treated as salary and therefore taxable as he received it for managing the father's estate. Even a co owner could employ another co-owner on the business of the joint ownership and similary a partner could be employed by another partner on the business of the firm. (*Addison, Ag.C.J. and Din Mohammad, J.*) L.H.G. CONVILLE *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **A I.R. 1933 Lah. 978.**

———**S. 7**—*Maintenance charge—Assessment to income-tax.*

Where by the decree of a Court, the assessee's stepmother has a charge not only on the son's zamindari property from which his agricultural income was derived,

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but also on all his other sources of income included in the assessment, the assessee's liability to his step mother is not of the same kind as his liability to provide for his wives and daughter. The case was not one of a charge created by the assessee for the payment of debts which he has voluntarily incurred and the liability to his stepmother does not fall within any of the exemptions or allowances allowed under Ss. 7 and 12. (*Lord Macmillan.*) BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME-TAX, CALCUTTA. **60 I.A. 196= 60 Cal. 1029=1933 M W.N. 553=37 C.W.N. 885= 57 C.L J. 503=1933 A L J. 641=35 Bom.L.R. 811= I.R. 1933 P.C. 127=143 I.C. 145=37 L.W. 775= A.I R. 1933 P.C. 145=65 M.L.J. 285 (P.C.).**

[**D** 13 P. 197 (199) (S B.), 37 Bom.L.R. 126 (129).]

———**S. 7**—*Payment of salary—Transfer of shares to employee.*

A transfer by the trustees of the shares to the employee at the termination of his employment is not a payment of 'salary', perquisite or profits received by the employee in addition to his salary or wages, which are paid by or on behalf of the company within the meaning of S. 7. (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* RANGOON ELECTRIC TRAMWAY AND SUPPLY CO., LTD. **11 Rang 70=I.R. 1933 Rang. 38=142 I.C. 239=A.I. R. 1933 Rang. 22.**

———**S. 7**—"*Salaries*"—*Meaning.*

A sum paid to an employee as gratuity not by the employer but by a stranger who was interested in the employer out of charitable motives is not chargeable under the head "salaries" in S. 7 of the Income tax Act, because it is not paid by the employer or any one on behalf of the employer. (*Page, C.J., Baguley and Ba U, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* JOHNSTONE. **12 Rang. 477=7 R.R. 182=152 I.C. 986=A.I R. 1934 Rang. 377 (S.B.).**

———**S. 7 (1)**—*Salaries—Lord Bishop of Lucknow—Annual allowance received in London.*

The annual allowance received at London from a fund by the Lord Bishop of Lucknow as such is a salary within the meaning of S. 7 (1). (*Mukerji and Sen, JJ.*) C. J. G. SOUNDERS, *In re.* **54 All. 223=I.R. 1932 All. 275=137 I C. 84=1931 A.L.J. 1107=A. I.R. 1932 All. 151.**

———**S. 7 (1)**—*Salary—Provident fund—Contribution by employer—Interest paid by employer.*

The interest paid by a company on the contributions which the company makes to the Provident Fund is a perquisite in addition to the salary or wages of the employees of the company. It is a sum that accrues to the members of the Provident Fund because they are under a contract of service with the company and as such it falls within the ambit of the term "salaries" in S. 7 (1). But unless and until the salary has been received by the employee and has been paid by the company to him, such salary is not assessable to income-tax. When therefore the interest of the company's own contributions to the Provident Fund is paid by the company and received by the employee the sum so paid is "salary" within the meaning of that term as used in S. 7 (1). (*Page, C.J., Mya Bu and Baguley, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* BOMBAY BURMA TRADING CORPORATION, LTD. **11 Rang. 172=I.R. 1933 Rang. 69 (2)=143 I.C. 532=A.I.R. 1933 Rang. 45 (F.B.).**

[**R.** 12 R. 477 (481)]

———**Ss 8 and 10**—*Government of India Notification under S. 60, dated 25th August, 1925—"Profits of any Co-operative Society"—Interest from securities, if included therein.*

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The objects of the Madras Provincial Co-operative Bank were (*i*) to collect funds for financing Co-operative Societies, (*ii*) * * * * (*iii*) to purchase and sell Government Promissory Notes, and (*iv*) to carry on general business in banking. Its income was derived, *inter alia*, from interest on investments in Government securities. It was contended for the assessee that the purchase and sale of Government Promissory Notes having been found by the Income tax authority to be a part of its business, the interest derived therefrom constituted "the profits of a Co operative Society" exempted from income-tax by the Notification of the Government of India, dated the 25th August, 1925.

Held, that the word "profits" as a subject of taxation, was distinct from, and did not include, interest on Government Securities and that such interest was not exempted from income-tax under the Notification. (*Beasley, C.J., Cornish and Bardswell, JJ.*) THE MADRAS PROVINCIAL CO-OPERATIVE BANK, LTD. *v.* THE COMMISSIONER OF INCOME-TAX, MADRAS. **56 Mad. 837 = I.R. 1933 Mad 405 = 144 I.C. 422 = 1933 M.W.N. 617 = 37 L.W. 758 = A.I.R. 1933 Mad. 489 = 64 M.L.J. 640 (F.B.).**

———**Ss. 8 and 9**—Special act creating trust—Balance after defraying expenses to be paid over to baronet—If "owned" or "received" by trustees — Liability to tax. *See* INCOME-TAX ACT, S. 40. **61 I.A. 209 = 58 Bom. 317 = A.I.R. 1934 P.C. 116 = 66 M.L.J. 643 (P.C.).**

———**S. 9**—*Annual value—Market-stalls.*

The income and profits from immovable property are to be ascertained by finding out the sum for which the property might reasonably be expected to let from year to year. Where the immovable property consists of a number of market stalls this is to be done by ascertaining the annual value of each of the stalls which in the aggregate make up the property to be assessed. In determining what that annual value is, the Income-tax Officer must have regard to the facts of the particular case under enquiry. One of such factors is the actual daily rent for each of the stalls. A.I.R. 1928 Cal. 456; A.I.R. 1928 Rang. 98; *William* v. *Sandies*, (1927) 2 K.B. 498 and *Attorney General* v. *Mutual Ten Time Westminster Association, Ltd.*, (1876) 1 Ex. D. 469, Ref. (*Page, C.J., Das and Maung Ba, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* SURATEE BARA BAZAR CO., LTD. **9 Rang. 154 = I.R. 1931 Rang. 233 = 133 I.C. 89 = A.I.R. 1931 Rang. 99 (S.B.).**

———**S. 9**—*Annual value of building —Finding of fact.*

In estimating or arriving at a decision as to the annual value of building the Income-tax Officer is entitled to take into account the actual sum expended in the erection of the building. The finding of the Income-tax Officer is one of fact with which the High Court cannot interfere. (*Jai Lal and Dalip Singh, JJ.*) HAVELI SHAH *v.* COMMISSIONER OF INCOME TAX. **6 I.R. (Lah.) 248 (1) = 146 I.C. 550 (1) = A.I.R. 1933 Lah. 829.**

———**S. 9**—*'Annual value'—Meaning—Mode of ascertainment.*

The phrase "annual value" whether in Income tax Acts or wherever else it appears in connection with rating or taxation means the same thing, *i.e*, "the sum for which the property may reasonably be expected to let from year to year." The annual value of a house means the annual money benefit derivable from it by the owner.

Per *Addison, J.*—What the landlord has been able to collect for past year is a fair measure of what the property may reasonably be expected to let for from year to year

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Per *Dalip Singh, J.*—The sum for which the property might reasonably be expected to let from year to year is a notional amount and has nothing to do with the rent actually received by the owner. A good way of arriving at the notional sum would be the correct average of the rents paid for similar and similarly situated buildings in any given area. The sum for which the property might reasonably be expected to let from year to year does not mean the sum that the most grasping landlord can secure from the most necessitous tenant but is the sum which migh reasonably be expected to be paid for that building from year to year regard being had to the rents paid for similar and similarly situated buildings in that locality. If circumstances make it impossible or inconvenient to apply this method, other factors may be taken into consideration. One of the more important ones is the length of time for which the landlord had been able to shift the burden on to the tenants of the taxation. A long time might well lead to the inference that the notional rent included that amount of the tax. (*Addison, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*) CHHUNNA MAL SALIG RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1931 Lah. 433 = 131 I.C. 193 = 32 P.L.R. 517 = A.I.R. 1931 Lah. 320 (2) (F.B.).**

———**S. 9**—*"Annual value"—Whether includes sums paid by owner as Municipal tax.*

Held, by the majority of the Full Bench (*Addison, J., dissenting*) that the "annual value" of the property for purposes of S. 9 of the Income tax Act does not include sums paid by tenants to the owner on account of Municipal house-tax payable by the owner under S. 61 (1) (*a*) of the Punjab Municipal Act.

Per *Tek Chand, J.*—The question in such cases does not admit of a general answer. The provisions of the Municipal Act in force in a particular locality and the relevant notification under which the tax is an important bearing on the decision in question.

Per *Addison, J.*—The question is one of fact and not of law, namely, what as a fact was the sum for which the property might reasonably be expected to let from year to year. (*Addison, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*) CHHUNNA MAL SALIG RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1931 Lah. 433 = 131 I.C. 193 = 32 P.L.R. 517 = A.I.R. 1931 Lah. 320 (2) (F.B.).**

[**Diss.** 60 C. 357 (360 361).]

———**S. 9**—*Applicability—Income from property in foreign country.*

S. 9 (1) which deals with assessment under the head "property" in respect of the *bona fide* annual value of buildings does not apply to property in a foreign country. (*Beasley, C.J., Cornish and Bardswell, JJ.*) A. S.P.L.V.R. RAMASWAMY CHETTIR *v.* COMMISSIONER OF INCOME TAX, MADRAS. **57 Mad. 22 = 148 I.C. 645 = 6 R.M. 509 = 39 L.W. 19 = 1933 M.W.N. 1362 = A.I.R. 1934 Mad. 59 = 65 M.L.J. 849 (F.B.).**

———**S. 9**—*Long lease—Land together with buildings built by lessee to revert to lessor—Rents recovered by assessee—Liability to assessment.*

Quaere.— Where the assessee having taken land on a long lease under which the land together with the buildings thereon will revert to the possession of the lesssor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildings, whether the tax payable by the assessee in respect of the rents is to be determined in accordance with S. 9 or with S. 12. (*Lord Tomlin.*) COMMISSIONER OF IMCOME TAX, U. P. *v.* BASANT RAI TAKHAT SINGH **60 I.A. 307 = 55 All. 452 = 57 C.L.J. 544 = 1933 M.W.N. 785 = 35 Bom.L.R. 823 = I.R.**

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1933 P.C. 192=1933 A.L.J. 1021=38 L.W. 443=144 I.C. 344=37 C.W.N. 881=A.I.R. 1933 P.C. 180=65 M.L.J. 247 (P.C.).

——**Ss. 9 and 66 (3)**—*Small sum—No mandamus.*

The only question in a petition under S. 66 (3) was whether a small sum expended on the mortgaged property was to be disallowed. The assessee was not able to give any facts about his income.

Held, that as the amount was small no mandamus can be issued on it alone though the reason given by the Assistant Commissioner for disallowing the sum does not appear correct. (*Jai Lal and Dalip Singh, JJ.*) FIRM OF HASHNAK MAL THAKAR DAS *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **6 I.R. (Lah.) 247 (2)=146 I.C. 551 (1)=A.I.R. 1933 Lah. 822.**

——**S. 9**—*'Vacancy'—Meaning—Character of unrealised rent.*

'Vacancy' cannot mean or include occupation. Consequently where an impecunious tenant fails to pay the rent, the house cannot be treated as not having been let at all. Nor can unrealised or unrealisable rent be treated as rent which did not accrue. (*Harrison and Tek Chand, JJ.*) MAHOMED NAQI *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **132 I.C. 1=I.R. 1931 Lah. 513=32 P.L.R. 418=A.I.R. 1931 Lah 656.**

——**S. 9 (1)**—*Lessee of land erecting buildings thereon—Assessment in respect of annual value of lands.*

In order to come within the provision of S. 9 (1) of the Income tax Act, the person who owns the building need not also be the owner of land upon which it stands. An assessee who takes on long lease a parcel of land from Government and erects buildings thereon with their permission and is entitled under the term of the said lease to remove the buildings within a stipulated period on the termination of the said lease is assessable in respect of the annual value of the buildings under S. 9 of the Act. (*Bealey, C.J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* MADRAS CRICKET CLUB. **151 I.C. 879 (2)=7 R.M. 145=1934 M.W.N. 773=A.I.R. 1934 Mad. 670 (F.B.).**

——**S. 9 (1) (iv)**—*Deposit of title-deeds—Charge if created.*

The deposit with the creditors of title deeds relating to property for the purpose of borrowing money for the purchase and extension of property does not constitute a charge on the property within the meaning of S. 9 (1), Cl. (4) of the Act. (*Mukerji and Bennet, JJ.*) BASANT LAL TAKHAT SINGH *v.* COMMISSIONER OF INCOME-TAX, U. P. **142 I.C. 864=I.R. 1933 All. 130=A.I.R. 1932 All. 451.**

——**S. 9 (1) (iv)**—*Income of the family—Impartible estate governed by rule of primogeniture—Allowances paid to junior members—Deduction of—Permissibility.*

The property belonging to an estate subject to the rule of primogeniture is still the property of the family and not the sole property of the manager for the time being for the purposes of super-tax. In computing income of the head of an impartible family governed by the law of primogeniture the allowances paid to junior members thereof should be deducted. They cannot be deemed to be part of the income of the family. They are the separate property of the junior members on which they can be separately assessed. (*Jai Lal and Monroe, JJ.*) KISHEN KISHORE *v.* COMMISSIONER OF INCOME-TAX. **14 Lah. 255=34 P.L.R. 560=141 I.C. 415=A.I.R. 1933 Lah. 284.**

——**S. 9 (1) (vi)**—*Collection charges—If can be deducted.*

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In computing the notional annual value of a house which is not in fact let, the cost of collecting the rent if the house was let cannot be deducted from that notional value; because even in the case of a house which is in fact let the collecting charges may not be deducted unless they have actually been incurred and in that case the sum which may be deducted is limited to a sum 'not exceeding the prescribed maximum'. (*Courtney Terrell, C.J. and Dhavle, J.*) MAHARAJADHIRAJA OF DHARBHANGA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **10 Pat. 261=I.R. 1931 Pat. 305=133 I.C. 33=12 Pat.L.T. 502=A.I.R. 1931 Pat. 223.**

——**S. 9 (1) (vii)**—*'Vacancies'—Meaning of—House vacant and housed unused—Distinction.*

The provision in S. 9. (1) paragraph (*vii*) is intended to apply primarily only to those cases in which the house in question is not in the occupation of the owner but is habitually let to tenants and the vacancies referred to are vacancies between the different tenancies. It may also be applied to cases where a house though not let is dismantled and shut up by the owner but it has no application to a house kept always furnished and ready for occupation by the owner but never in fact used by him at all. Such a house may be 'unused' but it cannot be called 'vacant'. (*Courtney Terrell, C.J. and Dhavle, J.*) MAHARAJADHIRAJA OF DHARBHANGA *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **10 Pat. 261=I.R. 1931 Pat. 305=133 I.C. 33=12 Pat. L.T. 502=A.I.R. 1931 Pat. 223.**

——**S. 9 (2)**—*Annual value—Total consideration received from tenant—Tax under S. 149 of Calcutta Municipal Act, 1923, paid by tenant—Computation of annual value—Deduction of tax—Permissibility.*

'The sum for which the property might reasonably by expected to let from year to year' is a hypothetical sum into which rates as such do not enter at all and from which they are not to be deducted. But if and so far as tha actual bargain made by the parties is considered as evidence of the amount which a hypothetical tenant would give or the landlord reasonably expect to get, the figure which matters is the figure which represents the *whole* of the consideration exacted by the landlord for the right to use and occupy the property —comprising not merely the rent paid by the tenant as such but also the tax paid to the corporation by the tenant. A. I. R. 1931 Lah. 320, Diss.

The owner's share of Municipal tax payable under S. 149 of the Calcutta Municipal Act, 1923, is not a tenant's tax. The discharge thereof is a benefit to the owner. It is a liability of the owner and if under the agreement it is paid oft by the tenant, it represents part of the consideration received by the landlord and has got to be included in the computation of the annual value of the premises. In calculating the annual value of property under S. 9, no deduction can be made on account of the municipal tax payable thereon under S. 149 of the Calcutta Municipal Act. (*Rankin, C.J., C. C. Ghose and Costello, JJ.*) KRISHNA LAL SEAL, *In the matter of.* **60 Cal. 357=I.R. 1932 Cal 679=140 I.C. 1=36 C.W.N. 1144=A.I.R. 1932 Cal. 886 (S.B.).**

——**S. 9 (2), proviso**—*"Residence"—Building owned by company and partly used for officers and partly let out to members.*

The word "residence" in S. 9 (2), proviso, of the Indian Income-tax Act, bears the ordinary meaning, *i.e.*, the place where a human being eats, drinks and sleeps or where his family and servants eat, drink or sleep, or where there is some permanence or continuance of such eating, drinking and sleeping. It does not bear the

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extended meaning, which it bears in the case of a company, namely, the place where the company keeps house and does business. There is no justification for applying the word to a fictional person such as that of a limited liability company. Consequently, a building owned by a Stock Exchange Association, which is partly occupied by its offices, and partly let out to its members for their business, but not used by them for their residence, does not constitute "residence" under the proviso to S. 9 (2). (*Lort Williams and Jack, JJ.*) THE CALCUTTA STOCK EXCHANGE ASSOCIATION, LTD., *In the matter of.* **62 Cal. 547 = 163 I.C. 337 = 9 R. C. 2 = 39 C.W.N. 327.**

———**S. 10**—Advance of loan to enable borrower to sell property—Agreement to pay portion of consideration —Receipt of a casual nature—Not profits or gains. *See* INCOME-TAX ACT, S. 4 (3) (*vii*). **11 Rang 454.**

———**S. 10**—*Allowance for depreciation—When claimable.*

The machinery plant and buildings on which an allowance for depreciation is claimed by a company should be used for the purposes of the company in respect of the profits whereof the assessment is made. Where the machinery, etc., were used by the constituent firms and they had obtained allowances in respect of depreciation.

Held, that the main company was not entitled to claim a deduction once again. (*Jai Lal and Agha Haidar, JJ.*) GOPALJI CO. *v.* THE COMMISSIONER OF INCOME-TAX. **32 P.L.R. 335 = A.I.R. 1931 Lah. 376.**

———**S. 10**—*Appropriation of payment to interest—Option of tax-payer.*

An assessee took over from the debtor in satisfaction of a loan, six items of property movable and immovable amounting in all to Rs. 20,74,943. Assuming that these six items might be treated as money's worth, it was contended that the sum which far exceeded the total amount of interest due on the loan must be treated as applicable in the first place to the discharge of the debtor's liability for interest.

Held, here there was an arrangement affecting the whole indebtedness whereby certain assets were accepted in part satisfaction and promissory notes were taken for the balance that the basis of the presumption, namely, that it is to the creditors' advantage to attribute payments to interest in the first place, leaving the interest-bearing capital outstanding was gone. Moreover, if the question were one between the debtor and the creditor (*i.e.*, assessee), the assessee might up to the last moment appropriate the above mentioned amount to capital account, for in a question with the revenue the taxpayer is entitled to appropriate payments as between capital and interest in the manner least disadvantageous to himself. Having regard to the nature of the transaction, the assessee is entitled to say that he has accepted the first six items in discharge *pro tanto* of his debtor's capital liability and the capital debt now stands discharged to that extent. No part of the sum of Rs. 20,74,973 was received by the assessee as taxable income in the year of computation. (*Lord Macmillan.*) COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 37 L.W. 701 = 142 I.C. 437 = 57 C.L.J. 318 = 14 Pat L.T. 341 = 1933 A.L.J. 527 = 35 Bom.L.R. 731 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

———**S. 10**—*Assessee having more than one business—Expenses incurred in re-starting of business ceasing by reason of cyclone—If can be set off against profits and gains of other business.*

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Assessee, a company, carried on business in motor accessories at several places and also in a mica mine at another place. The latter was, however, stopped on account of a cyclone. With a view to resume that business the company did some prospecting work and incurred expenses on account of salary, wages, legal expenses, depreciation, etc, but the mica business was not resumed in fact. The company claimed that the expenses incurred in attempting to re-start the mica business should be deducted against the profits and gains of the other business.

Held, that the said expenses were allowable as a deduction against the profits and gains of the other business of the assessee company under S. 10 of the Income tax Act, and that the question was not affected by the consideration that the business was not resumed after the expenses were incurred. (*Madhavan Nair, Stone and King, JJ.*) GENERAL CORPORATION, LTD. *v.* COMMISSIONER OF INCOME TAX, MADRAS. **159 I.C. 834 = 8 R.M. 552 = 1935 M.W.N. 1208 = A.I.R. 1936 Mad. 267 = 69 M.L.J. 876 (F.B.).**

———**S. 10**—Assessee financing an appeal—Additional sum received by him on appeal being successful—Liability to assessment. *See* INCOME TAX ACT, S. 4 (3) (*vii*). **1935 A.L.J. 405 = A.I.R. 1935 All. 495.**

———**S. 10**—Assessee paying part of profits to third party under agreement—Right to deduct out of taxable income. *See* INCOME-TAX ACT, SS. 4 AND 10. **37 Bom.L.R. 126 = A.I.R. 1935 Bom. 197.**

———**S. 10**—*'Business'—Meaning.*

Carrying on business can exist only when there is a succession of acts and the performance of a single act apart from special circumstances is not enough even though it may result in gains or profits. (*Beaumont, C. J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* CURRIMBHOY EBRAHIM & SONS, LTD. **57 Bom. 651 = 147 I.C. 566 = 6 R.B. 209 = 35 Bom.L.R. 914 = A.I.R. 1933 Bom. 422.**

———**S. 10**—*"Business"—Assessee dealing in piecegoods—Loss of cash from dacoity—Right to deduction.*

The assessee who was carrying on business in piecegoods accepted deposits from various peoples for the purpose of that business and paid interest on those deposits which were used in his piecegoods business. He had, however, no money-lending business. As a result of a dacoity committed in his premises one night, a sum of Rs. 14,400 was lost, and it was claimed that this sum should be deducted in computing the profits and gains under S. 10 (1), Income-tax Act.

Held, that the amount in question was neither the stock in trade nor expenditure necessary for the carrying on of the 'business' of the assessee or for earning the receipts, but was clearly a loss of capital and was not deductible. (*Addison and Sale, JJ.*) L.N. GADODIA & CO., *In the matter of.* **16 Lah. 494 = 155 I.C. 995 = 7 R.L. 811 = 37 P.L.R. 364 = A.I.R. 1935 Lah. 53.**

———**S. 10**—*Compensation for loss of agency—Assessability.*

Sums received by a firm, in the nature of a *solatium*, for the compulsory cessation of certain agency contracts, are not "income, profits or gains" arising from business *carried on* by them and they are consequently not liable to be assessed to income tax. (*Sir George Lowndes.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 I.A. 206 = 59 Cal. 1343 = 34 Bom.L.R. 1033 = 1932 A.L.J. 588 = 36 L.W. 63 = I.R. 1932 P.C. 156 = 1932 M.W.N. 618 = 9 O.W.N. 515 = 55 C.L.J. 386 = 36 C.W.N. 653 = 136 I.C. 742 = A.I.R. 1932 P.C. 138 = 63 M.L.J. 124 (P.C.).**

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———**S. 10**—Compensation for loss of agency—Taxable under S. 10 or 12. *See* INCOME-TAX ACT, S. 4 (3) (*vii*). **58 Cal. 1153 = A.I.R. 1931 Cal. 676.**

———**S. 10**—*Debt becomes bad when it becomes irrecoverable and not merely by being time barred—Presumption that time-barred debt is bad is rebuttable.*

The presumption that a debt barred by time is *prima facie* bad is rebuttable by evidence according to the circumstances of the case. A debt becomes actually bad when it becomes irrecoverable and not when it is merely time-barred. It may become bad even before it is time barred, when it becomes quite irrecoverable by the circumstances of the debtor. A.I.R. 1932 P.C. 178, Ref. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) BANSIDHAR PODDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **13 Pat. 101 = 151 I C. 858 = 7 R.P. 139 = A.I.R. 1934 Pat. 46.**

———**S. 10**—*Foreign remittance—Capital or profits—Question of fact.*

There is no *praesumptio juris* that a sum received from a foreign partnership is remitted out of the profits of that business. Where a firm was assessed to income-tax in respect of certain sums received from a foreign business and both the Income-tax Officer and the Assistant Commissioner held that the sums were the assessee's share of profits,

Held, that a further reference to the High Court on that question was not maintainable. (*Page, C.J. and Das, J.*) V. P. R. P. L. FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **11 Rang. 397 = 148 I.C. 330 = 6 R.R. 222 = A.I.R. 1933 Rang. 217.**

———**S. 10**—*Freight charges—Deduction in following year.*

An assessee is entitled to deduct the freight charges, etc., from the market value at the ports provided the charges are shown in the accounts as having been incurred. The deductions can be allowed in the following year if the charges are then shown. (*Broadway and Johnstone, JJ.*) BALAK RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **135 I.C. 597 = I R. 1932 Lah. 133 = 33 P.L.R. 526 = A.I R. 1931 Lah. 759.**

———**S. 10**—*Fresh promissory note executed by debtor for interest—Interest entered in accounts as received by creditor and so stated in profit and loss account—Interest, if assessable.*

Where the debtor executed a fresh promissory note for interest due on a prior debt and both in the interest account of the creditors and in the account which they kept relating to the debts of their respective debtors, the interest in question was shown as having been received by the assessees during the year of account, and it was so stated in the profit and loss account of the firm.

Held, that in effect what happens in such cases is that the assessees are content to stay their hands in connexion with the recovery of the loan and interest under the old transaction in consideration of the obligation undertaken by the debtors under the new promissory note which consists of the interest due under the old loan which is capitalised for the purpose of the new transaction. In other words, the assessees were investing the old interest as capital in the new loan. Hence such amount was interest upon loans that had accrued to the assessees in the accounting year, and as such was assessable to income-tax for the year. (*Page, C. J., Mosley, and Ba U. JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* M.A.L. CHETTIYAR FIRM. **13 Rang. 243 = 156 I.C. 653 = 8 R.R. 29 (2) = A.I.R. 1935 Rang. 171 (S.B.).**

———**S. 10**—*Income from other sources—Compensation for loss of agency—Assessability.*

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Sums received by a firm, in the nature of a *solatium*, for the compulsory cessation of certain agency contracts, are not "income, profits or gains" arising from business *carried on* by them and they are consequently not liable to be assessed to income-tax. (*Sir George Lowndes.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 I.A. 206 = 59 Cal 1343 = 34 Bom.L.R. 1033 = 1932 A.L J. 588 = 36 L.W. 63 = I.R. 1932 P C. 156 = 1932 M W.N. 618 = 9 O.W.N. 515 = 55 C.L.J. 386 = 36 C W.N 653 = 136 I.C. 742 = A.I.R. 1932 P.C. 138 = 63 M.L J. 124 (P.C.).**

———**S. 10**—*Interest—Assessment.*

The mere fact that the debtor of an assessee has made an entry in his books showing a credit to the assessee for the amount of interest due in the accounting period does not necessarily mean that the amount had been received or realized by the assessee and does not justify income-tax assessment. In order to justify the assessment there must be a clear finding based on some evidence that the amount was realized or received in some form by the assessee in the accounting period. A presumption by itself does not justify assessment. (*Tek Chand and Monroe, JJ.*) NARAIN DAS BHAGWAN DAS *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **15 Lah. 486 = 152 I.C. 67 = 7 R.L. 242 = 36 P.L.R. 80 = A.I.R. 1934 Lah. 408.**

———**Ss. 10 and 6 (iv)**—*Mutual Insurance Company—Contributions entirely by members—Provision for division of profits amongst certain members—Effect of—Assessability.*

Art. 5 of the Articles of Association of a Mutual Insurance Company limited by guarantee provided that every member should pay to the company all premiums payable in respect of insurances effected by him under company. Art. 88 provided that at any time after the company shall have carried on business for three years, the divisible profits of the company may be divided amongst those members only who shall have become members of the company during the first two years of its existence. This article was not acted upon and no division of profits had in fact been made. The question was whether the surplus of the calls or premiums and further sums mentioned in Art. 5 of the company received from its members over the expenditure for the year 1929-30 was liable to be assessed to income-tax as profits or gains of business under Ss. 6 (*iv*) and 10 of the Income-tax Act.

Held (1) The mere existence of the power given to the directors by Art. 88 which had not been and may never be exercised cannot affect the character of the funds held by the company. (2) The funds have been contributed by the members and will, on a winding up, come back to the members and so the principle of *Styles case*, 14 A. C. 381, applied to the assessee company. Therefore the surplus of the calls or premiums and further sums mentioned in Art. 5 of the Articles of Association received by the company from its members over its expenditure of the year is not liable to be assessed to income-tax as profits or gains of business under Ss. 6 (*iv*) and 10 or any other section of the Act. 33 Bom.L.R. 807, Ref. (*Beaumont, C J. and Rangnekar, J*) MILL OWNERS' MUTUAL INSURANCE ASSOCIATION, LTD., *In re*. **56 Bom. 119 = I.R. 1932 Bom. 125 = 135 I.C. 813 = 33 Bom L.R. 1581 = A.I.R. 1932 Bom. 104.**

———**S. 10**—*Mutual Insurance Company—Premiums paid by policy holders—Profits from non-participating policies—Assessability.*

In the case of a Mutual Insurance Company, limited by guarantee and having no share capital and of which under the Articles of Association every person who

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insures his life with the company under a participating policy is to be deemed to be a member of the company the premiums paid by the policy-holders who are to share in the whole of the profits of the company do not amount to profits or gains of the company which are liable to tax. The Company should only be charged upon its income derived from investments and on profits from non-participating policies or any other sources except the contributions from the participating shareholders. *Style's case*, (1819) App. Cas. 381, Foll. (*Beaumont, C. J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA. **55 Bom. 637 = I.R. 1931 Bom. 491 = 134 I.C. 555 = 33 Bom.L.R. 807 = A.I.R. 1931 Bom. 448.**

——**S. 10**—*Profits and gains of business—Meaning of—Isolated speculative venture—Profits from—Assessability to income-tax.*

Assessee who was a landowner and money-lender and had an interest in certain cotton mills purchased in Court auction the right, title and interest of a certain person in some legacies which were the subject of litigation. After a protracted litigation extending over several years he was able to realise a sum of some money in respect of the legacies, which was far in excess of the purchase-money paid by him. That excess receipt was sought to be assessed to income tax.

Held, that the transaction could not be described as an adventure or concern in the nature of trade, but it was an isolated transaction in no way connected with any other trade or business activities of the assessee, and that consequently the excess amount received by the assessee was not clearly assessable to income tax. (*Beasley, C. J., Ramesam and King, JJ.*) GANGARAJU GARU *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **58 Mad. 363 = 157 I.C. 656 = 8 R.M. 157 (2) = 1935 M.W.N. 577 = 41 L.W. 331 = A.I.R. 1935 Mad. 387 = 68 M.L.J. 222 (F.B.).**

——**S. 10**—*Profits earned abroad—Exemption.*

The section contains no hint that part of the profits will be exempted, although they arise or are received in British India, because they have been "earned" elsewhere. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) PORT SAID SALT ASSOCIATION, LTD., *In re.* **59 Cal. 1226 = I.R. 1932 Cal. 346 = 137 I.C. 340 = 55 C.L.J. 182 = 36 C.W.N. 563 = A.I.R. 1932 Cal. 626.**

——**S. 10**—*Receipt in kind—Whether taxable—Essential.*

A liability to pay interest, like a liability to make any other payment, may be satisfied by a transference of assets other than cash and a receipt in kind may be taxable income. In order that a payment in kind may be taxable income, it is essential that what is received in kind should be the equivalent of cash or should be money's worth. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat. 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 37 L.W. 701 = 142 I.C. 437 = 57 C.L.J. 318 = 14 Pat.L.T. 341 = 1933 A.L.J. 527 = 35 Bom.L.R. 731 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

——**S. 10**—*Royalties for preparing bricks—Assessability.*

Royalties for preparing bricks are assessable to income-tax. On the assessee's land there was a quantity of earth suitable for brick-making. He granted licences to brick makers to erect brick-kilns upon the land, to take away brick earth and use it for making bricks. The assessee charged fees at certain rates for the licenses.

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Held, the income was not of a casual or non-recurring nature, or agricultural income; it could not be considered as in the nature of a capital sale of the assets of the assessee and that it was assessable to income-tax. (*Courtney-Terrell, C.J. and Dhavle, J.*) MAHARANI JANKI KUER *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **10 Pat. 275 = 13 Pat.L.T. 14 = I.R. 1931 Pat. 310 = 133 I.C. 38 = A.I.R. 1931 Pat. 264.**

——**S. 10**—*Taking of promissory notes—Whether taxable.*

A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes. So far as such promissory note is concerned, the assessee does not receive payment of any taxable income from his debtor or indeed any payment at all. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat. 318 = I.R. 1933 P.C. 77 = 57 C.L.J. 318 = 14 Pat.L.T. 341 = 1933 A.L.J. 527 = 35 Bom.L.R. 731 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 37 L.W. 701 = 142 I.C. 437 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

——**S. 10 (1)**—*Accounts showing receipts to have been made over to sub-contractors—Tax payable only on profits, not receipts.*

The assessors' accounts in connection with two mills showed that the contracts in respect of the supply of labour to a company at these mills were in the name of the assessees and that the security deposits required from the assessee firm were also provided by them. The accounts also showed that the moneys received from the company were credited to the assessee firm but the sums so received by them were allocated to the credit of certain sub contractors who were not members of the assessee firm.

Held, that as income tax was payable not upon receipts but upon the profits and as the whole of the amounts received by the assessees has been paid by them to the sub-contractors, there was no material upon which the Income-tax Officer could find that the receipts were the profits of the assessees. (*Page, C. J., Das and Sen, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* THAVER BROS. **6 R.R. 242 = 148 I.C. 681 = A.I.R. 1934 Rang. 172 (S.B.).**

——**S. 10 (1)**—*Co-heirs—Common guardian carrying on business—Liability to assessment.*

Where a guardian or trustee carries on a business, though the persons ultimately deriving the benefit of the business may be some wards or beneficiaries, or as in this case partly the guardian and partly the minors, the business can be regarded as a business carried on by the trustee or guardian and can be assessed as a single business. This virtually amounts to saying that where the business is carried on by one person on behalf of a number of individuals, the whole group of individuals, on whose behalf the business is carried on can be assessed through the person who carries the business. Where there is no Hindu joint family but still on account of the minority of sharers, the sharers have all to be looked after by a common guardian and the business is carried on with the properties of the tenants-in-common put together with the advantages of such condition the Crown can assess the person carrying on the business under S. 10 (1). It may be different, of course, if no business is carried on, and the trustee or guardian is merely in receipt of the incomes on behalf of the beneficiaries or minors. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-

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———**Ss. 10 (1) and (2) and 24**—*Construction and scope—Company—Different concerns or businesses—Losses in one—If can bet set-off against profits in another—Business ceasing to exist before year of account.*

S. 10 of the Income tax Act deals only with business which are being carried on and not businesses which have ceased to be carried on. A company can carry on several distinct and separate businesses and it must always be a question of fact whether those businesses are separate or so interlocked with the main chief business of the company as to be really one business. If separate businesses are carried on during the year of account, the profits and gains of each of them separately will have to be arrived under S. 10 (1) and (2) of the Act after making the allowances given in sub-S. (2); and the loss, if any, in any one or more of the businesses would under S. 24 of the Act, be set-off against the profits and gains of the more successful businesses arrived at in the same way and the aggregate income computed. But an assessee company cannot adopt this course in the present case, because S. 10 only deals with businesses which are being carried on and not businesses which have ceased to be carried on as was the case here. Hence the assessee company was not entitled to set off the losses, as claimed by it which were of a capital nature, against the income from dividends. 52 Mad. 296=55 M.L.J. 600 (F.B.) Expl. (*Beasley, C.J., Ramesam and King, JJ.*) SOUTH INDIAN INDUSTRIALS, LTD., MADRAS *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **58 Mad. 433=157 I.C. 143 =8 R.M. 107=41 L.W 711=1935 M W.N. 309= A I.R. 1935 Mad. 330=68 M.L.J. 379 (F.B.).**

———**S. 10 (2)**—*Bad debt—Claim for allowance—Onus of proof on assessee.*

A claim to any of the allowances mentioned in S. 10 (2) is a claim which the assessee must prove. The same is true of a claim to deduct a bad debt. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) BINJRAJ HUKUM CHAND, *In the matter of.* **58 Cal. 1446=I R. 1931 Cal. 933=134 I.C. 933=54 C L.J. 550=35 C.W.N. 589=A.I R. 1931 Cal. 683 (S.B.).**

———**S. 10 (2)**—*Bad debt—Conditions for allowing deduction.*

Where the assessee claims deduction of an amount as bad debt, he must produce satisfactory evidence (1) of the nature and character of the debts, (2) that they were really and justly due to the assessee firm, and (3) that they became bad in the year of account. If the debt is in respect of another business, the assessee cannot claim deduction of the same as bad debt. Claim for deduction as bad debt disallowed. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) BINRAJ HUKUM CHAND, *In the matter of.* **58 Cal. 1446=I.R. 1931 Cal. 933=134 I. C. 933=35 C.W.N. 589=54 C.L.J. 550=A.I.R 1931 Cal. 683 (S.B.).**

———**S. 10 (2) (i) and (ix)**—*Payment of arrears of royalty—Voluntary payment with legal liability or necessity—Whether can be deducted.*

Where the assessee agreed to take a colliery business on the representation it was free from encumbrances, he subsequently discovered that there were arrears of fixed or bad rent due to the superior landlord, paid the arrears of royalty the superior landlord and claimed to deduct from the assessment the amount paid by him,

Held, negativing the claim, that the sum so paid by him was neither "rent" nor an expenditure incurred by him solely for the purpose of earning the profits or gains of the colliery business within the meaning of S. 10, sub-S. (*2*), (*i*) or (*ix*), that it was a sum payable by him in order to get possession of the colliery, not a sum expended by him in the carrying on of the colliery. If the assessee paid it without any legal liability or necessity on his part to do so, such a voluntary payment is not a permissible deduction from income. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I A. 146=12 Pat. 318=I.R 1933 P.C. 77=1933 M.W.N. 439=37 C.W.N. 598=37 L.W. 701=142 I.C 437= 57 C.L.J. 318=14 Pat L.T. 341=1933 A.L J. 527= 35 Bom.L.R. 731=A.I.R. 1933 P.C. 108=64 M.L.J. 612 (P C.)**

———**S. 10 (2) (iii)**—*Business carried on and profits earned outside British India—Money borrowed in India for the purpose of—Interest on—Deduction of—Permissibility.*

A finance company, which as part of its business, invested money in various parts of the world, borrowed in India a sum of thirty-two lacs of rupees, and invested it in foregn securities. The company claimed to deduct from their taxable profits in British India the interest on the borrowed amount notwithstanding the facts that the borrowed money was employed outside British India and that the profits derived therefrom were not brought within British India and therefore did not attract income-tax in India.

Held, that an allowance can be made under S. 10 (2) (*iii*) in respect of interest on capital borrowed for the purpose of the business—that business should be one that earns or is capable of earning taxable profits, or at least one which is so carried on that taxable profits may be earned, whether in fact profits are earned or not. Unless it is a business of that character, a deduction for interest on capital money borrowed for the purposes of that business is not allowable under the Act. 2 I.T. C. 505 (F.B.), Foll. (*Beaumont, C.J. and Rangnekar, J.*) THE PROVIDENT INVESTMENT CO., LTD., *In re.* **56 Bom. 92=I.R. 1932 Bom. 122=135 I.C. 810=33 Bom.L.R. 1587=A.I.R. 1932 Bom. 94.**

———**S. 10 (2) (iii) and (ix)**—*Dissolution of partnership—Payment towards defunct business—Capital loss not payment of interest on capital*

The assessee who was a money lender had been a partner in two firms which were dissolved in 1929. On the distribution of the assets and liabilities of the firms, liabilities amounting to a certain amount and representing the capital borrowed from third parties entirely for the purposes of the defunct firms had been allotted to his share. On that amount he had during the year of account paid a sum as interest which he claimed to deduct from the profits and gains of the business carried on by him.

Held, that the payment was a capital loss and not interest on capital borrowed for business or expenditure incurred for earning profits within the meaning of sub-Cls. (*iii*) and (*ix*) of S. 10 (2). (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* SIDHA GOUDAR & SONS. **55 Mad. 818=I.R. 1932 Mad. 432=137 I.C. 689= 35 L W. 806=1932 M.W.N. 610=A.I.R 1932 Mad. 375=62 M.L J. 638 (F.B.).**

———**S. 10 (2) (iii), Expl.**—*Applicability—Conditions—"Recurring".*

In order to satisfy the requirements of the explanation to S. 10 (2) (*iii*) of the Income tax Act, there must be recurring subscription paid periodically and the assessee must be a mutual benefit society. "Recurring" means a

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happening again and again—not that which occurs only once. Where the shares are paid in one lump sum, and the assessee is an ordinary banking concern whose transactions are not confined to their members only the allowance under S. 10 (2) (*iii*) cannot be permissible. (*Beasley, C.J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* MADHWA SIDDHANTHA ONNAHINI NIDHI, LTD **58 Mad. 8 = 7 R.M. 293 = 152 I.C. 927 = 40 L.W. 763 = 1934 M.W.N. 808 = A.I.R. 1934 Mad. 653 (2) = 67 M.L.J. 532 (F.B.).**

——Ss. 10 (2) (iii) and Expl. and 3—Fund registered as company—Capital consisting of recurring subscriptions—Subscriptions, if borrowed capital. *See* INCOME-TAX ACT, SS. 3 AND 10 (2) (*iii*). **56 Mad. 415 = 64 M.L.J. 260 = (F.B.).**

——S. 10 (2) (vi)—*Assessee letting out press—Allowance for depreciation—Right to claim.*

The letting of a jute press at a rent is as much a business as the letting of a ship to freight or the letting of a motor car or any other kind of machine, or machinery for hire. The fact that the lessor originally intended to work the press himself is immaterial. The lessees are liable only for repairs and not for depreciation, and in no circumstances could they claim an allowance for depreciation under S. 10 (2) (*vi*) because the buildings, machinery, etc., mentioned in that sub section must be the property of the owner assessee and hence the owner assessee is entitled to claim allowance for depreciation in respect of buildings, machinery etc., leased. A.I.R. 1926 Mad. 1032, Rel. on; 1 I.T.C. 50 and A.I.R. 1928 Cal. 456, Dist. (*Lort Williams and Jack, JJ.*) SADHUCHARAN ROY CHOWDHURY, *In re*. **62 Cal. 804 = 156 I.C. 394 = 7 R.C 706 — 62 C.L.J. 386 = 39 C.W.N. 739 = A I R.1935 Cal. 344.**

——S. 10 (2) (vi)—*Construction—"Original cost thereof to the assessee"—Meaning—Assessee company taking over business of old companies—Claim for depreciation—Calculation—Basis of.*

Where the assessee, a company formed for the purpose of acquiring, taking over and amalgamating with and carrying on the business, till then carried on by five old different companies, takes over the buildings and machinery of the said companies at the time of the amalgamation, not at the actual cost thereof but at their written down value when the amalgamation was effected, the depreciation which it can claim in respect of the buildings and machinery under S. 10 (2) (*vi*) of the Income-tax Act must be calculated only on the value at which the assessee company has taken them over and not on the actual original cost incurred by the old companies in respect of those buildings and machinery. (*Sir Lancelot Sanderson.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* BUCKINGHAM AND CARNATIC CO., LTD., MADRAS. **63 I A. 74 = 59 Mad. 175 = 62 C.L.J. 409 = 40 C.W.N 232 = 8 R.P.C. 119 = 43 L W. 1 = 1936 M.W.N. 1 = 38 Bom L. R. 133 = 1936 A.L J. 721 = 159 I.C 545 = 1935 O.W.N. 1351 = 1935 A W.R. 1480 = A.I.R. 1936 P.C. 5 = 69 M.L.J. 879 (P C.).**

——S. 10 (2) (vi)—*Depreciation of machinery—company taking over assets of old company at a valuation—Basis of calculation—Cost to old company or purchase value.*

The "old" company went into liquidation in 1924 and in 1928 its assets were sold to the "new company and the machinery and plant were valued and purchased at Rs. 16 lakhs by the new company. The assessees claimed a deduction on their assessment for income-tax in respect of depreciation of machinery and the question was whether that deduction should be based on the cost of the machinery to the assessees or on the cost to the old company.

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Held, (1) when an assessee succeeds another in business, the words "on the original cost thereof to the assessee" in S. 10 (2) (*vi*) of the Income tax Act, 1922, refer to the original cost to the person who is being actually assessed, and not to the previous owner of the business. (2) Consequently in the present case the assessees were entitled to have the depreciation allowance under S. 10 (2) (*vi*) of the Act calculated on the original cost to them and not to the old company from whose liquidators they purchased the business. *Massey & Co.'s case*, 3 I. T. C. 302 (F. B.), Diss. (*Beamont, C.J. and Rangnekar, J.*) SARASPUR MILLS CO., LTD., *In re*. **56 Bom. 129 = I.R. 1932 Bom 129 = 137 I.C. 898 = 34 Bom.L.R. 104 = A.I.R. 1932 Bom. 216.**

[**F.** 12 P. 12 (18) **Rel.** 11 R. 514 (518).]

——S. 10 (2) (vi)—*"Original cost" of depreciation*

The words "original cost" refer to the genuine original cost to the assessee and not to that paid by the predecessor in business of the assessee. 56 B. 129, Foll. 56 M.L.J. 451, Diss. from. (*Courtney Terrell, C.J. and Fazl Ali, J.*) MOTIRAM ROSAN LAL COAL CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **12 Pat 12 = 140 I.C. 904 = I.R. 1933 Pat. 35 (1) = 13 Pat.L.T. 618 = A.I.R. 1933 Pat 28.**

[**Rel.** 11 R. 514 (518).]

——S. 10 (2) (vi)—*Scope—Assessee acquiring property by bequests—Determination of original cost.*

It is not intended by the legislature that no allowance should be made for depreciation of "buildings, machinery, plant or furniture" belonging to the assessee merely because the assessee had acquired title to the property by bequest and not by purchase. The intention of the legislature in using the words "the original cost thereof to the assessee," is that the owner to be assessed should not receive an allowance for depreciation based on a capital value of the property higher than or different from the value of the property to the assessee at the time when he originally acquired it. If the assessee purchased the property, the best evidence of the value of the property to the assessee would be the price that he paid for it, but where the assessee acquires the property otherwise than by purchase (*e.g.*, by bequest) "the original cost thereof to the assessee" means, and is, the real value of the property at the time when the assessee acquired it less the expenditure (probate charges actually paid) necessary for the purpose of completing the title.

Semble: the word 'assessee' in S. 10 (2) (*vi*) means the assessee as defined in S. 2 (2) of the Act. (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* SOLOMON AND SONS. **11 Rang. 514 = 6 I R. (Rang) 86 = 146 I.C. 242 = A.I.R. 1933 Rang. 348 (S.B.).**

——S. 10 (2) (vii)—*Obsolescence allowance—Machinery scrapped as being old and worn out.*

Where the business of an oil mill was closed down for the reason that the machinery being old and worn out could not be worked at a profit in the face of competition,

Held, that the assessee would not claim obsolescence allowance as provided in S. 10 (2) (*vii*). Obsolescence allowance is not claimable whenever machinery has become worn out and is sold or discarded for that reason. It is claimable only when mechinery and plant have to be discarded not because it has come to the end of its working 'life' but by reason that newer types of machinery or newer methods have become necessary in the face of competition. 50 M.L.J. 157, Ref. to. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) SHEWDAYAL

INCOME-TAX ACT (1922), S. 10 (2) (ix).

JAGANNATH, JAGANNATH BINJRAJ, *In the matter of* **58 Cal. 985=I R. 1931 Cal. 782=134 I.C. 78=35 C.W.N. 314=A I.R. 1931 Cal. 599.**

———**S. 10 (2) (ix)**—*Capital expenditure—Lump sum payable by assessee to Government for excavation of lime shells.*

Where the assessee entered into an agreement with the Government for the excavation of lime shells in certain Government lands, and for the exclusive privilege of excavating chunam shells, he agreed to pay a sum of money in twelve equal quarterly instalments payable in advance, the portion of such an amount falling within the year of account payable by the assessee was not deductible in computing the income derived from the excavation and sale of lime, being a capital expenditure. The payment was not made in order to carry on an already existing business and to earn a profit out of it. The payment to be made was merely for the purpose of starting that particular venture. Any expenditure made thereafter would of course be deductible. But this was an initial expenditure without which the assessee could not even have begun winning the shells. (*Beasley, C. J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* CHENGALVAROYA MUDALIAR. **58 Mad 1=40 L.W. 469=1934 M.W.N. 840=152 I.C. 48=7 R.M 183=A I.R. 1934 Mad. 617 (2)=67 M.L J. 350 (F.B.).**

———**S. 10 (2) (ix)**—*"Capital expenditure"—Payment made to buy out agents—If deductible.*

Where a company has bought out its agents, with a view to running their own business by their own staff, by means of a payment, the payment made out of circulating capital is a revenue payment and not a capital expenditure, and is properly deductible by the assessees when arriving at their profits for the purpose of income-tax. A payment made out of circulating or floating capital, and not resulting in the acquisition of anything by way of a new asset or addition to the fixed capital, is not a capital expenditure. (*Costello and Lort Williams, JJ.*) IMPERIAL CHEMICAL INDUSTRIES (INDIA), LTD., *In re.* **62 Cal 87=39 C.W.N. 70.**

———**S. 10 (2) (ix)**—*Christmas presents—Allowance of.*

Per *Aston, A.J.C.*—No doubt expenditure in the nature of charity or presents can never be deducted in the case of a business if the gifts are of a voluntary nature; but gifts given to employees may be deducted when they are given as perquisites in return for services which they have rendered, even though such gifts may not be legally claimable by employee.

Per *Rupchand, A.J.C.*—In order to bring Christmas presents within the purview of Cl. (9), S. 10, there must be sufficient material before the Income-tax authorities to enable them to hold that the exependiture had been incurred solely for the purpose of earning profits. Such presents are in certain kinds of business, specially when made by non-Christians, necessary for the purpose of securing business and therefore a legitimate item to be considered. (*Aston and Rupchand, A.J.Cs.*) COMMISSIONER OF INCONE TAX *v.* HEMRAJ KANJI. **6 I.R. (Sind) 25=145 I.C. 202=A.I.R. 1933 Sind 145.**

———**S. 10 (2) (ix)**—*Compensation amount paid to agent—Whether can be permissible deduction.*

Whether a sum is received on Capital or revenue account depends or may depend on the character of the business of the payer and upon other factors related thereto. The case of payer and payee must be considered upon an independent statement of the relevant facts proved in his presence, there being no overriding principle of law that the income-tax authorities are entitled to tax once at least on every payment. Where the assessees paid to their agents in 1928 a certain amount as compensation for the loss of their office as agents to the assessees and the payment came to be considered by the income tax authorities in 1929-30 and in that year the assessee put forward the payment as a permissible deduction from their gross profits.

Held, that the claim should be allowed. (*Rankin, C. J. and Buckland, J.*) ANGLO PERSIAN OIL CO., LTD. *v.* COMMISSIONER OF INCOME-TAX BENGAL. **60 Cal. 840=149 I C. 919=6 R.C. 658=37 C.W.N. 430=A.I.R. 1933 Cal. 777.**

———**S. 10 (2) (ix)**—*Construction and scope — "Not being in the nature of capital expenditure"—Question as to expenditure being capital or not—Determination of —Rule.*

It is not possible to lay down any hard and fast rule or to enunciate a rigid and scientific principle which can be applied as a criterion for determining whether a particular expenditure is capital expenditure or not. The question is one of fact. But the question whether a particular sum is or is not a permissible item of deduction is one of law or at any rate one of mixed law and fact. If it is found that the expenditure in question is or is not made, as the case may be, with a view to bringing into existence some asset or advantage for the enduring benefit of the trade, the finding will be one of fact, when there is evidence to support that finding it will not be subject to review by the High Court. (*Costello and Lort Williams, JJ.*) IMPERIAL CHEMICAL INDUSTRIES (INDIA), LTD., *In re* **62 Cal. 87=39 C.WN. 70.**

———**S 10 (2) (ix)**—*"Expenditure incurred solely for the purpose of earning profits"—Payment out of profits and conditional on profits being earned—Deduction of —Permissibility.*

A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. Where the Pondicherry Railway Company entered into a convention with the French Colonial Government by which in consideration of the permission given to them to work a railway in Pondicherry they undertook to pay the Government one half of the net profits.

Held, the amount so payable to the Government cannot be allowed under S. 10, Cl. (*ix*) in computing the assessable income. "Profits on their coming into existence attract tax at the point and the revenue is not concerned with the subsequent application of the profits." *Gresham Life Assurance Society* v. *Styles*, (1892) A.C. 309, Ref. (*Lord Macmillan.*) PODICHERRY RAILWAY CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **58 I.A. 239=54 Mad. 691=I.R. 1931 P.C. 203=132 I.C. 619=1931 M.W.N. 701=34 L.W. 234=33 Bom.L.R. 1263=54 C.L.J. 381=35 C.W N. 895=1931 A.L.J. 481=A I.R. 1931 P.C. 165=61 M. L.J 251 (P.C).**

[**F.** 61 I.A. 41 (48) (P.C.), 37 Bom.L.R. 126 (129).]

———**S. 10 (2) (ix)**—*Expenses incurred in defending suit—If deductible.*

The Commissioner of Income-tax referred to the High Court the question whether the expenditure incurred by a company in defending as lessees of certain land a suit for possession and injunction instituted by the lessors is deductible under Cl. (*ix*), sub S. (2) of S. 10 of the Income-tax Act. It was urged on behalf of the company that the cost of the litigation was incurred to defend the monopoly of quarrying which is the very life-blood of the company and that for that reason the expenditure should be held to have been incurred solely for the purpose of earning profits or gains. Applying the criterion

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laid down by Lord Dunedin in 5 Tax Cases 529, that 'capital expenditure is a thing that is going to be spent once and for all and income expenditure is a thing that is going to recur every year."

Held, that the expenditure incurred by the company was clearly a non recurring outlay required to retain a capital asset and is, therefore, in the nature of capital expenditure and accordingly no deduction is permissible. (*Addison and Sale, JJ.*) KANGRA VALLEY STATE CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **16 Lah. 479 = 161 I.C. 965 = 8 R.L. 830 = 37 P.L.R. 749 = A.I.R. 1936 Lah. 350.**

———**S. 10 (2) (ix)**—*Expense for office furniture.*

A claim with regard to sums spent on furniture for office cannot be allowed as it is in the nature of capital expenditure. (*Aston and Rupchand, A.J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* HEMRAJ KANJI. **6 I R. (Sind) 25 = 145 I.C. 202 = A.I.R. 1933 Sind 145.**

———**S. 10 (2) (ix)**—*Insurance Company—Share of profits allotted to participating policy holders—If "expenses incurred for earning profits."*

The share of profits allowed to participating policy-holders is conditional on profits being earned and cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract Income-tax at that point, and the revenue is not concerned with the subsequent application of the profits. The share of profits so allotted to participating policy-holders is not, therefore, a permissible deduction. *Last* v. *London Assurance Corporation*, (1886) 10 A.C. 438 and 54 M. 691 (P.C.), Rel. on. (*Sir John Wallis.*) BHARAT INSURANCE CO., LTD. *v.* INCOME TAX COMMISSIONER, PUNJAB. **61 I.A 41 = 15 Lah. 224 = 6 R.P. C. 100 = 147 I.C. 899 = 39 L.W. 250 = 3 A.W R. 333 = 11 O.W.N. 242 = 1934 A.L.J. 236 = 36 Bom.L.R. 401 = 1934 M W.N. 193 = 59 C.L J. 175 = 36 P.L.R. 318 = 38 C.W.N. 375 = A I.R. 1934 P.C. 45 = 66 M.L.J. 391 (P.C.).**

———**S. 10 (2) (ix)**—*Mortgage suit—Deposit of part of of amount—Litigation extending to subsequent years—Subsequent mortgagee's decree—Deduction.*

The assessee had obtained a mortgage decree. A minor sued the assessee for a declaration that his share, *i.e.*, 1-8th in the mortgaged property, was not affected by the decree obtained by the assessee. Pending the decision in the suit, the mortgagee deposited a certain amount, *i.e.*, 1-8th of the purchase-money at which the property was purchased by him in sale, held in execution of his decree. The case was decided only more than two years after the purchase.

Held, that the assessee was to be assessed on the whole of the purchase-money as being the income in the year of purchase and that it was not permissible for him to deduct from such amount the amount deposited in computing the assessee's profits or gains for the year following the year of the purchase. (*Lord Macmillan.*) RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA **60 I.A. 133 = 12 Pat. 305 = I.R. 1933 P.C 86 = 37 C.W.N. 570 = 14 Pat L T. 237 = 1933 M.W.N. 429 = 35 Bom.L R. 536 = 37 L W. 691 = 57 C.L J. 294 = 1933 A.L.J. 564 = 142 I.C. 446 = A.I.R. 1933 P.C. 101 = 64 M L.J. 544 (P.C.).**

———**S. 10 (2) (ix)**—*Mortgage suit—Purchase of property—Reduction of expenses.*

Where an assessee purchases a property mortgaged to him, he is not entitled to deduct from the profits arising out of the sale, expenses incurred for taking delivery of possession of the property or for getting mutation effected. (*Lord Macmillan.*) RAGHUNANDAN PRASAD SINGH *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **60 I.A. 133 = 12 Pat. 305 = I. R. 1933 P.C 86 = 37 C.W.N. 570 = 14 Pat.L.T. 237 = 1933 M.W.N. 429 = 57 C.L.J. 294 = 1933 A.L.J. 564 = 35 Bom L.R. 536 = 37 L W. 691 = 142 I C. 446 = A. I.R. 1933 P.C. 101 = 64 M.L.J. 544 (P.C.).**

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———**S. 10 (2) (ix)**—*Partnership business—Salary of working partner—Deduction from profits—Permissibility.*

If a particular partner or partners possess special qualifications for which they are paid a salary irrespective of the existence of profits and over and above their share of profits, the salaries could be allowed as a deduction. The dual capacity of a partner cum employee, though suspect, is possible and to the extent that the person is in truth an employee, the salary is deductible from the profits of the partnership. 1 I. T. Cases 176, held stated too broadly and 4 I. T. Cases 171, Ref. (*Addison and Bhide, JJ.*) ELECTRIC AND DENTAL STORES, LAHORE *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 663 = I.R. 1931 Lah. 902 = 134 I. C. 198 = 32 P.L.R. 656 = A.I.R. 1931 Lah. 341**

———**S. 10 (2) (ix)**—*Payment of royalty—Exemption.*

The assessees entered into an agreement with *V* for the purchase by them and for the sale by him of all rights and privileges of manufacturing, selling and generally dealing in a medicine and covenanted that, if they successfully promoted the company *V* should sell to them all such rights and privileges for manufacturing, selling and generally dealing in the medicine subject to the following conditions: (1) that the parties on the first part pay to the party on the second part the sum of Rs, 81,000 in five yearly instalments at not less than Rs. 16 000 a year with effect from 1st April, 1928, and (2) that after the expiry of five years a royalty of eight annas on every bottle of medicine sold be paid to the party on the second part as long as the said company is in existence. According to Cl. (2), *V* was paid in the year of account Rs. 13,000 odd representing eight annas on every bottle of the medicine sold by the company. The company claimed deduction of Rs. 13,000 as payment made by them solely for the purposes of earning the profits or gains of the business which in the year of account amount to Rs. 28,000.

Held, that Cls. (1) and (2) must be taken together as between the parties providing the consideration for the purchase of the medicine and the amount of Rs. 13,000 was taxable as capital expenditure. It was the amount of money expended for the purchase by the company of this medicine and as such would be assessable and not a lawful deduction under S. 10 (2) (*ix*) The payment of royalty in accordance with Cl. (2) of the agreement was not of a sum lawfully deductible under S. 10 (2) (*ix*). (*Beasley, C. J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* MINSARARASAM & CO., LTD., SALEM. **I.R 1932 Mad. 550 = 138 I.C. 273 = 36 L.W. 40 = 1932 M.W.N. 756 = A.I.R. 1932 Mad. 437 = 63 M.L.J. 11 (S.B.).**

———**S. 10 (2) (ix)**—*Private company—Fees for directors—Deduction of—Permissibility—New Zealand Land and Income-tax Act*, 1923, *S*, 80 (2).

The trading account of a private company showed a debit of £ 10,000 in respect of fees to its two directors. The company claimed to deduct this amount from its assessable income as exclusively incurred in the production of that income under S. 80 (2) of the New Zealand Land and Income-tax Act, 1923, corresponding to S. 10 (2) (*ix*) of the Indian Act. The two directors were the

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sole directors as well as the sole shareholders. At the end of each trading year when a fair estimate of the profits was available or in some years, after the amount of profits had been ascertained, the fees to the Directors were fixed by a resolution of the company and that approximately at two-thirds of the gross profits.

Held, (*i*) that the mere production of a resolution fixing the remuneration of the Directors and vouchers for payment of the amounts so fixed did not preclude further enquiry by the Commissioner and entitle the company to the deduction claimed; (*ii*) that having regard to the complete identity of the persons interested as shareholders in fixing the fees and of the persons to whom the fees were to be paid, and to the refusal of the directors to allow themselves to be examined as to how the amount was fixed, the company had failed to discharge the onus under Ss. 14 and 25; and (*iii*) that the Magistrate was justified in holding it not proved that the amount was exclusively incurred in the production of the assessable income. (*Lord Thankerton.*) ASPRO, LTD. *v.* COMMISSIONER OF TAXES. **1932 A.C 683 = I.R. 1932 P.C. 305 = 139 I.C. 649 = 63 M.L.J. 920 (P.C.).**

——**S. 10 (2) (ix)**—*Profits—Life Insurance Company—Sums paid as profits to policy-holders—Assessability to income-tax.*

The sum of money allocated by a Life Insurance Company for distribution amongst the participating policy-holders must be considered to be a portion of the profits of the company and as such assessable to income-tax and not an expenditure incurred solely for earning the profits within the meaning of S. 10 (2) (*ix*).

Per *Bhide, J.*—The "profits of a business" mean that the nett proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned and the nett proceeds must be taken to be the basis for the assessment of income-tax irrespectively of their subsequent application or allocation. (*Addison and Bhide, JJ.*) BHARAT INSURANCE CO. LTD *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 704 = I.R. 1931 Lah. 701 = 132 I.C. 861 = 32 P.L.R. 960 = A.I.R. 1931 Lah. 739.**

[**Affirm.** 61 I.A. 41 (P.C.).]

——**S. 10 (3)**—*Capital advanced by partner—Interest payable irrespective of profits—Deduction of—Permissibility.*

There is nothing in sub-Cl. (3), S 10 to suggest that interest paid on the initial capital invested in a firm cannot be the subject-matter of an allowance. Where therefore a capitalist partner advances money to the firm on condition that interest would be paid to him, whether the business of the firm results in profit or not and is in no way made dependent on the profit if any earned, the firm is entitled to claim an allowance for the interest paid on such capital. It is immaterial whether such capital was advanced as initial capital or subsequently. There is no distinction between capital borrowed and capital contributed. Capital contributed by a capitalist partner is capital borrowed from him by the firm. (*Aston and Rupchand, A. J. Cs.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* TEJBHANDAS MOTUMAL. **I.R. 1933 Sind 181 = 144 I.C. 353 = A.I.R. 1933 Sind 192.**

——**S. 12**—Compensation for loss of agency—Taxable under S. 10 or 12. *See* INCOME-TAX ACT, S. 4 (3) (*vii*). **58 Cal. 1153 = A I R. 1931 Cal. 676.**

——**Ss. 12, 4 (3) (vii) and 6 (vi)**—Employee's gratuity—Employer's insolvency — Gratuity paid by stranger—Sum not assessable under S. 67 or 12—Exempt from income-tax under S. 4 (3) (*vii*). *See*

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INCOME TAX ACT, SS. 4 (3) (*vii*), 6 (*vi*) AND 12. **12 Rang 477 = A.I.R. 1934 Rang. 377 (S.B.).**

——**S. 12**—"*Income*"—*Impartible zemindari—Maintenance grant to younger sons—Royalty from—Assessability.*

Where an impartible zemindari is held exclusively by the eldest son of each successive Raja and the younger sons are settled with some mauzas in the zemindari in lieu of maintenance which the Raja was under obligation to provide the grant being resumable at the will of the Raja, unless he parts with it, the income of the mauza by way of royalty is income assessable to income-tax as part of Raja's income irrespective of whether such income reaches him or not. 5 Cal. 256; *Mersey Docks and Harbour Board* v. *Lucas*, 8 A.C. 891; *Sowery* v. *Harbour Mooring Commissioner of King's Lyon*, 2 Tax Cases 201 and *Hudson* v. *Gribble*, (1903) 1 K.B. 517, Ref. (*Courtney-Terrell, C. J. and Dhavle, J.*) JYOTI PRASAD SINGH DEO BAHADUR *v.* COMMISSIONER OF INCOME-TAX, BIHAR. **I.R. 1931 Pat. 139 = 130 I.C. 43 = A.I.R. 1931 Pat. 15.**

——**S. 12**—*Long lease—Buildings to revert to lessor—Rent received—Liability to assessment.*

Quaere.—Where the assessee has taken land on a long lease under which the land together with the buildings thereon will revert to the possession of the lessor on the expiry of the lease, has erected thereon masonry buildings and has received rents from lessees of the buildidgs, whether the tax payable by the assessee in respect of the rents is to be determined in accordance with S. 9 or with S. 12. (*Lord Tomlin.*) COMMISSIONER OF INCOME-TAX, U. P. *v.* BASANT RAI TAKHAT SINGH. **60 I.A 307 = 55 All. 452 = 57 C L.J. 544 = 1933 M. W N 785 = 35 Bom L.R. 823 = I R. 1933 P.C. 192 = 1933 A L.J. 1021 = 38 L.W. 443 = 144 I.C. 344 = 37 C.W.N. 881 = A.I.R. 1933 P.C. 180 = 65 M.L.J. 247 (P.C).**

——**S. 12**—*Maintenance charge—Exemption from assessment to tax.*

Where by the decree of a Court, the assessee's stepmother has a charge not only on the son's zemindari property from which his agricultural income was derived, but also on all his other sources of income included in the assessment, the assessee's liability to his step-mother is not of the same kind as his liability to provide for his wives and daughter The case was not one of a charge created by the assessee for the payment of debts which he has voluntarily incurred and the liability to his step-mother does not fall within any of the exemptions or allowances allowed under Ss. 7 and 12. (*Lord Macmillan.*) BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME-TAX, CALCUTTA. **60 I.A. 196 = 60 Cal. 1029 = 1933 M.W.N. 553 = 37 C.W.N. 885 = 57 C.L J. 503 = 1933 A.L J. 641 = 35 Bom.L.R. 811 = I.R. 1933 P.C. 127 = 143 I.C. 145 = 37 L.W. 775 = A.I.R. 1933 P.C. 145 = 65 M L.J. 285 (P.C.).**

——**S. 12**—*Purchase-money—Receipt of royalty by vendor—Assessment.*

Whether a particular sum received is of the nature of an annual profit or gain or is of a capital nature does not depend upon the language in which the parties have chosen to describe it. It is necessary in each case to examine the circumstances and see what the sum really is, bearing in mind the presumption that—"it cannot be taken that the legislature meant to impose a duty on that which is not profit derived from property but the price of it." The assessee sold to an oil company all her right, title and interest in and to twenty acres of her land. In consideration of the sale the company agreed to pay to the assessee the sum of $5,000 in cash on the execution of the agreement, to issue to her 25,000 fully

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paid shares in the company, and further deliver to her order the royalty of 10 per cent. of all the petroleum, natural gas and oil produced and saved from the said lands free of costs. In the year 1927 the company did no deliver to the assessee any of the oil produced, but sold the whole of it, and paid over $9,570·41, being 10 per cent. of the gross proceeds, which sum she accepted in satisfaction of the "royalties" reserved to her under the agreement. The assessee was subsequently assessed to tax in respect of this sum of $9,570·41 which she had received from the oil company.

Held, that the royalties were in effect payment by instalments of part of the price of the property which the assessee had finally disposed of to the company and hence were not liable to be assessed. (*Lord Macmillan.*) MINISTER OF NATIONAL REVENUE *v.* CATHERINE SPOONER. **6 I.R. (P.C.) 29 = 146 I.C. 747 = 1933 A.L.J. 1428 = 38 L.W. 621 = A.I.R. 1933 P.C. 211 = 66 M.L.J. 85.**

———**S. 12**—*Scope.*

Per *Mohamad Noor, J.*—Annuities have not been expressly taxed except as salary and before an annuity can be taxed it must be shown to come within the purview of "income, profits or gains" as mentioned in S. 12, Income tax Act. (*Courtney-Terrell, C.J. Mohamad Noor and Varma, J.*) COMMISSIONER OF INCOME-TAX *v.* GOPAL SARAN NARAIN SINGH **13 Pat. 661 = 151 I.C. 477 = 7 R.P. 97 = 15 Pat.L.T. 325 = A.I.R. 1934 Pat. 384 (F.B.).**

———**Ss. 12, 4 and 6**—Transfer of entire property by assessee—Transferee to pay off debts and annuity to transferor—Annuity if taxable. *See* INCOME-TAX ACT, SS. 4, 6 AND 12. **13 Pat. 661 = A.I.R. 1934 Pat. 384 (F.B.).**

———**S. 12**—*Year of taxable income—Expenditure occurring some years before—Exemption.*

The allowance for any expenditure incurred must be an allowance for expenditure incurred in the year in respect of which arise the income, profits and gains forming the basis of the assessment. There is no justification for deducting from the profits and gains something in respect of expenditure, whether it be regarded as capital expenditure or not, which occurred many years before. (*Lord Tomlin.*) COMMISSIONER OF INCOME TAX, U. P. *v.* BASANT RAI TAKHAT SINGH. **60 I.A. 307 = 55 All 452 = 57 C.L.J. 544 = 1933 M.W.N. 785 = 35 Bom L.R. 823 = I.R. 1933 P.C. 192 = 1933 A.L.J. 1021 = 38 L.W. 443 = 144 I.C. 344 = 37 C.W.N. 881 = A.I.R. 1933 P.C. 180 = 65 M.L.J. 247 (P.C.).**

———**S. 12 (1)**—"Income"—Meaning—Sale of immovable property—Annual sum reserved for payment by vendee to vendor—If taxable. *See* INCOME-TAX ACT, SS. 2 (1), 3, 4, 6, 7 AND 12. **69 M.L.J. 190 (P.C.).**

———**S. 12 (2)**—*Expenditure incurred solely for earning the profits—Receiver appointed to manage estate—Salary of—Deduction.*

The assessee was the receiver and manager appointed by the High Court of Calcutta to take charge and manage the property known as the Jheria Raj Estate. He claimed to deduct his salary as an allowance for expenditure incurred solely for the purpose of making or earning the income of the estate. That was refused *in toto* by the Assistant Commissioner.

Held, that sub-S. (2) of S. 12 did not require that the whole of the receiver's salary should be incurred solely for the purpose of earning income before any part of it can be deducted even if such part may represent no more than the receiver's services in earning the income, and that such proportion of his salary as may be attributable to the tax-paying part of the estate

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should be deducted. (But the exact proportion was left for the income tax authorities to decide.) (*Terrell, C. J. and Dhavle, J.*) SACHINDRA MOHAN GHOSH *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 47 = I.R. 1932 Pat. 63 = 136 I.C. 63 = A.I.R. 1932 Pat. 102.**

———**S. 12 (3)**—Private venture—Loan advanced to get specific amount—Receipt of a casual nature—Not profits or gains. *See* INCOME-TAX ACT, S. 4 (3) (*vii*). **11 Rang. 454.**

———**S. 13**—*Accounts unreliable—Income tax Officer, if justified in treating interest on mortgage as income.*

The assessing officer is justified in treating the interest due on mortgage as income when he finds that the books are false and unreliable, and he cannot be certain whether the sum has been received or not. The Income-tax Officer is entitled to assess the amount due on the assumption that it has been received if the method of accounting is unreliable. (*Addison and Beckett, JJ.*) JIWAN SHAW MAYA SHAH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **160 I.C. 129 = 8 R.L. 495 = A.I.R. 1935 Lah. 840.**

———**S. 13**—*Assessment of Income tax Officer—Objection to method of computation—Appeal.*

The fact that the Income-tax Officer has justifiably proceeded on a basis and in a manner of his own in computing the assessee's income, profits and gains, does not exempt his computation from examination on appeal and if it appears that he has adopted a wrong method the assessment may be set aside (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 37 L.W. 701 = 142 I.C. 437 = 57 C.L.J. 318 = 14 Pat L.T. 341 = 1933 A.L.J. 527 = 35 Bom L.R. 731 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.)**

———**S. 13**—*Books not showing income as such—Mode of computation*

Where an assessee keeps his books on a cash basis disclosed to the revenue authorities and the officer accepts that basis, the calculation must be based on actual receipts in the year of computation, but where the assessee kept his books on a hybrid system and it was his practice to enter sums as he received them in a deposit register not made available to the revenue authorities, without discriminating between interest and capital payments, and then subsequently to allocate and treat as income certain portions of these sums which he attributed to interest.

Held, that in order to compute the income in a particular year, the Income-tax Officer was entitled to take into account both the interest entered for that year by transference from deposit register and the interest actually received in that year. (1914) A.C. 1001, Ref. (*Lord Macmillan.*) COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat. 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 57 C.L.J. 318 = 14 Pat L.T. 341 = 1933 A.L.J. 527 = 35 Bom L.R. 731 = 37 L.W. 701 = 142 I.C. 437 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

———**S. 13**—*Flat rate—Amount of tax.*

Where the principle of assessment at a flat rate is not contested, its amount must be for the Income-tax Officer to determine. (*Lord Blanesburgh.*) FEROZ SHAH *v.* INCOME-TAX COMMISSIONER, PUNJAB. **60 I.A. 325 = 14 Lah. 682 = 6 I.R. P.C. 1 = 37 C.W.N. 1133 = 1933 M.W.N. 889 = 1933 A.L.J. 1258 = 34 P.L.R. 1000 = 144 I.C. 686 = A.I.R. 1933 P.C. 198 (2) = 65 M.L.J. 335 (P.C.).**

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——**S. 13**—*Fresh promissory notes issued by debtor for old debt and interest—Creditor entering in accounts interest as received—Liability of interest to assessment.*

Where the assessees have elected to treat the interest due under the original loans as having been received and paid on the execution and delivery of the fresh promissory notes by the debtor and the interest is entered as having been received both in the interest account and in the personal accounts of the respective debtors; and the creditors have accepted the obligations of the debtors under the fresh promissory notes in substitution for the old debts and the interest due thereon, and in past years were content that the interest accruing in this manner should be assessed to income-tax, it cannot be said that in these circumstances there were no materials before the Income-tax Officer which would justify him in concluding that these sums represented interest liable to assessment, which the assessee has regarded as being liquidated by delivery of fresh promissory note. In such cases, if the assessees want to escape assessment for such interest, they should so adjust their accounts as to make it clear that the acceptance of a fresh promissory note is not taken as effecting payment of the interest due under the old loan. (*Page, C.J., Mya Bu and Baguley, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* V. S. U. R. FIRM. **13 Rang. 231 = 7 R.R. 350 = 155 I.C. 703 = A.I.R. 1935 Rang. 109.**

——**S. 13**—*Interest on mortgage—Purchase of mortgaged property by assessee—Receipt of interest.*

When a mortgagee purchases at auction under a decree of the Court the property which was the subject of the mortgage, he can be said to have received the equivalent of the interest due on his mortgage. A I.R. 1929 Pat. 476, Ref. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat. 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 37 L.W. 701 = 142 I.C. 437 = 57 C.L.J. 318 = 14 Pat.L.T. 341 = 1933 A.L.J. 527 = 35 Bom.L.R. 731 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

——**S. 13**—*Lands taken over in liquidation of debts due to assessee—Profit and gain, how computed.*

No doubt the value of the land taken over in liquidation of debts due to the assessee as set out in the assessee's books of account may be treated as *prima facie* evidence of its true value, and the assessee normally would have no cause of complaint if the income tax authorities accepted for income tax purposes the value which the assessee himself had put upon his assets in his books of account. But in every case, it is incumbent upon the Income-tax Officer to ascertain as a matter of fact what are the real profits and gains of the business in the accounting year. Thus if the estimated value of the lands in the accounting year is greater than the principal sum that was lent, the income-tax authorities will be entitled to treat the balance, after deducting an amount equivalent to the loan, as representing profits and gains accruing from the transaction, and to assess the same as income chargeable with income-tax. But if the estimated value of the lands is less than the amount of the principal sum that has been lent, no tax will be chargeable in the accounting year in which the lands are transferred, although it may be that the estimated value of the lands in that year exceeds the amount due to the assessee in respect of interest on the loan. But as the assessment is made upon the footing that the transaction has been completed during the accounting year, the assessee is not entitled to have the value of the lands re-assessed in any other accounting year except that in which the lands are sold by him, and until the sale takes place the final adjustment of the assessment must necessarily remain in suspense. (*Page, C.J., Baguley and Ba U, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* P.L.S.M. CONCERN, MINHLA. **12 Rang. 483 = 151 I.C. 907 = 7 R.R. 125 = A.I.R. 1934 Rang. 274 (S.B.).**

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——**S. 13**—*Mercantile system of accountancy employed by assessee—Basis of assessment.*

Where the method of accounting regularly employed by the assessee is the so-called mercantile system of accountancy or book profit system, it is upon that basis alone that he is to be assessed to income tax under S. 13 of the Income-Tax Act. Under this system, entries are made in the account on the date not of the receipt of money or expenditure of money but on the date of the transactions irrespective of the date of cash payment. A profit and loss account prepared on this basis is accepted as evidence of the assessee's income and assessment is made accordingly. If any part of these "book profits" is later on found to have become irrecoverable, it is deducted from the assessment as a bad debt. (*Addison and Sale, JJ.*) AHMAD DIN *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **156 I.C. 272 = 7 R.L. 890 = 36 P.L.R. 199 = A.I.R. 1935 Lah. 12.**

——**S. 13**—*Receipt of amount by assessee in respect of mortgage decree — Interest outstanding — Allocation towards interest and not against the capital liability of the debtor.*

Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest, by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest. 48 I.A. 150 at 153 = 44 M. 570 = 40 M.L.J. 549 (P.C.), Foll.

Held (applying the above presumption), that where the assessee in the relevant year of computation received a lump sum from his judgment-debtor, but had not, at the date when he received payment, either in his own books or in relation to the revenue authorities, as yet attributed any sum towards the debtor's liability in interest, the Income-tax Officer was entitled to treat this lump sum as applicable to the outstanding interest and taxable as such, and the assessee could not contend that it should be treated in the first place as a payment against the capital liability of the debtor. (*Lord Macmillan.*) COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat. 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 57 C.L.J. 318 = 14 Pat.L.T. 341 = 1933 A.L.J. 527 = 35 Bom.L.R. 731 = 37 L.W. 701 = 142 I.C. 437 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

——**S. 13**—*Unrealized decree—Entry in interest* khata—*Item is not taxable.*

Unrealized decree entered in the interest *khata* the amount of which has not been received in fact is not taxable income for the purpose of assessment. There is nothing in S. 2 (15) or of S. 16 of the Act, which would imply that the total income is to include an amount which had been decreed but not received. (*Niamatullah and Bennet, JJ.*) JAGMANDAR DAS VAISH, *In re.* **57 All. 737 = 156 I.C. 939 = 8 R.A. 62 = 1935 A.L.J. 374 = 1935 A.W.R. 520 = A.I.R. 1935 All. 378.**

——**S. 13, Proviso**—*Applicability—Accounts not clearly kept.*

Where the accounts were kept by the assessee in such a form that the income, profits and gains could not properly be deduced therefrom, the proviso to S. 13 applies and the Income-tax Officer is bound to make the com-

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putation upon such basis and in such manner as he might determine. (*Harrison and Dalip Singh, JJ.*) PREM SAGAR *v.* COMMISSIONER OF INCOME-TAX. **I.R. 1932 Lah. 434 (2) = 138 I.C. 214 = 33 P.L.R. 10 = A.I.R. 1932 Lah. 178.**

——**S. 13 Proviso**—*Application—Absence of accounts regarding part of business—Assessment under proviso.*

Once it is established that no method of accounting has been regularly employed or that the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom, the proviso to S. 13 comes into operation and the Income-tax Officer becomes the sole arbiter of the basis on which they shall be computed. Where a colliery proprietor had invested the money in mortgages and loans and had kept regular and proper accounts of his income from the colliery and had not kept any account of his income from his investment in mortgages and loans, *held*, that the Income-tax Officer was justified in making an assessment of his income under the proviso to S. 13. (*Bhide and Tapp, JJ.*) ISHAR DAS *v.* COMMISSIONER OF INCOME-TAX. **I.R. 1931 Lah. 619 = 132 I.C. 523 = 32 P.L.R. 344 = A.I.R. 1931 Lah. 432.**

——**S. 13, Proviso**—*Assessment under—Question of law, if arises.*

A finding by the Income-tax Officer and the Assistant Commissioner that no regular method of accounting had been employed by the assessee and that the method employed was defective is a decision on a question of fact. When the Income-tax Officer makes an assessment under the proviso to S. 13 of the Income-tax Act, it may be shown that he has proceeded on a wrong basis of law, but in every case where the Income- tax Officer proceeds under that proviso it cannot be said that a question of law arises as to whether the assessment is legal or not. (*Beaumont, C.J. and Mirza, J.*) NARAYAN ATMARAM *v* COMMISSIONER OF INCOME TAX, BOMBAY. **152 I. C. 972 = 7 R B. 204 = 36 Bom.L.R. 818 = A.I.R. 1934 Bom. 378.**

——**S. 13, Proviso**—*Assessment under—When justified—High Court's power of enquiry.*

No doubt the Income-tax Officer is the sole arbiter for determining under the proviso to S. 13 of the Income-tax Act how the profits are to be computed. But it is a question of law, into which the High Court is entitled to inquire, whether there is any evidence on which the Income-tax Officer could come to the decision that the method of accounting adopted by the assessee is such that the gains could not be computed except by the arbitrary method contemplated by the proviso. If there was no evidence to justify the Income-tax Officer's rejection of that method of accounting, the assessment should be made under first part of S. 13 and not under the proviso. When there is no other reason except the fact of reduced profit to justify the assumption that profits cannot properly be deduced, from a method of accounting which admittedly has been regularly employed by the assessee and has been accepted in the past, the use of the proviso to S. 13 for the purpose of introduction of an arbitrary manner of computing the profits is not justified. (*Addison and Sale, JJ.*) PIONEER SPORTS, LTD., SIALKOT *v.* COMMISSIONER OF INCOME-TAX. **16 Lah 489 = 158 I C. 1122 = 8 R.L. 339 (2) = 37 P L.R. 740 = A.I. R. 1934 Lah 876.**

——**S 13, Proviso**—*Bad debt—Decision of Income tax Officer—Operation of, beyond the particular year.*

An assessee has no option of declaring debts bad. Whether a debt is a bad debt and when it becomes bad are questions fact to be determined in case of dispute not by the assessee but by the appropriate tribunal upon a consideration of all relevant and admissible evidence. The decision of the Income-tax Officer on the question whether a debt is bad or irrecoverable operates only for the particular year under assessment and it would be open to the assessee to repeat his claim in respect of any particular debt in any subsequent year, provided the debt had not been recovered in the interval. (*Addison and Sale, JJ.*) RULIA MAL RAUNAK RAM *v.* COMMISSIONER OF INCOME-TAX. **16 Lah. 416 = 157 I.C. 911 = 8 R.L. 160 = 37 P.L.R. 513 = A. I.R. 1935 Lah. 539.**

INCOME-TAX ACT (1922), S. 14 (1).

——**S. 13, Proviso**—*Income on promissory notes—Taxation—Basis—Actual income.*

Whether the Assistant Commissioner is justified in taxing the income on promissory notes, bonds and mortgage deed on the basis of interest accrued on the total amount invested in such promissory notes, bonds and mortgage-deeds, and not on the basis of interest actually realised by the assessee during the accounting period is a question of law. (*Tek Chand and Agha Haidar, JJ.*) BULAQI MAL AND SONS *v.* INCOME-TAX, COMMISSIONER, LAHORE **148 I.C. 228 = 6 R. L. 522 (1) = A.I.R. 1934 Lah. 43.**

——**Ss. 14, 20 and 48**—*Construction and scope.*

It may be that there are inconsistencies between S. 14 and what is implied in Ss. 20 and 48. But that cannot justify the Court to modify or add to the plain words of S. 14, by reference to the supposed implications of Ss. 20 and 48. (*Costello and Lort Williams, JJ.*) THE HUNGERFORD INVESTMENT TRUST, LTD., *In the matter of.* **62 Cal. 133 = 39 C.W N. 253.**

——**S 14 (1)**—*Ancestral impartible estate—Maintenance allowance received by junior member—Exemption.*

A sum of money received as maintenance by an assessee, entitled, as the brother of the last zamindar, to receive maintenance out of an ancestral impartible estate is a sum received by him as a member of a Hindu undivided family within the meaning of Cl. (1) of S. 14 and as such exempt from taxation. (*Beasley, C.J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* ZAMINDAR OF CHEMUDU. **57 Mad. 1023 = 40 L.W. 487 = 1934 M.W.N. 770 = 151 I.C. 926 = 7 R M. 153 = A.I.R. 1934 Mad. 608 = 67 M.L.J 306 (F B.).**

[**R.** 16 P.L.T. 351 (355).]

——**S. 14 (1)**—*Applicability—Conditions.*

S. 14 (1) of the Income tax Act can apply only if two conditions are made out. The assessee should establish that he is a member of a Hindu undivided family and further that the sum in question has been received by him as such. The relation of cause and effect must exist between the position of the assessee as a member of a Hindu undivided family and the receipt by him of the sum which is a question for the purpose of assessment. If a person who is a member of a Hindu undivided family receives an allowance not because he is such a member but wholly apart from that position, S. 14 (1) does not apply. (*Niamatullah and Bennet, JJ.*) MAHARAJ KUMAR OF VIZIANAGRAM, *In re.* **56 All. 1009 = 1934 A.L.J. 1237 = 6 R.A. 884 = 149 I.C. 306 = A.I.R. 1934 All. 818.**

——**S. 14 (1)**—Claim to exemption under—Burden of proof. *See* INCOME TAX ACT, SS. 3 AND 14 (1), **14 Pat. 785 = 16 Pat.L.T. 351 = A.I.R. 1935 Pat. 342 (S.B.).**

——**S. 14 (1)**—*Construction and scope—"As a member of a Hindu undivided family"—Meaning—Allowance received by member of joint family—If taxable.*

INCOME-TAX ACT (1922), S. 14 (1).

The Income-tax Act clearly contemplates that in the case of members of a joint Hindu family the unit of taxation shall be the family itself and not each individual member, *i e.*, the entire joint income of the members of the family is taxable only in the hands of the family and no part of it is taxable in the hands of the individual coparceners. This provides the clue to the meaning of the words "as a member of a Hindu undivided family" occurring in S. 14 (1) of the Act. S. 14 (1) exempts from taxation in the hands of a member of a family income which is liable to taxation in the hands of the family, whether it has been so taxed or not. In this view of the matter the burden is on the assessee to show that the sum in respect of which he claims exemption is assessable in the hands of the family.

Quaere,—Whether an allowance paid to a member of an undivided family and not exempted from assessment under S. 14 (1) may not be exempted on some other ground. (*Courtney Terrell, C. J., Khaja Mohammad Noor and Agarwala, JJ.*) VISHESWAR SINGH *v.* COMMISSIONER OF INCOME TAX, B. & O. **14 Pat. 785=156 I.C. 116=7 R.P. 685=16 Pat.L.T. 351=A.I.R. 1935 Pat. 342 (S.B.).**

———**S. 14 (1)**—*Exemption under—Burden of proof.*

S. 14 (1) merely relieves the assessee from showing that the sum in respect of which he claims exemption has already been taxed in the hands of the family It does not relieve him from the necessity of showing that the sum received is a part of income, or property, in which he had a vested right as a member of a Hindu undivided family. (*Courtney Terrell, C. J. and Agarwala, J.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* MAHARANI LAKSHMIBATI SAHEBA. **14 Pat. 313=154 I.C. 866=7 R P. 497=16 Pat.L.T. 171=A I.R. 1935 Pat. 8.**

———**S. 14 (1)**—*Impartible Raj—Hindu family possessed of—Maintenance received by junior member—Exemption from income-tax.*

An assessee claiming exemption under S. 14 (1) of the Income-tax Act should establish that he is a member of a Hindu undivided family and further that the sum in question has been received by him as such. A junior member of a joint family possessed of impartible Raj is a member of a Hindu undivided family within the meaning of S. 14 (1), as the custom of impartibility does not supersede the general law so far as his status is concerned, though his rights to demand partition and to participate in the income of the estate is taken away. If such a member is assessed to income-tax on the amount of the maintenance received by him from the holder of the impartible Raj the question for consideration is whether the allowance received by him is a payment made to him as a member of the family. If the sum be considered to be in the nature of a gift, pure and simple, it cannot be characterised as income received by a member of a Hindu undivided family as such. If the assessee is, by custom applicable to the estate, entitled to be maintained, with the revenue of the estate, and if the allowance fixed for him is in satisfaction of his right to be so maintained he should be considered to have received it as a member of a Hindu undivided family. A junior member claiming to be entitled to maintenance must establish a custom to that effect. In the case of a younger son, his right of maintenance has been so often asserted and recognized that a Court is entitled to presume that such a right exists. The presumption however is not conclusive but can be rebutted. It is open to the income-tax department to offer proof that such a custom does not exist in this family. (*Niamatullah and Bennet, JJ.*) MAHARAJ KUMAR OF VIZIANAGRAM, *In re*. **56 All. 1009=1934 A L.J. 1237=6 R A. 884=149 I.C. 306=A.I.R. 1934 All. 818.**

[D. 57 M. 1023 (1024).]

INCOME-TAX ACT (1922), S. 14 (2) (a).

———**S. 14 (1)**—*Impartible raj—Undivided family—Junior member—If joint with holder of* Raj.

It is now well established that in the case of an impartible *Raj*, the fact that the holder for the time is exclusively entitled to the estate is not inconsistent with other members of the family being joint with him. Where the assessee, a junior member of an impartible *Raj*, asserts that he is joint with the holder of the *Raj* (his brother), and his assertion is not controverted by the Commissioner of Income-tax except in so far as it follows from the view he takes of the law governing impartible estates but which view is unsustainable. it must be taken that the assessee is joint with the holder for purposes of S. 14 (1). Whether the allowance which is sought to be taxed is paid out of the zamindari income or from other sources available to the holder is immaterial for deciding the question. (*Courtney Terrell, C.J., Khaja Mohammad Noor and Agarwala, JJ.*) VISHESWAR SINGH *v.* COMMISSIONER OF INCOME-TAX, B. & O. **14 Pat. 785=156 I C. 116=7 R P. 685=16 Pat.L.T. 351=A.I.R. 1935 Pat. 342 (S.B.).**

———**S. 14 (1)**—"*Member*"—*Widow of deceased co-parcener—Maintenance amount—Whether assessable.*

The widow of a deceased co parcener is a member of the undivided family of her husband. Maintenance and arrears of maintenance received by the widow of a deceased member of an undivided family is exempt from taxation under S. 14 (1). (*Beasley, C. J., Ramesam and Cornish, JJ.*) VEDATHANNI *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **56 Mad. 1=I.R. 1932 Mad. 817=140 I C. 17=1932 M.W.N. 1139=36 L W 536=A.I.R. 1932 Mad. 733=63 M.L J. 542 (F.B.).**

[**Appr.** 59 B. 618 (622).]

———**S. 14 (1)**—Question as to jointness of assessee—Nature—If one of law. *See* INCOME TAX ACT, S. 66 (2). **14 Pat. 785=16 Pat.L.T. 351=A.I.R. 1935 Pat. 342 (S B.).**

———**S. 14 (1)**—"*Received as member of undivided family*"—*Maintenance grant.*

When a member of a Hindu undivided family receives a grant by way of maintenance from the head of the family it is not necessarily received "as a member of the family." (*Courtney Terrell, C. J. and Agarwala, J.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* MAHARANI LAKSHMIBATI SAHEBA. **14 Pat. 313=154 I.C. 866=7 R.P. 497=16 Pat.L T. 171=A.I.R. 1935 Pat. 8.**

———**S. 14 (2) (a)**—*Construction—Dividend—Exemption—When available—Taxation of whole of the profits or gains of company—If a condition precedent.*

According to the plain meaning of S. 14 (2) (*a*) of the Income-tax Act, when there has been an assessment on the profits or gains of a company, even though the dividends received by the shareholder are in fact to some extent paid out of profits or gains in the hands of the company which are free from taxation, the whole of the sum received by the assessee as shareholder, by way of dividends is exempt from taxation. The section cannot be construed as meaning or implying that the whole income of the company must be assessed or made chargeable to income-tax in order that the protection under it may be availed of by the assessee shareholder receiving the dividend. (*Costello and Lort Williams, JJ.*) THE HUNGERFORD INVESTMENT TRUST, LTD., *In the matter of*. **62 Cal. 133=39 C.W.N. 253.**

INCOME-TAX ACT (1922), S. 14 (2) (b).

——**S. 14 (2) (b)**—*Partner—Assessment — Procedure.*

The profits of the registered firm should be ascertained as a whole before the assessment is made upon individual partners. But there is nothing in the Act to say that the firm is to be assessed first, still less that the assessment on the firm is to operate as a sort of estoppel in favour of the individual partners. (*Rankin, C. J., C.C. Ghose and Buckland, JJ.*) NEEM CHAND DAGA, *In the matter of.* **58 Cal. 1204 = I.R. 1931 Cal 931 = 134 I.C. 931 = 35 C.W.N. 534 = A.I.R. 1931 Cal. 686 (S.B.).**

——**S. 14 (2) (b)**—*Partner—Assessment regarding share of profits of firm—Firm not assessed—Validity of assessment of partner.*

When part of the profits of a registered firm have escaped assessment, assessment can be made under S. 34 and tax levied upon a partner of the firm in respect of his share of such part, when proceeding, under the said section against the firm itself in respect of the said part have failed for lack of jurisdiction and fresh proceedings are time barred. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) NEEM CHAND DAGA, *In the matter of.* **58 Cal. 1204 = I.R. 1931 Cal 931 = 134 I.C. 931 = 35 C.W.N. 534 = A.I.R. 1931 Cal. 686 (S.B.).**

——**S. 14 (2) (b)**—*Partnership—Remuneration paid to partner for services — Deduction from assessable income.*

A partner might conceivably do business in his individual capacity and in that capacity might render services to the firm in consideration of which the firm might pay him a remuneration which would be a legitimate deduction from the assessable income of the firm. (*Macnair, O.J.C. and Jackson, A.J.C.*) RAMAKRISHNA RAMNATH *v.* COMMISSIONER OF INCOME TAX, C.P. **I.R. 1932 Nag. 95 = 139 I.C. 290 = A.I.R. 1932 Nag. 65.**

——**S. 16**—*Interest on tax free securities not deductible for calculating super tax.*

The scheme of the income-tax is that there is to be a statement of the total income of the assessee from which is to be deducted for the purpose of assessing income-tax, but not of super tax, nor for the purpose of any graduation of income-tax by reference to total income, the amounts of interest on tax free securities and of dividends and shares of profits already taxed. (*Sir Sidney Rowlatt.*) CURRIMBHOY EBRAHIN BARONETCY TRUST *v.* COMMISSIONER OF INCOME TAX, BOMBAY. **61 I.A. 209 = 58 Bom. 317 = 36 Bom L R. 557 = 59 C.L J. 403 = 1934 M W.N. 582 = 6 R P C. 145 = 1934 A L J. 429 = 38 C.W N. 618 = 39 L.W. 771 = 148 I.C. 855 = 4 A.W.R. 1615 = A.I.R. 1934 P.C. 116 = 66 M.L.J. 643 (P.C.).**

——**S 16**—"Total income"—Unrealised decree. *See* INCOME-TAX ACT, S. 13. **1935 A L.J. 374 = 1935 A W.R. 520 = A.I.R. 1935 All 378.**

——**S. 20**—*Certificates—Validity for purposes of refund.*

Certificates under S. 20 of the Act signed by the principal officer in the United Kingdom of such companies can be regarded as valid certificates for the purposes of S. 48 (1) of the Act and refund granted on their production. (*Beaumont, C.J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* MAJOR K. C. GOLDIE. **55 Bom. 734 = 136 I.C. 170 = I.R. 1932 Bom. 154 = 33 Bom.L.R. 776 = A.I.R. 1931 Bom. 420.**

——**Ss 20 and 48**—Scope—Effect on S. 14. *See* INCOME-TAX ACT, SS. 14, 20 AND 48. **62 Cal. 133 = 39 C.W.N. 253.**

——**S. 22**—*Income-tax Rules, R. 35— Procedure under—When permissible.*

INCOME-TAX ACT (1922), S. 22 (2).

Where the assessee is unable to provide particulars on which assessment can be made and if the Commissioner has no more reliable data, he can resort to R. 35 even though the data are not procurable for no fault of the assessee. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTRALASIA, LTD. **57 Bom. 519 = 35 Bom.L.R. 896 = 147 I.C. 370 = 6 R.B. 199 = A.I R. 1933 Bom 427.**

——**S. 22 (1)**—*Foreign Insurance Company—Failure to make return—Procedure.*

Where an Insurance Company (not incorporated in British India) has failed to make a return of the total income under S. 22 (1), the Income-tax Officer is justified in applying R. 35 of the Income-tax Rules made under S. 59 of the Act. To apply that rule, he has first of all to find out what is the total income, profits or gains of the assessee company. Where for the purpose the officer had no other reliable data except a triennial valuation, he is entitled to assume that the profits for the year in question would be the average annual profits shown in the triennial valuation after deducting the premiums paid on participating policies. (*Beaumont, C J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA. **55 Bom. 637 = I.R. 1931 Bom. 491 = 134 I.C. 555 = 33 Bom.L R. 807 = A.I.R. 1931 Bom. 448.**

[**R.** 11 R. 521 (527).]

——**Ss. 22 (2) and 32 (4)**—*Best judgment assessment—Validity.*

The assessee was called upon by a notice under S. 22 (2) to submit a return which he did but the return did not bear such verification as is required by the Income-tax Act nor did it bear the signature of the assessee. Subsequently the Income-tax Officer issued another notice under S. 22 (4) directing the assessee to produce his accounts. He did not produce the accounts and the Income-tax Officer made an assessment to the best of his judgment under S. 23 (4).

Held, that no questions of law could possibly arise on the findings of fact arrived at by the Income-tax Officer. (*Niamatullah and Bennet, JJ.*) MATHURA DAS CHUNNI LAL, *In the matter of.* **3 A.W.R. 288 = 154 I.C. 340 = 7 R.A. 738 = A.I.R. 1934 All. 929.**

——**S. 22 (2)**—*Case of assessment by Assistant Commissioner—Notice by Income tax Officer—Validity.*

Held, that in view of the C. P. Gazette Notification No. 97, dated 28th March, 1923, by the Commissioner of Income-tax, the Income-tax Officer's jurisdiction is taken away in the case of assessees who were at any time assessed to Rs. 40,000 and above since 1919—1920. Where the Income-tax Officer issues a notice in such a case instead of the Assistant Commissioner, the notice is illegal and the return does not become due in consequence. (*Macnair, O J.C. and Jackson, A.J.C.*) RAMAKRISHNA RAMNATH *v* COMMISSIONER OF INCOME-TAX, C.P. **I.R. 1932 Nag. 95 = 139 I.C. 290 = A.I.R. 1932 Nag. 65.**

——**S. 22 (2)**—*Firm—Liability to assessment—Object of enactment.*

The object of the Income-tax Act in treating the firm, in addition to the individual partners, as itself a subject liable to assessment is not to differentiate in respect of the ultimate liability to tax, between the partners in a firm and the sole owner of a business or other assessee. The method of double assessment is employed in the case of firms as a device in the nature of taxation at the source as distinguished from the method of deduction of tax at the source which is employed to collect tax upon salaries and interest on

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securities. The object of the double assessment to tax in the case of partners and their firm is not to get it often but to get it early and to make sure of getting it. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) NEEM CHAND DAGA, *In the matter of.* **58 Cal. 1204=I.R. 1931 Cal 931=134 I.C 931=35 C.W.N. 534=A.I.R. 1931 Cal. 686 (S B.).**

———**S. 22 (2)**—*Firm as partner—Receipt of profit from other firms—Assessment to income-tax.*

Besides owning a firm at Benares, the two partners had an interest in numerous firms bearing the same name and carrying on business in different parts of the country. In the year of account it was found that the firm made no profits but the firms in which the partners were interested made considerable profits. The question having been raised whether the firm could be assessed in respect of those profits.

Held, that the partners were members of the other firms only in their individual capacity, the firm itself being incapable of being a partner and that the assessment of the firm with reference to the profits of the other firm did not arise. (*Sulaiman, C.J. and Mukerji, J.*) JAI DAYAL MADAN GOPAL, *In the matter of.* **54 All. 846=143 I.C. 390=I.R. 1933 All. 239=1932 A.L.J. 999=A.I.R. 1933 All. 77.**

———**S. 22 (2)**—Notice calling for return—Failure to comply—Letter intimating non-liability. *See* INCOME-TAX ACT, S. 23 (4). **A.I.R. 1931 Pat. 306 (F.B.).**

———**S. 22 (2)**—*Notice of demand—Failure to comply—Death of assessee—Mode of assessment.*

Where an assessee failed to make a return of his income under S. 22 (2) of the Act and sometime later died, an assessment on his estate made by the Income-tax Officer under S. 23 (4) "to the best of his judgment" is illegal.

Per *Beaumont, C.J.*—In construing a taxing Act, the Court is not justified in straining the language in order to hold a subject liable to tax. If the legislature intends to assess the estate of a deceased person to tax charged on the deceased in his lifetime, the legislature must provide proper machinery and not leave it to the Court to endeavour to extract the appropriate machinery out of the very unsuitable language of the Statute." (*Beaumont, C.J and Barlee, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* ELIS REID **55 Bom. 312=I.R. 1931 Bom. 373=133 I.C. 261=33 Bom.L.R. 388=A.I.R. 1931 Bom. 333.**

———**S. 22 (2)**—*Notice by registered post—Delivery to assessee's son being minor—Effect.*

The Income-tax Officer issued by means of registered post acknowledgment due a notice under S. 22 (2). The notice was delivered by the postal peon to the assessee's son who was found to be a minor and possessed of ordinary intelligence. The son was living with his father and when on previous occasions notices had to be served on the assessee they were taken delivery of by his son.

Held, that in proper circumstances a minor son might be an agent of his father and that the service of the notice was good service. (*Mukerji and Bennet, JJ.*) DE SOUZA, *In the matter of.* **54 All. 548=I.R. 1932 All. 359=138 I.C. 70=1932 A.L.J. 409=A.I.R. 1932 All. 374.**

———**S. 22 (2)**—*Notice under—Time for return less than 30 days—Legality.*

A notice under S. 22 (2) must give the assessee thirty clear days from the day of the date of service thereof for the furnishing of the return. If that is not given, the notice is illegal, and a subsequent extension of the time will not cure the initial illegality (*Addison and*

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Sale, JJ.) JAMNA DHAR POTDAR & CO. *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **155 I.C. 526=7 R L. 728=A.I R 1935 Lah. 201.**

———**S. 22 (2)**—*Return not properly verified or signed—Best judgment assessment.*

Where the return under S. 22 (2) did not bear verification or the signature of the assessee.

Held, that there was no proper return and the Income-tax Officer could impose best judgment assessment under S. 23 (4). (*Niamatullah and Bennet, JJ.*) BEHARI LAL CHATTERJI *v.* COMMISSIONER OF INCOME-TAX. **56 All. 418=151 I.C 251=7 R A. 115=1934 A.L.J. 47=3 A W R. 290=A.I R 1934 All. 930.**

———**S. 22 (2)**—*Return signed and verified by agent—Authority of agent—Duty of Income-tax Officers to ascertain.*

It is the duty of Income-tax Officers, before they accept returns signed and verified by agents, to satisfy themselves about the authority of such agents to do so; and where the agents hold registered powers of-attorney the officers have easy means for getting the requisite knowledge or information (*Srivastava and Zia-ul-Hasan, JJ.*) THE COMMISSIONER OF INCOME-TAX, CENTRAL PROVINCES AND UNITED PROVINCES, *In the matter of.* **155 I.C 180=7 R.O. 564=1935 O.W.N. 490=A.I.R. 1935 Oudh 305.**

———**S. 22 (2)**—*Service of notice—Mode of—Vicarious service—Validity of.*

The service of notice under the Act need not be personal. It can be made on the authorised or recognized agent of the assessee. In the case of a recognized agent carrying on business in the name of the principal, an authority to accept notices being incidental to the business can be implied. (*Courtney Terrell, C. J. and James, J.*) SUNDER LAL *v.* COMMISSIONER OF INCOME-TAX. **10 Pat. 441=I R 1931 Pat. 391=13 Pat.L T. 89=133 I.C. 679=A.I.R 1931 Pat. 282.**

———**S. 22 (3)**—*Return filed before assessment—Rejection—Opportunity to assessee to adduce evidence.*

Where an assessee's return is made before assessment, it is a return made in due time under S. 22 (3) and before such a return can be disregarded, the assessee is entitled to a reasonable opportunity to produce any evidence upon which he might rely in support of the return (*Rankin, C.J., Pearson and S. K. Ghose, JJ.*) SADARAM PURANCHAND, *In the matter of.* **I.R. 1932 Cal. 59=134 I.C. 1275=A.I.R 1931 Cal. 729 (S.B.).**

———**S. 22 (3)**—*Return out of time.*

Although an assessee is late in filing his return, nevertheless, if he does file it before the assessment is actually made the return has to be considered and dealt with although out of time. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) PROTAP CHANDRA GANGULY *v.* COMMISSIONER OF INCOME TAX, BENGAL. **I.R. 1932 Cal. 646=139 I.C. 593=A I.R. 1932 Cal. 410 (S.B.).**

———**S. 22 (3)**—*Valid return—Prior non-compliance with notice under S. 22 (4)—Effect.*

A return which by S. 22 (3) is to be deemed to be a return made in due time cannot be treated as still born because of a previous failure to comply with a notice under S. 22 (4). (*Rankin, C. J., Pearson and S. K. Ghose, JJ.*) SADARAM PURANCHAND, *In the matter of.* **I.R. 1932 Cal 59=134 I.C. 1275=A.I.R. 1931 Cal. 729 (S.B.).**

———**S. 22 (4)**—*Assessment at too low a rate—Fresh notice—Determination of assessee's income* de novo.

Where an assessment of super tax has been completed as if the assessee were a Hindu undivided family and it is subsequently held that the assessee is an individual, if

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the original assessment was in the absence of a return made under S. 23 (4) and the assessee in answer to a notice under Ss. 22 (4) and 34 files a return disclosing a lesser income than that taken in the original assessment the Income-tax Officer can re-open the assessment and determine the assessee's income *de novo*. (*Mukerji and Sen, JJ.*) CHHOTEY LAL, *In re*. **I.R. 1932 All. 268 = 137 I C. 77 = 1931 A.L.J. 1109 = A.I.R. 1932 All. 83.**

———**Ss. 22 (4) and 23 (2)**—*Combined notice is not illegal.*

The combined notice under Ss. 22 (4) and 23 (2) is not illegal. (*Grille, J. C. and Subhedar, A. J. C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L.R. 32 = 153 I C. 7 = 7 R.N. 111 = A.I.R. 1934 Nag. 183 (2).**

———**Ss. 22 (4) and 23 (2)**—*Notice under, presupposes valid return.*

The issue of a notice under Ss. 22 (4) and 23 (2) presupposes the existence of a valid return having been made. (*Grille, J.C. and Subhedar, A. J. C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **153 I.C. 7 = 31 N.L.R. 32 = 7 R.N. 111 = A.I.R. 1934 Nag. 183 (2).**

———**S. 22 (4)**—*Notice—Validity of.*

A notice under S. 22 (4) for producing the account books of the assessee by him, issued after he has submitted a return of his income is valid. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) RAGHUNATHDAS SEWLAL *v.* COMMISSIONER OF INCOME-TAX, BENGAL. **I.R 1932 Cal. 644 = 139 I.C. 599 = A.I.R. 1932 Cal. 411 (S.B).**

———**S. 22 (4)**—*Notice under—When can be issued.*

The contention that the Income-tax Officer cannot issue a notice under S. 22 (4) after the assessee submits his return, that it is only after the assessee has been called upon to furnish a return and before he has actually furnished a return that the Income-tax Officer can issue a notice under S. 22 (4) is not sound, for it is open to an Income-tax Officer to issue a notice under S. 22 (4) at any time after he has called upon the assessee to furnish a return. A. I. R. 1931 Lah. 87, Foll. A. I. R. 1930 All. 49, Ref. (*Niamatullah and Bennet, JJ.*) PALLU MALL BHOLA NATH, *In re*. **55 All. 804 = 6 I.R. (All.) 324 = 146 I.C. 759 = 1933 A.L.J. 1474 = A.I.R. 1933 All. 541.**

———**S. 22 (4)**—Notice under S. 23 (2)—Non-production of accounts—Fresh notice under S. 22 (4)—Assessment under S. 23 (4)—Proper. *See* INCOME-TAX ACT, S. 23 (2) AND (4). **12 Lah. 129 = A.I.R. 1931 Lah. 87 (F. B.).**

———**S 22 (4)**—*'Require'—Meaning—Account book of previous year if 'required'.*

An Income-tax Officer is entitled to call for document which in his opinion would furnish him with relevant material for assessment of tax. The word 'require' in S. 22 (4) really means require as a piece of relevant evidence. It does not mean that he should ask for documents which he does not think to be relevant at all. Where the Income-tax Officer directed the assessee to produce his account books in respect of his income in order to make an assessment for the year 1929 to 1930 and the assessee produced some books but not those of the year 1925 to 1926.

Held, that the book of the year 1925 to 1926 was not 'required' within the meaning of S. 22 (4). (*Mukerji and Bennet, JJ.*) GANGA SAGAR OF KHURJA, *In the matter of*. **53 All. 451 = I.R. 1931 All. 489 = 132 I.C. 329 = 1931 A.L.J. 345 = A.I.R. 1931 All. 417.**

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———**S. 23**—*Assessment under—Rules of justice and equity.*

An Income-tax Officer does not possess absolutely arbitrary authority to assess at any figure he likes. Although he is not bound by strict judicial principles, he should be guided by the rules of justice, equity and good conscience. A.I.R. 1931 Lah. 87 (F.B.). Foll.(*Smith, J.*) ABDUL QAYUM & CO, FYZABAD *v.* COMMISSIONER OF INCOME-TAX, U. P. **9 Luck. 85 = 147 I.C. 117 (2) = 6 R.O. 230 = A.I.R. 1933 Oudh 396.**

———**S. 23**—*Decision of previous Income-tax Officer—Whether operates as* res judicata.

The order of an Income-tax Officer in a particular year allowing the salaries of two of the partners as business deductions does not bind his successor in a subsequent year. (*Addison and Bhide, JJ.*) ELECTRIC AND DENTAL STORES, LAHORE *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 663 = I.R. 1931 Lah. 902 = 134 I.C. 198 = 32 P.L.R. 656 = A.I.R. 1931 Lah. 341.**

———**S. 23**—*Expression "where at the time of making an assessment"—Meaning.*

The expression "where at the time of making an assessment under S. 23" merely means "when the time comes to make an assessment". (*Courtney Terrell, C.J. and Fazl Ali, J.*) MAHARAJADHIRAJ OF DHARBHANGA *v.* COMMISSIONER OF INCOME-TAX. **12 Pat. 5 = I.R. 1933 Pat. 232 = 144 I.C. 354 = 14 Pat. L T. 171 = A.I.R. 1933 Pat. 123.**

———**S. 23**—*Joint Hindu family—Denial of jointness—Need for affording opportunity to assessees to prove their case.*

Where the assessees were never given an opportunity to contest and disprove the allegation that they were members of a joint Hindu family and were liable to be taxed jointly,

Held, that the procedure was wrong and the assessment was invalid. (*Mukerji and Bennet, JJ.*) RADHEY LAL BALMAKUND, *In re*. **52 All. 991 = I. R 1931 All 298 = 130 I.C. 634 = 1930 A L J. 1548 = = A.I.R. 1931 All 23.**

———**S 23**—*Plea of division of shares of joint family—When should be raised.*

The plea that certain shares have been divided between the members of a joint Hindu family must be raised at the time of making an assessment under S. 23 and it cannot be raised for the first time on appeal against the assessment (*Niamatullah and Bennet, JJ.*) BIRADHMAL LODHA *v.* INCOME-TAX COMMISSIONER. **56 All. 504 = 1934 A.L J. 1213 = 153 I.C. 722 = 7 R.A. 574 = A.I.R. 1934 All. 217.**

———**S 23 (1)**—Assessment—No time limit except for cases coming under S. 34. *See* INCOME-TAX ACT, S. 34. **61 I.A. 10 = 61 Cal. 285 = 66 M.L.J. 121 (P.C.).**

———**Ss. 23 (1) and 34**—Notice under S. 22 served in proper time and assessment made—Assessment subsequently set aside by High Court—Fresh assessment in accordance with High Court order, but more than one year after the expiry of the tax year, not barred by limitation. *See* INCOME-TAX ACT, S. 34. **61 I.A. 10 = 61 Cal. 285 = 66 M.L J. 121 (P.C.).**

———**S. 23 (2)**—*Applicability.*

When an assessee has made a return which he knows that it is a *bona fide* return and in which he has put in his total income to the best of his then information, there might yet be some omission on his part due to some cause or other. To such and similar cases S. 23 (2) would apply but not to a case of deliberate omission to furnish particulars available with the assessee.

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(*Mukerji and Bennet, JJ.*) ABHEY RAM CHUNNI LAL, *In the matter of.* **6 I.R. (All.) 119 (2)=145 I.C. 562=1933 A.L.J. 49=A.I.R. 1933 All. 197.**

———**S. 23 (2)**—*Reasonable time—Question of fact.*

Whether a given time is reasonable time is a question of fact. (*Rankin, C.J. Pearson and S.K. Ghose, JJ.*) SADARAM PURANCHAND, *In the matter of.* **I.R. 1932 Cal. 59=134 I.C. 1275=A I.R. 1931 Cal. 729 (S.B.).**

———**S. 23 (2) and (4)**—*Failure to produce accounts—Issue of notice under S. 22 (4)—Assessment under S. 23 (4)—Validity.*

Per *Full Bench.*—In a case in which an assessee has duly filed a return of the "previous year" and has also on receipt of a notice under S. 23 (2) produced evidence in support of the return including some but not all of his account books, and the Income tax Officer is not satisfied with such evidence, he can at that stage issue a notice under S. 22 (4) calling upon the assessee to produce his complete account books for the 'previous year' and for three years prior thereto, and on the assessee's failure to do so, assess him under S. 23 (4). Case-law discussed.

Tek Chand and Dalip Singh, JJ.—The legislature should take the earliest opportunity of reviewing the position and, if possible, of re-drafting and re arranging the same. This seems all the more necessary as the interpretation which the Court has felt bound to put on these sections is likely to work great injustice in some cases. (*Shadi Lal, C.J., Harrison, Tek Chand, Dalip Singh and Johnstone, JJ.*) MAHOMED HAYAT HAJI MAHOMED SARDAR *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 129=I.R. 1931 Lah. 353=131 I.C. 81=32 P.L.R. 563=A. I.R. 1931 Lah. 87 (F.B.).**

———**S. 23 (3)**—*Assessment under—Procedure.*

Where the Income tax Officer found that some of the books of the assessees were not clear as regards the income derived by the owners thereof and assessed the income at a certain figure without stating what was the basis of his computation.

Held, that the assessment was illegal because the officer did not empoly any method at all. S. 13 of the Act did not authorise him to act arbitrarily and without any evidence. If the account books did not furnish any method of computation of the profits, he had to employ such methods and such basis as appealed to him as the best, but he had to employ some 'basis' or method as he thought fit. (*Mukerji and Bennet, JJ.*) RADHEY LAL BALMAKUND, *In re.* **52 All. 991=I.R. 1931 All. 298=130 I.C. 634=1930 A.L.J. 1548=A I.R. 1931 All. 23.**

———**S. 23 (3)**—*Scope—Duty of Income tax Officer under—Right to make private visit to assessee's place of business and act upon the result—Right of assessee to be heard in answer.*

On appeal from an assessment, the Assistant Commissioner of Income-tax, remanded the case to the Income tax Officer asking him to simply report the basis of his assessment, as that was not stated in the order of assessment. The Income tax Officer went beyond that instruction and paid a surprise visit to the business premises of the assessee and incorporated the results thereof in his report. The Assistant Commissioner on the basis of that report made a modified assessment, without, however, giving the assessee an opportunity to explain the facts stated in the report of the Income-tax Officer. His appeal to the Commissioner was also dismissed. On a reference under S. 66 (3) of the Income-tax Act,

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Held, that on natural principles of justice the new facts raised by the Income-tax Officer's report were matters which the assessee should have had an opportunity of dealing with, in order to enable justice to be done.

Held, further, that there was no obligation on the part of the Income tax Officer to compel him to receive evidence, that he was entitled to act on information obtained through private source or otherwise, that under S. 23 (3) of the Income tax Act, he must hear such evidence as an assessee might produce and such evidence as the Income-tax Officer might require on specified points to be committed in writing, during the course of the assessment, and that the inquiry in this case having been made at the appellate stage under the direction of the Assistant Commissioner, the Income tax Officer was not bound to take the evidence produced. (*Courtney-Terrell, C.J, Khaja Mohammad Noor and Agarwalla, JJ.*) ABDUL RAZAK *v.* COMMISSIONER OF INCOME-TAX, B. & O. **158 I.C. 959=8 R.P. 225=16 Pat.L.T. 429=A.I.R. 1935 Pat. 425 (S.B.).**

———**S. 23 (3)**—*Taxing Officer's estimate—Assessee can displace it by adducing evidence.*

Though a Taxing Officer is not entitled to make a guess without evidence, still when the assessee does not give correct returns, the Taxing Officer's estimate holds good unless the assessee displaces it by adducing evidence. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146=12 Pat. 318=I.R 1933 P.C. 77=1933 M.W.N 439=37 C.W.N. 598=57 C.L.J. 318=14 Pat.L.T. 341=1933 A.L.J. 527=35 Bom. L.R. 731=37 L.W. 701=142 I.C. 437=A I.R. 1933 P.C. 108=64 M.L J. 612 (P.C.).**

———**S. 23 (3) and (4)**—*Accounts—Non production of irrelevant books—Assessment under Cl. (4)—Propriety—Proper procedure.*

Where the Income-tax Officer called on the assessee to produce his account books and the assessee produced some books but not those of an earlier year and there upon the officer made an assessment under S. 23 (4) even though the books produced gave the necessary data.

Held, that the books of the earlier year were not really required within the meaning of S. 22 (4) and that the assessment should under the circumstances be made under Cl. (3) and not Cl. (4) of S. 23. (*Mukerji and Bennet, JJ.*) GANGA SAGAR OF KHURJA, *In the matter of.* **53 All. 451=I.R. 1931 All. 489=132 I.C. 329=1931 A.L.J. 345=A.I.R. 1931 All. 417.**

———**S. 23 (3) and (4)**—*Accounts produced by assessee—Entries in suspense account not explained—Assessment under S. 23 (4)—Validity of.*

Pursuant to a notice under S. 22 (4), the assessee produced his accounts to which no exception was taken. But the books included a suspense account in which entries were made purporting to relate to certain sums deposited and withdrawn by various persons not, however, described specifically. The assessee was unable to identify those persons and the Income-tax Officer, not being satisfied with the entries and the explanations, refused to accept the return and made an estimated assessment under S. 23 (4).

Held, that from the mere inability of the assessee to identify the depositors, it did not follow that the whole accounts were either false or incomplete. If the officer had been of opinion that the transactions in suspense accounts were not temporary deposits and withdrawals for which no interest was charged, but were loan transactions resulting in profits to the assessees he might have included such profits under S. 23 (3) in the assessment made by him. But in the present case there

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were no materials to justify the Income-tax Officer in disregarding the return *in toto* and making the assessment under S. 23 (4). (*Page, C.J., Das and Baguley, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* S. P.K.A.A.M. CHETTYAR FIRM. **10 Rang. 92=I.R. 1932 Rang 96=137 I.C. 206=A.I.R. 1932 Rang. 52 (S B.).**

———**S. 23 (3) and (4)**—*Principle of sub-sections—Right of appeal.*

Where the Income tax Officer does not get proper material on which to find out the true income of an assessee, it is in the interest of the State to guess the income of the assessee. The assessee cannot complain that he has been over taxed if owing to his own failure, the officer is not able to do justice towards him. But where the proper materials are before the Officer, he should utilise them and make an assessment under S. 23 (3) which is liable to be re-examined in appeal. When an assessment is made more or less on matters which have been guessed out, there cannot be a proper appeal. There would be no sense in substituting the Income-tax Officer's 'guess' by his superior officer's 'guess'. It is on this principle that an appeal is shut out in the case of "Best judgment assessment." (*Mukerji and Bennet, JJ.*) GANGA SAGAR OF KHURJA, *In the matter of.* **53 All. 451=I.R. 1931 All. 489=132 I.C. 329=1931 A.L J. 345=A.I.R. 1931 All. 417.**

———**S. 23 (3) and (4)**—"*Total income.*"

Income derived from the dividend paid by a company registered in England but doing business in India cannot be reckoned as part of the total income where the assessee is not resident in India and the dividend was paid to him by the Head Office of the company in England. The assessees item of income would fall within S. 14 (2) as having already paid income-tax in the hands of the company. (*Beaumont, C.J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* MAJOR K. C. GOLDIE. **55 Bom 734=33 Bom.L R. 776=136 I.C. 170=I.R. 1932 Bom. 154=A.I.R. 1931 Bom. 420.**

———**S. 23 (4)**—*Appeal—Dismissal* ex parte *by Assistant Commissioner—Legality.*

The Assistant Commissioner should hear the assessee or his Counsel and should then decide whether the case really fell under S. 23 (4). He should not merely scrutinize the memorandum of appeal and the assessment order of the Income-tax Officer behind the back of the assessee or his Counsel and dismiss the appeal on the ground that it is not allowable. (*Mukerji and Bennet, JJ.*) BHAGWATI PRASAD, *In the matter of.* **54 All. 496=I.R. 1932 All. 492=138 I.C. 682=1932 A.L J. 389=A.I R. 1932 All. 390.**

———**S. 23 (4)**—*Assessee's failure to make return—Assessment to best of judgment—Duty of Income tax Officer.*

S. 23 (4) provides that whenever there is a failure to make a return, there must be an assessment to the best of the judgment of the Income tax Officer. The Income tax Officer cannot tell the assessee, even if no return was made that he was in a position to make an assessment which would not be to the best of his judgment and which would be appealable. (*Mukerji and Bennet, JJ.*) SARJOO PERSHAD GAURI SHANKER, *In re.* **132 I. C. 564 (2).**

———**Ss. 23 (4) and 29**—*Assessment—Meaning—Notice under S. 29.*

The word "assessment" in S. 23 (4) means determining the total taxable income and the sum payable on it. A notice can be validly issued under S. 29 when the

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Income-tax Officer has made a best judgment assessment under S. 23 (4). (*Niamatullah and Bennet, JJ.*) BEHARI LAL CHATTERJI *v.* COMMISSIONER OF INCOME-TAX. **56 All. 418=151 I.C. 251=7 R A. 115=1934 A.L.J. 47=3 A.W.R. 290=A.I.R. 1934 All. 930.**

———**S. 23 (4)**—*Assessment*—"*To the best of his judgment*".

The expression "to the best of his judgment" seems nothing more than "as best as he can". It is incorrect to say that Income-tax Officer must exercise a "judicial discretion" in making the assessment. A judicial discretion presupposes that power has been confided to the tribunal to act or refrain from acting in a particular way in certain proved or admitted circumstances, whereas under the section if the assessee has not chosen to state an account, the officer *shall* make an assessment and he has no discretion in the matter. (*Page, C. J., Das, Maung Ba, Mya Bu and Dunkley, JJ.*) ABDUL BARI CHOWDHURY *v.* COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 281=I.R. 1931 Rang. 225=133 I.C. 81=A I.R. 1931 Rang. 194 (F.B.).**

———**S. 23 (4)**—*Assessment to the best of judgment—Essential conditions—Not in the nature of a penalty.*

Where the Income-tax Officer is to make an assessment to the best of his judgment it should not be an assessment by way of penalty; his judgment ought to proceed on some data, including legitimate presumptions arising from non-production of the account books. It should be borne in mind that an assessment under S. 23 (4) should not be influenced by a desire to punish the assessee for non-compliance with a notice under S. 22 or S. 23 however culpable such non-compliance may be. Any deliberate concealment or misstatement of the particulars of his income by the assessee is made punishable by S. 28; and if his act amounts to an offence under that Section, he should be tried and convicted if the offence is proved, in which case the law gives him a right to appeal, but to punish him indirectly by making a so-called best judgment assessment is wholly unwarranted. Where the assessee's books are available for the preceding and subsequent years in making an assessment to the best of judgment, the Income-tax Officer may draw inferences from receipts in those years, so as to form a satisfactory basis for the assessment. (*Niamatullah and Bennet, JJ.*) JOT RAM SHER SINGH, *In the matter of.* **56 All. 933=150 I.C. 197=6 R.A. 1045=1934 A L J. 274=3 A.W.R. 445=A.I.R. 1934 All. 559.**

———**S. 23 (4)**—*Assessment to the best of judgment—Incidental expenses—Presumption regarding—Finality of order.*

Once an assessment has been made to the best of the Income-tax Officer's judgment on a net income under S 23 (4) of the Act, it follows that all expenses incidental to the business must be assumed to have been taken into consideration in arriving at the net income assessed. Such an assessment is final, conclusive and not open to appeal. (*Broadway and Addison, JJ.*) GOVERNMENT MAIL MOTOR SERVICE, RAWALPINDI *v.* COMMISSIONER OF INCOME-TAX. **I R. 1932 Lah. 242=136 I.C. 706=33 P.L.R. 160=A.I.R. 1932 Lah. 396.**

———**S. 23 (4)**—"*Assessment to the best of judgment*"—*Mode of making.*

In making the "assessment to the best of judgment" under S. 23 (4) the Income-tax Officer does not possess absolutely arbitrary authority to assess at any figure he likes, and the Income-tax Officer though not bound by strict judicial principle, should be guided by the rules of justice, equity and good conscience. (*Shadi Lal, C.J.*

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Harrison, Tek Chand Dalip Singh and Johnstone, JJ.) MAHOMED HAYAT HAJI MAHOMED SARDAR *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 129 = I.R. 1931 Lah. 353 = 32 P.L.R. 563 = 131 I.C. 81 = A.I.R. 1931 Lah. 87 (F.B.).**

———**Ss. 23 (4), 27, 66 (2) and (3)**—*Assessment to the "best of judgment"—Power of High Court to require the Commissioner to state a case—Whether the assessment can be the subject of reference—Power of Assistant Commissioner to express opinion on the propriety of assessment under S. 23 (4)—Jurisdiction only if he entertains an appeal—Perversity of judgment or abuse of power by Income-tax Officer—Remedy—Revision to commissioner.*

S. 30, proviso expressly declares that there shall be no appeal from an assessment to the best of the Income-tax Officer's judgment under S. 23 (4) or under that subsection read with S. 27. Accordingly no question of law or fact arising from such assessment can be the subject of consideration by the Assistant Commissioner for the simple reason that no appeal lies to him, with the result that the Assistant Commissioner can never have an occasion to pass in appeal an order under S. 31 in relation to a best judgment assessment. The High Court can require the Commissioner to make a reference for decision by the High Court of a question of law only if it arises from an order under S. 31. The High Court has no power to require the Commissioner to state a case for the decision by the High Court of questions of law arising from an assessment under S. 23 (4) of the Act. Any question of law which arises from the best judgment assessment, sought to be set aside by an application under S. 27 cannot fall within the purview of S. 27. So, the question whether a wholly arbitrary assessment under S 23 (4) on assumed income or on conjectural estimate thereof involves an error of law cannot be the subject of reference under the orders of the High Court. It is not open to the Assistant Commissioner to express the opinion that the Income-tax Officer should not have assessed to the best of his judgment under S. 23 (4) if the latter stated in his order that a case existed for assessment to the best of his judgment. Any abuse of power by the Income-tax Officer or perversity of judgment is to be corrected by the Commissioner in revision, but the Assistant Commissioner has no jurisdiction, where he has before him what purports to be an appeal from an assessment under S. 23 (4). It is only if he has jurisdiction to entertain the appeal that he can say whether the assessment was perverse or arbitrary. That stage cannot be reached if he is not allowed by law to entertain an appeal from it. *(Niamatullah and Bennet, JJ.)* JOT RAM SHER SINGH, *In the matter of.* **56 All. 933 = 150 I.C. 197 = 6 R.A. 1045 = 1934 A.L.J. 274 = 3 A.W.R. 445 = A.I.R. 1934 All. 559.**

———**S. 23 (4)**—*Assessment by Income-tax Officer under—Propriety—Remedy of assessee.*

Where the Income-tax Officer issued a notice to a certain firm under S. 22 (4) calling upon them to produce the books of the particular branch and the firm did not produce the books stating that they kept no books at that branch but ths Income-tax Officer did not believe the statement and decided for reasons stated by him that the assessees had such books at that branch, that they had failed to comply with the terms of the notice and he further made an assessment under S. 23 (4).

Held, that the Income-tax Officer acted quite properly in making the assessment under S. 23 (4).

Held, further, that the remedy of the assessee in such a case was to apply under S. 27 and not to prefer an

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appeal. *(Carr, Offg. C.J., Cunliffe and Das, JJ.)* COMMISSIONER OF INCOME-TAX, RANGOON *v.* M. S. K. CHETTYAR FIRM. **8 Rang. 587 = I.R. 1931 Rang. 113 = 131 I.C. 49 = A.I.R. 1931 Rang. 53.**

———**S. 23 (4)**—*Assessment under—Appeal.*

A person who has been assessed under S. 23 (4) is not entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act. Proviso to S. 30 (1) is bar to such an appeal. 10 Lah. 596, (F.B.) Foll. *(Courtney-Terrell, C.J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.)* ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R. 1931 Pat. 401 = 133 I.C. 753 = A.I.R. 1931 Pat. 306 (F.B.).**

———**S. 23 (4)**—*Assessment under—Order of Assistant Commissioner under S. 31—Ground for reference.*

The question whether an assessment made by the Income-tax Officer under S. 23 (4) is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed under S. 31 and such a question cannot therefore be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case. 6 Rang. 21; 8 Rang. 209, 8 Rang. 203, 7 Rang. 669, Overr. *(Page, C.J., Das, Maung Ba, Mya Bu and Dunkley, JJ.)* ABDUL BARI CHOWDHURY *v.* COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 281 — I.R. 1931 Rang. 225 = 133 I.C. 81 = A.I.R. 1931 Rang. 194 (F.B.).**

[**F.** 56 A. 933 (941, 944, 953); 10 L. 462. **Not F.** 31 N.L.R. 32.]

———**S. 23 (4)**—Assessment under—Propriety—Order of Assistant Commissioner—Reference to High Court. *See* INCOME-TAX ACT, S. 66 (2). **9 Rang. 21 = A.I.R. 1931 Rang 97.**

———**S. 23 (4)**—*Assessment under—Reasonable notice to assessee—What constitutes.*

An assessment in default is a very serious thing; and unless it is open to the Court to insist that notices under Ss. 23 (2) and 22 (4) are given so as to afford reasonable opportunity to an assessee to comply with their requirements, the honest and diligent tax-payer will have no security for fair treatment and no remedy in the absence of fair treatment. Assessees who are not diligent or straightforward may no doubt be treated very strictly, but in such cases it is a plain and unnecessary mistake to order them to comply with the statutory requirements in an unreasonable time and to base an assessment in default upon their non-compliance. Where a notice is received at 3 p.m. on 18th of a month requiring the assessee to produce any evidence on which he might rely in support of his return on the 19th, the notice is not such a reasonable notice as law requires affording the assessee proper opportunity to comply with its return. *(Rankin, C.J., Pearson and S K. Ghose, JJ.)* SADARAM PURANCHAND, *In the matter of.* **I.R. 1932 Cal. 59 = 134 I.C. 1275 = A.I.R. 1931 Cal. 729 (S.B.).**

———**S. 23 (4)**—*Assessment under—Requisites of.*

Before the Income-tax Officer can obtain jurisdiction to assess summarily under S. 23 (4), it is not necessary that there must be a failure in each of the cases mentioned in S. 23 (4). *(Courtney-Terrell, C.J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.)* ANANDA *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R. 1931 Pat. 401 = 133 I.C. 753 = A.I.R. 1931 Pat 306 (F.B.).**

———**S. 23 (4)**—*Assessment under—Validity—Appeal—Rejection—Further reference to High Court.*

Where a notice was duly served on the assessee under S. 22 (4) but he failed to produce some of the accounts and thereupon the Income-tax Officer made an assessment under S. 23 (4) and subsequently he refused to

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cancel the assessment at the instance of the assessee holding that there was no sufficient cause for the non-production of the accounts and the same order was affirmed by the Assistant Commissioner on appeal.

Held, that the questions regarding the validity of the notice and the propriety of the assessment did not arise in the appeal and that there was no room for a reference to be made to the High Court. (*Page, C.J., Das and Maung Ba, JJ.*) A. K. R. P. L. A. CHETTYAR FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 25=I.R. 1931 Rang. 206=132 I.C. 718=A.I.R. 1931 Rang. 98.**

[R. 9 R. 281 (300) (F.B).]

———**S. 23 (4)**—*Assessment under—Validity—Return in prescribed form—Entries of profits with "about."—Details not given.*

Where the assessee makes a return in the prescribed form but under head five shows the profits or income as "about Rs. " and none of the details required under note 5 is given, Income-tax authorities can treat the return as no return at all and can ultimately make the assessment under S. 23 (4) particularly when the assessee does not declare the period to which the income declared relates. A.I.R. 1928 Rang. 108 (F.B.), Foll. (*Addison and Sale, JJ.*) COMMISSIONER OF INCOME-TAX, PUNJAB *v.* LAL MOHAMMAD. **159 I.C. 646=A.I.R. 1935 Lah. 858.**

———**S. 23 (4)**—*Assessment under—When permissible.*

If an assessee has books and does not produce them, he can be assessed in default under S. 23 (4), whatever other evidence he might choose to put forward in support of his return. Other evidence, in the absence of the books, can hardly satisfy a reasonable man. But it was never intended by the Act that failure to produce books, prior to the filing of a return, should deprive the assessee of his right to have the return duly and properly inquired into. A return which by S. 22 (3) is to be deemed to be a return made in due time cannot be treated as still born because of a previous failure to comply with a notice under S. 22 (4). (*Rankin, C.J., Pearson and S. K. Ghose, JJ.*) SADARAM PURAN CHAND, *In the matter of*. **I.R. 1932 Cal. 59=134 I.C. 1275=A.I.R. 1931 Cal. 729 (S.B.).**

———**S. 23 (4)**—*Cancellation of registration of firm.*

The order of the Commissioner cancelling the order of the Income-tax Officer directing the registration of a firm more than a year after the order was made is invalid. (*Aston and Rupchand, A.J.Cs.*) KHEM CHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **28 S.L.R. 174=149 I.C. 1204=6 R.S. 255=A.I.R. 1934 Sind 46.**

———**Ss. 23 (4) and 66**—*Compliance with terms of notice—Question of fact.*

Where the accounts or documents or evidence produced by the assessee do not furnish sufficient material for an assessment and in particular, if they, so far from revealing the income intentionally, falsify the income, it is open to the Income-tax Officer to make an assessment under S. 23 (4) for the assessee has failed to comply with all the terms of the notice The question whether there has been a compliance with the terms of the notice is not a question of law but a question of fact. Further whether the evidence before the Income-tax Officer is sufficient to justify him in rejecting the accounts of the assessee is also a question of fact. (*Stuart and Raza, JJ.*) MUZAFFAR ALI KHAN *v.* COMMISSIONER OF INCOME-TAX, U.P. **I.R. 1932 Oudh 268=137 I.C. 732 (1)=A.I.R. 1932 Oudh 164.**

———**S. 23 (4)**—*Demand of super tax—Interval of two years and four months.*

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In order to be valid, a demand for super-tax should be made within a reasonable time of the assessment for income-tax. Two years and four months or thereabouts is a wholly unreasonable time. (*Aston and Rupchand, A. J.Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **28 S.L.R. 174=149 I.C. 1204=6 R.S. 255=A.I.R. 1934 Sind 46.**

———**S. 23 (4)**—Ex parte *assessment—Local inquiry must be conducted.*

In every case before an *ex parte* assessment is made under S. 23 (4), the Income-tax Officer must invariably conduct such "local" inquiry to ascertain the income of the proposed assessee for the "previous year" as the circumstances of the case may warrant and he must place on the record "a note of the details and results of his inquiry" in order that the Commissioner of Income-tax under S. 33 or the High Court under S. 66 (2) or (3) may be in a position to see that the assessment "was according to the rules of reason and justice and not arbitrary". A.I.R. 1931 Rang. 194, Diss. from; A.I.R. 1931 Lah. 87 (F.B.), Foll. (*Grille, J. C. and Subhedar, A. J. C.*) COMMISSIONER OF INCOME TAX-CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L.R. 32=153 I.C. 7=7 R.N. 111=A.I.R. 1934 Nag. 183 (2).**

———**Ss. 23 (4) and 66**—Ex parte *assessment not made "to the best of his judgment"—Question of law.*

A point of law would invariably be involved in an *ex parte* assessment which is not shown to have been made 'to the best of his judgment' by the Income-tax Officer, so as to make it the subject of a reference to and decision by the High Court under S. 66 (2) or (3). (*Grille, J. C. and Subhedar, A.J.C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L.R. 32=153 I.C. 7=7 R.N. 111=A.I.R. 1934 Nag. 183 (2).**

———**S. 23 (4)**—*Fresh notice—Effect.*

The issue of a fresh notice under S. 34 does not do away with the previous assessment under S. 23 (4). (*Mukerji and Sen, JJ.*) CHHOTEY LAL, *In re*. **I.R. 1932 All. 268=137 I.C. 77=1931 A.L.J. 1109=A. I.R. 1932 All. 83.**

———**Ss. 23 (4) and 66 (3) and (4)**—*'No return case'—Appeal not maintainable—Application for reference does not lie.*

Firm *B* used to advance large sums of money to firm *N* and received from the latter charge substantial sums of interests. At the assessment of income-tax *N* claimed that the interest credited to *B* should be allowed to them as business expenses. In the year 1925 26 a notice was sent to *B* care of *N*. It was re-directed to *B* at Jaipur where it was not delivered. The same notice was then sent to *N*. As the declaration form was addressed to *B*, *N* returned the same in its blank state. Income-tax authorities assessed *B* treating the case as no return case. Similarly for the assessment of the year 1924-25 a declaration was so addressed to *B* through *N*. It was returned by *N* with a suggestion that it should be sent to Jaipur. A declaration form was again sent to *B* through *N* but was again returned.

Held, that the case for the year 1925 26 was a "no return case" and an application for reference under S. 66 (3) and (4) did not lie.

Held, further, that the assessment for the year 1924-25 also was a no-return case. The case fell under proviso to S. 30 and was one of those cases which fell within the category of assessment under S. 23 (4) or S. 23 read with S. 27. No appeal therefore lay in respect of the assessment. (*Broadway and Currie, JJ.*)

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NAWAL KISHORE KHARAITILAL *v.* INCOME-TAX COMMISSIONER, DELHI. **I.R. 1931 Lah. 697 = 132 I.C. 857 = A.I.R. 1930 Lah. 1014.**

———**S. 23 (4)**—*Notice calling for return—Failure to comply—Letter intimating non-liability.*

Where an assessee received a notice from the Income-tax Officer under S. 22 (2) requiring him to make a return in the prescribed form and verified in the prescribed manner setting forth his total income during the previous year and the assessee does neither fill the form, nor verify such form in the prescribed manner but instead writes a letter intimating his non-liability to be taxed under the Act, it must be taken that he has failed to make a return under S. 22 (2) within the meaning of S. 23 (4). (*Courtney Terrell, C. J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R. 1931 Pat. 401 = 133 I.C. 753 = A.I.R. 1931 Pat. 306 (F.B.).**

———**S. 23 (4)**—Notice of demand—Failure to make return—Death of assessee—Assessment under S. 23 (4)—Validity—Illegal. *See* INCOME-TAX ACT, S. 22 (2). **55 Bom. 312 = A.I.R. 1931 Bom. 333.**

———**Ss. 23 (4) and 30**—Notice under S. 22 (2) read with S. 34 to partner of firm—Partner denying any knowledge of profits or income of firm—Assessment under S. 23 (4)—Appeal not competent under S. 30. *See* INCOME-TAX ACT, SS. 30 AND 23 (4). **A.I.R. 1933 Lah. 290.**

———**S. 23 (4)**—*Order under—Appeal—Rejection of—When justified—Facts amounting in law to refusal to perform obligations imposed by Act—Question of law.*

Before an Assistant Commissioner denies the right of appeal from an order under S. 23 (4), he must be satisfied that the assessee has really incurred the penalty prescribed by law and that the Income tax Officer had acted legally in assessing him under S. 23 (4). The mere fact that the assessment purports to have been made under that sub section does not shut out the appeal; it must be shown that the circumstances of the case bring it within the scope of that sub-section, and it is only when the Assistant Commissioner is satisfied that the assessment was made, not ostensibly but genuinely under that sub-section, that he must stay his hands and decline to adjudicate upon the merits of the appeal on the short ground that the proviso to S. 30 (1) bars an appeal in such case. His decision on this point and his rejection of the appeal are a proceeding in connexion with an assessment and it is the duty of the Commissioner if required by the assessee to state a case raising the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the case within the ambit of proviso to S. 30 (1). 10 Lah. 596, Foll. (*Courtney-Terrell, C. J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R. 1931 Pat. 401 = 133 I.C. 753 = A.I.R. 1931 Pat. 306 (F.B.).**

———**S. 23 (4)**—*Return not properly verified or signed—Best judgment assessment.*

Where the return under S. 22 (2) did not bear verification or the signature of the assessee,

Held, that there was no proper return and the Income tax officer could impose best judgment assessment under S. 23 (4). (*Niamatulla and Bennet, JJ.*) BEHARI LAL CHATTERJI *v.* COMMISSIONER OF INCOME-TAX. **56 All. 418 = 151 I.C. 251 = 7 R.A. 115 = 8 A.W.R. 290 = 1934 A.L.J. 47 = A.I.R. 1934 All. 930.**

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———**S. 23 (4)**—*Return of only some of the branches—Assessment under S. 23 (4)—Validity of.*

A return which deliberately failed to comply with the rule contained in S. 22 (2) that the return was to be of the total income of the assessee is no return at all within the meaning of S. 22 (2). So where an assessee who had four branches sent in a return which did not mention two of them and the omission was not corrected in spite of time granted for it, the Income-tax Officer is entitled to make an assessment to the best of his judgment under S. 23 (4). (*Mukerji and Bennet, JJ.*) ABHEY RAM CHUNNI LAL. *In the matter of.* **6 I.R. (All.) 119 (2) = 145 I.C. 562 = 1933 A.L.J. 49 = A.I.R. 1933 All. 197.**

[**R.** 56 A. 418 (422).]

———**S. 23 (4)**—*Summary Assessment—Adjournments to comply with notice under Ss. 22 (4) and 23 (2)—Practice.*

Although the Act does not specifically provide for granting adjournments to comply with the terms of the notice served on the assessees under Ss. 22 (4) and 23 (2), in practice, adjournments are generally allowed for sufficient cause on the principle of justice, equity and good conscience. If therefore for any reason, a prayer for adjournment has to be refused a definite order, either oral or written, must be passed by the officer and communicated to the assessee or his agent, when he is present, before proceeding with the drastic action of summarily assessing him under S. 23 (4). Failure on the part of the Income-tax Officer in observing the aforesaid elementary principle of judicial procedure does, considerably detract from the technical legality of the summary assessment order recorded by him against the non-applicant. A.I.R. 1930 Mad. 113 (S.B.), Rel. on. (*Grille, J.C. and Subhedar, A.J.C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L.R. 32 = 153 I.C. 7 = 7 R.N. 111 = A.I.R. 1934 Nag. 183 (2).**

———**S. 23 (4)**—*Summary assessment higher than that of previous years—Legality of.*

Although a summary assessment was higher than that of the previous year which was based on the returns submitted by the assessee, if it is based on some evidence, it cannot be said it is arbitrary and so illegal. (*James and Chatterji, JJ.*) LALIT KISHORE MITRA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **I.R. 1933 Pat. 18 (1) = 140 I.C. 712 = A.I.R. 1932 Pat. 166.**

———**S. 23 A (2)**—*Assessment under—Conditions—Express finding as to intention to evade taxation—If essential.*

Before an Income-tax Officer can assess the shareholders of a Company under S. 23-A (2) of on accumulated or undistributed profits of the Company, he has to be satisfied (1) that the profits of the Company have been allowed to accumulate beyond the existing and contingent needs of the Company, or that a reasonable part of the profits, having regard to the said needs have not been distributed to its members, and (2) that such accumulation or failure to distribute is for the purpose of preventing the imosition of tax upon any of the members in respect of their shares in the profits so accumulated or not distributed. Both these conditions, which are questions of fact, must be satisfied before the members of a Company can be assessed to income-tax on their shares in the accumulated or undistributed profits. It is not, however, necessary that there should be an express finding that the accumulation was made for the purpose of evading taxation. Such a finding

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can be implied. (*Beasley, C. J., Cornish and Pandrang Row, JJ.*) HARVEY *v.* THE COMMISSIONER OF INCOME TAX, MADRAS. **158 I.C. 1031=8 R.M. 405=1935 M.W.N. 1176=42 L.W. 714=A.I.R. 1935 Mad. 1005=69 M.L.J. 577 (F.B.).**

———**S. 24**—Applicability—Conditions of set off—Company having several businesses—Losses in some which have ceased to exist—If can be set off against —Profits or gains of others. *See* INCOME-TAX ACT, SS. 10 (1) AND (2) AND 24 **68 M.L.J. 379 (F.B.).**

———**S. 24**—*Bad debt—Debt due from a joint-stock Company—Company carrying on business, not a 'bad debt.'*

The assessee was one of the agents for a certain mill company and in his capacity as such agent, he has been called upon to pay a large sum in respect of the liabilities of the Company guaranteed by the agent and he claimed, under S 24, that he was entitled to deduct that payment from his income arising under other heads, treating the payment as a loss in respect of his business as an agent.

Held, that so long as the company was on the register and so long as it was carrying on business as a going concern, it was impossible to say that any debt which it owes is necessarily irrecoverable. "To constitute moneys due by a joint stock company engaged in business a bad debt or a business loss to the creditor, it is necessary that the Company should have ceased to be a going concern." (*Beaumont, C.J. and Mirza, J.*) COMMISSIONER OF INCOME-TAX BOMBAY *v.* DINSHAW. **56 Bom. 457=140 I.C. 749=I.R. 1933 Bom. 34=34 Bom L.R. 1235=A.I.R. 1932 Bom. 609.**

[Reversed. 61 I.A. 318 (P.C.)]

———**S 24**—*Bad debt—Debt due from limited company—If can be treated as, when debtor company is still going in.*

A debt due from a limited company can be treated as irrecoverable and a bad debt for the purposes of income-tax, and as a business loss under S. 24 of the Income-tax Act, even when the debtor company is not actually wound up or has not ceased to be a going concern. The question is one of fact to be decided on the relevant facts of the particular case. (*Lord Russell of Killowen.*) DINSHAW *v.* COMMISSIONER OF INCOME TAX, BOMBAY. **61 I.A. 318=58 Bom. 579=7 R P.C. 21=1934 A.L.J. 797=40 L.W. 253=36 Bom.L.R. 855=38 C.W.N 1129=60 C.L.J. 63=36 P.L.R. 223=150 I.C. 806=11 O.W.N. 994=4 A.W R 162=1934 M. W.N. 852=A.I.R. 1934 P.C. 180=67 M.L.J. 213 (P.C.).**

———**S. 24**—*Bad debts—Deduction for, when allowable.*

Although the Act nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable. But they must be bad debts incurred in that particular year. For the purpose of computing yearly profits and gains, each year is a separate self-contained period of time, in regard to which profits earned or losses sustained before its commencement are irrelevant. It thus follows that a debt, which had in fact become a bad debt before the commencement of a particular year, could not properly be deducted in ascertaining the profits of that year, because the loss had not been sustained in that year. A.I.R. 1929 Nag. 50 (F.B.), Reversed. (*Lord Russell of Killowen.*) COMMISSIONER OF INCOME TAX, C. P. AND BERAR *v.* CHITNAVIS. **59 I.A. 290=I.R. 1932 P.C. 211=137 I.C. 772=36 C.W.N. 797=34 Bom.L.R. 1071=1932 A.L.J. 647=55 C.L.J. 575=36 L.W. 49=1932 M. W.N. 782=9 O.W.N. 737=28 N.L.R. 205=15 N.L. J. 54=A.I.R. 1932 P.C. 178=63 M.L.J. 361 (P.C.).**

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———**S. 24**—*Income of assessee—Rent lost to landlord —Whether can be taken into account.*

S. 24 should be read in as liberal a manner as possible. Where there is a *bona fide* loss, a man can always set it off against his income, profits are gains under the same head, and in exceptional cases where the loss is so heavy that it more than counterbalances the whole of the profits under that head of income in order that the assessee may obtain his full relief.

Held, that the amount of rent of a certain property which was occupied by a tenant, who in spite of the efforts of the assessee (landlord) persisted in making default and which amount the landlord in a subsequent litigation had to forego in order to secure the eviction of the tenant is not liable to be taken into account as the income of the assessee in arriving at the total sum on which the assessment is to be made. (*Harrison and Tek Chand, JJ.*) MAHOMED NAQI *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1931 Lah. 513=132 I.C. 1=32 P.L.R. 418=A.I.R. 1931 Lah. 656.**

———**S. 24**—*Land purchased by coparcenery—Allotted to assessee in partition—Subsequent sale—Loss cannot be claimed as set-off*

A land was purchased in 1920 by the coparcenary of which the assessee was a member, in partnership with a stranger to the coparcenery. In 1924, in a partition between the coparceners, this property was allotted to assessee. He sold it in 1928. The assessee claimed that he was entitled to deduct from his income the loss which he had sustained, *i.e.*, the difference between the price at which the land was purchased in 1920 and the price at which it was sold in 1928.

Held, that the purchase was an investment of capital in land and not a purchase made for the purpose of business in buying and selling land and when it came to the assessee it formed part of his capital The assessee was not therefore entitled to claim the loss as set off. (*Aston and Rupchand, A.J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* HEMRAJ KANJI. **6 I.R. (Sind) 25=145 I.C. 202=A.I.R. 1933 Sind 145.**

———**S. 24**—*Loss sustained owing to partner's default —Deduction of—Permissibility.*

The mere absence in the Act of a provision for loss in respect of a time-barred debt is no ground for disallowing it; but whether such loss could be claimed in any particular year or not is a question of fact depending upon the circumstances of each case. Where therefore an assessee is being taxed personally, it is open to him to say that on a settlement of accounts of the old partnership, he treated the amount due by a partner as a loan made by him personally to that partner and that the loss which he consequently sustained on account of the failure of such partner to pay back loan is a loss which he is entitled to claim credit for in assessing the profit which he has made in respect of all kinds of business carried on by him in the year of assessment. This is permissible to him under S. 24. A I.R. 1932 P.C. 178, Rel. on. (*Aston and Rupchand, A.J.Cs.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* KHEMCHAND RAMDAS. **6 I.R. (Sind) 28=145 I.C. 254=27 S.L.R 243=A.I.R. 1933 Sind 148.**

———**S. 24**—*Partnership formed by four brothers—Another firm consisting of the four brothers and another —Losses in latter firm—If can be set off against profits in former firm.*

A partnership firm is not a person but is merely a collective name for the individuals who are members of the partnership, and, as such, cannot be a partner in another firm. Hence where a partnership was formed of four brothers and another was formed by four brothers and another.

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Held, that the partnership firm of the four brothers could not claim that their partnership firm as such was a partner in the latter firm. Hence there could be no set-off of the losses of the latter firm against the profits of the partnership of the four brothers. A.I.R. 1924 Cal, 74 ; A.I.R. 1928 Cal. 148 and A.I.R. 1933 All. 77, Rel. on. (*Addison and Din Mohammad, JJ.*) SHIV NARAIN *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **160 I.C. 155=8 R.L. 502=A.I.R. 1935 Lah. 896.**

——**S. 24**—*Scope — Dissolution of partnership—Distribution of assets and liabilities—Interest on liabilities—Deduction from taxable income.*

Where two businesses are carried on and it is found on an account taken in accordance with S. 10 that there has been a loss in one business, that can be set off under S. 24 against the profits and gains of the other business whether it is of a similar or different nature. The assessee who was a money-lender had been a partner in two firms which were dissolved in 1929. On the distribution of the assets and liabilities of those firms liabilities amounting to a certain amount and representing the capital borrowed from third parties entirely for the purposes of the defunct firms had been allotted to his share. On that amaunt, he had during the year of account paid a sum as interest which he claimed to deduct from the profits and gains of the business carried on by him on his own account during the year.

Held, that the payment was a capital loss and not a trading loss and that the assessee was not entitled to the deduction claimed under S. 24. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* SIDDHA GOUDAR. **55 Mad. 818=I.R. 1932 Mad. 432=139 I.C. 689=35 L.W. 806=1932 M.W.N. 610=A.I.R 1932 Mad. 375=62 M. L J. 638 (F.B.).**

——**S. 24**—*When debt becomes bad, a question of fact—Assessee not sole arbiter to decide.*

Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else. The assessee has no option of declaring a debt as bad. The mere fact that a debt was incurred at a date beyond the period of limitation will not of itself make the debt a bad debt, still less will it fix the date at which it became a bad debt. A statute barred debt is not necessarily bad, neither is a debt which is not statute barred necessarily good. The age of the debt is no doubt a relevant matter to take into consideration. In every case it is a question of fact, to be determined after consideration of all relevant circumstances. (*Lord Russell of Killowen.*) COMMISSIONER OF INCOME-TAX, C. P. AND BERAR *v.* CHITNAVIS. **59 I.A. 290=I.R. 1932 P.C. 211=137 I.C. 772=36 C.W N 797=34 Bom L R 1071=1932 A.L.J. 647=36 L.W. 49=1932 M.W.N. 782=9 O.W.N. 737=28 N L.R. 205=15 N.L J. 54 = 55 C.L.J. 575=A.I.R. 1932 P.C. 178=63 M.L.J. 361 (P.C.).**

——**S. 24 (1)**—*Assessee having separate money-lending business and cotton business in partnership with another—Failure of cotton business—Assessee discharging all debts of partnership—Right to set off against profits of money-lending business.*

The assessee was the sole owner of a money-lending business and he was the capitalist partner with another in a separate cotton business. The cotton business failed and closed down with the ex-partner shown to be a debtor to that business in a certain sum of money. The assessee sought, in the year of account, to set off

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against his profits and gains of the money-lending business, the loss sustained by reason of his having had to take over the indebtedness of his ex-partner in the cotton business. This claim having been rejected by the income-tax authorities, the question was raised whether the ex partner's share of the loss in the cotton trade which the assessee had to bear could be set off against the assessee's other income, profits or gains, as a loss of profits or gains within the meaning of S. 24 of the Act.

Held, it is of course clear that where an assessee carries on more businesses than one, he is entitled to set off losses sustained by him in his other businesses against the profits and gains made in another business, the losses of course arising in the same year of account as the profits and gains of the business against which the losses are sought to be set off, that the loss sustained by him in having had to take over the indebtedness of his ex-partner in the other trade could not be set off against the profits and gains in his money-lending business. There was no bad debt owing by the ex-partner to the money-lending business because the money-lending business never lent any money to the ex-partner. If he had so lent and that had proved to be a bad debt, then the assessee's money-lending business could quite rightly have claimed to be allowed to set it off against its own profits and gains. In fact this was nothing more than a lending by the money-lending business to the cotton business and not to the ex partner. What had happened since the closing of the cotton trade was that the ex-partner had become a debtor of the assessee. He was not and never was a debtor of the money-lending business. (*Beasley, C.J., Ramesam and Sundaram Chetty, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* ARUNACHALAM CHETTIAR & SON. **152 I.C 43 (2) 40 L.W. 327=1934 M.W.N. 776=7 R.M. 169=A.I.R. 1934 Mad. 557=67 M.L.J. 236 (F.B.).**

——**Ss. 24 B and 34**—*Applicability and scope—If mutually exclusive.*

In a case to which S. 24-B of the Income-tax Act applies, the estate of a deceased person can be assessed either under sub S. (2) or sub-S. (3) of S. 24-B; if that is possible there is no occasion to introduce the provisions of S. 34 of the Act. (*Beaumont, C. J. and Sen, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* DARABSHA NASARWANJI. **159 I C 41 -8 R B 161=37 Bom.L.R. 112=A.I.R. 1935 Bom. 167.**

——**S. 24 B**—*Scope—If retrospective.*

S. 24-B of the Income-tax Act is not retrospective in operation. (*Beaumont, C.J. and Sen, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* DARABSHA NASARWANJI. **159 I.C. 41=8 R.B. 161=37 Bom. L R. 112=A.I.R. 1935 Bom. 167.**

——**S. 25 (3)**—*Applicability—Profits from profession—Meaning of.*

The profits from a profession or vocation mentioned in S. 25 (3) mean the professional earnings which are taxable under S. 11 (*v*). An assessee can only have the benefit of S. 25 (3) if he has been assessed for tax on professional earnings. (*Beasley, C. J., Cornish and Pandrang Row, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* FLETCHER. **59 Mad. 216=158 I.C. 895=8 R.M. 379=1935 M.W.N. 749=42 L.W. 812=A.I.R. 1935 Mad. 953=69 M.L.J. 611 (S.B.).**

——**S. 25 (3)**—*Applicability and scope—Assessment on salaries in year in which they are earned.*

S. 25 (3) is intended to prevent a double assessment. It cannot be intended to apply to a case where income-tax is assessed on salaries in the year in which they are earned. If the section were to apply, it would lead to this very strange and unreasonable result; that an asses-

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see who chooses to relinquish his appointment in the 11th month of the year would escape payment of income-tax on the salary earned by him in these 11 months; whereas, if he continued for one month longer, admittedly he would be assessable on his salary in the whole of the 12 months. (*Beasley, C. J., Cornish and Pandrang Row, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* FLETCHER. **59 Mad. 216=158 I C. 895=8 R.M. 379=1935 M.W.N. 749=42 L.W. 812=A.I R. 1935 Mad. 953=69 M.L.J. 611 (S.B.).**

——**S. 25 A**—*Applicability—Partial division of joint property.*

In the case of a partial division of a joint family property S. 25-A has no application. The partition contemplated by the section is not necessarily a partition by metes and bounds. (*Niamatullah and Bennet, JJ.*) BIRADHMAL LODHA *v.* INCOME-TAX, COMMISSIONER **56 All. 504=1934 A.L.J. 1213=153 I.C. 722=7 R. A. 574=A.I.R. 1934 All. 217.**

——**S. 25-A**—*Evidence of partition.*

A mere recital of a prior division of property in a will even though it be a registered one is no evidence of such division and cannot confer title. And such a document cannot be deemed to be evidence of a disruption of a Hindu undivided family within the meaning of S. 25-A. (*Jai Lal and Dalip Singh, JJ.*) MATHRA DAS & SONS *v.* COMMISSIONER OF INCOME-TAX. **35 P.L.R. 71=147 I.C. 248=6 R.L. 369=A I.R. 1933 Lah. 815.**

——**S. 25 A**—*Hindu joint family—Assessment of head of family—Plea of partition not raised before Income-tax Officer but raised in appeal—Sustainability.*

A notice was issued to the head of a joint family under S. 22 (2) calling on him to make a return of his income during the period 1927-1928. He complied with the notice and all subsequent notices and was assessed on a taxable income. Against the assessment he preferred an appeal to the Assistant Commissioner and one of the grounds raised before that officer was that the joint family had been dissolved owing to the fact that a suit for partition had been instituted in 1926-1927 and was pending. The Assistant Commissioner held that inasmuch as the particular objection had not been raised before the Income-tax Officer it could not be raised before him in appeal and that therefore he could not decide it.

Held, (*i*) that the fact that at the time of making the assessment for 1928-1929 the question regarding the dissolution of the joint family was not raised before the Income-tax Officer debarred the assessee from raising the point in appeal; (*ii*) that the provisions of S. 30 (1) barred the Assistant Commissioner from entertaining the plea. (*Broadway and Johnstone, JJ.*) KARAM CHAND *v.* COMMISSIONER OF INCOME-TAX. **12 Lah. 714=I.R. 1931 Lah. 495=131 I.C. 639=32 P.L.R. 448=A.I.R. 1931 Lah. 601.**

——**S. 25 A**—*Income-tax Officer accepting allegation of assessee as to partition in one year—Not barred from re opening question.*

Merely because the Income-tax Officer accepts the allegation of the assessee that there has been a partition in a certain year, he is not debarred from considering the truth about fact of partition in the next year. The fact that assessee's allegation has been accepted in the previous year may possibly alter the burden of proof. (*Jai Lal and Dalip Singh, JJ.*) MATHRA DAS & SONS *v.* COMMISSIONER OF INCOME-TAX. **35 P.L.R. 71=147 I.C. 248=6 R L. 369=A.I R. 1933 Lah. 815.**

——**S. 25-A**—*Income-tax Officer—Power to decide question of partition.*

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The dissolution or existence of a joint Hindu family depends on the intention of the members thereof and is a question of fact It is therefore open to the Income-tax Officer to decide on the facts whether the intention to dissolve is present or absent. (*Jai Lal and Dalip Singh, JJ.*) PIYARE LAL *v.* COMMISSIONER OF INCOME-TAX. **147 I.C. 862=6 R.L. 458 (1)=A.I.R. 1933 Lah. 827.**

——**Ss. 25-A and 26-A**—*Joint Hindu family—Not "firm."*

The very definition of a "firm" involves the idea of contractual relationship between several persons and when the finding of fact of the Income tax Officer is that there is no contractual relationship between these persons but the relationship between them is that of a joint Hindu family relationship based on a status and not on contract there is no firm in existence which he could possibly register under the provisions of S. 26-A. (*Jai Lal and Dalip Singh, JJ.*) PIYARE LAL *v.* COMMISSIONER OF INCOME-TAX. **147 I.C. 862=6 R.L. 458=A I.R. 1933 Lah. 827.**

——**S. 25-A**—*Partition by metes and bounds—If necessary.*

S. 25-A does not of necessity demand a partition by metes and bounds. But it contemplates that there should be, firstly, a finding by the Income-tax Commissioner that the Hindu joint family as such has disrupted and secondly, a finding that the joint family property has been divided among the various members or groups of members in definite portions. And it is not sufficient that a mere disruption of the Hindu family should be proved. There must also be, whether by consent or otherwise, a definite ascertainment of the shares of the different members composing the Hindu family. (*Jai Lal, Dalip Singh and Skemp, JJ.*) SHER SINGH NATHU RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **154 I.C. 191=7 R.L. 527=A.I.R. 1935 Lah. 81 (S.B.).**

——**S. 25-A**—*Partition—Partition by metes and bounds, if necessary.*

S. 25-A contemplates an actual partition by metes and bounds of the joint family property. (*Addison and Sale, JJ.*) SALIG RAM RAM LAL *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **155 I.C. 203=7 R L. 651=A I.R. 1934 Lah. 942.**

——**S. 25 A**— *Partnership firm— Registration — Proof as to existence of partnership—Powers of Income-tax Officer.*

When persons claim to constitute a partnership firm, for the registration of which they make an application, the Income-tax Officer may call upon them to prove by evidence that they are what they claim to be before he proceeds further with the application and it is consequently open to him to find against declarations contained in a partnership deed and reiterated by the parties before him that a Hindu joint family still exists. (*Harrison, and Addison, JJ.*) JATTU SHAH NATHU SHAH *v.* COMMISSIONER OF INCOME TAX, LAHORE. **14 Lah. 134=I.R. 1932 Lah 424=138 I.C. 187=33 P.L R. 947=A.I R. 1932 Lah. 575.**

——**Ss. 25-A and 66 (3)**—*Questions of law—Whether S. 25-A requires partition by metes and bounds, and whether a certain finding of Income-tax Officer is supported by evidence.*

The questions whether S. 25 A requires actual partition of the family property by metes and bounds as a condition precedent to the recognition of a partition under S. 25-A, and whether a finding of the Income tax Officer is supported by any evidence, are questions of law. (*Jai Lal and Monroe, JJ*) SHER SINGH NATHU

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RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **147 I.C. 273=6 R.L. 381 (1)=35 P.L.R. 175=A.I.R. 1933 Lah. 952.**

———**S. 25-A**—*Retrospective effect—Date of making assessment as the test.*

Although the income earned in a certain year forms the material out of which the assessment is made, it is the making of the assessment and the date thereof that determines the applicability of the law and procedure governing such assessment. S. 25-A therefore applies to a case where the section is passed before the commencement of the year in which the assessment takes place even though it may not have been passed at the time when the income under assessment was earned. (*Harrison and Addison, JJ.*) JATTU SHAH NATHU SHAH *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **14 Lah. 134=I.R. 1932 Lah. 424=138 I.C. 187=33 P.L.R. 947=A.I.R. 1932 Lah. 575.**

———**Ss. 25-A, 26 and 26 A**—*Right of assessee to adjudication of question as to whether new firm has been constituted.*

The assessee is entitled to an adjudication of the question whether a new firm has been constituted so as to attract the operation of S. 26 and he could not be deprived of his legal right, merely on the ground that an adjudication on this question would tend to affect the decision of the Income-tax Officer under S. 26-A against which no appeal is competent. S. 25-A no doubt deals with an assessment after partition of an undivided family, but it does not exclude the possibility of the members so separated to constitute themselves into a firm so as to bring their case within the ambit of S. 26. (*Addison and Din Mohammad, JJ.*) BELI RAM *v.* COMMISSIONER, INCOME-TAX, LAHORE. **156 I.C. 833=8 R.L. 35=A.I.R. 1935 Lah. 275.**

———**S. 26**—"*Any business*"—*Meaning.*

The words "any business" in S. 26 do not mean each and every business carried on by the former owner of a business. Where a company owning several businesses transfers one business to another company, the latter company is successor to the former and is assessable in respect of that business. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* BEST & CO., LTD., MADRAS. **55 Mad. 832=I.R. 1932 Mad. 584=138 I.C. 485=35 L W. 12=1932 M.W.N. 754=A.I.R. 1932 Mad. 434=63 M. L.J. 15 (S.B.).**

———**Ss. 26 and 25 A**—*Applicability—Joint family breaking up but individual members forming themselves into firm.*

Where on the breaking of a joint family the separated members immediately form themselves into a firm, S. 26 will come into operation, and the assessment on the firm should be made under that section and not under S. 25-A of the Act. (*Addison, Ag. C. J. and Din Mohammad, J.*) BELI RAM & BROS. *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **160 I.C. 517=8 R.L. 556=A.I.R. 1935 Lah. 681.**

———**Ss. 26, 26-A and 25 A**—Right of assessee to adjudication of question as to whether new firm has been constituted. *See* INCOME-TAX ACT, SS. 25-A, 26 AND 26 A. **A.I.R. 1935 Lah. 275.**

———**S. 26**—*Succession to business—Test.*

The plain meaning of the words "succeeded in such capacity by another person" is that if there is a business, profession or occupation, which was formerly carried on by a person and that property has now been taken over directly by another person who continues the business, the transference of ownership, whether it be by operation of law or by transfer *inter vivos*, is a succession. The real test of whether there has been a succession or not is to be decided by an examination of the business. Where a business was continued after a change of ownership,

Held, that there was a succession to a business. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) MAHARAJADHIRAJ OF DHARBHANGA *v.* COMMISSIONER OF INCOME-TAX. **12 Pat 5=I.R. 1933 Pat. 232=144 I.C. 354=14 Pat.L.T. 171=A.I.R. 1933 Pat. 123.**

[**Affirm.** 61 I.A. 312 (P.C.); **R.** 11 R. 501 (505)].

———**S. 26**—*Trading loss—Land purchased by money-lending firm—Depreciation of value—Whether amount to capital loss.*

Where at a time when a money-lending firm was reconstituted, the assessees entered in their books of account that certain lands possessed by the old firm had fallen in value and entered the difference as a loss to the business.

Held, that the sum was no trading loss but only the estimated depreciation in the value of the assets of the firm based upon a re-valuation of such assets for the purpose, and on the occasion of the reconstitution of the firm. Until property taken in repayment of loans is sold or otherwise disposed of for value, there can be no realised trading loss in respect of such property. (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* K.A. R K. FIRM. **11 Rang. 462=148 I.C. 109=6 R.R. 199 (2)=A.I.R. 1934 Rang. 1(F.B.).**

———**S. 26 (1)**—*Money-lending business by joint family—Partition—Business recommenced by some of the members—No "succession."*

An undivided Hindu family carried on money-lending and rice milling business. In 1929, there was a partition. *N.S M.*, one of the five members, received his one-fifth share in the assets of the money-lending business and he went out. For three months prior to the partition, the money-lending business carried on by the joint Hindu family had been discontinued. After the partition, the other four members carried on business at the old premises as before.

Held, that there was not a "succession" to the money-lending business. The business had been split up and carrying on part of the old business is not 'succession.' Secondly, where there is no continuity in carrying on the business and when one business has come to an end and after a time another business is started, it may be with the same assets and under the same conditions and in the same premises as the old business, the persons carrying on the new business do not "succeed" those who had carried on the old business under S. 26 (2) of the Act. (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* N.N. FIRM. **11 Rang. 501=6 R.R. 235=148 I.C. 594=A.I.R. 1934 Rang. 13 (S.B.).**

———**S. 26 (2)**—*Applicability—Joint Hindu family—Business carried on by father and son—Death of father—Son, if "succeeds" to the business—Basis of assessment—Son alone and his wife—If undivided Hindu family.*

Assessee and his father constituted a joint Hindu family, and carried on a money-lending business and earned income. His father having died, the assessee alone thereafter continued to carry on the business and was assessed to income-tax under S. 26 (2) of the Income-tax Act.

Held, that S. 26 (2) did not apply to the case, as the assesse had not "succeeded" his father in the business as contemplated by S. 26 (2) of the Act, as he himself was in part the owner of the business already, and as such, there had been no transfer of ownership in the business, the assessee having become entitled to it by survivorship. "Succession" as used in S. 26 (2) con-

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notes a transfer of ownership, and the person succeeding another must nave, by such succession, become owner of the business which his predecessor was carrying on, and which he, after the succession, carries on in such capacity as owner.

Quaere.—Whether the term, "undivided Hindu family," contemplated in the Income-tax Act, is limited to a family of 'coparceners'? (*Madhavan Nair, O.C.J., Stone and King, JJ.*) KESAVA RAO *v.* COMMISSIONER OF INCOME TAX, MADRAS. **59 Mad. 377=8 R.M. 553=159 I.C. 840=43 L W. 155=1935 M.W.N. 1237=A.I R. 1936 Mad. 67=70 M L.J. 13 (F.B.).**

———**S. 26 (2)**—*"Capacity" explained.*

By 'capacity' is meant a position enabling one to do something. (*Rupchand and Mehta, A.J Cs.*) COMMISSIONER OF INCOME-TAX *v.* SIND LIGHT RY. CO., LTD. **27 S L R. 47=I R. 1932 Sind 90=131 I.C. 673=A.I.R. 1932 Sind 189.**

———**S. 26 (2)**—*Effect.*

S. 26 (2) is evidently intended to secure to Government a tax based on the earnings of a business for a full year notwithstanding the transfer of the business from one person to another, before the expiry of the year provided of course that the business is continued by the transferee. If the transferor and the transferee are separately taxed for profits earned by them during the period, each of them carries on the business, and the incident of taxation would be seriously affected; and if the income for the whole year though enjoyed by two different persons is liable to be taxed at the end of the year, it is but proper that the person who is in possession of the business at the end of the year should be made responsible for it leaving it to him to settle the equities between him and the transferor with regard to the apportionment of such taxation. (*Rupchand and Mehta, A. J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* SIND LIGHT RY. CO., LTD. **27 S.L.R. 47=I R 1932 Sind 90 138 I.C. 673=A I.R. 1932 Sind 189.**

———**S. 26 (2)**—*Escaping assessment—Duty of Court.*

Though it may appear somewhat unreasonable to the Court that a company should escape assessment of tax on a profit which it has admittedly made, yet if the law, as it stands enables the compay to avoid payment of the tax, the Court is bound to give effect to it. Therefore where the Government acquires a private concern whom it pays profit for the previous nine months and keeps to itself profit for the last three months of the year, S. 26 (2) applies to such a case and the company cannot be assessed for the profits given to it by the Government. (*Rupchand and Mehta, A.J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* SIND LIGHT RY , CO., LTD. **27 S L.R. 47=I.R. 1932 Sind 90=138 I.C. 673=A.I.R. 1932 Sind 189.**

———**S. 26 (2)**—*Object—Person owning company in year of assessment—Liability.*

S. 26 is designed for the purpose of making somebody assessable to income tax, and the whole scheme of the Act is not to assess two people at the same time, but is to find somebody who is either properly assessable or more conveniently assessable; and what S. 26 (2) says is that where a person who was not the former owner of a company is found to be owning that company in the year of assessment, that person is to be assessed. That is not only a convenient course, but seems to be a just one. Upon whom the burden is ultimately to fall is a matter of arrangement between the vendor company and the purchaser company. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* BEST & CO., LTD., MADRAS. **55 Mad. 832=I.R. 1932 Mad. 584=138 I.C. 485=36 L.W. 12=1932 M.W.N. 754=A.I R. 1932 Mad. 434=63 M.L J. 15 (S B.).**

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———**S 26 (2)**—*Person carrying on business served with notice under S. 22 (2)—Successor on his death, if taxable.*

The word "assessment" is not confined to the definite act of making an order of assessment. Where a notice has been given under S. 22 (2) of the Income-tax Act to a person to furnish within the time specified a return in the prescribed form, the process of assessment has begun and continues until some order of assessment is made. The words "at the time of making the assessment" in S. 26 (2) therefore mean in the course of the process of assessment. Where at the date of his death, a person carrying on business had been served with a notice under S. 22 (2) and the time for furnishing the return had not expired and no return had been made, a person who succeeds to that business is taxable under S. 26 (2). (*Lord Tomlin.*) MAHARAJADHIRAJ OF DARBHANGA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **61 I A. 312=13 Pat 607=11 O.W.N. 1049=150 I.C 1042=7 R.P.C. 37=40 L.W. 337=1934 A L.J. 873=38 C W.N 1159=60 C.L.J. 132=15 Pat. L T. 573=36 Bom L.R. 972=1934 M.W. N. 964=4 A W R. 279=A.I.R 1934 P C. 200=67 M.L.J. 422 (P.C.)**

———**S. 26 (2)**—*"Person"—Secretary of State engaged in enterprises of commercial nature.*

"A person" includes the Secretary of State when engaged in enterprises of a commercial nature. The acquisition by him of a railway in the exercise of the statutory powers vested in him under the Railways Act would nevertheless make him the successor of the company in respect of such railway. (English case law discussed.) (*Rupchand and Mehta, A.J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* SIND LIGHT RY. CO., LTD. **27 S.L.R. 47=I.R. 1932 Sind 90=138 I.C. 673=A.I.R. 1932 Sind 189.**

———**S. 26 (2)**—*Successions to business—Meaning.*

There can be sucession to a person without there being succession to that person's business; succession to a person is not the same thing as succession to a business. A person may be succeeded by another in a business in the sense that it is the same sort of business although not the same business. When one person is succeeded by another, there must be a wiping out of the original individual, *i.e.*, the particular business activity together with all the old liabilities and assets appertaining to it must change hands. When *A* has not only taken over the actual business of *B*, but even the assets and liabilities, *i.e.*, when there is a succession to *B* by *A*, then *A* should be liable to pay the income tax for the year during which the transfer takes place. Under English law, the income tax authorities pursue the business; under Indian law, they pursue the individual along with the business; and that is why the words "in such capacity" are to be found incorporated in S. 26 (2), Income-tax Act. The succession referred to in S. 26 (2) is in relation to a person's business. "Business" in S. 26 (2) is not business in abstract but is business in concrete. Meaning of words "succeeded" and "succession" explained. (*Rupchand and Mehta, A.J.Cs.*) COMMISSIONER OF INCOME TAX *v.* SIND LIGHT RY. Co., LTD. **27 S L R. 47=I.R 1932 Sind 90=138 I.C. 673=A.I.R. 1932 Sind 189.**

———**Ss. 26-A, 25-A and 26**—Right of assessee to adjudication of question as to whether new firm has been constituted. *See* INCOME-TAX ACT, SS. 25-A, 26 AND 26-A. **A.I.R. 1935 Lah. 275.**

———**S. 27**—*Applicability—Order under S. 23 (4)—Setting aside.*

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S. 27 is applicable to the cases noted therein. It does not apply to a case where the Assistant Commissioner refuses to admit an appeal *ex parte* without hearing the assessee or his counsel. But even where S. 27 is applicable, it may still be open to the assessee if he has good case to file an appeal and to show that the order under S. 23 (4) was not justified. (*Mukerji and Bennet, JJ.*) BHAGWATI PRASAD, *In the matter of.* **54 All. 496 = I R. 1932 All. 492 = 138 I.C. 682 = 1932 A.L.J. 389 = A.I.R. 1932 All. 390.**

———**S. 27**—Assessment under S. 23 (4)—Income-tax Officer refusing to cancel—Order affirmed by Assistant Commissioner—Reference to High Court. *See* INCOME-TAX ACT, S. 66 (2) **9 Rang. 21 = A I.R. 1931 Rang 97.**

———**S. 27**—*Assessment under S.* 23 (4)—*Refusal to cancel—Appeal—Rejection—Reference to High Court.*

Where a notice was duly served on the assessee under S. 22 (4) but he failed to produce some of the accounts and thereupon the Income-tax Officer made an assessment under S. 23 (4) and subsequently he refused to cancel the assessment at the instance of the assessee holding that there was no sufficient cause for the non-production of the accounts and the same order was affirmed by the Assistant Commissioner. On appeal,

Held, that the questions regarding the validity of the notice and the propriety of the assessment did not arise in the appeal and that there was no room for a reference to be made to the High Court. (*Page, C.J., Das and Maung Ba, JJ.*) A. K. R. P. L. A. CHETTYAR FIRM *v.* THE COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 25 = I.R. 1931 Rang. 206 = 132 I.C. 718 = A. I.R. 1931 Rang. 98.**

———**S. 27**—*Assessment under S* 23 (4)—*Refusal to set aside—Appeal—Scope of enquiry.*

In an appeal against the order of the Income-tax Officer refusing to reopen the question of summary assessment, the only question before the Assistant Commissioner is whether the assessment should be reopened, *i.e.*, the order of the Income-tax Officer set aside; and where the decides that question in the negative and holds that there is no sufficient cause for reopening the question, he is not obliged to enter into the merits of the assessee's return. The assessment order stands and there is nothing to inquire about. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) PROTAP CHANDRA GANGULY *v.* COMMISSIONER OF INCOME-TAX, BENGAL. **I.R. 1932 Cal. 646 = 139 I C. 593 = A.I.R 1932 Cal. 410 (S B.).**

———**S. 27**—*Assessment under S.* 23 (4)—*Remedy of assessee.*

Where the Income-tax Officer makes an assessment under S. 23 (4), the proviso to S. 30 (1) applies and an appeal to the Assistant Commissioner is barred. The proper remedy for the assessee is to apply to the Income-tax Officer under S. 27 and in the event of the decision going against the assessee to file an appeal. (*Carr, Offg. C. J., Cunliffe and Das, JJ.*) COMMISSIONER OF INCOME-TAX RANGOON *v* M.S K. CHETTYAR FIRM. **8 Rang. 587 = I.R. 1931 Rang. 113 = 131 I.C. 49 = A.I.R. 1931 Rang. 53.**

———**S. 27**—*Sufficient cause.*

The sufficiency of the cause is a matter for the Income-tax Officer and if he has considered the cause insufficient, it cannot be said, as a point of law, he is not justified in his view. (*James and Chatterji, JJ.*) LALIT KISHORE MITRA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **140 I.C. 712 = I. R. 1933 Pat 18 (1) = A.I.R. 1932 Pat. 166.**

———**Ss. 27 and 66 (2)**—Sufficiency of cause for setting aside *ex parte* assessment—Question of law. *See*

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INCOME-TAX ACT, SS. 66 (2) AND 27. **A.I.R. 1934 Nag. 183 (2).**

———**S. 27**—*Words "satisfies" and "was prevented by sufficient cause"—Interpretation.*

The words "satisfies" and "was prevented by sufficient cause" being practically identical with similar words occurring in O. 9, R. 9; O. 41, R. 19, C. P. Code and S. 5, Limitation Act, they must receive similar interpretation as has been put upon those words in the latter enactments. (*Grille, J.C. and Subhedar, A.J.C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L.R. 32 = 153 I.C. 7 = 7 R.N. 111 = A.I.R. 1934 Nag. 183 (2).**

———**S. 28**—*Evidence as to actual income—Power of Income-tax Officer to refuse.*

In an inquiry under S. 28 as to whether penalty should be imposed, evidence adduced by the assessee purporting to disclose the real income of the assessee is relevant and admissible, not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under S. 28, and the Income-tax Officer is not justified in refusing to admit evidence of the income that in truth accrued in the course of the assessment year. (*Page, C.J., Baguley and Mackney, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* A. A. R. CHETTIAR CONCERN, MAWBIN. **11 Rang. 75 = I.R. 1933 Rang. 55 = 142 I C. 758 = A.I.R. 1933 Rang. 30 (F.B.).**

[**Appr.** 12 R. 470 (476).]

———**S. 28**—*Income-tax authorities—Duty of.*

In proceedings under S. 28, the income-tax authorities ought to act fairly and reasonably in the circumstances of each case. (*Page, C.J. and Ba U, J.*) K. M. O. CHETTIAR FIRM *v* COMMISSIONER OF INCOME-TAX, BURMA. **12 Rang. 268 = 149 I.C. 38 = 6 R.R. 284 = 151 I.C. 673 = 7 R.R. 112 = A.I.R. 1934 Rang. 95.**

———**S. 28**—*Incorrect statement—Later return being correct—Levy of penalty—Legality.*

Where an assessee submits deliberately an incorrect statement of his accounts to the Income-tax Officer, he cannot be said to have discovered his mistake on the day on which he files a corrected statement because at the time when he made his previous return, he knew it was incorrect and he could not at any subsequent time have discovered something which he knew at an earlier time, and so the order of the Income-tax authorities imposing a penalty on him under S. 28 is quite correct. Although the later return may for the purposes of assessability to income-tax be treated as a revised return under S. 22 (3), the income tax authorities are entitled to look at the previous incorrect return and are under S. 28 entitled to inflict a penalty upon the person who has made it. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* ARUNACHALAM CHETTIAR. **55 Mad. 827 = I.R 1932 Mad. 540 = 138 I C. 290 (2) = 1932 M.W N. 762 = A.I R. 1932 Mad. 433 = 63 M.L.J. 236 (S.B.).**

———**S 28**—*Penalty or assessment under—Enhancement—Power of Assistant Commissioner of Income-tax.*

The Assistant Commissioner of Income tax has no authority in law to enhance the penalty while hearing an appeal against imposition of penalty or imposition of assessment under S. 28 of the Act. (*Mukerji and Bennet, JJ.*) HAR KRISHNA DAS, *In the matter of.* **53 All. 679 = I.R. 1931 All. 525 = 132 I.C. 429 = 1931 A.L.J. 414 = A.I.R. 1931 All. 401.**

INCOME-TAX ACT (1922), S. 28.

———**S. 28**—*Penalty under—Limit of—Ascertainment—Imposition of penalty—Discretion.*

The maximum penalty which can be imposed under S. 28 (1), Income-tax Act, is determined by ascertaining the difference between the amount of the tax on the income set out in the false return and that on the income on which the assessment has been made. But the questions whether a penalty ought to be imposed and, if so the amount thereof, are matters which are (subject to Ss. 30 to 32) within the discretion of the Income-tax Officer; and upon these matters the assessee is entitled to be heard under S. 28 (3). (*Page, C. J., Baguley, Ba U, Leach and Mackney, JJ.*) A. A. R. CHETTIAR FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **12 Rang. 470=152 I.C. 941=7 R.R. 181=A.I.R. 1934 Rang. 354 (S.B.).**

———**S. 28**—*Quantum of penalty.*

The quantum of the penalty within the statutory limit that ought to be imposed is matter of fact and not of law, and is to be determined by the income tax authorities, and not by the Court. (*Page, C.J. and Ba U, J.*) K. M. O. CHETTIAR FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **12 Rang. 268=149 I.C. 38=6 R.R. 284=151 I.C. 673=7 R.R. 112=A.I.R. 1934 Rang. 95.**

[**R.** 12 R. 470 (475)].

———**S. 28**—*Strict construction—Penalty in case of super-tax—Whether can be levied.*

S. 28 of the Income tax Act must be strictly construed. There is no word in the section regarding super-tax. Therefore the Income-tax Officer has no jurisdiction to impose a penalty in the matter of super-tax. Effect of S. 58 (1) of the Act considered. (*Mukerji and Bennet, JJ.*) GUR CHARAN PRASAD KHATRI, *In the matter of.* **53 All. 445=I.R. 1931 All 443=131 I.C. 875=1931 A.L.J. 336=A.I.R. 1931 All. 421.**

———**S. 28 (1)**—*Maximum Penalty.*

The maximum penalty that be can imposed under S. 28 (1) is a sum representing the difference between the tax on the income declared by the assessees and the tax on the income ascertained under the Income-Tax Act in respect of which the assessment has been made. (*Page, C J., Baguley and Mackney, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* A. A. R. CHETTIAR CONCERN, MAWBIN. **11 Rang. 75=I.R. 1933 Rang. 55=142 I.C. 758=A.I.R. 1933 Rang. 30 (F.B.).**

[**Appr.** 12 R. 268 (273).]

———**S. 28 (1)**—*Maximum penalty.*

Under S. 28 it is the duty of the Income-tax authorities to estimate the amount of the penalty, if any, that ought to be imposed upon contumacious or fraudulent assessees, but in imposing the penalty, the maximum limit that is placed upon the quantum is that the penalty must not exceed the difference between the amount of the tax on the income assessable under the Act, and the amount of the tax upon the assessable income as returned by the assessee. 11 Rang. 75, Foll. (*Page, C.J. and Ba U, J.*) K. M. O. CHETTYAR FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **12 Rang. 268=149 I.C. 38=6 R.R. 284=151 I.C. 673=7 R.R. 112=A I R. 1934 Rang. 95.**

[**R.** 12 R. 470 (475)].

———**S. 28 (1)**—"*Real amount*".

The same meaning must be attributed to the term "income" for the purpose of construing the words "real amount" of income and "correct income" in S. 28. (*Page, C. J. and Ba U, J.*) K. M. O. CHETTYAR FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **12 Rang. 268=149 I.C. 38=6 R.R. 284=151 I.C. 673=7 R R. 112=A.I.R. 1934 Rang. 95.**

INCOME-TAX ACT (1922), S. 30.

———**S. 28 (3)**—*Scope—Enquiry under—Evidence of real income—Right of assessee to adduce.*

Although the questions as to whether a penalty ought to be imposed on the assessee under S. 28 (1), Income-tax Act, and if so, the amount of the penalty, are in the discretion of the income-tax Officer, the assessee is entitled under S. 28 (3) to be heard on these matters. He is entitled to adduce evidence as to his real income, not for the purpose of varying or affecting the assessment already made for imposing the tax, but for the purpose of showing either that no penalty ought to be imposed or that the amount of the penalty must be less than the maximum prescribed under the section. (*Page, C.J., Baguley, Ba U, Leach and Mackney, JJ.*) A. A. R. CHETIYAR FIRM *v.* COMMISSIONER OF INCOME-TAX, BURMA. **12 Rang. 470=152 I.C. 941=7 R R. 181=A.I.R. 1934 Rang. 354 (S.B.).**

———**S. 29**—"*Assessment*"—*Notice of demand.*

The word "assessment" in S. 23 (4) means determining the total taxable income and the sum payable on it. A notice can be validly issued under S. 29 when the Income-tax Officer has made a best judgment assessment under S. 23 (4). (*Niamatullah and Bennet, JJ.*) BEHARI LAL CHATTERJI *v.* COMMISSIONER OF INCOME-TAX. **56 All. 418=151 I.C. 251=7 R.A. 115=1934 A.L.J. 47=3 A.W.R. 290=A.I.R. 1934 All. 930.**

———**S. 29**—*Mistaken notice.*

Where there is a perfectly good assessment order, the fact that a mistaken notice was sent to the assessee in no way prevents a proper notice being sent when the mistake is discovered. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) PROTAP CHANDRA GANGULY *v.* COMMISSIONER OF INCOME-TAX BENGAL. **I.R. 1932 Cal. 646=139 I.C. 593=A.I.R. 1932 Cal. 410 (S.B.).**

———**S. 30**—"*Denying his liability to be assessed*"—*Scope—Question under S. 43.*

The clause "denying his liability to be assessed" under S. 30 (1) is wide enough to cover a case of an assessee who denies his liability to be declared as an agent under S. 43. Therefore an appeal against the order of an Income-tax Officer declaring any person to be an agent of a foreigner is not barred by S. 30 (1) (*Staples, A. J. C.*) GOKULDAS CHUNNILAL *v.* COMMISSIONER OF INCOME-TAX. **28 N.L.R. 194=I.R. 1932 Nag. 155=140 I.C. 490=A.I.R. 1932 Nag. 152.**

———**Ss. 30 and 23 (4)**—*Notice on partner of firm in Patiala under S. 22 (2)—Partner denying knowledge of profits—Account books not produced—Assessment under S. 23 (4)—Appeal.*

A firm carried on business in Patiala territory. Some of the members of firm and partners resided in British India at Kaithal. The Income-tax Officer issued a notice to one of them under S. 22 (2) read with S. 34. The assessee stated that he was only the sleeping partner of the firm and that he knew nothing of its income or profits. He was directed to obtain accounts and information from his partner in Patiala territory and though the time for making the return was extended by the Income-tax Officer on two separate occasions, the partner finally intimated that neither the accounts nor the information sought was available. The Income-tax Officer thereupon made assessment under S. 23 (4). The partner preferred appeal under S. 30.

Held, that the case was properly treated as one of "no return" and no appeal was competent against the order under S. 30. A.I.R. 1928 Lah. 729, Foll. (*Broadway and Abdul Qadir, JJ.*) BIR BHAN *v.* INCOME-TAX COMMISSIONER, PUNJAB **149 I.C. 1051=6 R.L. 785=A.I.R. 1933 Lah. 290.**

INCOME-TAX ACT (1922), S. 30.

———**S. 30**—*Objections to assessment for two years—Need for separate applications.*

The income-tax authorities should not allow the petitioner to combine his attack on the assessment for two years in one application. Separate objections and separate application should be filed in such a case with regard to the two years. (*Broadway and Currie, JJ.*) NAWAL KISHORE KHARAITILAL *v.* INCOME-TAX COMMISSIONER, DELHI. **I R. 1931 Lah. 697 = 132 I.C. 857 = A.I.R. 1930 Lah. 1014.**

———**S. 30**—*Order dismissing appeal—Appealability.*

Where an appeal is incompetent, the mere fact that the Assistant Commissioner in dismissing the appeal does not say that it is incompetent does not amount to an entertainment of the appeal so as to make the order appealable. (*Broadway and Currie, JJ.*) NAWAL KISHORE KHARAITILAL *v.* INCOME TAX COMMISSIONER, DELHI. **I.R. 1931 Lah. 697 = 132 I.C. 857 = A.I.R. 1930 Lah. 1014.**

———**S. 30 (before amendment)**—*Order refusing to register a firm under S. 26 A—Appealability.*

S. 30 of the Income-tax Act, as it existed before its amendment on September 11, 1933, gave no right to appeal against an order refusing to register a firm under S. 26-A. (*Jai Lal and Skemp, JJ.*) DURGA DAS GIRDARI LAL *v.* COMMISSIONER OF INCOME-TAX. **158 I.C. 357.**

———**S. 30**—*Right of Assistant Commissioner to examine record to test competency of appeal.*

The Assistant Commissioner is right in so far examining the case as to satisfy himself whether the appeal before him is competent. Without examining the record to some extent he cannot be in a position to find whether the assessment is under S. 23 (4) and whether an appeal lay. The Assistant Commissioner is right in professing not to admit the appeal, when he partially entered into the merits of the appeal and saw whether the Income-tax officer was right or not in making an assessment to the best of his judgment. And the order of the Assistant Commissioner to the effect that no appeal lay does not amount to an order dismissing an appeal under S 31. (*Niamatullah and Bennet, JJ.*) PALLU MALL BAOLA NATH, *In re.* **55 All. 804 = 6 I.R. (All.) 324 = 146 I.C. 759 = 1933 A.L.J. 1474 = A I.R. 1933 All. 541.**

———**S. 30 (1)**—*Assessment under S. 23 (4)—Remedy of assessee.*

Where the Income-tax Officer makes an assessment under S. 23 (4), the proviso to S. 30 (1) applies and an appeal to the Assistant Commissioner is barred. The proper remedy for the assessee is to apply to the Income-tax Officer under S. 27 and in the event of the decision going against the assessee, to file an appeal. (*Carr, Offg. C.J. Cunliffe and Das, JJ.*) COMMISSIONER OF INCOME-TAX, RANGOON *v.* M. S. K. CHETTYAR FIRM. **8 Rang. 587 = I R. 1931 Rang. 113 = 131 I.C. 49 = A.I.R. 1931 Rang. 53.**

———**S. 30 (1)**—*Plea not taken before Assistant Commissioner—Whether can be raised in appeal.*

A notice was issued to the head of a joint family under S. 22 (2) calling on him to make a return of his income during the period 1927-1928. He complied with the notice and all subsequent notices and was assessed on a taxable income. Against the assessment he preferred an appeal to the Assistant Commissioner and one of the grounds raised before that officer was that the joint family had been dissolved owing to the fact that a suit for partition had been instituted in 1926-1927 and was pending. The Assistant Commissioner held that inasmuch as the particular objection had not been raised before the Income-tax Officer it could not be raised before him in appeal and that therefore he could not decide it.

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Held, (1) that the fact that at the time of making the assessment for 1928-1929 the question regarding the dissolution of the joint family was not raised before the Income-tax Officer debarred the assessee from raising the point in appeal; (2) that provisions of S. 30 (1) barred the Assistant Commissioner from entertaining the plea. (*Broadway and Johnstone, JJ.*) KARAM CHAND *v.* COMMISSIONER OF INCOME-TAX. **12 Lah. 714 = I.R. 1931 Lah. 495 = 131 I C. 639 = 32 P.L.R. 448 = A.I.R. 1931 Lah. 601.**

———**S. 30 (1), Proviso**—*Assessment under S. 23 (4)—Appeal to Assistant Commissioner—Bar.*

A person who has been assessed under S. 23 (4) is not entitled to prefer an appeal to the Assistant Commissioner on the ground that he was not liable to be assessed under the Act. Proviso to S. 30 (1) is a bar to such an appeal. 10 Lah. 596 (F.B.), Foll. (*Courtney-Terrell, C.J., Wort, Kuiwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R. 1931 Pat. 401 = 133 I.C. 753 = A.I.R. 1931 Pat. 306 (F.B.).**

[R. 56 A. 933 (948)].

———**S. 30 (1), Proviso**—*Effect.*

The proviso to S. 30 (1) has not the effect of taking away a right of appeal in cases where the assessee does not challenge the assessment levied on him under S. 23, Cl. (4), but only challenges his liability to be taxed in a different capacity than that possessed by him and more so when such a capacity has been duly recognised by the Income tax Officer. Even if the proviso be open to a double construction, the proviso should be so interpreted as to exclude an appeal only in respect of an assessment levied under S. 23, Cl. (4) and not to an appeal of this nature. (*Aston and Rupchand, A.J.Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **28 S. L R. 174 = 149 I.C. 1204 = 6 R.S. 255 = A.I R. 1934 Sind 46.**

———**S. 30 (1), Proviso**—*Order of Assistant Commissioner rejecting appeal on the ground no appeal lay—Assessment under S. 23 (4)—Nature of order.*

The order of the Assistant Commissioner rejecting an appeal on the ground that no appeal lay because the assessment was made under conditions where S. 23 (4) was properly applied, is an order under S. 30 (1) proviso and not an order under S. 31. (*Niamatullah and Bennet, JJ.*) JOT RAM SHER SINGH, *In the matter of.* **56 All 933 = 150 I.C. 197 = 6 R.A. 1045 = 3 A. W.R. 445 = 1934 A L.J. 274 = A.I.R. 1934 All. 559.**

———**S. 30 (2)**—Appeal filed beyond time—Reason for delay not made out—Rejection—Effect of—Statement of case under S. 66 (2)—If can be ordered by High Court. *See* INCOME-TAX ACT, S. 66 (2). **155 I.C. 124 = A.I.R. 1935 All. 572.**

———**S 31**—*Absence of order under—Reference—Sustainability.*

Where no appeal lies under S. 31, no reference lies under S. 66 (2). The Assistant Commissioner of Income-tax had considered the reasons which had led the Income-tax Officer to assess under S. 23 (4) and he had held that those reasons were sufficient and therefore no appeal lay under S. 31. The Assistant Commissioner considered whether the assessment was properly made and held that an appeal lay.

Held, that as there was no order under S. 31, no reference to the High Court was competent. (*Mukerji and Bennet, JJ.*) SURAJ BHAN UGARSEN, *In the matter of.* **I.R. 1933 All. 71 = 141 I.C. 586 = 1932 A.L.J. 576 = A.I.R. 1932 All. 642.**

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——**S. 31**—*Application by assessee under S. 27—Appeal under S. 30 (1)—Assistant Commissioner's decision—Reference.*

An application by an assessee under S. 27 was rejected by the Income-tax Officer and the assessee filed an appeal under S. 30 (1) to the Assistant Commissioner, rightly or wrongly who decided it on merits.

Held, that the decision of the Assistant Commissioner was an order under S. 31 for purposes of applying to the Commissioner to make reference to the High Court. A.I.R. 1929 Rang. 8, Ref. (*Smith, J.*) ABDUL QAYUM & CO., FYZABAD *v.* COMMISSIONER OF INCOME-TAX, U. P. **147 I C. 117 (2)=6 R.O. 230=9 Luck. 85=A.I.R. 1933 Oudh 396.**

——**S. 31**—*Assessment under S. 23 (4)—Order under S. 31—Ground for reference.*

The question whether an assessment made by the Income tax Officer under S. 23 (4) is valid or not is a question of law that arises or can arise out of an order of the Assistant Commissioner passed under S. 31 and such a question cannot therefore be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case. 6 Rang. 21, 8 Rang. 209; 8 Rang 203; 7 Rang. 669, Overr. (*Page, C.J. Das, Maung Ba, Mya Bu and Dunkley, JJ.*) ABDUL BARI CHOWDHURY *v.* COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 281=I.R. 1931 Rang. 225=133 I.C. 81=A.I.R. 1931 Rang. 194 (F.B.).**

——**S. 31**—*Assistant Commissioner hearing appeal and passing order—Requirements under S. 66 (2) complied with.*

Where the Assistant Commissioner hears the appeal of the assessee and passes an appellate order under S. 31 dismissing the appeal, the requirements of S. 66 (2) are satisfied, whether the Assistant Commissioner has jurisdiction or not. (*Aston and Rupchand, A.J.Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **28 S.L.R. 174=149 I.C 1204=6 R S. 255=A.I R. 1934 Sind 46.**

——**S 31**—Order of Assistant Commissioner rejecting appeal on the ground no appeal lay—Assessment under S. 23 (4) Order not one under S. 31 but under S. 30 (1), Proviso. *See* INCOME-TAX ACT, S. 30 (1) PROVISO. **56 All. 933=A.I R. 1934 All. 559.**

——**Ss 31 and 66 (2)**—*Order confirming assessment—Appeal against assessment—Dismissal as barred by limitation—Order for statement of case—If can be made.*

An order confirming an assessment within the meaning of S. 31 of the Income tax Act means an order having reference to the assessment and affirming it. Where an appeal is dismissed by the Assistant Commissioner of Income tax on the ground that it is barred by limitation, without even considering the question of assessment, the order of dismissal is not an order confirming the assessment under S. 31, for the purposes of S. 66 (2) of the Income-tax Act. S. 66 (2) does not apply to such a case and the High Court cannot direct the Commissioner to state a case. (*Niamatullah and Bennet, JJ.*) SHIVNATH PRASAD *v.* COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES. **57 All. 971=155 I.C. 124—7 R.A 898=1935 A.W.R. 742—1935 A.L J. 845=A.I.R. 1935 All. 572.**

——**Ss 31 and 32**—*Order under—Appeal not maintainable—Validity of order.*

Where an appeal has been actually preferred to the appellate authority and where it has been disposed of by such authority, the order passed in such a proceeding may without straining the actual words of the section be regarded as an order under S. 31 or S. 32, as the case may be, even though no appeal might have been in fact competent. 9 Cal. 100, Foll. (*Courtney-Terrell, C.J., Wort, Kulwant Sahay, Faal Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 187=I.R. 1931 Pat. 401=133 I.C. 753=A.I.R. 1931 Pat. 306 (F.B.).**

[Comm 56 A. 933 (938, 948)].

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——**S. 32**—*Appeal—Limitation—Application for copy not properly stamped and not accompanied by authority—Validity of—Time taken up by—Deduction of—Permissibility.*

The order of the Assistant Commissioner was passed on 31st March, 1929. An application for copy was made on 15th April by the assessee's pleader but the office returned it on the ground that it was stamped only with one anna (and not two annas) and that it was not accompanied by an authority specifically enabling the party to apply for a copy. On 21st April the application was re-presented and found to be in order. The order was ready on 3rd May and the first application under S. 66 (2) was received in the Income tax Office on 16th May, 1929.

Held, that the first application dated 15th April could not be deemed to be a valid application, that the time which the assessee could deduct would run only from 21st April, and therefore, the application was out of time. (*Courtney-Terrell, C.J. and Dhavle, J.*) BASANT LAL RAMJIDAS *v* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 40=I.R. 1932 Pat 78=136 I C. 302=13 Pat. L.T. 437=A.I R. 1932 Pat. 103.**

——**S. 32**—*Order by Commissioner of Income tax—Application for copy—Court-fee.*

An application for copy of an order passed by the Assistant Commissioner of Income-tax falls within para. 5 of Art. 1 (*a*) of Sch. II of the Court Fees Act and requires a Court fee of two annas. (*Courtney-Terrell, C.J. and Dhavle, J.*) BASANT LAL RAMJIDAS *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 40=I R. 1932 Pat. 78=136 I.C. 302=13 Pat. L T. 437=A I.R. 1932 Pat. 103.**

——**S. 32 (1)**—*Appeal to Assistant Commissioner—Increase of one item of income and reduction of another—Total assessable income reduced—Order, if one "enhancing the assessment"—Appeal.*

When the Assistant Commissioner in an appeal to him from the order of assessment of the Income-tax Officer reduces the amount of income under one head but increases the amount under another, the net result, however, being a reduction both of the total income assessed and the tax, it is not an order "enhancing the assessment," though it may involve an enhancement of a particular item of income and no appeal lies to the Commissioner under S. 32 against that order. (*Beasley, C.J., Sundaram Chetty and Burn, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* NAMBERUMAL CHETTY & SONS. **56 Mad. 329=I R. 1933 Mad. 60=140 I C. 850=1932 M.W.N. 1298=36 L.W. 868=A I.R. 1933 Mad. 1=63 M.L J. 805 (F B).**

——**S. 33**—*Application to Income tax Officer to cancel registration of partnership—Rejection—Suit in Civil Court for declaration—Bar.*

It is competent for a Civil Court to make a declaration that the registration of the partnership instrument was null and void, and this course may be taken by the Court notwithstanding any concurrent remedy in that behalf under the Income tax Act, that may be open to the plaintiff and therefore notwithstanding the fact that the plaintiff applied as assessee to the Commissioner of Income-tax for cancellation of the registration under S. 33 and that the application was rejected, the Court is entitled to make the declaration. (*Page, C.J. and Das,*

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J.) NACHIAPPA CHETTYAR *v.* SECRETARY OF STATE. **11 Rang. 380 = 149 I.C. 845 = 6 R.R. 327 = A.I.R. 1933 Rang. 229.**

———**Ss. 33, 34 and 35**—*Commissioner's powers.*

The Commissioner's powers under S. 33 of the Act are subject to the time limit of one year mentioned in Ss. 34 and 35. Hence where the order of the Income-tax Officer is revised and cancelled by the Commissioner more than a year after it was passed, the cancellation is illegal. (*Aston and Rupchand, A. J. Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME TAX. **28 S.L.R. 174 = 149 I.C. 1204 = 6 R.S. 255 = A.I.R. 1934 Sind 46.**

———**Ss. 33 and 66 (1)**—Order arising under S. 33—Commissioner not obliged to state case—High Court has no power to order him to do so under S. 45 Specific Relief Act. *See* INCOME-TAX ACT, Ss. 66 (1) AND 33. **58 Bom. 331 = A.I.R. 1934 Bom. 62.**

———**Ss. 33 and 34**—*Order of Income tax Officer under Ss. 22 and 34—Remedy of aggrieved party.*

If the orders of the Income tax Officer under Ss. 22 and 34 are without jurisdiction, the Act provides the Commissioner with powers of revision under S. 33. If the Commissioner passes an order under S. 33 which the assessee considers prejudicial to him, he can avail himself of the provisions of S. 66 (2) of the Act as amended by Act XVIII of 1933. The contention that an application under S. 66 would entail delay, even if correct, does not justify the assessee in neglecting the remedy provided by the Act and in seeking instead to call in aid the extraordinary powers of the High Court to issue a writ of prohibition against the Income tax Commissioner. (*McNair, J.*) RAMJIDAS MAHALIRAM *In re* **62 Cal. 1011.**

———**S 33**—*Proceedings before Assistant Commissioner—Validity of — Enquiry into — Ultimate authority.*

It is incorrect to say that if the Commissioner sees fit to hold the proceedings before the Assistant Commissioner *ultra vires* and a nullity, the High Court has no power to inquire into the validity of the Commissioner's orders, since the quashing of the proceeding before the Assistant Commissioner results in the absence of any order which the High Court can inquire into. The ultimate authority on the question whether the proceedings before the Assistant Commissioner were *ultra vires* or not is the High Court and not the Commissioner. (*Aston and Rupchand, A.J.Cs*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **6 I.R. (Sind) 20 = 145 I.C. 145 = A.I.R. 1933 Sind 158.**

———**S. 34**—*Applicability — Assessment proceedings duly started in course of year of assessment but not completed within that year.*

S. 34 is applicable to cases in which either no assessment at all has been made upon the person who received the income, profits or gains liable to assessment, or where an assessment has been made in the course of the year, but some portion of the income, profits or gains of such assessee for some reason or other has not been included in the order of assessment. Such income is income which has "escaped assessment" in the year and falls within the ambit of S. 34 of the Act. S. 34 does not apply to cases in which assessment proceedings have been duly commenced in the course of the year of assessment, although it may be that they have not been completed within that year. **2 I. T. C. 82,** Ref. (*Page, C.J., Das and Maung Ba, JJ*) COMMISSIONER OF INCOME TAX, BURMA *v.* BURJORJEE. **9 Rang. 167 = I.R. 1931 Rang. 139 (2) = 131 I.C. 507 (2) = A.I.R. 1931 Rang. 101 (S.B.).**

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———**S. 34**—Applicability—Estate of deceased—**S. 24-B**, if excludes S. 34. *See* INCOME-TAX ACT, SS. 24-B AND 34. **37 Bom.L.R. 112 = A.I.R. 1935 Bom. 167.**

———**S. 34**—*Applicability—Notice under S. 22 served in proper time and assessment made—Assessment subsequently set aside by High Court—Fresh assessment in accordance with High Court order, but more than one year after the expiry of the tax year, not barred by limitation.*

An assessment made on B. & Co. in proper time and after the notices and returns under Ss. 22 and 23 was set aside by the High Court on the ground that the notice of assessment in so far as it mixed up the income of B. & Co. (an unregistered firm) with those of M. & Co. (a registered Company) was defective. In consequence thereof a fresh assessment was made by the Income-tax authorities on the assets of B. & Co. only. It was contended that by the time the second assessment was made more than one year had elapsed from the expiry of the tax year, it was barred by limitation.

Held, that the income of B. & Co. had not "escaped assessment" within the meaning of S. 34 and that consequently the serving of a notice within the succeeding year was not an essential pre-requisite of a valid assessment of that income and as there was no other time limit prescribed or necessarily implied in the Act, the second assessment was not out of time. (*Lord Macmillan.*) RAJENDRA NATH MUKERJEE *v.* COMMISSIONER OF INCOME TAX. **61 I.A. 10 = 61 Cal. 285 = 59 C L J 334 = 147 I.C. 663 = 6 R.P.C. 68 = 38 C. W.N. 319 = 39 L.W. 266 = 3 A W.R. 272 = 11 O.W. N. 236 = 36 Bom.L R. 267 = 1934 M.W.N. 175 = A.I.R. 1934 P.C. 30 = 66 M.L.J. 121 (P.C.).**

———**S. 34**—*Assessment—Limitation for.*

Ordinarily and apart from the two cases coming within the purview of S. 34 of the Income-tax Act, 1922, *viz.* [(1) where income has escaped assessment in any year, and (2) where income has been assessed at too low a rate in any year], there is no time limit prescribed or necessarily implied, in the Act within which an assessment must be made or completed and an assessment made after the expiry of the tax year is valid.

Semble:—Even in the two cases to which S. 34 applies if a notice is served within one year after the expiry of the tax year, the subsequent assessment or re-assessment may be made at any time and not necessarily within the year following the tax year. (*Lord Macmillan.*) RAJENDRA NATH MUKERJEE *v.* COMMISSIONER OF INCOME TAX. **61 I A. 10 = 61 Cal. 285 = 59 C L.J. 334 = 6 R.P.C. 68 = 38 C.W.N 319 = 39 L.W. 266 = 3 A.W R. 272 = 11 O.W.N. 236 = 36 Bom.L.R. 267 = 1934 M.W.N. 175 = 147 I.C. 663 = A.I.R. 1934 P.C. 30 = 66 M L J. 121 (P.C.).**

———**S. 34**—*Assessment of partner — Firm escaping assessment—Validity of assessment of partner.*

When part of the profits of a registered firm has escaped assessment, assessment can be made under S. 34 and tax levied upon a partner of the firm in respect of his share of such part, when proceedings under the said section against the firm itself, in respect of the said part have failed for lack of jurisdiction and fresh proceedings are time barred. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) NEEM CHAND DAGA, *In the matter of.* **58 Cal. 1204 = I.R 1931 Cal. 931 = 134 I.C. 931 = 35 C W.N. 534 = A.I.R. 1931 Cal. 686 (S.B.).**

———**S. 34**—*Assessment in previous year—Escaping assessment—Question depending on facts.*

When an assessment has already been made in respect of the previous accounting year under S. 34, the question whether all income which had accrued and had

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escaped assessment had been assessed to tax or not depends upon the investigation of facts of the case. (*C. C. Ghose, A.C.J., Pearson and Mukerji, JJ.*) BALDEODAS RAMESWAR, *In the matter of.* **135 I.C. 280 = I.R. 1932 Cal. 88 = A.I.R. 1931 Cal. 761 (S.B.).**

——**Ss. 34, 35 and 58**—Assessment as registered firm—Notice under S. 34 for re-assessment—Cancellation of registration—Notice demanding super tax—Appeal—Assistant Commissioner has jurisdiction to inquire into the appeal. *See* INCOME-TAX ACT, SS. 58, 34 AND 35. **A.I.R. 1933 Sind 158.**

——**S. 34**—Assessment at too low a rate—Fresh notice under S. 22 (4)—Determination of assessee's income *de novo* proper. *See* INCOME-TAX ACT, S. 22 (4). **A I R. 1932 All. 83.**

——**S. 34**—"*Assess or reassess such income, profits or gains*"—*Meaning*—*Extra assessment by Income tax Officer*—*Appeal*—*Jurisdiction of Commissioner to award other relief.*

The words "assess or reasses such income, profits or gains" must be taken to refer to the income, profits or gains chargeable to income-tax which have escaped assessment referred to in the prior part of S. 34. Accordingly in a proceeding under that section, the Income tax Officer and after him the Assistant Commissioner are only dealing with the extra income which has not been assessed to income tax. No jurisdiction is given to either of these officers to make a new assessment for the purpose of taxing the whole of that assessment. It is therefore not open to the Assistant Commissioner in appeal to grant any relief other than setting aside the extra assessment by the Income-tax Officer. (*Mukerji and Bennet, JJ.*) KASHI NATH BAGLA, *In the matter of.* **I R. 1932 All. 223 = 136 I C. 575 = 1931 A.L. J. 878 = A.I.R. 1932 All. 1.**

[**R.** 1931 A.L.J 1109 (1112).]

——**S. 34**—*Construction*—"*Escape assessment.*"

The expression "escape assessment" is not the same thing as "escape from" assessment.

Obiter.—So where there was an assessment on the income of a company at the proper time, but that assessment was subsequently set aside by the High Court as not having been made properly, it would scarcely be right to say that the income escaped assessment in respect of that income at a later period. (*C. C. Ghose, A. C. J., Costello and Mallik, JJ.*) BURN & CO., *In the matter of.* **61 Cal. 132 = 150 I C. 404 = 6 R C. 853 = 38 C.W.N. 201 = A.I.R. 1934 Cal. 515**

——**S. 34**—*Construction and scope*—"*Escaped assessment*"—*Meaning of*—*Burden of proof.*

Assessee, who was a money-lender and buying and selling gold and silver, was assessed to income-tax in 1932-1933 under S. 23 (3) of the Income-tax Act, the Income-tax Officer adding to the assessee's income 3 per cent. on the sale of gold and 5 per cent. on the sale of silver, as he was not able to ascertain with accuracy the profits from the sales of gold and silver. In the next year, a different Income-tax Officer came to the conclusion that, as the price of gold had risen very rapidly during the last two months of the previous year of assessment the profits from the sale of gold had been under-estimated, and that the income had therefore escaped assessment. He therefore re-assessed the income under S. 34 of the Act by imposing a higher flat rate on the sale of gold. On appeal, the Assistant Commissioner modified the rate by imposing a rate of 4 per cent. on gold and increasing the rate on silver to 10 per cent.,

Held, that the burden of proving that the income has escaped assessment under S. 34 or that it had been assessed at too low a rate was on the Income-tax authorities; that as it had not been proved that the assessee had in fact received a greater income or that any facts which were before the second Income-tax Officer were not before the first officer—the latter having had the means of knowing the rise in the price of gold—no income had escaped assessment within the meaning of S. 34. S. 34 is not confined to cases in which a source of income has escaped assessment. If it were proved that a certain amount had been received as income from a particular source, while the assessment was only on a lesser amount or if it were proved that the assessment was at a flat rate of say 3 per cent. whilst in fact profits at a higher rate had been made, then income would have escaped assessment within the meaning of S. 34. (*Beaumont, C. J. and Rangnekar, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* GOPAL. **59 Bom. 626 = 158 I.C. 757 = 8 R.B. 140 = 37 Bom.L R. 697 = A.I R. 1935 Bom. 410.**

——**S. 34**—*Distinction between "chargeability" and "assessability"—No machinery—Assessment—Validity.*

There is a clear distinction between chargeability and assessability. The former expression connotes liability to pay income-tax; the latter expression has reference primarily to the machinery, which ought to be utilized, and the procedure that must be followed in determining the amount which should be levied as income-tax. Where therefore no machinery exists to make it possible for the Income-tax authorities to assess the income, profits or gains of the company during that year, the assessment is not legal. (*Jai Lal and Agha Haidar, JJ.*) LAXMI INSURANCE CO., LTD., LAHORE *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **12 Lah. 757 = 33 P.L.R. 357 = 136 I C. 725 = 33 P.L R. 357 = I.R. 1932 Lah. 261 = A.I.R. 1931 Lah. 441.**

——**S. 34**—"*Escaped assessment*"—*Meaning*

Per *Rankin, C. J*—It may be that income cannot be said to have escaped assessment except in the case where an assessment has been made which does not include the income. At all events, income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) MESSRS. LACHHIRAM BASANTLAL AND BASANTLAL NATHANI, *In the matter of.* **58 Cal. 909 = I R. 1931 Cal. 651 = 133 I.C. 187 = 35 C.W.N. 310 = A I R. 1931 Cal. 545 (S B.).**

[**Appr.** 61 I.A. 10 (16).]

——**S. 34**—"*Escaped assessment*"—*Meaning of*

The expression "has escaped assessment" in S. 34 cannot be read as equivalent to "has not been assessed" nor can income which has already been duly returned (under S. 22) for assessment be said to have "escaped" assessment within the statutory meaning merely because the assessment on income so returned was not made (under S. 23) within the tax year. Income has not "escaped" assessment within the meaning of S. 34 if there are pending at the time proceedings for the assessment of the assessee's income which have not yet terminated in a final assessment thereof 58 C. 909, Appr. (*Lord Macmillan.*) RAJENDRA NATH MUKERJEE *v.* COMMISSIONER OF INCOME TAX. **61 I.A. 10 = 61 Cal. 285 = 59 C L J. 334 = 6 R.P C. 68 = 38 C W.N. 319 = 39 L.W. 266 = 3 A.W.R. 272 = 11 O.W.N 236 = 36 Bom L.R. 267 = 1934 M.W.N. 175 = 147 I.C. 663 = A I.R. 1934 P.C. 30 = 66 M.L.J 121 (P.C.).**

——**S. 34**—"*Escaped assessment*"—*Meaning of.*

The words "for any reason" placed before the expression "escaped assessment" clearly indicate that the Legislature intended to include all those cases which either resulted from mere inadvertence or from consci-

ous misapprehension of the proper situation. There is no justification for confining the meaning of the word "escape" to those cases only which have not come to the notice of the Income-tax Officer at all and excluding those cases where he has applied his mind, but on account of an error of judgment has set any part of the income free from assessment. The idea conveyed by the words "for any reason" is so wide as to make it impossible not to include any case of non-assessment to whichever cause it may be due. (*Addison and Din Mohammad, JJ.*) AMIR SINGH SHER SINGH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **158 I.C. 349 = 8 R.L 238 = A.I.R. 1935 Lah. 361.**

———**S. 34**—*"Escaped assessment"—Meaning of.*

(Per *Full Bench, Dalip Singh, J.*, contra).—The word "escape" has a wide meaning and the words "for any reason" in the beginning of S. 34 appear to widen the interpretation and not to narrow the meaning of the word "escape." Hence if an item of income is included in the return submitted by an assessee during a tax year but is left unassessed by the Income-tax Officer or if assessed in the first instance, the assessment is cancelled by any appellate or revisional authority, it escapes assessment within the meaning of S. 34 and the assessee can be legally served with a notice within one year of the end of that year. 14 Lah. 255, Overr.

Per *Dalip Singh, J.*—In such a case as stated above, the income cannot be said to have "escaped assessment" The word "escape" is not to be given its widest meaning. The use of the words "for any reason" cannot throw any light on the meaning of the word "escape". The word "assessment" means "the course of assessment." The course of assessment involves both the calculation of the income and the charging of the income. In order to "escape assessment" an income must avoid both calculation and charging. In the case where a deduction has been wrongly allowed, the income has possibly escaped being charged, but has not escaped calculation. It is true that the arithmetical result is the same, but that is not the same thing as holding that the calculation never took place. There is no distinction arising between a mistake of fact and a mistake of law on the part of the Income-tax Officer on the words of the statute. A I.R. 1935 Lah. 361, Diss. from. (*Addison, A. C. J., Dalip Singh and Din Mohammad, JJ.*) MADAN MOHAN LAL *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **16 Lah 937 = 8 R L. 286 = 38 P L.R 52 = 158 I.C. 718 = A.I.R. 1935 Lah. 742 (F.B.).**

———**S. 34**—*"Escaping assessment"—Meaning of—Assessment proceeding on a wrong category—Cancellation of assessment and re assessment on a different basis.*

An income cannot be said to have 'escaped' assessment when no part of it was concealed by the assessee, but was disclosed to and known to the authorities and has been assessed and that assessment had been set aside by superior authority owing to some mistake in procedure or to the income being treated in a wrong category. (*Jai Lal and Monroe, JJ.*) KISHEN KISHORE *v.* COMMISSIONER OF INCOME-TAX. **14 Lah. 255 34 P L R. 560 = 141 I.C. 415 = A.I.R. 1933 Lah. 284.**

———**S. 34**—*Final assessment—Revision—Permissibility.*

The Income-tax Officer has no jurisdiction to revise the assessment for the previous year which has been completed and has become final. A tobacco dealer was assessed under S. 23 (3). His accounts were rejected and taking such materials as were before him into consideration the Income-tax Officer estimated that for the year 1929-30 the assessee made a profit of Rs. 30 a maund on 787 maunds. In the following year another Income-tax Officer in the course of assessment proceedings for the year 1930-31 became dissatisfied with the assessment in respect of the tobacco business which had been made in the previous year as he took the view that the Income-tax Officer had estimated the quantity of tobacco at too high and the profit at too low a figure. Accordingly purporting to proceed under S. 34 he assessed the assessee's income for the year 1928-29 at Rs 60 a maund on 666 maunds.

Held, that the assessment by the Income-tax Officer was not under S. 34, but was an attempt by the Income-tax Officer to go behind and revise the assessment made by the Income-tax Officer in the previous year merely because he disagreed with his predecessor's finding as to the amount of the assessable income and he had no jurisdiction to do so. (*Page, C. J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME TAX *v.* U LU NYO. **12 Rang 118 = 6 I R. (Rang.) 88 = 146 I.C. 300 = A. I.R 1933 Rang. 350 (S B.).**

[**Diss.** 59 B. 626 (631, 633). **Rel.** 62 C. 1011 (1032).]

———**S. 34**—*Fresh notice—Effect.*

The issue of a fresh notice under S. 34 does not do away with the previous assessment under S. 23 (4). (*Mukerji and Sen, JJ.*) CHHOTEY LAL, *In re.* **I.R. 1932 All. 268 = 137 I.C. 77 = 1931 A.L.J. 1109 = A.I. R. 1932 All. 83.**

———**S. 34**—*"In any year"—Meaning of—Starting point of limitation for notice under S. 34.*

The expression "in any year" must be read as meaning the year during which proceedings in assessment in respect of that very year should have been initiated. Where, therefore, the assessment in the year 1928-29 is alleged to have escaped assesment, proceedings under S. 34 can only be opened before the end of the year 1929-1930 and the fact that an original assessment in the year 1928-1929 was set aside by the order of the High Court dated 16th May, 1930, does not have the effect of starting the limitation of one year from that date. So a notice, dated 31st March, 1931, is out of time under S. 34 in respect of the assessment for the year 1928-1929. (*C. C. Ghose, A. C. J., Costello and Mallik, JJ.*) BURN & CO., *In the matter of.* **61 Cal. 132 = 150 I.C. 404 = 6 R C. 853 = 38 C.W.N. 204 = A. I.R 1934 Cal. 515.**

———**S. 34**—*Notice under—Form of.*

There is no standard form of notice prescribed in S. 34 and all that the section requires is that a notice containing all or any of the requirements which may be included in a notice under S. 22 (2) shall be served. So where the so-called notice was in the form of a letter by the Office but it contained all the details provided for in a notice, the notice must be treated as sufficient and regular in form. (*C. C Ghose, A. C. J., Costello and Mallik, JJ.*) BURN & CO., *In the matter of.* **61 Cal. 132 = 150 I.C. 404 = 6 R.C. 853 = 38 C.W N. 204 = A.I.R. 1934 Cal. 515.**

———**S. 34**—*Notice under—Service on predecessor in business—Validity as against successor.*

When a notice under S. 34 has been served on a person and he has made a return in response thereto and then died, the proceedings can be continued by the issue of notices under Ss 22 (4) and 23 (2) to the successor of such person. It is not necessary that the proceedings against the successor should be started *de novo* (*Beasley, C. J, Cornish and Burdswell, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* NACHAL ACHI. **57 Mad. 357 = 39 L.W. 119 = 6 R.M. 402 = 147 I.C. 1023 = 1934 M.W.N. 62 = A I.R. 1934 Mad. 63 = 66 M.L J. 17 (F.B.).**

———**S. 34**—*Notice under—Subsequent transfer of proceeding to Special Officer—Same declared invalid—Fresh assessment by proper Officer—Term of one year*

INCOME-TAX ACT (1922), S 34.

having elapsed from original date of notice—Validity of assessment.

A notice was issued to the assessee on the 30th April, 1927. The assessee having failed to submit a return in spite of repeated reminders on 13th December, 1927, the Commissioner directed a special Income-tax Officer to deal with the case. In August, 1929, it was held that the said order was not valid. On the 25th September, 1929, the Income-tax Officer who had jurisdiction in the ordinary course issued a remainder and subsequently the assessees filed a return under protest and an assessment was made. Objection having been taken to its validity on the ground that more than one year had elapsed after the date of the original notice, *held*, that the assessment was valid. The effect of the *interim* proceedings of the Special Officer having been rendered nugatory was to keep alive the original proceeding and notice which had not proceeded to a final assessment and the Income tax Officer was entitled to make the assessment in pursuance thereof. (*Rankin C. J., C. C. Ghose and Buckland, JJ.*) MESSRS. LACHHIRAM BASANTLAL AND BASANTLAL NATHANI, *In the matter of.* **58 Cal. 909 = I.R. 1931 Cal. 651 = 133 I.C. 187 = 35 C.W.N. 310 = A.I.R. 1931 Cal. 545 (S.B.).**

——**S. 34**—*Proceedings under—Penalty—Power of Income-tax Officer to levy.*

The Income-tax Officer has jurisdiction to impose a penalty in the matter of income tax in proceedings for assessment taken under S. 34 of the Act. (*Mukerji and Bennet, JJ.*) GUR CHARAN PRASAD KHATRI, *In the matter of.* **53 All. 445 = I.R. 1931 All. 443 = 131 I.C. 875 = 1931 A.L.J. 336 = A.I.R. 1931 All. 421.**

——**S. 34**—*Reopening of assessment—Pre-requisites.*

Under S. 34, an assessment cannot be reopened merely at the discretion of the Income-tax Officer. He cannot reopen an assessment merely to enquire further into the assessee's books in case something assessable may be found. It is an essential pre requisite to re-opening an assessment that an item of income, profits or gains *has* escaped assessment and the Income tax Officer cannot give himself jurisdiction by an erroneous finding of fact. (*McNair, J.*) RAMJIDAS MAHALIRAM, *In re.* **62 Cal. 1011.**

——**S. 34**—*Scope— Assessment of income which escaped*—De novo *assessment not permissible.*

The income, profits or gains which the Income-tax Officer is authorized and bound to assess under S. 34 is the income, profits or gains chargeable to income tax that had escaped assessment in the particular year. It is not open to him to ascertain the whole assessable income of the assessee and then further to ascertain whether some portion of such income had or had not escaped assessment. (*Page, C. J., Das and Maung Ba, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* T. S. T. S CHETTYAR FIRM. **9 Rang. 28 = I.R. 1931 Rang. 191 = 132 I C. 559 = A.I.R. 1931 Rang 333.**

——**S. 34**—*Scope—Erroneous deduction—Recovery of tax.*

S. 34 is not limited to cases of non-disclosure by the assessee or discovery of new matter by the Income tax authorities or inadvertence as distinguished from erroneous deliberations on the part of the authorities. It can be applied to put right an assessment by which a deduction has been improperly allowed on the ground that the balance has "escaped assessment". (*Rankin, C.J. and Buckland, J.*) ANGLO PERSIAN OIL CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, BENGAL, **60 Cal. 843 = 37 C.W.N. 430 = 149 I.C. 919 = 6 R.C.. 658 = A.I.R. 1933 Cal. 777.**

INCOME-TAX ACT (1922), S. 40.

——**S. 34**—*Successor in business—Liability for assessment.*

When income has escaped assessment, an assessment can be made under S. 34 on the successor of the person who, if no succession had taken place, would have been liable. Such an assessment is not invalidated by the fact that the succession took place after the close of the year in which the income escaped assessment. (*Beasley, C.J., Cornish and Bardswell, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* NACHAL ACHI. **57 Mad. 357 = 6 R.M. 402 = 147 I.C. 1023 = 1934 M.W. N 62 = 39 L.W. 119 = A.I.R. 1934 Mad. 63 = 66 M. L.J. 17 (F.B.).**

——**S 34**—*"Too low a rate"—Assessment as joint Hindu family—Asessee subsequently found to be an individual—Mode of assessment.*

Where an assessment of super-tax has been completed as if the assessee were a Hindu undivided family and it is subsequently held that the assessee is an individual, the Income-tax Officer cannot proceed on the footing that any portion of the income has escaped assessment but he can proceed on the ground that the sum had been assessed at "too low a rate". (*Mukerji and Sen, JJ.*) CHHOTEY LAL, *In re.* **I.R. 1932 All 268 = 137 I.C. 77 = 1931 A.L.J. 1109 = A I.R. 1932 All. 83.**

——**S 40**—*Scope.*

S. 40 is not a charging section. It is only a machinery section enabling the Income-tax Officer to assess the trustees or guardians as representing their beneficiaries or wards if they so choose. But it is not obligatory for the officer so to do and the section cannot be invoked to prevent him from assessing on other basis. (*Beasley, C.J., Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* SALDANHA. **55 Mad. 891 = I.R 1932 Mad. 507 = 138 I C. 1 = 1932 M.W.N. 575 = 35 L.W. 735 = A.I.R. 1932 Mad 378 = 62 M L J. 600 (F B).**

——**S. 40**—*Scope—Special Act creating trust and empowering trustees to manage certain properties by defraying necessary expenses—Balance payable to beneficiary—Liability to tax.*

Even apart from S. 40, there may be other cases in which the trustees in receipt of trust income may be chargeable with tax on such income. By Act IV of 1913, for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, appellants were incorporated as trustees for executing the trusts. By S. 6 the corporation was to pay out of the income from the properties all rates and taxes and sundry other outgoings. By S. 7 the corporation was required to form two funds, called the Sinking Fund, and the Repair Fund, and to carry annually thereto respectively, out of the income of the properties, certain sums calculated on percentages of capital sums there specified. By S. 8 the residue of the income was to be paid to the Baronet for the time being, if of full age, for his own absolute use and benefit.

Held, that, so far as concerns the money which the appellants employ in maintaining the Sinking Fund and the Repair Fund and in defraying outgoings. they are not exempt from liability to pay tax. *William* v. *Singer* (1921) 1 A. C. 65, Ref.

Held also, that even with reference to the balance of the trust income paid over to the Baronet, it was 'receivable' or 'owned' by the trustees and so rightly assessed. (*Sir Sidney Rowlatt.*) CURRIMBHOY EBRAHIM BARONETCY TRUST *v.* COMMISSIONER OF INCOME-TAX, BOMBAY **61 I.A. 209 = 58 Bom 317 = 36 Bom. L R. 557 = 59 C.L J. 403 = 1934 M W N. 582 = 1934 A.L J. 429 = 6 R P.C. 145 = 38 C W.N. 618 = 39 L.W. 771 = 148 I.C. 855 = A.I R. 1934 P.C. 116 = 66 M.L.J. 643 (P.C.).**

INCOME-TAX ACT (1922), S. 40.

——**S. 40**—*Trust for special purpose—Person liable to assessment—Trustee or beneficiary—Currimbhoy Ebrahim Baronetcy Act (IV of 1913).*

In cases of trust not covered by Ss. 40 to 43 of the Act, the person liable to assessment is neither the trustee nor the beneficiary as such but the person in actual receipt and control of the income which it is sought to reach. If the beneficiary receives the income or profits, he is liable to be assessed ; if the trustee receives and controls them, he is primarily so liable. *Williams* v. *Singer*, (1921) 1 A C. 65, Ref. But the trustees of Currimbhoy Ebrahim Baronetcy, having been created a corporation by the special Act constituted an "individual" within the meaning of S. 3 and a taxable unit in respect of the trust property and as a matter of convenience may be assessed and charged both to income-tax and super-tax having regard to the peculiar circumstances and the peculiar language of the special Act. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX BOMBAY *v.* TRUSTEES OF THE SIR CURRIMBHOY EBRAHIM. **61 I.A. 209 = 58 Bom. 317 = I.R. 1932 Bom. 184 = 136 I.C 488 = 33 Bom.L.R. 1549 = A.I.R 1932 Bom. 106 = 66 M.L J. 643 (P C.)**

——**Ss. 40 and 41**—*If exhausts category of trustees.*

Per *Jai Lal and Skemp, JJ.*—Ss. 40 and 41 do not exhaust the category or description of trustees or other persons respectively, who may be in receipt of income as such or on behalf of others and do not limit the operation of S. 3 with regard to others. (*Young, C J., Addison and Tek Chand, JJ.*) TRIBUNE PRESS *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **16 Lah. 829 = 158 I.C. 306 = 8 R L. 219 = 37 P.L.R. 888 = A.I.R. 1935 Lah. 570 (F.B.).**

——**S. 42**—"*Business connection*"—*Meaning.*

The definition of the word "business" in S. 2 (4) is not exhaustive and does not restrict the meaning of "business connection" in S. 42 to such definition. All that is necessary is that there should be a business in British India and a connection between a non resident person or company and that "business" and that non-resident person or company has earned an income through such connection. (*Beaumont, C. J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTRALASIA, LTD. **57 Bom. 519 = 147 I.C. 370 = 6 R.B. 199 = 35 Bom.L.R. 896 = A.I R. 1933 Bom. 427.**

——**Ss 42 and 43**—*Business connection in British India—Foreign company owning all shares and controlling company in India—Profits on sales—Assessability of local company as agent.*

The assessee company was formed for acquiring from an American company and carrying on in a particular area the American company's business of selling their manufactures. The American company owned all the shares of the assessee company and had complete control over it. The question was if the local company can be deemed to be the agent of the American company so as to be assessed in respect of the profits made by the American company on the sales of its manufactures to the local company.

Held, that the necessary business connection having been established, the profits and gains in question accrued or arose to the foreign company directly or indirectly through or from a business connection in British India and the assessee company was chargeable for the same. (*Lord Russell of Killowen.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* REMINGTON TYPEWRITER, CO. **58 I.A. 42 = 55 Bom. 243 = I.R. 1931 P.C. 87 = 130 I.C. 679 = 33 L.W. 301 = 8 O.W N. 559 = 35 C.W.N. 349 = 53 C.L.J. 135 = 14 O.L.J. 396 = 1931 M.W.N. 248 = 33 Bom.L.R. 413 = A.I.R. 1931 P.C. 42 = 60 M.L.J. 609 (P.C.).**

INCOME-TAX ACT (1922), S. 42.

——**Ss. 42 and 43**—*Carrying on business—Foreign resident—Loan to person in British India—Business connection whether arises.*

The mere fact that a person residing outside British India with accumulated wealth chooses to invest part of it in a loan to a person in British India does not constitute a business. And the fact that the borrower chooses to use the money which he has borrowed for the purposes of his own business does not constitute any business connection so far as relates to the lender. The relationship between the parties is that of debtor and creditor and nothing else and that is not such a business connection as is referred to in S. 42. Hence the former cannot be appointed as the agent of the latter within S. 43 for assessment. The debtor company cannot be charged in respect of the creditor's place in Bombay, though it is properly in British India within the meaning of S, 42. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* CURRIMBHOY EBRAHIM & SONS, LTD. **57 Bom. 651 = 147 I.C. 566 = 6 R.B. 209 = 35 Bom.L.R. 914 = A.I.R. 1933 Bom. 422.**

——**S. 42**—*Company—Foreign income—Liability to assessment.*

In the case of a non-resident, income which neither accrues nor arises nor is received within British India may be liable to tax under the combined operation of Ss. 3, 4, and 42. Profits made by an insurance Company outside British India on premiums of participating policies collected and sent by its branches in India by investment outside India are profits or gains which are liable to tax in India. (*Beaumont, C. J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTRALASIA, LTD. **57 Bom. 519 = 147 I C. 370 = 6 R.B. 199 = 35 Bom.L.R. 896 = A.I.R. 1933 Bom. 427.**

——**S. 42**—*Hindu joint family—Several places of residence.*

The question as to what is the residence of a joint family cannot depend upon the nature of income it gets, It cannot be that the test of residence should be one thing if it is a trading family, and the test of residence some other thing if it gets income from securities, property or other sources. In the case of a Hindu joint family, the family should be said to reside in all those places where members of the family live and may, like a company or firm, have more than one place of residence. Therefore the test in A.I.R. 1927 Mad. 732 cannot apply to what are generally described in decisions as Hindu Law partnerships, *i.e.*, partnerships which are the creatures of Hindu Law and not of the law of contracts. (*Beasley, C J. Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* SOMASUNDRAM CHETTIAR. **55 Mad. 885 = I.R. 1932 Mad. 541 = 138 I C. 301 = 36 L.W 26 = 1932 M.W.N. 752 = A.I.R 1932 Mad. 435 = 63 M.L.J. 22 (S.B.).**

——**S. 42**—*Non-resident company—Computation of profits—Proportion of profits earned by manufacture in the country of origin—Deduction of—Permissibility.*

As assessee assessed under S. 42 in respect of a business in which the manufacture of a commodity takes place in a foreign country and the sale thereof takes place in British India, is not entitled, in computing the profits and gains of such business, to made a deduction representing the proportion of profits earned by manufacture in the country of origin. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) PORT SAID SALT ASSOCIATION, LTD., *In re.* **59 Cal. 1226 = I.R. 1932 Cal. 346 = 137 I.C. 340 = 55 C.L.J. 182 = 36 C.W.N. 563 = A.I.R. 1932 Cal. 626.**

INCOME-TAX ACT (1922), S. 42.

———**Ss. 42 and 43** — *Principal — Assessment — Appointment of agent if necessary.*

A principal can be assessed under S. 42 without the necessity of appointing an agent under the latter part of S. 43. (*Beaumont, C. J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTRALASIA, LTD. **57 Bom. 519 = 147 I.C. 370 = 6 R.B. 199 = 35 Bom.L.R. 896 = A.I.R. 1933 Bom. 427.**

———**S. 42**—*'Property'—Meaning.*

'Property' in S. 42 means something tangible and not a mere chose in action. A person who has advanced a loan is entitled to a mere debt and that is not property. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* CURRIMBHOY EBRAHIM & SONS, LTD. **57 Bom. 651 = 147 I.C. 566 = 6 R.B. 209 = 35 Bom.L.R 914 = A.I.R. 1933 Bom. 422.**

———**S. 42 (1)**—*'Business connection'—Meaning.*

A single monetary transaction by a non-resident with a resident in British India cannot be described as a "business connection" within the meaning of S. 42 (1) Where, therefore, a non-resident advances a loan to a company in British India taking security therefor, the interest earned by the non-resident on the loan, cannot be deemed to have accrued to him through or from any business connection in British India. That the company used the borrowed money in connection with their own business is not a fact which brings the non-resident any nearer to being a person who has a business connection in British India. The circumstance that the repayments of the loan are contemplated to extend over a period of five years, and that the interest would be payable from time to time during this period, is equally ineffective to bring the case within S. 42 (1). (*Sir George Rankin.*) THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN *v.* CURRIMBHOY EBRAHIM & SONS., LTD. **63 I.A. 1 = 60 Bom. 172 = 1936 M.W.N. 37 = 8 R.P.C 91 = 38 Bom.L.R. 139 = 1936 A.L.J. 715 = 1935 O.W.N. 1361 = 159 I.C. 555 = 62 C.L.J. 397 = 40 C.W.N. 199 = 43 L.W. 53 = 1935 A.W.R. 1526 = A.I.R. 1936 P.C. 1 = 70 M.L.J. 247 (P.C.).**

[On appeal from 57 Bom. 651.]

———**S 42 (1)**—*'Property'—Meaning of.*

The word 'property' in S 42 (1) means something tangible but it is not confined to immovable property or to buildings or lands appertaining thereto. There is nothing in the sub-section to exclude from its scope any of the six classes of income mentioned in S. 6 of the Income-tax Act. (*Sir George Rankin.*) THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY AND ADEN *v.* CURRIMBHOY EBRAHIM & SONS, LTD **63 I.A. 1 = 60 Bom. 172 = 1936 M.W.N. 37 = 8 R.P.C. 91 = 38 Bom.L.R. 139 = 1936 A.L.J. 715 = 159 I.C. 555 = 1935 A.W.R. 1526 = 43 L.W. 53 = 62 C.L.J. 397 = 40 C.W.N. 199 = 1935 O.W.N. 1361 = A.I.R. 1936 P.C. 1 = 70 M.L.J. 247 (P.C.).**

———**S. 43**—*Agency — Determination of question— S. 30 (1) whether operates as bar.*

The clause "denying his liability to be assessed" under S. 30 (1) is wide enough to cover a case of an assessee who denies his liability to be declared as an agent under S. 43. Therefore an appeal against the order of an Income-tax Officer declaring any person to be an agent of a foreigner is not barred by S. 30 (1). (*Staples, A. J.C.*) GOKULDAS CHUNNILAL *v.* COMMISSIONER OF INCOME-TAX. **28 N.L.R. 194 = I.R. 1932 Nag. 155 = 140 I.C. 490 = A.I.R. 1932 Nag. 152.**

———**S. 43**—*'Agent'—Meaning of—Ground of liability.*

INCOME-TAX ACT (1922), S. 48.

The word 'agent' in S. 43 is not to be used in the same sense as the same word in S. 42 (1). Any person who comes within the terms of S. 43 is put by that section artificially into the position of agent and assessed under S. 42 (1). It is not restricted to agents in actual receipt of the profits and gains. 57 I. A. 49; 58 M.L.J. 197 (P.C.), Ref. to. (*Lord Russell of Killowen.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* REMINGTON TYPEWRITER CO. **55 Bom. 243 = 58 I A. 42 = I.R. 1931 P.C. 87 = 130 I C. 679 = 33 L W. 301 = 8 O.W.N. 559 = 35 C.W.N. 349 = 33 Bom L.R. 413 = 53 C L.J. 135 = 14 O.L J. 396 = 1931 M.W.N. 248 = A.I.R. 1931 P.C. 42 = 60 M.L.J. 609 (P.C.).**

———**S 43 (c)**—*Word 'through'—Whether can be construed as 'from'.*

The word 'through' in S. 43 (*c*) cannot be construed as meaning 'from'. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* CURRIMBHOY EBRAHIM & SONS, LTD. **57 Bom. 651 = 147 I.C. 566 = 6 R.B. 209 = 35 Bom.L.R. 914 = A.I. R. 1933 Bom. 422.**

———**S. 46 (2)**—*Sale under, by Collector—Priority over previous insolvency sale.*

Though a land was attached and sold under the provisions of the Revenue Recovery Act, the sale would not give a higher title to the purchaser than the owner of the land himself would have given if he had alienated the property privately, when the sale was for the enforcement of other dues such as the income-tax. It is only if the sale was for the land-revenue, that the purchaser would get a preferential title free from all encumbrances *A* became an insolvent on 9th September 1925 and the properties of *A*, which vested in the Official Receiver, were sold on 17th January, 1927, and purchased by *M*. In 1924, before the insolvency, the entire village of which the suit property formed a part was attached in proceedings taken by the Collector under S. 46 (2), Income-tax Act, for the recovery of the amount of income-tax and the attached property was sold on 27th May, 1927, and purchased by *C*.

Held, that under the circumstances, the title which *M* obtained from the Official Receiver should prevail over the claims of *C*, though the attachment under which *C* claimed was prior in time. A.I.R. 1926 Mad. 1161 and A.I.R. 1927 Rang. 289, Foll. (*Madhavan Nair, J.*) CHINNAMMAL ACHI *v.* SAITHAKATHI ROWTHER. **158 I.C. 776 = 8 R.M. 348 = 1935 M.W.N. 940 = 42 L.W. 663 = A.I.R. 1935 Mad. 882.**

———**S. 48**—*Applicability—Refund.*

If the assessee is a person liable to Indian income-tax in respect of part of his income, a refund of Indian income-tax is admissible in respect of the sums or dividends received by him from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in S. 2 (6) of the Act. (*Beaumont, C.J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* MAJOR K. C. GOLDIE. **55 Bom. 734 = 136 I.C. 170 = I.R. 1932 Bom. 154 = 33 Bom.L.R. 776 = A.I R. 1931 Bom. 420.**

———**S. 48**—*Certificate under S. 20—Validity.*

Certificate under S. 20 of the Act signed by the Principal Officer in the United Kingdom of such companies can be regarded as valid certificates for the purposes of S. 48 (1) of the Act and refund granted on their production. (*Beaumont, C.J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX BOMBAY *v.* MAJOR K C. GOLDIE. **55 Bom. 734 = 136 I.C. 170 = I.R. 1932 Bom. 154 = 33 Bom.L.R. 776 = A.I.R. 1931 Bom. 420.**

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———**Ss. 48 and 67**—*Refund—Refusal to grant—Suit for refund—Maintainability.*

There is no provision made in the Act for appeals against a refusal to grant a refund under S. 48. So where the suit for refund of income-tax does not raise any question of assessment, it is not barred by S. 67. (*Milne, A.J.C.*) MT. ZENAB BAI *v.* SECRETARY OF STATE. **25 S.L.R. 426=I.R. 1932 Sind 69=136 I.C. 819=A.I.R. 1932 Sind 48.**

———**Ss. 48 and 20**—Scope—if modify S. 14. *See* INCOME-TAX ACT, SS. 14, 20 AND 48. **39 C.W.N. 253.**

———**S. 48 (2)**—*Legatee of deceased partner—Claim for refund—Maintainability.*

The legatee of the profits from the business of the firm due to one of the partners who died prior to the year of assessment is not entitled to maintain a claim for the refund of income-tax under S. 48 (2) because the deceased was not a person who paid the assessment on the firm for the year in question nor was he liable as he could not himself have been an assessee for that year. (*Milne, A.J.C.*) MT. ZENAB BAI *v.* SECRETARY OF STATE. **25 S.L.R. 426=I.R. 1932 Sind 69=136 I.C. 819=A.I.R. 1932 Sind 48.**

———**S 50**—*Application for refund beyond time—Power of Commissioner to extend time.*

Where an application for refund under S. 48 of the Income tax Act is made beyond the time prescribed by S. 50 of the Act, the Commissioner acts rightly in rejecting the application on the ground that it was time barred under S. 50 and there is no power given to him under the Act to extend the period prescribed in that section. (*Page, C. J., and Ba U, J.*) ADAMJEE HAJEE DAWOOD AND CO., LTD *v.* COMMISSIONER OF INCOME-TAX, BURMA. **13 Rang 729=161 I.C. 976=8 R.R. 526=A.I.R. 1936 Rang. 85.**

———**S. 50**—*Construction—Application for refund—Limitation—Assessment made only after period of limitation—Subsequent application—If competent.*

An application for refund under S. 48 of the Income-tax Act must be made within the time limited by S. 50 and on no consideration can an application made beyond that time be entertained. Though the assessment has been made only after the expiry of that period, that is no justification for, presenting the application beyond time. It is quite true that it is impossible for the assessee to ascertain whether he is or is not entitled to a refund under S. 48 (1) until after an assessment is made, and that it works a hardship in making it incumbent on him to present his application for refund within the time limited by S. 50, when the assessment itself is not made until after the expiry of that period. But the remedy lies not with the Courts administering the law, but with the legislature. (*Page, C.J. and Ba U, J.*) ADAMJEE HAJEE DAWOOD AND CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, BURMA. **13 Rang. 729=161 I.C. 976=8 R.R. 526=A.I.R. 1936 Rang. 85.**

———**S. 50-A**—*Scope—If exhaustive—Right to apply for mandamus under S. 45, Specific Relief Act.*

An assessee aggrieved by an order of the Commissioner refusing to allow a refund under S. 48, Income-tax Act, is not entitled to have recourse to S. 45 of the Specific Relief Act. S. 50-A of the Income-tax Act gives him a specific and adequate remedy, and precludes him fromtaking advantage of S. 45 of the Specific Relief Act. (*Page, C.J. and Ba U, J.*) ADAMJEE HAJEE DAWOOD AND CO., LTD, *v.* COMMISSIONER OF INCOME-TAX, BURMA. **13 Rang. 729=161 I.C. 976=8 R.R. 526=A I.R. 1936 Rang. 85.**

———**S. 50-A**—*Scope—Remedy under—If exhaustive—Specific Relief Act, S. 45—Applicability.*

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Where an assessee does not avail himself of the remedy of an appeal under S. 50-A of the Income-tax Act which is open to him, he cannot invoke S. 45 of the Specific Relief Act for getting relief. (*Beasley, C. J., Ramesam and King, JJ.*) VENKATACHALAM CHETTIAR *v.* COMMISSIONER OF INCOME-TAX MADRAS. **58 Mad. 367=156 I C. 64=7 R M. 634=1935 M.W. N. 576=41 L.W. 329=A I.R. 1935 Mad. 379=68 M L J. 227 (F.B.).**

———**Ss. 51 and 52**—*Offences under both sections are different.*

An offence under S. 52 is of a different nature to an offence under S. 51. It was taken for granted that the assessee had not committed an offence under S. 51, *i.e.*, failing to submit a return and it was considered that he had submitted a valid return but that there were false entries in that return. So he would be prejudiced by being found guilty on a charge what he was not called upon to meet and which was a charge of a different nature to the one which was made against him. He was only called upon to meet an accusation of an offence under S. 52 (*e*) for making a false return. The sanction granted by the Assistant Commissioner for the prosecution of him under S. 52 of the Act would not warrant a conviction of him for an offence under S. 51 of the Act. (*Staples, A J.C.*) CHAMPALAL *v.* EMPEROR. **30 N. L.R. 50=35 Cr L.J. 224=6 I.R. (Nag.) 102=146 I. C. 848=1933 Cr.C. 1501=A.I.R. 1933 Nag. 358.**

———**Ss. 51 and 52**—*Prosecution sanctioned under one section—Conviction under another—Legality of.*

Where there is a question of sanction and the sanctioning authority has sanctioned the prosecution under one section only, and the accused has been found not guilty of that offence, he cannot be found guilty of the other offence. (*Staples, A. J. C.*) CHAMPALAL *v.* EMPEROR. **30 N.L.R. 50=35 Cr.L.J. 224=6 I.R. (Nag.) 102=146 I.C. 848=1933 Cr.C. 1501=A.I.R. 1933 Nag 358.**

———**S. 52**—*Return not complete—Verification of such return does not constitute offence under S. 52.*

Where the assessee submits a return, but ostensibly and openly that return is not a complete one but is stated to be incomplete, there is no verification of the return as would make the return a valid one or constitute commission of an offence under S. 52. A.I.R 1929 All. 919, Dist. (*Staples, A.J.C.*) CHAMPALAL *v.* EMPEROR. **30 N.L.R. 50=35 Cr.L.J. 224=6 I.R. (Nag.) 102=146 I.C. 848=1933 Cr C. 1501=A.I.R. 1933 Nag. 358.**

———**S. 54**—*Evidence that account books have been produced before officer—If excluded.*

S. 54 does not merely exclude evidence with regard to contents of any documents which may be produced before the income-tax authorities for purpose of assessment, but it forbids any evidence with regard to such documents. It is wide enough to exclude evidence to the effect that account books have been produced before the Income tax Officer. (*Addison and Beckett, JJ.*) ASGHAR ALI SHAH *v.* ACHHRU MAL. **A.I.R. 1935 Lah. 272.**

———**S. 54**—*Object—Answers to interrogatories—Privileged statements.*

The intention of S. 54 is to encourage assessee to make a full and true disclosure of all relevant facts within his knowledge knowing that any statement made by him will not subsequently be used against him. It is certainly open to an assessee to object to answering interrogatories on statments made by him in such proceedings on the ground that they are privileged. (*Pollock, A. J. C.*) SHAMRAO *v.* MOTIRAM. **151 I. C. 104=7 R.N. 57=17 Nag.L.J. 63=A.I.R. 1934 Nag. 181.**

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——**S. 55**—*Application under—Need for valid registration.*

Registration in the manner prescribed under the Act is a condition precedent to the right of the Income tax Officer to proceed under S. 55. (*Page, C. J. and Das, J.*) NACHIPPA CHETTYAR *v.* SECRETARY OF STATE. **11 Rang. 380=149 I.C. 845=6 R.R. 327=A.I.R. 1933 Rang. 229.**

——**S. 55**—"*Hindu undivided family*"—*Sole surviving coparcener and female members—If constitute—Income derived by such coparcener—If income of Hindu undivided family—Mode of taxation.*

The expression "Hindu undivided family" in S. 55 of the Income-tax Act includes females and is much wider than the expression "coparcenery" which includes only the males in whom the joint family property is vested. In the case of a joint Hindu family consisting of the assessee, his mother and his wife, the income received by the assessee as sole surviving coparcener by right of survivorship has to be taxed as the income of a Hindu undivided family for the purposes of super-tax under S. 55, and not as his own individual income. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* GOMEDALLI LAKSHMI NARAYAN. **59 Bom 618=8 R.B 203=159 I C. 424 (2)=37 Bom.L.R. 692=A.I.R. 1935 Bom. 412.**

——**S 55, Proviso**—"*Individual*"—*If includes Hindu undivided family.*

The word "individual" in the proviso to S. 55 of the Income tax Act includes a Hindu undivided family. (*Niamatullah and Bennet, JJ.*) RAM RATTAN DAS *v.* COMMISSIONER OF INCOME TAX, U. P. **57 All. 745 =157 I C. 1000=1935 A.L.J. 364=1935 A.W.R. 331 =A.I.R. 1935 All. 444.**

——**Ss. 58, 34 and 35**—*Assessment as registered firm—Notice under S. 34 for re-assessment—Commissioner cancelling registration—Notice demanding super tax—Appeal—Jurisdiction of Assistant Commissioner.*

Certain persons were assessed as a registered firm for income-tax for the year 1926-1927 and the assessment was duly levied. On 4th February, 1928, proceedings were taken by the Income tax Collector under S. 34 for re-assessment of the income for the year 1926-1927. On 13th February, 1928, the Commissioner of Income-tax cancelled the registration of the firm and the proceedings under S. 34 were dropped. On 7th May, 1929, the assessees were served with a notice demanding a sum as super tax for the year 1926 1927. An appeal was made to the Assistant Commissioner against this super-tax.

Held, that under S. 58 read with Ss. 34 and 35 the Assistant Commissioner had jurisdiction to inquire into the appeal from the order demanding super-tax. (*Aston and Rupchand, A.J C*)) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **6 I.R. (Sind) 20=145 I.C. 145=A.I.R. 1933 Sind 158.**

——**S. 58 (1)**—*Effect—Case of super-tax—Levy of penalty by Income tax Officer—Permissibility.*

S. 28 of the Income-tax Act must be strictly construed. There is no word in the section regarding super-tax. Therefore the Income-tax Officer has no jurisdiction to impose a penalty in the matter of super-tax. Effect of S. 58 (1) of the Act considered. (*Mukerji and Bennet, JJ.*) GUR CHARAN PRASAD KHATRI, *In the matter of*. **53 All. 445=I.R. 1931 All 443= 131 I.C. 875=1931 A.L J. 336=A.I.R. 1931 All. 421.**

——**S. 59**—*Income-tax Rules, R. 35—Insurance Company not incorporated in British India—Basis of assessment.*

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Where an insurance company (not incorporated in British India) has failed to make a return of the total income under S. 22 (1), the Income-tax Officer is justified in applying R. 35 of the Income tax Rules made under S. 59 of the Act. To apply that rule, he has first of all to find out what is the total income, profits or gains of the assessee company. Where for that purpose the officer had no other reliable data except a triennial valuation, he is entitled to assume that the profits for the year in question would be the average annual profits shown in the triennial valuation after deducting the premiums paid on participating policies. (*Beaumont, C.J. and Murphy J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA. **55 Bom. 637=33 Bom.L. R 807=I.R. 1931 Bom. 491=134 I.C. 555=A.I.R. 1931 Bom. 448.**

——**S. 60**—*Co operative Society—Government of India Notification dated 12th August, 1925—Object of —Co operative Society—Interest on securities and income from property, if "profits."*

The intention of the Government underlying its notification, dated 12th August, 1925, was to exempt from income-tax the profits accruing to Co-operative Societies from carrying on the business of a Mutual Co-operative Society upon the ground that "a man cannot make a loss or profits out of himself" and in that way to encourage and foster Co-operative Societies which were designed to improve the conditions of Indian cultivators. But neither interest from securities nor income derived from property are "profits" within the meaning of the term as used in the notification, unless the investment of capital in property or securities is part of the business of the co-operative Society. In considering that question, the fact that such income appears as part of the profits in the profit and loss account of the assessee is not conclusive. (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LTD. **11 Rang. 521=6 R.R. 237=148 I C. 633=A. I.R. 1934 Rang. 27 (S B.).**

——**S. 60**—*Scope—Government of India Notification, dated 12th October, 1929—Effect of—Profits exempted only from income-tax, but not super-tax.*

Under S. 60, the Government of India can, by notification, deal with income-tax and super-tax but it does not follow that it cannot exempt, reduce in rate or otherwise modify income-tax alone or super-tax alone. The Government of India Notification, Finance Department (Central Revenue) No. 21, dated 12th October, 1929, exempts the assessee from the payment of income-tax in respect of such part of the profits of a firm which has discontinued its business if tax had at any time been charged on such business under the Income-tax Act (VII of 1918) or if an assessment has been made on the firm in respect of such profits under S. 25 (1) of the Income-tax Act (XI of 1922). This notification does not, however, extend to super-tax and the profits so exempted from income-tax can be included for ascertaining whether the income is sufficient to make it chargeable to super-tax. (*Beasley, C.J., Cornish and Bardswell, JJ.*) NACHIAPPA CHETTIAR *v.* COMMISSIONER OF INCOME TAX, MADRAS. **56 Mad. 679 =6 I.R. (Mad.) 185=145 I.C. 989=1933 M.W.N. 505=38 L.W. 474=A.I.R. 1933 Mad. 701=65 M. L.J. 327 (F.B.).**

——**S. 61**—*Application for copy of order—Special authorisation necessary.*

An application for a copy of the order passed by the Assistant Commissioner is within the words "attend-

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ance before an Income-tax Officer." Any person asking for a copy of the order should be expressly authorised in writing in that behalf and the fact that a pleader had been authorised by the party to conduct his case before the Assistant Commissioner is not sufficient to authorise him to apply for a copy of the order. (*Courtney Terrell, C.J. and Dhavle, J.*) BASANT LAL RAMJIDAS *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 40 = I.R. 1932 Pat. 78 = 136 I.C. 302 = 13 Pat.L.T. 437 = A.I.R. 1932 Pat. 103.**

——**S. 63**—*Person not authorized to accept service—Service of notice on such person—Validity.*

Income-tax Officers, in doing the very important work of assessing income-tax, must take the elementary precaution of seeing that the person with whom they are dealing is in fact authorized to represent the assessee, and they are not entitled to assume this merely because such person has on occasions signed a notice, possibly under pressure, or produced account books for inspection. A notice served on such person who is not authorized to accept service is not a valid service on the assessee. (*Subhedar and Pollock, A.J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* BAXIRAM RODMAL. **30 N.L.R. 340 = 151 I.C. 56 = 7 R.N. 49 = A.I.R. 1934 Nag. 175.**

——**S. 63 (1)**—*Notice delivered to assistant in shop otherwise than by post—Sufficiency.*

Where a notice under the Income-tax Act is delivered otherwise than by post to any clerk or servant on the premises where the assessee carries on business, and according to the practice obtaining in the business the employee is expected to hand on any communication which he has received to the manager, that is not evidence upon which the Income-tax authorities can find as a fact that the manager was served with the summons. (*Page, C.J., Mosely and Ba (', JJ.*) COMMISSIONER OF INCOME-TAX *v.* DEV BROTHERS. **13 Rang. 251 = 7 R.R. 414 = 156 I.C. 385 = A.I.R. 1935 Rang. 144 (S B).**

——**S. 63 (1)**—*Presumption under S. 27, General Clauses Act—Rebuttal—Posting of letter.*

S. 63, Income-tax Act, is to be read along with S. 27, General Clauses Act. The words "unless the contrary is proved" in S. 27 refer both to the service and the time. Consequently when a notice has been posted properly addressed and pre-paid and in a registered cover, the presumption raised even as regards the service is not conclusive but is rebuttable. (*Mukerji and Bennet, JJ.*) DESOUZA, *In the matter of.* **54 All. 548 = I.R. 1932 All. 359 = 138 I.C. 70 = 1932 A.L.J. 409 = A.I.R. 1932 All. 374.**

——**S. 64 (1)**—*Assessee with Head office at Benares—Branches elsewhere—Return of income from—Power of Officer at Benares to call for.*

Where the assessee has branches at several places and his head office at Benares, the Officer at Benares has jurisdiction to call for a return of the income of all the branches, though situate out of Benares. 47 A. 631, Foll. (*Mukerji and Bennet, JJ.*) ABHEY RAM CHUNNI LAL, *In the matter of.* **6 I.R. (All.) 119 (2) = 145 I.C. 562 = 1933 A.L.J. 49 = A.I.R. 1933 All. 197.**

——**S. 66**—*Costs of reference.*

All fiscal enactments must be construed in favour of the subject and it cannot be said that if an assessee has not been properly taxed and if he succeeds on a reference in the High Court yet he must lose a sum of Rs. 100 simply because the Income-tax Officer has chosen to make an assessment. (*Mukerji and Bennet, JJ.*) RADHEY LAL BALMAKUND, *In re.* **52 All. 991 = I. R. 1931 All. 298 = 130 I.C. 634 = 1930 A.L.J. 1548 = A.I.R. 1931 All. 23.**

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——**S. 66**—*Documents produced in reference—Court-fee.*

As no mention of the Court-fee payable on a reference under S. 66, Income-tax Act, is to be found in Schs, I and II, Court-Fees Act. S. 4 of that Act does not apply to documents produced in a reference to the High Court under S. 66, Income-tax Act, and therefore no Court-fee is chargeable on such documents. (*Aston and Rupchand, A.J.Cs.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* KHEMCHAND RAMDAS **27 S.L.R. 243 = 6 I.R. (Sind) 28 = 145 I.C. 254 = A.I.R. 1933 Sind 148.**

——**S. 66**—*Duty of Commissioner.*

It is the duty of the Commissioner to state the facts and then to formulate the questions of law which arise upon them. (*Beaumont, C.J. and Rangnekar, J.*) BAI SAKINABOO, *In re* **I.R. 1932 Bom. 345 = 137 I.C. 903 = 34 Bom.L.R. 100 = A.I.R. 1932 Bom 116.**

——**S. 66**—*Duty of Commissioner—Numbering of references.*

It is desirable that the questions of law which the Commissioner refers to the High Court should, for convenience of reference, be assembled and numbered consecutively at the end of the stated case. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146 = 12 Pat 318 = I.R. 1933 P.C. 77 = 1933 M.W.N. 439 = 37 C.W.N. 598 = 37 L.W. 701 = 142 I.C. 437 = 57 C.L.J. 318 = 14 Pat.L.T. 341 = 1933 A.L.J. 527 = 35 Bom.L.R. 731 = A.I.R. 1933 P.C. 108 = 64 M.L.J. 612 (P.C.).**

——**S. 66**—*Finding of fact—Binding nature.*

A finding of fact by the Income-tax Commissioner is binding on the High Court as a Court of reference. (*Mukerji and Niamatullah, JJ.*) CHOKHEY LAL *v.* MURLIDHAR *v.* COMMISSIONER OF INCOME-TAX. **A. I.R. 1932 All. 471.**

——**S. 66**—*Finding of fact—Finding that some sales actually effected were omitted—Assessee recording sales in any way he liked, not according to any fixed system—Finding if passed on no evidence.*

In response to a notice from the Income-tax Officer, pursuant to S. 22 (2) of the Act, served upon the assessee with reference to the year of assessment he made a return which showed his total income received during the previous year at a certain figure. The officer refused to accept this return, and to test its accuracy called, under S. 23 (2), for evidence in its support. In response the assessee's business books were produced. From them it appeared that his sales of timber therein recorded for the year in question produced Rs. 4,37,339 only, there having been omitted all record of some further sales actually effected during the year for an aggregate purchase price of Rs. 90,618. The sales were recorded in his books as it suited the assessee best or as he liked.

Held, that it could not be said that there was not evidence before the Income-tax Officer upon which he found this item of Rs. 90,618 was excluded from the assessee's account out of the ordinary course and for reasons not to be justified. (*Lord Blanesburgh.*) FEROZ SHAH *v.* INCOME-TAX COMMISSIONER, PUNJAB. **60 I.A. 325 = 14 Lah. 682 = 6 I.R. (P.C.) 1 = 37 C.W.N. 1133 = 1933 M.W.N. 889 = 1933 A.L.J. 1258 = 144 I.C. 686 = 34 P.L.R. 1090 = A.I.R. 1933 P.C. 198 (2) = 65 M.L.J. 335 (P.C.).**

——**S. 66**—*Findings of fact—Interference by High Court.*

The High Court is precluded from looking at the findings of fact except in so far as it is necessary to see whether there was any evidence which could have supported those findings; and except in cases where an Income tax authority has proceeded on a wrong construction of the Act, an inference drawn by him from

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the evidence cannot be challenged merely and solely on the ground that a different conclusion would reasonably be reached from the same facts by the High Court. *American Thread Co.* v. *Joyce*, (1912) 106 L. T. 171 and *Farmer v. Cotton's Trustees*, (1915) A.C. 922, Rel. on. (*Aston and Rupchand, A.J.C's*) COMMISSIONER OF INCOME TAX *v.* HEMRAJ KANJI. **6 I.R. (Sind) 25 = 145 I.C. 202 = A.I.R. 1933 Sind 145.**

———**S. 66**—*Form of questions.*

Where the Commissioner of Income-tax referred to the High Court whether the Income tax Officer was right in disallowing set off.

Held, that the form of the question was open to exception in view of the fact that under S. 66 the Court has to decide questions of law only. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) BINJRAJ HUKUM CHAND, *In the matter of.* **58 Cal. 1446 = I R. 1931 Cal. 933 = 134 I.C. 933 = 35 C.W.N. 589 = 51 C.L J. 550 = A. I.R. 1931 Cal. 683 (S.B.).**

———**S. 66**—*Form of question—Modification by High Court—Permissibility.*

When a case has been stated before the High Court by the Commissioner, the High Court can look into the facts and re-settle the issues as it were and decide the issues of law that properly arose on the statement. The fact that the Commissioner misunderstood the petition before him and failed to formulate the only point of law that arose on the petition does not preclude the High Court from framing the issue of law that arose and to decide it. A.I.R. 1929 All. 819, Foll. (*Mukerjee and Bennet, JJ.*) GANGA SAGAR OF KHURJA. *In the matter of.* **53 All. 451 - I R. 1931 All 489 = 132 I.C. 329 = 1931 A L J. 345 = A.I.R. 1931 All. 417.**

[**Rel.** 28 S.L.R. 174 (179).]

———**S. 66**—*Jurisdiction of High Court—Nature of.*

The jurisdiction conferred upon the High Court by S. 66 of the Income-tax Act is a special jurisdiction and forms no part of the Court's Original or Appellate Jurisdiction. The High Court is not a Court of appeal in income-tax cases. Its functions are confined strictly to the disposal of references on points of law. (*Lort Williams and Jack. JJ.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* HUNGERFORD INVESTMENT TRUST, LTD. **62 Cal. 671 = 39 C.W.N. 1140.**

———**S. 66**—*Mandamus to Commissioner to state case—Case triable in Sind—Discretion of High Court.*

Where a case, if stated by the Commissioner of Income-tax, would have to be referred to the Court of the Judicial Commissioner in Sind for decision, it would not be right for the Bombay High Court in the exercise of its discretion to make an order under this section requiring the Commissioner to state a case to it, even if the Bombay Court has jurisdiction to do so by reason of the fact that the Commissioner of Income-tax Bombay, is a public officer resident in Bombay. (*Beaumont, C. J. and Blackwell, J.*) INDIAN LIFE ASSURANCE COMPANY *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **I.R. 1931 Bom 273 = 130 I.C. 593 = 33 Bom.L.R. 36 = A I.R. 1931 Bom. 150**

[**R.** 26 S L.R. 235 (238)]

———**S. 66**—"*Obiter dicta.*"

An assessee is not entitled to obtain a mere *obiter dicta*. (*Courtney-Terrell, C.J. Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat 187 = I.R. 1931 Pat 401 = 133 I.C. 753 = 12 Pat.L.T. 915 = A.I.R. 1931 Pat 306 (F.B.).**

———**S. 66**—*Point of law—Question whether debt is bad or irrecoverable.*

Whether a debt is wholly or partly and to what extent, bad or irrecoverable is in every case (and whether the debtor is a human being or a joint stock company or other entity) a question of fact, to be decided by the appropriate tribunal upon a consideration of the relevant facts of that case. (*Lord Russell of Killowen.*) DINSHAW *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **61 I.A. 318 = 58 Bom. 579 = 7 R P C. 21 = 1934 A.L. J. 797 = 40 L W. 253 = 36 Bom L R. 855 = 38 C.W.N. 1129 = 60 C.L J 63 = 150 I.C. 806 = 11 O W.N. 994 = 4 A.W R 162 = 36 P.L R. 223 = 1934 M.W.N. 852 = A I.R. 1934 P.C. 180 = 67 M.L.J. 213 (P.C.).**

———**S. 66**—*Proceeding in contemplation—Power of Commissioner to seek advice of High Court.*

Per *Dalip Singh, J.*—There is no section which empowers the Commissioner to ask the advice of the High Court as to the legality of any proceedings that he intends to take and it would not be proper for the High Court to express any opinion on the point because the point may never arise as the assessee may not ask for a reference on the point and secondly, because any decision or advice given by the Court on a question not directly arising before it cannot bind the Bench that subsequently hears the reference, if any, upon this question when it really does arise. (*Addison, Ag.C.J., Dalip Singh and Din Mohammad, JJ.*) MADAN MOHAN LAL *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **16 Lah. 937 - 8 R.L. 286 = 158 I.C. 718 = 38 P.L.R. 52 = A.I.R. 1935 Lah. 742 (F B.).**

———**S. 66**—Question of fact—Compliance with the terms of notice under S. 22 (4) *See* INCOME-TAX ACT, SS. 23 (4) AND 66. **A.I.R. 1932 Oudh 164.**

———**S. 66**—*Question of law arising from statement of Commissioner.*

It is open to the High Court when hearing the case on the statement of the Commissioner to decide what are the questions of law which arise. (*Niamatullah and Bennet, JJ.*) BIRADHMAL LODHA *v.* INCOME-TAX COMMISSIONER. **56 All. 504 = 153 I.C. 722 = 7 R. A. 574 = 1934 A.L.J 1213 = A.I.R 1934 All. 217.**

———**S. 66**—*Question of law—Bad debt—Finding as to.*

No doubt the question whether a debt is a bad debt and if so at which point of time it became a bad debt, is a question of fact to be decided in the event of a dispute by the appropriate tribunal. But the conclusions of the appropriate tribunal must be based on relevant and admissible evidence, and the question whether there is such evidence to support the conclusions arrived at by the Income-tax authorities is a question of law open to consideration by the High Court. (*Addison and Din Mohammad, JJ.*) HUKAM CHAND JAGADHAR MAL *v.* THE COMMISSIONER OF INCOME-TAX, PUNJAB, LAHORE. **160 I.C. 324 = 8 R.L. 527 = 37 P.L.R. 497 = A.I.R. 1935 Lah. 637.**

———**S. 66**—*Question of law—Facts amounting in law to refusal by Assistant Commissioner to perform obligations imposed by the Act.*

Before declining to adjudicate on the merits of an appeal on the ground that it is barred by the proviso to S. 30 (1) it is incumbent on the Assistant Commissioner to satisfy himself that the assessment was not merely ostensibly but genuinely under S. 23 (4). His decision on this point and his rejection of the appeal are a proceeding in connexion with an assessment and it is the duty of the Commissioner if required by the assessee to state the question of law whether or not the facts established before the Assistant Commissioner are such as to bring the case within the ambit of proviso to S. 30 (1). 10 Lah. 596, Foll. (*Courtney Terrell, C.J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R. 1931 Pat. 401 = 133**

INCOME-TAX ACT (1922), S. 66.

I.C. 753=12 Pat.L.T. 915=A.I.R. 1931 Pat. 306 (F.B.).

———**S. 66**—*Question of law—Method of accounting—Whether profits can be deduced therefrom.*

Whether the evidence tendered before the Income-tax authorities established that the method of accounting was such that the profits and gains of the business could not be properly deduced therefrom is a question of fact. (*Addison and Sale, JJ.*) NIKI DEVI *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **A.I.R. 1934 Lah. 977.**

———**S. 66**—*Question of law—Sufficiency of cause under S. 27.*

The decision of the Income-tax Officer under S. 27 of the Income tax Act that no sufficient cause for non submission of a return was shown by the assessee, is essentially a question of fact and not of law that can be referred to the High Court. (*Addison and Sale, JJ.*) NANNEH MAL JANKI DAS *v.* COMMISSIONER OF INCOME-TAX. **16 Lah. 462=156 I.C. 227=7 R.L. 882=36 P.L.R. 198=A.I.R. 1934 Lah. 983.**

———**S. 66**—*Question of law—Validity of assessment under S. 24 (4).*

The validity or otherwise of an assessment made by the Income-tax Officer under S. 23 (4) of the Income-tax Act, except where he made the assessment *mala fide* and arbitrarily in the sense that he acted recklessly or fraudulently, is not a question of law that can be referred to the High Court. (*Addison and Sale, JJ.*) NANNEH MAL JANKI DAS *v.* COMMISSIONER OF INCOME-TAX. **16 Lah 462=156 I.C. 227=7 R.L. 882=36 P.L.R 198=A.I.R. 1934 Lah. 983.**

———**S. 66**—*Question of law or fact—Question, if accounts indicate true income of assessee.*

Where the only question is whether the accounts of the assessee are maintained in such a way that they indicate the true income of the assessee, reference cannot be made to the High Court since it is a question not of law but of fact. (*Addison and Sale, JJ.*) DIWAN CHAND *v.* COMMISSIONER OF INCOME-TAX, PUNJAB **160 I.C. 144=8 R.L. 496=A.I.R. 1935 Lah 841.**

———**S. 66**—*Re-casting of issues—Power of High Court on reference.*

On a reference by the Commissioner of Income-tax it is open to the High Court to re-settle the issues arising in the case and to answer them. (*Mukerji and Bennet, JJ.*) BHAGWATI PRASAD, *In matter of.* **54 All. 496=I.R. 1932 All. 492=138 I.C. 682=1932 A.L.J. 389=A.I.R. 1932 All. 390.**

[**Rel.** 28 S.L.R. 174 (179).]

———**S. 66**—*Reference on direction of High Court—Propriety of point being raised—Whether can be questioned by the Bench disposing of the matter.*

Where before issuing notice the High Court decided whether a certain point had already been decided and eventually ordered a reference to be made,

Held, that it was not competent for the Bench finally disposing of the matter to consider whether the point should be allowed to be raised. (*Macnair, O.J.C. and Jackson, A.J.C.*) RAMAKRISHNA RAMNATH *v.* COMMISSIONER OF INCOME-TAX, C.P. **I.R. 1932 Nag. 95=139 I.C. 290=A.I.R. 1932 Nag. 65.**

———**S 66**—*Reference under—High Court whether can come to contrary findings of facts—Production of accounts for first time before High Court—Permissibility.*

It is not open to an assessee to ask the High Court upon a reference under S. 66 to examine his books of account and come to findings of fact contrary to those arrived at by the Commissioner in the case stated. Still less it is intended that the High Court should be a last resort for the production of books which were not produced before the Income-tax Officers. (*Rankin, C. J., C.C. Ghose and Buckland, JJ.*) BINJRAJ HUKUM CHAND. *In the matter of.* **58 Cal. 1146=I.R. 1931 Cal. 933=134 I.C. 933=54 C.L.J. 550=35 C.W.N. 589=A.I.R. 1931 Cal. 683 (S.B.)**

INCOME-TAX ACT (1922), S. 66 (1).

———**Ss. 66 and 66-A**—*Reference under—Judgment not appealed against—Finality of.*

Upon a reference of questions of law made by the Commissioner of Income-tax under S. 66 of the Act the prior judgment delivered by the High Court, if not appealed against is binding between the parties (*i.e.*, the Income tax authorities on the one hand and the assessee on the other) and such judgment, whether right or wrong, must govern the relation of the parties in the particular case. (*Sir George Lowndes.*) COMMISSIONER OF INCOME TAX, U.P. *v.* TEHRI GARWAL STATE. **61 I.A. 1=56 All. 1=3 A.W.R 97=11 O.W.N. 151=36 Bom. L.R. 257=59 C.L.J. 115=1931 M.W.N. 161=6 R.P.C. 56=38 C.W.N. 314=1934 A.L.J. 165=39 L.W. 278=147 I.C. 434=A.I.R. 1934 P.C. 34=66 M.L.J. 127 (P.C.)**

———**S. 66**—*Reference under—New point whether can be raised.*

The High Court will not consider any point of law that was not raised before the appellate officer or the Commissioner himself by the assessees. (*Mukerji and Bennet, JJ.*) RADHEY LAL BALMAKUND, *In re.* **52 All. 991=I.R. 1931 All. 298=130 I.C. 634=1930 A.L.J. 1548=A.I.R. 1931 All. 23.**

———**S. 66**—*Reference under—Practice—Counsel for assessee—Right of reply.*

The practice to be followed under references under S. 66 should be that the Counsel for the assessee should begin and should also have a right of reply. A.I.R. 1921 Cal. 40, Foll.

Quaere.—Whether the Counsel for the Crown as such should be afforded a general right of reply. *Marquis of Chandos* v. *Inland Revenue Commissioners*, (1851) 6 Ex. 464, Ref. (*Aston and Rupchand, A.J Cs.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* KHEMCHAND RAMDAS. **27 S.L.R. 243=6 I.R. (Sind) 28=145 I.C. 254=A.I.R. 1933 Sind 148.**

———**S. 66**—*Reference under—Rules of procedure—Chapter XXX-A, Original Side Rules of Calcutta High Court.*

The Income-tax Act does not lay down any rules of procedure for references under S. 66 of the Act, and the Calcutta High Court has made the rules contained in Chapter XXX A of its Original Side Rules. This it had jurisdiction to do in the absence of any specific provision in the Act, (*Lort Williams and Jack, JJ.*) COMMISSIONER OF INCOME TAX, BENGAL *v.* HUNGERFORD INVESTMENT TRUST, LTD. **62 Cal. 671=39 C.W.N. 1140.**

———**Ss. 66 and 33**—*Amending Act of* 1933—*Retrospective operation.*

Amendment to S. 66, Income-tax Act, by the Amending Act of 1933 giving a right to the assessee to reopen an order of the Income-tax Commissioner under S. 33, on a reference to the High Court is not a mere matter of procedure and cannot be construed to give a restrospective right to an assessee to claim a reference from an order passed before the amendment came in force. (*Addisod and Sale, JJ.*) ATA-UR RAHMAN *v.* INCOME-TAX COMMISSIONER, LAHORE. **A.I.R. 1934 Lah. 1013 (2).**

———**S. 66 (1)**—*Costs of reference—Deposit for reference, included in.*

INCOME-TAX ACT (1922), S. 66 (1).

Where the Court has awarded costs to an assessee as against the Commissioner on a reference to the High Court, the amount of Rs. 100 deposited by the assessee as fee for reference is part of such costs and must be deemed to be included in the order. 52 All. 991, Foll. (*Mukerji and Niamatullah, JJ.*) LAHMAN DAS BABU RAM *v.* COMMISSIONER OF INCOME TAX, U P. **148 I.C. 325=6 R.A. 692=1933 A.L.J. 942=A.I.R. 1933 All. 853.**

——**S. 66 (1)**—*Grounds of reference—Whether binding on High Court.*

The grounds mentioned in the opinion of the Commissioner are not necessarily binding on the High Court and the Court is entitled to go through the whole record for a proper determination of the questions raised. (*Beaumont, C J. and Rangnekar, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* NATIONAL MUTUAL ASSOCIATION OF AUSTALASIA, LTD. **57 Bom.519=147 I C.370=6 R.B. 199=35 Bom. L.R. 896=A.I. R. 1933 Bom. 427.**

——**S. 66 (1)**—*No question of law—Assessment in previous year—Question as to escaping assessment.*

When an assessment has already been made in respect of the previous accounting year under S. 34, the question whether all income which had accrued and had escaped assessment had been assessed to tax or not depends upon the investigation of facts of the case. (*C. C. Ghose, A C.J., Pearson and Mukerji, JJ.*) BALDEODAS RAMESWAR, *In the matter of.* **135 I.C. 280=I. R. 1932 Cal. 88=A.I.R. 1931 Cal. 761 (S.B.).**

——**Ss. 66 (1) and 33**—*Order arising under S. 33—No obligation on Commissioner to state case.*

There is no express obligation upon the Commissioner to state a case on an order arising under S. 33; nor has the High Court power to order him to do so under S. 45, Specific Relief Act. The Commissioner has a discretionary power vested in him. 7 Rang. 581, Foll.; 49 M. 725 (S.B.), Diss. From. (*Beaumont, C.J. and Blackwell, J.*) TATA HYDRO ELECTRIC AGENCY, LTD. *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **58 Bom. 361=150 I.C. 52=6 R.B. 420=36 Bom.L.R. 23=A. I.R. 1934 Bom. 62.**

——**S. 66 (1)**—*Power of Commissioner to refer additional questions.*

In making a reference to the High Court, the Commissioner has power to refer additional questions other than the matter formulated in the question sent down to him. (*Addison, Ag. C.J. and Din Mohammad, J.*) BELI RAM & BROS. *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **160 I.C. 517=8 R.L. 556=A.I.R. 1935 Lah. 681.**

——**S. 66 (1)**—*Question of law—Modes of assessment—Adoption of one mode—Discretion of Income-tax Officer—Interference.*

Where, given a certain state of facts the law enjoins that a computation shall be made upon some other basis and in some other method both those factors being entirely within the discretion of the Income-tax Officer, the adoption of a particular basis and a certain method cannot give rise to any question of law. (*Bhide and Tapp, JJ.*) ISHAR DAS *v.* COMMISSIONER OF INCOME-TAX. **I.R 1931 Lah. 619=132 I.C. 523=32 P.L R. 344=A.I.R. 1931 Lah. 432.**

——**S. 66 (1)**—*Reference by Commissioner suo motu—Right to begin.*

In a reference under S. 66 (1) of the Income-tax Act by the Commissioner *suo motu*, the Advocate General or Counsel on behalf of the Commissioner has the right to begin. (*Beaumont, C. J. and Sen, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* DARABSHA NASARWANJI. **159 I.C. 41=8 R.B. 161=37 Bom.L. R. 112=A.I.R. 1935 Bom. 167.**

INCOME-TAX ACT (1922), S. 66 (2) and (3).

——**S. 66 (1)**—*Reference under—Duty of Commissioner to state specific point of law.*

It is the duty of the Commissioner, in a case stated under S. 66 of the Income-tax Act, to set out specifically the particular point of law upon which a determination from the High Court is sought to be obtained. The Court would not take upon itself the burden of investigating the facts for the purpose of finding out whether under any section of the Act a point of law could be extracted therefrom, and then determining it. (*Page, C. J., Mya Bu and Mackney, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* V.S.A.R. FIRM. **12 Rang. 633=156 I.C. 334=7 R.R. 400 (1)=A.I.R. 1935 Rang. 58 (1) (S B.).**

——**S. 66 (2)**—*Annual value of property—Estimate—Increase of.*

The question whether the Income tax Officer is justified in increasing the estimate of the annual value of the property from Rs. 1,200 to Rs. 3,000 merely on a finding as to the cost of erection of the buildings is one of law. (*Harrison and Dalip Singh, JJ.*) HAVELI SHAH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1932 Lah. 435 (1)=138 I.C. 212=33 P.L R. 11=A.I.R. 1932 Lah. 187.**

——**S. 66 (2)**—*Applicability—Appeal filed beyond time fixed under S. 30 (2)—Rejection as sufficient cause made out for delay—Effect of—Order for statement of case—If can be made.*

Where an appeal is presented to the Assistant Commissioner beyond the period of limitation fixed by S. 30 (2) of the Income tax Act, and the latter refuses to entertain the appeal, not being satisfied that there was sufficient cause for delay in presentation of the appeal, the appeal does not proceed beyond the stage referred to in S. 30 (2); no action can therefore be taken under S. 66 (2) of the Income tax Act and the High Court cannot direct the Commissioner to state a case. (*Niamatullah and Bennet, JJ.*) SHIVNATH PRASAD *v.* COMMISSIONER OF INCOME-TAX. CENTRAL AND UNITED PROVINCES **57 All. 971=155 I.C. 124=7 R.A. 898=1935 A.L.J. 845=1935 A.W.R. 742=A.I.R. 1935 All. 572.**

——**S. 66 (2)**—*Applicability—Order refusing refund under S. 48—Refusal by Commissioner to interfere under S. 33—Application under S. 66 (2)—Maintainability.*

Where the Commissioner of Income tax, acting under S. 33 of the Income tax Act, refuses to interfere with the Income-tax Officer's order refusing a refund under S. 48, the Commissioner's order is not prejudicial to the party, because it does no more than leave him in the position created by the order of the Income-tax Officer, His position has already been prejudiced by the Income-tax Officer's order of refusal. An application to the Commissioner under S.66 (2) is not therefore competent, because that section only applies when the order under S. 33 itself alters the position of the assessee or applicant to his prejudice. (*Beasley, C.J., Ramesam and King, JJ.*) VENKATACHALAM CHETTIAR *v.* COMMISSIONER OF INCOME TAX, MADRAS. **58 Mad. 367=156 I.C. 64=7 R.M. 634=1935 M.W.N. 576=41 L.W. 329=A.I.R. 1935 Mad. 379=68 M.L.J. 227 (F.B.).**

——**S. 66 (2) and (3)**—*Applicability—Reference—Procedure—Duty of assessee—Duty of Income tax Commissioner and of Court.*

S. 66 (2) of the Income-tax Act does not require the assessee to formulate precise questions of law. What he has to do within the prescribed time limit is to re-

INCOME-TAX ACT (1922), S. 66 (2).

quire the Commissioner to refer to the High Court any question of law arising out of the order or decision of the Assistant Commissioner; and then the Commissioner has, within sixty days, to draw up a statement of the case and refer it to the High Court, with his own opinion thereon. Where the Commissioner refuses to state a case under S. 66 (2), on the ground that no point of law arises, the Court can, under S. 66 (3), require the Commissioner to state "the case" that is, the case which he ought to have stated under Sub-S. (2) and to refer it to the Court, if it is not satisfied with the correctness of the Commissioner's view of the case. If the Court thinks that questions of law arise, it should indicate to the Commissioner, what those questions are, though the actual framing of the questions rests with the Commissioner. But the Court under S. 66 (3) is no more limited than the Commissioner under S. 66 (2) to the precise questions formulated by the assessee. (*Beaumont, C.J. and Rangnekar, J.*) VADILAL LALLUBHAI *v.* COMMISSIONER OF INCOME TAX, BOMBAY. **59 Bom. 405 = 156 I.C. 1097 = 8 R.B. 97 = 37 Bom L.R. 89 = A.I.R. 1935 Bom. 170.**

———**S. 66 (2)**—*Application under—Assistant Commissioner hearing appeal from assessment, officiating as Commissioner—Power to dispose of.*

There is nothing in the Act to prevent the officiating Commissioner who as the Assistant Commissioner had heard the appeal from assessment from disposing of the application under S. 66. (*Addison and Sale, JJ.*) NIKI DEVI *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **A.I.R. 1934 Lah. 977.**

———**S. 66 (2)**—*Assessment under S. 23 (4)—Order refusing to cancel—Same upheld by Assistant Commissioner—Reference to High Court.*

When there is ample evidence upon which the Income-tax Officer can find that there was no sufficient cause preventing the assessee from producing account books requisitioned under S. 22 (2) and it appears upon that ground he had refused to cancel the assessment made under S 23 (4) and his order is upheld by the Assistant Commissioner on appeal for the same reason, there is no question of law arising under the circumstances for the purposes of S. 66 (2). (*Page, C.J., Das and Maung Ba, JJ.*) COMMISSIONER OF INCOME TAX, BURMA *v.* A.K.R.P.L. A. CHETTYAR FIRM. **9 Rang. 21 = I.R. 1931 Rang. 189 = 132 I.C. 557 = A.I.R. 1931 Rang. 97.**

[R. 9 R. 28 (300) (F.B.).]

———**S. 66 (2)**—*Case stated—Mode of formulating questions.*

In stating a case to the Hight Court, the Commissioner should not frame the questions in general terms. Also he should state only such questions as are intended to be answered by the High Court. In such cases if the Commissioner thinks that there is a point of law proper to be referred, he is not bound to refuse merely because the assessee has not framed it properly. He can frame it properly and then refer it. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) KRISHNA KUMAR AND MAHENDRA KUMAR GHOSE. *In the matter of* **58 Cal 906 = I.R. 1931 Cal 648 = 133 I.C. 184 = 35 C.W.N. 312 = A.I.R. 1931 Cal 543 (S.B.).**

———**S. 66 (2)**—*Finding of fact—Finality—Question of reasonableness of notice.*

It is for the Commissioner in stating a case to find facts which must be accepted by the High Court. Whether the time granted by the Income-tax Officer under a notice as required by S 23 (2) is reasonable or not is a question of fact, (*Rankin, C.J., Pearson and S. K. Ghose, JJ.*) SADARAM PURANCHAND. *In the matter of.* **134 I.C. 1275 = I.R. 1932 Cal. 59 = A.I.R. 1931 Cal. 729 (S.B.).**

INCOME-TAX ACT (1922) S. 66 (2).

———**S. 66 (2)**—*Order in appeal—Reference.*

Where the Assistant Commissioner hears the appeal of the assessee and passes an appellate under S. 31 dismissing the appeal, the requirements of S. 66 (2) are satisfied, whether the Assistant Commissioner has jurisdiction or not. (*Aston and Rupchand, A. J. Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **28 S.L.R. 174 = 149 I.C. 1204 = 6 R.S. 255 = A.I.R. 1934 Sind 46.**

———**S. 66 (2)**—*Order for costs—Fees of Rs. 100 paid whether can be allowed.*

The fee of Rs. 100 paid along with a reference under S. 66 (2) forms part of the costs of and incidental to the reference and may be allowed to the assessee in a proper case. (*Page, C. J., Das and Mya Bu. JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* MILNE. **11 Rang. 454 = 148 I.C. 98 = 6 R.R. 197 = A.I.R. 1934 Rang. 4 (S B.).**

———**S. 66 (2)**—*Order refusing mandamus—Nature.*

A decision to the effect that a mandamus should not be issued on an application under S. 66 (3) is a final judgment. (*Broadway, Dalip Singh and Tapp, JJ.*) FEROZE SHAH KAKA KHEL *v.* INCOME-TAX COMMISSIONER, PUNJAB. **12 Lah. 166 = I.R. 1931 Lah. 672 = 132 I.C. 704 = 32 P.L.R. 234 = A.I.R. 1931 Lah. 138 (F B.).**

———**Ss. 66 (2) and 33**—Proceedings before Assistant Commissioner—Validity of—Enquiry into—Ultimate authority on the question whether the proceedings before Assistant Commissioner were *ultra vires* or not is the High Court and not the Commissioner. *See* INCOME-TAX ACT, S. 33. **A.I.R. 1933 Sind 158.**

———**S. 66 (2)**—*Question of law—Arithmetical exclusion from amount assessable—Decision by income tax authorities—Reference.*

The question raised was whether a certain amount ought to have been left out of account, as in respect of it no profit accrued to the assessee. The income-tax authorities considered the question whether the said amount should, as an arithmetical matter, be excluded.

Held, that the point raised did not involve a question of law so as to form the subject-matter of reference to the High Court. (*Raza and Smith, JJ.*) ASGHAR ALI MAHOMED ALI *v.* COMMISSIONER OF INCOME-TAX, U. P. **I.R. 1932 Oudh 123 = 136 I.C. 331 = 8 O.W.N. 1366 = A.I.R. 1932 Oudh 10.**

———**S. 66 (2)**—*Question of law—Income-tax Officer estimating income under S. 13 proviso.*

Where the Income-tax Officer finds as a fact on the evidence that complete accounts has not been produced before him and proceeds to estimate the income under the proviso to S. 13 of the Income-tax Act, no question of law arises. (*Addison and Sale, JJ.*) RULIA MAL RAUNAK RAM *v.* COMMISSIONER OF INCOME-TAX. **16 Lah. 416 = 157 I.C. 911 = 8 R.L. 160 = 37 P.L.R. 513 = A.I.R. 1935 Lah. 539.**

———**S. 66 (2)**—*Questions of law—Questions under Ss. 43, 30 (1) and 23 (4).*

The question whether a person is rightly declared an agent under S. 43 and the further question, whether when an assessment is made under S. 23 (4), the proviso to S. 30 (1) bars an appeal, though the appeal is not against the assessment but against the order of the Income-tax Officer declaring the assessee to be liable are questions of law and the reference under S. 66 (2) to the High Court on such questions is competent. (*Staples, A.J.C.*) GOKULDAS CHUNNILAL *v.* COMMISSIONER OF INCOME-TAX. **28 N.L.R. 194 = I.R. 1932 Nag. 155 = 140 I.C. 490 = A.I.R 1932 Nag. 152.**

INCOME-TAX ACT (1922), S. 66 (2).

———**S. 66 (2)**—*Question of law not raised in appeal —Right to demand reference.*

A question of law which has not been raised in the appeal to the Assistant Commissioner does not arise out of the order under S. 31 of the Income-tax Act. The assessee has therefore no right to demand that that question should be referred by the Commissioner. (*Addison and Sale, JJ.*) JAMNA DHAR POTDAR & CO. *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **155 I.C. 526—7 R.L. 728=36 P.L.R. 490=A.I.R. 1935 Lah. 201.**

———**Ss 66 (2) and 27**—*Question of law—Sufficiency of cause for setting aside* ex parte *assessment.*

Sufficiency of cause for having *ex parte* assessment reopened under S. 27 of the Income-tax Act is certainly a question of fact dependent on the circumstances of each case. But since is determination essentially depends upon the exercise of judicial discretion, the question whether discretion has or has not been exercised in the sound and reasonable manner in reaching the conclusion invariably involves a question of law. A.I.R 1930 Rang. 33, A.I.R. 1930 Rang. 78, Rel. on. (*Grille, J.C. and Subhdar, A.J.C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L.R 32=153 I.C. 7=7 R.N. 111=A.I.R. 1934 Nag. 183 (2).**

———**S. 66 (2)**—*Reference—Competency of—No question of law involved.*

Where it was admitted by the assessees that certain sums of money had been received by them as interest from third parties and it was pleaded by them that although these investments stood in their names, yet the money was the money of their sister and had been invested on her behalf, the onus lay on them to prove their plea and it was open to the Income tax Officer as a matter of law to hold that the evidence produced by the assessees was insufficient to discharge the onus of proof which lay on them. It is also open to the Income-tax Officer to hold that a certain agreement filed by the assessees had not been proved to be a genuine transaction and therefore he does not violate any rule of law in rejecting it. Thus no question of law having been raised, the reference is incompetent. (*Mukerji and Bennet, JJ.*) NARAIN DAS MOHAN LAL, *In re.* **I R. 1933 All. 389=144 I.C. 144=A.I.R. 1933 All. 231.**

———**S. 66 (2)**—*Reference to High Court—Reasons for reference and questions on reference to be kept separate—Desirability of separate documents.*

Where the assessee asks the Commissioner of the Income-tax to refer certain points of law to the High Court it is correct and proper that the Commissioner should write a judgment, so to say, giving his reasons for his conclusion. But if part of the conclusion to which he comes is that it is right to refer a certain question to the High Court, then he ought in strictness to make out another document, namely, a statement of the case upon that point for the opinion of the High Court. The order that he makes will no doubt give reasons why he will state a case on certain questions and refuses to state a case on other questions. But when he comes to state a case he has got past that stage, and is only concerned with the questions which he intends to refer to the High Court and the facts bearing thereon. The two things might with great advantage be separate documents (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) KRISHNA KUMAR AND MAHENDRA KUMAR GHOSE, *In the matter of* **58 Cal. 906=I.R. 1931 Cal. 648=133 I.C. 184=35 C.W.N. 312=A.I.R. 1931 Cal. 543 (S.B.).**

INCOME-TAX ACT (1922), S. 66 (2).

———**S. 66 (2)**—*Reference—Question of exemption under S. 14 (1).*

In the assessee did not, during the assessment, by the Income-tax Officer or in his appeal from that assessment, raise the issues necessary for the determination of the question of fact which arises under S. 14 (1), the question cannot be raised in reference as it does not arise out of the appellate orde. (*Courtney-Terrell, C. J. and Agarwala, J.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* MAHARANI LAKSHMIBATI SAHEBA. **14 Pat. 313=154 I C 866=7 R.P. 497=16 Pat L.T. 171=A.I.R. 1935 Pat. 8.**

———**S. 66 (2)**—*Reference—Question of offence under S. 52.*

The question whether after the filing of a revised return, the assessee can be deemed guilty under S. 52 cannot be referred to High Court. Reference can be made to the High Court of any question arising out of an order under S. 52 passed by an Assistant Commissioner, whether such order is contained in the order in appeal or whether it it is contained in a separate proceeding. So an order for the prosecution of an assessee under S. 52 cannot form the basis of reference to the High Court. (*Mukerji and Bennet, JJ.*) NARAIN DAS MOHAN LAL, *In re.* **I.R 1933 All. 389=144 I.C. 144=A.I.R. 1933 All. 231.**

———**S. 66 (2)**—*Reference—Right of assessee—Point not raised—Effect.*

The only right conferred upon an assessee to claim a reference to the High Court under S. 66 Cl. (2) of the Act is in respect of questions of law arising from an order passed under S. 31 or S. 32 of the Act or from a decision by a Board of Trade under S. 33 (*a*) of the Act. Where the Assistant Commissoner of income-tax has no occasion to deal with or apply his mind to a point of law, the point not having been raised before him, such point of law cannot be said to arise out of his order and the assessee can claim no reference in respect of that point 22 Q. B. D. 484, Ref (Case-law discussed) (*Rupchand and Mehta A.J.Cs.*) COMMISSIONER OF INCOME TAX *v.* SIND LIGHT RY. CO., LTD. **I.R. 1932 Sind 90—138 I.C. 673=27 S.L.R. 47=A.I.R. 1932 Sind 189.**

———**S. 66 (2)**—*Reference under—Question whether person is member of a joint Hindu family—If one of fact—Inference wrongly drawn by Commissioner—Power of High Court.*

The question whether a person is or is not a member of a joint undivided family is one of fact, but when the tribunal of facts states the circumstances on which it relies for its finding, and those circumstances do not in law lead to the conclusion arrived at by the tribunal of fact, it is open to a Court of Law to draw the proper inference from the circumstances stated. (*Courtney-Terrell, C. J., Khaja Mohammad Noor and Agarwala, JJ.*) VISHESWAR SINGH *v.* COMMISSIONER OF INCOME-TAX, B. & O. **14 Pat. 785=7 R P. 685=156 I C 116=16 Pat.L.T. 351=A I.R. 1935 Pat. 342 (S.B.).**

———**S. 66 (2)**—*Rules framed by Lahore High Court, Rr. 11 and 12—Power of Court to direct Commissioner to make modified statement of case.*

Where the assessee had ample notice that a reference had been made to the High Court by the Commissioner in the form originally proposed by him and he has made no application in writing, to the High Court to decide the question under R 12, it is not open to the High Court on an oral application made at the end of arguments in reference, to direct the Commissioner to make a modified statement of the case by Commissioner. (*Jai Lal and Skemp, JJ.*) SONA RAM *v.* INCOME-TAX.

INCOME-TAX ACT (1922), S. 66 (2),

COMMISSIONER. **161 I.C. 491 = 8 R.L. 763 = A.I.R. 1935 Lah. 727.**

———**S. 66 (2)**—*Rules framed by Lahore High Court, R. 12—Commissioner not modifying reference—Duty to notify the assessee.*

It is the duty of the Commissioner on receipt of objections by the assessee to notify to the latter, if he does not modify the reference, that he is not prepared to accede to his prayer to modify the proposed reference to the High Court. (*Jai Lal and Skemp, JJ.*) SONA RAM *v.* INCOME-TAX COMMISSIONER. **161 I.C. 491 = 8 R.L. 763 = A.I.R. 1935 Lah 727.**

———**S. 66 (2)**—*Rules for making application under Rr. 11 and 12 (Punjab)—Duty of Commissioner.*

Under the rules regarding applications under S. 66 (2), it is the duty of the Commissioner to settle the case in its final form only if no suggestion, addition or amendment is received by him within 14 days; but if a question does arise on the statement of the case, it is clearly his duty to decide whether he and the assessee are able or unable to agree. (*Jai Lal and Monroe, JJ.*) KANGRA VALLEY STATE CO., LTD. *In the matter of.* **6 I R (Lah.) 252 (1) = 146 I.C. 599 = A.I R. 1933 Lah. 859 (1).**

———**S.** 66 (2)—Scope and construction—Order under S. 31—What amounts to—Dismissal of appeal as barred by limitation— If one confirming assessment—Power to require statement of case. *See* INCOME-TAX ACT, SS. 31 AND 66 (2). **155 I C. 124 = A I.R. 1935 All. 572.**

———**S. 66 (2)**—*Scope—Order under S. 31 rejecting appeal—Maintainability of appeal—Reference to High Court.*

S. 66 (2) does not say expressly that the remedy provided by that section will not be available where the assessment is not appealable; all that it requires is that there should be an order or decision under S. 31 or S 32. Under S. 31 the Assistant Commissioner has the power to allow the appeal as well as to reject and the mere fact, that he rejects it on the ground that in his opinion no appeal lies, will be no ground for treating the order as one not under S. 31. In such cases the assessee can take to the High Court at least the limited question as to whether an appeal did or did not lie in the circumstances of the case. 49 Mad. 831. Ref. (*Courtney-Terrell, C. J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **11 Pat. 187 = I.R 1931 Pat. 401 = 133 I.C. 753 = 12 Pat.L.T. 915 = A.I.R. 1931 Pat 306 (F B.).**

———**S. 66 (2)**—*Scope—Question not arising out of appellate order—Appealability.*

S. 66 (2) provides for a reference to the High Court of any question of law arising out of an order under S. 31 or S. 32, that is, an appellate order. Where the questions as to validity of notice or propriety of assessment do not arise out of an appellate order, there cannot be a reference. (*Page, C.J., Das and Maung Ba, JJ.*) A.K.R.P.L.A. CHETTYAR FIRM *v.* THE COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 25 = I R. 1931 Rang. 206 = 132 I.C. 718 = A.I.R. 1931 Rang. 98.**

———**S. 66 (2)**—*"Served with notice of an order"—Meaning of.*

The words "served with notice of an order" in S. 66 (2) do not mean "served with a written notice" or "served with a copy of the detailed order giving reasons". It is sufficient if the applicant or his representative is given notice of the order in Court. Where the order was announced to the applicant's mukhtar-i an who was present in Court, notice to him is as good as notice to the applicant. (*Jai Lal and Skemp, J.*)

INCOME-TAX ACT (1922), S. 66 (2) and (3).

HARKISHEN DAS *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **158 I C. 382 (1) = A.I.R. 1935 Lah. 959.**

———**S. 66 (2)**—*Supplementary question of law—Time for.*

The refusal of the Income-tax Commissioner to make a reference of a supplementary question of law submitted to him one month after the Assistant Commissioner passed his orders, as being barred by time, is justified. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) RAGHUNATHDAS SEWGAL *v.* COMMISSIONER OF INCOME-TAX, BENGAL. **I.R. 1932 Cal. 644 = 139 I. C. 599 = A I.R. 1932 Cal 411 (S.B).**

———**S 66 (2) and (3)**—Assessment to the best of judgment under S. 23 (4)—Power of High Court to require Commissioner to state a case—Whether the reference involves an error of law cannot be subject of reference to the High Court. *See* INCOME-TAX ACT, SS. 23 (4), 27, AND 66 (2) AND (3). **56 All. 933 = A.I R. 1934 All 559.**

———**S, 66 (2) and (3)**—*Case not submitted to Commissioner under sub S. (2)—Jurisdiction of High Court to order him to refer.*

The High Court has no jurisdiction, on an application by an assessee, under S. 66 (3), to order the Commissioner of Income-tax to state a case and refer any question of law for consideration by the High Court, which the assessee has not duly required the Commissioner to refer under S. 66 (2) (Case-law referred.) (*Page, C.J., Das and Sen, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* C.P.L.E. CHETTYAR CONCERN. **12 Rang. 322 = 6 R R. 391 = 150 I.C. 408 = A I R 1934 Rang 132 (S B.).**

[**F.** 1934 L. 977 (971)]

———**S. 66 (2) and (3)**—*Mandamus on Income tax Commissioner.*

The assessee has no right to apply to the Court for an order in the nature of a mandamus under Specific Relief Act requiring the Commissioner to state a case and refer a question of law because a "specific and adequate legal remedy" in that behalf is available to the assessee under S. 66 (2) and (3), Income-tax Act. (Case-law discussed.) (*Page, C.J., Das and Sen, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* C.P L.E. CHETTYAR CONCERN. **12 Rang. 322 = 6 R R. 391 = 150 I.C. 408 = A.I R. 1934 Rang 132 (S B.).**

[**R.** 13 R. 729 (736); 62 C. 1011 (1023).]

———**Ss 66 (2), (3), and 23 (4)**—*Question of law—*Ex parte *assessment not made "to the best of his judgment."*

A point of law would invariably be involved in an *ex parte* assessment which is not shown to have been made to the best of his judgment by the Income-tax Officer, so as to make it the subject of a reference to and decision by the High Court under S. 66 (2) or (3). (*Grille, J.C. and Subhedar, A.J.C.*) COMMISSIONER OF INCOME-TAX, CENTRAL AND UNITED PROVINCES *v.* LAXMINARAIN BADRIDAS AGARWAL. **31 N.L R. 32 = 153 I C. 7 = 7 R.N. 111 = A I R 1934 Nag 183 (2).**

———**S. 66 (2) and (3)**—*Scope—Reference—Formulation of question—Duty of assessee—Power of High Court.*

The proper course for an assessee when he desires the Commissioner to refer a question of law to the High Court is to formulate, under S. 66 (2) of the Income-tax Act, the question which he desires to have so referred. Under S. 66 (3), the High Court has power to direct the Commissioner to refer some question other than that which the applicant has formulated, although generally, the High Court should be slow to go outside the question which the party himself asked the Commissioner to state. (*Beaumont, C. J. and Mirza, J.*)

INCOME-TAX ACT (1922), S. 66 (3).

NARAYAN ATMARAM *v.* COMMISSIONER OF INCOME TAX, BOMBAY. **152 I.C. 972=36 Bom.L.R. 818=A.I.R. 1934 Bom. 378.**

[F. 37 Bom.L.R. 89 (91).]

———**S. 66 (3)**—*Assessee in Sind—Relief under S. 45, Specific Relief Act, not open—Amendment suggested.*

An assessee who is assessed to Income-tax by an Income-tax Officer in Sind, unlike an assessee who is assessed by an officer amenable to the jurisdiction of High Court has no remedy under S. 45, Specific Relief Act, even though he cannot obtain relief under S. 66 (3) of the Income-tax Act. It is, however, for the Legislaturetoremedy this anomaly by extending the provisions of S. 45, Specific Relief Act, or by amending S. 66 (3) of the Income-tax Act, so as to give him a right of reference where Commissioner refuses to state a case on fanciful and unfounded grounds. (*Milne, J.C. and Rupchand, A.J.C.*) FIRM OF KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **26 S.L.R. 235=I.R. 1932 Sind 58=136 I.C. 762=A.I.R. 1932 Sind 1**

———**S. 66 (3)**—*Assessment under S. 23 (4)—Order under S. 31—Ground for reference.*

The question whether an assessment made by the Income tax Officer under S. 23 (4) is valid or not is not a question of law that arises or can arise out of an order of the Assistant Commissioner passed under S. 31, and such a question cannot therefore be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case. 6 Rang 21; 8 Rang. 203; 8 Rang 209; 7 Rang. 669, Overr. (*Page, C.J., Das, Maung Ba, Mya Bu and Dunkley JJ*) ABDUL BARI CHOWDHURY *v.* COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 281=I.R. 1931 Rang. 225=133 I.C. 81=A.I.R. 1931 Rang 194 (F.B.).**

[F. 56 A. 933 (941, 944, 953); 36 P.L.R. 198 (199); 16 L. 462 (464).]

[**Not Foll.** 31 N.L.R. 32 (47).]

———**S. 66 (3)**—*Commissioner directed to state case—Validity of order cannot be considered by Bench.*

It is not open to a Bench to consider whether an order under S. 66 (3) directing the Commissioner to state a case was valid. (*Aston and Rupchand, A.J.Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME TAX. **28 S.L.R. 174=149 I.C. 1204=6 R.S. 255=A.I.R. 1934 Sind 46.**

———**S. 66 (3)**—*Copies of orders to be filed—Time taken for obtaining copies—Exclusion—Permissibility.*

Where an application is made under S. 66 (3), the rules provide that there should be copies of the orders of the Income tax Officer, the Assistant Commissioner of Income tax and the Commissioner of Income tax disposing of the case. But the mere fact that these orders are required does not connote that the applicant has a right to extend the period of limitation by the period required for obtaining orders other than those of the Commissioner of Income-tax under reference. (*Mukerji and Bennet, JJ.*) GULAB CHAND CHOTEY LAL, *In re.* **53 All. 684=I.R. 1931 All. 733=133 I.C. 621=1931 A.L.J. 593=A.I.R. 1931 All. 673.**

———**S. 66 (3)**—*Finding of fact.*

The High Court cannot enter into a finding of fact arrived at by the Income tax Officer. (*Jai Lal and Dalip Singh, JJ.*) PIYARE LAL *v.* COMMISSIONER OF INCOME TAX. **147 I.C. 862=6 R.L. 458 (1)=A.I.R. 1933 Lah. 827.**

———**S. 66 (3)**—*Fit case—Question whether Income-tax Officer is justified in proceeding under proviso to S. 13 and not under part 1, S. 13.*

Where a question of law is involved, *viz.*, whether the Income tax Officer was justified in proceeding under the proviso to S. 13 and not under the first part of that section, it is a fit case in which the Commissioner should

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be directed to transfer the question to the High Court. (*Jai Lal and Dalip Singh, JJ.*) PIONER SPORTS LTD, SIALKOT *v.* COMMISSIONER OF INCOME-TAX, LAHORE. **6 I.R. (Lah.) 146 (2)=145 I.C. 944 (1)=34 P.L.R. 900=A.I.R. 1933 Lah. 832.**

———**S. 66 (3)**—*Jurisdiction of High Court—Extent of.*

The High Court has no jurisdiction under S. 66 (3) to order the Commissioner of Income-tax to state a case and refer a question for the consideration of the High Court, which the assessee has not duly required the Commissioner of refer under S. 66 (2). (*Addison and Sale, JJ.*) NIKI DEVI *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **A.I.R. 1934 Lah. 977.**

———**S. 66 (3)**—*Matter in issue decided with reference to previous year—Assessee whether can reagitate—Reference.*

Where the matter in issue has already been decided in connection with a previous year's assessment, the assessee cannot reagitate the matter before the Income-tax authorities or move the High Court for a reference, when the assessment for a subsequent year is in question. (*Findlay, J.C.*) MALAK *v.* COMMISSIONER OF INCOME-TAX, C.P. **I.R. 1932 Nag. 100=139 I.C. 295=A.I.R. 1932 Nag. 68.**

———**S. 66 (3)**—*No question of law—Determination of market value.*

The question whether the goods still in transit can be valued at market value prevalent at the place of destination does not involve any point of law. (*Broadway and Jhonstone, JJ.*) BALAK RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **135 I.C. 597=I.R. 1932 Lah. 133=33 P.L.R. 526=A.I.R. 1931 Lah. 759.**

———**S. 66 (3)**—*No question of law—Procedure.*

The employment of a correct procedure of assessment does not raise a question of law. (*Broadway and Johnstone, JJ.*) BALAK RAM *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **135 I.C. 597=I.R. 1932 Lah. 133=33 P.L.R. 526=A.I.R. 1931 Lah. 759.**

———**S. 66 (3) and 66A (2)**—*Order of the High Court declining to call upon Commissioner to state a case—Appeal to Privy Council—If lies.*

An order of the High Court dismissing an application under S. 66 (3), Income tax Act, and refusing to require the Commissioner to state a case and refer it is not a judgment "on a reference" within the meaning of S. 66-A (2) so as to allow a right of appeal to His Majesty in Council. (*Sulaiman, C.J. and Baipai, J.*) GURMUKH RAI *v.* SECRETARY OF STATE. **57 All. 306=7 R.A. 193=151 I.C. 604=4 A.W.R. 716=1934 A.L.J. 876=A.I.R. 1934 All. 974.**

———**S. 66 (3)**—*Order refusing mandamus—Right of further appeal to Privy Council.*

Where, in a case in which the subject-matter involved in Rs. 10,000 or more in value, the High Court refuses to issue a mandamus under S. 66 (3) of the Income-tax Act, the applicant can appeal to the Judicial Committee as of right. (*Broadway, Dalip Singh and Tapp, JJ.*) FEROZE SHAH KAKA KHEL *v.* INCOME-TAX COMMISSIONER, PUNJAB. **12 Lah 166=I.R. 1931 Lah. 672—32 P.L.R. 234=132 I.C. 704=A.I.R. 1931 Lah. 138 (F.B.).**

———**S. 66 (3)**—*Power of High Court to require Commissioner to submit other questions.*

It is not open to the High Court on a reference by the Commissioner either to require him to submit other question for decision by the High Court or to formulate other questions and to answer them. 3 I.T.C. 73, Foll. (*Jai Lal and Skemp, JJ.*) SONA RAM *v.* INCOME-TAX COMMISSIONER. **161 I.C. 491=8 R.L. 763=A.I.R. 1935 Lah. 727.**

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———**S. 66 (3)**—*Proceeding under—Applicability of S. 12, Limitation Act.*

S. 12 of the Limitation Act does not apply to a proceeding under S. 66 (3) of the Income-tax Act. (*Mukerji and Bennet, JJ.*) GULAB CHAND CHOTEYLAL, *In re.* **53 All. 684=I.R. 1931 All. 733=133 I.C. 621=1931 A.L.J. 593=A I.R. 1931 All 673.**

———**S. 66 (3)**—*Question of fact—Capital or profits—Foreign remittance.*

In every case when the question is whether a particular sum is "profits" or 'capital", the question is a question of fact to be determined upon the materials before the Income-tax authorities If therefore an assessee's foreign business remits money to him in a country in which his profits from his business in that country are assessed to income-tax, the question whether the remittance is a remittance from out of the profits of the foreign business or out of capital is a question of fact to be determined upon the material before the income tax authorities. In such circumstances the only question of law that can arise is whether there was material before the income-tax authorities upon which they could find that a particular sum was profits or income earned by the assessees and remitted during the year of assessment. (*Page, C.J. and Das, J.*) V.P R.P.L. FIRM *v.* COMMISSIONER OF INCOME-TAX. **11 Rang. 397=148 I.C. 330=6 R.R. 222=A.I.R. 1933 Rang. 217.**

———**S. 66 (3)**—*Question of law—Assessable income from interest proved to be irrecoverable—Whether to be treated as loss of capital or loss of revenue income.*

Ordinarily it is a question of fact to be determined by the Income-tax Officer whether a particular debt is recoverable or not. But the question, whether a sum of money which is shown in the assessee's accounts as assessable income from interest but proved irrecoverable should not be deducted from the total income in the assessment as a loss of profits and not a loss of capital is a question of law. (*Addison and Sale, JJ.*) TAHLIA RAM AMIR CHAND *v.* COMMISSIONER OF INCOME TAX, PUNJAB. **153 I C. 732=7 R.L. 452 (1)=37 P.L.R. 75=A.I.R. 1934 Lah. 940.**

———**S 66 (3)**—*Question of law—Assessment under S. 23 (4)—Finding of fact,*

The assessee was called upon by a notice under S. 22 (2) to submit a return which he did but the return did not bear such verification as is required by the Income-tax Act not did it bear the signature of the assessee. Subsequently the Income-tax Officer issued another notice under S. 22 (4) directing the assessee to produce his accounts. He did not produce the accounts and the Income-tax Officer made an assessment to the best of his judgment under S 23 (4).

Held, that no questions of law could possibly arise on the findings of fact arrived at by the Income tax Officer. (*Niamatullah and Bennet, JJ.*) MATHURA DAS CHUNNI LAL, *In the matter of.* **154 I C. 340=7 R. A. 738=3 A W.R. 288=A.I.R. 1934 All. 929.**

———**S. 66 (3)**—*Questions of law—Bad debt.*

The Commissioner was required to state the case on the following questions of law, "Whether when on a loan advanced a suit is brought and a decree is obtained for an amount smaller than the amount claimed under the loan, the part of the loan disallowed by the decree becomes a "bad debt" at once at the date of the decree, or the "bad debt" is to be ascertained as a whole at the time when the decree is eventually realized and the lender's position *qua* the loan finally determined?" (*Teh Chand and Agha Haidar, JJ.*) BULAKI MAL & SONS *v.* INCOME TAX COMMISSIONER, P. & N.W.F.P. **149 I.C. 976=6 R.L. 772 (1)=A.I. R. 1934 Lah. 67 (2).**

———**S. 66 (3)**—*Question of law—Money deposited with assessee—Question as to whether it belongs to person in whose name it stands deposited.*

The question as to whether money deposited with the asseseee belongs to the person in whose name it stands deposited is not a question of law. (*Jai Lal, Dalip Singh and Skemp, JJ.*) SHER SINGH NATH RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **154 I.C. 191=7 R.L. 527=A.I.R. 1935 Lah. 81 (S.B).**

———**S. 66 (3)**—*Question of law—Type, if part of machinery—S. 10 (2) (vi).*

In the case of the printing press whether "type" is part of the machinery or plant is a question of law. (*Addison and Sale, JJ.*) AMAR SINGH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **155 I.C. 968=7 R. L. 809=37 P.L R. 371=A.I. R. 1934 Lah. 919.**

———**S. 66 (3)**—*Question of law—Whether particular association is assessee.*

Whether the association in question can be held to be an assessee within the meaning of S. 3, is clearly a question of law which it would be proper for the Commissioner to refer for the decision of the High Court. (*Addison and Sale, JJ.*) LAHORE ICE FACTORIES ASSOCIATION, LAHORE *v.* COMMISSIONER OF INCOME-TAX. LAHORE. **A.I.R. 1935 Lah 100.**

———**S. 66 (3)**—*Reference—Absence of order under S. 31—Effect.*

Where no appeal lies under S. 31, no reference lies under S. 66 (2). The Assistant Commissioner of Income-tax had considered the reasons which had led the Income-tax Officer to assess under S. 23 (4) and he had held that those reasons were sufficient and therefore no appeal lay under S. 31. The Assistant Commissioner considered whether the assessment was properly made and held that no appeal lay.

Held, that, as there was no order under S. 31 no reference to the High Court was competent. (*Mukerji and Bennet, JJ.*) SURAJ BHAN UGARSEN, *In the matter of.* **141 I C 586=I.R 1933 All. 71=1932 A. L.J. 576=A.I R. 1932 All. 642.**

———**S. 66 (3)**—*Reference by Commissioner—Application under S. 66 (3) to ask Commissioner to refer question refused—Maintainability.*

The High Court sits to hear the reference by the Income-tax Commissioner and any device, such as by a petition under S. 66 (3), to ask the Income-tax authorities to state a case on the question which they refused to refer should be deprecated The reference cannot be extended by an application under S. 66 (3). (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) MULTANCHAND JOHURMULL *In re.* **58 Cal 999=I.R. 1931 Cal. 937 =134 I C 937=A.I R. 1931 Cal 727 (F.B.).**

———**S. 66 (3)**—*Reference—Judges equally divided—Reference to fuller Bench.*

Where a Bench of two Judges hearing a reference under S 66 (3) of the Income-tax Act are equally divided it is open to them to move the Chief Justice to have the matter disposed by a fuller Bench. (*Broadway, Dalip Singh and Tapp, JJ.*) UMAR BAKHSH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah 725=I.R. 1931 Lah. 657=132 I.C. 689=33 P.L.R. 349=A.I.R. 1931 Lah. 578 (F B.).**

———**S. 66 (3)**—*Scope.*

S. 66 (3) is limited to a case of refusal on the ground of any question of law arising, and it cannot be construed as covering a refusal on some other grounds, such as that the application was barred by limitation. A.I.R. 1928 Bom. 434, Foll. (*Milne, J. C. and Rupchand, A.*

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J. C.) FIRM OF KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **26 S.L.R. 235=I.R. 1932 Sind 58=136 I.C. 762=A.I.R. 1932 Sind 1.**

———**S. 66 (3)**—*Scope—Question of law under S. 48 (1)—Application for reference of—Maintainability.*

S. 66 (3) of the Income-tax Act is controlled by S. 66 (2); and under the latter, an assessee is not entitled to require the Commissioner of Income-tax to state a question of law arising under S. 48 (1) of the Act; and consequently the assessee is not entitled to apply under S. 66 (3), to the High Court for an order directing the Commissioner to refer such a question. (*Page, C. J. and Ba U, J.*) ADAMJEE HAJEE DAWOOD AND CO., LTD. *v.* COMMISSIONER OF INCOME-TAX, BURMA. **13 Rang. 729=161 I.C. 976=8 R.R. 526=A.I.R. 1936 Rang. 85.**

———**S. 66 (3) and (2)**—*Application to High Court—Competency of—Application under sub S. (2) rejected as time-barred.*

An application for copy of the order of the Assistant Commissioner was struck off the file for non-prosecution The assessee applied under S. 66 (2) after 30 days of the passing of the order and the application was rejected as time-barred. A further application was made under S. 66 (3) and the assessee contended that he ought to have been allowed time for obtaining copy.

Held, that the application was not maintainable. (*Adami and Kulwant Sahay, JJ.*) GANESH DAS KALU RAM *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **140 I.C. 714 (2)=I.R. 1933 Pat. 17=A.I.R. 1932 Pat. 167 (2).**

———**S. 66 (3) and (2)**—*Application to High Court—Competency of—No application under sub S. (2) made.*

The essential condition for an application under S. 66 (3) is that an application under S. 66 (2) has been made to the Commissioner and refused by him. The fact that the assessee makes an application under S. 33 invoking the powers of review and the application states that if the Commissioner is unwilling to exercise his power under S. 33, he should draw a statement of the case and refer it under S. 66 (1) is not sufficient. (*Das and Adami, JJ.*) PANCHU GOPAL BANERJI *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **140 I.C. 672=I.R. 1933 Pat. 14=A.I.R. 1932 Pat. 167 (1).**

———**S. 66 (3) and (4)**—No return case—Application for reference not maintainable. *See* INCOME-TAX ACT, SS. 23 (4) AND 66 (3) AND (4). **A.I.R. 1930 Lah. 1014.**

———**S. 66 (5)**—*Commissioner's duty to state questions.*

It is for the Commissioner and not for the High Court to state formally the questions which arise; and the duty of the High Court is only to decide the questions so raised. (*Lord Macmillan.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **60 I.A. 146=12 Pat. 318=I.R. 1933 P.C. 77=1933 M.W.N. 439=37 C.W.N. 598=37 L.W. 701=142 I.C. 437=57 C.L.J. 318=14 Pat.L.T 341=1933 A.L.J. 527=35 Bom.L.R. 731=A.I.R. 1933 P.C. 108=64 M.L.J. 612 (P.C.).**

———**S. 66 (5)**—*Powers of Court—Questions by Commissioner—Amendment of*

The Court has power under S. 66 (5) of the Act to amend the questions asked by the Commissioner by raising the real question and then answering that question. (*Beaumont, C. J. and Murphy, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA. **55 Bom. 637=I.R. 1931 Bom. 491=134 I.C. 555=33 Bom.L.R. 807=A.I.R. 1931 Bom. 448.**

INCOME-TAX ACT (1922), S. 66-A.

———**S. 66 (5)**—*Question of law arising from appellate order—Interference by High Court.*

Sub-S. (5), S. 66, enacts that the High Court upon the hearing of any such case shall decide the question of law raised thereby and the Court is not bound by the applicant's point of law or the Commissioner's. But the question of law must arise out of the appellate order. (*Aston and Rupchand, A. J. Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX. **28 S.L.R. 174=149 I.C. 1204=6 R.S. 255=A.I.R. 1934 Sind 46.**

———**S. 66 (5)**—*"Question of law raised thereby"—Meaning.*

The case stated by the order of the Court under sub-S. (4) is not different in form from that stated under sub-S. (2) and consequently the expression "the question of law raised thereby" in sub-S. (3) does not mean such question as in the opinion of the High Court arose when the application is made by the assessee to order the Commissioner to state a case. (*Courtney-Terrell, C. J., Wort, Kulwant Sahay, Fazl Ali and Dhavle, JJ.*) ANANDA *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **11 Pat. 187=I.R. 1931 Pat. 401=133 I.C. 753=12 Pat.L.T. 915=A.I.R. 1931 Pat. 306 (F.B.).**

———**S. 66 (5)**—*Re-assessment—Duty of Income tax Officer—Judgment of High Court to be given effect.*

It is the duty of the Income-tax Department to take up the question of re-assessment after a reference by the Commissioner of Income tax has been answered by the High Court and to see in the presence of the assessee whether in the light of the judgment of the High Court, any of the figures arrived at are liable to alteration or not. It is not enough to say that material alteration in the figure of assessment is not expected and therefore re-assessment is not necessary. (*Mukerji and Allen, JJ.*) SECRETARY OF STATE FOR INDIA *v.* BASANT RAI. **I.R. 1932 All. 625 (2)=140 I.C. 27=1932 A.L.J. 174=A.I.R. 1932 All. 317.**

———**S. 66 (5)**—*Scope—Powers of High Court under—Findings of Commissioner—If final.*

If the case stated by the Commissioner of Income tax contains merely conclusion on questions of pure fact then it is not open to the High Court to go behind the statement of facts. But if what the Commissioner states he has found as facts is actually a series of conclusions founded partly on pure facts and partly on inferences drawn from those facts, the High Court has power and ought to deal with the whole case and to see whether the evidence justified what the Commissioner held. It is not as if the only course open to the High Court is to either express an opinion upon the findings of the Commissioner or to say that it is impossible to do so because the findings are not warranted by the evidence on which they are based It is competent to the High Court to look at the real situation and to give a decision founded upon what appears to the High Court to be the real position. (*Costello and Lort Williams, JJ.*) IMPERIAL CHEMICAL INDUSTRIES (INDIA), LTD., *In re.* **62 Cal. 87=39 C.W.N. 70.**

———**S. 66 (6)**—*Costs—Income-tax reference—Fees paid along with reference whether can be allowed.*

The fee of Rs. 100 paid along with a reference under S. 16 (2) forms part of the costs of and incidental to the reference and may be allowed to the assessee in a proper case. (*Page, C.J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* MI.NE. **11 Rang. 454=148 I.C. 98=6 R.R. 197=A.I.R. 1934 Rang. 4 (S.B.).**

———**S. 66-A**—*Leave to appeal to Privy Council—New grounds taken by Commissioner disallowed—Not a fit case.*

INCOME-TAX ACT (1922), S. 66-A.

On a reference by the Commissioner under S. 66 (2), Income-tax Act, all the questions referred to were answered in favour of the assessee by the High Court and the Commissioner was not allowed to support the assessment on other provisions of the Act which he had not taken before.

Held, that it was not a fit case for appeal to the Privy Council and that leave should not be granted. (*Jai Lal and Monroe, JJ.*) COMMISSIONER OF INCOME-TAX, PUNJAB *v.* KISHEN KISHORE. **6 I.R. (Lah.) 294 = 146 I.C. 942 = A.I.R. 1933 Lah. 637.**

——**S. 66 A**—*Leave to appeal to Privy Council—Rules of Procedure—Chapter XXXIII, Original Side Rules of Calcutta High Court—If applicable*

The rules in Chapter XXXIII of the Rules and Orders of the Calcutta High Court, so far as they have the effect of altering the provisions of O. 45 C. P. Code, have been made under S. 129, C.P. Code, and apply only to matters arising within the Original Civil Jurisdiction of that Court, and therefore have no application to petitions for leave to appeal to the Privy Council, in Income-tax matters. In S. 66-A of the Income-tax Act, specific provision has been made and the procedure therein laid down must be followed. (*Lort Williams and Jack, JJ.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* HUNGERFORD INVESTMENT TRUST, LTD. **39 C.W.N. 1140 = 62 Cal. 671.**

——**S. 66-A (2)**—*Judgment on "reference"—Dismissal of application under S. 66 (3)—Appeal to Privy Council—If lies.*

An order passed by the High Court, declining to call upon the Commissioner to state a case and refer it to the High Court, is not a judgment "on a reference" within the meaning of S. 66 A (2) of the Income-tax Act, so as to allow a right of appeal to His Majesty in Council (*Sulaiman, C.J. and Baypai, J.*) GURMUKH RAI *v.* SECRETARY OF STATE. **57 All. 306 = 7 R.A. 193 = 151 I.C. 604 = 4 A.W.R. 716 = 1934 A.L.J. 876 = A.I.R. 1934 All. 974.**

——**S. 66-A (2)**—*Leave to appeal to Privy Council—Application by Commissioner.*

If the law permits the Commissioner of Income-tax to have the judgment of this Court examined by their Lordships of the Privy Council, there is no reason why his request for leave to appeal to the Privy Council should not be granted as it is possible that their Lordships of the Privy Council might come to a different conclusion. (*Rupchand, J.C. and Mehta, A.J.C.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* BULCHAND KESHAVDAS. **148 I.C. 161 = 6 R.S. 187 = A.I.R. 1933 Sind 344.**

——**S. 66-A (2) and (3)**—*Judgment of High Court on reference under S. 66—Right of appeal to Privy Council.*

The right of appeal to His Majesty in Council from a judgment of the High Court delivered on a reference made under S. 66 is conferred only by sub-S. (2) and not by sub-S. (3) of S. 66-A of the Income-tax Act and is therefore confined to only such cases as are certified to be fit by the High Court. Sub-S. (3) obviously deals with the procedure to be applied to appeals where such an appeal lies under sub-S (2). (*Sulaiman, C.J. and Bennet, J.*) COMMISSIONER OF INCOME TAX, U. P. *v.* MAHARAJ KUMAR OF VIZIANAGARAM. **158 I.C. 1003 = 8 R.A. 355 = 1935 A.L.J. 513 = 1935 A.W.R. 522 = A.I.R. 1935 All 464.**

——**S. 67**—*Applicability—Suit for declaration that registration of partnership is void—Not barred by the section.*

A suit in which the relief claimed is merely a declaration that the registration of the instrument of partnership was *ultra vires* and void, is not a suit to modify an assessment made under the Act. Such a suit is not barred by S. 67. (*Page, C.J. and Das, J.*) NACHIAPPA CHETTYAR *v.* SECRETARY OF STATE. **11 Rang. 380 = 149 I.C. 845 = 6 R.R. 327 = A.I.R. 1933 Rang. 229.**

——**Ss. 67 and 48**—*Suit for refund of income tax—No question of assessment—Maintainability of suit.*

There is no provision made in the Act for appeals against a refusal to grant a refund under S. 48. So where a suit for refund of income-tax does not raise any question of assessment, it is not barred by S. 67. (*Milne, A.J.C.*) MT. ZENAB BAI *v.* SECRETARY OF STATE. **25 S.L.R. 426 = I.R. 1932 Sind 69 = 136 I.C. 819 = A.I.R. 1932 Sind 48.**

——**S. 67-A**—*'Such order'—Time taken for obtaining copies of orders of Assistant Commissioner and Income tax Officer—Exclusion—Permissibility.*

S. 67-A merely refers to the time required for obtaining a copy of 'such order', that is, for the order which is the subject of reference under S. 66 (3). The section does not authorise the extension of the period of limitation by the time required for obtaining the other orders of the Assistant Commissioner of Income tax and the Income-tax Officer. (*Mukerji and Bennet, JJ.*) GULAB CHAND CHOTEYLAL, *In re* **53 All. 684 = I.R. 1931 All. 733 = 133 I.C. 621 = 1931 A.L.J. 593 = A.I.R. 1931 All. 673.**

INCOME TAX BECHUANALAND PROTECTORATE PROCLAMATION (1922), S. 15—*Repairs or capital charge—Railway company—Renewal of rails and sleepers.*

The periodical renewal by sections of the rails and sleepers of a railway line as they wear out by use is in no sense a reconstruction of the whole railway and is an ordinary incident of railway admistration. The fact that the wear although continuous is not and cannot be made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge. Where the expenditure is incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduction in respect of such wear and represents the costs of restoring them to a state in which they could continue to earn income, it does not result in the creation of any new asset; it is incurred to maintain the existing line in a state to earn revenue. In such a case the renewals effected constitute no improvement; but they merely make good the line so as to restore it to its original state and are "repairs" within the meaning of S. 15 (1) (*b*). (*Lord Macmillan.*) RHODESIA RAILWAYS, LTD. *v.* COLLECTOR OF INCOME-TAX OF BECHUANALAND. **6 I.R. (P.C.) 33 = 146 I.C. 890 = 1933 A.L.J. 1440 = 38 L.W. 749 = A.I.R. 1933 P.C. 222 = 65 M.L.J. 541 (P.C.).**

——**Ss. 51 and 17 (2)**—*Refund of tax overpaid—Discretion to Collector—Whether applies to legal right.*

The language of S. 51 in providing that the Collector "may" authorise a refund in the case of any tax overpaid is inappropriate to the case of a person claiming under S. 17 (2) a legal right of relief which the Collector has no discretion to refuse. (*Lord Macmillan.*) RHODESIA RAILWAYS, LTD. *v.* RESIDENT COMMISSIONER AND TREASURER. **6 I.R. (P.C.) 36 = 146 I.C. 926 = A.I.R. 1933 P.C. 230 (P.C.).**

INCONSISTENT CASE. *See* C. P. CODE, O. 6 R. 17.

INCONSISTENT PLEA. *See* C. P. CODE, S. 100.

INCORPORATED SOCIETY.

See (1) COMPANY.
(2) CORPORATION.

INDEMNITY. *See also* CONTRACT ACT, SS. 124 AND 125 and VENDOR AND PURCHASER.

———*Implied contract of—Sale of property subject to charge.*

Where property is sold subject to encumbrances, the purchase, impliedly agrees to indemnify the vendor against the encumbrances. The operation of this right of indemnity is not restricted to sales of immovable property but it would also apply to cases of dissolution of partnership, suretyship, contribution, etc. The right applies as well to cases of sale of property subject to a "charge" as to a case of the purchase of the equity of redemption. (*Madhavan Nair and Jackson, JJ.*) RAMA RAYANIMGAR *v.* VENKATALINGAM NAYANIM BAHADUR. **57 Mad. 218=149 I.C. 379=6 R.M. 642=1933 M.W.N. 486=38 L.W. 818=A.I.R. 1934 Mad 1=66 M.L.J. 4.**

INDEPENDENT ADVICE. *See* CONTRACT ACT, S. 16.

INDIAN CHRISTIAN—*Minor — Guardians, who are.*

Failing the father and mother and their appointees, no other person is entitled as of right to the custody of an Indian Christian minor or to the guardianship of his property. (*Madhavan Nair, J.*) SUNDARA NADAN *v.* ANNAMMAL. **I.R. 1931 Mad 616=132 I.C. 120 =1931 M.W.N. 415=33 L.W. 615=A.I.R. 1931 Mad. 529=60 M.L.J. 695.**

INDIAN (NON-DOMICILED PARTIES) DIVORCE RULES (1927), R. 9—*Scope—Suit for dissolution by wife—Allegation of adultery—Right of alleged adulteress to intervene—Procedure.*

Under the provisions of R. 9 of the Indian (Non-Domiciled) Divorce Rules, made under S. 1 (4) of the Indian and Colonial Divorce (Jurisdiction) Act, 1926, an alleged adulteress, against whom allegations of adultery are made in a suit for dissolution of marriage against a husband by his wife, is entitled to intervene on applying to the Court within the time specified in a notice served upon her. Such application for leave to intervene has to be made by summons supported by an affidavit, but returnable before the Judge in Chambers ; and when the order is made giving leave, it should contain or be accompanied with such directions as to appearance and procedure as the Court might think fit. (*Costello, J.*) ENID PEYCHERS. *In the matter of.* **62 Cal 82=156 I.C. 928=8 R.C. 46=39 C.W.N. 95=A.I.R. 1935 Cal. 456.**

———R. 9—Suit by wife for dissolution— Alleged adulteress—Right to intervene—Procedure. *See* INDIAN AND COLONIAL DIVORE (JURISDICTION) ACT, S. 1 (4) AND R. 9. **62 Cal 82=39 C. W.N. 95.**

———R. 12 (2)—*Petition for dissolution of marriage —Allegation of adultery—Adulterer as party—Procedure.*

In a wife's petition for dissolution of marriage the respondent filed an answer wherein he made charges of adultery with a certain person and there was also a prayer that the person should be impleaded as party and the cause title be amended. The alleged adulterer was served with a notice calling upon him to appear in the suit within a specified time and informing him that he was entitled within the said time to apply for leave to intervene in the cause. The latter entered appearance in pursuance of the notice but the same was objected to

Held, (*1*) that the notice in the form it was issued to the alleged adulterer was entirely out of order and that the proper procedure was to serve a copy of the answer on him, permit him to appear and have the cause title amended. In such a case, he, in the position of a co-respondent whether so described or not, should file an answer within 15 days.

Held, further, that the irregularity in the form of notice was not material in view of the fact that appearance had already been entered. Effect of Rr. 11 and 12 of the Indian (Non-domiciled Parties) Divorce Rules (1927), considered. (*Buckland, J.*) BANYARD *v.* BANYARD. **58 Cal. 1384=35 C.W.N 804=135 I.C. 447=I.R. 1932 Cal. 127=A.I.R. 1932 Cal. 149.**

———R. 24—*Petition for dissolution of marriage—Adulterer as party—Procedure.*

By R. 24, the Rules made under the Indian Divorce Act are made applicable to proceedings under the Act of 1926 Where in a wife's petition for dissolution of marriage, the respondent pleads adultery and the alleged adulterer applies to be impleaded as party, the proper procedure is to apply to the Court by a notice of motion. (*Buckland, J.*) BANYARD *v.* BANYARD **58 Cal. 1384=35 C.W.N. 804=135 I.C. 447=I.R. 1932 Cal. 127=A.I.R 1932 Cal. 149.**

———R. 24—*Petition for dissolution of marriage—Evidence by petitioner and witness—If can be given on affidavit.*

Under R. 24 of the Non-Domiciled Divorce Rules framed under the Indian and Colonial Divorce Jurisdiction Act, 1926, S. 45 of the Indian Divorce Act and O. 19, R. 1, C. P. Code, the Court may, for sufficient reason, allow the petitioner in divorce proceedings and also the petitioner's witness to give evidence by affidavit, subject to their being present for cross examination if so directed by the Court. (*Buckland, A. C.J.*) IVA STONES *v.* JOSEPH STONES. **38 C.W.N. 969.**

INDIAN AND COLONIAL DIVORCE JURISDICTION ACT (16 and 17 Geo. V, c. 40), (1926)—Rules framed under. *See* INDIAN (NON-DOMICILED PARTIES) DIVORCE RULES, 1927.

———*Adultery — Condonation — Subsequent matrimonial offence—Revival of prior adultery.*

Any matrimonial offence committed subsequent to the condonation of a prior matrimonial offence, such as adultery, will operate to revive the prior offence so as to enable the aggrieved party to rely upon it as a ground for seeking divorce or dissolution of marriage. The revival of prior adultery by subsequent desertion is of itself sufficient in law to found a petition for dissolution under the Indian and Colonial Divorce Jurisdiction Act. (*Costello J.*) STONES *v.* STONES. **62 Cal. 541=62 C.L.J. 264.**

———*Scope.*

The effect of the Indian and Colonial Divorce Jurisdiction Act of 1926 upon the divorce cases is to divide His Majesty's subjects in India into two classes. Upon those who are residing within the jurisdiction of a High Court established by Letters Patent some new facilities are conferred. Those who are resident elsewhere remain under the law as it was before the Indian and Colonial Divorce Jurisdiction Act was passed. (*Ferrers J.C.*) HALL *v.* HALL. **I.R. 1933 Sind 132=143 I.C. 618=A.I.R. 1933 Sind 70.**

———S. 1 (1) (d)—*Petition for dissolution of marriage by persons who are not domiciled and resident in India—When may be entertained.*

Consistorial causes should be entertained only in the Court of the parties' domicile. The High Court will always be slow to entertain petitions for the dissolution of marriages by persons who are not domiciled and resident in India. Only in exceptional circumstances will the Court exercise its jurisdiction in such cases. The Court before it does so, must be clearly of the

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opinion upon the facts before it that because of the reasons referred to in S. 1, sub-S. (1) (*d*) the petitioner cannot effectively prosecute his suit for divorce in the Court of his domicile. Further, the Court, before it will entertain such a petition, must be satisfied that the interests of justice imperatively demand that the suit should be decided in India. (*Thom, J.*) DUNBAR *v.* DUNBAR. **158 I C. 999 = 8 R.A. 356 = 1935 A.W.R. 1008 = 1935 A.L.J. 1025 = A.I R. 1935 All. 763.**

INDIAN STATES PROTECTION AGAINST DISAFFECTION ACT (1922), Ss. 3 and 5—*Trial in respect of three distinct offences—Sanction in respect of one only—Legality.*

Where a person is tried in respect of three distinct offences of his being editor, the printer and the author of the offending article and the sanction is in respect of one offence, the trial is illegal for want of sanction and the whole proceedings are vitiated. (*Subhedar, A.J.C.*) DIWAN SINGH *v.* EMPEROR. **155 I.C. 450 = 36 Cr. L.J. 744 — 7 R.N. 176 = 1935 Cr C. 418 = A.I.R. 1935 Nag 90.**

——**S. 5**—*Sanction in respect of particular offence—If covers other offences.*

Where a sanction authorises the complainant to make complaint of an offence under S. 3 of the Act and very clearly restricts the prosecution to one of four offences under the section specifically, there is no room for the contention that prosecution was sanctioned in regard to all. (*Subhedar, A.J.C.*) DIWAN SINGH *v.* EMPEROR. **155 I.C. 450 = 36 Cr L.J. 744 = 7 R.N. 176 = 1935 Cr. C. 418 = A.I.R. 1935 Nag. 90.**

——**S. 5 (1)**—*Scope—Liability under.*

Under S. 5 (1) any one or more of the four persons, *viz.*, author, editor, printer and publisher of libellous matter are liable. (*Subhedar, A.J.C.*) DIWAN SINGH *v.* EMPEROR. **155 I C. 450 = 7 R.N. 176 = 36 Cr.L. J. 744 = 1935 Cr.C. 418 = A.I.R. 1935 Nag. 90.**

INDIVISIBLE CONTRACT. *See* SALE OF GOODS.

INDORSEMENT.

See (1) NEGOTIABLE INSTRUMENTS.
(2) NEGOTIABLE INSTRUMENTS ACT, Ss. 16, 32, 35, 50, 59 AND 66.

INFANT.

See (1) CONTRACT ACT, S. 11.
(2) HINDU LAW—GUARDIANSHIP AND MINORITY.
(3) MAHOMEDAN LAW—GUARDIANSHIP.
(4) MINOR.

INFLUENCE—Undue. *See* CONTRACT ACT, S. 16.

INFRINGEMENT.

See (1) COPYRIGHT.
(2) PATENT.
(3) PATENTS AND DESIGNS ACT (1911), Ss. 29, 46 (3) 53, ETC.
(4) TRADE MARK.

INHERENT POWER.

See (1) C. P. CODE, Ss. 144, 151 AND 153; O. 41, R. 23; AND O. 47, R. 1.
(2) CR. P. CODE, S. 561-A.

INHERITANCE.

See (1) BUDDHIST LAW (BURMESE)—SUCCESSION.
(2) HINDU LAW—SUCCESSION,
(3) MAHOMEDAN LAW—SUCCESSION.
(4) SUCCESSION ACT.

INITIATION OF PROCEEDINGS. *See* CR. P. CODE, S. 476.

INJUNCTION.

See also (1) C.P.CODE., (1908), S. 151 AND O. 39.
(2) SPECIFIC RELIEF ACT (1877), SS. 52 TO 57.
(3) TRADE MARK—INFRINGEMENT.

——*Claim to—Suit based on possession—Maintainability.*

Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title. A claim for permanent injunction can be based on the plaintiff's possession. (*Mahadevayya J.*) DODDA VENKATAPPA *v.* NAGARI. **38 Mys.H.C.R. 296 = 11 Mys.L.J. 333.**

——*Decree for—Effect—Does not run with the land—Exceptions to the rule.*

The rule that a decree for injunction does not run with the land has been deviated from in the case of legal representatives on the death of the judgment-debtor on the ground of the express provisions made by S. 50 of the Cr P. Code and in the case of the transferees in virtue of S. 52. (*Patkar and Baker, JJ.*) AMRITLAL VADILAL *v.* KANTILAL. **I.R. 1931 Bom. 356 = 133 I.C. 244 = 33 Bom.L.R. 266 = A.I.R. 1931 Bom. 280.**

——*Election matter—Belated application on the eve of election—Duty of Court.*

When an application for injunction is made for an injunction in respect of an election very late on the eve of the date fixed for the election, the Court acts injudiciously in granting the injunction. (*Sulaiman, C.J. and Rachhpal Singh, J.*) MAHOMED IKRAM KHAN *v.* MIRZA MAHOMED BAQAR. **152 I.C. 817 = 7 R.A. 401 = 4 A.W.R. 1392 = 1935 A.L.J. 139 = A.I.R. 1935 All. 106.**

——Hat—*Injunction to restrain—When to issue.*

A *hat* is a useful institution run for the benefit of all the villagers, and unless a proper case is made out satisfactorily favouring an injunction against holding or continuing a *hat*, it ought not to be granted. (*Mukerji and S. K. Ghose, JJ.*) RAJA JAGADISH CHANDRA DEO DHABAL DEB *v.* SRINATH CHANDRA PANI. **62 C.L.J. 123.**

——*High Court—Power to grant apart from the Code.*

The High Court, over and above the powers which they enjoy under the Code, possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases. 27 L.W. 418, Rel. on; 34 C. 97 and 34 C. 101, Ref. to. (*Curgenven, J.*) GOVINDARAJULU NAYUDU *v.* IMPERIAL BANK OF INDIA, VELLORE. **I.R. 1932 Mad. 298 (2) = 136 I.C. 346 (2) = 35 L.W. 168 = A I.R. 1932 Mad. 180.**

[**Not.** 1". 56 M. 563 (566).]

——*High Court—Power to grant apart from C. P. Code, O. 39, R. 1.*

So far as the powers of the High Court in the matter of issuing injunctions on parties to an appeal pending before it are concerned they are not circumscribed by the provisions of O. 39, R. 1, C. P. Code. Any order may be made by the Court which ends of justice or expediency may require. (*Rankin, C. J., Mukerji and Guha, JJ.*) NANDA LAL MUKHERJI *v.* KALIPADA MUKHERJI. **I.R. 1932 Cal. 345 = 137 I.C. 519 = 54 C L J. 317 = 36 C.W.N. 291 = A.I.R. 1932 Cal. 353.**

——*Injunction restraining sale—Duty of other Court to give effect to order.*

Where a Court issued an injunction to another Court directing that certain property should not be sold.

Held, that the other Court, even though of superior grade should comply with the order. (*Broadway, A. C.*

INJUNCTION.

J.) MANDAR DAS *v.* ATMA RAM. **I.R. 1932 Lah. 575=139 I.C. 342=33 P.L.R. 667=A.I.R. 1932 Lah. 515.**

———Interlocutory. *See* CIVIL PROCEDURE CODE, O. 38, R. 2.

———*Jurisdiction—Consent of parties.*

An injunction may be passed by the Court on the parties consenting to it without a determination of the dispute. (*Mukerji and S. K. Ghose, JJ.*) HEM CHANDRA NASKER *v.* NARENDRA NATH BOSE. **61 Cal. 148=151 I.C. 723=7 R.C. 165=38 C.W.N. 101 =A.I.R. 1934 Cal. 402.**

———*Jurisdiction—Persons living within jurisdiction —Acts complained of committed outside—Remedy by way of injunction.*

A Court can issue an injunction against persons within its jurisdiction restraining them from doing acts outside the jurisdiction but it will not do so unless that remedy is likely to be an effective one. (*Beasley, C.J. and Cornish, J.*) VENKATACHALAM *v.* RAJAGOPAL NAIDU. **55 Mad. 966=1932 M.W.N. 835=36 L.W. 498=A.I.R 1932 Mad. 705=141 I.C. 660=I.R. 1933 Mad. 153=63 M.L J. 568.**

———*Light—Agreement not to close window—Erection of building, if prohibited.*

The plaintiff sued for a mandatory injunction requiring the defendant to demolish his house so as not to block the windows in his rooms. The plaintiff relied on a mutual agreement which however merely stated that the defendant was not to close the windows in question and the other circumstances indicated that the parties could not have intended that the defendant would not erect any building at all.

Held, that the plaintiff was not entitled to the injunction as prayed for.

Held, further, that the plaintiff would not be entitled to damages unless on proof of such diminution of light and air as would be ordinarily necessary and in this connection, the Court may take into account the other sources of light and air. (*Bhide, J.*) RATTAN CHAND *v.* LAL CHAND. **15 Lah. 320=6 R.L. 415=147 I. C. 640 (2)=35 P.L.R. 292=A.I.R. 1934 Lah. 240.**

———*Light and air—Grant of injunction—Considerations.*

The mere fact that the plaintiff possesses a prescriptive right to light and air on the property of the defendant is not by itself sufficient to justify the grant of an injunction for demolition of a wall or against closing a window. In order to pass such an order it is necessary to show that the obstruction complained of amounts to an 'actionable nuisance'. Where the loss of light and air is substantial, the plaintiff has suffered a legal wrong and pecuniary compensation cannot afford adequate relief, the Court may issue a mandatory injunction to the defendant directing her to so construct her building as to leave forty-five degrees of unobstructed light to enter into the window of the room on the first floor of the plaintiff's house. (*Tek Chand, J.*) JAS KAUR *v.* BHAG DEVI. **13 Lah. 806=33 P.L.R. 1015=I R. 1932 Lah. 638=140 I.C. 238=A.I.R. 1933 Lah. 29.**

———*Minor—Injunction against.*

Minority *per se* is not a ground for refusing an injunction, but before an injunction can be granted against a minor, it must be shown that the acts were done by him personally or by some one on his behalf or at his instance. (1879) 12 Ch. D. 675; (1899) 1 Ch. 343; 35 Beav. 127; 31 C. 839. Ref. (*Patkar and Broomfield, JJ.*) RAMCHANDRA BALWANT TILAK *v.* NARASINHA CHINTAMAN. **I.R. 1931 Bom 423=133 I.C. 839=33 Bom.L R. 590=A.I.R. 1931 Bom. 466.**

INJUNCTION.

———*Minor—Injunction against—Major defendant acting as guardian of minor defendant and giving up his defence — Injunction against minor defendant also.*

In an action to restrain several defendants from causing obstruction to the proposed construction of a building by the plaintiff, defendant No. 1 acted as guardian of the minor. The acts and misdeeds complained against were alleged to have been done by defendant No. 1 and by original defendant No. 2, the father of the minor and there was no evidence that the minor did any act or that the acts committed by original defendants Nos. 1 and 2 were done at the instance of the minor or on his behalf The defendant No. 1 filed a written statement on behalf of the minor son of defendant No. 2 raising the same contentions as he himself raised but he subsequently gave up his defence. The lower Court thereon granted an injunction against all the defendants including the minor.

Held, an injunction was a remedy against an individual and should be issued only in respect of acts done by *him* against whom it is sought to be enforced. So no injunction can be granted against the minor merely because his guardian gave up his defence. (*Patkar and Broomfield, JJ.*) RAMCHANDRA BALWANT TILAK *v.* NARASINHA CHINTAMAN. **I.R. 1931 Bom. 423= 133 I.C. 839=33 Bom.L.R. 590=A.I.R. 1931 Bom. 466.**

———*Non-resident—Jurisdiction of Court over.*

Where in a case of mutual contracts one of the parties instituted a suit in the Agra Court in spite of a condition in the agreement that disputes should be settled in the Calcutta Court.

Held, that the other party could apply for an order of injunction in the Calcutta Court to restrain the party resident in Agra from instituting the other suit. Jurisdiction of High Court over non resident discussed. (*Lort Williams, J.*) A. MILTON & CO. *v.* OJHA AUTOMOBILE ENGINEERING COMPANY. **57 Cal. 1280= I.R. 1931 Cal. 380=130 I.C. 252=A.I.R. 1931 Cal. 279.**

———*Privacy—Invasion of—Apertures in wall made by defendant—Plaintiff's privacy invaded—Plaintiff refused permission by Municipality to build on his own land—No ground for injunction.*

Defendant opened door and windows on his wall facing plaintiff's site. Plaintiff was refused permission by the Municipal Commitee to construct a wall in front of the aperture. Thereupon plaintiff filed a suit for injunction for closing the door and windows. Injunction was granted by the lower appellate Court on the ground that the Municipal Commitee had refused permission to build a wall.

Held, that that was not a legal ground for granting the injunction, that injunction was not the proper relief but that the threatened injury to plaintiff could be amply redressed by grant of pecuniary compensation. (*Tek Chand, J.*) KHASHI NATH *v.* RAM JIWAN. **148 I.C. 224=6 R.L. 520=A.I.R. 1933 Lah. 847.**

———*Support—Interference with—Suit to restrain— Actual damage not necessary.*

Every landowner has right to the support of his land in its natural state. It is not an easement. It is a right of property. In a suit for injunction restraining the defendant from interfering with plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. (*Mitter, J.*) TAMLUK TRADING

INJUNCTION.

AND MANUFACTURING CO., LTD. *v.* NABADWIP-CHANDRA NANDI. **59 Cal. 363=I.R. 1932 Cal. 488 138 I.C. 667=A.I.R. 1932 Cal. 542.**

——— *Water —Right to—Cutting of water-supply—Proof of actual damage unnecessary—Ryotwari tenure.*

When the whole of water-supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficut for a party to prove the precise amount or diminution caused by the action of others or the precise amount of the particular damage caused by that diminution. Under such circumstances the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage. 7 M. H. C. R. 60, Rel. on and 31 Mad. 171, Ref. (*Wallace and Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793=I R. 1931 Mad. 747=33 L W. 681=133 I.C. 507=A.I.R. 1931 Mad. 284=61 M.L.J. 563.**

———Waters—Submersion by—Customary storage of water—No interference by of Government—Right to restrain Government. *See* WATERS AND WATER-COURSES. **A I.R. 1932 Mad. 532.**

INQUEST REPORT.

See (1) CR. P. CODE, S. 162.
(2) CRIMINAL TRIAL—EVIDENCE.

INSANE OFFENDER—Plea of insanity. *See* PENAL CODE, S. 84.

INSANITY.

See (1) C. P. CODE, O. 32, R. 15.
(2) CR. P. CODE, SS. 465 AND 471.
(3) PENAL CODE, S. 84.

INSOLVENCY.

See also (1) C. P. CODE, SS. 115 AND 151.
(2) HINDU LAW.
(i) INSOLVENCY.
(ii) JOINT FAMILY.
(3) JURISDICTION.
(4) PRESIDENCY TOWNS INSOLVENCY ACT
(5) PROVINCIAL INSOLVENCY ACT.

———*Abatement—Order rejecting application for discharge—Appeal—Heirs of deceased creditors not brought on record—Appeal abates as a whole.*

Where an appeal is filed by the insolvent from an order dismissing his application for discharge but he does not bring on record the heirs of one of the deceased creditors, who had not raised any objection to the discharge, the appeal abates as a whole as such heir is a necessary party. But if there is a Receiver in insolvency appointed in the case, the absence of heirs of one of the creditors will not render the appeal infructuous and incompetent if the Receiver representing all the parties concerned is on record. (*Guha and Lodge, JJ.*) JATINDRA NATH *v.* KATIHAR OIL MLLS LTD. **158 I.C. 392 (2)=8 R.C. 180 (2)=39 C.W.N. 1292=A.I.R. 1935 Cal. 644.**

———*Account books of debtor—Investigation into—Necessity.*

It is absolutely essential, if an insolvency case has to proceed, in order to enable a Receiver to go into the affairs of the debtor, to investigate the account books (of the debtor) and to come to some conclusion thereon. Without the account books, it is impossible to say what exactly is the amount of the debts and the value of the assets of the debtor. The value of the account books is another matter. (*Wort and Agarwala JJ.*) HARDAYAN DASS JOHAR MALL *v.* JAGARNATH MARWARI. **152 I.C. 655=7 R.P. 227=15 Pat.L T. 461=A.I.R. 1934 Pat. 526.**

———Account books—Order calling upon a third party to produce—Official Assignee to make out a *prima facie* case. *See* INSOLVENCY—THIRD PARTY. **63 M.L.J. 810.**

———*Act of insolvency—Strict proof.*

Acts of bankruptcy have to be regarded critically and carefully and there is no such thing as an act of bankruptcy except that which the statute declares to be one. Observations of Lindley, M R., in (1899) 1 Q. B. 626, Rel. on. (*Greaves and B. B. Ghose, JJ.*) ANUPAMA DEBI *v.* GURUDAS CHATTERJI. **57 Cal. 1274=I.R. 1931 Cal. 478=131 I.C. 590=A.I.R. 1931 Cal. 246.**

———*Act of insolvency—Strict proof—Full particulars in insolvency petition.*

Adjudication of debtor as insolvent at the instance of the creditors involves considerable disgrace and legal disabilities to the debtor and therefore it is all the more necessary that the act of insolvency alleged to have been committed by him should be clearly and precisely described in the insolvency petition to enable the debtor to meet the charge brought against him and unless the facts alleged bring the debtor's conduct well within the ambit of the statute, the Court should stay its hands both in the matter of adjudication and the appointment of a receiver (*Jai Lal and Bhide, JJ.*) HARKISHAN LAL *v.* PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE. **14 Lah. 117=I.R. 1932 Lah. 701=140 I.C. 275=33 P.L.R. 992=A.I.R. 1932 Lah. 643 (2).**

———*Adjudication—Grounds—Assets not immediately realizable.*

The assets of the insolvent (consisting of inalienable land and house) if realized by him were worth more than the debts. The difference between the debts and assets on the most favourable showing was not very large.

Held, that the debts due were cash debts and the assets were not immediately realizable and in that sense the insolvent was unable to pay his debts and should therefore be declared insolvent. (*Dalip Singh, J.*) KARIM BAKHSH *v* GAJA DHARI. **6 R.L. 527=148 I.C. 48=A.I.R. 1934 Lah. 63 (1).**

———*Adjudication—Petition for, defective—Not to be kept pending.*

A petition for adjudication which is kept hanging over a man's head when as a matter of fact it is a mere shell of a petition from the beginning and contains no substantial details should not be allowed. (*Rankin, C.J. and Buckland, J.*) KRISHNA DAS RAY *v.* CHARSILA PAL CHAUDHURY. **35 C.W.N. 567.**

———*Annulment of adjudication—Order of—When to be made—Old insolvency—Principles.*

In cases of old insolvencies, the Court should be very slow in making orders of annulment. An order of annulment is intended to be a penalty imposed upon a debtor who fails to obtain his discharge, the theory being that it will deprive him of the benefit of the Insolvency law and render him liable to be proceeded against by his creditors; but in a case where the insolvency has gone on for a long time, to the extent of about 15 years, an order annulling the insolvency really confers a privilege upon the debtor, and does not impose a penalty on him. The creditors are not likely to arrest him, and unless an order is made for vesting the property, he may get the property returned to him. (*Beaumont, C.J. and Rangnekar, J.*) SIDICK HAJI HUSEIN *v.* OFFICIAL ASSIGNEE OF BOMBAY. **59 Bom. 600=157 I.C. 930=8 R.B. 90=37 Bom.L.R. 449=A.I.R. 1935 Bom. 310.**

———*Annulment of adjudication—Person having assets under vesting order—Right to impeach existence of debt shown in schedule.*

INSOLVENCY.

After the annulment of an adjudication, the officer of the Court in whose hands the assets are vested for the benefit of the creditors has the right and indeed the duty, to bring to the attention of the Court, facts which go to show that persons appearing in the list of creditors are not in fact creditors. This is not invalidating the act of the Official Receiver in admitting debt. It is part and parcel of the necessary steps that must be taken for the proper administration of the assets with which he is charged. He has this power as any other Receiver would have it, and quite apart from any express statutory provision. (*Stone and Pandurang Row, JJ.*) SRINIVASA RAO *v.* CHINNAPA REDDI. **43 L.W. 38=160 I.C. 205=8 R.M. 613=1936 M.W. N. 509=A.I.R. 1936 Mad. 125=69 M.L.J. 839.**

———*Assets of insolvent—Occupancy holding.*

Where a person having occupancy right in land applies for adjudication as insolvent, as the occupancy rights in the land can be sold to the landlord, their value is to be taken into consideration in assessing the assets of the insolvent. A. I. R, 1929 Lah. 392 and 99 I. C. 997, Ref. (*Jai Lal, J.*) SHANKAR DAS *v.* FAJJA. **154 I.C. 365 (2)=7 R.L. 552=A.I.R 1934 Lah. 133.**

———*Composition deed—Consenting party to—Right to apply for adjudication.*

A consenting party to a deed of arrangement or composition is estopped from filing an application for an order of adjudication. 48 M. 294, Foll. (*Doraisami Iyer, C.J. and Rama Rao, J.*) BHAGAWANJI *v.* RAJA SAMPANG) RAMA SHETTY. **36 Mys.H.C R. 39=9 Mys L J. 1.**

———*Composition deed sanctioned by Court—Surety who is party, if can back out.*

As soon as the Court sanctions a composition entered into by the debtor and his creditors supported by the guarantee of a surety, it becomes binding on the creditors, the debtor and the surety. Therefore it is not open to the surety after such sanction to say that he is not bound by his promise. And although the surety does not execute a bond as ordered by the Court, he is not relieved of his liabilities as a surety. (*Rupchand, A.J.C.*) SAT NARAIN STORES, *In re.* **7 R.S. 66=151 I.C. 791=A.I.R. 1934 Sind 134.**

———*Creditor—Fraudulent removal of property—Liability to refund.*

A creditor acting fraudulently and removing property of the insolvent without the permission of the Court is liable to refund the value of the same. (*Gruer, A. J. C.*) DHUDHCHAND *v.* SHRIPAD. **158 I.C. 990=8 R.N. 111=18 N.L.J. 14.**

———*Creditors not proving debts—Order "file"—If terminates proceeding — Execution petition presented after such order—Maintainability.*

Where, after adjudicating a debtor on his own application as an insolvent, the Court adjourns the petition for the framing of a schedule and for appointing a Receiver, and on the adjourned date, the creditors not having till then proved their debts, the Court passes an order "file", the order does not have the effect of terminating the proceedings. The proceedings still continue; and if an execution application is presented against the debtor after the date of the order, it is one made during the pendency of the proceedings and must be struck off as illegal and invalid, (*Courtney Terrell, C.J. and Varma, J.*) RAMAJODHIA *v.* HAZARI LALL-MATHURA PRASAD. **158 I.C. 18=8 R.P. 176=A.I. R. 1935 Pat. 480.**

———*Debts provable in—Future or contingent liability—Suit against insolvent after discharge—Maintainability.*

INSOLVENCY.

The debts and liabilities provable in insolvency include debts and liabilities, present or future, certain or contingent and an omission to prove such debts in insolvency proceedings is a bar to a suit by a creditor in respect of such debts after discharge of the insolvent, based on a revival of the old debt. The order of discharge is an effective bar to such a suit. (*Cunliffe, J.*) SUDHENDU MOHAN BAGCHI *v.* KSHITISH CHUNDER DAS GUPTA. **163 I.C. 858=9 R.C. 91=39 C.W.N. 563.**

———*Debt—Suit to recover—Limitation—Withdrawal of suit.*

Limitation for proving debts ceases to run during insolvency proceedings. Where therefore a creditor sues after ordinary period of limitation is over but before annulment of adjudication order, the proper course is not to dismiss the suit but to permit him to withdraw the suit with liberty to sue again after annulment of adjudication. (*Baguley, J.*) BANDEALLY JAFFER *v.* PEER MAHOMED. **6 I.R. (Rang.) 72=146 I.C. 124=A.I. R. 1933 Rang. 75.**

———Discharge—Subsequent promise to pay debts incurred prior to insolvency—Enforceability— Fresh consideration— Necessity. *See* CONTRACT— CONSIDERATION. **39 C.W.N. 563.**

———*Discharged insolvent—Meaning.*

In 1904 the plaintiff applied to be declared an insolvent. He was so adjudged in 1905 and the Judge directed "I grant the application and discharge the insolvent." The plaintiff's name having been taken off the electoral roll he sued for a declaration that he was not an undischarged insolvent, that he was a qualified voter.

Held, that though the debts of the insolvent were not wiped out by reason of the Judge's order of discharge the plaintiff was a discharged insolvent and was entitled to the declaration. If once he has been discharged as an insolvent, the section in Act III of 1907, are not applicable to his case. (*Sen and Niamatullah, JJ.*) PARMESHWARI DAS *v.* MUNICIPAL BOARD, BAREILLY. **I.R. 1931 All. 765=133 I.C. 909=A I.R. 1932 All. 58 (2).**

———*Executor's insolvency—Power of the Court to make an order against the estate of the testator.*

The insolvency of the executor does not have the effect of divesting the executor of the estate and vesting it in the Official Assignee; & hence the Insolvency Court could not pass an order against the estate of the testator. (*Beasley, C.J. and Cornish, J.*) KRISHNAMACHARIAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **55 Mad. 455=I.R. 1932 Mad. 410=137 I.C. 571=1932 M.W.N. 8=35 L W. 166=1932 Cr.C. 290=A.I.R. 1932 Mad. 256=62 M.L.J. 185.**

———*Firm—Adjudication of.*

The term 'debtor' in the Insolvency Regulation includes also a firm and a firm can be adjudicated insolvent. (*Doraswami Iyer, C.J. and Rama Rao, J.*) ASLAJI DHIRAJI BROS. *v.* SUNNI LAL. **36 Mys.H.C.R. 75=9 Mys.L J. 222.**

———*Firm—Adjudication of—Effect.*

An order of adjudication against a firm is an order of adjudication against each individual partner of the firm. A. I. R. 1927 Sind 18 and A.I.R. 1932 Sind 39, Rel. on. (*Ferrers, J. C. and Rupchand, A. J. C.*) DHARAMDAS THAWARDAS *v.* HUKUMCHAND MIRIMAL. **I.R. 1932 Sind 86=138 I.C. 628=A.I.R. 1932 Sind 62.**

———*Firm—Adjudication of two out of three partners—Debt due to solvent partner—Proof of, in insolvency.*

In a partnership suit, it was found that the partnership which was between three partners had been dissolved and that a large sum of money was due to one of the

partners. After the suit had been instituted two of the partners were adjudicated insolvent and by an arrangement between the solvent partner and the Official Assignee of the estate of the two insolvent partners, one-third of the assets of the partnership which had been realised was handed over to the representatives of the solvent partner who meanwhile had died. The representatives of the solvent partner obtained a final decree in the partnership suit and tendered a proof in the insolvency for the amount outstanding under the decree. An application was filed by one of the creditors in the insolvency for the purpose of obtaining an order expunging the proof of the debt by the representatives of the solvent partner upon the ground that, inasmuch as the assets distributable in the insolvency were part of the partnership assets and the solvent partner was liable as a partner to liquidate the debts of the partnership, the debt of his representatives was a debt owing by two partners who were insolvent to a third partner, and as such was postponed until after the debts of the outside creditors of the partnership had been satisfied. The learned Judge in insolvency dismissed the application on appeal.

Held, that the proof of the representatives of the solvent partner ought to be expunged. (*Page, C.J. and Mya Bu, J.*) A. K. R. M. M. C. T. CHETTYAR FIRM *v.* S.P. DAYABHOY & SONS. **12 Rang. 699=156 I.C. 336 =7 R.R. 402=A.I R. 1935 Rang. 59.**

———*Firm—Discharge—Liability of partners.*

Where after a decree was passed against a firm, the firm was adjudicated insolvent and subsequently discharged, the decree cannot be executed against any individual partner. The creditor cannot indent on the firm's name for fixing the liability on the partner and at the same time ignore it when the protection conferred by the order of discharge is invoked. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) ASLAJI DHIRAJI BROS. *v.* SUNNI LAL. **36 Mys.H.C.R. 75=9 Mys L.J. 222.**

———*Firm—Separate debt of member—Adjudication for.*

No application for an order of adjudication against a firm is maintainable on account of the non-payment of the separate and personal debt of an individual member thereof unconnected with the partnership liabilities. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) BHAGAWANJI *v.* RAJA SAMPANGI RAMA SHETTY. **36 Mys. H.C.R. 39=9 Mys L.J. 1.**

———Foreign adjudication—Prior attachment in British India—Creditor in British India not affected by adjudication. *See* PROVINCIAL INSOLVENCY ACT (V OF 1920), S. 51. **60 I.A. 167=56 Mad. 405=64 M.L.J. 562 (P.C.).**

———*Foreign adjudication—Vesting order passed by foreign Court—Earlier attachment in British India of the property of the insolvent—Rights of Receiver.*

That there being no grounds for distinguishing between the rights of a foreign and of a domestic receiver in insolvency, in each the debtor's property vests subject to any prior equities such as a charge or lien, and no such equities are created by an attachment. A vesting order passed by a foreign Court, (Secunderabad) is a transfer by operation of law, though not of British Indian law; at any rate, it is not a private transfer, and therefore it has not to give way to an earlier attachment and the rights of the Official Receiver under such a vesting order override those under an earlier attachment in British India. (*Curgenven and Bashyam Ayyangar, JJ.*) OFFICIAL RECEIVER OF SECUNDERABAD *v.* LAKSHMINARAYANA. **54 Mad. 727=I R. 1931 Mad. 649=132 I.C. 297=33 L.W. 562=1931 M.W.N. 444 =A.I.R. 1931 Mad. 474=61 M.L.J. 774.**

[Reversed 60 I.A. 167=56 M. 405 (P.C.).]

———*Foreign adjudication—Vesting of property in British India.*

A vesting order made by a competent foreign Court (Secunderabad) operates upon property of the insolvent within British India, creating a title in the Official Receiver so invested. The title so operates with effect from the date of the order. (1910) A. C. 508, Rel. on. (*Curgenven and Bashyam Ayyangar, JJ.*) OFFICIAL RECEIVER OF SECUNDERABAD *v.* LAKSHMINARAYANA. **54 Mad. 727=I.R. 1931 Mad. 649= 132 I.C. 297=33 L.W. 562=1931 M.W.N 444= A.I R 1931 Mad. 474=61 M L J 774.**

[Reversed 60 I.A. 167=56 M. 405 (P.C.).]

———*Foreign adjudication—Vesting of property—Subsequent execution proceeding—Stay.*

A debtor was adjudicated as an insolvent at Penang, a part of the Straits Settlements, on the 9th January, 1931. On the 15th March, 1931, the appellant, a resident of Ramnad in British India, filed a suit against the insolvent in the Sub Court of Ramnad and obtained an attachment before judgment of his immovable property on the 24th July, 1931, and a decree on the 28th November, 1931. On the 19th July, 1932, he attached in execution the insolvent's immovable property in Ramnad. On the 24th October, 1932, the insolvent executed a conveyance in Penang of his property in British India including the property under attachment in favour of the Official Assignee in Bankruptcy of Penang. On the 5th December, 1932, at the request of the Supreme Court of Penang an order was made by the High Court for the Official Assignee of Madras to act as auxiliary to the Official Assignee of Penang and take possession and realise the properties of the bankrupt. The Official Assignee of Madras having heard of the proceedings in execution taken by the appellant applied to the Insolvency Court for an order under S. 18 of the Presidency Towns Insolvency Act staying the appellant's execution proceedings.

Held, that the insolvents' immovable property in British India did not vest in the Official Assignee of Penang on the adjudication. The Straits Settlements Bankruptcy Ordinance would be *ultra vires* if it purported to cause such a vesting of extra-territorial immovable property. *Macleod* v. *Attorney General for New South Wales*, (1891) A. C. 455 and *Callender, Sykes & Co* v. *Colonial Secretary of Lagos and Davies*, (1891) A.C. 460. Ref.

Held, however, that the British Indian Court could, giving effect to rules of International Law, recognise the foreign adjudication as effective and stay the execution proceedings which were taken subsequent to the order of adjudication. (*Beasley, C. J. and Bardswell, J.*) AIYASWAMI CHETTY *v.* THE OFFICIAL ASSIGNEE, MADRAS. **57 Mad. 616=151 I.C. 14=7 R.M. 103 =1934 M.W.N. 81=39 L.W. 541=A.I.R. 1934 Mad. 344=67 M.L.J. 59.**

———*Forum—Choice of—Wishes of debtor.*

An insolvency debtor is not in the same position as a plaintiff as to the right of choice of the Court in which his insolvency should be conducted. (*Panckridge, J.*) KRISHNA KISHORE PAUL, *In re*. **35 C.W.N. 566= 135 I.C. 279=I.R. 1932 Cal. 87=A.I.R. 1931 Cal. 775.**

———*Hindu joint family—Coparcener—Receiver—Right to sell son's shares.*

On the insolvency of a member of a joint Mitakshara family, only the insolvent's share in the joint family property vests in the receiver. But in cases where the insolvent's sons are liable for their father's debts, the receiver may, by appropriate procedure, bring the shares of the sons to sale, the sale proceeds being divisible

among the creditors of the insolvent. (*Courtney-Terrell, C.J. and Agarwala, J.*) MAHABIR PRASAD *v.* SHIVANANDAN SAHAY. **152 I.C. 277=7 R.P. 162=15 Pat.L.T. 502=A.I.R. 1934 Pat. 515.**

———*Hindu joint family—Father—Power to sell son's share—If vests in receiver.*

As a result of the insolvency of a Hindu father not only his share but also his power to sell his son's share to satisfy his debts also pass to the receiver. (*Niyogi, A.J.C.*) FATEHCHAND DIPCHAND *v.* HIRALA. **158 I.C. 599=8 R.N. 93=18 N.L.J. 255=A.I.R. 1935 Nag. 193.**

———*Hindu joint family—Father—Receiver selling the right, title and interest—Sons not parties—What passes.*

Where a Hindu father is adjudged insolvent and the receiver sells "the father's right, title and interest," in particular circumstances the expression "right, title and interest of the father" may include the son's interest as well; but the expression simpliciter cannot be interpreted in that comprehensive sense. In each case the particular circumstances which would justify attaching wider import to that expression must be proved. The circumstance of the sons being made parties to the proceedings is one of the factors which may be considered in determining the question as to what was intended to be sold. Where the sons are not made parties and there is no other circumstance showing intention to sell the entire property, the use of the expression right, title and interest of the father means only the share of the father. 17 Cal. 584 (P.C.); 3 Cal 198 (P.C.); 10 Cal 626 (P.C.); and 14 Cal. 572 (P.C.). Appl : 13 Cal. 21 (P.C.), Disappr. The fact that the debts were not proved to be illegal or immoral does not make any contribution to the proof as to the intention to sell the whole property. Of course the evidence as to what the purchaser thought he was purchasing would be admissible and that evidence would be directed to show that the consideration paid represented the value of the whole property and not merely the father's share. (*Niyogi, A.J.C.*) FATEHCHAND DIPCHAND *v.* HIRALAL. **158 I.C. 599=8 R.N. 93=18 N.L.J. 255=A.I.R. 1935 Nag. 193.**

———*Hindu joint family—Son—Debts of father—Adjudication for—Liability to.*

The son of a Hindu father who died after incurring debts upon promissory notes, apart from some special circumstances which would make him personally liable for the family debt, cannot be adjudged insolvent on account of his liability as a member of the family to pay these debts out of the family properties. 50 Mad 681; 53 M.L.J. 403. Foll. (*Krishnan Pandalai, J.*) PURNAYYA *v.* BASAVA KOTAYYA. **34 L.W. 761=135 I.C. 31=I.R. 1932 Mad. 63=A.I.R. 1931 Mad. 788=61 M.L.J. 518.**

———Insolvency Court. *See* C. P. CODE, S. 151 AND O. 47, R. 1.

———*Insolvency Court—Claim Case—Determination of question—Finality.*

It is open to the person claiming certain property attached by the Insolvency Court, to bring a regular suit for adjudication on the merits of his claim but if he placed the matter before the Insolvency Court and that Court proceeds to determine the question, its decision is final and binding for all purposes as between the debtor and the debtor's estate and all claimants against him or the estate on the other. 46 All. 16 Foll. (*Subhedar, A.J.C.*) RAMRATAN SINGH *v.* HARI. **28 N.L.R. 89=I.R. 1932 Nag. 91=139 I.C. 288=A.I.R. 1932 Nag. 109.**

———*Insolvency Court—Declaration by of the title of a creditor to a debt—If conclusive as a judgment* in rem.

A declaration by the Insolvency Court that a person is a creditor in insolvency does not confer upon him a "legal character" within the meaning of S. 41 of the Evidence Act. Even assuming that a debt is a "specific thing", a declaration by the Insolvency Court that the creditor is entitled to a particular debt is not conclusive as a judgment *in rem* so as to preclude any other Court from reopening the same question, because the Insolvency Court can only declare the title of the creditor to the debt as against the insolvent and not absolutely as against the whole world. (*Beasley, C.J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **54 Mad 601=I R. 1931 Mad. 577=131 I.C. 817=1931 M.W.N. 774=34 L. W. 282=A.I.R. 1931 Mad. 441=61 M.L.J. 229 (S. B).**

———*Insolvency Court—Inherent jurisdiction of—Rectification of Receiver's errors.*

The Insolvency Court has inherent jurisdiction to rectify the Receiver's errors or mistakes or to reverse or modify his acts or decisions. (*Johnstone, J.*) HAVELI SHAH *v.* MT. ZOHAR JAN. **I.R 1931 Lah. 844 (2)=133 I.C. 876 (2)=32 P L.R. 698=A.I.R. 1932 Lah. 84.**

———*Insolvency Court—Judgment declaring judgment-debt is provable—Effect—No proof.*

Per *Stone, J.*—A judgment in insolvency, declaring that the creditor's debt (*i.e.*, a judgment debt) is a provable debt does not declare that an alleged debt which merged in that judgment-debt is proved. A.I.R. 1927 Pat. 61, Ref. (*Beasley, C.J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **54 Mad. 601=I.R. 1931 Mad. 577=131 I.C. 817=1931 M.W.N. 774=34 L W. 282=A.I.R. 1931 Mad. 441=61 M L J. 229 (S.B.).**

———*Insolvency Court—Jurisdiction of—Injunction order regarding proceedings in foreign Court—Passing of.*

There is nothing in principle which prevents the insolvency Court from restraining proceedings in a foreign Court where the parties sought to be restrained carry on business within the jurisdiction and have assets within the jurisdiction which can be attached in the case of any breach of the injunction. Case under Presidency Towns Insolvency Act. (*Panckridge, J.*) SUMERMULL SURANA, *In re.* **137 I.C. 299=I.R. 1932 Cal. 298=35 C.W.N. 506=A.I.R. 1932 Cal. 110.**

———*Insolvency Court—Jurisdiction of—Partition suit—Whether can be entertained.*

No suit for partition can ever be filed in the Insolvency Court by the Official Assignee representing the father. The Insolvency Court exists to distribute assets between the creditors and not for deciding partition suits or other questions between the insolvent and the rest of the world. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHY PILLAI *v.* SUNDARAMURTHY PILLAI. **55 Mad. 558=I.R. 1932 Mad. 532=138 I.C. 225=35 L.W. 592=A.I.R. 1932 Mad. 381=63 M.L.J. 37.**

———Insolvency Court—Power to award exemplary costs. *See* C. P. CODE, S. 35-A. **A.I.R. 1935 Nag. 207.**

———*Insolvency Court—Powers of — Decree-holder obtaining garnishee order against Official Assignee—Latter paying into executing Court dividend payable to creditor in insolvency — Decree-holder withdrawing amount from Court on security bond—Proof of claim*

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of creditor subsequently expunged—Power of insolvency Court to order decree holder to refund or to proceed against his security.

The heirs of *X*, one of the partners of a firm, obtained a decree against the co-partners. On the adjudication of the latter as insolvents, the heirs of *X* were admitted to be creditors for the amount of their decree. *Z*, who had obtained a decree against all the partners including *X*, obtained an order directing the Official Assignee to deposit in Court the amount of the dividend payable to *X's* heirs. The Official Assignee deposited the amount in the executing Court, which was paid out to *Z*, on his executing a security bond for the refund of the money in case it should be found that he was not entitled to it after the legal representatives of *X* had been brought on the record. Subsequently, on an application by one of the creditors in the insolvency, the High Court, on appeal, expressed the opinion that payment of the debt for which *X's* heirs tendered a proof must be postponed until after the debts of the outside creditors have been liquidated. On a question being raised as to the power of the Insolvency Judge to direct *Z* to repay the money drawn by him from Court to the Official Assignee or to proceed against the security furnished by him.

Held, (*i*) that the payment of the dividend, which the Official Assignee deposited in Court in the regular suit upon the footing that it was a dividend payable to *X's* heirs, ought not to have been made, as the debt due to them could not be paid *part passu* with the debt of the outside creditors of the firm; (*ii*) that the Insolvency Court had no jurisdiction to direct *Z* to refund the amount to the Official Assignee or to proceed against the property deposited by him as security in the regular suit, as *Z* did not receive payment of the money in any sense as a creditor in the insolvency but as a judgment-creditor in liquidation of his decree against *X inter alias* in the regular suit and as the security was furnished not for the benefit of the insolvent estate but for the benefit of the heirs of *X*. (*Page, C.J. and Mya Bu, J.*) A. K. R. M. M. C. T. CHETTIAR FIRM *v.* S.P. DAYABHOY AND SONS. **13 Rang. 703=161 I.C. 795=8 R.R. 510.**

———*Insolvency Court—Powers of—Secured creditor given Rs.* 500—*Claim for Rs.* 1,000—*Unsecured creditor objecting—Objection upheld—Appeal—Maintainability.*

A secured creditor *G* of the insolvent was first allowed by the Insolvency Court Rs. 500 out of insolvent's charge of Rs. 1,000 in respect of his share in a house on 26th February, 1932. *G* put in an objection claiming whole amount of Rs. 1,000. An unsecured creditor opposed this application contending that *G* was entitled to nothing and the Insolvency Judge upheld the contention. The District Judge, on appeal, held that as no appeal was preferre ' against the order of 26th February, 1932, *G* was entitled to retain Rs. 500. On second appeal,

Held, that *G* having made an application in connexion with the order of 26th February, 1932, the whole matter was re-agitated before the Insolvency Judge and hence it became unnecessary for the unsecured creditor to prefer an appeal to District Judge. The Insolvency Judge, who passed the order dated 26th February, 1932 had been transferred and no application for review was competent. The application of *G* could only be considered to have been made under the provisions of S. 151 and the Insolvency Judge had ample power in the exercise of his inherent jurisdiction to pass such order as was required by justice and the necessities of the case, and was thus competent to set aside the previous order dated 26th February, 1932. As the order passed was under S. 151, no appeal lay to the District Judge and he had no jurisdiction to modify it. (*Bhide, J.*) SHEO LAL

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v. GIRDHARI LAL. **150 I.C. 241=6 R.L. 842 (2)= A.I.R. 1934 Lah. 177.**

———*Insolvent—Death of—Application by sons for substitution—Rejection—If terminates proceedings.*

If, on the death of an insolvent, a petition by his sons to be substituted in his place is put in and rejected, the insolvency proceedings do not terminate on the dismissal of such petition. (*Courtney-Terrell, C.J. and Varma, J.*) RAMAJODHIA *v.* HAZARI LALL-MATHURA PRASAD. **158 I.C. 18=8 R.P. 176=A.I.R. 1935 Pat 480.**

———*Law of insolvency—Mode of administering.*

The law of insolvency should be administered broadly with special consideration, not for the particular protection of the insolvent where an act of insolvency has been clearly committed but for the general protection of the creditors and the trading public. (*Cunliffe, Ag. C. J. and Bagulay, J.*) SOONIRAM *v.* S. A. R.M. CHETTIAR FIRM **12 Rang. 64=149 I.C 723=6 R.R. 309= A.I.R. 1933 Rang. 363.**

———*Mortgage—Interest—Sale of mortgaged property by Official Receiver—Receiver retaining purchase-money—Mortgagee's right to interest at stipulated rate.*

Where the Official Receiver appointed on the insolvency of a person sells the property mortgaged by the insolvent, he holds the purchase money realised by the sale, in the capacity of administrator of the estate of the insolvent and not as agent of the mortgagee. The interest on the mortgage money therefore continues to run at the stipulated rate until payment. 20 Mad. 224 (F.B.); A.I.R. 1929 Oudh 231 and A.I.R. 1918 All. 234, Dist. (*Abdul Rashid, J.*) KHUSHAL CHAND *v.* GOURI SHANKAR. **161 I.C. 462=8 R.L. 753=A. I.R. 1935 Lah. 906.**

———*Mortgage suit—Receiver appointed at instance of mortgagee—Realizations—Right of mortgagee in preference to Official Assignee.*

A mortgagee who procures a receiver to be appointed in a mortgage suit is entitled to the income from the mortgaged property in the hands of the receiver in preference to the Official Assignee. An equitable mortgagee who obtains the appointment of a receiver of the mortgaged property establishes a claim to have the recoveries made by the receiver ear-marked for his benefit, in case the mortgaged property is not sufficient to satisfy his claim, and an Official Assignee cannot claim the rents and profits of the property in the hands of the receiver for the benefit of the general body of creditors in preference to the mortgagee. (*Milne, J. C. and Mehta, A.J.C.*) OFFICIAL ASSIGNEE *v.* PUNJAB NATIONAL BANK, LTD. **26 S.L.R. 61=I.R. 1932 Sind 79=137 I.C. 338=A.I.R. 1932 Sind 82.**

———Official Assignee—Duty of—Contested action—Standard of honesty—After acquired property of insolvent—Person dealing with insolvent *bona fide*—Rights—Whether Official Assignee should intervene. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 79. **8 Rang. 665=A.I.R. 1931 Rang. 74** (2).

———*Power of Court—Injunction restraining suit by unsecured creditor in Foreign State.*

The insolvent was adjudicated in Calcutta but subsequently the adjudication was annulled and a scheme of composition approved. It appeared that the insolvent had certain properties in Bikanir, which however was charged to the full in favour of creditors. The latter properties were not included in the composition. An unsecured creditor having sued to recover the debt contracted by the insolvent at Calcutta, the insolvent applied for an injunction restraining the creditor from proceeding with the suit.

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Held, that though the Court under the circumstances of the case can make an injunction order effective, it was not necessary to pass such an order having regard to the merits of the matter. (*Rankin, C. J. and Pearson, J.*) SUMERMULL SURENA *v.* BANSI LAL ABIR CHAND. **137 I.C 299 = I R. 1932 Cal 298 = 35 C.W. N. 997 - A I R. 1932 Cal. 310.**

[F 62 C. 659 (662).]

——Power of Court—Petition by debtor before execution sale and adjudication after—Purchase by decree-holder with leave of Court—Power of Court to order deposit of sale price. *See* C. P. CODE, O. 21, R. 72 (2). **A.I R. 1935 Mad. 907.**

——*Procedure—Money suit—Debtor becoming insolvent during pendency of suit—Right of creditor to join Official Assignee or Receiver as party to suit.*

Where a suit is brought against a debtor in respect of money due (*e.g*, a debt, or damages for breach of contract) and he becomes insolvent, the creditor is not entitled to join the Official Assignee or Receiver as a party to the suit. The suit is not one relating to the property of the insolvent, and the Official Assignee or Receiver is neither a necessary nor a proper party to the suit. (*Braund, J.*) BALTHAZAR AND SON *v.* MUNICIPAL CORPORATION, RANGOON. **160 I C. 90 = 8 R.R. 334 = A.I.R 1935 Rang. 439.**

——*Procedure—Proceeding by creditor not initiated* bona fide*—Abuse of process of Court.*

If insolvency proceedings are initiated or prosecuted by creditors not *bona fide* but with a view to extortion or fraud, or oppression, it would be a shocking thing for any Court of justice in a civilised country to be made the instrument of such proceedings. (*Page, C J. and Shaw, J.*) GALLIARA *v.* MURUGAPPA CHETTY. **12 Rang. 335 = 156 I.C. 345 = 7 R R. 402 = A.I.R. 1934 Rang. 292.**

——*Proof of claim—Onus—Promissory note executed by insolvent—Proof of consideration.*

Notwithstanding S. 118-A of the Negotiable Instruments Act, the burden of proving consideration for a promissory note executed by the insolvent is on the creditor who makes a claim and not on the Official Assignee. "The law requires a creditor of the Insolvent to prove his claim, the burden is therefore on him to prove his claim and not on the Official Assignee. The rights as between the Official Assignee and the claimant are entirely distinct from those between a debtor and a creditor, for the Official Assignee like the trustee in bankruptcy represents the general body of creditors and is entitled to go behind the covenant in a mortgage or a stated account and to require satisfactory evidence admitting proof that the claim represents a genuine debt." The bankruptcy Court can enquire into the consideration of judgment-debt, where grounds for an enquiry exist An investigation ought to be held, where there are facts which throw great suspicion on a claim ordinarily a judgment debt ought to be considered as binding. (*Aston, A.J C*) MCCURLEY, *In re*. **141 I.C. 470 = 26 S.L R 279 = I.R. 1933 Sind 56 = A.I.R. 1932 Sind 197.**

——*Property in Foreign State—Liability for debts of insolvent.*

Semble.—The property in a Foreign State is as between the creditors and the insolvent available to the creditors in Calcutta unless the Foreign Law was to the contrary. (*Rankin, C. J. and Pearson, J.*) SUMERMULL SURENA *v.* BANSI LAL ABIR CHAND. **35 C. W.N. 997 = 137 I C. 299 = I.R. 1932 Cal. 298 = A.I R.1932 Cal. 310.**

——*Receiver—Representative character.*

The receiver is an officer of the Court. It is not correct to say that his position is merely that of a representative of the insolvent. There are cases where the receiver represents not only the insolvent but also his creditors. 14 Ch. D. 265, Ref. (*Hasan, C. J. and Bisheshwar Nath, J.*) AJODHIA PRASAD *v.* SITA RAM. **I.R. 1931 Oudh 421 = 134 I.C. 1013 = 8 O.W. N. 1126 = A.I.R. 1931 Oudh 405.**

——Receiver—Sale by—Subsequent sale under Revenue Recovery Act for arrears of income tax in pursuance of attachment levied prior to insolvency—Priority. *See* INCOME-TAX, ACT, S. 46 (2). **A.I.R. 1935 Mad. 882.**

——*Res judicata*—Doctrine of—Applicable to proceedings in insolvency. *See* C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS — INSOLVENCY PROCEEDINGS. **56 Mad. 395 = A.I.R. 1933 Mad. 9 = 63 M L.J. 778.**

——*Right of suit—Suit filed during subsistency of insolvency—Insolvency subsequently vacated—Effect.*

Where a suit was instituted by the manager of an estate at a time when he was not entitled to sue, the right of suit having vested in the Official Assignee but the insolvency order was vacated during the pendency of the suit.

Held, that the suit was competent. The effect of the subsequent decision vacating the insolvency order is there was no decision vesting the estate in the Official Assignee at the date of the institution of the suit so as to prevent the plaintiff from maintaining the present suit, *i.e*, as if the prior decision vesting the estate in the Official Assignee had not existed at all. (*C. C. Ghose, Ag. C. J. and Mitter, J.*) SUNDERJI SHIBJI *v.* MANGTULAL BAGARIA. **60 Cal. 533 = 6 I R. (Cal.) 193 = 146 I.C. 257 = 37 C.W.N. 298 = A.I.R. 1933 Cal. 547.**

——*Sale of mortgaged property—Power of receiver to sell free of mortgage.*

In the case of insolvency of mortgagor, it is possible for the Official Receiver who stands in the position of the mortgagor to sell the mortgaged property outright free of the mortgage debt, if it can be shown that the mortgagee acted in such a way that his action was equivalent to an authorisation to sell on his behalf. Where the receiver who held the sale issued notices without any reference to the mortgage and the mortgagee consented to have the properties sold free of his mortgage, and at the sale his agent actually brought the property on behalf of the mortgagee.

Held, that the conduct of the agent amounted to an express authorisation to the receiver to sell free of the mortgage, and that the sale should be regarded as one free of mortgage. (*Baguley and Mackney, JJ.*) P. C. DASS *v.* U TUN AUNG. **151 I.C. 606 = 7 R.R. 89 = A I.R. 1934 Rang. 367.**

——*Suit by insolvent for defamation—Maintainability.*

An insolvent is entitled to sue for defamatory words whether published before or after his adjudication ; and such damages as he may recover will not belong to his trustees. Though in such a suit for damages for defamation of the insolvent a part of the claim refers to injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him. English cases relied on. (*Rupchand, A.J.C.*) CHAINRAI VALIRAM *v.* SUNDAY TIMES, LTD. **26 S.L.R. 21 = I R. 1932 Sind 183 = 140 I.C. 233 = A.I R. 1932 Sind 33.**

——*Third party—Order for production of account books—Evidence—Official Assignee's report.*

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Before a third party can be called upon to produce book of account in his custody, the Official Assignee must make out a *prima facie* case that the third party had such books in his custody. The report of the Official Assignee is no legal evidence in support of his application. (*Beasley, C. J. and Cornish, J.*) VALLIAMMAL *v.* OFFICIAL ASSIGNEE, MADRAS. **56 Mad. 273=1932 M.W.N. 959=36 L.W. 703=143 I.C. 265=I.R. 1933 Mad. 283=A.I.R. 1933 Mad. 74=63 M.L.J. 810.**

INSTALMENTS. *See* C. P. CODE, O. 20, R. 11.

INSTALMENT BOND.

See also (1) INTEREST.
(2) LIMITATION ACT, 1908, ART. 75.

———*Default clause—Enforceability—Acceptance of overdue instalments—Effect—Condonation.*

Mere acceptance of overdue instalments due under an instalment bond will not by itself prove waiver. But if the obligee by his acts causes the obligor to believe that the payments of the instalments tendered after they had accrued due were regarded as a regular satisfaction of the obligation, it must be taken that the obligee intended to condone the defaults, and he cannot afterwards be permitted to turn round and deny the regularity of the payments and to claim interest on the ground. (*Niyogi, A.J.C.*) KUNDAN LAL *v.* HARPRASAD. **163 I.C. 840 (2)=18 N.L.J. 232.**

INSTALMENT DECREE.

See (1) C. P. CODE, O. 20, R. 11.
(2) DECREE.
(3) EXECUTION.
(4) LIMITATION ACT, ART 182.

INSTALMENT PAYMENT. *See* C. P. CODE, O. 2, R. 2.

INSURANCE—*Contract of—Completion—Loss of cover-note sent before issue of policy—Commencement of risk.*

On the 7th November, 1928, a proposal form was filled in and signed by the plaintiff. He also paid a sum of Rs. 95 being the amount of premium. The insurance was to be in force for one year and the sum of Rs. 95 was the entire premium for that year. On 22nd November, 1928, the plaintiff received a document described a "cover note" which ran as follows: "Plaintiff having made a proposal for insurance of burglary, etc., and having paid the sum of Rs. 95, being the amount of premium thereon, the risk is hereby held insured subject to the terms and conditions of the Company's usual form of policy, for a period of 30 days from date within which period (provided the premium is paid) the policy will be issued."

Held, that there was a clear acceptance of the proposal on behalf of the Insurance Company. The fact that the policy did not arrive before the burglary took place could not be relied on by the Insurance Company as the acceptance of the proposal was complete and had been communicated to the plaintiff. (*Mukerji and Niamatullah, JJ.*) MAHOMED SULTAN *v.* CLIVE INSURANCE CO., LTD. **56 All. 726=3 A.W.R. 548=1934 A.L.J. 719=6 R.A. 711=148 I.C. 522=A.I.R. 1934 All. 298.**

———*Contract of—Conclusion—Formalities—Stipulation as to payment of premium—Effect of—Waiver.*

A contract of insurance, like any other contract, is completed by an offer and acceptance, and a pre payment of the premium is not in law a condition precedent to the contract. But it is almost a common practice for all insurers, except marine, to stipulate that the contract shall not begin to take effect until the premium has been paid, and the Court will not enforce a contract of insurance when there is such a stipulation in the policy, until the premium has been paid. But it is competent for the insurer to waive the condition and the Court will readily infer such a waiver which may be established either by evidence of an express agreement or may be inferred from the surrounding circumstances of the case. Even when there is a stipulation or a condition as to the payment of premium, if the assured undertakes to pay the premium or promises to pay it, the contract between the parties becomes a completed or concluded contract. (*Rangnekar, J.*) THE OCEAN ACCIDENT AND GUARANTEE CORPORATION CO., LTD. *v.* D. K. PATKAR. **156 I.C. 634=8 R.B. 11=37 Bom L.R. 304=A.I.R. 1935 Bom. 236.**

———*Fire insurance—Clause limiting liability of company to claims made within one year—Validity of.*

The policy of insurance contained a clause that "the company should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage, unless the claim was the subject of pending action or arbitration". Where the suit was filed more than twelve months after the fire, and there had been no reference to arbitration and all the time had been spent in the investigation of the claim and delay by the insured.

Held, that (*i*) the words "pending action" referred only to a pending suit and not to steps which the company might take in the investigation of the claim; (*ii*) that the clause only provided that the company shall not be liable if the claim was made more than twelve months from the date of the loss and not that the insured should not have the right to sue after 12 months, so it was not against public policy and it did not contravene the provisions of S. 28 of the Contract Act or Art. 86 of the Limitation Act. The suit was, therefore, not maintainable. (*Leach, J.*) GHOSE *v.* RELIANCE INSURANCE CO. **11 Rang. 475=149 I.C. 15=6 R.R. 298=A.I.R. 1934 Rang. 15.**

———*Fire insurance—Insurable interest—Sale and agreement to re-convey in future—Interest of vendor.*

Insurable interest is not synonymous with a legal interest as defined in S. 54, T. P. Act. Where *P* insures certain properties against fire and subsequently the same premises are sold, but on the day of sale the parties enter into another contract under which the purchaser agrees to sell and *P* to purchase the same, such agreement to purchase gives *P* an insurable interest in the property which entitles him to enforce the policy so long as the agreement for re conveyance is in force. *Lucena* v. *Crauford*, 2 Bos. & P (N.R.) 269 and *Castellain* v. *Preston*, 11 Q.B.D 380, Ref. (*Page, C.J. and Mya Bu, J.*) GNANA SUNDARAM *v.* VULCAN INSURANCE CO., LTD. **9 Rang 452=I.R. 1931 Rang. 285=134 I.C. 221=A.I.R. 1931 Rang. 210.**

———*Fire insurance—Lapse of policy—Renewal premium paid to canvasser—Policy never renewed in fact—Misappropriation by canvasser—Subsequent fire—Liability of the company.*

The plaintiff insured the stock-in-trade in his shop on a policy issued by the Company from 9-6-1930 to 9-6-1931. On 9 6-1931 the policy lapsed. Sometime after, the plaintiff paid a sum of money to one *C*, a person purporting to act as canvassing agent of the company for effecting new insurance. *C* gave him a receipt for the amount paid. The receipt however was referable not to a renewal of the policy but to a proposal for a new policy intended to be issued. The new policy was, however, never issued. On 27-8-1931 the plaintiff's stock-in-trade was destroyed by fire. In a suit by the plaintiff, reliance was placed on two documents, the

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receipt issued by the canvassing agent and a renewal receipt purporting to have been issued by the underwriters. The latter was, however, found to be a forgery.

Held, that the company was not liable. The provisional receipt did not purport to effect a new policy or the renewal of the old policy. Neither the canvassing agent nor the underwriter on whose behalf he professed to act had the authority to effect a renewal of the policy under the terms of his agency and in so far as the canvassing agent purported to do so, he was not acting within the scope of his employment. The liability of the insurer could only commence from the issue of the policy which in fact was never done. The fraudulent act of the canvassing agent could not bind the company. (*Page, C.J. and Das, J.*) UNIVERSAL FIRE AND GENERAL INSURANCE CO., LTD. *v.* SHUP SHIN HTAI. **12 Rang 312=154 I.C. 53=7 R.R. 252= A.I.R. 1934 Rang 261.**

———*Fire insurance—Material misdescription of property—Meaning of.*

In the case of a policy of fire insurance, a material misdescription of property means a misdescription such as would affect the mind of a reasonable insurer either as to accepting the risk or as to the premium which he would place upon the risk. Whether a misdescription is material or is not, is partly a question of evidence and also partly a question of law. Where a building consisting of a back wall built of brick, front wall of timber and the side walls partly of brick and partly of timber, is described in the policy as "constructed of brick walls and cement flooring in the ground storey" the description is inaccurate in a matter which is material for insurance purposes. (*Lord Atkin.*) DAWSONS BAND, LTD. *v.* VULCAN INSURANCE CO., LTD. **13 Rang. 63=39 C.W.N. 270=41 L W. 160=37 Bom L.R. 141=60 C.L.J. 551=1935 M W N. 13=37 P.L.R. 217=153 I.C. 311=1935 O W N. 34=1935 A.W.R. 80=7 R.P.C. 107=1935 A L J. 51=A.I.R 1935 P.C. 1=68 M L J. 99 (P.C.).**

[On appeal from, 11 Rang. 266]

———*Fire insurance — Material misdescription—Walls built of timer described as being built of bricks —Knowledge of parties.*

In a policy of insurance one of the conditions was that in case of material misdescription of the property insured, the company would not be liable on the policy. Certain walls in the building insured which were built of timber were described as being built of bricks.

Held, that as wooden buildings were highly combustible during certain periods of year and the acceptance of the policy or fixing up of the premium depended on the nature of the building, the above was a material misdescription and that the company was under no liability to the assured under the policy.

Held, further, that it was immaterial whether the agents knew about the misdescription and that the company was not liable in any case. (*Page, C. J. and Mya Bu, J.*) VULCAN INSURANCE CO., LTD. *v.* DAWSONS BANK, LTD. **11 Rang 266=6 I R (Rang.) 127=146 I.C 860=A I R. 1933 Rang. 166**

[**Affirm.** 13 Rang. 63=68 M.L J. 99 (P.C.).]

———*Fire insurance—Policy, when becomes effective.*

Unless there is among the conditions of the issue of policy an express stipulation that the policy shall not become effective until the premium has actually been paid, the policy becomes effective from the date of its signature by the agent of the company. (*Mackney, J.*) U SAN DUN *v.* NEW ZEALAND INSURANCE CO., LTD. **153 I.C. 387=7 R.R. 213=A.I.R. 1934 Rang, 343.**

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———*Fire insurance—Renewal—Effect of.*

Per *Buckland, J.*—The renewal of a policy is a fresh contract dating back to the date of the expiry of the original contract. (*Rankin, C. J. and C. C. Ghose, J.*) RAM SING *v.* CENTURY INSURANCE CO, LTD. **60 Cal. 332=I.R. 1933 Cal. 286=142 I.C. 505=36 C. W.N 1101=A.I.R. 1933 Cal. 170.**

———*Fire insurance—Renewal of policy—Fire between sending and acceptance of renewal—Right of assured to recover.*

The plaintiff insured his premises with the defendants for one year from 3-11-1927 to 3-11-1928, "or during any subsequent period for which the insured shall pay to the company and the company shall accept the sum required for the renewal." The policy expired on 3-11-1928. On 18-11-1928, the plaintiff sent the renewal premium which was received and accepted by the defendants on 26-11-1928. Meanwhile the premises had been destroyed by fire on 20 11-1928; plaintiff wrote on 22 11-1928 intimating the defendants of the fire; the letter was received by them on 28 11 1928 and at once they cancelled their acceptance of the renewal and repudiated their liability.

Held, that on a construction of the policy, it had reference only to a risk in the future and not to the past, that the renewal assumed that the subject-matter of the insurance continued to exist and as it had failed to exist at the time of the acceptance by the defendants, the assured was not entitled to recover. (*Rankin, C.J. and C. C. Ghose, J.*) RAM SING *v.* CENTURY INSURANCE CO., LTD. **60 Cal 332=142 I C 505=I.R 1933 Cal 286=36 C.W.N. 1101=A I.R 1933 Cal 170.**

———*Fire insurance—Risk—Commencement of.*

In a contract for fire insurance, the risk commences as soon as a binding contract of insurance is concluded, although it is always open to the parties to the contract to come to an agreement as regards the time from which the risk will commence. And such a contract can be enforced, notwithstanding the fact that no policy in the usual form had been issued and no premium had been paid. *Thomson* v. *Adams*, (1889) 23 Q. B. D. 361; *In re Norwhich Equitable Fire Insurance Society*, (1887) 57 L.T. 541, Ref. (*Iqbal Ahmad and Rachhpal Singh, JJ.*) HARI KISHAN DAS *v.* GUARDIAN ASSURANCE CO, LTD. **56 All. 237=1934 A L.J. 59=147 I.C. 301=6 R A. 457=3 A.W.R. 187=A.I.R. 1933 All. 900.**

———*Life insurance—Claim—Place of suing.*

In the case of a suit against an insurance company to recover the amount of a life insurance policy, the death of the assured is a part of the cause of action. So a suit against the insurance company can be brought where the insured died. 22 C.W N. 517; 41 I.C. 392, Foll ; 1 Rang. 231, Not Foll. (*Baker, J*) LIGHT OF ASIA INSURANCE CO., LTD. *v* BAI CHANCHAL. **I.R. 1932 Bom 596=140 I.C. 262=34 Bom.L.R. 815=A I R. 1932 Bom 392**

[**R.** 28 S.L.R. 192 (194).]

———*Life insurance—Lapse of policy—Refund of amount paid—Claim for.*

When, after the risk had once begun to run, a policy lapses by non-payment of the premium, the assured is not entitled to claim a return of the whole or any portion of the amounts paid. 43 Mad. 333, Foll. (*Venkatasubba Rao, J.*) SANKUNNI MENON *v* EMPIRE OF INDIA LIFE ASSURANCE CO., LTD. **I.R. 1931 Mad. 865=134 I.C. 977=34 L.W. 643=1931 M.W.N. 624=A.I.R. 1932 Mad. 241=61 M.L.J. 388.**

———*Life insurance—Lapse — Revival—Declaration by assured—Mis statements on material particulars—Effect.*

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On the lapse of a life insurance policy for non-payment of premium even after the days of grace, the assured in accordance with the rule of the insurance company sent a declaration in the prescribed form and also a payment, which were accepted, and the policy was revived. The rule in question provided for revival of the policy "on furnishing satisfactory evidence of continued good health", etc. Six months later, the assured died of *acute dyspepsia* the doctor's certificate showed that the assured was suffering from the disease from about four months after the revival of the policy till death, and that he had a slight attack two months before the lapse, but that he got over it by treatment for over a month. The company pleaded that the revival was invalid because of misstatement on a material particular in the declaration.

Held, that the printed form of declaration supplied by the company would not put the assured on sufficient notice as to the degree of care he was expected to exercise; that there was no misstatement, in view of the doctor's certificate; and that therefore the revival was not invalid. (*Varadachariar and Burn, JJ.*) INDIAN EQUITABLE INSURANCE COMPANY, LTD. *v.* ONKARAPPA. **152 I C. 654 = 1934 M W N. 1192 = 7 R M. 262 (2) = 40 L.W. 612 = A.I.R. 1934 Mad. 674 = 67 M.L.J. 522.**

———*Life insurance—Misrepresentation—Incorrect reply to question by doctor—Liability of insurer.*

Where the representations, statement and agreements made by an assured in his application for a policy of life assurance are made a basic condition of the contract by the policy of life assurance, the truth of the statements contained in the proposal are, apart from the question of their materiality, the condition of the liability of the assurance company. Where the assured incorrectly stated in the proposal and to the doctor that he had not been previously examined with a view to insurance, the company is entitled to repudiate its liability. It is unnecessary to go into the question as to whether the question and answer were in any way material. (1922) 2 A.C. 413 and 32 Bom.L.R. 1671, Foll. (*Patkar and Barlee, JJ.*) LAKSHMISHANKAR *v.* GRESHAM LIFE ASSURANCE SOCIETY, LTD. **140 I. C. 575 = 34 Bom L R 1295 = I R. 1933 Bom. 21 = A. I.R. 1932 Bom. 582.**

———*Life insurance—Nominee by the assured—Rights of—No privity of contract.*

In the case of a policy of insurance effected by *A* which provides that either on the death of *A* or at the expiration of a particular period, the insurance company will pay the sum assured to *B*, that does not confer any contractual right upon *B* nor does the taking of the policy in that form operate as a trust in favour of *B*. Consequently, on the death of *A* or on the expiration of the specified period, the executors of *A* or *A* himself, as the case may be, are the only persons who can recover the fund from the insurance company, and *B* has no claim to it. (*Beaumont, C. J. and Kemp, J.*) NADIR SHAW *v.* TIMES OF INDIA EMPLOYEES DEATH BENEFIT FUND. **I.R. 1931 Bom. 494 = 134 I.C. 558 = 33 Bom L R. 720 = A.I.R. 1931 Bom. 300.**

———Life insurance—Person named in policy not obtaining administration or succession certificate—Money in hands of insurance company—Not liable to attachment. *See* SUCCESSION ACT (1925), S. 214. **A.I.R. 1935 Rang. 211.**

———*Life insurance—Policy of—Default clause—Construction—Non payment of a portion of annual premium—Sufficiency of surrender value—Forfeiture.*

The Courts will, in construing a policy of insurance, far from favouring a forfeiture, lean against it. A policy of life assurance contained a clause as follows: "A policy which has acquired a surrender value sufficient to pay at least one year's premium is not forfeited immediately by non-payment of the premium within the days of grace; such surrender value being automatically applied in payment of instalments of premium and interest thereon to keep the policy in force for so long a term as such surrender value will cover." In a particular year a policy holder paid three instalments amounting to Rs. 113-1 0 but committed default as regards the fourth instalment which amounted to Rs. 37 11-0. It appeared that the surrender value of the policy on the date of default was Rs. 86 3 0. The question having been raised whether the policy was forfeited on account of the default of the policy holder,

Held, that the surrender value was sufficient to pay the year's premium and the policy was not forfeited. The expression "a year's premium" in the policy did not refer to a calendar year's premium in the abstract but referred to such portion of the annual premium as was actually payable by the policy-holder. (*Venkatasubba Rao, J.*) NATIONAL INDIAN LIFE INSURANCE CO., LTD. *v.* MAHADEVAN. **58 Mad. 980 = 1933 M W.N. 968 = 38 L.W. 327 = 147 I C. 458 = 6 R.M. 344 = A.I. R. 1933 Mad. 680 = 65 M.L.J. 324.**

———*Life insurance—Policy of—Hindu joint family—Policy whether enures for benefit of family.*

Ordinarily in the case of a joint Hindu family possessing property, the onus of proof that certain property is self acquired and not joint is upon the person asserting it. But in the case of an insurance policy, the presumption would not hold good. In the absence of proof that the policy was taken out for the benefit of the family and that premia were paid out of joint family funds the presumption is that the policy was taken out as a personal policy for the benefit of the personal heirs of the accused. (*Staples, A. J. C.*) SUGANDHABAI *v.* KESARBAI. **141 I.C. 182 = I.R. 1933 Nag. 44 = 15 N.L.J. 51 = A.I.R. 1932 Nag 162.**

———*Life insurance—Policy of—Succession—Company calling for succession certificate or probate—Propriety.*

There is nothing in law to prevent a company from entering into a contract with a proposer of life insurance that the company would pay the money only to him or his assign or to his executor or his administrator. Where a Hindu took a whole life policy and before his death, he adopted a boy and also executed a will in his favour and after him the minor's estate was taken over by the Court of Wards,

Held, that the Insurance Company was justified in calling for probate or letters of administration or a succession certificate before payment of the amount. (*Mukerji and Bennet, JJ.*) GRESHAM LIFE INSURANCE SOCIETY, LTD. *v.* COLLECTOR OF ETAWAH. **54 All. 1026 = 143 I C. 343 = I.R. 1933 All. 233 = 1932 A.L.J. 1015 = A.I.R. 1933 All. 1.**

———*Place of contract—Policy forwarded by Madras agent and accepted by Company in Calcutta.*

An insurance policy was effected by means of the local agent in Madras of the Insurance Company; it was accepted by the company by its directors in Calcutta. The local agent at Madras was not authorized to accept proposals; he was merely a post office.

Held, that the policy was effected in Calcutta and not in Madras. (*Beasley, C.J. and Baldswell, J.*) NATIONAL INSURANCE CO., LTD *v.* SEETHAMMAL. **6 I. R. (Mad.) 181 = 145 I.C. 998 = 1933 M W.N. 937 = 38 L.W. 504 = A.I.R. 1933 Mad. 764 = 65 M.L.J. 455.**

———*Life insurance—Suit to recover policy amount—Jurisdiction of Court.*

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The only definition of cause of action that will work if it has to be applied to cases of all kinds is the entire set of facts that gives rise to an enforceable claim. In the case of an insurance policy payable at death, the claimant must prove the death of the insured; hence the place of the death of the assured is a place where the cause of action arises, so as to give jurisdiction to the Court of that place. The words "on proof to the satisfaction of directors, that the sum assured has become payable" mean only proof of death of insured. (*Rupchand, A. J. C.*) SHIVKUMAR RADHAKISHENDAS *v.* BOMBAY LIFE ASSURANCE CO., LTD. **28 S.L.R. 192 = 151 I.C. 516 = 7 R.S. 62 = A.I.R. 1934 Sind 76.**

———*Life insurance—Terms relating to payment of premium—Enforcement of—If penalties.*

The terms in a policy of insurance relating to the payment of premium are always strictly enforced. Where it is stipulated in a policy of insurance that premiums shall be paid by a certain date, else the policy shall become void and also that an application for reviving a lapsed policy shall be made within twelve months from the due date, such stipulations will be strictly enforced. *Mackenna* v. *The City Life Assurance Co.* (1919) 2 K. B 491; *Hantler* v. *M. K. F. Life Association*, (1904) 90 L. T. 192, Ref. Clauses requiring that as regards any claim to a paid-up policy or surrender value, application should be made within twelve months, from the date on which the last unpaid premium became due, are not in the nature of penalties against which relief ought to be granted assuming they are stipulations for forfeiture. (*Venkatasubba Rao, J.*) SANKUNNI MENON *v.* EMPIRE OF INDIA LIFE ASSURANCE CO., LTD. **I.R. 1931 Mad. 865 = 134 I.C. 977 = 34 L.W. 643 = 1931 M.W. N. 624 = A.I.R. 1932 Mad. 241 = 61 M.L.J. 388.**

[**R.** 65 M.L.J. 29 (33).]

———*Third party risk—Indemnity under motor policy—Accident caused by daughter of insurer—Right of third party to recover—British Columbia Insurance Act, 1925, S. 24.*

The appellant claimed compensation for injuries sustained in a collision with a motor-car driven by *J*, the daughter of Berry, who had insured with the respondents. Under S. 24 of the British Columbia Insurance Act, "where a person incurs liability for injury or damage and is insured against such liability, the person entitled to the damages may recover by action against the insurer. It was contended for the appellant that by virtue of the last clause in the policy extending the indemnity "to any person while riding in or operating the automobile with the permission of the insured," *J* was "insured" within the meaning of S. 24 of the Act and hence the respondents were liable to compensate the appellant.

Held, (*i*) that no one could claim the benefit of the policy even if answering the general description, unless it was established that the person who directed the insurance to be affected actually *intended* to cover that particular person or at least some one who should answer the description. There was no evidence of any such intention and the mere generality of the language was not in itself sufficient; (*ii*) that though a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party, there again the intention to constitute the trust must be affirmatively proved: it cannot necessarily be inferred from the mere general words of the policy; (*iii*) that Berry had no insurable interest in *J's* (his daughter's) personal liability and so the policy, in respect of such a risk, was void under the statute; (*iv*) that in short, S 24 was satisfied only by a contract at law, enforceable directly against the insurers by the insured in his own

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name and not by an equitable right in *J* (even if it were constituted) enforceable only in the name of the statutory insured (Berry), that *J* was not "insured" within the meaning of S. 24 which the appellant was not, therefore, entitled to invoke. (*Lord Wright.*) ALICE MARIE VANDEPITTE *v.* THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK. **1933 A.C. 70 = 1933 A.L.J. 373 = I.R. 1933 P.C. 122 = 143 I.C. 79 = 37 L.W. 279 = A.I.R. 1933 P.C. 11 = 64 M.L.J 133 (P.C.).**

INTENTION.

See (1) CONTRACT—CONSTRUCTION.
(2) DEED—CONSTRUCTION.
(3) EVIDENCE ACT, S. 92
(4) INTERPRETATION OF STATUTE.
(5) PENAL CODE, S. 34.

INTEREST.

See also (*i*) C. P. CODE, SS. 34, 144 AND O. 34, RR. 4 AND 11.
(*ii*) CONTRACT ACT (1872), SS. 73 AND 74.
(*iii*) INTEREST ACT (1839).
(*iv*) USURIOUS LOANS ACT (X OF 1918).

As damages.
Award of.
Compound interest.
Contract rate.
Custom.
Damdupat.
Equitable grounds.
Hundis.
Instalment bond.
Liability for.
Meaning of.
Mortgage.
On damages.
Post decree.
Post diem.
Rate of.
Right to.
When suspended.

As damages.

———*As damages—If and when payable.*

In a case not covered by the Interest Act, the Court cannot award interest by way of damages as component of the compensation for breach of contract, under S. 73 of the Contract Act, in the absence of proof of special loss or damage sustained by the plaintiff in consequence of the non-payment. (Case-law discussed.) (*Curgenven and Sundaram Chetty, JJ.*) RAJA RAM DOSS BAVAJI *v.* GAJAPATHI KRISHNA CHANDRA DEO GARU. **57 Mad 205 = 6 I.R. (Mad) 122 = 145 I.C. 721 = 1933 M.W.N 498 = 38 L.W. 420 = A.I.R. 1933 Mad. 729 = 65 M.L.J. 620.**

[**F.** 41 L.W. 351 (352).]

———*As damages—Agent for collection and payment—Amounts due from.*

Defendant, a commission agent, was to collect amounts on behalf of plaintiff and pay them over. There was no contract to pay interest on such amounts. Plaintiff claimed amount and interest by way of damages.

Held, that in a case of this sort, interest could only be allowed if a contract, express or implied, had been made and that interest by way of damages could not be successfully claimed. 136 I.C. 719, Rel. on. (*Harrison and Agha Haidar, JJ.*) NAND RAM ATMA RAM *v.* GOKAL CHAND JAGANNATH. **149 I.C. 688 = 6 R.L. 731 = A.I.R. 1933 Lah. 841.**

———*As damages—Claim for unpaid price of goods supplied.*

A claim for interest on unpaid price of goods supplied by way of damages on equitable grounds is not sustain-

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able. (*Tek Chand and Monroe, JJ.*) RAGHOO MAL *v.* NANNE MAL JANKI DAS. **6 I.R. (Lah.) 86=145 I.C. 247=A.I.R. 1933 Lah. 127.**

———*As damages—Delay in payment of contractor's bill.*

Where a contractor has completed the work he has undertaken to do but his bill is unreasonably delayed, he is entitled to be compensated for the delay. Interest at 6 per cent. held was not excessive. (*Coldstream and Jai Lal, JJ.*) SECRETARY OF STATE *v.* GAJJAN SINGH. **160 I.C. 739=8 R.L. 579=A.I.R. 1935 Lah. 775.**

———*As damages—Detention of debt.*

In the case of a mere detention of a debt, where there is no contract, express or implied, to pay interest or no statute or mercantile usage allowing it, interest may be awarded by way of damages in a proper case. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **154 I.C. 479=7 R.C. 459=61 Cal. 711=A.I.R. 1935 Cal. 39.**

———*As damages—Interest apart from Interest Act—Power of Court to award.*

Besides the Interest Act and Ill. (*n*) to S. 73, there are other circumstances in which interest can be awarded on general grounds of equity. Where one of the co-sharers collected rent on behalf of himself and others but there was delay in making payment to the plaintiff co-sharer,

Held, that the latter could claim interest by way of compensation and that the same could be awarded under S. 73 (3), Contract Act. (*Pullan and Niamatullah, JJ.*) ABDUL JALIL KHAN *v.* MAHOMED ABDUL SALAM KHAN. **I.R. 1932 All 532=139 I.C. 158=1932 A.L.J. 733=A.I.R. 1932 All. 505.**

———*As damages—Mortgagee kept out of his money.*

Where there was no provision for charging interest on arrears of interest in a mortgage bond, but the creditor was kept out of his money for three years,

Held, that though interest could not be granted as of right, still the creditor was entitled to get interest in equity by way of damages. (*Middleton, J.C. and Saadud-din, A.J.C.*) KIDAR NATH *v.* DWARKANATH. **151 I.C. 54=7 R. Pesh. 5=A.I.R. 1934 Pesh. 8.**

———*As damages—Price of goods sold—Suit for.*

In a suit for price of goods sold, a claim for interest on the amount by way of damages for the delay in payment is not tenable; and such interest allowed by a Court can be disallowed in revision. A.I.R. 1923 Lah. 302, Rel. on; Lah. C.A. 2323 of 1926, Dist.; 20 Mad. 481 and 104 P.R. 1901, Ref. (*Bhide, J.*) JAGAT SINGH RAI *v.* JAGAT SINGH. **6 I.R. (Lah.) 64=145 I.C. 157=A.I.R. 1933 Lah. 212.**

———*As damages—Recoverability—Sale of land—Failure to give possession—Suit by vendee for recovery of price.*

Where a vendor fails to give possession to the vendee of the property sold, and the vendee files a suit for recovery of the amount paid and damages, interest by way of damages can be allowed for breach of the contract even though the formalities required by the Interest Act have not been complied with, as the Interest Act has no application to such cases. Interest at 1 per cent per mensem was held to be a reasonable assessment of the damages. (*Tek Chand and Coldstream, JJ.*) MUNICIPAL COMMITTEE, GUJRANWALA *v.* PRABHU DIAL. **6 I.R. (Lah.) 177=146 I.C. 154=A.I.R. 1933 Lah. 556.**

———*As damages—Sale of land—Contract of indemnity executed by vendor—Title found defective and vendee obliged to pay third person—Interest on the amount paid—Right of vendee to recover.*

Where the vendor executed a deed of security by which he undertook liability for all damages and costs, if his title to the property was found defective and the vendee, having been obliged to compromise a suit brought by another person claiming to be entitled to one-third of the property sold by the payment of Rs. 3,000 sued his vendor for that amount with interest.

Held, that apart from the contract, in view of the provisions of S. 73 the words "loss and damages" included also interest on the sum which the vendee had to pay. No distinction can be drawn between loss of possession of the property and the payment of a further sum arising from the vendor's defect of title. In either case, the plaintiffs sustained a loss of capital and in addition the vendees have had a loss of interest. They are entitled to compensation for both the losses. (*Thom and Bennet, JJ.*) BISHAMBHAR NATH TEWARI *v.* JAG PRASAD RAI. **6 I.R. (All.) 349=146 I.C. 804=1933 A.L.J. 963=A.I.R. 1933 All. 455.**

INTEREST—Award of.

———*As damages—Suit by landlord for unpaid premium.*

In a suit by the lessor for recovery of the unpaid part of premium payable in respect of a lease, interest by way of damages for failure to pay as agreed can be allowed although there is no agreement as to payment of interest. (*Niamatullah, J.*) BHAGAUTI SHUKUL *v.* CHANDRIKA PRASAD KUERI. **150 I.C. 289=6 R. A. 1063=A I.R. 1933 All. 147.**

———*As damages—When can be awarded.*

Interest by way of damages cannot be awarded on an unascertained amount. It can however be allowed in respect of a specified amount, namely, rent as determined on a particular date. Scope of Interest Act discussed. Unless the matter can be brought within the Interest Act, or within the proviso, there is no warranty under S. 73 of the Contract Act for awarding interest for the mere detention of money after the date has arrived upon which it should have been paid. In no case has it been said that damages by way of interest can be had merely on the allegation that money has been detained. For the mere detention of money, however wrongful, interest cannot be claimed as damages, though there is nothing in law to prevent compensation taking the form of interest (*Wort and Fazl Ali, JJ.*) PATTINSON *v.* BINDHYA DEBI. **12 Pat. 216=6 I.R. (Pat.) 225=146 I.C. 56=14 Pat L.T. 149=A.I.R. 1933 Pat. 196.**

[**F.** 12 P. 869 (879). R. 30 N.L.R. 213 (217)]

———*As damages—Wrongful detention of money.*

Interest can be allowed only either under a contract, express or implied, between the parties or when the requirements of the Interest Act have been satisfied. Where there is no contract and the Act is inapplicable, the Court cannot award interest for the wrongful detention of money. (*Shadi Lal, C.J. and Monroe, J.*) SHAM SINGH *v.* NANAK. **I.R. 1932 Lah. 255=136 I.C. 719=33 P.L.R. 161.**

———*As damages—Wrongful retention of money.*

Where a person has wrongly retained the money deposited by another, the latter can be awarded interest by way of damages. (*Coldstream and Jai Lal, JJ.*) MUNICIPAL COMMITTEE, GUJRANWALA *v.* CHARANJI LAL. **160 I.C. 574=8 R.L. 567=A.I.R. 1935 Lah. 685**

Award of.

———*Award of—Absence of stipulation in contract.*

Where a transaction between the parties is of the nature of contract or of a quasi-contract, as undoubtedly it is in the case of a buyer and seller, the Courts will be justified in allowing interest even where there is no definite contract to pay interest. (*Kendall, J.*) JAGANNATH *v.* RAM GOPAL. **6 R A. 459=4 A.W.R. 538=147 I. C. 342=1934 A.L.J. 533=A.I.R. 1934 All. 160.**

INTEREST—Award of.

———*Award of—Breach of contract — Damages—Interest before judgment.*

In a suit for damages for repudiation of the contract in pursuance of which the plaintiffs purchased linseed as defendants' brokers, no interest can be awarded before judgment. (*Beaumont, C. J. and Mirza, J.*) RATANLAL *v.* BRIJ MOHAN. **I R. 1931 Bom. 445 (2) = 133 I.C. 861 (2) = 33 Bom.L.R. 703 = A.I R. 1931 Bom. 386.**

———*Award of—Damages for use and occupation.*

Rent due is a debt no doubt but damages for use and occupation is not a liquidated sum and hence interest cannot be allowed. (*Dalip Singh, J.*) GOBIND RAM *v.* HARI MOHAN SINGH. **A.I.R. 1934 Lah. 175.**

———*Award of — Maintenance allowance payable under will—Demand.*

Where the plaintiff who was entitled to a maintenance allowance under her father's will disputed its genuineness and after her plea was rejected made a demand for maintenance,

Held, that interest could be awarded only in respect of the money payable after the demand and not before. (*King and Rachhpal Singh, JJ.*) SRINATHJI *v.* PANNA KUNWAR. **56 All. 711 = 155 I.C. 390 = 7 R. A. 922 = 3 A.W.R. 397 = 1934 A.L J. 230 = A.I.R. 1935 All. 239.**

———*Award of—Wrongful detention of money—Claim for interest only—Sustainability—Award of interest under Interest Act or otherwise.*

Where certain persons who had supplied goods to a Municipal Committee sued to recover interest on account of the money due to them having been wrongfully detained by the Committee,

Held, that it was open to the Court to award interest under the Interest Act or otherwise, presuming an implied agreement to that effect.

Held also, that a suit to recover interest only was maintainable in law. (*Jai Lal and Abdul Qadir, JJ.*) BHANDARI BROS. *v.* MUNICIPAL COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 1028 = 134 I.C. 1028 = 32 P.L.R. 546 = A I.R. 1931 Lah. 457.**

Compound interest.

———*Compound interest.*

No compound interest can be awarded unless it has been specially agreed to. A.I.R. 1928 P.C. 80, Ref. (*Pandalai, J.*) NARASIMHAM *v.* VENKATA SUBBAYYA. **6 I.R. (Mad.) 135 = 145 I.C. 762 = A.I.R. 1933 Mad. 171.**

———*Compound interest—Mortgage bond—Provision for payment of annual interest—On default, interest to be added to principal and interest payable thereon—Claim to compound interest—Sustainability.*

The stipulations contained in a mortgage bond in regard to the payment of interest were these: "We shall pay interest on it at the rate of Rs. 1-12-0 per cent. We shall repay the entire amount of principal and interest due to you within the month of Magh of the current year, which is the due date. Failing to repay within the said due date, we shall pay interest at the said rate up till the date of realisation of the entire amount, either amicably or by suit and shall pay every year the annual interest calculated upon the said money. In default, the outstanding interest shall be added to the principal on the expiry of each year and we shall pay interest (thereon) at the said rate of Rs. 1-12 0 by way of compound interest."

Held, on a construction of the bond, that having regard to the clear stipulations in the bond, the mortgagee was entitled, in the event of default to get compound interest at the rate provided for in the bond. (*Guha and Bartley, JJ.*) PURNA CHANDRA DE *v.* MUHAMMAD TUKA MIA. **163 I.C. 725 = 9 R.C. 65 = 62 C L.J. 7.**

INTEREST—Damdupat.

Contract rate.

———*Contract rate—Mortgage—Undue influence—Proof.*

In a suit on the basis of a mortgage, full interest should be given to the mortgagee at the contract rate unless the mortgagor is in a position to make out a case of undue influence as defined in S 16 of the Contract Act. (*Tek Chand and Agha Haidar, JJ.*) SURGIAN *v.* CHHAJJU KHAN. **I.R. 1931 Lah. 937 (2) = 134 I.C. 489 (2) = 32 P.L.R. 378.**

———*Contract rate—Suit on promissory note—Discretion of Court to award till date of payment—Interference in appeal.*

There is nothing illegal in the Court allowing interest in a suit on a promissory note at the contract rate up to the date of payment. Where the lower Court makes such an order in the exercise of its discretion, the appellate Court will not interfere except for good reasons. (*Coldstream and Johnstone, JJ.*) JUMMA KHAN *v.* ALLAH BAKHSH. **32 P.L.R. 716 = 135 I.C. 45 = I.R. 1932 Lah. 29 = A.I.R. 1932 Lah. 25.**

Custom.

———*Custom—Award of, on ground of—Arrears of rent—Absence of contract to pay interest—Right to interest prior to suit—Proof.*

The plaintiff in suit for arrears of rent claimed interest prior to the date of suit, but no contract as to such interest was established; the statement of witnesses as to custom was on the question of rate whenever liability to pay interest was otherwise established but not on question of liability to pay interest.

Held, that custom of payment of interest on arrears of rent was not established and the claim should be disallowed. (*Varadachartar, J.*) SANKARANARAINA VAZHUNNAVAR *v.* KUNHI RAMAN NAIR. **158 I.C. 607 — 8 R.M. 286 (2) = A.I.R. 1935 Mad. 794.**

Damdupat.

———*Damdupat—Applicability—* Pendente lite *interest.*

The rule of Damdupat applies to interest *pendente lite* in mortgage suits, that is to say, interest from the date of suit till the date fixed for payment in the preliminary decree for sale. (*Doraswami Iyer, C.J., Mahadevayya and Ramachandra Rao, JJ.*) PATEL MADE GOWDA *v.* BANUMIAH. **11 Mys. L.J. 97 = 38 Mys.H.C. R. 181 (F.B.).**

———*Damdupat—Rule of—Applicability.*

The rule of Damdupat can only be enforced when the debtor is a Hindu and a Muhammadan debtor cannot have it enforced against his Hindu creditor. 21 Bom. 38, Ref. (*Doraswami Iyer, C.J. and Srinivasa Iyer, J.*) AHMED SAB *v.* LAKSHMANA SETTY. **11 Mys.L.J. 480.**

———*Damdupat—Rule stated — Principal—Amount actually advanced or amount due on day of payment.*

The rule of damdupat is an equitable rule in favour of the debtor and should be strictly applied. The gist of the rule is that the amount to be recovered from the debtor at any time can never exceed twice the principal, *i.e.*, the amount advanced to him. By "principal" is meant the amount actually advanced and not a pecuniary liability which may arise in the future. On a sale of prospective cotton crop, the vendor agreed that if he failed to deliver the crop at the stipulated time, he would pay the price at the prevailing rate on that date with interest. As a security for payment, he mortgaged his house.

Held, that in a suit for redemption of the mortgage, the rule of damdupat will apply and according to that rule the principal will be the amount actually advanced at the time of the execution of the mortgage and not the amount due on the date fixed for payment. (*Staples,*

INTEREST—Equitable grounds.

A.J.C.) SHARIFUDDIN *v.* ABDUL KARIM. **I.R. 1933 Nag. 205=144 I.C. 135=A.I.R. 1933 Nag. 293.**

Equitable grounds.

———*Equitable grounds—Award on—Conditions of.*

Though a debtor pays his debts not very regularly, when there is no long delay, and when the creditor has been in the habit of overlooking these short delays, no interest can be awarded on equitable grounds. (*Srivastava, Ag. C.J. and Smith J.*) JWALA SAHAY & SONS *v.* MATHURA PRASAD. **10 Luck. 307=152 I.C. 786=7 R.O. 238=11 O.W.N. 1397=A.I.R. 1935 Oudh 209.**

———*Equitable grounds—Claim by beneficiary against mutawalli.*

In a suit by a beneficiary under a deed of wakf against the mutawalli for the payment to her of her share of profits, the payment of which had been unreasonably delayed.

Held, that the plaintiff was entitled to interest on the amount of his claim on "equitable" grounds. The mutawalli, though not a trustee, stands in respect of his obligations, in the position of a quasi-trustee. 40 A. 497 (P.C.); 38 A. 581 (P.C.); 57 M.L.J. 662 (P.C.), Ref. (*Mukerji, Ag.C.J. and Bennet, J.*) KISHWAR JAHAN BEGAM *v.* ZAFAR MAHOMED KHAN. **55 All. 164=6 I.R. (All.) 322=146 I.C. 733=1933 A.L.J. 21=A.I.R. 1933 All. 186.**

[R. 1934 A.L.J. 533 (535).]

Hundis.

———*Hundis—Suit on hundis in which no interest was mentioned—Award of 12 per cent. interest from date of hundi to date of institution is excessive.*

In a suit on hundis in which no interest was mentioned, the trial Court awarded 12 per cent. from date of hundi to date of suit and 9 per cent. from date of suit till realization,

Held, that there was no justification for allowing such high rate but that 6 per cent. from date of hundi to date of realization was sufficient. (*Addison and Agha Haidar, JJ.*) SODHI SADHU SINGH & SONS *v.* DAL CHAND TULSI RAM. **147 I C. 917=35 P.L.R. 227=6 R.L. 462=A.I.R. 1933 Lah. 922.**

Instalment bond.

———*Instalment bond—Enhanced interest on defaulted instalments and also exigibility clause—Mode of granting interest.*

In case of instalment bonds where there is a double penalty, namely, enhanced interest on defaulted instalments and an exigibility clause in case of certain defaults, the correct method in granting interest is to allow the enhanced interest on the defaulted instalments up to the date when the exigibility clause comes into operation and then from that date to allow interest at the original rate on the whole principal amount till the date of suit. From the date of suit, further interest may be allowed on the whole sum found due until the date fixed for payment. A.I.R. 1928 Nag. 67, Rel. on. (*Staples, A.J.C.*) RAJESHWAR *v.* MT. RUKHMA. **I.R. 1933 Nag. 127=142 I.C. 603=29 N.L.R. 142=A.I.R. 1933 Nag. 104.**

———*Instalment bond—Enhanced interest on defaulted instalments—Exigible clause—Right to contract rate on defaulted instalments.*

Where the debt bears interst at 12 annas per cent. per mouth with an enhanced rate of one per cent. per mensem on defaulted instalments, the Judge cannot reduce this to 12 annas per cent. only on defaulted instalments from the time when the whole sum becomes exibible, *e.g.*, on the default of five instalments, because a clause concerning the exigibility of the total payment cannot operate in the debtor's favour. (*Grille, J.C. and Pollock, A.J.C.*) WISHWANATH *v.* SHANKARGIR

INTEREST—Mortgage.

GURU MOTIGIR. **30 N.L.R. 331=153 I.C. 115=7 R.N. 122=A.I.R. 1934 Nag. 264.**

Liability for.

———*Liability for—Fixed deposit for a term—Expiry of term—No application for renewal—Return of amount made impossible by depositor himself—Right of depositor to claim interest.*

The manager of a joint family firm deposited a lakh of rupees in a bank in fixed deposit for a period of six months. It was subject to six months notice of withdrawal which was given at the time of deposit. The receipt given by the bank stated that the deposit was repayable on the expiration of six months, after which date it would cease to carry interest unless the receipt was endorsed by the depositor and presented again. Before the expiry of the term, the members of the firm fell out with each other and one of them gave a notice to bank not to pay the amount without his concurrence. At the end of the period, the bank sent a notice, desiring to know if the deposit was going to be withdrawn or renewed but received no reply. Six months later, the manager applied for renewal which the bank refused to do without the consent of the other member of the joint family. In a suit by the manager for recovery of the deposit with interest,

Held, that there was no stipulation for interest after the due date, no wrongful or unjust retention of the money and no fraud on the part of the bank; the bank was always ready to return the money to the firm and was prevented from doing so by the manager himself; the taking of a loan did not necessarily imply a promise to pay interest and that there was no rule of law or equity by which the bank was liable to pay interest. (*Tek Chand and Coldstream, JJ.*) PUNJAB NATIONAL BANK, LTD., DELHI *v.* NANNEH MAL JANKI DAS. **148 I C. 11=6 R.L. 537=A.I.R. 1933 Lah. 742.**

———*Liability for—Wrongful intention of money.*

In April, 1924, *K* and *R* jointly purchased certain property for Rs. 2,700. The property was subject to a mortgage in favour of *B* for Rs. 1,800. It was arranged that *R* should pay half the sale consideration payable by him, namely, Rs. 450 to the vendor and Rs. 900 to the mortgagee *K*, the other purchaser, was to pay Rs. 450 cash to the vendor and retain Rs. 900 with him for his share of the mortgage money. Subsequently some pre-emption suits were instituted in respect of the sale-deed and the plaintiffs ultimately obtained a decree for pre-emption in February, 1927.

Held, that *K* was liable to pay interest for the period from April, 1924, to February, 1927, on the entire amount of Rs. 900. (*Bisheshwar Nath, J.*) RAM ANAND SINGH *v.* KHEDOO SINGH. **I.R. 1933 Oudh 214=143 I.C. 843=10 O.W.N. 52=A.I.R. 1933 Oudh 146.**

Meaning of.

———*Meaning of.*

From the legal point of view, the original amount borrowed is the principal and everything else in excess of that, which is payable by the debtor, is interest. (*Mya Bu and Baguley, JJ.*) S.K.R.M. CHETTYAR *v.* V. E. A. CHETTYAR. **160 I.C. 490=14 Rang. 16=8 R.R. 393=A.I.R. 1935 Rang. 525.**

Mortgage.

See also CONTRACT RATE, *supra* AND POST DECREES, POST DIEM, AND RATE OF, *infra*.

See also WHEN SUSPENDED.

———*Mortgage—Deed silent as to charge—Effect.*

Even if the mortgage deed is silent, a mortgagee is entitled to treat interest due thereunder as a charge upon the mortgaged property provided there is no contract to the contrary. 5 Lah. 422 (P.C.), Appl.

INTEREST—Mortgage.

(*Shadi Lal, C.J. and Tapp, J.*) PIRAN DITTA *v.* IQBAL SINGH. **135 I.C. 497=I.R. 1932 Lah. 97=32 P.L.R. 735.**

———*Mortgage—Rate of—Fairness of mortgage.*

It is very difficult to lay down any hard and fast rule as regards a proper rate of interest for mortgage transactions. The rate would naturally depend on many circumstances and also on local conditions. *Prima facie* and in the absence of special circumstances to the contrary, the rate of 12 per cent. per annum may be taken as a fair, proper and reasonable rate.

Held, in this case that a rate of 12 per cent. per annum should be considered to be a fair and proper rate but the conditions for compounding it would make it an excessive rate and transform the transaction into a substantially unfair one. (Case-law referred.) (*Sulaiman, C.J. and King, J.*) GAJRAJ SINGH *v.* MAHOMED MUSHTAQ ALI. **56 All. 263=147 I.C. 124=6 R.A. 476=1934 A.L.J. 170=3 A.W.R. 502=A.I.R. 1933 All. 913.**

———Mortgage—Running of interest when stopped—Effect of tender—Under S. 84, T. P. Act, is to stop interest from the date of tender. *See* WHEN SUSPENDED, *infra*. **34 L.W. 843.**

———*Mortgage—Stipulation for enhanced interest—Penalty—Interest by way of compensation.*

The question whether a stipulation for enhanced interest contained in a mortgage deed is or is not penal in any particular case must depend on the facts and circumstances of the case. Where the mortgage deed provided that in case interest was not paid regularly the amount of interest which remained unpaid was to carry simple interest at 12 per cent. per annum.

Held, that the provision for interest on interest was intended only as compensation to the mortgagee in the event of default on the part of the mortgagor and even assuming the provision was penal the plaintiff could claim compensation and the Court may award the same at the same rate as the interest stipulated. (*Bisheshwar Nath and Kisch, JJ.*) GANGA PRASAD *v.* BISHUNATH SINGH. **9 O.W.N. 1081=I.R. 1933 Oudh 129=142 I.C. 821=A.I.R. 1933 Oudh 81.**

On damages.

———*On damages.*

No interest can be allowed on unliquidated damages. (*Mehta, A.J.C.*) E. A. ZIPPEL *v.* K. D. KAPUR & CO. **26 S.L.R. 167=I.R. 1932 Sind 99=139 I.C. 114=A.I.R. 1932 Sind 9.**

———*On damages—Suit for value of articles entrusted with defendant.*

In a suit to recover the value of certain articles entrusted with the defendant, interest cannot be allowed on the amount decreed, as it will be tantamount to awarding damages upon damages. (*Wazir Hasan, C.J. and Raza, J.*) BRIJ NATH SHARGHA *v.* LAKSHMI NARAIN KAUL. **8 Luck. 35=I.R. 1932 Oudh 228=137 I.C. 217=9 O.W.N. 239=A.I.R. 1932 Oudh 165.**

Pendente lite and future interest.

———*Pendente lite* and future interest—Power of Court. *See* AGRA TENANCY ACT (1926), S. 225. **1935 A.L.J. 557=A.I.R. 1935 All. 505 (F.B.).**

Post-decree.

———*Post-decree—Discretion of Court.*

Though it is correct to allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Code compelling the Court to do so. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in O. 34, R. 11 and even that only says that the Court

INTEREST—Post diem.

"may" order payment of interest. (*Kulwant Sahay and Rowland, JJ.*) SRIPAT SINGH *v.* NARESH CHANDRA BOSE. **I.R. 1932 Pat. 278=140 I.C. 104=13 Pat.L.T. 545=A.I.R. 1932 Pat. 332.**

———*Post-decree — Discretion of Court—No absolute right of mortgagee.*

So far as interest up to the date of suit or up to the date fixed for repayment of the mortgage-money is concerned, unless circumstances are made out which would bring the case within S. 74 of the Contract Act or give rise to considerations arising under Usurious Loans Act of 1918, the Court would be bound to grant interest at the rate stipulated for in the contract. As regards the interest for the period subsequent to the date fixed for repayment (by the decree) the Court would ordinarily make a decree for interest, though not at the stipulated rate but at such rate as the Court may consider fair and proper, and ordinarily such interest should be allowed at the Court rate, *viz.*, six per cent. per annum. But it does not mean that the mortgagee is entitled at all events to *some* interest after the date fixed for repayment. On the other hand, there may be circumstances justifying the Court in refusing interest absolutely after that date, *e.g.*, where the decree provided that interest at contract rate should be paid until the expiration of three months therefrom or date of realization, whichever was earlier and in default, the amount should be realized by sale of the mortgaged properties and it was only the mortgagee who, in spite of the default, preferred an appeal which remained pending for two years. (*Mukerji and Guha, JJ.*) REGISTERED JESSOR LOAN CO., LTD. *v.* SHAILAJANATH ROY CHAUDHURI. **59 Cal. 722=I.R. 1932 Cal. 626=139 I.C. 455=A.I.R. 1932 Cal. 689.**

Post diem.

———Post diem—*Discretion of Court.*

The awarding of future interest rests on the discretion of the trial Court, which will not without sufficient grounds be interfered with by the appellate Court. (*Wazir Hasan, C.J. and Bisheshwar Nath, J.*) SAID AHMAD *v.* BARKHANDI MAHESH PRATAB NARAIN SINGH. **8 Luck. 40=I.R. 1932 Oudh 339=139 I.C. 64=9 O.W.N. 253=A.I.R. 1932 Oudh 255.**

———Post diem—*Discretion of Court.*

Where in a mortgage bond there is no precise definition of the rate of interest prior to default, it is not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sawai* and payment of instalments. In such a case as the terms of the deed do not indicate what rate of interest should be paid after the entire amount became due, a reasonable rate of interest should be allowed by the Court. Interest allowed at 12 per cent. per annum. (*Macnair, J.C. and Staples, A.J.C.*) PARASHRAM *v.* KRISHNA. **I.R. 1932 Nag. 47=28 N.L.R. 1=136 I.C. 887=A.I.R. 1932 Nag. 39.**

———Post diem *interest on mortgage—If included in the charge.*

Post diem interest given to a mortgagee or a charge-holder by way of damages is not a charge on the properties, though when compensation for breach of penal clauses, the damages for which may have even to be ascertained by Court is awarded, it may be regarded as a portion of the mortgage-money, as it falls to be decided inside the provision of the contract of mortgage and not outside it. (Case-law discussed.) (*Narayana Iyer, C.J., Sahasranama Ayyar and Ouseph, JJ.*) VARU *v.* KOCHUVARKI. **143 I.C. 750=24 Coch.L.R. 314 (F.B.).**

INTEREST—Post diem.

———Post diem—*Mortgagee to enjoy property in lieu of interest — Dispossession of mortgagee— Claim for interest.*

Where under the deed of mortgage with possession the mortgagee is to enjoy the mortgaged property in lieu of interest for a period of five years and where he is deprived of his possession without payment of the principal, he is entitled to interest even subsequent to the period of five years fixed for redemption and the same can be made chargeable on the mortgaged property. 17 Mad. 469 and 46 Cal. 448, Rel. on. (*Sundaram Chetty, J.*) GURUSAMI THEVAN *v.* GANAPATHI CHETTI. **I.R. 1932 Mad. 319 = 136 I.C. 783 = A.I.R. 1932 Mad. 173.**

———Post diem—*No stipulation for—If may be awarded.*

Even where there is no express stipulation in a mortgage document for *post diem* interest, such interest may be awarded either under a contract to be implied or as compensation and the usual practice is to award such interest at the contract rate, (*Pandalai, J.*) NARASIMHAM *v.* VENKATA SUBBAYYA. **6 I.R. (Mad.) 135 = 145 I.C. 762 = A.I.R. 1933 Mad. 171.**

Rate of.

See also HUNDIS, *supra.*

———Rate of—Co-mortgagor paying up whole mortgage debt—Subrogation right—Right of co-mortgagor to interest at bond rate. *See* T. P. ACT, S. 95 **13 Pat. 356.**

———*Rate of—Defendant ordered to pay 6 per cent. interest after date fixed for payment—Unsuccessful appeal by him—Time extended for payment at his request—Liability to pay contract rate of interest.*

The stipulated rate of interest can be awarded up to the date of realisation or actual payment and a debtor should not be allowed to keep the money of his creditor at a low rate of interest by merely bringing an unsuccessful appeal. Where the defendant was ordered to make payment within certain time and on his failure to do so, interest was to be calculated from that date at 6 per cent. and the charged property was to be sold, and the defendant did not pay but appealed and the appeal was dismissed, but on his request, time was extended for payment and interest was ordered to be paid according to the contract rate for the period extended.

Held, that the order as to interest was proper as otherwise, a debtor has only to prefer an appeal in order to withhold the payment of money to his creditor for a long period without incurring liability for interest at the rate which he himself had agreed to pay and which he could not challenge on any valid ground. (*Sir Shadi Lal.*) SATINDRA NATH *v.* JATINDRA NATH. **62 I.A. 265 = 63 Cal. 1 = 42 L.W. 474 = 1935 A.W.R. 1177 = 9 R.P.C. 27 = 37 Bom.L.R. 833 = 16 Pat.L.T. 739 = 1935 M.W.N. 1145 = 1935 O.W.N. 952 = 39 C. W.N. 1191 = 157 I.C. 419 = 1935 A.L.J. 1005 = A.I. R. 1935 P.C. 165 = 69 M.L.J. 503 (P.C.).**

———*Rate of—Interest added in acknowledgment—Inference as to future interest.*

Where interest at a particular rate was added, when the acknowledgment was written, an inference could reasonably be drawn that the same rate of interest was payable thereafter. (*Jai Lal and Rangi Lal, JJ.*) THAKAR DAS RUPCHAND *v.* SHER AHMAD IQBAL AHMAD. **153 I.C. 233 = 7 R.L. 409 = 35 P.L.R. 687 = A.I R. 1934 Lah. 730.**

———*Rate of—1 per cent. per mensem payable on default—If penal.*

Where interest was made to run from the date of default, *held*, that act by itself would not bring the clause within the purview of a penalty. Nor would agreement to pay interest at the rate of 1 per cent. per mensem render it penal. (*Ferrers, J.C. and Rupchand, A.J.C.*) GANGA RAM *v.* ALI MOHAMMAD. **157 I.C. 331 = 8 R.S. 32 = A.I.R. 1935 Sind 140.**

INTEREST—Right to.

———*Rate of—Short term loan of small amount—2 per cent. per mensem not excessive.*

In transactions involving loans of small amounts, a rate of interest at 2 per cent. per mensem is not considered unreasonable in rural areas, especially where the parties had probably considered that it was a short term loan. (*Niamatullah, J.*) HARBANS DUBE *v.* SITA RAM. **6 I.R. (All.) 313 = 146 I.C. 607 = 1933 A.L.J. 1364 = A I.R. 1933 All. 576.**

Right to.

———*Right to—Contract of sale—Vendee let into possession—Formal sale-deed not executed and purchase-money not paid—Right of vendor to interest in equity.*

Under a compromise the defendants were to execute a sale-deed in May 1917 and the plaintiff to pay the consideration before the Registrar. If the plaintiff was then unable to pay, he was to pay interest at 9 per cent. But the the defendants quarelled among themselves and though the plaintiff was let into possession in May, 1917, the sale-deed could not be executed earlier than January, 1924.

Held, that the contract not having provided for such a contingency, the principle of equity became applicable that where the vendee is in possession, he should pay interest on the purchase-money from the date he got possession till the date of payment. (*Pakenham Walsh, J.*) SURYAPRAKASA RAO *v.* VENKATA DIKSHITALU. **6 I.R. (Mad.) 250 = 146 I C. 317 = 1933 M.W.N. 127 = A.I.R. 1933 Mad. 844.**

———*Right to—Course of dealings.*

A balance was struck between the parties but no mention was made about interest. But it was found that the course of dealings between the parties was such as to raise clear inference of an implied agreement to pay interest

Held, interest should be allowed. (*Tek Chand and Monroe, JJ.*) GURDITTA RAM CHAND *v.* MT. BHAGWATTI. **147 I.C. 683 = 6 R.L. 427 = 35 P.L.R. 197 = A.I.R. 1933 Lah. 1039.**

———*Right to—Date fixed for payment—Right to interest till the date of actual payment.*

A creditor is ordinarily entitled to interest at the rate stipulated till the date of actual payment, though a date for payment is fixed in the document. 19 A. 39 (P.C.); 1928 M.W.N. 648, Foll. (*Reilly and Anantakrishna Ayyar, JJ.*) NARAYANAN CHETTIAR *v.* SRINIVASAN CHETTI. **1930 M.W.N. 1240.**

———*Right to—Illegal detention of money by defendant.*

Where the suit is not based on any loan transaction or any dealing between the parties but is one for recovery of an amount which had been illegally retained by the defendant, interest is legally and equitably claimable by the plaintiff. (*Jai Lal and Skemp, JJ.*) PIARE MOHAN LAL *v.* GOPAL LAL. **158 I C. 156 = 37 P.L.R. 87 = A. I.R. 1935 Lah. 552.**

———*Right to—Money deposited with defendants as bankers.*

The Interest Act is not exhaustive and it is open to the Court to award interest on principles of equity, justice and good conscience. The real question for decision in such a case is whether the intention of the parties was that the money should be retained by the debtor free of charge. Where therefore the amount is deposited with the defendants in their capacity as

INTEREST—Right to.

bankers, the intention of the parties at the time of the deposit cannot be that no interest should be paid. (*Rangi Lal, J.*) KHAZAN CHAND *v.* MELA RAM. **153 I.C. 119=35 P.L.R. 785=A.I.R. 1934 Lah. 664 (1).**

———*Right to—Suspension of execution of decree—Claim for interest—Sustainability.*

Where suspension of execution of a decree carrying interest is granted to the judgment-debtor for a certain time during which period he is to pay interest, the decree-holder is entitled to continue to receive interest after such period but only to put in force his remedy of execution. (*Dalip Singh, J.*) RAM DIYAL *v.* DARBARI RAM. **149 I.C. 934=6 R.L. 761 (1)=A.I.R. 1934 Lah. 35.**

When suspended.

———*When suspended—Tender prior to suit—Effect of—Payment into Court, necessary to stop running of interest.*

In the case of ordinary money claims not based on mortgage, a tender before suit of the amount due must be followed by payment into Court when the creditor sues for the money in order to stop the running of interest. (38 Mad. 959; 16 Bom. 141; 34 Cal. 305, Rel.) In the case of mortgages, the rule is different and a tender alone has the effect, under S. 84, T. P. Act, of stopping interest from the date of the tender. (*Waller and Krishnan Pandalai, JJ.*) ARUNACHALA PILLAI *v.* GOVINDASWAMI NAICKER. **55 Mad. 458=135 I.C. 907=I.R. 1932 Mad. 235=1931 M.W.N. 1226=34 L.W. 843=A.I.R. 1932 Mad. 109=62 M.L.J. 266.**

———*When suspended.*

One important principle, under which running of interest may be suspended is where the delay in the payment of the principal debt is caused by some improper act or omission of the creditor. Neither an *ad interim* injunction ordered at the plaintiff's instance prohibiting the defendant from transferring any part of the properties in suit nor an order for the appointment of a receiver made by the Court to relieve the defendant from execution would justify the application of this principle. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

INTEREST ACT (XXXII OF 1839)—*Applicability—Demand—What is.*

To make the Interest Act applicable, it is necessary to make out that a demand and non-payment in spite of the demand. A notice printed on the top of a bill to the effect that in case of non payment, interest will be charged, does not constitute "demand," so as to support a claim for interest under the Act. (*Srivastava, Ag.C. J. and Smith, J.*) JWALA SAHAY & SONS *v.* PANDIT MATHURA PRASAD. **10 Luck. 307=152 I.C. 786=7 R.O. 238=11 O.W.N. 1397=A.I.R. 1935 Oudh 209.**

———*Decree for arrears of maintenance—Hindu widow—Suit to recover arrears of maintenance—Award of interest.*

A Hindu widow recovering arrears of maintenance is not entitled to interest thereon. To such a case the Interest Act does not apply. The Court can however award interest on the amount decreed from the date of suit till realization. (*Wort and Kulwant Sahay, JJ.*) BAHURIA SARASWATI KUER *v.* BAHURIA SHEORATAN KUER. **12 Pat. 869=6 R.P. 637=149 I.C. 738=15 Pat.L.T. 372=A.I.R. 1934 Pat. 99.**

———*Decree for dower — Interest whether can be awarded.*

INTEREST ACT (1839), S. 1.

Where a claim for dower is decreed it is in the discretion of the Court to award interest on the amount from the date of the institution of the suit till the recovery of the amount. (*Mukerji and Bennet, JJ.*) MAIMUNA BEGAM *v.* SHARAFAT ULLAH KHAN. **131 I.C. 115=1931 A.L.J. 197=A.I.R. 1931 All.403.**

———Interest apart from Act—Power of Court to award—Co-sharer—Retention of rent due to another—Liability for interest by way of compensation—Award of interest under S. 73 (3), Contract Act. *See* CO-SHARER—RENT. **I.R. 1932 All. 532=139 I.C. 158=1932 A.L.J. 733=A.I.R. 1932 All. 505.**

[R. 1933 A.L.J 963 (965).]

———*Interest apart from—If can be awarded.*

It is well established that the Interest Act is not exhaustive and that it is open to the Court to award interest on principles of equity, justice and good conscience. (*Rangi Lal, J.*) KHAZAN CHANDRA *v.* MELA RAM. **153 I.C. 119=7 R.L. 386 (2)=35 P.L.R. 785=A.I.R. 1934 Lah. 664 (1).**

———*Scope — Claim for interest alone— Maintainability.*

There is nothing in law which debars a creditor from suing for the recovery of interest alone if he has complied with the formalities required by the Interest Act and if his case is otherwise governed by the said Act. 1 C.W.N. 219, Disappr. (*Jai Lal and Abdul Qadir, JJ.*) BHANDARI BROS *v.* MUNICIPAL COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 1028=134 I.C. 1028=32 P.L.R. 546=A.I.R. 1931 Lah. 457.**

———Scope—Interest as damages—Award of, apart from Act. *See* CONTRACT ACT, S. 73. **A.I.R. 1935 Cal. 347.**

———**S. 1**—*Applicability—Sale of land—Failure of vendor to give possession—Suit by vendee for recovery of price—Interest on price by way of damages—Recoverability.*

Where a vendor fails to give possession to the vendee of the property sold, and the vendee files a suit for recovery of the amount paid and damages, interest by way of damages can be allowed for breach of the contract even though the formalities required by the Interest Act have not been complied with as the Interest Act has no application to such cases. Interest at 1 per cent. per mensem was held to be a reasonable assessment of the damages. (*Tek Chand and Coldstream, JJ.*) MUNICIPAL COMMITTEE, GUJRANWALA *v.* PRABHU DIAL. **6 I.R. (Lah.) 177=146 I.C. 154=A.I.R. 1933 Lah. 556.**

———**S. 1**—*Construction—"May be recovered."*

Tha expression "may be recovered" in the Act does not mean the same thing as "is sought to be recovered." (*Jai Lal and Abdul Qadir, JJ.*) BHANDARI BROS. *v.* MUNICIPAL COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 1028=134 I.C. 1028=32 P.L.R. 546=A.I.R. 1931 Lah. 457.**

———**S. 1**—*Interest.*

In the absence of an agreement or mercantile usage to pay interest, a claim for interest cannot be allowed. (*Tek Chand, J.*) RAMJI MAL GORDHAN DAS *v.* BELA RAM. **6 I.R. (Lah.) 306=35 P.L.R. 4=146 I.C. 1009 (2)=A.I.R. 1933 Lah. 962.**

———**S. 1**—*Mortgage—Default by mortgagee in payment of peishcush—Payment by mortgagor—Suit for damages—Interest on amount paid, if recoverable.*

A mortgage deed provided that the mortgagee should pay the peishcush and the land cess due on the portion mortgaged. The mortgagee defaulted to pay and the mortgagor who was compelled to pay the amount sued for the recovery of the amount and claimed interest thereon.

INTEREST ACT (1839), S. 1.

Held, that (*i*) the case was not governed by the Interest Act ; (*ii*) apart from the Act, in the absence of proof of special loss or damage, interest cannot be awarded under S. 73 of the Contract Act as damages for the mere wrongful detention of money. 20 M. 481 ; 31 M. 250 ; 53 M. 549 ; 1913 M.W.N. 874 ; 26 I.C. 429 and 50 M. 94 (F.B.), Foll. ; 42 M. 661 and 1926 M.W. N. 957, Disappr. (*Curgenven and Sundaram Chetty, JJ.*) RAJA RAM DOSS BAVAJI *v.* GAJAPATHI KRISHNA CHANDRA DEO. **57 Mad. 205=6 I.R. (Mad.) 122=145 I.C. 721=1933 M.W.N. 498=38 L.W. 420 A.I.R. 1933 Mad. 729=65 M.L.J. 620.**

[F. 41 L.W. 351(352).].

———**S. 1**—*No notice under—Interest to be disallowed.*

In a suit to recover price of goods sold, if the claim for interest is based on an alleged agreement that is not proved, and no notice as to interest is given as required by Act XXXII of 1839, interest should be disallowed. (*Bhide, J.*) JAGAT SINGH RAI *v.* JAGAT SINGH. **6 I.R. (Lah.) 64=145 I.C. 157=A.I.R. 1933 Lah. 212.**

———**S. 1**—*Scope—Money paid in respect of shares in company—Claim for—Interest if can be awarded.*

The provisions of the Interest Act are all comprehensive and interest can only be allowed in accordance therewith. Where the plaintiff who had paid a sum of Rs. 1,400 towards shares which, however, were never allotted to him, sued for refund of the money,

Held, that the payment was not "a debt or sum certain payable at a certain time" within the meaning of the Interest Act, that interest was only payable "otherwise" as money had and received, from the date of demand. (*Jackson and Mockett, JJ*) OFFICIAL LIQUIDATOR OF THE BELLARY ELECTRIC SUPPLY CO., LTD. *v.* KANNIRAM RAWOOTHMAL. **56 Mad. 391=I R. 1933 Mad. 77=141 I.C. 120=1933 M.W. N. 157=37 L.W. 808=A.I.R. 1933 Mad. 320=64 M.L.J. 130.**

———**S. 1**—*Suit on pro-note—Claim for interest subsequent to date of demand—Power of Court to grant.*

Where the plaintiff had made a demand of the amount due under a pro-note but there was no claim for interest by way of damages from the date of demand until payment,

Held, that the plaintiff was not entitled to such interest under the Interest Act. (*Bisheshwar Nath and Smith, JJ.*) ABDUL RAHMAN *v.* AFZAL HUSAIN. **6 I.R. (Oudh) 35=145 I.C. 233=10 O.W.N. 316=A. I.R. 1933 Oudh 259.**

———**S. 1**—*Suit on promissory note referred to arbitration—Award allowing interest in absence of provision.*

The Interest Act allows the Court or an arbitrator to whom a suit on a promissory note claiming interest is referred, to award interest even though there is no provision in the promissory note for the payment of interest. (*Bennet, J.*) RAM NATH *v.* AUDH BEHARI LAL. **1934 A.L.J. 939=4 A.W.R 75=153 I.C. 169=7 R. A. 461=A.I.R. 1934 All. 939.**

INTERIM INJUNCTION. *See* C. P. CODE, O. 39, RR. 1 AND 3.

INTERIM RECEIVER. *See* C. P. CODE, O. 40, R. 1.

INTERLOCUTORY INJUNCTION. *See* C. P. CODE, O. 38, R. 2 AND O. 39, R. 1.

INTERLOCUTORY ORDER.

See (1) C.P CODE, SS. 110 and 115.
(2) CR. P. CODE, S. 439.

INTERNATIONAL LAW. *See also* CONFLICT OF LAWS.

———*Capacity of parties—Law governing—Mercantile contracts.*

INTERNATIONAL LAW.

The capacity of parties, to enter into contracts, in the case of ordinary mercantile contracts, is governed by the *lex loci contractus* and not by the law of domicile. So a person who was a minor under the law of Ceylon and endorsed certain bills during his minority is not liable on his endorsements. (*Ramesam and Cornish, JJ.*) T. N. S. FIRM *v.* MAHOMED HUSSAIN. **57 Mad. 398 =6 I.R. (Mad.) 291=146 I C. 608=1933 M.W.N. 1095=38 L.W. 481=A.I.R. 1933 Mad. 756=65 M.L. J. 458.**

———*Conflict of laws—Law of ship's flag.*

Where any question arises involving a conflict of laws, the law of the ship's flag prevails unless it is clear from the express language of the bill-of-lading or otherwise that the parties intended some other law to prevail. *Moore* v. *Harris*, (1876) A.C. 318, Foll. (*Rupchand, A. J.C.*) HAJI SHAKOOR GANY *v.* VOLKART BROTHERS. **25 S.L R. 222=I.R. 1931 Sind 109=133 I.C. 77=A. I.R. 1931 Sind 124.**

———*Crimes—Jurisdiction of municipal law—Crime of piracy.*

With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the Municipal law of each country. But whereas according to international law the criminal jurisdiction of Municipal law is ordinarily restricted to crimes committed on its *terra firma* or territorial waters or its own ships, and to crime by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national but *hostis humani generis* and as such he is justiciable by any State anywhere. (*Viscount Sankey.*) PIRACY JURE GENTIUM, *In re*. **151 I.C. 553=40 L.W. 444= 7 R.P.C. 66 (2)=A I.R. 1934 P C. 220 (P.C.).**

———*Crime of piracy.*

Actual robbery is not an essential element in the crime of piracy "jure gentium." A frustrated attempt to commit a piratical robbery is equally piracy "jure gentium." (*Viscount Sankey.*) PIRACY JURE GENTIUM, *In re*. **151 I.C. 553=40 L.W. 444=7 R.P.C. 66 (2)= A.I.R.1934 P.C. 220 (P.C.).**

———*Determination of —Selection of views by Court —Permissibility.*

In the strict sense, international law still has no legislature, no executive and no judiciary,though in a certain sense there is now an international judiciary in the Hague Tribunal and attempts are being made by the Legaue of Nations to draw up codes of international law. Speaking generally, in embarking upon international law, the Courts are to a great extent in realm of opinion aud estimating the value of opinion it is permis sible not only to seek a consensus of views, but to select what appear to be the better views upon the question. (*Viscount Sankey.*) PIRACY JURE GENTIUM, *In re*. **151 I.C. 553=40 L.W. 444 =7 R.P.C. 66 (2)=A.I.R. 1934 P.C. 220 (P.C.).**

———*Domicile—Meaning.*

Domicile connotes the place in which a man has voluntarily fixed the habitation of himself and his family, not for a special or temporary purpose, but with the intention of making a permanent home until some unexpected event shall occur to induce him to adopt some other permanent home. Every person at birth acquires a domicile of origin. A person may change his domicile by choice. The domicile of origin is retained until one of choice is acquired by a combination of

residence and intention. Two things are in fact essential to constitute a domicile of choice in a new country, *viz.*, residence in that country without any *animus revertendi* to the country of origin and the intention of making a permanent home in a new country. Domicile of choice is, in fact, a mixed question of intention and act. (*Dunkley, J.*) EMPEROR *v.* MAN MOHAN. **6 I.R. (Rang.) 77=146 I.C. 193=34 Cr.L J. 1184=1933 Cr.C. 813=A.I.R. 1933 Rang. 193.**

———*Domicile—Presumption—Burden of proof.*

Domicile is of two kinds, domicile of origin and domicile of choice. The domicile of origin is irrevocably ascertained at the party's nativity. A domicile of choice he can indeed acquire, but the domicile of origin remains in abeyance and is at any moment ready to revive. Every presumption is to be made in favour of the original domicile. It is for the party who relies on a change of domicile to prove that such a change has taken place. To do this he must demonstrate a double intention, the intention of the abandoning his domicile of origin and the intention of adopting the domicile of choice. A domicile of choice is not established by mere assertion. The pertitioner left his native land under orders and not of his own freewill. He came to India in obedience to other authority, and not in the exercise of any choice of his own. Being thus transplanted he did not strike root. The petitioner, moreover, was neither a house holder, nor any member of any club in India nor was he permanently employed.

Held, that the petitioner was not domiciled in India. (*Ferrers, J.C.*) HALL *v.* HALL. **I.R. 1933 Sind 132=143 I.C. 618=A.I.R. 1933 Sind 70.**

———*Dominion of Canada—Customs Act*, 1927, *Ss.* 151 *and* 207—*Vessel containing dutiable goods "hovering" within* 12 *miles of coast—Forfeiture of such goods is legitimate—British North America Act* (1867), *S.* 91.

Under the British North America Act the Dominion legislature has full power to enact customs laws for Canada and it is not debarred from introducing into such legislature any provisions designed to operate beyond its shores or at any rate beyond a certain limit, from the coast. It is therefore within the power of the Dominion Parliament to pass a legislation authorizing the forfeiture of dutiable goods found in vessels "hovering" within a distance of 12 miles from the coast of Canada. (Case-law referred.) (*Lord Macmillan.*) E. R. CROFT *v.* SYLVESTER DUNPHY. **I.R. 1933 P.C. 118=143 I.C. 91=1933 A.L.J. 284=37 L.W. 528=A.I.R. 1933 P.C. 16 (P.C.).**

———*Jurisdiction—Place of crime governs nature of offence.*

The doctrine that the law of the country where a crime has been committed governs the nature of the offence and that the Courts of that country alone have jurisdiction to try the offender is a well-established principle of international law. (*Kulpchand, J.C. and Lobo, A.J.C.*) GOKALDAS AMARSEE *v.* EMPEROR. **27 S.L.R. 392=148 I.C. 135 (2)=35 Cr.L J. 585=6 R. S. 180=1933 Cr.C. 1130=A.I.R. 1933 Sind 333.**

———*Marriage—Law governing — Christian lady marrying Muhammadan—Indian domicile—Wife adopting Muhammadan faith—Right of husband to divorce wife by talak.*

The forms necessary to constitute a valid marriage and the construction of the marriage contract depend on the *lex loci contractus*, that is, the law of the place where the marriage ceremony is performed; (2) on marriage, the wife automatically acquires the domicile of her husband; (3) the status of spouses and their rights and obligations arising under the marriage contract are

governed by the *lex domicilii*, that is, by the law of the country in which for the time being they are domiciled. 8 A. C. 43 and (1930) P. 217; (4) the rights and obligations of the parties relating to the dissolution of the marriage do not form part of the marriage contract, but arise out of, and are incidental to, such contract and are governed by the *lex domicilii*. In 1906, Jessie, a Christian lady domiciled in Scotland, married Gulam, a Muhammadan, domiciled in British India, by civil marriage in Scotland. The parties then settled in British India, in 1912; she adopted the Muhammadan faith. In 1922 Gulam divorced his wife by talak. Shortly after, Jessie obtained a declaration from the District Court that the was no longer married to Gulam. In 1923 she married Mancherji, a Parsi convert to Christianity (respondent). In 1933, she filed a petition for dissolution of her marriage with the respondent on the ground of adultery and cruelty. The respondent contended that the petitioner's marriage with Gulam had not been validly dissolved and was still subsisting and that his marriage with the petitioner was void.

Held, that (*i*) the declaration obtained by the petitioner from the District Court did not operate as a judgment *in rem* and was not binding on the respondent; (*ii*) the status attaching to the marriage and the rights flowing therefrom are determined by *lex domicilii*, not *lex loci contractus* and divorce by talak being recognised by the Muhammadan Law of British India, Jessie was validly divorced. (*Beaumont, C.J.*) KHAMBATTA *v.* KHAMBATTA. **149 I C. 1232=6 R.B. 417=36 Bom. L.R. 11=A.I.R. 1934 Bom. 93.**

———Non-resider •foreigner—No jurisdiction unless he submits to it. *See* C. P. CODE, S. 13. **158 I C. 24.**

———Private—Attachment of movables by British Indian Court—Subsequent adjudication in insolvency—Effect. *See* C. P. CODE, S. 64—INSOLVENCY SUBSEQUENT. **60 I.A. 167=56 Mad. 405=A.I.R. 1933 P.C. 134=64 M.L.J 562 (P.C.).**

———*Sea coast—State may enact laws affecting.*

States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law. Whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. (*Lord Macmillan.*) E R CROFT *v.* SYLVESTER DUNPHY. **I.R. 1933 P.C. 118=143 I.C. 91=1933 A.L.J. 284=37 L.W. 528=A.I.R. 1933 P. C. 16 (P.C.).**

INTERPRETATION OF STATUTES.

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INTERPRETATION OF STATUTES—Act conferring power.

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Act conferring power.

———*Act conferring power—Jurisdiction—Exercise of—Principles.*

Where an Act gives a special power, that power must be limited to the purpose for which it is conferred and jurisdiction must be exercised strictly in accordance with the provisions of the statute which creates it. It is an evasion of the law to treat an aggravated offence as an ordinary one and thus introduce a different jurisdiction or a lower scale of punishment. (*Mahadevayya, C.J.*) CHANDRACHARI *In the case of.* **13 Mys. L.J. 130 = 39 Mys. H.C.R. 1056.**

INTERPRETATION OF STATUTES—Amending Act.

———*Act conferring power—Mode of expression—Language of the Act.*

Where an Act of Parliament or other instrument confers power to authorize some act, the instrument which exercises that power should be expressed in language following as far as possible the language of the Act or instrument which creates the power. (*Beaumont, C.J. and Divatia, J.*) DHORIBHAI DADABHAI *v.* PRAGDASJI BHAGWANDASJI. **59 Bom. 412 = 157 I.C. 1086 = 8 R.B. 95 = 37 Bom. L.R. 120 = A.I.R. 1935 Bom. 172.**

Act conferring privilege.

———*Act conferring privilege—Strict construction—Punjab Alienation of Land Act, 1900, S. 16.*

Courts are not justified in reading into an Act words which are not there. It is a settled canon of law that a provision of the character which has the effect of conferring a privilege on certain classes of debtors and of trenching on the ordinary right of a creditor to realize his money from the property of his debtor, must receive a strict construction and it ought not to be extended to matters to which it does not in terms apply. Observations made with reference to S. 16 (1) of the Punjab Alienation of Land Act. (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367 = I.R. 1931 Lah. 291 = 130 I.C. 419 = 31 P. L. R. 842 = A.I. R. 1930 Lah. 1034.**

Alternative constructions.

———*Alternative constructions—Absurdity and injustice to be avoided.*

When the language used by the legislature admits of two constructions, the Court should not adopt a construction which would lead to an absurdity or obvious injustice but should adopt that construction which appears to be most in accord with covenience, reason and justice. Rule applied in construing S. 541, Cr. P. Code. (*Bhide and Tapp, JJ.*) KUNDAN LAL *v.* EMPEROR. **12 Lah. 604 = I.R. 1931 Lah. 481 = 131 I.C. 625 = 32 Cr. L.J. 785 = 32 P.L.R. 423 = 1931 Cr.C. 625 = A.I.R. 1931 Lah. 353.**

———*Alternative constructions—Duty of Court—Construction in favour of subject.*

When the language of the legislature admits of two constructions, one leading to obvious illegality or injustice, Courts have to act on the view that such a result could not have been contemplated, unless the intention has been manifested in express words. The mode of interpretation must be in favour of the subject. (*Mahadevayya, C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) VENKATARANGAIENGAR *v.* GOVERNMENT OF MYSORE. **12 Mys. L J. 328 = 39 Mys. H.C. R. 485 (F.B.).**

Amending Act.

———*Amending Act—Applicability to pending actions.*

Where an amending Act lays down a rule of procedure, it ordinarily affects pending actions. Hence where a document which is inadmissible under law at the time the suit is pending in the trial Court is made admissible by an amending Act when the appeal is pending, the appellate Court can admit the document. A.I.R. 1930 A. 706, Ref. (*Sulaiman, C.J. and Collister, J.*)

INTERPRETATION OF STATUTES—Amending Act.

SOHAN LAL *v.* ATAL NATH. **56 All. 142=148 I.C. 229=6 R.A. 656=1933 A.L.J. 1584=A.I.R. 1933 All. 846.**

———*Amending Act—Judicial construction—Re-enactment of—Effect—T. P. Act, S.* 92.

The Legislature is presumed to know not only the general principles of law but the construction of the particular statutes. Where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of the construction. 43 C. 103; 26 C.W.N. 703; 57 C. 381; (1890) 24 Q.B D. 557, Ref. (*Niyogi, A.J.C.*) JAIRAM *v.* BHILAJI. **27 N.L.R. 152=I.R. 1930 Nag. 361=127 I.C. 889=13 N.L.J. 166=A.I.R. 1930 Nag. 300.**

———*Amending Act—Judicial interpretation prior to amendment.*

Per *Fazl Ali, J.*—Where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered, the rule laid down by the decisions is to be adhered to. 40 All. 292, Rel. on. (*Wort, J., on difference between Das and Fazl Ali, JJ.*) HARNANDAN RAI *v.* BALIRAM PRASAD. **I.R. 1931 Pat. 193=130 I.C. 785=12 Pat.L.T. 127=A.I.R. 1931 Pat. 1.**

———*Amending Act—Modification of provisions in the old Act—Inference—Provincial Insolvency Act,* 1920, *S.* 28.

When certain changes have been made in the new Act in the place of certain provisions in the old Act, the natural conclusion is that the new provisions are intended to deal solely with that matter and that the Court should look for guidance to the new provisions and not attempt to read provisions into general words in other parts of the Act. Rule applied in construing S. 28 of the Provincial Insolvency Act, 1920. (*Bennet, J.*) ALI HUSAIN *v.* LACHHMI NARAIN MAHAJAN. **54 All. 416=I R. 1932 All. 639=140 I.C. 150 (2)=34 Cr L. J. 18=13 L.R. 55 (Cr.)=1932 A.L.J. 168=1932 Cr. C. 204=A.I.R. 1932 All. 188.**

———*Amending Act—Retrospective effect.*

No statute can be construed to be retrospective unless such a construction appears very clearly in the terms of the Act or by necessary implication. The fact that an Amending Act says that certain sections shall not have retrospective effect does not necessarily mean that the others are to be retrospective. If they affect vested interests, the provisions of an Amending Act cannot be construed as having retrospective operation. (*Baguley, J.*) KO PO KUN *v.* C.A.M.A.L. FIRM. **10 Rang. 465=I.R. 1932 Rang. 219=140 I.C. 156=A.I.R. 1932 Rang. 197.**

———*Amending Act—Retrospective effect.*

Where the provision is an amending and not a declaratory one it does not take retrospective effect. Rule applied to use of the words "under this Act" in S. 16 of the Agra Pre-emption Act, as amended. (*Sulaiman and Young, JJ.*) AMJAD ALI KHAN *v.* SAADAT BEGAM. **53 All. 524=132 I.C. 193=1931 A.L.J. 269=A.I.R. 1931 All. 317.**

———*Amending Act—Retrospective effect—Act dealing with substantive rights.*

The provision of S. 109, B. T. Act, as it stood before its amendment by Act IV of 1928 conferred a substantive right on the other party. The amended section cannot be said to take retrospective effect so as to validate a pending action which would otherwise be barred under the old section (*Suhrawardy and Graham, JJ.*)

INTERPRETATION OF STATUTES—Bye-laws.

GOSTA BEHARI PRAMANIK *v.* NAWAB BAHADUR OF MURSHIDABAD. **136 I.C. 606=I.R. 1932 Cal. 238=35 C.W.N. 1147=A.I.R. 1932 Cal. 207.**

———*Amending Act—Retrospective effect—Applicability to pending actions.*

The general rule is well-established that an amendment of an Act during the currency of a suit does not affect pending actions. The rights of the parties are governed by the Act as it existed at the time when the suit was started. (*Beaumont, C.J. and Wadia, J.*) BAKOR *v.* ISHVAR. **156 I.C. 911=8 R.B. 35=37 Bom.L.R. 372=A.I.R. 1935 Bom. 257.**

———*Amending Act—Retrospective effect—Evidence Act,* 1872, *as amended S.* 68 (*proviso*).

It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case. Proviso to S. 68 of the Evidence Act held to be inapplicable to a case disposed of before it took effect. (*Mukerji and Bennet, JJ.*) BANWARI LAL *v.* GOPI NATH. **I.R. 1931 All. 397=131 I.C. 557=1931 A. L.J. 342=A.I.R. 1931 All. 411.**

Benevolent construction.

———*Benevolent construction—Patent injustice to be avoided.*

It is open to the Courts to so construe the enactment as to avoid patent injustice, regard being had to the presumption that the legislature does not intend to do palpable injustice. If a benevolent interpretation is possible without violence to the spirit of the enactment, the Courts are bound to resort to it in order to obviate inconvenient or unjust consequences. (*Niyogi, A.J.C.*) BALIRAM SHUKUL *v.* MT. SITABAI SHUKUL. **31 N.L.R. 386=8 R.N. 49=157 I.C. 294=A.I.R. 1935 Nag. 168.**

Bye-laws.

———*Bye-laws—Rules—Validity of—Bye laws in excess of statute.*

If the rules framed under a statute or bye-laws framed under the rule are in excess of the provisions of the statute or are in contravention of or inconsistent with such provisions, then those provisions must be regarded as *ultra vires* of the statute and cannot be given effect to. S. 22 of the Act provides that on the death of a member, the share or interest of the deceased member shall be transferred to his nominee or to his legal representative who may be qualified in accordance with the rule or bye-laws of the society. R. 6 of the bye-laws of the appellant bank provided that "the following are eligible for membership:—Persons above 18 years residing or holding property in Bakerganj." R. 17 (*b*) of the bye laws provided that "in the case of the death of a preference shareholder, his shares may be transferred to his heir or nominee if he is eligible for membership and is duly elected as such."

Held, that R. 17 (*b*), in so far as it made election as a condition to membership was in excess of the provision of S. 22, proviso (*ii*) and *ultra vires* and was not validated by R. 7 of the bye-laws which referred to election, because the qualifications of members were contained in R. 6 and not R. 7. (*Mitter and McNair, JJ.*) BARISAL CO-OPERATIVE CENTRAL BANK, LTD *v.* BENOYBHUSAN GUPTA. **151 I.C. 165=7 R.C. 79=38 C.W.N. 459=A.I.R. 1934 Cal. 537.**

———*Bye laws—Validity—Test.*

Where there is a competent authority to which a statute entrusts the power of making regulations or bye-laws, it is for the authority to decide what regulations are necessary; and any regulations which they may decide to make should be supported unless they are manifestly unreasonable or unfair. (*Mitter, J.*)

INTERPRETATION OF STATUTES—Clear language.

VARMA *v.* EMPEROR. **60 Cal. 689=I.R. 1933 Cal. 525=144 I.C. 198=34 Cr.L.J. 693=37 C.W.N. 344 =1933 Cr.C. 322=A.I.R. 1933 Cal. 243.**

Clear language.

See also DUTY OF COURT, *infra.*

———*Clear language.*

Per *Addison, J.*—It is not for the Court to legislate when an enactment is clear, whatever may be the opinion of the Court as to the justice of that enactment. Observations made with reference to S. 9 of Income-tax Act. (*Addison, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*) CHUNNA MAL SALIG RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1931 Lah. 433=131 I.C. 193=32 P.L.R. 517=A.I. R. 1931 Lah. 320 (2) (F.B.).**

———*Clear language—Act to be given effect to.*

When the language of a statute is clear and unambiguous, it must be given effect to apart from considerations of possible inconvenience or hardship. (*Bhide, J.*) BASHESHAR DAS *v.* DIWAN CHAND. **6 I.R. (Lah.) 287=146 I.C. 939=34 P.L.R. 1085=A.I.R. 1933 Lah. 615.**

———*Clear language—Argument of convenience—Relevancy.*

The argument of convenience is not very often an argument when the language of the law is clear beyond doubt. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I.C. 119=I.R. 1932 All. 7=1931 A.L.J. 122=A.I.R. 1931 All. 162 (F.B.).**

———*Clear language—Duty of Court.*

If the words of an Act are clear, they must be followed, even though they lead to manifest absurdity. The Court has nothing to do with the question whether the legislature has committed an absurdity. When once the meaning is plain, it is not the province of a Court to scan its widom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words. Rule applied in construing provisions of S. 23 of the Indian Income-tax Act. (1892) 1 Q.B. 273, Ref. (*Shadi Lal, C.J., Harrison, Tek Chand, Dalip Singh and Johnstone, JJ.*) MAHOMED HAYAT HAJI MAHOMED SARDAR *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 129=I.R. 1931 Lah. 353=131 I.C. 81=32 P.L. R. 563=A.I.R. 1931 Lah. 87 (F.B.).**

———*Clear language—Principles—Literal construction.*

A legal enactment must be interpreted in its plain sense; and so long as the language of the enactment is clear and unambiguous, a subject is perfectly justified in construing it literally, and he cannot be penalized for not interpreting it in a manner not warranted by the plain language. (*Addison and Din Mohammad, JJ.*) MST. UDE BAI *v.* RAM AUTAR SINGH. **156 I.C. 965 =8 R.L. 54=37 P.L.R. 298=A.I.R. 1935 Lah. 423.**

Code.

———*Code—Exhaustive character of.*

A code must be taken as an exhaustive treatise on the subject with which it deals and the law must be looked for within the four corners of the provisions. (*Fraser, J.C. and Saaduddin Khan, A.J.C.*) GOPI CHAND *v.* MAHOMED UMAR. **160 I.C. 134=18 R. Pesh. 100= A.I.R. 1935 Pesh. 176.**

———*Code—Indian Code—Reference to English Law.*

Where the law in India is codified it is not open to the Courts in India to ignore the enacted law and follow the English Law, simply because in certain cases the enforcement of law might create a hard case. (*Mears, C.J., Mukerji and Young, JJ.*) NAZIR KHAN *v.* RAM MOHAN. **53 All. 114=I.R. 1931 All. 627= 133 I.C. 307=1931 A.L.J. 64=A.I.R. 1931 All. 183 (F.B.).**

INTERPRETATION OF STATUTES—Court-Fees Act.

Consolidating Act.

———Consolidating Act—Meaning of words—Earlier statute—Words taken from—Judicial interpretation of them intended to be followed in later enactment. *See* MEANING OF WORDS, *infra.* **53 All. 612=A.I.R. 1931 All. 294 (F.B.).**

———*Consolidating Act—Presumption as to pre-existing law not being altered.*

The presumption that the legislature did not intend to alter the law by an Act described as a consolidating Act cannot override the plain meaning of the words used. Rule applied with reference to Succession Certificate Amendment Act, 1929. (*Rewfry, J.*) BHOLA-NATH PAL, *In the goods of.* **58 Cal. 801=134 I.C. 1279=I.R. 1932 Cal. 63=35 C.W.N. 122=A.I.R. 1931 Cal. 580.**

Constituent Act.

———*Constituent Act.*

In interpreting a constituent or organic statute that construction most beneficial to the widest possible amplitude of its powers must be adopted. (*Lord Chancellor.*) BRITISH COAL CORPORATION *v.* KING. **157 I.C. 571=8 R.P.C. 38=A.I.R 1935 P.C. 158 (P.C.).**

Construction nullifying Act.

———*Construction nullifying Act—Object and intention clear—Duty of Courts.*

Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used. (*Sulaiman, A.C.J., Mukerji, Boys and Bajpai, JJ.*) RAM BHAROSE *v.* GANGA SINGH. **54 All. 154=136 I.C. 609=I.R. 1932 All. 225=1931 A.L.J. 1049=A.I.R. 1931 All. 727 (F.B.).**

———*Construction nullifying, Act to be avoided.*

Any construction of a statute would be rejected, if escape from it were possible, which enables a person to defeat a statute or impair the obligation of his contract by his own act or otherwise to profit by his own wrong. (*Curgenven and Sundaram Chetty, JJ.*) GOPALA-SWAMI CHETTIAR *v.* SECRETARY OF STATE **57 Mad. 237=6 I.R. (Mad.) 151=145 I.C. 917=38 L. W. 455=1933 M.W.N. 989=A.I.R. 1933 Mad. 748 =65 M.L.J. 518.**

Court-Fees Act.

———*Court-Fees Act—Amending Act to—Retrospective effect—Application for review.*

The Court-fee leviable on an application for review is governed by Art. 5 of Sch. I and the amount should be calculated on the basis of the fee leviable on the memorandum of appeal according to the law in force when the memorandum was filed. Where the memorandum of appeal, which determines the fee leviable on the application for review was filed before the Act amending the Court-Fees Act came into force.

Held, the question what fee was leviable on the memorandum of appeal at the time when it was filed is not affected by the subsequent commencement of the amending Act. (*King, J.*) PARMESHWAR KURMI *v.* BAKHTAWAR PANDE. **54 All. 1092=1932 A.L.J. 908=143 I.C. 481=I.R. 1933 All. 266=A.I.R. 1933 All. 20.**

INTERPRETATION OF STATUTES—Court-Fees Act.

———*Court-Fees Act—Fiscal Act—Strict construction.*

Fiscal statutes such as the Court-Fees Act should be construed strictly and if a document which is not chargeable under the statute, the person sought to be charged in respect of document is entitled to the benefit of doubt. (*King, J.*) MAHOMED SALIM-ULLAH KHAN *v.* KHALIL-UR RAHMAN KHAN. **54 All. 465 = I.R. 1932 All. 627 = 140 I.C. 47 = 1932 A.L.J. 149 = A.I.R. 1932 All. 526.**

———*Court-Fees Act—General and special provisions—Both being applicable—Which to prevail.*

In such an Act as the Court-Fees Act, if there is a special provision which applies to a particular case, then that special provision must be applied by the Court rather than some general classification, in which the suit may also be included which may be more favourable to the plaintiff. (*Reilly and Anantakrishna Aiyar, JJ.*) VENKATASIVA RAO *v.* VENKATANARASIMHA SATYANARAYANAMURTY. **56 Mad. 212 = I.R. 1932 Mad. 643 = 139 I.C. 317 = 36 L.W. 225 = 1932 M.W.N. 992 = A.I.R. 1932 Mad. 605 = 63 M.L.J. 764.**

———*Court-Fees Act—Strict construction.*

The Court-Fees Act is a taxing statute and it is a principle to be applied as regards any charging section in such a statute that the subject is not to be made liable except upon the plain words of the enactment. (*Rankin, C.J.*) ANANDA LAL CHAKRABUTTY, *In re.* **59 Cal. 528 = 137 I.C. 469 = I.R. 1932 Cal. 323 = 35 C.W.N. 1103 = A.I.R. 1932 Cal. 346.**

Crown when bound.

———*Crown when bound.*

The Crown is not bound by a statute unless specially named in it. The intention that the Crown should be bound or agreed to be bound must clearly appear from the language used and from the nature of the enactment. (*Beaumont, C. J. and Rangnekar, J.*) HIRANAND KHUSHIRAM KIRPALANI *v.* SECRETARY OF STATE. **58 Bom. 635 = 153 I.C. 142 = 7 R.B. 212 (2) = 36 Bom L.R. 820 = A.I.R. 1934 Bom. 379.**

———*Crown when bound—Taxing statute.*

It is a general cannon of construction that the Crown is not bound by Acts of Parliament unless named expressly or by necessary implication. But in the case of sections relating to taxation, the Crown is bound except where exempted from payment. (*Beaumont, C. J. and Rangnekar, J.*) SECRETARY OF STATE *v.* MUNICIPAL CORPORATION OF BOMBAY (NO. 1). **59 Bom. 681 = 158 I.C. 151 = 8 R.B. 113 = 37 Bom. L.R. 499 = A.I.R. 1935 Bom 347.**

Declaratory Act.

———*Declaratory Act—Declaratory provision—Retrospective effect.*

A declaratory Act merely declares the law as it is at the date of its commencement and as it was, and it may have and ordinarily will have a retrospective effect, though the mere description of an act as a declaratory Act is not decisive on that point. A provision of an Act not in its general character declaratory may be declaratory in effect, though not in form, may have retrospective operation. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627 = 33 L.W. 168 = 130 I.C. 177 = I.R. 1931 Mad. 353 = A.I.R. 1931 Mad. 83 = 60 M.L.J. 191.**

Disabling provisions.

———*Disabling provisions—Ambiguity—Construction in favour of subject should be adopted.*

If there is ambiguity as to the meaning of a disabling section, the construction which is in favour of the freedom of the individual should be given effect to. (*Sir Lancelot Sanderson.*) JONATHAN EDWARD DAVID *v.* DE SILVA. **6 R.P.C. 126 = 148 I.C. 607 = A.I.R. 1934 P.C. 36 (P.C.).**

———*Disabling provisions—Construction.*

Where an equivocal word or an ambiguous sentence is used in a disabling section, the construction which is in favour of the freedom of the subject should be given effect to. (*Ferrers, J. C. and Rup Chand, A. J. C.*) EMPEROR *v.* MT. ASIAT. **29 S.L.R. 19 = 156 I.C. 294 = 7 R.S. 240 = 36 Cr.L.J. 902 = 1935 Cr.C. 520 = A.I.R. 1935 Sind 102.**

———*Disabling provisions—Strict construction*

O. 22, R. 9 is a disabling rule and should be construed strictly. (*Addison and Bhide, JJ.*) LACHMAN *v.* BANSI LAL. **12 Lah. 275 = I.R. 1931 Lah. 370 = 131 I.C 98 = 31 P.L.R. 973 = A.I.R. 1931 Lah. 79 (2).**

Duty of Court.

———*Duty of Court.*

A Court has to interpret the law as it stands and is not competent to play the role of a legislator and to introduce amendments based on equitable consideration to remove the possible defects. (*Addison and Din Mohammad, JJ.*) ABDUL HASAIN KHAN *v.* MT. MAHMUDI BEGAM. **16 Lah. 667 = 158 I.C. 502 = 37 P.L.R. 676 = A.I.R. 1935 Lah. 364.**

———*Duty of Court.*

It is for the legislature to make enactments and for the Court to enforce such enactments. Courts are not concerned with its policy. (*Sulaiman, C.J. and Collister J.*) SOHAN LAL *v.* ATAL NATH. **56 All. 172 = 6 R.A. 656 = 148 I.C. 229 = 1933 A.L.J. 1584 = A.I.R. 1933 All. 846.**

———*Duty of Court.*

It is the duty of the Court, when interpreting Acts of the legislature, to give to the words used their natural significance. (*Cunliffe, Ag. C. J. and Bagulay, J.*) SOONIRAM *v.* S. A. R. M. CHETTYAR FIRM. **12 Rang. 64 = 149 I.C. 723 — 6 R.R. 309 = A.I.R. 1933 Rang. 363.**

———*Duty of Court.*

It is not the function of the Court to legislate. It must take the law as it stands. (*Srivastava and Allsop, JJ.*) HARNAM SINGH *v.* BAHU RANI. **9 Luck. 406 = 147 I.C. 186 (1) = 6 R.O. 250 = 10 O.W.N. 1202 = A.I.R. 1933 Oudh 528.**

———*Duty of Court.*

Courts have to construe an Act as they find it, and, if the language is not clear, it is for the legislature, and not for the Courts, to remedy an apparent defect. (*Beaumont, C. J and Blackwell, J.*) TATA HYDRO ELECTRIC AGENCY, LTD. *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **58 Bom. 361 = 36 Bom.L.R. 23 = 150 I.C. 52 = 6 R.B. 420 = A.I.R. 1934 Bom. 62.**

———*Duty of Court.*

In construing a statute, it is not permissible to import into its text any words of limitation unless the text requires those words by necessary implication. If the context requires that the words should be supplied, the Court does not offend against any known canon of construction by supplying those words. (*Mukerji, Sen and Bennet, JJ.*) RADHA MOHAN DATT *v.* ABBAS ALI BISWAS. **53 All. 612 = I.R. 1931 All. 577 = 133 I.C. 129 = 1931 A.L.J. 377 = A.I.R. 1931 All. 294 (F.B.).**

———*Duty of Court.*

It is not the function of the Court to make the law reasonable, but to expound it as it stands according to the sense of the words. Rule applied in construing the term 'market' in S. 23 (1), C. P. Local Government Act. 17 C.P.L.R. 113 and 10 N.L.R. 42, Ref. (*Niyogi,*

INTERPRETATION OF STATUTES—Duty of Court.

A. J. C.) PRAYAGRAO *v.* BETUL DISTRICT COUNCIL. **28 N.L.R. 98 = I.R. 1932 Nag. 108 = 139 I.C. 374 = A.I.R. 1932 Nag 105.**

———*Duty of Court to administer law as it is.*

It is not the province of a Court to scan the wisdom or the policy of the law. Its duty is to administer the law as it finds it, and it cannot allow itself to be deflected from the straight course by its own notions of the propriety or otherwise of the law. Rule applied to a case under S. 4 (1) (*c*) of the Press Ordinance. (*Shadi Lal, C.J., Broadway and Abdul Qadir, JJ.*) PRITHVI DASS SHARMA *v.* EMPEROR. **12 Lah. 345 = I.R. 1931 Lah. 713 = 132 I.C 889 = 32 Cr.L.J. 997 = 32 P. L.R. 676 = 1931 Cr.C. 539 = A.I.R. 1931 Lah. 283 (F B.).**

———*Duty of Court—Court not to make or amend laws.*

However strongly a Court may feel that the legislature has overlooked a necessary provision or however obvious it may be that a provision has been inserted or omitted owing to the blunder of the draftsman, a Court is not at liberty to make laws or amend them. (*Kemfry J.*) BHOLANATH PAL, *In the goods of.* **58 Cal. 801 = 134 I.C. 1279 = 35 C.W.N. 122 = I.R. 1932 Cal. 63 = A.I.R. 1931 Cal. 580.**

———*Duty of Court—Express words—Effect to—Pensions Act* (*XXIII of* 1871), *S.* 4.

Though where a statute limits the ordinary rights of a subject, it should be liberally construed in favour of the subject, it is, however, the duty of Courts to give effect to the intentions of the legislature when they are clearly expressed, as they are in S. 4 of the Pensions Act. (*Madgavkar and Murphy, JJ.*) GANGAGIR JANKIDAS *v.* SECRETARY OF STATE. **33 Bom.L.R. 1029 = 134 I.C. 1217 = I.R. 1932 Bom. 1 = A.I.R. 1931 Bom. 505.**

———*Duty of Court—Giving effect to statutory provisions.*

Per *King, C. J.*—A Court cannot refuse to give effect to a statutory provision, according to its plain and ordinary meaning, on the ground that it would result in hardship or injustice. (*King, C. J., Srivastava and Zia-ul-Hasan, JJ.*) EMPEROR *v.* MUMTAZ HUSAIN. **11 Luck. 123 = 155 I.C. 344 = 7 R.O. 583 = 36 Cr.L.J. 720 = 1935 O.W.N. 509 = 1935 Cr.C. 670 = A.I.R. 1935 Oudh 337.**

———*Duty of Court—Interpretation can be carried near process of legislative enactment.*

The process of carrying judicial interpretation dangerously near the process of legislative enactment is permissible when there seems to be no other alternative but to admit that the Act is inconsistent or unintelligible. (*King, C. J. and Zia-ul-Hasan, J.*) JAGADAMBA PARSAD *v.* MATA PARSAD. **11 Luck. 289 = 156 I.C. 49 = 1935 O.W.N. 818 = 7 R.O. 650 = A.I.R. 1935 Oudh 427.**

———*Duty of Court—Language of Act—Modification—Permissibility.*

The Court has to deal with what the legislature has put before it and is not at liberty to turn itself into a legislative body for the purpose of supplying deficiencies in the statute. (*Beasley, C. J., Ramesam, Reilly, Anantakrishna Aiyar and Sundaram Chetty, JJ.*) RAJA OF MANDASA *v.* JAGANNAYAKULU. **55 Mad. 883 = I.R. 1932 Mad. 859 = 140 I.C. 331 = 1932 M.W.N. 350 = 36 L.W. 292 = A.I.R. 1932 Mad. 612 = 63 M.L.J. 450 (F.B.).**

———*Duty of Court—Language to be interpreted as it stands—Intention of legislature.*

INTERPRETATION OF STATUTES—Duty of Court.

It is not only undesirable but unsafe for the Court to vary the words of a statute, in an endeavour to meet a particular situation, for the purpose of giving effect to what may presumably have been the intention of the legislature. It is the duty of Court to interpret the language of the legislature as it stands and neither to add to it nor to take away from it. (*Costello and Lort Williams, JJ.*) THE HUNGERFORD INVESTMENT TRUST, LTD. *In the matter of.* **62 Cal. 133 = 39 C.W. N. 253.**

———*Duty of Court—Language of statute not be departed from.*

It is not permissible to depart from the language of the statute unless there are adequate and strong grounds for doing so. The function of a Court is to interpret the statute and not to legislate. (*Srivastava and Zia-ul-Hasan, JJ.*) MUHAMMAD YAKUB KHAN *v.* AZIZ-UN-NISSA. **155 I C. 1076 = 7 R.O. 631 = 1935 O.W-N. 881 = A.I.R 1935 Oudh 437.**

———*Duty of Court—Overlapping of powers conferred on different persons—Construction.*

Per *Dalip Singh, J.*—While it is possible that there might be an overlapping of powers conferred on different persons in a statute, yet where the matter admits of doubt at least, the construction against overlapping of powers should be adopted ordinarily. (*Addison, Ag.C.J. Dalip, Singh and Din Mahammad, JJ.*) MADAN MOHAN LAL *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **16 Lah. 937 = 8 R.L. 286 = 38 P.L.R. 52 = 158 I.C. 718 = A.I.R. 1935 Lah. 742 (F.B.).**

———*Duty of Court—No duty to supply deficiency—Competing constructions.*

If on the true construction of a statute, not excluding a taxing statute, a lacuna or defect appears, it is no part of the duty of the Court to supply the deficiency; but in choosing between two competing constructions, each of them possible, it is not irrelevant to consider that one of them is consistent with the obvious purpose of the Act, while the other would render the statute capricious or abortive. (*Page, C.J. and Mya Bu, J.*) C. T. MUDALIAR *v.* MAYMYO MUNICIPAL COMMITTEE. **11 Rang. 182 = I.R. 1933 Rang. 84 = 144 I.C. 159 = 34 Cr.L.J. 700 = 1933 Cr.C. 486 = A.I.R. 1933 Rang. 68.**

———*Duty of Court—Remedying of defects.*

It is not for a Court of law to remedy the fault in the law enacted by the legislature. The Court has only to declare the law as it appears in the enactment, and must leave the legislature to consider what steps they may think it necessary to take by way of amendments to remedy the defects. (*Costello and Lort Williams, JJ.*) THE HUNGERFORD INVESTMENT TRUST, LTD. *In the matter of* **62 Cal. 133 = 39 C.W N. 253.**

———*Duty of Court—Reasonableness or utility of enactment—If relevant.*

Courts are not concerned with the desirability, utility or reasonableness of any particular enactment It is their duty to give effect to the law as it stands without regard to expediency or consequence. (*O'Sullivan, A. J.C.*) EMPEROR *v.* HARI VISHINJI. **28 S.L.R. 397 = 157 I.C. 697 = 36 Cr.L.J. 1161 (2) = 1935 Cr.C. 753 = A.I.R. 1935 Sind 145.**

———*Duty of Court—To apply accurately the precise words of statute.*

The provisions of statutory enactments must always and necessarily be somewhat less elastic than those to be gathered from the Common Law which in effect is enshrined in judgments in decided cases. Courts have to administer and to apply as accurately as lies in their

INTERPRETATION OF STATUTES—English law.

powers the precise words of the relevant statutory enactments. (*Costello and M.C. Ghose, JJ.*) ABDUL RAHMAN *v.* EMPEROR. **62 Cal. 749=156 I.C. 678=8 R.C. 21=36 Cr.L.J. 982=1935 Cr.C. 467=A.I.R. 1935 Cal. 316.**

English law.

See also CODE, *supra.*

———*English law.*

When there is a positive enactment of the Indian Legislature, the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any considerations derived from the English law on which it may be founded. (*Dalip Singh and Bhide, JJ.*) DIWAN CHAND *v.* MANAK-CHAND. **16 Lah. 392=155 I C. 938=7 R.L. 802 (2) =36 P.L R. 185=A.I.R. 1934 Lah. 809.**

———English law—English Act—Definition of word 'Agriculture' in—Not applicable to Madras Estate Land Act. *See* MEANING OF WORDS *infra.* **54 Mad. 900 =A.I.R. 1931 Mad. 659=61 M.L.J. 648.**

———*English law—English Acts and rules—Reference to—Permissibility—Divorce Act* (*IV of* 1869), *S.* 7.

An Indian Act should not ordinarily be construed in the light of statutes enacted by another legislature. But where the Indian Act makes express reference to the Court in England exercising the corresponding jurisdiction and to the principles and rules on which that Court acts and gives relief, it is relevant to consider those rules with a view to the construction of the Indian enactment. Thus by virtue of the reference to the English Court of Matrimonial Causes in S. 7 of the Divorce Act, the Courts in India can be taken to have in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England undoubtedly enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase. (*Lord Russell of Killowen.*) ISWARAYYA *v.* SWARNAM ISWARAYYA. **54 Mad, 774=58 I.A. 350=I.R. 1931 P.C. 252=133 I C. 716=34 L.W. 518 =33 Bom.L R. 1402=1931 A.L.J. 808=35 C W.N. 1185=8 O.W.N. 980=A.I.R. 1931 P.C. 234=61 M. L.J. 367 (P.C.).**

———*English law—English decisions—Authority of—Indian enactment* ipsissima verba *as the English.*

Where a Colonial legislature has passed an Act in the same terms as an Imperial Statute and the latter has been authoritatively construed by the Court of Appeal in England, such construction should be adopted by the courts of the Colonies ; they must yield to the High authority of the Court of Appeal. *Trimble* v *Hill.* 5 A.C. 342, Ref. (*Tyabji, J.*) BHIMAJI *v.* CHUNILAL. **57 Bom. 623=I.R. 1932 Bom. 451=138 I.C. 824=34 Bom L.R. 683=A.I.R. 1932 Bom. 344.**

———*English law— English decisions— Income tax Act—Reference to decision under Imperial Income-tax Code—Permissibility.*

The invocation of Imperial Income tax Code and of decisions pronounced upon it is apt to be very misleading in the interpretation of Indian Income tax legislation which is framed on other and fortunately much simpler lines. (1901) A.C. 20, Expl. (*Lord Macmillan.*) BEJOY SINGH DUDHURIA *v.* COMMISSIONER OF INCOME-TAX, CALCUTTA. **60 I.A. 196=60 Cal. 1029 =1933 M.W.N. 553=37 C.W.N. 885=57 C.L.J. 503 =1933 A L.J. 641=35 Bom.L.R. 811=I.R. 1933 P.C. 127=143 I.C. 145=37 L.W. 775=A.I.R. 1933 P.C. 145=65 M L J. 285 (P.C.).**

———*English law—English decisions— Reference—Interest Act*, 1839.

INTERPRETATION OF STATUTES—Equity.

The Interest Act and Lord Tenderden's Act being indistinguishable, cases under the English Law are relevant for the decision of questions under the former Act. (*Wort and Fazl Ali, JJ.*) PATTINSON *v.* BINDHYA DEBI. **12 Pat. 216=6 I.R. (Pat.) 225= 146 I.C. 56=14 Pat.L.T. 149=A.I.R. 1933 Pat. 196.**

———*English law—English decisions—Value of.*

Per *Sulaiman, C. J.*—Where the language of the sections of English and Indian Acts are almost identical, Indian Courts would very much hesitate to depart from the view expressed by eminent Judges in England who have had great experience of Company law unless there is something internal in the section itself which would justify its interpretation in a different way. (*Sulaiman, C. J., Mukerji and King, JJ.*) SHIAM LAL *v.* OFFICIAL LIQUIDATORS OF THE U. P. OIL MILLS CO. LTD. **55 All 912=3 A.W.R. 201=6 I. R. (All.) 184=145 I C. 893=1933 A.L J. 1203=A. I.R. 1933 All. 789 (F.B).**

———*English law—Popular sense—Meaning of word "lottery."*

Indian Courts are not bound by common law prevailing in England and should interpret the word used in a statute in its current meaning. Meaning of word 'lottery' considered. (*Addison, J.*) GURBAKHSH SINGH *v.* EMPEROR. **16 Lah. 51=155 I.C. 590=7 R.L. 738= 36 Cr.L.J. 785=1934 Cr C. 1182=35 P.L.R. 753= A.I R. 1934 Lah. 840.**

———*English law—Reference to—Duty of Court—Language of the Act.*

In interpreting the statutory provisions of an Indian Act, the Courts should examine the language of the Indian statute itself uninfluenced by any consideration derived from the English law on which it might have been based or without any reference to the previous state of law on the subject. 55 Cal. 519, Ref. (*Subhedar, A.J.C.*) DIWAN SINGH *v.* EMPEROR. **155 I.C. 450=7 R.N. 176=36 Cr.L.J. 744=1935 Cr.C 418= A.I.R. 1935 Nag. 90.**

———*English law—Reference to English Act—When permissible—Punjab Court of Wards Act, S.* 16.

Where the language, of a section in Indian Act, such as S. 16 of the Punjab Court of Wards Act is borrowed from an English statute it is permissible to interpret it in the light of the latter. (*Shadi Lal, C. J. and Tapp, J.*) COURT OF WARDS *v.* MOKAND LAL. **I.R. 1931 Lah. 1011=134 I.C. 819=32 P.L.R 667=A.I. R. 1931 Lah. 756.**

———*English law—Reference to— Permissibility—Evidence Act, S.* 30.

In considering the meaning and effect of an Indian statute, a rule or principle adopted in or derived from English Law is not permissible if thereby the true and actual meaning of the statute under construction be varied or denied effect 43 I.A. 262, Foll. (*Page, C. J., Mya Bu and Baguley, JJ.*) AUNG HLA *v.* EMPEROR. **9 Rang. 404=1931 Cr.C. 875=135 I.C. 849=33 Cr.L.J. 205=I.R. 1932 Rang 65=A.I.R. 1931 Rang. 235.**

Equity.

———*Equity—Clear language—Grounds of equity, if material.*

Per *Sen, J.*—A clear provision of law has to be followed and given effect to and it cannot be displaced by a mere equitable principle however wholesome it may be. Observation made with reference to the effect of S. 70 of the T. P. Act. (*Sulaiman King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334 =I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273 =A.I.R. 1931 All. 277 (F.B.)**

INTERPRETATION OF STATUTES—Equity.

———*Equity—English equitable doctrine—Application of—Case governed by Indian statute.*

An English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract should not be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be rreated by means of a registered instrument. (*Lord Russell of Killowen.*) ARIFF *v.* JADUNATH MAJUMDAR. **58 I.A. 91=58 Cal. 1235=I.R. 1931 P.C. 154=131 I.C. 762=33 Bom.L R. 913=53=C.L J. 359=8 O.W.N. 739=15 R.D. 354=35 C.W.N. 550=1931 M.W.N. 480=33 LW. 586=A.I.R. 1931 P.C. 79=60 M. L.J. 538 (P.C.).**

Expropriating statute.

———*Expropriating statute.*

If the executive wishes to extinguish private rights by statutory power, it must strictly regard the provisions of the statute. (*Jackson, J.*) PRATAPRAO BAHADUR GARU *v.* NARAYANA GAJAPATHIRAJU. **1932 M.W. N. 922.**

Fiscal Act.

See also COURT-FEES ACT, *supra* AND INCOME-TAX ACT, *infra.*

———*Fiscal Acts.*

It is an incontestable principle that fiscal Acts must be interpreted for the benefit of the subject rather than the State. It is no doubt true that partition suit frequently involve great expenditure of labour on the part of the Court concerned, and that they frequently relate to property of very great value. This however is no reason for requiring a larger Court-fee where on a strict interpretation of the law a lower one would suffice. (*Fraser, J.C. Saaduddin Khan, A.J.C.*) HASSAN KHAN *v.* AHMAD KHAN. **A.I.R. 1935 Pesh. 30.**

———*Fiscal Act.*

Fiscal enactments must be construed strictly. (*Addison, Jai Lal and Bhide, JJ.*) BHOLA RAM & SONS *v.* EMPEROR. **15 Lah. 501=150 I.C. 781 (2)=7 R.L. 24=36 P.L.R. 9=1934 Cr.C. 835=A.I.R. 1934 Lah. 530 (S.B.).**

———*Fiscal Act—Authority to tax on doing certain acts—Taxing authority must show that act is done.*

It is a well-settled principle of law that when the legislature has empowered an authority to impose taxes after doing a certain act, it cannot impose the taxes unless that act is done and the authority must show, if challenged, that the act was done. (*Mahomed Noor, J.*) CHAIRMAN, DHANBOD MUNICIPALITY *v.* JAJNESWAR BHAKAT. **6 R.P. 512=148 I.C. 918=A.I.R 1934 Pat. 83.**

———Fiscal Act—Benefit of doubt. *See* DUTY OF COURT, *supra.* **11 Rang. 182=A.I.R. 1933 Rang. 68.**

———*Fiscal Act— Construction— Strict compliance necessary—Madras Proprietary Estates Village Service Act (II of 1894), Ss. 2 and 27.*

Taxing enactments should be strictly construed and the imposition of any tax would not be legal unless the conditions precedent to the imposition of that tax are strictly complied with. This principle is applicable to the provisions of Madras Act II of 1894. (*Sundaram Chetty, J.*) GOPALASWAMI CHETTIAR *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.R. 1931 Mad. 623=136 I.C. 130=34 L.W. 333=1931 M.W.N. 537=A.I.R. 1931 Mad. 525=61 M.L.J. 754.**

———Fiscal Act—Crown bound except where exempted from payment. *See* CROWN WHEN BOUND, *supra.* **A.I.R. 1935 Bom. 347.**

INTERPRETATION OF STATUTES—Fiscal Act.

———*Fiscal Act—Express language.*

When the State requires the subject to pay a tax of any kind, that must be done by definite enactment strictly interpreted. (*Reilly and Anantakrishna Ayyar, JJ.*) RAMASWAMI AYYAR *v.* RENGASWAMI AYYAR. **55 Mad. 26=I.R 1932 Mad. 1 (2)=1931 M.W.N. 916=134 I.C. 1137 (2)=34 L.W. 429=A.I.R. 1931 Mad. 683=61 M.L J. 933.**

———*Fiscal Act—Incidence of general tax—Exemption—If to be presumed—Onus of proving exemption.*

It is true that in one sense a taxing statute should be construed liberally and favourably to the subject, but on the other hand, equality and impartial justice in the incidence of taxation are of greater moment, and the statute should therefore be construed so as to promote that equality and that impartiality of justice. There is no presumption in favour of the exemption of the few from the incidence of a general tax. The presumption is for eqality and rather against the partiality which is involved in special exemptions. (*Courtney Terrell, C. J., Khaa Mohammad Noor and Agarwala, JJ.*) VISHESWAR SINGH *v.* COMMISSIONER OF INCOME-TAX, B. & O. **14 Pat. 785=156 I.C. 116=7 R.P. 685=16 Pat.L T. 351=A.I.R. 1935 Pat. 342 (S.B.).**

———*Fiscal Act—Intention of legislature immaterial.*

Per *Courtney-Terrell, C.J.*—While dealing with a fiscal statute, the Court is not concerned either with the intention of the legislature or with the spirit of the legislation. In such cases, the Court has merely to regard the letter of the law unless such considerations are clearly specified in the enactment for the guidance of tribunals. (*Courtney Terrell, C.J., Kulwant Sahay and James, JJ.*) COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA *v.* KAMESHWAR SINGH. **13 Pat. 336=6 R.P. 412=147 I.C. 1236=15 Pat.L.T. 85=A I.R 1934 Pat. 178 (S.B.).**

———*Fiscal Act—Principles.*

The principle which must always be applied in construing a taxing Act is that the Government must show that the tax sought to be recovered has been imposed in language which admits of no reasonable doubt. (*Beaumont, C.J. and Sen, J.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* DARABSHA NASARWANJI. **159 I.C 41=8 R.B. 161=37 Bom L.R. 112=A.I.R. 1935 Bom. 157.**

———*Fiscal Act—Principles.*

In construing a taxing Act the Court ought not to strain the language of the Act against the tax payer. (*Beaumont, C.J. and Rangnekar, J.*) COMMISSIONER OF INCOME TAX, BOMBAY *v.* CHUNILAL B. MEHTA. **59 Bom. 719=159 I.C. 413=37 Bom.L R. 753=A.I. R. 1935 Bom. 423.**

———*Fiscal Act—Principle of enactment, if material.*

The Courts have no right to make a search for principles and to legislate, thereby interpreting fiscal statutes. They have to decide that either the enactment applies or it does not apply. Rule applied to case under Court-Fees Act (*Hasan, C.J. and Kisch, J.*) SHEO RAM SINGH *v.* BARKAR SINGH. **6 Luck 684=I.R. 1931 Ouh 389=134 I.C. 597=14 O.L.J. 365=8 O.W. N. 536=A.I.R. 1931 Oudh 366.**

———*Fiscal Act—Rule,*

Per *Wort, J.*—The rule of construction applicable to a taxing statute is that it must be construed strictly against the crown. (*Wort, Khaja Mahomed Noor and James, JJ.*) DEOJ GOA *v.* TRICUMJI JIVAN DAS. **14 Pat. 658=159 I.C. 4=16 Pat.L T. 433=A.I.R. 1935 Pat. 396 (S B.).**

———*Fiscal Act—Stamp Act—Strict construction.*

The Stamp Act being a fiscal enactment, its provsions should, as far as possible, be construed in favour

INTERPRETATION OF STATUTES—Fiscal Act.

of the subject. Art. 57, Stamp Act, construed. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) BOARD OF REVENUE *v.* LALTA BAKHSH SINGH. **6 Luck. 601 = I.R. 1932 Oudh 241 = 132 I.C. 225 = 14 O.L.J. 224 = 8 O.W.N. 116 = A.I.R. 1931 Oudh 99.**

———*Fiscal Act—Strict construction.*

The language of a Statute imposing a tax must receive a strict construction. There can be no equitable construction regarding such an act. (*Addison, J.*) HIRACHAND *v.* EMPEROR **13 Lah 53 = I.R 1931 Lah. 662 = 32 Cr.L J. 946 = 132 I.C. 694 = 32 P.L.R. 639 = 1931 Cr.C. 860 = A.I.R. 1931 Lah 572.**

———*Fiscal Act—Strict construction.*

An Act imposing taxation has always to be construed strictly, that is to say, the Crown has to show that the tax in question is imposed upon a fair construction of the language used. (*Beaumont, C. J., Broomfield and Wadia, JJ.*) SHARANBASAPPA *v.* SANGANBASAPPA. **59 Bom. 469 = 156 I.C. 960 = 8 R.B. 40 = 37 Bom. L.R. 346 = A.I.R. 1935 Bom. 256.**

———*Fiscal Act—Strict construction—Central Provinces Municipalities Act (II of 1922), S. 66—"Metals and their manufactures" — Motor cars—Tax on—Legality of.*

Statutes which impose pecuniary burden are subject to the rule of strict construction and the subject is not to be taxed unless the language of the statute clearly imposes the obligation. Thus where a municipality is authorized to levy octroi duty on commodities specified in the Schedule which included *inter alia* "metals and their manufactures", a complicated machinery such as a motor car is not included therein and the Municipality has no power to levy octroi duty on motor cars brought into the Municipality for use within its limits. (*Macnair, J.C. Jackson and Subhedar, A.J.Cs.*) DHAN KUMARI *v.* MUNICIPAL COMMITTEE, SAUGAR. **27 N.L.R. 175 = I.R. 1931 Nag. 178 = 134 I.C. 850 = A.I.R. 1931 Nag. 156 (F.B.).**

———*Fiscal Act—Strict construction—Madras City Municipal Act, 1919.*

Fiscal enactments imposing burdens ought to be strictly construed, and an assessee is entitled to object to a taxation unless his case is reasonably and clearly brought within the wordings of the taxing section. (*Reilly and Anantakrishna Ayyar, JJ.*) MADRAS CENTRAL URBAN BANK, LTD. *v.* CORPORATION OF MADRAS. **I R. 1932 Mad. 499 = 138 I.C. 12 = 1932 M.W.N. 75 = 35 L.W. 573 = A.I.R. 1932 Mad. 474 = 62 M.L.J. 720.**

———*Fiscal Act — Strict construction — Rule not applicable to matters of procedure.*

The principle that a statute which imposes a duty must be strictly construed does not extent to mere matters of procedure for collecting the impost. (*Curgenven and Sundaram Chetty, JJ.*) GOPALASWAMI CHETTIAR *v.* SECRETARY OF STATE. **57 Mad. 237 = 6 I.R. (Mad.) 151 — 145 I.C. 917 = 38 L.W. 455 = 1933 M.W.N. 989 = A.I.R. 1933 Mad. 748 = 65 M.L.J. 518.**

General and special Acts.

———*General and special Acts.*

Where the Legislature has given its consent to a separate subject and made provisions for it, the presumption is that a subsequent general enactment will not override the special provisions contained in the earlier enactment dealing with the separate subject, unless such an intention is made clear. (*Allsop and Baipai, JJ.*) GOVIND RAM *v.* KASHI NATH. **161 I.C. 903 = 8 R.A. 802 = 1936 A.L.J. 350 = 1935 A.W.R. 1432 = A.I.R. 1936 All. 239.**

INTERPRETATION OF STATUTES—General and Special Act.

———*General and special Acts—Conflict between.*

Where there is a conflict between a special Act and a general Act, the provisions of the special Act prevail. (*Beaumont, C. J. and Wadia, J.*) COLLECTOR OF BOMBAY *v.* KAMALAVAHOOJI. **36 Bom.L.R. 297 = 154 I.C. 861 = 7 R.B. 378 = A.I.R. 1934 Bom. 162.**

———*General and special Acts—Conflict between—Rule in case of—Limitation law.*

It is well-recognized principle of interpretation of statutes that the general law does not affect the particular law. The rule is that general provisions such as those contained in the Limitation Act do not derogate from the special provisions, but the latter do derogate from the latter. When there is a conflict between the provisions of the general law and the special laws, the latter will prevail conflict between S. 29 (2) (*b*), Limitation Act and S. 160 (3), C P. Land Revenue Act. (*Niyogi, A.J.C.*) MISRILAL *v.* RATANLAL. **163 I.C. 623 = 9 R.N. 10 = 18 N.L.J. 285.**

———*General and special Acts—Construction.*

A special Act such as the Sale of Goods Act cannot possibly, except in the branch of law to which it especially applies, overrule a general Act such as the General Clauses Act. (*Cunliffe, J.*) A. SWAMI IYAH NADAR *v.* THE COMMISSIONER FOR THE PORT OF RANGOON. **9 Rang. 13 = I R. 1931 Rang. 303 = 134 I.C. 511 = A.I.R. 1931 Rang. 109.**

———*General and special Acts—Construction.*

If the legislature makes a special Act dealing with a particular case and later makes a general Act, which by its terms should include the subject of the special Act and is in conflict with the special Act. nevertheless, unless it is clear that in making the general Act, the Legislature has had the special Act in its mind and has intended to abrogate it, the provisions of the general Act do not override the special Act. If the special Act is made after the general Act, the position is even simpler. Having made the general Act, if the legislature afterwards makes a special Act in conflict with it, it is assumed that the legislature had in mind its own general Act when it made the special Act and that it intended the special Act to be an exception to the general Act. (English case law discussed.) (*Reilly and Anantakrishna Aiyar, JJ.*) CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS, LTD. **54 Mad. 364 = I.R. 1931 Mad. 417 = 130 I.C. 721 = 1931 M.W.N. 73 = 33 L.W. 224 = A.I.R. 1931 Mad. 152 = 60 M.L.J. 551.**

———*General and special Acts — Conviction under special Act—Action under the general Act not excluded.*

A plender convicted under S. 3, Police Incitement to Disaffection Act and under S. 17, Criminal Law (Amendment) Act, can be dealt with in the exercise of its disciplinary jurisdiction by the High Court under S. 12 of the Legal Practitioners' Act. There is, in such a case, no question of any indictment or trial for the same offence under any other law and there is no question of punishing him over again for those offences. (*Jwala Prasad, Ag.C.J., Wort, Kulwant Sahay, Fazl Ali and James JJ.*) RAM GOBIND, *In re.* **11 Pat. 365 = I.R. 1931 Pat. 497 = 134 I.C. 945 = 32 Cr L.J. 1256 = 12 Pat.L.T. 773 = 1931 Cr.C. 897 (2) = A.I.R 1934 Pat. 369 (F.B.).**

———*General and special Acts — Earlier special enactment—Subsequent general enactment—Effect of.*

When the legislature has given its consent to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. But in that

INTERPRETATION OF STATUTES—General and Special Acts.

respect, every enactment must be construed according to its own subject-matter and its own terms. The charter of the City of Montreal was amended in 1910, by 1 Geo. V, c. 48, which specifically dealt with the annexation of the town of Longue Pointe as a ward of the City. It conferred on the City the power to macadamise the streets, the cost of it to come out of the general fund of the City. The charter was again amended by several Acts in 1911, 1912 and 1914, which provided that "notwithstanding any law to the contrary", the cost of paving shall be apportioned among the proprietors in the respective streets or lanes.

Held, that having regard to the fact that the amendments were all of the statutory charter and that the special enactment was recognized in the same statute as the general enactment, the later, though general, enactment modified the earlier statute and that the City had the power to charge the frontagers. (*Lort Wright.*) CORPORATION OF THE CITY OF MONTREAL *v.* MONTREAL INDUSTRIAL LAND CO., LTD. **I.R. 1932 P. C. 302 (2)=9 O.W.N. 990=139 I.C. 667=36 L.W. 741=A.I.R. 1932 P.C. 252=63 M.L.J. 926 (P.C.).**

———*General and special Acts — Offences under — Punishment.*

Where an act is punishable under a special law and also under a general statute, the offender can be proceeded with under either or both but cannot be punished twice for the same act. Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the legislature to exclude it. (*Mears, C.J. and Sen, J.*) JOTI PRASAD GUPTA *v.* EMPEROR. **136 I.C. 91=1931 A.L.J. 986=33 Cr.L. J. 236=I.R. 1932 All. 139.**

General and special provisions.

———General and special provisions—Both being applicable—Which to prevail—Court-Fees Act. *See* COURT-FEES ACT, *supra*. **63 M.L.J. 764.**

———*General and special provisions—Harmonious construction.*

Per *King, J.*—When there are two provisions having the force of law and regulating the same subject, they should if possible be so construed as to be consistent with each other. When a Court is given discretion to do something, it must be understood that the judicial discretion is given, to be exercised according to law, not an absolute discretion which may be exercised in defiance of law. Statutory provisions cannot be overriden without clear words to that effect. Where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one. (*Mukerji, Ag. C.J., King and Niamatullah, JJ.*) BAHADUR LAL *v.* JUDGES OF ALLAHBAD HIGH COURT. **55 All. 432=I.R. 1933 All. 299=143 I C. 559=1933 A.L.J. 207=A.I.R. 1933 All. 241 (F.B.).**

———*General and special provisions in same Act—Effect.*

If in an Act there exist some general provision as well as special provisions dealing with any particular matter, the law on the subject is to be found in the special provisions and the general provisions cannot be drawn upon. (*Middleton, J.C. and Saaduddin, A.J.C.*) UNION INSURANCE SOCIETY OF CANTON *v.* MAHOMED KARAM ILLAHI KHAN. **150 I.C. 314=A.I.R. 1934 Pesh. 37.**

General and specific words.

———*General and specific words—Intention of the legislature as the test.*

INTERPRETATION OF STATUTES—Government statement.

Ordinarily a general word receives its natural meaning but a general word which follows particular and specific words of the same nature as itself may take its meaning from them and may be taken to be restricted to the same genus as those words. This rule of construction however is used only for the purpose of ascertaining the intention of the legislature. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey. Rule applied in construing P. 16 of Sch. II, C. P. Code. (*Shadi Lal, C.J. and Monroe, J.*) RALA RAM WALAITI RAM *v.* BANSI LAL JAGGAN NATH. **13 Lah. 528=I.R. 1932 Lah. 187=136 I.C. 11=33 P.L.R. 163=A.I.R. 1932 Lah. 239.**

General principle.

———*General principle.*

In interpreting a statute the proper course is in the first instance to examine the language of the statute itself and ask what its natural meaning is. Except where the terms used in the statute have acquired a technical sense, ordinary meaning should be attached to the word or words used and the intention of a statute has to be gathered from the words used and not from any speculation about its object. Regard has to be paid to three important factors : (1) A statute enacts everything essential to its existence. (2) Remedial measures must be liberally construed so as to advance the remedy. (3) Where the words are ambiguous and two meanings are possible, the scope and object of the enactment may be looked at for the elucidation of the meaning. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I.C. 119=I.R. 1932 All. 7=1931 A.L.J. 122=A.I.R. 1931 All. 162 (F.B).**

———*General principle—Exhaustiveness of Act.*

It is not permissible to deviate from the general rule governing the interpretation of statutes, namely, that an Act should be considered as exhaustive on the matters with which it deals. Rule applied with reference to Agra Tenancy Act (*Keane, S. M. and Oppenheim, J. M.*) BADAL *v.* AMINUDDIN. **15 R.D. 316=12 L.R. 110 (Rev.).**

———*General principle—Natural meaning.*

Acts should be interpreted to mean what they appear to say, and strained interpretations are not necessarily the best interpretations. (*Bagulay, J.*) RAM AWATAR *v.* HUBRAJEE. **A.I.R 1935 Rang. 123.**

———*General principle—Part of an Act cannot be ignored.*

An Act or part of an Act cannot be ignored or treated as being meaningless; it must be construed as having some operative result. (*Wort, J.*) BRAHAMDEO SAO *v.* HARO SINGH. **157 I.C. 327=8 R. Pat. 117=A. I.R. 1935 Pat. 237.**

Government resolution.

———*Government resolution—Whether can override law.*

A Government resolution cannot override the law. (*Murphy and Broomfield, JJ.*) EMPEROR *v.* GOPAL SHINDE. **57 Bom. 441=6 I.R. (Bom.) 44=145 I. C. 138=34 Cr.L J. 905=35 Bom.L.R. 376=1933 Cr. C. 657=A.I.R. 1933 Bom. 234.**

Government statement.

———Government statement—Statement on behalf of Government in Legislative Assembly or elsewhere—Relevancy. *See* PROCEEDINGS OF THE LEGISLATURE, *supra*. **31 N.L.R. 318=A.I.R. 1935 Nag. 149.**

INTERPRETATION OF STATUTES—Hardship.

Hardship.

———*Hardship—Argument* ab inconvenienti.

The argument *ab inconvenienti* has always to be received with caution in the construction of statutes. It is not usually considered admissible unless there is some evident ambiguity. (*Broomfield and Divatia, JJ.*) LLOYDS BANK, LTD., *In re.* **58 Bom. 152—149 I C. 1005 6 R B. 409=35 Cr.L J. 1028=1934 Cr.C. 306 —36 Bom.L.R. 88=A I.R. 1934 Bom. 74.**

———*Hardship or inconvenience—If relevant.*

In construing a statute, considerations of hardship and inconvenience have little weight, if the words of the statute and the intention of the Legislature were clear and unambiguous. The Court must give effect to them in spite of the consequences (*Lort Williams and Costello, JJ.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUN CHANDRA SINGHA. **61 Cal. 1047=38 C.W.N 917 =60 C.L.J. 312=153 I.C. 972=7 R.C. 414=A.I.R. 1934 Cal. 862.**

Harmonious construction.

———*Harmonious construction.*

Per *Shingne, J.*—"One of the principles of construction of a statute is that it must be construed strictly, and that Courts of Law must generally take it absolutely for granted that the legislature has said what it meant and meant what it has said. But undue strictness in construing a provision in a statute may sometimes sacrifice the true intention of the legislature and the rational development of the law to the tyranny of words. The true principle of construing a statute is that we ought to give to an Act of the legislature, the plain, fair, literal meaning of its words, where we do not see from its scope that such meaning would be inconsistent or would lead to manifold injustice and that the true meaning of any provision in an Act will have to be gathered by comparing it with the other parts of the same Act and that every clause of the Act should be construed with reference to the context, so far as possible, so as to make a consistent enactment of the whole Act relating to the subject matter. (*Shingne, J.*) SOMESHWAR RAJARAM *v.* MANILAL. **I.R. 1932 Bom. 306=137 I. C. 603 (2)=34 Bom.L R. 206=A.I R. 1932 Bom. 210.**

———*Harmonious construction.*

It is a recognized rule of construction that if the words of a statute when there is a doubt about their meaning are to be understood in the sense in which they best harmonise with the subject of the enactment and the object which the legislature has in view. (*Subhedar, Niyogi and Pollock, A.J. Cs.*) VITHOBA CHIMNAJI *v.* GOVINDRAO VITHALRAO. **143 I C. 514=I R. 1933 Nag. 171=29 N.L.R. 278=A.I.R. 1933 Nag. 193 (F.B.).**

———*Harmonious construction.*

The provisions of a statute should as far as possible be construed in such a manner that all its provisions should be consistent and none of them be rejected as redundant. (*Raza and Srivastava, JJ.*) BINDESHWARI PRASAD UPADHYAY *v.* KRISHNA MURARI. **9 Luck. 670=149 I C. 550=6 R O. 585=11 O.W.N. 430=18 R.D. 213=A.I.R. 1934 Oudh 145.**

———*Harmonious construction.*

It is a well-recognized principle that statutes must as far as possible be construed so as to produce harmony and not discord. (*Fazl Ali, J.*) SHRI THAKURJI *v.* DWARIKA RAM. **158 I.C. 276=8 R.P. 183=A.I.R. 1935 Pat. 492.**

———*Harmonious construction—Acts of the same legislature—Apparent inconsistency of.*

INTERPRETATION OF STATUTES—Harmonious construction.

It is incumbent upon the Court to see that the provisions of one Act which are apparently inconsistent with the provisions of another Act passed by the same legislature should, as far as possible, be reconciled by reading one as a qualification of the other and that if that be not possible, the provisions of the latter Act should prevail as it speaks the last intentions of the makers. *Ibbs* v. *Boulnois*, (1875) 10 Ch. 479; *Reg* v. *The Overseers of the Parish of Tonbridge*, (1884) 13 Q.B.D. 339; *The Wardens and Governors of Cholmeley School, Highgate* v *Sewell*, (1894) 2 Q.B D 906; *Imray* v. *Oakshette*, (1897) 2 Q.B. 218; In re *Cummings, Ltd* and *the County Council of Middlesex*, (1907) 1 K. B. 51, Rel. on. (*Rupchand, A J.C.*) HAJI SHAKOOR GANY *v.* VOLKART BROTHERS. **25 S.L.R. 222=I R. 1931 Sind 109=133 I.C. 77=A.I.R. 1931 Sind 124.**

———*Harmonious construction—Construction as a whole.*

A Court should not deal separately with the terms of an enactment which is in its nature composite. It should avail itself, as an aid to construction, of the light thrown upon each of its expressions by the presence within it of the others. Further in its construction of words, it should pay sufficient regard to the setting in which they are found. (*Lord Blanesburgh.*) VACUUM OIL COMPANY *v.* SECRETARY OF STATE. **59 I.A. 258=I.R. 1932 P.C. 203=137 I.C. 535=56 Bom. 313=34 Bom.L R. 1057=36 C.W.N. 854=55 C.L.J. 520=36 L.W. 156=A.I.R. 1932 P.C. 168=63 M.L. J. 437 (P.C.).**

———*Harmonious construction—Cr. P. Code* (1898), *Ss.* 235 *and* 236.

It is a general principle of interpretation that effect should be given to every part of a statute. Ss. 235 and 236 of the Cr. P. Code should be read together. (*King, J.*) SHIB CHARAN *v.* EMPEROR. **53 All 233=I.R. 1931 All. 588=133 I.C. 140=32 Cr L.J 1007=1931 A.L J. 1015=1931 Cr C. 121=A.I R. 1931 All. 49.**

———*Harmonious construction—Inconsistencies in Acts—Reconciliation.*

According to well-recognized canons of interpretation of statutes, the Court should try to reconcile any apparent inconsistencies and should give preference to a construction which avoids making any provision superfluous. Provisions of O. 43, R. 1 (*w*) read subject to O. 47, R. 7, C P. Code. (*Raza and Bisheshwar Nath, JJ.*) BANKEY BEHARI LAL *v.* ABDUL RAHMAN. **53 All. 868=135 I.C 139=I R. 1932 All. 27=8 O. W N. 1267**

———*Harmonious construction—Inconsistent enactments—Rule of construction.*

A cardinal principle of interpretation of statutes is that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other. (*Courtney Terrell, C.J. and Dhavley, J.*). RAMCHANDRA NAIK KALIA *v.* AJODHYA SINGH. **15 Pat. 8=158 I.C. 399=8 R.P 197=16 Pat.L.T. 633=A.I.R. 1935 Pat. 508.**

———*Harmonious construction—Natural meaning of words.*

It is a recognized rule of interpretation that the words of a statute should be so construed as would bring them in harmony with the other provisions of that statute, provided of course the interpretation does no violence to the meaning of which they are natually susceptible. Rule applied in construing Ss. 22 and 27 of the Bengal Municipal Act (*Mallik and Jack, JJ.*) BANKIM CHANDRA DUTTA *v.* KHAGENDRA NATH GANGULI. **60 Cal. 1008=I.R. 1933 Cal. 453=143 I.C. 602=37 C.W.N. 1029=A.I.R. 1933 Cal. 443.**

INTERPRETATION OF STATUTES—Harmonious construction.

———*Harmonious construction — Statutes* in pari materia.

Per *Bisheshwar Nath, J.*—"Where there are different statutes *in pari materia* though made at different times or even expired and not referring to each other they should be taken and construed together as one system and as explanatory of each other" Maxwell on the Interpretation of Statutes applied. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MAHOMED BAQAR *v.* MAHOMED QASIM. **7 Luck. 601=I.R. 1932 Oudh 321=138 I C. 725=9 O.W.N. 538=A.I.R 1932 Oudh 210 (F B.).**

———*Harmonious construction—Whole statute to be looked at.*

The true meaning, the exact scope and significance of any passage occurring in a statute may be found not merely in the words of that passage, but on a comparison of the same with other parts of the statute and the intention of the Legislature ascertained in that way. 2 A C. 743 and (1898) A.C. 576, Ref. (*Guha and M. C. Ghose, JJ.*) AGHORE CHANDRA JALNI *v.* RAJNANDINI DEBI. **60 Cal. 289=141 I.C. 842=I.R. 1933 Cal 442=36 C.W.N. 924=A.I R. 1933 Cal. 335.**

———*Harmonious construction—Words nullifying effect—Deletion of—Power of Court.*

Where no meaning can be given to certain words of a statute without rejecting some of those used in it, or where a statute would become a nullity were all the words retained, the Court has power to read a section as though the words which make it meaningless or nullify it were not there. In re *Ettridge*, (1909) 2 K. B. 24, Ref. (*Aston, Rupchand and Mehta, A J.Cs.*) PAHLUMAL SANTDAS *v.* NARAIN DAS DIPCHAND. **I.R. 1933 Sind 157=143 I C. 863=27 S.L.R. 121=A.I R. 1933 Sind 151 (2) (F.B.).**

Headings.

———Headings—Headings of chapter whether governs substantive provisions—C. P. Code, O 34. *See* RE-ENACTMENT, *infra*. **34 Bom.L R. 1615.**

———*Headings—Marginal notes—Reference—Permissibility.*

It is settled law that no inference can be drawn from the heading of a section or from the marginal note written opposite a section. (*Smith, S.M. and Oppenheim, J.M.*) BINDESRI *v.* RAM SUKH. **15 R.D. 597 —12 L.R. 343 (Rev.).**

———*Headings—Reference.*

Per *Sulaiman, A.C.J.*—Although the headings in the body of an Act are of some help in clearing up obscurities, when there is an ambiguity they cannot control the provisions of sections when they are unequivocal and clear. The headings are like preambles which supply a key to the mind of the legislature but do not control the substantive sections of the enactment. (*Sulaiman, A. C.J., Mukerji and Boys, JJ.*) DURGA THATHERA *v.* NARAIN THATHERA. **54 All. 220=136 I C. 274= I.R 1932 All. 162=1931 A.L.J. 875=A.I.R. 1931 All. 597 (F.B.).**

———*Headings—Reference.*

Per *Beaumont, C.J.*—The headings of a statute can be referred to for the purpose of finding out the meaning of a doubtful expression in the section. (*Beaumont, C.J., Murphy and Rangnekar, JJ.*) EMPEROR *v.* ISMAIL SAYAD SAHEB. **57 Bom 537=6 I.R. (Bom.) 139=146 I C 248=34 Cr.L J. 1239=35 Bom L R. 886=1933 Cr.C. 1289 (2)=A.I.R. 1933 Bom. 417 (F. B.).**

History of legislation.

———*History of legislation—Reference when there is ambiguity.*

INTERPRETATION OF STATUTES—Income-tax Act.

In order to interpret the provisions of an Act, when the sections themselves are clear, the Court cannot allow its mind to be influenced by the previous history of the law and draw any inferences as regards the supposed policy of the legislature. It is only in cases of ambiguity, that previous legislation may be referred to in order to throw light upon the interpretation of a particular section But where the Act itself is clear, the presumption is that the legislature deliberately intended to alter the law and the Court must interpret the sections as they stand. (*Sulaiman and Young, JJ.*) OFFICIAL RECEIVER OF MORADABAD *v.* MURTAZA ALI. **54 All 616=I.R. 1932 All. 373=1932 A.L J. 402=138 I.C. 112=16 R D. 466=13 L.R. 332 (Rev.)=A.I.R. 1932 All. 434.**

———*History of legislation—Relevancy of.*

The proper method is to take the language of the section as it now stands without reference to or comparison with the corresponding sections in previous statute and then to see what the application of it would be in the case at hand, taking the language in its ordinary and natural meaning. 33 C.W N. 1058, Ref. (*Kisch, J.*) BAJRANG BAHADUR SINGH *v.* EMPEROR. **7 Luck. 716=9 O.W.N. 875=1932 Cr.C. 848=A.I.R. 1932 Oudh 308.**

Illustrations.

———*Illustrations—If control section.*

The illustration does not limit the genarality of the section to which it is appended. It is what it purports to be an illustration; a simple statement of facts to which the section itself has got to be applied. (*Baguley and Mackney, JJ.*) V. E. A. CHETTYAR FIRM *v.* SEIN HTAUNG. **159 I.C. 1038=A.I.R. 1935 Rang. 420.**

———*Illustrations—Value of.*

Although a Court should not lightly disregard the illustration, it does not mean that under every circumstance an illustration should be taken as part of the statute. If it is repugnant to the provisions of the main enactment, it may be rejected. 51 M.L.J. 765, Ref. (*Beasley, C.J. and Bardswell, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SAMPATH NAIDU. **6 I.R. (Mad.) 170=145 I C. 965=1933 M.W.N. 1377=38 L.W. 610=A.I.R. 1933 Mad. 795=65 M.L.J. 588.**

———*Illustrations—Value.*

Illustrations are no part of the section but they are helpful in the working and application of the statute. (*Mukerji and S. K. Ghose, JJ.*) HEM CHANDRA NASKER *v.* NARENDRA NATH BOSE. **61 Cal. 148= 151 I C. 723=7 R.C. 165=38 C.W.N 101=A.I.R. 1934 Cal. 402.**

———*Illustrations—Whether controls section.*

An illustration cannot be used to defeat the plain words of the section. Rule applied in construing S. 5 (2), Bombay Mamlatdar's Courts Act. (*Beaumont, C.J.*) MARUTI *v.* BANKATLAL. **6 I R. (Bom.) 79=145 I.C. 405=35 Bom.L R. 576=A.I.R. 1933 Bom. 313.**

Implied powers.

———*Implied powers.*

If the legislature enables something to be done, it gives power at the same time, by necessary implication, to do everything which is indispensable for carrying out the purpose in view. (*Curgenven and Sundaram Chetty, JJ.*) GOPALASWAMI CHETTIAR *v.* SECRETARY OF STATE. **57 Mad 237=6 I.R. (Mad.) 151= 145 I.C. 917=38 L.W. 455=1933 M.W.N. 989= A.I.R. 1933 Mad. 748=65 M.L.J. 518.**

Income tax Act.

See also ENGLISH LAW, *supra.*

———*Income-tax Act—Ambiguity — Construction in favour of subject.*

INTERPRETATION OF STATUTES—Income-tax Act.

The Income-tax Act is a fiscal enactment and in the case of an ambiguity it is to be construed by the well-known principle in favour of the subject and not against him. S 28 of the Act construed. (*Mukerji and Bennet, JJ.*) HAR KRISHNA DAS, *In the matter of.* **53 All. 679=I.R. 1931 All. 525=132 I C. 429=1931 A.L.J. 414=A.I.R. 1931 All. 401.**

———*Income-tax Act—Ambiguity — Construction in favour of the subject.*

The Income tax Act is a fiscal enactment and in the case of an ambiguity it is to be construed by the well-known principle in favour of the subject and not against him. S. 28 of the Act construed. (*Mukerji and Bennet, JJ.*) HAR KRISHNA DAS, *In the matter of* **53 All. 679=I.R. 1931 All. 525=132 I.C. 429=1931 A.L.J. 414=A.I.R. 1931 All. 401.**

———*Income-tax Act—Construction of Act of one country—Relevancy in construing Act of another country—Precedents.*

Little can be gained by trying to construe an Income-tax Act of one country in the light of a decision upon the meaning of the Income-tax legislation of another country. (*Lord Russell of Killowen.*) GOPAL SARAN NARAIN SINGH *v.* COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA. **62 I.A. 207=14 Pat. 552=1935 A.L.J. 925=39 C.W.N. 1093=1935 A.W.R. 1030=37 Bom.L.R. 817=1935 M.W.N. 806=156 I C. 856=1935 O.W.N. 810=16 Pat.L.T. 531=8 R. P.C. 1=42 L W. 243=A.I.R. 1935 P.C. 143=69 M. L.J. 190 (P.C.).**

———*Income tax Act—Expression "Religious or charitable purposes" in—Construction with reference to personal law of assessee.*

For the purposes of construing the words "religious or charitable purposes" in the Income tax Act, it is quite unnecessary to investigate the meanings of the words in the particular system of jurisprudence that may be followed by the assessee. It is proper to construe the term with reference to the English law on the point, especially as the draft was made in the English language and by persons presumably acquainted with the English law on the point. In interpreting a statute which, like a taxing statute, is meant to apply to all persons irrespective of their personal law, the canon of construction must be either to take the plain grammatical meaning of the words used or to take the legal construction from the jurisprudence of the country in which the statute was drafted and apply it as far as possible to make the effect of the statute equal whether in a sister country or to sister communities following a different system of jurisprudence. 1891 A.C. 531, Rel. on. (*Broadway, Dalip Singh and Tapp, JJ.*) UMAR BAKSH *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **12 Lah. 725=33 P.L.R. 349=I R. 1931 Lah. 657=132 I.C. 689=A..I.R. 1931 Lah. 578 (F B.).**

———*Income-tax Act—Fiscal Act—Strict construction.*

It is a well-recognized rule that in a statute imposing pecuniary burdens, if there is a reasonable doubt with regard to the construction of any burdensome provision, the construction most beneficial to the subject is to be adopted. (*Rupchand and Mehta, A.J.Cs.*) COMMISSIONER OF INCOME-TAX *v.* SIND LIGHT RY. CO., LTD. **27 S.L.R. 47=I.R. 1932 Sind 90=138 I.C. 673=A.I.R. 1932 Sind 189.**

———Income-tax Act—Language not to be strained to hold a subject liable to tax. *See* INCOME-TAX ACT, S. 22 (2). **55 Bom. 312=A.I.R. 1931 Bom. 333.**

———Income tax Act, S. 28—Penal provision—Strict construction. *See* PENAL PROVISION, *infra.* **53 All. 445=A.I.R. 1931 All. 421.**

INTERPRETATION OF STATUTES—Intention of legislature.

Intention of legislature.

———*Intention of legislature—Alteration of law.*

It must always be presumed that the legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by necessary implication or in other words beyond the immediate scope and object of the statute. In all general matters beyond the law remains undisturbed. (*Rupchand, A.J.C.*) HAYATUDDIN *v.* MT. RAHIMAN. **159 I.C. 427=A.I.R. 1935 Sind 73.**

———*Intention of legislature—Convenience, reason, justice and legal principles.*

Per *Bench.*—The Courts are no doubt bound to give effect to the plain language of a statute, but in determining the meaning of the language used by the legislature in any particular passage, that intention must be presumed to be the true one which appears to be most in accord with the convenience, reason, justice and legal principles. (*Niyogi and Staples, A.J.Cs.*) GOPINATH MAHARAJ *v.* MOTI CHIWA. **30 N.L R. 155=6 R.N. 188=148 I.C. 561=A.I.R. 1934 Nag. 67.**

———*Intention of legislature—Enquiry into—Duty of Court.*

Per *Bhide, J.*, in the order of reference: "When the words of a statute admit of but one meaning, the Court is not at liberty to speculate on the intention of the legislature, and to construe them according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations, the ground for construing an enactment that is unambiguous in itself. To depart from the meaning on account of such views is, in truth, not to construe the Act, but to alter it. But the business of the interpreter is not to improve the statute, it is to expound it. The question for him is not, what the legislature meant, but what its language means, *i.e.*, what the Act has said that it meant. (Maxwell, 6th Ed., p. 10)." (*Tek Chand and Monroe, JJ.*) MT. SURJI *v.* SHEO RAM. **14 Lah. 389=6 I.R. (Lah.) 34=144 I.C. 965=34 P.L.R. 277=A.I.R. 1933 Lah. 492.**

———*Intention of legislatare—Enquiry into—Duty of Court.*

It is one of the elementary rules of construction that the intention of the legislature is to be gathered from the words used by it, and where the wording is plain and unambiguous and admits of but one meaning only, the Courts must give effect to it. In such cases, it is beyond the province of the Judge to speculate as to what the "real intention" of the framers of the statute was. The "question for the interpreter is not what the legislature meant but what its language means, *i.e.*, what the Act has said that it meant". (*Tek Chand and Monroe, JJ.*) BHAGTA NAND *v.* SARDAR MOHAMMAD NAWAZ KHAN. **16 Lah. 204=156 I.C. 450=7 R.L. 905=37 P.L.R. 441=A.I.R. 1935 Lah. 150.**

———*Intention of legislature—Guide to.*

The language used is the best declaration of the intention of the legislature and is conclusive of it. When once the meaning is plain, it is not within the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands according to the real sense of the words. (*Saadud-din, A.J.C.*) PUBLIC PROSECUTOR *v.* MUQARRAB. **I.R. 1933 Pesh. 1=141 I.C. 881=34 Cr.L.J. 232=1933 Cr.C 145=A.I.R. 1933 Pesh. 3.**

———*Intention of legislature—History of law—Relevancy.*

It is a cardinal principle of the interpretation of statutes that the Court should look first to the words of the statute itself and if these words are plain it is not

INTERPRETATION OF STATUTES—Intention of legislature.

permissible to consider what was the intention of the statute or the previous history of the law. (*Walsh, J.*) SUBRAMANYA SASTRY *v.* SHEIKH GHANNU. **A.I.R. 1935 Mad. 628.**

———*Intention of legislature—Reference to other parts of statute—Permissibility.*

The true meaning, the exact scope and significance of any passage occurring in a statute may be found not merely in the words of that passage, but on a comparison of the same with other parts of the statute. and the intention of the legislature ascertained in that way. (1877) 2 A.C. 743 and (1898) A.C. 571, Rel. on. (*Guha and M. C. Ghose, JJ.*) AGHORE CHANDRA JALUI *v.* RAJNANDINEE DEBEE. **60 Cal. 289=58 C.L.J. 484=36 C.W.N. 924=141 I.C. 842=I.R. 1933 Cal. 185=A.I.R. 1933 Cal. 283.**

———*Intention of legislature—Relevancy of—Language giving rise to different construction.*

Whatever the avowed intention of the legislature may be, the statute should be construed according as it is expressed; the intention has to be gathered from what is contained in the clear words of the statute and it is not permissible to construe the statute with reference to the underlying intention while the language of the statute gives rise to a different construction. (*Mitter and Mc Nair, JJ.*) BARISAL CO OPERATIVE CENTRAL BANK, LTD. *v.* BENOYBHUSAN GUPTA. **151 I.C. 165=7 R.C. 79=38 C.W.N. 459=A.I.R. 1934 Cal. 537.**

———*Intention of legislature—Two possible constructions—Intention, the guide.*

In construing an Act of the legislature, the Court must look at what appears to have been the real object of the Act in order to determine which of the two rival constructions should be adopted. (*Beaumont, C J. and Barlee, J.*) EMPEROR *v.* BASTIAO. **149 I.C. 1129=6 R.B. 415=35 Cr.L.J. 1036 (2)=36 Bom.L.R. 430=1934 Cr.C. 760=A.I.R. 1934 Bom. 213.**

Interpretation by the executive.

———Interpretation by the executive—Value of—Ordinances. *See* ORDINANCES, *infra*. **A.I.R. 1932 Sind 107.**

Interpretation clause.

———*Interpretation clause—Construction.*

Interpretation clauses of a comprehensive nature are not to be taken as strictly defining what the meaning of a word must be under all circumstances, but merely as declaring what things may be comprehended within the term where the circumstances require that they should. 35 Bom. 412, Foll. (*Aston, A.J.C.*) NARAINDAS TULSIDAS *v.* KARACHI MUNICIPALITY. **27 S.L.R. 371=147 I.C. 345=6 R.S. 142=A.I.R. 1933 Sind 258.**

Jurisdiction.

See also RETROSPECTIVE EFFECT, RIGHT AND REMEDY AND SPECIAL TRIBUNAL *infra*.

———*Jurisdiction—Civil Court—Exclusion.*

It is a fundamental rule of construction that any statute, which establishes a special jurisdiction and excludes the jurisdiction of the ordinary Civil Courts, must be construed strictly. (*Findlay, J.C.*) M. A. KOYAL *v.* BHONDLAL. **I.R. 1931 Nag. 68=130 I.C. 820=A.I.R. 1931 Nag. 48.**

———*Jurisdiction of Civil Courts—Statute affecting—Principles.*

Statutes affecting the jurisdiction of Civil Courts must be construed, as far as possible, in such a way as to avoid the effect of transferring the determination of rights and liabilities from the ordinary Civil Courts to Executive Officers. (*Nanavutty and Zia ul-Hassan, JJ.*) GIR HAR SAROOP *v.* BHAGWAN DIN. **152 I.C. 861=7 R.O. 250=11 O.W.N. 1435=A.I.R. 1935 Oudh 96.**

INTERPRETATION OF STATUTES—Language.

———*Jurisdiction — Enactment ousting jurisdiction of Civil Court—Strict construction—Madras Hindu Religious Endowments Act (II of 1927), S. 73.*

A provision of law should receive a strict interpretation when it is sought by it to oust the ordinary jurisdiction of the Civil Court. So if the language of the enactment is open to two alternative constructions, the one ousting, and the other retaining the jurisdiction of the Civil Courts, it is permissible to select the latter. 9 Lah. 504 and *Leach* v. *Rex*, (1912) A.C. 305, Rel. (*Curgenven and Cornish, JJ.*) VYTHILINGA PANDARA SANNADHI *v.* TEMPLE COMMITTEE TINNEVELLY CIRCLE. **54 Mad. 1011=I.R. 1931 Mad. 702=133 I.C. 14=34 L.W. 254=A.I.R. 1931 Mad. 801=61 M.L.J. 815.**

———*Jurisdiction—Provision ousting jurisdiction of Civil Courts—Chota Nagpur Tenancy Act (VI of 1908), S. 64 (3).*

Statutes and provisions which take away the jurisdiction of the ordinary Courts must be construed strictly. As S. 64 (3) of the Chota Nagpur Tenancy Act stands, the bar comes into play in those cases only in which the landlord's consent is required but is not obtained and civil suits for ejectment are not barred in those cases in which a cultivator is not required by sub S. (1) to take the landlord's consent. (*Dhavle, J.*) DIGAMBAR SINGH *v* LENGRA MAJHI. **13 Pat.L.T. 781=142 I.C. 673 (2)=I.R. 1933 Pat. 171=A.I.R. 1933 Pat. 52.**

———*Jurisdiction of Supreme Court—Abrogation—Need for clear language.*

There was at the time Act V of 1898 was passed an existing jurisdiction in the High Court to order prosecution for the offence of perjury committed in relation to the appeal. In construing S. 195 (*b*), the Court should bear in mind the rule that no existing jurisdiction of a Supreme Court can be taken away unless the language used in the enactment which purports to take that jurisdiction away is in the clearest possible terms. (*Young and Sen, JJ.*) KETAKI KUNWAR *v.* SHEO NARAIN JAFA. **53 All. 799=136 I.C. 378=I.R. 1932 All. 202=33 Cr.L.J. 285=1931 A.L.J. 829=1931 Cr.C. 1042=A.I.R. 1931 All. 706.**

King's prerogative.

———*King's prerogative—Restriction of, by Colonial Act.*

The King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or Colonial matters, that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms, or by necessary intendment, but it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite power by an Imperial Act likewise giving the power either by express terms or by neceessary intendment. (*Lord Chancellor.*) BRITISH COAL CORPORATION *v.* KING. **157 I.C. 571=8 R.P.C. 38=A.I.R. 1935 P.C. 158 (P.C.).**

Language.

———*Language—Effect to.*

Indian statutes like the Madras Local Boards Act which are from time to time wholly repealed or re-enacted or extensively amended should not be construed by the language of those which they replaced or of similar legislation elsewhere in India or England, on an assumption, that no change in the law was intended and thereby declining to give effect to the words. 58 M.L.J. 300 (P.C.); 23 C. 563 and 7 Pat. 221 (P.C.), Ref.

INTERPRETATION OF STATUTES—Language.

(*Pandalai, J.*) SWAMY BABU *v.* UNION BOARD, NARASANNAPET. **6 I.R. (Mad.) 280=146 I.C. 499 =38 L.W. 660=A.I.R. 1933 Mad. 791=65 M.L.J. 725.**

———*Language—Examination of.*

In arriving at a conclusion as to the meaning of an enactment, the proper course is in the first place to examine the language of the statute and ask what is its plain meaning and not to start arguing how the law previously stood. (*Ferrers, J.C. and O'Sullivan, A.J. C.*) MURLIMAL SANTRAM *v.* MANARSIDAS & SONS. **28 S.L.R. 366=155 I.C. 895=7 R.S. 212=A.I.R. 1935 Sind 62.**

———*Language—"Golden Rule"—Grammatical sense.*

In construing statutes, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity or some inconsistency with the rest of the statute. (*Beasley, C.J. and Stone, J.*) MERCANTILE BANK OF INDIA *v.* OFFICIAL ASSIGNEE OF MADRAS **56 Mad. 177=37 L.W. 32=I.R. 1933 Mad. 316=143 I.C. 641=A.I.R. 1933 Mad. 207=64 M.L.J. 320.**

———*Language—Meaning to be given—Intention of legislature.*

In construing a statute, due meaning should be given to every part of the language which it employs, and a construction which fails to do this *prima facie* fails to give effect to the intention with which it has been drafted. (*Curgenven and King, JJ.*) PICHAI PILLAI *v.* BALASUNDARA MUDALY. **58 Mad. 787=157 I.C. 24=8 R.M. 103=36 Cr.L.J. 1241=41 L.W. 558= 1935 M.W.N. 457=1935 Cr.C. 619 (2)=A.I.R. 1935 Mad. 442=68 M.L.J. 608.**

Limitation Act.

———*Limitation Act.*

In giving effect to a statute of limitation, if two articles limiting the period for bringing a suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should, generally, and apart from other equitable considerations, be preferred. (*Wadia, J.*) KASTURCHAND *v.* HARI GOVIND. **154 I.C. 680 =7 R.B. 365=36 Bom.L.R. 1068=A.I.R. 1934 Bom. 491.**

———*Limitation Act—Amendment of—Barred remedy —Effect on.*

The law of limitation affects only the form of remedy and belongs to the domain of adjective law. As a consequence, the limitation enactment applicable to a case is the one actually in operation on the date of its institution, even though the enactment may have to be enforced retrospectively. The provisions of limitation as such do not create or take away any rights ; they are negative in character, they only interpose a bar of time for enforcing existing rights. Unless the new statute expressly says so, if a remedy is already barred under the existing law, it will not be revived by the amending or repealing Act. (Case-law referred to.) (*Doraiswami Iyer, C.J. and Rama Rao, J.*) KADUR KALAPPA *v.* KARE GOWDA. **9 Mys L J. 328.**

———*Limitation Act—Construction.*

Statutes of limitation are to be construed strictly and the defence of lapse of time against a just demand is not to be extended to cases which are not clearly within the enactment, while provisions which give exceptions to the operation of such enactments are to be construed liberally. In cases of doubt, such provisions are to be construed in the manner most favourable to the person whose right is the subject of limitation. (*Wild, J.C.*

INTERPRETATION OF STATUTES—Literal meaning.

and Rupchand, A.J.C.) MUNICIPALITY OF HYDERABAD *v.* ALLAHDINO. **25 S.L.R 230=I.R. 1931 Sind 113=134 I.C. 369=A I.R. 1931 Sind 146.**

———Limitation Act—Relief on ground of hardship or mistake—Discretion of Court. *See* LIMITATION ACT —CONSTRUCTION. **68 M.L.J. 665 (P.C.).**

———*Limitation Act—Retrospective effect.*

Bajpai, J.—The law of limitation is a law of procedure and the general rule is that a statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might accrue before the Act come into force. 35 All. 227, Ref. The law of limitation is not always a purely adjective law, inasmuch as in certain cases it provides for the creation of rights by prescription, and the corresponding extinction of rights (S.28, Lim. Act of 1908) and if those rights have vested in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation or by an amendment in the law. It is only when the retrospective application of a statute of limitation would destroy vested rights, that it is not to be construed retrospectively otherwise the ordinary rule is that rules of limitation are rules of procedure and no one has a vested right in any period of limitation. (*Sulaiman, A. C.J., Mukerji, Boys, King and Bajpai, JJ.*) RAM KARAN SINGH *v.* RAM DAS SINGH. **54 All. 299= 136 I.C. 145=I R. 1932 All. 145=1931 A L.J. 1018=15 R.D. 815=A.I.R. 1931 All. 635 (F.B.).**

———*Limitation Act—Rules of construction.*

In construing the Limitation Act, the Court must always remember that the object of the legislature is to induce people to be active in the assertion of their rights and to penalise those who sleep upon their rights; and if it is possible to avoid giving a statute of limitation a meaning which has the effect of destroying a right to sue before that right has effectively arisen, the Court should do so. (*Beaumont, C.J. and Rangnekar, J.*) GANPAT BHUJANG *v.* HANAMGOUDA. **57 Bom. 593=147 I.C 919=6 R.B. 225=35 Bom.L.R. 956= A.I R. 1933 Bom. 439.**

———*Limitation Act—Two possible views—Preference to the one that entails no hardship.*

The Courts should have no hesitation in applying the statute of limitation where it clearly applies, but where there are two possible views under this statute. one tending to deprive a person of his just dues and the other entitling him to recover them, there is no reason why one should not lean in favour of the view which does not entail any hardships or lead to any unjust consequences. (*Macpherson and Fazl Ali, JJ.*) MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH. **11 Pat. 112=I.R. 1931 Pat. 465=134 I.C. 609=12 Pat.L.T. 755=A.I.R. 1931 Pat. 285.**

Literal meaning.

———*Literal meaning—Departure—Permissibility.*

It is the rule that words are used in an Act or Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily, and they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred. (*Lord Macmillan.*) MAYOR, COUNCILLORS AND BURGESSES OF THE BOROUGH *v.* TARANAKI ELECTRIC POWER BOARD. **6 I.R. (P.C) 20=146 I.C. 179= 38 L.W. 626=1933 A L.J. 1478=A.I.R. 1933 P.C. 216=66 M.L.J. 67.**

———*Literal meaning—Intention of legislature, if relevant.*

INTERPRETATION OF STATUTES — Mandatory or directory.

It is an elementary principle of the construction of statutes that the words have to be read in their literal sense. The Courts cannot put upon them a construction which they believe to represent the intention of the legislature at the time of the passing of the statute. Rule applied in construing S. 29 of the Arms Act. (*Fraser, J.C. and Saaduddin, A.J.C.*) GOVERNMENT ADVOCATE, N.-W.F. PROVINCE *v.* FAZAL RAHIM. **I.R. 1933 Pesh. 29 = 143 I C. 508 = 34 Cr.L.J. 670 = 1933 Cr.C. 1309 = A.I.R. 1933 Pesh. 69.**

Mandatory or directory.

———*Mandatory or directory—Act of public utility—Words "it shall be lawful".*

In construing Acts of public utility where the framing of the rules and the making of the appointment is necessary in order that the objects of the Act may be attained, such words which might otherwise be considered permissive are really mandatory. The permissive form is a mere courteous convention. The Act really imposes a duty on the executive, and it is implied that a public body will carry out the duties indicated by the legislature, in order that the purpose of the legislature may not be frustrated. But the case is otherwise when a public body or officer is invested with authority to exercise a judicial discretion. The words "it shall be lawful" in such a case are not equivocal, but are plain and unambiguous. They merely make that legal and possible which there would otherwise be no right or authority to do ; and according to their natural meaning they are permissive or enabling words only. S. 138 of the Bihar and Orissa Local Self-Government Act as amended by Bengal Self-Government Amendment Act, 1908, interpreted. (*Courtney-Terrell, C.J., Wort, Fazl Ali, Agarwala and Luby, JJ.*) LACHMI CHAND SUCHANTI *v.* RAM PRATAP CHOUDHURY. **14 Pat. 24 = 152 I.C. 805 = 7 R.P. 247 = 15 Pat.L.T 623 = A.I.R. 1934 Pat. 670 (2) (F.B).**

Marginal notes.

———*Marginal notes.*

Obiter.—Though the marginal notes of a statute cannot be held to govern the clear text of a section, yet they can be taken as an indication of what the legislature meant. (*Lort Williams and Khundkar, JJ.*) ABDUL HAKIM *v.* FOUZIA MIA. **62 Cal. 266 = 155 I.C. 1003 = 7 R.C 655 = 36 Cr.L.J. 857 = 39 C.W.N. 57 = 1935 Cr.C. 392 = A.I.R. 1935 Cal. 287.**

———*Marginal notes.*

No reliance can be placed on the marginal note for the purpose of interpreting the section. (*McNair, J.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUN CHANDRA SINGHA. **60 Cal. 1470 = 149 I.C. 24 (2) = 6 R.C. 547 = 38 C W.N. 153 = A.I.R. 1934 Cal. 325.**

———*Marginal notes—Reference to.*

Per *Beaumont, C. J.*—A marginal note can be looked at for the purpose of construing a statute. (*Beaumont, C. J., Murphy and Rangnekar, JJ.*) EMPEROR *v.* ISMAIL SAYAD SAHEB. **57 Bom 537 = 6 I.R. (Bom) 139 = 146 I.C. 248 = 34 Cr.L.J. 1239 = 1933 Cr.C. 1289 (2) = 35 Bom.L.R. 886 = A.I.R. 1933 Bom. 417 (F.B.).**

———*Marginal notes—Reference to.*

Marginal notes can be looked at in order to see the general trend of the sections of the Act. (*Beaumont, C. J. and Rangnekar, J.*) SECRETARY OF STATE *v.* MUNICIPAL CORPORATION OF BOMBAY (NO. 1). **59 Bom. 681 = 158 I.C. 151 = 8 R.B. 113 = 37 Bom.L.R. 499 = A.I.R. 1935 Bom. 347.**

———*Marginal notes—Reference to—Permissibility.*

A marginal note cannot be referred to in construing the provisions of a section. Rule applied in construing S. 12 (2) of the Workmen's Compensation Act. (*Wadia, J.*) DHUNJIBHOY BOMANJI *v.* GUNPA KHANDU KOLI. **57 Bom. 699 = 6 I.R. (Bom) 166 = 146 I.C. 616 = 35 Bom.L R. 694 = 1933 Cr.C. 915 = A.I.R 1933 Bom. 338.**

———*Marginal notes—Reference to—Permissibility.*

Per *King, C.J.*—Marginal notes can be referred to in case of the obscurity of any expression in the text of the statute, if they can be regarded as inserted by, or under the authority of, or assented to, by the legislature. (*King, C. J., Srivastava and Zia-ul-Hasan, JJ.*) EMPEROR *v.* MUMTAZ HUSAIN. **11 Luck. 123 = 155 I.C. 344 = 7 R.O. 583 = 36 Cr.L.J. 720 = 1935 O. W.N. 509 = 1935 Cr. C. 670 = A.I R. 1935 Oudh 337.**

Meaning of words.

———*Meaning of words.*

Words used in an Act should be interpreted in their ordinary sense except when it is shown that they have been used in a special or technical sense. (*Niamatullah and Bennet, JJ.*) JAGMANDAR DAS VAISH, *In re.* **57 All. 737 = 156 I.C. 939 = 8 R.A. 62 = 1935 A.L.J. 374 = 1935 A W.R. 520 = A.I.R. 1935 All. 378.**

———*Meaning of words.*

Per *Din Mohammad, J.*—If a plain word carries a plain sense in the English language, however strict the law may interpret it, it will not ignore the ordinary meaning which it carries. (*Addison, Ag. C. J., Dalip Singh and Din Mohammad, JJ.*) MADAN MOHAN LAL *v* COMMISSIONER OF INCOME TAX, PUNJAB. **16 Lah. 937 = 8 R.L. 286 = 158 I.C. 718 = 38 P.L.R. 52 = A.I.R 1935 Lah. 742 (F.B.).**

———*Meaning of words—Continuous practice followed by legislation—Reference to—Permissibility "profits."*

In interpreting the meaning of the word "profits" occurring in a Notification issued by the Government of India and dated 25th August, 1925, the continuous practice that had previously obtained (in the Income-Tax Department and in decided cases) treating the "profits of a business" and "interest on securities" as distinct subjects of taxation, can be referred to, especially when there is nothing in the Notification to indicate that the legislature intended to alter that practice. *Pemsel's case,* (1891) A.C. 531 at 591, Ref. (*Beasley, C. J., Cornish and Bardswell, JJ.*) THE MADRAS PROVINCIAL CO OPERATIVE BANK, LTD. *v.* THE COMMISSIONER OF INCOME-TAX, MADRAS. **56 Mad. 837 = I.R. 1933 Mad. 405 = 144 I.C. 422 = 1933 M. W.N. 617 = 37 L W. 758 = A.I.R. 1933 Mad. 489 = 64 M.L.J. 640 (F.B.).**

———*Meaning of words—Continuous practice followed by legislation—Reference to — Permissibility "profits.*

In interpreting the meaning of the word "profits" occurring in the Notification issued by the Government of India and dated 25th August, 1925, the continuous practice that had previously been recognized in the decided cases treating "interest on securities" as taxable apart from the "profits of a Co-operative Society should be taken as having been accepted by the legislature when there is nothing to indicate a contrary intention. *Pemsel's case,* (1891) A.C 531, at 591, Ref. (*Page, C. J., Das and Mya Bu, JJ.*) COMMISSIONER OF INCOME-TAX BURMA *v.* BENGALEE URBAN CO-OPERATIVE CREDIT SOCIETY, LTD. **11 Rang. 521 = 6 R.R. 237 = 148 I.C. 633 = A.I R. 1934 Rang. 27 (S.B.).**

———*Meaning of words—Definition contained in different enactment — Usefulness of—Definition of 'agriculture' in English Act— Applicability to Madras Estates Land Act.*

INTERPRETATION OF STATUTES—Meaning of words.

Per *Reilly, J*—"To use the definition of a word in one Act and to apply it as the definition of that word in another Act especially when the second Act is in force in another country and under other conditions, appears to be a very dangerous course. That is road which leads to many "pit falls". The definition of the "agriculture" contained in English enactments cannot therefore be called in aid to throw light on the meaning of the term as used in the Madras Estates Land Act. (*Reilly and Anantakrishna Ayyar, JJ.*) CHANDRASEKHARA BARATHI SWAMIGAL *v.* DURAISWAMI NAIDU. **54 Mad. 900=I.R. 1931 Mad. 794=134 I. C. 42=34 L W. 185=A.I.R. 1931 Mad. 659=61 M. L.J. 648.**

———*Meaning of words—Different words in relation to same matter—Presumption.*

It is a rule of construction that where in the same Act and in relation to the same subject matter, different words are used, the Court must see whether the legislature has not made the alteration intentionally, or with some definite purpose; *prima facie* such an alteration would be considered intentional. (*Niyogi, A. J. C.*) SARDARMAL BANI *v.* DAU GHANSHYAM SINGH. **157 I.C. 582=A.I.R. 1935 Nag. 20.**

———*Meaning of words—Earlier statute.*

Where the words or expressions in a statute or plainly taken from earlier statutes *in pari materia* which have received judicial interpretation, it must be assumed that legislature was aware of such interpretation and intended it to be followed in later enactments. The rule is especially applicable in the case of consolidating Codes. (*Mukerji, Sen and Bennet, JJ.*) RADHA MOHAN DATT *v.* ABBAS ALI BISWAS. **53 All. 612=I.R. 1931 All. 577=133 I.C. 129=1931 A.L.J. 377=A.I. R. 1931 All. 294 (F B.).**

———*Meaning of words—"May."*

Per *Das J.—Prima facie* the word "may" is an enabling word; but there is no doubt whatever that under certain circumstances enabling words may have a compulsory force. It is a question in each case whether the power conferred by use of the word "may" is one which is intended by the legislature to be exercised; and there is no doubt on the authorities that, although the statute in terms has only conferred a power, the circumstances may be such as to create a duty. *Julius v. Lord Bishop of Oxford*, (1880) 5 A.C. 214, Ref (*Wort, J.*, on difference between *Das and Fazl Ali, JJ.*) HARNANDAN RAI *v.* BALIRAM PRASAD. **I.R. 1931 Pat. 193=130 I.C. 785=12 Pat. L.T. 127=A.I.R. 1931 Pat 1.**

———*Meaning of words—"May".*

The word "may" in S. 35, Cr. P. Code, not only confers a power but also imposes a duty of putting it in use, The word "may" in that section should be read as meaning "shall". (*Ferrers, J.C. and Aston, A. J. C.*) EMPEROR *v* DHARAMDAS. **26 S L.R. 416=141 I.C. 280=I.R. 1933 Sind 46=34 Cr.L.J. 143=1933 Cr. C. 33=A.I.R. 1933 Sind 9.**

———*Meaning of words—Natural and grammatical meaning.*

The words of a statute should be construed according to their natural and grammatical meaning. Rule applied to construction of the words "orders passed in appeal" in S. 249 of the Agra Tenancy Act, 1926. (*Sulaiman and Sen, JJ.*) RAMESHWAR DAYAL *v.* OM PRAKASH. **53 All. 698=I.R. 1931 All. 621=133 I.C. 301=12 L.R. 277 (Rev.)=1931 A.L.J. 599=15 R.D. 543=A.I.R. 1932 All. 40.**

———*Meaning of words—Ordinary and natural meaning to be given in the absence of ambiguity.*

INTERPRETATION OF STATUTES—Meaning of words.

When there is no ambiguity in the provisions of a section in an enactment, the words must properly be construed in their ordinary and natural meaning. The Court cannot countenance a construction involving the insertion in the section of words which are not found therein and are not in the least necessary for an intelligible construction thereof. (*Sir Lancelot Sanderson.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* BUCKINGHAM AND CARNATIC CO., LTD., MADRAS. **63 I. A. 74=59 Mad. 175=62 C.L.J. 409=40 C.W.N. 232=43 L.W. 1=1936 M.W N. 1=38 Bom.L.R. 133=8 R.P C. 119=1936 A L.J 721=159 I.C. 545=1935 O W.N. 1351=1935 A.W.R. 1480=A.I.R. 1936 P.C. 5=69 M.L.J. 879 (P.C.).**

———*Meaning of words—Ordinary sense of words to be adopted.*

Per *Bhide, J.*—Words in a statute should be construed in their ordinary sense unless there is any clear indication to the contrary. Word 'dependent' in S. 2 (1) (*d*) of the Workmen's Compensation Act explained. (*Addison and Bhide, JJ.*) MUNSHIRAM, *In the matter of*. **12 Lah. 658=I.R 1931 Lah. 394=131 I.C. 234=32 P.L.R. 341=A.I.R. 1931 Lah. 399.**

———*Meaning of words—Plain language—Departure—Permissibility.*

The mere fact that literal meaning of the words used in a statute leads to an injustice is no ground for disregarding the meaning. Interpretation cannot go beyond the possible meaning of the words used. In extreme cases, where the words conflict with the obvious intention of the enactment, they may be disregarded, but it must be an extreme case and the words are then construed as meaning nothing. O. 21, R. 89, C. P. Code, held to apply to Original Side of the Calcutta High Court because it is not expressly saved by O. 49, R. 3 of the Original Side Rules. 1913 A.C. 107, Ref. (*Remfry, J.*) ASHUTOSH BASU *v.* SUDHANGSHUBHUSHAN MUKERJI. **58 Cal. 510=I.R. 1931 Cal. 715=133 I.C. 587=A.I.R. 1931 Cal 688.**

———*Meaning of words—Presumption against loose use of language.*

It is seldom safe to treat language as being loosely used in either statutes or statutory rules; and when the rules speak in one place of dependents and elsewhere of heirs, the better view seems to be that in each instance the appropriate word is used with its proper meaning. (*Fazl Ali and Rowland, JJ.*) NEAZMUL HAQUE *v.* MT. MOULUDUNNISSA. **149 I.C. 1011=6 R.P. 681=15 Pat. L.T. 226=A.I.R 1934 Pat. 304.**

———*Meaning of words—Primary meaning.*

In the construction of statutes, ordinarily speaking, the primary meaning of a word has to be considered as the meaning unless there is something to show that that was not the meaning of the legislature. (*Dalip Singh, J.*) MT. SHAMO BAI *v.* DAYA RAM. **153 I. C. 458 (1)=7 R.L. 442 (2)=1934 Cr.C. 290 (1)=A I.R. 1934 Lah. 115 (1).**

———*Meaning of words—Same word occurring in both section and notification—Construction.*

Where a word in the section is used in the notification under the section, the word must be construed similarly both in the section and the notification. (*Beaumont, C. J. and Barlee, J.*) EMPEROR *v.* BHIMABAI. **154 I. C. 827=7 R B. 373=36 Cr L.J. 592=1934 Cr.C. 664=36 Bom.L.R. 314=A.I.R. 1934 Bom. 176.**

———Meaning of words—'Shall include'—'Includes'—Two senses. *See* GENERAL CLAUSES ACT (1897). S. 3 (21) AND (40). **28 S.L.R. 27=A.I.R. 1934 Sind 96.**

———*Meaning of words—Similar expressions in other enactments.*

INTERPRETATION OF STATUTES—Meaning of words.

The meaning of an expression in a statute need not be restricted because the same expression has been used in a restricted sense in other enactments. (*Sulaiman, C.J. and Mukerji, J.*) COLLECTOR OF MEERUT *v.* CHAUDHARY RISAL SINGH. **151 I.C. 7=7 R.A. 106=3 A. W.R. 816=1934 A.L.J. 835=A.I.R. 1934 All. 681.**

———*Meaning of words 'suit' whether includes 'appeal'.*

In a Code which deals with both 'suits' and 'appeals' it cannot be said that the word suit has been used in the same sense as appeal. Meaning of the word 'suit' in S. 3 (14) of the Agra Tenancy Act considered. (*Mukerji and Bennet, JJ.*) SATYA NIHAN BANERJI *v.* MAHOMED HAZUBBER ALI KHAN. **53 All. 516=17 R.D. 1180=15 L.R. 11 (Rev.)=I R. 1931 All. 439=131 I.C. 871=1931 A.L.J. 964=A.I.R. 1931 All 533.**

———*Meaning of words—Words occurring at several places in the same Act—Press and Registration of Books Act (XXV of 1867), Ss. 3, 4 and 5—"Printing".*

A word which occurs more than once in the same Act must be given the same meaning throughout the Act, unless the context shows that the legislature used the word in different senses. The word "printing" in Act XXV of 1867 does not according to this rule, include lithography. (*Staples, A.J.C.*) RAMESHWAR PRASAD *v.* EMPEROR. **27 Nag.L R. 270=I R.1931 Nag. 182=134 I.C. 854=32 Cr.L J. 1266=1931 Cr.C. 918=A.I.R. 1931 Nag. 177.**

New Act.

See also PENAL ACT AND RETROSPECTIVE EFFECT, *infra.*

———*New Act—Old and new Acts—Interpretation under old Act—Applicability to case under new Act.*

Where the words and expressions in a statute are plainly taken from an earlier statute *in pari materia* and have received judicial interpretation, it must be assumed that the legislature was aware of such interpretation and intended it to be followed in later enactment. Decision under old Succession Act relied on in construing the new Act of 1925. (*Panckridge, J.*) SARAH EZRA, *In the goods of.* **58 Cal. 761=I R. 1931 Cal. 827=134 I C. 443=A.I.R. 1931 Cal. 560.**

———*New Act—Procedure—Choice of forum—Retrospective effect.*

The choice of forum is a matter of procedure and not a substantive right and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned. The analogy of a new Act not affecting a pending action does not apply. (*Sulaiman, A.C.J. and Smith, J.*) HAZARI TEWARI *v.* MAKTALA CHAUBAIN. **I.R. 1931 A L.J. 834=134 I.C. 450=1931 A. L.J. 844=15 R.D. 684=A.I.R. 1932 All. 30.**

———*New Act—Retrospective effect.*

Sulaiman, Ag. C. J.—If a new enactment lays down that a person may under certain conditions sue for certain specified reliefs, and he sues after an Act has come into force, it would not, strictly speaking, be giving to the Act a retrospective effect if he avails himself of its provisions. The Act is in force when he is suing, even though his cause of action might have accrued before the Act was passed. It would be a retrospective effect if the Court applied the Act to a suit previously instituted. (*Sulaiman, A.J.C., Mukerji, Boys, King and Bajpai, JJ.*) RAM KARAN SINGH *v.* RAM DAS SINGH. **54 All. 299=136 I.C. 145=I.R. 1932 All. 145=1931 A.L.J. 1018=15 R.D. 815=A.I.R. 1931 All. 635 (F.B.).**

———*New Act—Retrospective effect—Pending actions—Effect on—Vested rights under decree.*

INTERPRETATION OF STATUTES—Object of legislature.

A new law should be construed so as to interfere as little as possible with vested rights and a statute is therefore not to be construed to have a greater retrospective operation than its language renders necessary, and when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. In the case of suit, which is not merely pending, but has already been decreed before the coming into force of a new Act, the decree so passed by a Court of competent jurisdiction remains good until reversed or set aside in appeal. It cannot automatically become invalid, merely because since the passing of that decree the law has been changed pending appeal therefrom, unless there is some clear provision in the new law to make it applicable to pending suits and appeal. (*Fazl Ali and Luby, JJ.*) SHIVA JANKI THAKURAIN *v.* KIRTYANAND SINGH. **160 I.C. 606 (2)=8 R.P. 371=16 Pat. L.T 782=A.I.R. 1936 Pat. 173.**

———*New Act—Retrospective effect—Pending proceeding.*

When the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun, unless the new Act shows a clear intention to vary such rights. Rule applied regarding S. 20 (1)-A of the Bengal Tenancy Act. (*Mukerji and Mitter, JJ.*) KANAK KANTI ROY *v.* KRIPA NATH GAIN. **58 Cal. 817=131 I.C. 398=52 C.L.J. 597=35 C.W.N. 125=A.I.R. 1931 Cal. 321.**

———*New Act—Retrospective effect—Substantive rights—Choice of forum and limitation.*

Sulaiman. Ag. C. J.—A substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantive right. The selection of forum and the period of limitation are ordinarily matters of procedure only. The selection of a Court in no way affects the right of suit itself. The Limitation Act does not necessarily extinguish the right, though it certainly places a bar against the remedy by suit. When a question of limitation is raised it ought to be decided in accordance with the question of limitation in force at the time of the institution of the suit and not that in force at the time of the cause of action unless there be any express provision to the contrary in the Act itself. (*Sulaiman, A.J.C., Mukerji, Boys, King and Bajpai, JJ.*) RAM KARAN SINGH *v.* RAM DAS SINGH. **54 All. 299=136 I C. 145=I.R 1932 All. 145=1931 A.L J. 1018=15 R.D. 815=A.I.R. 1931 All. 635 (F.B.).**

Notification under Act.

———*Notification under Act*—Ultra vires *character.*

A notification or rule issued under a statutory power must not be in excess of the power authorizing them nor repugnant to the statute or to the general principles of law.

Held, that the notification to the Punjab Local Government directing the detention of approvers in police custody was *ultra vires.* (*Shadi Lal, C. J. and Abdul Qadir, J.*) KHAIRATI RAM, *In the matter of.* **12 Lah. 635=I.R. 1931 Lah. 615=32 Cr.L J. 913=132 I.C. 519=32 P.L.R. 493=1931 Cr.C. 700=A.I.R. 1931 Lah. 476.**

Object of legislature.

———*Object of legislature—Reference.*

In construing a statute, it is permissible to look for the purposes of the enactment the mischief or defect to

INTERPRETATION OF STATUTES—Object of legislature.

be prevented, the remedy and the reason of the remedy which the legislature intended to apply should be looked for. Rule applied in construing Hindu Inheritance Amendment Act, 1929. (*Baker and Rangnekar, JJ.*) SHIDRAMAPPA *v.* NEELAVABAI. **57 Bom. 377=6 I.R. (Bom.) 20=144 I.C. 925=35 Bom.L.R. 397=A.I.R. 1933 Bom. 272.**

———*Object of legislature—Relevancy of.*

Courts of justice are not concerned with the objects with which the legislature enacts any particular law unless in the particular enactment the object is stated as a guiding principle to be followed in interpretation. It may well be that the promoters of any particular bill in the legislature may have particular objects in view but any section as ultimately enacted may well be the result of the compromise and it may be that the words ultimately agreed upon have been passed by the legislature in such a form that one or all the objects of the promoters is defeated. In cases therefore where the legislature has not thought fit to express its intention otherwise than by the use of the words of the section, those words must be followed. (*Courtney-Terrell, C.J. Fazl Ali and Agarwala, JJ.*) RADHA KISHUN MARWARI *v.* EMPEROR. **12 Pat. 46=34 Cr.L.J. 1=I.R. 1932 Pat 299=140 I.C. 283=13 Pat.L.T. 627=1932 Cr.C. 765=A.I.R. 1932 Pat. 293 (S.B.).**

Ordinance.

———*Ordinance—Interpretation by the executive—Value of—Ordinances.*

To interpret the words of an Ordinance is a function reserved for the Courts which are established for that purpose; any exposition which may be proposed by the Executive Government of a province has the weight which must always belong to the considered opinion of enlightened experience, but it cannot be quoted or received as an authority by a Court of Law. (*Ferrers, J.C.*) JETHMAL PARSRAM *v.* EMPEROR. **I.R. 1932 Sind 146—139 I.C. 777—33 Cr.L.J. 902=1932 Cr.C. 554=A.I.R. 1932 Sind 107.**

———*Ordinance — Plain language—Prevention of Intimidation Ordinance*, 1930.

The rules of interpretation applicable in the case of an Act of the legislature are equally applicable to the case of an Ordinance. The plain language of the Ordinance should be given effect to. (*Cuming, J.*) BROJENDRA NATH GUPTA *v.* EMPEROR. **35 C.W.N. 436=33 Cr.L.J. 28=134 I.C. 1129=1931 Cr.C. 833=A.I.R. 1931 Cal 633.**

———*Ordinance—Rules of interpretation.*

The principles of interpretation of Ordinance are the same as those applicable to interpreting of statutes. The only safe and certain guide in interpreting an Act or Ordinance is the Act or the Ordinance itself, and when the words are perfectly plain the Court need not look any further or speculate as to intention by reference to objects and reasons (*Cuming, J.*) JUGAL KISHORE DHAR *v.* EMPEROR. **134 I C. 1129=33 Cr.L.J. 28=I R. 1932 Cal. 41=1931 Cr C. 833=A.I.R. 1931 Cal. 633.**

Penal Act.

———*Penal Act—Benefit of doubt—Child Marriage Restraint Act*, 1929.

Where, in a penal statute, such as the Child Marriage Restraint Act, there is a reasonable doubt as to the expressions occurring in the section, the benefit of doubt must be given to the accused. (*Niyogi, A. J. C.*) GANPAT RAO *v.* EMPEROR. **28 N L R. 302=142 I. C. 277=I.R 1933 Nag. 104=34 Cr.L J. 311=1932 Cr.C. 909=A.I.R. 1932 Nag. 174.**

INTERPRETATION OF STATUTES—Penal Act.

———*Penal Act—Conditions prescribed for conduct of business or trade—Non-compliance—Effect of.*

When conditions are prescribed by a statute for the conduct of a particular business and such conditions are not observed, agreements made in the course of such business are void if the object in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the conditions are imposed; the agreements are valid if no specific penalty is attached to the specific transaction and if it appears that the condition was imposed for merely administrative purposes. The excise Law is a law passed not merely for the benefit of the revenue but for the protection of public morals and consequently a breach of the conditions prescribed under the provisions of that law for the regulation of liquor traffic is opposed to public policy and void. (*Doraswami Iyer, C.J. and Srinivasa Iyer, J.*) GANTE GOWDA *v.* ANKAM THIMMAPPA SETTY. **10 Mys.L.J. 1.**

———*Penal Act—Construction—Press and Registration of Books Act (XXV of 1867), Ss. 3, 4 and 5.*

Penal Statutes should be construed in the strict and the narrow sense. (*Staples, A.J.C.*) RAMESHWAR PRASAD *v.* EMPEROR. **27 Nag.L.R. 270=I.R. 1931 Nag. 182=134 I.C. 854=32 Cr L.J. 1266=1931 Cr. C. 918=A.I R. 1931 Nag. 177.**

———*Penal Act—Legislature is presumed to enact prospectively and not retrospectively and specially so in cases of penal statutes.*

The legislature is presumed to enact prospectively and not retrospectively. Every new enactment should affect future and not past times. These principles should be followed with particular strictness in reference to penal statutes. *Reg* v. *Inswich Union*, 2 Q.B.D 269, Rel. on *Midland Ry.* v. *Pye*, 10 C.B.M.S. 179 and *Att. General* v. *Sillem*, (1884) 2 H. and C. 431, Ref. (*Tek Chand. J.*) PARS RAM *v.* EMPEROR. **I.R. 1931 Lah. 449=32 Cr.L.J. 700=131 I.C. 353=32 P.L.R. 71=1931 Cr.C. 257=A.I.R. 1931 Lah. 145.**

———*Penal Act—Principles—Duty of Court—Successive trials for same offence.*

Courts must lean generally, in cases of doubt, against any construction of a penal law which is patently oppressive to the subject, and in favour of a construction which is in accord with the general policy of the criminal law, which is to protect the subject from a fresh prosecution after he has been convicted or acquitted in respect of what is in substance the same matter. (*Pandrang Row, J.*) RANGACHARIAR *v* VENKATASAMI CHETTI. **58 Mad 513=1934 M.W.N. 1088=153 I.C. 322=7 R.M. 343=36 Cr L J. 311=40 L.W. 834=1935 Cr.C. 55=A.I.R. 1935 Mad. 56 (2)=67 M.L J. 873.**

———*Penal Act—Repeal by express enactment.*

Penalties that have been incurred while a statute is in force are not (in the absence of an express provision to the contrary) affected by the mere fact of the statute having ceased to be in force by express repeal or by expiration by effluxion of time. (*Panckridge and Patterson, JJ.*) JOGENDRA CHANDRA ROY *v.* SUPERINTENDENT OF THE DUM DUM SPECIAL JAIL. **60 Cal. 742=I.R. 1933 Cal. 241 (2)=142 I.C. 204=34 Cr.L.J. 291 (2)=37 C.W N. 363=1933 Cr.C. 361=A.I.R. 1933 Cal. 280.**

———*Penal Act—Rules of construction.*

No doubt a penal statute should be strictly construed but it is none the less true that every such statute whether penal or not should be construed in a manner consistent with common sense and that if the intention of the legislature is not apparent from the words of the statute itself, it ought to be presumed to have been

INTERPRETATION OF STATUTES—Penal Act.

such as is consistent with reason and justice. (*Panckridge and Patterson, JJ.*) JOGENDRA CHANDRA ROY *v.* SUPERINTENDENT OF THE DUM DUM SPECIAL JAIL. **60 Cal. 742=I R.1933 Cal. 241 (2)= 142 I.C. 204=34 Cr.L.J. 291 (2)=37 C.W.N. 363= 1933 Cr.C. 361=A.I.R. 1933 Cal. 280.**

———*Penal Act—Strict construction—Ambiguity—Liberty of subject to be protected.*

The principle that a penal law ought to be construed strictly is not only a sound one but the only one consistent with free institutions. In a case of doubt or ambiguity the construction must be in favour of the personal liberty of the subject. 2 M. and W. 239, Rel. on. (*Shadi Lal, C. J. and Abdul Qadir, J.*) KHAIRATI RAM, *In the matter of.* **12 Lah. 635 - I.R. 1931 Lah. 615=32 Cr.L.J. 913=132 I.C. 519=32 P.L.R. 493=1931 Cr.C. 700=A.I.R. 1931 Lah. 476.** [R. 15 L. 663 (666).]

———*Penal Act—Strict construction—Press (Emergency Powers) Act*, 1931.

The provisions of the Press (Emergency Powers) Act are of a penal character and, according to the ordinary rules of interpretation they should be construed strictly and in such a manner as to protect the liberties of the subject. (*Agha Haidar and Tek Chand, JJ.*) DES RAJ *v.* EMPEROR. **151 I.C. 943=7 R.L. 227=35 Cr. L.J. 1447 (2)=1934 Cr.C. 502 (2)=A.I.R. 1934 Lah. 264.**

Penal provision.

———*Penal provision—Penalty—Clause open to double construction.*

It is a well-settled rule of construction that the Court will not hold that a penalty has been incurred unless the language of the clause which is said to impose it is so clear that the case must necessarily be within it. And where a proviso to a section is open to a double construction, one which inflicts a penalty and the other which does not, the latter construction should prevail. (*Acton and Rupchand, A.J.Cs.*) KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME-TAX **149 I.C. 1204= 28 S.L.R. 174=6 R.S. 255=A.I.R. 1934 Sind 46.**

———*Penal provision—Strict construction — C. P. Land Revenue Act, S. 201.*

A penal provision must be construed strictly. Rule applied in interpreting S. 201 of the C. P. Land Revenue Act. (*Gowan, R.M.*) GODRA LUNGRAY *v.* NAMDEO. **14 N.L J. 37 (Rev.).**

———*Penal provision—Strict construction—Income tax Act, 1922, S. 28.*

A penal provision such as S, 28 of the Income-tax Act should be strictly construed. (*Mukerji and Bennet, JJ.*) GUR CHARAN PRASAD KHATRI, *In the matter of.* **53 All. 445=I R. 1931 All. 443=131 I.C. 875= 1931 A.L.J. 336=A.I.R. 1931 All. 421.**

Permissive provision.

———*Permissive provisions—Statutory power—Exercise of—Private rights—Rangoon Port Act (IV of 1905), S. 87.*

Where the terms of the statute are not imperative but permissive, the fair inference is that the legislature intended that the discretion as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights. *Managers of the Metropolitan Asylum District* v. *Frederick Hill*, (1881) 6 A.C. 192, Foll. (*Dunkley, J.*) MOOLA & SONS *v.* COMMISSIONER FOR THE PORT OF RANGOON. **I.R. 1931 Rang. 177 (2)=132 I.C. 545 (2)=A.I.R. 1931 Rang. 95.**

Plain meaning.

———*Plain meaning—Considerations of hardship—U.P. Court of Wards Act, S. 10.*

INTERPRETATION OF STATUTES—Preamble.

Where the language of the law is clear, it is not necessary to see whether the interpretation put upon the law is likely to lead or not to hardships and to absurdities. But this test may be applied to see whether the interpretation is a sound one or not. Rule applied in construing S. 10, U.P. Court of Wards Act. (*Sulaiman, C. J., Mukerji and Benerji, JJ.*) KAULPATI KUNWAR *v.* RAM BARAN SINGH. **54 All. 954=I.R. 1932 All. 513=139 I.C. 39=1932 A.L.J. 677=A.I.R. 1932 All. 494 (F.B.).**

———*Plain meaning — Construction—Contract Act, S. 264.*

A section in an Act is *prima facie* to be interpreted according to the plain meaning of the words. If to take the language of the section at its face value were to make it say something paradoxical or plainly inconvenient or disastrous to commerce the statute may be interpreted so as to render the provisions reasonable. S 264. Contract Act, construed according to its plain language. (*Rankin, C.J. and Bucland, J.*) PRAMATHA CHANDRA KAR *v.* BHAGWANDAS MADANLAL. **59 Cal. 40=136 I C 529=I.R. 1932 Cal. 209=35 C. W.N. 705=A.I.R. 1932 Cal. 236.**

———*Plain meaning—Departure when justified,*

Where the language of a statute, in its ordinary meaning and grammatical construction, leads to some inconvenience or absurdity, hardship or injustice, presumably not intended, construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their correlation by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Rules applied in construing S. 35, Indian Stamp Act. (*Kendall, J.*) MT. MEWA KUNWARI *v* BOWREV. **56 All 781=149 I.C. 90=6 R.A. 851=1934 A.L.J. 1202=A.I.R.1934 All. 388.**

———*Plain meaning—Modification by inference from judicial decisions.*

It is always dangerous to modify the plain reading of a statute by what it is claimed can be inferred from various judicial decisions. (*Jackson, J.*) THIRAPATIRAYUDU *v.* SECRETARY OF STATE FOR INDIA. **154 I.C. 614=7 R.M. 463=40 L.W. 755=A.I.R. 1935 Mad. 70.**

Popular meaning.

———*Popular meaning—Advancing remedy under Act.*

One rule for the interpretation of statutes is that the words may and normally should be construed in their popular sense. Another rule is that the words should be construed so as to advance the remedy provided by the Act. Expression "unmarried daughter" in S. 2 (1) (*d*) of the Workmen's Compensation Act held to include a widowed daughter. (*Rankin, C.J. and Ameer Ali, J.*) SOLEMAN BIBI *v* EAST INDIAN RAILWAY. **60 Cal. 820=I R. 1933 Cal. 351=143 I.C. 154=37 C.W.N. 453=1933 Cr.C. 494 (2)=A.I.R. 1933 Cal. 358.**

Preamble.

———*Preamble.*

INTERPRETATION OF STATUTES—Preamble.

The provisions of a section in a statutory enactment should be read along with the rest of the provisions of the Act and its dominating object as revealed in the preamble. (*Wazir Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) KEDAR NATH *v.* PEAREY LAL GUPTA. **7 Luck. 648=I R. 1932 Oudh 202=137 I.C. 42=9 O.W.N. 229=A.I.R. 1932 Oudh 152 (F.B.).**

———*Preamble.*

When there is nothing in the provisions of the Act to define the scope of the applicability of the Act, and there is a doubt in that respect in the enacting part, the wording of the preamble may legitimately be looked at for solving the doubt. (*Sundaram Chetty and Pakenham Walsh, JJ.*) KRISHNA CHETTIAR *v* MANICKKAMMAL. **57 Mad. 718=147 I.C. 1139=6 R.M. 417=1933 M.W.N 1404=39 L.W. 73=A.I R. 1934 Mad. 138=66 M.L.J. 70.**

———*Preamble—Reference to.*

The preamble of a statute has been said to be a good means of finding out its meaning, and, as it were a key to the understanding of it ; and, as it usually states, or professes to state, the general object and intention of the legislature, it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt. But the preamble cannot either restrict or extend the enacting part of the statute, when the language and object of the Act are not open to doubt. (*Nazim Ali and Khundkar, JJ.*) BADAR RAHIM *v.* BADSHA MIA. **62 Cal. 125=153 I C. 291=7 R C. 364=60 C.L J. 298=38 C.W.N. 1056=A.I.R. 1934 Cal. 741.**

———*Preamble—Reference to.*

Where the enacting part of a statute is ambiguous, the preamble can be referred to, to explain and elucidate it. A preamble may afford useful light as to what a statute intends to reach; but if the enactment is itself clear and unambiguous, no preamble can qualify or cut down the enactment. (*Lort Williams and Costello, JJ.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUNCHANDRA SINGH **61 Cal 1047=60 C L.J. 312=153 I.C. 972—7 R C. 414=38 C.W.N. 917=A.I.R. 1934 Cal. 862.**

———*Preamble—Reference to—Ambiguity.*

A preamble can never control or restrict the substantive provisions of an Act. It merely supplies a key to the interpretation of those sections. But where there is an ambiguity in the sections or where there is any doubt as to the true scope of the provisions of that enactment, the preamble may be of some guidance. (*Sulaiman, C.J., Mukerji and King, JJ.*) BHOLA UMAR *v.* MT. KAUSILLA. **55 All. 24=I R. 1933 All 1=140 I.C. 631=1932 A L J. 941=A.I.R. 1932 All. 617 (F.B.).**

———*Preamble—Reference to—Madras City Tenants Protection Act (III of 1922).*

A reference to the preamble of an enactment is permissible in two classes of cases, to clear up an ambiguity in the text of the statute or to indicate the particular instances to which the apparently unqualified and very general language of the enactment was intended to apply. It is, indisputable that before restricting the scope of an Act by the terms of its preamble, the Court must be satisfied that there was an intention on the part of the legislature that its scope should be so restricted and, in fact, that the legislature would have agreed, had the point been so put, that the passage relied upon in the preamble should form part of the text of the Act. But the language of the Madras City Tenants Protection Act (III of 1922), conferring on the tenants rights of compensation and acquisition is sufficiently clear and explicit.

INTERPRETATION OF STATUTES—Preceding or succeeding sections.

It may be hard, it may be unjust but there is no ambiguity about it. And the preamble when it talks of "the hope of the tenants that they would not be evicted" is so vague and indefinite and so far from defining any particular class of tenants that the legislature can hardly have intended to make it a qualification for the acquisition of rights under the Act. The preamble of this act cannot therefore be invoked to restrict the scope of the provisions of the Act. (*Curgenven and Bashyam Ayyangar, JJ.*) C. KANNAMMAL *v.* KANAKASABHAI MUDALIAR. **54 Mad. 845=I.R. 1931 Mad. 779=133 I.C. 779=1931 M W N. 461=33 L.W. 676=A.I.R. 1931 Mad. 629=61 M.L J. 535**

———*Preamble—Reference to—Permissibility.*

Where the enacting part of an Act is explicit and unambiguous, the preamble cannot be resorted to in order to control, qualify or restrict it but where the enacting part is ambiguous, the preamble can be referred to to explain or elucidate it (*Addison and Coldstream, JJ.*) SAHIB SINGH *v.* DATA RAM. **14 Lah. 203=34 P.L. R. 550=I.R. 1931 Lah. 996=134 I.C. 788=32 P.L. R. 598=A.I.R. 1931 Lah. 706.**

———*Preamble—Reference to—Permissibility.*

The title and preamble of a statute may be relied upon as aid to the understanding of the meaning thereof, or for determining the general object and intention of the legislature in passing the enactment. They may legitimately be consulted for the purpose of solving any ambiguity, or for fixing the meaning of words which may have more than one, or for keeping the effect of the Act within its real scope, but with the important proviso that this can only be done when the enacting part is open to doubt in any of these respects. When the language, object and the scope of the Act are not open to doubt, the enacting part cannot be restricted, extended or modified by reference either to the title or preamble. The preamble of an Act is not exhaustive. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ABDULLAH KHAN *v.* BAHRAM KHAN. **155 I.C. 1022=7 R. Pesh. 109=A.I.R. 1935 Pesh. 69.**

———*Preamble—Value of.*

The words of operative sections of an Act must be given effect to irrespective of inferences to be drawn from a preamble if the words themselves are clear and capable of only one meaning. (*Krishnan Pandalai, J.*) KATAMREDDI RAMIREDDI *v.* SREERAMULU REDDI. **I.R. 1933 Mad. 58=140 I.C. 826=A.I.R. 1933 Mad. 120.**

Precedents.

———*Precedents—Value of.*

Decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the Statute may come to be unduly extended and attention may be diverted from what has been enancted to what was judicially said about the enactment. (*Lord Chancellor.*) ATTORNEY-GENERAL OF CANADA *v.* ATTORNEY-GENERAL OF ONTARIO. **I.R. 1932 P.C. 34=135 I.C. 754=A.I.R. 1932 P.C. 36 (P.C.).**

Preceding or succeeding sections.

———*Preceding or succeeding sections—Reference.*

Per *Reilly, J.*—If a section which is clear in itself may be affected by preceding or succeeding sections, it can only be so when those other sections are themselves capable only of an interpretation which is clearly repugnant to or startling in juxta-position with, the section in question. Rule applied in interpreting S. 162, Cr. P. Code. (*Reilly, Anantakrishna Ayyar and Sundaram*

INTERPRETATION OF STATUTES—Presumption.

Chetty, JJ.) SYAMO MAHA PATRO *v.* EMPEROR. **55 Mad. 903=I.R. 1932 Mad. 338=33 Cr.L.J. 418=137 I.C. 9=35 L W. 705=1932 M.W.N. 305=1932 Cr.C. 355=A.I.R. 1932 Mad. 391=62 M.L.J. 742 (F.B.).**

Presumption.

———*Interpretation by—Courts Legislature must be deemed to be aware of.*

The legislature must be taken to be aware of interpretation of the statute enacted by them by the Courts; if they find that the interpretations by Courts of justice are not in conformity with their intention they should amend it to bring it in conformity with their intention. (*Mohamed Noor and Luby, JJ.*) SOURENDRA MOHAN SINHA *v.* SECRETARY OF STATE. **14 Pat. 283=155 I.C. 1099=7 R.P. 674=16 Pat. L.T. 129=A.I.R. 1934 Pat. 701.**

———*Presumption—Sanction for every law.*

Per *Hasan, C.J.*—It must be presumed that the legislature enacts laws for the purpose of their being obeyed and in the case of disobedience to enforce obedience. For every law there must be a sanction. Where the law imposes certain duties on a class of individuals, the presumption is that it was further intended that the said duties should be performed by those individuals and in the absence of voluntary performance, perfomance should be enforced. Otherwise it is not law; it will merely be an expression of pious wishes. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MAHOMED BAQUAR *v.* MAHOMED QUASIM. **7 Luck. 601=I.R. 1932 Oudh 321=138 I.C. 725=9 O.W.N. 538=A.I.R. 1932 Oudh 210 (F.B.).**

Principle of Act.

———*Principle of Act—When can be discussed.*

It is not either necessary or permissible to examine and discuss the principle underlying a statute unless the words of the statute are vague and ambiguous and unless the principle is helpful in clearing up the ambiguity. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL, **53 All. 239=135 I.C. 119=I R. 1932 All. 7=1931 A. L.J. 122=A.I.R. 1931 All. 162 (F.B.).**

Prior state of law.

———*Prior state of law—Reference to.*

In construing a statute, regard cannot be had to the law prior to the statute. (*Wort, J.*) BADRUDDIN KHAN *v.* BHAGLOO KOERI. **153 I.C. 759=7 R.P. 381=15 Pat.L T. 519=A.I.R. 1934 Pat; 555.**

———*Prior state of law—Reference to—Permissibility.*

Of course, if the language used in a statute is precise and unambiguous all that the Court is called upon or entitled to do is to construe the statute according to its plain meaning. But where the terms of a statute are not clear, and certain words therein are capable of more than one interpretation, the Court is not precluded from having recourse to the previous state of the law and the surrounding circumstances for the purpose of ascertaining which meaning the legislature intended the ambiguous terms to bear. (*Page, C.J. and Ba U, J.*) CASSIM & SONS *v.* SARA BIBI. **13 Rang. 335=160 I.C. 715=8 R R. 413=A.I.R. 1936 Rang. 17.**

Private rights.

See also REMEDY, *infra.*

———*Private rights—Act encroaching on imposing burdens—Strict construction.*

Statutes which encroach on the rights of the subject, whether as regards person or property, or which impose burdens, are subject to a rule of strict construction. (*Chari, J.*) SHIVALINGAPPA *v.* HOLEBASAPPA GOWDA. **12 Mys.L.J. 478=39 Mys.H.C.R. 853.**

INTERPRETATION OF STATUTES—Proceedings of the legislature.

———*Private rights—Interference—Acts constituting local bodies.*

While full effect is to be given to the purport of the provisions in enactments constituting local bodies such as District Board, the language of such enactments is not to be stretched to cover attempts made to interfere in any way with the exercise of the ordinary rights of citizens. (*Iqbal Ahmad, J.*) AMBA PRASAD MAPESHWARI *v.* JUGUL KISHORE. **1935 A W.R. 1497=8 R.A. 505=1936 A.L.J. 438=159 I.C. 790=A.I.R. 1936 All. 112.**

———Private rights — Statute interfering with—Remedy of private party aggrieved—Civil suit if lies. *See* REMEDY, *infra.* **16 Pat L.T. 877=A.I.R. 1936 Pat. 87.**

Procedural law.

See also AMENDING ACT, *supra* AND RETROSPECTIVE EFFECT, *infra.*

———*Procedural law—Act affecting—Applicability to pending cases.*

When a new enactment deals with right of action unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act. Execution proceedings were pending in the Sub Court when the Notification No. 576 I.A. 39 dated 26th March 1932, was published in the U.P. Gazette which was to take effect from 1st April, 1932, regarding the transfer of execution of decrees in which Civil Courts had declared agricultural land to be sold to the Collector.

Held, that though the proceedings had started earlier as the Notification dealt only with procedure, that applied to the pending execution proceeding and that it would be transferred to the Collector. (*Nanavutty, J.*) NAGI AHMAD *v.* SHEO SHANKAR LAL. **8 Luck. 504=6 I.R. (Oudh) 51=145 I.C. 363=10 O.W.N. 517=A.I.R. 1933 Oudh 274.**

———*Procedural law—Applicability to pending proceeding—Succession Act, 1925, S. 276.*

S. 276 of the Succession Act lays down a rule of procedure and not substantive law and therefore applies to on application pending at the time, the new Act took effect. (*Sulaiman, Mukerji and Young, JJ.*) PITAM LAL *v.* KALLA RAM. **53 All. 687=136 I.C. 284=I.R. 1932 All. 172=1931 A.L.J. 711=A.I R. 1931 All. 489 (F.B).**

———*Procedural law—Beneficial construction.*

When there is a choice between two interpretations of a rule of procedure the more beneficial interpretation must be adopted especially when the adoption of the other might lead to injustice. (*Baker and Barlee, JJ.*) ANNA CHARYA *v.* NARAYAN. **57 Bom 616=6 I R. (Bom.) 114=145 I.C 773 (2)=35 Bom.L.R. 769=A I R. 1933 Bom. 358.**

———Procedural law—Retrospective effect. *See* RETROSPECTIVE EFFECT, *infra.* **A.I R. 1934 All. 253.**

Proceedings of the legislature.

———*Proceedings of the legislature—Reference.*

It is not permissible for Courts to refer to proceedings in the Legislative Council in order to construe an enactment. (*Guha and M. C. Ghose, JJ.*) NAFAR CHANDRA PAL *v.* BHIKU SHEIKH. **I R. 1931 Cal. 569=132 I.C. 249=35 C.W.N. 19=A.I.R. 1931 Cal. 550.**

———*Proceedings of the legislature—Reference—Permissibility.*

Proceedings in Council whilst a statute is being enacted are not relevant and cannot be looked at by the Court

INTERPRETATION OF STATUTES—Proceedings of the legislature

on the question of construction of the Act. (*Baker and Rangnekar, JJ.*) SHIDRAMAPPA *v.* NEELAVABAI **57 Bom. 377 = 6 I.R. (Bom.) 20 = 144 I.C. 925 = 35 Bom.L.R. 397 = A.I.R. 1933 Bom 272.**

———*Proceedings of the legislature—Speeches made in the course of—Relevancy.*

Speeches made in the legislature during the passage of an Act are of no value in interpreting the meaning of the statute. The Court must interpret the sections of an Act on the basis of the plain wordings of the sections themselves. The legislature must be taken to have meant what they have said and not what they contemplated to say but did not say. (*Khaja Mahomed Noor, James and Agarwala, JJ.*) RAM RANBI JAY PRASAD SINGH *v.* RAMGIRHI RAI. **14 Pat 720 = 155 I.C. 902 = 7 R.P. 636 = 16 Pat.L.T. 333 = A.I.R. 1935 Pat. 346 (S.B.).**

———*Proceedings of the legislature—Statements made in Legislative Assembly on behalf of Government—Relevancy.*

The Court is precluded from considering any statements made in the Legislative Assembly or elsewhere on behalf of Government. It is no duty of the Courts of law to examine, criticise or interpret anything that may be said on behalf of Government in debate or elsewhere. The duty of the Court is to interpret the law as enacted. (*Grille, J.C.*) RUIKAR *v.* EMPEROR. **31 N L R. 318 = 157 I.C. 618 = 36 Cr.L.J. 1153 = 1935 Cr.C 834 = A.I.R. 1935 Nag. 149.**

Proviso.

———*Proviso—Construction of.*

It is a rule of law that a proviso should receive a strict construction. It is not open to the Court to add words to a proviso with a view to enlarge the scope of the proviso. The proviso must be restricted to the scope reasonably conveyed by the words used therein. (*Reilly and Anantakrishna Ayyar, JJ.*) PERICHIAPPA CHETTIAR *v.* NACHIAPPAN **I R. 1932 Mad. 616 = 139 I.C. 54 = 35 L.W 206 = A.I.R. 1932 Mad. 46.**

———*Proviso—Meaning.*

The proper way to regard a proviso is as a limitation upon the effect of the principal enactment (*Wazir Hasan, C. J. and Smith, J.*) MT. RAJ RANI *v.* DWARKA NATH SINGH. **147 I C. 160 = 6 R.O. 236 = 10 O.W N. 1041 = A.I.R. 1933 Oudh 491.**

Punctuation.

———*Punctuation.*

Punctuation marks cannot control the meaning of the section. In construing a statute a Court of Law is bound to read it without the commas inserted in the print. A.I R. 1929 P.C. 69 and 14 Cal. 365 (P.C.), Rel. on. (*Sulaiman, C.J.*) MANSA *v.* MT. ANCHO. **55 All. 700 = 6 I R. (All.) 170 = 145 I.C. 802 = 1933 A.L.J. 998 = A.I R. 1933 All. 521.**

———*Punctuation.*

Punctuation is no part of the statute and a Court of Law is bound to interpret the section without the commas inserted in the print. 14 I. A. 30 and A. I. R. 1929 P. C. 69, Foll. (*Sulaiman and Young, JJ.*) NIAZ AHMAD KHAN *v.* PARSOTTAM CHANDRA. **53 All. 374 = I R. 1931 All. 177 = 129 I.C. 545 = 1931 A.L.J. 153 = A.I R. 1931 All. 154.**

———*Punctuation—If a guide.*

Although punctuation is not a part of a statute where it is not contended that a punctuation is wrongly placed there is no reason why the punctuation should not be taken as a good guide for the purpose of understanding the sense of the passage in which it occurs. (*S. K. Ghose, J.*) BIRENDRA LAL CHOWDHURY *v.* NAGENDRA NATH MUKHERJEE. **163 I.C. 573 = 9 R.C. 36 = 39 C.W.N. 910 = 62 C.L J. 349.**

INTERPRETATION OF STATUTES—Re-enactment.

Re-enactment.

———*Re-enactment—Incorporation of existing Act in subsequent Act—Addition to former Act—Effect on the latter.*

Where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition. Ex parte *St. Sepulchre*, 33 L.J. Ch. 372; *London Chatham and Dover Ry* v. *Wandsworth Board of Works* L.R. 8 P.C. 185, Ref. (*Sir George Lowndes.*) SECRETARY OF STATE FOR INDIA *v.* HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY, LTD. **58 I A. 259 = 59 Cal. 55 = 1931 M.W.N. 695 = 132 I.C. 748 = 54 C L.J. 14 = I.R. 1931 P.C. 236 = 1931 A.L J. 475 = 33 Bom.L.R. 1006 = 35 C.W.N. 794 = A.I.R. 1931 P.C. 149 = 61 M.L.J. 864 (P.C).**

[D 55 A. 798 (802).]

———*Re-enactment—Incorporation of existing Act in subsequent Act—Repeal of the former—Effect on the latter.*

Where a statute is incorporated by reference into a second statute, the repeal of the first statute does not affect the second; despite the death of the parent Act, its offspring survives in the incorporating Act. (*Sir George Lowndes.*) SECRETARY OF STATE FOR INDIA *v.* HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY, LTD. **58 I.A. 259 59 Cal. 55 = 1931 M.W.N. 695 = 132 I.C. 748 = 54 C L J. 14 = I.R 1931 P.C. 236 = 1931 A L J. 475 = 33 Bom.L.R. 1006 = 35 C.W.N. 794 = A.I.R. 1931 P C. 149 = 61 M.L.J. 864 (P.C.).**

[D. 55 A. 798 (802)]

———*Re-enactment—Rulings under repealed statute—Value.*

It must be presumed that the legislature was aware of the trend of rulings. Where in re-enacting a Statute it has adhered to the former phraseology, the Court will be justified in inferring that the interpretation laid down in the rulings has been approved by the legislature. Rule applied with reference to S. 276 of the Indian Succession Act, 1925. (*Sulaiman, Mukerji and Young, JJ.*) PITAM LAL *v.* KALLA RAM. **53 All. 687 = 136 I.C. 284 = I.R. 1932 All. 172 = 1931 A.L.J. 711 = A.I.R. 1931 All. 489 (F.B)**

———*Re-enactment—Scope of repealed Act, if material—Heading of chapter whether governs substantive provisions—C. P. Code, O. 34.*

O. 34, C. P. Code, was substituted for sections in the T. P. Act which dealt only with mortgages of immovable property. A presumption can therefore be drawn that in taking those provisions out of an Act relating to property and incorporating them in an Act relating to procedure the legislature did not intend to extend the scope of the provisions. The heading of O. 34 defines the general words 'mortgagee,' 'mortgage security,' 'mortgage property,' in the substantive provisions and limit their operation to mortgages of immovable property. "The Court is entitled to read the heading of O. 34 into the various rules of that order having regard to the history of the order for the purpose of fixing the meaning of words which may have more than one meaning as for the purpose of keeping the effect of the Act within its real scope." (*Beaumont, C. J. and Blackwell, J.*) OFFICIAL ASSIGNEE OF BOMBAY *v.* CHIMNIRAM MOTILAL. **57 Bom. 346 = 142 I C. 370 = I.R. 1933 Bom. 223 = 34 Bom.L.R. 1615 = A.I.R. 1933 Bom. 51**

INTERPRETATION OF STATUTES—Re-enactment.

———*Re-enactment—Words judicially interpreted—Use of in re-enactment—Intention.*

Where the legislature, in re enacting the provisions of an amending Act retains words which have received a certain judicial interpretation, it has to be presumed that the words are retained or used in the sense in which they have been interpreted judicially, unless a contrary intention appears. (*Ramesam and Venkatasubba Rao, JJ.*) KANNIAPPA MUDALIAR *v.* SECRETARY OF STATE **59 Mad. 107=8 R.M. 462=159 I.C. 13=1935 M W N. 1104=42 L W. 914=A.I.R. 1936 Mad. 42=69 M.L.J. 728.**

Registration Act.

———*Registration Act—Strict construction.*

The Registration Act has to be strictly construed ; but there is a point at which it is unnecessary to multiply technicalities. Non-compliance with R 30 of the Act held to be an irregularity. (*Rankin, C.J. and C.C. Ghose, J.*) NILABJABARANI DASI *v.* NANDARANI DASI. **58 Cal. 133=I.R. 1931 Cal. 638=—133 I.C. 110=A.I.R. 1931 Cal. 478.**

Remedy.

———*Remedy if—Law of—Substantive law—Retrospective effect.*

Mukerji J.—The law of remedies is substantive law, and therefore ordinarily the law will have no retrospective effect. It is no doubt open to the legislature to enact a substantive rule of law and yet to give it a retrospective effect. But the presumption as regards interpretation is that unless and until the legislature gives the clearest indication that a rule of substantive law will have a retrospective effect, the Court will not give the rule that effect. Where an existing right is likely to be taken away by the operation of an Act, unless there is something which compels a Court to give the Act a retrospective effect, it will not give the Act that effect. *Craies Statute Law*, Edn. 3, pp. 326, 330 and 331, Ref. (*Sulaiman, A.C.J., Mukerji, Boys, King and Baijnath, JJ.*) RAM KARAN SINGH *v.* RAM DAS SINGH. **54 All. 299=136 I.C. 145=I.R. 1932 All 145=1931 A.L.J. 1018=15 R.D. 815=A.I.R. 1931 All. 635 (F.B.).**

———*Remedy—Private right—Statute interfering with—Remedy of private party aggrieved—Civil suit—If lies.*

If any private right is interfered with under the authority of any statute and no remedy is provided in the statute itself, the aggrieved party has no remedy at all ; but if a remedy has been given by the statute, the aggrieved party can get that remedy only in the manner stated, provided always that those in authority who interfere with private rights do so strictly in accordance with the mode prescribed by the statute. The aggrieved party cannot maintain an action in the Civil Court in respect of the interference. (*Macpherson and Khaja Mahomed Noor, JJ.*) SECRETARY OF STATE *v.* KAMESHWAR SINGH BAHADUR. **15 Pat. 240=160 I.C. 915=8 R P. 387=16 Pat.L.T. 877=A.I.R. 1936 Pat. 87.**

———*Remedy—Remedy indicated by statute—Exclusiveness of—Bar of separate suit—Madras Hindu Religious Endowments Act (II of 1927), S. 84 (2).*

When by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted and in the case of injury, the party cannot proceed by suit. Thus S. 84 (2) of the Madras Hindu Religious Endowments Act provides an application to the District Court as the remedy for a person aggrieved by the decision of the Religious Endowments Board under S 84 (1) and so debars him from proceeding by a separate suit. (Case-law discussed.) (*Curgenven and Cornish, JJ.*) ISWARANANDA BHARATHI SWAMI *v.* BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS. **54 Mad. 928=I R. 1931 Mad. 696=133 I C. 8=34 L W. 209=A I R. 1931 Mad. 574=61 M.L.J. 117.**

INTERPRETATION OF STATUTES—Restrictive Act.

———*Remedy—Right to sue—Provision for complaint by Municipality—Right of private party to complain.*

Where a statute creates an offence and specifies the persons by whom the provisions of the Act shall be enforced, no other person can prosecute for the offence. Thus where S. 161 of the Bombay District Municipal Act provided that the Municipality may direct the prosecution for any public nuisance, no private individual has any right to complain of the erection of a weather-shed without the permission of the Municipality. (*Madgavkar and Barlee, JJ.*) MOTILAL AMRATLAL SHAH. *In re.* **55 Bom. 89=I.R 1931 Bom. 150=129 I.C. 342—32 Cr.L.J. 280=32 Bom.L.R. 1502=1931 Cr.C. 189—A I.R. 1931 Bom. 141.**

[D. 59 B. 53 (56)]

Repealing Act.

———*Repealing Act—Effect of.*

The effect of repeal of a statute in the absence of saving clauses is that it has to be considered as if the statute so repealed had never existed. It ceases to be operative unless there is any clause in the new statute preserving the old statute—the underlying principle being that there cannot be two inconsistent Codes in the same matter. (*Guha and Bartley, JJ.*) DIGAMDAR PAUL GHOSH *v.* TAFAZUDDI IJARDAR. **60 Cal. 1438=149 I.C. 27—6 R.C. 546=37 C.W.N. 1033—58 C.L J. 76=A.I.R. 1934 Cal. 80 (2).**

———*Repealing Act—Effect on pending proceedings.*

The effect of the repeal of a statute, in the absence of a saving clause, is that it has to be considered as if the statute so repealed had never existed. Where the Court in proceedings under a repealed Act has not done anything till the date of the repealing statute, excepting taking cognizance of a case under the repealed Act, and before it proceeds to pass any order, the statute under which it has taken cognizance is repealed without any reservation as regards pending proceedings, the Court has no jurisdiction to proceed further in the matter, and any order passed by it would be void as *ultra vires*. (*Shankaranarayana Rao, J.*) KANNIR IYTHA MAISTRY *v.* COLACO. **13 Mys.L J. 279=40 Mys.H.C.R. 136.**

———*Repealing Act—Pending transaction, if affected.*

Where an Act is in force when the transaction was effected, any subsequent repeal of the Act does not affect the merits, rights or liabilities of the parties as on the date of the transaction. (*Baker and Rangnekar, JJ.*) SUNDRABAI *v* MANOHAR. **6 I R. (Bom) 11=144 I. C. 781=35 Bom.L R. 404=A I R. 1933 Bom. 262.**

Restrictive Act.

———*Restrictive Act—Law restraining enterprise—Copyright.*

All laws which put a restraint upon human activity and enterprise must be construed in a reasonable and generous spirit. Under the guise of a copyright, a plaintiff cannot ask the Court to close all the avenues of research and scholarship and all frontiers of human knowledge. (*Tek Chand and Agha Haidar, JJ.*) KARTAR SINGH GIANI *v* LADHA SINGH. **16 Lah 103=153 I C. 1020=7 R.L. 499 (2)=37 P.L.R. 466=A.I. R. 1934 Lah. 777.**

———*Restrictive Act—Strict construction—Punjab Municipal Act, S. 195.*

INTERPRETATION OF STATUTES—Restrictive Act.

In the case of a restrictive statute Courts are bound to place a strict interpretation on it so as not to bring a case within its provisions which does not come within the reasonable meaning of the phraseology used by the legislature. Rule applied in construing S. 195, Punjab Municipal Act. (*Tek Chand, J.*) JIWAN DAS *v.* MUNICIPAL COMMITTEE, PINDI GHELE. **I.R. 1932 Lah. 535 – 138 I.C. 743 = 33 P.L.R. 782 = A.I.R. 1932 Lah. 597.**

———*Restrictive Act—Strict construction—T. P. Act, S. 67-A.*

A statute which restricts rights, *e.g.*, S. 67-A, T. P. Act, which restricts the rights of mortgagees, must be construed strictly. (*Lort Williams and Costello, JJ.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUNCHANDRA SINGHA. **61 Cal. 1047 = 60 C.L.J. 312 = 153 I.C. 972 – 7 R.C. 414 = 38 C.W.N. 917 = A.I.R. 1934 Cal. 862.**

Retrospective effect.

See also AMENDING ACT, COURT-FEES ACT, NEW ACT, *supra* AND SUBSTANTIVE LAW, *infra.*

———*Retrospective effect.*

Unless an intention to the contrary is clear, an Act is to be construed as operating only on cases or facts which come into existence after the Act, and not retrospectively on cases or facts which had come into existence before the Act. (*Subhedar, A.J.C.*) HARLAL *v.* LALA PRASAD. **I.R. 1931 Nag. 123 = 133 I.C. 395 = 14 N.L.J. 77 = A.I.R. 1931 Nag. 138.**

———*Retrospective effect.*

Ordinarily a statute is not retrospective, and it can never be so when the amending statute itself lays down that the amendments would not affect transactions before a certain date. (*Niyogi, A.J.C.*) MT. BANA BAI *v.* MT. CHANDRABHAGA. **27 N.L.R. 24 = I.R. 1931 Nag. 98 = 132 I.C. 450 = A.I.R. 1931 Nag. 60.**

———*Retrospective effect.*

No rule of construction is more firmly established than this, that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. (*Sulaiman, C.J., Kendall and Niamatullah, JJ.*) HAIDAR HUSAIN *v.* PURAN MAL. **58 All. 63 = 157 I.C. 157 = 1935 A.L.J. 895 = 8 R.A. 115 = 1935 A.W.R. 823 = A.I.R. 1935 All. 706 (F.B.).**

———*Retrospective effect—Act is not retrospective unless specifically provided.*

The legislature may be express provision give a retrospective effect to any legislation, but the general principle of the construction of statutes is that in the absence of such provision, an Act is not intended to have retrospective effect. (*Middleton, J. C. and Saaduddin, A.J.C.*) JADA RAM *v.* FAIZULLAH KHAN. **150 I.C. 308 = 6 R. Pesh 79 = A.I.R 1934 Pesh. 30.**

———*Retrospective effect—Act taking away vested rights—Provincial Insolvency Act, 1920.*

Every statute which takes away or impairs vested rights acquired under the existing law or creates a new obligation or attaches a new disability in respect of transactions already past must be presumed to be intended not to have a retrospective effect. Provincial Insolvency Act, 1920, held not to have retrospective effect. (*Ferrers, J.C. and Rupchand, A.J.C.*) GURMUKHDAS RANGALMAL *v.* HASSOMAL. **26 S.L.R. 204 = I.R. 1932 Sind 124 = 139 I.C. 589 = A.I.R. 1932 Sind 71.**

———*Retrospective effect—Clear language necessary.*

INTERPRETATION OF STATUTES—Retrospective effect.

A retrospective effect ought not be given to a statute unless an intention to that effect is expressed in plain and unambiguous language. S. 53 A of the T. P. Act (as amended) held not to have retrospective effect. (*Beasley, C.J. and Cornish, J.*) KANJI & MOOLJI BROS. *v.* SHANMUGAM PILLAI. **56 Mad. 169 = I.R. 1932 Mad. 805 = 139 I.C. 870 = 36 L.W. 626 = 1932 M.W.N. 897 = A.I.R. 1932 Mad. 734 = 63 M.L.J. 587.**

[**F.** 30 N.L.R. 1 (8).]

———*Retrospective effect—Intention of legislature—Duty of Courts to give effect to.*

It is a recognized principle that Courts are bound to give effect to the intention of the legislature and are bound by the express words of the legislature when those words can have but one meaning. Where, however, it is possible to construe the words of the legislature in more than one way, the Courts will always lean against an interpretation which will give retrospective effect to the terms of an enactment. (*Barlee and Sen, JJ.*) SHANTINIKETAN CO OPERATIVE HOUSING SOCIETY, LTD. *v.* MADHAVLAL. **60 Bom. 125 = 161 I.C. 96 = 8 R B. 311 = 37 Bom.L.R. 955 = A.I.R. 1936 Bom. 37.**

———*Retrospective effect—Jurisdiction under repealed statute—If can be claimed under new law.*

It cannot be laid down that a litigant has a vested right to the continuance of the tribunal before which he originally seeks his relief, notwithstanding a change is law. Where an Act or Regulation giving a special jurisdiction is repealed, parties cannot claim as of right that that jurisdiction must continue under the new Act or Regulation. (*Weston.*) HET RAM *v.* TULSI RAM RAM SARUP. **1935 A.M.L.J. 18.**

———*Retrospective effect—Act not dealing with procedure—Madras Act XI of 1930.*

A statute other than one dealing with procedure shall not be construed so as to have a retrospective effect unless the intention of the legislature that it should have such an effect appears in its terms or by clear and necessary implication. Meaning of declaratory enactment discussed.

Held, that S. 54 (2) of the Madras Act XI of 1930 is not a declaratory provision and that the Act itself is an amending and not a declaratory Act. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERAH VANDAYAR. **54 Mad. 627 = I.R. 1931 Mad. 353 = 130 I.C. 177 = 33 L.W. 168 = A.I.R. 1931 Mad. 83 = 60 M.L.J. 191.**

———*Retrospective effect—Need for express language.*

Per *Mitter, J.*—A retrospective operation is not to be given to a statute so as to impair an existing right or obligation otherwise than as regards matter of procedure unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation it ought to be construed as prospective only. Rule applied in construing S. 48-C., B.T. Amending Act, 1928. (*Rankin, C.J., Pearson and Mukerjee, JJ.*) JIBAN KRISHNA CHAKRAVARTY *v.* ABDUL KADER CHOWDHURY. **60 Cal. 1037 = I.R. 1933 Cal. 356 = 143 I.C. 164 = 37 C.W.N. 689 = 57 C.L.J. 477 = A.I.R 1933 Cal. 435 (F.B.).**

[**D.** 38 C.W.N. 841 (843). **R.** 38 C.W.N. 105 (106).]

———*Retrospective effect— No presumption of.*

The general rule is that an Act should not be construed to have retrospective operation, unless such a construction is clearly warranted by the express terms of the Act. (*Sundaram Chetty and Pakenham Walsh,*

INTERPRETATION OF STATUTES—Retrospective effect.

JJ.) KRISHNA CHETTIAR *v.* MANICKKAMMAL. **57 Mad. 718=147 I C. 1139=6 R.M 417=1933 M.W. N. 1404=39 L.W. 73=A.I.R. 1934 Mad. 138=66 M.L J. 70.**

———*Retrospective effect—Procedural law.*

No doubt a statute cannot be construed to have retrospective effect unless its language makes it clear that the intention was that it should have retrospective effect But this principle cannot be applied to enactments dealing with procedure which are always retrospective to this extent that provisions will apply to proceedings already commenced at the time of their enactment, the reason being that no one can have vested right in forms of procedure. (*Young and Rachhpal Singh, JJ.*) LAIQ RAM *v.* HAR PRASAD. **6 R A 624–147 I.C 1201=3 A W.R. 579=A.I R. 1934 All. 253.**

———*Retrospective effect—Procedure — Amendments touching—Right of appeal*

While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. A right of appeal is not a mere matter of procedure. It is a vested right created by statute. (*Addison and Sale, JJ.*) ATA UR-RAHMAN *v* INCOME-TAX COMMISSIONER, LAHORE. **A I.R. 1934 Lah 1013 (2).**

———*Retrospective effect—Rule against.*

No statute shall be construed so as to have a retrospective operation, unless such a construction appears clearly in the Act itself or arises by necessary and distinct implication. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SUBBIAH *v.* LAKSHMINARASIMHA SASTRY **11 Mys L.J. 404.**

———*Retrospective effect—Rule as to.*

A statute which affects only the procedure would apply to pending actions. But a statute which creates a right of action or takes away one has no retrospective effect. It is a general rule that where the Legislature alters the right of parties by taking away or conferring a right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. (*R.C. Mitter, J.*) JAGA MOHAN GHOSE *v.* BEHARI BARUI. **39 C.W.N. 1006.**

Right and remedy.

See also SPECIAL TRIBUNAL, *infra.*

———*Right and remedy—Jurisdiction of Civil Courts.*

When the statute which creates the right also prescribes a special remedy, the person aggrieved is limited to the remedy so prescribed. If, however, a legal right is recognized to exist apart from and independently of the statute and no special remedy is provided, the Civil Courts would continue to exercise their jurisdiction under S. 9 of the C. P. Code. (*Subhedar, Nivogi and Pollock, A.J Cs.*) VITHOBA CHIMNAJI *v* GOVINDRAO VITHALRAO. **29 N L R. 278=I.R. 1933 Nag. 171=143 I C. 514=A.I.R. 1933 Nag. 193 (F B.).**

———*Right and remedy—Jurisdiction of ordinary Courts.*

When a new cause of action is created by statute and a special jurisdiction outside the course of the general law is prescribed, there is no ouster of the jurisdiction of the ordinary Courts, for they never had any. On the other haud, the proposition is well-established that where an Act creates a special jurisdiction and provides a special remedy, such jurisdiction is exclusively conferred upon the Court expressly empowered to deal with the matter. (*Coldstream and Bhide, JJ.*) KARAM

INTERPRETATION OF STATUTES—Rules.

DEVI *v.* RADHA KISHAN. **16 Lah 975=157 I.C. 87=8 R.L. 86=37 P.L.R. 77=A.I.R. 1935 Lah. 406.**

———*Right and remedy—Particular remedy given by statute—Aggrieved party must be confined to that remedy.*

Where a particular liability is created by statute and a particular remedy is given by that statute, then the particular person found liable is confined to the particular remedy. (*Young, J.*) SHEO NARAIN *v.* TOWN AREA PANCHAYAT, CHHABRAMAN. **153 I.C. 549=7 R.A. 538=A.I.R 1934 All 792.**

———*Right and remedy—Remedy, if exhaustive.*

Where the statute which creates the right also prescribes a particular remedy for the infringement of that right, that remedy and that remedy alone can be pursued by the person complaining of the infringement of the right for the redress of the alleged wrong done to him. 47 All. 513, Foll. (*Iqbal Ahmad and Kisch, JJ.*) JOTI PRASAD UPADHIYA *v.* AMBA PRASAD. **55 All. 406=I.R. 1933 All. 111=142 I.C. 403=1933 A.L.J. 303=A.I R. 1933 All. 358.**

———*Right and remedy—Remedy, when exhaustive.*

Where a statute creates a new offence or gives a new right and prescribes a particular penalty or special remedy, no other remedy can, in the absence of evidence of contrary intention, be resorted to; but where a statute is confirmatory of a pre-existing right, the new remedy is presumed as cumulative or alternative, unless an intention to the contrary appears from some other part of the statute. (*Sulaiman, C.J. and King, J.*) MUNICIPAL BOARD, BAREILLY *v.* ABDUL AZIZ KHAN. **1934 A.L.J. 739–152 I.C. 792=7 R.A. 389=4 A. W.R 314=A.I.R. 1934 All. 795.**

Rule of practice.

———*Rule of practice—Principle of* cursus curiae*—Applicability.*

The principle of *cursus curiae* or the rule of practice, in the sense of the practice of the Court to decide the construction in a certain way, can only be applied when first the statute is ambiguous, secondly, when the decisions are consistent throughout; thirdly when titles are dependent upon those decisions. (*Wort, James and Mahomed Noor, JJ.*) RAMKRISHNA JHA *v.* JAINANDAN JHA. **14 Pat. 672=157 I C. 98=8 R. Pat. 90=16 Pat.L.T. 451=A.I R 1935 Pat. 291 (F.B.).**

Rules.

———*Rules—Rule containing conditions—Additional terms—Imposition by construction—Permissibility.*

Where the conditions are inserted in a rule it may be taken that they were inserted for the purpose of showing that no conditions other than those specified are to stand in the way of the statutory right conferred. It is not legitimate to read a rule which expressly prescribes a fixed sum as meaning that to that sum may be added an unascertained amount on that result can be arrived at by any other method. Rule applied with reference to O. 21, R. 89, C. P. Code, applying to mortgage suits on the Original Side, Calcutta High Court. (*Remfry, J.*) ASHUTOSH BASU *v.* SUDANGSHUBHUSHAN MUKERJI. **58 Cal. 510–I R. 1931 Cal. 715=133 I.C. 587–A.I. R. 1931 Cal. 688.**

———*Rules framed under Act—If can control meaning of statute.*

The interpretation of a statute cannot be controlled by the meaning attached to it in rules made by an authority to which the power of rule making has been delegated under the statute. The meaning put upon the statute by the rule-making power, though often instructive, cannot be binding as the proper interpretation of the provisions of the statute. (*Reilly, C. J. and*

INTERPRETATION OF STATUTES—Rules.

Shankaranarayana Rao, J.) MYSORE CLAY WORKS, LTD. *v.* RAMACHANDRA RAO. **40 Mys. H.C.R. 316**

———*Rules—Rules framed under Act should be consistent with Act.*

The rules framed under an Act shall be consistent with the Act. Courts cannot put a forced or unnatural construction upon the language of the Act in order to bring it into conformity with a rule. *(Ferrers, J.C. and Rupchand, A.J.C.)* HEMANDAS SATAONDAS *v.* BHAI NIHCHALDAS. **151 I.C. 89=7 R.S 41 (2)=A.I.R. 1934 Sind 110.**

———Rules—Validity of. *See* BYE LAWS *supra.* **38 C.W.N. 459=A.I.R. 1934 Cal. 537.**

Similar enactment.

———*Similar enactment—Construction of provisions of Act of one province.*

The provisions of an Act of one Provincial Legislature form a very poor guide to the construction of the provisions of an Act of another Provincial Legislature. *(Dunkley, J.)* EMPEROR *v.* KHIN MAUNG **147 I. C. 1152=6 R R. 191=35 Cr L.J. 599=1933 Cr.C. 1019=A I R. 1933 Rang 275.**

———*Similar enactment—Interpretation of statute of one country—If a guide to interpret law of another.*

In interpreting the statutes of one country, no safe guidance can be got from the interpretation of statutes of another country which are not worded in exactly that way. *(Reilly, C.J. and Shankaranarayana Rao, J.)* KARKHANE ABDUL RAHIMAN *v.* KHATIZABIYAMMA. **40 Mys H C R. 63.**

———*Similar enactment—Later enactment in same language—Uniformity of interpretation.*

It is well recognized rule of construction that if a statute upon which a particular construction has been put is re-enacted *ipsissimis verbis*, that construction must be considered to have the sanction of the legislature and this rule applies with greater force when the provisions of an English statute have been reproduced by the Indian Legislature; and it is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same. A.I.R. 1927 Sind 130, Foll. *(Ferrers, J.C. and Rupchand, A.J.C.)* WADHUMAL *v.* MALLICK NOOR AHMAD. **27 S.L.R. 230=6 I.R. (Sind) 37=145 I.C. 706=A.I.R. 1933 Sind 179.**

———*Similar enactment—Reference to, if the two are identical in terms.*

It is not permissible to construe the provisions of one statute in the light of any judicial decision on a provision of another statute, unless the two are *in pari materia* and are identical in terms. *(Sulaiman, Boys and Sen, JJ.)* MT SIRAJ FATIMA *v.* MAHOMED ALI. **54 All 646 I.R. 1932 All 418=138 I C 465=16 R.D. 327=1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.)**

———Similar enactment—Reference to—Whether proper. *See* LANGUAGE, *supra.* **A.I R. 1933 Mad. 791=65 M.L.J. 725.**

———*Similar enactment—Words taken from earlier enactment—Words subject of judicial interpretation.*

Where words or expressions in a statute are plainly taken from earlier enactments *in pari materia* which have received judicial interpretation, it must be assumed that the Legislature was aware of such interpretation and intended it to be followed in later enactments. *(Oppenheim, S.M. and Drake Brockman, J.M.)* RUDRA PRATAB SINGH *v.* HUBBA. **15 L.R. 623 (Rev.)=18 R D. 526=11 O.W.N. 1211.**

Special enactments.

———*Special enactments—Strict construction*

INTERPRETATION OF STATUTES—Statement of objects and reasons.

Special enactments which derogate from the ordinary law must be strictly construed. *(Grille, J.C.)* ABDUL RAHIMAN *v.* ABDUL WAHAB. **31 N.L.R. (Supp.) 9=155 I.C. 813=7 R.N. 202=A.I.R. 1935 Nag. 120.**

Special tribunal.

———Special tribunal appointed by Act—Its jurisdiction exclusive. *See* C. P. CODE, S. 9. **1935 A.L.J. 1111.**

———*Special tribunal—Jurisdiction of Civil Courts.*

In cases where the right and liability has been created by statute and the legislature has left to another authority the appointment of a tribunal to try such liability and the framing of the procedure under which the tribunal contemplated is to carry out its duties, but the tribunal so contemplated has never been brought into existence, it is to be presumed that the jurisdiction of the Civil Courts has been acquiesced in; in such circumstances, the subject has the right to proceed in the ordinary Civil Courts. And it is only when the legislature carries out its duty of appointing such a special tribunal, that the jurisdiction of the Civil Courts will be ousted. *(Courtney-Terrell, C. J., Wort, Fazl Ali, Agarwala and Luby, JJ.)* LACHMI CHAND SUCHANTI *v.* RAM PRATAP CHOUDHURY. **14 Pat. 24=152 I C. 805=7 R P. 247=15 Pat.L.T. 623=A.I.R. 1934 Pat. 670 (2) (F B.).**

———*Special tribunal—Suit impugning validity of rules appointing—Jurisdiction of Civil Courts.*

The grant of jurisdiction to the special tribunal to deal finally or exclusively with the cases arising out of the lawful administration of a particular statute cannot take away the jurisdiction of the Civil Courts to afford relief against any illegality committed under colour of that statute. If the special tribunal arbitrarily refuses to exercise its jurisdiction or if the rules which create the special tribunal and lay down the procedure are themselves impeached as being *ultra vires*, then the Civil Courts have jurisdiction to correct the illegality and give proper relief to the aggrieved person. *(Subhedar, Niyogi and Pollock, A J.Cs.)* VITHOBA CHIMNAJI *v.* GOVINDRAO VITHALRAO. **29 N.L.R. 278=I R. 1933 Nag. 171=143 I.C. 514=A.I.R. 1933 Nag. 193 (F.B.).**

Statement of objects and reasons.

———*Statement of objects and reasons—Admissibility for the purpose of construction—Prevention of Intimidation Ordinance (V of 1930), Ss. 3 and 4—Temperance work, if an offence.*

On the ordinary canons of interpretation, it is not open to Court to consider the statement of objects and reasons in the case of an ordinance any more than in the case of an Act. If the Legislature or the Governor-General desires to make temperance work, by which is meant dissuasion of people from drink a penal offence, the intention must be clearer than it is in the present definition of molestation in S. 3 *(Madgavkar and Barlee, JJ.)* EMPEROR *v.* SAKINABAI LUKMANI. **55 Bom. 220=I.R. 1931 Bom. 154=129 I C 346=32 Cr.L J. 283=32 Bom.L R. 1506=1931 Cr.C. 78=A I.R. 1931 Bom. 70.**

———*Statement of objects and reasons—Reference to—Permissibility.*

It is not permissible to refer to the statement of objects and reasons and to the notes on clauses, to determine the proper construction of a section of a statute. It must be determined on the words, as they stand, having regard to the general scope and object of the legislation as determined by the provisions contained in it. *(Krishnan Pandalai, J.)* KATEMREDDI RAMIREDDI

INTERPRETATION OF STATUTES—Statement of objects and reasons.

v. SREERAMULU REDDI. **I.R. 1933 Mad. 58=140 I.C. 826=A.I.R. 1933 Mad. 120.**

———*Statement of objects and reasons—Reference to—When justified.*

No reference may be made to the introductory note to a Code or to any statement of reasons for legislation, unless it be where a section is ambiguous, and cannot be construed without some such reference to outside sources. (*Lort Williams and Jack, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* TARAK NATH CHATTERJEE. **62 Cal. 666 =162 I C. 910=8 R C. 663—37 Cr.L J. 698=1935 Cr.C. 491—A.I.R 1935 Cal. 304.**

Substantive law.

———Substantive law—Law of remedies—Retrospective effect. *See* REMEDY, *supra*. **54 All. 299=A.I.R. 1931 All. 635 (F.B).**

———*Substantive law—Retrospective effect—Intention.*

Enactments of substantive law, affecting the status and rights of property cannot be considered as retrospective unless the contrary intention is clearly to be found in the Act itself, although matters of adjective law or procedure may properly be deemed retrospective even if the intention to make them retrospective be not expressly found in the legislation itself. (*Courtney-Terrell, C.J. and Varma, J.*) PUNYABRATA *v.* MONMOHAN RAY. **153 I C. 520=7 R.P. 349=15 Pat.L.T. 380=A I R. 1934 Pat. 427.**

Temporary Act.

———*Temporary Act—Proceedings under—Expiry of Act—Effect of.*

As a general rule, unless there is some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it and it ceases to have any further effect. An offence therefore committed against a temporary Act must be prosecuted and punished before the Act expires, and as soon as the Act expires, any proceedings which are being taken against a person will *ipso facto* terminate. (*Sulaiman, C.J., Mukerji and King, JJ.*) BANS GOPAL *v.* EMPEROR. **55 All. 961=6 I R. (All.) 141=145 I.C. 680=34 Cr. L J. 1030=1933 A L.J. 875=1933 Cr.C 1181=A.I. R. 1933 All 669 (F B.).**

[F. 15 L. 782 (784)]

Vested right.

———Vested right—Act taking away—No retrospective effect. *See* RETROSPECTIVE EFFECT, *supra*. **26 S.L.R. 204=A.I.R. 1932 Sind 71.**

———*Vested rights—Alteration.*

King, J.—Statutes should be interpreted, if possible, so as to respect vested rights. *Craies on Statute Law*, Edn. 3, p. 330 and (1923) 2 K.B. 193, Ref. (*Sulaiman, A.C.J., Mukerji, Boys, King and Bajpai, JJ.*) RAM KARAN SINGH *v.* RAM DAS SINGH. **54 All 299=136 I.C 145=I.R 1932 All 145=1931 A L.J. 1018 =15 R D. 815=A.I R. 1931 All. 635 (F.B.).**

INTERROGATORIES. *See* C P. CODE O. 11

INTERVENER. *See* DIVORCE ACT, S. 16.

INTOXICATION. *See* PENAL CODE, S. 86.

INVESTIGATION. *See* CRIMINAL TRIAL.

INVOLUNTARY PAYMENT. *See* CONTRACT ACT, S. 72.

IRISH FREE STATE CONSTITUTION (AMENDMENT No. 22) ACT (1933)—*Prohibition of appeal to King in Council—Validity.*

The Treaty and the Constituent Act respectively form parts of the Statute of the United Kingdom, each of them being parts of an Imperial Act. Before the passing of the Statute of Westminster, it was not competent for the Irish Free State Parliament to pass an Act abrogating the Treaty because the Colonial Laws Validity Act forbade a Dominion Legislature to pass a law repugnant to an Imperial Act. The effect of the Statute of Westminster was to remove the fetter which lay upon the Irish Free State Legislature by reason of the Colonial Laws Validity Act. The Legislature can now pass Acts repugnant to an Imperial Act. Hence the Constitution (Amendment No. 22) Act of 1933, by which proviso to Art. 66 of the Constitution of 1922 has been removed and appeals to the King in-Council are now prohibited is valid. Whatever might be the position of the King's prerogative, if it were left as matter of the common law, it is here in this particular respect and in this particular enactment made matter of Parliamentary legislation, so that the prerogative is *pro tanto* merged in the statute, and the statute gives powers of amending and altering statutory prerogative. (*Lord Chancellor.*) ROBERT LYON MOORE *v.* ATTORNEY-GENERAL FOR IRISH FREE STATE. **157 I.C. 578=8 R P.C. 45=A.I.R. 1935 P.C. 149 (P.C.).**

IRREGULARITY.

See (1) C. P. CODE, S. 115—MATERIAL IRREGULARITY.
(2) CR. P CODE, S. 439.

ISSUE. *See* C. P. CODE, O. 14.

JAGIR.

See also (1) GRANT.
(2) LAND TENURE.

———*Resumption—Custom of resumption on failure of male heirs—Grant in favour of three persons jointly—Resumability in part.*

Where the original grant of a jagir was made in favour of three persons jointly one of the grantees dies childless and the plaintiff, who claimed to resume one-third of the jagir on the death of one of the grantees without heirs, only proved a general custom to resume on the failure of male heirs,

Held, that unless the plaintiff proved a custom under which only a share in the jagir originally granted to two or more persons may be resumed by the landlord on the failure of the direct male line of any one of the original grantees or jagirdars, the grantor is not entitled to resume the share of one of the grantees, while the remaining grantees are alive, even though the grantees may have been holding the grant as tenants-in-common. (*Wort and Fazl Ali, JJ.*) KAMAKHYA NARAIN SINGH *v.* KIRAN CHANDRA MUKERJEE. **I R 1932 Pat 211=139 I C. 143=13 Pat.L.T. 264 =A.I R. 1932 Pat. 195.**

JAINS.

See also (*i*) CUSTOM—JAINS.
(*ii*) HINDU LAW—APPLICABILITY.

———*Widow—Power over ancestral property left by husband.*

In the absence of a proof of custom, a Jain widow does not acquire an absolute right in properties left by her husband which were acquired from the income of a business which had grown out of an ancestral nucleus. The reported decisions only go the length of holding such a custom proved so far as the husband's self-acquired property is concerned but do not go further. (*Sulaiman and Young, JJ.*) PAHAR SINGH *v.* SHAMSHER JANG BIJAI BAHADUR SINGH. **I.R. 1931 All. 737=133 I C 785=1931 A.L.J. 314=A I R. 1931 All. 695 (2).**

JALKAR. *See* FISHERY.

JAMABANDI. *See* REVENUE PAPERS.

JAMABRIT *See* GRANT—MINERALS.

JAMMU AND KASHMIR AGRICULTURISTS RELIEF REGULATION, S. 8—*Bond—Passing of consideration—Burden of proof.*

JAMMU AND KASHMIR AGRICULTURISTS RELIEF REGULATION, S. 8.

JAMMU AND KASHMIR LAND ACQUISITION REGULATION, S. 18.

In a suit governed by the provisions of the Agriculturists Relief Regulation, the burden of proof of the passing of the consideration lies on the money lending creditor and it is immaterial whether the suit is based on a bond or even upon a negotiable instrument as the ordinary law of the land has been modified by the Agriculturists Relief Regulation in this respect. (*B.R. Sawhney, J.*) DHANI RAM *v.* SHAMI. **37 P.L.R J. & K. 14.**

JAMMU AND KASHMIR LAND ACQUISITION REGULATION, S. 18—*Collector refusing to make reference — Liability for damages in Civil Court.*

When the Collector wrongly refuses to make a reference under S. 18 of the Land Acquisition Regulation, the general liability will arise of the person taking the land for damages in the Civil Court. (*Dalal, C J and Abdul Qayoom, J.*) WAZIR ASOO RAM *v.* HOME AND JUDICIAL MINISTER. **37 P.L R J. & K. 8.**

JAMMU AND KASHMIR LAND REVENUE REGULATION, Ss 126 and 161—*Partition by Revenue Officer—Civil suit for possession of share allotted, after expiry of three years—If competent*

There is no doubt that a summary remedy is provided in S. 126 of the Land Revenue Regulation and it is open to one after the preparation of the instrument of partition by a revenue officer to apply to that officer within a period of three years from the date of the instrument of the partition to be put in possession of the share allotted to him on partition but that does not mean that the remedy of such a person is lost after the lapse of the period of three years or that the jurisdiction of the Civil Court has been excluded. There is nothing in S. 161 of the Land Revenue Regulation or of Ss. 84 and 85 of the Tenancy Regulation excluding the jurisdiction of the Civil Court in such a matter. (*B. R. Sawhney. J.*) MANGA *v.* MOULOO. **37 P.L.R.J. & K. 13.**

———**S. 161**—Partition by Revenue Officer—Civil suit for possession of share allotted, after expiry of three years—If competent. *See* JAMMU AND KASHMIR LAND REVENUE REGULATION, S. 126. **37 P.L.R.J. & K. 13.**

JAMMU AND KASHMIR LIMITATION REGULATION, Arts. 152, 153 and 154, Expl.—*Interpretation.*

Under the Expl. to Arts. 152, 153 and 154 of the Limitation Regulation, the maximum period is double the period mentioned in the second column of the Schedule opposite Arts 153 and 154. If double the period of limitation is about to expire and the High Court is still in another province, the appellant must either go to that province and file the appeal there or he must present it to the Court of the District Judge in his own province as an appeal intended for the High Court. (*Dalal, C.J. and Sawhney, J.*) FAKIR CHAND *v.* NANAK CHAND. **37 P L.R.J. & K. 35.**

———**Art. 180 (5)**—*Step-in-aid—Application to obtain money deposited in Court*

An application by the decree holder to obtain from Court money deposited in Court by the judgment-debtor is not an application in aid of execution. (*Dalal, C.J. and Sawhney, J.*) RAM LAL *v.* AHMAD JOO. **37 P. L.R J. & K. 110.**

JAMMU AND KASHMIR MUNICIPAL REGULATION, Ss. 34 and 38—*Legitimate purpose—Acquisition of land for building of shops.*

The building of shops by the municipality in connection with a large scheme of improvement is a legitimate object for which the Municipality may under Ss. 34 and 38 of the Municipal Regulation move the Government for compulsory acquisition of land. The acquisition of land for the building of shops is not an acquisition separate from the acquisition of land for the construction of a new thoroughfare which is needed for the benefit of the public. It is the ordinary method of town improvement that when a road is widened and the locality is improved, a larger area than that required is compulsorily acquired so that on the balance of the land not required for the road, the municipality can make profit by sale of that land and pay the cost of widening the road. (*Dalal, C J. and Abdul Qayoom, J.*) WAZIR ASOO RAM *v.* HOME AND JUDICIAL MINISTER. **37 P.L R J. & K 8.**

JAMMU AND KASHMIR TENANCY REGULATION, S. 84.

JAMMU AND KASHMIR REGISTRATION REGULATION, S 17, Exp.—*Agreement for sale of immovable property—Registration, if compulsory.*

By reason of the Explanation added to S. 17 of the Registration Regulation, there is no necessity to register an agreement for sale of immovable property even if consideration has passed under the agreement unless it is proved by internal evidence of the document that the parties agreed that the agreement should transfer title to property. (*Dalal. C.J. and Abdul Qayoom, J.*) ABDUL GHANI *v.* ALI JOO. **37 P L.R J. & K 5**

———**S. 32**—*Presentation of document—Validity—Executant omitting to object—Estoppel.*

A Civil Court deciding a suit for compulsory registration must adjudicate upon the proper presentation of the document for registration. Where there is no valid presentation of a sale deed for registration as provided in S. 32 of the Registration Regulation, the registration and the deed are void. It cannot be contended that the executant and his representatives in interest are estopped from questioning the validity of the presentation of the deed because they were present before the Sub-Registrar, and raised no objection. The express provisions of the Registration Regulation not having been complied with, there can be no estoppel. (*B, R. Sawhney and Abdul Qayoom, JJ.*) YAQUB KHAN *v.* MAHOMED HUSSAIN. **37 P.L R.J. & K. 20.**

———**S. 47**—*Vendor losing title between date of execution and registration—Title of vendee.*

Although under S. 47 of the Registration Regulation, the registration of a deed makes it effective from the date of its execution, the title does not pass until registration has been effected. Accordingly, where the vendor loses his title to the property between the date of the execution and the date of the final registration, no title passes by virtue of the sale-deed. (*Dalal, C.J. and Sahwney, J.*) DAULAT RAM ISHAR DAS *v.* JAI CHAND. **37 P.L.R J. & K. 25.**

———**S. 77**—*Proceeding under—Scope of enquiry—Question of fraud, if relevant.*

Under S. 77 of the Registration Regulation, all that the Court has to see is whether the document had been executed and whether the requirements of the law as to presentation for registration to the proper office and the manner generally prescribed in the Registration Regulation had been complied with by the person presenting the document for registration. The question of fraud is not one which may be considered in these proceedings. (*Dalal, C.J. and B. R. Sawhney, J.*) HARI RAM *v.* ISMAIL. **37 P L.R J. & K. 18.**

JAMMU AND KASHMIR TENANCY REGULATION, Ss. 84 and 85—Partition by Revenue Officer — Civil suit for possession of share allotted, after expiry of three years — If competent. *See* JAMMU AND

JATI VAISHNAVAS.

KASHMIR LAND REVENUE REGULATION, SS. 126 AND 161. **37 P.L.R.J. & K. 13.**

JATI VAISHNAVAS. *See* HINDU LAW—APPLICABILITY.

JATS.

See (1) CUSTOM—PUNJAB.
(2) HINDU LAW—APPLICABILITY.

JEWS—*Divorce—Jewish woman divorcing her husband—Question of alimony—Law applicable.*

The question as to whether a Jewish woman who has divorced her husband is entitled to alimony depends upon the personal law of the Jews which is to be ascertained as a question of fact upon evidence adduced in that behalf. (*Page, C.J. and Mya Bu, J.*) EZEKIEL M. SAUL *v.* RAMAH SAUL. **156 I.C. 795 (1)=8 R R. 52=A.I.R. 1935 Rang. 190.**

JEWISH LAW—*Bene Israel in Rangoon—If eligible for appointment of trustees of the Musmeah Yeshua Synagogue.*

The Bene Israel in Rangoon do not in fact differ from other Jews in Rangoon in their observance of the Jewish law with regard to divorce and halissa. Hence they are eligible for appointment as trustees of the Musmeah Yeshua Synagogue and are entitled to vote at elections of trustees. But this does not mean that the name of any Bene Israel should be included in the voter's list who is known to be of the Jewish faith and openly refuses to obey the personal law of the Jews. (*Leach, J.*) EZEKIEL *v.* JOSEPH. **157 I.C. 772=8 R.R. 103 =A.I.R. 1935 Rang. 221.**

———*Jews in Calcutta—Law of succession.*

In order to show that the English Law on its introduction by the Charter of 1726 was inapplicable to a particular community, it is not enough to prove the community had prior to that date been governed by a law differing from English Law. What must be shown is that the English Law is based on or presupposed social or political conditions peculiar to the country of its origin.

Held, that Part V of the Succession Act applies to the members of the Jewish community in Calcutta. (*Panckridge, J.*) SARAH EZRA, *In the goods of.* **58 Cal 761=I.R. 1931 Cal. 827=134 I.C. 443=A.I.R. 1931 Cal 560.**

———*Marriage—Betrothal void—Bill of divorcement—Necessity for.*

Where a betrothal has been found to be void, the High Court has jurisdiction to grant a formal decree for divorce. It would confer upon the wife conclusive evidence that the alleged betrothal was void. In such a case, the betrothal being void, it is not necessary to have a bill of divorcement. 28 Bom.L.R. 328, Foll. (*Beaumont, C.J. and Mirza, J.*) DAVID SASSOON *v.* NAJIA NOORI. **55 Bom. 803=I.R. 1931 Bom. 486=134 I. C. 550=33 Bom.L.R. 725=A.I.R. 1931 Bom. 402.**

———*Marriage—Betrothal subject to conditions—Conditions not fulfilled—Effect.*

Under the Jewish Law a Jewish marriage consists of two parts, *viz.*, the betrothal ceremony known as the "Kaseph Kiddushim" and a further ceremony known as "Chuppa", *i.e.*, a ceremony of nuptials. A betrothal may be subject to conditions and if those conditions are not fulfilled, the betrothal is void. Thus where it was proved that the betrothal ceremony was entered into by the plaintiff subject to the conditions that the defendant was about 24 years of age, that he was high-born and earned Rs. 500 a month and these conditions were not fulfilled, *held*, the betrothal was void. (*Beaumont, C.J. and Mirza, J.*) DAVID SASSOON *v.* NAJIA NOORI.

JUDGE AND JURY.

55 Bom. 803=I.R. 1931 Bom. 486=134 I C. 550=33 Bom.L R. 725=A.I.R. 1931 Bom. 402.

———*Marriage—Marriage of man to widow of his deceased brother.*

The marriage of a man to the widow of his deceased brother who has died childless is known as yibboom. The procedure which follows the refusal of the surviving brother to marry his sister-in law is known as halissa, and when it is carried out it has the effect of setting the widow free to marry again according to her own choice. The modern Jew refuses to marry his brother's widow and openly disobeys the Mosaic law in this respect. A Jew whose brother has died and left a childless widow now prefers to submit to the procedure implied by the word halissa. The consequence is that the odium which formerly attached to the refusal of the surviving brother to marry his sister in law no longer exists, and the halissa ceremony has been so modified that it is now carried out in a manner which entails no unpleasant consequences to the unwilling brother-in law. (*Leach, J.*) EZEKIEL *v.* JOSEPH. **157 I.C. 772=8 R.R. 103 =A.I.R. 1935 Rang. 221.**

———*Marriage—View of.*

Under English law, marriage is looked upon as a contract. The Roman Catholic Church considers marriage as a sacrament and as such indissoluble. The view of the Jewish Law stands somewhere between that of English Law and that of the Roman Catholic Church. The Jewish Law regards marriage as not only a civil contract but as a relation between two persons involving very sacred duties. (*Beaumont, C.J. and Mirza, J.*) DAVID SASSOON *v.* NAJIA NOORI **55 Bom 803=I. R. 1931 Bom. 486=134 I.C. 550=33 Bom.L.R. 725 =A I R. 1931 Bom. 402.**

JIBKA TENURE. *See* LAND TENURE.

JODI—Agraharamdars—Liability for jodi dues——Apportionment. *See* LAND TENURE—AGRAHARAM. **A.I.R. 1931 Mad. 51.**

JOINDER.

———Of causes of action. *See* C. P. CODE, O. 1 AND O. 2, R. 3.
———Of charges. *See* CR. P. CODE, SS. 238-240.
———Of claims. *See* PRACTICE.
———Of parties. *See* C. P. CODE, O. 1, RR. 1, 2, 3 AND 10.

JOINT CONTRACT. *See* CONTRACT ACT, SS. 43 AND 45.

JOINT DECREE.

See (1) APPEAL—COMPETENCY.
(2) CONTRACT ACT, S. 44.

JOINT PROMISORS. *See* CONTRACT ACT, S. 43.

JOINT POSSESSION.

See (1) CO SHARER.
(2) CR. P. CODE, S. 145.

JOINT TENANTS.

See (1) CONTRACT ACT, S. 45.
(2) HINDU LAW.
(3) LANDLORD AND TENANT.

JOINT TORTFEASORS. *See* TORT.

JOINT TRIAL. *See* CR. P. CODE, S. 239.

JOINT TRUSTEES. *See* TRUST—CO-TRUSTEES.

JOINT VENDEES. *See* CONTRACT ACT, S. 45.

JOTE.

See (1) BENGAL TENANCY ACT, S. 49.
(2) LAND TENURE.

JUDGE.

See (1) CR. P. CODE, S. 19.
(2) GOVERNMENT OF INDIA ACT, S. 107.

JUDGE AND JURY. *See* PRACTICE—JUDGE AND JURY.

JUDGMENT.

See (1) C.P. CODE, O. 20 AND O. 41.
(2) CR. P. CODE, SS. 367 AND 537 AND R. 31.
(3) EVIDENCE ACT, S. 35.
(4) LETTERS PATENT (BOMBAY), CL. 15.
" (CALCUTTA), CL. 15.
" (MADRAS), CL. 15.
" (RANGOON), CL. 13.
(5) PRACTICE.

JUDGMENT IN REM. *See* EVIDENCE ACT, S. 41.

JUDICIAL ACTS. *See* EVIDENCE ACT, S. 114.

JUDICIAL COMMITTEE.

See (1) C. P. CODE, SS. 109 AND 110.
(2) PRACTICE.
(3) PRIVY COUNCIL.

JUDICIAL COMMITTEE RULES (1925), Rr. 34 and 36—*Dismissal for non-prosecution—Order of—Not a 'final order or decree' within Art.* 182 (2) *of the Limitation Act.*

Not only under R. 34 but also under R. 36 of the Judicial Committee Rules, 1925, the dismissal for non-prosecution of an appeal to the Privy Council even *after* admission and appearance of the respondents does not constitute a final order or decree of the appellate Court within the meaning of Art. 182 (2) of the Limitation Act. So the starting point of limitation for an application for execution of the decree is the date of the dismissal of the appeal by the High Court and not the date of dismissal by the Privy Council for non prosecution. 36 All. 284; 36 All. 250 ; 49 Cal. 203, Rel. on; 2 P.L T. 28, Not Foll. (*Macpherson and Dhavle, JJ.*) HIRDAY NARAYAN SINGH *v.* MAHESHWARI PRASAD SINGH. **11 Pat. 477=I.R. 1932 Pat. 217=139 I.C. 198=A.I.R. 1932 Pat. 251.**

JUDICIAL OFFICERS' PROTECTION ACT (XVIII OF 1850)—*Applicability—Suit for damages for breach of contract.*

The Act does not probably contemplate the protection of a Judge from a suit for damages for breach of contract, but the language of the Act is sufficiently wide to grant protection even against a suit of that nature. (*Kendall, Young and King, JJ.*) JANGE LAL. *In re.* **52 All. 844=I.R. 1931 All. 419=131 I.C. 675=1931 A L.J. 41=A.I.R 1931 All. 189 (F.B).**

———*Scope.*

The Act has no bearing whatsoever on the case of a contract into which a Judge may enter according to the general law of the land. Enforceability of security bond executed in the name of the Judge considered. (*Hasan, C. J., Raza and Bisheshwar Nath, JJ.*) BOARD OF REVENUE *v.* LALTA BAKHSH SINGH. **6 Luck. 601=I.R. 1931 Oudh 241=132 I.C. 225=14 O.L.J. 224=8 O.W.N. 116=A.I.R. 1931 Oudh 99.**

———**S. 1**—*Scope.*

If the act complained of against a judicial officer is in its nature judicial, and within his jurisdiction, he is not liable to be sued, even though the act was done maliciously. If, on the other hand, he acts without jurisdiction, his liability would depend, not on whether the act was malicious and without reasonable and probable cause, out on whether it was within the protection of Act XVIII of 1850. 12 All. 115, Ref. (*Kendall, J.*) SHEO BARAN SINGH *v.* LACHMI NARAIN. **147 I.C. 830=6 R.A. 570=A.I.R. 1933 All 749.**

JUDICIAL SEPARATION.

See (1) DIVORCE.
(2) DIVORCE ACT, S. 22

JURISDICTION—Absence of.

JURISDICTION.

See also (1) C. P. CODE, SS. 9, 20, 21, 100 AND 115.
(2) CONFLICT OF LAWS.
(3) CR. P. CODE, SS 177, 179, 181, 439 AND 476.
(4) CRIMINAL TRIAL.
(5) INTERNATIONAL LAW — JURISDICTION.

Absence of.
Accounts.
Acquiescence.
Appeal.
Caste.
Cause of action.
C I.F. contract.
Civil Court.
Civil and Criminal Courts.
Civil and Revenue Courts.
Conflict of laws
Consent of parties.
Contempt.
Court seized of case.
Criminal jurisdiction.
Determination.
Divorce.
Duty of Court.
Estoppel.
Execution.
Foreign Court.
Foreign state.
Forum.
High Court.
Injunction.
Insolvency.
Insolvency Court.
Judgment.
Life Insurance. *See* FORUM.
Lunacy.
Meaning of.
Native State Court. *See* FOREIGN COURT.
Objection to.
Pecuniary jurisdiction.
Privy Council.
Restitution of conjugal rights.
Revenue Court.
Revision.
Small Cause Court.
Special tribunal.
Statutory prohibition.
Stay of suit.
Submission to.
Territorial jurisdiction.
Test of.
Transfer.
Under trial prisoner.
Valuation for.
Waiver.
Writ of prohibition
Miscellaneous.

Absence of.

———*Absence of—Assumption of jurisdiction—Effect on proceedings.*

Where a Court assumes jurisdiction which it has not, its proceedings are void, because they are without jurisdiction. (*Middleton, J.C.*) MAHOMED *v.* MT. WAHAB JAN. **159 I.C. 819=37 Cr.L.J. 197=1935 Cr.C. 1163=A.I.R. 1935 Pesh. 174.**

———*Absence of—Order in case not pending—Validity.*

JURISDICTION—Absence of.

An order passed in no pending case is without jurisdiction and cannot be taken advantage of by a party specially when it is passed without notice to the other side. (*Baguley, J.*) MAUNG LAT *v.* MAUNG KYAW THA. **147 I.C. 130=6 R.R. 167=A.I.R. 1933 Rang. 8.**

———*Absence of—Privy Council appeal—Compromise during pendency—Power of High Court to pass decree.*

Where after the grant of leave to appeal to the Privy Council, the parties compromised the suit and applied to the High Court to pass a decree in terms of the compromise.

Held, that the High Court had no power to do so, as it would supersede the first decree. (*Murphy and Nanavati, JJ.*) GURURAO *v.* RAMACHANDRA. **57 Bom. 369=6 I.R. (Bom) 74=145 I.C. 286=35 Bom.L.R. 413=A.I.R. 1933 Bom. 244.**

———*Absence of—Waiver—Effect.*

It is a well-settled rule that proceedings which are wholly without jurisdiction can have no legal effect and that as a general rule even a waiver on the part of any of the parties cannot cure the defect of jurisdiction. Execution sale held without jurisdiction set aside. (*Wazir Hasan, C.J. and Bisheshwar Nath, J.*) HARI SARAN DAS *v.* PYARE LAL. **I.R. 1931 Oudh 394=134 I.C. 602=8 O.W.N. 927=A.I.R. 1931 Oudh 398.**

Accounts.

———*Accounts—Suit for—Basis for jurisdiction.*

The pecuniary jurisdiction of the Civil Court is ordinarily speaking governed by the value stated by the plaintiff in his plaint and if a suit for partnership accounts having regard to the valuation in the plaint is within the jurisdiction, such jurisdiction is not ousted by the Court ultimately, finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff. (*Courtney-Terrell, C. J., Kulwant Sahay and James, JJ.*) MT. UTREHAN KUER *v.* MT. KABUTAI. **6 R.P. 495=148 I.C. 579=13 Pat. 344=15 Pat.L.T. 131=A.I.R. 1934 Pat. 204 (S.B.).**

Acquiescence.

See also CONSENT OF PARTIES, *infra*.

———Acquiescence—Omission to raise objection in written statement—No right to plead subsequently that the suit is not maintainable. *See* TRANSFER OF PROPERTY ACT, S. 53. **A.I.R. 1935 Rang. 489.**

Appeal.

———*Appeal—Forum—Suit for redemption filed in Munsiff's Court—Appeal remanded for ascertaining improvements amounting to Rs.* 5,000—*Appeal to District Judge or High Court.*

In a redemption suit the value of the suit for purposes of jurisdiction of the trial Court had been fixed at Rs. 99. The suit was dismissed but on appeal, the appellate Court remanded the case to the trial Court for a finding regarding the value of improvements made by the mortgagee. On remand the lower Court found the value of improvements to be Rs. 5,000. An objection was then taken that the value of the improvements being Rs. 5,000, the appeal lay to the High Court and not to the District Judge.

Held, that for purposes of jurisdiction in the trial Court the value of the suit was Rs. 99 and on the dismissal of the suit it remained the same for purposes of the appeal to the District Judge. Hence the appeal had been properly valued and was cognizable by him. The fact that the value of the improvements was Rs. 5,000, did not oust the jurisdiction of the District Judge to entertain the appeal and to decree the amount in favour of the mortgagee as a condition precedent to the redemption of the mortgage, if he ultimately found that the mortgagor was bound to pay for the improvements. (*Jai Lal, J.*) MAST RAM *v.* MAHOMED KHALIL. **135 I.C. 49=I R. 1932 Lah. 33=32 P.L.R. 102=A.I.R. 1931 Lah. 584.**

[R. 15 L. 512 (523) (F.B.).]

———*Appeal—Forum—Valuation.*

The general rule is that the value fixed by the plaintiff in his plaint must *prima facie* be the basis for determining the forum of the suit or appeal arising out of it. But the position is different if it is found that the plaintiff has deliberately under-valued or over-valued his claim with the object of having the suit tried or the appeal heard by a Court which would not have jurisdiction to try the suit or hear the appeal in case the claim is properly valued. The position is also the same where the plaintiff has acted recklessly in fixing the valuation of the suit. (*Bisheshwar Nath and Pullan, JJ.*) PITAM SINGH *v.* BISHUN NARAIN. **6 Luck. 426=I.R. 1931 Oudh 147=130 I.C. 339=7 O.W.N. 1188=A.I.R. 1931 Oudh 58.**

[R. 15 Lah. 151 (174) (F.B.).]

Caste.

———Caste—Caste question—Civil Court. *See* C. P. CODE, S. 9.

———*Caste—Expulsion from—Procedure to be followed—Court's jurisdiction.*

The general principles applicable to the expulsion of members from a club also govern cases of expulsion of persons from caste; the expulsion must be in accordance with the rules of natural justice, which means primarily that the accused must have a fair hearing and that the expulsion must be in accordance with the rules. All that the Court can do is to see that the rules are obeyed as they stand. Failure to follow the rules will make the acts of the caste liable to be questioned in Courts of Law. (*Beaumont, C.J. and Rangnekar, J.*) RATANSEY VIRJI *v.* MEGHJI HIRJI. **36 Bom.L.R. 901=153 I.C. 283=7 R.B. 224=A.I.R. 1934 Bom. 431.**

[F. 37 Bom.L.R. 603 (620).]

Cause of action.

———Cause of action—Contract—Sale of goods—Payment for goods at buyer's place by Hundies—Seller discounting Hundies at his place—Suit for damages by buyer at his place for short delivery and inferiority of goods—Maintainability. *See* C. P. CODE, S. 20 (*c*). **68 M.L.J. 504 (F.B.).**

———Cause of action—Meaning. *See* C. P. CODE, S. 20 (*c*). **58 Cal. 539=A.I.R. 1931 Cal. 659.**

C.I.F. contract.

———*C. I. F. contract—Place of delivery of goods.*

In the case of a C. I. F. contract the place where the documents are to be tendered or symbolical possession of the goods sold is to be given, or price for the goods is to be paid is not necessarily the only place which would decide the question of jurisdiction. The place where the goods are to be delivered does also help to decide the question of jurisdiction. (*Mehta, A.J.C.*) E. A. ZIPPEL *v.* K. D. KAPUR & CO. **26 S.L.R. 167=I.R. 1932 Sind 99=139 I.C. 114=A.I.R. 1932 Sind 9.**

Civil Court.

See also CIVIL AND REVENUE COURTS, *infra*.

———Civil Court—Acts of Municipal Committee—*Ultra vires* acts—Interference. *See* PUNJAB MUNICIPAL ACT, S. 188. **152 I.C. 850=A.I.R. 1935 Lah. 196.**

———Civil Court—Assessment or taxation by a Cantonment Board. *See* CANTONMENTS ACT (1924), SS. 84 AND 88. **A.I.R. 1933 All. 163.**

JURISDICTION—Civil Court.

———*Civil Court—Concurrent remedy with Income-tax Officers.*

It is competent for a Civil Court to make a declaration that the registration of the partnership instrument was null and void, and this course may be taken by the Court notwithstanding any concurrent remedy in that behalf under the Income-tax Act, that may be open to the plaintiff and therefore notwithstanding the fact that the plaintiff applied as assessee to the Commissioner of Income tax for cancellation of the registration under S. 33 and that the application was rejected, the Court is entitled to make the declaration. (*Page, C.J. and Das, J.*) NACHIAPPA CHETTYAR *v.* SECRETARY OF STATE. **11 Rang. 380=149 I.C. 845=6 R.R. 327=A.I.R. 1933 Rang. 229.**

———*Civil Court—Deceased being in possession of hereditary lease—Suit by heir and donee for possession.*

Where the deceased is shown not to have had under-proprietary rights but only a hereditary lease the Civil Courts have no jurisdiction to entertain a suit by the heir who is also the donee for possession of land. (*Bisheshwar Nath and Nanavutty, JJ.*) BISHU NATH SARAN SINGH *v.* JUGRAJ KUAR. **8 Luck. 676=6 I. R. (Oudh) 23=144 I.C. 967=10 O.W.N. 143=17 R. D. 147=14 L.R. 130 (Rev.)=A.I.R. 1933 Oudh 191.**

———*Civil Court—Ejectment from building land.*

A suit for ejectment from a plot of land leased for building purposes is cognizable by the Civil and not by the Revenue Court. (*Sulaiman, C.J. and Mukerji, J.*) TIKA RAM *v.* SRI THAKUR DAOJI MAHARAJ. **152 I.C. 189=7 R.A. 286=4 A.W.R. 1105=1934 A.L.J. 674=18 R.D. 240=15 L.R. 260 (Rev.)=A.I.R. 1934 All. 787.**

———*Civil Court—Modification of power by legislative enactment—Strict proof.*

The Civil Courts are *prima facie* entitled to determine all civil matters; legislation that ousts their jurisdiction must be very carefully examined, and unless the Courts are satisfied that the conditions upon which they are ousted are fulfilled to their own satisfaction, they will not hold that they are debarred from inquiring into any matter before them. They will not take the mere *ipse dixit* of the authority which ousts them, unless the law definitely states that they are bound to do so. (*Baguley, J.*) MAUNG BA LAT *v.* LIQUIDATOR, CEMMENDINE THATHAHITA CO-OPERATIVE SOCIETY, LTD. **11 Rang. 125=149 I.C. 120=6 R.R. 287=A.I.R. 1933 Rang. 124.**

———Civil Court—Municipal employee—Dismissal of—Cause of action—Right of suit—Special procedure laid down—Jurisdiction of Court—Extent of. *See* BOMBAY DISTRICT MUNICIPAL ACT (1901), SS. 46 (*c*) AND 184. **26 S.L.R. 435 and 469.**

———*Civil Court—Municipal tax*—Ultra vires *levy—Suit to contest—Maintainability—Bengal Municipal Act*, 1884, *S.* 261.

The question raised was whether on the facts stated it could be said that the entire area in respect of which licence fee was levied by the Municipality under S. 261, Bengal Municipal Act, was "a yard or depot for trade in jute" and whether the levy was *ultra vires*.

Held, that the question related to the basis of assessment and that the Civil Court had jurisdiction to entertain the suit. (*Guha, J.*) JESRAJ JAICHANDLAL BAID *v.* CHAIRMAN OF THE COMMISSIONERS OF NATORE. **58 Cal. 1356=I.R. 1932 Cal. 222=136 I.C. 542=A.I.R. 1932 Cal. 177.**

———*Civil Court—Plea of bar of jurisdiction of—Onus.*

Civil Courts must be taken *prima facie* to have jurisdiction to entertain and dispose of all suits of civil nature and the *onus* is upon those who allege that the Civil Courts have no jurisdiction in any particular instance to make out the ground on which it is contended the Court has no jurisdiction. (*Anantha-krishna Aiyar and Cornish, JJ.*) NARAYANASWAMI BAHADUR *v.* BODA THAMMAYYA. **1930 M.W.N. 945.**

———Civil Court—Prerogative act of Government—Suit in Civil Court—Maintainability. *See* MYSORE REGULATION (VII OF 1923). **13 Mys.L.J. 228.**

———*Civil Court—Private debutter estate—Suit to frame scheme—Maintainability.*

Where some of the heirs of the founder of a private debutter trust sued for the framing of a scheme and the other heirs did not join them though they had been served with notices.

Held, (1) that the Civil Court had jurisdiction to entertain the suit; (2) that the heirs who did not join the plaintiffs in the institution of the suit could be presumed not to have an objection to the prayer of the plaintiffs being granted. (*Mallik and Guha, JJ.*) RABINDRA NATH MANDAL *v.* CHANDI CHARAN MANDAL. **I.R. 1931 Cal. 864=134 I.C. 576=53 C.L. J. 621=A.I.R. 1932 Cal. 117.**

———*Civil Court—Purchaser of share of landlord's rent—Suit against tenant for rent—Forum.*

Where a purchaser of a share of the rent to which certain landlords were entitled sued the tenants for rent, the suit is cognizable by a Civil Court. 61 P.L.R. 1912, Foll. (*Addison, J.*) ISHAR *v.* DITTU. **12 Lah. 433=134 I.C. 1119=32 P.L.R. 924=I.R. 1932 Lah. 151=A.I.R. 1931 Lah. 623**

———*Civil Court—Relation of lender and borrower—Suit for money.*

Where the claim is for recovery of money lent by the plaintiff to the defendants, the suit is triable by Civil Courts. It is immaterial whether the money is paid by the plaintiff direct to the revenue authorities. The fact that the plaintiff is the landlord and the defendants are his tenants would make no difference. (*Jai Lal, J.*) GHELA RAM SINGH *v.* GUL SHER. **A.I.R. 1934 Lah. 165 (1).**

———*Civil Court—Resumption of inam land—Tahsildar granting patta to person in possession—Civil Court cannot question validity of grant.*

Where, on the resumption of an inam land, the Tahsildar finds that a particular person is in possession and grants him the patta in respect of that land the action of the Tahsildar is within the scope of his authority and a Civil Court cannot question the validity of the grant. 26 Mad. 268 and 30 Mad. 270, Dist. (*Madhavan Nair, J.*) KRISHNASWAMI PILLAI *v.* EKAMBARESWARAR. **A.I.R. 1935 Mad. 725.**

———*Civil Court—Special tribunal set up by statute—If has exclusive jurisdiction.*

When the legislature has set up a special tribunal for the purpose of determining certain questions as to rights which are the creatures of an Act of the Legislature, then the jurisdistion of that tribunal is exclusive, and the Civil Court cannot take cognisance of such matters. (*Nasim Ali, J.*) MAHEDAR RAHAMAN MIA *v.* KANTI CHANDRA BASU. **61 Cal. 980=154 I C. 82=7 R.C. 428=59 C.L.J. 523=38 C.W.N. 838=A.I.R. 1935 Cal. 10.**

———*Civil Court—Statute giving right and prescribing remedy—Suit in Civil Court—Maintainability—Act affirming right existing independently and prescribing peculiar remedy—Remedy by civil suit—Availability.*

If a right is given to an individual by a statute, and the mode of obtaining that right is also provided in the

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statute itself, a suit to enforce that right is not maintainable in the Civil Court. When a right is created by a statute, the only remedy available for the infringement of that right is the one provided in the statute itself. Even assuming that the right existed independently of the statute and that the statute only affirmed it and provided a peculiar form of remedy, that particular remedy is exclusive, and the jurisdiction of the Civil Court is barred by necessary implication. (*Macpherson and Khaja Mahomed Noor, JJ.*) SECRETARY OF STATE *v.* KAMESHWAR SINGH BAHADUR. **15 Pat. 246=160 I.C. 915=8 R.P. 387=16 Pat.L.T. 877=A.I.R. 1936 Pat. 87.**

———*Civil Court—Suit for declaration that certain land is not partible—Question of title involved.*

A suit for a declaration to the effect that certain land was excluded from the ordinary *shamilat* and could not be partitioned involved a question of title and the Civil Court has jurisdiction to entertain the same. (*Harrison and Dalip Singh, JJ.*) MOHAMMADA *v.* JHANDA. **I.R. 1931 Lah. 861=133 I.C. 893=32 P.L.R. 545=A.I.R. 1931 Lah. 654.**

———*Civil Court—Suit to recover revenue—Dues not falling under Punjab Tenancy Act*, 1887—*Maintainability.*

Where certain Brahmins who were in the position of jagirdars sued certain Rajputs who were in proprietary possession of lands to recover certain revenue which had been reserved to them and it appeared that no portion of the produce represented any priestly dues.

Held, that the dues were not covered by the provisions of the Punjab Tenancy Act and that the suit was consequently not cognizable by the Civil Court. (*Shadi Lal, C.J. and Broadway, J.*) VIDYA DHAR *v.* DILA RAM. **I.R. 1931 Lah. 873=32 P.L.R. 477=134 I.C. 105=A.I.R. 1931 Lah. 652.**

———*Civil Court—Sweepstake—Suit to establish right under.*

The question as to who among two persons is the true owner of a winning number in sweepstake is a matter for the Civil Court and a Criminal Court cannot be used for that purpose. (*Lort Williams and S.K. Ghose, JJ.*) SHER SINGH *v.* JITENDRANATH SEN. **59 Cal. 275=I.R 1932 Cal. 5=36 C.W.N. 16=134 I.C. 1045=54 C.L.J. 253=33 Cr.L.J. 3=1931 Cr.C. 759=A.I.R. 1931 Cal. 607.**

———*Civil Court*—Ultra vires *action of Municipal Committee.*

A Civil Court is entitled to adjudicate upon the question of *ultra vires* or *intra vires* of an action of a Municipal Committee and give proper relief to the aggrieved party. Validity of procedure under S. 81 of the Punjab Municipal Act gone into. 11 Lah. 276, Rel. on. (*Jai Lal, J.*) ABDULLAH *v.* THE MUNICIPAL COMMITTEE, DELHI. **I.R. 1931 Lah. 758=133 I.C. 278=32 P.L.R. 172=A.I.R. 1931 Lah. 315 (2).**

Civil and Criminal Courts.

———Civil and Criminal Courts—Power of Criminal Court to adjudicate upon the rights of landlords and tenants on orders of Civil Court. *See* B. T. ACT, S. 26 F, CL. 6 (*iii*). **61 C.L.J. 586.**

Civil and Revenue Courts.

See also CIVIL COURT, *supra* AND REVENUE COURT, *infra.*

———*Civil and Revenue Courts—Adverse possession—Decision of question as to.*

Only a Civil Court can decide finally as to whether adverse possession exists or not ; and when the question arises before the Revenue Court, it must adopt the procedure of S. 98, Tenancy Act, and refer the parties to a civil suit and not decide the point itself. Neglect to do so is a failure of jurisdiction justifying interference in revision. (*Irving, F. C.*) SADHU RAM *v.* MEHR SHAH. **13 Lah.L.T. 43.**

JURISDICTION—Civil and Revenue Courts.

———Civil and Revenue Courts—Building lease by one of several co-sharers in respect of agricultural land—Remedy of others—Suit for joint possession and demolition of buildings—Maintainability in Civil Court. *See* CO-SHARERS—JOINT POSSESSION. **1935 R.D. 410=A.I.R. 1935 All. 967.**

———*Civil and Revenue Courts—Case falling under both in part—Forum.*

Where a suit is partly cognizable by the Civil Court and partly by the Revenue Court, the Civil Court must decide the whole case. 6 O.W.N. 1095, Appl. (*Keane, S.M.*) DURGA UPADHIA *v.* RAJESHWARI PRASAD. **15 R.D. 482=12 L.R. 229 (Rev.).**

———*Civil and Revenue Courts—Claim falling under both—Procedure.*

Where one of the claims is triable by a Civil Court while the other is triable by a Revenue Court, the whole claim does not become triable by such a Court. The proper course in such a case is to have the plaint amended so as to bring the claim within the jurisdiction of the Civil or Revenue Court. (*Bhide, J.*) RUKNUDDAULLAH *v.* MAHOMED UMAR DARAZ ALI KHAN. **I.R. 1932 Lah. 533=138 I.C. 755=33 P.L.R. 766=A.I.R. 1932 Lah. 595.**

———*Civil and Revenue Courts—Claim that land should be included in particular village—Kumaun.*

A suit claiming that a particular land should be included within the boundaries of a particular village in Kumaun falls within the purview of the Nayabad Rules in Kumaun and is therefore triable only in a Revenue Court, though ordinarily a suit of that nature would ordinarily fall within the jurisdiction of the Civil Courts. (*Drake Brockman J.M.*) GOPAL DAS *v.* KEDAR SINGH. **18 R.D. 406 (2)=15 L.R. 509 (Rev.).**

———*Civil and Revenue Courts—Conflict of jurisdiction—Interpretation of Act to avoid*

Although the decision of a Civil Court as to title or possession is always binding on the Revenue Court, a conflict of jurisdiction between the two Courts should always be avoided. (*Mukerji and Nag, JJ.*) SACHINDRA KUKAR ROY *v.* NABENDRA KISHORE ROY. **149 I.C. 712=6 R.C. 619=57 C.L.J. 569=A.I.R. 1934 Cal 155.**

———*Civil and Revenue Courts—Decision by Civil Court—Power to Revenue Court to reopen.*

It is not permissible for Revenue Courts to go behind the decision of Civil Courts and reopen matters already decided by competent judicial authority. (*Irving, F.C.*) SAPARAS *v.* MT. AMIRAN. **13 Lah.L.T. 40.**

———Civil and Revenue Courts—Decree of Civil Court—Revenue officer's duty to recognise and give effect to *See* MUTATION—DECREE OF CIVIL COURT. **13 Lah. L.T. 53.**

———*Civil and Revenue Courts—Decree for cultivatory possession.*

Although a Civil Court might give proprietary possession to a party, it cannot grant cultivatory possession. (*Oppenheim, S.M. and Drake Brockman, J.M.*) DWARIKA SINGH *v.* SAIDA BIBI. **18 R.D. 516=15 L.R. 652 (Rev.).**

———*Civil and Revenue Courts—Lease—Plaintiff not party to—No relationship of landlord and tenant—Suit for possession—Civil Court—Jurisdiction of.*

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Where the plaintiff is no party to the lease and the lease is ineffectual against him, no relationship of landlord and tenant comes into existence between him and defendants as to make it necessary for the plaintiff to eject the defendants through the Revenue Courts. The position of the defendants as against the plaintiff is merely that of trespassers, and the relief for possession can be granted by the Civil Court. (Case law discussed.) (*Srivastava and Smith, JJ.*) RAM RUP *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **9 Luck. 365=6 R.O. 329=147 I.C. 910=11 O.W.N. 193=18 R.D. 97=A.I.R. 1934 Oudh 55.**

———*Civil and Revenue Courts—Matter within the exclusive cognizance of revenue Court—Order—Suit to set aside—Maintainability.*

When a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by the Court as between the parties, no subsequent suit will lie in the Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. 6 O.W.N. 1214, Foll. (*Raza and Bisheshwar Nath, JJ.*) JAGESHWAR SINGH *v.* RAMESHAR BAKHSH SINGH. **I.R. 1932 Oudh 364=139 I.C. 498=16 R.D. 472=13 L.R. 303 (Rev.)=9 O.W.N. 610=A.I.R. 1932 Oudh 273.**

———*Civil and Revenue Courts—Objection regarding forum—Whether can be raised in appeal.*

Objection regarding jurisdiction referring to the nature of Court (Civil or Revenue) in which the suit should be brought, can be raised in appeal for the first time. A.I.R. 1931 All. 35 (F.B.) and A.I.R. 1924 P.C. 95 Rel. on. (*Pullan, J.*) ALI HUSAIN *v.* HARHANGA LOHAR. **I.R. 1931 All 829=134 I.C. 253=15 R.D. 623=A.I.R. 1931 All. 406.**

———*Civil and Revenue Courts—Part of claim cognizable by Civil Courts.*

Civil Courts have jurisdiction to entertain suits which cannot be brought in Revenue Courts, although part of the claim is of a nature cognizable exclusively by the Revenue Courts. (*Dhavle and James, JJ.*) PADMA CHARAN NAIK *v.* ASHUTOSH CHANDRA MITRA. **13 Pat. 510=6 R.P. 701=150 I.C. 56=A.I.R. 1934 Pat. 439.**

———*Civil and Revenue Courts—Proprietor—Recognition by Civil Court—Payment of dues to him—Order by Revenue Court.*

When the Civil Court has recognized the status of a person as proprietor, the Revenue Court may order payment of dues to him even though there has been no mutation. (*Irving, F.C.*) MAHAIN *v.* SHAFI MAHOMED. **11 Lah L T. 95.**

———Civil and Revenue Courts—Question of proprietary title—Dispute between co-sharers as to possession of the land, *See* AGRA TENANCY ACT, S. 271, EXPL. II. **18 R D. 664.**

———*Civil and Revenue Courts—Question of status of tenant—Duty of Revenue Courts—Order referring parties to Civil Court—When to be made.*

It is the duty of a Revenue Court in cases where it can legally decide the question of status of a tenant to finally decide the matter. It is only in cases where under-proprietary rights are claimed with some *prima facie* justification, that a Revenue Court should refer the zemindar to the Civil Court, without coming to any definite decision, since only a Civil Court has jurisdiction in such cases. (*Knox, S. V. and Grant, J.M.*) MAHARANA OF DHOLPUR *v.* GOKUL PRASAD. **1935 R.D. 502=1935 O.W.N. 1187.**

———*Civil and Revenue Courts—Revenue Court passing decree without jurisdiction—Plaintiff dispossessed in execution—Suit for possession.*

Where the plaintiff is dispossessed of his lands in execution of a decree which has been passed by a Revenue Court without jurisdiction in that the decree was passed against the plaintiff's father who was dead at the time and the plaintiff, though brought on the record as his representative was not served with a notice or heard before the decree was passed, a suit brought by the plaintiff in a Civil Court for the possession of his land is competent. (*Tek Chand and Monroe, JJ.*) BUDHA *v.* MAULA BAKSH. **A.I.R. 1934 Lah. 841.**

———*Civil and Revenue Courts—Suit comprising tenancy holding and other property.*

Where a suit is brought in the Civil Court relating to a holding as well as other property, such Court has jurisdiction to grant relief in matters relating to tenancy. The suit so far as it relates to other property has to be brought in the Civil Court; and it would be obviously excessive to require the plaintiff to file two separate suits in respect of two different kinds of property belonging to the same person, when the matter has to be settled in one Court. (*Oppenheim, S.M. and Drake Brockman, J.M.*) BINDHYACHAL UPADHYA *v.* SAHDEO RAI. **18 R D. 436=15 L.R. 572 (Rev.).**

———*Civil and Revenue Courts—Suit for damages for wrongful cutting of crops—Dispossession of tenant pleaded—Forum.*

The plaintiff alleged that he was the sub-tenant of a particular plot and that the defendants have wrongfully cut away the crops sown by the plaintiff from his field on 6th October, 1928. He claimed damages for the losses of the crops. The defendants denied that the plaintiff was the sub-tenant and pleaded that the holding had been surrendered long before that date and that the crops had not been sown by the plaintiff. A question as to forum having been raised,

Held, that if the plaintiff was dispossessed from its holding as a result of the cutting away of the crops which had been sown by him, he might have instituted a suit in the Revenue Court for the recovery of possession of his holding and also for compensation for wrongful dispossession under S. 99 of the Agra Tenancy Act. If he could have claimed adequate relief through the Revenue Court, he was bound under S. 230 to have recourse to it. The mere fact that the relief claimed by him is not in form identical with what he might have claimed is immaterial. On the other hand if the plaintiff was really not dispossessed from his holding at all but his crops were cut and removed his remedy would lie in the Civil Court. (*Sulaiman, A.C.J. and Smith, J.*) KHUSHI RAM *v.* MANTA. **I.R. 1931 All. 699=133 I.C. 539=12 L.R. 331 (Rev.)=1931 A.L.J. 692=15 R.D. 564=A.I.R. 1931 All. 758.**

———*Civil and Revenue Courts — Suit filed in Civil Court in respect of grove—Letters Patent Appeal—New plea by plaintiff that suit was not cognizable by Civil Court—Practice.*

Where the plaintiffs filed a suit in the Civil Court on the allegation that the subject-matter of the suit was a grove in the possession of the defendants who were the Zamindars, it must be assumed against them that they treated the property as if it was not a land within the meaning of the Agra Tenancy Act. A plea by the plaintiffs raised for the first time that the suit was not cognizable by the Civil Court will not be entertained in the Letters Patent appeal. (*Sulaiman, C.J. and Bennet, J.*) ANRUDH RAI *v.* SANT PRASAD RAI. **57 All. 891=155 I.C 569=7 R.A. 947=1935 A.L.J. 838=1935 R.D. 182=1935 A.W.R. 474=A.I.R. 1935 All. 746 (2).**

JURISDICTION—Civil and Revenue Courts.

———*Civil and Revenue Courts—Suit in respect of village service Inam.*

Where the holder of a village service inam can get relief only by insisting on his title as office-holder and on the character of the lands attached to the office as emoluments, the principle of exclusive jurisdiction of the Civil Court will apply. (*Varadachariar, J.*) RAMALINGAM *v.* VEERABHADRADU. **59 Mad. 51 = 161 I.C. 447 = 8 R.M. 826 = 42 L.W. 558 = 1935 M.W.N. 1071 = A.I.R. 1935 Mad. 914 = 69 M.L.J. 890.**

———*Civil and Revenue Courts—Test as to question of jurisdiction.*

Where a Court has to decide whether Civil Court has jurisdiction to try the suit or not, the proper question to be considered is not whether the plaint could be filed in a Civil Court, but whether it was or was not a suit that could be decided by a Revenue Court. Where a suit could be decided by the Revenue Court, it should be decided by that Court and not by a Civil Court. (*Pullan, J.*) ALI HUSAIN *v.* HARHANGA LOHAR. **I.R. 1931 All. 829 = 134 I.C. 253 = 15 R.D. 623 = A.I.R. 1931 All. 406.**

Conflict of laws.

———Conflict of laws—Law of ship's flag. *See* SHIPPING. **25 S.L.R. 222 = A I R. 1931 Sind 124.**

Consent of parties.

———*Consent of parties.*

When a Judge has no jurisdiction over the subject-matter of a suit, parties cannot by their mutual consent convert it into a proper judicial process. 11 Bom. 153, held overruled; 9 All. 191; 11 Mad. 26 and A. I. R. 1923 Lah. 425, Rel. on. (*Walsh, J.*) VENKATARAMA CHETTY *v.* ANGATHAYAMMAL. **6 I R. (Mad.) 220 (2) = 146 I.C. 204 = 38 L.W. 896 = A.I.R. 1933 Mad. 471.**

———*Consent of parties or acquiescence*

No consent or acquiescence of parties can cure a lack of jurisdiction in law. If a Court has no authority in law to hear and decide an appeal, its decision on appeal is one made without jurisdiction. (*Dunkley, J.*) KO SIT YAR *v.* MA SHWE TAING. **152 I.C. 144 = 7 R. R. 145 = A.I.R. 1934 Rang. 312.**

———*Consent of parties or acquiescence—If can validate proceedings without jurisdiction.*

If a Court assumes to act where it has no jurisdiction, its proceedings are all utterly void and have no effect either by way of estoppel or otherwise; its judgment is not merely voidable but void; its proceedings are in fact a mere nullity. And, where no jurisdiction exists, no action or inaction upon the part of the parties can invest the Court with any authority so as to covert the proceedings before it into a proper judicial process. (Case-law referred.) Where after the passing of a preliminary and final decree on the Original Side of the High Court in respect of property outside its territorial jurisdiction a Full Bench of the High Court holds that the original side has no jurisdiction to entertain such mortgage suits, the Court has not from the beginning of this suit the slightest jurisdiction and accordingly, its orders passed in the suit are a mere nullity, not susceptible of being made valid by any consent or waiver of or by the parties. As a valid decree the preliminary decree does not exist; nor does the final decree, and no valid proceedings can be taken subsequently on the basis of these decrees. (Case-law referred.) (*Braund, J.*) BANK OF CHETTINAD *v.* S. P. K. V. R. FIRM. **160 I.C. 818 = 8 R R. 437 = A.I.R. 1935 Rang. 517.**

———*Consent of parties—Court having no inherent jurisdiction.*

JURISDICTION—Contempt.

When a Court has no inherent jurisdiction in any matter it cannot acquire it by consent or acquiescence of the parties nor can a partial payment made in discharge of an obligation imposed by an agreement incorporated in an order passed without jurisdiction, make the order executable. (*Subhedar, Staples and Niyogi, A.J.Cs.*) GANGARAM TEKCHAND FIRM *v.* DHARAMSI JETHO CO., BOMBAY. **159 I.C. 739 = 31 N.L R. 43 (Supp.) = 8 R N. 133 = 18 N L.J. 295 = A.I.R. 1935 Nag. 250 (F B.).**

———*Consent of parties—Court having no jurisdiction—Consent of defendant—Defect not cured.*

If the Court has no jurisdiction having regard to the subject-matter of the suit and the failure of the plaintiff to obtain the necessary leave of the Court, no consent express or implied on the part of the defendants can cure the defect. (*Panckridge, J.*) SEWDAYAL RAMJEEDAS *v.* OFFICIAL TRUSTEE OF BENGAL. **58 Cal. 768 = I.R. 1931 Cal. 820 = 134 I.C. 436 = A.I.R. 1931 Cal. 651.**

———*Consent of parties—Court's jurisdiction not modified.*

The consent of parties cannot affect the jurisdiction of a Court. It is not open to the parties to agree that a suit under S. 92, C. P. Code, which the District Court alone is competent to dispose of should be stayed pending disposal of a question regarding the public nature of a trust in an independent proceeding in a subordinate Court. (*Mukerji and Bennet, JJ.*) RAJA RAM *v.* CHHOTAY LAL. **I.R. 1931 All 267 (1) = 130 I.C. 299 (1) = A I.R. 1931 All. 332.**

———*Consent of parties—Irregular procedure—Adoption of—Subsequent objection—Sustainability.*

Though consent of parties cannot confer jurisdiction on the Court, there is a distinction between jurisdiction and procedure. If the parties consented to an irregular procedure, the Court would not be exceeding its jurisdiction in adopting that procedure and the party who had consented to such irregular procedure cannot subsequently be allowed to impugn it. (*Pakenham Walsh, J.*) NARASAYYA *v.* RAMAGOVINDAM. **38 L.W. 337 = 149 I C. 192 = 6 R M 611 = A.I R. 1933 Mad. 753.**

———*Consent of parties—Whether can confer jurisdiction.*

When the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process. 11 Mad. 26, Rel. (*Buckland, J.*) BICUMCHAND CHURURIA *v.* DEEPCHAND DOOGAR. **58 Cal. 1251 = I.R. 1931 Cal. 903 = 134 I C. 903 = A.I.R. 1932 Cal. 67.**

[Reversed 59 C 827.]

Contempt.

———*Contempt—Bench of High Court hearing criminal appeals—Power to hear applications for contempt of mofussil Courts.*

Applications for contempt cannot be subject-matter of reference by the lower Court to the High Court. Such applications cannot be heard by a Bench of the High Court hearing criminal appeals unless they are specially referred by the Chief justice. (*Lort Williams and S. K. Ghose, JJ.*) AMULYA CHANDRA BHADURI *v.* SATISH CHANDRA GIRI. **1932 Cr.C. 287 = 137 I.C. 238 = I.R. 1932 Cal. 281 = 33 Cr.L.J. 444 = 35 C.W.N. 1265 = A.I.R. 1932 Cal. 254.**

———*Contempt—Execution of orders passed—Contempt proceedings.*

If a Court has jurisdiction to make an order, it has necessarily jurisdiction to enforce the order; and the law does not allow its machinery to be clogged in this respect. In matters of contempt the jurisdiction of the Court is somewhat larger. (*Kania, J.*) KILACHAND

JURISDICTION—Contempt.

DEVCHAND & CO. *v.* AJODHYAPRASAD SUKHANAND. **59 Bom. 10 = 154 I.C. 162 = 7 R.B. 288 = 36 Bom. L.R. 892 = A.I.R. 1934 Bom. 452.**

———Contempt—Residence of party not material. *See* CONTEMPT. **57 Mad. 831 = A.I.R. 1934 Mad. 423 = 66 M.L.J. 650.**

Court seized of a case.

———*Court seized of a case—Finding as to absence of property within jurisdiction—Effect.*

Where the Court is seized of a case, the Court should proceed with it though it is found that there is no property in suit within its jurisdiction. (*Milne, J.C.*) TAYABALLY *v.* BIBI FATMA. **I.R. 1932 Sind 17 = 135 I.C. 257 = A.I.R. 1932 Sind 67.**

Criminal jurisdiction.

See also HIGH COURT, *infra.*

———*Criminal jurisdiction — Europeans committing offence outside British India—Powers of High Court to entertain complaint.*

If there is any power to try Europeans for an offence committed outside British India the complaint should be lodged on the Original and not on the Appellate Side of the High Court. (*Rankin, C. J. and Pearson, J.*) SASADHAR ACHARJYA, *In the matter of.* **1932 Cr.C. 177 = I.R. 1932 Cal. 230 = 136 I.C. 598 = 33 Cr.L.J. 322 = 35 C.W.N. 1082 = A.I.R. 1932 Cal. 229.**

Determination.

——— *Determination—Allegations in plaint.*

The question of jurisdiction should be determined on the allegations in the plaint. (*Bennet, J.*) KALKA PERSHAD *v.* JANGI SINGH. **I.R. 1931 All. 651 = 133 I.C. 411 = A.I.R. 1931 All. 664.**

———*Determination—Allegations in plaint material.*

The question of jurisdiction should in the first instance be decided on the statement of facts as disclosed in the plaint. (*Pullan and Niamatullah, JJ.*) JOTI PRASAD *v.* HAR PRASAD **I.R. 1932 All. 558 = 139 I.C. 346 = 1932 A.L.J. 567 = 16 R.D. 429 = 13 L.R. 266 (Rev.) = A.I.R. 1932 All. 473.**

———*Determination — Civil or Revenue Court—Court finding on investigation that it has jurisdiction—Absence of assertion in plaint—Effect of.*

Although as a general proposition it may be said that the question of jurisdiction is to be determined by the allegations in the plaint, it cannot be said, after the Court on an investigation of the case comes to the conclusion that it has jurisdiction, that there was no jurisdiction in the Court merely because of the absence of an assertion in the plaint. (*Wort, J.*) KANCHAN TELI *v.* MOGA MAHTON. **16 Pat.L.T. 109 = 7 R.P. 271 = 152 I.C. 906 = A.I.R. 1934 Pat. 593.**

———*Determination—Mode of.*

It is well settled that the question of jurisdiction is to be determined with reference to the allegations in the plaint and not with reference to the pleas. Where it was alleged in the plaint that according to the agreement, which was the basis of the suit, the amount claimed was payable at the place where the suit was filed, the question of jurisdiction could not be separated from the merits of the case, and the Court should allow the parties to produce their full evidence in regard to the execution of the agreement before coming to any decision as to whether the suit was cognizable by it or not. (*Rangi Lal, J.*) COMMERCIAL CREDIT CORPORATION, LTD. *v.* MAHOMED MAHBOOB ALI SHAH. **151 I.C. 726 = 7 R.L. 201 (2) = 36 P.L.R. 6 = A.I.R. 1934 Lah. 803.**

———*Determination—Preliminary issue.*

JURISDICTION—Foreign Court.

When a question of jurisdiction is raised, that has to be decided first before proceeding further with the matter. (*Reilly and Anantakrishna Ayyar, JJ.*) KRISHNA IYER *v.* SUBBARAMA IYER. **55 Mad. 689 = I.R. 1932 Mad. 801 = 139 I.C. 877 = 1932 M.W.N. 234 = 35 L.W. 565 = A.I.R. 1932 Mad. 462 = 62 M.L.J. 550.**

———*Determination—Suit as framed.*

The jurisdiction of a Court has to be determined primarily on the suit as framed. (*Blunde, J.*) SECRETARY OF STATE FOR INDIA *v.* BAHADUR CHAND. **I.R. 1931 Lah. 863 = 133 I.C. 895 = A.I.R. 1932 Lah. 67.**

Divorce.

———*Divorce—Christian British subjects—Mysore Courts.*

Courts in Mysore have no jurisdiction to make decrees for dissolution of marriage or for judicial separation in respect of Christian British subjects. 3 Mys.C.C.R. 78, Foll. (*Rama Rao and Sreenivasa Iyer, JJ.*) KENT *v.* KENT. **9 Mys L.J. 269.**

Duty of Court.

———*Duty of Court.*

The question of jurisdiction is as a rule a very ticklish one. If a Court in which a suit is brought can reasonably assume jurisdiction, it should not turn away a suitor merely because in the case of some other Court there could not possibly be any doubt on the ground of jurisdiction. (*Mehta, A.J.C.*) E.A. ZIPPEL *v.* K.D. KAPUR & CO. **26 S.L.R. 167 = I.R. 1932 Sind 99 = 939 I.C. 114 = A.I.R. 1932 Sind 9.**

Estoppel.

———*Estoppel—Whether can confer jurisdiction.*

Estoppel against a party cannot confer jurisdiction on a Court when it had none. (*Sulaiman, A.C.J., Boys and Banerji, JJ.*) MAHABIR SINGH *v.* NARAIN TEWARI **54 All. 25 = I.R. 1931 All 812 = 134 I.C. 236 = 1931 A.L.J. 715 = A.I.R. 1931 All. 490 (F.B.).**

[R. 9 Luck. 435 (451) (F.B.)]

Execution

See EXECUTION—JURISDICTION.

Foreign Court.

———*Foreign court—Charge—Creation over property outside Court's jurisdiction—Validity.*

Quaere, Whether charge created by Court of foreign jurisdiction over the property outside its jurisdiction is on the face of it invalid and does not affect the mortgage security of subsequent mortgagee. (*Subhedar, A.J.C.*) RAMKRISHNA NANDRAM *v.* GANESH NARAIN. **30 N.L.R. 303 = 150 I.C. 20 = 6 R.N. 279 = 35 Cr.L.J. 1063 = 1934 Cr.C. 658 = A.I.R. 1934 Nag. 149.**

———Foreign Court—Court in Native State—Order of adjudication as insolvent—Prior attachment of movables by British Indian Court—Effect. *See* C.P. CODE, S. 64—INSOLVENCY SUBSEQUENT. **60 I.A. 167 = 56 Mad. 405 = 64 M.L.J. 562 (P.C.).**

———*Foreign Court—Native State Court—Decree—Objection in execution—Maintainability—Party, if need apply to—Native State Court for review of judgment.*

It is open to a judgment debtor against whom a decree has been passed by a Native State Court to object to its validity on the ground of want of jurisdiction in the Court to which the execution has been transferred. It the decree passed is without jurisdiction and therefore a nullity, he can certainly claim that he is not bound by it. It is not incumbent on him to go to the Court of the Native State and ask that Court to review its order. By doing so he may be said

JURISDICTION—Foreign Court.

in one sense to subject himself to the jurisdiction of that Court. His remedy is to object to the execution in the Court to which the execution has been transferred and which is executing it. (*Sulaiman and Niamatullah, JJ.*) SHEO TAHAL RAM *v.* BINAEK SHUKUL. **53 All. 747 = 136 I.C. 353 = I.R 1932 All. 177 = 1931 A.L.J. 653 = A.I.R. 1931 All. 689.**

[**R.** 64 M.L.J. 532 (534). **Appr.** 57 M. 824 (826).]

———Foreign Court—Native State Court—*Ex parte* decree in personal action—Effect — Submission to jurisdiction—What amounts to. *See* C. P. CODE, S. 13. **1931 A.L.J. 653 = A.I.R. 1931 All. 689.**

Foreign State.

———*Foreign State—Property in Berar—Court in British India—Jurisdiction to pass decree in respect of.*

The Courts in British India have no jurisdiction to pass a decree in respect of property situate in Berar, that is, in a foreign territory. (Case law referred.) (*Subhedar and Pollock, A.J.Cs.*) BAJIRAO VITHOBA *v.* SARDARMAL. **31 N.L.R. 357 = 158 I.C. 597 = 8 R.N. 95 = A.I.R. 1935 Nag. 192.**

———*Foreign State—Property situate in—Power of British Indian Court to attach before judgment.*

A Civil Court constituted by Order in Council under the Foreign Jurisdiction Act is not competent to attach before judgment, moveable property of a defendant British subject which is in a foreign State (*Broadway and Abdul Qadir, JJ.*) MELA MAL *v.* BISHAN DAS. **13 Lah. 206 = I.R. 1931 Lah 1014 = 134 I.C. 822 = 32 P.L.R. 645 = A.I.R. 1931 Lah. 723.**

Forum.

———Forum — Agreement for service — Suit for remuneration—Absence of failure of justice—Interference. *See* C. P. CODE, SS. 20 AND 21. **A.I.R. 1934 All. 549.**

———*Forum—Choice of—New Act taking effect after accrual of cause of action—Applicability.*

A right of action is different from the choice of the forum. They may be a vested right of action when the cause of action has accrued before the old Act had been altered, but there can be no vested right in the choice of a particular forum. If the legislature has thought fit to deprive the Civil Court of its jurisdiction to entertain suits of a particular nature, a plaintiff cannot compel a Civil Court to hear his suit merely because his cause of action had accrued before the new Act depriving the Civil Court of its jurisdiction was passed. (*Sulaiman, A.C.J. and Smith, J.*) HAZARI TEWARI *v.* MAKTULA CHAUBAIN. **I.R. 1931 All. 834 = 134 I.C. 450 = 15 R.D 684 = 1931 A.L.J. 844 = A.I.R. 1932 All. 30.**

———*Forum—Life insurance—Claim.*

In the case of a suit against an insurance company to recover the amount of a life insurance policy, the death of the assured is a part of the cause of action. So a suit against the insurance company can be brought where the insured died. 22 C.W.N. 517; 41 I.C. 392, Foll; 1 Rang. 231, Not Foll. (*Baker, J.*) LIGHT OF ASIA INSURANCE CO., LTD. *v.* BAI CHANCHAL. **I.R. 1932 Bom. 596 = 140 I.C. 262 = 34 Bom.L.R. 815 = A.I.R. 1932 Bom. 392.**

[**R.** 28 S.L.R. 192 (194)]

———*Forum—Machinery and plant—Mortgage of land with machinery and plant permanently fixed—Suit on—Forum—If to be instituted in Court within whose jurisdiction they are situate.*

Machinery and plant, permanently installed and established on land approximate to land in law and are no longer chattels; as between a mortgagor and mortgagee, they pass to the mortgagee as part of the land. A suit therefore to enforce such a mortgage must be instituted in a Court within whose jurisdiction the machinery, etc., are situate. (*Cunliffe, J.*) BUDHSING BALCHAND *v.* ARNHOLD & CO. **39 C.W.N. 1018.**

JURISDICTION—High Court.

———*Forum — Malicious prosecution — Suit for damages.*

The defendant instituted criminal proceedings at place *D* against plaintiff who was residing at place *C*. Summons was served on plaintiff at *C* and as a result of proceedings, plaintiff sued to recover special and general damages for malicious prosecution.

Held, that part of the cause of action arose at place C and with leave under Cl. 12 of the Letters Patent the Court at C had jurisdiction to entertain the suit. (*Lort Williams, J.*) ALEXANDER BRAULT *v.* INDRA KRISHNA KAUL. **60 Cal 918 - 38 C.W.N. 120 = 147 I.C. 455 - 6 R.C 331 = A.I.R. 1933 Cal. 706.**

———*Forum—Principal and agent—Suit by agent at his place of business—If proper.*

Defendants who had a shop at a place in Faridkote State used to send orders for goods by post to plaintiffs who are commission agents at Delhi, and the latter executed the orders by despatching the goods from Delhi to Faridkote. After the dealings went on for sometime one of the partners of the plaintiffs' firm went to Faridkote where the accounts were gone into and a balance was struck in the books of the plaintiffs showing a balance in their favour Plaintiffs sued upon the entry in the accounts at Delhi. It was found that payments had been made to the plaintiffs at Delhi.

Held, the Court at Delhi had jurisdiction to entertain the suit, and the fact that a balance was struck in Faridkote did not make any difference in the relationship of parties which was one of commission agent and principal. (*Tek Chand, J.*) CHANDU LAL KISHORI LAL *v.* GHANISHI LAL. **152 I.C. 802 (1) = 7 R.L. 330 (1) = A.I.R. 1935 Lah. 68.**

High Court.

See also CONTEMPT, *supra*, INSOLVENCY, LUNACY AND WRIT OF PROHIBITION, *infra*.

———*High Court—Calcutta High Court, Original Side—Offences committed by resident British subjects outside British India.*

Quaere.—Whether the Original Side of the High Court, Calcutta, has any jurisdiction to try British subjects resident within its jurisdiction for offences committed outside British India. (*Buckland, J.*) SASADHAR ACHARJYA *v.* SIR CHARLES TEGART. **1932 Cr.C 341 = 137 I.C. 674 = I.R. 1932 Cal. 362 = 35 C.W.N. 1086 = A.I.R. 1932 Cal. 394**

———High Court—Extraordinary criminal jurisdiction of. *See* LETTERS PATENT (CALCUTTA), Cl. 24. **35 C.W.N. 782 = A.I.R. 1931 Cal. 646.**

———*High Court—Power to issue order of injunction against non-resident.*

The order of one Indian Court may be effective against a person within the jurisdiction of another Indian Court. Injunction order issued by Calcutta High Court against person seeking to institute proceeding in the Court at Agra. (*Lort Williams, J.*) A. MILTON & CO. *v.* OJHA AUTOMOBILE COMPANY. **57 Cal. 1280 = I.R. 1931 Cal. 389 = 130 I.C. 252 = A.I.R. 1931 Cal. 279.**

———*High Court—Stay of suit—Pendency of second appeal—Power of High Court to stay later proceeding.*

An application for stay of a subsequent suit in the lower Court because a previous suit in its second appellate stage is pending before the High Court can be made on the principle of S. 10, C. P. Code. But the attempt should first be made in the Court below to have the suit stayed and failing that the application may be made to the High Court. (*Suhrawardy and Patterson,*

JURISDICTION—Injunction.

JJ.) MAKHANLAL CHOUDHURY *v.* CHANDI NATH MAJUMDAR. **I R. 1931 Cal 670 (1)=133 I.C. 222 (1)=53 C.L.J. 619=A.I.R. 1931 Cal. 779 (1).**

Injunction.

——*See also* HIGH COURT, *supra.*

——*Injunction—Interim order—Power of Court—Denial of jurisdiction of Court.*

The power of the Court to grant a temporary injunction is not limited by the absence of any finding on the question of jurisdiction which has been raised in the case. *Prima facie* until such a question is decided in the negative a Court has jurisdiction to do all acts and take any action that may be sanctioned by law in connection with the case. (*Tapp, J.*) KARTAR SINGH GAVANI *v.* LADHA SINGH. **I R. 1931 Lah. 634=132 I.C. 586=A.I.R. 1931 Lah. 624.**

——*Injunction—Persons living within jurisdiction—Acts complained of committed outside—Remedy by way of injunction.*

A Court can issue an injunction against persons within its jurisdiction restraining them from doing acts outside the jurisdiction, but it will not do so unless that remedy is likely to be an effective one. (*Beasley, C.J. and Carmish, J.*) VENKATACHALAM *v.* RAJAGOPAL NAIDU. **55 Mad 966=1932 M W N. 835=36 L.W. 498=141 I.C. 660=A.I.R. 1932 Mad. 705=63 M.L. J. 568.**

Insolvency.

——*Insolvency—Insolvency petition—Debtor residing in mofussil—Court having jurisdiction being closed—Power of High Court.*

The High Court has no power to entertain a petition for the adjudication of a debtor, who is outside the limits of the Presidency town, as an insolvent, even though the mofussil Court having jurisdiction in the matter is at the time closed for summer recess. 52 Mad. 52=55 M.L.J. 690, Foll. (*Beasley, C.J. and Bardswell, J.*) VELLAMANDA *v.* RAGHAVIAH **57 Mad. 443—6 R.M. 552—39 L W 493=148 I C. 849=1934 M.W.N. 157=A.I.R. 1934 Mad 314=466 M.L J. 428.**

——Insolvency — Suit by unsecured creditor in foreign State—Injunction restraining progress of suit—Permissibility. *See* SPECIFIC RELIEF ACT, S. 53. **35 C.W.N. 997.**

Insolvency Court.

——*Insolvency Court—Inherent powers—Ratification of Receiver's errors.*

The Insolvency Court has inherent jurisdiction to rectify the Receiver's errors or mistakes or to reverse or modify his acts or decisions. (*Johnstone, J.*) HAVELI SHAH *v.* MT. ZOHRA JAN. **I.R. 1931 Lah. 844 (2)=133 I.C. 876 (2)=32 P.L.R. 698=A.I.R. 1932 Lah. 84.**

Judgment.

——*Judgment—Delivery after handing over charge to successor—Validity*

A judgment delivered by a Sessions Judge after handing over charge to his successor and after vacating his office is without jurisdiction and bad in law. (*Bannerji and King, JJ.*) RAM RATTAN *v.* EMPEROR. **1932 A L J. 753=1932 Cr C. 700=I R. 1933 All 32 (1)=141 I C 31=34 Cr L J. 112 (1)—18 L.R. 749 (Cr.)=A I.R. 1932 All 582.**

Lunacy.

——*Lunacy—Person not residing in Calcutta—Jurisdiction of Original Side, Calcutta High Court.*

The Original Side of the Calcutta High Court has no jurisdiction to direct an inquisition or appoint a guardian of person or property in the case of an Indian who is alleged to be a lunatic and is not resident in Calcutta but resides outside the local limits of the Ordinary Original Civil Jurisdiction of the Court. 57 Cal. 533, Cons. (*Panckridge, J.*) PHANINDRA CHANDRASET, *In the matter of.* **58 Cal. 919—I.R. 1931 Cal. 652=133 I.C. 188=A.I.R. 1932 Cal. 91.**

JURISDICTION—Objection to.

Meaning of.

——*Meaning of.*

Jurisdiction is the power to hear and determine. It does not depend on the regularity of the exercise of the power, 48 C. 138, Appl (*Mukerji and Bennet, JJ.*) JAI RAJ SINGH *v.* MUSTAFAI BEGAM. **I.R. 1931 All. 446=131 I.C. 878=1931 A.L.J 301=A.I R. 1931 All. 425.**

——*Meaning of—Erroneous order—If can be challenged collaterally.*

Jurisdiction is the power to hear and decide and the power to decide is the power to decide erroneously as well as correctly. Hence unless an order, even if it is wrong has been vacated, it is operative between the parties and cannot be ignored and challenged collaterally in a different proceeding. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) MURLIMAL SANTRAM *v.* BANARSIDAS & SONS. **155 I.C. 895=7 R.S. 212=28 S.L.R. 366=A.I.R. 1935 Sind 62.**

Objection to.

See also PECUNIARY JURISDICTION, *infra.*

——*Objection to—Failure to plead bar under S. 109, B. T. Act—Effect.*

A judgment of a Court having jurisdiction over the subject-matter and the parties of the suit is not void merely because a bar which had been placed on the Court's power such as under S. 109, B. T. Act, had not been pleaded. Such a judgment cannot be challenged collaterally. (*Khaja Mahomed Noor and Dhavle, JJ.*) GIRWAR NARAYAN MAHTON *v.* KAMLA PRASAD. **12 Pat. 117 I.R. 1933 Pat 109—142 I.C. 113=13 Pat L.T. 737=A I R 1933 Pat. 104.**

[F. 69 M.L J. 196 (201).]

——*Objection to—Failure to raise—If raises estoppel.*

A judgment of a Court without jurisdiction is a nullity and failure on the part of a person to question jurisdiction does not estop him subsequently to challenge the legality of an order on the score of absence of jurisdiction. (*Subhedar, A.J.C.*) JAGANNATH BRIJRAJ *v.* KHAJA FAISUDDIN. **31 N.L R. 408=159 I.C. 584=A.I.R. 1935 Nag. 212.**

——*Objection to—Late stage—Validity—Interference in revision.*

Where the parties went to trial on the merits and after the evidence of both parties had been recorded and arguments heard, the issue as to want of jurisdiction was raised by the Subordinate Judge *suo motu.*

Held, in revision, the order of the Court returning the plaint was not justified and that the same should be set aside. (*Tek Chand, J.*) FAZAL DIN *v.* GHULAM MUSTAFA. **I.R 1931 Lah. 431 (2)=131 I.C. 303 (2)=32 P L.R. 737.**

——*Objection to—Maintainability in revision.*

An objection to jurisdiction on the ground that the suit was triable by a Civil Court and not by a Revenue Court cannot for the first time be raised in revision, when it does not appear to have been raised in the earlier Courts. (*Drake Brockman, J M.*) GOPAL DAS *v.* KEDAR SINGH. **18 R.D. 406 (2)=15 L.R. 509 (Rev.).**

——*Objection to—Omission to raise in time—Waiver.*

If a Judge is competent to try a cause and the parties without objection to join issue and go to trial upon the merits, the defendant cannot subsequently dispute his

JURISDICTION—Objection to.

jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. The irregularity in assuming jurisdiction is waived if no objection is taken in time. (*Khaja Mohamad Noor and Varma, JJ.*) THAKURAIN KUSUM KUMARI *v.* BISESWAR LAL MARWARI. **14 Pat. 356=157 I C. 316=8 R Pat. 109=16 Pat.L.T. 536=A. I. R. 1935 Pat. 439.**

———*Objection to—Party under-valuing—Right to object in execution.*

A party who is responsible for an under-valuation cannot subsequently object in execution proceedings on the score of such under-valuation. (*Abdul Rashid, J.*) GIAN CHAND *v.* CHARANJI LAL. **36 P.L R 238=155 I.C. 229=7 R L. 661=A.I.R. 1934 Lah. 804.**

———*Objection to—Point to be raised in written statement.*

The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement and as a substantive part of the defence. (*Rankin, C.J. and Pearson, J.*) SECRETARY OF STATE FOR INDIA *v.* GOLABRAI PAI IRAM. **59 Cal. 150=135 I C. 873=I.R. 1932 Cal. 169=35 C.W.N. 930=A.I.R. 1932 Cal. 146.**

———*Objection to—Power of Court to decide.*

If the question of jurisdiction is to be decided by the Court itself with reference to the existence or otherwise of a particular fact in bar of the trial there is no want of inherent jurisdiction. The question of jurisdiction should in such a case be decided by the Court itself. (*Khaja Mahomed Noor and Dhavle, JJ.*) GIRWAR NARAYAN MAHTON *v.* KAMLA PRASAD. **12 Pat. 117=I.R. 1933 Pat. 109=142 I.C 113=13 Pat.L.T. 737=A I.R. 1933 Pat. 104.**

———Objection to—Proper time for *See* SUITS VALUATION ACT (1887), S. 11 (1) (*b*). **13 Pat. 344=A.I R. 1934 Pat. 204 (S B.).**

———*Objection to—Raised in appeal—Sustainability.*

An objection to territorial jurisdiction cannot be upraised for the first time in appeal unless failure of justice is shown. (*Broadway, O C.J. and Bhide, J.*) NIHAL CHAND *v.* DAL SINGH. **I R. 1932 Lah. 193=136 I.C. 17=32 P.L.R. 874=A.I.R. 1932 Lah. 135.**

———*Objection to—Waiver—Court having no jurisdiction over subject-matter of action.*

When a Court has no jurisdiction over the subject-matter of the action in which an order is made, such order is wholly void and the maxim applies that consent cannot give jurisdiction. But when in a cause which the Court is competent to try, the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. In such a case the objection to the exercise of the jurisdiction is considered as waived because it was not taken at the time the exercise of the jurisdiction was first claimed. 36 Cal. 193, Foll. (*Subhedar, Staples and Niyogi, A.J.Cs.*) GANGARAM TEKCHAND FIRM *v.* DHARAMSI JETHA CO., BOMBAY. **31 N. L. R. 43 (Supp.)=8 R.N. 133=159 I.C. 739=18 N.L J. 295=A.I.R. 1935 Nag. 250 (F.B.).**

———*Objection to—Waiver—Respondent in appeal asking for security for costs—If amounts to.*

A respondent is an appeal who has asked for security or costs must not be deemed thereby to have waived fis objection on the ground of want of jurisdiction. h*Pandrang Row, J.*) KUPPUSWAMI CHETTY *v.* AYYAMMAI AMMAL. **1935 M.W.N. 552=8 R.M. 79=156 I.C. 916=A.I.R. 1935 Mad. 723.**

———Objection to—Waiver—When confers jurisdiction—Inherent want of jurisdiction and irregular assumption of jurisdiction—Distinction—Suit to declare that decree is null and void as being made without jurisdiction—Maintainability. *See* C. P. CODE, S. 21. **18 N.L J. 295 (F.B.).**

———*Objection to—When can be raised.*

Objection founded on a point of jurisdiction can be taken up at any stage of the case (*Middleton, J.C. and Mir Ahmad, A.J.C.*) DOST MOHAMMAD *v.* JAI RAM. **158 I.C. 971=8 R. Pesh. 71=A.I.R. 1935 Pesh. 151.**

———*Objection to—When can be raised.*

A question of jurisdiction may be raised at any stage, at any rate of an appeal. (*Kendall, J.*) ABDUL JALIL KHAN KUNWAR *v.* GULAB SINGH. **17 R D 309=149 I.C. 1066 (2)=6 R.A. 1013=14 L.R. 252 (Rev.)=A.I.R. 1933 All. 392.**

Pecuniary jurisdiction.

———*Pecuniary jurisdiction—Date of decree, not of execution material.*

A Court which passed a decree does not lose jurisdiction to execute the same merely because subsequent to the decree its pecuniary jurisdiction has been curtailed. Where the Judge passing the decree had jurisdiction to pass a decree for the amount but his successor before whom the execution application was made had only a more limited jurisdiction so that he could not entertain such suit.

Held, that the succeeding Judge was competent to entertain the application for execution. (*Mitter and M.C. Ghose, JJ.*) ABDUS SATTAR *v.* MOHINI MOHAN DAS. **149 I.C. 1024=6 R.C. 681=37 C.W.N. 679=A.I.R. 1933 Cal. 684.**

———Pecuniary jurisdiction—Objection to—Time for. *See* SUITS VALUATION ACT (1887), S. 11 (1) (*b*). **13 Pat. 344=A.I.R. 1934 Pat. 204 (S.B.).**

———*Pecuniary jurisdiction—Objection to—Waiver—Effect of.*

In the matter of pecuniary jurisdiction, the waiver of a party is not sufficient to clothe the Court with jurisdiction which it does not otherwise possess. (*Pandrang Row, J.*) KUPPUSWAMI CHETTY *v.* AYYAMMAI AMMAL. **1935 M.W N. 552—8 R M. 79=156 I C. 916=A.I.R 1935 Mad. 723.**

———Pecuniary jurisdiction—Value of suit exceeding jurisdiction—Proceedings *coram non judice*. *See* C. P. CODE, O. 7, R. 10. **153 I C. 53=37 P.L R. 125.**

Privy Council.

———*Privy Council—Irish appeals*

The Privy Council has jurisdiction to hear an appeal from a decision by the Supreme Court of Irish Free State. (Saorstat Eireann.) (Case law referred.) (*Lord Chancellor.*) PERFORMING RIGHT SOCIETY, LTD. *v.* URBAN DISTRICT COUNCIL OF BRAY. **124 I.C. 894=32 P L.R. 20=I.R. 1930 P C. 270=1930 A.C. 377=99 L J P.C. 116=A.I.R. 1930 P C. 314 (P.C.).**

Restitution of conjugal rights.

———*Restitution of conjugal rights—Suit for—Residence of plaintiff, if sufficient to confer jurisdiction.*

In a suit for restitution of conjugal rights the mere fact that the plaintiff has his home within jurisdiction is not sufficient to give the Court jurisdiction. Where the defendant is not resident within its jurisdiction and the parties had at no time been living together within that jurisdiction, the Court may refuse to entertain the suit.

JURISDICTION—Revenue Court.

(*Butler, J.*) LAKSHMI AMMAL *v.* VENUGOPALA NAIDU. **149 I.C. 1199=6 R.M. 674 (2)=1934 M W.N 1035=39 L.W. 720=A.I.R. 1934 Mad. 407=67 M.L J. 271.**

Revenue Court.

See also CIVIL AND REVENUE COURT, *supra.*

———*Revenue Court — Adjudication as to tenancy rights by Civil Court—Binding nature.*

In a case of declaration of tenant rights where there has been prolonged litigation in the Civil Court it is the duty of the Revenue Courts to carry out the direction contained in the judgment of the Civil Court. (*Oppenheim, J.M.*) ASGHAR ALI *v.* MAHOMED YUSUF. **15 R.D. 589=12 L.R 323 (Rev.).**

———*Revenue Court—Agricultural land.*

It is the intention of the law that the Revenue Courts should deal with agricultural land and the Civil Court with non-agricultural land. Where the suit related to a barren plot of land within an agricultural area,

Held, that the land was not non-agricultural and that the Revenue Court had jurisdiction. (*Oppenheim, S. M. and Walton, J.M.*) SRI THAKURJI RASAK BEHARI LALJI *v.* MT. PHOOL KUNWAR. **13 L R. 289 (Rev.).**

———*Revenue Court—Canvassing Civil Court's prior decision—Propriety.*

Where the question of piority or otherwise of a mortgage has been decided by a Civil Court it is not proper for the Revenue Court to go into the question afresh. (*Oppenheim, S M. and Drake Brockman, J.M.*) HARISH CHANDRA SINGH *v.* NANAK BUX SINGH. **18 R D. 330.**

———*Revenue Court—Decision of Civil Court—Whether can be re opened.*

The Revenue Courts have no jurisdiction to reopen a matter decided by a competent Civil Court. Where it does so, the Financial Commissioner can interfere in revision. (*Irving, F. C.*) BANU MAL *v.* GANDA SINGH. **11 Lah. L.T. 57.**

———*Revenue Court—Ejectment of tenant by landlord—Suit to recover possession.*

On the death of an occupancy tenant the plaintiffs who claimed to be his collaterals got possession of the holding and subsequently obtained a declaration against their landlords that they were entitled to hold the land as occupancy tenants. Later on they were dispossessed by the landlords and after the expiry of more than one year they brought a suit for possession of the land on the allegation that the landlords had unlawfully dispossessed them two years before the institution of the suit.

Held, that the suit was cognizable by the Revenue Court. (*Shadi Lal, C.J. and Broadway, J.*) PIRAN DITTA *v.* LAL. **I.R. 1932 Lah. 407 (1)=138 I.C. 39 =33 P.L R. 646.**

———*Revenue Court*—Ex parte *order—Setting aside—Review*

It is not admissible for a Revenue Officer to set aside an *ex parte* order in a partition suit except by means of a review. (*Irving, F.C.*) HUKAM CHAND *v.* MALAK RAM. **11 Lah. L.T. 42.**

———Revenue Court—Licensee—Person planting tree on land—Understanding to give landholder half the wood—Suit in Revenue Court by landholder for value of wood—Maintainability. *See* AGRA TENANCY ACT, S. 3 (4). **1935 R.D. 381.**

———*Revenue Court—Minor challenging order passed by—Jurisdiction of Civil Court.*

Per *Sen, J.*—If a minor plaintiff has a right either to ignore or to challenge the propriety of an order passed by the Revenue Court against him in partition proceedings, the said right is undoubtedly a substantive right. A suit to enforce such a right is clearly a suit of a civil nature within the purview of S. 9, C P. Code. The jurisdiction of the Civil Court to entertain a suit of that description exists unless it has been taken away by clear legislative enactment. (*Sulaiman, Boys and Sen, JJ.*) MT. SIRAJ FATIMA *v.* MAHOMED ALI. **54 All. 646=I R. 1932 All. 418=138 I.C. 465=16 R.D. 327=1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.).**

JURISDICTION—Revision.

———*Revenue Court—Recording land as sir—Modification of Civil Court's decision.*

A Revenue Court will not record a land as *sir* if the effect of that would be to destroy occupancy rights declared by Civil Court. (*Drake Brockman, S. M. and Holmes, J.M.*) BISHWANATH MISRA *v.* RAM DASI. **15 L.R. 66 (Rev.)=18 R.D. 58.**

———*Revenue Court—Rights of exproprietary tenant—Determination—Forum.*

The determination of the rights of an exproprietary tenant is a matter within the province of the Revenue Court. (*Bisheshwar Nath and Pullan, JJ*) ANGNEV *v.* ABID HUSAIN. **I.R 1931 Oudh 131=130 I.C. 115 =7 O.W.N. 1162=14 R.D. 706=12 L.R. 6 (Rev.)= A I.R. 1931 Oudh 62.**

———*Revenue Court—Set off.*

A Revenue Court has no jurisdiction to entertain a claim by way of legal set-off. (*Irving, F C.*) KESAR SINGH *v.* TIRATH SINGH. **13 Lah. L.T. 45.**

———Revenue Court—Suit to expunge entry from register or correct entries—If lies. *See* KUMAUN RENT AND TENANCY RULES (1911)—JURISDICTION. **18 R.D. 692.**

———*Revenue Court—Suit to recover* haq buha.

A suit to recover *haq buha* is maintainable only in the Revenue Court and not in the Civil Court. (*Johnstone, J.*) BHAGTA NAND *v.* MAHOMED NAWAZ KHAN. **131 I.C. 338=31 P.L.R. 954=A.I.R. 1931 Lah. 175.**

———*Revenue Court—Suit regarding agricultural land—Barren land in agricultural area.*

It is the intention of the law that the Revenue Courts should deal with agricultural land and the Civil Courts with non-agricultural land. Where barren land situate within agricultural land though not used for agricultural purposes is the subject-matter of suit, the land can be treated as agricultural for purposes of conferring jurisdiction on the Revenue Court. (*Oppenheim, S. M. and Walton, J. M.*) RASAK BEHARI LALJI *v.* PHOOL KUNWAR. **16 R.D. 426.**

———*Revenue Court—Suit for rent—Forum:—Determination — Test — Absence of* bona fide *question of title.*

Where a suit is instituted for recovery of rent of land, jurisdiction has primarily to be determined by reference to the allegations in the plaint; and when the allegations in the plaint make it clear that no *bona fide* question of title arises, the suit is one for the Revenue Courts. (*Latif, F.C.*) MAHOMED USMAN KHAN *v.* ABDUL HAMID KHAN. **14 Lah. L.T. 13.**

Revision.

———*Revision — Powers of Court — Ordinary and extraordinary powers—Distinction.*

There is a well recognized distinction between the ordinary powers of a Court and the extraordinary and discretionary powers of superintendence or revision. These latter powers have never been considered part of the every-day machinery of the administration of justice. They are invoked as a rule only when the ordinary procedure supplies no proper remedy or to correct some

JURISDICTION—Small Cause Court.

manifest illegality or injustice. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* MARINO. **59 Bom. 663=159 I C. 90=8 R.B. 164=7 Bom L R. 658=1935 Cr.C. 1065=A.I.R. 1935 Bom. 393.**

Small Cause Court.

———Small Cause Court—Suit for arrears of rent by assignee—Cognisability—If suit for debt. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 8. **150 I.C. 767.**

Special tribunal.

———*Special tribunal—Condition precedent to vesting of jurisdiction not fulfilled—Proceedings void.*

Where it is provided that recourse may be had to a special form of procedure for the purpose of determining a dispute or recovering a valid demand upon the fulfilment of a condition precedent and the condition precedent to the vesting of jurisdiction in the special tribunal has not been fulfilled, all the proceedings before that tribunal are null and void. 25 Cal. 833 (P.C.), Foll (Case-law Ref.) (*Page, C.J., Dass and Ba U, JJ.*) RANGOON DEVELOPMENT TRUST *v.* BEHARA AND SONS **10 Rang 412=I R. 1932 Rang. 195=139 I. C. 566=A.I.R. 1932 Rang. 123 (F.B).**

———*Special tribunal—Special remedy—Party not availing himself of—Effect of.*

When jurisdiction has been conferred upon a special Court for investigation of particular matters, such jurisdiction is exclusive. Where therefore a party having a special remedy before the special tribunal fails to avail himself of the same, he cannot be allowed to agitate the same question by means of a regular suit. On that principle if a person served with a notice under S. 9 of the Land Acquisition Act and with notice of the apportionment proceedings failed to apply under S. 18 of the Act, he cannot be allowed to reopen the question of apportionment by a regular suit. (*Bisheshwar Nath, J.*) CHHEDI RAM *v.* AHMAD SHAFI. **8 Luck. 295 =9 O W.N 1176=141 I.C. 674=I.R. 1933 Oudh 73 =A.I.R. 1933 Oudh 100.**

Statutory prohibition.

———*Statutory prohibition—Court acting in contravention of—Effect of.*

When a Court acts in contravention of a statutory prohibition [*e.g*, stay is ordered without and taking security making provision for what is contained in O. 41, R. 5 (3) (*c*), C P. Code] it acts without jurisdiction. The only jurisdiction the Court has to grant stay in such circumstances is with the consent of the decree-holder. Such orders ought not to be passed except on such conditions as a decree holder is likely to agree to and certainly never when the decree-holder objects to a stay except on conditions. (*Bose, A J.C.*) ANANDI PRASHAD *v.* GOVINDA BAPU. **150 I C. 59=6 R N. 274=A.I.R. 1934 Nag. 160.**

Stay of suit.

———Stay of suit—Pendency of second appeal—Power of High Court to stay later proceedings. *See* HIGH COURT, *supra*. **A I.R. 1931 Cal. 779 (1).**

Submission to.

———*Submission to—Effect of—Small cause suit tried on the original side without objection—High Court—Courses open to.*

Where a Small Cause suit is tried on the original side and the parties do not raise any question of jurisdiction in the trial Court and an appeal is preferred to the District Judge, it is open to the High Court, on a reference made to it under O. 46, R. 7 (2) of the Code to adopt one of two alternatives: (1) to set aside the decree of the Court below and direct the plaintiff to present the plaint before the proper Court, and (2) to look into the merits of the case and decide whether the decree of the Court below is a just and proper one or not. 31 I C. 991, Foll. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) JADUNI PANDE *v.* SHEONANDAN PANDE. **11 Pat. 690=I.R. 1933 Pat. 46=141 I.C. 130=14 Pat.L.T. 269=A.I.R 1933 Pat. 31.**

JURISDICTION—Territorial Jurisdiction.

———*Submission to—Non-resident foreigner taking the plea of want of jurisdiction and defending case on merits.*

If in a suit instituted against a non-resident foreigner, the defendant takes the plea of want of jurisdiction but also enters appearance, and during the course of a protracted trial, produces evidence, cross examines the witnesses of the opposite party and takes his chance of winning the case on merits, it is no longer open to him to say that the Court had no jurisdiction to entertain the suit. (*Niamatullah and Rachhpal Singh, JJ.*) GAEKWAR BARODA STATE RAILWAY *v.* HABIB ULLAH. **56 All. 828=153 I C 824=7 R A. 611=3 A.W.R. 621 =1934 A.L J. 1093=A.I.R. 1934 All. 740.**

———*Submission to—Offence committed on high seas —Place of trial.*

The commander of a steamship laid a complaint before the Chief Presidency Magistrate against members of the crew charging them with having been guilty of rioting and causing grievous hurt while on the high seas. Processes however could not be served on them as they were not to be found at the address which they had themselves supplied to the shipping office. Subsequently after proclamations were issued, all the accused surrendered themselves to the Chief Presidency Magistrate, who transferred the case to the Third Presidency Magistrate for trial.

Held, that the Third Presidency Magistrate had jurisdiction to proceed with the trial, although there was no evidence to show that the accused were in Calcutta on the day on which the complaint was made. 39 Cal. 487, Rel. on. (*C. C. Ghose and Panckridge, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* RAISALLEE. **60 Cal. 44=I.R. 1933 Cal. 477=143 I C 774—34 Cr.L J. 631=1933 Cr.C. 222=A.I.R. 1933 Cal. 145.**

———*Submission to—Person coming to Court as plaintiff—If gives Court jurisdiction to entertain cross-action.*

A person who in the character of plaintiff voluntarily submits to the jurisdiction of the Court cannot object to the validity of the judgment of that Court on the ground that it had no jurisdiction over him. Further, a person who comes before the Court as plaintiff in general gives the Court jurisdiction to entertain a counter claim, or in other words a cross-action against him. (*Mya Bu and Dunkley, JJ.*) K. B. WALKER *v.* GLADYS P. WALKER. **158 I.C. 547—8 R.R. 179=A.I.R. 1935 Rang. 284.**

———*Submission to—Proceedings closed—Objection, if can be taken.*

When there is submission without objection to a jurisdiction which is inherent and exists, no objection can be taken to mere irregularities in procedure after the proceedings are finally closed. (*Vivian Bose, A.J. C.*) VITHAL BALAJI KASAR *v.* CHUNNILAL. **31 N. L R. 212=157 I.C. 242=8 R.N. 37=A.I.R. 1935 Nag. 33.**

Territorial jurisdiction.

———*Territorial jurisdiction—Change of—Power to decide pending cases.*

Unless pending cases are expressly transferred by a notification effecting a change in the territorial jurisdic-

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tion of a Court, or unless there is a specific provision in any enactment to the same effect, the Court in which the suit or appeal was instituted does not cease to have jurisdiction to decide the matter, despite the change in its territorial jurisdiction. 55 Mad. 801 (F.B.), Rel. on. (*Subhedar. A.J.C.*) MAKHANLAL LOLARAM *v.* PANCHAM LAL. **149 I.C. 718 (2)=6 R.N. 247=29 N.L.R. 342=A.I.R. 1933 Nag. 318.**

Test of.

———*Test of.*

For the purpose of jurisdiction, the criterion is an examination of the plaint and not an examination of the issues which have been framed after the written statement has been filed. (*Courtney-Terrell, C.J., Kulwant Sahay and James, JJ.*) NARAYAN JHA NARONE *v.* JOGNI PRASAD JHA. **13 Pat. 329=6 R. P. 410=147 I C. 1222=15 Pat L.T. 139=A.I.R. 1934 Pat. 184 (S.B.).**

Transfer.

———*Transfer—Case pending before Additional Sessions Judge—Transfer to Court of Sessions Judge by another Additional Sessions Judge—Legality.*

There is nothing in the Cr. P. Code which gives jurisdiction to a Sessions Judge to transfer an appeal from the file of an Additional Sessions Judge to his own file; much less has an Additional Sessions Judge jurisdiction to transfer a case on the file of another Additional Sessions Judge to the file of the Sessions Judge. (*Young, J.*) DAULAT RAM ASTHANA *v.* EMPEROR. **135 I C. 252=33 Cr.L.J. 158=I.R. 1932 All. 76=1931 A.L J. 591=12 L.R. 113 (Cr.)=1931 Cr.C. 707=A.I.R. 1931 All. 435.**

Under-trial prisoner.

———*Under-trial prisoner—Complaint regarding treatment in jail—Power of Court to inquire.*

When a prisoner complains to a Court that he is not treated in accordance with the provisions of the Prisons Act and the rules thereunder, the Court has jurisdiction to enquire into such a complaint and pass necessary orders. The position of a subordinate Court is not different in this respect from that of the High Court. In such cases however the Court will not insist on a public inquiry if public interests are likely to suffer thereby. (*Bhide and Tapp, JJ.*) SUKH DEV RAJ *v.* EMPEROR. **I.R. 1931 Lah. 731=133 I.C. 59=32 Cr. L.J. 988=32 P.L.R. 586=1931 Cr.C. 850=A I.R. 1931 Lah 562.**

Valuation for.

———*Valuation for—Basis of.*

A suit must be valued according to the nature of the plaint. (*Middleton, J.C.*) MAHOMED *v.* MT. WAHAB JAN. **159 I.C. 819=37 Cr.L J. 197=1935 Cr.C. 1163 =A.I.R. 1935 Pesh. 174.**

———*Valuation for—Defeated claimant—Suit for removal of attachment and declaration of title.*

Where an unsuccessful claimant desires not only that the attachment should be removed, but also that his title should be declared as against the judgment-debtors, in cases in which the value of the property attached is more than the value of the decree, the value of the suit which governs the jurisdiction of the Court to deal with it is the value of the property itself and not merely the value of the decree. 39 Mad. 602 and 17 All. 69, Foll. (*Baguley, J.*) DAW DUT *v.* DAW KWI. **I.R. 1932 Rang. 38=137 I.C. 54=A I R. 1932 Rang. 20.**

———*Valuation for—Government promissory notes—Face value.*

Where the subject-matter of a suit consists of a fund consisting of five Government promissory notes of the

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total face value of, Rs. 5,43,000 and of the market-value of Rs. 3,32,587-8-0 the face value determines the jurisdiction. (*Smith, J.*) MAHOMED SADIQ ALI KHAN *v.* KAZIM ALI KHAN. **9 Luck. 507=150 I.C. 193=6 R.O. 619=11 O.W.N. 323=A.I.R. 1934 Oudh 118 (2).**

———*Valuation for—Relief not capable of money assessment—Basis of valuation—Right of plaintiff to put own valuation.*

In a suit for declaration in which the relief sought is one that cannot be assessed in terms of money, the suit properties being properties set apart for charitable purposes, the market-value of the properties is not the correct basis of valuation; the plaintiff however is not entitled to put any value he likes for purposes of jurisdiction. (*Pandrang Row, J.*) ACHUTA MOOTHAN *v.* KRISHNA MOOTHAN. **158 I.C. 1023=8 R M. 398= 1935 M.W.N. 1174=A.I.R. 1935 Mad. 874.**

———*Valuation for—Same as that for Court-fees—Mysore Court-Fees Regulation (I of 1908), S. 4 (xi) (cc).*

In a suit by the landlord for ejectment, the valuation fixed by the plaintiff for purposes of Court-fee under S. 4 (*xi*) (*cc*) of the Court-Fees Regulation is also the valuation for purpose of jurisdiction. (*Doraswami Iyer, C.J. and Mahadevayya, J.*) JAFER KHAN *v.* SYED GHOUSE. **10 Mys.L J. 25.**

See also ABDULLAH KHAN SAB *v.* GURUSAMI. **10 Mys L.J. 32.**

———Valuation for—Suit for removal of dam and damages—Future damages—If to be valued. *See* SUITS VALUATION ACT, S. 8. **16 Pat.L.T. 103=A I.R. 1935 Pat. 160.**

———*Valuation for—Valuation in plaint as deciding forum—Grant of interest* pendente lite, *if material.*

In a suit on mortgage for sale the claim at the date of the suit was laid at Rs. 4,477-2-0. The plaint, however, contained prayer for interests *pendente lite* and costs, etc. The preliminary decree for sale was for Rs. 6,357-7 0.

Held, that the appeal did not lie to the High Court but to the District Judge. The value of the suit was to be taken to be the amount at which the claim was stated in the plaint. (*Mukerji and Mitter, JJ.*) SAILENDRA KUMAR PALIT *v.* HARI CHARAN SADHU KHAN. **58 Cal. 829=I.R. 1931 Cal. 396=130 I.C. 876=52 C.L.J. 589=A.I.R. 1931 Cal. 159.**

Waiver.

See also ABSENCE OF OBJECTION TO, AND PECUNIARY JURISDICTION, *supra.*

———*Waiver.*

Waiver cannot confer jurisdiction on a Court when none exists. If a Court has no jurisdiction over the subject-matter of the suit, parties cannot, by consent, or waiver, or acquiescence, convert it "into a proper judicial process." 13 I. A. 134, Foll. (*Wadia, J.*) MAHOMED HAJI HAMID *v.* JUTE AND GUNNY BROKERS, LTD. **33 Bom L R. 1364=135 I.C. 170=I. R 1932 Bom. 58=A.I R. 1932 Bom. 42.**

———Waiver—Pecuniary jurisdiction—Objection to—Waiver not sufficient to confer jurisdiction. *See* PECUNIARY JURISDICTION, *supra.* **A.I.R. 1935 Mad. 723.**

Writ of prohibition.

———*Writ of prohibition—High Court's power to issue to Controller of Patents—"Court."*

The High Court has jurisdiction to issue a writ of prohibition on the Controller of Patents. The Controller of Patents, though not technically a Court or a

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tribunal exercising judicial functions, has a duty imposed on him to hear and determine objections to applications for leave to amend, and to that extent there is a fair analogy between his position and that of a Court. (*Panckridge, J.*) NATIONAL CORBON CO. AND BRIGHT STAR BATTERY, CO., *In re.* **61 Cal. 450 = 152 I.C. 914 = 7 R.C. 329 = 38 C.W.N. 729 = A.I.R. 1934 Cal. 725.**

——Writ of prohibition—High Court's power to issue—Reference under Co operative Societies Act—Dispute between Society and former directors—Reference to arbitration—Competency—Issue of writ by High Court. *See* MADRAS CO OPERATIVE SOCIETIES ACT, S. 51 (1) (*b*) AND (*c*). **69 M.L.J. 726.**

——*Writ of prohibition—Issue of, to Income-tax Commissioner—Power of single Judge of High Court.*

The High Court has power in a proper case to compel a public officer, and even a Revenue Officer, to carry out a duty imposed upon him. Under the power and authority conferred on it by the charter, the High Court can issue a writ of *certiorari* or prohibition against the Income tax Officer, if the facts are such as to justify the issue of a writ. A single Judge on the Original Side is competent to deal with an application of this character. Though the matter concerns income-tax and the provisions of the Income tax Act have to be considered in coming to a decision, yet, the application is not one under S. 66 or any other section of the Income-tax Act and, therefore, neither that Act nor the rules under it are applicable. (*McNair, J.*) RAMJIDAS MAHALIRAM, *In re* **62 Cal 1011.**

——*Writ of prohibition—Issue of— Principles—Persons on whom High Court can issue.*

When a person, or body of persons, is clothed with power to determine questions and decide issues, affecting the rights of private citizens or of the public, the Kings Bench Division in England, and likewise the High Court, will interfere by the issue of writs of prohibition or *certiorari* to prevent the illegal exercise of such power. (*Panckridge, J.*) NATIONAL CORBON CO. AND BRIGHT STAR BATTERY CO., *In re.* **61 Cal. 450 = 38 C.W.N. 729 = 152 I.C. 914 = 7 R.C. 329 = A.I.R. 1934 Cal. 725.**

Miscellaneous.

——*Miscellaneous—Appeal filed—Power of trial Court to correct clerical mistake in plaint and decree.*

The mere fact of an appeal being filed does not oust the jurisdiction of the Court to amend the plaint and decree on the ground of clerical error. The case however will be different where the trial Court's decree has been affirmed in appeal and thereby merged in the appellate decree. (*Sulaiman and Baipai, JJ.*) KODAI MISIR *v.* REYAZUL HAQ. **1931 A L.J. 536 = 135 I.C. 848 = I.R. 1932 All. 112 = A.I.R. 1931 All. 766 (1).**

——Miscellaneous— Application to continue suit as pauper—Dismissal of suit—Power of Court to enquire into application. *See* C. P. CODE, S. 11. **60 C.L.J. 587.**

JURY. *See* CR. P. CODE, SS. 274, 276, 282, 297, 301 and 307, ETC.

——Trial by. *See* (1) CR. P. CODE, SS. 298, 423 (2) AND 537.
(2) PRACTICE — JUDGE AND JURY.

——*Trial of suit—Province of Judge and jury.*

In a trial before a Judge and jury, all facts, the proof of which is essential to the establishment of legal liability on the part of a defendant, must be either admitted or proved, and if in dispute, they must be found by the jury, either as answers to specific questions, or as flowing from those answers or as involved in a general verdict for the plaintiff. Upon the facts so admitted or proved, the Judge has then to determine as matter of law whether judgment should be entered for the plaintiff or defendant. (*Lord Russell of Killowen.*) GEORGE BENAD DUPIGNY *v.* PINARD & CO. **157 I.C. 630 = 8 R.P.C. 49 (P.C.).**

JUS TERTII.

See (1) EJECTMENT.
(2) EVIDENCE ACT, S. 116.
(3) LANDLORD AND TENANT—EJECTMENT.

JUSTICE. *See* PRACTICE.

JUSTICE, EQUITY AND GOOD CONSCIENCE.

See (1) OUDH LAWS ACT (1876), S. 3.
(2) PRACTICE.

JUVENILE OFFENDER.

See (1) BORSTAL SCHOOL.
(2) CR. P. CODE, S. 562.

KABULIYAT.

See (1) LANDLORD AND TENANT.
(2) LEASE.

KANGANAM—Cess—Tenant not liable to pay. *See* LANDLORD AND TENANT—CESSES, **A.I.R. 1935 Mad. 258.**

KANOM.

See (1) LAND TENURE.
(2) MALABAR LAW.
(3) MORTGAGE- KANAM.

KARACHI CITY MUNICIPAL ACT (1933), Ss. 195 (1) (a) and 197—*Chief Officer—Power of to take action in respect of fixture—Plea of adverse possession—Maintainability.*

Where statutory powers are specifically conferred, it cannot be the intention of legislature that these powers should be nullified by the application of Art. 146-A, Limitation Act. Where therefore there is a clear statutory provision, authorizing the Chief Officer to take action in respect of any structure, fixture or covering described in S. 195, erected before the Bombay District Municipal Act, 1901, came into force, a plea of acquisition of right by adverse possession cannot be availed of by a person owning such a fixture, and he can be rightly fined for failure to comply with the orders of the Chief Officer in connexion with the fixture. (*Davies, J. C. and Lobo, A. J. C.*) DURLABJI HANSRAJ *v.* MUNICIPAL CORPORATION, KARACHI. **29 S.L.R. 315 = 37 Cr.L.J. 82 = 159 I.C. 247 = 1935 Cr.C. 1253 = A.I.R. 1935 Sind 222.**

KARACHI SMALL CAUSES COURTS ACT (1929), S. 32—*Scope.*

S. 32 covers not only "final order", but is wide enough to cover any order in any case. The words "according to law" would preclude a multiplicity of applications on questions of pure fact unless substantial injustice has resulted. (*Ferrers, J. C. and O'Sullivan, A. J. C.*) MURLIMAL SANTRAM *v.* MESSRS. MANARSIDAS & SONS. **28 S.L.R. 366 = 155 I.C. 895 = 7 R.S. 212 = A.I.R. 1935 Sind 62.**

KARSA CHAKRAN. *See* B. T. ACT, S. 181.

KATTALAI. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), SS. 9 (11) AND 73 (2).

KAUSTUBHA. *See* HINDU LAW—TESTS.

KAYASTHAS. *See* HINDU LAW—APPLICABILITY.

KEITTIMA ADOPTION. *See* BUDDHIST LAW (BURMESE)—ADOPTION.

KHAIRAT. *See* WORDS AND PHRASES—KHAIRAT

KHAJAN LAND.

KHAJAN LAND. *See* LAND TENURE.

KHALSA. *See* AGRA TENANCY ACT, S. 4 (*b*).

KHATAUNI. *See* LANDLORD AND TENANT—RENT.

KHOTI TENURE.

See (*i*) LAND-TENURE—KHOTI.
(*ii*) BOMBAY KHOTI LEASES ACT (1865).
(*iii*) BOMBAY KHOTI SETTLEMENT ACT (I OF 1880).

KHUDKASHT LAND.

See (1) AGRA TENANCY ACT (1926), SS. 4 (*b*) AND (*c*) AND 44.
(2) B. T. ACT, S. 116.
(3) C. P. TENANCY ACT, S. 69.
(4) LANDLORD AND TENANT.

KHUNTKATTI TENURE. *See* CHOTA NAGPUR TENANCY ACT (1908), S. 127.

KIDNAPPING. *See* PENAL CODE, SS. 361-369.

KOLE KARSHA KABULIYAT. *See* B.T. ACT, S. 49 (*a*).

KORKAR—Conversion of land into—Right of occupancy by custom. *See* CHOTA NAGPUR TENANCY ACT (1908), SS. 64 (3) AND 67. **13 Pat.L.T. 781.**

KRITRIMA—Adoption. *See* HINDU LAW—ADOPTION.

KULAVETTU—Cess—Paid for a number of years—Tenant liable to pay. *See* LANDLORD AND TENANT—CESSES. **A.I.R. 1935 Mad. 259 and 995.**

KUMAUN—Custom—Law governing will. *See* HINDU LAW—WILL. **A.I.R. 1933 All. 916.**

KUMAUN RENT AND TENANCY RULES (1918)—*Jurisdiction—Suit to expunge or correct entries—Maintainability in Revenue Court.*

A suit does not lie for relief by way of correction or expunging of certain entries from the prescribed registers. Nor has a Revenue Court jurisdiction to pass consequential orders involving changes in the 'plaint' corresponding to the Khewat, though it has such jurisdiction in respect of entries of other registers. (*Drake Brockman, S.M. and Holmes, J.M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D. 692.**

———*Pakka Khaikari Village—If can become Kacha Khaikari.*

A Pakka Khaikari Village can of course become a Kacha Khaikari. But that can only happen as the result of invasions of the rights of the Kaikars, and such invasions must be extensive and sustained. (*Drake Brockman, S. M. and Holmes, J.M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D. 692.**

———*Partition proceedings—Reference to Board of Revenue—Competency.*

The Kumaun rules do not provide for references to the Board of Revenue, and the Chapter of the Land Revenue Act relating to partition does not find a place in the Land Revenue Act as extended to Kumaun. The Board have therefore no jurisdiction to entertain a reference in proceedings for partition in Kumaun. (*Drake Brockman, S. M. and Knox, J.M.*) KEDAR SINGH v. DHAN SINGH. **1935 R.D. 363.**

———*Scope—Suit for declaration—Jurisdiction of Revenue Court.*

Per *Drake Brockman, S. M.*—No section or serial of Kumaun Rent and Tenancy Rules seems to cover a suit for a declaration of any sort. Declaratory decrees are usually foreign to a Revenue Court and they are incapable of execution.

Per *Holmes, J. M.*—A Revenue Court has jurisdiction

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to entertain a suit for determination of any incident to a tenancy, which is substantially the same as a declaration in such a case. (*Drake Brockman, S.M. and Holmes, J.M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D. 692.**

———*Suit by minor to set aside transfer of Khaikari right—Limitation.*

S. 6 of the Limitation Act is made applicable to the Kumaun Rules by a notification of 1918 and it confers on a minor a larger period of limitation for instituting a suit to avoid a sale of khaikari right. (*Oakden, S.M. and Smith, J.M.*) DHARMA NAND *v.* DEBI DUTT. **14 R.D. 635.**

———**Rr. 3 and 9**—*Occupancy holding—Building of house—Nature of holding altered.*

The plaintiff brought a suit for possession of a house built on a plot of land and a courtyard attached thereto. The defendant contended that the said plot of land was his occupancy holding. The parties were the residents of the Kumaun District, U. P. The suit was confined to the house and the courtyard and not to any other part of the plot used for agricultural purposes. The plaint did not suggest that the property claimed was being used for any agricultural purposes.

Held, that in the above circumstances when the landlord allowed a building to be put on, the nature and character of the holding changed and it ceased to be land held for agricultural purposes. The plot was therefore not a holding within the meaning of the Kumaun Rules and the suit was of a civil nature and congnizable by a Civil Court. (*Sulaiman and Young, JJ.*) JATHALI BHUL *v* NADIA. **I.R. 1932 All. 390=1932 A.L.J. 468=138 I.C. 347=16 R.D. 413=A.I.R. 1932 All. 415.**

———**Sch. I, Group A, Serial 9**—*Khaikari right—Transferability.*

Khaikars have no right of transfer but *bona fide* transfer is not absolutely void because it is not definitely forbidden by law nor is opposed to public policy. The only person entitled to challenge the transfer is the Khaikari body as a whole. (*Oakden, S. M. and Smith, J.M.*) DHARMA NAND *v.* DEBI DUTT, **14 R.D. 635.**

———**Sch. I, Group A, Serial 16**—*Scope—Decree declaring Village as Pakka Khaikari—Jurisdiction to grant.*

A Revenue Court has no jurisdiction under Serial 16, Sch. I, Group A of the Kumaun Rules, to grant a declaratory decree to the effect that a Village is a Pakka Khaikari Village. (*Drake Brockman, S. M. and Holmes, J.M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D 692.**

———**Sch. I, Group A, Serials 16 and 21**—*Applicability—Khaikari Village—Infringement of rights by landholder—Suit by Khaikars.*

A suit by the Khaikars of a Village alleging that the Village is a Pakka Khaikari and that the landholder has infringed their common rights and claiming formal delivery of possession to themselves of the land taken possession of by the landholder is governed by Serial No. 16 of the Kumaun Rent and Tenancy Rules. Serial 21 does not apply to such a case. (*Drake Brockman, S.M. and Holmes, J.M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D 692.**

———**Sch I, Group A, Serials 16 and 21**—*Declaratory suit relating to status of entire village—Competency—Jurisdiction of Revenue Court.*

No declaratory suit relating to the status of an entire village can be brought or was intended to be capable of being brought either under Serial 16 or Serial 21. Under Serial 16, the panch Kaikars of a Pakka Khaikari village

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can bring a suit against a hissedar for an infringe ment of their common right. The suit must relate to a specific infringement. Similarly the hissedars can only bring a suit under Serial 21 against an individual *khaikar* to determine his class or status. As in suits under Serial 16 so in suits under Serial 21, an issue regarding the status of the village will inevitably arise on the pleadings. Such suits must necessarily be brought in the Revenue Courts. (*Oppenheim, S. M. and Drake Brockman, J. M.*) KRISHNA NAND *v.* DAULAT SINGH. **1935 A.W.R. 33 = 1935 R.D 2 = 16 L.R. 163 (Rev.).**

———Sch I, Group A, Serials 16 and 21—*Jurisdiction under—Claim to alternative relief.*

The jurisdiction of the Revenue Courts is restricted by the Kumaun Rent and Tenancy Rules to certain specific suits, the rules do not provide for any alternative relief. Consequently, when a suit is brought under Serial No. 16 of Sch. I, Group A of the Rules, it would not be legitimate to give relief under R. 21. (*Drake Brockman, S.M. and Holmes, J. M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D. 692.**

———Sch, I, Group A, Serials 16 and 21—*Scope—Suits under—If can be joined—Option of plaintiff—Evasion of limitation—Permissibility.*

The law does not allow a plaintiff to join a suit under Serial 16 with one under Serial 21, or give him an option to bring his action under either serial, so as to evade the law of limitation. The law cannot have intended to impose a period of limitation with one hand and to take it away with the other. (*Drake Brockman, S. M. Holmes, J. M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D. 692.**

———Sch. I, Group A, Serial 21—*Scope—Panch Khaikars—Suit for declaration that village is Pakka Khaikari—Maintainability.*

A suit by the Panch Khaikars of a village against the hissedars for a declaration that the village is a Pakka Khaikari and that the defendants have no right to have the lands in suit recorded as their khudkhasht is not maintainable under Serial No. 21, Group A of Sch. I of the Rules. (*Drake Brockman, S. M. and Holmes, J.M.*) PREM SINGH *v.* TIRLOK SINGH. **18 R.D. 692.**

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See (1) CHIT FUND.
(2) MALABAR LAW.

LACHES. *See also* LIMITATION ACT, S. 5.

———Distinction from acquiescence. *See* ACQUIESCENCE. **12 Lah.L.T. 1**

———*Doctrine of—Applicability of—Scope of.*

The ground for admitting the defence of laches according to the doctrine of the English Courts of Equity is that a plaintiff in equity is bound to prosecute his claim without undue delay but where there is a statutory time limit to all conceivable kinds of action, the plaintiff is entitled to the full statutory period before his claim becomes unenforceable. 122 I.C. 37, Ref. (*Irving and Boyd, F Cs.*) ATA ULLAH *v.* GHULAM HAIDAR KHAN. **12 Lah L.T. 1**

LAHORE HIGH COURT RULES AND ORDERS, (1932), Vol I, pp. 45 and 46—*Dismissal of appeal for default—Temporary absence of Counsel—Restoration of appeal.*

Where almost immediately after an appeal was dismissed for default under O. 41, R. 17 the Counsel for appellant came to Court and represented that as there was a lengthy appeal above his case he hid not expect his case to be called on so soon and was busy in another part of the Court. He put in an application praying for the re-admission of the appeal under the circumstances and urged that the client was a *pardanashin* lady whose

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interests would suffer by his temporary absence which was not intentional. The Court having rejected the same, *held*, in appeal, that under those circumstances the appeal should have been restored. 19 I.C. 504; 96 I.C. 402, Ref. to. (*Abdul Qadir, J.*) MT. LACHHMAN *v.* MURARI LAL. **I.R. 1931 Lah. 888 = 134 I.C. 120 = 33 P.L.R. 85 = A.I.R. 1932 Lah. 65 (1).**

———Vol. I, Ch. XII 1, R. 19—*Interpretation.*

Where shops stituated in different localities within the municipal limits of the town were sold in execution of a decree against the owner and a single warrant of sale was issued in respect of all the shops but the sales were held separately though on the same day:

Held, that the correct interpretation of R. 19, is that, in a case like the present, the auctioneer should be allowed commission on the aggregate amount realized by the sale of the entire property offered for sale in a single execution case. (*Abdul Rahshid, J.*) BELI RAM *v.* JAL SHAH. **161 I.C. 246 = 8 R.L. 703 = A.I.R. 1935 Lah. 956.**

———Vol. III, Chap. IX-A, R. 1—*Offence under S. 500, I. P. Code—Summoning witnesses at Government expense—Right of accused.*

The accused cannot in a case under S. 500, I. P. Code, pending against him claim that his witnesses should be summoned at Government expense since such a course is opposed to R. 1 of Chapter IX-A, Vol. III, Rules and Orders of the High Court. (*Tek Chand, J.*) DIWAN SINGH *v.* JOWALA DAS. **I R. 1932 Lah. 662 (2).**

———Vol. V, Ch I-A, R. 4—*Letters Patent appeal not requiring certificate—Limitation.*

The usual period of limitation of 30 days applies to an appeal under the Letters Patent, even when no certificate of the Judge making the order is necessary. Simply because a certificate is not necessary, it does not follow that the memorandum of appeal can be put in at any time. (*Young, C.J., Addison and Abdul Rashid, JJ.*) JOG DHIAN *v.* HUSSAIN. **16 Lah. 448 = 156 I.C. 668 = 8 R.L. 16 = 37 P.L.R. 504 = A.I.R. 1935 Lah. 328 (F.B.).**

———Vol. V, Ch. 6-B, R. 10 and Ch 3-B, R. 2—*Scope—Misconduct of legal practitioner—Bench of three Judges—If competent to enquire into.*

Rule 10, Ch. 6-B (Rules and Orders of the Court, Volume V) merely confers an additional power on the High Court to remove or suspend a legal practitioner without the necessity of an inquiry in open Court such as is contemplated by R. 2, Ch. 3 B. R. 10, Ch. 6-B does not in any way conflict with or affect the applicability of the rules which have been framed by the High Court under S. 108, Government of India Act. A Bench of three Judges properly constituted under R. 2, Ch. 3-B is competent to inqure into and pass final orders about the conduct of a legal practitioner charged with misconduct. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT-LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354 = 149 I.C. 764 = 6 R.L. 741 = 35 Cr. L J. 1010 = 1934 Cr.C. 479 = A.I.R. 1934 Lah. 251 (S.B.).**

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See also (1) AGRA TENANCY ACT (1926), SS. 17, 226 AND 265.
(2) CO-SHARER.

———*Agreement to bargain office—Illegality.*

Any traffic or bargain relating to public offices is opposed to the public policy upon the obvious principle that any agreement relating to such traffic is calculated to prejudice the interest of the public by obstructing or interfering with the selection in office of the most competent person. An agreement by one co-sharer in a mahal

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to pay a certain sum of money to another co-sharer in the same mahal in consideration of the latter withdrawing his candidature for lambardarship in favour of the former amounts to an agreement to bargain or traffic relating to a public office and as such opposed to public policy. (*Son, J.*) PUTTULAL *v.* RAJ NARAIN. **53 All. 609=I.R. 1931 All. 515 (2)=132 I.C. 419 (2)=1931 A.L.J. 397 · A.I.R. 1931 All. 428.**

———*Appointment of—Hereditary claims—No preference merely on the ground of.*

The Collector is in no way bound to respect hereditary claims in appointing a lambardar. Whare he has properly exercised his discretion and preferred the younger to the elder brother, the selection should not be interfered with on appeal. (*Calvert, F.C.*) RAJA *v.* SARANG. **11 Lah.L.T. 153.**

———*Appointment—Interlocutory and final orders—Appeal.*

An order of the Collector refusing to appoint a candidate as lambardar and returning the case for a fresh report is an interlocutory order and is not appealable. In the final proceeding the defeated candidate can press his claim and the final order is appealable. (*Irving, F.C.*) SURAT SINGH *v.* EMPEROR. **13 Lah.L.T. 6.**

———*Appointment of—Persons entitled to a voice in—Right of proprietary body to be consulted.*

The object of the *wajib ul-arz* is to give a simple statement of the general lines on which it has been customary to appoint the lambardar. It cannot be expected to give detailed instructions. The Revenue Courts can only interpret the *wajib-ul-arz* according to the dictates of common sense. It is opposed to common sense to give a voice in the choice of the lambardar to the persons who take no *bona fide* interest in the village or to appoint a lambardar before the proprietary body is duly consulted. (*Gowan, R.M.*) DAULAT RAM *v.* MAN-SINGH. **16 Nag.L.J. 122.**

———*Decision of Collector—Interference—Principles stated.*

In a lambardari case if the Collector exercised his discretion in a reasonable manner neither ignoring any portion of those matters which he ought to consider nor perversely running counter to the general sense of the rule, his decision ought to be allowed to stand and the mere fact that an appellate or revising officer takes a different view of personal claimes is not a good ground for upsetting or modifying that decision. 131 P.L.R. 1918, Foll. (*Irving, F. C.*) JAGAT SINGH *v.* BHAGAT SINGH. **11 Lah.L.T. 1.**

———*Dismissal—Disqualification involving no moral defect—Removal of—Right to re-appointment.*

Where a lambardar is dismissed for a disqualification involving no moral defect, *e.g.*, on the ground that he has ceased to own land in the *patti*, he has a strong claim to be re-appointed if he has cured it by the time a fresh order is passed by the acquisition of land even though it is by gift and even if he has not yet obtained physical possession thereof. In effect it is to regard him as his own heir with a hereditary right and is not to be passed over unless there is a disqualification. (*Irving, F.C.*) CHARAN SINGH *v.* FAZIL. **11 Lah. L.T. 125.**

———*Dismissal—Grounds—Constant absence from village.*

In a matter so important as the dismissal of a lambardar which insolves not only the person dismissed but his line of descendants, justice requires that his defence should be on record. It is also desirable that he should before the Collector be called upon to plead to a definite charge framed under one or more of the

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clauses of the Land Revenue Rule, 16.

Held, that constant absence is not by itself a good ground for dismissal unless neglect to discharge his duties is also proved. (*Irving, F.C.*) BUDH SINGH *v.* EMPEROR. **11 Lah L T. 88.**

———*Dismissal—Grounds—False verification of statement.*

It is a very important part of the duties of a lambardar to give certificates on which Government places serious reliance. Where he verifies a statement which as a matter of fact he has taken no steps to assure himself of, that is a good ground for his dismissal. (*Irving, F.C.*) NAZAR HUSSAIN *v.* KHAN MAHOMED. **11 Lah.L.T. 29.**

———*Dismissal — Grounds — Indebtedness — If a ground.*

A lambardar should not ordinarily be dismissed from his post merely because of indebtedness, unless he fails to give security for the collection of the dues for which he is responsible, and unless there is reason to fear that he will be guilty of breach of trust in regard to these dues. (*Latifi, F.C.*) ABDUL GHANI *v.* EMPEROR. **14 Lah. L.T. 6.**

———*Dismissal—Grounds—Serious financial embarrassment.*

The Commissioner should not interfere with the discretion of a Collector in lambardari cases except for clear and strong reasons. Where the Crown is the owner of the land in the *chak*, hereditary claims need not be considered. A headman may be dismissed if he is seriously embarrassed by debt. When a man is committed to civil jail for debt he is seriously embarrassed. (*Calvert, F.C.*) HUSSAIN BAK[illegible]=A *v.* GHULAM RASUL. **11 Lah.L.T. 67.**

9—*Khaikari r[illegible]*

———*Dismissal of headman—Son, [illegible]ed.*

There is a presumption that the disqualification of being under the influence of a dismissed headman exists in the case of his sons; but it cannot be said that the son can under no circumstances be appointed. (*Irving, F. C.*) LACHHMAN SINGH *v.* MOHAN SINGH. **11 Lah. L.T. 122.**

———*Emoluments—Right, if lost by co sharers making collection directly.*

The duties of a lambardar are manifold and are not confined to the realization of rents and distribution of the profits. So long as he holds the office he is entitled to his prescribed dues though the co-sharers might be making the collections directly. (*Sulaiman, J.*) GOBIND RAM *v.* JUGAL KISHORE. **136 I.C. 76=I.R. 1932 All. 124=15 R.D. 333=12 L.R. 128 (Rev.).= A.I.R. 1932 All. 245.**

———*Estate held by homogeneous body—Change of holders—Rules applicable.*

It is desirable that when an estate is held by a homogeneous body the *lambardari* should be held in that body so far as possible. This is however subject to the Collector's decision as to conditions under which the administration can be carried out. (*Irving, F.C.*) BHAGWAN SINGH *v.* SALAMAT RAI. **11 Lah.L.T. 74.**

———*Hereditary right—Disqualification—Participation in violent crimes.*

Participation in violent crimes entirely destroys the family claims to headmanship. Heir excluded on ground of predecessor's aggression in pursuance of family or tribal feud. (*Irving, F.C.*) DEWAN SINGH *v.* UJAGAR SINGH. **11 Lah.L T. 27.**

———*Liability for under-proprietary rent.*

The lambardar of a village cannot be made liable for the payment of under-proprietary rent due in respect of

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an under-proprietary holding. (*Nanavutty and Thomas, JJ.*) MANZOOR HUSAIN *v.* DAWAR ALI. **155 I.C. 295=7 R.O. 577=1935 R.D. 247=1935 O.W.N. 537=A.I.R. 1935 Oudh 409.**

———*Omission to forward collections to Treasury—Offence, if constituted.*

A lambardar who had made collections of revenue did not pay the same into the Treasury for two months and when approached by the police paid a certain sum though he had made larger collections. It appeared however that he had deposited the collections in a secure place because he knew that the Tahsildar would probably refuse to take anything except the full amount.

Held, that the lambardar was not guilty of criminal breach of trust. (*Addison, J.*) LACHMAN SINGH *v.* EMPEROR. **131 I.C. 910=32 Cr.L.J. 811=1931 Cr.C. 692=A.I.R. 1931 Lah. 468.**

———*Position of—Purchase of property recorded in the name of two co-sharers in proceedings to which one of them was not party—Right to mutation.*

A lambardar collecting rent of an estate acts in a representative capacity and his possession is possession on behalf of the rightful co-sharers. Hence where a lambardar purchased at a Court sale part of a property in his estate recorded in the name of two co-sharers in proceedings to which one of them was not a party, all that he can get from the Revenue Courts is mutation of his name over that part of the property which stands in the name of the person against whom the proceedings were instituted. He cannot get mutation of his name over the part standing in the name of the other co-sharer. If he has rights to that property, he must establish them in the Civil Courts in a case to which the other co-sharer is a party. (*Oppenheim, S.M. and Drake Brockman, J.M.*) LACHMI NARAIN *v.* TASA WAR HUSAIN. **14 L.R. 577 (Rev.)=17 R.D. 690.**

———*Rambursement—Payment of revenue for co-sharer—Adjustment in accounts—Same varied in appeal—Fresh decree for refund of revenue paid.*

A lambardar sued a co-sharer for revenue which he had paid on her account. The co-sharer brought a suit against the lambardar for settlement of the accounts. The Assistant Collector in deciding the latter case credited to he lambardar the revenue paid and dismissed his suit. On appeal the District Judge found that the lambardar did not hold the office for those years and absolved him from liability to account.

Held, that that appellate decision necessitated a revision of the order regarding the revenue paid and that the lambardar was entitled to the decree for the same. (*Keane, S.M. and Oppenheim, J.M.*) BINDRABAN *v.* BHAGWAN DEI. **15 R.D. 311=12 L.R. 119 (Rev.).**

———*Right to sue for ejectment.*

A lambardar is entitled as manager to sue for the ejectment of the tenant. (*Oppenheim, S.M. and Walton, J.M.*) FARIDUDDIN AHMAD *v.* HAR DIN MURAO. **14 L.R. 126 (Rev.)=17 R.D. 166.**

———*Succession—Dismissal of prior incumbent—His heir passed over—Subsequent vacancy—Right of the heir to succeed—Land Revenue Rule* 17 (ii).

The Land Revenue Rules should be interpreted strictly. When on the death or dismissal of a lambardar, his heir, whether minor or not, has been passed over, he has been passed over for good and the appointment to the next vacancy should be made under the rule of primogeniture deriving from the last incumbent of the post. (*Irving, F.C.*) NABI BAKHSH *v.* FAIZ RASUL. **11 Lah.L.T. 131.**

LAND ACQUISITION ACT (1894), S. 3 (d).

———*Succession—Dismissal of prior lambardar—Appointment of stranger—Subsequent succession—Land Revenue Rule* 17 (ii)

Where in 1860 the then lambardar was dismissed and another person in no way related to him was appointed and the post became hereditary in the family of the latter, the descendants of the former have no right to succeed as against the hereditary claims of the descendants of the latter. (*Fagan, F.C.*) KURA *v.* MAN SINGH. **11 Lah.L.T. 137.**

———*Succession—Hereditary rule—Preferential right of nearer heir.*

A person who is descended from the father of a deceased lambardar is entitled to succeed in preference to a person descended from the grandfather of the deceased unless there are reasons which would justify his dismissal from the office of a headman. (*Irving, F.C.*) NAZAR HUSSAIN *v.* KHAN MAHOMED. **11 Lah. L.T. 29.**

———*Succession—Non-residence of heir—Claim can be overlooked.*

If the Collector has good reason for believing that the appointment of a substitute should be refused he may legitimately regard absence as a reason for passing over an heir. (*Irving, F.C.*) BHAGWAN SINGH *v.* SALAMAT RAI. **11 Lah.L.T 74.**

———*Succession to office — Disqualification—Father's failure to produce witness in criminal case.*

The failure to produce a witness in S. 498, I.P. Code, case for whom the applicant's father had given security is not sufficient warrant for his non-appointment as lambardar in succession to his father. (*Townsend, F.C.*) SURAIN SINGH *v.* EMPEROR. **10 Lah. L.T. 5.**

———*Succession—Rule of primogeniture.*

An heir is the eldest male in the eldest branch in direct descent from the common ancestor. Therefore the nephew succeeds before the brother, where he is the son of an elder brother. (*Irving, F. C.*) RAJA *v.* SARDARA. **11 Lah L.T. 21.**

LAND ACQUISITION ACT (I OF 1894)—*Applicability to Court-fees Act.*

The special provisions of the Land Acquisition Act, which govern appeals under that Act, should not be extended by analogy to vary the provisions of the Court-Fees Act, a fiscal enactment which must be construed strictly. (*Mahomed Noor, James and Varma, JJ.*) THAKAN CHAUDHURI *v.* LACHMI NARAIN. **14 Pat. 4=152 I.C. 244=7 R.P. 159=15 Pat.L.T. 548=A.I.R. 1934 Pat. 571 (S.B.).**

———*Title to property—Onus.*

When Government are acquiring immovable property for a public purpose under the Act, it is for the person claiming compensation to establish his title to it affirmatively. (*Sir George Lowndes.*) THE SECRETARY CONTONMENT COMMITTEE, BARRACKPORE *v* SATISH CHANDRA SEN. **57 I.A. 339=58 Cal. 858=33 L.W. 41=53 C.L.J. 1=33 Bom.L.R. 175=130 I.C. 616=1931 A.L.J. 249=I.R. 1931 P.C. 78=35 C.W.N. 173=1931 M.W.N. 41=34 P.L.R. 455=A.I.R. 1931 P.C. 1=60 M.L.J. 142 (P.C.).**

———**S. 3 (b)**—*"Person interested"—Whether includes Collector.*

A "person interested" in S. 3 (*b*) does not include the Collector. (*Das and Brown, JJ.*) K. N. K. R. M. K. CHETTYAR FIRM *v.* SECRETARY OF STATE. **11 Rang 344=149 I.C. 865 (2)=6 R.R. 334=A.I.R. 1933 Rang. 176.**

———**S. 3 (d)**—*"Court"—Revisional jurisdiction of High Court.*

LAND ACQUISITION ACT (1894), S. 3 (d).

The "Court" mentioned in S. 3 (*d*) of the Land Acquisition Act is a Court subordinate to the High Court and therefore amenable to its revisional jurisdiction. (*Mukerji, King and Niamatullah, JJ.*) MAKAN LAL *v.* SECRETARY OF STATE. **56 All. 656 = 1934 A.L.J. 32 = 3 A W R 1 = 148 I.C. 617 = 6 R A. 734 = A.I.R. 1934 All. 260 (F B).**

———**S. 3 (d)**—*'Principal Civil Court'—Small Cause Judge appointed Special Judicial Officer.*

The Chief Judge of the Small Cause Court appointed by the Local Government as "Special Judicial Officer" to perform the functions of a Court is a special Court and not 'a principal Civil Court or original jurisdiction' within the meaning of S. 3 (*d*). (*Wallace and Stone, JJ.*) BAGAVATHI DOSS BAVAJI *v.* SARANGARAJA IYENGAR. **54 Mad. 722 = 135 I.C. 460 = I.R. 1932 Mad. 140 = 1931 M.W.N. 290 = 33 L.W. 528 = A.I.R. 1931 Mad. 586 = 61 M.L.J. 312.**

———**S. 3 (e)**—*Company—Co-operative Society registered under Bombay Act (VIII of 1925) as amended by Bombay Act (VIII of 1933)—Acquisition of land for—Legality.*

"Company" as defined in S. 3 (*e*) of the Land Acquisition Act, includes not only a society registered under the Co operative Societies Act (II of 1912), but also a society registered under the Bombay Act (VIII of 1925); S. 72-A of the latter Acts added to it by Bombay Act (VIII of 1933), enacts that the reference to the Co-operative Societies Act of 1912 in S. 3 (*e*) of the Land Acquisition Act, shall be read as a reference to the Bombay Act (VIII of 1925); and a society registered under the Bombay Act of 1925 is therefore a company as defined by S. 3 (*e*) of the Land Acquisition Act. It is therefore permissible and legal for the Local Government to acquire lands compulsorily under the Land Acquisition Act for the benefit of such a society. (*Barlee and Sen JJ.*) SHANTINIKETAN CO OPERATIVE HOUSING SOCIETY, LTD *v.* MADHAVLAL. **60 Bom. 125 = 161 I.C. 96 = 8 R.B. 311 = 37 Bom.L.R. 955 = A.I.R. 1936 Bom. 37.**

———**S. 3 (f)**—*"Public purpose"—Acquisition of house-sites for Panchamas.*

Even if only a section of the public is benefited by such acquisition, the purpose would still be a public purpose and hence the acquisition of house sites for Panchamas is a public purpose. 49 Mad. 237 and 59 M. L. J. 274, Rel. on. (*Sundaram Chetty, J.*) RAMASWAMI AYYAR *v.* SECRETARY OF STATE FOR INDIA. **I R. 1931 Mad. 551 = 131 I.C. 647 = 1931 M.W.N. 126 = 33 L W. 572 = A.I R. 1931 Mad. 361.**

———**S. 4**—*Market value—Mode of ascertainment.*

The market value of the land to be acquired is to be considered at the date of the publication of the notification under S 4. A. I. R. 1925 Sind 112, Rel. on; A. I. R. 1925 P. C. 91 and A. I. R. 1929 P. C. 92, Expl. (*Wild, J C. and Milne, A. C. J.*) CHOITHRAM BEGRAJ *v.* SECRETARY OF STATE FOR INDIA. **25 S L R. 285 = 131 I.C. 222 = A.I R. 1931 Sind 52.**

———**S. 4 (1)**—*Two different notifications—Earlier notification, if superseded—Mode of assessing value of lands.*

The Government issued a notification under S. 4 (1) in May, 1923, stating the need for acquiring certain lands in two named districts. It did not however give the extent of the lands to be acquired nor any specific description. Subsequently the Land Acquisition Act was amended by Act XXXVIII of 1923 and the Government issued a second notification under S. 4 (1) in September, 1925, which contained full details of the lands to be acquired.

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Held, that the first notification was superseded by the second one and that the value of the lands should be determined as on the date of the second notification. (*Ramesam and Venkatasubba Rao, JJ.*) AKILANDAMMAL *v.* SPECIAL DEPUTY COLLECTOR, VM. T. RY. TRICHINOPOLY. **1932 M.W.N. 853.**

———**S. 6 (1)**—*"Wholly or partly out of public revenues"—Contribution by Government of 80 per cent.—Proposal to recoup cost from assignees of sites—Validity.*

A notification was published in the official Gazette that certain land was needed for a public purpose and that the compensation to be awarded for such property had to be paid, twenty per cent. by the applicants, after grant of sites to them and 80 per cent. by Government from the public revenues to be recouped by instalments from the assignees of the sites.

Held, that the provision of the Act had been strictly complied with. It was not a mere loan to the assignees and the requirements of the proviso to the section had been fulfilled. 11 C L. J. 612, Ref.; 59 M. L. J. 274 and 1929 M. W. N. 779, Rel. on. (*Sundaram Chetty, J.* RAMASWAMY AYYAR *v.* SECRETARY OF STATE FOR INDIA **I.R. 1931 Mad. 551 = 131 I C. 647 = 1931 M.W.N. 126 = 33 L W. 572 = A.I.R. 1931 Mad. 361.**

———**S. 9**—*Joint claimants—Notice served on one—Validity of.*

Obiter.—A notice which is addressed to all the joint claimants and served on some of them should be regarded as good service as against the persons not personally served. 45 I. A. 222, Ref. (*Mitter and Guha, JJ.*) PRASANNA KUMAR DUTT *v.* SECRETARY OF STATE. **61 Cal. 245 = 151 I.C. 160 = 7 R.C. 76 = 38 C.W.N. 239 = A.I.R. 1934 Cal. 525.**

———**S. 9**—*Notice under—Burden of proof.*

Where a person receives some notice and appears before the Collector and receives the money, it is for such person to prove that he did not receive the notice required by S. 9 of the Act. (*Staples, A.J.C.*) SHIVMAL *v.* RAMCHANDRA BAPU. **30 N.L.R. 40 = 147 I.C. 877 = 6 R N. 147 = A.I.R. 1933 Nag 322.**

———**S. 9**—*Omission to specify amount of claim—Sufficient cause—Appellate Court—Powers of.*

The appellate Court can consider the question as to whether the failure of the claimant to specify the amount of his claim was with or without sufficient cause and whether the omission could be condoned where the District Judge had failed to do so. Where a claimant failed to specify the amount of his claim before the Land Acquisition Officer in the belief that he was not required to do so, such belief would indubitably afford a sufficient ground for condonation, and more so, when the claimant had placed materials showing what his expert considered to be a fair compensation and the Land Acquisition Officer dealt with the claim on the materials placed before him without demur and without requiring the claimant to make the claim more specific. (*Ferrers, J C. and Rupchand Bilaram, A. J. C.*) SECRETARY OF STATE *v.* DINSHAW. **27 S.L.R. 84 = 6 I.R. (Sind) 109 = 146 I.C. 1040 = A.I.R. 1933 Sind 21.**

———**Ss. 9 and 23**—*Scope—Compensation under each sub-head of S. 23, if need be specified by claimant.*

All that S. 9 requires is that a person claiming an interest in the land under acquisition should (1) specify the interest he claims, (2) specify the amount he claims for such interest, and (3) give particulars of his claim to compensation. It does not go further than that, and

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does not require him to specify the amount of compensation he claims in respect of each of the six sub-heads referred to in S. 23 of the Act. A failure therefore to specify the amount claimed in respect of any particular sub-head of S. 23 is no bar to the Judge reviewing the award of the Land Acquisition Officer in respect of such sub-head. (*Ferrers, J.C. and Rupchand Bilaram, A.J.C.*) SECRETARY OF STATE *v.* DINSHAW. **27 S.L.R. 84=6 I.R. (Sind) 109=146 I.C. 1040=A.I.R. 1933 Sind 21.**

———**S. 9 (2)**—*Fifteen days' notice.*

The statute sets out only that the date must not be earlier than fifteen days after the service of the notice. It does not require fifteen clear days' notice. Where the notice was served on the 8th and the date was the 23rd, or exactly fifteen days after the service was acknowledged, it is a sufficient compliance with the statute. (*Macpherson and Fazl Ali, JJ.*) GOKUL KRISHNA BANERJI *v.* SECRETARY OF STATE FOR INDIA. **137 I.C. 116=I.R. 1932 Pat. 136=12 Pat.L.T. 659=A.I.R. 1932 Pat. 134.**

———**S. 9 (3)**—*Notice not served on occupancy raiyat in possession of holding—Right to question correctness of award.*

An occupancy raiyat in possession of a holding on whom a notice contemplated by S. 9 (3) has not been served is entitled to question correctness of the award. (*Varma, J.*) SOMA SINGH *v.* JAIGOBIND PANDE. **A.I.R. 1935 Pat. 42.**

———**S. 11**—*Amount of compensation—Rule regarding.*

The correct rule for determining the amount of compensation is that the land to be acquired is to be valued in the first instance including all interest and the amount so ascertained has then to be apportioned amongst the parties interested according to their interests. 42 Mad. 644, Foll. (*C. C. Ghose and Mitter, JJ.*) COLLECTOR OF DACCA *v.* RAI SARAT KISHORE BOSE BAHADUR. **143 I.C. 367=55 C.L.J. 558=I.R. 1933 Cal. 412=A.I.R. 1933 Cal. 312.**

———**S. 11**—*Award by Land Acquisition Officer—Contents of.*

Although S. 26 requires the Judge to specify in his award the several particulars referred to therein, it is sufficient for the Land Acquisition Officer under S. 11 to state what he considers to be fair compensation to be allowed for the whole of the land under acquisition and how it should be apportioned. S. 25 refers to the whole claim made by the claimant, and the whole amount of compensation awarded to him under S. 11, and empowers the Judge to alter the award of the Land Acquisition Officer under any one or more of the sub-heads by either decreasing or increasing the amount awarded, provided he does not award less than the total amount awarded by that Officer or more than the total amount claimed before that Officer by the claimant. (*Ferrers, J.C. and Rupchand Bilaram, A.J.C.*) SECRETARY OF STATE *v.* DINSHAW. **27 S.L.R. 84=6 I.R. (Sind) 109=146 I.C. 1040=A.I.R. 1933 Sind 21.**

———**Ss. 11 and 26**—*Award under—Difference.*

Under S. 26 the award of the Court is not the same as anaward by the Collector under S. 11. An award by the Collector under S. 11 must include the apportionment of the compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information whether or not they have respectively appeared before him. That forms no part of the award as defined in S. 26. Hence an award of Court under S. 26 cannot be deemed to be a decree executable against the Collector. (*Das and Brown, JJ.*)

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K.N.K.R.M.K CHETTYAR FIRM *v.* SECRETARY OF STATE. **11 Rang. 344=149 I.C. 865 (2)=6 R.R. 334=A.I.R. 1933 Rang. 176.**

———**S. 11**—*Duty of Collector—Only one award to be made for each parcel of land—Award to be self-contained.*

The duty of the Collector under S. 11 of the Act is to make an award in regard to three matters, *viz.*, (1) the area of the land included in the award; (2) the total compensation to be allowed for that land; and (3) the apportionment of that compensation among all the persons interested in that land. The Act does not contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land. (*Lord Russell of Killowen.*) PRAG NARAIN *v.* COLLECTOR OF AGRA. **59 I.A. 155=54 All. 286=I.R. 1932 P.C 113=136 I.C. 449=9 Q.W.N. 423=36 C.W.N 579=34 Bom.L.R. 885=35 L.W 812=1932 M.W.N. 758=1932 A.L.J. 741=55 C.L.J. 318=A.I.R. 1932 P.C. 102=62 M.L.J. 682 (P.C.).**

———**S. 11**—*Proceeding under—Nature of adjournment of inquiry—No extension of time for making claim.*

The proceeding under S. 11 is not a judicial proceeding. The Collector is not limited in making the award, to the evidence taken before the opposite party or disclosed at the inquiry and the fact that he adjourned the inquiry several times for making the award does not also extend the time for making a claim, the date for which has been already fixed under S. 9. 30 Cal. 36, Ref. (*Macpherson and Fazl Ali, JJ.*) GOKUL KRISHNA BANERJI *v.* SECRETARY OF STATE FOR INDIA. **137 I.C. 116=I.R. 1932 Pat. 136=12 Pat.L.T. 659=A.I.R. 1932 Pat. 134.**

———**S. 12**—*Acquiring officer's award—Modification—Burden of proof.*

The acquiring officer's award is strictly speaking not an award at all but an offer. But if his award is not accepted and the matter is taken into Court the proceedings are thenceforward judicial in character. The party claiming enhanced compensation is more or less in the position of a plaintiff and must produce evidence to show that the award is inadequate. If he has no evidence, the award must stand and if he succeeds in showing *prima facie* that the award is inadequate the Government must support the award by producing evidence. (*Rangnekar and Broomfield, JJ.*) ASST. DEVELOPMENT OFFICER, TROMBAY *v.* TAVABALLI. **149 I.C. 271=6 R.B. 356=35 Bom.L.R. 763=A.I.R. 1933 Bom. 361.**

———**S. 15**—*Building—Basis of compensation—Potential use.*

On acquisition due allowance must be made for the probable use which would have given the dispossessed owner the best return and not merely its present use or disposition. The presumption must always be that a man makes the best use of his own property. It is not sufficient to rely on hypothetical building schemes but the owner must show that he was going to make a certain use of his property which would have brought him in profits or that he would have made such use of it, had he not been prevented by unavoidable circumstances, if he wishes the Court to give an enhanced value to that property on acquisition by Government. A.I.R. 1931 Lah. 207, Foll. (*Tek Chand and Walker, JJ.*) PRIBHU DIYAL *v.* SECRETARY OF STATE. **135 I.C. 183=I.R.**

LAND ACQUISITION ACT (1894), S. 15.

1932 Lah. 55=33 P.L.R. 1100=A.I.R. 1931 Lah. 364.

———S. 15—*Valuation.*

The actual lay out of a site at the time of acquisition should be taken as the most lucrative way of utilizing it at that time. (*Tek Chand and Walker, JJ.*) PRIBHU DIVAL *v.* SECRETARY OF STATE. **135 I.C 183=I.R. 1932 Lah. 55=33 P.L.R. 1100=A.I.R. 1931 Lah. 364.**

———S. 16—"*Encumbrance*" — *If covers customary right—Right to discharge water over property acquired —If destroyed by acquisition.*

The word "encumbrance" in S. 10 is sufficiently wide to cover not only an easement but also a customary right. The right to discharge water from particular properties over the property acquired, whether it is a right of easement or a customary right, is destroyed by acquisition. (*Allsop, J.*) GEORGE HIGH SCHOOL, AZAMGARH *v.* ABDUL KARIM KHAN. **157 I.C. 111=8 R.A. 98 1935 A.L.J. 992 1935 A.W.R. 971=A.I.R. 1935 All. 895.**

———S. 16—*Possession taken by Government—Subsequent backing out.*

After the Government has taken possession of the land proposed to be acquired, it cannot withdraw from acquisition. It is bound to complete the proceeding, make an award and give compensation. (*Nelson, R.M.*) MT. RUKHMABAI, *In re.* **14 N.L.J. 17 (Rev.).**

———S. 18—*Application for reference out of time—Power to refuse—Land Acquisition Officer.*

The final determination of the question as to whether the application for a reference under S. 18 is barred by time or not must be made by the District Judge. The Land Acquisition Officer has no jurisdiction to refuse to make the reference, even if in his opinion the application is not in time under Cl. (*a*) or Cl. (*b*) of sub-Sec. (2) of S. 18. (*Hasan, C.J. and Kisch, J.*) AHMAD ALI KHAN ALAWI *v.* SECRETARY OF STATE. **7 Luck. 578=I.R. 1932 Oudh 197—137 I.C. 68=13 L.R. 148 (Rev.)=16 R.D. 320=9 O.W.N. 234=A.I.R. 1932 Oudh 180.**

———S. 18—*Apportionment of compensation—Party aggrieved by order—Remedy.*

Persons who have received notice and who have appeared before the Collector at the time of the apportionment of the compensation money must, if they object to that apportionment, make an application under S. 18 of the Act and are not able to avail themselves of proviso (3), S. 31 (2) of the Act and are therefore debarred from filing a civil suit. (*Staples, A.J.C.*) SHIVMAL *v.* RAM CHANDRA BAPU. **30 N.L.R. 40=6 R.N. 147=147 I.C. 877=A.I.R. 1933 Nag. 322.**

———S. 18 and Civil Procedure Code, O. 40, R. 1—*Award—Acceptance by receiver appointed by Court—Right of claimant to make reference—If barred.*

An acceptance of the award by the receiver who is appointed by the Court to an estate and directed to accept the award on behalf of the claimants, but the appointment was "without prejudice to the contentious of the parties" as to the inadequacy of the compensation money, will not take away the right of a claimant to make a reference. Even under the general law relating to receivers, a claimant would not lose his right of reference by the appointment of a receiver as 'the appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of the receiver and others." (*Jack and Khundkar, JJ.*) LEAH ELIAS JOSEPH SOLOMON *v.* H. C. STORK **61 Cal. 1041=153 I.C. 938=7 R.C. 411=38 C.W.N. 844=60 C.L.J. 184=A.I.R. 1934 Cal. 758.**

LAND ACQUISITION ACT (1894), S. 18.

———S. 18—*Collector acting under S. 18 is not Court within C. P. Code, S. 115.*

When a Collector is acting under S. 18 of the Act he is not a Court within the meaning of S. 115, C.P. Code. Hence where he refuses to make an order of reference, no revision to High Court is competent. (Case law reviewed.) (*Page, C.J. and Das, J.*) MAYET *v.* LAND ACQUISITION COLLECTOR, MYINGYAN. **12 Rang. 275=150 I.C. 1049=7 R.R. 30=A.I.R. 1934 Rang. 118.**

———S. 18—*Collector's award—Objection—Onus of proof.*

After Collector has declared his award, the burden is upon the objectors, who go to the District Court, to show that the award is erroneous. But after the District Judge has increased the rate, it is for the appellant to show that the decision of the District Judge was erroneous. (*Addison and Agha Haidar, JJ.*) SECRETARY OF STATE *v.* FAUJA SINGH. **154 I.C. 407=7 R.L. 567=A.I.R. 1934 Lah. 97.**

———S 18—*Compensation—Apportionment as between landlord and tenant.*

In the absence of any definite evidence, the Court may presume that the interests of the landlord and of the occupancy tenant, exclusive of specific amounts spent on extraordinary improvements of the land, are in the ratio of 10: 6 ; but if there are other considerations, that presumption may be rebutted. (*Sulaiman, C.J., Mukerji and King, JJ.*) SHIAM LAL *v.* COLLECTOR OF AGRA. **55 All. 897=6 R.A. 634=148 I.C. 100=15 L.R. 73 (Rev.)=3 A.W.R. 139=18 R.D. 81=1934 A.L.J. 8=A.I.R. 1934 All. 239 (F.B.).**

———S. 18—*Dispute as to title between party and Government—Reference to Court.*

Where a dispute arises between the Government and claimant on a question of title, it is open to the Collector to refer the matter to the Court. (*Mukerji, King and Niamatullah, JJ.*) MAKAN LAL *v.* SECRETARY OF STATE. **56 All. 656=6 R.A. 734=148 I.C. 617=3 A.W.R. 1=1934 A.L.J. 32=A.I.R. 1934 All. 260 (F.B.).**

———S. 18—*Objection to reference—Stage.*

A highly technical objection that the application requiring the Collector to make a reference was not made by the proper person should be taken at the first opportunity, when it might possibly have been met by making a fresh application and if not so taken, must be considered to have been waived. (*Sir John Wallis.*) VENKATAKRISHNAVYA *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1931 P.C. 108=1931 M.W.N. 345=35 C.W.N. 560=33 L.W. 523=53 C.L.J. 302=33 Bom. L.R. 874=131 I.C. 332=A.I.R. 1931 P.C. 39=60 M.L.J. 399 (P.C.).**

———S. 18—*Order of Collector—Review.*

The Collector acting under S. 18 has no power to review his own order. (*Mukerji, J.*) KASHI PRASAD *v.* NOTIFIED AREA OF MAHOBA. **54 All. 282=143 I.C. 111=I.R. 1933 All. 187 (2)=A.I.R. 1932 All. 598.**

———S. 18—*Order of Collector under—Revision by High Court.*

The Collector is not subordinate to the High Court and the High Court has no jurisdiction to correct the Collector if he improperly fails to make a reference or having made a reference withdraws the reference before the reference has reached the District Judge. (*Mukerji, J.*) KASHI PRASAD *v.* NOTIFIED AREA OF MAHOBA. **54**

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All. 282=143 I.C. 111=I.R. 1933 All. 187 (2)=A. I.R. 1932 All. 598.

———**S. 18 and Civil Procedure Code, S. 115**—*Order refusing to make a reference—Revision—Collector, if "Court."*

The Land Acquisition Collector is not a "Court" within the meaning of S. 115, C. P. Code, or S. 107, Government of India Act. But his order refusing to make a reference under S. 18, Land Acquisition Act, is a judicial Act. Though therefore, S. 115, C. P. Code, may not technically apply, there being no remedy outside the Chartered High Court, the High Court has power to revise the order. (*Jack and Khundkar, JJ.*) LEAH ELIAS JOSEPH SOLOMON *v.* H. C. STORK. **61 Cal. 1041=153 I.C. 938=7 R.C. 411=38 C.W.N. 844=60 C.L.J. 184=A.I.R. 1934 Cal. 758.**

———**S. 18**—*Order refusing to make reference—Revision to High Court—Sustainability.*

In proceedings under S. 18, the Collector acts as an administrative and not as a judicial officer. Even assuming he is a 'Court' he is not a Court subordinate to the High Court.

Held, that an order under S. 18 refusing to make a reference cannot be revised by the High Court. (Case-law discussed.) (*Sulaiman, C.J., Mukerji and King, JJ.*) BHAJANI LAL SECRETARY OF STATE. **54 All. 1085=141 I.C. 587=I.R. 1933 All. 68=1932 A.L.J. 769=A.I.R. 1932 All. 568 (F.B.).**

———**S. 18**—Party dissatisfied with award—Remedy of—Failure to apply under S. 18—Effect of—No right to re-open the question of the right to the amount of compensation by a regular suit. *See* LAND ACQUISITION ACT, S. 31 (2), PROVISO. **9 O.W.N. 1176.**

———**S. 18**—"*Person interested*"—*Plaintiff could have filed cross-objections claiming plot in question.*

An award was with respect to three survey numbers which were in dispute in Civil Court between two claimants *A* and *B*. Prior to the notification in the acquisition proceedings, *A* had obtained decree in trial Court against *B* with respect to two out of three survey numbers. *B* had appealed but *A* had not but could have filed cross-objections with regard to the third survey number.

Held, that *A* was a person interested in the third survey number also. (*Sir John Wallis.*) VENKATA-KRISHNAYYA *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1931 P.C. 108=1931 M.W.N. 345=35 C.W.N. 560=33 L.W. 523=53 C.L.J. 302=33 Bom.L.R. 874 =131 I.C. 332=A.I.R. 1931 P.C 39=60 M.L.J. 399 (P.C.).**

———**S. 18**—*Reference made—Plea of bar of limitation—Whether available subsequently.*

After a reference has been made by the Collector, it is not open to the Secretary of State to plead before the Court that the application by the owner was barred by limitation and that the reference ought not to have been made. (*Mukerji and Bennet, JJ.*) SECRETARY OF STATE FOR INDIA *v.* BHAGWAN PRASAD. **141 I.C. 621=I.R. 1933 All. 75=1932 A.L.J. 752=A.I.R. 1932 All. 597.**

———**S. 18**—*Reference under—Inquiry as to negligence or error in payment made by Collector.*

On a reference to a Court, the matters for decision may include either a question as to the total amount of compensation, a question in which the Collector is clearly interested, or a dispute between the parties claiming amongst themselves as to the person or persons to whom compensation should be paid, a question in which the Act does not consider the Collector to be interested. There is no suggestion that on such a reference the Court should have to decide, whether or not the Collector had been so negligent that he should be required to pay the compensation twice over to different persons, and a question of that sort is one which can only be decided satisfactorily in a separate suit. (*Das and Brown, JJ.*) K.N.K.R.M.K. CHETTYAR FIRM *v.* SECRETARY OF STATE. **11 Rang. 344=149 I.C. 865 (2)=6 R.R. 334=A.I.R. 1933 Rang. 176.**

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———**S. 18** — Reference under — Order deciding apportionment—Appeal claiming larger amount—Court-fees. *See* COUR FEES ACT, S. 8. **A.I.R. 1935 Lah. 448.**

———**S. 18**—*Refusal to make reference—Revision.*

An order of the Land Acquisition Officer refusing to make a reference under S. 18 is a judicial order which could be revised by the High Court 47 Bom. 699, Not foll. (*Wazir Hasan, C. J. and Kisch, J.*) AHMAD ALI KHAN ALAWI *v.* SECRETARY OF STATE. **7 Luck. 578=I.R. 1932 Oudh 197=137 I.C. 68=13 L.R 148 (Rev.)=16 R.D. 320=9 O.W.N. 234=A.I.R. 1932 Oudh 180.**

———**S. 18**—*Remand of case to District Court—Persons not parties to prior proceedings—Right to intervene.*

Where a case is referred to the District Judge on objections being raised to the award of the Land Acquisition Officer and the case on appeal to the High Court by some of objectors is again remanded to the District Court, an objector who has not taken part in the proceedings before the District Judge and those who have not appealed from order of District Judge, are not entitled to intervene as objectors on remand. (*Addison and Agha Haidar, JJ.*) SECRETARY OF STATE *v.* MEHRAJ DIN. **147 I.C. 953=6 R.L. 471=35 P.L.R. 221=A.I.R. 1933 Lah. 948.**

———**S. 18 (2)**—*Application for reference—Formalities—Letter to Land Acquisition Officer—If amounts to.*

A letter writen by the claimant to the Land Acquisition Officer stating that he does not accept the award and requesting that the question of the amount of compensation be referred to the High Court is a proper application for reference and is a sufficient compliance with the terms of S. 18 (2) (*Beaumont, C.J. and Rangnekar, J.*) THE PROVIDENT INVESTMENT CO., LTD. *v.* THE LAND ACQUISITION OFFICER, BOMBAY. **60 Bom. 1=157 I.C. 650=8 R.B. 77=37 Bom.L.R. 465=A.I.R. 1935 Bom. 319.**

———**S. 18 (2) (a)**—*Applicability—Party not actually present — Representation — Presence of receiver—If sufficient.*

Though a party is not actually present when the award is drawn up and signed, when a receiver appointed by the Court for the estate is directed to accept the award on behalf of the claimants and he appears before the Collector on the date when the award is drawn up and signed and accepts the award, that is sufficient representation of the parties concerned, and the party who is not actually present is also represented and comes within the terms of S. 18 (2) (*a*) (*Jack and Khundkar, JJ.*) LEAH ELIAS JOSEPH SOLOMON *v.* H. C. STORK. **61 Cal. 1041=153 I.C. 938=7 R.C. 411=38 C.W.N. 844=60 C.L.J. 184=A.I.R. 1934 Cal. 758.**

———**S. 18 (2) (a)**—*Starting point of limitation—"Made"—Meaning of.*

Under S. 18 (2) (*a*) an award cannot be said to be made until it is drawn up and signed by the Collector. It is not "made" when it is settled what the award is to be and it takes several days after that to draw up the actual award so determined. Hence the starting point of limitation under S. 18 (2) (*a*) is the date on which it is so drawn up and signed. (*Jack and Khundkar, JJ.*)

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LEAH ELIAS JOSEPH SOLOMON *v.* H. C. STORK. **61 Cal. 1041=153 I.C. 938=7 R.C. 411=38 C.W.N. 844=60 C.L.J. 184=A.I.R. 1934 Cal. 758.**

———**S. 20**—*Notice to Collector—When necessary.*

Notice to Collector is necessary only in a case where the objection is in regard to the area of the land or to the amount of compensation. (*Das and Brown, JJ.*) K.N.K.R.M.K. CHETTYAR FIRM *v.* SECRETARY OF STATE. **11 Rang. 344=149 I.C. 865 (2)=6 R.R. 334=A.I.R. 1933 Rang. 176.**

———**S. 21**—*Landlord and tenant—Apportionment of compensation—Mode of valuing the land.*

Where a claim to apportionment of compensation between landlord and tenant is involved, the reasonable course is to find the value of the land as a whole first. The rights between the landlord and tenant are to be raised subsequently as between them and not between the Secretary of State and the tenants The valuation of the land should be ascertained by considering cases of similar sales. It is not a proper method of approach to value the different interests separately, unless it is quite clear what the rights of the different parties are and unless the evidence affords instances of dealings in exactly the same rights as are in question. (*Rankin, C.J and Mukerji, J.*) COLLECTOR OF JALPAIGURI *v.* JALPAIGURI TEA CO., LTD. **58 Cal. 1345=I.R. 1932 Cal. 118—135 I.C. 438=A.I.R. 1932 Cal. 143.**

[R 55 A. 19 (900) (F.B.)]

———**S. 23**—*Agricultural land—Compensation for—20 years' purchase.*

Compensation in respect of agricultural land should be allowed on the basis of 20 years' purchase, in a case where the average annual income of the land is expected in perpetuity and the owner obtains it without any effort other than signing of a lease. (*Wild, J.C. and Milne, A.J.C.*) SECRETARY OF STATE FOR INDIA *v.* KALIANDAS **25 S L.R. 304=I R. 1931 Sind 154=134 I.C. 1002=A I.R. 1931 Sind 168.**

———**S. 23**—*Boom and fall of price—Deduction for fall.*

Where the price paid for property has been influenced by a boom which is followed by a fall in price, the Court should make a reasonable deduction while awarding compensation. Since the time when the claimant purchased his property, the greatest recorded fall in a certain quarter in Karachi occurred with regard to plots situated only 182 yards from the claimant's plot and the fall exceeded 50 per cent., there was a similar fall elsewhere but the average was about 44 per cent.

Held, that 44 per cent. of the value paid by the claimant should be deducted for the purpose of compulsory land acquisition. (*Ferrers, J.C. and Aston, A.J.C.*) KARACHI MUNICIPALITY *v.* NARAINDAS **6 I.R. (Sind) 44=145 I.C. 795=A.I R. 1933 Sind 57.**

———**S. 23**—*Building—Difference between frontage and back.*

A differentiation may be made in the properties acquired between frontage and back but no ratio can be fixed between the values of the former and of the latter as each case will turn on its own merits. The depth of frontage is a matter of importance and it can be best settled by assuming that the owner of a property will make the best possible use of it and that the actual "lay out" of the property at the time of acquisition was in all the circumstances of the case the most advantageous and lucrative, it being open to the owner to show that, owing to special circumstances such as minority or litigation or poverty or unbusinesslike methods, full advantage had not been taken of the property, in which case assistance can be derived from the frontage or other

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buildings in the locality. 33 Bom. 325 and A.I.R. 1928 Lah. 263, Foll. (*Tek Chand and Walker, JJ.*) PRIBHU DIYAL *v.* SECRETARY OF STATE. **135 I.C. 183=I.R. 1932 Lah. 55=A.I.R. 1931 Lah. 364.**

———**S. 23**—*Building with walls of architectural beauty.*

Where a land is acquired which contains walls of architectural beauty, the value of the walls cannot be assessed from that standpoint but only with regard to the materials used. (*Addison and Agha Haidar, JJ.*) SECRETARY OF STATE *v.* MEHRAJ DIN. **147 I.C. 953=6 R L. 471=35 P.L.R. 221=A I R. 1933 Lah. 948.**

———**Ss. 23 and 9**—*Claim—Amount claimed under each sub-head, if need be specified.*

S. 9 only requires that a claimant should specify the interest he claims, the amount of compensation and the particulars of his claim to compensation. It does not require him to specify the amount of compensation claimed in respect of the six sub heads referred to in S. 23. (*Ferrers, J. C. and Rupchand Bilaram, A.J.C.*) SECRETARY OF STATE *v.* DINSHAW. **27 S L.R. 84=6 I.R. (Sind) 109—146 I.C. 1040=A.I.R. 1933 Sind 21.**

———**S. 23**—*Compensation.*

A land which has been assessed as a garden cannot also be assessed as an agricultural land. (*Addison and Agha Haidar, JJ.*) SECRETARY OF STATE *v.* MEHRAJ DIN. **147 I.C. 953=6 R L. 471=35 P.L.R. 221=A. I.R. 1933 Lah. 948.**

———**S. 23**—Compensation—Basis—Potential use. *See* LAND ACQUISITION ACT, S. 15. **A.I.R. 1931 Lah. 364.**

———**S. 23**—*Compensation—Power to enforce contract in absence of contracting parties.*

From the provisions of S. 23 of the Act, it is fairly clear that the Land Acquisition Officer and the Court dealing with the matter on a reference from him have only to decide the market-value of the property, subject to the considerations mentioned in that and the following sections. Neither the Land Acquisition Officer nor the Court has got the power to enforce a contract between the claimant and the District Board as such in the absence of the contracting parties when the District Board is no party to those proceedings, whatever their ultimate interest in the acquisition may be. (*Varadachariar and Burn, JJ.*) DAWOODSAHIB *v.* COLLECTOR OF CHINGLEPUT **155 I.C 280=7 R M. 559=1934 M.W.N. 1400=A.I.R. 1935 Mad. 279 (2).**

———**S. 23**—*Compensation—Rules applicable.*

In determining compensation two things should be borne in mind. (1) the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker, and (2) the value to the owner consists in all advantages which the land possesses present or future but it is the present value alone of such advantages that falls to be determined. (*Mitter and Henderson, JJ.*) BIJAYA KANTA LAHIRI *v.* SECRETARY OF STATE. **150 I.C. 368=6 R.C. 835=58 C.L. J. 38=A.I.R. 1934 Cal. 97.**

———**S. 23**—*Evidence—Expert opinion—Evidentiary value of.*

Expert opinion is evidence of determining valuation but its evidential value is not great. The value of expert's opinion depends upon the facts upon which it rests and the validity of the process by which the conclusion is reached. A.I.R. 1924 Lah. 548, Ref. (*Ferrers, J.C.*) LAND ACQUISITION OFFICER *v.* FAKIR MAHOMED. **I.R. 1933 Sind 145=143 I.C. 699=A.I.R. 1933 Sind 124.**

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———**S. 23**—*Inam land—Compensation payable for—Non-transferability, if material.*

In determining the compensation payable for inam land under the Act, the element of non-transferability of the land cannot enter into consideration. The publication of the declaration under S. 6 has the effect of removing all restrictions on the rights of the owner and consequently lifts the embargo on its transferability. So after the declaration, the inam land stands on the same footing as any freehold land. (*Niyogi and Grille, A.J. Cs.*) SHAFKAT HUSSAIN *v.* COLLECTOR OF AMRAOTI. **I.R. 1933 Nag. 108 = 142 I.C. 364 = A.I.R. 1933 Nag. 208.**

———**S. 23**—*Inam land—No action taken under S. 31 (3)—Limited interest of owner, still material.*

Even if no action is taken under S. 31 (3) of the Act. the fact that the land was service inam cannot be ignored, in computing the amount of compensation. S. 31 does not exclude the operation of S. 23, on the other hand, it presupposes the determination of the pecuniary value of the right or interest in the land held by the claimant in accordance with the direction contained in S. 23; and S. 31 (3) comes into operation only at the time of award ing a money compensation. (*Niyogi and Grille, A.J. Cs.*) SHAFKAT HUSSAIN *v.* COLLECTOR OF AMRAOTI. **I.R. 1933 Nag. 108 = 142 I.C. 364 = A.I.R. 1933 Nag. 208.**

———**S, 23**—*Inam—Pre British grant as remuneration for services—Status of grantee.*

Where the inam was granted in pre-British period to the ancestor of the present holder as remuneration for service as a *Kazi*.

Held, that even if the grant meant an assignment of revenue and not of land, it was capable of being regarded as an alienated land within the meaning of S. 4 (17), Berar Land Revenue Code, 1896, and S. 2 (2) of the Berar Land Revenue Code, 1928, and as the grant had been confirmed under R. 4 of the Berar Inam Rules, the grantee was a superior holder with an interest in the land and not a mere licensee. (*Niyogi and Grille, A.J. Cs.*) SHAFKAT HUSSAIN *v.* COLLECTOR OF AMRAOTI. **I.R. 1933 Nag. 108 = 142 I.C. 364 = A.I.R. 1933 Nag. 208.**

———**S. 23**—*Inferences drawn from successive sales.*

The objection that averages may be influenced by coincidence when they are based on the sale of all and sundry kinds of property, is not applicable to inferences drawn from the successive sales of the same property. (*Ferrers, J. C. and Aston, A. J. C.*) KARACHI MUNICIPALITY *v.* NARAINDAS. **6 I.R. (Sind) 44 = 145 I.C. 795 = A.I.R. 1933 Sind 57.**

———**S. 23**—*Land acquired intended to be used as road—Depreciation in value of rest of the land—Claim for.*

Where the land acquired is intended to be used as a road, the claimant is entitled to compensation for depreciation in the value of the rest of his land in consequence of such use. *Buccleuch (Duke)* v. *Metropolitan Board of Works*, 5 H.L. 418 and *Cowper Essex* v. *Local Board for Acton*, (1889) 14 A. C. 153, Ref. In estimating compensation for severance, both the actual and prospective use of the land must be considered. A prospective buyer is likely to pay less for the plot that remained than what he might have paid if he could use the land for building two bungalows. (*Ferrers, J.C and Rupchand Bilaram, A. J. C.*) SECRETARY OF STATE *v.* DINSHAW. **27 S L R 84 = 6 I.R. (Sind) 109 = 146 I.C. 1040 = A.I.R. 1933 Sind 21.**

———**S. 23**—*Land purchased as prospective building plots—Market value—Mode of assessment.*

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J purchased the land with the intention of laying it out in building plots and roads to give access to these plots and selling the plots. He actually sold some plots, one on 28th August, 1924 and others before the notfiication was published under S. 6, Land Acquisition Act,

Held, that the market value of the land on the date of the notification would be estimated at the sum which a prudent man in *J*'s position would have accepted on 28th August, 1924 for the entire land and not the amount which *J* would have received if he had sold all the plots for the best offers which he could obtain in a few weeks. (*Macnair, J.C. and Staples, A.J.C.*) COLLECTOR OF NAGPUR *v.* JOGLEKAR. **6 I.R. (Nag.) 62 = 146 I.C. 77 (2) = 29 N.L.R. 155 = A.I.R. 1933 Nag. 290.**

———**S. 23**—*Land with buildings—Valuation of.*

The value of the bare site and cost of the building may, in the case of a building used as the personal residence of the owner, be borne in mind, when estimating the market-value; it is only in rare instances that a reliable estimate will be obtained by adding the cost of the building to the value of the bare site. Land is a marketable commodity of one description and land with buildings on it is a marketable commodity of another and a different description. 34 Bom. 486; 60 P.R. 1918 and 10 Bom.L.R. 907, Rel. on. (*Ferrers, J.C. and Aston, A.J.C.*) KARACHI MUNICIPALITY *v.* NARAINDAS. **6 I.R. (Sind) 44 = 145 I.C. 795 = A.I.R. 1933 Sind 57.**

———**S. 23**—*Landlord and tenant—Apportionment of compensation—Case of occupancy tenants.*

The occupancy tenants usually pay to their landlords land revenue plus malikana at different rates. If the Court should assume that land revenue was equal to half the rent paid by a non occupancy tenant, the proportion of the interest of the landlord and the occupancy tenant in the land acquired may be fairly taken to be the same as that between the malikana and the land revenue. (*Bhide, J.*) RAM KISHEN *v* JATI RAM. **I. R. 1931 Lah. 666 = 132 I.C. 698 = A.I.R. 1931 Lah. 649.**

———**S. 23**—*Market-value of agricultural land—Method of computation.*

Per *Macpherson, J.*—Although in most of the decisions the cost of cultivation to be deducted from the value has been taken to be one third and the number of years purchase at twenty, those rules which might have been appropriate to pre-war times cannot be applied to post-war conditions in Chota Nagpur. Having regard to the conditions of tenancy, the limited right of sale, lack of demand and several other adverse conditions, the cost of cultivation may well be fixed at one half the gross produce over a period of years and the number of years purchase or the multiplier at fifteen.

Per *Fazl Ali, J.*—"Once it is found that the main principle on which the lands have been valued is correct, it is neither usual nor proper for the High Court to lightly disturb the conclusion arrived at by the Courts which must be assumed to be familiar with the local conditions merely because more than one view is possible as to what are mere details." (*Macpherson and Fazl Ali, JJ.*) GOKUL KRISHNA BANERJI *v.* SECRETARY OF STATE FOR INDIA. **137 I C 116 = I.R 1932 Pat. 136 = 12 Pat.L.T. 659 = A.I.R. 1932 Pat. 134.**

———**S. 23**—*Market-value—Belting system—Value of—Front and back lands—Soundness of distinction.*

The value of belting system, though widely used, depends much on a variety of facts. In land acquisition or improvement schemes in and near about Calcutta, land is generally divided into blocks facing some particular street or road or lane and each block is divided into three belts, the first to a depth of 60 feet or so, on

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the road frontage, the second to a depth of about 150 feet thereafter and the third consisting of all land behind and the relative values of the three belts are fixed in the proportion of 100,66 6 and 50. But in localities where land is sold by *bighas* or acres, and there is no real evidence of such proportionate diminution in value, the system is based on no sound principle and must be regarded as unsatisfactory. Of course there is a distinction in value between front lands and back lands everywhere, but that would not justify a recourse to the belting system in each and every case. It is a highly artificial system and cannot be resorted to as a hard and fast rule. Nor again can there be any hard and fast rule, that back land must be of less value than front land or that the proportion should be as one to a half or that there must be a certain proportion at a certain distance from the road. 36 C. 967; 11 C.L.J. 612; A.I.R. 1926 B. 44; 10 B. 585; 33 B. 325; 11 C.L.J. 393 and 18 C.L. J. 244, Ref. (*Mukerji and Guha, JJ.*) NITYAGOPAL SEN PODDAR *v.* SECRETARY OF STATE FOR INDIA. **59 Cal. 921=141 I.C. 673=I.R. 1933 Cal. 161=A. I.R. 1933 Cal. 25.**

——**S. 23**—*Market-value — Considerations regarding—Sales in the vicinity.*

Where there is evidence of sales of similar lands in the vicinity, having similar irrigational facilities, the Land Acquisition Officer is bound to take such sales into consideration while fixing the market-value of the land in question and the mere fact that the owners have not cultivated it for the last ten years is no ground for capitalizing the value of it at one tenth or less of the net income, where it is not shown that the land remained uncultivated because of the poverty of the soil. (*Wild, J.C. and Rupchand, A.J.C.*) DHARMDAS KHUSHIRAM *v.* LAND ACQUISITION OFFICER, HYDERABAD, SIND. **I.R. 1931 Sind 75=131 I.C. 715=A.I.R. 1931 Sind 56.**

——**S. 23**—*Market value—Future utility of property.*

Where land is taken for public purposes under the Act, the market value of the property is to be determined with reference to the future utility, but it must not be entirely conjectural 3 I.C. 277, Ref. (*Wild, J.C. and Milne, A.J.C.*) CHOITHRAM BEGRAJ *v* SECRETARY OF STATE FOR INDIA. **25 S.L.R. 285=131 I.C. 222=A.I.R. 1931 Sind 52.**

——**S. 23**—*Market value — Guiding principles—Post notification transfers—Reference—Permissibility.*

In valuing immovable property, the Court is justified in taking a broad view as favourable to the owner as the evidence permits. But as in the case of any other judicial proceedings, the findings must be based on evidence and legitimate deductions from it and if there is an appeal both the evidence and deductions are subject to reconsideration by the Court of appeal. In determining the value, post notification transactions need not necessarily be ignored. But if a considerable interval has elapsed, the Court will attach little value to the subsequent sale. (*Rangnekar, and Broomfield, JJ.*) ASST. DEVELOPMENT OFFICER, TROMBAY *v.* TAYABALLI. **149 I.C. 271=6 R.B. 356=35 Bom.L.R. 763=A.I.R. 1933 Bom. 361.**

——**S. 23**—*Market value—Matters for consideration—Burden of proof.*

In determining the market value four things have to be considered, *viz.*, firstly, the price paid within a reasonable time for the land itself; secondly, the rents and profits received on account thereof shortly before the acquisition; thirdly the prices paid for adjacent land possesssing similar advantages; and fourthly, the opinion of valuators or experts. In proceedings in reference, the

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burden of proof is on the claimant to prove that the valuation is insufficient. 11 C.W.N. 875, Ref. (*Ferrers, J.C.*) LAND ACQUISITION OFFICER *v.* FAKIR MAHOMED. **I.R. 1933 Sind 145=143 I.C. 699=A.I.R. 1933 Sind 124.**

——**S. 23**—*Market-value—Potential user to be taken into account.*

In considering what is the fair market-value of the land, it is right to take into account not only the use to which the land is being put at the time of the acquisition but its market value laid out in the most lucrative and advantageous way in which the owners could dispose of it. Where it has a potential value which is not merely speculative, it ought to be taken into consideration. (*Page, C.J. and Ba U, J.*) MAUNG BOW KHIN *v.* SPECIAL COLLECTOR, MAUBIN. **156 I.C. 624=8 R. R. 31=A.I.R. 1935 Rang. 157.**

——**S. 23**—*Market value—Probable user for building purposes to be considered.*

Where Government takes property from private persons under statutory powers, the Courts in computing the amount of compensation to be awarded to the person interested therein should be guided by the principle that the owner is entitled to have the price of his land fixed in reference to the probable use, which will give him the best return and not merely in accordance with its present use or disposition. Probabilities of agricultural land within Municipal limits of Multan being used for building purposes taken into account in fixing compensation. (*Tek Chand Currie. JJ.*) SECRETARY OF STATE FOR INDIA *v.* CHUNI LAL. **12 Lah. 117=I R. 1931 Lah 460=131 I.C. 364=32 P.L R. 321=12 Lah. L.J. 280=A.I R. 1931 Lah. 207.**

[**Appr.** 33 P.L.R. 1100 (1102). **R.** 145 I.C. 334 (335)]

——**S. 23**—*Methods of valuation.*

Methods of valuation of land acquired under the Land Acquisition Act may be classified under three heads, *viz.*; (1) the opinion of experts, (2) the price paid within a reasonable time in *bona fide* transactions of purchase of the lands acquired or the lands adjacent to the land acquired and possessing similar advantages, (3) and a number of years' purchase of the actual or immediately prospective profit of the lands acquired. It is generally necessary to take two or all of these methods of valuation, in order to arrive at a fairly correct valuation, but exact valuation is practically impossible, and much reliance cannot be placed on the evidence of experts unless it is supported by or coincides with other evidence. 11 C W N. 875, Foll; 10 Bom.L.R. 675; A.I. R. 1928 P.C. 305 and 34 Cal. 599, Ref. (*Ferrers, J.C. and Aston, A.J.C.*) KARACHI MUNICIPALITY *v.* NARAINDAS. **6 I.R. (Sind) 44=145 I.C. 795=A. I.R. 1933 Sind 57.**

——**Ss 23 and 24**—*Object of.*

These sections only lay down rules for determining the market-value and do not create any right on the part of the owners of the lands or the holders of interest therein to obtain compensation on the footing of their respective rights as at the date of the declaration. (*Mukerji and Bartley, JJ.*) NRISINHA CHARAN NANDI CHOWDHURY *v.* NAGENDRA BALA DEBY. **60 Cal. 281=144 I.C. 743=6 R.C. 12=37 C.W.N. 14=A.I.R. 1933 Cal. 522.**

——**S. 23**—*Objection to assessment—Burden of proof.*

It is for the appellant to show that the assessment of the Land Acquisition Officer is too low. 106 I.C. 909; 34 Cal. 599, Rel. on. (*Tek Chand and Walker, JJ.*) PRIBHU DIYAL *v.* SECRETARY OF STATE. **135 I.C. 183=I.R. 1932 Lah. 55=33 P.L.R. 1100=A.I.R. 1931 Lah. 364.**

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———**S. 23**—*Tenancy land—Basis of compensation.*

The true tests for determining the amount of compensation which ought to be awarded to the proprietors in the case of tenancy lands is to ascertain the market-value of the land. The correct rule in all cases of this class is that the land to be acquired is to be valued in the first instance including all interests and the amount so ascertained has then to be apportioned amongst the parties interested according to their interests. A.I.R. 1919 Mad. 222, Ref. (*C. C. Ghose and Mitter, JJ.*) COLLECTOR OF DACCA *v.* ASHRAF ALI. **I.R. 1933 Cal. 412=143 I.C. 367=55 C.L.J. 557=A.I.R. 1933 Cal. 312.**

———**S. 23**—*Valuation—Adjacent land.*

The valuation with reference to a plot which is very close to the acquired land cannot form the basis of valuation with regard to the lands far apart; but where the distance between the plots is so negligible as 75 yards, it does not make any difference when valuing a land on the locality, if the valuation is based on a document with reference to one plot in the locality which is of the same description with similar advantages as the other plots. Similarly land outside the Municipal limits can be valued in the same way as land in close proximity to the Municipal area. (*C. C. Ghose and Mitter, JJ.*) COLLECTOR OF DACCA *v.* ASHRAF ALI. **I.R. 1933 Cal. 412=143 I.C. 367=55 C.L.J. 557=A.I.R. 1933 Cal. 312.**

———**S. 23**—*Valuation—Expert evidence.*

Where the so-called "expert witnesses" give no data in support of their opinions, their evidence should be rejected. A.I.R. 1924 Lah. 548, Foll. (*Tek Chand and Walker, JJ.*) PRIBHU DIYAL *v.* SECRETARY OF STATE. **135 I.C. 183=I.R. 1932 Lah. 55=33 P.L.R. 1100=A.I.R. 1931 Lah. 364.**

———**S. 23**—Valuation of land—Interests of landlord and tenant. *See* LAND ACQUISITION ACT, S. 21. **58 Cal. 1345=A.I.R. 1932 Cal. 143.**

———**S. 23**—"*Value.*"

"Value" for the purpose of the Land Acquisition Act means the market-value of the property. It may be affected by, but cannot be governed by, the procedure laid down in the lease for fixing renewal premia. (*Ferrers, J.C. and Aston, A.J.C.*) KARACHI MUNICIPALITY *v.* NARAINDAS. **6 I.R. (Sind) 44=145 I.C. 795=A.I.R. 1933 Sind 57.**

———**S. 23**—*Value — Determination of— Property subject to restrictions—Possibility of restrictions being determined—Relevancy of.*

In considering the claim of the owner, the value to be paid for is the value to the owner as it existed at the date of taking, not the value to the taker. The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Again the value to be assessed is the value to the old owner who parts with his property and not the value to the new owner who takes it over. Where the old owner takes the property subject to restrictions, it is necessary to inquire how far these restrictions affect the value. In determining the burden of the restrictions one circumstance to consider is the chance of such a restriction being determined. When there was evidence to show that the area acquired was so situate as to make it possible that within a reasonable period some of it would become a building site, some allowance was made for such a possibility. (1909) 1 K.B. 16; (1914) A.C. 569; 25 C. 194 (P.C.); 46 M. 782, Rel. on. (*Wallace and Stone, JJ.*) COLLECTOR OF CHINGLEPUT *v.* KRISHNAVENI AMMAL. **6 I.R. (Mad.) 104=145 I.C. 604=A.I.R. 1933 Mad. 190.**

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———**S. 23**—*Value of land—Demands for buildings limited—Land to be valued as agricultural land.*

Where except for a small portion of land, the land in dispute had no value as a building site because the demand for buildings was limited, the value of the land should be assessed on the basis of what was its worth as an agricultural land. (*Harrison and Dalip Singh, JJ.*) TARA SINGH *v.* SECRETARY OF STATE. **6 I.R. (Lah.) 244 (1)=146 I.C. 556=34 P.L.R. 997=A.I.R. 1933 Lah. 508.**

———**S. 23 (1)**—*Date of expropriation.*

The date of expropriation must be deemed to be the date on which the notification for acquisition is issued. 17 S.L.R. 288, Foll. (*Wild, J.C. and Rupchand, A.J.C.*) SECRETARY OF STATE *v.* SUKKUR MUNICIPALITY. **26 S.L.R 321=I.R. 1931 Sind 50=131 I.C. 178=A.I.R. 1931 Sind 67.**

———**S. 23 (1)**—*Land intended originally for tow path but not so used—Value as building site.*

The land had been originally granted to Municipality for purposes of agriculture and subsequently it was exempted from assessment on the understanding that it would be used as a tow path. But at the time when the notification for acquisition was issued, the land was not being used as a tow path nor was there any necessity to do so. It was argued that it was open to the revenue authorities to refuse to grant the permission for converting the land into building site and that therefore its potential value as building site could not be taken into account.

Held, that with the non-user of the land as a tow path, the proprietary rights of the Municipality in it to hold it as an ordinary agricultural land on payment of assessment were not at an end and therefore the potential value of the land as a building site could be taken into consideration in fixing the compensation. 1 Bom. L. R. 454, A.I.R. 1925 Sind 112 Rel. on. (*Wild, J.C. and Rupchand, A.J.C.*) SECRETARY OF STATE *v.* SUKKUR MUNICIPALITY. **26 S.L.R. 321=I.R. 1931 Sind 50=131 I.C. 178=A.I.R. 1931 Sind 67.**

———**S. 23 (1)**—*Market-value.*

The market-value is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for the purpose for which the property is compulsorily acquired. 6 Lah. 69 (P.C.) and *Fraser v. City of Fraserville*, (1917) A.C. 187, Foll. (*Wild, J.C. and Rupchand, A.J.C.*) SECRETARY OF STATE *v.* SUKKUR MUNICIPALITY. **26 S.L.R. 321=I.R. 1931 Sind 50=131 I.C. 178=A.I.R. 1931 Sind 67.**

———**S. 23 (1)**—*Market-value—Date of.*

The market-value of the land to be acquired is to be considered at the date of the publication of the notification under S. 4. A.I.R. 1925 P.C. 91 and A.I.R. 1929 P.C. 92. Expl. (*Wild, J.C. and Milne, A.J.C.*) CHOITHRAM BEGRAJ *v.* SECRETARY OF STATE FOR INDIA. **25 S.L.R. 285=131 I.C. 222=A.I.R. 1931 Sind 52.**

———**S. 23 (1)**—*Market value — Rent received by owner—How far conclusive as basis for computing market value.*

In awarding compensation based on rent actually received, regard should be had to the question whether the lease was one for a considerable period and the rent received was an amount which was likely to be received for a lengthy period. If it was a long lease or one which was not likely to be determined early,

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the rent may be taken as an index to the value. If, on the other hand, it is a short lease and the bargain was one such as the landlord was hardly ever likely to get once again, it cannot be made a basis for computing the market-value. (*Baker and Broomfield, JJ.*) ISMAILJI MAHOMEDALLI *v.* DIST. DEPUTY COLLECTOR, NASIK. **141 I.C. 352=I.R. 1933 Bom. 69=34 Bom.L.R. 1457=A.I.R. 1933 Bom. 37.**

———**S. 23 (1)**—*Mode of valuation—Tenants and landlords having separate interest in land to be acquired.*

Where tenants and landlord have separate interest over land which is to be acquired, it is not the separate interest which has to be valued but primarily the land. The matter that can strictly arise in relation to several interests is the question of the division of the compensation allowed. 58 Cal. 1345, Ref. (*Wort and Fazl Ali, JJ.*) SECRETARY OF STATE *v.* BARA LAL KANDARP NATH SAH DEO. **13 Pat. 221=150 I.C. 27=6 R.P. 719=A.I.R. 1934 Pat. 168.**

———**S. 23 (1)**—*Scope.*

It depends on the circumstances of each case at what rate the property should be capitalized. 17 W.R. 221, Rel. on; A.I.R. 1925 Sind 288; 25 I.C. 393 and 16 Mad. 369 (P.C.), Ref. (*Wild, J.C. and Milne, A.J.C.*) CHOITHRAM BEGRAJ *v.* SECRETARY OF STATE FOR INDIA. **25 S.L.R. 285=131 I.C. 222=A.I.R. 1931 Sind 52.**

———**S. 23 (2)**—*Award of 15 per cent. on market-value—Statutory right of claimant.*

Award of 15 per cent. on market-value on compulsory acquisition is a statutory amount of compensation in addition to the market-value; and the Court has no power to deprive a claimant of that amount on the ground that he has not previously claimed it specifically. (*Nimatullah and Kalkhpal Singh, JJ.*) MAHOMED SAJJAD ALI KHAN *v.* SECRETARY OF STATE. **6 I.R. (All) 113=145 I.C. 526=A.I.R. 1933 All. 742.** * *

———**S. 23 (4)**—*Market value—Occupancy holding—Custom entitling landlord to one-fourth of the purchase-money on transfer—Acquisition of holding—Apportionment of compensation.*

Where the landlords are by local custom entitled to a share of one-fourth of the purchase-money on the transfer of an occupancy holding, this right should be taken into account when the occupancy holding is acquired by the Government and the landlord is entitled to receive one-fourth of the compensation paid to the *raiyat*, though unlike in the case of a private transfer, the landlord has no power to withhold his approval to the acquisition. (*Jwala Prasad and James, JJ.*) ABDUL HAQUE *v.* SECRETARY OF STATE FOR INDIA. **11 Pat. 485 I.R. 1932 Pat 145=137 I.C. 226=13 Pat L.T. 46=A.I.R. 1932 Pat. 120.**

———**S. 23 (4)**—*Right of privacy—Infringement of—Compensation for.*

Obiter: The infringement of the right of privacy is an appropriate subject for compensation. England and Indian cases referred. (*Mitter and Guha, JJ.*) PRASANNA KUMAR DUTTA *v.* SECRETARY OF STATE. **61 Cal. 245=151 I.C. 160=7 R.C. 76=38 C.W.N. 239 =A.I.R. 1934 Cal 525.**

———**S. 25**—*Land acquired by Government—Zamindar cannot claim compensation for kankar.*

When Government made settlements in the Province of Agra, both permanent and temporary, as settlements of right in the soil only, stone quarries were treated as a monopoly of Government and no rights of Zamindars were recognized in stone quarries; and hence a Zamindar whose land is acquired by Government under the Land Acquisition Act cannot claim compensation for kankar, which comes under the definition of mineral, and which is essentially the property of Government. (Case-law discussed.) (*Mukerji and Bennet, JJ.*) KHUSHAL SINGH *v.* SECRETARY OF STATE FOR INDIA. **53 All. 658=I.R. 1931 All. 723=133 I.C. 611=1931 A.L.J. 660=A.I.R. 1931 All. 394.**

[R. 55 A. 897 (909) (F.B.), 56 A. 656 (665) (F.B.).]

———**S. 25**—Powers of District Judge—Award of Land Acquisition Officer—Alteration of. *See* LAND ACQUISITION ACT, S. 11. **27 S.L.R. 84=A.I.R. 1933 Sind 21.**

———**S. 25 (1)**—*Award in excess of claim—Permissibility.*

It is not permissible to the Land Acquisition Judge to award a sum in excess of the claim made by the applicants to compensation. (*Mitter and Guha, JJ.*) PRASANNA KUMAR DUTTA *v.* SECRETARY OF STATE. **61 Cal. 245=151 I.C. 160=7 R.C. 76=38 C.W.N. 239=A.I.R. 1934 Cal. 525.**

———**S. 25 (1)**—*Claim delayed but put in*—25 (1) *applies.*

Where the claimants did not put in their claims at the time required by the notice under S. 9, but did so later, the amount which the Court can award is governed by S. 25 (1). 33 All. 376 and 60 P.R. 1918, Ref. (*Ferrers, J.C.*) LAND ACQUISITION OFFICER *v.* FAKIR MAHOMED. **I.R. 1933 Sind 145=143 I.C. 699=A.I.R. 1933 Sind 124.**

———**S. 25 (1)**—*Power of District Judge to vary different items.*

There is nothing in S. 25 (1) which precludes the District Judge from introducing variations in different items that make up the award, so long as the total amount is not reduced. (*Addison and Din Mohammad, JJ.*) SECRETARY OF STATE *v.* AMIR MOHAMMED KHAN. **159 I.C. 257=8 R.L. 370=A.I.R. 1935 Lah. 653.**

———**S. 25 (2)**—*Sufficient reason—Adjournment of inquiry—Time for making claim not thereby extended.*

The fact that the Collector adjourned the inquiry *sine die* for making the award does not by itself extend the time for making the claim already fixed by the notice under S. 9. 30 Cal. 36, Ref. (*Macpherson and Fazl Ali, JJ.*) GOKUL KRISHNA BANERJI *v.* SECRETARY OF STATE FOR INDIA. **137 I.C. 116=I.R. 1932 Pat. 136 =12 Pat. L.T. 659=A.I.R. 1932 Pat. 134.**

———**S. 25 (2)**—*Sufficient reason—Defective notice—Appearance and objection by party on the date specified.*

Per *Macpherson, J.*—Even though a notice issued under S. 9 may have been defective in several particulars regarding the date, the name or description of the area proposed to be acquired, that is not a sufficient reason for not making the claim if in pursuance of the notice the party has appeared at the time and place specified and raised objections regarding measurement but failed to specify the amount claimed as compensation. (*Macpherson and Fazl Ali, JJ.*) GOKUL KRISHNA BANERJI *v.* SECRETARY OF STATE FOR INDIA. **137 I.C. 116=I.R. 1932 Pat. 136=12 Pat. L.T. 659=A.I.R. 1932 Pat. 134.**

———**Ss. 26 and 11**—Award under—Difference. *See* LAND ACQUISITION ACT, SS. 11 AND 26. **11 Rang. 344=A.I.R. 1933 Rang. 176.**

———**(As amended by Act XIX of 1921), S. 26 (2)**—*Calcutta Improvement Act (Beng. Act V of* 1911), *S. 71—Award of Calcutta Improvement Tribunal—Finality of—Appeal to Privy Council—Competency of.*

LAND ACQUISITION ACT (1894), S. 27 (2).

The new sub-S. (2) of S. 26 of the Act does not have the effect of enabling an appeal to be taken to His Majesty in Council from a judgment and decree of the High Court, Calcutta, on appeal from an award of the Calcutta Improvement Tribunal in respect of land compulsorily acquired under the Calcutta Improvement Act. 39 I.A. 197, Ref. (*Sir George Lowndes.*) SECRETARY OF STATE FOR INDIA *v.* HINDUSTAN CO-OPERATIVE INSURANCE SOCIETY, LTD. **58 I.A. 259=59 Cal. 55 =1931 M.W.N. 695=132 I.C. 748=54 C.L.J. 14= I.R. 1931 P.C. 236=33 Bom.L.R. 1006=1931 A.L.J. 475=35 C.W.N. 794=A.I.R. 1931 P.C. 149=61 M.L.J. 864 (P.C.).**

[R. 59 C. 528 (529); 57 M. 271 (297)(F.B.)]

———**S. 27 (2)**—*Costs—Discretion.*

S. 27 (2) is limited to the proceedings in the Court of first instance. Costs of proceedings in the Higher Courts are at their discretion. (*Beaumont, C.J. and Murphy, J.*) ASSISTANT COLLECTOR, SOUTH SALSETTE *v.* SHAPURJI CAWASJI. **136 I.C. 173 (1)= I R. 1932 Bom. 157(1)=33 Bom L R. 1210=A.I.R. 1931 Bom. 520.**

———**S. 27 (2)**—*Enhancement of rate of compensation —Disallowance of claimant's costs—Propriety.*

Where the Collector awarded compensation at Rs. 26 a cent and the claimant appealed claiming at Rs. 31 and the Court awarded compensation at Rs. 28, but disallowed his costs,

Held, that under the circumstances, the Collector should have been directed to pay the claimant's costs because the claim was not extravagant and there was no negligence in putting it forward. (*Ramesam and Venkatasubba Rao, JJ.*) AKILANDAMMAL *v.* SPECIAL DEPUTY COLLECTOR, VM. T. RY., TRICHINOPOLY. **1932 M.W.N. 853.**

———**S. 28**—*Excess amount awarded by District Judge—Interest on—Right of claimant.*

The claimant is entitled to interest on the excess amount awarded by the District Court from the date of possession by the Collector up to the date of actual payment of such excess in Court and not up to the date of the award only. (*Ferrers, J.C. and Rupchand Bilaram, A.J.C.*) SECRETARY OF STATE *v.* DINSHAW. **27 S.L.R 84=6 I R. (Sind) 109=146 I.C. 1040= A.I.R. 1933 Sind 21.**

———**S. 28**—*Interest—Discretion of Court to award.*

Under S. 28, it is within the discretion of a Court to decree interest where a larger amount of compensation has been given than was awarded by the Collector. (*Mukerji and Bennet, JJ.*) KHUSHAL SINGH *v* SECRETARY OF STATE FOR INDIA. **53 All. 658=I.R. 1931 All. 723=133 I.C. 611=1931 A.L J. 660= A.I.R. 1931 All. 394.**

———**S. 29**—*Landlord and tenant—Apportionment of compensation.*

In apportioning the compensation between landlord and tenant, the Court should proceed on the principle of ascertaining what is the value of the interest of the landlord on the one hand and that of the tenant on the other and apportion the compensation according to those values. 30 Cal. 801, Foll. (*Jai Lal, J.*) HAKIM SINGH *v.* THE COLLECEOR, GURDASPUR. **I.R. 1932 Lah. 186=136 I.C. 10=32 P.L R. 864=A.I.R. 1932 Lah. 123 (2).**

———**S. 29**—*Zamindar and tenure-holders—Apportionment of compensation between—Burden of proof.*

Where, persons claiming a permanent interest as jagirdars intermediate tenure-holders under a Zamindar in respect of certain land which has been compulsorily acquired under the Land Aquisition Act contend that the Zamindar is only entitled to get compensation to the extent of the amount he has agreed to grant abatement in rent, it is for them to show that their interest is permanent, that the landlord has parted with his *prima facie* right to enhance the rent, and that the rent is mokarrari The mere fact that they call themselves jagirdars so far from showing that they have a permanent interest tends the other way. *Prima facie* the Zamindar has the whole of the interest; it is for the tenure-holders to show what part of the interest the Zamindar has divested himself of in their favour. (*Rankin, C.J. and Mitter, JJ.*) RADHU RAY *v.* RAJA GYOTI PRASAD SINGH DEO. **140 I.C. 385=I.R. 1932 Cal. 714=36 C.W.N. 866=A.I.R. 1933 Cal. 21.**

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———**S. 30**—*Default in payment of arrears of revenue —Acquisition by Government—Award setting off arrears of revenue—Subsequent sale—Relative rights of purchaser and prior proprietor to compensation.*

The defendants were the owners of the Tausi with a 3 as. *gantidari* interest. For default in payment of revenue dated 28-3-1925, the tausi was sold on 18 9 1925. In pursuance of a declaration dated 11-12-1924, some of the lands (call it *A*) were acquired award made, and possession taken on 16 9-25; and some others (call it *B*) were taken possession of on 22-12-1925. On a dispute between the purchaser at the sale of 18-9-1925 and the previous owners as to their relative rights to the compensation amount,

Held, (*i*) the effect of S. 28 and Sch. A of the Revenue Sale Law (Act XI of 1859) is that the title of the purchaser is to be deemed to have vested in him on the date of the default and the defendants' interest as proprietors were forfeited or rather determined on 28 3 1925; and the acquired lands vested in the Collector free from encumbrances on 16 9 1925 and 22-12-1925; (*ii*) by the award of 16-9 1925 regarding *A* lands, abatement of Government revenue was allowed for the acquired lands from the kist previous to the date of taking possession and as at the time of sale the lands were no longer subject to the payment of Government assessment. The lands were not in arrears; they could not be sold; the purchasers could not have got any title to it and so the prior proprietors were entitled to the entire compensation amount regarding *A* lands; (*iii*) but regarding *B* lands, the sale took place before acquisition and on 3-10 1925, the purchaser had annulled the *ganti* and so the purchaser was entitled to the whole of the compensation, both that for the proprietary interest and that for the *gantidari* interest. (*Mukerji and Bartley, JJ.*) NRISINHA CHARAN NANDI *v.* NAGENDRA BALA DEBY. **60 Cal. 281=6 I.R. (Cal.) 12=144 I.C. 743 =37 C.W.N. 14=A.I.R. 1933 Cal. 522.**

———**S. 30**—Kheraji brahmottardars—*Land held at* mokarari *rent—Zamindar whether entitled to share.*

Where the rent is *mokarari* and fixed, the zamindar is not entitled to any share of the compensation amount in respect of land held by *kheraji brahmottardars* under him. (*C. C. Ghose and S. K. Ghose, JJ.*) JYOTI PRASAD SINGHA DEO *v.* KENARAM DUBEY. **6 I.R. (Cal.) 236=146 I.C. 579=37 C.W.N. 702=A.I.R. 1933 Cal. 767.**

———**S. 30**—malik makbuza *plot*—mahal *leased in perpetuity—Apportionment of compensation between proprietor and perpetual lessee—Power of Land Acquisition Officer.*

Where a *Malik makbuza* plot (in a *Mahal* which had been leased in perpetuity) was acquired by the Government and the Land Acquisition Officer allowed the per-

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petual lessee compensation for loss of the revenue and also a certain sum to the malguzar.

Held, that neither the Land Acquisition Officer nor the Court to whom the matter of compensation was referred had any authority to decide what lease money should be paid in future and that the proprietor and the lessee should come to an agreement on the point or have the matter decided by a competent Court. (*McNair, J.C.*) SADASHIV RAO *v.* COLLECTOR OF NAGPUR. **29 N.L.R. 31=6 I.R. (Nag.) 49=145 I.C. 447=16 N.L.J. 21=A.I.R. 1933 Nag. 114.**

——**S. 30**—*Order as to apportionment of compensation—Appeal.*

Though the order determining the apportionment of the compensation is not an award within the meaning of S. 54, it is in the nature of a decree and an appeal lies against it. (*Baker and Ragnekar, JJ.*) RAGHUNATHDAS *v.* DT. SUPERINTENDENT OF POLICE, NASIK. **57 Bom. 314=6 I.R. (Bom.) 3=144 I.C. 710=35 Bom.L.R. 276=A.I.R. 1933 Bom. 187.**

——**Ss. 31 and 32**—*Applicability—Land belonging to impartible estate.*

Where land belonging to an impartible estate is acquired under the Land Acquisition Act, the holder can in no sense be held to be absolute owner of his impartible estate, and Ss. 31 and 32 must *prima facie* apply to him. In the ordinary sense of the words, the holder is clearly incompetent to alienate the lands acquired and it is in accordance with the policy of the Impartible Estates Act, that the compensation money should not be paid over to him but should be converted into other land to form part of the impartible estate, which will not thus suffer from the acquisition and hence the acquisition officer is right in depositing the money under S. 31. (*Beasley, C.J. and King, J.*) SPECIAL DEPUTY COLLECTOR, RAMNAD *v.* RAJAH OF RAMNAD. **58 Mad. 442=157 I.C. 500=1935 M.W.N 160=41 L. W. 267=A.I.R. 1935 Mad. 215=68 M.L.J. 575.**

——**S. 31**—*Compensation amount paid by Collector—Order as to disposal.*

Where the Collector has paid the amount of compensation, the Court cannot direct him to pay again to some one else, unless he has shown such negligence that he could be rightly held liable to do so. (*Das and Brown, JJ.*) K. N. K. R. M. K. CHETTYAR FIRM *v.* SECRETARY OF STATE. **11 Rang. 344=149 I.C. 865 (2)=6 R.R. 334=A.I.R. 1933 Rang. 176.**

——**S. 31 (2) Proviso**—*Bar of suit—Party dissatisfied with award—Remedy of—Failure to apply under S. 18—Effect of.*

The Land Acquisition Act creates a special jurisdiction and provides a special remedy for persons aggrieved with anything done in the exercise of that jurisdiction. That jurisdiction is exclusive. A party who is served with notice under S. 9 of the Act is bound, if he is dissatisfied with the award to apply for a reference under S. 18. If he disables himself from availing of it by accepting the compensation without any protest or if for any other reason he does not apply under S. 18, he cannot be allowed to reopen the question of the right to the amount of compensation by means of a regular suit, against the persons alleged to have wrongfully received the same. 26 C.W.N. 506, Foll. (*Bisheshwar Nath, J.*) CHHEDI RAM *v.* AHMAD SHAFI. **8 Luck. 295=141 I.C. 674=I.R. 1933 Oudh 73=9 O.W.N. 1176=A.I.R. 1933 Oudh 100.**

——**S. 31 (2), Proviso 3**—*Persons receiving notice and appearing at apportionment—They must apply under S. 18 and cannot avail of S. 31 (2), Proviso 3—Civil suit barred.*

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Persons who have received notice and who have appeared before the Collector at the time of the apportionment of the compensation money must, if they object to that apportionment, make an application under S. 18 of the Act and are not entitled to avail themselves of proviso 3 to S. 31 (2) of the Act and are therefore debarred from filing a civil suit. A. I. R. 1922 Cal. 4, Foll.; 7 C.W.N. 538; 10 C.W.N. 991 and 7 Cal. 388 (P. C.), Dist. (*Staples, A.J.C.*) SHIVMAL *v.* RAMCHANDRA BAPU. **30 N.L.R. 40=6 R.N. 147=147 I.C. 877=A.I.R. 1933 Nag. 322.**

——**S. 32**—*Acquisition of Hindu widow's interest—Money invested in G. P. Notes—Re-investment in lands—Power of President of Calcutta Improvement Trust.*

The President of the Calcutta Improvement has jurisdiction to re-invest money invested in G. P. Notes, being the compensation money in respect of the acquisition of the interest of a Hindu widow, in the purchase of other lands, and in this matter he acts as a Judge and must exercise his function in a judicial manner and in the interest of the person for whom the money is held in trust. The primary consideration for the Court is the interest of the person for whose benefit the legislature has given the power. (*Nasim Ali and Khundkar, JJ.*) SARALA DASI *v.* PRESIDENT OF THE CALCUTTA IMPROVEMENT TRUST TRIBUNAL. **62 Cal. 154=154 I.C. 772=7 R.C. 523=60 C.L.J. 88=A.I.R. 1935 Cal. 29.**

——**S. 32**—*Applicability — Debutter property—Receiver appointed by Court—Powers of—Duty of Land Acquisition Tribunal to pay amount of compensation to receiver.*

The land acquired by the Calcutta Improvement Trust Tribunal belonged to a Thakur ordinarily managed by shebaits. In a suit relating to that debutter estate, a receiver had been appointed by the Court to take possession of the properties. The Tribunal proposed to invest the compensation money in the purchase of other lands on the ground that there was no one competent to alienate the land.

Held, that as the receiver represented not only the Shebaits but also the Thakur, he was competent to alienate the land and so S. 32 was not applicable. Secondly even otherwise, under S. 32 (*b*), the receiver appointed by the Court was a person who had become absolutely entitled to the amount and to whom the Tribunal was consequently bound to pay and that the Tribunal had no discretion to invest it on the purchase of other lands. (*Costello and Jack, JJ.*) ADHAR KUMAR MITRA *v.* SRI SRI ISWAR RADHA MADAN MOHAN JIU. **I.R. 1932 Cal. 610=139 I.C. 180=36 C.W.N. 370=A.I.R. 1932 Cal. 660.**

——**S. 32**—*Procedure under—Money invested in G. P. Notes—Re-investment in lands—Person interested in investment, if to be heard.*

The Land Acquisition Act does not lay down any procedure which is to be followed in the matter of re-investment in lands of money already deposited in G. P. Notes. But the Court should hear the person who is interested in the money before it decides whether it is desirable or advantageous that the money which has remained invested in G. P. Notes without any objection from anybody should be re-invested in the purchase of other lands in view of the grounds alleged by such person. (*Nasim Ali and Khundkar, JJ.*) SARALA DASI *v.* PRESIDENT OF THE CALCUTTA IMPROVEMENT TRUST TRIBUNAL. **62 Cal. 154=154 I.C. 772=7 R.C. 523=60 C.L.J. 88=A.I.R. 1935 Cal. 29.**

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——S. 32—*Procedure under—Notice to show cause why money should not be re invested in land—Jurisdiction of President of Calcutta Improvement Tribunal.*

The President of the Calcutta Improvement Tribunal has no jurisdiction under S. 32 to issue a notice to the party to show cause why the compensation money invested in Government Securities should not be re-invested in lands. Such a notice is also wrong in law. (*Mitter and Edgley, JJ.*) SARALA DEBI *v.* THE PRESIDENT OF THE CALCUTTA IMPROVEMENT TRIBUNAL. **155 I.C. 999=7 R.C. 657=39 C. W. N. 169=60 C.L J. 227=A.I.R. 1935 Cal. 248.**

——S. 32—*Scope—Investment in Government Securities—Re-investment in law—If obligatory.*

When there is an investment of the compensation money in Government Securities, already made as far back as 20 years, S. 32 does not make a re-investment in land obligatory. (*Mitter and Edgley, JJ.*) SARALA DEBI *v.* THE PRESIDENT OF THE CALCUTTA IMPROVEMENT TRIBUNAL. **155 I.C. 999=7 R.C. 657=39 C.W.N. 169=60 C.L J. 227=A. I. R. 1935 Cal. 248.**

——S. 32 (1)—*Applicability—Properties settled on Nawab Bahadur of Murshidabad.*

The effect of Murshidabad Act (XV of 1891 amended by Act XXV of 1923) is that in spite of certain powers conferred on the Secretary of State, no right of owner ship or disposition is conferred on the Secretary of State and the Nawab Bahadur continues as a limited owner but with the income intercepted in certain contingencies. Where such lands are proposed to be acquired, the tribunal has jurisdiction to act under S. 32 (1) of the Act. (*Pearson and Mallik, JJ.*) NAWAB BAHADUR OF MURSHIDABAD *v.* KUMAR DINENDRA MULLIK. **59 Cal. 1272=140 I.C. 866=I.R. 1933 Cal. 55=36 C. W.N. 848=A.I.R. 1932 Cal. 844.**

——S. 32 (1)—*Investment in Government Securities—Re-investment in purchase of land—Jurisdiction of tribunal.*

Under S. 32 (1) of the Land Acquisition Act, the Calcutta Improvement Tribunal has jurisdiction, even after once adopting the alternative in S. 32 (1) (*b*), and has power, impliedly conferred on it, to order the money to be re-invested in the purchase of land. (*Pearson and Mallik, JJ.*) NAWAB BAHADUR OF MURSHIDABAD *v.* KUMAR DINENDRA MULLIK. **59 Cal. 1272=140 I.C. 866=I.R. 1933 Cal. 55=36 C.W.N. 848=A.I. R. 1932 Cal. 844.**

——S 32 (1) (a)—*Enquiry as to valuation—Parties to—Persons interested in the properties concerned.*

The parties interested in the properties forming the subject-matter of investigation are not parties to the proceedings under the Act for appraising the offers. (*Pearson and Mallik, JJ.*) NAWAB BAHADUR OF MURSHIDABAD *v.* KUMAR DINENDRA MULLIK. **59 Cal. 1272=140 I.C. 866=I R. 1933 Cal. 55=36 C.W. N. 848=A.I.R. 1932 Cal. 844.**

——S. 32 (1) (a)—*Enquiry as to valuation—Procedure.*

The President of the Calcutta Improvement Tribunal, acting under S. 32, is a Judge and is bound to exercise his functions in a judicial manner. Where he referred the question of valuation to an outside expert and on receipt of his report, adopted it without giving the parties concerned an opportunity to examine or cross-examine him.

Held, that the procedure was illegal. (*Pearson and Mallik, JJ.*) NAWAB BAHADUR OF MURSHIDABAD *v.* KUMAR DINENDRA MULLIK. **59 Cal. 1272=140 I.C. 866=I.R. 1933 Cal. 55=36 C.W.N. 848=A.I.R. 1932 Cal. 844.**

LAND ACQUISITION ACT (1894), S. 53.

——S. 32 (2)—*Construction—"Reasonable charges and expenses"—Attorney acting in the matter of purchase of lands with compensation money—Right of to remuneration from Collector.*

As it was considered necessary to engage the services of an attorney for the purchase of lands advertised for sale by the Registrar of the High Court on the Original Side, by way of investment of money deposited in respect of acquired lands belonging to a person incompetent to alienate property, an attorney was engaged with the approval of the Special Land Acquisition Judge. He made the necessary investigation as to the suitability, market value and title, and did other things incidental to the completion of the purchase. The attorney having submitted a bill of costs.

Held, that he was entitled to reasonable remuneration for the work done by him, by way of "reasonable charges and expenses", within the meaning of S. 32 (2) and that the said charges and expenses were payable by the Collector, although the acquisition money was not invested in land immediately after the same was deposited in Court by the Collector but subsequently. (*Guha and Bartley, JJ.*) CHARAN MANJURI *v.* LAND ACQUISITION COLLECTOR ALIPORE. **162 I.C. 329=8 R.C. 599=39 C.W.N. 251=A.I.R. 1935 Cal. 119.**

——S. 34—*Interest—Power of executing Court to grant.*

The award of a District Judge in Land Acquisition proceedings has the same force as a decree of Civil Court. Where such award does not mention interest, the Court executing the award has no power to grant the same. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) THE LAND ACQUISITION OFFICER *v.* GOWRAMMA, **9 Mys.L J. 55.**

——S. 39—*Agreement as to compensation—Essentials for validity.*

In order to constitute a binding agreement as to the value to be paid for compensation, the intention of the parties must be distinct and common to both. An agreement does not admit of difference. Where the Collector offered to buy at a certain sum and in response to that offer, the appellant's manager agreed to sell for a sum higher than that, it amounted to a refusal of the offer by the Collector, followed by a counter offer and there was no concluded agreement as to the compensation. (*Mitter and Henderson, JJ.*) BIJAYAKANTA LAHIRI *v.* SECRETARY OF STATE. **58 C.L J. 38=150 I.C. 368=6 R.C. 835=A.I.R. 1934 Cal. 97.**

——S. 49—*Reference under—Order on—Appeal from—Maintainability.*

The order of Court on a reference by the Collector under S. 49, proviso, should be regarded as a 'decree' from which an appeal lies to the High Court. 45 M. 320 (P.C.), Ref. (*Ramesam, O.C.J. and Cornish, J.*) SECRETARY OF STATE FOR INDIA *v.* NARAYANASWAMI CHETTIAR. **55 Mad. 391=138 I.C. 426=I. R. 1932 Mad. 572=35 L.W. 831=1931 M.W.N. 1266=A.I.R. 1932 Mad. 55=63 M.L.J. 962.**

[**Comm.** 57 M. 271 (288) (289) F.B.]

——S. 53—*Calcutta Improvement Trust Tribunal—Orders passed by—Revision by High Court.*

In dealing with the acquisition of property, the Calcutta Improvement Trust Tribunal is acting as a 'Court' under the Land Acquisition Act and under S. 115, C. P. Code, as well as under 107 of the Government of India Act, the High Court is entitled to interfere with the order passed by the President of the

LAND ACQUISITION ACT (1894), S. 53.

Tribunal. (*Costello and Jack, JJ.*) ADHAR KUMAR MITRA *v.* SRI SRI ISWAR RADHA MADAN MOHAN JIU. **I.R. 1932 Cal. 610=139 I.C. 180=36 C.W.N. 370=A.I.R 1932 Cal. 660.**

[R. 55 A. 1008 (1037).]

———**S. 53**—*Proceedings before Collector—Review.*

S. 53 applies to 'the Court'. It does not apply to proceedings before the Collector under S. 18, Land Acquisition Act. (*Mukerji, J.*) KASHI PRASAD *v.* NOTIFIED AREA OF MAHOBA. **54 All 282=143 I. C. 111=I.R. 1933 All. 187 (2)=A.I.R 1932 All. 598.**

———**S. 54**—*Amount of compensation—Interference with—Privy Council—Practice.*

The Board will not review the decree of an Indian appellate Court in land acquisition proceedings merely upon questions of value, unless the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied. 48 M.L.J. 386 (P.C.), Foll. (*Lord Russell of Killowen.*) PRAG NARAIN *v.* COLLECTOR OF AGRA. **59 I.A. 155 =54 All. 286=34 Bom.L.R. 885=I.R. 1932 P.C. 113=136 I.C. 449=9 O.W.N. 423=36 C.W.N. 579= 35 L.W. 812=1932 M.W.N. 758=1932 A.L.J. 741 =55 C.L.J. 318=A.I.R. 1932 P.C. 102=62 M.L.J. 682 (P.C.).**

———**S. 54**—*Award and decree—Distinction—Appeal.*

An award is nothing but a statement of the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information. But when the sum has been deposited in Court under S. 31, sub-S. (2) the function of the award has ceased and the decision of a Court on the subsequent dispute between interested people as to the extent of their interest is not an award but a decree from which no appeal is competent. (*Wallace and Stone, JJ.*) BAGAVATHI DOSS BAVAJI *v.* SARANGARAJA IYENGAR. **54 Mad. 722= 1931 M.W.N. 290=135 I.C. 460=I.R. 1932 Mad. 140=33 L.W. 528=A.I.R. 1931 Mad. 586=61 M.L. J. 312.**

———**S. 54**—*Award giving compensation to three persons in certain shares—Objections by them regarding amount—Reference made by Collector—Two of them absent—Decree passed in favour of persons who appeared and case of others dismissed for default—Restoration petition dismissed—Appeal—Revision.*

Under the Collector's award in connection with acquisition of a building, compensation was found payable to respondent 2 in respect of two-thirds of the ownership rights, to appellants and petitioners in respect of one-third of the ownership rights, and to respondent 3 in respect of electric fittings. On various dates within the period of limitation all those benefiting under this award applied to the Collector under S. 18 for a reference to Court. There were three such applications. The objections of all three applicants were directed against the amount of compensation and were not in respect of their shares. The Collector made one reference in respect of all three applications. The Court registered the reference as one proceeding, issued notice to all the objectors and framed issues in the presence of all upon 2nd February, 1934. Upon 3rd April, 1934, which was a date fixed for the recording of some of the plaintiff's evidence, none of the objectors were present or represented in Court except respondent 2. The Court dismissed the case of other two objectors for default. Application for restoration was dismissed and judgment was pronounced granting decree to respondent 2. Appellant and petitioners appealed against the award and also against the order dismissing petition for restoration.

LAND ACQUISITION ACT (1894), S. 54.

Held, that in the present proceedings the three objectors, although interested in the amount of the award, did not come forward upon the basis of the same contention. They made different claims in regard to the correct amount of that compensation, and they based their claims upon different evidence. It was therefore impossible to regard them as joint plaintiffs in a single suit, they have never joined in a joint objection, they have relied upon different allegations, they have wished to produce different evidence, and they have claimed different reliefs. But had there been no default in appearance and had the evidence of all objectors been recorded, the Court, when giving its award as to the amount of compensation which should be paid for the building, would have considered the whole of the evidence and would have come to one conclusion on the point; so that in the final result, each objector, except respondent 3 would have shared in the benefit, if any, awarded after consideration of the evidence of the other objectors. Hence proceedings were not similar to those in the three separate suits.

Held, also, that the Court was bound to follow the procedure in the Civil Procedure Code so far as it was possible to do so but that as the Court did not act without jurisdiction or commit any irregularity, no revision lay.

Held further, that the order dismissing the case for default was certainly not an award or part of an award, and therefore no appeal could lie from it under S. 54 of the Act and as respondent 2 did not request that the suit or proceedings should proceed as though the absentee plaintiffs had appeared, the absentee objectors could not claim any benefit under the final award. (*Middleton, J.C.*) LAKHMIDASS *v.* SECRETARY OF STATE. **157 I.C. 382=8 R Pesh. 23=A.I.R. 1935 Pesh. 92.**

———**S. 54**—*Chief Judge of Small Cause Court appointed "Special Judicial Officer"—Appeal from—Competency*—Persona designata.

The section confers on the High Court only an authority to hear appeals from award. It does not confer any power to act as a Court of appeal from the decrees of the Court specially constituted under the Local Rules. (*Wallace and Stone, JJ.*) BAGAVATHI DOSS BAVAJI *v.* SARANGARAJA IYENGAR. **54 Mad. 722=1931 M.W.N. [illegible]=135 I.C. 460=I.R. 1932 Mad 140=33 L.W.** [illegible] **amount and to Mad. 586=61 M.L.J. 312.** [illegible] **tly bound to** [illegible] **ion to invest**

———**S. 54**—Ex parte *award—Application to set aside —Dismissal—Appeal.*

No appeal lies from the dismissal of an application to set aside an *ex parte* award made in the course of land acquisition proceedings. 39 Cal. 393 and 54 Cal. 312, Foll.; 11 C.W.N. 430, Diss. So the memorandum of an appeal from an application to set aside an *ex parte* award cannot be converted into a memorandum of appeal from the award itself, when the latter has become barred by time. (*Mukerji and Mitter, JJ.*) RAJENDRA NATH KANRAR *v.* KAMAL KRISHNA KUNDU. **59 Cal. 1057=I.R. 1932 Cal. 507=138 I. C. 748=36 C.W.N. 352=A.I.R. 1932 Cal. 558.**

———**S. 54**—*Order as to apportionment of compensation—Appeal.*

Though the order determining the apportionment of the compensation is not an award within the meaning of S. 54, it is in the nature of a decree and an appeal lies against it. (*Baker and Rangnekar, JJ.*) RAGHUNATHDAS *v.* DT. SUPERINTENDENT OF POLICE,

LAND CUSTOMS ACT (1924), S. 7.

NASIK. 57 Bom. 314=6 I.R. Bom. 3=144 I.C. 710 =35 Bom.L.R. 276=A.I.R. 1933 Bom. 187.

LAND CUSTOMS ACT (XIX OF 1924), S. 7—*Carrying non-dutiable goods without permit—Enquiry into offence.*

Where a person carries non-dutiable goods from foreign territory to British territory without a permit, the offence, if any, would be one to be dealt with only by the Land Customs Officer himself under S. 7 and would not constitute an offence for which a complaint could be made to a Magistrate. (*Walsh, J.*) SANTHANA KRISHNA CHETTY, *In re*. 147 I.C. 46=6 R. M. 325=35 Cr.L J. 331=1934 Cr.C. 9 (2)=38 L. W. 979=A.I.R. 1933 Mad. 888 (2)=65 M.L.J. 837.

——S. 7 (1) (c)—*Onus.*

For a conviction under S. 7 (1) (*c*), the onus is on the prosecution to prove that the goods were taken by land from foreign territory to British territory at a time when such goods are dutiable. (*Walsh, J.*) SANTHANA-KRISHNA CHETTY, *In re*. 147 I.C. 46=6 R.M. 325 =35 Cr.L.J. 331=1934 Cr.C. 9 (2)=38 L W. 979= A.I.R. 1933 Mad. 888 (2)=65 M.L.J. 837.

LANDHOLDER—*See* MADRAS ESTATES LAND ACT (1908), S. 3 (5).

LAND IMPROVEMENTS LOANS ACT (XIX OF 1883), S. 7 (1), Proviso—*Construction—Scope—Loans under Act—Priority over mortgages.*

The language of the proviso to S. 7 (1) makes it clear that it was the intention of the legislature to give land improvement loans priority over existing encumbrances. (*Roughton, R.M.*) KIRTIBHANURAI, *In re*. 18 N.L.J. 193.

——S. 7 (2)—"*Owner*"—*If refers to owner at time of sale—Subsequent alienee unconnected with loan—Right to apply under S.* 7 (2).

"Owner" in S. 7 (2) means the owner of the property at the time the property is put to sale; and it includes a subsequent alienee of the property, having no connection with the loan, from whose property the Improvement Loan is recovered instead of from the borrower. Such a person is a proper applicant under S. 7 (2). (*Before the Governor in Council.*) MUKANDRAM *v.* SHRIKRISHNA. 18 N.L J. 280.

LANDLORD AND TENANT. *See also* THE FOLLOWING.—

Agra Tenancy Act (*III of* 1926).
Bengal Landlord and Tenant Procedure Act (*VIII of* 1869).
Bengal Tenancy Act (*VIII of* 1885).
C. P. Tenancy Act (*XI of* 1898).
C. P. Tenancy Act (*I of* 1920).
Chota Nagpur Landlord and Tenant Procedure Act (*I of* 1879).
Chota Nagpur Tenancy Act (*VI of* 1908).
Custom (*General*).
Land Acquisition Act (*I of* 1894), *Ss.* 23 *and* 29.
Land Tenure.
Lease.
Madras Estates Land Act (*I of* 1908).
Punjab Tenancy Act (*XVI of* 1887).
T. P. Act, Ss. 106—117.

Abadi.
Abandonment.
Abwab.
Accretion.
Acquiescence in tenancy.
Admission to tenancy.
Agricultural village.
Adverse possession.
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Cesses.
Construction.
Contract of tenancy.
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Creation of tenancy.
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Expropriatary holding.
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Fixed rate tenancy.
Forfeiture.
Graveyard.
Grazing rights.
Grove.
Holding over.
Joint tenancy.
Kabuliyat.
Khoti land. *See* FORFEITURE.
Khudkasht land.
Lambardar. *See* EJECTMENT.
Lease. *See* LEASE.
Merger.
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Mortgagee.
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Nature of tenancy.
Non transferable holding.
Notice to quit.
Occupancy holding.
Occupancy rights.
Occupancy tenancy.
Occupancy tenant.
Permanent tenancy.
Possession.
Premium.
Procedure.
Proof of tenancy.
Qabzadari tenant.
Re entry.
Relationship.
Relinquishment.
Rent.
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Repudiation of tenancy.
Reversion. *See* PERMANENT TENANCY.
Right of landlord.
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Shamilat.
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Sir land.
Status of tenant.
Statutory tenancy.
Sub-tenancy.
Succession to tenancy.
Surrender.
Termination of tenancy.
Thekadar.
Transfer of tenancy.
Trees.
Trespasser.
Under-proprietary rights.
Urban area.
Utbandi tenancy.
Warapath land Zamindar.
Miscellaneous.

LANDLORD AND TENANT—Abadi.

Abadi.

———*Abadi—Alienation—Custom—Proof.*

The most cogent evidence is required before a custom permitting the transfer of house-sites in a village is held to be established. Where in a village consisting of 600 houses there were 22 sale-deeds spread over 100 years.

Held, that the evidence was insufficient to prove custom. (*Boys and Smith, JJ.*) GANGA KALWAR *v.* BENI MADHO PRASAD SINGH. **54 All. 82=I.R. 1931 All. 753 (1)=133 I.C. 897 (1)=1932 A.L.J. 111=16 R. D. 186=A.I.R. 1932 All. 52.**

———*Abadi—Appurtenance to holding—Proof—Onus.*

There is no presumption of law that the house occupied by a cultivator in a village is appurtenant to his holding and either the house or the site must be given up, simply because the tenancy has either been lost or has lapsed by death in favour of the Zamindar. The landlord must establish by direct evidence, or by proof of circumstances which justify the inference that the tenant's right to the site is dependent on his right to retain the holding. 29 A. 133; 3 A.L.J. 619 and 13 A. L.J. 745, Cons. (*Mukerji and Niamatullah, JJ.*) GOPI SHANKER *v.* LILAWATI. **54 All. 379=141 I.C. 800=I.R. 1933 All. 92=1932 A.L.J. 142=13 L.R. 105 (Rev.)=16 R.D. 222=A.I.R. 1932 All. 252.**

———*Abadi—Co-sharers—Shares on partition—Proprietor in possession of less share—Deficiency, if can be made up.*

Where the village abadi is partible the shares of the proprietors are to be in accordance with their holdings in the village; every proprietor is however entitled to appropriate for his residential purposes as much land as he needs. If it is found that particular proprietor in the village is in possession for the purpose of residence of more land than would fall to his share on partition, then his possession shall not be disturbed; otherwise, if a proprietor is in possession for the purposes of residence of less land than he would be entitled to on partition, then the deficiency would be made good out of land available for partition, that is to say, out of baras., etc.; land reserved for public purposes cannot be partitioned and also the land occupied by houses cannot be partitioned but in making adjustments of areas, land occupied by houses must be taken into consideration. (*Jai Lal, J.*) NARAIN SINGH *v.* GANESH. **150 I.C. 101=6 R.L. 822=A.I.R. 1934 Lah. 288.**

———*Abadi—Gauri Nawada—Right by custom to transfer houses with right of residence.*

In Gauri Nawada, the Raiyats have the right by custom of transferring houses with right of residence and the Zemindars of the soil have no right to question such transfer. (*Iqbal Ahmad and Niamatullah, JJ.*) ALIF KHAN *v.* WAJID ALI. **I.R. 1933 All. 90=141 I.C. 668=17 R.D. 556=14 L.R. 399 (Rev.)=A.I.R. 1933 All. 306.**

———*Abadi—House belonging to Zamindar—Right of transfer after Zamindar loses his right in village.*

A distinction should be drawn between the position of persons who have been Zamindars and who in their capacity as Zamindars own houses in the village abadi and the condition of persons who are mere ryots. In the case of a mere ryot the Zamindar grants a license to the ryot to make a residence. Such a license remains a license and the ryot has no right of transfer of the house which he makes in pursuance of such license. But a house built or brought by a Zamindar is a transferable house and such rights of transfer do not cease when the Zamindar loses his proprietary rights in the village at an auction sale of his Zamindary share. (*Sulaiman, C.J. and Bennet, J.*) KANNAIYA LAL *v.* SHEVA LAL. **58 All. 376=158 I.C. 637=8 R.A. 319=1935 A.L.J. 1118=1935 R.D. 471=1935 A.W.R. 1146=A.I.R. 1936 All. 14.**

LANDLORD AND TENANT—Abadi.

———*Abadi—House not appertaining to agricultural holding—Presumption as to right of residence.*

Where the house is found not to appertain to an agricultural holding the ordinary presumption is that a person, who has built a house on the site belonging to the Zamindar, has a right of residence to occupy it so long as the house stands or he does not abandon it. The right can be inherited by his legal heirs but in the absence of any custom is not transferable. (*Sulaiman, A.J.C. and Bajpai, J.*) NABI MAHOMED *v.* BHAGWAT PRASAD SHUKUL. **I.R. 1931 All. 533=132 I.C. 565=1931 A. L.J. 649=15 R.D. 560=12 L.R. 303 (Rev.)=A.I.R. 1932 All. 33.**

———*Abadi— House erected by agriculturist and trader—House not forming part of holding.*

Where a village is a purely agricultural village and a purely agricultural tenant occupies a house on a site belonging to the Zamindar there would be a presumption that the house is appurtenant to the holding. But a slight change of circumstances may alter the result. Thus where the occupiers are not merely tenants and cultivators but also dyers and printers and further it appears that the house was built before the ancestors of the occupant began cultivating the land.

Held, that it was open to the lower Court to find that the house was not an appurtenance to the holding. (*Sulaiman, A.J.C. and Bajpai, J.*) NABI MAHOMED *v.* BHAGWAT PRASAD SHUKUL. **I.R. 1931 All 533=132 I.C. 565=1931 A.L J. 649=15 R.D. 560=12 L. R. 303 (Rev.)=A.I.R. 1932 All. 33.**

———*Abadi—House sites — Agricultural village—Zamindar and tenant—Presumption—Right of tenants to transfer—Custom—Proof—Onus.*

In an agricultural village the presumption is that the Zamindars own the whole of the village including the sites upon which the tenant's houses have been built. The tenants are only the owners of the materials with which the houses have been constructed and apart from some special custom, the sites remain the property of the Zamindars. *Prima facie*, therefore, a tenant cannot transfer a dwelling house and the site upon which is built, unless of course there is some custom legally binding on the parties which gives the tenant such a right. The mere production and proof of sale deeds or mortgages is no proof that the Zamindars were aware of these transactions and did in fact acquiesce in them. The defendant alleging such a custom must not only establish positively that such sale took place with the knowledge and acquiescence of the Zamindars. (*Harries, J.*) TIRKHA RAM *v.* MURARI LAL. **158 I.C. 109=8 R.A. 285=1935 A.W.R. 735=1935 R.D. 283=A.I.R. 1935 All. 720.**

———*Abadi—License to reside—Revocation.*

Held, on a construction of the wajib-ul-arz that the house tenants in the village of Wazirnagar, Pargana Misrikh, District Sidapur, have no power to execute a usufructuary mortgage of their right to reside in the house as they have no transferable rights in the house and ahata. They are mere licensees occupying the house as an appurtenant to the holding and the license to reside in the house must be deemed to be revoked under S. 62, Easements Act, where the license is granted for a specific purpose and the purpose is abandoned or has become impracticable. (*Nanavutty, J.*) SURAJ BAKSH SINGH *v.* BHUGGA. **8 Luck. 509=6 I.R. (Oudh) 7=**

LANDLORD AND TENANT—Abadi.

144 I.C. 776=14 L.R. 555 (Rev.)=17 R.D. 718=10 O.W.N. 398=A.I.R. 1933 Oudh 302.

———*Abadi — Possessory mortgage by occupant to stranger and lease back—Effect—Landlord's right of re-entry.*

Where the occupant of an abadi has executed a possessory mortgage in favour of a stranger but subsequently again continues in possession as a tenant on a monthly rent and he executed a rent note in favour of the mortgagee, he is only a tenant at will and has no rights over the house. He has given up all rights of redemption and has acknowledged the stranger as the owner, there is a complete transfer and the landlord has therefore a right of re-entry. A. I. R. 1925 Nag. 204 and 396, Rel. on. (*Staples, A.J.C.*) RAMA JADAM GUJAR *v.* NATHU LAL. **149 I.C. 673=6 R.N. 246=16 N.L.J. 263=A.I.R. 1934 Nag. 105.**

———*Abadi—Right of tenant to build on outer "satan".*

In the absence of the landlord's consent, a raiyat in a village abadi has no right to construct a building on land which he was using as an outer "satan" appurtenant to his house. A.I.R. 1930 All. 89, Diss. From. (*Mukerji and Niamatullah, JJ.*) RATAN BARHAI *v.* KISHEN DEI. **55 All. 204=6 I.R. (All.) 334=146 I.C. 736=1933 A.L.J. 56=17 R.D. 141=14 L.R. 104 (Rev.)=A.I.R. 1933 All. 288.**

———*Abadi—Tenants only licensees—Burden of proving occupation at thirty years settlement.*

The whole of the abadi site belongs to the landlord and *prima facie* every tenant dwelling thereon is a licensee whose occupation is protected by the terms of the wajib-ul-arz. The burden of proving that the site was occupied at the thirty years settlement lies on the tenant or his successor in interest and not on the landlord. A. I. R. 1929 Nag. 41 and 11 N. L. R. 126, Rel. on. (*Grille, J.C.*) RAMCHANDRA *v.* RUPCHAND. **149 I.C. 452=6 R.N. 232=A.I.R. 1934 Nag. 127.**

———*Abadi—Trees grown on* parti *land—Right of tenant to wood.*

The Zamindar is the owner of the soil of a *parti* land in the village site and presumably the trees which are grown on that *parti* land go with the land and must be regarded as pertaining to the land. It lies on the tenant to plead and prove a custom by which he could be entitled to take the wood of the trees planted by him. In the absence of any proof of custom, *prima facie* the presumption is in favour of the Zamindar and the tenant has no right to cut the trees. (*Sulaiman, C.J. and Bennet, J.*) RAM CHARAN *v.* GAJADHAR. **57 All. 960=155 I.C. 1031=7 R.A. 1006=1935 A.W.R. 624=1935 R.D. 249=1935 A.L.J. 501=A.I.R. 1935 All. 555.**

———*Abadi—Wrongful construction of building—Ejectment of trespasser—Right of single proprietor alone to maintain—Decree in his favour whether enures for others.*

In a case of unauthorized construction of building on abadi land even a single proprietor can maintain a suit for ejectment against the occupier who becomes a trespasser. The fact that there is a difference of opinion among the proprietors and that some of them are favourable to the trespasser is immaterial when the wajib-ul-arz says that the holding is impartible. The decree given in favour of one of the proprietors under such circumstances would enure for the benefit of the entire proprietary body. 95 I.C. 121, Ref. (*Shadi Lal, C.J. and Broadway, J.*) BALWANT KAUR *v.* AMAR SINGH. **I.R. 1931 Lah. 653=132 I.C. 669.**

LANDLORD AND TENANT—Abandonment.

Abandonment.

———*Abandonment—Leaving village, not sufficient—Arrangement for cultivation and payment of rent—Presumption.*

Whether there is abandonment or not is a question of intention. If a tenant leaves his village having made arrangement for the cultivation of the land and the payment of the rent during his absence, which he intends to be temporary, there would be no abandonment. But if he makes these arrangements and then leaves the village never intending to return, there will be abandonment. But merely because a man leaves his home and does not return to it there is no presumption that he never intended to return. It may be that he left the village for a pilgrimage with full intention of coming back to his home, but somehow or other either he met with an accident or suddenly died and did not return, in such a case there is no abandonment. (*Mahomed Noor, J.*) BHAGWAT RAI *v.* GORAKH RAI. **150 I.C. 765=7 R.P. 19=A.I.R. 1934 Pat. 93.**

———*Abandonment—Non transferable occupancy holding—Mortgage Sale—Right of purchaser to possession.*

When a non-transferable occupancy holding is sold in execution of a mortgage the holding is, in the eye of the law, abandoned. The purchaser at such a sale cannot claim possession as against a co sharer landlord or any one deriving title from such co sharer. (*R. C. Mitter, J.*) HARIS GHANDRA *v.* SHEIK KADIR. **158 I.C. 702=8 R.C. 211=61 C.L.J. 15=A.I.R. 1935 Cal. 709.**

———*Abandonment—Non-transferable occupancy holding—Partial transfer by execution sale and partial transfer by private sale—If abandonment—Purchase of part by landlord—Right of re entry on entire holding.*

For purposes of abandonment a sale in *invitum* stands on the same footing as a transfer by the act of the occupancy raiyat, and the transfer of the entire holding, to constitute abandonment, need not be effected all at once. If the entire holding is sold but in parts at different times, partly by private sale and partly by sale in execution, it will amount to abandonment as soon as the last transfer is made. But where the landlord himself is purchaser of part of the holding, he cannot claim on the basis of abandonment to re-enter on the entire holding. (*Mitter, J.*) SAROJINEE RAY *v.* RAMESH CHANDRA BISWAS. **62 Cal. 1110=40 C.W.N. 269=A.I.R. 1936 Cal. 536.**

———*Abandonment—Plea raised at late stage—Sustainability.*

The question of abandonment of a holding by a tenant is a mixed question of fact and law. Such a question cannot be allowed to be raised at the time of the argument or at a subsequent stage of the litigation. (*Suhrawardy and Jack, JJ.*) RUHINI KUMAR DAS *v.* AMINUDDIN KAVIRAJ. **137 I.C. 668=I.R. 1932 Cal. 347=35 C.W.N. 648=A.I.R. 1932 Cal. 405.**

———*Abandonment—Proof.*

The question of abandonment is one of intention on the part of the tenant. Mere non-payment of rent when lands became submerged under water cannot be evidence of such intention. Plea of abandonment rejected on the evidence in the case. (*Kulwant Sahay and Macpherson, JJ.*) JURAWAN SINGH *v.* RAMSAREKH SINGH. **12 Pat. 261=149 I.C. 561=6 R.P. 620 (2)=14 Pat. L.T. 113=A.I.R. 1933 Pat. 224.**

———*Abandonment—Raiyat executing sale-deed to stranger—Ejectment.*

Ordinarily execution of an effective sale-deed by the raiyat in favour of a stranger will constitute an abandonment of the holding by the raiyat. If afterwards the

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raiyat continues cultivating the land and has made arrangement for the payment of rent, he is not liable to be ejected, provided that he has not repudiated the relationship with his landlord. (*Mahomed Noor, J.*) LABY DHARNIDHAR *v.* JAGESHWAR MAHTON. **156 I.C. 917 = 8 R.P. 46 = A.I.R. 1935 Pat 269.**

———*Abandonment—Settlement with other tenants by zamindar—Legality of.*

The tenant mortgaged his holding and then left the village. The mortgagee never got possession and never exercised effective possession and the Zamindar made arrangements for the cultivation of the land on his own account.

Held, that there was nothing in the N. W. P. Rent Act (XII of 1881) then in force prescribing any particular procedure to be taken by the landholder in cases of abandonment and that he was justified in protecting his own interests as regards rent. (*Drake Brockman, S. M.*) RAGHUNANDAN KOHAR *v.* GUR CHARAN PRASAD. **14 L.R. 702 (Rev.)**

———*Abandonment—Transfer of entire holding.*

An abandonment of holding by the tenant can be legitimately inferred, if it is proved that the entire holding has been transferred by the tenant and that the transferee has been put in possession of the whole holding. (*Nasim Ali, J.*) GOLAM MUSTAPHA *v.* HANUMANDAS MUNDRA. **61 Cal. 937 = 155 I.C. 321 = 7 R. C. 582 = A.I.R. 1935 Cal. 80**

Abwab.

See also B. T. ACT, S. 74.

———Abwab—*Kabuliyat—Agreement to deliver straw and husk—Rent or abwab.*

Where the tenants in their Kabuliyat state that they had been in the habit of delivering to the landlords fixed quantities of straw and husks as part of their rent according to the village custom and they undertake to continue to deliver these quantities as part of the rent, and the intention of the parties to the contract is clear that the delivery of straw and husks was also part of and not an addition to, the rent fixed by the contract, the mere fact that the statement about giving straw and husk to the landlord is contained in a separate clause in the contract does not change the character of the stipulation and make it abwab. The real test is as to whether the provision for the delivery of the goods in kind was with the addition of the cash rent a certain and definite obligation and whether it was part of the consideration for which the lease was granted. 8 P.L.T. 813 (P.C.) and 32 C.W.N. 31, Foll.; 16 C.L.J. 296 and 19 C.L.J. 402, Not Foll. and 45 Cal. 259, Ref. (*Courtney Terrell, C.J. and Adami, J.*) NAWNIT PRAYAJI *v.* BUDHU MAHTON. **I.R. 1931 Pat. 257 = 132 I.C. 97 = 12 Pat.L.T. 3 = A.I.R. 1931 Pat. 161.**

———Abwab—Siwai *receipts—Amount payable.*

Receipts by way of *Siwai* fluctuate greatly but they should never exceed a moderate estimate of the income therefrom. Average for 3 years taken into account. (*Drake Brockman, S. M. and Holmes, J. M.*) BABU RAM *v.* EMPEROR. **18 R.D. 118 = 15 L.R. 128 (Rev.).**

Accretion.

See also OCCUPANCY HOLDING, *infra.*

———*Accretion—Land forming opposite to occupancy land—Who is entitled.*

It is settled law that land emerging from a river gradually opposite to occupancy land becomes part of the occupancy holding (*Oppenheim, J.M.*) RAMDAUR *v.* PARTAB NARAIN SINGH. **15 R.D. 476 = 12 L.R. 237 (Rev.).**

LANDLORD AND TENANT—Admission to Tenancy.

Acquiescence in tenancy.

———*Acquiescence in tenancy—Acceptance of rent—If amounts to.*

Mere acceptance by the landlord of rent from a person who is not a legal tenant cannot amount to acquiescence in tenancy, so as to preclude him from ejecting the alleged tenant as a trespasser. (*Knox, S.M. and Grant, J.M.*) SHIVE NARAIN *v.* KALI CHARAN. **1935 R.D. 375.**

Admission to tenancy.

———*Admission to tenancy—Burden of proof.*

The burden of proving admission to tenancy is on the person who alleges the admission. (*Oakden, S.M. and Oppenheim, J.M.*) SHEO PRASAD LAL *v.* GUDAR AHIR. **15 R.D. 110 = 12 L.R. 12 (Rev.).**

———*Admission to tenancy—Collection of rents.*

Where on the death of the uncle, the nephew who was his heir collected the rents from the tenants of his deceased uncle.

Held, that it did not amount to admission by the nephew to tenancy. (*Oppenheim, S.M. and Walton, J. M.*) MAHOMED BADUDDIN *v.* PRAN. **14 L.R. 291 (Rev.) = 17 R.D. 407.**

———*Admission to tenancy—Inference.*

On the death of the tenant in chief, the land was occupied by the sub tenants and the landlord gave permit to one of them to continue in occupation of land on condition that he paid the arrears of rent due by the last-holder. Subsequently however the landlord executed a formal lease in favour of a third person at an enhanced rent.

Held, that the sub-tenant had been admitted by the landlord as tenant and that the subsequent lease did not confer any rights on the lessee. (*Oppenheim, S. M.*) CHANDI *v.* PARAGI. **16 R.D. 162 = 13 L.R. 45 (Rev.).**

———*Admission to tenancy—Onus.*

If in a suit for ejectment of the defendant as a trespasser, the defendant claims that he was admitted to the tenancy, the onus lies on him to prove the admission. (*Drake Brockman, S.M. and Knox, J.M.*) RAMESH DAYAL *v.* PAHLAD SINGH. **1935 A.W.R. 189 = 1935 R.D. 120.**

———*Admission to tenancy—Proof.*

Where a person's name is entered in the revenue papers as a tenant and the landlord does not take any steps to correct the entry and waits for two years to file a suit after he is forcibly dispossessed by such person.

Held, that none of these facts justifies the inference that the landlord has admitted that person to the tenancy. (*Drake Brockman, S.M. and Knox, J.M.*) RAM DAYAL *v.* PAHLAD SINGH. **1935 A.W.R. 189 = 1935 R.D. 120.**

———*Admission to tenancy—Proof—Patwari's papers—Evidentiary value.*

The burden of proving admission to tenancy lies on the person who claims that there had been admission. Where the patwari does not give relevant evidence on the subject, it is not permissible to infer from the entries in the patwari's register only that a contract of tenancy had been framed. (*Keane, S.M. and Oppenheim, J.M.*) MAHANTH BISHWANATH JATI *v.* RAM KISHUN SINGH. **15 R.D. 289 = 12 L.R. 84 (Rev.).**

———*Admission to tenancy—Proof—Patwari's statement—Evidentiary value.*

Where the admission to the tenancy was sought to be proved by the patwari's statement that he heard from the landlord that the person had been admitted as tenant but the statement of the patwari was not put to the landlord.

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Held, that the statement would be admissible only for the purpose of contradicting the landlord while he is being examined and for no other purpose and that the admission to tenancy had not been proved. (*Oakden, S.M. and Oppenheim, J.M.*) SHEO PRASAD LAL *v.* GUDAR AHIR. **15 R.D. 110=12 L.R. 12 (Rev.).**

———*Admission to tenancy—Proof of—Payment of rent by alleged sub-tenant direct to Zamindar—Rights of tenant in chief not prejudiced.*

G, the original tenant, was ejected in 1899, and *B* recorded as tenant. *B* was succeeded by his son *C* whose name was sometime later recorded as occupancy tenant. But *G* was also for some time recorded as the sub tenant of *C*, he made payments of rent to the zemindar direct and, when the holding was compulsorily acquired, got the compensation himself. On the death of *G*, his widow claimed occupancy rights.

Held, (by Holmes, J.M., confirming the Commissioner), that *G* having been ejected in 1899, strong evidence of re admission to tenancy was necessary to support the claim, that there was no evidence of a contract of tenancy between *G* and the Zamindar and that, therefore, his widow was not entitled to the occupancy rights claimed by her. (*Drake Brockman, S M. and Holmes, J.M.*) MT. JANKI *v.* CHHEDI. **14 L.R. 772 (Rev.).**

———*Admission to tenancy—Proof—Testimony of patwari—Need for corroboration.*

Where in a suit for ejectment, the defendant pleads admission to tenancy, it would be dangerous to accept as adequate the uncorroborated evidence of a patwari as proof of the contract of the tenancy. (*Keane, S.M. and Oppenheim, J.M.*) MUSHTAQ HUSAIN *v.* GANGA DEI. **15 R.D. 284=12 L R. 87 (Rev.).**

———*Admission to tenancy—Right of a co-sharer in respect of plot allotted to another at partition.*

A co-sharer is not entitled to create in favour of a stranger a tenancy in respect of a plot of land allotted to another co-sharer at the partition. The person so admitted to the tenancy is a holder without title. (*Oppenheim, S M. and Drake Brockman, J.M.*) RAM KISHAN *v.* MT. RAGHBIRO. **14 L R. 549 (Rev.)=17 R D. 715.**

———*Admission to tenancy—Special manager of Government estates provisionally sanctioning lease—Quabuliat signed—Collector refusing sanction.*

Where the Special Manager of Government estates provisionally sanctioned that a lease should be issued to a certain person and that person signed the *quabuliat* and paid rent but the Collector never sanctioned his lease and no lease was issued to him.

Held, that there was no admission of that person by the landlord to the holding and that the signing of the *quabuliat* was no more than a proposal which was neither accepted nor acted upon. (*Knox, J.M.*) ABDUL MAJID *v.* RAJ KALI. **1935 R.D. 110=1935 A.W.R. 298.**

Adverse possession.

See also ADVERSE POSSESSION—LANDLORD AND TENANT AND MINERALS.

———*Adverse possession—Acquisition of title by tenant—Evidence.*

Where land was originally groveland but no rent was ever paid for 60 years and the grantee built upon the land without protest on the part of the landholder.

Held, that the grantee acquired title by adverse possession and was not liable for rent. (*Young, J.*) SUBHADRA KUAR *v.* RAM SEWAK. **149 I.C. 807=6 R.A. 985=14 L.R. 869 (Rev.)=17 R D. 1085=A.I. R. 1934 All. 288.**

LANDLORD AND TENANT—Adverse possession.

———*Adverse possession—Assertion of higher status by tenant of lower status—Effect of.*

A tenant having a lower status cannot, by asserting to the knowledge of his landlord for more than twelve years that he has a higher status, acquire a higher status, (*Mitter, J.*) BEPIN CHANDRA MUKHOPADHYA *v.* TARAPRASANNA CHAKRABORTY. **157 I.C. 601=8 R.C. 118=39 C.W.N. 451=61 C.L.J. 20=A.I.R. 1935 Cal. 498.**

———Adverse possession—Assertion of permanent right by annual tenant—Claim upheld in Revenue Court—Civil suit in ejectment—Plea of permanent tenancy by adverse possession—Maintainability. *See* ADVERSE POSSESSION — LIMITED INTEREST. **37 Bom.L.R. 593=A.I.R 1935 Bom. 382.**

———Adverse possession — Claim to mokarrari right —Failure of tenants to identify their interest with land in dispute—Plea of adverse possession not sustainable. *See* ADVERSE POSSESSION—LANDLORD AND TENANT. **A.I.R. 1932 P.C. 126=62 M L.J. 674 (P.C.).**

———Adverse possession—Collection of rent by landlord on behalf of tenant—Effect of. *See* ADVERSE POSSESSION—LANDLORD AND TENANT. **14 L.R. 99 (Rev.)=17 R D. 168.**

———Adverse possession—Denial of title by tenant—Possession dves not become adverse. *See* DENIAL OF TITLE, *infra*. **A.I.R. 1931 Mad. 577.**

———Adverse possession—Evidence—Mere 'holding over' without payment of rent—Law applicable in Punjab is Tenancy Act and not Transfer of Property Act. *See* ADVERSE POSSESSION—LANLORD AND TENANT. **13 Lah. 432=A.I.R. 1932 Lah. 586.**

———*Adverse possession—Evidence of—Non payment of rent.*

Where the relationship of landlord and tenant is not established and no rent has been paid, possession for the statutory period gives adverse possession; but where the relationship of landlord and tenant is created, the tenant in order to claim adverse possession, must have done something more to deny the landlord's title than mere non payment of rent for a number of years, 97 P. R. 1915, Dist. (*Tek Chand, J.*) MAHOMED *v.* MAKHU. **6 I.R. (Lah.) 269=146 I.C. 726=34 P.L.R. 1018=A I.R. 1933 Lah. 776.**

———*Adverse possession — Evidence—Trees — Mere taking of fruits no evidence of adverse possession.*

Where a malguzar is recorded as the owner of trees and a tenant or other person is permitted to take the fruit, there can be question of adverse possession and in the absence of proof that the malguzar prevented a transferee of the tenant in any way from taking the fruit of the trees after the tenant's death or that the transferee asserted a title adverse to the malguzar, no adverse possession is proved. 3 C. P. L. R. 160, Rel. (*Staples, A.J.C.*) RUKHADOOSA *v.* TEJA. **6 I.R. (Nag.) 104=146 I.C. 982=16 N.L.J. 163=A.I.R. 1933 Nag. 265.**

———*Adverse possession—Limited interest—Conditions of—Assertion of own title—When operative—Marfatdari receipt—Effect of.*

For the purpose of adverse possession or the acquisition of a limited interest by adverse possession, it is necessary that the landlord must know of the hostile claim; the adverse possession must be adequate in continuity, publicity and extent; and the element of publicity would be wanting if the landlord is not aware of it. Before there can be an assertion of title to operate against the landlord, it must be made to the knowledge of the landlord. A *marfatdari* receipt produced by the tenant is of no use, for the party putting

LANDLORD AND TENANT—Adverse possession.

it forward puts forward not his own title, but that of the person on whose behalf he makes the payment. (*Dhavle, J.*) NALINIKANTA MUKERJI *v.* GOBINDA RAMANUJ DAS. **6 R.P. 709=150 I.C. 102=A.I.R. 1934 Pat. 458.**

———*Adverse possession—Mortgagee rights as against landlord—Extinction of tenancy—Effect on mortgagee rights.*

As a tenancy cannot be acquired by prescription, any lesser right (*e.g.*, mortgagee rights) which depends for its existence on the tenancy, cannot also be acquired by prescription as against the landlord. A mortgagee can no doubt acquire the rights of a mortgagee in possession by prescription against his mortgagor-tenant, and such rights would be good as against the tenant and would subsist as long as the tenancy subsists, but there would be no right as against the landlord and, if the tenancy comes to an end, the rights of a mortgagee which depend upon the tenancy would also terminate and the landlords are entitled to refuse the tender of rent made by such mortgagee in satisfaction on the decree for arrears of rent against the tenant. (*Staples, A.J.C.*) SHIVLAL *v.* ABDUL HUSSAIN. **30 N.L.R. 25=148 I.C. 257=6 R.N. 180=A.I.R. 1933 Nag. 255.**

———*Adverse possession—Non payment of rent.*

Where the dofendans do not set up a title altogether independent of the plaintiff's title as Zemindar and their case was that they had been enjoying the lands rent free under some grant from the Zemindar's predecessors, the mere fact of non-payment of rent for a long time is not sufficient to constitute adverse possession. 2 Pat. 38 (P.C.), Foll. (*Mitter, J.*) JAGADDWIPTENDRANARAYAN BHUP *v.* BILASH RAY AGARWALLA. **59 Cal. 454=I.R. 1932 Cal 375=137 I.C. 860=A.I.R. 1932 Cal. 427.**

———Adverse possession—Non-payment of rent—Materiality of. *See* ADVERSE POSSESSION—LANDLORD AND TENANT. **A.I.R. 1932 Oudh 140.**

———*Adverse possession—Possession under invalid lease.*

A tenant who has entered into possession under a valid lease which is not permanent, cannot by his own assertion or act, during the tenancy, enlarge his rights into a permanent tenants. But this is not applicable when possession is held without valid tenancy or after a tenancy has terminated. If the Cowledars and their transferees who admittedly got no valid right to any permanent tenancy under the original Cowle of 1865 have been in possession in open assertion of that right from that date and at least from 1902, the landlord knowing of the asserted right, allowed the defendants to continue in possession till 1918, the defendants cannot be evicted after 12 years of such adverse possession. 47 M. 337, Dist. (*Waller and Krishnan Pandalai, JJ.*) PERIYANAN CHETTY *v.* GOVINDA RAO. **I.R. 1932 Mad. 402=137 I.C. 487=1931 M.W.N. 1287=35 L.W. 191=A.I.R. 1932 Mad. 328=62 M.L.J. 496.**

———Adverse possession—Possession under lease—When becomes adverse—Non-payment of rent—Effect of. *See* ADVERSE POSSESSION—LANDLORD AND TENANT. **A.I.R. 1935 Lah. 441.**

———*Adverse possession—Tenant asserting hostile title.*

A person who lawfully comes into possession of land as a tenant cannot by setting up, during the continuance of the tenancy, any title adverse to the landlord, and inconsistent with the real legal relation between the parties, acquire, by the operation of the law of limitation, title as owner, or any other title inconsistent with that under which he is let into possession. (*Broomfield and Wadia, JJ.*) RACHOTAPPA *v.* KONHER ANNARAO. **59 Bom. 194=155 I.C. 516=7 R.B. 433=36 Bom. L.R. 1083=A.I.R. 1935 Bom. 41.**

LANDLORD AND TENANT—Cesses.

———*Adverse possession—Title acquired by tenant by adverse possession.*

A tenancy cannot, of course, be acquired by adverse possession and a tenant cannot hold adversely to his landlord. But a tenant can hold adversely to a third party, though if he does again a title by such adverse possession, he acquires a title not for himself but for his landlord. 10 C. 820, Foll. (*Staples, A.J.C.*) JAI KRISHNA *v.* BABU. **29 N.L.R. 48. 6 I.R. (Nag.) 19=144 I.C. 696=A.I.R. 1933 Nag. 112.**

Agricultural village.

———*Agricultural village—Test.*

An agricultural village will only lose its character if it is shown that it has altered and has changed into a town. That would be shown by evidence that there were a large number of people in the village engaged in industries which were non-agricultural such as working in a factory. The mere fact that some of the inhabitants are weavers is not sufficient. Nor is it enough to show that there is a bare majority of persons who are not actively pursuing agriculture in the village. (*Bennet, J.*) AZIMULLAH *v.* PHOOL KUNWARI. **6 R.A. 896=149 I.C. 385=17 R.D. 1053=14 L.R. 851 (Rev.)=A.I.R. 1934 All. 361.**

Appurtenance.

———Appurtenance to holding—Abadi—Proof—Onus. *See* ABADI, *supra.* **54 All. 379=A.I.R. 1932 All. 252.**

Building by tenant.

———*Building by tenant—Chappar site—Right of tenant to build.*

A tenant is not entitled to build a house on the site of a chappar. (*Mukerji and Bennet, JJ.*) RATI SINGH *v.* DAMODAR LAL. **I.R. 1931 All. 206=129 I.C. 718=1930 A.L.J. 1608=15 R.D. 77=A.I.R. 1931 All. 129 (1).**

———*Building by tenant — Permissibility —Permanent lease on fixed rent.*

According to the English Law which applies to tenancies not governed by the T. P. Act, the tenant may lawfully erect buildings which improve the value of the land. So in the case of a permanent lease on a fixed and unvarying rent irrespective of the extent of cultivation, it cannot be said that the character of the holding will be changed or the landlord's interest imperilled by the erection of buildings. On the other hand, it would only increase his security. (*Waller and Krishnan Pandalai, JJ.*) PERIYANAN CHETTY *v.* GOVINDA RAO. **I.R. 1932 Mad. 402=137 I.C. 487=1931 M.W.N. 1287=35 L.W. 191=A.I.R. 1932 Mad. 328=62 M.L.J. 496.**

Cesses.

———*Cesses—Agreement regarding jama—Construction—Subsequent levy of cess by Government—Liability of tenure holder.*

The agreement between the Zamindar and the tenure-holder provided as follows: "No demand shall be made either for any excess *jama* or for any other imposition over and above the aforesaid *mokrari jama.*

Held, that the Zamindar had not precluded himself from recovering a statutory obligation subsequently levied, namely the embankment cess. (*Mitter and Pearson, JJ.*) SASI SEKHAR SEN BISWAS *v.* MAHARAJA BIR BIKRAM KISHORE. **59 Cal. 255=137 I.C. 147=I.R. 1932 Cal. 273=35 C.W.N. 1239=A.I.R. 1932 Cal. 267.**

———*Cesses—"Chhatram" cess—Liability of tenants to pay—Cess collected from time immemorial.*

LANDLORD AND TENANT—Cesses.

The mere fact that the cess has been collected from time immemorial cannot impose a legal liability on the tenants to pay the cess unless the Zamindar succeeds in establishing a legal basis for the claim *i.e.*, a contract, either proved or presumed, supported by consideration. Where the chhatram cess has no direct or proximate bearing on the purpose for which the land is let it has no legal origin. It cannot therefore be claimed from the tenants by the Zamindar. A.I.R. 1918 Mad. 1055 and A.I.R. 1919 Mad. 535, Foll. (*Madhavan Nair, J.*) RAMASWAMI KAMYA NAICKAR *v.* IRULAPPA PILLAI. **160 I.C. 471=8 R.M. 650=1935 M.W.N. 1065=A.I.R. 1935 Mad 995.**

———Cesses — Contract of tenancy—Provision for payment of Rajaswa—Cess included. *See* BENGAL CESS ACT (1880). **60 Cal. 587=A.I.R. 1933 Cal. 527.**

———*Cesses* — Kanganam *and* kulavettu — Manibham *lands.*

It is only such cesses which have any direct or any proximate bearing on the purpose for which the lands are let that can be claimed by the landlord. In the case of *manibham* lands, even if they pay rent, the rent payable to the landlord is fixed and there is no necessity for any supervision of the harvest. Therefore, the levy of *kanganam*, a cess in respect of supervision of harvest, would be illegal and the landlord cannot recover this cess even if he proves payment of the cess for a number of years. *Kulavettu* is a cess collected in respect of charges incurred for repairs of tanks in the village. As between the landlord and a ryot it has been held that the levy of this cess is proper if the cess has been paid for a number of years. (*Varadachariar, J.*) VYRAVEN CHETTIAR *v.* COLLECTOR OF SIVAGANGA. **7 R.M. 304=152 I C. 975=A.I.R. 1935 Mad. 259.**

———*Cesses*—"Kulavettu"—*Landlord repairing irrigation sources—Tenant paying cess for long time—Presumption.*

Where, the landlord keeps in repairs the sources of irrigation and the tenants enjoy the benefit of the irrigation water for their lands a cess called "*Kulavettu*" cess is charged by the landlord for the purpose of repairs. Where long payment of such cess has been proved a lawful consideration for the contract to pay the cess can be presumed. A.I.R. 1914 Mad. 285, Foll. (*Madhavan Nair, J.*) RAMASWAMI KAMYA NAICKER *v.* IRULAPPA PILLAI. **160 I.C. 471=8 R M. 650=1935 M.W.N. 1065=A.I.R. 1935 Mad. 995.**

———*Cesses—Rent fixed including cess—Lease not containing any restriction as to increased cess—Re assessment—Liability for increased cess.*

The liability to pay cess under the Cess Act can be contracted out; but the contract must be clear and expressive. Where a lease contained no such contract, but only stated that the cess so far paid had been included in the rent, and there was no mention in it that further cess assessed upon the tenure would not be payable by the tenure-holder by whom it must be paid under the law, the landlord is entitled to increased cess from the tenant for the period after re-assessment. (*Mohamad Noor, J.*) GOUR CHANDRA CHOUDHURY *v.* SARAT KUMARI DEBI. **155 I.C. 96=7 R.P. 546=A.I.R. 1935 Pat. 305.**

Construction.

———*Construction—Arrear of revenue—Meaning.*

An arrear of revenue under the Oudh Rent Act means an arrear not from the point of view of the Government but from the point of view of the persons who ought to have paid it. (*Pullan, J.*) NILKANTHA *v.* SURAJ PRASAD. **6 Luck. 395=7 O.W.N. 1089=I.R. 1931 Oudh 113=130 I.C. 65 (1)=11 L.R. 397 (Rev.)=14 R D. 667=A.I.R. 1931 Oudh 32.**

LANDLORD AND TENANT—Co-sharer.

———*Construction*—Bila lagan *tenant—Status.*

The words '*bila lagan*' do not necessarily imply a rent-free grant but merely denotes that rent has not been fixed. (*Oakden, S.M. and Smith J.M.*) SANTA SINGH *v.* RAM SHANKER SHUKLA. **11 L.R. 344 (Rev.)=14 R.D. 712.**

———*Construction* —Kayemi jote—*Meaning.*

The expression '*kayemi jote*' is applicable to a raiyat or a tenure holder. It imports permanence of occupation, not fixity of rent, or in other words, the lessor has an occupancy holding, which is heritable but is not held at a fixed rate of rent. (*Rankin, C.J. and Pearson, J.*) SARADA SUNDARI *v.* RAJANI KANTA MANDOL. **149 I.C. 1019=6 R.C. 668=37 C.W.N. 643=A.I.R. 1933 Cal. 682.**

———Construction—'Raiyati jote' in tenancy— No inference the right is heritable. *See* RIGHTS OF TENANT, *infra.* **A.I.R. 1934 Cal. 398.**

Contract of tenancy.

———*Contract of tenancy—Duration of tenancy—Agreement referring to "heirs"—Meaning of.*

An agreement between a landlord and tenant mentioning the word "heirs" cannot be construed as conveying rights in perpetuity; for what was intended thereby may be a provision to deal with cases in which the heirs were allowed to hold on to the land. Had the agreement intended to convey rights in perpetuity, it should have contained some reference to "*naslan bad naslan.*" (*Oppenheim, S. M.*) JAGAT BAHADUR SINGH *v.* SHIVA SHANKER SINGH. **14 L.R. 330 (Rev.)=17 R.D. 475.**

———*Contract of tenancy—Government land vested in Municipal Committee for administration—Committee's right to sue for ejectment of tenant.*

Where land belonging to Government had vested in the Municipal Committee for the purpose of administration and according to rules framed by Government, its sanction for leasing the land for more than five years was necessary and sanction was obtained from time to time by the Municipal Committee when the renewal of the lease was for more than five years, the contract of tenancy was between the Municipal Committee and the tenant and not between the Government and the tenant and the Committee was therefore entitled to sue for the ejectment of the tenant. (*Jai Lal, J.*) TEJ KAUR *v.* MUNICIPAL COMMITTEE, AMRITSAR. **6 R.L. 656=149 I.C. 123=A.I.R. 1934 Lah. 621.**

———*Contract of tenancy—Inference—Receipt of canal dues.*

It will be far fetched to hold that an acceptance of money dues on account of canal dues warrants the inference that there was a contract of tenancy. (*Keane, S. M. and Oppenheim, J. M.*) SRI DURGA DEBI JI *v.* BADRI PRASAD. **15 R.D. 399.**

Co-sharer.

———*See also* ABADI AND ADMISSION TO TENANCY *supra* AND EJECTMENT, NOTICE TO QUIT, OCCUPANCY HOLDING, OCCUPANCY TENANCY, RENT—SUIT FOR AND SIR LAND, *infra.*

———*Co-sharer—Co-sharer landlords—Suit by some for rent or ejectment—Maintainability.*

Where the landlord's rights belong jointly to several persons a suit to recover rent on a new basis or to eject the tenant can only be brought by all the co-sharers suing jointly as plaintiffs. It makes no difference whether the suit be technically one for enhancement or rent or to recover rent on a new basis of calculation. (*Broomfield, J.*) VAGHA JESING *v.* MANILAL BHOG I-

LANDLORD AND TENANT—Co-sharer.

LAL. **156 I.C. 898=8 R.B. 36=37 Bom.L.R. 249=A.I.R. 1935 Bom. 262.**

———Co-sharer—Cultivation by—If as landlord or as tenant. *See* AGRA TENANCY ACT (1926), S. 4 (*d*). **18 R.D. 711 (2).**

———*Co-sharer—Partion between co sharer landlords—Effect on their relationship with tenants.*

The Civil Court partition is between landlords and by itself it does not constitute the breaking up of the holding. The holding is a unit for which a certain rent is payable to the landlord. The rent payable is not divisible being a lump rental in respect of the entire holding. The holding can be broken up and rents apportioned with the consent of all the parties concerned, namely, all the landlords and raiyats concerned. There is no procedure in Civil Court partition suits under which the tenants can be brought on the record and the rents apportioned after splitting up the holdings. What the Civil Court partition does is that it changes the position of the co-sharer landlords from holders of lands as tenants-in-common into landlords holding different pieces of land in severalty, but so far as their relation with a raiyat, lands of whose holding have been allotted to the different landlords, is concerned, they continue to be his co-sharer landlords. Before the partition each co sharer had his undivided share extending over the entire holding; after the partition, each co-sharer holds different pieces of the land comprising the holding in severalty, but the holding is still a holding under all the landlords taken as a whole and from the raiyat's point of view all of them taken together will be his landlords. (*Mohammad Noor, J.*) MT. NEPUR KUER *v.* BHAN PARTAP. **156 I.C. 881=8 R.P. 34=16 Pat. L.T. 443=A.I.R. 1935 Pat. 227.**

Co-tenants.

———*Co-tenants—Co tenancy — Ancestral holding—Presumption of jointness—Separate possession—Effect of.*

The legal presumption in the case of an ancestral holding is that it is joint unless partition has been proved clearly. Separate possession for a number of years cannot destroy the principle of co-tenancy, although such separate possession may suit the interests of a joint family for the time being. (*Knox, S. M. and Grant, J.M.*) LAKHAN KURMI *v.* DUBER KURMI. **1935 R.D. 455.**

———Co-tenants— Liability of each for the whole rent. *See* RENT *infra*. **A.I.R. 1935 Pat. 146.**

———*Co tenants—Relinquishment of interest by one co tenant—Effect.*

On a relinquishment by one or more of several co-tenants of a holding of their interest, such interest passes to those co tenants whose interests survive. (*Oppenheim, S.M and Drake Brockman, J. M.*) BINDHYACHAL UPADHYA *v.* SAHDEO RAI. **18 R.D. 436=15 L.R. 572 (Rev.).**

———*Co-tenants—Sub-lease by one contrary to law—Admission of sub-lessee by landlord—Effect of.*

A sub lessee from one of two co-tenants under a sub-lease which is illegal cannot claim to be regarded as a tenant-in-chief by admission of the landholder, still less as a co tenant with the other co-tenant, without the consent of the latter. It is open to the landholder to set aside such an illegal arrangement, but he cannot admit the sub lessee to tenancy without the consent of the other co-tenant. (*Drake Brockman, S. M. and Knox, J. M.*) SIS RAM *v.* RAM DIYA. **1935 R.D. 148.**

LANDLORD AND TENANT—Denial of title.

Covenants.

———Covenants—Construction. *See* LEASE.
(1) CONSTRUCTION.
(2) FORFEITURE.

Creation of tenancy.

———*Creation of tenancy—Actual delivery of possession, not necessary.*

A tenancy is created if a tenant already in possession is continued to be so upon an express agreement with the new landlord by recognizing the latter's title and by duly executing a lease deed and attorning to him. 40 Mad. 561, Foll. (*Rama Rao, J.*) TAVAKAL SABI *v.* CHANNAPPA. **9 Mys.L.J. 339.**

———*Creation of tenancy— Mistake of landlord—Wrong entry by patwari—Effect.*

Neither the mistake of a landlord nor the wrong entry made by a patwari would have the effect of creating a new tenancy. (*Oppenheim, S. M.*) MAHIPAT SINGH *v.* INDERBALI PANDEY. **16 R.D. 176=13 L.R. 61 (Rev.).**

———*Creation of tenancy—Tenant being in possession—Different tenancy created by* Karinda—*Legality.*

Where there is a tenant lawfully let into the land, the landlord cannot through his *Karinda* superimpose another tenant. (*Oppenheim, J. M.*) DUDH NATH SINGH *v.* JAG LAL. **15 R.D. 760=12 L.R. 356 (Rev.).**

Customary dues.

———*Customary dues—Right of Zemindar—Proof.*

A custom must be certain and definite where a custom is pleaded to the effect that certain tenants are liable to make certain payments to the Zemindar it should be shown that there is some fixed basis for the levy. Where the collection depends on the will of the Zemindar and the origin of the payments are shown to be voluntary the levy cannot be enforced against the tenants on the basis of custom. (*Mukerji and Bennet, JJ.*) JANGI *v.* MEWA LAL. **I.R. 1931 All. 323=15 R.D. 338=130 I.C. 707=1931 A.L.J. 79=A.I.R. 1931 All. 215.**

Denial of title.

See also FORFEITURE SUB-TENANCY AND TERMINATION OF TENANCY, *infra*.

———*Denial of title—Effect.*

When a person has once become a tenant under a landlord, he cannot merely by denying the right of the landlord convert his possession, permissive as it was originally into adverse, against the landlord. 47 M. 337 (P.C.) and 47 B. 798 (P.C.), Ref. (*Anantakrishna Aiyar, J.*) GOPALA KUDVA *v.* JUVAPPA KAMTHI. **I.R. 1931 Mad. 721=133 I.C. 369=35 L.W. 400=1930 M.W.N. 874=A.I.R. 1931 Mad. 577.**

———*Denial of title—Expiration of tenancy—Applicability of rule of estoppel.*

While under S. 116 of the Evidence Act a tenant during the continuance of the tenancy is not estopped from denying that at the beginning of the tenancy his landlord had any title to the demised premises, it is open to a tenant in a suit for recovery of rent to show that the title of his landlord has expired or been legally determined. Thus where an ouster by title paramount or an attornment thereto is alleged it is not the title of the landlord at the beginning of the tenancy which is being impeached by the raising of such a defence and the rule of estoppel laid down in S. 116 no longer operates as a bar. Such a defence is permissible without a tenant having to surrender possession as is ordinarily necessary before the lessee can deny the lessor's title. (*Tapp, J.*) RAM RAKHA MAL *v.* MUNNA LAL.

LANDLORD AND TENANT.

MAIDHAN. **I.R. 1931 Lah. 829=133 I.C. 653=32 P.L.R. 338=A.I.R. 1931 Lah. 243.**

———Denial of title by manager of Hindu joint family —Family, if bound. *See* HINDU LAW — JOINT FAMILY—MANAGER. **36 Bom L.R. 1083.**

Ejectment.

See also ABADI *supra* AND ESTOPPEL, SHIKMI TENANT AND SIR LAND *infra*.

———*Ejectment—Agreement to grant permanent lease.*

In a suit for ejectment, defendant pleaded that there was an agreement, which could be enforced, for grant of a permanent lease to him. It was found that the defendant had not done his part of the contract.

Held, that he could not rely on the agreement and that he could be ejected. (*Rowland, J.*) SRINIWAS HUKUM SINGH *v.* RAJKISHORE SAHAY. **148 I.C. 207=6 R.P. 429=A.I.R. 1933 Pat. 579.**

———*Ejectment—Breach of conditions of lease.*

The mere allegation of a breach of the conditions of a lease does not put an end to the relationship of landlord and tenant for the purpose of a suit for ejectment. (*Bhide, J.*) SECRETARY OF STATE FOR INDIA *v.* BAHADUR CHAND. **I.R. 1931 Lah. 863=133 I.C. 895=A.I.R. 1932 Lah. 67.**

———*Ejectment—Burden of proof.*

Though in a suit for ejectment, the plaintiff has got the *prima facie* duty of proving his case, when both parties have adduced evidence with respect to the question of Kudivaram rights claimed by the tenant, the question of burden of proof is not very material. 45 M. 586 (P.C.); 47 M. 337 (P.C.); 51 M.L.J. 10; 1927 M.W.N. 609 and 52 M. 453 (P.C.), Ref. (*Madhavan Nair, J.*) SUBBARAJU *v.* PONNAMMA. **1930 M W.N. 1125.**

———*Ejectment—Burden of proof.*

Prima facie a tenant is liable to be ejected unless he shows that either by custom, by contract or by virtue of statute he has occupancy rights and that he cannot be ejected by the landholder. 43 M. 567 (P.C.); 47 M. 337 (P.C.); 52 B. 176 (P C) and 52 M. 549 (P.C.), Ref. (*Anantakrishna Aiyar and Cornish, JJ.*) NARAYANASWAMI BAHADUR *v.* BODA THAMMAYYA. **1930 M.W.N. 945.**

———*Ejectment—Cause of action, if recurring.*

There is no annually recurring cause of action as regards the ejectment of a tenant of Oudh on the ground that he holds proprietary rights in the village. If an ejectment is once claimed on that ground and the claim is contested and fails, the zemindar is estopped from renewing his pursuit. (*Oakden, S.M. and Smith, J.M.*) HEERA *v.* KALI PRAKASH. **11 L.R. 282 (Rev.)=14 R.D. 540=7 O.W.N. 929.**

———*Ejectment—Co-mortgagees—Right of one to eject tenant.*

One of several co-mortgagees cannot sue to eject a tenant. Even as a tenant may not relinquish a part of his holding, so a proprietor cannot be allowed to divide up a tenant's holding at his discretion. (*Oppenheim, S. M and Knox, J.M*) KEDAR NATH TEWARI *v.* RAM HIT. **16 R.D. 167=13 L R. 53 (Rev).**

———*Ejectment—Co-sharer landlord purchasing non-transferable occupancy holding—Right to sue for ejectment of trespasser.*

A purchase by a co sharer landlord of a non-transferable occupancy holding is good against every body except the co-sharers. Hence he can sue for ejectment of a trespasser. (*Henderson. J.*) NAYEBATI SARKAR *v.* LALIT MOHAN ROY. **154 I.C. 714=7 R.C. 519=38 C.W.N. 1126=A.I.R. 1935 Cal. 151.**

LANDLORD AND TENANT—Ejectment.

———*Ejectment—Co-sharer landlords—Right to joint possession—Stranger transferee of interest—Rights.*

The defendants who were complete strangers purchased a non transferable occupancy holding from the previous tenant and thereafter, though within a short time of the purchase, acquired a small share in the superior interest, thus becoming co sharer landlords. The other landlords having instituted a suit to recover joint possession with the defendants to the extent of their share,

Held, that the defendants having taken possession as trespassers, the plaintiffs had the right to evict them and no acquiescence on their part having been established they were entitled to joint possession to the extent they owned. (*Mukerji, J.*) SARAT CHANDRA SAHA *v.* BEPIN BEHARI CHAKERBUTTY. **149 I.C. 1014=6 R. C. 672=37 C.W.N. 256=A I.R. 1933 Cal. 687.**

———*Ejectment—Co-sharer selling share but retaining one plot—Liability to ejectment by vendee.*

The one time possessor of a share who retains even only one specific plot in proprietary right, though he sells the whole of his share, is to that extent still a co-sharer. As such he is entitled to hold land *khudkasht*. If he holds in *khudkasht* more than what the extent of his share warrants, he is liable to render profits. But he cannot be ejected by his vendee. The whole proprietary body, not the transferee of his former proprietary rights less one plot, are his landholders who can eject him. (*Drake Brockman, S M. and Knox, J.M.*) RAIDAL SINGH *v.* KUREY SINGH. **1935 R.D. 374 (1).**

———*Ejectment—Cultivation not proved for 12 years before planting grove—Liability to ejectment for cutting down grove.*

In a suit to eject the defendants on the ground that the land was the grove of the defendants which they had cut down and had in consequence become non occupancy tenants thereof, the defendants pleaded they had acquired occupancy rights.

Held, that the defendants had to show that they had acquired occupancy rights in the land before they planted the grove, that they had failed to prove that they had cultivated for 12 years before they planted the grove and so they were only non-occupancy tenants liable to ejectment since the grove had been cut down. (*Walton, J.M.*) TOTA RAM *v.* RANI HAREESH MUKHI DASI. **14 L.R. 160 (Rev.)=17 R.D. 207.**

———*Ejectment—Declaration by Board as to special agreement—Civil Court decree not superseding same—Right to eject.*

The Board held that the defendant was holding under a special agreement. The zamindars went to the Civil Court for a declaration to the effect that the tenant had no under-proprietary rights and they obtained a declaration to that effect. The Civil Court however declined to define the class of the tenancy.

Held, that the tenant was not entitled to ejectment by notice since the Board's decision was in no way superseded. (*Walton, J.M.*) UMA PRASAD *v.* THAKUR DIN. **16 R.D. 519.**

———*Ejectment—Decree against lessor—Sub-lessee if bound.*

A decree in ejectment passed against a lessee at the instance of a lessor is not only binding upon the lessee but also upon his sub-tenants provided they have no right independent of the right of their lessor in the demised premises. (*Suhrawardy and Graham, JJ.*) SHEIKH YUSUF *v.* JYOTISH CHANDRA BANERJEE. **59 Cal. 739=137 I.C. 139=I R. 1932 Cal 267=54 C. L.J. 493=35 C.W.N. 1132=A.I.R. 1932 Cal. 241.**

LANDLORD AND TENANT—Ejectment.

———*Ejectment—Decree passed—Old settlement numbers given—Correction in execution—Permissibility.*

Where in a suit for ejectment a decree was passed but the pre settlement numbers were given instead of the current numbers and the Court directed the party to amend the same and insert the numbers of the current settlement but meanwhile he had lost his case in the Court of the Commissioner and won his case in the Court of the Board, and thereafter applied for execution giving the correct numbers,

Held, that there being no doubt about the identity of the land, execution could be proceeded with. (*Keane, S. M. and Oppenheim, J.M.*) NAGESHAR PRASAD SINGH *v.* ZAMAN MUSALMAN. **15 R D. 210=12 L.R. 61 (Rev.).**

———*Ejectment—Denial of title by tenant for first time in pleadings—Landlord's right to decree for ejectment on ground of forfeiture.*

Where in a suit for possession of land by the landlord, the tenant denies the title of the landlord for the first time in the pleadings, the landlord is not entitled to a decree for ejectment of the tenant on the ground of forfeiture by virtue of such denial in the suit. (*Jai Lal and Salk, JJ.*) SARUP SINGH *v.* PURAN SINGH. **159 I.C. 962=8 R.L. 441=A.I.R. 1935 Lah. 804.**

———*Ejectment—Denial of title by tenant—Permissibility.*

Where a person is recorded as an expropriatary tenant by an order of Court, it is not open to a sub-tenant of his to deny that status in answer to a suit in ejectment brought several years later. (*Drake Brockman, J. M.*) TULSHI *v.* BHAJAN LAL. **14 L R. 574 (Rev.)=17 R. D. 741.**

———*Ejectment—Entry of recorded tenants entirely* farzi*—No proof of tenancy—Suit for ejectment of sub-tenants—Maintainability.*

Where the entry of recorded tenants was entirely *farzi* and there is no proof of their having cultivated the holding and no proof again of any genuine subletting, a suit by those tenants for the ejectment of sub-tenants is liable to be dismissed. (*Oppenheim, S.M. and Drake Brockman, J.M.*) PATESHWARI PRASAD *v.* TILAK LAL. **14 L.R. 475 (Rev.)=17 R.D. 634.**

———*Ejectment—Extinction of occupancy rights—No fresh contract with occupant—Liability of occupant to ejectment.*

Where, by reason of surrender, the occupancy rights had been extinguished, and there was no evidence to show that there was a new contract of tenancy with the occupant or that rent was accepted from him on his own account or otherwise as the representative of the occupancy tenant, the occupant is liable to be ejected as a trespasser. (*Oppenheim, S.M. and Walton, J.M.*) SRI RAM *v.* GAJJU CHAMAR. **14 L R. 74 (Rev.)=17 R. D. 86.**

———*Ejectment—Kanomdar—Agreement for renewal—Resistance to suit by lessor for possession—Permissibility.*

A kanomdar who has an agreement of renewal in his favour cannot for that reason withstand a suit for possession brought by a lessor or purchaser from the lessor; but where the right of kanomdar to enforce specific performance of the agreement in his favour is not barred by limitation, it would be open to him to apply to the Court to have the suit for ejectment stayed with a view to file a separate suit in his turn and get specific performance. (*Reilly and Anantakrishna Ayyar, JJ.*) KALYANI *v.* KRISHNAN NAMBIAR. **55 Mad. 519=I.R. 1932 Mad 489=138 I.C. 78=1932 M.W.N. 193=35 L.W. 307=A.I.R. 1932 Mad. 305=62 M.L.J. 525.**

LANDLORD AND TENANT—Ejectment.

———*Ejectment—No clause for re-entry on failure to pay rent—Remedy.*

Where there is no clause providing for re-entry in the event of failure to pay rent, the Court has no right to get the lessee or his assigns ejected when they fail to pay rent. In the absence of a clause providing for re-entry, the only remedy of lessor is to sue for arrears of rent. (*Tek Chand and Skemp, JJ.*) BHAGWAN DAS *v.* GHULAM MOHAMMAD. **159 I.C. 1019=8 R.L 453=A.I.R. 1935 Lah. 863.**

———*Ejectment—Non-transferable holding—Tenant effecting transfer—Right of landlord to eject tenant.*

In cases between a landlord and transferee of his tenant having no right to transfer or between a person in whom the paramount right is vested and transferee from a holder under a maintenance grant, the transferee is ejected by virtue of right of re-entry contained in the lease or grant or by virtue of proprietary right being vested in a person who can eject trespassers. In such cases the person in whom the paramount title is vested can be prevented from entering on the property only by the lessee or grantee, as the case may be, who has the right of enjoyment. Any other person even though he may be a transferee of a person or grantee who *ex hypothesi* acquires no right under his transfer, cannot question the right of the paramount owner to enter on his own land. It the lessee or grantee having no right of transfer has himself abandoned possession and transferred it to a third person, the person in whom the paramount title is vested can re-enter. All that he need establish in support of his right of re-entry is that the lessee or grantee abandoned his interest in the property restricted in its enjoyment to him personally. (*Pullan and Niamatullah, JJ.*) RAM NATH *v.* NANAK CHAND. **143 I.C. 61=I.R. 1933 All. 166=1932 A. L J. 821=A.I R. 1932 All. 686.**

———Ejectment—Non-transferable occupancy holding—Abandonment—Prior settlement in favour of another—Validity. *See* T. P. ACT, S. 43. **58 C.L.J. 145=37 C.W.N. 1144.**

———*Ejectment—Notice—Repudiation of landlord's title.*

Though forfeiture may not result without some overt act on the part of the landlord, the repudiation of the landlord's title is sufficient to dispense with notice of the suit for ejectment. (*Bhide, J.*) IMAM DIN *v.* NATHA SINGH. **I.R. 1931 Lah. 920=134 I.C. 296=32 P.L. R. 626=A I.R. 1932 Lah. 43.**

———*Ejectment—Occupancy raiyat—Grant of raiyati jote patta—Liability of lessee to ejectment.*

Where the lessors who were ordinary occupancy raiyats granted an ordinary raiyati jote patta at an annual rental to be held from generation to generation.

Held, that the lessees were liable to ejectment as under-raiyats. (*Rankin, C.J and Pearson, J.*) SARADA SUNDARI *v.* RAJANI KANTA MANDOL. **149 I.C. 1019=6 R.C. 668=37 C.W.N. 643=A I.R. 1933 Cal. 682.**

———*Ejectment—Occupant shown in village papers as liable to pay rent—Liability to be ejected as trespasser.*

Where the landlord sues to eject the occupant as a trespasser on the ground that although he was in possession for 14 years, he had not paid any rent,

Held, that as the village papers showed the defendant as liable to pay rent, he could not be regarded as a trespasser and that the suit should fail on that ground. (*Smith, J.M*) NARAIN GIR *v.* MAHADEO RAI. **14 L R. 111 (Rev.)=17 R.D. 81.**

———*Ejectment—Occupier—Lease to third party—Effect.*

LANDLORD AND TENANT—Ejectment.

The status of an existing occupier will not be affected by a lease granted before ejecting the occupier. This is specially so where the later lease is a paper transaction as between the members of a Hindu joint family. (*Oppenheim, S. M. and Knox, J. M.*) RAM SUKH PATAK *v.* MT. BHAGWANDEI. **16 R.D. 601=13 L.R. 63 (Rev.).**

———*Ejectment—Permanent lease by co sharer—Lessee not obtaining possession but recorded as co-tenant—Claim by lessee to be co-tenant and in possession—Liability to ejectment.*

A lessee under a permanent lease from a co-sharer, which does not, however, secure him possession of the holding or any protection from ejectment, is liable to be ejected by the landholder, if such lessee, being recorded as a co-sharer, claims to be such and in possession. The landholder is perfectly justified in ejecting such a lessee. (*Oppenheim, S. M. and Drake Brockman, J. M.*) RAGHUNATH SINGH *v.* MOHAN SINGH. **1935 R.D. 16=16 L.R 170 (Rev.).**

———*Ejectment—Plea as to tenancy—Burden of proof.*

Where in a suit for ejectment the defendant claims that there has been a contract of tenancy, the burden of proof lies on him to prove the contract. It may be shifted by such entries as those noted by the Commissioner, as the burden of proof is generally shifted from time to time as a case progresses but the original burden of proof is on the defendant. (*Oppenheim, J.M.*) BHAGIRATH *v.* BALRAM DAS. **15 R.D. 603=12 L.R. 305 (Rev.).**

———*Ejectment—Plea of permanent rights—Onus.*

In an action of ejectment, when the defendant is admittedly in possession of the land in dispute the onus is initially on the plaintiff to prove his title thereto; and when the plaintiff has proved his title as landlord, the burden shifts to the defendant, if he claims to be a tenant, to prove that the tenancy is not precarious, but entitles him to continue in occupation. (*Courtney-Terrell, C.J., Dhavle and Agarwala, JJ.*) JAHABAJ KHAN *v.* SRI KRISHNA DEY. **15 Pat. 187=160 I.C. 437=8 R P. 365=16 Pat.L.T. 864=A.I.R. 1936 Pat. 29 (F.B.).**

———*Ejectment—Proof of tenancy—Burden of proof.*

In a suit for ejectment, where the plaintiffs are admittedly the owners of the land in dispute, the burden of proving the tenancy lies on the defendants. (*Niamatullah and Bennet, JJ.*) RIKH DEO RAI *v.* GANGA PRASAD PANDE. **6 I.R. (All.) 395=146 I.C. 1002=17 R.D. 772=14 L.R. 632 (Rev.)=A.I.R. 1933 All. 825.**

———*Ejectment—Proof of title—No proof of attornment—Damages for use and occupation—Right to.*

The plaintiff sued for possession and rent. The defendant denied both title and tenancy. The lower Court held the plaintiff's title proved but that the defendant had not attorned to the plaintiff.

Held, the plaintiff was entitled to possession and damages for use and occupation. 7 S.L.R. 23, Foll. (*Wild, J.C. and Milne, A.J.C.*) MUNSHI ALLAHWARYO *v.* MT. BEGUM. **25 S.L.R. 266=I.R. 1931 Sind 143=134 I.C. 399=A.I.R. 1931 Sind 145.**

———*Ejectment—Raiyat executing sale to stranger and cultivating land as under-raiyat of purchaser—Ejectment of purchaser—Right to.*

Where the raiyat who has executed a sale cultivates the land under the purchaser as an under-raiyat, the landlord is entitled to a decree for ejectment against the purchaser. 4 I.C. 473, Ref.; 33 Cal. 531, Dist. (*Mohamad Noor, J.*) LALEY DHARNIDHAR *v.* JAGESHWAR MAHTON. **156 I.C. 917=8 R.P. 46=A.I.R. 1935 Pat. 269.**

LANDLORD AND TENANT—Ejectment.

———*Ejectment—Rights as mortgagee set up by defendant—Mortgage unregistered and therefore inadmissible—Suit to be decreed.*

The plaintiff sued to eject the defendant as shikmi tenant. The defendant admitted that he had been given possession by plaintiff but claimed that he was protected from ejectment by the fact that he held the land as mortgagee. It appeared, however, that the mortgage was unregistered though of the value of above Rs. 100.

Held, that the existence of mortgage should be ignored and the suit for ejectment decreed. (*Keane, S.M. and Oppenheim, J. M.*) BRIJ MOHAN BARAI *v.* HEMRAJ SAITHWAR. **15 R.D. 281=12 L.R. 90 (Rev.).**

———*Ejectment—Service tenure—Failure to perform services—Right of landlord to re-enter—Delay—Effect.*

The refusal by a tenant to perform services which are incidental to his holding is sufficient of itself to ground a suit for ejectment. No question of the lessor having to assert a right of forfeiture or any matter of the kind arises at all. Nor does the landlord lose the right merely by allowing a long period of time to elapse before he took steps to enforce that right by legal process.

Per *Curiam*.—There seems to be a distinction between a case where there is a right to service of a public character such as *chawkdari chakran* and one where the service is to a private person such as the grantor. In the former case the zemindar himself is not or may not always be entitled to resume possession whereas in the latter case he can do so either when the service is not required or when the grantee has refused to perform the service. (*Costello and Jack, JJ.*) PROKASH CHANDRA DAS *v.* RAJENDRA NATH DAM. **58 Cal. 1359=135 I.C. 296=I.R. 1932 Cal. 104=35 C.W.N. 823=A.I.R. 1932 Cal. 221.**

———*Ejectment—Sub-tenant becoming mortgagee.*

Where a mortgage was treated in the form of a sub-tenancy for ten years of an occupancy holding and the occupancy tenant sued the sub-tenant in ejectment after the expiry of the period of sub-lease.

Held, that the sub-tenant was liable to be ejected. (*Oakden, S.M. and Smith, J.M.*) HARDAM PIARI *v.* AMMAN KHAN. **15 R.D. 150.**

———*Ejectment—Sub-tenants—Recognition of title of tenant in-chief—Liability to ejectment.*

The mother was treated as occupancy tenants of the holding in succession to the sons. It appeared that she was admitted by the sub-tenants themselves to have a direct interest in the holding and they had paid rent to the landlord on her behalf. The mother having sued the sub tenants in ejectment,

Held, that the mother was the tenant-in-chief, and that the defendants were sub-tenants liable to be ejected by the plaintiff. (*Oakden, S.M. and Keane, J.M.*) LACHMINIA *v.* BHAIRO. **15 R.D. 170=12 L.R. 45 (Rev.).**

———*Ejectment—Suit against* 'sirtans'—*Claim as* 'khaikars' *under an unregistered agreement—No rent clause in the agreement—Tenants if can be ejected.*

Under an unregistered agreement, the plaintiff, a *hissedar*, agreed that the defendants were to occupy the land until the next settlement as *sirtans* or tenants-at-will and that at the time of the settlement he would accept them as *khaikars*. But there was no clause about the rent. In a suit by the plaintiff for rejecting the tenants for refusal to pay rent,

Held, the respondents could be ejected from the land. (*Keane, S.M. and Oppenheim, J.M.*) ATMA RAM *v.* LALU. **12 L.R. 425 (Rev.)=16 R.D. 69.**

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———*Ejectment—Suit by landlord for ejectment of defendant as tenant, dismissed—Landlord, if can subsequently sue him as trespasser.*

Where an earlier suit by the landlord for ejectment of the defendant as a tenant was dismissed by the rent Court, the landlord having elected once to accept the defendant as a tenant, cannot be allowed to shift his ground and sue him as a trespasser. (*Srivastava and Smith, JJ.*) BHARAT SINGH *v.* GUR PRASAD SINGH. **157 I.C. 960=8 R O. 59=1935 O.W N. 985=1935 R.D. 451=A.I.R. 1935 Oudh 515.**

———*Ejectment—Suit for—Alleged illegal sub-letting —Correction of* Khatauni*—Application by defendant for—Name of alleged sub-tenant expunged—Effect on suit.*

Where during the pendency of a suit for ejectment of the defendant for illegal sub-letting, the application which the defendant had filed prior to the suit for correction of *Khataun* was disposed of and as a result of it, the name of the alleged sub-tenant was expunged from the papers.

Held, that the suit for ejectment should be dismissed as the effect of correction proceedings was a finding that there was no sub-letting at all, legal or illegal. (*Oppenheim, S.M. and Walton, J.M.*) GOLAI *v.* TEJ BAHADUR SINGH. **14 L R. 109 (Rev.)=17 R.D. 123.**

———*Ejectment—Suit for —Claim of underproprietary rights—Duty of Revenue Court to decide.*

It is a well-established principle in Oudh that where a person raises a plea that he has rights, adjudication on the nature of which can only be made by a Revenue Court, *e.g.*, that he has a right of occupancy in the land or that it is held at a favourable rate of rent, it is incumbent on the Revenue Courts before they eject him to adjudicate on those rights. (*Drake Brockman, S.M. and Holmes, J.M.*) BABU LAL *v.* TIRBHAWAN BAHADUR SINGH. **14 L.R. 892 (Rev.).**

———*Ejectment—Suit for—Contract of tenancy not made out—Procedure.*

Where the plaintiff brought a suit for ejectment alleging that the defendants were tenants under a lease which had expired, and on the defendants raising the question of title, it was found as a fact that there was no contract of tenancy, the proper course is to dismiss the suit and not to convert it into a declaratory and possessory suit which is of another nature entirely. (*Courtney Terrell, C.J., Kulwant Sahay and James, JJ.*) NARAYAN JHA NARONE *v.* JAGNI PRASAD JHA. **13 Pat. 329=6 R P. 410=147 I.C. 1222=15 Pat.L.T. 139=A.I.R. 1934 Pat. 184 (S.B.).**

———*Ejectment—Suit for—Joint tenant—Parties to suit.*

The liability of joint tenants is *prima facie* joint and a joint tenant cannot be ejected simply from an undivided share. Unless it is proposed to evict all the tenants it must be shown that the share of the tenant whom it is proposed to evict is *de facto* separated. If it is proposed to eject a joint tenant from the portion of the tenancy actually separately possessed by him, it is necessary to implead the co sharers, as they may object that no private partition has been made in which case the Court would be at liberty to proceed on an alternative plea to evict all. (*Miles Irvings, J.C.*) KHUDU *v* SHER KHAN. **13 Lah.L.T. 14.**

———*Ejectment—Suit by one of several co-sharers— Right found different from right pleaded—Procedure.*

Where the plaintiff sues for ejectment in his individual capacity and the Court finds that the holding belongs to the plaintiff and other proprietors the Court should not pass a decree in favour of the plaintiff on behalf of all the co-sharers. A.I.R. 1926 Lah. 545, Ref. (*Addison and Hilton, JJ.*) SAPURAN SINGH *v.* KHAWAJA KHAN. **I.R. 1932 Lah. 560=139 I.C. 133=33 P.L. R. 124=A.I.R. 1933 Lah. 241.**

———*Ejectment—Suit for—Parties.*

It would be unreasonable to force a landlord to make in a suit for ejectment against his lessee all the under-lessees or even persons who may be in actual possession under such under-lessees, parties to the suit the nature of which may change from a simple suit for ejectment on forfeiture or determination of the lease. (*Suhrawardy and Graham, JJ.*) SHEIKH YUSUF *v.* JYOTISH CHANDRA BANERJEE. **59 Cal. 739=137 I.C. 139=I.R. 1932 Cal. 267=54 C.L.J. 493=35 C.W.N. 1132 =A.I R. 1932 Cal. 241.**

———*Ejectment—Suit for—Plea of occupancy rights —Burden of proof.*

A landlord is *prima facie* entitled to *khas* possession of every *bigha* of land within the ambit of his *Zemindari* unless the tenant is in a position to establish a title in him to remain in occupation of the land, by showing that there is an agreement between him and the landlord that he shall have something more than the ordinary tenancy at-will or from year to year. The onus is on the tenant to prove a grant in his favour or establish a custom entitling him to retain possession of the land. (*Das and Foster, JJ.*) KEDAR NATH MULLICK *v.* BIKAL PRUSTI. **16 Pat L.T. 861.**

———*Ejectment—Suit for—Plea of permanent rights —Burden of proof.*

A landlord is entitled to *khas* possession of every *bigha* of land within the ambit of his *Zemindari* unless the tenant in possession establishes title to hold such lands and shows that there is some custom or agreement between him and the landlord that he shall have something more than ordinary tenancy-at-will or from year to year. (*Das and Foster, JJ.*) KRISHNA CHARAN MAHANTY *v.* PUNAI. **16 Pat.L T. 858.**

———*Ejectment—Suit for—Plea of statutory tenancy —No evidence in support of—Dismissal of suit improper.*

In a suit for ejectment of the several defendants on the footing of trespassers, only one appeared and pleaded statutory tenancy. No evidence was produced. Plaintiff however led some evidence in favour of his contention.

Held, that in the circumstances of the case, the dismissal of the suit was not proper. (*Oppenheim, S.M. and Drake Brockman, J.M.*) RAM KUMAR SINGH *v.* SUKHKHU AHIR. **14 L.R. 444 (Rev.)=17 R.D. 587.**

———*Ejectment—Suit to recover possession—Jurisdiction of Revenue Court.*

On the death of an occupancy tenant the plaintiffs who claimed to be his collaterals got possession of the holding and subsequently obtained a declaration against their landlords that they were entitled to hold the land as occupancy tenants. Later on they were dispossessed by the landlords and after the expiry of more than one year they brought a suit for possession of the land on the allegation that the landlords had unlawfully dispossessed them two years before the institution of the suit.

Held, that the suit was cognizable by the Revenue Court. (*Shadi Lal, C.J. and Broadway, J.*) PIRAN DITTA *v.* LAL. **I.R. 1932 Lah. 407 (1)=138 I.C. 39 =33 P.L R. 646.**

———*Ejectment—Suit for—Tenant holding over for number of years.*

A person who claims to be on the land on payment of rent, after the demise of his father who was before his death holding over, for a number of years, after the expiration of the terms of his lease, cannot be held to

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be in the position of a trespasser on the land, against whom the landlord has to proceed by way of getting his title established in a properly constituted suit. The landlord can maintain a suit for ejectment. (*Guha and Bartley, JJ.*) ASUTOSH PRAMANIK *v.* JIBANDHAN GANGULY. **147 I.C. 209=6 R.C. 301=59 C L J. 5 =A.I.R. 1933 Cal. 822.**

———*Ejectment—Surrender of land by tenant to lambardar—Right of succeeding lambardar.*

Where a tenant surrendered his land to the lambardar co-sharer who was later on dismissed from lambardarship for having given a theka of his proprietary rights, and where a new lambardar was appointed in his place,

Held, the possession of the old lambardar did not become unlawful merely because a new lambardar was appointed, and hence he could not be ejected as a tres passer. (*Oppenheim, J.M.*) PIRAE LAL *v.* USMAN AHMAD KHAN. **13 L.R. 12 (Rev.)=16 R.D. 93.**

———*Ejectment—Tenancy at will—Purchaser from licensee—Right of landlord to evict.*

Where a licensee-potter from a landlord was allowed to erect a mud house and the defendant having purchased the potter's right put up a pucca structure without the landlord's consent and the latter sued in ejectment,

Held, that neither the potter nor the purchaser had an interest in the land, and the defendant was liable to ejectment. (*Macpherson and Agarwala, JJ.*) RAMKISHUN PANDEY *v.* BIBI SOHAILA. **6 I.R. (Pat.) 192 =145 I.C. 567=14 Pat.L.T. 685=A.I.R. 1933 Pat. 561.**

———*Ejectment—Tenant holding for hundred years—Absence of muchilikas.*

Where tenants have been introduced on uncultivated lands in a mirasi inam village and they have been in possession for over a century without executing muchilikas, they are not liable to be ejected at the option of either the mirasidar or of any body, for in such cases the presence of muchilikas has been regarded as a sure indication of the landlord's right to eject the tenant. (*Ramesam. O. C. J. and Venkatasubba Rao, J.*) VENUGOPALA NAIDU *v.* PERUMAL ODAYAN. **154 I.C. 294=7 R.M. 417=A.I.R. 1934 Mad 275.**

———*Ejectment—Tenant in possession of land not belonging to landlord—Suit by owner.*

The defendants were in possession under proprietors of adjoining toujis and they had encroached upon the plaintiff's land. It was not quite clear whether those proprietors settled the disputed lands or whether the encroachments were made by the defendants themselves.

Held, that the plaintiff was entitled to a decree of khas possession from the defendants. (*Henderson, J.*) SYED DAD ALI *v.* JAMIRUDDIN SHEIKH. **A.I.R. 1934 Cal. 715.**

———*Ejectment—Undivided brother allowed to continue—Sons of ejected tenant subsequently suing for rights—No interruption.*

The sons of an ejected tenant applied for a declaration of their rights four years after the ejectment. It appeared that an undivided brother of the ejected tenant had been allowed to hold the land during the interval.

Held, that there was no break in the tenancy. (*Walton, J.M.*) KALLU *v.* TIKA RAM. **16 R.D. 399= 13 L R. 169 (Rev.).**

Encroachment.

See also RENT—ADDITIONAL RENT, *infra.*

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———*Encroachment by tenants on lands not belonging to landlord—Right to such encroachments—Additional rent in respect of—If payable.*

If a tenant encroaches upon the lands of persons other than his landlord and acquires title to them by adverse possession he acquires it *prima facie* to the ultimate benefit of the landlord, unless he had expressed a clear intention to hold if for his own benefit. But this principle would not entitle the landlord to claim additional rent in respect of such lands whether or not the tenant's title has been perfected. The true scope of the principle is that if the tenancy determines in any way, the landlord becomes entitled to take possession not only of the lands originally included in the tenancy, but also of the encroached lands; and the tenant would have no right to retain them. (*Mitter, J.*) SURJA KANHA SARKAR *v.* SAROJ KUMAR BOSE. **39 C.W.N. 616.**

———*Encroachment by tenant on land of third party—Title to such land—Right of landlord to additional rent.*

A tenant encroaching upon an adjoining land belonging to a third party and obtaining it by adverse possession obtains it for the benefit of his landlord who gets a title to the land encroached. Hence the benefit accruing to the tenant during the term of the tenancy must be taken to be a benefit, so far as the tenant is concerned, saddled with the burden of paying additional rent for excess land, once it is found that the land encroached upon is held as part of the tenancy. (English and Indian case-law discussed.) A.I.R. 1928 Cal. 142, Dist. (*Guha and Lodge, JJ.*) SAROJ KUMAR BOSE *v.* SURJYA KANTA SARKAR. **63 Cal. 497=159 I.C. 685=8 R.C. 355=40 C.W.N. 121=A.I.R. 1935 Cal. 771.**

Estoppel.

See also EVIDENCE ACT, SS 115 AND 116.

———*Estoppel—Basis of rule—Person holding from tenant—Whether can dispute landlord's title.*

S. 116 of the Evidence Act which enacts the rule of estoppel of a tenant is not exhaustive of all principles of estoppel as between landlord and tenant. The basis of the principle is the fact of the letting of the tenant into possession which creates the estoppel. If a tenant consents to give up possession to a party claiming title adverse to the landlord's title that party is estopped as the tenant would have been from disputing the landlord's title. (*Mukerjee, J.*) AJITULLA *v.* BILATI BIBI. **137 I.C. 556=I R. 1932 Cal. 321=35 C.W.N. 652=54 C.L.J. 151=A.I R. 1932 Cal. 383 (2).**

———*Estoppel—Ejectment—Suit against sub-tenant—Grove planted by sub tenant with the tacit consent of tenant—Estoppel.*

Where a sub-tenant plants trees with the proved consent, tacit or express, of a tenant in chief, he holds under an implied agreement so far as the tenant in-chief is concerned to hold so long as the grove lasts and the tenant-in-chief is estopped from suing for his ejectment as a tenant from year to year. (*Oppenheim, S. M. and Drake Brockman, J.M.*) JAGAT NARAIN RAI *v.* GAURI AHIR. **14 L.R. 527 (Rev.)=17 R.D. 678.**

———*Estoppel against landlord—Tenant selling land—Building by purchaser—Acquiescence—What is—Ejectment—Rights of tenant.*

Under the equitable doctrine of acquiescence, the Court will restrain the landlord from exercising his legal right of eviction, if, amongst other things, he has known that the tenant under a mistake as to his legal rights has expended money by way of purchasing the holding and building upon it on the faith of his mistaken belief and has encouraged the tenant in his expenditure of money,

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directly or by abstaining from asserting his legal right. But the doctrine cannot be invoked unless it is shown that the landlord consented or encouraged the tenant to purchase the lands or that he knew of the purchase. Vague evidence that the tenants of the estate had in the past been selling the lands as if they had some interest in the lands higher than that of a mere tenancy-at-will will not be enough to entitle the tenant to the benefit of this rule of estoppel. (*Murphy and Barlee, JJ.*) DEVJI ARJAN DALVADI *v.* BHOJA VAIJA KACHAR. **37 Bom.L.R. 220 = A.I.R. 1935 Bom. 219.**

———*Estoppel—Landlord not estopped.*

In order that a tenant may raise the plea of estoppel as against his landlord there should be a representation believed in by the tenants and in the second place it must be a case consistent with the document under which the tenancy was created. Where the alleged representation was contrary to the terms of the document between the parties,

Held, that the plea of estoppel was not available. (*Rankin, C. J. and Pearson, J.*) SARADA SUNDARI *v.* RAJANI KANTA MANDOL. **149 I.C. 1019 = 6 R. C. 668 = 37 C.W.N. 643 = A.I.R. 1933 Cal. 682.**

———*Estoppel — Mistake in describing land—Effect against person making mistake—Contract of tenancy.*

The misdescription of a plot of land in a prior suit cannot estop the landholder from denying the status of a person claiming rights on the basis of such misdescription. It would lead to all sorts of difficulties if it were held that the effect of the mistakes was to establish a contract of tenancy in land in which other people might will have interests. Misdescription regarding ex proprietary holding held to be immaterial. (*Smith, S.M. and Oppenheim, J.M.*) GANPAT RAI *v.* RAGHUBIR SINGH. **15 R.D. 577 = 12 L.R. 326 (Rev.).**

———*Estoppel—Plea regarding character of land as* sir *—Subsequent repudiation by heir—Permissibility.*

The heir of an ex-proprietor cannot raise a plea in direct contravention of the plea raised by the ex-proprietor at an earlier stage, namely, that the land was *sir* land of which the claimant was entitled to retain possession and not grove land which would have gone to the new proprietor. (*Keane, S.M. and Oppenheim, J.M.*) HANUMAN PRASAD SINGH *v.* NEKCHED SINGH. **15 R.D. 300 = 12 L.R. 101 (Rev.).**

———*Estoppel—Sub-tenants taking land as* sir*—Right to question* sir*—Character of land.*

Where the entry of *sir* in the name of a particular person and his heirs has gone on for the best part of 50 years and the defendant took the land as sub-tenants of the plaintiff's predecessors,

Held, that it was not open to the defendants to contest the entry regarding the *sir* character of the land. (*Keane, J.M.*) SADHO SARAN MISRA *v.* GHAUSA RAM. **15 R.D. 220.**

———*Estoppel—Tenant holding at favourable rent—Assertion of want of title against mortgagee.*

A tenant holding at a favourable rate of rent is estopped, in the same way as a muafidar, from asserting against a mortgagee, whom he has ejected, his own want of title. (*Raza, Srivastava and Smith, JJ.*) HAKIM HUSAIN *v.* MUSHTAQ HUSAIN. **6 I.R. (Oudh) 136 = 146 I.C. 482 = 10 O.W.N. 1330 = 18 R.D. 15 = 15 L.R. 42 (Rev.) = A.I.R. 1933 Oudh 542 (F.B.).**

Ex-proprietary holding.

———*Ex-proprietary holding—Arrangement amongst proprietary body assigning tenant to particular landholder—Right to sue in ejectment.*

An ex-proprietary tenant becomes the tenant of the whole proprietary body but if the whole proprietary body agree among themselves that he should become the tenant of a particular proprietor, there is nothing whatever in the law which would render such an arrangement invalid. The consequence of such an arrangement would be that the person empowered to deal with the tenant would be the person whom the general body of proprietors had accepted as landholder of that tenant, and he is entitled to sue for ejectment of that tenant. (*Oppenheim, S.M. and Walton, J.M.*) MAHOMED FAIQ *v.* BAL MUKUND GIR. **14 L.R. 153 (Rev.) = 17 R.D. 204.**

LANDLORD AND TENANT—Fixed rate tenancy.

———*Ex-proprietary holding — Government tenancy (Punjab)—Acquisition of proprietary rights by tenant —Punjab Government Letter dated* 19—12—1910*—Widow holding life-interest.*

Although the conditions of the tenancy situated in the Lower Chenab Canal Colony do not provide for the acquisition of proprietary rights, the privilege of acquiring such rights was conferred by the Punjab Government letter No. 186, Rev., dated the 19th December, 1910; and widows holding a life interest are thereby allowed to acquire proprietary rights. (*Boyd, F.C.*) MT. MALAN *v.* EMPEROR. **12 Lah.L.T. 15.**

———*Ex-proprietary holding* — Khudkasht malikan—*Meaning of.*

Khudkasht means land actually cultivated by the proprietor himself or in the case of a joint *khudkasht* by the holders jointly. The word "*malikan*" cannot mean in the case of *khudkasht* "any proprietors who may at any particular time be recorded as proprietors"; it must mean certain definite proprietors. (*Drake Brockman, J.M.*) CHHOTU SINGH *v.* MAHADEO PRASAD. **14 L.R. 382 (Rev.) = 17 R.D. 521.**

Ex-proprietary tenancy.

See also GROVE, *infra.*

———Ex proprietary tenancy—Ex-proprietary tenant—Insolvency—Rights of Official Receiver over tenancy. *See* PROVINCIAL INSOLVENCY ACT, S. 28. **18 R.D. 714 (1).**

———*Ex-proprietary tenancy — Extinguishment — Revival.*

Where a claim to ex-proprietary rights was not made within six months of the transfer, the claim is finally lost and nothing can revive it. (*Oakden, S.M. and Smith, J.M.*) BRIJLESHWARI PRASAD *v.* PRAG NARAIN. **14 R.D. 695.**

———*Ex-proprietary tenancy—Proof.*

Where the entries in the patwari and settlement papers were not uniform and there was no other evidence to prove the ex-proprietary nature of the tenancy,

Held, that Court could not from those facts infer an ex proprietary tenancy. (*Keane, S.M. and Oppenheim, J.M.*) JAHALI AHIR *v.* MUKUT NATH DASS. **15 R.D. 201 = 12 L.R. 57 (Rev.).**

Fixed rate tenancy.

———*Fixed rate tenancy—Creation by landlord — Transferable rights, if conferred.*

Apart from S. 20 (3) of Act II of 1901 there is nothing to prevent a landlord from creating heritable and transferable tenancy by executing a registered lease in favour of the grantee. The law does not prescribe any particular mode of expression by which alone a transferable right can be conferred upon a grantee. The intention to create such rights may be expressed by any appropriate words employed in the instrument conferring them. Where the landlord purported in 1887 to create a fixed rate tenancy which was tranferable,

Held, that he must have intended to confer on the lessee all the rights enjoyed by a fixed rate tenant including the right to transfer. (*Sen and Niamatullah, JJ.*) MAHESH NARAIN SINGH *v.* BISHESHAR LONIA. **I.R. 1931 All. 692 = 133 I.C. 532 = 1931 A.L.J. 432 = = 15 R.D. 451 = A.I.R. 1931 All. 534.**

———*Fixed rate tenancy—Rent partly in cash and partly in kind.*

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Where the landlord and tenant agree that the tenant is to hold the land at a money rent of Rs. 9-8 0 and a paddy rent of 40 *avis* of paddy per annum, and that this rent will not be altered on any account, the tenancy is one in which the rent is fixed in perpetuity. (*M.C. Ghose, J.*) TOFAZZAL AHMED CHOUDHURY *v.* MASALAT KHAN CHOUDHURY. **152 I.C. 484=7 R. C. 278=38 C.W.N. 797=A.I.R. 1934 Cal. 747.**

Forfeiture.

See also PREMIUM, *infra* AND LEASE—CONSTRUCTION.

———*Forfeiture—Covenant against transfer by tenant—Mortgage of two thirds of the holding by tenant—Right of re entry.*

Where a condition in a lease provided that the tenant "shall not be able to transfer the said *karsha* right in any way by gift or sale, or to grant any *karsha* settlement in respect thereof or to encumber the same in any way" and that the tenant was, in the event of breach of that condition, liable to be ejected.

Held, that forfeiture was to be incurred by the lessees and the right of re entry was to accrue to the lessor only in the event of the lessee transferring or encumbering the entire leasehold, and that the condition was not broken by usufructuary mortgage by the tenant of a two-third share of the holding. *Church* v. *Holding*, 15 Ves. 258, Foll. (*Guha and M C. Ghose, JJ.*) SWARNAMOYEE DEBYA *v.* ADYAJADDI. **60 Cal. 47=I.R. 1932 Cal. 577=139 I.C. 239=36 C.W.N. 819=A.I.R. 1932 Cal. 787.**

———*Forfeiture—Covenant for payment on certain date and in default lessor to have right to eject lessee—Default—Plea of suspension of rent—If available when lessee has already got damages for interference.*

Where a lease stipulated that the lessee should pay the lessor certain sums of money on certain fixed dates and contained a covenant that on failure to pay those sums on the due dates the lessor would be entitled to eject the lessee, default on the part of the tenant to make the payment on the fixed dates entails forfeiture and renders him liable to ejectment. He cannot plead in answer to such forfeiture, suspension of rent on the ground of interference with his possession on the part of the lessor, when he has already obtained damages for such interference from the landlord. The lessee cannot be allowed to maintain his right to possession under the lease while at the same time repudiating his covenant to pay his dues on the dates fixed. (*Allsop, J.*) NARAIN DAS *v.* PERMANAND. **156 I.C. 351=7 R.A. 1062=1935 A.W.R. 995=1935 A.L.J. 1055.**

———*Forfeiture—Denial of landlord's title in ejectment suit, if sufficient.*

The denial of the landlord's title not before suit but in the suit itself will not work a forfeiture of the tenant's rights. (*Broadway and Abdul Qadir, JJ.*) GUJAR SINGH *v.* ABDUL GHAFOOR. **I.R. 1931 Lah. 1038=134 I C. 1038.**

———*Forfeiture—Denial of title—Relief against—Power of Court.*

The power of Court in India to relieve against forfeiture arising by disclaimer of title, on grounds of justice, equity and good conscience, is not necessarily limited to cases where the denial of title is occasioned by the fraud, mistake or accident of the landlord and where the tenant is neither careless nor negligent. (*Broomfield and Wadia, JJ.*) RACHOTAPPA *v.* KONHER ANNARAO. **59 Bom. 194=155 I C. 516=7 R.B. 433=36 Bom.L R. 1083=A.I.R. 1935 Bom. 41.**

———*Forfeiture—Denial of title—Rule as to—English law—Applicability.*

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The T. P. Act largely reproduces the English law, and the principles of English law as to forfeiture apply both to tenancies created before the Act came into force and to those excepted from its operation. The definition of "disclaimer" in S. 111 (*g*) of the Act is taken from an English case. To entail a forfeiture, the repudiation of the landlord's title must be clear and unequivocal, and made to the knowledge of the landlord. But the English law as to forfeiture by matter *in pais* does not apply to India. There can be no forfeiture by disclaimer in cases not covered by the T. P. Act, unless the disclaimer is in matter of record. For a denial of landlord's title to be effective, there must be present the elements of an estoppel (a change of position has been brought about or the bar of *res judicata* has arisen) or the rule that a man cannot approbate and reprobate must apply. There is a good deal to be said for the view that where the T. P. Act does not apply, the disclaimer of the landlord's title, even though clear and unequivocal and even though made in a judicial proceeding, would not operate as a forfeiture of the tenancy, unless it amounts to an estoppel or comes within the mischief of the rule that a man may not approbate and reprobate, or is made in such circumstances that it would render the tenant's possession adverse to the landlord. Assuming that a bare disclaimer in matter of record is legally sufficient to work a forfeiture, the Courts have the power to relieve against it. Cases dealing with disclaimer in tenancies from year to year cannot be regarded as authorities on the subject of forfeiture. (*Broomfield and Wadia, JJ.*) RACHOTAPPA *v.* KONHER ANNARAO. **59 Bom. 194=155 I C. 516=7 R.B. 433=36 Bom L R. 1083=A.I.R. 1935 Bom. 41.**

———*Forfeiture—Denial of title by some of tenants in written statement.*

Where a denial of title made in a written statement was not by all the tenants,

Held, that the statements made therein were not sufficient in law to sustain a forfeiture of the tenancy. (*Mitter, J.*) GANIMIA *v.* WAJID ALI. **156 I.C. 563=8 R.C. 7=39 C.W.N. 882=61 C.L.J. 328=A.I.R. 1935 Cal. 393.**

———*Forfeiture—Express clause for re-entry necessary.*

Even if a tenant has been guilty of a breach of duty by building on land intended for cultivation, it does not operate necessarily as a forfeiture and render him liable to be evicted. Even in cases to which S. 111 of the T.P. Act applies, forfeiture is incurred only by the breach o an express condition entitling the lessor to re-enter or fo denial of the lessor's title and in case the lessor should give notice of his intention to terminate the lease. 26 M. 157 and 42 Mad. 589 (P. C.), Ref. (*Waller and Krishnan Pandalai, JJ.*) PERIYANAN CHETTY *v.* GOVINDA RAO. **I.R. 1932 Mad. 402=137 I.C. 487=1931 M.W.N. 1287=35 L.W. 191=A.I.R. 1932 Mad. 328=62 M.L J. 496.**

———*Forfeiture—Khoti lands—Mortgage by tenant without Khoti's consent—Effect of—Mortgage redeemed before suit—Right of re-entry not affected.*

The mere execution of a mortgage by a tenant without the Khot's consent of his khot nisbat lands (in the Mangaon taluka of the Kolaba District) is sufficient to give the Khot the right to re-enter and that right is not affected by the fact that the mortgage is redeemed before the landlord made the re entry or commenced the suit. 24 Bom.L R. 1160, Foll. (*Baker, J.*) RAMCHANDRA VITHAL *v.* JANKI LAKSHMAN. **141 I C. 481=I.R. 1933 Bom. 104=34 Bom.L R. 975=A.I.R. 1932 Bom, 524.**

LANDLORD AND TENANT—Forfeiture.

———*Forfeiture—Waiver of—Onus.*

The onus is on the lessee to adduce some evidence of the lessor's knowledge of the act of the tenant constituting a breach of conditions of the lease. It is not enough for the lessee to prove an act on the part of the lessor showing recognition of the tenancy, or to show that the lessor's ignorance of the breach has not been proved. It is incumbent on him to prove positively that the lessor had knowledge of the breach and yet continued to recognise the tenancy. (1923) A. C. 435, Foll. (*Guha and M.C. Ghose, JJ.*) SWARNAMOYEE DEBYA *v.* ADYAJADDI. **60 Cal. 47=I.R. 1932 Cal. 577=139 I.C. 239=36 C.W.N. 819=A.I.R. 1932 Cal. 787.**

Graveyard.

———*Graveyard—Right of landlord to graze cattle.*

Once a plot of land has been proved to be a graveyard the zemindar has no right left at all for the simple reason that the graveyard becomes a wakf for the purpose of burying the dead. The zemindar cannot interfere with the use of the land as graveyard so long as it is used for this purpose and he can neither graze cattle upon the graveyard nor can he use it for any other purpose whatsoever. (*Young, J.*) JHAO LAL *v.* AHMUDULLAH. **149 I.C. 966=3 A.W.R. 347=1934 A.L.J. 248=6 R.A. 1006=18 R.D. 157=15 L.R. 179 (Rev.) =A.I.R. 1934 All. 835.**

Grazing rights.

See also GRAVEYARD, *supra.*

———*Grazing rights—Immemorial user by tenants—Presumption as to lawful origin—Extent of tenant's rights.*

Where it was found that certain occupancy tenants had been grazing their cattle for a very long time in the entire *banjar* land of the village,

Held, that the tenants' user must be taken to be lawful.

Held, further, that the tenants could only insist on suitable area being kept in the village and could not prevent the landlord from executing improvements on the waste lands for all time to come. (*Tek Chand, J.*) KARTARA *v.* PRITAM SINGH. **I.R. 1932 Lah. 307=137 I.C. 225=33 P.L.R. 942.**

———*Grazing rights—Landlord can still cultivate waste.*

Tenants have no right to graze on any particular land and the malguzar can, in spite of a right of the tenants to graze their cattle on the village, waste cultivate part of the waste. He must however leave sufficient land for grazing purposes. (*Staples, A.J.C.*) GOVINDA KALAR *v.* GANGARAM SINGH. **30 N.L.R. 246=150 I.C. 33 =6 R.N. 282=A.I.R. 1934 Nag. 137.**

Grove.

See also ESTOPPEL, *supra* AND SIR LAND, *infra.*

———*Grove—Existence for 35 years—Knowledge and consent of landholder—Inference.*

Where no written permission was shown but the grove existed for 35 years and no objection was ever made,

Held, that the landlord must have had notice and that implied consent may be presumed. (*Oakden, S.M. and Keane, J.M.*) RAM DIAL *v.* MAHOMED MUZZAMILULLA KHAN. **15 R.D. 256.**

———*Grove—Ex-proprietary rights in.*

Ex-proprietary rights can accrue in grove land. (*Drake Brockman, S.M. and Holmes, J.M.*) MURARI LAL *v.* AMARNATH SETH. **14 L.R. 806 (Rev.).**

———*Grove—Groveholder—Right to transfer.*

The owner of a grove can transfer the same. The law on this point under U.P. Act III of 1926 is merely a summing up of the pre-existing principles. (*Keane, S.M.*) MUKARRAM HUSSAIN *v.* ABDUL SHAKUR. **15 R.D. 527.**

LANDLORD AND TENANT—Grove.

———*Grove—Portion falling vacant—Right of landlord to take possession—Separate groves held under different grants.*

Where a plot of land is given to a person to plant a grove thereon, the landlord is not entitled to enter into possession of portions of the grove which have become vacant (*i.e.*, devoid of trees) or to cultivate them himself or let them for cultivation to others, because the plot must be taken to have been granted as a whole and the tenure must stand or fall as a whole. For the application of this principle, however, it is necessary that the entire area must be held under one single grant. It has no application to a case in which separate groves are held under different grants and one of the groves has become devoid of trees. 3 O.W.N. 392, Dist. (*Bisheshwar Nath, J.*) LACHHMI NARAIN *v.* KAMPTA PRASAD. **8 Luck. 111=140 I.C. 700=16 R.D. 487=13 L.R. 312 (Rev.)=9 O.W.N. 677=A.I.R. 1932 Oudh 281.**

———*Grove—Premium—Place of payment of—Duty of lessee.*

It is the duty of the lessee of a grove to apply to the lessor to appoint a place for payment of the premium due; and when he does not do so, it has to be inferred that there is an implied promise by the lessee to make the payment to the lessor at the latter's place of residence, the rule being that the debtor must find the creditor to pay the debt or pay where the creditor is. (*Niamatullah, J.*) BHAGWATI SHUKUL *v.* CHANDRIKA PRASAD KUERI. **18 R.D. 403=15 L.R. 527 (Rev.).**

———*Grove—Proof.*

The Commissioner's report stated that there were, excluding shrubs and self grown trees only four mango trees, one *jaman* tree and two *tari* trees.

Held, that the question whether the land was grove should be decided on personal inspection by the Commissioner and that the report was not conclusive one way or the other. (*Oakden, S.M. and Keane, J.M.*) DURGA NARAIN SINGH *v.* KALKA. **15 R.D. 794.**

———*Grove—Sale of* sir *land—Ex-proprietary rights with regard to trees, if claimable.*

Where a plot which is entirely grove and has not been cultivated for many years is sold, the proprietor loses his *sir* rights by sale of the land and his grove rights by sale of the trees. He cannot therefore claim ex-proprietary right with reference to the trees. (*Holmes, J.M.*) SAFIUL HASNAIN *v.* CHANDRA DEVI. **14 L.R. 714 (Rev.).**

———*Grove—Sale with Zamindar's permission permitted by custom—Zamindar belonging to a joint family —Consent of* karta, *if sufficient.*

Where there is a custom recorded in the *wajib-ul-arz* under which a tenant's grove can be sold with the permission of the Zamindars, it could not possibly have been intended that such a consent cannot be obtained if there is any minor member living among the families of the numerous Zamindars in the village. Obviously the consent of the managing member or the *karta* would be enough, otherwise it would be practically impossible to sanction a transfer. (*Sulaiman, C.J. and Bennet, J.*) ANRUDH RAI *v.* SANT PRASAD RAI. **57 All 891=155 I.C. 569=7 R.A. 947=1935 A.L.J. 838=1935 R.D. 182=1935 A.W.R. 474=A.I.R. 1935 All. 746 (2).**

———*Grove—Some members of family leaving village —Right of other members.*

LANDLORD AND TENANT—Holding over.

There is no reason why the effect of the departure of some members of the family from the village should have been to oust the other members of the family from the possession of the grove. The natural sequence of the events would have been for the resident branch of the family to have retained possession of the grove which they would occupy partly on their own account and partly on account of the absentee members. (*Keane, S.M. and Oppenheim, J.M.*) ZALIM SINGH *v.* SHEO MANGAL SINGH. **15 R.D. 572=12 L.R. 293 (Rev.).**

Holding over.

See also STATUS OF TENANT, *infra* AND LEASE—CONSTRUCTION.

———*Holding over—Contumacious conduct— Penal rent.*

Where the lessee contumaciously holds over, the landlord is clearly entitled to damages. In the absence of definite proof as to actual loss, the Court may in such cases award double the normal rent by way of damages. (*Broadway and Bhide, JJ.*) SUNDAR SINGH *v.* RAM SARAN DAS. **14 Lah. 137=142 I.C. 754=I.R. 1933 Lah. 269=33 P.L.R. 323=A.I.R. 1933 Lah. 61.**

———*Holding over—Contumacious conduct—Suit to recover rent—Basis.*

Held, that it was a matter of discretion resting with the Court to decide whether a tenant contumaciously holding over should be penalized to the extent of making him pay double the rent or some lesser amount. (*Broadway and Johnstone, JJ.*) NARAIN DAS *v.* DHARAM DAS. **13 Lah. 216=I.R. 1932 Lah. 454 (2)=138 I.C. 290 (1)=33 P.L.R. 238=A.I.R. 1932 Lah. 275.**

———*Holding over—Damages for use and occupation.*

Where the landlord never assented to the tenant continuing in possession after the expiry of lease, there is no tenancy at all and the landlord is not entitled to damages for use and occupation beyond the time actually spent by the tenant on the premises. (*Dalip Singh, J.*) GOBIND RAM *v.* HARI MOHAN SINGH. **A.I.R. 1934 Lah. 175.**

———Holding over—Expiry of lease—Tenant holding over against will of landlord—Status and liability of—Notice to quit—Necessity. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 31. **68 M.L.J. 196.**

———*Holding over—Lessee—Liability for use and occupation—Basis of.*

Where the tenancy has terminated and the defendants have been found to be in unlawful possession, they cannot rely on the terms of the tenancy. The compensation for "use and occupation" in such a case must be assessed on the basis of the normal rent realizable during the period in question. (*Addison and Bhide, JJ.*) UBED-UL-RAHMAN *v.* DARBARI LAL. **6 I.R. (Lah.) 276=146 I.C. 845=34 P.L.R. 262=A.I.R. 1933 Lah. 509.**

———*Holding over—Position of lessee—Termination of lease in dispute—Effect of.*

The possession of a lessee for a fixed term holding over after the expiry of the term cannot be considered to be that of a tenant. The fact that the question whether the lease had or had not terminated was in dispute does not improve his position; the question must be decided in the light of the final decision of the point. (*Addison and Bhide, JJ.*) UBED-UL-RAHMAN *v.* DARBARI LAL. **6 I.R. (Lah.) 276=146 I.C. 845=34 P.L.R. 262=A.I.R. 1933 Lah. 509.**

———*Holding over—Tenancy for fixed term—Clause for damages in lease—Effect.*

Where the lease is for a fixed term and the tenant holds over, the tenant is a trespasser. The mere fact that there is a clause in the lease deed providing for damages by way of enhanced rent for use and occupation does not mean that the relationship of landlord and tenant continues in such a case. (*Dalip Singh and Monroe, JJ.*) KIRAT SINGH *v.* BHAI KALU SINGH. **149 I.C 948=6 R.L. 766=35 P.L.R. 24=A.I.R. 1934 Lah. 129.**

LANDLORD AND TENANT—Kabuliyat.

———*Holding over—Tenant, if bound by previous covenants.*

It is well established that where a tenant holds over after the expiration of the term, he impliedly holds subject to all the covenants in the lease which are applicable to him in the new situation. (*Tek Chand, J.*) ALLAH DITTA *v.* KARTAR SINGH. **37 P.L.R. 765.**

———Holding over by tenant—Damages—Measure of. *See* AGRA TENANCY ACT, S. 44. **18 R.D. 570.**

Joint tenancy.

See also EJECTMENT, *supra* AND NOTICE TO QUIT, *infra*.

———*Joint tenancy—Proof.*

Sharing in cultivation of a holding does not constitute a joint tenancy. Any tenant is at liberty to get another man to share in his cultivation but that does not alter the fact that the sole tenant is the man to whom the land was leased. (*Oakden, S. M. and Smith, J.M.*) CHARAN SINGH *v.* BHAGWAN DASS. **11 L.R. 366 (Rev.)=14 R.D. 638.**

Kabuliyat.

See also LEASE—CONSTRUCTION.

———*Kabuliyat*—Consideration—Settlement of doubtful claims and forbearance to sue. *See* CONTRACT—CONSIDERATION. **62 Cal. 346=60 C.L.J. 477=A.I.R. 1935 Cal. 368.**

———Kabuliyat—*Provision for rent—Stipulation for interest and damages in case of default—Enforceability.*

A *kabuliyat* contained a clause as follows: "If we make default in payment of the instalments, we shall pay interest at the rate of Rs. 2 per cent. per mensem. If we neglect to pay rent, you shall be competent to realise damages at 25 per cent. therefor by auction-sale according to Reg. VIII of 1819 and the law in force or that shall be in force in future". The landlord having sued to recover rent, interest and damages,

Held, that under the contract the plaintiff was entitled to recover besides rent both interest and damages, as stipulated in the *kabuliyat*.

Held, further, that the provision for damages at 25 per cent. was not a penalty and even if it were so, the Court should give effect to the terms of the agreement. (*Cuming, J.*) CHANDI CHARAN LAHA *v.* JIBAN KUMAR MAJUMDAR. **I.R. 1931 Cal. 624=132 I.C. 912=53 C.L.J. 516=A.I.R. 1931 Cal. 772 (1).**

———Kabuliyat—*Registration—Necessity for—Liability to ejectment.*

In a *kabuliyat* the defendants acknowledged that they occupied sites in the abadi without the permission of the lambardar and they undertook to pay rent for these sites at the rate of Rs. 10 per year for five years and to give up possession at the end of five years. They also undertook that, if they decided to remain in the village after five years, in breach of the agreement they would pay rent at Rs. 25 per year, but said nothing as to the period for which they would occupy at that rate.

Held, that the document was clearly a lease within the meaning of S. 2 (7), Registration Act, which includes an undertaking to occupy and as the lease was unregistered it was not admissible in evidence. But, even if it were admissible, it did not show that the defendants were entitled to occupy the sites for ever subject simply to the payment of Rs. 25 per annum and the defendants where therefore liable to ejectment after due notice from the landlord. (*Jackson, A.J.C.*)

LANDLORD AND TENANT—Khudkasht land.

SADARAM *v.* SUNDAR SINGH. **I.R. 1931 Nag. 135 = 134 I.C. 263 = A.I.R. 1931 Nag. 128.**

Khudkasht land.

See also EJECTMENT—EX-PROPRIETARY HOLDING, *supra* AND OCCUPANCY TENANCY, *infra*.

———*Khudkasht land—Cultivating partnership—Proof—Mulguzar—Status.*

To constitute a contract of cultivating partnership regarding khudkasht land, it is essential that the mulguzar should supply part of the working capital and by so doing take some part in the cultivation. It is not necessary that he should take any actual part in agricultural operations or even in superintendence thereof. The agreement to share net profits does not necessarily connote a partnership. (*Grille, A.J.C.*) SOBHAG SINGH *v.* KHUSHAL. **28 N.L.R 198 = I.R. 1933 Nag. 11 = 140 I.C. 708 = A.I.R. 1932 Nag. 138.**

Merger.

———*Merger—Occupancy right—Tenants becoming proprietors.*

Where, to all intents and purposes, the proprietors and the tenants are virtually (though not actually) the same people, there is a merger of the occupancy rights with the proprietary rights. 1 R. D. 669; 5 R. D. 294, Foll. (*Oppenheim, S.M. and Walton, J.M.*) ABHILAKH *v.* SRI BHAGWAT NAIK. **14 L.R. 37 (Rev.) = 17 R.D. 25.**

———*Merger—Occupancy tenant—Purchase of proprietary right—Effect.*

Where an occupancy tenant purchases proprietary rights, the occupancy rights merge in the proprietary rights and cease to exist. (*Dobson, F. C.*) WAZIR ALI KHAN *v.* HARI RAM. **11 Lah.L.T. 6.**

———*Merger—Proprietary and under-proprietary tenures separately entered—Coalescence of right must be proved.*

Where the under-proprietary tenure has been entered separately from the proprietary tenure and these entries are maintained successively when one person is succeeded in possession by another, the under-proprietors sold their right to *N* and *S*, and *S* succeeded to *N* as proprietor and entered into acual possession.

Held, that any coalescence of right to extinguish the separation of title did not take place. 48 I.A. 485, Rel. on. (*Wazir Hasan, C.J. and Raza, J.*) MAULA BAKHSH *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **6 R.O. 347 = 147 I.C. 1011 = 10 O.W.N. 1263 = 17 R.D. 1132 = 14 L.R. 908 (Rev.) = A.I.R. 1934 Oudh 47.**

———*Merger—Tenant becoming proprietor—Merger of occupancy rights.*

Where, to all intents and purposes, the proprietors and the tenants are virtually (though not actually) the same people, there is a merger of the occupancy rights with the proprietary rights. 1 R. D. 669; 5 R. D. 294, Foll. (*Oppenheim, S.M. and Walton, J.M.*) ABHILAKH *v.* SRI BHAGWAT NAIK. **14 L.R. 37 (Rev.) = 17 R.D. 25.**

———*Merger—Widow, owner of malik makbuza muafidar, selling fields to occupancy tenant thereof.*

Where a widow who is for the time being owner of the malik makbuza muafidar sarkar rights of the fields sells the fields to the occupancy tenants thereof, the general rule is that merger would occur in absence of an overt act or declaration by the vendees that they intended to retain occupancy rights. The mere fact that the transaction in suit is voidable does not in law detract from the title conferred by the widow. Merger is not therefore prevented by the mere fact that the vendor is a woman. (*Gruer, A.J.C.*) MT. KASHIBAI *v.* SANDOO. **153 I.C. 435 = 7 R.N. 136 = 17 N.L.J. 235 = A.I.R. 1934 Nag. 255.**

LANDLORD AND TENANT—Nature of tenancy.

Mortgagee.

See also ADVERSE POSSESSION, *supra*, RENT AND SIR LAND, *infra*.

———*Mortgagee—Mortgage by tenant—Invalidity—Right of tenant to eject mortgagee as trespasser.*

A tenant who mortgages his land is not entitled to ignore the existence of the mortgage and proceed against the mortgagee as a trespasser. (*Oppenheim, J.M.*) RAGHUNANDAN *v.* PUTTO LAL. **15 R.D. 718.**

———Mortgagee of occupancy tenant—Not a tenant—No liability for rent. *See* RELATIONSHIP, *infra*. **18 R.D. 712.**

———*Mortgagee recorded as tenant—Redemption of mortgage—Status of mortgagee continuing in possession.*

Where a mortgagee who was entered in the revenue records as a tenant continued in possession even after the redemption of the mortgage,

Held, that he was a mere trespasser and should be recorded as being in possession "*bila tas fia lagan.*" (*Oppenheim, S. M. and Drake Brockman, J. M.*) MAHAPAT RAWAT *v.* BUDH RAM AHIR. **14 L.R. 914 (Rev.) = 18 R.D. 73.**

——— Mortgagee—Usufructuary mortgagee of lessee not liable for rent. *See* RENT, *infra*. **A.I.R. 1934 Mad. 563.**

Mukhtar aman.

———Mukhtar aman—*Power to let land—Exercise by* mukhtar—*Binding nature on landlord.*

A *mukhtar amin* executed under the old Agra Tenancy Act gives the *mukhtar* wide powers, including the power to admit to the land and to grant leases. He was also empowered to do anything incidental to the estate management which was not harmful to the estate. The *mukhtar* admitted a person to land after the new Act.

Held, that the transaction should be upheld especially when it was shown that it was beneficial to the estate. (*Oppenheim, J.M.*) ASHGAR ABBAS *v.* MOHAN. **12 L.R. 5 (Rev.) = 16 R.D. 85.**

Nature of tenancy.

———*Nature of tenancy—Decree of Settlement Court—Not acted on for a long time—How far binding in a subsequent suit.*

Where a portion of the holding of the appellants which was shown as occupancy land in the old papers was really fixed rate land by virtue of a decision of the Settlement Court but no action was taken on the decision for a long time, in a subsequent suit for enhancement of rent,

Held, that the appellants were occupancy tenants and not fixed rate tenants notwithstanding the decision of the Settlement Court, as that decision was not acted upon for a long time. (*Oppenheim, J.M.*) FAUZDAR SINGH *v.* BALJIT SINGH. **12 L.R. 431 (Rev.) = 16 R.D. 65.**

———*Nature of tenancy—Inference from conduct.*

Where the exact nature and terms of the tenancy are obscure, they must be gathered from the conduct of the parties and the apparent use which has been made of the land ever since the grant. (*Pullan and Niamatullah, JJ.*) JOTI PRASAD *v.* HAR PRASAD. **I.R. 1932 All. 558 = 139 I.C. 346 = 1932 A.L.J. 567 = 16 R.D. 429 = 13 L.R. 266 (Rev.) = A.I.R. 1932 All. 473.**

———*Nature of tenancy—Land in market town—Origin unknown—User as shop and residence on fixed rate of rent—Evidence of transfer and succession—Inference—Ejectment—Notice to quit.*

Certain lands in a market town were held by one E. B. The lands abutted on a road and had structures

LANDLORD AND TENANT—Nature of tenancy.

on them consisting of two buildings with roofs of corrugated iron sheets and floors of boards, the premises having been used all along for a shop and also for a residence. The rent paid was the same without any change for about 52 years, and was payable annually. The origin of E.B.'s tenancy was unknown; but he sold it in 1877 to one *I*, who continued to pay the same rent as E.B. On *I's* death, his heirs sold it to defendant No. 1 and the predecessor of the other defendants. The value of land increased enormously.

Held, (*i*) that the facts did not point unmistakably to permanence and were not inconsistent with a non-permanent tenancy; that abstention on the part of the landlord from taking steps to eject the transferee or heirs or to enhance the rent could not lead to the inference of permanency of tenure; and consequently the character of the tenancy was it was not permanent nor heritable nor transferable; (*ii*) that the tenancy was one from year to year at a fixed rent, and for a term not specified and so terminable on notice, and not a tenancy-at-will or a monthly tenancy; that it was an old tenancy which had its origin prior to the Transfer of Property Act and has been continued from year to year; (*iii*) that the tenancy being apparently one according to the Bengali year, a six months' notice, calculated according to the Bengali calendar and expiring with the end of the Bengali year was necessary for terminating the tenancy; (*iv*) a tenancy to continue year to year is a continuing tenancy so long as the parties are satisfied; and though terminable at the option of either party at the end of any year, it is not *ipso facto* terminated at the end of every year. In the case of such a tenancy a reasonable notice is necessary. (*Mukerji and M.C. Ghose, JJ.*) JAMIRUDDIN SAODAGAR *v.* HAZI MAL GANI SAODAGAR. **62 C.L.J. 201.**

———Nature of tenancy—Old tenancy of unknown origin—Tenant, if ryot or tenure holder—Tests to find out—Purpose and use of tenancy—Relevancy—Presumption based on extent of area of tenancy. *See* B. T. ACT, S. 5. **61 C.L.J. 530.**

———Nature of tenancy—Proof of letting for residential purposes—Subsequent user for purposes of agriculture—If alters nature or incidents of tenancy—If agricultural tenancy—Tenant—If occupancy raiyat. *See* B. T. ACT, S. 5 (2). **39 C.W.N. 1041.**

Non-transferable holding.

See also ABANDONMENT AND EJECTMENT, *supra*, OCCUPANCY HOLDING AND REPUDIATION OF TENANCY, *infra*.

———*Non-transferable holding—Transfer of—Effect of—Decree for rent obtained by landlord and holding purchased—Suit for ejectment—Adverse possession.*

Ordinarily a raiyat who has transferred the whole of his (non-transferable) holding may be held to have abandoned it and to have forfeited his tenancy. But the landlord is not bound to re-enter and may well have recourse to the alternative remedy open to him, that is to say, he may still sue the original tenant for the rent of his holding. The obligation to pay rent is not avoided by merely transferring the holding. So a decree obtained in 1918 by the landlord against the original tenant for rent is not nullity in spite of a transfer by the tenant of his holding in 1907 and the decree-holder purchaser is entitled to eject the tenants unless they can prove adverse possession for twelve years from the date of the auction purchase. (*Courtney-Terrell, C.J., Fazl Ali and Agarwala, JJ.*) KALAP CHAUDHURI *v.* SITAB CHAND. **11 Pat. 798=I.R. 1932 Pat. 286=140 I.C. 3=13 Pat.L.T. 567=A.I.R. 1932 Pat. 330 (S.B.).**

LANDLORD AND TENANT—Notice to quit.

———Non-transferable holding—Transfer of—Recognition by landlord—Conditions of validity—Transfer by transferee—Subsequent recognition—Sufficiency — Suit against original transferee after transfer by him—Decree and sale in execution—If passes tenancy interest. *See* B. T. ACT, S. 146 A. **62 C.L.J. 147.**

———*Non-transferable holding—Transfer—Void or voidable.*

A transfer of a non-transferable occupancy holding is not void but voidable. (*Khaja Mahomed Noor and Luby, JJ.*) SATYANARAIN SAMI *v.* JAMUNA BAI. **14 Pat. 294=155 I.C. 834=7 R.P. 629=15 Pat.L.T. 807=A.I.R. 1935 Pat. 133.**

Notice to quit.

See also TERMINATION OF TENANCY, *infra*.

———*Notice to quit—Accidental error—Effect.*

A notice was given on 9th November, 1927, to the lessee stating that he should vacate the land on 13th May, 1927. It appeared that 1927 in the notice was a mistake for 1928 and the parties were not misled on that account.

Held, that the notice was valid. (*Sulaiman, C.J. and Mukerji, J.*) TIKA RAM *v.* SRI THAKUR DAOJI MAHARAJ. **152 I.C. 189=7 R.A. 286=4 A.W.R. 1105=1934 A.L.J. 674=18 R.D. 240=15 L.R. 260 (Rev.)=A.I.R. 1934 All. 787.**

———*Notice to quit—Co-sharer landlords—Notice by one—Validity.*

A notice to quit issued by one of several co-sharer landlords on behalf of all is a valid notice to quit, when it is shown that he is the manager. As manager he is entitled as the agent of all to do any lawful thing for the management of the property; and when the other co-sharers admit that he was acting for them by joining in the suit for ejectment, the tenant cannot plead the invalidity of the notice. (*Murphy and Barlee, JJ.*) DEVJI ARJAN DALVADI *v.* BHOJA VAIJA KACHAR. **37 Bom.L.R. 220=A.I.R. 1935 Bom. 219.**

———*Notice to quit—Ejectment of lessee holding over—Need for notice.*

Where there was a term in a lease that the lessee would be ejected without service of new notice to quit, and on the expiry of the term mentioned in the lease, the lessee held over and the landlord accepted rents,

Held, as the rent was accepted it was a new contract of tenancy, it was a contract of tenancy from year to year according to the purpose for which it was taken, that the term as to notice was not carried over to the new lease and that notice was necessary to eject the lessee holding over. (*Mitter and M.C. Ghose, JJ.*) DASARATHI KUMAR *v.* SARAT CHANDRA GHOSE. **37 C.W.N 971=149 I.C. 722=6 R.C. 630=A.I.R. 1934 Cal. 135.**

———*Notice to quit—Failure to give—Case pending for two years—Defect not material.*

A suit by landlord to eject a tenant was decreed in the lower appellate Court. The tenant appealed from the judgment on the ground that he was not given a month's notice as stipulated in the lease deed. The case was pending for over two years.

Held, that under the above circumstances, the tenant can have no grievance on the ground of lack of notice and that the High Court will not interfere in second appeal on the technical ground of want of notice. A. I. R. 1926 Lah. 129, Rel. on. (*Bhide, J.*) KARAM CHAND *v.* AMAR NATH MOHSAN. **6 I.R. (Lah.) 150 (2)=145 I.C. 992=34 P.L.R. 884=A.I.R. 1933 Lah. 377.**

———*Notice to quit—Joint tenants—Service on one—If sufficient as to others.*

Service of a notice to quit on one of several joint-tenants holding the demised property affords *prima facie*

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evidence that it has reached the rest. (*Beaumont, C. J. and Divatia, J.*) VAMAN VITHAL *v.* KHANDERAO. **156 I.C. 1020=8 R.B. 41=37 Bom.L.R. 376=A.I.R. 1935 Bom. 247.**

———*Notice to quit—Landlord sole owner of one holding and co-sharer as to another—Joint notice covering both—Validity.*

The plaintiff was owner of a *bastu*, but only a co-owner of a tank. He let out the *bastu* to the defendant separately, but joined his co-sharers (not parties to the suit) in letting out the tank. The defendant was thus a tenant of both Plaintiff's authorised agent sent a notice to quit requiring the defendant to vacate both the *bastu* and the tank.

Held, the notice, so far as it concerned, the tank was invalid, but that invalidity did not make the notice bad as to the *bastu* and the defendant was liable to be ejected from the *bastu* on the basis of the notice. (*Mitter, J.*) PANCHU CHARAN ADAK *v.* BENOI E BEHARI HALDAR. **157 I.C. 1115=39 C.W.N. 246=A.I.R. 1935 Cal. 577.**

———*Notice to quit—Necessity for—Agricultural holding—Subordinate tenure created for residential purposes—Nature.*

Where the parent holding was an agricultural holding and the tenancy that was created in respect of a fraction was created expressly for residential purposes and in favour of a person who was not an agriculturist prior to the passing of the Bengal Tenancy Act and at a time when the Transfer of Property Act had come into existence, and there was no indication that the lands were put to agricultural use at any time.

Held, that the subordinate holding was not governed by the incidents of the parent holding, that the case was governed by the Transfer of Property Act and not by the Bengal Tenancy Act and that the suit was not maintainable without service of notice. (*Mukerji, J.*) BANOWARI LAL SAHA *v.* KALI DAS SAHA. **6 I.R. (Cal.) 230=146 I.C. 540=58 C.L.J. 226=37 C.W.N. 471=A.I.R. 1933 Cal. 643.**

———*Notice to quit—Offer to abandon notice on payment of enhanced rent—If invalidates notice.*

A notice to quit on a particular date, accompanied by an offer to abondon the notice if the tenant would agree to pay a further enhanced rent is a perfectly valid notice. Coupling the offer with the notice does not invalidate the notice. (*Beaumont, C. J. and Divatia, J.*) VAMAN VITHAL *v.* KHANDERAO. **156 I.C. 1020=8 R.B. 41=37 Bom.L.R. 376=A.I.R. 1935 Bom. 247.**

———*Notice to quit—Proof of service of—Notice sent by registered post to joint tenants—Service on some only—Sufficiency.*

A landlord sent notices to quit to his three joint tenants by registered post, addressing them correctly. One was returned with the endorsement that it was refused. The rest did not come back but two acknowledgment slips purporting to be signed by the respective addressees were received by the landlord in due course.

Held, that it must be held that there was service of the notices to quit by post on two of the joint tenants; and that, therefore, all the three joint tenants must be taken to have got the notice to quit. (*R. C. Mitter, J.*) RAJANI SUTRADHAR *v.* BAIKUNTHA CHANDRA SAHA. **164 I.C. 446=9 R.C. 215=39 C.W.N. 1041.**

———*Notice to quit—Service—Notice addressed and sent by post but refused by tenant—If sufficient service.*

A registered letter containing a notice by the landlord to the tenant to quit, sent by post and tendered to the addressee, but refused by the latter and brought back unopened, cannot be considered to be validly or sufficiently served on the tenant. (*Beaumont, C. J. and Divatia, J.*) VAMAN VITHAL *v.* KHANDERAO. **156 I.C. 1020=8 R.B. 41=37 Bom.L.R. 376=A.I.R. 1935 Bom. 247.**

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———*Notice to quit—Sufficiency of—Agricultural tenancy.*

What is needed to terminate an agricultural lease is not the six months' notice prescribed by the Transfer of Property Act, but reasonable notice. But such notice is necessary. Until such notice to quit is given by the landlord to the tenant, the lessee remains a tenant on the usual agricultutal terms applicable to the property and he cannot be compelled to pay mesne profits on the footing of being wrongfully in possession. (*Pandalai, J.*) GURUMURTHI *v.* RANGIAH. **6 I.R. (Mad.) 118=145 I.C. 690=A.I.R. 1933 Mad. 165.**

———*Notice to quit—Sufficiency of—Monthly tenancy in the Punjab.*

In the case of a monthly tenancy, the tenant, according to a rule recognized in the Punjab Courts, is entitled to 15 days' notice terminating with the month's tenancy and a notice received by him on 20th or 23rd of the month is invalid. (*Bhide, J.*) RATTAN SEN SACHHAR *v.* KRISHAN KAUR. **I.R. 1933 Lah. 138=141 I.C. 513=34 P.L.R. 162=A.I.R. 1933 Lah. 134.**

———*Notice to quit—Tenancy at will.*

In the case of a tenancy at will, no formal notice to quit is necessary. (*Macpherson and Agarwala, JJ.*) RAMKISHUN PANDEY *v.* BIBI SOHAILA. **6 I.R. (Pat.) 192=145 I C. 567=14 Pat.L.T. 685=A.I.R. 1933 Pat. 561.**

———*Notice to quit—Termination of under lease.*

A valid notice to quit not only determines the original demise but any under-lease which the tenant might have made. (*Suhrawardy and Graham, JJ.*) SHEIKH YUSUF *v.* JYOTISH CHANDRA BANERJEE. **59 Cal. 739=I.R. 1932 Cal. 267=137 I.C. 139=54 C.L.J. 493=35 C.W.N. 1132=A.I.R. 1932 Cal. 241.**

Occupancy holding.

See also ACCRETION, *supra* AND SHIKMI TENANT, *infra.*

———*Occupancy holding—Accretions—Encroachment by tenant on land adjoining holding—Benefit of—Right to—Assessment of extra rent—Permissibility.*

Where an occupancy tenant encroaches upon land adjoining his holding and continues in possession of the encroachment for a long series of years, namely, for 15 or 16 years, the land encroached forms an integral part of the holding. But at the same time no extra rent can be assessed on the encroachment. (*Knox, S.M. and Grant, J. M.*) HARAKH CHAND *v.* SAHDEO. **1935 R.D. 457 (1).**

———*Occupancy holding—Death of tenant without heirs—Right of landlord to enter into possession—Mortgage by occupancy tenant—Extinguishment.*

On the death of an occupancy tenant without heirs the landlord does not take by devolution. He takes possession because the tenancy has become extinguished. Consequently a mortgagee from the tenant has no right against the landlord and the latter takes the land free from encumbrances whether he had notice or not of the same. (*Broadway and Currie, JJ.*) NIZAM DIN *v.* MT. WAZIR. **11 Lah. 716=131 I.C. 342=32 P.L.R. 183=A.I.R. 1931 Lah. 211.**

———*Occupancy holding—Family entered in records—Right not extinguished—Permissive occupation by others—Effect.*

Where there was nothing to show that the rights of the family in certain occupancy land was extinguished, and it appeared that the claimants were allowed to

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occupy the land by virtue of their relationship to members of the family entitled to the land.

Held, that the occupants did not acquire the status of occupancy tenants. (*Oppenheim, J. M.*) RAJAB ALI *v.* GULAM MAHOMED. **15 R.D. 514=12 L.R. 181 (Rev.).**

———*Occupancy holding—Heritability.*

"Heritability is a right which has been attached by legislation to the tenure of an occupancy raiyat in Bengal, Bihar and Orissa, but it is not a necessary condition attaching to the enjoyment of an occupancy right for life. The question of whether an under-raiyat who acquires occupancy right acquires also the right of an occupancy raiyat as defined by the Tenancy Acts depends entirely on local custom." Observation in 1930. Pat. 562 approved.

Quaere: Whether korfa under-raiyats in Manbhum paying cash rents have occupancy rights. (*Dhavle, J.*) SHAILA BALA DEVI *v.* GANGANARAYAN BHAKAT. **148 I.C. 353=6 R.P. 448=A.I.R. 1933 Pat. 457.**

———*Occupancy holding—Mortgage by tenant—Binding nature of.*

A mortgage of a holding will be binding on the landlord only when the holding is a transferable one. (*Kulwant Sahay, J.*) MAHOMED ZAKARIA *v.* MAHOMED NURUL HAQUE. **154 I C. 193=7 R.P. 444=A.I.R. 1934 Pat. 88.**

———*Occupancy holding—Non-transferable—Sale in execution against tenant—Purchase by co-sharers—Suit by purchaser of holding against co-sharers in possession—Defence.*

Where in execution of a money decree against the tenant of a non-transferable holding, one of the co-sharer landlords purchased the interest of the tenant and was in possession and the plaintiff who had purchased a part of the holding from the above purchaser brought a suit against him,

Held, that although viewed in his character of purchaser in execution sale of the right, title and interest of the tenant, the defendant was not entitled to raise the question of the transferability of the holding, yet in his capacity as co-sharer landlord, he was entitled to raise that question to the extent of his share. 57 I.C. 511, Foll. (*Wort, J.*) BAIJNATH MANDAR *v.* RAM ADHIN RAY. **150 I.C. 896=7 R.P. 36=A.I.R. 1934 Pat. 64.**

———*Occupancy holding—Non-transferable—Transfer—Recognition by one co-sharer landlord—If binds the others.*

A landlord who accepts rent from the transferee of a non-transferable occupancy holding, after his interest had been sold to another, cannot be held to have acted in good faith; such recognition of the transfer by one of the landlords is not binding on the purchaser landlord (*Fazl Ali and Saunders, JJ.*) LEAKAT *v.* DILDAR ALI KHAN. **153 I.C. 246=7 R.P. 327=15 Pat.L.T. 581=A I.R. 1934 Pat. 544.**

———*Occupancy holding—Non-transferable—Transfer by tenant without consent of landlord—Re-entry by landlord—Right of transferee.*

If a transfer of a non-transferable occupancy tenancy was a tranfer of the whole tenancy so as to amount to an abandonment of the land, the landlord would be entitled to re-enter against the transferee. If it was not and the landlord by force re-entered against the transferee, the latter would be entitled to bring a suit to recover the land independently altogether of S. 9 of the Specific Relief Act. 42 Cal. 172 (F.B.), Rel. (*Rankin, C.J. and C.C. Ghose, J.*) HIRALAL GHOSE *v.* SHEIKH IMANUDDI. **I.R. 1932 Cal. 572=139 I.C. 227=56 C.L.J. 256=36 C.W.N. 478=A.I.R. 1932 Cal. 584.**

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———*Occupancy holding—Possessory mortgage of—Suit to recover money under—Maintainability—Contract Act, S. 23.*

A contract for the possessory mortgage of occupancy holdings if permitted would defeat the provisions of the Tenancy Law and is therefore void under S. 23 of the Contract Act. Consequently a covenant enabling the mortgagee to recover money if there was no delivery of possession is not enforceable. (*Sulaiman and King, JJ.*) MAKUND LAL *v.* MT. SUNITA. **I.R. 1931 All. 518 (1)=132 I.C. 422 (1)=A.I.R. 1931 All. 461.**

———*Occupancy holding—Rights in kankar.*

The Agra Tenancy Act does not provide tenants with any rights is kankar. Removal of the kankar appears to be analogous to the extracting of minerals. Therefore as between the landlord and his tenant, the landlord who is the owner of the land is the owner of the kankar. (*Kendall, J.*) BASDEO SAHAI *v.* MAN SINGH. **153 I.C. 691=7 R A. 568=A.I.R. 1934 All. 906.**

———*Occupancy holding—Succession—Right of inheritance—Evidence of sister of deceased—Value.*

In a case of succession to an occupancy holding by inheritance, the Court may place reliance on the testimony of a sister of the deceased who presumably has knowledge of the names of her father and brother. (*Oppenheim, J.M.*) MANNA LAL *v.* CHAUDHRI KEWAL SINGH. **12 L.R. 391 (Rev.)=16 R.D. 41**

———*Occupancy holding—Widow of tenant—Re-marriage—Termination of right.*

A widow holding after re marriage does not *ipso facto* become a trespasser. There is nothing to prevent her becoming a tenant in her own right. (*Oppenheim, S. M. and Drake Brockman, J.M.*) RAGHUBAR RAI *v.* SOMARI. **14 L.R. 934 (Rev.)=18 R.D. 3.**

Occupancy rights.

See also EJECTMENT AND MERGER, *supra* AND LEASE—CONSTRUCTION.

———*Occupancy rights—Acquisition—Conditions of—Burden of proof.*

Permanent rights of occupancy in land can only be obtained by a tenant by custom, or by a grant from the owner of the land having the power to grant such rights, or under an Act of the Legislature. The onus of proving such a custom, grant or statutory right is always on the tenant claiming permanent rights. (*Das and Foster, JJ.*) KRISHNA CHARAN MAHANTY *v.* PUNAI. **16 Pat L.T. 858.**

———*Occupancy rights—Acquisition of—Continuing in possession for over twelve years after assertion of permanent rights—Effect.*

A person in possession as an ordinary tenant liable to be ejected cannot, by a mere assertion of the right to permanent occupancy, acquire such a right by continuing to remain in possession for over twelve years. 45 All. 919 (P.C.); 47 Bom. 798 (P.C.); 47 Mad. 337 (P.C.), Rel. on. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) CHIKNAGAPPA *v.* VENKATARAMIAH. **9 Mys.L.J. 70.**

———Occupancy rights—Acquisition by custom by the conversion of land into Korkar. *See* CHOTA NAGPUR TENANCY ACT (1908), SS. 64 (3) AND 67. **13 Pat.L.T. 781.**

———*Occupancy rights—Acquisition of—Land given for grazing of cattle—Whether occupancy right can be acquired.*

Land in respect of which a right of occupancy could be acquired by a tenant must be land used or to be used for agricultural or horticulture purpose, and for that purpose land occupied for purpose subsidiary to or promotting agricultural or horticultural becomes subject to right of occupancy. Hence where lands have been given to the tenant for grazing of cattle required for agricultural

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purpose, rights of occupancy can be acquired by the tenants in occupation of such land. (*Guha and Bartley, JJ.*) SHYAM SUNDER DAS *v.* IVANS. **60 Cal. 1287 = 37 C.W.N. 1009 = 6 I.R. (Cal.) 33 = 144 I.C. 808 = 59 C.L.J. 23 = A.I.R. 1933 Cal. 590.**

———*Occupancy rights—Acquisition by tenants—Entry as to liability to ejectment in* wajib ul-arz*—Effect.*

An agreement recorded in a *wajib-ul-arz* that tenants can be ejected is no bar to the acquisition of occupancy rights by tenants under the law. (*Irving, F.C.*) QAMAR DIN *v.* SULTAN. **11 Lah. L.T. 51.**

———*Occupancy rights—"Chukani" tenant—Acquisition by.*

A "chukani tenant" in Rangpur District, who holds the land for more than twelve years becomes an occupancy tenant. The chukani right which he possesses develops into an occupancy right after twelve years. (*Mc Nair, J.*) DABIRUDDIN SARKAR *v.* ABADDI MAMUD. **154 I C. 761 = 7 R.C. 525 = 38 C.W.N. 1093 = 60 C.L. J. 110 = A.I.R. 1935 Cal. 149.**

———Occupancy rights—Compromise decree conferring —Conditions—Mode of construction—Comparison with acquisition under S. 5, Oudh Rent Act. *See* COMPROMISE—CONSTRUCTION. **8 O.W.N. 785 = A.I R. 1931 Oudh 352.**

———*Occupancy rights—Korkardar under-raiyat.*

Though the Chota Nagpur Tenancy Act does not expressly acknowledge the occupancy right of a korkardar under-raiyat, such a right can be acquired by custom and is heritable. (*Macpherson and Agarwala, JJ.*) KRISHNA MAHTO *v.* RAMANANDA BHAKAT. **6 I.R. (Pat) 239 = 146 I.C. 115 = 14 Pat. L.T. 723 = A I.R. 1933 Pat. 635.**

———*Occupancy rights—Mode of creation—One year's lease in Central Provinces.*

An occupancy tenancy need not be created by granting a lease in perpetuity. To create such a tenancy it is sufficient to grant a lease for a year: the parties must be presumed to know that by the operation of law, the lessee becomes an occupancy tenant. No registered document is necessary. The rights of an occupancy tenant differ from those of a perpetual lessee whose rights in future years depend on the contract of lease. (*Macnair, J.C.*) DAULAT RAO *v.* RATAN SINGH. **141 I.C. 652 = I.R 1933 Nag. 77 (2) = 15 Nag.L.J. 99 = A.I.R. 1933 Nag. 44 (1).**

———*Occupancy right—Partner of occupancy tenant—Status of.*

Where an occupancy tenant takes a stranger into partnership in cultivation but there is no proof that the landholder had conferred occupancy rights or lost his right to challenge his position as tenant, it can confer no rights of occupancy on the partner. The fact that he is recorded in the revenue papers as co-tenant and that he pays rent direct to the zemindar would be immaterial. (*Oppenheim, S.M. and Drake Brockman, J.M.*) MUNNA TEWARI *v.* BARAN KURMI. **14 L.R. 442 (Rev.) = 17 R.D. 585.**

———Occupancy rights—Patta of whole village for ten years—Only 25 bighas let for first year—Tenancy of whole village to commence one year later—No presumption of occupancy rights. *See* CHOTA NAGPUR TENANCY ACT (1908), S. 16. **36 C.W.N. 626 = 63 M.L. J. 1 (P.C.).**

———*Occupancy rights—Person holding under* melabhag *agreement.*

Ordinarily a person holding under *melabhag* agreement is not an occupancy raiyat and cannot acquire occupancy rights. (*Agarwala, J.*) NIRANJAN CHAKRAVARTI *v.* MUKUNDA MOHAN. **150 I.C. 987 = 7 R.P. 51 = A.I.R. 1934 Pat. 53.**

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———*Occupancy rights—Proof of—Land originally* muafi *but subsequently treated as occupancy.*

The land was originally *muafi* and the holder had to pay Government revenue *plus* ten per cent. as *taluqdarna*. Recently however the *taluqdar* treated the present holder as ordinary tenant and the settlement entries showed that he was an occupancy tenant.

Held, that the status of the holder was that of an occupancy tenant and not that of an under-proprietor. (*Oppenheim, J.M.*) MANNA LAL *v.* CHAUDHRI KEWAL SINGH. **12 L.R. 391 (Rev.) = 16 R.D. 41.**

———*Occupancy rights—Proof of—Mutation proceeding—Admission based on mistake—Effect.*

An occupancy tenant died leaving him surviving a widow. Mutation of land was however made in favour of one *R* daughter's son, on the widow alleging that her husband had adopted *R* as his son and agreed to get mutation entered in his name. One *K* lambardar was present at the time of mutation and attested the mutation. Some time after the death of the widow the descendants of *K* sued for possession of half of occupancy rights as landlords *qua* their share as the landlord of the other half had obtained a similar decree and it was held that adoption of *R* had not been established.

Held, that although *K* was present at the mutation proceedings, the mere fact that he attested the mutation could not be regarded as having created a fresh occupancy tenancy in favour of *R* and that even if *K*'s attestation could be regarded as an admission by him of the adoption, the admission being based on an erroneous state of affairs would not be binding on him or his successors. (*Shadi Lal, C.J. and Broadway, J.*) MAM CHAND *v.* RUPA. **142 I.C. 720 = I.R. 1933 Lah. 249 = 33 P.L R. 819 = A.I.R. 1932 Lah. 651.**

———*Occupancy rights—Proof of—Presumption as to grant—Evidence necessary to raise.*

No tenant can obtain a permanent right of occupancy by prescribing against his landlord. Where the tenancy is admitted but the terms of the letting are not known, the Court has to ascertain whether, as a term of the original letting, occupancy rights were conferred. Direct evidence not being *ex hypothesi* available, the Court has to ascertain whether as a term of the original letting occupancy rights were conferred. The question in each case is whether the onus originally cast on the claimants has been discharged by the cumulative effect of the evidence. Where besides the statements of the tenants, there was evidence adduced under the heads of (1) evidence of hereditary occupation of the same lands, unqualified by proof of the grant of any terminable lease, (2) payment of cist or rent according to fixed scale of rates. (3) non-exercise of the right to evict, and (4) alienation of tenants' holding to the knowledge and with the acquiescence of the inamdars.

Held, that the cumulative effect of the evidence was to establish occupancy rights in the tenants. (*Venkatasubba Rao and Curgenven, JJ.*) GOPALARAJA *v.* MUTUKARUPPAN CHETTY. **1932 M.W.N. 1025.**

———*Occupancy rights—Proof of—Rights recognized in Khatian of* 1902 *and tenants in unbroken possession —Acceptance of rent by thikadars—Effect of.*

A factory had, during the possession as thikadars, acquired by purchase the occupancy rights over certain bighas and later on transferred their interest to the predecessor-in-title of the appellants. The title of the appellants as transferees was recognised in the Khatian of 1902. In 1909 on the expiry of the earlier lease in favour of the factory, the zemindars granted another lease in favour of three thikadars and that lease expired in 1918. In 1921, the *mauza* was sold to the respon-

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dents who sued to eject the appellants. The latter set up their occupancy rights and in proof produced a rent receipt, dated 1912 and signed by the then three thikadars.

Held, that the receipt, which was found to be genuine was not merely a recognition of *some* tenancy; having regard to the early recognition of the right of occupancy in favour of the Factory in the Khatian of 1902 and to the unbroken sequence of their possession, the acceptance of rent amounted to a full recognition of the occupancy rights which prevailed against the purchasers of *mauza*. (*Lord Wright.*) SRI CHANDRA CHURDEO *v.* LALDHARI PRASAD SINGH. **16 R.D. 535=I R. 1932 P.C. 295=1932 M.W.N. 1174=37 C.W.N. 98 =56 C.L J. 360=139 I.C. 550=14 Pat.L.T. 57=A. I.R.1932 P.C. 264=63 M.L J. 731 (P.C.).**

———*Occupancy rights—Relation of landlord recorded as tenant-in chief—Cultivator recorded sub-tenant for over 30 years—Ejectment suit on death of recorded tenant—Claim by cultivator to occupancy rights—Maintainability.*

A zemindar's wife and then his daughter were successively recorded as the tenants in-chief of a plot of land, presumably to defeat the interests of the actual cultivators. The latter were recorded as sub-tenants for a period of over 30 years. After the death of the last tenant in chief (daughter), the zemindar sued to eject the cultivators and the latter claimed occupancy rights.

Held, that though tenants could not be allowed to contract out of their rights, yet they were under no misapprehension regarding their status, and allowed the landlord to rest assured that occupancy rights could not be acquired by them, they could not turn round and claim occupancy rights after being recorded as subtenants for over 30 years. (*Grant, J.M.*) BALDEO *v.* LAL SHANKAR NATH SINGH. **1935 R.D. 483.**

———*Occupancy right—Transfer by will—Validity.*

An occupancy right is a right of property and is devisable by will. The B.T. Act cannot be taken to prohibit such transfers merely because it is silent on the point. (*Jack and Nag, JJ.*) SHREEHARI DAS *v.* ADWAITA CHANDRA MANDAL. **60 Cal. 1115=147 I.C. 727=6 R.C. 351=38 C.W.N. 96=A I.R. 1933 Cal. 908.**

———*Occupancy rights—Transferee of portion—Right to sue for declaration that decree obtained by landlord for eviction of tenant is fraudulent.*

A person who has purchased a portion of an ordinary non transferable occupancy holding is entitled, where nevertheless the original raiyats had not abandoned the holding and has not transferred the whole of it, to resist the landlord from recovering possession and to have it declared that a decree obtained by the landlord for the eviction of his tenants as *thika* tenants (or tenants at will) was fraudulent and collusive and not binding on him. 16 C.L.J. 139, Foll. (*Rankin, C. J. and C. C. Ghose, J.*) BIJOY KRISHNA BASU *v.* BENODE BEHARI PRAMANIK. **59 Cal. 1155=I.R. 1932 Cal. 459=138 I.C. 463=36 C.W.N. 535=A.I.R. 1932 Cal. 479.**

Occupancy tenancy.

———*Occupancy tenancy—Co sharer— Gift of occupancy to—Co-sharer taking possession—Status of.*

Where a co-sharer takes a gift of an occupancy tenancy and enters into possession of the holding and remains in possession, the occupancy tenancy determines; from that date the co-sharer donee holds the land as *khudkasht*. (*Drake Brockman, S. M. and Knox, J. M.*) MAHATAM RAI *v.* BINDESARI RAI. **1935 R.D. 295.**

———*Occupancy tenancy—Partition papers—Entry of persons name as co-occupancy tenant—Effect.*

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The mere entry of a person's name as a co occupancy tenant in the partition papers is not sufficient proof that he is really an occupancy tenant. The landlords cannot be tied down to the extent of admitting that every man's name which is entered in an occupancy holding is a correct entry. (*Keane, S. M. and Smith, J. M.*) MAHARAJ SINGH *v.* MEGH NARAIN SINGH. **15 R D. 516=12 L.R. 189 (Rev.).**

———*Occupancy tenancy—Re-letting by landlord to member of original tenant family—Effect.*

All the members of a family which had an occupancy tenancy migrated from the place without making any arrangement in respect of the holding. The landlord took over the land and later he let it to one of the members of the family.

Held, that the other members of the family had no rights in the lease. (*Keane, S. M. and Oppenheim, J. M.*) DUKHII *v.* SITAL. **10 R.D. 730=12 L.R. 395 (Rev.).**

———*Occupancy tenancy—tenancy—Sub-tenant holding on after death of tenant—Status of.*

A sub-tenant holding on after the death of the occupancy tenant cannot be recorded as a trespasser without any rights, but as *qabiz bila tasfia*. His position is only that on the death of the occupancy tenant the sub tenancy comes to an end and the sub tenant has no claim to hold on unless he can prove that he has some fresh right. (*Knox, S.M. and Grant, J. M.*) ZABAR SINGH *v* BALDEO SAHAI. **1935 R.D. 432.**

Occupancy tenant.

See also MERGER, *supra*

———*Occupancy tenant—Commutation of Bhowli rent into cash rent—Effect of.*

There is a good deal of difference between a raiyati right created by contract and a raiyati right created by a statute. An occupancy raiyat is a creation of law; he has certain rights and certain liabilities and his rights and liabilities are governed by law and are practically unaffected by contract. But if the landlord inducts on his land a raiyat not having a previous status in the village, the relationship between this raiyat and the landlord will be governed by the contract entered into between them. Where the kabuliyat does nothing more than to commute the bhowli rent into rent in cash, the status of an occupancy tenant is not changed into one of a raiyat at fixed rent. (*Wort and Mahomed Noor, JJ.*) SARJU MAHTO *v.* KRISHNA PRASAD NARAYAN SINGH. **150 I C. 516=7 R.P. 3=A.I.R. 1934 Pat. 195.**

———*Occupancy tenant—Mortgagee from—Liability for rent.*

A mortgagee of an occupancy tenant is not a tenant and is therefore not liable for rent. (*Oppenheim, S.M. and Drake Brockman, J. M.*) GAYA DATTA *v.* MAN. SHAD ALI. **18 R.D. 712=16 L.R. 130 (Rev.).**

———Occupancy tenant—Succession to—Tenant dying leaving several sons. *See* AGRA TENANCY ACT (1926), S. 25. **18 R.D. 656.**

Permanent tenancy.

See also ADVERSE POSSESSION, EJECTMENT AND NATURE OF TENANCY, *supra* AND LEASE—CONSTRUCTION, AND PERPETUAL LEASE.

———*Permanent tenancy—Acquisition by prescription —Assertion of permanent tenancy by annual tenant—Effect of.*

When a tenant in occupation of land paying an annual rent asserts at the commencement of his tenancy that he is a permanent tenant, and the claim, though disputed by the landlord is not challenged by a suit for over 60 years, the position does not result in law in the acquisi-

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tion of a tenancy by the tenant, either under any presumption or under the Limitation Act. Where a person is given possession of land as a tenant, the mere fact that he asserts that the tenancy is of a particular kind will not by lapse of time convert the tenancy into one of that kind. Whether a tenancy is permanent or not must depend on the facts of the case and the agreement between the parties and not on mere assertions. The fact that the landlord has been accepting rent from the tenant every year and has given a receipt therefor in no special form only means that he has recognised him as tenant. That does not mean that he is a permanent tenant or that the possession of the tenant has ever been adverse to the landlord. (*Beaumont, C.J. and Divatia, J.*) VAMAN VITHAL *v.* KHANDERAO. **156 I.C. 1020=8 R.B. 41=37 Bom L.R. 376=A.I.R. 1935 Bom. 247.**

———*Permanent tenancy—Agreement to give up land on the expiry of the term—Compromise of doubtful claim.*

The plaintiff sued the defendants for possession of the property alleging that the lease to the defendants for a period of twenty-five years had expired. The defendants set up a plea of permanent occupancy. The kabuliyat under which the defendant's possession was originally confirmed imposed restrictions with regard to the cultivation of the thikans, planting of trees and erection of buildings and the tenants gave up the right to have the land continued to them after the expiry of the period of lease. At the time when the kabuliyat was entered into, there was dispute between the tenants and the landlord, *i.e.*, the State, that the State wanted to enhance the rent and ultimately by the intervention of the Bombay Government, the terms of the kabuliyat were settled.

Held, the agreement was a compromise of doubtful rights which did away with the right to permanent tenancy, if any existed, and that it was binding on the tenants and his co-sharers (*i.e.*) the other members of the family as it was for their benefit. *Stapilton* v. *Stapilton*, W. & T. L. C., Ref. (*Baker and Nanavati, JJ.*) SHANKAR YESU *v.* KHEM SAWANT. **136 I.C. 801=I.R. 1932 Bom. 209=33 Bom.L.R. 1303=A.I.R. 1932 Bom. 3.**

———*Permanent tenancy—Building site—Grant in perpetuity.*

Under a deed of lease the lessee covenanted as follows: "I have taken the site agreeing to pay for it an annual rent. In case of default, interest in addition will be paid. So long as the house stands on the site, myself, my bhaubands or such others as there may be will continue to pay you the rent according to the aforesaid agreement. In case the said shop or house is to be sold, that will be done after informing you of it and not otherwise. In case a sale of the building is to be made a quarter of the proceeds will be payable to you".

Held, that the document gave rise to a permanent lease. (*Patkar and Murphy, JJ.*) VENKATESH KRISHNA *v.* BHUJABALLI. **57 Bom. 194=I.R. 1933 Bom. 242=142 I.C. 481=35 Bom.L.R. 60=A.I.R. 1933 Bom. 97.**

———*Permanent tenancy—Burden of proof— Land built upon by tenant.*

Once it is found that the land is leased, the onus of proving permanent tenancy or the right to hold without disturbance is on the tenant. In regard to onus, ordinarily, the lessee must prove that he is entitled to hold the land of the lessor. The mere fact of a tenancy for eighty years at a low and uniform rental does not shift the onus of permanent tenancy from the lessee on to the lessor. He is responsible for preserving the lease deed and for producing it to substantiate his right to possession and its loss does not entitle him to any inference in his own favour. Substantial buildings do not justify an inference of a permanent lease. 16 I.A. 6; 15 I.A. 83; 52 Cal. 43; 31 Bom.L.R. 830 (P.C.), Ref. The suit land on which the plaintiff had built a house belonged to the Government and had been leased to a predecessor in title of the plaintiff. The original lease deed and other records were lost and the plaintiff contended that by reason of the fact that the words *vechanpatti* were used by the survey-map in describing the land, and the fact of substantial buildings as well as non-payment of annual rent, the onus was upon the Government to show that the period of the lease had expired and that the plaintiff was liable to be ejected, or assessed to increased rent.

Held, that the evidence showed it was a ninety-nine years' lease which had expired, and that the plaintiffs had failed to discharge the onus proving a permanent tenancy. (*Madgavkar, J.* on difference between *Patkar and Barlee, JJ.*) HIRALAL RANCHHODDAS *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1931 Bom. 529=134 I.C. 721=33 Bom L.R. 828=A.I.R. 1931 Bom. 436.**

———*Permanent tenancy — Circumstance justifying presumption*

Mere absence of pucca structure is not a determining factor on the question whether a tenancy is permanent or not. Nor is it sufficient for an inference of permanency that the tenants have possessed the land for a long period succeeding from father to son on payment of a uniform rent. The plaintiffs brought a suit for a declaration that the defendants were not permanent but tecca tenants of a part of the land and trespassers in respect of the other part, that they were attempting to raise a pucca structure on the land which they had no right to do and they prayed for an injunction that the defendants, be restrained from doing so. It was proved that the defendants, their father and grandfather had been residing on the said land and they had been paying rent at a uniform rate. It also appeared from the record and evidence that for 40 years the plaintiffs had notice that the defendants were claiming permanent right and yet they had suffered them to remain on the land for 40 years before instituting this suit.

Held, that the circumstances of this case established the presumption that the defendants had a permanet right. (*M.C. Ghose, J.*) MOSLEM MOLLA *v.* SUBAL CHANDRA CHANDRA ROY. **153 I.C. 1047=7 R.C. 417=A.I.R. 1934 Cal. 716.**

———Permanent tenancy—Claim to mokarrari right. *See* ADVERSE POSSESSION—LANDLORD AND TENANT. **36 C.W.N. 573=A.I.R. 1933 P.C. 126=62 M L.J. 674 (P.C.).**

———*Permanent tenancy*—Daimi Kaima patta—*Entry in record of-rights to tenure as occupancy holding.*

The patta relating to a tenure showed that the land was let out on an annual rent of Rs. 3 including cess, and stated that "on payment of rent you enjoy and possess (the land) in succession of sons and grandsons downwards. In these terms I execute this *daimi kaimi patta*, etc."

Held, that the words *daimi kaimi* indicated that the tenancy was a permanent tenancy, and that an entry in the record of-rights to the effect that the holding was an occupancy one could not be given effect to since the recitals in the patta lead to the conclusion that it was intended that the tenancy should be permanent. From

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the recital to the effect, that if the demand by the superior landlord be ever increased, the lessee would be liable to pay proportionate amount, and the possible liability of the tenant to pay an additional amount on the happening of a certain contingency, it cannot be held that the rent should not be fixed. (*S.K. Ghose, J.*) SURENDRA KUMAR NANDI *v.* BEPIN CHANDRA GUHA. **153 I.C. 623=7 R.C. 387=38 C.W.N. 1091=A.I.R. 1934 Cal. 861.**

———*Permanent tenancy—Denial of title—Forfeiture—Relief against.*

Under certain circumstances even a permanent tenancy can be forfeited; and if the tenant pays no rent to the landlord by only the Government assessment, the difference between a permanent tenant and the owner is not merely nominal. Even when the permanent tenancy has been technically forfeited, the Court has power to grant and should grant relief against it. (*Broomfield and Wadia, JJ.*) RACHOTAPPA *v.* KONHER ANNARAO. **59 Bom. 194=155 I.C. 516=7 R.B. 433=36 Bom.L.R. 1083=A.I.R. 1935 Bom. 41.**

———*Permanent tenancy—Evidence.*

The legal inference of permanency is to be drawn from the ascertained facts taken as a whole; and though there are a number of facts pointing to the tenancy having a permanent character, the effect of these facts as evidence may be destroyed by a single piece of negative evidence. Where the tenancy dated back to some considerable time before 1874, and substantial structures were constructed on the land for residential purposes, the transfer and succession thereof was recognized by the landlord himself and there was a uniform payment of rent.

Held, that the tenancy way permanent. (*Rankin, C.J. and Pearson, J.*) DEBENDRA NATH DHANG *v.* PASHUPATI NATH DEB. **136 I.C. 889=I.R. 1932 Cal. 241=35 C.W.N. 1047=A.I.R. 1932 Cal. 198.**

———*Permanent tenancy—Grant of waste land by Government—Grantee to retain land as* pukka asami *if he reclaimed whole land—Authority given to settle all lands within specified boundaries—Power to revoke reserved only in case of failure to reclaim entire land—Nature of rights conferred—Grantee, if mere tenant-at-will.*

The predecessor in interest of the defendants was granted by the Government in 1862 a *tasallinama*, which authorized the grantee to settle or "abad karo" all the lands that fell within certain specified boundaries (the lands being barren and uncultivated) and provided that the settling cultivator who brought the entire land under cultivation would be considered a full or permanent tenant (entitled to retain the land as *pukka asami*), and that if he failed to settle all the lands and it remained uncultivated or waste, the Government would have power to make over the village to somebody else for purposes of settlement; but that if he settled the whole, he would be entitled to it. There was no mention of a right of ejectment in any other contingency. The original grantee as well his successors (the defendants) had been in possession of the village without objection for over 70 years had colonized it and constructed houses of considerable value and had been paying rent continuously. The document mentioned no rent, but it was assessed under separate proceeding. In a suit by the Government for ordering the defendants to execute a lease for 30 years and in default for ejectment,

Held, that on a proper construction of the document in question, the defendants could not be treated as tenants-at-will liable to ejectment at any time but that they had heritable rights as tenants liable to pay rent; that the grant having been made long before the tenancy

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Acts came into existence, the defendants did not come under any of the categories of tenants mentioned there, and that the case would be governed by the Crown Grants Act (XV of 1895), which was retrospective. (*Sulaiman, C.J. and Bennet, J.*) AMBA DATT *v.* SECRETARY OF STATE FOR INDIA. **159 I.C. 642=1935 A.W.R. 1364=8 R.A. 486=1935 R.D. 402=A.I.R. 1935 All. 974.**

———*Permanant tenancy—Inference from circumstances—Contents of patta and kabuliyat.*

Where the land was shown to be full of jungle at the inception of the tenancy and the tenure was a permanent and a heritable one and the word *nirdharita* was frequently used in the patta and kabuliyat and it contained a provision for rent regarding excess area held,

Held, that though the word "*makarrari*" was not used, the effect of the document was to create a permanent lease at a fixed rent. (*C. C. Ghose and Pearson, JJ.*) AMBIKA CHARAN DAS *v.* BASANTAKUMAR MANDAL. **58 Cal. 1046=134 I.C. 1130=I.R. 1932 Cal. 42=36 C.W.N. 178=A.I.R. 1932 Cal. 73.**

———*Permanent tenancy—Inference from circumstances—Residential tenancy of unknown origin—Rent not varied—If permanent—Number of transfers necessary.*

When all that has been proved by the tenants is, (1) that the tenancy was for residential purposes, (2) that its origin is unknown, (3) that the rent has not been varied at any time, and (4) that there has been one, or possibly two transfers, these circumstances do not lead to the inference that the tenancy was in its origin of a permanent character. Unless there be a series of transfers of a tenancy for residential purposes of which the origin is unknown and a series of recognitions, the Court would not be right in inferring that the tenancy was in its origin of a permanent character. There would be far little scope for drawing such an inference where there is only one or two transfers and where in the deeds of transfer no assertion is made by the tenant that his tenancy is of a permanent nature. (*R.C. Mitter, J.*) RAI SATYENDRA NATH BHADRA BAHADUR *v.* CHARU SANKAR ROY CHOWDHURI. **161 I.C. 247=8 R.C. 500=40 C.W.N. 854=61 C.L.J. 570=A.I.R. 1936 Cal. 100.**

———*Permanent tenancy—Kabuliyat—Construction—'Miadi Sarbarakari.'*

A kabuliyat in respect of a "miadi sarbarakari" tenure in Orissa contained a clause which provided, "On the expiry of the aforesaid period of settlement, I or my legal representatives shall have the right to a renewal of the settlement on the revenue that may then be fixed; and if we do not take the settlement on the revenue then fixed, we shall be entitled to receive *malikhana* at the usual rates."

Held, that there was nothing to prove that it was a permanent tenure or that the proprietor ought to recognize the tenure as permanent. (*Courtney-Terrell, C.J. and Varma, J.*) GOBINDA CHANDRA PATNIKA *v.* HARSA MUKHI DASI. **152 I.C. 759=7 R.P. 235=15 Pat. L.T. 639=A.I.R. 1934 Pat. 632.**

———*Permanent tenancy—Land not used for purposes for which it was taken—Reversion.*

Where the Government has taken lands as tenants and pays rent regularly to the landlord, the landlord cannot get the land by reversion, merely because the Government has ceased to use the land for purposes for which it was taken; and the fact that the Government had on a prior occasion returned another land on such non-use does not matter. The ordinary rule is that, in the absence of an express contract to the contrary

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reversion does not take place and that a case of forfeiture should be made out by clear and unequivocal evidence. (*Jai Lal and Sale, JJ.*) SARUP SINGH *v.* PURAN SINGH. **159 I.C. 962=8 R.L. 441=A.I.R. 1935 Lah. 804.**

———*Permanent tenancy—'Mokra'—Meaning of.*

The word 'Mokra' admittedly is a corruption of the Arabic word Mokarrar which is derived from the word 'Karar' meaning agreement. The inflexions of 'Karar' Mokarrar or Mokarrara which has taken the Indian form of Mokarrari means 'agreed upon' or 'fixed.' The word 'Mokarari' has assumed a special signification by usage. So that the word 'Mokarrari or Mokra' in itself does not signify perpetual fixity. But if a document indicates that it was used in place of Mokarari, it certainly would have the significance. (*Suhrawardy, J.*) NABENDRA KISHORE ROY *v.* CHOUDHURY MIAN. **131 I.C 584=52 C.L.J. 583=I.R. 1931 Cal. 472=A.I.R. 1931 Cal. 265 (2).**

———*Permanent tenancy—'Mokra'—Meaning of.*

Though the use of the word 'Mokra' may not by itself signify perpetual fixity of rent, and though there is no presumption that a permanent lease must be at the same time mokarari, the intention may be gathered from the terms of the document to create a permanent mokarari lease. Thus where one of the conditions in the lease is to the effect that the tenant shall pay without notice additional rent at the stipulated rate for land which may be found to be in excess by measurement, it indicates that the rent was a fixed one because it could not have been intended that the tenant would pay for the excess area at the rate stipulated in the Kabuliat and at the same time would have to pay at an enhanced rate for the original are a mentioned in the Kabuliat. A.I.R. 1922 Cal. 18, Foll. (*Suhrawarday, J.*) NABENDRA KISHORE ROY *v.* CHOUDHURY MIAN. **131 I.C. 584=52 C.L.J. 583=A.I.R. 1931 Cal. 265 (2).**

———*Permanent tenancy—No portion of tenure reclaimed by tenant.*

If no part of the tenure has been reclaimed by tenant, this is a ground for holding that the tenancy is not permanent. Patna First Appeal No. 183 of 1919, Rel. on. (*Agarwala, J.*) ANANTPAL RAM PANDE *v.* KUMAR KAMAKHYA NARAIN SINGH. **6 R.P. 422=148 I.C. 190=A.I.R. 1934 Pat. 24.**

———*Permanent tenancy—Proof—Evidence.*

The following facts were found that the origin of the tenancy was unknown, that the existence of the tenancy had been traced back for a period of at least 90 years, that during the tenancy there has been one succession by inheritance in the case of one of the tenancies and one case of transfer by gift, that the masonry structures had been erected more than 80 years ago, that the rents had not been varied and that saleable values in the locality had risen very considerably during the period, and the rent receipts described the tenants as *Bhaiatra.*

Held, that the tenants' interest cannot be taken to be a permanent one. (*B.B. Ghose and N.K. Bose, JJ.*) NARENDRA NATH MONDAL *v.* SANNYASI CHARAN DAS. **I.R. 1932 Cal 350=137 I.C. 658=54 C.L.J. 353=A.I.R. 1932 Cal. 398.**

———*Permanent tenancy—Proof — Evidence—Sub-tenant held to be one in perpetuity.*

"When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally constitutes the test and indeed the only evidence to prove the tenancy.". 27 Cal. 570 at 582, Appr. Permanent sub-tenancy held

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to be proved. (*Pollock, A.J.C.*) VENKATESH *v.* SYED AKBAR. *See also* C. P. TENANCY ACT, SS. 37 AND 38. **150 I.C. 883=7 R.N. 28 (1)=17 N.L.J. 19=A.I.R. 1934 Nag. 166.**

———*Permanent tenancy—Proof—Mere assertion in judicial proceeding.*

A person who is, in fact, in possession of land under a tenancy or occupancy title cannot, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as a permanent tenant. 50 I.A. 202, Foll. (*Baker and Nanavati, JJ.*) SHANKAR YESU *v.* KHEM SAWANT. **136 I.C. 801=I.R. 1932 Bom. 209=33 Bom. L.R. 1303=A.I.R. 1932 Bom. 3.**

———*Permanent tenancy—Proof—Onus.*

The onus of proving permanent tenancy is on the tenant alleging the same. Where the record of rights showed that the defendant had a resumable tenure and the plaintiff sued in ejectment after notice to quit and proved that though the defendant had been holding for 40 years, the rent was variable.

Held, that the tenancy was not permanent. (*Fazl Ali, J.*) TELANGA MARANDI MAJHI *v.* CHANDRA MOHAN SINGH. **147 I.C. 1177=6 R.P. 407=14 Pat.L.T. 616=A.I.R. 1933 Pat. 664.**

———*Permanent tenancy—Proof—Residential holdings.*

Where lands described as 'bagan' had all along been used as basti lands and the tenants had been settled thereon by the defendant and his predecessors for the purpose of dwelling but the tenants had been paying a uniform rent and had made excavations on the land, cut trees and transferred the property without the consent of the landlord, *held*, that the tenancy may be said to be of a permanent character. (*Guha and Bartley, JJ.*) KUMAR MANMATHA NATH MITTER *v.* PROMATHA NATH CHATTERJEE. **61 Cal. 32=38 C.W.N. 65=150 I.C. 238=6 R.C. 810=A.I.R. 1934 Cal 288.**

[R. 1934 C. 716 (717).]

———*Permanent tenancy—Right to fish on payment of a fee per head of men employed.*

In a suit to restrain the defendants from fishing on plaintiff's waters, the defendants pleaded that they had been so fishing from time immemorial on payment of a fee to the landlord per head of fishermen employed, and that they had acquired the status of settled raiyats.

Held, that such a tenancy was unknown to the law and there was no evidence to support a grant, which implied a definite body of men in whose favour, and definite terms on which, it was made. (*Mukerji and Bartley, JJ.*) BRAJENDRA KISHORE ROY CHOWDHURY *v.* BAMA CHARAM KAIVARTA. **146 I.C. 427=6 I.R. (Cal.) 223=37 C.W.N. 18=A.I.R. 1933 Cal. 539.**

Possession.

———*Possession—Denial by tenant—Burden of proof.*

Where there is no dispute as to the identity of the subject let, but the tenant denies that he has ever got possession of the subjects, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent. The landlord must not only show that the tenant is in possession of the subjects of the lease, but that such possession was attributable to the lease or might be so. (*Lord Thankerton*) JOGESH CHANDRA ROY *v.* EMDAD MEAH. **59 I.A. 29=59 Cal. 1012=I.R. 1932 P.C. 94=136 I.C. 398=36 C.W.N. 221=35 L.W. 112=9 O.W.N. 119=16 R.D. 95=55 C.L.J. 72=1932 M.W.N. 275=34 Bom.L.R. 481=13 L.R. 271 (Rev.)=A.I.R. 1932 P.C. 28=62 M.L.J. 336 (P.C.).**

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———*Possession of tenant—Continuity—Evidence.*

Where a person was shown as being in possession for faslis 1333 and 1335 but his name was omitted from the papers for the year 1334, but it appeared that he had throughout claimed the land as having been given to him by the landholder.

Held, that the Court could infer that he was in continuous possession as a claimant under S. 99 (*b*), Agra Tenancy Act, and that the same was not interrupted. (*Keane, S.M. and Oppenheim, J.M.*) BIKRAM BAR *v.* MAHESH LAL. **15 R.D. 529=12 L.R. 205 (Rev.).**

Premium.

See also GROVE, *supra.*

———*Premium—Payment of—Forfeiture of lease—Refund of consideration.*

Consideration paid for a lease is exhausted by the grant of the lease and the tenant's forfeiture of the lease cannot in the absence of a provision to that effect operate so as to convert the original consideration into a debt which must be paid before the forfeiture could be enforced. Where when the lease was given to the defendant a part of the premium was paid and it was agreed that if the balance was not paid within the period fixed the plaintiff would be entitled to recover the balance and to get possession over the property leased by cancellation of the lease.

Held, that it could not be said that it was the intention of the parties that on the non-payment of the balance the plaintiff would be liable to refund a part of the premium which had been paid to him. (*Rachhpal Singh, J.*) HAZARI KALWAR *v.* ABDUL MAJID KHAN. **6 R A. 931=149 I.C. 621=17 R.D. 1082=14 L.R. 874 (Rev.)=A.I.R. 1934 All. 293.**

———*Premium—Suit for—Interest by way of damages—Permissibility.*

In a suit by the lessor for recovery of the unpaid part of premium payable in respect of a lease, interest by way of damages for failure to pay as agreed can be allowed although there is no agreement as to payment of interest. (*Niamatullah, J.*) BHAGAUTI SHUKUL *v.* CHANDRIKA PRASAD KUERI. **150 I.C. 289=6 R A. 1063=A.I.R. 1933 All. 147.**

Procedure.

———Procedure—Suit against recorded tenant—Minor members of tenant's family—If to be impleaded—Compromise between landlord and tenant—Minor members—If bound. *See* HINDU LAW—JOINT FAMILY. **16 Pat L.T. 122=A.I.R. 1935 Pat. 206.**

———*Procedure—Suit between tenants—Landlord not joined as party—Effect.*

Where the landlord is not joined as party to a civil suit between tenants, the decision is not binding on the former. (*Oppenheim, S.M. and Drake Brockman, J.M.*) LACHHMI NARAIN PANDE *v.* RAM NAGAR TEWARI. **18 R.D. 369.**

———*Procedure—Suit between tenant and sub-tenant—Withdrawal without permission to bring fresh suit—Second suit—Bar.*

The prohibition as to a second suit when the first suit is withdrawn without liberty to bring a fresh suit does not apply to ejectment suits by tenants against sub-tenants. Where however special rights of a permanent character have been claimed, there is a permanent prohibition of ejectment. (*Oppenheim, J.M.*) FARHAT ALI *v.* KAMARUDDIN. **15 R.D. 598=12 L.R. 344 (Rev.).**

———*Procedure—Suit by tenants—Failure to give notice to one of the landlords—Effect.*

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It is not always necessary for all the landlords to join in an action for ejectment against the tenant and if that latitude is allowed to the landlord, it is monstrous not to allow it to the tenant when he files a suit against the landlord to contest a notice of ejectment. (*Irving, F. C.*) BISHAMBAR LAL BASHESHAR LAL *v.* RAMCHANDAR. **11 Lah.L.T. 89.**

———*Procedure—Suit for declaration of tenant rights—Adjudication by Civil Court—Duty of Revenue Court to carry out same.*

In a case of declaration of tenant rights where there has been prolonged litigation in the Civil Court, it is the duty of the Revenue Courts to carry out the direction contained in the judgment of the Civil Court. (*Oppenheim, J.M.*) ASGHAR ALI *v.* MAHOMED YUSUF. **15 R.D. 589=12 L.R. 323 (Rev.).**

———*Procedure—Suit for possession—Co-sharers in cultivation of deceased—Dispossession by landlord—Suit to recover possession—Limitation.*

A suit was filed to recover possession on the ground that the plaintiffs had shared in the cultivation of the land at the time of the death of the last tenant. The plaintiff mentioned the date of the tenant's death as the date of the plaintiff's dispossession It appeared however that in fact the plaintiffs were dispossessed only after the harvest of the *Rabi* crop on the land. It appeared that the suit will be in time only from the latter date.

Held, that the plaint should be amended so as to give the proper date of the plaintiff's dispossession and that the suit was not time-barred. (*Keane, S.M. and Oppenheim, J.M.*) DIN DAYAL *v.* RAM ACHAL PANDE. **15 R.D. 293=12 L R. 107 (Rev.).**

———*Procedure—Transfer without mutation—Effect.*

Where a transfer is not followed by mutation, the right to file suits or applications in the Revenue Courts rests with the transferor. In every other way, the transfer immediately becomes absolute whether mutation is effected or not. (*Holmes, J.M.*) WAZIR AHMAD *v.* RANBIR SINGH. **14 L.R. 902 (Rev.).**

Proof of tenancy.

———*Proof of tenancy—Acceptance of rent.*

The mere acceptance of rent is not sufficient evidence of a contract of tenancy. (*Oppenheim, S.M. and Walton, J.M.*) SURAJ PAL SINGH THAKUR *v.* RAM SARUP KALWAR. **14 L R. 63 (Rev.)=17 R.D. 158.**

———Proof of tenancy—Lease to Hindu coparcener—Lessee, one of three undivided brothers—If lease to joint family—Inference. *See* HINDU LAW—JOINT FAMILY. **18 R.D. 715.**

———*Proof of tenancy—Oral evidence.*

A tenancy can be proved by oral evidence or documentary evidence. (*Mitter, J.*) SUNDAR ALI *v.* NUR MAMUD. **155 I.C. 733=7 R.C. 618=60 C.L.J. 225=A.I.R. 1935 Cal. 202.**

———*Proof of tenancy—Order of assessment of fair and equitable rent—Effect of.*

A proceeding for assessment of fair and equitable rent presupposes the existence of the relationship of landlord and tenant; and an order in such proceedings has the force of a decree until it is set aside, and is proof of the relationship of landlord and tenant. (*C.C. Ghose, A.C. J. and Mallik, J.*) KHETRA LAL SINGHA RAI *v.* MAHOMED ZIKARIA. **60 C.L J. 13.**

———*Proof of tenancy—Right to rent—If a necessary implication of relationship.*

The right to recover rent is a necessary implication of the declaration of relationship of landlord and tenant. (*Courtney-Terrell, C.J. and Saunders, J.*) NAGA MANJHI *v.* KINI MAHATANI. **150 I.C. 242=6 R.P. 729=A.I.R. 1933 Pat. 695.**

LANDLORD AND TENANT—Proof of tenancy.

———*Proof of tenancy—Tenant treated as tenant-in-chief for several years.*

Where the appellant has been treated as a tenant-in-chief for many years and the respondents failed to prove that they were acting not as landlords but as mortgagees of the occupancy tenants, *held*, that the statutes of the appellant was that of a tenant-in-chief. (*Oppenheim, S. M. and Walton, J.M.*) TILAKDHARI SINGH *v.* SUKHRAJ KOERI. **14 L.R. 148 (Rev.) = 17 R.D. 241.**

———*Proof of tenancy—Unregistered lease—Reference, if permissible.*

Where a lease is not registered and is therefore not proved, no inference can be drawn therefrom as regards a contract of tenancy. (*Oppenheim, J. M.*) KUMMI SINGH *v.* DURGA KUNWAR. **15 R.D. 519 = 12 L.R. 180 (Rev.).**

———*Proof of tenancy—Wrongful entry at settlement and issue of rent receipts—Effect of.*

Where there was no intention on the part of the landlord to make a new contract of tenancy and no acquiescence on his part, the mere fact that the settlement contains a wrongful entry showing certain persons as co-tenants and the issue of receipts of rent to them as joint tenants does not necessitate the inference that they were admitted as co-tenants of the holding. (*Oppenheim, S. M. and Walton, J. M.*) ABDUL BARI *v.* RAGHU KURMI. **14 L.R. 84 (Rev.) = 17 R.D. 134.**

Qabzadari tenant.

———*Qabzadari tenant—Transfer prohibited—Court-sale in execution of decree against tenant—Validity.*

Where a suit between landlord and tenant resulted in a compromise under which the latter was allowed to hold certain land as qabzadari at a specified rent and it was further provided that he was to have no right of transfer.

Held, that if a transfer is made contrary to the conditions it was voidable at the instance of the taluqdar and not void. Consequently the tenant's rights may be sold in execution of a decree against him and the sale will take effect so long as the taluqdar does not object. (*Bisheshwar Nath and Kisch, JJ.*) GAYA PRASAD *v.* BENI MADHO. **7 Luck. 111 = I.R. 1931 Oudh 376 = 134 I.C. 472 = 8 O.W.N. 785 = 15 R.D. 412 = A.I.R. 1931 Oudh 352.**

Re-entry.

See also EJECTMENT, FORFEITURE, OCCUPANCY HOLDING AND REPUDIATION OF TENANCY, *infra* AND LEASE—CONSTRUCTION.

———*Re entry—Landlord's right to re-enter—Transfer of holdings by tenant.*

The right of the landlord to re-enter when his land remains unoccupied or is in the occupation of a trespasser is a right which is conferred upon him under the general law apart from S. 87 of the Bengal Tenancy Act. Where the original holder agrees at the time the tenancy is constituted not to transfer the holding, his successors are bound by the terms of the tenancy. In such a case if the holding is transferred the landlord can exercise his right to re-enter. (*Suhrawardy and Jack, JJ.*) ABDUL MAJID BHUIYA *v.* ALI MIA. **58 Cal. 869 = I.R. 1931 Cal 610 = 132 I.C. 898 = 35 C.W.N. 217 = A.I.R. 1931 Cal. 657.**

Relationship.

———Relationship— Formal admission to tenancy—Necessity. *See* AGRA TENANCY ACT (1926), S. 19. **1935 R.D. 186.**

———*Relationship—Mortgagee of occupancy tenant—Liability.*

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A mortgagee of an occupancy tenant is not a tenant and is not liable for rent. (*Oppenheim, S. M. and Drake Brockman, J.M.*) GAYA DATTA *v.* MANSHAD ALI. **18 R.D. 712 = 16 L.R. 130 (Rev.).**

———*Relationship—Proof—Evidence of payment of rent and entry as tenants in records—Relevancy.*

Per *Bennet, J.*—In a suit by a landlord against the tenants when the issue is whether the defendants are tenants or proprietors, it is relevant for the plaintiff-landlord to prove that the defendants have been paying rent and that they are entered in the village papers as ex-proprietary tenants. (*Sulaiman, C. J. and Bennet, J.*) DHANPATTI *v.* BADRI SINGH. **156 I.C. 53 = 7 R.A. 1031 = 1935 R.D. 303 (2) = 1935 A.W.R. 753 = A.I.R. 1935 All. 729.**

Relinquishment.

———*Relinquishment of tenancy—Transfer in wife's name whether amounts to.*

Where a tenant applied for transfer of tenancy in his wife's name because he found it inconvenient to pay rent while he was away on service.

Held, that the tenant did not purport to relinquish the holding but merely wanted a transfer on grounds of convenience. (*Kisch, J.*) ZAHIDA BEGAM *v.* AKHTAR JAHAN. **I.R. 1931 Oudh 359 = 134 I.C. 407 = 8 O.W.N. 883 = 15 R.D. 427 = 12 L.R. 213 (Rev.) = A.I.R. 1931 Oudh 346.**

Rent.

———*Rent—Abatement—Diluvion.*

The right of a tenant at the general law to claim an abatement of rent by reason of a portion of the land of his tenancy having been washed away by the action of a river cannot now be disputed. (*Rankin, C. J., Buckland, Suhrawardy, Mukerji and Guha, JJ.*) ARUN CHANDRA SINGHA *v.* BHAGABAN CHANDRA ROY. **59 Cal. 155 = I R. 1931 Cal. 705 = 133 I.C. 577 = 35 C.W. N. 1011 = 54 C.L J. 31 = A.I R. 1931 Cal.** 537 **(F.B.).**

———*Rent—Abatement—Diluvion—Burden of proof.*

In a suit for rent if the tenant pleads that he is not liable to pay the full agreed rent on account of diluvion and there is admission by the landlord or it is proved that some diluvion has taken place, the onus is upon the tenant to prove the extent of the diluvion and the corresponding abatement which he may claim. 62 I.C 474, Overr. (Case-law discussed.) (*Rankin, C. J., Buckland, Suhrawardy, Mukerji and Guha, JJ.*) ARUN CHANDRA SINGHA *v.* BHAGABAN CHANDRA ROY. **59 Cal. 155 = I.R. 1931 Cal. 705 = 133 I.C. 577 = 35 C W.N. 1011 = 54 C.L.J. 31 = A.I.R. 1931 Cal. 537 (F.B.).**

[**D.** 59 C. 1012 (P. C.) **R.** 60 C. 247 (251).]

———*Rent—Abatement—Grounds.*

When land is allowed to lie fallow, the claim for rent is not sustainable. 1930 M.W.N. 885 (P.C.), Rel. (*Sundaram Chetty, J.*) RAJAH OF RAMNAD *v.* KUPPAMMAL. **131 I.C. 121 (2) = 1930 M.W.N. 1235 = A. I.R. 1931 Mad. 206.**

———*Rent—Abatement—Landlord's neglect of* gilandozi *works.*

An entry in the record-of-rights describing the landlord's responsibility for maintenance of irrigation works can be used to impute liability to landlords although there is no independent proof of some special contract between the particular tenants and their landlords by which the landlords undertake to do their duty in this respect.

Held, that the tenant was entitled to abatement of rent on account of the failure of crops due to the landlord's neglect of *gilandozi* works. (*James, J.*) DHANUKHDHARI SINGH *v.* MT. BIBI AMMA. **6 I.R.**

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(Pat.) 176=145 I.C. 431=14 Pat.L.T. 368=A.I.R. 1933 Pat. 441.

———*Rent—Abatement—Non-cultivation— Exemption under custom—Onus of proof.*

Where in a suit for rent, the tenants plead that by custom they were not liable for rent for lands left waste due to causes beyond their control, the burden is on the ryots to prove the circumstances under which the lands could not be cultivated. 7 L.W. 471, Rel. on. (*Jackson and Mockett, JJ.*) RAJA OF RAMNAD *v.* PERUMAL MOOPAN. **141 I.C. 29=I.R. 1933 Mad. 66=36 L. W. 795=A.I.R. 1933 Mad. 101—63 M.L J. 884.**

———*Rent—Abatement— Plea of dispossession by tenant—Burden of proof — Dispossession found in previous suit—Relevancy of.*

Where a tenant claims suspension of rent on account of dispossession, it is for him to prove dispossession during the period for which rent is claimed by the landlord. It is not sufficient to show that in an earlier suit for rent, the tenant was found to be out of possession. That dispossession cannot as a matter of law be deemed to continue up to the institution of the subsequent suit for rent and there is no presumption against the landlord which it is for him to rebut by showing that the tenant had been restored to possession. The onus is on the tenant to prove eviction and the extent of such eviction before he can claim abatement of rent. 40 I.A. 223, Ref.; 13 C.L J. 119, Dist. (*Guha and M.C. Ghose JJ.*) SATISH CHANDRA PAL *v.* RAJA RESHEE CASE LAW. **60 Cal. 247=143 I.C. 30=36 C.W.N. 1134=I.R. 1933 Cal. 345=57 C.L.J. 403=A.I.R. 1933 Cal. 290.**

[**R.** 61 C. L. J. 134, (136)].

———*Rent—Acceptance—Effect.*

Acceptance of rent is no admission of any special status claimed by a tenant. It may be an admission of tenancy but not more than that. (*Smith, J.*) BRIJ LAL *v.* GOKUL PRASAD. **15 R D. 222.**

———*Rent—Additional rent—Encroachments by tenant on landlord's lands and other lands—Right of landlord to additional rent—Principle.*

Encroachments made by a tenant from adjoining waste during the term are *prima facie* for the benefit of the tenant *during the term* and thereafter of his land lord. This principle applies where the encroachment is not on the landlord's *khas* lands but on lands of other owners.

Obiter: Where the encroachment is on the landlord's *khas* lands, the landlord has the option to treat the tenant as a trespasser in respect of the encroachments and recover possession or treat him as his tenant and on that footing proceed to assess rent. (*Mitter, J.*) SURJYA KANTA SARKAR *v.* SAROJ KUMAR BOSE. **39 C.W.N. 616.**

———*Rent — Additional rent — Stipulation for — Abandonment by landlord—Interference from conduct.*

Where a lease provided that after a certain period the lands should be measured and the lessee should pay additional rent for any excess area held by him, but for a very long period after the expiry of the time specified in the lease deed for measurement the landlord accepted rent at the old stipulated rates.

Held, in a suit to recover additional rent that the provision regarding measurement must be deemed to have been abandoned by the landlord and that the landlord by accepting rent upon the footing that the area was as stated in the patta and at the rates stipulated for in the patta for a long number of years must be taken to have precluded themselves from requiring any such measurement at the time of the institution of the suit. 22 W.R. 275, Ref. to. (*Costello and Jack,*

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JJ.) KALIDAS DUTT *v.* HARENDRA NATH MUKHERJEE. **53 C.L.J. 526=133 I.C. 104=I.R. 1931 Cal. 632=A.I.R. 1932 Cal. 243.**

———*Rent—Advance payment of—If binds mortgagee of landlord.*

A voluntary payment of rent in advance by the lessee to the lessor (mortgagor) with notice of the mortgagee before the rent becomes due is not valid as against the lessor's mortgagee who acquires his interest before the rent becomes due. Such a payment cannot be called a payment of rent, but is only a loan by the tenant to the landlord. (*Khaja Mahomed Noor and Agarwala, JJ.*) RAMESHWAR LAL *v.* BUTTO KRISTO RAI. **13 Pat. 396=7 R.P. 281=152 I.C. 992=A.I.R. 1934 Pat. 653.**

———*Rent—Agreement for—Stipulation for enhancement—Validity.*

Where a kabuliyat stated that the tenant was holding a Jama of 40 bighas by guess at a rate of Rs. 1 10 0 per bigha, that he would go on paying the said rental but when the measurement would be next made and the quantity of lands would be ascertained, the tenant would remain bound to pay rent at the highest rate paid by tenants of the same class holding neighbouring lands and on measurement, the lands were found to measure 48 bighas and the rate was Rs. 4.

Held, that the contract was without consideration and unenforceable and that the landlord's only remedy was to apply for enhancement of rent. (*Mukerji, J.*) SADANANDA MORAL *v.* BASUDEB MORAL. **6 I.R. (Cal.) 229=146 I.C. 524=57 C.L.J. 202=A.I.R. 1933 Cal. 725.**

———*Rent—Apportionment—Lessor having life-estate—Rents apportioned between heirs and reversioners.*

Rent payable by a lessee accrues due from day to day, though actual payment is to be made on the expiry of a year. Where therefore a lessor, who has only a life-estate, dies during the period of lease, as between those representing his estate and the reversioners, rent payable by the lessee is to be apportioned. (*Nizamatullah, J.*) MT. AMINA KHATOON *v.* MAHOMED HASAN. **149 I.C. 323=6 R.A. 892=18 R.D. 351=A.I.R. 1934 All. 453.**

———*Rent—Arrears of—Proof—Reference to accounts and* Jama-wasil-bakis.

Where the question arose whether the revenue of a holding in Dihi Panchannagram within the district of 24 parganas was in arrears, and in the *jama-wasil-bakis* of the collectorate the year of arrear was entered in Bengali while the English date was given whenever the revenue was recoverable by the Collector,

Held, that the accounts should be read in the light of the *jama-wasil bakis* and the liability for arrears determined on that basis. (*Rankin, C. J. and Mitter, J.*) JOGENDRANATH DAS *v.* DAMODARDAS KHANNA. **60 Cal. 302=I.R. 1933 Cal. 503=144 I.C. 125=A.I.R. 1933 Cal. 373.**

———*Rent—Assessment of—Suit for—Plea of* niskar*—Burden of proof.*

Where a landlord proceeds to assess rent on land, in respect of which no rent had previously been paid, and is met with the plea of *niskar*, the initial burden of proof is on the landlord. The burden is not discharged by mere proof that the lands are within the geographical limits of his estate. But where there is an entry in the record-of-rights in favour of the landlord, the initial onus which is on him is shifted on to the tenant who can discharge it by proving a grant of a rent-free title or evidence leading to the inference of such a grant. (*R. C. Mitter, J.*) KANTA MOHAN MALLIK *v.* MAKHAN SANTRA. **164 I.C. 186=9 R.C. 158=39 C.W.N. 277.**

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———*Rent—Charge for.*

The landholder has a first charge on the land for the rent due to him from his tenant. (*Oppenheim, S. M.*) MATA PRASAD *v.* RAM ADHIN. **18 R.D. 714 (1) = 16 L.R. 98 (Rev.).**

———*Rent—Charge for—Practice in Burma.*

In Burma a landlord has no charge on the crops for the rent due to him. (*Baguley, J.*) RAMAN CHETTYAR *v.* U BA THIT. **148 I.C. 18 = 6 R.R. 204 = A.I.R. 1933 Rang. 357.**

———*Rent—Commutation as to part of holding only—Landlord, if bound—Jurisdiction of Revenue Officer.*

In a proceeding for commutation of rent, the Revenue Officer commuted the rent in respect of only a part of the holding.

Held, that the right to commute extends to the whole holding and not to parts of the holding. The Revenue Officer who commuted the rent had therefore no jurisdiction to do so, hence the landlord was not bound by the commutations proceedings. (*Faal Ali and Luby, JJ.*) MD. YUSUF *v.* MT. RAMDAN KUAR. **160 I.C. 925 = 8 R.P. 394 = A.I.R. 1935 Pat. 524.**

———*Rent—Covenant to pay whether title or no title—If runs with the land—Liability of transferee from lessee.*

Any covenant in a lease concerning rent of the demised premises is a covenant which touches the land or runs with the land. A covenant to pay rent, whether there is title in the lessor or not, is binding not only on the original lessee, but can also be enforced against his transferee, it being a covenant running with the land. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346 = 159 I.C. 98 = 8 R.C. 257 = 60 C.L.J. 477 = A.I.R. 1935 Cal. 368.**

———*Rent—Decree for against former tenants and purchasers—Execution.*

The appellant obtained a decree in a rent suit brought against two persons who had formerly been tenants of the holding and also against the respondents who had purchased the holding at a Court sale held in execution of a previous rent decree. The decree was for a total sum of the amount payable by each for the periods for which they were tenants of the holding. It was executed as a rent decree for the whole amount and the holding was put up for sale.

Held, that the decree could not be executed as rent decree as it included the money which the respondent was not liable to pay, that it could be executed only as a money decree and that the sale should be set aside. (*Saunders, J.*) KESHO PRASAD SINGH *v.* MADHO PRASAD SINGH. **6 I.R. (Pat.) 328 = 146 I.C. 1049 = A.I.R. 1933 Pat. 608.**

———*Rent—Decree for—Charge created by right to be subrogated to.*

Where a person advances the money to a mortgagor to pay off a mortgage debt and gets a mortgage in security of that advance, then he is entitled to be subrogated to the rights of the original mortgagee. But the charge which is created by the decree for rent obtained by the landlord is a right to which the landlord alone is entitled and there is no right of subrogation in the person advancing money to the mortgagor to pay off the rents. (*Wort, J.*) RAMNANDAN PRASAD SINGH *v.* RAM DAS. **155 I.C. 663 = 7 R P. 608 = A.I.R. 1934 Pat. 70.**

———*Rent—Default of payment—Provision for interest and damages—Enforceability.*

Where it was agreed between the parties to a *kabuliat* that in default of the payment of money due on each *kist*, interest would run at 2 per cent. per month and it was

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further agreed that damages at the rate of 25 per cent. over and above the interest payable by the tenants would have to be paid by the tenants in case the institution of suits for recovery of interest and rent became necessary.

Held, that the provisions for interest and damages were not exclusive of each other and that the Court might grant both. (*C. C. Ghose, Ag. C. J. and S. K. Ghose, J.*) CHUNDY CHURN LAW *v.* ABBAS ALI BHUYA. **149 I.C. 1140 = 6 R.C. 715 = 37 C.W.N. 1170 = 58 C.L.J. 93 = A.I.R. 1934 Cal. 213.**

———*Rent—Demand of excessive rent—Payment under protest—Right to refund.*

Where a tenant pays certain rent under protest in pursuance of a demand for excessive rent and it is found that the demand is illegal and unreasonable, the tenant is entitled to refund of the amount which was not legally due to the landlord. (*Pandrang Row, J.*) BASHIAM NAIDU *v.* CORPORATION OF MADRAS. **158 I.C. 407 = 8 R.M. 262 = 1935 M.W.N. 745 = 42 L.W. 317 = A.I.R. 1935 Mad. 625.**

———*Rent—Determination of—Subsequent increase in the extent of holding in some of the items of properties—Some of the items lost—Proper method to determine rent.*

Where a co-sharer grants a lease of her interest in all the items of properties which she inherited for a fixed rent and is subsequently allotted at a partition an increased share in certain items of properties only, the lower Court decided she is not entitled to rent as settled under the contract but applied a method of rule of three to determine the rights of the parties.

Held, this method is arbitrary and should not have been adopted.

Held also, there should be abatement of rent in respect of such properties as have been lost since the lease. (*Suhrawardy and Graham, JJ.*) AHAMMAD MOHAMMAD PARUK *v.* RAHIMANESSA KHATUN. **137 I.C. 441 = I.R. 1932 Cal. 308 = 35 C.W.N. 1260 = A.I.R. 1932 Cal. 262.**

———*Rent—Disallowance of—Landlord preventing tenant from cultivating land.*

Where the landlord prevents the tenant from cultivating the land and the land consequently lies fallow and uncultivated, he is not entitled to claim arrears of rent for such period. (*Nanavutty, J.*) RAJA RAM PAL SINGH *v.* ABDUL HAMID. **11 O.W.N. 674 = 18 R.D. 66 = 148 I.C. 1079 = A.I.R. 1934 Oudh 97 (2).**

———Rent—Enhanced rent—Right of landlord to claim. *See* MADRAS CITY TENANTS' PROTECTION ACT. **A.I.R. 1935 Mad. 625.**

———*Rent—Enhancement—Agreement binding only on parties.*

An agreement for enhancement of a holding is binding only in respect of the share of the landholders who enters into the agreement and not in respect of other shares. (*Oppenheim, J.M.*) ALI YAWAR KHAN *v.* HASHMAT ULLAH. **15 R.D. 464.**

———*Rent—Enhancement—Neglect by landlord of earth-work—No ground for refusal.*

Neglect by itself without considering its effect cannot be a ground for refusing enhancement. The question that arises is whether the neglect complained of has in any way affected the cultivating tenants of the village. If it has not, the enhancement claimed cannot be refused on that ground. (*Wort and Mahomed Noor, JJ.*) SARJU MAHTO *v.* KRISHNA PRASAD NARAYAN SINGH. **150 I.C. 516 = 7 R.P. 3 = A.I.R. 1934 Pat. 195.**

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———*Rent—Enhancement—Principles applicable.*

A kabuliyat contained a stipulation to the following effect: "If the Government revenue due on the land is enhanced after the period of the lease, rent can be enhanced after taking into consideration the rate of rent for similar land with similar rights in the neighbourhood". The landlord having sued for enhancement on the ground that the revenue had increased,

Held, that the claim for enhancement was sustainable. The time which has to be taken into account in determining the prevailing rate of rent in the locality was the time of the claim be the landlord for enhancement, the time of the institution of the suit and not the time when the tenant was let into possession or the time when the tenancy was created. Tenancies of similar description and the similar advantages in the neighbourhood have to be taken into account and the rate of rent should be enhanced without reference to the improvements effected by the tenants, and without reference to the civil importance of the town. If the prevailing rate cannot be found, the Court would be justified in taking an average. 7 W.R. 97 and 21 W. R. 157, Ref. to. (*Guha, J.*) HARA KISHORE CHAKRABARTY *v.* ISWAR CHANDRA DE CHOWDHURY. **I.R. 1931 Cal. 664=133 I.C. 216=53 C.L.J. 608=A.I.R. 1932 Cal. 339.**

———*Rent—Enhancement—Protest of tenant—Ejectment as remedy.*

Where enhanced rate of rent is proposed by a landlord and the tenant continues to occupy the property without any protest as to enhancement of rent, the latter should be deemed to have accepted the proposal. But when the tenant protests against the enhancement, the remedy of the landlord is ejectment and where he does not pursue that remedy, he cannot subsequently claim the enhanced rent. (*Wazir Hasan, C.J. and Raza, J.*) MAHOMED NOOR *v.* ASHI BEG. **9 Luck. 112=6 I. R. (Oudh) 56=145 I.C. 647=10 O.W.N. 1000=A.I. R. 1933 Oudh 465.**

———*Rent—Enhancement—Right to enhance—Mention of one contingency—Effect of.*

It cannot be asserted that mention of one contingency in one document on the happening of which the right to enhance the rent is conferred on the landlord, excludes all other contingencies giving rise to the claim of the landlord for enhancement of rent when the right has been conferred on him by law after the contract. 35 C.L.J, 90, Foll. (*Suhrawardy, J.*) NABENDRA KISHORE ROY *v.* CHOUDHURY MIAN. **I.R. 1931 Cal. 472=131 I.C. 584=52 C.L.J. 583=A.I.R. 1931 Cal. 265 (2).**

———*Rent—Enhancement—Right of landlord*—Mokarari *lease.*

Where a reclamation lease recited that the tenants possessed the land originally rent-free, that the rent was to be progressive, first at As. 8, then at As. 12 and finally from a particular year at full rate of Re. 1 per bigha, the tenants agreed not to raise any objection as to the payment of rent on any ground, that the tenancy would be liable to enhancement or abatement of rent according to the measurment of the land from time to time, that in case the Government revenue was raised, the tenant would pay it and that the tenants would be "bound by all the provisions of the law relating to rent which is in force or will in future be enforced."

Held, the kabuliyat created a *mokarari* lease and the rent was not liable to be increased except in the two cases specified by the deed. (*Mitter and Pearson, JJ.*) SATYA CHARAN LAW *v.* RAI MOHAN SIL DAS. **I.R. 1932 Cal. 424=138 I.C. 139=36 C.W.N. 183=A.I. R. 1932 Cal. 436.**

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———*Rent—Enhancement of—Right to—Rent fixed on basis of area without measurement—Claim to rent on different basis of calculation.*

Where the agreement between the parties, *i.e.*, landlord and tenant, is that rent is to be calculated on the basis of an area estimated approximately without actual measurement, the landlord has no right without the consent of the tenant to substitute a different method of calculation whether by actual survey or otherwise and to claim enhanced rent on such basis. (*Broomfield, J.*) VAGHA JESING *v.* MANILAL BHOGILAL. **156 I.C. 898=8 R.B. 36=37 Bom.L.R. 242=A.I.R. 1935 Bom. 262.**

———*Rent—Entry in revenue papers—Value.*

In the absence of other evidence, it must be assumed that the rent entered in the revenue papers is correct. (*Knox, J.M.*) RAM LAL *v.* RAJA ANAND RAM. **13 L.R. 88 (Rev.)=16 R.D. 181.**

———*Rent—Excess or diminution in area.*

Where two leases of jungle lands were granted with the stipulation that for the first twelve years the land was to be held free of rent, and for the seven years it was to be held at a progressive rent increasing year by year till the full rate come into operation, and the leases further provided that after the expiry of the rent-free period the lessee should cause a survey of the lands to be made and pay additional rent for any excess area held by him while at the same time entitled to abatement if it was short, and a suit was brought after seventy years for additional rent for the area held in excess.

Held, on a construction of the leases, that the intention of the parties was that there should be a measurement at the end of the rent-free period, before the lessee was called upon to pay rent at all. 6 C.W.N. 360, Dist,; 22 W.R. 275, Ref. to. (*Costello and Jack, JJ.*) KALIDAS DUTT *v.* HARENDRA NATH MUKERJEE. **I.R. 1931 Cal. 632=53 C.L.J. 526=133 I.C. 104=A.I.R. 1932 Cal. 243.**

———*Rent—Fair and equitable rate—Deduction on account of fall in price.*

In fixing the fair and equitable rate of rent, no deduction ought to be made on account of fall in price. The tenant will, however, be entitled to claim temporary remissions of rent on account of a fall in prices in the same way as other tenants get remission. (*Knox, S.M. and Grant, J.M.*) GADADHAR PRASAD *v.* SRI DHAR. **1935 O.W.N. 1196=1935 R.D. 498 (2).**

———*Rent—Fair and equitable rent—Remissions granted to tenants in village.*

In determining the fair and equitable rate of rent, the remissions granted to the tenants in the village in those years can be taken into consideration. (*Srivastava and Nanavutty, JJ.*) KULWANT *v.* HARPAL SINGH. **6 R. O. 390=148 I C. 243 (1)=18 R.D. 40=11 O.W. N. 70=A.I.R. 1933 Oudh 97 (1).**

———Rent—Fixed in kind in lease—Price of rent stipulated in lease—If conclusive—Landlord's right to market value. *See* LEASE—CONSTRUCTION. **61 C.L. J. 351.**

———*Rent—Liability for—If ceases on institution of suit for ejectment—Suit if interference with quiet possession.*

The bare institution of a suit for ejectment of the tenant is not an interference with his actual possession, which may still be quietly enjoyed. Rent does not stop during the period of the suit for ejectment for a tenure holder, particularly when the plea of the latter is that he holds a permanent tenancy and cannot be ejected. The tenant is therefore liable for rent for the period of the suit. (*Macpherson and James, JJ.*) RAM

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RACHEYA SINGH *v.* KAMAKHYA NARAIN SINGH. **158 I.C. 1134=8 R.P. 243=16 Pat. L.T. 363=A.I.R. 1935 Pat. 415.**

———*Rent—Liability for—Co-sharer tenants—Nature of decree—Presumption.*

It is open to the landlord to sue any co-sharer in a tenancy since the co sharers are jointly and severally liable in respect of the rent. He is entitled to a decree against such defendant and it is not a matter for concern in the suit itself whether the decree obtained is a rent decree or a money decree, and indeed he must be presumed to accept the less valuable relief if he has not framed his suit so as to obtain a rent decree. (*Macpherson and James, JJ.*) DAMRI AHIR *v.* KESHO-PRASAD. **158 I.C. 51=A.I.R. 1935 Pat. 152.**

———*Rent—Liability for—Co tenants.*

Each of several co tenants is separately liable to pay the whole rent when sued by the landlord. (*Macpherson and James, JJ.*) KUMAN DAS *v.* KAMESH-WAR SINGH. **156 I.C. 352=7 R.P. 720=A.I.R. 1935 Pat. 146.**

———*Rent—Liability for—Failure to put tenant into possession.*

A landlord is bound to put the tenant in possession and cannot recover rent until he does so The fact that he himself was not in khas possession and that the tenant knew that a third person was in possession does not make the rule inapplicable. When there is already a tenant holding under the landlord, the landlord is not competent to grant a lease in favour of another; such a lease would be of no effect in law and on its basis no rent can be recovered by the landlord. (*Mitter, J.*) HARIPADA DUTT *v.* GOBINDA CHANDRA DAS. **60 C.L.J. 220=A.I.R. 1935 Cal. 193.**

———*Rent—Liability for—Mortgagee from lessee—English doctrine of privity of estate—Not applicable to India.*

The plaintiff granted a lease to defendant No. 7 for a period of thirty years at a rent of Rs. 324. Defendant No. 7 in turn executed an anomalous mortgage to defendant No. 9 by which the mortgagee was given possession and enjoyment and it was further provided that the income of the property was to be credited against interest and principal and that the mortgagors were to be responsible for the land revenue. In a suit brought by the lessor against the mortgagee for rent due under the lease,

Held, that the English doctrine of privity of estate did not apply to India, even assuming that it applied as between lessor and lessee, privity of estate in English depends, not upon the assignee being in possession, but upon the whole term granted by the lease being legally vested in him and there being no intervening estate between the estate of the lessee and the estate of the lessor the mortgage in the present case did not transfer the estate of the lessee so as to introduce that doctrine, because all that it transferred was merely a right to possession and enjoyment and the document did not transfer the whole estate which the lessee might possess under the lease, assuming that he possessed any estate. The mortgagee was not, therefore, liable for rent. 29 Bom. 391, Overr.; 40 Mad. 1111, Appr. (*Beaumont, C.J., Tyabji and Wadia JJ.*) KESHAVLAL *v.* MAGANLAL. **58 Bom. 327=6 R.B. 317=148 I.C. 993=36 Bom.L.R. 197=A.I.R. 1934 Bom. 134 (F.B.).**

———*Rent—Liability for—Personal liability*—Rehandar—*Liability of.*

The liability of a tenant for rent is clear if the relationship of landlord and tenant exists between the

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parties; and a landlord holding a decree for rent can pursue his remedy both against the holding and also against the tenant personally if the latter has any property over and above his interest in the holding. But as against a *rehandhar* who is as between him and the landlord is not a tenant at all he has no personal remedy except in so far as that person's interest in the tenancy is concerned, which of course may be destroyed by the fact of the sale of the holding and the landlord cannot proceed against him and attach his personal and separate property. (*Courtney-Terrell, C. J. and Varma J.*) RAMDEO SINGH *v.* KOMAL SINGH. **7 R.P. 260=152 I.C. 845=15 Pat.L.T. 800=A.I.R. 1935 Pat. 23.**

———*Rent—Liability for—Stranger admitted to holding—Suit in ejectment withdrawan—Status of tenant.*

Where a person admitted to tenancy by an occupancy tenant is sought to be ejected on the footing of being a tenant from year to year but the suit is withdrawn without permission to bring a fresh suit, the former is assimilated to the position of a sub-tenant or non-occupancy tenant. He is liable to ejectment only on the grounds on which a non-occupancy tenant may be ejected and is subject to all the liabilities of a non-occupancy tenant such as fixation and determination of rent unless he can prove he was admitted to hold without being subject to such liability. (*Drake Brockman, J.M.*) MAHADEO PRASAD *v.* DATA DIN LAL. **14 L.R. 415 (Rev.)=17 R.D. 509.**

———*Rent—Liability for—Usufructuary mortgage of lessee.*

There is no privity of contract between a usufructuary mortgagee of the lessee and the lessor and therefore the former is not legally liable to pay rent to the latter. (*Curgenven, J.*) MODIN KUTTI *v.* MANNAN. **154 I.C 541=7 R.M. 444=40 L.W. 656=1934 M. W.N. 1322=A.I.R. 1934 Mad. 563.**

———*Rent—"Net rent exclusive of all taxes"—Liability for property tax.*

The reservation of a "net rent or rent free of all taxes etc.", in a lease granted by the landlord imposes on the tenant the burden of all taxes except property tax. (*Srivastava, Ag. C.J. and Smith, J.*) JWALA SAHAY & SONS *v.* MATHURA PRASAD. **10 Luck. 307=152 I.C. 786=7 R.O. 238=11 O.W.N. 1397=A.I.R. 1935 Oudh 209.**

———*Rent—Payment to landlord—Inference.*

The *muafidar* had not been heard of for 30 years. The landlords brought a suit for expunging his name but it was decided that it should remain. Later on his son got himself recorded as *muafidar* and sued the tenants for rent. The latter pleaded that they had paid to the landlord.

Held, that no court could hold that it was extremely improbable that the tenants would have been allowed to occupy the land for a long time without paying rent to any one and uphold the tenant's plea. (*Oppenheim, J. M.*) KHUSHAL *v.* SHEO DATTA. **12 L.R. 367 (Rev.)=16 R.D. 14.**

———*Rent—Payment—Proof—Entry in* sihaya.

An entry in *sihaya* (copy of accounts) which has not been signed by the landlord is not sufficient evidence to prove payment of rent by the tenant. 14 R.D. 93, Foll. (*Keane, S.M. and Oppenheim, J.M.*) BHAGWAT PRASAD SINGH *v.* PARSAD. **15 R.D. 401.**

———*Rent—Penalty clause.*

A stipulation in a Kabuliyat that if paddy rent is not paid by a certain time half as much again would be required to discharge the arrear is the stipulation by way of penalty and comes under S. 74, Contract Act

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with the result that the landlord will only get the reasonable compensation in the discretion of the Court. (*Rankin, C.J. and C.C. Ghose, J.*) SHYAM LAL BOSE *v.* KALIM SHAIKH. **58 Cal. 84 I.R. 1931 Cal. 338 = 130 I.C. 274 = 34 C.W.N. 905 = A.I.R. 1931 Cal. 111.**

———*Rent—Proof of—No entry in the* sihaya*—Entry in the landlord's estate accounts insufficient.*

Under S. 159 of the Land Records Manual, it is the duty of the person receiving payments to give information about such payments to the patwari when he comes round to collect the information. Where no such information was given and the alleged payments were not entered in the *sihaya*, the entries in his estate account books cannot be taken as sufficient proof of the amount alleged to have been paid as rents. (*Oppenheim, S.M. and Drake Brockman, J.M.*) DINA *v.* TEG BAHADUR SINGH. **14 L.R. 570 (Rev.) = 17 R.D. 712.**

———*Rent—Rate of.*

In the absence of any evidence to prove the actual produce of the land during the years in suit, the Court is justified in allowing rent for those years at the rate which has been decreed in a previous suit relating to an earlier period. (*Srivastava and Nanavutty, JJ.*) KULWANT *v.* HARPAL SINGH. **6 R.O. 390 = 148 I C. 243 (1) = 18 R D. 40 = 11 O.W.N. 70 = A.I.R. 1934 Oudh 97 (1).**

———*Rent—Rate of—Absence of evidence as to—Proper rate to be decreed—Fair and equitable rate.*

When the relationship of landlord and tenant is established, the tenant is bound to pay rent to the landlord; when there is no satisfactory evidence of the rate of rent payable, the Revenue Court would decree rent at a fair and equitable rate. (*Latif, F.C.*) MAHOMED USMAN KHAN *v.* ABDUL HAMID KHAN. **14 Lah. L. T. 13.**

———*Rent—Rate of—Evidence.*

Where rent is charged at a certain rate but the collection has never been made at that rate and a beriz deduction has been allowed all along on the ground that land was not fertile, the landlord can claim only rent which has been paid all along when it is not shown that the condition of the land has in any way been improved. (*Bardswell, J.*) RAJA OF VIZIANAGARAM *v.* VEERABADRA RAO. **151 I.C. 217 = 7 R.M. 114 = A.I.R. 1934 Mad. 160.**

———*Rent—Rate of—Incidental decision by Court—Binding nature.*

In S. 44 proceeding, the Court held on the basis of the high rate of rent that the holder was a tenant,

Held that the rate of rent could not be reduced in a later suit for arrears of rent. (*Keane, S.M. and Oppenheim, J.M.*) GANGA BISHUN GOND *v.* JAGESHWAR. **15 R D. 712.**

———*Rent—Reasonable rent—Bhaoli rent fixed by landlord not much exceeding that fixed by Court—If correct.*

The bhaoli rent charged by the landlord in his account books was not very much in excess of the amount of rent fixed by the Court in a rent suit.

Held, that the amount of rent charged was not unreasonable and the account could not be said to be incorrectly made up. (*Fazl Ali and Luby, JJ.*) MD. YUSUF *v.* MT. RAMDAN KUAR. **160 I.C. 925 = 8 R. P. 394 = A.I.R. 1935 Pat. 524.**

———*Rent—Registered agreement fixing rent payable—Liability of tenant to increased rent.*

Where there is registered agreement between the landlord and tenant fixing the rent payable, the tenant

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is not liable to pay any greater amount even if in the settlement papers the land was shown as paying certain legal rent and certain "Zaid lagan." The fact that the tenant paid more rent than that due from him, does not make him legally liable for the increased amount. (*Oppenheim, S.M. and Walton, J.M.*) RAMESHWAR MISRA *v.* MATHURA SINGH. **14 L.R. 159 (Rev.) = 17 R.D. 203.**

———*Rent—Remission — Co-sharer in possession of raiyati land—Right of.*

Where a co sharer is in possession of a part of the raiyati land and a greater part of which is not capable of cultivation, he is entitled to remission or reduction of rent apart from Ss. 38 and 52, Bengal Tenancy Act. (*Wort, J.*) RAGHUNANDAN PRASAD SINGH *v.* LALIT MOHAN GHOSH. **152 I C. 600 = 7 R.P. 215 = 15 Pat.L.T. 785 = A.I.R. 1934 Pat. 542.**

———*Rent—Remission of—Inundation—Revenue sale—Encumbrance—Custom as to remission of rent.*

A custom of 'Hajabad' to the effect that a tenant is not liable to pay rent to his landlord for the years when there has been inundation is not as encumbrance which can be disregarded by the landlord who is a recent purchaser at a revenue sale. (*C.C. Ghose, A.C.J. and Mallick, J.*) NOLIN BEHARI BOSU *v.* HARIPADA BHUIA. **149 I.C. 1093 = 6 R.C. 704 = 38 C.W.N. 139 = A.I.R. 1934 Cal 452.**

———*Rent—Right not disputed—Rent not collected for many years—Effect of.*

The fact that no rent has ever been paid for trees and the mere fact that the landlord has failed to collect rent for number of years cannot deprive the landlord of his right to claim rent, if that right is found to exist, when the landlord's right to recover rent was not disputed before the Assistant Settlement Officer and no question of limitation arises. (*Fazl Ali and James, JJ.*) DEORAJ SINGH *v.* RAMJIWAN RAI. **149 I.C. 436 = 6 R.P. 615 = A.I.R. 1934 Pat. 259.**

———*Rent — Right to sue for—Mortgagee — Rent accrued due before mutation.*

Though the mortgagee from the landlord has no right to sue in a Civil or Revenue Court until he has obtained mutation of his name, the moment he has obtained mutation. he is entitled to sue for anything that may be due to her even anterior to the date of mutation. (*Oppenheim, S M. and Walton, J.M.*) KAMAL SINGH *v.* MT. BHAGWATI. **14 L.R. 204 (Rev.) = 17 R.D. 237.**

———*Rent—Right to—Symbolical possession delivered to purchaser.*

Where in execution of a decree, the possession of land was given to the purchaser by beat of drum, that is sufficient to entitle him to claim rent from the cultivating tenants. (*Maynard, F.C.*) RAM DAS *v.* UDMI. **11 Lah.L.T. 135.**

———*Rent—Right to—Use and occupation—Right to recover for—Basis of.*

The foundation of a right to recover for the use and occupation of land has always been a contract either express or implied. (*Bose, A.J.C.*) MOHNIRAJ *v.* SECRETARY, MUNICIPAL COMMITTEE, BASIM. **29 N.L.R. 57 = 6 I R. (Nag.) 2 = 144 I.C. 667 = A.I.R. 1933 Nag. 93.**

———*Rent—Sale in execution of rent decree—Person wrongly recorded as tenant—Rent decree and sale in execution—Validity as against real tenant.*

Where the interest of a tenant in a holding has been sold away in execution of a rent decree and purchased by a person, but subsequently the name of the ex-tenant is recorded in the settlement records as tenant, a sale in

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execution of a rent decree obtained by the landlord against such recorded tenant cannot effect the right or interest of the original purchaser who is the real and actual tenant. (*Nasim Ali, J.*) KUMAR PRATIVA NATH ROY *v.* BENODE BEHARI GHOSE. **162 I.C. 296=8 R.C. 588=61 C.L.J. 75=A.I.R. 1936 Cal. 181.**

———*Rent—Suit for, against alleged tenant—Tenant paying rent to another—Right of plaintiff.*

Where *A*, being liable under a contract to pay money to *B*, pays away the money to *C* on another contract, *B* cannot recover from *C*. A receiver who was authorized to collect rents sued an alleged tenant from the landlord, and also another person who was alleged to be in possession of the property, and who had received rent from the tenant alleging that he had leased the land to such tenant. The crop was not a charge for the rent due to the landlord.

Held, that the receiver could have no cause of action against the person receiving the rent and that he could not recover the rent realised by him from the tenant. (*Baguley, J.*) RAMAN CHETTYAR *v.* U BA THIT, **148 I.C. 18=6 R.R. 204=A.I.R. 1933 Rang. 357.**

———*Rent—Suit for arrears—Landlord transferring tenure prior to decree—Nature of decree—Right of purchaser.*

Where a landlord has parted with his interest in the property prior to an action for arrears of rent, the decree obtained by him cannot result in a rent decree, and the subsequent purchaser in execution can only proceed against the tenure or holding. (*Wort, Ag. C.J. and Kulwant Sahay, J.*) RAMESHWAR SINGH BAHADUR *v.* RAMDHARI SINGH. **149 I.C. 1047=6 R.P. 682=A.I.R. 1933 Pat. 526.**

———*Rent—Suit for—Collusive decree and sale—Rights of transferees from tenant, if affected.*

Where a tenant having parted with a large portion of his raiyati allows the rent to fall into arrears and enables the landlord to bring a suit for rent and obtain a decree which is not a rent decree and get the property sold in execution of that decree and obtain a resettlement, the purchasers under the decree stand in the shoes of the original tenants and cannot claim a higher right to eject the transferees from the tenants. Nor can the landlord in such a case treat the entire holding as having been abandoned or the tenancy to have been extinguished. (*Suhrawardy and Jack, JJ.*) RUHINI KUMAR DAS *v.* AMINUDDIN KAVIRAJ. **137 I.C. 668=I.R. 1932 Cal. 347=35 C.W.N. 648=A.I.R. 1932 Cal. 405.**

———*Rent—Suit for—Decree against wrong person—Setting aside.*

Where a decree is obtained not against the proper person who represents the estate and the estate is sought to be sold in execution of such a decree, the case falls within the principle of *Khiarajmal* v. *Daim*, 32 Cal. 296 and the decree is liable to be set aside in revision for want of jurisdiction. (*Mitter, J.*) ANANGA MOHAN RAY CHOUDHURY *v.* NAWAB KHAJE HABIBULLA. **I.R. 1931 Cal. 801=134 I.C. 305=53 C.L.J. 415=A.I.R. 1931 Cal. 673.**

———*Rent—Suit for—Decree for enhancement and for rent—Distinction.*

The decree for enhancement is separable from the decree for rent. Merely because the two claims are joined in one suit, it does not necessarily follow that if the decree for enhancement cannot be enforced, the decree for rent also cannot be enforced. (*Fazl Ali, J.*) RAMNAND SINGH *v.* DAMODAR PRASAD. **I.R. 1933 Pat. 191=143 I.C. 64=14 Pat.L.T. 144=A.I.R. 1933 Pat. 195.**

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———*Rent—Suit for—Decree passed—Payment of decree amount—Right of third party to proceed against tenant.*

Where in a suit for rent the Court passes a decree in the plaintiff's favour, there is no danger of the defendant being compelled twice over to pay to a third party the amount which he pays under the decree. (*Hasan, C.J.*) SUNDER DEVI *v.* UJHI LAL. **I.R. 1931 Oudh 350 (2)=132 I.C. 798 (2)=14 O.L.J. 378=8 O.W.N. 546=A.I.R. 1931 Ohdh 321 (1).**

———*Rent—Suit for—Failure of lessee to get possession of entire property—Claim for proportionate rent—Late stage—Payment of costs.*

A suit by a lessor for rent was dismissed by the High Court on the finding that the lessee had failed to obtain possession of the whole of the leased properties. In appeal before the Board the lessor claimed rent proportionate to the area, of which is lessee obtained possession.

Held, that though this case for an abated rent should have been raised and investigated along with the other questions in the case, it would be an injustice, if the appellant is prepared to submit to the penalties of his failure to raise it earlier, that the respondent should escape from payment of rent in respect of the possession which he could alone attribute to the kabuliyat. (*Lord Thankerton.*) JOGESH CHANDRA ROY *v.* EMDAD MEAH. **59 I.A. 29=59 Cal. 1012=136 I.C. 398=I.R. 1932 P.C. 94=36 C.W.N. 221=35 L.W. 112=9 O.W.N. 119=16 R.D. 95=55 C.L.J. 72=1932 M.W.N. 275=13 L.R. 271 (Rev.)=34 Bom.L.R. 481=A.I.R. 1932 P.C. 28=62 M.L.J. 336 (P.C.).**

[D. 38 C. W. N. 1202 (1206, 1207, 1208)].

———*Rent—Suit for fractional share of rent—Maintainability.*

The plaintiffs had sued for a three-fourths share of the rent because that was the share to which they were entitled in law. The defence was that the entire rent had been paid to another co-sharer. This defence was negatived.

Held, in the circumstances it must be held to have been so negatived with reference to the plaintiff's share of the rent only, that the payment of only one-fourth rent made to another co-sharer was a valid payment and that the suit was maintainable. (*Wazir Hasan, C.J.*) INDERPAL SINGH *v.* GAYA PRASAD. **149 I.C. 520 (1)=6 R.O. 567 (1)=11 O.W.N. 253=18 R.D. 160 (2) A.I.R. 1934 Oudh 132.**

———*Rent—Suit for—Lease between parties proved—Question of title, if material.*

Where a lease is proved to exist as between the parties, in a suit by the landlord for rent no question of title to the property arises. (*Dunkley, J.*) ALAKHAN *v.* ARUMUGAM CHETTIAR. **6 I.R. (Rang.) 110=146 I C. 640=A.I.R. 1933 Rang. 262.**

———*Rent—Suit for—Misdescription of holding—If fatal.*

The mere misdescription of the holding in plaint is not necessarily fatal to a success in a rent suit. Where the holding described in the plaint is the holding as described in the record-of-rights, but with two plots omitted, and the question of what is the correct area and rent of the holding has been decided in favour of the tenant, it does not follow that the landlord must necessarily forfeit rent which is found to be due. (*James, J.*) BRIJ BILAS RAI *v.* SHEO LAGAN. **153 I.C. 323=7 R.P. 330=A.I.R. 1935 Pat. 101.**

———*Rent—Suit for—Parties.*

If the suit is not brought against all the tenants interested in the holding, it cannot be maintained as a rent

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suit. (*Fazl Ali. J.*) KESHO PRASAD SINGH *v.* MOHENDRA PRASAD. **147 I.C. 200=6 R.P. 347=15 Pat.L.T. 166=A.I.R. 1933 Pat. 582.**

———*Rent—Suit for—Parties—Claim of abatement.*

Where two or more persons have a joint right to any land, they cannot assert it except jointly. In a suit for recovery of arrears of rent by some of the landlords against some tenants co-sharers only, a plea of abatement of rent cannot be put forward by tenants who are on the record. The claim of abatement cannot be established in the absence of all the tenants as parties. (*Jack, J.*) ABDUL BARI MIA *v.* RAM CHANDRA MAJUMDAR. **6 I.R. (Cal.) 122=145 I.C. 593=A.I.R. 1933 Cal. 182.**

———*Rent—Suit for—Parties—Third party claiming as purchaser—Intervention—Procedure.*

Where in a rent suit a third party seeks to be impleaded as party on the ground that he is the purchaser of the holding, his application should set out a verified statement that he has purchased the holding and that the landlord has accepted him as a tenant. The Court may then implead him and enquire into the truth of the allegations at the hearing of the rent suit. (*Kulwant Sahay, J.*) UJAGIR SINGH *v.* RANI BHUNESHWARI KUER. **6 I.R. (Pat.) 235 (1)=146 I.C. 15 (1).**

———*Rent—Suit for—Plaintiff under contract with defendant to pay the whole rent—Plea of contract by way of defence.*

Where the plaintiff himself is under contract with the defendant to pay the whole of the rent which he claims, the defendant is entitled to plead this contract by way of defence to a suit for rent, and the plea is not a plea of set-off ; it is a plea that the plaintiff himself is liable to fulfil the obligation which he is seeking to cast on the defendant ; and in such circumstances he is not entitled to invoke the aid of the Court to compel the defendant to do what he himself is bound to do. (*Macpherson and James, JJ.*) KUMAN DAS *v.* KAMESHWAR SINGH. **156 I.C. 352=7 R.P. 720=A.I.R. 1935 Pat. 146.**

———*Rent—Suit for—Plea of superior title in third person—Sustainability—Repudiation of title—Effect of.*

A tenant cannot terminate his tenancy by repudiating the tenancy, or by denying his landlord's title. Such an assertion on his part only gives the landlord a right or option to terminate the tenancy and to recover khas possession. But the landlord need not exercise that option at all. If he ignores the repudiation, he can still go on receiving rent or go on suing the tenant for rent and in a suit for rent by the landlord, the tenant cannot urge that another person has a superior title to that of the plaintiff. 117 I.C. 842 and A.I.R. 1921 Cal. 532, Rel. on. (*R. C. Mitter, J.*) RAGHUPATHI *v.* PANCHANANI. **158 I.C. 380=8 R.C. 179=A.I.R. 1935 Cal. 609.**

———*Rent—Suit for—Question of title—Whether can be decided.*

Where the plaintiffs claimed rent as co sharer landlords and both the defendants and the third party who supported the defendants raised the question of title and the same was fully fought out.

Held, that the decree of the Court was not vitiated on the ground that a plea of title was decided in the rent suit. (*Mallik and Jack, JJ.*) AKHIL CHANDRA DUTTA *v.* RAMANI RANJON DUTTA. **147 I.C. 481=6 R.C. 345=57 C.L.J. 287=A.I.R. 1933 Cal. 824.**

———*Rent—Suit for—Rent and possession—Distinct causes of action—Non-compliance with notice to quit.*

The claim for rent is a distinct cause of action from that for the recovery of possession. The tenant fell into arrears with his rent and the landlord sued him for two months' rent and was successful. The two months' rent

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then in arrears was from 9th February to 9th May. On 1st June the landlord sued for ejectment of the tenant. His plaint set out that the tenant had leased his land and that he had given him one month's notice on 18th April to quit on 31st May. The lower Court dismissed the suit for ejectment holding that in the former suit the landlord had not applied for leave of the Court to bring a suit for ejectment.

Held, that the evidence necessary to prove the two cases was not the same, and the former suit was not a bar to the second.

Held also that his cause of action in the second suit was not complete until after the tenant had failed to comply with the notice to quit and that notice did not expire until after he had obtained his decree in the first case. 32 Mad. 330, Rel. on. (*Bagulay, J.*) M.R.M. A. CHETTYAR FIRM *v.* AH WAING. **6 I.R. (Rang.) 5=144 I.C. 751=A.I.R. 1933 Rang. 107.**

———*Rent—Suit for—Suit filed against two persons—Death of one before decree—Executability of decree.*

Where a suit for rent is brought against two tenants and one of them dies before a decree is passed, the decree is not executable against the surving tenant as a rent decree but it can be executed as a money decree. (*Fazl Ali, J.*) RAMANAND SINGH *v.* DAMODAR PRASAD. **I.R. 1933 Pat. 191=143 I.C. 64=14 Pat. L.T. 144=A.I.R. 1933 Pat. 195.**

———*Rent—Suit for—Tenant admitting plaintiff's status as landlord—Payment under protest—Third party's possible claim—Conditional decree—Validity.*

Where in a suit for rent the defendant tenant admitted the plaintiff's status as landlord but lodged a protest on the ground that some third party had claimed the same rent from him and thereupon the Court passed a decree in plaintiff's favour subject to the condition that the money deposited should not be paid to him till he obtained a decree from the proper Court, declaring his title to the property.

Held, that the condition which the Court had attached to the decree was not warranted and should therefore be deleted. If in such a case a third party claims title, it is for him to bring a suit for a declaration of his title. (*Hasan, C.J.*) SUNDAR DEVI *v.* UJHI LAL. **I.R. 1931 Oudh 350 (2)=132 I.C. 798 (2)=14 O.L.J. 378 =8 O.W.N. 546=A.I.R. 1931 Oudh 321 (1).**

———*Rent—Suit for—Vendor in possession of property for one agricultural season—Decree for damages for use and occupation.*

Even after the sale of land, the vendor continued in possession of the land for an agricultural season. In a suit by vendee for rent on the ground of an alleged tenancy and for ejectment,

Held, that even if the tenancy was not proved, the vendor was liable to pay damages for use and occupation of the land. (*Das and Dunkley, JJ.*) VEERAPPA CHETTYAR *v.* KO BA KIN. **148 I.C. 195=6 R.R. 203=A.I.R. 1933 Rang. 310.**

———*Rent—Suspension.*

The tenant cannot claim suspension of rent merely because the landlord has attempted to extinguish his rights by means of entries in the record of rights. (*Graham and Mitter, JJ.*) RAJA RESHEE CASE LAW *v.* SATISH CHANDRA PAL. **I.R. 1931 Cal. 513=132 I.C. 81=35 C.W.N. 46=A.I.R. 1931 Cal. 397.**

———*Rent—Suspension.*

The fact that the tenant has got a paper decree for possession of the demised premises will not disentitle the tenant from pleading suspension of rent if he had in fact been dispossessed. (*Graham and Mitter, JJ.*) RAJA RESHEE CASE LAW *v.* SATISH CHANDRA PAL.

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———*Rent—Suspension—Dispossession by landlord—Burden of proof—Prior decree allowing suspension—If sufficient—Entry in finally published record of rights—Presumption from—Rebuttal—Onus.*

In a claim for suspension of rent on the ground of dispossession by the landlord from a part of the tenancy, the onus is on the tenant to prove dispossession and the extent of eviction, even though suspension of rent was allowed on the ground of dispossession in a suit for rent for a previous period. It is for the tenant affirmatively to prove that the earlier dispossession continued down to the period for which rent is claimed in the present suit. It is not for the landlord to prove that the tenants have since been restored to possession. The prior decision does not operate as *res judicata* in a later suit. Further where the entry in a record-of-rights finally published after the period covered by the prior suit shows that the defendants are in possession of the entire holding for the entire rent claimed, it is incumbent on the defendant tenant to rebut the presumption arising in favour of the landlord that there was no dispossession of the tenants from any portion of the tenancy in respect of which the rent is claimed. (*Guha and Bartley, JJ.*) JOTINDRA NATH HALDAR *v.* ASWINI KUMAR MANDAL. **61 C.L.J. 134=A I.R. 1935 Cal. 554.**

———*Rent—Suspension—Eviction by title paramount—Plea of—When valid and maintainable.*

In order that the plea of eviction by title paramount as a ground for suspension of rent might constitute a good defence, three conditions have to be fulfilled: (1) the eviction pleaded must be from something which actually forms part of the premises demised; (2) the party evicting must have a good title; and (3) the tenant must have quitted against his will. Forcible expulsion is not, however, necessary. Nor is it necessary for the tenant actually to go out of possession. It is enough if there is a change of title by attornment to the person with title paramount. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A.I.R. 1935 Cal. 368.**

———Rent—Suspension—Eviction from part of land held in different holdings—Court applying suspension of rent—Subsequent perfect partition among co-sharers—Change of holding—Suspension of rent—How far enforceable. *See* BENGAL ESTATES PARTITION ACT, S. 81. **153 I C. 1024 (2)=A.I.R. 1935 Pat 142.**

———*Rent—Suspension—Grounds for—Principles—Eviction by lessor—What amounts to—Entry by agreement—Effect of.*

Eviction which entitles a tenant to suspend payment of rent is a doctrine of English Common law, introduced in India as one based on justice, equity and good conscience. It applies to cases where the rent is a lump rent and every bit of the leased property is liable for that rent. But there are exceptions to this rule, in which on equitable considerations the Court allows an apportionment of rent and gives a decree for the portion in the possession of the tenant. To constitute eviction at law, it has to be established that the lessor, without the consent and against the will of the lessee, wrongfully entered on the demised property, evicted him and kept him so evicted. In other words, to justify the lessee to a suspension of rent, the entry by the lessor must be tortious which implies that the entry must be against the consent of the tenant. Any entry by the landlord by arrangement with, or with the consent of, the lessee is not tortious. Depriving the landlord of his rent is a sort

LANDLORD AND TENANT—Rent.

of penalty imposed upon him for his wrongful act in withholding the possession from his tenant. This penalty cannot be imposed upon him, unless his act is wrongful and is of such a nature as to give the tenant a cause of action in the courts of law. Where the only fact proved was that by some arrangement a portion of the leasehold was taken away from the tenant who, since then, was all along paying a reduced rent at a fixed figure, and the landlord accepted such payment.

Held, there was a case for apportionment of rent, and that there was no equity in favour of the tenant for a suspension. (*Khaja Mahomed Noor and Agarwala, JJ.*) RAMESHWAR LAL *v.* BUTTO KRISTO RAI. **13 Pat. 396=152 I.C. 992=7 R.P. 281=A.I.R. 1934 Pat. 653.**

———*Rent—Suspension—Landlord keeping tenant out of possession.*

Rent is paid for the use of the land, that is, the ordinary use of the land as understood by agricultural tenants, and if a zemindar through his own fault keeps a tenant out of possession, until such time that he cannot use the land in the ordinary manner, the zemindar is not entitled to rent for that harvest. (*Pullan, J.*) RAJJAB *v.* GHULAM HUSAIN KHAN. **I.R. 1931 Oudh 102=129 I.C. 326=7 O.W.N. 1075=14 R.D. 660=A.I.R. 1931 Oudh 12.**

———*Rent—Suspension—Limits of doctrine.*

If a landlord dispossesses a tenant from a portion of the tenure, he is not entitled to recover any rent from the tenant until he restores the portion, from which his tenant has been dispossessed, to him and it makes no difference that at some time the tenant is found to be in possession of some more lands but not the entire tenure. Where the tenants are out of possession for more than 12 years of the plot, it cannot be said that they cannot recover the same from the landlord and that they have made themselves liable to pay rent for the portion in their possession.

Per *Suhrawardy, J.*—It may be that where the lessor commits an honest mistake about the extent of the property leased including in it some portion over which he had no disposing power or was the innocent cause of the dispossession of the lessee by a third party from a portion of the lease hold or otherwise acts *bonafide*, he is entitled to some relief. (*Suhrawardy and Graham, JJ.*) KRISHNA CHANDRA RAY *v.* SURENDRA NATH BANDOPADHYA. **I.R. 1932 Cal. 365=137 I.C. 696=36 C.W.N. 72=54 C.L.J. 479=A.I.R. 1932 Cal. 385.**

[F. 38 C.W.N. 1202, (1205)].

———*Rent—Suspension—Limits of doctrine—Ejectment of fraction.*

Where dispossession or eviction by the landlord is found and the Court is called on to determine the question of the suspension of rent, no consideration whether the rental is a lump rental or a rental at a certain rate per bigha or acre enters into the question. The real test is whether there was one indivisible tenancy and whether there was interference by the landlord with the due enjoyment of the premises or any part of them. In deciding the test, however, one may consider whether the tenancy consists of separate mouzas or parcels of land separately assessed to rent or whether the tenancy is in fact and not in law only divisible or indivisible. If it is to be held that where rent is assessed at a rate per bigha the doctrine will not apply, though it be a case of dispossession or eviction by the landlord, the doctrine will fail to achieve its object. Doctrine as to suspension of rent discussed. (*Mukerji, J.*) SAKHISONA DASI *v.* PRAN KRISHNA DAS. **6 I.R. (Cal.) 213=146 I.C. 398=37 C.W.N. 301=A.I.R. 1933 Cal, 566.**

LANDLORD AND TENANT—Rent.

———*Rent—Suspension—Principles governing.*

In order to make out a case of suspension of rent the first element that has got to be established is that the lands from which the tenants have been dispossessed formed part of the original tenancy. It should also be noticed that it is not any and every act of dispossession by a landlord which ought to be penalised. A wrongful or tortious act of dispossession is necessary in order that the principle may be applied. (*Mukerji, J.*) DHARANI MOHAN RAY *v.* SAJANI KANTA TARAFDAR. **149 I.C. 1117=6 R.C. 706=57 C.L.J. 515=A.I.R. 1934 Cal. 146.**

———*Rent—Suspension—Principles — Lump rent—Dispossession from part—Effect*

When the rental is a lump rental, and the tenant is forcibly and deliberately dispossessed from a part of the demised premises, there can be no question of an equity to an apportionment of rent; the tenant is entitled to entire suspension of rent till he is restored to possession of the dispossessed portion. (*Mitter and Patterson, JJ.*) MAHOMED ALI FAKIR *v.* KARAM ALI TALUKDAR. **155 I.C. 506=7 R.C. 594=38 C.W.N. 1202=A.I.R. 1935 Cal. 134.**

———*Rent—Suspension—Requisites for.*

Whether the doctrine of suspension of rent is to apply or not clearly depends on the circumstances of each case in the sense that mere dispossession of the tenant is not enough but that it must be found that the landlord was a party to it and that too, deliberately (Case-law discussed.) (*Dhavle and Saunders, JJ.*) HIRA LAL SINGH *v.* BABU RINKAURI SINGH. **154 I.C. 1066=7 R.P. 521=15 Pat.L.T. 21=A.I.R. 1934 Pat. 75.**

———*Rent—Suspension—Tenant evicted from portion of premises.*

In cases of eviction of the tenant from a portion of premises, proportionate rent for remaining portion should not be decreed in all cases. Where the value of such a tenancy depends upon enjoyment of the whole of it, and it might well be that if the landlord dispossessed his tenant of a comparatively small but important part of the tenancy, the value of the latter would so deteriorate that mere non-realisation of the proportionate amount of rent would be an entirely inadequate compensation. It would be the same if the landlord dispossessed the raiyat of a large slice or of the best lands with the result that the holding became uneconomic. Perhaps the sound course is to determine what is eqitable in the particular case, and that might range from the apportionment of rent per bigha where the dispossession is trivial or slight, in a rapidly rising gradient to entire suspension where the interference with the enjoyment of the tenancy is considerable. (*Macpherson and James, JJ.*) DALIP NARAYAN SINGH *v.* SURAJ NARAYAN MISSIR. **14 Pat. 323=7 R.P. 328=153 I.C. 298=A.I.R. 1935 Pat. 38.**

———*Rent—Suspension—When can be allowed.*

The Courts should be very careful in applying the rule of suspension of rent which can only be allowed in exceptional cases, and unless the tenants make out a strong case of suspension of rent, such suspension ought not to be allowed. (*Kulwant Sahay, J.*) MOHESHWAR SINGH *v.* JAGESHWAR SINGH. **149 I.C 573=6 R.P. 629=A I R. 1933 Pat. 678.**

———*Rent—"Zaid Mutalba"—If recoverable.*

The rent recoverable is that entered in column 8 of the Khatauni. As explained in R. 180 of the Land Records Manual, "the difference, if any, between the amount actually demanded by the landholder and the amount recorded in column 8 is entered as excess demand in column 9. Sums entered as "zaid Mutalba" are not legally recoverable. (*Oppenheim, S. M. and Drake Brockman, J.M.*) DINA *v.* TEG BAHADUR SINGH. **14 L.R. 570 (Rev.)=17 R.D. 712.**

LANDLORD AND TENANT—Rights of tenants.

Rent-free grant.

———*Rent-free grant—Evidence—Long possession.*

In proper cases, the presumption can be legitimately raised that a rent-free claim was based upon a grant which is lost, though care must always be taken to see, in these cases, that long possession is clearly established to have been enjoyed under a definite claim or right in such a manner that, in the circumstances, it was likely to have attracted the notice of the person whose rights are adversely affected by such a claim. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMJI MISSER. **149 I.C. 979=6 R.P. 677=A.I.R. 1933 Pat. 685.**

———*Rent-free grant—Evidence—Long possession and non payment of rent.*

Long possession without any demand or payment of rent would be evidence of a grant of rent-free title. (*R. C. Mitter, J.*) KANTA MOHAN MALLIK *v.* MAKHAN SANTRA. **164 I.C. 186=9 R.C. 158=39 C.W.N. 277.**

———*Rent-free grant—Presumption from long possession.*

Where a tenant proves that he has been holding the land for a long period without paying rent, a presumption arises that the land is rent-free. And a suit for assessment of rent by the landlord brought more than 12 years after the claim to hold the land rent free is made by the tenant is barred by limitation. (*Agarwala, J.*) KESHO PRASAD SINGH BAHADUR *v.* TRIBENI SAHAY. **6 I.R. (Pat.) 213=145 I.C. 949=A.I.R. 1933 Pat. 596.**

Repudiation of tenancy.

———Repudiation of tenancy—What constitutes—Non-transferable occupancy holding—Sale by raiyat—Transferee in occupation of part—Payment of rent to landlord by transferee—Transferor paying rent to transferee for lands held by him—If repudiation—Landlord's right of re entry. *See* B.T. ACT, S 87. **61 C.L.J. 545.**

Right of landlord.

———*Right of landlord—Lien by agreement—No priority over attaching creditor.*

A landlord is not entitled to a lien on the crops of his tenant for the arrears of his rent, even if there was an agreement with the tenant to that effect, in priority to an attaching creditor, who is not shown to have had any knowledge of the agreement. 7 Rang. 100, Ref. (*Das, J.*) MUTU KUMARA PILLAY *v.* VEERAPPA. **I.R. 1931 Rang. 141=131 I.C. 509=A.I.R. 1931 Rang. 160.**

Rights of tenants.

———*Rights of tenants—Decree obtained by tenant—Execution—Loss of tenant right—Effect.*

A tenant has no right to execute a decree which he had obtained in his capacity as tenant when he has lost his rights as a tenant at the time that he sought execution. (*Keane, S.M. and Oppenheim, J.M.*) KALAP NATH *v.* BASDEO CHAUBEY. **16 R.D. 153.**

———*Rights of tenants—Dispossession by landlord—Tenant's right to indemnity.*

The landlord is bound by an implied obligation to indemnify the tenant against disturbance by his own act or by the acts of those who claim under him and he is liable for damages caused to the tenant. (*Guha and Bartley, JJ.*) WAZUDDIN GAZI *v.* SAYED AHAMED. **157 I.C. 353=8 R.C. 102=A.I.R. 1935 Cal. 464.**

LANDLORD AND TENANT—Rights of tenants.

———*Rights of tenants—Planting rees.*

Where the plots were not groves at the time of the lease, no consent on the part of the sub-tenant can justify the planting of trees by a tenant holding under the sub-tenant ; nor the fact that the plots were groves at some earlier period. (*Oppenheim, S.M. and Walton, J. M.*) DEBI PRASAD *v.* NAZIR KHAN. **14 L.R. 94 (Rev.)=17 R.D. 114.**

———*Rights of tenants—Raiyati jote in tenancy—If heritable—Onus.*

In a suit for partition on the allegation that *N* had a raiyati jote in respect of the lands in suit and that *N* died leaving as heirs two daughters, by the heirs of one of the daughters claiming a partition and separate possession of her share,

Held, that the mere expression "jote" would not necessarily lead to the inference that the right of *N* was heritable. The onus of proof was upon the plaintiffs who claimed a share of the land in right of inheritance. It was for them to prove that the right of *N* was heritable. If the plaintiffs had proved that *N's* rights were heritable, then the mere fact that the defendant *N's* son took a fresh settlement two years after the death of *N* would not destroy the heritable right of his brothers and sisters. (*Lort Williams and M. C. Ghose, JJ.*) DHAN GAJI *v.* NAZAMADDIN PRADHANIA. **6 R.C. 475=148 I.C. 729=A.I.R. 1934 Cal. 398.**

———*Rights of tenants—Rent note—Custom contrary to—Admissibility of.*

In considering the respective rights of the landlord and tenant who has executed a rent note in favour of the former, the terms of the contract with reference to the surrounding circumstances and the previous history of the land should be taken into consideration. But evidence of custom in respect of tenancy is inadmissible when it is contradictory to the terms of the written agreement. (*Baker, J.*) NARAYAN BALKRISHNA *v.* SHIVSHANKARDAS. **I.R. 1932 Bom. 495=139 I.C. 258=34 Bom.L.R. 959=A.I.R. 1932 Bom. 493.**

———*Rights of tenants—Village jungle— Right of raiyat to cut wood—Patna Dhalbhum estate.*

A raiyat is entitled to take from the jungle of his own village without any payment, forest produce for *bona fide* domestic and agricultural requirements He has therefore right to cut and appropriate wood for the same purposes. (*Macpherson, J.*) ISWAR PANDA *v.* EMPEROR. **130 I.C. 806=32 Cr.L.J. 617=12 Pat. L.T. 577=1931 Cr.C. 227=A.I.R. 1931 Pat. 99.**

Royalty.

———*Royalty—Joint demise by four lessors (shebaits) —Suit by one for aliquot share of royalties payable— Maintainability.*

Where the lease discloses a joint demise or contract, no one of the four lessors, with or without the consent of his co-lessors, can sue for an aliquot part of the whole; the suit must be for the whole of the interest demised, else it fails. Where the other co-lessors have refused to join with the plaintiff in the hut, and are impleaded as *pro forma* defendants, the plaintiff's claim must nevertheless be for the entire amount of the joint interest and not merely for his share thereof. (*Lord Alness.*) BARABONI COAL CONCERN, LTD. *v.* GOKULANANDA MOHANTA TAKUR. **61 I.A. 35=61 Cal. 313=3 A. W.R. 193=11 O.W.N. 225=18 R.D. 112=59 C.L.J. 257=1934 A.L.J. 295=1934 M.W.N. 300=36 Bom. L.R. 390=6 R.P.C. 85=147 I.C. 884=39 L.W. 291 =38 C.W.N. 325=A.I.R. 1934 P.C. 58=66 M.L.J. 399 (P.C.).**

———*Royalty—Payment — Under lease—Breach of contract—Re-payment.*

LANDLORD AND TENANT—Shikmi tenant.

Where the tenant has paid a certain sum as royalty to a zemindar for a certain lease, he can recover the amount from the zemindar on breach of the contract of lease in spite of the fact that the plaintiff was a sub-lessee and exclusive of any question of privity of contract between them. (*Niyogi and Grille, A. J. Cs.*) KARIMBHOY SHAMSHUDDIN *v.* RUDRA PRATAP SINGH. **28 Nag.L.R. 142=I.R. 1932 Nag. 126=140 I.C. 68 (2)=A.I.R. 1932 Nag. 118.**

Shamilat.

———Shamilat—*Transfer of land*—Shamilat *also whether passes—Partition—Allocation of land—Effect regarding* shamilat.

The rights of a proprietor in the *shamilat* of a village are not a mere accessory to the land separately held by him and a transfer of the latter does not *ipso facto* convey any rights in the former to the transferee. Where before the partition both the parties were entitled to share equally in the *shamilat* land but the area allotted to one party at the partition was more than that allotted to the other, *held*, that such a difference in holding did not have the effect of disturbing their vested rights in the *shamilat* unless the parties intended that the *shamilat* should not be held in equal shares. In such a case, the onus is on the party who seeks to disturb the *status quo ante* to prove an intention on the part of the sharers to that effect. (*Shadi Lal, C.J. and Broadway, J.*) GHULAM MAHOMED *v.* MAHOMED YAR. **I.R. 1931 Lah. 160=133 I.C. 892=32 P.L.R. 544=A.I.R. 1931 Lah. 768.**

Shikmi tenant.

See also SIR LAND, *infra.*

———Shikmi *tenant—Claim to be under proprietor —Recognition by landholder— Evidence.*

The landlord issued a notice of ejectment to a person as *shikmi* tenant. The latter however contended that he was an under-proprietor. The landlord thereupon cancelled the notice by an application in which it was stated that the other party had satisfied him and he also stated that the existing state of things should continue.

Held, that under the circumstances the landlord could not be deemed to have accepted the claim of the person to be an under-proprietary tenant and that he could issue a fresh notice in ejectment as *Shikmi*. (*Oppenheim, J.M.*) RAM BAHADUR SINGH *v.* RAM LAL. **15 R.D. 654.**

———Shikmi *tenant—Possession for more than* 12 *years* —Shikmi *rights whether acquired.*

A proprietor had occupied certain occupancy land for 13 years. It was shown at the settlement in the column of *shikmi* tenants and the words "*bila tasfia lagan*" were entered against the land.

Held, that the proper inference would be that the landlord was occupying a portion of the occupancy land and that no rent had been fixed on account of the occupation. The contract of tenancy would not arise until rent had been fixed. In consequence there was no evidence to warrant the inference that the status of the proprietor was that of *shikmi* tenant. (*Keane, S. M. and Oppenheim, J.M.*) DEORAJ UPADHIA *v.* SITARAM. **15 R.D. 208=12 L.R. 60 (Rev.).**

———Shikmi *tenant—Suit by tenant—Decree against* shikmi *tenant—Decree not executed—Status of* shikmi *if altered.*

Where in an ejectment case the chief tenant obtained a decree against *shikmi* tenant but the same was not executed, and he was allowed to remain in possession.

Held, that the status of the tenant as *shikmi* was not altered. (*Oppenheim, J.M.*) RUSTOM *v.* SUNDER. **15 R.D. 245.**

LANDLORD AND TENANT—Sir land.

Sir land.

See also ESTOPPEL AND GROVE, *supra.*

———*Sir land—Co-sharers—Entry in decree—Effect.*

Where a person obtains a decree for joint possession of *sir* land and puts it in execution under O. 21, R. 35 (2), C. P. Code, he is entitled to ask the Revenue Court to enter him as proprietor of his share in the *sir* land and such entry will enable him to get his share of the *sir* land on partition and also enable him to get profits though it will not entitle him to take physical possession of any portion of it. (*Drake Brockman, S.M.*) KALIKA SINGH *v.* BASDEO SINGH. **15 L.R. 111 (Rev.)=18 R.D. 26.**

———Sir *land—Co-*sir *holder—Right to mortgage share*

It is doubtful if a co *sir*-holder can mortgage a share of *sir* and it is doubtful if the mortgagee can have got possession on the basis of his mortgage. (*Drake Brockman, S.M. and Holmes, J. M.*) DIP NARAIN SINGH *v.* CHANDI SHUKLA. **18 R.D. 119=15 L.R. 166 (Rev.).**

———Sir *land—Ejectment of lessee—Procedure.*

In the case of a lessee of *sir* lands the ejectment should be by suit and not by notice. (*Smith, J.M.*) LAL JOGENDRA BUX SINGH *v.* BIJOY BAHADUR SINGH. **14 R.D. 559=7 O.W.N. 969.**

———Sir *land—Exchange—Custom in pargana Kaswar Raja—Right of* shikmi *tenant to object.*

According to the customs prevalent in pargana Kaswar Raja, *sir* is capable of being exchanged without loss of *sir* rights. In such a case the tenant who is recorded as *shikmi* has no right to object. (*Smith, J M.*) JAIRRI SINGH *v.* PANCH KOSHI SINGH. **15 R.D. 231.**

———Sir *land—Land recorded as* sir *land in* 1895 *and since—Cultivation after transfer for twelve years not proved—Holders—Status of.*

Certain land was shown in 1895 as the *sir* land of the respondent and has been so shown ever since. The appellants were holding the land since 1915.

Held, that as the respondents could not have cultivated the land for 12 years between 1895 and 1901, the land could not be *sir* and so the holders must be held to be occupancy tenants. (*Oppenheim, S.M. and Walton, J.M.*) SUNDER *v.* GHIRDHAR DAS. **14 L.R. 206 (Rev.)=17 R.D. 230.**

———Sir *land—Lease by one co-sharer—Validity.*

A lease, whether permanent or otherwise, of *sir* land jointly held by several co sharers, can only be given by all the co-sharers or joint holders; a tenant under a lease by one only is liable to ejectment as a trespasser. (*Oppenheim, S. M. and Drake Brockman, J. M.*) RAGHUNATH SINGH *v.* MOHAN SINGH. **1935 R.D. 16=16 L.R. 170 (Rev.).**

———Sir *land—Lessee protected from ejectment as to small undivided portion—If immune from eviction from whole plot.*

A tenant of *sir* land under a permanent lease which protects him from ejectment only in respect of an infinitesimal and undivided portion of a plot of the land cannot save him from ejectment from the whole plot of land taken as a whole. So far as he is an ordinary tenant of *sir* land, he is liable to ejectment at the suit of the landholder. He might may have been protected by the permanent lease in respect of that area which is covered by it. (*Oppenheim, S.M. and Drake Brockman, J.M.*) RAGHUNATH SINGH *v.* MOHAN SINGH. **1935 R.D. 16=16 L R. 170 (Rev.).**

———Sir *land—Mahomedan co-heirs—Entry of names—Possession by widow, if exclusive and personal.*

LANDLORD AND TENANT—Sir land.

Where the heirs under the Mahommedan Law succeeded to the *sir* land of a deceased holder but the widow alone entered into possession.

Held, that her possession was not exclusive or personal to herself but was on behalf of all the co-heirs who should consequently be entered as *sir*-holders. (*Keane, S.M.*) AMAN BIBI *v.* QUADRATULLAH KHAN. **15 R.D. 390.**

———Sir *land—Mortgage before Agra Tenancy Act,* 1901*—Redemption—Character of land not altered.*

Sir land mortgaged before the Tenancy Act of 1901 resumes its character of *sir* land on redemption. The effect of a misdescription of the land at the settlement would not alter the character of the land or deprive the proprietor of his rights on redemption (*Keane, S. M. and Oppenheim, J.M.*) TIRBENI NAIK *v.* DHAJJU. **15 R.D. 406.**

———Sir *land—Mortgage of before* 1901 *with possession—If loses character of* sir*—Occupancy rights—If can be acquired.*

Sir land mortgaged with possession does not lose its character of *sir*. The right lies dormant and revives when the mortgage is redeemed. The tenant who holds such land cannot, therefore, become an occupancy tenant. (*Knox, J.M.*) CHARITRA KOERI *v.* JAGESHAR. **1935 R.D. 564.**

———Sir *land—Mortgage—Nature of land if altered.*

Certain *sir* land was mortgaged along with other lands but there was no change in the *sir* entry. The mortgage was subsequently redeemed but the tenants claimed to be tenants in-chief on the ground that the land had ceased to be *sir*.

Held (*Oppenheim, J.M.* dissenting) that the tenant's plea was unsustainable and that the land continued to be *sir*. (*Keane, S.M. and Oppenheim, J. M.*) SUKKHU NONIA *v.* RAM NATH DUBE. **12 L.R.401 (Rev.)= 16 R.D. 45.**

———Sir *land—Mortgage—Redemption— Claim of exproprietary rights—Time limit.*

Where a co sharer, not in actual or constructive possession, mortgages his *sir* with possession and the mortgagee admits a sub tenant, the mortgagor should after redemption of the mortgage claim exproprietary rights within six months; otherwise the actual cultivator will become the tenant-in-chief. (*Drake Brockman, J.M.*) BISHAMBHAR UPADHYA *v.* HAMID KHAN. **18 R.D. 100=15 L.R. 146 (Rev.).**

———Sir *land—Mortgage—Redemption of—Revival of rights.*

Sir rights will revive on the redemption of a mortgage. A mistaken entry at the settlement will not affect such rights. (*Keane, S. M. and Oppenheim, J. M.*) DHARAM DUTT *v.* LACHHMAN AHIR. **15 R.D. 416= 12 L.R. 145 (Rev.).**

———Sir *land—Mortgagee of—Transfer of proprietary right—Right of mortgagee over occupancy right.*

A mortgagee who is entitled to a decree against the mortgagor's rights in the *Sir* lands is entitled to claim a decree against what is left of them, the occupancy rights, though the other part, the proprietary right, may have already passed to the same mortgagee or to any other person. (*Macnair, J. C.*) RAMKUAR BAI *v.* CHHITIA BAI. **28 N.L R 166=138 I.C. 184=15 N.L.J. 8=I.R. 1932 Nag. 75=A.I.R. 1933 Nag. 81.**

———*Sir land—Permanent lease before sale of proprietary rights—Rights of tenants, if prejudiced.*

Where a permanent lease of the *sir* lands was executed three days before the proprietary rights were sold to the mother of the lessee, so that the transferee became

LANDLORD AND TENANT—Sir land.

the permanent lessee of the *sir* lands and owner of the proprietary rights.

Held, that the object of the lease was to preserve to the vendees of the proprietary rights, all the advantages of *sir* and that such a fictitious arrangement could not affect the rights of the tenants in occupation of the land. (*Drake Brockman, S. M.*) RAM PRASAD LAL *v.* PHULAMAN BHAR. **14 L.R. 605 (Rev.).**

——Sir *land—Perpetual lease—Effect.*

The execution of a perpetual lease of *sir* land does not destroy the status of *sir*. In such cases the lessor cannot resile from the contract and the lessees are entitled to the benefit thereof during their lifetime. (*Smith, J.M.*) LAL JOGENDRA BUX SINGH *v.* BIJOY BAHADUR SINGH. **14 R.D. 559=7 O.W.N. 969.**

——Sir *land—Planting of grove—Effect of.*

The planting of a grove in the *sir* land does not destroy its character as *sir* (*Drake Brockman, S.M. and Holmes, J.M.*) MURARI LAL *v.* AMARNATH SEIH. **14 L.R. 806 (Rev.).**

——Sir *land—Proof—Entry in papers for* 50 *years.*

Where the entry of *sir* in the name of a particular person and his heirs has gone on for the best part of 50 years and the defendants took the land as sub-tenants of the plaintiff's predecessors,

Held, that it was not open to the defendant to contest the entry regarding the *sir* character of the land. (*Keane, J.M.*) SADHO SARAN MISRA *v.* GHAUSA RAM. **15 R.D. 220.**

——Sir *land—Revenue—Mode of assessment.*

Revenue of *sir* land in proprietary cultivation should be assessed at circle rates after reduction of 25 per cent. for proprietary cultivation and should not be valued at assumption rates. (*Smith, S.M.*) AINUL HUSAIN *v.* ABID HUSAIN. **15 R.D. 648.**

——Sir *land—Sale of—Finding of exproprietary rights—Third appeal.*

Certain lands, occupied by guava groves, were recorded in 1333 Fasli as *khudkasht* and were in the possession of the owner in 1334 Fasli. They were therefore technically *sir*. They were sold in 1931 and the three lower Courts held that the owner was entitled to claim exproprietary rights.

Held, that the decision was correct. (*Drake Brockman, S.M.*) BASANTI *v.* SURAJ DIN. **14 L.R. 684 (Rev.).**

——Sir *land—Sale of proprietary rights and waiver of exproprietary rights by one co-sharer—Death of vendee—Vendor becoming entitled to it by inheritance—Ejectment of tenant.*

Two co-sharers owned a plot of *sir* land in common. One of them sold his proprietary right to the other and waived his exproprietary rights therein. In proceedings under S. 36 of the U. P. Land Revenue Act, this plot was, however, not portioned off as *sir*. On the death of the vendee, his interest passed to the vendor by inheritance and the vendor thereupon sued for the ejectment of the tenant in occupation.

Held, that the plot remained *sir* and that the tenant can be ejected. (*Oppenheim, S.M. and Drake Brockman, J.M.*) SWARATH RAI *v.* GANGA BISHUN. **17 R.D. 579=14 L.R. 504 (Rev.).**

——Sir *land—Share of one co sharer sold to another—Partition amongst others—Mode of.*

Upon the sale of his share in *sir* land by one co-sharer to another co-sharer without any claim to exproprietary rights, the whole *sir* should in any subsequent partition amongst the other co-sharers be divided according to the co sharer's interest in the *khewat*. (*Oppenheim, S.M. and Walton, J.M.*) MAHOMED

LANDLORD AND TENANT—Status of tenant.

ZAMIRUL HASAN KHAN *v.* MAHOMED MASIHUL ZAMAN KHAN. **14 L.R. 403 (Rev.)=17 R.D. 497.**

——Sir *land—Sub tenancy of area—Mortgage of share—Effect.*

Where the sub-tenants of a major portion of a *sir* plot took an extra portion into cultivation under a mortgage executed by one of the co sharers.

Held, that the sub-tenancy related to the entire area held. (*Drake Brockman, S.M. and Holmes, J.M.*) DIP NARAIN SINGH *v.* CHANDI SHUKLA. **18 R.D. 119=15 L.R. 166 (Rev.).**

——Sir *land—Suit for ejectment from some of the plots—Second suit for ejectment from remaining plots—Maintainability.*

The principle underlying the rule that when once a suit for ejectment has been dismissed for default the plaintiff has no right to sue again on the same cause of action is based on the ground that where the withdrawal of a suit or its dismissal for default has resulted in the determination of the status of a tenant, he should not be again embarrassed by subsequent litigation. The same considerations do not, however, exist in the case of tenants and sub-tenants in *sir* land. If such a tenant was to be allowed to hold for ever because his landholder withdrew a previous suit or allowed it to go by default, the result would be that he would acquire occupancy or statutory rights, which is directly prohibited by the Tenancy Act. So the fact that the plaintiffs who owned a very large holding sued in the previous case for ejectment of the defendants from some of the plots is no bar to their second suit for ejecting the defendants from the other plots omitted in the previous suit. (*Oppenheim, S. M. and Walton, J.M.*) DEBI PRASAD *v.* NAZIR KHAN. **14 L.R. 94 (Rev.)=17 R.D. 114.**

——Sir *land—Transfer by one co-sharer—Character of land held by transferee.*

Where a co-sharer sells a portion of his share including a proportionate share of jointly held *sir* and the transferee comes into possession of certain *sir* lands which represent the proportionate area of *sir* which may be deemed to have been transferred along with the share transferred, he cultivates by licence of the other *sir* holders and does not hold the land independently as his *khudkasht*. (*Drake Brockman, S. M.*) UDIT RAI *v.* TAHLU RAI. **14 L.R. 888 (Rev.).**

——Sir *land—Valuation—Partition case—Statutory rates as correct basis.*

In a partition case the fairest method of valuing *sir*, which is transferred and becomes the subject of exproprietary rights, is at statutory rates. It would be unfair to the proprietor to value it at *shikmi* or competition rates. On the other hand, it would be unfair to the other co-sharers to value it at exproprietary rates for those rates represent its value on transfer only and not its value to the proprietor. (*Oakden, S.M. and Oppenheim, J.M.*) BANKEY SARAN *v.* JAWALA. **15 R.D. 237=12 L.R. 125 (Rev.).**

——Sir *land—Wrong entry by patwari—Character of land if changed thereby.*

A wrong entry by a patwari showing *sir* land as ordinary land cannot change the character of the land. (*Oppenheim, S.M. and Walton, J.M.*) KULDIP SINGH *v.* GANGA BARAI. **14 L.R. 325 (Rev.)=17 R. D. 444.**

Status of tenant.

——*Status of tenant—Settlement made by receiver of attached land under Cr. P. Code, S.* 146*—Person holding under such settlement does not acquire any under-raiyati rights as against person rightfully entitled to possession.*

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A settlement made by receiver of attached land under Cr. P. Code, S. 146, does not give the person holding under such settlement any rights of an under-raiyat. The utmost that he can ask for is a declaration that he is entitled to retain possession up to the end of the agricultural year in which the decree is pronounced by the Civil Court, but beyond that he can go no further and he is not even entitled to a notice to quit before he can be ejected. His possession is merely that of a licensee or a farmer and he is bound to give up possession as soon as the attachment is withdrawn as an effect of the decree of the competent Court. (*Kulwant Sahay and Macpherson, JJ.*) JURWAN SINGH *v.* RAM SAREKH. **12 Pat. 261=149 I.C. 561=6 R.P. 620 (2)=14 Pat.L.T. 113=A.I.R. 1933 Pat. 224.**

———*Status of tenant—Tenant holding after expiry of lease—Status as trespasser, if constituted.*

A tenant does not automatically become a trespasser on the day when the period of his lease expires. (*Dalal, J.*) KHADERU CHAMAR *v.* SRI NATH PANDE. **I.R. 1931 All. 185=129 I.C 553=12 L.R. 35 (Rev.)=15 R.D. 162=A.I.R. 1931 All. 198.**

———*Status of tenant—Unregistered lease for twelve years—Need for registration—Lease being dodge to deprive tenant's rights—Effect.*

Where an unregistered lease for 12 years was executed by the landholder just before his property was put in the management of the Court of Wards and it appeared that it is a mere dodge to lower the status of the actual cultivators who were tenants in chief in respect of a portion of the holding,

Held, that the lease being unregistered was inadmissible in evidence and the status of the tenants was not modified thereby. (*Oakden, S.M. and Oppenheim, J.M.*) SHER SINGH *v.* BANWARI SINGH. **15 R.D. 106=12 L.R. 14 (Rev.).**

———Status of tenant—Whether a raiyat or tenure-holder—Determination of. *See* CHOTA NAGPUR TENANCY ACT (1908), S. 5. **A I.R. 1935 Pat. 63.**

Statutory tenancy.

———*Statutory tenancy—Inference as to permission.*

On a question as to whether the status of a person was that of a statutory tenant, the Court can take into consideration whether it was likely that he could have been allowed to occupy the land without permission. (*Oppenheim, J.M.*) JAGESHAR SHUKLA *v.* GHURPATI SHUKLA. **12 L.R. 400 (Rev.)=16 R D. 43.**

———Statutory tenancy—Person coming in as heir—If can claim to be statutory tenant. *See* OUDH RENT ACT (1886), S. 3 (18). **18 R.D. 715.**

———*Statutory tenancy—Widow—Third person associated in management—Rights of widow and third person as statutory tenants.*

A widow being unable to carry on the cultivation, a third person discharged the arrears and was accepted as occupancy tenant along with the widow.

Held, that the widow and the third person were co-tenants and should be recognized as statutory tenants. (*Keane, S.M. and Oppenheim, J.M.*) LARAITI *v.* MAN BHAWAN SINGH. **15 R.D. 659.**

Sub tenancy.

See also EJECTMENT, ESTOPPEL AND SIR LAND *supra.*

———*Sub tenancy—Arrangement between tenant and sub-tenant for payment of rent—Validity.*

There is nothing in law which would prohibit a tenant in-chief arranging with his sub-tenant to pay the rent due from the tenant-in-chief direct to the landlord and deducting the amount so paid from the rent due to the tenant-in-chief. (*Oppenheim, J. M.*) KHUSHALO *v.* ITWARI. **16 R.D. 388.**

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———*Sub-tenancy—Contract of tenancy—Contract by sub tenant with tenant to pay latter's rent to superior landlord—Landlord's right to sue sub tenant.*

A landlord is entitled to enforce a contract made by a sub-tenant to the original tenant under which the sub-tenant undertook to pay the tenant's rent to the landlord; and when all the parties are before the Court, neither common sense nor convenience, equity nor good conscience would require that the parties should be forced into further and unnecessary litigation. (*Lort Williams and M. C. Ghose, JJ.*) KHIROD BEHARI DUTT *v.* MAN GOVINDA PANDA. **61 Cal 841=152 I.C. 351=7 R.C. 263=38 C.W.N. 682=A.I.R. 1934 Cal. 682.**

———*Sub-tenancy — Illegal subletting — Recurring cause of action.*

When a sub-tenant without a written lease is allowed to continue to cultivate land for second year it amounts to fresh subletting and is consequently illegal. In such a case each subletting gives a fresh cause of action. (*Keane, S M. and Oppenheim, J. M.*) TULLA RAM *v.* BAHADUR SINGH. **16 R.D. 125=13 L R. 127 (Rev.).**

———*Sub-tenancy—Possession for several years—Presumption of renewal—Applicability of—Possession for one year.*

Where the person in possession of a holding is proved to have been a sub-tenant from year to year for a number of years, a presumption may arise that the sub-tenancy was renewed in subsequent years; but there is no presumption that a sub-tenancy for a single year continued after that year had expired. (*Subhedar, A. J. C.*) GULABCHAND *v.* HARBHAGAT. **I.R. 1932 Nag. 44=136 I.C. 884=14 Nag.L.J. 171=A.I.R. 1932 Nag. 36.**

———*Sub tenancy—Sub-tenant—Denial of title of tenant—Changed entry in records—Starting point of limitation.*

Where a person is recorded as sub-tenant up to a certain date and thereafter as 'quabiz' the changed entry indicates a denial of the person's right as tenant-in-chief and in the absence of definite evidence should be taken as marking of the starting point of limitation. (*Smith, J.M.*) KHALAWAN *v.* SAT RAM. **15 R.D. 143.**

———*Sub tenancy—Sub-tenant — Ejectment suit by recorded tenant—Plea that plaintiff is not tenant—Maintainability.*

In a suit by a recorded tenant to eject an alleged sub-tenant, it is open to the latter to plead in defence that the recorded tenant is not a tenant at all. (*Oppenheim, S.M. and Drake Brockman, J. M.*) BINDHACHAL SAHI *v.* SURAJDIN. **1935 R.D. 49.**

Succession to tenancy.

———*Succession to tenancy—Hindu joint family—Members taking as joint tenants.*

Where the inheritance to occupancy right is governed by S. 9 of the U. P. Rent Act of 1881, the ordinary Hindu Law would apply. If the several branches of the family are separate, the inheritance would go to the nearest relative. Where however the different branches are joint, the rights would enure for the whole family and the members will continue to be joint tenants of the grove land so inherited. (*Oppenheim, J.M.*) NAND KISHORE SINGH *v.* LAL BAHADUR SINGH. **15 R.D. 611=12 L.R. 249 (Rev.).**

———*Succession to tenancy—Mode of devolution—Effect of change in the interpretation of law.*

The principle of allowing the method of devolution to be changed owing to a change in the interpretation of

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law is to be deprecated. Thus if a holding devolves from mahant to chela for many years, an attempt to secure succession by an adoption on the ground of a new interpretation of law, cannot be permitted. (*Oppenheim, S. M.*) MAHESH BHARTI *v.* PERSHADI LAL. **14 L. R. 438 (Rev.) = 17 R.D. 582.**

Surrender.

See also EJECTMENT *supra.*

———*Surrender—Essentials.*

A surrender is not effected merely by the execution of a deed unless the deed was executed with a complete intention to surrender. The making over of the deed to the landlord is necessary, and if the deed is made over with a promise that the landlord would settle the land with a particular person, the surrender does not take effect till the settlement is made with that person. It is a provisional surrender dependent upon the settlement of the land with that person. (*Muhammad Noor, J.*) JAGATBANDHU DUTTA *v.* SHAYAM CHAND BHOLE. **6 I.R. (Pat.) 137 = 144 I.C. 946 = A.I.R. 1933 Pat. 446.**

———*Surrender—Proof.*

The execution of *istifa* and the payment of money to the persons making the surrender can be taken to be sufficient evidence of actual surrender. In such a case the fact that the surrender was not at the end of the agricultural year is immaterial, if the same is otherwise acted on by the parties. (*Keane, S. M.*) NARAIN *v.* HAR PIARI. **15 R.D. 524 = 12 L.R. 266 (Rev.).**

———*Surrender—Validity of—Consideration—Necessity for.*

Though a surrender is a transfer in some sense, inasmuch as by it the limited interest which a tenant has in a particular land is transferred from the tenant to the landlord and the tenant's right is brought to an end, unlike a transfer, it does not require consideration, in order to be effective. (*Mohamed Noor and Agarwala, JJ.*) SHEOPRASAD SAHU *v.* DEOCHARAN SAHU. **13 Pat. 390 = 151 I.C. 188 = 7 R P. 74 = A.I.R. 1934 Pat. 212.**

———*Surrender—Validity of—Raiyat having minor sons.*

A raiyat has a right unless otherwise precluded to surrender his holding if he chooses to do so, and in the absence of any fraud or collusion this surrender is perfectly valid. There is no law under which a raiyat, who has minor sons, is debarred from giving up cultivation of his holding if he is not able to cultivate. Unless it can be shown that the surrender by the raiyat was a dishonest transaction entered into with the intention of depriving his sons of their interest in the holdings, the surrender should be upheld, especially when for years afterwards nothing seems to have been done to repudiate it. A landlord cannot refuse to accept a surrender on the ground that the tenant as minor sons. (Case-law referred.) (*Mohamed Noor and Agarwala, JJ.*) SHEOPRASAD SAHU *v.* DEOCHARAN SAHU. **13 Pat. 390 = 151 I.C. 188 = 7 R.P. 74 = A.I.R. 1934 Pat. 212.**

———*Surrender—Validity of—Undefined portion of holding surrendered by some tenants.*

The surrender of an unascertained undefined portion of a holding by some of the tenants in favour of the landlord is valid and binding on the parties to it. 22 N. L.R. 27, Foll. (*Macnair, O.J.C.*) RINDU *v.* VITHOBA. **27 N.L R. 116 = I.R. 1931 Nag. 158 = 134 I C. 286 = A.I.R. 1931 Nag. 159.**

———*Surrender—Widow—Validity of.*

Obiter.—A widow though holding a limited interest represents for certain purposes her husband's estate and she is not debarred from surrendering a holding if she cannot manage it. If a widow in the usual course of management settles a land with a raiyat, the raiyat acquires occupancy right in that land. (*Mohamed Noor and Agarwala, JJ.*) SHEOPRASAD SAHU *v.* DEOCHARAN SAHU. **13 Pat. 390 = 151 I.C. 188 = 7 R. P. 74 = A.I.R. 1934 Pat. 212.**

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———*Surrender—Wife left in possession by tenant—Right of wife to surrender holding to proprietor.*

Where a statutory tenant leaves the place and places his wife in charge of the land, it is competent for the wife to surrender the holding to the proprietor and the interest of the tenant thereupon ceases. (*Keane, S. M. and Oppenheim, J.M.*) GAJADHAR MISIR *v.* BABU RAM. **15 R.D. 288 = 12 L R. 85 (Rev.).**

Termination of tenancy.

———*Termination of tenancy — Joint landlords—Lease by—Sale by tenant to one landlord—Effect—Right of other to possession.*

Two proprietors who had a share in a separate account in a certain taluk leased the land in question to tenants who in turn sold it later on to one of the lessors.

Held, that as a result of the sale the tenancy ceased to exist and that both the landlords were entitled to hold the land in khas possession. (*Henderson, J.*) NALINI KUMAR ROY *v.* KAMINI KUMAR ROY. **154 I.C. 712 = 7 R.C. 518 = 60 C.L.J. 34 = A.I.R. 1935 Cal. 93.**

———*Termination of tenancy—Repudiation of landlord's title by tenants—Effect of.*

When a tenant repudiates the title of the landlord to the knowledge of the latter, unless the landlord accepts such repudiation, his position as landlord does not terminate. (*Dalip Singh, J.*) MT. UMRI *v.* KALU. **6 I.R. (Lah.) 98 (2) = 145 I.C. 343 = 34 P.L.R. 841 = A.I.R. 1933 Lah. 491.**

———*Termination of tenancy—Tenancy from year to year—Notice to quit—Necessity.*

A tenancy to continue from year to year is a continuing tenancy so long as the parties are satisfied; and though terminable at the option of either party at the end of any year, it is not *ipso facto* terminated at the end of every year. A reasonable notice to quit is necessary in such a case; and if it is one according to the Bengali year a six months' notice expiring with the end of that year and calculated according to the Bengal Calendar would be necessary. (*Mukerji and M. C. Ghose, JJ.*) JAMIRUDDIN SAODAGAR *v.* HAZI MAL GANI SAODAGAR. **62 C.L.J. 201.**

Thekadar.

———*Thekadar*—Right to grant leases—Lessee from *thekadar* at rent below economic rate—If trespasser—Ejectment. *See* AGRA TENANEY ACT (1926), S. 44. **1935 R.D. 394.**

———Thekadar — *Settlement decree—Provision for increased jama—Enforcement by taluqdar.*

A settlement decree provided as follows: "The claim of the plaintiffs to be under-proprietors is dismissed. A decree is passed for "daswandh" and for the theka of the village. As regards this theka the taluqdar is to have power to fix a new jama or to assess or amend the jama in accordance with the practice prevalent in Shahi times. In any year in which the talukdar is himself in charge of the property or in which the plaintiffs refuse the theka, the plaintiff will be entitled to receive daswandh from the assets of the village."

Held, that it was the intention of the decree that the tenants should be in occupation so long as they paid jama in accordance with the practice prevalent in the Shahi days and that it was not intended that the land could be resumed at the option of the taluqdar or that the *thekadars* would be liable to have their jama enhanced to an exorbitant extent at the will of the taluqdar and

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would have to relinquish their land if they were unable to pay the amount asked. He can sue for ejectment only under S. 53 (3) read with S. 71, Oudh Rent Act for non payment of rent. (*Smith, S.M. and Oppenheim, J.M.*) LAKHPAT *v.* JAGDAMBA DEVI. **15 R.D. 593 =12 L.R. 299 (Rev.).**

———Thekadar—*Supercession—Procedure.*

It is not permissible for a landlord to superimpose a tenant on an existing tenant He must first get rid of the old tenant. The same principle applies to *thekadars.* It is necessary for the landholder to get rid of one *thekadar* before giving the land to another *thekadar.* (*Oppenheim, S. M. and Drake Brockman, J. M.*) MAHOMED AMIR ALI KHAN *v.* ASA RAM. **18 R.D. 341 (2)=15 L.R. 449 (Rev.).**

Transfer of tenancy.

———*Transfer of tenancy—Death of transferor without issue—Right of transferee.*

If a tenant after having made a transfer which is valid as against himself and as against the landlord were voluntarily to surrender his tenancy, the law will presume that the tenancy has a continuance in order to work out the rights created by such a valid transfer. The principle has however no application where the tenant right comes to an end by operation of law, that is when the tenant dies without heirs entitled to succeed under the law. The determination of the tenancy in such cases enlarges the rights of the landlord and gives him a right to immediate possession leading to the forfeiture of the rights of the transferee in the land. (*Subhedar, A.J.C.*) BALDEOPRASAD *v.* PREMNARAIN. **28 N.L.R. 93=I.R. 1932 Nag. 110=139 I.C. 369= A.I.R. 1932 Nag. 107.**

———*Transfer of tenancy—Operation of—Duration—Custom varying the terms of the lease—Permissibility.*

In the case of a lease for a long term of years, as for example a lease in favour of a *miadi sarbarakar,* for a fixed period, the lessee has security of tenure and may with the consent of the lessor alienate his interest but his interest and that of his transferees is none the less temporary and for the period of the lease only and no amount of transference by contract, succession or inheritance during the period of the lease can create a custom to vary the terms of the lease and override the stipulation for a fixed period. A *miadi sarbarakar* has a temporary tenure and for the period of settlement only. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) RANI HARSAMUKHI DASI *v.* PARSURAM BIDHAR RAI DALBEHERA. **11 Pat. 757 =141 I.C. 340=I.R. 1933 Pat. 63=14 Pat.L.T. 743=A.I.R. 1933 Pat. 74.**

———*Transfer of tenancy—Relinquishment of agricultural holding—Absence of delivery of possession.*

The interest of a tenant in an agricultural holding is no more and no less than a possessory interest and if possession is not delivered, the transfer cannot be said to be a transfer of that interest. (*Hasan, C.J. and Kisch, J.*) AMAR NATH SINGH *v.* HAR PRASAD SINGH. **7 Luck. 425=I.R. 1932 Oudh 125=136 I. C. 333=8 O.W.N. 1359=15 R.D. 785=13 L.R. 20 (Rev.)=A.I.R. 1932 Oudh 79.**

———*Transfer of tenancy—Tenancy prior to the T. P Act.*

A tenancy which came into existence before the Transfer of Property Act was passed, whether it was of homestead or of agricultural lands, is not transferable. Only two exceptions have been engrafted on the rule by the case-law on the subject: (1) where the lease was for building and residential purposes or where, as a matter

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of fact, *pucca* buildings were erected without objection by the landlord, and (2) where the transferability has been proved by custom. (Case-law discussed.) (*Suhrawardy and Graham, JJ.*) KAMALA MAYEE DASI *v.*. NIBARAN CHANDRA PRAMANIK. **I.R. 1932 Cal. 388 =138 I C. 72=36 C.W.N. 149=A.I.R. 1932 Cal. 431.**

Trees.

See also ABADI AND RIGHTS OF TENANTS, *supra.*

———*Trees—Right to—Landlord to cut and remove—Penal Code, S.* 379.

So long as the trees stand, a *raiyat* is entitled to use and enjoyment of them, and the landlord is not entitled to disturb that enjoyment. Where therefore persons cut and remove such trees on behalf of the landlord, against the consent of the raiyat, they cannot be said to have any *bona fide* claim to the trees, and are liable to conviction of theft under S. 379, I. P. Code. (*Rowland, J.*) BALDEO NARAYAN CHAUDHURY *v.* EMPEROR. **160 I,C. 443=8 R.P. 364=37 Cr.L.J. 309 (1)=16 Pat. L.T. 891=1936 Cr.C. 68=A.I.R. 1936 Pat. 38.**

———*Trees—Right to produce of.*

Under the ordinary law the ownership in trees standing on tenancy lands is always with the landlord, but the tenant is entitled to the natural annual produce of such trees. This is the general law, though it may be controlled or varied by contract or custom. (*Pollock, A.J.C.*) SINGHAI KARANJELAL *v.* SINGHAI KHUSHALCHAND & CO. **160 I.C. 990=8 R.N. 202=18 N.L.J. 172.**

———*Trees—Right to timber and fruits.*

It is a settled law that the timber of the trees standing on the holdings of tenants, whether occupancy or ex proprietary tenants, belongs to the Zamindar. As regards the fruits it is also an equally settled law that a tenant has a right, in the absence of a contract to the contrary, to appropriate the fruits growing in his holding, whether they were planted by him or not. If there is any contract to the contrary reserving the right to appropriate the fruits of the trees for the Zamindar, it is for the Zamindar to set up and prove that contract. When a land is let out to a tenant by a Zamindar it is to be presumed that it is let out with trees. (*Ganga Nath, J.*) JAGAI KURMI *v.* HARAKH RAJ SINGH. **155 I.C. 116=7 R.A. 897= 1935 R.D. 179=1935 A. W.R. 473.**

Trespasser.

See also STATUS OF TENANT, *supra.*

———*Trespasser—Suit for damages for use and occupation against trespasser—Maintainability.*

The action for use and occupation is founded in the English Common law upon a permission, expressed or implied, giving rise to a presumption that a reasonable compensation for the use of the premises has been agreed upon between the parties, so that the action is not, according to English authorities, maintainable against a wilful trespasser who sets up a tenancy from a third person claiming adversely to the plaintiff. But in India, actions of this kind against trespassers are recognised. *See* 17 Cal. 541; 22 Mad. 149, A.I.R. 1925 Lah. 196; A.I.R. 1928 Nag. 118. The question, however, was left open. (*Doraiswami Iyer, C.J.*) HUSAIN BI *v.* ABDUL RAHIMAN SAHEB. **8 Mys.L.J. 443.**

———Trespasser—Suit by tenant to eject—Maintainability—Burden of proof. *See* BURDEN OF PROOF—SUIT BY TENANT AGAINST TRESPASSER. **60 C.L.J. 225.**

Under-proprietary rights.

See also EJECTMENT AND MERGER, *supra.*

LANDLORD AND TENANT—Under proprietary rights.

———*Under proprietary rights—Claims to—Cognizability by Civil Courts.*

Claims for sub settlement or for under-proprietary rights can be entertained and decided by the Civil Courts of the province of Oudh regardless of the fact that such claims were not recognized by the Settlement Courts. 4 O.W.N. 15, Ref. (*Bisheshwar Nath, J.*) JAMWANTI KUNWAR *v.* CHETAN DAS. **8 Luck. 129 = 141 I.C 706 = I R. 1933 Oudh 75 = 9 O.W.N. 745 = 16 R.D. 499 = 13 L.R. 328 (Rev.) = A.I.R. 1932 Oudh 290.**

———*Under proprietary rights—Claim to—Restoration of proprietary rights following Lord Canning's Proclamation—Defendants full proprietors prior to.*

The only effect of the general restoration of proprietary rights following Lord Canning's Proclamation of 1859 is the restoration of the rights of the subordinate proprietors which had been held against the proprietors *before* the confiscation. Even before the confiscation, the defendants were admittedly the full proprietors. So no question of restoration of under-proprietary rights arises. 4 O.W.N. 15 and 7 O.W.N. 703, Ref. (*Bisheshwar Nath, J.*) JAMWANTI KUNWAR *v* CHETAN DAS. **8 Luck. 129 = 141 I.C 706 = I.R. 1933 Oudh 75 = 9 O.W.N. 745 = 16 R.D. 499 = 13 L.R. 328 (Rev.) = A.I.R. 1932 Oudh 290.**

Urban area.

———*Urban area—Old Cawnpore.*

Old Cawnpore has for many years been within the Municipal area of Cawnpore and is now an urban area and not agricultural land. (*Young, J.*) SUBHADRA KUAR *v.* RAM SEWAK. **149 I.C. 807 = 6 R.A. 985 = 17 R.D. 1085 = 14 L.R. 869 (Rev.) = A I R. 1934 All. 288.**

———*Urban area—Sites of factories and houses—Nature of possession of occupier—Presumption.*

Although in an agricultural village occupiers of houses are presumed to be *riyas* or licensees, unless the contrary is proved, the position is materially different where the land in dispute lies in an urban area which cannot be characterised as an agricultural village. Where the lands in dispute, which were once the sites of factories and houses, lie in a '*qasba*' or town and there is no evidence of the origin of the possession of the original owner, it cannot be presumed that he was let in possession as a licensee or that he had otherwise permissive possession on behalf of the landlord. (*Niamatullah, J.*) AMJAD ALI *v.* GHAFOOR MAHOMED KHAN. **152 I. C. 25 = 7 R.A. 315 = 1934 A.L.J. 1247 = 18 R D. 441 = 15 L R. 552 (Rev.) = 4 A.W.R. 346 = A.I R. 1935 All. 76.**

Utbandi tenancy.

———*Utbandi tenancy—Incidents.*

The incidents of *utbandi* holdings vary under the influence of custom. But the outstanding general conception of all such holdings is that the land which is specified remains the *khas khamar* land of the landlord and the raiyat is allowed to occupy it for a season or for a year and the raiyat pays rent at a given rate for so much of it as he cultivates during that term. The landlord is not bound to give the land to the same raiyat nor is the raiyat bound to take it in the next season or the next year. In some places there is a custom under which the raiyat has a sort of lien which entitles him to occupy the lands for three years if he elects to do so; and there is an implied agreement that if without fresh rates being fixed, the raiyat occupies the lands for the next season or year, he would pay at the same rate also for the lands he may cultivate during the period of such occupation. *Utbandi* raiyat held not entitled to notice under S. 106,

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T. P. Act. (*Mukerji, J.*) SURENDRA NATH SARKAR *v.* BAIDYA NATH MUKERJI. **60 Cal. 681 = 6 I.R. (Cal.) 177 = 146 I.C. 55 = 37 C.W.N. 335 = A.I.R. 1933 Cal. 609.**

Warapath land.

———*Warapath land—Reverter to waram—Exchange of fresh patta, if necessary.*

A succeeding land-holder can revert to waram rates in a warapath village even though during the interval pattas have provided for cash rent. (*Waller and Krishnan Pandalai, JJ.*) FOULKES *v.* KANDASWAMY PILLAI **55 Mad. 994 = 142 I.C. 99 = I R. 1933 Mad. 191 = 37 L.W. 49 = 1932 M.W.N. 767 = A.I.R. 1932 Mad. 739 = 63 M.L.J. 949.**

Zamindar.

See also ABADI, ABANDONMENT ADMISSION TO TENANCY AND CUSTOMARY DUES, *supra.*

Miscellaneous.

———Miscellaneous—*Pradhan* tenure—*Hat* held by *Pradhan*—Suit by zamindar for injunction to restrain—Zamindar's right to injunction. *See* INJUNCTION—HAT. **62 C.L.J. 123.**

———*Miscellaneous—Temporary owner—Acts when binding on ultimate owner.*

It is as impossible to lay down that all the acts of a temporary owner are binding on the ultimate owner as that none of them are binding. Act done honestly in the ordinary course of business would be binding, but when a definite allegation of collusion is made an enquiry is at any rate necessary. (*Oakden, S. M. and Smith, J.M.*) JAGANNATH SINGH *v.* DWARKA PRASAD. **14 R.D. 642.**

LAND TENURE—*Agraharam—Liability for jodi dues.*

Agraharam are ordinarily held on a single and indivisible tenure and agraharamdars are jointly and severally liable to the Zemindar for the jodi due on the entire agraharam in the absence of any contract to which the zemindar is a party apportioning the jodi on the various sub-divisions of the agraharam made by the agraharamdars *inter se.* 11 L.W. 523, Foll.; 56 M L.J. 273 and 54 M.L.J 30, Dist. Where a joint and several decree was passed against the agraharamdars with respect to the payment of the amount of jodi decreed against them and it is not pleaded there was any arrangement between them and the zamindar, and consented to by him which entitles them to say that the jodi amount should be apportioned, and they were not alienees of separate portions of the agraharam,

Held, the liability of each of them cannot be limited only to the jodi proportionately payable on the lands in his possession. (*Madhavan Nair, J.*) SAMPATH AYYANGAR *v.* RAJAH OF VENKATAGIRI. **I.R. 1931 Mad. 348 = 129 I.C. 828 = 33 L.W. 284 = A.I.R. 1931 Mad. 51.**

———Anubhavam tenure—Test—Grantee paying Government assessment and definite quantity of produce to grantor but taking all rest to himself—Redeemability. *See* MALABAR LAW. **A.I.R. 1935 Mad. 682.**

———*Cantonment—Cantonment lands—Proof of title to.*

Where the respondent claimed certain lands comprised in a Cantonment as his own and claimed compensation therefor under the Land Acquisition Act, it is incumbent on him to prove his title to it affiramatively. Where the evidence adduced by him only showed that he was in possession of the building in those lands from 1900 or even earlier, and that no government assessment was ever paid by him not apparently had the land ever been assessed but there was no entry in the

land registers as private property but on the other hand an entry in the mouzawari register showed the land as a *mehal* "Khas Sircar," it was held that the respondent had failed to make out his title to the lands and that it was not in any way inconsistent with a mere Cantonment tenure, carrying with it no property in the land. He was therefore entitled to compensation only for the house built by him and not for the land. (*Sir George Lowndes.*) THE SECRETARY, CANTONMENT COMMITTEE, BARRACKPORE *v.* SATISH CHANDRA SEN. **57 I.A. 339=58 Cal. 858=33 L.W. 41=53 C.L.J. 1=33 Bom.L.R. 175=130 I.C. 616=1931 A L J. 249=I.R. 1931 P C. 72=35 C.W.N. 173=34 P.L.R. 455=1931 M W.N. 41=A.I.R. 1931 P.C. 1=60 M.L.J. 142 (P.C.).**

———*Cantonment—Cantonment tenure—Origin and nature.*

Land comprised in the various Cantonments in different parts of India was originally acquired by Government for military purposes, but private individuals were allowed to erect houses upon various plots. Government appear to have encouraged this form of development as providing a simple solution of the varying demand for officers' quarters, and to have recognized, subject to certain restrictions, rights of private ownership in the buildings, while at the same time retaining in themselves the property in the soil. This is sometimes referred to as "military or cantonment tenure." (*Sir George Lowndes.*) THE SECRETARY, CANTONMENT COMMITTEE, BARRACKPORE *v.* SATISH CHANDRA SEN. **57 I.A. 339=58 Cal. 858=33 L W. 41=53 C L J 1=33 Bom L.R. 175=130 I.C. 616=1931 A.L J. 249=I.R. 1931 P.C. 72=35 C W.N. 173=34 P.L.R. 455=1931 M.W.N. 41=A.I.R. 1931 P.C. 1=60 M.L.J. 142 (P.C.).**

———Chaukidari chakran lands included in patni settlement—Resumption and transfer to Zamindar—Zamindar entitled to rent in addition to patni rent. *See* BENGAL CHAUKIDARI CHAKRAMS ACT. **35 C.W N. 597.**

———Chandua tenure—Nature and incidents of. *See* ORISSA TANANCY ACT, SS. 4 AND 236. **16 Pat. L. T. 858.**

———*Chota Nagpur*—Talabi brahmatter—*Fixed rent for over hundred years—Slight variation subsequently—Effect of—Presumption of fixed jama*

Where the rent receipts relating to a certain *talabi brahmatter* land in a certain mauza in the Birbhum District in Chota Nagpur, successively for over a hundred years show that a particular fixed sum has been the rent charged for the tenure, a mere change of one pie in the Record of Rights prepared after those hundred years will not affect the tenant's rights to a fixed jama. Such a mere unexplained variation is insufficient to destroy the tenant's right to a fixed jama. The presumption in the above circumstances is that the rent is a fixed one. 1 W.R. 230 and 4 W.R. (Act 10 Rulings) 33, Ref. (*Macpherson and Dhavle, JJ.*) RAJENDRA NARAYANA SINGH DEO *v.* BIHARI LAL CHAKRAVARTY. **11 Pat. 569=I.R. 1932 Pat. 185=138 I.C. 419=A I.R. 1932 Pat. 157.**

———*Chota Nagpur*—Talabi brahmatter *tenure.*

In Chota Nagpur Province especially in the Manbhum District the tenures known as *talabi brahmatters* among others take rank among the hereditary tenures at a fixed rent not liable to enhancement. These tenures escheat to the Crown and not to the zamindars. (*Macpherson and Dhavle, JJ.*) RAJENDNA NARAYANA SINGH DEO *v.* BIHARI LAL CHAKRAVARTY. **11 Pat. 569=I.R. 1932 Pat. 185=138 I.C. 419=A.I.R. 1932 Pat. 157.**

———*Chukani* lease—Tenant mere under-raiyat—If acquires permanent right of occupancy. *See* LEASE—CONSTRUCTION. **39 C.W.N. 454.**

———Darputni—Nature of—If permanent tenure. *See* WORDS AND PHRASES—DARPUTNI. **62 C.L.J. 67.**

———Darputni—Darputnidar—Mineral rights. *See* ADVERSE POSSESSION—MINERAL RIGHTS.

———Daipatni holding—Accretion to—Right of tenant holding from the Zamindar. *See* ALLUVION AND DILUVIAN. **A.I.R. 1934 Cal. 111.**

———Desabandam inam—Alienability. *See* GRANT—DESABANDAM INAM. **68 M.L.J. 46.**

———*Gamal lands (Mysore)—Property in.*

Gamal lands in Mysore attached to unalienated villages are lands at the disposal of Government and the proprietary interest therein, apart from the right of pasturage, does not vest in the villagers, (*Doraiswami Iyer, C J.*) THE GOVERNMENT OF MYSORE *v.* RAMA RAO. **10 Mys. L J. 110.**

———*Ghatwali tenure.*

By their very nature the *ghatwalis* were inalienable, this is not affected or altered by Regulation XXIX of 1814. (*Wort and Khaja Mahomed Noor, JJ.*) ABDUL RAHIM *v.* GOBIND LAL SINGH. **I R. 1932 Pat. 263=139 I.C. 853=13 Pat. L.T. 224=A.I.R. 1933 Pat. 117.**

———*Ghatwali tenure—Ghatwal—Dismissal of ghatwal—Power of Magistrate—Suit in Civil Court—Forfeiture of tenure.*

(1) In the case of a ghatwali tenure a Magistrate has jurisdiction to dismiss a ghatwal. (2) Such an order of dismissal cannot be questioned in the Civil Court and the officer passing the dismissal order should be presumed to act within the scope of his authority. (3) The dismissal of a ghatwal carries with it the forfeiture of his tenure. (*Suhrawardy and Graham, JJ.*) PITAMBAR LAIK *v.* MATI LAL LAIK. **135 I C. 275=I.R. 1932 Cal. 83=54 C.L J. 205=A.I.R. 1932 Cal. 77.**

———*Ghatwali tenure—Ghatwal's—Position of.*

The question whether the interest of the ghatwals is co-ordinate with that of the zemindar or subordinate to him is a question of fact. A ghatwal's interest may not necessarily be that of a subordinate tenure-holder. The fact that a land is within the ambit of one's zemindari does not necessarily show that the holder of the land is subordinate to the zemindar. His rights may be co-ordinate with him. Where however in lieu of his holding the tenure, the ghatwal pays some rent to the zemindar, he is a tenureholder under him. The fact that as a part of consideration for holding the tenure, the ghatwal has to render services to the Government, is in no way derogatory to the position of the zamindar who is the proprietor of the tenure. (*Mahomed Noor and Agarwala, JJ.*) MUKTAKESHI PATRANI *v.* MIDNAPUR ZAMINDARY CO., LTD. **13 Pat. 517=156 I. C. 136=7 R P. 691=A.I.R. 1935 Pat. 33.**

———*Ghatwali tenures—Government ghatwali—Incidents of.*

The incidents of a Government ghatwali are that it is hereditary, indivisible, and inalienable, but the rule as to inalienability may be relaxed by the Government in certain cases and the tenure may be alienated by the special permission of the Government. A Government ghatwal while he enjoys certain special privileges also suffers from this disability that he can at any time be dismissed by the Government for misconduct. If the Ghatwal holds the ghatwali tenure subject to the payment of a fixed and established annual sum and the performance of certain duties for the maintenance of the public place, he will be liable to be dismissed by the

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Government on failure to discharge either of these obligations. (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTIYANAND SINGH. **14 Pat. 70 = 157 I.C. 433 = 8 R.P. 121 = A.I.R. 1935 Pat. 306.**

———*Ghatwali tenure—Government ghatwalli—Surplus proceeds of last holder—Liability for rent falling due during his lifetime.*

It is well settled that any surplus proceeds of the property which accrued due during the lifetime of a Government ghatwal's predecessor and have come into his hands can be followed for the purpose of realising the rent for which such predecessor was liable in his lifetime. (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH. **14 Pat. 70 = 157 I.C. 433 = 8 R.P. 121 = A.I.R. 1935 Pat. 306.**

———*Ghatwali tenure—Handwe Raj—Status of.*

There can be no doubt that the Handwe estate was in its origin and has continued to be a Government ghatwali estate possessing all the incidents of a Government ghatwali. There is nothing in the Sanad of 1780 or in the proceedings of the Decennial or the Permanent Settlement to show that it was intended that the ghatwals of Handwe should by reason of the inclusion of their estate in the Zamindari of Kharagpur occupy a status different from that which they occupied before. The status held by the Handwe ghatwals before the Permanent Settlement was that of the talukdars who were declared to be the proprietors of the soil by Regulation VIII of 1793, but by reason of the fact that they did not take steps to have their taluks separated from the Kharagpur Zamindari either under the provisions of the aforesaid Regulation or the Regulation of 1801, their status was converted into one of dependent talukdars. Their failure to apply for separation merely deprived them of the right to separation, other rights remaining unaffected. The position of the proprietor of the Kharagpur estate is that of a superior landlord or one who is entitled to realise a certain rent from the Handwe ghatwals, but the holders of Handwe properties possess all the rights which usually go with the proprietorship of the soil. (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH. **14 Pat. 70 = 157 I.C. 433 = 8 R.P. 121 = A.I.R. 1935 Pat. 306.**

———*Ghatwali tenure — Inclusion of Government ghatwali in a Zamindari—Effect of.*

A Government ghatwali does not cease to be a Government tenure merely by reason of its inclusion in a Zamindari estate and its being a unit in the assessment of that estate, unless such inclusion can be shown to have amounted to a release by the Government of the ghatwali services or to a grant to a third party of the right to receive them and of the right to appoint a ghatwal. (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH. **14 Pat. 70 = 157 I.C. 433 = 8 R P. 121 = A.I.R 1935 Pat. 306.**

———Ghatwali tenure—Korkar—Right of occupancy by custom. *See* CHOTA NAGPUR TENANCY ACT (1908) SS. 64 (3) AND 77. **13 Pat. L T. 781.**

———*Ghatwali tenure—Record of rights—Entry in—Presumption of correctness, not affected by the incidents of ghatwali tenure.*

The mere existence of a general legal proposition that non-accrual of a right of occupancy is an inherent incident in a *ghatwali* tenancy, would not rebut the statutory presumption that the record of rights is correct until the contrary is proved by evidence, any more than the general proposition that a landlord is entitled to all land within his estate would rebut an entry that a certain raiyat possesses a right of occupancy in his holding. Least of all would it do so in Chota Nagpur, where it is common knowledge that in such tenancies a local custom or usage exists that a right of occupancy can accrue even as regards agricultural land settled with a new raiyat and much more so where the land is *Korkar*. (*Macpherson and Scroope, JJ.*) BIMALA PRASAD KANJILAL *v.* HARE KRISHNA RAI. **11 Pat. 464 = I.R. 1932 Pat. 225 = 139 I.C. 385 = A.I.R. 1933 Pat. 57.**

———*Ghatwali tenure*—Shikmi ghatwali—*Alienability—Lease beyond the life time of* ghatwal—*Validity.*

By their very nature the *ghatwalis* are inalienable. The *shikmi ghatwal* had to perform police services at the time of the grant. The *shikmi ghatwali* when it was created, was nothing more than a subdivision or at the most a sub-infeudation in relation to the *ghatwali* itself and it cannot take upon itself a higher right than that of the *ghatwali*. The *shikmi ghatwalis* are therefore inalienable and the *shikmi ghatwal* has no power to grant a lease which is valid beyond his lifetime. (case law discussed.) (*Wort and Khaja Mahomed Noor, JJ.*) ABDUL RAHIM *v.* GOBIND LAL SINGH. **I.R. 1932 Pat. 263 — 139 I.C. 853 = 13 Pat.L.T. 224 = A.I.R. 1933 Pat. 117.**

———*Ghatwali tenures—Types of.*

Very broadly speaking, Ghatwali tenures may be said to fall under two classes : (1) those created by the Government or the ruling power and (2) those created by the Zamindar or the holder of a Ghatwali estate. There is also another class of Ghatwali tenures which though created by the Government have, since their creation, and generally at the time of the Permanent Settlement, been included in a Zamindari estate and formed into a unit in its assessment. These last Ghatwali tenures are really a branch of class (1). (*Fazl Ali and Saunders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH. **14 Pat. 70 = 157 I.C. 433 = 8 R.P. 121 — A.I.R. 1935 Pat. 306.**

———Grama Natham — Incidents of — Right of Revenue authorities—Public user—Effect of—Burden of proof. *See* GRAMA NATHAM. **1931 N.W.N. 973.**

———Grant of—Mineral rights not included. *See* MINERALS. **A.I.R. 1935 Pat. 149.**

———*Grant of—Right to fish, if conveyed.*

The settlement of land carries with it in the absence of express reservation the right to fish when there is water on land. Hence if a landlord creates a tenure of the entire village, the tenure extends over all the lands included within the ambit of the village and includes fishery rights situated therein. (*Mohammad Noor, J.*) JYOTI PRASAD *v.* BENGAL COAL CO., LTD. **163 I.C. 169 - 8 R.P. 633 (2) = A.I.R. 1935 Pat. 149.**

———*Guzara—Incidents—Right of widow to succeed.*

The guzara is a sort of subordinate Zamindari or under-proprietary tenure carved out in the estate, but this fact will not make the widow of a guzaradar who has been expressly given only a life-estate under a family arrangement, a talukdar. (*Nanavutty and Smith, JJ.*) ABDUL QAYUM *v.* ABDUL RAHMAN. **8 Luck. 602 = 6 I.R. Oudh 160 (2) = 146 I.C. 710 = 10 O.W.N. 844 = A.I.R. 1933 Oudh 439.**

———*Inam—Carpenter's service inam—Lease of—Subsequent resumption—Validity.*

The validity of a lease for a term of 33 years (or Khandagutte Cowle), of a carpenter's service inam, is not affected by a subsequent resumption of the inam. The resumption and re-grant involve no more than terminating the inam by the imposition of full assessment, but they do not operate to extinguish any engage-

ment entered into by the holder of the inam prior to such resumption. What was resumed was not the land itself but only the remitted assessment. A reference to S. 13 (*it*) of Act III of 1895 and to Paragraph 3 of the Board's Standing O. 55 will show that purposes of resumption, an inam is presumed to comprise the net assessment on the land, except where there is *prima facie* evidence that the land too is included. (*Curgenven and Cornish, JJ.*) YERRANNA *v.* SOMANNA. **156 I. C. 873 = 8 R M. 70 = 41 L W. 271 = 1935 M.W.N. 515 = A I.R. 1935 Mad. 320 = 69 M.L.J. 115.**

———*Inam—Enfranchised inam cess* — "Kulavettu" *can be recovered by Zamindar.*

In a suit by a Zamindar against an holder of an enfranchised inam for recovery of *kulavettu*, a cess for keeping the tanks in proper repair.

Held, that *kulavettu* was a legal cess and was recoverable, especially where the irrigation tanks and supply channels had been maintained by the Zamindar in proper condition and the defendant's lands were irrigated by one of the tanks so kept in good repair. 42 M. 197 ; 42 M. 702 and 22 I.C. 972, Rel. on. (*Venkatasubba Rao, J.*) ANNAMALAI CHETTY *v.* MUTHU VIJAYA RUGHUNATHA DORAISINGAM. **160 I.C. 680 = 8 R.M. 711 = 42 L.W. 583 = 1935 M.W.N. 897 = A. I.R. 1935 Mad. 718.**

———*Inam — Service inam— Enfranchisement by Government—Suit by Zamindari for declaration of invalidity—Onus.*

In a suit by a Zamindar for a declaration that the Government was not entitled to enfranchise certain service inams within his Zamindari on the ground that they were included in the assets of the Zamindari and not excluded from it at the time of the Permanent Settlement and that the right of resumption was in him and not in the Government, the burden is on the Zamindar of proving that the lands were included in his Zamindari, in spite of the fact that they are within the geographical limits of the Zamindari. (*Ramesam and Madhavan Nair, JJ.*) PARTHASARATHY APPA RAO *v.* SECRETARY OF STATE. **58 Mad. 141 = 162 I.C. 661 = 8 R M. 1025 = 41 L.W. 689 = A.I.R. 1936 Mad. 313 = 68 M.L.J. 409.**

———*Inam—Service inam given to* kazi—*Liability to attachment and sale.*

The fields which are service inam fields given to *kazi* for his service are not liable to be attached and sold, even to the extent of his life interest. (*Gruer, A.J.C.*) DEVI PRASAD *v.* SYED WAZIRUDDIN. **31 N.L.R. 217 = 156 I.C. 995 = 8 R.N. 5 = A.I.R. 1935 Nag. 30.**

———*Inam—Several persons liable to pay amount in respect of inam—Liability, if joint or several.*

Where several persons hold an inam land and a decree is passed against them all for an amount in respect of the inam, the general principle in deciding the question as to whether the defendants are liable jointly and severally is that the defendants were holding the lands as tenants in common they would be jointly liable but if they were holding the land in severalty they would be severally liable. (*Ramesam, J.*) VENKATA RAO *v.* GURUSAMI CHETTI. **154 I.C. 619 = 7 R.M. 461 = 1934 M W.N. 1119 = 41 L.W. 641 = A.I.R. 1935 Mad. 41 = 68 M.L.J. 172.**

———Inam — Shet-sanadi inam — Nature of. *See* GRANT—CONSTRUCTION. **36 Bom.L.R. 1055.**

———Inam—Shet sanadi lands—They are watan lands under the Watan Act *See* BOMBAY HEREDITARY VILLAGE OFFICES ACT (1874). **35 Bom.L.R. 114 = A.I.R. 1933 Bom 123.**

———*Inferior proprietors—Village waste and forest produce—Central Provinces—Right of inferior proprietor—Rights enjoyed in other districts—Presumption.*

In a suit by the inferior proprietors of a mauza in the Drug district against the Zemindar for a declaration of their rights over the village waste and forest produce.

Held, that there was no presumption that the rights which the inferior proprietors enjoyed in other districts of the province were enjoyed by inferior proprietors in the mauza in question and that they could only succeed it they showed that they acquired these rights by custom or by grant at the time of sub settlement. (*Sir Dinshah Mulla.*) LAL INDRA SINGH *v.* SHEOSANKAR. **59 I. A. 197 = I.R. 1932 P C. 132 – 136 I.C. 628 = 28 N.L. R. 201 = 35 L.W. 789 = 36 C.W.N. 603 = A.I.R. 1932 P.C. 129 = 62 M.L.J. 708 (P.C.).**

———*Jagir butadi—Failure to perform obligations—Effect of—Exorbitant claim—Relief.*

The jagir butadi tenures under which the lands are to be given for supplying ration to landlord while touring in villages is similar to service tenures and the principles of the latter apply to them. Hence failure to perform the obligations entails the penalty of ejectment without notice. If the claim for rations is exorbitant or unreasonable, the Court can refuse ejectment on equitable ground. (*Mahomed Noor and Agarwala, JJ.*) DEOBANS SINGH *v.* BAHWRIA CHANDRA KALI KUAR. **150 I. C. 112 = 6 R.P. 708 = 15 Pat.L.T. 391 = A.I.R. 1934 Pat. 319.**

———*Jagir — Decree against jagirdar— Binding nature of.*

A decree passed against a jagirdar as representing the estate (and not merely his personal interest) after a fair and *bona fide* contest is binding on the succeeding holders of the estate. 2 I.A. 145 ; 39 C. 887 ; 9 Bom. 198 (F.B.), Ref. (*Niyogi, A.J.C.*) SYED KHANEJAMA *v.* FATEKHAN. **27 N.L.R. 127 = I R. 1931 Nag. 159 = 134 I.C. 287 = A.I.R. 1931 Nag. 183.**

———Jagir—Maintenance grant—Tenure-holder being members of a senior branch of the family. *See* LAND TENURE—ZAMINDARI. **58 I.A. 9 = 10 Pat. 296 = 60 M.L J. 253 (P.C.).**

———Jagir—Right of jagirdar to minerals. *See* MINERALS. **58 I.A. 9 = 10 Pat. 296 = 60 M.L.J. 253 (P.C.).**

———Jamabut tenure—Mineral rights—Express words necessary. *See* MINERALS. **58 I.A. 29 = 10 Pat. 407 = 60 M.L.J. 183 (P.C.).**

———Jibka *tenure—If indicates life-tenure.*

The expression *jibka* tenure used in a maintenance grant does not necessarily mean that the grant is limited to the life of the grantee or that it is resumable. The meaning of the expression is equivocal. (*Mitter and Nasim Ali, J.*) NAGENDRA CHANDRA NAG *v.* PURNA CHANDRA GUPTA. **39 C.W.N. 98 = 60 C.L J. 384 = A I R. 1935 Cal. 261.**

———"*Jote*"—*Meaning and significance of.*

The word 'jote' does not necessarily mean a tenure. Jote simply means a tenancy. (*Nasim Ali, J.*) SARIATULLA *v.* HABIBAR RAHAMAN KHAN. **39 C.W.N. 454 = A.I.R. 1935 Cal. 462.**

———Kanom. *See* MALABAR LAW.

———'Karsa chakran'—Entry in the Record of Rights —Constitutes a service tenure. *See* B. T. ACT, S. 181. **39 C.W.N. 581 = 61 C.L.J. 143.**

———*Kayamgem tenure in South Kanara—Permanent tenancy—Burden of proof.*

The burden of proving a right of permanent tenancy in bar of a suit in ejectment is on the tenant. This rule equally applies to South Kanara as elsewhere. 47 M

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337 (P.C.); S. A. No 850 of 1921 and S. A. No. 418 of 1924, Foll.; 30 M. 528 and 1915 M.W.N. 271, Not foll. (*Anantakrishna Aiyar, J.*) GOPALA KUDVA *v.* JUVAPPA KAMTHI. **I.R. 1931 Mad. 721=133 I.C. 369=35 L. W. 400=1930 M.W.N. 874=A.I.R. 1931 Mad. 577.**

———*Khairat Kusbrit tenure—Custom in Ramgarh estate.*

Khairat Kusbrit is, as defined by Mr. Sifton's Settlement Report, a tenure given on the condition of the grantee maintaining the worship at a particular temple and it is resumable if the condition is not properly fulfilled. In the Ramgarh estate, there is a custom of resuming *khairat* grants on failure of male heirs in the male line of the original grantee. (*Ross and Fazl Ali, JJ.*) LACHUMAN LAL PATHAK *v.* KAMAKSHYA NARAYAN SINGH. **I.R. 1931 Pat. 228=131 I.C. 788 =12 Pat L.T. 891=A.I.R. 1931 Pat. 224.**

———*'Khajan lands'—Meaning.*

'Khajan land," as it is called is a special kind of land recognised as partly cultivable in villages on the sea and tidal creeks, and although such lands may not be actually cultivated, they are part of the lands of the village from which Government could derive some revenue in the forms of fees for digging earth, sand and keeping of boats thereon. (*Murphy and Divatia, JJ.*) SECRETARY OF STATE *v.* FAREDOON. **154 I.C. 278 =7 R.B. 308=36 Bom.L.R. 761=A.I.R. 1934 Bom. 434.**

———Khas Mahal—Sukhuls holding—Not revenue free. *See* BENGAL LAND REGISTRATION ACT (VII OF 1876), S. 78. **35 C.W.N. 648.**

———*Khoti tenure—Incidents—Relationship of parties.*

The relation between a *khot* and his tenant is not strictly that of landlord and tenant. The *khot* is not a landlord, but in theory a farmer of land revenue. (*Murphy and Sen, JJ.*) DALU CHAND VELJI GUJAR *v.* SHANTI SARASHI. **156 I.C. 339=7 R.B. 506=36 Bom.L.R. 1253=A.I.R. 1935 Rom. 98.**

———*Khoti tenure—Khot—Re-entry—Right of landlord—Mortgage by tenant without Khot's consent—Mortgage redeemed before suit—Effect of.*

The mere execution of a mortgage by a tenant without the khot's consent of his khot nisbat lands (in the Mangaon taluka of the Kolaba district) is sufficient to give the khot the right to re-enter and that right is not affected by the fact that the mortgage is redeemed before the landlord made the re-entry or commenced the suit. 24 Bom. L.R. 1160, Foll. (*Baker, J.*) RAMCHANDRA VITHAL *v.* JANKI LAKSHMAN. **141 I.C. 481=I.R. 1933 Bom. 104=34 Bom.L.R. 975=A.I.R. 1932 Bom. 524.**

———*Khoti tenure—Khoti lands—Mortgage of—Purchase of occupancy rights by mortgagee—Accretion to mortgaged property.*

During the currency of a mortgage of khoti lands, the mortgagee purchased khoti nisbat lands in the village from the occupancy tenants without the permission of the mortgagor. The mortgagors sold the equity of redemption to the mortgagee and two years later sold a share in the khoti nisbat lands purchased by the mortgagee to the plaintiff.

Held, that whether the lands are regarded as khoti khasgi lands or as khoti nisbat, they should be treated as an accretion to the mortgaged property which vested in the mortgagors on redemption and were included in the sale of all the "privileges and rights" of the mortgagor to the mortgagee and that the plaintiff acquired no right to the same by his subsequent purchase. 20

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Bom. L. R. 681, Foll. (*Beaumont, C. J. and Broomfield, J.*) KONDU RAMJI *v.* MAHADEV GOPAL. **I.R. 1932 Bom. 553=34 Bom.L.R. 855=139 I.C. 812= A.I.R. 1932 Bom 526.**

———Malguzar—Right to minerals. *See* C. P. LAND REVENUE ACT (1917), S. 218. **29 N.L.R. 148.**

———*Manibam—Enfranchisement and grant of inam—Non-mention of cess payable to zamindar in title-deed—Liability to pay.*

Where manibam lands were enfranchised and inam title deed issued which recited that the quit-rent imposed was to be paid to the Government, in addition to jodi to which the zamindar is entitled,

Held, that the non-mention of the cess in the inam title deed did not relieve the grantee from the liability to pay the cess due to zamindar, even granting that previous to the enfranchisement such liability existed. (*Venkatasubba Rao, J.*) ANNAMALAI CHETTY *v.* MUTHU VIJAYA RAGHUNATHA DORAI-INGAM. **160 I.C. 680=8 R.M. 711=42 L.W. 583=1935 M.W.N. 897=A.I.R. 1935 Mad. 718.**

———*Maufi-khidmati tenure—Nature and incidents of—Distinction from Muafi khairati tenure.*

Maufi-khidmati lands are lands held in lieu of service, and persons holding such lands are usually village servants or malguzar's servants. Muafi-khairati lands, on the other hand, may be lands held free in lieu of service on condition of service by persons who are not tenants, or they may be lands held by person who are tenants, but by favour of the malguzar hold the lands rent-free or at a low rent. The question therefore is one of fact whether the person, in whose favour fields have been recorded as muafi-khairati, is a tenant or not. The difference between land given on condition of service and land given to a tenant, which is to be held rent-free as long as the tenant performed certain services is that in the latter case, if the tenant ceases to perform services, then the landlord, though he cannot eject the tenant, is entitled to recover the assessed rent from tenant. 9 N.L.R. 97, Dist.; 3 N.L.R. 185, Rel. on. (*Staples, A.J.C.*) FATERAM *v.* JANAK. **6 I.R. (Nag.) 88=146 I.C. 404=A.I.R. 1933 Nag. 313.**

———*Miadi sarabarakar (Orissa)—Nature of tenure.*

The tenure of a *miadi sarabarakar* is not permanent, heritable and transferable. Its duration is limited to the period of settlement and the tenure-holder has no claim as a matter of right to re-appointment. The history of the tenure in Orissa traced. (*Courtney Terrell, C.J. and Kulwant Sahay, J.*) RANI HAR SAMUKHI DASI *v.* PARSURAM BIDHAR RAI DALBEHERA. **11 Pat. 757=141 I.C. 340=I.R. 1933 Pat. 63 (2)=14 Pat.L.T. 743=A.I.R. 1933 Pat. 74.**

———"Miadi sarbarakars"—Status of. *See* BENGAL DECENNIAL SETTLEMENT REGULATION (VIII OF 1793) AND SARBARAKARIS, *supra*. **15 Pat.L.T. 639 =A I.R. 1934 Pat. 632.**

———Miadi sarbarakar—Transfer of tenancy—Operation of—Duration—Custom varying the terms of the lease—Permissibility. *See* LANDLORD AND TENANT—TRANSFER OF TENANCY. **11 Pat. 757.**

———Mineral rights. *See* MINERALS.

———*Mirasi tenure.*

Except in Chingleput and Tanjore Districts, mirasi tenure, with hereditary rights has become practically extinct everywhere. (*Wallace and Bardswell, JJ.*) NARASIMHA RAGHAVACHARI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.R. 1931 Mad. 613 =132 I.C. 117=32 L.W. 945=A.I.R. 1931 Mad. 135 =60 M.L.J. 137.**

———*Mirasi tenure—Hereditary right—Onus of proof.*

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The nature and extent of mirasidars in Miras villages vary from place to place in the presidency and the onus is on the mirasidars to prove that any specified incident attaches to miras rights in any particular district. 40 M. 410, 2 M. 149, Ref. 'Miras' right to cultivable land does not mean absolute ownership; it is only a preferential right. The right of cultivable waste is again a matter for a proof. 6 M. 303 and 21 M. 433, Ref. So in the absence of any reliable evidence, apart from opinions expressed by some of the witnesses, no assumption can be made that, because the plaintiff is styled *ekabhogam* mirasdar, and has hitherto been the sole pattadar in a village close to the Chingleput border, he must have such rights and privileges. (*Wallace and Bardswell, JJ.*) NARASIMHA RAGHAVACHARI *v* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **32 L.W. 945 = I.R. 1931 Mad. 613 = 132 I.C. 117 = A.I.R. 1931 Mad. 135 = 60 M.L.J. 137.**

———*Mirasi tenure—Mirasi inam village—Tenants introduced into uncultivated lands—Melwaramdar as landlord—Right of thunduwaramdar.*

In the case of a mirasi inam village, where new tenants have been introduced into uncultivated land, the melwaramdar can only be regarded as the landlord; and even though the mirasidar receives the thunduvaram he cannot be regarded as a landlord nor is he entitled to eject the newly introduced tenants. The payment of thunduvaram is not indicative of the character of mirasidar as landlord. It is only a customary payment due to the mirasidar on account of his preferential rights in the village. The right to the thunduvaram can only be regarded as the present remnant of a customary right the origin of which is lost in obscurity. It is not possible to contend that the mirasidars are the sole landlords, while recognizing the melwaramdars as entitled to a portion of the rent due to the landlords of the village. The position that there is a double set of landlords, melwaramdars getting the melwaram, and the mirasidars getting the thunduwaram is an impossible position. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) VENUGOPALA NAIDU *v.* PERUMAL ODAYAN. **154 I.C. 294 = 7 R.M. 417 = A.I.R. 1934 Mad 275.**

———*Mirasi tenure—Mirasi inam village—Tenants introduced on uncultivated lands—Muchilikas not taken for over a century—Liability of tenants to ejectment—Only melwaramdar and not the mirasidar is the landlord—Introduction of tenants in uncultivated lands in mirasi inam village and mirasi ryotwari villages—No distinction.*

Where tenants have been introduced on uncultivated land in a mirasi inam village and they have been in possession for over a century without executing muchilikas they are not liable to be ejected at the option of either the mirasidar or of any body. Absence of muchilikas though the whole century would be practically conclusive of the consciousness of all parties that all the newly introduced tenants whether their rights are less than mirasidars or equal to theirs were certainly not regarded as ejectable at the option of the mirasidars or of anybody whatever help the mirasidar might have rendered the tenant by introducing him on the kaduvetti or immemorial waste land for the purpose of reclamation, the melwaramdar only must be regarded as a landlord and the mirasidar cannot be regarded as a landlord. Having regard to the nature of the mirasi tenure and its incidence, the mirasidars, in so far as they are mirasidars cannot be regarded as landholders and are not entitled to eject the newly introduced tenants. There is no particular reason why tenants introduced into uncultivated lands in the mirasi inam villages should stand on a different footing from tenants introduced into such lands

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in mirasi ryotwari villages. (*Ramesam Offg. C.J. and Venkatasubba Rao, J.*) VENUGOPALA *v.* PERUMAL. **154 I.C. 294 = 7 R.M. 417 = A.I.R. 1934 Mad. 275.**

———*Mokhasa.*

Mokhasa is a well-known tenure in Northern Sircars. It implies a tenure subject to service. (*Anantakrishna Aiyar and Cornish, JJ.*) NARAYANASWAMI BAHADUR *v.* BODA THAMMAYYA. **1930 M.W.N. 945.**

———*Mukarrari tenure—Mukarrari patta granted by zamindar—Subsequent record of rights—Status of holder.*

The original mukarrari granted by the zamindar to the transferor of the plaintiff showed that there was no reservation to the zamindar of any right or interest in the village except to receive the rent reserved. In a subsequently prepared record-of-rights defendant 1 who was doing services was recorded as holding under the zamindar.

Held, that the record-of-right was incorrect. (*Agarwala, J.*) JAGANNATH MAHADANI *v.* UDHAB CHANDRA SINHA. **6 I.R. (Pat.) 5 = 144 I.C. 753 = A.I.R. 1933 Pat. 259.**

———Mullagiri *land—Partibility.*

Mullagiri land, assigned as remuneration for services useful to the village community, has no special character by reason being attached to the office of *mulla*; it is governed as regards inheritance by the personal law of the holder and as such it is partible. (*Murphy and Wadia, JJ.*) MAKTUMSAB *v.* DADABHAI. **154 I.C. 684 (2) = 7 R.B. 364 = 36 Bom.L.R. 1098 = A.I.R. 1934 Bom. 495.**

———*Mullanki land—Succession to—Female heir—Right of.*

A female is not entitled to inherit what are called *mullanki* or *mullagiri* lands, that is lands assigned for the remuneration of a village *mulla*. The duties of a *mulla* are of a religious and not a secular nature, and part of his duties is the performance of ceremonies in the mosque which a female is not capable of performing under the Mahomedan Law. (*Broomfield, J.*) BIYAMMA *v.* AHMADSAHEB. **156 I.C. 656 = 8 R.B. 22 = 37 Bom. L.R. 257 = A.I.R. 1935 Bom. 245**

———*Mulraiyat—Office of—Incidents attached to—Liability of holding in execution*

The private holding of a mulraiyat (a class of headmen in the Deoghar subdivision of the Santhal Parganahs) is the holding recorded as such in the settlement record. The holding can be sold up by the landlord in execution of a decree for rent, because under paragraph 12 of the record-of-rights the *mulraiyati* right is transferable by a single transaction. If it can be sold privately, it can be sold in execution of a decree. (*Das and Allanson, JJ.*) RAM CHARAN SINGH *v.* TILKU CHAUDHURY. **12 Pat.L.T. 351**

———Noabad taluqs—*Incidents of.*

The word *noabad* by itself means newly cultivated. *Noabad taluqs* are temporarily settled estates. A *noabad taluqdar* has got security of tenure for the period of a particular settlement; but at the expiration of the settlement, the taluqdar will be entitled to a fresh settlement, of the cultivated lands from Government on terms to be arranged between the *taluqdar* and the Government. As regards uncultivated lands, they are ordinarily at the absolute disposal of the Government at the expiration of the settlement and a taluqdar has no right to have a fresh settlement in respect of uncultivated lands. (*Rankin, C.J. and C.C. Ghose, J.*) NAGENDRA CHANDRA DE *v.* HAR KUMAR DE. **I R 1932 Cal. 293 = 137 I.C. 311 = 56 C.L.J. 4 = A.I.R. 1932 Cal. 514.**

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———*Parjantdar—Nature of tenure.*

Quaere.—Whether the tenure of a parjantdar is that of a permanent nature. (*Mukerji and Bennet, JJ.*) QADIR KHAN *v.* KESHO DAS. **I.R. 1931 All. 238 = 130 I.C. 14 = 1930 A.L.J. 1409.**

———*Patni—Intermediate interest—Right of zamindar to create.*

A zamindar can create a tenure intermediate between his zamindary interest and a patni which had already been created under it, provided he does not thereby prejudice the position of the first tenant. (*Mallik and Jack, JJ.*) PARABI BIBI *v.* BIRENDRA NATH SARKAR. **60 Cal. 1082 = I.R. 1933 Cal. 497 = 144 I.C. 92 = A I.R. 1933 Cal. 543.**

———Patni — Minerals — Rights of patnidar. *See* MINERALS. **58 I.A. 228 = 67 M.L.J. 632 (P.C.).**

———*Pradhani tenure—Nature and incident—Right of Pradhan to hold* hat.

A Pradhani tenure is not a statutory tenure; the incidents of any particular tenure must, therefore, be largely the creature of custom or of contract. Whether a Pradhan has a right to establish and hold a *hat* in the Mauza must depend on an express grant of authority or on a permission tacitly implied from the course of dealing between the Pradhan and the Zamindar. (*Mukerji and S. K. Ghose, JJ.*) RAJA JAGADISH CHANDRA DEO DHABAL DEB *v.* SRINATH CHANDRA PANI. **62 C.L.J. 123.**

———*Rent-free tenure—Central provinces—Grant by Municipality in* 1880.

Where certain land was granted in 1880 by the Municipality acting as agents of the Government without any stipulation for rent and under the rules then in force plots were generally given in freehold right, *held*, that the lands should be declared revenue free in perpetuity. (*Nelson, R.M.*) MADHAO RAJESHWAR, *In re.* **14 Nag.L.J. 33 (Rev.).**

———*Ryotwari tenure—Cutting off of water supply—Cause of action—Proof of actual damage unnecessary—Injunction.*

When the whole of water supply has not been cut off, but only some of it, and when there has also been a general shortage of supply, it is very difficult for a party to prove the precise amount of diminution caused by the action of others or the precise amount of the particular damage caused by that diminution. Under such circumstances the injured party has a cause of action apart from proof of actual damage and has a right to an injunction if he establishes prospective probable damage. 7 M. H. C. R. 60, Rel. on and 31 Mad. 171, Ref. (*Wallace and Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793 = I.R. 1931 Mad. 747 = 133 I.C. 507 = 33 L.W. 681 = A.I.R. 1931 Mad. 284 = 61 M.L.J. 563.**

———*Ryotwari tenure — New irrigation channel—Opening of—Loss of supply to another in consequence—Cause of action.*

If a ryot entitled to water in an irrigation source, starting in the river bed, abandons his customary channel and opens another in such a way as to cause loss or likelihood of loss of supply to another ryot in his customary channel, the latter has a right of action against the offending ryot. It makes no difference in the law applicable that the Government supply of water in the river bed sinks at time below the surface. Government by recognizing these channels have recognized that the sub-surface water is part of the recognized supply, which it is their duty to have conveyed in sufficient quantity to the respective wet areas. So that even if it is underground water, it is underground water in which there

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can be a legal right. 16 Mad. 333 and 31 Mad. 171, Ref.; 38 Mad. 280 and 45 I.C. 86, Dist. (*Wallace and Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793 = I.R. 1931 Mad. 747 = 133 I.C. 507 = 33 L.W. 681 = A.I.R. 1931 Mad. 284 = 61 M.L.J. 563.**

———*Ryotwari tenure—Patta—Evidentiary value of.*

The exact weight to be attached to a patta depends on the circumstances of the case; it differs according as the question arises between the Government or the landholder on the one hand and ryot on the other, or between two rival ryots. In the latter case, a patta is not merely evidence of possession but evidence of title as well. It is sometimes the only evidence of a grant from the zamindar and not merely a "bill for rent." 26 M. 268; 29 M. 461; 47 M. 861 i 1925 M.W.N. 481; 49 M. 249 (P.C.); 28 M. 505; 12 Bom. L. R, 229 (P. C.), Ref. to. (*Anantakrishna Ayyar, J.*) DONGANNA *v.* JAMMANNA. **I.R. 1931 Mad. 782 = 133 I.C. 782 = 1931 M.W.N. 508 = A.I.R. 1931 Mad. 613.**

———*Ryotwari tenure—Rights to water as against Government and as against other wet ryots—Interference with customary supply by private parties—Cause of action.*

The ryot is entitled to such supply of water as is necessary and sufficient for the irrigation of his registered wet fields. He must accept that supply from the irrigation source approved by Government who can alter the manner and method of supply. He has no right to insist on any particular source or any other source than that recognized by Government or that it shall come by any particular channel, nor can he prescribe against the Government for such right by user otherwise for any length of time. Between him and the Government there is something in the nature of a contractual obligation under which Government undertakes to regulate, distribute and furnish to him his necessary supply in the manner authorized by it as the proper and usual manner, until and unless Government has provided him with another, equally efficient. This obligation by Government is in certain cases subject to the reciprocal obligation of the ryot to keep the main channel free from silt and sometimes himself to construct the minor interfield channels. As between two villages or areas each taking off from the same source by its own channel, the right of each to water, be it contractual or proprietary, as against Government, is to its necessary and sufficient supply and as against each other to that supply, so soon as the supply has passed into its own channel and earmarked for it. The same principle *mutatis mutandis* applies to individual wet ryots of the same villages *inter se*. The wet ryot has a right as against other wet ryots and even subject to Government's right to give him an equally efficient supply, as against Government to the protection of law for that supply, once it has passed into the channel earmarked for his supply. One ryot cannot prescribe against another or against Government for supply by any one particular channel. His user of a particular channel is in no sense adverse to the user by another of another channel, since each uses it by authorization of Government. Nor is it an easement by which he is conveying property of his own over a servient tenement. It is an incident of ryotwari tenure. If the customary supply and manner of supplying according to this contractual or proprietary right has been interfered with not by Government but by private parties, such interference, *prima facie*, is an invasion of a right and will give rise to a civil cause of action. 7 M.H.C.R. 60; 16 Mad. 333; 28 Mad. 72; 31 Mad. 171; 32 Mad. 141; 32 Mad. 423; 37 Mad. 304 and

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1 Mad. 205, Ref. (*Wallace and Pandalai, JJ.*) BASAVANA GOWD *v.* NARAYANA REDDI. **54 Mad. 793=I.R. 1931 Mad. 747=133 I.C. 507=33 L.W. 681=A.I.R. 1931 Mad. 284=61 M.L.J. 563.**

———Sarbaraharis (*Orissa*)—*Classification and incidents.*

Tenures in Orissa are classified into "*maurasi sarbarakari*" and "*miadi sarbarakars*". The former has a permanent heritable interest while the latter has only a temporary tenure during the continuance of the lease. "*Sarbarakars*" who were in possession from generation to generation before 1803 were classified as "*maurasi*" while those who could not prove the existence of such a tenure but who nevertheless, were in possession long and at the time of the settlement were recognized as "*miadi*". These latter cannot consequently claim to have acquired a permanent and heritable right in the property held by them, notwithstanding that they may have been described as sub-proprietors in the *khewats* and *khatians*. (*Courtney-Terrell, C. J. and Varma, J.*) GOBINDA CHANDRA PATNIKA *v.* HARSA MUKHI DASI. **152 I.C. 759=7 R.P. 235=15 P.L.T. 639=A.I.R. 1934 Pat. 632.**

Service tenure.

See also LAND TENURE—INAM.

———*Service tenure—Failure to perform services—Liability to ejectment.*

The refusal by a tenant to perform services which are incidental to his holding is sufficient of itself to ground a suit for ejectment. No question of the lessor having to assert a right of forfeiture or any matter of that kind arises at all. The tenancy automatically comes to an end when the tenant makes default in rendering the services stipulated for and the grantor thereupon becomes entitled to re-enter. Nor does the landlord lose the right merely by allowing a long period of time to elapse before he takes steps to enforce that right by legal process.

Per *Curiam* :—There seems to be a distinction between a case where there is a right to service of public character such as *chowkidari chakran* and one where the service is to a private person such as the grantor. In the former case the zemindar himself is not or may not always be entitled to resume possession whereas in the latter case he can do so either when the service is not required or when the grantee has refused to perform the service. (*Costello and Jack, JJ.*) PROKASH CHANDRA DAS *v.* RAJENDRA NATH DAM. **58 Cal. 1359=135 I.C. 296=I.R. 1932 Cal. 104=35 C.W.N. 823=A.I.R. 1932 Cal. 221.**

———Service tenure—Grant of land on service tenure to raiyat to cultivate himself and grant to tenure-holder with right to collect rents—Distinction between—Effect on raiyats' customary rights. *See* B. T. ACT, S. 181. **61 I.A. 93=13 Pat. 254=66 M.L.J. 298 (P.C.).**

———Service tenure— Village Blacksmith's service inam—Incidents of—Rights of holder in lands. *See* ADVERSE POSSESSION—SERVICE INAM. **59 Mad. 51 =69 M.L.J. 890.**

———Shet sanadi lands. *See* LAND TENURE—INAM.

———Shikmi ghatwali. *See* GHATWALI TENURE, *supra.*

———*Shikmi tenure—Resumption of rent-free grant by landlord—Acquisition of occupancy rights.*

Persons cultivating land as shikmi tenants at the time of the resumption of rent-free grant could not acquire occupancy rights unless they prove that they shared in the cultivation of the land with the former *muafidar* and succeeded him on his death. (*Oppenheim, J. M.*)

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SRI RAM *v.* GANDHARI. **13 L.B. 14 (Rev.)=16 R. D. 92.**

———*Transferability—Superior proprietor—Restriction upon alienation in settlement Court decree is for benefit of superior proprietor—Transfer voidable and not void.*

Restrictions upon alienation contained in a Settlement Court decree (not in a statute) do not render the land incapable of transfer. The restriction is imposed for the benefit of the superior proprietor who may avail himself of the condition if he so chooses, but no one else except the superior proprietor is entitled to challenge the alienation of such lands. The transfer is not void but only voidable at the option of the superior proprietor. (*King, C.J. and Zia-ul-Hasan, J.*) JAGADAMBA PARSAD *v.* MATA PARSAD. **11 Luck. 289=156 I.C. 49=7 R O. 650=1935 O.W.N. 818=A.I.R. 1935 Oudh 427.**

———Watan lands. *See* ADVERSE POSSESSION.

———Watan—Adverse possession by alienee partly during the life of one watandar and partly during that of successor—Perfection of title by adverse possession—Tacking of prior possession allowed. *See* ADVERSE POSSESSION—WATAN LANDS. **34 Bom.L.R. 967= A.I.R. 1932 Bom. 464.**

———*Zamindari—Lands in—Presumption—Tenure holders members of the same family—Inference.*

There is a general presumption that the land in a Zamindari is the property of the Zamindar and held under him. Where the Zamindar and the tenure-holders are members of the same family, the natural inference would be that it was a khorposh or maintenance jagir granted to them by the head of the family. The fact that they are the senior branch of the family is not by itself sufficient to rebut this presumption that the lands which they hold in the Zamindari are held from the Zamindar as khorposh or maintenance grant. (*Sir John Wallis.*) BAGESWARI CHARAN SINGH *v.* KUMAR KAMAKHYA NARAIN SINGH. **58 I.A. 9=10 Pat. 296=33 L.W. 277=131 I.C. 325=I.R. 1931 P.C. 101=12 Pat. L.T. 375=35 C.W.N. 233=53 C. L.J. 11=A.I.R. 1931 P.C. 30=60 M.L.J. 253 (P.C.).**

LAW REPORTS. *See* REPORTS.

LAW REPORTS ACT (III OF 1875), S. 3—*Scope.*

The Court has a discretion to hear a case cited from an unauthorised report. In exercising its discretion in any particular occasion, the Court should give due weight to the practice prevailing in the Courts with reference to any particular report the decision from which is cited at the bar. (*Anantakrishna Aiyar and Sundaram Chetty, JJ.*) RAGHAVALU NAIDU *v.* THANDAVAROVA PILLAI. **I.R. 1931 Mad. 366=130 I.C. 190=1930 M.W.N. 955=A.I.R. 1931 Mad. 71.**

LEASE.

See also (1) CO-SHARER.
(2) LANDLORD AND TENANT—T. P. ACT 1882, SS. 106, 117.

Agricultural lease.
Assignment.
Bemiadi.
Construction.
Covenant.
Creation of.
Forfeiture.
Lessor's liability.
Miadi Sarbarakari.
Mining lease.
Mokarari.
Notice to quit. *See* LANDLORD AND TENANT.
Perpetual lease.

LEASE—Agriculture lease.

Registration.
Renewal.
Rent.
Right of lessee.
Sub-lease.
Thika Morka.
Termination.
Transferability.
Validity.
Zaripeshgi.
Miscellaneous.

Agricultural lease.

———*See also* LEASE—CONSTRUCTION.

———Agricultural lease—Lime stone holders standing on holding—Removal of stones by third person with consent of tenant—Landlord's right to claim value from. *See* LANDLORD AND TENANT—MINERALS. **18 N.L.J. 344.**

———*Agricultural lease—Oral lease—Public auction—Highest bid accepted—Alleged subsequent agreement in writing varying terms of tenancy—Admissibility of.*

The plaintiff's lands were leased by public auction in March, 1921, for a period of seven years. The defendant's bid was the highest and he deposited a portion of the amount before the selling officer, the balance to be paid in yearly instalments. The defendant continued in possession for about 4 years and the plaintiff brought the present suit for delivery of possession, alleging that the lease in favour of the defendant was a yearly lease and for that purpose relied on the auction list, a muchalika executed by the defendant a day after the auction and an agreement, dated 15th June, 1921, for showing that the original lease was superseded by a later lease in writing.

Held, that as it was an agricultural lease, it could be made orally, that the oral lease became complete on the acceptance by the selling officer of the defendant's bid, that the documents which came into existence subsequently did not supersede the oral lease, that the auction list and muchalika having been suppressed by the plaintiff, he could not be permitted to establish their contents by secondary evidence and that the plaintiff was not entitled to the relief prayed for. (*Curgenven and Sundaram Chetty, JJ.*) SIVASUBRAMANIA THEVAR *v.* ZAMINDAR OF SINGAMPATTI. **I.R. 1933 Mad. 364=144 I C. 27=1933 M.W.N. 672=37 L.W. 672=A.I.R. 1933 Mad. 451=64 M.L.J. 676.**

———*Agricultural lease—Right of owner to grant permanent heritable and transferable rights.*

There is nothing in law to prevent the owner of a land from granting heritable and transferable rights in an agricultural lease upon the lessee; nor is there anything to prevent him from granting a perpetual lease to such a lessee. (*Sulaiman, A. C. J. and Bajpai, J.*) RAGHUNATH TEWARI *v.* BUDHO RAM TEWARI. **I.R. 1931 All. 753 (2)=133 I.C. 897 (2)=A.I.R. 1932 All. 112.**

———*Agricultural lease—Use of word 'theka'—Effect.*

Where a document is otherwise an ordinary agricultural lease the mere use of the word 'theka' does not alter it. (*Keane, S.M. and Oppenheim, J.M.*) MAHOMED BAKSH *v.* PABITTARA PANDAIN. **15 R.D. 212=12 L.R. 55 (Rev.).**

Assignment.

———*Assignment—Liability for rent—Assignor's right to indemnity against assignee—If arises only on payment to superior landlord—Assignment and sub-lease—Distinction.*

LEASE—construction.

When a lessee assigns his term under the lease, the lessee is liable to pay rent to the superior landlord; but the assignor also continues to be liable for the rent on his personal covenant. He is therefore entitled to an indemnity from the assignee in respect of the rent payable to the landlord. But a suit by the assignor against the assignee for recovery of the rent from him, alleging that the defendant had not paid the rent to the landlord and that the latter had given him (plaintiff) notice to pay rent will be premature when the plaintiff has not himself paid the rent to the landlord and when the landlord has not taken any steps beyond issuing the notice to the assignor. The obligation of the assignee of a lease to pay rent to the superior landlord and the right of indemnity which the assignor has as against the assignee both arise under the law itself and not by reason of any covenant between the parties as in the case of a sub-lease. (*Pinkenham Walsh and Varadachariar, JJ.*) VENKATA RAJAGOPALA RAMA SURYAPRAKASA RAO *v.* VENKATA RAO. **157 I C. 1005=8 R M. 198=42 L.W. 212=1935 M.W.N. 544=A.I.R. 1935 Mad. 669=69 M.L.J. 133.**

———*Assignment—Punjab—Oral agreement—Binding nature.*

In the Punjab, the T.P. Act is not in force; therefore even an oral agreement of lease can be binding and the execution of a formal document or its registration is not essential to its validity. (*Broadway and Bhide, JJ.*) SUNDAR SINGH *v.* RAM SARAN DAS. **14 Lah. 137=142 I.C. 754=I.R. 1933 Lah. 269=33 P.L.R. 323=A.I.R. 1933 Lah. 61.**

Bemiadi.

See LEASE—CONSTRUCTION AND PERPETUAL LEASE.

Construction.

———*Construction—Agricultural lease in mofussil—Intention of parties.*

When dealing with an agricultural lease drawn up in the mofussil in terms of paddy rent, it is a good rule that in case of difficulty, one should try to get at the real intention of the parties by taking a reasonable view of the contract as a whole, rather than follow some artificial doctrine of construction. Mourasi Mukrari lease construed. (*S.K. Ghose, J.*) MOHITKRISHNA KUNDU *v.* MAHENDRA NATH GUHA. **58 Cal. 72=I.R. 1931 Cal. 658=133 I C. 210=A.I.R. 1931 Cal. 468.**

———Construction—Bemiadi—Enhancement of rent—Right of landlord—Clauses indicative of. *See* B.T. ACT, S. 30 (*b*). **36 C.W.N. 341=A I.R. 1932 Cal. 508.**

———*Construction*—"Bemeyadi *Settlement*"—*Premium and rent higher than before—Restriction of rights of lessees—Clause for* Khas *possession by lessor in stated circumstances.*

A lease recited that the lessee was already in possession of the property (consisting of a hat bazar, bandar and ghat under a (miadi) temporary ijara settlement, that the lessor had acceded to the lessee's prayer and made a *bemeyadi* settlement with him. The premium under the previous temporary settlement had been Rs. 2,000 and the rent Rs. 500 per annum, whereas under the present lease the premium was Rs. 3,500 and the annual rent Rs. 800. The lease contained conditions disabling the lessee from claiming abatement of the fixed rent on any ground, from making a surrender and from granting any *bemeyadi* settlement to any other person and specifically reserved to the landlord the right of taking *khas* possession in certain specified circumstances. On a question arising if, on a proper construction of the kabuliyat, the tenancy was perpetual or determinable at will.

LEASE—Construction.

Held, that the question cannot be resolved by reference only to the use and meaning of the word "*bemeyadi*" but should be determined after consideration of all the provisions of the kabuliyat, by which the rights of the parties are defined ; that the settlement created a perpetual tenancy, not terminable at will on notice. (*Lord Russell of Killowen.*) JANAKI NATH ROY *v.* DINA NATH KUNDU. **I.R. 1931 P.C. 268=133 I.C. 732=54 C.L.J. 412=35 C.W.N. 982=A.I.R. 1931 P.C. 207=61 M.L.J. 377 (P.C.).**

———*Construction*—Chukani—*Status of* chukanidar *—Permanency of right.*

The word *chukani* does not mean a temporary interest but it implies a permanent element which may develop into an occupancy right. But where in a lease the word "chukani" is used only with reference to the interest of an under-raiyat which is not heritable, the *chukanidar* cannot acquire a right of occupancy by 12 years' occupation of the land in question. Consequently on the death of the *chukanidar*, his heirs are liable to be ejected as trespassers. (*Nasim Ali, J.*) SARIATULLA *v.* HABIBAR RAHAMAN KHAN. **39 C.W.N. 454=A.I.R. 1935 Cal. 462.**

———*Construction—Clause for perpetual renewal—Operation of.*

A lease in favour of an incorporated company provided as follows: "After the agreement has expired, if subsequently you require the land, I shall go on giving it to you on receiving money at the above (rate of) rent. I shall not give it to another." It was held the clause, if otherwise valid, conferred an interest in the land which would enure so long as the company lasted. (*Pathak and Barlee, JJ.*) INDIAN COTTON COMPANY, LTD. *v.* RAGHUNATH HARI DESHPANDE. **I.R. 1931 Bom. 278=130 I.C. 598=33 Bom.L.R. 111=A.I.R. 1931 Bom. 178.**

———*Construction*—Darputni — *Abadharita jama—Lessee to bring in possession all lands within specified boundaries and to pay fixed rent without claiming any reduction on any ground—Nature of tenure—Liability to pay enhanced rent.*

A lease described as a *Darputni patta* recited "Therefore bringing in possession all the lands cultivated, Patit, Garden, Falkar, Nalkar, Bankar, etc, situated within the four boundaries of the said lot with all rights and appurtenances, you down to your heirs, etc., in succession will continue to enjoy and possess the same in *Darputni* right taking Dakhilas on paying to me or to authorised officer the stipulated rent (Abadharita jama) of Rs. 4,761 year by year in instalments specified below without raising any plea whatsoever for reduction of rent on the grounds of inundation doubtful covering by sand cyclone, and washing away by river and pool and without yourself or through another killing fish or any other animal or realising any rent in respect of that."

Held, that the tenure was a mokrari lease on a fixed rent and that the rent was not liable to enhancement. Darputni means permanent tenure with fixity of rent. Abadharita jama means fixed rent. (*Mitter and B. N. Rau, JJ.*) KUMUD NATH DAS SAHA *v.* KUNJABALA DASSYA. **164 I.C. 132=9 R.C. 144=62 C.L.J. 67.**

———*Construction—Demise of mining and "other rights" in certain plots of coal land—If confers right to sue in respect of abstraction of coal prior to date of lease.*

Where a lease "demises unto the lessee all those coal-mines now being worked and all those coal-mining rights and other rights of and in the said three plots of coal land", the words "other rights" are limited by the words "of and in the said three plots of coal land," which clearly relate to these plots as they stood at the date of grant and the lessee does not acquire a title to sue in respect of the abstraction of coal prior to date of his lease and it would require clear words to assign such a right of action to him. (*Lord Thankerton*) SRIS CHANDRA NANDY *v.* BAIJNATH JUGAL KISHORE. **62 I.A. 40=14 Pat. 327=39 C.W.N. 352=16 Pat L. T. 143=153 I.C. 929=41 L.W. 237=1935 R.D. 82 =7 R.P.C. 130=1935 M.W.N 169=37 Bom.L.R. 323=61 C.L.J. 96=1935 A.W.R 191=1935 O.W.N. 252=1935 A.L.J. 740=A.I.R 1935 P.C. 36=68 M. L.J. 600 (P.C.).**

———*Construction—Duration of—Kabuliyat for term of 5 years—Provision that if at the end of term the tenant cannot make a fresh settlement he will continue as before and pay the rent settled—If a fresh demise for another term.*

A Kabuliyat executed by a tenant to his landlord which was for a term of 5 years on a rent of Rs 15 per annum, after stating that the lessee would take a fresh settlement after the expiration of the term, provided. "At the end of the term if I cannot make a fresh settlement I will continue to be tenant under you as before and pay the aforesaid rent as the rent settled."

Held, that the clause in question was not a mere covenant for renewal but a present demise for a period of 5 years more after the expiry of the original term. (*Nasim Ali, J.*) BANAMALI DAS *v.* KAMALA KANTA MAJUMDAR. **164 I.C. 55=9 R.C. 127=39 C.W.N. 906.**

———Construction—Faida payable by tenant to khot —Illegal attachment by Government—Damages—Commuted value of grain produce—Right to. *See* BOMBAY KHOTS LEASES ACT (1865), S. 38. **33 Bom.L.R. 1039=A.I.R. 1931 Bom. 455.**

———Construction—Fixed rate tenancy—"Abadharita" and "Dharjya"—Meaning of—If indicate tenancy with rent fixed in perpetuity or *mokurari*. *See* BENGAL TENANCY ACT, S. 30 (B). **39 C.W.N. 1244.**

———*Construction— Forfeiture clause— Stipulation for forfeiture on lessee's bankruptcy—Lessee benamidar for limited company—Liquidation of company—If entails forfeiture of lease.*

Appellant granted a lease of the suit property for a term of 75 years to K, who was admittedly a benamidar for the respondents, a limited company. The lease provided *inter alia* that 'if the lessee becomes bankrupt, the lessee's rights shall *ipso facto* cease and this (lease) shall be void and lessor shall have the right to re-enter and take possession of the premises as if this lease were non existent and without the lessee being entitled to claim damages or compensation of any kind from the lessor." About two and a half years after the lease, the High Court made an order for the compulsory winding up of the respondent company and an official liquidator was appointed. Appellant claimed that he was entitled to enforce the forfeiture clause as the "lessee", the company had become "bankrupt," as the company had gone into liquidation.

Held, (1) that a forfeiture clause in a lease must always be construed strictly as against the person seeking to enforce and to take advantage of it, and effect should be given to it only so far as it was rendered absolutely necessary by the wording of the clause ; (2) that the benami character of the lease did not necessarily lead to the inference that the proviso for forfeiture and re-entry was not intended to apply to the insolvency of the benamidar lessee ; (3) that it could not be said that the

appellant lessor had in mind on the date of the lease that possibility of the respondent company going into liquidation and intended to guard himself against such a contingency; and (4) that therefore appellant was not entitled to enforce the clause in question. (*Beasley, C. J. and King, J.*) RAMAN MENON *v.* MALABAR FOREST AND RUBBER CO, LTD. **58 Mad. 378=154 I.C. 445=7 R.M. 428=1935 M.W.N. 34=41 L.W. 46=A.I.R. 1935 Mad. 163=68 M.L.J. 269.**

———*Construction—Holding over by tenant—Liability for rent.*

A certain property was usufructuarily mortgaged by *B* in favour of *A* on 18th January, 1911, on condition that the "othi" right was to be for the period of two years. Instead of actually taking possession of the mortgage property, *A* granted a lease on 19th January, 1911, of the same on a fixed annual rent, such rent being payable up to the time of the redemption of the "othi." There was a collateral agreement by way of mortgage, under which the property was offered as security for the payment of rent due under the lease. In 1916 a certain amount was paid by *B* towards the rent due under the lease and was accepted by *A*. After a period of more than 12 years, *A* brought the present suit for the recovery of a sum alleged to be due under the lease-deed.

Held, (1) that the usufructuary mortgage and the lease-deed were the parts of the same transaction and that the lease was for a period of two years only; (2) that *B's* continuance of possession after expiration of the original term of two years must be taken to be that of a tenant holding over on the original terms of the lease; (3) that the collateral security clause in the lease-deed was not any part of the terms which constituted the transaction of the lease and hence this clause could not be carried over after the determination of two years period; (4) that *A* could only recover the rent due for three years prior to the suit. (*Sundaram Chetty and Pandrang Row, JJ.*) GNANADESIKAM PILLAI *v.* ANTONY. **58 Mad. 75=155 I.C. 838=7 R.M. 618=40 L.W. 246=A.I.R. 1934 Mad. 458=67 M.L.J. 455.**

———Construction—Kabuliyat—Clause reciting that tenant shall have no interest in land except to cultivate land and pay rent—Stipulation not to change features or status of land—Effect of—Right of occupancy. *See* B. T. ACT, SS. 5 (2) AND 21 (1). **62 I.A. 64=68 M. L.J. 476 (P.C.).**

———*Construction—Lease and mortgage — Suit on kabuliyat—Maintainability.*

A executed a registered kabuliyat in favour of *B* agreeing to pay manhunda for certain land. A zarpeshgi for a certain amount was also granted by *A* in favour of *B* on the same day. *B* was to be in possession of the lands as rehander, which were also hypothecated in simple mortgage by way of security. *B* agreed to hold the land on payment of manhunda rent.

Held, that the mortgage and the kabuliyat were two distinct transactions. The relationship of landlord and tenant was created between *B* and *A* and a suit on the basis of the kabuliyat was maintainable. 23 All. 338; 47 Cal. 377 (F.B.); 23 All. 341 and 27 All. 313, Rel. on; A.I.R. 1925 Pat. 118, Expl. (*Fazl Ali and Chatterji, JJ.*) ABDUL RAHIM *v.* RAGHUNATH SUKUL. **I.R. 1931 Pat. 179=130 I.C. 531=12 Pat.L.T. 614=A.I.R. 1931 Pat. 22.**

———*Construction – Lease or mortgage.*

A deed recited that for a sum of money (the kanam and the puramkadam amounts) the land was demised to the grantee, who may hold it on karankari right without being liable to surrender it. It further mentioned the total pattam to be 389 paras odd, out of which about

106 paras, were to be retained by the grantee for interest on the kanam and puramkadam amounts and the balance of about 282 paras was to be paid to the grantor for purapad. The grant further stated that the kanam shall be renewed from time to time on payment of the renewal fee and that the grantee may enjoy the property in perpetuity,

Held, that the transaction in question was by no means a mortgage pure and simple, but resembled more closely a lease. (*Venkatasubba Rao, J.*) RAMAN THIRUMUMPU *v* KARUNAKARA MENON. **147 I.C. 735=6 R.M. 386=1933 M.W.N. 79=38 L.W. 843=A.I.R. 1933 Mad. 852.**

———*Construction—Lease or sale—Perpetual lease reserving no right of re entry.*

Where a perpetual lease of under-proprietary tenure ostensibly reserved a rent of Rs. 4 to the lessor but in fact it really left nothing to its executant and no right of re-entry was reserved in his favour in any event,

Held, that, though the price was called '*Nazrana*' (rent) it was really an out and out sale, subject to a right of pre-emption. (Case law discussed.) (*Nanavutty, J.*) RAM ANAND *v.* RAM DAS. **14 L.R. 581 (Rev.)=17 R.D. 706=143 I.C. 887=10 O.W.N. 613=I.R. 1933 Oudh 217=A.I.R. 1933 Oudh 329.**

———*Construction—Lease by talukdar—Lease acknowledging accupancy rights of lessee to be perpetual—Use of words "naslan bad naslan" and "malikana"—Right of re-entry not reserved to lessor—Lease, if confers under proprietary rights.*

Where a lease executed by a talukdar acknowledged the occupancy right of the lesseee, which was for life, to be perpetual and fixed the amount of rent which the lessees would have to pay and stated that they had to pay at a certain rate the malikana dues to the talukdar himself and his heirs and also had to provide for the pay of the chaukidar and the patwari and for the village expenses, and ended up by saying that the talukdar executed a "perpetual lease" and that the lessees should remain in possession and occupation generation after generation "naslan bad naslan" according to the conditions of the lease.

Held, that the talukdar merely wished to grant to the lessees heritable occupancy rights in the place of the occupancy rights for life and there was no intention of converting their occupancy rights into the rights of under-proprietors and that the use of the expression "naslan bad naslan" the provision for payment of malikana dues to the lessor and to his heirs, the liability to pay for the chaukidar and the patwari and the non-reservation of the right of "re-entry" to the lessor, do not necessarily indicate any intention of conferring a transferable estate. (*King, C.J. and Nanavutty, J.*) HIRA LAL *v.* GAJRAJ KUER. **11 Luck. 203=155 I. C. 909=7 R.O. 625=1935 R.D. 289=1935 O.W.N. 638=A.I.R. 1935 Oudh 423.**

———*Construction — Lease of tank — Agricultural purposes—Test.*

Where the lease is of a tank, the true test as to whether the lease is for agricultural purposes or not is to see whether the primary object was the lease of the tank or lease of the land surrounding it for purposes of agriculture with the tank within it. (*Mitter, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* AMANADDIN. **159 I.C. 235=8 R.C. 297=40 C.W.N. 156=A.I.R. 1935 Cal. 638.**

———*Construction—Lease for term on fixed rent—Covenant for re-entry—Binding nature.*

A kabuliyat provided as follows: "I have remained in possession by taking lease in the benami of *S* and

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paying Rs....as the annual rent; if the Sarkar requires it I shall give up the building and the trees which I may grow on taking the proper market price. On this understanding I sign this mokarrari lease. If there is any necessity for *huzooralt* to resume possession I shall relinquish it and get back consideration money."

Held, on a construction of the lease, that the lease was not a permanent one but was one on a fixed rent with a covenant for entry.

Held also, that the covenant as to re-entry ran with the land and was binding on the parties and their successors. (*Guha and M. C. Ghose, JJ.*) BEJOY CHAND MAHATAB *v.* MAHOMED YASIN. **133 I.C. 564=52 C.L J. 486=A.I.R. 1931 Cal. 160.**

———Construction — Lease for three years fixing Rs. 400 for third year—No rent for the first two years—Nature of lease—Registration—Interest on rent—Right to. *See* REGISTRATION ACT, S. 171 (*d*), PROVISO. **41 L.W. 351=A.I.R. 1935 Mad. 305 (1).**

———Construction — Mokarrari — Rent—Landlord's right to increase. *See* LANDLORD AND TENANT—RENT. **36 C.W.N. 183=A.I.R. 1932 Cal. 436.**

———*Construction*—Mourasi Mokarrari *lease—Rent in cash and kind—Liability of tenant to pay either rent.*

A Patta for *Mourasi Mokarrari* lease of agricultural land created by landlord recited among other things that the lease will form a *Mokarrari Mourasi Kayemi* tenancy and Rs. 27-12-0 in cash rent and the paddy rent of 10 arhis will not be enhanced. The price of ten arhis was stated to be Rs. 10. The lease further provided for a selami of Rs. 150 and two kinds of penalties, namely for default of cash rent and for default of paddy rent; for the former default, interest was realisable and for the latter default barhi or damages were to be realisable.

Held, on construction of the lease, (1) that it was intended that a cash rent and paddy rent were to be kept separate; (2) that the paddy rent was meant to be a real rent, that is to say, a tenant was liable to deliver paddy in addition to paying cash rent; (3) that in case of failure to deliver paddy rent the landlord was entitled to get the paddy rent at Rs. 10 and not at the current market rate; (4) that the primary liability was to pay 10 arhis of paddy and only if he could show that he was unable for any reason to deliver the paddy was he liable to pay Rs. 10. It was not intended that the tenant should escape liability when he was in a position to give paddy, or that he should be liable to pay its cash value of the current market rate when, owing to scarcity for instance, there was dearth of paddy and the price would be high. (*Ghose, J.*) MOHITKRISHNA KUNDU *v.* MAHENDRA NATH GUHA. **58 Cal. 72=I.R. 1931 Cal. 658=133 I.C. 210=A.I.R. 1931 Cal. 468.**

———Construction—New lease or confirmation of old—Test—Considerations. *See* BENGAL TENANCY ACT, SS. 20 AND 44 (*c*). **61 C.L J. 189.**

———*Construction—Occupancy rights conferred—No limit of time fixed—Lessees in continuous possession—Land held not to be* sir.

The lease started by giving reference to occupancy cultivation, recited that the lessees were to get occupancy rights and fixed no limit to the period of the lease. There was no reference to the fact that the land was *sir*. Twice within the lease the word "dakhlikar" was used. The lease was dated 1905 and the lessees were in possession by themselves or their fathers for 26 years.

Held, that the land was not *sir*, that the lease was definitely intended to confer occupancy rights and that those rights if not conferred were acquired by over 12 years' continuous cultivation. (*Oppenheim, S.M. and Walton, J.M.*) MAHABIR *v.* AJEYPAL SINGH. **14 L.R. 238 (Rev.)=17 R.D. 358.**

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———*Construction—Option of first refusal—Meaning of.*

Where a lease is granted for a period of one year on condition that the lessee would be given first refusal of a lease for the ensuing year, the lessee gets a preferential right to take a lessee for the ensuing year, if he is prepared to pay as much as any other *bona fide* applicants are prepared to give. The lessee has, so to speak, a right of pre-emption, and he is not entitled to take a lease at a lower figure than that offered by any *bona fide* applicant. (*King, C.J., and Ziaul-Hasan J.*) RAGHUNATH PRASAD *v.* LUCKNOW SUGAR WORKS, LTD. **159 I.C. 121=8 R.O. 156=1935 O.W.N. 1211=A.I.R. 1936 Oudh 56.**

———*Construction — Original lease for* 12 *years—Renewal—No period fixed*—Sowjanyam *fixed—New demise also if for* 12 *years.*

A new demise did not state the period for which the renewal was executed but it expressly said that the renewal that had been given under the document was a renewal of the property held under the previous *melcharath* which was expressly made for 12 years and *sowjanyam* was also to be paid.

Held, that the renewal also was for a period of 12 years, especially in view of the fact that it was not customary in the case of leases from year to year to pay *sowjanyam* for renewal. (*Madhavan Nair, J.*) AGHILESWARA AYYAR *v.* SHAMU AYYAR. **156 I.C. 147=7 R.M. 652=1935 M.W.N. 877=42 L W. 494=A.I.R. 1935 Mad. 411.**

———*Construction—Paddy rent—Price fixed in kabuliyat—Landlord's right to claim market rate—"Ticca" —Meaning—If perpetually fixed—Interest on rent fixed in money only—Effect of.*

The terms of a registered kabuliyat for lands let out at a produce rent stated that the tenant if the tenant failed to deliver the paddy, the landlord had a right to realise amicably or by suit the *ticca* sum of Rs. 20 with interest at the rate of Re. 1 per month.

Held, that the use of the word '*ticca*' indicated meant that it was 'fixed in perpetuity' and that on non-delivery of the paddy, the landlord was entitled only to claim the sum of Rs. 20 mentioned in the kabuliyat with the specified rate of interest and not to the market value; and that the absence of a provision "bari" also implied that the landlord was entitled only to the amount stipulated in the lease. (*Mitter, J.*) RAM CHARAN CHAKRAVARTY *v.* RAJ KUMAR CHAKRAVARTY. **160 I.C. 735 =8 R.C. 450=61 C.L.J. 351=A.I.R. 1936 Cal. 29.**

———*Construction—Perpetual lease.*

Although the word "dowam" *per se* might not imply perpetuity, where the lessee was given the right to build a house or to let it out on rent to any one else and it was further said that the lessee shall have the same right as the lessor enjoyed up till then and the lessor had proprietary rights, there is no reason why the lessee should not be deemed to have the same rights, and that would only be consistent with the idea of the lease being a perpetual lease. (*Kendall and Bajpai, JJ.*) MAHOMED ISMAIL KHAN *v.* JAWAHIR LAL. **154 I.C. 305 (1)=7 R.A. 730 (1)=1935 A.W.R. 198=1935 R.D. 90=1935 A.L.J. 1288=A.I.R. 1935 All. 492.**

———*Construction—Perpetual lease—Forfeiture clause —Effect.*

Under a perpetual lease, the lessee was granted heritable and transferable rights in the property but it also contained a provision to the effect that if the lessee or

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his transferee or legal representatives failed to pay the instalments of rent at the stipulated time, they would be liable to ejectment at the end of the year under S. 52, Oudh Rent Act.

Held, that the lease did not cease to be a lease in perpetuity simply because it contained a forfeiture clause. (*Raza and Smith, JJ*.) BHAGWATI PRASAD *v.* BALGOBIND. **8 Luck. 377=I.R. 1933 Oudh 136=142 I C. 885=10 O.W.N. 55=14 L.R. 113 (Rev.)=17 R D. 160=A.I.R. 1933 Oudh 161.**

———*Construction—Perpetual lease—Heritability.*

Where the lease was given "*Waste dawam ke*" and the lease was described as a "*patta istimrari*" and it further provided that the rent could not be enhanced, nor the lessee ejected except by a suit for arrears of rent, and the only condition laid down was that the lessee should pay the rent and be loyal and no evidence had been led or any suggestion made that there was any local custom according to which perpetual and "*istimrari*" leases were not heritable, *held*, that the lease was to be held in perpetuity on a heritable basis. (*Grant, J.M*.) MAHOMED MOIN UDDIN ANSARI *v.* BATASHA. **1935 O.W.N. 1190=1935 R D. 504.**

———*Construction — Perpetual lease — Lease in perpetuity—Guzaredar directed to pay rent—Provision against enhancement of rent — Effect — Status of Guzaredar.*

Where under a deed described as a lease in perpetuity property was left with certain persons as guzara and it was agreed that the guzaredar was to pay a fixed sum and if the same was not paid the lessee was given power to proceed in due course of law to recover the rent and there was a definite prohibition of enhancement of rent or of ejectment but there was no mention of right of transfer,

Held, that under the agreement the guzaredar did not become an under-proprietor. The effect of the agreement was that the guzaredar accepted his status as that a tenant of the new lessees. (*Oppenheim, S.M. and Walton, J.M*.) JARBANDAN SINGH *v.* BAJRANG BAHADUR SINGH. **13 L.R. 132=16 R.D. 235.**

———*Construction—Perpetual lease—Lease of proprietary rights or agricultural lease.*

Where the lessor who is the owner of the plots leased professes to grant a perpetual lease to the lessee with right to hold possession generation after generation and with rights of mortgage and sale, without reserving to himself any right to eject, and receives premium as consideration for the grant of a perpetual lease, the lease is not merely an agricultural lease for a short term but a lease of proprietary interest in land But if the lessor is not the owner but a *thekadar*, or tenant-in-chief or a co-sharer only, a lease, though ostensibly a perpetual, may not amount to such lease. But it is otherwise when the lessor is the full proprietor and grants the lease for consideration with rights of inheritance and transfer. Such a lease is not a mere agricultural lease nor the lessee a non occupancy tenant liable to be ejected at will. (*Sulaiman, C.J. and Rachhpal Singh, J*.) AJODHIA KALWAR *v.* BALKARAN. **57 All. 568=152 I.C. 925=7 R.A. 414=18 R D. 703=16 L.R. 89 (Rev.)=4 A.W.R. 1452=1935 A.L J. 1=A.I.R. 1935 All. 93.**

———*Construction—Perpetual lease—Lease without any definite period specified—Duration of—Circumstances to be considered.*

From the mere fact that no definite period is specified in a lease, it does not necessarily follow that the lease is a perpetual lease. If a grant be made to a man for an indefinite period, if enures, generally speaking, for his lifetime and passes no interest to his heirs unless there are some words showing an intention to grant a hereditary interest. But this rule does not apply if the period of the grant can be definitely ascertained from the other terms of the instrument creating the lease. In the absence of express words importing perpetuity in the lease itself it is permissible to take into consideration the object of the lease, the circumstances under which it was created and the subsequent conduct of the parties to determine whether the grant was intended to be perpetual. (*Nasim Ali, J*.) CHANDI CHARAN MITRA *v.* ASHUTOSH LAHIRI. **164 I.C. 837=40 C.W.N. 52.**

———*Construction—Perpetual lease—Lessee to remain in possession of land so long as house stands.*

A finding that the defendant is entitled to remain in possession of land "so long as the house stands" does not amount to a finding that there is a perpetual lease, because in the case of a perpetual lease the lessee would have a right to remain in possession, even though the house has ceased to stand. (*Bennet, J*.) RAM SAHAI RAM RATAN *v.* IMAMI. **157 I.C. 526=8 R.A. 202=1935 A.L.J. 772=1935 A.W.R. 703=A.I.R. 1935 All. 586.**

———*Construction—Perpetual lease—Stipulation that in case of compulsory acquisition of premises, land compensation should go to lessor and compensation for well, trees, etc., to lessee—Effect of—If covenant running with the land—Assignee from lessee—Rights of, in compensation money—Extent of.*

A "Kayamgoni" or perpetual lease provided *inter alia* that "in case the Government acquire the said land and award compensation, the land compensation will have to go to the lessor alone and the compensation for wells, trees, etc., will go to the lessee." The lessee's interest in the lease was subsequently assigned and changed hands. The land was compulsorily acquired by the Government and the Land Acquisition Officer made a reference to the Court as regards the distribution of the compensation money.

Held, that the lease was a lease in perpetuity with a limitation or condition by which the lease is determined on the acquisition of the land by the Government; that the lease was determined on such acquisition, that the compensation for all the interest in the land except for wells, trees and other lessee's improvements should go to the lessors, and the assignee of the lessee's interest was entitled only to so much of the compensation as represented the value of improvements effected by the lessee; that the stipulation bound not only the original lessee but also the ultimate assignee of the lessee's interests in the lease, though it did not amount to a covenant running with the land (*Reilly, C.J. and Srinivasa Rao, J*.) VENKATARAMIAH *v.* NANJAPPA SETTY. **13 Mys. L.J. 237=40 Mys H.C.R. 227.**

———*Construction—Perpetual lease—"Thika mokra"—Permanent tenancy.*

A *Kabuliyat*, after referring to the fact that the tenant had been holding the land for some considerable time before the execution of the document, stated that it was being executed as the tenant was desirous of having a registered potta or lease *thika mokra* for a fixed yearly rent of Rs. 6. In case of default in payment of rent, the landlord was entitled to evict the tenant without obtaining relinquishment from the tenant. Without the landlord's consent, trees could not be cut down or new tanks dug or transfer of lands by sale or mortgage made. New taxes by the State were to be paid by tenant who also undertook to preserve the boundaries as of old.

Held, that in the context, the word '*thika*' indicated the creation of a tenancy, and '*mokra*' signified that the

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rent had been fixed in perpetuity and that slight increase of rent from Rs. 6 to Rs. 6-3-0 or the restrictions on the powers of the tenant did not destroy the permanent character of the tenancy. (*Rankin, C.J. and C. C. Ghose, J.*) BHABATARAN PAHARI *v.* TRAILOKYA NATH BAG. **59 Cal. 1282=140 I.C. 743=36 C.W.N. 632=55 C. L.J. 398=A.I.R. 1932 Cal. 764.**

———*Construction—Reduction of rent — Effect on tenancy.*

The fact that under an agreement between the parties the landlord reduces the rent payable by the tenant does not put an end to the continuity of the tenancy. The old tenancy still continues. (*Mitter, J.*) HARI PADA DUTT *v.* GOBINDA CHANDRA DAS. **60 C.L.J. 220=A.I.R. 1935 Cal. 193.**

———Construction — Rent fixed including cess—Re-assessment—Liability for increased cess—Lease not providing against increase in cess—Effect. *See* LANDLORD AND TENANT—CESS. **155 I.C. 96=A.I.R. 1935 Pat. 305.**

———*Construction—Right of action for damages, if included.*

Where the leassor demised to the lessee "all the coal mines, etc., and inclines, privileges, advantages, appurtenances, appertaining thereto,"

Held, the lease did not convey to the lessee the right of action for damages which had accrued to the lessor prior to the lease. (*Wort and Fazl Ali, JJ.*) BAIJNATH JUGAL KISHORE *v.* MANINDRA CHANDRA NANDI. **I.R. 1931 Pat. 373=133 I.C. 453=13 Pat. L.T. 73=A.I.R. 1931 Pat. 436.**

———*Construction—Tenant unable to acquire any right of transfer or any other legal right—Tenancy created was "tenancy-at will."*

Where character of tenancy is to be determined, the terms of the kabuliyat should be looked into. Under one of the terms of the kabuliyat the tenant was not to acquire any right of transfer or any other legal rights.

Held, that the tenancy created was tenancy at will. A.I.R. 1927 Cal. 179 and A.I.R. 1921 Cal. 474, Dist. (*Mukherji and S. K. Ghose, JJ.*) LUXMAN CHANDRA MISTRY *v.* CHARU CHANDRA MITHRA. **159 I.C. 613=8 R.C. 331=62 C.L.J. 111=A.I.R. 1935 Cal. 783.**

———*Construction*—Thica Mokra, Mourashi, 'Putra Pautradikramay'—*Nature of tenure.*

The words *Thica Mokra, Mourashi, Putra Pautradikramay* in a patta, which also stipulates that there will be no remission of rent on any account, imply that a hereditary tenure with a fixed rent was intended to be created. The tenure was intended to be held from generation to generation and not for a temporary period. The tenancy is not only hereditary, but the rent also is fixed in perpetuity. (*Lort Williams and Nasim Ali, JJ.*) HANUMAN DAS MUNDRA *v.* DAMODAR LAIK. **152 I.C. 540=7 R.C. 282=59 C.L.J. 381=A.I.R. 1934 Cal. 782.**

———*Construction—Undertaking by lessee to pay cesses —Extent of liability.*

A lessee covenanted as follows: "I shall render accounts to you in respect of road-cess, Taluk Board cess, etc., leviable for each fasli as per accounts in the said villages and pay then and there the said sums legally payable to the afor said partner and obtain receipt. Further I shall also pay other cesses which may be newly levied hereafter."

Held, that the lessee undertook only to pay by way of cesses what was legally payable by him to the landholder. (*Sundaram Chetty, J.*) SUBRAMANIA AYYAR *v.* ARUNACHALAM CHETTIAR. **I.R. 1932 Mad. 857=140 I.C. 329=A.I.R. 1933 Mad. 95.**

LEASE—Covenant.

———Construction—Whether the tenant is a raiyat or tenure-holder. *See* CHOTA NAGPUR TENANCY ACT (1908), S. 5. **A.I.R. 1935 Pat. 63.**

Covenant.

———*Covenant against alienation — Provision for enhanced rent on breach—If penal—Power of Court to relieve against—Waiver—Acceptance of original lower rent after alienation—Effect of.*

A permanent mulgeni lease deed provided that the lessees were not to alienate their interest and that in case of such alienation, the rent was to be paid at an enhanced rate from that date. The lessees sold their interests, but the lessor continued to accept rent at the original rate. About 16 years after the alienation, the lessor sued for rent at the enhanced rate.

Held, that the stipulation for enhanced rent on breach of covenant against alienation was not penal, but only in the nature of liquidated damages and could not be relieved against, and that the lessor was entitled to claim rent at the enhanced rate except for the period for which he had collected the rent at the lower rate.

Held, further, that the acceptance by the lessor of the lower rent with full knowledge of the breach of the condition would not amount to waiver of the claim for enhanced rents. (*Madhavan Nair, J.*) RAMAKRISHNA RAO *v.* MAHADEVAYYA BHATTA. **58 Mad. 856=156 I.C. 767=8 R.M. 51=41 L.W. 407=1935 M.W.N. 312=A.I.R. 1935 Mad. 335=68 M.L.J. 482.**

———*Covenant as to mutation fee in case of transfer —Transferee bound—Default by transferee—Right of landlord to sue—Court auction-purchaser—Right to sue transferee in ejectment.*

One of the terms of a *mourashi mokrari* lease was as follows:—"If you transfer the lands of this jama to anybody, the purchaser would be bound to pay into my sarkar as mutation fee one fourth of the amount which would be the fair price for the land at the time, if such fee is not paid, the transfer will not be valid." The lessee sold the tenancy but the transferee did not pay *chouth*. The lessors sued the original lessee for rent and had the property sold in execution of their decree The purchaser who made his purchase at the rent execution sale sued the transferee from the lessee in ejectment.

Held, such a restrictive covenant in a lease is a valid covenant for the benefit of the lessor and is operative and it runs with the land and remains operative during the entire period of the lease, that the covenant as to payment of mutation fee was valid and enforceable and that the purchaser was entitled to treat the transferee as one with no title to remain on the land and to eject him under the circumstances. The words "right, title and interest of the debtor" as used in the sale certificate must be construed with reference to the circumstances under which the sale took place as well as the proceedings leading up to the sale. (*Mukerji, J.*) NABJAN SARDAR *v.* NEBURALI MOLLA. **6 I.R. (Cal) 15=144 I.C. 764=37 C.W.N. 272=57 C.L.J. 387=A.I.R. 1933 Cal. 506.**

———Covenant to pay rent—If runs with the land—Liability of transferee from lessee. *See* LANDLORD AND TENANT—RENT. **62 Cal. 346=A.I.R. 1935 Cal. 368.**

———*Covenant—Restrictive covenants.*

Covenants in the lease imposing restrictive conditions on the rights of ths lessee are construed with the utmost jealousy to prevent the going beyond the express stipulation. (*Guha and M. C. Ghose, JJ.*) SWARNAMOYEE

LEASE—Creation of.

DEBVA *v.* ADYAJADDI. **60 Cal. 47=I.R. 1932 Cal. 577=139 I.C. 239=36 C.W.N. 819=A.I.R. 1932 Cal. 787.**

See also LANDLORD AND TENANT—FORFEITURE.

Creation of.

———*Creation of—Actual delivery of possession, not necessary.*

A tenancy is created if a tenant already in possession is continued to be so upon an express agreement with the new landlord by recognizing the latter's title and by duly executing a lease deed and attorning to him. 40 Mad. 561, Foll. (*Rama Rao, J.*) TAVAKAL SABI *v.* CHANNAPPA. **9 Mys.L.J. 339.**

Forfeiture.

See (1) LANDLORD AND TENANT—FORFEITURE.
(2) LEASE—CONSTRUCTION.

———*Forfeiture—Breach of conditions of lease—No expression by landlord of his intention to determine lease—No forfeiture is produced.*

Forfeiture will not be produced merely by the unilateral act of ceasing to comply with the conditions upon which the property is held, but must involve also some expression of intention to enforce the forfeiture on the part of the lessor. (*Curgenven, J.*) VENKATARAMA IYER *v.* PONNUSWAMI **163 I.C. 36=8 R.M. 1100=1936 M.W.N. 935=A.I.R. 1935 Mad. 918.**

———Forfeiture—Premium—Refund of consideration. *See* LANDLORD AND TENANT—PREMIUM. **A.I.R. 1934 All. 293.**

Lessor's liability.

———*Lessor's liability—Liability to rates and taxes.*

Where by the terms of a lease, the lessee covenanted to pay water tax and the lessor covenanted that he would during the said lease pay all rates and taxes, payable in respect of the said premises except the rates covenanted to be paid by the lessee, the lessor is clearly bound to pay property tax based on an increased assessment made after the lease. (*Beaumont, C. J. and Blackwell, J.*) ISMAIL *v.* ABDULLA. **55 Bom. 525=I.R. 1931 Bom 220=129 I.C. 748=32 Bom.L.R. 1660=A.I.R. 1931 Bom. 118** and (*Beaumont, C. J. and Blackwell, J.*) SULLEMAN *v.* AISHABAI. **I.R. 1931 Bom. 223=129 I.C. 751=32 Bom.L.R 1668=A.I.R. 1931 Bom. 122.**

Miadi sarbarakari.

———Miadi sarbarakari — Kabuliyat—Construction—Permanent tenancy, if creatad. *See* LANDLORD AND TENANT—PERMANENT TENANCY. **A.I.R. 1934 Pat. 632.**

———Miadi sarbarakari—Transfer of tenancy—Operation of—Duration—Custom varying the terms of the lease—Permissibility. *See* LANDLORD AND TENANT—TRANSFER OF TENANCY. **11 Pat. 757.**

Mining lease.

——— *See also* LANDLORD AND TENANT—ROYALTY.

———Mining lease. *See* LEASE—CONSTRUCTION. **62 I.A. 40=14 Pat. 327=68 M.L.J. 600 (P.C.).**

Mokarrari.

See also LEASE—CONSTRUCTION, *supra.*

———Mokarrari — Mourasi Mokarrari lease. *See* LEASE—CONSTRUCTION.

———*Mokarrari—Proof of—Clause for variation of rent according to area.*

The question whether the rent is fixed under the contract must be decided on the construction of the terms of the contract itself in each particular case. The existence of a condition that on increase or reduction of area, the rent would be increased or reduced at a particular rate is not sufficient by itself to justify the inference that the tenure is mokarrari. (*Suhrawardy and Graham, JJ.*) LAKSHAN CHANDRA MONDAL *v.* NARIM SARDAR. **I.R. 1932 Cal. 466=138 I.C. 545=36 C.W.N. 341=A.I.R. 1932 Cal. 508.**

———Mokarrari—Rent—Enhancement of. *See* LANDLORD AND TENANT—RENT. **A.I.R. 1932 Cal. 436.**

Perpetual lease.

See also (1) LANDLORD AND TENANT—PERMANENT TENANCY.
(2) LEASE—CONSTRUCTION.

———*Perpetual lease*—Bemiadi *lease of land in Municipal town to Muktear, for building* basha—*Object of lessee to reside there for practising in Courts of the place—If permanent lease—Construction of pucca huts, etc.—Landlord not objecting—If estoppel from ejecting lessee after expiry of period.*

A *bemiadi* lease of land in a Municipal town taken by a Muktear with the object of building a *basha* thereon to enable him to carry on the legal profession in the Law Courts of the place, is not a permanent lease. *Basha* does not carry with it the idea of a permanent residence. The lease is one for the lifetime of the lessee. The erection on the land by the lessee of 3 or 4 corrugated iron roofed huts with pucca plinths, stairs and compound wall is not inconsistent with the lease being only for the lifetime of the lessee. Nor would the consent of the lessor to such erections, change the lease as originally granted into a perpetual right of occupation by an implied contract, as it were, the structures being such as can be erected by the lessee for his purpose during his lifetime in a Municipal town. The lessee cannot also invoke the equitable doctrine of estoppel by acquiescence in such a case, because, the lessor cannot be said to have abstained from asserting his legal rights, or encouraged the lessee to erect the structures, so as to prevent him from evicting the lessee who has made no mistake about his rights, being fully aware that the lease is not one in perpetuity. (*Nasim Ali, J.*) CHANDI CHARAN MITRA *v.* ASHUTOSH LAHIRI. **164 I.C. 837=40 C.W.N. 52.**

———Perpetual lease—Bemeyadi settlement—Restriction of rights of lessees—Premium and rent higher than before. *See* LEASE—CONSTRUCTION. **35 C.W.N. 982=A.I.R. 1931 P.C. 207=61 M.L.J. 377 (P.C.).**

———Perpetual lease—Covenant against alienation—Provision for enhanced rent on breach—If penal—Power of Court to relieve against. *See* LEASE—COVENANT AGAINST ALIENATION. **58 Mad. 856=68 M.L.J. 482.**

———*Perpetual lease by Mahant—Validity—Revenue Courts—Jurisdiction.*

The Revenue Courts have jurisdiction to enquire into the validity of a permanent lease granted by the Mahant of a math under the Agra Tenancy Act. (*Oppenheim, S.M. and Walton, J. M.*) RAGHWA NAND MATHDHARI *v.* RAM NEWAZ. **14 L.R. 591 (Rev.)=17 R.D. 726.**

———*Perpetual lease — Surrender — Execution of kabuliyat.*

Where a permanent lease is capable of being surrendered and a subsequent kabuliyat in writing and registered is given, the former lease is surrendered automatically. (*Sulaiman, C.J. and Mukerji, J.*) TIKA RAM *v.* SRI THAKUR DAOJI MAHARAJ. **152 I.C. 189=4 A.W.R. 1105=7 R.A. 286=1934 A.L.J. 674=18 R.D. 240=15 L.R. 260 (Rev.)=A.I.R. 1934 All. 787.**

Registration.

———Registration—Unregistered lease for twelve years—Need for registration—Status of tenant. *See*

LEASE—Registration.

LEASE—Renewal.

LANDLORD AND TENANT—STATUS OF TENANT. **15 R.D. 106.**

Renewal.

———*Renewal—Clause for—Tenant holding over—Right to renew, not lost.*

Where a lease confers a right on the lessee to apply for renewal and no time is fixed for it, the lessee will not necessarily lose his right of renewal by not having made the application within the currency of his term if he continues in possession afterwards with the sanction of the lessor. The right is not lost so long as the relation of landlord and tenant continues. The landlord may call upon him to decide if he will take the lease and any delay thereafter on the part of the lessee is fatal to his right, But in the absence of waiver or refusal, the mere fact that the original term has expired cannot be regarded as determining the relationship between the parties, and the tenant cannot be said to have lost his right of renewal. (English cases Ref.) (*Mukerji and Bartley, JJ.*) HEMANTA KUMARI DEBI *v.* SEFATULLA BISWAS. **144 I.C. 889=6 I.R. (Cal.) 62=37 C.W.N. 9=A.I.R. 1933 Cal. 477.**

Rent.

See LANDLORD AND TENANT—RENT.

Right of lessee.

———*Right of lessee—Lease invalid for want of registration—Lessee's right to compensation for structures on ejectment.*

A lessee under an unregistered lease is not, on ejectment, entitled to get compensation for the structures built by him, in the absence of a finding, that the structures are permanent or that he was led into the belief that he had a permanent tenancy and that he raised the structures under that belief. (*Nasim Ali, J.*) DURGAPADA KARMAKAR *v.* NRISINGHA CHANDRA NANDY CHAUDHURY. **62 Cal. 492=159 I.C. 20=8 R.C. 294=39 C.W.N. 416=A.I.R. 1935 Cal. 541.**

———Rights of lessee—Right to recover possession—Enforceability against lessor and the prior lessee. *See* T. P. ACT, S 108 (B). **A.I.R. 1931 All. 649.**

Sub lease.

———Sub-lease—Distinction between sub-lease and assignment. *See* LEASE—ASSIGNMENT. **69 M.L.J. 133.**

———*Sub-lease—Grant by some members of joint family—Binding nature.*

Where there was no reason for holding that the members of the Hindu joint family who sublet or otherwise transferred the plots did not do so as representatives of the whole family.

Held, that the sub-lease was binding on the whole family. (*Oppenheim, S. M. and Drake Brockman, J. M.*) DIWAN SINGH *v.* JAGDISH PRAKASH. **18 R. D. 163=15 L.R. 177 (Rev.).**

———*Sub-lease—Right of lessor to recover rent from sub-lessee.*

There being no privity of contract between the original lessor and a sub-lessee, the former is not entitled to claim rent from the latter, his remedy being only against the lessee with whom he made the contract. (*Addison, J.*) JETHA NAND *v.* JOINT HINDU FAMILY OF UDHO DAS. **131 I.C. 121 (1)=32 P.L.R. 422=A.I.R. 1931 Lah. 614.**

Termination.

———*Termination—Lease for residential purposes—Tenancy if heritable.*

Where the lease is for residential purposes, the leasehold interest must be regarded as heritable in the absence of an intention to the contrary on the death of the lessee, the kabuliyat has not spent its force and does not terminate and the plaintiff is not entitled to recover possession. 37 C. 377 and 17 C.L.J. 459, Ref. (*Mitter, J.*) DIGAMBAR DAS *v.* BEPIN BEHARI ROY. **136 I.C. 607=I.R. 1932 Cal. 239=35 C.W.N. 1180=A.I.R. 1932 Cal. 215.**

———Termination—Lease for term—Payment of money by tenant in advance—Destruction of subject-matter by fire—Tenant's notice to terminate lease—Right to refund of money. *See* CONTACT ACT, S. 65. **A.I.R. 1935 Nag. 208.**

Thika mokra.

———*Thika mokra*—Mourashi—Putra pautradikramay—No remission of rent on any account—Tenure hereditary and perpetual. *See* LEASE—CONSTRUCTION. **A.I.R. 1934 Cal. 782.**

———'Thika mokra'—Permanent tenancy. *See* LEASE—CONSTRUCTION. **59 Cal. 1282=A.I.R. 1932 Cal. 764.**

Transferability.

———*Transferability.*

Where there is no condition in the lease prohibiting a transfer of the property, leasehold property can be transferred. (*Jai Lal, J.*) YAQUB KHAN *v.* MOHAN LAL. **I.R. 1932 Lah. 603=139 I.C. 680=33 P.L.R. 626=A.I.R. 1932 Lah. 518.**

Validity.

———*Validity—Duty of lessee to disclose income of property.*

The lessee is not under a duty to disclose to the lessor the real income of the property (fishery) at the time when the darpatni patta was executed. The law does not lay down any statutory duty on him; and failure or omission on his part to so disclose the income will not render the lease invalid. (*Nasim Ali, J.*) PURNA CHANDRA CHOWDHURY *v.* SAROJINI CHOUDHARANI **60 C.L.J. 25=155 I.C. 1027=7 R.C. 662=A I.R. 1935 Cal. 234.**

———*Validity—Long term lease by* mahant—*Succeeding* mahant *receiving rent—Tenancy from month to month created.*

Apart from the question of necessity a *mahant* in charge of a religious institution has no power to lease the property under his management beyond the period of his tenure. Consequently the tenancy created by a preceding *mahant* comes to an end when he is removed from office. Where the succeeding *mahant* continues to receive the rent and there is nothing to show that he ratified the prior long term lease, a fresh tenancy must be deemed to have been created between the parties from month to month. (*Bhide, J.*) HAR NATH *v.* MOHAR SINGH. **32 P.L.R. 469=A.I R. 1931 Lah. 675 (1).**

Zaripeshgi.

———Zaripeshgi—*Construction—Land given as security for payment—Transaction, if amounts to a mortgage.*

A *Zaripeshgi* lease recited, that, in consideration of Rs. 400 *Zaripeshgi*, the lessor conveyed to the lessee 7 bighas of land rented at Rs. 15 a year for a period of 15 years. The lease provided that on the termination of the period of the lease the lessor was to repay the Rs. 400 *Zaripeshgi* to the lessee and that he was not to sue in ejectment until that money was repaid to the lessee.

Held, that as there was no payment as an advance against rent to fall due in future years, it was not a lease and that it amounted to a mortgage within the meaning of S. 58 of the T. P. Act. (*Walton, J.M. and Oppen-*

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LEASE—Zaripeshgi.

heim, S.M.) WALI BAKHSH *v.* AJUDHIA. **14 L.R. 226 (Rev.) = 17 R.D. 270.**

———Zaripeshgi—*Distinction from mortgage.*

There is very little actual difference between a mortgage and a *Zaripeshgi* lease with a condition against ejectment, but there is no justification for treating as a mortgage a document which is termed a lease and has all the characteristics of a lease. (*Oakden, S. M. and Smith, J.M.*) ZORA *v.* JAHANIA. **15 R.D. 135.**

Miscellaneous.

———Agreement for—Mineral rights—Suit for return of premium—Defective title of lessor—Proof of. *See* MINERALS. **58 I.A. 392 = 59 Cal. 699 = 61 M.L.J. 699 (P.C.).**

———*Heritability—Lease for residential purposes—Tenancy, if heritable.*

Where the lease is for residential purposes the leasehold must be regarded as heritable in the absence of an intention to the contrary. 37 C. 377 and 17 C.L.J. 459, Ref. (*Mitter, J.*) DIGAMBAR DAS *v.* BEPIN BEHARI ROY. **136 I C. 607 = I.R. 1932 Cal. 239 = 35 C.W. N. 1180 = A.I.R. 1932 Cal. 215.**

———Melwaram—Possessory right. *See* MELWARAM. **56 Mad 366 = 64 M.L J. 361.**

———*Proof—Production of* patwari's *papers.*

A lease for seven years cannot be proved by the production of the entries in the *patwari's* papers. (*Keane, S. M. and Oppenheim, J M.*) MUKUT NATH *v.* DHARMA DATTA. **15 R D. 694 = 12 L R. 355 (Rev.).**

———*Tenant holding on—Whether becomes trespasser.*

A tenant does not automatically become a trespasser on the day when the period of his lease expires. (*Dalal, J.*) KHADERU CHAMAR *v.* SRI NATH PANDE. **I.R. 1931 All. 185 = 129 I.C. 553 = 15 R D. 162 = 12 L.R. 35 (Rev.) = A.I.R. 1931 All. 198.**

LEASE OR LICENCE.

See (1) EASEMENTS ACT (1882), S. 52.
(2) TRANSFER OF PROPERTY ACT (1882), S. 105.
(3) STAMP ACT (II OF 1899), S. 2 (16) (*b*).

LEAVE TO APPEAL.

See LETTERS PATENT, BOMBAY, CL. 15.
,, ,, CALCUTTA, CLS. 15 AND 41.
,, ,, LAHORE, CLS. 10 AND 26.
,, ,, MADRAS, CL. 15.
,, ,, PATNA, CLS. 10 AND 33.
,, ,, RANGOON, CLS. 37 AND 39.

LEAVE OF COURT.

See (1) C. P. CODE, O. 40, R. 1.
(2) PRESIDENCY TOWNS INSOLVENCY ACT, (1909), SS. 45 (2) AND 46 (3)
(3) PROVINCIAL INSOLVENCY ACT (1920), S. 28 (2).

LEAVE TO DEFEND. *See* LETTERS PATENT—RANGOON, CL. 13.

LEAVE TO SUE.

See (1) LETTERS PATENT, BOMBAY, CL. 12.
,, ,, CALCUTTA, CL. 12.
,, ,, RANGOON, CL. 10.
(2) PRESIDENCY TOWNS INSOLVENCY ACT (1909), SS. 45 (2) AND 46 (3).
(3) PROVINCIAL INSOLVENCY ACT (1920). S. 28 (2).

LEGACY.

See (1) SUCCESSION ACT, SS. 129-178.
(2) WILL.

LEGAL ADVISER.

See (1) EVIDENCE ACT, S. 126.
(2) LEGAL PRACTITIONER.

LEGAL PRACTITIONER—Admission.

LEGAL CRUELTY. *See* HUSBAND AND WIFE—RESTITUTION OF CONJUGAL RIGHTS.

LEGAL DISABILITY. *See* LIMITATION ACT, SS. 6 8.

LEGAL NECESSITY. *See* HINDU LAW—DAUGHTERS, GUARDIANSHIP, JOINT FAMILY, RELIGIOUS ENDOWMENT AND WIDOW—ALIENATION.

LEGAL PRACTITIONER.

See also (1) BAR COUNCILS ACT (1926).
(2) C. P. CODE, O. 3.
(3) EVIDENCE ACT, S. 126.
(4) LEGAL PRACTITIONERS' ACT.
(5) LETTERS PATENT.

Abandonment.
Admission
Appearance.
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Attorney.
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Cross-examination of witnesses.
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Abandonment.

———Abandonment of claim for damages—Authority. *See* POWERS, *infra.* **A I.R. 1934 Pat. 25.**

———*Abandonment of plea—Question of law—Binding nature of.*

Counsel for the defendant definitely gave up the plea regarding limitation after the evidence of all the issues had been taken.

Held, that the question was one of law, that the party was not bound by the statement of his Counsel and that as the opposite party was not prejudiced, the plea can be taken in appeal by the party. (*Addison and Bhide, JJ.*) DES RAJ HUKAM CHAND *v.* LACHHI RAM PRABH DAYAL. **147 I.C. 57 = 6 R.L. 324 = A.I. R. 1933 Lah. 404.**

Admission.

See also POWERS, *infra.*

———*Admission—Execution of promissory note—Binding nature of.*

In the ordinary course of his duties a pleader has authority to bind his client by admissions of fact provided such admissions are made during the actual progress of litigation. An admission of execution of a promissory note made by the defendant's pleader in a previous suit between the parties obviates the necessity of proving its execution afresh. (*Baker and Wadia, JJ.*) CHHAGANI AL *v.* BONDERBAI. **151 I.C. 376 = 7 R.B. 57 = 36 Bom L.R. 334 = A.I.R. 1934 Bom. 186.**

———*Admission—Mixed question of fact and law.*

An admission by Counsel on a mixed question of fact and law is not final and binding on the client and the question can be reopened on appeal when there is no question of springing a surprise on the other party.

LEGAL PRACTITIONER—Admission.

(*Wazir Hasan, C.J. and Raza, J.*) GANESH BAKHSH SINGH *v.* AJUDHIYA BAKHSH SINGH. **7 Luck. 564 =I.R. 1932 Oudh 230=137 I.C. 349=9 O.W.N. 304 =A.I.R. 1932 Oudh 172.**

———*Admission—Mixed question of fact, law and custom—Binding nature on litigant.*

If Counsel deliberately abandons questions which are mixed questions of law, custom and fact, it is not open to the litigant to go behind the admission and re agitate the same points in the Court of Second Appeal. (*Harrison and Tek Chand, JJ.*) DHERU *v.* HIRA LAL. **13 Lah. 185=I R. 1932 Lah. 425=138 I.C. 185=33 P. L.R. 421=A.I.R. 1932 Lah. 343.**

———*Admission—Point of law.*

An admission by a legal practitioner on a point of law is not binding on his client. (*Mitter and Patterson, JJ.*) NAWAB ALI *v* HANUMAN JUTE MILL. **6 I.R. (Cal.) 10=144 I C. 701 (2)=1933 Cr.C. 857 = 37 C.W.N. 186=A.I R. 1933 Cal. 513.**

———*Admission—Point of law—Binding nature of.*

An erroneous admission by Counsel on a point of law is of no legal effect as against his client; it does not preclude the latter from claiming his legal rights in the appellate Court (Cases ref.) (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) SEENAPPA *v.* GURU SIDDAPPA. **12 Mys.L.J. 190=39 Mys. H C.R. 156.**

———*Admission—Point of law—Not binding.*

An erroneous admission on a question of law by the mukhtyar is not binding on the party. (*Shadi Lal, C. J. and Abdul Qadir, J.*) MT. NAZO BIBI *v.* HASSAN ALI KHAN. **I.R. 1933 Lah. 514=144 I C. 610.**

———*Admission—Question of fact—Statement of intention of executant of document by his pleader.*

The question whether the parties intended that the mortgage-deed should or should not be enforced in the case of default of either party is in this aspect purely a question of fact and not a question of law. The counsel when he stated that in the event of default by either party, the plaintiff was entitled to enforce the mortgage was merely stating his client's position as to the real understanding between the parties and not expressing an opinion on a point of law. Hence a statement regarding such intention of the executant by his pleader is a question of fact and is binding on his client. (*Bhide and Din Mahomed, JJ.*) BUTA RAM *v.* SAYYAD MAHOMED. **16 Lah. 328=37 P.L.R. 596=157 I.C. 806= A.I.R. 1935 Lah 71.**

———*Admission—Question of law—Binding nature on client.*

Any admission or concession on the part of a pleader on a pure question of law will not estop the party from questioning it in appeal or revision. (*Sundaram Chetty J.*) SIVASUBRAMANIA NADAR *v.* SUBRAMANIA NADAR **I.R. 1932 Mad. 488 (1)=138 I.C 88=35 L.W. 393=A.I.R. 1932 Mad. 409.**

Appearance.

———*Appearance—Absence of Vakalat—Effect.*

Counsel who has not filed any vakalat from his client has no authority to appear for him. (*Mahadevayya, C. J.*) N.O. MANDRE *v.* BASAPPA KOLIWAD. **12 Mys. L.J. 383.**

———*Appearance—Appearance of Counsel against interest of his client—If permissible.*

A Counsel should not be allowed to appear against the interests of a person who has briefed him at one or other stage of the case. It is absolutely necessary for taking opinion that the party should lay all his cards before the Counsel concerned, and it is only after he has thoroughly gone into the facts of the case that a lawyer can be in a position to advise his client. In the circumstances it would be unfair to allow the Counsel to appear against the same person later on, and an assurance on the part of that individual that he had no objection to the counsel's appearance in Court would also be of no avail in the matter. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) RADHA KISHAN *v.* SHIVAN DITTA. **158 I.C. 591=8 R. Pesh. 60 (1)=A.I.R. 1935 Pesh. 65 (1).**

LEGAL PRACTITIONER—Attorney.

———*Appearance—Mukhtar appearing in trial Court —Power to file appeal.*

A mukhtar though appearing in trial Court cannot file an appeal unless his power-of-attorney authorises him to do so. Mere general words in power are not sufficient. 132 I.C. 895, Dist. (*Bhide, J.*) KARAM SINGH *v.* NARAIN. **147 I.C. 843=6 R.L. 457=A.I. R. 1933 Lah. 504.**

———*Appearance—Pleading in case in which he is personally interested—Propriety.*

It is undesirable for a member of the Bar to plead in a case concerning which he has a personal interest. (*Cunliffe, J.*) THE PIONEER INSURANCE COMPANY, LTD., *In the matter of.* **164 I.C. 897=39 C.W.N. 274.**

———*Appearance—Separate appearances for same party in different capacities—Propriety.*

A solicitor or Counsel appearing for a client who is interested in two different capacities can state the case of his client in respect of each capacity, but he cannot appear separately for the same person. Nor is the same party entitled to appear by separate Counsel or separate solicitors in different capacities. (*Beaumont, C.J. and Rangnekar, J.*) IBRAHIM F. LALJI *v.* HUSSEIN BHOV A. LALJI. **158 I.C. 579=8 R.B 135=37 Bom L R. 49=A.I.R. 1935 Bom. 119.**

Appointment by minor.

———*Appointment by minor—Attorney.*

No minor can appoint an attroney and if he does, the attorney has no valid appointment under which he can act. (*Young, J.*) SHAFI ULLAH *v.* EMPEROR. **150 I C. 139=1934 A L J. 387=6 R.A. 1033=35 Cr.L.J. 1053=3 A.W.R. 598=1934 Cr.C. 756=A.I.R. 1934 All. 589.**

Attorney.

See also APPOINTMENT BY MINOR, *supra.*

———*Attorney—Arbitration—Reference on behalf of firm—Legality.*

An attorney acting for a firm and having the power to conduct a suit has no power to refer a matter to arbitration unless he is authorized specifically for that purpose. (*Rankin, C.J. and Pearson, J.*) RAJENDRA PROSAD *v.* PANNA LAL CHAMPA LAL. **I.R. 1932 Cal. 458=138 I.C. 386=36 C.W.N. 8=A.I.R. 1932 Cal. 343.**

———*Attroney—Authority—Engagement for suit— Right to act in execution proceedings.*

The retainer of an Attorney ordinarily comes to an end when the suit is ended. After the suit is over, the Attorneys are *ipso facto* discharged so far as the suit is concerned and would need fresh authority from their clients to act for them in execution proceedings. (*Mirza, J.*) RANGILDAS VITHALDAS *v.* BURJORJI. **I R. 1932 Bom. 363=138 I.C. 320=34 Bom.L.R. 615=A.I.R. 1932 Bom 337.**

———*Attorney—Authority—Improper compromise by guardian* ad litem*—No right to continue suit.*

If a suit has been compromised by the guardian *ad litem* improperly without the leave of the Court, that may be a ground for appropriate proceedings by the minor on attaining majority or by another guardian during minority. But the attorneys who received their instructions from the guardian cannot go behind them

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and continue to represent the minor. (*Mirza, J.*) ABU-BAKER MAHOMED *v.* AMIABAI. **I.R. 1932 Bom. 367 = 138 I.C. 312 (1) = 34 Bom.L.R. 614 = A.I.R. 1932 Bom. 401 (1).**

———*Attorney—Change by litigant—Right of attorney in respect of costs.*

A litigant has the right to employ any attorney he likes and to change him for another attorney in the course of the same proceeding if he so wishes, provided that he does not thereby cause delay or injustice to any other party or inconvenience to the Court. If he has not paid costs to the attorney whom he wishes to discharge that would affect his right to obtain papers and documents on which the attorney might claim a lien for his unpaid costs. But it is not open to an attorney to say that his client shall continue to employ him in the suit or proceeding until all the costs due to him are paid. (*Mirza, J.*) DHARAMDAS *v.* KACHUDAS. **I.R. 1933 Bom. 315 = 144 I.C. 628 = 35 Bom.L.R. 298 = A.I.R 1933 Bom. 182.**

———*Attorney—Change of—Practice.*

It is a rule of the Court not to sanction a change of solicitors when the former solicitor has not discharged himself, so long as his costs remain unpaid. (*Wadia, J.*) NARAYANDAS SUNDARLAL *v.* NARAYANDAS. **I R. 1932 Bom. 360 = 138 I.C. 257 = 34 Bom.L.R. 703 = A.I.R. 1932 Bom. 363.**

[Diss. 35 Bom.L.R. 298 (300).]

———*Attorney—Duties of—Solicitor entrusted with moneys for investment.*

It is the duty of a solicitor entrusted with the moneys of his client for investment, before investing the amount upon the mortgage of a farm, to have a proper valuation made. If he chooses to rely mainly on his own general knowledge of farms in the vicinity, he does so at his own risk and if his judgment is shown to have been at fault he is liable for the loss traceable to his breach of duty to his client. (*Sir George Lowndes.*) WILLIAM ABERCROMBIE SHAW *v.* FREDERICK CHATER JACK. **I.R. 1932 P.C. 207 = 137 I C. 531 = 1932 Cr.C. 612 = A.I.R. 1932 P.C. 194 (P.C.).**

———Attorney—Lien—Kinds of—Passive or retaining lien—Nature of—Moneys recovered by solicitor—Rights over—Extent of. *See* CONTRACT ACT (1872), S. 171. **60 Cal. 1442 = A.I.R. 1934 Cal. 341.**

———*Attorney—Order for change of Attorney—Procedure.*

No order for change of Attorney should be made unless provision is made for payment of costs to the attorney subject of course to this that no such provision will be made where the Attorney has by his own conduct or misconduct discharged himself. (*C. C. Ghose, Ag. C. J. and Costello, J.*) PANKAJ KUMAR GHOSH *v.* SUDHIR KUMAR SIKDAR. **60 Cal 1273 = 147 I.C. 1064 = 6 R.C. 394 = 37 C.W.N. 998 = A.I.R. 1934 Cal. 58.**

Authority.

See also ATTORNEY, *supra* AND MUKHTAR, *infra.*

———*Authority—Abandonment of issue.*

A vakil's general power in the conduct of a suit includes the abandonment of an issue, which in his discretion he thinks it inadvisable to press. (*Bhide and Din Mahomed, JJ.*) BUTA RAM *v.* SAYYAD MAHOMED. **16 Lah. 328 = 157 I.C. 806 = 37 P.L.R. 596 = A.I.R. 1935 Lah. 71.**

———Authority—Authority to file criminal appeal—Vakalat—Necessity for. *See* MYS. CR. P. CODE REGULATION—APPEAL. **13 Mys.L.J. 24.**

———*Authority—Compromise.*

Where a vakalatnama gives power to a vakil, to enter into a compromise, a compromise entered into by him is

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binding on his client especially when the compromise is an eminently fair reasonable one. (*Young, J.*) MT. GOVINDI *v.* GANGA PRASAD. **147 I.C. 1256 = 6 R.A. 632 = A.I.R. 1933 All. 955.**

———*Authority—Compromise—Authority withdrawn by client—Opposite party in ignorance—Court, if will enforce compromise.*

Counsel in India have the same implied authority to compromise an action as have Counsel in the English Courts. But if such authority is invoked to support an agreement of compromise, the circumstances must be carefully examined. In the first instance, the authority is an actual authority implied from the employment as Counsel. It may however be withdrawn or limited by the client; in such a case the actual authority is destroyed or restricted; and the other party if in ignorance of the limitation, could only rely upon ostensible authority. But if in fact Counsel has had his authority withdrawn or restricted, the Courts will not feel bound to enforce a compromise made by him contrary to the restriction, even though the lack of actual authority is not known to the other party. (*Lord Atkin.*) SHEONANDAN PRASAD SINGH *v.* HAKIM ABDUL FATEH MOHAMMED. **62 I.A. 196 = 14 Pat. 545 = 1935 O.W.N. 754 = 156 I.C. 694 = 16 Pat.L.T. 479 = 42 L W. 154 = 7 R.P.C. 226 = 1935 A.L.J. 865 = 1935 A.W.R. 980 = 39 C.W.N. 1185 = 37 Bom.L.R. 845 = 1935 M.W.N. 778 = A.I.R. 1935 P.C. 119 (P.C.).**

———*Authority—Compromise—Power to — Advocate, O.S., Bombay—Power to agree to extension of time for award.*

The rights of an advocate, O.S., are the same as those of a Barrister. Amongst the many powers, duties, privileges and obligations extending beyond the mere duty of acting as an Advocate, he has power to refer the matter in dispute to arbitration or to compromise it. Those powers and obligations are derived from his retainer as Counsel and not from any contractual appointment as an agent. In non-litigious work, on the other hand, Counsel has no such special authority. His authority in that class of work is merely that of an agent and depends on the terms of his particular employment.

Obiter.—The special authority of Counsel in relation to litigation is confined to litigation in the ordinary course and does not extend to matters pending before private tribunals. Even apart from any such special authority, even an ordinary agent (and more so in the case of an Advocate) has the power to agree to an extension of time for making the award. (*Beaumont, C.J. and Mirza, J.*) FULCHAND DHANRAJ *v.* CLARKE AND SMITH. **58 Bom. 447 = 149 I.C. 1235 = 6 R.B. 422 = 36 Bom.L R. 18 = A.I.R. 1934 Bom. 101.**

———*Authority— Compromise— Power over matter collateral to suit.*

In an action by transferee challenging a mortgage by the transferor as collusive, a compromise to the effect that the mortgagee should buy out the plaintiff's interest in the mortgaged property for an agreed price cannot be entered into by Counsel as it is a matter collateral to the suit. Not only would it not be binding on the parties but it would, in any case, be a matter in respect of which the Court in pursuance of O. 23, R. 3, should not make a decree. A compromise by the Counsel cannot be supported by reference only to the implied authority of the Advocate. Although a Counsel has complete authority over the suit, the mode of conducting, it and all that is incident to it—such as withdrawing the record, calling no witnesses or selecting such as, in his discretion, he thinks ought to be called, and other matters which properly belonged to the suit and the

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management and conduct of the trial—he has not, by virtue of his retainer in the suit, any power over matters that are collateral to it. So in an action however, desirable it may be that litigation should cease by one of the parties purchasing the property of the other, the Counsel have no authority to agree to such a sale and bind the parties to the suit without their consent, and certainly not contrary to their instructions and such an agreement would be void. (*Lord Atkin.*) SHEONANDAN PRASAD SINGH *v.* HAKIM ABDUL FATEH MAHOMED. **62 I. A. 196=14 Pat. 545=1935 O.W.N. 754=156 I.C. 694=16 Pat. L.T. 479=42 L.W. 154=7 R.P.C. 226 =1935 A.L.J. 865=1935 A.W.R. 980=39 C.W.N. 1185=37 Bom.L.R. 845=1935 M.W.N. 778=A.I.R. 1935 P.C. 119 (P.C.).**

———*Authority—Compromise—Terms of power-of attorney.*

Where the power of-attorney expressly confers the authority to settle the suit by a compromise it is not necessary for an Advocate to consult his client before entering into the compromise if he acts in good faith. (*Shadi Lal, C.J. and Rangi Lal, J.*) MT. FAZAL JAN *v.* ABDUL RAHIM SHAH. **15 Lah. 626=151 I.C. 786 (2)=7 R.L. 206=35 P.L.R. 199=A.I.R. 1934 Lah. 393.**

———*Authority —Compromise —Vakalatnama —Construction.*

Where the vakalatnama which was executed by a client contained among other things the following clause "*avasyamanal* (if necessary or expedient) you are to compromise the suit or raise contest."

Held, that to decide whether it was necessary or expedient to compromise the suit, was within the discretion of the pleader, and not the Court, and that a compromise entered into by him was binding on his client. (Case law reviewed.) (*Walsh, J.*) BASHYAM AYYANGAR *v.* SRINIVASA CHARIAR. **6 I.R. (Mad.) 224=146 I.C. 219=38 L.W. 341=A.I.R. 1933 Mad. 734.**

———*Authority—Consent decree—Binding nature on client.*

When the case was opened, the Counsel for defendant in view of certain documents mentioned to the Attorney that the defendant should consent to a decree and he also consulted his client behind his back, but it appeared that the Counsel was under the impression that the person consulted was a relative of the party and not the party himself. The decree that was passed on the basis of the Counsel's representation was sought to be impugned on the ground that the Counsel did not have the requisite authority.

Held, that the party present having in fact been consulted the agreement was binding on him.

Per *Rankin, C.J.*—If the party thought he was not properly and adequately consulted then his duty was to refuse, when his Counsel was proposing to consent to a decree to allow that to happen and if necessary to give notice to the other side and the Court that he was withdrawing the authority which the Counsel had on his behalf. If any right is to accrue to the client from the fact of his being in Court, he must at least make his presence known to the Counsel in order that the Counsel may act accordingly and it is monstrous to suppose that, because he keeps quiet in a back seat and does not even instruct his Counsel as to who the client is or take any steps to inform the Counsel of his presence, the Counsel has got to carry on upon the footing that he has no authority to deal with the case as circumstances may require. (*Rankin, C. J. and Buckland, J.*) GHASIRAM GOENKA *v.* HARIBUX GOVERDHONE DAS. **59 Cal. 31=54 C.L.J. 558=136 I.C. 535=I.R. 1932 Cal. 215=35 C.W.N. 674=A.I.R. 1932 Cal. 211.**

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———*Authority—Construction—General powers followed by specific instances of special authority—Power to abide by oath of witness, implied.*

Per *F.B.* (*Mukerji, J., dissenting*).—In the case of an appointment of a vakil by vakalatnama to conduct a case, it is *prima facie* implied that he has full power to conduct the ease in the way he considers best and therefore such a document should be construed liberally. If the vakalatnama confers very wide powers in very general terms on the vakil, and authorizes him to conduct the case and to take other proceedings and expressly states that whatever is done by the vakil should be accepted by the litigant and then it goes on to specify certain particularly important powers like those of appointing arbitrators and compromising disputes, etc., unless there is a special clause excluding his authority to act in a particular way in the course of the suit, such an authority should be implied. The mere fact that certain important powers are emphasised in particular does not in any way derogate from the general authority conferred upon him. It follows therefore, that when general authority to conduct a case is conferred upon a vakil and it is followed by special powers to compromise a case and to refer the dispute to arbitration, the power to abide by the oath of a witness whether under the Oaths Act or by way of an agreement or compromise is by necessary application implied. 58 M.L.J. 551 (P.C.); 43 Cal. 527; 19 A.L J. 63; 13 All. 272 (F.B.); 38 All. 131; 25 A.L J. 29, Ref. (*Sulaiman, C.J. Mukerji and King, JJ.*) AKBARI BEGAM *v.* RAHMAT HUSAIN. **56 All. 39=6 I.R. (All.) 232=146 I.C. 84 =1933 A.L.J. 1127=A.I.R. 1933 All 861 (F.B.).**

———*Authority—Objection to trial in criminal proceeding—Waiver.*

No serious defect in the mode of conducting a trial can be justified or cured by the consent of the advocate of the accused. (*Raza and Srivastava, JJ.*) RAM LOTAN *v.* EMPEROR. **6 Luck. 386=I.R. 1931 Oudh 17=32 Cr.L.J. 91=7 O.W.N. 972=128 I.C. 209= 1931 Cr.C. 273=A.I.R. 1931 Oudh 113.**

———*Authority—Offer of oath by pleader—Client whether bound.*

If a pleader has been expressly authorized to make an offer on behalf of his client to be bound by the oath of the other party, his action in that respect would be binding on the client. (*Jai Lal, J.*) HATA *v.* SAMAIL. **I.R. 1932 Lah. 387=137 I.C. 810 (2)=33 P.L.R. 470=A.I.R. 1932 Lah. 414.**

———*Authority—Power-of-attorney—Authorization to act in trial Court or in any other Court—Presentation of appeal.*

A power-of-attorney given by a client to his vakil authorized him to act and appear for the party in the trial Court or in any other Court.

Held, that the vakil had sufficient authority to enable him to present an appeal. (*Jai Lal, J.*) SHUSHIL CHANDAR DAS *v.* RAM SARAN DAS SRI RAM. **I.R. 1932 Lah. 331=137 I.C. 279 (1)=33 P.L.R. 34.**

———Authority—Power to compromise suits or refer to arbitration. *See* POWERS, *infra*. **1935 A.L.J. 953 =A.I.R. 1935 All. 626.**

———*Authority—Resumption of—Issue of notice.*

When a member of the Bar writes a letter purporting to be instructed by a client, there is a presumption, until the contrary is proved. that the letter is written under instructions. (*Baguley, J.*) HAMIDA BI *v.* ABDUL GAFFAR. **6 I.R. (Rang.) 25=144 I.C. 996= A.I.R. 1933 Rang. 147.**

LEGAL PRACTITIONER—Barrister.

Barrister.

———Barrister—Status of Barrister practising as an advocate in India. *See* BARRISTER. **55 All. 570=1933 A.L J. 451=A.I R. 1933 All. 417 (F.B.).**

Contempt of Court.

———Contempt of Court—Imputation against Bench. *See* CONTEMPT—LEGAL PRACTITIONER. **33 P.L.R. 872=A.I.R 1932 Lah 485 (F.B.).**

———*Contempt of Court—Objectionable allegations in affidavit—Characterising proceedings of Court.*

A legal practitioner against whom proceedings for misconduct were pending in Court filed affidavits which contained *inter alia* deliberate allegations such as these, namely, that the procedure has hampered the course of justice and injustice will be done to him; that an enquiry under the Legal Practitioner Regulation would expose him to grave risks and become improper, etc; that the grossest piece of injustice has already been done to him since findings of facts adverse to him and prejudicial to the course of justice had been recorded; that he apprehended injustice because two witnesses were allowed to blacken his character behind his back; that injustice was done to him by examining him as a Court witness; that his being compelled to state on oath, etc., was improper, etc.

Held, that the statements constituted contempt of Court demanding suitable action and that such objectionable conduct must be disapproved. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTA RAO, *In the case of.* **12 Mys.L J. 292=39 Mys.H. C.R. 380.**

———*Contempt of Court—Practitioner a party to litigation—Imputation against Judges—Disciplinary action—Propriety of.*

An advocate deliberately making false allegations involving imputations upon the fairness and impartiality of judicial officers in proceedings connected with an execution case to which he was himself a party cannot be punished under the disciplinary side under Bar Councils Act. (*Young, Pullan and Niamatullah, JJ.*) AN ADVOCATE OF BENARES, *In the matter of.* **54 All. 912=142 I C. 564=I R 1933 All. 132=1932 A.L.J. 773=A.I.R. 1932 All. 492 (S.B.).**

———Contempt of Court—Threat used by advocate to Judge in letter—Offence. *See* CONTEMPT OF COURTS ACT (1926), S. 3. **1934 A.L J. 145=A.I.R. 1934 All. 317.**

Cross-examination of witnesses.

———*Cross-examination of witnesses — Irrelevant questions deprecated.*

Protracted examinations of witnesses with questions which are quite irrelevant to the suit, and only tend to swell the size of the record, must be deprecated. It is an abuse which enormously increases the cost of litigation without any corresponding benefit to the parties and it is clearly within the powers of the High Court to direct inquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals. (*Sir John Wallis.*) RAJ KUMAR SEN CHOWDHURY *v.* RAM SUNDAR SHAHA. **1932 A L. J. 198=I R. 1932 P C. 54=136 I.C 102=34 Bom.L. R. 526=55 C L J 120=35 L.W. 409=1932 M.W.N. 584=A.I.R. 1932 P.C 69=62 M. L.J. 457 (P.C.).**

———Cross examination of witnesses—Limits of. *See* PRIVILEGE, *infra.* **34 Bom.L R. 443=A I.R. 1932 Bom. 199.**

Disciplinary action.

———*Disciplinary action—Considerations.*

The point to be considered in all cases of disciplinary action against a member of the Bar is whether his conduct involves unfitness on his part for the exercise of his profession. Moral turpitude which would entitle the Court to take action must be such as is connected with the pleader's profession or consists of any attack upon the system of which the Court forms part or embarrasses in any way the administration of justice by the Courts. A speech of a vakil alleged to injure the feelings of an important sect of the Mohammadans does not fall in any of these categories and is, therefore, not one which would induce the High Court of Jammu and Kashmir to take any action against him. The State imposes suitable penalties for the infringement of its laws and provides proper sanctions for the enforcement of such penalties and there is no reason why the disciplinary jurisdiction vested in the High Court should be employed merely in aid of the Criminal Law. (*Dalal, C.J., B. R. Sawhny and Abdul Qayoom, JJ.*) GULAM MOHAMMAD AND YAQUB ALI, *In case of.* **37 P.L.R. J. & K. 16.**

LEGAL PRACTITIONER—Duties.

———*Disciplinary action—Conviction for sedition—Legality of conviction—If can be challenged.*

Where a legal practitioner has been convicted for sedition, it is not open to him in an inquiry under disciplinary jurisdiction to contend that his conviction was not justified on the facts found. The High Court must assume for the purposes of the enquiry that the speeches made by the legal practitioner did contain the expressions mentioned by the Magistrate in his judgment. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT-LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354=149 I.C. 764=6 R L. 741=35 Cr.L.J. 1010=1934 Cr.C. 479=A.I.R. 1934 Lah. 251 (S.B.).**

———*Disciplinary action—High Court's discretion—If can be fettered by Local Government.*

The Local Government have no *locus standi* in any way to fetter the discretion of the High Court to take or not to take any action under Cl. 8, Letters Patent, or under the Legal Practitioners' Act against any legal practitioner; the matter is one which is entirely within the discretion of the High Court. As the Local Government is not competent to claim that action should be taken against any particular legal practitioner, it has also no right or power either to abandon any proceedings or to condone the conduct of the legal practitioner so far as it comes within the purview of the disciplinary jurisdiction of the High Court so as to bind it in any way. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT-LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354=149 I.C. 764=6 R.L. 741=35 Cr.L.J. 1010=1934 Cr.C. 479=A.I.R. 1934 Lah. 251 (S.B.).**

———*Disciplinary action—Motive.*

The motive of the informer is immaterial. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354=149 I.C. 764=6 R.L 741=35 Cr L.J. 1010=1934 Cr.C. 479=A.I.R. 1934 Lah. 251 (S.B.).**

———*Disciplinary action—Speech inciting breaking laws and defying dispersal orders—If a ground for.*

The speech inciting the audience to break those laws which the All-India Congress Committee might declare should be broken and the speech in which the speaker exhorts the audience to resist orders for dispersal attract the disciplinary jurisdiction of the High Court (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT-LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354=149 I.C. 764=6 R L. 741=35 Cr L.J. 1010=1934 Cr.C. 479=A.I.R. 1934 Lah. 251 (S.B.).**

Duties.

See also MISCONDUCT AND RELATION WITH CLIENT, *infra.*

LEGAL PRACTITIONER—Duties.

———*Duties—Accepting brief for opposite party—Rules regulating — Madras High Court Rules of Practice, R.* 277.

R. 277 of the Madras High Court Rules of Practice only embodies the principles observed by the Courts generally in India and England for regulating professional conduct and etiquette in cases where a Counsel who has advised a party or acted for him at any stage of a suit wishes to appear for the opposite party in the same proceeding. The general rule is that he cannot appear for the opposite party except when specially authorized by the Court or with the consent of the party. Such consent may be express or presumed if, without offering an engagement to the pleader, the party engages another to appear for him. In the absence of consent express or implied, the pleader is bound to give an opportunity to the party to engage his service. But even in a case where the party refuses to retain him, Counsel ought not to accept a brief for the opposite party if he would be embarrassed in the discharge of his duty by reason of the confidence reposed in him. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) BANK OF MYSORE *v.* SHANKARA RAO. **9 Mys.L.J. 166.**

———*Duties — Approval of breach of laws—Impropriety.*

Practising pleader wishing to remain on the roll must remember that those who live by the law should keep the law and not encourage others in its breach by publicly extolling and glorifying persons sentenced for breach of laws and by showing hearty sympathy towards seditious and disloyal movement. A pleader who gives formal and public expression of his approvol of the conduct of a person who commits offences against the law of the land is not a proper person to hold the office of the pleader. (*Haveliwala and Milne, A J.Cs.*) HUR BUXRAI, *In re.* **25 S L.R. 131=I.R. 1931 Sind 59=131 I.C. 187=1931 Cr.C. 193=A.I R. 1931 Sind 33.**

———*Duties—Collecting evidence for client.*

A pleader helping his clients by collecting evidence for them to be used on their behalf does not exceed his duties as their Counsel. In the Punjab the Counsel has the duties both of solicitor and of advocate, and it cannot be held that it is no part of the duties of a solicitor either to collect evidence on behalf of his client or even to furnish him information which was in his own personal knowledge and not in the knowledge of his client at all. (*Harrison and Dalip Singh, JJ.*) AJIT SINGH *v.* RADHA KISHEN. **I R. 1931 Lah. 947=134 I.C. 515=32 P.L.R. 772=A.I.R 1931 Lah. 246.**

———*Duties—Conduct of case—Intimidation by Judge—Duty of Counsel to protest.*

It is the duty of the members of the Bar, if their clients are prematurely threatened from the Bench, not to adopt an attitude which may appear pusillanimous, but to protest then and there, that they resent such observations, and if necessary, after consultation with their attorney instructing them, to apply for a transfer of the case to the list of another Judge. (*Cunliffe, J.*) MOUSELL & CO., LTD *v.* GANSHYAMDAS JUMNADAS. **62 Cal. 223=155 I.C. 297=7 R.C. 576=36 Cr. L J. 698=60 C.L.J. 179=39 C.W.N. 61=A.I.R. 1935 Cal. 231.**

———*Duties—Drafting pleadings—Grave and serious allegations.*

Per *Thom, J.*—No Counsel is entitled to frame a serious charge against a party to a litigation unless he is in possession of admissible and relevant evidence upon which, if accepted, Counsel could reasonably ask the Court to hold the allegations true. It may well be that the evidence in support of the allegations is untrue and it is certainly not the duty of a Counsel in the ordinary course to test the truth of the witnesses whom he intends to put into the witness box but at the conclusion of the evidence which he has led, he should be in a position to submit as a reasonable proposition to the Court that the evidence which he has led if accepted establishes the allegations for which he had made himself responsible. If he is not in possession of such evidence to support them, he is not entitled to make grave and serious allegations.

Per *Iqbal Ahmad, J.*—It is in the interest of administration of justice that too rigid a test of the conduct of an Advocate in the matter of drafting pleadings should not be emphasised and that the test should be such as not to deter a Counsel from fearlessly placing before the Court such allegations as their clients instruct them to make, so long as those allegations do not appear manifestly reckless and unfounded. It is no doubt the duty of Counsel to use their own judgment, experience and discretion and not to make irrelevant or unduly insulting allegations in the pleadings, but it is equally their duty to embody the case of their clients in the pleadings fearlessly, provided the instructions received from the clients justify the case in the pleadings. While on the one hand a Counsel is expected to be careful, and not reckless in drafting the pleadings, he cannot, on the other hand, assume the role of a Judge and refuse to embody allegations that his client instructs him to make unless and until he has examined the evidence on the subject. A Counsel is one sense the mouthpiece of his client, but he does not guarantee or pledge himself for his client's veracity.

Per *Allsop, J.*—On the one hand Counsel must look to the interests of his client and not be deterred by fear or favour from making any allegations which in those interests it is necessary for him to make. On the other hand, he cannot take shelter behind his client and claim to be an entirely irresponsible instrument in his client's hands. There remains in him a duty and an obligation to his fellow citizens and he is certainly not entitled to make scandalous and serious allegations against those fellow citizens unless he has some basis upon which the allegations can be grounded. (*Thom, Iqbal Ahmad and Allsop, JJ.*) AN ADVOCATE OF CAWNPORE, *In re.* **155 I.C. 1043=7 R.A. 1007=1935 A.L J. 759=1935 A.W.R. 285=A.I.R. 1935 All. 425 (F B.).**

———*Duties—Duty to Court — Display of temper—Propriety.*

It is the duty of an advocate to maintain towards the Court a respectful attitude and treat the Bench always with courtesy and deference. He is bound to help the Judge in the administration of justice It is highly unprofessional to display temper in or out of Court because of an adverse ruling or decision. He should not indulge in objectionable observations or insinuations against the Judges in the course of arguments or in affidavits so as to lower their authority or to bring the administration of justice into contempt. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys.L.J. 292=39 Mys H.C.R. 380.**

———*Duties—Duty to be present when case is called or to make proper arrangements.*

Counsel should be present as their case are called, and if they are unavoidably absent, they should make proper arrangements. The mere fact that Counsel happens to be engaged in one Court is no excuse that the Judges in other Court, where he has cases, should wait for him until he can find time to attend to them, or postpone those cases as they come up for hearing. Counsels who are in large practice, should advise their clients to

LEGAL PRACTITIONER—Duties.

engage a colleague with them, so that the interest of the clients may not suffer and the time of the Court may not be wasted. (*Agha Haidar, J.*) DAYA KISHEN KAUL *v.* MEHRAJ DIN. **158 I.C. 609=8 R.L. 283.**

———*Duties—Evidence in another case—Summoning for particular purpose — Use for different purpose—Permissibility.*

Legal practitioners should confine themselves to such documents as were produced by them and exhibited in the case. If the record of another case happens to be before the Court for specific purpose, *e.g.*, where the genuineness of a document on the record of another case of which a certified copy is produced in the case, is denied and the record of that other case has to be summoned to formally produce the original and prove its genuineness, such record as a whole and its contents cannot be treated as evidence in the case for any purpose other than the one for which it has been summoned. (*Sen and Niamatullah, JJ.*) GAURI SHANKAR SHARMA *v.* THAKUR MEWA RAM. **I.R. 1931 All. 369=131 I.C. 513=A.I.R. 1931 All. 600.**

———*Duties—Formal communication by one party—Retainer not paid—Appearance for other side—Propriety.*

In order to prevent Counsel from appearing for the other party he must have definite retainer with a fee paid or he must have had such confidential communication from one of the parties as would make it improper for him to appear for the other party. The respondent had written to the petitioner's Counsel complaining of his wife's conduct and stating that he desired to take action for the custody of his children. In the suit for divorce, the Counsel had been retained by the petitioner. An objection having been taken by the respondent,

Held, that Counsel had not been retained by respondent, nor was there any communication of a confidential nature and that Counsel could appear for petitioner. (*Young, J.*) HARDLESS *v.* HARDLESS **I R. 1932 All. 622 (1)=140 I.C. 62=33 Cr.L.J. 867=1932 A.L.J. 755=1932 Cr.C. 633=A.I.R. 1932 All. 536.**

———*Duties — Pleading containing allegation of fraud or collusion against public officer—Duty to satisfy himself that client is not making reckless statement.*

When a pleading contains allegations of fraud or collusion or other similar charges against a public officer the duty of the pleader ends when he has satisfied himself that his client was not making a reckless irresponsible statement and that he has some material on which he bases his charge. It is not necessary that the pleaders themselves should have inquired into the truth of the charge. Investigation of truth is the function of a Court and not the duty of a lawyer. (*Mahomad Noor, James and Varma, JJ.*) K, A. PLEADER, *In re.* **14 Pat. 10=152 I.C. 313=7 R.P. 170=36 Cr.L J. 1=15 Pat.L.T. 560=A.I.R. 1934 Pat 598 (S.B.).**

———*Duties—Presence at hearing—Rule of the bar.*

It is an unwritten rule of the bar that where two Counsel have been briefed, one or the other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on. 33 Bom. 475, Ref. (*Blackwell, J.*) ABDULLABHAI EBRAHIMJI *v.* ISABHAI. **141 I.C. 402=I.R. 1933 Bom. 81=34 Bom.L.R. 1425=A.I.R. 1932 Bom. 634.**

———*Duties—To appear—Refusal to appear against brother practitioner—Resolution of Bar Council prohibiting such appearance—Impropriety.*

It is a fundamental right possessed by every legal practitioner that he may be allowed freely to exercise his profession and to appear in any case in which he may

LEGAL PRACTITIONER—Examination as witness.

choose to appear without interference of any kind except where such interference is based upon some valid and legal grounds. It is not merely a right—nay—it is his duty to appear if a proper fee is paid, he is adequately instructed and the case is one which he is accustomed to take. To refuse to do so simply on the ground that he would appear against a brother practitioner would be professional misconduct. *A fortiori* a resolution by the Bar Association that no member thereof should appear for the prosecution in any criminal case against any other member is a flagrant and unwarranted interference with the rights of legal practitioners, contrary to the best traditions of the Bar and to all accepted notions of forensic propriety. 51 A. 892, Ref. (*Suhrawardy and Graham, JJ.*) HOHO MOHAN SEN *v.* SHAMA PADA BHATTACHARJI. **59 Cal. 709=137 I.C. 434=33 Cr. L.J. 466=I.R. 1932 Cal. 311=54 C.L.J. 530=36 C.W.N. 294=1932 Cr.C. 313=A.I R. 1932 Cal. 370.**

———*Duties—To conduct case even without funds.*

When a solicitor takes up a case and undertakes to conduct it, he is bound, whether his client is rich or poor, to proceed with due diligence and honesty to prosecute or defend the claim, even if he is not put in funds, for it is open when he takes up the case to assure himself whether his client is a person of substance, or if necessary to insist on a sufficient advance at the outset to cover all probable costs. (*Wadia, J.*) NARAYANDAS SUNDARLAL *v.* NARAYANDAS. **I.R. 1932 Bom 360=138 I.C. 257=34 Bom.L R. 703=A.I.R. 1932 Bom. 363.**

Etiquette.

———*Etiquette — Member of Co operative Society —Appearance for Society.*

Merely because a legal practitioner is a member of a Co operative Society he is not prevented by any rule of professional etiquette from accepting instructions from the Society of which he is a member. There can be no impropriety in his doing so provided that his engagement is not directly due to his being a member. But it is improper for a legal practitioner who is a Director to appear for remuneration for the Society in its legal business. (*Beasley, C.J. and Bardswell J.*) KRISHNA AIYAR *v.* SECRETARY, URBAN BANK, LTD. CALICUT. **56 Mad. 970=6 I.R. (Mad.) 66=145 I.C. 438=1933 M.W.N. 977=38 L.W. 401=A.I.R. 1933 Mad. 682 =65 M.L.J. 367.**

Examination as witness.

———*Examination as witness—Likelihood of examination—Appearance for party—Desirability.*

Though it is undesirable that a lawyer should appear in a case in which he knows or has reason to believe that he would be an important witness, there is no harm in his giving evidence in a case in which he is appearing. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R. (Pat.) 17=145 I.C. 1=14 Pat.L.T. (Supp.) 1= A.I.R. 1933 Pat. 306.**

———*Examination as witness—Right to object.*

A legal practitioner is not entitled to resist an attempt to have him examined as a witness on the ground that the result of such examination would be prejudicial to his interests. The question has to be judged not from the standpoint of individual interests of the legal practitioner, but from the point of view of the interests of justice and truth which alone are the deciding factors. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys.L.J. 292=39 Mys.H.C.R. 380.**

LEGAL PRACTITIONER—Fees.

Fees.

———*Fees—Money withdrawn from Court for client—Suit for—Plea of appropriation for services rendered—Sustainability—Lien—Question, if arises.*

In a suit against an advocate by his client to recover a sum of money withdrawn from Court by the defendant on behalf of the plaintiffs, the defendant pleaded that he had rendered professional services for which the remuneration promised had not been paid and that he had appropriated the amount towards that. The Small Cause Judge without going into the case set up by the defendant decreed the suit holding that the defendant had no right to exercise a right of lien over the money in his hand.

Held, that the general question of the right of exercise of a legal practitioner's lien did not arise in the case and that the question for decision was whether the services were rendered as pleaded entitling the defendant to remuneration and there was an agreement to appropriate the amount towards such remuneration. (*Mahadevayya, O.C.J.*) KRISHNA RAO *v.* SRINIVASA SETTY. **39 Mys.H.C.R. 553.**

———*Fees—Payment—Execution of promissory note—Taxation of costs.*

R. 1 of Ch. XXI of the General Rules framed by the Allahabad High Court contemplates actual payment and not a mere promise to pay, even though such promise is evidenced by a promissory note, bond or any other instrument. Where payment is not actually made but is only promised, it cannot be taxed as part of the costs incurred by the party alleged to have made the payment. (*Pullan and Niamatullah, JJ.*) BHAGWANT SINGH *v.* BHAO SINGH. **54 All. 490=I.R. 1932 All. 247=136 I.C. 817=1932 A.L.J. 272=A.I.R. 1932 All. 337.**

[R. 56 A. 702 (711).]

———*Fees—Taxation—Junior Counsel—Two-thirds scale adopted for taxation purposes*

It is a most undesirable practice for the Taxing Officer to assess the fees allowed to junior Counsel on the basis of market value of such Counsel. It is much safer that some sort of recognized scale should be adopted by the Taxing Officers. The most practical rule is the one prevalent in English and Irish Courts, namely to fix the fees of the junior Counsel according to the two-thirds scale. Whether the profession in general adopt that rule or not is immaterial. (*Lort Williams, J.*) GOPALCHANDRA SINGHA, *In re.* **58 Cal. 505=I.R. 1931 Cal. 700=133 I.C. 572=1931 Cr.C. 675=A.I.R. 1931 Cal. 523.**

Lien.

See also ATTORNEY, *supra.*

———*Lien—Advocate's lien—Nature.*

An Advocate is entitled to be paid his dues from out of the estate of his client for the work done for him; but he has no lien on the property recovered by his exertions except in the case of an express agreement by the client to that effect. (*Beasley, C. J. and Cornish, J.*) KRISHNAMACHARIAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **55 Mad. 455=137 I.C. 571=I.R. 1932 Mad. 410=1932 M.W.N. 8=35 L.W. 166=1932 Cr. C. 290=A.I.R. 1932 Mad. 256=62 M.L.J. 185.**

———*Lien—Compromise depriving solicitor of lien—Validity of—Remedy of solicitor.*

The Court never interferes for the purpose of preserving the solicitor's lien after a *bona fide* compromise between the parties has been arrived at, though the result of such compromise may be to deprive the solicitor of his costs. The solicitor's lien never precludes a fair and honest arrangement between the parties unless the solicitor is in a position to prove that there was a fraudulent intention on the part of the plaintiff and defendant to cheat him of the costs payable to him by the party. In the absence of any such collusion, the parties may, even after notice of the solicitor's lien, compromise before verdict or judgment, without regard to the solicitor's claim for costs. But if a valid compromise is made, and after the compromise the solicitor gives notice that he has a lien for costs, it is at the defendant's peril if in face of that notice he pays over the money which has been agreed to be paid to the plaintiff by way of compromise. *Ross* v. *Buxton*, 42 Ch. D. 190; *Welsh* v. *Hole*, 1 Doug. 237 and other English cases referred. (*Wadia, J.*) JHAVERCHAND *v.* ACHALDAS **140 I.C. 809=I.R. 1933 Bom. 41=34 Bom.L.R. 721=A.I.R. 1932 Bom. 352.**

LEGAL PRACTITIONER—Lien.

———*Lien—Solicitor and client—Nature of lien—Attachment of decree by third party without notice—Effect.*

In India as at English Common Law, a solicitor has a particular lien which does not depend on actual possession of the property, as distinguished from possessory lien by reason of certain property like title deeds being in his hands. This lien is not liable to be defeated on the ground that the assignee of a decree or the attaching creditor of the Solicitor's client had no express notice of the lien. The fact of there being a fund in Court amounts to notice of the existence of a Solicitor's lien. 51 Bom. 855, Foll. (*Venkatasubba Rao, J.*) GHULAM MOHIDEEN SAHIB *v.* MD. OOMER SAHIB. **I.R. 1931 Mad. 494=131 I.C. 158=33 L.W. 430=1931 Cr.C. 287=A I.R. 1931 Mad. 183=60 M.L.J. 133.**

———*Lien—Solicitor's lien—Amount deposited under O 45, R. 7, C. P. Code—Appeal being allowed.*

The sum deposited by a party under O. 45, R. 7, C.P. Code to be available for the payment of the costs of the respondents in case their Lordships of the Privy Council ordered such costs to be paid is not the subject-matter of dispute or the part of the action and therefore after the appeal is allowed a lien cannot be claimed on that amount by a legal practitioner appearing for the appellant before the High Court.

Quaere.—Whether an Advocate is entitled to claim the same lien which an ordinary Solicitor would be entitled to in any land. (*Sulaiman, C.J. and Mukerji, J.*) RASHID AHMAD, *In re.* **142 I.C. 241=I.R. 1933 All. 103=1932 A L.J. 764=A.I.R. 1933 All. 3.**

———*Lien—Solicitor's lien—General and special lien—Extent of—Discharge by client and discharging himself—Distinction between.*

A solicitor has a lien upon the funds, money or property recovered for his client, but this lien is, unlike a lien on documents and papers, not a general lien, but restricted to costs incurred in the recovery of the funds, money or property. He has, however, a general lien upon all his client's papers and documents for payment of all taxable costs, charges and expenses incurred by him on behalf of his client and the lien entitles him to refuse production of the papers and documents to his client except on certain conditions. There is, however, a distinction in English and Indian law according to which the rule is quite different when the solicitor discharges himself from what it is when the solicitor is discharged by his client. If a solicitor discharges himself, the client or his new solicitor is entitled to an order not merely for inspection and production of the papers and documents in the former solicitor's possession, but also for delivery thereof on an undertaking to hold them without prejudice to the former solicitor's lien, and subject to the re-delivery thereof after the hearing of the suit and if necessary, subject also to the undertaking to

LEGAL PRACTITIONER—Lien.

prosecute the suit in an active manner. If, on the other hand, the client discharges the solicitor, the solicitor is under no obligation to deliver, nor even to produce or allow inspection of the documents and papers in his possession for the client's benefit until all his taxed costs are paid. (*Wadia, J.*) NARAYANDAS SUNDARLAL *v.* NARAYANDAS. **I.R. 1932 Bom. 360 = 138 I.C. 257 = 34 Bom.L.R. 703 = A.I.R. 1932 Bom. 363.**

———*Lien—Solicitor's lien—No priority over parties' right to set-off.*

The question whether an attorney's lien should or should not be allowed to intercept a set off between the parties to a suit is in India a matter of discretion. The lien has no overriding priority. (Authorities reviewed.) (*Blackwell, J.*) VALLABHDAS *v.* PRANSHANKAR. **141 I C. 406 = I.R. 1933 Bom. 84 = 34 Bom L R. 1429 = A.I.R. 1932 Bom. 619.**

Misconduct.

See also (1) BAR COUNCILS ACT (XXXVIII OF 1926), S. 10

(2) LEGAL PRACTITIONERS ACT (1879), SS. 12 AND 13.

(3) SIND COURTS ACT (1866), S. 16.

———'*Misconduct*'.

Misconduct is not necessarily the same thing as conduct involving moral turpitude. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT-LAW AND ADVOCATE, *In the matter of*. **15 Lah. 354 = 149 I.C. 764 = 6 R.L. 741 = 35 Cr L J. 1010 = 1934 Cr.C. 479 = A.I.R. 1934 Lah. 251 (S.B.).**

———Misconduct—Appearance for opposite party—When unprofessional. *See* BAR COUNCILS ACT, S. 12. **11 O.W.N. 23 = A.I.R. 1934 Oudh 58 (S.B.).**

———*Misconduct—Complaint by Court—Justification.*

It is right and proper that all judicial officers should keep a vigilant eye on the conduct of legal practitioners of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all entitled also to the protection of the Court and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. As much injustice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper and strong action against cases of misconduct. Complaint rejected. (*Boys, Banerji and Niamatullah, JJ.*) SHANKER LAL, *In the matter of*. **136 I C. 287 = 33 Cr.L J. 260 = I R. 1932 All. 175 = 1931 A L.J. 678 = A.I.R. 1931 All. 580.**

———*Misconduct—Criminal offence—Disciplinary action—Advisability of criminal trial in the first instance.*

Per *Reilly, J.*—Misconduct which is the subject of inquiry under the Bar Councils Act may often involve the commission of criminal offences. The criminal offence involved may sometimes be of a petty nature, such as trespass or assult, or may be only incidental to the misconduct which is the serious matter alleged against the Advocate concerned. In such cases it may often be quite unnecessary to insist that the criminal charge should be disposed of before the Advocate's conduct is investigated under the Bar Councils Act. Again the criminal offence alleged against the Advocate may be such that he can be prosecuted for it only on the complaint of a private person, which has not been made, or may be one in respect of which it is obviously appropriate that the complaint has been made. In either of those cases there may be nothing improper or inappropriate in launching an inquiry into misconduct under the Bar Councils Act, although the criminal charge involved has not been disposed of. But when, as in the present case, the Advocate is accused of a grave criminal offence, for which no private complaint is required, to deal with him under the Bar Councils Act for the misconduct involved in the commission of that offence before he has been tried for the offence appears to me altogether improper. (*Waller, Reilly and Anantakrishna Aiyar, JJ.*) VENKATACHARIAR, *In the matter of*. **54 Mad. 857 = I.R. 1931 Mad. 785 = 134 I C 33 = 32 Cr L J. 1085 = 34 L.W. 19 = A.I.R. 1932 Mad. 131 = 61 M.L.J. 148 (F.B.).**

LEGAL PRACTITIONER—Misconduct.

———*Misconduct — Criminal offence — Government amnesty for offence not involving violence.*

The High Court issued a notice to a *mukhtar* to show cause why he should not be suspended or dismissed inasmuch as he was convicted by a Criminal Court of the offence of criminal intimidation. It appeared that the *mukhtar* had threatened a zamindar with this consequence that his tenants would stop rendering of unpaid labour or "begar" and payment of rent. The Government of India had however granted a general amnesty if the conduct of persons did not relate to violence or incitement to violence.

Held, that the threat made by the *mukhtar* though it did come within the definition of criminal intimidation did not imply any violence to person or property and that the proceedings may therefore be dropped. (*Mukerji and King, JJ.*) A MUKHTAR OF GORAKHPUR, *In the matter of*. **I.R. 1932 All. 588 = 139 I.C. 787 = 33 Cr.L.J. 830 = 1932 A.L.J. 116 = 1932 Cr.C. 230 = A.I.R. 1932 All. 232.**

———*Misconduct—Criminal offence—Prosecution to precede disciplinary action.*

Though it is not incompetent for the High Court to deal under Cl. 8, Letters Patent, with charges of a criminal nature against a practitioner unless and until these have been investigated by a Criminal Court, it is eminently fitting that in such cases the criminal prosecution should precede any disciplinary decision. (*Lord Macmillan.*) A PLEADER *v.* JUDGES OF THE ALLAHABAD HIGH COURT. **35 C.W.N. 640 = 58 I A. 152 = 53 All. 183 = I R 1931 P.C. 192 = 132 I.C. 608 = 1931 A.L J. 450 = 1931 M.W N. 603 = 33 Bom.L.R. 945 = 34 L.W. 59 = 53 C.L.J. 405 = 1931 Cr.C 519 = A.I.R. 1931 P.C. 112 = 61 M.L.J. 130 (P.C.).**

———Misconduct—Drunkenness. *See* LEGAL PRACTITIONERS ACT (1879), S. 13. (*f*). **12 Rang. 180 = A I.R. 1934 Rang. 156.**

———*Misconduct—Duty of practitioner to Court and Bar—Reckless charge of fraud in pleadings—Conduct of practitioner as being improper.*

Although an Advocate has a duty towards his client to perform, he has other duties and responsibilities as well. He has no right whatever, even on the instructions of his client recklessly to make charges of fraud. His responsibility to the Court, and to the Bar, whose traditions it is his duty to maintain, make it incumbent upon him to satisfy himself that there are reasonable grounds for making such charges. Where, in a written statement filed by the defendants and signed by their Advocate on their behalf, a charge of fraud against the plaintiff was recklessly made without a shred of evidence to support it and this fact was well known to the defendants and their Advocates.

Held, that the conduct of the Advocate in alleging fraud on behalf of his client, in the written statement

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without satisfying himself that there was some evidence which would reasonably justify such a charge was most improper and should be strongly condemned. A. I.R. 1924 All. 253, Ref. (*Beasley, C.J. and King, J.*) THANGAVELU MUDALIVAR *v.* CHENGALVAROYA GURUKAL. **158 I.C. 302=8 R M. 254=36 Cr.L J. 1342=42 L.W. 412=1935 M.W.N. 340=1935 Cr.C. 924=A.I.R. 1935 Mad. 578=69 M.L.J. 250.**

———"*Misconduct*" — *If confined to professional activity.*

The conduct of a legal practitioner which subjects him to the disciplinary jurisdiction of the Court need not necessarily be connected with his professional activities. He is equally amenable to the jurisdiction of the Court if the acts to which objection is taken have been done outside his professional duties. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARISTER-AT-LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354=149 I.C. 764=6 R.L. 741=35 Cr.L.J. 1010=36 P L R. 510=1934 Cr.C. 479=A.I.R. 1934 Lah. 251 (S.B.).**

———*Misconduct—Mukhtar—Standard of honour—Fabrication of documents and making false charges.*

A mukhtar's profession is a laborious one. It is of great public utility. From mukhtars great qualities are expected, and heavy responsibilities are placed upon their shoulders. Their reputation should be as jealously guarded by the Courts as those of Pleaders or Vakils or Barristers, and the same high standard of honour demanded from them. When a mukhtar has broken the professional rules and, secondly attempted surreptitiously to alter documents in the case with a view to covering up his faults and came to the Court with a story which was manifestly untrue, and lastly attacked reputable persons with the suggestion that they committed perjury and were setting up a false case against him, he is no longer fit to remain a member of the profession. (*Courtney-Terrell, C. J., Fazal Ali and Agarwala, JJ.*) JATINDRANATH BANERJI, *In the matter of.* **I.R. 1932 Pat. 275=140 I.C. 107=33 Cr.L.J. 874=13 Pat.L T. 552=1932 Cr.C. 761=A. I.R. 1932 Pat. 289 (S.B.).**

———Misconduct—Negligence—If amounts to. *See* BAR COUNCILS ACT, S. 10 (1). **62 Cal. 158 (S.B.).**

———"*Misconduct*"—*Obtaining adjournment on false grounds and usurping functions of Court.*

To establish misconduct all that has to be proved is misbehaviour which would justify removal or suspension; it is not necessary that the act of misconduct should have all the ingredients of a 'crime' under the criminal law. Where by deceiving the Court, a legal practitioner obtains an adjournment to delay the course of justice and to gain an advantage for his client by dishonest means, and while continuing to be Counsel for his client and being fully aware that the case is still pending, he improperly gives himself jurisdiction as an arbitrator and prevents the Court from proceeding to decide the case and thereby helps his client to improperly procure an award, he is guilty of gross professional misconduct which is highly unscrupulous and improper. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) B. SRINIVASA IYENGAR, *In the case of.* **12 Mys.L.J. 311=39 Mys.H.C.R. 461.**

———*Misconduct—Obtaining adjournment on grounds known to be false.*

A pleader who obtains adjournment of a case on grounds which, to his knowledge, were false is guilty of improper conduct. If a legal practitioner deliberately, for the purpose of impeding the course of justice, makes a statement to a Court which he knows or believes to be untrue and thereby gains an advantage for his client he

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is guilty of grossly improper conduct and as such renders himself liable to be dealt with by the High Court in the exercise of its disciplinary jurisdiction. (*Beasley, C.J. and Sundaram Chetty, J.*) FIRST GRADE PLEADER, VELLORE, *In the matter of.* **54 Mad. 520=I R. 1931 Mad. 481=131 I.C. 145=32 Cr.L J. 657=1931 M. W.N. 321=33 L W. 425=1931 Cr.C. 470=A.I.R. 1931 Mad. 422=60 M.L.J. 393 (F.B.).**

———*Misconduct—Obtaining adjournment by wilful misrepresentation.*

An Advocate obtained an adjournment by making a wilful misrepresentation to the Court, and later on accepted the appointment of an arbitrator. While continuing as Counsel and without obtaining leave to retire from the case, he constituted a rival tribunal and gave himself jurisdiction in order to prevent the Court from proceeding with the suit.

Held, that the Advocate had deceived the Court and had obtained the adjournment to delay the course of justice and to gain an advantage for his client by means of a trick, and that he was guilty of grossly improper conduct and rendered himself liable to punishment. (*Mahadevayya, O.C.J. and Sankaranarayana Rao, J.*) CARTER *v.* OAKELY DUNCAN & CO., LTD. **12 Mys. L.J. 81=39 Mys.H.C.R. 263.**

———*Misconduct—Offence of perjury.*

An Advocate having regard to his education and training and in particular the profession in which he is engaged is expected to exercise greater degree of caution and rectitude than ordinary persons in making statements on oath in a Court of Law. Where therefore an Advocate was convicted of perjury and disciplinary proceedings were started against him, the High Court marked their sense of disapprobation of the Advocate's conduct by ordering him to be suspended from practice for six months. (*Hasan, C.J., Raza and Nanavutty, JJ.*) AN ADVOCATE, *In the matter of.* **I.R. 1931 Oudh 179=131 I.C 67=32 Cr.L J. 625=14 O.L.J. 114=8 O.W N. 267=1931 Cr.C. 433=A.I.R. 1931 Oudh 161.**

———Misconduct—Pleader accepting vakalats from both sides. *See* BOMBAY PLEADERS' ACT, S. 25. **36 Bom.L.R. 1225=A.I.R. 1935 Bom. 71.**

———*Misconduct—Proceedings against—Practitioner—Burden of proof.*

In proceedings against a legal practitioner the burden of proving the charges against the practitioner is on the complainant. The complainant's evidence in such cases needs corroboration. (*Waller, Reilly and Anantakrishna Ayyar, JJ.*) VENKATACHARIAR, *In the matter of.* **54 Mad. 857=I.R. 1931 Mad. 785=134 I. C. 33=32 Cr.L.J. 1085=34 L.W. 19=A.I.R. 1932 Mad. 131=61 M.L J. 148 (F.B.).**

———*Misconduct—Professional misconduct—Enquiry—Duty of practitioner to be candid with Court.*

In an enquiry into charges of professional misconduct, it is the duty of the legal practitioner concerned to be absolutely candid with the Court. He may unwisely maintain a solid silence and take up the position that the case against him must be completely proved. In such case he runs a grave risk. On the other hand, if he elects to state his defence, it ought not to be a perversion of truth. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) PRAGAJI JETHAJI & CO. *v.* RANGA RAO. **12 Mys L.J. 222=39 Mys.H.C.R. 203.**

———*Misconduct—Reckless allegations in pleadings—Duty of pleader.*

When a client asks his pleader to write in a pleading or petition accusations of dishonesty, criminality, etc., against any one or instructs him to ask questions of

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that nature, the pleader is not to blindly follow the instruction. He must satisfy himself that, apart from their relevancy, there are materials on which those accusations or questions can be made or asked and that they are not recklessly made. If he does not do so, he is guilty of professional misconduct. It is not, however, necessary that at the time of receiving instructions or preparing the pleadings, the pleader must insist on having certified copies of all the papers. He must act in good faith and with due care. But it is not his duty to go about and inquire into the truth of the allegation. Investigation of truth is not the duty of the pleader, but the function of the Court. When a pleading contains allegations of fraud or collusion or other similar charges, the pleader's duty ends when he has satisfied himself that his client was not making a reckless irresponsible statement and that there is some material on which it is based. It is enough if he believes that there are good grounds for making the charge. While it is the duty of the Court to see that pleaders do not recklessly make themselves parties to such allegations and take shelter under the privilege of a lawyer and escape the consequences by simply stating that they were instructed, so much restriction should not be placed on them that when a member of the public feels aggrieved against a public officer and wants to take up his conduct before a tribunal, lawyers may not be available to accept the brief. (*Mahomed Noor, James and Varma, JJ.*) KEDAR NATH LAL, *In the matter of.* **14 Pat 10 = 152 I C. 313 = 7 R.P. 170 = 36 Cr L.J. 1 = 15 Pat.L.T. 560 = A.I.R. 1934 Pat 598 (S.B).**

———*Misconduct—Retention of client's moneys and inability to pay when called upon.*

A pleader drew out moneys belonging to his client and paid the cheque to his own credit in his own Bank; he did not enter those moneys in his client's account and he was not able to refund those moneys when called upon.

Held, that the pleader had been guilty of such misbehaviour as would justify the Court in taking action under S. 16, Sind Courts Act (1866). (*Ferrers, J.C. and Aston, A.J.C.*) G, A PLEADER, *In re.* **I.R. 1933 Sind 141 = 143 I C. 631 = 1933 Cr.C. 207 = A.I. R. 1933 Sind 65.**

———*Misconduct—Retention of client's money without proper grounds.*

Where a legal practitioner retained a considerable amount belonging to his client on an excuse which was merely a pretence for retaining the money and it also appeared from the evidence that when pressed by the client he gave a cheque on a bank in which he had no sufficient funds,

Held, that the practitioner was guilty of a serious mishehaviour for which the only adequate punishment was the cancellation of his sanad. (*Ferrers, J.C. and Aston, A. J. C.*) B, A BARRISTER, *In re.* **I R 1933 Sind 113 (2) = 142 I.C. 593 = A.I R. 1933 Sind 45.**

———*Misconduct— Retention of moneys— Suspicious conduct of client—Disciplinary action not called for.*

An Advocate received money from a client for filing an appeal. He did not file the appeal as he found out later that the appeal was barred by time. The explanation given by the Advocate as to the application of the money was not quite satisfactory nor did the client give out the correct and true information to the Court, and the client's conduct also was not consistent with what normally would have happened under the circumstances of the case.

Held, that having admitted the receipt of money, though it was for the advocate to account for its application, there was no reasonable cause established to enable

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the Court to remove or suspend the advocate from practice, that the Court cannot be uninfluenced by the conduct of the client in withholding the correct information and that the Advocate should return the money as received. (*Jai Lal, Monroe and Bhide, JJ.*) S, A BARRISTER, *In re.* **6 I.R. (Lah.) 91 (2) = 145 I.C. 278 = 34 Cr.L.J. 954 = 1933 Cr.C. 831 = A.I.R. 1933 Lah. 575 (S.B.).**

———*Misconduct—Subornation of witness.*

A pleader who is a party to an attempt to suborn a witness is unfit to be a member of an honourable profession and his name should be struck off the register of pleaders. (*Page, C.J. and Mya Bu, J.*) *In the matter of* A HIGHER AND A LOWER GRADE PLEADER. **13 Rang. 506 = 157 I.C. 48 = 8 R.R. 72 = 36 Cr.L.J. 1099 = 1936 Cr.C. 329 = A.I.R. 1936 Rang. 180.**

———*Misconduct—Taking interest in litigation.*

A, an Advocate, allowed his clerk to enter into agreement with his clients to finance the litigation about property which they launched against others ; the clerk was to be compensated for his labour and expenses by being given a share in the property in dispute if the cases be ultimately decided in favour of his clients, and in pursuance of this *A* appeared for those clients without receiving any fees in advance. It was proved that the advocate's clerk consulted him and showed him the papers before he entered into agreements with his clients and that he gave him advice regarding the prospect of the litigation.

Held, that a Counsel is expected to be free from any personal as distinguished from professional interest in litigation and the conduct of the Advocate in allowing his clerk to enter into such a transaction called for severe censure, but his conduct in advising him in the matter and then appearing for the litigants without receiving the usual fees in advance amounted to professional misconduct. (*Jai Lal and Monroe, JJ.*) A, AN ADVOCATE, *In the matter of.* **142 I.C. 689 = I.R. 1933 Lah. 239 = 34 P.L.R. 445 = A.I.R. 1932 Lah. 584.**

———*Misconduct—Test—Rules for guidance.*

The principles to be applied in considering whether certain conduct amounts to misconduct or not are as follows : (1) that the mere holding of certain views and expression of such views in language however emphatic or strong is no ground for taking disciplinary action against a legal practitioner ; (2) that mere conviction for an offence is not sufficient but the Court must look into the nature of the act on which the conviction is based to decide whether the legal practitioner is an unfit person to remain in the profession ; (3) that a legal practitioner is a part of the machinery provided for the maintenance of order and the enforcement of the law of the land ; it is therefore inconsistent with his duties as legal practitioner to incite others either to boycott the Courts or to break the law which it is the duty of the Courts to administer : those who live by the law cannot preach the breaking of the law ; (4) that organized breach of the peace, incitement to acts tending to subvert order is a reasonable cause to suspend or remove a lega practitioner; and (5) that acts involving moral turpitude or which imply general infamy make a legal practitioner unfit to remain on the rolls of the Court. (*Jai Lal, Dalip Singh and Monroe, JJ.*) BARRISTER-AT-LAW AND ADVOCATE, *In the matter of.* **15 Lah. 354 = 149 I.C. 764 = 6 R.L. 741 = 35 Cr.L J. 1010 = 1934 Cr.C. 479 = 36 P.L R. 510 = A.I.R. 1934 Lah. 251 (S.B.).**

———*Misconduct—Unlawful association—Taking part in—Status of Vakil.*

A Vakil is an officer of the Court with a responsible position and ought certainly to uphold the preservation

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of law and order. If he deliberately took the law into his own hands and defied the orders of constituted authority, by taking part in a meeting of *Sewak Dal* volunteers who had been declared by the Local Government to be an unlawful association under the Criminal Law Amendment Act of 1908 and was convicted under that Act and in response to the notice by the High Court expressed no regret or assurance as to his future conduct, it is a proper case for the High Court to exercise the disciplinary jurisdiction. It is not necessary for the exercise of this jurisdiction that the act of the Vakil should have subjected him to anything like general infamy or imputation of bad character. 44 B. 418, Ref. (*Mitter, C. J, Mullick and Kulwant Sahay, JJ.*) MADHAVA SINGH, *In the matter of.* **72 I.C. 875 = 1923 P.H.C.C. 42 = 12 Pat. L. T. 725 = A. I. R. 1923 Pat. 185 (2) (S.B.).**

Mukhtar.

See also APPEARANCE AND MISCONDUCT, *supra.*

———*Mukhtar—Power to take action under Oaths Act —Terms of* mukhtarnama.

Where the *mukhtarnama* gave the mukhtar authority to make a compromise, confess judgment or make a reference to arbitration,

Held, that the powers were sufficiently wide to include authority to take action under Ss. 8, 9 and 10 of the Oaths Act. (*Bisheshwar Nath, J.*) JASODA *v.* GOPAL. **136 I.C. 246 = I.R. 1932 Oudh 102 = 8 O.W.N. 880 = A.I.R. 1931 Oudh 350.**

Negligence.

———*Negligence—Omission to file documents—Liability for damages.*

Where it is shown that the judgment-debtor obtained copies of documents and gave them to his pleader and the latter did not produce the same at the proper time the Court may refuse to admit the same in appeal.

Semble.—The remedy of the party, if any, is to file a suit for damages against the pleader. (*Agha Haidar, J.*) BUTA SINGH *v.* BALWANT SINGH. **136 I.C. 788 = I.R. 1932 Lah. 276 = 32 P.L.R. 813 = A.I.R. 1932 Lah. 93.**

———*Negligence—No ground for extension of limitation.*

A *bona fide* mistake on the part of the pleader may be condoned but gross negligence on his part cannot justifiably be condoned so as to extend time under S. 5 of the Limitation Act. The remedy of the client is only against the defaulting legal advisor. (*Maung Ba, J.*) MAUNG PO CHEIN *v.* PO THA. **I.R. 1931 Rang. 139 (1) = 131 I.C. 507 (1) = A.I.R. 1931 Rang. 80.**

———*Negligence—Standard of diligence—Compromise on behalf of client—Claim for mesne profits omitted—Liability of Advocate for negligence.*

An Advocate in the exercise of his profession is bound to exercise reasonable skill and prudence but he is not expected to be infallible and unless the Court is satisfied that the act complained of was such that could not reasonably have been done by an Advocate exercising reasonable skill and care, a suit for negligence is not maintainable against the Advocate. The defendant acted as Counsel for the plaintiff in a suit for restitution of conjugal rights against his wife and a share of her inherited properties. He had been instructed to insist on the plaintiff's right to mesne profits in respect of his share. The suit was compromised and cl. (3) of the compromise declared that the plaintiff was entitled to one-third of the joint interest of the couple in the estate of the wife's father at the time of his death. No mention was made of mesne profits as the Advocates differed on the amount to which the plaintiff was entitled and considered it inadvisable to postpone the compromise on that account and the plaintiff's Advocate thought that it would be open to the plaintiff to agitate the matter subsequently, if necessary. In the administration proceedings that followed, cl. (3) was construed by the Court as absolutely debarring the plaintiff from claiming any mesne profits in respect of that property. In a suit for damages for negligence by the plaintiff against his Advocate,

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Held, that the view taken by the Advocate that on a true construction of cl. (3) the plaintiff's right to claim mesne profits was not excluded could not be said to be one so unreasonable that no skilled legal advisor would advise a client in that way, and that the action was not, therefore, maintainable. (*Page, C. J. and Sen, J.*) SAW HLA PRU *v.* S. S. HALKAR. **9 Rang 575 = 135 I.C. 648 = I.R 1932 Rang. 56 = A.I.R. 1932 Rang. 1.**

———*Negligence—Suit for damages—Limitation.*

A suit by the client for damages for negligence of his Advocate is governed by Art. 90 of the Limitation Act and time begins to run from the date when the negligent act became known to the plaintiff and not from when he discovers the act to be negligent. (*Page, C. J. and Sen, J.*) SAW HLA PRU *v.* S. S. HALKAR. **9 Rang. 575 = 135 I.C. 648 = I.R. 1932 Rang. 56 = A.I.R. 1932 Rang. 1.**

Position and status.

———*Position and status—Responsibility for acts—Misconduct.*

A legal practitioner is not merely a lawyer but also a moral agent. As such he is a Judge of right and wrong, and an advocate of what is right. Search for truth is to be his ideal. The practice of law is a personal right or privilege limited to selected persons of good character. It is a franchise which may be revoked for misconduct, the test being whether the misconduct is such as shows him to be unfit or unsafe to discharge the duties of his office, or unworthy of confidence. No legal practitioner can disclaim responsibility for his acts. Just as he is entitled to enjoy the privileges of his profession, he has also peculiar obligations and responsibilities attached. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) HANUMANTHO RAO, *In the matter of.* **12 Mys. L.J. 292 = 39 Mys H.C R. 380.**

Powers.

———*Powers—Abandonment of claim for damages.*

The general powers of a vakil in the conduct of a suit include the abandonment of an issue which in his discretion he thinks it inadvisable to press. Where therefore in a suit for Kewala and for damages, the pleader for the plaintiff "did not press for the damages claimed" and that prayer was consequently disallowed, the claim cannot be urged in second appeal. 25 M. 367 (P.C.), Rel. on. (*Macpherson, J.*) LALITA PRASAD CHAUDHURI *v.* RAM NARAIN SINGH. **6 R.P. 332 = 147 I.C. 95 = A.I.R. 1934 Pat. 25.**

———*Powers—Counsel's power to make admission in or refer to arbitration or compromise suits.*

A Counsel's powers to make admissions in or refer to arbitration or compromise suits in which he is instructed are as follows: (1) A Counsel has authority to make admissions in Court on behalf of his client on matter of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client. (2) A Counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client. (3) A Counsel cannot without express authority agree to compromise or

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refer to arbitration matters unconnected with the subject matter of the suit in which he is instructed. (4) Where in the course of a suit, a Counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the Counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client. (5) It is a question of fact in each case whether the Counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the Counsel acted on instructions, even though there is no direct evidence on the point. (6) A Counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client. 50 Mad. 786, Foll. (*Ganga Nath, J.*) MT. BASHIRAN *v.* MOHAMMAD ABRAR. **158 I.C. 97=8 R.A. 282=1935 A.L.J. 953=1935 A.W.R. 772=A.I.R. 1935 All. 626.**

———*Powers—Statement giving up claim—Client, if bound.*

When a pleader who is authorized by a vakalatnama to appear for a party does make a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not sufficient material to contradict his pleader. Where the pleader stated that he would be satisfied if the party's right to one half of the suit properties was declared and the Court recorded the statement and acted on the same,

Held, that no express authority besides the vakalatnama was necessary so as to make the statement of the pleader binding on the party. (*Mahadevayya and Ramachandra Rao, JJ.*) SANJEEVIAH *v.* VENKATAPPA. **11 Mys.L.J. 71.**

Privilege.

See also POSITION AND STATUS, *supra* AND RELATION WITH CLIENT, *infra.*

———Privilege — Confidential communication. *See* EVIDENCE ACT (1872), S. 126. **58 Cal. 1379=A.I.R. 1932 Cal. 148.**

———Privilege—Confidential talk with accused person. *See* CRIMINAL TRIAL—UNDER-TRIAL PRISONER. **A.I.R. 1935 Cal. 101.**

———*Privilege — Cross examination of witnesses — Limits of.*

The Counsel for the accused is at liberty to cross-examine prosecution witnesses with a view to show they are dishonest witnesses But there is always a limit beyond which Counsel should not go in attacking the opposite party or his witnesses. Counsel has a very valuable privilege in that he is not liable in other than exceptional circumstances to civil or criminal proceedings on account of anything which he may say in Court on behalf of his clients. But that privilege imposes a corresponding responsibility and Counsel has to be very careful not to make any attack upon parties or witnesses engaged in the case, which goes beyond what is fairly necessary for the presentation of his own client's case. (*Beaumont, C. J. and Broomfield, J.*) RAMKRISHNA BHAI *v.* DAVAR. **I.R. 1932 Bom. 401=138 I.C. 543=34 Bom L R. 443=1932 Cr.C. 803=A.I.R. 1932 Bom 199.**

[**Rel.** 34 Bom. L. R. 910 (914).]

———*Privilege — Defamatory suggestion against witness—Protection.*

A civil suit for damages for a defamatory statement made on oath or otherwise by Counsel, party or witness in a judicial proceeding is governed not by S. 499 of the Penal Code but by the principles of justice, equity and good conscience, which are identical with the corresponding rules of English Common Law. The protection under the law extends to all statements made by a party, pleader or witness in the suit, no matter whom it may relate to, whether it is the opposite party or his witness, so long as it is not irrelevant to the matter in hand. 40 All. 341; 48 C. 388, Ref. (*Grille, A. J. C.*) MANMOHANSING *v.* BISHALSING. **29 N.L.R. 24=I R. 1933 Nag. 58=141 I C. 362=15 N.L.J. 149=1933 Cr.C. 191=A.I R. 1933 Nag. 47.**

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———*Privilege—Extent of.*

Counsel's privilege does not extend to stating his instructions, when these instructions involve an attack on the dignity of the Court. (*Broadway, C. J., Coldstream and Monroe, JJ.*) SHAM LAL, *In the matter of.* **I.R. 1932 Lah. 543=138 I.C. 878=33 Cr.L J 675=33 P.L.R. 785=1932 Cr.C. 679=A.I.R. 1932 Lah. 502 (F.B.).**

———*Privilege — Extent of—Presumption of good faith—Defamatory statements about third parties—Caution necessary—Duty to withdraw statement, when shown to be untrue.*

A member of the bar in this country has no absolute privilege. An Advocate who makes defamatory statements in the conduct of a case has no wider protection than a layman ; that is to say, he has to bring his case within the terms of Excep. 9 to S. 499, I. P. Code, and under 105 of the Indian Evidence Act the burden of proof would normally be with him. But in practice the Courts have held that an Advocate is entitled to special protection and that if an Advocate is called in question in respect of defamatory statements made by him in the course of his duties as an Advocate, the Court ought to presume that he acted in good faith and upon instructions and ought to require the other party to prove express malice. The Advocate ought to be cautious about making defamatory statements, particularly about people who are not parties or witnesses on the strength of instructions which he has had no time to verify; and if he has been misled into making such a statement which turns out to be untrue, it is his duty to withdraw the statement as soon as it is shown to be untrue or take the consequences like any other individual. (Case-law referred.) (*Baker and Broomfield, JJ.*) TULSIDAS AMANMAL *v.* BILLIMORIA. **I.R. 1932 Bom. 487=139 I.C. 275=33 Cr.L J. 740=34 Bom. L.R. 910=1932 Cr.C. 614=A.I.R. 1932 Bom. 490.**

Relation with client.

———*Relation with client—Duty to client and to Court.*

The relation of the legal practitioner and client involves the highest personal trust and confidence. The practitioner is bound to discharge his duties to his client with the strictest fidelity and is subject to the disciplinary jurisdiction of the Court for dereliction of duty. He is more than an agent or servant of his client, so far as the Court is concerned. He is in fact an officer of the Court, and as such, owes good faith and honourable dealing to the Court before which he practises his profession. The misconduct of an Advocate is not a matter solely between him and this client; it is a matter of public importance, and the High Cobrt has a duty to perform to the suitors and to the legal profession, and is bound to see that the persons admitted to the profession are those persons on whose integrity and honour reliance may be placed and that their conduct is such as to inspire confidence in their character. (*Mahadevayya O.C.J. and Ramachandra Rao, J.*) PRAGAJI JETHAJI & CO. *v.* RANGA RAO. **12 Mys.L.J. 222=39 Mys. H.C.R. 203.**

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———*Relation with client—If to be dictated to by client—Contempt of Court—Privileges.*

A Counsel is not expected to act blindly and allow himself to be dictated by his client. He has to exercise his own discretion and judgment and he has to warn his client when scandalous or defamatory matters have to be communicated, especially when the statement would be a contempt of Court. His privileges cannot extend to interference with the administration of justice, and he cannot take shelter under the client's instructions He has to help in the administration of justice and not to be an impediment to it. (*Sulaiman, C. J. and Harries, J.*) RAJENDER SINGH *v.* UMA PRASAD. **57 All. 573=159 I.C. 193=8 R.A. 404=4 A.W.R. 1280=1935 A.L J. 29=A.I.R. 1935 All. 117.**

———*Relation with client—Suit for accounts by client in respect of moneys entrusted with Counsel—Maintainability.*

Even if there is no "general agency" between a Counsel and client, nevertheless a suit for accounts can be maintained by the client against his Counsel in respect of the moneys entrusted to the latter in the several suits in which he was engaged. 50 M. 249, Foll. (*Bhide, J.*) RAM LAL ANAND *v.* LONGKRAN. **I.R. 1933 Lah. 13=140 I.C. 564 (1)=33 P.L.R. 1074=A.I.R. 1933 Lah. 60.**

Solicitor.

See also LIEN, *supra.*

———*Solicitor—Personal liability for costs—Suit filed on behalf of non-existent person.*

Once a solicitor is on record, the opposing party is entitled to look to him, if successful for his costs, if it turned out that the so-called plaintiff is a non-existent person. (Case-law discussed.) (*Beaumont, C.J. and Rangnekar, J.*) DHANRAJGIRJI *v.* PAYNE & CO. **58 Bom. 1=6 I.R. (Bom.) 101=145 I C. 641=35 Bom. L.R. 554=A.I.R. 1933 Bom. 317.**

LEGAL PRACTITIONERS' ACT (XVIII OF 1879)—*Pleader struck of rolls—Restoration—Inherent power of High Court.*

There is inherent power in the High Court to restore a pleader whose name has been struck off the rolls, although there is no express provision for a review of an order made under the Legal Practitioners' Act. (*Kisch, Bajpai and Rachhpal Singh, JJ.*) THAKUR HAR PRASAD SINGH, *In re.* **156 I. C. 243=7 R A. 1064 (1)=4 A.W R. 1404=A.I.R. 1935 All. 321 (F.B.).**

———**S. 2**—"Legal practitioner" — Barrister included therein—Right to sue for fees. *See* BARRISTER. **55 All. 570=A.I.R. 1933 All. 417 (F.B.).**

———**S. 7**—*Rules framed under Act, R.* 13—*Renewal of certificate—Powers of District Court to suspend a practitioner pending receipt of certificate.*

The High Court has not delegated to District Judges the power to suspend legal practitioners pending the receipt of their renewed certificates. Any order in regard to suspension must proceed from the High Court. So an order of the District Judge suspending a practitioner pending the receipt of his renewed certificate is illegal. (*Jackson, J.*) U. GOPALA MENON, *In the matter of a pleader* **54 Mad. 574=I.R. 1931 Mad. 762=133 I.C. 522 (1)=1931 M.W.N. 392=33 L.W 561=1931 Cr.C. 960=A.I.R 1931 Mad. 688=60 M.L.J. 588.**

———**S. 12**—*Applicability—Conviction not sufficient—Defect of character necessary.*

It is not sufficient for the applicability of the section that the pleader has been convicted of a criminal offence. Though the Court cannot in the exercise of its disciplinary jurisdiction question the propriety of the

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conviction, it has yet to inquire into the nature of the crime in order to decide whether the offence was such as to imply defect of character rendering him unfit to continue in the profession. (*Jwala Prasad, Ag.C.J., Wort, Kulwant Sahay, Fazl Ali and James, JJ.*) RAM GOBIND, *In re.* **11 Pat. 365=I.R. 1931 Pat. 497=134 I.C. 945=32 Cr.L.J. 1256=12 Pat.L.T. 773=1931 Cr C. 897 (2)=A.I.R. 1931 Pat. 369 (F.B.).**

———**S. 12**—*Applicability—Essentials.*

S. 12 has no application unless the conviction alone shows the convict to be unfit to be a pleader. (*Macnair, J. C., Jackson, Subhedar, Staples and Niyogi, A.J.Cs.*) LOCAL GOVERNMENT *v.* N. B. DESHPANDE. **27 N.L.R. 29=I R. 1931 Nag. 74=130 I C. 826=32 Cr.L.J. 604=14 N.L.J. 1=1931 Cr.C. 217=A.I.R. 1931 Nag. 33 (S.B.).**

———**S. 12**—*Conviction—Conclusiveness.*

A pleader is not entitled to go behind the conviction in order to show that his conviction was not justified either in law or on facts and that he committed no offence. 22 All. 49, Foll. (*Macnair, J.C., Jackson, Subhedar, Staples and Niyogi, A. J. Cs.*) LOCAL GOVERNMENT *v.* N. B. DESHPANDE. **27 N.L.R. 29=I.R. 1931 Nag. 74=130 I.C. 826=32 Cr.L.J. 604=14 N.L.J. 1=1931 Cr.C. 217=A.I.R. 1931 Nag. 33 (S.B.).**

———**S. 12**—Conviction of criminal offence involving moral turpitude—Order for suspension of pleader or mukhtar and not of vakil whose cases are dealt with by Cl. 8 of Letters Patent. *See* LETTERS PATENT (ALLAHABAD), CL. 8. **A.I.R. 1931 Oudh 161.**

———**S. 12**—*Conviction under Salt Act.*

Conviction under the Salt Act for certain activities in pursuance of Civil Disobedience renders a pleader unfit to continue as such and deserves disciplinary action under the Act. (*Courtney-Terrell, C.J., Adami and Khaja Mahomed Noor, JJ.*) GOLAKH NATH DE, *In the matter of.* **I.R. 1931 Pat. 279 (2)=132 I.C. 359 (2)=12 Pat L.T. 61=1931 Cr C. 527 (2)=A.I.R. 1931 Pat. 208.**

———**S. 12**—*Conviction under Special Acts—Disciplinary proceedings not excluded.*

A pleader convicted under S. 3, Police Incitement to Disaffection Act and under S. 17, Criminal Law Amendment Act can be dealt with in the exercise of its disciplinary jurisdiction by the High Court under S. 12 of the Legal Practitioners' Act. There is in such a case no question of any indictment or trial for the same offence under any other law and there is no question of punishing him over again for those offences. (*Jwala Prasad, Ag.C J., Wort, Kulwant Sahay, Fazl Ali and James, JJ.*) RAM GOBIND, *In re.* **11 Pat. 365=I. R. 1931 Pat. 497=134 I.C. 945=32 Cr L J. 1256=12 Pat.L T 773=1931 Cr.C. 897 (2)=A.I.R. 1931 Pat. 369 (F.B.).**

———**S. 12**—"*Criminal offence.*"

The words "criminal offence" used in S. 12 mean an offence punishable under Penal Code as well as any act or omission made punishable by any law for the time being in force which is indictable and punishable criminally by Courts of Justice. (*Jwala Prasad, Ag.C.J., Wort, Kulwant Sahay, Fazl Ali and James, JJ.*) RAM GOBIND, *In re.* **11 Pat. 365=I.R. 1931 Pat. 497=134 I C. 945=32 Cr L.J. 1256=12 Pat L T 773=1931 Cr.C. 897 (2)=A.I.R. 1931 Pat. 369 (F.B.).**

———**S. 12**—*Criminal offence—Conviction under Police Incitement to Disaffection Act, S. 3 or Criminal Law Amendment Act, S. 17.*

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A pleader convicted under S. 3, Police Incitement to Disaffection Act or under S. 17, Criminal Law Amendment Act, is one convicted of "criminal offences" within the meaning of S. 12, but the conviction is not in itself sufficient to show a defect of character within the meaning of the section. (*Jwala Prasad, Ag.C.J., Wort, Kuwant Sahay, Fazl Ali and James, JJ.*) RAM GOBIND, *In re.* **11 Pat. 365=I.R. 1931 Pat. 497=134 I.C. 945=32 Cr.L.J. 1256=12 Pat.L.T. 773=1931 Cr.C. 897 (2)=A.I.R. 1931 Pat. 369 (F.B).**

——**S. 12**—*Criminal offence—Refusal to give security under S.* 107, *Cr. P. Code.*

A pleader bound down under S. 107, Cr. P. Code, to keep the peace and sent to jail for refusing to give security cannot be said to be convicted of any criminal offence within the meaning of S. 12. (*Jwala Prasad, Ag.C.J., Wort, Kulwant Sahay, Fazl Ali and James, JJ.*) RAM GOBIND, *In re.* **11 Pat. 365=I.R. 1931 Pat. 497=134 I.C. 945=32 Cr.L.J. 1256=12 Pat.L.T. 773=1931 Cr.C. 897 (2)—A.I.R. 1931 Pat. 369 (F.B.).**

——**S. 12**—*Defect of character—Conviction under S.* 17 (1), *Criminal Law Amendment Act and Ss.* 124-*A.* 153-*A and* 178, *I. P. Code.*

A pleader was not only convicted under S. 17 (1) and (2), Criminal Law Amendment Act, but was also convicted for having committed offences under Ss. 124-A and 153-A, Penal Code, and was once found guilty of an offence under S. 178, Penal Code.

Held, these convictions entailed severe action as they undoubtedly implied defect of character in a legal practitioner. (*Guha and Lodge, JJ.*) N, A PLEADER, SYLHET, *In re.* **159 I.C. 664=37 Cr.L.J. 153=8 R. C. 344=1935 Cr.C. 1143=A.I.R. 1935 Cal. 742.**

——**S. 12**—"*Defect of character*"—*Meaning—Conviction during Civil Disobedience movement.*

The expression "defect of character" as used in S. 12 must be taken to include not only moral turpitude but also such defect in the character of a pleader which renders him unfit to be a member of the honourable profession to which he belongs. The pleaders were connected with the Civil Disobedience movement, and were convicted in 1930; they were convicted again in 1932 for offences committed as members of a procession organized in connexion with the Civil Disobedience movement.

Held, that the offences for which they were convicted involved serious defect of character, seeing that they were directed against obedience to law, which it was the duty of the Courts and of the members of the legal profession to enforce and maintain, and that action could be taken under S. 12. So they were amenable to the disciplinary jurisdiction. Orders of suspension for six months made. (*Guha and Bartley, JJ.*) TWO PLEADERS, *In the matter of.* **60 Cal. 1453=145 I.C. 316=6 R C. 92=38 C.W.N. 278=1933 Cr.C. 1296=A.I.R. 1933 Cal. 731.**

——**Ss. 12 and 13**—*High Court—Power to take action* suo motu.

The High Court can act upon the report submitted to it by the District and Subordinate Courts or *suo motu* take action for either suspension or dismissal of a pleader. (*Jwala Prasad, Ag.C.J., Wort, Kulwant Sahay, Fazl Ali and James, JJ.*) RAM GOBIND, *In re.* **11 Pat. 365=I.R. 1931 Pat. 497=134 I.C. 945=32 Cr. L.J. 1256=12 Pat.L.T. 773=1931 Cr.C. 897 (2)=A. I.R. 1931 Pat. 369 (F.B.).**

——**S. 12**—*Misconduct—Habitual defiance of the law.*

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No distinction can be drawn between the various kinds of law-breaking as to when such breaking amounts to a defect of character making pleader unfit to practise as pleader. The principle upon which Courts ought to proceed is, that where a pleader wilfully breaks the law upon one or two isolated occasions, it may not be necessary for the Court to take any action under S. 12. Where, on the other hand, it is shown that the pleader has wilfully and habitually broken the law, then the Court may quite reasonably come to the conclusion that his acts imply such a defect of character as to render him unfit for practice as a pleader, and in such a case the Court may dismiss him from practice. Where the acts of the pleader fall midway between the two extremes, then the Court may take a more lenient view and may think it sufficient to warn the pleader, by inflicting upon him a period of suspension or otherwise, that if he persists in breaking or defying the law, such conduct will inevitably lead the Court to the conclusion that he is totally unfit to practise in the Courts which have been established to enforce the law. A pleader was prosecuted three times and convicted twice for semi-political offences.

Held, that the case fell within the mediate position and warning with suspension was sufficient. (*Lort Williams and M. C. Ghose, JJ.*) A, A PLEADER, *In the matter of.* **38 C.W.N. 276=35 Cr.L.J. 592=1934 Cr.C. 354=6 R.C. 419=148 I.C. 57=A.I.R. 1934 Cal. 242 (2).**

——**S. 12**—*Pleader bound over under S.* 118, *Cr. P. Code, and convicted under S.* 17 (2), *Criminal Law Amendment Act—Defect of character.*

An order binding over a pleader under S. 118, Cr. P. Code, may not be a conviction for an offence. But a pleader who is convicted under S. 17 (2) of the Criminal Law Amendment Act is guilty of nothing short of an open and defiant violation of law. Seeing that it is the duty of the members of the legal profession to assist the Courts to maintain and enforce obedience to law, such conduct in a pleader is such a defect of character as would unfit him to be a pleader, and make him liable to action under S. 12 of the Act. (*Mallick and Jack, JJ.*) CHANDRA BENODE DAS, *In the matter of.* **152 I.C. 943=7 R.C. 337=59 C.L.J. 410=1934 Cr.C. 1278=A.I.R. 1934 Cal. 808.**

——**S. 12**—*Pleader as suitor—Contempt of Court—Disciplinary action may be taken.*

In re *Wallace* (L.R. 1 P.C. 283) is no authority for holding that an Advocate should never be punished professionally for contempt of Court committed by him in his personal capacity, however gross the offence may be. Each case must be dealt with according to the circumstances. Where a pleader in his capacity as a suitor in the Small Cause Court made a grossly improper remark reflecting upon the Judges of the High Court who at that stage had no concern whatever with the suit and a gratuitous hit at the Chief Justice without the slightest justification and was fined Rs. 75 for contempt of Court.

Held, that the fine was not under the circumstances sufficient, and that he should be suspended from practice for six months. (*King and Iqbal Ahmad, JJ.*) A PLEADER, *In the matter of.* **55 All 148=6 I.R. (All) 171=145 I.C. 847=1933 Cr.C 385=1933 A.L. J. 251=A.I.R. 1933 All. 224.**

[*Editor's note*:—The judgment of the Special Bench of the same High Court delivered a few months before this case and reported in A.I.R. 1932 All. 492 (S.B.) was apparently not brought to the notice of the Court in this case.]

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——**S. 12**—*Scope—Disciplinary action—Object.*

S. 12 contains no implication that disciplinary action against a pleader convicted of an offence cannot be based on his conduct when such conduct includes the commission of any offence for which he has been punished. Disciplinary action is not taken by way of punishment but on consideration whether the person formerly admitted to practise is a proper person to continue to practise or not. No one can be admitted to practise until he makes a solemn declaration, and the inference is that one who has contravened this declaration and is likely to do so in future is not such a person. The fact that the motive of the pleader in taking part in a Civil Disobedience movement was to draw attention to the dissatisfaction with the forest policy of Government is no justification nor is the fact he was only a participant and not a leader in the movement material in considering the necessity for disciplinary action. 22 All. 49; 44 Bom. 418; A.I.R. 1924 Mad. 479 and 55 I. C. 198 (F.B.), Ref. (*Macnair, J.C., Jackson, Subhedar, Staples and Niyogi, A.J.Cs.*) LOCAL GOVERNMENT *v.* N. B. DESHPANDE. **27 N.L.R. 29 = I R. 1931 Nag. 74 = 130 I.C. 826 = 32 Cr.L.J. 604 = 14 N.L.J. 1 = 1931 Cr.C. 217 = A.I.R. 1931 Nag. 33 (S.B.).**

——**Ss. 12, 13 and 14**—*Scope—Pleader—Misconduct—Enquiry—Jurisdiction of High Court and of Subordinate Courts.*

Under the Legal Practitioners' Act, the duty of admitting and suspending or dismissing pleaders, is entrusted to the High Court. If a pleader is convicted of a criminal offence implying a defect of character which unfits him to be a pleader, the High Court has power under S. 12 of the Act to suspend or dismiss him. Where the misconduct referred to in S. 13 is alleged, or where a pleader is otherwise alleged to be guilty of professional misconduct, the High Court, after making such enquiry as it thinks fit, can suspend or dismiss him under S. 13. Where, however, in the course of a proceeding before a subordinate Court, that Court has reason to think that a pleader has committed misconduct in the course of his professional duty, S. 14 gives power to the presiding officer of such Court to institute proceedings against the pleader under that section and hold an enquiry; and in case he finds the charge established, he shall record his finding and forward his report to the High Court for necessary action. It is only the presiding officer of the Court in which the misconduct is alleged to have been committed who can institute proceedings under S. 14 and none else has jurisdiction in the matter. (*Page, C. J. and Ba U, J.*) U THEIN NYUN *v.* DT. SUPERINTENDENT OF POLICE, MAUBIN. **13 Rang. 737 = 161 I.C. 958 = 8 R.R. 520 = 37 Cr.L J. 510 (2) = 1936 Cr.C. 242 = A.I.R. 1936 Rang. 158.**

——**S. 13**—*Misconduct—Advocate's name appearing in decree—Appearance in execution.*

When an Advocate sees his name appearing in the rent decree he is entitled to assume that a vakalatnama has been filed in the rent suit and that he is entitled to appear in the subsequent execution proceedings and there is no breach of the rules of the Court, relating to the matter, amounting to professional misconduct on the part of the Advocate though it is found that no vakalatnama was filed in the rent suit. (*Wort, A.C.J., Kulwant Sahay and Fazl Ali, JJ.*) B, AN ADVOCATE, *In the matter of.* **12 Pat. 843 = 6 I.R. (Pat.) 217 = 145 I.C. 1017 = 34 Cr.L J. 1131 = 14 Pat L T. 709 = 1933 Cr.C. 1931 = A.I.R. 1933 Pat. 571 (S B.).**

——**S. 13**—*Misconduct — Counsel issuing election manifesto.*

It is a well-recognised rule of etiquette in the legal profession that no attempt should be made to advertise

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oneself directly or indirectly. The issuing of circular letters or election manifestoes by a lawyer with his name, profession and address printed thereon, appealing to the members of his profession practising in the lower Court, who are of course in a position to recommend clients to Counsel practising in the High Court, is obviously an indirect way of advertisement. It does not however amount to any professional misconduct, but only to a breach of a professional etiquette. (*Sulaiman, C.J., Thom and Harries, JJ.*) THIRTEEN ADVOCATES, ALLAHABAD, *In the matter of.* **153 I.C. 667 = 7 R. A. 547 = 16 L.R. 23 (Cr.) = 4 A.W.R 780 = A.I.R. 1934 All. 1067 (S.B.).**

——**S. 13**—*Misconduct—Fee certificate—Departure from rule prescribed.*

Where a legal practitioner deliberately ignores the language of the fee certificate prescribed by the High Court by R. 1, Ch. 21 and adopts fee certificate form of his own which materially and substantially differs from the form prescribed by the High Court and which entirely nullifies the object of the High Court in prescribing the form of the certificate, he is guilty of serious professional misconduct. (*Mukerji, Young and King, JJ.*) S, AN ADVOCATE, BADAUN, *In the matter of.* **6 R A. 516 (2) = 147 I.C. 608 = 35 Cr.L.J. 421 = 3 A. W.R. 586 = 1934 A.L J. 333 = A.I.R. 1934 All. 109 (2) (S.B.).**

——**S. 13**—*Misconduct—Lawyer blindly following client's instructions.*

When their clients ask them to write in a pleading or petition accusations of dishonesty, criminality, etc., against anybody, or instruct them to ask questions of that nature, the lawyers are not to blindly follow the instructions. They must satisfy themselves that, apart from the relevancy of those accusations or questions, there are materials on which those accusations can be made or questions asked, and that the accusations and suggestions are not recklessly made. If they do not do so, they are guilty of professional misconduct. (*Mahomad Noor, James and Varma, JJ.*) K, A PLEADER, *In re.* **13 Pat. 550 = 152 I.C. 446 = 7 R P. 190 = 15 Pat.L.T. 715 = A.I R. 1934 Pat. 398 (S. B.).**

——**S. 13**—*Misconduct—Mortgage in lieu of fees—Exorbitant terms.*

It is inexpedient to express precisely the limits to the conduct of an Advocate in entering into a transaction, the purpose of which is the provision of fees for his work, in a case in which he is engaged by the person with whom such transaction is entered into. An Advocate entered into a mortgage transaction for providing for his fees from the client at the rate of Rs. 3 per month, with monthly rests.

Held, that the relationship of lawyer and client was created from the moment when they made the bargin as to the payment of fees and that the Advocate was guilty of professional misconduct. (*Wort, A C.J., Kulwant Sahay and Fazl Ali, JJ.*) B, AN ADVOCATE, *In the matter of.* **12 Pat. 843 = 6 I.R (Pat.) 217 = 145 I.C. 1017 = 34 Cr.L J. 1131 = 14 Pat.L.T. 709 = 1933 Cr.C. 1331 = A.I.R. 1933 Pat. 571 (S B.).**

——**S. 13**—*Misconduct—Notice by pleader to judge imputing malice and ill-will.*

A pleader of 30 years' standing signed and served a notice, purporting to be given on behalf of his client under S. 80, C. P. Code, on a Subordinate Judge. In this notice at more than one place the said Subordinate Judge was charged with having misused his powers and also with having wantonly, with intent to harm and disgrace the client, ordered an attachment of his property before judgment. Malice and ill will was imputed to

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the Judge in the discharge of his duty. The defence of the pleader was that the notice was drafted by his client and that he, without reading, had merely signed it.

Held, that the accusations coming from a pleader acting on behalf of his client, which were directed against a judicial officer presiding over a Court and which were almost defamatory in character, amounted to grossly improper conduct on the part of the said pleader, in the discharge of his professional duty.

Held, further, that a pleader of such experience must be held responsible for the contents of the notice. (*Mallik and M. C. Ghose, JJ.*) H, A PLEADER, *In re.* **61 Cal 522=152 I.C. 58=7 R.C. 234=1934 Cr. C. 1109=A.I.R. 1934 Cal. 723.**

———**S. 13**—*Misconduct—Omission to file vakalatnama in criminal case.*

Where an Advocate appeared in certain criminal proceedings without filing a vakalatnama, though required by the rules of the Court,

Held, though the rules requiring the filing of a vakalatnama or mukhtarnama in criminal proceedings is an arbitrary rule having no moral sanction behind it, it is a rule which an officer of the Court must comply with but a disobedience of that rule did not amount to professional misconduct in the particular case. (*Wort, A. C. J., Kulwant Sahay and Fazl Ali, JJ.*) B, AN ADVOCATE, *In the matter of.* **12 Pat. 843=6 I.R. (Pat.) 217=145 I C. 1017=34 Cr. L.J. 1131=14 Pat L.T. 709=1933 Cr.C. 1331=A.I.R. 1933 Pat. 571 (S.B.).**

———**S. 13**—*Misconduct—Soliciting work—Retaining judgment to get engagement.*

Where an Advocate retains the judgment of the trial Court with the intention of getting himself engaged in appeal without any valid excuse for retaining the judgments, the Advocate is guilty of professional misconduct. (*Wort, A.C.J., Kulwant Sahay and Fazl Ali, JJ.*) B, AN ADVOCATE, *In the matter of.* **12 Pat. 843=6 I.R. (Pat.) 217=145 I C. 1017=34 Cr.L.J. 1131=14 Pat L.T. 709=1933 Cr. C. 1331=A.I.R. 1933 Pat. 571 (S B.).**

———**S. 13**—Misconduct — Unlawful association—Taking part in conviction for—Proper for the High Court to exercise disciplinary jurisdiction. *See* LEGAL PRACTITIONER—MISCONDUCT. **12 Pat.L.T. 725.**

———**S. 13**—*Perjury committed by inexperienced young lawyer—Punishment.*

Perjury by members of the legal profession, apart from the question that it is a criminal offence, is a very serious matter from the point of view of the profession. Apart from the fact that it harms the profession, it sets a very bad example to the general public and is a great block in the administration of justice. Therefore, if and when cases of perjury by members of the legal profession are discovered, the member concerned deserved the most severe punishment which the High Court can give in the exercise of its disciplinary jurisdiction on the legal profession. Where the perjury was committed by a young inexperienced pleader which showed that it was not intended to deceive the Court or to practise any fraud upon it.

Held, that suspension from practice for six months was sufficient. (*Wort, Mohammad Noor and Agarwala, JJ.*) R. S, PLEADER, SAMASTIPUR, *In the matter of.* **156 I.C. 889=8 R.P 36=36 Cr L J. 1023=16 Pat L. T. 231=1935 Cr.C. 645=A.I.R. 1935 Pat. 249 (S.B.).**

———**S 13**—*Unprofessional conduct—Mukhtar standing bail for accused in criminal case and taking indemnity from person not accepted as surety—Concealment of truth from Courts—Misconduct.*

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There is nothing against a legal practitioner becoming a surety for an accused in a criminal case. But where a Mukhtar enters into a contract of indemnity with, and receives money from, a third person, who has been rejected as a surety, on the understanding that he should become a surety for appearance and that the amount should indemnify him, if he suffered any loss on account of the bail bond being cancelled, such an agreement constitutes public mischief, being opposed to public policy and the mukhtear is guilty of unprofessional and highly improper conduct; and when the mukhtear further attempts to conceal the agreement from the knowledge of the Court, it has to be viewed as a serious aggravation of the original offence rendering him liable to supension from practice. (*Wort, Khaja Mohamed Noor and Agarwala, JJ.*) SURJA NARAIN, *In the matter of.* **14 Pat. 442=155 I.C. 430=7 R.P. 586=36 Cr.L.J. 730=16 Pat L.T. 223=1935 Cr.C. 534=A.I.R. 1935 Pat. 195 (F.B.).**

———**S. 13 (b)**—*Applicability—"Fraudulently and grossly improper conduct"—Giving false information to client.*

A pleader who gives his client false information that a certain order has been passed by a Court, when no such order has been passed at all, is guilty of "fraudulent and grossly improper conduct in the discharge of his professional duty" within the meaning of S. 13 (*b*) of the Act (*Guha and Bartley, JJ.*) EMPEROR *v.* KUMARISH CHANDRA BANERJEE. **157 I C. 998=8 R.C. 144=36 Cr.L J. 1271=39 C.W.N. 283=1935 Cr.C. 939=A.I.R. 1935 Cal. 547.**

———**S. 13 (b)**—*Imputation of partiality and unfairness—Angry and turbulent behaviour—Disciplinary proceeding.*

R, a pleader, was granted a timber licence in respect of certain area and the accused was employed as his agent for carrying on work under licence. The accused was charged with selling timber in a manner not permitted by the licence. *R* appeared to defend the case and the record disclosed that he allowed himself to be "swayed too much by his own feelings" in the course of the trial and conducted the case for the defence in a manner that made manifest his intention improperly to obstruct the course of justice. The record was replete with frivolous objections and open and covert attacks upon the presiding Magistrate for alleged unfairness and partiality. On one occasion *R* invoked the wrath of the Gods and insisted in an angry and turbulent manner in turning and speaking to them loudly and defiantly about the Court's injustice,

Held, that it was not only indiscreet but reprehensible that *R* should have conducted the case for the defence. For the due administration of justice it was essential that order and decorum in the conduct of judicial proceedings should be maintained and that *R's* conduct had been so unseemly, contumacious and impertinent that serious notice of it ought to be taken. (*Page, C. J. and Mya Bu, J.*) U, A HIGHER GRADE PLEADER, *In the matter of.* **142 I C. 828=34 Cr.L J. 466=1933 Cr.C. 287=A.I R. 1933 Rang. 34.**

———**S. 13 (b)**—*Misconduct—Pleader obtaining adjournment of case on grounds known to be false.*

When a pleader repeatedly applied for the adjournment of a case pending before a Magistrate on the ground that his client intended to move the High Court for a transfer of the case but it appeared from the past conduct of the client and the surrounding circumstances that the pleader must have known while applying for adjournment that the purpose for which the application was made would never be carried out, it was held that

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the pleader was guilty of professional misconduct. (*Beasley, C.J., Reilly and Sundaram Chetty, JJ.*) FIRST GRADE PLEADER, VELLORE. *In the matter of.* **54 Mad. 520=I.R. 1931 Mad. 481=131 I.C. 145=32 Cr.L.J. 657=1931 M.W.N. 321=33 L.W. 425=1931 Cr.C. 470=A.I.R. 1931 Mad. 422=60 M.L.J. 393 (F.B.).**

———S. 13 (b)—*Mukhtar—Fabrication of documents and making false charges.*

A mukhtar's profession is a laborious one. It is of great public utility. Their reputation should be as jealously guarded by the Courts as those of pleaders or Vakils or Barristers and the same high standard of honour demanded from them. When a mukhtar has broken the professional rules and, secondly, attempted surreptitiously to alter documents in the case with a view to covering up his faults and came to the Court with a story which was manifestly untrue, and lastly attacked reputable persons with the suggestion that they committed perjury and were setting up a false case against him, he is no longer fit to remain a member of the profession. (*Courtney-Terrell, C.J., Fazl Ali and Agarwala, JJ.*) JATINDRA NATH BANERJI, *In the matter of.* **I.R. 1932 Pat. 275=140 I.C. 107=33 Cr. L.J. 874=13 Pat.L.T. 552=1932 Cr.C. 761=A.I.R. 1932 Pat. 289 (S.B.).**

———S. 13 (b) and (f)—*Boycott of Court—Consent of clients—Offence, if constituted.*

Certain pleaders had collectively agreed upon abstention from Court and had made their clients agree to the same. It appeared that the object was political, namely, to assist the boycott movement.

Held, that the pleaders were guilty of unprofessional conduct within the meaning of S. 13 (*b*) and (*f*). Order for suspension for three months passed. 49 Cal. 732, Ref. to. (*Guha and M.C. Ghose, JJ.*) EMPEROR *v.* RAJANI NATH BHATTACHARJEE **I.R. 1931 Cal. 612=132 I.C. 900=32 Cr.L.J. 980=35 C.W.N. 223=1931 Cr.C. 986=A.I.R. 1931 Cal. 706.**

———S. 13 (b) and (f)—*Suit against Sub-Divisional Officer—Allegations of conspiracy, collusion, malice, etc.—Suit dismissed for default—Proceedings against pleaders who filed the plaint—Propriety.*

In a suit filed against a Sub-Divisional Officer, a Municipal Chairman and others, the plaint a copy of which had already been sent along with the notice of suit, contained allegations of conspiracy and collusion and characterised the acts of the defendants as entirely malicious, illegal and *ultra vires*. The plaint was signed by the pleaders, one of them having the prior notice. The suit was, however, dismissed for default and compensatory costs were awarded to the defendants. There after proceedings were drawn up against the two pleaders under S. 13 (*b*) and (*f*) of the Legal Practitioners' Act. The pleaders did not claim absolute privilege, but stated that on the materials placed before them they felt justified in filing the plaint. The pleaders had supplied to them some papers, original plain copies, which, though they could not lead to the conclusion that there was collusion, furnished materials which justified the lawyers to take up the brief; the party too offered to give evidence at the hearing. There was a general impression in the place that any one who took any step against the Municipal Chairman was involved in some case or other, and those cases had been either found to be false or withdrawn when transferred.

Held, that the facts justified the pleaders in filing the plaint. The fact that later on the plaintiff allowed the case to be dismissed for default did not make the filing of the plaint by the pleaders unprofessional. The pleaders having acted in good faith and with due care, the proceedings were uncalled for and should not have been started. (*Mahomed Noor, James and Varma, JJ.*) KEDAR NATH LAL, *In the matter of.* **152 I.C. 313=7 R.P. 170=36 Cr.L.J. 1=15 Pat L.T. 560=A.I.R. 1934 Pat. 598 (S.B.).**

———S. 13 (f)—*"Any other reasonable cause"—Scope and meaning—Person practising Civil Disobedience.*

The jurisdiction under S. 13, sub-S. (*f*) is not confined to acts done in a professional capacity. Taking part in an organised resistance to law and assisting a movement involving grave danger to the public peace by a pleader may not have been done in a professional capacity but they are such as to render it necessary to enquire into the expediency of allowing him to continue practice. 49 Cal. 845 (P.C.), Foll. Also where, a pleader holds the view that it is desirable to disobey the law, he is likely to advise clients to break the law and it is undesirable in the public interests to allow one who sets a bad example to occupy the privileged position of a pleader. (*Macnair, J.C., Jackson Subhedar, Staples and Niyogi, A.J.Cs.*) LOCAL GOVERNMENT *v.* N. B. DESHPANDE. **27 N.L.R. 29=I.R. 1931 Nag. 74=130 I.C. 826=32 Cr.L.J. 604=14 N.L.J. 1=1931 Cr.C. 217=A.I.R. 1931 Nag. 33 (S.B.).**

———S. 13 (f)—*Boycott of Court—Joining in hartal—Proof of intention to boycott necessary.*

On a hartal day certain pleaders failed to attend Court. They having been proceeded against under S. 14 for having joined a boycott of the Court said in explanation of their conduct (1) that they were hurt by the news of the arrest of Mr. Gandhi, (2) that there were no carriages available, (3) that if they had attempted to attend Court there was a risk of their being molested and socially boycotted, and (4) that they had no cases in Court that day. It was not proved that they conspired to boycott the Court so as to paralyse the administration of justice.

Held, that with the absence of evidence of intention of any individual pleader to join the boycott it was not proper to take action against him under S. 13 (*f*). It is possible that the excuses preferred by the pleaders were justified even in cases where existence of the hartal as alleged as the ground. (*Suhrawardy and Jack, JJ.*) EMPEROR *v.* SUPENDRA MOHAN MAITRA. **35 C.W.N. 344=134 I.C. 1044=I.R. 1932 Cal. 4=33 Cr.L.J. 2=1931 Cr.C. 768=A.I.R. 1931 Cal. 616.**

———S. 13 (f)—*Criminal conviction—When can form basis of disciplinary action.*

Even if a person is convicted of a criminal offence, it is necessary for the Court, before taking disciplinary action, to know whether his conduct necessitates such action. Where the judgment in the criminal case does not disclose what exactly the conduct of the practitioner was, the Court may give the accused the benefit of doubt. (*Macnair, J.C. and Subhedar, A.J.C.*) LOKRE, *In re.* **141 I.C. 570 (1)=34 Cr.L.J. 224 (1)=I.R. 1933 Nag. 77 (1)=15 N.L.J. 90=1933 Cr. C. 1576=A.I.R. 1933 Nag. 383 (2).**

———S. 13 (f)—*Misconduct—Perjured evidence by mukhtar for his client.*

It is the duty of the Court not only to protect the members of the public against disreputable members of the profession but it is also its duty to protect the profession itself against the loss of reputation brought upon it by the conduct of such members. It is not part of the etiquette of the members of the profession to tell lies in Court or to give perjured evidence on behalf of their clients. Where the mukhtar informed the Court that accused could not appear in Court as he was unwell

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that day, whereas in fact the accused had come to Court that day and had been talking to the mukhtar, *held*, that the conduct of the mukhtar was highly unworthy of a member of his profession and that he should be removed from the rolls. (*Courtney-Terrell, C.J., Fazl Ali and James, JJ.*) EMPEROR *v.* GURU PRASAD. **6 R.P. 364 (2) = 147 I.C. 687 = 35 Cr.L.J. 453 = 15 Pat L.T. 63 — 1934 Cr.C. 283 = A.I.R. 1934 Pat. 142 (S.B.).**

——**S. 13 (f)**—*Pleader also carrying on business of insurance agent—Misconduct.*

A person who enters the profession of law as a pleader must make up his mind to conduct the business of the pleader and nothing else. Where a pleader tries to run two businesses at a time,—the business of pleader and the business of an insurance agent—such a practice being in the highest degree injurious to the interest of the profession and to the interest of the public, the pleader is guilty of professional misconduct. (*Courtney-Terrell, C.J., Dhavle and Agarwala, JJ.*) SHYAMAPADA DE, *In the matter of*. **15 Pat. 175 = 160 I.C. 23 = 8 R.P. 330 = 37 Cr.L.J. 230 (2) = 16 Pat.L.T. 781 = 1936 Cr.C. 10 = A.I.R. 1936 Pat. 1 (S.B.).**

——**S. 13 (f)**—*Pleader showing lack of faith in Courts of justice—Liability to be dealt with.*

Where the attitude of the pleader in connexion with proceedings before the Court was highly reprehensible and his conduct showed that he had no faith in justice administered by the Courts in this country.

Held, that the case must be dealt with severely. A.I.R. 1923 Cal. 329, Foll. (*Guha and Lodge, JJ.*) N, A PLEADER, SYLHET, *In re*. **159 I.C. 664 = 37 Cr.L.J. 153 = 8 R.C. 344 = 1935 Cr.C. 1143 = A.I.R. 1935 Cal. 742.**

——**S. 13 (f)**—"*Reasonable cause.*"

The words "for any other reasonable cause" should be interpreted according to their ordinary and literal meaning and not restricted by reasonable cause of the same class or description referred to in the preceding sub-sections. (*Suhrawardy and Graham, JJ.*) HOHO MOHAN SEN *v.* SHAMA PADA BHATTACHARJI. **59 Cal. 709 = 137 I.C. 434 — 33 Cr.L.J. 466 = I.R. 1932 Cal. 311 = 54 C.L.J. 530 = 36 C.W.N. 294 = 1932 Cr. C. 313 — A.I.R. 1932 Cal. 370.**

——**S. 13 (f)**—*Reasonable cause—Mukhtar—Advice to client to present gratification to Magistrate after successful termination of case.*

The mukhtar who advised his clients who had been acquitted in a criminal case to present some gratification to the Magistrate is guilty of misconduct, positively deplorable. Mukhtar suspended for one year. (*Courtney-Terrell, C.J., Fazl Ali and Agarwala, JJ.*) AWADH BIHARI LAL, *In the matter of*. **I.R. 1932 Pat 285 = 140 I.C. 10 = 33 Cr.L.J. 871 = 13 Pat.L.T 574 = 1932 Cr.C. 912 = A.I.R. 1932 Pat. 356 (S.B.).**

——**S. 13 (f)**—*Reasonable cause—Participation in the Civil Disobedience Movement.*

Pleaders who are guilty of illegal acts committed in connection with the Civil Disobedience Movement which led to their prosecution and conviction and to the preventive action by the Magistrate under S. 107, Cr. P. Code, bring themselves under the disciplinary jurisdiction of the Court vested under S. 13 (*f*) of the Act. Their refusal to give an undertaking for future behaviour is an aggravation of the offence which should be severely dealt with. (*Jwala Prasad, Ag.C.J., Wort, Kulwant Saha, Fazl Ali and James, JJ.*) RAM GOBIND, *In re*. **11 Pat. 365 = I.R. 1931 Pat. 497 = 134 I.C. 945 = 32 Cr.L.J. 1256 = 12 Pat L.T. 773 = 1931 Cr.C. 897 (2) = A.I.R. 1931 Pat. 369 (F.B.).**

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——**S. 13 (f)**—"*Reasonable cause*"—*Resolution of Bar Association prohibiting appearance in criminal case against member—Disobedience—Subsequent resolution to boycott disobedient member—Impropriety—Misconduct.*

It is a fundamental right of every legal practitioner to exercise his profession and appear in any case in which he may choose to appear without interference of any kind except when such interference is based upon some valid and legal grounds. So where a Bar Association passed a resolution to the effect that no member thereof should appear in any criminal case against any other member and subsequently on one of the members defying that resolution, passed another resolution amounting to a professional boycott of that member, the resolution is a flagrant and unwarranted interference with the rights of legal practitioners, contrary to all accepted notions of forensic propriety. So the action of the two members who proposed and seconded the resolution to "boycott" the defiant member amounts to 'reasonable cause" within the meaning of S. 13 (*f*) of the Act. (*Suhrawardy and Graham, JJ.*) HOHO MOHAN SEN *v.* SHAMA PADA BHATTACHARJI. **59 Cal. 709 = 137 I.C. 434 = 33 Cr.L.J. 466 = I.R. 1932 Cal. 311 = 54 C.L.J. 530 = 36 C.W.N. 294 = 1932 Cr. C. 313 = A.I.R. 1932 Cal. 370.**

——**S. 13 (f)**—*Second conviction.*

A pleader who was suspended for six months after a conviction for breach of Salt Act, did not apply for restoration of certificate but was again convicted under S. 17, Criminal Law Amendment Act. He made no appearance to notice under S. 14.

Held, that his name should be removed from rolls. (*Courtney-Terrell, C.J., Fazl Ali and Agarwala, JJ.*) D, A PLEADER, *In the matter of*. **I R 1932 Pat 317 = 140 I C. 295 (1) = 34 Cr.L.J. 8 = 1932 Cr.C. 772 = A.I.R. 1932 Pat. 300 (S.B.).**

——**S. 13 (f)**—*Sufficient cause—Drunkenness.*

The pleader was addicted to drinking. In defending an accused, he came to Court in so drunken a condition that he was unable to conduct the case on behalf of his client. On another occasion, he came to Court "hopelessly drunk" and not properly dressed and insulted the Court; again on another occasion, he assaulted the bench clerk.

Held, that he was not fit to be entrusted with the responsible duties of the legal profession and that his name should be struck off the list of pleaders. (*Page, C.J. and Mackney, J.*) A LOWER GRADE PLEADER, *In the matter of*. **12 Rang. 180 = 150 I.C. 236 = 6 R. R. 377 = 1934 Cr.C. 782 = A.I.R. 1934 Rang. 156.**

——**S. 14**—*Jurisdiction under—Misconduct in proceedings in the Court of the Additional Sessions Court—Institution of proceedings by District Magistrate—If ultra vires.*

The only person entitled to take proceedings against a pleader under S. 14 of the Legal Practitioners' Act is the presiding officer of the Court or office in which the proceedings are pending in the course of which the pleader concerned is alleged to have been guilty of misconduct. Where a pleader is alleged to be guilty of misconduct under S. 14 of the Act, in that, he, while being engaged for the defence in a trial in the Court of the Additional Sessions Judge, attempted by means of a bribe to induce two prosecution witnesses to resile from the statements they had made, the District Magistrate has no jurisdiction to start proceedings against the pleader under S. 14, because he is not the presiding officer of the Court. If he institutes proceedings in such a case, they are invalid in law and must be quashed as *ultra vires*. (*Page, C.J. and Ba U, J.*) U THEIN

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NYUN *v.* DT. SUPERINTENDENT OF POLICE, MAUBIN. **13 Rang. 737=161 I.C. 958=8 R.R. 520=37 Cr.L. J. 510 (2)=1936 Cr.C. 242=A.I.R. 1936 Rang. 158.**

———S. 14—*Misconduct — Appearance for opposite side.*

Proper professional conduct is not a mere matter of compliance with technical rules. It is one of which every one who aspires to be called a gentleman should have an instinctive appreciation. The conduct of a pleader who had already taken instructions from the defendant in an application to set aside an *ex parte* decree and received his confidence in the matter of the genuineness of a Small Cause Court suit but who notwithstanding that confidence accepts the instructions and vakatatnama of the other side in a title suit to set aside the same *ex parte* decree deserves the severest censure. (*Courtney Terrell, C.J., Mahomed Noor and Varma, JJ.*) S. P. A PLEADER, *In the matter of.* **15 Pat.L T. 305=150 I.C. 16 =6 R.P. 724=1934 Cr.C. 721=A.I.R. 1934 Pat. 352 (S.B.).**

———S. 14—*Misconduct—Charge not established beyond reasonable doubt.*

Where the point for enquiry was whether a pleader signed and filed a satisfaction, of a mortgage execution case without instruction, and the Court finds that the charge is not established beyond reasonable doubt, no action could be taken against the pleader under the Legal Practitioners Act. (*Lort Williams and M. C. Ghose, JJ.*) DEBI PADA CHATTERJEE *v.* EMPEROR. **152 I.C 43=7 R.C. 224=59 C.L.J. 419=1934 Cr.C. 1210 (1)=A.I.R. 1934 Cal. 794.**

———S. 14—*Misconduct — Criminal offence—Procedure.*

Where the allegations against a legal practitioner amount to a charge rendering him liable to criminal prosecution, the correct procedure to be followed is that proceedings under the Legal Practitioners Act should not be taken, but that if it was thought necessary to take action it should be by way of criminal prosecution. (*Guha and Bartley, JJ.*) EMPEROR *v.* PRASANNA KUMAR DAS. **149 I.C 874=6 R.C. 644 (1)=38 C. W.N. 8=A.I.R. 1934 Cal. 272.**

———S. 14—*"Misconduct"—Pleader refusing to hand over papers to client on ground of non-payment of fees in part—If guilty.*

A pleader cannot be held to be guilty of professional misconduct because he refuses to part with the papers of a client on the ground that part of his fees was not been paid. He can claim to retain his client's papers on that ground.

Quaere.—Whether a legal practitioner in India has a right of possessory lien over his client's papers. (*Venkatasubba Rao, O.C.J.*) BIJILI SAHIB *v.* DADHAMIA BHALAMBAI. **160 I.C 123=8 R.M. 607 (1)=37 Cr. L.J. 279=43 L.W 326=1936 M.W.N. 73=A.I.R. 1936 Mad. 48=69 M.L.J. 802.**

———S. 14—*Proceeding in Revenue Court—Imputation of dishonesty made against officer — Whether amounts to professional misconduct.*

S. 14 is material even when any pleader is acting in his professional capacity on behalf of his client in a proceeding in a Revenue office. Where the pleader stated before the Tahsil officer that if Rs. 5 had been paid to the Peshkar of the Tahsil office, the remission of *jotedari* donation would have been granted.

Held, that the practitioner was guilty of misconduct in having imputed dishonesty to the Peshkar. No amount of irritation or disappointment would be any justification for any legal practitioner casting imputations upon the honesty and integrity of one of the officers of the Court before which he is appearing (*Costello and Jack, JJ.*) HEM CHANDRA GANGULY, *In the matter of.* **I.R. 1933 Cal. 407=143 I.C. 359=56 C L.J. 595 =1933 Cr C. 416=A I.R. 1933 Cal. 344.**

———S. 14—*Reference to High Court — Report of District Judge—Contents of—Specification of appropriate sentence not necessary.*

If the District Judge finds, as cl. (4) says, that the charge is established and considers that the pleader should be suspended or dismissed in consequence, he should record his finding and the ground thereof and returned the same to the High Court. The section does not anywhere say that he must pass a sentence on the pleader before he recommends the case to the High Court for orders. Infliction of punishment on the legal practitioner is within the exclusive jurisdiction of the High Court. 15 C.W.N. 764, Dist. (*Suhrawardy and Graham, JJ.*) EMPEROR *v.* SHYAMA PADA BHATTA CHARJI. **59 Cal. 709=I.R. 1932 Cal. 311=137 I C. 434=33 Cr.L.J. 466=36 C.W.N. 294=54 C L J. 530 =1932 Cr.C. 313=A.I.R. 1932 Cal. 370.**

———S. 27—*Rules under—C. P. Legal Practitioners Fees Rules, Rr. 6 and 8 — Decree assigned—Original pleader re-engaged by assignee—Fees for.*

There is no provision in the C. P. Legal Practitioners' Fess Rules for the case in which a pleader who has been engaged in the suit itself is re-engaged by the assignee decree-holder and no pleader's fee can be allowed in execution afresh. (*Grille, A.J.C.*) MT. JAINABAI *v.* RAMCHANDRA. **I.R. 1933 Nag. 236=144 I.C. 379=1933 Cr.C 1549=A.I.R. 1933 Nag. 360.**

———S. 36—*Cases under — Power of Judicial Commissioner's Court to interfere in revision.*

In cases under S. 36 of the Act the Judicial Commissioner's Court has the power to interfere in revision in the exercise of its general power of superintendence and control over subordinate Courts. (*Jackson, J.C.*) YESHWANT RAO *v.* SECRETARY, HIGH COURT BAR ASSOCIATION, NAGPUR. **28 N.L R. 4=I.R. 1932 Nag. 57=137 I.C. 66=33 Cr.L.J. 408=A.I R. 1932 Nag. 50.**

———S. 36—*Deposition of defence witness—Same prejudicial to third party—Value.*

In a proceeding under S. 36, certain legal practitioners who had been produced as defence witnesses by some of the persons proceeded against gave evidence in favour of those who had cited them and at the same time deposed that the rest were known to them by reputation or otherwise as touts.

Held, that such evidence could not be relied on as evidence against those persons on whose behalf the witnesses had not been cited. (*Jai Lal, J.*) CHATUR BHUJ *v.* EMPEROR. **12 Lah. 385=I.R 1931 Lah. 398 =131 I.C. 238=32 Cr.L.J. 672=1931 Cr.C. 137=A. I.R. 1931 Lah. 57.**

———(As amended by Act XV of 1926), S. 36—*General repute—Proof—Effect of amending Act.*

After the amendment of the Act in 1926, while it is open to proceed under S. 36 in the old way and call evidence, it can also avoid the calling of witnesses once a resolution is presented to it which satisfies the requirements of Act XV of 1926. (*Mears, C.J. and Sen, J.*) KUNDHAN LAL *v.* EMPEROR. **I.R. 1931 All. 293= 130 I.C. 629=A.I.R. 1931 All. 315.**

———S. 36—*Order under—Revision.*

That the order under S. 36 (2), was passed by the District Magistrate without giving the applicant an opportunity of appearing before him and being heard is sufficient ground for revision. 45 A. 676, Foll. (*Staples, A.J.C.*) DEBIDIN *v.* EMPEROR. **27 N.L.R.**

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398=14 N.L J. 122=135 I.C. 411=33 Cr.L.J 146=I.R. 1932 Nag. 11=1931 Cr.C 993=A.I.R. 1931 Nag. 187.

[R. 28 NLR 4 (6).

———S. 36—*Order under—Revision by High Court.*

The powers under S. 36 are not conferred on individual officers by names as *persona designata* but upon officers presiding in the Courts which are mentioned therein, and the High Court in the exercise of its power of general superintendence over all Courts subject to its appellate jurisdiction can, under S. 107 of the Government of India Act, revise orders made by such Subordinate Courts under S. 36 of the Legal Practitioners Act. 27 Cr.L.J. 476; 21 A 181; 45 A. 676; 4 C.W.N. 36; 11 C.L.J. 513 and 6 Pat. 567, Ref. (*Rangnekar, J.*) MAGANBHAI NATHABHAI *v.* DINKARRAO. **56 Bom. 577=I.R. 1933 Bom. 14=34 Cr.L.J. 47=140 I.C. 553=34 Bom.L.R. 1281=1932 Cr.C. 864=A.I.R. 1932 Bom. 596.**

———S. 36—*Proceeding under—Enquiry delegated to Subordinate Court—Right of District Judge to disagree with report.*

Under S. 36 (2) the District Judge has the power to differ from or accept the report of a Subordinate Court as regards the question referred, namely, whether certain persons should be declared touts or not. Where the District Judge refuses to accept the report, the High Court will not interfere in revision unless the order is manifestly wrong. (*Dalip Singh, J.*) EMPEROR *v.* MEHR SINGH. **I.R. 1931 Lah. 866=134 I.C. 98=32 Cr.L J. 1129=31 P.L.R. 1003=1931 Cr.C 162 (2)=A.I.R. 1931 Lah. 98 (2).**

———S. 36—*Proceeding under—Irregularity—Acquiescence.*

The proceedings under S. 36 are of quasi-criminal nature and it is doubtful whether consent of the persons complained against would have validated the otherwise invalid proceedings, *viz.*, where several petitioners were declared to be touts and evidence was recorded on one record, though the case of each was separately tried. (*Jai Lal, J.*) CHATUR BHUJ *v* EMPEROR. **12 Lah. 385=I.R. 1931 Lah. 398=131 I C. 238=32 Cr.L J. 672=1931 Cr.C. 137=A.I.R. 1931 Lah. 57.**

———S. 36—*Resolution based on general repute—Admissibility.*

If a resolution declaring a person to be a tout is based on general repute the Court may attach less weight to it, but it cannot be said that such a resolution is invalid or legally inadmissible in evidence and cannot be taken into consideration by the Court. Such a resolution is legally admissible as evidence of general repute, even though the basis of that resolution may be hearsay evidence. (*Sulaiman, A.C.J. and Bajpai, J.*) RAM PHAL *v.* EMPEROR. **54 All. 230=136 I.C. 374=I.R. 1932 All. 198=33 Cr L.J. 282=1932 A.L J. 176=1931 Cr.C. 1047=A.I.R. 1931 All 711.**

———S. 36 (1)—*Report of Senior Subordinate Judge—Duty of District Judge to pass formal orders on report.*

Where the District Judge sends to the Senior Subordinate Judge the names of persons suspected to be touts for the purpose of enquiry and report, the District Judge should on receipt of such report pass final orders as to the inclusion of the persons in the list of touts. In such a case an order disposing of the objections to the report preferred by one of the persons proceeded against cannot take the place of the requisite order to be passed by the District Judge. (*Abdul Qadir, J.*) ABDUL MAJID *v.* EMPEROR. **I.R. 1931 Lah. 466=131 I.C. 370=32 Cr.L J. 730=32 P.L.R. 9=1931 Cr.C. 268=A.I.R. 1931 Lah. 156.**

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———S. 36 (1), Expl—*Meeting—Procedure—Committee's report as evidence.*

It is not necessary that the meeting of the legal practitioners should be summoned by a method different from that usually adopted when meetings of the Association are held or that every member of the Association should receive notice of a special meeting. It is also not necessary that the members present should consider the evidence themselves. It is sufficient if they find reason to believe that the report prepared by a sub-committee appointed for the purpose is prepared with impartiality and care and support the resolution because of the report. (*Macnair, J.C.*) YESHWANT RAO *v.* SECRETARY, HIGH COURT BAR ASSOCIATION, NAGPUR. **28 N.L.R. 159=I R. 1932 Nag. 129=139 I.C. 900=33 Cr L.J. 940 (2)=1932 Cr C. 759=A.I R. 1932 Nag. 141.**

———S. 36 (1), Expl—*Resolution of Bar Association—Essentials for validity as evidence.*

In order to enable a Court to admit in evidence the resolution of the Bar Association declaring certain persons to be touts, it is necessary to establish that it was a meeting specially convened for the purpose of passing the resolution in question. This implies that the meeting should have been properly convened and that the object of the proposed meeting should have been properly notified to all the members of the Association. It is however not always legally necessary that there should be a personal service of notice on all the members, but when any notice other than a personal notice is claimed to have been given, it must be established that such a mode of giving notice is authorized by the rules and regulations of the Association or that the members concerned had such means of knowledge as to give them the opportunity of attending the meeting. Where it is not proved that all the members of the Association who were able to attend had been notified nor is it shown that those who were not notified were otherwise not capable of attending the meeting, the special meeting convened to declare certain persons touts cannot be said to have been properly convened and consequently the resolution passed thereat is not a valid resolution, such as is contemplated by explanation to S. 36 (1) of the Act. (*Jai Lal, J.*) CHATUR BHUJ *v.* EMPEROR. **12 Lah. 385=I.R. 1931 Lah. 398=131 I C. 238=32 Cr L.J. 672=1931 Cr.C. 137=A.I.R. 1931 Lah. 57.**

———S. 36 (1), Expl—*Resolution of legal practitioners—Evidentiary value—Irregularity in procedure.*

Under S. 36 (1), Expl, the resolution is valuable evidence even though the facts on which the resolution is based are not disclosed. In the absence of any other cogent evidence, the resolution if duly passed should ordinarily be regarded as sufficient for declaring a person to be a tout. The proof of any occupation which involves attendance at Courts for particular purposes is not very material evidence in rebuttal. Where the meeting is specially convened for declaring *A* to be or not to be a tout and the resolution declares *B* to be a tout the resolution in so far as *B* is concerned is not such a resolution as is contemplated by S. 36 and the High Court may set aside an order passed on the basis of such a resolution. (*Macnair, J.C.*) YESHWANT RAO *v.* SECRETARY, HIGH COURT BAR ASSOCIATION, NAGPUR. **28 N.L.R. 159=I.R. 1932 Nag. 129=139 I.C. 900=33 Cr.L J. 940 (2)=1932 Cr.C. 759=A I. R. 1932 Nag. 141.**

———S. 36 (2) (a)—*Proceeding under — Report of Sub-Judge to District Judge—Person knowing he was included—Duty to appear—Notice.*

The Senior Subordinate Judge was asked by the District Judge to hold an enquiry with regard to certain

LEGAL PRACTITIONERS ACT (1879), S. 36.

persons named in the list framed by a Bar Association. The name of the petitioner was included in the list and the matter was so reported.

Held, that under S. 36 (2) (*a*) it was the duty of the petitioner who knew that he was included in the list to enter appearance before the District Judge and apply to be heard and it was not the duty of the District Judge to issue notice to him. (*Aldison, J.*) SHAM LAL *v.* EMPEROR. **13 Lah 323 = I.R. 1931 Lah. 686 = 132 I. C. 846 = 32 Cr.L J. 966 = 33 P.L.R. 591 = 1931 Cr.C. 783 (2) = A I.R. 1931 Lah 543 (2).**

———**S. 36 (2-A)**—*Enquiry under—Resolution under Explanation to sub S.* (1)—*Strict proof of.*

Proceedings under S. 36 (2-A) are of a quasi-criminal nature. An order declaring a person to be a tout is one which very seriously affects his character and living. It is therefore incumbent upon the District Judge to satisfy himself that the conditions laid down by the Explanation to sub-S. (1) for the admissibility of a resolution are duly fulfilled and satisfied. (*Rangnekar, J.*) MAGANBHAI NATHABHAI *v.* DINKARRAO. **56 Bom. 577 = I R. 1933 Bom. 14 = 34 Cr.L.J. 47 = 140 I.C. 553 = 34 Bom L R. 1281 = 1932 Cr.C. 864 = A I.R. 1932 Bom. 596.**

———**S. 36 (2-A), Proviso**—*Delegation of inquiry—Report—Opportunity to alleged tout.*

A District Magistrate can delegate the enquiry to a Subordinate Magistrate but he cannot act on the report submitted by the latter recommending that a person should be declared a tout without hearing that person, if the person appears and desires to be heard. The District Magistrate cannot delegate the matter of hearing a person against whom a report has been made. He must himself hear such a person before passing any order against him. The proviso does not state that a notice should be issued to the person against whom a report has been made but the District Magistrate should satisfy himself that the person is aware that a report has been submitted against him, and should give him a reasonable time and opportunity for appearing and stating his objections to the report, before he passes any final order. (*Staples, A.J.C.*) DEBIDIN *v.* EMPEROR. **27 N.L.R. 398 = 135 I.C. 411 = 33 Cr. L.J. 146 = I. R. 1932 Nag. 11 = 14 N.L.J. 122 = 1931 Cr.C. 993 = A.I.R. 1931 Nag. 187.**

———**S. 41**—*Order passed by Judicial Commissioner's Court confirmed by Local Government—Rescission by Chief Court—Sanction of Local Government necessary.*

The power to rescind order under S. 41 possessed by the Court of the Judicial Commissioner of Oudh vests in the Chief Court. But as the order passed by the Bench of the Judicial Commissioner's Court was confirmed by the Local Government, it should not be rescinded without its confirmation. (*Wazir Hasan, C.J., Srivastava and Smith, JJ.*) MAHOMED YUSUF HUSSAIN KHAN *v.* EMPEROR. **6 R.O. 401 = 148 I.C. 299 = 35 Cr. L.J. 678 = 11 O.W.N. 368 = 1934 Cr.C. 373 = A.I. R. 1934 Oudh 140 (S.B.).**

———**S. 41**—*Practitioner debarred for 15 years—Unconditional apology—Order should be rescinded.*

Where a legal practitioner has been sufficiently punished by having remained debarred from practice for about fifteen years and he has tendered an unconditional apology, the order under S. 41 should be rescinded. (*Wazir Hasan, C. J., Srivastava and Smith, JJ.*) MAHOMED YUSUF HUSSAIN KHAN *v.* EMPEROR. **6 R.O. 401 = 148 I.C. 299 = 35 Cr.L.J. 678 = 11 O.W. N. 368 = 1934 Cr. C. 373 = A.I.R. 1934 Oudh 140 (F. B.).**

LETTERS OF ADMINISTRATION.

LEGAL PRACTITIONERS (FEES) ACT (XXI OF 1926), Ss. 3 and 4—*Fees not settled—Regulation fees.*

Where the fee payable is not settled with the client under S. 3, then under S. 4 the pleader is entitled only to such fee as would come to on computation, in accordance with the law for the time being in force in regard to the computation of the costs to be awarded to a party in respect of the fee of his legal practitioner. (*Jwala Prasad and Ross, JJ.*) MT. BABUI RADHIKA DEBI *v.* RAMASRAY PRASAD CHOWDHRY. **9 Pat. 865 = 131 I.C. 542 = I R. 1931 Pat 222 = 13 Pat.L.T. 200 = 1931 Cr.C. 353 (2) = A.I.R. 1931 Pat. 137.**

———**Ss. 3 and 4**—*Private agreement for fee—Enforcement.*

A legal practitioner can not only by private agreement settle with a client the terms and fee but also sue for his fee due under that agreement and the former cannot be said to stand in any confidential relation towards the latter in view of the plain language of Ss. 3 and 4. Such a private agreement can be impugned like any other contract and in case the agreement is avoided, then the fee would have to be computed according to the rules for the time being in force as provided in S. 4. A.I R. 1930 Rang. 243, Foll. *Tyrell* v. *Bank of London*, 10 H.L. C. 44, Ref ; 25 C. 595, Not Foll. (*Maung Ba, J.*) SAW HLA PRA *v.* MAUNG PO HLIN. **I.R. 1931 Rang. 207 = 132 I C. 719 = A.I R. 1931 Rang. 104.**

———**S. 4**—"Legal practitioner"—Barrister included therein. *See* BARRISTER. **55 All. 570 = 1933 A.L.J. 451 = A.I.R. 1933 All. 417 (F.B.).**

———**S. 4**—Quantum meruit—*Pleader engaged but vakalatnama not signed by pleader—Right to remuneration.*

A client engaged a pleader and filed a vakalatnama in his favour but it was not signed by the pleader.

Held, that, whether the vakalatnama has been signed or not, the pleader is entitled to his remuneration for the work done by him on the principle of *quantum meruit*. 12 Bom. 557 and 29 I C. 453, Ref. (*Jwala Prasad and Ross, JJ.*) MT. BABUI RADHIKA DEBI *v.* RAMASRAY PRASAD CHOWDHRY. **9 Pat. 865 = I.R. 1931 Pat. 222 = 131 I.C. 542 = 13 Pat. L.T. 200 = 1931 Cr.C. 353 (2) = A.I.R. 1931 Pat. 137.**

———**S. 4**—*Several pleaders engaged—Each entitled to full fees.*

When there are several gentlemen retained by a client in the same vakalatnama, each of the vakils is entitled to claim from his client the full fee stipulated for by him and not merely a share in the single fee allowed as against the losing party. 38 I.C. 210, Foll., 7 C.W.N. 300, Not foll. (*Jwala Prasad and Ross, JJ.*) MT. BABUI RADHIKA DEBI *v* RAMASRAY PRASAD CHOWDHRY. **9 Pat. 865 = I.R. 1931 Pat. 222 = 131 I.C. 542 = 13 Pat. L.T. 200 = 1931 Cr.C. 353 (2) = A.I.R. 1931 Pat. 137.**

LEGAL REPRESENTATIVE. *See* C. P. CODE, S. 2 (11), O. 21, R. 16 AND O. 22.

LEGATEE. *See* WILL.

LEGISLATURE. *See* INTERPRETATION OF STATUTES.

LEGITIMACY.

See (1) EVIDENCE ACT, S. 112.
(2) MAHOMEDAN LAW.

LESSOR AND LESSEE.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) TENANCY ACTS.

LETTERS OF ADMINISTRATION. *See* SUCCESSION ACT (1925), SS. 278-283.

LETTERS OF ADMINISTRATION.

———Burmese customary law—Rights of the sister and a step child. *See* BUDDHIST LAW (BURMESE)—SUCCESSION—STEP-DAUGHTER. **12 Rang. 703=A.I.R. 1935 Rang. 58 (2).**

———Grant to creditor—Conditions—Allegations and proof—Evidence requisite. *See* SUCCESSION ACT, S. 219 (*f*). **150 I.C. 748 (1).**

LETTERS PATENT APPEAL.

See (1) APPEAL—PRACTICE.
(2) C. P. CODE, S. 100.
(3) LETTERS PATENT.

———*C. P. Code and rules under it—Applicability.*

The Civil Procedure Code and the Rules made under it apply to an appeal from a Judge of the High Court. (*Mukerjee and Patterson, JJ.*) LEA BADIN *v.* UPENDRA MOHAN ROY. **154 I.C. 1056=7 R.C. 548=39 C.W.N. 155=A.I.R. 1935 Cal. 35.**

———New point—Maintainability. *See* APPEAL—NEW POINT. **A.I.R. 1934 Bom. 466.**

LETTERS PATENT (Allahabad), Cl. 2—*Matrimonial jurisdiction—Mode of exercise—Suit to declare marriage to be void—Sustainability.*

The jurisdiction in matrimonial matters conferred on Allahabad High Court by Art. 26 of its Letters Patent is to be exercised in accordance with the provisions of the Divorce Act of 1869 and in accordance with that Act alone. So far as a suit for declaring a marriage null and void is based on the grounds that the petitioner was an idiot at the time of his marriage and that the consent of the petitioner was obtained by force or fraud, the jurisdiction of the High Court exists, because of the provisions of S. 19, Divorce Act. This Act does not empower the High Court to declare a marriage null and void on the ground that the ceremonies necessary for a marriage enjoined by the Church have not been performed. A suit based on the ground of non-observance of essential ceremonies must therefore be instituted in an ordinary Court of Original Civil Jurisdiction, namely, in the Court of a Munsif or a Subordinate Judge, according to the pecuniary and territorial jurisdiction of such Court. It is no doubt open to the High Court, when such a suit is instituted in the Court of a Munsif or a Subordinate Judge, to transfer it to itself and to try it under its extraordinary original civil jurisdiction. But no such suit is permitted by law to be instituted directly in the High Court. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428=153 I.C. 733=7 R.A. 583=1934 A.L.J. 1129=3 A. W.R. 70=A.I.R. 1934 All. 273.**

———**(Allahabad), Cl. 8**—Criminal charges—Criminal prosecution should precede disciplinary decision—Legal practitioner. *See* LEGAL PRACTITIONER—MISCONDUCT. **58 I.A. 152=53 All. 183=61 M.L.J. 130 (P.C.).**

———**(Allahabad), Cls. 8 and 27**—*Jurisdiction to deal with misconduct of Advocate—Still vesting in the High Court—Opinion of majority of the Benches prevails.*

Jurisdiction to deal with advocates still vests in the High Court under Cl. 8, and the High Court in exercising that jurisdiction is performing a function directed by the Letters Patent, and its Benches are therefore governed by the rule as to the opinion of the majority mentioned in Cl. 27 of the Letters Patent. There is nothing in the Bar Councils Act or in any rules made thereunder which is inconsistent with the provision that the opinion of the majority of the Judges hearing the case should prevail. Indeed the fact that the Act is silent and so are the rules would suggest that the provisions of the Letters Patent have necessarily been retained. (*Sulaiman, C.J.*) *In the matter of* B, AN ADVOCATE, GHAZIPUR. **159 I.C. 653=8 R.A. 493 =1935 A.W.R. 1245=37 Cr.L.J. 139=1935 Cr C. 1239=1936 A L.J. 383=A.I.R. 1935 All. 1037.**

LETTERS PATENT (Allahabad), Cl. 10.

———**(Allahabad), Cl. 8**—*Misconduct—Conviction for offence involving moral turpitude—Suspension*

The mere fact of conviction of any criminal offence implying moral turpitude can be sufficient basis in law for an order of suspension or dismissal of a pleader or a Mukhtar only but not of a vakil whose cases of misconduct are not provided by the Legal Practitioners' Act but by Paragraph 8 of Letters Patent. According to that paragraph the High Court has a discretion to remove from practice on reasonable cause any vakil of the High Court and the order is conclusive. (*Hasan, C.J., Raza and Nanavutty, JJ.*) AN ADVOATE, *In the matter of.* **I.R. 1931 Oudh 179=131 I.C. 67=32 Cr.L.J. 625=14 O.L.J. 114=8 O.W.N. 267=1931 Cr.C. 433=A.I.R. 1931 Oudh 161.**

———**(Allahabad), Cl. 8**—*Procedure—Discretion of Court—Trial by Judges who framed charge—Undesirability—Leave to appeal.*

The procedure to be followed in proceedings under Art. 8 is left to the discretion of the Court, but it is manifest that where grave charges such as perjury and champerty are involved, scrupulous care should be taken to see, not only that justice is done, but also that justice should seem to be done. An appropriate guide in dealing with such cases is to be found in the disciplinary provisions of the Legal Practitioners' Act, and therefore it is undesirable that such an investigation should proceed before the same Judges as have heard the case out of which the charges arise. Where the accused's defence involves a challenge of the previous decision of the Judges before whom he is arraigned, it is obvious that this must occasion embarrassment on his part. But if this procedure does not involve miscarriage of justice special leave to appeal cannot be granted. (*Lord Macmillan.*) A PLEADER *v.* JUDGES OF THE ALLAHABAD HIGH COURT. **58 I.A. 152=53 All. 183=35 C.W.N. 640=53 C.L.J. 405=I.R. 1931 P.C. 192= 132 I.C. 608=1931 A.L.J. 450=1931 M.W.N. 603= 33 Bom.L R. 945=34 L.W. 59=1931 Cr C. 519= A.I.R. 1931 P.C. 112=61 M.L.J. 130 (P.C.).**

———**(Allahabad), Cl. 10**—*Appeal under—Procedure.*

Though a Letters Patent Appeal is not preferred under the C. P. Code, the Court hearing it, *viz.*, the High Court is still an appellate Court, and as an appellate Court has got under the C. P. Code all the powers which a Court of first instance has got, its procedure is governed by the C.P. Code. It is entitled to remit issues and do other things which an appellate Court can do. Thus it can direct the plaint to be returned for presentation to the proper Court. (*Sulaiman C.J. and Mukerji, J.*) HABIB-UL-LAH KHAN *v* BHABHUTI. **6 R.A. 841=148 I.C. 1175=15 L.R. 250 (Rev.)=18 R.D. 209=A.I.R. 1934 All. 551.**

———**(Allahabad), Cl. 10**—*Application under S.* 491, *Cr. P. Code—Dismissal—Appeal.*

No appeal lies under Cl. 10, Letters Patent, against an order dismissing an application under S. 491, Cr P. Code. (*Mukerji and King, JJ.*) HAIDARI BEGAM *v.* JAWAD ALI SHAH. **56 All. 899=150 I.C. 740=7 R.A. 21=1934 A.L.J. 684=3 A.W.R. 297=A.I.R. 1934 All. 606.**

———**(Allahabad), Cl. 10**—*Judgment in appeal—Review—Permissibility.*

Held, by the Majority of the F B. (Mukerji, J. dissenting) that an application for review of the judgment, passed by a Bench hearing an appeal from the decision

LETTERS PATENT (Allahabad), Cl. 10.

of a single Judge of the Court under Cl. 10 of the Letters Patent does not lie. 1 A.L.J. 509 and 16 A.L.J. 964, Appr.

Per *Banerji and Bennet, JJ.*—Procedure is one thing and jurisdiction is another. There is a clear distinction between procedure and jurisdiction. A Bench hearing a Letters Parent appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code, because the Letters Patent provides that such an appeal should lie to a Bench and the Code makes no such provision and as S. 114 is not intended to provide for the review of judgments passed in the exercise of jurisdiction derived from other laws.

Per *Mukerji, J.* (dissenting).—The mere fact that the Letters Patent provided for a third appeal while the C. P. Code allows only two appeals does not in any way take away the applicability of the provisions of the Code from the appeal itself. (Case law discussed.) (*Mukerji, Banerji and Bennet, JJ.*) ABHILAKHI *v.* SADA NAND. **53 All. 535=1931 A.L.J. 187=I.R. 1931 All. 456=132 I.C. 24= A.I.R. 1931 All. 244 (F.B.).**

[F. 12 P.L.T. 652 (655).]

———(Allahabad), Cl. 10—"*Judgment*"—*Order by single Judge under S.* 5, *Limitation Act.*

The order of a single Judge dismissing an application under S. 5, Limitation Act, and refusing to extend time is not a judgment within the meaning of Cl. 10, and accordingly no appeal lies from that order. (*Sulaiman, C.J., Naimatullah and Rachhpal Singh, JJ.*) MST. SHAHZADI BEGAM *v.* ALAKH NATH. **57 All. 983=157 I.C. 347=8 R.A. 171=1935 A.L.J. 681=1935 A.W.R. 743=A.I.R. 1935 All. 620 (2) (F.B.).**

———(Allahabad), Cl. 10—Judgment—Order of remand passed by single Judge—Appeal lies against. *See* C. P. CODE, O. 41, R. 23—APPEAL. **55 All. 326 =A.I.R. 1933 All. 262 (F.B.).**

———(Allahabad), Cl. 10—*Judgment—Order of single Judge transferring suit—Appeal.*

An order by a single Judge of the High Court transferring a suit from one Subordinate Court to another is a discretionary order and does not amount to a decision as to the rights of the parties at all. It is not a "judgment" within the meaning of Cl. 10 of the Letters Patent and is therefore not appealable. A Judge has jurisdiction independently of S. 24, C. P. Code, to transfer a suit from one Court to another under S. 107 (*b*), Government of India Act, and an order under the latter section is expressly made non-appealable under Cl. 10 of the amended Letters Patent. (*Sulaiman, C.J. and Bennet, J.*) KHUNI LAL LACHHMI NARAIN *v.* NARAIN DAS GOPAL DAS. **156 I.C. 43=7 R.A. 1055=1935 A.W.R. 922=1935 A.L.J. 968=A.I.R. 1935 All. 750 (1).**

———(Allahabad), Cl. 10—*Order under S.* 115, *C.P. Code—Appeal.*

No appeal lies from an order passed by a single Judge in a case under S. 115, C.P. Code. (*Sulaiman C.J. and Bennet, J.*) GULZARI LAL *v.* SHEO CHARAN LAL. **156 I.C. 389=7 R.A. 1064 (2)=1935 A.L.J. 940=1935 A.W.R. 1006=A.I.R. 1935 All. 889.**

———(Allahabad), Cl. 12—*Application by mother to be appointed guardian of person of minor—Considerations.*

In a case where the father and the mother are living apart, and where each of them claims to have the custody of the child, the main question for the consideration of Court is, what would be more conducive to the child's welfare, *i.e.*, whether the child would be better looked after by the mother or by the father. The Court has also to take into consideration the personal law to

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which the parties are subject. (*Mukerji and King, JJ.*) HAIDARI BEGAM *v.* JAWWAD ALI SHAH. **150 I.C. 149=6 R.A. 1053=1934 A.L.J. 399=3 A.W.R. 787=A.I.R. 1934 All. 722 (2).**

———(Allahabad), Cl. 12—*Appointment of guardian of the person of minor—Jurisdiction of High Court.*

On an application under Cl. 12 of the Letters Patent paying that the applicant may be appointed guardian of the person of a minor, the High Court has jurisdiction to grant the relief prayed for, even though the applicant's more appropriate remedy would be no make an application to the District Judge under S. 9 of the Guardians and Wards Act for the guardianship of the child. There is no general rule that the High Court should in all cases take action under Cl. 12, as there may be cases in which complicated questions of fact have to be ascertained, and such cases might be more suitably dealt with in the Court of the District Judge where witnesses could be examined and cross-examined. (*Mukerji and King, JJ.*) HAIDARI BEGAM *v.* JAWWAD ALI SHAH. **150 I.C. 149=6 R.A. 1053=1934 A.L.J. 399=3 A.W.R. 787=A.I.R. 1934 All. 722 (2).**

———(Allahabad), Cl. 27—*Difference of opinion—Procedure—Reference of whole case, not proper.*

When a Bench differ in opinion on certain points of law, under S. 98, C.P. Code, they may state those points and the hearing by the other Judges is confined to the specific points stated and cannot cover the whole case again. S. 98 is confined to points of law only but the newly added sub S. (3) makes it subject to the provisions of the Letters Patent, Cl. 27 of which states that the points of difference may be referred to the other Bench This clause is wider than S. 98 of the C. P. Code, because it covers points of facts as well points of law. But in both cases only the points of difference should be stated and not the whole case. (*Sulaiman, C.J., Mukerji and King, JJ.*) AKBARI BEGAM *v.* RAHMAT HUSAIN. **56 All. 39=6 I.R. (All.) 232= 146 I.C. 84=1933 A.L.J. 1127=A.I.R. 1933 All. 861 (F.B.).**

———(Allahabad), Cl. 27—Letters Patent Appeal—Difference of opinion between two Judges—Appeal under Letters Patent governed by Cl. 27—Appeal under C. P. Code governed by S. 98 *See* C. P. CODE, S. 98. **1931 A.L.J. 1157=A.I.R. 1932 All. 195.**

———(Allahabad), Cl. 30—Pleader as suitor—Contempt committed by—Disciplinary action—Leave to appeal to Privy Council—Power of High Court to grant. *See* C.P. CODE, S. 109 (*c*) AND LETTERS PATENT, CL. 30—FIT CASE. **55 All. 246=A. I. R. 1933 All. 225.**

———(Allahabad), Cl. 30—*Proceeding under Bar Councils Act for misconduct of advocate—Leave to appeal to Privy Council—C.P. Code, S.* 109 (c).

When special power has been conferred upon the High Court under S. 10, Bar Councils Act, to get an inquiry made into the alleged misconduct of an advocate and on receipt of the finding, to fix a date for the hearing of the case and to hear the parties concerned and then pass such final orders in the case as it thinks fit and make an order as to the payment of the costs of the inquiry and of the hearing in the High Court, and if necessary, later on to review its order, the High Court in such proceeding is acting judicially and not merely in an administrative capacity. The entire proceeding is of a judicial nature and the proceeding is a hearing before the High Court and orders for the payment of costs of such proceedings can be passed. No doubt, in essence, the action taken is a disciplinary action but the proceeding in itself is of the nature of a judicial proceeding and

LETTERS PATENT (Bombay), Cl. 11.

the inquiry is a public inquiry in which the parties concerned are entitled as of right to be heard. It cannot therefore be said that in such a judicial proceeding, the High Court is not exercising any 'jurisdiction' within the meaning of Cl. 30, Letters Patent. Such a jurisdiction is not an appellate jurisdiction, nor is it a criminal jurisdiction. As it is the High Court only which passes final orders in the case on the receipt of the finding, it must be held to be exercising original jurisdiction and not any appellate jurisdiction. The order passed in such a proceeding is therefore an order passed in the exercise of original jurisdiction of the High Court conferred upon it by the Indian Bar Councils Act, modifying to some extent the power conferred upon it by the Letters Patent. The High Court has therefore jurisdiction to grant leave to appeal to His Majesty in Council provided it is satisfied that it is a fit and proper case. In the case of an advocate the High Court found that not only was the filing of fee certificate contrary to the rules framed by the High Court but that he acted in bad faith in filing it. The point raised was that there was some contradiction in the two sub-sections of the Rule at the time when the advocate had got his form of certificate printed, which contradictions had been lately removed by amendment, that there was latitude allowed to him inasmuch as it was provided that the certificate shall be 'so far as is possible' in the form prescribed and that in filing a certificate he had made it clear in it that he had not received the amount in cash but had accepted a promissory note in lieu of the fee.

Held, that this was a case which should be certified as a fit one for appeal to the Privy Council under S. 109 (*c*), C.P. Code, or at any rate under Cl. 30, Letters Patent. (*Sulaiman, C.J. and King, J.*) S. AN ADVOCATE *v.* JUDGES, ALLAHABAD HIGH COURT. **56 All. 702=1934 A.L.J. 722=150 I.C. 699=7 R.A. 11=4 A.W.R. 1129=A.I.R. 1934 All. 898.**

———**(Bombay), Cls. 11 and 12**—Decree passed by High Court—Execution outside limits of original civil jurisdiction—Powers of High Court. *See* BOMBAY HIGH COURT RULES (O. S.) (1930), RR. 386 AND 387. **58 Bom. 729=36 Bom.L.R. 454—A.I.R. 1934 Bom. 225 (F.B.).**

———**(Bombay), Cl. 12**—*'Cause of action'—Meaning.*

The words "cause of action" under the Letters Patent mean every fact essential to the maintenance of the action and each one of such facts separately is a part of the cause of action. A cause of action has no relation whatever to the defence set up by the defendants. It refers entirely to the grounds set forth in the plaint and leave granted under Cl. 12 is also confined to the cause of action or causes of action set forth in the plaint. (*Wadia, J.*) MAHOMED HAJI HAMED *v.* JUTE AND GUNNY BROKERS, LTD. **135 I.C. 170=I.R. 1932 Bom. 58=33 Bom.L.R. 1364=A.I.R. 1932 Bom. 42.**

———**(Bombay), Cl. 12**—*Commission agents at Bombay—Constituents outside Bombay—Dealings with—Place of cause of action.*

The Plaintiffs were doing business at Bombay as pakka adatias and claimed a certain sum of money as the balance due on accounts from the merchants who resided in Gaziabad (in Meerut) and who had employed them. The plaintiffs had addressed a letter to the defendants intimating the terms on which they were prepared to do business and on that basis, the defendants had been forwarding merchandise to the plaintiffs at Bombay to be sold on commission.

Held, that the cause of action arose wholly and not merely in part at Bombay. 46 A. 465 and 30 Bom.L.R. 1391, Ref. (*Beaumont, C.J. and Rangnekar, J.*) DEVIDATT *v.* SHRIRAM. **56 Bom. 324=I.R. 1932 Bom. 245=137 I.C. 381=34 Bom.L.R. 236=A.I.R. 1932 Bom. 291.**

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———**(Bombay), Cl. 12**—*Leave to sue—Condition precedent to suit,*

In a case in which the cause of action has arisen in part only within the local limits of the original jurisdiction of the High Court, it is a condition precedent to the maintenance of the suit that the leave of the Court should have been first obtained. It is not a condition which it is competent for a court to ignore or for the parties to waive. 35 Cal. 394, Diss.; 31 Bom.L.R. 1002, Over. (*Beaumont, C. J. and Rangnekar, J.*) DEVIDATT *v.* SHRIRAM. **56 Bom. 324=I.R. 1932 Bom. 245=137 I.C. 381=34 Bom.L.R. 236=A.I.R. 1932 Bom. 291.**

———**(Bombay), Cl. 12**—*Leave to sue—Contract made in Bombay with constituent resident in Central Provinces—Goods delivered, advances made and accounts to be rendered in Bombay—Leave, not necessary.*

A contract between the plaintiffs as pakka adatias and the defendant, a constituent resident at Sujalpur, Central Provinces, was made in Bombay. Goods were handed over, and advances made, to the plaintiffs in Bombay. By the contract, plaintiffs undertook to sell the goods and to render an account and defendants to pay the balance due. The defendant firm had a place of business also at Bombay

Held, that it was a fair inference that the accounts were to be rendered and payments made in Bombay, that the cause of action arose wholly in Bombay and that no leave under Cl. 12 was necessary for the suit. 10 Bom.L.R. 1230, Dist. (*Crump, J.*) NEW EAST INDIA PRESS CO., LTD. *v.* RAMESHVAR NANDLAL. **34 Bom.L.R. 1410.**

———**(Bombay), Cl. 12**—*Leave to sue—Suit for accounts by principal against agent—Agent carrying on business at Calcutta—Agency agreement at Calcutta—Bombay High Court—Jurisdiction.*

The plaintiff brought a suit for accounts in Bombay against their agents doing business at Calcutta. The agency agreement was entered into in Calcutta; the orders issued from Bombay were accepted by the defendants at Calcutta; statements of accounts were prepared and payments often made in Calcutta.

Held, no material part of the cause of action arose in Bombay and leave granted under Cl. 12 was not conclusive when the jurisdiction was in issue. (*Wallis, J.*) MAHOMED HAJI HAMED *v.* JUTE AND GUNNY BROKERS, LTD. **135 I.C. 170=I.R. 1932 Bom. 58=33 Bom.L.R. 1364=A.I.R. 1932 Bom. 42.**

———**(Bombay), Cl. 12**—*Suit for land—Setting aside sale—Adjudication of title.*

Where the suit is for cancellation of sale but the object is to get an adjudication as to title to land as between the parties the suit is one for land within the meaning of Cl. 12. (*Patkar and Barlee, JJ.*) KESHAVLAL SAKHIDAS *v.* AMARCHAND. **57 Bom. 456=148 I.C. 116=6 R.B. 272=35 Bom.L.R. 630=A.I.R. 1933 Bom. 398.**

———**(Bombay), Cl. 12**—*Suit for land—Suit on mortgage—Order of High Court creating mortgage on properties outside jurisdiction—Subsequent order in execution—Validity.*

A suit for sale on a mortgage cannot be regarded as a suit *in personam* to recover a debt because the decree which is passed in such a suit directly affects the title to and disposition of the land mortgaged. Hence a suit on a mortgage is one for land, and is therefore excluded

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from the cognizance of the Bombay High Court unless the mortgaged property is situate within the jurisdiction of the Court. The Bombay High Court has therefore no jurisdiction to make an order purporting to create a mortgage on properties situate outside the jurisdiction of that Court. Such an order is void for want of jurisdiction and a subsequent order passed in execution of the first is also void. A.I.R. 1926 Bom. 1 (F.B.); 19 Cal. 361 (*n.*); 27 Mad 157 and A.I.R. 1934 Rang 250, Foll.; A.I.R. 1927 Bom. 278 (F.B.) and A.I.R. 1932 Bom. 642, Diss. from. (*Subhedar, Staples and Niyogi, A. J Cs*) GANGARAM TEKCHAND FIRM *v.* DHARAMSI JETHA CO., BOMBAY. **31 N.L.R. (Supp.) 43=8 R.N. 133=159 I.C. 739=18 N.L.J. 295=A.I.R. 1935 Nag. 250 (F.B.).**

———**(Bombay), Cl 15**—*Contempt proceeding—Order against persons not being parties—Appeal.*

Contempt arising out of comments upon a pending trial by persons some of whom are parties to the suit and some of whom are not is contempt of a criminal nature and the order passed in such proceedings is not appealable. (*Beaumont, C. J. and Blackwell, J.*) NARAYANRAO *v.* SOLOMON MOSES. **57 Bom. 286=I.R. 1933 Bom. 283=143 I.C. 691=35 Bom.L.R. 9=A.I.R. 1933 Bom. 108.**

———**(Bombay), Cl. 15**—*'Judgment'—Leave to defend—Conditional order—Appeal.*

An order granting leave to defend on condition that the defendant should deposit in Court a sum of money by a date mentioned therein is a "judgment" within the meaning of Cl. 15 of the Letters Patent from which an appeal lies. 30 C. W. N. 298 and 42 C. 735, Dist. (*Beaumont, C. J. and Rangnekar, J.*) RAMANLAL *v.* CHUNILAL. **56 Bom. 268=I.R. 1932 Bom 253=137 I.C. 397=34 Bom.L.R. 252=A.I.R. 1932 Bom. 163.**

[**R.** 57 B. 371 (373). **Diss.** 13 R. 239 (240, 242).]

———**(Bombay), Cl. 15**—*'Judgment'—Leave to sue* in forma pauperis—*Order refusing.*

An order of the Judge sitting in Chambers refusing leave to sue *in forma pauperis* is appealable as a judgment. (*Beaumont, C.J and Blackwell, J.*) SADASHIV *v.* SOONDARDAS **I.R. 1931 Bom 232=130 I.C. 24=32 Bom.L.R. 1647=A.I.R. 1931 Bom. 166.**

———**(Bombay), Cl. 15**—*Judgment—Order fixing date of sale.*

An order fixing the date of sale or extending the time for sale of certain partnership property is in the nature of an order regulating the procedure under the order for sale and not a "judgment" within Cl 15 of the Letters Patent and is not appealable. (*Beaumont, C. J. and Rangnekar, J.*) IBRAHIMBAI *v.* YOOSUF. **56 Bom. 237=I R. 1932 Bom. 264=137 I.C. 456=34 Bom.L.R. 12=A.I.R. 1932 Bom. 134.**

———**(Bombay), Cl. 15**—*Judgment—Order refusing issue of commission.*

An order refusing the issue of a commission to examine witnesses is not a "judgment" within Cl. 15 of the Letters Patent and no appeal lies from such an order. 35 Mad. 1 (F.B.); A.I.R. 1920 Cal. 894; 3 Rang. 293; 3 Rang. 605, Foll.; 2 I.C. 157, Expl (*Beaumont, C. J. and Barlee, J*) DHANBAI BURJORJI *v.* BABLIBAI SHAPURJI. **152 I.C. 264=7 R.B. 137=36 Bom. L R. 272=A.I.R. 1934 Bom. 168.**

———**(Bombay), Cl. 15**—*"Judgment"—Order under S. 10, C. P. Code, refusing stay—Appealability.*

An order under S. 10, C. P. Code, refusing to stay a suit is not a "judgment" within the meaning of Cl. (15) and is not appealable. (*Beaumont, C. J. and Blackwell, J.*) JIVANLAL NARSI *v.* PIROJSHAW. **57 Bom. 364=I.R. 1933 Bom. 285=143 I.C. 806=35 Bom.L.R. 15=A.I.R. 1933 Bom. 85.**

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———**(Bombay), Cl. 15**—*Judgment—Order under S. 39—Lunacy Act—Appeal.*

An order dismissing a petition under S. 39, Lunacy Act, to adjudge a person to be a lunatic is not a judgment, and is not appealable. (*Beaumont, C. J. and Rangnekar, J.*) AISHABAI *v.* ISMAIL SAKHI. **57 Bom. 371=I.R. 1933 Bom. 295=144 I.C. 100=35 Bom.L.R. 38=A.I.R. 1933 Bom. 112.**

———**(Bombay), Cl. 15**—*Leave to appeal from second appeal—Principles applicable—C. P. Code, Ss. 109 and 110.*

The right of appeal from the decision of one Judge in second appeal to the High Court and the right of appeal from the decision of more Judges than one to the Privy Council are governed *mutatis mutandis* by the same principles. In each case, the case must be certified to be a fit one for appeal. Though considerations of private or public importance, or importance as precedents and like matters must exist in a greater measure when a decision is requested from the Privy Council, than when a decision is invited from a Bench of the High Court, yet where there is no point in dispute which the Court could in the exercise of judicial discretion certify as being of great public or private importance and there are not involved questions of public importance or which may be important precedents governing numerous other cases, no leave can be granted from the decision of second appellate Court. The principles for granting leave to appeal under Cl. 15 are similar to those in S. 109 (*c*), C. P. Code If therefore the development of law is to be on principles of co-ordination and synthesis, similar principles must with the necessary modifications, be taken for guidance when the question arises for granting leave to appeal under either of these analogous provisions. The single Judge hearing second appeal has himself the power to refer the matter to a Bench of more Judges than one, as soon as he considers it desirable to do so. The Advocates who are concerned can before the case comes on for hearing apply to the Chief Justice in his administrative capacity to have any particular second appeal placed before a Bench of two or more Judges. These are considerations of a remedial nature by way of alternatives which the Court has to bear in mind when leave under Cl. 15 is applied for. 28 I.A. 11; 50 B 753; 15 Bom.L.R. 1021; 43 M.L.J. 728 and 50 A. 640, Ref. (*Tayabji, J.*) SADASHIV VISHNU *v.* SAKARAM. **I.R. 1932 Bom. 397=138 I. C. 454=34 Bom.L.R. 398=A.I R. 1932 Bom. 218.**

———**(Bombay) Cl. 15**—*Order dismissing petition to set aside award.*

An order extending the time for making an award and dismissing a petition to set aside the award is appealable. (*Beaumont, C.J. and Blackwell, J.*) SHIVJI *v.* RAMJIMAL. **55 Bom. 452=129 I C 886=32 Bom. L R 1650=A.I R. 1931 Bom. 125.**

———**(Bombay), Cl. 39**—*Appeal to His Majesty in Council—Decision of single Judge of High Court.*

No appeal lies to His Majesty in Council from the decision of a single Judge of the High Court in the exercise of appellate or revisional jurisdiction. To this extent, S. 111, C. P. Code, overrides Cl. 39 of the Letters Patent. 56 Cal. 512 and 46 M. 958, Foll. (*Patkar and Baker, JJ.*) HANMANT SHRINIWAS *v.* SHRINIWAS LAKSHMIPATI. **33 Bom L.R. 1106=I.R. 1932 Bom. 44=134 I.C. 1164=A.I.R. 1931 Bom. 503.**

———**(Bombay), Cl. 39**—*Scope.*

Cl. 39 deals only with two categories of cases, first, a final judgment, decree or order made on appeal, *i.e.*, made on appeal on the Original Side or under the C. P. Code on appeals from the mofussil and secondly, a final

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judgment, decree or order of the said High Court in the exercise of its original jurisdiction made by individual Judges of the High Court or by a Division Bench from which an appeal does not lie to the said High Court under Cl. 15 of the Letters Patent. (*Patkar and Murphy, JJ.*) BAI MANGU *v.* BHARATKHAND COTTON MILLS. **55 Bom. 785=136 I.C. 183=I R. 1932 Bom. 167=33 Bom.L.R. 1476=A I R. 1932 Bom. 90.**

———(**Calcutta**), **Cl. 12**—*Application for revocation—Grounds—Cause of action partly arising within jurisdiction—Refusal to revoke.*

An application to revoke a leave once granted under Cl. 12 is maintainable. The party is not obliged to wait until the trial and to take the point by way of defence in his written statement. But he is entitled to apply to the Judge who gave the leave that the leave may be revoked. The application to revoke should however be based on something better than a mere criticism of the clarity of the pleadings. If a pleading is not quite in order, the reasonable thing for the learned Judge to do would be to order particulars to be given or to order an amendment of the plaint and it would be unreasonable for him to withdraw the leave and to order the plaint to be taken off the file until he has satisfied himself what the real case of the plaintiff is in respect of the matter which is alleged to give jurisdiction to the Court. In granting leave or revoking it the Judge should go by the cause of action alleged. Where in the case of contracts part of the cause of action arises within the jurisdiction of the Court, the defendant cannot ask for revocation unless he shows that Cl. 12 has no application at all. Term 'cause of action' explained.

Per *Rankin, C. J.*—It cannot be said that the Judge in granting leave should not consider matters of evidence outside the plaint. (*Rankin, C.J. and C C. Ghose, J.*) ENGINEERING SUPPLIES, LTD. *v.* DHANDHANIA & CO. **58 Cal. 539=I.R. 1931 Cal. 769=134 I.C. 65=A.I.R. 1931 Cal. 659.**

[**R.** 60 C. 918 (924); 28 S.L.R. 192 (193), 1934 R 234 (235, 236, 238).]

———(**Calcutta**), **Cl. 12**—*Application to revoke leave—Case involving important and difficult questions—Proper procedure.*

Questions of difficulty and importance should not be dealt with by an application to revoke the leave under Cl. 12 and to take the plaint off the file. The proper course is to dismiss the application to take the plaint off the file and to direct that the case do proceed on all points in the usual way. After it has proceeded to written statement and discovery, it would be open to either party to apply for determination of the issues as preliminary issues. (*Rankin, C.J. and Pearson, J.*) SECRETARY OF STATE FOR INDIA *v.* GOLABRAI PALIRAM. **59 Cal. 150=135 I.C. 873=I R. 1932 Cal. 169=35 C.W.N. 930=A.I.R. 1932 Cal. 146.**

[**R.** 13 R. 330 (334).]

———(**Calcutta**), **Cl. 12**—*Assignment of debt—Suit in place of assignment—Grant of leave.*

In a suit by an assignee of a debt the assignment is a part of the cause of action and upon that leave is invariably granted. It is impossible in practice to decide before the hearing of the suit whether an assignment is or is not *bona fide*. The Court would not be justified on a mere suspicion that the assignor might not have acted in the ordinary way of business in depriving the plaintiff of the right to bring a suit in the place where the assignment was made. (*Ameer Ali, J.*) HARNATHRAI BINJRAJ *v.* CHURAMONI SHAH. **148 I C. 442=6 R.C. 461=37 C.W.N. 1139=A.I.R. 1934 Cal. 175.**

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———(**Calcutta**), **Cl. 12**—*Exercise of jurisdiction under—Effect of order for sale regarding mofussil properties*—Lis pendens.

Under Cl. 12 of the Letters Patent in the case of a suit for land of which a part is within its jurisdiction, the High Court acquires jurisdiction over the entire suit provided that its leave is first obtained. When once it acquires jurisdiction to determine the suit, the decree that it passes is in no way different from a decree passed by the mofussil Court. Thus an order for sale passed in a mortgage suit in respect of mortgaged properties which are partly within the original jurisdiction of the High Court and partly without, attracts the operation of the doctrine of *lis pendens*. (*Mukerji and Mitter, JJ.*) C. L. KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal. 598=I.R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

———(**Calcutta**), **Cl. 12**—*Malicious prosecution—Suit for damages—Forum.*

The defendant instituted criminal proceedings at place *D* against plaintiff who was residing at place *C*. Summons was served on plaintiff at *C* and as a result of proceedings plaintiff sued to recover special and general damages for malicious prosecution.

Held, that part of the cause of action arose at place *C* and with leave under Cl. 12 of the Letters Patent the Court at *C* had jurisdiction to entertain the suit. (*Lort-Williams, J.*) ALEXANDER BRAULT *v.* INDRA KRISHNA KAUL. **60 Cal. 918=147 I.C. 455=6 R.C. 331=38 C.W.N. 120=A.I.R. 1933 Cal. 706.**

———(**Calcutta**), **Cl. 12**—Mortgage of machinery and plant permanently installed and fixed to land—Suit to enforce—Machinery, etc., beyond local limits of High Court—Jurisdiction of High Court. *See* JURISDICTION —PLACE OF SUING **39 C.W.N. 1018.**

———(**Calcutta**), **Cl. 12**—*Plaint not in order—Procedure.*

If a pleading is not quite in order the reasonable thing for the Judge to do would be to order particulars to be given or to order an amendment of the plaint. He should not order the plaint to be taken off the file or withdraw the leave granted under Cl 12. (*Rankin, C. J. and C.C. Ghose, J.*) ENGINEERING SUPPLIES, LTD. *v.* DHANDHANIA & CO. **58 Cal. 539=I.R. 1931 Cal 769=134 I.C. 65=A.I.R. 1931 Cal. 659.**

———(**Calcutta**), **Cl. 12**—*Scope—Debutter property partly in Calcutta and partly in mofussil—Jurisdiction.*

Cl. 12 contemplates the suit being brought for land and such land being situated partly within and partly without the jurisdiction. The cause of action does not matter in such a case except in so far as it affects the propriety of the joinder of the claim to the different parcels of land in the same suit Two different suits cannot be rolled into one for the purpose of obtaining jurisdiction over land outside the limits. If however the claim to the different parcels of land is properly based upon a common title and the right to relief arises out of the same set of facts, it cannot be laid down that each defendant or set of defendants must be interested in some land within the jurisdiction. The question whether in any particular case the jurisdiction is to be exercised is left to the discretion of the Court. Suit relating to debutter property situate partly in Calcutta and partly in the mofussil held to fall within Cl. 12. (*Rankin, C.J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SHREE SHREE ISHWAR BHUBANESHWARI THAKURANI. **60 Cal. 54=6 I.R. (Cal.) 20=144 I.C. 792=A I.R. 1933 Cal. 295.**

———(**Calcutta**), **Cl. 12**—*Suit for land—Claim to proprietary title not put forward by plaintiff—Effect.*

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Where the plaintiff sued to have it established that on the death of the tenant for life, the title to the immovable property no longer remained in the Official Trustee in trust for the sons as they attain the age of 21 years but reverted to the estate of the settlor and that the property accordingly had become available to satisfy the claims of their creditors.

Held, that the suit was one for land though the plaintiff did not claim a proprietary title for himself. (*Panckridge, J.*) SEWDAYAL RAMJEE DAS *v.* OFFICIAL TRUSTEE OF BENGAL. **58 Cal. 768 = I.R. 1931 Cal. 820 = 134 I.C. 436 = A.I.R. 1931 Cal. 651.**

———**(Calcutta), Cl. 12**—*Suit for land—Mortgage suit—Nature of.*

Quaere.—Whether a mortgage suit is a suit for land *prima facie* or substantially or only a suit for money? (*Cunliffe, J.*) BUDHSING BALCHAND *v.* ARNHOLD & CO. **39 C.W.N. 1018.**

———**(Calcutta), Cl. 12**—"*Suit for land*"—*Suit for administration of trusts declared by will or deed—Property situated beyond local limits—Jurisdiction—English law.*

Cl. 12 of the Letters Patent cannot be taken to be coextensive with the rules of English law or to reproduce and embody the principles of English law as to jurisdiction, *i.e.*, principles "sanctioned by international comity". But assuming that it is so, the rules of English law do not bar suits for the administration of trusts declared by will or deed, for construction, and for the determination of the validity and effect of the trusts so declared, notwithstanding that as a result the decisive title vest in *A.B.*, to the exclusion of *Y.Z.* or that *A.B*, will become entitled to possession. The High Court therefore has jurisdiction, though the property dealt with under the will is situate beyond the local limits of the ordinary original jurisdiction of the High Court. (*Ameer Ali, J.*) VEDABALA DEVI *v.* THE OFFICIAL TRUSTEE OF BENGAL. **62 Cal. 1062 = 39 C.W.N. 1154.**

———**(Calcutta), Cl. 12**—*Suit—Originating summons.*

For the purpose of Cl. 12, an originating summons is a 'suit'. (*Panckridge, J.*) SEWDAYAL RAMJEE DAS *v.* OFFICIAL TRUSTEE OF BENGAL. **58 Cal. 768 = I.R. 1931 Cal. 820 = 134 I.C. 436 = A.I.R. 1931 Cal. 651.**

———**(Calcutta), Cl. 12**—"*Suit*"—*Originating summons—Cause of action partly arising outside—Leave of Court—Necessity.*

An originating summons is a "suit" within the meaning of Cl. 12 and when the cause of action arises partly outside the High Court's jurisdiction, leave of the Court is necessary under Cl. 12. (*Remfry, J.*) ELIZA MARTIN, *In the goods of.* **62 Cal. 120 = 157 I.C. 936 = A.I.R. 1935 Cal. 511.**

———**(Calcutta), Cl. 12**—Trust property outside jurisdiction—Suit relating to—Jurisdiction—S. 92, C.P. Code, overrides Cl. 12—Suit not maintainable. *See* C. P. CODE, S. 92—JURISDICTION. **59 Cal. 357 = A.I.R. 1932 Cal. 444.**

———**(Calcutta), Cl 15 (as amended)**—*Appeal—Order refusing leave to appeal.*

Whether an order refusing leave to appeal be a judgment or not, it cannot be appealed against. Under the amended Letters Patent leave granted by the Judge hearing the second appeal is the sole and necessary condition for such an appeal. (*Rankin, C.J. and Mukerji, J.*) HARENDRA CHANDRA GHOSH *v.* KAILASCHANDRA GHOSH. **58 Cal. 342 = I.R. 1931 Cal 862 (2) = 134 I.C. 574 (2) = A.I.R. 1931 Cal. 571.**

———**(Calcutta), Cl. 15**—'*Judgment*'—*Application under O. 21, R. 58—Dismissal on Original Side—Appeal.*

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An order on the Original Side dismissing an application under O. 21, R. 58, is not appealable under Cl. 15, because of the prohibition contained in O. 21, R. 63. (*Rankin, C.J. and Pearson, J.*) KALOORAM MARWARI *v.* MOTILAL. **60 Cal. 914 = 147 I.C. 359 = 6 R.C. 316 = 37 C.W.N. 641 = A.I.R. 1933 Cal. 715.**

———**(Calcutta), Cl. 15**—*Judgment—Order directing change of attorney.*

An order directing a change of attorney is appealable. (*C. C. Ghose, Ag.C.J. and Costello, J.*) PANKAJ KUMAR GHOSH *v.* SUDHIR KUMAR SIKDAR. **60 Cal. 1273 = 147 I.C. 1064 = 6 R.C. 394 = 37 C.W.N. 998 = A.I.R. 1934 Cal. 58.**

———**(Calcutta), Cl. 15**—*Judgment—Order refusing application for appointment of receiver.*

As an order refusing an application for the appointment of a receiver based on a provision in the indenture of hypothecation, that on a breach of any one of the covenants contained therein, the plaintiff's assignor would be entitled to have a receiver appointed, the order has determined a right which is one of the matters in the controversy itself, and so is a judgment within the meaning of Cl. 15. (*Mukerjee and Patterson, JJ.*) LEA BADIN *v.* UPENDRA MOHAN ROY. **154 I.C. 1056 = 7 R.C. 548 = 39 C.W.N. 155 = A.I.R. 1935 Cal. 35.**

———**(Calcutta), Cl. 15**—"*Judgment*"—*Order refusing stay under S. 10, C. P. Code—Appeal.*

An order refusing to stay a suit under S. 10, C. P. Code, is a judgment within Cl. 15 and is appealable. (*Costello and Panckridge, JJ.*) DURGA PROSAD *v.* KANTI CHANDRA MUKERJI. **61 Cal. 670 = 154 I.C. 645 = 7 R.C. 504 = 38 C.W.N. 818 = A.I.R. 1935 Cal. 1.**

———**(Calcutta), Cl. 15**—*Mortgage suit—Order to sell without reserve—Appealability.*

Where the Judge on the Original Side directed that the Registrar might be at liberty to sell the mortgaged properties without reserve.

Held, that the order was not appealable. (*C. C. Ghose and Mitter, JJ.*) MAHAMMAD FAZLUL KARIM *v.* AHMAD MOHAMMAD PARUK. **60 Cal. 506 = 6 I.R. (Cal.) 95 = 145 I.C. 318 = A.I.R. 1933 Cal. 504.**

———**(Calcutta), Cl. 17**—*Infant coparcener in Mitakshara joint family—Appointment of guardian for—Inherent jurisdiction.*

The High Court can, in the exercise of its inherent jurisdiction under Cl. 17 of the Letters Patent (and apart from the Guardian and Wards Act, 1890), appoint a guardian of an infant coparcener in an undivided Mitakshara family. 54 Bom 75; 50 Cal. 141 and 50 All. 709, Foll.; 25 All 407 (P.C.) and 53 All. 190, Dist. (*Costello, J.*) BIJAYAKUMAR SINGH BUDER, *In re.* **59 Cal. 570 = I.R. 1932 Cal. 523 = 138 I.C. 739 = A.I.R. 1932 Cal. 502.**

———**(Calcutta), Cl. 17**—*Person not residing in Calcutta—Jurisdiction of Original Side, Calcutta High Court.*

The Original Side of the Calcutta High Court has no jurisdiction to direct an inquisition or appoint a guardian of person or property in the case of an Indian not resident in Calcutta. 57 Cal. 533, considered. (*Panckridge, J.*) PHANINDRA CHANDRA SET, *In the matter of.* **58 Cal. 919 = I.R. 1931 Cal. 652 = 133 I.C. 188 = 35 C.W.N. 1045 = A.I.R. 1932 Cal. 91.**

———**(Calcutta), Cl. 21**—*Applicability of English common law—Extent of.*

Although the English common law is enforced on the original side of the Chartered High Courts, on the appellate side and in the *mofussil* Courts, the English common law is not and has not ever been followed. (*Lort-Williams and M.C. Ghose, JJ.*) KHIRODBIHARI

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DUTT *v.* MANGOBINDA. **61 Cal. 841=38 C.W.N. 682 =152 I.C. 351=7 R.C. 263=A.I.R. 1934 Cal. 682.**

———(Calcutta), Cl. 22—*Original criminal jurisdiction of High Court—Modification by Ordinance.*

S. 106 of the Government of India Act leaves the definition of the High Court's original criminal jurisdiction to be made by the Letters Patent and the High Court derives a particular original criminal jurisdiction from Cl. 22, Letters Patent. It is within the power of the Indian Legislature to alter and amend the Letters Patent and consequently within the Ordinance-making power of the Governor General under the Government of India Act. (*Rankin, C.J. and Ameer Ali, J.*) AMAR CHANDRA *v.* EMPEROR. **60 Cal. 814=I.R. 1933 Cal. 259=142 I.C. 310=34 Cr.L.J. 320=37 C. W.N. 481=1933 Cr.C. 500=A.I.R. 1933 Cal. 364.**

———(Calcutta), Cl. 24—*Advocate-General appearing for accused—Whether ceases to hold office.*

Where the Advocate-General appeared on behalf of the accused in a previous revision application and does not commence proceeding under Cl. 24, it cannot be said that he ceased to be Advocate-General and an application made to the Court to recommend to the Local Government that the petitioner's Advocate should be clothed with the powers of the Advocate-General cannot be maintained as it is a confused and extravagant application. (*Rankin, C.J. and Pearson, J.*) SASADHAR ACHARJYA, *In the matter of.* **136 I.C. 598=I.R. 1932 Cal. 230=33 Cr.L.J. 322=1932 Cr. C. 177=35 C.W.N. 1082=A.I.R. 1932 Cal. 229.**

———(Calcutta), Cl. 24—*Applicability.*

Extraordinary criminal jurisdiction is conferred on the High Court under Cl. 24. (*Rankin, C.J. and Pearson, J.*) SASADHAR ACHARJYA *v.* SIR CHARLES TEGART. **135 I.C. 880=I.R. 1932 Cal. 176=33 Cr.L.J. 219=35 C.W.N. 1088=1932 Cr.C. 108=A.I.R. 1932 Cal. 123.**

———(Calcutta), Cl. 24— *Applicability — Offences outside British India—Accused resident within original jurisdiction.*

Where certain British Indian subjects resident within the original jurisdiction were accused of offences committed outside British India,

Held, that the complaint cannot be entertained by the High Court on its appellate side, Cls. 24 and 29 not being applicable to such a case. (*Rankin, C.J. and Pearson, J.*) SASADHAR ACHARJYA, *In the matter of.* **136 I C 598=I.R. 1932 Cal. 230=33 Cr.L J. 322=35 C.W.N. 1082 =1932 Cr.C. 177=A.I.R. 1932 Cal. 229.**

———(Calcutta), Cl. 24—Application under—Appellate Side not Original Side of High Court as forum. *See* LETTERS PATENT (CALCUTTA), CL. 29. **35 C.W. N. 1086.**

———(Calcutta), Cl. 24—*Extraordinary criminal jurisdiction—Offence committed in foreign territory—Power of High Court to direct enquiry.*

Quaere: Whether the High Court has in a special case the power of ordering a Magistrate to enquire into offence committed outside British India and in a foreign country. Assuming it has the power, such proceedings should be started either by information laid by the Advocate-General or by an application to the High Court in its original jurisdiction for an order to hold such an enquiry. A Criminal Appeal Bench of the High Court has no jurisdiction to deal with such an application. (*Lort-Williams and S. K. Ghose, JJ.*) SASADHAR ACHARJYA *v.* SIR CHARLES TEGART. **134 I.C. 1189 =35 C.W.N 782=33 Cr.L.J. 83=I.R. 1932 Cal. 69 =1931 Cr.C. 846=A.I.R. 1931 Cal. 646.**

LETTERS PATENT (Calcutta), Cl. 41.

———(Calcutta), Cl. 26— *Misdirection to jury—Interference by special Bench of High Court.*

Where the accused was prosecuted for offences under Ss. 406 and 477, I. P. Code, but it appeared that the Judge had misdirected the jury on the question of law, namely, as to the ingredients forming the offence.

Held, that it was fit case for interference under Cl. 26. Accused acquitted. (*Rankin, C. J., C. C. Ghose, Mukerji, Mallik and Guha, JJ.*) EMPEROR *v.* SUSEN BEHARI ROY. **58 Cal. 1051=35 C.W N. 425=I.R. 1931 Cal. 529=132 I.C. 145=32 Cr.L.J. 836=1931 Cr.C. 248=A.I.R. 1931 Cal. 184 (S.B.).**

———(Calcutta), Cl. 29—Applicability—Offences outside British India—Accused residing within original jurisdiction—Complaint not to be entertained on the appellate side. *See* LETTERS PATENT (CALCUTTA), CL. 24. **35 C.W N. 1082.**

———(Calcutta), Cl. 29—*Application under—Appellate Side not Original Side of High Court as forum.*

Applications for the exercise of the jurisdiction conferred by Cls. 24 and 29 of the Letters Patent shall be heard and disposed of on the Appellate Side of the High Court and not on its Original Side.

Quaere.—Whether the Original Side of the High Court has any jurisdiction to try British subjects resident within the jurisdiction for offences committed outside British India. (*Buckland, J.*) SASADHAR ACHARJYA *v.* SIR CHARLES TEGART **35 C.W N. 1086= 137 I.C. 674=I.R. 1932 Cal. 362=1932 Cr.C. 341= A.I R. 1932 Cal. 394.**

———(Calcutta), Cl. 29—*Scope.*

The second-half of Cl 29 is addressed to the same, subject-matter as the first half. The clause merely confers a power of transfer. If the High Court transfers the case to its file it assumes original criminal jurisdiction. The High Court has no power under this clause to take proceedings against certain persons one of whom is not in India at all and the others are either Indian subjects or else residing within the Original Jurisdiction of the High Court. (*Rankin, C. J. and Pearson, J.*) SASADHAR ACHARYA *v.* SIR CHARLES TEGART. **135 I.C. 880=I.R. 1932 Cal. 176=33 Cr.L.J. 219=35 C.W.N. 1088=1932 Cr.C. 108=A.I.R. 1932 Cal. 123.**

———(Calcutta), Cl. 37—*Rules under—C. P. Code. O. 3, R. 4 (5), if modified.*

O. 3, R. 4 (5) is inconsistent with the rules of the Calcutta High Court framed under Cl. 37, Letters Patent of 1865, and O. 3, R. 4 (5) being contrary to rules under Cl. 37 the latter must prevail. (*Mitter and Patterson, JJ.*) RAM DAYAL DE, *In re.* **59 Cal. 370 =I.R. 1932 Cal. 149=135 I.C. 789=35 C.W.N. 1100 =A.I R. 1932 Cal. 1.**

———(Calcutta), Cl. 39—*Scope—Decision of High Court in criminal appeal—Application for leave to appeal to Privy Council—Maintainability.*

It is reasonably plain as a matter of construction of Cl. 39 that the words "in any matter not being of criminal jurisdiction" govern all the classes of judgments or decrees or orders which are hereinafter in that clause mentioned.

Held, that no appeal lies to the Privy Council against a decision of the High Court sitting in criminal appeal and that the application for leave was not maintainable. (*Rankin, C. J. and Mukerji, J.*) HEMAYETUDDIN AHMED *v.* EMPEROR. **58 Cal. 344=I.R. 1931 Cal. 848=134 I.C. 544=32 Cr.L.J. 1183=1931 Cr.C. 678 =A.I.R. 1931 Cal. 526.**

———(Calcutta), Cl. 41—*Applicability—Contempt of Court—Summary procedure—Order punishing—If one made in the exercise of ordinary criminal jurisdiction*

LETTERS PATENT (Calcutta), Cl. 41.

—Application for leave to appeal to Privy Council—Maintainability.

Summary proceedings for contempt of the High Court —a Court of Record—in respect of an offence of scandalising the Court, are not made or done in the exercise of "ordinary original criminal jurisdiction," within the meaning of Cl. 41 of the Letters Patent. They are proceedings of a peculiar nature, though in some respects quasi-criminal. An application under Cl. 41 for leave to appeal to the Privy Council against a sentence or order of punishment passed in such proceedings is therefore incompetent Even if it be held that such proceedings are made or done in the exercise of its ordinary original criminal jurisdiction, the High Court will not in such a case declare under Cl. 41 that the case is a fit one for appeal to the Privy Council. (*Derbyshire, C.J. and Costello, J.*) TUSHAR KANTI GHOSH, *In re.* **63 Cal. 287=39 C.W.N. 823.**

———**(Calcutta), Cl 41**—*Scope—Order in criminal revision—Appeal to Privy Council.*

There is no right of appeal to the Privy Council under Cl. 41 from an order of a single Judge passed in revisional criminal jurisdiction. (*Lort Williams and Jack, JJ.*) R. C. CURTIS *v.* EMPEROR. **62 Cal. 389=39 C.W.N. 235=157 I.C. 653=36 Cr.L.J. 1211=1935 Cr.C. 869=A.I.R. 1935 Cal. 477.**

———**(Lahore), Cl. 8**—*Conviction of legal practitioner—Power of High Court to go into the merits of.*

It is not within the right of a legal practitioner who has been convicted by a Criminal Court and who has been called upon to show cause why disciplinary action should not be taken against him to insist that the High Court should go into the merits of the original conviction. No doubt the High Court has wide powers to intervene in any case brought to its notice in the interests of justice apart from the fact whether the accused himself has moved the High Court or has appealed from the conviction against him or not; such a power, however, would only be exercised in very special cases but it is not a right of the accused or any one else but a power inherent in the High Court itself. (*Jai Lal, Dalip Singh and Monroe, JJ.*) EMPEROR *v.* FARID-UL-HAQ ANSARI. **14 Lah. 532=I R 1933 Lah. 384=143 I.C. 737=1933 Cr.C. 846=A I.R. 1933 Lah 577 (S.B.).**

———**(Lahore), Cl. 8**—Legal practitioner—Moneys received by—Failure to account for—Client's conduct not straightforward—Disciplinary action not justified. *See* LEGAL PRACTITIONER—MISCONDUCT. **A.I.R. 1933 Lah. 575 (S.B.).**

———**(Lahore), Cl. 8**—Professional misconduct — Taking interest in litigation—Appearing for the litigants without receiving the usual fees in advance amounted to professional misconduct. *See* LEGAL PRACTITIONER—MISCONDUCT. **A. I. R. 1932 Lah. 584.**

———**(Lahore), Cl. 8**—*Reasonable cause—Fitness of legal practitioner—Practitioner convicted under S. 17 (1) of the Criminal Law Amendment Act—Being a member of unlawful association and assisting the operations of unlawful association—Distinction between.*

The Courts are bound to see that its officers are proper persons to be trusted by the Court with regard to the interests of the suitors. It is necessary therefore for the Court to know what the nature of the act complained of is in order to decide whether that act shows that the person in question is an improper person to remain a practitioner. There is a distinction between being a member of an unlawful association and assisting the operations of an unlawful association. The former

LETTERS PATENT (Lahore), Cl. 10.

interferes with the maintenance of law and order or is a danger to public peace and it may well be considered to render a man an improper person to be a practitioner in a Court of justice, but it by no means follows that a man who has committed an isolated act which assists the operations of an unlawful association is necessarily such an improper person. Much would depend upon the nature of the act done and the particular operation assisted. Where, apart from the conviction of the legal practitioner under S. 17 (1) of the Criminal Law Amendment Act for having assisted in the celebration of the Independence Day, there was nothing on the record to show what exactly the respondent did on the occasion.

Held, that there was no reasonable cause within the meaning of Cl. 8 to take disciplinary action.

Held also, that the speech made by the practitioner at a meeting organised by an unlawful association protesting against the arrest of Mr. Sen Gupta did not warrant disciplinary action against the practitioner who made the speech. (*Jai Lal, Dalip Singh and Monroe, JJ.*) EMPEROR *v.* FARID-UL-HAQ ANSARI. **14 Lah. 532 =I.R. 1933 Lah. 384=143 I.C. 737=1933 Cr.C. 846 =A.I.R. 1933 Lah. 577 (S B.).**

———**(Lahore), Cl. 10**—*Appeal under—New point.*

A new point cannot be raised in an appeal under the Letters Patent. (*Shadi Lal, C. J. and Broadway, J.*) MEWA SINGH *v.* TARA SINGH. **6 I.R. (Lah.) 100= 145 I.C. 416 (1)=34 P.L.R. 853=A.I.R. 1933 Lah. 685.**

———**(Lahore), Cls. 10 and 26**—*Appeal to Privy Council—Leave—Power to grant.*

Under Cl. 10 the declaration that the case is a fit one for further appeal to the Privy Council can only be made by the Judge who passed the judgment and Cl. 26 does not confer such power on any other Judge. (*Coldstream, J.*) DASAUNDHA SINGH *v.* GANDA SINGH. **I.R. 1933 Lah. 315 (1)=143 I.C. 141 (1)=34 P.L.R. 469= A.I.R. 1933 Lah. 534 (1).**

———**(Lahore), Cl. 10**—Application for leave under —Conversion into petition for review on refusal of leave —Permissibility. *See* C. P. CODE, O. 47, R. 1. **16 Lah. 602=A.I.R. 1935 Lah. 330 (1).**

———**(Lahore), Cl. 10**—*Discretion of single Judge—Interference in appeal.*

Where a guardian for a minor is appointed by a single Judge in exercise of his discretion, though an appeal is competent from his order, the fact that the making of the order is a matter of discretion is a good ground for refusing to exercise the appellate jurisdiction, unless the appellant succeeds in establishing a strong case, such as would justify interference in appeal. 71 I.C. 824 and 21 M.L.J. 1, Rel. on. (*Shadi Lal, C.J. and Abdul Qadir, J.*) MT. PREM KAUR *v.* BANARSI DAS. **14 Lah. 804=6 I R. (Lah.) 11 (2)=144 I.C. 672=35 P.L.R. 98=A I.R. 1933 Lah. 881.**

———**(Lahore), Cl. 10**—*Leave to appeal—Authority to grant.*

Under Cl 10 of the Letters Patent, the authority to make the declaration that the case is a fit one for appeal is conferred only on the Judge who passed the judgment and on none other. No other Judge or Judges of the High Court have any jurisdiction to grant a certificate. (*Tek Chand and Abdul Rashid, JJ.*) ALLAH BUX *v.* MST. SARDARAN. **16 Lah. 602=157 I.C 23=8 R.L. 74 (2)=37 P.L R. 708=A.I.R. 1935 Lah. 330 (1).**

———**(Lahore), Cl. 10**—*Order refusing to restore second appeal dismissed for default—Letters Patent appeal—Certificate—Necessity—"Appellate jurisdiction."*

LETTERS PATENT (Lahore), Cl. 26.

An order by a single Judge refusing an application under O. 41, R. 19, C.P. Code, for the restoration of a second appeal dismissed for default is not appealable under Cl. 10 of the Letters Patent without a certificate from the Judge who has dismissed such application. The jurisdiction under O. 41, R. 19, C. P. Code, is exercised only in respect of the appellate power of the Judge. An order dismissing a second appeal for default in effect confirms the judgment and decree of the lower appellate Court and a Judge refusing to set aside such dismissal declines to reopen the case or to withdraw the order confirming the decree of the lower appellate Court. The order of refusal is made in respect of the appeal and in the exercise of appellate jurisdiction. (*Addison and Din Mohammad, JJ.*) MOHAN LAL *v.* AMAR CHAND. **156 I.C. 454=7 R.L. 910=A.I.R. 1935 Lah. 815**

———(Lahore), Cl. 26—*Appeal from moffusil—Division Bench—Difference of opinion—Procedure—C. P. Code, S.* 98.

Cl. 26 of the Letters Patent and not S. 98 of the C. P. Code applies in case of a difference of opinion between the Judges of a Division Bench even in the case of an appeal from the moffusil. 52 M. 563, Foll. (*Addison and Agha Haidar, JJ.*) PURI & SONS *v.* LYONS CINEMA, LTD. **I.R. 1933 Lah. 206=142 I.C. 427=34 P.L.R. 584=A.I.R. 1933 Lah. 648 (1).**

———(Lahore), Cl. 26—*Difference of opinion in Division Bench—Procedure.*

With the addition of sub-S. (3), S. 98, C. P. Code, made by the Repealing and Amending Act, XVIII of 1928, that section has no application to cases heard by Division Bench of a Chartered High Court, whether on appeals from decrees of Subordinate Courts or from decrees passed by a Judge of the High Court on the Original Side. All cases of difference of opinion among the Judges composing the Division Bench are governed by Cl. 26, Letters Patent, and the Division Bench should state expressly the points of difference. (*Tek Ckand, Dalip Singh and Abdul Qadir, JJ.*) MT. SARDAR BIBI *v.* HAQ NAWAZ KHAN **15 Lah. 425=149 I.C. 575=35 P.L.R. 760=6 R.L. 708=A.I.R. 1934 Lah. 371 (F B.).**

———(Madras), Cl. 10—*Proceeding against legal practitioner—Bench of High Court—Jurisdiction to enquire into—Madras High Court Appellate Side Rules, R.* 8

Under the Madras High Court Appellate Side Rules a Bench of three Judges of the High Court can hear and dispose of an inquiry against a legal practitioner under Cl. 10 of the Letters Patent. It is not necessary in such cases that the full Court should deal with the matter. (*Waller, Reilly and Anantakrishna Aiyar, JJ.*) VENKATACHARIAR, *In the matter of.* **54 Mad. 857=I.R. 1931 Mad. 785=134 I.C. 33=32 Cr.L.J. 1085=34 L.W. 19=A.I.R. 1932 Mad. 131=61 M.L.J. 148 (F B.).**

———(Madras), Cl. 13—*Suit transferred from City Civil Court to High Court—Court fee payable.*

Where a suit is transferred from the City Civil Court to the High Court under Cl. 13 of the Letters Patent and tried by the High Court as a Court of Extraordinary Original Jurisdiction, the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Jurisdiction (and not those payable under the Court Fees Act) as the case is expressly governed by S. 14 of the Madras City Civil Courts Act (VII of 1892). 38 Mad. 807; 27 M. L. J. 30 (P. C.), Ref. (*Venkatasubba Rao, J.*) ABDUL HAKIM SAHIB *v.* CHATTANADHA AYYAR. **I.R. 1931 Mad. 679=132 I.C. 647=33 L.W. 318=A.I.R. 1931 Mad. 457=60 M.L.J. 435.**

LETTERS PATENT (Madras), Cl. 15.

———(Madras), Cl. 13—*Transfer of suit from Moffussal Court to High Court—Powers of High Court—Transfer without notice—Right of parties to appeal—Transfer in the interests of justice—If open to be set aside—C. P. Code, S.* 24.

Both under Cl. 13 of the Letters Patent and under S. 24, C.P. Code, the High Court has power to withdraw a suit from a Subordinate Court and try and dispose of the action itself. S. 24, C. P. Code, gives the High Court power to make such an order of transfer of its own motion and without notice to the parties and at any stage of the suit; while Cl. 13 of the Letters Patent authorizes the High Court to remove a suit from a Subordinate Court and try and dispose of it for purposes of justice. And when the High Court makes an order of transfer in the interests of purity of administration, but without notice to the parties, a party feeling aggrieved by such an order has a right to appeal under Cl. 15 of the Letters Patent and ask for a re-consideration of the order; but since the transfer is made in the interests of purity of administration of justice, such considerations transcend any personal grounds which a party may urge and no re transfer will be ordered unless it is shown to be necessary in the interests of justice. (*Venkatasubba Rao, O. C. J., Cornish and Burn, JJ.*) ANNAMALAI CHETTIAR *v.* RAMANATHAM CHETTIAR. **160 I.C. 80=8 R.M. 603=1935 M.W.N. 1329=42 L.W. 945=A.I.R. 1936 Mad. 55=69 M.L.J. 776 (F.B.).**

———(Madras), Cl. 15—*Judgment—Death of appellant pending appeal—Order impleading legal representative—Appealability.*

Where during the pendency of an appeal the appellant died and an application having been made by one of the respondents, claiming as legal representatives of the deceased, the Court brought him on record as appellant after going into the genuineness of a will under which he claimed,

Held, that the order was not a judgment within the meaning of Cl. 15 and was not appealable. (*Beasley, C. J. and Bardswell, J.*) APPAJI REDDIAR *v.* THAILAMMAL. **56 Mad 689=I R. 1933 Mad. 257=142 I C. 679=1933 M.W.N. 237=37 L.W. 460=A.I.R. 1933 Mad. 417=64 M.L.J. 493.**

———(Madras), Cl. 15—*Order of single Judge of High Court under O.* 43, *R.* 1 (s) *of C. P. Code—Appeal*

The C. P. Code does not control the provisions of the Letters Patent. The judgment of a single Judge of the High Court in an appeal under O. 43, R. 1 (*s*) of the C. P. Code, is appealable under Cl 15 of the Letters Patent. 22 M. 68 and 13 M. L. J. 497, Foll. (*Ramesam, Anantakrishna Aiyar and Cornish, JJ.*) PARAMASIVAN PILLAI *v.* RAMASAMI CHETTIAR. **56 Mad. 915=6 I.R. (Mad.) 70=145 I C. 449=1933 M.W.N. 850=38 L W. 96=A.I.R. 1933 Mad. 570=65 M L.J. 222 (F B.).**

———(Madras), Cl. 15—Order under Cl. 13 transferring suit to High Court from Moffussal Court—Transfer in the interests of justice—Appeal—Re transfer—If can be ordered. *See* LETTERS PATENT (MADRAS), CL. 13. **69 M.L.J. 776 (F.B.).**

———(Madras), Cl 15—*Second appeal—Decision in—Refusal to grant leave to appeal under Letters Patent—Appealability.*

An order by a single Judge refusing to grant leave to file a Letters Patent appeal against his decision in a second appeal is not appealable. (*Varadachariar and Stodart, JJ.*) GOVINDA RAO, *In re.* **59 Mad. 293=160 I.C. 1036=8 R M. 754=1935 M.W.N. 1308=42 L.W. 941=A I.R. 1936 Mad. 134.**

LETTERS PATENT (Madras), Cl. 16.

———(Madras), Cls. 16 and 26—*High Court—Scope of powers of superintendence.*

Under its superintending powers the main function of the High Court is to see that the inferior tribunal does not usurp a jurisdiction which it does not possess whether at all or to the extent claimed or refuses to exercise a jurisdiction which it has and ought to exercise or act illegally in the exercise of its jurisdiction But it is no part of that function to substitute its own opinion for that of the Court superintended in matters assigned by the legislature to the cognizance of the latter. That can be done only when a right of appeal is given to it. Revisional jurisdiction over Board of Revenue regarding orders under S. 173, Madras Estates Land Act, negatived. (*Beasley, C. J., Ramesam, Reilly, Anantakrishna Aiyar and Sundaram Chetty, JJ.*) RAJA OF MANDASA *v.* JAGANNAYAKULU. **55 Mad 883=140 I.C. 331=I.R. 1932 Mad 859=1932 M.W.N. 350=36 L. W. 292=A.I.R. 1932 Mad. 612=63 M.L.J. 450 (F.B.).**

———(Madras), Cl. 18—*Insolvency—Application for adjudication—Debtor being in mofussil—Court having jurisdiction being closed—Jurisdiction of High Court.*

The High Court has no power to entertain a petition for the adjudication of a debtor, who is outside the limits of the Presidency town, as an insolvent, even though the mofussil Court having jurisdiction in the matter is at the time closed for summer recess. 52 Mad. 52=55 M.L.J. 690, Foll. (*Beasley, C.J. and Bardswell, J.*) YELLAMANDA *v.* RAGHAVIAH. **57 Mad. 453=6 R.M. 552=39 L.W. 493=148 I.C. 849=1934 M. W.N. 157=A.I.R. 1934 Mad. 314=66 M.L.J. 428.**

———(Madras), Cl. 21—*High Court, appellate side—Power to issue injunction apart from C. P. Code.*

The High Court, as appellate or revisional authority, has no jurisdiction to issue an injunction apart from and except in accordance with the provisions of O. 39, 35 L W. 168, Diss. from. (*Bardswell, J.*) KARUPPAYYA NADAR *v.* PONNUSWAMI NADAR. **56 Mad. 563=I. R. 1933 Mad. 146 (2)=141 I.C. 607=1933 M.W.N. 18=37 L.W. 110=A.I.R. 1933 Mad. 500 (2)=64 M. L.J. 112.**

———(Madras), Cl. 26—"*Decision on a point of law*"—*What constitutes—Question as to admissibility of evidence—Failure of Judge to decide—Ground for review.*

Held, by the majority (*Madhavan Nair and Curgenven, JJ., dissenting*).—A point of law referred to in Cl. 26 of the Letters Patent means a point of law submitted to and decided by the trial Judge or any direction as to the law given by him in the course of his summing up to the jury. The word "decision" cannot be read so as to cover cases where the Judge has never applied his mind to the matter and has not pronounced an opinion on it.

(Per *Madhavan Nair and Curgenven JJ., dissenting*).—All questions which have to be necessarily decided in a trial and which in effect have been decided by the Judge, though not expressly, would fall within the meaning of the word "decision". The words "decision" and "decided", in Cl. 26 should be liberally construed when inadmissible evidence is admitted, though no objection is taken and no ruling is given by the Judge, it should be understood having regard to his duties, that the Judge has decided to admit the evidence and consequently there is a "decision". Where certain statements were given in evidence by the witnesses examined for the prosecution and they were not objected to by the Advocate for the accused either when evidence was taken or when the Judge referred to the evidence in his summing up to the jury and later on objection was taken to those statements having been taken as evidence and the Advocate-General granted a certificate under Cl. 26 of the Letters Patent.

Held (by the majority), that there was no decision on a point of law by the trial Judge and the review application was consequently unsustainable. (*Beasley, C J., Ramesam, Madhavan Nair, Curgenven, Cornish, Burn and Pandrang Row, JJ.*) EMPEROR *v.* RAMANUJA AIYANGAR. **58 Mad. 523=158 I.C. 662=8 R.M. 293 =1934 M.W.N. 1410=36 Cr.L.J 1398=1935 Cr.C. 686 (2)=42 L.W. 53=A.I.R. 1935 Mad. 486=68 M. L.J. (Supp.) 1 (F.B.)**

———(Madras), Cl. 26—*Grant of certificate by Advocate General—Absence of decision on point of law—Power of High Court to reject review application.*

In an enquiry following the grant of a certificate by the Advocate-General, the High Court has jurisdiction to say that the Advocate-General's certificate should not have been granted on the ground that there was no decision on a point of law involved in the case and if it came to that conclusion, the petition could straightaway be dismissed without any further consideration of the merits of the case. (*Beasley, C.J., Ramesam, Madhavan Nair, Curgenven, Cornish, Burn and Pandrang Row, JJ.*) EMPEROR *v.* RAMANUJA AIYANGAR. **58 Mad. 523=158 I.C. 662=8 R.M. 293=1934 M.W.N. 1410 =36 Cr.L.J. 1398=42 L.W. 53=1935 Cr.C. 686(2) =A.I.R. 1935 Mad. 486=68 M.L J. (Supp.) 1 (F B.).**

———(Madras), Cl. 26—*Review—Grounds—Non-direction on point of law—What amounts to.*

The accused was tried and convicted at the Criminal Sessions of the High Court for an offence under S. 302, I. P. Code. He subsequently obtained a certificate for review under Cl. 26 of the Letters Patent Objection was taken therein to the Judge having failed to bring to the notice of the jury the question whether in the circumstances they could draw a presumption under S. 114 of the Evidence Act as to the continued possession of certain articles belonging to the deceased It appeared, however, that the only question put in issue was whether the articles belonged to the accused and the question as to the continued possession of the articles did not arise for consideration in view of the plea of the accused himself.

Held, that the plea of non-direction did not arise for consideration. (*Beasley, C.J, Ramesam, Madhavan Nair, Curgenven, Cornish, Burn and Pandrang Row, JJ.*) EMPEROR *v.* RAMANUJA AIYANGAR. **58 Mad. 523=158 I.C. 662=8 R.M 293=1934 M.W N. 1410 =36 Cr.L.J. 1398=42 L.W. 53=1935 Cr.C. 686 (2) =A.I.R. 1935 Mad. 486=68 M.L J. (Supp.) 1 (F.B).**

———(Madras), Cl. 36—*Applicability—Proceeding before High Court under S. 439, Cr. P. Code—Difference of opinion—Procedure.*

S 429, Cr. P. Code, and not Cl. 38 of the Letters Patent, lays down the correct procedure in case of differences of opinion in the High Court under S. 439, Cr. P. Code. (*Wallace, J.*, on a difference of opinion between *Waller and Krishnan Pandalai, JJ.*) KUNHAMBU *v.* LOCAL FUND OVERSEER, CHIRAKKAL. **1932 M.W.N. 873.**

———(Madras), Cl. 41—*Leave to appeal—Question as to inadmissibility of evidence—Other evidence being sufficient to sustain conviction—Refusal of leave.*

The accused was convicted at the Criminal Sessions of the High Court of an offence under S. 302, I. P. Code, and sentenced to death. He then applied to the Advocate-General and obtained a certificate under

LETTERS PATENT (Patna), Cl. 8.

Cl. 26 of the Letters Patent on the ground that certain inadmissible evidence had been put to the jury at the trial. The majority of the Full Bench, who heard the review application, held that there was no decision on a point of law with reference to the question raised and dismissed the review application. At the same time the trial Judge acting under Cl. 25 of the Letters Patent referred the question as to the admissibility of the evidence for further consideration by the High Court. The matter once again came up before a Full Bench and it was held that the evidence was admissible in law and that in any case there was ample evidence, quite apart from the evidence called in question, to support the conviction. The accused having applied for leave to appeal to the Privy Council,

Held, that it was not a fit case for leave being granted as the Court had found that there was ample evidence to support the conviction apart from the evidence objected to. Jurisdiction of Privy Council in criminal cases pointed out. (*Cornish, Burn and Lakshmana Rao, JJ.*) RAMANUJA AIYANGAR *v.* EMPEROR. **159 I.C. 240 = 1935 M.W.N 5 = 42 L W. 140 = 37 Cr.L J. 64 = 1935 Cr.C. 1049 = A.I.R. 1935 Mad. 793 = 68 M L.J. (Supp.) 93 (F.B.).**

———**(Patna), Cl. 8**—Disciplinary jurisdiction—Exercise—General infamy of vakil not necessary—Conviction for taking part in unlawful association. *See* LEGAL PRACTITIONER—MISCONDUCT. **12 Pat L.T. 725.**

———**(Patna), Cl. 9**—*Removal of case from lower Court to High Court—Omission to record reasons—Irregularity.*

The mere non-recording of reasons where a case is removed from the Court of the Subordinate Judge to the High Court is only an irregularity which does not affect the jurisdiction of the High Court and does not make its decision illegal. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727 = 149 I.C. 809 = 6 R.P. 652 = 14 Pat.L.T. 258 = A.I.R. 1933 Pat. 250.**

———**(Patna), Cl. 10**—*Appeal—Order of a single Judge in revision.*

No appeal lies under the Letters Patent from a decision of a single Judge of the High Court passed in revision. The words "which has been called for by the said Court" (which occurred in Cl. 10 prior to the amendment of 1929) are general in their application and refer both to the case in which the High Court has *suo motu* called for records and the case where the records have been called for on the application of one of the parties. In both cases, no appeal is competent 34 C.L.J. 489, Foll. (*Courtney-Terrell, C.J. and Khaja Mahomed Noor, J.*) RAGHUBANS LAL *v* SOLANO. **10 Pat. 428 = I R. 1931 Pat. 388 = 133 I.C. 676 = 12 Pat.L.T. 599 = A.I.R. 1931 Pat. 292.**

———**(Patna), Cl. 10**—*Appeal under—Review of.*

No application for review lies against a decision on appeal under the Letters Patent. 1931 A.L J. 187 (F.B.) and 40 M. 651, Foll. (*Courtney-Terrell, C.J.*) INDER MAHTON *v.* RAMAKISHUN MISSIR. **I.R. 1931 Pat. 486 = 134 I.C. 630 = 12 Pat.L.T. 652 = A.I.R. 1931 Pat. 409.**

———**(Patna), Cl. 10**—*Judgment—Order refusing to entertain application for review under S. 151, C. P. Code—Appealability.*

Where a Judge refuses to exercise his discretion under S. 151, C. P. Code, and grant a review, his order is not a 'judgment' and is not appealable. (*Courtney-Terrell, C. J. and Khaja Mahomed Noor, J.*) BANWARI LAL *v.* SHUKRULLAH. **12 Pat. 202 = I.R. 1933 Pat. 153**

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= 142 I.C. 455 = 14 Pat.L.T. 1 = A.I.R. 1933 Pat. 139.

———**(Patna), Cl. 10**—*Leave to appeal—Grant of—Principles.*

A certificate of 'leave to appeal" should not be granted merely on the ground that a point of law arises in the case. It is only when a case presents some difficulty and the Judge feels really that the matter before him requires further consideration by a larger Court that "leave" should be granted. If the judge decides the case with confidence, that should indicate that it is not a fit case for appeal ; and if he accepts the responsibility which is cast upon him by the Letters Patent, his decision will be final (*Courtney-Terrell, C.J. and Agarwala, J.*) ASARFI MANDER *v.* KARU MANDER. **13 Pat. 587 = 151 I.C. 921 = 7 R.P. 141 = 15 Pat.L.T. 456 = A.I R. 1934 Pat. 466.**

———**(Patna), Cl. 17** — Ex-officio *information by Government Advocate—Power of High Court to entertain.*

The High Court of Patna has jurisdiction to try persons against whom the Government Advocate with the previous sanction of the Local Government has exhibited an *ex officio* information. (*Lord Atkin.*) DWARKANATH VARMA *v.* EMPEROR. **I.R. 1933 P.C. 65 = 14 Pat.L.T. 305 = 14 L.R. 81 (Cr.) = 1933 A.L.J. 645 = 142 I.C. 335 = 37 C.W.N. 514 = 37 L.W. 584 = 1933 M.W N. 409 = 1933 Cr.C. 442 = 35 Bom.L R. 507 = 34 Cr.L.J. 322 = 57 C.L.J 177 = 10 O.W.N. 522 = A I.R. 1933 P.C. 124 = 64 M.L.J. 466 (P.C.).**

———**(Patna), Cl. 28 (as amended in 1928)**—Appeal from Subordinate Court—Difference of opinion between Judges constituting the Bench—Effect of—C. P. Code, S. 98, sub-S. (3). *See* C. P.CODE, S. 98 (3). **11 Pat. 772.**

———**(Patna), Cl. 28**—*Reference under — Single Judge—Power to hear.*

A single Judge is competent to hear a reference under Cl. 28. (*Jwala Prasad, J.*) DEBI PRASAD PANDEY *v.* GAUDHAM RAI. **11 Pat. 772 = 141 I.C. 369 = I.R. 1933 Pat. 69 = 14 Pat.L.T. 374 = A I.R. 1933 Pat. 67.**

———**(Patna), Cl. 33**—*Construction and scope—Criminal case—Leave to appeal—Grant of.*

The matter of appeals to His Majesty in Council from decisions of the High Court is limited by the Letters Patent under which the High Court's jurisdiction is exercised. While Cl. 31 of the Letters Patent refers to civil appeals, the matter of criminal appeals is dealt with by Cl. 33. The wording of Cl. 33 is very precise and must be strictly construed. Under that clause there is a right of appeal from any judgment or order or sentence made in the exercise of original criminal jurisdiction. Leave to appeal is also granted when a point or points of law have been reserved for the opinion of the High Court in the manner provided by Cl. 18. When the case does not fall under either of these two categories there is no right of appeal. (*Courtney-Terrell, C.J. and Agarwala, J.*) RAHMAN *v.* EMPEROR. **14 Pat. 318 = 155 I.C. 577 = 7 R.P. 598 = 36 Cr.L.J. 815 = 15 Pat.L.T. 833 = A.I.R. 1935 Pat. 66.**

———**(Patna), Cl. 35**—*Patna High Court Rules, Ch. XXII, R. 5 and Ch. II, R. 4—Vacation Judge—Power to hear case arising in Orissa.*

Under Cl. 35 of the Letters Patent read with R. 5 of Ch. XXII of the Rules of the High Court, the vacation Judge has no jurisdiction to hear a matter which is required by those provisions to be heard in Orissa. The power given to the vacation Judge by R. 4 in Chapter II of the Rules are confined to Patna as distinguished from

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Orissa. Rule 5 cannot be read with, or as controlling R. 4 of Chapter II and therefore the discretionary power of the Chief Justice under cl. 35 of the Letters Patent to order that any particular case arising in the Division of Orissa shall be heard at Patna does not vest in the vacation Judge. Apart from the exercise of discretion by the Chief Justice, no Judge sitting at Patna in term time has power to exercise the jurisdiction of the High Court in respect of cases arising in the Orissa Division except in accordance with the rules made under Cl. 35 of the Letters Patent. The possible inconvenience arising from the absence of a vacation Judge for Orissa is no reason for placing upon R. 4 an interpretation which it will not bear if regard is had to the other rules in Chs II and XXII and Cl. 35 of the Letters Patent. (*Dhavle, J.*) RAJENDRA PRASAD BOSE *v.* GOPAL PRASAD SEN. **I.R. 1931 Pat. 166=130 I.C. 262=11 Pat.L.T. 862=A.I.R 1931 Pat. 61.**

———**(Rangoon), Cl. 10** -Ex parte *order granting leave to file suit—Power of Court to revoke—Original Side Rules, Rr.* 8 *and* 25

Plaintiff applied for leave to file a suit under Cl. 10 of the Letters Patent and R. 25 of the High Court Rules, Original Side. No notice was issued and none was required to be issued to the defendants. After one month defendants applied to set aside the leave granted.

Held, R. 8 did not apply to *ex parte* orders of this nature and the Court had full power to revoke at any stage, leave to the plaintiff to file a suit, on a proper cause being shown. (*Leach, J.*) A. M. M. MURUGAPPA CHETTIAR *v.* GALLIARA. **13 R. 330=159 I.C. 142=8 R.R. 251=A.I.R 1935 Rang. 367.**

———**(Rangoon), Cl. 10**—"*Suit for land*"—*Interpretation.*

A suit is a "suit for land" within Cl. 10 of the Letters Patent, if having regard to the issues raised in the pleadings, the decree or order in the suit will affect directly the proprietary or possessory title to land or other immovable property. It makes no difference to the jurisdiction of the Court that the "substantial" or "primary" object of the plaintiff or the 'substantial' or 'main' issue in the suit does not relate to land, if in the circumstances of the case the decree sought, if made, will directly affect the title to land, and it matters not a whit, whether other issues are raised in the suit or whether some other issue raises the "main" or "substantial" question in the suit. In other words, the question whether a suit is a "suit for land" or not, depends not upon the motive or the purposes of the plaintiff but upon the nature and effect of the decree. (*Page, C.J., Mya Bu, Sen, Ba U and Dunkley, JJ.*) V. E. R. M. C. T. CHETTYAR *v.* A. R. A. R. R. M. CHETTYAR FIRM. **12 Rang. 370=151 I.C. 519=7 R.R. 79=A.I.R. 1934 Rang. 250 (F.B.).**

———**(Rangoon), Cl. 10**—"*Suit for land*"—*Meaning of—Suit to enforce mortgage.*

"Suit for land or other immovable property" means suits in which having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land of other immovable property. A suit to enforce a mortgage is a suit in which the plaintiff asks the Court to sell the property in the event of the mortgage debt not being paid within the time allowed for redemption. The fact that the plaintiff asked for a decree for the amount due and for an order for sale only in the event of the mortgage money not being paid within the period allowed by the Court does not change the character of the suit. The plaintiff is suing for the enforcement of his mortgage and the decree which he obtains does directly affect the land. The plaintiff asked for a decree for Rs. 14,577 against

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defendants 1 to 5. He also sued for a declaration that certain property was mortgaged to him and asked for a mortgage decree in respect thereof. Defendant 9 challenged the right of defendants 1 to 5 to mortgage the property at all, and he claimed that the property belonged to him.

Held, that the suit directly involved the title to the land and was clearly a suit "for land" within the meaning of Cl. 10. (Case-law reviewed.) (*Leach, J.*) BHAIYAT *v.* LIM CHONG KHAN. **149 I.C. 940=6 R.R. 344=A.I.R. 1934 Rang. 35.**

———**(Rangoon), Cl. 10**—"*Suit for land*"—*Mortgage suit for sale—Mortgage by deposit of title-deeds.*

It cannot be doubted that in England a suit to enforce a mortgage by foreclosure or sale would be regarded not only as "substantially" a suit for land, but also as a suit which "touches the reality" and directly affects the title to and disposition of the land In India also, it is manifest that a mortgage is immovable property and a suit to enforce a mortgage by sale of the land is a "suit for land." It cannot be reasonably contended that the Court acts "*in personam*" in a mortgage suit, as the Court when it passes a preliminary decree or a final decree does not lay any obligation upon the mortgagor to do or to refrain from doing anything. It merely gives the mortgagor an option, which he may or may not elect to exercise, to redeem the property in the manner therein prescribed. The operative and essential ingredient in a decree passed in a mortgage suit for sale is the order for sale. Where a mortgage is created in Rangoon by deposit of title-deeds relating to certain lands situate outside the limits of the ordinary original civil jurisdiction of the High Court at Rangoon, that Court has no jurisdiction under Cl. 10 of the Letters Patent to entertain a suit to enforce the mortgage by sale of the mortgaged land. (*Page, C.J., Mya Bu, Sen, Ba U and Dunkley, JJ.*) V. E. R. M. N. C. T. CHETTYAR *v.* A. R. A. R. R. M. CHETTYAR FIRM. **12 Rang. 370=151 I.C. 519=7 R.R. 79=A.I.R. 1934 Rang. 250 (F.B.).**

[**R.** 12 R. 432 (435); 12 R. 690 (697).]

———**(Rangoon), Cl. 13**—*Judgment— Conditional order setting aside* ex parte *decree.*

An order was passed directing that the *ex parte* decree should be set aside on certain terms, *viz.*, that the defendants would pay into Court within ten days a certain sum plus certain costs. Before the ten days had completely elapsed, an appeal was filed against the order.

Held, that the order was not a judgment within Cl. (13), Letters Patent, and that no appeal lay from it. 2 Rang. 469, Rel. on ; 6 Rang. 703 and 35 Mad. 1, Ref. (*Baguley and Macknev, JJ.*) ALAMUTHUVANDAYAR *v.* K. N. L. CHETTYAR FIRM. **151 I.C. 402=7 R.R. 70=A I.R. 1934 Rang. 192.**

———**(Rangoon), Cl. 13**—"*Judgment*"—*Meaning of —Order of transfer made by High Court under S.* 24, *C. P. Code.*

In the Letters Patent of the High Courts the word "judgment" means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. The term "suit" in the Letters Patent includes suits instituted by a plaint or by an originating summons in the manner prescribed under the Rules of the Court. A final judgment is a decree in a suit by which all the matters at issue therein are decided. A preliminary or interlocutory judgment is a decree in a suit by which the right to the relief claimed in the suit is decided, but under which further proceedings are necessary before the suit in its entirety can be determined. All other decisions are orders, and are not "judgments" under the Letters Patent, or appealable as such. Hence an order of the High Court under S. 24, C. P. Code, transferring a suit

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from a subordinate Court to the High Court does not fall within the ambit of judgment in Cl. 13, Letters Patent. 6 R. 703; A.I.R. 1929 Rang. 41 (F.B.), Overr. (*Page, C.J., Mya Bu, Baguley, Sen, Mosely, Ba U and Dunkley, JJ.*) DAYABHAI JIVANDASS *v.* MURUGAPPA CHETTYAR **13 Rang. 457=157 I.C. 1107=8 R.R. 135=A.I.R. 1935 Rang. 267 (F.B.).**

———**(Rangoon), Cl. 13**—*Judgment—Order on application for review.*

In a suit for specific performance of a contract for the sale of land, a single Judge gave the plaintiff a decree and directed him to pay the money in Court within a certain date. Another Judge subsequently extended the time but on an application for review of that order, he cancelled his own previous order and dismissed the suit on the ground that the plaintiff had not deposited the money in time. This order is a "judgment" within the meaning of Cl. 13 of the Letters Patent and leave of the Judge is a condition precedent to the maintainability of an appeal therefrom. (*Page, C.J., Maung Ba and Baguley, JJ.*) MAUNG PO MYIT *v* MAUNG PO SIN. **9 Rang. 31=I.R. 1931 Rang. 153=131 I.C. 729=A. I.R. 1931 Rang. 147 (F.B.).**

———**(Rangoon), Cl. 13**—"*Judgment*"—*Order declaring invalid certain proxies used in a statutory meeting under S.* 153, *Companies Act.*

The order passed by a Judge in the orginal side declaring that certain proxies, used in a statutory meeting held under S. 153 of the Companies Act for the purpose of approving a scheme of arrangement, were invalid and that another meeting should be held, is a "judgment" within Cl. 13 of the Letters Patent and as such appealable. 31 C.W.N. 894, Ref. (*Page, C.J. and Mya Bu, J.*) DAWSON *v.* HARMASJI. **10 Rang. 189=I.R. 1932 Rang. 129=137 I.C. 444=A.I.R. 1932 Rang. 96**

———**(Rangoon), Cl. 13**—*Judgment—Order dispensing with security by receiver in insolvency.*

An order directing that the receiver of an estate in insolvency should not be required to give security for the costs of a suit filed by the insolvent and continued by the receiver is not a 'judgment' within Cl. 13 of the Letters Patent and is not appealable. (*Page, C. J. and Mya Bu, J.*) JORDEN *v.* MAUNG BA CHIT. **9 Rang. 478=I.R 1931 Rang. 318=134 I.C. 750=A.I R. 1931 Rang. 286 (1).**

———**(Rangoon), Cl. 13**—"*Judgment—*"—*Order staying hearing of suit.*

An order under S. 10, C.P. Code, staying the hearing of a suit pending the determination of the appeal to His Majesty in Council in another suit is not a "judgment" within the meaning of Cl. 13 of the Letters Patent and is not appealable. An order so made does not, and does not purport to, "finally decide the rights of the parties" or "to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned." (*Page, C.J. and Mya Bu, J.*) MADAN GOPAL BAGLA *v.* THE CHETTIYAR FIRM OF S. P.K.A.A.M. **12 Rang. 687=154 I.C. 774=7 R R. 317=A.I.R 1935 Rang. 73 (1).**

———**(Rangoon), Cl. 13**—"*Judgment*"—*Order granting leave to defend on certain conditions—C.P. Code, O.* 37, R 3.

An order granting leave to the defendant to defend the suit under the provisions of O. 37, C. P. Code, on condition that he pays into Court within a certain time a certain sum of money and furnish security for the balance of the claim to the satisfaction of the Court and that in the event of his failing to comply with the condition, leave to defend will be withdrawn and the plaintiff will be entitled to a decree for the full

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amount claimed, does not amount to a "judgment" within Cl. 13 of the Letters Patent. It is an order which merely regulates the procedure in the suit and does not determine any right or liability as between the parties in the suit. (*Page, C.J. and Mya Bu, J.*) A. S. CHETTIAR FIRM *v.* V. T. VEERAPPA CHETTIAR. **13 Rang. 239=157 I.C. 778=8 R.R. 108=A.I R. 1935 Rang. 245.**

———**(Rangoon), Cl. 13**—"*Judgment*"—*Test and scope.*

In order to determine whether a certain order is a "judgment" or not, the test is finality in relation to the Court passing the order. An order passed on a preliminary issue of jurisdiction allowing the suit to proceed is therefore not a judgment within the meaning of Cl. 13 of the Letters Patent. (*Page, C.J. and Mya Bu, J.*) RAMAN CHETTYAR *v.* BANK OF CHETINAD, LTD. **11 Rang. 19=I R. 1933 Rang. 27=142 I. C. 58=A.I.R. 1933 Rang. 15.**

[R. 12 R. 687 (689)]

———**(Rangoon), Cl. 13**—*Order rejecting scheme under S.* 153 *of Companies Act.*

An order rejecting a scheme for the re-organization of the capital of a company is appealable both under S. 202 of the Companies Act, and Cl. 13 of the Letters Patent. 10 Rang. 189; 27 Bom. L. R. 655 Foll. (*Page, C. J. and Cunliffe, J.*) DAWSON *v.* HORMASJI. **10 Rang. 438=I.R. 1932 Rang. 209=140 I.C. 133=A.I.R. 1932 Rang. 154.**

———**(Rangoon), Cl. 13**—*Suit for land—Suit raising question of title to immovable property—Frame of suit as one for damages—Effect.*

Where the suit was to recover damages for the wrongful act of the defendants in preventing the plaintiff from removing the buildings and materials as under an agreement and also for an injunction and the defendants pleaded that the buildings and materials belonged to him *held*, that the suit related to immovable property and should be filed in the Court having jurisdiction. Suit filed in the High Court, held incompetent for want of jurisdiction. In such cases the question of jurisdiction should be decided on the broad issue in the case. Meaning of 'suit for land' discussed. 54 C. 655, Ref. to. (*Cunliffe, J.*) SWAMI IYAH NADAR *v* THE COMMISSIONER FOR THE PORT OF RANGOON. **9 Rang. 13=I.R. 1931 Rang. 303=134 I.C. 511=A.I. R. 1931 Rang. 109.**

———**(Rangoon), Cl. 35**—Power of High Court to levy court fees on Original Side appeals. *See* GOVERNMENT OF INDIA ACT, S. 107 (*e*). **13 Rang. 156.**

———**(Rangoon), Cl. 37**—"Final order" — Order deciding cardinal issue and remanding others—Appealable. *See* C.P. CODE, S. 109 (a)—FINAL ORDER. **10 Rang. 499=A.I.R. 1932 Rang. 189.**

———**(Rangoon), Cl. 37**—'Final order'—Order of High Court dismissing petition for adjudication of debtor—Further appeal to Privy Council. *See* C.P. CODE, SS. 109 & 110—FINAL ORDER. **12 Rang. 355=A.I R. 1934 Rang. 292.**

———**(Rangoon), Cl. 37**—"*Final order*"—*Order refusing leave ta appeal* in forma pauperis

An order refusing leave to appeal *in forma pauperis* is not a "final order" and so not appealable to His Majesty in Council. (*Page, C.J. and Brown, J.*) AISHA BEE BEE *v.* NOOR MAHOMED **10 Rang. 504=141 I.C., 277 (1)=I.R. 1933 Rang. 20 (1)=A.I.R. 1932 Rang. 192 (1).**

———**(Rangoon), Cl. 37**—*Leave to appeal* in forma pauperis—*Order dismissing abplication—Appeal to Privy Council.*

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No appeal to Privy Council can lie against an order of the High Court dismissing an application to grant leave to appeal *in forma pauperis*, as such an order is not a final judgment, decree or order of the High Court within Cl 37. (*Page, C.J. and Mya Bu, J.*) VERTANNES *v.* LAWSON. **157 I.C. 39 (1)=8 R R. 70.**

———**(Rangoon), Cl. 39**—*Leave to appeal in criminal cases—Grant of—Consideration — Admission of inadmissible evidence—If a ground.*

The grant of the leave to appeal to His Majesty in Council is a step ancillary to the determination of the appeal, and the principles which regulate the ultimate decision of the appeal cannot obviously be ignored when an application for leave is examined. Leave to appeal is not granted "except where some clear departure from the requirements of justice" exists, nor unless "by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done". Mis direction as such, even irregularity as such, will not suffice. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future. The admission of inadmissible evidence would, therefore, form no ground upon which an application under Cl. 39 could be based, if the course of the trial was in no way thereby deflected. (*Page, C.J. and Mya Bu, J.*) SCOTT *v.* EMPEROR. **13 Rang. 141=157 I. C. 821=8 R.R. 116=36 Cr. L.J. 1232=1935 Cr.C. 847=A.I.R. 1935 Rang. 214.**

———**(Rangoon), Cl. 39**—*Person convicted and sentenced at High Court Sessions—Application by, for declaration that case is fit one for appeal to Privy Council—If lies.*

An application by a person convicted and sentenced at the Sessions of the High Court for a declaration "that the case is a fit one" for appeal to His Majesty in Council lies under Cl. 39. (*Page, C.J. and Mya Bu, J.*) H. W. SCOTT *v.* EMPEROR. **13 Rang. 141=157 I.C. 821=8 R R. 116=36 Cr L.J. 1232=1935 Cr. C. 847=A.I.R. 1935 Rang. 214.**

LEX SITUS. *See* CONFLICT OF LAWS—LEX SITUS.

LIABILITY.

———For Torts. *See* TORT.

———of Agents

See (1) CONTRACT, AGENT, S. 211.
(2) PRINCIPAL AND AGENT.

———of Sons for Father's debts.

See HINDU LAW—DEBTS.

———of Government.

See (1) CROWN.
(2) GOVT. OF INDIA ACT, SS. 29, AND 30, AND 32.

———of Guardian. *See* GUARDIAN AND WARDS ACT, S. 41 (3).

LIBEL.

See (1) TORT—DEFAMATION.
(2) PENAL CODE, SS. 499, 500.

"LIBERTY TO APPLY."

See (1) C. P CODE, S. 92—CLAUSE IN SCHEME.
(2) COMPROMISE—CONSENT ORDER—"LIBERTY TO APPLY."
(3) DECREE—CONSTRUCTION.

LICENSE. *See* EASEMENTS ACT. SS. 52-63.

———Revocation of—Notice of. *See* EASEMENTS ACT (V OF 1882), S. 63.

——— *Licensee—Right of suit in own name.*

LIMITATION.

A bare licensee cannot maintain an action in his own name. But when a licensee in possession of a piece of land has been using it as a courtyard, has cattle troughs and a platform in it, he can maintain an action against a person who, having no possession, interferes with the land and removes the cattle troughs. The plaintiff in such a case, even if the licence is not coupled with a grant, has sufficient possessory title to entitle him to sue. (*Sulaiman, C.J. and Barpai, J.*) KANTA TEWARI *v.* SHEO NARAIN LAL. **159 I.C. 44=8 R.A. 378=4 A.W.R. 1277=1935 A.L.J. 123=A.I.R. 1935 All. 123.**

——— *Right of burial—Erection of tomb-stones.*

A license to bury includes the right to erect tombstones. (*Young, J.*) JHAO LAL *v.* AHMUDULLAH. **149 I.C. 966=3 A.W.R. 347=1934 A.L J. 248=6 R. A. 1006=18 R.D. 157=15 L R. 179 (Rev.)=A.I.R. 1934 All 335.**

LICENSE OR LEASE. *See* LEASE OR LICENCE.

LIEN.

See (1) ATTORNEY'S LIEN.
(2) CONTRACT ACT, SS. 95 AND 171.
(3) LEGAL PRACTITIONER—LIEN.
(4) T. P. ACT, S. 55 (4).

LIFE ESTATE.

See (1) DEED—CONSTRUCTION—GIFT.
(2) GRANT—RESUMPTION.
(3) T. P. ACT, S. 14.
(4) WILL.

LIFE INSURANCE. *See* INSURANCE.

LIGHT AND AIR.

See (1) EASEMENT.
(2) EASEMENTS ACT, SS. 15, 33.

LIMITATION—Acquisition of title—Onus of proof—Necessity for actual possession. *See* ADVERSE POSSESSION—ONUS OF PROOF. **155 I.C. 122=A.I.R. 1935 Pat. 254.**

——— *Appeal—Deduction of time—Time spent in review proceedings.*

For purposes of appeal, the time taken in review proceedings ought to be deducted. The fact that the review application is unsuccessful does not affect this rule. (*Irving, F.C.*) NARINDAR SINGH *v.* MT. SHIB DEVI. **11 Lah.L.T. 37.**

——— *Appeal from decree of Consul-General passed under jurisdiction tested by King's Order-in-Council—Duty of Consul General.*

Where an appeal from the decree of the Consul-General is presented, his duty is only to take the memorandum of appeal when it is presented to him and transmit the same together with other papers to the High Court. He cannot decide whether the appeal is barred by time. It is only when the appeal comes on for hearing that the question of limitation can be taken. (*Harrison and Addison, JJ.*) KANHAYA LAL SARDHA RAM *v.* BALDEO DAS. **14 Lah 656=6 I.R. (Lah.) 163=146 I.C. 45=34 P.L R. 937=A.I.R. 1933 Lah. 681.**

——— *Appeal—Presentation—Vakalatnama not containing particulars—Correction after expiry of period for presenting appeal—Validity of presentation.*

The Counsel who presented an appeal had a power-of-attorney from the party but his name had not been entered in it nor was it specified in the heading for which of the parties the Counsel appeared. The power-of-attorney was however signed both by Counsel and the party. The defect was pointed out to the Counsel and was rectified by him but after the period for filing the appeal had expired.

Held, that the omission regarding proper authorization was merely accidental, that it did not invalidate his

acts and that the appeal should be deemed to have been properly filed on its first presentation. 19 I.C. 674, Not Foll. (*Jai Lal, J.*) MANGAL SINGH *v.* BABU SINGH. **I.R. 1931 Lah. 882 = 134 I C. 114 = 33 P.L.R. 74 = A. I.R. 1932 Lah. 134.**

———*Appeal* prima facie *time barred—No explanation of delay or prayer for condonation—Court's power to reject.*

The Court has power to reject summarily an appeal which is *prima facie* time barred and which contains no explanation of the delay or any prayer for condonation. (*Grille, J.C.*) BALWANT RAO *v.* BALMUKUND. **155 I.C. 588 = 7 R N. 196 = A.I.R. 1935 Nag. 109.**

———Application for execution—Rent decree—Adjustment by agreement—Whether period of limitation can be extended by agreement between parties. *See* B. T. ACT, SCH. III, ART. 6. **39 C.W.N. 1036.**

———*Bar of—Effect.*

Bajpai, J.—When a period of limitation is prescribed for the institution of a particular suit, it does not create any right in favour of anybody; but simply prescribes that a suit of that nature has to be filed within that particular period and if it is not so filed, the remedy is lost although the right remains. (*Sulaiman, A.C.J., Mukerji, Boys, King and Bajpai, JJ.*) RAM KARAN SINGH *v.* RAM DAS SINGH. **54 All. 299 = 136 I.C. 145 = I.R 1932 All. 145 = 1931 A.L.J. 1018 = 15 R.D. 815 = A.I.R. 1931 All. 635 (F.B.)**

———*Bar of—Effect.*

The rule is now well settled that lapse of limitation apart from S. 28, bars only the remedy and does not extinguish the title of the claimant. (*Banerji and Niamatullah, JJ.*) MAHOMED RAZA AHMAD *v.* ZAHOOR AHMAD. **52 All. 979 = I.R. 1931 All. 453 = 132 I.C. 21 = 1930 A.L.J. 1416 = A.I.R. 1930 All. 858.**

———*Bar of—Effect—Only the remedy barred.*

Per *Sulaiman, A.C.J.*—Limitation only bars the remedy and does not extinguish the debt. (*Sulaiman, A. C. J. and Niamatullah, J.*) ABDUL RAFIQ *v.* BHAJAN. **53 All. 963 - I.R. 1932 All. 296 = 137 I C. 243 = 1932 A.L.J. 77 = A I.R. 1932 All. 199.**

———*Breach of contract—Covenant in lease regarding additional rent—Abandonment by landlord—Bar of claim.*

A lease provided that after a certain period the lessee should cause the land to be measured and pay additional rent for the excess land held by him, but no steps for measurement were taken by the landlord for over 70 years. In a suit by the landlord after the period of 70 years for additional rent,

Held, that it the law of limitation is to apply at all upon the footing that the cause of action arose immediately after the contract was broken in the sense that the measurement did not take place at the appointed time, whatever period of limitation might have been appropriate that period has long since elapsed at the time of the institution of the suit and that the claim would not be sustained. (*Costello and Jack, JJ.*) KALIDAS DUTT *v.* HARENDRA NATH MUKERJEE. **I.R. 1931 Cal. 632 = 53 C.L J. 526 = 133 I.C. 104 = A.I.R. 1932 Cal. 243.**

———*Burden of proof—Suit for recovery of deposit—Plaintiff's case* prima facie *within time—Defendant must plead and prove that particular demand was made and refused beyond period of limitation.*

When the plaintiff's suit is *prima facie* within time, then if the defendant alleges that it is not within limitation it is for him to make out such a case. If the defendant wishes to defeat the claim of the plaintiff on the ground of limitation then it is absolutely necessary

for him to plead that on account of a particular demand made by the plaintiff, the cause of action had accrued not on the date alleged in the plaint but on some previous date, and on that ground the suit was not within limitation. (*Young and Rachhpal Singh, JJ.*) MT. LUGDI *v.* HAR PRASAD. **154 I.C. 415 = 7 R.A. 754 = 3 A.W.R. 176 = A.I.R. 1934 All. 11.**

———*Combination of claims—Separation for purpose of limitation.*

A combination of claims in one action can be split into its component parts each of which comes under its own rule of limitation. (*Shadi Lal, C.J. and Walker, J.*) BHIMA MAL & SONS *v.* RAHMATULLAH. **130 I.C. 574 = A.I.R. 1931 Lah. 309.**

———*Company—Death of contributory—Impleading legal representatives.*

On the death of the contributory, the personal representatives of the contributory automatically became liable instead of the deceased contributory. No application for the purpose is necessary and consequently no question of limitation arises. (*Bhide, J.*) PUNJAB SINDH CHHATAR *v.* LAHORE BANK, LTD. **141 I.C. 168 = I.R. 1933 Lah. 76 - 34 P.L.R. 79 = A.I R. 1932 Lah. 648.**

———*Company—Winding up—Limitation in favour of debtors.*

As regards the application of the statute of limitation there is no analogy between the position of a debtor to, and a creditor of, a company in liquidation; and the winding up does not prevent the statute from running in favour of persons indebted to the company. (*Lord Russell of Killowen.*) HANSRAJ GUPTA *v.* OFFICIAL LIQUIDATORS OF THE DEHRA DUN-MUSSORIE TRAM CO. **60 I.A. 13 = 54 All. 1067 = 37 C.W.N. 379 = 1933 A.L.J. 175 = 142 I.C. 7 - I.R. 1933 P.C. 43 = 35 Bom L R. 319 = 37 L.W. 445 = 57 C L J. 166 = 1933 M.W.N. 190 = A.I.R. 1933 P.C. 63 - 64 M.L.J. 403 (P.C.).**

[**Appl.** 55 A. 912 (F.B.)]

———Computation—Mortgage-deed—Provision for payment of interest annually—Effect of—Suit for interest—Cause of action. *See* MORTGAGE—CONSTRUCTION. **67 M L.J. 653.**

———Computation—Suspension of time—Suit and decree on second mortgage—Subsequent suit on first mortgage—Decree and purchase by first mortgagee—Suit against mortgagor and third party purchaser in possession under purchaser in execution of decree on second mortgage—Maintainability after 12 years after money became payable—Deduction of time—Right to. *See* MORTGAGE—PRIOR AND SUBSEQUENT. **38 C. W.N. 1178.**

———*Continuing nuisance—Obstruction to right of way.*

Obstruction to a right of way being a "continuing nuisance," limitation does not apply to such a case. (*Patterson, J.*) APTABUDDIN KHA *v.* JOHAR ALI KAZI. **155 I.C. 75 = 7 R.C. 557 = 60 C.L.J. 213 = A. I.R. 1935 Cal. 201.**

———*Contract saving limitation—Whether can be pleaded.*

No one can contract himself out of the statute of limitation and consequently where the result of a compromise is that the limitation provided by law is extended it is open to the judgment-debtor to plead that the decreee-holder's application was barred by limitation. (*Sulaiman, Mukerji and Boys, JJ.*) GOBARDHAN DAS *v.* DAU DAYAL. **54 All. 573 = I.R. 1932 All. 467 = 138 I.C. 583 (2) = 13 L R. 199 (Rev.) = 1932 A.L.J. 365 = 16 R D. 293 = A.I.R. 1932 All. 273 (F.B.).**

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———Limitation—Co-sharers—Allotment in partition to one of land in the possession of another—Suit for recovery of—Starting point. *See* CO-SHARER—PARTITION. **A.I.R. 1935 Pesh. 97.**

———*Co-sharers—Suit by one for declaration of title as against another—Cause of action.*

Obiter.—In the case of co sharers, an ouster by one them gives a fresh cause of action, from that date. (*Middleton, J.C. and Almond, A.J.C.*) DARAZ KHAN *v.* SADOZAI. **159 I.C. 254=8 R.P. 78=A.I.R. 1935 Pesh. 163.**

———*Date of institution—Suit filed with insufficient Court-fee—Deficiency made up after limitation.*

Where a plaint is presented with insufficient Court-fee and the deficiency is made up only after the period of limitation and after the time allowed by the Court, the plaint must be deemed to have been validated only on the day on which the deficiency is made up. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) THIMME GOWDA *v.* MURIGAPPA. **12 Mys L.J. 521=39 Mys.H.C.R. 850.**

———*Dead man—Insertion of name as defendant—Effect against widow.*

The mere insertion of the name of a person who is dead long before the institution of the suit in the array of defendants does not save limitation against his widow and heir who is not impleaded in the suit (*Tek Chand, J.*) KARAM SINGH *v* MT. MAVA WANTI. **I.R. 1932 Lah. 710=140 I.C. 387=A.I.R. 1932 Lah. 592.**

———*Determination—Tests—Form of remedy.*

The article of the Limitation Act applicable in any proceeding is the article that relates to the form of remedy which the plaintiff seeks and not the article applicable to some other claim which the plaintiff might also have made. (*Stone and Walsh, JJ.*) CHENNAMMA *v.* MANGAMMA. **158 I.C. 121=1935 M.W.N. 1154=42 L.W. 535=A.I.R. 1935 Mad. 709.**

———*English Law—Applicability.*

The English Law of limitation cannot be applied in India. (*Mukerji and Young, JJ.*) JAUNPUR SUGAR FACTORY, LTD., *In the matter of.* **3 A.W.R. 222.**

———Execution application—Dismissal for default—Subsequent application after limitation—Barred. *See* CHOTA NAGPUR TENANCY ACT (1908), S. 181. **A.I.R. 1934 Pat. 237.**

———*Exemption from—Ground for—Not stated in execution application—Party not entitled subsequently to rely on it.*

Where a person relies upon a particular ground as reviving limitation for an execution application, it is incumbent upon him to specify that ground in the application. If he fails to do so, it is not open to him to take advantage of it subsequently. (*Rupchand, J.C. and Mehta, A.J.C.*) KALIANDAS BALCHAND *v.* MAHOMED KHAN. **147 I.C. 30=6 R.S. 133=A.I.R. 1933 Sind 365.**

———Exemption from—Suit by ex-minor—Claim to exemption from limitation on ground that he attained majority within three years of suit—Onus of proof. *See* BURDEN OF PROOF—ATTAINMENT OF MAJORITY. **60 C.L.J. 391=A.I.R. 1935 Cal. 228.**

———*Mortgage—Bar of limitation—Applicability to plea in defence.*

There is no limitation against a defence. There is nothing to prevent a mortgagee whose claim on an earlier mortgage is barred by limitation from setting it up as a shield in defence of his possession of the property in a suit by an intermediate mortgagee. 6 O.L.J. 270, Ref. (*Raza and Bisheshwar Nath, JJ.*) KANHAIYA LAL *v.* GULAB SINGH. **7 Luck. 655=I.R. 1932 Oudh 304=138 I.C. 206=9 O.W.N. 387=A.I.R. 1933 Oudh 9.**

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———*Mortgage—Prior mortgagee setting up his rights as shield—No limitation.*

There is no limitation for the prior mortgagee setting up his rights as a shield against the puisne mortgagee. (*Bisheshwar Nath and Pullan, JJ.*) MATHURA PRASAD *v.* GHANSHIAM DAS. **8 O.W.N. 179=I.R. 1931 Oudh 319=132 I.C. 767=14 O.L.J. 233=A.I.R. 1931 Oudh 157.**

[R. 9 Luck. 475 (478).]

———*Nature of plea.*

Limitation is a question of procedure and not one of jurisdiction. A wrong decision whether express or implied on a question of limitation does not oust the jurisdiction. (*Sulaiman, Mukerji and Boys, JJ.*) GOBARDHAN DAS *v.* DAU DAYAL. **54 All. 573=I.R. 1932 All. 467=138 I.C. 583 (2)=13 L.R. 199 (Rev.)=1932 A.L.J. 365=16 R.D. 293=A.I.R. 1932 All. 273 (F.B.).**

———*Person being in possession—Bar of limitation.*

A party in possession cannot be prejudicially affected by the law of limitation (*Addison and Bhide, JJ.*) DALIP SINGH *v.* SIKH GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 645=132 I.C. 661=32 P.L.R. 479=A.I.R. 1931 Lah. 668.**

———*Plea of—Appeal.*

A plea of limitation which is apparent on face of record can be taken in appeal, though not taken in trial Court, where such plea has not been waived. (*Dalip Singh, J.*) RAM CHAND *v.* DEWAN CHAND. **147 I.C. 507 (1)=6 R.L. 398 (1)=A.I.R. 1933 Lah. 1044 (1).**

———*Plea of—When open in appeal.*

A question of limitation, which arises from the facts of the case, can be raised at any stage of the proceeding and, if so raised, must be considered and decided even by the Appellate Court. 53 All. 65 (F.B.), Dist. (*Staples, A.J.C.*) MAHARAJ SAI *v.* KEDAR NATH. **6 I.R. (Nag.) 34=144 I.C. 948=29 N.L.R. 272=A.I.R. 1933 Nag. 130.**

———*Revision—Application to Court of Financial Commissioner, Punjab—Time limit.*

No period of limitation is fixed for the exercise by the Financial Commissioner of his power of revision, but it is to be expected that the applicant will exercise due diligence and unless special cause is shown the Commissioner will not admit an application for revision after the period of 90 days fixed for an appeal. (*Irving, F.C.*) JAGIR CHAND *v* GULAB. **11 Lah.L.T. 16.**

———*Revision petitions.*

Although it is not a matter of law, but it is a matter of uniform practice that civil revisions are entertained only if they are filed within three months of the date of the order sought to be revised. (*Fazl Ali, J.*) KESHO PRASAD *v.* MOHENDRA PRASAD. **147 I.C. 200=6 R.P. 347=15 Pat.L.T. 166=A.I.R. 1933 Pat. 582.**

———Starting point—Award—Execution—Failure of award—Application after three years of making of award—If barred. *See* ARBITRATION ACT, S. 15. **61 C.L.J. 515.**

———*Starting point—Money due under bond—Joint and several promisors—Demand on one—If operates against all—Suit against the others—Starting point of limitation.*

A demand upon one of several joint and several promisors does not amount to a demand on the others also, so as to make time commence to run against all. Consequently proof of debt due under a bond as against one joint promisor in insolvency does not in any way affect the creditor's rights against the other promisors, and time does not commence to run against the latter until an actual demand is made on them.

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(*Beasley, C.J.*) NAGENDRA IYER *v.* SUBBURAMACHARI. **158 I.C. 1133=1935 M.W.N. 688=42 L.W. 687=A.I.R. 1935 Mad. 1055.**

———Starting point—Partition by Revenue Court—Refusal to alter entry in accordance with Civil Court judgment—Suit for declaration—Denial of title by defendant—Cause of action when arises. *See* PUNJAB LAND REVENUE ACT, S. 117. **152 I.C. 821=A.I.R. 1935 Lah. 63.**

———*Tacking—Different title pleaded for different periods.*

In 1915 the plaintiff set up a *jagir* right but the legal proceedings then instituted resulted in a decision in 1921 that the land was *raiyati*. The defendant subsequently contended that they had a right to hold the land rent free. In 1928 the plaintiff instituted a suit for rent and damages.

Held, that the title pleaded by the defendants in respect of the two periods was totally different and the two periods could not be added together for purposes of limitation. (*Agrawala, J.*) SHAMU BHAGAT *v.* RAM DASS BHAGAT. **6 I.R. (Pat) 289=146 I.C. 811=A.I.R. 1934 Pat. 31.**

LIMITATION ACT (IX OF 1908)—*Applicability—Awards.*

The Limitation Act is certainly applicable to arbitration proceedings but it does not necessarily follow that awards which have not been decided in accordance with the Limitation Act are on that account invalid. (*Curgenven and Cornish, JJ.*) S.C.T. AL. ALAGAPPA CHETTIAR *v.* S.S. C.T. CHIDAMBARAM CHETTIAR. **I.R. 1931 Mad. 762 (2)=133 I.C. 522 (2)=1931 M.W.N. 451—34 L.W. 507=A.I.R. 1931 Mad. 619.**

———*Applicability to defences—Suit on lease deed—Plea that deed was obtained by undue influence and misrepresentation—Limitation.*

A defendant is not precluded from urging by way of defence to a suit on the basis of a lease deed that the instrument on which the action is brought ought not to be enforced on equitable grounds such as undue influence, fraud or misrepresentation, although a suit by him to have the instrument set aside or cancelled would then be barred by limitation. The Limitation Act refers only to the remedy of a plaintiff and not to his rights, but it does not refer at all to the case of a defendant. The object of the Act is to prevent a party from putting forward stale or antiquated demands; but a ground of defence cannot become stale or barred by limitation. A defendant may, therefore, put forward any defence, though defence as a claim made by him may be time-barred on the date it is raised. And when the title of a person in possession is challenged, he may set forth any defence in favour of his right to the property and the statute will not run so as to prevent him from setting forth any such relief. (*Rangnekar, J.*) GOPAL BHAURAO *v.* JAGANNATH PANDIT. **59 Bom 502=8 R.B. 175=159 I.C. 213=37 Bom.L.R. 471=A.I.R. 1935 Bom. 326.**

———*Applicability—Proceedings under Punjab Tenancy Act.*

The Limitation Act and the Code of Civil Procedure should, as far as possible, be construed together as being allied general acts of procedure, the two acts are *in pari materia*. To the extent, therefore, to which justice, equity and good conscience will allow, it is proper to apply the Limitation Act by analogy to proceedings where any section, rule or order of the Code of Civil Procedure has the force of a rule under the Punjab Tenancy Act. (*Jatif, F.C.*) SARDAR ALI SHAH *v.* BHUDHU RAM KHANNA. **14 Lah.L.T. 15.**

———*Article applicable to suit—How determined.*

LIMITATION ACT (1908).

In determining the proper article of the Limitation Act applicable to a suit what has to be considered is the "true effect of the suit and not its formal or verbal description." (*Bhide and Din Mahomed, JJ.*) MILKHA SINGH *v.* RAM KISHEN. **154 I.C. 988=7 R.L. 622=37 P.L.R. 353=A.I.R. 1934 Lah. 725.**

———*Construction.*

It is an established rule of construction that a general article does not govern when there is a particular article to cover the case. 42 Cal. 85; A.I.R. 1925 Lah. 478 and A.I.R. 1925 Pat. 765, Ref. (*Niyogi, A.J.C.*) KRISHNA *v.* SITARAM. **I.R. 1931 Nag. 61=130 I.C. 157=13 N.L.J. 209=A.I.R. 1931 Nag. 47.**

———*Construction.*

In construing the provisions of the Limitation Act, equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide. (*Mitter and M C. Ghose, JJ.*) ASHUTOSH CHOUDHURY *v.* KUMED KAMINI DAS. **I.R. 1933 Cal. 517=144 I.C. 150=A.I.R. 1933 Cal. 422.**

———*Construction—Date of decree—What is—Trial court judgment or affirming judgment of appellate court.*

When an appeal is taken against a decree, the decree of the lower courts becomes merged in and is superseded by the decree of the Appellate Court and for purposes of limitation time runs from the date of the decree which is capable of execution, that is the appellate Court's decree even in cases where the appeal is dismissed. 6 Pat. 24; 36 All. 250 and 4 Rang. 562, Ref. (*Heald and Sen, JJ.*) ABDUL KARIM *v.* MAUNG SAN KYAW. **I.R. 1932 Rang. 74=135 I.C. 858=A.I.R. 1932 Rang. 54.**

———*Construction—Equitable considerations.*

The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide. (*Sir Dinshah Mulla.*) NAGENDRA NATH DEY *v.* SURESH CHANDRA DEY. **59 I.A. 283=60 Cal 1=I.R. 1932 P.C. 195=137 I.C. 529=36 C.W.N. 803=34 Bom. L.R. 1065=1932 A.L.J. 643=55 C.L.J. 528=33 P. L.R. 621=36 L.W. 7=1932 M.W.N. 817=9 O.W.N. 681=A.I.R. 1932 P.C. 165=63 M.L.J. 329 (P.C.).**

———*Construction—Principles—Discretion of Court to relieve on grounds of hardship.*

In the matter governed by the Limitation Act, which in some respects gives the Court a statutory discretion, the Court has no general discretion, outside the limits of the Act, to dispense with its provisions or to relieve a suitor form the operation of the Act in a case of hardship or mistake. (*Lord Tomlin.*) MAQBAL AHMAD *v.* ONKAR PRATAP NARAIN SINGH. **62 I. A. 80=57 All. 242=7 R.P.C 191=37 P.L.R. 395=37 Bom.L.R. 533=1935 A.W.R. 615=1935 O.W.N. 527=155 I.C. 205=1935 A.L.J. 578=39 C.W.N. 640=41 L.W. 629=1935 M.W.N. 438=61 C.L.J. 267=A.I.R. 1935 P.C. 85=68 M L J. 665 (P.C.).**

———*Construction—Two Articles applicable.*

As between two Articles that are applicable to the case, the more specific Article will apply. (*Niyogi, A.J.C.*) JAIRAM *v.* BHILAJI. **27 N L.R. 152=I.R. 1930 Nag. 361=127 I.C. 889=A.I.R. 1930 Nag. 300.**

———*Construction—Two Articles applicable.*

In giving effect to a statute of Limitation if two articles limiting the period for bringing the suit are wide enough to include the same cause of action and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, apart from other equita

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ble considerations, be preferred. 4 Pat. 448, Foll. (*Niyogi, A.J.C.*) JAIRAM *v.* BHILAJI. **27 N.L.R. 152=I.R. 1930 Nag. 361=127 I.C. 889=A.I.R. 1930 Nag. 300.**

———*If exhaustive—Provisions as regards exclusion of time.*

The provisions of the Limitation Act as regards the exclusion of time are exhaustive, and it is not permissible to supplement or to add to those provisions. If a suit or an application does not fall within any one of the sections that prescribe about the exclusion of certain period in the computation of the period of limitation, the time must be computed from the date prescribed in the third column of the Schedule, and no principle outside the Limitation Act can be appealed to as a justification for the exclusion of any time. There is no sanction in law to invoke in aid principles of equity to enlarge the period of limitation by excluding some time in computing the period of limitation, for which no authority is to be found within the four corners of the Limitation Act. (*Thom and Iqbal Ahmad, JJ.*) MAHOMED YUNIS *v.* TILOK CHAND. **153 I.C. 1058=7 R A. 661 (2)=4 A. W.R. 1352=1935 A.L.J. 201=A.I.R. 1935 All. 323.**

———*Object of Act—Nature of bar of limitation.*

The object of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right. The bar is created against a suit to enforce an existing right. It does not extinguish the right but the right though existing becomes unenforceable in Court. (*Sulaiman and Young, JJ.*) BHAJJA *v.* MAHOMED SAID KHAN. **54 All. 525=I.R. 1932 All 397=138 I.C. 396=1932 A.L.J. 489=A.I.R. 1932 All. 543.**

———*Provision of law applicable—Plaintiff's claim as the test.*

In determining the particular article of the Limitation Act applicable to a case much depends on the nature of the plaintiff's claim. If the plaintiff is entitled so to frame his suit as to make a certain article giving a favourable period of limitation applicable, it is not a valid objection to say that he could have framed it otherwise so as to make a less favourable article applicable. (*Pullan and Niamatullah, JJ.*) ZIA UDDIN AHMAD KHAN *v.* AKBAR ALI. **I.R. 1932 All. 252=136 I.C. 829=13 L.R. 152 (Rev.)=16 R.D. 373=1932 A.L.J. 317=A.I.R. 1932 All. 358.**

———*Scope.*

The law of limitation only bars remedies and does not extinguish rights apart from S. 28 of the Act. (*Addison and Rhide, JJ.*) DALIP SINGH *v.* SIKH GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 645=132 I.C. 661=32 P.L.R. 479=A.I.R. 1931 Lah. 668.**

———Scope—If exhaustive of the grounds of exemption from limitation. *See* LIMITATION ACT, S. 3. **62 Cal. 66.**

——— **—S. 2 (5)—'***Easement*"—Profit a prendre—*Right to cut bamboos in another's land—Nature of.*

What is known as a *profit a prendre* in England is included in India in the term "easement," as defined in S. 2 (5) of the Limitation Act. A right in favour of one person not being a tenant or licensee, to cut trees, such as bamboos, standing on the land of another—between whom and the former there is no relationship—would be what is known as a *profit a prendre in gross*, and such right is an "easement" under S. 2 of the Limitation Act. (*Wort, J.*) JANGBAHADUR SINGH *v.* THITHAR SINGH. **155 I.C. 966=7 R.P. 653=16 P. L.T. 192=A.I.R. 1935 Pat. 188.**

———**Ss. 2 (5) and 26**—*Easement*—Profit a prendre—*Right to fish.*

LIMITATION ACT (1908), S. 3.

A mere right to fish not excluding the rightful owner is a *profit a prendre* and falls within the definition of easement given in S. 2 (5) of the Limitation Act and may be acquired by 20 years' uninterrupted enjoyment under S. 26. (*Fazl Ali, J.*) RAMHARY PAL *v.* NIDHI MAHANTY. **6 R.P. 473=148 I.C. 431=A.I.R. 1934 Pat. 420.**

———**S. 2 (8)**—"*Plaintiff*"—*Watandar.*

A succeeding watandar claims under his predecessor. So adverse possession against the previous holder operates equally as bar to a suit by the successor against the vendee of watan lands. (*Patkar and Shingne, JJ.*) TUKA *v.* GANU. **55 Bom. 21=I.R. 1931 Bom. 129=129 I.C. 145=32 Bom.L.R. 1398=A.I.R. 1931 Bom. 24.**

———**S. 3**—*Appeal filed with decree copy insufficiently stamped—Return and refiling with proper stamp beyond limitation—Appeal, if barred.*

Where the appeal is filed within limitation but without the copy of the decree appealed against being sufficiently stamped and the same is returned and filed again with proper stamp but out of limitation, the appeal is barred by time. (*Din Muhammad, J.*) MAHOMED FAZAL ELAHI *v.* RAM LAL. **7 R.L. 364=153 I.C. 64=37 P.L.R. 124=A.I.R. 1935 Lah. 124 (2).**

———**S. 3**—*Applicability—Claim of liquidator under Burma Co operative Societies Act* (1922), *S.* 47.

S. 3, Limitation Act, does not apply to the case of a claim by a liquidator under S. 47, Burma Co-operative Societies Act, because such a claim would ordinarily have to be made in a Court of law, on whom S. 3 of the Limitation Act is binding. (*Chari, J.*) MAUNG BA LAT *v.* THE LIQUIDATOR, KEMMENDINE THATHANAHITA CO OPERATIVE SOCIETY. **8 Rang. 581=I.R. 1931 Rang. 119=131 I.C. 55=A.I.R. 1931 Rang. 72.**

———**S. 3**—Application for leave to sue in *in forma pauperis*—Rejection—Subsequent suit with Court fee—Date of presentation—If relates back. *See* C. P. CODE, S. 149. **A.I.R. 1935 Mad. 878.**

———**S. 3**—*Basis for determination.*

Limitation must be dependant to some extent on the form and substance of the plaint. (*Dalip Singh, J.*) MT. UMRI *v.* RALU. **6 I. R. (Lah.) 98 (2) 145 I.C. 343=84 P.L.R. 841=A.I.R. 1933 Lah. 491.**

———**S. 3**—*Date of institution—Suit under S.* 77, *Registration Act—Defendant lunatic—Absence of guardian* ad litem—*Effect.*

Registration of a document having been refused on 3 11-1928, a suit was instituted on 1-12—1928 under S. 77 of the Registration Act. The defendant who was a lunatic died on 15 12-1928, without a guardian *ad litem* having been appointed at all. His heirs were substituted on 18-1-1929.

Held, the suit was instituted on 1-12-1928 and not on 18-12 1929, when the heirs of the deceased defendant were substituted, it cannot be said that because there was no guardian *ad litem* appointed for the lunatic defendant, there was no legally instituted suit against him. (*Henderson, J.*) PRASANNA RAM GHOSH *v.* ANFAR ALI. **153 I.C. 621=7 R.C. 388=38 C.W.N. 900=A.I.R. 1934 Cal. 833.**

———**S. 3**—*Duty of Court.*

It is the duty of the Court under S. 3 to see that a suit is not barred by limitation. A general finding that a suit is not barred by limitation may become inconclusive if on the finding of further facts it is discovered that some other article is applicable which bars it. (*Sulaiman, A.C.J. and Bajpai, J.*) SHARIFUL HASAN *v.* LACHMI NARAIN. **135 I.C. 558=I.R. 1932 All. 94=1931 A.L.J. 858=A.I.R. 1932 All. 16.**

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———**S. 3**—*Duty of Court to consider question of limitation, even if no plea raised.*

By reason of S. 3 of the Limitation Act it is incumbent upon a Court to dismiss a suit if it has been filed after the period of limitation prescribed therefor by the Act even if limitation has not been set up as a defence. A question of limitation when it arises on the facts before a Court must be heard and determined whether or not it is directly raised in the pleadings or in the ground of appeal. 12 All. 467, Ref. (*Bennet and Baipai, JJ.*) RADHA MOHAN *v.* AMI CHAND **149 I.C. 651 = 6 R. A. 939 = 1933 A.L.J. 1283 = A.I.R. 1934 All. 386.**

———**S. 3**—*Duty of Courts under—Appeal filed second time.*

It is the duty of a Court under S. 3, Limitation Act, to see that an appeal which has not been filed in time should be dismissed even though the plea is not taken by the defence, unless sufficient cause is shown under S. 5. (*Sulaiman, C.J. and Ruchhpal Singh, J.*) SUDAMA RAI *v.* BISHESHAR PRASAD. **152 I.C. 939 = 7 R A. 419 = 4 A.W R. 1460 - 16 L R. 131 (Rev.) = 18 R.D. 706 = A.I.R. 1935 All. 92.**

———**S. 3**—*Limitation—Basis for decision.*

The question whether a suit is within time must be decided primarily on the basis of the plaintiffs' own pleadings and not on the basis of defence set up. (*Addison and Bhide, JJ.*) DES RAJ HUKAM CHAND *v.* LACHHI RAM PRABH DAYAL. **147 I.C. 57 = 6 R L 324 = A.I.R. 1933 Lah. 404.**

———**S. 3**—*Point of limitation not argued in trial Court—It may be raised on appeal.*

When on the face of the plaint it appears that the suit is barred by limitation, the Court is bound to consider the question of limitation and to come to a decision thereon, whether it is raised by the defendant or not; and although the point may not have been argued before the original Court, it is open to the defendant to raise it on appeal. (*Dunkley, J.*) M. S. CHETTYAR FIRM *v.* S E BHOLAY **13 Rang. 43 = 154 I.C. 153 = 7 R R. 269 - A I R. 1934 Rang. 329.**

———**S 3**—*Scope—If mandatory—Question of limitation not raised—Duty of Court.*

The terms of S. 3 are peremptory and it is the duty of the Court to notice and give effect to the Limitation Act even though it is not referred to in the pleadings. (*Lord Tomlin.*) MAQBAL AHMAD *v.* ONKAR PRATAP NARAIN SINGH. **62 I A. 80 = 57 All 242 = 7 R.P.C. 191 = 37 Bom L R. 533 = 37 P L.R. 395 = 1935 A.W. R 615 - 1935 O W.N. 527 = 155 I C. 205 = 1935 A.L. J. 578 = 39 C.W.N. 643 = 41 L W. 629 = 1935 M.W N. 438 = 61 C.L.J. 267 = A.I.R. 1935 P.C. 85 = 68 M.L. J. 665 (P.C)**

———**S. 3**—*Scope and effect of—Exemption from limitation—Grounds of.*

In view of S. 3 it is not permissible to claim any exemption apart from what is contained in the Indian Limitation Act. (*Nasim Ali and Khundkar, JJ.*) JATENDRACHANDRA BANDOPADHYAY *v.* LEBATEE MOHAN DAS. **62 Cal 66 = 158 I.C. 191 = A.I.R. 1935 Cal. 333.**

———**S. 3**—*"Suit instituted"—Meaning—Effect of explanation.*

The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint. A mere claim against a company in compulsory liquidation is not by virtue of the explanation to S. 3 a "suit instituted" within the meaning of those words in S. 3. The 'Explanation' merely enacts that in the case of a suit (*i.e.*, a proceeding instituted by the presentation of a plaint) against a company which is being wound up by the Court the institution of such a suit is for purposes of S. 3

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advanced to an earlier date, namely, the date when the claim was first sent in to the Official Liquidator. (*Lord Russell of Killowen.*) HANSRAJ GUPTA *v.* OFFICIAL LIQUIDATORS OF THE DEHRA DUN-MUSSORIE TRAM CO. **60 I A. 13 = 54 All. 1067 = 37 C.W.N. 379 = 1933 A.L J. 175 = 142 I.C. 7 = I R 1933 P.C. 43 = 35 Bom.L.R. 319 = 37 L.W. 445 = 57 C.L.J. 166 = 1933 M.W.N. 190 = A.I.R. 1933 P.C. 63 = 64 M.L J. 403 (P.C.).**

———**S. 3, Expl.**—Plaint filed by pleader not duly authorised in writing—If valid presentation. *See* C. P. CODE, O. 3, RR. 1 AND 4. **39 C.W.N. 534.**

———**S. 3, Expl.**—*Presentation of plaint—Date of—Leave under cl. 12 of Letters Patent, not material.*

The plaint even where leave is required is presented when it is handed over by the plaintiff or his agent to the proper officer in the prothonotary's office. The obtaining of the leave of the Judge under cl. 12 of the Letters Patent in a case where such leave is necessary and the admission of the plaint does not affect in any way the presentation of the plaint for the purposes of the Limitation Act. (*Beaumont C. J. and Rangnekar, J.*) RAMGOPAL CHUNILAL *v.* RAM SARUP. **6 R. B. 328 = 148 I C. 1038 = 36 Bom. L.R. 84 = A I.R. 1934 Bom. 91.**

———**S 3, Expl**—Suit—Date of institution—What is. *See* C.P. CODE, O 4, R. 1. **62 Cal. 1015.**

———**S. 4**—*Appeal—Time for filing—Vacation period to be added to the time allowed by Art. 156.*

Article 156 should be read with S. 4 of the Act and the period allowed for filing an appeal is the time allowed by Art. 156 plus the time during which the Court was closed. (*Kulwant Sahay and Mahomed Noor, JJ.*) RAM CHARAN SUKUL *v.* SRI THAKURJI MANDIL DARKADHIS. **I R. 1931 Pat. 169 (1) = 130 I.C. 265 (1) = 14 Pat.L T. 91 = A.I.R. 1931 Pat. 60.**

[N. F. 13 P. 632 (634).]

———**S. 4**—*Applicability—Application under S. 54 of the Provincial Insolvency Act* (1920).

Where the period of three months prescribed by S. 54 of the Provincial Insolvency Act expired during the vacation and the Official Receiver filed an application under S 54 of the Act for the annulment of a mortgage on the reopening day,

Held, that the petition was in time and validly presented. S. 10 of the General Clauses Act did not apply but the same effect was achieved by virtue of S. 4 of the Limitation Act which, by S. 29 (2), was made applicable to proceedings under the Provincial Insolvency Act. (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH MALABAR. **1933 M.W. N. 1049.**

———**S. 4**—*Applicability—Application under S. 68, Provincial Insolvency Act (V of 1920).*

By reason of the express terms of S. 29 (2) (*a*) of the Limitation Act, S. 4 of that Act applies to an application under S. 68 of the Provincial Insolvency Act, so that if the last day of limitation for that application happens to be a Sunday, it may be presented on the next day. 5 Rang. 384, Diss.; 34 A. 503, Rel. (*Page, C. J. and Das, J.*) MA THAN MAY *v.* BAILIFF OF THE TOWNSHIP COURT OF KYAUNGGON. **9 Rang 150 = I R. 1931 Rang. 287 = 134 I.C. 223 = A.I.R. 1931 Rang. 209.**

———**S. 4**—*Applicability—Judge being absent from headquarters—Presentation of appeal after return—Permissibility*

The Subordinate Judge of *S* used to sit for a week every month at *L*. During his absence the plaintiff presented his plaint at *S* which was accepted by the Naibsheriff of the Court. It was placed before the Judge on

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his return but by that time the appeal had become time-barred and was dismissed on that ground.

Held, that the Court at *S* should be deemed to have been closed during the time the Subordinate Judge was absent and the plaintiff was entitled to deduct that period. (*Bhide, J.*) NUR MAHOMED *v.* GHULAMAN. **15 Lah. 308=152 I.C. 618=7 R.L. 304=36 P.L.R 466=A.I.R. 1934 Lah. 622 (1).**

——**S. 4**—*Insolvency—Last day for enforcing debt being holiday—Adjudication of debtor on reopening day—Proof of debt in insolvency.*

If on the last day when the debt could have been enforced was a public holiday and on the next reopening day the debtor is adjudicated an insolvent, the debt is provable in insolvency. It is not necessary for the creditor for the purpose of keeping his debt alive, to file a suit on the reopening day after the intervention of the insolvency. (*Beasley, C.J., Ramesam and Cornish, JJ.*) FATMA BI *v.* NAGOORKHAN. **55 Mad. 630=I.R. 1932 Mad. 321=136 I.C. 822=1932 M.W.N. 216=35 L.W. 260=A.I.R. 1932 Mad. 287=62 M.L.J. 256 (F.B).**

——**S. 4**—*Minor—Court closed on the date of expiration of three years from his attaining majority—Right to institute suit on re opening day.*

The phrase "the period of limitation prescribed for any suit, etc," in S. 4 of the Limitation Act is wide enough to include a period of time contained in the First Schedule of the Limitation Act but computed with the aid of one or more of the Ss. 12 16 of the Limitation Act or starting from the date of attaining majority under S. 6 of the Act. So, if on the last day after three years from the date when a minor attained majority when he ought to have filed a suit, the Court is closed, he is entitled to the benefit of S. 4 and file his suit on the reopening day. 37 M.L.J. 256, Doubt; 36 B. 258, Diss; 45 M 785, Expl. 26 Bom. 782 and 44 Mad. 817, Dist. (*Cornish, J.*) NAGANNA *v.* KRISHNAMURTHY. **55 Mad. 286=135 I.C. 587=I.R. 1932 Mad. 171=1931 M.W.N. 1127=34 L.W. 650=A.I.R. 1932 Mad. 139=61 M.L.J. 675.**

——**Ss. 4 and 12**—*Mode of computation.*

In case of appeals the period prescribed by any article should first be subjected to the correction prescribed by S. 12, if the circumstances of the case justify such correction, and then if the end of such corrected period falls within the vacation, S. 4 may be applied and the appeal must then be lodged upon the day on which the vacation comes to an end and the Court reopens. A.I.R. 1931 Pat. 60, *held not correct law.* (*Courtney Terrell, C.J. and Macpherson, J.*) DHANNA MISTRY *v.* BENGAL NAGPUR RY. CO., LTD. **13 Pat. 632=151 I.C. 380=7 R.P. 83=15 Pat.L.T. 369=A.I.R. 1934 Pat. 367.**

——**S. 4**—*Presiding officer on leave—Absence does not amount to court being closed.*

The absence of a presiding officer of a Court is not tantamount to the Court being closed during the period of his leave within the meaning of S. 4 where the office of the Court is open and the establishment of the Court is present. (*Tapp, J.*) HIRA LAL *v.* SOJAN CHAND. **I.R. 1933 Lah. 197=142 I.C. 307=34 P.L.R. 338=A I.R. 1933 Lah. 239.**

——**Ss. 4 and 14**—*Scope and object of—"On the day on which that Court reopens"—"Court"—Meaning of.*

There is a marked distinction in the scope and purpose of Ss. 4 and 14 of the Limitation Act. S. 14 provides for the exclusion of certain periods in computing the period of limitation. S. 4, on the other hand, has nothing to do with computing the period of limitation. What it provides is that where the period prescribed expires on a day when the Court is closed, the

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application, etc., may be made on the day the Court reopens. There is nothing in S. 4 which alters the length of the prescribed period. The benefit under which can be claimed only when the application, etc., is made in the proper Court on the day on which that Court reopens. The Court in the words "on the day that the Court reopens" in S 4 means the proper Court in which the application, etc., ought to have been made. (*Lord Tomlin.*) MAQBAL AHMAD *v.* ONKAR PRATAP NARAIN SINGH. **62 I.A. 80=57 All. 242=7 R.P.C. 191=37 Bom L.R 533=37 P.L.R. 395=1935 A.W.R. 615=1935 O.W.N. 527=155 I.C 205=1935 A.L.J. 578=39 C.W.N. 640=41 L.W. 629=1935 M.W.N 438=61 C.L.J. 267=A.I.R. 1935 P.C. 85=68 M.L.J. 665 (P C).**

——**Ss 4 and 13**—*Time spent in obtaining copy and period of vacation during which Court is closed should be excluded.*

Judgment was delivered on 28th September, 1932. Ordinarily the period of limitation would have expired on 27th December, 1932. The appeal was filed on 8th February, 1933. Appellant applied for copies on 19th November, 1932, and received them on 29th November, 1932. Further the Court remained closed for the annual vacation from 29th September until 1st November, 1932.

Held, that appellant was entitled to exclude the period spent for obtaining copies and the period of vacation and that the appeal was in time. A.I.R. 1916 Pat. 317, Expl. and Rel. on; A.I.R. 1929 Pat. 615, Ref; Pat. M. J.C. No. 80 of 1931, Dist. (*Agarwala, J.*) PIKHESAR NATH TEWARI *v.* JANAKDEO NATH TEWARI. **146 I.C. 931=6 R.P. 299=A.I.R. 1934 Pat. 4.**

——**S. 5.**

Amendment of decree.
Appeal in forma pauperis
Applicability.
Delay in getting copies
Discretion of Court.
Duty of Court.
Equitable consideration
Execution.
Extension of time.
Fraud of pleader's clerk
Good faith.
Laches of Court.
Mistake as to Court.
Mistake as to Court-fee
Mistake of Counsel.
Mistake of party.
Mistake of pleader's clerk.
Negligence of Counsel.
Negligence of party.
Negligence of vakil's clerk
Order under.
Pardansahin lady.
Review application.
Review pending.
Scope.
Sufficient cause.
Miscellaneous.

Amendment of decree.

——**S. 5**—*Amendment of decree—Mortgage decree—Variation of decree and reduction of the amount of redemption ten months later — Appeal by decree-holder from original decree—Limitation.*

A decree on a mortgage bond which allowed the defendants to redeem on payment of Rs. 265 to the mortgagee was, on an application put in by the defendants ten months later varied and the amount payable

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by the defendants was reduced to Rs. 77. The decree-holder thereupon appealed within thirty days from the date of the variation, questioning the correctness of the original decree which permitted the defendants to redeem.

Held, it was a fit case in which time should be extended under S. 5 as the decree to be appealed against is the amended decree. 3 C.L.J. 188, Foll. (*Suhrawardy and Jack, JJ.*) SOUDAMINI DAS *v.* NABALAK MIA BHUIYA. **I.R. 1931 Cal. 699=133 I.C. 571=35 C.W.N. 251=A.I.R. 1931 Cal. 578.**

———**S. 5**—*Amendments of decree—Sufficient cause—Application for amendment of decree by the other side in the lower Court — Amendment unconnected with grounds of appeal.*

Whether in a case where an application for amending the decree was made in the lower Court, there is sufficient cause for extending the time under S. 5 must depend on the circumstances of each case. It is not an inflexible rule that an extension can only be granted if the amendment sought in the lower Court had something to do with the grounds on which the appeal is based. On the other hand, even in a case in which the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, circumstances may appear which may justly bring the case within the meaning of the expression "sufficient cause". 3 C. L. J. 188, *pro tanto*, Diss. (*Mukerji and Mitter, JJ.*) NANDALAL GANGULI *v.* DASARATHI MUKERJEE. **59 Cal. 1052=I.R. 1932 Cal. 520=138 I.C. 754=36 C.W.N. 218=A.I.R. 1932 Cal. 534.**

Appeal in forma pauperis.

———**S. 5**—Appeal *in forma pauperis* — Appeal filed without stamp along with application for permission to appeal as paupers—Court-fee paid after limitation on rejection of application. *See* C. P. CODE, S. 149. **1935 O.W.N. 162=A.I.R. 1935 Oudh 231.**

———**S. 5**—Appeal *in forma pauperis* — Application for leave to appeal *in forma pauperis* presented out of time—Rejection of motion—Subsequent application under S. 5, Limitation Act not maintainable—Appeal may be presented with the proper Court-fee accompanied by an application under S. 5. *See* C. P. CODE, O. 44, R. 1 **1933 A.L.J 585=A I R. 1933 All. 308.**

Applicability.

———**S. 5**—*Applicability—Appeal against dead man—Extention of time.*

Where the appeal was filed against a sole respondent who was dead some time before the date of the filing

Held, that the appeal against the dead man was null and void and that the Court did not have the power to admit the appeal under S 5 of the Limitation Act. (*Keane, J.M.*) SECRETARY OF STATE FOR INDIA *v.* NAGESHAR PRASAD RAI. **15 R.D. 244.**

———**S. 5**—*Applicability — Appeal to Privy Council held incompetent—Deduction of time.*

The judgment of the High Court was delivered on the 25th January, 1929. On the 22nd April, 1929, the Secretary of State applied for leave to appeal to His Majesty in Council and leave was granted on 2nd July, 1929. In March, 1931, however the Privy Council dismissed the appeal as incompetent. The Secretary of State came to know of this in May, 1931. In June, 1931, the successful party applied for a review of the judgment of the High Court. It appeared that the party had been misled by an earlier decision as to the competency of appeal.

Held, that the time between the delivery of the judgment and the disposal of the appeal by the Privy Council could not be deducted either under S. 14 (2) or S. 5 of the Limitation Act and that the application was not maintainable. (*C. C. Ghose, A.C.J. and Mitter, J.*) SECRETARY OF STATE FOR INDIA *v.* HINDUSTHAN CO OPERATIVE INSURANCE SOCIETY, LTD. **I.R. 1933 Cal. 323=144 I.C. 561=36 C.W.N. 40=A.I.R. 1932 Cal. 171.**

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———**S. 5**—*Applicability—Appeal under S. 39, Ordinance II of 1932.*

S. 5 of the Limitation Act is inapplicable to appeals from Special Magistrates under S. 39 of Ordinance II of 1932. The provisions as to limitation contained in S. 39 (2) of the Ordinance is a specific provision the consequences of which are provided for as a matter of limitation by S. 29 of the Limitation Act. (*Rankin, C.J and Pearson, J.*) NIL RATAN GANGULI *v.* EMPEROR. **60 Cal. 571=I.R. 1933 Cal. 478=143 I.C. 802=34 Cr.L.J. 633=37 C.W.N. 195=1933 Cr.C. 140=A.I.R. 1933 Cal. 124.**

———**S. 5**—*Applicability—Application for final decree in mortgage suit under Art.* 181.

The provisions of S. 5 are not applicable to an application for a final decree in a mortgage suit under Art. 181 of the Limitation Act, and the Court has, therefore, no discretion under S. 5 to extend the period of limitation prescribed by Art. 181. (*Lord Tomlin.*) MAQBAL AHMAD *v.* ONKAR PRATAP NARAIN SINGH. **62 I.A. 80=57 All. 242=7 R.P.C. 19=37 Bom.L.R. 533=37 P.L.R 395=1935 A.W.R. 615=1935 O.W.N. 527=155 I.C. 205=1935 A.L.J. 578=39 C.W.N. 640=41 L.W. 629=1935 M.W.N 438=61 C.L.J. 267=A.I.R. 1935 P.C 85=68 M L.J. 665 (P.C).**

———**S. 5**—*Applicability—Applications governed by Arts.* 163, 164, 168 *and* 169.

S. 5 of the Limitation Act does not apply to an application of the kind governed by Art. 163, or Art. 164, or Art. 168, or Art. 169. (*Mya Bu and Baguley, JJ.*) K. P. L. S. S. CHETTYAR *v.* THE OFFICIAL RECEIVER RAMNAD. **13 Rang. 595=159 I.C 945=8 R.R. 294=A.I.R. 1935 Rang. 466.**

———**S. 5**—*Applicability—Application to set aside abatement.*

S. 5 of the Limitation Act is expressly made applicable by O. 22, R. 9, C. P. Code, to an application to set aside abatement for which time can be extended for 'sufficient cause'. (*Boys and Smith, JJ.*) LAKSHMI CHAND *v.* BEHARI LAL. **54 All. 280=I.R. 1932 All. 47=135 I.C. 159=1932 A.L.J. 18=A.I.R. 1932 All. 459.**

———**S. 5**—*Applicability—Application to set aside* ex parte *decree—Time taken by—Deduction of.*

The time taken up by an application to set aside an *ex parte* decree, which was dismissed on the merits, cannot be deducted in computing the time allowed for an appeal from the same decree. 23 Cal. 325, Foll.; 44 I.A. 218, Dist. (*Mukerji and Mitter, JJ.*) RAJENDRA NATH KANRAR *v.* KAMAL KRISHNA KUNDU CHOWDHURY. **59 Cal. 1057=I.R. 1932 Cal. 507=138 I.C. 748=36 C.W.N. 352=A.I.R. 1932 Cal. 558.**

———**S. 5**—*Applicability—Applications under S.* 78, *Provincial Insolvency Act—Creditor's petition under S.* 9.

The provisions of S. 5 of the Limitation Act cannot be applied to the case of a creditor's petition under S. 9 of the Provincial Insolvency Act because such a petition is not an application within the meaning of S. 78 of that Act. Distinction between petition and application pointed out. (*Reilly and Anantakrishna Ayyar, JJ.*) GANGJEE PREMJEE & CO. *v.* O. L. K. K. N. FIRM, COLOMBO. **55 Mad. 766=I.R. 1932 Mad. 440=137 I.C. 740=1932 M.W.N. 204=35 L.W. 544=A.I.R. 1932 Mad. 352=63 M.L.J. 152.**

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———**S. 5**—*Applicability—Application under S. 17 proviso, Provincial Small Cause Courts Act, 1887—Extension of time for making deposit.*

Quære.—Whether the Court had the power to grant an extension of time for making the deposit in the case of an application under S. 17, Provincial Small Cause Courts Act, unaccompanied by such deposit. (*Dhavle, J.*) MUNSHI SINGH *v.* BANSROPAN CHAMAR. **I.R. 1933 Pat. 158=142 I.C. 599=14 Pat.L.T. 20=A.I.R. 1933 Pat. 134.**

———**S. 5**—*Applicability—Copy obtained before expiry of limitation—Deduction of time.*

When the copy of the trial Court's judgment has been obtained before the expiry of the period of limitation, the time spent in obtaining the same cannot be added under S. 5 to the end of the period of limitation. (*Hilton, J.*) SHAH QUMRI CHARAN *v.* DIN DAYAL. **6 R.L. 606=148 I.C. 818 (1)=36 P.L.R. 103=A.I.R. 1934 Lah. 464.**

———**Ss. 5 and 12**—*Applicability—Delay caused by supply of wrong information to copying department—Deduction of time.*

Where delay in filing an appeal which is *prima facie* time barred is caused by the supply of wrong information to the copying department, a person making the application is not entitled to deduction of time as of right. He has to satisfy the Court that the wrong information was given in circumstances for which he was not responsible, and if the Court is satisfied as to the justness of his contention, the Court will then extend time under S. 5. The appeal on the face of it is time barred and it is the duty of the applicant to append to his appeal the reason for the delay and to ask for condonation of the delay under S. 5. (*Grille, J.C.*) BALWANT RAO *v.* BALMUKUND. **155 I.C. 588=7 R.N. 196=A.I.R. 1935 Nag. 109.**

———**S. 5**—*Applicability—Dismissal of appeal for default—Application for restoration.*

An application for restoration of an appeal which has been dismissed for default of prosecution is governed by Art. 168 and S. 5 of the Limitation Act has no application to such a case. (*Heald and Brown, JJ.*) MA SEIN *v.* S. T. R. M. FIRM. **I R. 1933 Rang. 36=142 I.C. 185=A.I.R. 1933 Rang. 96.**

———**S 5**—*Applicability—Dismissal of suit for default—Limitation—Starting point.*

The starting point of the period of limitation for an application to set aside a dismissal for default of appearance of plaintiff is the date of dismissal, and not the date of knowledge as in Art. 164. Hence an application filed beyond 30 days from the date of dismissal should be dismissed, even though plaintiff is not aware of dismissal, S. 5, not having been made applicable to such application so as to give the Court power to extend the time. (*Rowland, J.*) DECRUZE *v.* PITTS. **147 I.C. 179=6 R.P. 345=A.I.R. 1933 Pat. 557.**

———**S. 5**—*Applicability*—Ex parte *decree.*

S. 5 does not apply to application for reopening an *ex parte* decree. (*Baguley, J.*) RAMANATHAN CHETTYAR *v.* BALDEO SINGH **6 I.R. (Rang.) 23=144 I C. 980=A.I.R. 1933 Rang. 110.**

———**S. 5**—*Applicability*—Ex parte *decree of Small Cause Court—Application to set aside—Powers of Court—Specific rules under S. 122, C. P. Code, extending S. 5 to such applications necessary.*

Except where there are special rules made by the High Court extending the provision of S. 5 of the Limitation Act to applications for setting aside *ex parte* decree, the Courts do not have the power to have recourse to the provisions of S. 5, or enlarge the period prescribed by Art. 164 by resorting to S. 151 of the C. P. Code. The

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Nagpur Judicial Commissioner's Court has not framed any rules under S. 122 of the C. P. Code extending the application of S. 5 of the Limitation Act to applications for setting aside *ex parte* decrees and so that Court has no such power. (*Subhedar, A. J. C.*) PUNDALIK VITHOBA *v.* GANPAT **I.R. 1933 Nag. 239=144 I.C. 394=A.I.R. 1934 Nag. 43.**

———**S. 5**—*Applicability—Petition for insolvency—Provincial Insolvency Act* (1920), *S.* 13.

S. 5, Limitation Act, does not apply to petitions for insolvency. A.I.R. 1932 Mad. 352, Foll. (*Dalip Singh, J.*) RATAN CHAND *v.* SMAIL. **149 I.C 853=6 R.L. 753 (2)=A I R. 1933 Lah. 821.**

———**S. 5**—*Applicability — Petition under O. 21, R. 90.*

S. 5 does not apply to an application made under R. 90, O. 21 (*Young and Rachhpal Singh, JJ.*) NAROTAM DAS *v.* BHAGWAN DASS. **151 I.C. 244=7 R.A. 119=3 A.W.R. 545=1934 A.L J. 859=A.I.R. 1934 All. 314.**

———**S. 5**—*Applicability—Proceedings before Revenue Officers.*

Revenue Officers are entitled to apply the principles of the limitation including S. 5 (*Irving, F.C.*) NAWAB *v.* GANDA MAL. **11 Lah.L.T. 35.**

———**S. 5**—Applicability—Punjab Alienation of Land Act, S. 21-A—Application under—Abatement—Setting aside—Power of Court to excuse delay. *See* C. P. CODE, O. 22, RR. 4 (3) AND 9 (3) **A.I.R. 1935 Lah 443.**

———**S 5**—*Applicability—Remedy of appeal open but not availed of—Time taken in review—Exclusion.*

Where a person had two remedies open to him, namely, to appeal or apply for review, and he chooses the latter and fails, he cannot apply to have the time taken in prosecuting the review to be excluded from the period of limitation for prosecuting his appeal. (*Gowan, R.M.*) BHIARILAL, *In re* **17 N.L.J. 22.**

———**S. 5**—*Applicability—Time limit under O. 21, R. 89, C. P. Code—Extension.*

Under O. 21, R. 89 the money to get the sale set aside has got to be deposited within thirty days of the date of sale. S. 148 has no application because the period of thirty days is not fixed or granted by the Court; it is fixed by the Code and cannot be extended under the Limitation Act. It is entirely inextensible. A.I.R. 1928 Rang. 286, Rel. on. (*Baguley, J.*) MAUNG LAT *v.* MAUNG KYAW THA. **147 I.C. 130=6 R R. 167=A.I.R. 1933 Rang. 8.**

———**S. 5**—*Applicability—U. P. Revenue Manual, R. 1057 — Appointment of Register Qanugo by Collector—Appeal—Delay—Power of Commissioner to excuse.*

In an appeal against the Collector's order appointing a Registrar Qanugo, the Commissioner has power both under S. 5 of the Limitation Act and under R. 1057, Revenue Manual, to excuse the delay in presentation and to extend the period of limitation. But before doing so, it is necessary that he should give his reasons for so doing. (*Oppenheim, S.M.*) KHEMA NAND *v.* KALEY RAI. **18 R.D. 710=16 L.R 82 (Rev.).**

Delay in getting copies.

———**S. 5**—*Delay in getting copies—Sufficient cause—Application for copies—Deficiency of copy stamps not supplied—Delay not wanton—Appeal filed seven days after reopening—Period expiring during vacation—Delay excused.*

The applicant had failed to supply the additional folios for obtaining copies It appeared however that he did not know of the deficiency and that when he did not know he took the necessary steps in all haste. He

LIMITATION ACT (1908), S. 5—Delay in getting copies.

filed the appeal seven days after vacation but the period for filing appeal had expired during vacation, It appeared that the procedure of the copying department was not such that the applicant could be held to have received information of the deficiency.

Held, that the Court could under the circumstances excuse the delay in filing the appeal. (*Pullan, J.*) RAHIM BUX *v.* MAIKU. **6 Luck. 578 = I R. 1931 Oudh 329 = 132 I.C. 777 = 12 L.R. 162 (Rev.) = 14 O L.J. 195 = 15 R.D. 459 = 8 O.W.N. 191 = A.I.R. 1931 Oudh 314.**

———**S. 5**—*Delay in getting copies—Delay due to erroneous practice of copying department.*

An appellant is entitled to the benefit of S. 5, where the appeal is not filed by him within the period of limitation on account of the delay in obtaining copies due to an erroneous practice prevailing in the copying department. (*Agha Haidar, J.*) RURA MAL *v.* RAM CHAND. **159 I.C. 178 = 8 R L 353 = 37 P.L.R. 784 = A.I R. 1936 Lah. 200.**

———**S. 5**—Delay in getting copies—Negligence of pleader's clerk—No sufficient cause *See* NEGLIGENCE OF PLEADER'S CLERK, *infra*. **1932 M.W N. 328.**

Discretion of Court.

———**S. 5**—*Discretion of Court—Arbitrary exercise of —Second appeal—Interference in.*

Where a discretion under S. 5, has been exercised on proper lines, that discretion may not be questioned in second appeal. But where the discretion has been exercised arbitrarily without due regard to the principles, that discretion cannot be said to have been properly exercised, and it may be challenged in second appeal. (*Mukerji, Ag.J.C. and Bennet, J.*) BADRI PRASAD *v.* AMJID ALI. **I R 1933 All. 386 = 144 I.C. 133 = 1933 A L J. 561 = A.I R. 1933 All 294.**

———**S. 5**—*Discretion of Court—Interference.*

When once a discretion has been exercised by the lower appellate Court under S. 5, the High Court will not interfere. (*Agha Haidar, J.*) RURA MAL *v.* RAM CHAND. **159 I C 178 = 8 R L. 353 = 37 P.L R. 784 = A.I R. 1936 Lah. 200.**

———**S 5**—*Discretion of Court—Sufficient cause.*

The Court under S. 5 has a discretion to excuse the delay in filing an appeal, and if it applies its mind to the question and exercise its discretion judicially after considering all the circumstances, it will be acting correctly. (*Srivastava, Ag C. J. and Smith, J.*) GOKUL PRASAD *v.* KUNWAR BAHADBR. **10 Luck. 250 = 152 I.C. 419 = 7 R.O. 215 = 11 O.W.N. 1359 = A.I.R. 1935 Oudh 30.**

Duty of Court.

———**S. 5**—*Duty of Court—Sufficient cause.*

The provisions of S. 5 of the Limitation Act are not involved in a consideration of the question whether the Court will allow the substitution of the name of a representative after 90 days from the date of death or not, but the Court has to be satisfied that the person was prevented by sufficient cause from making an application to bring the representative of the deceased on the record within 90 days from the date of the death of the deceased. (*Oppenheim, S. M. and Drake Brockman, J. M.*) UMRAO RAM *v.* GANGA DAS. **11 O.W.N. 713 = 18 R D. 298 = 15 L R. 353 (Rev.).**

Equitable consideration.

———**S. 5**—*Equitable consideration— Extension of limitation.*

Plaintiff cannot be allowed any extension of time to save limitation merely on equitable consideration unless the extension is provided for by the statute. A.I R. 1920 Mad. 1 (F.B.) and A.I.R. 1924 Lah. 40, Ref. (*Bhide, J.*) BASHESHAR DASS *v.* DIWAN CHAND. **6 I R. (Lah.) 287 = 146 I.C. 939 = 34 P.L.R. 1085 = A.I.R. 1933 Lah. 615.**

LIMITATION ACT (1908), S. 5—Extension of time.

Execution.

———**S. 5**—*Execution—Defective application filed on the last day—Failure to get copy of decree owing to misdescription—Case not fit for restoration.*

Where the decree holder waited for three years and on the last day filed his application for execution which was rejected as not being accompanied with a copy of the decree and the failure to obtain a copy of the decree was due to his having given a wrong description and a wrong date to the copying department.

Held, that the decree-holder was not entitled to any consideration and that it was not a fit case for restoration. (*Oppenheim, S. M. and Walton, J. M.*) SRI THAKUR RANGI MAHARAJ *v.* SANWALIA. **17 R.D. 273 = 14 L.R. 257 (Rev.).**

Extension of time.

———**S. 5**—*Extension of time—Appeal filed in time—Defect in vakalatnama remedied after limitation.*

An appeal was duly filed within time but the power-of attorney which the counsel for the appellants had filed along with the memorandum of appeal, was returned to him by the office, because it did not give the names of the parties. The power-of-attorney was re filed with the names of the parties entered in it after the expiry of limitation.

Held, that the omission of the names of the parties in the vakalatnama was a mere accidental oversight and should be condoned and that in any case, the benefit of S. 5 of the Limitation Act should be extended to the appellants. (*Agha Haidar, J.*) KANSHI RAM *v.* MUNICIPAL COMMITTEE, MOGA. **155 I.C 893 = 7 R.L. 797 = 36 P.L.R 277 = A.I.R. 1934 Lah 1011.**

———**S 5**—*Extention of time—Delay not explained.*

Where the appellant failed to pay a substantial portion of the Court fee in time and there is no question of *bona fide* mistake or misapprehension, there is no reason to extend the time. (*Addison and Hilton, JJ.*) PESHAURI LAL *v.* JAI KISHAN DAS. **142 I.C. 829 (1) = I.R. 1933 Lah 277 (2) = 33 P.L.R. 12.**

———**S. 5**—*Extension of time—Filing cross-objection —Excusing delay—Grounds—Notice served by affixation.*

Where notice of an appeal was served by affixation and it was difficult to say when he got it

Held, that a delay of 4 or 5 days in filing the memorandum of cross objections could be condoned. (*Drake Brockman, S M. and Holmes, J.M.*) BAL KISHORE SINGH *v.* RAHIMULLAH. **15 L.R. 69 (Rev.) = 18 R. D. 56.**

———**S. 5**—*Extention of time—Grounds—Power-of-attorney not being in form—Correction.*

Where a power-of-attorney in favour of a pleader is not in proper form the Court may extend the time for appeal in order to have the error rectified. (*Hilton, J.*) DOST MAHOMED *v.* SARDAR ALI. **7 R.L. 20 = 150 I.C. 731 = A.I.R. 1934 Lah. 444 (2).**

———**S. 5**—*Extention of time— Order refusing— Interference.*

The power to extend time under S 5, is discretionary. The High Court will not interfere in revision with an order refusing to grant extension based on certain reasons. (*Bhide, J.*) KHAZANA MAL BHAGAT RAM *v.* MANGAT RAM. **153 I.C. 259 (1) = 7 R.L. 421 = 35 P.L.R. 374.**

———**S. 5**—*Extension of time—Surety for appearance of judgment-debtor—Execution petition dismissed for default of decree-holder and surety discharged—Appli-*

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cation for restoration also dismissed—Appeal from order discharging surety.

Where an execution petition is dismissed for default of the decree holder and the surety for appearance of the judgment-debtor is discharged and an application to restore the execution petition is also dismissed, the decree-holder is not entitled to extension of time for an appeal from the order discharging the surety, in respect of the time spent in the application for restoration. Such an application cannot be considered to be proper alternative remedy for getting the order of discharge of surety set aside, as the liability of the surety is not automatically revived on the restoration of the application. (*Bhide, J.*) KASHMIRI LAL *v.* CHUNI LAL. **155 I.C. 503=7 R.L. 724=A I.R. 1934 Lah. 349.**

———**S. 5**—*Extension of time—Technical omission due to defective copy supplied by Court—Condonation of.*

An appeal from a decree was dismissed on the ground of the absence of the formal order as well as on the ground that in the memorandum, the names of all the appellants and respondents were not mentioned. Before the appeal came on for hearing, the complete list was filed and the reason for failure to do so was explained as due to the fact that in the certified copies supplied, the parties were described as shown in the memorandum.

Held, that the District Judge should have exercised his powers under S. 5 and extended the time for filing the appeal up to the date when the complete list was filed. (*Tek Chand, J.*) MT. KHEMI *v.* KESHAV RAM. **6 I. R. (Lah.) 234=146 I.C. 517=A.I.R 1933 Lah. 224.**

———**S. 5**—*Extension of time—Time prescribed by Art.* 166.

The period of limitation under Art. 166 being fixed by statute and not by the Court, it cannot be extended under S. 148, C. P. Code, or under S. 5, Limitation Act. (*Middleton, J.C.*) BHAGCHAND *v.* MT. NAJAB SULTAN. **148 I.C. 1082=6 R Pesh. 69=A.I R. 1934 Pesh. 25.**

Fraud of pleader's clerk.

———**S. 5**—*Fraud of pleader's clerk—Extension of time.*

Where the limitation for filing an appeal has expired due to the deliberate fraud of the Counsel's clerk and there is no fault either on the part of the client himself who had paid everything he had to pay or on the part of the Counsel who trusted his clerk, S 5 of the Limitation Act may be used for extending the time. (*Young, C.J. and Din Muhammad, J.*) ALLAH WADHAYA *v.* HAJI MUHAMMAD RAMZAN-AMIR-UD-DIN. **155 I C 135=7 R.L. 640=36 P.L.R. 284=A.I.R. 1934 Lah. 986 (2).**

Good faith.

———**S. 5**—*Good faith—Necessity of.*

The element of "good faith" is necessary to bring a case even with the purview of S. 5. A.I.R. 1932 Oudh 523 (F.B.), Rel. on. (*Wazir Hasan, C.J. and Raza, J.*) MT. PATRAJI *v.* RADHIKA BAKHSH SINGH. **147 I. C. 799=10 O.W.N. 1247=6 R.O 307=A.I.R. 1934 Oudh 10 (1).**

Laches of Court.

———**S. 5**—*Laches of Court—Delay due to—Exclusion of—Right of party.*

No litigant party can suffer on account of the laches or delay of the Court or its officers. Where, therefore, in spite of an order passed by the Sub-Judge on the 25th March, 1924, directing the plaint to be returned to the plaintiff for presentation to the proper Court, it was not however returned in fact till the 10th of April owing to delay by office.

LIMITATION ACT (1908), S. 5—Mistake of Counsel.

Held, that the plaintiff was entitled to have the period between 25th March and 10th April excluded in computing the period of limitation. (*Jai Lal and Agha Haidar, JJ.*) MAHOMED DIN *v.* GURBAKSH SINGH. **I.R. 1933 Lah. 408=144 I.C. 5=34 P.L.R. 634=A. I.R. 1933 Lah. 611 (1).**

Mistake as to Court.

———**S. 5**—*Mistake as to Court—Land acquisition appeal preferred to High Court—Return for presentation to District Judge—Party being misled by prevailing practice—Excusing delay.*

A Land acquisition appeal which was originally presented to the High Court was returned and was presented to the District Judge. It appeared that the practice on the date when the appeal was first filed was to prefer such appeals to the High Court. It was however held in two subsequent decisions of the High Court that such appeals should be preferred to the District Judge. It appeared that those decisions rested on an earlier Privy Council case which impliedly decided the question. The appellant sought to exclude the time taken in filing the appeal first to the High Court.

Held, that though the decision of the Privy Council was before the date of the filing of the appeal to the High Court, the question as to the proper forum for appeal was by no means settled till the High Court decided the matter, and that it was a proper case for excusing the delay. (*Ramesam, J.*) SUNDARAGIRI-RAJA AYYANGAR *v.* BALASUBRAMANIA AYYAR. **152 I.C. 155 (2)=7 R.M. 190=1934 M.W.N. 991=A.I. R. 1934 Mad. 637 (1)=67 M.L.J. 902.**

Mistake as to Court-fee.

———**S. 5**—*Mistake as to Court fee*—Bona fide *mistake—Deficiency in Court fee on copies of judgments—One day's delay—Extension of time.*

The judgment of the Court below was pronounced on the 14th June, 1930, but as vacations intervened before the time for appeal expired the last day for filing the appeal was 6th October. It was filed shortly before the reopening of the Court on the 3rd October but the office found the Court-fee paid on the memorandum and copies to be insufficient and therefore returned the papers. The appeal was refiled on 6th October with the correct Court fee on the memorandum of appeal. The other papers, namely copies of the judgments, were properly stamped on 7th October; that is a day later than the last possible date. It was contended that the appeal was not presented in time.

Held, that the defect that was left after making up the deficiency on the memorandum of appeal was comparatively unimportant and that the case was a fit one for extension of time under S. 5. (*Abdul Qadir, J.*) THAKAR DAS *v.* MIR ZAMAN **131 I.C. 127=32 P. L.R. 240=A.I.R. 1931 Lah. 349.**

Mistake of Counsel.

———**S. 5**—*Mistake of Counsel.*

There is no authority for the view that a mistake of a legal advisor, however gross and inexcusable, if *bona fide* acted upon by a litigant will entitle him to the protection of S. 5. The discretion given to Courts by that section cannot be crystallized into a rigid rule of law but the following rule expressed by Brett, M.R., in *Highton* v. *Treherne*, (1878) 48 L. J. K. B. 167, embodies a sound working formula. "In cases of negligence or gross want of legal skill of his legal advisor, the suitor has his remedy against the legal advisor and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct or through negligence nor through want of reasonable skill but such as a skilled person might make, the rights of the client should not be thereby forfeited."

LIMITATION ACT (1908), S. 5—Mistake of Counsel.

(Case-law, English and Indian, exhaustively discussed.) (*Mukerji and Guha, JJ.*) SURENDRA MOHAN RAI CHAUDHURY *v.* MOHENDRA NATH BANERJEE. **59 Cal. 781 = 140 I.C. 662 = I.R. 1933 Cal. 14 = 36 C.W. N. 420 = A.I.R. 1932 Cal. 589.**

——**S. 5**—*Mistake of Counsel—Accidental mistake.*

Accidental mistake of the Counsel in making in the bundle a certain date as the last day on which the appeal could be filed, which was a day too late, is no ground for excusing delay under S. 5. 86 I.C. 114, Ref. (*Curgenven, J.*) NATESA MUDALY *v.* VEDACHELA NAICKEN. **1931 M.W.N. 1161.**

——**S. 5**—*Mistake of Counsel—Appeal erroneously preferred to District Court—Law relating to forum never in doubt—Mistaken advice of Counsel, if a sufficient excuse.*

A legal adviser's mistake to justify extension of limitation must be a *bona fide* one, that is, it must be done with due care and attention. But when there has never been any doubt as to the law in the Punjab regarding the forum for an appeal from a suit for accounts and it has always been held that it was the value of the amount decreed that determined the Court of appeal and when the amount decreed was over Rs. 10,000 the appeal lay to the High Court, the appellant who had preferred his appeal to the District Court is not entitled to an extension of time on the ground of the erroneous advice of his Counsel. (*Harrison and Addison, JJ.*) UTTAM CHAND *v.* VISHAN DAS. **I.R. 1933 Lah. 536 = 144 I.C. 627 = A.I.R. 1933 Lah. 568.**

——**S. 5**—*Mistake of Counsel*—Bona fide *mistake—Pleader failing to get fresh power-of-attorney—Extension of time.*

Where the Counsel made a *bona fide* mistake in failing to get a fresh power of-attorney after the death of the party for the purpose of impleading the legal representatives.

Held, that the Court could extent the time under S. 5. (*Bhide and Tapp, JJ.*) PARJA *v.* DUMANUN. **I.R. 1931 Lah. 845 = 133 I.C. 877 = 32 P.L.R. 389.**

——**S. 5**—*Mistake of Counsel—Excusing delay—Grounds.*

In order that S 5 may be invoked in favour of party it must be fund that the error which caused the delay was one that might easily have occarred even if reasonably due care had been exercised by the advocate. Where the Advocate concerned left for England and left the copying fees with his clerk who however did not deposit the money and misappropriated the same and that even after the Advocate's return he did not look into the matter for three months and then applied for re admission of the appeal,

Held, that the delay was unreasonable and could not be excused. (*Heald and Brown, JJ.*) MA SEIN *v.* S. T. R. M FIRM. **I.R. 1933 Rang. 36 = 142 I.C. 185 = A I R. 1933 Rang. 96.**

——**S. 5**—*Mistake of Counsel—Sufficient cause.*

Where an appeal lay to the Judicial Commissioner's Court and it was through mistake preferred in the Court of the District Judge, and the mistake committed in presenting the appeal in the Court of the District Judge was an honest one, and the appellants were not guilty of any carelessnes or negligence, for they relied on the advice of the Counsel engaged by them.

Held, that they should not suffer for the Counsel's mistakes and that the appellants were entitled to the extension of time under S. 5. (*Middleton, J. C. and Saaduddin, A. J. C.*) AHMAD SHAH MUBARAK SHAH *v.* ATTA KHAN. **7 R. Pesh. 49 = 152 I C. 323 = A.I.R. 1934 Pesh. 57.**

LIMITATION ACT (1908), S. 5—Mistake of party.

——**S. 5**—*Mistake of Counsel—Sufficient cause.*

An honest mistake made by a litigant on an erroneous advice given by his lawyer is a sufficient cause for extending limitation. 22 A. L. J. 674, Appl. (*Oppenheim, S. M. and Drake Brockman, J.M.*) BHAGWATI DEVI *v.* LACHMAN DAS. **14 L.R. 441 (Rev.) = 17 R D. 577.**

——**S. 5**—*Mistake of Counsel—When sufficient to justify extension.*

A legal adviser's mistake to justify extension of limitation must be a *bona fide* one, that is, it must be done with due care and attention. But when there has never been any doubt as to the law in the Punjab regarding the forum for an appeal from a suit for accounts and it has always been held that it was the value of the amount decreed that determined the Court of appeal and when the amount decreed was over Rs. 10,000 the appeal lay to the High Court, the appellant who had preferred his appeal to the District Court is not entitled to an extension of time on the ground of the erroneous advice of his Counsel. (*Harrison and Addison, JJ.*) UTTAM CHAND *v.* VISHAN DAS. **I.R. 1933 Lah. 536 = 144 I.C. 627 = A.I.R 1933 Lah. 568.**

——**S. 5**—*Mistake of Counsel—Wrong advice of Counsel—Delay, if to be excused.*

An appellant is entitled to the benefit of S. 5, though he has acted in good faith on the advice of Counsel, when such advice is given negligently, though honestly. (*Nanavutty and Zia ul-Hasan, JJ.*) BHAGWAN DIN *v.* BADRI PRASAD. **153 I.C. 161 = 7 R.O. 309 = 11 O. W N. 1530 = A.I.R. 1935 Oudh 108.**

——**S. 5**—*Mistake of Counsel—Wrong advice of Counsel—Sufficient cause.*

Whether a litigant is entitled to an extension of limitation owing to a mistake of his pleader must depend entirely on the circumstances of each case. The party is not precluded from showing that he acted on the advice given him by his pleader but that advice must be honest advice arrived at after a study of the case and the object of the discretion permitted by S. 5 would be defeated if the client were entitled to shelter behind the advice of a pleader given carelessly and recklessly. (*Grille, A.J.C.*) NARESHWAR *v.* CHABILDOS. **I R. 1933 Nag. 197 = 144 I C. 41 = A.I.R. 1934 Nag. 52.**

——**S. 5, Expl.**—*Mistake of Counsel—Mortgage suit—Preliminary and final decrees—Appeals from—Conflicting decisions—Sufficient cause.*

Where the appellant had filed an appeal only from the final decree and none from the preliminary decree and in an application to convert it into an appeal from the preliminary decree and excuse the delay, he pleaded that his advocate was misled by the conflicting decisions of that Court as regards the competency of appeals from preliminary and final decrees

Held, the conflict related to a different point, even that had been set at rest by the decision of the Full Bench in 57 C. 1013; that on the incompetency of the appeal in the present form, S. 97 was and had all along been quite clear and that there was no ground made out for excusing the delay. (*Mukerjee and Guha, JJ.*) SURENDRA MOHAN RAI CHOUDHURY *v.* MOHENRAD NATH BANERJEE. **59 Cal. 781 = 140 I.C. 662 = I.R. 1933 Cal. 14 = 36 C.W.N. 420 = A.I.R. 1932 Cal 589.** **[Appr.** 9 Luck. 193 (196) (F.B.). **Rel.** 29 N.L.R. 295 (297).**]**

Mistake of party.

——**S. 5**—*Mistake of party—Last day of limitation falling on a holiday—Practice of Commissioner to work on that day unknown to party—Appeal may be filed on next working day.*

Where the last day of limitation for an appeal was the last Saturday of the month which was generally

LIMITATION ACT (1908), S. 5—Mistake of party.

regarded as a holiday but, which however, was a working day according to the individual practice of the Commissioner,

Held, the party may be excused for his ignorance of the Commissioner's individual practice and the appeal allowed to be filed on the next working day (*Oppenheim, S.M. and Walton, J.M.*) KHALIL AHMAD *v.* LALTUA. **14 L.R. 293 (Rev.) = 17 R.D 412**

——**S. 5**—*Mistake of party—Sufficient cause—Alleged mistake in reading date* '9' *as* '19'.

Where the appellant who filed his appeal on the 19th instead of the 9th December alleged that he made a mistake in reading the date '9' as '19' in the letter written by Counsel's clerk, but the letter was not produced,

Held, that no sufficient cause was made for condoning the delay. (*Bisheshwar Nath, J.*) MAHOMED RAZA *v.* GANGA DEVI. **I.R. 1932 Oudh 204 (1) = 136 I.C. 838 = 9 O.W.N. 227 = A.I.R. 1932 Oudh 167.**

——**S. 5**—*Mistake of party—Sufficient cause—Appeal from decree based on award*—Bona fide *mistake—Subsequent appeal from the order modifying the award.*

Where the appellant being misled by the only reported decision on the question erroneously preferred an appeal from the decree based on an award the time during which that appeal was pending may be deducted as a plausible excuse for extension of time under S. 5 for preferring a fresh appeal from the order of the Court modifying the award. (*Mukerji and Bartley, JJ.*) NILMONI PAL *v.* DAKSHINESWAR PAL. **I.R. 1932 Cal 539 = 36 C.W.N. 1069 = 138 I.C. 848 = A.I.R. 1932 Cal. 713.**

——**S. 5**—*Mistake of party—Sufficient cause—Mistake in amount of Court-fee.*

Where the appellant honestly believed that he paid the proper Court fee when he originally presented the memorandum of appeal which was admittedly within time.

Held, that the delay in paying the adequate Court-fee should be condoned. (*Jai Lal, J.*) BHAGWAN DAS *v.* TIKAYA RAM. **I.R. 1933 Lah. 423 = 144 I.C. 184 = A.I.R 1933 Lah. 264.**

Mistake of pleader's clerk

——**S. 5**—*Mistake of of pleader's clerk.*

Where by a *bona fide* mistake of the clerk, an earlier judgment of the same date and same month but of a different year was filed along with the memorandum of appeal and subsequently on discovery of the mistake the counsel prayed to have the correct judgment filed when the time for presenting the appeal had expired,

Held, that the mistake being *bona fide*, the time should be extended. (*Jai Lal, J.*) THAKAR SINGH *v.* JAGAT SINGH. **I R 1933 Lah. 3 = 140 I.C. 495 = 33 P L.R. 1085 = A.I.R. 1933 Lah. 1.**

——**S. 5**—*Mistake of pleader's clerk—Extension of time.*

A memorandm of appeal was filed out of time by two days. The explanation given for the delay was that in accordance with the longstanding practice, the clerk of the Government Pleader's office inquired of the stamp reporter as to the last day for filing of appeal, and believing in good faith his calculation to be correct, the appeal was filed.

Held, that the stamp reporter or any body in his office was not under any obligation to inform litigants or their advisers as to last date for filing appeals, that the litigant or his legal adviser, (*i.e.*, the Government Pleader or his assistant in this case) was responsible for making such calculations, that the mistake in this case was not of a legal adviser or his clerk but of some body who was in no better position than a man in the street and as such the discretion under S. 5 could not be

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exercised. (*C. C. Ghose, and S. K. Ghose, JJ.*) KHAJEH HABIBULLAH *v.* ABDUL KARIM ABU AHMAD KHAN. **57 C.L.J. 39 = 6 I R. (Cal.) 72 = 145 I.C. 116 = A.I.R. 1933 Cal. 462.**

——**S. 5**—*Mistake of pleader's clerk—Sufficient cause.*

Where on an application to set aside an *ex parte* decree passed by the Small Cause Court, the decretal amount required by S. 11 of the Provincial Small Cause Courts Act to be deposited in Court, though handed over to the vakil's clerk by the party in time, could not be deposited in Court in time owing to the *bona fide* mistake of the vakil's clerk in mislaying the chellan, *held*, there was sufficient cause to excuse the delay under S. 5. There is no distinction for the purpose of this section between a mistake committed by a party's vakil and one committed by his clerk. 21 L.W. 24; 44 M.L.J. 247; 45 Mad, 628, Rel. (*Anantakrishna Ayyar, J.*) RAMJI DAS MAHANT BAVAJEE *v.* KUMARAKALATHI MUDALI. **135 I C. 737 = I R. 1932 Mad. 209 = 34 L W. 795 = A I.R. 1932 Mad. 142 = 61 M.L J. 710.**

[R. 1932 M.W.N. 328 (329)]

Negligence of Counsel.

——**S. 5**—*Negligence of Counsel.*

The plaintiff is not entitled to the benefit of S. 5 where he has acted in good faith on the advice of Counsel which advice has been given negligently even though honestly. 10 O.W.N. 1154, Foll. (*Srivastava and Nanavutty JJ.*) RAJENDRA BAHADUR SINGH *v.* RAI RAJESHWAR BALI. **6 R O. 536 = 149 I.C. 239 = 11 O. W.N. 653 = A I.R. 1934 Oudh 360.**

——**S. 5**—*Negligence of Counsel—Appeal presented by pleader with defective power.*

Where a pleader whose power has terminated with proceedings in trial Court does not take steps to find out whether or not the appeal has been properly presented, he acts without due care and attention and as he delays in the hope that the irregularity might escape detection, it does not form proper cause for the delay in filing the appeal. 59 Cal. 781; 7 Rang. 18 and 5 N L.R. 25, Rel. (*Macnair, J C.*) RAMRAO BAPU *v* SANTOSHRAO PANDURANG. **29 N L R. 295 = 6 I.R. (Nag.) 58 = 145 I.C. 760 = A.I.R. 1933 Nag. 219.**

——**S. 5**—*Negligence of Counsel—"Sufficient cause"—Counsel's advice—Gross carelessness—Extension of time.*

A Court may give a liberal construction to the words "sufficient cause" but the interpretation should be in accordance with judicial principles. A client preferring a time-barred appeal under the mistaken advice of his Counsel may be entitled to the benefit of S. 5 but the mistake must be *bona fide*, *i.e.*, made in spite of due care and attention. *Bona fide* mistake on the part of the Counsel may be excused but want of care and attention is not "sufficient cause." Filing of an appeal in a wrong Court through carelessness of the Counsel is not a "sufficient cause" for presenting the appeal to the proper Court after the expiry of the period of limitation. (*Wazir Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MITHOO LAL *v.* JAMNA PRASAD. **9 Luck 193 = 6 I.R. (Oudh) 83 = 146 I.C. 127 = 10 O.W.N. 1154 = A.I.R. 1933 Oudh 523 (F.B.).**

——**S. 5**—*Negligence of Counsel—"Sufficient cause."*

The power conferred on the Court for enlarging time under S. 5 is discretionary. A *bona fide* mistake on the part of the pleader may be condoned but gross negligence on his part cannot justifiably be condoned so as to extend time under S. 5. The client has his remedy against the defaulting legal adviser. *Highton* v. *Treherne*, (1878) 48 L. J. Ex. 167, Rel. on. (*Maung Ba,*

LIMITATION ACT (1908), S. 5—Negligence of party.

J.) MAUNG PO CHEIN *v.* PO THA. **I R. 1931 Rang. 139 (1) = 131 I.C. 507 (1) = A.I.R. 1931 Rang. 80.**

Negligence of party.

——**S. 5**—*Negligence of party—Gross negligence.*

Where the applicant is guilty of gross negligence and carelessness in not taking the proper proceedings in the proper Court, application for extension of time under S. 5 should not be allowed. (*Raza and Srivastava, JJ.*) GANESH DAS VARMA *v.* HARI CHAND **151 I.C. 529 (1) = 7 R.O. 131 = 11 O.W.N. 1256 - A.I.R. 1934 Oudh 131 (1).**

——**S. 5**—*Negligence of party—Second extension of time—Refusal.*

It cannot be held that after the error regarding in effective filing of an appeal is pointed out and ample time given for its rectification, the excuse of carelessness can be pleaded a second time for the grant of a further extension of time. (*Irving, J.C.*) HAYAT *v.* MAHOMED HUSSAIN. **11 Lah L.T. 31.**

Negligence of Vakil's clerk.

——**S. 5**—*Negligence of Vakil's clerk—No sufficient cause.*

Where an application for copies was returned for being dated and represented but the Vakil's clerk waited till the printing charges were called for with the result that the application was dismissed in due course and he filed a fresh application and appeal was filed out of time with copies so obtained.

Held, that there was no sufficient cause to excuse delay.

Semble.—It seems to be cumbrous to hold that the second application is a continuation of the former one so as to apply S. 12. (*Jackson, J.*) POONGAVANA GRAMANI *v.* MANICKA GOUNDAN. **1932 M.W.N. 328.**

Order under.

——**S. 5**—*Order under.*

An order extending time under S. 5, should give sufficient indication that the discretion given by the law has been judicially exercised. (*Suhrawardy and Graham, JJ.*) JNANADA SUNDARI SHAHA *v.* MADHABCHANDRA MALA. **59 Cal. 388 = I R. 1932 Cal. 483 = 138 I. C. 613 - A.I.R. 1932 Cal. 482.**

——**S. 5**—*Order under—Order refusing to extend time—Interference in second appeal.*

Where the Court below upon a consideration of the facts before it and surrounding circumstances comes to the conclusion that no proper case has been made out for exercising its discretion for extending the period of limitation under S. 5 and dismisses the appeal on that ground, there is no point of law involved in the appeal so as to call for interference in second appeal. (*Sen and Niamatullah, JJ.*) RAMA SHANKAR *v.* JANKI PRASAD. **130 I.C 840 (2) = 1930 A.L.J. 1256 = A.I.R. 1931 All 28.**

Pardanashin lady.

——**S. 5**—*Pardanashin lady—Appeal filed without stamp and out of time—Extension.*

A memorandum of appeal was filed without any stamps and out of time by 21 days.

Held, that even though the litigant was a pardanashin lady, extension of time ought not to be granted. (*C.C. Ghose and S. K. Ghose, JJ.*) BENODINI CHAUDHURANI *v.* JAGABANDHU ROY. **6 I.R (Cal) 206 = 37 C.W.N. 179 = 146 I.C 359 (1) - A.I.R. 1933 Cal. 796.**

Review application.

——**S. 5**—Review application—Application in time without certified copy of order sought to be reviewed—Certified copy filed after limitation—Period, if to be extended. *See* PATNA HIGH COURT RULES. **16 Pat.L.T. 595 = A.I.R. 1935 Pat. 486.**

LIMITATION ACT (1908), S. 5—Sufficient cause.

——**S. 5**—*Review application—Sufficient cause.*

An application for review of judgment must be made within 90 days of the passing of the judgment and it is only when sufficient cause is shown that the time can be extended under S. 5 Application rejected. (*Mukerji and Bennet, JJ.*) BHUKHAN SARAN *v.* PIARE LAL. **1931 A.L.J. 103 = 130 I C. 839 = A.I.R. 1931 All.218.**

Review pending.

——**S. 5**—*Review pending—Application for—Time taken up in.*

The time spent by the party in prosecuting with due diligence an application for review should be excluded in calculating the time for filing an appeal. 49 B. 149 and 45 C. 94, Foll. (*Wild, J.C. and Milne, A.J.C.*) PRIDHANMAL *v.* LALOO. **25 S.L R. 242 = I R. 1931 Sind 33 = 130 I.C. 545 = A I.R. 1931 Sind 3.**

——**S. 5**—*Review peding—"Sufficient cause"—Appeal filed beyond time—Excuse of delay—Pendency of review application—If a good ground,*

A review application is a good ground for extending limitation in the case of an appeal presented beyond time, if the review application has been prosecuted with proper diligence only and not otherwise Where a review application requiring *ad valorem* stamp duty is not so stamped, and the deficiency is not made good when demanded, and as a result the application is dismissed, it cannot be said to have been prosecuted with proper diligence and time cannot therefore be excluded under S. 5. (*Weston, J.C.*) KANHIYA LAL *v.* MST PHULAN. **1935 A.M.L.J. 22.**

Scope.

——**S. 5**—*Scope.*

The provisions of S. 5 can only be invoked when the period of limitation has actually expired. The section does not apply to suits. (*Grille, J.C.*) MODEL MILLS, NAGPUR, *v.* HIRALAL RAMGOPAL. **30 N.L.R. 294 = 6 R.N. 255 = 149 I.C 956 = A.I.R. 1934 Nag. 145.**

——**S 5**—*Scope—Appeal filed beyond time—Discretion of Court.*

Under S. 5 it is competent to a Court to admit an appeal filed after the period of limitation, if the appellant shows sufficient cause for the delay. (*Sulaiman, C. J. and Rachhpal Singh, J.*) SUDAMA RAI *v.* BISHESHAR PRASD. **152 I.C. 939 = 7 R.A. 419 = 4 A W.R. 1460 = 18 R D. 706 = 16 L.R. 131 (Rev.) = A.I.R. 1935 All. 92.**

Sufficient cause.

See also UNDER THE OTHER HEADINGS IN S. 5.

——**S. 5**—Sufficient cause—Application to bring on record legal representatives—Delay in making—Ignorance of death of deceased—If adequate ground. *See* C. P. CODE, O. 22, R 9 (2). **155 I C. 610 = A.I.R. 1935 Lah. 478.**

——**S. 5**—"*Sufficient cause*"—*Application to set aside abatement—Ignorance of death of party.*

Ignorance of the death of one of the respondents, in the absence of any negligence or other act or omission for which the applicant can be held responsible, can be "sufficient cause" within the meaning of S. 5 A.I.R. 1925 Pat. 162, Ref. (*Boys and Smith, JJ.*) LAKSHMI CHAND *v.* BEHARI LAL. **54 All. 280 = I.R. 1932 All. 47 = 1932 A.L.J. 18 = 135 I.C 159 = A.I.R. 1932 All. 459.**

——**S. 5**—*Sufficient cause—Calcutta Municipal Act (III of 1923), S. 141, Sub S. (2)—Order of Deputy Executive Officer—Appeal from.*

Though the order by the Deputy Executive Officer was passed on 2nd May, 1928, and the assessee ought to have filed his appeal within one month from that date but in fact did so on the 28th September, where it was proved that he knew of the order only on the 2nd

LIMITATION ACT (1908), S. 5—Sufficient cause.

September in spite of various attempts made by him to acquaint himself with what had happened and there was no question of want of *bona fides* on his part, *held*, 'sufficient cause' had been made out for extension of the period of limitation. (*Mukerji and Mitter, JJ.*) CORPORATION OF CALCUTTA *v.* A. C. PAL. **58 Cal. 793=I.R. 1931 Cal. 684=133 I.C. 332=54 C.L.J. 475=35 C.W.N 283=A.I.R 1931 Cal. 506.**

———**S. 5**—*Sufficient cause—Case prosecuted in good faith and with diligence.*

Where the appellant had been prosecuting his case in good faith and with due diligence and he had been sent from Court to Court and still the matter in controversy had not been decided by any Court,

Held, that the appellant had sufficient cause for not preferring the appeal within the period of limitation. (*Raza and Bisheshwar Nath, JJ.*) ABID ALI KHAN *v.* KIDAR NATH. **142 I.C. 826=I.R. 1933 Oudh 135 =9 O.W.N. 1165=A.I.R. 1933 Oudh 83.**

———**S. 5**—*Sufficient cause—Copy of order filed in one and not filed in connected appeal.*

Where two appeals were filed from the same order but a copy of the order was filed in only one of them in time and the copy in the other appeal was filed out of time,

Held, that it was a fit case in which the period of limitation should be extended under S. 5. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) DOMI LAL SAHU *v.* BIJOY PRASAD SINGH. **12 Pat. 36=141 I.C. 37=I. R 1933 Pat. 39=13 Pat.L.T. 612=A.I.R. 1932 Pat. 349.**

———**S. 5**—*Sufficient cause—Inability to file on the last day proved.*

It is sufficient for the applicant to prove that he was unable to file the appeal on the last day. It is not necessary for him to satisfy the Court that he was unable to present the appeal throughout the period allowed by the law. 132 I.C. 169, Foll. (*Curgenven, J.*) NATESA MUDALY *v.* VEDACHALA NAICKAN. **1931 M.W.N. 1161.**

———**S. 5**—*Sufficient cause—Onus.*

It is the duty of the litigant to know the last day on which he can present his appeal and if he has been guilty of delay, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. 41 Mad. 412 (P.C.), Ref. Where the appellants did not show any particular diligence in the appeal and indeed did not take the trouble to apply for a copy at all till more than a month and a half after the judgment had been delivered, the Court held there was no ground for extending the time. (*Percival, J.C. and Rupchand Bilaram, A.J.C.*) MANGHOMAL *v.* BIBI SARDAR KHATUN. **24 S L R. 415=I.R. 1931 Sind 89=132 I.C. 473=A.I R. 1931 Sind 58.**

———**S. 5**—*Sufficient cause—Partition proceedings under the U. P. Land Revenue Act (III of 1901)—Orders on specific matters—Appeal—Limitation for—Prevailing view.*

Any objection that the parties may entertain against the Collector's orders on specific matters may be urged in an appeal recording or confirming the partition under the U. P. Land Revenue Act (III of 1901). That was the view held till the decision in 14 R.D. 538 in 1930 holding that such specific orders are governed by the six months' limitation in S. 214. The original view has now been affirmed to be the law by the Amending Act, II of 1932.

Held, even apart from the amendment, the fact that it was believed that orders on specific matters could be challenged in an appeal from the final order was a sufficient cause for extending the time under S. 5 of the

LIMITATION ACT (1908), S. 6.

Limitation Act. (*Oppenheim, S.M. and Walton, J.M.*) ABDUL WAHID *v.* RAM BALI. **14 L.R. 191 (Rev.)= 17 R.D. 247.**

———**S. 5**—*Sufficient cause—Proof of.*

Where an appeal is filed beyond the time, it is for the appellant to show sufficient cause for extending the time; and for this he has to justify every day taken beyond time. (*Harrison and Addison, JJ.*) KANHAYA LAL SARDHA RAM *v.* BALDEO DAS **14 Lah. 656=6 I.R. (Lah.) 163=146 I.C. 45=34 P.L.R. 937=A.I.R. 1933 Lah. 681.**

Miscellaneous.

———**S. 5**—Miscellaneous—Suit for possession by dispossessed tenant—Coupling of two sections—Claim barred under one, while not barred under another—Suit really falling under section barring—Delay, if excusable. *See* AGRA TENANCY ACT, SS. 99 AND 121. **18 R.D. 439**

———**S. 6**—*Alienation by father during minority of son—After born son—Setting aside alienation—Commencement of limitation.*

Where in the Punjab the father has made certain alienations without necessity and where on the date of the sale only one minor son is alive, while a second son is born after the date of the sale, limitation will run from the date of the cessation of the elder son's minority and both the sons can sue to set aside that alienation so long as the cause of action is subsisting. This is so because the second son has no independent right to sue. His right is derived from his elder brother's right to sue, he being alive on the date of the alienation. (*Addison and Hilton, JJ.*) JOWALA SINGH *v.* SANT SINGH. **13 Lah. 520=I.R. 1932 Lah. 706=140 I.C. 375=33 P.L.R. 808=A.I.R. 1932 Lah. 605.**

———**S. 6**—*Applicability.*

Where shortly after a decree, the decree-holder died and execution was taken out on behalf of the minor, which was dismissed, and execution was taken out again nearly four years after such dismissal,

Held, that the minor was protected under S. 6 of the Limitation Act as on the date of the dismissal of the execution he was under disability and that therefore the execution taken out again was within time. (*Skemp, J.*) DUNI CHAND PANNA LAL *v.* KULDIP SINGH. **A.I.R. 1935 Lah. 144 (1).**

———**S. 6**—*Applicability — Alienation by Hindu widow—Suit by after-born reversioner—Limitation—Benefit of S 6—If available.*

A person who is a minor on the date of an alienation by a Hindu widow or who is born subsequently during the lifetime of the widow is entitled to the benefit of S. 6 of the Limitation Act; and a suit by such a person, after the widow's death, for a declaration of his rights, is governed by Art. 120 and not Art. 125 of the Limitation Act. The starting point under Art. 120 is the date on which the circumstances entitling him to have his interest guarded first come to his knowledge. (*Fazl Ali and Rowland, JJ.*) SITAL RAUT *v.* ADALAT RAUT. **155 I C. 244=7 R P. 570=16 Pat.L.T. 236=A.I.R. 1935 Pat. 256.**

———**S. 6**—*Applicability—Application to set aside execution sale.*

S 6, Limitation Act, deals with cases where a person entitled to institute a suit or make an application for the execution of decree is, at the time from which period of limitation is to be reckoned, a minor, or insane or an idiot. It does not cover a case of an application under O. 21, R. 90, C. P. Code, to set aside a sale held in execution of a decree. (*Courtney-Terrell, C.J. and Varma, J.*) BHOLANATH *v.* MT. SAYEDATUNNISSA BEGEM. **159 I.C. 253=8 R P. 267=16 Pat.L.T. 923 =A.I R. 1935 Pat. 450.**

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———**S. 6**—*Applicability—Application under Sch. II, para* 20, *Civ. P. Code—Minority of applicant—If a ground of exemption from limitations.*

S. 6 of the Limitation Act has no application to cases under para. 20, Sch. II, C. P. Code, and an applicant under that rule cannot claim benefit of that section. (*Courtney-Terrell, C.J. and Varma, JJ.*) PANCHI MANDAL *v.* GENA MANDAR. **14 Pat. 855=161 I.C. 691=8 R.P. 466=17 Pat.L.T. 20=A.I.R. 1936 Pat. 161.**

———**S. 6**—*Applicability—Child en ventre sa mere—If can take advantage of.*

S. 6 can be taken advantage of by a child *en ventre sa mere*. (*Beasley, C.J., Ramesam and King, JJ.*) RANGANATHA REDDI *v.* RAMASWAMI MUDALI. **58 Mad. 886=8 R.M. 459=1935 M.W.N. 920=159 I.C. 1=42 L.W. 349=A.I.R. 1935 Mad. 839=69 M.L.J. 425 (F.B.).**

———**S. 6**—*Applicability—Decree obtained by Collector as manager of Court of Wards—U. P. Court of Wards Act, S.* 55.

Where a decree is obtained by the Collector as manager of the Court of Wards in charge of the estate of a minor, the decree holder is the minor and not the Collector, and he can have the benefit of S. 6 of the Limitation Act. It is clear from S 55 of the U. P Court of Wards Act that it is the ward who sues, though in the name of the Collector, who is in charge of his property. (*Ganga Nath, J.*) DINA NATH *v.* THE COLLECTOR OF FARUKHABAD. **160 I.C. 275=8 R. A. 586=1935 A.W.R. 1334=1935 A.L.J. 1336=A. I.R. 1936 All. 63.**

———**S. 6**—*Applicability to Kumaun Rules.*

S. 6 of the Limitation Act is made applicable to the Kumaun Rules by a notification of 1918 and it confers on a minor a larger period of limitation for instituting a suit to avoid a sale of Khaikari right. (*Oakden, S.M. and Smith, J.M.*) DHARMA NAND *v.* DEBI DUTT. **14 R.D. 635.**

———**S. 6**—Applicability—Mortgage suit—Death of next friend—Application for final decree by minor after attaining majority—S. 6 not applicable as it is not a proceeding in execution. *See* MORTGAGE SUIT. **37 C.W.N. 184=A.I.R. 1933 Cal. 508.**

———**S. 6**—Applicability—Person carrying on business under another name—Death of such person leaving minor sons—Business carried on by guardian—Hundi in business name—Suit on by minors after majority—If barred—Benefit of S. 6, if available. *See* C. P. CODE, O. 30, R. 10. **16 Pat.L.T. 649.**

———**S. 6**—Applicability—Suit by minor co-sharer for proprietary profits—S. 160, C. P. Land Revenue Act. *See* C. P. LAND REVENUE ACT, S. 160(3). **18 N.L. J. 285.**

———**S. 6**—Application—Alienation by Hindu father—Suit to set aside by subsequently born son—Limitation—Elder brother existing at the time of alienation—Effect of. *See* HINDU LAW—ALIENATION BY FATHER. **41 L.W. 610=A.I.R. 1935 Mad. 431.**

———**Ss. 6, 7 and 8**—*Disqualified proprietor—Property in possession of Court of Wards—Period of limitation, if extended.*

The limitation Act though it recognises and enumerates certain conditions as legal disabilities entitling person affected by them to an extended period of limitation, it does not touch disqualification under S. 6 (*a*), Court of Wards Act and the disqualified proprietor is not exempted from suing so long as the property remains in the hands of Court of Wards. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R 1931 Oudh 177.**

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———**Ss. 6 and 7 and Art. 12**—*Execution sale against minors represented by Court guardian—Suit by minor on their attaining majority to recover possession of property—Limitation.*

A lady died shortly after a decree was passed against her, leaving the plaintiffs 1 and 2, her minor children. At the instance of the decree holder, an officer of the Court was appointed as guardian of the plaintiffs and the property was brought to sale and purchased by the decree holder himself. The plaintiffs instituted a suit for recovery of possession of the property almost at the expiry of the period of 12 years from the date of sale. In substance, their case was that they were not really represented in the execution proceedings and the sale was accordingly not binding on them. They also added that the decree-holder was guilty of fraud in not disclosing the existence of their maternal grandmother and grandfather in connection with his guardian application.

Held, (*i*) that the propriety of attributing fraud to the decree-holder merely because he did not mention the existence of certain relations in connection with the guardian application, is doubtful; (*ii*) that there is no question in the present case either of absolute, non representation or of the appointment of a guardian whose appointment is prohibited by statute and the most that can be said is that the decree-holder has persuaded the Court to make a wrong order in the matter of appointing a Court officer as guardian and the sale is, if at all, only voidable and is not a nullity, (*iii*) that the plaintiffs must have taken the necessary proceedings within the one year allowed by Art. 12 of the Limitation Act, subject to such extension of time as they may get under S. 6; (*iv*) that the suit is barred by the operation of S. 7 of the Limitation Act, even if it was not instituted beyond one year of the attainment of majority of plaintiff No. 2, and that S. 7 can be invoked even if there is no proof of *de facto* management by the major member and even if there is no other property except the suit property and therefore there is nothing for a managing member to manage. (*Varadachariar, J.*) NEMMAYYA SHETTY *v.* NAGARAJA SHETTY. **8 R.M 366=1935 M.W.N. 964=158 I.C. 874=A.I.R 1935 Mad. 1085.**

———**S. 6**—*Guardian of lunatic suing last guardian.*

A lunatic is protected under S. 6 as long as he is under disability. The mere fact that there was a guardian on his behalf, who could have sued earlier, would not deprive him of the protection given by that section. (*Sulaiman, C. J. and Mukerji, J.*) MUSI IMRAN *v.* COLLECTOR OF BIJNORE. **148 I.C. 1166=6 R.A. 839=1934 A.L.J. 803=3 A.W.R. 671=A.I. R. 1934 All. 434.**

———**S. 6**—*Insolvency, no disability.*

Insolvency is not a disability under the Limitation Act and the time for setting aside an *ex parte* order is not extended by the adjudication of the party against whom the order was passed. (*Curgenven and Cornish, JJ.*) SIRUR *v.* MYTHILI AMMAL. **136 I.C. 45=I. R. 1932 Mad. 253=1931 M.W.N. 1124=34 L.W. 783=A.I.R. 1932 Mad. 170=61 M.L.J 688**

———**S. 6**—*Minor—Child in the womb—Alienation by Hindu father—Suit to set aside—After born son—Commencement of limitation.*

A person cannot be said to be a minor until he is born and so the provisions of S. 6 of the Act do not apply to the case of a son who was begotten before but born subsequent to the alienation sought to be set aside. So a suit to set aside an alienation by a Hindu father brought by the son who was in the womb at the time of

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the alienation, more than twelve years after the alienee took possession of the property though within three years of his attaining majority is barred by Art. 126. 14 I.C. 60; 54 I.C. 838; 10 Lah. 713; 79 I.C. 1010; 64 I.C. 757, Foll. (*Madhavan Nair, J.*) VENKATARAMA AIYAR *v.* MIRTHINJAYA AIYAR. **I.R. 1931 Mad. 668 = 132 I.C. 316 = 33 L.W. 768 = A.I.R. 1931 Mad. 456 = 60 M.L.J. 521.**

——— **S. 6**—*Minor—Court closed on expiration of minority—Filing appeal on reopening day.*

The phrase 'the period of limitation prescribed for any suit, etc.,' in S. 4 of the Limitation Act is wide enough to include a period of time contained in the First Schedule of the Limitation Act but computed with the aid of one or more of the Ss. 12 16 of the Limitation Act or starting from the date of attaining majority under S. 6 of the Act. So if on the last day after three years from the date when a minor attained majority when he ought to have filed a suit, the Court is closed he is entitled to the benefit of S. 4 and file his suit on the reopening day. 37 M.L.J. 256, Doubt.; 36 Bom. 258, Diss; 45 Mad. 785, Expl; 26 Bom. 782 and 44 Mad. 817, Dist. (*Cornish, J.*) NAGANNA *v.* KRISHNAMURTHY. **55 Mad. 286 = 135 I.C. 587 = I.R. 1932 Mad. 171 = 1931 M.W.N. 1127 = 34 L.W. 650 = A.I.R. 1932 Mad. 139 = 61 M.L.J. 675.**

——— **S. 6**—Minors dealt with in the Act are human beings not juristic persons like idols and corporations—Idol not perpetual minor—Dedicated property—Minority affecting limitation is of the shebait and not of the idol. *See* ADVERSE POSSESSION—RELIGIOUS ENDOWMENT. **A.I.R. 1932 Mad. 328 = 62 M.L.J. 496.**

——— **S. 6**—*Mortgage in favour of father—Acknowledgment made during son's minority—Son instituting suit within three years after majority—Bar.*

A mortgage was executed by two persons in favour of the father of the plaintiff. The plaintiff was then a minor living jointly with his father. The father died in 1912 and in 1913 the mortgagors executed a second mortgage in favour of another including in that mortgage the whole of the amount due under the earlier mortgage. In 1928 the plaintiff sued to recover the amount and claimed that he was entitled to do so within three years of his attaining majority.

Held, that time began to run from the date of the execution of the mortgage, but the mortgage of 1913 contained an acknowledgment and therefore saved limitation.

Held, further, that the plaintiff being a minor at the time from which limitation has to be reckoned, the suit filed within three years of the plaintiff attaining majority, was competent. (*Pullan and Niamatullah, JJ.*) CHANDRABHAN *v.* RAJ KUMAR. **54 All. 1019 = 142 I.C. 794 = I.R. 1933 All 197 = 1932 A L.J. 1012 = A.I.R. 1933 All. 100.**

——— **S. 6**—*Punjab Customary Law—Alienation of ancestral property—Minor reversioner—Right to contest alienation—Extension of time.*

In the case of alienation of ancestral property, a reversioner who is a minor on the date of alienation has an independent right to contest the alienation; and he is entitled to extension of time under S. 6, notwithstanding the existence of nearer reversioners including his own father. A I.R. 1932 Lah. 39, Rel. on. (*Tek Chand, J.*) KHUSHI RAM *v.* NAND LAL. **147 I.C. 399 = 6 R.L. 389 = A.I.R. 1933 Lah. 866.**

——— **S. 6**—*Punjab Customary Law—Minor in existence at time of alienation—Suit to challenge alienation.*

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Under the Customary Law, every minor who was in existence at the time of alienation which is being challenged by him can bring a suit within three years of attaining majority. Therefore, where the plaintiffs are still minors they have clearly ample time for bringing their suits and no objection on the ground of limitation can be taken to their suit. (*Young, C. J. and Rangi Lal, J.*) SARWAN SINGH *v.* MT. BASANTI. **154 I. C. 603 = 7 R.L. 582 = A.I.R. 1934 Lah. 908.**

——— **S. 6**—*Punjab Customary Law—Minor reversioner—Right to contest adoption—Extension of time.*

If a reversioner and his minor sons are alive at the date of an alleged adoption, they have separate rights both derived from the common ancestor. The right of the father being barred does not bar the right of the son, if he be a minor. The son will have the advantage under the Limitation Act of adding the period of his minority to the limitation period. (*Young, C.J. and Din Mohammad, J.*) HARI RAM *v.* SAHI. **154 I.C. 675 = 7 R.L. 598 = A.I.R. 1934 Lah. 968 (2).**

——— **S. 6**—*Scope.*

S. 6 contemplates cases where there is only one minor decree holder or where all the decree-holders are minors. (*Nasim Ali and Henderson, JJ.*) ABED HOSSAIN *v.* ABDUL RAHMAN. **63 Cal. 92 = 158 I.C. 567 = 8 R.C. 198 = A.I.R. 1935 Cal. 631.**

——— **Ss. 6 and 29 (2)**—*Scope—Suit after three years of majority—If barred—S. 29 (2).*

A suit by a person after three years of attaining majority is not barred under S. 6, Limitation Act, because S. 6 is not one of the sections mentioned in S. 29 (2) of the Act, S. 29 (2) (*a*) prescribes the sections to be applied when they are not excluded by any special or local law; and S. 29 (2) (*b*) says that the remaining sections shall not apply. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KARAN SINGH *v.* CHARAN SINGH. **18 R D. 624 = 16 L.R. 40 (Rev.).**

——— **Ss. 6 (1) and (3)**—*Applicability—Hindu minor widow—Adoption by—Suit by adopted son—Limitation, if saved—"Death"—"Legal representative"—Meaning of.*

The extended period of limitation allowed by S. 6 of the Limitation Act only applies to the case of a minor and his legal representative after his death and not to an assignee from the minor. A son adopted by a Hindu minor widow is not under the Hindu Law an assignee from the widow, but is in a position closely analogous. If the Indian Limitation Act, S. 6 (3), had intended to provide for cases of notional death, appropriate language could have been used. The expression "where the disability continues up to the death of such person" in S. 6 (3), refers to physical death and to nothing else and the "legal representative" must be a legal representative whose title depends on the death. An adopted son is not the legal representative of the adopting widow within the meaning of S. 6 (3). When the adopted son is himself a major at the date when the cause of action arises, he is not entitled to the benefit of S. 6 (1). S. 6 (1) will not apply when the person entitled to bring the suit was not, at the time from which the period of limitation is to be reckoned, a minor. (*Beaumont, C. J.*) MARIYAVVA *v.* CHANVIRANGOUDA. **159 I.C. 272 = 8 R.B. 184 = 37 Bom L.R. 706 = A.I.R. 1935 Bom. 420.**

——— **S. 7**—*Alienation by Hindu mother—Suit by sons after attaining majority to set aside—Commencement of limitation.*

Where two Hindu brothers sued for a declaration that the sale executed by their mother as guardian was invalid and it was found that the elder of the two plaintiffs

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had attained majority more than three years before the suit was filed,

Held, that the suit was barred and that time had run against the younger brother also. (*Jackson and Butler, JJ.*) (JADDU PADHI *v.* CHOKKAPU BODDU.) **58 Mad. 155=150 I.C. 76=6 R.M. 680=39 L.W. 795=1934 M.W.N. 635=A.I.R. 1934 Mad. 469=67 M.L.J. 27.**

———**S. 7**—*Applicability.*

S. 7 clearly has got no application to any but the cases to which it is made applicable, namely to debts and to execution of decrees. (*Banerji and King, JJ.*) KAMTA RAI *v.* RANI JAI URAJ KUNWARI. **I.R. 1931 All. 603=133 I.C. 155=A.I.R. 1931 All. 398.**

———**S. 7**—*Applicability—Capacity to give discharge—Question of benefit to family immaterial—"Discharge"—Meaning of—Adult member should be definitely found to be manager.*

In a suit by the plaintiffs claiming to be the owners of certain property alleged to have been given in trust to the defendants during plaintiffs' minority and to have been misappropriated by them, the defendants pleaded that as the manager of the family (one of the plaintiffs) had failed to sue within three years after attaining majority, the whole suit was barred under S. 7 of the Limitation Act. The lower Court held that S. 7 was inapplicable on the ground that the manager was not competent to give a valid discharge as there was obviously no benefit in not instituting a suit in time.

Held, (*i*) that the view of the lower Court was erroneous; S. 7 merely refers to the capacity to give discharge: "If he gives a discharge without any benefit to the family, his act may be liable to be challenged by the minors but that is immaterial to the question of limitation." 45 B. 446; 38 M. 118, Foll. ; 48 A. 152 (P. C.), Dist.; (*ii*) that S. 7 applied not only to cases of discharge of debts but also to cases involving immovable property; "the word 'discharge' in S. 7 is wide enough to include any form of quittance, whereby the rights and liabilities between two parties are put an end to." 46 B. 535 and 25 I C. 755, Foll.; (*iii*) but that before S. 7 could be applied, it should be found definitely whether the adult member was or became the manager. "It cannot be predicted of every Hindu family that an adult brother as soon as he becomes major, becomes the manager and therefore necessarily competent to give a discharge. This depends upon several questions of fact and a variety of circumstances varying with different families and unless the necessary facts are properly alleged and proved by the party who wants to deprive the person under disability of the benefit of S 6 of the Limitation Act, the claim cannot be thrown out as barred by limitation." (An issue was therefore framed, 'Was the adult member the manager' and remitted to the lower Court.) (*Bhide, J.*) LAL CHAND *v.* GIAN CHAND. **I R. 1933 Lah 192=142 I.C. 295=34 P.L. R. 384=A.I.R. 1933 Lah. 479.**

———**S. 7**—*Applicability—Guardian and Ward—Money due to minor under decree—Certificated guardian—Power of, to give valid discharge.*

Whatever may be the powers of the certificated guardian to collect other moneys of the minor, his powers to receive money payable to a minor under a decree is subject to the permission of the Court. He cannot receive the decretal money amicably and out of Court and give a discharge. The discharge given by a certificated guardian who is appointed next friend of the minor with the permission of the Court is really a discharge by the order of the Court. 36 Mad. 295, Rel. on. (*Nasim Ali and Henderson, JJ.*) ABED HOSSAIN *v.*

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———**S. 7**—*Applicability—Hindu minor brothers—Alienation by mother as guardian—Suit to set aside—Limitation—Starting point.*

A Hindu widow acting as guardian of her minor sons (plaintiffs) sold their joint family property on 11th March, 1915. The 1st plaintiff became a major in January, 1921, and on 22nd January, 1923, he filed a suit for himself and as guardian of his minor brother, 2nd plaintiff, to set aside the sale-deed and to redeem certain prior mortgages. As the suit was bad under the Dekkhan Agriculturists Relief Act, the High Court gave permission in second appeal for the suit to be withdrawn with liberty to file a fresh suit "if so advised", on 26th March, 1926. 2nd plaintiff became a major on 11th December, 1926, and on 9th March, 1927, both the plaintiffs sued for a declaration that the sale was not binding on them.

Held, that the suit was barred as regards both the plaintiffs, because plaintiff No. 1 was capable of giving a valid discharge within the meaning of S. 7 of the Limitation Act, and consequently the bar of limitation operated against the 2nd plaintiff when it operated against the 1st plaintiff.

Held, further, that S. 14 of the Limitation Act did not apply, and the 1st plaintiff could not claim the benefit of that section in view of the clear language of O. 23, R. 2, C. P. Code. (*Broomfield, J.*) KONDAJI *v.* DAGADU. **157 I.C. 592=8 R.B. 72=37 Bom. L. R. 225=A.I.R. 1935 Bom. 259.**

———**S. 7**—*Applicability—Joint Hindu family—Suit by a member against stranger setting up title by adverse possession.*

A suit brought by one member of a joint Hindu family against a transferee from the manager raises a question as to the authority of the manager and in that sense involves a dispute as to the respective rights of the members of the family *inter se*. The nature of such a suit is obviously distinguishable from that of a suit brought against a person, who is an entire stranger to the family, who does not claim title through any member of the family and who is setting up his adverse possession as a paramount title. In such cases the manager represents the family as one unit and if time has run out against the manager, limitation is not saved merely because some minor members of the family are still living. Such a case falls within the ambit of S. 7 of the Limitation Act. (*Sulaiman, C.J. and Bennet, J.*) ANRUDH RAI *v.* SANT PRASAD RAI. **57 All. 891=155 I.C. 569=7 R.A. 947=1935 A.L.J. 838=1935 R.D. 182=1935 A.W.R. 474=A.I.R. 1935 All. 746 (2).**

———**S. 7**—*Applicability — Joint promissory note — Decree in favour of brothers—Elder brother authorized to recover entire amount—Period of minority cannot be excluded.*

Where a decree was passed on a joint promissory note in favour of two brothers, one of whom was a minor and the decree itself empowered the elder brother to recover the entire amount on furnishing security for the half share of his minor brother.

Held, that as the elder brother could have given a valid discharge without the concurrence of the other brother, the person under disability is not entitled to the benefit of S. 7. (*Lakshmana Rao, J.*) VENKATARAMA DASS *v.* BHIMA RAO. **148 I.C. 54 (1)=6 R.M. 426=39 L.W. 62=1933 M.W.N. 895=A.I.R. 1934 Mad. 103 (1).**

———**S. 7**—*Co-heirs—Right of one to give discharge of debt.*

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One co-heir cannot give a valid discharge in respect of a debt due to the ancestor without the concurrence of the other co-heirs. (*Baker and Rangnekar, JJ.*) UMAKANT BALAKRISHNA *v.* MARTAND KESHAV. **6 I.R. (Bom) 59=145 I.C. 164=35 Bom.L.R. 388=A.I.R. 1933 Bom. 245.**

——**S. 7**—*Co-mortgagees—Death of one before final decree—Minor heirs impleaded—Limitation for execution application.*

Ordinarily one mortgagee alone cannot enforce the mortgage for his share of the debt only, except in cases where three has been severance of the mortgagee's interests effected with the mortgagor's consent. Further the discharge by one mortgagee alone as regards his share of the debt is not valid against the rest. Where some minors were impleaded as co-mortgagees in the place of one of the co mortgagees since deceased and a final decree is passed but the execution application was filed five years after,

Held, that it was not barred by limitation. (*Mitter and M.C. Ghose, JJ.*) SATISH CHANDRA SEN *v.* JIWAN LAL DAGA. **149 I.C. 1062=6 R.C. 696=37 C.W.N. 838=A.I.R. 1934 Cal. 1.**

——**S. 7**—*Hindu joint family — Alienation by manager—Bar of limitation against some—Whether binds the rest.*

In the case of alienation by manager or guardian of minors, the bar of limitation as against one member does not affect other members if such other members have a right to impeach alienation. A.I.R. 1926 P.C. 16, Foll. (*Banerji and King, JJ.*) KAMTA RAI *v.* RANI JADURAJ KUNWARI. **I.R. 1931 All. 603=133 I.C. 155=A.I.R. 1931 All. 398.**

——**S. 7**—*Hindu joint family—Single legal representative—One person whether can give valid discharge.*

S applied for execution of a money decree, which he had obtained against the judgment-debtor; during the pendency of the proceeding, he died leaving three sons *A*, *B* and *C*, of whom *C* was a minor. They were brought on record as the legal representatives of *S* and continued the proceeding which was ultimately consigned to the record-room on 21 6-'24, leaving a balance still payable under the decree. *C* on attaining majority applied for execution on 16 8-'29 and was met with a plea that the application was barred by limitation.

Held, that the minor and his two brothers, being legal representatives of their father, who was the original decree holder, constituted one legal representative of the decree-holder and that one of them could not execute the decree nor give a valid discharge.

Held, further, that O. 21, R. 15, C. P. Code, did not confer an unconditional right on one of the decree-holders to execute the decree, that such a right was subject to control by the executing Court, that the above rule did not affect S. 7, Limitation Act, and that the application for execution was not barred by limitation. 29 All. 279; A.I.R. 1929 Lah. 467; 55 Cal. 608; A.I.R. 1929 Mad. 394, Ref.; 66 P.R. 1893, Dist. (*Jai Lal, J.*) MAHOMED KAZAM *v.* NADIR ALI SHAH. **I.R. 1931 Lah. 275=130 I.C. 403=A.I.R. 1931 Lah. 5.**

——**S. 7**—*Minor reversioner—Nearer reversioners omitting to sue—Effect.*

Under S. 7, not only must there be a joint right to sue but it must be possible for a valid discharge to be given by those who are not under any disability. The omission to sue on the part of the next reversioner to an alienation by the widow is by the customary law not a bar to the maintainability of a suit by the remoter reversioner and therefore a person who was a minor at the time of transfer can avoid it within the time allowed by law even though the nearer reversioners had not done so. (*Shadi Lal, C.J. and Broadway, J.*) WALI CHAND *v.* PUNJAB SINGH. **I.R. 1931 Lah. 649=132 I.C. 665=A.I.R. 1932 Lah. 39.**

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——**S. 7**—*Scope—Discharge by certificated guardian out of Court—If valid.*

S. 7 contemplates a legal capacity to give discharge without the concurrence of the person under disability. The section requires that the co-decree-holder in addition to his capacity as a co-decree holder must have such a legal capacity as would empower him alone to realize the decretal debt and give a discharge without putting the decree into execution, even if his minor co decree-holder had been under no disability and had the capacity to give his assent. In other words, the legal capacity must enable him alone to give a discharge, the consent of the other decree-holders not being necessary at all in the exercise of that legal capacity. The law must clothe him with rights to give a discharge for the whole debt irrespective of the consent of the other decree-holders. Familiar instances of such legal capacities are those of a partner and the karta of a joint Hindu family. Their legal capacity to give a discharge is derived from the substantive law. They have the power to realize the whole decretal debt amicably and are not required by law to take the consent of the other joint decree-holders or the permission of the Court under the processual law before giving discharge. The legal capacity of a certificated guardian to realize moneys payable to a minor decree holder under a decree of the Court not fulfil the test, indicated above. It is not independent of the rights of the minor decree-holder. S. 7 contemplates discharge by a person who, by virtue of his own legal capacity under the substantive law is able to give a discharge. It does not contemplate a legal capacity which only empowers a person to realize a debt on behalf of another by the process of execution with the permission of the Court. Hence where ther are five joint decree-holders one of whom is a minor and the other are adults and one of the adults is the certificated guardian of the minor a discharge given by such guardian out of Court is not a discharge by a guardian—far less a discharge without concurrence of the minor within the meaning of S. 7 unless it is proved that the adult decree-holder who represents the minor is in a position to give discharge. A.I.R. 1929 Cal. 165, Expl. and Dist.; A.I.R. 1924 Cal. 710, Rel. on. (*Nasim Ali and Henderson, JJ.*) ABED HOSSAIN *v.* ABDUL RAHMAN. **63 Cal. 92=158 I.C. 567=8 R.C. 198=A.I.R. 1935 Cal. 631.**

——**S. 7**—*Suit by reversioners to set aside alienation—Nature of—Starting point of limitation.*

A suit by a reversioner to challenge an alienation by the female limited owner is a representative one and it follows that if there is at the date of the alienation a reversioner who is competent to challenge it, but fails to do so within the period of limitation, the result is binding on the whole body of reversioners, whether minors or otherwise. A.I.R. 1927 Mad. 216; 41 M. 659 and 6 Lah. 405, Rel. on; 8 Lah. 711, Dist. (*Addison and Bhide, JJ.*) GAJINDAR SINGH *v.* BALWANT KAUR. **149 I.C. 696=6 R.L. 734=A.I.R. 1933 Lah. 524.**

——**S. 9**—*Applicability—Subsequent disability by reason of cancellation of cause of action.*

S. 9 contemplates only cases where the cause of action continues to exist; but where the cause of action is cancelled by reason of subsequent events, this section will not apply. (*Nasim Ali and Khundkar, JJ.*) JATENDRACHANDRA BANDHOPADHYAY *v.* REBATEE MOHAN DAS. **62 Cal. 66=158 I.C. 191=A.I.R. 1935 Cal. 333.**

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———**S. 9**—*Suspension of limitation—Submersion of mortgaged property—Suits on mortgage.*

Where once limitation begins to run for a suit to enforce a mortgage, it is not suspended merely because the mortgaged property is submerged under water, as it does not affect the mortgagee's right to bring a suit on the mortgage. (*Kulwant Sahay, J.*) RAGHUNATH BHAGAT *v.* MEGHU MANDER. **146 I.C 856=6 R.P. 297=A.I.R. 1933 Pat. 693.**

———**S. 10**—*Applicability—Essentials.*

In order to bring a case within the purview of S. 10, there must be a trust for a specific purpose, *i.e.*, "a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed". 49 I.A. 37, Foll. (*Lord Thankerton.*) ANNAMALAI CHETTIAR *v.* MUTHUKARUPPAN CHETTIAR. **58 I.A. 1=8 Rang. 645=35 C.W.N. 145=33 L.W. 30=1931 M.W.N. 137—33 Bom.L.R. 168=54 C.L.J. 175=I.R. 1931 P.C. 65=130 I.C. 609=A.I.R. 1931 P.C. 9=60 M.L.J. 1 (P.C.).**

———**S. 10**—Applicability—G. P. Notes belonging to joint family of two brothers given as security for service of one of members—Subsequent partition but G.P. Notes allowed to continue as security—G. P. Notes given to brother in service after retirement—Suit by heirs of other brother for recovery of G. P. Notes—Art. 145 and not S. 10 or Art. 49 governs. *See* LIMITATION ACT, ART. 145. **61 Cal. 119=A.I.R. 1934 Cal. 87.**

———**S. 10**—*Applicability—Property held by Mahant of asthan.*

Property held by a Mahant of a math for maintaining the math and the office relating thereto is not property which "has become vested in trust for any specific purpose." The endowments are not "conveyed in trust" nor is the head of a math a "trustee" with regard to them save as to specific property proved to have been vested in him for a specific object. So S. 10 is not applicable to property appertaining to the mahant of an asthan. 44 M. 834 (P.C.), Rel. on. (*Wazir Hasan, C.J. and Srivastava, J.*) CHINKAN PANDE *v.* DURGA BHARTHI. **9 Luck. 384—6 R.O. 274=147 I.C. 607=11 O.W.N. 39=A.I.R. 1934 Oudh 96.**

———**S. 10**—*Applicability and scope—Suit for damages for wilful default of trustee in management—Limitation—Starting point—Limitation Act, Art. 120.*

S. 10, Limitation Act, which applies to trusts, does not in terms apply to suits for damages for breach of trust. It certainly does not apply to such suits for damages on the footing of wilful default, when *ex hypothesi* the money claimed has not come into the hands of the trustees; and the reference to an account does not extend it to such claims. The section read as a whole justifies a decree for any trust funds shown, on an account being taken, to be in the hands of the trustees. A claim to damages for alleged breaches of trust in the management of trust property falls under Art. 120, Limitation Act, which is the only article applicable. Time runs from the breach and not from the date of the consequent loss. A claim to damages on the footing of wilful default is not one to follow trust funds, and is not saved by S. 10, Limitation Act. (*Barlee and Sen, JJ.*) SHIRINBAI *v.* NAVROJI PESTONJI. **160 I.C. 612=8 R.B. 267—37 Bom.L.R. 946=A.I.R. 1936 Bom. 30.**

———**S. 10**—*Applicability—Trust contrary to the will under which the properties vested.*

Where a testator made a will bequeathing all his property to *A* and also entered into a contract with *A*'s father not to revoke the same but later executed a second will by which he revoked the first and bequeathed all his property to *R*, his wife, whom he appointed executrix and it was contended that by virtue of the contract there was a trust created in favour of *A* within the meaning of S. 10.

Held, that the trust did not fall within S. 10 as it could not be said that the property vested in the executrix under the second will for the specific purpose of making them over to *A*. (*Sir George Lowndes.*) RANI CHHATRA KUMARI DEVI *v.* MOHAN BIKRAM SHAH. **58 I.A. 279=10 Pat. 851=8 O.W.N. 905=1931 A.L.J. 783=34 L.W. 411=133 I.C. 705=13 Pat.L.T. 1=I.R. 1931 P.C. 241=33 Bom.L.R. 1390=A.I.R. 1931 P.C. 196=35 C.W.N. 953=61 M.L.J. 78 (P.C.).**

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———**S. 10**—*Applicability—Trust property—Possession by stranger independent of trustee—If can be adverse.*

Under S. 10 an express trustee cannot prescribe for a title by adverse possession against his beneficiary; the trustee's legal representatives or assignees are in no better position than the trustee himself. But the rule does not apply in the case of a stranger to the trust who takes possession of the trust property independently of the trustee. The section does not prevent such a person from acquiring title by adverse possession. (*Curgenven and Cornish, JJ.*) MANICKAMMAL *v.* MURUGAPPA GRAMANI. **157 I.C. 181 (2)=8 R.M. 115=A.I.R. 1935 Mad. 483.**

———**S. 10**—*Applicability—"Vested"—Meaning—Wakf—Suit by Sajjadanashin for possession of properties from dismissed mujavars.*

In a suit brought in 1926 by the Sajjadanashin of a Mahomedan *daragh* (shrine) for possession of wakf lands from defendants who were at one time mujawars (*i.e.*, attendants and servants of the shrine) and who were in possession in lieu of their services but had been dismissed in 1898.

Held, that in view of the decision in *Vidya Varuthi's* case, the suit did not come within the provisions of S. 10 as it stood before the amendment; that the Sajjadanashin is not a "trustee" in the technical sense nor is any property belonging to the wakf "vested" in him within the meaning of S. 10, Limitation Act, as it stood prior to its amendment. (*Sir Lancelot Sanderson.*) ALLAH RAKHI *v.* SHAH MAHOMED ABDUR RAHIM. **61 I.A. 50=6 R.P.C. 80=56 All. 111=147 I.C. 887=38 C.W.N. 400=3 A.W.R. 387=11 O.W.N. 297=39 L.W. 421=36 Bom.L.R. 408=1934 M.W.N. 258=59 C.L.J. 157=1934 A.L.J. 466=A.I.R. 1934 P.C. 77=66 M.L.J. 431 (P.C.).**

———**S. 10**—*Applicability—"Vested in trust for a specific purpose"—Meaning of.*

Where by an arrangement, a person receives a monthly sum of money which is to enure to the benefit of another during the latter's minority, the money when paid to the former becomes vested in him for a specific purpose within the meaning of S. 10. (*Panckridge, J.*) MAHOMED HABEED ALUM *v.* ANJUMAN ARA BEGUM. **62 Cal. 393=164 I.C. 109=9 R.C. 136.**

———**S. 10**—*Director of companies, not trustees.*

Directors of companies under the Indian Companies Act are not trustees for the purpose of S. 10, and the entrustment of the company's moneys to the directors for the general purpose of carrying on the business of the company cannot be deemed to be an entrustment for a specific purpose. (English cases referred to. Observations in 44 M.L.J. 431 commented upon as too wide.) (*Ramesam and Cornish, JJ.*) NARASIMHA AYYANGAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad. 153=I.R. 1931 Mad. 61=128 I.C. 477=1930 M.W.N. 968**

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=32 L.W. 555=A.I.R. 1931 Mad. 58=60 M.L.J. 280.

———(as amended in 1929), S. 10—*Express trustee—Manager of Hindu Religious Endowment—Position of.*

Under S. 10 of the Limitation Act, as amended by the Amending Act of 1929, the manager of a Hindu Religious Endowment is in the same position as an express trustee, although it cannot be said that any property is conveyed to a shebait or mutawalli, in the case of a dedication under the Hindu or Mahomedan Law, or vested in him. Whatever property he holds for the idol or the institution, he holds as manager with certain beneficial interests regulated by custom or usage. (*Curgenven and Cornish, JJ.*) MANICKAMMAL *v.* MURUGAPPA GRAMANI. **157 I.C. 181 (2)=8 R.M 115=A.I.R. 1935 Mad. 483.**

———S. 10—*Express trustees—Persons interested in fire temple belonging to Parsis—Purchase of property in interests of trust.*

In the mofussil Parsis are governed by rules of justice, equity and good conscience. The rule in *Vidya Varuthi's* case, I.L.R. 44 Mad. 831 (P.C.), cannot be applied to a Parsi charity. Where the vendees acted on behalf of the Anjuman and purchased properties with the express purpose of guarding against a danger to the fire-temple.

Held, that the vendees were express trustees for purpose of S. 10, Limitation Act, and their subsequent conduct in derogation of the trust should be disregarded. (*Baker, A.C.J. and Divatia, J.*) JAMSHEDJI PESTONJI *v.* DORABJI KUVERJI. **149 I.C. 317=35 Bom.L.R. 1091=6 R.B. 368=A.I.R. 1934 Bom. 1.**

———S. 10—*"For any specific purpose."*

The purpose of following the property in the hands of the trustees referred to at the end of S. 10 must be the purpose of restoring it to the trust which is specified in the earlier part of the section. (*Mukerji and S.K. Ghose, JJ.*) BIBHU BHUSAN DUTTA *v.* ANADI NATH DUTT. **61 Cal. 119=150 I.C. 398=6 R C. 847=58 C.L.J. 502=A.I.R. 1934 Cal. 87.**

———(as amended in 1929), S. 10—*If retrospective.*

The amendment of S. 10 (by Act I of 1929) which was effected in consequence of the decision in *Vidya Varuthi's* case is not retrospective and does not apply to suits instituted prior to it. The law of limitation applicable to a suit is the law in force at the date when such suit is instituted and not an amending law which comes into force during the pendency of the suit. (*Sir Lancelot Sanderson.*) ALLAH RAKHI *v.* SHAH MAHOMED ABDUR RAHIM. **61 I.A. 50=56 All. 111=6 R.P.C. 80=147 I.C. 887=38 C.W.N. 400=3 A.W.R. 387=11 O.W.N. 297=39 L.W. 421=36 Bom L.R. 408=1934 M.W.N. 258=59 C.L.J. 157=1934 A.L.J. 466=A.I.R. 1934 P.C. 77=66 M.L.J. 431 (P.C.).**

———S. 10—*"Period prescribed for suit"—Meaning.*

The words "period prescribed for a suit" have reference only to the period prescribed at the end in the Schedule. 26 Bom. 782, Foll.; 48 All. 726, Diss. (*Mitter, J.*) ANISUDDIN AHMED *v.* KALIPADA ROY CHOWDHURY. **58 Cal. 1148=134 I.C. 1132=35 C.W.N. 370=A.I.R. 1931 Cal. 785.**

———S. 10 and Art. 123—*Scope of—Property not mentioned in will of testator and property set apart for religious or charitable trusts which have failed—Suit by next-of-kin—Limitation.*

If property is set aside by a testator from the general body of his estate and vested in trustees upon certain trusts, which upon the face of them are inadequate to exhaust the whole of the property, there remains as to the balance a trust impressed upon the trustees in favour of the next-of-kin or the heir-at-law, a trust for the purpose of which you have to do no violence to the language of the will, for which it is unnecessary to disregard any intention or desire that the testator has expressed. The principle, known as the rule in *Salter* v. *Cavenagh*, and followed by Courts in India, does not apply to property not so set apart by the testator or property not mentioned by him at all in his will. This residue is held by the trustees for the benefit of next-of kin, but it does not come within S. 10 of the Limitation Act, but is covered by Art. 123 of the Limitation Act. Nor does the rule in *Salter* v. *Cavenagh* apply to property set apart for charitable and religious trusts which have failed. A suit by the next-of-kin to recover such property is governed by the rule in *Churcher* v. *Martin*, 42 Ch. D. 312. In other words, S. 10, benefits those who sue to enforce express trusts and not those who claim, not under express trusts, but adversely to them. Such suits do not fall under S. 10. (*Barlee and Sen, JJ.*) SHIRINBAI *v.* NAVROJI PESTONJI **160 I.C. 612=8 R.B. 267 =37 Bom.L.R. 946=A.I.R. 1936 Bom. 30.**

———S. 10—*Settlement deed—Trust in favour of certain persons—Suit to enforce—Limitation.*

Where a father executed a settlement deed by which the son who was given the properties was directed to pay a certain amount to the settler's daughters,

Held, that there was a trust in favour of the daughters and a suit to enforce the same was not governed by any rule of limitation. (*Krishnan Pandalai, J.*) NACHIMUTTU AMMAL *v.* MUTHUSWAMY MANIAGARAN. **6 R.M. 529=148 I.C. 685=1934 M.W.N. 64=39 L.W. 496=A.I.R. 1934 Mad. 273.**

———S. 10, Arts. 61 and 120—Suit by trustee of temple to recover money from former trustee—Proper article applicable is Art. 120 and neither S. 10 nor Art. 61 applies. *See* LIMITATION, ARTS. 120, 61 AND S. 10. **A.I.R. 1934 Mad. 542.**

———S. 10—*"Vesting"—Mere transference of management or control not enough.*

While transfer of proprietary rights is not intended mere transference of management or control is not enough to satisfy the requirements of "vesting" as contemplated by S. 10; a right to call for a transfer and to possess the property for the purposes of the trust and also power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the "vesting". 4 Cal. 455 and 20 Cal. 51 (F.B.), Ref. (*Mukerjee and S. K. Ghose, JJ.*) BIBHUTI BHUSAN DUTTA *v.* ANADI NATH DUTT. **61 Cal. 119=150 I.C. 398=6 R C. 847=58 C.L.J. 502=A.I.R. 1934 Cal. 87.**

———S. 12—*Applicability—Case where applicant need not file copy of decree.*

Where it is not necessary for the applicant to file a copy of the decree with the grounds of appeal or the application, S. 12 has no application and the period between the delivery of the judgment and the signing of the decree cannot be excluded. (*Jai Lal and Monroe, JJ.*) HARI RAM *v.* PREM NATH. **158 I.C. 120=A.I.R. 1935 Lah. 341.**

———S. 12—*Applicability—Proceeding under S. 18, Land Acquisition Act.*

S. 12 does not apply to an application for reference under S. 18, Land Acquisition Act. (*Mukerji, J.*) KASHI PRASAD *v.* NOTIFIED AREA OF MAHOBA. **54 All. 282=143 I.C. 111=I.R. 1933 All. 187 (2)=A.I.R. 1932 All. 598.**

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——**S. 12**—*Applicability—Proceeding under S.* 66 (3), *Income-tax Act.*

S. 12 of the Limitation Act does not apply to a proceeding under S. 66 (3) of the Income tax Act. (*Mukerji and Bennet, JJ.*) GULAB CHAND CHOTEY LAL, *In re.* **53 All. 684=I R. 1931 All. 733=133 I.C. 621=1931 A.L.J. 593=A.I.R. 1931 All. 673.**

——**S. 12**—Applicability—Wrong information supplied to copying department—Delay caused by—Right to exclusion of time. *See* LIMITATION ACT, SS. 5 AND 12. **155 I.C. 588=A.I.R. 1935 Nag. 109.**

——**S. 12**—*Application for copy—Date of notifying requisite stamps—Holiday following—Deduction—Calcutta High Court General Letter No.* 16.

Under Cl. (2) of the Rule in General Letter No. 16, whenever there is any holiday or holidays immediately following the period between the date of application for the copy of the decree and the date of notification of the requisite number of stamps and folios, such holiday or holidays must always be excluded in computing the period of limitation for appeal. The view that the time occupied in filing the folios can only be deducted if the entire period between the date of notifying the stamps and folios and the date of supplying the same falls within holidays and if the stamps and folios are supplied on the reopening day is not correct. (*Suhrawardy and Jack, JJ.*) MAHOMED ISMAIL CHOWDHURY *v.* KALICHARAN SINGH. **58 Cal. 969=I.R. 1931 Cal. 895=134 I.C. 895=35 C.W.N. 451=A.I.R. 1931 Cal. 731.**

——**S. 12**—Application for copy—Dismissal—Fresh application whether a continuation for the former one so as to apply S. 12. *See* LIMITATION ACT, S. 5.—NEGLIGENCE OF PLEADER'S CLERK. **1932 M.W.N. 328.**

——**S. 12**—*Application for copy of judgment and decree returned as decree was not drawn under R.* 11, *High Court Rules—Petition to Court to draw up decree—Delay—Deduction of time—Permissibility—Sufficient cause.*

The judgment of the Subordinate Court was pronounced on 10th October, 1931. On the 29th the plaintiff applied for the copy of the judgment and decree and the order was made on that application "no decree was drawn in view of R. 11 at p. 27 of the High Court Rules, and there is no direction of the Court to draw the decree. The record is sent herewith." Nothing was done by the plaintiff until 5th January, 1932, when he filed his petition alleging that as he intends to prefer an appeal a decree is required.

Held, that the plaintiff was out of time in applying for the direction of the Court to prepare a decree if the circular rule is taken into consideration. The period between 30th October, 1931, the date upon which the copy of the judgment was given to the plaintiffs, and 5th January, 1932, when he petitioned the Court to order the preparation of the decree was a period *within the control of the plaintiff* and therefore cannot be deducted for the purpose of determining the question of limitation. Advantage of S. 5 also could not be had as there was no sufficient cause. 49 Cal. 999 (P.C.), Foll. (*Wort and Varma, JJ.*) LACHMINARAYAN TEKRIWALA *v.* JOGESH CHANDRA LAHARE. **13 Pat. 371=149 I.C. 142=6 R P. 570=15 Pat.L.T. 649=A.I.R. 1934 Pat. 266.**

——**S. 12**—*Application for copies not accompanied by deposit—Application accepted by copying department as valid—Time deductible.*

Where an application for copies which is not accompanied by a deposit is accepted by the copying department as valid, and the preparation of the copies is not in any way held up for want of a deposit, so that the time which elapses is exactly the same time as would elapse if the application has been accompanied by an advance, the applicant is entitled to deduct the full time spent in obtaining the copies. 37 P.L.R. 510, Foll. (*Beckett, J.*) SURJAN DAS-GUJAR MAL *v.* DWARKA DAS-RAGHBAR DAYAL. **161 I.C. 243=8 R.L. 702=37 P.L.R. 792=A.I.R. 1936 Lah. 123.**

——**S. 12**—*Application for copy without depositing copying fees—Effect of.*

Where the rules framed in connexion with an application for copies of record provide that the applicant must put in with his application a deposit sufficient to cover the cost of preparing and certifying the copies, there can be no proper application until such deposit is made, within the meaning of S. 12. A.I.R. 1927 Oudh 129 and 35 P.L.R. 713, Rel. on. (*Addison, Ag.C.J. and Din Mohammad, J.*) MT. JIWAN *v.* PUNJAB NATIONAL BANK, LTD., LAHORE. **160 I C. 897=8 R.L. 630=A.I.R. 1935 Lah. 889.**

——**S. 12**—*Construction—"Time requisite for obtaining copy of the decree appealed from"—Meaning of—Period between date of judgment and application for copy—If deductible.*

"The time requisite for obtaining copy of the decree appealed from" must be construed as meaning "the time which would have been necessary in any case" and not "the time actually employed by the appellant". No period which may be under the control of the appellant between the date on which judgment is pronounced (which is the date of the decree under the C. P. Code) and the date on which the appeal is filed can be considered as "the time requisite" under S. 12 of the Act. In cases where the decree of the trial Court follows upon the judgment without the parties being required to do anything in the interval, the appellant will be entitled to the exclusion of the time between the judgment and the decree. In exceptional cases, as for instance cases of partition and mesne profits, in which the drawing up of the decree may depend upon the filing of the necessary stamp paper or Court-fees, the exclusion of time in favour of the party who is to file the stamp paper or Court-fees will depend upon the circumstances, but other parties to whom no responsibility attaches for the delay will be entitled to exclude the time. But it cannot be laid down that in no case can the period between the date of judgment and the application for copy of the decree be excluded. 2 P.L.T. 361, Overr. (*Courtney Terrell, C.J., Wort, Macpherson, Khaja Mahomed Noor, Dhavle, Agarwala and Varma, JJ.*) GABRIEL CHRISTIAN *v.* CHANDRA MOHAN MISIR. **15 Pat. 284=160 I.C. 447=8 R.P. 361=16 Pat.L.T. 849=A.I.R. 1936 Pat. 45 (F.B.).**

——**S. 12**—*Copy application—Who should make.*

The application for the copies need not be made by the appellants in person. (*Bhide, J.*) CHANDU *v.* MAST RAM. **149 I.C. 1127=6 R.L. 809=A.I.R. 1934 Lah. 135.**

——**S. 12**—*Copying agent—If agent of applicant.*

The copying agent can only be treated as an agent of the applicant and not that of the Court. A.I.R. 1928 Lah 16; 35 P.L.R. 713 and 9 I.C. 381, Rel. on. (*Addison and Din Mohammad, JJ.*) NAUL MAL *v.* RERU MAL. **160 I.C. 788=8 R.L. 609=A.I.R. 1935 Lah. 625.**

——**S. 12**—*Copying agent—If agent of applicant.*

Where an applicant for a copy of judgment and decree complies with the rules framed by the High Court regarding the application for copies of records, the copying agent does not remain the agent of the applicant but is agent of the Court. (*Dalip Singh and*

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Beckett, JJ.) MATHELA *v.* SHER MOHAMMAD. **17 Lah. 621=161 I.C. 72=8 R.L. 667=A.I.R. 1935 Lah. 682.**

———**S. 12**—*Court closed from the next day after judgment—Limitation for appeal.*

From the next day after delivery of judgment, the Court was closed for annual vacation. After the re-opening, excluding the time taken up for application for copy of the judgment, the appeal was presented on the ninetieth day.

Held, that the appellant was entitled to exclude the period of the vacation and that the appeal was in time. 20 C.W.N. 1303 and A.I.R. 1929 Pat. 615, Foll. (*Agarwala, J.*) RIKHESARNATH TEWARI *v.* JANAKDEO NATH TEWARI. **6 R.P. 299=146 I.C. 931=A.I.R. 1934 Pat. 4.**

———**S. 12**—*Date when copy was ready—Exclusion of.*

The date on which the copy of the judgment applied for was ready should also be excluded as time requisite for obtaining the copy. (*Grille, J.C.*) SHIVA KUNBI *v.* DASHRATH. **147 I.C. 1113=6 R.N. 151=A.I.R. 1933 Nag. 362.**

———**S. 12**—*Delay of Court—Communication of judgment.*

Where the appeal was within time from the day on which the judgment was ready, but that date was not communicated to the appellants till a particular date, the period of limitation must be reckoned from the latter date. (*Bhide, J.*) CHANDU *v.* MAST RAM. **149 I.C. 1127=6 R.L. 809=A.I.R. 1934 Lah. 135.**

———**S. 12**—*Income-tax case—Application for leave to appeal to Privy Council—Time taken for obtaining copies—Deduction.*

The Commissioner of Income-tax preferring an application for leave to appeal to the Privy Council is entitled in computing limitation to deduct the period taken for obtaining copies of the judgment. (*Rankin, C. J. and Pearson, J.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 Cal. 251=I.R. 1932 Cal. 588=139 I.C. 236=36 C.W.N. 127=A.I.R. 1932 Cal. 587.**

———**S. 12**—*Laches of copying department—Party, if affected.*

The copying department is not an agent of the applicant for copies, though the department is directly paid from a fund which represents the receipts from the copying fees. It is a department under the control of the Deputy Commissioner and is a branch of the Deputy Commissioner's office, and no person can be dammified on account of the laches, ignorance or negligence of any official attached to a department connected with the administration of justice. (*Agha Haidar, J.*) RURA MAL *v.* RAM CHAND. **159 I.C. 178=8 R.L. 353=37 P.L.R. 784=A.I.R. 1936 Lah. 200.**

———**Ss. 12 and 29**—*Letters Patent Appeal (Patna)—Time taken for obtaining copy—Deduction of—Permissibility.*

The amended S. 29 of the Limitation Act makes S. 12 applicable to all special and local laws but the rules of the High Court do not come under that category. Under the Patna High Court Rules, a copy of the judgment or decree is not necessary for filing a Letters Patent Appeal and so the time taken for obtaining a copy cannot be deducted in computing the period of limitation for a Letters Patent Appeal (*i.e.*, thirty days). (*Courtney-Terrell, C.J. and Varma, J.*) MUKUND MAHTO *v.* NIRANJAN CHAKRAVARTHY. **151 I.C. 107=7 R P. 64=15 Pat.L.T. 301=A.I.R. 1934 Pat. 353.**

———**S. 12**—*No application for copy—Delay in drawing decree—Exclusion of.*

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S. 12 cannot be interpreted so as to exclude periods during which there has been delay in drawing up the decree. Ordinarily therefore the time requisite for obtaining copies will not run until applications are made. (Case-law considered.) (*Macnair, J. C. and Subhedar, A. J. C.*) MUKUNDA RAMKRISHNA *v.* BISANSA SAKHARAMSA. **I.R. 1933 Nag. 184=143 I.C. 745=29 N.L.R. 220=A.I.R. 1933 Nag. 125.**

———**S. 12**—*Period between the delivery of judgment and preparation of decree—Deduction of.*

In computing the period of limitation for preferring an appeal, a party is entitled to deduct the time between the delivery of the judgment and the preparation of the decree. 13 Cal. 105 (F.B.), Foll. (*Oppenheim, S. M. and Drake Brockman, J.M.*) ATAL SINGH *v.* KUREY. **14 L.R. 532 (Rev.)=17 R.D. 696.**

———**S. 12**—*Period during which requisite copying fees are not filed—Deduction of.*

According to the Rules and Orders of the Punjab High Court, when the requisite copying fees are not filed with the application for copies, the date of the application must be considered to be that on which the fees were filed. The time spent by the copying agent in getting estimate, etc., and putting in the application with the proper fee cannot be allowed to an appellant as time requisite for obtaining copies in computing the period of limitation for appeal, as the copying agent is not an officer of the Court and cannot be regarded as of a higher status than a private agent of the appellant. (*Abdul Rashid, J.*) MEHR ALI BEG *v.* SARWAN. **35 P.L.R. 713.**

———**S. 12**—Period expiring during vacation—Appeal presented seven days later—Sufficient cause. *See* LIMITATION ACT, S. 5. **A I.R. 1931 Oudh 314.**

———**S. 12**—*Revision—Time necessary for obtaining copies of trial and appellate Court's judgment—Exclusion.*

For a revision petition a copy of the judgment of the trial Court is required as a matter of practice, but that is more in the interests of the petitioner himself than an absolute necessity for the validity of the petition. A petitioner must therefore apply for both the copies simultaneously, that is to say, for the copy of the lower appellate Court's judgment and of the trial Court's judgment. If he is unable to get the trial Court's judgment within the period of limitation, he must present his revision petition with the copy of the lower appellate Court's judgment attached to it, and if he satisfies the High Court that he had applied simultaneously, ordinarily time would be given to him to get the copy of the trial Court's judgment and attach it to his petition. Else time required for trial Court's judgment is not excluded under S. 12. (*Middleton, J.C. and Saaduddin, A.J.C.*) SAINDITTA RAM *v.* CHHATA RAM PIARA LAL. **6 R. Pesh. 45=35 P.L.R. 274=147 I.C. 1138=A.I.R. 1934 Pesh. 9.**

———**S. 12**—*Time requisite—Series of applications for copy—Second copy used for purpose of appeal—Deduction of time taken.*

The time requisite in S. 12 is the time beyond the appellant's control occupied in obtaining the copy which accompanies the appeal and not an ideal lesser period which might have been occupied if the application for copy had been filed at some other date. Thus the Court cannot restrict the time granted by the statute by adding to it a limitation that, where an appellant has got more than one copy of judgment and decree he ought, if he seeks exclusion of time for obtaining the copy, to use the first copy obtained by him. The judgment and decree were passed on 24-2 1927. The plaintiff applied for a

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copy on 1-3 1927 and obtained it after 34 days had been occupied by the copying department. He again applied for a copy on 20-4-1927 and since the vacation intervened the time occupied was 82 days. The appeal was filed on 13-8-1927 with the second copy of judgment.

Held, that the appeal was within time, the period of 82 days taken in obtaining the second copy being a deductible period of time. (*Madhavan Nair, Jackson and Krishnan Pandalai, JJ.*) TIRUMALA REDDY *v.* ANAVEMAREDDI. **57 Mad. 560=149 I.C. 172=6 R. M. 605=39 L.W. 559=1934 M.W.N. 105=A.I.R. 1934 Mad. 306=66 M.L.J. 687 (F.B.).**

———**S. 12**—*Time requisite—Time spent in ascertaining cost of copies—District Court Rules.*

As the rules with regard to the supply of copies from the records of a District Court stand, the time spent in ascertaining the cost of the copies should be regarded as time requisite for obtaining them within the meaning of S. 12 of the Limitation Act. (*Beckett, J.*) GHULAM HUSSAIN *v.* MANGAT RAM. **37 P L.R. 794.**

———**S. 12**—*Time spent in obtaining copy which is not filed with application—Exclusion of.*

A petitioner is not entitled to have the time spent in obtaining a copy which he has not filed together with his application for review, but which he has filed in another case, excluded in computing the period of limitation. (*Ba U, J.*) V. E. A. CHETTIAR FIRM *v.* KARUPPAN CHETTIAR. **156 I.C. 733=8 R.R. 43=A.I.R. 1935 Rang. 184.**

———**S. 12**—*Time to be excluded—Computation of.*

The time which may be legitimately excluded from limitation under S. 12, Limitation Act, is that between the date of the application for the copy of judgment and decree and the date on which it is despatched, whether by ordinary post or V. P. P., from the copying department. (Case-law reviewed.) (*Fraser, J.C.*) SULTAN DIN *v.* PARTAB SINGH. **I.R. 1933 Pesh. 9=142 I.C. 230=A.I.R. 1933 Pesh. 22.**

———**S. 12**—*Time to be excluded—Computation of.*

Judgment was delivered on 22nd December, 1933, and the appeal was instituted on the 3rd April, 1934 (*i.e.*) 12 days after expiry of three months. Copies of the judgment and decree-sheet were applied for urgently on the 3rd January, 1934. From the 3rd to 13th January, 1934, copies could not be given as the Court had not prepared the decree-sheet, on the 13th January this had been done, and the copying department was able to prepare an estimate for the preparation of copies on that date. The estimated price was not paid till the 25th January, and copies were ready on the 30th.

Held, that the appellant is entitled to the time from the 3rd to the 13th January and from the 25th to the 30th January and even if the period between the 13th and 25th January be excluded, as not necessary, the appeal is still well within time. (*Addison and Din Mahomed, JJ.*) BAIJ NATH *v.* GAPU RAM. **157 I.C. 181 (1)=8 R.L. 97 (1)=37 P.L.R. 235.**

———**S. 12**—*Translation of decree unsigned—If sufficient to save limitation.*

Where an appeal was filed on the last date of limitation deducting the time taken in obtaining copies of the judgment and the decree, but with the memorandum of appeal a copy of the translation of the decree, unsigned by the lower Court was filed. No copy of decree was applied for.

Held, that translation of decree unsigned by the lower Court is not a proper substitute for the decree so as to save limitation. (*Jai Lal, J.*) MEHR SINGH *v.* RAM CHAND. **150 I.C. 781 (1)=7 R.L. 27=A.I.R. 1934 Lah. 304 (2).**

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———**S. 12 (2)**—*Applicability—Appeal from original side—Letters Patent (Rangoon), Cl. 13.*

S. 12 (2) of the Limitation Act applies to appeals from decrees or orders of the Original Side of the Rangoon High Court under Cl. 13 of the Letters Patent. (*Page, C.J., Ba U and Leach, JJ.*) MCKENZIE & CO., LTD. *v.* AH WIN. **12 Rang. 525=154 I.C. 852=7 R.R 324=A.I.R. 1935 Rang. 65 (F.B.).**

———**S. 12 (2)**—*Applicability to Letters Patent appeals.*

The rules under the Letters Patent do not amount to a special or local law. Consequently the time requisite for obtaining a copy of the judgment appealed against cannot be excluded in computing the time for filing an appeal under the Letters Patent. (*Young, C.J., Addison and Abdul Rashid, JJ.*) JOG DHIAN *v.* HUSSAIN. **16 Lah. 448=156 I.C. 668=8 R.L. 16=37 P.L.R. 504=A.I.R. 1935 Lah. 328 (F.B.).**

———**S. 12 (2)**—*Application for leave to appeal filed before obtaining decree copy—Exclusion of time requisite for obtaining decree copy.*

In computing the period of limitation prescribed for an application for leave to appeal to the Privy Council, the time requisite for obtaining a copy of the decree should be excluded under S. 12 (2). The section does not say why the time is to be excluded but simply enacts it as a positive direction. Where the application for leave to appeal is filed before the copy of the decree is supplied, it cannot be argued that the copy of the decree is not requisite and that the time cannot be excluded. S. 12 (2) enables the applicant to exclude the whole of the time from the date when the application is made until the date when the copy of the decree is ready. (*Kendall and Bajpai, JJ.*) GAEKWAR BARODA STATE RAILWAY *v.* HABIB ULLAH. **57 All. 751=157 I.C. 170=8 R.A. 124 (2)=1935 A.L.J. 291=1935 A.W R. 138=A.I.R. 1935 All. 258.**

———**S. 12 (2)**—*Application for review—Time taken in obtaining copy of judgment—Exclusion.*

It is not necessary for the applicant to obtain a copy of the judgment for the purpose of making his application for review, If however he does make an application for copy the time taken for obtaining the same may be excluded under S. 12 (2). (*King and Rachhpal Singh, JJ.*) GAURI SHANKAR *v.* KASHI NATH. **56 All. 591=6 R.A. 677=148 I.C. 290=3 A.W.R. 48=1933 A.L.J. 1631=A.I.R. 1934 All. 367.**

———**S. 12 (2)**—*Award—Objections—Exclusion of time.*

Period requisite for obtaining copy of an award should be allowed while computing period for filing objections to the award. (*Bagaley, J.*) D. B. DAS *v.* DAYALAL & SONS. **I.R. 1933 Rang. 46=142 I.C. 835=A.I.R. 1933 Rang. 38.**

———**S. 12 (2)**—*Civil Circular No. IV-6, Rr. 3 and 25—Period during which copy is stopped for want of funds—Deduction of.*

An applicant is not bound, in the very first instance, to deposit the whole of the advance required for obtaining copies. At the time of presenting his application for copies he should make the deposit according to his own estimate. If this estimate is discovered by the Copying Department to be mistaken it is their obvious duty to bring the mistake to the notice of the applicant and demand the deficit of the costs when he appears—as he is bound to—on the successive dates, which have to be fixed at intervals of only seven days, on which he is asked to attend "to ascertain whether the copy is ready or whether any further advance is required." This being the position, the day or days on which copying is

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stopped for want of funds during the first period when he is told to appear after the date of the representation of the application for copies, or during the subsequent weekly periods, to which delivery of copies may be postponed, must not be counted against an applicant if he attends on those dates but is not asked to pay further advance. In other words this period must be counted as time requisite for obtaining copies within the meaning of S. 12 (2), Limitation Act. 12 N.L.R. 66, Rel. on. (*Subhedar, A.J.C.*) GAJPATILAL *v.* MAULIPRASAD. **6 I.R. (Nag.) 57=145 I.C. 742=A.I.R. 1933 Nag. 218.**

———**S. 12 (2)**—*Delay in drawing up decree—Neglect of appellant—Exclusion of time.*

To entitle the appellant to exclude time under S. 12 (2), Limitation Act, it is not sufficient to say that there is no decree or order in existence of which a copy could be obtained. Any delay in obtaining a copy of the decree or order for which delay the appellant is responsible cannot be deducted in computing the time requisite for obtaining such copy. (*Buckland and Costello, JJ.*) BRIJLAL GANERIWALLA *v.* GIRINDRA SEKHAR. **61 Cal. 306=151 I C. 809=7 R.C. 179=38 C.W.N. 702 =A.I R. 1934 Cal. 543.**

———**S. 12 (2)**—*Time for copies—Original Side appeal—Time taken up for drawing up of the decree.*

In the case of an appeal from the Original Side, the time requisite for obtaining a copy of the decree or order, which can be excluded under S. 12 of the Limitation Act may include the period prior to an application for a copy of the order, where such application though not made within twenty days from the date when the order was pronounced, was made before the order was formally drawn up and the delay in the drawing up of the order was not due to the laches of the party. 13 C. 104 (F.B.), Foll.; 32 C. L. J. 127, overr. An order on the Original Side was pronounced on the 17th March but in spite of the efforts of the parties to expedite the matter, the formal order was settled on 12th May, signed on the 20th and filed on 1st June. An application for copy was put in on the 18th May and as soon as it was obtained, the appeal was presented but returned on the ground that as no application for copy had been made within twenty days from the date when the order was pronounced, the appeal was out of time under Art. 151 of the Limitation Act.

Held, that the appellant was entitled to deduct the time prior to 18th May as time requisite for obtaining a copy of the order. (*Rankin, C.J., C. C. Ghose, Buckland, Pearson and Mukerjee, JJ.*) PASHUPATI MUKERJEE, *In the goods of.* **59 Cal. 1215=I.R. 1932 Cal. 341=137 I C. 526=56 C.L.J. 557=36 C.W.N. 469= A.I.R. 1932 Cal. 331 (F.B.).**

[Not F. 29 N,L,R. 220 (223).]

———**S. 12 (2)**—*'Time requisite'—Computation of—Decree remaining unsigned.*

"The time requisite for obtaining a copy," under S 12 (2) does not begin to run until an application for copies has been made; and the interval during which a decree remains unsigned after judgment cannot be excluded from the period of limitation, unless an application for copies has been made and the applicant is actually and necessarily delayed through the decree not having been signed. (*Srivastava, Ag.C.J. and Smith, J.*) GOKUL PRASAD *v.* KUNWAR BAHADUR. **10 Luck. 250=152 I.C. 419=7 R.O 215=11 O.W.N. 1359= A.I.R. 1935 Oudh 30.**

———**S. 12 (2)**—*Time requisite—Time spent in obtaining copy which appellant chooses to file with memorandum.*

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The words "time requisite" means simply the time required by the appellant to obtain a copy of the decree, assuming that he acted with reasonable promptitude and diligence; and the time requisite for obtaining a copy is the shortest time during which a copy could have been obtained by the appellant. It has nothing to do with the amount of time spent by him in obtaining the copy which he chooses to file with the memorandum of appeal. 57 M. 560=66 M.L.J. 687 (F.B.), Diss. from. (*Dalip Singh and Beckett, JJ.*) MATHELA *v.* SHER MOHAMMAD. **17 Lah 621=161 I.C. 72=8 R.L. 667 =A.I.R. 1935 Lah. 682.**

———**S. 12 (2)**—*Time requisite—Time taken by copying department.*

Where there has been no mistake of Counsel, no negligence, nor inaction nor want of *bona fides* imputable to the applicant, but the delay in giving a copy is due to the slipshod and negligent procedure of the copying department, the time which the department itself notes as having elapsed between the application and the completion of the copy can be regarded as 'time requisite' within the meaning of sub-S. (2), S. 12 of the Limitation Act. (*Coldstream, J.*) LABHU RAM *v.* BANSI DHAR. **158 I.C. 736–8 R.L. 296=37 P.L.R. 510= A.I.R. 1936 Lah. 120.**

———**S. 12 (3)**—*Applicability—Application for leave to appeal to His Majesty in Council—Time requisite for obtaining copy of judgment—If can be excluded.*

On an application for leave to appeal to His Majesty in Council, it is not only important but also necessary that a copy of the judgment from which it is sought to appeal should be before the Court; and S. 12 (3) permits the time requisite for obtaining a copy of the judgment to be excluded from period of 90 days prescribed for the application by Art. 179 of the Limitation Act. (*Page, C. J. and Sen, J.*) R. K. BANERJEE *v.* ALAGAMMA ACHI. **13 Rang. 762=161 I.C. 464=8 R.R. 481= A.I.R. 1936 Rang. 82.**

———**S. 12 (3)**—*Applicability—Application for leave to appeal to Privy Council.*

The legislature has clearly intended that sub-S. (3) of S. 12 should not apply to an application for leave to appeal to His Majesty in Council but that it should apply only to appeals. Therefore an applicant for such leave is not entitled to exclude the time requisite for obtaining a copy of the judgment also in addition to the time requisite for obtaining a copy of the decree. (*Sulaiman, C. J. and Rachhpal Singh, J.*) GULAB CHAND *v.* PEARY LAL. **57 All. 455=152 I.C. 384= 7 R.A. 328=4 A.W.R. 848=1934 A.L.J. 1211=A.I. R. 1935 All. 99.**

———**S. 12 (4)**—*Period for obtaining copy—Exclusion.*

Under S. 12 (4) the period required for obtaining copy is to be excluded in computing the time allowed by Art. 158. (*Curgenven, J.*) CHENDRAYYA *v.* APPALAMMA. **I.R. 1932 Mad. 812=140 I.C. 11 (2)=A.I. R. 1932 Mad. 588.**

———**S. 14**—*Applicability.*

There are two conditions for the applicability of the section: (*i*) the previous proceeding must be founded upon the same cause of action, and (*ii*) it must have been in a Court not competent to entertain the proceeding. In calculating the period of limitation for a suit in ejectment, the time taken up by a prior suit for correction of papers cannot, therefore, be excluded. (*Holmes, J.M.*) BHAGWANT SINGH *v.* BHAGEL. **14 L.R. 625 (Rev.).**

———**S. 14**—*Applicability.*

A decree was passed on 22nd November, 1922, and the money claimed was payable within one year from

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that date. In December, 1922, however one of the parties applied to have the decree set aside under O. 9, R. 13. The same was dismissed in 1923 and an appeal having been preferred, the latter was dismissed on 28th July, 1926. An application for execution was filed in January, 1928.

Held, that S. 14 was inapplicable to the circumstances of the case. (*Rankin, C. J. and C. C. Ghose, J.*) PROFULLA KUMAR BASU *v.* SOROJBALA BASU. **I. R. 1931 Cal. 439 = 131 I.C. 263 = 35 C.W.N. 155 = 52 C.L.J. 594 = A.I.R. 1931 Cal. 332.**

——**S. 14**—*Applicability.*

It is only when the civil proceeding is prosecuted in a Court, which from defect of jurisdiction or other cause of a like nature is unable to entertain it, that S. 14 can apply. 31 Mad. 431 (F.B.), Ref. (*Niyogi, A. J. C.*) KRISHNA *v.* SITARAM. **I.R. 1931 Nag. 61 = 130 I.C. 157 = 13 N.L.J. 209 = A.I.R. 1931 Nag. 47.**

——**S. 14**—*Applicability—Appeals.*

S. 14 does not apply to appeals; but the Court can admit an appeal under S. 5, if it is satisfied that there is sufficient cause. (*Sulaiman, C. J. and Rachhpal Singh, J.*) SUDAMA RAI *v.* BISHESHAR PRASAD. **152 I.C. 939 = 7 R.A. 419 = 4 A.W.R. 1460 = 18 R.D. 706 = 16 L R. 131 (Rev.) = A.I.R. 1935 All. 92.**

——**S. 14**—*Applicability—Cases governed by S. 5 Repealing (Punjab Loans Limitation) Act*, 1923.

The provisions of S. 14 of the Limitation Act can be availed of in the case of suits governed by the special rule of limitation enacted by S. 5 of the Repealing (Punjab Loans Limitation Act) III of 1923. (*Shadi Lal, C. J. and Monroe, J.*) THAKUR DAS *v.* DHARMA RAM. **I.R. 1932 Lah. 630.**

——**S. 14**—*Applicability—Conditions.*

One of the conditions which must be complied with in order that S. 14 may operate is that the cause of action in both the suits must be the same. (*Beaumont, C.J. and Rangnekar, J.*) KARSONDAS DHUNJIBHOY *v.* SURAJBHAN RAMRIJPAL. **58 Bom. 200 = 6 I. R. (Bom.) 107 = 145 I.C. 630 = 35 Bom.L.R. 929 = A.I. R. 1933 Bom. 450.**

——**S. 14**—*Applicability—Essentials—Prior suit not comprising same cause of action—Absence of due diligence.*

Where the previous suit was not founded upon the same cause of action as the later one and it appeared that the plaintiff did not prosecute his claim to the moiety of property with due diligence,

Held, that S. 14 had no application. Essentials for applicability of S. 14 laid down. (*Tek Chand, J.*) TOLA RAM SINGH *v.* SHEHINCHI KHAN. **I.R. 1932 Lah. 519 = 138 I.C. 621 = 33 P L R. 360.**

——**S. 14**—*Applicability—Execution proceedings.*

S. 14 is comprehensive enough to cover execution applications. The question whether the applicant acted in good faith is a question of fact. (*Tek Chand, J.*) KALA SINGH *v.* GEHNA SINGH. **14 Lah. 106 = I.R. 1932 Lah. 515 = 138 I.C. 646 = 33 P.L.R. 740 = A.I. R. 1932 Lah. 531.**

——**S. 14**—*Applicability—Former suit dismissed without plaint being returned.*

The plaintiff is entitled to claim the benefit of the provision in S. 14 whether he comes up on the second occasion with the original plaint or with a new plaint. An order of dismissal by the Court in the former suit on the ground that it ought to have been instituted in another Court is not a disposal of the suit on the merits; it is merely a refusal of relief which from the defect of jurisdiction it is unable to give. Such a dismissal cannot operate as a bar to a second suit instituted before a Court having jurisdiction. (*Macpherson and James, JJ.*) BRIJLAL GEINKA *v.* JNANENDRA NARAIN. **7 R.P. 305 = 153 I.C. 155 (2) = A.I.R. 1935 Pat. 82.**

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——**S. 14**—*Applicability—"For the same relief"—Application for execution of preliminary mortgage decree—Subsequent application for final decree—Exclusion of period spent in execution—Right to.*

An application for execution of a preliminary mortgage decree is not an application "for the same relief" (within the meaning of S. 14, Limitation Act) as an application for a final decree for sale. Consequently in computing the period of limitation for a final decree under Art. 181 of the Act, the applicant cannot exclude the period spent in the prior execution proceedings. (*Lord Tomlin.*) MAQBAL AHMAD *v.* ONKAR PRATAP NARAIN SINGH. **62 I.A. 80 = 57 All. 242 = 7 R P.C. 191 = 37 Bom.L R. 533 = 37 P.L R. 395 = 1935 A.W. R. 615 = 1935 O.W.N. 527 = 155 I.C. 205 = 1935 A. L J. 578 = 39 C.W.N. 640 = 41 L.W. 629 = 1935 M. W.N. 438 = 61 C.L.J. 267 = A.I.R. 1935 P.C. 85 = 68 M.L.J. 665 (P.C.).**

——**S. 14**—*Applicability—"Good faith"—Suit failing for negligence of plaintiff—Exclusion of time.*

A plaintiff is not entitled to deduct the period during which a former suit was being prosecuted in another Court, unless he can show that he was prosecuting that suit in good faith. In other words S. 14 will not apply where the prior suit has failed owing to the negligence or laches of the plaintiff. (*Lort Williams and Jack, JJ.*) GHISULAL GONFSHILAL *v.* GUMBHIRMALL PANDHYA. **62 Cal. 510 = 164 I.C. 111 (2) = 9 R.C. 137 = 39 C.W.N. 606.**

——**S. 14**—Applicability—Hindu minors—Alienation by guardian—Suit to set aside—Withdrawal as suit was not maintainable as framed—Fresh suit—Deduction of time spent in prior suit—Right to. *See* LIMITATION ACT, S. 7. **37 Bom.L.R. 225 = A.I.R. 1935 Bom. 259.**

——**S. 14** — *Applicability—Identity of cause of action and relief essential.*

For the applicability of S. 14, not only the cause of action should be the same, but the relief sought also should be the same. Hence where the same cause of action entitles a party to several reliefs and he chooses to sue only for one of them, he [illegible] the benefit of S. 14 so far as limitation i[illegible] 290 = 3 A.W.R. 48 brings a suit for another relief. (Ca[illegible] [illegible]ken-ham Walsh, J.) RAMA KRISH[illegible] when he —*Exclusi*[illegible]AYA-RAMA IYER. **6 I.R. (Mad.) [illegible]red.) [illegible]351 = 38 L.W. 595 = A.I.R. 1933 Mad. [illegible]AR *v.* J[illegible] (P[illegible]**

——**S. 14**—*Applicability—"Cause of a like nature"—Plaintiff prosecuting insolvency proceedings against defendant unsuccessfully—Right to deduction of time.*

A plaintiff who had been [illegible]ecuting diligently proceedings in insolvency again[illegible] he defendants unsuccessfully, the petition of the plaintiff to adjudicate the defendants being ultimately dismissed by the High Court on the ground that no "act of insolvency" was definitely made out, is entitled, under S. 14 of the Limitation Act, to deduct the period during which the insolvency proceedings were pending in computing the period of limitation for a suit against the defendants on the same cause of action. The reason for the dismissal of the insolvency petition is certainly "a cause of like nature," even if it cannot be described as a "defect of jurisdiction" under S. 14. (*Tek Chand and Abdul Rashid, JJ.*) LORIND CHAND-PARMANAND & SONS *v.* BAHADUR KHAN. **156 I.C. 378 = 7 L.R. 897 = A.I.R. 1935 Lah. 736.**

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——S 14—*Applicability—"Prosecuting"—Plaintiff resisting application under S. 47, C.P. Code, in prior proceeding—Right to deduct period.*

To make S. 14 of the Limitation Act applicable, the plaintiff in the later suit must have been *prosecuting* another civil proceeding. The word *prosecuting* used in the 1st para. of the section means the plaintiff in the later suit must be either the plaintiff or an applicant in the previous civil proceeding. He is not entitled to any deduction of time when in a previous proceeding under S. 47, C. P. Code, he was resisting the same as an opposite party. (*R. C. Mitter, J.*) ABDUL SATTAR CHOUDHURY *v.* ABDUL RUSAN. **164 I.C. 651=9 R. C. 262=39 C.W.N. 966.**

——S. 14—*Applicability—"Same cause of action."*

S. 14 can be applied when the cause of action is the same in the previous and subsequent proceedings. It does not matter that the reliefs are different in the two. A person might ask for different reliefs in the same cause of action ; but that does not make the cause of action different in the two. (*Bennet, J.*) BALKARAN PANDEY *v.* RAM BADAN PANDEY. **152 I.C. 800=7 R.A. 393=4 A.W.R. 258=1934 A.L.J. 630=A.I.R. 1934 All. 824.**

——S. 14—*Applicability—Suit withdrawn under O. 23, R. 1, C.P. Code—Fresh suit.*

There is no room for the application of S. 14 where a suit is withdrawn under O. 23, R. 1, C.P. Code, with liberty to bring a fresh suit and a second suit is instituted after the expiry of limitation, though the first suit was in time. (*Pullan and Niamatullah, JJ.*) RAM PATI KUNWAR *v.* PHOOL SINGH. **I R. 1932 All. 366 =138 I C. 108=1932 A.L.J. 421=A.I.R. 1932 All. 377.**

——S. 14—*Application—Suit presented in Small Cause Court—Return for presentation to proper Court—Deduction of time.*

Where a suit is orginally filed in the Small Cause Court, and that Court ultimately decides that it has no jurisdiction and returns the plaint for presentation to the proper Court, the plaintiff is entitled to the benefit of S 14 for the period from the date of institution of the suit and the date of its return. (*Allsop, J.*) ABDUL SHAKUR KHAN *v.* RAJENDRA KISHORE SARAN **155 I.C 1092=7 R.A. 1029=1935 R D. 345=1935 A.W.R. 818=1935 A.L.J. 966=A.I.R. 1935 All. 759.**

——S. 14 and Art. 166—Application under O. 21, R. 89, C.P. Code, to set aside sale—Court ordering petition to be dismissed as withdrawn—Sale upheld in appeal—Fresh application to set aside sale—Continuance of earlier petition—Extension of time—Original application cannot be treated as pending—Later application cannot be entertained on any principle of equity based on S. 14. *See* LIMITATION ACT, ART. 166 AND S. 14. **A.I R. 1934 Mad. 593=67 M.L J. 189.**

——S. 14—Bona fide *mistake of advocate—Prosecution of other proceeding.*

Where the mistake of the advocate is *bona fide* the time spent in the prosecution of a prior proceeding can be excluded. (*Raza and Smith, JJ.*) MAHABIR SINGH *v.* MT. RADHA. **150 I C. 533=7 R O. 27=10 O.W. N. 424=A.I.R. 1933 Oudh 231.**

——S. 14—*"Civil proceedings"—Insolvency proceedings.*

Proceedings in insolvency in the Insolvency Court are "civil proceedings" within the meaning of S. 14 (*Tek Chand and Abdul Rashid, JJ.*) LORIND CHAND-PARMANAND & SONS *v.* BAHADUR KHAN. **156 I.C. 378=7 R.L. 897=A.I.R. 1935 Lah. 736.**

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——S. 14—*Claim suit filed in wrong Court—No objection by opposite party—Discovery of mistake by Court and return of plaint for presentation to proper Court—Time spent in former Court—Exclusion of.*

On the dismissal of objection to an attachment, a suit was filed in a Subordinate Judge's Court. The opposite party took no objection and after a year during which the trial was proceeding, the presiding Judge discovered that the Court had no jurisdiction as the value of the suit was beyond the pecuniary jurisdiction of his Court. The amended plaint was presented in the proper Court, more than a year had elapsed since the dismissal of the objection to the attachment.

Held, that the period spent in the former Court should be excluded in computing limitation. A.I R. 1914 Lah. 337, Dist. (*Tek Chand, J.*) MUL CHAND *v.* ALLAH YAR KHAN. **6 I.R. (Lah.) 171=146 I.C. 125=A.I.R. 1933 Lah. 652.**

——S. 14—*Computation of time—Time taken* bona fide *in deciding the value of suit.*

The time taken by the plaintiff in proceedings necessitated for ascertaining the correct value of the suit can be allowed to be deducted under S. 14, where it is found that the plaintiff acted *bona fide* throughout and did not intentionally under-value the suit. (*Suhrawardy and Graham, JJ.*) MAHENDRA NATH BAGCHI *v.* TARAK CHANDRA SINHA. **I.R. 1932 Cal. 443= 138 I C. 349=36 C.W.N. 326=A.I.R. 1932 Cal. 504.**

——S. 14—*Delay in presenting plaint to proper Court—Effect of.*

A plaintiff who is entitled to the benefit of S. 14 does not lose it by merely delaying the presentation of the plaint in the proper Court after it was ordered to be returned to him, if such presentation is within time after excluding the period during which the suit remained pending in the wrong Court. (*Zia ul-Hasan, J.*) GANGA PRASAD *v.* KARIM KHAN. **157 I.C. 629=1935 O.W.N. 942=A.I.R. 1935 Oudh 444.**

——S. 14—*Discretion of Court—Time spent in proceeding in wrong Court—Exclusion of—Interference in second appeal.*

Where the lower Court has in the exercise of its discretion allowed the plaintiff in computing limitation, to exclude the time taken up first, for amending the frame of the suit and again, for presenting the plaint to the proper Court (Subordinate Judge's Court) instead of the Munsif's Court where it was originally presented, the High Court refused to interfere with that discretion in second appeal. (*Ramesam, J.*) NAPU *v.* SAN BIBI. **I R. 1931 Mad. 525 (2)=131 I.C. 461 (2)=A.I.R 1931 Mad. 632.**

——Ss. 14 and 15—*Exclusion of time—Enquiry.*

Where the plaintiff is entitled to exclusion of time under Ss 14 and 15, Limitation Act, then the Court is not concerned as to how the plaintiff has spent his time till the expiry of the ordinary period of limitation, excluding the time allowed under the above sections. (*Grille, J.C.*) MODEL MILLS, NAGPUR, LTD. *v.* HIRALAL RAMGOPAL. **30 N.L.R. 294=6 R. N. 255 =149 I.C. 956=A.I.R. 1934 Nag. 145.**

——S. 14—*Good faith—Plaintiff prosecuting suit in spite of defendant's objection as to jurisdiction.*

It cannot be argued that since an objection to jurisdiction was taken by the defendants in the earlier suit, the plaintiff cannot be considered to have been prosecuting their suit in good faith in that Court, when such objection was overruled by that Court and upheld only in appeal. (*Macpherson and James, JJ.*) BRIJLAL GEINKA *v.* JANENDRA NARAIN. **7 R.P. 305=153 I.C. 155 (2)=A.I.R. 1935 Pat. 82.**

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———**S. 14**—*'Good faith'—Suit mistakenly filed in Civil Court—Return for presentation to proper Court—Deduction of time.*

If a suit is honestly and with due care and caution instituted in a Civil Court but at a subsequent stage it is found that a wrong forum had been chosen and that the Revenue Court alone had jurisdiction, it cannot be doubted that if an admission to that effect be made and the Court which has no jurisdiction returns the plaint for presentation to the proper Court S. 14 will be applicable. (*Pullan and Niamatullah, JJ.*) RAM PATI KUNWAR *v.* PHOOL SINGH. **I.R. 1932 All. 366 = 138 I.C. 108 = 1932 A.L.J. 421 = A.I.R. 1932 All. 377.**

[R. 1934 A.L.J. 535 (540) (F.B.)]

———**S. 14**—*Ignorance of law.*

Ignorance of or inattention to, the law by persons who should be well aware of its provisions cannot be regarded as a *bona fide* mistake. The provisions of S. 14 should not be applied. (*Tapp, J.*) DEPUTY COMMISSIONER, JHANG *v.* DEVI DITTA. **6 I.R. (Lah.) 11 (1) = 144 I.C. 690 = 34 P.L.R. 780 = A.I.R. 1933 Lah. 589.**

———**S. 14**—*Mistake of pleader.*

Where the pleader was shown to have wrongly advised the party as to the forum of appeal,

Held, that the delay in presenting the appeal to the proper Court might be excused. (*Tek Chand and Monroe, JJ.*) GHULAM MAHOMED *v.* USMAN. **I.R. 1932 Lah. 665.**

———**S. 14**—*Onus.*

In order to get the benefit of S. 14, the plaintiff must show that he acted in good faith ; in other words, the test is whether the plaintiff believed and *bona fide* believed that his suit could be instituted at *X* and not at *Y*. (*Jai Lal, J.*) BHAGWAN DAS *v.* TIKAYA RAM. **I.R. 1933 Lah. 423 = 144 I.C. 184 = A.I.R. 1933 Lah. 264.**

———**S. 14**—*Order under S. 169 (1) (b), C. P. Land Revenue Act—Time spent in appeal in Revenue Court cannot be excluded—Exclusion of—Permissibility.*

Where an order is made under S. 169 (1) (*b*) to file a suit in Civil Court within six months, time spent in appeal in the Revenue Court cannot be excluded in calculating the period of limitation which runs from the date of the order. (Case law referred.) (*Niyogi and Grille, A.J.Cs.*) MT. MOHANKUAR *v.* BHAGATRAM. **149 I.C. 622 = 6 R.N. 235 - A.I.R. 1933 Nag. 340.**

———**S. 14**—*"Other cause of like nature"—Mistake of party with regard to relief.*

There is nothing analogous to a defect of jurisdiction in a mistake of a party with regard to the relief he seeks. Such a question arises out of incompetence on the part of those advising the litigant. If the unsuccessful respondent to an appeal in the High Court applied to the High Court under Cl. 13, Letters Patent, there is no defect of jurisdiction or anything analogous to it in the High Court dismissing it and the period spent in that application cannot be deducted under S. 14 for computing the time for a subsequent application for review. 3 Pat. 42, Diss. from. (*Cunliffe, J.*) MAUNG PU *v.* U PAING. **152 I.C. 415 = 7 R.R. 154 = A.I.R. 1934 Rang. 158.**

———**S. 14**—*"Prosecuting"—Meaning of.*

The expression "prosecuting" referred to in S. 14 is generally applicable to proceedings by a person as a plaintiff or an applicant, and not to proceedings in which such person is merely resisting, as a defendant or respondent, the claim of another. (1864) 1 W.R. 29 and A.I.R. 1924 Bom. 39, Ref. ; (1864) 1 W.R. 310, Dist. (*Rupchand, J.C. and Mehta, A.J.C.*) PRIBHADINO MAL METHUMAL *v.* MT. CHUTTI. **27 S.L.R. 422 = 147 I.C. 94 = 6 R.S. 125 = A.I.R. 1933 Sind 379.**

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———**S. 14**—*Right to benefit of—Party guilty of negligence.*

S. 14 cannot help a party guilty of negligence, laches, inaction or bad faith. (*Raza and Kisch, JJ.*) JAGMOHAN TEWARI *v.* MAHADEO PRASAD. **I.R. 1932 Oudh 293 = 138 I.C. 149 = 9 O.W.N. 430 = A.I.R. 1932 Oudh 220.**

———**S. 14**—*Scope.*

S. 14 does not apply in case of continuance of the same proceeding. (*Coldstream and Bhide, JJ.*) TOPAN DASS *v.* THARIA RAM. **150 I.C. 739 = 7 R.L. 22 = 36 P.L.R. 215 = A.I.R. 1934 Lah. 412.**

———**S. 14**—Scope—Benefit under—When claimable —S. 4—Distinction. *See* LIMITATION ACT, SS. 4 AND 14. **68 M.L.J. 665 (P.C.).**

———**S. 14**—*Scope—Decree against minor—Objection to decree in execution proceeding—Subsequent suit to set aside decree—Exclusion of time.*

S. 14 was intended to protect a *bona fide* plaintiff from the consequence of some mistake made by his advisers in prosecuting his claim. The word 'jurisdiction' in the section should be construed liberally. If the other conditions mentioned in the section are satisfied, the benefit given by the section cannot be taken away merely because the course adopted before was not a well-conceived one. Where in the prior execution proceedings the minor attacked the validity of the decree on the ground that the guardian had acted collusively and fraudulently and in the latter suit he sought to set aside the decree.

Held, that the prior proceedings were not entirely misconceived and that time taken therein should be excluded. (*Sundaram Chetty, J.*) TIRUMALA NARASIMHACHARYULU *v.* SOBHANADRI APPA RAO. **I.R. 1932 Mad. 839 = 140 I.C. 270 = 1932 M.W.N. 1317 = A.I.R. 1933 Mad. 197.**

———**Ss. 14 and 15**—*Setting aside sale—Party prevented from instituting suit—Deduction of time.*

The sale was effected in 1900 but up to March, 1917, the property was in *custodia legis* under an erroneous order of the Insolvency Court and that the plaintiff could not during that period have instituted the suit. The suit was filed in 1919 to set aside the sale.

Held, that limitation was saved by Ss. 14 and 15. (*Tek Chand and Tapp, JJ.*) MT. UMRAO BIBI *v.* RAM KISHEN. **13 Lah. 70 = I.R. 1932 Lah. 379 = 137 I.C. 820 = 33 P.L.R. 1003 = A.I.R. 1932 Lah. 281.**

———**Ss 14 and 22**—*Suit against dead person—Application to bring legal representatives on record—Deduction of interval—Permissibility.*

Where a plaint is filed against a person who is in fact dead at the time of presentation of the plaint, no application by way of amendment or bringing on record legal representatives can be validly made because the whole proceeding is void and has no effect whatever. And the period between the date of the institution of the suit and the date of the application to implead the legal representatives cannot be deducted under S. 14 of the Limitation Act. 16 M. 319 ; 31 M 86 ; 1928 M.W.N. 240 and 24 I.C. 112, Rel. (*Krishnan Pandalai, J.*) CALICUT MUNICIPAL COUNCIL *v.* KUNHIPATHUMMA. **I.R. 1933 Mad. 312 = 143 I.C 596 = 1933 M.W.N. 641 = 37 L.W. 489 = A.I.R. 1933 Mad. 454.**

———**S. 14**— Suit for arrears of rent—Plea of occupier of payment to landlord—Landlord impleaded—Payment found true—Appeal dismissed—Subsequent suit under S. 37 of Agra Tenancy Act—Deduction of time between the denial of right by the landlord in the previous

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litigation and the date of the final decision on appeal allowed. *See* AGRA TENANCY ACT (1926), S. 37. **14 L.R. 99 (Rev.) = 17 R.D. 168.**

——**S. 14**—*Suit kept pending in wrong Court—Mistake more of Court than of party—Exclusion of time.*

Where on account of a mistake more on the part of the Court than through any fault of the plaintiff, his suit remains pending in a Court having no jurisdiction, the plaintiff can claim the benefit of S. 14. (*Srivastava and Zia-ul Hasan, JJ.*) GAPPOO SINGH *v.* HAR CHARAN. **158 I.C. 267 = 8 R.O. 74 = 1935 O.W.N. 1045 = A.I.R. 1935 Oudh 501.**

——**S. 14**—*Suit for profits—Plaintiff obtaining mere decree for possession in prior suit—Unsuccessful attempt to recover profits in restitution—Right to deduction of period occupied by restitution proceedings.*

The plaintiffs who were some of the members of a joint Hindu family brought a suit against a purchaser in execution of a mortgage decree against another member and obtained a decree for possession of their shares in the property. There was no prayer in the plaint for profits. After an unsuccessful attempt to recover profits in restitution proceedings, the plaintiffs brought a suit for their share of the profits during the period they were kept out of possession and claimed deduction of the period during which the restitution proceedings were pending.

Held, that for the purpose of the application of S. 14 of the Limitation Act, it must be shown that the restitution proceedings were conducted in "good faith" (*i.e.*), as the result of due care and attention and that they failed on the ground of want of jurisdiction or other defect of a like nature and that it was difficult to hold that by any reasonable construction of S. 144, C. P. Code, the present case could have been believed to fall under that section and that the mere fact that the plaintiffs might have honestly believed that they could get all that they were entitled to by way of proceedings in restitution would not suffice to give them the benefit of S. 14. (*Varadachariar and Burn, JJ.*) SIDDALINGANA GOWD *v.* BHIMANA GOWD. **156 I.C. 640 = 8 R.M. 30 = 41 L.W. 138 = 1935 M.W.N. 107 = A.I.R. 1935 Mad 731 = 68 M.L.J. 487.**

——**S. 14**—*Time of previous arbitration proceedings—Exclusion of.*

In a suit brought in a Civil Court, the time taken in previous arbitration proceedings relating to the subject-matter of the suit cannot be excluded for the purpose of computing limitation, because proceedings before arbitration cannot be held to be upon the same cause of action as a civil suit. The cause of action in proceedings before arbitrators is the agreement of the parties to refer the matter in dispute between them to arbitration, whilst in a civil suit there is no such agreement and the cause of action is upon the right or title which the plaintiff alleges in himself. S. 14 is not also applicable because in the first place, although the Limitation Act should be applied by analogy to proceedings before arbitrators and S. 14 can be invoked with regard to proceedings before arbitrators with reference to previous proceedings before arbitrators, still proceedings before arbitrators will not be proceedings before a Court within the meaning of S. 14 with reference to a subsequent civil suit. Secondly the decree of a Civil Court that an award delivered by arbitrators is not valid and binding does not deprive the arbitrators of their jurisdiction and the cancellation of the award cannot be considered a cause of a like nature within the meaning of S. 14. 56 C. 1048 (P.C.), Dist. (*Staples, A.J.C.*) MAHARAJ SAI *v.* KEDAR NATH. **29 N.L.R. 272 = 6 I R. (Nag.) 34 = 144 I.C. 948 = A.I.R. 1933 Nag. 130.**

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——**S. 14**—*Time spent in prosecution of another case—Allowance.*

The section is mandatory, and if the Court has to exclude the time spent in prosecuting a case in good faith, the Court must determine whether the prosecution was in fact in good faith or not. In order that the Court should arrive at the period which is to be excluded under S. 14, it must also determine how much must be included, whether by reason of prosecution in bad faith or owing to any other reason. (*Grille, J.C.*) MODEL MILLS, NAGPUR, LTD. *v.* HIRALAL RAMGOPAL. **30 N.L.R. 294 = 6 R.N. 255 = 149 I.C. 956 = A.I.R. 1934 Nag. 145.**

——**S. 14**—*Time spent in revision—Exclusion.*

The principle that party who proceeds contrary to a clearly expressed provisions of law cannot be regarded as prosecuting another civil proceeding in good faith is sound but should not be applied with rigidity. If in the revision proceedings there is no want of diligence and good faith, there is no reason why the plaintiff should not have the benefit of S. 14 because of the negligence of his advocate. Every case has to be judged on its own merits. *C* purchased a field in suit in execution of a decree obtained by him against *S* and took possession of the same. *L* obtained a final decree for foreclosure and got possession of the said field on 10—8—1926. *C's* application in revision filed on 27—9—1926 was also dismissed on 21—3—1927 after notice to the other side. *C* sued *L* on 21—3—1928 for establishing his right under O. 21, R. 103 and *L* contended that the suit not having been filed within one year from 10—8—1926 was barred by time. The trial Court gave *C* the benefit of S. 14, Limitation Act, and ordered that the suit should proceed. *L* applied for revision of this order, urging that *C* was not entitled to the benefit of S. 14 of the Limitation Act.

Held, that in view of the fact that the Court in revision thought it fit to hear the parties, it might be assumed that *C* had reasonable ground for supposing that the original order would be set aside in revision. The lower Court was, therefore, right in giving the benefit of S. 14 of the Limitation Act to *C*. But the lower Court should only have excluded from the computation the period during which the application was pending, *i.e.*, from 17—9—1926 to 21—3—1927 and not the time between the date of the order of the lower Court and the date of filing the revision between 1—8—1926 and 27—9—1926. In this view *C's* suit was time barred. 7 Rang. 466, Dist. (*Niyogi, A. J. C.*) LAXMAN DAS *v.* CHUNNI LAL. **27 N.L.R. 251 = I R. 1931 Nag. 49 = 130 I.C. 145 = A.I.R. 1931 Nag 17.**

——**S. 14**—*Two Courts with concurrent jurisdiction—Suit filed in one—Good faith.*

If two Courts have jurisdiction to try a suit, it is initially the privilege of the plaintiff to decide in which Court he would file the suit, and the exercise of this option by filing it in a particular Court does not affect the question of jurisdiction or his *bona fides*. The mere fact therefore that the plaintiff instituted the suit in the Civil Court at *X* instead of at *Y*, because it was convenient for him to do so, does not indicate that he did not institute the suit in good faith. (*Jai Lal, J.*) BHAGWAN DAS *v.* TIKAYA RAM. **I.R. 1933 Lah. 423 = 144 I.C. 184 = A.I.R. 1933 Lah. 264.**

——**S. 14 (1)**—*Applicability—Withdrawal of suit under O. 23, R. 1—Fresh suit on same cause of action—Bar.*

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The appellant filed a suit against two sets of defendants on bahi khata accounts. A preliminary objection was taken to the plaint in the earlier suit and it was held in the end that the plaint was bad because of misjoinder of parties. The appellant was ordered in that suit to make his election as to which part of the claim he wished to proceed with. Upon this order the appellant stated that he wished to proceed against one set of defendants and he withdrew the part of the claim directed against the respondents in the appeals. His suit against the other set of defendants was decreed.

Held, that the plaintiff was not entitled to claim the benefit of S. 14 (1) on account of the previous suit he had withdrawn.

Semble.—The words "is unable to entertain it" do not merely mean that the Court has expressed its mind that the suit is defective but must mean that the Court has passed an order terminating the suit or proceeding on the ground that there is a defect of jurisdiction. (*Sulaiman, C.J., Mukerji and King, JJ.*) SADAYATAN PANDE *v.* RAM CHANDRA GOPAL. **57 All. 145=150 I.C. 135=6 R.A. 1038=3 A.W.R. 806=1934 A.L.J. 535=A.I.R. 1934 All. 688 (F.B.).**

———**S. 14 (1)**—*'Prosecuting with due diligence'—Erroneous view of law.*

Where a party has reasonable cause for thinking that the view of the law on which he relied might be accepted, in other words, is prosecuting with due diligence a proceeding which would secure to him all that he desires, the case falls under S. 14 (1). (*Keane, S. M. and Oppenheim, J. M.*) HARIHAR BAKSH SINGH *v.* INDER SHEKHAR BAKSH SINGH. **15 R.D. 799.**

———**S. 14 (2)**—Applicability — Appeal to Privy Council held incompetent—Application for review of the judgment of High Court—Deduction of time not allowed under S. 5 or 14 (2). *See* LIMITATION ACT, S. 5. **36 C.W.N. 40=A.I.R. 1932 Cal. 171.**

———**S. 14 (2)**—Applicability—Decree as against several defendants—One defendant remaining *ex parte*—Appeal—Dismissal—Subsequent application to set aside *ex parte* decree—Limitation saved under S. 14 (2). *See* C. P. CODE, O. 9, R. 13—LIMITATION. **54 All. 423=1932 A.L.J. 257=A.I.R. 1932 All. 340**

———**S. 14 (2)**—*Applicability—Defendant not claiming decree—Subsequent suit on same facts—Exclusion of time.*

There is no general rule that a party defending a suit is entitled to deduct the time spent in defending it in computing the period during which limitation ran against him for the purpose of prosecuting a suit on the same facts. Where in the prior suit the defendant was defending a money suit and nothing that he did would have entitled him to a decree in his favour and there was nothing to restrain him from filing his own suit,

Held, that the defendant who instituted the later suit was not entitled to exclusion of time under S. 14 (2). (*Grille, A.J.C.*) HIRALAL *v.* KRIPAL SINGH. **28 Nag.L.R. 348=I.R. 1933 Nag. 26=141 I.C. 34=A.I.R. 1933 Nag. 13.**

———**S. 14 (2)**—*Application for final decree under O. 5, R. 34, C. P. Code—Exclusion of time taken in unsuccessfully executing preliminary decree.*

In a mortgage suit, a decree for sale in terms of a compromise entered into by the parties was passed in favour of the plaintiffs against the defendant. The plaintiff decree holders filed an application for execution of the decree and the defendant objected to the application for execution, *inter alia*, on the ground that the compromise decree, being a preliminary decree for sale, was not capable of execution. The execution Court

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overruled the objection, but the appellate Court gave effect to it and dismissed the application for execution, holding that the compromise decree was a decree under O. 34, R. 4, C. P. Code. The plaintiff decree holders filed an application for preparation of a final decree under O. 34, R. 5, C. P. Code, and sought to bring the said application within limitation by alleging that they were entitled, in computing the period of limitation, to exclude the time during which the application for execution was pending in the Court below and in the appellate Court.

Held, that the plaintiff decree-holders were not entitled to the benefit of the provisions of S. 14 (2) of the Limitation Act, as their prior application for execution was not "for the same relief" within the meaning of that section, for which their application for the preparation of the final decree was filed. (*Thom and Iqbal Ahmad, JJ.*) MAHOMED YUNIS *v.* TILOK CHAND. **153 I.C. 1058=7 R.A. 661 (2)=4 A.W.R. 1352=1935 A.L.J. 201=A.I.R. 1935 All. 323.**

———**S. 14, Expl. 1**—*Termination of proceeding—Order for return of plaint—Limitation computed from date of return.*

On 26th May, 1927, a case was ordered to be returned for presentation to the proper Court. On the 13th June, 1927, the Deputy Registrar made an order and in accordance with that, an officer of the Court returned the plaint which was filed in the proper Court the next day.

Held, that limitation should be computed only from 13th June 1927. (*Mukerji and Guha, JJ.*) NEERENDRABHOOSHAN LAHIRI *v.* BERHAMPUR OIL MILLS, LTD. **60 Cal. 1122=149 I.C. 79=6 R.C. 512=A.I.R. 1933 Cal. 914.**

———**S. 15**—Applicability—Application under O. 21, R. 97, C. P. Code—If one for execution. *See* C.P. CODE, O 21, R. 79 AND LIMITATION ACT, S. 15. **62 Cal. 66.**

———**S. 15**—*Applicability—Direction to postpone execution for some time—Order made in different suit in the absence of execution application—Effect.*

Where after a decree had been obtained and when no execution appliction was pending therein, the Judge ordered in a connected suit that the decree holder might wait for some time for payment.

Held, that the order did not suspend limitation and did not operate as a stay of the execution proceeding in the prior suit. (*Lord Tomlin*). RAJA KIRTYANAND SINGH *v.* PRITHI CHAND LAL CHAUDHURY. **60 I.A. 43=12 Pat. 195=I.R. 1933 P.C. 33=57 C.L.J. 276=14 Pat. L.T. 167=37 L.W. 335=1933 A.L.J. 359=37 C.W.N. 548=35 Bom.L.R. 526=141 I.C. 760=1933 M.W.N. 112=10 O.W.N. 226=A.I.R. 1933 P.C. 52=64 M.L.J. 599 (P.C.).**

———**S. 15**—*Applicability—Execution application.*

Quære: If S 48 of the C.P. Code is controlled by the provisions of S. 15 of the Limitation Act? 8 O.W.N. 624; 8 O.W.N. 1186 and 13 O.C. 303, Ref. (*Hasan, C.J. and Kisch, J.*) AMIR MIRZA BEG *v.* GAURI NATH. **I.R. 1932 Oudh 253 (1)=137 I.C. 603 (1)=9 O.W.N. 513=A.I.R. 1932 Oudh 246.**

———**S. 15**—*Applicability—Execution stayed by injunction—Order "dismissing execution for the present"—Propriety—Application after removal of injunction for revival—Limitation—Limitation Act, Art. 181—Applicability.*

An order passed by the executing Court "dismissing for the present," an execution case, which cannot be proceeded with because of an injunction restraining the decree-holder from proceeding with it, is unwarranted in law; it does not, however, put an end to the execution

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case, but is only a suspensory order which keeps the execution case pending, though off the list of pending cases, for a time, namely, so long as the injunction lasts. If therefore, after the removal of the injunction the decree-holder makes an application to revive or continue the prior application, such an application, not being in terms a fresh application for execution, does not come within S. 15 of the Limitation Act as amended in 1908. Nor does Art. 181 apply to such an application. In fact there is no rule of limitation prescribed for such an application. It is the duty of the court to have in right all undisposed cases and when the bar is removed to direct the party to take the necessary steps for further progress of the case. (*Henderson and R.C. Mitter, JJ.*) S.M. KRISTO KAMINI DEBI *v.* GIRISH CHANDRA MONDAL. **63 Cal. 57=162 I.C. 654=8 R.C. 628=39 C.W.N. 1030=A.I.R. 1936 Cal. 239.**

——**S. 15**—*Application for execution—Dismissal for non-payment of batta—Collateral litigation—Appeal pending—Fresh application after three years from the date of the previous order—If can be treated as continuing or reviving previous application.*

A mortgagee decree-holder filed an execution application for sale of mortgaged properties on 2nd October, 1922. It was dismissed on 16th January, 1923, owing to non payment of batta for fresh sale notice as ordered by Court. Meanwhile third persons filed a suit against both the mortgagor and mortgagee, alleging that the mortgaged properties belonged to a public religious endowment and were as such alienable and he sought a declaration from the Court to such an effect. That suit was decreed a day previous to the dismissal of the execution application. But on appeal the High Court reversed the decision of the lower Court and dismissed the collateral suit on 16th August, 1927. The mortgagee decree-holder put in another execution application after the termination of the said appeal on 23rd September, 1927, but it was dismissed as time-barred. On the question whether the decree in the collateral litigation would be tantamount to an injunction staying the execution proceedings and whether the fresh application filed after three years would be taken to revive or continue the original application for execution filed by the decree-holder,

Held, that in order to make the provisions of S. 15 of the Limitation Act apply to this case, it must be shown that a suit or application for the execution of the decree had been stayed by an injunction or order. If the decree-holder could not bring herself within the exemptions provided for in the Act, she could not escape the bar of limitation by pleading in equity an implied order or a collateral litigation which would render her proceedings futile.

Held also, that since the earlier application for execution had been finally and properly dismissed for non payment of batta and the later execution application was filed more than three years from the date of the order passed on the former one, it should be deemed to have been barred by limitation under Art. 180 of the Limitation Act. In order to enable the later application to be treated as one in continuation or to revive the former one, there should have been no final disposal or there should have been a wrong dismissal on account of some obstacle which had existed but which had been subsequently removed. (*Jackson, Sundaram Chetty and Vere Mockett, JJ.*) SUNDARAMMA *v.* ABDUL KHADAR. **56 Mad. 490=1933 M.W.N. 566=I.R. 1933 Mad. 274=143 I.C. 1=37 L.W. 607=A.I.R. 1933 Mad. 418=64 M L.J. 664 (F.B.).**

[D. 65 M.L. J. 747 (751)]

——**S. 15**—*Construction.*

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Expressly excluded means by express words. **A.I.R. 1930 Sind 93, Foll.** (*Aston, A.J.C.*) ASANDAS HASHMATRAI *v.* KHAN CHAND. **148 I.C. 178=6 R.S. 189=1933 Cr.C. 800=A.I.R. 1933 Sind 240.**

——**S. 15**—*Construction and scope—Execution—Stay by injunction order—Application to revive after dissolution of injunction—Limitation—Principle of revival—If superseded by S. 15.*

The enlargement of the scope of S. 15 of the Limitation Act, by the Act of 1908 by which the section has been made applicable to execution application also, has not in any way superseded the principle that a later application can in certain circumstances be treated as an application for revival or in continuation of an earlier application. S. 15 only contemplates the filing of an application for execution and does not in terms apply to any other application. An application by a decree-holder for revival of or to continue his previous application which had been stayed by an injunction does not come within S. 15. (*Henderson and R. C. Mitter, JJ.*) KRISTO KAMINI DEBI *v.* GIRISH CHANDRA MONDAL. **63 Cal. 57=162 I.C. 654=8 R.C. 628=39 C.W.N. 1030=A.I.R. 1936 Cal. 239.**

——**S. 15**—*Execution application—Dismissal for default—No effect as stay order.*

Where the order on an application for execution shows that it had been dismissed on account of the decree holder's absence, it cannot be treated as an order for stay of execution within the meaning of S. 15. (*Bhide, J.*) ASA NAND *v.* BISHAN SINGH. **131 I.C. 345=A.I.R. 1931 Lah. 125.**

——**S. 15**—*Insolvency—Suit to recover debt brought after limitation but before annulment of adjudication—Withdrawal of suit.*

Limitation for proving debts ceases to run during insolvency proceedings. Where therefore a creditor sues after ordinary period of limitation is over but before annulment of adjudication order, the proper course is not to dismiss the suit but to permit him to withdraw the suit with liberty to sue again after annulment of adjudication. (*Bagulay, J.*) BANDEALLY JAFFER *v.* PEER MAHOMED. **6 I.R. (Rang.) 72=146 I.C 124=A.I R. 1933 Rang. 75.**

——**S 15**—*Purchase of property by plaintiff at auction—Declaratory suits by plaintiff and defendant—Plaintiff obtaining possession but delivery of possession stayed by stay order obtained by defendant—Suit by plaintiff for recovery of mesne profits—Limitation, if extended by stay orders.*

Plaintiff purchased certain property at auction sale, and after disputes with the defendant, the plaintiff was held entitled to the whole property. Plaintiff obtained possession of the property but delivery of possession was twice stayed by stay order obtained by the defendant, In a suit by plaintiff for mesne profits wrongfully received by the defendant,

Held, that the stay order did not extend the time under S. 15 as there was nothing to prevent the plaintiff from filing the suit for mesne profits even though the question was not decided. (*Bhide, J.*) BASHESHAR DASS *v.* DIWAN CHAND. **6 I.R (Lah.) 287=146 I.C. 939=34 P L.R. 1085=A I.R. 1933 Lah. 615.**

——**S 15**—*Scope—Order staying execution—Effect of.*

An order which stayed the execution of a decree is an order which would not come under S. 15. being an order merely staying the Court, as it did not put an end to the rights of either the judgment-debtor or the judgment creditor to apply for execution. (*Beasley, C.J. and Bardswell, J.*) KADIMCHERJA RAJU *v.* AYYAPARAJU. **164 I.C. 896=A.I R. 1935 Mad. 352.**

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——**S. 15 (1)**—Applicability—Period mentioned in S. 48, C.P. Code—Execution stayed by injunction or order of the Court—Application for execution 12 years after decree—Bar—Time during which execution was stayed cannot be excluded under S. 15 (1)—S. 48, C. P. Code, not controlled by S. 15 (1). *See* C. P. CODE, S. 48—SCOPE. **A.I.R. 1931 Oudh 351.**

——**S. 15 (2)**—*Applicability—U.P. Court of Wards Act*, 1912, *S. 17—Notification of claim under—Deduction of period of limitation.*

The notification of the claim under S. 17 of the U.P. Court of Wards Act is merely an information to the Collector of the particulars of the claim. It is not necessarily a notice of a civil suit on the basis of the claim. And s. 15 (2) of the Limitation Act which excludes the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment would not apply to the notifying of the claim under S. 17. (*Sulaiman, A. C. J. and King, J.*) BARODA KANT SEN *v.* COURT OF WARDS. **I.R. 1931 All. 697=133 I C. 537=1931 A.L.J. 949=A.I.R. 1931 All. 752 (2).**

——**S. 18**—*Applicability—Application under S.* 174, *B. T. Act.*

S. 18 of the Limitation Act applies to applications under S. 174 of the amended B. T. Act. (*Mitter and M. C. Ghose, JJ.*) MIDNAPORE ZAMINDARY CO., LTD. *v.* PRIYA BALA DASI. **60 Cal. 970=148 I.C. 15=6 R.C. 456=57 C.L.J. 377=37 C.W.N. 927=A.I.R. 1933 Cal. 782.**

——**S. 18**—*Applicability to B. T. Act—Application to set aside sale under S.* 173 (3)—*Fraud—Effect on limitation for application.*

Where the irregularities affecting the validity of a sale have, by the fraud of the decree-holder or other parties to the sale, been kept concealed from the judgment-debtor, the latter is entitled in an application to set aside the sale under S. 173 (3) of the B. T. Act, to avail himself of the provisions of S. 18 of the Limitation Act, and to compute the period of limitation as against the person who is a party to the fraud, from the time when the fraud became known to him, whether the sale has been confirmed or not. (*Guha and M. C. Ghose, JJ.*) PARTHASARATHI RAY *v.* AHINDRA NATH ROY. **154 I.C. 347=7 R.C. 445=60 C.L.J. 36=A.I.R. 1935 Cal. 89.**

——**S. 18**—*Applicability—Fraud of any person.*

The words of S. 18 are sufficiently wide to include any person (*e.g.*, auction-purchaser) whose fraud has kept from the knowledge of another person his right to institute a suit or make an application. A.I.R. 1925 Cal. 1227, Not foll; 17 Cal. 669; 1 C.W.N. 67 and A.I. R. 1926 Cal. 229, Ref. (*Beasley, C.J. and Bardswell, J.*) PULLA REDDI *v.* PATTABHIRAMI REDDI. **56 Mad. 734=6 I.R. (Mad.) 62=143 I.C. 388=38 L. W. 131=1933 M.W.N. 589=A.I.R. 1933 Mad. 626=65 M.L.J. 139.**

——**S. 18**—*Fraud—Burden of proof.*

Where a suit is on the face of it barred, it is for the plaintiff to prove in the first instance the circumstances which would prevent the statute from having its ordinary effect. A person who, in such circumstances, desires to invoke the aid of S. 18 must establish that there has been fraud, and that, by means of such fraud, he has been kept from the knowledge of his right to sue or of the title whereon it is founded. Once this is established, the burden is shifted on to the other side to show that the plaintiff had knowledge of the transaction beyond the period of limitation. Mere suggestions of fraud do not amount to such knowledge as is required by the section and the knowledge must be clear and definite knowledge of the facts constituting the particular fraud. (*Addison and Beckett, JJ.*) BHAGWANA *v.* SHADI. **16 Lah. 408=155 I.C. 654=7 R.L. 758=36 P.L.R. 114=A.I.R. 1934 Lah. 878.**

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——**S. 18**—*Fraud — What amounts to—Silence of co sharer.*

A co-sharer coming into exclusive possession of property belonging to himself and his co sharer will be presumed to have done so not only for himself but for his co-sharer as well until there is ouster. If the plaintiff was unaware of that the defendant (his co-sharer) had the property, there is a duty on the defendant to speak and if he remained silent, it amount to concealed fraud on his part, on which the plaintiff can justly rely to get over the bar of limitation. The burden is on the defendant to show that the plaintiff had clear and definite knowledge of the facts which constitute fraud. It is not enough for him to show that the plaintiff had means available to him for coming to know of the fraud. *Beljmann* v. *Beljmann*, (1895) 2 Ch. 474, Foll. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v.* PROBODH CHANDRA SARKAR. **143 I.C. 402=I.R. 1933 Cal. 425=36 C.W.N. 758=55 C.L.J. 420=A.I. R. 1933 Cal. 253.**

——**S. 18**—*Fraud—When affects limitation.*

Fraud only affects limitation when that fraud prevents a person from knowing of his right or the title on which his right is founded. (*Baguley, J.*) RAMANATHAN CHETTYAR *v.* BALDEO SINGH. **6 I.R. (Rang.) 23=144 I.C. 980=A.I.R. 1933 Rang. 110.**

——**S. 18**—*Plaintiff establishing fraud of defendant—Onus of proving—Knowledge of plaintiff beyond period of limitation.*

The terms of S. 18, Limitation Act, are materially different from S. 26, Real Property Limitation Act (3 and 4 Will. 4, c. 27), and when a plaintiff has established that by fraud of the defendant he had been kept from the knowledge of his right to sue, the burden is shifted on the defendant to show that the plaintiff had knowledge of the transaction impeached beyond the period of limitation. A.I.R. 1922 Cal. 157, Foll. (*R. C. Mitter, J.*) JADU NATH GUHA ROY *v.* KASISWAR GUHA ROY. **160 I.C. 250=8 R.C. 419=A.I.R. 1935 Cal. 779.**

——**S. 18**—*Scope.*

Except when the plaintiff's knowledge is an ingredient of his cause of action, the plaintiff's ignorance of his right to sue does not prevent time from running against him. But it is otherwise if such ignorance is brought about by the fraud of the defendant. In order to constitute fraud, there must be some abuse of confidential position, some intentional imposition, or some deliberate concealment of facts, a designed fraud by which a party knowing to whom the right belongs, conceals the facts and circumstances giving that right. The right of the party so defrauded is not affected by lapse of time or by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v.* PROBODH CHANDRA SARKAR. **143 I.C. 402=I.R 1933 Cal. 425=36 C.W.N. 758=55 C.L J. 420=A.I.R. 1933 Cal. 253.**

——**S. 19.**

Acknowledgment.
Admissibility of evidence.
Admission of execution of pro-note.
Admission of liability.
Agent.

LIMITATION ACT (1908), S. 19—Acknowledgment.

Applicability to C. P. Code.
Authority to acknowledge.
Barred debt.
Basis of suit.
Burden of proof.
Communication to creditor.
Construction.
Derivative title. *See* MORTGAGOR AND MORTGAGEE.
Effect of acknowledgment.
Form of acknowledgment.
Fresh contract.
Guardian.
Implied acknowledgment.
Law applicable.
Mistake.
Mortgagor and mortgagee.
No acknowledgment.
Partner. *See* AUTHORITY TO ACKNOWLEDGE.
Principal debtor and surety.
Proof of acknowledgment.
Registration.
Scope.
Sufficiency of acknowledgment.
Unconditional acknowledgment.

Acknowledgment.

———**S. 19**—*Acknowledgment.*

A letter by the debtor after receiving a statement of account from the creditor which amounts to an admission of the correctness of that account and a request for him to pay, is an acknowledgment within the meaning of the section. 30 Bom.L.R. 688, Foll. (*Baker, J.*) VELCHAND *v.* BHAGWANDAS. **I.R. 1931 Bom. 127=128 I.C. 911=32 Bom.L.R. 1390=A.I.R. 1931 Bom. 74.**

———**S. 19**—*Acknowledgment—It must be definite and unequivocal.*

For a case to be brought within the purview of S. 19 there must be a definite or unequivocal acknowledgment of the debt. (*Mya Bu and Bagulay, JJ.*) MAUNG PO GYI *v.* B. K. BANERJEE. **156 I.C. 783=8 R.R. 48=A.I.R. 1935 Rang. 152.**

———**S. 19** — *Acknowledgment after limitation—Limitation expiring on Court holiday—Acknowledgment made on or before reopening of Court—Validity.*

An acknowledgment made after the period of limitation but on or before the reopening of the Court when such period expires on a Court holiday does not give a fresh start of limitation under S. 19. 26 Bom. 782, Foll.; 48 All. 726, Diss. (*Mitter, J.*) ANISUDDIN AHMED *v.* KALIPADA ROY CHOWDHURY. **58 Cal. 1148=I.R. 1932 Cal. 44=134 I.C. 1132=35 C.W.N. 370=A.I.R. 1931 Cal. 785.**

———**S. 19**—*Acknowledgment after limitation—Validity.*

An Acknowledgment of liability to be valid and effective under S. 19 must be made before the expiration of he period prescribed by the first schedule. 52 B. 521, Foll. (*Jai Lal and Abdul Qadir, JJ.*) DIYALU MAL *v.* NANDU SHAH DEV RAJ. **13 Lah. 240=I.R. 1931 Lah. 638=132 I C. 590=33 P.L.R. 59=A.I.R. 1931 Lah. 691.**

———**S. 19**—*Acknowledgment — Promissory note not admissible in evidence—If can be use as acknowledgment.*

A promissory note which is executed in renewal of a prior promissory note but which is inadmissible in evidence, can be relied on as an acknowledgment of the debt due under the earlier promissory note. (*Kendall, J.*) RANDHIR SINGH *v.* THAMAN LAL. **153 I.C. 551=7 R.A. 541=4 A.W.R. 657=A.I.R. 1934 All. 951.**

———**S 19**—*Acknowledgment — Renewal of promissory note—Endorsement in earlier note—Effect.*

Where in respect of liability under an earlier promissory note a fresh note was executed and there was an endorsement on the earlier note to the effect that "in lieu of the earlier promissory note a second note was executed and the former thereby became void" and the latter note being insufficiently stamped was incapable of being sued on and the plaintiff thereupon sued on the earlier note.

Held, that the endorsement on the earlier note was a valid acknowledgment so as to save limitation. (*Muker-ji and Bennet, JJ.*) SALIG RAM *v.* RADHAY SHIAM. **I.R. 1931 All. 830=134 I.C. 254=1931 A.L.J. 522=A.I.R. 1931 All. 560.**

———**S. 19**—*Acknowledgment—Statement of facts.*

A statement of facts need not necessarily imply that it is not an acknowledgment of liability. On the contrary an "acknowledgment" may be and is generally found in a statement of facts. Thus if in a later deed the fact is stated that there is a pre existing mortgage it must mean that the debt secured thereby is a pre-existing debt and the statement will amount to an acknowledgment of liability. (*Hasan, C. J. and Kisch, J.*) RAM BILAS *v.* LACHMI NARAIN. **I.R. 1931 Oudh 302=132 I.C. 542=14 O.L.J. 380=8 O.W.N. 541=A.I.R. 1931 Oudh 295.**

———**S. 19** —*Acknowledgment—What amounts to—Test.*

To find out whether there is acknowledgment in a document, the document should be read as a whole. There must be a conscious acknowledgment that the party concerned is liable to pay under the document on which reliance is placed. Where on a proper construction, the defendant purported to say 'no doubt there is a contract into which we entered but no money is liable to be paid under the contract because I am prepared to see the contract through'.

Held, it did not amount to an acknowledgment. (*Madhavan Nair, J.*) P. C. MUTHU CHETTIAR *v.* VENKATACHALAM CHETTY. **159 I.C. 486=8 R.M. 505=41 L.W. 476=1935 M.W.N. 237=A.I.R. 1935 Mad. 287.**

LIMITATION ACT (1908), S. 19—Admissibility of evidence.

Admissibility of evidence.

See also ACKNOWLEDGMENT, *supra* AND SUFFICIENCY OF ACKNOWLEDGMENT *infra*.

———**S. 19**—*Admissibility of evidence—Promissory note, insufficiently stamped—Not admissible, even as an acknowledgment.*

If a promissory note is insufficiently stamped, it is inadmissible in evidence not only as a promissory note but also as an ackowledgment. (*Staples, A.J.C.*) GOVINDA *v.* HARI BHAOO. **147 I.C. 981=6 R.N 150=16 N.L J. 241=A.I.R. 1933 Nag. 391.**

———**S. 19 (2)**—*Admissibility of evidence—Insolvency of judgment debtor—Schedule containing acknowledgment—Date being stroked out—Evidence as to date of acknowledgment.*

Where a judgment-debtor became insolvent and the schedule of assets and liabilities filed by him contained an acknowledgment of liability as regards the suit claim, but the schedule contained a date that had been stroked out, which, if taken into account, would bar the later execution application,

Held, that for purposes of S. 19 (2) the writing containing the acknowledgment should be taken to be undated and evidence may be given as to its correct date. 26 B. 128, Disappr. (*Madhavan Nair, J.*) PERAMA-

LIMITATION ACT (1908), S. 19—Admissibility of evidence.

NAYAGAM PILLAI *v.* RAMAN CHETTIAR. **140 I.C. 774=1932 M.W.N. 1330=I.R. 1933 Mad 44=36 L.W. 865=A.I.R. 1933 Mad. 104=63 M.L.J. 785.**

——S. 19, Expl. 1—*Admissibility of evidence—Extrinsic evidence to explain acknowledgment.*

According to Expl. 1 to S. 19 of the Limitation Act it is not necessary that the writing itself should specify the exact nature of the property or right in respect of which liability is acknowledged and there is no bar to extrinsic evidence being admitted for the purpose. (*Bhide and Din Mahomed, JJ.*) NIHALU RAM CHELA RAM *v.* RADHU RAM HUKMI RAM. **16 Lah. 258=155 I.C. 1074=7 R.L. 833=37 P.L.R. 478=A.I.R. 1934 Lah. 835.**

Admission of execution of pro-note.

——S. 19—*Admission of execution of pro-note—Effect of.*

The admission of the execution of a promissory note *prima facie* is no more than an admission of liability as at the date of the note. 33 Cal. 1047 and 50 Mad. 548=51 M.L.J. 856, Foll. (*Panckridge, J.*) SAGOREMAL GOPALKA *v.* A. C. BANERJEE & CO. **63 Cal 512=159 I.C. 618=8 R.C. 334=40 C.W.N. 132=A.I.R. 1935 Cal. 721.**

——S 19—*Admission of execution of pro-note—Suit on pro-notes—Written statement admitting execution but alleging various re-payments.*

A suit was instituted for recovery of money due on various promissory notes executed by the same defendant. The defendant filed a written statement wherein he admitted the execution of the pro notes but alleged that several re-payments had been made in respect of the several pro-notes.

Held, that the statement amounted to an admission that all the pro notes were at least in part undischarged at the date the written statement was filed. (*Panckridge, J.*) SAGOREMAL GOPALKA *v.* A. C. BANERJEE & CO **63 Cal. 512=8 R.C. 334=159 I.C. 618=40 C.W.N. 132=A.I.R. 1935 Cal. 721.**

Admission of liability.

See also COMMUNICATION TO CREDITOR, *infra.*

——S. 19—*Admission of liability—Admission in another suit on the same matter.*

Plaintiff who had two promissory notes executed by the defendant in his favour filed a suit on one of them. The defendant in his written statement admitted the existence of two promissory notes, but pleaded an agreement by which the plaintiff had agreed to take certain amount on account of both the promissory notes and that certain part of it had been paid. The agreement was not proved. In a suit on the second promissory note, plaintiff relied on the above written statement to save limitation.

Held, that it was a sufficient acknowledgment. (*Kendall, J.*) RAGHUBAR DAYAL *v.* BANWARI LAL. **6 I.R. (All.) 8=144 I.C. 903=A.I.R. 1933 All. 352.**

——S. 19—*Admission of liability — Admission of past liability—Effect of.*

There is no rule of law that an admission of a past liability unaccompanied by an allegation discharge should in all cases be interpreted as an admission of a subsisting liability. The question in each case is, is it a proper inference to draw from the facts and circumstances, that the debtor intended to make an admission that on the date it was made, the debt was existing. (*Venkatasubba Rao, J.*) APPASAMI PILLAI *v.* MORAN GAM MUTHIREAN. **157 I.C. 259=8 R.M. 131=1935 M.W.N. 783=41 L.W. 747=A.I.R. 1935 Mad. 371=68 M.L.J. 73.**

LIMITATION ACT (1908), S. 19—Agent.

——S. 19—Admission of liability—Items admitted in course of negotiations for settlement. *See* LIMITATION ACT, ART. 115. **A.I.R 1935 Lah. 775.**

——S. 19—*Admission of liability—Examination of insolvent—Statement made by debtor — Mention of decree debt—Admission of liability.*

The inclusion of a decree debt in the insolvency petition which has to be signed by the insolvent amounts to an acknowledgment within the meaning of S. 19. So also the mention of the decree debt in a statement made by the insolvent in an examination for ascertaining his assets and liabilities without any further mention of any payment towards its discharge amounts to an implied admission that the liability under the decree was then subsisting. 36 I.C. 389, Ref. (*Lakshmana Rao, J.*) SAKALA RATTAM *v* MUSALAYYA. **I.R 1933 Mad. 328 (1)=143 I.C 681=1933 M.W.N. 1303=38 L W. 204=A.I.R. 1933 Mad. 565 (1).**

——S. 19, Expl. 1—*Admission of liability—Application by judgment-debtor admitting indebtedness and alleging agreement by decree-holder to postpone execution—If an acknowledgment.*

An application made by the judgment-debtor alleging that the matter had been settled, that in consequence of a part-payment the decree holder had agreed in his letter not to take out execution before the end of the next year and praying that the original letter of the decree-holder may be placed on the record is in substance an admission by him that he still owes money to the decree holder and has obtained a respite from the decree holder for making further payment; it amounts to an acknowledgment of liability giving a fresh starting point of limitation. (*Niamatullah and Kisch, JJ.*) ADYA PRASAD SINGH *v.* LAL GIRJISH BAHADUR PAL. **55 All. 393=6 I.R. (All.) 357=146 I.C. 836=1933 A. L.J. 256=A.I.R. 1933 All. 364.**

——S. 19, Expl. 1—*Admission of liability—Letters by debtor's secretary that all arrears would be paid—If acknowledgment.*

Expl. 1 to S. 19, is very wide in its scope Under it admissions, however indirect, and even if accompanied by a refusal to pay, constitute sufficient acknowledgment. In answer to a letter by the creditor to the debtor stating the amount due to him the debtor's secretary sent a letter by post reciting that he had been directed to intimate to the creditor by the debtor that all the arrears of accounts would be paid in a particular month,

Held, that it was a sufficient acknowledgment of the debt. (*Srivastava and Smith, JJ.*) SHAH MAHOMED KHAN *v.* AHMAD ALI KHAN. **153 I.C. 987=7 R.O. 417=11 O.W.N. 880=A.I.R. 1935 Oudh 170.**

Agent.

——S. 19—*Agent—Acknowledgment by mortgagee's agent—Acknowledgment of a mortgagor's right to redeem.*

An attestation in the settlement records signed by the agent of the mortgagee in which the name of the mortgagee is expressly mentioned as the mortgagee is an acknowledgment of the mortgagor's right to redeem within the meaning of Art. 148, Limitation Act. 1 All. 117 (F.B.) and 145 P.R. 1889, Rel. on; A.I.R. 1920 All. 92 (F.B.), Expl. and Dist. (*Addison, J.*) BHAGWAN DAS *v.* SAID MAHOMED. **14 Lah. 587=147 I.C. 1174=6 R.L. 483=34 P.L.R. 862=A.I.R 1933 Lah. 345.**

——S. 19—*Agent — Acknowledgment by Official Assignee—Saving of limitation against insolvent.*

LIMITATION ACT (1908), S. 19—Agent.

The Official Assignee is not the agent of the insolvent and an acknowledgment made by him does not save limitation. (*Beaumont, C.J. and Blackwell, J.*) CURRIMBHAI *v* AHMEDALI. **58 Bom. 505=I.R. 1933 Bom. 281=143 I C. 698=35 Bom.L.R. 12=A.I.R. 1933 Bom. 91.**

——— **Ss. 19 and 20**—*Agent "Agent duly authorized" —Appointee of insolvent's property—Provincial Insolvency Act* (1920), *Ss.* 37 *and* 43.

If after the annulment of the order of adjudication a person is appointed to receive the property of the insolvent, he is not the insolvent's agent duly authorized to make the payment, because the insolvent has no control over the property and it is impossible to conceive that he would in law be in a position to grant valid authority to the appointee to make any payment out of the property held by the appointee. Hence a payment by such appointee cannot be regarded as being payment made by authority of the ex insolvent and cannot save limitation. (*Mya Bu and Baguley, JJ.*) MAUNG PO GYI *v.* B. K. BANERJEE. **156 I.C. 783=8 R.R. 48=A.I.R. 1935 Rang. 152.**

——— **S. 19**—*Agent—Authority to acknowledge.*

S. 19 or 21 does not contemplate that the authority to be given to the agent must in every case be an express authority. (*Banerji and King, JJ.*) KANTA RAI *v.* RANI JADURAJ KUNWARI. **I.R. 1931 All 603=133 I.C. 155=A.I.R. 1931 All. 398.**

——— **S. 19**—*Agent—President of Committee.*

A President of a Committee who is authorized to purchase goods has equal authority to acknowledge. Such authority need not be express. A.I R. 1919 P.C. 120; A.I.R. 1925 All. 176 and A.I.R. 1925 Rang. 30, Ref. (*Walsh, J.*) SRIVILLIPUTTUR MUNICIPAL COUNCIL *v.* ARUNACHALA NADAR. **6 I.R. (Mad.) 5=144 I.C. 784=37 L.W. 429=A.I.R. 1933 Mad. 332.**

——— **Ss. 19 and 21**—*Agent—Wife of lunatic not appointed manager of his estate—Acknowledgment by—Sufficiency of.*

In a suit on a promissory note executed by the defendant's deceased husband, the plaintiff contended that the suit was in time by reason of an acknowledgment to be found in an admission made by the defendant in a petition which she put in to get herself appointed guardian of her husband who had then become insane and in which she had included the plaintiff's debt in her husband's liabilities. Pending that petition, her husband had died and she was never in fact appointed his guardian and the manager of his property.

Held, that the wife could not be deemed to be "an agent duly authorized in this behalf" and that the acknowledgment made by her could not save limitation (*Beasley, C.J. and Bardswell, J.*) GOMATHI AMMAL *v.* AVU AMMAL. **56 Mad. 964=6 I.R. (Mad) 208 =146 I.C. 49=1933 M.W N. 365=38 L.W. 321=A. I.R. 1933 Mad. 686=65 M.L J. 355.**

Applicability to C. P. Code.

——— **Ss. 19 and 20**—Applicability to C. P. Code, S. 48—Acknowledgment or payment by judgment-debtor —Period of 12 years prescribed by S. 48. C.P. Code not extended. *See* C.P. CODE, S. 48—BAR OF LIMITATION. **10 Luck. 208=A.I.R. 1934 Oudh 465.**

Authority to acknowledge.

See also AGENT, *supra* AND PRINCIPAL DEBTOR AND SURETY *infra*.

——— **S. 19**—*Authority to acknowledge—Acknowledgment—Deposition by defendant made in insolvency proceedings—Judge and the clerk have no authority to acknowledge—C.P. Code, O.* 18, *R.* 5 (*Rangoon*).

LIMITATION ACT (1908), S. 19—Authority to acknowledge.

In a suit on a promissory note a deposition by the defendant made in an insolvency proceeding to the effect that "I borrowed Rs. 600 from the plaintiff on a promissory note" and recorded under C. P. Code, O. 18, R. 5 (Rangoon), was sought by the plaintiff to save the limitation by way of acknowledgment under S. 19, Limitation Act, on the ground that the clerk who signed the certificate at the end of the deposition was the agent of the defendant for the purpose of making such acknowledgment of indebtedness.

Held, that neither the Judge nor the clerk, who signed the certificates at the end of the defendant's deposition had any authority, either derived from the defendant himself or by reason of any duty cast upon them by law, to make an acknowledgment of indebtedness on behalf of the appellant and hence the condition that an acknowledgment must be in the form of a writing which has been signed either by the debtor or by some person duly appointed as his agent in that behalf, was not fulfilled.

Held, further, that R. 5 (Rangoon) merely required the clerk to sign the certificate at the end of the deposition; consequently the clerk of the Court had not signed the deposition as such, either as agent of the witness or in any other capacity. (*Dunkley, J*) U PO YIN *v.* U BA CHIT. **12 Rang. 610=153 I C. 957=7 R R. 239=A.I.R. 1934 Rang. 282.**

——— **S. 19**—*Authority to acknowledge —Partner— Acknowledgment by—Effect of.*

Direct evidence that one of several partners or co-contractors had authority to acknowledge liability or make payments so as to save limitation as against his partners or co-contractors is not necessary, but such authority can be inferred from surrounding circumstances such as the position of other co-contractors or partners. Where the endorsement was made and signed by one of the partners in the ordinary course of business and such an endorsement was made with the implied consent of the other partners,

Held, that he had authority and it saved limitation. (*Skemp, J.*) DAYAL & CO., LAHORE *v.* RADHA KISHAN. **158 I.C. 260=8 R.L. 214=A.I.R. 1935 Lah. 559.**

——— **S. 19**—Authority to acknowledge—Partnership—Acknowledgment by surviving partner—It binds heirs of deceased partner. *See* CONTRACT ACT, S. 264. **37 Bom.L.R. 516=A.I.R. 1935 Bom. 357.**

——— **S. 19**—*Authority to acknowledge—Pleader's admission.*

An admission by a pleader in petition made in course of his business is binding as an acknowledgment so as to give fresh starting point irrespective of whether the pleader represents majors, or guardian for minors. 18 All. 384, Foll. (*Banerji and King, JJ.*) KAMTA RAI *v.* RANI JADURAJ KUNWARI. **I.R. 1931 All. 603= 133 I.C. 155=A.I.R. 1931 All. 398.**

——— **S. 19**—*Authority to acknowledge—Pre emptor whether representative of vendee.*

The result of a decree in a suit for pre-emption is not a re sale of the property by the vendee to the pre-emptor involving any fresh contract or conveyance. When the decree is for pre-emption which places the pre-emptor in the shoes of the vendee thereby becoming the representative of the original vendor, the Court enforces the original obligation of the vendor to offer the property to the pre-emptor and substitutes the pre-emptor in the place of the vendee because the transfer to the latter has taken place in violation of the pre-emptor's preferential right. Consequently a pre emptor is not a representative of the vendee so as to make a valid acknowledgment. An acknowledgment made by

LIMITATION ACT (1908), S. 19—Barred debt.

the vendee after the claim for pre-emption has been brought is binding on the pre-emptor. (*Sulaiman, C. J. and Banerji, J.*) SHANKAR LAL *v.* HASHMI BEGAM. **54 All. 1023=143 I C. 41=I.R. 1933 All. 164=1932 A. L.J. 878=A.I.R. 1932 All. 700.**

Barred debt.

See also UNCONDITIONAL ACKNOWLEDGMENT, *infra.*

——**S. 19**—*Barred debt—Acknowledgment of—No fresh contract.*

A time-barred debt may be revived by an express contract to that effect and a simple acknowledgment is not sufficient for that purpose Where acknowledging the debt, the debtor expressed his willingness to renew the debt,

Held, that there was no fresh contract. (*Buckland, J.*) SATYA KETU DUTT *v.* ROMESH CHANDRA SEN. **60 Cal. 714=6 I.R. (Cal) 270=146 I C. 834 =37 C. W.N. 326=A.I.R. 1933 Cal. 658.**

——**S. 19**—*Barred debt—Effect of acknowledgment —No distinct promise to pay.*

An unconditional acknowledgment imports a promise to pay and can form the basis of a suit but an acknowledgment of time-barred debts which does not contain a distinct promise to pay does not fulfil the requirements of S. 25 (3) of the Contract Act and a suit is not maintainable thereon. (Case-law discussed.) (*Bhide, J.*) MUKHI LAL CHAND *v.* GUL MAHOMED. **I.R. 1933 Lah. 155 (2)=141 I.C. 617=34 P.L.R. 430=A.I.R. 1933 Lah. 209.**

Basis of suit.

See also EFFECT OF ACKNOWLEDGMENT, *infra.*

——**S. 19**—*Basis of suit—Acknowledgment—Suit based on—Maintainability—Promise to pay—Necessity for.*

A bare acknowledgment of a past debt, without a promise to pay, cannot be made the basis of a suit. A distinction, however, must be made between an acknowledgment which contains an express promise to pay and one from which a promise to pay can be inferred. (*Weston, J. C.*) NARSINGH DAS *v.* RAM KANWAR. **1935 A.M.L.J. 14.**

——**S. 19**—*Basis of suit—Debt due on unstamped pro-note acknowledged—Acknowledgment.*

Where the debt due on an unstamped pro note is acknowledged, the acknowledgment is part of the same transaction as the loan by the promissory note and cannot be treated as an independent transaction upon which the plaintiff could frame a cause of action. A. I.R. 1932 All. 199 and A.I.R. 1929 All. 980, Dist. (*Banerji and King, JJ.*) DHONKAL SINGH *v.* HARBANS LAL. **I.R 1933 All. 391=144 I.C. 130=A.I.R. 1933 All. 280.**

——**S. 19**—*Basis of suit—Unconditional acknowledgment.*

A suit lies on an unconditional acknowledgment as it implies a promise to pay. Where the deed cannot be registered owing to some legal objection, the document can be used as the basis of a claim for return of the money acknowledged to be due therein and it is not necessary to base the claim on the original dealings which may however afford very good evidence in the case if the claim is contested on the merits. (*Addison, J.*) BARU MAL *v.* DAULAT RAM. **I.R. 1932 Lah. 299 (1)=137 I.C. 155=33 P.L.R. 517 (2)=A.I.R. 1932 Lah. 400.**

Burden of proof.

——**S. 19**—*Burden of proof—Acknowledgment within time.*

LIMITATION ACT (1908), S. 19—Effect of acknowledgment.

Per *Sulaiman, A.C.J.*—The onus lies on the creditor to prove that the acknowledgment to pay a money debt was made within time; and it would be contrary to the provisions of Ss. 101 to 104 of the Evidence Act to require that the burden lies on the defendant who acknowledged the liability. (*Sulaiman, A.C.J. and Niamatullah, J.*) ABDUL RAFIQ *v.* BHAJAN. **53 All. 963=I.R. 1932 All. 296=137 I.C. 243=1932 A. L.J. 77=A.I.R. 1932 All. 199.**

Communication to creditor.

——**S. 19**—*Communication to creditor—Acknowledgment—Admission of liability in deed—Communication if necessary.*

An admission of liability contained in a deed of gift executed by the debtor in favour of his son constitutes a valid acknowledgment under S. 19 and it is not necessary for its validity that it should be addressed or communicated to the creditor. (*Wazir Hasan, C.J. and Srivastava, J.*) AIJAZ HUSAIN *v.* RAM SARUP. **I.R. 1931 Oudh 155=130 I.C. 347=7 O.W.N. 1195=A. I.R. 1931 Oudh 54.**

Construction.

——**S. 19**—*Construction.*

The words "before the expiration of the period prescribed for a suit" mean the period prescribed for the suit at the time when the acknowledgment was made, 35 All. 227, Expl. An unconditional acknowledgment implies a promise to pay and a suit can be based on the acknowledgment. (Case-law considered.) (*Dilip Singh, J.*) PUNJAB RAM *v.* JOWAYA. **I.R. 1933 Lah. 122=141 I.C. 425=34 P.L.R. 252=A.I.R. 1933 Lah. 47.**

——**S. 19**—*Construction—"Signed"—Initials—If sufficient.*

There is no reason for construing the word "signed" in S 19 of the Limitation Act as meaning "signed in full". Initials are equivalent to signature. The object of the Act is to regard as sufficient what the writer intends to be equivalent to his signature, the form being immaterial so long as it verifies the acknowledgment. (*Venkatasubba Rao, J.*) LANGOJU TAVUDU *v.* VENKATARATNAM. **59 Mad. 72=156 I.C. 449=8 R M. 1=41 L.W. 744=1935 M.W N. 490=A.I.R. 1935 Mad. 555=68 M L.J. 623.**

——**S. 19**—*Construction—"Signing"—Affixing of rubber stamp.*

When the acknowledgment is written by an agent duly authorised in that behalf, if he affixes thereto the name of his principal in any position, even by impressing it with a rubber stamp, such affixation of the name of the principal must be held to be a signing of document within the meaning of S. 19. (*Dunkley, J.*) VELLAYAPPA CHETTYAR *v.* SOMASUNDARAM CHETTYAR. **13 Rang. 322=156 I.C. 589=8 R.R. 28=A.I.R. 1935 Rang. 160.**

Effect of acknowledgment.

See also BARRED DEBT, *supra.*

——**S. 19**—*Effect of acknowledgment.*

An acknowledgment satisfying the requirements of S. 19 does not create any new right of action but only enlarges the time and has the effect of making a new period run from the time of the acknowledgment. In other words according to the Indian Law such an acknowledgment does not operate as a new contract but only keeps alive the original cause of action. (*Hasan, C.J. and Bisheshwar Nath, J.*) JANAKA *v.* SHEO CHARAN. **7 Luck. 313=135 I C. 390=I.R. 1932 Oudh 38=8 O.W.N. 1210=A.I.R. 1932 Oudh 49.**

——**S. 19**—*Effect of acknowledgment—Cannot be basis of suit.*

LIMITATION ACT (1908), S. 19—Form of acknowledgment.

An acknowledgment of a debt does not amount to a supersession of the debt acknowledged. It only confirms the older debt and, therefore, if anything has to be recovered, it is on the debt which is being acknowledged by the document called acknowledgment. A mere acknowledgment of an older debt cannot be made the basis of a suit. 1929 A.L.J. 1279, Not foll. (*Mukerji and Young, JJ.*) BAL KRISHNA *v.* DEDI SINGH. **56 All. 281=149 I.C. 571=6 R.A. 918=1933 A.L.J. 1530=A.I.R. 1934 All. 76.**

Form of acknowledgment.

———**S. 19**—*Form of acknowledgment—Part payment falling short of requirements under S. 20—If amounts to.*

The amendment to S. 20 of the Limitation Act by Act I of 1927 has made it less stringent; either there should be an endorsement in the handwriting of the person making the payment, though unsigned, or the writing should be signed by him, though not in his handwriting. If a debtor makes a part-payment and endorses on the note signing but not writing the endorsement himself, but long before the 1st of January, 1928, when the Act I of 1927 came into force, the right had become unenforceable by lapse of time, still though the writing owing to some defect does not fulfil the requirements of S. 20, it may nevertheless, as an acknowledgment of liability, operate to save the claim under S. 19. (*Venkatasubba Rao, J.*) KRISHNASWAMI NAICKER *v.* THIRUVENGADA MUDALIAR. **157 I.C. 272=8 R.M. 136=41 L.W. 721=1935 M.W.N. 122=A.I.R. 1935 Mad. 245=68 M.L.J. 63.**

Fresh contract.

See also NO ACKNOWLEDGMENT AND UNCONDITIONAL ACKNOWLEDGMENT, *infra.*

———**S. 19**—*Fresh contract—Effect.*

Where an acknowledgment was made after the period of limitation but the document contained an express promise to pay a time barred debt,

Held, that the agreement gave rise to a fresh period of limitation to institute a suit to recover the debt. (*Sen, J.*) MIHIM LAL JWALA PRASAD *v.* MARGUERITE BUTTER DAIRY FARM. **I.R. 1931 All. 516=132 I.C. 420=A.I.R. 1932 All. 38.**

———**S. 19**—*Fresh contract—Proof.*

The plaintiff alleged there had been accounting between the parties at some time and that a certain sum was acknowledged by the defendant as due to the plaintiff and that there was an entry made by the defendant in the plaintiff's account book that the defendant agreed to pay the principal amount with interest within six months,

Held, that it was a case of novation of contract giving the plaintiff a fresh and independent cause of action and not of an acknowledgment within the meaning of S. 19. 1 O.W.N. 797, Foll.; 3 O.C. 195, Dist. (*Bisheshwar Nath, J.*) SHEO GOBIND *v.* JAI SRI SINGH. **130 I.C. 503 (1)=14 O.L.J. 179=8 O.W.N. 126=A.I.R. 1931 Oudh 97.**

———**S. 19**—*Fresh contract—Unconditional acknowledgment—Promise to pay—Suit upon.*

An unconditional acknowledgment implies a promise to pay and can form the basis of suit. (*Shadi Lal, C. J. and Walker, J.*) JESA RAM DIWAN CHAND *v.* LACHMAN DAS. **130 I.C. 570.**

Guardian.

———**Ss. 19 and 20**—*Guardian—Hindu mother—Acknowledgment not for minor's benefit—Effect.*

Money spent on the obsequies of the father of the minor cannot be deemed to be necessaries supplied to the minor within the meaning of S. 68 of the Confract Act and as such an acknowledgment by the mother as the guardian of a debt borrowed for the above purpose is not binding on the minor. (*Bisheshwar Nath and Nanavutty, JJ.*) BECHU SINGH *v.* BALDEO PRASAD. **6 I.R. (Oudh) 25=145 I.C. 180=10 O.W.N. 188=A.I.R. 1933 Oudh 132.**

LIMITATION ACT (1908), S. 19—Mortgagor and mortgagee.

Implied acknowledgment.

———**S. 19**—*Implied acknowledgment—Admission of execution.*

When a document is presented for registration, the executants not only admit the fact of its execution but admit the contents of the document, namely, their liability on it. Hence if a person admitted before the Sub-Registrar execution of a mortgage bond which recited that old accounts had been looked into and the sum arrived at had remained due, his acknowledgment of liability was implied. (*Ramesam and Cornish, JJ.*) ROSAYYA *v.* PITCHAYYA. **57 Mad. 43=6 I.R. (Mad.) 113=145 I.C. 654=1933 M.W.N. 1046=38 L.W. 439=A.I.R. 1933 Mad. 713=65 M.L.J. 380.**

———**S. 19**—*Implied acknowledgment—Payment by debtor—Acknowledgment of remaining liability not implied.*

Where a debtor pays a certain sum of money to his creditor, there may be an implied acknowledgment of the liability to the extent of the amount paid. It cannot however be said that the remaining liability shown by evidence *aliunde* should be deemed to have also been acknowledged. (*Niamatullah and Rachhpal Singh, JJ.*) RAM PRASAD *v.* BINAFK SHUKUL. **55 All. 632=6 I.R. (All.) 5=144 I.C. 899=1933 A.L.J. 930=A.I.R. 1933 All. 453 (2).**

Law applicable.

———**S. 19**—*Law applicable—Date of.*

The validity of an acknowledgment set up by plaintiff as saving limitation in his favour must be decided with reference to the law in force when the suit is brought and not with reference to that in force when the acknowledgment was made. 40 I.A. 74, Foll. (*Baker, J.*) AMARCHAND RAJARAM *v.* NARAYAN VISHNU. **I.R. 1932 Bom. 470=139 I.C. 218=34 Bom.L.R. 953=A.I.R. 1932 Bom. 531.**

Mistake.

———**S. 19**—*Mistake—Acknowledgment made by—No promise to pay to be inferred.*

Where an acknowledgment is proved to have been made by inadvertence or mistake, it cannot be treated as implying a promise to pay even though it may be ostensibly unconditional. (*Kendall, J.*) MANI RAM *v.* BADRI DAS BEHARI LAL. **6 I.R. (All.) 30=144 I.C. 1005=1933 A.L.J. 170=A.I.R. 1933 All. 175.**

Mortgagor and mortgagee.

See also AGENT, *supra.*

———**S. 19**—*Mortgagor and mortgagee—Acknowledgment—Entry signed by mortgagor in bahi of mortgagee.*

An entry in the bahi of the mortgagee signed by the mortgagor and bearing the name of the former as a scribe cannot be regarded as a valid acknowledgment by the mortgagee of the mortgagor's right to redeem. On the face of it, is an acknowledgment by the mortgagor of the balance standing against him and is not an acknowledgment by the mortgagee. (*Shadi Lal, C.J. and Abdul Qadir, J.*) HAJI ABDULLAH *v.* BHOJA MAL. **131 I.C. 349=12 Lah. L.J. 251=A.I.R. 1931 Lah. 122.**

———**S. 19**—*Mortgagor and mortgagee—Acknowledgment—Essentials—Entry in patwari's register not signed by mortgagee—Effect.*

LIMITATION ACT (1908), S. 19—Mortgagor and mortgagee.

An acknowledgment in order to be effective under S. 19 should be a conscious acknowledgment of liability. An entry in the patwari's register which is not signed by the mortgagee cannot be assumed to be signed by him so as to save limitation. The entry not purporting to have been signed by the mortgagee cannot be regarded in any sense as an acknowledgment by the mortgagee of the mortgagor's right to redeem. (*Shadi Lal, C.J. and Abdul Qadir, J.*) HAJI ABDULLAH *v.* BHOJA MAL. **131 I.C. 349=12 Lah L.J. 251=A.I.R. 1931 Lah. 122.**

———**S. 19**—*Mortgagor and mortgagee—Acknowledgment—Mortgage by conditional sale—Failure of mortgagee to take possession after expiry of stipulated period—Unregistered acknowledgment of amount due—Effect of*

According to the terms of a deed of mortgage executed on 10th July, 1911, money was payable within five years and, if it was not so paid, the mortgagee was entitled to take possession as owner of the house. The mortgagee however did not take possession of the house and on 9th March, 1927, the mortgagor made an acknowledgment in plaintiff's bahi to the effect that interest on the mortgage debt had been paid up to date and that a sum of Rs. 950 was due under the registered mortgage deed.

Held, that the mortgagee was not entitled to recover the mortgage debt by sale of the property on the strength of the acknowledgment, that the acknowledgment did not amount to a novation of contract and that being unregistered, could not by itself create a fresh charge on the property.

Held, further, that the remedy of the mortgagee to sue for money, even if he had, was barred by time. (*Bhide, J.*) BADRI DAS *v.* BESU. **6 I.R. (Lah.) 62=145 I.C. 159=34 P.L.R. 1055=A.I.R. 1933 Lah. 174.**

———**S. 19**—*Mortgagor and mortgagee—Acknowledgment by mortgagor after sale of property—If binds purchaser.*

In a mortgage document dated 1st May, 1901 the mortgagors obliged themselves to deliver 26 garces of paddy with interest also payable in kind and the document bore endorsements of delivery of a garce of paddy on each of the following dates, *viz.*, 3rd January, 1904 14th January 1911 and 12th January 1914. The equity of redemption was sold on 5th January 1908 and was purchased by a stranger. The mortgagee filed a suit within 12 years from 12th January 1914 and it was contended by the defendant purchaser that the suit was barred by limitation on the ground that the acknowledgments by the mortgagor subsequent to the purchase did not bind him.

Held, that under S. 19 of the Limitation Act an acknowledgment by the mortgagor subsequent to the sale kept the mortgage alive and that the purchaser of the equity of redemption was liable. 32 Cal. 1077, Rel. on. (English and Indian Cases discussed.) (*Ramesam and Stone, JJ.*) NARAYANA *v.* VENKATARAMANNA. **161 I.C. 921=8 R.M. 885=A.I.R. 1935 Mad. 899**

———**S. 19**—*Mortgagor and mortgagee—Acknowledgment by one of several mortgagees—Effect of.*

An acknowledgment of liability to be redeemed made by one of several joint mortgagees is not sufficient to keep the right to redeem alive either as against the mortgagee who signed the acknowledgment or as against the rest. A.I.R. 1920 Lah. 516, Rel. on. (*Jai Lal, J.*) AHMAD SHAH *v.* KARTAR SINGH. **151 I.C. 385 (1)=7 R.L. 121=A.I.R. 1934 Lah. 293 (1).**

LIMITATION ACT (1908), S. 19—Mortgagor and mortgagee.

———**S. 19**—*Mortgagor and mortgagee—Alienation of part of mortgaged property—Subsequent acknowledgment by mortgagor—Effect as against alienee.*

When a mortgagor had sold a portion of the mortgaged property but remains personally or in respect of the unsold portion liable on the mortgage, an acknowledgment of the mortgage by him subsequent to the alienation is effective both against the mortgagor and his alienee. 32 C. 1077, 24 M.L.J. 66 and 40 M.L.J. 126, Ref. to. (*Jackson and Krishnan Pandalai, JJ.*) MUTHU CHETTIAR *v.* MUTHUSWAMI AIYANGAR. **55 Mad 758=I R. 1932 Mad. 601=138 I.C. 632=36 L. W. 44=1932 M.W.N. 614=A.I.R. 1932 Mad. 516=63 M.L.J. 111.**

———**S. 19**—*Mortgagor and mortgagee*—Dakhalnama—*Recital as to existence of mortgage—Valid acknowledgment*

Where the acknowledgment was not addressed to the mortgagors directly but was contained in a *dakhalnama* which was filed in Court in an execution proceeding against them and it appeared that the document after describing the property stated that it did not include an area which was in their possession as mortgagees,

Held that the document contained a valid acknowledgment in respect of the mortgage. (*Sulaiman, C.J. and Mukerji, J.*) MAHOMED RAFI *v.* KRIPA RAMJI. **142 I.C. 784=I.R. 1933 All. 149=1932 A.L J. 1010=A.I.R. 1933 All. 99.**

———**S. 19**—*Mortgagor and mortgagee—Derivative title—Acknowledgment against mortgagor — Effect against subsequent mortgagee.*

Whether the subsequent mortgage is made before or after the acknowledgment of the prior mortgage-debt in either case the mortgagee derives his title from the mortgagor and is bound by an acknowledgment made by the latter. (*Hasan, C.J. and Bisheshwar Nath, J.*) AMIR MIRZA BEG *v.* LACHMI NARAIN. **7 Luck. 270=138 I.C. 800=I.R. 1932 Oudh 314=8 O.W.N. 1160=A.I.R. 1932 Oudh 1.**

———**S. 19**—*Mortgagor and mortgagee—Derivative title—Mortgagor and sub mortgagee.*

For an acknowledgment under S. 19 it is enough that it is made by the party against whom the right is claimed by some person through whom he derives title or liability. The operation of the section cannot be confined to acknowledgments made before such title or liability was derived. Rule applied to a case of acknowledgment by mortgagor to a sub-mortgagee. (*Raza and Bisheshwar Nath, JJ.*) RAM SAHAI *v.* KUNWAR SAH. **7 Luck. 26=139 I C. 626=I.R. 1932 Oudh 373=8 O.W.N. 522=14 O.L J. 370=A.I R. 1932 Oudh 314.**

———**Ss. 19 and 20**—*Mortgagor and mortgagee—Mortgage bond—Sum payable as profits—Endorsement of payment—Effect of.*

An endorsement on the back of the mortgage-deed to the effect that a sum of Rs. 82 on account of profit from June, 1923 to June, 1925, had been paid that day to the mortgagee signed by both parties amounts to an acknowledgment of liability in respect of the mortgage and if the period of limitation has not then expired, a fresh period of limitation commences from that date. S. 20 applies as well, as the sum of Rs. 82 payable every two years was in the nature of interest. (*Addison, J.*) HARBANS LAL *v.* ARJAN. **A.I.R. 1934 Lah. 971.**

———**S. 19**—Mortgagor and mortgagee—Mortgage suit—Redemption—Subsisting right to redeem—Burden of proof. *See* MORTGAGE—SUIT FOR REDEMPTION. **155 I.C. 576=37 P.L.R. 392.**

LIMITATION ACT (1908), S. 19.

———**S. 19**—*Mortgagor and mortgagee—Mortgage of* 1834—*Admission of mortgage by mortgagee in* 1864 *and* 1877—*Suit for redemption in* 1924—*Limitation.*

A mortgage was executed by plaintiff's ancestors to defendants' ancestors in 1834. In 1864, the mortgagee admitted that he held the lands on mortgage in a kabuliyat to the inamdar. In a suit of 1877 by the daughter of the mortgagee, the mortgage was again admitted. The present suit for redemption was brought in 1924.

Held, that the acknowledgments operated to save limitation and that the suit was not barred. (*Baker, J.*) AMARCHAND RAJARAM *v.* NARAYAN VISHNU. **I.R. 1932 Bom. 470=139 I.C. 218=34 Bom.L.R. 953=A I.R. 1932 Bom. 531.**

———**S. 19**—*Mortgagor and mortgagee—Second mortgage—Recital as to first mortgage—Acknowledgment made out.*

A mortgage was executed by two persons in favour of the father of the plaintiff. The plaintiff was then a minor living jointly with his father. The father died in 1912 and in 1913, the mortgagors executed a second mortgage in favour of another including in that mortgage the whole of the amount due under the earlier mortgage. In 1928 the plaintiff sued to recover the amount and claimed that he was entitled to do so within 3 years of his attaining majority.

Held, that time began to run from the date of the execution of the mortgage, but the mortgage of 1913 contained an acknowledgment and therefore saved limitation.

Held further, that the plaintiff being a minor at the time from which limitation has to be reckoned, the suit filed within three years of the plaintiff attaining majority was competent. (*Pullan and Niamatullah, JJ.*) CHANDRABHAN *v.* RAJ KUMAR. **54 All. 1019=142 I.C. 794=I.R. 1933 All. 197=1932 A.L.J. 1012=A. I.R. 1933 All. 100.**

———**S. 19**—*Mortgagor and mortgagee—Valid acknowledgment—Second mortgage—Recital as to prior mortgage.*

A recital in a second mortgage as to the existence of a prior mortgage in favour of another can be relied on by that other person as an acknowledgment of liability. (*Bhide, J.*) KALLA RAM *v.* BHANA MAL. **I.R. 1932 Lah. 694=140 I.C. 177=A.I.R. 1933 Lah. 33.**

No acknowledgment.

———**S. 19**—*No acknowledgment—Accounts settled—Entry in plaintiff's account books "Rs. 3,000 to be paid"—Definite promise to pay, not a mere acknowledgment.*

The plaintiff and the defendant had dealings for some time. They went through the accounts and settled the balance. They agreed that Rs. 3,000 were due to plaintiff and an entry was made to the effect in the plaintiff's account books, the expression used being 3,000 *rupia bahat nugsan deyne.*

Held, that the word *deyne* (lit. "to be paid") expressed a definite promise to pay on the part of the debtor, and was not a mere acknowledgment of his liability, taking into account the fact that there had been mutual dealings, and that this balance was the result of a mutual inspection of the accounts. 33 C. 1046 (P.C.); A.I.R. 1929 Lah. 263; 21 Mad. 49 and 38 Mad. 660, Ref. (*Harrison and Addison, JJ.*) KANSHI RAM BANSHI RAM *v.* ARJAN DAS. **137 I.C. 840=I.R. 1932 Lah. 369=33 P.L.R. 940=A.I.R. 1932 Lah. 470.**

———**S. 19**—*No acknowledgment—Letter expressly denying liability.*

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Under S. 19, there need not be a promise to pay, but the document relied on as an acknowledgment must, on a fair reading, amount to an admission of liability, absolute or conditional, and in the latter case, the condition must be fulfilled. But a document or letter which expressly states that there is no liability and in fact denies and repudiates the liability cannot extend limitation under S. 19. (*Mitter, J.*) DEBJI GHELABHAI & BROS *v.* MEHTA & CO. **155 I.C. 721=7 R.C. 622=39 C.W.N. 139=60 C.L.J. 396=A.I.R. 1935 Cal. 255.**

———**S. 19**—*No acknowledgment—Letter offering to pay out of grace.*

A letter offering to pay as a matter of grace and for the sake of the recommendation of a third person, does not amount to an acknowledgment of any liability. (*Bhide and Ranga Lal, JJ.*) SITA RAM *v.* MT. MAHMUDI BEGAM. **155 I.C. 238=7 R.L. 662=35 P.L.R. 529=A I.R. 1934 Lah. 475**

———**Ss. 19 and 20**—*No acknowledgment—Loan of money in* 1920—*Pledge of shares in* 1922 *not in writing—Payment of interest in* 1924—*Limitation—If saved.*

Certain loans were alleged to have been made in 1920 and subsequently in 1922 it was alleged that certain shares in a company were pledged to secure the loans, but there was no writing evidencing the pledge. It was also alleged that interest was paid in 1924 on the loan. The suit was filed in 1929.

Held, (1) that the pledge not being in writing was not an acknowledgment under S. 19, Limitation Act, and could not extend the period of limitation, (2) that the payment of interest having been made more than three years after the loan could not also be availed of to extend the period of limitation, (3) that the payment of interest as such on the loan could not extend the period of limitation for a suit to enforce the pledge by sale of the pledged property; and that the suit was barred both as regards the personal claim and as regards the sale of the pledged property. (*Wadia, J.*) PERCY F. FISHER *v.* ARDESHIR. **156 I.C. 531=7 R.B. 515=37 Bom.L.R. 165=A.I.R. 1935 Bom. 213.**

———**S. 19**—*No acknowledgment—Plea of discharge.*

The acknowledgment contemplated under S. 19 must be an acknowledgment of liability. Where the party pleads payment of the entire amount on a certain date there is no question of acknowledgment. (*Grille, A.J.C.*) HIRALAL *v* KRIPAL SINGH. **28 Nag.L.R. 348=141 I.C. 34=I.R. 1933 Nag. 26=A.I.R. 1933 Nag. 13.**

———**S. 19**—*No acknowledgment—Plea of* jus tertii *in prior suit.*

In a previous suit by reversioners, the defendant pleaded that the reversioners could not sue in the presence of the plaintiff who was the preferential heir. In the suit by the plaintiff, the defendant relied on the pleading of the defendant in the prior suit to save limitation.

Held, that the plea therein raised was merely one of *jus tertii* to defeat the reversioner's suit and did not constitute an acknowledgment within the meaning of S. 19. (*Dalip Singh, J.*) MT UMRI *v.* KALU. **6 I.R. (Lah.) 98 (2)=145 I.C. 343=34 P.L.R. 841=A.I.R. 1933 Lah. 491.**

———**S. 19**—*No acknowledgment—Promise to pay on condition.*

Where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled. Where there was a conditional promise to pay if the arbitrator found the sum to be due, and the arbitration proceedings proved abortive,

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Held, the condition was not fulfilled and that there was no acknowledgment which was sufficient to save limitation. (*Addison, J.*) NANAK CHAND *v.* OMKAR NATH. **154 I.C. 687=7 R.L. 596 (1)=A.I.R. 1934 Lah. 973 (2).**

———**S. 19**—*No acknowledgment—Promissory note—Admission of execution coupled with denial of consideration.*

An admission of execution of a promissory note coupled with denial of liability on the ground of having received no consideration does not amount to an acknowledgment. 33 Cal. 1047 (P.C.), Dist. (*Baker and Walia, JJ.*) CHHAGANLAL *v.* BONDERBAI. **151 I.C. 376=7 R.B. 57=36 Bom.L.R. 334=A.I.R. 1934 Bom. 186.**

———**S. 19**—*No acknowledgment—Receipt referring to debt created by promissory note—Promissory note inadmissible in evidence.*

Where the promissory notes are inadmissible in evidence on the ground of insufficiency of the stamps, receipts which do not purport to acknowledge liability for an earlier debt but merely state that money had been taken under promissory notes of even date by the executant, cannot amount to an acknowledgment of any earlier debts of which the plaintiff can take advantage. (*Sulaiman, C.J. and Harries, J.*) GHULAM MURTAZA *v* FAZIH-UN-NISSA BIBI. **57 All. 434=152 I.C. 370=7 R.A. 330=1934 A.L.J. 1185=4 A.W.R. 754=A.I.R. 1935 All. 129.**

———**S. 19**—*No acknowledgment—Signature of debtor on back of promissory note.*

A bare signature by a debtor on the back of a promissory note executed by him is not an acknowledgment of liability for such a signature, unless an intention is proved, cannot be construed to admit a liability to pay. (*Bagulay, J.*). TALOK THEINGAN *v.* SEVUGAN CHETTIAR. **152 I.C. 501=7 R.R. 163=A.I.R. 1934 Rang. 287.**

———**S. 19**—*No acknowledgment—Statement by decree-holder under O. 21, R. 66, C. P. Code.*

The plaintiff sued on a mortgage. In a prior suit on a second mortgage the decree holder had filed a statement under O 21, R. 66 wherein he had informed the Court that upon an examination of the registration office he had found that there was a mortgage deed of the property.

Held, that the statement did not amount to an acknowledgment. (*Banerji and King, JJ.*) NAIT RAM *v.* ROSHAN LAL. **136 I C. 624=I.R. 1932 All. 240=1931 A.L.J. 862=A.I.R. 1932 All. 62.**

———**S. 19**—*No acknowledgment — Trespasser—Admission as to ownership—Suit for ejectment—Saving of limitation.*

If a trespasser admits that a portion of the land belongs to the owner when the owner challenges his possession but declines to vacate the land in spite of demands there is open dispossession and the owner must bring his suit within 12 years of dispossession. The admission of the trespasser cannot give further time to the owner unless such admissions come within S. 19. (*Rumfry, J.*) NUTBIHARI DAS *v.* BISHESHWARI DEBEE. **60 Cal 404=I.R. 1933 Cal. 520=144 I.C. 177=A.I.R. 1933 Cal. 414.**

———**S. 19**—*No acknowledgment—Unspecified payment by debtor—No admission of liability.*

Per *Sulaiman, C.J.*—Where a payment is made without any specification and the debtor does not signify whether he is making the payment of interest as such or of part-payment of the principal, there is really no admission on his part that any further sum is still due from him, and there is therefore no acknowledgment of liability on his part. He merely pays a lump sum of money and by no means admits that the debt is not fully discharged. There is an admission no doubt that there was a liability on him to the extent of the amount so paid, but there is no acknowledgment of any further liability. (*Sulaiman, C.J., Thom, Niamatullah, Rachhpal Singh and Bajpai, JJ.*) UDEYPAL SINGH *v.* LAKSHMI CHAND. **58 All. 261=8 R.A. 428=159 I.C. 387=1935 A.L.J. 1029=1935 A.W.R. 1155=A.I.R. 1935 All. 946 (F B.).**

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Principal debtor and surety.

———**S. 19**—*Principal debtor and surety—Authority to acknowledge—Acknowledgment by principal debtor—Effect against surety.*

An acknowledgment by principal debtor does not save limitation against the surety unless it is shown that the latter allowed himself to be represented by the person who made the payment. (*Jai Lal and Abdul Qadir, JJ.*) DIYALU MAL *v.* NANDU SHAH DEV RAJ. **13 Lah. 240=33 P.L.R. 59=I.R. 1931 Lah. 638=132 I.C. 590=A.I.R. 1931 Lah. 691.**

———**S. 19**—*Principal debtor and surety—Authority to acknowledge—Payment by principal—Effect against surety.*

Payments by a principal debtor do not extend the period of limitation against a surety. (*Raza and Bisheshwar Nath, JJ.*) JAINARAIN SINGH *v.* PARMESHAR MURAO. **I.R. 1931 Oudh 350=132 I.C. 798 (1)=14 O.L.J. 376=8 O.W.N. 544=A.I.R. 1931 Oudh 310.**

Proof of acknowledgment.

———**S. 19**—*Proof of acknowledgment—Agreement between the parties in another case—If could save limitation.*

Plaintiff and defendant had entered into agreement in another case, the material portion of which was "because there have been transactions of buying and selling between us and there is a dispute as to the profit and loss incurred by either side in the dealings, therefore we agree, etc."

Held, that as there were mutual dealings and it was not known at the time of the agreement which party owed or was owed money, the agreement could be relied upon to save limitation in the present case, 33 C. 1047 (P.C.); 1 Lah. 357 and 53 I.C. 898, Rel. on; 40 Mad. 701, Ref. (*Harrison and Addison, JJ.*) KANSHI RAM BANSHI RAM *v.* ARJAN DAS. **137 I.C. 840=I.R. 1932 Lah. 369=33 P.L.R. 940=A.I.R. 1932 Lah. 470.**

Registration.

———**S. 19**—*Registration—Acknowledgment in a letter addressed to third party—Necessity for.*

An acknowledgment contained in a communication addressed to a third party does not require registration. (*Viscount Dunedin,*) BAGESHWARI CHARAN SINGH *v.* JAGANATH KUARI. **59 I.A. 130=11 Pat. 272=I.R. 1932 P.C. 142=136 I.C. 798=36 C.W.N. 250=35 L.W. 217=34 Bom.L.R. 463=1932 A.L.J. 186=1932 M.W.N. 660=55 C.L.J. 136=13 Pat.L.T 279=9 O.W.N. 43=A.I.R. 1932 P.C. 55=62 M.L.J. 296 (P.C.).**

Scope.

———**S. 19**—*Scope.*

S. 19 of the Limitation Act is not confined to acknowledgments in respect of debts, but applies to cases in which a plea of limitation is raised to bar a claim to movable or immovable property and also to acknowledgments saving the bar of limitation in cases of appli-

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cations for execution of decrees. (*Sulaiman, A.C.J. and Niamatullah, J.*) ABDUL RAFIQ *v.* BHAJAN. **53 All. 963=I.R. 1932 All. 296=137 I.C. 243=1932 A.L.J. 77=A.I.R. 1932 All. 199.**

———**Ss. 19 and 20**—*Scope—Theory of acknowledgment—Difference between English and Indian law.*

There is a fundamental difference in the theory of acknowledgment according to the law in India as compared with the law in England. In England the acknowledgments or part-payments in order to be effective must be such as to amount to a fresh promise to pay. Under the Indian law no promise to pay either express or implied is required. The English authorities cannot therefore afford any guidance in determining the question under the Limitation Act. The difference in language used in Ss. 19 and 20 is not merely accidental. (*Hasan, C.J. and Bisheshwar Nath, J.*) AMIR MIRZA BEG *v.* LACHMI NARAIN. **7 Luck. 270=138 I.C. 800=I.R. 1932 Oudh 314=8 O.W.N. 1160=A.I.R. 1932 Oudh 1.**

Sufficiency of acknowledgment.

———**S. 19**—*Sufficiency of acknowledgment.*

An acknowledgment need not contain an admission that a precise sum is owing but an acknowledgment that something is or may be due is sufficient. (*Bagaley, J.*) HAMIDA BI *v.* ABDUL GAFFAR. **6 I.R. (Rang.) 25=144 I.C. 996=A.I.R. 1933 Rang. 147.**

———**S. 19**—*Sufficiency of acknowledgment—Conditional offer by Railway Company.*

A letter from the railway company informing the consignee that a certain sum, namely, the balance of the sale proceeds of the property was payable to him on certain conditions, namely, that he should accept it in full satisfaction of his claim, cannot be taken as an acknowledgment of any liability for the price of the goods or compensation for any wrongful detention or compensation for non-delivery and would not give a fresh starting point of limitation for a suit for compensation for non-delivery. (*King, J.*) FOOTWEAR *v.* N. W. RAILWAY. **6 I.R. (All.) 45=144 I.C. 1029=A.I.R. 1933 All. 348.**

———**S. 19**—*Sufficiency of acknowledgment—Document being silent—Inference.*

Each case relating to the question of an acknowledgment saving limitation must be treated on its own merits and from the language used and the circumstances in which the acknowledgment is made, it must be decided whether it amounts to an acknowledgment or an implied acknowledgment of the particular liability under consideration. Where the document merely stated that a certain amount had been paid in cash in lieu of a decree debt and it further provided that nothing remained by the writer in respect of the decree.

Held, that it would not be said to be sufficient acknowledgment regarding the executant's liability to deliver possession of certain plots of land under the decree. (*Kisch J.*) BAIJ NATH PRASAD *v.* SHEO DULAREY. **I.R. 1931 Oudh 430=134 I.C. 1022=8 O.W.N. 1117=A.I.R. 1932 Oudh 154.**

———**S. 19**—*Sufficiency of acknowledgment of—Extrinsic evidence of liability—Admissibility of.*

Whether an acknowledgment is one of an existing liability or not, depends upon the terms of the acknowledgment and subsequent events or external evidence cannot be relied upon with a view to show that there was an existing liability at the time and thus to place upon the acknowledgment an interpretation of which it would not otherwise admit. 8 All. 540; 6 C.L.J. 544; 26 Mad. 34; 8 Bom. 99 Ref. (*Baker, J.*) AMARCHAND RAJARAM *v.* NARAYAN VISHNU. **I.R. 1932 Bom. 470=139 I.C. 218=34 Bom.L.R. 953=A.I.R. 1932 Bom. 531.**

LIMITATION ACT (1908), S. 20.

———**S. 19**—*Sufficiency of acknowledgment of—Receipt—Meaning of—Evidence to explain—Admissibility of.*

On 3 7-1927 the defendant borrowed a sum of Rs. 531 from the plaintiff and executed a pro-note and a receipt therefor on the same date. Again on 10 6-1930, the defendant executed another receipt and promissory note for the same debt. The later pro note was inadmissible in evidence In a suit founded on the original debt,

Held, that the receipt, dated 10-6-1930, was a sufficient acknowledgment of the earlier loan and evidence was admissible under S. 95 of the Evidence Act to show that the receipt, by itself unmeaning, referred to the loan of 3-7-1927. (*Hasan, C.J. and Bisheshwar Nath, J.*) BABU RAM CHAUBE *v.* SHEO HARAKH TEWARI. **8 Luck. 195=141 I. C. 298=I.R. 1933 Oudh 52=9 O.W.N. 1024=A.I.R. 1933 Oudh 80.**

Unconditional acknowledgment.

———**S. 19**—*Unconditional acknowledgment—Whether constitutes a fresh cause of action—Nature of the plea of limitation in such a case—Time-barred debt—Inclusion of.*

Per *Niamatullah, J.*—An unconditional acknowledgment implies a promise to pay and affords a new cause of action to the obligee. If in making the acknowledgment, he has included time-barred debts which he might well have repudiated, it may be open to the party to plead failure of consideration to that extent. But a simple plea of limitation will have reference only to the period commencing on its date. That the debt acknowledged should not be a time barred debt is made necessary not because it is treated as an acknowledgment under S. 19 of the Limitation Act which certainly saves the bar only if the acknowledgment was made before the debt had become barred but because of S. 25 of the Indian Contract Act. So a time barred debt is not a valid consideration unless there is an express promise made in writing and signed by the debtor. That the original debt had become barred by limitation is not a plea of limitation in reference to the acknowledgment on which the suit is founded, but is the back ground of the plea of want of consideration for the acknowledgment and should be taken in that form. S. 19 contemplates a large variety of admissions which cannot amount to new contracts.

Per *Sulaiman, A.C.J.*—"It is not correct to say that every acknowledgment of liability amounts to a new contract. If the transaction has amounted to a new contract, it can undoubtedly be made the basis of a suit; if not, unless it is made within the period of limitation, it cannot be the basis of a fresh suit. A promise to pay does not necessarily imply an admission that the debt on the date of acknowledgment had not become barred by time. (Case-law discussed.) (*Sulaiman, A.C.J. and Niamatullah, J.*) ABDUL RAFIQ *v.* BHAJAN. **53 All. 963=I.R. 1932 All. 293=137 I.C. 213=1932 A.L.J. 77=A.I.R. 1932 All. 199.**

[**Cons.** 1934 A.L.J. 1185 (1187). **Not F.** 56 A. 281 (284).]

———**S. 20**—*Acknowledgment in debtor's handwriting—Payment by cheque.*

Where a cheque is accepted by a creditor and is subsequently honoured, for the purpose of S. 20 of the Limitation Act, the payment must be deemed to have been made by the debtor and it must further be deemed to appear in his handwriting by virtue of his signature and writing on the cheque. 42 C. 1043; 129 I.C. 909 and 9 Pat. 851, Foll. (*Jai Lal and Abdul Rashid, JJ.*) DIAL SINGH *v.* DAVINDAR SINGH. **I.R. 1933 Lah. 526=144 I.C. 641=A.I.R. 1933 Lah. 741.**

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———**S. 20**—*Acknowledgment—Illiterate debtor—Endorsement by scribe for debtor—Sufficiency of.*

The endorsement of the payment of interest by a scribe on behalf of the debtor who was illiterate and who made no mark beneath the endorsement is a sufficient acknowledgment effective to save limitation under S. 20. 62 I. C. 644, Foll.; 33 C.W.N. 930, Ref. (*Jack, J.*) RAJANI MANDAL *v.* DIGINDRA MOHAN. **I.R 1932 Cal. 370 = 137 I.C. 788 (2) = 36 C W.N. 188 = A.I.R. 1932 Cal. 440.**

———**S. 20**—*Applicability—Instalment bond—Condition regarding default—Enforcement of claim*—Terminus a quo.

A suit was instituted on the basis of an instalment bond which provided for the payment of the principal according to certain instalments and in default of two successive instalments the entire amount was to fall due. The plaint stated that the mortgagor had paid a certain sum in Bhadra 1321 B.S. and the suit was for the balance which had not been paid. It was found that the payment though made on one date was in respect of three kists due at the time of the payment.

Held, that S. 20 had no concern with the suit which was governed by Art. 75 according to which the *terminus a quo* was not the date of the payment but the date of non payment in accordance with the stipulation of the contract. The suit was therefore in time. 6 Lah. 163, Foll.; 35 P.R. 1913, Not Foll.

Held, further, that as the mortgagee had accepted overdue instalments and thereby waived the benefit of the provisions which gave him the right of the entire claim as to the first default, S. 20 had no application. (*Guha and M. C. Ghose, JJ.*) PROBHAT CHANDRA DEB SARKAR *v.* MOHISH CHANDRA BARMA. **58 Cal. 615 - 130 I.C. 571 = 52 C L J. 591 = A.I R. 1931 Cal. 157.**

———**S. 20**—*Applicability—Payment of interest beyond limitation—If sufficient*

S. 20 of the Limitation Act does not apply to payment of interest made beyond the period of limitation and such payments cannot operate to extend the period of limitation. (*Wadia, J.*) PERCY F. FISHER *v.* ARDESHIR. **156 I C. 531 = 7 R.B. 515 - 37 Bom. L R. 165 - A I.R. 1935 Bom. 213.**

———**S. 20**—*Applicability—Written statement—Payment set up in—If can be relied on for purpose of suit.*

A written statement filed in a suit which recites payment cannot be called in aid under S. 20 of the Limitation Act for the purpose of that suit itself. (*Mitter, J.*) DEBJI GHELABHAI & BROS. *v.* MEHTA & CO. **155 I C. 721 = 7 R.C. 622 = 39 C.W.N. 139 = 60 C.L J. 396 = A I R. 1935 Cal. 255.**

———**S. 20**—*Certification of payment—Saving of limitation.*

It cannot be laid down as a matter of law that the decree-holder's certification is in itself a step in-aid of execution and can afford a fresh starting point of limitation. In order to save limitation the payment must be made within three years of the decree or of the last starting point of limitation to be effectual under S. 20 but it may be certified at any subsequent time by the decree-holder. Such a certification is not an application to the Court. 56 I.A. 30, Rel. on. (*Rankin, C.J., C. C. Ghose, Buckland, Suhrawardy and Mukerji, JJ.*) AMAR KRISHNA CHOWDHURY *v.* JAGAT BANDHU BISWAS. **59 Cal. 760 = I.R. 1931 Cal 922 = 134 I.C. 922 = 35 C.W.N. 1192 = 54 C.L.J. 201 = A.I.R. 1931 Cal 719 (F.B).**

[F. 55 A. 393 (397); 7 Luck. 590 (600) **(F.B.). D.** 31 N.L.R. 333 (336).]

LIMITATION ACT (1908), S. 20.

———**S. 20**—*Cheque accepted by creditor before expiry of limitation but cashed subsequently—Limitation extended.*

The part-payment of principal of a debt, before the expiration of the prescribed period, by means of a cheque which has been accepted by the creditor and has subsequently been cashed by him has the effect of extending the period of limitation so as to entitle the creditor to a fresh period of limitation from the time when the payment was made, within the meaning of S. 20. (*Jai Lal, J.*) JAGTU MAL SADASUKH RAI *v.* CHARANJI LAL FAKIR CHAND. **14 Lah. 580 = I.R. 1933 Lah. 158 = 141 I.C. 611 = 34 P.L R. 179 and 514 = A.I.R. 1933 Lah. 341.**

———**S. 20**—Endorsement of payment on promissory note—Evidence to prove or disprove such payment—Admissibility. *See* EVIDENCE ACT, S. 91. **4 A.W.R. 1342 = A.I.R. 1935 All. 58.**

———**S. 20**—*Joint debtors—Part payment by one—Validity—Mere presence of others—Sufficiency.*

Where a part payment by one of the joint debtors is made, the mere presence of the other debtors at the place of payment will not save limitation, unless it is proved that they also made the payment or that the person who actually paid it, did so being authorized by the others. (*R.C. Mitter, J.*) ANNADA CHARAN *v.* JHATU CHARAN. **158 I C. 512 = 8 R.C. 190 = A.I.R. 1935 Cal. 648.**

———**S. 20**—*Joint promisors—Part payment by one—If extends time against others.*

A payment by one joint promisor liable to pay the debt is for the purpose of S. 20, Limitation Act, sufficient to operate against all the joint debtors, for a fresh period of limitation begins not merely in respect of the liability of the one who pays but in respect of the liability upon the whole debt. A.I.R. 1926 Cal. 150; A I.R. 1918 All. 61; A.I.R. 1927 All 209 and A.I.R. 1929 All. 380, Foll. (*Brund, J.*) U SIN *v.* U TUN SI. **160 I.C. 314 = 8 R.R. 372 = A.I.R. 1935 Rang. 473.**

———**S. 20**—*Mortgage debt—Death of mortgagor—Payment by one of his heirs—If saves limitation as against others*

Where subsequent to the death of the mortgagor, one of his heirs makes a payment within the period of limitation, such payment does not save limitation as against all heirs but only as against the person who makes the payment. 37 Cal. 461, Not Foll.; A.I.R. 1922 All. 37, Foll.; 32 Cal. 1077 and 33 Cal. 1278, Dist. (*Mitter, J.*) ANNADA CHARAN *v.* JHATU CHARAN. **158 I.C. 512 = 8 R.C. 190 = A.I.R. 1935 Cal. 648.**

———**S. 20**—*Part payment by debtor—If can avail against others liable in respect of debt.*

A part-payment can avail not merely against the person making the payment or those deriving title under him subsequent to such payment but even against other persons liable in respect of the same debt. (*Varadachariar and Burn, JJ.*) LAKSHMI NAIDU *v.* GUNNAMMA. **58 Mad. 418 = 154 I.C. 1053 = 7 R M. 535 = 1935 M.W.N. 17 = 41 L.W. 94 = A.I.R. 1935 Mad. 101 = 68 M.L.J. 470.**

———**S. 20**—"*Part payment*"—*Payment expressed to be in full discharge—If saves limitation.*

If a debtor makes a part payment unaccompanied by an express denial or repudiation, an admission of a right in the payee for the balance of the debt may be inferred. But where, without there being a bare naked payment, the debtor expressly states in a letter that the payment is in full discharge, though as a matter of fact something more is found due, far from its amounting to an admission of right, there is an unequivocal denial of it. Such

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a payment will not have the effect under S. 20 of the Limitation Act of removing the statutory bar. (*Venkatasubba Rao, J.*) APPASAMI PILLAI *v* MORANGAM MUTHIREAN. **157 I.C 259=8 R.M. 131=1935 M. W.N. 783=41 L.W. 747=A.I.R. 1935 Mad. 371=68 M.L.J. 73.**

———**S. 20**—*Part payment of principal—Burden of proof.*

According to S. 20, a payment cannot help the plaintiff unless it was made in part payment of the principal debt and the burden of proof lies on him to establish that the payment was made towards the debt, which forms the subject-matter of the suit. (*Bhide and Rangi Lal, JJ.*) SITA RAM *v.* MT. MAHMUDI BEGAM. **155 I.C. 238=7 R.L. 662=35 P.L.R. 529=A.I.R. 1934 Lah. 475.**

———**S. 20**—*Part payment of principal—If can be inferred—If to be express.*

If the payment by a debtor is not payment of interest as such within the meaning of S. 20, Limitation Act, it cannot be said that the payment must of necessity be payment of principal and so fall under the second branch of the section. That is attractive but unsound. For, if the payments have been actually appropriated to interest, then in fact there has been no part payment of principal. A.I.R. 1933 All. 453, Foll. (*Braund, J.*) U SIN *v.* U TUN SI. **160 I C. 314=8 R.R. 372=A I.R. 1935 Rang. 473.**

———**S. 20**—*Part payment in time—Acknowledgment out of time—If effectual.*

The part payment of the principal of a debt within the period of limitation gives a fresh start to the period of limitation provided an acknowledgment of the payment appears in the handwriting of the person making the payment. It is enough if the payment is made in time; it does not matter that the acknowledgment in writing is made by the debtor after the expiry of the period of limitation. 17 Mad. 92; A.I.R. 1929 Mad. 432 and A.I.R. 1923 Nag. 117, Foll. (*Iqbal Ahmad, J.*) LAL SINGH *v.* GULAB RAI. **55 All. 280=6 I.R. (All) 306=116 I.C. 510=1933 A.L.J. 403=A I.R. 1933 All. 363.**

———**S. 20**—*Part payment—Whether need be proved by writing itself.*

In order that limitation may be saved under S. 20, it is not necessary that the writing itself must show that the payment was in the nature of part payment. The character of the payment as opposed to the mere fact of payment is provable by other evidence regarding the state of the accounts between the parties. (*Addison and Hilton, JJ.*) BHARAT NATIONAL BANK, LTD. *v.* BISHAN LAL. **13 Lah. 448=I.R. 1932 Lah. 145=135 I.C. 673=33 P.L.R. 42=A I.R. 1932 Lah 212.**

———**S. 20**—*Payment by cheque—Effect.*

Where a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon the due presentation the cheque is not paid, the original debt revives. When such a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently honoured, the proviso to S. 20 has been complied with. 42 Cal. 1043, Foll.; 9 Mad. 271 and 19 All. 307, Not Foll. (*Haveliwala, A.J.C.*) CHOTIRMAL *v.* RUPCHAND. **25 S.L.R. 360=I.R 1931 Sind 29=129 I.C. 909=A.I.R. 1931 Sind 28.**

———**S. 20**—*Payments on behalf of illiterate person—Signature—Necessity for.*

In the case of a debt due on a bond executed by an illiterate person, a payment by or on his behalf, to be effective under S. 20, Limitation Act, must be signed by the person who writes on his behalf. (*Weston.*) NATHU *v.* SARWAN. **1935 A.M.L.J. 45.**

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———**S. 20**—*Payment intended towards principal—Creditor subsequently appropriating it towards interest—Fresh start.*

A payment intended to be made towards principal is effective to start a fresh period of limitation and it does not matter that the creditor afterwards changed his mind and choose to regard the payment as one towards interest. (*Kendall, J.*) RAMBOHOR MISIR *v.* CHATURGHUN RAI. **151 I.C. 1070=7 R.A. 866=1935 A.L.J. 304=4 A.W.R. 1342=A.I.R. 1935 All. 58.**

———**S. 20**—*Payment of interest—Mortgage with possession—Possession not given to mortgagee—Rents collected by mortgagor, if effective to save limitation.*

Where in a mortgage with possession, it was provided that any amount realized by the mortgagee as rent may be appropriated by him towards interest, it appeared, however, that possession was never given to the mortgagee and that possession continued with the mortgagors so that the relationship of landlord and tenant did not come into existence either between the mortgagee and the mortgagors or between the mortgagee and the tenants of the mortgagors.

Held, that the condition as to appropriation did not come into operation as possession was never given to the mortgagee, and that even if the mortgagee had collected rents from the tenants it could not be held to be a collection of, or payment towards, interest as such within the meaning of S. 20 (*Jai Lal and Abdul Rachid, JJ.*) DIAL SINGH *v.* DAVINDAR SINGH. **I.R. 1933 Lah. 526=144 I.C. 641=A.I.R. 1933 Lah. 741.**

———**S. 20**—*Payment of interest as such—Meaning of.*

A payment cannot be considered to be of interest as such unless it was "avowedly" made towards interest. Where, therefore, a debtor does not specifically state that the payment is to be appropriated towards interest or principal, it cannot be inferred that he paid interest as such from the fact that at the time of the payment interest in excess of the amount paid is due. (*Niamatullah, J.*) KIRPA RAM *v.* BALAK RAM. **154 I.C. 1007=7 R.A 847=1935 A.L.J. 23=4 A.W.R. 1346=A.I.R. 1935 All. 47.**

———**S. 20**—*Payment of interest as such—Acknowledgment by payer—Necessity—Evidence of intention of debtor—If necessary.*

Under Limitation Act, S. 20, no payment of interest can be made to avail unless it is a payment of interest "as such." Hence some acknowledgment must be given by the payer at the time of the payment that the money paid is intended by him to be a payment of interest or there must be sufficient evidence from which it can be inferred that the debtor intended that the amount should be appropriated towards interest. A.I.R. 1929 Rang. 339, Ref. (*Braund, J.*) U SIN *v.* U TUN SI. **160 I.C. 314=8 R.R. 372=A.I.R. 1935 Rang. 473.**

———**S. 20**—*Payment of interest "as such"—Inference from mere payment without indication—Intention.*

The fact that there are arrears of interest owing at the date of payment more than sufficient to absorb the payment itself is one of those circumstances which together with other circumstances, may legitimately be taken into account in considering whether there is an intention to pay interest "as such." But this reasoning should not be stretched further as it ignores the question of intention, inasmuch as it may be none the less possible to have what may be described as an "indiscriminate" payment where there are arrears of interest as in a case where there are not. A.I.R. 1934 Mad. 45, Not Foll. (*Braund, J.*) U SIN *v.* U TUN SI. **160 I.C. 314=8 R.R. 372=A.I.R. 1935 Rang. 473.**

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——**S. 20**—*Payment of interest—What constitutes.*

The carrying forward of a balance including certain items of interest, by making certain entries of interest to the credit of the plaintiff in the defendant's accounts does not amount to payment of interest within the meaning of S. 20. The effect of a payment of interest must be to lessen the defendant's liability on that account. Where there has been no such decrease of liability, there has been no payment of interest as such and S. 20 cannot help the plaintiff. (*Pollock, A.J.C.*) VADOSA *v.* NARAYANSA. **17 N.L.J. 68—152 I.C. 319=7 R.N. 93=A.I.R. 1934 Nag. 219.**

——**S. 20**—*Payment should be made as interest or as principal.*

Where a debtor pays certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal, the payment will not be considered to be the payment of interest as such and will not save limitation on that footing; and although the creditor may have appropriated it in satisfaction of interest, the payment not being of interest as such cannot save limitation and though it is in writing it cannot be assumed to be payment of principal so as to save limitation under S. 20. (*Niamatullah and Kachhpal Singh, JJ.*) RAM PRASAD *v.* BINAIK SHUKUL. **55 All. 632=6 I.R. (All.) 5=144 I.C. 899=1933 A.L.J. 930=A.I.R. 1933 All. 453 (2).**

——**S. 20**—*Payment not endorsed.*

Payment not endorsed in the handwriting of the person paying cannot be taken into account. (*Dunkley, J.*) ALAGAN *v.* MAUNG PO PEIK. **151 I.C. 426=7 R.R. 77=A.I.R. 1934 Rang. 227.**

——**S. 20**—"*Payment*"—*Money realized by creditor by sale of pledged jewels.*

Under S. 20 payment must necessarily be made by the debtor or his duly authorized agent. Where a creditor who is in possession of jewels pledged with him as security for a debt, get them sold, and appropriates the sums realised towards the debt, it cannot be said that they are payments made by the debtor for interest as such or towards the principal. (*Sundaram Chetty and Pandyang Row, JJ.*) VALLIAPPA CHETTIAR *v.* MARUDA PANDIAN PILLAI. **152 I.C. 299=7 R.M. 210=1934 M.W.N. 1076=40 L.W. 270=A.I.R. 1934 Mad 549=67 M.L.J. 258.**

——**S. 20**—*Payment by mortgagor—Prior assignment of mortgaged property to third person—Effect of payment against third persons.*

The payment by a mortgagor towards the satisfaction of the mortgage, even though he had previously assigned the mortgaged property to a third person, has the effect of keeping alive the claim of the mortgagee against the assignee and the mortgaged property even if the suit was brought by the mortgagee more than twelve years fixed for repayment of the mortgage amount. *Jewin* v. *Wilson*, 11 A.C. 639; *Chinnery* v. *Evans*, 11 H.L.C. 115 and *Dem Lal* v. *Roshan Dobey*, 11 A.C. 639, Foll.; *Newbould* v. *Smith*, 33 Ch.D. 127, Not Foll. (*Guha and M.C. Ghose, JJ.*) UMESH CHANDRA MONDAL *v.* CHOUDHURY HEMANGA CHANDRA MAITY. **60 Cal. 87=143 I.C. 315=I.R. 1933 Cal. 399=58 C.L.J. 422=36 C.W.N. 1138=A.I.R. 1933 Cal. 325.**

——**S. 20**—*Payment signed by person making it—If material whether it is for interest or principal.*

Where the payment is evidenced by a writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both. (*Varadachariar and Burn, JJ.*) LAKSHMI NAIDU *v.* GUNNAMMA. **58 Mad. 418=1935 M.W.N. 17=154 I.C. 1053=7 R.M. 535=41 L.W. 94=A.I.R. 1935 Mad. 101=68 M.L.J. 470.**

——**S. 20**—*Payment towards principal—Inference from payment being not of interest as such.*

Where interest is not paid as such, that is, the debtor does not clearly mention that the payment by him was to be appropriated towards interest, it cannot be considered to have been paid by him towards principal. Cases are easily conceivable in which a debtor may pay a certain amount in part satisfaction of what is due from him without caring to specify that the sum is to be appropriated towards interest or principal. In such a case, whether the payment was of interest or principal would depend on the manner in which the creditor exercises his option. If he treats it as payment of interest, it becomes a payment of interest and cannot be subsequently converted into payment of principal only because it is for the benefit of the creditor that he should reconsider his position as regards payment. (*Niamatullah, J.*) KIRPA RAM *v.* BALAK RAM. **154 I.C. 1007=7 R.A. 847=1935 A.L.J. 23=4 A.W.R. 1346=A.I.R. 1935 All. 47.**

——**S. 20**—*Payments, when effective to save limitation.*

Where, in a suit to recover arrears of maintenance, the plaintiff relied on certain payments to save limitation,

Held, that as it was not proved that those payments had been made as *interest*, they did not operate to save the suit from the bar of limitation. (*Agarwala, J.*) RAJMANI BIBI *v.* BALDEO DAS. **6 R.P. 325=146 I.C. 1033=A.I.R. 1934 Pat. 244.**

——**S. 20**—*Payment within limitation—Acknowledgment after limitation—Effect.*

A payment within the period of limitation saves limitation provided there is an acknowledgment in writing. It does not matter even if the acknowledgment is made beyond the period of limitation as it is the payment and not the acknowledgment which saves limitation. The acknowledgment is merely a matter of evidence and provided it is signed before the suit is commenced that is sufficient. (*Beaumont, C.J. and Baker, J.*) VISHWANATH *v.* MAHADEO. **57 Bom. 453=6 I.R. (Bom.) 32=144 I.C. 990=35 Bom.L.R. 471=A.I.R. 1933 Bom. 252.**

——**S. 20**—*Payment towards decretal dues found true—No evidence of such payment having been made towards interest as such—Presumption.*

The decretal amount consisted of Rs. 385. This comprised both principal and interest up to the date of the decree. The interest alone was much more than Rs. 50. The costs of execution amounted only to Rs. 22-13-0. On an application for execution, it was alleged that a payment of Rs. 50 had been made by the judgment debtor within three years before the application and that was relied on to save limitation. The payment was found true but there was no evidence it was made, either for principal or for interest as such.

Held, that, under the circumstances of the case, it may be presumed to have been made for interest and that under S. 20 it operated to extend the period of limitation. 22 L.W. 827 and 44 M. 544, Foll.; A.I.R. 1926 Lah. 329, Ref. (*Sundaram Chetty, J.*) JANAKI AMMAL *v.* SRINIVASAN. **148 I.C. 126=6 R.M. 443=39 L.W. 237=1933 M.W.N. 1023=A.I.R. 1934 Mad. 45=66 M.L.J. 40.**

——**S. 20**—*Principal and surety—Payment made by principal—Whether available against surety.*

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A payment made by the principal debtor to the creditor does not prevent time running in favour of the surety. (*Beasley, C.J. and Bardswell, J.*) VAIYAPURI PANDARAM *v.* SEETHARAMA CHETTIAR. **152 I.C. 464=7 R.M. 232=1934 M.W.N. 118=40 L.W. 479 =A.I.R. 1934 Mad. 639.**

——**S. 20**—*Principal and surety—Suit on bond—Claim barred as against principal debtor but not against surety—Decree against surety—Right of creditor.*

Though the liabilities of the principal debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purpose of application of S. 20 of the Limitation Act. Consequently, even if a suit is barred by limitation as against the principal debtor, if the surety has made certain payments and endorsements on the bond on which the suit is based thus preventing limitation running as against him, the plaintiff is entitled to a decree though as against the surety only. (Case-law discussed.) (*Baguley, J.*) U BA PE *v.* MA LAY. **10 Rang. 321=139 I.C. 738=I.R. 1932 Rang. 174=A.I.R. 1932 Rang. 88.**

——**S. 20**—*Receipt of interest as such—Necessity.*

Unless interest is received as such, S. 20 cannot extend the period of limitation in favour of the plaintiff. (*Madhavan Nair and Jackson, JJ.*) FALLESATHA BANU *v.* MUHAMMAD RASHIDHUDDIN. **153 I.C. 462 =7 R.M. 357=40 L.W. 595=1934 M.W.N. 929=A. I.R. 1934 Mad. 656.**

——**Ss. 20 and 21**—*Scope—Authority need not be special one for payment of particular loan.*

There is no foundation for the contention that the authority contemplated by S. 21 must be special authority given for the purposes of making payment of the particular loan. (*Mitter and Henderson, JJ.*) JIBAN KRISTA KUNDU *v.* RAI HARI NATH GHOSE. **147 I.C. 459=6 R.C. 321=A.I.R. 1933 Cal. 826.**

——**S. 20 (as amended by Act I of 1927)**—Scope and effect of—Part payment before amendment—Debtor signing but not writing endorsement of—Effect of—Validity as acknowledgment. *See* LIMITATION ACT, S. 19. **68 M.L.J. 63.**

——**S. 20**—*Scope—Part payment on account—Items for three years prior to that not barred.*

S. 20 does not suggest that the writing must come into existence immediately and when the part payment is admitted and the fact of the part payment is made in writing by the debtor, the debt is revived and a suit can be maintained within three years of the part payment. The section however requires that the part payment must be made before the expiry of the prescribed period and when the part payment is made on account, any items which might be found due to the plaintiff for three years before that period would not be barred; neither would any of the items after that date. (*Banerji and King, JJ.*) GANESH *v.* MALLU MAL GIRDHAR DAS. **I.R. 1931 All. 435=131 I.C. 867=A.I.R. 1931 All 375.**

——**S. 20**—*Suit on basis of "Sarkhat"—No mention of interest either therein or in endorsements of payments—Payments, if must be regarded as payments of principal.*

In a suit on the basis of a "Sarkhat", it was found there was no mention of interest in the "Sarkhat" itself or in the endorsements upon the back of the "Sarkhat" relating to payments to account made by the debtor. The plaintiff stated in evidence that there was an agreement to pay interest and that he had appropriated the payments made by the debtor to interest.

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Held, that as there was no reference to interest in the "Sarkhat" or in the endorsements, the onus lay heavily on the plaintiff to prove an agreement to pay interest and that as the plaintiff had not discharged that onus, the payments referred to in the endorsements must be regarded as payments of principal and such payments towards redemption of the principal sum under S. 20 of the Limitation Act interrupted the period of limitation and a fresh period commenced from the date of payment. (*Thom, Niamatullah and Bajpai, JJ.*) NAGESHAR MISIR *v.* BATUKA KUNWARI. **156 I.C. 748=8 R.A. 26=1935 A.L.J. 657=1935 A.W.R. 774=A.I.R. 1935 All. 605 (F.B.).**

——**S. 20**—Uncertified payment by one defendant for himself only—Limitation not extended against others. *See* LIMITATION ACT, ART. 182 (5). **A.I.R. 1933 Mad. 674.**

——**S. 20**—*Unspecified payment by debtor—Appropriation by creditor towards interest—Effect of.*

Per *Full Bench by a majority.*—Where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest as such nor a part payment of the principal within the meaning of S. 20. 1933 A.L.J. 930 and 1935 A.L.J. 23, Appr. (*Sulaiman, C. J., Thom, Niamatullah, Rachhpal Singh and Bajpai, JJ.*) UDEYPAL SINGH *v.* LAKSHMI CHAND. **58 All. 261=8 R.A. 428=159 I.C. 387=1935 A.L.J. 1029=1935 A.W.R. 1155=A.I.R. 1935 All. 946 (F.B.).**

——**S. 20**—*"Writing signed by person making payment."*

Where the plaintiff's case is that defendants signed their names and afterwards, without consulting them and without their authorization another person wrote the endorsement over their signature.

Held, that that writing was not an acknowledgment of the payment in a writing signed by the defendants making the payment. Limitation therefore could not be extended under S. 20 of the Limitation Act. (*Baguley, J.*) TALOK THEINGAN *v.* SEVUGAN CHETTIAR. **152 I.C. 501=7 R.R. 163=A.I.R. 1934 Rang. 287.**

——**S. 20 (1)**—*Joint debtors—Promissory note by father and son—Part payment—Endorsement by father alone—If saves limitation against son*

In a suit upon a promissory note executed by two persons, father and son, the plaintiff in the suit in order to overcome the bar of limitation, relied on an endorsement of part payment on the note which was signed by the father alone to the effect, "paid towards principal and interest Rs. 1,300 through Mr. *G*." It was found that on the date of the endorsement, plaintiff went to the house of the executants to demand payment of the debt and met both the father and son. After the discussion between the father and son in respect of an amount due to them by Mr. *G*, the son asked his father to go with plaintiff to Mr. *G's* house and arrange with Mr. *G* for payment to plaintiff. Accordingly the father accompanied the plaintiff to Mr. *G's* house and obtained from him a pro-note in favour of the plaintiff for Rs. 1,300 after which the endorsement in question was made on the suit pro-note by the father.

Held, the case fell under S. 20 (1) of the Limitation Act and that the payment or part payment was by a debtor, who could be a co-debtor as well, duly authorized to do so, and therefore the suit was not barred by limitation as against the son. It is not necessary that the money with which the part payment is made should

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belong to the co-debtor who authorized his agent to make it; that is an irrelevant consideration. Where two debtors who are equally liable, jointly and severally on a promissory note, are pressed for payment and one of them not having the ready money to satisfy a part of the debt asks his co-debtor who may have the ready money to do so on behalf of both, such part payment saves limitation against both. (*Beasley, C. J. and Bardswell, J.*) NARAYANA AYYAR *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **151 I.C. 1087=7 R. M. 167=40 L.W. 590=1934 M.W.N. 120=A.I.R. 1934 Mad. 623=67 M.L.J. 908.**

———**Ss. 20 (1) and 21 (2)**—*Joint promisors—Payment of interest by one—If effective as against others.*

The expression "the person liable to pay the debt" is not the same thing as "a person liable to pay the debt" where there is joint liability. Where there are joint contractors, S. 21 (2) makes it clear that the payment of interest by one of them does not extend the period of limitation against the other. (*Macpherson, J.*) MADHOLAL *v.* SHAMLAL. **151 I.C. 753 (2)=7 R.P. 124 (1) =15 Pat.L.T. 113=A.I.R. 1934 Pat. 224.**

———**S. 20 (1)**—*Mortgage—Successors of mortgagor —Payment of interest by one—Effect against others.*

A payment towards interest due under a mortgage decree, made before the expiry of the period prescribed for the execution of a decree by a person who has inherited a part of the mortgaged property is binding on a person who prior to the payment has purchased another part of the mortgaged property in execution of a money decree so as to extend the period of limitation for executing the mortgage decree and enabling the decree-holder to proceed against the portion of the property sold in execution of the money decree. (*Rowland and Agarwala, JJ.*) BADRI DAS *v.* PASUPATI BANERJI. **12 Pat. 93=I.R. 1932 Pat. 293=140 I. C. 145=14 Pat L.T. 6=A.I.R. 1933 Pat. 1.**

[D. 15 P.L.T. 113 (114).]

———**S. 20 (1), Proviso (as amended by Act I of 1927)**—*Applicability.*

The decree was passed on June 10, 1927. On December 9, 1929, the judgment-debtor paid a certain amount out of Court to the decree-holder. The decree-holder applied to certify it on March 16, 1931, and the execution application was filed on June 24, 1931.

Held, that S. 20, proviso, applied to the case and that the payment of December 9, 1929, did not save limitation. Meaning of expression 'step-in aid' stated. (*Sulaiman, C. J.*) JAI KARAN *v.* PANCHAITI AKHARA CHOTA NAYA NANAK SHAHI. **143 I.C. 324= I.R. 1933 All. 232=1932 A.L.J. 1035=A. I. R. 1933 All. 49.**

———**S. 20 (1), Proviso (as amended by Act I of 1927)**—*Effect of.*

The amendment of the proviso to S. 20, Limitation Act, has been made in favour of the creditor who is not able to prove the writing of the debtor not only relating to the fact of the payment but also to the acknowledgment of the fact of payment. (*Jai Lal, J.*) JAGTU MAL SADASUKH RAI *v.* CHARANJI LAL FAKIR CHAND. **14 Lah. 580=I.R. 1933 Lah. 158 =141 I.C. 611=34 P.L.R. 179=A.I.R. 1933 Lah. 341.**

———**S. 20 (1), Proviso**—*'Signed'—Meaning of—Scribe taking pen from the debtor and writing the fact of payment by him and signing as scribe—Sufficiency.*

Where *S* (the debtor) touched a pen and passed it to *B* and *B* wrote "22nd March, 1930, *S* paid Re. 1", subsequently adding his signature as a scribe which was followed by the signature of the attestor.

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Held, that the endorsement was a perfectly neutral endorsement. It was not signed by anybody. The fact that the person who wrote it subsequently appended his signature amounted to nothing. He signed as scribe; he did not sign or purport to sign for and on behalf of *S*. The fact that it contained *S's* name did not amount to signature. It was not signed by the scribe on behalf of *S*. Hence, the endorsement was not signed within the meaning of S. 20. (*Stone, J.*) KARUPPAYYA THEVAR *v.* SUBBAYYA THEVAR. **159 I.C. 158=8 R.M. 455 (2)=1935 M.W.N. 1082=42 L.W. 644=A.I.R. 1935 Mad. 1047.**

———**S. 21**—*Acknowledgment—Pleader's admission.*

Where an admission is made in a petition made in course of his business for the appointment of guardian and the vakils of the guardian signed the acknowledgment, it is binding, where they were acting on behalf of the guardian of the minor, as an acknowledgment so as to give fresh starting point. It is immaterial that under the vakalatnama, in favour of vakils, no specific authority is given to them for acknowledging a debt. Neither S. 19 nor S. 21 contemplates that the authority to be given to the agent must in every case be an express authority. The vakils had done nothing which was not necessary to carry on the cases that they were entrusted with. 18 All. 384, Foll. (*Banerji and King, JJ.*) KAMTA RAI *v.* RANI JADURAJ KUNWARI. **I R. 1931 All. 603=133 I.C. 155=A.I.R. 1931 All. 398.**

———**S. 21**—*Admission by guardian.*

An admission amounting to an acknowledgment within the meaning of S. 19 of the Limitation Act made by the guardian of a minor appointed by the Court is binding on the minor. (*James and Agarwala, JJ.*) BAGESHWARI CHARAN SINGH *v.* BINDESHWARI CHARAN SINGH. **12 Pat. 147=142 I.C. 495=I.R. 1933 Pat. 145=13 Pat.L.T. 509=A.I.R. 1932 Pat. 337.**

———**S. 21**—*Execution of mortgage by a person on his own and on behalf of a minor as guardian—Payment of a portion of debt and endorsement thereon—Acknowledgment by him on behalf of minor, authorized.*

Where a person executed a mortgage bond and registered it on 9th September, 1909, for himself and on behalf of a minor as guardian and made an endorsement on 18th July, 1915, of some payment on the document when the minor had not attained majority, his acknowledgment was proper as he was certainly a person authorized within the meaning of S. 21 of the Limitation Act. Therefore his acknowledgment of 1915 was binding on the person on whose behalf he acknowledged and a decree against him could be given. (*Ramesam and Cornish, JJ.*) ROSAYYA *v.* PITCHAYYA. **57 Mad. 43=6 I.R. (Mad.) 113=145 I.C. 654=1933 M.W.N. 1046=38 L.W. 439=A.I R. 1933 Mad. 713=65 M L.J. 380.**

———**S. 21**—*Implied authority—Debt due by two brothers allotted to one at partition—Payment of interest by one—Saving of limitation.*

Where a debt is due by two brothers and, on a partition between them, it is allotted to one of them, payment of interest by such brother will not save limitation as against the other brother, unless there is an implied or express authority conferred by the partition arrangement to make such payment of interest. A.I.R. 1929 P.C. 297, Dist. (*Mitter and Henderson, JJ.*) JIBAN KRISTA KUNDU *v.* RAI HARI NATH GHOSE. **147 I.C. 459=6 R.C. 321=A.I.R. 1933 Cal. 826.**

———**S. 21**—*Lawful guardian—Hindu mother—Power to acknowledge.*

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On the death of the father of a minor his mother is not only the natural guardian but also the legal guardian under Hindu Law and being a legal guardian she is also a lawful guardian within the meaning of S. 21 and can as such acknowledge debts. (*Bisheshwar Nath and Nanavutty, JJ.*) BECHU SINGH *v.* BALDEO PRASAD. **6 I.R. (Oudh) 25=145 I.C. 180=10 O.W.N. 188=A.I.R. 1933 Oudh 132.**

———**S. 21**—*Lawful guardian—Hindu mother—Power to acknowledge.*

On the death of the father of a Hindu minor, his mother is a lawful guardian and can act under S. 21 of the Limitation Act as an agent duly authorized to acknowledge a debt on behalf of the minor. No question arises under S. 21 of the benefit to be derived by the minor from his guardian's action in acknowledging a debt. The question of benefit is only relevant to the original debt. If the original debt is binding upon the minor, the action of the guardian in acknowledging it merely extends limitation but does not alter the character of the debt. In the same way, if the original debt is tainted with immorality, and not therefore binding upon the minor, the guardian's acknowledgment of it does not change its character. (*Shadi Lal, C. J. and Hilton, J.*) RAM NARAIN SINGH *v* HARBANS SINGH. **153 I.C. 23=7 R.L. 370=35 P.L.R. 661=A.I.R. 1934 Lah. 685.**

———**S. 21**—*'Lawful guardian'—Payment by* de facto *guardian—Saving of limitation.*

The maternal uncle of a minor was appointed *ad interim* guardian, "for the purpose of collecting sums due to the minor's estate and paying of debts due by the estate. Before paying such dues he was to file a list in Court of those which he purported to pay and take permission to pay them." The said guardian while in management made certain payments on promissory note but he did not obtain the sanction of the District Judge.

Held, that the person appointed acted as a *de facto* and not as a *de jure* guardian in making the acknowledgments and that they were not effective. (*Ramesam, J.*) SUBBAKKA *v.* VENKATA SETTI. **1932 M.W.N. 1193.**

———**S. 21** — *Partnership — Acknowledgment by partner in the course of business—Validity.*

In the case of a going partnership concern there is a presumption that each partner is entitled to sign an acknowledgment on behalf of the firm in the ordinary course of business. (*Jai Lal, J.*) KULJAS RAM *v.* WISHAN SINGH. **I.R. 1932 Lah. 359 (1)=137 I.C. 771=33 P.L.R. 584=A.I.R. 1932 Lah. 456.**

———**S. 21 (2)**—*Manager and other members liable to pay debt—Payment made by manager—Inference that it is on behalf of other members.*

Where a manager and other members of a Hindu undivided family are liable to pay a debt and a payment is made by the manager, it may be possible to infer from the circumstances that the payment was made by the managing member on behalf of the other members as well on the principle of implied agency and that in that connexion the very fact of his being a managing member would itself be a factor of importance. (*Varadachariar and Burn, JJ.*) LAKSHMI NAIDU *v.* GUNNAMMA. **58 Mad. 418=1935 M.W.N. 17=154 I.C 1053=7 R. M. 535=41 L.W. 94=A.I.R. 1935 Mad. 101=68 M.L.J. 470.**

———**S. 21 (2)**—*Partnership—"Only"—Meaning of.*

The meaning to be given to the word "only" in S. 21 (2) is that it must also be shown that the partner signing the acknowledgment had authority, express or implied, to do so and that in a going mercantile concern such agency is to be presumed as an ordinary rule. **32** Bom. L. R. 201, Foll. (*Mirza, J.*) GORDHANDAS BALDEODAS *v.* BHULABHAI. **I R. 1932 Bom. 426=138 I.C. 805=34 Bom.L R. 623=A.I R. 1932 Bom. 316.**

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———**S. 21 (2)**—*Payment by one debtor—Effect against co-debtors.*

The payment of interest by a debtor does not save limitation against his co debtors whose agent the payer was not. 14 I.C. 128, Appr. (*Costello and Jack, JJ.*) JOGESH CHANDRA SAHA *v.* MANINDRA NARAIN CHAKRAVARTY. **59 Cal. 1128=I.R 1932 Cal. 503=138 I.C. 740=36 C.W.N. 487=55 C.L.J. 347=A.I.R. 1932 Cal. 620.**

———**S. 22**—*Applicability—Joint Hindu family—Suit by manager alone—Amendment adding other members of family.*

S. 22 has no application where, in a suit by the manager of a joint Hindu family, the other members of the family are brought on record by amendment of the plaint. 12 B. 158, Foll. (*Shingne, J.*) MADHGOUDA BABAJI *v.* HALAPPA BALAPPA. **58 Bom. 348=36 Bom L R. 327=151 I.C. 370 (2)=7 R.B. 60=A.I.R. 1934 Bom 178.**

———**S. 22**—*Applicability—Suit against wrong legal representative — Proper person added after time—Validity.*

Where the suit was originally instituted within the limitation but a wrong person was impleaded as representing the estate of the deceased and the plaintiff impleaded the right person after expiry of the period of limitation prescribed for the suit,

Held, that S. 22 applied to the facts of the case and the suit was therefore time-barred. (*Shadi Lal, C. J. and Hilton, J.*) NORTHERN BANK OF INDIA, LTD. *v.* RAMESH CHANDAR. **I.R. 1932 Lah. 292=137 I.C. 89=33 P.L.R. 253=A.I.R. 1932 Lah. 314.**

———**S. 22**—*Applicability—Suit by or against firm—Disclosure and placing on record of names of partners later on—If substitution or addition.*

A firm as such has no legal entity, nor is it a person in the eye of the law. It is nothing more than a compendious name for the individuals who carry on business in partnership. When therefore a suit is instituted by or against a firm, it is a suit by or against the partners who are members of that firm although their names are not disclosed in the plaint. If their names are subsequently disclosed and placed on the record, such names are not substituted for the names of persons who are already on the record, nor are such names added to any names which are on the record so as to attract the applicability of S. 22. Where therefore a plaint is filed against a firm consisting of certain persons, it should be deemed as filed against them as existing persons although their names are not disclosed and if the names of the members of the firm are subsequently disclosed, the amendment is merely for correcting a misdescription of the existing person and the suit must be deemed to have been instituted when the plaint was presented and not when it was amended. 7 All. 284; A I R. 1924 Cal. 74; A.I.R. 1925 Bom. 527; 17 Bom. 413 and A.I.R. 1933 Bom. 304, Rel on; A.I.R. 1928 Bom. 191, Dist. (*Rupchand Bilaram, A.J C.*) HAMPSON *v.* JEEWANMALL BROS. **159 I.C. 933=8 R S. 105=A.I.R. 1935 Sind 225.**

———**S. 22**—*Applicability—Suit for possession—Defendant's plea of title in idol—Idol impleaded after limitation—Effect.*

In a suit for possession of property after declaring that a certain alienation was invalid, the alienee defend-

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ant pleaded that he held a portion of the property on behalf of an idol, he having transferred it to the idol. The idol was thereafter impleaded, but only after the period of limitation had expired.

Held, S. 22, applied to the case and that the suit as against the idol was barred by limitation. (*Agarwala and Saunder., JJ.*) RAJIB NAIN LAL *v.* MT. BINDESHWARI DAI. **15 Pat.L.T. 596.**

——S. 22—*Applicability—Suit on promissory note—Relief against minor's assets in defendant's hands asked for—Amendment asking relief against defendant personally allowed.*

Where in a suit on a promissory note signed by a person on his own behalf and as guardian of a minor, only relief against the assets of the minor in the guardian's hands was asked for but subsequently an amendment claiming relief against the guardian personally was allowed

Held, that the effect of the amendment was not to add a new person as defendant but to alter the ground on which a person already a defendant was to be held liable. Consequently once the amendment was allowed, S. 22 did not apply. (*Walsh, J.*) SESHAGIRI RAO *v.* SESHAGIRI RAO **154 I.C. 582—7 R.M 452=1934 M W. N. 854—A I R 1935 Mad. 160.**

——S. 22—*Award—Application for filing in Court—Transposition of parties beyond limitation—Permissibility.*

Where, in an application for filing an award, one of the party respondents in whose favour also the award had been made applied to the Court to be transposed as applicant but it appeared that the period of limitation for his filing an application had already expired.

Held, that the Court could transpose the party and that the mere transfer did not amount to a fresh application so as to create a bar of limitation against him. (*Sulaiman, A.C.J. and Baptai, J.*) MANGAL SEN *v.* PRAG DAS. **I R. 1931 All. 650 = 133 I.C. 410 1931 A.L.J. 863—A I.R. 1931 All. 725.**

——S. 22—*Joint promisees—Suit by one of several legal representatives—Decree for share.*

Where one of the legal representatives instituted a suit for the recovery of the whole amount and the other legal representative, on objection being taken was made a plaintiff and the plaint was amended, the decree granted for half the amount due in favour of the legal representative who originally instituted the suit is not open to any valid objection.

Quære.—Whether the whole claim should have been decreed in his favour. (*Jai Lal, J.*) KHAIRATTI SHAH *v.* DIWAN SINGH. **141 I.C. 190 - I R. 1933 Lah. 66 = 34 P.L R. 508 = A.I R. 1932 Lah. 652.**

——S. 22—*Mortgage suit—Impleading puisne mortgagee after 12 years—Bar.*

If a mortgagee sues the mortgagor for sale and then after the expiry of 12 years from the date of the mortgage impleads a puisne mortgagee, his suit as against that mortgagee is barred by S. 22. (*Jackson, J.*) BHASKARUNNI BANGARU *v.* PUNNAVVA. **1932 M. W N. 330.**

——S. 22—"*New defendant*"—*Hindu joint family—Manager representing—Inclusion of other members as party defendants subsequently—Bar.*

If parties are effectively represented through those whose actions bind them, so that a decree passed against them is binding on such parties, a specific mention of the name of such party subsequently made in the title of the suit cannot be regarded as addition of a new defendant for the purposes of limitation. Rule applied to the case of members of joint Hindu family

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subsequently impleaded as parties to a suit in which they were effectively represented by the manager. (*Pullan and Niamatullah, JJ.*) BANWARI SINGH *v.* SAKHRAJ SINGH. **135 I C. 248 = I.R. 1932 All. 72 = 1931 A.L J. 421 = A I.R. 1931 All. 585.**

——S. 22—*Partnership—Suit for accounts against one partner only—Other partners added as parties after period of limitation.*

When a partner sues only one of his partners for accounts of partnership and the other partners are added after the period of limitation has elapsed, the suit must be dismissed. 14 Cal. 791 and 8 P.R. 1880, Ref. (*Aston and Havelwalla, A.J.Cs*) PAHLOOMAL *v.* PARAMANAND. **I R. 1933 Sind 163 = 143 I.C. 900 = A I.R. 1933 Sind 121.**

——S. 22—*Proper but not necessary party—Joinder after expiry of limitation—Permissibility.*

When a suit can be, and is, constituted without joining certain persons as parties, and they are subsequently added as parties for the benefit of the defendants to ensure them against further litigation the suit should proceed though they are added as parties after the expiry of the period of limitation and the Court should award such relief as may be given in the suit as framed. To such a case the provisions of S.22 do not apply. (Case-law reviewed.) (*Matter and McNair, JJ.*) SECRETARY OF STATE *v.* DHIRENDRA NATH ROY. **151 I C. 1076 = 7 R.C. 211 = 38 C.W.N. 409 = 59 C.L.J. 295 = A.I. R. 1934 Cal. 187.**

——S. 22—*Scope—Applicability—Proceedings under O. 21, R. 101, C. P. Code.*

S. 22 is confined to suits under R. 101 and does not apply to application under R. 101 ; the proper article of limitation to apply to such application is Art. 165. (*Panckridge, J.*) INDUBHUSHAN DAS *v.* HARI CHARAN MANDAL. **58 Cal. 55 = I.R. 1931 Cal. 583 = 132 I.C. 631 = A.I R. 1931 Cal. 385.**

——S. 22—*Scope—Substitution of plaintiff—Power of Court—Limitation.*

The Court under O. 1, R. 10 (1), C.P. Code, will substitute a right plaintiff in the place of a wrong one, in the case of a *bona fide* mistake, only if on the date on such substitution the right to sue is not barred under S. 22, Limitation Act. (*Beaumont, C.J. and Barlee, J.*) KRISHNAJI SHIVAJI *v.* HANMAREDDI. **58 Bom. 536 = 153 I C. 800 = 7 R.B. 265 = 36 Bom.L R. 814—A.I. R. 1934 Bom. 385.**

——S. 22—Suit against dead person—Application to bring on record legal representatives not valid—Deduction of interval—Not permissible. *See* LIMITATION ACT, SS. 14 AND 22. **A.I.R. 1933 Mad. 454.**

——S. 22—*Suit by partners—Subsequent declaration naming fresh partner—Expiry of limitation—Procedure.*

Under O. 30, R. 2, C P. Code, once partners have been declared, the persons whose names have been declared are to be regarded as parties to the suit. There is however nothing to prevent a party from making a further declaration the effect of which might afterwards fall to be considered by the Court. But if it is made after the period of limitation has elapsed, it would be of no effect and the Court would regard the suit as being one by the parties, whose names were originally declared. (*Ameer Ali, J.*) BHAIROBUX MANGILAL *v.* DEOKARAN. **60 Cal. 1217 = 149 I.C. 22 = 6 R.C. 550 = 37 C.W.N. 1105 = A.I.R. 1934 Cal. 253.**

——S. 22—*Suit on pronote against widow of deceased executant as his legal representative—Daughter and daughter's son claiming under will of deceased, added*

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parties subsequent to expiry of limitation—Suit, if liable to be dismissed against them.

In a suit on a promissory note brought against the widow of the deceased executant as his legal representative, it was pointed out by her that the deceased died leaving a will under which her daughter and daughter's son were interested in his property. The plaintiff then amended his plaint and made them parties but by that time the promissory note had become barred.

Held, that the added parties could not rely on S. 22 as the estate was sufficiently represented by the widow in the suit as it was originally constituted and as such they were potentially parties to the suit and could not be said to have been added as parties only when their names were actually entered on the record after the amendment, and that the suit, therefore, could not be dismissed against them. (*Madhavan Nair, J.*) ADI LAKSHMI *v.* DURGAMMA. **159 I.C. 129 = 8 R.M. 449 = A.I.R. 1935 Mad. 737.**

——S. 22 (1)—*Addition of new parties—Suit barred against them on the date of addition—Relief against others already on record—Effect on.*

S. 22 refers only to the parties subsequently added; the suit cannot fail as against the original defendants, merely because the plaintiffs may have lost their remedy as against the newly added defendants unless such a result follows from the nature of the suit. (*Wadia, J.*) BISHAMBERDAS *v.* BRIJLAL. **135 I.C. 423 = I R. 1932 Bom. 71 = 33 Bom L.R. 1385 = A I R 1931 Bom 590.**

——S. 22 (1)—*Applicability—Amendment changing capacity of defendants in which relief was sought.*

Where a suit is originally brought against the defendants as members of a joint undivided family and subsequently the plaintiff was allowed to amend his plaint by adding an alternative claim against them as partners, there is no change in the "*persona*" of the parties but only a change in the basis on which the same parties were sought to be held liable and with reference to them, they cannot be deemed to be newly added under S. 22. 27 Bom L.R. 1122, 15 M. 417; 51 Cal. 845, Foll. (*Wadia, J.*) BISHAMBERDAS *v.* BRIJLAL. **135 I.C. 423 – I R. 1932 Bom. 71 = 33 Bom.L.R. 1385 = A.I.R. 1931 Bom. 590.**

——S 22 (1)—*Applicability—Suit by one co-sharer for arrears of rent—Other co-sharers impleaded as* pro forma *defendants and subsequently transposed as defendants.*

Where in a suit by one co sharer for recovery of his 8 annas share of the arrears of rent, the other co sharers were impleaded as *pro forma* defendants and subsequently transposed as plaintiffs and on payment of Court fees claimed their respective shares also and the defendant contended that the claim of the others was barred on the date of transposition.

Held, that the case was governed by S. 22 (1) and that there was no question of a bar by limitation. (*Kulwant Sahay and Scrope, JJ.*) RAMBEAS TEWARI *v.* AKHAURI RAJ MOHAN SAHAY. **I R. 1932 Pat. 243 = 139 I C. 535 = 13 Pat.L.T. 392 = A.I.R. 1932 Pat 304.**

——S. 22 (1)—*Applicability—Transposition of defendant as plaintiff.*

If a party already on the record is transferred from the category of defendant to that of plaintiff, the provisions of S. 22 (1) will not apply; sub Cl (2) provides that the change of position will not affect limitation. (*Curgenven, J.*) KOMAN NAIR *v.* MOOLACHERI NAIR. **154 I C. 747 = 7 R.M. 481 = 1934 M.W.N. 1396 = 40 L.W. 900 = A.I.R. 1935 Mad. 95.**

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——S. 22 (1)—Suit on mortgage—Insolvency of mortgagor defendant—Addition of Official Receiver—Limitation. *See* PROVINCIAL INSOLVENCY ACT, S. 28 (2). **A.I.R. 1935 Lah. 316.**

—— S. 22 (2)—*Applicability—Transposition of defendant as plaintiff—Plaintiff and defendant having different causes of action.*

Cl. (2) of S. 22 no doubt says that the bar of limitation which may arise under Cl. (1) of the section, when a new plaintiff or a new defendant is substituted or added, will not apply to a case where a plaintiff is made a defendant or a defendant is made a plaintiff. But the provisions of S. 22, Cl (2) can be availed of only in cases where the plaintiff and the defendant have a joint cause of action and not when their causes of action are different. (*Madhavan Nair, J.*) PERIAKARUPPAN CHETTI *v.* MOTTAYYA MUDALI. **156 I.C. 455 = 8 R.M. 5 = 41 L W 177 = 1935 M.W N. 210 = A.I.R. 1935 Mad. 240 = 69 M.L.J. 30**

——S. 22 (2)—*Scope—Suit in time—Transposition of defendants as plaintiffs after limitation—Effect.*

Where a suit is instituted in time, but two of the defendants are made plaintiffs after the period of limitation for the suit, the case is covered by S. 22 (2) and there is no bar of limitation as regards the claim of the transposed parties. (*Srivastava, C.J. and Thomas, J.*) BHAGAT *v.* MADHO PRASAD. **10 Luck. 203 = 151 I.C. 452 = 7 R O. 127 = 11 O.W.N. 1071 = A.I R. 1934 Oudh 462.**

——S. 22 (2)—*Transposition of parties—Bar of limitation, if material.*

The transposition of *pro forma* defendant into a plaintiff cannot be disallowed on the ground that it would affect limitation, since the object of S. 22 (2) is to provide for cases of this nature. (*Macpherson, J.*) DEVJI GOA *v.* TRICUMJI JIVANDAS. **149 I.C. 760 = 6 R.P. 647 = 14 Pat L.T. 252 = A.I R. 1933 Pat. 239.**

——S. 23—*Applicability—"Continuing wrong"—Suit to set aside order under S. 147, Cr.P. Code—Limitation.*

A suit to set aside an order passed under S. 147, Cr. P. Code, directing that no organised procession of certain communities should pass along certain streets until a Civil Court had declared that there was a right to do so, is governed by Art. 120 of the Limitation Act and will be barred unless instituted within six years of the date of the order. S. 23 of the Act does not apply to the suit as there is no "continuing wrong" caused by the defendants. (*Curgenven and King, JJ.*) PONNU NADAR *v.* KUMARU REDDIAR. **69 Mad 75 = 161 I C. 653 = 8 R M. 837 = 42 L.W. 599 1935 M.W.N. 634 = A.I R 1935 Mad. 967 = 69 M L.J 739.**

——Ss. 23 and 24—*Applicability—Obstruction to water-course—If a continuing cause of action.*

In view of the illustration to S. 24, in respect of interference with a water course, the party injured has a continuing cause of action. Whether the principle of continuing wrong as laid down in S. 23 can be applied to obstruction to a right of way or not, it undoubtedly applies to cases of interference with a water-course. Although it has sometimes been stated generally that whenever a permanent state of things has been brought about by the defendant, there is no scope for the application of S. 23, the theory of a permanent state of things being brought about can have no application, when it is brought about on the defendant's own land. In such a case, the doctrine of title by adverse possession will not apply. When there is interference with a flow of water, in whatever manner the interference is effected, S. 23 will apply. (*Varadachariar, J.*)

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MUTHALAGAPPA CHETTIAR *v.* NAVANEETHESWARA GURUKKAL. **158 I.C. 987=8 R.M. 393=1935 M.W.N. 538=42 L.W. 183=A.I.R. 1935 Mad. 668=69 M.L.J. 42.**

———**S. 23**—*Applicability—Right to irrigate from* kuhl.

The right of proprietors of a village to irrigate from a *kuhl* is a recurring right to which S. 23 applies. (*Irving and Latifi, F. Cs.*) RAM SINGH *v.* SADHU RAM. **13 Lah.L.T. 22.**

———**S. 23**—Building house—Interference with light and air of another's house—Decree for injunction—Execution—Limitation. *See* LIMITATION ACT, ART. 181. **37 P.L.R. 576=A.I.R. 1935 Lah. 702.**

———**S. 23**—*Continuing wrong—Exclusive occupation of building meant for common purposes.*

The exclusive occupation of a building meant for common purposes as distinct from a building meant for religious purposes is not a continuing wrong. (*Dalip Singh, J.*) WADHAWA *v.* ALLAH DITTA. **I.R. 1932 Lah. 153=135 I.C. 681=33 P.L.R. 180=A.I.R. 1932 Lah. 220.**

———**S. 23**—*Continuing wrong—Interference with right of worship—Recurring time-limit.*

In a suit alleging interference with the plaintiff's right of worship on a holy hill and claiming relief by way of injunction and declaration in respect of *charans* or foot-prints of saints which the defendants had removed and replaced by *charans* of a different type abhorrent to the plaintiffs.

Held, that the suit was not barred by Art 120 as the act complained of was a continuing wrong and that under S. 23 of the Act a fresh period began to run at every moment of the day on which the wrong continued. (*Sir John Wallis.*) HUKUM CHAND *v.* MAHARAJ BAHADUR SINGH. **60 I.A. 313=12 Pat. 681=35 Bom.L.R. 990=58 C.L.J. 56=14 Pat.L.T. 559=38 L.W. 306=1933 M.W.N. 882=1933 A.L.J. 1325=I.R. 1933 P.C. 187=144 I.C. 346=37 C.W.N. 1021=A.I.R. 1933 P.C. 193—65 M.L.J. 163 (P.C.).**

[R. 1934 P. 34 (35)]

———**S. 23**—*Continuing wrong—Obstruction to passage way.*

Where the plaintiff has a right to use the land on which certain sheds have been erected, as a passage and those sheds are obstructing his passage way, there is a continuing wrong and a suit for declaration of plaintiff's right to use the land and for removal of sheds is governed by S. 23. (*Lort-Williams and Jack, JJ.*) SARAT CHANDRA MUKHERJEE *v.* NERODE CHANDRA MUKHERJEE. **156 I.C. 390=7 R.C. 703=A.I.R. 1935 Cal. 405.**

———**S. 23**—*Continuing wrong—Obstruction to right of way.*

A wrongful interference with a public right of way constitutes a nuisance and is a continuing wrong within the meaning of S. 23. (*Kulwant Sahay, J.*) BHAGWAN DUTT *v.* ASARFI LAL MAHTA. **6 I.R. (Pat) 260=146 I.C. 408=A.I.R. 1934 Pat 34.**

———**S. 23**—*Continuing wrong—Order under S. 146, Cr. P. Code—Suit to contest—Limitation.*

An order passed by the Magistrate under S. 146, Cr.P. Code is, where it is challenged, a case of continuing wrong and under S. 23 and the right to sue accrues from moment to moment so long at the attachment lasts and the suit cannot be held to be barred by lapse of six years from the date of the order. (*Kulwant Sahay and Macpherson, JJ.*) JURAWAN SINGH *v.* RAMSAREKH SINGH. **12 Pat. 261=149 I.C. 561=6 R.P. 620 (2)=14 Pat.L.T. 113=A.I.R. 1933 Pat. 224.**

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———**S. 23**—*Continuous breach of duty by directors—Misfeasance proceedings—Limitation.*

An omission by directors to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board is a breach of duty which continues as long as the decision is deferred and the starting point of limitation is governed by the third part of the time clauses in Art. 115. (*Ferrers, J. C.*) KARACHI BANK, LTD. *v.* SHEWARAM. **I.R. 1933 Sind 147=143 I.C. 713=A.I.R. 1933 Sind 103.**

———**S. 23**—*Property in possession of temple—Each denial is fresh invasion and affords fresh cause of action.*

Where the property in dispute has throughout been in possession of the temple, each denial of title of the temple to the property in dispute is a fresh invasion of its right and affords a fresh cause of action to establish its title to the property in dispute. 8 Lah. 22, Foll. (*Jai Lal and Agha Haidar, JJ.*) RAM LAL *v.* THAKURJI MANDIR. **6 I.R. (Lah.) 175=146 I.C. 136=A.I.R. 1933 Lah 920.**

———**S. 23**—Scope—Successive causes of action not foreign to S. 23 and Art. 116. *See* LIMITATION ACT, ART. 116. **A.I.R. 1931 Pat. 285.**

———**S. 23**—*Surety for judgment-debtor undertaking to produce him on each date of hearing—Failure to produce him on certain date—Execution proceedings terminating after several subsequent hearings—Execution against surety—Limitation.*

A surety for a judgment-debtor undertook to produce him on each date of hearing and further stipulated that in case of default he would be liable to pay the whole amount due under the decree. The surety failed to produce the judgment-debtor on a certain date. The execution proceedings subsequently dragged on for several hearings and then came to an end. An application for execution was filed against the surety exactly three years after the date when the execution proceedings terminated.

Held, that S. 23 had no application as it was not a case of continuous breach of the surety bond and that the right to apply for execution against the surety accrued when the surety failed to produce the judgment-debtor on a certain date and that counting the period from that date, the application was clearly time barred. (*Agha Haidar, J.*) JALAL DIN *v.* MEHANGA RAM. **153 I.C. 459=7 R.L. 445=37 P.L.R. 72=A.I.R. 1935 Lah. 174 (2).**

———**S. 24, Ill.**—Scope and effect of—Obstruction to water course—Suit for injunction—Limitation—Starting point—If continuing cause of action. *See* LIMITATION ACT, SS. 23 AND 24. **69 M.L.J. 42.**

———**S. 25**—*Bond—Six months fixed for payment—Date fixed as per Kuar Puran Mashi 1332 F—Limitation period—Instruments deemed to be made with reference to Gregorian Calendar.*

Plaintiff sued for on registered bond for Rs. 150 executed by defendant on 16th April 1924. The bond provided for payment of money in six months, the date being fixed as Kuar Sudhi Puran Mashi 1332 which corresponded to 13th October, 1924. The suit was filed on 15th October, 1930, and was dismissed as being beyond limitation by two days.

Held, that all instruments should for the purposes of limitation be deemed to be made with reference to Gregorian Calendar. The date of the Fasli year is a movable date with reference to the Gregorian Calendar and therefore could not be taken as the date of payment with reference to which limitation should be calculated. Date of payment should be calculated as six months

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from 16th April, 1924, and as limitation in this case was six years, the suit was filed one day before the limitation expired. (*Nanavutty, J.*) PULAI RAM *v.* SANCHIT MISIR. **134 I.C. 601=I.R. 1931 Oudh 393=8 O.W.N. 834=A I.R. 1931 Oudh 357.**

———**S. 25**—*Effect—Saving of limitation—Burden of proof.*

Under S. 25 a promise to pay a time-barred debt is valid if it is made in writing and signed by the person to be charged therewith. The onus of proof lies on the plaintiff to show that his case comes within the period of limitation on account of such acknowledgment. (*Mukerji and Bennet, JJ.*) GIRDHARI LAL *v.* BISHUN CHAND. **54 All. 506=140 I.C. 783=I.R 1933 All. 26 =1932 A.L.J. 279=A.I.R. 1932 All. 461.**

———**S. 26**—"*As of right*"—*Meaning.*

The term "as of right" is not synonymous with "rightfully" but signifies enjoyment by a person in the assertion of a right. It is enjoyment had, not secretly or by stealth or tacit sufferance or by leave or favour or by permission asked from time to time on each occasion or even on many occasions of using it, but an enjoyment had openly, notoriously without particular leave at any time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of right. 15 B.L.R. 361, Rel. on. (*Tek Chand and Agha Haidar, JJ.*) RAM SARUP *v.* ABDUL HAQ. **12 Lah. 741= 135 I.C. 51=I.R. 1932 Lah. 35=33 P.L.R. 139= A.I.R. 1931 Lah. 395.**

———**S. 26**—"*As of right*"—*Meaning—Partition—Twenty years' enjoyment of right not reserved—Effect.*

The words "as of right" in S. 26 mean *nec vi, nec clam, nec precario*. Twenty years' enjoyment of a right to light and air after a partition, which however did not reserve such a right, is enjoyment "as of right." (*Rankin, C.J and Pearson, J.*) JOTINDRA MOHAN MITTER *v.* PROBODH KUMAR DUTT. **59 Cal. 260= 138 I.C 193=I.R. 1932 Cal. 434=35 C.W.N. 963= A.I.R. 1932 Cal. 249.**

———**S. 26**—*Easement—Acquisition—"As of right"—Evidence as to—User without interruption—If user as of right.*

An open user continued without interruption for more than 20 years and not shown to be attributable to permission or sufference on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of S. 26. It is not necessary to the plaintiff to adduce or lead evidence to prove that he had been using as of right. (*Agha Haidar, J.*) BISHAN DAS *v.* BEHARI LAL. **157 I.C. 871=8 B.L. 155 (2)=A.I.R. 1935 Lah. 937.**

———**S. 26**—*Easement— Continuous enjoyment for twenty years—Presumption as to—If arises from prior enjoyment.*

There cannot be any presumption, in the case of an easement, that what was the state of facts twenty or thirty years ago has continued since. The law only provides that an easement is established when and only when it is shown that there has been a continuous enjoyment, and when it is necessary, as the law requires, to prove that fact, no presumption can possibly arise. (*Wort, J.*) JANGBAHADUR SINGH *v.* THITHAR SINGH. **155 I.C. 966=7 R.P. 653=16 Pat.L.T. 192 =A.I.R. 1935 Pat. 188.**

———**S. 26**—*Easement of light and air—Window and in the ownership of person claiming—Right if affected.*

The subject-matter of S. 26 is the access of light over defendant's premises into the plaintiff's building. The fact that the window through which light passes does not belong to the plaintiff is immaterial. (*Rankin, C.J. and*

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Pearson, J.) JOTINDRA MOHAN MITTER *v.* PROBODH KUMAR DUTT. **59 Cal. 260=138 I.C. 193=I.R. 1932 Cal. 434=35 C.W.N. 963=A.I.R. 1932 Cal. 249.**

———**S. 26**—*Easement—Right of fishery in gross.*

The right of fishing on another's water either by himself or by hired men on payment of a fee per head of men employed is not such a right as can be acquired by prescription. 9 C. 698, Ref. (*Mukerji and Bartley, JJ.*) BRAJENDRA KISHORE ROY CHOWDHURY *v.* BAMA CHARAN KAIVARTA. **146 I.C. 427=6 I.R. (Cal.) 223=37 C.W.N. 18=A.I.R. 1933 Cal. 539.**

———**S. 26**—"*Interruption*"—*Meaning.*

In India, an "interruption" to be effective must result in actual discontinuance of the enjoyment of the right of the claimant. 17 Q B 267, 10 Cal. 214; 31 I.C. 528, Ref. (*Tek Chand and Aga Haidar, JJ.*) RAM SARUP *v.* ABDUL HAQ. **12 Lah 741=135 I.C. 51=I.R. 1932 Lah. 35=33 P.L.R 139=A I.R. 1931 Lah. 395.**

———**S. 26**—*License—User by prescription.*

Where the grant is in the nature of a license and not of an easement, right of user by prescription cannot be acquired by prescription. (*Almond, J. C. and Mir Ahmad, A. J. C.*) SAYED GALUN SHAH *v.* NAWAB ALI. **152 I C. 141=7 R Pesh. 44=A.I.R. 1934 Pesh. 96.**

———**S 26**—"*Peaceable*"—*Meaning.*

All that the word "peaceable" in S. 26 means is that the plaintiff who claims to be the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within 20 years expiring within two years of the suit, nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right. The person who claims a right over the property of another must not have deprived him of that right by the use of force or secretly. The word "peaceably" qualifies the verb "enjoyed." A mere denial by the defendant of the plaintiff's alleged right and his unsuccessful attempt to have this right negatived in Courts of Law, does not affect the plaintiff's acquisition of easement. 31 I.C. 528, Rel. on; 49 I.C. 963, Ref. (*Tek Chand and Agha Haidar, JJ.*) RAM SARUP *v.* ABDUL HAQ. **12 Lah. 741=135 I.C. 51=I.R. 1932 Lah. 35=33 P.L.R. 139=A.I.R. 1931 Lah. 395.**

———**S. 26**—*Presumption of grant—Applicability of English Rule.*

In cases of easements acquired by prescription, the English Law presumed a grant and its accidential loss due to lapse of time. In India, such a presumption is not necessary as the right depends on positive enactments, *e.g.*, S. 26. (*Tek Chand and Agha Haidar, JJ.*) RAM SARUP *v.* ABDUL HAQ. **12 Lah. 741=135 I.C. 51=I.R. 1932 Lah. 35=33 P.L.R. 139=A.I.R. 1931 Lah. 395.**

———**S. 26**—*Right to fish—Acquisition of easement.*

A mere right to fish not excluding the rightful owner is a profit *a prendre* and falls within the definition of easement given in S. 2 (5) of the Limitation Act and may be acquired by 20 years' uninterrupted enjoyment under S. 26. (*Fazl Ali, J.*) RAMHARY PAL *v.* NIDHI MAHANTY. **6 R.P. 473=148 I.C. 431=A.I.R. 1934 Pat. 420.**

———**S. 28**—*Adverse possession by widow—Title acquired by—Devolution of property.*

A title acquired under S. 28 of the Limitation Act, through adverse possession by a widow, who claims and holds a widow's estate, inures to the estate of her deceased husband and it descends upon her death accordingly. Where a Hindu widow became a convert to Mahomedanism, married a Mahomedan and continued to hold the properties of her former Hindu husband,

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Held, that the effect of the re marriage was to cause a forfeiture of her rights in the estate of her first husband, that her possession thereafter was unlawful, but that the re marriage could not enlarge her estate into an absolute one. The effect of continued possession for over twelve years was only to perfect her title to a widow's estate which inured to the estate of her Hindu husband and devolved on his next heirs. 51 I.A. 171, Rel ; A.I.R. 1925 All. 269 ; A.I.R. 1927 All. 174 and A.I.R. 1929 Lah. 327 and 11 Lah. 424, Foll. (*Hasan, C.J. and Bisheshwar Nath, J.*) PARBATI *v.* RAM PRASAD. 7 **Luck. 320=141 I.C. 831=I R. 1933 Oudh 88=10 O.W.N. 21=A.I R. 1933 Oudh 92.**

———S. 28—*Applicability—Cases under C.P. Tenancy Act.*

S. 28 applies to cases under the C. P. Tenancy Act under provisions of S. 104 of the Act. The landlord can therefore eject one party to an exchange because he must be considered a trespasser as against the landlord and not a liensee of the original tenant, whose rights have been determined by the provisions of S. 28. (*Staples, A.J.C.*) SUJATKHAN *v.* NAZAFALI. **30 N.L.R. 208 =6 R.N. 200=148 I.C. 733=A.I.R 1934 Nag. 61.**

———S. 28—*Applicability—Local laws.*

S. 28 does not in terms apply to cases under special and local laws ; but the principle underlying it is of general application and can be applied to cases governed by local laws. (*Tek Chand and Skemp, JJ.*) KARTAR SINGH *v.* KHARKHA. **160 I.C. 1000=8 R.L. 651= A.I R. 1935 Lah. 787.**

———S. 28 and Art. 139—*Applicability—Mortgage and lease back—Suit for money after determination of lease—Limitation.*

A mortgagee of melwaram interest in certain land leased back that interest to the mortgagors under a lease for a term of years. The tenancy terminated, but the mortgagee as landlord did not sue within twelve years for recovery of possession, but after 12 years, he brought a suit for his mortgage money and for profits for 3 years prior to suit. It was found that the mortgagor lessee had not been paying any rent to the mortgagee.

Held, that by the operation of S. 28 read with Art. 139 of the Limitation Act all the rights of the mortgagee as landlord had become extinguished, and that the suit was barred.

Held, further, that Art. 131 could not be applied to the case. (*Beasley, C.J. and King, J.*) AMBALAM *v.* PERIAKARUPPAN CHETTY. **157 I C. 569=41 L.W. 398=1935 M W.N. 207=A.I.R. 1935 Mad. 377.**

———S. 28 and Art 47—*Applicability—Order under S. 145, Cr. P. Code—Suit after three years—Parties and area in dispute not same—Effect*

In proceedings under S. 145, Cr. P. Code, there was a dispute about crops and possession of the crops was delivered to one of the parties, but not possession over the fields on which the crops were. The parties to a suit instituted after three years from the date of the order in those proceedings were not all of them parties to the said proceedings. It was also not proved that the area of the fields in dispute in the suit was the subject-matter of the prior dispute.

Held, the suit was not barred under Art. 47 and S. 28 of the Limitation Act. (*Nanavutty and Thomas, JJ.*) RAM DUTT SINGH *v.* MOHAMMAD NAZIR KHAN. **152 I.C. 180=7 R.O 191=18 R D. 490=11 O.W.N. 1165 =A.I.R. 1934 Oudh 449.**

———S. 28 and Art 47—*Applicability—Order under S. 145 (6), Cr. P. Code—Successful party deprived of possession by stranger after three years—Subsequent suit by unsuccessful party—If barred*

S. 145 (6), Cr. P. Code, requires that the Magistrate deciding that one of the parties was or should be treated as being in possession of the land in dispute shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law. If the successful party is evicted by means of a suit by a stranger (not being a party to the proceeding) within three years, as provided by Art. 47, Limitation Act, the order of the Magisrate is rendered ineffectual and the shorter period of limitation under the article ceases to run against the unsuccessful party. There is thus no room left for the application of Art. 47, and S 28 of the Limitation Act, will not become operative until the expiry of the period of limitation laid down in the ordinary law. But the unsuccessful party has no right left at all to the property after the expiry of three years irrespective of the question of the identity of the person who is thereafter in possession of the property, that is to say, whether the person who evicts the successful party and remains in possesson is or is not within the category of persons successful in proceedings under S. 145, Cr. P. Code, and persons claiming under them. When the unsuccessful party has not filed a suit under Art. 47 within three years, S. 28 of the Limitation Act is a complete answer to his claim, if made after three years. (*Fazl Ali and Rowland, JJ.*) NANDO KAHAR *v.* BHUP NARAIN SINGH. **14 Pat. 424=155 I.C. 1094=7 R.P. 670=16 Pat.L.T. 183 = A.I R 1935 Pat. 164.**

———S. 28—*Applicability—Persons in possession.*

S. 28 does not apply to person who, being in actual possession which has never been disturbed, have had no occasion to sue for recovery of it, as a party in possession cannot be prejudicially affected by the law of limitation. (*Banerji and Niamatullah, JJ.*) MAHOMED RAZA AHMAD *v.* ZAKOOR AHMAD. **52 All 979= I R. 1931 All. 453=132 I C. 21=1930 A.L.J. 1416 =A.I R. 1930 All 858.**

———S. 28—*Applicability—Person not out of possession.*

The law of limitation only bars remedies and does not extinguish rights apart from S. 28 That section presupposes a person who by force of limitation has already lost his remedy to sue for possession. The section cannot apply to persons who have always been in possession and who have never been disturbed in their possession and have never had the occasion to sue for recovery of it. (*Addison and Bhide, JJ.*) DALIP SINGH *v.* SIKH GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 645=132 I.C. 661= 32 P.L.R. 479=A.I.R. 1931 Lah. 668.**

———S. 28—*Applicability — Puisne mortgagee—Omission to bring suit for sale or foreclosure—If bars right to redeem.*

The application of S. 28, according to its plain wording, is confined to suits for possession. It does not apply to a suit by a mortgagee for recovery of money due to him either by sale or by foreclosure of the mortgaged property. Even if his remedy for the mortgage money becomes barred by his omission to sue for sale or foreclosure within the period of limitation prescribed therefor, his right as a mortgagee cannot be extinguished under S. 28. (*Srivastava and Nanavutty, JJ.*) RAM ADHAR *v.* SHANKAR BAKHSH SINGH. **10 Luck. 531=153 I.C. 808=7 R.O. 400=1935 O.W.N. 40= A.I.R. 1935 Oudh 139.**

———S. 28—*Applicability and scope—Person in possession of property—If affected.*

S. 28 presupposes that a person has, by force of limitation, lost his remedy by a suit for possession and it

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is only in regard to such person that the section declares that his right to the property is extinguished. It cannot apply to persons who are in possession. (*Rangekar, J.*) GOPAL BHAURAO *v.* JAGANNATH PANDIT. **59 Bom. 502 = 8 R B. 175 = 159 I.C. 213 = 37 Bom.L.R. 471 = A.I.R. 1935 Bom. 326.**

———**S. 28**—*Applicability—Service inam lands—Adverse possession by stranger—Dispossession by holder under decree of Revenue Court—Suit for possession by stranger on basis of prior adverse possession—Benefit of S. 28—If available.*

Neither S. 28 nor the principle thereof can be applied to a case where during the period of the alleged adverse possession, no suit for possession could have been instituted in a Civil Court because of some special enactment. A holder of a service inam, who is out of possession of the lands attached to his office, must, under the Madras Hereditary Village Offices Act, sue for possession in the Revenue Court within three years. But where the holder of the office has taken possession of the properties under a decree obtained by him in the Revenue Court, a third party who is aggrieved by that decree, cannot merely sue for possession on the basis of his prior adverse possession and seek the benefit of S. 28 of the Act. (*Varadacharlar, J.*) RAMALINGAM *v.* VEERABHADRUDU. **59 Mad. 51 = 161 I.C. 447 = 8 R.M. 826 = 42 L.W. 558 = 1935 M.W.N. 1071 = A.I.R. 1935 Mad. 914 = 69 M.L J. 890.**

———**S. 28, Arts. 144 and 149**—*Fishery rights in navigable river—Adverse possession against the Government—Evidence of.*

The plaintiff claimed to have acquired by adverse possession a prescriptive right to the fishery in the river Cossye, which bring a "large navigable river" the property of the *alveus* and of the fishery was *prima facie* in the Government under the provisions of the Bengal Regulation XI of 1825.

Held, on the evidence, that the plaintiff had established that he and his predecessors in title had for 60 years been in possession adverse to the Government of the fishery in question, and therefore by operation of the Limitation Act, S. 28 and Art. 149 (as read with Art. 144), the right of the Government to the fishery was extinguished and the plaintiff had thereby acquired a right to it. The granting by the plaintiff and his predecessors of leases or licenses of the fishery (which *prima facie* belonged to the Government) was evidence of the usurpation by the plaintiff of the distinctive rights of the Government and was thus most significant evidence of adverse possession. (*Lord Macmillan*) SECRETARY OF STATE *v.* DEBENDAR LAL KHAN. **61 I.A 78 = 61 Cal. 262 = 5 R P C. 49 = 38 C.W N. 285 = 1934 A.L.J. 153 = 39 L.W. 257 = 11 O.W N. 96 = 147 I C. 545 = 59 C.L.J. 56 = 3 A.W.R. 101 = 36 Bom.L R. 249 = 1934 M.W.N. 165 = A.I.R. 1934 P.C. 23 = 66 M.L.J. 134 (P.C.).**

———**S. 28**—Invalid sale—Vendee's possession—Suit to recover possession by heirs of vendors—Proof of adverse possession—S. 2 (*b*) of the Punjab Limitation Act, read with S. 28 of the Limitation Act cannot be availed of. *See* PUNJAB LIMITATION ACT, S. 2 (*b*) **A.I.R. 1931 Lah. 439.**

———**S. 28**—*Jalkar right—Acquisition of title by prescription.*

A case of exclusive right to fishing would seem to fall within the definition of interest in immovable property under Art. 144 and adverse possession of such a right for more than twelve years would by operation of S. 28 extinguish the right of the lawful owner to that extent. (*Mitter, J.*) KUMAR KRISHNA NANDI CHOUDHURY *v.* LOKENATH MOOKERJEE. **59 Cal. 344 = 137 I.C. 279 = I R. 1932 Cal. 287 = 35 C.W.N. 1256 = A.I.R. 1932 Cal. 300.**

———**S. 28**—Mortgage decree—Mortgagee purchasing property in another sale—Mortgage decree barred by limitation—Security not extinguished—Suit for possession by purchaser from mortgagor—Right of mortgagee to use mortgage as shield not barred. *See* T. P. ACT, S. 101. **A I R. 1933 Nag. 241.**

———**S. 28**—*Mortgagee in possession—Right to sue barred—Right to resist claim for possession on basis of his prior mortgage.*

It is only just and equitable that a person who obtains possession of property over which he has a charge should have that charge satisfied before he is made to part with possession irrespective of the fact that his remedy to enforce the charge may be barred by limitation. A.I.R. 1922 All. 394 and A.I.R. 1926 Nag. 21, Rel. on ; A I.R. 1931 P. C. 79, Expl. and Dist. (*Subhedar, A.J.C.*) NARHAR RAMCHANARA GUDE *v.* GULLU DHONDBA KASAR. **6 I.R. (Nag.) 10 = 144 I C. 716 = A.I.R. 1933 Nag. 190.**

———**S. 28**—*Right extinguished—Revival of right—Possibility of.*

Once a right to property has been extinguished under S. 28, there can be no question of that right being revived or perfected by any action on the part of the person who lost that right. So where a person has allowed his right of pre emption to become barred by time anything subsequently done by him, an agreement with the vendee or reference to arbitration or even a decree obtained on the basis of the award, is of no avail and he cannot set up his time-barred right as a bar to another seeking to pre empt the property. (*Nanavutty, J.*) SALAMAT ALI *v.* NUR MAHOMED KHAN. **9 Luck. 475 = 149 I.C. 258 = 6 R O. 547 = 11 O.W.N. 317 = A.I.R. 1934 Oudh 303.**

———**S. 28**—Sale by guardian—Suit to set aside—Withdrawal by minor from—Effect of—Extinguishment of minor's rights. *See* LIMITATION ACT, ART. 44. **34 Bom.L.R. 1512.**

———**S. 28**—*Scope—Failure to institute suit within limitation—Effect—Subsequent revival of title—If possible.*

S. 28 lays down clearly and specifically that after the period prescribed for instituting a suit for possession of any property, the person who should have instituted such suit, but has failed to do so, shall cease to have any right to the property After the expiry of the period, the law declares not simply that the remedy is barred but that the title is extinct in favour of the possessor. And there cannot be a revival of title of which there has been a statutory extinguishment. (*Fazl Ali and Rowland, JJ.*) NANDOO KAHAR *v.* BHUP NARAIN SINGH. **14 Pat. 424 = 155 I C. 1094 = 7 R P. 670 = 16 Pat L.T. 183 = A.I.R. 1935 Pat 164.**

———**S. 28**—*Suit for possession of office of mutawalli barred—Right to recover possession of property, if barred*

A suit for possession of the office of mutawalli is an action of a personal character and is not "a suit for possession of any property." Where the action for possession of the office is statute-barred, right to a particular wakf property is not necessarily extinguished under S. 28, which is limited to suits for "possession of property." 26 Mad. 410, Rel. on (*Sen and Niamatullah, JJ.*) ABDUL ALIM *v.* ABDUL HAMID. **I R. 1931 All. 151 = 129 I.C. 375 = A I.R. 1930 All. 866.**

———**S. 28**—Usufructuary mortgage—Adverse possession of trespasser for more than 12 years—Right of

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mortgagor, if lost. *See* LIMITATION ACT, ART. 144. **1935 A.L.J. 496=A.I.R. 1935 All. 542.**

———**S. 29**—*Amendment by Act X of* 1922—*Effect of.*

The amendment made in S. 29 of the Limitation Act by Act X of 1922 introducing sub Ss. (1) and (2) merely means that such sections as Ss. 19 and 20 are not to apply by virtue of the Limitation Act to cases under any special or local law and that if they are to apply, the grounds for applying them are to be found in the special or local Act itself; but that that section is not to be construed as intending to cut down whatever is provided by any special or local law either by express words or by clear intention. 9 Pat. 747, Foll. (*Rankin, C.J. and Mitter, J.*) MOULVI WAZED ALI KHAN *v.* BROJENDAR KUMAR BANDOPADAYA. **141 I.C. 716 =I.R. 1933 Cal. 173=36 C.W.N. 833=A.I.R. 1933 Cal. 90.**

———**S. 29**—*Applicability—Proceeding under Land Acquisition Act, S. 18.*

S. 29 does not apply to an application under S. 18 of the Land Acquisition Act. Time cannot be extended on account of an earlier infructuous application for copy. 9 Lah. 244, Rel. on. (*Mukerji, J.*) KASHI PRASAD *v.* NOTIFIED AREA OF MAHOBA. **54 All. 282=143 I.C. 111=I.R. 1933 All. 187 (2)=A.I.R. 1932 All. 598.**

———**S 29**—*Applicability—Rules of the Patna High Court, Ch. 7, R. 2—Letters Patent appeal—Time taken for obtaining copy—Deduction of—Permissibility*

The amended S. 29 of the Limitation Act makes S. 12 applicable to all special and local laws but the rules of the High Court do not come under the category of special or local laws. Under the Patna High Court Rules, a copy of the judgment or decree is not necessary for filing a Letters Patent appeal and so the time spent for obtaining a copy cannot be deducted in computing the period of limitation for a Letters Patent appeal (*i.e.*, thirty days). The period of 30 days is an absolute period of limitation. (*Courtney-Terrell, C. J and Varma, J.*) MUKUND MAHTO *v.* NIRANJAN CHAKRAVARTY. **151 I.C. 107=7 R.P. 64=15 Pat.L.T. 301=A.I.R. 1934 Pat. 353.**

———**S. 29**—*Special law—C. P. Code.*

S. 29 of the Limitation Act does not include the Code of Civil Procedure in its scope, as it is not a "special law." (*Srivastava, Ag.C.J. and Smith, J.*) NARENDRA BAHADUR SINGH *v.* OUDH COMMERCIAL BANK, LTD., FYZABAD. **151 I C 541=7 R O. 132 (2)=11 O.W.N. 1103=A.I.R. 1934 Oudh 465.**

———**S. 29**—*Special law—Code of Civil Procedure,* 1908.

The Code of Civil Procedure should not be taken to be a special law for purposes of S. 29. (*Raza and Kisch, JJ.*) GANESHI LAL *v.* IMTIAZ ALI. **7 Luck. 49=I.R. 1931 Oudh 257 (1)=132 I.C. 257 (1)=14 O.L.J. 459=8 O.W.N. 642=A.I.R. 1931 Oudh 351.**

———**S. 29**—*'Special law'—English statute.*

The Limitation Act does not purport to revive claims which are declared as extinguished by lapse of time. It also does not purport to affect the period of limitation provided by an English statute, nor does an English statute come within the meaning of a local or special law referred to in S. 29, Limitation Act. (*Rupchand, A.J.C.*) HAJI SHAKOOR GANG *v.* VOLKART BROTHERS. **25 S.L.R. 222=I.R. 1931 Sind 109=133 I.C. 77=A.I.R. 1931 Sind 124.**

———**S. 29**—*Special period—Ordinance II of* 1932, *S. 39—Extension of time.*

S. 5 of the Limitation Act is inapplicable to appeals from special Magistrates under S. 39 of Ordinance II of

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1932. For the purposes of S. 29 of the Limitation Act, Ordinance of II of 1932 is a special law. It contains provisions for setting up certain special Criminal Courts. The provision as to limitation contained in S. 39 (2) of the Ordinance is a specific provision the consequences of which are provided for as a matter of limitation by S. 29 of the Limitation Act. (*Rankin, C.J. and Pearson, J.*) NIL RATAN GANGULI *v.* EMPEROR. **60 Cal. 571=I.R. 1933 Cal. 478=143 I.C. 802=34 Cr L.J. 633=37 C.W.N. 195=1933 Cr.C. 140=A. I. R. 1933 Cal. 124.**

———**S. 29**—*Suit by Crown—Damages for breach of statutory duty.*

S. 29 applies even to the Crown. Therefore a suit by the Secretary of State against the Municipality for damages for injury caused to a police sowar's horse which put its foot into a manhole belonging to the Municipality which had been left open in breach of a statutory duty cannot be instituted without giving notice as contemplated by S. 167, Bombay District Municipal Act, and the suit must be brought within six months from the date of the injury caused to the horse. 14 Mad. 386 and A.I.R. 1930 Sind 93, Dist. (*Milne, A.J.C.*) SECRETARY OF STATE *v.* MUNICIPALITY OF KARACHI. **I R. 1931 Sind 53=131 I C. 181=A.I.R. 1931 Sind. 55.**

———**S. 29 (2)**—Scope—Ex-minor—Suit after three years of majority—If barred. *See* LIMITATION ACT, SS. 6 AND 24. **18 R.D. 624.**

———**S. 29 (2) (a)**—Application under S. 54 of the Provincial Insolvency Act (1920)—Applicability of S. 4 of the Limitation Act to. *See* PROVINCIAL INSOLVENCY ACT, S. 54. **1933 M.W.N. 1049.**

———**S. 29 (2) (a)**—*Application under S. 68 of the Provincial Insolvency Act—Applicability of the Act.*

By reason of the express terms of S. 29 (2) (*a*) of the Limitation Act, S. 4 of that Act applies to an application under S. 68 of the Provincial Insolvency Act; so that if the last day of limitation for that application happens to be a Sunday, it may be presented on the next day. 5 Rang. 384, Diss.; 34 A. 503, Rel. (*Page, C.J. and Das, J.*) MA THAN MAY *v.* BAILIFF OF THE TOWNSHIP COURT OF KYAUNGGON. **9 Rang. 150=I R. 1931 Rang 287=134 I.C. 223=A.I.R. 1931 Rang. 209.**

———**S 29 (2) (a) and (b) (as amended in 1922) and S. 6**—*Conflict between Limitation Act, S. 29 (2) (b) and S. 160 (3) of the C.P. Land Revenue Act—Scope and effect of S. 29 (2) (a) and (b) on the power of the local legislature to apply or exclude certain provisions of the Limitation Act—Applicability of S. 6 to a suit by minor co-sharer for proprietary profits.*

Where a plaintiff instituted a suit for recovering his share of village profits, on 16 6 28 after attaining majority, it was contended that the suit for the recovery of a share of proprietary profits between co sharers and lambardars is not governed by S.6 of the Limitation Act in view of S. 29 (2) (*b*) as amended in 1922,

Held, the amendment in reality amplified the scope of the old S. 29 of the Act. There is a clear conflict between S. 29 (2) (*b*) which says that the remaining provisions, which include S. 6 of the Limitation Act shall not apply and S. 160 (3), C.P. Land Revenue Act, which says that the provisions of the Indian Limitation Act shall apply and does not exclude any. The rule is that the general provisions such as those contained in the Limitation Act do not derogate from special provisions but that the latter do derogate from the former. Moreover S. 29 (2) (*b*) is a negative provision and cannot be interpreted as having been intended to affect any posi-

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tive provision of the local law. It is not the intention of S. 29 to restrict the power of the local legislature to apply or exclude the application of the provisions of the Limitation Act. S. 29 (2) (*a*) presupposes the power of the local legislature to exclude the operation of certain sections of the Limitation Act. If so, it is unreasonable to assume that Cl. (*b*) deprives the local legislature of its power to apply certain provisions, if it so desires, or in any way restricts the scope of the local law which prescribes the application of certain sections of the Limitation Act. Cl. (*b*) must be construed as laying down that the remaining provisions of the Act shall not apply unless they are expressly made applicable by any special or local Act. It therefore means that is shall not apply to a local law by its own force. It does not prohibit the future or the past application of the provisions of the Limitation Act by any special or local law. So S. 6 of the Limitation Act applies to the suits for recovery of proprietary profits. (*Niyogi, A.J.C.*) SETH MISRILL *v.* RATANLAL. **163 I.C. 623 = 9 R.N. 10 = 18 N.L.J. 285.**

——**S. 29 (2) (b)**—*Effect—Provisions of S. 23, Oudh Rent Act*, 1886, *excluded*

S. 29 (2) (*b*) of the Limitation Act as amended in 1922 clearly excludes the application of S. 23 of the Rent Act. (*Oakden, S.M. and Smith, J.M.*) GOURI SHANKER *v.* BHAGAWAN DIN. **15 R.D. 6.**

——**S. 31**—*Applicability and construction—Mortgage executed in* 1892—*Renewal in* 1905—*Effect of as against a mortgage of* 1902.

S. 31 of the Limitation Act must be interpreted as prescribing a period of limitation even for the purposes of acknowledgments, part payments and renewals under Ss. 19 and 20 of the Limitation Act. The operation of the section cannot be limited or restricted to such acknowledgments or renewals made between 1908 and 1920. It also applies to one made before 1908. Hence a simple mortgage of 1892, renewed in 1905, is effective and has priority over one executed in 1902. (*Beasley, C. J., Varadachariar and King, JJ.*) SURYANARAYANA RAO *v.* VENKATARAJU. **58 Mad. 270 = 153 I.C. 2 = 7 R.M. 317 = 40 L.W. 893 = 1934 M.W.N. 1343 = A.I.R. 1935 Mad. 64 = 68 M.L.J. 12 (F.B.).**

——**Art. 2**—*Applicability— Malicious arrest—Suit for damages.*

The plaintiff alleged that the defendant who was a Sub-Inspector of Police cherished malice against him and arrested him wrongfully in excess of his authority and sent him to another place handcuffed. The suit for damages was brought within two years but more than 90 days after it. The defendant pleaded that he was acting in pursuance of his statutory duty and that he had no malice. It was found that the defendant acted with malice but also that he had a *bona fide* belief as to his statutory powers.

Held, that the case was governed by Art. 2 and not by Art. 36. (*Sulaiman, A.C.J. and Bajpai, J.*) SHARIFUL HASAN *v.* LACHMI NARAIN. **135 I.C. 558 = I.R. 1932 All. 94 = 1931 A.L.J. 858 = A.I.R. 1932 All. 16.**

——**Art. 2**—*Applicability—Municipal committee—Levy of money unauthorised—Suit to recover—Limitation.*

Art. 2, does not apply to a suit to recover money paid under protest to a Municipal Committee which has no authority to realise the amount under the law. (*Tek Chand, J.*) NOTIFIED AREA COMMITTEE, CHICHAWATNI *v.* LADHA RAM. **152 I.C. 680 = 7 R.L. 320 = A.I.R. 1935 Lah. 47 (1).**

LIMITATION ACT (1908), Art. 7.

——**Art. 2**—"*In pursuance of any enactment*"—*Interpretation of.*

The expression "in pursuance of any enactment" in Art. 2 of the Limitation Act must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment, he is protected although he exceeds the actual power conferred upon him by that enactment. But where a person merely pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. Art. 2 should not be applied as if it were proved against the averment of the plaintiff and there should be an enquiry as to whether the defendant had, in fact, acted in good faith or not. Even where the facts are false to the knowledge of the defendant, he cannot seek shelter behind the provisions of Art. 2. Where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded, there would be protection in cases of good faith and *bona fide* belief. Although the words chosen by the legislature are not happy their introduction was intended to obviate the difficulty of the article being interpreted too strictly. (*Sulaiman, C.J., Kendall and Rachhpal Singh, JJ.*) SHIAM LAL *v.* ABDUL RAOF. **57 All. 935 = 155 I.C. 131 = 7 R.A. 876 = 1935 A.L.J. 459 = 1935 A.W.R. 547 = 1935 Cr. C. 560 = A.I.R. 1935 All. 538 (F.B.).**

——**Arts. 2 and 48**—*Wrongful sale of goods by Railway company—Suit for damages—Railways Act, S.* 55.

A sale of goods by the railway company without the formality provided by S. 55 of the Railways Act is wrongful and a suit for damages for such wrongful sale is one for conversion and is governed by Art. 48 and not by Art. 2 of the Limitation Act. (*Courtney-Terrell, C.J. and Agarwala, J.*) SUNDARJI SHIOJI *v.* SECRETARY OF STATE. **13 Pat. 752 = 151 I.C. 995 = 7 R. P. 148 = 16 Pat.L.T. 61 = A.I.R. 1934 Pat. 507.**

——**Art. 7**—*Applicability*—Shahna—*If "labourer"—Suit for amount due for watching crops.*

Art. 7, Limitation Act does not apply to a suit by a *shahna* for the amount of wages due to him in respect of watching the crops attached in execution of a decree, as he is not a labourer within the meaning of that article. Such a suit is governed by Art. 102 of the Limitation Act. (*Bennet, J.*) BABU LAL *v.* HUKAM SINGH. **152 I.C. 932 = 7 R.A. 426 = 4 A.W.R. 1253 = 1935 A. L.J. 78 = A.I.R. 1935 All. 102.**

——**Arts 7 and 102**—*Applicability—Suit for wages by person employed as salesman.*

A person who was appointed as a salesman by a dealer to assist him in the sale of goods sued for the wages due to him.

Held, that he was a salesman and not merely a labourer and as such the suit was governed by Art. 102 and not by Art. 7. (*Ba U, J.*) MUSA MEAH SAWDAGAR *v.* SHIRAZULLA. **157 I.C. 732 = 8 R.R. 104 = A. I.R. 1935 Rang. 235.**

——**Art. 7**—'*Artisan*'—*Village carpenter.*

A village carpenter is an artisan within the meaning of Art. 7 of the Limitation Act, and a suit for wages by

LIMITATION ACT (1908) Art. 7.

him is governed by Art. 7 and not by Art. 102 or Art. 56. (*Subhedar, A.J.C.*) NAMDEO *v.* RAMKRISHNA MAHADEO. **152 I.C 885 = 7 R.N. 110 = A.I.R 1934 Nag. 260.**

———**Art. 7**—*'Household servant'—Meaning.*

The term 'household servant' as used in Art. 7 must be read *ejusdem generis* with the words 'artisan or labourer' which follow it. It cannot apply to a person who is employed for the purpose of collecting rents of houses and as a male companion in his employer's journey abroad. (*Srivastava, J.*) SUBHANI BEGAM *v.* IMTIAZ AHMAD KHAN. **8 Luck 119 = 147 I.C. 227 (2) = 6 R O. 252 = 10 O.W.N. 1311 = A.I.R. 1933 Oudh 393.**

———**Art. 10**—*Property being in possession of mortgagee—Suit for pre-emption—Commencement of limitation.*

Where land which is sold is in the cultivating possession of a mortgagee the property is not capable of physical possession within the meaning of Art. 10 and time commences to run for instituting a suit for pre-emption form the date of the registration of the sale-deed. (*Allison J.*) DARABALI *v.* HUSSAIN. **135 I.C. 512 = I.R. 1932 Lah. 112 = 32 P.L.R. 743 = A.I.R 1932 Lah. 98.**

———**Art. 10 and S. 18**—*Sale disguised as mortgage—Pre-emption suit—Limitation—Computation.*

Where in order to avoid pre-emption a sale was disguised in the form of a mortgage, there can be no question that the parties acted fraudulently in giving the transaction the shape of a mortgage and the plaintiff, in a suit for pre emption, is therefore entitled to compute limitation from the time when that fraud first became known to him. (*Addison and Beckett, JJ.*) BHAGWANA *v.* SHADI. **16 Lah. 408 = 155 I.C. 654 = 7 R. L. 758 = 36 P.L.R. 114 = A.I.R. 1934 Lah. 878.**

———**Art. 11**—*Applicability—Attachment raised as irregular and invalid—Claim under O. 21, R. 58 accepted—Subsequent declaratory suit to set aside gift.*

The provisions of Art. 11 do not apply unless there has been an attachment in the manner provided by the C. P. Code. 51 M. 349 (P.C.), Ref. An attachment of property effected in execution of a decree was held not to have been effected in accordance with law and the property was released. An objection to the attachment filed by a claimant on the basis of a gift deed in his favour was subsequent to the above order formally accepted. More than a year after this order a suit was filed to declare the gift deed as fictitious and fraudulent,

Held, that the suit was not one under O. 21, R. 63, C. P. Code, and as such Art. 11, Limitation Act, did not apply; and that the suit was governed by Art. 120. (*Tek Chand and Coldstream, JJ.*) QASIM ALI *v.* KALYAN DAS. **I.R. 1933 Lah. 460 = 144 I.C. 378 = 34 P.L.R 443 = A.I.R. 1933 Lah. 449.**

———**Art. 11**—*Applicability—Claim—Order dismissing on ground of delay—Effect—Suit within one year—If necessary.*

An order dismissing a claim on the ground that it was unnecessarily delayed is an order rejecting a claim under O. 21, R. 63, C. P. Code, and is conclusive if not set aside by a suit within the time prescribed by Art. 11 of the Limitation Act. If the party against whom such order is made fails to bring the suit as contemplated by R. 63, he is precluded from asserting his title against the auction-purchaser whether as plaintiff or defendant. (*Guha and Bartley, JJ.*) ABDUL LATIF LASKAR *v.* AKLU MIA LASKAR. **157 I.C. 688 = 8 R.C. 125 (2) = 39 C.W.N. 457 = 61 C.L.J. 5 = A.I.R. 1935 Cal 500**

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———**Art 11**—Applicability—Claim petition—Order of dismissal on withdrawal—Suit after one year—If barred. *See* C. P CODE, O. 21, R. 63. **41 L.W. 578 = A.I.R. 1935 Mad. 544.**

———**Art. 11** – Applicability — Claim —Withdrawal stating that suit will be filed—Dismissal—Suit—If to be filed within one year. *See* C. P. CODE, O. 21, R. 63. **41 L.W. 500 = A I.R. 1935 Mad. 328.**

———**Art. 11**—*Applicability—Court declining jurisdiction—Limitation of one year—If applies.*

When a claim under O. 21, R. 58, C. P. Code is rejected by the Court, which declines jurisdiction on the ground that the claimant has no *locus standi*, the order of the Court is one under the Code of Civil Procedure, within the meaning of Art. 11, Limitation Act, and a suit based on such rejection would be barred after one year. But when the matter is one to which O 21 R. 58, C. P. Code, does not apply, it is not within the mischief of Art. 11, Limitation Act, although the applicant by mistake purports to apply under O. 21, R. 58. (*Wort, J.*) SRI KRISHNA SAHU *v.* DHIRAJ MAHTO. **6 R. P. 725 = 150 I.C. 40 = A I.R. 1935 Pat. 31.**

———**Art. 11**—*Applicability—Court sale—Delivery of symbolical possession—Suit for actual possession.*

Where in execution of a mortgage decree the auction purchaser obtained a decree and an order for symbolical delivery against the 1st defendant and he subsequently brought a suit against the 2nd defendant for actual possession, the previous order in execution not having been a final order cannot be considered to be passed under R. 103 of Order 21, C. P. Code. There is therefore no obligation upon him to bring a suit for possession within one year from the date of that order and a suit brought later cannot therefore be deemed to be barred by rule 103. 20 C.W.N. 1001, Dist. (*Madhavan Nair, J.*) ARUMUGA PADAYACHI *v.* MUTHAL REDDI. **1930 M.W.N. 1051.**

———**Art 11**—Applicability—Objection by attaching decree-holder to sale in execution of another decree—Order dismissing—Suit within one year—If necessary. *See* C. P CODE, O. 21, RR 58 AND 59. **A.I.R. 1935 Nag. 171.**

———**Art. 11**—Applicability—Order allowing claim—No suit by decree-holder within one year—Subsequent insolvency of judgment-debtor—Application by decree-holder for annulment of transfer—Adverse claim order—If a bar. *See* C. P. CODE, O. 21, R. 63. **69 M L. J. 120.**

———**Art. 11**—*Applicability—Suit under O. 21, R. 63, C. P Code.*

In every suit of the nature contemplated by R. 63 brought by the decree-holder the title of the objector has to be negatived before his right to attach and sell the property alleged to belong to judgment-debtor is affirmed. Where the plaintiff sues for a declaration that the defendants have no title in the property, the suit falls under R. 63 and is governed by Art. 11 of the Limitation Act. (*Niamatullah and Kisch, JJ.*) DAMODAR DAS *v.* PEAREY LAL. **I.R 1931 All. 248 = 130 I.C. 200 = 1930 A.L.J. 1322.**

———**Arts. 11 and 62**—*Decree obtained by three mortgagees—Property sold—Decrees of prior and second mortgagees satisfied and execution recorded as satisfied—Attachment of balance by third mortgagee—Application for amendment of decree by second mortgagee allowed by raising decretal amount—Application by second mortgagee in execution proceedings of third mortgagee for payment of money to him dismissed—Subsequent suit for payment of the amount.*

LIMITATION ACT (1908), Art. 11.

M mortgaged his property to three sets of persons and all three sets obtained decrees against him for realisation of their dues by the sale of the property; the property was sold and out of it the previous mortgagee and second mortgagee were satisfied, by payment of decretal amount and the execution was filed as fully satisfied. The third mortgagee, whose mortgage was subsequent to the other two put in an execution application in his decree and attached the sum which remained out of the sale proceeds. He then applied for payment of that sum towards the satisfaction of his decree. In the meantime one of the decree-holders in the second mortgage decree applied for amendment of the second mortgage decree. This was after the attachment of the balance by the third mortgagee. The second mortgage decree was amended by raising the decretal amount. The second mortgagee applied in execution proceedings of third mortgagee that he was entitled to the balance of sale proceeds. His objection was dismissed on the ground that his execution was proceedings were consigned to the record room as fully satisfied. More than two years subsequent to this order he filed a suit for payment of the amount.

Held, that the suit was barred by time as he should have filed declaratory suit within one year of the order under Art. 11 and that the suit was not governed by Art. 62.

Held, further, that the proper procedure for him was to put his own amended decree into execution. (*Addison and Din Mohammad, JJ.*) ISHAR DAS *v.* PANNA LAL. **159 I.C. 608=8 R.L. 409=A.I.R 1935 Lah 642.**

———**Art. 11**—*Execution proceeding—Order against claimant under O. 21, R. 63—Appeal—Time limit.*

Where an objection to execution proceedings is dismissed under O. 21, R. 58 as being made after unnecessary delay, the order rejecting the claim is an order made against the claimant under O. 21, R. 63, C. P. Code, and the time within which to bring a suit to establish the applicant's claim is limited to one year by the Limitation Act. (*Beaumont, C. J. and Murphy, J.*) TRIMBAK TUMDUSHET *v.* ZIPARU CHATURDAS. **57 Bom. 213=6 I.R. (Bom) 31 -144 I.C. 993=35 Bom.L.R. 147=A.I.R. 1933 Bom. 190.**

———**Art 11**—*Non-institution of suit within time—If extinguishes rights of claimant or judgment debtor.*

A suit under Art. 11 will not fall within the language of S. 28 of the Limitation Act so that the omission to bring a suit of the kind contemplated by Art. 11 will not operate to extinguish the rights of the claimant or the judgment-debtor. (*Varadachariar, J.*) MANICKA MUDALI *v.* ABDUL KARIM SAHIB. **158 I.C. 863=8 R.M. 364=1935 M.W.N. 763=42 L.W. 710=A.I.R. 1935 Mad. 1015.**

———**Art. 11**—*Starting point—Sale in execution—Objection by son of judgment-debtor—Dismissal—Suit to set aside sale.*

Certain ancestral land was attached in execution of a money decree against the father. The sons objected to the attachment under O. 21, R. 58, C. P. Code, and the objection was dismissed in January, 1922, and then suit for a declaration under O. 21, R. 63, was also dismissed. A fresh suit was filed by them in 1924 after their father's death for possession of the attached land which was sold in execution of the decree and purchased by the decree holder.

Held, that the suit was not barred by limitation, as the cause of action for the suit is the alienation effected in execution proceedings after the sons' objection had been dismissed, and a suit for possession is incompetent in the lifetime of the father. (*Broadway and Coldstream, JJ.*) HARCHAND SINGH *v.* SUKHKH CHAND. **I.R. 1932 Lah. 590=139 I.C. 522=33 P.L.R. 882=A.I.R. 1932 Lah 460.**

LIMITATION ACT (1908), Art. 11-A.

———**Arts. 11 and 120**—*Suit arising out of objection to attachment before judgment.*

Although the provisions of Rr. 58 to 63, O. 21, C. P. Code, may be applied to claims or objections made in attachments before judgment, no period of limitation is prescribed by R. 63, O. 21, and the rule in Art. 11 of the Schedule to the Limitation Act is expressly limited to claims or objections made to the attachment of property attached in execution of a decree. No special provision is made for suits of this nature arising out of objections to attachment before judgment so that Art. 120, Limitation Act, must be held to apply to such suits. (*Fazl Ali and James, JJ.*) MT. BABBAL KUMARI JAYASWALIN *v.* MULCHAND MARWARI. **152 I.C. 297=7 R.P. 187=16 Pat.L.T. 304=A.I.R. 1934 Pat. 580.**

———**Art. 11**—*Suit by decree-holder under O. 21, R. 63, C. P. Code—Claims of other creditors—Suit when barred.*

A suit by a decree-holder under O. 21, R. 63, C. P. Code to declare an alienation by his judgment debtor as fraudulent after an adverse order has been made against him in objection proceeding is governed by Art. 11 and time runs from the date of the adverse order. Art. 120 does not apply to such a suit so far as the decree-holder is concerned. But as for the other creditors of the judgment-debtor who had not attached the property in respect of which declaration was sought, the order in the objection proceedings (to which they were not parties) gives them no such present cause of action as to bring their claim within the purview of Art. 11 and the grant of the relief asked for in favour of such creditors is barred by Art. 120. (*Coldstream and Dalip Singh, JJ.*) JAGIRI LAL *v.* TARA CHAND. **I.R. 1932 Lah 481=138 I.C. 412=33 P.L.R. 759=A.I.R. 1932 Lah. 516.**

———**Art. 11 (1)**—*Applicability—Sale under mortgage decree - Suit to contest.*

Art. 11 (1) does not apply unless there has been an attachment in the manner prescribed by the C. P. Code In cases where the property has been, or is sought to be, sold under a mortgage decree, there can be no attachment within the meaning of O. 21 R. 58 of the C. P. Code and a suit to contest an order passed on an objection to such a sale need not be filed within one year. (*Tek Chand, J.*) MATHRA DAS *v.* AMIN CHAND. **I.R. 1933 Lah. 97 -141 I.C. 252 -33 P.L.R. 1033=A.I.R. 1933 Lah. 75.**

———**Art. 11-A** — *Applicability—Order allowing application in part as unopposed—Dismissal of part as no evidence was adduced—Suit to set aside—Limitation.*

An application by an auction-purchaser under O. 21, R. 97, C. P. Code, was allowed as to one item of property as being unopposed and dismissed as to another item because the auction-purchaser adduced no evidence.

Held, that the order is not one made in default, but one made on investigation and a suit to set aside such an order was governed by Art 11 A of the Limitation Act. (*Lort Williams and M.C. Ghose, JJ.*) HARI SADAY SAHA *v.* MAHENDRA NARAIN ROY. **155 I.C. 702=7 R.C. 612=39 C.W.N. 164=A.I.R. 1935 Cal. 267.**

———**Art. 11-A** —*Applicability—Petition not pressed—Dismissal not a disposal after enquiry.*

Where the lower Court dismissed the petition, as "not pressed, as the decree-holder has to file a separate suit for the purpose", *held*, that the petition was not disposed

LIMITATION ACT (1908), Art. 11-A.

of after enquiry or investigation and the plaintiff was not limited to the period of one year prescribed by Art. 11 (*a*) of the Limitation Act. (*Venkatasubba Rao, J.*) CHINNA BRAHMAYYA *v.* VENKAMMA. **1933 M.W.N. 924.**

———**Art. 11-A**—*Application—Need for application by decree-holder.*

Where there is no application by the decree-holder there can be no order under O. 21, R. 100, C. P. Code, and the period of one year cannot commence to run against the decree-holder. (*Tapp, J.*) MILKHI RAM *v.* BASANT SINGH. **I.R. 1931 Lah. 684 (2) = 132 I.C. 844 (2) = A.I.R. 1931 Lah. 686.**

———**Art. 11 A**—*Order in revision—Limitation.*

Art. 11 (*a*) does not contemplate computation of the period of limitation from the date of any order passed in revision. There is a clear distinction between an appeal and an application for revision. Whereas the right of appeal is a substantive right created by statute, interference by the High Court by way of revision is entirely discretionary and when the High Court rejects a petition for revision, it is not as if the order of dismissal is the only subsisting order in the case. It only amounts to the High Court abstaining from exercising its jurisdiction and allowing the order of the Subordinate Court to stand. (*Niyogi, A.J.C.*) LAXMAN DAS *v.* CHUNNI LAL. **27 N.L.R. 251 = I.R. 1931 Nag. 49 = 130 I.C. 145 = A I.R. 1931 Nag. 17.**

———**Art. 12**—*Applicability—Setting aside sale for fraud—Time limit.*

If a sale is sought to be set aside on the ground of fraud the article applicable is Art. 95 and not Art. 12. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MADHO SARAN SINGH *v.* MANNA LAL. **149 I.C. 129 = 6 R P. 563 = 14 Pat L T. 441 = A.I.R. 1933 Pat. 473.**

———**Art. 12**—*Applicability — Unsuccessful claimant in execution proceedings—Subsequent suit for a declaration of his hypothecation.*

Art. 12 is not applicable to a suit, by an unsuccessful claimant in execution proceedings, for a declaration of his lien on the property arising out of a hypothecation in his favour by the judgment-debtor. The suit is not one for setting aside the sale nor is it necessary for the plaintiff so to do as he was not a party to it. (*Bhide, J.*) MULKH RAJ *v.* NANAK. **I.R. 1933 Lah. 5 = 140 I.C. 534 (2) = 34 P.L R. 468 = A.I.R. 1933 Lah. 10.**

———**Art. 12**—Execution sale against minors represented by Court guardian—Suit by minors on their attaining majority to recover possession of property—Limitation. *See* LIMITATION ACT, SS. 6 AND 7. **158 I.C. 874 = A.I.R. 1935 Mad. 1085.**

———**Art 12 (b)**—*Applicability—Sale under Madras Estates Land Act.*

Obiter.—Art 12 (*b*) of the Limitation Act does not apply to a suit to set aside a sale under the Madras Estates Land Act. 52 M.L.J. 390, Foll.; 45 M.L.J. 840, Doubt. (*Remesam, J.*) KOOTOORLINGAM PILLAI *v.* SENNAPPA PILLAI. **I.R. 1931 Mad 840 = 134 I C. 184 = 34 L.W. 94 = A.I.R. 1931 Mad. 724 = 61 M L J. 203.**

———**Art. 13**—*Applicability—Order of Insolvency Court for sale of interest of insolvent without deciding title—Suit by third party to establish title to properties.*

Where subsequent to an order of the Insolvency Court under sub-sec. (3) of S. 4 of the Provincial Insolvency Act for sale of the interest of the insolvent in certain properties, leaving the question of title to be decided by a competent Civil Court, the plaintiff's suit

LIMITATION ACT (1908), Art. 14.

for declaration of his title to those properties, though brought after one year from the date of that order, is not barred by Art. 13 of the Limitation Act. (*Pearson and Mallik, JJ.*) ABDUL MAJID *v.* ABDUL HUQ. **143 I.C. 475 = I.R. 1933 Cal. 434 = 36 C.W.N. 621 = A.I.R. 1933 Cal 263.**

———**Art. 14**—*Act of Government illegal or* ultra vires—*Suit for declaration and injunction.*

Where the act of the Government in respect of which a declaration and injunction is sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, then in such a case neither S. 59, Revenue Recovery Act, nor Art. 14, Limitation Act, applies, but Art. 120 applies. But if the ground of such a suit is not that the act of Government was *ultra vires* or illegal but a mere irregularity which does not vitiate the main proceedings but relates only to some question of detail such as the exact amount to be collected or something of that kind which does not make the proceedings *ultra vires*, in such a case Art. 14, Limitation Act, may apply or in a case falling under the Revenue Recovery Act, even S. 59, Revenue Recovery Act, may apply. Case-law reviewed. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) THIRUVENKATA CHARYULU *v.* SECRETARY OF STATE. **57 Mad 501 = 154 I.C. 990 = 7 R.M. 523 = 1934 M.W.N. 221 = 39 L.W. 216 = A.I.R. 1934 Mad. 147 = 66 M.L J. 715.**

———**Art. 14**—*Applicability—Levy of illegal enhanced assessment—Suit to recover payment made under protest—Limitation.*

Art, 14, Limitation Act, does not apply to an order of enhanced assessment which is a nullity or in excess of authority ; in such a case it is not incumbent on the plaintiff to file a suit to have the order set aside. Consequently a suit to recover payments made under protest filed more than one year after the order to recover such assessment was made is not barred by limitation. (*Murphy and Divatia, JJ.*) SECRETARY OF STATE *v.* FAREDOON. **154 I C. 278 = 7 R.B. 308 = 36 Bom. L R. 761 = A I.R. 1934 Bom. 434.**

———**Art. 14**—*Applicability—Order of Government directing payment of allowance to defendant—Suit by plaintiff for share.*

The plaintiff brought the suit to recover his share of the cash allowance (toga giras hak) payable by the Government to the defendants. In December, 1917, the Commissioner had directed payment of that allowance to the 1st defendant and the present suit was brought more than one year from the date of that order.

Held, the suit was not barred, as the plaintiff's claim was entirely independent of the order of Government. It was not necessary for him to set aside that order so long as he gets his share. It is matter of indifference to him if the Government had directed payment in the first instance to 1st defendant or to any other person. (*Madgavkar and Baker, JJ.*) DOLAT SINGH HAMIR SINGH *v.* JORAVARSING NARANSING. **I.R. 1931 Bom. 435 = 133 I.C. 851 = 33 Bom.L.R. 783 = A.I.R. 1931 Bom. 473.**

———**Art. 14**—Applicability—Right of way affirmed by Mamlatdar—Suit to contest—Art. 47 applies. *See* LIMITATION ACT, ART. 47. **33 Bom.L.R. 517 = A.I. R. 1931 Bom. 256.**

———**Arts. 14 and 120**—*Applicability—Service inam—Enfranchisement by Government—Suit by Zemindar for declaration of invalidity — Limitation—Starting point.*

A suit by a Zamindar against the Government for a declaration that an enfranchisement by the Government of a service inam in his Zemindari is not valid and bind-

LIMITATION ACT (1908), Art. 24.

ing on him, is generally governed by Art. 120, but if the Zamindar was a consenting party to such enfranchisement proceedings and did not object to the same, Art. 14 might apply. Where, however, the Zamindar has not appeared before the Inam Commissioner or taken any part in the proceedings, and sues on the footing that the proceedings are *ultra vires*, it is not necessary to set aside the proceedings and Art. 14 will not apply. In such a case Art. 120 applies and the cause of action arises only when he is injuriously affected by the enfranchisement, *i.e.*, when the inamdar definitely refuses to perform the services for which the inam was originally granted. (*Ramesam and Madhavan Nair, JJ.*) PARATHASARATHY APPA RAO *v.* SECRETARY OF STATE. **58 Mad. 141=162 I.C. 661=8 R.M. 1025 =41 L.W. 689=A.I.R. 1936 Mad. 313=68 M.L.J. 409.**

———**Art. 14**—Applicability — Suit for declaration and injunction—Art. 120 applies, not Art. 14. *See* LIMITATION ACT, ART. 120. **55 B. 447=A.I.R. 1931 Bom. 369.**

———**Art. 14**—*Applicability— Suit to get rid of order.*

If it is necessary for a plaintiff to get rid of an order made by an officer of the Government which stands in his way before he can obtain a certain relief and in order to obtain that relief, he does not expressly ask for the setting aside of the order but merely for a declaratory decree, still the suit should be deemed to be one to set aside an order falling within the ambit of Art. 14. (*Tek Chand, Jai Lal and Monroe, JJ.*) GANGU *v.* MAHANRAJ CHAND. **15 Lah. 389=149 I.C. 661=6 R.L. 723=36 P.L.R. 337=A.I.R. 1934 Lah. 384 (F.B.).**

———**Art. 14**—Grant—Sanad granting in perpetuity a percentage of Government assessment — Subsequent substitution of fixed annual sum—Suit for declaration—Limitation. *See* LIMITATION ACT (1908), ART. 131. **66 M.L.J. 914 (P.C.).**

———**Art. 14**—*Right to mortgage—Order of Collector —Suit to avoid—Limitation.*

A suit under S. 12, Redemption of Mortgages Act XI of 1913, instituted by a person aggrieved by an order passed by the Collector under Ss. 6 to 10 or 11 of the Act to establish his right in respect of the mortgage is governed by Art. 14, Limitation Act; it makes no difference that the suit is one for a mere declaration and no relief to set aside the order of the Collector has been expressly asked in the plaint. 4 Lah. 346, Overruled and A.I.R. 1925 Lah. 385, Appr. (*Tek Chand, Jai Lal and Monroe, JJ.*) GANGU *v.* MAHANRAJ CHAND. **15 Lah. 389=149 I.C. 661=6 R.L. 723=36 P.L.R. 337=A.I.R. 1934 Lah. 384 (F.B.).**

———**Art. 16**—*Cess paid under protest—Suit to recover.*

A suit to recover the amounts paid as village service cess by the plaintiff under protest is governed by article 16. (*Sundaram Chetty, J.*) GOPALASWAMI CHETTIAR *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.R. 1931 Mad. 626=132 I.C. 130=34 L.W. 333=1931 M.W.N. 537=A.I.R. 1931 Mad. 525=61 M.L.J. 754.**

———**Art. 17**—Land acquisition—Money paid to person apparently entitled—Suit by person having interest in land for money so paid. *See* LIMITATION ACT, ART. 120. **A.I.R. 1935 Pat. 42**

———**Art. 22** — *Applicability — Claims under the Workmen's Compensation Act.*

Art. 22 does not apply to claims by workmen under the Workmen's Compensation Act. (*Baker and Divatia, JJ.*) HOGAN *v.* GAFUR RAMZAN. **58 Bom. 128=149 I.C. 247=6 R.B. 350=35 Bom.L.R. 1142 =1934 Cr.C. 115=A.I.R. 1934 Bom. 28.**

LIMITATION ACT (1908), Art. 29.

———**Art. 22**—*Applicability—Suit for damages—Enticement of plaintiff's wife.*

An action for damages against the defendant for enticing away the plaintiff's wife is governed by Art. 22 and the action if brought more than one year after the enticement will be barred. (*Ganga Nath, J.*) TIKA RAM *v.* SOBHA RAM. **8 R.A. 4=1935 A.W.R. 956= 1935 A.L.J. 1003=156 I.C. 556=A.I.R. 1935 All. 855.**

———**Art. 22**—"*Injury*"—*Wrongful obstruction— Suit to recover damages—Limitation.*

'Injury' in Art. 22 has a wider connotation than physical hurt. Assault even though it causes no hurt is an offence to the human body and wrongful obstruction to a person from entering a temple is an injury to her person and a claim for damages regarding the same is governed by Art. 22. (*Jackson, J.*) MANIKYASWAMI *v.* LAKAMMA. **I.R. 1932 Mad. 488 (2)=138 I.C. 84 (1)=35 L.W. 392=A.I.R. 1932 Mad. 432.**

———**Art. 23**— *Suit for compensation for malicious prosecution—Revision preferred against order of acquittal—Limitation—Fresh start.*

Under Art. 23 the limitation for filing a suit for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted. The fact that the defendant filed an application for revision against the order of acquittal obtained by the plaintiff in his favour, does not enable the latter to assert that though time had once begun to run against him from the date of the order of his acquittal, yet, as he had to contest the application for revision which was dismissed, a fresh period of limitation for bringing his suit for damages began to accrue to him. (*Nanavutty, J.*) SHANKAR PRASAD *v.* SHEO NARAIN. **11 Luck. 237 =155 I.C. 706=7 R.O. 614=1935 O.W.N. 619=A I.R. 1935 Oudh 392.**

———**Art. 29**—Applicability — Release of property from wrongful attachment—Suit for its return. *See* LIMITATION ACT, ART. 49. **1935 A.W.R. 957=A. I.R. 1935 All. 915.**

———**Art. 29**—Claim for money paid to save property wrongfully attached — Art. 62 applies, not Art. 29. *See* LIMITATION ACT, ARTS. 62 AND 29. **A I.R. 1934 Oudh 158 (2).**

———**Art. 29**—*Starting point—Subsequent sale not material.*

The crux of Art. 29 is in the words "wrongful seizure." If the seizure is not wrongful, there can be no cause of action. The seizure may be wrongful either because the property does not belong to the judgment-debtor or that the Court has no jurisdiction to attach the property. It is because the process is illegal that the seizure becomes wrongful so as to give a cause of action for the suit. The sale of the property after the wrongful seizure does not give a new cause of action. (*Niyogi, A.J.C.*) KRISHNA *v.* SITARAM. **I.R. 1931 Nag. 61=130 I.C. 157=13 N.L.J. 209=A.I.R. 1931 Nag. 47.**

———**Art. 29**—*Suit for damages for wrongful attachment—Starting point.*

In a suit for damages for the unlawful attachment and seizure of certain properties, the date from which time begins to run is not the date of the attachment, but the date of the seizure, and hence it is immaterial whether the attachment is or is not a continuing wrong. (*Dunkley, J.*) M. S. CHETTYAR FIRM *v.* S. E. BHOLAT. **13 Rang. 43=154 I.C. 153=7 R.R. 269=A.I.R. 1934 Rang. 329.**

LIMITATION ACT (1908), Art. 29.

———**Art. 29**—*Suit for damages for wrongful attachment—Time taken in getting seizure declared illegal—It can be excluded.*

A cause of action is not suspended while the plaintiff is seeking to prove in other proceedings the facts upon which his cause of action depends. In a suit for damages for wrongful attachment, the time taken in getting the seizure declared illegal either on appeal or by other means cannot be deducted. (*Dunkley, J.*) M. S. CHETTYAR FIRM *v.* S. E. BHOJAT. **13 Rang. 43=154 I C. 153=7 R.R. 269=A.I R. 1934 Rang. 329.**

———**Art. 30**—*Suit against Railway for damage to goods—Starting point.*

A suit against a Railway Company for compensation for losing or injuring goods clearly comes under Art. 30 and time begins to run from the date when the loss or injury occurs and not from the date on which open delivery is given to the plaintiff by the Railway. (*Bennet, J.*) SECRETARY OF STATE *v.* NEAZ ALI HAMID ALI. **157 I C. 46=8 R A. 95=1935 A.W.R. 141=1935 A.L.J. 398=A.I.R. 1935 All. 407.**

———**Art. 30**—*Suit for short-delivery—Onus.*

The loss or injury referred to in Art. 30 is the loss or injury to the goods and not the loss or injury to the consignee. The onus is on the railway company, in a suit for short delivery, to prove when the loss or injury to the goods actually occurred and that more than one year has elapsed from that date. Where the company had on the other hand throughout taken up the position that no loss had in fact occurred, Art. 30 is out of the question. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) BENGAL AND NORTH WESTERN RY. CO., LTD. *v.* KAMESHWAR SINGH BAHADUR. **12 Pat. 67=141 I.C. 813 (2)=I R. 1933 Pat. 94=13 Pat.L.T. 695=A.I.R. 1933 Pat. 45.**

———**Art. 31**—*Applicability—State railways.*

It is true that Government is excluded from the definition of "common carrier" for the purpose of the Carriers Act, 1865, but Art. 31, Limitation Act, does not contain the expression "common carrier"; it only applies to a "carrier" and is therefore presumably of a wider meaning, and therefore Art. 31 does apply to a State Railway. (*King, J.*) FOOTWEAR *v.* N.W. RAILWAY. **6 I R. (All.) 45=144 I.C 1029 A.I.R. 1933 All 348.**

———**Art. 31**—"*Carrier*"—*Secretary of State.*

Government is not a 'common carrier" within the meaning of the Carriers Act (III of 1865), but this does not make the Secretary of State incapable of taking advantage of Art. 31. The word "carrier" in Art 31 has not the same meaning as the words "common carrier" as defined in the Carriers Act. (*Mukerji, J.*) ALAMGIR FOOTWEAR & CO. *v.* SECRETARY OF STATE. **6 I R (All.) 1=144 I.C. 703=1933 A.L.J. 796=A I R. 1933 All. 466.**

———**Art. 31**—*Delay in taking delivery—Carrier not converted into bailee for purpose of limitation.*

By delaying taking delivery of goods, the liability of the carrier as a carrier cannot be continued for an indefinite period, and for the period following the arrival of the goods, if there be no delivery, the carrier's liability is that of a bailee and not that of a carrier; but the carrier does not become the bailee for the purpose of limitation and Art. 48 or Art. 49 does not apply but Art. 31 applies. (*Mukerji, J.*) ALAMGIR FOOTWEAR & CO. *v.* SECRETARY OF STATE **6 I.R. (All) 1=144 I.C. 703=1933 A L J. 796=A.I R. 1933 All. 466.**

———**Art. 31**—Inapplicability—Goods not lost but in possession of company—Sale by public auction—Suit for damages. *See* LIMITATION ACT, ART. 48. **A I.R. 1935 All. 601.**

LIMITATION ACT (1908), Art. 36.

———**Art. 31**—*Suit for damages for short delivery—Date of delivery—How to be fixed—No date mentioned in contract—Defendant responsible for delay—Effect of.*

In a suit brought on 4th October, 1923 for damages for short delivery, it was contended that the first delivery having been made on the 21st September, 1922, the suit was barred under Art. 31.

Held, (*i*) that under Art. 31, the material date was the date of delivery. No date having been fixed in the contract, a reasonable date should be fixed. The contract was an indivisible one. It referred not only to the delivery of iron but also to the delivery of certain wooden frames which were delivered only on the 5th October, 1922, and that the suit was in time; (*ii*) though the plaintiff wrote on 23rd October, 1922, to the Company, the latter had sent no definite reply till August 1923 and were therefore responsible for the delay in the institution of the suit It was not open to them to plead the suit had been brought too late. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) BENGAL AND NORTH WESTERN RY. CO., LTD. *v.* KAMESHWAR SINGH BAHADUR. **12 Pat. 67=141 I.C. 813 (2)=I R. 1933 Pat. 94=13 Pat L.T. 695=A I.R. 1933 Pat. 45.**

———**Art. 31**—Suit for wrongful conversion of goods. *See* LIMITATION ACT, ART. 48 **1935 A.L.J. 61=A I.R. 1935 All. 156.**

———**Art. 32**—*Applicability—Licensee of land using land contrary to terms of license and against owner's will—Suit for possession—Limitation—Art.* 142.

Art. 32 only deals with the case of a person having a legal right to use certain property. It does not apply to the case of a mere *licensee* who has no *right* to use the property within the meaning of that Article. In the case of a person who is allowed to use certain property by way of license for certain purposes, such as for grazing cattle, for cattle troughs, for use as threshing floor, etc., if the licensee plants trees on the property against the will of the owner, a suit by the owner for possession by removal of the trees will be governed by Art. 142 of the Act. (*Sulaiman, C.J. and Bennet, J.*) GURCHARAN PRASAD *v.* JAI NARAIN SINGH. **159 I C 521=8 R A. 461=1935 A.W R. 1362=1935 R D. 400=A.I.R. 1935 All. 964.**

———**Art. 32**— Applicability—Village Shamilat—Exclusive possession taken by one set of co-sharers and diverted for purpose other than the ordinary one—Suit by the other set of co-sharers to restrain, Art. 120 applies, not Art. 32. *See* LIMITATION ACT, ART. 120. **14 Lah. 267=A I R. 1933 Lah 705 (F B.).**

———**Art. 32**—Inapplicability—Suit against tenant for possession of land—Tenant using land by way of license. *See* LIMITATION ACT, ART. 142. **A.I.R. 1935 All. 964.**

———**Art. 32**—"*Right to use*".

Art. 32 of the Limitation Act in referring to a right to use property does not embrace a mere license to use the property; a distinction is to be drawn between a legal right to remain in possession of property and a mere license which is revocable at any time. (*Bennet, J.*) LACHMAN *v.* RATNAKAR SINGH. **153 I.C. 670=7 R.A. 546=A I R. 1934 All. 836.**

———**Arts. 32 and 120**—Suit for permanent injunction—Removal of construction on Shamilat of which both plaintiff and defendant are owners. Art. 120 applies, not Art. 32. *See* LIMITATION ACT, ARTS. 120 AND 32. **35 P L R. 472=A.I.R. 1934 Lah. 701.**

———**Art. 36**—Applicability—Contract of bailment—Suit to recover damages. Art. 115 applies, not Art. 36. *See* LIMITATION ACT, ART. 115. **10 O.W.N. 1105=A.I.R. 1933 Oudh 518.**

LIMITATION ACT (1908), Art. 36.

———**Art. 36**—*Applicability—Ex communication from caste—Suit for damages—Limitation.*

A suit for damages in respect of ex communication for caste is governed by Art. 36. (*Murphy and Barlee JJ.*) DEVCHAND TOTARAM *v.* GHANASHYAM SAKHARAM. **158 I.C. 414=8 R.B. 124=37 Bom.L.R. 417=A.I.R. 1935 Bom. 361.**

———**Arts. 36, 102 and 120**—*Applicability—Hereditary archaka of temple—Suit for emoluments against trustee—Limitation.*

A suit by a hereditary archaka office holder of a temple against the trustee of the temple, for recovery of emoluments due to him, consisting of rice and food offerings assessed at a money value, is governed by Art. 102 and not by Art. 36 or 120. The archaka is a servant of the trustee and the emoluments are his wages. (*Beasley, C.J. and King, J.*) VEDAGIRI SASTRIAR *v.* SANKARACHARYA SWAMIGAL. **155 I.C. 591=7 R.M. 594=1935 M.W.N. 120=41 L.W. 40=A.I.R. 1935 Mad. 128—68 M.L.J. 132.**

———**Art. 36**—Applicability—Malicious arrest—Suit for damages. Art. 2 applicable and not Art 36. *See* LIMITATION ACT, ART. 2. **1931 A.L.J. 858.**

———**Art. 36**—*Applicability—Misfeasance of directors—Application under S. 235 of Companies Act.*

Misfeasance dealt with in proceedings under S. 235 of the Companies Act is not independent of contract within the meaning of Art. 36; hence limitation for proceedings under that section are not governed by Art. 36. (Case-law Ref.) (*Ferrers, J.C.*) KARACHI BANK, LTD. *v.* SHEWARAM **I.R. 1933 Sind 147=143 I.C. 713—A.I.R. 1933 Sind 103.**

———**Art. 36**—*Applicability—Misfeasance of directors of companies.*

A right to sue for misfeasance of directors of companies arises from the date of misfeasance and is governed either by Art. 120 or Art. 36. (*Ramesam and Cornish, JJ.*) NARASIMHA AYYANGAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad 153=I.R. 1931 Mad. 61=128 I.C 477=1930 M.W.N. 966=32 L.W. 555=A.I.R. 1931 Mad 58=60 M.L.J. 280.**

———**Art. 36**—*Attachment of goods—Claimant misappropriating attached property—Suit for compensation.*

Arts. 48 and 49 are intended to apply to cases where the plaintiff having the right to the possession of the property learns of the acquisition by theft or dishonest misappropriation or conversion. Where an attachment by a plaintiff was stayed by a rival claimant pending his suit for establishment of claim and the claimant having misappropriated the goods attached, the attaching decree holder sued him for compensation,

Held, that Art. 36 and not Art. 48 or 49 applied to the case. (*Sulaiman and Young, JJ.*) KIRPA RAM *v.* KUNWAR BAHADUR **54 All 467=136 I.C. 809=I.R. 1932 All. 243=13 L.R. 157 (Rev.)—16 R.D. 380=A.I.R. 1932 All 256.**

———**Art. 36**—*Continuing wrongs for over two years—Relief.*

Where each act of depositing silt on plaintiff's grounds afforded the plaintiffs a separate cause of action, their relief in respect of silt deposited more than two years before suit is statute barred under Art. 36. (*Ferrers, J.C. and Rupchand, A.J.C.*) MORUMAL *v.* GOBINDRAM BIKHCHAND. **27 S.L.R. 41=I.R. 1933 Sind 191=144 I.C. 452=A.I.R. 1933 Sind 176.**

———**Art. 36**—Suit for compensation for breach of term in compromise—Art. 115 applies, not Art. 36 or Art. 120 even if conpromise is merged in decree. *See*

LIMITATION ACT (1908), Art. 44.

LIMITATION ACT, ARTS. 115, 36 AND 120. **A.I.R. 1934 Pat. 7.**

———**Arts. 36 and 95**—*Suit for relief on ground of fraud.*

Art. 36 is a residuary article. A suit for a relief on the ground of fraud is governed by Art. 95 and not by Art. 36. That being so, time begins to run from the date of the knowledge of fraud. (*Niamatullah and Allsop JJ.*) DEHRA DUN TRAMWAY CO. *v.* HANSRAJ. **58 All 342=159 I.C 977=8 R.A. 537=1935 A.W.R. 1189=A.I.R 1935 All 995.**

———**Art 40**—*Infringement of copyright—Recurring cause of action.*

Under the copyright Act an infringement takes place not only when a book is reprinted but also when a book in respect of which a copyright exists is sold. There is a fresh cause of action on the sale of every book. (*Sulaiman, C.J. and Thom, J.*) M.P. MARSHALL *v.* RAM NARAIN LAL. **154 I.C. 207=7 R.A. 713—3 A.W.R. 255=A.I.R. 1934 All. 922.**

———**Art 44**—*Alienation by certificated guardian—Setting aside by minor after attaining majority.*

A permission obtained by a certificated guardian by a fraudulent misrepresentation is a nullity but a transfer made in pursuance thereof is only voidable. Where the minor sues after attaining majority to set aside the transfer, the suit is governed by Art. 44 and not Art. 144 of the Limitation Act (*Pullan and Niamatullah, JJ.*) RAM CHARITTER MISIR *v.* SURAJ TELI. **53 All. 738=136 I.C 71=I.R 1932 All. 119=1931 A.L.J. 997=A.I.R. 1932 All. 108.**

———**Art. 44**—Alienation by *de facto* guardian—Suit to set aside—Art. 44 not applicable, but Art. 144, (Buddhist Burmese Law). *See* BUDDHIST LAW—BURMESE—GUARDIAN. **A.I.R. 1931 Rang. 178.**

———**Art. 44**—*Applicability*—De facto *and* de jure *guardians—Alienations by*

Art 44 applies to alienations by *de jure* guardians and not to those by *de facto* guardians. 44 Bom. 742; 38 Mad. 1125, A.I.R. 1928 Mad. 226, Ref. In the latter case, a suit can be brought within twelve years. (*Ramesam, J.*) PURUSHOTTAMA RAIHO *v.* BRUNDAVANA DASS **I.R. 1931 Mad. 773=133 I.C. 773=33 L.W. 664=1931 M.W.N 417—A.I.R. 1931 Mad. 597 (2).**

———**Art 44**—*Applicability*—De facto *guardian—Alienation by—Suit to set aside—Indian Christian minor.*

An alienation by the *de facto* guardian of an Indian Christian minor is void, a suit to set it aside is not governed by Art. 44 and is in time if brought within 12 years after the alienation. (*Madhavan Nair, J.*) SUNDARA NADAN *v.* ANNAMMAL. **I.R. 1931 Mad. 616=132 I.C. 120=1931 M.W.N. 415=33 L.W. 615=A.I.R. 1931 Mad. 529=60 M.L.J. 695.**

———**Art. 44**—*Applicability—Hindu minor coparceners—Alienation by guardians—Suit to set aside after majority—Limitation—Art. 144.*

During the minority of two minor cousins, undivided members of a Hindu joint family, their mothers acting as guardians alienated certain properties of the minors. One of the minors subsequently died. More than three years after the surviving minor became a major, but within 12 years of the alienation, the surviving coparcener instituted a suit to set aside the alienation, as having been unauthorized.

Held, the suit was governed by Art. 44 and not 144 of the Limitation Act and that the suit was barred. (*Varadacharlar, J.*) ANKAMMA *v.* KAMESWARAMMA. **154 I.C. 616=7 R.M. 464=1934 M.W.N. 960=40 L.W. 760=A.I.R. 1935 Mad. 1=68 M.L.J. 87.**

LIMITATION ACT (1908), Art. 44.

———**Art. 44**—*Applicability—Natural father of adopted minor—Alienation by.*

The natural father of an adopted minor is not a guardian *de jure* and a suit to set aside an alienation by him is not governed by Art. 44. (*Romesam, J.*) PURUSHOTTAMA RADHO *v.* BRUNDAVANA DASS. **I R. 1931 Mad. 773=133 I.C. 773=33 L.W. 664=1931 M.W.N. 417=A.I.R. 1931 Mad. 597 (2).**

———**Art. 44**—*Applicability—Suit by transferee from minor.*

Art. 44 does not apply to a suit by a transferee from a minor to which the minor is not a party. 49 Bom. 309 and 56 M.L.J. 332, Dist. The father and natural guardian of the minor had transferred the property to the defendant in 1912. The minor attained majority in 1923 and sold the property to the plaintiff No. 1 in 1925. The plaintiff No. 1 and the quandom minor (as plaintiff No. 2) brought a suit in 1926 to set aside the alienation of 1912. Plaintiff No. 2 withdrew from the suit without objection on the part of plaintiff No. 1 and on the question whether the suit was in time.

Held, that Art. 44 of the Limitation Act did not apply to the suit. "The question is not whether the suit was barred by limitation, but whether the plaintiff has a right to continue the suit. After the minor had withdrawn, he has virtually elected to acquiesce in the sale by his guardian and the interest of the minor in the property has been extinguished under Art. 44 read with S. 28 of the Act. The plaintiff, therefore, had no right to continue the suit." (*Patkar and Murphy, JJ.*) JHAVERBHAI *v.* KABHAI BECHER. **141 I.C. 806=I R. 1933 Bom. 165—34 Bom.L.R. 1512=A.I.R. 1933 Bom. 42.**

———**Art. 44**—*Applicability—Transfer by Christian mother as natural guardian—Suit by minor to avoid.*

An alienation by a Christian mother acting as the natural guardian of her minor child is voidable and not void and a suit by the minor avoiding the transfer should be instituted within the three years prescribed by Art. 44. (*Curgenven and Pakenham Walsh, JJ.*) BANGARAMMAL *v.* LYDIA KENT. **57 Mad. 1062=152 I.C. 546=7 R.M. 249=40 L.W. 406=1934 M.W.N. 499=A.I.R. 1934 Mad. 605=67 M.L.J. 322.**

———**Arts. 44 and 144**—*Applicability—Void and voidable transactions — Distinction — Alienation by guardian.*

The Limitation Act draws a distinction between void transactions and voidable transactions, and while a longer period is allowed for remedies arising out of void transactions, a shorter period has been prescribed for all actions seeking to set aside voidable transactions; and it makes no difference that there is also a prayer for possession. It is also a well-established principle that whenever there is a specific article applicable to a suit, a general article like Art. 144 will be excluded. (*Varadachariar, J.*) ANKAMMA *v.* KAMESWARAMMA. **154 I.C. 616—7 R M. 464=1934 M.W.N. 960=40 L.W. 760=A.I.R. 1935 Mad. 1=68 M.L J. 87.**

———**Arts. 44 and 144**—Joint family consisting of uncle and nephew—Alienation by uncle—Suit for possession by nephew—Limitation—Art. 144 applies not Art. 44. *See* LIMITATION ACT, ARTS. 144 AND 44. **35 P.L.R. 722—A.I R 1934 Lah. 601.**

———**Art. 44**—*Manager of joint family not a guardian—Minor coparcener not bound to sue within three years—Suit by alienee from coparcener not barred by Art. 44.*

The manager of a joint Hindu family consisting of himself and his minor brothers is not to be deemed their guardian within the meaning of that term in Art. 44. It is not necessary for the minor brother himself to bring a suit within three years to set aside the alienation made by his brother nor is there any legal objection to his alienating the right to a share in the property which he possessed. A suit by the alienee of the minor brother is not therefore barred by Art. 44. (*Broomfield and Wadia, JJ.*) HANMANTAPPA *v.* DUNDAPPA. **151 I.C. 1043=7 R.B. 100=36 Bom.L.R. 474=A.I.R. 1934 Bom. 234.**

LIMITATION ACT (1908), Art. 14.

———**Art. 44**—*Scope and applicability—Minor's property—Alienation by guardian as if it were his own.*

Where a minor's property is sold by his guardian, who professed to act as such or who can be shown to have acted in that capacity, the minor may be bound to have the deed set aside within three years after attaining majority; but where the property has been alienated by the guardian as if it were his own and the mortgagee treats it as the property of the alleged guardian personally and has it sold as such, Art. 44 cannot apply. Where a guardian transfers property in circumstances which did not justify the transfer, such transfer is only voidable. Wherever the transfer is void *ab initio*, Art. 44 does not apply. Where a minor's property is sold by another person, even though he be his guardian claiming it to be his own, the minor's interest is not affected by such transfer which is void. (*Niamatullah, J.*) BHAGWAN DASS *v.* KASHI PRASAD. **157 I.C. 118 (2)=8 R.A. 99=1935 A.W.R. 555=A I R. 1935 All. 417.**

———**Art. 44**—*Scope—Minor being in joint possession—Suit to set aside sale and for partition.*

Cases contemplated by Art. 44 are those in which "transfer of property" has been made by a guardian. It implies that the property has changed hands and does not apply to cases where the erstwhile minor is in possession of his property in spite of deeds of transfer executed by the guardian under which either possession does not pass from transferor to transferee, *e.g.*, deed of simple mortgage, or possession has not been parted with though it ought to have been delivered. A person brought a suit beyond three years of his attaining majority for partition of the house and declaration that the sale effected by his certified guardian without permission of the District Judge was void and ineffectual as against him. He claimed to be entitled to half share of the house which was so transferred and made the other co-sharer of the house as well as the vendee defendant to the suit. It was found that the plaintiff was all along in possession with the co sharer in spite of the sale in favour of defendants.

Held, that Art. 44 did not apply to the case, and even if it applied it only barred the remedy of the plaintiff to get the sale-deed set aside but was not fatal to his title which still subsisted and entitled him to separate possession of what is now in joint possession of himself and other co sharer. The rule is well settled that lapse of limitation, apart from S. 28 of the Limitation Act, bars only the remedy and does not extinguish the title of the claimant. S. 28 not being applicable to this case, the plaintiff's title subsists and consequently the main relief sought, namely, partition as against the co-sharer was not affected by Art. 44. A. I. R. 1916 P. C. 172, Ref. (*Banerji and Niamatullah, JJ.*) MAHOMED RAZA AHMAD *v.* ZAHOOR AHMAD. **52 All. 979=I.R. 1931 All. 453=132 I.C. 21=1930 A.L.J. 1416=A.I.R. 1930 All. 858.**

———**Art. 44**—*Void and valid deeds—Distinction between.*

LIMITATION ACT (1908), Art. 47.

If a sale is held to be void owing to fraudulent registration, there will be no need to set it aside and a suit to recover possession of the properties alienated under the sale deed will not be barred, though brought by the ward about eleven years after the date of the sale. If, on the other hand, if it is not void, then such a suit has to be regarded as one for setting aside the sale deed even though no such relief has been sought for, in that possession cannot be obtained unless that document is set aside and such a suit should be brought within three years from the date of the sale. (*Wallace and Bardswell, JJ.*) SRI RAJA SOBHANADRI APPARAO BAHADUR GARU *v.* RAJA INUGANTI VENKOBA RAMA RAO. **54 Mad. 352=I.R. 1931 Mad 245=129 I.C. 245=32 L.W. 680=1930 M.W.N. 1067=A.I.R. 1931 Mad. 45=60 M.L.J. 701.**

———**Art. 47**— *Applicability— Joint lands—Order under S. 145, Cr. P. Code, in respect of part of lands—Suit by co-sharer for possession on declaration of title—Limitation.*

Art. 47, Limitation Act, applies only to a suit for possession of an undivided share of property in respect of the whole of which there was a final order under S. 145, Cr. P. Code. It is not contemplated by the article that the title of the co-sharer of any joint property must be held to be extinguished or that there could not be any claim for joint possession or partition, simply because an order passed by a Criminal Court in respect of a part of the property, has not been challenged by suit within three years. The co-sharer's right to exclusive possession would be barred after three years under Art. 47, but his title will not be extinguished so as to disentitle him to a decree for partition. (*Guha and Bartley, JJ.*) JOGESH CHANDRA KHASNAVIS *v.* SURESH CHANDRA NAMADAS. **163 I.C. 370=9 R.C. 19=39 C.W.N. 853**

———**Art. 47**—Applicability—Order under S. 145 (6), Cr. P. Code—No suit by unsuccessful party—Subsequent eviction of successful party by third party—Suit by unsuccessful party later on against successful party and third party—Bar of. *See* LIMITATION ACT, S. 28 AND ART. 47. **16 Pat.L.T. 183=A.I.R. 1935 Pat. 164.**

———**Art. 47**— Applicability — Proceedings under S. 145, Cr. P. Code, about crops—Order as to possession of crops alone—Subsequent suit after three years—Parties and area in dispute not same—Suit, if barred. *See* LIMITATION ACT, S. 28 AND ART. 47. **11 O.W.N. 1165.**

———**Art. 47**—*Applicability—Right of way affirmed by Mamlatdar—Suit to contest.*

A suit denying a right of way as affirmed by an order of a Mamlatdar under Mamlatdars Courts Act, is a suit respecting possession of immovable property and as between Arts. 14 and 47, Art. 47 applies to such suit. 11 Bom. 429 (432), Dist.; 10 Bom.L.R. 749; 19 Bom. 828, Ref. (*Madgavkar, J.*) BULLAPPA *v.* TIPPAN GOWDA. **135 I.C. 427=I.R. 1932 Bom. 75=33 Bom.L.R. 517=A.I.R. 1931 Bom. 256.**

———**Art. 47**—*Person not party to proceeding under S. 145, Cr. P. Code—If bound by order of Magistrate.*

The provisions of the Statute of Limitation must be construed with reasonable strictness. A person who is not a party to the proceedings under S. 145, Cr.P. Code, cannot be held to be a person bound by the order of the Magistrate within the meaning of Art. 47, Limitation Act, even though he is a witness in them. (*Hilton and Rangi Lal, JJ.*) MT. MAYA DEVI *v.* DIWAN CHAND. **1935 Cr.C. 181=A.I.R. 1935 Lah. 115 (2).**

———**Arts. 48 and 49**—Applicability—Carrier—Suit against—Delay in taking delivery—Carrier not converted into bailee—Art. 31 applies, not Art. 48 or 49. *See*

LIMITATION ACT (1908), Art. 48.

LIMITATION ACT, ART. 31. **1933 A.L.J. 796=A.I.R. 1933 All. 466.**

———**Art. 48**—*Applicability—Goods not lost but in possession of company—Sale by public auction—Suit for damages.*

Where goods had reached their destination and had never been lost from the possession of the railway company and were in the lost property office and were sold by public auction against the express direction of plaintiff

Held, that the suit was not governed by Art. 31 of the Limitation Act as the cause of action was not non-delivery but that it was governed by Art. 48. (*Sulaiman, C.J. and Bennet, J.*) SECRETARY OF STATE *v.* SIMLA FOOTWEAR COMPANY. **57 All. 843=157 I.C. 1080=8 R.A. 254=1935 A.L.J. 793=1935 A.W.R. 918=A.I.R. 1935 All. 601.**

———**Arts. 48 and 49**—*Scope—Attachment of goods—Claimant misappropriating attached property—Suit for compensation.*

Arts. 48 and 49 are intended to apply to cases where the plaintiff having the right to the possession of the property learns of the acquisition by theft or dishonest misappropriation or conversion. Where an attachment by a plaintiff was stayed by a rival claimant pending his suit for establishment of claim and the claimant having misappropriated the goods attached, the attaching decree-holder sued him for compensation.

Held, the plaintiff's right was confined to get the goods sold through the Court and realise his decretal money out of the sale proceeds. But this right did not entitle him to take possession of the goods direct. Art. 49 is not hence applicable. Art. 36 which is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere must apply since neither Art. 48 nor Art. 49 applies. (*Sulaiman and Young, JJ.*) KIRPA RAM *v.* KUNWAR BAHADUR. **54 All. 467=16 R.D. 380=I.R. 1932 All. 243=136 I.C. 809=1932 A.L.J. 241=13 L.R. 157 (Rev.)=A.I.R. 1932 All. 256.**

———**Art. 48**—*Suit against carrier for wrongful conversion of goods.*

A suit against a carrier for damages for wrongful conversion of goods is governed by Art. 48 and not by Art. 31 of the Limitation Act. (*Kendall, J.*) NAWAB BOOT HOUSE *v.* SECRETARY OF STATE. **159 I.C. 40 (2)=8 R.A. 379=1935 A.L.J. 61=1935 A.W.R. 37=A.I.R. 1935 All. 156.**

———**Art. 48**—*Trover—Removal of coal prior to plaintiff's title—Right of action.*

The plaintiff is not entitled to maintain an action for damages in respect of coal removed from the plaintiff's mine before the plaintiff got his title to it. (*Wort and Fazl Ali, JJ.*) BAIJNATH JUGAL KISHORE *v.* MANINDRA CHANDRA NANDI. **I.R. 1931 Pat. 373=133 I.C. 453=13 Pat. L.T. 73=A.I.R. 1931 Pat. 436.**

———**Art. 48**—*Trover—Removal of coal—Suit for damages.*

Per *Wort, J.*—An action for damages for trespass upon the plaintiff's mine and extraction of coal therefrom is an action in trover governed by Art. 48 and not Art. 144. It is necessary for the defendants to show that the coal has been removed at a time beyond the period of limitation.

Per *Fazl Ali, J.*—Art. 48 is applicable only when the movable property lost is still in the possession of the defendants and not when the property cannot be traced. (*Wort and Fazl Ali, JJ.*) BAIJNATH JUGAL KISHORE *v.* MANINDRA CHANDRA NANDI. **I.R. 1931 Pat. 373=133 I.C. 453=13 Pat L.T. 73=A.I.R. 1931 Pat. 436.**

LIMITATION ACT (1908), Art. 48.

——**Art. 48**—*Wrongful sale of goods by railway company—Suit for damages—Limitation—Starting point—Railways Act, S. 55.*

A sale of goods by the railway company without the formality provided by S. 55 of the Railways Act is wrongful and a suit for damages for such wrongful sale is one for conversion and is governed by Art. 48 of the Limitation Act and the starting date of limitation is the date when the plaintiff, *i.e.*, the person who has the right to possession, first learns of the act of conversion. If the company seeks to show that the suit is not maintainable by reason of the expiry of the statutory period of limitation, it is upon it to prove precisely at what period the plaintiff became aware of the sale and its wrongfulness, that is to say, became aware of the fact of conversion. (*Courtney-Terrell, C. J. and Agarwala, J.*) SUNDARJI SHIVJI *v.* SECRETARY OF STATE. **13 Pat. 752=16 Pat. L.T. 61=151 I.C. 995=7 R.P. 148=A.I.R. 1934 Pat. 507.**

——**Art 49**—*Applicability—Suit for recovery of share in movable property on declaration of title.*

Art. 49 applies only to a suit for "specific movable property", which means property of which one can demand the delivery *in specie*. It is not applicable to a suit for the recovery of a share in certain movable property on declaration of title thereto. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v.* PROBODH CHANDRA SARKAR. **143 I.C. 402=I.R. 1933 Cal. 425=36 C.W.N. 758=55 C.L.J. 420=A.I.R. 1933 Cal. 253.**

——**Art. 49**—*Release of property from wrongful attachment—Suit for its return—Limitation—Starting point.*

The defendant had a decree against certain persons, in execution of which he got attached the produce of the plaintiff. On the responsibility of the defendant, the produce was put in the custody of the *shahanas*. The plaintiff filed an objection to the attachment which was allowed and the attachment was removed. Thereafter the defendant brought a suit under O. 21, R. 63, C.P. Code which was dismissed. The property continued in the custody of the *shahanas*. The plaintiff sued to recover his produce and in the alternative its price.

Held, Art. 29 of the Limitation Act is not applicable as the suit is not for damages for wrongful attachment of property but it is for the return of the property after it had been released from the wrongful attachment, and that Art. 49 will apply to the case and time began to run from the date of the release of the property from attachment, when the possession of the defendant and his *shahanas* became unlawful (*Ganga Nath, J.*) PARSHADI LAL *v.* CHANDAN. **158 I.C. 1014=8 R. A. 358=1935 A.L.J 1010=1935 A.W.R. 957=A.I. R. 1935 All. 915.**

——**Art. 52**—*Applicability—Suit for recovery of price of medicines.*

A suit for the recovery of the price of medicines supplied is governed by Art. 52. (*Sulaiman, A.C.J. and King, J.*) BARODA KANT SEN *v.* COURT OF WARDS. **I.R. 1931 All. 697=133 I.C. 537=1931 A L J. 949=A.I.R. 1931 All. 752 (2).**

——**Art. 52**—*Goods supplied to Cantonment Board—Suit for recovery of price—Limitation.*

S. 273 (1) of the Cantonments Act does not contemplate the class of suits of private contracts for which specific rules of evidence are prescribed by the Limitation Act. It contemplates actions brought against the Board in respect of acts done in pursuance of any rule or bye-law that has the force of law. Hence a suit against the Board for the price of goods supplied is not governed by S. 273 but by Art. 52, Limitation Act. (*Sulaiman, C. J. and Mukherji, J.*) CANTONMENT BOARD, ALLAHABAD *v.* HAZARI LAL GANGA PRASAD. **56 All. 885=149 I.C. 49=6 R.A. 847=1934 A.L.J. 805=3 A.W.R. 393=A.I.R. 1934 All. 436.**

LIMITATION ACT (1908), Art. 56.

——**Arts 52 and 96**—*Goods sold and delivered—Wrong person debited—Mistake subsequently discovered—Claim against right person.*

A who was dealing in business with two brothers *B* and *C* doing business independently, sold and despatched to *B* certain goods at his request but through mistake entered the debit wrongly in the name of the other brother *C*. On a refusal by *C* to pay the amount on demand being made from him, the mistake was discovered and *A* presented a demand to *B* and instituted a suit against him for recovery of the amount.

Held, that the claim put forward by *A* was one for price of goods sold and delivered and the suit was governed by Art. 52 and not by Art. 96. 12 Cal. 533; A.I.R. 1925 Pat. 765, Dist. (*Ferrers, J.C. and Rupchand Bilaram, A.J.C.*) NARUMAL HIRACHAND *v.* NANUMAL BENARSIDAS. **27 S L.R. 81=I R. 1933 Sind 93=142 I.C. 470=A.I R. 1933 Sind 32.**

——**Art. 52**—*Sale of goods—Liability to pay full price—Date of accrual.*

In a simple transaction of sale of goods, the liability to pay the full price accrues on the date of the sale. The fact that the purchaser, not having all the money in his hands, agrees to pay the balance with interest at a certain rate does not prevent the accruing of the vendor's right to recover the whole price on account of the purchase and time begins to run from the date of the sale. Vendor must sue within three years from that date in order to get a personal decree against the purchaser. If the original contract between the parties had been that the plaintiffs would purchase goods on behalf of the defendants retain them and then re-sell them on instruction from the defendants and then only the account would be settled, time would not begin to run from the date of the initial purchase. Case held not to be a case where purchaser stipulates to pay the price after settlement of account on a future date, the goods being re sold by the purchaser in the meanwhile. (*Sulaiman and Young, JJ.*) MUKAT LAL *v.* GULAB SINGH PRAN MAL. **I.R. 1931 All. 518 (2) =132 I.C. 422 (2)=1931 A.L.J. 363=A.I.R. 1931 All. 229.**

——**Art. 52**—*Sale of goods to recover balance of price.*

The defendant entered into a contract with the plaintiff's transferor for the purchase of certain motor cars and accessories for a sum of money paid an amount by way of earnest money and took delivery of a car. Subsequently however the contract was broken and the defendant neither returned the car nor made further payment. The plaintiffs sued to recover the balance of the price of the car delivered, damages for breach of contract and interest. The defendant having raised the plea of limitation.

Held, that the defendant was liable for the sale price of the car he had retained and that the suit in respect of such claim was governed by Art. 52 and not Art. 115. In such a case a combination of claims can be split up into its component parts and the suit entertained to the extent it is not barred. (*Shadi Lal C.J. and Walker, J.*) BHIMA MAL & SONS *v.* RAHMAT ULLAH. **130 I.C. 574=A.I.R. 1931 Lah. 309.**

——**Art. 56**—*Inapplicability—Suit for wages by village carpenter.*

A village carpenter is an artisan within the meaning of Art. 7 of the Limitation Act and a suit for wages by

LIMITATION ACT (1908), Art. 57.

him is governed by Art. 7 and not by Art. 102 or Art. 56. (*Subhedar, A.J.C.*) NAMDEO *v.* RAMKRISHNA MAHADEO. **152 I C. 885=7 R.N. 110 = A I R. 1934 Nag. 260.**

——**Art. 57**—*Account—Suit to recover money—Account not being mutual—Limitation.*

A mutual account means not mearly where one of the parties has received money and paid it on account of the other, but where each of the parties has received and paid on the other's account. It is the essence of mutuality that each party to the account must extend the credit to the other on the faith of an admitted indebtedness to him. In a suit for recovery of money on a *bahi* account it was found that the dealings between the parties were simple meney loans as between creditor and debtor and the account was not matual in any sense of the term. The defendant borrowed money from the plaintiff from time to time made payments to him occasionally and struck balance in his favour. The transactions created obligation on one side only, those on the other being merely complete or partial discharge of such obligations. On the account as it stood there were not independent obligations in the sense in which the term is used in reference to "mutual" account and there were and could be no reciprocal demands between the parties.

Held, that Art. 85 was inapplicable and the suit being one for recovery of money payable for money lent was governed by Art. 57. (*Tek Chand and Walker, JJ.*) RAM DHAN *v.* MALIK MAHOMED DOST KHAN. **12 Lah. 420=I.R. 1931 Lah. 945=134 I.C. 513=32 P.L.R. 954=A I.R. 1931 Lah. 241.**

——**Art. 57**—*Applicability—Money advanced as loan—Suit for recovery less sum due for work done.*

The plaintiff was a dealer in timber and the defendant did the business of sawing wood. The plaint stated that between certain dates a certain sum of money was advanced to the defendant and the plaintiff sued to recover the money lent less the value of the work done by the defendant,

Held, that the suit was governed by Art. 57 and not by Art. 115. (*Mukerji, J.*) ABDUL AZIZ KHAN *v.* NIAZ ULLAH. **6 R.A 456=147 I.C. 295=3 A W.R. 190=A.I R. 1934 All. 126.**

——**Art. 57**—Applicability—Suit on account stated—Distinction from suit on mutual open and current account—Art. 64 or perhaps 57 applies not Art. 85. *See* LIMITATION ACT, ART. 64. **A.I.R. 1931 Lah. 233.**

——**Art. 57**—*Applicability—Suit for money secured by pledge—Limitation.*

A suit for recovery of money secured by a pledge is really a suit for money lent and advanced, and a suit to recover the balance due after the sale of the pledged property is none the less a suit for money lent, and the period of limitation is three years under Art. 57. The fact that movable property has been pledged does not change the nature of the suit. (*Wadia, J.*) PERCY F. FISHER *v.* ARDESHIR. **156 I C. 531=7 R B. 515=37 Bom.L.R 165=A.I.R. 1935 Bom. 213.**

——**Art. 57**—*Applicability—Transaction starting as deposit—Subsequent withdrawals and deposits—Relation of customer and banker.*

Where the transaction between parties starts as a deposit and subsequenlty there are several items of deposits and withdrawals in the handwriting of the depositee, the transaction is one between customer and banker and to such a case Art. 60 applies and Art. 57 does not apply. (*Tek Chand and Agha Haidar, JJ.*) GULAB RAI GUJAR MAL *v.* SANDHI. **15 Lah. 242=151 I.C. 712=7 R.L. 200=37 P.L.R. 56=A.I.R. 1934 Lah. 42.**

LIMITATION ACT (1908), Art. 60.

——**Art. 57**—*Principal and surety—Liability of surety—Commencement of limitation.*

Where a person took a loan and signed a *Bahi* and it appeared that no date was fixed for re payment and a surety who had guaranteed payment by a letter of even date was sued along with the executant, *held*, that the loan became payable at once, on the date of the loan under Act. 57 and the liability of the surety also began to run from the same date. (*Jai Lal and Abdul Qadir, JJ.*) DIYALU MAL *v.* NANDU SHAH DEV RAJ. **13 Lah. 240=I.R. 1931 Lah. 638=132 I.C. 590=33 P. L.R. 59=A.I.R. 1931 Lah. 691.**

——**Art. 57**—*Sale of goods—Suit for personal decree for price—Limitation.*

Where it was agreed the goods sold remain in the custody of the vendor as security for the unpaid price of the goods and the vendor sues the vendee for a personal decree against him and not for enforcement of any charge on the security, the suit is not governed by Art. 120, but by the three years' rule of limitation so far as the personal liability of the defendant is concerned. 24 All. 251 and 30 Bom. 218, Ref. (*Sulaiman and Young, JJ.*) MUKAT LAL *v.* GULAB SINGH PRAN MAL. **1931 A.L.J. 363—I.R. 1931 All. 518 (2)=132 I.C. 422 (2)=A.I.R. 1931 All. 229.**

——**Arts. 59 and 116**—*Applicability—Bond registered.*

In the case of a registered bond, the article of the Limitation Act, which is applicable, is not Art. 59 but Art. 116. A.I.R. 1933 P.C. 143, Rel. on. (*Dunkley, J.*) ALAGAN *v.* MAUNG PO PEIK. **151 I.C. 426=7 R.R. 77=A.I.R. 1934 Rang. 227.**

——**Art. 59**—Applicability—Deposit—Suit to recover—Art. 60 applies, not Art. 59. *See* LIMITATION ACT, ART. 60. **1932 A.L J. 261.**

——**Arts. 59 and 60**—*Applicability—Money left with a Nattukottai Chetty—Terms—Presumption as to—Suit to recover—Limitation.*

If there is no evidence whatever as to the terms upon which moneys are left with a Nattukottai Chetty on "Thavanai", there is a presumption that the Chetty is in the position of a banker and the person transacting business with him is a customer and that account is on the demand basis to which Art. 60 of the Limitation Act would apply and not Art 59. Art. 60 not only applies to deposits made by a customer with a banker where the money is payable on demand from the beginning, but also applies where the money is payable on demand after the termination of a fixed period. (*Stone and Pakenham Walsh, JJ.*) MURUGAPPA CHETTY *v.* RAMANATHAN CHETTY. **157 I C. 274=8 R.M. 133=1935 M.W.N. 559=41 L.W. 536=A.I.R. 1935 Mad. 734.**

——**Art. 60**—*Agreement to pay on demand—Inference from conduct.*

In order to make Art. 60 applicable, it is not necessary that the agreement to pay the amount due on demand must be "express;" its provisions are attracted even if the agreement is to be "implied" from the course of dealings between the parties or the other circumstances of the case. (*Tek Chand and Agha Haidar, JJ.*) GULAB RAI GUJAR MAL *v.* SANDHI. **15 Lah 242=151 I C. 712=7 R.L. 200=37 P.L.R. 56=A.I.R 1934 Lah. 42.**

——**Art. 60**—*Agreement to pay money deposited on demand—Absence of demand—Commencement of limitation.*

Under Art. 60 the period of limitation for a suit to recover money deposited under an agreement that it shall be payable on demand, is three years from the date

LIMITATION ACT (1908), Art. 60.

when the demand is made. The making of the demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made, in which case no question of limitation arises. (*Agarwala, J.*) BAIJNATH SOTI *v.* BIHARI RAM SHAM LAL. **147 I.C. 1094=6 R.P. 399=A.I.R. 1933 Pat. 701.**

———**Art. 60**—*Applicability—Implied agreement to pay on demand—Filing of suit constitutes demand.*

The plaintiff sued the defendant alleging that he had deposited certain amounts at various times with the defendant and had obtained *ruqqas* from the defendant to the effect that the moneys were received as *amanat*, that a year ago he had demanded the same but the defendant had refused to pay. The defendant pleaded that there had been no deposits with him and that the deposits if any had been validly accounted for in the plaintiff's account. The plaintiff denied that he had any account with the defendant.

Held, that an implied agreement to pay on demand might be presumed and the suit was governed by Art. 60

Held also, that the suit itself may be taken to constitute a demand for purposes of that article. (*Dilip Singh, J.*) ALLAH DITTA *v.* SADHU SHAH. **6 R.L. 385=147 I.C. 338=35 P.L.R. 91=A.I.R. 1934 Lah. 179.**

———**Art. 60**—*Applicability—Transaction starting as deposit—Relation of customer and banker.*

Where the transaction between parties starts as a deposit and subsequently there are several items of deposits and withdrawals in the handwriting of the depositee the transaction is one between customer and banker and to such a case Art. 60 applies and Art. 57 does not apply. (*Tek Chand and Aghi Haidar, JJ.*) GULAB RAI GUJAR MAL *v.* SANDHI. **15 Lah. 242=151 I.C. 712=7 R.L. 200=37 P.L.R. 56=A.I.R. 1934 Lah. 42.**

———**Art. 60**—*Deposit—Suit to recover—Limitation.*

The plaintiffs sued to recover a sum of money alleged to have been deposited by their mother with the defendant.

Held, that the transaction was a deposit and not a loan and that Art. 60 and not Art. 59 applied to the case. (*Pullan and Niamatullah, JJ.*) SOHAN PAL *v.* MUSTAFA HUSAIN. **I.R. 1932 All. 631=140 I.C. 96=1932 A.L.J 261.**

———**Art. 60**—*Stridhanam monies invested with firm—Deposit—Demand for payment back—Unconditional demand necessary.*

The stridhanam moneys belonging to a Nattukottai Chetti woman were converted into a hundi for that amount and invested in 1899 with a firm of Nattukottai Chettis. Her husband was transacting business on behalf of her. From the circumstances of the case if the transaction would not amount to a constitution of trust it at least amounted to a deposit under an agreement that it is payable on demand: a suit having been filed within three years from the date of the notice demanding payment,

Held, that even viewing the transaction as merely a deposit, the suit would be in time within Art. 60 since time would run from the date of demand. In order to satisfy the requirement of Art. 60 a demand should be an unqualified demand for the whole sum due. (*Curgenven and Sundaram Chetty, JJ.*) SUBBIAH CHETTY *v.* VISALAKSHI ACHI. **I R 1932 Mad. 635=139 I.C. 164=1932 M W N 918=36 L.W. 514=A.I.R. 1932 Mad. 685=63 M.L.J. 232.**

LIMITATION ACT (1908), Art. 61.

———**Art. 60**—Terminus a quo—*Date of last balance or demand.*

The period of limitation prescribed in Art. 60 is three years and not six years and the *terminus a quo* is not the date of the last balance but the date "when the demand is made." (*Tek Chand and Aghi Haidar, JJ.*) GULAB RAI GUJAR MAL *v.* SANDHI. **15 Lah. 242=151 I.C. 712=7 R.L. 200=37 P.L.R. 56=A.I.R. 1934 Lah. 42.**

———**Art. 61**—*Applicability—Essentials.*

According to Col. 3, Art. 61, time begins to run from when the money was paid and extends to a period of three years. There is nothing in Art. 61 which requires that the payments on behalf of another should be accepted or adopted by the person on whose behalf they are made. (*Bhide and Tapp, JJ.*) SHAHBAZ KHAN *v.* BHANGI KHAN. **135 I.C 177=I.R. 1932 Lah. 49=A.I.R. 1931 Lah. 344 (2).**

———**Art. 61**—Applicability—Mortgagee undertaking to discharge mortgage—Default—Mortgagor discharging debt and suing for recovery — Limitation—Art. 120 applies, not Art. 61. *See* LIMITATION ACT, ART. 120. **1931 A L.J. 533=A.I.R. 1931 All. 549 (2).**

———**Art. 61**—*Applicability — Redemption by purchaser—Purchase set aside—Suit for reimbursement.*

A suit for reimbursement by a purchaser, whose purchase has been set aside as a sham transaction, of the sum of money he had paid for the redemption of an undisclosed mortgage on the property is governed by Art. 61. (*Patkar, J.*) RAGHUNATH *v.* LAHANU. **I. R. 1931 Bom 123=128 I.C. 907=32 Bom. L.R. 1376=A I.R. 1931 Bom. 39.**

———**Art. 61**—*Applicability — Suit against sub-partner.*

Art. 61 has no application to a suit by a partner against the sub-partner for contribution of the loss sustained by the plaintiff, as a partner paying his share of the firm's loss could not be deemed to be paying it for, or on behalf of, his sub-partner but should be taken to have made the payment on his own behalf. The fact that he could recover a proportion of what he had paid from the sub-partner is no reason for holding that he had paid it on the latter's behalf. Such a suit is governed by Art. 120. (*Venkatasubba Rao, J.*) SEENAYYA *v.* RAMALINGAYYA **57 Mad. 347=148 I.C 204=6 R.M. 447 (2)=1933 M.W.N. 1382=38 L.W. 858=A.I.R. 1934 Mad. 12=65 M.L J. 789.**

———**Art. 61**—Applicability—Suit by agent for balance due on account—Starting point—Repudiation of transaction and refusal to pay—Art. 85 and not Art. 61 applies. *See* LIMITATION ACT, ART. 85. **A.I.R. 1932 Bom. 593.**

———**Art. 61**—*Applicability — Suit by* de facto *guardian to recover expenses incurred on behalf of ward.*

A suit by a *de facto* guardian against his ward to recover the expenses incurred by him on behalf of the ward is governed by Art. 61 of the Limitation Act and the suit must be brought within three years of the advance made by him. Even assuming the proposition that a guardian cannot sue a minor during his minority for expenses incurred on his behalf is correct in the case of a *de jure* guardian, it cannot apply to a *de facto* guardian between whom and the minor no jural relationship at all exist. The very term *de facto* guardian as opposed to *de jure* guardian implies that there is not a jural relationship between them, though there may be analogous rights and liabilities conferred by a particular law upon a *de facto* guardian. Again, whatever implied contract there may be between an agent and his principal

LIMITATION ACT (1908), Art. 61.

for the agent to be indemnified by the principal for loss incurred, no such contract can be implied in the relationship of a *de facto* guardian and the ward. It would follow, therefore, that the *de facto* guardian is only in the position of a person advancing monies on behalf of another. Art. 61 would, therefore, apply to a suit by him and there is no valid reason for holding that limitation must commence from the date of the ward's attaining majority. It must be borne in mind that the *de facto* guardian is at liberty to terminate the connection at any moment if he finds that he is incurring expenses on behalf of the minor without being recouped from the estate of the minor. (*Dalip Singh and Bhide, JJ.*) PIARE LAL *v.* LAJJIA RAM **17 Lah. 78=159 I.C. 203=8 R.L. 356=37 P.L.R. 246=A.I.R. 1935 Lah. 437.**

——**Art. 61**—Applicability—Suit to enforce charge on immovable property—Suit under S. 177, B. T. Act—Art. 132 applicable not Arts. 61, 91 and 120. *See* LIMITATION ACT, ART. 132. **35 C.W.N 678=A.I.R. 1931 Cal. 493.**

——**Arts. 61, 83 and 120**—*Applicability—Suit by receiver to recover money due to estate—Money spent in suit for—Limitation.*

When a receiver or manager is appointed by the Court, he is appointed on behalf of all persons interested in the property. Hence the expenses incurred by the receiver of an estate in instituting a suit to recover money due to the estate are incurred by him on behalf of and for the person who owns the estate and they are "money payable to the plaintiff for money paid for the defendant" within the meaning of Art. 61. Therefore a suit by the quondam receiver to recover the amount spent by him in instituting a suit on behalf of the estate is governed by Art. 61, and not by Art. 83 or 120, Limitation Act. The circumstance that the receiver was also benefited by the suit does not make the suit any the less a suit on behalf of the owner of the estate or take it out of the purview of Art. 61. 34 M. 167; 32 C. 582 and 38 M. 260, Expl. (*Madhavan Nair, J.*) CHEERATH VEETIL KARNAVAN *v.* NARAYANA AYYAR. **157 I.C. 746=8 R.M. 160=1935 M.W.N. 598=42 L.W. 680=A.I.R. 1935 Mad. 594=69 M.L.J. 539.**

——**Art. 61**—*Breach of compromise—Term of payment to creditor—On breach, payment by other party—Limitation—Starting point.*

Where in a compromise one party agrees to pay off certain creditor and on the failure of fulfilment of the term the other party pays off the creditor, then limitation runs from the date of the payment by the other party to creditor. (*Tek Chand and Skemp, JJ.*) AIJAZ HUSSAIN *v.* MAQBUL HUSSAIN. **156 I.C. 836 =8 R.L. 38=A.I.R. 1935 Lah. 307.**

——**Arts. 61 and 83**—*Defendants purchasing goods and getting transaction entered in plaintiff's name—Decree against plaintiff by vendor—Suit by plaintiff against defendant for decree amount without paying decree amount—Maintainability of suit—Limitation.*

Defendant purchased goods and wrongfully got the transaction entered in the name of the plaintiff. A suit by the vendor against the plaintiff was decreed. Plaintiffs before paying the decree amount sued the defendant for the amount,

Held, that Art. 83 has no application as there was no contract of indemnity, that the article applicable to such a case was Art. 61, but that the present suit was premature as plaintiffs had not paid the amount and that the cause of action will arise only on actual payment. 13 Cal. 155; 31 P.R. 1904 and 26 Mad. 322, Rel. on.

LIMITATION ACT (1908), Art. 62.

(*Addison and Bhide, JJ.*) DES RAJ HUKAM CHAND *v.* LACHHI RAM PRABH DAYAL. **147 I.C. 57=6 R. L. 324=A.I.R. 1933 Lah. 404.**

——**Art. 61**—Inapplicability—Co-mortgagor redeeming mortgage—Suit for contribution. *See* LIMITATION ACT, ART. 132. **1935 O.W.N. 278=A.I.R. 1935 Oudh 245.**

——**Art. 61**—*Invalid deposit.*

When the deposit, for the recovery of which the action is brought, is subsequently held to be invalid and insufficient, it cannot be said that limitation commenced to run from that date. (*Bisheshwar Nath and Nanavutty, JJ.*) MURLIDHAR *v.* NAUNIHAL SINGH. **8 Luck. 79=I.R. 1932 Oudh 297=138 I.C. 137=9 O. W.N. 414=A.I.R. 1932 Oudh 222.**

——**Art. 61**—*Starting point.*

For the purposes of Art. 61, limitation runs not from the date of deposit but from the date of its appropriation. 48 I.C. 336 and 36 I.C. 392, Foll. (*Bisheshwar Nath and Nanavutty, JJ.*) MURLIDHAR *v.* NAUNIHAL SINGH. **8 Luck. 79=I.R. 1932 Oudh 297=133 I.C. 137=9 O.W.N. 414=A.I.R. 1932 Oudh 222.**

——**Arts. 61, 120 and S. 10**—Suit by trustee of temple to recover money from former trustee—Art. 120 applies and neither S. 10 nor Art. 61 applies. *See* LIMITATION ACT, ARTS. 120 AND 61 AND S. 10. **A.I.R. 1934 Mad. 542.**

——**Arts. 61, 83 and 116**—*Vendor and purchaser—Purchaser directed to pay off incumbrances but defaulting—Vendors damnified—Suit against vendee—Limitation for—Starting point.*

Where a vendee required to pay off vendor's incumbrances defaults in paying, and the vendor sustains loss thereby, a suit by the vendor for relief against the vendee is governed by Art. 116 read with Art. 83 or Art. 61 and the starting point for limitation is the date when the vendor is actually damnified. 34 All. 429, Not Foll. (Case-law considered.) (*Tek Chand and Monroe, JJ.*) GULZARI MAL *v.* MAGHI MAL. **14 Lah. 380=I.R. 1933 Lah. 88=141 I.C. 435=34 P.L.R. 156=A.I.R. 1933 Lah. 109.**

——**Art. 62**—*Account against trustee—Suit for.*

Art. 62 does not apply to an equitable claim against a trustee liable to account for an account and ascertainment of what may be due. (*Lord Thankerton.*) ANNAMALAI CHETTIAR *v.* MUTHUKARUPPAN CHETTIAR. **58 I.A. 1=8 Rang. 645=33 L.W. 30=1931 M.W.N. 137=33 Bom.L.R. 168=54 C.L.J. 175=I.R. 1931 P. C. 65=130 I.C. 609=35 C.W.N. 145=A.I.R. 1931 P.C. 9=60 M.L.J. 1 (P.C.).**

——**Art. 62**—*Action for money under void agreement—Starting point of limitation.*

In a suit to recover money paid under a void agreement, the *terminus a quo* for purposes of limitation is the date of the agreement, that being the time at which (in the absence of special circumstances) the agreement was discovered to be void within the meaning of S. 65 of the Contract Act. 50 Cal. 929 (P.C.), Rel. on. (*Lord Russell of Killowen.*) HANSRAJ GUPTA *v.* OFFICIAL LIQUIDATORS OF THE DEHRA DUN MUSSORIE TRAM CO. **60 I.A. 13=54 All. 1067=37 C.W.N. 379 =1933 A.L.J. 175=142 I.C. 7=I.R. 1933 P.C. 43= 35 Bom.L.R. 319=37 L.W. 445=57 C.L.J. 166= 1933 M.W.N. 190=A.I.R. 1933 P.C. 63=64 M.L.J. 403 (P.C.).**

——**Arts. 62, 97 and 116**—*Advance of money for mortgage by plaintiff — Repudiation of mortgage plaintiff—Suit for money paid.*

Where a plaintiff, who had advanced money on a mortgage, repudiates it himself and files a suit for the

LIMITATION ACT (1908), Art. 62.

money paid, such a suit is not a suit for compensation for breach of contract and is governed either by Art. 62 or by Art. 97, Limitation Act, according as to whether the contract is void or voidable and not Art. 116. If breach had been committed by defendant, Art. 116 would have been applicable. 40 Bom. 614, Rel. on; A. I. R. 1925 Nag. 130, Ref. (*Addison and Agha Haidar, JJ.*) MILKHA SINGH *v.* FAZAL DIN. **6 I.R. (Lah.) 74=145 I.C. 186=34 P.L.R. 96=A.I.R. 1933 Lah. 581.**

———**Arts. 62, 106, 113 and 120**—*Applicability—Agreement of partnership—Undertaking to finance litigation of third party—Realisation of money by defendant—Suit for plaintiff for accounts after notice—Limitation.*

Plaintiff and defendant entered into a written agreement on 4-7-1918, under which, they jointly agreed to finance certain litigations and to share the profits half and half. Defendant realised the amounts so advanced partly in cash and partly in the shape of immovable properties. After certain notices had passed between the parties, the plaintiff demanded of the defendant on 2-10-1925, accounts of the transactions. Getting no reply thereto, he filed a suit on 27-10-1926, for accounts of the partnership.

Held, that neither Art. 62 nor Art. 106 of the Limitation Act applied to the case, but that Art. 113 or 120 could both apply, and that the suit was in time under either article. (*Wadia, J.*) KASTURCHAND *v.* HARI GOVIND. **154 I.C. 680=7 R.B. 365=36 Bom. L.R. 1068=A.I.R. 1934 Bom. 491.**

———**Arts. 62 and 120**—*Applicability—Claim by administrator to account against debtor of estate of deceased.*

Art. 62 does not apply to a claim for an account against a trustee. Where the defendant is not holding under an express trust and the claim against him is an equitable claim, it is governed by Art. 120, and cannot be barred so long as there is no denial or infringement of the right claimed. Art. 62 will not apply to such a claim. (*Rempfry, J.*) ELIZA MARTIN, *In the goods of.* **62 Cal. 120=157 I.C. 936=A.I.R. 1935 Cal. 511.**

———**Art. 62**—Applicability—Contract of indemnity—Suit to enforce—Art. 116 applies, not Art. 62 or 97. *See* LIMITATION ACT, ART. 116. **A.I.R. 1932 All. 358.**

———**Art. 62**—Applicability—Contract of sale of land—Suit against stranger in possession by vendee—Dismissal of—Subsequent suit against vendor for damages—Art. 116 applies, not Art. 62 or 97. *See* LIMITATION ACT, ART. 116. **A.I.R. 1933 Mad. 126=64 M.L.J. 336.**

———**Arts. 62 and 120**—*Applicability—Decree setting aside execution sale in suit by stranger—Absence of saleable interest in judgment debtor—Suit by purchaser for refund of purchase-money—Limitation.*

Plaintiff was the auction purchaser at an execution sale which was duly confirmed, the purchase price having been deposited in Court. Subsequently a stranger obtained a decree setting aside the sale, on the ground that he (the stranger) had purchased the property from the judgment debtor and that the latter had therefore no saleable interest on the date of the sale. Plaintiff who was deprived of the property brought a suit for refund of the purchase price deposited by him in Court.

Held, that the suit was governed by Art. 62 of the Limitation Act and not by Art. 120, as the suit was in substance one for money had and received. (*Cornish, J.*) SIVARAMARAJU *v.* SECRETARY OF STATE FOR INDIA. **159 I.C. 750=8 R. M. 542=41 L.W. 305=1935 M.W.N. 338=A.I.R. 1935 Mad. 351=68 M.L.J. 630.**

LIMITATION ACT (1908), Art. 62.

———**Art. 62**—*Applicability—Failure of consideration—Suit on original liability—Starting point of limitation.*

On 1st October, 1921, a suit instituted by *L* against *D* for the recovery of a certain sum of money was withdrawn and dismissed. *D* executed a mortgage in favour of *J* of certain land and *J* made an entry in the *bahi* of *L* admitting liability for the sum originally claimed from *D*. Subsequently there was trouble over the mutation of the mortgage and *J* came into Court as a plaintiff against *D* and his suit was eventually dismissed on appeal on 26th June, 1923. *L* instituted a suit against *D* and others claiming the amount,

Held, that the suit was governed by Art. 97 and not by Art. 62 and that time commenced to run from 26th June, 1923, when owing to *J*'s failure to secure possession the original liability of *D* revived. (*Harrison and Tek Chand, JJ.*) LAL DITTA *v.* DOST MAHOMED. **13 Lah. 188=I.R. 1932 Lah 386=137 I.C. 828=33 P.L.R. 440=A.I.R. 1932 Lah 382.**

———**Art. 62**—Applicability—Mesne profits—Undivided lands—Claim between co-owners—Art. 120 applies—Rent received cannot be considered to be money payable as money received for her use. *See* LIMITATION ACT, ART. 120. **A.I.R. 1931 Rang. 150.**

———**Arts. 62 and 127**—*Applicability—Partition suit—Income accruing between preliminary decree and final decree—Suit for share in such income—Limitation.*

When once a partition has taken place and property has been divided, a suit for a share in any property that remained over or that was subsequently acquired by one of the members of the family, *e.g.*, debts due to the family realised, would not be a suit to enforce a share in joint ancestral property and would not be governed by Art. 127. On the other hand, although a suit for partition will effect a severance of the joint family status, it does not *ipso facto* divide the property; and where a preliminary decree is passed which declares that the property is joint and that the parties to the suit have a right to share in the property according to defined shares, it cannot be said that a partition is effected until further proceedings are taken and a final decree is passed. The income of the joint family property, which accrues during the period between the preliminary and final decrees in a partition suit constitutes joint family property; and, if that is not divided by the final decree for partition, a suit to enforce a share in such income is governed by Art. 127, Limitation Act (and not by Art. 62). (Case-law referred.) (*Staples, A.J.C.*) MANSARAM *v* CHAMPALAL. **31 N.L.R. 304=8 R.N. 1=156 I.C. 672=A.I.R. 1935 Nag. 137.**

———**Art. 62**—*Applicability—Principal and agent—Suit for accounts.*

Art. 89 applies to suits for accounts between principal and agents. The period begins to run from the date on which accounts are demanded and refused during the continuance of the agency or from the date on which the agency terminates. Such a suit is not governed by Art. 62 as that Article applies to cases where a definite sum of money had been received by the defendant and which he was to hold for the use of the plaintiff. (*Niamatullah and Rachhpal Singh, JJ.*) MOTI LAL *v.* RADHEY LAL **55 All. 814=147 I.C. 529 (2)=6 R.A. 484=1933 A.L.J. 1009=A.I.R. 1933 All. 642.**

LIMITATION ACT (1908), Art. 62.

——**Art. 62**—*Applicability—Profession tax illegally collected by Local Board—Suit for refund—Limitation.*

A suit for the refund of money illegally collected as profession tax is not a suit for compensation or damages and does not fall within S. 225 of the Madras Local Boards Act. Such a suit is virtually one for money had and received and the period of limitation is three years under Art. 62 of the Limitation Act. (*Sundaram Chetty, J.*) TALUK BOARD OF DEVAKOTTAH *v.* CHOCKALINGAM CHETTIAR. **1932 M.W.N. 1089.**

——**Art. 62**—Applicability— Suit for arrears of maintenance charges on property—Art. 123 applies, not Art. 62. *See* LIMITATION ACT, ART. 123. **35 C.W.N. 307=A.I.R. 1931 Cal. 670.**

——**Art. 62**—*Applicability—Suit for recovery of arrears of revenue.*

A claim for arrears of revenue is governed by Art. 62 and not Art. 131 which applies only to a suit to establish a periodically recurring right. 34 All. 246; 5 Pat. 249, Foll.; 34 Bom. 349; 15 Bom. 135, 22 Bom. 669; 38 Mad. 916 (F.B.), Ref. to. (*Madgavkar and Barlee, JJ.*) JANARDHAN TRIMBAK *v.* DINKAR HARI. **55 Bom. 193=I.R. 1931 Bom. 289=131 I. C. 465=33 Bom. L.R. 127=A.I.R. 1931 Bom. 189.**

——**Art. 62**—Applicability—Suit to recover money erroneously paid—Time limit—Art. 97 applies, not Art. 62, as the suit is based on failure of consideration of an existing contract. *See* LIMITATION ACT, ART. 97. **32 P.L.R. 457=A.I.R. 1931 Lah. 448.**

——**Art. 62**—Applicability—Suit for refund of purchase-money—Registered deed of sale—Breach of covenant for title—Starting point—Art. 116 applies, not Art. 62 or 97. *See* LIMITATION ACT, ART. 116. **25 S.L.R. 173=A.I.R. 1931 Sind 141.**

——**Arts. 62 and 29**—*Claim for money paid to save property wrongfully attached.*

Where the plaintiff's claim is for recovery of the amount of money he has voluntarily paid to the Official Liquidator to save his property which had been wrongfully attached by the latter and for damages, Art. 62 and not Art. 29 applied. 8 Bom. 17; 21 M. 431, Dist.; 38 M. 972, 39 A. 322 and 38 A. 676, Rel. on; 55 I.C. 786, Not Foll.; 53 M. 621, Foll. (*Nanavutty, J.*) OFFICIAL LIQUIDATOR *v.* RAMCHARAN LAL. **9 Luck. 577=6 R.O. 410=148 I. C. 448=11 O.W.N. 398=A.I.R. 1934 Oudh 158 (2).**

——**Art. 62**—Inapplicability—Assignment of mortgage bond which had been re paid—Suit against assignor by assignee. *See* LIMITATION ACT, ART. 120. **A. I.R. 1935 Pat. 159.**

——**Art. 62**—Inapplicability—Decree obtained by three mortgagees—Property sold—Decrees of prior and second mortgagees satisfied and execution recorded as satisfied—Attachment of balance by third mortgagee—Application for amendment of decree by second mortgagee allowed by raising decretal amount—Application by second mortgagee in execution proceedings of third mortgagee for payment of money to him dismissed—Subsequent suit for payment of the amount. *See* LIMITATION ACT, ART. 11. **A.I.R. 1935 Lah. 642.**

——**Art. 62**—Land acquisition—Money paid to person apparently entitled—Suit by person having interest in land for money so paid. *See* LIMITATION ACT, ART. 120. **A.I.R. 1935 Pat. 42.**

——**Art. 62**—*Landlord and tenant— Claim for refund of premium.*

A claim for the refund of premium paid by the tenant is governed by Art. 62 and not Art. 120. (*Beaumont, C. J. and Rangnekar, J.*) ABASBHAI SHAIKH *v.* BHIMJI. **I.R. 1932 Bom. 113=135 I.C. 801=33 Bom.L.R. 1563=A.I.R. 1932 Bom 86.**

——**Arts. 62 and 97**—*Plaintiff on majority repudiating mortgage in his favour—Suit for mortgage—Amount—Limitation for.*

Where the plaintiff had immediately on attaining majority repudiated a mortgage executed in his favour during his minority and subsequently brought the present suit for the refund of the mortgage amount paid out of his estate,

Held, that the suit was governed by three years' period of limitation under Art. 62 or Art. 97 according as to whether the contract was void or voidable. (*Addison and Agha Haidar, JJ.*) MILKHA SINGH *v.* FAZAL DIN. **6 I.R. (Lah.) 74—145 I.C. 186=34 P. L.R. 96=A.I.R. 1933 Lah. 581.**

——**Art. 62**—*Scope and applicability—Subscription collected for construction of bridge—Suit by District Board against Collector—Limitation—Starting point.*

Art. 62 of the Limitation Act contemplates a suit in which the plaintiff is entitled to obtain the whole of the money received as soon as it is received. It does not apply where the plaintiff is not entitled to the money when it was received by the defendant. The defendant promised to pay to the plaintiff a District Board, a certain amount by way of personal contribution for the purpose of constructing a bridge over a river and he also collected subscriptions for the same purpose. The District Board sued through its President to recover from the defendant both the amounts. The evidence in the case showed that the construction of the bridge could not have been begun earlier than 1923 and the suit was instituted on 5th September, 1925. The lower Court decreed the suit in respect of the personal contribution but held that the claim as regards the subscription collected was barred by limitation.

Held, in appeal, that the claim in respect of the subscription amount was not barred by limitation, Art. 120 and not Art. 62 of the Limitation Act being applicable. The subscription became payable only when definite steps had been taken towards the construction of the bridge. (*Madhavan Nair, J.*) THE DISTRICT BOARD OF RAMNAD *v.* MAHOMED IBRAHIM SAHIB. **I.R. 1933 Mad. 305=1933 M.W.N. 368=37 L.W. 631=143 I.C. 496=A.I.R. 1933 Mad. 524=64 M.L.J. 574.**

——**Art. 62**—*Suit to recover money—Money retained by defendant as stake-holder till decision of suit—Limitation—Starting point.*

Where the understanding between the plaintiff and the defendant was that the defendant be allowed to retain a certain sum of money as a stake-holder till it was judicially decided as to whether the plaintiff was entitled to it, a suit to recover the money instituted within three years from the date of decision is within time. (*Niamatullah, J.*) KAILASH NATH *v.* CHANDRA BHAN. **156 I.C. 970=8 R.A. 65 (2)=1935 A.W.R 500.**

——**Art. 62**—*Void sale—Refund of consideration—Suit for—Possession handed over to vendee—Starting point.*

Where a sale is void *ab initio*, and possession is not given to the purchaser, a suit to recover the purchase-money would be governed by Art. 62. Where, however, the title is imperfect and possession is not handed over and it is subsequently discovered that the contract of sale became void, Art. 97 would apply to a suit to recover the purchase-money on an existing consideration which afterwards failed, from the time when the purchaser endeavoured to obtain possession of the property and

LIMITATION ACT (1908), Art. 62-A.

being opposed found himself unable to obtain possession; but where possession has been handed over by the vendor to the vandee, the cause of action would not arise till the vendee is dispossessed. 25 Bom. 593 ; 19 Cal. 123 (P.C.) ; 38 Mad. 887 , 37 Bom. 538 ; 46 Mad. 40 ; 26 All. 519, Ref. (*Patkar and Broomfield, JJ.*) RATANBAI *v.* GHASHIRAM. **55 Bom. 565=I.R. 1932 Bom. 37=134 I.C. 1157=33 Bom.L.R. 1092=A.I.R. 1932 Bom. 36.**

———**Arts. 62-A and 89**—Applicability—Suit by principal for moneys misappropriated by agent. *See* LIMITATION ACT (1908), ART. 89. **A.I.R. 1934 Cal. 238.**

———**Art. 64**—*Account stated—Entries amounting to —Limitation.*

The accounts ran from 11th July, 1913, to 5th February, 1914. On the 31st March, 1914, a balance was struck and was followed by two items on each side. Interest ran on this amount and a second balance was struck on 29th April, 1921. A suit to recover the amount due on the second settlement with interest was instituted on 3rd April, 1925.

Held, that the account was not a mutual open and current account within the meaning of Art. 85 but an account stated within that of Art. 64 and that therefore the suit was within time. (Case law reviewed.) (*Shadi Lal, C.J. and Walker, J.*) JESA RAM DIWAN CHAND *v.* LACHMAN DAS. **130 I.C. 570.**

———**Art. 64**—"*Account stated*"—*Entry signed by creditor and debtor admitting amount to be due.*

A document containing an entry signed by a creditor that on making account on a particular day in respect of the old sarkat and after deducting repayments, a certain amount is found due including the interest, and also an entry signed by the debtor admitting the amount to be due cannot be regarded as "accounts stated" within the meaning of Art. 64. (*Subhedar, A.J.C.*) SHAMLAL *v.* GULABCHAND. **159 I C. 447 (2)=8 R.N. 129=A.I.R. 1935 Nag. 221.**

———**Art. 64**—"*Account stated*"—*Meaning.*

The expression "account stated" has a technical meaning where the accounts were gone into, a balance was struck and the defendant signed the same but there was nothing before the Court to show that the several items for which credit had been given to the defendant were due to him from the plaintiff,

Held, that it was not a case of account stated and that Art. 64 was inapplicable. (*Banerji and King, JJ.*) GANESH *v.* MALLU MAL GIRDHAR DAS. **I.R. 1931 All. 435=131 I C. 867=A.I R. 1931 All. 375.**

———**Art. 64**—"*Account stated*"—*Meaning.*

Art. 64 contemplates an account stated by one party and an account stated by the other party, that is, two accounts and not merely an account stated by a single party. In other words there must be reciprocal demands.

Quere.—Whether the account must be stated within the period of limitation? (*Mukerji and Bennet, JJ.*) GIRDHARI LAL *v.* BISHUN CHAND. **54 All. 506=I.R. 1933 All. 26=140 I.C. 783=1932 A.L.J. 279=A.I.R. 1932 All. 461.**

[Reversed 61 I.A. 273 (P.C.)].

———**Art. 64**—*Account stated—Principles underlying—Payments may be merely in reduction of indebtedness.*

The essence of an account stated is not the character of the items on one side or the other but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable. Such a transaction is

LIMITATION ACT (1908), Art. 64.

in truth bilateral, and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debts as true and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence there is mutual consideration to support the promises on either side and to constitute the new cause of action. The account stated is accordingly binding, save that it may be reopened on any ground—for instance, fraud or mistake—which would justify setting aside any other agreement. It follows from the idea of an account stated that whatever the consideration for each item, every item must appear in terms of money, since what is being agreed is matter of account ; it is also clear that in that great class of cases where the whole dealings between the parties are financial, the items of account can only be in terms of money and can only consist of payments of one to the other and *vice versa*. There can be account stated although the balance of indebtedness is throughout in favour of one side. It is irrelevant whether the debt in favour of the final creditor is created at the outset by one large payment or consists of several sums of principal and several sums of interest. Nor is it material whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealings. In any event items must be ascertained and agreed on each side before the balance can be struck and settled. (English case-law discussed.) 54 All. 506, Reversed. (*Lord Wright.*) BISHUN CHAND *v.* GIRDHARI LAL. **61 I.A. 273=56 All. 376=36 Bom.L.R. 723=1934 M.W.N 786=6 R.P.C. 166=150 I.C. 6=40 L.W. 71=1934 A.L.J. 623=59 C.L.J. 535=38 C.W.N. 961=11 O.W.N. 1003=4 A.W.R. 174=A.I.R. 1934 P.C. 147=67 M.L. J. 110(P.C.).**

———**Art. 64**—Account stated—Varieties and consequences of. *See* ACCOUNTS. **61 Cal. 64=A.I.R. 1934 Cal. 441.**

———**Art. 64**—*Account taking—Striking of balance—Suit to recover amount—Limitation.*

Balance struck after going into accounts implies a promise to pay and a suit brought to recover the amount secured by it is governed by Art. 64. (*Tek Chand and Coldstream, JJ.*) GANESH DAS GOBIND RAM *v.* HAR BHAGWAN. **I.R. 1932 Lah. 506=138 I.C. 542=33 P.L.R. 213=A.I.R. 1932 Lah. 273.**

———**Art. 64**—*Applicability—Account stated must be mutual.*

Art. 64 is applicable even when the account is between a creditor and a debtor and consists of loans on one side and repayments on the other. It is not necessary that the account must be mutual. (*Coldstream and Bhide, JJ.*) SOHAN LAL *v.* ARYA MEGH UDHAR SABHA. **159 I.C. 677=8 R.L. 414=37 P.L.R. 126=A.I.R. 1935 Lah. 877.**

———**Art. 64**—*Applicability—Account stated—Kinds of*—"*Real account stated*"—*Meaning of.*

An account stated may only take the form of a mere acknowledgment of a debt, and though, if those circumstances amount to a promise, and the existence of a debt may be inferred, that can be rebutted by showing that there is no real debt at all. On the other hand, there is another form of account stated, a "real account stated," which contains entries on both sides and in which the parties have agreed that the items on one side should be set against those on the other, and the balance only should be paid ; the items on the smaller side are set off

LIMITATION ACT (1908), Art. 64.

and deemed to be paid by those on the larger side, and there is a promise for good consideration to pay the balance. It is not necessary, to make out a real account stated, that the debts should be debts *in praesenti*, or that they should be legal debts. Plaintiff had been employed under the defendant from 1913 to 1928. In the books of the defendant's business there were accounts of drawings by plaintiff from time to time; there was no account on the other side as the plaintiff's salary was never fixed. In 1928, an account was drawn up by the defendant's manager, showing credits for salary and debits for drawings and ending in a balance in favour of the plaintiff.

Held, it was an account stated and involved a promise to pay the balance for good consideration. (*Lord Atkin.*) ELVIRA RODRIGUES SIQUERIA *v.* GONDICALO HYPOLITO CONSTANCIO NORONHA. **38 C.W.N. 813=151 I.C. 90=7 R P.C. 30=59 C.L J. 494=40 L.W. 12=36 P.L R. 57=1934 M.W.N. 702=11 O.W.N. 997=4 A.W.R. 166=A.I.R. 1934 P.C. 144=67 M.L J. 103 (P C.).**

[R. 61 I.A. 273 (280).]

———**Art. 64**—*Applicability—Account settled—Subsequent mutual dealings—Suit to enforce stated account—Limitation.*

Where the transaction between the parties were conducted as between a debtor and a creditor and on a certain date the balance was struck and it was agreed that the debtor should pay interest from that date on the amount found due by him and the creditor sued to enforce his rights.

Held, that the suit was on an account stated and that it was governed by Art. 64 or perhaps Art. 57 and not by Art. 85.

Held, further, that the mere fact that subsequent to the date of the striking of the balance there were four items on each side of the account did not have the effect of converting that account into a mutual, open and current account, and of reducing the period of limitation from 6 years to 3 years. (*Shadi Lal, C. J. and Coldstream, J.*) MILKHI RAM HEM RAJ *v.* RUP CHAND LACHHMAN DAS. **I R. 1931 Lah. 420=131 I.C. 292=32 P.L R. 65=A I.R. 1931 Lah. 233.**

———**Arts. 64, 115 and 120**—Partnership dissolved—Accounts adjusted—Suit governed not by Art. 64 but by Art. 115 or Art. 120—Art. 64 is no bar to a suit on unsigned adjustment. *See* LIMITATION ACT, ARTS. 120, 115 AND 64. **27 S.L.R. 308=A I.R. 1933 Sind 324.**

———**Art. 64**—*Suit on account stated—Limitation.*

In order to bring a case within Art. 85, it is necessary that the dealings on either side must be so independent of each other that neither party giving credit to the other relied on the debt which he had against him. Where the dealings between the parties were simple transactions between principal and agent and a document was passed by the *munim* of the defendants containing a verbatim copy of the accounts with a statement at the end that a certain amount was due to the plaintiff with interest.

Held, that there was no mutuality and a suit to recover the amount was governed by Art. 64 and not Art. 85. (*Tek Chand and Monroe, JJ*) DASAUNDHI RAM *v.* MOOL CHAND. **14 Lah. 14=I.R. 1932 Lah. 691=140 I.C. 187=34 P.L.R. 381=A.I.R. 1933 Lah. 12.**

———**Art 65**—*Applicability—Suit for indemnity by commission agent.*

Art. 65 does not apply unless there is an agreement between the parties to pay the loss immediately on its being ascertained and in the absence of any specified

LIMITATION ACT (1908), Art. 66.

time or specified contingency. Art. 65 does not apply. So a suit by a commission agent to recover loss on the transactions entertained on behalf of his constituents is governed by Art. 83 and not by Art. 65. (*Patkar and Baker, JJ.*) HARAKCHAND *v.* SUMATILAL. **136 I.C. 481=I.R. 1932 Bom. 177=33 Bom. L.R. 1200=A.I.R. 1932 Bom. 25.**

———**Art. 65**—Applicability — Surety—Execution against—Art. 182 applies. *See* LIMITATION ACT, ART. 182. **A.I.R. 1933 Mad. 219.**

———**Art. 66**—*Applicability—Suit based on personal covenant in registered mortgage bond.*

The appropriate article of the Limitation Act in the case of a suit based on a personal covenant in a registered mortgage bond is Art. 116 and not Art. 66. 52 Mad. 105, Foll (*Pearson and Jack, JJ.*) UMAPADA TRIVEDI *v.* HARIPADA SAHA. **I.R. 1931 Cal. 629=133 I.C. 101=35 C.W.N. 1030=53 C.L.J. 520=A I R. 1931 Cal. 801 (1).**

———**Arts 66, 67 and 116**—Mortgage — Personal relief—Limitation —Art. 116 applicable, not Art. 66 or 67. *See* LIMITATION ACT, ART. 116. **13 Pat. 228=A I.R. 1934 Pat. 578.**

———**Art. 66**—*Second mortgage—Clause providing for redemption at the same time as the first mortgage—Suit on second mortgage—Starting point of.*

A mortgage deed, dated 13—2—1894, recited a previous mortgage and stated that the mortgagor would redeem the mortgage at the same time when he would redeem the first mortgage. In a suit on the second mortgage,

Held, that the condition regarding the time for redemption did not amount to specifying a day for payment within the meaning of Art. 66 and as no date was specified, the period of twelve years to enforce the second mortgage commenced from the date of the mortgage, 13—2—1894. (*Jai Lal, J.*) BHAGWAN SAHAI *v.* BHURIA. **I R. 1933 Lah. 41 (1)=140 I.C. 855=34 P.L.R. 37=A.I.R. 1933 Lah. 84.**

———**Art. 66**—*Simple bond—Money payable within one year—Limitation—Starting point.*

Where a simple bond sets out firstly that the money is payable on demand and further on, it sets out that the whole sum with interest should be paid within one year, it is not open to the debtor to make a payment before the end of the period of one year fixed, as the bond is not payable within that period unless the creditor makes a demand. Art. 66 applies to a suit on such a bond and the period of limitation runs not from the date of execution but from the expiry of the period of one year specified in the bond. (*Bennet, J.*) UMRAO SINGH *v.* MANGLA. **154 I.C. 521=7 R.A. 772=1935 A.L.J. 381=1935 A.W.R. 205=A.I.R. 1935 All. 413.**

———**Arts. 66 and 68**—*Simple bond—Money payable after specified period—Breach of condition—Waiver—Limitation.*

Where in a simple bond it is provided that, if the monthly interest is not paid or if the principal money lent is not paid at the end of a specified period, the creditor may sue, even though there is a breach of the condition for payment of interest, still that is a matter over which the creditor has a right of waiver and limitation will only begin to run from the period stipulated in the bond for payment. In such cases, the clause regarding right to sue on breach of condition regarding interest is exclusively for the benefit of the creditor. The two Arts. 66 and 68 must be read together in the case of such bonds; and limitation runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken.

LIMITATION ACT (1908), Art 68.

The two Arts. 66 and 68 read together, are tantamount to Art. 132 and the expression "when the money sued for becomes due" would apply to either Art. 66 or Art. 68. 1933 All. 235 (F.B.), Rel. on. (*Bennet, J.*) NARAIN DAS *v.* MANOO LAL. **157 I.C. 409=8 R.A. 183=1935 A.L.J. 341=1935 A.W.R. 252=A. I. R. 1935 All. 405.**

———**Arts. 68 and 66**—Simple bond—Money payable after specified period—Breach of condition—Waiver—Limitation. *See* LIMITATION ACT, ARTS. 66 AND 68. **A.I.R. 1935 All. 405.**

———**Art. 73**—*Applicability — Promissory note by Hindu father—Suit against son.*

A suit against the Hindu son, on a promissory note executed by his father is governed by Art. 73 and limitation runs from the date of the note. The father executed the promissory note on 13-6-1923. He acknowledged his liability on 1-6-1926. He died in June, 1928. The creditor unaware of his death, brought a suit against the father and that was dimissed, The present suit against the son was brought on 14 8-1929.

Held, that on the date of the present suit, the debt could not have been enforced against the father and *a fortiori* the son was not bound. 33 M. 308; 5 Pat. 746, Foll; 23 All 206, Not. Foll. (*Beaumont, C. J. and Murphy, J.*) LAKSHMAN *v.* MAHABLESWAR. **135 I.C. 804=I. R. 1932 Bom. 116=33 Bom. L. R. 1234=A I.R. 1931 Bom. 542.**

———**Art. 73**—*Pro-note, accompanied by security bond—Suit on—Limitation—Amount of interest recoverable.*

A suit based on a pro note, accompanied by a security bond of the same date, hypothecating certain property specified in the deed, brought after three years after the execution of the pro note is within time by virtue of the security bond, though brought after the pro note has become barred by time. But the plaintiff cannot claim more interest on the pro-note than what is legally recoverable under it in spite of the security bond which is intended to be limited to the amount due on account of the principal and interest on the pro note which could be legally recoverable. (*Raza and Smith, JJ.*) BENI MADHO *v.* MAHOMED ISHRAT ALI **140 I.C. 460=I.R. 1933 Oudh 2=9 O.W.N. 912=A I.R. 1932 Oudh 286.**

———**Art. 74**—*Instalment bond—Default—Suit on—Limitation—Absence of default clause.*

In the absence of a default clause making the whole amount payable on default of one or more instalments, a suit on the bond must be considered to be a suit upon a series of causes of action accruing as and when the instalments fall due. Plaintiff will be entitled to a decree for such of the instalments as have fallen due within three years of the date of suit. (*Weston, I.C.S.*) NATHU *v.* SARWAN. **1935 A M L.J. 45.**

———**Art. 74**—Instalment bond — Enforcement of penalty clause—Limitation for claim—Art. 75 applies—The creditor by giving up a part of the claim cannot fall back on Art. 74. *See* LIMITATION ACT, ART. 75. **1934 A.L J. 1035=A I.R. 1934 All. 661 (F.B.).**

——— **Arts. 74, 75 and 80**—Instalment bond—Interest to be paid monthly and principal after three years—Default clause—Suit instituted beyond three years from date of default—Suit barred under Art. 80—Arts. 74 and 75 have no application *See* LIMITATION ACT, ARTS. 80, 74 AND 75. **34 P L.R. 145=A.I.R. 1933 Lah. 548.**

———**Art. 75**—*Advantage of waiver—If available against surety.*

LIMITATION ACT (1908), Art. 75.

The advantage of the waiver described in Art. 75 can be taken by the creditor against the principal debtor only and not against a person standing surety for payment of the debt, because the former are parties to the transaction, *viz*, the payment of the sum and the acceptance thereof. The underlying principle is that the debtor is shown an indulgence and he cannot turn round and say that the creditor's remedy has become barred because he was kind to him. But the same cannot be said of the surety. It is to his interest that the debt is cleared as soon as possible and if he is no party to the payment which extends limitation, the cause of action to sue him for the whole money due under the bond arises on the date of the first default. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) GOPI CHAND *v.* MOHAMMAD UMAR KHAN. **160 I.C. 134=8 R. Pesh. 100=A I.R. 1935 Pesh. 179.**

———**Art. 75**—Applicability—Instalment bond—Condition regarding default—Enforcement of claim—S. 20 has no concern with the suit governed by Art. 75—*Terminus a quo*, according to Art. 75 is not the date of payment but the date of non payment in accordance with the stipulation of the contract. *See* LIMITATION ACT, S. 20. **58 Cal. 615=A I.R. 1931 Cal. 157.**

———**Art. 75**—*Applicability—Instalment bond—Default clause—Starting point of limitation.*

Where the creditor had a right to recover the whole sum, with interest, if there was default on any instalment, or he could waive this right and sue for each instalment as it fell due and no instalment being paid he sued for the whole sum.

Held, since the creditor sued for the whole amounts there was no waiver, and time runs from the date when default was made. (*Hilton, J.*) RAM CHAND *v.* NANGA. **149 I.C. 972 (1)=6 R L. 771 (1)=A.I.R. 1934 Lah. 283 (1).**

———**Art. 75**—*Bond—Principal to be paid by yearly instalments—Monthly interest—Whole amount to be payable in default of "principal and interest"—Limitation—When begins.*

A bond executed on 1st December, 1926, after setting out that the principal was payable by yearly instalments after the expiry of three years (*i.e.*, 1st instalment being payable on 1st December, 1929) went on to provide that interest was payable monthly, and if according to the above conditions "principal and interest" were not paid, then the plaintiff could sue at once for the whole amount. Only a small sum was paid by way of interest. The suit was brought on 22nd November, 1930. The trial Court held that the suit was barred by time as the cause of action for the whole amount arose at the time of the first default in payment of interest. On appeal,

Held, that the condition was that the whole amount would become payable at once, only if there was a default as regards the payment of principal and interest and the word "and" between the words "principal and interest" cannot be read as "or" and so the suit was not time barred. (*Addison and Din Mahomed, JJ.*) BABU LAL *v.* SHAM SUNDAR LAL. **157 I C. 828=8 R.L. 146=37 P.L.R. 242=A.I.R. 1935 Lah. 557.**

———**Art. 75**—*Instalment bond—Default clause—Creditor's option—Time runs from the date of exercise of option and not from first default.*

In a simple bond it was provided that the debt was to be paid in four years and that interest was to be paid on the amount every six months. The bond further provided that in case of default in payment of interest of any six monthly period or the amount of principal the creditor had power to realize in any way he liked his entire amount. Default was made in the payment of interest from the very outset.

LIMITATION ACT (1908), Art. 75.

Held, the covenant in the bond, entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period of four years, was for the benefit of the creditor, and it was open to him to waive that option, and to wait for the full period of four years before putting the bond into suit, and that the time for recovery of the debt did not begin to run from the date of the first default. A.I.R. 1932 P.C. 207, Foll. (*Iqbal Ahmad and Kisch JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **55 All. 283=149 I.C. 181=6 R.A. 852=1933 A.L.J. 550=A.I.R. 1933 All. 235.**

[D. 1934 A.I.J. 1035 (1042) (F.B.). 30 N.L.R. 314 (317). F. 1934 A.L.J. 1035 (1051) (*Mukerji, J.*)]

———**Art. 75**—*Instalment bond—Default clause—Enforcement.*

Where an instalment bond provided that if default be made in payment of one or more instalments the whole shall be due and the creditor elected to enforce the default clause,

Held, that the suit was governed by Art. 75.

Held, further, that the creditor could not by merely saying that he chose to give up a part of the claim fall back on Art. 74. (*Sulaiman, C.J., Mukerji and King, JJ.*) JAWAHAR LAL *v.* MATHURA PRASAD. **57 All 108=151 I.C. 585=7 R.A. 169=1934 A.L.J. 1035=3 A.W.R. 845=A.I.R. 1934 All. 661 (F B.).**

———**Art. 75**—Instalment bond—Default clause—Suit instituted three years from date of default barred under Art. 80—Arts. 74 and 75 have no application. *See* LIMITATION ACT, ART. 80, 74 AND 75. **153 I.C. 553=7 R.A. 539=A.I.R. 1934 All. 697.**

———**Art. 75**—*Instalment bond—Default clause—Waiver—Proof.*

An instalment bond provided that the creditor will be entitled on default of any one instalment to realize the full amount with interest in a lump sum or by miscellaneous amounts. There was default but the debtor made voluntarily miscellaneous payments which the creditor accepted and subsequently sued for the balance on the ground that he was entitled to sue for the whole amount. It was contended for the debtor that the creditor had waived such a right and that he was entitled only to the balance with interest from date of last default.

Held, that unless and until the creditor took some action to enforce either of those penalties, it must be held that as the debtor continued to make payments as if he were acting under the original arrangement and the creditor continued to receive those payments, the creditor was undoubtedly acting as if the arrangement still subsisted, and must be held to have waived his right to renounce the agreement until he gave notice of that renunciation by taking the proceedings that resulted in the suit and that he was entitled only to the balance with interest from date of the last default. (*Kendall, J.*) NANAK *v.* FAQIR CHAND. **153 I.C. 553=7 R. A. 539=A.I.R. 1934 All. 697.**

———**Art 75**—*Instalment bond—Default—Waiver—Acceptance of overdue instalment—Effect of.*

Payment and acceptance of amounts equivalent to overdue instalments are not sufficient to prove waiver, when such payments are not appropriated to any particular instalments (*MacNair, J.C.*) TUKARAM APPA *v.* LAXMAN-APPA. **159 I.C. 96=8 R.N. 122=18 N. L.J. 104.**

———**Art. 75**—*Instalment bond—Default clause—Waiver—Proof of acceptance of overdue instalments.*

A mortgage-decree provided that the amount was to be paid in five equal yearly instalments. It was further provided that in case of default of any instalment on due date, interest was to be paid and in case of default

LIMITATION ACT (1908), Art. 75.

of two consecutive instalments, the whole balance was due with interest,

Held, that the acceptance of the overdue instalments could not by itself prove waiver, much less waiver of clause relating to right to sue for whole amount but not of clause relating to interest, and that if acceptance of overdue instalments amounted to an implied waiver, it follows that he accepted the earlier payments as having been made to him on the due dates fixed for payment. 5 Bom.H.C.R. 55, Ref. (*Rupchand, J.C. and Mehta, A. J.C.*) KALIANDAS BALCHAND *v.* MAHOMED KHAN. **147 I.C. 30=6 R.S. 133=A.I.R. 1933 Sind 365.**

———**Art. 75**—*Instalment bond—Option to plaintiff—Waiver—Suit for subsequent instalments only—Sustainability.*

In order to claim the benefit of Art. 75 it is necessary for the obligee to show that he has waived the benefit of the provision entitling him to sue on an earlier default and that he bases his claim on the subsequent default in respect of which there is no waiver. Waiver in respect of the earlier instalment can be proved in a variety of ways. If the promisee had the option to sue for the entire amount on the occurrence of the first default, but he did not base his claim on that option but instead sued specifically for the last three instalments, basing his cause of action on each of the said defaults, that is sufficiently indicative of his having waived his option. If the last three defaults are in time, he is entitled to a decree for those instalments even though in respect of the first default, the action is out of time. (*Bisheshwar Nath, J.*) NAGESHAR PRASAD DUBE *v.* BAKRIDI. **I R. 1932 Oudh 227=137 I.C. 223=9 O.W.N. 250=A.I.R. 1932 Oudh 176.**

———**Art. 75**—*Instalment bond—Time from exercise of option.*

A bond was payable in six annual instalments. In default of any one instalment, the promisee had the option to realise the entire amount at once. The first two instalments were paid; but the third was not paid. The promisee filed a suit when all the instalments were due for the fourth, fifth and sixth and no suit was filed in respect of third instalment.

Held, that the bond gave the plaintiff the option of taking advantage of the forfeiture clause, and his right to realize the amount by instalments as originally agreed upon could not be lost by his failure to exercise his option and that the suit was not time-barred. A.I.R. 1930 Lah. 214, Rel. on. (*Tek Chand, J.*) CHHAJJU *v.* NANAK BAKHSH. **149 I.C. 861 (1)=6 R.L. 753 (1)=A.I.R. 1933 Lah 849 (1).**

———**Art. 75**—*Instalment bond—Time from first default.*

Where a bond payable by instalments provided that in default were made in the payment of one or more instalments, the whole amount should become due and the debtor committed default, the whole sum becomes at once due within the meaning of Art. 75 and the creditor cannot subsequently sue even for the latter instalments, counting limitation from the day on which these instalments would have fallen due, had there been no default clause. 53 Cal. 277, Foll. (*Jackson, J.C., Subhedar and Niyogi, A J.Cs.*) VISHWANATH *v.* SADASHIVA **28 N.L.R 44=135 I.C. 414=I.R. 1932 Nag. 14=14 Nag.L.J. 141=A.I.R. 1932 Nag. 1 (F.B.).**

[F. 30 N.L.R. 314 (316, 317).]

———**Art. 75**—*Instalment bond—Whole amount falling due on default—Option to creditor—Time from the exercise of option.*

Where an instalment bond provided for monthly payment of interest and in case of default in payment of

LIMITATION ACT (1908), Art. 75.

instalments, the creditor was at liberty to recover the whole amount, principal and interest, without waiting for the whole period, the option is in the nature of a liberty reserved to the creditor and it is open to him to avail himself or not of that option. The creditor is therefore entitled to wait until the last instalment falls due. (*Ross and Scroope, JJ.*) RAM CHANDRA NAYEK KALIA *v.* GHARBHARAN AHIR. **I.R. 1931 Pat. 272 =11 Pat.L.T. 866=132 I.C. 112.**

———**Art. 75**—*Scope and applicability—Instalment bond—Default clause.*

It cannot be laid down that whenever a suit is brought on the basis of an instalment bond, no matter for what relief, the mere fact that the bond contains a default clause would make Art. 75 applicable to it. Art. 75 would not be applicable if the nature of the claim or the character of the suit be different, for instance, where some other covenant in the document is being sought to be enforced or where the suit is brought for the recovery of the instalment that has fallen due and before there is such a default as makes the whole amount become due. But where there has been no waiver of the benefit of the provision of a default clause made by the creditor, and owing to a default the whole amount has become due and a suit is brought to recover either the whole of the amount or only a portion of it after the expiry of three years from the date of the default (or six years if the deed be a registered one), then the whole claim is barred by time and the creditor cannot be allowed to say that he should get a portion of that amount because his suit should be treated as one falling under Art. 74. (*Sulaiman, C.J. and Rachhpal Singh, J.*) SUKH LAL *v.* BHOORA. **57 All. 561=153 I.C. 205=7 R A. 465 =1934 A.L J. 1056=4 A.W.R. 966=A.I R. 1934 All. 1039.**

———**Art. 75**—*Simple money bond—Suit for whole amount barred—Creditor cannot sue for instalments not barred under primary terms of bond—Simple money bond is different from mortgage.*

There is a difference in principal between money lent on a mortgage and money lent on a simple money bond. When a creditor lends money on a mortgage, he obtains a long term investment on security and it is not necessarily for his benefit that the money should be repaid before the stipulated term has expired, but in lending money on a simple bond without security he is actuated by a different consideration. If a simple money bond is payable by instalments and provides that if default is made in payment, the whole debt should become due, the suit is governed by Art. 75 of the Limitation Act and the mere failure to sue on default cannot amount to a waiver, and if a suit for the whole amount has become barred under Art 75 the creditor cannot sue for instalments which under the primary terms of the bond would have fallen due after the default. A.I.R. 1932 P.C. 207, Dist.; A.I.R. 1932 Nag. 1, Foll. (*Pollock, A.J.C.*) SHAMRAO *v.* MORESHWAR. **30 N.L.R. 314=151 I. C. 97=7 R.N. 56=A.I.R. 1934 Nag. 180.**

———**Art. 75**—*Starting point under—Chit fund—Instalment bond—Default—Suit for balance—Limitation.*

An instalment bond executed in respect of a chit fund, after referring to the obligation to pay the various instalments that would be due from the executant on various future dates provided. "If at any auction the amount therefor is not paid and default is made therein the amount that should be subscribed thereto as the balance left after deducting the dividend therein, would be paid within a month with profit thereon at 2 per cent. per month, and if default is made therein also, all the amounts that are seen to be paid in future after excluding those that have been paid, till then, would be paid with profit," etc. Default was committed, and a suit was filed for the balance due. There was no question of waiver.

Held, that the suit must be instituted within three years from the time when on default the entire amount became due and if not so instituted, would be barred. (*Madhavan Nair, J.*) GOPALA MENON *v.* ABDUL AZEEZ. **156 I C. 443=7 R M. 697=41 L.W. 442= 1935 M.W.N. 336=A.I.R. 1935 Mad. 303=68 M.L. J. 244.**

———**Art. 75**—*Waiver—Acceptance of overdue instalment—Effect of.*

Where the debtor agrees to pay the debt in instalments and there is a stipulation to the effect that in case of default in paying any one instalment, the whole amount would fall due, the acceptance of an overdue instalment by the creditor amounts to waiver of the right to claim, the entire debt, provided it can be definitely proved that the payment has been made towards the liquidation of that particular instalment and ex-necessitate the whole sum due is paid. But a payment towards the reduction of the general debt can on no account be considered as waiver because it is not the acceptance of any specified instalment. Where therefore a creditor waives his right to take advantage of the forfeiture clause with regard to the first three instalments and brings his suit for recovery of the whole of the balance within three years from the date when the fourth instalment falls due, his suit is within time. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) GOPI CHAND *v.* MOHAMMAD UMAR KHAN. **160 I.C. 134=8 R.Pesh. 100=A.I.R. 1935 Pesh. 179.**

———**Art. 75**—*Waiver—Proof of—Acceptance of overdue instalments.*

In the case of instalment bonds where the whole amount becomes exigible on default of instalment or instalments, the acceptance of an overdue instalment or mere forbearance to sue by itself does not amount to waiver. The question whether there is waiver or not depends on the attending circumstances of the act claimed as a waiver in each particular case. Where there is no evidence either that the debtors requested the creditors to excuse the default or that the payment was accepted as a consequence of waiver, the suit filed more than 3 years from the date of the first default cannot be saved from the bar of limitation by a plea of waiver. A.I.R. 1932 Nag. 1 and 7 N.L.R. 147, Foll. (*Grille, A.J.C.*) SEWAKRAM *v.* BASOD. **I.R. 1933 Nag. 213=144 I.C. 211=A.I.R. 1933 Nag. 70.**

———**Art. 75**—*Waiver—Proof—Acceptance of overdue instalments—Right of suit on subsequent default.*

Where money is payable by instalments subject to a condition that the whole amount remaining due will become payable upon non-payment of any instalment, the creditor is not bound to enforce the condition, but may accept payment of instalments after due date—thus impliedly waiving his right—and may sue upon a subsequent default of any future instalment. It is not possible to lay down any hard and fast rule as to what would or would not constitute a waiver. (*Srivastava, Ag C.J. and Smith, J.*) (GAYA DIN *v.* KHIALI RAM. **151 I.C. 852=7 R.O. 151=11 O W.N. 1191=A.I.R. 1934 Oudh 455.**

———**Art. 75**—*"Waives the benefit"—Meaning of—Mere inaction or omission to sue—If waiver.*

The words "waives the benefit" in Art. 75 do not mean the same thing as availing oneself of the equitable doctrine of waiver, for which either fresh consideration,

LIMITATION ACT (1908), Art. 80.

a fresh agreement or something amounting to an estoppel is necessary. That doctrine is invoked against a creditor, whereas the waiver of the benefit spoken of in Art. 75 is something exercised for the benefit of the creditor and not against him. The waiver, therefore, may be a purely one-sided act and need not be for consideration proceeding from the debtor. The waiver may be by expression of an intention to waive the benefit either by communication to the debtor or by any other overt act. Waiver is a mixed question of law and fact and it depends on the circumstances of each case. It necessarily follows that a mere inaction or omission to sue within the prescribed period cannot amount automatically to a waiver within the meaning of the third column of this article. To hold so would make this article nugatory and the first portion of the column altogether superfluous. Then in every case where there has been an omission to sue, there would necessarily be a waiver inferred as a matter of law and no further question of limitation would arise. (*Sulaiman, C.J. and Rachhpal Singh, J.*) SUKH LAL *v.* BHOORA. **57 All. 561=153 I.C. 205=7 R.A. 465=1934 A.L.J. 1056=4 A.W.R. 966=A.I.R. 1934 All. 1039.**

——**Art. 80**—"*Became payable*"—*Mortgage suit—Application for personal decree.*

There were two mortgages between the same parties, one dated 20th February, 1902 and the other dated 8th September, 1903, the mortgagor promising to pay the amount in eight years. There was a further provision that if the interest for one complete year remained unpaid, the creditors were to have power to recover the interest and also were at liberty to recover the principal and interest without having any regard "for the stipulated period." Interest was not paid and there was default at the expiry of one year on account of both these mortgage deeds. There was an acknowledgment of both these mortgage debts on 3rd March, 1906, which gave a fresh start for the purpose of limitation. One consolidated suit was filed on 22nd February, 1916, to recover the amounts due on both these documents and in 1917, the claim was decreed. On 20th February, 1929, after all the mortgaged properties had been sold there still remained a balance over Rs. 2,000 to be realised. The mortgagees accordingly filed an application on 21st August, 1929, under O. 34, R. 6 for a personal decree against the mortgagors.

Held, that the limitation for a decree under O. 34, R. 6, commenced to run not after the expiry of one year within which the mortgagor continued default for payment of interest, but it commenced to run after the expiry of eight years' term stipulated in the deed. (Case-law discussed). (*Sulaiman, C.J., King and Niamatullah, JJ.*) MD. HUSSAIN *v.* SANWAL DAS. **56 All. 954=6 R.A. 795=148 I.C. 951=1934 A.L.J. 261=3 A.W.R. 431=A.I.R. 1934 All. 397 (F.B.).**

——**Art. 80**—*Bond payable in two years—Default clause—Breach—Option to sue.*

Where a bond payable in two years contains a clause providing that the creditor can sue for the full amount either on the failure to pay the monthly interest or on failure to pay the principal amount, and default in payment of interest is committed, the clause gives an option exclusively in favour of the creditor, who is entitled to the benefit of the investment for the full term originally provided, and need not sue until that term expires even if there is a default in the payment of interest. A.I.R. 1933 All. 235; A I.R. 1935 All. 405; 10 P.R. 1883 and A.I R. 1932 P.C. 207, Rel. on. (*Beckett, J.*) MOOL CHAND *v.* CHITTAR. **160 I C. 1068=8 R.L. 659 (1) =A.I.R. 1935 Lah. 948.**

LIMITATION ACT (1908), Art. 83.

——**Arts. 80, 74 and 75**—*Instalment bond—Default clause—Suit instituted beyond three years from date of default—Limitation.*

The suit bond was executed on 1st December, 1926. According to the terms of the bond interest was to be paid monthly and the principal amount was to be paid in certain instalments after the lapse of the first three years. The bond further provided that in default of payment of interest month by month the whole amount should become payable at once. The defendant paid interest only for the first six months. The suit for the recovery of the entire amount was instituted on the 22nd November, 1930.

Held, that the suit was barred under Art. 80 and that Arts. 74 and 75 had no application. (*Bhide, J.*) SHAM SUNDAR LAL *v.* BABU LAL. **I.R. 1933 Lah. 281=142 I.C. 851 (2)=34 P.L.R. 145=A.I.R. 1933 Lah. 548.**

——**Art. 80**—*Promissory note payable at specified place—Suit on war bond—Limitation—Starting point.*

Where the claim was for recovery of the amount due on a war bond, which in form was a promissory note payable at a specified period after date thereof and at a specified place.

Held, that the suit was governed by Art. 80 and time commenced to run from the date on which it should have been presented for payment at the specified place. (*Curgenven and Sundaram Chetty, JJ.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KUNHI KRISHNA VARMA VALIA RAJA. **I.R 1933 Mad. 213 =142 I.C. 286=37 L.W. 302=A.I.R. 1933 Mad. 376=64 M.L.J 172.**

——**Arts 83 & 116**—*Applicability—Sale—Covenant for indemnity—Breach of—Right to damages—Starting point—Dispossession by third party.*

In execution of a money decree, a house belonging to the judgment-debtor was purchased by the father of the defendant and the father of the plaintiffs each contributing one half of the consideration. In 1914, the defendant's father sold his share also to the plaintiff's father for Rs. 8,175. The sale-deed provided that in case, any loss was caused to the vendee in any suit brought in respect of the property by a third party, the vendor would be responsible to the extent of his half share. The son of the judgment debtor brought a suit and got a decree in 1916 declaring that his one half share in the property was not affected by the execution sale. The plaintiff's father and the defendant's father thereupon brought a suit for partition and a decree was therein passed in 1924 declaring the vendees to be entitled only to a moiety of the house. The son of the judgment-debtor got possession of his half share in December 1924. The present suit was filed on March 10, 1926, by the plaintiffs for refund of consideration and it was contended by the defendant that the suit was barred under Art. 62.

Held, that the cause of action to recover damages on account of the covenant for indemnity in the sale-deed arose only when the plaintiffs were dispossessed, *i.e.*, in December, 1924, and not when the son of the judgment-debtor filed a suit or got a decree, that the suit was governed by Art. 83 read with Art. 116 and that the suit was in time. 31 Mad. 452, foll.; 26 Bom. 750, dist. (*Patkar and Broomfield, JJ.*) RATANBAI *v.* GHASHIRAM. **55 Bom. 565=134 I.C. 1157=I R. 1932 Bom. 37=33 Bom L.R. 1092=A I.R 1932 Bom. 36.**

[F. 14 L 646 ((650). R. 28 N.L.R. 31 (41) (F B.).]

——**Art. 83**—Applicability—Defendant purchasing goods in the name of plaintiff—Decree against plaintiff—Suit for decretal amount by plaintiff. *See* LIMITATION ACT (1908), ARTS. 61 AND 83. **A.I.R. 1933 Lah. 404.**

LIMITATION ACT (1908), Art. 83.

———**Arts. 83 and 120**—Applicability—Receiver—Suit on behalf of estate—Money spent in—Suit to recover—Limitation. *See* LIMITATION ACT, ARTS. 61, 83 AND 120. **A.I.R. 1935 Mad. 594.**

———**Art. 83**—*Applicability—Sale of property subject to charge—Suit to enforce right of indemnity against purchaser.*

Art. 83 only applies to personal contracts of indemnity and not to a case of indemnity arising under a charge. Where, therefore, property subject to a charge is sold in execution, a suit by the owner of the property against the purchaser to enforce his implied right of indemnity is not governed by Art. 83 but by Art. 132. (*Madhavan Nair and Jackson, JJ.*) RAMA RAYANIMGAR *v.* VENKATALINGAM NAYANIM BAHADUR. **57 Mad. 218=149 I.C. 379=6 R.M. 642=1933 M.W.N. 486 =38 L.W. 818=A.I.R. 1934 Mad. 1=66 M.L.J. 4.**

———**Arts. 83 and 65**—*Applicability—Suit by commission agent for indemnity.*

A suit by a commission agent to recover loss on the transactions entered into on behalf of his constituents is governed by Art. 83 and time would begin to run when the plaintiff is actually damnified. The right to indemnification though recognized by statute (S. 222 of the Indian Contract Act) is the necessary consequence of the agency contract. The contract to indemnify under Art. 83 need not be by express stipulation, and may be either imposed by statute or implied or inferred in virtue of the jural relations of the parties. Art. 65 would not apply unless there is an agreement between the parties to pay the loss immediately on its being ascertained and in the absence of any specified time or specified contingency, Art. 65 would not apply. When the commission agent allocates the cross-contracts to himself, it may be said that he is damnified on the day when the cross-contracts were entered into. If, on the other hand, he enters into cross contracts with others, it cannot be said that the loss has necessarily occurred to the commission agent on the day on which such cross-contracts were entered into. 16 C.W.N. 1040, Ref. (*Patkar and Baker, JJ.*) HARAKCHAND *v.* SUMATILAL. **136 I.C. 481=I.R. 1932 Bom. 177=33 Bom.L.R. 1200= A.I.R. 1932 Bom. 25.**

———**Arts. 83 and 115**—Breach of compromise—Term of payment to creditor—On breach, payment by other party—Limitation—Starting point. *See* LIMITATION ACT, ART. 61. **A.I.R. 1935 Lah. 307.**

———**Art. 83**—Inapplicability—Co-mortgagor redeeming mortgage—Suit for contribution. *See* LIMITATION ACT, ART. 132. **1935 O.W.N. 278=A.I.R. 1935 Oudh 245.**

———**Arts. 83 and 116**—Registered sale—Portion of purchase-money retained by vendee—Express contract to indemnify—Starting point of limitation—Combined effect of Art. 116 read with Art. 83—Period of 6 years from the date when the plaintiffs were damnified. *See* LIMITATION ACT, ARTS. 116, 111 AND 83. **14 Lah. 646.**

———**Arts. 83, 111 and 116**—Sale—Portion of consideration left with vendee and charged on property—Sales in turn by vendee—Balance not paid by second vendee—Suit by vendor against first vendee and the balance realised—Suit by first vendee against second vendee—Limitation must be computed under Art. 116, not Art. 111, the document having been registered—Combined effect of Art. 116 read with Art. 83—Six years from the date when the plaintiffs were actually damnified *See* LIMITATION ACT, ARTS. 116, 83 AND 111. **34 P.L.R. 734=A.I.R. 1933 Lah. 793.**

———**Art. 83**—*Sale—Sale price left with vendee to pay debt of vendor—Failure of vendee to pay and payment by vendor—Suit by vendor against vendee for amount—Limitation.*

LIMITATION ACT (1908), Art. 84.

If a portion of the purchase-money is left with a vendee for payment, to a creditor of the vendor, and no time is fixed for payment, there is an implied agreement on the part of the vendee to pay the amount due to the creditor either forthwith or within a reasonable time. If the vendee commits a breach of the implied agreement by failing to pay the amount left with him by the vendor for payment to the third party, he is bound in law to indemnify the vendor for any damage sustained by the vendor, in consequence of the breach of agreement on his part. The suit by a vendor in such cases is not for the return of the unpaid purchase money that the vendee failed to pay, but is to enforce the implied contract of indemnity the breach of which was committed by the vendee by failing to pay the third party and comes within the purview of Art. 83. The time against the plaintiff in such a suit does not begin to run till he "is actually damnified". Hence where the vendor himself pays the debt, limitation for a suit against the vendee runs from the date of such payment, and not from the date of sale. (*Iqbal Ahmad and Kisch, JJ.*) KUNWAR UNKAR SINGH *v.* KASHI PRASAD. **55 All. 490=I.R. 1933 All. 340=143 I.C. 821=1933 A.L.J. 787=A.I.R. 1933 All. 386.**

———**Art. 83**—*Scope—Sale deed—Breach of covenant by vendee—Suit by damnified vendor.*

Where the vendor has actually been damnified in consequence of a breach of covenant by the vendee to a sale-deed, the suit by the vendor will come under Art. 83. (*Bennet, J.*) ABDUL WAHID KHAN *v.* SHER MOHAMMAD KHAN. **154 I.C. 305 (2)=7 R.A. 731=1935 R.D. 75=1935 A.W.R. 199=1935 A.L.J. 255= A.I.R. 1935 All. 463.**

———**Arts. 83 61 and 116**—Vendor and purchaser—Purchaser directed to pay off incumbrances—Default of purchaser—Vendors damnified—Suit against vendee—Starting point of limitation—Suit governed by Art. 116 read with Art. 83 or Art. 61. *See* LIMITATION ACT, ARTS 61, 83 AND 116. **14 Lah. 380=A.I.R. 1933 Lah. 109.**

———**Art. 83**—*Vendor and purchaser—Purchase-money left with purchaser to be paid to mortgagee—Default—Suit for damages—Commencement of limitation.*

Where a portion of the purchase money was left with the purchaser to be paid over to a mortgagee and in consequence of the failure of the purchaser so to do the seller was obliged to pay the amount due to the mortgagee, a suit for damages against the purchaser is in time if brought within three years from the date of payment to the mortgagee. Limitation does not run from the date of contract of sale. 34 A. 429, Dist.; 49 A. 603, Foll. (*Jwala Prasad and James, JJ.*) MT. RAJBANSI KUFR *v.* BISHUNDEO NARAYAN SINGH. **10 Pat. 451 =I.R. 1931 Pat. 264=132 I.C. 104=12 Pat.L.T. 211=A.I.R. 1931 Pat. 271.**

———**Art. 84**—*Applicability—Applications.*

Quaere.—If the article is applicable to applications by way of analogy, though it is restricted to suits? (*Venkatasubba Rao, J.*) GHULAM MOHIDFEN SAHIB *v.* MD. OOMER SAHIB. **I.R. 1931 Mad. 494=131 I.C. 158= 33 L.W. 430=1931 Cr.C. 287=A.I.R. 1931 Mad. 183 =60 M.L.J. 133.**

———**Art. 84**—*Applicability—Decree providing for payment of costs to solicitor named.*

Art. 84 does not apply in the case of a decree which provides that the costs shall be paid to the solicitor (named) of one of the parties to the suit. It is governed

LIMITATION ACT (1908), Art. 84.

by the residuary Art. 120. (*Tyabji, J.*) RUSTOMJI AND GINWALA *v.* FAZAL RAHIM. **I.R. 1932 Bom. 445=138 I.C. 832=34 Bom.L.R. 670=A.I.R. 1932 Bom. 378.**

———**Art. 84**—"*Termination of suit or business.*"

Where in a petition for which the attorney was engaged resulted in an order in favour of the client in 1924, and nothing was done further till 1930 when the client instructed his attorney to have his bill of costs taxed, it cannot be said, where the continuance of the solicitor's lien is in question, that the 'business' terminated in 1924 and that the lien has become barred in 1930. (*Venkatasubba Rao, J.*) GHULAM MOHIDEEN SAHIB *v.* MD. OOMER SAHIB. **I R. 1931 Mad. 494=131 I.C. 158=33 L.W. 430=1931 Cr C. 287=A.I.R. 1931 Mad. 183=60 M.L.J. 133.**

———**Art. 85**—*Applicability.*

Where, during the long course of dealings between the parties, the plaintiffs never owed anything to the defendants, nor were the accounts, when adjusted from time to time, ever signed by the defendants but when accounts were finally struck on 21-2-1927, a certain sum was found to be due to the plaintiff by them and admittedly in their suit instituted on 21-1 1930, the plaintiffs could not claim for any item prior to 21 2-1927

Held, that Art, 85 was not applicable and could not be invoked. (*Bennet and Baipai, JJ.*) RADHA MOHAN *v.* AMICHAND. **149 I.C. 651=6 R A. 939=1933 A L.J. 1283=A.I.R. 1934 All. 386.**

———**Art. 85**—Applicability—Account settled—Subsequent mutual dealings—Suit to enforce stated account—Limitation—Art. 64 applies, not Art. 57 or 85. *See* LIMITATION ACT, ART. 64. **32 P.L.R. 65=A.I.R. 1931 Lah. 233.**

———**Art. 85**—*Applicability—Account stated—Entries amounting to—Limitation*

The accounts ran from 11 th July, 1913 to 5th February, 1914. On the 31st March, 1914, a balance was struck and was followed by two items on each side. Interest ran on this amount and a second balance was struck on 29th April 1921. A suit to recover the amount due on the second settlement with interest was instituted on 3rd April, 1925.

Held, that the account was not a mutual, open and current account within the meaning of Art. 85 but in account stated within that of Art. 64 and that therefore the suit was within time. (Case-law reviewed). (*Shadi Lal, C. J. and Walker, J.*) JESA RAM DIWAN CHAND *v.* LACHMAN DAS. **130 I.C. 570.**

———**Art. 85**—*Applicability—Essentials.*

The conditions for the applicability of Art. 85 are that there should be cross-claims arising out a of course of dealings which evidences or is referable to an intention of set off. The phrase "reciprocal demands" does not import that either party has made an actual demand in fact. Where the plaintiff entered into an agreement with the defendant by which he undertook to advance money to the latter for the purpose of tea garden and the agreement further provided that the defendant should send the consignments of tea through the plaintiff who was to receive their price and credit the same to the defendant's account and the plaintiff sued to recover the money due to him on the basis of such amounts.

Held, that the suit was governed by Art. 85 of the Limitation Act. Case-law elaborately discussed with reference to the meaning of mutual accounts. (*Rankin, C.J. and C. C. Ghose, J.*) TEA FINANCING SYNDICATE, LTD. *v.* CHANDRA KAMAL. **58 Cal. 649=I.R. 1931 Cal 753=133 I C. 801=34 C.W.N. 1175=52 C.L.J. 314=A.I.R. 1931 Cal. 359.]**

[D. 29 N.L.R 20 (21)]

LIMITATION ACT (1908), Art. 85.

———**Art. 85** — Applicability — Goods sold and delivered from time to time—Payment by customer from time to time without specifying item. *See* LIMITATION ACT, ARTS. 52 AND 85. **1935 A.L.J. 33=4 A.W.R 1335=A.I.R. 1935 All 131.**

———**Art. 85**—*Applicability—Suit by agent against principal.*

A suit by an agent against the principal for balance due on an account falls within Art. 85 23 Bom.L.R. 540; 24 Bom.L.R. 1284; 1 I.A. 346, Foll. (*Crump, J.*) NEW EAST INDIA PRESS CO., LTD. *v.* RAMESHVAR NANDLAL. **34 Bom L.R 1410**

———**Art. 85**—*Applicability — Suit by agent for balance due on account—Starting point—Repudiation of transaction and refusal to pay.*

The plaintiff, a commission agent, had purchased goods under instructions of their principals who refused on 23-3-1921 to pay for them and take delivery. The plaintiff resold the goods and on March 15, 1924, brought the suit for the balance due.

Held, that Art. 85, and not Art. 61 applied, that time began to run from the date of refusal to pay and not from when the agent had paid for the goods and the suit was in time. (*Ranganadhan, J.*) BABASA BAKALE *v.* HOMBANNA. **140 I.C. 624=I.R. 1933 Bom 22=34 Bom L R. 1268=A.I R. 1932 Bom. 593.**

———**Art. 85**—Applicability—Suit on mutual account or account stated—Test—Suit governed by Art. 64 and not Art. 85. *See* LIMITATION ACT, ART. 64. **I.R. 1932 Lah. 691=140 I C. 187.**

———**Art. 85**—*Mutual account—Essentials.*

In order to prove a mutual account it is necessary to establish mutual dealing between the parties. There can be no mutual account unless each party has a right to demand the fulfilment of certain obligations. (*Sen, J.*) MIHIM LAL JWALA PRASAD *v.* MARGUERITE BUTTER DAIRY FARM. **I.R. 1931 All. 516=132 I.C. 420=A.I.R. 1932 All. 38.**

———**Art. 85**—*Mutual account—Test.*

The question whether the dealings with which a particular case is concerned can be described as mutual, open and current, must depend upon the general nature of the account and not upon some casual entries. It is not the number of the entries alone that determines the question, for, cases may be conceived where though the items giving rise to reciprocal demands are very few yet the account possesses the essential attribute of mutuality. Where the accounts extending over several years showed that there were sales by the plaintiff creating obligations on the defendant's part and payments were made from time to time by the defendant in discharge of the amounts due by him and there were also two items of sale made by the defendant to the plaintiff after the accounts were practically closed and there was not a single debit entry made against the defendant thereafter.

Held, that the two sales by the defendant were casual merely and not such as would imply a regular course of reciprocal dealings and that on the facts taken as a whole, the test of mutuality was clearly wanting. (*Venkatasubba Rao, J.*) ANDHRA RICE MILL *v.* M. NARASIMHA RAO. **158 I.C. 429=8 R.M. 264=A.I R. 1935 Mad. 982.**

———**Art. 85**—*Mutual account—Test of—Shifting balance, if conclusive—Account consisting of advances and repayments from time to time.*

A shifting balance is not necessarily a conclusive test of mutual dealings between the parties. It is the

LIMITATION ACT (1908), Art. 85.

nature of the dealings which is the true criterion and the nature of the dealings may establish mutuality without the balance ever having shifted at all, or may negative mutuality even where there is a shifting balance. Where the accounts consisted entirely of sums advanced by the plaintiff which were repaid from time to time by the defendant and on two occasions by reason of a slight over-payment, the balance shifted in defendant's favour and the payments by the defendant were only made in repayment of his debts,

Held, the account was not mutual and a suit thereon was not governed by Art. 85. 58 Cal. 649, Ref. (*Grille, A.J.C.*) GOKULDAS *v.* RADHAKISAN. **29 N.L.R. 20 = I.R. 1933 Nag. 89 = 142 I.C. 123 = 15 N.L.J. 105 = A.I.R. 1933 Nag. 50.**

———**Art. 85**—Mutual account—What constitutes—Suit to recover money on one-sided account—Limitation—Suit being for recovery of money payable for money lent Art. 57 applies, not Art. 85. *See* LIMITATION ACT, Art. 57. **12 Lah. 420 = A.I.R. 1931 Lah. 241.**

———**Art. 85**—*Mutual, open and current account—Shifting balance.*

The defendant firm was depositing money with the plaintiff bank from time to time and the plaintiff bank was allowing them to draw money in excess of the deposits with the result the the balance was frequently shifting in favour of one or the other party.

Held, that the account was a mutual, open and current one. (*Coldstream and Bhide, JJ.*) PUNJAB UNITED BANK, LTD., LAHORE *v.* MAHOMED HUSSAIN. **15 Lah. 652 = 152 I.C. 626 = 7 R.L. 300 = 36 P.L.R. 325 = A.I.R. 1934 Lah. 358.**

———**Art. 85**—*Mutual, open and current account—Test.*

Where there is no open account on the date of suit, the plaintiff cannot sue on a mutual account and claim the benefit of Art. 85.

Per *Rangnekar, J.*—The question whether an account is mutual, open and current so as to attract the operation of Art. 85 is one of fact and must depend upon the nature of the dealings between the parties, nature of the entries and other relevant circumstances. In order that an account should be mutual, there must be dealings between the parties and such dealings must be capable of giving rise to independent obligations on each side of the account at any given period or stage. One test commonly applied is the possibility of shifting balances sometimes in favour of one party and sometimes in favour of the other. But that test is not conclusive or decisive of the matter. The real test is whether the dealings between the parties are of such a nature that the balance might so shift. An account current means a running account that is, an account which is continued and not stopped or closed. If the account is running, that is to say, if it is unclosed, then it is open and current. Mere cessation of dealings between the parties, however, does not mean that the account is closed. The real question in each case would be what is the intention of the parties. (*Beaumont, C. J. and Rangnekar, J.*) KARSONDAS *v.* SURAJBHAN KAMRIJPAL. **58 Bom. 200 = 6 I.R. (Bom.) 107 = 145 I.C. 630 = 35 Bom L.R. 929 = A.I.R. 1933 Bom. 450.**

———**Art. 86**—*Fire insurance — Clause limiting liability of Company to claims made within one year——Validity of.*

The policy of insurance contained a clause that "the Company should not be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage, unless the claim was the subject of pending action or arbitration" Where the suit was filed more than twelve months after the fire, and there had been no reference to arbitration and all the time had been spent in the investigation of the claim and delay by the insured,

Held, that (*i*) the words "pending action" referred only to a pending suit and not to steps which the Compauy might take in the investigation of the claim; (*ii*) that the clause only provided that the Company shall not be liable if the claim was made more than twelve months from the date of the loss and not that the insured should not have the right to sue after twelve months, so it was not against public policy and it did not contravene the provisions of S. 28 of the Contract Act, or Art. 86 of the Limitation Act. The suit was, therefore, not maintainable. (*Leach, J.*) GHOSE *v.* RELIANCE INSURANCE CO. **11 Rang. 475 = 149 I.C. 15 = 6 R.R. 298 = A.I.R. 1934 Rang. 15.**

LIMITATION ACT (1908), Art. 89.

———**Art. 89**—*Agency—Termination—Date—Settlement of accounts—If a condition precedent—Admission of liability after limitation—Effect of.*

An agency terminates when the agent ceases to represent the principal and in the case of an agent for sale of goods, it terminates when the goods are sold, though the agent may still be liable in respect of acts done by him as agent, he may be under liability to pay some money to the plaintiff. It is not necessary that he must settle his accounts and pay the money due by him to make the agency terminate. Therefore a suit brought after three years from the date when the agency terminated is barred under Art. 89 of the Limitation Act. Even if the ex-agent admits in such a suit his liability to a certain extent, no relief can be granted to the principal on the basis of that admission, because, once the claim is barred it is barred entirely and no such separation of the claim can be made for the purposes of limitation. (*Madhavan Nair, J.*) NAGAYYA *v.* YERRIKALAPPA. **152 I.C. 266 = 7 R.M. 207 = 1934 M.W.N. 1250 = 40 L.W. 538 = A.I.R. 1934 Mad. 691 (1).**

———**Art. 89**—*Agent.*

When an agent agrees to submit yearly accounts to his principal, a suit for accounts against the agent is governed by Art. 89. 43 C. 248; 30 C.L.J. 90 and 35 C. 293, Ref. (*Reilly and Anantakrishna Aiyar, JJ.*) ANNU AVATHANIGAL *v.* SOMASUNDARA AVATHANIGAL. **54 Mad. 654 = I.R. 1931 Mad. 501 = 131 I.C. 165 = 1930 M.W.N. 1199 = 33 L.W. 1 = A.I.R. 1931 Mad. 185 (2) = 62 M.L.J. 45.**

[**Appl.** 57 M. 378 (388, 389, 396)]

———**Art. 89**—*Applicability—Dissolution of partnership—Subsequent agreement—Relationship of principal and agent—Suit for accounts—Limitation.*

After a dissolution of partnership, an agreement was entered into by the partners to the effect that the two partners, as mentioned in the agreement, were to collect the outstandings of the partnership as trustees and to deposit the amount in a Bank after paying off the partnership liabilities and to share it equally. Then a suit had been instituted for rendition of accounts of the moneys realized as per agreement.

Held, that under the abovementioned circumstances the suit was governed by Art. 89 and not by Art. 106 of the Act, because by virtue of the said agreement, the trustee partners were the agents of the partnership for recovering the assets, and therefore the suit was essentially between a principal and an agent and for accounts. The agreement had created a modified form of relationship of principal and agent between the parties quite apart from that of the original agreement of partnership, that had been dissolved. A.I.R. 1922 P.C. 115, Dist. (*Jai Lal and Abdul Qadir, JJ.*) RUP LAL *v.*

LIMITATION ACT (1908), Art. 89.

GIAN CHAND. **I.R. 1931 Lah. 959=134 I.C. 527=A.I.R. 1931 Lah. 300.**

———**Art. 89**—Applicability—Suit for partnership accounts—Agreement to render accounts and distribute profits annually—Art. 120 applies, not Art. 89 or Art. 100 or 116. *See* LIMITATION ACT, ART. 116. **29 N. L R. 34=A.I.R. 1933 Nag. 127.**

———**Art. 89**—*Applicability—Suit by principal for moneys misappropriated by agent.*

A suit by the principal against the agent for recovery of certain sums misappropriated by him is governed by Art. 89 and not Art. 62. Art. 89 is not confined to suits for accounts only. (*Jack and Nag, JJ.*) KHONDKAR MAHOMED AMIRUL ISLAM *v.* MAHOMED ABDUL HAMID. **60 Cal. 1347=149 I.C. 996=6 R.C. 677=38 C.W.N. 211=A.I.R. 1934 Cal. 238.**

———**Art. 89**—*Death of principal—Agent continuing in service under his sons—Suit for accounts for periods before and after death of father—Limitation.*

The omission of any mention of legal representatives in the words under "description of suit" in Art. 89 does not mean that the article is not intended to apply to a case where one of the parties is a representative of the principal or the agent. Where an agency is created between two persons and the principal dies but the agent continues in the service of his sons and they file a suit for accounts for period both before and after the death of their father, as the former agency terminates with the death of the father, the two periods should be separately considered and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which that agency terminated, the suit for accounts must be regarded as barred. A.I.R. 1922 Cal. 53; 44 C. 1 (P.C.), 9 C.L.J. 107, Rel. on; 17 C.W. N. 5, Not Foll.; A.I.R. 1927 Mad. 157, Foll. (*Mukerji and S. K. Ghose, JJ.*) BIKRAM KISHORE *v.* JADAB CHANDRA. **160 I.C. 388=8 R C. 433=40 C W.N. 245=62 C.L.J. 464=A.I.R. 1935 Cal. 817.**

———**Art. 89**—*Refusal—Demand to furnish accounts—Definite repudiation of liability necessary.*

The refusal under Art. 89 need not always be express and may on the other hand be inferred from circumstances. Though the failure to comply with a definite demand may sometimes amount to a refusal, there must be a definite repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission on his part to render accounts might be construed as a refusal. (*Mukerji and Bartley, JJ.*) ABDUL LATIFF *v.* GOBESWAR CHATTORAJ. **141 I.C 225=I.R. 1933 Cal. 85=56 C.L.J. 172=A.I.R. 1933 Cal. 204.**

———**Art. 89**—*Scope.*

Art. 89 applies to a suit by a principal against his agent for an account and for any money that may be found due on the taking of such account. The starting point of limitation is (1) when the account is demanded and refused, or (2) when the agency terminates. (*Beaumont, C.J. and Rangnekar, J.*) KARSONDAS DHUNJIBHOY *v.* SURAJBHAN RAMRIJPAL. **58 Bom. 200=6 I.R. (Bom) 107=145 I.C. 630=35 Bom.L.R. 929=A.I.R. 1933 Bom. 450.**

———**Arts. 89 and 90**—*Scope of—Alteration of frame of suit in appeal—Permissibility.*

Where in a suit for accounts between principal and agent, the foundation of the entire claim is one for accounts, the suit is governed by Art. 89 and not Art. 90. Plaintiff cannot alter frame of suit in appellate stage to establish that Art. 90 and not Art. 89 applies. (*Mukerji and S.K. Ghose, JJ.*) BIKRAM KISHORE *v.* JADAB CHANDRA. **160 I.C. 388=8 R.**

LIMITATION ACT (1908), Art. 90.

C. 433=40 C.W.N. 245=62 C.L.J. 464=A.I.R. 1935 Cal. 817.

———**Art. 89**—*Starting point under—Termination of agency—What constitutes.*

An agency is terminated when the agent ceases to represent the principal even though his liability in respect of acts done by him may continue. The question as to when the agent is to get his arrears of salary or under what conditions, *viz.*, whether only on getting his accounts passed, has nothing to do with the question of termination of the agency. Where an agent appointed specially to carry on the principal's business at a particular place for a particular period, handed over charge to his successor appointed by the principal and left the place and appeared before the principal sometime later for getting the balance of salary due to him and for having his accounts passed.

Held, that the agent ceased to represent the principal in respect of the agency after he handed over charge to his successor and that the period of limitation under Art. 89, commenced to run from that date and not from the date the agent appeared before the principal for the purpose of getting the balance of salary and having his accounts passed. (*Pandrang Row, J.*) SOMASUNDARAM CHETTI *v.* NACHAL ACHI. **158 I.C. 573=8 R. M.h274=1935 M.W.N. 967=42 L.W. 342=A.I.R. 1935 Mad. 707.**

———**Art. 89**—*Suit for accounts between principal and agent.*

Art. 89 applies to suits for accounts between principal and agents. The period begins to run from the date on which accounts are demanded and refused during the continuance of the agency are from the date on which the agency terminates. Such a suit is not governed by Art. 62 as that article applies to cases where a definite sum of money had been received by the defendant and which he was to hold for the use of the plaintiff. (*Niamatullah and Rachhpal Singh, JJ.*) MOTI LAL *v.* RADHEY LAL. **55 All. 814=147 I.C. 529 (2)=6 R.A. 484=1933 A.L J. 1009=A.I R. 1933 All. 642.**

———**Art. 89**—*Tenants-in-common.*

When by an oral agreement one tenant in common is left in possession as the agent of the other tenants-in-common, if one of them sues him for an account, the suit is governed by Art. 89. 45 M. 648; 24 A. 27; 40 C. 108, 44 C. 1 (P.C.) and 27 C.W.N. 725 (P.C.), Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) ANNU AVATHANIGAL *v.* SOMASUNDARA AVATHANIGAL. **54 Mad 654=I R. 1931 Mad 501=131 I.C. 165=33 L.W. 1=1930 M W.N. 1199=A I.R. 1931 Mad. 185 (2)=62 M L J. 45.**

[Appl. 57 M. 378 (388, 389, 396) **D** 29 N L.R. 34 (40).]

———**Art. 89**—Termination of agency—Burden of proof. *See* EVIDENCE ACT, S. 109. **A.I.R. 1935 Lah. 49.**

———**Art. 89**—*Termination of agency—What constitutes—Agent legal practitioner—Acceptance of vakalat from principal—Effect.*

A legal practitioner, who happens to be the agent of a party, does not cease to be such agent merely because he gets a vakalatnama from his principal and sues on the strength of it for realising the amount due to his principal. (*Tek Chand, J.*) HIRA WAZIR *v.* MOHAMMAD ALI. **157 I.C. 815=A.I.R. 1935 Lah. 49.**

———**Art. 90**—*Applicability—Date of withholding of money to be proved.*

Before Art. 90 can be invoked, it must be ascertained at which time or on what date the fact of the defendant's withholding of the money from the plaintiff became known to him. (*C.C. Ghose and Pearson, JJ.*) SAKTIPRASANNA BHATTACHARYA *v.* NALINIRANJAN

LIMITATION ACT (1908), Art. 90.

BHATTACHARYA. **58 Cal. 923=I.R. 1931 Cal. 641 =133 I.C. 177=A.I.R. 1931 Cal. 738.**

——**Art. 90**—*Legal practitioner—Negligence of—Suit for damages—Starting point.*

A suit in which a client claims damages for negligence of his Advocate is governed by Art. 90. Limitation runs from the date when the negligent act becomes known to the plaintiff and not from when the plaintiff discovers the act to be negligent.

Per *Page, C.J.*—Art. 90 is not happily worded, for the law knows nothing of negligence or misconduct in the abstract, and no cause of action can exist and no suit will lie, that is founded on negligence or misconduct as such. A suit for negligence in Art. 90 means a suit in respect of some negligent act or omission and the words in the third column mean 'from the time when the negligent act or omission becomes known to the plaintiff." (*Page, C. J. and Sen, J.*) SAW HLA PRU *v.* S. S. HALKAR. **9 Rang. 575=135 I C. 648=I R. 1932 Rang 56=A I.R. 1932 Rang. 1.**

——**Art. 90**—*Misconduct of directors of branch office—Suit for compensation—Limitation—Starting point.*

A suit by a bank against the directors of a branch office for compensation for misconduct in sanctioning a loan in violation of the rules is governed by Art. 90 and the period starts from the date when the head office comes to know of such misconduct. (*Coldstream and Jai Lal, JJ.*) PEOPLES BANK OF NORTHERN INDIA *v.* DES RAJ. **160 I.C. 759=8 R L. 588=A.I R. 1935 Lah. 705.**

——**Art. 91**—*Applicability—Fictitious mortgage—Suit for possession.*

Art. 91 is not applicable to a suit for possession on the ground that a deed of mortgage in respect of the suit properties was a fictitious and sham transaction. The instrument being inoperative, it is not necessary for the plaintiff to have it set aside as a preliminary to his obtaining the relief for possession and the relief for cancellation of the deed is merely ancillary. 35 C. 551 and 8 O.W.N. 593, Foll. (*Bisheshwar Nath and Smith, JJ.*) MAHOMED YASIN ALI KHAN *v.* SARJU TEWARI. **140 I.C. 709=9 O.W.N. 958=I R. 1933 Oudh 19=A.I.R. 1933 Oudh 72.**

——**Art. 91**—*Applicability—Plaintiffs not party to lease.*

Art. 91 has no application to a case where the plaintiff is not a party to the lease and does not need to have it set aside. (*Srivastava and Smith, JJ.*) RAM RUP *v.* SPECIAL MANAGER, COURT OF WARDS BALRAMPUR ESTATE. **9 Luck. 365=6 R.O. 329=147 I.C. 910=11 O.W.N. 193=18 R D 97=A.I.R. 1934 Oudh 55.**

——**Art. 91**—*Applicability—Setting aside instrument—When necessary.*

Art. 91 can have no application where the deed which the plaintiff challenges is one which was not executed by him or by one under whom he claims and where it is absolutely immaterial to the plaintiff whether it is cancelled or not. But it does apply to a case in which it is not possible to the plaintiff to get any relief until the instrument is set aside. In other words, if the instrument is binding upon the plaintiff, then even though the plaint may have been made to look as much like a suit for recovery of lands as possible, the plaintiff in order to get any such relief must have the instrument cancelled or at any rate have a declaration of its invalidity as against him. (*Mukerji, J.*) RADHIKA MOHAN GOPE *v.* HARI BASHI SAHA. **6 I.R. (Cal.) 284=146 I.C. 1010=37 C.W.N. 1141=57 C.L.J. 399=A.I.R. 1933 Cal. 812.**

——**Art. 91**—*Applicability—Suit for recovery of self acquired property of last owner—Defendant claiming to be vendee—Prayer for cancellation of sale necessary.*

In a suit for recovery of possession of land to which the plaintiff claimed to be entitled by inheritance and which had been transferred to the defendant by the deceased owner by means of a fictitious sale deed,

Held, that the property having been found to be non-ancestral and to be the self-acquired property of the last owner, it was necessary for the plaintiff to obtain a cancellation of the sale deed in favour of the defendant and that Art. 91 applied to the suit even though the main prayer in the suit was a decree for possession of the land. (*Jai Lal, J.*) HASSU *v.* BAZIDA **I.R. 1933 Lah. 212=142 I.C. 586=34 P.L.R. 412=A.I.R. 1933 Lah. 399.**

[R. 1934 A.L.J. 817 (819).]

——**Arts. 91, 95 and 120**—Applicability—Suit to set aside compromise decree—No allegation of fraud—Limitation. *See* COMPROMISE—CONSENT DECREE. **61 C.L J. 193.**

——**Arts. 91 and 120**—*Applicability—Suit to recover property against instrument of lease executed by plaintiff.*

Where a person seeks to recover property against an instrument of lease executed by himself or one under whom he claims, he must first obtain the cancellation of the instrument and the three years' rule enacted by Art. 91 applies to a suit brought by such person. But where such instrument is executed by a person who is not the full owner of the property but has only conditional authority to dispose of it, that article would not apply and the limitation applicable is that prescribed by Art. 120. In such a case the cancellation of the lease is to be regarded as merely subsidiary to the main relief for possession. (*Ganga Nath, J.*) ABDUL GAFOOR *v.* RAM KRISHNA MURARIJI. **158 I.C. 434=8 R.A. 304=1935 R D. 461=1935 A.W.R. 1113=A.I.R. 1935 All. 1018.**

——**Art 91**—*Applicability—Suit to set aside fraudulent transfer.*

A suit by a creditor to declare the invalidity as against him of a fraudulent transfer executed by his debtor is not governed by Art. 91 but is governed by Art. 120. (*Raza and Kisch, JJ.*) PARKASH NARAIN *v.* BIRENDRA BIKRAM SINGH. **7 Luck 131=I.R. 1931 Oudh 211=132 I C. 51=8 O.W.N. 593=A.I.R. 1931 Oudh 333.**

[**Appl.** 9 O.W.N. 958 (960).]

——**Art. 91**—*Applicability—Voidable transfer—Suit for setting aside.*

When a person sues to obtain possession of property which has been transferred by the person through whom he claims, the suit must be brought within the period allowed by Art. 91 so long as the transfer is voidable and not *ab initio* void. When the transfer has been made by some person who had no title to make it and the transfer is therefore void, then the claim to have such transfer set aside will be merely ancillary or incidental to the main claim which will be one, for possession but when the plaintiff's own predecessor has made a transfer which is voidable and not void, the claim to have such transfer set aside cannot be regarded as merely ancillary to the plaintiff's claim for possession. The plaintiff cannot evade the limitation prescribed by Art. 91 by merely framing his suit as though it were a suit for possession and nothing else. (*King and Collister, JJ.*) AZIZUNNISSA *v.* SIRAJ HUSAIN. **152 I. C. 146=7 R A. 268=1934 A.L.J. 817=3 A.W.R. 302 =A.I.R. 1934 All 507.**

——**Art. 91**—*Applicability—Wrongful lease by agent of principal's property—Suit to set aside.*

LIMITATION ACT (1908), Art. 91.

Where an agent granted a mulgeni lease of his principal's property, treating it as his own and not as that of his principal, the principal is not bound to get the transaction set aside under Art. 91 and a suit to set it aside is governed by Art. 144. The possession of the agent must be deemed to be the possession of the principal. The possession became adverse only when the plaintiff became aware of it. (*Venkatasubba Rao, J.*) LAKSHMINARAYANA NAVADA *v.* MADAPPAYYA. **1931 M.W.N. 856.**

——**Art. 91**—*Starting point of limitation.*

The period of three years permitted by Art. 91 begins to run from the discovery of the plaintiff of the true nature of the deed which he had signed, and not from the date when he escaped from the influence by which, according to the plaintiff, he was dominated. 15 Cal. 58 (P.C.), Ref. (*Lord Alness.*) SOMESHWAR DUTT *v.* TIRBHAWAN DUTT. **61 I.A. 224=9 Luck 178=38 C.W.N. 806=40 L.W. 5=59 C.L.J. 454=36 Bom. L.R. 652=1934 A.L.J. 585=6 R.P.C. 151=149 I.C. 480=3 A.W.R. 865=1934 M.W.N. 647=11 O.W.N. 784=A.I.R. 1934 P.C. 130=67 M.L.J. 7 (P.C.).**

——**Art. 91**—*Suit to set aside gift executed under undue influence—Starting point of limitation.*

Where the evidence showed that the donee had misused his position as a brother and as one in a position of domination to cause his weak-minded brother to execute a gift deed of his entire property, *held*, that the transfer was vitiated by undue influence and that the deed could be set aside within three years from the date when the true facts became known to the plaintiff. (*Hasan, C.J. and Pullan, J.*) TRIBHAWAN DUTT *v.* SUMISHWAR DUTT. **I.R. 1931 Oudh 135=130 I.C. 119=7 O.W.N. 1129=A.I.R. 1931 Oudh 34.**

——**Art. 91**—*Undue influence—Suit to set aside transfer—Starting point of limitation.*

The plaintiff sued to recover possession of a village alleging that a deed of gift which set out that she had given a certain village to her brother in 1909, had been procured from her by fraud. The brothers had left plaintiff in 1910 or 1911 but the suit was filed only in 1925.

Held, that the suit was barred under Art. 91 because it had not been filed within three years of the date when undue influence was withdrawan. (*Sulaiman and Young, JJ.*) DEO SINGH *v.* RANE DULAIVA JUDEO. **135 I.C. 232=I.R. 1932 All. 56=1931 A.L.J. 909=A.I.R. 1932 All. 63.**

——**Art. 93**—Applicability—Suit by widow for possession of properties left by her husband—Limitation—Omission to set aside will set up by defendants—Effect of. *See* LIMITATION ACT, ARTS. 144 AND 93. **A.I.R. 1935 Mad. 709.**

——**Arts. 95 and 120**—*Applicability*—Ex parte *decree against minor—Suit to set aside on ground of gross negligence of guardian—Limitation—Starting point.*

A suit by a minor for a declaration than an *ex parte* decree passed against him is null and void on the ground that the guardian *ad litem* was guilty of gross negligence, is governed by Art. 120, Art. 95 which refers to a suit for setting aside a decree obtained by fraud is not applicable to such a suit. The cause of action cannot be held to arise the moment the decree is passed, but it arises only when the gross negligence which entitles the minor to have the decree set aside becomes known to him. The suit may therefore be instituted within six years of the date when he has such knowledge. (*Khaja Mahomed Noor and Dhavle, JJ.*) MATHURA SINGH *v.* RAMA RUDRA PRASAD SINHA. **14 Pat. 824=162 I.C. 235=8 R.P. 522=16 Pat.L.T. 484=A.I.R. 1936 Pat. 231.**

LIMITATION ACT (1908), Art. 95.

——**Art. 95**—*Applicability—Suit to set aside consent decree on ground of fraud.*

Where a suit is filed to set aside a consent decree in a partition suit on the ground of fraud, Art. 95 applies and limitation is three years from the date of the discovery of the fraud. (*Aston, A.J.C.*) RATANCHAND REWACHAND *v.* ANANDBAI. **6 I.R. (Sind) 41=145 I.C. 777=A.I.R. 1933 Sind 53.**

——**Art. 95**—Omission to disclose near relations of minor in guardian application—If amounts to fraud. *See* LIMITATION ACT, SS. 6 AND 7. **158 I.C. 874=A.I.R. 1935 Mad. 1085.**

——**Art. 95**—*Scope—Minor—Suit for possession of property on ground that decree is not binding—Allegation of fraud against guardian* ad litem.

Where a suit by a person for possession of certain property on the ground that a decree obtained against him during his minority is not binding on him, is based, not only on allegations of gross negligence on the part of the guardian *ad litem* but also on the assertion that the agent of the guardian *ad litem* had colluded with the opposite party and had failed to produce material evidence, it *prima facie* falls within the purview of Art. 95 and is within time when the plaintiff alleges that he came to know of the fraud only a couple of months before institution of the suit. (*Bhide, J.*) GURBACHAN SINGH *v.* HAZARA SINGH. **A.I.R. 1935 Lah. 961.**

——**Art. 95**—*Setting aside sale—Allegation of fraud—Time-limit.*

If a sale is sought to be set aside on the ground of fraud, the Art. applicable is Art. 95 and not Art. 12. (*Courtney-Terrell, C.J. and Kulwant Sahay, JJ.*) MADHO SARAN SINGH *v.* MANNA LAL. **149 I.C. 129=6 R.P. 563=14 Pat.L.T. 441=A.I.R. 1933 Pat. 473.**

——**Arts. 95 and 115**—*Suit for compensation against pretended agent—Limitation—Starting point.*

Whether Art. 95 or 115 applies to a suit for compensations against a pretended agent under S. 235 of the Contract Act, the period of limitation is three years. The date from which limitation starts is the date on which the plaintiff has noticed that the implied agency did not exist, but it must be an effective notice. Where a Mahomedan son, who is not the authorized agent of his father, by mortgaging his father's land holds himself out to be an agent, the limitation for a suit for compensation starts from the date on which the father obtains a decree in a suit for possession of the mortgaged property and not from the date of institution of suit. Though the plaintiff knew that the father repudiated the agency directly he instituted his suit, he was in possession of the land and it was not until a decree was obtained that he suffered any loss. (*Middleton, J.C.*) MAYA RAM *v.* MAHOMED UMAR. **151 I.C. 58=7 R. Pesh. 7=A.I.R. 1934 Pesh. 49.**

——**Art. 95**—*Suit under*—Ex parte *decree setting aside—Grounds—Fraud—Proof of — Non-service of summons, if sufficient.*

In a suit under Art. 95 to set aside an *ex parte* decree on the ground of fraud, it is not enough if the plaintiff proves merely that there was no service of summons on him. He must show that the decree was obtained by fraud; he must show that the summons was fraudulently suppressed and by fraud of the plaintiff (in the former suit) he was kept ignorant of the decree. (*M. C. Ghose, J.*) ABBAS ALI BHUIYA *v.* RAM KANAI MAJUMDAR. **154 I.C. 414=7 R.C. 446=60 C.L.J. 120=A.I.R. 1935 Cal. 95.**

LIMITATION ACT (1908), Art. 96.

——**Arts. 96 and 120**—*Applicability—Adjustment of decree—Suit to rectify petition for adjustment of decree and order on the ground of mistake—Limitation.*

A suit to rectify on the ground of mistake a petition for adjustment of a decree and the order passed thereon alleging that the same did not represent correctly the intention of the parties falls under Art. 96, the terms of which are perfectly general. There is no scope for the application of Art. 120 to such a suit. (*R.C. Mitter, J.*) ABDUL SATTAR CHOUDHURY *v.* ABDUL RUSAN. **164 I.C. 651=9 R.C. 262=39 C.W.N. 966.**

——**Art. 96**—*Applicability—Mistake in partition—Suit to rectify—Starting point.*

A suit to re-open a partition and to re-adjust the shares of the parties thereto on the ground that certain properties allotted to the share of the plaintiff really belonged to a third party, who obtained a decree and possession of those properties from the plaintiff is governed by Art. 96 and not Art. 127 or 144. The latest possible date from which time would run against the plaintiff would be that of his dispossession in pursuance of that decree and a suit brought more than three years thereafter is barred by limitation. 45 B. 582, Foll. (*Curgenven and Cornish, JJ.*) RAMAKOTAYYA *v.* SUNDARARAMAYYA. **54 Mad 883=34 L.W. 262=135 I C. 9=I.R. 1932 Mad. 41=A.I.R. 1931 Mad. 707=61 M.L.J. 430.**

——**Arts. 96 and 52**—Goods sold and delivered—Wrong person debited—Mistake subsequently discovered—Claim against right person—Suit governed by Art. 52, and not by Art. 96 *See* LIMITATION ACT, ARTS. 52 AND 96. **27 S.L.R 81=A.I.R. 1933 Sind 32.**

——**Arts. 96 and 95**—Second suit for partition—Lands omitted in the first suit by mistake or fraud—Suit governed by Art. 142 or 144, and not Art. 95 or 96. *See* LIMITATION ACT, ART. 142. **A.I.R. 1931 Sind 27.**

——**Art. 97**—*Applicability — Agreement to convey property by guardian subsequently removed by Court.*

A guardian agreed to convey property of the minors after obtaining sanction of the Court. He was found unfit to be the guardian and was removed from guardianship,

Held, a suit for the money paid under the agreement was not governed by Art. 97 as this was not a case of a voidable sale, but of no sale or in any case of a sale which was void *ab initio*. 25 Bom. 593, Ref. (*Rupchand, J.C. and Mehta, A.J.C.*) PRIBHADINOMAL METHUMAL *v.* MT. CHUTTI. **27 S L.R. 422=147 I.C. 94=6 R.S. 125=A.I.R. 1933 Sind 379.**

——**Arts. 97 and 115**—*Applicability—Contract to execute lease—Payment of consideration in two instalments on different dates—Breach by lessor—Suit for return of consideration—Limitation—Starting point.*

Plaintiff made two payments of money on different dates to the defendant, being the consideration in respect of a lease, which the defendant promised to execute in his favour, of a certain holding. The defendant resiled from the agreement and refused to execute the lease. Plaintiff sued to recover the sums paid by him.

Held, the suit was governed either by Art. 97 or 115 of the Limitation Act, and that the cause of action in either case arose only on breach of the agreement by the defendant, which could only be after the second payment by the plaintiff. (*Allsop, J.*) ABDUL SHAKUR KHAN *v.* RAJENDRA KISHORE SARAN. **155 I.C. 1092=7 R.A. 1029=1935 R.D. 345=1935 A.W.R. 818=1935 A.L.J. 966=A I.R. 1935 All, 759.**

——**Art. 97**—Applicability—Contract of indemnity—Suit to enforce by mortgagee decree-holder—Suit governed by Art. 116, not by Art. 62 or 97. *See* LIMITATION ACT, ART. 97. **1932 A.L.J. 317=A.I.R. 1932 All. 358.**

——**Art. 97**—Applicability—Contract of sale of land—Suit against stranger in possession by vendee—Dismissal of—Subsequent suit against vendor for damages—Starting point—Suit governed by Art. 116, and not by Art. 97 or 62. *See* LIMITATION ACT, ARTS. 116, 62 AND 97. **A.I R. 1933 Mad. 126=64 M.L J. 336.**

——**Art. 97**—Applicability—Excessive execution—Suit for refund—Art. 115 or 120 applies, not Art. 97. *See* LIMITATION ACT, ART. 120. **33 P L.R. 1084=A.I.R. 1933 Lah. 112.**

——**Art. 97**—*Applicability—Insolvency proceeding—Money paid to receiver as price of property sold—Sale falling through—Suit for refund of advance—Starting point of limitation.*

On 24th February, 1926, the plaintiff paid the Receiver certain amount as part of the purchase money of the estate of the insolvent. The Insolvency Court having refused to sanction the transfer the purchaser applied in October, 1929, for a refund of the amount paid by him and the Court dismissed his application and he thereupon instituted a suit in May, 1931, for recovery of the amount. Meanwhile the property had been sold in auction in September, 1927.

Held, that the suit was governed by Art. 97 and time commenced to run from the date of failure of consideration, namely, the date on which the property was sold to another person. (*Sulaiman, C.J. and King, J.*) LACHMAN KACHHI *v.* SECRETARY OF STATE. **6 R. A. 749=148 I.C. 629=1934 A L.J. 864=4 A.W.R. 558=A.I R. 1934 All 547.**

——**Art. 97**—*Applicability—Sham transaction.*

A suit for reimbursement by the purchaser of certain property of tha amount paid for the redemption of an undisclosed mortgage, after the purchase in his favour was found to be sham and nominal, is not governed by Art. 97. It cannot be said to be "for money paid upon an existing consideration which afterwards fails," because *ex hypothesi* no consideration was ever intended for the transaction. 15 I.A. 211; 28 A. 466 and 25 A. 618, Dist. (*Patkar, J.*) RAGHUNATH *v* LAHANU. **I.R. 1931 Bom. 123=128 I.C. 907=32 Bom L R. 1376=A.I R. 1931 Bom. 39.**

——**Arts. 97 and 116**—Compensation for breach of a contract—Suit governed by Art. 97 also—Suit based on registered document—Applicability of Art. 116. *See* LIMITATION ACT, ARTS. 116 AND 97. **30 N.L R. 138.**

——**Art. 97**—*Contract of sale—Breach—Suit for refund of purchase money paid—Limitation.*

Where the purchase money was paid on 16th June, 1925 and the stamp papers for conveyance were passed on 5th January, 1926 but on 16th March, 1926 the defendant informed the plaintiff that the conveyance could not be executed and the plaintiff having failed to get possession in March 1929, sued for refund of the purchase money on 17th May, 1929.

Held, that Art. 97 applied and the suit was not barred by limitation. (*Guha and Bartley, JJ.*) SUDHA MUKHI DEBI *v.* CHAIRMAN OF THE COMMISSIONERS OF THE TOLLYGUNJ MUNICIPALITY. **150 I.C. 89=6 R.C. 756=58 C L J. 235=A.I R. 1934 Cal. 148.**

——**Art. 97**—*Decree affirmed in appeal—Starting point of limitation.*

Where a decree is confirmed in appeal, time under Art. 97 runs from the date of the adverse judgment of the first Court. The running of the time is not postponed by reason of the filing of the appeal. (*Venkatasubba Rao, J.*) MUTHIRULAPPA PILLAI *v.* KAMARAJA

LIMITATION ACT (1908), Art. 97.

PANDIA NAICKER. **6 R.M. 496=148 I.C. 523=39 L.W. 147=A.I.R. 1934 Mad. 224.**

———**Arts. 97, 115 and 116**—Distinction in the applicability of Art. 97 and Art. 116—Lease—Failure to deliver possession—Suit for recovery of Nazarana. *See* LIMITATION ACT, ARTS. 116, 97 AND 115. **13 Pat 192=A.I.R. 1934 Pat. 148.**

———**Art. 97**—*Failure of consideration—Suit based on original liability—Starting point of limitation.*

On 1st October, 1921, a suit instituted by *L* against *D* for the recovery of a certain sum of money was withdrawn and dismissed. *D* executed a mortgage in favour of *J* of certain land and *J* made an entry in the *bahi* of *L* admitting liability for the sum originally claimed from *D*. Subsequently there was trouble over the mutation of the mortgage and *J* came into Court as a plaintiff against *D* and his suit was eventually dismissed on appeal on 26th June 1923 *L* instituted a suit against *D* and others claiming the amount.

Held, that the suit was governed by Art. 97 and not by Art. 62 and that time commenced to run from 26th June, 1923, when owing to *J's* failure to secure possession the original liability of *D* revived. (*Harrison and Tek Chand, JJ.*) LAL DITTA *v.* DOST MAHOMED. **13 Lah 188=I.R. 1932 Lah. 386=137 I.C. 828=33 P.L.R. 440=A.I.R. 1932 Lah. 332.**

———**Art. 97**—Lease—Breach of covenant to deliver possession—Suit to recover advance—Limitation—Suit barred whether Art. 97 or 116 applied. *See* LIMITATION ACT, ART. 116. **A.I.R. 1932 Mad. 225.**

———**Art 97**—*Money erroneously paid—Suit to recover—Time-limit.*

The representative of the mortgagee received from the representative of the mortgagor a sum of money and executed a redemption deed agreeing to deliver possession forthwith. In that deed the former further stipulated that, if any difficulty was experienced by the latter in obtaining possession they would take necessary steps or recoup him. Possession was not delivered and a week after the deed certain third persons asserted right to the property as donees from the mortgagee. Thereupon the mortgagor's representative sued to recover possession. It was held that the plaintiff could redeem only on payment of the money once again to the third parties. The decision was upheld in appeal. The plaintiff thereupon sued to recover the amount he has already paid to the mortgagee with interest and the expenses of the prior litigation.

Held, that the suit was governed by Art. 97 and not Art. 62 of the Limitation Act because the suit was based on failure of consideration of an existing contract.

Held, further, that the stipulation for reimbursement was integral part of the transaction embodied in the redemption deed and that the plaintiff's suit to recover compensation was governed by Art. 116. (*Harrison and Tek Chand, JJ.*) CHANAN MAL *v.* MAHARAJ. **13 Lah. 1=135 I.C. 63=I.R 1932 Lah. 47=32 P.L.R. 457=A.I.R. 1931 Lah. 448.**

———**Art. 97**—*Mortgage by occupancy tenants—Failure of consideration—Dispossession of mortgagee—Suit by mortgagee for recovery of money—Starting point.*

The plaintiffs were occupancy tenants and effected a mortgage in favour of one of the landlords and put him in possession. A suit was brought by other landlords and the mortgage was set aside as having been made without their consent. This decree was executed and the mortgagors were formally put in possession. In spite of this, the mortgagees remained in possession and claimed to have recently been dispossessed and

LIMITATION ACT (1908), Art. 97.

sued for the money lent urging that the suit was within three years of their actual abandoing and leaving the land.

Held, that in a suit of this sort, it was for the plaintiffs to show that they had come to Court within three years of time beginning to run against them. In the above case, the date on which consideration failed under Art. 97, which governed this case, was the date on which the plaintiffs ceased to be in possession as mortgagees under the instrument or in other words, the date from which their possession became that of trespassers as opposed to their holding under an existing title. That when the plaintiff obtained possession and was subsequently dispossessed, time began to run from the date of dispossession. The words "date of failure of consideration" show that the date to be taken was the date on which plaintiff ceased to derive any benefit from the transfer. (*Harrison, J.*) NUR DIN *v.* ALLAH DIN. **140 I.C. 760=I.R. 1933 Lah. 29 (2)=34 P.L.R. 104=A.I.R. 1933 Lah. 83.**

———**Art. 97**—*Plaintiffs wrongly paying defendants to redeem mortgage—Third person obtaining foreclosure decree—Plaintiffs paying him to redeem mortgage—Suit to recover money wrongly paid to defendants—Limitation—Starting point*

The plaintiffs who were representatives in interest of the mortgagors paid money to redeem the mortgage to defendants who executed a deed of re-conveyance of the mortgaged property. One *L* who had acquired an interest in the mortgagee's interests brought a suit for foreclosure on the basis of the mortgage. The Court, holding that the payment by the plaintiffs was wrongly made to the defendants, passed a decree for foreclosure in consequence of which the plaintiffs had to pay money to *L* for the purpose of redeeming the mortgage. In a suit by the plaintiffs to recover the money wrongly paid to the defendants,

Held, that the proper article to apply was neither Art. 116 nor Art. 120 but Art. 97, and that the period of three years should run from the date of the foreclosure decree. (*King, C. J.*) SHAMBHU DUTT *v.* RAM BAKHSH. **11 Luck. 110=155 I.C. 299=7 R.O. 575=1935 O.W.N. 549=A.I.R. 1935 Oudh 378.**

———**Arts. 97 and 116**—Refund of purchase money and expenses—Suit for—Registered sale deed—Breach of covenant for title—Art. 116 applies, not Art. 97—Cause of action begins from the date from when it became clear that the sale was voidable. *See* LIMITATION ACT, ARTS. 116 AND 97. **A.I.R. 1932 Nag. 3.**

———**Art. 97**—*Suit for price on failure of consideration—Adjudication by Courts—Final decree of second appellate Court—Starting point of limitation.*

The plaintiff purchased a decree. A suit to have that decree set aside on ground of fraud was decreed by the first Court but was reversed on appeal. The High Court, however, on second appeal restored the decree of the first Court. The plaintiff having sued for refund of the price on the ground of failure of consideration,

Held, that time bagan to run from the date of the High Court's decree. 42 M. 507, Foll.; 36 M.L.J. 557 (P.C.), Dist. (*Sulaiman, A.C.J.*) SABIR HUSAIN KHAN *v.* JAN MAHOMED. **53 All. 914=I.R. 1931 All. 655 (1)=133 I.C. 415 (1)=A.I.R. 1931 All. 651.**

———**Art. 97**—*Suit for refund of purchase-money—Limitation—Title bound with complicated family history—Limitation from final decision by Court.*

In a suit for refund of purchase-money, limitation will ordinarily run from the date of the agreement. But there may be special circumstances in which it would not. When there is a misapprehension as to the pri-

LIMITATION ACT (1908), Art. 97.

vate rights of the vendor in the property which he purported to sell, the limitation begins when the true nature of those rights is discovered. Once the plaintiff establishes that there was a misrepresentation and that he was kept from a knowledge of the defect in title by it, then the burden shifts to the other side. If the question of title has been bound up with a complicated family history, the plaintiff cannot know of the defect in the title with reasonable definiteness until the Court has finally decided the matter and then the starting point is the date of decision in the appellate Court. (Case law discussed.) (*Bose, A. J. C.*) RAMJIRAO *v.* MARUTI NARAIN. **6 I.R. (Nag.) 15=144 I.C. 724=A.I.R. 1933 Nag. 244.**

———**Art. 97**—Suit for refund of purchase-money—Registered deed of sale—Breach of covenant for title—Starting point, Art. 116 applies, not Art. 97. *See* LIMITATION ACT, ART. 116. **25 S.L.R. 173=A.I.R. 1931 Sind 141.**

———**Art. 97**—*Vendee unable to obtain possession of whole land sold—Suit for refund of money—Limitation—Starting point.*

Where a vendee who has paid the full consideration for the land purchased fails to obtain possession of the whole land as the whole of it does not belong to vendor, a suit for refund of the money in respect of such land is governed by Art. 97 and time begins to run from the date he finds it unable to obtain possession. (*Coldstream and Jai Lal, JJ.*) MUNICIPAL COMMITTEE, GUJRANWALA *v.* CHARANJI LAL. **160 I.C. 574=8 R.L. 567=A.I.R. 1935 Lah. 685.**

———**Art. 97**—*Void sale—Refund of consideration—Suit for—Possession handed over to vendee—Starting point.*

Where a sale is void *ab initio*, and possession is not given to the purchaser, a suit to recover the purchase-money would be governed by Art. 62. Where, however, the title is imperfect and possession is not handed over and it is subsequently discovered that the contract of sale became void, Art. 97 would apply to a suit to recover the purchase-money on an existing consideration which afterwards failed, from the time when the purchaser endeavoured to obtain possession of the property and being opposed found himself unable to obtain possession, but where possession has been handed over by the vendor to the vendee, the cause of action would not arise till the vendee is dispossessed. 25 Bom. 593; 19 Cal. 123 (P.C.); 38 Mad. 887; 37 Bom. 538; 46 Mad. 40; 26 All. 519, Ref. (*Patkar and Broomfield, JJ.*) RATANBAI *v.* GHASHIRAM. **55 Bom. 565=I.R. 1932 Bom. 37=134 I.C. 1157=33 Bom.L.R. 1092=A.I.R. 1932 Bom. 36.**

———**Art. 99**—*Applicability — Sub-mortgage by co mortgagees—Sale of property—Suit for contribution.*

The plaintiffs and the defendant were mortgagees under a deed of 29th May, 1908. The mortgage was executed for Rs. 1,000 in which plaintiffs were mortgagees of half of the property and the defendant was mortgagee of the remaining half. The plaintiffs and the defendant sub-mortgaged their mortgagee rights for Rs. 1,000 on 24th May, 1909. The plaintiffs' case was that they paid the amount due from them (Rs. 551-4-0) to their mortgagee on 31st August, 1911, and that the defendant paid nothing on account of his share. It was further alleged that their mortgagee brought a suit on 22nd May, 1923, for sale of the mortgagee rights against the plaintiffs and the defendant, as their liability was joint, and obtained a joint decree against them, that in execution of that decree, she herself (mortgagee) purchased the mortgagee rights for Rs 800 at the sale

LIMITATION ACT (1908), Art. 102.

held some time before 21st October, 1927, and got possession of the same through Court, on 19th January, 1928, and that as the plaintiffs lost possession owing to the defendant's default, they were entitled to claim Rs. 500 with interest at one per cent. per mensem from the defendant. The suit was framed as one for contribution and was filed on 9th January, 1931.

Held, the suit was barred by time, that Art. 120 did not apply, that even if Art. 99 applied, limitation ran from date of sale and not date of dispossession and that S. 69, Contract Act, had no application as payment was held not to have been made. (*Razi and Allsop, JJ.*) BHIKHAM SINGH *v.* SANT BAKHSH SINGH. **147 I.C. 1042=6 R.O. 350=10 O.W.N. 919=A.I.R. 1933 Oudh 478.**

———**Art. 99**—Applicability—Suit to enforce charge on immovable property—Suit under S. 171—Bengal Tenancy Act—If question of limitation arises, Art. 132 applies. *See* LIMITATION ACT, ART. 132. **35 C.W.N. 678=A.I.R 1931 Cal. 493.**

———**Art. 99**—*Hindu joint family—Payment of decree debt by one member after separation—Claim for contribution—Starting point of limitation.*

Plaintiff and his three brothers who formed a joint Hindu family were indebted to a certain person. The creditor filed a suit against plaintiff and one other member and obtained a decree in June, 1913. Subsequently the family separated and later on execution was taken out against plaintiff and he executed a mortgage in favour of the decree-holder on 4th July, 1924, in lieu of the decree amount, Plaintiff instituted a suit for contribution against the other members of the family on 4th July, 1927.

Held, that the joint debt was wiped out in 1924, that time began to run against the plaintiff only from that date and the suit being governed by Art. 99 was in time.

Held, further, that the suit was not governed by Art. 107 and that the right to claim contribution did not arise on the date when the debts were incurred. 20 Cal. 18, Cons. (*Sulaiman, A.C.J. and Bupai, J.*) SAT ROHAN PRASAD TEWARI *v.* BHARATH PRASAD MAN TEWARI. **I.R. 1931 All. 836=134 I.C. 452=1931 A.L.J. 651=A.I.R. 1931 All. 652.**

———**Art. 100**—Applicability—Suit for partnership accounts only—Art. 120 applies, not Art. 89 or 100 or 116. *See* LIMITATION ACT, ART. 120. **29 N.L.R. 34=A.I.R. 1933 Nag. 127.**

———**Art. 102**— Applicability— Hereditary temple archaka—Suit against trustee for emoluments—Limitation. *See* LIMITATION ACT, ARTS. 36, 102 AND 120. **68 M.L.J. 132.**

———**Art. 102**—Applicability—*Shahna* employed to watch crops attached in execution—Suit for wages—Limitation. *See* LIMITATION ACT, ART. 7. **1935 A.L.J. 78=4 A.W.R. 1253=A.I.R. 1935 All. 102.**

———**Art. 102**—Applicability—Suit for wages by person employed as salesman. *See* LIMITATION ACT, ART. 7. **A.I.R. 1935 Rang. 235.**

———**Art. 102**—*Inapplicability—Suit for wages by village carpenter.*

A village carpenter is an artisan within the meaning of Art. 7 of the Limitation Act and a suit for wages by him is governed by Art. 7 and not by Art. 102 or Art. 56. (*Subhedar, A.J.C.*) NAMDEO *v.* RAMKRISHNA MAHADEO **152 I.C. 835=7 R.N. 110=A.I.R. 1934 Nag. 260.**

———**Art 102**—*Monthly wages—Suit for arrears—Limitation—Starting point.*

LIMITATION ACT (1908), Art. 103.

In the case of monthly wages, the wages accrue and become due in law on the final day of the month, and the period of limitation for recovery of arrears of monthly wages runs under Art. 102 of the Limitation Act from that date and not from the date of termination of service. (*Bennet, J.*) GAJADHAR PRASAD *v.* DHARMA NAND. **154 I.C. 713=7 R.A. 797=1935 A.W.R. 365=1935 A.L.J. 379=A.I.R. 1935 All. 716.**

———**Art. 103**—*Prompt dower—Suit for—Demand—Necessity for—Evidence of.*

Limitation for a suit for dower is governed by Art. 103; it is three years from the date when the dower becomes payable. Although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture. It is only upon her making such demand that it becomes payable. The demand must be specific and not conditional or ambiguous. No amount of opposition on the husband's part would be sufficient to constitute a cause of action, unless the wife had made a previous demand. 8 All. 149; 2 I.A. 235 (P.C.) and 63 P. R. 1892, Appl. A jirga was sent to a woman who had applied for execution of a maintenance decree against her husband with the idea of bringing about her return to the husband and inducing her to live with him. She expressed possible readiness to accompany her husband if he would pay her the dower.

Held, that there was not a definite and specific demand for dower so as to set the statute of limitation running against the wife. The jirga was in no way primarily concerned with the dower. (*Fraser, J.C. and Saaduddin, A.J.C.*) MT. AMTUL RASUL *v.* KARIM BAKHSH. **I.R. 1933 Pesh. 15=142 I.C. 833=A.I.R. 1933 Pesh. 31.**

———**Art. 104**—*Starting point—Divorce—Talak pronounced in absence of wife and later communicated to her.*

It is a part of the Mahomedan Law that, so far as a claim for dower is concerned, the marriage is dissolved only when it comes to the wife's notice, and there is nothing in Art. 134 against that rule. So a suit brought by a Mahomedan wife for deferred dower is in time if within three years from the date when the talak pronounced in her absence by her husband was communicated to her, though it may be more than three years from the date of the pronouncement. (*Venkatasubba Rao, J.*) KATHIYUMMA *v.* UROTHEL MARAKKAR. **I.R. 1931 Mad. 727=133 I.C. 375=1931 M.W.N. 570=A.I.R. 1931 Mad. 647.**

———**Art. 106**—*Applicability.*

Art. 106 relates to a suit for an account and share of the profits of a dissolved partnership while Art. 120 governs a suit for dissolution and accounts of a subsisting partnership. 37 M.L.J. 353; 66 I. C. 811 and 1930 Lah. 378, Ref. (*Pakenham Walsh and Bardswell, JJ.*) SRINIVASALU NAIDU *v.* RAMAKRISHNA NAIDU. **I. R. 1933 Mad. 437=144 I.C. 573=1933 M.W.N. 689 =37 L.W. 288=A.I.R. 1933 Mad. 353 (2).**

———**Art. 106**—*Applicability—Attachment of property as belonging to one partner—Suit for declaration.*

A suit for a declaration that certain property, attached in execution of a decree against one of the partners as belonging solely to him, is not solely owned by him, and that the plaintiff has got a share in it, is not a suit for account or for share of profits of a dissolved partnership and is not governed by Art. 106. (*Niamatullah and Rachhpal Singh, JJ.*) ANANDA PRASAD *v.* BHAGWANT PRASAD. **148 I.C. 515=6 R.A. 713=A.I.R. 1933 All. 926.**

———**Art. 106**—Applicability—Partnership—Dissolution—Fresh agreement to collect the outstandings, to share deposit them and the amount equally—Relationship of principal and agent—Suit for accounts—Limitation—Art. 89 applies, not Art. 106. *See* LIMITATION ACT, ART. 89. **A.I.R. 1931 Lah. 300.**

LIMITATION ACT (1908), Art. 106.

———**Art. 106**—*Applicability—Suit against sub partner.*

Art. 106 contemplates suits between partners *inter se* and does not apply to an action by a partner against the sub-partner. Such an action is governed by Art. 120. (*Venkatasubba Rao, J.*) SEENAYYA *v.* RAMALINGAYYA. **57 Mad. 347=148 I.C 204=6 R M. 447 (2)=1933 M.W.N. 1382=38 L.W. 858=A.I.R. 1934 Mad. 12 =65 M.L.J. 789.**

———**Art. 106**—Applicability—Suit for accounts of partnership. *See* LIMITATION ACT, ARTS. 62, 106, 113 AND 120. **36 Bom.L.R. 1068.**

———**Art. 106**—*Applicability—Suit for accounts of partnership—Decree—Amount found due to* ex parte *defendant—Suit by latter to recover—Limitation.*

In a ptevious suit between the parties for accounts of a dissolved partnership, there was decree in favour of the plaintiff on the basis of a report by a commissioner who went into the accounts and found the amounts due to the respective parties. A defendant in that action who remained *ex parte* therein and did not ask for a decree in his favour subsequently sued for the amount which was found due to him as per accounts of the commissioners in the former suit,

Held, that the claim was not analogous to one arising out of an adjustment of partnership accounts; that the suit did not involve or require the kind of accounts-taking usually directed in a case of the ordinary accounting kind; and that the suit was therefore not governed by Art. 106. The present suit was therefore maintainable for the enforcement of rights so declared, though not enbodied in the decree in the previous suit. (*Beasley, C.J. and Varadacharlar, J.*) RATHAN CHAND KUMAJI *v.* AMI CHAND. **156 I.C. 264=7 R.M. 669 1934 M.W.N. 539=40 L.W. 792=A.I.R. 1934 Mad. 665=67 M.L J. 413.**

———**Art. 106**—Death of partner—Continuance of business by survivors and son of deceased partner in old firm name—Use of old premises and old account books —Suit for accounts—Limitation. *See* PARTNERSHIP —DISSOLUTION—DEATH OF PARTNER. **153 I.C. 969=A.I.R. 1935 Lah. 209.**

———**Art. 106**—*Dissolved partnership — Suit for accounts.*

Where one of the partners had died in 1920 and a suit for dissolution and taking of accounts was filed in 1925,

Held, that the suit was barred under Art. 106, as it was in substance one for the taking of accounts of an already dissolved partnership. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) KOTHANDAPANI CHETTI *v.* SREEMANAVEDAN RAJA. **57 Mad. 378=151 I.C. 81 =7 R M. 80=1934 M.W.N. 22=39 L.W. 164=A.I. R. 1934 Mad. 162=66 M.L.J. 625.**

———**Art. 106**—*Partnership—Dissolution—Suit for rendition of accounts.*

Where after dissolution of partnership, a suit was brought for rendition of accounts and for mesne profits. Art. 106 and not Art. 120 is applicable. (*Shadi Lal, C.J. and Broadway, J.*) KARAM CHAND *v.* BASHESHAR NATH. **I.R. 1932 Lah. 500 (2)=138 I.C. 375 =33 P.L R. 713=A.I.R. 1932 Lah. 519.**

———**Art. 106**—*Suit for dissolution and accounts—Limitation—Business stopped but partnership continued for realising assets—Date of dissolution.*

LIMITATION ACT (1908), Art. 107.

Where the partners decide that they would do no more business and agree that the assets should be realized, the partnership, even after the stopping of the business, continues for the realization of the assets and until the assets are realized, the final dissolution of the partnership does not take place. The period of limitation therefore for a suit for dissolution and accounts of partnerships begins from the date of the final dissolution. Three partners entered into a partnership business to run a motor car each contributing towards the business. Subsequently the partners agreed to do no more business so far as the running of the car was concerned and closed the partnership.

Held, that the partnership continued even after the agreement not to run the motor car, for purposes of realization of assets, *i.e.*, until the sale of the motor car. A.I.R 1927 P.C. 70, Foll (*Aston and Havelivala, A. J.Cs.*) PAHLOOMAL *v.* PARAMANAND. **I.R. 1933 Sind 163=143 I.C. 900=A.I.R. 1933 Sind 121.**

———**Art. 107**—Applicability—Joint family debt—Payment by separated member—Claim for contribution—Starting point of limitation—Art. 99 applies, not Art. 107. *See* LIMITATION ACT, ART. 99. **1931 A L J. 651=A.I.R. 1931 All 652.**

———**Art. 109**—Applicability—Co-sharers—Suit for share of rents governed by Art. 120 and not by Art. 109. *See* LIMITATION ACT, ART. 120. **A.I.R. 1933 Lah. 951.**

———**Art. 109**—Inapplicability—Suit for share of profits—Suit by members of joint family against purchaser of another member's interest in property. *See* LIMITATION ACT, ART. 120. **41 L.W. 138=68 M. J. 487.**

———**Arts. 109 and 120**—*Reversioner's suit for possession decreed in part against transferee of Hindu widow—Subsequent suit for mesne profits—Limitation.*

Where the reversioner's suit for recovery of property in the possession of a transferee of a Hindu widow was decreed in part, a subsequent suit for mesne profits against the transferee is governed by Art. 109 and not Art. 120 of the Act. The profits claimed were profits which had been wrongfully received by the transferee within the meaning of Art. 109, even though it was held in the former suit that the transferee was entitled to retain a portion of the property. (*Srivastava and Smith, JJ.*) BHARAT SINGH *v.* GUR PRASAD SINGH. **157 I.C. 960=8 R.O. 59=1935 R.D. 451=1935 O. W.N 985=A.I.R. 1935 Oudh 515.**

———**Art. 109**—*Suit for mesne profits—Limitation.*

In a suit for recovery of mesne profits wrongfully received by the defendant, limitation runs from the date of receipt of such profits by defendant and not from the date of decision as to the question of title of the plaintiff. (*Bhide, J.*) BASHESHAR DAS *v.* DIWAN CHAND. **6 I.R. (Lah.) 287=146 I.C. 939=34 P.L.R. 1085=A.I.R. 1933 Lah. 615.**

———**Art. 109**—"Wrongfully received"—Co owners—Mesne profits—Claim for—Art. 120 applies. *See* LIMITATION ACT, ART. 120. **A.I.R. 1931 Rang. 150.**

———**Art. 110**—Applicability—Suit to recover rent under registered lease deed—Art. 116 applies, not Art. 110. *See* LIMITATION ACT, ART. 116. **A.I.R. 1931 Cal. 790.**

———**Arts. 111 and 116**—*Applicability.*

Art. 111 does not apply to a case where no time was fixed for completing the sale and the purchase-money is not payable till some date after conveyance of the property. Where the purchase-money or a substantial portion of it was not payable until one year after the conveyance of the property and no time was fixed for completing the sale.

LIMITATION ACT (1908), Art. 112.

Held, Art. 116 did not apply. A.I.R. 1933 P.C. 143, Rel. on. (*Dalip Singh, J.*) GURBACHAN SINGH *v.* SHAM LAL. **154 I.C. 432 (1)—7 R.L. 571 (1)=A.I. R. 1934 Lah. 296 (1).**

———**Art. 111**—Applicability—Vendor and purchaser—Suit to recover unpaid purchase-money on breach of contract—Limitation—Art. 116 applies, not Art 111. *See* LIMITATION ACT, ART. 116. **1931 A.L.J. 985=A.I R. 1931 All. 419.**

———**Art. 111**—Inapplicability—Vendee failing to pay vendor's creditor as agreed—Claim by vendor to recover amount from vendee personally. *See* LIMITATION ACT, ART. 116. **1935 A.L J. 279=A.I R. 1935 All. 411.**

———**Arts. 111 and 116**—Registered sale—Portion of purchase-money retained by vendee—Contract of indemnity—Limitation—Art. 116 applies, not Art. 111. *See* LIMITATION ACT, ARTS. 116, 111 AND 83. **14 Lah. 646.**

———**Arts. 111 and 120**—Sale by guardian—Money left with vendee to be paid to two minors on attaining majority—Suit by such guardian as reversioner for money—Limitation governed by Art. 120 and not by Art. 111. *See* LIMITATION ACT, ART. 120. **A.I.R. 1933 Lah. 860.**

———**Art. 111**—*Scope.*

Art. 111 governs suits for unpaid purchase-money payable to or to the order of the vendor under the agreement to sell and is independent of rights arising by the deed of sale. When the agreement is embodied in the registered sale deed, a suit for compensation for breach of contract is governed by Art. 116. 22 Bom. 846, Dist.; 25 Mad. 55, Ref. (*Krishnan Pandalai, J.*) NAVAMANINADAR *v.* VEDAMANICKA NADAR. **56 Mad. 724=I.R. 1933 Mad. 435=144 I C. 550=1933 M.W.N. 370=37 L.W. 503=A.I.R. 1933 Mad. 424 =64 M.L.J. 526.**

———**Arts. 111 and 116**—Vendor and purchaser—Amount kept with vendee to pay previous mortgage—Surplus to be paid to vendor—Claim for surplus—Limitation—Art. 111 is not applicable, but Art. 116 is applicable. *See* LIMITATION ACT, ART. 116. **11 O. W.N. 691=A.I.R. 1934 Oudh 240.**

———**Art. 112**—*Applicability—Liquidator's claim.*

A call made before the winding up is quite different from the new liability to contribute to the assets of the company on winding up; the fact that the company could not realise the calls by lapse of time is no answer to the liquidator's claim. The fact that the calls were barred by time as against the company is immaterial. (*Ross and Scroope, JJ.*) PRAYAN PRASAD *v.* GAYA BANK, AND TRADES ASSOCIATION, LTD. **10 Pat. 249=I. R. 1931 Pat. 182=130 I C. 534=12 Pat.L.T. 215=A.I.R. 1931 Pat. 44.**

———**Art. 112**—Calls barred under—Liability in respect of in winding up of company. *See* COMPANIES ACT, S. 156. **A.I.R. 1934 Lah. 1015.**

———**Art. 112**—*Company—Suit for recovery of call money barred—Name continued as shareholder and subsequent forfeiture of shares—Revival of debt.*

When a suit to recover the call money has been barred by time, the fact that simply because the name is kept in the register as a shareholder and the share is forfeited only subsequently does not revive the debt, and the company cannot claim that limitation should run from the date of forfeiture. (*Raza and Nanavutty, JJ.*) SHRI MAHALAKSHMI SUGAR CORPORATION, LTD. *v.* JASJIT SINGH. **8 Luck. 723=6 I.R. (Oudh) 179 (2)=146 I.C. 825=10 O.W.N. 447=A.I.R. 1933 Oudh 285.**

LIMITATION ACT (1908), Art. 112.

———**Art. 112**—*Mortgage of unpaid calls—Calls made payable—Liquidation of company—Suit by mortgagee—Starting point.*

A company issued certain shares which were partly unpaid up. In 1920 they mortgaged the unpaid calls to the plaintiff. By a resolution of the company the unpaid calls were made payable on the 31st August, 1931. The shareholders took no notice of the calls. In April, 1923, the plaintiff sued on his mortgage. In July, 1923, the company went into liquidation. The plaintiff bought the unpaid calls in 1924 at the sale in execution of his own decree and then sued the shareholders.

Held, that the suit was barred by Art. 112, that time began to run from 31st August, 1921, and that the limitation was not interrupted in any way by the liquidation of the company. (*C. C. Ghose, A. C. J. and Pearson, J.*) PABNA DHANA BHANDAR CO., LTD. *v.* PROMODE CHANDRA RAY. **I.R. 1932 Cal. 290=137 I. C. 380=54 C L.J. 588=A.I.R. 1932 Cal. 382.**

———**Art 113**—*Agreement by vendee to re-convey property—Denial of agreement by vendee when re-sale is demanded—Refusal to perform agreement.*

Where there is an agreement by the vendee to re-convey the property to the vendor and on the vendor's demanding re-sale of the property, he (vendee) denies the agreement, his denial amounts to a refusal to perform the agreement within the meaning of Art. 113. (*Shingne, J.*) HARIKISANDAS *v.* BAI DHANOO. **151 I C. 536=7 R.B. 68=36 Bom.L.R. 290=A.I.R. 1934 Bom. 171.**

———**Art. 113**—*Applicability—Agreement of partition—Suit to enforce specifically—Limitation.*

A deed of agreement to partition provided that partition would be effected in accordance with the rules therein and that within six months from the date of the agreement, the parties shall get the properties divided according to shares by calling certain gentlemen and get the partition deed properly executed and registered.

Held, that a suit to enforce specifically the agreement to partition would be barred, under Art 113, at the end of three years after the lapse of 6 months from the date of the agreement. (*Mitter and B.N. Rau, JJ.*) TRAILOKYA NATH DAS *v.* KENARAM DAS. **61 C.L.J. 551.**

———**Arts. 113, 120 and 144**—*Applicability—Award—Clause embodying agreement between parties—Undertaking to convey interest in immovable property as between co-sharers—Suit to obtain conveyance on basis of.*

In the course of arbitration proceedings arising from a partition suit between co-sharers, the parties agreed among themselves that none of them should purchase or acquire any interest in any subordinate tenancy within the allotment of any other co sharer, and that if any one did so, he should convey that interest to the co-sharer within whose allotment the lands of such tenancy were situate. The said agreement was embodied in a clause in the award by the arbitrators. In a suit to obtain a conveyance of such an interest purchased by one of the co-sharers,

Held, (1) that a suit to enforce the rights arising under that clause was governed by Art. 113 and since no time was fixed in the agreement, limitation would run from the date of refusal to convey in accordance with the clause which really embodied the contract between the parties; (2) that assuming that the clause embodied the decision of the arbitrators, and not the contract between the parties, Art. 120 would apply and time would run from the date of refusal to convey; (3) that Art. 144 had no application, because a person could not prescribe with reference to his own property; the property having been purchased by one co-sharer for the benefit of another co-sharer, the possession of the former would be the possession of the latter (rightful owner) and not of a wrong-doer. (*R.C. Mitter, J.*) SARAFUDDIN NUR AHMAD MAZUMDAR *v.* JIBANNESSA KHATOON. **163 I.C. 347=9 R.C. 10=39 C.W.N. 716.**

LIMITATION ACT (1908), Art. 113.

———**Art. 113**—*Applicability—Award directing annual payment—Suit for recovery of payments due.*

Where an award directed that the defendant should pay a certain sum per year to the plaintiff for the use of land belonging to the latter, a suit for the recovery of the sums so due for three years past is not a suit for specific performance of the award and is not governed by Art. 113. It is a recurring right, and no question of limitation can arise. (*Baker and Wadia, JJ.*) GOVINDLAL MANEKLAL *v.* MANEKCHOWK SPINNING & WEAVING MILLS CO **151 I C. 156=7 R.B. 44=36 Bom.L.R. 174=A.I.R. 1934 Bom. 140.**

———**Art. 113**—Applicability—Suit for accounts of partnership. *See* LIMITATION ACT, ARTS. 62, 106, 113 AND 120. **36 Bom L.R. 1068.**

———**Art. 113**—*Compromise—Executory contract under—Enforcement—Starting point of limitation.*

Where under the terms of a compromise one party had agreed to give a certain extent of land out of his property to the other but the land had not been localised,

Held, that the contract being executory, a suit to enforce the same was governed by Art. 113, and no date having been fixed for its performance, limitation would run from the date when the plaintiff had notice that performance was refused. 26 All. 497, Ref. (*Bhide, J.*) MAHBUB *v.* MUNSHI. **135 I C. 203=I.R. 1932 Lah. 75=32 P.L.R. 761=A.I R. 1932 Lah. 24.**

———**Art. 113**—"*Date fixed*"—*Meaning of.*

The date fixed for the performance must be a date expressly fixed in the contract itself which is to be specifically enforced and not a date which the parties may have fixed by necessary implication without stating expressly what it was. If not expressly stated, the date of notice of refusal of performance is the starting point of limitation. (*Mukerji, A.C.J. and Bennet, J.*) KASHI PRASAD *v.* CHHABI LAL. **6 I.R. (All.) 123=145 I.C. 586=1933 A L J. 300=A I.R. 1933 All. 410 (2).**

———**Art. 113**—*Provision in partition deed that if inequality in shares is discovered subsequently—Person having excess is bound to make good deficit in other share—Such provision confirmed by subsequent oral agreement—Suit for recovery of possession on strength of above clause is governed by Art.* 113—*Discovery of inequality—Separate ownership created by partition not put an end to.*

A suit was instituted for recovery of possession of land on the strength of a certain provision in the partition deed which was said to have been confirmed by subsequent oral agreement. The provision in question was to the effect that if there was any inequality discovered afterwards in the share allotted by the partition deed, which, according to the partition deed, were to be enjoyed separately thereafter, the person who had excess land in his possession was to make good the deficit in the other share by giving a sufficient portion of land from a certain field adjoining the latter's share therein. In a suit for recovery of such land, *held*, that the mere discovery of an inequality did not have the effect in law of putting an end to the separate ownership created or brought into being by the partition deed of 1914, and of giving rise to a different kind of ownership in respect of the same property, namely, joint ownership. The provision in the partition deed as well as the alleged oral agreement is nothing but a covenant whereby the person whose share shows an excess binds himself to make good the deficit in the others' share, and any suit to

LIMITATION ACT (1908), Art. 113.

enforce this covenant must be deemed to be a suit to enforce the specific performance of a contract and must therefore be governed by Art. 113. (*Pandrang Row, J.*) NATARAJAN *v.* PALANIANDI PILLAI. **156 I.C. 879=8 R M 75=1935 M.W.N. 510=42 L.W. 208=A.I.R. 1935 Mad. 559.**

———**Arts. 113 and 144**—*Suit for possession under a lease—Plaintiff found never to have been in possession—Article applicable.*

Where the plaintiff sues for possession under a lease under which it is found that he had never been in possession, the correct article to apply is Art. 113 and not Art. 144 as the suit cannot be treated as a mere suit for possession, but is one for specific performance of a contract. (*Bennet, J.*) SURAJ PATISH NANDAN LAL *v.* ATUL BIBI. **156 I.C. 894=8 R.A. 48=1935 A L.J. 662—1935 R.D. 262=1935 A.W R. 721=A.I.R. 1935 All. 569.**

———**Art 113**—Terminus a quo—*No date fixed for performance of contract.*

The *terminus a quo* under Art. 113 in a case where no date for the performance of the contract is fixed is the date when the plaintiff has notice of the refusal of performance. The refusal means unconditional refusal. (*Shadi Lal, C J. and Tapp, J.*) LAL SINGH *v.* HARI SINGH **I R 1932 Lah. 566 (2)=139 I.C. 121=33 P.L.R. 562=A.I.R 1932 Lah. 36.**

———**Art. 113** *—Vendor and purchaser—Covenant to pay mortgage debt—Default—Specific performance.*

Where a purchaser of a portion of properties has bound himself absolutely to get a release of the properties from an existing mortgage and to pay the share of mortgage debt payable by the vendors but he fails to do so, the cause of action for a suit by the vendor on such covenant asking that the defendant be ordered to pay the sum of Rs. 2,700 for payment to the mortgagee arises either on the date when such payment is to be made or at least not later than the date when the vendor calls upon the purchaser to do so. Such a suit is governed by Art. 116 and if it is for specific performance it is governed by Art. 113. (*Lort Williams, J.*) CHAN BIBI *v.* SANTOSHKUMAR PAL. **60 Cal. 761=6 I.R. (Cal.) 274=146 I.C. 863=A.I.R. 1933 Cal, 641.**

———**Art. 114**—Applicability—Conditional gift—Non-fulfilment of condition—Suit to recover possession—Limitation—Art. 143 applies, not Art, 114. *See* LIMITATION ACT, ART. 143. **I.R. 1932 Lah. 645 (2).**

———**Art. 115**—*Applicability—Contract of bailment—Suit to recover damages.*

The defendant borrowed from the plaintiff his car for private use and while it was in his use it met with an accident which resulted in considerable damage to the car. The plaintiff sued to recover the repair charges and interest by way of damages,

Held, that the case was one of bailment and that the claim for damages was governed by Art. 115 and not Art. 36. (*Bisheshwar Nath and Allsop, JJ.*) HOLLOWAY *v.* HOLLAND. **9 Luck 189=6 I.R. (Oudh) 77=10 O.W.N. 1105=145 I.C. 1001=A.I.R. 1933 Oudh 518.**

———**Art. 115**—*Applicability—Contract to pay time-barred debt—Breach—Suit for compensation.*

A debt is a sum payable in respect of a money demand recoverable by action. Where the debtor wrote a letter to the following effect in respect of a time barred debt: "In regard to my overdrawn floating account with your branch, I herewith send Rs. 100 through *B*, General Manager of your Bank, to be credited in my above over-drawn floating account and I promise to pay the balance as soon as I am able to arrange within a period

LIMITATION ACT (1908), Art. 115.

of six months. This is to give you time in the matter of limitation. . . . ."

Held, that on a breach of the contract embodied in the letter, the creditor's remedy was a suit for compensation and that such a suit was covered by Art. 115. (*Addison and Hilton, JJ.*) BHARAT NATIONAL BANK, LTD. *v.* BISHAN LAL. **13 Lah. 448=I.R. 1932 Lah. 145=135 I C. 673=33 P.L.R. 12=A.I.R. 1932 Lah. 212.**

———**Art. 115**—*Applicability*—D *contracting with* N *to supply goods and perform duties for fixed sum*—D *breaking contract*—P *purchasing debts due to* D *from* N *for goods supplied and services rendered*—*Suit by* P *against* N *for debts.*

Art. 115 is a general provision applying to all actions *ex contractu* not specifically provided for otherwise. Where *D* contracted with *N* to supply goods and render services to *N* for a fixed sum of money and after the contract was broken, *P* purchased the debts due to *D* from *N* on account of goods supplied and services rendered to *N* by *D* and *P* sued *N* for the purchased debts.

Held, that Art. 52 did not apply and Art. 115 applied to this suit. (*Tek Chand and Abdul Rashid, JJ.*) MAHOMED BAKHSH *v.* RAWALPINDI CLUB, LTD. **A. I.R. 1935 Lah. 222.**

———**Art. 115**—Applicability—Money advanced as loan—Suit for recovery less sum due for work done. Suit governed by Art. 57 and not by Art. 115 *See* LIMITATION ACT, ART 57. **A I.R. 1934 All. 126.**

———**Art, 115**—Applicability—Promise to pay maintenance and other expenses—Suit to recover—Parties Hindus—Limitation—Arts. 128 and 129. *See* LIMITATION ACT, ARTS. 128 AND 129. **16 Pat L.T. 789.**

———**Arts 115 and 131**—Applicability—Promise to pay recurring sums of money by way of maintenance—Suit to recover arrears of amounts—Limitation. *See* LIMITATION ACT, ART. 131. **16 Pat.L.T. 789.**

———**Art 115**—Applicability—Suit for balance of price of article sold—Claim for damages and interst added but found barred—Procedure—Suit governed by Art. 52 and not Art. 115. *See* LIMITATION ACT, ART. 52. **A.I.R. 1931 Lah. 309.**

———**Art. 115**—*Applicability—Suit for value of work done.*

A suit for recovery of a sum of money as the value of building work done by the plaintiff is governed by Art. 115 and the period of limitation is three years from the date of the breach of the contract. *Bhide and Rangi Lal, JJ.*) SITA RAM *v.* MT. MAHMUDI BEGAM. **155 I.C. 238=7 R.L. 662=35 P.L.R. 529=A.I.R. 1934 Lah. 475.**

———**Arts 115 and 83**—Breach of compromise—Term of payment to creditor—On breach, payment by other party—Limitation—Starting point. *See* LIMITATION ACT, ART. 61. **A.I.R. 1935 Lah. 307.**

———**Art. 115**—*Company—Unpaid calls—Forfeiture of share—Suit to recover amount due—Commencement of limitation.*

A shareholder was called on to pay a certain amount by March 2, 1925, but he failed to do so and thereupon the directors of the company forfeited his share on March 22, 1926. The liquidator, who was appointed subsequently, sued to recover the amount on March 16, 1929.

Held, that the suit was in time, the cause of action having arisen when the share was forfeited. (*Banerji and King, JJ.*) BISHAMBHAR NATH *v.* AGRA ELECTRIC STORES, LTD. **54 All. 541=I.R. 1932 All. 649=140 I.C. 502=1932 A.L.J. 354=A.I.R 1932 All. 342.**

LIMITATION ACT (1908), Art. 115.

———**Art. 115**—*Compromise decree—Suit for compensation based on contract—Limitation.*

A compromise decree has got both the characteristics of a compromise and a decree. Where a suit is filed for compensation for non-compliance with such a decree it depends on the facts of each case whether the suit is on the compromise or on the decree. Where the suit was for compensation based on a contract in the compromise decree.

Held, that the suit was governed by Art. 115 and not Art. 120. (*Wort, A. C. J. and Kulwant Sahay, J.*) MAHARAJA KUMAR GOPAL SARAN NARAIN SINGH *v.* CHHAKAURI LALL. **12 Pat 792=148 I.C. 375=6 R P. 452=15 Pat.L.T. 197=A.I.R. 1934 Pat. 7.**

———**Art. 115**—*Continuous breach of duty by directors—Misfeasance proceedings—Starting point of limitation.*

An omission by directors to come to any conclusion whatsoever on an important piece of business duly proposed for the decision of the Board is a breach of duty which continues as long as the decision is deferred and the starting point of limitation is governed by the third part of the time clauses in Art. 115. (*Ferrers, J C.*) KARACHI BANK, LTD. *v.* SHEWARAM. **I.R. 1933 Sind 147=143 I.C. 713=A.I.R. 1933 Sind 103.**

———**Art. 115**—*Contract to sell—Breach—Suit to recover compensation—Limitation—Starting point.*

In a case of alternative contract to sell land or pay compensation the claim to recover compensation accrues only when the vendor elects to adopt one of the courses and the three years period runs only from that date. (*Harrison and Tek Chand, JJ.*) ABDUR RAHMAN *v.* NASIR ALI. **I.R 1931 Lah. 601=132 I.C. 489=33 P.L.R. 66=A I.R. 1931 Lah. 657.**

———**Art. 115**—*Contract for toll—Default by contractor—Attempted resale by District Board—Second resale—Loss sustained by—Suit to recover—Limitation for—Starting point of.*

The defendant had contracted a toll for Rs. 7,500 from 1—4—1921 to 31—3—1922. He defaulted in October 1921. The District Board exercised its option of resale which was held on 26—10—1921. There were, however, no bidders and a second sale was held on 10—12—1921. The present suit was brought on 12—11—1924 to recover the loss sustained by the resale.

Held, that the case was governed—not by S. 107—but by S. 39 of the Contract Act that notice of resale put an end to the contract that limitation began to run from the date of the first attempted resale and that the suit was barred by limitation. (*Pakenham Walsh, J.*) GOPALAN NAIR *v.* DT BOARD OF MALABAR. **6 I.R. (Mad) 82=145 I.C 476=1933 M.W.N. 825=38 L. W. 533=A.I R. 1933 Mad. 704.**

———**Art. 115**—*Contracter to be paid after completion of work on measurement—Work completed and failure of other party to measure—Negotiations for settlement of claim till date of suit—Limitation.*

Under an agreement, the contractor was to be paid for the work after the completion of the work and on measurement being made by the Engineer of the other party to contract in the presence of the contractor. The contractor after finishing the work requested the other party to take measurement. But it was not done and negotiations between the parties continued up to date of suit for settlement of claim. In a suit by the contractor,

Held, no question of limitation arose in the case and even if it arose, the replies sent to him by the opposite party in the course of negotiations were acknowledgments of liability of items admitted therein. (*Coldstream and Jai Lal, JJ.*) SECRETARY OF STATE *v.* GAJJAN SINGH. **160 I.C. 739=8 R.L. 579=A.I.R. 1935 Lah. 775.**

LIMITATION ACT (1908), Art. 115.

———**Arts. 115, 116 and 97**—Distinction in the applicability of—Lease—Failure to deliver possession—Suit for recovery of nazarana. *See* LIMITATION ACT, ARTS. 116, 97 AND 115. **13 Pat. 192=A.I R. 1934 Pat. 148.**

———**Art. 115**—Excessive execution—Suit for refund—Suit governed by Art. 115 or 120, and not by Art. 97. *See* LIMITATION ACT, ART 120. **33 P.L.R. 1084=A. I.R. 1933 Lah. 112.**

———**Art. 115**—*Fees due to medical practitioner—Suit for recovery—Starting point of limitation.*

A suit by a medical practitioner for the recovery of fees due for medical attendance is governed by Art. 115. In such a case there is an implied contract to pay the fee on each day of the visit and there is a breach of contract whenever there is non payment. If the practitioner demands the fee and the party promises to pay the same promptly and fails to do so there is a breach of contract at least on the last date of the attendance or anyhow on the date of the death of the patient. (*Sulaiman, A.C. J. and King, J.*) BARODA KANT SEN *v.* COURT OF WARDS. **I.R. 1931 All. 697=133 I.C. 537=1931 A. L J. 949=A.I.R. 1931 All. 752 (2).**

———**Arts. 115, 120 and 64**—Partnership dissolved—Accounts adjusted—Suit on—Suit governed by Art. 115 or 120. *See* LIMITATION ACT, ARTS. 120, 115 AND 64. **27 S.L.R. 308=A I.R. 1933 Sind 324.**

———**Art. 115**—*Principal and surety—Extension of time against principal by local Act—Effect against surety.*

The fact that limitation against the principal is extended by a local Act such as the Punjab Loans Limitation Act does not have the effect of extending the period of limitation against the surety. (*Jai Lal and Abdul Qadir, JJ.*) DIVALU MAL *v.* NANDU SHAH DAV RAJ. **13 Lah 240=I.R 1931 Lah 638=132 I.C. 590=33 P.L.R. 59=A.I.R. 1931 Lah. 691.**

———**Art. 115**—*Principal and surety—Liability of surety—Commencement of limitation.*

A suit by a creditor against a surety upon a letter of guarantee executed by the latter in respect of a debt payable forthwith is governed by Art. 115 and limitation begins to run from the date of the execution of the guarantee notwithstanding a stipulation in the guarantee to the effect that the creditor may look for payment to the surety if the principal debtor makes default in payment. (*Jai Lal and Abdul Qadir, JJ.*) DIVALU MAL *v*, NANDU SHAH DAV RAJ. **13 Lah. 240=I.R. 1931 Lah. 638=132 I.C. 590=33 P.L.R. 59=A I R. 1931 Lah. 691.**

———**Arts. 115 and 116**—"*Registered*"—*Meaning of—Application under S.* 235 *of the Companies Act—Limitation.*

The word "registered" in Art. 116 means registered under the Registration Act. Hence registration of a company under the Companies Act is not equivalent to a registration of the Articles of Association within the meaning of the Limitation Act, Art. 116 and therefore limitation for proceedings under S. 235, Companies Act is governed by Art. 115 and not by Art. 116. 49 Mad. 468 (F.B.), Foll. (*Ferrers, J. C.*) KARACHI BANK, LTD. *v.* SHEWARAM. **I.R 1933 Sind 147=143 I.C. 713=A.I.R. 1933 Sind 103.**

———**Art. 115**—*Scope.*

Art. 115 applies to a case of express or implied contract and not a contract in writing registered. The article again applies to cases for compensation and not where the action is for a liquidated sum of money (*Wort, A. C. J. and Kulwant Sahay, J.*) MAHARAJA,

LIMITATION ACT (1908), Art. 115.

KUMAR GOPAL SARAN NARAIN SINGH *v.* CHHAKAURI LALL. **12 Pat. 792=148 I.C. 375=6 R P. 452=15 Pat.L.T. 197=A.I.R. 1934 Pat. 7.**

———**Arts. 115 and 95**—Suit for compensation against pretended agent—Limitation. *See* LIMITATION ACT, ARTS. 95 AND 115. **A.I.R 1934 Pesh. 49.**

———**Arts. 116, 62 and 97**—*Advance of money for mortgage by plaintiff—Repudiation of mortgage by plaintiff—Suit for money paid.*

Where a plaintiff who has advanced money on a mortgage, repudiates it himself and files a suit for the money paid, such a suit is not a suit for compensation for breach of contract and is governed either by Art. 62 or by Art. 97, Limitation Act according as to whether the contract is void or voidable and not Art. 116 If breach had been committed by defendant, Art. 116 would have been applicable. 40 Bom. 614, Rel. on; A. I. R. 1925 Nag. 130, Ref. (*Addison and Agha Haidar, JJ.*) MILKHA SINGH *v*, FAZAL DIN. **6 I.R (Lah.) 74=145 I.C. 186=34 P.L.R. 96=A.I.R. 1933 Lah. 581.**

———**Arts. 116 and 131**—*Applicability—Anubhavam—Suit for arrears of rent.*

A suit by landlord under an irredeemable anubhavam tenure for arrears of rent is governed by Art. 116 and not by Art. 131 and the award of arrears of rent can be limited to a period of six years. 38 M. 916 (F.B.), Dist. (*Varadachariar, J.*) CHATHANNI RAYIRAN *v.* NARAYANAN. **158 I C. 228=8 R.M. 241=1935 M. W.N. 866=42 L.W. 596=A.I.R. 1935 Mad. 682.**

———**Art. 116**—*Applicability—Arrears of maintenance—Suit for—Maintenance charged on certain properties and security bond registered—Suit merely claiming arrears due.*

The suit was to recover arrears of maintenance due to plaintiff's mother to the date of her death. A prior suit by the mother had been compromised and by that compromise, the annuity had been charged on certain properties and the security bond registered. The plaint in the present suit, however, contained no reference to the security bond; it was simply a claim for money due on account of arrears of maintenance with interest.

Held, that the suit was not governed by Art. 116 and that the period of limitation was only three years. (*Agarwala, J.*) RAJMANI BIBI *v.* BALDEO DAS. **6 R. P. 325=146 I C. 1033=A.I R. 1934 Pat. 244.**

———**Art. 116**—Applicability—Covenant in redemption deed—Suit to recover compensation—Time limit—Stipulation for reimbursement was an integral part of transaction embodied in the redemption deed—Suit governed by Art. 116. *See* LIMITATION ACT, Art 97. **32 P.L.R. 457=A.I.R. 1931 Lah. 448.**

———**Art. 116**—*Applicability—Dissolved partnership—Suit for taking of accounts.*

A suit for taking the accounts of a dissolved partnership cannot be deemed to be a suit "for compensation for breach of contract" and is not therefore governed by Art. 116. (*Ramesam, O. C. J. and Venkatasubba Rao, J.*) KOTHANDAPANI CHETTI *v.* SREEMANAVEDAN RAJA. **57 Mad. 378=151 I C. 81=7 R M. 80=1934 M.W.N. 22=39 L.W. 164=A.I.R. 1934 Mad. 162=66 M L.J. 625.**

———**Art. 116**—*Applicability—Liability arising out of registered conveyance.*

Where the liability of the vendee arises in virtue of the conveyance, *i.e.*, upon a contract in writing registered within the meaning of Art. 116, the six years' period allowed by that article applies. (*Sir George Lowndes.*) RAM RAGHUBIR LAL *v.* UNITED REFINERIES (BURMA), LTD. **60 I.A. 183=11 Rang. 186=I R. 1933 P.C. 106=142 I.C. 786=1933 M.W.N. 461=37 C.W.N. 633=57C.L.J. 308=1933 A.L J. 541=35 Bom.L.R. 753=37 L.W. 784=A.I.R. 1933 P.C. 143=64 M.L.J. 655 (P.C.)**

[**Rel.** 1934 R. 227 (228).]

LIMITATION ACT (1908), Art. 116.

———**Art 116**—*Applicability—Personal covenant in mortgage deed registered—Suit on—Limitation.*

A suit by a mortgage against the mortgagor, on a personal covenant contained in a registered deed of mortgage, to recover the amount remaining due after the mortgaged property has been sold, is governed by Art. 116. (*Rangnekar, J.*) VASANJI KALLIANJI *v.* FRUCHSHAW DOSSACHAI. **59 Bom. 634=156 I.C. 286=7 R.B. 492=37 Bom.L.R 170=A.I.R. 1935 Bom. 203.**

———**Art. 116**—*Applicability—Suit for accounts.*

A suit for accounts between tenants in-common or between a principal and agent even if it be based on a registered agreement, is essentially different from a suit for compensation for breach of contract and is governed by Art. 89 and not by Art. 116. 44 C. 759 (P.C.) and 14 C. 147 (P.C.), Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) ANNU AVATHANINGAL *v.* SOMASUNDARA AVATHANIGAL. **54 Mad. 654=I.R. 1931 Mad. 501=131 I.C. 165=1930 M W.N. 1199=33 L W. 1=A.I.R. 1931 Mad. 185 (2)=62 M.L.J. 45.**

[**D.** 29 N.L.R. 34 (40). **Appl.** 57 M. 378 (388, 389, 396).]

———**Art. 116**—*Applicability—Suit based on registered mortgage bond.*

The appropriate article of the Limitation Act in the case of a suit based on a personal covenant in registered mortgage bond is Art. 116 and Art. 66. 52 Mad. 105, Foll. (*Pearson and Jack, JJ.*) UMAPADA TRIVEDI *v.* HARIPADA SAHA. **I.R. 1931 Cal. 629=133 I.C. 101=35 C.W.N. 1030=53 C.L J. 520=A.I.R. 1931 Cal. 801 (1).**

———**Art. 116**—*Applicability—Suit for money payable under contract.*

Art. 116 applies not merely to a suit for compensation for breach of contract in the narrow sense of the word 'compensation' but also to a suit for money payable under the terms of the contract and it is applicable in all cases in which the contract is in writing and registered, notwithstanding that there may be an Article directly applicable to the class of contrct in question. 44 I.A. 65 (P.C.), Ref. (*Carrand Cunliffe, JJ.*) RAM RAGUBHIR LAL *v.* THE UNITED REFINERIES (BURMA). LTD. **9 Rang. 56=I.R. 1931 Rang. 305=134 I C. 737=A.I.R 1931 Rang. 139.**

[**Affirmed** 11 R. 186=60 I.A. 183 (P.C.) (varied on another point). **R.** 10 Luck. 26 (34). **Rel.** 1934 R. 227 (228).]

———**Art. 116**—Applicability—Suit for partnership accounts governed by Art. 120 and not Art. 89 or 100 or 116. *See* LIMITATION ACT, ART. 120. **29 N.L.R. 34=A.I.R. 1933 Nag. 127.**

———**Art 116**—*Applicability—Suit to recover rent under registered lease.*

Where the suit is to recover the arrears of rent payable under a registered lease the correct article to apply is Art. 116 and not Art. 110. 44 Cal. 759, Ref. (*Pearson and Jack, JJ.*) FATE CHAND BOKARIA *v.* KUMAR NAGENDRA KISHORE ROY CHOWDHURY. **I.R. 1931 Cal. 630 (1)=133 I.C. 102 (1)=53 C.L.J. 522=A.I.R. 1931 Cal. 790.**

———**Art. 116**—*Application fos personal decree under O. 34, R. 6, C.P. Code.*

An application for a decree under O. 34, R. 6, C. P. Code, is governed by the six years' rule of limitation prescribed by Art. 116. (*Mukerji and Guha, JJ.*) DHARANIDHAR GHOSH *v.* INDRANARAYAN SINHA.

LIMITATION ACT (1908), Art. 116.

143 I.C. 472=I.R. 1933 Cal. 435=36 C.W.N. 117=A.I.R. 1933 Cal. 268.

———**Art. 116**—*Breach of covenant of title—Suit for damages—Limitation—Starting point—Date of sale or date of disturbance.*

In a suit for compensation by a vendee of immovable property for breach of covenant for title, the vendee being dispossessed by a prior mortgagee whose mortgage is not disclosed to the vendee, the cause of action arises on the date of disturbance of possession, and the limitation for suit commences to run from that date and not from the date of the conveyance. (*Veankatasubba Rao, J.*) ALAGARAPPA REDDIAR *v.* ALAGIRISAMI NAICK. **156 I.C. 843 (2)=8 R.M. 65=41 L.W. 728=1935 M.W.N. 375=A.I.R. 1935 Mad. 636=68 M.L.J. 588.**

———**Arts. 116 and 97**—"*Compensation for breach of a contract*"—*Meaning of—Suit on a registered document—Suit also coming within some other Article—Applicability of Art.* 116.

The words "compensation for breach of a contract" contained in Art. 116 must be widely construed and where the suit is in substance a suit based on a registered document and it can be regarded as a suit for compensation for breach of a contract, then Art. 116 must apply, although the suit may come within some other Article of the Limitation Act. Under Art. 116, Limitation begins to run from the date when limitation would have begun to run against a suit brought on a similar contract not registered. If the contract had not been registered, the article applicable would have been Art. 97, and limitation under this Article begins to run from the date of the failure of the consideration. (*Pollock, A J.C.*) AMBADAS *v.* WAMAN RAO. **30 N.L.R. 138=6 R.N. 184=148 I.C. 480=A.I.R. 1934 Nag. 16.**

———**Art. 116**—*Contract of indemnity—Enforcement by mortgagee decree-holder—Starting point of limitation.*

Where it was declared that certain property could not be sold in execution of a decree obtained by the plaintiff on foot of his mortgage deed and the decree became thereby infructuous and a suit for a simple money decree having been barred on that date the plaintiff sued for damages for breach of a covenant for indemnity contained in the mortgage deed,

Held, that the suit was governed by Art. 116 and not by Art. 62 or 97.

Held, further, that the suit was in time whether it was reckoned from the date of the objection to the plaintiff's execution or the date of the decree nullifying the decree in favour of the plaintiff. (*Pullan and Niamatullah, JJ.*) ZIA UDDIN AHMAD KHAN *v.* AKBAR ALI. **1932 A.L.J. 317=I.R. 1932 All 252=136 I.C. 829=13 L.R. 152 (Rev.)=16 R.D. 373=A.I.R. 1932 All. 358.**

———**Arts. 116, 62 and 97**—*Contract of sale of land—Suit against stranger in possession by vendee—Dismissal of—Subsequent suit against vendor for damages—Starting point.*

The plaintiff entered into a contract for the purchase of lands in 1916, but was unable to get possession of some of them. He sued the person in possession but his suit was dismissed in 1921. Within six years thereafter the plaintiff brought the present suit for damages against his vendor for breach of the implied covenant of title.

Held, that the suit was governed by Art. 116, and not by Art. 97 or 62, and as the contract can be said to be broken only when it is found as a result of the suit against the stanger known to be in possession that the vendor had no title, the starting point was the date of the dismissal of the suit against the stranger and that the present suit was in time. (*Krishnan Pandalai, J.*) THILAIKANNU ACHI *v.* ABDUL KADIR ROWTHER. **I.R. 1933 Mad. 49=140 I.C. 805=1933 M.W.N. 649=37 L.W. 497=A.I.R. 1933 Mad. 126=64 M.L.J. 336.**

LIMITATION ACT (1908), Art. 116.

———**Arts. 116 and 97**—*Covenant for title—Breach of—Suit for refund of purchase-money and expenses—Starting point.*

A house was sold with its site without apprising the vendee of the fact that the permission of both the co-sharers of the village in which the site stood was essential as the house stood in joint patti of the village. The vendee pulled down the house and erected another. The lambardar of the patti, on which the house stood, sued for possession of the site and got a decree. Vendee consequently brought a suit claiming return of price and reimbursement of the money spent in building the new house and the costs which he incurred in defending his title.

Held, that the suit was governed not by Art. 97 but by Art. 116 and that the cause of action did not begin to run from the date of the sale but from the date when it became clear that the sale was voidable at the instance of the lambardar. (*Macnair, J.C.*) BHAWANI SINGH *v.* GIRDHARI. **I.R. 1932 Nag. 52=137 I.C. 61=A.I.R. 1932 Nag. 3.**

———**Art. 116**—*Direction to purshaser to pay off vendor's creditor—Default by purchaser—Decree obtained by creditor and vendor's properties sold in execution—Suit by vendor for damages—Starting point.*

Where the purchaser under a registered deed of sale undertakes to satisfy a mortgage debt of the vendor with part of the purchase-money, there is implied in that agreement an agreement to indemnify the vendor against losses which may be caused by the action taken by the creditor on default of payment by the purchaser. Such an agreement to indemnity can be said to be broken only when the vendor is compelled to pay the creditor himself or (as in the present case) his property is sold in execution of a decree obtained by the creditor. Where, therefore, after the sale of his properties in execution in consequence of the default of the purchaser, the vendor brings a suit against the purchaser for return of the purchase-money reserved with the latter, the suit being based on the implied contract of indemnity, the starting point of limitation is the date of the sale of the properties in execution when the vendor actually suffered loss and not the date of deed of sale executed in favour of the defendant, 49 All. 693; 33 Bom.L.R. 136 and 8 Pat. 860, Foll. (*Krishnan Pandalai, J.*) NAVAMANI NADAR *v.* VEDAMANICKA NADAR. **56 Mad. 724=I.R. 1933 Mad. 435=144 I.C. 550=37 L.W. 503=1933 M.W.N. 370=A.I.R. 1933 Mad. 424=64 M.L.J. 526.**

———**Arts. 116, 97 and 115**—*Distinction in the applicability of the articles—Lease—Failure to deliver possession—Suit for recovery of nazarana.*

Where Arts. 115 and 116 apply the very basis of the suit is that the contract has been broken, is no longer in existence and damages are sought. Art. 97, on the other hand applies when the plaiiff says the contract is still good and subsisting and an event contemplated by the contracting parties has happened, that is to say, the possible future liability of the plaintiff to enjoy the property, and the plaintiff relies upon the express or implied contract on the part of the defendant that on the happening of such circumstances the defendant will pay back the money which he has already received. Under Arts. 115 and 116 the events subsequent to contract are immaterial while under Art. 97 they are material. The existence of a registered document is the item

LIMITATION ACT (1908), Art. 116.

of difference between Arts. 115 and 116. The difference, however, between Arts. 117 and 97 has nothing whatever to do with the form of the contract. It is rather to do with the question of the date of the failure of consideration and it is quite immaterial in discussing whether Art. 97 or Art. 116 applies to ascertain whether the contract was effected by means of a registered instrument or not. A suit to recover the nazarana paid by plaintiffs, the defendants have broken the contract to place the plaintiff in possession is governed by Art. 116 and not by Art. 97. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) LALJI SINGH *v.* RAMKUP SINGH. **13 Pat. 192=150 I.C. 975=7 R.P. 47=A.I.R. 1934 Pat. 148.**

——**Art. 116**—*Execution sale—Sale by auction purchaser—Sale deed laying down that vendor do give plaintiff lawful delivery after getting sale certificate from Court—Default—Adverse possession by judgment-debtor—Suit for refund of consideration—Starting point of limitation.*

The defendants were the auction purchasers in an execution sale on a decree in a different suit but had not got the lawful delivery of the property sold. The plaintiff got a sale deed of the said property from the defendants. The judgement debtor in decree on which execution sale was held pleaded adverse possession. The plaintiff then sued the defendants for the recovery of the property or return of the consideration paid by him to the defendants. There was a clause in the sale deed as under: "We shall put in an application for delivery and give delivery to you. Afterwards we shall bring from the Court the said receipt for delivery, and the certificate and give the same to you. You will have to bear the charges for the said delivery."

Held, that Art. 116 applied to such cases. That no time was fixed within which delivery was to be given, and although it was true that the plaintiff might at any time after the execution of the sale deed have sued to enforce delivery under it, so that time would have begun to run for such a suit from the date of contract, yet under the circumstances of the case, the cause of action for refund of the purchase money would not have simultaneously arisen but would only have become available when the vendors became incapable of carrying out their undertaking Before that occassion arose, the vendees could not have sued, alleging a breach of the contract of title for the return of the purchase money. 38 Mad. 887 and 26 Bom. 750, Dist. (*Curgenven, J.*) SATYANARAINARAO *v.* VENKATASWAMI. **I.R. 1933 Mad. 307=143 I.C. 504=A.I.R. 1933 Mad. 153.**

——**Art. 116**—Inapplicability—Plaintiffs wrongly paying defendants to redeem mortgage—Third person obtaining foreclosure decree—Plaintiffs paying him to redeem mortgage—Suit to recover money wrongly paid to defendants. *See* LIMITATION ACT, ART. 97. **1935 O.W.N. 549=A.I.R. 1935 Oudh 378.**

——**Art. 116**—*Lease—Breach of covenant to deliver possession—Suit to recover advance—Commencement of limitation.*

The defendant leased some property to the plaintiff for a period of 7 years to run from 1st July, 1920, to 30th June, 1927. The lessee gave the lessor an advance of Rs. 200 which under the terms of the lease was to be adjusted towards the last year's rent, that of 1926-27. The plaintiff however was not given possession of the property and thereupon sued for the return of the advance on 27 6 1927.

Held, that the breach of the covenant to lease occurred from the commencement of the lease and that the suit was barred whether Art. 97 or 116 applied.

LIMITATION ACT (1908), Art. 116.

Held also, that such a breach of the covenant to deliver possession was not a continuing breach.

Semble.—If the plaintiff had produced evidence that he had agreed to take delivery of the land on some later date the case would be different. (*Curgenven, J.*) APPASWAMI AYYANGAR *v.* KRISHNASWAMI PADAYACHI. **I.R. 1932 Mad. 516=138 I.C. 119=35 L.W. 68=1932 M.W.N. 51=A.I.R. 1932 Mad. 225.**

——**Art. 116**—*Mortgage—Personal relief—Limitation—Starting point.*

In a rehan bond there was a personal covenant to repay on a certain date and in addition, there was a clause regarding dispossession which gave the mortgagee the right to realise from the mortgaged property from the person of the mortgagor and from his other properties if he was dispossessed from the rehan property. The mortgagee sued basing his cause of action on dispossession and after sale of the mortgaged property in execution of his decree applied for a personal decree for the balance.

Held, that the article of the Limitatian Act applicable to a claim based on the personal covenant to recover the balance due to the mottgagee after the sale of the mortgaged property is Art. 116 which provides a period of six years from the due date and not Art. 66 or 67 and that on the mortgage deed as it stood the dispossession was as much a cause of action in a registered deed giving rise to limitation under Art. 116 as the cause of action of failure to pay on the date fixed in the bond and that the starting point for limitation was the date of dispossession. (*Macpherson and Dhavle, JJ.*) BALA BUX *v.* NATH MULL. **13 Pat. 228=153 I.C. 120=7 R.P. 302=15 Pat L T. 811=A.I.R. 1934 Pat. 578.**

——**Art. 116**—*Mortgage—Right to redeem only four years after date of mortgage—Personal relief—Limitation for.*

A mortgage deed provided that the mortgage-money would be paid in four years and that the mortgaged property would be redeemed and the mortgagee would be entitled to recover the amount after four years.

Held, that the limitation for personal relief against the mortgagor was six years from the date when the mortgage money became payable and not six years from the date of mortgage. (*Tek Chand and Monroe, JJ.*) ISHAR DAS *v.* MAYA MAL. **6 I R. (Lah) 23=144 I.C. 738=34 P L R. 171=A.I.R. 1933 Lah. 329.**

——**Art. 116**—*Personal decree in mortgage suit*—Terminus a quo.

The period of limitation for a claim for personal decree in a mortgage suit is six years; the *terminus a quo* being the date of the mortgage. (*Tek Chand, J.*) KARAM SINGH *v.* MT. MAYA WANTI. **I.R. 1932 Lah. 710=140 I.C. 387=A.I.R. 1932 Lah. 592.**

——**Arts. 116, 83 and 111**—*Portion of consideration retained by vendee—Sale in turn by vendee—Undertaking by second vendee to pay the amount to original vendor—Default—Suit by original vendor and amount realised from first vendee—Suit by first vendee against second—Limitation.*

N sold certain property to *G* for Rs. 18,500 on 28th February, 1919. A sum of Rs. 12,000 was left with *G* to be paid within a year and the amount was charged on the property. *G* sold the property to *A* who in turn sold it to *J* and in both cases the vendee undertook to pay Rs. 12,000 to *N*. The amount was not paid; *N* brought a suit against *G* and recovered the amount on 19th December, 1926. Thereupon *G* brought a suit on 22nd July, 1927, against *A* to recover the amount paid by him.

LIMITATION ACT (1908), Art. 116.

Held, that the document having been registered, limitation must be computed under Art. 116 and not Art. 111; that the combined effect of Art. 116 read with Art. 83 was to give a period of six years from the date when the plaintiffs were actually damnified, *i.e.*, 19th December, 1926. 2 Lah. 316; 55 Bom. 565; 8 Pat. 860, Rel. on; 34 All.429, Diss. from; 63 I.C. 84; 95 I.C. 913, Ref. (*Addison and Bhide, JJ.*) ABDUL KADIR *v.* BILAS KAUR. **14 Lah. 646 = I R. 1933 Lah 459 = 144 I.C. 362 = 34 P.L.R. 734 = A.I.R. 1933 Lah. 793.**

———**Art. 116**—*Registered deed of charge—Claim for personal decree.*

Where a deed of charge is registered, the article of the Limitation Act applicable to a claim for a personal decree in the event of the sale proceeds of the charged property being found insufficient to discharge the amount due is Art. 116 which provides a period of six years from the date when the amount becomes payable. (*Tek Chand and Din Mahomed, JJ.*) KESARI MAL UMRAO SINGH *v.* TANSUKH RAI KIDAR NATH. **16 Lah. 137 = 153 I.C. 1064 = 7 R.L. 503 = 37 P.L.R. 482 = A.I.R. 1934 Lah. 765.**

———**Art. 116**—*Registered kabuliyat—Expiry of term—Suit by lessee to recover damages—Bar.*

Where a registered kabuliyat expired on 31st March 1922, and the lessee sued to recover damages from the lessor on 30th April, 1925.

Held, that the suit was barred by Art. 116. (*Mukerji and Guha, JJ.*) AJIT KUMAR BASU THAKUR *v.* CHAIRMAN OF THE COMMISSIONERS OF DACCA MUNICIPALITY **58 Cal. 930 = I R. 1931 Cal. 643 = 133 I.C. 179 – A.I.R. 1932 Cal 85.**

———**Art. 116**—*Registered sale deed—Agreement by vendee to pay vendor's creditor—Breach—Claim by vendor to recover amount from vendee personally.*

Where in a registered sale deed there is an express stipulation that a certain amount is left with the vendee for payment to a creditor of the vendor and the vendee fails to pay, the article applicable to a claim by the vendor to recover the amount from the vendee personally is Art. 116 of the Limitation Act. Art. 111 would not be applicable because that applies to a simple case where the vendee has not paid a portion of the purchase-money to the vendor and not where he has broken a contract to pay the same to a creditor of the vendor. (*Kisch and Bajpai, JJ.*) BABU RAM *v* INAM ULLAH. **57 All. 797 = 157 I.C 533 = 8 R.A. 205 = 1935 A.L.J. 279 = 1935 W.R. 344 = A.I.R. 1935 All. 411.**

———**Art. 116**—*Registered sale deed—Covenant by vendee to discharge prior debt—Breach of—Suit for reimbursement—Starting point.*

Where under a registered sale deed the vendee undertook to discharge a prior debt of the vendor and failed to do so, the cause of action to sue for the breach of the covenant arises—not on the date of the deed or on the date when the fact of non-payment came to vendor's knowledge but on the date when the vendor himself was obliged to pay the debt and thereby incurred loss. 49 All. 603, Ref. (*Niyogi and Grille, A.J.Cs.*) BHANJI *v.* GOVIND. **29 N L R. 298 = 149 I.C. 1200 = 6 R N. 264 = A.I.R. 1933 Nag. 379.**

———**Arts. 116 and 97**—*Registered sale deed—Vendee put in possession—Lease by him—Lessee dispossessed by vendor—Suit by vendee for declaration of title against vendor and his brother—Sale found binding only as to vendor's share—Subsequent suit by vendee for refund of excess purchase money over half price of goods—Cause of action held started when previous suit was decided—Whether limitation started from decision of trial Court or appellate Court.*

LIMITATION ACT (1908), Art. 116.

On 8th April, 1920, *W* executed a registered sale-deed of survey No. 2 1 in favour of *A*. He was placed in possession and granted a five years' oral lease to *V* who remained in possession until he was ejected by *W* on the 11 April, 1921. *A* brought a suit against *W* and his lunatic brother *R* for declaration of his title to the field and for possession with effect from January, 1926, when the lease which he had granted to *V* was due to expire. The Court on 15th September, 1925, held that the field was the joint family property of *W* and *R* and that the sale was without legal necessity and therefore not binding on *R's* share. The consideration for the sale was Rs. 4,000, but the Court held that only Rs. 2 795-14 0 had been paid and as *A* had already paid more than half the consideration for the whole field, he was entitled to possession of a half share without further payment *A* then brought a suit on 15th September, 1928, against *W* for the recovery of Rs. 795-14 0, which was the amount he had paid in excess for the value of the half share, and Rs. 280 as interest thereon.

Held, that the filing of written statement by *R* claiming that he was entitled to a half share in the property was not sufficient to start limitation running. The question whether there had been a failure of consideration because *W* had no complete title depended on whether the sale was made for legal necessity or not, and that point was not decided until the suit was decided. The suit was not therefore barred by limitation.

Held, further, that it was not necessary to consider whether limitation would run from the date of the decision in the first Court or from the date of decision in the appellate Court. (Case-law discussed.) (*Pollock, A.J.C.*) AMBA DAS *v.* WAMAN RAO. **30 N L R. 138 = 6 R N. 181 = 148 I C. 480 = A.I.R. 1934 Nag. 16.**

———**Arts 116, 111 and 83**—*Registered sale—Portion of purchase money retained by vendee—Contract of indemnity—Starting point of limitation.*

Where, under a registered deed of sale, the vendee, with whom a portion of the purchase-money had been left, had entered into an express contract to indemnify his vendor, the combined effect of Art. 116, read with Art. 83 of the Limitation Act gives a period of six years for instituting a suit, time running from the date when the plaintiffs were actually damnified. It is governed not by Art. 111 but by Art. 116, the *terminus a quo* is not the date of the execution of the sale-deed but the date on which the contract is deemed to have been broken, this date being either when there was a repudiation of the liability under it or when the contract had become impossible of performance on account of the vendor's debt having been satisfied. 2 L. 316; 55 B. 565; 8 Pat. 860, Foll. (*Addison and Bhide, JJ.*) ABDUL QADIR *v.* MT. BILAS KAUR. **14 Lah 646 = 144 I.C. 362 = I R. 1933 Lah. 459 = 34 P.L.R. 734 = A.I.R. 1933 Lah. 793.**

———**Art. 116**—*Scope—Successive causes of action.*

The notion of continuing or successive causes of action is not entirely foreign to the Limitation Act as will appear from S. 23 and Art. 116 and where therefore a party has recurring or successive causes of action whether under the terms of contract or by operation of law, each cause of action will give a fresh start to the period of limitation and the mere fact that party has not availed himself of the earlier cause of action, will not prevent him from availing himself of a later one. (*Macpherson and Faz Ali, JJ.*) MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH. **11 Pat. 112 = I.R. 1931 Pat. 465 = 134 I.C. 609 = 12 Pat. L.T. 755 = A. I.R. 1931 Pat. 285.**

LIMITATION ACT (1908), Art. 116.

———**Art. 116**—*Sons impugning sale-deed by father—Trial Court granting them decree followed by delivery of possession—Decree affirmed on appeal—Suit by vendee for refund of price—Limitation—Starting point.*

Where the sons impugned the sale-deed executed by their father on the ground that the property which it purported to convey belonged to the joint family and that there was no legal necessity for the alienation, and the suit was decreed by the trial Court and delivery of possession was taken by the sons, a suit by the vendee for refund of price and damages based on the covenant of title in the sale-deed is governed by Art. 116 and the time runs from the date of the decree of the trial Court. The plaintiff's cause of action was complete when the trial Court found that the vendor had no power to sell and the vendee was dispossessed. Subsequent affirmance of the decree of the trial Court on appeal cannot give a fresh starting point. (*Niamatullah and Allsop, JJ.*) JAWAHAR RAM *v.* JHINGURI LAL. **58 All. 90=156 I.C. 177=7 R.A. 1052=1935 A.W.R. 768=1935 A.L.J. 929=A.I.R. 1935 All. 786.**

———**Art. 116**—*Suit for refund of purchase money—Registered deed of sale—Covenant for title—Breach of—Starting point.*

A suit for refund of the purchase-money paid under a registered instrument on the ground that the vendor had no title and there was no consideration is governed by Art. 116 and time begins to run only from the date when it is found that the vendor had no title or the purchaser is dispossessed of the property in consequence thereof. It is not governed by Art. 62 or Art. 97. 45 B. 955; 8 Pat. 432 and 118 I.C. 203, Foll. (*Havelivala, A.J.C.*) CHANDRA WATIBAI *v.* VALABDAS. **25 S.L.R. 173=I.R. 1931 Sind 108=133 I.C. 76=A.I.R. 1931 Sind 141.**

———**Arts. 116 and 120**—*Suit under S. 68, T. P. Act—Mortgagor losing property in litigation—Suit for personal decree—Starting point.*

A suit under S. 68 of the T. P. Act for a personal decree against the mortgagor, on the ground that the security was lost as the result of a litigation between the mortgagor and a third party, is governed by Art. 116 or 120 and the period commences (*i.e.*, the cause of action arises) at the time when the mortgagor loses the property and not when the mortgagee comes to know of such loss. (*Srivastava and Zia-ul-Hassan, JJ.*) SHAMBHU DAT *v.* SHIAM NARAIN. **7 R.O. 126=151 I.C. 448=11 O.W.N. 1198=A.I.R. 1934 Oudh 415.**

———**Arts. 116 and 111**—*Vendor and purchaser—Amount kept with vendee to pay previous mortgage—Surplus to be paid to vendor—Claim for surplus—Limitation—Starting point of.*

Where out of the sale consideration a certain sum is left with the vendee, for payment to the vendor's mortgagee in satisfaction of his mortgage with a stipulation that if any surplus be left in the hands of the vendee after the redemption of the property the same be returned to the vendors. The seller's right to refund would arise only when it would be found that after satisfying the prior charge some money still remained in the hands of the vendee. Before that point is decided the vendor has no right of suit against the vendee. Art. 111 is not applicable to the case but Art. 116 is applicable and the period would commence from the date of the breach, *i.e.*, where for the first time in the suit instituted by the vendee for redemption the Court of first instance would find that a smaller sum than the amount left with the vendee was due. Case-law discussed. (*Smith and Rachhpal Singh, JJ.*) BAIJNATH *v.* PARMESHWARI DAYAL. **6 R. [illegible] 582=149 I.C. 529=11 O.W.N. 691=A.I.R. 1934 Oudh 240.**

LIMITATION ACT (1908), Art. 116.

———**Art. 116**—*Vendor and purchaser—Breach of covenant—Suit to recover unpaid purchase money—Limitation.*

Where the vendee failed to pay the balance of the consideration left with him to the creditors of the vendor within a reasonable time and thereupon the vendor sued for the recovery of the unpaid purchase money as specified in the registered sale-deed.

Held, ,that the suit was governed by Art. 116 and not Art. 111.

Held further, that the plaintiff was damnified because interest was mounting upon his debts and that he had therefore a cause of action to sue for the recovery of the money. (*Sen and Bennet, JJ.*) MAKUND LAL *v.* BHOLA RAI. **I.R. 1931 All. 430 (2)=131 I.C. 686 (2)=1931 A.L.J. 985=A.I.R. 1931 All. 419.**

———**Art. 116**—*Vendor and purchaser—Breach of covenant of title—Suit for damages—Starting point—Date of sale or dispossession.*

In a suit for damages for breach of convenant of title contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor and the sale is void *ab initio* as against the rightful owner, the starting point of limitation under Art. 116 of the Limitation Act is the date of dispossession of the vendee by the rightful owner and not the date of sale. (*Jackson, O.J.C., Subhedar and Niyogi, A.J.Cs.*) KASHI RAO *v.* ZABU. **28 N.L.R. 31=136 I.C. 225=I.R. 1932 Nag. 17=14 N.L.J. 125=A.I.R. 1932 Nag. 5 (F.B.).**

[**D.** 30 N.L.R. 138 (140).]

———**Art. 116**—*Vendor and purchaser—Contract expressed in—Personal remedy—Suit for.*

If the vendee's promise to pay the purchase money is set out in the registered conveyance which is accepted by him, the contract between the parties can be regarded as embodied in the conveyance, even though it is not actually executed by the vendee. The plaintiff's right to a personal decree on the failure of the defendant to pay the balance of consideration in such a case is governed by Art. 116. (*Carr and Cunliffe, JJ.*) RAM RAGUBHIR LAL *v.* THE UNITED REFINERIES (BURMA), LTD. **9 Rang. 56=I.R. 1931 Rang. 305=134 I.C. 737=A.I.R. 1931 Rang. 139.**

[**Affirmed** 11 R. 180=60 I.A. 183 (P.C.), (varied on another point). **R.** 10 Luck. 26 (34). **Rel.** 1934 R. 227 (228)].

———**Art. 116**—Vendor and purchaser—Covenant to pay mortgage-debt—Default—Vendor's right to indemnity. Art. 116 Applies. *See* LIMITATION ACT, ART. 113. **60 Cal. 761=A.I.R. 1933 Cal 641.**

———**Art 116**—*Vendor and purchaser — Implied covenants.*

Art. 116 is applicable to all breaches of covenants, express or implied, for title incorporated in registered Instruments. 45 Bom. 955; 49 Bom. 596; 52 All. 604, 55 Bom. 565, Foll. (*Jackson, O.J.C., Subhedar and Niyogi, A.J.Cs.*) KASHI RAO *v.* ZABU. **28 N.L.R. 31=136 I.C. 225=I.R. 1932 Nag. 17=14 N.L.J. 125=A.I.R. 1932 Nag. 5 (F.B.).**

———**Arts. 116, 61 and 83**—Vendor and purchaser—Purchaser directed to pay off incumbrances—Default—Suit against purchaser—Starting point of limitation—Suit governed by Art. 116 read with Art. 83 or Art. 61. *See* LIMITATION ACT, ARTS. 83, 61 AND 116. **14 Lah. 380=A.I.R. 1933 Lah. 109.**

———**Art. 116**—*Vendor and purchaser—Sale declared void—Suit for refund of purchase money—Starting point of limitation.*

LIMITATION ACT (1908), Art. 116.

Where a sale was declared to be null and void by the Court and the vendee sued to recover the purchase price and relied on an express covenant in the sale deed,

Held, that the suit was governed by Art. 116 and time commenced to run from the date when the sale was declared void by the trial Court and not from the date when such decision was affirmed in appeal. (*Coldstream and Bhide, JJ.*) CHUNI LAL *v.* HARI CHAND. **6 R. L. 602 (2)=148 I.C. 825=35 P.L.R. 179=A.I.R. 1934 Lah. 305 (2).**

———**Art. 116**—*Vendor and purchaser—Suit for unpaid purchase-money from vendee—Agreement to pay third person by vendee—Starting point.*

A suit to recover the amount of unpaid purchase-money from the vendee, which he had agreed to pay under the terms of a registered sale-deed to a creditor of the vendor, from whom it was recovered by the creditor, is governed by Art. 116 and the cause of action arises on the date when the vendor suffered loss or when the agreement of the vendee became impossible of performance by reason of payment made by the vendor. 8 Pat. 860; 2 Lah. 316; 26 Cal. 241; 49 All. 603, Foll.; 34 All. 429, Not foll. (*Patkar, J.*) AMMANIBAI *v.* ANANT NARAYAN. **I.R. 1931 Bom. 379=133 I.C. 267 =33 Bom.L.R. 136=A.I.R. 1931 Bom. 365.**

———**Art. 117**—*'Date of the judgment'—Appeal in foreign court against judgment of trial court—Starting point of limitation for suit.*

If in an action in a Foreign State an appeal is preferred from the judgment of the trial court and is dismissed, for the purpose of a suit brought in British India to enforce the foreign judgment, time begins to run from the date of the judgment of the Court of first instance and not that of the appellate Court. (*Stone, J.*) BAIJNATH KARNANI *v.* VALLABHADAS DAMANI. **I.R. 1932 Mad. 609=138 I.C. 648=35 L.W. 763= A.I.R. 1932 Mad. 661=62 M.L.J. 566.**

———**Art. 117**—*Inapplicability—Suit on call order passed by liquidation Court in Baroda.*

An order made by a liquidation Court is not a decree though it is enforceable in the same manner as if it was a decree. Therefore a suit on a call order passed by a liquidation Court in Baroda is not a suit on a foreign judgment and is therefore governed by Art. 120, and not by Art. 117. 8 Bom. H. C. R 200, Not Foll. (*Addison and Din Mohammad, JJ.*) MODERN CHEMICAL WORKS, LTD., BARODA *v.* MANMOHAN NATH DAR. **17 Lah. 341=160 I.C. 346=8 R.L. 528=38 P.L.R. 662=A.I.R. 1935 Lah. 975.**

[*On appeal from* **A.I.R. 1935 Lah. 553.**]

———**Art. 117**—*Order by foreign Court authorizing liquidators to file suits against contributories residing outside jurisdiction—Suit by liquidators.*

Where the Baroda Court passed an order calling upon the contributories to pay Rs. 20 per share, and a date was fixed for the payment of the call money and the liquidators were authorized by the Court to file suits against contributories residing outside the jurisdiction of the Baroda State.

Held, that it was a foreign judgment, and a suit against a contributory outside the State was governed by Art. 117. (*Agha Haidar, J.*) MODERN CHEMICAL WORKS, LTD. *v.* MANMOHAN NATH DAR. **A.I.R. 1935 Lah. 553.**

———**Art. 117**—*Suit on foreign judgment—Judgment of trial Court—Appeal from—Dismissal of—Starting point—Original or appellate decree.*

Where in a Foreign State there is a suit and in that suit a judgment is given and from that judgment, appeal is made, which appeal is dismissed, the "judgment in that suit" is the judgment of the appellate Court for the purpose of Art. 117 and not the judgment of the Court of first instance. The test of finality is the treatment of the judgment by the foreign tribunal as a *res judicata* and as the decree of the first Court which is taken on appeal to the appellate Court is not *res judicata* but on the other hand its finality is destroyed by the appeal, the judgment of the appellate Court alone is the final and the only decree for purposes of execution. *Nouvion v. Freeman*, 15 A C. 1; 8 Cal. 218 (F.B.); 13 Cal. 13; 39 Cal. 925; 24 Cal. 616 (P.C.); 45 Cal. 442 (P.C.); 61 M L.J. 420 (P.C.). Ref.; 62 M.L.J. 566 Reversed. (*Beasley, C.J. and Bardswell, J.*) BAIJNATH KARNANI *v.* VALLABHADASS DAMANI. **56 Mad. 951=6 I.R. (Mad.) 21=144 I.C. 853=1933 M.W.N. 453=38 L.W. 35 =A.I.R. 1933 Mad. 511=65 M.L.J. 572.**

LIMITATION ACT (1908), Art. 120.

———**Art. 118**—*Applicability—Suit by Hindu widow to recover possession of deceased husband's estate.*

A suit by a Hindu widow to recover possession of the estate of her deceased husband from the defendant who claimed to be the adopted son of the deceased is not governed by Art. 118 and is in time if brought within twelve years from the death of the husband. 48 Bom. 411, Foll. (*Sir John Wallis.*) PADMALAV ACHARIYA *v.* FAKIRA DEBYA. **53 C.L.J. 292=8 O.W.N. 700= 35 C.W.N. 465=1931 M.W.N. 561=I.R. 1931 P.C. 150=131 I.C. 758=33 Bom.L.R. 904=12 Pat.L.T. 563=33 L.W. 477=A.I.R. 1931 P.C. 84=60 M.L.J. 619 (P.C.).**

———**Art. 118**—*Starting point under.*

Where the plaintiff had no knowledge of the deed of adoption of 1917 until the date when the gift was mutated in 1925, the period of six years should count from the latter date. (*Hilton, J.*) CHIRAGH DIN *v.* MEHTAB. **15 Lah. 645=149 I.C. 986=6 R.L. 776=36 P.L.R. 315=A.I.R. 1934 Lah. 274 (2).**

———**Arts. 119 and 141**—*Suit for declaration of validity of adoption—Suit by adoptee for possession on death of Hindu female—Limitation applicable.*

A suit under S. 42, Specific Relief Act, for a declaratory decree that an adoption is valid or did take place is governed by Art. 119; but the article applicable to a suit by an adoptee for possession of immovable property on the death of Hindu female who was in possession as the adopted mother under an agreement is Art. 141, even if it is necessary to decide in the suit whether an adoption was or was not valid. (Case-law referred.) (*Baker and Wadia, JJ.*) BHAGIRTHIBAI *v.* APPA DADA. **58 Bom. 280=149 I.C 674=6 R.B. 389=36 Bom.L.R. 185=A.I.R. 1934 Bom. 110.**

———**Art. 120.**

Accounts.
Applicability.
Assignment.
Attachment of property.
Charge.
Claim to office.
Company.
Compromise.
Construction.
Continuing wrong.
Co-owners.
Co-sharers. *See* CO-OWNERS.
Costs.
Declaratory suit.
Ejectment.
Emoluments.
Government act.
Hindu joint family.
Injunction.

LIMITATION ACT (1908), Art. 120—Accounts.

Land acquisition.
Landlord and tenant.
Mesne profits. *See* CO-OWNER AND HINDU JOINT FAMILY.
Mortgagor and mortgagee.
Movable property.
Partnership.
Possession.
Profits.
Record-of-rights
Rectification.
Refund.
Religious endowment.
Revenue records. *See* RECORD-OF RIGHTS.
Reversioner.
Sale.
Setting aside alienation.
Setting aside decree.
Setting aside order.
Starting point of limitation.
Suit for compensation. *See* COMPROMISE AND SALE.
Suit for conveyance.
Trust.
Miscellaneous.

Accounts.

See also CO-OWNERS AND PARTNERSHIP, *infra.*

——**Art, 120**—*Accounts—Claim against trustee.*

The article applicable to an equitable claim against a trustee, liable to account, for an account and ascertainment of what may be due, is Art. 120 and not Art. 62, and limitation does not begin to run until the "right to sue" accrues, *i.e.*, until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant. Consequently the plea of limitation fails when the defendant is unable to specify the particular date at which the claim to an account was denied by him. 11 I.A. 59 and 59 M.L.J. 621 (P.C.), Foll. ((*Lord Thankerton*) ANNAMALAI CHETTIAR *v.* MUTHUKARUPPA CHETTIAR. **58 I.A. 1=8 Rang. 645=35 C.W.N. 145=33 L.W. 30=54 C.L.J. 175=1931 M.W.N. 137=33 Bom.L.R. 168=I.R. 1931 P.C. 65=130 I.C. 609=A.I.R. 1931 P.C. 9=60 M.L.J. 1 (P.C.).**

[R. 63 M.L.J. 232 (224). **Rel.** 62 Cal. (120) 124.**]**.

——**Art. 120**—Accounts—Person dealing with fund as executor—Suit against for accounts—Limitation. *See* SUCCESSION ACT, S. 303. **A.I.R. 1935 Cal. 511.**

Applicability.

——**Art. 120**—*Applicability.*

Art. 120 being a residuary article, will not apply if there is any other provision in the Act applicable to the case. (*Bhide, J.*) BASHESHAR DAS *v.* DIWAN CHAND. **6 I.R. (Lah.) 287=146 I.C. 939=34 P.L.R. 1085=A.I.R. 1933 Lah. 615.**

——**Art. 120**—*Applicability.*

Art. 120 is a residuary article and cannot be applied when there is a specific article applicable. 49 Cal. 886, Ref. (*Addison and Agha Haidar, JJ.*) MILKHA SINGH *v.* FAZAL DIN. **6 I.R. (Lah.) 74=145 I.C. 186=34 P.L.R. 96=A.I.R. 1933 Lah. 581.**

——**Art. 120**—*Applicability—Application for revocation of probate.*

Quaere.—Whether an application for revocation of probate is governed by Art. 120? (*Mukerji and Mitter, JJ.*) HAIMABATI MITRA *v.* KUNJA MOHAN DAS. **135 I.C. 282=I.R. 1932 Cal. 90=35 C.W.N. 387=A.I.R. 1931 Cal. 713.**

——**Art. 120**—Applicability—Claim by administrator against debtor of estate of deceased—Limitation—

LIMITATION ACT (1908), Art. 120—Applicability.

Starting point. *See* LIMITATION ACT, ARTS. 62 AND 120. **62 Cal. 120.**

——**Art. 120**—*Applicability—Indemnity—Sale of property subject to charge—Suit to enforce implied right of indemnity—Article applicable.*

Where some of the properties furnished as security under a bond executed as a condition for stay of execution were sold in execution of another decree subject to the charge, and on the failure of the purchaser to pay-off the charge, the owner of the properties brought a suit in effect praying for a declaration of his right to indemnity and for its enforcement by the sale of the property.

Held, that it was not necessary for the plaintiff to pray specifically for a declaration which was involved in the prayer for sale of the property, that the main relief was the enforcement of the charge and that the suit was governed by Art. 132 and not Art. 120. (*Madhavan Nair and Jackson, JJ.*) RAMA RAYANIMGAR *v.* VENKATALINGAM NAYANIM BAHADUR **57 Mad. 218=149 I.C. 379=6 R.M. 642=1933 M.W.N. 486=38 L.W. 818=A.I.R. 1934 Mad. 1=66 M.L.J. 4.**

——**Art. 120**—*Applicability—Mortgagee undertaking to discharge prior debt—Default—Mortgagor paying debt and suing for recovery.*

The mortgagors left certain moneys with the mortgagee for payment to the prior creditors as mortgagors. The mortgagees did not pay that sum. The mortgagors being threatened by their creditors with a suit were forced to pay the money and they subsequently sued to recover the amount with interest by way of damages from the mortgagees. The date of the mortgage was June 11, 1921, and the payments were made by the mortgagors on June 12, 1922 and June 14, 1923. The suit was brought on June 14, 1927.

Held, that the payment was made by the mortgagors for themselves and not for the mortgagees and that Art. 61 of the Limitation Act did not apply.

Held further, that the suit was governed by the residuary Art. 120 and that the suit was in time whether the cause of action accrued on the date of the mortgage or on the date when the mortgagor discharged the debt. (*Young and Pullan, JJ.*) ZAITUN AHFER *v.* SAT RAM SINGH. **53 All. 702=I.R. 1931 All. 727=133 I.C. 615=1931 A.L.J. 533=A.I.R. 1931 All. 549 (2).**

——**Art 120**—Applicability — Plaintiffs wrongly paying defendants to redeem mortgage—Third person obtaining foreclosure decree—Plaintiff paying him to redeem mortgage—Suit to recover money wrongly paid to defendants. *See* LIMITATION ACT, ART. 97. **1935 O.W.N. 549=A.I.R. 1935 Oudh 378.**

——**Art. 120**—*Applicability—Subscription collected for construction of bridge—Suit by District Board against Collector—Starting point of limitation.*

The defendant promised to pay to the plaintiff a District Board, a certain amount by way of personal contribution for the purpose of constructing a bridge over a river and he also collected subscriptions for the same purpose. The District Board sued through its President to recover from the defendant both the amounts. The evidence in the case showed that the construction of the bridge could not have been begun earlier than 1923 and the suit was instituted on 5th September 1925. The lower Court decreed the suit in respect of the personal contribution but held that the claim as regards the subscription collected was barred by limitation.

Held, in appeal, that the claim in respect of the subscription amount was not barred by limitation, Art. 120 and not Art. 62 of the Limitation Act being appli-

LIMITATION ACT (1908), Art. 120—Assignment.

cable. The subscription became payable only when definite steps had been taken towards the construction of the bridge. (*Madhavan Nair, J.*) THE DISTRICT BOARD OF RAMNAD *v.* MAHOMED IBRAHIM SAHIB. **I.R. 1933 Mad. 305=143 I C. 496=1933 M.W.N. 368=37 L.W. 631=A.I.R. 1933 Mad. 524=64 M.L. J. 574.**

———**Art. 120**—Applicability—Suit for money spent in litigation on behalf of estate—Limitation. *See* LIM. ACT, ARTS. 61, 83 AND 120. **A.I.R. 1935 Mad 594.**

Assignment.

———**Arts. 120 and 62**—*Assignment—Assignment of mortgage bond which had been paid—Suit against assignor by assignee.*

A member of a Hindu family had assigned to him a mortgage bond by the *karta* of the family at the partition which took place in 1929. The mortgage bond was however repaid in fact in 1922. An action being brought by the member on the mortgage with an alternative claim for a money decree against the *karta* if he had received the money,

Held, that this being merely a case of conversion by the *karta* or a case where having held the money for many years from the date of the partition, he must be said to hold it in trust for the plaintiff in which event Art. 120 would apply and not Art. 62. (*Wort, J.*) NARSINGH PANDE *v.* MATHURANATH PANDE. **156 I.C. 887=8 R.P. 33=A.I.R. 1935 Pat. 159.**

Attachment of property.

———**Arts. 120 and 11**—*Attachment of property—Suit arising out of objection to attachment before judgment.*

Although the provisions of rules 58 to 63, O. 21, C.P. Code, may be applied to claims or objections made in attachment before judgment, no period of limitation is prescribed by R. 63, O. 21, and the Rule in Art. 11 of the Schedule to the Limitation Act is expressly limited to claims or objections made to the attachment of property attached in execution of a decree. No special provision is made for suits of this nature arising out of objections to attachment before judgment so that Art. 120, Limitation Act, must be held to apply to such suits. (*Fazl Ali and James, JJ.*) MT. BABBAL KUMARI JAYASWALIN *v.* MULCHAND MARWARI. **152 I.C 297=7 R.P. 187=16 Pat.L.T. 304=A.I.R 1934 Pat. 580.**

Charge.

———**Art. 120**—Charge—Suit to enforce charge on immovable property—Suit under S. 171 B.T. Act. Art. 132 applies, not Art. 61, 91, or 120. *See* LIM. ACT, ART. 132. **35 C.W.N. 678=A.I.R. 1931 Cal. 493.**

Claim to office.

———**Art. 120**—*Claim to offence—Right to hereditary office.*

A claim to a hereditary office (religious) is governed by Art 124 and not Art. 120. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAYA PILLAI. **I R. 1931 Mad. 705=133 I.C. 193=1931 M.W.N. 8=A.I.R 1931 Mad. 505.**

———**Art 120**—*Claim to office—Suit for possession of non-hereditary office—Art. 120 applies.*

Suits to recover possession of an office which is not hereditary are governed by Art. 120, Limitation Act. 1926 Mad. 1012, Ref. (*Walsh and Varadachariar, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR. **1935 M.W.N. 503=A.I.R. 1935 Mad. 449.**

———**Arts. 120 and 124, Expln.**—*Claim to office—Explanation to Art. 124 lays down only general rule for determining questions of possession in respect of offices—Applicability to cases governed ay Art. 120 for recovery of possession of office.*

LIMITATION ACT (1908), Art. 120—Compromise.

The explanation in Col. 3, Art. 124, Limitation Act, only lays down a general rule for determining the question of possession in respect of offices and is applicable to cases governed by Art. 120 whenever the claim is in substance one to recovery of possession of an office. Where in a suit to recover possession of the temples in the villages and the properties endowed to them, against the defendant who was in possession and management of the temples and the properties, the defendant set up a right in himself and claimed them adversely to the villagers.

Held, that the defendant was in possession of an office, within the meaning of the explanation in Col. 3 Art. 124 Limitation Act, and that the office not being a hereditary one, the suit was governed by Art. 120, Limitation Act. (*Walsh and Varadachariar, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR. **1935 M.W.N. 503=A.I.R. 1935 Mad. 449.**

Company.

———**Art. 120**—*Company—Call order by Baroda Liquidation Court—Suit for money due for call based on order.*

A call order was passed by a liquidation Court in Baroda authorizing liquidators to institute suits to recover sums due from persons living outside the jurisdiction of Baroda Court. A suit was filed for recovery of money due for the call and was based on the order. The plaint was in the form of an ordinary action,

Held, that the suit was governed by Art. 120. 70 P.R. 1903, Rel. on. (*Addison and Din Mohammad, JJ.*) MODERN CHEMICAL WORKS, LTD., BARODA *v.* MANMOHAN NATH DAR. **17 Lah. 341=160 I.C. 346=8 R.L. 528=38 P L.R. 662=A.I.R. 1935 Lah. 975.** [*On appeal from* **A I.R. 1935 Lah. 553**].

———**Art. 120**—*Company—Declaratory suit—Right to shares in company—Starting point of limitation.*

Where a Company rejected the request of the plaintiff to have his name entered along with that of his son as the owner of certain shares in June 1918, a suit brought by the plaintiff for declaration of his title thereto in June 1924 is in time, though the shares might have been purchased in 1914. (*Patkar and Baker, JJ.*) DHARWAR BANK, LTD. MAHOMED HAYAT. **I.R. 1931 Bom 353=133 I.C. 241=33 Bom.L R. 250=A.I R. 1931 Bom. 269.**

———**Art. 120**—*Company—Right to sue—Misfeasance of Directors of Companies.*

A right to sue for misfeasance of directors of companies arises from the date of misfeasance and is governed by Art. 36 or Art. 120. (*Ramesam and Cornish, JJ.*) NARASIMHA AYYANGAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad. 153=I.R. 1931 Mad. 61=128 I.C. 477=1930 M.W.N. 966=32 L.W. 555=A.I.R. 1931 Mad. 58=60 M.L.J. 280.**

——— **Art. 120**—Company—Suit by liquidator for unpaid calls from share-holders—Limitation—Starting point. *See* COMPANIES ACT, S. 156. **A.I.R. 1935 Lah. 335.**

Compromise.

———**Art. 120**—Compromise—Compromise decree—Suit for compensation based on contract governed by Art. 115 and not Art. 120. *See* LIMITATION ACT, ART. 115. **12 Pat. 792.**

———**Art. 120**—Compromise—Suit for compensation for breach of terms in compromise—Art. 115 applies, not Art. 36 or 120—Even if compromise is merged in

LIMITATION ACT (1908), Art. 120—Construction

decree. *See* LIMITATION ACT, ARTS. 115, 36 AND 120. **A.I.R. 1934 Pat. 7.**

Construction.

———**Art. 120** — *Construction—'Right to sue'—Meaning.*

The expression "right to sue" in Art. 120 means the right to bring the particular suit with reference to which the plea of limitation is raised. (*Sir George Lowndes.*) GOBINDA NARAYAN SINGH *v.* SHAM LAL SINGH. **58 I.A. 125=53 C.L.J. 333=35 C.W.N. 521=1931 M.W.N. 435=33 L.W. 707=58 Cal. 1187=I.R. 1931 P.C. 145=131 I.C. 753=38 Bom.L.R. 885=A.I.R. 1931 P.C. 89=61 M.L.J. 9 (P.C.).**

———**Art. 120** — *Construction — "Right to sue"—Pledge for money advanced—Suit on — Limitation —Starting point.*

In the case of a pledge to secure moneys advanced as loans, a suit on the security is governed by Art. 120 and a suit filed more than six years after the date of the pledge will be barred by limitation. The right to sue on the security in default of payment is simultaneous with the right to sue on the loan. There cannot be one *terminus a quo* for the right to sue on the debt and another for the right to sell the pledged property. (*Wadia, J.*) PERCY F. FISHER *v.* ARDESHIR. **156 I.C. 531=7 R.B. 515=37 Bom.L.R. 165=A.I.R. 1935 Bom. 213.**

———**Art. 120**—*Construction—Right to sue—Starting point.*

The interpretation to the placed upon the expression 'when the right to sue accrues" in Art. 120 to a large extent depends on the particular facts of the case to which the article is to be applied on the relief sought. A.I.R. 1931 Lah. 238 and A.I.R. 1932 Mad. 589, Ref. (*Bhide, J.*) MAHOMED UMAR *v.* MAHOMED IBRAHIM. **I.R 1933 Lah. 379=143 I.C. 725=34 P.L.R. 598=A.I.R. 1933 Lah. 270.**

Continuing wrong.

See also CO-OWNERS, *supra.*

———**Art. 120** — *Continuing wrong — Interference with right of worship—Recurring time limit.*

In a suit alleging interference with the plaintiff's right of worship on a holy hill and claiming relief by way of injunction and declaration in respect of *charans* or foot-prints of saints which the defendants had removed and replaced by *charans* of a different type abhorrent to the plaintiffs,

Held, that the suit was not barred by Art. 120 as the act complained of was a continuing wrong and that under S. 23 of the Act a fresh period began to run at every moment of the day on which the wrong continued. (*Sir John Wallis, J.*) HUKUM CHAND *v.* MAHARAJ BAHADUR SINGH. **60 I.A. 313=12 Pat. 681=35 Bom.L.R. 990=58 C.L.J. 56=14 Pat. L.T. 552=38 L.W. 306=1933 M.W.N. 883=1934 A.L.J. 1325=I.R. 1933 P.C. 187=144 I.C. 346=37 C.W.N. 1021=A.I.R. 1933 P.C. 193=65 M.L.J. 163 (P.C.).**

Co-owners.

See also PARTNERSHIP, *Infra.*

———**Art. 120**—*Co owners—Claim for mesne profits.*

In 1923, the plaintiff obtained a decree against the defendants for partition of her share of the joint properties and mesne profits. In 1930, the plaintiff brought a second suit for mesne profits of seven years from 1923 to 1930. No partition had been effected between the parties in spite of the decree of 1923. It was contended that the suit was governed by Art. 109 or 62 and so only three years' profits could be claimed.

Held, (i) the possession of the defendants until actual partition was effected was that of co-owner and as such

LIMITATION ACT (1908), Art. 120—Co-owners.

the profits could not be said to have been "wrongfully received by the defendants" within the meaning of Art. 109; (*ii*) as the rents and profits were in respect of undivided lands, none of the co-owners being entitled to any specific part, the rents received by the appellant cannot be considered to be money payable by him to the respondents as money received for their use within the meaning of Art. 62; (*iii*) that Art. 120 applied; the claim could be allowed for a period of six years prior to suit. 37 M. 381. Foll. (*Heald and Sen, JJ.*) MAUNG PO NYUN *v.* MA SAW TIN. **I.R. 1931 Rang. 143=131 I.C. 511=A.I.R. 1931 Rang. 150.**

———**Art. 120**— *Co-owners — Co-sharer—Suit for declaration—Ouster from possession.*

A suit by a co-sharer in possession for a declaration that this defendant is not a co sharer is not barred, if brought within six years from an attempt to oust him from possession. Limitation does not begin to run from the date when the defendant's name was entered in the revenue records. (*Colvistream and Johnstone, JJ.*) PARAS RAM *v.* CHETAN DAS. **135 I.C. 501=I.R. 1932 Lah. 101=32 P.L.R. 731=A.I.R. 1932 Lah. 81.**

———**Art. 120** — *Co-owners — Co sharers—Suit for share of rents.*

A suit by one co-sharer against another co-sharer (who is in exclusive possession of the joint property) for his share of the rents of the joint property is governed not by Art. 109, but by Art. 120. 45 M. 648 (F.B.). Foll. (*Shadi Lal, C.J. and Abdul Qadir, J.*) KIDAR NATH *v.* SHIV DAYAL. **147 I.C. 909=6 R.L. 474=35 P.L.R. 208=A.I.R. 1933 Lah. 951.**

———**Art. 120** — *Co-owners — Co-sharers — Village Shamilat—Exclusive possession taken by one set of co-sharers and diverted purpose other than the ordinary one —Suit by the other set of co-sharers to restrain.*

The property in dispute was a portion of the village Shamilat, owned by the proprietary body of which the plaintiffs and the defendants were members. It had been set apart for use for a specific purpose and both the plaintiffs and the defendants had an equal right to use it for that purpose. Subsequently the defendants took exclusive possession of the disputed property and diverted it to a purpose other than the one for which it had been set apart. They set up their own exclusive ownership of area in question and denied its character as joint property of the parties. In a suit for injunction by the excluded co-proprietors to restrain the defendants from preventing the plaintiffs from using the common property for the specific purpose for which it had originally been set apart,

Held, that though the cases in which the dispute was between the person who had given the use of his property to another for a specific purpose and this other had perverted it to an unauthorised purpose would be governed by Art. 32, yet in those in which, as in the present case both the plaintiff and the defendant were co-owners of a plot of land and had set it apart for their common use for a specific purpose but which the defendant had diverted to an unauthorised purpose and excluded the plaintiff from using it for the purpose for which it was originally intended, the real cause of action is the ouster of the plaintiff from the common property and not its perverted user and a suit to restrain the defendants from excluding the plaintiffs is governed by Art. 120 and not Art. 32. (*Shadi Lal, C. J., Broadway, Tek Chand, Jai Lal and Dalip Singh, JJ.*) MASTAN SINGH *v.* SANTA SINGH. **14 Lah. 267=6 I.R. (Lah.) 113=145 I.C. 553=34 P.L.R. 618=A.I.R. 1933 Lah. 705 (F.B.).**

[F. 35 P.L.R. 472 (474).]

———**Art. 120**—*Co-owners—Denial of title—Suit for injunction.*

LIMITATION ACT (1908), Art. 120—Co-owners.

In cases where the litigating parties are co-owners or co-tenants having an equal right to use property for a specified purpose, the presumption of law is that the possession of one is the possession of all. Every such person is seized of the property *per my et per tout*, and anything short of denial of title cannot destroy the plaintiff's right. To suits between co-owners or co-tenants *inter se*, where the title of one is denied by the other, Art. 144 or Art. 120 would apply, according as the relief claimed is one for possession or injunction. (*Shadi Lal, C.J., Broadway, Tek Chand, Jai Lal and Dalip Singh, JJ.*) MASTAN SINGH *v.* SANTA SINGH. **14 Lah. 267=6 I.R. (Lah.) 113=145 I.C. 553=34 P.L.R. 618=A.I.R. 1933 Lah. 705 (F.B.).**

———**Art. 120**—*Co owners—Mahomedan co-sharers—Suit for accounts.*

In a partition suit between the co-sharers of a Mahomedan family, a female co sharer asked for accounts and profits of her share from the managing co sharer for a period of ten years.

Held, that the right to sue was a continuing one and arose when there was a demand and a refusal for accounts and profits. In this case the refusal was before one year of the suit and hence the suit was not barred under Art. 120. That the plaintiff could claim an account for the whole period of ten years, because if the suit had been brought within six years after the demand and refusal then the person liable may be asked to account for the entire period of his management even if it exceeds six years. (Case-law discussed.) (*Madhavan Nair, J.*) SYED LEVVAI ROWTHER *v.* SYED AMMAL. **I.R. 1933 Mad. 241=142 I.C. 708=A.I.R. 1933 Mad. 200.**

Costs.

———**Art. 120**—*Costs—Payment to solicitor named—Decree providing for—Enforcement of.*

Art. 84 does not apply in the case of a decree which provides that the costs shall be paid to the solicitor (named) of one of the parties to the suit. It is governed by the residuary Art. 120. (*Tyabji, J.*) RUSTOMJI AND GINWALA *v.* FAZAL RAHIM. **I.R. 1932 Bom. 445=138 I.C. 832=34 Bom.L.R. 670=A.I.R. 1932 Bom. 378.**

Declaratory suit.

See also UNDER THE OTHER HEADINGS.

———**Art. 120**—*Declaratory suit—Cause of action—Plaintiff in possession.*

The plaintiff need not bring his declaratory suit from the time of his first denial of title, specially where the plaintiff is in possession of the property; the same principle applies when neither the defendant nor the plaintiff is in possession of the property. A fresh cause of action accrues to the plaintiff when he has his possession of the property disturbed. (*Dalip Singh, J.*) SHANKAR DAS *v.* MT. DHAN DEVI. **6 I.R. (Lah.) 78=145 I.C. 241=A.I.R. 1933 Lah. 53.**

———**Art. 120**—*Declaratory suit — Declaration and injunction—Suit for—Cause of action.*

The period of limitation for a suit for a declaration and injunction of six years from the date of the invasion of the plaintiff's right. As long as the title of the plaintiff is not lost by adverse possession of the defendant, each invasion gives him a fresh cause of action. (*Mahomed Noor and Agarwala, JJ.*) MUKTAKESHI PATRANI *v.* MIDNAPUR ZAMINDARY CO., LTD. **13 Pat. 517=156 I.C. 136=7 R.P. 691=A.I.R. 1935 Pat. 33.**

———**Art. 120**—*Declaratory suit—Fresh denial of right—Fresh start.*

If a person against whom an entry is made in the revenue papers fails to bring a suit for declaration within six years from the date of such entry, he is not debarred for all time to come from suing for a declaration and any new invasion of rights which amounts to a fresh denial of title confers on the owner in possession a fresh right to sue. The fresh act must be on the part of the defendants which can be said to amount to a fresh invasion of the plaintiff's right or a fresh attempt to cast a cloud on the plaintiff s title and not merely a denial of the plaintiff's title when the plaintiff attempts to assert his title because this denial would be merely a continuation of the denial made long ago. (*Baipai, J.*) SHIAM LAL *v.* MOHAMAD ALI ASHGAR HUSAIN. **7 R.A. 442=153 I.C. 73=1935 A.W.R. 607=A.I.R. 1935 All. 174.**

LIMITATION ACT (1908), Art. 120—Declaratory Suit.

———**Art. 120**—Declaratory suit — Grant — Sanad granting in perpetuity a percentage of government assessment—Subsequent substitution of fixed annual sum—Limitation. *See* LIMITATION ACT (1908), ART. 131. **66 M.L.J. 614 (P.C.).**

———**Art. 120**—*Declaratory suit—Limitation for—Starting point of.*

The starting point of limitation for a suit praying for a declaration of title is the date when the plaintiff's title was disputed. (*Tek Chand and Monroe, JJ.*) SUKHDEV SINGH *v.* MATHRA SINGH. **I.R. 1933 Lah. 215=142 I.C. 606=34 P.L.R. 115=A.I.R. 1933 Lah. 412.**

———**Art. 120**—*Declaratory suit—Mutation effected by parties' consent—Assertion of title—Suit for declaration—Cause of action.*

Where the mutation entries in the name of the defendants were made with the plaintiff's consent and the plaintiff had no grievance until the defendants asserted title on thot basis.

Held, that it was the wrong assertion which constituted the cause of action for a declaratory suit. (*Bisheshwar Nath and Nanavutty, JJ.*) SUKHDASI KUAR *v.* FATEH BAHADUR SINGH. **I.R. 1933 Oudh 237=144 I.C. 316=10 O.W.N. 366=A.I.R. 1933 Oudh 283.**

———**Art. 120**—*Declaratory suit—Mutation order—Suit for declaration of title.*

Plaintiff was in possession of the land which was the subject of alienation by will in favour of the defendant; mutation was effected in favour of defendant whereupon plaintiff sued for declaration of his title,

Held, that it was unnecessary for him to bring any suit to set aside the alienation by will as he was in possession of the property and that his suit fell under S. 45, Land Revenue Act, and was governed by Art. 120, Limitation Act, and not by Sch. I, Art. 1, Punjab Limitation Act. (*Bhide, J.*) DALIP SINGH *v.* MT. TABI. **15 Lah. 469=152 I.C. 100=7 R.L. 244 (2)=36 P.L.R. 357=A.I.R. 1934 Lah. 134.**

———**Art. 120**—*Declaratory suit—Obstruction proved within three years—Onus shifted.*

Where a plaintiff, in a suit for declaration of a right to graze cattle over certain lands, proves that he was obstructed in the enjoyment of his right within three years before suit, the onus is shifted on to the defendant; and he has to show, in order that the suit may be time barred that such obstruction took place more than six years before the suit. (*Bhide, J.*) COURT OF WARDS, BHABAUR ESTATE *v.* BAKHTAWAR KHAN. **6 I.R. (Lah.) 45 (2)=144 I.C. 976=A.I.R. 1933 Lah. 370.**

———**Art. 120**—*Declaratory suit—Property brought in Court—No fresh start.*

A claim to something or to some sum of money which has become time barred would not revive when it has

LIMITATION ACT (1908), Art. 120—Declaratory Suit.

been brought into Court. 26 Mad. 415; A.I.R. 1931 P.C. 89, Ref. (*Walsh, J.*) NATESA AYYAR *v.* MANGALATHAMMAL. **I.R. 1933 Mad. 455=144 I.C. 602 =1933 M.W.N. 1106=38 L.W. 194=A.I.R. 1933 Mad.** 503 (2).

———**Art. 120**—*Declaratory suit—Right regarding alluvial land—Suit against Government.*

The plaintiffs alleged that the order by the Collector disposing of the suit lands in favour of the second defendant was null and void, that the plaintiffs being the owners of the adjacent land and the grant being of alluvial land, the grant should have been made to the plaintiffs under S. 63 of the Bombay Land Revenue Code. The suit was for declaration against the Secretary of State and for possession as against his grantee,

Held, the relief regarding possession could not be awarded in the suit: that it was really a suit for declaration and injunction and governed by Art. 120, and not by Art. 144 or 14. 22 Bom.L.R. 146, Diss.; 24 B. 435, Appr. (*Beaumont, C.J. and Murphy, J.*) DAMODAR NARAYAN *v.* SECRETARY OF STATE. **55 Bom. 447 =I.R. 1931 Bom. 524=134 I.C. 716=33 Bom.L.R. 772=A.I.R. 1931 Bom. 369.**

———**Art. 120**—*Declaratory suit—Right when accrues.*

A right to sue for a declaration accrues under Art. 120 only when the right to the property is infringed or at least clearly and unequivocally threatened to be infringed by the defendant. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727=149 I.C. 809=6 R.P. 652=14 Pat.L.T. 258=A.I.R. 1933 Pat. 250.**

———**Art. 120**—*Declaratory suit—Suit to declare will to be invalid—Commencement of limitation.*

Where a suit is filed by certain reversioners for recovery of possession of property on the ground that a will executed by the deceased was invalid, it is for the plaintiffs to explain from what date they came to know of the will and how the suit was within limitation. To such a case Art. 120 would apply. (*Bhide, J.*) JAHANA *v.* MT. HAFIZAN. **I.R. 1932 Lah. 647.**

Ejectment.

———**Art. 120**—*Ejectment—Suit for ejectment by proprietor against non proprietor.*

Where a non proprietor made a gift of the house occupied by him in favour of his sister and thereupon some of the proprietors instituted a suit for his ejectment.

Held, that the suit was in essence one for possession and was governed by Art. 144 and not Art. 120. (*Bhide, J.*) ABDUL RAHMAN *v.* MT CHHAJJI. **I.R. 1931 Lah. 887=134 I.C. 119=33 P.L.R 298=A.I.R. 1932 Lah. 47.**

Emoluments.

———**Art. 120**—Emoluments—Temple archaka—Suit against trustee for emoluments—Limitation. *See* LIMITATION ACT, ARTS. 36, 102 AND 120. **68 M.L.J. 132.**

Government act.

———**Art. 120**—*Government act—Illegal act of Government—Suit for declaration and injunction.*

Where the act of the Government in respect of which a declaration and injunction is sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, then in such a case neither S. 59, Revenue Recovery Act, nor Art. 14, Limitation Act, applies but Art. 120 applies. But if the ground of such a suit is not that the act of Government was *ultra vires* or illegal but

LIMITATION ACT (1908), Art. 120—Hindu joint family.

a mere irregularity which does not vitiate the main proceedings but relates only to some question of detail such as the exact amount to be collected or something of that kind which does not make the proceedings *ultra vires*, in such a case Art. 14, Limitation Act, may apply or in a case falling under the Revenue Recovery Act, even S. 59, Revenue Recovery Act, may apply. Case-law reviewed. (*Ramesam, O. C. J and Venkatasubba Rao, J.*) THIRUVENKATACHARYULU *v.* SECRETARY OF STATE. **57 Mad. 501=1934 M.W.N. 221=154 I.C. 990=7 R.M. 523=39 L.W. 216=A.I.R. 1934 Mad. 147=66 M.L.J. 715.**

———**Art. 120**—Government act—Suit by Zamindar against Government—Prayer for declaration that enfranchisement of service inam was not valid and binding —Limitation—Starting point. *See* LIMITATION ACT, ARTS. 14 AND 120. **58 Mad. 141=68 M.L.J. 409.**

Hindu joint family.

———**Arts. 120 and 127**—*Hindu joint family—Coparcener excluded from enjoyment—Suit for declaration and injunction to—Limitation.*

The proper relief to be granted to a person who is excluded from the enjoyment of his rights as a coparcener by the other members of the family, is a declaration of his rights and a decree for joint possession. The suit is not one to enforce a right to share in joint family property. Hence where such a person sues for a declaration and injunction it is purely a declaratory suit with a consequential relief in the form of an injunction, and as such Art. 120 applies and not Art 127. 26 Bom. 141; A.I.R. 1933 Lah 712, Rel. on; 19 Bom. 99; 29 Cal. 500 and 23 Bom. 144, Dist. (*Mir Ahmad, A. J. C.*) MOTI RAM *v.* DEVI DAS. **157 I.C 345=8 R. Pesh. 20=A.I.R. 1935 Pesh. 95.**

———**Art. 120**—*Hindu joint family—Joint family property—Alienation—Suit to set aside—Limitation.*

Where the sons sued to set aside certain alienations made by a Hindu father and it appeared some of the properties transferred had been transferred by gift to the alienor by his father.

Held, that the suit related to joint family property and was governed by Art. 120 and not Art. 126. (*Jai Lal, J.*) GOBIND RAM *v.* GOPICHAND. **150 I.C. 963= 7 R.L. 36 (2)=36 P.L.R. 214=A.I.R. 1934 Lah. 397.**

———**Art. 120**—*Hindu joint family—Suit for share of mesne profits—Suit by members of joint family against purchaser of another member's interest in property.*

A suit by some of the members of a joint Hindu family against a purchaser in execution of a mortgage decree against another member for their share of the profits during the period they were kept out of possession by him is governed by Art. 120 and not Art. 109 of the Limitation Act. As the purchaser of the mortgagor's interest is entitled to his share in the property, the parties are really in the position of co-owners. The first column of Art. 109 speaks of property "belonging" to the plaintiffs and also of the profits thereof having been "wrongfully" received by the defendant. Neither of the conditions assumed here can properly apply as between co-owners, because in such a case the property cannot be said to belong to the plaintiffs alone nor could the profits received by the other co-owners be held to have been wrongfully received by them. (*Varadachariar and Burn, JJ.*) SIDDALINGANA GOWD *v.* BHIMANA GOUD. **156 I.C. 640=8 R.M. 30=41 L.W. 138= 1935 M.W.N. 107=A.I.R. 1935 Mad. 731=68 M.L J. 487.**

LIMITATION ACT (1908), Art. 120—Injunction.

Injunction.

See also DECLARATORY SUIT, *supra.*

———**Arts. 120 and 32**—*Injunction—Suit for permanent injunction—Removal of construction on shamilat of which both plaintiff and defendant are owners.*

A suit by the plaintiffs against the defendant for a permanent injunction to have certain constructions removed on the ground that they had been built by the defendant upon a part of the Village Shamilat of which the plaintiffs as well as the defendant are some of the owners, is governed by Art. 120 and not by Art. 32. 14 Lah. 267 (F.B.), Foll. (*Tek Chand and Coldstream, JJ.*) QARUM *v.* DEWA SINGH. **156 I C 358=7 R. L.900=35 P.L.R. 472=A.I.R. 1934 Lah. 701.**

Land acquisition.

———**Art. 120**—*Land acquisition—Money paid to person apparently entitled—Suit by person having interest in land for money so paid.*

Where the Government has acquired the land and has paid the money to one who was apparently entitled to it, a suit by a person who has also got interest in the land and claims the money paid by the Government is governed by Art. 120 and not by Art. 17 or Art. 62. (*Varma, J.*) SOMA SINGH *v.* JAIGOBIND PANDE. **A.I.R. 1935 Pat. 42.**

Landlord and tenant.

———**Art. 120**—*Landlord and tenant—Claim for refund of premium by tenant.*

A claim for the refund of premium paid by the tenant is governed by Art 62 and not Art. 120 of the Limitation Act. (*Beaumont, C. J. and Rangnekar, J.*) ABASBHAI SHAIKH *v.* BHIMJI. **I.R. 1932 Bom. 113 =135 I C. 801=33 Bom. L.R. 1563=A.I.R. 1932 Bom. 86.**

———**Art. 120**—*Landlord and tenant—Occupancy right—Disposal by will—Suit by landlord to avoid—Limitation—Starting point.*

Art. 120, Limitation Act, governs a suit by a landlord to avoid a transfer of occupancy right by a tenant by will, and the period begins to run from the date of the testator's death. (*Irving, F. C.*) SAPARAS *v.* MT. AMIRAN. **13 Lah.L.T. 40.**

Mortgagor and mortgagee.

———**Art. 120**—Mortgagor and mortgagee—Applicability—Sub-mortgage by co-mortgagees—Discharge of debt—Sale of property—Suit for contribution—Art. 120 did not apply—Applicability of Art. 99—Starting point—Limitation begins from date of sale. *See* LIMITATION ACT, ART. 99. **10 O.W.N. 919=A.I.R. 1933 Oudh 478.**

Movable property.

———**Art. 120**—*Movable property—Suit for declaration of title and recovery of share in movable property.*

A suit for a declaration that the plaintiff is entitled to an 8 annas share in certain movable property and for recovery of possession thereof from the defendant wrongfully withholding the same is governed by Art. 120 and not by Art. 49 or 62. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v.* PROBODH CHANDRA SARKAR. **143 I.C. 402=I.R. 1933 Cal. 425=36 C.W. N. 758=55 C.L.J. 420=A I.R. 1933 Cal. 253.**

Partnership.

———**Arts 120, 115 and 64**—*Partnership—Accounts of dissolved partnership adjusted—Suit on.*

Where a partnership is dissolved and there is subsequently an adjustment of accounts, the suit for the recovery of the amount is one on an adjusted account which entitles the plaintiff to claim that by virtue of that adjustment, there is a new cause of action originating from the date of adjustment and the fact that the adjustment is not signed does not deprive the plaintiff of his cause of action. Art. 64 is not bar to suit on the unsigned adjustment, the suit is governed by Art. 115 or 120. (*Rupchand, J. C. and Mehta, A. J. C.*) MADHOWDAS RAM DAS *v.* SANTRAM DAS. **27 S.L.R. 308=147 I.C. 432=6 R.S. 166=A.I.R. 1933 Sind 324.**

LIMITATION ACT (1908), Art. 120—Profits.

———**Art. 120**—Partnership — Dissolution—Suit for rendition of accounts. Art. 106 applies, not Art. 120. *See* LIMITATION ACT, ART. 120. **A.I.R. 1932 Lah. 519.**

———**Art. 120**—*Partnership—Suit against sub-partner for contribution of loss sustained—Article applicable—Arts.* 61 *and* 106.

Where a plaintiff, a member of a firm having had to bear his share of the loss sustained by the partnership sued his sub-partner for contribution under a settlement between him and the plaintiff.

Held, that the suit was governed by Art. 120 and not 61 or 106. (*Venkatasubba Rao, J.*) SEENAYYA *v.* RAMALINGAYYA. **57 Mad. 347=148 I.C. 204=6 R. M. 447 (2)=38 L.W. 858=1933 M.W.N. 1382=A. I.R. 1934 Mad. 12=65 M.L J. 789.**

———**Art. 120**—*Partnership—Suit for accounts only.*

A suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an expressed agreement between the partners to render accounts and to distribute the profits annually is governed by Art. 120 and not Art. 89 or Art. 100, or Art. 116. (*Niyogi, A.J.C.*) BINJRAJ *v.* KISANLAL. **29 N.L.R. 34=I.R. 1933 Nag. 52 (2)=141 I.C. 277 (2)=16 N. L.J. 10=A.I.R. 1933 Nag. 127.**

———**Art. 120**—*Partnership—Suit for dissolution.*

Art. 106 relates to a suit for an account and share of the profits of a dissolved partnership while Art. 120 governs a suit for dissolution and accounts of a subsisting partnership. 37 M.L.J. 353; 66 I.C. 811; 1930 Lah. 378, Ref. (*Pakenham Walsh and Bardswell, JJ.*) SRINIVASALU NAIDU *v.* RAMAKRISHNA NAIDU. **I R. 1933 Mad. 437=144 I.C. 573=1933 M.W.N. 689=37 L.W. 288=A.I.R. 1933 Mad. 353 (2).**

———**Art. 120**—Partnership—Suit for partnership accounts. *See* LIMITATION ACT, ARTS. 62, 106, 113 AND 120. **36 Bom.L.R. 1068.**

Possession.

See also DECLARATORY SUIT, *supra.*

———**Art. 120**—Possession—Suit ostensibly for declaration but in effect for possession. Art. 144 applies, not Art. 120. *See* LIMITATION ACT, ART. 144. **34 Bom.L.R. 1469.**

———**Art. 120**—Possession—Suit to recover property against instrument of lease executed by plaintiff. *See* LIMITATION ACT, ART. 91. **1935 A.W R. 1113=A.I.R. 1935 All. 1018.**

Profits.

———**Art. 120**—*Profits—Person entitled to profits in property—Suit to enforce same against others interested.*

A suit by a person to enforce her right to profits in certain property against other persons interested therein founding her claim upon an instrument (under which she was entitled to recover from the defendant the profits relating to the moiety share of her husband in the joint estate owned by the latter and another) is governed by Art. 120. (*Sen and Allen, JJ.*) LAKHMI CHAND *v.* MT. ANANDI. **I.R. 1932 All. 100=135 I.C. 836=16 R.D. 190=1932 A.L.J. 177=13 L.R. 144 (Rev.)= A.I.R. 1932 All. 272.**

LIMITATION ACT (1908), Art. 120—Record of rights.

Record of rights.

——**Art. 120**—*Record of rights—Applicability—Wrong entry in revenue records on basis of finding by Court—Suit to establish title—Limitation—Starting point.*

Where a Court of competent jurisdiction gives a finding against a person that a particular area lies within a particular mauza, and on that finding an entry is made in the revenue records to the knowledge of that person, a suit by that person to establish his title must be brought within six years from the time when the finding is given, under Art. 120. (*Drake Brockman, J.M.*) BIR DEB *v.* ISHURU DATT. **18 R.D. 689=16 L.R. 122 (Rev.).**

——**Art. 120**—*Record of rights—Declaration regarding—Starting point of limitation.*

Where a party sues for a declaration relating to an entry in a record of rights, the suit is governed by Art. 120 and time commences to run from the time when the plaintiff's right was actually infringed (*Mukerji and S.K. Ghose, JJ.*) KUMAR BIRENDRA NATH ROY BAHADUR *v.* SURENDRA NATH TAGORE. **150 I.C. 617=7 R.C. 32=58 C.L.J. 120=A.I.R. 1934 Cal. 192.**

——**Art. 120**—*Record of rights—Declaratory suit—Allegation that fraud was practised by defendant—Cause of action, when arises.*

A suit by plaintiff for a declaration that he alone was entitled to succeed to his father's property and that the defendant had fraudulently procured the entry of his name in the revenue records is governed by Art. 120 and the cause of action arises when the fraud becomes known to the plaintiff. (*Coldstream and Bhide, JJ.*) BHAGAT RAM *v.* PARS RAM. **6 R.L. 600=148 I.C. 776=A.I.R. 1934 Lah. 574.**

—— **Art. 120**—*Record of rights—Dismissal of application for correction of jamabandi—Suit for declaration—Plaintiff in possession—Starting point.*

In a suit by a person whose application for correction of jamabandi has been dismissed by the Revenue Court, whereby a cloud has been cast on his title which he seeks to remove by the suit for declaration, plaintiff alleging that he has been in possession of the property all along, the limitation for the suit is to be reckoned from the date of the order of the Revenue Court. (*Nanavutty, J.*) BHAGWATI PRASAD *v.* CHAUHARJA. **153 I.C. 965=7 R.O. 430=15 L.R. 677 (Rev.)=18 R.D. 560=11 O.W.N. 1297=A.I.R. 1935 Oudh 181.**

——**Art. 120**—*Record of rights—Joint family property—Father's gift to stranger—Declaratory suit by sons in possession—Cause of action—Entries in revenue records in favour of defendant—Suit to establish title.*

The father of the plaintiffs made a gift of lands belonging to the joint family to a stranger in 1915, a mutation of which was granted. In 1924, the donee sold the property to another, who applied for the land to be partitioned, when the plaintiffs who were in possession raised an objection that the gift was invalid. The plaintiffs were then directed by the revenue authorities to establish their claim in a Civil Court as the entries in the revenue records were in favour of the defendant vendee. They accordingly instituted the present suit in 1928. The suit was resisted *inter alia* on the ground of limitation.

Held, that as the plaintiffs were in possession of the property in suit, they were not obliged to sue for a declaration of title on the first or on each succeeding denial of their title, and that it was open to them to treat the gift as a nullity and not to go to Court for the purpose of setting aside the gift but that they were forced to go to Court as a result of the partition proceedings, and

LIMITATION ACT (1908), Art. 120—Refund.

that a fresh cause of action had arisen to them when they were directed by the revenue authorities to establish their title in a Civil Court and the suit was therefore within time under Art. 120. (*Coldstream and Bhide, JJ.*) RIASAT ALI *v.* IQBAL RAI. **16 Lah. 659=157 I.C. 75=8 R.L. 74 (2)=37 P.L.R 846=A.I.R. 1935 Lah. 827.**

——**Art. 120**—*Record of rights—Suit for correction.*

Limitation for a suit for the correction of an entry in record of rights is six years from date of final publication on the record of rights. 1 P.L.J. 73, Ref. (*Agarwala, J.*) ABAY CHARAN SEKHAR *v.* IBRAHIM MIAN. **148 I.C. 193=6 R.P. 427=A.I.R. 1933 Pat. 698 (2).**

——**Art. 120**—*Record of rights—Suit for correction—Cause of action—Each denial of right a cause of action.*

An owner in possession of property acquires a cause of action on each occasion on which his rights are denied. Where therefore such a person makes in 1917 an application for correction of khewat by entry of his name in place of defendants 1 and 2 and the application is dismissed, and again in 1926 the owner in possession makes an application for correction of khewat, and the application is again refused, a suit by such owner in 1926 for a declaration is not barred. 31 All. 9, Expl.; A. I. R. 1929 All. 529, Rel. on. (*Niamatullah and Bennet, JJ.*) MT. SALAMAT BEGAM *v.* SHEIKH IKRAM. **6 I.R. (All.) 151=145 I.C. 728=17 R.D. 846=14 L.R. 655 (Rev.)=A.I.R. 1933 All. 663.**

——**Art. 120**—Record of rights—Suit to declare incorrectness of entry in record of rights and for injunction—Limitation—Cause of action—Accrual of—Final publication of record or injury arising out of such entry. *See* B. T. ACT, S. 111-A, PROVISO. **62 Cal. 969=61 C.L.J. 519=A.I.R. 1935 Cal. 801.**

Rectification.

——**Art. 120**—Rectification—Suit to rectify petition of adjustment of decree and order thereon on the ground of mutual mistake—Limitation. *See* LIMITATION ACT, ARTS. 96 AND 120. **39 C.W.N. 966.**

Refund.

See also LANDLORD AND TENANT, *supra.*

——**Art. 120**—Refund—Execution sale—Setting aside in suit by stranger as judgment-debtor had no saleable interest—Suit by auction-purchaser for refund of sale price—Limitation. *See* LIMITATION ACT, ARTS. 62 AND 120. **41 L.W. 305=68 M.L.J. 630**

——**Art. 120**—*Refund—Sale by guardian—Money left with vendee to be paid to minors on attaining majority—Suit by guardian as reversioner claiming the money—Limitation.*

Plaintiff, acting as the guardian of two minor girls, sold a certain property. It was stipulated that the sale amount should remain with the vendee who was to pay it to minors on their attaining majority. One of the girls while still a minor married. Under the customary law which governed the family of the vendors, she lost her right in the purchase money which devolved on her sister with the result that the whole of the said purchase-money became the property of the younger girl. She also died while she was a minor. The plaintiff, as reversioner, became entitled to the whole of the purchase money which was lying with the vendee defendant and sued for the same.

Held, that Art. III did not apply because the plaintiff was not the vendor of the property, but had acted merely as the *de facto* guardian of the two minor girls under the customary law, that the suit was governed by Art. 120 and that limitation ran from the date of

LIMITATION ACT (1908), Art. 120—Refund.

the death of the younger girl. (*Addison and Agha Haidar, JJ.*) GULAB *v.* MT. SARWAR JAN. **15 Lah. 35=147 I.C. 269=6 R.L. 374=35 P.L.R. 161=A.I.R. 1933 Lah. 860.**

———**Art. 120**—*Refund — Subscription for specific purpose—Purpose becoming impossible—Suit for refund.*

In response to an appeal for funds for the founding of a college for a particular community, a person subscribed a certain amount. The founding of the college became impossible by the passing of a University Act. The money so collected was sought to be utilised for the purpose of the general educational advancement of the community but the donor claimed refund.

Held, that the donor had given subscription for a specific purpose and as that became impossible, he was entitled to refund, and the suit was governed by Limitation Act, Art. 120.

Held, further, that the doctrine of *cypres* had no application as it applies only to wills and not to deeds. A.I.R. 1921 Cal. 389, Rel. on. (English cases referred.) (*Wazir Hasan, C.J. and Rachhpal Singh, J.*) AUDESH SINGH *v.* COMMISSIONER, LUCKNOW. **7 R.O.33=150 I.C. 713=11 O.W.N. 937=A.I.R. 1934 Oudh 329.**

———**Art. 120**—*Refund—Suit for—Excessive execution.*

Where a decree-holder omitted to give credit in his execution application to certain amounts received from the judgment-debtor and the payment of which he had certified to the Court and had the house of the judgment-debtor sold in execution and realised amounts far more than due to him,

Held, that a suit by the judgment-debtor to recover the excess realised was governed by Art. 115 or 120 and not by Art. 97 and that the starting point of limitation was the date of sale. (*Jai Lal, J.*) KARAM ELAHI *v.* HARI RAM. **I.R. 1933 Lah. 12 (1)=140 I.C. 472 =33 P.L.R. 1084=A.I.R. 1933 Lah. 112.**

Religious endowment.

———**Art. 120**—*Religious endowment — Declaratory suit—Head of math—Suit for declaration and injunction—Commencement of limitation.*

In the case of a suit for declaration of title to the property which is in *custodia legis*, the Article applicable is Art. 120. The right to sue accrues within the meaning of the Article only when the defendant infringes or at least has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Where the plaintiff sued for a declaration that he was entitled on behalf of a math to obtain and remain the possession of the property which was in *custodia legis* and held by the administrator and for an injunction restraining the defendants from recovering possession and from asserting their claim,

Held, that the plaintiff having claimed in his own right, time commenced to run from his installation to the office. (*Patkar and Barlee, JJ.*) SHARADHA PEETH MATH *v.* RAJRAJESHWARASHRAM. **6 I.R. (Bom.) 49=145 I.C. 190=35 Bom.L.R. 440=A.I.R. 1933 Bom. 276.**

———**Art. 120**—*Religious endowment — Declaratory suit—Suit for declaration and possession of wakf property.*

A suit for a declaration that the plaintiffs are the Mutawallis of the trust property or a suit for possession of the office of the mutawalli are both governed by Art. 120. (*Sen and Niamatullah, JJ.*) ABDUL ALIM *v.* ABDUL HAMID. **I R. 1931 All. 151=129 I.C. 375 =A.I.R. 1930 All. 866.**

LIMITATION ACT (1908), Art. 120—Reversioner.

———**Arts. 120, 124 and 144**—*Religious endowment —Suit by shebait for declaration of right to office and for possession of properties from persons unlawfully holding as shebaits.*

B, the head of a mutt, having a number of subordinate mutts executed a will by which he appointed two of his disciples, defendant No 1, and one *BG* to succeed him, dividing the mutts and the properties between them. On *B's* death disputes arose which were, however, amicably settled, each of them succeeding as provided for by the will of *B*. On the death of *BG* later on, he was succeeded in his office by the plaintiff Defendant No. 1 filed a suit against the plaintiff disputing the validity of his appointment by *BG*, but the suit was ultimately dismissed on appeal by the Privy Council. Defendant No. 1 was subsequently convicted on a charge of rape and sentenced to imprisonment, but he had prior to the conviction appointed the defendant No. 2 as his successor. Plaintiff, describing himself as Mohunt and shebait of all the mutts instituted a suit against the defendants, alleging that he was the rightly appointed Mohunt and that he as the shebait of all the idols was entitled to possession of the properties and praying for possession thereof as Mohunt and shebait. He did not pray for the removal of the defendants, such a prayer being unnecessary. He also disputed the validity of the will executed by *B* and the right of defendant No. 1 to hold under it and to nominate defendant No. 2. The suit was instituted within 12 years of *B's* death.

Held, (1) the suit was not barred by limitation having been instituted within 12 years of the death of *B*, that being the earliest point of time at which the adverse possession of the defendant No. 1 could have commenced as against the shebait of the idols represented by the plaintiff; (2) that Art. 124 did not apply to the case, as the suit was not one for the possession of a hereditary office as contemplated by that article; (3) nor would Art. 120 apply, because the plaintiff did not want any relief in any shape other than a recovery of possession of the properties in his capacity as Mohunt and shebait of his idols mentioned in the plaint. (*Mukerji and S. K. Ghose, JJ.*) GOBIND RAMANUJ DAS *v.* RAM CHARAN RAMANUJ DAS. **63 Cal. 326=164 I. C. 33=9 R.C. 115=62 C.L.J. 153.**

Reversioner.

———**Arts. 120 and 125**—Reversioner—Alienation by Hindu widow—After-born reversioner—Suit by, for declaration of rights—Limitation. *See* LIMITATION ACT, S. 6. **16 Pat.L.T. 236=A.I.R. 1935 Pat. 256.**

———**Art. 120**—Reversioner — Suit by after born reversioner for declaration of right in respect of alienation by Hindu widow—Cause of action—When arises. *See* LIMITATION ACT, S. 6. **16 Pat.L.T. 236=A.I.R. 1935 Pat. 256.**

———**Art. 120**—*Reversioners—Suit to set aside alienations by widow.*

A Hindu widow executed mortgage deed on 8-2-1912 in favour of one *D* and on 21-7-1920 a deed of gift in favour of her daughter and the son of her daughter's brother-in-law. In a suit by the reversioners for a declaration that both the deeds were null and void,

Held, (*i*) that so far as the mortgage was concerned, Art. 120 applied and hence the suit, not having been brought within 6 years from the date of the mortgage, was barred; (*ii*) that the gift did not amount to a surrender because it was made in favour of her daughter and a stranger, Art. 125 had consequently no application, the suit was governed by and barred under. Art. 120 in respect of the gift as well. (*Niamatullah and Rachhpal Singh, JJ.*) JAGRANI *v.* GAYA. **6 I.R.**

LIMITATION ACT (1908), Art. 120—Sale.

(All.) 389=1933 A.L.J. 1305=146 I.C. 977=A.I.R. 1933 All. 856.

Sale.

———*See also* REFUND, *supra.*

———**Art. 120**—*Sale—Suit for compensation—Agreement for sale—Specific performance—Purchaser failing to pay mortgagee—Payment by vendor—Suit to recover money paid with interest.*

The vendor agreed with Y for selling him certain of his encumbered properties. It was agreed that a certain amount was to remain with the vendee *Y* to be paid to the mortgagee of the vendor in satisfaction of the mortgage debt. The vendor instead of selling the properties to *Y* sold them to *X* whereupon *Y* sued the vendor for specific performance of the contract and in execution of the decree got the sale deed executed as agreed upon. But *Y* did not pay the required amount to the mortgagee immediately but did so after six years and the amount was accepted in part satisfaction. Meanwhile the properties had been taken over by the Court of Wards. The manager of the Court of Wards paid the remaining amount to the mortgagee and freed the property from encumbrance. The Court of Wards having sued *Y* to recover the amount.

Held, that the Court of Wards was entitled to recover the amount paid by it to the mortgagee with reasonable interest.

Held, further, that the suit was governed by Art. 120, Limitation Act, time running from the date of payment to the mortgagee. (*Pullan and Niamatulla, JJ.*) MAHTAB SINGH *v.* COLLECTOR OF SAHARANPUR. **142 I.C. 83=I.R. 1933 All. 96=1932 A.L.J. 556=A.I.R. 1932 All. 454.**

———**Art. 120**—*Sale—Sale of goods—Suit for personal decree for price—Limitation.*

Where the goods sold remain in the custody of the vendor as security for the unpaid price of the goods and the vendor sues the vendee for a personal decree against him and not for enforcement of any charge on the security, the suit is not governed by Art. 120, but by the three years' rule of limitation so far as the personal liability of the defendant is concerned. 24 All. 251 and 30 Bom. 218, Ref. (*Sulaiman and Young, JJ.*) MUKAT LAL *v.* GULAB SINGH PRAN MAL. **I.R. 1931 All. 518 (2)—132 I.C. 422 (2)—1931 A.L.J. 363=A.I.R. 1931 All. 229.**

Setting aside alienation.

See also HINDU JOINT FAMILY, *supra.*

———**Art. 120**—*Setting aside alienation—Declaratory suit—Cause of action—Starting point—Suit to set aside alienation.*

A suit for a declaration of the invalidity of an alienation and an injunction is governed by Art. 120; the cause of action arises when the alienation is made and not when the alienation becomes known to the plaintiff. 38 M. 1064, Foll. (*Baker and Nanavati, JJ.*) DATTATRAYA PANDURANG *v.* LAKSHMAN MAHADEV. **136 I.C. 161=I.R. 1932 Bom. 145=33 Bom.L.R. 1418=A.I.R. 1932 Bom. 15.**

———**Art. 120**—*Setting aside alienation—Declaratory suit—Fraudulent transfer—Starting point of limitation.*

A suit by a creditor to declare the invalidity as against him of a fraudulent transfer executed by his debtor is not governed by Art 91 but is governed by Art. 120. In such cases the right to sue accrues only when the creditor has a clear and definite knowledge of the facts which constitute fraud and of its effect upon his interests. (*Raza and Kisch, JJ.*) PARKASH NARAIN *v.* BIRENDRA BIKRAM SINGH. **7 Luck. 131=I.R. 1931 Oudh**

LIMITATION ACT (1908), Art. 120—Setting aside decree.

211=132 I.C. 51=8 O.W.N. 593=A.I.R. 1931 Oudh 333.

———**Art. 120**—*Setting aside alienation—Declaratory suit—Suit under O 21, R. 63, C. P. Code, by decree-holder—Claim of other creditors—Suit when barred.*

A suit by a decree-holder under O. 21, R. 63, C. P. Code, to declare an alienation by his judgment debtor as fraudulent after an adverse order has been made against him in objection proceeding is governed by Art. 11 and time runs from the date of the adverse order. Art. 120 does not apply to such a suit so far as the decree-holder is concerned. But as for the other creditors of the judgment-debtor who had not attached the property in respect of which declaration was sought the order in the objection proceedings gives them no right to bring their claim within Art. 11 and their claim is governed by Art. 120. (*Coldstream and Dalip Singh, JJ.*) JAGIRI LAL *v* TARA CHAND. **I.R. 1932 Lah. 484=138 I.C. 412=33 P.L.R. 759=A.I.R. 1932 Lah. 516.**

Setting aside decree.

———**Art. 120**—Setting aside decree—Compromise decree—Suit to set aside—No fraud alleged—Limitation. *See* COMPROMISE—CONSENT DECREE. **61 C.L.J. 193.**

———**Art. 120**—*Setting aside decree—Declaratory suit—Setting aside mortgage decree—Suit for—Starting point.*

A mortgage without possession had been executed with regard to wakf property and a suit brought on that basis had resulted in a decree. The plaintiffs sued for a declaration that the decree was not binding and for injunction to protect their property. Held, on the facts, that the decree was final

Held, that limitation under Art. 120 commenced to run from the date the plaintiff came to know of the mortgage, *i.e.*, the date on which the mortgage was sought to be enforced and not the date on which the mortgage was executed. A.I.R. 1932 Mad. 589, Rel. on; 33 Mad. 31 and A.I.R. 1932 Bom. 15, Dist. (*Bhide, J.*) MAHOMED UMAR *v.* MAHOMED IBRAHIM. **I.R. 1933 Lah. 379=143 I.C. 725=34 P.L.R. 598=A.I.R. 1933 Lah. 270.**

———**Art. 120**—*Setting aside decree*—Ex parte *decree against minor—Suit to declare null and void on ground of gross neglect of guardian—Limitation.*

Per *Dhavle, J.*—There is obvious difference between avoiding a decree and being entitled to ignore it, *i.e.*, to treat it as a nullity. In the former case the question of limitation arises. No article of the Limitation Act specifically deals with the negligence of a guardian *ad litem*. In the case of a suit for declaring null and void a decree passed *ex parte* against a minor on the ground of the gross negligence of his guardian *ad litem*, the residuary Art. 120 has therefore to be applied. (*Khaja Mahommad Noor and Dhavle, JJ.*) MATHURA SINGH *v* RAMA RUDRA PRASHAD SINHA. **14 Pat. 824=162 I.C. 235=8 R.P. 522=16 Pat.L.T. 484=A.I.R. 1936 Pat 231.**

———**Art. 120**—Setting aside decree—*Ex parte* decree against minor—Suit to set aside on ground of gross negligence of guardian—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 95 AND 120. **16 Pat.L.T. 484.**

———**Art. 120**—*Setting aside decree—Minor—Suit to set aside decree brought about by gross negligence of guardian.*

A suit by the plaintiff for a declaration that a decree passed against him while he was a minor was vitiated by the gross negligence of his guardian and that it was based on an award on a reference without the sanction of Court under O. 32, R. 7, C. P. Code, is governed by Art. 120.

LIMITATION ACT (1908), Art. 120—Setting aside order.

The right to sue in such a case accrues not on the date of decree but only on the date when the decree comes to the knowledge of the plaintiff, or when there was a clear and unequivocal threat to infringe the plaintiff's rights by executing the decree. 57 I.A. 325, Foll. (*Madgavkar and Baker, JJ.*) SADASHIVAPPA GANGAPPA *v.* SANGAPPA. **134 I.C. 1221=33 Bom.L.R. 1033=A.I.R. 1931 Bom. 500.**

Setting aside order

———**Art. 120**—Setting aside order—Applicability—Order under S. 147, Cr. P. Code—Suit to set aside. *See* LIMITATION ACT, S. 23. **69 M.L.J. 739.**

Starting point of limitation.

———**Art. 120**—*Starting point of limitation.*

The starting point of limitation under Art. 120 is the date on which the circumstances entitling the plaintiff to have his interests guarded first comes to his knowledge and from which date a right to sue accrues to him. A.I.R. 1926 Mad. 66 and 44 I.C. 551, Ref. (*Addison and Bhide, JJ.*) LAL SINGH *v.* JAICHAND. **12 Lah. 262=I R. 1931 Lah. 346=130 I.C. 778=31 P.L.R. 1014=A.I.R. 1931 Lah. 70 (2).**

———**Art. 120**—*Starting point of limitation—Right to sue—Claim for* "zarichaharum."

In the case of a claim for payment of *zarichaharum* to the owner of the site the suit should be brought within six years from the date of the confirmation of the sale and not on the date of auction sale. (*Mukerji and Bennet, JJ.*) DEO DAS *v.* MAHESH RAM GOND. **52 All. 921=I.R. 1931 All 236=130 I.C. 12=1930 A. L J. 1284=A.I.R. 1931 All. 25.**

Suit for conveyance.

———**Art. 120**—Suit for conveyance—Award—Clause embodying contract between co sharers—Undertaking to convey interest in immovable property purchased by one to another—Suit for conveyance—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 113, 120 AND 144. **39 C.W.N. 716.**

Trust.

See also ACCOUNTS AND EMOLUMENTS, *supra.*

———**Art. 120**—Trust—Breach of trust by trustee in management—Suit for damages—Limitation, if any—Starting point. *See* LIMITATION ACT, S. 10. **37 Bom. L.R. 946=A.I R. 1936 Bom. 30.**

———**Art. 120**—*Trust—Infringment of plaintiff's right.*

The plaintiff sued as trustee for a declaration that the mortgage decree in the former suit was not binding on the trust property. There was no right to infringe the plaintiff's right before the mortgage suit was instituted.

Held, that limitation commenced to run from the date of the mortgage suit. 57 I. A 325, relied on. (*Wallace and Cornish, JJ.*) KANDASAMI PILLAI *v.* MUNISAMI MUDALIAR. **I.R. 1932 Mad. 435=137 I. C. 707=1932 M.W.N. 321=35 L.W. 350=A.I.R. 1932 Mad. 589.**

———**Art. 120**—*Trust—Right of beneficiary—En for cement of.*

The Indian law makes no distinction between legal and equitable estates and the "owner" in case of trust property is the trustee not the beneficiary. The right of the latter is only in a proper case to call upon the trustee to convey to him and that right is governed by Art. 120 and not Art. 144. Tagore Case, I.A. (Supp.) 47 and 31 C. 57, Ref. (*Sir George Lowndes*) RANI CHHATRA KUMARI DEVI *v.* MOHAN BIKRAM SHAH. **58 I.A. 279=10 Pat. 851=I.R. 1931 P.C. 241=133 I.C. 705 =33 Bom.L.R. 1390=8 O.W.N. 905=1931 A.L.J. 783=34 L.W. 411=13 Pat.L.T. 1=35 C.W.N. 953 =A.I R. 1931 P.C. 196=61 M.L.J. 78 (P.C.).**

LIMITATION ACT (1908), Art. 123.

———**Arts. 120, 61 and S. 10**—*Trust—Suit by trustee of temple to recover money from former trustee.*

The defendant was the trustee of a temple and the plaintiffs succeeded him in January, 1922. They filed the present suit in 1923 to recover from the defendant a certain sum of money which he had taken from the temple funds for the expenses of a litigation to remove him from the trusteeship and have a scheme framed. The lower Courts gave the plaintiffs a decree for the amount claimed. In appeal it was contended that the suit was barred by time.

Held, that the proper article applicable to such a suit was Art. 120 and neither S. 10 nor Art. 61 applied. (*Varadachariar, J.*) KRISHNA KUDVA *v.* SRI VENKATRAMANA TEMPLE. **152 I.C. 345—7 R.M. 216 (2)=1934 M.W.N. 1032=40 L.W. 275=A.I.R. 1934 Mad. 542.**

Miscellaneous.

———**Art. 120**—*Miscellaneous—Partion of estate—Separate registration—Refusal by Collector—Fresh application by owner—Bar.*

The Collector's work in refusing or allowing registration of part of an estate is of a mechanical nature and does not partake of the nature of decision. Hence where a Collector refuses separate registration, a fresh application is not barred by *res judicata*; even if the owners pay the full peishcush without seeking separate registration for any length of time, they cannot be barred from exercising this right to get separate registration as the alienee of part cannot be said to have acquired a right by prescription that it should never be split up. Further the owner who pays the full peishcush has an inherent right to get a contribution from the owner of the alienated portion. (*Ramesam and Venkatasubba Rao, JJ.*) VENKATAKRISHNAMARAJU *v.* SURYANARAYANARAJU. **57 Mad. 460=151 I C. 129=7 R. M. 89=39 L.W. 304=A.I.R. 1934 Mad 373=67 M.L J. 544.**

———**Art. 120**—*Miscellaneous—Prior cause of action arising beyond the period—Suit on fresh cause of action.*

A fresh cause of action may arise to a plaintiff and he may bring a suit even though a prior cause of action had arisen to him beyond the period of six years. (*Mukerji and Bennet, JJ.*) PARJAPATI *v.* JOT SINGH. **150 I.C. 814=7 R.A. 51=18 R.D. 349=15 L.R. 458 (Rev.)=A.I.R. 1934 All. 539.**

———**Art. 122**—*Applicability—Suit upon judgment.*

Where a former suit ended in a declaratory judgment, and the decree was not framed in an executable form, a suit will lie to enforce the rights so declared, and such a suit will be governed by Art 122 of the Limitation Act. (*Beasley, C. J. and Varadachariar, J.*) RATHAN CHAND KUMAJI *v.* AMICHAND. **156 I.C. 264=7 R. M. 669=40 L.W. 792=1934 M.W.N. 539=A.I.R. 1934 Mad. 665=67 M.L.J. 413.**

———**Art. 123**—*Applicability.*

A suit by the heirs of the deceased owner for possession of the property from the defendants in possession of the property without any color of title and not claiming under the original owner is not governed by Art. 123. (*Page, C. J. and Das, J.*) MAHOMED CHOOTOO *v.* ABDUL HAMID KHAN. **10 Rang. 82=I.R. 1932 Rang. 95=137 I.C 200=A.I.R. 1932 Rang. 55.**

———**Art. 123**—*Applicability—Claim to vested right of inheritance—Limitation.*

Respondent was the son of one *M* by his first wife who died in 1914. His father married another wife next year. In 1931 his father and the second wife exe-

LIMITATION ACT (1908), Art. 123.

cuted a sale deed of the suit property in favour of the appellant, and in 1934, appellant sued for possession of the property. It was found that the site of the property was the property of the first marriage, but that the house thereon was built after the second marriage. Respondent pleaded that the property formed the estate of his father and mother and that consequently he had acquired a vested right in it upon his father's remarriage in 1915.

Held, that the claim preferred by the respondent was governed by Art. 123 of the Limitation Act and being barred by limitation long before the date of suit, had been extinguished by the time he asserted it in Court. U TUN HLAING *v.* MAUNG SEIN WIN. **158 I C. 118 = 8 R.R. 149.**

———**Art. 123**—*Applicability—Defendant not under obligation to distribute estate.*

Art. 123 of the Limitation Act only applies where the suit is brought against an executor or an administrator or some person legally charged with the duty of distributing the estate. It has no application to suits in which the defendant is not a person who is under an obligation to distribute the estate. 59 I A. 74, Foll. (*Page, C. J. and Shaw, J.*) MA PWA THIN *v.* U NYO. **12 Rang. 409 = 152 I.C. 768 = 7 R.R. 173 = A I.R. 1934 Rang. 318.**

———**Arts. 123 and 144**—Applicability—Mahomedan heir—Suit for recovery of share. Art. 144 applies, not Art. 123. *See* LIMITATION ACT, ART. 144—CO-HEIRS. **A.I.R. 1933 Lah. 784 (2).**

———**Art. 123**—*Applicability—Recovery of legacy—Suit against party in possession.*

A suit for recovery of a legacy from persons who are in possession of the estate and who are legally bound to pay the same is governed by Art. 123. (*King and Rachhpal Singh, JJ.*) SRINATHJI *v.* PANNA KUNWAR. **56 All. 711 = 155 I.C. 390 = 7 R.A. 922 = 1934 A.L.J. 230 = 3 A.W.R. 397 = A.I.R. 1935 All. 239.**

———**Art. 123**—*Applicability—Suit to recover property under will against person in possession.*

Art. 123 only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate. So a suit by the plaintiff to recover possession of certain Government promissory notes in accordance with the terms of a will left by the original owner against the defendant alleged to have the notes in his custody contrary to the terms of the will is not governed by Art. 123 as the defendant is not charged with any duty of distributing the estate. 59 I.A. 74, Foll. and applied. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v.* PROBODH CHANDRA SARKAR. **143 I.C. 402 = I.R. 1933 Cal. 425 = 36 C.W.N. 758 = 55 C.L.J. 420 = A.I.R. 1933 Cal. 253.**

———**Art. 123**—*Co-owners—Co-heirs—Suit against to recover his share of deceased father's property.*

Art. 123 only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate ; a suit brought by a Muhammadan heir against his co-heir (elder brother) to recover his share of their deceased father's immovable property is not governed by Art. 123 at all but comes under Art. 144. (*Sir George Lowndes.*) GHULAM MAHOMED *v.* SHAIKH GHULAM HUSAIN. **59 I.A. 74 = 54 All. 93 = 1932 A.L.J. 245 = 34 Bom L R. 510 = 35 L.W. 464 = I.R. 1932 P.C. 118 = 9 O.W.N. 399 = 136 I.C. 454 = 36 C.W.N. 310 = 55 C.L.J. 470 = A.I.R. 1932 P.C. 81 = 62 M.L.J. 371 (P.C.).**

[F. 12 R. 409 (412). **R. & Expl.** 56 A. 711 (716, 717, 718). **R.** 36 C.W.N. 758 (765).]

LIMITATION ACT (1908), Art. 125.

———**Art. 123**—*Maintenance right—Suit to enforce.*

Where the amount of maintenance granted under a will is to come out of income of particular property and the defendants are in possession of the property under the will, the proper article to apply to the suit for arrears of such maintenance against the defendants is Art. 123 and not 62. (*Jack and Remfrey, JJ.*) HARI CHARAN BHUNYA *v.* KAMAL KUMARI DASI. **I R. 1931 Cal. 604 = 132 I.C. 684 = 35 C.W.N. 307 = A.I.R. 1931 Cal. 670.**

———**Art. 123**—Scope — Property not mentioned by testator in will and property set apart for religious and charitable trusts which fail—Suit by next-of-kin to recover—Limitation. *See* LIMITATION ACT, S. 10 AND ART. 123. **37 Bom.L.R. 946 = A.I.R. 1936 Bom. 30.**

———**Art. 124**—Applicability—Suit by shebait of Mutt for possession of properties of Mutt—Defendants holding as shebaits under invalid appointment—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 120, 124 AND 144. **62 C.L.J. 135.**

———**Art. 124**—*Hereditary religious office—Office held adversely for over twelve years.*

In the case of a suit for possession of an hereditary office, time runs against the plaintiff from the time when the defendant takes possession of the office adversely to the plaintiff. Where the plaintiff alleges, he is entitled to the hereditary office of Sri Pandaram and that he is lawfully prevented from discharging his duties by the trustees and it was found that more than twelve years prior to the suit by the plaintiff, the trustees had obtained a declaration of their right to appoint the Sri Pandaram and their nominee has been holding the office ever since, plaintiff's suit is barred by limitation. The trustees, through the exercise of the power of appointment vested in them by the decree adversely to the claimant for over the statutory period, have deprived the plaintiff of his right to the office. 34 M. L .J. 93, Foll. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAYA PILLAI. **I.R. 1931 Mad. 705 = 133 I.C. 193 = 1931 M.W.N. 8 = A.I.R. 1931 Mad. 505.**

———**Art. 124**—*Hereditary religious office—Right of predecessor of plaintiff barred—Right of plaintiff.*

In a suit for declaration and injunction regarding a hereditary religious office, if the predecessor of the present plaintiff has allowed his rights to the office to get barred by limitation, those who are next in succession to him should also be deemed to have lost their rights. 23 M. 271 (P.C.), Foll. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAYA PILLAI. **I.R. 1931 Mad. 705 = 133 I.C. 193 = 1931 M.W.N. 8 = A. I.R. 1931 Mad. 505.**

———**Art. 124**—*Objects of.*

Per *Rankin, C.J.* (in the order of reference).—The intention of Art. 124 was to treat hereditary offices like land for the purposes of barring suits for possession of the office and extinguishing the right to possession after a certain period. The inheritor of such an office cannot therefore be entitled to deny that he derives his right from or through his predecessor. (*C. C. Ghose, Mukerji, Mitter, Guha and M. C. Ghose, JJ.*) MONOHAR MUKHERJEE *v.* BHUPENDRA NATH MUKERJEE. **60 Cal. 452 = 141 I.C. 544 = I.R. 1933 Cal. 115 = 56 C.L.J. 468 = 37 C.W.N. 29 = A.I.R. 1932 Cal. 791 (F.B.).**

———**Arts. 124 and 120, Expl.**—Applicability to cases governed by Art 120—Question of possession in respect of offices. *See* LIMITATION ACT, ARTS. 120 AND 124 EXPL. **A.I.R. 1935 Mad. 449.**

———**Art. 125**—*Alienation by widow—Suit by reversioners challenging.*

LIMITATION ACT (1908), Art. 125.

Although for the purpose of determining whether a widow possessed unrestricted power of alienation in the property which had descended to her from her husband, it is immaterial whether the property was ancestral or self-acquired in his hands, but the question is of great importance for ascertaining the period of limitation governing a declaratory suit by a reversioner to challenge the widow's alienation. If the property was ancestral of the husband and the contesting reversioner, there can be no doubt that (Punjab) Act I of 1920 is applicable and the period of limitation is six years. If however the property was non-ancestral, *qua* the plaintiff, the suit would be governed by Art. 125, Limitation Act. (*Tek Chand, J.*) SANT SINGH *v.* HARDIT SINGH. **6 I.R. (Lah.) 211=146 I.C. 350=34 P.L.R. 929=A.I.R. 1933 Lah. 945.**

———**Art. 125**—*Applicability—Gift by widow of her property to her daughter and a stranger.*

The gift by a widow of her property in favour of her daughter and the son of the daughter's husband's brother cannot be called a surrender since the second of the donees is a stranger. Art. 120 and not Art. 125 is therefore applicable to a suit to set it aside. (*Niamatullah and Rachhpal Singh, JJ.*) JAGRANI *v.* GAYA. **6 I.R. (All.) 389=146 I.C. 977=1933 A.L.J. 1305=A.I.R. 1933 All. 856.**

———**Art. 125**—*Applicability—Perpetual lease by widow.*

A perpetual lease is an alienation within the meaning of Art. 125 and a suit by the reversioners to set aside a permanent lease by the widow is governed by that article. 40 M. 709 (P.C.), Ref. (*Pollock, A.J.C.*) MT. IMRAT BAI *v.* MT. PHULA. **149 I.C. 687=6 R.N. 245=16 N.L.J. 300=A I.R. 1934 Nag. 103.**

———**Art. 125**—Reversioner—Suit to set aside alienations by widow—Art. 120 applies, not Art. 125. *See* LIMITATION ACT, ART. 120—REVERSIONER. **1933 A.L.J. 1305=A.I.R. 1933 All. 856.**

———**Art. 126**—Alienation by father who has son living—Suit by after-born son to set aside—Limitation—Starting point. *See* HINDU LAW—JOINT FAMILY—ALIENATION—SETTING ASIDE. **A.I.R. 1935 All. 742.**

———**Art. 126**—*'Ancestral'—Meaning of.*

The expression "ancestral" in Art. 126 has been used in the ordinary sense of Hindu Law, and cannot be given a wider sense for Limitation Act. (*Jai Lal, J.*) GOBIND RAM *v.* GOPI CHAND. **150 I.C. 963=7 R.L. 36 (2)=36 P.L.R. 214=A.I.R. 1934 Lah. 397.**

———**Art. 126**—*Hindu joint family—Alienation by father—Child in the womb on the date of alienation—Suit to set aside.*

A person cannot be said to be a minor until he is born and so the provisions of S. 6 of the Act do not apply to the case of a son who was begotten before but born subsequent to the alienation sought to be set aside. So a suit to set aside an alienation by a Hindu father brought by the son who was in the womb at the time of the alienation, more than twelve years after the alienee took possession of the property though within three years of his attaining majority is barred by Art. 126. 14 I.C. 60; 54 I.C. 838; 10 Lah. 713; 79 I. C. 1010; 64 I. C. 757, Foll. (*Madhavan Nair, J.*) VENKATARAMA AIYAR *v.* MIRTHINJAYA AIYAR. **I.R. 1931 Mad. 668=132 I.C. 316=33 L.W. 768=A.I.R. 1931 Mad. 456=60 M.L.J. 521.**

———**Art. 126**—*Hindu joint family—Alienation by manager—Suit by other members for setting aside.*

A suit for redemption by the surviving members of a joint Hindu family is not one to set aside an alienation within Art. 126, its object indeed being to obtain relief *under the alienation* and *not in spite of it*. The allegation that any term embodied in the deed of mortgage was *ultra vires* of the manager of the joint family, the mortgagor will not change the character of the suit. 2 O. W.N. 650, Ref. (*Raza and Smith, JJ.*) SURAJ BAKHSH SINGH *v.* KEDAR NATH. **8 O.W.N. 1090.**

LIMITATION ACT (1908), Art. 127.

———**Art. 127**—Applicability—Coparcener excluded for enjoyment of joint property—Suit by for declaration of rights and for injunction—Limitation. *See* LIMITATION ACT, ARTS. 120 AND 127. **A.I.R. 1935 Pesh. 95.**

———**Art. 127**—*Applicability—Partition—Mistake—Suit to re open—Starting point.*

A suit to re open a partition and to re adjust the shares of the parties thereto on the ground that certain properties allotted to the share of the plaintiff really belonged to a third party, who obtained a decree and possession of those properties from the plaintiff, is governed by Art. 96 and not Art. 127 or 144. The latest possible date from which time would run against the plaintiff would be that of his dispossession in pursuance of that decree and a suit brought more than three years thereafter is barred by limitation. 45 Bom. 582, Foll. (*Curgenven and Cornish, JJ.*) RAMAKOTAYYA *v.* SUNDARARAMAYYA. **54 Mad. 883=34 L.W. 262=135 I.C. 9=I.R. 1932 Mad. 41=A.I.R. 1931 Mad. 707=61 M.L.J. 430.**

———**Art. 127**—Applicability—Partition suit—Income accruing between preliminary and final decrees—Suit for share in—Limitation. *See* LIMITATION ACT, ARTS. 62 AND 127. **A.I.R. 1935 Nag. 137.**

———**Art. 127**—Applicability—Separation of joint family members—Property continuing undivided after separation—Suit for possession governed by Art. 144 not by Art, 127—Property which has continued undivided after a division is not joint family property. *See* LIMITATION ACT, ART. 144—HINDU JOINT FAMILY. **58 I.A. 106=27 N.L.R. 131=60 M.L J. 386 (P.C.).**

———**Art. 127**—*Applicability—Stranger purchaser.*

Art. 127 does not apply where a stranger has acquired the property. Where the managing member of a joint family and a minor represented by his mother sold the property in 1904 to a stranger who in turn sold it to another stranger in 1917, a suit brought by the minor on his attaining majority in 1924 is barred under Art. 144. The possession of the purchaser is adverse to the other coparceners from the moment of his obtaining possession. 23 B. 137 (F.B.); 12 M. 292, Ref. (*Tyabji, J.*) FAKIRAPPA BABAPPA *v.* RUDRAPPA RACHAPPA. **I R. 1932 Bom. 256=137 I.C. 367=34 Bom.L.R. 354=A.I.R. 1932 Bom. 255.**

———**Art. 127**—*Hindu joint family—Exclusion of coparcener—Exclusive enjoyment by another—Adverse possession.*

Long and exclusive possession of property by one coparcener is evidence of the exclusion of another and the man who is out has to make out a *prima facie* title and establish either an agreement or some jural relation to account for the exclusive possession of his opponent or that the situation was due to any accidental circumstances such as for instance situation of the properties, of the residence of the parties and so on. If he fails to establish that, a suit for partition by him of such property is barred by Art. 127 even though he is in possession of part of the joint family property. Rule as to adverse possession as between members of Hindu joint family discussed. (*Rangnekar and Broomfield, JJ.*) LINGANGOUDA *v.* SANGANGOUDA. **6 I.R. (Bom.) 120=145 I.C. 780=35 Bom.L.R. 779=A.I.R. 1933 Bom. 386.**

LIMITATION ACT (1908), Art. 128.

———**Arts. 128 and 129**—*Applicability*—"*Hindu*"—*Meaning of.*

The word "Hindu" in Arts. 128 and 129 of the Limitation Act does not refer to the religious persuasion of the plaintiff. The articles apply where the maintenance is claimed not on the basis of contract but on the basis of status of the plaintiff under the Hindu Law. A suit for maintenance based on an express promise made by the defendants' predecessor in interest is governed by Art. 115, Limitation Act, and not by Arts 128 and 129, though the plaintiff is a Hindu. (*Khaja Mahomed Noor and Saunders, JJ.*) KAMJI DAS *v.* MAHAMAYA PRASAD SINGH. **161 I.C. 478=8 R.P. 452=16 Pat. L.T. 789=A.I.R. 1936 Pat. 158.**

———**Art. 128**—*Applicability—Hindu wife—Claim for maintenance under deed and under general law.*

Where a Hindu wife living apart from her husband sued after his death to recover maintenance on the basis of a tamliknama and under the general Hindu Law,

Held, that the claim was not one for maintenance but was a mere money claim and that the suit was not governed by Art. 128. (*Wort and Kulwant Sahay, JJ.*) BAHURIA SARASWATI KUER *v.* BAHURIA SHEORATAN KUER. **12 Pat. 869=159 I.C. 738=6 R.P. 637=15 Pat.L.T. 372=A.I.R. 1934 Pat. 99.**

———**Arts. 128 and 129**—*Scope.*

Art. 129 is intended to apply to cases where the status of a person on the basis of which maintenance is claimed is denied and the person *inter alia* wants to establish that status; but where such status is not denied. Art. 128 applies. 15 Bom. 135 and 26 Mad. 291, Ref. (*Jai Lal and Abdul Rashid, JJ.*) MT. SHIBBI *v.* JODH SINGH. **14 Lah. 759=148 I.C. 479=6 R.L. 567=34 P.L.R. 1082=A.I.R. 1933 Lah. 747.**

———**Art. 131**—Applicability—Anubhavam tenure—Suit for arrears of rent—Limitation, *See* LIMITATION ACT, ARTS. 116 AND 131. **A.I.R. 1935 Mad. 682.**

———**Art. 131**—Applicability—Mortgage and lease back—Expiry of lease—Suit by mortgagee for mortgage-money and profits after 12 years—If barred. *See* LIMITATION ACT, S. 28 AND ART. 139. **41 L.W. 398=A.I.R. 1935 Mad. 377.**

———**Art 131**—*Applicability—Recurring amounts promised to be paid to plaintiff by way of maintenance, etc.—Suit to recover—Limitation Act, Art.* 115.

A suit to establish a periodically recurring right is distinct from a suit to realise sums of money due on the basis of that right. Where the plaintiff sues to recover arrears of recurring sums of money promised to be paid to him by way of maintenance, etc., Art. 115, and not Art. 131 of the Limitation Act, applies to the suit. (*Khaja Mahomed Noor and Saunders, JJ.*) RAMJI DAS *v.* MAHAMAYA PRASAD SINGH. **161 I.C. 478=8 R.P. 452=16 Pat L.T. 789=A.I.R. 1936 Pat. 158.**

———**Art. 131**—*Applicability—Test—Suit for declaration of relationship of landlord and tenant and ejectment.*

The test of the proper Article to apply is to consider the facts alleged in the plaint and the remedy granted by the Court. It is not necessarily to be measured by the remedy which the plaintiff may have asked for but which has been refused. It is the duty of the Court to consider the facts and then to give such remedies as are not barred by limitation. Plaintiff sued in Civil Court for a declaration that defendant was an under raiyat under him, that he (defendant) had denied that relationship and refused to pay rent to him and further prayed for his eviction.

Held, the Civil Court had jurisdiction only to decide whether the relationship of landlord and tenant existed but not to grant relief of possession as this was within the jurisdiction of Revenue Court under the Chota Nagpur Tenancy Act and that the article to be applied for deciding the question of limitation was Art. 131 and not Art. 142 or 143. (*Courtney-Terrell, C.J. and Saunders, J.*) NAGA MANJHI *v.* KINI MAHATANI. **150 I.C. 242=6 R.P. 729=A.I.R. 1933 Pat. 695.**

LIMITATION ACT (1908), Art. 132.

———**Art. 131**—*Landlord and tenant—Remission of rent—Suit for declaration of custom—Landlord denying custom in cases of some tenants—If refusal of right of all generally.*

The fact that a certain co sharer landlord denies the existence of a custom of remission once, in respect of some tenants and not all, cannot destroy the custom; the right if any of the tenants generally cannot be held to be barred by limitation, because there might have been refusal to grant remission under custom in the case of some. Hence suit brought by the tenants under O. 1 R. 8, C.P. Code, for a declaration of the custom is not barred by limitation in any way nor is there any bar to their being granted relief by way of declaration in case the custom set up by them be established on evidence. (*Guha and Lodge, JJ.*) DINANATHKAR *v.* JITENDRA NANDAN DAS. **160 I.C. 121=8 R.C. 407=40 C.W.N. 468=A.I.R. 1935 Cal. 744.**

———**Art. 131**—*Periodically recurring right—Suit to recover arrears of revenue.*

Where a claim is expressly for arrears of revenue and not for the establishment of a right, Art. 62 and not Art. 131 applies Art. 131 applies in express terms to a suit to establish a periodically recurring right and not to recover sums due under such a right. A suit may claim both the reliefs, but while the former claim falls under Art. 131, the latter claim falls under Art. 62. 34 All. 246 and 5 Pat. 249, Rel. on ; 34 Bom. 349, Expl.; 15 Bom. 135 ; 22 Bom. 669 and 38 Mad. 916, Ref. (*Madgavkar and Barlee, JJ.*) JANARDAN TRIMBAK *v.* DINKAR HARI. **55 Bom. 193=I.R. 1931 Bom. 289=131 I.C. 465=33 Bom.L.R. 127=A.I.R. 1931 Bom. 189.**

———**Art. 131**—*Sanad granting in perpetuity a percentage of the government assessment—Government subsequently substituting a fixed annual sum—Suit for declaration of right to variable annual sum—Limitation.*

In 1889, the right to 2 per cent. of the Government assessment conferred on the plaintiff's ancestor was altered into one for a fixed annual sum. In 1913, his claims to the old percentage were definitely negatived.

Held, that Art. 131 and not Art. 14 or 120 of the Limitation Act applied and the suit was well in time, as it was within 12 years of the refusal by the Government in 1913, to admit any right in the plaintiff to a variable annual sum (*Lord Russell of Killowen.*) SECRETARY OF STATE *v.* PARASHRAM MADHAVRAO. **61 I.A. 190=58 Bom, 306=36 Bom L.R. 551=6 R.P.C. 137=148 I.C. 796=3 A.W.R. 663=1934 A.L.J. 438=38 C.W.N. 568=39 L.W. 748=1934 M.W.N. 437=59 C.L.J. 282=A.I.R. 1934 P.C. 108=66 M.L.J. 614 (P.C.).**

———**Art. 131**—Suit to recover malikhana is governed by Art. 132 and not by Art. 131. *See* LIMITATION ACT, ARTS. 132 AND 131. **A.I.R. 1934 Pat. 44.**

———**Art. 132**—*Applicability—Charge under S. 85, Madras District Municipalities Act—Suit to enforce—Limitation.*

Art 132 of the Limitation Act is not applicable to a suit by a municipality for recovery of property tax which is made a first charge on the property under S. 85 of the Madras District Municipalities Act of 1920. Such a suit is governed by S. 345 of the Madras District Municipalities Act and must be instituted within three years from the date of the cause of action. (*Madhavan*

LIMITATION ACT (1908), Art. 132.

Nair, J.) MUNICIPAL COUNCIL OF TRICHINOPOLY *v.* RATNAM PILLAI. **160 I.C. 254=8 R.M. 615=41 L.W. 457=1935 M.W.N. 379=A.I.R. 1935 Mad. 378.**

———**Art. 132**—*Applicability— Discharge of prior mortgage—Suit to enforce priority.*

Where a subsequent mortgagee who has discharged a prior encumbrance sued to enforce his claim to priority as against an intermediate encumbrancer the suit is governed by Art. 132. (*Raza and Bishishwar Nath, JJ.*) RAM SAHAI *v.* KUN WAR SAH. **7 Luck 26=139 I. C.626=I.R. 1932 Oudh 373=14 O.L.J. 370=8 O.W. N. 522=A.I.R. 1932 Oudh 314.**

———**Art. 132**—*Applicability—Hindu widow—Suit to recover arrears of maintenance.*

A Hindu widow's maintenance is not a charge on her husband's properties and a suit to recover arrears of maintenance is not governed by Art. 132. (*Wort and Kulwant Sahay, JJ.*) BAHURIA SARASWATI KUER *v.* BAHURIA SHEORATAN KUER. **12 Pat. 869=149 I.C. 738=6 R P. 637=15 Pat.L.T. 372=A.I.R. 1934 Pat. 99.**

———**Art. 132**—Applicability—Maintenance charged on immovable property—Suit for arrears of—Limitation. *See* C. P. CODE, S. 47. **39 C.W.N. 725.**

———**Art. 132**—*Applicability—Puisne mortgagee—Suit by, for redemption of prior mortgage—Art.* 148.

A suit by the representatives of a puisne mortgagee to redeem the property from the representatives of a prior mortgagee falls within the terms of Art. 148 of the Limitation Act. It is not a suit to enforce payment of money charged upon immovable property and Art. 132 does not apply to the suit. (*Srivastava and Nanavutty, JJ.*) RAM ADHAR *v.* SHANKAR BAKHSH SINGH. **10 Luck. 531=153 I.C. 808=7 R.O. 400=1935 O.W. N. 40=A I.R. 1935 Oudh 139.**

———**Art. 132**—*Applicability—Suit to enforce charge—Payments under S. 170-B. T. Act—Suit to recover same on basis of accounts—Limitation.*

The shebait of a temple made certain payments under S. 170-B.T. Act, and sued for the enforcement of a statutory mortgage under S. 171, on the basis of accounts showing the payments made. The payments were made in the years 1914 to 1917, the person making the payment went into possession in 1915 and continued till February, 1926, and sued on the basis of accounts in April 1927.

Held, that no question of limitation arose, and that assuming it arose, Art. 132 of the Limitation Act would apply because the claim was to enforce payment of money charged upon immovable property and the suit was not barred in any event. To such a case the provisions of Arts. 61, 91 and 120 of the Limitation Act have no application. (*Rankin, C.J. and Guha, J.*) RAJESWAR PRASAD BHAKAT *v.* RAJANI NATH BANERJEE. **I.R. 1931 Cal. 779=134 I.C. 75=35 C.W.N. 678=A.I.R. 1931 Cal. 493.**

———**Art. 132**—*Applicability — Suit to enforce—Charge—Starting point.*

When a suit is brought to enforce payment of money charged upon immovable property the proper Article to be applied is Art. 132, and under this Article the question when money sued for becomes due has necessarily to be decided with reference to the terms of each bond. (*Macpherson and Fazl Ali, JJ.*) MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH. **11 Pat. 112=I R. 1931 Pat. 465=134 I C. 609=12 Pat.L.T. 755=A.I. R. 1931 Pat 285.**

———**Art. 132**—*Applicability—Suit for money.*

Where the plaintiff asks for a money decree only and does not seek to enforce a charge on immovable property, Art. 132 does not apply. (*King and Rachhpal Singh, JJ.*) SRINATHJI *v.* PANNA KUNWAN. **56 All. 711=155 I.C. 390=7R.A. 922=1934 A.L.J. 230 =3 A.W.R. 397=A.I.R. 1935 All. 239.**

———**Art. 132**—*Applicability—Suit for redemption by puisne mortgagee.*

Art. 132 does not apply to a suit for redemption of the prior mortgage brought by the puisne mortgagee who was authorized by the mortgagor to redeem the earlier mortgage. (*Tek Chand, and Monroe, JJ.*) SUNDAR DAS *v.* BELI RAM. **14 Lah. 596=I R. 1933 Lah. 299=142 I.C. 805=34 P.L R. 502=A.I.R. 1933 Lah. 503.**

———**Art. 132**—*Applicability—Suit for redemption by puisne mortgagee.*

A suit by a puisne mortgagee for redemption of a prior mortgage against the auction purchaser in a suit on the prior mortgage to which the puisne mortgagee was not impleaded as a party, is not governed by Art. 132 of the Limitation Act. It is impossible to regard such a suit as one to enforce payment of money charged upon immovable property. The puisne mortgagee is not suing for enforcement of his own mortgage at all but is enforcing his right to redeem which he has under S. 91, T. P. Act (*Niamatullah, J.*) NAROTAM DAS *v.* SANWAL DASS. **153 I.C. 664=7 R.A. 548=4 A.W.R 70= A.I.R. 1934 All. 946.**

———**Art. 132**—*Co-mortgagor redeeming mortgage—Right to charge—Suit for contribution—Limitation.*

Where a co-mortgagor redeems the mortgaged property, he, by virtue of S. 92 of the T. P. Act, acquires by subrogation the same rights as the mortgagee and under Ss. 92 and 95 of the T. P Act, he would be entitled to claim contribution from the other co-mortgagors with a charge on their share of the property. The right of subrogation under S. 92 as well as the rights accruing to a co-mortgagor under S. 95 of that Act arise only on the redemption of the mortgage and not on payment of a portion of the mortgage-money to the mortgagee. Therefore no cause of action on the basis of redemption for recovery of the amount paid on behalf of the co-mortgagors arises in favour of the redeeming co-mortgagor until the date when the mortgage debt is completely liquidated and a suit instituted within twelve years of that date is within time. Such a suit is not governed either by Art. 61 or Art. 83. (*Srivastava and Zia-ul-Hasan, JJ.*) NISAR AHMAD KHAN *v.* MANZUR AHMAD KHAN. **10 Luck. 690=154 I.C. 267=7 R.O. 464=1935 O.W.N. 278=A.I.R. 1935 Oudh 245.**

———**Art. 132**—*Default clause in mortgage—Mortgagee has option to sue.*

In an instalment mortgage bond, a default clause is inserted exclusively for the benefit of the mortgagee and confers no right on the mortgagor, and therefore the mortgagee has an option to realize the whole amount on default by the mortgagor, even though such option is not expressly mentioned, and the whole amount does not "become due" on such default. A.I.R. 1932 P.C. 207, Rel. on; A.I.R. 1931 Pat. 285, Foll. (*Pollock, A.J.C.*) PUNAJI *v.* GOVINDA RAGHOBA. **30 N.L.R 290=152 I.C. 438=7 R.N. 104=A.I.R. 1934 Nag. 191.**

———**Art. 132**—*Default clause in mortgage—Option to sue given to mortgagee.*

When the deed of mortgage entitles a mortgagee to institute a suit for a relief under the mortgage on default being made on payment of interest agreed to be paid yearly, the limitation commences to run from the date of such default in spite of a further covenant to the effect that the mortgagee may not sue on such a default. The

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mortgage money does not become due within the meaning of Art. 132 until the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. (*Raza, Bisheshwar Nath and Smith, JJ.*) PARBATI *v.* MAHOMED ABRAHIM. **8 Luck. 240=I.R. 1933 Oudh 98=142 I.C. 64=9 O.W.N. 1202=A.I.R. 1933 Oudh 66 (F.B.).**

———**Art. 132**—*Default clause in mortgage—Time from the exercise of option by mortgagee.*

A mortgage bond, under which the principal amount was to be repaid in six years, provided for payment of interest annually and that, in case of default, the mortgagee would be entitled "within and after the expiry of the stipulated period of six years" to realise the entire mortgage-money in a lump sum. No interest was ever paid under the mortgage, and the mortgagee brought a suit to enforce his security within 12 years from the expiry of the stipulated period (six years) but more than 12 years from the first default in the payment of interest.

Held, that the proviso in question was inserted in the mortgage deed exclusively for the benefit of the mortgagee and gave him an option either to enforce his security at once on default by the mortgagor in the payment of the interest or to wait for the full term of the mortgage, and it was not competent to the mortgagor to take advantage of his own default and claim a right to redeem before the expiry of the stipulated term.

Held, accordingly, that the principal money did not become "due" (within the meaning of Art. 132 of the Indian Limitation Act) immediately upon default, but when both the mortgagors right to redeem and the mortgagee's right to enforce his security accrued, and that therefore the suit was well in time under Art. 132. 37 All. 400 and 45 All. 27, Overr. (*Sir George Lowndes.*) LASA DIN *v.* MT. GULAM KUNWAR. **59 I.A. 376=7 Luck. 442=I.R. 1932 P.C. 251=36 C.W.N. 1017=1932 M.W.N. 912=36 L.W. 246=56 C.L.J. 237=1932 A.L.J. 913=34 Bom L.R. 1600=138 I.C. 779=9 O.W.N. 638=A.I.R. 1932 P.C. 207=63 M.L.J. 187 (P.C.).**

[Appl. 55 A. 283 (297). **F.** 8 Luck 240 (244, 246) (F.B.); 64 M.L.J. 606 (608). **R.** 8 Luck. 488 (492).**]**

———**Art. 132**—*Default clause in mortgage—Time from exercise of option—Waiver—Proof of.*

A mortgage bond recited that the principal amount was payable within two years while the interest was payable at the end of each month and in case of default in the payment of interest, compound interest at a higher rate and also the principal and interest was to become payable. Default was made in the payment of even the first instalment of interest.

Held, that the period of limitation for the suit brought by the mortgagee should be computed only from the date of the expiry of the term of the mortgage; the clause empowering the mortgagee to sue on default should be deemed to have been inserted exclusively for his benefit and as such it gave him an option to enforce the security at once or to stand by his investment for the full term of his mortgage. 7 Luck. 442 (P.C.), Foll. The mere fact that in the plaint compound interest is calculated even from the date of the first default in the payment of interest does not necessarily indicate that the option given to him of suing within the period of limitation calculated from the expiry of the term fixed for the payment of principal has been waived. (*Curgenven and Sundaram Chetty, JJ.*) BABU *v.* VENKATACHALAPATHI IYER. **148 I.C. 311=6 R.M. 466=1933 M.W.N. 331=37 L.W. 751=A.I.R. 1934 Mad. 227=64 M.L.J. 606.**

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———**Art. 132**—*Equitable mortgage—Deposit of promissory note and title-deeds—Promissory note payable on demand—Starting point of limitation.*

Where a mortgage is evidenced by a promissory note accompanied by deposit of title-deeds, 12 years' limitation does not run from the date of execution of promissory note merely because the promissory note is payable on demand. The question to be considered is whether the words "on demand" are mere words, or whether, looking at the whole document, it is really intended that the demand should be made before the liability to pay arises. 11 Rang. 328 and 46 M. 259, Rel. on. (*Sen, J.*) VILLA *v.* PETLEY. **6 R.R. 245=148 I.C. 721=A.I.R. 1934 Rang. 51.**

———**Art. 132**—*Execution sale—Sale of property subject to charge—Default of purchaser—Suit by owner to enforce his right of indemnity.*

Where some of the properties furnished as security under a bond executed as a condition for stay of execution were sold in execution of another decree subject to the charge, and on the failure of the purchaser to pay off the charge, the owner of the properties brought a suit in effect praying for a declaration of his right to indemnity and for its enforcement by the sale of the property,

Held, that it was not necessary for the plaintiff to pray specifically for a declaration which was involved in the prayer for sale of the property, that the main relief was the enforcement of the charge and that the suit was governed by Art. 132 and not Art. 120. (*Madhavan Nair and Jackson, JJ.*) RAMA RAYANIMGAR *v.* VENKATALINGAM NAYANIM BAHADUR. **57 Mad 218=149 I.C. 379=6 R.M. 642=1933 M.W.N. 486=38 L.W. 818=A.I.R. 1934 Mad. 1=66 M.L.J. 4.**

———**Art. 132**—*Mortgage bond—Provision for instalments—Default clause allowing recovery of expired and unexpired instalments in one lump with interest on default—Default—Cause of action for suit—Limitation.*

A mortgage bond provided for repayment of the principal amount in 20 instalments, the first of which was to become due in May-June, 1913, and in case of default of any one instalment the mortgagee and his heirs "have and shall have power to recover in a proper way the expired and unexpired instalments in one lump with interest thereon at 1 per cent. per month by sale of the mortgaged properties, etc." No instalments were paid at all and a suit was instituted on the bond on 11-8 1928.

Held, Art. 132 was applicable; that the case was one of the class of cases where the creditor is given a different right for each instalment in respect of which default may be made, the creditor being entitled to take the most recent instalment as that which gives rise to the particular cause of action on which he sues, provided the cause of action arose not more than 12 years before the institution of the suit; that it was not that the same cause of action would arise in respect of each instalment as and when it became due and was unpaid, but the cause of action in respect of any particular instalment was different from that in respect of any other instalments; and that what had to be considered was how much had fallen due and had not been paid and was not barred by limitation; and secondly, how much remained to be paid even though till that moment the instalment had not fallen due; and that the suit was not therefore barred by limitation though instituted more than 12 years after the date when the 1st instalment became due and the 1st default was made. (*Courtney-Terrell, C.J. and Varma, J.*) RAGHUNANDAN SINGH *v.* KISHUN SINGH. **15 Pat. 1=156 I.C. 475=8 R.P. 1=16 Pat. L.T. 893=A.I.R. 1935 Pat. 383.**

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———**Art. 132**—*Mortgage deed—Default clause—Limitation—Starting point.*

Where the term of a mortgage is a period of one year and it is clearly stipulated in the mortgage deed that the principal, interest and compound interest will be paid to the mortgagee on the expiry of one year from the date of the mortgage, a covenant in the deed giving an option to the mortgagee not to wait for the full period of one year and to put the mortgage deed into suit after the expiry of six months in the event of the failure of the mortgagor to pay interest on the expiry of six months, is, at best, an option given to the mortgagee and it is open to the mortgagee not to avail himself of this option and to wait for the full stipulated period of the mortgage. Accordingly a suit for sale on the basis of the mortgage bond filed more than 12 years after the date of the default committed by the mortgagor in the payment of interest but within 12 years from the date of the expiry of one year from the date of the execution of the mortgage deed, is not barred by limitation. (*Thom and Iqbal Ahmad, J.*) BOHRA HOTI LAL *v.* MITHU LAL. **157 I.C. 675=8 R.A. 222=1935 A.L.J. 515=1935 A.W.R. 543=A.I.R. 1935 All. 421.**

———**Art. 132**—*Mortgage—Default clause—Option given to mortgagee to enforce payment earlier—Effect—Starting point of limitation.*

A mortgage bond provided that the mortgagors should pay the amount after one year, that they should pay half yearly interest failing which the same was to be added to the principal and there was a further clause that if there was default, the mortgagor might realise the entire amount.

Held, that the mortgage term was not cut down and that limitation commenced to run after the expiry of one year. (*Mukerji and Bennet, JJ.*) RAM DAYAL *v.* AMINUDDIN. **I.R. 1931 All. 631=133 I.C. 311=1931 A.L.J. 29=A.I.R. 1931 All. 203.**

———**Art. 132**—*Mortgage—Default—Provision for recovery of amount before expiry of period—Starting point of limitation.*

A mortgage bond executed on 12th May, 1912, provided that interest would be paid yearly and that the principal would be paid within five years. It further provided as follows:—"In the case of default of payment at the time fixed or on the discovery taking place within the stipulated period of any act of bad faith, then the creditor would be entitled to recover his money principal and interest in any way by filing a suit". The mortgagor failed to pay interest in May, 1913, but the suit was not brought till April, 1929.

Held, that the act of bad faith which the parties had in contemplation was not the mere default in the payment of the annual interest, that there was no default by the mortgagor which would entitle the mortgagee to realise the whole of the mortgage money within the period of five years and that the suit having been brought before 12 years from the expiry of the period of five years was within time. (*Mukerji and Bennet, JJ.*) RAM SEWAK KUERI *v.* RAM RUP TELI. **I.R. 1931 All. 387=131 I.C. 547=A.I.R. 1931 All. 537.**

———**Art. 132**—*Mortgage—Default clause—Time from exercise of option.*

Where an instalment mortgage bond fixes the time by which the entire principal money and interest thereon are to be paid and a clause is inserted for the benefit of the mortgagee that if any of the instalments due is not paid in time the mortgagee would be at liberty to call in the entire money, the effect of such a stipulation is that under the terms of the bond the mortgagee has successive or recurring causes of action and it is left to his option to avail himself of any one of these causes of action, and base his suit upon any of them. (Case-law exhaustively discussed.) (*Macpherson and Fazl Ali, JJ.*) MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH. **11 Pat. 112=I.R. 1931 Pat. 465=134 I.C 609=12 Pat.L.T. 755=A.I.R. 1931 Pat. 285.**

[**R.** 1931 M.W.N. 1246 (1250); 35 L.W. 424 (428) **F.** 30 N.L.R. 290 (292).]

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———**Art. 132**—*Mortgage—Sale in execution of decree—Suit against pusne mortgagees by purchaser—Starting point of limitation.*

The amount due on a simple mortgage was payable in 1909. In 1914 the simple mortgage brought a suit for sale in which he omitted to implead certain subsequent purchasers of the equity of redemption. In 1924 the properties were in execution of the mortgage decree sold by Court and purchased by the plaintiff. In 1926 the plaintiff sued to recover possession from the purchasers of the equity of redemption and subsequently applied to amend his plaint and add a prayer for a decree for sale.

Held, a suit for sale should have been brought within twelve years from when the amount fell due (*i. e.* 1909) and not from the date fixed by the mortgage decree; the relief sought by the amendment was time barred even at the date of plaint. 6 Rang. 297, Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) CHANDRAMMA *v.* SEETHAN NAIDU. **I.R. 1931 Mad. 737=133 I.C. 497=33 L.W. 648=A.I.R. 1931 Mad. 542=61 M.L. J. 316.**

———**Art. 132**—*Mortgage—Stipulation for payment within three years and making amount exigible on failure to pay interest yearly—Default—Limitation—Starting point.*

A mortgage deed provided that the mortgage amount with interest was to be paid within three years and there was also a default clause that if interest at the end of each year was not paid, the principal and interest should be collected at once without waiting for the period fixed, *viz.*, three years. Default in payment of interest was made by the mortgagor, ultimately resulting in a mortgage suit.

Held, that the default clause was one that was exclusively for the benefit of the mortgagee, that it purported to give the mortgagee an option either to enforce the security at once or to stand by the investment for the full term of the mortgage. The mortgagor could not be allowed to take advantage of his own default and that the period of limitation commenced to run only after stipulated period of three years and not from the date of default. 53 I.A. 184 and 59 I.A. 376, Foll. (*Pandrang Row, J.*) THIRTHAGIRI UDAYAN *v.* VENKATARAMA CHETTY. **159 I.C. 172=8 R.M. 453=1935 M.W.N. 995=A.I.R. 1935 Mad. 884.**

———**Art. 132**—*Mortgage suit—Application for personal decree—Commencement of limitation.*

There were two mortgages between the same parties, one dated 20th February, 1902, and the other dated 8th September, 1903, the mortgagor promising to pay the amount in eight years. There was a further provision that if the interest for one complete year remained unpaid, the creditors were to have power to recover the interest and also were at liberty to recover the principal and interest without having any regard "for the stipulated period". Interest was not paid and there was default at the expiry of one year on account of both these mortgage-deeds. There was an acknowledgment of both these mortgage debts on 3rd March, 1906, which gave a fresh start for the purpose of limitation. One consolidated suit was filed on 22nd February, 1916, to recover the amounts due on both these documents and in 1917 the claim was decreed. On 20th February, 1929,

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after all the mortgaged properties had been sold, there still remained a balance over Rs. 2,000 to be realised. The mortgagees accordingly filed an application on 21st August, 1929, under O. 34, R. 6, for a personal decree against the mortgagors.

Held, that the limitation for a decree under O. 34, R. 6, commenced to run not after the expiry of one year within which the mortgagor continued default for payment of interest, but it commenced to run after the expiry of eight year term stipulated in the deed. (Case-law discussed.) (*Sulaiman, C.J., King and Niamatullah, JJ.*) MD. HUSSAIN *v.* SANWAL DAS. **56 All. 954=6 R.A. 795=148 I.C. 951=1934 A.L.J. 261=3 A.W.R. 431=A.I.R. 1934 All. 397 (F.B.).**

———**Art. 132**—*Mortgage—Suit for contribution by co-mortgagor—Starting point of limitation.*

The case of Sreemati Rajkumari (25 C.W.N 283) was wrongly decided in so far as it was held in that case that a suit by a redeeming co-mortgagor for contribution, instituted beyond the period within which the original mortgagee could institute his suit on the mortgage, had it not been redeemed, was barred. In such a case the suit for contribution can be filed by the co-mortgagor within 12 years of the date on which the other mortgage was paid. 25 C.W.N. 283, Overr. (*Rankin, C.J., C.C. Ghose, Mukerji, Mallik and Guha, JJ.*) UMAR ALI *v.* ASMAT ALI. **58 Cal. 1167 =I.R. 1931 Cal. 409=130 I.C. 889=35 C.W.N. 409 =53 C.L.J. 154=A.I.R. 1931 Cal. 251 (F.B.).**

———**Art. 132**—*Mortgage suit—Purchaser of equity of redemption not impleaded—Purchaser at mortgage sale suing for possession—Bar.*

Where in a mortgage suit the transferee of the equity of redemption was not impleaded as party, though the mortagee had knowledge of the transfer and the purchaser at the mortgage sale instituted a suit to recover possession from the purchassr of the equity of redemption more than 12 years after the date fixed in the mortgage bond,

Held, that the suit was barred under Art. 132. (*Mallik and Jack, JJ.*) SURENDRALAL KUNDU *v.* AHAMMAD ALI. **60 Cal. 1193=147 I.C. 608=6 R. C. 361=A.I.R. 1933 Cal. 912.**

———**Art. 132**—*Mortgage suit—Submersion of mortgaged property under water—Suspension of limitation.*

When once limitation begins to run for a suit to enforce a mortgage, it is not suspended merely because the mortgaged property is submerged under water, as it does not affect mortgagees right to bring a suit on the mortgage. (*Kulwant Sahay, J.*) RAGHUNATH BHAGAT *v.* MEGHU MANDER. **146 I.C. 856=6 R.P. 297=A.I.R. 1933 Pat. 693.**

———**Art. 132**—*Mortgagee paying prior mortgage decree—Right to enforce security by virtue of subrogation—Limitation—Starting point.*

Per *Sulaiman, C.J.*—The payment of a prior mortgage decree by a subsequent mortgagee confers upon the latter a statutory right under S. 92 of the T. P. Act, which right is not identical with the rights of an assignee of the mortgagee itself but is an acquisition of a fresh charge enforceable within the period of limitation applicable to such a suit. Art. 132 of the Limitation Act would apply when the charge is sought to be enforced, and limitation would run from the date when the decretal amount was paid and the statutory right acquired. (*Sulaiman, C. J., Bennet and Ganga Nath, JJ.*) ALAM ALI *v.* BENI CHARAN. **160 I.C. 541=8 R.A. 618=1935 A.L.J. 1294=1935 A.W.R. 1456=A.I. R. 1936 All. 33 (F.B.).**

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———**Art. 132**—*Redemption by co mortgagor—Suit against other mortgagors—Limitation—Starting point.*

The right to enforce the charge created under S. 95, T. P. Act, by the redemption of a mortgage by the holder of a part of the mortgaged property accrues only when the whole mortgage debt has been paid off; and the limitation for a suit to enforce such a charge is 12 years from the date when the entire debt is paid off. (*James and Agarwala, JJ.*) BIRENDRA KESHRI PRASAD NARAIN SAHEE *v.* BAHARIA SARASWATI KUER. **18 Pat. 356=155 I.C. 756=7 R.P. 619=16 Pat.L.T. 147=A.I.R. 1934 Pat. 612.**

———**Art. 132**—*Redemption by one mortgagor — Charge acquired by—Enforcement of—Starting point.*

The starting point for the enforcement of a charge acquired by one of the mortgagors who redeemed the whole mortgage is the date of payment. 28 A. 482 (P.C.), Foll. (*Sulaiman, A.C.J. and Sen, J.*) COLLECTOR OF FARRUKHABAD *v.* KISHORE MOHAN. **I R. 1932 All. 274=137 I.C. 86 (2)=1932 A.L.J. 19 =A.I.R. 1932 All. 250.**

———**Art. 132**—*Royalty charged upon leasehold property—Limitation for recovery of.*

Semble.—A suit to recover royalties charged upon leasehold premises is subject to 12 years' limitation period (Art. 132, Limitation Act). (*Sir George Lowndes.*) BARABONI COAL CONCERN, LTD. *v.* DEBA PRASANNA MUKHERJEE. **154 I.C 596=7 R.P.C. 147=38 C.W.N. 481=59 C.L.J. 207=39 L.W. 722 =A.I.R. 1934 P.C. 119=66 M.L.J. 479 (P.C.).**

———**Art. 132**—*Scope—When money becomes due.*

Under Art. 132 money can become due only when the mortgagee can sue for his money and also the mortgagor can redeem the mortgaged property. (*Sulaiman, C.J. and Thom. J.*) ABDUL RAHMAN *v.* SHEO DAYAL. **56 All. 496=151 I.C. 900=7 R.A. 233=4 A.W.R. 1535=1934 A.L.J. 371=A.I.R. 1934 All. 152.**

———**Art. 132**—*Suit by first mortgagee—Second mortgagee not impleaded—Purchaser in execution—Suit by, against second mortgagee—Starting point—Cause of action.*

The purchaser of the equity of redemption in a suit by the first mortgagee gets a cause of action in addition to the cause of action on the mortgage against the second mortgagee who could not have been sued on the mortgage because his existence was not known. Therefore the period of limitation under Art. 132, Limitation Act, for a suit against the second mortgagee by the purchaser of the equity of redemption in a suit by the first mortgagee, who did not know of the existence of the second mortgage and therefore could not implead him in his suit, for enforcing his rights under the mortgage, is to be calculated from the date df the purchase by him and a suit within 12 years from the date of the sale certificate granted to the purchaser is not barred by limitation. Appeal No. 65 of 1932 Appl.; 1917 All. 359, Rel. on ; 1924 M. 650, Ref.; 1935 Cal. 139 and 1926 All. 480, not Foll. (*Madhavan Nair, J.*) GOPALAN NAIR *v.* MOIDEEN MADAR ROWTHER. **157 I.C. 1050 =A.I.R. 1935 Mad. 680.**

———**Art. 132**—*Suit to foreclosure—Mortgage term—Option given to mortgagor to redeem earlier—Right of foreclosure—When accrues.*

Where a mortgage deed fixed a term of three years and at the same time allowed the mortgagor the right to redeem earlier than the stipulated period,

Held, that the stipulation as to earlier redemption was one in favour of the mortgagor and for his benefit and that the mortgagee did not thereby get the right to

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foreclose before the expiry of 3 years. The period of limitation for foreclosure commenced to run after the expiry of the three years period and not earlier. (*Bisheshwar Nath and Kisch, JJ.*) GANGA PRASAD *v.* BISHUNATH SINGH, **142 I. C. 821=I.R. 1933 Oudh 129=9 O.W.N. 1081=A.I.R. 1933 Oudh 81.**

———**Art. 132**—*Suit for foreclosure—Right to foreclose or redeem only after five years under the mortgage deed—Starting point.*

If the effect of the clauses in the mortgage deed be that neither the mortgagor had the right to repay the mortgage money and to redeem the mortgaged property nor the mortgagees had the right to recall the mortgage money and to sue for forelosure before the expiry of five years, limitation for a suit for foreclosure is caculated from the first date after the expiry of the five years. In such a case, limitation does not start earlier even if the mortgagees had bargained for possession and never got it. (*Wazir Hasan, C.J., and Bisheshwar Nath, J.*) RAM SARUP SINGH *v.* GAYA PRASAD. **I.R. 1932 Oudh 334=139 I.C. 61=9 O.W.N. 280=A.I.R. 1932 Oudh 178.**

———**Arts. 132 and 131**—*Suit to recover malikana is governed by Art. 132 and not by Art. 131.*

A suit to recover malikana is governed by Art. 132 where the plaintiff seeks to recover it in respect of an interest in land; and to such a suit Art. 131 does not apply. (*Wort, J.*) PADHUM LAL *v.* TRIBENI SINGH. **154 I.C. 1043=7 R.P. 518=A.I R. 1934 Pat. 44.**

———**Art. 132**—*Suit for redemption—Simple mortgagees in possession as purchasers in execution—Puisne mortgagee's suit barred by limitation—Suit to redeem earlier simple mortgage—Right to possession.*

Defendants 1 and 2 were the first and simple mortgagees and the plaintiffs subsequent mortgagees. Defendants 1 and 2 brought a suit to enforce their mortgage and in that suit acquired the property. The plaintiffs were not impleaded in that suit and their right to enforce their mortgage was barred by time under Art. 132 of the Limitation Act and brought a suit to redeem the first mortgages of defendants 1 and 2.

Held, that the effect of the sale was not to convert the defendants into mortgagees in possession, because as simple mortgagee they were not entitled to possession, but to make them the holders of equity of redemption. So even if the plaintiffs were allowed to redeem the defendants, they could only be entitled on payment to the first mortgagee defendants 1 and 2, of what is due on their first mortgage, to take a transfer of the security but without any right to possession. That would not however, help the plaintiffs any way as in enforcing their second mortgage, the bar of limitation would as before apply. (*Beaumont, C.J. and Nanavati, J.*) NATHMAL MOTIRAM *v.* NILKANTH VISHNU. **141 I. C. 811=34 Bom. L.R. 1519=I.R. 1933 Bom. 163=A.I.R. 1933 Bom. 25.**

———**Art. 132**—*Time from first default.*

A deed of mortgage executed on 2-10 1916 provided that the money should be repaid within 2-10-1920 by instalments of Rs. 3 a month, and if three months' instalments remained unpaid, the mortgagee would have the right either at once to realise the full amount or wait till the expiry of the fixed period. Nothing was paid. The suit was brought on 13-9-1930.

Held, that in such a case the money must be considered to become due at the earliest date when it is possible under the terms of the mortgage to enforce payment thereof, that time began to run from 3-1-1917 when three months' instalments were due and that the suit was out of time, 6 O.W.N. 926, Foll. (*Kisch,*

LIMITATION ACT (1908), Art. 134.

J.) NATHOO SINGH *v.* KALLOO. **I.R. 1932 Oudh 295 (2)=138 I.C. 145=9 O.W.N. 444=A.I.R. 1932 Oudh 253.**

———**Art. 132**—*Vendor's lien — Enforcement of charge.*

The vendor has a statutory charge over property in the hands of the vendee for purchase-money left with the vendee and limitation is 12 years under Art. 132. (*Sulaiman, C.J. and Mukerji, J.*) AHMAD ALI *v.* RAIHAN RAZA. **6 R.A. 747=148 I C. 639=1934 A. L.J. 682=3 A.W R. 697=A.I.R. 1934 All. 525.**

———**Art. 134**—*Amendment by Act (I of 1929)—Not retrospective.*

The Amending Act I of 1929 does not revive a suit which had become barred before that date. (*Kisch, J.*) RAGHUNANDAN MISRA *v.* MAHADEO. **I.R. 1932 Oudh 399=140 I.C. 182=9 O.W.N. 835=A.I.R. 1933 Oudh 38 (2).**

———**Art. 134**—*Applicability—Transferee not acting in good faith.*

Art. 134 is not restricted in its application to a purchaser in good faith, but applies also to an alienee from a trustee who takes the property with full knowledge that the alienor was acting in excess of his power. (*Addison, J.*) FAZAL DIN *v.* MAHOMED HAFIZ. **I.R. 1931 Lah. 348=130 I.C. 780=32 Punj. L.R. 17=A. I.R. 1931 Lah. 129.**

———**Art. 134**—*Initial onus.*

The initial onus of proving the suit is in time is on the plaintiff. If neither in the plaint nor at any subsequent stage of the case, the plaintiff has ever fixed any date at which he alleges that he came to know of the transfer of the mortgaged property to the defendant, the suit must fail. (*Kisch, J.*) RAGHUNANDAN MISRA *v.* MAHADEO. **I.R. 1932 Oudh 399=140 I.C. 182=9 O.W.N. 835=A.I.R. 1933 Oudh 38 (2).**

———**Art. 134**—*Knowledge of defendant—Materiality of.*

The question of notice, actual or constructive, on the part of the transferee that the transferor held only mortgagee rights in the property transferred is wholly irrelevant for the purpose of Art. 134. (*Kisch, J.*) RAGHUNANDAN MISRA *v.* MAHADEO. **I.R. 1932 Oudh 399=140 I.C. 182=9 O.W.N. 835=A.I.R. 1933 Oudh 38 (2).**

———**Art. 134**—Math property—Alienation by Mahant—Suit by successor to avoid. Suit governed by Art. 144, not by Art. 134. *See* LIMITATION ACT, ART. 144—RELIGIOUS ENDOWMENT. **60 I.A. 124=12 Pat. 251=64 M.L.J. 505 (P.C.).**

———**Art. 134**—*Mortgage—Transferee from Mortgagee—Suit to redeem.*

In the case of transfers by mortgagees, Art. 134 applies only where the transferee has acted in good faith. In other cases the suit to redeem against him is governed by Art. 148. (*Shadi Lal, C.J. and Broadway, J.*) MEHUNGA *v.* ZAMAN ALI SHAH. **I.R. 1931 Lah. 536=132 I.C. 184=32 P.L.R. 359=A.I. R. 1931 Lah. 464.**

———**Art. 134**—*Starting point.*

The operation of the Article begins only from the date on which the purchaser takes possession, 40 M. 1040 (F.B.), Ref. (*Anantakrishna Aiyar, J.*) VEERANNA *v.* VENKADU. **1930 M.W.N. 1148.**

———**Arts. 134 and 144**—*Temple property—Improper alienation—Suit to set aside.*

A suit for recovery of possession of lands improperly alienated by the Dharmakarta of a temple is governed by Art. 144 and not by Art. 134, because he is not a 'trustee' within the meaning of that Article. 44 Mad.

LIMITATION ACT (1908), Art. 134.

831 (P.C.). (*Waller and Krishnan Pandalai, JJ.*) PERIYANAN CHETTY *v.* GOVINDA RAO. **I.R. 1932 Mad. 402=137 I.C. 487=1931 M.W.N. 1287=35 L. W. 191=A I R. 1932 Mad. 328=62 M.L.J. 496.**

[**Cons.** 64 M.L.J. 706 (712).]

———**Art. 134**—*Transfer—Assignment— Redemption by assignee—Suit to set aside assignment—Limitation.*

In 1905 *Y* acting as the guardian of plaintiffs 1 and 2 had sold the equity of redemption to *S*. In 1907 *S* redeemed the mortgage and got possession. In 1924, more than three years after they attained majority, the plaintiffs brought a suit to set aside the sale on the ground that *Y* had no power to sell the equity of redemption and for taking of accounts on foot of the mortgagee. There was no dispute that the purchase by *S* of the equity of redemption and his redemption when the mortgagee gave up possession to him were in good faith both on the part of *S* and on the part of the mortgagee.

Held, (*i*) Art. 134 was not applicable as the mortgagee did not purport to do anything outside or opposed to his mortgage. It was not a transfer by the mortgagee in the sense in which that word is used in Art. 134. (*ii*) The purchase by *S* was in his own absolute right and he had been holding as owner (from 1907 at least) and not on behalf of the mortgagor or mortgagee. From 1907 to 1924, his possession was adverse to the knowledge of the plaintiffs and so the suit was barred under Art. 144. (*Madgavkar, J.*) SHIDLINGAYA SADEPPA *v.* RAJAVA TENESAHEB. **I.R. 1931 Bom 478=134 I.C. 366=33 Bom.L.R. 603=A.I.R. 1932 Bom. 23.**

———**Art. 134**—*Wakf property—Alienation by mutawalli—Suit to avoid.*

Art. 134 does not apply to suits to avoid alienations of the generally endowed property vested in the sajja danashin and mutawalli of a wakf. Such suits are governed by Art. 144. Where as a result of the alienations the previous encumbrances have been paid off, it cannot be said that there were several trespassers in succession so as to bar the true owner under Art. 142 after the lapse of 12 years from the date of the earlier mortgage. (*Patkar and Murphy, JJ.*) HAMIDMIYA SARFUDDIN *v.* NAGINDAS JIVANJI. **57 Bom. 709=148 I.C. 385=6 R.B. 294=35 Bom.L.R. 252=A.I.R. 1933 Bom. 217.**

———**Arts. 134 and 144**—*Wakf property—Mutawalli having beneficial interest—Sale of endowed property—Suit by succeeding mutawalli to avoid—Starting point of limitation.*

Where the mutawalli of a Mahomedan wakf, who has a beneficial interest in the endowed property, sells the property, the alienation is valid during the lifetime of the vendor, and a suit by a succeeding mutawalli for a declaration that the sale is invalid and for recovery of possession of the property sold is governed by Art. 144 and not Art. 134 and is in time if instituted within 12 years from the date of the death of the mutawalli who sold the property. There is no distinction in this respect between a lease and a sale. (*Madhavan Nair and Jackson, JJ.*) ARUMUGAM PILLAI *v.* KHAZI MOHIDEEN SHERIFF SAHIB. **I.R. 1933 Mad. 428=144 I. C. 541=1933 M.W.N 1215=37 L.W. 737=A.I.R. 1933 Mad. 533=64 M L.J. 706.**

———**Art. 134**—*Wakf property—Suit to recover property on behalf of*—Mutawalli—*If trustee.*

Art. 134 is not applicable to Muslim *wakfs*. Neither the *sajjadanashin* nor the *mutawalli* has any right in the property belonging to the *wakf*; the property is not vested in him and he is not a trustee in the technical sense. The property of a *wakf* is vested in God Almighty. The *sajjadanashin* or *mutawalli* is only a manager. (*King, C.J. and Zia-ul-Hasan, J.*) WAHID ALI *v.* MAHBOOB ALI KHAN. **11 Luck. 297=156 I. C. 92=7 R.O. 654=1935 O.W.N. 815=A.I.R. 1935 Oudh 425.**

LIMITATION ACT (1908), Art. 136.

———**Art. 134-B**—*Debuttar property—Alienation by* shebait—*Suit by succeeding* shebait—*Execution sale against* shebait—*Suit by succeeding* shebait—*Limitation—Starting point.*

In the case of suit by a *shebait* succeeding to the previous *shebait* to impeach an alienation by the prior *shebait*, a suit brought within 12 years from the date of the death of the previous *shebait* would not be barred by limitation. The period of limitation would run from the date of the death of the alienating *shebait*. But in the case of a sale in execution of a mortgage decree passed against the previous *shebait*, the period of limitation would run from the date of the sale and a suit brought 12 years from the date of sale is barred by limitation. (*Mitter and B.N. Rau, JJ.*) RONALD DUNCAN CROMARTIC *v.* SRI SRI ISWAR RADHA DAMODAR JEW. **62 C.L.J. 10.**

———**(as amended), Art. 134-B**—*Trust property—Perpetual lease—Setting aside—Limitation.*

Where a perpetual lease is granted of trust property, the lease is void and a suit by the succeeding manager to recover possession is governed by Art. 134 (*b*) and time commences from the death or removal of the previous manager who effected the transfer. (*Drake Brockman, S.M. and Holmes, J.M.*) SITA RAM JI *v.* SANT KUMAR BASU. **14 L.R 905 (Rev.).**

———**Art. 135**—*Mortgage-deed—Default clause—Starting point.*

A mortgage deed contained a forfeiture clause where by the mortgagees might obtain possession of the land in default of payment of the first or subsequent instalments of interest.

Held, that the payment of interest could not possibly be construed as an acknowledgment of the mortgagee's right to enforce their right to possession under the default clause, and that he had a right to secure possession as soon as the first default occurred, The fact that any subsequent default also gave him a right of possession was not sufficient to prevent time from running against him. 1930 Lah. 327, Rel. on; 1919 Oudh 217, Dist. (*Beckett, J.*) JAI MAL *v.* RAN RATTAN. **156 I.C. 42 (2)=7 R.L. 843=A.I.R. 1934 Lah. 993.**

———**Art. 135**—*Scope—Prior mortgage with possession—Subsequent mortgagee's suit for possession—Limitation.*

For the purpose of Art. 135 the mortgagor must either have actual possession or an unconditional right to recover possession from somebody who has in fact got it and unless and until he has that right, time does not start to run. In a case where possession is outstanding in a prior mortgagee at the date of a subsequent mortgage, time begins to run against the subsequent mortgagee from the date when possession is recovered by the mortgagor from the prior mortgagee and not from the date of his mortgage. (*Beaumont, C.J. and Rangnekar, J.*) GANPAT BHUJANG *v.* HANAMGOUDA. **57 Bom. 593=147 I.C. 919=6 R.B. 225=35 Bom.L.R. 956=A.I.R. 1933 Bom. 439.**

———**Art. 136**—"*Out of possession*"—*Meaning—Test.*

Possession contemplated by Art. 136 is not confined to actual occupation only; it also includes constructive possession. The expression "out of possession," as used in Art. 136 implies that some person is in possession adversely to the vendor. Time does not begin to run under Art. 136, until the property is held in possession adverse to the vendor. The question for decision in applying Art. 136 is whether, if there had been no

LIMITATION ACT (1908), Art. 136.

second sale, and the vendor had brought the suit for possession, he would have succeeded. If he would have succeeded, then the vendee must succeed in the suit brought by him. A.I.R. 1918 Cal. 68 and 9 I.C. 495, Rel. on. (*Dunkley, J.*) SAW EN HOKE *v.* MA PO YIN. **151 I.C. 357 (2)=7 R.R. 65=A.I.R. 1934 Rang. 223.**

———**Art. 136**—*Sale of share in joint property by co-sharer—Co-sharers entitled to possession more than twelve years before—Suit by purchaser—Limitation.*

Where a special relationship exists between persons, such as tenants-in common or members of an undivided family, the Court will presume that possession held by one is possession held on behalf of all the co-owners or members of the family. It does not follow that because a tenant in-common is out of possession, time immediately begins to run against him. The possession of one co-owner is in itself rightful and does not imply hostility as would be the possession of a stranger. If a co-tenant were to sell his share in a joint property to a stranger some time after twelve years from the date when he and other co-sharers became entitled to the property, it would not be proper to defeat the right of the purchaser by saying that the suit was barred because his vendor first became entitled to possession on the date on which the co-sharers became entitled to the property. (*Shingne, J.*) ANANT GANPATI v. VISHNU RAMBHAU. **58 Bom. 410=154 I.C. 824=7 R.B. 375=36 Bom.L.R. 284=A.I.R. 1934 Bom. 273.**

———**Art. 138**—*Applicability.*

Art. 138 applies only to a case in which a decree-holder having purchased a property had failed to take advantage of the procedure under the Civil Procedure Code for the purpose of obtaining possession when the judgment-debtor was in possession and brings a suit to obtain possession (*Wort and Khaja Mahomed Noor, JJ.*) RAM PRASAD OJHA *v.* BAKSHI BINDESHWARI PRASAD SINHA. **11 Pat 165=142 I.C. 246=I R. 1933 Pat. 132=13 Pat.L.T. 121=A.I.R. 1932 Pat. 145.**

———**Art. 138**—'*Purchaser*'—*Decree-holder auction-purchaser.*

Art. 138 makes no distinction between a decree-holder purchaser and a third party purchaser. The former as well as the latter has twelve years within which to bring a suit for recovery of possession of the property purchased in execution of the decree. (*Courtney-Terrell, C.J., Jwala Prasad, Ross, Wort and Kulwant Sahay, JJ.*) TRIBENI PRASAD SINGH *v.* RAMASRAY PRASAD CHAUDHARI. **10 Pat. 670=I.R. 1931 Pat. 337=133 I.C. 337=12 Pat.L.T. 423=A.I.R. 1931 Pat. 241 (F.B.).**

———**Arts. 139, 143 and 144**—Applicability—Alienation of *khoti* land—Suit by managing *khot* to set aside—Limitation—Starting point. *See* BOMBAY KHOTI ACT. **36 Bom.L.R. 1253—A.I.R. 1935 Bom. 98.**

———**Art. 139**—Applicability—Mortgage and lease back—Suit for mortgage money and profits more than 12 years after expiry of lease—Bar of. *See* LIMITATION ACT, S. 28 AND ART. 139. **41 L.W. 398=A.I.R. 1935 Mad. 377.**

———**Arts. 139 and 144**—*Applicability—Suit by landlord to eject tenant—Limitation—Starting point.*

A suit by a landlord to recover possession from a tenant is governed by Art. 139 of the Limitation Act, which is the specific article for a suit between landlords and tenant and must be applied to all suits of that nature in preference to Art. 144 which is a general article. The *terminus a quo* is the date on which the tenancy was determined. The question for decision in

LIMITATION ACT (1908), Art. 139.

such suits is whether the lease has been put an end to within 12 years of suit and not whether there has been adverse possession. (*Murphy and Barlee, JJ.*) LAKHAMGOWDA *v.* JAMBHU. **159 I.C. 378=8 R.B. 196=37 Bom.L.R. 593=A.I.R. 1935 Bom. 382.**

———**Arts. 139 and 144**—*Applicability—Wakf property in possession of dismissed mujawars—Suit by sajjadanashin to recover—Plea of adverse possession by defendants—Limitation applicable.*

Defendants who were left into possession of the suit lands belonging to a Mahamoden darga in consideration of their services as mujawars (attendants and servants of the shrine) were dismissed in 1898, but continued in possession. In a suit brought in 1926 by the sajjadanashin to recover possession of the lands, the defendants pleaded adverse possession.

Held, (1) that the defendant's plea of adverse possession was inconsistent with the application of Art. 139; (2) that though at one time 1894, the defendants asserted their title to the lands adversely to the then sajjadanashin, since they did not persist in their contention that they were owners and since after their dismissal from office in 1894, they were content to occupy the position of attendants and servants of the shrine and claimed merely a right as such to render services to the shrine, the possession coupled with the performance of the services was consistent with their being allowed to remain inoccupation by leave and licence of, and not adversely to the sajjadanashin; and (3) that under the circumstances and on the evidence, the defendants had not discharged the onus that lay on them under Art. 144, Limitation Act, of proving the adverse possession relied on by them, and the suit for possession was consequently not barred by limitation. (*Sir Lancelot Sanderson.*) ALLAH RAKHI *v.* SHAH MAHOMED ABDUR RAHIM. **61 I.A. 50=56 All. 111=6 R.P.C. 80=147 I.C. 887=38 C.W.N. 400=3 A.W.R. 387=11 O.W.N. 297=39 L.W. 421=36 Bom L R. 408=1934 M.W.N. 258=59 C.L.J. 157=1934 A.L J. 466=A.I.R. 1934 P.C. 77=66 M.L.J. 431 (P.C.).**

———**Art. 139**—*Commencement of Time.*

Per *Niyogi, A.J.C.*—The limitation begins to run against the landlord from the date when by efflux of time tenancy comes to an end. (*Niyogi and Staples, A. J.Cs.*) GOPINATH MAHARAJ *v.* MOTI CHIWA. **30 N.L R. 155=6 R.N 188=148 I.C. 561=A.I.R. 1934 Nag. 67.**

———**Art. 139**—*Expiry of lease—Tenant continuing in possession on same terms—Recovery of property—Limitation.*

Where, after the expiry of the period fixed in a lease the tenant continues in possession as tenant on the same terms expressed in the lease, he cannot claim adverse possession and there is no period of time from which it can be said that the statute runs so as to debar the lessors from their remedy for the recovery of the property. (*Lord Tomlin.*) CHANDRIKA PRASADA *v.* B. B. & C. I. RY. CO. **1935 A.W.R. 459=1935 O.W. N. 379=154 I.C. 945=39 C.W.N. 552=7 R.P.C. 151=1935 R.D. 165=61 C.L.J. 147=16 L.R. 250 (Rev.)=37 Bom.L.R. 393=41 L.W. 617=37 P.L.R. 331=1935 M.W.N. 434=A.I.R. 1935 P.C. 59=68 M.L.J. 552 (P.C.).**

———**Art. 139**—*Tenancy-at-sufferance—Holding on by son—Nature of right.*

Per *Niyogi, A.J.C.*—Whatever possessory rights a tenant-at-sufferance may have against a rank trespasser, it cannot be claimed that the "tenancy-at-sufferance" is heritable. The son of such tenant cannot style himself as a tenant holding over. His possession is nothing

LIMITATION ACT (1908), Art. 140.

better than that of a trespasser. His possession is clearly adverse to the owner ofthe land and would be ripen into a prescriptive title by 12 years' possession. (*Niyogi and Staples, A.J.Cs.*) GOPINATH MAHARAJ *v.* MOTI CHIWA. **30 N.L.R. 155=6 R.N. 188=148 I.C. 561 =A.I.R. 1934 Nag. 67.**

——**Arts. 140, 141 and 142**—*Applicability—Cause of action arising in lifetime of last full owner—Subsequent interposition of life estate—Effect.*

If the cause of action has arisen during the lifetime of the last full owner, the subsequent interposition of a life-estate or a widow's estate would not bring into operation either Art. 140 or Art. 141, Limitation Act, on the principle formulated in S. 9 of the said Act. Art. 142 of the Act would apply, time running from the date of the dispossession. (*Derbyshire, C.J. and R.C. Mitter, J.*) HEMENDRA NATH ROY CHOWDHURY *v.* JNANENDRA PRASANNA BHADURI. **63 Cal. 155 =159 I.C. 1101=8 R.C. 388=40 C.W.N. 115=62 C. L.J. 49=A.I.R. 1935 Cal. 702.**

——**Arts. 140 and 141**—*Suit under—Defendant suing to avoid operation of Articles—Onus.*

When plaintiff brings his case *prima facie* under Arts. 140 and 141, and the defendants want to avoid the operation of these Articles they must prove that limitation began to run from the time when the plaintiff's adoptive father was the full owner, that is to say, he was dispossessed when he was the full owner. 19 C.W. N. 1280, Dist. (*Derbyshire, C.J. and R.C. Mitter, J.*) HEMENDRANATH ROY CHOWDHURY *v.* JNANENDRA PRASANNA BHADURI. **63 Cal. 155=159 I.C. 1101= 8 R.C. 388=40 C.W.N. 115=62 C.L J. 49=A.I.R. 1935 Cal. 702.**

——**Art. 141**—*Applicability—Plaintiffs in constructive possession after the death of limited owner—Mutation of names in defendants' favour—Subsequent suit for possession.*

Art. 141 only applies to a suit for recovery of possession in respect of property of which the reversioners were out of possession at the death of the female and which was in the possession of another person from whom they seek to recover it. Where the Court found that the plaintiffs were the nearest reversioners to the last male owner, that on the death of the limited owner in 1902 no one had been in possession, that in 1914 the defendants for the first time during the settlement proceedings got their names entered in respect of those lands,

Held, that the suit brought in 1924 was in time, that the plaintiffs who had the title should be deemed to have been in possession till 1914, that limitation began to run only from that date and that Art.141 was inapplicable to the case. (*Suhrawardy and Graham, JJ.*) MAHENDRA NATH BAGCHI *v.* TARAK CHANDRA SINHA. **I.R. 1932 Cal. 443=138 I.C. 349=36 C.W. N. 326=A.I.R. 1932 Cal. 504.**

——**Art. 141**—*Applicability—Re-marriage of widow and property held by mother and daughter jointly—Possession of daughter, when adverse—Suit by reversioner.*

A bhagdar in the Broach District died leaving a widow, a mother, and a daughter who, according to a local custom, was disqualified from inheritance. The widow re-married in 1905 and the mother died in 1920. The mother during her lifetime and the daughter lived together and enjoyed the property. In 1925, the plaintiff sued to recover possession of the property as a reversioner to the last made owner. It was contended that the daughter was in adverse possession from the date of the re-marriage of the widow and that the suit was barred by limitation.

LIMITATION ACT (1908), Art. 141.

Held, that Art. 141 applied to the suit, that where there was no decree against the widow or other act in law in the widow's lifetime depriving the reversionary heir of his right, the possession of the daughter even if adverse to her grandmother could not be deemed to be adverse to the reversioner who was consequently entitled to bring his suit within twelve years from the date of the widow's death. (*Patkar and Barlee, JJ.*) BAI MANCHHA *v.* TRIBHOVAN LALLUBHAI. **I.R. 1932 Bom. 459=139 I.C. 28=34 Bom.L.R. 385=A.I.R. 1932 Bom. 434.**

——**Art. 141**—*Life-tenant dispossessed — Reversioner's suit for possession— Limitation— Starting point.*

If a life tenant be dispossessed, the reversioner or remainderman is in time if he institutes the suit for possession of immovable property within 12 years of the death of the life tenant, and if successive life-estates had been created the remainderman of the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life tenant. (*Derbyshire, C. J. and R. C. Mitter, J.*) HEMENDRA NATH ROY CHOWDHURY *v.* JNANENDRA PRASANNA BHADURI. **63 Cal. 155=159 I.C. 1101=8 R.C. 388 =40 C.W.N. 115=62 C.L.J. 49=A.I.R. 1935 Cal. 702.**

——**Art. 141**—*Suit by reversioner.*

Where a widow is found to have been lawfully holding her husband's estate for life, whether under a will or under the provisions of S. 22 of Act I of 1869, no question of adverse possession arises and the suit for possession by a reversioner is governed by Art. 141 of the Limitation Act. 26 I.A. 71 and 56 I.C. 267, Foll. (*Hasan, C. J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

——**Art. 141**—*Suit by reversioner to avoid alienation by widow—Starting point of limitation.*

A suit by a reversioner challenging the alienation of a Hindu widow should be instituted within 12 years of the widow's death. (*Raza and Smith, JJ.*) RAJESHAR BALI *v.* HARKISHEN BALI. **147 I.C. 313=6 R.O. 259=10 O.W.N. 147=A.I.R. 1933 Oudh 170(2).**

——**Art. 141**—*Suit by reversioner for possession—Question of adoption involved.*

The Article applicable to a suit by a reversioner for possession of immovable property on the death of a Hindu female is Art. 141 even if it is necessary to decide in the suit whether an adoption was or was not valid. (*Abdul Rashid, J.*) HIRDE RAM *v.* JHANDU. **149 I.C. 434=6 R.L. 680=35 P.L.R. 338=A.I.R. 1935 Lah. 213 (2).**

——**Art. 141**—*Suit by reversioner—Surrender in favour of daughter—Reversioner's right to sue—Starting point of limitation.*

The basis of the doctrine of surrender is the effacement of the widow's interest, and not the *ex facie* transfer by which such effacement is brought about. There is therefore no difference between surrender to a daughter and surrender to the nearest male reversioner. Where, therefore, a widow made a surrender of her estate in 1884, in favour of her daughter, who died in 1894, the right of the male reversioners to sue arises on the daughter's death and is barred under Art. 141 of the Limitation Act if brought more than 12 years thereafter, though in time if the computation is made from the subsequent death of the widow. 46 All. 59, Appr. (*Sir John Wallis*) SITANNA *v.* VIRANNA. **61 I.A. 200=57 Mad. 749=38 C.W.N. 697=59 C.L.J. 354.**

LIMITATION ACT (1908), Art. 141.

=1934 M.W.N. 414=36 Bom.L.R. 563=15 Pat.L.T. 497=1934 A.L.J. 433=3 A.W.R. 729=11 O.W.N. 596=6 R.P.C. 142=39 L.W. 607=148 I.C. 828=A. I.R. 1934 P.C. 105=67 M.L.J. 20 (P.C.).

———Arts. 141 and 119—*Suit for declaration of validity of adoption—Suit for possession by adoptee on death of Hindu female including such a declaration—Limitation applicable.*

A suit under S. 42, Specific Relief Act, for a declaratory decree that an adoption is valid or did take place is governed by Art. 119; but the article applicable to a suit by an adoptee for possession of immovable property on the death of a Hindu female who was in possession as the adopted mother under an agreement is Art. 141, even if it is necessary to decide in the suit whether an adoption was or was not valid. (Case-law referred.) (*Baker and Wadia, JJ.*) BHAGIRTHIBAI *v.* APPA DADA. **58 Bom. 280=149 I.C. 674=6 R.B. 389=36 Bom.L.R. 185=A.I.R. 1934 Bom. 110.**

———Art. 141—*Talukdari estate—Death of taluqdar—Possession by widow as limited owner—Suit for possession by the next heir—Starting point of limitation.*

On the death of the last taluqdar to an estate, succession to which was governed by the terms of the primogeniture sanad, his wife entered into possession of the properties and in the mutation proceedings, the position she claimed was that of a claimant to the estate under S. 22 (7) of the Oudh Estates Act, *i.e.*, as a limited owner. So the right of the next heir to sue for complete proprietary title accrues only after, and not before the death of the limited owner. A suit for possession by him is governed by Art. 141. (*Wazir Hasan, C.J. and Smith, J.*) GAYA BAKHSH SINGH *v.* DEO SINGH. **9 Luck. 484=150 I.C. 495=7 R.O. 1=11 O.W.N. 351=A.I.R. 1934 Oudh 190.**

———Art. 142.

Applicability.
Burden of proof.
Co-sharer.
Discontinuance of possession.
Dispossession.
Distinction between Arts. 142 and 144.
Ejectment.
Hindu widow.
Landlord and tenant.
License.
Minerals.
Partition.
Possession.
Possession following title.
Religious endowment.
Revenue sale.
Suit by adopted son.
Scope. *See* DISTINCTION BETWEEN ARTS. 142 AND 144.
Tacking.
Trespasser.
Waste land.

Applicability.

———Arts. 142 and 144—*Applicability—Assertion of title, but no assertion of possession or dispossession—Article applicable.*

Where there is a clear assertion of title and there is nowhere any assertion of possession by the plaintiffs or of their dispossession by the defendants, Art. 142 cannot be applied. It is unnecessary for the plaintiffs to show in their plaint that the case is of a nature to which Art. 144 applied. That article is a residuary article and must be applied unless some special article applies. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MULLA AHMAD

LIMITATION ACT (1908), Art. 142—Applicability.

v. FAZAL AHMAD. **158 I.C. 968=8 R.Pesh. 68=A. I.R. 1935 Pesh. 133.**

———Art. 142—*Applicability—Claim not based on possession and subsequent dispossession.*

Where the claim to property is not based on possession and subsequent dispossession, Art. 142 can have no application. (*Tek Chand and Coldstream, JJ.*) HARNAM SINGH *v.* UPENDRA CHAND. **151 I.C. 490 =7 R.L. 142=36 P.L.R. 269=A.I.R. 1934 Lah. 576.**

———Art. 142—*Applicability—Essentials.*

In cases falling under Art. 142 the claimant must prove his possession within twelve years next preceding the date of the institution of the suit and in cases of that nature an enquiry into questions of adverse possession is irrelevant. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W. N. 349=A.I.R. 1931 Oudh 177.**

———Art. 142—*Applicability—No dispossession alleged.*

Where the plaintiff does not claim to have been dispossessed or to have discontinued possession, Art. 144 and not Art. 142 applies. (*Pollock, A.J.C.*) GANPATRAO *v.* VITHABAI. **30 N.L.R. 284=6 R.N. 165=148 I.C. 62=A.I.R. 1934 Nag. 36.**

———Art. 142—*Applicability—Plaintiff being owner—Defendant continuing in independent possession.*

Where plaintiff alleges that he is owner of certain piece of land but the defendant is proved or admitted to be in possession of it for a long time, and that not with the leave and license of the plaintiff, a suit for possession is governed by Art. 142 and not Art. 144. (*Ba U, J.*) TUN MRA AUNG *v.* MA AH MRA. **149 I.C. 1120=6 R.N. 370=A.I.R. 1933 Rang. 413.**

———Arts. 142 and 144—Applicability—Suit for confirmation of possession—No disturbance alleged—Neither Art. 142 nor Art. 144 applicable. *See* LIMITATION ACT, ART. 144. **36 C.W.N. 783=A.I.R. 1932 Cal. 842.**

———Art. 142—*Applicability—Suit on basis of title—Art. 144 as the proper Article.*

Art. 142 is restricted to suits which are in terms and substance based on the plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. Where the plaintiff sued on the basis of her title acquired by inheritance and she did not allege that she was dispossessed.

Held, the suit fell under Art. 144, not under Art. 142 and that the plaintiff need not prove his adverse possession, (*Kisch, J.*) ZAHIDA BEGAM *v.* MUMTAZ ALI KHAN. **I.R. 1931 Oudh 391=134 I.C. 599=12 L.R. 312 (Rev.)=8 O.W.N. 921=15 R.D. 566=A.I.R. 1931 Oudh 382.**

———Art. 142—*Applicability—Test.*

Art. 142 applied only to those cases in which the plaintiffs rely on their possession as opposed to lawful title. If a person though not the owner is, while in the enjoyment of his peaceful possession, ousted, he has a right to claim to be restored to possession. It is to such cases that Art. 142 applies. Under Art. 142 the question of limitation does not depend on the length of the defendant's possession but on the question whether the plaintiff was dispossessed or discontinued his possession. This Article makes no reference to the defendant at all. "Has the plaintiff been dispossessed or discontinued his possession within 12 years" is the sale question. A.I.R. 1929 All. 753 and 12 All. 551, Rel. on. (*Niyogi, A.J.C.*) MT. JIJIBAI *v.* ZABU. **30 N.L.R. 18=150 I.C. 679= 7 R.N. 21=A.I.R. 1933 Nag. 274.**

LIMITATION ACT (1908), Art. 142—Burden of proof.

Burden of proof.

See DISPOSSESSION AND WASTE LAND, *infra.*

———**Art. 142**—*Burden of proof.*

If Art. 142 applies, the *onus* would be upon the plaintiff to prove that his suit is not time barred ; it is otherwise if the case falls within Art. 144 · for in such a case the *onus* would be upon the defendant to prove that his possession had been adverse to that of the plaintiff for more than 12 years. 14 Bom. 458 and 2 L.B.R. 56, Ref. (*Otter and Brown, JJ.*) MAUNG SIN *v.* MAUNG SO MIN. **8 Rang. 556=I.R. 1931 Rang. 79=129 I.C 511=A.I R. 1931 Rang. 40.**

———**Art. 142**—*Burden of proof.*

Where the plaintiff fails to show that he was in possession of the property within 12 years from the date of filing the plaint the suit must be held to be time-barred. (*Nanavutty, J.*) ABDUL RAHIM *v.* MOHAMMAD NAZIR. **I.R. 1931 Oudh 379=134 I.C. 475=8 O.W. N. 797.**

———**Arts 142 and 144**—Burden of proof—Plaintiff admitted to have title to jungle lands—Defendant not claiming proprietary interest but limited tenancy interest from zemindar. *See* LIMITATION ACT, ART. 144—BURDEN OF PROOF. **A.I.R. 1934 Pat. 339.**

———**Arts. 142 and 144**—*Burden of proof—Suit for possession both on ground of title and dispossession.*

In cases where the plaintiff sues for possession of immovable property both on the ground of title and on the ground of his possession having been disturbed by the defendant if he proves his title, the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds in proving that fact the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent Art. 144 will apply to such a suit but it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within 12 years. If that be the case Art. 142 will apply and the burden will be on the plaintiff. (*Raza and Smith, JJ.*) MAHOMED MAHMUD *v.* MAHOMED AFAQ. **6 R.O. 299 (2)=147 I.C. 805=11 O.W.N. 104=A.I.R. 1934 Oudh 21.**

Co-sharer.

———**Art. 142**—*Co-sharer—Conditions.*

Art. 142 of the Limitation Act is very general in its scope, and the only conditions necessary are that the suit should be for possession of immovable property and that the plaintiff while in possession of the property must have been dispossessed or must have discontinued his possession. Obviously the word "plaintiff" in this article includes his predecessor-in-title as well. There are no words in this article which would confine its applicability to suits based on possessory title only, or confine it to plaintiffs who claim the property wholly and are not co sharers or co-owners with the defendants. Where therefore a plaintiff who was a co-sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees sometime prior to the institution of the suit, Art. 142 applies and not Art. 144. 51 A 1042 and 1933 A.L.J. 105. Overr. (*Sulaiman, C.J., Mukerji and King, JJ.*) BINDHVACHAL CHAND *v.* RAM GHARIB CHAND. **57 All. 278=1934 A.L.J. 973 =4 A.W.R. 821=152 I.C. 1=18 R.D. 541=7 R.A. 302=A.I.R. 1934 All. 993 (F.B.).**

———**Art. 142**— Co sharer— Dispossession—What constitutes. *See* DISPOSSESSION, *infra.* **A.I.R. 1934 All. 993 (F.B.).**

———**Art. 142**—*Co-sharers—Suit by one for declaration of right and possession—Property not capable of physical possession—Onus of proof of acts of possession within 12 years.*

In a suit by one co-sharer against another for declaration of his right and in the alternative for possession, where the property in dispute is not capable of actual enjoyment, it is not necessary for the plaintiff, to succeed in his suit, to prove by evidence definite acts of possession within 12 years of the suit. In such a case possession must follow title. (*Niamatullah, J.*) BABOO SINGH *v.* RAM MANOHAR. **155 I.C. 824=7 R A. 990=1935 A.W.R. 728=1935 R.D. 267=1935 A.L. J. 828=A.I R. 1935 All. 774.**

LIMITATION ACT (1908), Art. 142—Dispossession.

Discontinuance of possession.

———**Art. 142**—*Discontinuance of possession—Article applicable—Starting point of limitation.*

The owner of an impartible estate made a gift, in June, 1909, of a portion of the estate in favour of his second wife who thereupon entered into possession. The alienation, having been made without obtaining the previous sanction of the Commissioner, was void *ab initio* under sub section (3) of section 12-A of the Chota Nagpur Encumbered Estates Act (VI of 1876). The alienor died in February, 1924, and his successor in title brought the present suit in February, 1925, to recover possession from the alienee,

Held, that it was not a case of adverse possession falling within Art. 144 of the Limitation Act, but one of discontinuance of possession within Art. 142, and that limitation ran forthwith from the date of the alienation in 1909. If a person discontinued his possession and never resumed it, it is a case governed by Art. 142 and not Art. 44. (*Viscount Dunedin.*) THAKUR BAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI. **59 I.A. 130=11 Pat. 272=I.R. 1932 P.C. 142=136 I.C 798=36 C.W.N 250=35 L.W. 217=34 Bom.L.R.463=1932 A L.J. 186=55 C L.J. 136=13 Pat. L.T. 279=9 O.W.N. 43=1932 M W N. 660= A.I R. 1932 P.C. 55=62 M.L.J. 296 (P.C.).**

———**Art. 142**—*Discontinuance of possession—Proof.*

Where the agreement is that the plaintiff should resume possession upon repayment of the loan, possession cannot be held to be discontinued within the meaning of Art. 142.

Per *Otter, J.*—Where the mortgagee, who is in possession of the property claimed, cannot be said to be a mortgagee because the unregistered mortgage for over Rs. 100 in his favour cannot be legally proved, but it is clear that neither the mortgagor nor the mortgagee *ex hypothesi* intended that the possession of the mortgagor should be discontinued for ever, the case does not fall under Art. 142. 6 Cal. 311, Ref. (*Otter and Brown, JJ.*) MAUNG SIN *v.* MAUNG SO MIN. **8 Rang. 556=I R. 1931 Rang. 79=129 I.C. 511=A.I.R. 1931 Rang. 40.**

Dispossession.

See also MINERALS AND TRESPASSER, *infra.*

———**Art. 142**—*Dispossession.*

Where the plaintiff alleges his possession over immovable property and dispossession by the defendant, and where it is found that the possession of the plaintiff was discontinued when defendant entered into possession not as tenant of the plaintiff but in his own rights, the article of limitation applicable to such a suit is Art. 142 and not Art. 144. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYED MD. SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349= A.I.R 1931 Oudh 177.**

———**Art. 142**—*Dispossession—Suit for possession based on—Burden of proof.*

LIMITATION ACT (1908), Art. 142.

Where the plaintiff prays for possession, alleging recent forcible dispossession, the suit is governed by Art. 142 and it is for the plaintiff to establish his previous possession and dispossession by the defendant; it is not for the defendant to prove his adverse possession for more than twelve years. 108 I.C. 374, Rel. (*Abdul Qadir, J.*) SHERU *v.* SHAM SINGH. **I R. 1933 Lah. 352=143 I.C. 428=A.I.R. 1933 Lah. 627.**

———**Art. 142**—*Dispossession—Defendant pleading possession under an irrevocable license.*

Where the plaintiffs allege that they had been dispossessed two months before the suit and the defendants did not plead adverse possession but pleaded possession under an irrevocable license,

Held, that the suit was governed by Art. 142. (*Sulaiman, C. J. and King, J.*) KUNJI *v.* NIVAZ HUSAIN. **55 All. 755=152 I.C. 12=7 R.A. 297=1934 A.L.J. 147=3 A.W.R. 424=A.I.R. 1934 All. 362.**

———**Art. 142**—*Dispossession—Onus on plaintiff.*

Where the plaintiff claims the legal title to lands in dispute and she says that the defendants have entered upon these lands and interrupted her possession, to enable her to sue for recovery, it is incumbent upon her to show not only that she has a good legal title but also that the date of dispossession is less than 12 years from the date of filing the suit. As the defendants are claiming a title which really runs back to a date before the plaintiff claims a title which her predecessors-in-interest acquired, so they are not claiming ownership through possession which is, or became at some indeterminate date, adverse to the title of the plaintiff and therefore the plaintiff's suit is governed by Art. 142 and not by Art. 144 A.I.R. 1916 P.C. 21: 14 Bom. 454 and A. I R. 1929 Rang. 53, Rel. on. (*Bagulev, J.*) MA HME NI *v.* MA HMWE YAN U. **I.R. 1933 Rang. 100=144 I.C. 274=A.I.R. 1933 Rang. 48**

———**Arts. 142 and 144**—*Dispossession—Nature of—Plaintiff pleading possession and constructive dispossession.*

Where in a suit for possession, plaintiff pleads possession and dispossession, the suit is governed by Art. 142. It cannot be said that in all cases Art. 144 is to govern the case once the plaintiff has proved a title to the property. Dispossession may be either actual in the sense of an existing actual possession being forcibly terminated by actual dispossession, or it may be a legal constructive possession being terminated by a legal dispossession. (*Dalip Singh, Addison and Din Mahomed, JJ.*) BEHARI LAL *v.* NARAIN DAS. **16 Lah. 442=157 I.C. 686=8 R.N. 135=37 P.L.R. 743=A.I.R. 1935 Lah. 475 (F.B.).**

———**Art. 142**—*Dispossession—Suit based on prior possession and dispossession—Proof of possession.*

Where a plaintiff alleges definite previous acts of possession in respect of a piece of land and sues for possession on the allegation of subsequent dispossession therefrom, the proof by plaintiff of his possession may be such as the land is capable of by exercising acts of ownership thereon. The acts of ownership need not be continuous; nor need they be frequent. A party may be said to be in possession of land when he exercises such acts of ownership in respect of the same as might be expected in the circumstances of the case or having regard to the purpose for which land can be used. (*Guha, J.*) NALAKSMI *v.* ABHOY CHANDRA SIL. **149 I.C. 1109 (2)=6 R.C 713=58 C L.J. 478=A.I.R. 1934 Cal. 294.**

———**Art. 142**—*Dispossession—Suit based on—Relevancy of adverse possession.*

A suit for possession of immovable property of which the plaintiff while in possession of the property has been dispossessed or has discontinued possession is governed by Art. 142 and does not raise an issue of adverse possession; but adverse possession for over twelve years, if made out by the defendant, may imply dispossession of the plaintiff. (*Lord Macmillan.*) NAGESHWAR BUX ROY *v.* BENGAL COAL CO **58 I.A. 29=10 Pat. 407=1931 A.L.J. 537=I.R. 1931 P.C. 59=130 I.C. 315=33 Bom.L.R. 425=12 Pat L.T. 251=15 R.D. 194=35 C.W.N. 265=1931 M.W.N. 121=33 L.W. 162=53 C.L.J. 487=A.I.R. 1931 P.C. 18 and 186=60 M.L.J. 183 (P C.).**

———**Arts. 142 and 144**—*Dispossession—Suit for possession—Allegation of dispossession — Burden of proof.*

A suit for possession, the claim being based on dispossession, is governed by Art. 142 of the Limitation Act, and the burden is on the plaintiff to establish his possession within limitation. (*Srivastava and Nanavutty, JJ.*) RAM SHANKAR *v.* SHEO DUTT. **10 Luck. 513=7 R.O. 337=153 I C 371=1935 O.W.N. 8=16 L.R. 177 (Rev.)=1935 R.D. 12=A.I R. 1935 Oudh 88.**

———**Art. 142**—*Dispossession—Suit for possession on dispossession—Defendants admitting plaintiff's possession but denying dispossession—Onus.*

Where in a suit for possession on dispossession, the defendants admit plaintiff's possession up to the date of the suit and deny that they ever dispossessed the plaintiff, the latter has nothing left to prove respecting his possession within 12 years and as such it is not incumbent on him to prove dispossession within 12 years. (*Niyogi, A.J.C.*) SHEORAM *v* KISAN. **31 N.L.R. 393=158 I.C. 344=8 R.N. 77=18 N.L.J. 261=A.I.R. 1935 Nag. 205.**

———**Art. 142**—*Dispossession—Suit under—Proof of.*

In a suit falling under Art.142 the fact that the date of dispossession is not given or proved is immaterial, for, if the plaintiff can show possession within twelve years, the fact that he is not in possession at the time he institutes his suit establishes that some time in the interval he has been dispossessed. 122 I.C. 81, Foll. (*Harrison, J.*) ALI AKBAR *v.* RAKHA. **I.R. 1933 Lah. 400=144 I.C. 72=A I.R. 1934 Lah. 245.**

———**Art 142**—"*Dispossession*"—*What constitutes—Co-sharers.*

Per *Mukerji, J.*—A mere denial of title of the plaintiff on the part of a defendant who is a co-sharer of the plaintiff, and whose possession may be regarded as plaintiff's possession, will not amount to plaintiff's dispossession and the plaintiff's proper remedy will be by a suit for a declaration of title. Where the defendant's possession could be treated in law as plaintiff's possession, but the defendant subsequently transfers possession to a party whose possession cannot be any longer treated in law as the possession of the plaintiff, the plaintiff will have to regard himself as dispossessed and will have to bring his suit within twelve years of the transfer. This of course presupposes that the transfer is brought to the notice of the plaintiff and that the transfer is under circumstances which do not imply in law a continuance of the possession of the plaintiff. (*Sulaiman, C. J., Mukerji and King, JJ.*) B INDHYA CHAL CHAND *v.* RAM GHARIB CHAND. **57 All. 278=152 I.C. 1=18 R.D. 541=7 R A. 302=1934 A.L.J. 973=4 A.W.R. 821=A.I.R. 1934 All. 993 (F.B.).**

Distinction between Arts. 142 and 144.

———**Arts. 142 and 144**—*Distinction between Arts. 142 and 144.*

The question of whether Art. 142 or Art. 144 of the Limitation Act applies has to some extent to be judged

LIMITATION ACT (1908), Art. 142.

by the allegations in the plaint, where the plaintiff asserts that he had been dispossessed. But that does not necessarily conclude the matter, because the question of the onus to be determined upon the allegations of the plaintiff and the defendant. If the defendant admitted that he had dispossessed the plaintiff, then quite clearly Art. 142 would apply; but if, he asserted, that the plaintiff had never been in possession, that he (defendant) had been there and had been prescribing against him (plaintiff), the case does not come under Art. 142. It is a case which is otherwise provided for by the Limitation Act and therefore Art. 144 applies. (*Wort, J.*) KANCHAN TELI *v.* MOGA MAHTON. **152 I.C. 906=7 R.P. 271=16 Pat. L.T. 109=A.I.R. 1934 Pat. 593.**

——**Arts. 142 and 144** — *Distinction between Arts. 142 and 144.*

The essential difference between Art. 142 and Art. 144 of the Limitation Act is that when a plaintiff is suing for possession on the basis of dispossession, the burden lies on him to show that the date of his dispossession or discontinuance of possession, which gave him the cause of action for the suit, was within twelve years of the suit; while if the suit is not for possession based on the ground of dispossession, but is a suit for possession of immovable property not especially provided for in any other Article of the Act, then on proof of title the plaintiff's suit cannot be dismissed until the defendant further establishes his adverse possession for more than twelve years. Ordinarily an owner of property starts with the presumption in his favour that he is in possession of his property. But where the plaintiff admits that he has been dispossessed by the defendant or, at any rate, it is found in the case that he has been dispossessed and is not in possession at the time when he brings the suit, then he cannot start with such presumption and he would have no right of action unless he brings his suit within twelve years of the date on which he was dispossessed or when he discontinued his possession. The burden of showing that his date was within twelve years of the suit is on the plaintiff. If the Court after considering all the evidence and circumstances were to record a finding that the plaintiff had failed to prove his possession, constructive or actual, within twelve years, then the suit must fail, even though the Court does not record a finding that the defendant had established his adverse possession for more than twelve years. (*Sulaiman, C. J., Mukerji and King, JJ.*) BINDHYA CHAL CHAND *v.* RAM GHARIB CHAND. **57 All. 278=152 I.C. 1=18 R.D. 541=7 R.A. 302=4 A.W.R. 821=1934 A.L.J. 973=A.I.R. 1934 All 993 (F.B.).**

——**Art. 142**—*Distinction between Arts. 142 and 142.*

Art. 144 applies to a suit in which the plaintiff sues for possession of immovable property on the basis of his title and in such a suit if the plaintiff proves his title he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years. Art. 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on possessory title; and the burden of proving in such cases that the plaintiff was in possession and was dispossessed within 12 years from the date of the suit lies on the plaintiff. 1929 A.L.J. 1106, Foll. (*Niamatullah and Bennet, JJ.*) KALLAN *v.* MOHAMMAD NABI KHAN. **55 All. 209=I.R. 1933 All. 270=143 I.C. 497=1933 A.L.J. 105=A.I.R. 1933 All. 775.**

——**Art. 142**—Distinction between Arts. 142 and 144. *See* LIMITATION ACT, ART. 144. **8 O.W.N. 1153.**

LIMITATION ACT (1908), Art. 142.

——**Art. 142**—Distinction between Arts. 142 and 144—Test of applicability. *See* LIMITATION ACT, ART. 244—SCOPE. **11 O.W.N. 104=A.I.R. 1934 Oudh 21.**

——**Arts. 142 and 144**—*Distinction between Arts. 142 and 244—Scope and applicability—Duty to scrutinize pleadings.*

In all cases in which the applicability of Art. 142 or Art. 144 is in controversy, it is necessary to scrutinize the pleadings of the plaintiff and to ascertain exactly the allegations on which the plaintiff has come into Court and the reliefs sought by him. Sometimes the pleas raised in defence by the defendant are also relevant to the enquiry. Where the plaintiff comes into Court on the distinct allegation that the property in suit is owned and possessed by him and that some time ago the defendant forcibly and unlawfully took possession of the same, his case comes within the purview of Art. 142. Art. 144 is applicable to cases in which the property in suit is, from its nature, such that physical possession in the ordinary sense would not be possible and the plaintiff was not at any time in actual possession thereof. In such cases, the plaintiff has been to prove his title and the defendant, wno is in possession, will have to give affirmative evidence of his adverse possession for a period of 12 years. (*Agha Haidar, J.*) KAUR SAIN *v.* GULAB. **157 I C. 399=8 R.L. 100=37 P.L.R. 171=A.I.R. 1935 Lah. 507.**

Ejectment.

See POSSESSION FOLLOWING TITLE AND TRESPASSER, *infra.*

——**Arts. 142 and 144**—*Ejectment—Suit for—Defendant admittedly in possession—Proof of title and possession.*

In suits for ejectment of persons who were at the date of suit admittedly in possession of the land from which it was sought to eject them, it lies upon the plaintiffs to prove not only a title as against the defendants to their possession, but to prove that the plaintiffs had been dispossessed or had discontinued possession within twelve years immediately preceding the commencement of the suit. 18 I.C. 17 (P.C.), Rel. on. (*Ferrers, J.C., Acton, Rupchand and Malta, A. J. Cs.*) KHANU CHUHAR *v.* PAUJAL SHAH. **27 S.L.R. 341=6 I.R. (Sind) 81=146 I.C. 777=A.I.R. 1933 Sind 279 (F.B.).**

——**Art. 142**—*Ejectment—Suit for—Dispossession within 12 years—Burden of proof.*

In suit to eject a trespasser, the plaintiff under Art. 142 of the Limitation Act has to prove that the dispossession complained of took place within 12 years of the suit and that he was in possession within 22 years of the suit. (*Henderson, J.*) HAJI NAYEBALI SARKAR *v.* LALIT MOHAN ROY. **154 I.C. 714=7 R.C. 519=38 C.W.N. 1126=A.I.R. 1935 Cal. 151.**

Hindu widow.

——**Arts. 142 and 144**—*Hindu widow—Widow leaving husband's house and living in rented house—Occupation of the house by her mother-in-law—Effect of.*

Where a Hindu widow who was in possession of the house left by her husband leaves it and lives in a rented house, and her mother-in-law continues to reside in the house, and on the evidence all that can be suggested is that she found it more convenient to live apart from her mother-in-law, it cannot be said that the occupation of the house by the mother-in-law alone after she left amounts to dispossession of the widow or that the possession of the mother-in-law is adverse to her. Her possession did not discontinue and must be deemed to have continued till she was ousted by another person

LIMITATION ACT (1908), Art. 142.

claiming adversely to her. She must be considered to have had a subsisting title, even if Art. 142 be applied. (*Niamatullah, J.*) KALLU *v.* JAYANTI. **157 I.C. 696=8 R.A. 225=1935 A.W.R. 557=A.I.R. 1935 All. 639.**

Landlord and tenant.

——**Art. 142**—Landlord and tenant—Occupancy raiyat—Suit for possession of holding from landlord—Limitation—Bengal Landlord and Tenant Procedure Act (VIII of 1869), S. 27. *See* BENGAL LANDLORD AND TENANT PROCEDURE ACT, S. 27. **39 C.W.N. 502.**

——**Art. 142**—*Landlord and tenant—Suit against tenant for possession of land—Tenant using land by way of license.*

The landlords brought a suit against the tenant for possession of certain plots by removal of trees planted by the tenants on that land. The land belonged to the landlord and the user of the land by tenants was a mere use by license and not as of a legal right.

Held, that for a suit for possession of the land, Art. 142 applied and not Art. 32, as Art. 32 dealt with the case of a person having legal right to use the property. (*Sulaiman, C.J. and Bennet, J.*) GURCHARAN PRASAD *v.* JAI NARAIN SINGH. **159 I.C. 521=8 R.A. 461=1935 R.D. 400=1935 A.W.R. 1362=A.I.R. 1935 All. 964.**

——**Arts. 142 and 144**—*Landlord and tenant—Suit for possession against alleged tenant—Tenancy not proved and defendant found to be in possession for more than 12 years before suit—Suit barred.*

Where plaintiff sues for recovery of possession of certain property from the defendant alleging that the defendant is his tenant, but fails to prove the tenancy and it is proved that the defendant has been in possession for more than 12 years before suit, the suit is barred by Art. 142 if it is to be based on dispossession of the plaintiff by the defendant as such dispossession ought to have taken place within the period of 12 years next before the suit. (*Tek Chand and Monroe, JJ.*) HASAN MAHOMED *v.* AHMAD BAKHSH. **147 I.C. 285=6 R.L. 379=35 P.L.R. 144=A.I.R. 1933 Lah. 893.**

——**Art. 142**—*Landlord and tenant—Suit to recover possession—Date of dispossession—Commencement of limitation.*

A suit was filed to recover possession on the ground that the plaintiffs had shared in the cultivation of the land at the time of the death of the last tenant. The plaint mentioned the date of the tenant's death as the date of the plaintiff's dispossession. It appeared however that in fact the plaintiffs were dispossessed only after the harvest of the *Rabi* crop on the land. It appeared that the suit will be in time only from the latter date.

Held, that the plaint should be amended so as to give the proper date of the plaintiff's dispossession and that the suit was not time-barred. (*Keane, S.M. and Oppenheim, J. M.*) DIN DAYAL *v.* RAM ACHAL PANDE. **15 R.D. 293=12 L.R. 107 (Rev.).**

License.

See also LANDLORD AND TENANT, *supra.*

——**Art. 142**—License—License to use land as grazing field, threshing floor or cattle-trough—Planting of trees by licensee—Suit by owner for possession by removal of trees—Limitation Act, Art. 32. *See* LIMITATION ACT, ART. 32. **1935 R.D. 400.**

Minerals.

——**Art. 142**—*Minerals — Dispossession—Adverse possession by defendant amounting to—Mines—Sinking of pits at different places openly and without challenge.*

LIMITATION ACT (1908), Art. 142.

A coal company was in possession of a village by virtue of a lease, containing an express power to work the underlying coal. This, their lessors had no right to confer, as it was conceded that their lessors who in their turn claimed under a *sanad* granted by an ancestor of the plaintiff, had only surface rights and no rights to the underground minerals. In a suit by the plaintiff for a declaration of his title to the minerals and an injunction to restrain the company from working the coal, it was found that the village was treated as a unit of property and the minerals underlying it constituted a defined unit. Rent was paid for the village as a whole. The company had been systematically carrying on the colliery work from 1901. They sank three pits at different points and made bores in likely places, anywhere in the village they chose, openly and without challenge. Their conduct and actings were consistent only with the assertion of a right to the minerals under the whole village. In these circumstances it was held, that the fact that the company may not have worked any one pit for twelve years was immaterial, if for twelve years they have been carrying on operations in various parts of the field. The possession for over the statutory period was effective possession not only of the surface of the village but of the whole mineral field underlying it and adverse to the plaintiff. For such period the plaintiff has been dispossessed of the whole field and the suit brought in 1919 was, therefore, held to be barred by time. (*Lord Macmillan.*) NAGESHWAR BUX ROY *v.* BENGAL COAL CO. **58 I.A. 29=10 Pat. 407=1931 A.L.J. 537=I.R. 1931 P.C. 59=130 I.C. 315=33 Bom.L.R. 425=12 Pat.L.T. 251=15 R.D. 194=35 C.W.N. 265=1931 M.W.N. 121=33 L.W. 162=53 C.L.J. 487=A.I.R. 1931 P.C. 18 and 186=60 M.L.J. 183 (P.C.).**

——**S. 142**—Minerals — Zamindari — Grant of surface rights—Adverse possession of sub-soil by grantee—Art. 144 applicable and not Art. 142. *See* LIMITATION ACT, ART. 144. **58 I.A. 228=61 M.L.J. 632 (P.C.).**

Partition.

——**Arts. 142 and 144**—*Partition—Second suit for—Lands omitted in the first suit by mistake or fraud.*

Where a plaintiff brings a suit as a tenant-in-common for partition of certain survey numbers, which were not included in a previous partition suit brought by him, alleging that he was not aware of the existence of those numbers and that information about them was withheld from him either through mistake or fraud of the defendant, he is not asking for relief on the ground of fraud or mistake: the suit is governed by Art. 142 or 144 and not Art. 95 or 96. (*Wild, J.C. and Rupchand, A.J.C.*) UTTAM CHAND MANGHIR MAL *v.* SALAMATRAI KHUBCHAND. **I.R. 1931 Sind 40=130 I.C. 552=A.I.R. 1931 Sind 27.**

——**Art. 142**—*Partition—Suit for possession by partition.*

Art. 142 is restricted suits which are in terms and substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. It does not apply to a suit for possession by partition based on title. (*Raza and Bisheshwar Nath, JJ.*) ZAHIDA BEGAM *v.* MUMTAZ ALI KHAN. **I.R. 1932 Oudh 112=136 I.C. 256=8 O.W.N. 1364=15 R.D. 808=A.I.R. 1932 Oudh 122.**

Possession.

——**Art. 142**—*Possession—No evidence regarding—Presumption.*

(Per *Tyabji, J., in order of reference*).—Where there is no evidence as to who was in possession, the presumption is that the owner was in possession Plaintiff's

father purchased certain property from defendant in 1915 and died in 1918. In 1927 plaintiff sued for possession of the property alleging dispossession by defendant within 12 years of suit. There was no evidence as to who was in possession.

Held, that it must be presumed that the plaintiff's father was in possession till his death in 1918 and that the plaintiff's suit was not barred by time. (Case law referred) (*Tyabji, J.*) KRISHNAJI *v.* MADHUSA APPANSA. **58 Bom. 397 = 6 R B. 394 = 149 I C. 882 = 36 Bom L.R 445 = A.I.R. 1934 Bom. 207.**

———**Art 142**—Possession—Proof of—Suit based on prior possession and dispossession. *See* DISPOSSESSION, *supra*. **A.I.R. 1934 Cal. 294.**

Possession following title.

See also WASTE LAND, *infra*.

———**Art. 142**—*Possession following title—Applicability of presumption—Open site—Proof of possession—Effective possession not proved by other party—Result.*

The plaintiff brought a suit in ejectment alleging title under a sale deed of 1898 from the then owners of the land, possession up to 1919 and dispossession by the defendants in that year. The land in dispute was a vast stretch of open site unbuilt upon and uncultivated. It was found that for the period of twelve years before suit up to the date of the alleged dispossession in 1919, there was no effective enjoyment, no effective possession of the plot by any one either the plaintiff or the defendant. So far as title went, that of the plaintiff was found to be more reliable than that of the defendants to nearly one-third of the disputed plot. It was contended that as the plaintiff came to Court with an allegation of definite acts of possession and dispossession which he had failed to prove, he should be non-suited and the presumption of possession following title ought not under such circumstances to be applied.

Held, (*i*) the plea would be effective only if the possession presumed by law had been displaced by proof of effective acts of possession by the defendant. None such had been established by him. (*ii*) Though as a general rule the plaintiff in a suit for ejectment should prove possession within twelve years of suit, the possession to be proved is only such possession as the property is capable of. Where therefore owing to the fact that the land was an open site, neither party was able to prove any act of effective possession, possession must follow title, and the plaintiff should be granted a decree to the one third portion of the plot to which he had proved his title. 16 C. 473 ; 9 C. 744. Ref ; 26 C.W.N. 724, Not Foll. (*Wallace and Krishnan Pandalai, JJ.*) RAMANATHAN CHETTIAR *v.* LAKSHMANAN CHETTIAR. **54 Mad. 622 = I.R 1931 Mad. 697 = 133 I C. 9 = 33 L.W. 747 = A.I.R. 1931 Mad. 644 = 61 M.L.J. 224.**

———**Art. 142**—*Possession following title—Applicability of rule.*

The mere fact that the land in dispute was such as was not capable of actual continuous physical possession does not necessarily make it waste land so as to attract the application of the principle that possession follows title. (*Guha, J.*) NALAKSMI *v.* ABHOY CHANDRA SIL. **149 I.C. 1109 (2) = 6 R C. 713 = 58 C.L.J. 478 = A I.R. 1934 Cal. 294.**

———**Art. 142**—*Possession following title—Presumption—Application.*

Per *S. K. Ghose, J.*—It is doubtful if any land is altogether incapable of enjoyment. In any case it is not necessary before plaintiff can raise in his favour the presumption that possession follows title, that he must show that the land was incapable of enjoyment. He can get the benefit of that presumption if he succeeds in showing even by the evidence on the side of defence that

as a matter of fact no act of enjoyment has been exercised. (*Cuming and S. K. Ghose, JJ.*) JIRA BEWA *v.* UMA CHARAN SAHA. **I.R. 1931 Cal. 815 = 134 I.C. 319 = 53 C.L.J. 411 = A.I.R. 1931 Cal. 501.**

Religious endowment.

———**Art. 142**—*Religious endowment*—Wakf—*Suit on behalf of for possession of property unlawfully alienated by manager—Starting point.*

A representative suit brought on behalf of the Muslim community for possession of a plot of *wakf* property forming a graveyard, alleging that the defendant had unlawfully taken possession of the same and built upon it is a case to which Art. 142 of the Limitation Act applies ; and time begins to run from the date of dispossession or transfer to the defendant and not from the date of death of the manager or *takiadar* who alienated the property to the defendant. (*King, C. J. and Ziaul-Hasan, J.*) WAHID ALI *v.* MAHBOOB ALI KHAN. **11 Luck. 297 = 1935 O.W.N. 815 = 156 I.C. 92 = 7 R. O. 654 = A.I.R. 1935 Oudh 425.**

Revenue sale.

———**Art. 142**—*Revenue sale—Sale under Bengal Public Demands Recovery Act—Suit to avoid—Limitation.*

Where notice has not been served under S. 10 of the Bengal Public Demands Recovery Act and a suit is brought to set aside the sale and recover possession of the property sold, Art. 142 of the Limitation Act applies. 34 Cal. 811, Foll. (*Pearson and Jack, JJ.*) ARUN CHANDRA RAY *v.* RAMANATH KARMAKAR. **I.R. 1931 Cal. 630 (2) = 133 I.C. 102 (2) = 53 C.L.J. 524 = A.I.R. 1932 Cal. 115.**

Suit by adopted son.

———**Art 142**—*Suit by adopted son after death of widow—Allegation of previous possession and dispossession.*

A suit by an adopted son after the death of a Hindu widow for possession, alleging previous possession and dispossession is governed by Art. 142. (*Henderson, J.*) JNANADA PRASANNA BAHADURI *v.* HEMENDRA NATH ROY CHOWDHURY. **60 C.L.J. 391 = A.I.R. 1935 Cal. 228.**

Tacking.

See also TRESPASSER, *infra*.

———**Art. 142**—*Tacking—Successive trespassers—Tacking possession—Aliences from mutawalli of wakf property.*

Art. 134 does not apply to suits to avoid alienations of the general endowed property vested in the Sajjadanashin and mutawalli of a wakf. Such suits are governed by Art. 144. Where as a result of the alienations the previous encumbrances have been paid off it cannot be said that there were several trespassers in succession so as to bar the true owner under Art. 142 after the lapse of 12 years from the date of the earlier mortgage. (*Patkar and Murphy, JJ.*) HAMIDMIYA SARFUDDIN *v.* NAGINDAS JIVANJI. **57 Bom 709 = 148 I.C. 385 = 6 R.B. 294 = 35 Bom.L.R. 252 = A.I.R. 1933 Bom. 217.**

Trespasser.

See also WASTE LAND, *infra*.

———**Art. 142**—*Trespasser—Admission as to ownership coupled with refusal to give possession—Suit for ejectment—Limitation.*

If a trespasser admits that a portion of the land belongs to the owner when the owner challenges his possession but declines to vacate the land in spite of demands, there is open dispossession and the owner must bring his suit within 12 years of dispossession. The admission of the trespasser cannot give further time to the owner unless such admissions come within S. 19 of

LIMITATION ACT (1908), Art. 142.

the Limitation Act. (*Remfry, J.*) NUTBIHARI DAS *v.* BISHWESHWARI DEBEE. **60 Cal. 404=I.R. 1933 Cal. 520=144 I.C. 177=A.I.R. 1933 Cal. 414.**

Waste land.

———**Art. 142**—*Waste land—Possession follows title.*

So far as the question of possession is concerned it is indisputable that if the plaintiff is entitled to immovable property and possession thereof and the property thereof and the property sued for is a vacant unoccupied site of which actual or effective enjoyment by taking produce is not possible, possession will be presumed to be with the person who has the title. 54 M. 622, Ref. (*Krishnan Pandalai, J.*) SURANNA *v.* SUBBARAYUDU. **1933 M.W.N. 823=38 L.W. 952=147 I.C. 680=6 R.M. 379=A.I.R. 1933 Mad. 871=65 M.L.J. 769.**

———**Art. 142**—*Waste land—Presumption regarding possession—Onus of proving adverse possession.*

The plaintiff had title to the suit land which was lying waste and which the defendants cultivated in F. 1320. The plaintiff sued for khas possession on declaration of title.

Held, that the onus was upon the plaintiff to prove that he was in possession within 12 years before the suit. But when evidence had been gone into that onus may be discharged, by reference to the evidence on either side including the evidence that has been adduced for the defence. Suit held not to be barred by limitation. (*Cuming and S. K. Ghose, JJ.*) JIRA BEWA *v* UMA CHARAN SAHA. **I.R. 1931 Cal. 815=134 I.C. 319=53 C.L.J. 411=A.I.R. 1931 Cal. 501.**

———**Art. 142**—*Waste land—Suit for possession—Allegation of effective possession by plaintiff found against—Presumption of possession following title, if available to plaintiff.*

In a suit for possession of waste land, the plaintiffs alleged they were in effective possession of the land until one year prior to the suit the defendants trespassed on it. The lower Court found against the allegation of effective possession and on that account dismissed the suit. It was contended that having regard to the nature of the land which was waste land, the lower Court ought to have relied on the presumption of possession following title and as the defendant had not shown possession for more than seven years, the suit should have been decreed in plaintiff's favour.

Held, though if plaintiff proves his title, there is a presumption of possession especially in the case of waste land, yet where the plaintiffs put forward a case of effective possession and adduces evidence in support of it, then he cannot give up that case and rely upon any "presumption" in support of his possession because the special case set up by him is inconsistent with any such presumption. 67 I. C. 673, Foll. (*Madhavan Nair, J.*) SEVUGAN CHETTY *v.* KANNAPPA CHETTY. **130 I.C. 845 (2)=1931 M.W.N. 299=33 L.W. 457=A.I.R. 1931 Mad. 282=60 M.L.J. 430.**

———**Art. 142**—*Waste land—Suit for possession—Plaint alleging effective possession by plaintiff and trespass by defendant—Onus.*

Where the plaint in a suit for possession of waste land alleged that the suit property belonged to the plaintiffs by purchase, that they were in effective possession of the property for a considerable number of years and that one year prior to the suit the defendants trespassed upon the land, the suit falls under Art. 142 and not Art. 144. The onus was correctly placed by the lower Court on the plaintiffs of proving their possession within twelve years of the suit. (*Madhavan Nair, J.*) SEVUGAN CHETTY *v.* KANNAPPA CHETTY.

LIMITATION ACT (1908), Art. 143.

130 I.C. 845 (2)=1931 M W.N. 299=33 L.W. 457=A.I.R. 1931 Mad. 282=60 M.L.J. 430.

———**Art. 143**—*Applicability—Conditional gift—Non-fulfilment of condition—Suit to recover possession—Limitation.*

A Hindu widow made a gift of her land to two persons on the condition that the latter would provide maintenance for her and would render services to her during her lifetime. It was expressly provided that if the donees failed to maintain the donor or to render services to her then the latter would be entitled to revoke the gift and resume possession of the land. Alleging that from December, 1926, the donees had ceased to maintain the widow and to render her services she sued in March, 1930, for possession of the land gifted by her.

Held, that the suit was governed by Art. 143 and not Art. 114. (*Jai Lal, J.*) BUDHU *v.* HANJRO. **I.R. 1932 Lah. 645 (2).**

———**Art. 143**—*Applicability—If restricted to landlord and tenant.*

Art. 143 is in general terms. It applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. Art. 143 is not applicable only to suit between landlord and tenant. When a particular article is intended to be made applicable to suits between landlord and tenant only it is stated to be so in express terms in the Limitation Act. (*R. C. Mitter, J.*) JADUNATH GUHA ROY *v.* KASISWAR GUHA ROY. **160 I.C. 250=8 R.C. 419=A.I.R. 1935 Cal. 779.**

———**Art. 143**—"*Falls into possession*"—*Meaning.*

By the expression "falls into possession" is meant the time when a reversioner or a remainderman becomes entitled to the actual possession of the estate. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIVID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———**Art. 143**—"*Forfeiture*"—*Meaning of.*

A tenancy can be forfeited on the breach of a covenant in a lease providing in such cases for re entry, or where the title of the landlord is repudiated, but other interest owned by persons other than tenants can be forfeited by rules of law or by reason of breach of express conditions, and a person may also be entitled to possession on certain conditions being not performed. A.I.R. 1928 Cal. 714; 30 Mad. 316; A.I.R. 1920 Mad. 812; 4 All. 493 and 8 Cal. 224 (P.C.), Foll.; 22 I C. 28 and A.I.R. 1930 Cal. 165, Dist. (*R. C. Mitter, J.*) JADUNATH GUHA ROY *v.* KASISWER GUHA ROY. **160 I.C. 250=8 R.C. 419=A.I.R. 1935 Cal. 779.**

———**Art. 143**—*Service incidental to holding of land—Defendant ceasing service long before landlord's notice of termination of tenancy—Landlord's suit within 12 years—Time begins from date of determination and not from date of ceasing of service by tenant, hence suit is in time, Art. 143 being applicable.*

Where the defendant (tenant) ceased to perform the service incidental to the holding of the land long prior to the date when the landlord showed his intention to forfeit the tenancy by a notice determining the tenancy, and the landlord filed the suit within 12 years from the date of notice.

Held, that the time began to run from the date the landlord determined the tenancy and not from the date when the service ceased to be performed and that therefore the suit was in time under Art. 143, Limitation Act. (*Curgenven, J.*) VENKATARAMA *v.* PONNUSWAMI. **A.I.R. 1935 Mad. 918.**

LIMITATION ACT (1908), Art. 144.

———Art. 144. *See also* LIMITATION ACT, ART. 142.

Acquisition of title.
Adverse possession.
Agency.
Applicability.
Burden of proof.
Co-heirs
Co-mortgagors. *See* MORTGAGE, *infra.*
Co-owners.
Co-sharers.
Co-tenants.
Distinction between Arts. 142 and 144.
Ejectment.
Evidence.
Fishery right.
Hindu joint family.
Hindu widow.
Immovable property.
Interruption of possession.
Landlord and tenant.
License. *See* PERMISSIVE POSSESSION.
Math property. *See* RELIGIOUS ENDOWMENT.
Minerals.
Minor.
Mortgage.
Mutation proceeding.
Partition.
Permissive possession.
Religious endowment.
Sale.
Scope.
Space above land.
Suit on title.
Tacking.
Trespasser.
Trust.
Void transfer.
Watan lands.

Acquisition of title.

———Art. 144—*Acquisition of title—Essentials.*

Mere possession for any length of time does not *per se* create any title by adverse possession. In order to acquire such title, the possession must not only be open and exclusive but it must be also shown to have been adverse for the full statutory period. Notoriety of possession may, in some cases, justify a presumption that the true owner was aware of the character of the possession being adverse. But whether in the absence of direct proof of actual knowledge on the part of the true owner such a presumption should be raised against him or not must depend upon the special facts and circumstances of each case. Where there was no evidence of an unequivocal character which would justify the Court in presuming that the owner must have known that the possession of another was in assertion of a hostile title.

Held, that the latter cannot be said to have perfected his title by adverse possession. (*Bisheshwar Nath and Kisch, JJ.*) SURAJ BALI *v.* MAHADEO PRASAD. **7 Luck. 250=137 I.C. 678=I.R. 1932 Oudh 259=8 O.W.N. 1153=A.I.R. 1932 Oudh 46.**

———Art. 144—*Acquisition of title—Evidence.*

In a suit for declaration of title to certain land, the plaintiff claimed to have acquired title to it by adverse possession. There was no reliable evidence to prove that the plaintiffs physically dispossessed the defendants or that they ever asserted hostile title. All that was made out by evidence was that the plaintiffs had been in possession for many years, that they had never paid any rent in respect of the land and that in the village papers they had been recorded as *bila faisla* tenants whereas the tenants were recorded as proprietors.

LIMITATION ACT (1908), Art. 144.

Held, that the facts were not sufficient to establish a title by adverse possession. (*Bisheshwar Nath, J.*) BABU *v.* THAKUR DEEN. **8 O.W.N. 140=131 I.C. 400=15 R.D. 89=12 L.R. 82 (Rev.)=14 O.L.J. 290 =A.I.R. 1931 Oudh 144 (1).**

[F. 9 O.W.N. 17 (19).]

———Art. 144—*Acquisition of title—Party taking possession to the exclusion of real heir—Order in mutation proceeding—Effect.*

Where the mother of a sonless owner took possession of the property after her son's death and enjoyed it for more than 12 years to the exclusion of the son's widow who was really entitled to the property,

Held, that the mother had acquired a title by adverse possession and that it was in no way affected by the order of the Assistant Collector, who ordered mutation to the effect that she should have no power of transfer over the property. (*Raza and Smith, JJ.*) ABDUR RAHMAN KHAN *v.* AHMAD KHAN. **I.R. 1933 Oudh 203=143 I.C. 831=10 O.W.N. 42=14 L.R. 137 (Rev.)=17 R.D. 104=A.I.R. 1933 Oudh 427.**

Adverse possession.

See also MINERALS, *infra.*

———Art. 144—*Adverse possession—Commencement—Conditional decree for possession—Failure to execute.*

When a conditional decree for possession has not been executed, the possession of the decree becomes adverse to the plaintiff and the adverse possession matures into ownership after the expiry of 12 years. 64 I.C. 352, Foll. (*Shadi Lal, C.J. and Broadway, J.*) KIRPA RAM *v.* MAHOMED ZAHUR DIN. **13 Lah. 311=I.R. 1931 Lah. 795=133 I.C. 555=32 P.L.R. 786=A.I.R. 1932 Lah. 46.**

———Art. 144—*Adverse possession—Dismissed archakar—Continuance in possession of property.*

When a dismissed archaka continues in possession although another has been appointed, his possession is adverse and a suit brought more than 12 years from the date of dismissal is barred. (*Venkatasubba Rao, J.*) SAMI AYYANGAR *v.* VENKATARAMANA AYYANGAR. **150 I.C. 156=6 R.M. 702=39 L.W. 513=A.I.R. 1934 Mad. 381.**

———Art. 144—*Adverse possession—Proof—Erection of* Khurli.

The erection of a *Khurli* or a mud trough for feeding cattle cannot give rise to a claim by adverse possession. User of such sort is neither intended to denote a claim of ownership of land under it nor understood as denoting that. (*Addison, J.*) NAWAB KHAN *v.* ABDULLA KHAN. **I.R. 1931 Lah. 918=134 I.C. 294=32 P.L.R. 467=A.I.R. 1931 Lah. 489.**

———Art. 144—*Adverse possession—Essentials.*

To constitute "adverse" possession, the possession required must be adequate in continuity, publicity and in extent to show that it is possession adverse to the competitor. 27 I.A. 136; 27 Cal. 943 (P.C.), Foll. (*Sir Lancelot Sanderson.*) ALLAH RAKHI *v.* SHAH MAHOMED ABDUR RAHIM. **61 I.A. 50=56 All. 111 =6 R.P.C. 80=147 I.C. 887=38 C.W.N. 400=3 A.W.R. 387=11 O.W.N. 297=39 L.W. 421=36 Bom. L.R. 408=1934 M.W.N. 258=59 C.L.J. 157=1934 A.L.J. 466=A.I.R. 1934 P.C. 77=66 M.L.J. 431 (P.C.).**

———Art. 144—*Adverse possession—Essentials of.*

By adverse possession is meant possession adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. The possession required must be *nec vi, nec clam* and *nec precario.* It is not necessary in order to establish adverse possession, that the proof of acts of possession should cover every moment of the requisite period. The nature of the

requisite possession must necessarily vary with the nature of the subject possessed. The possession must be the kind of possession of which the particular subject is susceptible. There is no authority for holding that adverse possession should be shown to have been brought to the knowledge of the other party. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. Further, it is not necessary in order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. (*Lord Macmillan.*) SECRETARY OF STATE *v.* DEBENDRA LAL KHAN. **61 I.A. 78=61 Cal. 262 =59 C.L.J. 56=3 A.W.R. 101=36 Bom.L.R. 249= 1934 M.W.N. 165=6 R.P.C. 49=38 C.W.N. 285= 1934 A.L.J. 153=39 L.W. 257=11 O.W.N. 96=147 I.C. 545=A.I.R. 1934 P.C. 23=66 M.L.J. 134 (P.C.).**

[Reaffirm. 39 C.W.N. 352 (P.C.). **F.** 68 M.L.J. 600=62 I.A. 40 (44) (P.C.).]

——Art. 144 — *Adverse possession — Essentials to prove—Declaration of title on basis of adverse possession—Permissibility—Proof of title.*

A declaration of title may be made on proof of 12 years' adverse possession. Such a declaration cannot however be given on a title distinctly stated in the plaint or in the issues. The question of adverse possession is a mixed question of law and fact and if a party claims a title by adverse possession it is his duty to make clear allegations in the plaint and to lead evidence as regards facts from which he asks the Court to draw the inference that the proved facts amount in law to adverse possession. (*Addison and Agha Haidar, JJ.*) SHIROMANI GURDWARA PARBANDAK COMMITTEE *v.* PREM DAS. **13 Lah. 677=140 I.C. 604=I.R. 1933 Lah. 15 =33 P.L.R. 1035=A.I.R. 1933 Lah. 25.**

——Art. 144—*Adverse possession — Essentials to prove—Possession as owner with intention to oust.*

A defendant, in order successfully to set up a title by adverse possession, must show that he was in possession of the land in such a manner as to indicate that he was claiming to be in possession as an owner and was intending to oust the plaintiff. It is true that every form of occupation and every act of possession is not such as to show an intention of this kind, and is consequently not necessarily sufficient to give rise to a title by adverse possession, but each case must be decided upon its own peculiar circumstances, and whether those circumstances indicate that the person in possession was setting up an adverse claim is a question of fact. (*Allsop, J.*) RAM SHANKAR *v.* SHEO DUTT. **6 I.R. (Oudh) 198=146 I.C. 987=10 O.W.N. 1011=A.I.R. 1933 Oudh 462.**

——Art. 144—*Adverse possession—Evidence of.*

Where the defendant in proof of his plea of adverse possession over a certain land relies on various acts of enjoyment such as dumping of rubbish, tethering of cattle enclosing the land with wall, etc., such acts if they stood by themselves would not be sufficient to prove adverse possession on the part of the defendant, but they, taken in conjunction with the fact that the defendant had enclosed the land in dispute which had been in existence for a period much longer than twelve years would be sufficient proof of adverse possession. (*Abdul Rashid, J.*) MT. AISHA BIBI *v.* ALLAH BAKHSH. **154 I.C. 919=7 R.L. 613=37 P.L.R. 351=A.I.R. 1934 Lah. 684.**

——Art. 144—*Adverse possession—Mortgage decree-holders—Purchase in execution—Symbolical possession —Suit for possession.*

The defendants were in possession of the suit property as purchasers in a money decree. The plaintiffs obtained a mortgage decree and purchased the property in 1908, the sale was confirmed in 1912, and the writ of delivery taken out by the plaintiffs in 1915. The present suit for declaration of title and possession was brought in 1927 by the plaintiffs and the question was from which date the defendants could be said to have been in adverse possession.

Held, that the title of the defendants could not be said to be adverse until the plaintiff attempted to enforce his rights under the sale and that date being 1915, the suit was in time. 27 C.W.N. 259 and 33 C.W.N. 963, Foll. (*Wort and Khaja Mahomed Noor, JJ.*) RAM PRASAD OJHA *v.* BAKSHI BINDESHWARI PRASAD. **11 Pat. 165=142 I.C. 246=I.R. 1933 Pat. 132=13 Pat. L.T. 121=A.I.R. 1932 Pat. 145.**

——Art. 144—*Adverse possession—Onus of proof.*

When the title to the lands in dispute is in the plaintiffs, the onus under Art. 144 is on the defendants, who rely on adverse possession as a bar, to show that they had been in adverse possession of the lands for more than 12 years prior to the institution of the suit. (*Sir Lancelot Sanderson.*) ALLAH RAKHI *v.* SHAH MAHOMED ABDUR RAHIM. **61 I.A. 50=56 All. 111 =6 R.P.C. 80=147 I.C. 887=38 C.W.N. 400=3 A. W.R. 387=11 O.W.N. 297=39 L.W. 421=36 Bom. L.R. 408=1934 M.W.N. 258=59 C.L.J. 157=1934 A.L.J. 466=A.I.R. 1934 P.C. 77=66 M.L.J. 431 (P.C.).**

——Art. 144—*Adverse possession—Plea of—Proof.*

When a party raises a plea of adverse possession the first thing he has to establish is that he had been actually in possession of the property. (*Bisheshwar Nath and Nanavutty, JJ.*) SUKHDASI KUAR *v.* FATEH BAHADUR SINGH. **I.R. 1933 Oudh 237=144 I.C. 316= 10 O.W.N. 366=A.I.R. 1933 Oudh 283.**

——Art. 144—*Adverse possession—Proof.*

Where possession by a person not the owner is an open, visible and notorious character, the Court may presume it to be adverse. (*Bisheshwar Nath and Smith, JJ.*) INDAR GIR *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **135 I.C. 689=I.R. 1932 Oudh 49=12 L.R. 409 (Rev.)=8 O.W.N. 1275 =15 R.D 745=A.I.R. 1932 Oudh 135.**

——Art. 144—*Adverse possession — Proof—Nature of property.*

An inference of adverse possession may be drawn from circumstances, such as long possession and the absence of any proof of licence or agreement between the person in possession and the landlord, even in a village, which is largely agricultural or even where the disputed land is situated within the Municipal area. 33 All. 757, Rel. on. (*Kendall, J.*) ALOPI *v.* GAJADHAR. **I.R. 1931 All. 264=130 I.C. 296=A.I.R. 1931 All. 323.**

——Art. 144—*Adverse possession—Proof—Non-payment of rent.*

The mere non-payment of rent does not necessarily imply adverse possession. (*Tapp, J.*) BAQRI *v.* MANAK. **I.R. 1931 Lah. 1037=134 I.C. 1037=32 P.L.R. 727 =A.I.R. 1932 Lah. 72.**

——Art. 144—*Adverse possession—Starting point— When adverse.*

The starting point of limitation under Art. 144, Limitation Act, is the date when the possession of the defendant becomes adverse. In order to apply the article it must be determined first what was the nature and effect of the defendant's possession ; and that again depends on the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it. Possession to be adverse must be adequate in continuity in publicity and in extent. The classical

LIMITATION ACT (1908), Art. 144.

requirement is that the possession should be *nec vi nec clam nec paecario.* Adverse possession need not be shown to have been brought to the knowledge of the owner. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running, ought, if he exercises due vigilance, to be aware of what is happening Where the assertion of right is secret and not open, the possession cannot be held to be adverse. (*Nasim Ali, J.*) UPENDRANATH RAY *v.* JITENDRANATH KUNDU CHAUDHURI. **9 R.C. 125=62 Cal. 921=164 I.C. 61.**

———**Art. 144**—*Adverse possession—Suit by mortgagee for possession—Limitation — Starting point—Date of execution or of registration of mortgage deed.*

Where the plaintiff sued for possession as mortgagee of a certain land on the basis of a mortgage deed which was compulsorily registered and the suit was brought twelve years after the execution of the mortgage deed but within twelve years of the completion of its registration.

Held, that although under S. 47 of the Registration Regulation, the title of the plaintiff dated back to the date of the execution of mortgage deed, it was not until the registration was completed that he became entitled to take possession and the possession of the defendant became adverse only from that date and the suit was therefore in time. (*Dalal, C. J. and Sawhny, J.*) KAMLA *v.* DUNI CHAND. **37 P.L.R.J. & K. 23.**

———**Art. 144** —*Adverse possession—Title to proprietary holding—Right in* shamilat *also lost.*

A person who loses his right in a proprietary holding by adverse possession should also be taken to lose his right in *shamilat* land appurtenant thereto. (*Shadi Lal, C.J. and Tapp, J.*) KARAM DAD *v.* REHMAT. **134 I.C 1106 (2)=32 P.L.R. 634=A.I.R. 1931 Lah. 648 (2).**

Agency.

———**Art. 144**—*Agency—Transferee—Lease by agent of principal's property—Suit to set aside.*

In 1910 the agent granted a lease of his principal's property treating it as his own. The principal became aware of it only in 1915; the agency was terminated in 1922, and the suit was brought in 1925.

Held, that Art. 91 did not apply, that the possession of the agent became adverse in 1915 and the suit was not barred under Art. 144. (*Venkatasubba Rao, J.*) LAKSHMINARAYANA NAVADA *v.* MADAPPAYYA. **1931 M.W.N. 856.**

Applicability.

———**Art. 144**—Applicability—Case of dispossession. *See* LIMITATION ACT, ART. 142—DISPOSSESSION. **A.I.R. 1933 Rang. 48.**

———**Art. 144**—Applicability—Case of possession and dispossession—Possession of plaintiff discontinued when defendant entered into possession—Art. 142 applicable, not Art. 144. *See* LIMITATION ACT, ART. 142. **8 O. W.N. 349=A.I.R. 1931 Oudh 177.**

———**Art. 144**—*Applicability—Claim for possession by proprietor against non-proprietor—Limitation.*

Where a non-proprietor made a gift of the house occupied by him in favour of his sister and thereupon some of the proprietors instituted a suit for his ejectment,

Held, that the suit was in essence one for possession and was governed by Art. 144 and not Art. 120. (*Bhide, J.*) ABDUL RAHMAN *v.* MT. CHHAJJI. **I.R. 1931 Lah. 887=134 I.C. 119=33 P.L.R. 298=A.I.R. 1932 Lah. 47.**

———**Art. 144**—Applicability—Custom (Punjab)—Alienation by father - Suit by daughter for possession from alienees—Limitation. *See* PUNJAB LIMITATION ACT, SS. 7 AND 8 AND ART. 2 (2). **16 Lah. 237.**

LIMITATION ACT (1908), Art. 144.

———**Arts. 144 and 142**—Applicability—Defendant asserting that the plaintiff had never been in possession that he had been prescribing against the plaintiff—Art. 144 applies. *See* LIMITATION ACT, ARTS. 142 AND 144—APPLICABILITY. **A.I.R. 1934 Pat. 593.**

———**Art. 144**—*Applicability—Delivery of possession to mortgagee-decree-holder—Subsequent dispossession—Suit for recovery of possession—Starting point.*

Where the land in actual possession of the judgment-debtor was in execution delivered to the decree-holder under O. 21, R. 35 (1), C. P. Code, and subsequently the judgment-debtor dispossessed the decree-holder and regained possession, the decree-holder has twelve years from such dispossession to bring another suit for recovery of possession of the land. The fact that the judgment-debtor did not consent to, or was not apprised of, the delivery of possession to the decree-holder is not necessary under O. 21, R. 35 or material to the question of limitation. 5 C. 584; 34 M.L.J. 97 (P.C.), Foll. (*Tek Chand, J.*) MOHAN LAL *v.* FATOO. **I.R. 1933 Lah. 9=140 I.C. 530 (2)=33 P.L.R. 1082=A.I.R. 1933 Lah. 22.**

———**Art. 144**—*Applicability — Dispossession not alleged.*

Where the plaintiff does not claim to have been dispossessed or to have discontinued possession. Art. 144 and not Art. 142 applies. (*Pollock, A.J.C.*) GANPATRAO *v.* VITHOBAI. **30 N L.R. 284=6 R N. 165=148 I.C. 62=A.I.R 1934 Nag. 36.**

———**Art. 144**—*Applicability—Essentials.*

In cases falling under Art. 144 where the defence was one of title acquired by adverse possession for more than 12 years, it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I. R. 1931 Oudh 177.**

———**Art. 144**—Applicability—Plaintiff being owner—Defendant continuing in independent possession—Art. 142 applies, not Art. 144. *See* LIMITATION ACT, ART. 142. **A.I.R 1933 Rang. 413.**

———**Arts. 144 and 142**—*Applicability—Suit for confirmation of possession—No disturbance alleged.*

Where the plaintiff, who was for a long time in possession of the suit land without any disturbance, sued for a declaration that an entry in the record-of-rights showing the plot as jointly belonging to the touzis of the plaintiff and the defendant was erroneous and for confirmation of possession,

Held, neither Art. 142 nor Art. 144 was applicable to the suit. The plaintiff has no cause of action and the suit must fail, since it is not based on any allegation or proof of interference or threat of interference by the defendant with the plaintiff's possession which he claims, except in so far as such interference in the future may be inferred as likely from the fact that in the record of-rights, the land has been recorded as belonging to two touzis jointly. (*Pearson and Mallik, JJ.*) NAGENDRA KISHORE ROY CHOUDHURY *v.* BROJENDRA KISHORE ROY. **I.R. 1932 Cal. 650=139 I.C. 759=56 C.L.J. 316=36 C.W.N 783=A.I.R. 1932 Cal. 842.**

———**Art. 144**—Applicability— Suit for declaration and injunction—Alluvial lands—Grant by Collector—Art. 120 applicable not Art. 144 or 14. *See* LIMITATION ACT, ART. 120. **55 Bom. 447=A.I.R. 1931 Bom. 369.**

Burden of proof.

See also ADVERSE POSSESSION, *supra* AND SUIT ON TITLE, *infra.*

LIMITATION ACT (1908), Art. 144—Burden of of proof.

———**Art. 144**—*Burden of proof.*

If Art. 142 applies, the *onus* would be upon plaintiff to prove that his suit is not time-barred. It is otherwise if the case falls within Art. 144; for in such case the *onus* would be upon the defendant to prove that his possession had been adverse to that of the plaintiff for more than 12 years. 14 Bom. 458 and 2 L.B R. 56. Ref. (*Otter and Brown, JJ.*) MAUNG SIN *v.* MAUNG SO MIN. **8 Rang. 556=I R. 1931 Rang. 79 =129 I.C. 511=A.I.R. 1931 Rang. 40.**

———**Art. 144**—*Burden of proof.*

In a case falling under Art. 144, the onus is on the defendant to show that he has acquired a title by adverse possession at the time of the action. (*Wort and Khaja Mahomed Noor, JJ.*) RAM PRASAD OJHA *v.* BAKSHI BINDESHWARI PRASAD SINHA. **11 Pat. 165 =142 I.C. 246=I.R. 1933 Pat. 132=13 Pat.L.T. 121=A.I.R. 1932 Pat. 145.**

———**Art. 144**—*Burden of proof—Adverse possession—Onus to prove undertaken—Failure to do so—Whether Court is bound to presume possession from title.*

When *prima facie* title is proved by the plaintiff, onus is shifted to the defendant to prove adverse possession. But where the trial Court required the plaintiffs to prove in the first instance that they were in possession within 12 years of the suit and it only required the defendants to prove adverse possession in the event of the plaintiffs failing to establish this fact and the plaintiff accepted this but failed to discharge the burden.

Held, since the plaintiff took no objections to the frame of the issues made by the trial Court, he cannot subsequently complain that onus has been wrongly placed on him and that his possession must be presumed from title. When a party accepts the burden of proof laid on him by the trial Court and undertakes to discharge it but fails to do so, he cannot in appeal turn round and say that he has not been fairly treated in the matter of burden of proof. Since the plaintiffs accepted the onus of proving before the trial Court that they had leased the properties to the defendant about three years before the suit and that in any case they had been in possession within twelve years before the suit, the appellate Court is not bound to presume possession from the very start and to remand the case to enable the defendants to establish adverse possession for more than twelve years. (*Sale, J.*) BISHAMBAR DAS *v.* TELU RAM. **A.I.R. 1934 Lah. 1019 (2).**

———**Arts. 144 and 142**—*Burden of proof—Plaintiff's title admitted to jungle land.*

It was admitted that the lands were parti and jungle lands and that the plaintiffs had a title to it but the defendants claimed a limited tenancy interest only as against the admitted proprietor, the zemindar.

Held, that the defendant must either show title to tenancy right by contract or by the fact that he has been in possession for the necessary period and the onus is equally upon him to show the date upon which he came into possession and his title began. Such cases are governed by Art. 144 and not by Art. 142 and it is impossible for the Judge in trying such a suit to raise any presumption against the plaintiff by reason of the absence of any witness on the part of the plaintiff. (*Wort and Agarwala, JJ*) KAMESHWAR SINGH BAHADUR *v.* FATURI MISRA. **6 R.P. 617 (2)=149 I C. 453 (2)=A.I.R. 1934 Pat 339.**

———**Art. 144**—*Burden of proof—Plaintiff's title found—Defendant's adverse possession not found—Decree in favour of plaintiff.*

The plaintiffs who sued to recover possession of certain property alleged that some six or seven years before the suit, the premises had been let out to the defendant for rent and that the latter had agreed to pay rent. It appeared that the plaintiff's predecessor-in-interest had filed a previous suit for a declaration that he was the owner of the property and the same had been decreed.

Held, that though the plaintiff's allegation as to tenancy was wrong, since their title was found they were entitled to succeed in the absence of proof by the defendant that he had been in adverse possession for over 12 years. (*Mukerji and Niamatullah, JJ.*) MAHOMED ISHAQ *v.* MT. ZINDI BEGAM. **I.R. 1931 All. 845=134 I.C. 461.**

LIMITATION ACT (1908), Art. 144—Co-heirs.

———**Art. 144**—*Burden of proof—Plaintiff's title proved—Dummy defendant claiming possession.*

Semble.—It would be a most dangerous doctrine to hold that if a mere dummy is set up to claim possession of the disputed property and deny the plaintiff's possession within limitation without any shadow of claim of his own either by title or by possession, this would throw the burden of proving possession within limitation on the plaintiff whose title is established. (*Kisch, J.*) ZAHIDA BEGAM *v.* MUMTAZ ALI KHAN. **I.R. 1931 Oudh 391=134 I.C. 599=12 L.R. 312 (Rev.)=8 O.W.N. 921=15 R.D. 566=A.I.R. 1931 Oudh 382.**

———**Arts. 144 and 142**—*Burden of proof—Suit for possession both on ground of title and dispossession—Burden of proof.*

In cases where the plaintiff sues for possession of immovable property both on the ground of title and on the ground of his possession having been disturbed by the defendant, if he proves his title, the burden of establishing title by adverse possession lies upon the defendant and if the defendant succeeds in proving that fact the suit must fail, otherwise the plaintiff is entitled to a decree. To this extent Art. 144 will apply to such a suit. But it may be that the plaintiff though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within 12 years. If that be the case Art. 142 will apply and the burden will be on the plaintiff. (*Kaza and Smith, JJ.*) MAHOMED MAHMUD *v.* MAHOMED AFAQ. **6 R O. 299 (2)=147 I.C. 805=11 O.W.N. 104=A.I.R. 1934 Oudh 21.**

———**Art. 144**—Burden of proof—Suit for possession—Claim based on dispossession. *See* LIMITATION ACT, ARTS. 142 AND 144. **1935 O.W.N. 8=A.I.R. 1935 Oudh 88.**

Co heirs.

———**Art 144**—*Co-heirs—Denial of title regarding one item of property—Effect regarding other items.*

Where the title of the co-heirs relates to a number of properties, any assertion of adverse title with reference to any one of the properties whether they are included in the plaint or not might have some bearing upon the question of adverse possession. (*Sen and Niamatullah, JJ.*) SHAMIM AHMAD *v.* HESAMUL HAQ. **131 I.C. 211=1930 A.L.J. 1456=A.I R. 1931 All. 193.**

———**Art. 144**—*Co-heirs — Mahomedan co-heirs—Denial of title—Act of management by person in exclusive possession.*

Where a Mahomedan heir dies leaving a number of heirs and only one of the heirs remains in possession of the property his possession is not adverse to the other co-heirs in the absence of a clear denial of title and an overt act amounting to ouster. The mere fact that he exclusively grants a lease is not sufficient denial of title. (*Sen and Niamatullah, JJ.*) SHAMIM AHMAD *v.* HESAMUL HAQ. **131 I.C. 211=1930 A.L.J. 1456 =A.I.R. 1931 All. 193.**

LIMITATION ACT (1908), Art. 144—Co-heirs.

———**Art. 144**—*Co heirs — Mahomedan co-heirs—Denial of title—Suit for declaration—Time limit.*

The plaintiff was entitled to a third share in certain property as one of the heirs of the deceased. There was a denial of her right by another co-sharer, who sold the entire property but the plaintiff did not challenge the sale, because she continued in joint possession. Subsequently however a cloud was thrown upon her title in a criminal case and she sued for a declaration of her title.

Held, that the suit having been brought within 12 years of the original sale was maintainable. (*Harrison and Tek Chand, JJ.*) JALAL DIN *v.* MT. KARAM NUR. **I.R. 1931 Lah. 939=134 I.C. 491=32 P.L.R. 381.**

———**Art. 144**—*Co heirs — Mahomedan heir—Suit against co heir for recovery of share—Starting point.*

A suit brought by a Mahomedan heir against his co-heir (elder brother) to recover his share of their deceased father's immovable property is not governed by Art. 123 of the Limitation Act but by Art. 144 and time commences to run against the plaintiff only when the possession of the defendant became adverse. Possession held by the mother on behalf of both her sons cannot be deemed to be adverse to either of them. (*Sir George Lowndes.*) GHULAM MAHOMED *v.* SHAIKH GHULAM HUSAIN. **59 I.A. 74=54 All. 93=I.R. 1932 P.C. 118 =1932 A.L.J. 245=136 I.C. 454=34 Bom L.R. 510 =9 O.W.N. 399=35 L.W. 464=36 C.W.N. 310 =55 C.L.J. 470=A.I.R. 1932 P C. 81=62 M.L.J. 371 (P.C.).**

[**Expl.** 56-A 711 (716, 717).]

———**Art. 144**—*Co-heirs—Mahomedan heir—Suit for the recovery of share.*

Where a Mahomedan dies intestate, his estate vests in his heirs as tenants-in-common and no one is charged by law with its distribution and if a suit is brought by one of the heirs to recover his share, Art. 123, does not apply but Art. 144 will apply in the case of immovable property. A.I.R. 1929 Lah. 549 and A.I.R. 1928 All. 467 (F.B.), Rel. on; A.I.R. 1926 P.C. 145, Expl. and Dist.; A.I.R. 1922 Mad. 457 and A.I.R. 1918 Bom. 54, Dist. (*Jai Lal and Abdul Rashid, JJ.*) MT. GHULAM BIBI *v.* MT. SARWAR BIBI. **14 Lah. 794=148 I.C. 1143=6 R.L. 643=35 P.L.R. 121=A.I.R. 1933 Lah. 784 (2).**

———**Art. 144**—*Co-heirs—Ouster—Proof.*

The mere statement by some of the co-heirs that they are the exclusive heirs of the deceased cannot amount to an overt act which would make the statute of limitation run against the other co-heirs. In such cases in order to prove title by adverse possession, there must be ouster. *Corea* v. *Appuhamy*, 1912 A.C. 230, Appl. (*Tek Chand and Agha Haidar, JJ.*) SALHUM *v.* MALKU. **I.R. 1931 Lah. 377=131 I.C. 105=A.I.R. 1931 Lah. 439.**

Co owners.

———**Art. 144**—*Co-owners — Acquisition of title against stranger—Continuity of possession—Case not one of independent trespassers.*

The defendants were shown to have made an encroachment on the adjacent land belonging to the plaintiff and the revenue records showed that one or other of them were in continuous possession of them. The plaintiff sued to recover the land after the expiry of 12 years.

Held, that the defendants co-owners could be presumed to have trespassed on the suit land jointly, that possession by one of them was really possession for all and that the suit was consequently barred by limitation,

Held, further, that it was not a case of independent trespassers and that the question of abandonment of possession by the original trespassers did not arise. (*Jai Lal, J.*) ASIMULLAH *v.* GHULAM MAHOMED. **131 I.C. 341=32 P.L.R. 246=A.I.R. 1931 Lah. 232.**

LIMITATION ACT (1908), Art. 144—Co-owners.

———**Art. 144**—*Co-owners—Ouster.*

When the parties are co-sharers, co owners or tenants-in-common and no partition has taken place between them, the sole occupation of one of them is not *prima facie* inconsistent with the right of others. Mere non-participation in the profits by one and exclusive occupation and enjoyment of the joint property by the others is not *per se* adverse in order that possession may be adverse, there must be (1) a disclaimer of the others' right by an open assertion of a hostile title on the part of the co-owner setting up adverse possession, and (2) notice thereof to others, either direct or to be inferred from notorious acts and circumstances. (*Middleton, J. C. and Saaduddin, A.J.C.*) MT. YAKUT *v.* INAYATULLA. **6 R.Pesh. 63=148 I C. 926=A.I R. 1934 Pesh. 7.**

———**Art. 144**—*Co-owners—Ouster—Exclusion from enjoyment of profits.*

If the person possessed of legal title to an estate is also in the enjoyment of the profits of that estate more or less, his title cannot be held to have been extinguished by reason of the physical possession of the estate held by another person who has no title to it. Such person cannot put an end to the possession of legal owner by any secret intention in his mind. There must be an ouster or equivalent to an ouster. (1912) A.C. 230 and L.R. 53 I.A. 220, Ref. *Wazir Hasan, C.J. and Pullan, J.*) EJAZ ALI KIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS. **6 Luck. 106=I.R. 1931 Oudh 113 (2)=130 I.C. 65 (2)=7 O.W.N. 988 =A.I.R. 1930 Oudh 510.**

[**Affirm.** 68 M.L.J. 397 (404) (P.C.)]

———**Art. 144**—*Co-owners—Ouster—Proof.*

There can be no adverse possession by one co-owner against another until there is an ouster or something equivalent to an ouster of the latter. The original owner died in 1896. Sood after, the entire suit property was the subject of alluvial action of a river and when it emerged a trespasser took possession of it. In 1889 the defendant, one of the members of the joint family entitled to the property, instituted a suit against the trespasser and recovered possession under a compromise decree. He subsequently sued and recovered rent from trespassers on the land. It appeared that the joint family became divided in 1912 or 1913, but the defendant was left in exclusive possession of the said property. The other members of the family having instituted a suit to recover his share of the property,

Held, that the plea of ouster has been made out and that defendant had obtained a title by adverse possession. 27 O.C. 77, Rel. on. (*Hasan, C J. and Kisch, J.*) PAHLAD SINGH *v.* KALKA SINGH. **I.R. 1931 Oudh 299=132 I.C. 539=14 O.L J. 467=8 O.W.N. 710.**

———**Art. 144**—*Co owners—Ouster—Proof.*

In the case of co owners in the absence of an open assertion of a hostile title by one to the knowledge of the others, there can be no ouster. Mere non participation in rents and exclusive occupation by another will not establish adverse possession. Nor can an assertion of hostile title made in a suit to which the other co-owners are not parties be sufficient. (*Broadway, O.C.J. and Bhide, J.*) ANANT RAM *v.* KISHORE CHAND. **135 I.C. 686=I.R. 1932 Lah. 158=32 P.L.R. 824=A.I.R. 1932 Lah. 143.**

———**Art. 144**—*Co-owners—Ouster — Proof—Exclusive enjoyment not sufficient.*

LIMITATION ACT (1908), Art. 144—Co owners.

With regard to co-owners of joint property, the law is that there should be an ouster and adverse possession after ouster for more than 12 years, before one co owner can succeed against another. To establish adverse possession as between co-owners of joint properties, there must be evidence of open assertion of hostile title by one to the knowledge of the other. Mere exclusive use of a common well and incurring of costs for the repair of the property by one is not sufficient. Nothing short of ouster can bring about that result. The plaintiff's possession, as co-owners must be referred to their lawful title and he cannot be allowed to assert that he has acquired title by prescription on the ground that the defendant (the other co-owner) has not been in possession for some 15 years before suit and that he had a secret intention to exclude the other completely from possession. (Case-law reviewed.) (*Addison and Currie, JJ.*) NARSINGH DAS *v.* GOKAL CHAND. **12 Lah. 101=I.R. 1931 Lah 529=132 I.C. 177=32 P.L.R 316=A I.R. 1931 Lah. 339.**

———**Art. 144**—*Co-owners—Redemption of mortgage by one—Suit for possession by other—Limitation—Starting point.*

When one of two co owners redeems a mortgage, he does not become a mortgagee but is a mere charge-holder and a suit by the other co-owner to recover possession is governed by Art. 144 and not Art. 148 of the Limitation Act and the starting point is the date of redemption. Rule as to adverse possession among co owners stated. (*Broadway and Johnstone, JJ.*) GANDA RAM *v.* MUNSHI RAM. **136 I.C. 264=I.R. 1932 Lah. 216=32 P.L.R. 649.**

[F. 34 P.L.R. 239 (241).]

———**Art. 144**—*Co-owners — Tenants in common—Ouster—Non participation in profits—Denial of title.*

The possession of one tenant in common would not be adverse to the other until ouster. In a suit by a member of one branch of family against a representative of another branch for possession of certain villages, which the plaintiff contended, had continued undivided after a division between the members of the family long ago, the question was if the defendants had been in adverse possession for over twelve years. With reference to three villages, the defendant's predecessors had been in sole possession and participation of the profits of the villages for more than the statutory period and as early as 1884, in the revenue proceedings of that year the interest of the first plaintiff in those villages was denied by the defendant's predecessor. With reference to the fourth, there was no denial of title prior to 1912; but having regard to the separation of the branches, non-participation of profits since 1880, and the omission of this village in the list of properties handed over to the first plaintiff on his attaining majority by his guardian, the possession of the defendant was adverse for more than the statutory period and the suit was, therefore, barred by Art. 144. (*Sir John Wallis.*) GOVINDRAO *v.* RAJABAI. **58 I.A. 106=27 N.L.R. 131=I.R. 1931 P.C. 81=130 I.C. 673=33 L.W. 439=53 C.L.J. 313=14 N.L.J. 56=35 C.W.N. 438=33 Bom.L.R. 442=A I.R. 1931 P.C. 48=60 M.L.J. 386 (P.C.).**

[D. 1934 Pesh. 7 (9) R. 61 C. 37 (383)]

Co-sharers.

———**Art. 144**—*Co-sharers.*

The possession of one co sharer of a share belonging to another recorded co-sharer is not adverse. (*Oakden, S. M. and Keane, J. M.*) BHULAI UPADHAYA *v.* BHAGWANTA. **15 R.D. 151=12 L.R. 25 (Rev.).**

———**Art. 144**—*Co-sharer—Adverse possession—Essentials.*

LIMITATION ACT (1908), Art. 144—Co-sharers.

The possession of one co-sharer must be deemed to be the possession of the other co-sharers and it is for the co-sharer in possession in order to defeat the title of the absentee co sharer or his descendants to prove that by some overt act he converted his possession into an adverse possession to the other co-sharers, an overt act of which such co-sharer had knowledge. (*Jai Lal, J.*) BELI RAM *v.* MUNSHI. **15 Lah. 907=154 I.C. 983=7 R.L. 621=37 P.L.R. 195=A.I.R. 1934 Lah. 456.**

———**Art. 144**—*Co sharers — Adverse possession—Evidence of—Exclusive receipt of profits.*

To constitute adverse possession as between tenants-in-common, there must be an exclusion or an ouster. Exclusive receipt of profits continuously for a long period may point to an ouster, if the Court is satisfied that such taking of profits is an indication of a denial of right in the other co tenant to receive them. 35 Cal. 961, Ref. (*Shingne' J.*) ANANT GANPATI *v.* VISHNU RAMBHAN. **58 Bom. 410=154 I.C. 824=7 R.B. 375=36 Bom.L.R. 284=A.I.R. 1934 Bom. 273.**

———**Art. 144**—*Co sharers — Adverse possession—Knowledge of the true owner, if necessary.*

It is sufficient if adverse possession is adequate, continuous and exclusive, the true owner must be vigilant and it does not prevent time running if he could have obtained, but did not actually obtain, knowledge of the adverse possession. (*Macnair, J.C.*) MURADUDDIN *v.* MT. UMRAOBI. **28 Nag L.R. 282=140 I.C. 831=I.R. 1933 Nag. 14=A.I.R. 1933 Nag. 27.**

———**Art. 144**—*Co-sharers — Adverse possession—Proof—Inequality of shares—If material.*

It is possible though rare for a co-sharer to assert his adverse title as against the other co sharers. Where in prior proceedings the party never took up the position that he had been in occupation adversely of more than his share except the *kothri*,

Held, that he had failed to establish adverse title except as regards the *kothri*. Where two co-sharers are in possession of unequal shares, and the co-sharer in possession of the bigger share sues to eject the other on the ground that the other is no sharer at all and fails, his suit alone is not sufficient to constitute adverse possession as regards the bigger share in his possession, though adverse possession against a co-sharer is not impossible. The inequality of shares possessed is immaterial. (*Harrison, J.*) MT. RAKHI *v.* MT. KHAIRAN. **I.R. 1932 Lah. 604=139 I.C. 676=33 P.L.R. 261=A.I.R. 1932 Lah. 421.**

———**Art. 144**—*Co-sharers — Brothers and sister—Living amicably—Proof of adverse possession.*

Where brothers and sister are co-sharers and are living amicably together, the brothers cannot establish title by adverse possession against the sister unless they had expressly set up an adverse title to her knowledge. A. I. R. 1924 All. 384, Foll. (*Banerji and King, JJ.*) MD. MOHIT ULLAH *v.* BIBI HALIMA BEGAM. **54 All. 742=13 L.R. 298 (Rev.)=I.R. 1932 All. 546=139 I.C. 176=16 R.D. 476=1932 A.L.J. 621=A.I.R. 1932 All. 666.**

———**Art. 144**—*Co-sharers—Continuity of adverse possession—When it breaks.*

Where *A* and *B* held a two thirds share in a house and the plaintiff and the defendant jointly held the remaining one third share, and *A* and *B* transferred their two-thirds share to the plaintiff in 1924, it was a transfer by one co-sharer to another, and the continuity of the adverse title set up by the defendant in 1915 was thus broken and could not prevail against one who was at the time of the transfer a co-sharer in the property. (*Tapp, J.*) SONU MALIK *v.* BHERI MALIK. **I.R. 1931 Lah. 954=134 I.C. 522=A.I.R. 1931 Lah. 251**

LIMITATION ACT (1908), Art. 144—Co-sharers.

———**Art. 144**—*Co sharers — Cultivating possession af one—Effect on others.*

Where one of several co-sharers in an occupancy holding is in actual cultivating possession thereof, his possession cannot be considered to be wrongful nor can he be said to be in wrongful receipt of the profits accruing from the holding belonging to them in common. Possession of one of the co sharers or receipt of income derived by him from the joint holding is on behalf of all the co-sharers and there is no wrongful receiving of the profits. (*Niamatullah, J.*) AMJAD ALI *v.* AZIZUDDIN. **132 I.C. 201 (1)=A.I.R. 1931 All. 551.**

———**Art. 144**—*Co-sharers—Denial of title and ouster —Suit for possession.*

In cases where the litigating parties are co-owners or co-tenants having an equal right to use property for a specified purpose, the presumption of law is that the possession of one is the possession of all. Every such person is seized of the property *per my et per tout*, and anything short of denial of title cannot destroy the plaintiff's right. To suits between co-owners or co-tenants *inter se*, where the title of one is denied by the other, Art. 144 or Art. 120 of the Limitation Act would apply, according as the relief claimed is one for possession or injunction. (*Shadi Lal, C.J., Broadway, Tek Chand, Jai Lal and Dalip Singh, JJ.*) MASTAN SINGH *v.* SANTA SINGH. **14 Lah. 267=6 I.R. (Lah.) 113=145 I.C. 553=34 P.L.R. 618=A.I.R. 1933 Lah. 705 (F.B.).**

———**Art. 144**—*Co-sharers—Lessees from different co-owners—Adverse possession by one — Effect against tenure-holder.*

Lessees of different shares under different co-owners in a Zamindari are not themselves co-owners. Where they assert a hostile title to the true owner, adverse possession commences from the date when the owner has knowledge of the same and he cannot institute a partition suit on the footing that he had been in joint possession all the time. (*Guha and Bartley, JJ.*) MONI MOHAN PAL *v.* GOUR CHANDRA DAS. **60 Cal. 1212=149 I.C. 111=6 R.C. 518=37 C.W.N. 835=A.I.R. 1934 Cal. 71.**

———**Art. 144**—*Co sharers—One co sharer redeeming entire mortgage—Suit by other co sharer for his share—Limitation—Starting point.*

A suit by a co sharer for recovery of possession of his share brought against another co-sharer who has redeemed the entire mortgage cannot be considered to be governed by Art. 148 but must be deemed to be governed by Art. 144. Limitation in such a case commences to run against the plaintiff ever since the defendant obtained possession and mutation. 9 O.C. 91, Foll. (*Bisheshwar Nath, J.*) RAM AGRE RAMUDIT. **I.R. 1931 Oudh 261=132 I.C. 261=14 O.L.J. 472=8 O.W.N. 637.**

———**Art. 144**—*Co-sharers—Ouster.*

In the case of co-sharers there should be proof of ouster in order to establish adverse possession. Ouster held not to be proved. (*Hasan, C.J. and Nanavutty, J.*) KARAM BIBI *v.* RAHIM KHAN. **18 R.D. 39.**

———**Art. 144**—*Co sharer—Ouster—Evidence.*

Exclusive possession by a co-sharer is not an assertion of exclusive title. What amounts to ouster is a question of fact depending on the circumstances of each case. Where the co sharer has built his residential house on the land, it amounts to as assertion of hostile and exclusive title to the knowledge of the co-sharers. (*Dalip Sigh, J.*) JIWA RAM *v.* MAN SINGH. **6 R.L. 611=(1)=148 I.C. 943=A.I.R. 1934 Lah. 84 (1).**

LIMITATION ACT (1908), Art. 144—Co-sharers.

———**Art. 144** — *Co-sharer — Ouster—Evidence — Receipt of income.*

It is a well accepted rule that as between co-sharers possession of one and non-receipt of profits by the other do not set limitation running against the co-sharer not in possession. In the absence of ouster, there can be no adverse possession in such a case. Ouster implies denial of the right of the claimant to his or her knowledge, actual or presumed. (*Niamatullah and Rachhpal Singh, JJ.*) FAZAL HUSAIN *v.* MAHOMED KAZIM. **56 All. 582=1934 A.L.J. 544=150 I.C. 81=18 R.D. 374=6 R.A. 1027=15 L.R. 465 (Rev.)=4 A.W.R. 1427=A.I.R. 1934 All. 193.**

———**Art. 141**—*Co-sharers—Ouster—Proof.*

The parties were co-sharers. The defendant had remained in occupation of the land for 25 years against the plaintiff's will. In spite of this, plaintiff slept over his right and never demanded any rent.

Held, that the possession was adverse. (*Kisch, J.*) SHEORAJ NARAIN *v.* JAGANNATH PRASAD. **I.R. 1931 Oudh 324=132 I.C. 772=12 L.R. 193 (Rev.) =15 R.D. 424=8 O.W.N. 854=A.I.R. 1931 Oudh 381.**

———**Art. 144**—*Co sharers—Ouster—Proof.*

Although as a general rule one co sharer has no right to take exclusive possession of a joint property, the question whether such exclusive possession amounts to ouster or not depends on the circumstances of each particular case and in a case where it cannot be held that there has been ouster the exclusive possession of a co-sharer should not be disturbed at the instance of another who is similarly in possession of another portion of the joint property. In such a case the fact that one person constructs buildings upon land is not such an injury as cannot be remedied in a partition suit. 89 I.C. 831, Ref. (*Coldstream and Johnstone, JJ.*) YARA *v.* JALAL. **135 I.C. 38=I.R. 1932 Lah. 22=32 P.L.R. 653=A.I.R. 1931 Lah. 631 (2).**

———**Art. 144**—*Co sharers—Ouster — What constitutes—Resistance to possession coupled with denial of title.*

Where there is an actual turning out or keeping excluded the co-tenant entitled to joint possession, there is an ouster. Where in spite of a decree for a joint possession in plaintiff's favour and an order in execution for formal delivery of possession, the defendant resisted all attempts of the plaintiff and effectively prevented him from obtaining actual possession, the resistance, coupled with an open denial of plaintiff's title amounts to ouster and where persisted in for more than 12 years, bars the plaintiff's rights. (*Iqbal Ahmad and Bajpai, JJ.*) AMBIKA PRASAD UPADHYA *v.* SADA SHEO LAL. **55 All. 173=14 L.R. 734 (Rev.)=149 I.C. 819=6 R.A. 988=1933 A.L.J. 33=A.I.R. 1933 All. 173.**

———**Art. 144**—Co-sharers—Partition — Arbitration —Award—Clause embodying contract to convey interest in immovable property by one co-sharer to another—Suit to enforce—Limitation. *See* LIMITATION ACT, ARTS. 113, 120 AND 144. **39 C.W.N. 716.**

———**Art 144**—*Co-sharers—Possession by one is not adverse to another.*

The possession of a co owner of joint undivided property can never be deemed to be adverse to any one who is lawfully entitled to joint possession with him. (*Nanavutty and Smith, JJ.*) ABDUL QAYUM *v.* ABDUL RAHMAN **8 Luck. 602=6 I.R. (Oudh) 160 (2)=146 I.C. 710=10 O.W.N. 844=A.I.R. 1933 Oudh 439.**

———**Art. 144**—*Co sharers—Proof of ouster.*

If a property belongs to several co sharers and one co-sharer is in possession of the entire property, his pos-

LIMITATION ACT (1908), Art. 144—Co-sharers.

session cannot be deemed to be adverse to other co-sharers. He must be deemed to be in possession on behalf of the other co sharers and adverse possession cannot be founded on the basis of such exclusive possession unless there has been an ouster of the other co-sharers or a successful assertion of right to the sole enjoyment of the property. (*Smith, J.*) BRAHMA SINGH *v.* RAGHURAJ SINGH. **149 I.C. 1172=6 R.O. 611=15 L.R. 118 (Rev.)=18 R.D. 21=10 O.W.N. 1326=A.I.R. 1933 Oudh 560.**

———**Art. 144** — *Co-sharers—Property belonging to joint family—Possession by stranger for over twelve years—Subsequent purchase by a member of joint family with his own funds—Nature of his possession.*

In the case of joint property, possession on exclusive occupation by one co-sharer without more is not sufficient to constitute ouster or adverse possession even if such exclusive possession extends beyond the statutory period of twelve years. But this rule has no application to a case where some items of joint property were rightly or wrongly taken possession of by a stranger and passed out of the joint family and the stranger having been in possession thereof for more than twelve years and acquired an indefeasible right to them by adverse possession, one of the joint family members purchased them from the stranger with his own money. In such a case, the possession of that member cannot be said to be the possession of a co-sharer. (*Mitter and Henderson, JJ.*) SUBODHCHANDRA NIYOGI *v.* BHUBALIKA DASEE. **60 Cal. 1406=149 I.C. 410=6 R.C. 580=A.I.R. 1934 Cal. 356.**

———**Art. 144**—*Co-sharer — Suit by co-sharer on dispossesssion by transferee of another co-sharer.*

Where a plaintiff who was a co-sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, Art. 142 of the Limitation Act applies and not Art. 144. (*Sulaiman, C.J., Mukerji and King, JJ.*) BINDHYA CHAL CHAND *v.* RAM GHARIB CHAND. **57 All. 278=152 I.C. 1=4 A.W.R. 821=18 R.D. 541=7 R.A. 302=1934 A.L.J. 973=A.I.R. 1934 All. 993 (F.B.).**

———**Arts. 144 and 142**—*Co sharers—Suit by one against another for declaration of title and possession in the alternative—Defendant setting up exclusive title—Limitation.*

A suit by one co-sharer against another for declaration of his right to half a tank and in the alternative for possession, alleging that the defendant had set up his exclusive right and possession, is governed by Art. 144 of the Limitation Act rather than by Art. 142. (*Niamatullah, J.*) BABOO SINGH *v.* RAM MANOHAR. **155 I.C. 824=7 R.A. 990=1935 A.W.R. 728=1934 R.D. 267=1935 A.L.J. 828=A.I.R. 1935 All. 774.**

———**Art. 144**—*Co-sharers—Transferee's possession—When adverse.*

Where from the very commencement of possession there was co-ownership, the possession of one must *prima facie* be deemed to be permissive and not adverse. There can be no difference in principle whether a person is the original co-owner or has become a co-owner by virtue of a transfer. The burden would be on the transferee to establish that the denial of title and ouster were brought to the knowledge of the other co-owner and in the absence of such proof he would not be able to perfect his adverse possession. (*Sulaiman, J.*) SUBAH LAL *v.* FATEH MAHOMED. **54 All. 628=I.R. 1933 All. 18=140 I.C. 653=1932 A.L.J. 425=A.I.R. 1932 All. 393.**

LIMITATION ACT (1908), Art. 144—Fishery right.

Co-tenants.

———**Art. 144**—*Co tenant—Permissive possession.*

Where one member of a family leaves a village without any intention of giving up his rights in his ancestral land and when this ancestral land is cultivated by his co-tenants the rights of that member in the ancestral land remain alive. In the absence of specific evidence that possession is adverse it must be held that a co-tenant is occupying land on behalf of the whole body of co-tenants. (*Keane, S.M. and Oppenheim, J.M.*) KEDAR *v.* BARAN. **15 R.D. 259=12 L.R. 132 (Rev.).**

———**Art. 144**—*Co-tenants—Proof of adverse possession.*

Possession by one co-tenant must be held to be possession on behalf of the body of co-tenants and not possession adverse to the other people who have rights as tenants. The onus of proving adverse possession is on the person raising the plea. 5 A.L.J. 511, Ref. (*Keane, S.M. and Oppenheim, J.M*) RAMZAN *v.* MAKUT BEHARI LAL. **15 R.D. 261=12 L.R. 141 (Rev.).**

———**Art. 144**—*Co-tenants—Proof of adverse possession.*

Possession of a co-tenant is possession on behalf of the whole body of co-tenants and in the absence of evidence to the contrary is not possession adverse to the other co-tenants. (*Keane, S.M. and Oppenheim, J.M.*) MAN MOHAN NATH TEWARI *v.* RAM DHANI NATH. **16 R.D. 286.**

Distinction between Arts. 142 and 144.

See also ART. 142.

———**Arts. 144**—Distinction between Arts. 142 and 144. *See* LIMITATION ACT, ART. 142. **55 All. 209=A.I.R. 1933 All. 775.**

———**Art. 144**—Distinction between Arts. 142 and 144. Test of applicability. *See* LIMITATION ACT, ART. 142. **11 O.W.N. 104=A.I.R. 1934 Oudh 21.**

Ejectment.

———**Art. 144**—*Ejectment—Suit for—Title of proprietary body denied—Adverse possession—Burden of proof.*

In a suit by some of the proprietary body for ejectment of the defendants as tenants, the defendants denied the title of the plaintiffs and claimed the lands as theirs.

Held, that the suit was governed by Art. 144 and not Art. 142, as the plaintiffs based their claim on title and that the defendants had to prove their adverse title extending over twelve years. (*Harrison, J.*) ALI AKBAR *v.* RAKHA. **I.R. 1933 Lah. 400=144 I.C. 72=A.I.R. 1934 Lah. 245.**

Evidence.

———**Art. 144**—*Evidence—Mere non-payment of rent.*

Mere non-payment of rent does not create any title to hold rent free by adverse possession. A.I.R. 1922 P. C. 272, Rel. on. (*Rowland, J.*) MOHAN LAL JHA *v.* KAMESHWAR SINGH BAHADUR. **6 I.R. (Pat.) 187 (1)=145 I.C. 527=A.I.R. 1933 Pat. 175.**

———**S. 144**—*Evidence—Non-payment of rent.*

Mere non-payment of rent will not create rent-free title. But long possession may be used to support an inference of legal origin or lost grant. (*Fazl Ali and Rowland, JJ.*) KESHAVA PRASAD SINGH *v.* BRAHMDEV RAI. **13 Pat. 45=149 I.C. 1177=6 R.P. 699=A.I.R. 1933 Pat. 656.**

Fishery right.

———**Art. 144**—Fishery right—Acquisition of r ght by prescription. *See* IMMOVABLE PROPERTY,—*Infra.* **35 C.W.N. 1256.**

———**Arts. 144 and 149**—Fishery rights in navigable river—Adverse possession against the Government—

LIMITATION ACT (1908), Art. 144—Hindu joint family.

Evidence of. *See* LIMITATION ACT, S. 28 AND ARTS. 144 AND 147. **61 I.A. 78=61 Cal. 262=66 M.L.J. 134 (P.C.).**

Hindu joint family.

———Arts. 144 and 44—*Hindu joint family—Joint family consisting of uncle and nephew—Alienation by uncle—Suit for possession by nephew—Limitation.*

Where an uncle and a minor nephew are members of a joint Hindu family and a mortgage is effected by the uncle comprising not only the share of the nephew but of the entire land of the uncle and the nephew, in a suit for possession by the nephew on the allegation that he is the owner of the property, the uncle cannot be said to be a guardian of the plaintiff within Art. 44 of the Limitation Act and the alienation is effected by the manager of the joint Hindu family and a suit to set aside such an alienation is governed by Art. 144 and not by Art. 44. (*Jai Lal, J.*) KAKA *v.* FAQIR CHAND. **152 I.C. 633=7 R.L. 311=35 P.L.R. 722=A.I.R. 1934 Lah. 601.**

———Art. 144—*Hindu joint family—Secret adoption by widow—Other member remaining in adverse possession—Right of adopted son whether lost.*

Where an adoption by a Hindu widow has secretly taken place without the knowledge or assent of her deceased husband's brother who has remained in absolute and exclusive possession of the property, the adopted son cannot be said to be in constructive possession of the property in suit through the other party who will get a pertected title by adverse possession if he has remained in possession for more than 12 years from the date of adoption. (*Boys and Sen, JJ.*) MUL CHAND *v.* THAKUR DAS. **I.R. 1931 All. 755=133 I.C. 899=A.I.R. 1932 A. 61.**

———Art. 144—*Hindu joint family—Separation—Suit for possession.*

Art. 144—and not Art. 127—is applicable to a suit by one member of a family against another who is separate and divided from him for possession of immovable property which is not joint family property as the effect of the separation was that any immovable joint property which continued undivided was no longer joint family property so as to come under Art. 127, but came under Art. 144. (*Sir John Wallis.*) GOVINDRAO *v.* RAJABAI. **58 I.A. 106=27 N.L.R. 131=I.R. 1931 P.C. 81=14 N.L.J. 56=130 I.C. 673=33 L.W. 439=53 C.L.J. 313=35 C.W.N. 438=33 Bom.L.R. 442=A.I.R. 1931 P.C. 48=60 M.L.J. 386 (P.C.).**

———Art. 144—*Hindu joint family—Stranger purchaser.*

Where the managing member of a joint family and a minor represented by his mother sold the property in 1904 to a stranger who in turn sold it to another stranger in 1917, a suit brought by the minor on his attaining majority in 1924 is barred under Art. 144. The possession of the purchaser is adverse to the other co-parceners from the moment of his obtaining possession, 23 Bom. 137 (F.B.); 12 Mad. 292, Ref. (*Tyabji, J.*) FAKIRAPPA BABAPPA *v.* RUDRAPPA RACHAPPA. **I.R. 1932 Bom. 256=137 I.C. 367=34 Bom.L.R. 354=A.I.R. 1932 Bom. 255.**

Hindu Widow.

———Art. 144—*Hindu widow—Acquisition of title.*

Where mutation was effected in favour of a Hindu widow with the consent of the other members of the family with a view to console her, and she remained in possession of the property for more than 12 years as of right,

Held, that she had acquired a title by adverse possession. (*Raza and Bisheshwar Nath, JJ.*) HUBRAJI

LIMITATION ACT (1908), Art. 144—Immovable property.

v. CHANDRBALI UPADHIYA. **6 Luck. 519=I.R. 1931 Oudh 161=8 O.W.N. 6=130 I.C. 849=14 O.L.J. 66=A.I.R. 1931 Oudh 89 (2).**

———Art 144—*Hindu widow—Possession of joint family property when adverse.*

Where a widow who is only entitled to maintenance out of her husband's estate, enters into possession of the property of her husband who was a member of a joint Hindu family at the time of his death, her possession of the share of her husband is *prima facie* adverse unless it can be shown that it was the result of any arrangement with the reversioners or that she took possession of the property prescribing only for the limited estate of a Hindu widow. L.R. 27 I.A. 132, Relied on. (*Pullan and Srivastava, JJ.*) SANT BAKSH SINGH *v.* BHAGWAN BAKSH SINGH. **6 Luck. 365=I.R. 1931 Oudh 104=129 I.C. 328=7 O.W.N. 1082=A.I.R. 1931 Oudh 25.**

———Arts. 144 and 93—*Hindu widow—Suit by widow for possession of property left by her husband—Defendants alleging will in their favour—Limitation.*

A suit by a widow to recover possession of the husband's properties falls under Art. 144, Limitation Act Art. 93 is not applicable to such a suit merely from the fact that a will alleged to have been executed by her husband, which she now attacks as a forgery, had been put forward against her in a prior succession certificate proceeding and that she had not, within three years from the date of such proceeding, taken any steps to declare the will invalid. (Case law discussed.) (*Stone and Walsh, JJ.*) CHENNAMMA *v.* MANGAMMA. **158 I.C. 121=1935 M.W.N. 1154=42 L.W. 535=A.I.R. 1935 Mad. 709.**

———Art. 144—*Hindu widow—Suit to recover possession.*

A suit by Hindu widow to recover possession of the estate of her deceased husband from the defendant who claimed to be a son adopted by the deceased is not governed by Art. 118 but by Art. 144 and is well in time if brought within 12 years from the death of the husband. (*Sir John Wallis.*) PADMALAV ACHARIYA *v.* FAKIRA DEBYA. **I.R. 1931 P.C. 150=33 Bom.L.R. 904=12 Pat.L.T. 563=33 L.W. 477=131 I.C. 758=35 C.W.N. 465=53 C.L.J. 292=80 W.N. 700=1931 M.W.N. 561=A.I.R. 1931 P.C. 84=60 M.L.J. 619 (P.C.).**

———Art. 144—*Hindu widow—Title to limited or absolute estate—Inference from circumstances.*

It cannot be said that whenever a Hindu widow is found in possession of property without title, her possession must be regarded as that of a widow's estate; the determination of the question as regards adverse possession must be based on circumstances of each case.

Held, on the facts that the Hindu widow while in possession prescribed not for an absolute estate but only for a limited estate. (*Pullan and Srivastava, JJ.*) SANT BAKHSH SINGH *v.* BHAGWAN BAKHSH SINGH. **6 Luck 365=I.R. 191 Oudh 104=129 I.C. 328=7 O.W.N. 1082=A.I.R. 1931 Oudh 25.**

[6 Luck. 519 (536).]

Immovable property.

———Art. 144 — *Immovable property — Endowed property—Right to collect assessment.*

Per *Broomfield, J.*—The right to collect the assessment of lands endowed in favour of a shrine and in the possession of occupancy tenants must be regarded as immovable property or an interest in immovable property within the meaning of Art. 144. (*Baker and Broomfield, JJ.*) NARAYAN BALWANT *v.* DATTATRAYA RAMCHANDRA. **141 I.C. 103=I.R. 1933 Bom. 59=34 Bom.L.R. 1469=A.I.R. 1933 Bom. 26.**

LIMITATION ACT (1908), Art. 144—Immovable property.

———**Art. 144**—*Immovable property—Interest in—Projection of eaves.*

Though the projection of eaves resulting in discharge of rain water is an easement according to S. 23, Ill. (*b*) of the Easements Act, the mere projection of the eaves alone is not. The column of air occupied by a projection is not immovable property or any interest therein within the meaning of Art. 144, capable of being acquired by adverse possession. 37 Bom. 491 and 24 Bom.L.R. 305, Ref. (*Patkar and Barlee, JJ.*) CHHAGANLAL *v.* HEMCHAND. **I.R. 1932 Bom. 396=138 I.C. 458=34 Bom.L.R. 395=A I.R. 1932 Bom. 224.**

———**Art. 144**—*Immovable property—Jalkar right—Acquisition of right by prescription.*

A case of exclusive right to fishing would seem to fall within the definition of interest in immovable property under Art. 144 and adverse possession of such a right for more than twelve years would by operation of S. 28 extinguish the right of the lawful owner to that extent. (*Mitter, J.*) KUMAR KRISHNA NANDI CHOUDHURY *v.* LOKENATH MOOKERJEE. **59 Cal. 314=I.R. 1932 Cal. 287=35 C.W.N. 1256=137 I.C. 279=A.I.R. 1932 Cal. 300.**

———**Art. 144**—Immovable property—Space above land—Adverse possession of. *See* SPACE ABOVE LAND, *infra*. **A.I.R. 1934 All. 1054.**

Interruption of possession.

———**Art. 144**—*Interruption of limitation—Decree for possession and ownership.*

Whether a prior decree to which a defendant is a party operates as breaking the continuity of possession of the defendant or not must necessarily depend on the nature of the decree. Where however the decree is in favour of a plaintiff for possession as owner and is passed against a defendant who is in possession, it would break the continuity of the possession of the defendant and prevent him from relying on his prior possession for the purposes of limitation under Art. 144. (*Milne, J.C. and Rupchand, A. J. C.*) GAGUMAL METHARAM *v.* ALLAHBUX. **26 S L.R. 127=I.R. 1932 Sind 178=140 I.C. 228=A I R 1932 Sind 35.**

———**Art. 144**—*Interruption of possession—Delivery of symbolical possession to another.*

Where *A* is in possession of the property adversely to the plaintiff, the plaintiff cannot by obtaining a decree against *B* and being placed in symbolical possession in execution of that decree thereby give himself a fresh start of limitation. (*Pollock, A. J. C.*) GANPATRAO *v.* VITHOBAI. **30 N L.R. 284=6 R.N. 165=148 I.C. 62=A.I.R. 1934 Nag. 36.**

Landlord and tenant.

———**Art. 144**—*Landlord and tenant—Acquisition of title by adverse possession by tenant.*

Where land was originally grove land but no rent was ever paid for 60 years and the grantee built upon the land without protest on the part of the landholder,

Held, that the grantee acquired title by adverse possession and was not liable for rent. (*Young, J.*) SUBHADRA KUAR *v.* RAM SEWAK. **149 I.C. 807=6 R.A. 985=14 L.R. 869 (Rev.)=17 R.D. 1085=A.I.R. 1934 All. 288.**

———**Art. 144**—*Landlord and tenant—Assertion of claim to ownership—Commencement of adverse possession.*

The mere assertion by a tenant of the claim to ownership as embodied in the revenue records would not of itself alone suffice to afford a starting point for adverse possession especially when it is not accompanied by any change in the money payment. (*Bhide and Currie, J J.*) SOHAWA SINGH *v.* KESAR SINGH. **13 Lah. 432=I.R. 1932 Lah. 715=140 I.C. 474=33 P.L.R. 771=A.I.R. 1932 Lah. 586.**

LIMITATION ACT (1908), Art. 144—Landlord and Tenant.

———**Art. 144**—*Landlord and tenant—Court auction-purchaser—Delivery of symbolical possession—Surrender by purchaser—Suit for ejectment by landlord.*

A holding was purchased at Court sale but the purchaser got only formal delivery of possession and the judgment-debtor (defendant) continued in possession of the land in spite of the sale. After about 25 years, the purchaser surrendered the holding to the landlord and the landlord filed a suit for ejectment of the judgment-debtor describing him as an under-raiyat under the purchaser.

Held, whatever right the purchaser obtained by the sale was lost by efflux of time, that there was nothing for the purchaser on the date of surrender to surrender in favour of landlord and that the suit should be dismissed. (*Mahomed Noor, J.*) RAMDEYAL MAHANTI *v.* PITAM BOURI. **6 I R. (Pat.) 194=145 I.C. 613=A.I.R. 1933 Pat. 269.**

———**Art. 144**—*Landlord and tenant—Non payment of rent—Holding over—Adverse possession.*

Mere non-payment of rent is not sufficient ground for holding that the tenancy is determined and that the tenant's possession is adverse. In the Punjab the case of a tenant holding without the permission of the owner is governed by the Tenancy Act and not by the Transfer of Property Act. A tenant has the right to continue in possession if he wishes until his landlord serves him with notice of ejectment. There is no question of the tenancy being determined by lapse of time and therefore the holding over after the expiry of the lease does not amount to adverse possession. (*Bhide and Currie, JJ.*) SOHAWA SINGH *v.* KESAR SINGH. **13 Lah. 432=I.R. 1932 Lah. 715=140 I.C. 474=33 P.L.R. 771=A.I.R. 1932 Lah. 586.**

———**Art. 144**—*Landlord and tenant— Proof of adverse possession.*

A tenant cannot hold adversely to his landlord by the mere fact of his encroachment. It is necessary that his adverse enjoyment should have been brought home to the notice of the landlord. (*Mukerji, J.*) LEKHRAJ *v.* CHANDRA PRAKASH. **151 I.C. 256=7 R.A. 121=15 L R. 207 (Rev.)=3 A.W.R. 456=18 R.D. 159=A.I R. 1934 All. 722 (1).**

———**Art. 144**—*Landlord and tenant— Proof of adverse possession—Entries in* Jamabandi *papers—Value.*

No general rule as regards a presumption to be drawn from entries in *Jamabandis* can be laid down. Each case must be considered on its own facts. Thus if it were simply a case of whether one man or the other was in possession it might be presumed that the *Jamabandi* entry supporting one man's possession is correct. Where however the assertion is only by the party in possession effect can be given to the same only from the date when the record was drawn up. (*Bhide and Currie, JJ.*) SOHAWA SINGH *v.* KESAR SINGH. **13 Lah. 432=I R. 1932 Lah. 715=140 I.C. 474=33 P.L.R. 771=A.I.R. 1932 Lah. 586.**

———**Art. 144**—*Landlord and tenant—Service tenure—Land held as—Cessation of service—Possession not adverse.*

If in the beginning, possession is only permissive, the burden of proving that at some later time it became adverse to the owner is clearly on the person who sets up a title by such adverse possession. If a land is held as a service tenure to be enjoyed as remuneration for services, the fact that no services have been performed for any length of time cannot of itself make the holding

LIMITATION ACT (1908), Art. 144—Landlord and Tenant.

adverse. In order to make the possession adverse to the owner, there must be a refusal to perform service or a claim to hold the land free of service. 23 Bom. 602 and 1 Pat. 292. (*Sundaram Chetty, J.*) RAJAGOPALA GOUNDAR *v.* MARUTHAMUTHU ASARI. **147 I.C. 501=6 R.M. 356=A.I.R. 1933 Mad. 668.**

———**Art. 144**—Landlord and tenant—Suit for ejectment—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 139 AND 144. **37 Bom.L.R. 593=A.I.R. 1935 Bom. 382.**

———**Arts. 144 and 113**—Landlord and tenant—Suit for possession under a lease—Plaintiff found never to have been in possession—Article applicable. *See* LIMITATION ACT, ART. 113. **1935 A.L.J. 662=A.I.R. 1935 All. 569.**

———**Art. 144**—*Landlord and tenant—Tenancy-at-sufferance—Son of such tenant as trespasser.*

Per *Niyogi, A.J.C.*—Whatever possessory rights a tenant-at-sufferance may have against a rank trespasser, it cannot be claimed that the "tenancy-at-sufferance" is heritable. The son of such tenant cannot style himself as a tenant holding over. His possession is nothing better than that of a trespasser. His possession is clearly adverse to the owner of the land and would ripen into a prescriptive title by 12 years' possession. (*Niyogi and Staples, A.J.Cs.*) GOPINATH MAHARAJ *v.* MOTI CHIWA. **30 N.L.R. 155=6 R.N. 188=148 I.C. 561 =A.I.R. 1934 Nag. 67.**

———**Art. 144**—*Landlord and tenant—Tenant dispossessed by one of the body of landholders—Suit by tenant for possession.*

A suit for possession by the recorded occupancy tenant dispossessed by one of the body of landholders is governed by 12 years' rule of limitation. S. 99 of the Agra Tenancy Act does not apply to it. It applies only when the landlord is also the landholder. (*Waltan, J. M.*) BISHUNATH SINGH *v.* DWARKA. **14 L.R. 218 (Rev.).**

Minerals.

———**Art. 144**—*Minerals Putni—Grant of surface rights—Deposit of Ochre underneath sub-soil—Adverse possession of—Possession of surface insufficient—Different strata of the sub-soil—Possession of sub-soil—Presumption—Article applicable.*

Upon a grant of the surface rights by a zamindar he remains in the eye of the law in possession of the sub-soil, though it may be only constructive in possession. But the doctrine that "possession follows title" is well established. So while lands are submerged, constructive possession is with the true owner, and that, though immediately prior to the diluviation physical possession had been with the adverse claimant. It is for this reason that cases as to adverse possession of mineral rights must ultimately fall to be decided under Art. 144 rather than Art. 142. Once title is proved or admitted to be in the zamindar, he will be presumed to continue in possession until adverse possession by the trespasser is established, and that, whether the trespasser is the grantee surface or a stranger. It is in effect only an instance of of the a shifting onus. (*Sir George Lowndes.*) BHUPENDRA NARAYAN SINHA BAHADUR *v.* RAJESWAR PRASAD BHAKAT. **58 I A. 228=59 Cal. 80=I.R. 1931 P.C. 194=54 C L.J. 137=1931 M.W.N. 865= 33 Bom L.R. 1273=35 C.W.N. 870=132 I.C. 610= 1931 A.L.J. 566=34 L.W. 1=A.I.R. 1931 P.C. 162 =61 M.L.J. 632 (P.C.).**

———**Art. 144**—*Minerals—Adverse possession—Grant of surface rights—Rights of patnidar.*

There can be separate ownership and separate possession of different strata of the sub-soil at all

LIMITATION ACT (1908), Art. 144—Minor.

events where minerals are involved and so the mere working superincumbent stratum of stone and gravel by the putnidar does not constitute adverse possession of the underlying deposit of ochre. The law strictly confines the title of the trespasser to the property in his actual possession. So possession must be presumed with the zamindars as adverse possession by the patnidars for the statutory 12 years is not established. (*Sir George Lowndes.*) BHUPENDRA NARAYAN SIMHA BAHADUR *v.* RAJESWAR PRASAD BHAKAT. **58 I.A. 228=59 Cal. 80=I.R. 1931 P.C. 194=54 C.L.J. 137=1931 M.W.N. 865=33 Bom.L.R. 1273 =35 C.W.N. 870=132 I.C. 610=1931 A.L.J. 566= 34 L.W. 1=A.I.R. 1931 P.C. 192=61 M.L.J. 632 (P.C.).**

———**Art. 144**—*Minerals—Trover—Removal of coal—Suit for damages.*

An action for damages for trespass upon the plaintiffs mine and extraction of coal therefrom is an action in trover governed by Art. 48 and not Art. 144. (*Wort and Fazl Ali, JJ.*) BAIJNATH JUGAL KISHORE *v.* MANINDRA CHANDRA NANDI. **I.R. 1931 Pat. 373= 133 I.C. 453=13 Pat.L.T. 73=A.I.R. 1931 Pat. 436.**

Minor.

———**Art. 144**—Minor—Alienation by guardian—Applicability—Hindu minor co-parceners—Suit to set aside—Limitation—Art. 44. *See* LIMITATION ACT, ART. 44. **40 L.W. 760.**

———**Arts. 144 and 44**—Minor—Alienation by guardian—Applicability—Void and voidable transactions—Distinction. *See* LIMITATION ACT, ARTS, 44 AND 144. **40 L.W. 760.**

———**Art. 144**—Minor—*De facto* guardian Alienation by—Suit to set aside—Art. 144 applicable (Buddhist Burmese Law). *See* BUDDHIST LAW—BURMESE—GUARDIAN. **A.I.R. 1931 Rang. 178.**

———**Art. 144**—*Minor—Sale of equity of redemption by guardian—Redemption of the mortgage by the vendee—Suit by minor to set aside alienation—Good faith of the transferee and the mortgagee—Adverse possession by the transferee.*

In 1905, *V* acting as the guardian of plaintiffs 1 and 2 had sold the equity of redemption to *S*. In 1907 *S* redeemed the mortgage and got possession. In 1924 more than three years after they attained majority, the plaintiffs brought a suit to set aside the sale on the ground that *V* had no power to sell the equity of redemption and for taking of accounts on foot of the mortgage. There was no dispute as to the good faith of *S* who redeemed the mortgage and the mortgagee who had given up possession.

Held, (*i*) Art. 134 was not applicable as the mortgagee did not purport to do anything outside or opposed to his mortgage. It was not a transfer by the mortgagee in the sense in which that word is used in Art. 134. (*ii*) The purchase by *S* was in his own absolute right, he had been holding as owner (from 1907 at least) and not on behalf of the mortgagor or mortgagee. From 1907 to 1924 his possession was adverse to the knowledge of the plaintiffs and so the suit was barred under Art. 144. (*Madgavkar, J.*) SHIDLINGAVA SADEPPA *v.* RAJAVA TANESAHEB. **I.R. 1931 Bom. 478=134 I.C. 366=33 Bom.L.R. 603=A I.R. 1932 Bom. 23.**

———**Arts 144**—*Minor—Setting aside alienation of guardian after attaining majority.*

A permission obtained by a certified guardian by a fraudulent representation is a nullity but a transfer made in pursuance thereof is only voidable. Where the minor sues after attaining majority to set aside the transfer the suit is governed by Art. 44 and not Art. 144

LIMITATION ACT (1908), Art. 144—Mortgage.

of the Limitation Act. (*Pullan and Niamatullah, JJ.*) RAM CHARITTER MISIR *v.* SURAJ TELI. **53 All. 738 = 136 I.C. 71 = I.R. 1932 All. 119 = 1931 A.L.J. 997 = A.I.R. 1932 All. 108.**

Mortgage.

See also CO-OWNER AND CO SHARER, *supra.*

———Art. 144—*Mortgage—Adverse possession by mortgagee.*

Where certain persons accept the position of mortgagees, they are precluded from acquiring a title by adverse possession. Possession for however long a period by a mortgagee can give him no title other than the title which he has acquired by his mortgage. The owner can in such a case always redeem the mortgage. (*Pullan and Niamatullah, JJ.*) BASDEO RAI *v.* JAIMANGAL RAI. **136 I.C. 69 = I.R. 1932 All. 117 = 1931 A.L.J. 914 = A.I.R. 1932 All. 53.**

———Art. 144—Mortgage—Alienee from mortgagee—Possession of—If can be tacked to that of mortgagor. *See* TACKING, *infra.* **61 I.A. 78 = 61 Cal. 262 = 66 M. L.J. 134 (P.C.).**

———Art. 144—*Mortgage—Co mortgagors—Redemption of mortgage by one—Suit by another for redemption.*

Where one of five co mortgagors redeemed the mortgage on the whole property, and was in possession of the property, his possession does not on that account become adverse to the other co-mortgagors ; he only becomes entitled to the rights of a mortgage in relation to his co-mortgagors and a suit against him by one of the other co mortgagors for redemption of his share in the property is governed by Art. 148 and not Art. 144. (*Niyogi, A.J.C.*) JAIRAM *v.* BHILAJI. **27 N.L.R. 152 = I.R. 1930 Nag. 361 = 127 I.C. 889 = A.I.R. 1930 Nag. 300.**

———Art. 144—Mortgage—Co mortgagors—Redemption by one—Suit for possession of his share by another. —Art. 144 applies, and not Art. 148. *See* ADVERSE POSSESSION—CO-MORTGAGOR. **34 P. L. R. 239 = A.I.R. 1933 Lah. 91.**

———Art. 144 — *Mortgage — Co mortgagor —Suit against.*

Where one of the co mortgagors pays off the mortgage debt in full, a suit by another co mortgagor for redemption of his share is governed by Art. 148 and not by Art. 144. 26 Bom. 500 and 46 Cal. 111, Not Foll.; 14 All. 1 (F.B.), Rel. on. In such a case, limitation begins to run from the date when the co-mortgagor redeems the mortgage. 24 N.L.R. 92, Foll. (*Niyogi, A.J.C.*) JAIRAM *v.* BHILAJI. **27 N L.R. 152 = I.R. 1930 Nag. 361 = 127 I.C. 889 = A.I.R. 1930 Nag. 300.**

———Art. 144—*Mortgage — Co mortgagors— Suit between, to recover possession.*

The position of a co-mortgagor who redeems the whole of the mortgaged property is that of a charge holder and not that of a mortgagee and a suit by another co-mortgagor for possession of his share of the redeemed property is governed by Art. 144 and not Art 148. A.I. R. 1929 Lah. 238, Ref. (*Addison and Bhide, JJ.*) JHANDU *v.* NUR MAHOMED. **12 Lah 671 = 135 I.C. 506 = I.R. 1932 Lah. 106 = 32 P.L.R. 622 = A.I.R 1931 Lah. 744.**

———Art. 144—*Mortgage — Invalid mortgage — Adverse possession—Commencement.*

In the case of an invalid mortgage, the mortgagee prescribes as such and the result is in the ordinary circumstances that after the period of limitation has expired he is entitled to retain possession until his mortgage is redeemed. Adverse possession is limited to the intention of the person in possession. (*Macpherson, J.*) ABDUL JABBAR KHAN *v.* GULAB KHAN. **I.R. 1933**

LIMITATION ACT (1908), Art. 144—Mutation proceeding.

Pat. 236 = 144 I.C. 439 = 14 Pat.L.T. 294 = A.I.R. 1933 Pat. 288.

———Art. 144—*Mortgage—Mortgagor and mortgagee —Plea of adverse possession.*

A mortgagee in possession of the mortgaged property cannot set up adverse possession over the mortgaged property. Where the defendants admit in documents the right of the plaintiff to redemption and agree to continue as the mortgagee of the plaintiff, it is not open to the defendants having accepted the position of a mortgagee of the plaintiff to set up a defence that the plaintiff is not entitled to redeem the mortgage in question. (*Mukerji and Bennet, JJ.*) ARJUN SINGH *v.* MAHESHA NAND. **I R. 1932 All. 391 = 1932 A.L.J. 474 = 138 I C. 366 = 16 R.D. 463 = 13 L.R. 337 (Rev.) = A.I.R. 1932 All. 437.**

———Art. 144—*Mortgage—Redemption by purchaser of equity of redemption—Suit by owner to recover possession—Commencement of limitation.*

The plaintiffs mortgaged four survey numbers with possession to *Y*. Subsequently the plaintiffs sold the equity of redemption in two of the plots to *G* and the defendants. Later on the defendants successfully sued to redeem the original mortgage but did not implead the plaintiffs as parties. The plaintiffs having sued to redeem the mortgage and recover possession of the several items,

Held, that the decree for redemption which the defendants had obtained created a charge in their favour by virtue of S. 95, T.P. Act and that the suit by the plaintiffs to recover possession was governed by Art. 144 and not Art. 148 of the Limitation Act.

Held further, that the defendants acquiring the property did not hold as co-sharers and that limitation commenced to run from the date of the possession after redemption. (*Patkar and Murphy, JJ.*) RAMCHANDRA *v.* GANESH. **57 Bom. 134 = I.R. 1933 Bom. 289 = 144 I C. 8 = 35 Bom L.R. 48 = A.I.R. 1933 Bom. 114.**

———Art. 144—*Mortgage—Usufructuary mortgage —Adverse possession of trespasser for more than 12 years —Right of mortgagor, if lost.*

The right of the mortgagor is not lost by the adverse possession of a trespasser for more than 12 years during the continuance of a usufructuary mortgage. The mortgagor's righ to sue for possession accrues for the first time when after redemption he is unable to take possession of the mortgaged property which he finds to be in possession of a trespasser, who denies his title to it. He becomes entitled to sue the trespasser when he redeems the property and is opposed by the trespasser. The period of limitation for his suit is 12 years to be reckoned from the date of redemption, and the trespasser's possession would not become adverse to him till after redemption. (*Niamatullah, J.*) SALIG RAM *v.* GAURI SHANKAR TANDAN. **159 I.C. 151 = 8 R.A. 395 (2) = 1935 A.L.J. 496 = 1935 A.W.R. 605 = A.I. R. 1935 All. 542.**

Mutation proceeding.

———Art. 144—*Mutation proceeding—Adverse order —Effect.*

The mere fact that after the death of a Mahomedan the mutation takes place in the name of son does not by itself show that he asserted his exclusive title in opposition to the claim of his step-mother especially when the mother and son lived amicably and in one house. (*Middleton, J. C. and Saaduddin, A. J. C.*) MT. YAKUT *v.* INAYATULLA. **6 R.Pesh. 63 = 148 I.C. 926 = A.I.R. 1934 Pesh. 7.**

LIMITATION ACT (1908), Art. 144—Partition.

Partition.

——**Art. 144**—Partition—Mistake—Suit to re-open—Starting point—Art. 96 applies, not Art. 127 or 144. *See* LIMITATION ACT, ART. 96. **54 Mad. 883=61 M. L J. 430.**

——**Arts. 144 and 142**—Partition—Second suit for partition—Lands omitted in the first suit by mistake or fraud—Art. 142 or 144, applies. *See* LIMITATION ACT, ARTS. 142 AND 144. **A.I.R. 1931 Sind. 27.**

Permissive possession.

——**Art. 144**—*Permissive possession — Claim to charge—Possession held to enforce such claim—Possession not adverse.*

A should not be considered to be in "adverse possession" of property belonging to *B* when he does not deny the ownership of the latter but merely claims a lien over it and refuses to allow *B* to enter into possession until repayment of a charge held over it by him and expressing his willingness to give up possession on payment of the said charge. (Case law discussed.) (*Bhide, J.*) MAHOMED ALI *v.* MAHOMED KHAN. **I R. 1931 Lah. 941=134 I.C 493=A.I R. 1931 Lah 313.**

——**Art. 144**—*Permissive possession—Not sufficient.*

Possession in order to be adverse must be by a person claiming as of right as against the true owner. It must be continuous for the statutory period and open and notorious. It will not do if the possession is merely premissive nor will it do if the person against whom adverse possession is sought is not entitled to immediate possession. Nor will it do if the circumstances show that person had no knowledge of the hostile claim. Where a deed of sale was executed between mother and daughter but it was not registered and there was no delivery of possession and the mother continued to manage the property as before and on the death of the daughter she remained as her heir ostensibly and mutated her name.

Held, that her possession was not adverse to the daughter's husband. (*S. K. Ghose, J.*) KALIRAM MAJUMDAR *v.* DULAL RAM CHOUDHURY. **I.R 1933 Cal. 309=142 I.C 582=A.I.R. 1933 Cal. 544.**

——**Art. 144**—*Permissive possession—Possession as a licensee—Proof of hostile title necessary to constitute adverse possession.*

Where the defendant is proved to have come into possession as a licensee it must be proved that prior to twelve years of the filing of the suit, the defendant at any time asserted a title hostile to the true owners. Even if the plaintiff, who was a purchaser from the true owners, had acknowledged the title of the defendant, the former is not debarred from proving that his admission was wrong. (*Subhedar, A.J.C.*) KHANHAILAL *v.* BHAIYALAL. **149 I.C. 1031=6 R.N. 259=16 N.L.J. 248=A,I.R. 1934 Nag. 51.**

——**Art. 144**—*Permissive possession—Uncle managing for nephew—Inference.*

The property governed by the rule of primogeniture had come into ownership of a Mahomedan boy of tender years living with his uncle and other members of the family. By family custom, the uncle used to see to the management of the property.

Held, that it is impossible to hold by way of inference that the uncle's possession in its inception was adverse and hostile to the legal title of his nephew or that its continuance for more than twelve years had the effect of extinguishing that title. (*Wazir Hasan, C.J. and Pullan, J.*) EJAZ ALI KIDWAI *v* SPECIAL MANAGER, COURT OF WARDS **6 Luck. 106=I.R. 1931 Oudh 113 (2)=130 I.C. 65 (2)=7 O.W.N. 988=A. I.R. 1930 Oudh 510.**

[Affirm. 68 M.L.J. 397 (P.C.).]

LIMITATION ACT (1908), Art. 144—Religious endowment.

Religious endowment.

——**Art. 144** — *Religious endowment — Adverse possession—Nominee of villagers dismissed and new one appointed—Suit by newly appointed nominee for possession of temples and properties—Previous nominee setting up right in himself repudiating claim of villagers—Adverse possession of previous nominee starts from date of suit.*

Where in a suit by a newly appointed nominee of the villagers to recover possession of temples in a village and the properties endowed therefor by the villagers, against the previous nominee who was dismissed by the villagers, the ex-nominee set up a right in himself to the temple and the properties and repudiated the claim of the villagers.

Held, that in view of the dismissal of the ex nominee by the villagers and his repudiation, in his written statement of their claim to it, the ex-nominee's possession from the date of that suit was not one consistent with the claim and title of the villagers and that therefore adverse possession of the ex-nominee commenced to run from the date of that suit. (*Walsh and Varadachariar, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR. **1935 M.W.N. 503=A.I.R. 1935 Mad. 449.**

——**Art. 144**—*Religious endowment—Adverse possession by non-shebait.*

The doctrine that an idol is a perpetual minor is an extravagant doctrine contrary to the decision of the Privy Council in such cases as 37 Cal. 885. It is open to shebaits or any person interested in an endowment to bring a suit to recover the idol's properties for debutter purposes. Strong facts may be necessary in order to establish adverse possession in any case in which there is a reasonable possibility that the possession is being held under the idol's title ; but where a non-shebait is holding property in open derogation of the trust a plea of adverse possession can be sustained. (*Rankin, C. J. and Costello, J.*) SURENDRAKRISHNA RAY *v* SHREE SHREE ISHWAR BHUBANESHWARI THAKURANI. **60 Cal. 54=6 I.R. (Cal.) 20=144 I C. 792=A.I.R. 1933 Cal. 295.**

——**Art 144**—*Religious endowment—Alienation by mahant—Adverse possession—Commencement—Interruption.*

Where an alienation is made by a mahant of mutt property without necessity, adverse possession by the alienee commences when the alienor-mahant ceases to be a mahant by death or otherwise. If the alienation is by way of a permanent lease, the succeeding mahant can continue the lease, in which case the lessee's possession will not be adverse until the death of that mahant. But when the alienation is by way of a gift, in the absence of evidence to show that the possession which became adverse when the original grantor died was kept permissive by subsequent conduct, the adverse possession counts from the date of death of the first mahant, and when completed by possession for the statutory period bars the title of the mutt. (*Madhavan Nair and Jackson, JJ.*) PANDURANGI BHIMACHARYA *v.* DVIADHINA CHARYA. **152 I C. 251=7 R.M 203=40 L W. 529=1934 M.W.N. 494=67 M L.J. 430=A.I.R. 1934 Mad. 624.**

——**Art. 144**—*Religious endowment—Applicability—Suit for possession—Meaning of—Endowed property in possession of occupancy tenants—Suit ostensibly for declaration and injunction.*

A suit for possession does not invariably mean a suit for actual physical possession. It only means a suit for such possession as the property is then capable of. In a suit for recovery of endowed properties wrongfully alie-

LIMITATION ACT (1908), Art. 144—Religious endowment.

nated by one of the vahivatdars which were in the possession of occupancy tenants, relief by way of actual possession is out of the question and the only right that can be claimed is the right to collect the rents. So even if the reliefs prayed for are a declaration that the plaintiffs, as managers, are entitled to collect the assessment and an injunction to restrain the defendant No. 1 from wrongfully collecting the same, it is nevertheless a suit for possession governed by Art. 144 and not by Art. 120. (*Baker and Broomfield, JJ.*) NARAYAN BALWANT *v.* DATTATRAYA RAMCHANDRA. **141 I C 103 = I.R. 1933 Bom. 59 = 34 Bom.L.R. 1469 = A.I.R. 1933 Bom. 26.**

———**Art. 144**—*Religious endowment—Debutter properties—Partition among vahivatdars—Subsequent alienation of one of them—Suit for recovery—Starting point.*

In 1909, *R* and *H*, the then vahivatdars of certain endowed properties, divided the properties and worship. On June 7, 1914, *H* sold his share of the property to the first defendant. *H* died in 1919. On June 7, 1926, the sons of *R* brought the suit to set aside the alienation on the ground that the endowed properties were inalienable.

Held, that time began to run from June 7, 1914, when the alienation was made to a stranger and not from 1909 when the brothers partitioned the properties, because they were the vahivatdars and so long as the property remained with them there was no question of adverse possession against the shrine. The suit was therefore in time. (*Baker and Broomfild, JJ.*) NARAYAN BALWANT *v.* DATTATRAYA RAMCHANDRA. **141 I.C. 103 = I R. 1933 Bom. 59 = 34 Bom L R. 1469 = A.I R. 1933 Bom. 26.**

———**Art. 144**—*Religious endowment—Debutter properties—Temple property—Adverse possession of—Theory of perpetual minority of idol—Correctness of.*

Though it may be convenient to speak of an idol as a minor for certain purposes, *i.e.*, for the purposes of determining the powers of manager of temple property, it is not correct to speak of an idol as a perpetual minor and illogical to extend to idols the privileges as to limitation of actions conferred on minors in the limitation Act, so as to make it impossible for temple property improperly alienated to be acquired by adverse possession. The minors dealt with in the Act are human beings, not juristic persons like idols and corporations who can really hold property in an ideal sense. The acquisition, protection and loss of property by juristic persons can result only from the acts of natural persons. The minority which may affect limitation in cases of dedicated property is of the shebait and not of the idol. 32 C. 129 (P.C.) and 48 All. 348, Ref. (*Waller and Krishnan Pandalai, JJ*) PERIYANAN CHETTI *v.* GOVINDA RAO. **I R 1932 Mad. 402 = 137 I.C. 487 = 1931 M W.N. 1287 = 35 L.W. 191 = A.I.R. 1932 Mad 328 = 62 M.L.J. 496.**

———**Art. 144**—*Religious endowment—Debutter properties—Transferee from manager mahant—Commencement of limitation.*

When the property does not vest in the mahant but vests in the idol and the mahant purports to transfer it in his capacity as the manager of the idol, adverse possession against the idol commences from the very moment possession is taken under the sale deed and it cannot be deemed to be postponed till the mahant died. (*Sulaiman, C. J. and Young J*) SARABDEO BHARTHI *v.* RAM BALI **54 All 909 = 143 I C. 452 = I R. 1933 All. 262 = 1932 A.L J. 836 = A.I.R 1933 All. 19.**

———**Art. 144**—*Religious endowment—Math property—Alienation by Mahant—Suit by successor to avoid—Commencement of adverse possession.*

LIMITATION ACT (1908), Art. 144—Religious endowment.

Where a Mahant alienates property appertaining to a math without any legal necessity the alienation is not void but it good for the period during which the alienor is in office. Where a Mahant without any necessity executed a permanent mokurrari lease of math properties in December 1909 and a sale-deed of the same properties in February 1911 in favour of the defendants and died in July 1913 and his successor in office instituted a suit in May 1924, that is more than 12 years after the alienations but within 12 years of the alienor's death, in order to recover the properties transferred.

Held, that the suit was governed by Art. 144 and not Art. 134 and the suit was not barred as adverse possession commenced to run only when the alienating Mahant died. (*Lord Russell of Killowen.*) RAM CHARAN DAS *v.* NAURANGI LAL. **60 I.A. 124 = 12 Pat. 251 = 57 C.L J. 229 = 37 L.W. 512 = 35 Bom. L. R. 530 = I.R. 1933 P.C. 56 = 14 Pat. L.T. 185 = 1933 M W.N 272 = 1933 A L J. 327 = 10 O.W.N. 455 = 17 R.D. 754 = 37 C-W.N. 541 = 142 I.C 214 = A I.R. 1933 P.C. 75 = 64 M.L.J. 505 (P.C.).**

[F. 62 I.A. 47 = 68 M.L.J. 499 (P C.).]

———**Art 144**—*Religious endowment—Math property—Alienation by manager—Suit by successor in office for recovery—Bar.*

Where the manager of a math effected a gift of endowed property and his successor in office sued to recover the property after the expiry of 12 years from the date of transfer and delivery of possession.

Held, the suit was barred by Art. 144. (*Baker, J.*) SHRI SATVADHVANA TIRTH *v.* BHUJANG CHINTAMAN. **I. R. 1933 Bom. 298 = 144 I.C. 277 = 35 Bom. L.R. 368 = A.I.R. 1933 Bom. 253.**

———**Art. 144**—*Religious endowment—Math properties—Lessee of—Acquisition of title by adverse possession.*

A lessee cannot claim adverse possession for himself under Art. 144 during the lifetime of the head of the mutt who granted him the lease. (*Addison and Agha Haidar, JJ.*) SHIROMANI GURDWARA PARBANDHAK COMMITTEE *v.* PREMDAS. **13 Lah. 677 = 140 I.C. 604 = I.R. 1933 Lah. 15 = 33 P.L.R. 1035 = A.I. R. 1933 Lah. 25.**

———**Art. 144**—*Religious endowments—Math property—Possession of property obtained as mahant—Subsequent compromise with rival claimant—Compromise conferring unrestricted power of alienation—Character of possession, if changed.*

Where a person enters into the possession of property as the mahant of math and holds it on behalf of the math until a certain compromise which he enters into with a rival claimant, the mere fact that the parties to the compromise purport to confer upon each other an unrestricted power of alienation in respect of the endowed property does not change the character of that person's possession and he does not hold the property adversely to the institution from the date of the compromise. (*Sir Shadi Lal.*) MAHADEO PRASAD SINGH *v.* KARIA BHARTHI. **62 I.A. 47 = 57 All. 159 = 37 P.L.R. 311 = 153 I.C. 1100 = 7 R P.C. 135 = 1935 M. W.N. 162 = 41 L.W. 291 = 39 C.W.N 433 = 61 C.L.J. 122 = 37 Bom L R. 333 = 1935 A.L.J. 678 = 1935 O.W.N. 247 = 1935 A.W.R. 185 = A.I.R. 1935 P.C. 44 = 68 M.L.J. 499 (P.C.)**

———**Art. 144**—Religious endowment—Math properties—Suit by shebait of mutt claiming as rightly appointed mahant for possession of properties of Mutt—Defendants holding under invalid appointment by previous deceased mahant—Limitation—Starting point. *See* LIMITATION ACT, ARTS. 120, 124 AND 142. **62 C.L.J. 153.**

LIMITATION ACT (1908), Art. 144—Religious endowment.

——**Art. 144**—*Religious endowment—Math property—Transfer by mahant—Suit by successor to recover—Starting point.*

Under the law which obtained prior to its amendment by the Indian Limitation (Amendment) Act (I of 1929), the article applicable to a suit by a mahant to recover math property transferred by the preceding mahant is Art. 144 and the period of limitation does not begin to run until the death of that mahant. (*Sir Shadi Lal.*) MAHADEO PRASAD SINGH *v.* KARIA BHARTHI. **62 I.A. 47=57 All. 159=153 I.C. 1100=7 R P.C. 135 =1935 M.W.N. 162=41 L.W. 291=39 C.W N. 433 =61 C.L J. 122=37 Bom. L R. 333=1935 A.L J. 678=1935 O.W.N. 247=1935 A.W.R. 186=37 P.L. R. 311=A.I.R. 1935 P.C. 44=68 M.L J. 499 (P.C.)**

——**Art. 144**—*Religious endowment—Prescription for right of mutawalli.*

In the generality of cases the claim to the office of mutawali and to the property appurtenant thereto go together and are inseparable. This would depend upon the terms of the foundation or settlement. A person in adverse possession of property claiming to hold it as mutawalli does not prescribe for more than a mutawalli s right in such property and may acquire to that extent the status of a mutawalli. The right to the office and the right to the possession of property are distinct jural concepts. (*Sen and Niamatullah, JJ.*) ABDUL ALIM *v.* ABDUL HAMID. **I.R. 1931 All. 151=129 I.C. 375=A.I.R 1930 All. 866.**

——**Art. 144** — *Religious endowment — Property attached to office—Right to sue for recovery af possession of the office barred—Right to sue for possession of the propetics attached to the office, whether barred.*

Where it was contended that the plaintiffs were not suing for recovery of an office but only for recovery of the properties attached to the temple and that as the suit was within twelve years from the date from which the defendant had been in unlawful management and possession of the properties.

Held, that where preperties are attached to an office whether by way of endowment or by way emoluments, the right to possession of the properties goes with the right to the possession of the office and if the right to sue for recovery of possession of the office is barred, the possession of the properties cannot be dissociated therefrom and independently dealt with. (*Walsh and Varadachariar, JJ*) RAJAGOPALA NAIDU *v* BALASUBRAMANIA. **1935 M.W N. 503=A.I.R. 1935 Mad. 449.**

——**Art. 144** — *Riligious endowments—Shebait—Adverse possessicn of property.*

There can be no adverse possession against an idol by the shebait.

Quaere:—Whether the possession of two joint shebaits becomes adverse to the idol when they openly claim to divide the property between them. (*Rankin, C.J. and Costello, J.*) SURENDRAKRISHNA RAY *v.* SHREE SHREE ISHWAR BHUBANESHWARI THAKURANI. **60 Cal. 54=6 I.R. (Cal.) 20=144 I.C. 792=A.I.R. 1933 Cal. 295.**

——**Art. 144**—*Religious endowment—Temple property—Invalid alienation—Adverse possessicn by lessee.*

The suit was brought in 1918 by the Dharmakarta of a temple for possession of various plots of land which had been alienated by a permanent Cowle in 1865 by the then Dharmakarta in favour of two persons from whom the defendants derived title as lessees. It was conceded that the Cowle of 1865 was invalid and beyond the powers of the Dharmakarta to grant but the defendants contended that they had, by adverse possession, acquired title to permanent tenancy. The evidence showed that the permanent grant was made in view of the contemplated reclamation and cultivation of the area computed to be cultivable but that the grantees were bound to pay a fixed rent from the fourth year onwards whether they reclaimed and cultivated or left the land waste. It was also proved that the Cowledars and their transferees were, since the inception of the lease, openly asserting their right to permanent tenancy.

Held, (*i*) that the suit was not governed by Art. 134 as Dharmakarta was not a trustee within the meaning of the section; (*ii*) that the suit was barred under Art. 144 whether the starting point of the adverse possession be held to be the date of the lease or the date of the death, removal or resignation of the alienating Dharmakarta. The ruling of the Privy Council in 44 Mad. 831 is confined to alienations by Matathipadhis and is not applicable to a permanent lease by the Dharmakarta of a temple. (Case-law referred.) (*Wailer and Krishnan Pandalai, JJ.*) PERIYANAN CHETTI *v.* GOVINDA RAO. **I.R. 1932 Mad. 402=137 I.C. 487=1931 M. W N. 1287=35 L.W. 191=A.I.R. 1932 Mad. 328= 62 M L.J. 496.**

[**Cons.** 64 M.L.J. 706 (712).]

——**Art. 144**—*Religious endowment—Wakf property—Alienation by mutawalli—Suit to avoid.*

Art. 134 does not apply to suits to avoid alienations of the generally endowed property vested in the Sajjadanashin and mutawalli of a wakf. Such suits are governed by Art. 144. Where as a result of the alienations the previous encumbrancers have been paid off it cannot be said that there were several trespa sers in succession so as to bar the true owner under Art. 142 after the lapse of 22 years from the date of the earlier mortgage. (*Patkar and Murphy, JJ.*) HAMIDMIYA SARFUDDIN *v.* NAGINDAS JIVANJI. **57 Bom. 709=148 I.C. 385= 6 R B. 294=35 Bom.L R. 252=A.I.R. 1933 Bom. 217.**

——**Art. 144**—*Religious endowment—Wakf property—Alienation of—Suit to avoid — Commencement of limitation.*

Where a mutawalli completely transfers wakf property to a stranger by sale or mortgage the period of limitation for a suit to recover that property begins to run from the date of the alienation. Distinction between cases of permanent lease and sale pointed out. (Case-law discussed.) (*Patkar and Murphy, JJ*) HAMIDMIYA SARFUDDIN *v.* NAGINDAS. **57 Bom. 709=148 I.C 385=6 R B. 294=35 Bom. L.R. 252=A.I R. 1933 Bom. 217.**

——**Arts. 144 and 134**—*Religious endowment—Wakf property—Mutawalli having beneficial interest—Sale of endowed property—Suit by successsor to avoid—Starting point of limitation.*

Where the mutawalli of a Mahomedan wakf, who has a beneficial interest in the endowed property, sells the property, the alienation is valid during the lifetime of the vendor and a suit by a succeeding mutawalli for a declaration that the sale is invalid and for recovery of possession of the property sold is governed by Art. 144 and not Art. 134 and is in time if instituted within 12 years from the date of the death of the mutawalli who sold the property. There is no distinction in this respect between a lease and a sale. (*Madhavan Nair and Jackson, JJ.*) ARUMUGAM PILLAI *v.* KAZHI MOHIDEEN SHERIFF SAHIB. **I.R. 1933 Mad. 428=144 I. C. 541=1933 M.W.N. 1215=37 L.W. 737=A.I.R. 1933 Mad. 533=64 M.L.J. 706.**

——**Art. 144**—*Religious endowment—Wakf property—Successive mortgages by mutawalli—Commencement of limitation.*

LIMITATION ACT (1908), Art. 144—Reversioner.

In the case of alienations by a mutawalli where there are a series of mortgage transactions, each mortgage being redeemed when the subsequent mortgages were effected, time begins to run from the date of the execution of each successive mortgage. (*Patkar and Murphy, JJ.*) HAMIDMIYA SARFUDDIN *v.* NAGINDAS JIVANJI. **57 Bom. 709=148 I.C. 385=6 R.B. 294=35 Bom.L.R. 252=A.I.R. 1933 Bom 217.**

Reversioner.

——**Art. 144**—*Reversioner — Death of widow—Daughter in possession for thirty years—Reversioners' right to sue barred.*

On the death of the widow, who had a life-estate under a compromise arrangement, the share of the estate which stood mutated in her name went into the possession of her daughter. She died more than thirty years later. In a suit by the reversioners after the death of the daughter,

Held, that their right to sue arose on the death of the widow and as the daughter had no right to get possession on the death of her mother, her possession was adverse to the reversioners and their suit was barred. To a case of this description, Art. 144 would apply. The suit which is not instituted within a period of 12 years from the date of the death of the widow is barred by limitation. (*Rachhpal Singh and Smith, JJ.*) ADYA SHANKAR TEWARI *v.* CHANDRAWAT. **150 I.C. 519=11 O.W.N. 736=7 R.O. 17=A.I.R. 1934 Oudh 265.**

——**Art. 144**—*Reversioner—Limited owner—Alienees from—Possession of—Not adverse to reversioners.*

During the lifetime of the limited owner, the possession of her father's brother or his transferees cannot be adverse to the reversioners so as to destroy their contingent rights. The reversioner's cause of action arises on her death and not earlier. A suit instituted within 12 years of her death is not barred by limitation. 51 All. 188 (F.B.), Foll. (*Sulaiman, C. J. and Thom, J.*) SHAMBU PRASAD *v.* MAHADEO PRASAD. **55 All. 554=I.R. 1933 All. 409=144 I.C. 293=1933 A.L.J. 1185=A.I.R. 1933 All. 493.**

Sale.

——**Art. 144**—*Sale—Life-estate of Punjab soldier—Excess sale by Government—Suit to recover possession—Bar.*

The property of a Punjab soldier who had a life-estate in certain land was for forfeited for desertion and the Government had it sold. The soldier was not heard of for several years and was presumably dead. The heirs sued the alienee to recover possession.

Held, that the suit was governed by Art. 144 and that the plaintiff should prove that the previous holder must have died within 12 years of the suit. (*Bhide, J.*) MEHAR KHAN *v.* SAKHI MAHOMED. **I.R. 1931 Lah. 865=134 I.C. 97=33 P.L.R. 237=A.I.R. 1932 Lah. 45.**

——**Art. 144**—*Sale—Voidable sale—Possession under—Whether becomes adverse.*

Where the sale is voidable at the instance of reversioners it is good for the lifetime of the alienating proprietor and the possession of the vendee can become adverse only after the death of the vendor. (*Tek Chand and Agha Haidar, JJ.*) SALHUN *v.* MALKU. **I.R. 1931 Lah. 377=131 I.C. 105=A.I.R. 1931 Lah. 439.**

Scope.

——**Art. 144**—*Scope.*

Art. 144 is a residuary article which cannot be resorted to, if the suit is governed by Art. 148. (*Niyogi, O. A.J.C.*) JAIRAM *v.* BHILAJI. **27 N.L.R. 152=I.R. 1930 Nag. 361=127 I.C. 889=A.I.R. 1930 Nag. 300.**

——**Art. 144**—*Scope—Case of dispossession.*

Art. 144 of the Limitation Act is a residuary article and is applicable only when a suit does not fall within any of the numerous articles found in Sch. I. If on the allegations made in the plaint the suit falls within Art. 142, there is no justification for taking it out of that Article and for applying Art. 144 on grounds which are not to be found mentioned in Art. 142 itself. There is no justification for restricting the scope of Art. 142 to cases in which the relief for possession is based only on "possessory title and not on proprietary title. It must therefore be applied in every case where the plaintiff alleges his own dispossession by the defendant prior to the suit as also where he does not make any such allegation, but it is found, as a fact, that he was dispossessed by the defendant prior to the institution of the suit. 51 A. 1042 and (1933) A.L.J. 105, Overr. (*Sulaiman, C. J., Mukerji and King, JJ.*) BINDHYA CHAL CHAND *v.* RAM GHARIB CHAND. **57 All. 278=1934 A.L.J. 973=4 A.W.R. 821=152 I C. 1=18 R.D. 541=7 R. A. 302=A.I.R. 1934 All. 993 (F.B.).**

LIMITATION ACT (1908), Art. 144—Suit on title.

——**Art. 144**—*Scope—Comparison of Arts.* 142 *and* 144.

Art. 142 is restricted to suits for possession on dispossession or on discontinuance of possession. In order to bring a suit within the purview of that article it must be shown that the suit was in terms as well as in substance based on an allegation of the plaintiff having been in possession and having subsequently lost it either by dispossession or by discontinuance of possession. Art. 144 on the other hand is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession or discontinuance of possession must fall within that article. It is well settled that the question whether the article of limitation applicable to a particular suit is Art. 142 or Art. 144 has to be determined by reference to the pleadings. Where there was no allegation about the plaintiff having lost possession either by dispossession or by discontinuance of possession, *held*, that the suit was governed by Art. 144 and not by Art. 142. (*Bisheshwar Nath and Kisch, JJ.*) SURAJ BALI *v.* MAHADEO PRASAD. **7 Luck. 250=137 I.C. 678=I.R. 1932 Oudh 259=8 O.W.N. 1153=A.I.R. 1932 Oudh 46.**

[**R.** 11 O.W.N. 104 (107) (Reference to Art. 142).]

——**Arts. 144 and 142**—Scope—Duty to scrutinize pleadings. *See* LIMITATION ACT, ART. 142. **37 P.L.R. 171=A.I.R. 1935 Lah. 507.**

Space above land.

——**Art. 144**—*Space above land—Immovable property—Acquisition of title—Adverse possession of space above land.*

As the owner of the soil is the owner of the space above it and as there can be no ownership without property the space above the land is property and it is itself immovable property. It being so, a defendant who constructed a three storied verandah projecting over the land of the plaintiff more than 12 years ago, acquires a right to the space occupied by such projection and the right to maintain it in its position. (*Kendall and Iqbal Ahmad, JJ.*) STATE OF INDORE *v.* VISHESHWAR BHATTACHARYA. **151 I.C. 1094=7 R.A. 245=4 A. W.R. 378=1934 A L.J. 846=18 R.D. 465=A.I.R. 1934 All. 1054.**

Suit on title.

——**Art. 144**—*Suit on title.*

The plaintiff who was a vendee from the owner of a share in certain property sued to recover possession of the same from a third party holding without any title. The plaintiff raised no plea of dispossession.

Held, that the suit was based on title and was gover-

LIMITATION ACT (1908), Art. 144—Suit on title.

ned by Art. 144. (*Raza and Bisheshwar Nath, JJ.*) ZAHIDA BEGAM *v.* MUMTAZ ALI KHAN. **I.R. 1932 Oudh 112=136 I.C. 256=8 O.W.N. 1364=15 R.D. 808=A.I.R. 1932 Oudh 122.**

——**Art. 144**—*Suit on title—Burden of proof.*

In suits for possession of immovable property where title to the property in suit is found to be with the plaintiffs, it lies on the defendant to prove adverse possession for the period of 12 years. The onus is not on the plaintiffs to prove possession within 12 years. 39 Mad. 617 (P.C.); A.I R. 1930 Lah. 608 and A.I.R. 1933 Lah. 721, Foll. (*Tek Chand, J.*) GANPAT RAI *v.* HAR DIAL. **6 I.R. (Lah.) 270=146 I.C. 725=34 P.L.R. 1007=A.I.R. 1933 Lah. 722.**

——**Art 144**—*Suit on title—Burden of proving adverse possession.*

Where the plaintiffs do not aver their peaceful possession as having been disturbed by the defendants but claim on the sole ground of their title and they prove their title, that title can only be extinguished by the adverse possession on the part of the defendants. The case is one which is governed by Art. 144 and the burden of proving adverse possession lies on the defendants. (*Niyogi, A J.C.*) MT. JIJIBAI *v.* ZABU. **30 N.L.R. 18=150 I.C. 679=7 R.N. 21=A.I.R. 1933 Nag. 274.**

——**Art. 144**—Suit on title—Decision of survey officer in favour of title —Effect on defendant's adverse possession—Burden of proof. *See* MADRAS SURVEY AND BOUNDARIES ACT, S. 13. **40 L. W. 536.**

——**Arts. 144 and 142**—*Suit on title—Plaintiff claiming title and alleging defendant's tenancy—Title proved but not tenancy—Right to decree for possession.*

If in a suit for possession the plaintiff claims title to the property alleging that it is being held by the defendants as his tenants, and it is found that the title of the plaintiff is established but that the tenancy is not proved, the proper article to be applied is Art. 144 and not Art. 142. If the defendants are not able to prove adverse possession under Art. 144, then the plaintiff must get a decree for possession though the tenancy alleged by him has been found against. Art. 142 applies to cases of continuance and discontinuance of possession. (*Madhavan Nair, J.*) SULAIMAN ROWTHER *v* DAWOOD KHAN SAHIB. **8 R M. 23=156 I C. 581=1935 M.W.N. 740=42 L.W. 593=A.I.R. 1935 Mad. 754.**

——**Art 144**—*Suit on title—Plea of adverse possession—Burden of proof.*

When the plaintiff comes into Court relying upon his title, it is not necessary for him, as in a case falling under Art. 142, to prove that he had been in possession at a period within twelve years prior to the commencement of the suit. It is sufficient if the plaintiff establishes a *prima facie* title and it is then for the defendant to substantiate the plea of adverse possession. 41 All. 669, Foll. (*Addison and Agha Haidar, JJ.*) RAUSHAN ARA BEGAM *v.* MAHOMED BEG. **I.R. 1933 Lah. 79=141 I. C. 234=34 P.L.R. 163=A.I.R. 1933 Lah, 105.**

——**Art. 144**—*Suit on title—Possession within 12 years if need be proved.*

Where the plaintiff sued on the basis of her title acquired by inheritance and she did not allege that she was dispossessed,

Held, that the suit fell under Art. 144, not under Art. 142 and that the plaintiff need not prove adverse possession. (*Kisch, J.*) ZAHIDA BEGAM *v.* MUMTAZ ALI KHAN. **I R. 1931 Oudh 391=134 I. C. 599=12 L.R. 312 (Rev.)=8 O.W.N. 921=15 R.D. 566=A.I.R. 1931 Oudh 382.**

LIMITATION ACT (1908), Art. 144—Tacking.

Tacking.

——**Art. 144**—*Tacking*—Abadi *title by adverse possession—Tacking on of predecessor's possession.*

A person who is neither an agriculturist tenant nor a village handicraftsman, but who his in possession of a house in the *abadi*, which he and his predecessors-in-title have held for considerably more than twelve years without paying rent or acknowledging in any way the title of the landlord to the site upon which it is built, acquires an absolute ownership of the house site. The fact that the present occupier has not been in actual possession of the house for the whole of the period of adverse possession but has acquired the house by a deed of gift from a person whose title to it has not been proved, does not make any difference if his predecessor's possession was also adverse to that of the landlord. 14 A. L. J. 115, Dist.; 29 All. 133 and 33 All. 757, Rel. on. (*Kendall J.*) AIOPI *v.* GAJADHAR. **I.R. 1931 All. 264=130 I.C. 296=A.I.R. 1931 All. 323.**

——**Art. 144**—*Tacking—Adverse possession—Doctrine of independent trespasser—Death of person in possession—Another thinking he is entitled to succeed, stepping in without interruption—Whether tacking is allowed.*

The doctrine of independent trespasser will come in only when the second man trespasses upon the possession of the first man abandoning possession. It is not applied to a case in which on the death of the first man while still in possession, the person who thinks he is entitled to succeed him steps in without any interruption. Where properties were in the possession of *A* who claimed them adversely to the legal owner and his son succeeded on his death without any interruption.

Held, that the son could not be regarded as an independent trespasser and that he was entitled to tack on the period of his father's adverse possession to his own, to claim title by adverse possession. (*Walsh and Varadachariar, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA AYYAR. **1935 M.W.N. 503=A.I.R. 1935 Mad. 449.**

——**Art. 144**—*Tacking—Adverse possession—Tacking of possession of separate trespassers.*

The general principle regarding the tacking of possession of separate trespassers is that it will be tacked when the second trespasser derives his possession from the first. But this cannot be done if the two trespassers are independent of each other and the second has obtained possession otherwise than through the first. It is not always necessary that the second trespasser should receive possession by the voluntary acts of the first. Where the subsequent trespassers claim on behalf of village proprietary body as the owners of the land and themselves get possession on the claim that the first trespassers were in fact trespassers with no rights, their possession is in no sense derived from that of the first trespassers, but merely follows that possession. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MULLA AHMED *v.* FAZAL AHMED. **158=I.C. 968=8 R. Pesh. 68=A.I R. 1935 Pesh. 133.**

——**Art. 144**—*Tacking—Possession of independent trespassers—Tacking not permitted—Mortgagor's adverse possession may be tacked to that of mortgogee.*

Having regard to the definition of "plaintiff" in S. 2, sub-Sec. (8) of the Limitation Act, a plaintiff claiming title by adverse possession cannot "tack" the possession of an independent trespasser from or through-out whom he does not derive his right to sue. *Dixon* v. *Gayfere*, (1853) 17 Beav. 421: 51 E. R. 1097, Rel. on. But a mortaggor can, for the purposes of the Limitation Act, avail himself of and "tack" on to his own adverse

LIMITATION ACT (1908), Art. 144—Tacking.

possession the adverse possession of his mortgagee. It is true that the periods of possession of a series of independent trespassers cannot be added together and utilised by the last possessor to make up the statutory period of adverse possession. Possession acquired under a foreclosure decree is not in privity with the motgage title but when the foreclosure decree is set aside the title of alienee from a mortgagee is derived from the mortgagor and he is not held answerable as a mortgagee in a suit for redemption and accounts. (*Lord Macmillan.*) SECRETARY OF STATE *v.* DEBENDRA LAL KHAN. **61 I.A. 78=61 Cal. 262=59 C.L.J. 56=3 A.W.R. 101=36 Bom. L.R. 219=1934 M.W.N. 165=6 R P.C. 49=38 C.W.N. 285=1934 A.L J. 153=39 L.W. 257=11 O.W.N. 96=147 I.C. 545=A.I.R. 1934 P.C. 23=66 M.L.J. 134 (P.C.).**

———**Art. 144**—*Tacking—Possession as mortgagee and possession as vendee.*

It is permissible for a person claiming adverse possession to add the period of possession as usufructuary mortgagee to the period of his possession as vendee from his usufructuary mortgagor. (*Mukerji and Bennet, JJ.*) PRAHLAD SINGH *v.* BARUMAL. **52 All. 976=I.R. 1931 All. 313=1930 A.L.J. 1420=130 I.C. 697=A I.R. 1931 All- 18.**

———**Art. 144**—*Tacking—Possession as mortgagee from co-owner—Subsequent purchase—Acquisition of title against other co owners.*

Where the possession of the co-owner himself was not adverse to his other co-owners, and it is not he but the mortgagee, who having become his subsequent vendee, is setting up adverse possession then the mortgagee vendee would not be able to join the two periods together in order to complete his period of prescription for acquiring full title. When a person is in possession in the capacity of a usufructuary mortgagee unlawfully against the true owners, the only title which he can acquire by adverse possession is that of a mortgagee. If that title is perfected he would be entitled to insist on being redeemed. But he cannot after a lapse of 12 years' possession as a usufructuary mortgagee successfully claim to have acquired the full proprietary interest. (*Sulaiman, J.*) SUBAH LAL *v.* FATEH MAHOMED. **54 All. 628=140 I.C. 653=I.R. 1933 All. 18=1932 A.L J. 425=A.I R. 1932 All. 393.**

[R. 34 P.L.R, 880 (883) (Adverse possession of transferee from co-owner.)]

———**Art. 144**— *Tacking — Prior possession of stranger.*

Under Art. 144 time begins to run when the defendant's possession becomes adverse. The defendant cannot take advantage of the possession of others before him unless they are persons through whom he derives his liability. He must prove adverse possession either by himself or through his predecessors-in-title. He cannot acquire a prescriptive title against the plaintiffs who are the rightful owners by tacking to the term of his own trespass the period of possession held by a person holding under hostile title who did not represent him or whom he did not represent. 43 I.C. 943; 45 B. 570; 44 C. 858 (P.C.), Rel. on. (*Niyogi, A.J.C.*) MT. JIJIBAI *v.* ZABU. **30 N.L R. 18=150 I.C. 679=7 R. N. 21=A.I.R. 1933 Nag. 274.**

———**Art. 144**—*Tacking—Trespassers—Continuity of possession—Effect.*

Unless there is a break in the continuity of possession the true owner would be barred by twelve years' adverse possession even if that continuous adverse possession be of two or more trespassers who did not claim under one another. 45 Mad. 370. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W. N. 349=A.I.R. 1931 Oudh 177.**

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Trespasser.

See also TACKING *supra.*

———**Art. 144**—*Trespasser — Presumption— Parti land—Possession of one plot—Presumption in respect of other portion.*

In the case of *parti* land the possession of one portion of the plot cannot lead to any presumption in respect of the other portion. There can be no presumption of possession in favour of a trespasser. (*Bisheshwar Nath and Smith, JJ.*) INDAR GIR *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **135 I.C. 689=I.R. 1932 Oudh 49=12 L.R. 409 (Rev.)=8 O.W.N. 1275=15 R.D. 745=A.I.R. 1932 Oudh 135.**

Trust.

———**Art. 144**—*Trust—Agreement to convey properties to the plaintiff—Contract not to revoke disposition in favour of plaintiff—Resulting trust—Right of beneficiary—Enforcement.*

Art. 144 is applicable only to a possessory suit by the owner of the properties claimed against a person holding adversely to him without title. Where a testator made a will bequeathing all his property to *A* and also entered into a contract with *A's* father not to revoke the same but later executed a second will revoking the first, the contractee or his legal representative can enforce specific performance of the agreement or obtain compensation for its breach but that would not make *A* the "owner" of the properties, entitled for the purpose of bringing a suit for possession, to the benefit of twelve years under Art. 144. Assuming that, by virtue of the contract, there was a trust created in favour of *A* and that trust continued even after the death of the testator (which their Lordships doubted), that would not entitle him to sue for possession as "owner". The Indian Law makes no distinction between legal and equitable estates and the "owner" in case of trust property is the trustee. The right of the beneficiary is in a proper case to call upon the trustee to convey to him and that right is governed by Art. 120 and not Art. 144. (*Sir George Lowndes.*) RANI CHHATRA KUMARI DEVI *v.* MOHAN BIKRAM SHAH. **58 I.A. 279=10 Pat. 851=I R. 1931 P.C. 241=133 I.C. 705=8 O.W N. 905=33 Bom.L R. 1390=1931 A.L.J. 783=34 L W. 411=13 Pat.L.T. 1=35 C W N. 953=A.I.R. 1931 P.C. 196 =61 M.L.J. 78 (P.C.).**

[R. 54 A- 975 (984). (Suit on title).]

Void transfer.

———**Art. 144**—*Void transfer—Transferee's possession for more than 12 years—Effect.*

Where the transferee enters into possession under a deed of transfer which is *ab initio* void on the ground of immoral consideration, the transferor cannot recover the property if the transferee has been in possession for more than 12 years. (*Patkar and Barlee, JJ.*) SABAVA YELLAPPA *v.* YAMANAPPA SABU. **149 I.C. 464=6 R B. 380=35 Bom.L R. 345=A.I.R. 1933 Bom. 209.**

Watan lands.

———**Art. 144**—Watan lands—Sale of—Possession by vendee—Commencement of adverse possession. *See* ADVERSE POSSESSION —WATAN LAND. **55 Bom. 21=A.I.R. 1931 Bom. 24.**

———**Art. 145**—"*Depositary*".

Where one man's property is handed by that man to another, he becomes a depositary of it, unless of course, there is something in the terms of that handing over which would prevent his being treated as a person with whom it was deposited at all. (*Mukerji and S. K.*

LIMITATION ACT (1908), Art. 145.

Ghose, JJ.) BIBHUTI BHUSAN DUTTA *v.* ANADI NATH DUTT. **61 Cal. 119=150 I.C 398=6 R.C. 847 =58 C.L J. 502=A.I.R. 1934 Cal. 87.**

———**Arts. 145 and 149**—*G. P. notes belonging to joint family given as security for service of one of two brothers—Partition—G. P. notes allowed to continue as security—Retirement of brother—G. P. notes handed over to him—Suit by heirs of other brother for recovery of their share of G. P. notes—Limitation.*

G.P. notes belonging to two brothers of a joint family *D* and *G* were given as security for the service of *G* in the Burdwan Raj. In spite of a subsequent partition between them, the notes remained with the Raj until *G* retired from service when the G. P. notes were given back to him and soon after he died. In a suit by the heirs of *D* against the heirs of *G* for recovery of their share,

Held, that the suit was outside the scope of S. 10 because even assuming that the G. P. notes vested in *G* for serving as security deposit for his service, the present suit was not for restoring the G. P. notes to that trust which had been completed and was no longer capable of administration and that it was governed by Art. 145 and not by Art. 49.

Held, further, that the character of transactions in so far as it was a deposit was not altered by the death of the depositary but that his heirs, in whose hands the thing deposited came, became depositary within the meaning of Art. 145. (*Mukerji and S. K. Ghose, JJ.*) BIBHUTI BHUSAN DUTTA *v.* ANADI NATH DUTT. **61 Cal. 119=150 I.C. 398=6 R.C. 847=58 C.L.J. 502=A.I R. 1934 Cal. 87.**

———**Art. 146 A**—Scope and effect—Special statutory powers—If can be nullified by Article. *See* KARACHI CITY MUNICIPAL ACT, SS. 195 (1) (*a*) AND 197. **A.I. R. 1935 Sind 222.**

———**Art. 148**—Applicability—Co-mortgagors—Redemption by one—Suit for possession of his share by another. Governed by Art. 144, not by Art. 148. *See* ADVERSE POSSESSION—CO-MORTGAGOR. **34 P. L.R. 239=A.I.R. 1933 Lah. 91.**

———**Art. 148**—Applicability—Co mortgagors—Suit between, for possession—Art. 144 applies, not Art. 148. *See* LIMITATION ACT, ART. 144—MORTGAGE. **32 P. L.R. 622=A.I.R. 1931 Lah 744.**

———**Art. 148**—Applicability — Co-sharers—Limitation—Art. 144 applies, not Art. 148. *See* LIMITATION ACT, ART. 144. **8 O.W.N. 637.**

———**Art. 148**—*Applicability—Co owners— Redemption of mortgage by one—Suit by other to recover possession—Limitation—Starting point.*

When one of two co-owners redeems a mortgage he does not become a mortgagee but is a mere chargeholder and a suit by the other co owner to recover possession is governed by Art. 144 and not Art. 148 of the Limitation Act and the starting point is the date of redemption. Rule as to adverse possession among co-owners stated. (*Broadway and Johnstone, JJ.*) GANDA RAM *v.* MUNSHI RAM. **136 I.C. 264=I.R. 1932 Lah. 216=32 P.L.R. 649.**

———**Art. 148**—Applicability — Mortgage—Redemption by purchaser of equity of redemption—Suit by owner to recover possession—Governed by Art. 144, not Art. 148. *See* LIMITATION ACT, ART. 144. **57 Bom. 134=A.I.R. 1933 Bom. 114.**

———**Art. 148**—*Applicability—Suit against redeeming co-mortgagor.*

The position of a redeeming co-mortgagor is that of a mortgagee so as to make Art. 148 applicable to a suit for possession by the other co-mortgagors. 14 All. 1 and A.I.R. 1922 All. 410, Foll. (*Banerji and Niamatullah, JJ.*) AHMAD ZAMAN KHAN *v.* BALDEO DAS. **I.R. 1933 All. 394=144 I.C. 152=A.I.R. 1933 All. 228.**

LIMITATION ACT (1908), Art. 149.

———**Art. 148**—Applicability—Suit by puisne mortgagee for redemption of prior mortgage—Limitation—Art. 132. *See* LIMITATION ACT, ART. 132. **1935 O. W.N. 40=A.I.R 1935 Oudh 139.**

———**Art. 148**—*Applicability—Suit for redemption by puisne mortgagee.*

A suit by a puisne mortgagee for redemption of a prior mortgage against the auction purchaser in a suit on the prior mortgage to which the puisne mortgagee was not impleaded as a party, is governed by Art. 148 and the period of limitation is clearly 60 years reckoned from the date of the prior mortgage. (*Niamatullah, J.*) NAROTAM DAS *v.* SANWAL DAS. **153 I.C. 664 =7 R.A. 548=4 A.W.R. 70=A.I.R. 1934 All. 946.**

———**Art. 148**—*Applicability — Transferee from mortgagee—Suit to redeem.*

In the case of transfers by mortgagees, Art. 134 applies only where the transferee has acted in good faith. In other cases the suit to redeem against him is governed by Art. 148. (*Shadi Lal, C.J. and Broadway, J.*) MEHUNGA *v.* ZAMAN ALI SHAH. **I.R. 1931 Lah. 536=132 I.C. 184=32 P.L R. 359=A.I.R. 1931 Lah. 464.**

———**Art. 148**—*Redemption of mortgage by one co-mortgagor—Suit by another co-mortgagor for redemption of his share.*

A dispute relating to a mortgage executed in 1892 by five brothers was referred to the Debt Conciliation Board which delivered an award by which *A*, one of the brothers, was made solely responsible for redemption. *A* was put in exclusive possession of the mortgaged property and he discharged the mortgage in 1909. A suit filed by one of the other co mortgagors for redemption of his share as against *A* is governed by Art. 148 and not Art. 144, and time begins to run from the date of the redemption of the mortgage by *A*. (*Niyogi, A.J. C.*) JAIRAM *v.* BHILAJI. **27 N.L.R 152=I.R. 1930 Nag. 361=127 I.C. 889=13 N.L J. 166=A.I.R. 1930 Nag. 300.**

———**Art. 148**—*Scope—Puisne mortgagee authorized to redeem prior mortgage—Suit for redemption by.*

Art. 148 is not limited to suits by the mortgagor but governs all suits for redemption by parties entitled to redeem the mortgage. Where the puisne mortgagees were specifically authorized by the mortgagor to redeem the prior mortgage, a suit brought by the former to redeem the prior mortgage is governed by Art. 148 and not Art. 132. 47 M L.J. 602 and 20 L.W. 620, Not Foll. (*Tek Chand and Monroe, JJ.*) SUNDAR DAS *v.* BELI RAM. **14 Lah. 596=I.R. 1933 Lah. 299= 142 I.C. 805=34 P.L R. 502=A.I.R. 1933 Lah. 503.**

———**Art. 149**—*Adverse possession against Crown—No special discrimination in favour of Crown apart from longer period.*

When adverse possession is asserted as against the Government, it is not necessary that the adverse character of the possession should be actually brought home to the knowledge of the Crown. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due diligence to be aware of what is happening, and if the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. Apart from the longer period of limitation allowed to the Government by Art. 149, there is no discrimination in the Act between the

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Crown and the subject as regards the requisites of adverse possession. (*Lord Macmillan.*) SECRETARY OF STATE *v.* DEBENDRA LAL KHAN. **61 I.A. 78 = 61 Cal. 262 = 59 C.L.J. 56 = 3 A.W.R. 101 = 36 Bom. L.R. 249 = 1934 M.W.N. 165 = 6 R.P.C. 49 = 38 C. W.N. 285 = 1934 A.L.J. 153 = 39 L.W. 257 = 11 O.W. N. 96 = 147 I.C. 545 = A.I.R. 1934 P.C. 23 = 66 M.L. J. 134 (P.C.).**

———**Art. 149**—*Crown land handed over to Municipal Committee—Suit for possession by latter against trespasser.*

Where Crown land had been handed over to a Municipal Committee for management, a suit for possession by the Committee against the defendant who has interfered with their possession is governed by Art. 149. (*Addison and Beckett, JJ.*) LABHA SINGH *v.* MUNICIPAL COMMITTEE OF AMRITSAR. **36 P.L.R. 251 = 153 I.C. 964 = 7 R L. 485 = A.I.R. 1934 Lah. 960.**

———**Arts. 149 and 144**—Fishery rights in navigable river—Adverse possession against the Government—Evidence of—Right of the Government extinguished by operation of S. 28 and Art. 149. *See* LIMITATION ACT, S. 28 AND ARTS. 144 AND 149. **61 I.A. 78 = 61 Cal. 262 = 66 M.L.J. 134 (P.C.).**

———**Art. 151**—Time from the date of pronouncement to the date of drawing up of the order—Deduction of. *See* LIMITATION ACT, S. 12. **59 Cal. 1215.**

———**Art. 154**—*Applicability—Order under S.* 476, *Cr. P. Code.*

When a Court refuses to complain under S. 476, Cr. P. Code, it amounts to an order to the effect that it will not complain and is governed by Art. 154 of the Limitation Act. 52 Bom. 164 and 52 Cal. 1009. (*Jackson, J.*) KANDASWAMI PILLAI *v.* TIRUNAVUKARASU PILLAI. **1931 M.W.N. 1064.**

———**Art. 156**—*Appeal from preliminary decree—Commencement of time.*

Time for filing an appeal from a preliminary decree runs from date of the preliminary decree and not from that of the final decree. (*C. C. Ghose and S. K. Ghose, JJ.*) BENODINI CHOUDHURANI *v.* JAGABANDHU ROY. **6 I.R. (Cal.) 206 = 37 C.W.N. 179 = 146 I.C. 359 (1) = A.I.R. 1933 Cal. 796.**

———**Art. 156**—*Court closed from the next day after judgment—Limitation for appeal.*

From the next day after delivery of judgment, the Court was closed for annual vacation. After the re-opening, excluding the time taken up for application for copy of the judgment, the appeal was presented on the ninetieth day.

Held, that the appellant was entitled to exclude the period of the vacation and that the appeal was in time. 20 C.W.N. 1303 and A.I.R. 1929 Pat. 615, Foll. (*Agarwala, J.*) RIKHESARNATH TEWARI *v.* JANAKDEO NATH TEWARI. **6 R.P. 299 = 146 I.C. 931 = A. I.R. 1934 Pat. 4.**

———**Art. 156**—*Decree—Amendment or review.*

Per *Suhrawardy J.*—If a decree amended either by way of review or under S. 152 of the C. P. Code, the decree to be appealed from is the amended decree and no appeal should therefore lie from the original decree. The time for appeal should be reckoned from the date of the amended decree (*Suhrawardy and Jack, JJ.*) SOUDAMINI DASS *v.* NABLAK MIA BHAUIYA. **I.R. 1931 Cal. 699 = 133 I.C. 571 = 35 C.W.N. 251 = A.I.R. 1931 Cal. 578.**

———**Art. 156**—"*Decree or order appealed from*—Ex parte *decree set aside by trial Court*—Ex parte *decree restored by High Court—Appeal from decree—Limitation.*

LIMITATION ACT (1908), Art. 157.

Where a preliminary decree on a mortgage was passed *ex parte* and subsequently set aside by the Court which passed it within the appealable period and therefore no appeal was thereafter competent to the defendant but the High Court, in revision, restored the *ex parte* decree, limitation runs only from the date of the order of the High Court reviving the *ex parte* order and not from the date of the *ex parte* order itself. "The language of the third column should be so interpreted as to carry out the intention of the legislature, that is to say, by dating the cause of action from a date from which the remedy is available to the party. 43 M. 185 (F.B); 11 A. 47 (P.C.), Ref. (*Wallace and Krishnan Pandalai, JJ.*) PEER AMMAL *v.* NALLUSAMI PILLAI. **54 Mad. 455 = I.R. 1931 Mad. 434 = 130 I.C. 738 = 33 L.W. 154 = 1931 M.W.N. 18 = A.I.R. 1931 Mad. 149 = 60 M.L.J. 239.**

———**Art. 156**—*Presentation of appeal—Correction of vakalatnama out of time—Permissibility.*

The Counsel who presented an appeal had a power-of-attorney from the party but his name had not been entered in it nor was it specified in the heading for which of the parties Counsel appeared. The power of-attorney was however signed both by Counsel and the party. The defect was pointed out to the Counsel and was rectified by him but after the period for filing an appeal had expired.

Held, that the omission regarding proper authorization was merely accidental, that it did not invalidate his acts and that the appeal should be deemed to have been properly filed on its first presentation. 19 I. C. 674, Not Foll. (*Jai Lal, J.*) MANGAL SINGH *v.* BABU SINGH. **I.R. 1931 Lah. 882 = 134 I.C. 114 = 33 P.L.R. 74 = A.I.R. 1932 Lah. 134.**

———**Art. 156**—*Time for appeal—Vacation during the time allowed.*

Art. 156 should be read with S. 4 of the Act and the period allowed for filing an appeal is the time allowed by Art. 156 plus the time during which the Court was closed. (*Kulwant Sahay and Mahomed Noor, JJ.*) RAM CHARAN SHUKUL *v.* SRI THAKURJI MANDIL DARKADHIS. **I.R. 1931 Pat. 169 (1) = 130 I.C. 265 (1) = 14 Pat.L.T. 1 = A.I.R. 1931 Pat. 60.**

———**Art. 157**—*Appeal against acquittal—Necessity for expedition.*

Though a period of six months is the limitation allowed by law for appeals from acquittals, it is advisable and necessary for such appeals being preferred with all resonable expedition possible, not only in the public interest but in justice to the persons whose acquittal it is sought to reverse. 5 All. 253, Foll. (*Page, C.J. and Mya Bu, J.*) EMPEROR *v.* U SAN WIN. **10 Rang. 312 = 138 I.C. 523 = I.R. 1932 Rang. 170 = 33 Cr.L.J. 701 = 1932 Cr.C 709 = A.I R. 1932 Rang. 146.**

———**Art. 157**—*Applicability—Appeal under S.* 449, *Cr. P. Code.*

The right of appeal in a case tried by jury under the provisions of Chap. 33, Cr. P. Code, is not created by S. 449. The right of appeal against an order of acquittal is created by Ss. 417 and 449; in its application to appeals against acquittals it merely has the effect of enlarging the scope of such appeals in certain classes of cases. The appeal against acquittal under S. 449 is also an appeal against an order of acquittal, and the effect of Art. 157, Limitation Act is to fix the period of limitation in respect of such appeals at six months in all classes of cases, whatever may have been the form of trial and whatever may be the scope of the appeal. The only effect is that by reason of the provisions of S. 449 its scope extends to questions of fact as well as to questions

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of law. (*Patterson and Guha, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BAGIRATH MAHTO. **61 Cal. 991=151 I. C. 662=7 R.C. 147=35 Cr.L J. 1367=38 C.W N. 854=59 C.L J. 482=1934 Cr.C. 908=A.I.R. 1934 Cal. 610.**

———**Art. 158**—*Applicability—Objection in answer to application for making award rule of Court.*

An objection to an award was preferred after a period of ten days, from the filing of the award in Court. The objection was a statement in answer to an application for having the award made a rule of the Court.

Held, that Art. 158 had no application to the case. 14 O.C. 308, Foll. (*Din Mahommad, J.*) MANGHOO RAM *v.* GIRDHARI LAL. **162 I.C. 124=8 R.L. 849=A.I.R. 1935 Lah. 951.**

———**Art. 158**—*Applicability—Objection under para. 12 or 14, C. P. Code, Sch. II.*

Art. 158 of the Limitation Act applies only to objections under para. 15 of the C. P. Code, Sch. II, *i.e.*, where the application is to set aside the award completely. Where the application, on the other hand, is only for the modification or remission of the award, it comes within para. 12 or para. 14 of the second schedule of the C. P. Code, and Art. 158 which provides 10 days' limitation is not applicable thereto. (*Baipai, J.*) KIROTI *v.* BEHARI LAL. **6 I.R (All.) 314=146 I.C. 596=1933 A.L.J. 519=A.I R. 1933 All. 648.**

———**Art. 158**—*Award—Objections to—Decree within the time fixed for—If can be passed.*

Under Art. 158, Limitation Act, the time for putting in objections to the award, under Sch. II, para. 16, C.P. Code, is ten days, and the Court should not pronounce judgment within 10 days after the award has been received. (*Pakenham Walsh, J.*) SUBBA RAO *v.* RAMALINGAYYA. **152 I.C. 157=7 R.M. 189=40 L. W. 364=A.I.R. 1934 Mad. 619=67 M.L.J. 377.**

———**Art. 158**—*Award—Objections—Time taken in getting copies—Exclusion.*

Period requisite for obtaining copy of an award should be allowed while computing period for filing objections to the award. (*Bagulay, J.*) D. B. DAS *v.* DAYALAL & SONS. **I.R. 1933 Rang. 46=142 I.C. 835=A.I.R. 1933 Rang. 38.**

———**Art. 158**—*Extension of limitation—Need for plea being taken.*

A Court is not bound to go beyond the *prima facie* facts in matters of limitation and to inquire how long he took to obtain copies. There are many ways in which limitation, as fixed by definite periods of time, may be extended, but if the appropriate plea is not put forward, it is not the business of the Court to conduct an investigation in order to satisfy itself before acting that it has complied with all the provisions of the law. An award was filed in Court on the 30th June and notice on the same day given to the parties for the 11th July, that date being clearly fixed in order to comply with Art. 158. The defendant urged before the High Court that the following day, the 1st July, was a Sunday, and that on the 2nd July he applied for a copy of the award which was not obtained until the 9th. Accordingly he had only the interval between the 9th and 11th instead of the ten clear days allowed. He therefore contended that the Court below acted illegally and without jurisdiction in passing the decree on the basis of the award.

Held, that as the defendant had failed to bring this fact to the notice of the lower Court and as it was not the duty of the Court *suo motu* to make inquiry, the High Court could not interfere in revision. 29 I.C. 860, Ref.

LIMITATION ACT (1908) Art. 164.

(*Curgenven, J.*) CHENDRAYYA *v.* APPALAMMA. **I. R. 1932 Mad. 812=140 I.C. 11 (2)=A.I.R. 1932 Mad. 588.**

———**Arts. 163 and 181**—Applicability—Plaintiff not informed of date of adjourned hearing—Dismissal for default—Application to restore—Limitation. *See* C. P. CODE, S. 151 AND O. 9, RR. 8 AND 9. **A.I.R. 1935 Pesh. 186.**

———**Arts. 163 and 164**—*Application to set aside dismissal for default—Limitation—Starting point.*

The starting point of the period of limitation for an application to set aside a dismissal for default of appearance of plaintiff is date of dismissal, and not date of knowledge as in Art. 164. Hence an application filed beyond 30 days from the date of dismissal should be dismissed, even though plaintiff is not aware of dismissal, S. 5 not having been made applicabe to such an application so as to give the Court power to extend time. In Art. 163, the starting point is the date of dismissal, and there is nothing in this article about the date of knowledge as there is in Art. 164. (*Rowland, J.*) DECRUZE *v.* PITTS. **147 I.C. 179=6 R.P. 345=A.I R. 1933 Pat. 557.**

———**Art. 163**—*Dismissal for default—Subsequent death of plaintiff—Application by legal representatives three months later—Limitation.*

A suit was dismissed on 22-12 1930 for plaintiff's default. The plaintiff died on 9 1-1931. No application under O. 9, R. 9 of C. P. Code was made by the legal representatives within thirty days. Three months later the widow applied to have her name brought on record.

Held, that the time had begun against the husband and expired on 23-1-1931 and the widow could not be in a better position than her husband and the application was barred. (*Raza and Allsop, JJ.*) DHANPAT DEI *v.* RAM RACHHPAL SINGH. **6 I.R. (Oudh) 201=146 I.C. 1001=14 L R. 739 (Rev.)=17 R.D. 909=10 O.W.N. 1008.**

———**Art. 164**—*Applicability—Defendant having due notice of suit—Omission to ascertain date of hearing.*

Art. 164 is not intended to help a defendant who is duly served with a summons and has due notice of the suit but who intentionally neglects to ascertain the dates of the suit after it has been transferred to another Court with a view to come at a late stage and get the decree set aside if it were passed *ex parte*. No proceedings can therefore be taken on an application by such defendant, to set aside an *ex parte* decree presented after the period of limitation. A.I.R. 1926 Lah. 379, Rel. on. (*Bhide, J.*) SHAM SUNDAR KHUSHI RAM *v.* DEVI DITTA MAL. **I.R. 1932 Lah 576=139 I.C. 354=33 P.L R. 838=A.I.R. 1932 Lah. 539.**

———**Art. 164** — *Applicability — Order allowing amendment of decree—Application to set aside.*

A decision given under S. 152, C. P. Code, granting an application for amendment of a decree is an order and not a decree. Hence an application to set aside such an order is governed by Art. 181 and not by Art. 164. (*Ba U, J.*) LAWRENCE *v.* DEWAN SINGH. **6 I R. (Rang.) 59 (1)=145 I.C. 823=A.I.R. 1933 Rang. 264.**

———**Art. 164**—*Application to set aside* ex parte *decree attaching security bond—Withdrawal of application as being defective—Second application with same security bond within limitation—Verification of bond by surety after limitation—Bond, when takes effect.*

An application was made for setting aside an *ex parte* decree with the necessary security bond attached to it.

LIMITATION ACT (1908), Art. 164.

This application was withdrawn as being defective in certain formalities. Subsequently a second application for the same purpose was made within limitation and to this application the same security bond was attached. The security bond was verified by the surety after limitation on a question being raised as to limitation.

Held, that although the Court would accept the security bond after some evidence in support of its genuine character, the date of the evidence would not affect the date on which the security bond was actually filed and that inasmuch as the surety verified the security bond as a genuine and correct document, the bond was effective and valid from the date on which it was filed. (*Wazir Hasan, C.J.*) SHIAM BEHARI LAL *v.* BANSIDHAR. **7 R O. 268=152 I.C. 974=11 O.W.N. 1639=A.I.R. 1935 Oudh 35.**

———**Art. 164**—*Application to set aside* ex parte *decree—Extension of time—Power of Court.*

For an application to set aside an *ex parte* decree, a period of limitation is prescribed by Art. 164. The provision of S. 3, Limitation Act, render it imperative that an application presented after the statutory period of limitation shall be dismissed. It is not competent for the Courts to enlarge the period of limitation laid down by the statutory law. (*Fraser, J.C. and Saaduddin, A.J.C.*) AJAB KHAN *v.* ALAF GUL. **A.I.R. 1935 Pesh. 146.**

———**Art. 164**—*Application to set aside* ex parte *decree—Security bond filed in time but verified late—Validity of.*

A security bond, which was filed along with the application to set aside an *ex parte* decree, had not however been verified by the two sureties. It was in fact verified later but by that time it was two days beyond the period of limitation prescribed for making the application.

Held, that the bond was filed, though not verified in the first instance, and was perfectly good and effective and that the application was within time. 29 A.L.J. 1049, Ref. (*Kendall, J.*) AHMAD YAR KHAN *v.* KHEYALI. **147 I.C. 853=6 R.A. 580=1933 A.L.J. 992=A.I.R. 1933 All. 933.**

———**Art. 164**—*Commencement of limitation—Knowledge of decree.*

Under Art. 164 an application to set aside an *ex parte* decree must be filed within 30 days from the date of the applicant's knowledge of the decree and not within 30 days of the knowledge of the suit. (*Khaja Mahomed Noor and Agarwala, JJ.*) RAJESHWARI PRASAD SINGH *v.* BRAHMANAND LAL. **12 Pat. 745=6 I.R. (Pat) 157=145 I.C. 314=14 Pat.L.T. 326=A.I.R. 1933 Pat. 279.**

———**Art. 164**—*Decree passed* ex parte *on substituted service—Application to set aside—Enquiry into due service—Duty of Court.*

The fact that substituted service by order of Court has been declared under O. 5, R. 20 (2), C.P. Code, to be as effectual as if it had been made on the defendant personally does not necessarily mean that the first part of Art. 164, Limitation Act, covers the application to set aside decrees which follow such service. The words "or where the summons was not duly served" in Art. 164 clearly connote an inquiry into the due service of the summons which can only be found out by giving a chance to the petitioner to prove that he has not been served according to law. (*Mir Ahmad, A.J.C.*) AHMAD DIN *v.* GOKAL CHAND. **158 I.C. 355=8 R. Pesh. 52 =A.I.R. 1935 Pesh. 137.**

———**Art. 164**—"*Due service*"—*Effect of substituted service.*

LIMITATION ACT (1908), Art. 164.

The lower Court acting on certain decisions then in vogue held substituted service is due service within the meaning of Art. 164, Limitation Act. Subsequently however a slightly modified view had been taken in other cases.

Held, that the lower Court had not acted erroneously and that it was not a case for interference in revision. The decisions on the question of substituted service reviewed. (*Curgenven, J.*) RAJAGOPALACHARI *v.* SUBRAMANIAM. **I R. 1932 Mad. 525=138 I.C. 146 =1932 M.W.N. 133=A.I.R. 1932 Mad. 472.**

———**Art. 164**—*Due service—Substituted service.*

The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. But if for no fault of the defendant, a defendant was never put in a position to know that a suit has been instituted against him, whatever steps might have been taken for serving the summons on him, these steps can never be taken as amounting to "due service." It is therefore open to the defendant, when he appears to show that the method employed was not calculated to effect the purpose of informing the defendant of the institution of the suit, and in order to see whether there was due service or not, the Court must consider all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him and where and how the summons was served. (*Sulaiman, A.J.C., Mukerji, Boys and Bajpai, JJ.*) RAM BHAROSE *v.* GANGA SINGH. **54 All. 154=136 I C. 609=I.R. 1932 All. 225=1931 A.L.J. 1049=A. I.R. 1931 All. 727 (F.B.).**

———**Art. 164**—'*Due service*'—*Substituted service.*

The aggrieved party may be given an opportunity of proving that substituted service had not been properly effected, that, in other words, there had been no due service. In that sense it is incorrect to say that substituted service is necessarily due service which can never be contested by the judgment-debtor at a later date; but it is equally incorrect to say that it is necessarily not due service. The Court can in a case of substituted service come to the conclusion that the substituted service was properly asked for, granted and effected, in other words, that there was due service. (*Waller and Krishnan Pandalai, JJ.*) MUHADIN KADER MEERA SAHIB. *v.* LAKSHMANAN CHETTIAR. **55 Mad. 240= 135 I.C. 344=I.R. 1932 Mad. 88=1931 M.W.N. 1079=34 L.W. 633=A.I.R. 1931 Mad. 812=61 M. L.J. 931.**

———**Art. 164**—"*Due service*"—*Substituted service—Application for setting aside* ex parte *decree—Limitation.*

Substituted service under O. 5, R. 20, C.P. Code, is as effectual as personal service and is therefore "due service" within the meaning of Art. 164 of the Limitation Act. Where the order for substituted service is based on proper materials and an *ex parte* decree is passed an application for having it set aside should be made within the prescribed time. (*Nanavutty, J.*) THAKUR PRASAD *v.* BARATI LAL. **I.R. 1931 Oudh 330=132 I.C. 778=14 O L.J. 543=8 O.W.N. 845=A.I.R. 1931 Oudh 369 (1).**

———**Art 164**—'*Due service*'—*Substituted service—Service of summons—Limitation.*

In the case of substituted service a summons is duly served for the purpose of Art. 164 even though it does not in fact come to the defendant's knowledge and as time runs from the date of the decree in such cases, an application for setting aside an *ex parte* decree made

LIMITATION ACT (1908), Art. 164.

after the expiry of 30 days from the date of the decree is clearly barred by limitation. (*Addison, J.*) HANSRAJ *v.* NARAIN SINGH. **131 I.C. 344=31 P.L.R. 1006=A.I.R. 1931 Lah. 118.**

———**Art. 164**—*Due service—What is—Substituted service.*

Substituted service cannot always be deemed to be due service within the meaning of Arts. 164 and 169 of the Limitation Act. Due service within the meaning of those Articles is not service which is technically and formally correct as a basis for proceeding *ex parte* but service which has really been effective, which has achieved the object of service by bringing the claim against him to the knowledge of the defendant or respondent. 52 M.L.J. 512 and 28 L.W. 513, Diss.; 54 M.L.J. 448. Ref. (*Reilly and Anantakrishna Aiyar, JJ.*) GYANAMMAL *v.* ABDUL HUSSAIN SAHIB. **55 Mad. 223=I.R. 1932 Mad. 18=1931 M.W.N. 1069=34 L W. 496=134 I.C. 1202=A.I.R. 1931 Mad. 813=61 M.L.J. 920.**

[**Cons.** 55 M. 240 (241, 242); **R.** 1932 M. W. N. 133 (134)].

———**Art. 164**—"Duly served"—Substituted service—If due service. *See* C. P. CODE, O. 9, R. 14—"DULY SERVED." **38 C.W.N. 1066.**

———**Art. 164**—Ex parte *decree—Application to set aside.*

Where an *ex parte* decree was passed against two defendants on 12th June, 1928, and an application to have it set aside was made by one of them on 4th December, 1928, and the other applied on 15th February, 1929.

Held (per *Obiter*), that the proper article applicable was Art. 164 and not Art. 181. (*Bhide, J.*) PURAN CHAND *v.* RALIA RAM. **I.R. 1931 Lah. 775=133 I.C. 439=32 P.L.R. 410.**

———**Art. 164**—Ex parte *decree—Application for setting aside—Starting point of limitation.*

The Court ordered a suit for accounts to be proceeded with *ex parte* and passed a preliminary decree on 14th November, 1927, and a final decree on 20th December, 1927. The defendant applied on 10th November, 1928, to set aside the decree alleging that he came to know of it on 2nd November, 1928.

Held, that time began to run against the defendant under Art. 164 from the date of the decree and he was not entitled to count limitation from the date on which he alleged he had knowledge of the decree. (*Tapp, J.*) BALDEV SINGH *v.* KRISHEN. **135 I.C. 42=I.R. 1932 Lah. 26=33 P.L.R. 938=A.I.R. 1931 Lah. 268.**

———**Art. 164**—Ex parte *decree—No failure to serve summons—Starting point of limitation.*

A suit for rendition of accounts was adjourned at the instance of the defendant's Counsel but the defendant or his Counsel did not appear on the adjourned date with the result that the Court proceeded with the suit *ex parte* and passed preliminary and final decrees. The defendant having applied to have the decree set aside.

Held, that the case was not one where the summons had not been duly served so as to make the second part of the provision in the last column of Art. 164 applicable. (*Tapp, J.*) BALDEV SINGH *v.* KRISHEN. **135 I.C. 42=I.R. 1932 Lah. 26=33 P.L.R. 988=A.I.R. 1931 Lah. 268.**

———**Art. 164**—Ex parte *decree—Setting aside—Date of knowledge.*

Where an application made by a defendant to set aside an *ex parte* decree is opposed on the ground that the defendant was aware of the decree long before and so his application was out of time, it is necessary for the opposing plaintiff to prove that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum and not merely the knowledge of the defendant that a decree had been passed by some Court against him. 47 Bom. 485; 36 Cal. 394 and 49 M. L. J. 445, Ref. (*Niyogi, A. J. C.*) CHINTAMAN *v.* PANNALAL. **27 N.L.R. 53=I.R. 1931 Nag. 151=134 I C. 279=A.I.R. 1931 Nag. 119.**

———**Art. 164**—Ex parte *decree—Setting aside—Date of knowledge—Onus of proof.*

When a defendant comes forward with an application for setting aside an *ex parte* decree more than 30 days after the date of the decree, the *onus* lies on him of proving for purposes of Art. 164 that his application is presented within 30 days of his having knowledge of the decree if the summons was not duly served on him, 7 Lah. 161, relied on. (*Shadi Lal, C.J.*) TIPPAR CHAND LAKHMI CHAND *v.* HABIB UL-RAHMAN. **I.R. 1932 Lah. 562=139 I.C. 131 (1)=33 P.L.R. 123 (2).**

———**Art. 164**—Ex parte *order of adjudication—Setting aside—Limitation.*

There is no provision in the Provincial InsolvencyAct for the setting aside of an order of adjudication of an insolvent passed *ex parte*. Application for setting aside such an order has to be made under O. 9, R. 13 and is governed by Art. 164 of the Limitation Act. (*Abdul Qadir, J.*) UMAR DIN *v.* RAGHUNATH SAHAI. **I.R. 1932 Lah. 498=138 I.C. 377=33 P.L.R 698=A.I.R. 1932 Lah. 522.**

———**Art. 164**—*Extension of time—Powers of Court.*

Except where there are special rules made by the High Court extending the provisions of S. 5 of the Limitation Act to applications for setting aside *ex parte* decree, the Courts do not have the power to have recourse to the provisions of S. 5, or enlarge the period prescribed by Art. 164 by resorting to S. 151 of the C.P. Code. The Nagpur J. C.'s Court has not framed any rules under S. 122 of the C. P. Code extending the application of S. 5 of the Limitation Act to applications for setting aside *ex parte* decrees and so that Court has no such power. (*Subhedar, A. J. C.*) PUNDALIK VITHOBA *v.* GANPAT. **I.R. 1933 Nag. 239=144 I.C. 394=A.I.R. 1934 Nag. 43.**

———**Art. 164**—*Starting point.*

Where the summons was duly served, the starting point of limitation for an application to set aside the *ex parte* decree is the date of the decree. (*Wazir Hasan, C. J. and Raza, J.*) HAR CHARAN SETH *v.* MAHOMED AZIZULLAH. **141 I.C. 759=I.R. 1933 Oudh 85=9 O.W.N. 896=A.I.R. 1932 Oudh 326.**

———**Art. 164**—"*Summons*"—*Meaning of.*

The summons referred in Art. 164 is the summons for the first hearing of the case, and there is no essential difference between the case where a suit is adjourned owing to the absence of the presiding officer or some other cause and a case in which a suit remanded for retrial by the appellate Court. The underlying principle in such cases is that where the existence of the suit has been brought to the notice of the defendants by due service of a summons on them, it is their duty thereafter to inform themselves of what is being done in the case (*Almond, J. C.*) TARA CHAND *v.* RAM CHAND. **154 I.C. 429=7 R. Pesh. 81 (2)=A.I.R. 1935 Pesh. 7.**

———**Art. 164**—"*Where summons was not duly served*"—*Effect.*

The words "where the summons was not duly served" in Col. 3, Art. 164, refer to the summons for the first hearing of the suit and not to any summons issued for a subsequent hearing. The intention is to give an extended period of limitation in cases where the defendant has no knowledge at all of the suit. But when he has

LIMITATION ACT (1908), Art. 165.

knowledge of the suit, the mere fact that he did not get the due notice of a subsequent hearing can hardly be considered to be a ground for extension of the period. 57 I. C. 15 and A. I. R. 1924 Lah. 666, Foll. (*Bhide, J.*) SHAM SUNDAR KHUSHI RAM *v.* DEVI DITTA MAL. **I.R. 1932 Lah. 576 = 139 I.C. 354 = 33 P L.R. 838 = A I.R. 1932 Lah. 539.**

———**Art. 165**—*Applicability—Proceedings under O. 21, R. 101, C. P. Code.*

S. 22 of the Limitation Act is confined to suit and does not apply to application under R. 101; the proper article of limitation to apply to such application is Art. 165. (*Panckridge, J.*) INDUBHUSHAN DAS *v.* HARICHARAN MANDAL. **58 Cal. 55 = I.R. 1931 Cal. 583 = 132 I.C. 631 = A.I.R. 1931 Cal. 385.**

———**Art. 165**—*Application under O. 21, R. 100, C.P. Code—Non joinder of sub-purchaser—Subsequent joinder after 30 days—Bar of limitation.*

Where the claimant preferred his petition under O 21, R. 100 within 30 days of his dispossession bringing the judgment-creditor and the auction purchaser on record but failed to bring the sub-purchaser on record till he had notice of the sub-purchase and after 30 days.

Held, that the petition was not barred by limitation. (*Panckridge, J.*) INDUBHUSHAN DAS *v.* HARICHARAN MANDAL. **58 Cal 58 = I.R. 1931 Cal. 583 = 132 I.C. 631 = A.I.R. 1931 Cal. 385.**

———**Arts. 166 and 181**—*Applicability—Application by auction-purchaser under O. 21, R. 91, C. P. Code.*

Art. 166 of the Limitation Act governs all applications under Civil Procedure Code, to set aside a sale in execution of a decree, including one by the auction-purchaser under O. 21, R. 91 to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Art. 181 does not apply to such an application. (*Sulaiman, C. J. and Bennet, J.*) GULZARI LAL *v.* SHEO CHARAN LAL. **156 I C. 389 = 7 R.A. 1064 (2) = 1935 A.L.J. 940 = 1935 A.W.R. 1006 = A.I.R. 1935 All. 889.**

———**Art. 166**—Applicability—Objections under S.47, C. P. Code, governed by Art. 181 and 166. *See* LIMITATION ACT, ARTS. 181 AND 166. **A.I.R. 1933 Lah. 570.**

———**Art. 166**—*Applicability—Void execution sale—Application to set aside.*

If a party wants a sale to be set aside for any of the reasons given in R. 90, O. 21, then the application must be made within 30 days as enacted by Art. 166, Limitation Act; but where a void sale is sought to be set aside then the application would not be under R. 90 O. 21, but will be deemed to be an application made in execution governed by S. 47 and to which Art. 181, Limitation Act, would be applicable. (*Young and Rachhpal Singh, JJ.*) NAROTAM DAS *v.* BHAGWAN DAS. **151 I.C. 244 = 7 R.A. 119 = 1934 A.L.J. 859 = 3 A.W.R. 545 = A.I.R. 1934 All. 314.**

———**Art. 166**—*Application by judgment-debtor under O. 21, R. 89, C. P. Code—Deposit not made in time owing to inaction of Court—Effect.*

No doubt under O. 21, R. 89, read with R. 92 (3), C, P. Code, and Art. 166 of the Limitation Act, it is necesssary that not only the application but also the deposit must be made within thirty days of the date of the sale and this period cannot be extended by the Courts, S. 148, C. P. Code, being inapplicable. But it is well settled that a party litigant ought not to be penalised when he found it impossible to comply with the requirements of the statute, not because of any fault of his own, but by reason of the action or inaction of the Court. Where therefore the

LIMITATION ACT (1908), Art. 166.

deposit by the judgment-debtor was not made in time owing to unnecessary delay on the part of the Court in issuing the chalan, there is no reason why he should suffer in consequence. (*Tek Chand, J.*) BUTI RAM *v.* SARDAR SINGH. **36 P.L.R. 101 = 155 I.C. 603 = 7 R. L. 741 = A.I.R. 1934 Lah. 875.**

———**Art. 166**—*Application to set aside sale—Date of service of notice of motion as material.*

An application to set aside a sale is made in time if service of the notice of motion is made within time. The fact that it comes on for disposal after the time prescribed does not matter. (*Lort Williams, J.*) JNANENDRA KUMAR ROY CHAUDHURI *v* AMRITAKRISHNA DATTA. **60 Cal. 1106 = 147 I C. 797 = 6 R.C. 363 = A.I.R. 1933 Cal. 886.**

———**Art. 166**—*Application to set aside sale—No fraud made out—Judgment-debtor's knowledge—Date of —Relevancy of.*

In an application to set aside a sale in execution, if no fraud in conducting the sale has been made out, the question of the date of knowledge of the judgment-debtor is irrelevant. (*Mukerji and Guha, JJ.*) J. C. GALSTAUN *v.* SYED MAHOMED HUSAIN. **140 I.C. 732 = I.R. 1933 Cal. 26 = 36 C.W.N 242 = A.I.R. 1932 Cal. 627.**

———**Art. 166**—*Application to set aside sale—Notice to purchaser—Actual but not formal notice, if sufficient.*

Where a purchaser has actual notice of the application to set aside a sale, the absence of formal notice is not a bar to the maintainability of the application. (*Lort Williams, J.*) JNANENDRA KUMAR ROY CHAUDHURI *v.* AMRITAKRISHNA DATTA. **60 Cal. 1106 = 147 I C. 797 = 6 R.C. 363 = A I.R. 1933 Cal. 886.**

———**Art. 166 and S. 14**—*Application under O. 21, R. 89, C. P. Code, to set aside sale—Court ordering petition to be dismissed as withdrawn—Sale upheld in appeal—Fresh application to set aside sale—Continuance of earlier petition—Extension of time—C. P. Code, O. 21, Rr. 89 and 90.*

In execution of a mortgage decree the mortgaged property was brought to sale. Defendants 19 to 21 objected to the execution and their objection having been dismissed they took the matter in appeal to the High Court. Certain other defendants attacked the sale under O. 21, R. 90, C. P. Code. Defendants 19 to 21 also deposited the decree amount in Court and prayed to have the sale set aside under O. 21, R. 89 of the Code. They obtained a stay of any further proceedings under R. 89 pending the disposal of their appeal to the High Court objecting to the execution. Subsequently the application under O. 21, R. 90 were allowed and the sale was set aside. Against this the vendee appealed to the High Court. After the sale was set aside defendants 19 to 21 first got their stay order in the High Court cancelled and then applied to the lower Court for permission to withdraw their application under O. 21, R. 89 and the Court ordered that the application be dismissed as withdrawn and the deposit made by them was refunded. Later on, the High Court allowed the appeal preferred by the vendee and restored the sale. Thereafter defendants 19 to 21 presented an application to the ower Court under S. 151 and Q. 21, R. 89 praying that he sale be cancelled, if necessary, by reviving their earlier application under O. 21, R. 89 and by excusing the delay. The lower Court set aside the sale as prayed for.

Held, in appeal, that the subsequent application having been made more than thirty days after the date of the sale was timebarred; and the Court could not treat the original application as pending in spite of its order of dismissal.

LIMITATION ACT (1908), Art. 166.

Held, further, that the Court could not entertain the later application on any general ground of equity based on the principle of S. 14 of the Limitation Act, because the applicants had in withdrawing their original application acted at their own risk. (*Jackson and Butler, JJ.*) CHIDAMBARAM CHETTIAR *v.* ANNAMALAI CHETTIAR. **40 L.W. 266=152 I.C. 519=7 R.M. 234 (2)=A.I.R. 1934 Mad. 593=67 M.L.J. 189.**

———**Art. 166**—"*Date of sale*"—*Sale when complete—Deposit of* 25 *per cent.—If essential.*

The sale is complete as soon as the offer of the auction purchaser is accepted by the auctioneer and it is immaterial for the purpose of Art. 166, whether the 25 per cent. deposit is made or not. (*Almond, A.J.C.*) PADAM LAL *v.* MOHAN LAL. **159 I.C. 273=8 R. Pesh. 80=A.I.R. 1935 Pesh. 160.**

———**Art. 166**—Decree executed against minor—Sale made in absence of guardian—Application to set aside sale—Limitation. *See* LIMITATION ACT, ART. 181. **A.I.R. 1935 Lah. 972.**

———**Art 166**—Deposit made by judgment debtor after limitation with consent of decree-holder—Power of Court to set aside sale. *See* C. P. CODE, O. 21, R. 89. **1935 O.W.N. 975.**

———**Art. 166**—*Execution—Exemption of property from attachment—Limitation for plea being taken.*

Where a judgment-debtor is aware of the proclamation of sale and his property has been attached but does not make any objection prior to the sale, he cannot, after the sale, be allowed to raise an objection under S. 60 that the property proclaimed to be sold is not liable to attachment and sale under that section. An objection or application by a judgment-debtor that his property is not liable to attachment and sale under S. 60 is an objection under S. 47 and is governed by Art. 166. (*Staples, A.J.C.*) SOBHA KHUSHAL *v.* CHHAGANBAI. **30 N.L.R. 135=6 R.N. 174=148 I.C. 200=A.I.R. 1934 Nag. 82.**

———**Art. 166**—*Execution sale—Application to set aside.*

Though an application by a judgment-debtor for setting aside sale on the ground that he was not notified either under O. 21, R. 22 of the application for execution or under O. 21, R. 66 of the date of the preparation of the sale proclamation, falls under S. 47, C. P. Code, still it is governed by Art. 166 of the Limitation Act. (Case-law reviewed.) (*Dalal and Bennet, JJ.*) KASHI RAM *v.* MT. HASMAT BANOO. **I.R. 1931 All. 324=130 I.C. 708=1931 A.L.J. 119=A.I.R. 1931 All. 145.**

———**Art. 166**—Execution sale—Application to set aside under S. 47, C. P. Code—Art 181 applies, not Art. 166. *See* LIMITATION ACT, ART 181. **32 P.L.R. 440=A.I.R. 1931 Lah. 586 (2).**

———**Art. 166**—*Execution sale—Application under O.* 21, *R.* 89, *C. P. Code—Limitation—Starting point.*

The rule of limitation govering applications under O. 21, R. 89 is to be found in Art. 166 of the Limitation Act. The *terminus a quo* for such applications is the date of sale. The provisions of the C. P. Code suggest that it is only on the date when the bid is accepted and a declaration made about a person being a purchaser which declaration is to be followed immediately with the deposit of one fourth of the purchase-money that the sale can be said to have been completed and the starting point of limitation for an application under R. 89 must be the date of such declaration and deposit and not the date when the bid was made. (*Bisheshwar Nath and Kisch, JJ.*) KANWAL RAM *v.* GURDEVI. **I.R. 1931 Oudh 263=132 I.C. 263=14 O.L.J. 427=8 O.W.N. 633=A.I.R. 1931 Oudh 291.**

LIMITATION ACT (1908), Art. 168.

———**Art. 166**—*Extension of time.*

The period of limitation under Art. 166 being fixed by statute and not by the Court, it cannot be extended under S. 148, C. P. Code, or under S. 5, Limitation Act (*Middleton, J.C.*) BHAG CHAND *v.* MT. NAJAB SULTAN. **148 I.C. 1082=6 R. Pesh. 69=A.I.R. 1934 Pesh. 25.**

———**Art. 166**—*Sale by Collector under Oudh Civil Rules, R.* 211—*Application to set aside sale—Limitation—Starting point.*

Where property to be sold in execution of a decree is self-acquired revenue paying land belonging to the judgment-debtor and the papers are sent to the Collector for sale under R. 211 of the Oudh Civil Rules, the Collector is acting merely as a sale officer under the directions of the executing Court and the Court remains seized with the execution and the sale is not completed until the Court formally accepts the bid and declares the purchaser. O. 21, R 84, C. P. Code, prior to such order, the bidder, whose bid has been accepted by the sale officer at the time of the bid, does not acquire any interest in the property and the starting period of limitation under Art. 166 of the Limitation Act for an application to set aside the sale is the date on which the Court approves of the sale and declares the purchaser. (*Nanavutty and Thomas, JJ.*) HARI SHANKAR *v.* AMINA BIBI. **10 Luck. 557=1935 O.W.N. 208=153 I.C. 719=7 R.O. 376=1935 R.D. 99=A.I.R. 1935 Oudh 131.**

———**Art. 167**—*Application for delivery of possession under O.* 21, *R.* 95—*Resistance—Application under O.* 21, *R.* 97 *held barred by limitation—Fresh application for warrant of possession not barred.*

After the purchase, the decree-holder-purchaser made an application under O 21, R. 95, for delivery of possession of the property, and a warrant for possession was issued. A report was then received that resistance was offered. The Judge held that an application under O. 21, R. 97 was barred by limitation and the decree-holder-purchaser applied for a fresh warrant for possession.

Held, that the case did relate to an application under O. 21, R. 95 and the matter at issue between the parties did relate to the execution of the decree, and hence a suit could be barred under S. 47. The purchaser as a decree-holder was not barred by O. 21, R. 97, or by Art. 167, Limitation Act, for making a fresh application for execution or possession. (*Staples, A.J.C.*) NATHU HARISHANKAR *v.* FATUSA. **147 I.C. 582=6 R.N. 132=A.I.R. 1933 Nag. 369.**

———**Art. 167**—Scope—Obstruction to judgment-debtor—Fresh application for possession—No bar—Art. 167 has nothing to do with such an application. *See* C. P. CODE, O. 21, R 97. **35 Bom.L.R. 1033=A.I.R. 1933 Bom. 457 (F.B.).**

———**Art. 168**—*Appeal dismissed for default—Application for restoration—Limitation.*

An application for restoration of an appeal which has been dismissed for default of prosecution is governed by Art. 168 and S. 5 of the Limitation Act has no application to such a case. (*Heald and Brown, JJ.*) MA SEIN *v.* S.T.R.M. FIRM. **I.R. 1933 Rang. 36=142 I.C. 185=A.I.R. 1933 Rang. 96.**

———**Art. 168**—*Appeal dismissed under O.* 41, *R.* 10 (2) *of C. P. Code—Application to restore.*

An application for the restoration of an appeal dismissed under O. 41, R. 10 (2), C. P. Code, for failure of the appellant to furnish security for costs is governed by Art. 68. (*Curgenven and Cornish, JJ.*) SIRUR *v.* MY-

LIMITATION ACT (1908), Art. 169.

THILI AMMAL. **136 I.C. 45 = I.R. 1932 Mad. 253 = 1931 M.W.N. 1124 = 34 L.W. 783 = A.I.R. 1932 Mad. 170 = 61 M.L.J. 688.**

———**Art. 169**—Due service—What is—Substituted service not due service within the meaning Arts. 164 and 169. *See* LIMITATION ACT, ART. 164. **A.I.R. 1931 Mad. 813 = 61 M.L.J. 920.**

———**Art. 169**—"*Notice of appeal.*"

Quaere.—Whether the expression "notice of appeal" in Art. 169, refers to first notice as regards the appeal having been filed or to the subsequent notices as to the dates fixed for hearing. (*Bhide, J.*) GHULAM HUSSAIN *v.* MAKHAN LAL. **147 I.C. 288 = 6 R.L. 381 (2) = 35 P.L.R. 146 = A.I.R. 1933 Lah. 882.**

———**Art. 174**—*Adjustment—Need for certification.*

Having regard to the provisions of R. 2, O. 21 and Art. 174, it is not open to a judgment-debtor to prove adjustment or satisfaction, if he did not take steps to have the same certified within a period of 90 days from the date on which the alleged payment or adjustment was made. This rule would apply whether the payment pleaded is sought to be proved against the decree-holder or his assignee. (*Young and Rachhpal Singh, JJ.*) MURARI LAL *v.* RAGHUBIR SARAN. **56 All. 694 = 6 R.A. 827 = 148 I.C. 1118 = 3 A.W.R. 477 = 1934 A. L.J. 198 = A.I.R. 1934 All. 209.**

———**Art. 174**—*Applicability — Certification by decree-holder.*

The limitation of ninety days prescribed by Art. 174 does not apply to a certification by the decree holder. (*Hilton, J.*) SUNDAR DAS VIR BHAN *v.* BISHEN DAS. **15 Lah. 910 = 155 I.C. 315 = 7 R.L. 692 = 37 P.L.R. 196 = A.I.R. 1935 Lah. 194 (2).**

———**Art. 174**—*Scope—Agreement not to sell property in execution of sale—Sale in contravention of—Application to set aside on the ground of "fraud"—Limitation.*

The judgment-debtor applied to have a sale set aside under O. 21, R. 90, C. P. Code, on the ground that the property was sold in contravention of a private agreement between him and the decree-holder that the property should not be sold and that the suppression of the agreement constituted fraud.

Held, assuming that there was "fraud", the application, being uncertified as required by O. 21, R. 2, ought to be presented within 90 days of the date of the agreement. An application presented after 90 days could not be treated as one for certifying adjustment of the decree. (*Madhavan Nair and Cornish, JJ.*) MURUGAPPA CHETTIAR *v.* S. K. APPAVOO CHETTIAR. **152 I.C. 763 = 7 R.M. 284 = 40 L.W. 622 = A.I.R. 1935 Mad. 257 (1).**

———**Art. 174**—*Starting point under—Agreement by judgment-debtor to decree-holder to deliver possession of property if purchased by latter—Decree-holder purchasing and taking possession — Application by judgment-debtor to record satisfaction—Limitation—When commences.*

In pursuance of an agreement between the decree-holder and the judgment debtor under a mortgage decree, that if the former purchased the mortgage-decree in Court auction, the latter should, within one month after the confirmation of sale, put the former in possession of the property without any obstruction, after removing therefrom certain temporary sheds put up by him, and that the decree-holder should apply to record satisfaction of the decree. The decree-holder purchased the property in Court auction on the date of the agreement, 15-4-1931, the sale was confirmed on 13-7-1931

LIMITATION ACT (1908), Art. 177.

and the decree-holder took possession of the property on 18-12-1931, prior to which the temporary sheds had been removed. The judgment-debtor filed an application under O. 21, R. 2, C. P. Code, on 17-3-1932, to have the adjustment recorded.

Held, the time commenced to run only from the date when the decree-holder got poseession of the property, and that the application having been made within three months of that date was in time. (*Beasley, C. J. and Cornish, J.*) RAGHUPATHIRAYADU *v.* PICHAYYA. **158 I.C. 961 = 8 R.M. 390 = 42 L.W. 258 = 1935 M.W. N. 498 = A.I.R. 1935 Mad. 581 = 69 M.L.J. 77.**

———**Art. 175**—*Decree of lower Court — Appeal dismissed—Application for instalments — Limitation—Starting point.*

When an appeal is taken against a decree, the decree of the lower Court is superseded by that of the appellate Court any time for purposes of limitation runs from the date of the decree of the appellate Court even where the appeal is dismissed. So the time for an application for payment of the decretal amount by instalments runs only from the date of the decree of the appellate Court even though the latter only confirmed the judgment of the lower Court and dismissed the appeal. (*Heald and Sen, JJ.*) ABDUL KARIM *v.* MAUNG SAN KYAW. **I.R. 1932 Rang. 74 = 135 I.C. 858 = A.I.R. 1932 Rang. 54.**

———**Arts. 176 and 177**—*Applicability — Deceased merely party to preliminary proceedings.*

Prima facie neither Art. 176 nor Art. 177 applies to a case where the deceased is neither plaintiff or an appellant nor a defendant or a respondent, but is merely an applicant or opponent, in a proceeding which is instituted as a preliminary step to the filing of a suit or of an appeal. A.I.R. 1929 Sind 136 and 7 Bom. 373, Ref. (*Aston and Rupchand, A.J.Cs.*) NOOR AHMED *v.* CHATTOMAL GURMUKHDAS. **28 S.L.R. 150 = 6 R. S. 207 = 148 I.C. 819 = A.I.R. 1934 Sind 36.**

———**Art. 177**—*Applicability — Appeal in execution proceedings—Abatement.*

Art. 177 applies to an appeal against an order in execution proceedings: 'If in such an appeal a respondent dies and his legal representative is not brought on record within the time limited, it would abate'. (*Jackson and Pakenham Walsh, JJ.*) GANGU NAIDU *v.* MUTTENNA. **151 I.C. 777 (1) = 7 R.M. 135 (2) = 1935 M.W. N. 89 = 40 L.W. 623 = A.I.R. 1934 Mad. 664 (1).**

———**Art. 177**—*Applicability—Execution proceedings.*

The provisions as regards substitution do not apply to execution proceedings. 10 P.L.T. 763 (F.B.), Foll. (*Kulwant Sahay and James, JJ.*) SHEOGOBIND RAM *v.* MT. KISHUNBASI KUER. **11 Pat. 546 = I.R. 1932 Pat. 171 (2) = 138 I.C. 91 = 13 Pat.L.T. 318 = A.I.R. 1932 Pat. 222.**

———**Art. 177**—*Application to bring on record legal representatives—Limitation.*

Applications to bring on record the legal representatives of a deceased person are governed by Art. 177 and not by Art. 181. (*Reilly and Anantakrishna Ayyar, JJ.*) RAJA OF KALAHATSI *v.* JAGANNADHA RAYANIMGAR. **55 Mad. 1006 = I R. 1932 Mad. 681 = 139 I.C. 402 = 36 L.W. 170 = 1932 M.W.N. 597 = A.I.R. 1932 Mad. 574 = 63 M.L J. 827.**

———**Art. 177**—*Suit dismissed for default but restored—Death of party during interval—Application to implead legal representatives—Extension of time.*

Where a suit by the landlord was dismissed for default but the order of dismissal was subsequently set aside and during the interval some of the tenants defendants died and the plaintiff subsequently applied for

LIMITATION ACT (1908), Art. 178.

impleading the heirs of the deceased and it appeared that three months had expired from the date of the death of the defendants though not from the date of the restoration order.

Held that the application could be entertained. (*Oppenheim, J.M.*) RAMDAUR *v.* PARTAB NARAIN SINGH. **15 R.D. 476 = 12 L.R. 237 (Rev.).**

———**Art 178** — Applicability — Award under Co-operative Societies Act—Application for execution—Limitation. *See* CO-OPERATIVE SOCIETIES ACT, S. 43—BENGAL RULE 22 (7). **39 C.W.N. 1301.**

———**Art. 178**—*Inapplicability—Suit to file award.*

An application under para. 20 of Sch. II, C. P. Code, is not the only remedy open to a person in whose favour the award is made. He can file a regular suit in which case Art. 178, Limitation Act does not apply. (*Tek Chand, J.*) RATAN CHAND *v.* RUP LAL. **A.I.R. 1935 Lah. 134.**

———**Art. 179**—*Commencement of time—High Court calling for finding—Leave to appeal to Privy Council.*

The High Court in an interlocutory judgment having set aside the conclusions but not the decree of the lower Court sent down an issue for a finding and on receipt of the finding it passed a decree.

Held, that the order sending down the issue for finding was one under O. 41, R. 25, that it was not a final order and that an application for leave to appeal to the Privy Council against the said order could be made with in 90 days from the final decree. (*Murphy and Nanavati, JJ.*) JIVANLAL *v.* VRAJLAL. **6 I.R. (Bom.) 64 = 145 I.C. 258 = 35 Bom.L.R. 415 = A.I.R. 1933 Bom. 251.**

———**Art. 179**—*Income-tax case — Application for leave to appeal to Privy Council—Limitation—Starting point.*

An application for leave to appeal to the Privy Council in a case under the Income-tex Act is governed by Art. 179 rather than by Art. 181 of the Limitation Act and the date of the judgment is the starting point of limitation. (*Rankin, C.J. and Pearson, J.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 Cal. 251 = I.R. 1932 Cal. 588 = 139 I.C. 236 = 36 C.W.N. 127 = A.I.R. 1932 Cal. 587.**

———**Art. 179**—Period prescribed under—Computation—Time for obtaining copy of judgment—Right to exclude. *See* LIMITATION ACT, S. 12 (3). **13 Rang. 762.**

———**Art. 179**—*Separate appeals—Single application—Second application filed out of time—Bar.*

There is no provision of law authorising one application for leave to appeal in two separate suits and appeals. Where one such application is filed, it is not open to the party to file another application out of time. It is however open to him to amend the application by confirming the prayer for certificate to one of the cases. (*Jai Lal and Agha Haidar, JJ.*) GOPAL SINGH *v.* JOHNSTONE. **I.R. 1932 Lah. 682 = 140 I.C. 70 = 33 P.L.R. 455 = A.I.R. 1932 Lah. 441.**

———**Arts. 180, 181 and 182**—*Applicability—Application for possession by decree-holder-purchaser—Limitation.*

As Art. 180 applies to an application for possession by a decree holder-purchaser, the residuary Art. 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So, Art. 182 cannot apply. Art. 180 being the more specified article must therefore apply. (Case law reviewed.) 13 Mad. 374; 32 Mad. 136 and 24 Mad. 185, Expl. and Rel. on. (*Beasley, C. J., Ramesam and King, JJ.*) ABDUL AZIZ SAHIB *v.* CHOKKAN CHETTIAR. **58 Mad. 893 = 8 R.M. 483 = 159 I.C. 279 = 1935 M.W.N. 926 = 42 L.W. 375 = A.I.R. 1935 Mad. 803 = 69 M.L.J. 821 (F.B.).**

LIMITATION ACT (1908), Art. 180.

———**Art. 180**—*Application for delivery—Order for delivery not carried out—Second application dismissed as time barred—Third application—Limitation.*

In spite of an order directing delivery of the properties purchased in auction by the decree holder, he was unable to get delivery. Two years later, he applied again for delivery but the application was dismissed as time-barred. Next year, he filed the present application.

Held, that the present application should be regarded as a remainder to the Court to proceed with the original petition on which delivery had been ordered and which was never properly disposed of. It was not therefore time-barred and no time ran against the presentation of such a reminder petition. 50 M.L.J. 215, Rel. on. (*Pakenham Walsh, J.*) APPAVOO NAINAR *v.* LAKSHMANA REDDI. **6 I.R. (Mad.) 57 = 147 I.C. 397 = 1933 M.W.N. 970 = 38 L.W. 347 = A.I.R. 1933 Mad. 745 = 65 M.L.J. 305.**

———**Art. 180**—Application for execution—Dismissal for non-payment of batta—Collateral litigation—Appeal pending—Fresh application after three years from the date of the previous order—Later application deemed to have been barred by Art. 180. *See* LIMITATION ACT, S. 15. **56 Mad. 490 = A.I.R. 1933 Mad. 418 = 64 M.L.J. 664 (F.B.).**

———**Art. 180**—*Application under O. 21, R. 95 C.P. Code—Limitation—Starting point.*

An application for delivery of possession by an auction-purchaser under O, 21, R. 95, C.P. Code, has to be made within three years of the date of the confirmation of the sale and not from any later date such as the date of the issue of the sale certificate. (*Mukerji and Mitter, JJ.*) ANARJAN BIBI *v.* CHANDRAMANI SHAHA. **54 C.L.J. 241 = I.R. 1932 Cal. 68 = 134 I.C. 1188 = A.I.R. 1932 Cal. 75.**

———**Art. 180**—*C. P. Code O. 21, Rr. 92 (1), and 95—Appeal from order of Sub Judge disallowing application to set aside sale—Appeal dismissed—Application by auction-purchaser for delivery of possession—Time for.*

In construing the meaning of words "when the sale becomes absolute" in Art. 180, regard must be had not only to the provisions of O. 21, R. 92 (1) but also to the other material sections and orders of the Code including those which relate to appeals from orders made under O. 21, R. 92 (1) Where therefore there is an appeal to the High Court from an order of the Subordinate Judge disallowing the application to set aside the sale, the order of the Subordinate Judge confirming the sale did not become effective and the sale will not become absolute within the meaning of Art. 180 until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do when he decided to disallow the abovementioned application. The sales did not become absolute within the meaning of Art. 180 till the date when the High Court dismissed the appeal. So applications for possession of the properties under O. 21, R. 95 purchased at the auction sale were not barred by limitation as the period of three years commences from the date of the dismissal of the appeal by the High Court. When there was a final conclusive definite order confirming the sale and not from the date on which the application to set aside the sale by the judgment-debtor was dismissed by the Subordinate Judge. A.I.R. 1932 Cal. 75, Reversed; 56 Cal. 608, Overr.; A.I.R. 1933 Cal. 311, Appr.; 43

LIMITATION ACT (1908), Art. 181.

Mad. 185, Ref. (*Sir Lancelot Sanderson.*) CHANDRA MANI *v.* ANARJAN BIBI. **61 I.A. 248=61 Cal. 945 =36 P.L.R. 289=11 O.W.N. 1213=1934 M.W.N. 765=6 R.P.C. 157=150 I.C. 11=38 C.W.N. 901=40 L.W. 65=1934 A.L.J. 618=59 C.L.J. 547=4 A.W. R. 1624=36 Bom.L.R. 717=A.I.R. 1934 P.C. 134= 67 M.L.J. 79 (P.C.).**

———**Art. 180**—*Decree-holder auction purchaser—Application for delivery of possession—Commencement of limitation.*

The mortgagee decree-holder purchased certain property on the 17th September, 1924. The judgment-debtor applied for setting aside the sale on 31st October, 1924, and that application was dismissed on 30th May, 1925, and the sale was confirmed on that date. There was an appeal by the judgment-debtor against the order dismissing the application for setting aside the sale and the appeal was dismissed on the 25th July, 1927. The application for delivery of possession was made on the 18th January, 1929,

Held, that limitation applicable was the one prescribed by Art. 180 and the application having been filed within three years after 25th July, 1917, was in time. (*Guha and Bartley, JJ.*) CHHOGAN LAL BAGRI *v.* BEHARI LAL SAHA RAY. **147 I.C. 881=6 R.C. 380 =56 C.L.J. 520=A.I.R. 1933 Cal. 311.**

———**Art. 180**—"*Purchaser*"—*If includes decree-holder-purchaser.*

The meaning of Art. 180 is plain because the word "purchaser," in this article includes cases of a decree-holder-purchaser and a purchaser who is not a decree-holder. (*Beasley, C. J., Ramesam and King, JJ.*) ABDUL AZIZ SAHIB *v.* CHOKKAN CHETTIAR. **58 Mad. 893=159 I.C. 279=8 R.M. 483=1935 M.W.N. 926=42 L.W. 375=A.I.R. 1935 Mad. 803=69 M.L. J. 821 (F.B.).**

———**Art. 180**—*Starting point under—Cancellation of cause of action for application—Subsequent removal of cancellation—Application after—Maintainability.*

Under Art. 180, an application by an auction-purchaser for delivery of possession has to be made within three years from the time when the sale becomes absolute. But when, by reason of a decree of a competent Court (declaring that the decree-holders had acquired no right on the basis of their auction-purchase in execution of the mortgage decree and consequently had no right to get possession) there is a cancellation of the cause of action for delivery, operating to suspend the rights of the auction-purchaser, he is entitled, on the removal of such cancellation by a Court of appeal, to avail of a fresh cause of action, which arises by reason thereof. (*Nasim Ali and Khundkar, JJ.*) JATEENDRACHANDRA BANDHOPADHYA *v.* REBATEE MOHAN DAS. **62 Cal. 66=158 I.C. 191=A.I.R. 1935 Cal. 333.**

———**Art. 181**—*Applicability.*

In view of the fact that all the preceding articles apply to applications made under the Code of Civil Procedure, Art. 181 also applies to other applications under the same Code, *i.e.*, the application contemplated therein is *ejusdem generis* with the other applications which are specially specified. (*Sulaiman, C.J. Mukerji and King, JJ.*) SHIAM LAL *v.* OFFICIAL LIQUIDATORS OF THE U. P. OIL MILLS CO., LTD. **55 All. 912=3 A.W.R. 201=6 I.R. (All.) 184=145 I.C. 893 =1933 A.L.J. 1203=A.I.R. 1933 All. 789 (F.B.).**

———**Art. 181**—Applicability—Application for delivery by decree-holder-purchaser. *See* LIMITATION ACT, ARTS. 180, 181 AND 982. **58 Mad. 893=A.I. R. 1935 Mad. 806=69 M.L.J. 821 (F.B.).**

LIMITATION ACT (1908), Art. 181.

———**Art. 181**—*Applicability—Application to implead legal representatives.*

Application to bring on record the legal representatives of a deceased person are governed by Art. 177 and not by Art. 181. (*Reilly and Anantakrishna Ayyar, JJ.*) RAJA OF KALAHASTI *v.* JAGANNADHA RAYANIMGAR. **55 Mad. 1006=I.R. 1932 Mad. 681 =139 I.C. 409=36 L W. 170=1932 M.W.N. 597= A.I.R. 1932 Mad. 574=63 M.L J. 827.**

———**Art. 181**—Applicability—Application to restore suit dismissed for default. *See* C. P. CODE, S. 151 AND O. 9, RR. 8 AND 9. **A.I.R. 1935 Pesh. 186.**

———**Art. 181**—*Applicability—Application under S 26-J of the B.T. Act*, 1885.

An application under S. 26-J of the B. T. Act, is governed by Art. 181. (*Costello and Mallik, JJ.*) SAKTISARAN SINHA *v.* RADHA RAMAN MANDAL. **149 I.C. 1134=6 R.C. 718=38 C.W.N. 50=A.I.R. 1934 Cal. 396.**

———**Art. 181**—*Applicability—Application under O. 21, R. 2, C. P. Code.*

A certification by the judgment debtor under O. 21, R. 2, C. P. Code, is an application under Art. 181, Limitation Act, whereas one by the decree holders cannot be held to be such. For the latter, there is no period of limitation. (*Wort and Dhavle, JJ.*) MADAN SINGH *v.* KAMAKHYA NARAIN SINGH. **153 I.C. 1018= 7 R.P. 400=15 Pat.L.T. 457=A I.R. 1934 Pat. 380.**

———**Art. 181**—Applicability—Application under O. 21, R. 91, C. P. Code. *See* LIMITATION ACT, ARTS. 166 AND 181. **1935 A.L.J. 940=156 I.C. 389=A.I.R. 1935 All. 889.**

———**Art. 181**—*Applicability — Income tax case—Application for leave to appeal to Privy Council.*

An application for leave to appeal to the Privy Council in a case under the Income-tax Act is governed by Art. 179 rather than by Art. 181 and the date of the judgment is the starting point of limitation. (*Rankin C J. and Pearson, J.*) COMMISSIONER OF INCOME-TAX, BENGAL *v.* SHAW WALLACE & CO. **59 Cal. 251 =I.R. 1932 Cal. 588=139 I.C. 236=36 C W.N. 127 =A.I.R. 1932 Cal. 587.**

———**Arts. 181 and 166**—*Applicability—Objections under S. 47, C.P. Code.*

Limitation for lodging objections under S. 47, C. P. Code, is governed by Art. 181 and not by Art. 166. Hence the limitation for thirty days prescribed for objections under O. 21, R. 90, C. P. Code, does not apply in a case where objections are lodged under S. 47, C.P. Code, and in such cases a second appeal is competent. (Case-law referred.) (*Currie, J.*) HANS RAJ *v.* KARAM CHAND. **6 I.R. (Lah.) 49 (2)=145 I.C. 113=A.I.R. 1933 Lah. 570.**

———**Art. 181**— *Applicability —Order allowing amendment of decree—Application to set aside.*

A decision given under S. 152, C.P. Code, granting an application for amendment of a decree is an order and not a decree. Hence an application to set aside such an order is governed by Art. 181 and not by Art. 164. (*Ba U.J.*) LAWRENCE *v.* DEWAN SINGH. **6 I.R. (Rang.) 59 (1)=145 I.C. 823=A.I.R. 1933 Rang. 264.**

———**Art. 181**—*Applicability—Partition suit—Application for appointment of Commissioner.*

Art. 181 applies only to applications to Court for exercise of acts and powers which the Court is not bound to perform *suo motu*. An application for the exercise of purely ministerial functions which the Court has no discretion to refuse is not within the Article. In a partition suit, after the preliminary decree, the Court is bound to proceed further and to appoint a Commissioner

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to actually partition the property and on the report of the Commissioner, if accepted, to pass a final decree. So an application in a partition suit after the preliminary decree was passed for the appointment of a Commissioner is not subject to Art. 181 or any rule of limitation. 22 Cal. 425 and 53 Mad. 378, Rel. on. (*Middleton, J. C. and Sraduddin, A.J.C.*) FAQIR CHAND *v.* MAHOMED AKBAR KHAN. **6 I.R. Pesh. 14=145 I.C. 201=A.I.R. 1933 Pesh. 101 (2).**

———**Art. 181**—"*Application*"—*Certification of payment by decree-holder.*

Certification to the Court under O. 21, R. 2 (2), C. P. Code by a decree-holder of a payment made to him out of Court, even if made in the form of an application, is not an application, within Art. 181. (*Venkatasubba Rao, J.*) GANGAYYA *v.* SESHAGIRI RAO. **159 I.C. 38=8 R.M. 439 (1)=A.I.R. 1935 Mad. 922.**

———**Art. 181** —*Company—Application under S.* 186, *Companies Act.*

Quaere: Whether Art. 181 only relates to applications made under the Civil Procedure Code or applies also to applicaiions by the Liquidator under S. 186, Companies Act. (*Lord Russell of Killowen.*) HANSRAJ GUPTA *v.* OFFICIAL LIQUIDATORS OF THE DEHRA DUN-MUSSORIE TRAM CO. **60 I.A. 13=54 A. 1067=37 C.W.N. 379=1933 A.L.J. 175=142 I.C. 7=I R. 1933 P.C. 43=1933 M.W.N. 190=35 Bom.L R. 319 =37 L.W. 445=57 C.L.J. 166=A.I.R. 1933 P.C. 63 =64 M.L.J. 403 (P.C.).**

[**Appl.** 55 A. 912 (920, 926i et seq.) (F.B.). **R.** 1934 A.L.J. 86 (90).].

———**Art. 181**—*Company—Filing of objections to notice served on contributory—Limitation specifically provided in rules framed by the High Court*

Where limitation is specifically provided for in the Rules framed by the High Court under the Indian Companies Act for filing objections to a notice served on a contributory as regards his having been placed on the list of contributories, the specific provision must prevail and not the general provision in the Limitation Act. ((*Bhide, J.*) SHANTI LAL. *v.* LYALLPUR BANK, LTD. **159 I.C. 1044 (1)=8 R.L 459=A I.R. 1935 Lah. 645.**

———**Arts. 181 and 182**—*Continuation—Application for attachment of decrees—Subsequent application for attachment of immovable properties—Limitation not saved by prior application.*

An application for the attachment of immovable property cannot be held to be in continuation of an application for the attachment of decrees. So the time for an application with the former relief is not extended by a prior application for the attachment of decrees. 3 A.L.J. 325 and 12 R. D. 697, Foll. (*Oppenheim, S.M. and Walton, J.M.*) TULSHI PERSHAD *v.* GULZARI LAL. **14 L.R. 71 (Rev.)=17 R.D. 59.**

———**Art. 181**—*Decree for injunction—Limitation.*

O. 21, R. 32, C. P. Code, only prescribes the mode for the execution of a decree for injunction. If however a Court is moved to enforce execution of the decree under this provision of law, the application must be made within limitation as prescribed by Art. 181. Where therefore a person, who has obtained an injunction forbidding defendants from building their house in such a way as to interfere with the passage of light and air through the ventilators in his house, puts in an execution application on the ground that defendants have violated the injunction by building a wall against the ventilators, it is incumbent upon him to prove that the breach of injunction took place within three years of his application. The building of the wall is not a continuing wrong and limitation is not saved by the provisions of S. 23 of the Limitation Act, as the wrongful act on the part of the defendants is completed by the building of the wall. (*Abdul Rashid, J.*) MOTI RAM *v.* HANSRAJ. **160 I.C. 777=8 R.L. 598=37 P.L R. 576=A.I.R. 1935 Lah. 702.**

———**Art. 181**—Execution—Application to execute decree of Revenue Court, *See* LIMITATION ACT, ART. 182. **14 Lah. L.T. 15.**

———**Art. 181**—*Execution of decree—Conditional decree for possession—Starting point.*

Where under the terms of a decree the right of the decree-holder to recover possession of some property in the hands of the defendants is contingent upon the decree-holder paying certain sums of money to the defendants but no date for payment is specified, the decree-holder is entitled to pay the money on the date when the decree was passed and to ask for possession immediately after the payment had been made. The right accrues to the decree-holder immediately and he is not entitled to prolong the date of the payment by his inaction or laches. Consequently an application made more than three years from the date when the decree was passed will be barred under Art. 181. (*Sen and Bennet, JJ.*) SIRI NARAIN TEWARI *v.* BRIJ NARAIN RAI. **I.R. 1931 All. 399=131 I.C. 559=1931 A.L.J. 319=A.I.R. 1931 All. 326.**

———**Art. 181**—*Execution of decree—Decree satisfied by execution of decree—Decree-holder compelled to restore property obtained, by subsequent proceedings—Revival of decree—Execution—Starting point.*

If, as a result of execution, a decree has been satisfied and if the decree-holder is compelled to refund or restore the property as a result of proceedings taken subsequently by the judgment-debtor or by a third party the satisfied decree revives on the refund or the restoration of the property and an application to execute the revived decree would be competent within three years from the time when the right to apply accrued to the decree-holder. In such cases the starting point for an application would be the date when the decree-holder is compelled to refund the amount or restore the property. Where the High Court merely declares that the execution proceedings are ineffectual and it is the executing Court that orders restitution, *held*, that limitation runs from date on which restitution takes place. (*Rangi Lal, J.*) AKBAR ALI *v.* MEHR ALI. **158 I.C. 5= A.I R. 1935 Lah. 166.**

———**Art. 181**—*Execution petition—No application to bring legal representatives on record within three years —Bar.*

The law does not require any application being made to bring on the record the legal representatives of a judgment debtor and an execution application against them is not barred merely because no application to substitute the legal representatives is made within three years of the death of the judgment-debtor. (*Jai Lal, J.*) MAULA BAKHSH *v.* MAHOMED IKRAM. **154 I.C. 307=7 R.L 544=A.I.R. 1934 Lah 55.**

———**Art. 181**—*Execution sale—Applicability—Void execution sale—Application to set aside.*

If a party wants a sale to be set aside for any of the reasons given in R. 90, O. 21, then the application must be made within 30 days as enacted by Art. 166, Limitation Act, but where a void sale is sought to be set aside then the application would not be under R. 90, O. 21, but will be deemed to be an application made in execution governed by S. 47 and to which Art. 181, would be applicable. (*Young and Rachhpal Singh, JJ.*) NAROTAM DAS *v.* BHAGWAN DAS. **151 I.C. 244=7 R.A 119=1934 A.L.J. 859=3 A.W.R. 545= =A.I.R. 1934 All. 314.**

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———**Art. 181**—*Execution sale—Application to set aside.*

An application to set aside an attachment and sale in execution by the judgment debtor who continued in possession is governed by Art. 181 but the right to apply accrued not from the date of sale but from when the notice of attachment served on him was returned. 46 Bom. 1031, Ref. (*Madgavkar and Baker, JJ.*) GANGADHAR MARTAND *v.* JAG MOHANDAS VARJIVANDAS. **I.R. 1931 Bom. 442=133 I.C. 858=33 Bom.L.R. 781=A.I.R. 1931 Bom. 446.**

———**Art. 181**—*Execution sale—Application to set aside.*

Even when an execution sale is a nullity because the property sold is in excess of the property mortgaged, an application to have it set aside under S. 47, C.P. Code, is governed by Art. 181 and not Art. 166 of the Limitation Act. (*Shadi Lal. C. J. and Broadway, J.*) SUNDAR DAS *v.* NIKKA. **I.R. 1931 Lah. 605=132 I.C. 493=32 P.L.R. 440=A.I.R. 1931 Lah. 586 (2).**

———**Arts. 181 and 166**—*Execution sale—Decree executed against minor—Sale made in absence of guardian—Application to set aside sale—Limitation.*

Obiter.—An application on behalf of a minor to set aside a sale in execution of a decree against him, on the ground of its being made in the absence of any guardian to represent the interests of the minor in the execution proceedings is governed by Art. 181 and not by Art. 166 inasmuch as the sale is void. A.I.R. 1924 Mad. 431, Rel. on. (*Bhide, J.*) MEHAR SINGH *v.* LAL. **159 I.C. 988=8 R.L. 449=A.I.R. 1935 Lah. 972.**

———**Art. 181**—*Execution—Stay of execution till rehearing—Later order staying till further orders—No further orders passed.*

An *ex parte* decree was passed in December 1922. On 4th January, 1923, the judgment-debtor applied for setting aside the decree. On 9th April, 1923, the decree holders applied for execution but on 25th May, 1923, the judgment-debtors obtained from the Court an order in these terms: "In compliance with this order, the execution proceedings should be stayed until the re-hearing case is disposed of. Let the execution be stayed until further orders". In compliance with this order, the executing Court passed an order on 14th December, 1923, in these terms: "It is useless to keep the execution case pending any longer. Struck off". The rehearing case was dismissed on 19th December, 1923. On the 7th January, 1924, the judgment debtors took an appeal, but it was dismissed on 21st June, 1926. On 11th January, 1929 the decree-holders filed a fresh execution application.

Held, that no "further orders" having even been passed the decree holders were entitled to wait till the proceedings relating to the re-hearing were finally disposed of on appeal and that the execution application was in time. (*Mukerji and Guha, JJ.*) RADHA BALLAV KHAN *v.* PEARY LALA GHOSH. **58 Cal. 1113=I.R. 1931 Cal. 939=134 I.C. 939=35 C.W.N. 540=A.I.R. 1932 Cal. 19.**

———**Art. 181**—*Execution—Suspension of execution—Injunction order in another suit—Dismissal of other suit—Application to continue execution—Time limit.*

When a Court suspends proceedings in any pending execution for some reason, then the application has not been judicially disposed of. When therefore the executing Court receives an injunction order from the other Court and the former postpones the execution proceedings indefinitely till the dispute between the parties is decided, then the execution proceedings would continue and it is open to the decree-holders to apply for the continuation of the execution proceedings within a period of three years from the date on which the injunction order becomes ineffective, *i.e.*, the date on which the suit issuing the injunction is dismissed and not the date of the decision of appeal when no stay is applied for. (*Young and Rachhpal Singh, JJ.*) MT. NABBAN BEGAM *v.* MT. MOTI BEGAM. **6 R.A. 709=148 I.C. 525=1934 A.L.J. 363=3 A.W.R. 550=A.I.R. 1934 All. 294.**

———**Art. 181**—Ex parte *decree—Application to set aside.*

Where an *ex parte* decree was passed against two defendants on 12th June, 1928, and an application to have it set aside was made by one of them on 4th December, 1928, and the other applied on 15th February, 1929.

Held, (per *Obiter*), that the proper article applicable was Art. 164 and not Art. 181. (*Bhide, J.*) PURAN CHAND *v.* RALIA RAM. **I.R. 1931 Lah. 775=133 I.C. 439=32 P.L.R. 410.**

———**Art. 181**—*Instalment decree — Execution in respect of instalments fallen due.*

Where in case of an instalment decree an application has been made after some instalments have fallen due, the appropriate Article is Art. 182 (7). Art. 181 has no application to such a case. But so far as default clause is concerned, Art. 181 would apply and the remedy for the enforcement of the default clause in the instalment decree is time barred after the expiry of three years from the default in payment of 2nd instalment when the right to apply for execution for the whole amount accrued to the decree-holder. The decree holder cannot in such a case claim the recovery of future instalments merely because in some future years there has been again a default in the payment of the agreed successive instalments. His remedy to recover the instalments as and when they fall due is however not barred by the default clause. (*Sulaiman, C. J. and Mukerji, J.*) RAM PARSAD RAM *v.* JADUNANDAN UPADHIA. **56 All. 921=6 R.A. 955=149 I.C. 598=1934 A.L.J. 772=4 A.W.R. 498=A.I.R. 1934 All. 534.**

———**Art 181**—*Mesne profits—Application to ascertain.*

The Code does not require that a party should make an application for the ascertainment of mesne profits and therefore Art. 181 cannot apply to such an application when made. (*Sulaiman, C. J. and Bajpai, J.*) NARAIN DAS *v.* BHAGWATI PRASAD. **151 I.C. 755=7 R.A. 202=1934 A.L.J. 86=3 A.W.R. 154=A.I.R. 1934 All. 465.**

———**Art. 181**—Mesne profits—Application for mesne profits in execution—Cause of action—When arises—Date of decree or date of taking possession. *See* C. P. CODE, S. 144. **17 N.L.J. 281.**

———**Art. 181**—*Mesne profits — Application for—Starting point of limitation.*

Limitation for ascertainment and realization of mesne profits, is governed by Art. 181, and the period of limitation runs from the date on which the possession is delivered. (*Bhide, J.*) MT. KARAM BIBI *v.* MEHR ALI KHAN. **I.R. 1933 Lah 502=144 I.C. 553=A.I.R. 1933 Lah. 876**

———**Art. 181**—Mesne profits — Application for—Starting point, from the time when possession has been restored to the successful party. *See* LIMITATION ACT, ARTS. 181 AND 182—RESTITUTION. **1934 A.L.J. 503=A.I.R. 1934 All. 626 (F.B.).**

———**Art. 181**—Mortgage — Application for final decree in mortgage suit—Delay in making—Court's

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discretion to excuse under S. 5. *See* LIMITATION ACT, S. 5. **68 M.L.J. 665 (P.C.).**

———**Arts. 181 and 183**—*Mortgage—Application for personal decree against mortgagor.*

An application for personal decree against a mortgagor is not a mode of enforcing preliminary decree or the final decree in the mortgage suit, but is an application for a new decree imposing liability upon the mortgagor personally; therefore such an application is governed by Art. 181 and not by Art. 183. (*Page, C.J. and Ba U, J.*) A. L. S. S. CHOKALINGAM CHETTIAR *v.* MAUNG TUN YIN. **13 Rang. 305 = 156 I C. 701 = 8 R.R. 39 = A.I.R. 1935 Rang. 187.**

———**Art. 181**—*Mortgage decree—Application under O. 34, R. 6, C. P. Code—Starting point of limitation.*

In the case of an application under O. 34, R. 6, the time from which limitation would run is the date of the confirmation of the sale, inasmuch as unless and until the sale confirmed by the Court after disposing of all the objections against it, the deficiency in the amount cannot be ascertained for the purpose of O. 34, R. 6. 32 C.W.N. 971 Ref. to. (*Mukerji and Mitter, JJ.*) KRISHNA BHANDU GHATAK *v.* PANCHAKARI SAHA. **58 Cal. 741 130 I.C. 815 = 35 C.W.N. 231 = 52 C.L.J. 531 = A.I.R. 1931 Cal. 166.**

———**Art. 181**—*Mortgage decree—Provision by compromise for instalment payment—Default—Application for decree under O. 34, R. 5, C. P. Code,*

If a preliminary mortgage decree under O. 34, R. 4, purporting to be in terms of the compromise of the parties provides for the payment of the mortgage amount in instalments payable on the fixed dates as not been appealed against, it becomes final and there is nothing to debar the decree-holder from applying for preparation of the final decree under O. 34, R. 5, within three years from the date of default in payment of an instalment. The fact that three years have elapsed from the date of the preliminary decree is immaterial. 49 All. 297, Dist. (*Mukerji and Bennet, JJ.*) NANKU SINGH *v.* PARAMATMANAND SINGH. **I.R. 1931 All. 279 = 1931 A.L.J. 58 = 130 I.C. 487 = A.I.R. 1931 All. 340.**

———**Art. 181**—*Mortgage—Execution of final decree—Continuation—Execution—Appeal and stay order—Subsequent application to continue proceedings—Limitation for.*

In execution of a final decree in a mortgage suit, an order to proclaim and sell was passed and the application was posted to another date for final hearing. In the meantime an appeal was filed and an order staying execution was passed. The execution application was kept pending in the Court with the order "await final order." The appeal was disposed of on 21st November, 1924. An application was filed on 8th April, 1927, to continue the previous execution proceedings

Held, the application was not a fresh one, that limitation was three years from the date on which stay came to an end and that application was in time. 49 All. 276 (F.B.), Foll.; 45 Mad. 785, Dist. (*Walsh, J.*) BAYYA NAIKO *v.* DESETTI KRUPA. **I.R. 1933 Mad. 227 = 142 I.C. 534 = 38 L.W. 268 = A.I.R. 1933 Mad. 325.**

———**Arts. 181 and 182**—Mortgage— Redemption decree—Decree allowing redemption on payment of a certain sum by decree holder—Application for execution —Art 182 applies, not Art. 181. *See* LIMITATION ACT, ARTS. 182 AND 181. **A.I.R. 1935 Pesh. 129.**

———**Art. 181**—*Mortgage suit—Application for final decree—Adjournment* sine die—*Fresh application—Bar.*

In a mortgage suit the Registrar fixed the date for payment on 9th September, 1926. On 26th January, 1927, the plaintiff moved a notice of motion against the defendant for a final decree. The matter was adjourned *sine die* on the defendant's Attorney stating in Court that the defendant had become insane. Pending a suit for setting aside the preliminary mortgage decree on behalf of the defendant, he died and his heir was substituted in the mortgage suit. On 15th August, 1930, the plaintiff gave a notice of motion served on the heir asking for a final decree.

Held, that the adjournment did not amount to a discontinuance of the suit, that the subsequent application could be treated as a continuation of the earlier one and the same was not barred by limitation. (*Rankin, C. J. and Costello, J.*) MENAKA BALA DASI *v.* HIRALAL GOBINDLAL. **147 I.C. 206 = 6 R.C. 295 = 37 C.W.N. 583 = A.I.R. 1933 Cal. 816.**

———**Art. 181**—*Mortgage suit—Application for final decree dismissed for default—Second application beyond time—Decree passed on such application—Sale in execution—Decree and sale—If nullity as time-barred—Objection by judgment debtor after sale—Competency.*

A preliminary decree in a mortgage suit was passed on 27 1-1927. The first application for a final decree within three years was dismissed for default, for omission to take steps to serve notice on the judgment-debtor. The decree-holder again applied for a final decree, but not until after the expiry of three years prescribed by Art. 181. Notice was served on the judgment-debtor on that application but he did not appear or contest it, and a final decree was passed by the Court on 25-11-1930 Execution was started in June, 1933, and after the usual formalities, the properties were sold and purchased by the decree holder on 7-11-1933. The judgment debtor, though served with notice under O. 21, R. 22, C. P. Code, on the execution application, did not appear or urge any objection. More than 6 months after the sale, the judgment-debtor filed objections and the executing Court dismissed the execution case altogether on the ground that the decree was time-barred and incapable of execution and in fact a nullity.

Held, that the decree was neither time-barred nor incapable of execution and that the judgment-debtor should have raised the objection earlier and not after the sale. (*Fazl Ali and Luby, JJ.*) HARLAL KAMTI *v.* JHARI. **15 Pat. 51 = 8 R.P. 263 = 159 I.C. 248 = 16 Pat.L.T. 744 = A.I.R. 1936 Pat. 93**

———**Art. 181**—Mortgage suit—Application for final decree made beyond three years from preliminary decree—Power of Court to pass final decree—Final decree passed on such application—If nullity and unexecutable. *See* EXECUTION— EXECUTING COURT. **159 I.C. 248 = 16 Pat L.T. 744 = A.I.R. 1936 Pat. 93.**

———**Arts. 181 and 183**—*Mortgage suit—Application for final decree—Nature of—Limitation.*

An application for a final decree under O. 34, R. 3 (2), C. P. Code, is not an application to enforce the preliminary decree that has already been passed because, in order to be a mode of enforcing the preliminary decree, it must be an application to enforce a right that accrued to the mortgagee under the preliminary decree. In the old form of mortgage decree under S. 88 of the T. P. Act, the decree directed that the property should be sold on default being made by the mortgagor, but under O. 34, R. 3 of the Code, the preliminary decree does not direct that in case of default the property shall be sold nor does any right of sale thereunder accrue to the mortgagee. The right that is given under the preliminary decree to the mortgagee is a right, subject to any order that may be made in respect of redemption, to apply to the Court for a final decree for sale of the property. Such an application does not fall within

Art. 183, but within Art. 181. (*Page, C.J. and Mya Bu, J.*) M.A.L.M. CHETTIAR FIRM *v.* MAUNG PO HMYIN. **13 Rang. 325=157 I.C. 784=8 R.R. 109=A.I.R. 1935 Rang. 239.**

———**Art. 181**—*Mortgage suit—Application for personal decree—Commencement of limitation.*

Art. 181 is a residuary Article adapted to many different classes of applications. The words in the third column are only the expression of a broad common law principle. They have to be interpreted and applied according to the substance of each case.

Held, that an application for a personal decree under O. 34, R. 6, C. P. Code, is governed by Art. 181 and time commences to run from the date of the order confirming the sale. In this connection, the fact that the taxation of costs has not been completed is immaterial. (*Rankin, C.J. and Costello, J.*) PRADYUMANAKUMAR MALLIK *v.* GOPENDRA MALLIK. **60 Cal. 19=I.R. 1933 Cal. 462=143 I.C.679=A.I.R. 1933 Cal. 251.**

———**Art. 181**—*Mortgage suit—Death of next friend after Preliminary decree—Application by minor after attaining majority for final decree—Bar.*

A minor represented by next friend sued and obtained a preliminary mortgage decree on 1st December, 1917. The next friend died subsequently but steps were not taken to get another next friend appointed. The minor applied within three years of his attaining majority for a final decree on 30th November, 1928.

Held, (1) that S. 6 of the Limitation Act had no application since the proceeding to obtain a final decree was not a proceeding in execution; (2) that having regard to the provisions contained in O. 32, R. 10, C. P. Code, the suit did not abate but was kept in abeyance and it was the duty of the Court to appoint a next friend; and (3) that the application for final decree was maintainable and was within time. (*Guha and M. C. Ghose, JJ.*) PULIN CHANDRA SEN *v.* MUZAFFAR AHMED. **6 I.R. (Cal.) 18=144 I.C. 768=37 C.W.N. 184=A.I.R. 1933 Cal. 508.**

———**Art 181**—*Mortgage suit—Preliminary decree—Appeal therefrom withdrawn and dismissed—Final decree—Application for—Limitation—Starting point of.*

An order dismissing an appeal for want of prosecution does not deal judicially with the matter of the suit and can in no sense be regarded as an order adopting or confirming the decision appealed from. Time for applying for final decree in a mortgage suit would in such a case run from the date fixed for payment in the preliminary decree. But where the appeal is formally brought before the Court but is withdrawn and dismissed, the order dismissing the appeal amounts to a decree which supersedes the original order appealed against and time for applying for final decree would run only from the date of the appellate order and not from the date fixed for payment in the preliminary decree. (*Madhavan Nair and Jackson, JJ.*) JUJISTI MAHAPATRO *v.* MAGATA PATRO. **56 Mad. 520=I.R. 1933 Mad. 294=143 I.C. 412=1933 M.W.N. 623=37 L.W. 557=A.I.R. 1933 Mad. 442=64 M.L.J. 695.**

[**R.** 1933 M.W.N. 1469 (1472).].

———**Art. 181**—*Mortgage suit—Preliminary decree confirmed on appeal—Application for final decree—Limitation.*

The right to ask for a final decree arises where the preliminary decree has been under appeal, from the date of the judgment in appeal. In cases where there has been a final decree in pursuance of the preliminary decree of the lower Court pending the appeal, the final decree is valid and binding to the extent to which it is not altered by the appellate decree, and a decree of the appellate Court confirming after judicial consideration the preliminary decree of a lower Court is for this purpose one altering it. The consequence is that where there is a final decree obtained in pursuance of the lower Court's preliminary decree and that preliminary decree is taken up in appeal and the appellate Court on a judicial determination confirms the preliminary decree and dismisses the appeal, the decree-holder has the right, which he may exercise within three years from the date of the decree in final appeal, to obtain a final decree in conformity with that appellate decision or if that is the proper way of expressing it, amending the old final decree so as to bring it into such conformity. 39 All. 641; 6 Pat. 24 (P.C.); 5 Lah. 257; 1930 M.W.N. 104 and 1933 M.W.N. 623, Foll. (*Krishnan Pandalai, J.*) RAMASWAMI IYER *v.* PAKKIRI PATHAR. **147 I.C. 1179=6 R.M. 420=38 L.W. 946=1933 M.W.N. 1469=A.I.R. 1934 Mad. 65=66 M.L.J. 24.**

———**Arts. 181 and 182** — Partnership — Decree against firm—Application for leave to execute against partners, governed by Art. 182, and not by Art, 181. *See* LIMITATION ACT, ARTS. 182 AND 181. **A.I.R. 1935 Mad. 926.**

———**Art. 181**—*Representative suit—Death of plaintiff—Application by person interested to be made a party.*

An application on the death of the plaintiff by a person on whose behalf the suit was filed by the plaintiff in a representative capacity, to be brought on the record as *eo nomine* plaintiff is governed by Art. 181. 11 M.L.T. 257, Not Foll.; 9 L.W. 166, Foll. (*Sundaram Chetty, J.*) MAHOMED KANNI ROWTHER *v* NAINA MAHOMED ROWTHER. **54 Mad. 770=I.R. 1931 Mad. 641=132 I.C. 289=33 L.W. 604=A.I.R. 1931 Mad. 590=60 M.L.J. 659.**

———**Arts. 181 and 182**—*Restitution—Application for restitution—Limitation—Starting point.*

An application for restitution under S. 144, C. P. Code, is not an application for the execution of a decree within the meaning of Art. 182 and that article does not apply to it. It is an application not specifically provided for and is governed by Art. 181. The time for applying begins to run from the date of the lower appellate Court's decree when the first Court's decree was reversed and the right to apply for restitution first accrued. But where the application is for recovery of mesne profits, the time does not begin to run till possession has been restored to the successful party. (*Sulaiman, C.J., Mukerji and King, JJ.*) PARMESHAR SINGH *v.* SITLA DIN DUBE. **57 All. 26=150 I.C. 1096=7 R.A. 65=1934 A.L.J. 503=3 A.W.R. 740=A.I.R. 1934 All. 626 (F.B.).**

———**Art. 181** — *Restitution — Application under S. 144, C. P. Code—Commencement of time.*

An application for restitution must be treated as an application for execution of a decree and the article applicable is Art. 182 and not Art. 181. If Art. 181 applies, limitation begins to run from the date of the decree of the final Court of appeal. The right to apply for restitution is dependant on a decree of the appellate Court to the same extent as the right to apply in execution is dependant on that decree. (*Das and Brown, JJ.*) MUTHUKARAPPAN CHETTYAR *v.* ANNAMALAI CHETTYAR. **11 Rang. 275=149 I.C. 889=6 R.R. 337=A.I.R. 1933 Rang. 180.**

———**Art. 181** — *Restitution — Application under S. 144, C. P. Code—Decree modified in appeal—Starting point of limitation.*

An application under S. 144, C.P. Code, is an application for execution of a decree passed in appeal when that decree varies or reverses the decree of the Court of first instance, it being in substance an application made for

LIMITATION ACT (1908), Art. 181.

seeking the aid of the Court in working out the final decree. Where an appellate Court has ordered restitution to a person who has been dispossessed under a decree and an appeal against that order has been dismissed by the High Court, the period of limitation under Art. 181 for an application for assessment of mesne profits begins to run from the date of the order of the High Court. (*Raza and Bisheshwar Nath, JJ.*) CHANDIKA SINGH *v.* BITHAL DAS. **6 Luck. 448 = I.R. 1931 Oudh 126 = 130 I.C. 78 = 7 O.W.N. 1153 = A.I.R. 1931 Oudh 51.**

——**Art. 181** — *Restitution — Application under S. 144, C. P. Code—Decree reversed in appeal—Reversal affirmed in second appeal—Commencement of limitation.*

Where a decree is passed by the trial Court but reversed in appeal and the reversal is confirmed in second appeal, the time for an application under S. 144, C. P. Code, runs from the date of the first appellate decree and the period taken up in second appeal cannot be deducted. (*Mukerji and Bennet, JJ.*) DHAPO *v.* BAKRIDI. **54 All. 770 = 141 I.C. 121 = I.R. 1933 All. 61 = 1932 A.L.J. 724 = A.I.R. 1932 All. 609.**

[**R.** 57 A. 26 (32, 61, 62) (F.B.).]

——**Art. 181**—*Restitution—Deposit of sale price by auction-purchaser—Sale set aside—Withdrawal of money by judgment debtor—Sale affirmed in appeal—Claim for restitution.*

The right to apply for restitution accrues really on the date when for the first time a decision is given which entitles the party asking for restitution to have restitution. In execution of a decree for rent, the holding was sold by auction and the auction purchaser deposited the amount which was in excess over the decree amount in Court. The decree-holder withdrew the amount due to him and the balance due to the judgment debtor was kept in Court. On an application to have the sale set aside, it was set aside and the auction purchaser's money was ordered to be paid. The auction purchaser withdrew the amount in Court deposit. The decree-holder filed an appeal against the order and the sale was confirmed. An appeal was filed against this appellate order by one of the judgment debtors in which the plaintiffs, also a judgment-debtor, was impleaded as respondent; but the appeal was dismissed. Plaintiff filed a suit for restitution of the amount withdrawn by the auction-purchaser three years after the order confirming the sale, but within three years from the date of High Court's order of dismissal of appeal.

Held, that the cause of action arose on the date confirming the sale, that the appeal in the High Court did not concern him as he had not appealed and that the suit was time-barred. (*Mitter and M.C. Ghose, JJ.*) ASHUTOSH CHOUDHURY *v.* KUMED KAMINI DASSI. **I.R 1933 Cal. 517 = 144 I.C. 150 = A.I.R. 1933 Cal. 422.**

——**Art. 181**—*Restitution — Limitation—Starting point.*

An application for restitution under S. 144, C. P. Code, is not an application for execution. Such an application is governed by Art. 181 and not by Art. 182 of the Limitation Act and time begins to run from the decree which for the first time gave the applicant the right to restitution. (Case law discussed.) (*Rankin, C.J. and Pearson, J.*) SAROJ BHUSAN GHOSH *v.* DEBENDRA NATH GHOSH. **59 Cal. 337 = 137 I.C. 302 = I.R. 1932 Cal. 295 = 54 C.L.J. 506 = 35 C.W.N. 1294 = A.I.R. 1932 Cal. 308.**

——**Art. 181** — *Restitution—Mortgage suit—* Ex parte *decree—Setting aside—Application for restitution* —Terminus a quo.

LIMITATION ACT (1908), Art. 181.

On 4th March 1916 the mortgagees obtained against the mortgagor an *ex parte* decree for the recovery of the amount due to them by the sale of the mortgaged property and in execution of that decree the property was sold to certain persons and the sale was confirmed by the Court on 25th June, 1927. The defendant applied to have the *ex parte* decree set aside and the same was granted on 17th July, 1921. The suit brought by the mortgagees was subsequently tried on the merits and dismissed in February, 1922, though the mortgagor had admitted the execution of the mortgage deed and the receipt of the consideration. On 10th April, 1923, the mortgagor applied for the recovery of the possession of the house which had been sold in execution of the *ex parte* decree but the application was dismissed in April, 1924. On 18th October, 1924, he made an application that the money realised by the sale of the property be paid to him.

Held, that the application was barred by time. The right to apply accrued on 7th July, 1921, and there was no fresh accrual of right which could supply a new *terminus a quo*. (*Shadi Lal, C.J. and Broadway, J.*) GUJAR MAL *v* NARAIN SINGH. **I.R. 1931 Lah. 910 = 134 I.C. 206 = 32 P.L.R. 395 = A.I.R. 1931 Lah. 504.**

——**Art. 181**—Revival of execution—Application for, after removal of injunction staying execution—Limitation. *See* LIMITATION ACT, S. 15. **39 C.W.N. 1030.**

——**Art. 181**—*Revival of execution—Pending execution proceeding—Application for revival—Starting point of limitation.*

An *ex parte* mortgage decree was passed in January, 1924. An application for execution was filed on August 7, 1925, and while that was pending, the judgment-debtors applied for the setting aside of the *ex parte* decree on October 13, 1925. There was an interim order staying execution passed on that date. On April, 1926, the decree-holder and the judgment debtors compromised and agreed that the judgment-debtors should be given 3 months to pay up the amount and if they failed to do so execution should proceed. There was a written compromise filed in Court and verified by the parties on May 12, 1926. On May 22, 1926, the Court passed an order striking off the application for the setting aside of the *ex parte* decree on the ground that the matter had been compromised. Subsequently on June 4, 1926, the Office put up a report before the Court stating that the decree-holder could sell the property if the amount was not paid within 3 months. On this the Court ordered 'the execution case be struck off for the present without payment being entered.' The judgment debtors did not deposit the amount within the period which expired on July 24, 1926. An application for execution of the decree was made on July 24, 1929.

Held, that the application was one merely to revive the earlier proceeding which had been kept in abeyance and that Art. 181 did not apply.

Held, further, that assuming Art. 181 applied, the decree holder had applied within 3 years of the date when the right to apply accrued.

Per *Niamatullah, J.*—Where it is the duty of a Court to do something or to take some action, Art. 181 does not govern such an application to do such thing or take such action. Thus when an execution proceeding is pending the right to apply in a recurring one and any application made during the pendency of the proceeding cannot be barred by Art. 181. (*Sulaiman and Niamatullah, JJ.*) PREM NARAIN *v.* GANGA RAM. **I.R.**

LIMITATION ACT (1908), Art. 181.

1931 All. 636=133 I.C. 316=1931 A.L.J. 436=A.I.R. 1931 All. 458 (2).

———**Arts. 181 and 182 (1)**—*Scope—Execution application—Decree declared satisfied—Order reversed on appeal—Application for execution—Limitation.*

A decree for money was passed in 1922. In 1924, on a petition by the judgment-debtor, the Court directed the decree to be entered as satisfied. The order was reversed on appeal in 1926. The decree holder applied for execution in 1928. The application was dismissed by the lower Courts as barred by limitation under Art. 182.

Held, that the application was not barred either on the ground that the words "the date of the decree" in Art. 182 (1) implied the condition that the decree should be legally executable during the whole of the three years period or on the ground that the application was governed by Art. 181, the limitation being three years from the time when the right to apply accrued, *i.e.*, when the bar to the executability of the decree was removed. 40 M.L.J. 1 (P.C.), Appl. (*Krishnan Pandalai, J.*) MANGAMMA *v.* NARAYANAPPA. **6 I.R. (Mad.) 159=145 I.C. 930=38 L.W. 557=A.I.R. 1933 Mad. 785=65 M.L.J. 747.**

———**Art. 181**—*Starting point—"Decree to be drawn up on production of succession certificates"—Right to produce succession certificates, if barred.*

The plaintiffs, in a suit to recover money, obtained a decree on June 10, 1921, subject to the following condition: "The decree should be drawn up after the several claimants produce succession certificates and apply for the drawing up of the decree." In 1923 and 1924 the plaintiffs applied twice for drawing up of the decree but as they produced no succession certificate, the applications were dismissed. On February 19 1926, they applied with the certificate and the lower Court held that the application was barred by Art. 181.

Held, the succession certificate and not an application for drawing up of the decree was the essence of the judgment, the decree necessarily following upon the production of the certificate and as the judgment specified no time within which to produce the certificate, Art. 181 did not apply to the right of the appellants to produce a succession certificate and therefore their application was in time. 37 C. 796; 6 C. 60; 8 C. 420, Foll. (*Madgavkar, J.*) FATIMABIBI *v.* SHAMSUDDIN. **I.R. 1931 Bom. 502=134 I.C. 694=33 Bom.L.R. 618=A.I.R. 1931 Bom. 407.**

———**Art. 181**—Surety—Execution against—Surety for judgment-debtor undertaking to produce him on each date of hearing—Failure to produce him on certain date—Execution proceedings terminating after several subsequent hearings—Execution against surety—Limitation. *See* LIMITATION ACT, S. 23. **158 I.C. 459=A.I.R. 1935 Lah. 174 (2).**

———**Art. 181**—*Surety— Liability for judgment-debtor's default—Starting point of limitation.*

When a decree, dated 3rd September, 1919, was put into execution, *N* executed a surety bond undertaking to pay the amount in case the decree-holder failed to realise the amount from the judgment debtor. From time to time the decree-holder applied for execution against the judgment-debtor and realised portion of the decree debt. The last application was made on 23rd May, 1930. Subsequently the first application against the surety was made on 24th March, 1931.

Held, that the period of limitation against the surety did not run under any of the clauses of Art. 182, that Art. 182 was not exhaustive for all execution applications, that Art. 181 applied and that limitation in this case was three years from the date when the decree was

LIMITATION ACT (1908), Art. 182.

kept alive as against the judgment-debtor, *i.e.*, 23rd May, 1930, and as such the application was in time. (Case-law reviewed.) (*Srivastava and Nanavutty, JJ.*) SHYAM LAL *v.* NASIRUDDIN BEG. **8 Luck. 427=I.R. 1933 Oudh 199=143 I.C. 808=10 O.W.N. 571=A.I.R. 1933 Oudh 209.**

———**Arts. 181 and 182** — *Surety— Surety for movables attached in execution—Limitation—Application for arrest of second surety—Prior application for recognition of assignment of decree and for arrest of first surety, if available to save limitation as against surety.*

In April, 1922, the respondent and another executed a bond for the production of certain movables attached in execution of a decree by the appellant. The terms of the bond provided that "if any default is made in respect of the properties, ourselves (the sureties) would be liable for all the loss that may be sustained thereby and for any amount that may be directed by the Court." On the failure of the sureties to produce the articles, the first surety was arrested in March, 1923, and the petition against him was closed in September, 1923. In January, 1926, an assignment of the decree was recognised and in August, 1926, the assignee applied for the arrest of the respondent, the second surety. The question was if the application was in time.

Held, that (*i*) steps taken in execution against the judgment-debtor are not steps against the sureties nor are steps in execution against sureties steps in execution of the decree itself, so that the proceedings of January, 1926, for the recognition of the assignment of the decree did not save limitation; (*ii*) that the application was governed by Art. 181 and not Art. 182; (*iii*) the application of March, 1923, for the arrest of the first surety in which no relief was sought against the second surety, did not save limitation against the second surety and that the petition was, therefore, barred by limitation. (*Pakenham Walsh, J.*) JAMUNDAS RAVUJI SAIT *v.* KRISHNAN. **6 I.R. (Mad.) 194=145 I.C. 1004=1933 M.W.N. 1005=38 L.W. 450=A.I.R. 1933 Mad. 722=65 M.L.J. 507.**

———**Art. 182**—Applicability—Application for delivery—If one in execution. *See* LIMITATION ACT, ARTS. 180, 181 AND 182. **58 Mad. 893=A.I.R. 1935 Mad. 803=69 M.L.J. 821 (F.B.).**

———**Art. 182**—*Applicability—Application for recovery of contributions under Madras Hindu Religious Endowments Act—Limitation—Starting point.*

An application by the Board of Commissioners for Hindu Religious Endowments, Madras, made to the District Judge for recovery of contributions under S. 70 (2) of the Madras Hindu Religious Endowments Act, after demand and refusal, is governed by Art. 182 of the Limitation Act. The right to apply accrues only after the expiry of three months from the date of the demand made by the Board and the amount becomes payable only then. (*Beasley, C.J. and King, J.*) PRESIDENT OF THE BOARD OF COMMISSIONERS FOR H. R. E., MADRAS *v.* SHIRUR MUTT. **58 Mad. 760=156 I.C. 747=8 R.M. 44=41 L.W. 264=1935 M.W.N. 142=A.I.R. 1935 Mad. 217=68 M.L.J. 200.**

———**Art. 182**—*Applicability—Conditional decree.*

Where a decree is not immediately executable and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Art. 182 is clearly inapplicable and the only Article governing the execution is the residuary Art. 181. (*Sen and Bennet, JJ.*) SIRI NARAIN TEWARI *v.* BRIJ NARAIN RAI. **I.R. 1931 All. 399=131 I.C. 559=1931 A.L.J. 319=A.I.R. 1931 All. 326.**

LIMITATION ACT (1908), Art. 182.

———**Arts. 182 and 181**— *Applicability— Decree against firm—Application for leave to execute against partners—Limitation.*

An application under O. 21, R. 50, Cl. 2, C. P. Code, for leave to execute the decree against the partners of a firm who were not personally served in the suit is merely an ancillary application in the application for execution and is not barred so long as the decree against the firm is alive. Such an application is governed by Art. 182, and not by Art. 181. A.I.R. 1932 Bom. 516, Foll. (*K. S. Menon, J.*) KUPPUSWAMI AYYAR *v.* RATHILAL SOMABHAI & CO. **158 I.C. 907=8 R.M. 388=1935 M.W.N. 849=A.I.R. 1935 Mad. 926**

———**Art. 182**— *Award— Execution of— Starting point.*

An award is a decree and executable as such on and from the date it is available in the Court for putting it on the file, that is the day on which it is received in the Court for that purpose. (*Ferrers, J.C. and Mehta, A.J.C.*) ACHRAJ SING RAM SING *v.* ACHRAJRAM SAHNI. **27 S.L.R. 109=I R. 1933 Sind 95=142 I.C. 489=A.I R. 1933 Sind 78.**

———**Art. 182**—*Continuation of proceedings—Application asking new relief.*

An execution application asking for a new relief cannot be treated as an application for the revival or continuation of the previous execution proceedings. When the character of the application is different from that of the previous application, it cannot be treated as a continuation. (*Sulaiman, Mukerji and Boys, JJ.*) GOBARDHAN DAS *v.* DAU DAYAL. **54 All. 537=I.R. 1932 All. 467=138 I.C. 583 (2)=13 I. R. 199 (Rev.) =1932 A.L.J 365=16 R D. 293=A.I.R. 1932 All. 273 (F.B.).**

———**Art. 182**—*Execution sale—Purchaser's application for possession—Order on application not on merits —Next application for possession within one year—If continuation of first one.*

An application for possession of property was made by the purchaser within three years of the confirmation of sale. An order on this application was made by the Court which order was not on merits of the case and did not amount to a refusal of any of the reliefs claimed by the applicant, hence not compelling him to prefer an appeal against the order. Another application was then presented by the applicant within a year of the last application requesting for possession of the property purchased.

Held, that the latter application was the continuation of the previous one and therefore was within time. (*Beasley, C.J., Ramesam and King, JJ.*) ABDUL AZIZ SAHIB *v.* CHOKKAN CHETTIAR. **58 Mad. 893=159 I.C. 279=1935 M.W.N. 926=8 R.M. 483=42 L.W. 375=A.I.R 1935 Mad. 803=69 M.L J. 821 (F.B.).**

———**Art. 182**—*Fresh application—Dismissal of prior application for execution for want of prosecution —Application for revival—If a fresh application.*

Where after dismissal of an application for execution of decree for want of prosecution another application is made in a tabular form setting forth all the particulars required by O. 21, R. 11, C. P. Code, and praying that the decree may be executed and the property sold by "revival" of the previous proceedings, it should be construed as a fresh application for execution. (*Niamatullah, J.*) PARSHOTAM SARAN *v.* NARAIN DAS. **4 A.W.R. 396=152 I.C. 36=7 R.A. 259=A.I.R. 1934 All. 1047.**

———**Art. 182**—*Insolvency—Execution application— Proceeding against person of insolvent.*

LIMITATION ACT (1908), Art. 182.

S. 28 of the Provincial Insolvency Court imposes a disability on the creditor from proceeding against the person of the insolvent without leave of Court. So an application for execution, if made within the period of limitation from the order granting leave, is not barred by limitation, even though it may be more than three years from the date of decree. (*Kulwant Sahay and Macpherson, JJ.*) HIT NARAYAN SINGH *v.* BRIJ NANDAN SINGH. **10 Pat. 422=I.R. 1931 Pat. 489 =134 I.C. 633=12 Pat.L.T. 345=A.I.R. 1931 Pat. 357.**

———**Arts. 182 and 181**—*Mortgage— Redemption decree—Application for execution— Decree allowing redemption on payment of a certain sum by decree holder.*

An application for execution of a decree allowing redemption of mortgage on payment of a certain sum of money by the decree-holder and fixing no period within which the sum is to be paid, is governed by Art. 182 and not by the general Art. 181. 30 M. 28 Foll.; A.I.R. 1931 All. 326, Not Foll. (*Almond, A.J.C.*) BUDHU RAM *v.* MUSHTAQ SHAH. **158 I.C. 517=8 R. Pesh. 57=A.I.R. 1935 Pesh. 129.**

———**Art 182**—*Mortgage suit—Death of one co-mortgagee before final decree—Minor heir substituted—Execution application—Limitation.*

Ordinarily one mortgagee alone cannot enforce the mortgage for his share of the debt only, except in cases where there has been severance of the mortgagee's interests effected with the mortgagee's consent. Further the discharge by one mortgagee alone as regards his share of the debt is not valid against the rest. Where some minors were impleaded as co-mortgagees in the place of one of the co-mortgagees since deceased and a final decree is passed but the execution application was filed five years after,

Held, that it was barred by limitation. (*Mitter and M. C. Ghose, JJ.*) SATISH CHANDRA SEN *v.* JIWAN LAL DAGA. **149 I.C. 1062=6 R.C. 696=37 C.W.N. 838=A.I R. 1934 Cal. 1.**

———**Art. 182**—*Plea of limitation—To be raised early.*

Where a decree-holder applies for execution and the judgment-debtor being entitled to and having had an opportunity to raise a plea of limitation does not do so and an order for execution by attachment is made on the application, the judgment-debtor is precluded from raising that plea at a subsequent stage in the execution proceedings. (*Mitter and M. C. Ghose, JJ.*) LALIT MOHAN ROY *v.* SARAT CHANDRA SAHA. **149 I.C. 1017=6 R.C. 670=37 C.W.N. 752=A.I.R. 1933 Cal. 855.**

———**Arts. 182 and 181**—*Restitution—Application for.*

An application for restitution is an application in execution governed by Art. 182 and not Art. 181, and what is to be executed is the decree of the Court which, by reversing or varying a decree under appeal, entitles a party to be restored to the position which he occupied prior to the decree reversed or varied. (*Agarwala and Saunders, JJ.*) LOKE NATH SINGH *v.* MAHABIR SINGH. **152 I.C. 944=7 R.P. 277=15 Pat.L.T. 745 =A.I.R. 1934 Pat. 646.**

———**Arts 182 and 181**—*Restitution—Application for—Limitation.*

Per *Full Bench.*—An application for restitution and for mesne profits under S. 144 of the C. P. Code is an application in execution and is therefore governed by Art. 182 and not by Art. 181. 3 Pat. 371 (F.B.), Overr. (*Courtney-Terrell, C. J., Wort, Kulwant Sahay,*

LIMITATION ACT (1908). Art. 182.

(*Macpherson and Fazl Ali, JJ.*) BHAUNATH SINGH *v.* KEDAR NATH SINGH. **13 Pat. 411=148 I.C. 1180=6 R.P. 540=15 Pat.L.T. 173=A.I.R. 1934 Pat. 246 (2) (F.B.).**

———**Art. 182**—*Restitution—Application for—Starting point.*

Proceedings under S. 144, C. P. Code, are proceedings in execution governed by Art. 182. An application for refund of purchase-money by the purchaser at a Court-auction is in time if within three years from the date of the decree of the High Court on second appeal confirming the claim of a claimant to the suit properties, although it may be more than three years from the date of the decree of first appellate Court and of dispossession. 51 M. L. J. 161, Ref. (*Lakshmana Rao, J.*) MUNIAH *v.* GANGAMMA. **1931 M W.N. 1006.**

———**Art. 182**—*Restitution—Application under S. 144, C. P. Code—Not an application for execution.*

An application for restitution under S. 144, C. P. Code, is not an application for execution. Such an application is governed by Art. 181 and not by Art. 182 of the Limitation Act and time begins to run from the decree which for the first time gave the applicant the right to restitution. Case-law discussed. (*Rankin, C.J. and Pearson, J.*) SAROJ BHUSAN GHOSH *v.* DEBENDRA NATH GHOSH. **59 Cal. 337=137 I.C. 302=I R. 1932 Cal. 295=35 C.W.N. 1294=A.I.R. 1932 Cal. 308.**

———**Art. 182**—*Revenue Court decree—Execution—Civil Court—Limitation.*

A Revenue Court in the Punjab is a "Civil Court" within the meaning of Art. 182, and that Article therefore goveres applications to execute the decrees of Revenue Courts. Art. 181 does not apply to such applications. (*Latifi, F.C.*) SARDAR ALI SHAH *v.* BUDHU RAM KHANNA. **14 Lah.L.T. 15.**

———**Art. 182**—*Revival—Application for execution dismissed for default, pending suit by decree-holder under O. 21, R. 63, C. P. Code—Application for revival after decree in above suit—If fresh application.*

The decree-holder filed an application to execute his decree by attachment and sale of a certain property, but an objection was raised by one *K* on the ground that he had a lien on the property. This objection was allowed and the proceedings in execution were stayed, because in the meantime the decree-holder had instituted a suit under O. 21, R. 63, C. P. Code, and did not wish to proceed with the execution till the question of *K's* lien had been decided. The suit was decreed in January, 1922, but in the meantime in December, 1918, the application of the decree holder had been dismissed in default and the property attached released. The next application by the decree-holder was made in August, 1922, in which the prayer was to revive the previous application and to sell the property which had already been attached on the ground that the suit brought by the decree-holder had been decreed. Overruling the contention that the subsequent application was barred by limitation,

Held, that the subsequent application must, in spite of the dismissal in default, be deemed to be a revival of the previous application. (*Jai Lal and Skemp, JJ.*) HIRA LAL *v.* PUNJAB NATIONAL BANK. **37 P.L.R. 651=157 I C. 679=8 R L. 133=A.I.R. 1935 Lah. 911.**

———**Art. 182**—*Revival—Execution application not proceeded with on account of allowance of claim—Subsequent application after removal of bar—If one in continuation.*

LIMITATION ACT (1908), Art. 182.

An application for execution must be treated as a continuation of the previous application, where the previous application could not be proceeded with on account of a bar having been placed by the allowance of a claim, and once the bar is removed that execution can proceed and the fresh application in nothing more than an application to revive the proceeding which had to be stopped. (*Mahomed Noor and Luby, JJ.*) BANSARI PRASAD CHAUDHURY *v.* KIRTYANAND SINGH BAHADUR. **155 I.C. 831=7 R.P. 626=16 Pat.L.T. 301=A.I.R. 1934 Pat 532.**

———**Art. 182**—*Revival—Rent decree—Application for actachment of trees—Subsequent application after three years for attchment of land—If continuation of the prior one.*

The holder of a rent decree first applied to execute the decree by attaching the trees on the holding of the defendant. Subsequently, after the expiry of the period of limitation and on learning that the trees formed part of a grove and were not attachable, they applied for attachment of immovable property.

Held, the second application could not be treated as a continuation of the first, and was barred. (*Knox, S. M. and Grant, J. M.*) RAJA RAM SINGH *v.* MALAI SINGH. **1935 R.D. 406.**

———**Art. 182**—*Saving of time—Prior execution application*—Bona fides, *if material.*

The *bona fides* or otherwise of a previous application for execution which is allowed to go by default is immaterial for the purpose of deciding whether limitation is saved. (*Boys, J.*) SUDESHWARI PRASAD NARAIN SINGH *v.* PALJHAN DUBE. **I R. 1931 All. 337 (2)=131 I.C. 33 (2)=A.I.R. 1931 All. 722.**

———**Art. 182** — *Scope—Application more than 12 years from date of decree—C. P. Code, S. 48.*

An application for execution will be out of time unless made within three years from any of the dates mentioned in the third column of Art. 182 of the Limitation Act. To an application for execution, Art. 182 has first to be applied and if it is found not wanting when tested by Art. 182, then S. 48 of the C. P. Code will operate as a further test. The effect of S. 48 of the C. P. Code is not to supersede the law of limitation. It is the Limitation Act (and not S. 48 of the C. P. Code) which prescribes a period of limitation for execution of decrees. S. 48 of the C. P. Code only fixes an outside period after which execution of a decree, although not barred by the Limitation Act, may not be granted. (*Raza and Kisch, JJ.*) JAG MOHAN TEWARI *v.* MAHADEO PRASAD. **I.R. 1932 Oudh 293=138 I.C 149=9 O.W.N. 430=A.I.R. 1932 Oudh 220.**

———**Art. 182**—Starting point—Decree adjusted by agreement—Application for execution in terms of the agreement—Limitation—Starting point—Date of decree or date of agreement. *See* BENGAL TENANCY ACT, SCH. III, ART. 6. **39 C.W.N. 1036.**

———**Art. 182**—*Surety—Application for execution against—Starting point of limitation.*

When an attachment before judgment of the movables of the debtor was made, the surety executed a bond to produce the items attached whenever called upon by the Court and to be bound by such orders as may be passed by the Court. It was dated 7—11—1921. A decree was passed on 7—9—1922. An application for execution was filed by assignee decree-holder on 7—11—1925.

Held, that the application was barred under Art. 182 that Art. 65 was not applicable; that limitation on the bond began to run from the date of the decree itself and that the application was barred. (*Madhavan Nair, J.*)

LIMITATION ACT (1908), Art. 182.

RAMI REDDI *v.* GURUMURTHI. **I.R. 1933 Mad. 222=142 I.C. 368=1932 M.W.N. 1296=37 L.W. 127=A.I.R. 1933 Mad. 219.**

——**Art. 182**—Surety—Liability of—Starting point of limitation—Art. 182 not exhaustive for all execution applications—Art. 182 applied. *See* LIMITATION ACT, ART. 181. **8 Luck. 427=A.I.R. 1933 Oudh 209.**

——**Art. 182**—*Surety bond—Enforcement of—Starting point of limitation—Liability not absolute but only for deficiency after sale up to stated limit.*

An application to enforce a surety bond must be within three years if the application is properly an application in the suit, or within six years if it should be made by independent suit. Where a bond is executed by a surety in pursuance of an order of Court, the bond should be considered in the light of the order directing the security to be given. Pending an appeal from a mortgage decree, stay of execution was granted for one year from April 1919 on the mortgagor furnishing security to the extent of about a lakh and odd which represented one year's interest on the mortgage money. As part of the security, the puisne mortgagee defendant executed a bond which provided for two contingencies in the following terms: (*i*) (if the appeal be disposed of within one year from 1st April 1919) "the defendants shall pay the sum of Rs. 77,000 or whatever may be payable under the High Court order not exceeding Rs. 77,000" (in default) "any amount so payable as aforesaid shall be realised from (me)"; (*ii*) if the appeal be not disposed of within one year "the decree-holders according to the order of the High Court shall be able to execute their decree with interest and to realise Rs. 77,000 from me." The appeal was dismissed in July 1921. The mortgaged properties were sold in January 1925. There was a deficiency. The decree-holder applied in January 1927 to enforce the bond and on objections raised by the surety,

Held, that on a true construction of the document and a consideration of the circumstances in which it was executed, (*a*) it was not absolute security which the decree-holders were to be free to realise immediately on the 1st April 1920; it was a security to the extent of Rs. 77,000 for the balance, if any, remaning unpaid after sale; (*b*) that until the property was sold, the liability under the bond could not be enforced and the date of sale being January 1925, the application in January 1927 to enforce the bond was in time. (*Lord Tomlin.*) RAGHUNANDAN PRASAD SINGH *v.* KIRTYANAND SINGH BAHADUR. **I.R. 1932 P.C. 133=136 I.C. 629=36 C.W.N. 701=55 C.L.J. 413=36 L.W. 111=14 Pat.L.T. 273=A.I.R. 1932 P.C. 131=63 M.L.J. 85 (P.C.).**

——**Art. 182 (1)**—"Date of decree"—Decree declared satisfied—Order reversed on appeal—Application for execution—Limitation. *See* LIMITATION ACT, ARTS. 181 AND 182 (1). **A.I.R. 1933 Mad. 785=65 M.L.J. 747.**

——**Art. 182 (1)**—*Date of decree—Mistake of Court—Date erroneously stated in decree—Decree holder misled—Power of Court to grant relief.*

Where a decree was by mistake dated 16th February 1929, instead of 11th February and the decree-holder being misled thereby, applied for execution on the 15th February, 1932, held, *actus curiae neminem gravabit* and that the decree ought to be regarded as having been passed on the 16th February, 1929. (*Jack, J.*) NALINI KANTA RAY *v.* KAMARADDI. **141 I.C 114 (1)=I.R. 1933 Cal. 82=56 C.L.J. 185=A.I.R. 1933 Cal. 239.**

LIMITATION ACT (1908), Art. 182.

——**Art. 182 (1) and (2)**—*Date of the decree—Cross-decrees—Agreement for set-off and execution of excess—Starting point.*

Where the parties to two cross-suits agreed when the suits were pending, that after the two decrees were passed, the party who was entitled to the larger amount should pursue execution of the decree in his favour to the extent of the excess,

Held, that the agreement showed a set off and entitled the party in whose favour the excess who decreed to ultimately take out execution, that the excess could be only ascertained after the final decree was passed in appeal, if any, perferred by any of the parties, and that for purposes of the execution, the date of the decree of the appellate Court and not of the trial Court was the starting point of limitation. (*Murphy and Divatia, JJ.*) RAMGOPAL SHRIRAM *v.* RAMGOPAL BHUTADA. **59 Bom 1=153 I.C. 273=7 R.B. 220=36 Bom.L.R. 643=A.I.R. 1934 Bom 307.**

——**Art. 182 (2)**—*Appeal against portion of decree regarding particular relief—Limitation for execution of other unappealed reliefs—Starting point.*

In all cases, what Art. 182 (2), Limitation Act, refers to his decree, *viz.*, one decree, and it is not permissible for Courts in execution to look into the matter and say that, as there are several reliefs which are severable, what is nominally one decree, consists of several decrees. In the case of a plaint claiming several reliefs where the Court passes a decree granting some of such reliefs and refusing the others, but where an appeal is preferred only against a portion of the decree regarding a particular relief, limitation for the excution of the other unappealed reliefs runs only from the date of the appellate decree. 59 I. A. 283 (P.C.), Appl. (*Beasley, C. J and Cornish, J.*) KANNIAMMAL *v.* BALAKRISHNA THARVADY. **156 I.C. 1029=8 R.M. 99=1935 M.W.N. 329=A.I.R. 1935 Mad. 557.**

——**Art. 182 (2)**—*Appeal dismissed for default—Starting point of limitation.*

The plain meaning of Cl. (2) of Art. 182 is that the time for execution runs from the final order of the appellate Court, whether that be an order of dismissal in default of prosecution or an order passed on the appeal on merits. (*Almond. A.J.C.*) BUDHU RAM *v.* MUSHTAQ SHAH. **158 I.C. 517=8 R. Pesh. 57=A.I.R. 1935 Pesh. 129.**

——**Art. 182 (2)**—'*Appeal*'—*Meaning.*

There is no definition of appeal in the Civil Procedure Code and any application by a party to an appellate Court asking to set aside a decision of a Subordinate Court is an appeal within the ordinary acceptation of the term. An appeal is no less an appeal because it is irregular or incompetent. Hence an appeal against an order granting the review comes under the definition. (*Patkar and Barlee, JJ.*) NAGAPPA *v.* GURUSHANTAPPA. **57 Bom 388=147 I.C. 1227=6 R.B. 250=35 Bom.L.R. 432=A.I.R. 1933 Bom. 255.**

——**Art. 182 (2)**—*Appeal—Operation of decree, if suspended.*

An original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal. (*Dunkley, J.*) M. S. CHETTYAR FIRM *v.* S. E. BHOLAT. **13 Rang 43=154 I.C. 153=7 R.R. 269=A.I.R. 1934 Rang 329.**

——**Art. 182 (2)**—*Applicability—Appeal against order refusing to set aside decree.*

The second clause of Art. 182 is not intended to cover an appeal from an order refusing to set aside a decree. (*Rankin, C. J. and C. C. Ghose, J.*) PROFULLA KUMAR BASU *v.* SAROJBALA. **I.R. 1931 Cal.**

LIMITATION ACT (1908), Art. 182 (2).

439 = 35 C.W.N. 155 = 131 I.C. 263 = 52 C.L.J. 594 = A.I.R. 1931 Cal. 332.

——Art. 182 (2)—*Applicability—Appeal rejected as being out of time—Execution of lower Court's decree—Starting point of limitation.*

Where a decree was obtained on the 5th September, 1922, by the appellant in the lower Court, and the decree was confirmed on appeal on the 20th April, 1925, and the judgment-debtor preferred a second appeal to the High Court which, on its having been filed 4 days out of time, was dismissed on 5th March, 1926, and the decree that was thereafter sought to be executed was that of the first appellate Court, dated 20th April, 1925, and the present application to execute the decree was made on the 6th December, 1928, *i.e.*, admittedly more than three years after the date of the appellate decree in 1925, and the question arose whether the execution application was barred by limitation or whether according to the contention of the appellant that inasmuch as there had been an appeal to the High Court, the date of the final order of the High Court, that is, 5th March, 1926, should alone be considered as the starting point for computing the period of limitation,

Held, that since the appeal memorandum presented to the High Court had been rejected as having been out of time there had been no appeal to the High Court and the appellant was not entitled to take advantage of the provisions contained in Art. 182 (2) of the Limitation Act in support of his contention that the execution petition was not barred by limitation. There has been no appeal when the Court has refused to receive the memorandum on its file in view of the sub S. (3) to R. 1 (Madras Amendment) of O. 41 of the C. P. Code, under which, the question of delay is decided beforehand, and the appeal is not admitted till that point has been decided in the appellant's favour. (*Madhavan Nair, J.*) BYYA REDDI *v.* GOPALA RAO. **57 Mad. 741 = 150 I C. 71 = 6 R.M 681 = 1934 M.W. N. 710 = 39 L.W. 499 = A.I R. 1934 Mad. 303 = 66 M.L.J. 486.**

——Art. 182 (2)—*Decree awarding costs—Appeal—Limitation.*

For purposes of Art. 182 (2) it is sufficient that there has been an appeal and there is no warrant for reading into the words of the Article any qualification either as to the character of the appeal or as to the parties to it. Where there was an appeal from the decree in the suit in which respondent was awarded costs but the question as to costs was not the subject matter of the appeal

Held, that the period of limitation did not begin to run from the original date of the decree. (*Bhide, J.*) GULAM HUSSAIN SHAH *v.* RADHIKA RANI. **15 Lah. 267 = 6 R L. 422 (1) = 147 I.C. 689 (1) = 35 P.L.R. 194 = A.I.R. 1934 Lah. 318 (1).**

——Art. 182 (2) — "*Final decree*" — *Meaning—Amendment of decree — Execution application—Commencement of limitation.*

Art. 182 (2) has to be interpreted by giving the words their natural and ordinary meaning. The words "final decree" merely indicates the final order by which an appellate Court decided an appeal and they cannot be interpreted to mean that the decree must be one which finally disposes of the suit and merges in itself the decretal order of the original Court. The word 'final' is used in antithesis to the word 'interlocutory'. It is only when the decree sought to be executed in the decree of the lower Court and not merely of the appellate Court, and the appeal is with regard to a part of the decree or against any other decision in the suit which is subjudice between the parties that the question as to whether time would run from the date of the appellate

LIMITATION ACT (1908), Art. 182 (2).

decree would arise for decision and Art. 182 (2) would come into operation. If there is an appeal, time must run from the date of the decree of the appellate Court if the decision of the appellate Court is not interlocutory but final. A decree was passed in a partition suit against defendant 3 and in favour of defendants 1 and 2. Defendants 1 and 2 appealed to the High Court but both appeals were dismissed on preliminary grounds. An execution application was filed within three years from the date of the order of the High Court but beyond three years from the date of the amended decree by the trial Court.

Held, that the appeal was no less an appeal even though it was incompetent. (*Patkar and Barlee, JJ.*) NAGAPPA *v.* GURUSHANTAPPA **57 Bom. 388 = 147 I C. 1227 = 6 R.B. 250 = 35 Bom L R. 432 = A.I R. 1933 Bom. 255.**

——Art. 182 (2)—"*Final decree or order*"—*Dismissal of appeal by Privy Council for non prosecution—Execution—Application for—Starting point.*

Not only under R. 34 but also under R. 36 of the Judicial Committee Rules, 1925, the dismissal for non-prosecution of an appeal to the Privy Council even after admission and appearance of the respondents does not constitute a final order or decree of the appellate Court within the meaning of Art. 182 (2) of the Limitation Act. So the starting point of limitation for an application for execution of the decree is the date of the dismissal of the appeal by the High Court and not the date of dismissal by the Privy Council for non prosecution. 36 A. 284; 36 A. 250; 49 C. 203, Rel. on; 2 P L.T. 28, Not Foll. (*Macpherson and Dhavle, JJ.*) HIRDAY NARAYAN SINGH *v.* MAHESHWARI PRASAD SINGH. **11 Pat 477 = I.R. 1932 Pat. 217 = 139 I.C. 198 = A. I.R. 1932 Pat. 251.**

——Art. 182 (2)—"*Final order of the appellate Court*"—*Order declaring appeal to have abated—New starting point of limitation.*

An order of the Appellate Court holding that the appeal had abated and refusing to set aside the abatement is a final order within the meaning of Art. 182 (2) since it deals judicially with matters before the Court. When an order is judicially made by an Appellate Court which has the effect of finally disposing of an appeal such an order gives a new starting point for the period of limitation prescribed by Art. 182. (*Sir George Lowndes.*) ABDULLA ASHGHAR ALI *v.* GANESH DAS VIG. **60 I.A. 83 = 60 Cal. 662 = 142 I.C. 326 = 10 O. W N. 183 = 1933 M W.N. 170 = 37 L W. 296 = 37 C. W N. 412 = 1933 A.L.J 239 = 35 Bom.L.R. 337 = 57 C.L J. 130 = 34 P.L.R. 335 = A.I R. 1933 P.C, 68 = 64 M.L.J. 421 (P.C.).**

[Appl 14 L. 609 (612) R. 57 M. 741 (748).]

——Art. 182 (2)—"*Final order*"—*Order dismissing appeal in default under O. 41, R. 17, C. P. Code—New starting point.*

There can be no doubt that an order under O. 41, R. 17 is a judicial order. It may not be a judicial order dealing with the merits of the appeal, but it is certainly a judicial order dealing with the matter before the appellate Court and as such is a final order which gives a new starting point for limitation under Art. 182 (2). (*Dalip Singh and Sale, JJ.*) BANK OF UPPER INDIA (IN LIQUIDATION) *v.* SRI KISHAN DAS. **16 Lah. 564 = 161 I.C. 122 = 8 R.L. 671 = 37 P.L R. 727 = A.I.R. 1935 Lah. 771.**

——Art. 182 (2)—*Irregular appeal—Dismissal of—Application for execution within three years thereafter—Limitation.*

There is no warrant for reading into the words "where there has been an appeal" any qualification

LIMITATION ACT (1908), Art. 182 (2).

either as to the character of the appeal or as to the parties to it; the words mean just what they say. So long as there is any question *sub judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. The contention that an appeal in order to save limitation under Cl. 2 of the Article must be one to which the persons affected were parties and that it must also be one in which the whole decree was imperilled is not sound. So an application for execution presented within three years from the date of the decree of the appellate Court but more than three years from the date of the decree of the trial Court is in time even though the appeal was irregular in form and was dismissed on that ground. (*Sir Dinshah Mulla.*) NAGENDRA NATH DEY *v.* SURESH CHANDRA DEY. **59 I.A. 283=60 Cal. 1=I.R. 1932 P.C. 195=137 I.C. 529=36 C W. N. 803=34 Bom.L.R. 1065=1932 A.L J. 643=55 C. L.J. 528=33 P.L.R. 621=36 L.W. 7=1932 M.W.N. 817=9 O.W.N. 681=A.I.R. 1932 P.C. 165=63 M.L. J. 329 (P.C.).**

[Appl 58 M. 743 (745) **D.** 144 I.C. 150; 144 I C. 608. **F.** 57 B. 388 (392, 395, 397). **R.** 65 M.L.J. 747 (750); 57 M. 795 (800). **Expl.** 57 M. 741 (744, 745, 746). **Rel.** 15 L. 267 (269), 64 M.L.J 75 (77).]

———**Art. 182 (2)**—*Preliminary decree in partition suit—Appeal from—Final decree — Application for execution—Starting point of limitation.*

A preliminary decree in a partition suit was passed on 18-4-1918 and confirmed by High Court on 20-3-1923. A final decree was passed by the trial Court on 30-9-1919 and on an application for execution filed on 24-3-1925.

Held, that the appeal referred to in Art. 182 (2) was an appeal against the decree sought to be executed and as no appeal had been preferred from the final decree which was the decree sought to be executed, time began to run from 30-9-1919 and the application was therefore barred, even though it was within three years of the date when the High Court confirmed the preliminary decree. (*Madhavan Nair, J.*) AHAMAD KUTTY *v.* KUTTU. **56 Mad. 458=1933 M.W N. 23=148 I.C. 58=6 R.M. 436=37 L.W. 180=A.I.R. 1933 Mad. 315=64 M.L J. 251.**

[Cons 58 M. 743 (746).]

———**Art. 182 (2)**—*Starting point—Appeal dismissed as out of time.*

Art. 182 speaks of "the final decree or order of the appellate Court" and it does not say that the decree or order must be passed in an appeal which was a competent appeal. Even if the appeal be dismissed as having been filed out of time the decree of the appellate Court so dismissing the appeal would furnish a fresh starting point for computing the period within which an application for execution may be brought. 16 Cal. 250, Foll. (*Kulwant Sahay and Khaja Mahomed Noor, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BENI MADHO SINGH. **11 Pat. 430=I R. 1931 Pat. 457=134 I.C. 425=12 Pat.L.T. 701=A.I.R. 1931 Pat. 422.**

———**Art. 182 (2)**—"*Where there has been an appeal*" —*Meaning—Application to set aside* ex parte *decree—Appeal—Exclusion of time.*

The words "where there has been an appeal" contemplate and mean an appeal from the decree and no other appeal and proceedings taken for setting aside an *ex parte* decree cannot be held to be proceedings for a review of judgment. The period of limitation for an execution application cannot be said to run from the dismissal on appeal of an application to set aside an *ex parte* decree. (*Pullan and Niamatullah, JJ.*)

LIMITATION ACT (1908), Art. 182 (4).

SUKHNANDAN SINGH *v.* RAMDEVI KUNWAR. **I.R. 1932 All. 490=138 I.C. 692=1932 A.L J. 731=A. I R. 1932 All. 601.**

———**Art. 182 (3)**—*Review of decree—Parties not impleaded in review proceeding — Application for execution—Time limit—Date of review as starting point.*

Where there has been a review of the decree the period of limitation for purposes of Art. 182 (3) of the Act should be taken to run from the date of the review, notwithstanding that the persons against whom time is reckoned were not parties to the review proceedings. 63 M. L. J. 329 (P.C.), Rel. on. (*Jackson and Mockett, JJ.*) RAMAYYA *v.* KOTTAYYA. **I.R. 1933 Mad. 83=141 I.C. 175 (2)=36 L.W. 919=1933 M.W.N. 155=A.I.R. 1933 Mad. 276=64 M.L.J. 75.**

[R. 57 M. 795 (800)]

———**Art. 182 (4)**—*Amendment of decree—Execution —Starting point of limitation.*

Where the decree which could be executed was only the amended decree, limitation begins to run from the date of the amendment. (*Sundaram Chetty and Pakenham Walsh, JJ.*) THIAGARAJA THEVAR *v.* SAMBASIVA THEVAR. **57 Mad. 795=148 I.C. 1088 =6 R.M. 563=39 L.W. 488=1934 M.W.N. 90=A. I.R. 1934 Mad. 283=66 M.L.J. 492.**

———**Art. 182 (4)**—*Construction and scope.*

The effect of Art. 182 (4), Limitation Act, the words of which must be given their plain meaning, is that it is an answer to any objection taken with regard to the plea of limitation so far as the earlier final decree (*i.e.*, before the amendment) is concerned. When it is amended, limitation starts from the date of the amendment. The fact that the decree had already become barred before the amendment or that the amendment applied for was unnecessary are matters which ought to have been dealt with by the Court which was moved to amend the decree. (*Beasley, C.J. and King, J.*) LAKSHMIKANTA RAO *v.* RAMMAYYA. **58 Mad. 743= 154 I.C. 847=7 R.M. 502=40 L.W. 896=A.I.R. 1935 Mad. 97=67 M L.J. 904.**

———**Art. 182 (4)**—*Decree barred at the date of amendment—Amendment—Effect of.*

A decree which is capable of execution and is not executed within three years from its date becomes dead and cannot be revived by a subsequent application or order for amendment. 59 I.C. 186, Foll. (*Madhavan Nair, J.*) AHAMAD KUTTY *v.* KUTTU. **56 Mad. 458= 148 I.C. 58=6 R.M. 436=1933 M.W.N. 23=37 L. W. 180=A.I.R. 1933 Mad. 315=64 M.L J. 251.**

———**Art. 182 (4)**—*Mortgage suit—Appeal from preliminary mortgage decree dismissed with costs— Final decree already passed—Application for its amendment so as to include costs of appeal allowed— Execution—Limitation.*

After an appeal from a preliminary mortgage decree was dismissed with costs, the decree-holder presented an application to the trial Court that the final decree previously prepared be amended so as to include the costs awarded to him in appeal. The Court allowed it and directed the amendment of the final decree as prayed. The decree-holder applied for execution of the final decree more than three years after the date of the final decree as originally prepared but less than three years from the date of its amendment. Overruling the plea of limitation,

Held, that the final decree could not have been "amended" under any rule of law and that the mortgagee's application asking for amendment and the order of the Court thereon amounted, in substance, respectively to an application and an order for preparation of a

LIMITATION ACT (1908), Art. 182 (4).

fresh final decree which was the only decree capable of execution on the date on which the application for execution was made. (*Niamatullah and Allsop, JJ.*) BAHAL SINGH *v.* CHAMELI. **155 I.C. 495=7 R.A. 936=1935 A.W.R. 342=1935 A.L.J. 289=A.I.R. 1935 All. 606.**

———**Art. 182 (4)**—*Principal of—Decree already barred by time—Amendment of decree no fresh start of limitation.*

Clause (4), Art. 182, presupposes that at the time of amendment the decree is alive. The basic idea underlying, Art. 182, is that the decree is subsisting at the various points of time from which the limitation starts to run under provisions of Col. 3 of the article. The decree-holder cannot get a start for limitation from the date of amendment, even in a case where the decree had already become barred by time when the amendment was made. (Case law discussed.) (*Srivastava and Smith, JJ.*) HAIDRI KHANAM *v.* BHAWANI SHANKAR. **6 R.O. 302=147 I.C. 815=11 O.W.N. 10=A.I.R. 1934 Oudh 43.**

———**Art. 182 (4)**—*Scope—"Provided for"—Meaning—Amendment of decree—Commencement of limitation.*

The words "provided for" mean that where execution is barred by S. 48, C. P. Code, execution cannot be allowed under Art. 182, Limitation Act. In other words Art. 182 is subject to the provisions of S. 48. An amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by S. 48, that is, that the period of 12 years under S. 48 is final and cannot be extended by way of amendment of the decree, whether that amendment is made before the expiry of the period of 12 years, or whether that amendment is made after the expiry of the period of 12 years. 42 Bom. 309, Ref.; 60 I.C. 318, Diss. From. (*Mukerji and Benmt, JJ.*) FAQIR CHAND *v.* KUNDAN SINGH. **54 All. 622=I.R. 1932 All. 363=138 I.C. 93=1932 A.L.J. 471=A.I.R. 1932 All. 351.**

———**Art. 182 (5).**

Applicability.
Application against a dead person.
Application for leave to bid.
Application in accordance with law.
Application not in accordance with law.
Assignee of decree.
Batta application. *See* STEP-IN-AID—WHAT IS.
Bona fides of decree-holder.
Certification.
Construction.
Date of presentation.
Defective application.
Effect of amendment.
Final order.
Ineffective application.
Insolvency of decree holder.
Jurisdiction of Court.
Oral application.
Principal and surety.
Proper Court.
Step-in-aid—What is.
Step in-aid—What is not.
Step in aid—Miscellaneous.
Terminus a quo.
Transfer of decree. *See* PROPER COURT AND STEP IN-AID—WHAT IS.

Applicability

———**(as amended by Act IX of 1927), Art. 182 (5)**—*Applicability.*

To make this clause applicable, the necessary conditions which must be satisfied, whether the application is

LIMITATION ACT (1908), Art. 182 (5)—Application for leave to bid.

one for execution or to take some step-in-aid of execution of the decree or order are that in either case (1) the application must be in acoordance with law, (2) it must be made to the proper Court, and (3) there must be a final order passed on the application. These conditions are adjectival both to the application for execution and to the application to take step-in-aid of execution of the decree or order. (*Wazir Hasan, C.J., Raza and Srivastava, JJ.*) RAM BHAROSE *v.* RAMMAN LAL. **7 Luck. 590=I.R. 1932 Oudh 264=137 I.C. 768=9 O.W.N. 209=A.I.R. 1932 Oudh 148 (F.B.).**

———**Art. 182 (5)**—*Applicability—Essentials.*

Two conditions are necessary to satisfy Art. 182 (5): (1) There must be an application in accordance with law asking the proper Court to take a step; (2) The step required to be taken by the Court must be one in aid of execution. When both these conditions are fulfilled the requirements of the law are fully satisfied; and nothing more is needed. It is not necessary that the proposed step should be actually taken or that even an order should be passed by the Court on the application. As soon as an application of the above description is made, the period of limitation will run from the date of the presentation of the application. (*Shadi Lal, C.J., Broadway and Jai Lal, JJ.*) GHANYA LAL *v.* NATHU RAM. **12 Lah. 153=I.R. 1931 Lah. 372=131 I.C. 100=32 P.L.R. 84=A.I.R. 1931 Lah. 81 (F.B.).**

Application against a dead person.

———**Art. 182 (5)**—*Application against a dead person.*

An application for execution is nevertheless a step-in-aid although it was made against a dead judgment-debtor. 4 P.L.T. 54, Foll. (*Kulwant Sahay and James, JJ.*) SHEOGOBIND RAM *v.* MT. KISHUNBOSI KUER. **11 Pat. 546=I.R. 1932 Pat. 171 (2)=138 I.C. 91=13 Pat L.T. 318=A.I.R. 1932 Pat. 222.**

———**Art. 182 (5)**—*Application against a dead person.*

An application for execution against a dead person is not in accordance with law and cannot amount to an application for taking-steps in aid of execution. (*Sulaiman, C.J. and Mukerji, J.*) RAMKALI *v.* BIR BHADARMAN TEWARI. **56 All. 890=148 I.C. 1131=6 R.A. 833=1934 A.L.J. 829=4 A.W.R. 509=A.I.R. 1934 All. 463.**

———**Art. 182 (5)**—*Application against dead person.*

An execution application filed *bona fide* within the time prescribed by law against a dead person, though it cannot be acted upon, is nevertheless a step-in-aid of execution, which has the effect of saving the decree from being barred. (*Venkatasubba Rao, J.*) SUBRAMANIA DESIKA GNANASAMBANDA PANDARA SANNADHI *v.* RANGASWAMI CHETTIAR. **155 I.C. 327=7 R.M. 567=1935 M.W.N. 15=41 L.W. 173=A.I.R. 1935 Mad. 161=68 M.L.J. 261.**

———**Art. 182 (5)**—*Application against a dead person—Step-in-aid.*

Where the decree-holder makes an application against the deceased judgment-debtor in good faith as he was not aware of the death of the judgment-debtor, the application must be deemed to be an application made in accordance with law to take some step in-aid of execution within the meaning of Art. 182. (*Jai Lal, J.*) MAULA BAKHSH *v.* MAHOMED IKRAM. **154 I.C. 307=7 R.L. 544=A.I.R. 1934 Lah. 55.**

Application for leave to bid.

———**Art. 182 (5)**—*Application for leave to bid—Step-in-aid.*

Per *Shadi Lal, C.J. and Broadway, J.*—It cannot be affirmed as an inflexible rule that the granting of leave

LIMITATION ACT (1908), Art. 182 (5)—Application in accordance with law.

to bid must in every case amount to a step in-aid of execution ; nor can it be said that it may not, in any case, aid the execution. Whether it belongs to one category or the other must depend upon the circumstances of each case. 3 C.L.J. 240, Rel. on. (Case-law referred.)

Per *Jai Lal, J.*, contra.—An application for leave to bid always implies a suggestion that the proposed step would promote the execution of the decree as every increase in the number of bidders or even of bids promotes the execution of the decree and this is the moving factor in granting the leave to bid. In its very nature an application for leave to bid amounts to an application to the Court to take a step in-aid of execution and this irrespective of the hidden motive of the decree-holder in applying or of the actual result of the granting of the application and the combination of some other prayer in the application does not affect the question as then it would be the granting of such a prayer that would be the step-in aid of execution and not the granting of the leave to bid which in that case must be held never to amount to a step-in aid of execution. (*Shadi Lal, C. J., Broadway and Jai Lal, JJ.*) GHANYA LAL *v.* NATHU RAM. **12 Lah 153=I.R. 1931 Lah. 372=131 I.C. 100=32 P.L.R 84=A.I.R. 1931 Lah. 81 (F.B.).**

Application in accordance with law.

See also DEFECTIVE APPLICATION.

———Art. 182 (5)—*"Application in accordance with law"—Application for execution containing no description of property—C. P. Code, O. 21, R. 13.*

An application for execution which does not contain any description of the property and other particulars required by O. 21, R. 13 of the C. P. Code cannot be deemed to be "an application in accordance with law" for the purpose of saving limitation under Art. 182. (*Murphy, J.*) SAKKARGAUDA *v.* BHIMAPPA. **I.R. 1931 Bom. 143 (1)=129 I.C. 159 (1)=32 Bom.L.R. 1368=A.I.R. 1931 Bom. 128.**

———Art. 182 (5)—*Application in accordance with law—Application for execution of decree dependent on payment by decree-holder—Money not paid.*

An application for execution of a decree dependent on the payment by the decree-holder of a sum of money is an application for execution made in accordance with law, even though the money had not been deposited. (*Almond, A.J.C.*) BUDHU RAM *v.* MUSHTAQ SHAH. **158 I C. 517=8 R.Pesh. 57=A.I.R. 1935 Pesh. 129.**

———Art. 182 (5)—*Application in accordance with law—Application with judgment-debtor's name wrongly spelt—Want of diligence of decree holder immaterial.*

Under the present Limitation Act neither *bona fides* nor due diligence on the part of the decree-holder is required to keep the decree alive and that is no warrant for reading into the clause any requisites of good faith or due diligence. The language of the clause ought not to be strained in favour of the judgment debtor who has not paid his debt. Even if the previous execution application was dismissed on the ground of gross carelessness because the judgment-debtor was wrongly shown as "Sheodeni" instead of "Sheobeni" it is an application in substantial compliance with the law to save limitation, whether it was admitted, rejected, returned, or allowed to be amended. 53 Cal. 664, Rel. on. (*Dhivle, J.*) SRI RAI *v.* SHEOBENI MISSER. **6 R.P. 557=149 I.C. 102=A.I.R 1934 Pat. 289.**

———Art. 182 (5)—*Application in accordance with law—Application omitting particulars required under O. 21, R. 11 (2).*

An application for execution which did not mention the fact that there was an appeal and that the decretal amount was reduced on appeal, thus omitting the particulars required under Cls. (*d*) and (*g*) of O. 21, R. 11 (2) cannot, on that account, be deemed to be otherwise than in accordance with law. (*Krishnan Pandalai, J.*) PALLI VITTALA HEGDE *v.* SHEENAPPA SHETTY. **147 I.C. 386=6 R M. 338=1933 M.W N. 929=38 L.W. 877=A.I.R. 1933 Mad. 872.**

———Art. 182 (5)—*Application in accordance with law—Application returned for amendment but not represented.*

An application which has been returned for amendment but not re presented is sufficient to save limitation. 29 I.C. 16; 35 I.C. 876 and 40 Mad. 949, Ref. (*Krishnan Pandalai, J.*) THIRUPATHI AYYANGAR *v.* YEGNAMMAL. **I.R. 1933 Mad. 337=143 I.C. 844=1933 M W.N. 1233=38 L.W. 224=A.I.R. 1933 Mad. 568.**

———Art. 182 (5)—*Application in accordance with law—Decree by Additional Munsif—Application to first Munsif for execution.*

The Court of an Additional Munsif is a Court of the Munsif. The Court of an Additional Munsif who may happen to be sent to a district in a particular year is not necessarily the same Court as the Court of the Additional Munsif deputed to the same area in other years. For the purpose of execution of the decree which the Additional Munsif pronounced, his Court is the Court of the first Munsif, for he is then trying suits appertaining to the area which was comprised in the territorial jurisdiction of the latter. The application for execution of a decree of Additional Munsif to the Court of first Munsif is made in accordance with law and saves limitation. (*Courtney-Terrell, C. J. and Saunders, J.*) MANOGI LAL SAH *v.* JOG SAH. **13 Pat. 5=151 I.C. 375=7 R P. 85 (1)=15 Pat.L.T. 215=A.I.R. 1934 Pat. 199 (1).**

———Art. 182 (5)—*Application in accordance with law—Legality of final order immaterial.*

A Judge has jurisdiction to decide wrongly as well as rightly, and when the execution proceedings begin upon an application which is valid in its inception, for the purposes of limitation, it does not matter whether the final order passed therein is in accordance with law or not ; time will begin to run from the date of such final order. So the fact that in the previous application, no notice to the assignor of the decree was issued as required by O. 21, R. 16 does not make all the execution proceedings void as if they never existed for purposes of limitation especially as the judgment-creditor admitted the transfer of the decree in the previous execution taken out by him. (*Mya Bu and Dunkley, JJ.*) U NYO *v.* U PO HLAING. **149 I.C. 98=6 R.R. 279=A.I.R. 1934 Rang. 101.**

———Art. 182 (5)—*"Application in accordance with law"—Meaning of—Minor errors and motive of applicant immaterial.*

In order to see whether an application for execution is in accordance with law, all that has to be seen by the Court is whether it is in accordance with the requirements of law. It does not matter if there are some obvious errors of detail or that the mode of execution sought is not available through that Court at that time so long as the application fulfils the requirements of O. 21, R. 11. It does not even matter if the application was not *bona fide* but merely put in to extend limitation. (*Ferrers, J. C. and Mehta, A. J. C.*) ACHRAJ SING RAM SING *v.* ACHRAJRAM SAHNI. **27 S.L.R. 109=I.R. 1933 Sind 95=142 I.C. 489=A.I.R. 1933 Sind 78.**

LIMITATION ACT (1908), Art. 182 (5)—Application in accordance with law.

———**Art 182 (5)**—"*Application in accordance with law*"—*Meaning—Non compliance with O. 21, R. 11 (g), C. P. Code—Effect of.*

To see whether a particular application for execution is or is not in accordance with law by reason of the omission from it of the particulars required by O. 21, R. 11, C. P. Code, what has to be looked is whether the executing Court would or would not issue execution on the application as preferred to it The expression "in accordance with law" in Art. 182 (5), Limitation Act, must be taken to mean that the application, though defective in some particulars, is one on which execution could lawfully be ordered. If the omissions are such as to make it impossible for the Court to issue execution upon it, it must be held that the application is not in accordance with law. But an application in substantial compliance with the law will be effectual to stay the progress of limitation, whether the Court admits, or rejects, or returns the application or allows it to be amended. (*Murphy and Divatia, JJ.*) RAMGOPAL SHRIRAM *v.* RAMGOPAL BHUTADA. **59 Bom. 1=153 I.C. 273=7 R.B. 220=36 Bom.L.R. 643=A.I.R. 1934 Bom 307.**

———**Art. 182 (5)**—*Application in accordance with law—Non production of succession certificate.*

An application for execution is in accordance with law if it complies with the requirements of O. 21, Rr. 11 to 14, C. P. Code. The want of succession certificate no doubt may deprive the applicants of their remedy, namely, execution of the decree, but it cannot vitiate the application itself. Applications in execution are not always successful; nevertheless they are treated as steps in aid of execution. (*Niyogi, A. J. C.*) PILWASAO *v.* MT. KHAIRUN NISSA. **31 N.L.R. 126=153 I.C. 955 =7 R.N. 152=A.I.R. 1935 Nag. 1.**

———**Art. 182 (5)**—*Application in accordance with law—Two decree-holders—Application for execution, by one—Arrest by other decree holder—Application if legal.*

A decree obtained by two persons was sought to be executed by one of them alleging that the other had relinquished his right during pendency of suit. On an objection being raised, the other decree holder gave a purshis stating that he had no objection if the decree were executed by the applicant alone. The application ultimately failed for want of prosecution. A question having raised whether application was according to law and serves as a step in aid of execution.

Held, that the statement made by the other decree-holder in the purshis did not amount to a relinquishment or to an assignment of his interest in the decree. The application made in reliance of the alleged relinquishment was mistaken. It was however made by a person entitled to make it and was thus in accordance with law. A.I.R. 1931 Lah. 600, Foll. (*Murphy and Divatia, JJ.*) BABAMIYA *v.* ABDUL KARIM. **58 Bom 428=153 I.C. 176=7 R.B. 216=36 Bom.L.R. 437=A.I.R. 1934 Bom. 216.**

Application not in accordance with law.

See also ASSIGNEE OF DECREE AND JURISDICTION OF COURT, *supra* AND STEP-IN-AND—WHAT IS NOT, *infra.*

———**Art. 182 (5)**—Application not in accordance with law—Application filed by vakil without vakalatnama. *See* STEP-IN-AID—WHAT IS NOT. **A.I.R. 1934 Rang. 107.**

———**Art. 182 (5)**—"*Application not in accordance with law*"—*Application for a relief not competent—Surety liable to one sixth of the decree—Application for execution of the whole decree against surety.*

Where under the terms of a decree, the surety was liable only to the extent of one-sixth of a decree, but nevertheless the decree-holder applied for execution of the whole of the decree against the surety and the judgment-debtors and that application was dismissed as incompetent, it is not 'an application in accordance with law' so as to save from the bar of limitation a subsequent application for execution. The former was for a relief which the Court had decided could not be given and which was entirely outside the law. 13 B 237; 23 A. 619; 33 C. 867, Foll; 7 Pat. L. T. 330; 3 Pat. L. T. 322; 8 Pat. L. T. 217, Dist. (*Ross and Chatterjee, JJ.*) DURGA PRASAD SAHU *v.* MUSAMMAT POWDHARO KUER. **10 Pat. 183=I.R. 1931 Pat. 255 =131 I.C. 815=13 Pat.L.T. 70=A.I.R. 1931 Pat. 274.**

LIMITATION ACT (1908), Art. 182 (5)—Bona fides of decree-holder

———**Art. 182 (5)**—*Application not in accordance with law—Application not signed or verified by decree-holder.*

An execution application, which is neither signed nor verified by the decree-holder, but which is signed by his vakil, who, however, does not profess to be acquainted with the facts of the case, is not in accordance with law within the meaning of Art. 182 and consequently does not save limitation. Nor is the defect cured by the provisions of O. 21, R. 17 (2), C. P. Code. 26 Mad. 101=12 M.L. J. 435, Foll. (*Reilly and Anantakrishna Ayar, JJ.*) SANGILIYA PILLAI *v.* MUTHU CHETTIAR. **135 I.C. 15=I.R. 1932 Mad. 47=34 L.W 546=61 M.L.J. 516.**

———**Art. 182 (5)**—*Application not in accordance with law—Saving of limitation.*

Where the previous execution application was not in accordance with law and the decree-holder refused to correct the same in spite of the Court's order,

Held, that the execution petition did not save limitation. (*Boys, J.*) SUDESHWARI PRASAD NARAIN SINGH *v.* PALJHAN DUBE. **I.R. 1931 All. 337 (2)= 131 I.C. 33 (2)=A.I.R. 1931 All. 722.**

Assignee of decree.

———**Art. 182 (5)**—*Assignee of decree—Application not in accordance with law—Application by assignee of decree for recognition.*

An application by a transferee to be brought on the record without asking for execution of the decree is not an application in accordance with law, as it is not an application for execution of the decree; that is to say, an application setting the Court in motion that the decree be executed in any manner set out in the last column of the prescribed form. (Case-law Disc.) (*Rupchand, J. C. and Lobo, A. J. C.*) DEVRAJ MULTANI SAHAI *v.* FATEH CHAND RAM CHAND. **27 S.L.R. 314=147 I.C. 470=6 R.S. 158=A.I.R. 1933 Sind 341.**

———**Art. 182 (5)**—*Assignee of decree—Application for substitution—Step in-aid.*

Although an application by assignee to get his name substituted is not an application for execution, it is an application asking the Court to take a step-in-aid of execution. Under O. 21, R. 16, no doubt, the transferee might file an application for execution, but he cannot get execution in any form until after the notice mentioned in the proviso has been issued and the Court has heard objections to execution, if any. If a person therefore asks the Court to free him from an impediment, which clogs his freedom of action in executing his decree he must be regarded as asking the Court to take a step in aiding him to execute the decree. 29 All. 301 and 31 Mad. 234, Rel. on; 24 Cal 778 and 27 Cal. 709, Ref. (*Baguley, J.*) MOIDOO *v.* MAHOMED. **I.R. 1933 Rang. 104= 144 I.C. 310=A.I.R. 1933 Rang. 55.**

Bona fides of decree-holder.

———**Art. 182 (5)**—Bona fides *of decree-holder—If material.*

LIMITATION ACT (1908), Art. 182 (5)—Bona fides of decree-holder.

A decree-holder or a person applying for execution of a decree is not called upon to satisfy the Court that a previous application for execution or for some step-in-aid of execution from which he seeks to reckon the period of limitation for his next application had been made with a genuine intention of obtaining execution of his decree if reasonably possible and that he did not abandon the proceedings except upon a genuine belief that it would not be reasonably possible to obtain execution. It is not open to the execution Court to go into the question of the *bona fides* of the application for execution. If the application fulfils the requirements of O. 21, R. 11, C. P. Code, it is good and operative for saving limitation and it is immaterial whether the decree holder wanted to have immediate execution or merely wanted to make the application in order to keep the decree alive. 1929 A. L. J. 938, Rel. on; 24 A. L. J. 137, Cons. (*Sen and Bennet, JJ.*) RUPAI RAI *v.* MURLAT TEWARI. **I.R. 1931 All. 422=131 I.C. 678.**

———**Art. 182 (5)**—Bona fides *of decree-holder—If material.*

In determing the question of limitation for execution of a decree, the question whether a previous application for execution was made in good faith for the purpose of executing the decree or merely for the purpose of keeping execution proceedings alive is immaterial. (*Grille, J. C.*) HANUMAN LALA KALAR *v.* SHEONARAYAN SONAR. **31 N.L.R. 333=156 I.C. 114=7 R.N. 220=A.I.R. 1935 Nag. 131.**

———**Art. 182 (5)**—Bona fides *of decree-holder immaterial—Application merely for giving time nevertheless effective.*

Under Art. 182, Cl. (5) it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree, and it is not further necessary to show that such application was not merely colourable but had been made with a *bona fide* and genuine intention of obtaining execution of the decree and not simply for the purpose of gaining time and keeping the decree alive. 52 All. 11 (F.B.), Appr. and 48 All. 468, Overr. (*Sir Lancelot Sanderson.*) KHALIL-UR-RAHMAN KHAN *v.* COLLECTOR OF ETAH. **61 I.A. 62=55 All. 993=59 C.L.J. 103=39 L.W. 126=11 O.W.N. 41=1934 M.W.N. 33=35 P.L.R. 189=36 Bom.L.R. 237=3 A.W.R. 33=15 Pat L.T. 221=6 R.P.C. 42=147 I.C. 323=38 C.W.N. 229=1934 A.L.J. 110=A.I.R. 1934 P.C. 14=66 M. L.J. 79 (P.C.).**

———**Art. 182 (5)**—Bona fides of *decree-holder—Relevancy of.*

In considering if an application for execution was in time, the question of *bona fide* intention of the person applying for execution of a decree does not arise. 52 All. 11 (F. B.), Foll. (*Milne, A. J. C.*) VOLKART BROTERS *v.* ACHRAJRAM. **25 S.L.R. 528=I.R. 1932 Sind 14=134 I.C. 1182=A.I.R. 1931 Sind 160.**

Certification.

———**Art. 182 (5)**—*Certification by decree holder of payment.*

Mere certification by the decree-holder of a payment of money under the decree is not an application to take a step in-aid of execution of the decree within the meaning of Art. 182 (5). A.I.R. 56 I.A. 30; A.I.R. 1930 Rang. 64; A.I.R. 1931 Cal. 719 and A.I.R. 1932 Oudh 148, Foll. (*Niamatulah and Kisch, JJ.*) ADYA PRASAD SINGH *v.* LAL GIRJISH BAHADUR PAL. **55 All. 393=6 I.R. (All.) 357=146 I.C. 836=1933 A.L.J. 256=A.I.R. 1933 All. 364.**

LIMITATION ACT (1908), Art. 182 (5)—Date of presentation.

———**Art. 182 (5)**—*Certification of decree-holder under O. 21, R. 2 (1).*

The certificate of the decree-holder under O. 21, R. 2 (1) of the C. P. Code is not an application within the meaning of Art. 182 (5) of the Limitation Act and there being no application, the certificate could not be called a step-in-aid of execution. So also the mere recording of payment by the Court under O. 21, R. 2 (1) cannot be regarded as a final order within the meaning of Art. 182 (5). 56 M.L.J. 223 (P.C.); 7 Luck. 590, Foll, (*Wazir Hasan, C.J. and Nanavutty, J.*) SURAIYA BEGAM *v.* TRILOKI NATH. **9 Luck. 288=6 R.O. 304=147 I.C. 766=10 O.W.N 1251=A.I.R. 1934 Oudh 426.**

———**Art. 182 (5)**—*Certification of payment by decree-holder after decree gets statute barred is not.*

A certification of payment made by decree holder after the decree is statute barred is not a step in-aid of execution within the meaning of Art. 182 and cannot revive limitation. (*Rupchand, J.C. and Mehta, A.J. C.*) KALIANDAS BALCHAND *v.* MAHOMED KHAN. **147 I C. 30=6 R.S. 133=A.I.R. 1933 Sind 365.**

———**Art. 182 (5)**—*Certification of payment—Saving of payment.*

It cannot be laid down as a matter of law that the decree-holder's certification is in itself a step-in-aid of execution and can afford a fresh starting point of limitation. In order to save limitation the payment must fall within the provisions of S. 20 of the Limitation Act. Such a certification is not an application to the Court. 56 I.A. 30, Rel. on. (*Rankin, C.J., C. C. Ghose, Buckland, Suhrawardy and Mukerji, JJ.*) AMAR KRISHNA CHOWDHURY *v.* JAGAT BANDHU BISWAS. **59 Cal. 760=I.R. 1931 Cal. 922=134 I.C. 922=35 C.W.N. 1192=54 C L.J. 201=A.I.R. 1931 Cal. 719 (F.B.).**

———**(as amended by Act IX of 1927), Art. 182 (5)**—*Certification under O. 21, R. 2, C. P. Code—Presumption of application.*

From the mere fact of certification under O. 21, R. 2, C. P. Code, it cannot be presumed there was an application to be treated as a step-in-aid, because under that rule, the term of the rule involve no application. (*Wazir Hasan, C.J., Raza and Srivastava, JJ.*) RAM BHAROSE *v.* RAMMAN LAL. **7 Luck. 590=I.R. 1932 Oudh 264=137 I C. 768=9 O.W.N. 209=A.I.R. 1932 Oudh 148 (F.B.).**

[F. 9 Luck. 288 (289); 55 A. 393 (397); 146 I.C. 805 (806) (O).]

———**(as amended by Act IX of 1927), Art.182 (5)**—*Certification under O. 21, R. 2, C. P. Code.*

The mere certification of itself by the decree holder of a payment of money under the decree is not an application to take some step-in-aid of execution within the meaning of sub-Cl. (5), Art. 182. (*Wazir Hasan, C.J. Raza and Srivastava, JJ.*) RAM BHAROSE *v.* RAMMAN LAL. **7 Luck. 590=I.R. 1932 Oudh 264=137 I.C. 768=9 O.W.N. 209=A.I.R. 1932 Oudh 148 (F.B.).**

Construction.

———**Art. 182 (5)**—*Construction—'In accordance with law.'*

The expression "in accordance with law" is adjectival both "to the proper Court for execution and to take some step-in-aid of execution." (*Rupchand, J.C. and Lobo, A.J.C.*) DEVRAJ MULTANI SAHAI *v.* FATEH CHAND RAM CHAND. **27 S.L.R. 314=147 I.C. 470=6 R.S. 158=A.I.R. 1933 Sind 341.**

Date of presentation.

———**Art. 182 (5)**—*Date of prsentation—Transfer of application from one Court to another.*

The transfer of an application for execution from one Court to another consequent upon the adjustment of territorial jurisdiction does not affect or alter the date of

LIMITATION ACT (1908), Art. 182 (5)—Defective application.

original presentation which is material under Cl. (5) (*Lakshmana Rao, J.*) RAGHAVA AYYANGAR *v.* NATESAN CHETTIAR. **1931 M.W.N. 413.**

Defective application.

See also APPLICATION IN ACCORDANCE WITH LAW, *supra* AND STEP-IN-AID—WHAT IS, *infra*.

———**Art. 182 (5)**—*Defective application.*

Where the guardian *ad litem* of the minor judgment-debtor had died but all the same an execution application was made as against him.

Held, that the application, though defective in form, was a step in-aid of execution. (*Addison, J.*) GHULAM HUSSAIN *v.* NARAIN SINGH. **134 I.C. 1107 (2)=I. R. 1932 Lah. 3 (2)=32 P L.R. 635= A.I.R. 1931 Lah. 636.**

———**Art. 182 (5)**—*Defective application—Application in accordance with law—Defective application.*

No doubt the language of Art. 182 (5) ought not to be strained in favour of a judgment-debtor who has not paid debt and that the words "a step-in-aid of execution" should be liberally interpreted in favour of the decree-holder, but whether an application which is defective should be treated as an application in accordance with law must depend on the facts of each particular case and no hard and fast rule can be laid down in that behalf. (*Rupchand, J.C. and Lobo, A.J.C.*) DEVRAJ MULTANI SAHAI *v.* FATEH CHAND RAM CHAND. **27 S.L.R. 314=147 I.C. 470=6 R.S. 158=A.I.R. 1933 Sind 341.**

———**Art. 182 (5)**—*Defective application—Application in accordance with law—Rejection of—No finding that it was not in accordance with law—Power of appellate Court.*

Where the Court dismissed the prior application in the following words. "D. H. absent: application is incorrect. It is rejected" and the question was whether that application saved limitation.

Held, that the order of rejection should contain an express or implied finding that the application is not in accordance with law. The term "incorrect" would cover both cases of such irregularities which would prevent the application forming a basis for execution and thus being not in accordance with law and minor defects which it is desirable to set right but which in themselves would not vitiate the application. Where there is no definite finding of the Court to that effect, the appellate Court can consider the previous application to determine if it was in accordance with law. 17 Nag. L. R. 179, Appl. (*Grille, A.J.C.*) GULAMALI *v.* RAJ KUMAR. **I.R. 1933 Nag. 138=142 I.C. 762=16 Nag L.J. 47=A.I. R. 1934 Nag. 117.**

———**Art. 182 (5)**—*Defective application—Application in accordance with law—Technical defect—Omission to state form of notice.*

If an application substantially complies with the provision set out in the rules it is an application in accordance with law and technical defects of no importance should not be allowed to save defaulting debtors from paying the money which they owe. An application does not cease to be in accordance with law because it does not contain the form of notice which the petitioner urges on the Court to issue. (*Baguley, J.*) KADIRESAN CHETTYAR *v.* MAUNG SAN YA. **I.R. 1933 Rang. 40 =142 I.C. 435=A.I R. 1933 Rang. 87.**

———**Art. 182 (5)**—*Defective application—Not an application in accordance with law—Effect.*

If an application for execution is rejected as being not in accordance with law for the reason that it was so defective in material particulars that the Court could not, on the basis of that application, exercise its powers of

LIMITATION ACT (1908), Art. 182 (5)—Final order.

execution, that application must be regarded as not having been presented at all for purposes of Art. 182. The application is ineffectual to stay the running of limitation. (*Jackson, Staples and Niyogi, A.J Cs.*) GULAMALI *v.* RAJKUMAR CHATTERJI. **28 N.L.R. 7=I.R. 1931 Nag. 169=134 I C 681=14 Nag.L J. 101=A.I.R. 1931 Nag. 154 (F.B.).**

[**Rel.** 31 N.L.R. 333 (334).]

Effect of amendment.

———**(as amended by Act IX of 1927), Art. 182 (5)**—*Effect of amendment.*

Whereas under Limitation Act (IX of 1908), limitation ran from the date of applying in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order, the Amending Act (IX of 1927) makes the period of limitation to begin not from the date of the previous application but from the date of the final order passed on it. (*Wazir Hasan, C.J., Raza and Srivastava, JJ.*) RAM. BHAROSE *v.* RAMMAN LAL. **7 Luck. 590=I.R. 1932 Oudh 264=137 I.C. 768=9 O.W.N. 209=A.I R. 1932 Oudh 148 (F.B.).**

———**(as amended by Act IX of 1927), Art. 182 (5)**—*Effect of amendment—Applicability to pending applications.*

If the right of the decree-holder to execute his decree had not become barred on the 1st January, 1928, when the Limitation (Amendment) Act IX of 1927 came into force an application for execution made after that date is governed by the new provision of the amended Act. (*Anantakrishna Aiyar, J.*) NAGALINGAM PILLAI *v.* SIVA CHIDAMBARA SABAPATHY DEEKSHITAR. **1932 M.W.N. 1116=140 I C. 500= I.R. 1933 Mad. 8=36 L.W. 716=A.I.R. 1933 Mad. 85=63 M.L J. 725.**

Final order.

See also APPLICATION IN ACCORDANCE WITH LAW, *supra*.

———**Art. 182 (5)**—*Final order—Application for transfer of decree.*

Where a decree holder makes an application to the Court which passed the decree asking for a certificate of transfer to another Court for execution, the final order on such application cannot be considered to have been passed until the date on which the required certificate is prepared and handed over to the decree-holder who has undertaken to present it before the other Court, and limitation is to be reckoned only from such date and not from the date of the order of the Court merely directing the office to prepare a certificate. (*Niamatullah, J.*) HAFIZUDDIN *v.* PARSHADI LAL MANOHAR LAL. **154 I.C. 718=7 R.A. 795=1935 A.W.R. 419=1935 A.L.J. 370=A.I R. 1935 All. 757.**

———**Art. 182 (5)**—*Final order—Date of—Matter carried in appeal.*

Under the provisions of Art. 182, Cl. (5) of the Limitation Act, the period of limitation is computed from the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in-aid of execution or order. Where the matter is carried in appeal, the date of the final order is the date of the appellate order. (*Agha Haidar, J.*) ABHE RAM *v* BHOLAR. **157 I.C. 604=8 R.L. 130=37 P.L.R. 257.**

———**Art. 182 (5)**—*Final order—Meaning.*

Final order means an order which conclusively decides the matter between the parties as distinguished from interlocutory. (*Saaduddin, A.J.C.*) PUNJAB NATIONAL BANK, LTD. *v.* DINA NATH. **149 I.C. 136= 6 R. Pesh. 72=A.I R. 1934 Pesh. 23.**

LIMITATION ACT (1908), Art. 182 (5)—Final order.

———**Art. 182 (5)**—*Final order—Order closing case—Fresh starting point of limitation.*

'Final order' means final order in the proceeding, to which the application gave rise. Where the Judge ordered notice to issue to the judgment-debtor returnable on the 13th November, 1929, and on that date the cases were closed at the decree-holder's request and he applied for execution against the same judgment-debtors on 8th November, 1932,

Held, that the order closing the case was the final order and the application was in time. The fact that the application for execution is withdrawn or struck off at the request of the decree-holder does not prevent it from giving rise to a new starting point for a period of limitation. (*Baguley, J.*) KADIRESAN CHETTYAR *v.* MAUNG SAN YA. **I.R 1933 Rang. 40=142 I.C. 435=A I.R. 1933 Rang. 87.**

———**Art. 182 (5)**—*Final order—Order dismissing execution petition on part-payment—Decree-holder giving judgment-debtor two months' time for payment of balance—Default by judgment-debtor—Fresh application for execution—Limitation.*

On the receipt of a part payment of the decree amount, the decree holder allowed his execution application to be dismissed with costs on the 9th July, 1930, and at the same time gave two months' time to the judgment-debtor to clear the balance. On default by the judgment-debtor, he made another application on 8th September, 1933, which was dismissed by the executing Court on the ground that it was made more than three years after the last order passed by the Court. On revision,

Held, that the order passed on the 9th July, 1930, was a 'final order passed on an application made', and the two months' time given by the decree-holder to the judgment-debtor to pay the decretal amount did not suspend the proceedings, as the application itself was dismissed on that day with costs and that, therefore, the order of the executing Court was correct. (*Kendall, J.*) MAHESH PRASAD *v.* SHYAM LAL. **1935 A.W.R. 1055 =8 R.A. 169—1935 A.L.J. 1087=157 I.C. 273=A. I.R. 1935 All. 909.**

———**(as amended by Act IX of 1927), Art. 182 (5)**—*Final order—Recording of payment by Court under O. 21, R. 2 (1), C. P. Code.*

The words "final order" imply that it should be final as far as the Court passing the order is concerned. It should be an order which if not reversed or modified by a Court of appeal would be binding between the parties. In the case of a certification by the decree-holder and the recording of payment by the Court, the law does not require any notice being sent to the judgment-debtor and it is always open to the judgment debtor to question the alleged payment, hence recording of payment by the Court under O. 21, R. 2 (1) cannot be regarded as a final order within the meaning of Art. 182, Cl. (5). (*Wazir Hasan C.J., Razi and Srivastava, JJ.*) RAM BHAROSE *v.* RAMMAN LAL. **7 Luck 590=I R. 1932 Oudh 264=137 I.C 768=9 O.W.N. 209=A.I.R. 1932 Oudh 148 (F.B).**

———**(as amended by Act IX of 1927), Art. 182 (5)**—*Final order—Second application for execution returned for amendment—Application re presented with a third application—Time for third application—Starting point.*

A second execution application (filed after the amending Act IX of 1927 came into force) was returned for correction of some defects and only re-presented along with a third application for execution more than three years from the date of the first application.

LIMITATION ACT (1908), Art. 182 (5)—Jurisdiction of Court.

Held, that so long as no final orders had been passed on the second application, it was still pending and no question of limitation arose and that the Court should first pass orders on the second application and then, if necessary, consider whether the third application was in time. (*Madhavan Nair, J.*) MAHOMED ABU BAKKAR MARACAIR *v.* RAMAKRISHNA CHETTIAR. **I R. 1933 Mad. 383=144 I.C. 167=37 L.W. 469=A.I.R. 1933 Mad. 540 (1)=64 M.L J. 401.**

———**Art. 182 (5)**—*Final order—Transferring execution to another Court.*

Where the execution Court transfers the execution to another Court to enable the decree-holder to receive his rateable distribution, so far as the Court seized with the execution is concerned, this is the final order. (*Saadudin, A.J.C.*) PUNJAB NATIONAL BANK, LTD. *v.* DINA NATH. **149 I.C. 136=6 R. Pesh. 72=A.I.R. 1934 Pesh. 23.**

Ineffective application.

———**Art. 182 (5)**—Ineffective application for execution—Want of territorial jurisdiction—Step-in aid. *See* JURISDICTION OF COURT, *infra*. **A I.R. 1934 Lah. 54.**

Insolvency of decree holder.

———**Art. 182 (5)**—*Insolvency of decree-holder—Transfer of Official Assignee—Application by decree-holder after insolvency—If saves limitation for later application by transferee.*

A decree-holder having been adjudicated insolvent on his own application, the Official Assignee sold all the debts due to the insolvent to the appellant. It appeared that after the insolvency, the original decree-holder filed an execution application and the appellant who took out execution later on relied on the application filed by the original decree holder was a step-in-aid under Art. 182 (5), Limitation Act, and saves limitation in his favour.

Held that the original-decree holder who was on record was entitled to execute the decree, and that his insolvency was not material as the Official Assignee had transferred all his rights, and that consequently the transferee could rely on the prior application as a step-in-aid (*Beasley, C.J. and King, J.*) JAVANARAYANA *v.* POLAVYA. **159 I.C. 589=8 R.M. 516=41 L.W. 295=1935 M.W.N. 203=A.I.R. 1935 Mad. 383=68 M L J. 392.**

Jurisdiction of Court.

See also STEP-IN-AID—WHAT IS NOT, *infra*.

———**Art. 182 (5)**—*Jurisdiction of Court—Application not in accordance with law—Property out of jurisdiction—Application for sale.*

When in an application for execution of a decree, the relief asked for, to sell property not situated within the jurisdiction of the Court, is such as the Court cannot grant, the application is not in accordance with law, as the Court is asked to do something which is not competent to do. The same principle applies in the case of movable property outside the jurisdiction of the Court and equally where the execution is sought against the movable property of the judgment debtor and the judgment-debtor has no movable property within jurisdiction of the Court. 52 All 11 and 12 All. 64, Rel. on.

The application might however be held to be in accordance with law if there is a *bona fide* belief that the movable property did exist within the jurisdiction of the Court. 11 Beng. L.R. 23 and 2 All. 792, Rel. on. (*Milne, A.J.C.*) VOLKART BROTHERS *v.* ACHARJRAM. **25 S L.R. 528=I.R. 1932 Sind 14=134 I.C. 1182=A.I.R 1931 Sind 160.**

———**Art. 182 (5)**—*Jurisdiction of Court—Step-in-aid—Application for execution—Form of.*

LIMITATION ACT (1908), Art. 182 (5)—Jurisdiction of Court.

In considering whether an application can be treated as a step-in-aid of execution, the form of the application is of no importance. An application for transfer of a decree for execution need not be on any particular form. Whether an application is one for execution or for transfer is to be decided on the nature of the prayer made and not on the choice of a particular form. If an application for transfer is incompetent because the Court to which the decree is sought to be transferred has no jurisdiction to entertain the same it cannot be treated as a step-in-aid of execution. Such an application does not become an application for execution merely because it was made on a form prescribed for an application for execution as the decree-holders asked the Court to do a certain thing which the Court was not empowered to do that is, to send the decree for execution to the Court which had no jurisdiction to execute that decree. The form of the application has no bearing on the question. (*Khaja Mahomed Noor and Dhavle, JJ.*) SITAL PRASAD SHUKUL *v.* BABU LAL SHUKUL. **11 Pat. 785=142 I.C. 155=I.R. 1933 Pat. 120=13 Pat.L.T 498=A.I.R. 1932 Pat. 309.**

——**Art. 182 (5)**—*Jurisdiction of Court—Step-in-aid—Ineffective application for execution—Want of territorial jurisdiction.*

Where an execution application is filed against the legal representatives of the judgment-debtor in the Court which passed the decree and a notice thereon is issued to the legal representatives to show cause why the decree should not be executed against them, it cannot be dismissed for want of jurisdiction merely because it turns out to be ineffective owing to the non-existence of any property within the jurisdiction of the Court. (*Jai Lal, J.*) MAULA BAKHSH *v.* MAHOMED IKRAM. **154 I.C. 307=7 R.L. 544=A.I.R. 1934 Lah. 55.**

Oral application.

——**Art. 182 (5)**—*Oral application for issue of arrest warrant to judgment-debtor.*

Where a decree-holder, when a warrant of arrest has been returned unexecuted asks for the issue of a fresh warrant, he asks the Court to take a step-in-aid of execution proceedings, since the action taken on the previous application has failed. The application, though oral, is a definite act and a necessary act, and saves limitation in respect of a subsequent application within three years. (*Grille, J.C.*) HANUMAN LALA KAHAR *v.* SHEONARAYAN SONAR. **31 N.L.R. 333=156 I.C. 114=7 R.N. 220=A.I.R. 1935 Nag. 131.**

——**Art. 182 (5)**—*Oral application for time to enquire about legal representatives.*

An oral application by a decree-holder for time to make inquiries as to the legal representatives of a deceased judgment debtor is a step-in-aid of execution within the meaning of Art 182, Cl. (5). A.I.R. 1921 Bom. 33, Ref. (*Broomfield and Wadia, JJ.*) GOPAL SHANKAR *v.* RAISING PREMJI. **151 I.C. 676=7 R.B. 78=36 Bom.L.R. 510=A.I.R. 1934 Bom. 266.**

Principal and surety.

——**Art. 182 (5) and Expl. I**—*Principal and surety—Execution against principal—If saves limitation against surety.*

Where a decree-holder, after executing the decree against the principal judgment-debtor and getting part satisfaction, files an application against the surety more than three years after the date of the decree, the case is governed by Art. 182 (5) of the Limitation Act, Expl. I to the Article does not apply to the case. The prior execution against the principal judgment-debtor saves limitation against the surety also. The surety may no doubt be technically liable from the date of the decree, but in equity his liability arises only upon the failure of the principal to satisfy the decree. (*Beasley, C.J and King, J.*) GANGARAJU *v.* SUBBAYYA. **58 Mad. 276=155 I.C. 864=7 R.M. 621=1935 M.W.N. 90=41 L.W. 148=A.I.R. 1935 Mad 188=68 M.L.J. 119.**

LIMITATION ACT (1908), Art. 182 (5)—Proper Court.

Proper Court.

See also JURISDICTION OF COURT, *supra.*

——**Art. 182 (5)**—*Proper Court—Application to.*

In order to bring a case under Cl. (5), Art. 182, the essential conditions which must be satisfied are that there must be; (*a*) an application in accordance with law; (*b*) the application must be made to the proper Court, and (*c*) the application must be to take some step in-aid of execution of the decree. Hence Cl. (5) can have no application unless there is an application made to the proper Court. A decree-holder's application to the Collector for declaration of his mortgage lien under the decree is not an application made "to the proper Court" to take some step-in aid of execution of the decree for sale of the mortgaged property, as the Collector is not certainly "the Court whose duty it is to execute the decree" within the meaning of Expl. 2, Art. 182. (*Raza and Srivastava, JJ.*) TILLA SINGH *v.* TIRBHUWAN SINGH. **9 Luck. 273=6 I.R. (Oudh) 177=146 I.C 805=10 O.W.N. 1229=17 R.D. 1056=A.I.R. 1933 Oudh 564.**

——**Art. 182 (5)**—*Proper Court—Application to—Application to transferee Court before receipt of papers.*

Where a decree was ordered to be transferred by the trial Court to another Court, an application for execution made to the latter Court is one made to the proper Court though the papers may not have been actually transferred. (*Ferrers, J.C. and Mehta, A.J.C.*) ACHRAJ SING RAM SINGH *v.* ACHRAJRAM SAHNI. **27 S.L.R. 109=I.R. 1933 Sind 95=142 I.C. 489=A.I.R. 1933 Sind 78.**

——**Art. 182 (5)**—*Proper Court—Application for execution to Court passing decree—Absence of territorial jurisdiction—Saving of limitation.*

Even if an application is made to a Court which passed the decree to execute it in respect of a property outside its territorial limits, the Court will not have jurisdiction to carry on such execution. Where however the limits of the jurisdiction of the old Court were altered and an application was made by the Court which passed the decree for execution,

Held, that the decree should be forwarded to the proper Court but that it had the effect of saving limitation. Since the Court which passed the decree has the right to entertain an application for its execution, so long as it has not already transferred that decree to some other Court for execution. (*Mukerji and Mitter, JJ.*) SREENATH CHAKRAVARTI *v.* PRIYANATH BANDOPADHYA. **58 Cal. 832=I.R. 1931 Cal. 533=132 I.C. 149=35 C.W.N. 77=52 C.L.J. 569=A.I.R. 1931 Cal 312.**

[**Rel.** 27 S.L.R 109 (118). **F.** 13 P. 21 (29).]

——**Art. 182 (5)**—Proper Court-Decree by Additional Munsif—Application to first Munsif for execution—Limitation saved. *See* APPLICATION IN ACCORDANCE WITH LAW, *supra.* **13 Pat. 5=A.I.R. 1934 Pat. 199 (1).**

——**Art. 182 (5)**—*Proper Court—Decree transferred to another Court for execution—Execution application dismissed—Subsequent application in original Court before return of the decree—Limitation.*

The appellant obtained a decree against the respondent in the Munsif's Court at Dacca on the 2nd August, 1926. That decree was transferred to the Munsif's Court at Tangail for execution. Execution proceedings were

LIMITATION ACT (1908), Art. 182 (5)—Proper Court.

started and on the 29th August, 1927, they were eventually dismissed by the Tangail Court. On the 25th January, 1929, the appellant filed another application for execution in the Court of the Munsif at Dacca. The application remained pending in that Court for some time. On the 2nd March, 1929, the decree, together with the certificate of non-satisfaction, was returned by the Tangail Court to the Dacca Court. The appellant's application for execution dated 25th January, 1929, was registered and an order for issue of notice was passed. Notice was however not issued and the execution proceedings were dismissed. There was no subsequent application for execution when the Court at Dacca acquired jurisdiction to execute the decree after the 2nd March, 1929. The execution proceedings were again started on 1st June, 1931.

Held, the decree is barred by limitation as the application of the 25th January, 1929, was not made to the proper Court though the application was presented to a Court which had no jurisdiction and it remained pending on the file of the Court till it acquired jurisdiction. Proper Court means the Court whose duty is to execute the decree. (*Mitter and M. C. Ghose, JJ.*) JATINDRA KUMAR DAS *v.* MOHENDRA CHANDRA BANIKYA. **60 Cal 1176=149 I.C. 17=6 R.C. 542=58 C.L J. 192=37 C.W N. 1167=A.I.R. 1933 Cal. 906.**

[**Rel.** 35 P.L.R. 751 (753). **R.** L. 80 (84) (Proper Court to execute the decree).]

——**Art. 182 (5)**—"Proper Court"—Mortgage decree—Subsequent alteration of territorial jurisdiction—Application to Court having jurisdiction over place where mortgage property lies—If made to proper Court. *See* EXECUTION—JURISDICTION. **69 M.L.J. 466.**

——**Art. 182 (5)**—*Proper Court—Proper application—Application under S. 28 (2), Provincial Insolvency Act—Effect.*

An application made under S. 28 (2) to the Insolvency Court for leave to execute the decree is not an application made to the proper Court within the meaning of the explanation to Art. 182 and does not save limitation. The Insolvency Court which is entirely a creature of the Provincial Insolvency Act is a different Court from the Court which is to execute a decree obtained independently of the Insolvency Act and the mere fact that the Judge is the same person will not make the two Courts the same. (*Curgenven and Pakenham Walsh, JJ.*) RARICHAN *v.* KUNHAMU. **57 Mad. 808=150 I.C. 113=6 R.M. 693=39 L.W. 639=A.I.R. 1934 Mad. 392=67 M.L J. 762.**

——**Art. 182 (5)**—*Proper Court—Step in-aid—Plaint, if—"Proper Court"—Decree of Small Cause Court—Suit for declaration in regular Court that immovable property is attachable—Decree not transferred for execution to regular Court—Plaint, if application to proper Court.*

A plaint in a suit in a Munsif's Court for a declaration that certain immovable property of the judgment-debtor was liable to attachment and sale in execution of a decree obtained in a Small Cause Court, can be treated as a step-in aid of execution under Art. 182 (5). But it cannot be treated as an application made to the "proper Court," unless the said decree of the Small Cause Court has, before the plaint is filed, been transferred to the Munsif's Court for execution. When the decree has not been so transferred, Art. 182 (5) will not apply to save limitation. (*King, C.J.*) KHUSHI RAM *v.* RAM SUMER. **11 Luck. 266=155 I.C. 505=7 R.O. 592=1935 O.W.N. 672=A.I.R. 1935 Oudh 430.**

——**Art. 182 (5)**—*Proper Court — Subordinate Court temporarily established for one year but continued from year to year—Decree passed by—Execution petition to District Court—If made to "proper Court."*

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is.

Courts established temporarily have jurisdiction not only to pass decrees but also to execute those passed by them. The mere fact that a Subordinate Court is established for one year and is thereafter continued from year to year cannot deprive it of its character of the Court which passed the decree. It has therefore jurisdiction in the subsequent year to execute a decree passed by it in the previous year. Consequently when that Court exists, an application to execute a decree passed by it, made to the District Court, is not an application made to "the proper Court" within the meaning of Art. 182(5) of the Limitation Act, and cannot therefore be availed of for the purpose of saving limitation. (*Beasley, C.J. and Cornish, J.*) RAMANATHAN CHETTIAR *v.* MUTHAYYAN CHETIAR. **58 Mad. 1009=159 I.C. 835=8 R.M. 556=1935 M.W.N. 705=42 L.W. 5=A.I.R. 1935 Mad. 849=69 M.L.J. 215.**

Step-in-aid—What is.

See also APPLICATION AGAINST DEAD PERSON AND ASSIGNEE OF DECREE AND DEFECTIVE APPLICATION, *supra.*

——**(as amended by Act IX of 1927), Art. 182 (5)**—*Step-in aid—What is.*

If the facts of a particular case show that the proceeding in question has the effect, of facilitating or advancing the execution to any extent of removing some obstacle from the way of execution, it may well be regarded as a step-in-aid of execution. (*Wazir Hasan, C. J., Raza and Srivastava, JJ.*) RAM BHAROSE *v.* RAMMAN LAL. **7 Luck. 590=I R. 1932 Oudh 264=137 I.C. 768=9 O.W.N. 209=A.I R. 1932 Oudh 148 (F.B.)**

——**Art. 182 (5)**—*Step-in-aid—What is—Application against minor with guardian dead before date of application.*

An application for execution against a minor judgment-debtor mentioning therein as his guardian the person who had been appointed and was acting as guardian but who happened to have died before the date of the application is sufficient to furnish a fresh starting point for limitation for a further application. A.I.R. 1931 L. 636; 72 I.C. 1003, Rel. on; 17 M. 76, Ref. (*Krishnan Pandalai, J.*) JAGANNATHA RAO *v.* NARAYANAMURTY. **6 I.R. (Mad.) 121=145 I C. 714=1933 M.W.N. 819=38 L.W 435=A.I.R. 1933 Mad. 696=65 M L.J. 374.**

——**Art. 182 (5)**—*Step-in aid—What is—Application against wrong legal representative.*

All *bona fide* applications against a wrong person as the legal representative save limitation. 20 C. 388; 12 B. 427; 33 M. 6, Foll. (*Madgavkar, J.*) HARI MAHADEV *v.* VISHNU BALKRISHNA. **I R. 1931 Bom. 507 (1)=134 I.C. 699 (1)=33 Bom.L R. 622=A.I.R. 1931 Bom. 425 (1).**

——**Art. 182 (5)**—*Step-in aid—What is—Application to bring legal representatives on record and for execution—Application for execution invalid—If application can be treated as step-in-aid.*

An application to bring on to the record the legal representatives of the defendant and to execute the decree is a step in-aid of execution, even though so far as the prayer for execution of the decree was concerned the application was not in accordance with law, the applicant claiming under an oral transfer of the decree. 24 Cal. 778, Foll. (*Jackson, J.*) CHINNA VEL NAICK *v.* VENKATRAMA NAICK. **54 Mad. 852=I.R. 1931 Mad. 311=134 I.C. 59=34 L.W. 231=A.I.R. 1932 Mad. 19=61 M L.J. 541.**

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is.

———**Art. 182 (5)**—*Step-in aid—What is—Application to execute attached decree.*

The execution of the attached decree on the application of the attaching decree-holder is a step in-aid of execution of the decree in execution whereof the attachment has been made. (*Jai Lal, J.*) BISHAN SAHAI *v.* AMIR SINGH. **I.R. 1931 Lah. 651=132 I.C. 667=A.I.R. 1931 Lah. 705.**

———**Art. 182 (5)**—*Step-in-aid—What is—Application for execution against one only of two executors.*

An application for execution, made against one only of two executors under the *bona fide* belief that he was the only executor and that the other had resigned, is an application in accordance with law within the meaning of Art. 182 and in any event it is an application to take a step-in-aid of execution of the decree and would give a fresh start to the period of limitation. 8 Pat. L.T. 217, Foll. (*Macpherson and Fazl Ali, JJ.*) BRAJASUNDER DAS *v.* RADHA PRASAD BHAGAT. **11 Pat. 508=I.R. 1932 Pat. 261=139 I.C. 840=A.I.R. 1932 Pat. 306.**

———**Art. 182 (5)**—*Step-in-aid—What is—Transfer of decree to another Court—Application to first Court to execute decree.*

Per *Full Bench.*—When a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court (*a*) to execute the decree, (*b*) to transfer it to another Court and (*c*) to transfer it for execution to the same Court for execution is a valid application and is a step-in-aid of execution so as to save limitation, even if it is made before the proceedings taken in the other court have been reported and certified by that Court.

Per *Skemp, J.*—The application to the first Court to execute the decree may be regarded as an application to that Court to obtain the decree from the Court to which it has been transferred for execution after certification in order to execute it at the original Court. (*Jai Lal, Skemp and Rangi Lal, JJ.*) KANTI NARAIN *v.* MADAN GOPAL. **157 I C. 488=8 R.L. 116=37 P.L. R. 636=A.I.R. 1935 Lah. 465 (F.B.).**

———**Art. 182 (5)**—*Step-in-aid—What is—Application with full particulars containing mistake as to amount of interest—Effect.*

An application for execution which is correct in all particulars except that there was a slight mistake as to the amount of interest calculated from the date of the decree up to the date of execution is a step-in-aid of execution so as to save limitation. (*Nanavutty, J.*) KISHUN DUTT *v.* CHHEDI. **I.R. 1931 Oudh 262=132 I.C. 262=14 O.L.J. 433=8 O.W.N. 639=A.I.R. 1931 Oudh 312.**

———**Art. 182 (5)**—*Step-in-aid—What is—Application for precept under S. 46, C.P. Code.*

Before the expiry of one year from the date of decree, the decree-holder put in an application for execution in accordance with O. 21, R. 11 and on the same day he also filed another application for amendment of the first application, by which in effect he prayed that a precept be issued to the District Court of another district for attachment of money standing to the credit of the judgment-debtor in the Allahabad Improvement Trust. The application was accordingly amended.

Held, that the application was one in accordance with law and a step in-aid of execution. (*Niamatul'ah and Rachhpal Singh, JJ.*) RAMJI *v.* RAMJI. **6 I.R. (All.) 393=146 I.C. 991=1933 A.L.J. 902=A.I.R. 1933 All. 844.**

———**Art. 182 (5)**—*Step-in-aid—What is—Application returned by Court, and not represented.*

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is

An application for execution properly made to a Court to which the decree had been transferred for execution but returned by the Court under a misapprehension that a fresh certificate of transfer was necessary, is, though never represented, nevertheless tantamount to a step-in-aid of execution. (*Macpherson and Fazl Ali, JJ.*) SHESHAIVER RAJAMANNAR AIYER *v.* MADAN MOHAN PATNAIK. **11 Pat 513=I.R. 1932 Pat. 259=139 I.C. 843=13 Pat. L.T. 623=A.I.R. 1932 Pat. 286.**

———**Art. 182 (5)**—*Step-in-aid—What is—Application not specifying mode of execution—Object being to realise money by sale.*

Where an application for execution was in form except that it did not describe the mode in which the assistance of the Court was required and it appeared that the object was to realise the decree amount by sale of property,

Held, that the application was valid in law so as to extend limitation. (*Shadi Lal, C.J. and Broadway, J.*) GHANAYA LAL *v.* PUNJAB NATIONAL BANK, LTD., LAHORE. **14 Lah. 6=I.R. 1932 Lah 440=138 I.C. 249=34 P.L.R. 376=A.I R. 1932 Lah. 534.**

———**Art. 182 (5)**—*Step-in-aid—What is—Application for transfer.*

An application for transfer of a decree is a step in-aid of execution. (*Ferrers, J. C. and Mehta, A. J. C.*) ACHRAJ SING RAM SING *v.* ACHRAJRAM SAHNI. **27 S.L.R. 109=I.R. 1933 Sind 95=142 I.C. 489=A.I. R. 1933 Sind 78.**

———**Art. 182 (5)**—*Step-in aid—What is—Application for transfer of decree.*

The expression "step in aid of execution" must be taken to be intended to cover every application made by the decree-holder in accordance with law, setting the Court in motion to execute the decree and in furtherance of the proceeding in execution. Hence an application made for transfer of the decree from one Court to another for the purpose of execution, must be deemed to be an application to keep the decree in force and in that way a step-in-aid of execution. A.I.R. 1922 Cal. 3, Dist. (*Guha and Lodge, JJ.*) AHAD BUX *v.* KINKAR CHANDRA. **158 I.C. 590=8 R.C. 204=A. I.R. 1935 Cal. 640.**

———**Art. 182 (5)**—*Step-in aid—What is—Application for transfer of decree.*

An application made to the Court passing a decree to transfer it for execution to another Court is an application to take a step-in-aid of execution within the meaning of Art. 182. (*Nanavutty, J.*) SHANTA DUTT RAM *v.* MAHOMED ASGHAR. **I.R. 1933 Oudh 192=143 I.C. 678=10 O.W.N. 363=A.I.R. 1933 Oudh 131.**

———**Art. 182 (5)**—*Step-in aid—What is—Application for transfer of execution—Judgment-debtor dead.*

An application for the transfer of the execution of a decree made at a time when the judgment-debtor is dead is a valid application to take step in-aid of execution. (*Sulaiman, C, J. and Mukerji, J.*) MT. RAM KALI *v.* BIR BHADARMAN TEWARI. **56 All. 890=6 R.A. 833=1934 A.L.J. 829=4 A.W.R. 509=148 I. C. 1131=A.I.R. 1934 All. 463.**

———**Art. 182 (5)**—Step in-aid—What is—Application for transfer as regards some judgment-debtors. *See* LIMITATION ACT, ART. 182, EXPL. 1. **11 O.W. N. 1294.**

———**Art. 182 (5)**—*Step-in aid — What is—Batta application.*

The payment of batta for issue of a warrant of sale of the property is a step-in-aid of execution. (*Paken-*

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is.

ham Walsh, J.) NATARAJA MUDALIAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1933 Mad. 369 (2) = 144 I.C. 58 = 1933 M.W.N. 667 = 38 L.W. 766 = A.I.R. 1933 Mad. 438 = 64 M.L.J. 692.**

——**Art. 182 (5)**—*Step in-aid—What is—Batta application—Judgment-debtor objecting that decree was satisfied—Batta application by decree-holder, for summoning witnesses to prove that objection was false.*

The filing of a batta application by the judgment-creditor is an execution proceeding for summoning certain persons to attend Court and give evidence to show that the objection of the judgment-debtor that the decree had been satisfied was untrue, is a step-in aid of execution which saves limitation, because, before executing the decree, the objection of the judgment-debtor has to be removed and the judgment-creditor by presenting the batta application is asking the Court to do something which would help to remove the obstruction to execution and allow execution to go on. (*Beasley, C. J. and King, J.*) VEERAPPA SETTI *v.* MUNISAMI ACHARI. **58 Mad. 301 = 154 I.C. 593 = 7 R.M. 455 = 42 L.W. 523 = 1934 M.W.N. 986 = A.I.R. 1934 Mad. 710 = 69 M.L.J 19.**

——**Art. 182 (5)**—Step-in-aid—What is—Decree of Small Cause Court—Suit for declaration in regular Court that immovable property is attachable—Plaint can be treated as step in-aid. *See* PROPER COURT, *supra.* **A.I.R. 1935 Oudh 430.**

——**Art. 182 (5)**—*Step in aid—What is—Execution application filed* bona fide *against wrong legal representative.*

Where a petition for execution is filed within time *bona fide* against a wrong legal representative, in spite of the mistake, it would still be an application to take a step in aid of the execution. (*Venkatasubba Rao, J.*) SUBARAMANIA DESIKA GNANASAMBANDA PANDARA. SANNADHI *v.* RANGASWAMI CHETTIAR. **155 I.C. 327 = 7 R.M. 567 = 1935 M.W.N. 15 = 41 L.W. 173 = A.I.R. 1935 Mad. 161 — 68 M.L.J. 261.**

——**Art. 182 (5)**—*Step-in-aid — What is—Mere drawing out of money without any application.*

The mere drawing out money is not a step in-aid of execution unless there was an application either before or after to draw the money so that such application might be construed as a step in-aid of execution. 46 M.L.J. 453 and 17 Mad. 165, Dist.; 2 Mad. 174; 16 Mad. 452; 22 Bom. 340; 35 M.L.J. 576; 8 Cal. 89 and 10 Cal. 549, Ref. (*Pakenham Walsh, J.*) RAMANATHAN CHETTIAR *v.* ESTATE COLLECTOR OF SIVAGANGA. **I.R. 1933 Mad. 371 = 144 I.C. 66 = 38 L.W. 205 = A.I.R. 1933 Mad. 597.**

——**Art. 182 (5)**—*Step in-aid — What is—Prior application dismissed for default—If saves limitation.*

An application which has been dismissed in default without any determination as to the propriety of the application is effective for the purpose of saving limitation. It is only when the order rejecting an execution application amounts to a finding that it was not in accordance with law that the application so rejected would be ineffective for purposes of saving limitation. (*Grille, J. C.*) HANUMAN LALA KALAR *v.* SHEONARAYAN SONAR. **31 N.L.R. 333 = 156 I.C. 114 = 7 R.N. 220 = A.I.R. 1935 Nag 131.**

——**Art. 182 (5)**—*Step in aid—What is—Remittance of subsistence allowance for debtor in jail.*

The despatch by money order of the subsistence allowance for the judgment-debtor in jail to the Jail Superintendent who, under O 21, R. 39 (4) is the proper officer to whom the payment should be made is "an application to the proper Court to take a step-in-aid

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is not.

of execution" within the meaning of Art. 182 (5). (*Madhavan Nair, J.*) RAJA OF RAMNAD *v.* KUPPUSWAMI PILLAI. **56 Mad. 320 = I.R. 1933 Mad. 9 = 140 I.C. 498 = 1932 M.W.N. 1198 = 36 L.W. 738 = A.I.R. 1933 Mad. 83 = 63 M.L.J. 792.**

——**Art 182 (5)**—*Step in aid—What is—Transfer of decree to another Court—Application to first Court to transfer it for execution to same transferee Court.*

Per *Jai Lal and Rangi Lal, JJ.* (*Skemp, J., holding* contra.)—Where a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court to transfer it for execution to the same Court is a valid application, even if such an application is made before the proceedings taken in the other Court have first been reported and certified by that Court and is a step-in-aid of execution.

Skemp, J.—After the first Court has sent the decree once to the other Court for execution it is no longer the duty of the first Court to execute the decree; the proper Court is the transferee Court, and hence an application made to the first Court to send the decree to the same transferee Court where it has already been sent once and whence it has not been sent back is not an application in accordance with law to the proper Court or a step-in aid of execution. (*Jai Lal, Skemp and Rangi Lal, JJ.*) KANTI NARAIN *v.* MADAN GOPAL. **157 I.C. 488 = 8 R.L. 116 = 37 P.L.R. 636 = A.I.R. 1935 Lah. 465 (F.B.).**

Step in aid—What is not.

See also APPLICATION AGAINST DEAD PERSON, *supra.*

——**Art. 182 (5)**—*Step in aid—What is not.*

A step-in aid in accordance with law must be some step taken in aid of execution and when an application is made relating to the execution of a decree but the applicant does not state what step he wishes to be taken, that application will not come under this clause. 1 All. 675 Rel. on. (*Rangnekar, J.*) RATANCHAND *v.* CHANDU LAL. **150 I.C. 866 = 7 R.B. 34 = 36 Bom. L.R. 115 = A.I.R. 1934 Bom. 113 (2).**

——**Art. 182 (5)**—*Step-in aid—What is not.*

A memorandum for the return of sale papers or an oral application for grant of time to file the sale papers or an affidavit filed subsequent to the petition for leave to bid is not a step-in aid of execution. 1927 M.W.N. 792; 41 M. 251, Foll. (*Lakshmana Rao, J.*) RAGHAVA AYYANGAR *v.* NATESAN CHETTIAR. **1931 M.W.N 413.**

——**Art. 182 (5)**—*Step-in-aid—What is not—Application by decree-holder to record payment made out of Courts.*

An application by a decree holder to record the payment of money made out of Courts towards his decree is not an application to take a step-in aid of execution and will not save limitation under Art. 182 (5) of the Limitation Act. (*Burn and K.S. Menon, JJ.*) PRESIDENT, UNION BOARD, PENTAPADU *v.* THIRUMALA VENKATA SPINIVASA CHARYULU. **59 Mad. 424 = 8 R.M. 513 = 1935 M.W.N. 1319 = 159 I.C. 544 = 42 L.W. 858 = A.I.R. 1936 Mad. 118 = 69 M.L.J. 785.**

——**Art. 182 (5)**—*Step in aid—What is not—Application filed by vakil without vakalatnama—If in accordance with law.*

An execution application filed by a vakil, who had no vakalat from the decree-holder is not one in accordance with law within the meaning of O. 3, R. 4, C. P. Code, and therefore is null and void and is also not a step-in-aid which will save limitation. (*King, J.*) MODONO MAHONO DEO *v.* KUNJA BEHARI ANANGA BHIMA DEO. **158 I.C. 891 = 8 R.M. 372 = A.I.R. 1935 Mad. 786.**

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is not.

——**Art. 182 (5)**—*Step in aid—What is not—Application for copy of decree.*

An application for a copy of a decree cannot be said to be a step in-aid of execution. A copy of a decree might be applied for a variety of purposes; not necessarily for execution. To come within Art. 182 a decree holder must make some application to the execution Court itself. (*Young, J.*) NARAYAN DAS HUSAIN *v.* TRAVATI. **6 I.R. (All.) 207=145 I.C. 915 (2)= 1933 A.L.J. 1126=A I.R. 1933 All. 756 (1).**

——**Art. 182 (5)**—*Step-in aid—What is not—Application for re-construction of decree.*

An application for reconstruction of a decree destroyed by fire is not a step-in aid of execution within Art. 182 (5) of the Limitation Act. 46 B. 269, Dist. 23 B. 644; 30 All. 179 and 40 All. 209, Ref. (*Rangnekar, J.*) RATANCHAND *v.* CHANDULAL. **150 I.C. 866= 7 R B. 34=36 Bom.L.R. 115=A.I.R. 1934 Bom 113 (2).**

——**Art. 182 (5)**—*Step-in-aid—What is not—Application for time to put in petition for substituted service.*

A step in-aid in execution for the purpose of Art. 182 must satisfy two conditions: (1) the step is one which the Court has to take, and (2) the Court must be asked to take it. (Case-law referred.) An application for time to put in a petition for substituted service is not a step in aid so as to save limitation. (*Pakenham Walsh, J.*) RAMASWAMI CHETTY *v.* PALANIAPPA CHETTY. **6 I.R (Mad.) 156=145 I C. 933=1933 M W N. 352 =38 L.W. 301=A.I.R. 1933 Mad. 675=65 M L.J. 271.**

——**Art. 182 (5)**—*Step-in aid—What is not—Application for transfer of decree.*

An application for transfer of decree for execution is not a step-in aid of execution. (*Wort, J.*) GOPAL TEWARI *v.* RAMDHARI PANDEY. **152 I.C 987=7 R. P. 288=A.I.R. 1934 Pat. 662.**

——**Art. 182 (5)**—*Step in-aid—What is not—Application for transfer by decree holder—Plea of satisfaction of decree by judgment-debtor—Counter petition—Affidavit in support—Vakalat—Batta.*

A decree-holder applied under O. 21, R. 16, on 20th August, 1923, for transfer of the decree to another Court. The defendants pleaded that the decree had been satisfied. On 5th December, 1923, the Court directed the decree holder to bring his account books in three days. The decree holder on the same day filed a counter petition and an affidavit in support denying accounts books having been kept by him. The transfer was ordered on 7th December, 1923. The decree holder then applied for execution on 22nd November, 1926.

Held, that neither the affidavit, counter, batta for witnesses nor the vakalath could be deemed to be a step in aid of the execution and that none of them saved limitation for the present execution application. (*Pakenham Walsh, J.*) MUNISAMI ACHARI *v.* VEERAPPA SETTI. **I.R. 1933 Mad. 207=142 I.C 197=37 L. W. 455=A I R. 1933 Mad. 403=64 M L.J. 345.**

——**Art 182 (5)**—*Step in aid—What is not—Application for transfer of decree to another Court in ignorance of judgment-debtor's death.*

An application by a decree-holder under S. 39, C P. Code, for transfer of his decree to another Court for execution, in ignorance of the death of the judgment debtor, is a step-in-aid of execution within the meaning of Art. 182, Cl. (5), 17 Mad. 76 and 35 Cal. 1047, Foll; 19 All. 337, Dist. From. (*Broomfield and Wadia, JJ.*) GOPAL SHANKAR *v.* RAISING PREMJI. **151 I C 767 =7 R.B. 78=36 Bom.L R. 510=A.I.R. 1934 Bom. 266.**

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is not.

——**Art. 182 (5)**—*Step-in aid—What is not—Application for transfer of decree to Court without jurisdiction.*

When a decree holder asks a Court to do a thing which the Court is not empowered to do, such an application cannot he held to be a step in-aid of execution. So an application for transfer of a decree to a Munsif's Court which had no pecuniary jurisdiction to entertain the same is not a step in aid. 3 P.L.T. 422, Foll. (*Khaja Mahomed Noor and Dhavle, JJ.*) SITAL PRASAD SHUKUL *v.* BABU LAL SHUKUL. **11 Pat. 785=142 I C. 155=I.R. 1933 Pat. 120=13 Pat L.T. =498 A.I R. 1932 Pat 309.**

——**Art. 182 (5)**—*Step in aid—What is not—Application under O. 21, R. 16*

An application under O. 21, R. 16, C. P. Code, is not a step-in-aid of execution. (*Wort, J.*) GOPAL TEWARI *v.* RAMDHARI PANDEY. **152 I C. 987=7 R.P. 288= A.I.R. 1934 Pat 662.**

——**Art. 182 (5)**—*Step in-aid—What is not—Attachment of the decree sought to be executed.*

An order for attachment of the decree sought to be executed cannot be treated as a step-in aid of the original decree. (*Mitter and Henderson, JJ.*) ANIL KUMAR GHOSH *v.* HEMANTA KUMAR GHOSE. **60 Cal. 1357 =149 I.C. 999=6 R C. 676=A.I.R. 1934 Cal 234.**

——**Art. 182 (5)**—*Step in aid—What is not—Certificate of search from registration office.*

The obtaining of a certificate of search of certain documents from the office of the sub registrar cannot be called a step-in-aid of execution; nor the fact that the decree holder got back certain documents filed by him in the previous execution. (*Wazir Hasan, C.J. and Nanavutty, J.*) SURAIYA BEGAM *v.* TRILOKI NATH. **9 Luck 288=6 R.O 304=147 I.C. 766=10 O.W.N. 1251=A.I.R. 1934 Oudh 426.**

——**Art. 182 (5)**—*Step in aid—What is not—Decree holder auction-purchaser—Application for delivery of possession.*

Semble. An application for delivery of possession by the decree holder auction-purchaser is not a step in aid of execution. 72 I C. 938, Ref. (*Macpherson and Fazl Ali, JJ.*) SHESHAIYER RAJAMANNAR AIYER *v* MADANMOHAN PATNAIK. **11 Pat 513=I R 1932 Pat. 259=139 I C. 843=13 Pat.L T. 623=A.I.R. 1932 Pat. 286.**

——**Art. 182 (5)**—*Step in aid—What is not—Part-payment out of Court—Effect.*

The decree was passed on June 10, 1927. On December 9, 1929, the judgment-debtor paid a certain amount out of Court to the decree holder. The decree-holder applied to certify it on March 16, 1931, and the execution application was filed on June 24, 1931.

Held, that S. 20 proviso applied to the case and that the payment of December 9, 1929 did not save limitation. Meaning of expression "step-in-aid" stated. (*Sulaiman, C J.*) JAI KHARAN *v.* PANCHAITI AKHARA CHOTA NAVA NANAK SHAFI. **143 I.C. 324=I.R. 1933 All. 232=1932 A.L J. 1035=A.I R. 1933 All. 49.**

——**Art. 182 (5)**—*Step in aid—What is not—Payment made out of Court.*

Payment made out of Court does not operate as step-in aid of execution. (*Bennet, J.*) HARI RAM *v.* HIMAN LAL. **157 I.C. 1052=1935 A L.J. 1291=1935 A.W. R 531=A.I.R 1935 All. 259**

——**Art 182 (5)**—*Step in aid—What is not—Payment out of Court—Saving of limitation.*

In order to bring a case under Art 182 (5) the essential conditions which must be satisfied are that there-

LIMITATION ACT (1908), Art. 182 (5)—Step-in-aid—What is not.

must be (*a*) an application in accordance with law; (*b*) the application must be made to the proper Court; and (*c*) the application must be to take some step in-aid of the execution of the decree Cl. (5) can have no application unless there is an application to the proper Court. Where there was no application made to any Court and the payment is made out of Court, the requirements of Cl. (5) are not satisfied. (*Hasan, C.J. and Bisheshwar Nath, J.*) MATA DEEN *v.* KAUSILLA. **7 Luck. 38 = I.R. 1931 Oudh 349 = 132 I.C. 797 = 14 O.L.J. 474 = 8 O.W.N. 769 = A.I.R. 1931 Oudh 356 (2).**

[**R.** 9 Luck. 273 (276); **F.** 146 I.C. 805 (806).]

———**Art. 182 (5)**—*Step in aid—What is not—Prior application dismissed for non compliance with O. 21, R. 11 (2), C. P. Code.*

Where an application for execution was signed, verified and presented on behalf of the decree-holder by a man who purported to be the *mukhtar-i am* of the decree holder but no *mukhtarnama* was filed, and the opportunity given by the Court to show that the application wss signed and verified in accordance with O. 21. R. 11 (2), C. P. Code, was not availed of, with the result that the Court rejected the application.

Held, that the application could not be treated as a step-in-aid of execution. (*Iqbal Ahmad, J.*) RAM GOPAL SINGH *v.* HARISH CHANDRA LAL. **158 I C. 752 = 8 R.A. 329 = 1935 A.L J. 1184 = 1935 A W.R. 1131 = A.I.R. 1936 All. 17.**

———**Art. 182 (5)**—*Step-in-aid—What is not—Uncertified payment by one defendant for himself only—Limitation not extended against others.*

An execution application was made beyond three years from the last application in 1922. One of defendants had made certain payment which was not certified towards costs within three years from the execution last filed. The payment was not made on behalf of the other defendants.

Held, that the application was barred against the other defendants as mere payment is not a step-in aid of execution and it is only the petition put in to certify such payment that can constitute a step-in aid of execution such as will give a fersh starting point of limitation under S. 182 (5) and the payment by one of the defendants being only for himself could not extend limitation under S. 20 also: A.I.R. 1925 Mad. 131, Foll; 41 M. 251 and 31 I.C. 318, Dist. (*Madhavan Nair, J.*) CHATHU KUTTY *v.* RAMAN. **147 I.C. 586 = 6 R.M. 361 = A.I.R. 1933 Mad. 674.**

Step in aid—Miscellaneous.

———**Art. 182 (5)**—*Miscellaneous—Step-in aid—No pending execution—Application necessary.*

An application to take a step-in-aid of execution of a decree may be made even though there is no pending application for execution. 45 M. 202, Foll, 45 M. 466, Not foll. (*Broomfield and Wadia, JJ.*) GOPAL SHANKAR *v.* RAISINGH PREMJI. **151 I.C. 767 = 7 R.B. 78 = 36 Bom. L.R. 510 = A I.R. 1934 Bom. 266.**

———**Art. 182 (5)**—*Step-in aid—Miscellaneous Pending execution if necessary.*

Semble.—The balance of decisions is in favour of the view taken in 45 Mad. 202 = 41 M.L.J. 374, that an application in order to be a step in aid of execution need not be made in a pending execution petition. (*Curgenven and Pakenham Walsh, JJ.*) RARICHAN *v.* KUNHAMU. **57 Mad. 808 = 150 I.C. 113 = 6 R.M. 693 = 39 L.W. 639 = A.I.R. 1934 Mad. 392 = 67 M. L.J. 762.**

Terminus a quo.

———**Art. 182 (5)**—Terminus a quo—"*Date of applying*"—*Effect of amendment by Act IX of* 1927.

LIMITATION ACT (1908), Art. 182 (7).

The *terminus a quo* under the unamended form of Art. 182, Cl. (5) is date of the application for execution or to take some step-in-aid of execution and not (as under the amending Act IX of 1927) the result of the application *viz.*, the date of the final order passed on such application. (*Sir Lancelot Sanderson.*) KHALILUR RAHMAN KHAN *v* COLLECTOR OF ETAH. **61 I.A. 62 = 56 All. 993 = 59 C.L.J. 103 = 39 L.W. 126 = 11 O. W.N. 41 = 1934 M.W.N. 33 = 35 P.L.R. 189 = 36 Bom. L.R. 237 = 3 A.W.R. 33 = 15 Pat. L. T. 221 = 6 R.P.C. 42 = 147 I.C. 323 = 38 C.W.N. 229 = 1934 A. L J. 110 = A.I.R. 1934 P.C. 14 = 66 M.L.J. 79 (P.C.)**

———**Art. 182 (6)**—*Combined notice under O. 21, Rr. 16 and 22, C.P. Code—Effect.*

Issue of a combined notice under O. 21, Rr. 22 and 16 upon the judgment-debtor is sufficient under the law to save limitation. (*Fazl Ali and Rowland, JJ.*) LALL *v.* RAJKISHORE NARAIN SINGH. **13 Pat. 86 = 147 I. C. 101 = 6 R P. 333 = 15 Pat. L.T. 407 = A.I.R. 1933 Pat. 658.**

———**Art. 182 (6)**—*Notice issued on defective or invalid execution application—Saving of limitation.*

When notice has once issued, time runs anew and it is immaterial that it was issued on an application for execution which was defective or invalid. (*Fazl Ali and Rowland, JJ.*) LALL *v.* RAJKISHORE NARAIN SINGH. **13 Pat. 86 = 147 I.C. 101 = 6 R.P. 333 = 15 Pat.L. T. 407 = A.I.R. 1933 Pat. 658.**

———**Art. 182 (7)**—Applicability—Compromise decree—Provision for plaintiff executing decree after executing registered receipt within 6 months of majority—Death of plaintiff before majority—Execution by legal representative—Limitation—Starting point. *See* COMPROMISE—CONSTRUCTION. **40 L.W. 875 = A.I.R. 1935 Mad. 107 (2).**

———**Art. 182 (7)**—*Applicability—Execution for instalments fallen due.*

Where in case of an instalment decree an application has been made after some instalments have fallen due the appropriate Article is Art. 182 (7) Art. 181 has no application to such a case. But so far as default clause is concerned Art. 181 would apply and the remedy for the enforcement of the default clause in the instalment decree is time barred after the expiry of three years from the default in payment of instalments making whole amount. The decree holder cannot in such a case claim the recovery of future instalments merely because in some future years there has been a default in the payment of the agreed successive instalments. His remedy to recover the instalments as and when they fall due is however not barred by the default clause. (*Sulaiman, C. J. and Mukerji, J.*) RAM PARSAD RAM *v.* JADUNANDAN UPADHIA. **56 All. 921 = 6 R.A. 955 = 149 I C. 598 = 1934 A.L J. 772 = 4 A.W.R. 498 = A. I.R 1934 All. 534.**

———**Art. 182 (7)**—*Applicability—Instalment decree—Default clause—Construction—Application as regards instalments falling due within three years—If barred.*

Art. 182 (7) applies to a decree which makes the decree amount payable in certain instalments on certain specified dates and also provides that if the defendant fails to pay any one instalment, plaintiff might recover the whole amount at once by executing the decree. And when default is made, the fact that the decree-holder omits to enforce the default clause, by executing the decree for the whole amount, does not deprive him of his right to recover the instalments which have become due within three years before the filing of the darkhast. (*Beaumont, C. J. and Wadia, J.*) VEHERBHAI *v.* JAVER SOMA. **60 Bom. 62 = 160 I.C. 527 = 8 R.B. 265 = 37 Bom. L.R. 942 = A.I.R. 1936 Bom, 17.**

LIMITATION ACT (1908), Art. 182 (7).

———**Art. 182 (7)**—*Compromise decree—Amount payable by annual instalments—Default clause—Option to creditor—"Such date"—Meaning of.*

By a compromise decree, the decretal amount was payable in yearly instalments. In default of payment of any instalment, the decree holder was entitled to realise the entire decree amount.

Held, that under the terms of the decree, the decree-holder was given the option to execute the decree for the whole amount if there was a default; in such a case, the decree holder may execute his decree on the happening of first, second or subsequent default; the case was governed by Art. 182 (7); the words "such date" in Cl. (7) referred to the date on which a default was made in payment of any of the instalments and on the occasion of *each default* the decree-holder was entitled to enforce his claim for the payment of the entire amount due except in respect of which the claim had become barred. 11 Pat. 440; 4 P. L. J. 365 and 51 All. 237, Foll. (*Rachhpal Singh, J.*) LAL BHADUR *v.* MATHURA PRASAD. **9 Luck. 602=149 I.C. 603=6 R.O. 592=11 O.W.N 498=A.I.R. 1934 Oudh 334.**

———**Art. 182 (7)**—*Compromise decree—Part of decree amount to be paid within certain time—Balance in instalment—On failure to pay part of decree amount on two instalments whole amount payable—Default in payment of part of decree amount—Decree-holder not exercising right—Subsequent default in two instalments—Application for whole amount—Limitation.*

There was a compromise decree for instalments passed between the parties by which it was agreed that the total amount due was Rs. 1,100, that Rs. 300 would be paid within a month of the compromise decree and that the balance of Rs. 800 was to be paid by instalments of Rs. 25 on the 1st November and 1st May, the first instalment being payable on 1st November, 1928. The compromise further provided that in case of failure to pay two instalments, all the money will be paid at once and in case the sum of Rs. 300 is not paid, all the money will be paid at once with 1 per cent. interest per mensem. There was default in the payment of Rs. 300; but the decree holder did not apply for execution of the whole decree. This amount of Rs. 300 was paid in some instalments and on default of two instalments, the decree holder applied for execution of the whole of the balance remaining, but the application was filed more than three years from date of default to pay Rs. 300.

Held, that the right of the decree holder to apply for execution of the decree for the whole of the remaining sum due to him was time barred, but of the decretal amount, he had a right to apply for execution of the instalments of Rs. 25 which have fallen due provided that the date of those instalments were within time from the date of the application. (*Bennet, J.*) HARI RAM *v.* HIMAN LAL. **157 I.C. 1052=1935 A.L.J. 1291=1935 A.W.R. 531=A.I.R. 1935 All. 259.**

———**Art. 182 (7)**—*Compromise decree payable in instalments—Whole amount payable on default—Default committed—Application made more than three years after, but relating to instalments due within three years—If within time.*

Where a compromise decree directs payment of the decretal amount by instalments on particular dates and provides that in case the defendant fails to pay any instalment at the stipulated period, then the entire decretal amount might be realised by execution, an application made three years after the first default but relating only to instalments which fell due within three years of the application is within time, and Art. 182 (7) governs the relief sought in the application. (*Srivastava Nanavutty and Zia ul Hasan, JJ.*) AJODHIA PRASAD *v.* BANSI LAL. **11 Luck. 276=1935 O.W.N. 837=8 R.O. 1=156 I.C. 764=A.I.R. 1935 Oudh 465 (F.B.).**

LIMITATION ACT (1908), Art. 182, Expl 1.

———**Art. 182 (7)**—*Instalment decree—Option to decree-holder in case of default—Default—Exercise of option—Application more than three years from.*

A decree provided that the principal amount together with interest was repayable within twelve years of the decree and in default, the immovable property was to be sold after twelve years. It also provided that interest was to be paid every year and in case of default in payment of any two years' interest plaintiff was given an option to execute the decree at once. Immediately on the first default the plaintiff exercised his option by praying for the sale of the property. He did not pursue that darkhast any further and after nine years of the default and after twelve years of the decree, he gave another darkhast for the execution of the decree.

Held, that the second darkhast was time barred because the plaintiff having exercised his option on the first default, he could not fall back on the former clause giving him twelve years' time and elect to continue to treat the decree as an instalment decree. 28 A. 249, Rel. on; 25 Bom.L.R. 203 at 205; 27 Bom.L.R. 461; 45 A. 27 (F.B.), Ref. (*Malgaokar, J.*) PANDURANG *v.* MAHADEV. **I.R. 1931 Bom. 325=132 I.C. 437=33 Bom.L.R. 459=A.I.R. 1931 Bom 263.**

———**Art. 182 (7)**—*Instalment decree—Option to decree-holder to realise whole amount on default—Limitation—Starting point of.*

In the case of a decree providing for payment by instalments and that in the event of default of payment of any instalment the decree holder was entitled to take out execution for the whole amount, unless the decree leaves him no option on the happening of default but to execute the decree once for all for the whole amount due under it, the decree-holder may execute it on the happening of the first, second or any subsequent default; and limitation will run only against him in respect of each instalment separately from the time when each instalment may become due and payable. The failure by the decree holder to exercise his option on one occasion does not take away from him the right of exercising it on any subsequent occasion. 4 Pat.L.J. 365, Foll. (*Jwala Prasad, A. C. J. and James, J.*) BRAHAM KISHUN NARAIN DEO *v.* HARIHAR MUNDER. **11 Pat. 440=139 I.C 202=I.R. 1932 Pat. 215=13 Pat.L T. 454=A I R. 1932 Pat. 253.**

[F. 11 O.W.N. 498 (499, 500).]

———**Art. 182 (7)**—*Instalment decree—Whole amount payable on default—Default committed—Still instalments within time can be recovered.*

A decree holder in an instalment decree is entitled to take out execution for the instalments still due which are within time, irrespective of the fact that so far as the execution proceedings are concerned, the default was made from the very start and that the whole amount had become payable. (Case-law discussed.) (*Saadudin, A J.C.*) MT. KORAN *v.* BHAI NANAK SINGH. **141 I.C. 745=A.I.R. 1933 Pesh. 14.**

———**Art. 182, Expl. 1**—*Decree against several persons—Each liable for his own share of decretal amount—Limitation.*

Where a decree is obtained against a number of persons and the decree requires each judgment debtor to pay his own share only of the decretal amount and the costs, it must be considered that there are separate decree against them individually. The mere fact that the decree is written on one sheet of paper makes no difference. Therefore the rule of limitation is applicable separately against each judgment-debtor, so that time begins to run as regards him individually irrespec-

LIMITATION ACT (1908), Art. 182, Expl. (1).

tive of the period of limitation as regards other judgment-debtors. 22 C. W. N. 192, Foll. (*Addison and Din Mohammad, JJ.*) UMRAO SINGH *v.* HAFIZ MUHAMMAD ABDULLAH. **162 I.C. 208 = 8 R.L. 865 = 33 P.L.R. 517 = A.I.R. 1935 Lah. 949.**

——**Art. 182, Expl. (1)**—*Decree for partition—Reservation of a strip of land to serve as a common road—Application by one party to be put in possession—If effective in favour of others.*

A decree for partition passed on 28th March, 1927, allotted various lands in severalty to each of the parties but reserved as *etmali* a kalikhola and also a strip of land to serve as a road giving access to the allottees, The plaintiff in February, 1928, applied for execution and obtained part satisfaction. In November, 1930, the defendants applied to be put in possession.

Held, that the decree was, so far as the Kalikhola and the road were concerned, one for joint possession in favour of all the parties and as that was an integral part of the arrangements, the whole decree should be deemed to be joint and that the defendant's application was within time by reason of the previous application of the plaintiff (*Rankin, C. J. and C. C. Ghose, J.*) MAN MOHAN GOPE *v.* MADHUSUDAN GOPE. **I.R. 1932 Cal. 655 = 139 I C. 786 = 36 C.W.N. 772 = 56 C.L J. 10 = A.I.R. 1932 Cal. 869.**

——**Art. 182, Expl. 1**—*Decree specifying respective liabilities of several judgment debtors—Limitation.*

Where a decree specifies clearly the respective liabilities of the various judgment-debtors and put it beyond doubt that the decree holder could proceed against individual judgment-debtor in respect of his share of the decretal amount and costs, it is in reality a separate decree against each of the judgment-debtors and the mere fact that the decree is written out on one sheet of paper does not in fact make any difference. In applying the law of limitation, the decree has to be kept in force against each judgment-debtor and the execution taken against one of them is not sufficient to prevent the period of limitation running in favour of the other. (*Agha Haidar, J.*) HAFIZ MAHOMED ABDULLAH *v.* AMRAO SINGH. **153 I.C. 238 = 8 R.L. 415 = 35 P.L.R 692 = A.I.R. 1934 Lah. 637 (2).**

——**Art. 182, Expl. 1**—*Joint decree—Application by one co sharer for delivery of his share—Limitation saved for other co-sharers also.*

Where in a suit for partition all the sharers are awarded their shares, but certain property is declared to be joint, as the same decree cannot be both joint and several, the whole decree must be understood as joint, to the benefit of which all the sharers are entitled. Hence an application by one for delivery of his share can save the application of another from limitation.

Quaere.—Whether in a final decree for partition merely awarding several plots to several sharers, an application for one plot cannot save from limitation the application for another plot. (*Krishnan Pandalai, J.*) MAHOMED SAHOOA LEVAI SAYARU *v.* MAYAMAD AMMAL. **6 I R. (Mad.) 174 = 145 I.C. 968 = 1933 M. W.N. 1295 = 38 L W. 568 = A.I.R. 1933 Mad. 789 = 65 M.L J. 582.**

——**Art. 182, Expl. 1**—*Joint decree—Some joint decree holders applying for execution on their own behalf—Others also applying, but application incompetent—The two applications cannot supplement each other to extend limitation.*

Where some out of several joint decree-holders apply for execution on their own behalf and during the pendency of such application the others also apply but the latter application is not competent, the two applications

LIMITATION ACT (1908), Art. 183.

cannot be considered to supplement each other in order to extend limitation. (*Middleton, J. C.*) AHMAD ALI *v.* MT. FATIMA SULTAN. **152 I.C. 443 = 7 R. Pesh. 59 = A.I.R. 1934 Pesh. 40.**

——**Art. 182, Expl. 1**—*Step in-aid—Application for transfer as regards some judgment-debtors—Effect.*

An application for transfer of a decree for execution to another Court in respect of some of the judgment-debtors is a step-in-aid of execution under Art. 182, Limitation Act; but, in the case of a decree which determines the liabilities of the several judgment debtors *inter se* the individual liability of each being specified in the decree, it saves limitation only as against the judgment-debtors in respect of whom the transfer is asked for, and not as against the others. (*Thomas and Smith, J.*) SAHAI LAL *v.* THE DEPUTY COMMISSIONER, SITAPUR. **10 Luck. 260 = 152 I.C. 457 = 7 R.O. 224 = 18 R.D. 554 = 11 O.W.N. 1294 = A.I.R. 1935 Oudh 9(2).**

——**Art. 182, Expl 1, Cl. (2)**—*Joint or several decree—Decree passed against legal representatives.*

A decree passed against persons as legal representatives is a joint and several decree. Execution can be taken out against any one, or any number or all of them and any of them can be made to satisfy the whole amount of the decree to the decree-holder, and he will then, on so satisfying the decree have a right of contribution against the other legal representatives in proportion as they each obtained the property of the deceased. The fact that there is a limit to the amount which any one judgment-debtor can be required to pay, namely, the amount of the property of the deceased which has come into his possession, does not have the effect of making the decree a several decree. 38 Mad. 1102, Dist. (*Mya Bu and Dunkley, JJ.*) U NYO *v.* U PO HLAING **149 I.C. 98 = 6 R.R. 279 = A.I.R. 1934 Rang. 101.**

——**Art. 182, Expl. 1, Cl. (2)**—*Saving of time—Execution against one of several judgment-debtors—Effect.*

Where execution application is being sought against one of several judgment-debtors. Expl. 1, Cl. (2) of the Art. 182 saves the time as against others also. (*Johnstone, J.*) GOPE CHAND *v.* MEHR CHAND. **I. R. 1931 Lah. 898 = 134 I.C. 194 = 31 P.L.R. 961 = A. I.R. 1931 Lah. 116.**

——**Art. 182, Expl. 2**—Proper Court. *See* LIMITATION ACT, ART. 182 (5)—PROPER COURT.

——**Art. 183**—*Applicability—Decree against father—Execution against sons.*

An application against the sons for execution of a decree for costs obtained against the father is governed by Art. 183 and the obligation of the sons to pay the decree continues so long as the execution is commenced within twelve years of the date of the decree. 28 Mad. 466, Not foll. (*Wort and Fazl Ali, JJ.*) SRI CHANDRA CHUR DEO *v.* MT. SHYAM KUMARI. **11 Pat. 445 = I.R. 1932 Pat. 229 = 139 I.C. 397 = 13 Pat.L.T. 719 = A.I.R. 1932 Pat. 261.**

——**Art. 183**—Mortgage suit—Application for final decree—Nature of—Limitation. *See* LIMITATION ACT, ART. 181. **13 Rang. 325.**

——**Art. 183, Proviso**—*Construction.*

The provisions of Art. 183 regarding acknowledgment as well as payments are self contained and must be read independently of Ss. 19 and 20 of the Limitation Act. (*Fazl Ali and Chatterjee, JJ.*) TUGAN MULL *v.* LADHU LAL. **10 Pat. 213 = I R. 1931 Pat. 269 = 132 I.C. 109 = 12 Pat L.T. 888 = A.I.R. 1931 Pat. 218.**

——**Art. 183, Proviso**—"*Payment*"—*Realisation in execution.*

The word "payment" is used in Art. 183 in a wider sense than in S. 20 and not qualified in any way as to

LIMITATION ACT (1908), Art. 183, Proviso.

the mode in which the payment is to be made or as to the person who is to make it. 49 M.L.J. 101, Rel. on.

A sum of money realised in execution in partial satisfaction of the decree amounts to "payment" and provided a fresh starting point for the limitation. (*Fazl Ali and Chatterjee, JJ.*) TUGAN MULL *v* LADHU LAL. **10 Pat. 213=I.R. 1931 Pat. 269=132 I.C. 109=12 Pat.L.T. 888=A.I.R. 1931 Pat. 218.**

———**Art. 183, Proviso**—"*Secured by decree*"—*Costs.*

In order to save limitation, some part of the principal money *secured by the decree* or some interest on such money stored be paid, The money secured by the decree includes costs and so the payment made by a debtor towards costs would give rise to a fresh starting point for limitation. (*Fazl Ali and Chatterji, JJ.*) TUGAN MULL *v.* LADHU LAL. **10 Pat. 213=I.R. 1931 Pat. 269=132 I.C. 109=12 Pat.L.T. 888=A.I.R. 1931 Pat. 218.**

———**Sch. I, Column 3**—*Construction of—Principles—Dating of cause of action.*

The language of the third column of Sch. I to the Limitation Act should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. (*Nasim Ali and Khundkar, JJ.*) JATEENDRACHANDRA BANDOPADHYAY *v.* REBATEE MOHAN DAS. **62 Cal. 66=158 I.C. 191=A.I.R. 1935 Cal. 333.**

LIMITED COMPANY.

See (1) COMPANY.
(2) COMPANIES ACT.

LIMITED INTEREST.

See (1) ADVERSE POSSESSION.
(2) HINDU LAW—GIFT AND WILL.

LIMITED OWNER.

See (1) ADVERSE POSSESSION.
(2) HINDU LAW—DAUGHTER, LIMITED OWNER AND WIDOW.

LIS PENDENS. *See* T. P. ACT, S. 52.

LOCAL INSPECTION. *See* C. P. CODE, O. 18, R. 18.

LOCAL INVESTIGATION. *See* CR. P. CODE, S. 202.

LOTTERY.

See also (1) CONTRACT ACT, S. 30.
(2) PENAL CODE, S. 294-A.

———Running lottery—Object of Company being illegal—Winding up of Company. *See* COMPANIES ACT, S. 162. **56 Mad 26.=63 M.L.J. 554.**

LOWER BURMA LAND AND REVENUE ACT (II OF 1876). *See also* BURMA (LOWER) LAND AND REVENUE ACT.

———**S. 18**—*Rules under S. 18—Ch. 3, R. 20—Interest of grantee in grant—Extinction.*

M who had a grant of land issued by the Deputy Commissioner applied to the Deputy Commissioner for permission to transfer the land to *K* to whom he was indebted. The Headquarters Assistant sanctioned the transfer and on the face of the original grant an endorsement was made to the effect that the grant was transferred to *K*.

Held, that there was no valid transfer as the interest of *M* can be lost only by transfer by a registered deed or by having the grant cancelled. (*Baguley, J.*) U LU PE *v.* OO KIM SENG. **6 I.R. (Rang.) 8=144 I.C. 825=A.I.R. 1933 Rang. 136.**

———**S. 37**—"*Mortgagee*"—*Whether refers to mortgagee in possession.*

Reference to 'mortgagee' in S. 37, Lower Burma Land Revenue Act, is to a mortgagee in possession and not merely to a holder of a registered mortgage. (*Baguley, J.*) MA MYA MAY *v.* MA LON. **I.R. 1933 Rang. 106=144 I.C. 392=A.I.R. 1933 Rang. 112.**

LUNACY ACT (1912), S. 7.

———**S. 37**—"*Possession*"—*Meaning.*

Possession of the land referred to in S. 37, must be regarded as possession by the owner. (*Baguley, J.*) MA MYA MAY *v.* MA LON. **I.R. 1933 Rang. 106=144 I.C. 392=A.I.R. 1933 Rang. 112.**

LUNACY.

See (1) C. P. CODE, O. 32, R. 15.
(2) CR. P. CODE, SS. 464 TO 473.
(3) CONTRACT ACT, S. 12.
(4) LIMITATION ACT, S. 6
(5) PENAL CODE, S. 84.

LUNACY ACT (IV OF 1912)—*Lunatic's estate—Joint managers—Death of one—If terminates other's office.*

Until the legislature see fit to introduce into the Lunacy Act a provision similar to S. 38, Guardians and Wards Act, by which on death of one of joint guardians, principle of survivorship is applied, the rule of English law should be followed and where there is no provision for survivorship in the order of appointment of the joint managers, the office of the survivor should terminate on the death of his co-manager. There is no provision in the Lunacy (District Courts) Act (XXXV of 1858) nor in the Lunacy Act of 1912 on this point. The cases of joint executors or joint trustees are distinguishable because in these cases there is a vesting of property in the surviving executor or trustee: *vide* S. 312, Succession Act and S. 76, Trusts Act. (*Jack and Khundkar, JJ.*) NABA KUMAR SINGH *v.* FATEH SINGH NAHAR. **61 Cal. 986=154 I.C. 108=7 R C. 432=60 C.L J. 14=38 C.W.N. 1054=A.I.R. 1935 Cal. 33.**

———*Proceedings for inquisition—Unsuccessful party—Costs out of the estate—Right to—Power of Court.*

Under the Lunacy Act, the Court has no power to award costs to an unsuccessful applicant out of the estate of the alleged lunatic, even though the application is *bona fide* and in the best interests of the lunatic. In the absence of a provision in the Act, similar to S. 109 of the English Lunacy Act of 1890, the Court has no discretion to award costs. (*Beasley, C.J. and King, J.*) SESHA AMMAL *v.* VENKATANARASIMHA BHATTACHARIAR. **58 Mad. 281=7 R.M. 292=152 I.C 882=1934 M.W.N. 1259—40 L.W. 710=A.I.R. 1935 Mad. 91=67 M.L.J. 797.**

———**S. 3 (5)**—*Test of insanity—Conduct of lunatic.*

No person can have direct experience of the mind of another and the proper test of insanity is conduct. A person might conceivably have all kinds of mental unsoundness; he might have all kinds of delusions, but if his conduct remains normal, there would be no power under the Lunacy Act to deal with him because the Law of Lunacy deals with conduct and the proper test for insanity is not the beliefs that the person concerned may entertain but the conduct exhibited by that person. (*Courtney-Terrell, C.J. and Agarwala, J.*) SONABATI DEBI *v.* NARAYAN CHANDRA UPADHYA. **158 I.C. 965=8 R.P. 226=16 Pat L.T. 874=A.I.R. 1935 Pat. 423.**

———**S. 7**—*Lunacy petition—Enquiry—Delegation—Notice not served on alleged lunatic—Validity of procedure.*

A verified petition was presented to the District Judge by the petitioner affirming that a certain person was a lunatic and praying for his own appointment as a guardian of the person and the property of the alleged lunatic. The District Judge without any judicial determination of the question whether an inquisition had been

LUNACY ACT (1912), S. 38.

asked for and without recording any order directingan inquisition issued a commission on the Munsif for enquiry and report as to the mental condition of the lunatic No notice of any kind was served on the lunatic but his two daughters had been served with notices. The Munsif after investigation reported to the effect that the alleged lunatic was of unsound mind. The District Judge there on appointed the petitioner as guardian of the person and property of the lunatic.

Held, that such proceedings were not fit to be treated as the inquisition which the Act contemplated and that Courts should be very careful in dealing with such cases under the Act. 31 C. W. N. 838, Rel. on. (*Mukerji and Guha, JJ.*) MAIJUDDI HAZI *v.* MOULVI T. TOFAILADDI. **135 I.C. 734 = I R 1932 Cal. 142 = 35 C.W.N. 481 = A I.R. 1932 Cal. 20.**

———**S. 38**—*Application under—Person not residing in Calcutta—Jurisdiction of Original Side, High Court.*

The Original Side of the Calcutta High Court has no jurisdiction to direct an inquisition or appoint a guardian of person or property in the case of an Indian not resident in Calcutta. (*Panckridge, J.*) PHANINDRA CHANDRA SET, *In the matter of.* **58 Cal 919 = I.R. 1931 Cal 652 = 133 I.C. 188 = 35 C.W.N. 1045 = A.I. R. 1932 Cal. 91.**

———**S. 38**—*Application for inquisition—Order—When to be made—Essentials.*

In an application for an order directing an inquisition under the Lunacy Act, what has to be found is that the person is of unsound mind and that the unsoundness of mind is such as to make him incapable of managing his affairs. The Court on an application under S. 38 must hold that both unsoundness of mind and incapacity to manage his affairs are present and that the latter is due to the former. (*Beasley, C.J. and King, J.*) SESHA AMMAL *v.* VENKATANARASIMHA BHATTACHARIAR. **58 Mad. 281 = 7 R.M. 292 = 152 I.C. 882 = 1934 M.W. N 1259 = 40 L.W. 710 = A.I.R. 1935 Mad. 91 = 67 M.L J. 797.**

———**S 62**—*Jurisdiction of District Court—Residence of lunatic—Prior reception order of Chief Presidency Magistrate of Calcutta—Effect.*

The alleged lunatic was a person ordinarily residing within the District Court of Nadia where he had his house and family. In 1927 however he was for some time living temporarily in Calcutta for the purpose of his treatment and during that time the Chief Presidency Magistrate of Calcutta had passed an order directing the authorities of the Mental Hospital to receive the alleged lunatic. In 1928 an application was made to the District Court, Nadia, for an inquisition under the Lunacy Act.

Held, that it could not be said that at the date of the application the alleged lunatic was subject to the jurisdiction of the High Court of Calcutta so as to take away the jurisdiction of the District Court to make an order for inquisition. (*Mukerji and Guha, JJ.*) KAMALA BALA DEBI *v.* EMPEROR. **35 C.W.N. 543 = I.R. 1932 Cal 47 = 134 I.C. 1135 = 1931 Cr.C. 991 = A.I.R. 1931 Cal. 711.**

———**Ss. 63 and 80**—*"Curator"—Meaning of—Removal from guardianship.*

The word "curator" is used in the Lunacy Act in the sense of a public curator appointed under the Succession (Property Protection) Act (1841). Hence where a person has not been appointed curator in the above sense there is no bar to her removal under S. 80 of the Act from the guardianship of the lunatic. Where the guardian had not submitted any accounts since her appointment, had been leading an immoral life and had not taken proper care of her mother (lunatic).

LUNACY ACT (1912), S. 83.

Held, there was reason to suspect that she had been misappropriating the income from the property and there was sufficient justification for her removal from the guardianship of the property as well. (*Bhide, J.*) MT. GIAN DEVI *v.* MT. SHAM DEVI **6 I.R. (Lah) 244 (2) = 146 I.C. 553 = A.I.R. 1933 Lah. 626.**

———**S 65**—*Finding as to lunacy—Interference by High Court.*

A person who is not sufficiently intelligent to manage his own affairs, is not necessarily of unsound mind. Under S. 65, there must be a finding that the alleged lunatic is of unsound mind and incapable of managing himself and his affairs. The High Court has power to interfere to correct a wrong finding under S. 65 (2). (*Pollock, A.J.C.*) MAHIPATI *v.* MT. CHANGUNA. **30 N.L R. 224 = 6 R.N. 182 = 148 I.C. 462 = A.I.R. 1934 Nag. 27.**

———**S 65**—*Order in lunacy—Binding nature of.*

Although an order in lunacy is not a judgment which is conclusive against the world as one of the judgments enumerated in S. 41 of the Evidence Act, it is still relevant and binding upon the parties thereto and those who claim under them just like any other judgment of a Civil Court. (*Krishnan Pantalu, J.*) SUBBA NAICKER *v* SOLAIAPPA NAICKER **56 Mad 904 = 147 I.C. 479 = 6 R.M. 347 = 1933 M.W.N. 514 = 38 L.W. 135 = A.I.R. 1933 Mad. 624 = 65 M.L J. 279.**

———**S. 71**—*Guardian appointed under—Right to custody of lunatic.*

A person who has been appointed guardian of the person of a lunatic under S. 71 is, in the absence of very special circumstances, entitled to the custody of the lunatic and the Court appointing the guardian has power to give such custody. (*Curgenven and Bardswell, JJ.*) KRISHNA AYYAR *v.* SUBBALAKSHMI AMMAL. **58 Mad. 252 = 7 R.M. 310 = 153 I.C. 94 = 1934 M.W N. 843 = 40 L W 712 = A.I.R. 1934 Mad. 724 = 67 M.L.J. 661.**

———**S. 72**—*Guardian of lunatic—No preference to legal heir.*

S. 72 operates as a kind of warning that particular care should be exercised by the Court, where a person is entitled to inherit part of the property of a lunatic and would therefore benefit by his death, to see that the appointment of such person as the guardian of the lunatic is a beneficial one. Hence a person whose interest as an heir to the lunatic would be greater if the lunatic dies before her should not be appointed guardian of the person of the lunatic in preference to another who is a non heir. 15 All. 29 and 39 All. 158, Ref. (*Mya Bu and Dunkley, JJ.*) E. M. DAWOOD *v.* MA KHATUN **152 I.C. 512 = 7 R.R. 165 = A.I.R 1934 Rang. 164.**

———**S. 81**—*Order imposing fine on guardian for contumacious conduct—If "decree" under Sch. II, Art. 2, Court-Fees Act.*

It is true that the fine imposed on a guardian of a lunatic by the Court for contumacious conduct under S. 81, Lunacy Act, can be recovered as if it were due under a decree of Court, but it is doubtful if the order imposing the fine can be said to have the force of a decree under Sch. II, Art. 2, Court-Fees Act, for the purposes of appeal. (*Rangi Lal, J.*) MAHOMED DIN *v.* MIRAN BAKHSH. **150 I.C. 664 = 6 R.L. 862 = 36 P.L R. 179 = A.I.R. 1934 Lah. 853 (1).**

———**S. 83**—*Application for custody—Order rejecting—Appeal.*

An order of the District Judge, dismissing the application of a guardian for custody of the lunatic is appealable to the High Court under S. 83. (*Curgenven and Bardswell, JJ.*) KRISHNA AYYAR *v.* SUBBALAKSHMI

LUNACY ACT (1912), S. 91 (1).

AMMAL. 58 Mad. 252=7 R M. 310=153 I.C. 94=1934 M W.N. 843=40 L.W. 712=A.I.R. 1934 Mad. 724=67 M.L J. 661.

———**S. 91 (1)**—*Punjab Government Rule, R.* 185—*"District Funds"—Meaning.*

The words "District Funds" in R. 185 of the Rules framed by the Punjab Government under Lunacy Act, S. 91 (2) does not include the funds of the Small Town Committee. (*Jai Lal, J.*) REHMAT ALI *v.* SMALL TOWN COMMITTEE, DHARIWAL. **15 Lah. 480=151 I.C. 403=7 R L. 127=36 P.L.R. 350=A.I.R. 1934 Lah. 148.**

LUNACY (DISTRICT COURTS) ACT (XXX OF 1858)—Lunatic's estate—Joint managers—Death of one—The office of the survivor terminates—No provision applicable to such cases in the Act—Rule of English Law applicable. *See* LUNACY ACT (IV OF 1912). **61 Cal. 986=A.I R. 1935 Cal 33.**

MADRAS ABKARI ACT (I OF 1886)—General Sales Notification, Cl. 27—Abkari licence—Partnership in contravention of Act—Moneys advanced to not recoverable. *See* CONTRACT ACT, SS. 23 AND 24. **58 Mad. 727=68 M.L.J. 570 (F.B.).**

———**S. 3 (17)**—*Possession of single ganja plant—No evidence of tending—Offence if proved.*

Where there is only a single plant and no evidence of personal tending the evidence is insufficient to support a conviction. (*Wallace, J.*) VENKATAPPA *v.* EMPEROR. **1932 M W N. 70.**

———**S. 24 and R. 27**—*Partnership for sale of liquor—Legality—Promissory note in respect of—Enforceability—"Transfer" in R. 27—Meaning of—Public policy.*

Defendant executed a promissory note to plaintiff and on the same day they and three others entered into a partnership and it was agreed that plaintiff on behalf of the partnership was to bid for the right to sell toddy and obtain a license in his name. At the auction held a month later, plaintiff became the successful bidder. A suit having been brought on the promissory note,

Held, that the partnership did not involve a "transfer" within the meaning of R. 27 as the partnership had already come into existence when the plaintiff bid for the right and it was therefore not illegal. Consequently the suit promissory note was enforceable. A partnership for the sale of liquor is not *per se* illegal or opposed to public policy. To attempt to discover a policy with a view to make illegal things not expressly prohibited is unwarranted. (*Venkatasubba Rao, J.*) SATYALA SANYASI *v.* BHOGAVALLI SANYASI. **158 I.C. 1055=8 R M. 417=1935 M W.N. 935=42 L.W. 840=A,I.R. 1935 Mad. 895=69 M.L.J. 490.**

———**S. 28**—*Default by contractor—Sale of his house for recovery of dues—Failure by vendee to deposit purchase price—Re-sale—Encumbrance on property unknown to parties at the time of first sale—Low price fetched by re-sale—Suit by Government against first vendee for loss caused by re sale—Amount claimable—Madras Revenue Recovery Act (II of 1864), S. 36.*

An abkari contractor committed default in the payment of the monthly rental due to the Government. The Government sustained loss on re-sale of the shop and therefore put up the house of the defaulter for sale. The defendant bid for Rs. 1,805, at the auction and the property was knocked down to him. He did not however, deposit the necessary amount within the time mentioned in the conditions of sale. The Government therefore resold the house. At the re-sale, the price was only Rs. 20. The Government therefore brought this suit to recover the loss caused by the re-sale from the defendant. At the time of the first sale, both the Government and the defendant were not aware of the existence of an encumbrance on the property and that accounted for the low price at the re-sale.

Held, that (*i*) a sale under the Act did not require confirmation by the Collector; (*ii*) although a sale for default under the Abkari Act is held in the manner of one for recovery of arrears of land revenue under Madras Act II of 1864 the property is not sold free of encumbrance as it is in a land revenue sale; (*iii*) although the Government may not be legally bound to notify in the sale of immovable property for default under the Abkari Act that it is subject to encumbrance, the fact that the forms of sale proclamation were identical with those of the sale for revenue arrears was apt to mislead the public into thinking that the sales were free of encumbrances; (*iv*) the property sold subject to a mortgage at the re sale was not the same as the property purchased by the defendant at the first sale, not subject to the mortgage; (*v*) the amount which the Government was entitled to recover was not the difference in prices—but the difference between the amount bid for at the first sale and the price fetched by re sale with any encumbrance amounts due at the time of the re-sale added to the latter figure. (*Pakenham Walsh, J.*) GOVINDARAJULU NAIDU *v.* SECRETARY OF STATE FOR INDIA. **I R. 1933 Mad. 421=144 I.C. 525=1933 M.W.N. 582=38 L.W. 125=A.I.R. 1933 Mad. 649=65 M.L J. 317.**

———**Ss. 55 (b), 55 (g) and 58**—*Scope—Unlawful manufacture and possession of arrack—Conviction under S. 55 (b)—Separate convictions under Ss. 55 (g) and 58—Sustainability.*

The offence of manufacturing arrack unlawfully under S. 55 (*b*) of the Act includes also the offence relating to possession of the apparatus, etc., namely, that comprised under S. 55 (*g*). If a person unlawfully manufactures arrack and is in possession of the same, he can only be convicted under S. 55 (*b*) of the Act. He cannot also be convicted separately under S. 55 (*g*) for being in possession of the apparatus or under S. 58 for being in possession of the arrack manufactured by him unlawfully. (*K. S. Menon, J.*) RAMA RAO, *In re.* **59 Mad. 90=159 I C. 40 (1)=37 Cr L.J. 2=8 R M. 439 (2)=1935 M.W N. 946 (1)=42 L W 651=1936 Cr.C 198=A.I.R. 1936 Mad. 219=69 M.L.J. 763.**

———**S. 55 (c)**—*Offence under—Proof—Single ganja plant—No personal tending.*

The Abkari Act does not in the case of an offence under S. 55 (*c*) of the Act throw on the accused the onus of accounting for his possession of a single ganja plant. The prosecution must prove that the accused cultivated, it *i.e.*, tended it and looked after it. Where there is only a single plant and no evidence of personal tending the evidence is insufficient to support a conviction. (*Wallace, J.*) VENKATAPPA *v.* EMPEROR. **1932 M.W.N. 70.**

———**Ss. 56 (b) and 64**—*Offence by licensee's servant—Liability of licensee.*

The holder of a license is liable to be punished for the offences committed by his employee or any one acting on his behalf; and if he seeks to escape liability he has to establish that all due and reasonable precautions were taken by him to prevent the commission of such offence. He is not to be exonerated merely because he may not have been consciously a party to the offence. (*Curgenven and Cornish, JJ.*) CHINNAPPAYYA MUDALI, *In re.* **58 Mad. 346=154 I.C. 604=7 R.M. 460=40 L.W. 846=1934 M.W N. 1142=1935 Cr.C. 61=A.I.R. 1935 Mad. 79=67 M.L.J. 876.**

MADRAS ABKARI ACT (1886), S. 64 (2).

——**S. 64 (2)**—*Scope—Liability of licensee for act of servant.*

The intention of the provision in paragraph 2 of S. 64 of the Abkari Act is to place a heavier responsibility for the act of his servant upon the licensee, as such, than lies upon an employer under the ordinary criminal law. (*Curgenven and Cormish, JJ.*) CHINNAPPAYYA MUDALI, *In re.* **58 Mad. 346=154 I.C. 604=7 R.M. 460=40 L.W. 846=1934 M.W.N. 1142=1935 Cr.C. 61=A.I.R. 1935 Mad. 79=67 M.L.J. 876.**

MADRAS AGENCY TRACTS INTEREST AND LAND TRANSFER ACT (I OF 1917), S. 4 (3) & R. 4 UNDER THE ACT—*Application under S. 4 (2) for ejectment—Dismissal of—Second appeal.*

An application under S. 4 (2) of the Act for ejectment is not a suit and the order refusing it is not a decree. No second appeal lies from that order. (*Pakenham Walsh, J.*) DIBBA BALESU *v.* CHINNA SANYASAYYA. **56 Mad. 984=6 I.R. (Mad) 150=145 I.C. 941=1933 M.W.N. 975=38 L.W. 397=A.I.R. 1933 Mad. 695=65 M.L.J. 383.**

MADRAS BORSTAL SCHOOLS ACT (V OF 1926), S. 8—*Applicability—Accused not proved to be of criminal habits.*

Where the accused is not proved to be of criminal habit, tendencies or association, he cannot be sent to a Borstal School. (*Jackson, J.*) RAMALINGA AYYAR *v.* EMPEROR. **1931 M W N. 401.**

——**S. 8**—*Applicability—Accused aged 22.*

The Act does not literally apply to an accused aged 22 but the fact that he is so near adolescence may nevertheless be a circumstance for consideration. (*Jackson, J.*) RAMALINGA AYYAR *v.* EMPEROR. **1931 M.W. N. 401.**

——**S. 8**—*Applicability—Essentials.*

t The requisites for the applicability of the section are chat the adolescent offender should be addicted to priminal habits or tendencies or be associated with persons of bad character and the Court should be satisfied that he is a person likely to benefit by detention in a Borstal institution. The mere fact that the accused falls within the term "adolescent offender" as defined in S. 2 of the Act is not sufficient to justify the Court in detaining him in a Borstal institution. (*Beasley, C.J. and Sundaram Chetty, J.*) SELLAPPA GOUNDAN, *In re.* **54 Mad. 764=I.R. 1931 Mad. 776=133 I.C. 776=32 Cr.L.J. 1044=1931 M.W.N. 772=34 L.W. 45=1931 Cr.C. 1027=A.I.R. 1931 Mad. 771=61 M.L.J. 222.**

——**S. 8**—*No finding of criminal habits—Legality of sentence.*

Where there is no finding and no reason to suppose that the boys are of criminal habits or associate with persons of bad charater, the boys cannot be borstalized. (*Jackson, J.*) KANDASWAMI NAYAKAR *v.* EMPEROR. **1931 M.W.N. 265.**

——**S. 8**—*Sentence of imprisonment—Committing person to prison whether sufficient.*

By virtue of Proviso 2 to S. 397, action under S. 123 amounts to sentencing a person to imprisonment. Therefore the case of an adolescent within the meaning of S. 2, Madras Borstal Schools Act, who has been committed to prison under S. 123, Cr. P. Code, is governed by S. 8, Madras Borstal Schools Act. And further, even in such a case the period for furnishing security is only one year, yet, when detention in a Borstal School is ordered instead of imprisonment, then that detention can only be for such period as is provided for in the Borstal Schools Act, which period is of two years. (*Bardswell, J.*) CHENGADU, *In re.* **57 Mad. 928=150 I.C. 796=7 R.M. 48 (1)=40 L.W. 63=35 Cr.L.J. 1153=1934 Cr.C. 302=1934 M.W.N. 486=A.I.R. 1934 Mad. 457=67 M L.J. 800.**

MADRAS CHILDREN ACT (IV OF 1920), S. 4—*Scope.*

S. 4 merely provides that the *special* powers conferred upon Courts by the Children Act shall be exercised only by special Courts. It does not take away the jurisdiction of second class Magistrate to try children or youthful offenders. (*Burn, J.*) APPALASWAMY, *In re.* **1932 M.W.N. 1076.**

——**S. 37**—*Age of accused—"Due enquiry"—Adequate evidence—Necessity for.*

S. 37 requires that a "due enquiry" into age shall be made and that evidence shall be taken. The burden of proof in such matter is on the accused, though in case of doubt the Judge would be careful to give him the benefit of the doubt. It is desirable that a declaration of age under S. 37 should not be made except on adequate and proper evidence for the reasons (1) that in the public interest criminals should suffer the legal penalty for their offences and not escape on an unduly lenient finding as to age, (2) that the declaration, is final and cannot be interfered with in appeal, or revision, and (3) that it also affects the length of detention in the Certified School. (*Walter and Krishnan Pandalai, JJ.*) RAMUDU *v.* EMPEROR. **135 I.C. 622=I R. 1932 Mad. 190=33 Cr.L.J. 192=34 L.W. 896=1931 M.W.N. 1192=1932 Cr.C. 155=A.I.R. 1932 Mad. 213.**

MADRAS CITY CIVIL COURT ACT (VII OF 1892), S. 8—*Construction—"Law"—If includes procedure of the High Court—Leave to sue defendant residing outside jurisdiction—If a condition precedent to institution.*

The word "law" in S. 8 of the Act is not wide enough to include the procedure in force in the High Court. There is no reason why the City Civil Court should be placed in the same position as the High Court in the matter of procedure or why it should not be governed by the Civil Procedure Code. Consequently, in the case of a defendant living outside Madras, leave to sue in the City Civil Court may be obtained even after the institution of the suit. It is not obligatory that such leave should be applied for *before* the suit is filed. (*Beasley, C.J. and King, J.*) KHUMCHAND DHULAJI PALADUVALA *v.* GOMRAJ FATECHAND. **58 Mad. 511=156 I.C. 527=8 R M. 19=41 L.W. 223=1935 M.W.N. 126=A.I.R. 1935 Mad. 219 (1)=68 M.L.J. 205.**

——**S. 14**—*Suit transferred from City Civil Court to High Court—Court-fee payable.*

Where a suit is transferred from the City Civil Court to the High Court under Cl. 13 of the Letters Patent and tried by the High Court as a Court of Extraordinary Original Jurisdiction, the Court fee payable is that in force in the High Court as a Court of OrdinaryOriginal Jurisdiction (and not that payable under the Court-Fees Act) as the case is expressly governed by S. 14 of the Madras City Civil Court Act (VII of 1892). 38 Mad. 807=27 M.L.J. 30 (P.C.), Ref. (*Venkatasubba Rao, J.*) ABDUL HAKIM SAHIB *v.* CHATTANADHA AYYAR. **I.R. 1931 Mad. 679=132 I.C. 647=33 L.W. 318=A.I.R. 1931 Mad. 457=60 M.L.J. 435.**

MADRAS CITY MUNICIPAL ACT (IV OF 1919), S. 110—*"Company"—Meaning of—Banks registered under the Co-operative Societies Act if included.*

The word 'company' is used in the City Municipal Act in its ordinary popular sense and means a body of persons associated for a common object, for some busi-

MADRAS CITY MUNICIPAL ACT (1919), S. 111.

ness or other purpose; thus the Banks registered under the Co-operative Societies Act are 'companies' within the meaning of S. 110. (*Reilly and Anantakrishna Ayyar, JJ.*) MADRAS CENTRAL URBAN BANK, LTD *v.* CORPORATION OF MADRAS. **I.R. 1932 Mad. 499 = 138 I.C. 12 = 1932 M.W.N. 75 = 35 L.W. 573 = A.I.R. 1932 Mad. 474 = 62 M.L.J. 720.**

———**S. 111**—*Profession tax if leviable on Banks registered under Co-operative Societies Act.*

Banks registered under Co-operative Societies Act are companies within the meaning of S. 110 of the Act and hence not liable to profession tax. (*Reilly and Anantakrishna Ayyar, JJ.*) MADRAS CENTRAL URBAN BANK, LTD. *v.* CORPORATION OF MADRAS. **I.R. 1932 Mad. 499 = 138 I.C. 12 = 1932 M.W.N. 75 = 35 L.W. 573 = A.I.R. 1932 Mad. 474 = 62 M.L.J. 720.**

———**S. 186**—*Construction—"Alter"—Meaning of—Conversion of existing latrine into flush out latrine—Notice directing—Validity.*

The word "alter," in S. 186 of the City Municipal Act also includes the making of a structural alteration in a thing so as to change its character and cover the case of conversion of an ordinary latrine into a flush out latrine. A notice by the Commissioner under S. 186, calling upon the owner of a house to convert the existing latrine in his building into a flush out latrine is perfectly valid. (*Beasley, C.J. and Cornish, J.*) DURAIVELU MUDALIAR *v.* CORPORATION OF MADRAS. **157 I.C. 1016 = 8 R.M. 204 = 42 L.W. 440 = 1935 M.W.N. 374 = A.I.R. 1935 Mad. 600 = 69 M.L.J. 182.**

———**S. 186**—*Scope—Owner of several buildings—Notice by Commissioner demanding conversion of ordinary latrines into flush out latrines—If* ultra vires—*Power to enforce general scheme of drainage.*

The power conferred on the corporation by S. 186 is quite general and unqualified. It can be exercised in respect of the single owner of a number of houses or buildings as well as in respect of a number of individual owners of single buildings. And even if the purpose of serving notices under the section demanding the conversion of ordinary existing latrines into flush out latrines is to enforce a general scheme of drainage in the district, this will not make the action of the corporation *ultra vires*. The section empowers such action. (*Beasley, C. J. and Cornish, J.*) DURAIVELU MUDALIAR *v.* CORPORATION OF MADRAS. **157 I.C. 1016 = 8 R.M. 204 = 42 L.W. 440 = 1935 M.W.N. 374 = A.I.R. 1935 Mad. 600 = 69 M.L.J. 182.**

———**S. 287**—*Licence—Powers of Commissioner—Regulation and not prohibition.*

The Commissioner has no doubt powers under the section over persons who conduct a number of different trades, occupations and operations; the powers so entrusted to the Commissioner are not intended for the prohibition of those trades and occupations but for their regulation. He cannot refuse licence arbitrarily; he should state reasons for refusal. Any one aggrieved by the order of the Commissioner has a right of appeal to the Standing Committee and if the Standing Committee use their powers unreasonably or perversely, he has his remedy in the Courts (*Reilly and Anantakrishna Aiyar, JJ.*) CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS, LTD. **54 Mad. 364 = I.R. 1931 Mad. 417 = 130 I.C. 721 = 1931 M.W.N. 73 = 33 L.W. 224 = A.I.R. 1931 Mad. 152 = 60 M.L.J. 551.**

[R. 65 M.L.J. 800 (862).]

———**S. 287 and Sch. VI**—*Licence for manufacture—Storing—Necessity for fresh licence.*

For the use of premises for any purpose specified in Sch. VI the owner must under S. 287 apply for a licence. He cannot get a licence for manufacturing oil and then

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pack or store it without a licence. But it is obviously inequitable to charge a person the same fee for manufacturing and packing or storing. (*Jackson, J.*) SAMARAPURI CHETTY *v.* CORPORATION OF MADRAS. **54 Mad. 1034 = I.R. 1931 Mad. 573 (1) = 131 I.C. 621 (1) = 32 Cr.L.J. 779 (1) = 131 I.C. 621 (1) = 33 L. W. 553 = 1931 M.W.N. 404 = 1931 Cr.C. 552 = A.I. R. 1931 Mad. 488 = 60 M L.J. 711.**

———**Ss. 287 and 355 (3) and (10)**—*Application for licence—Fees received and Chellan issued—Subsequent refusal to issue licence on the ground that the application was not a proper one—Direction to close down business—Propriety of.*

Where a manager of a condiment business applied to the Commissioner of the Corporation for a factory licence enclosing the fees for the same, the money was received and chellan issued but subsequently the Commissioner refused to issue the license on the ground that there was no proper application for a license and that no license could be issued and also directed that the business should close down,

Held, that the power of stopping businesses under S. 287 (2) should be used very carefully; that the order directing the closing down of the business was made without any statutory or proper authority and should be quashed. The ground alleged by the Commissioner in his letter of refusal, *viz.*, "the Standing Committe refused to reconsider their order of refusal" was invalid because the Standing Committee had nothing to do with the issue of licenses unless and until the application had been received, considered and refused with reasons given. The situation had never arisen in this case. (*Stone, J.*) VENKATACHALAM *v.* THE COMMISSIONER, CORPORATION OF MADRAS. **149 I.C. 750 = 6 R.M. 655 = 39 L.W. 29 = A.I.R. 1934 Mad. 70 = 65 M.L.J. 860.**

———**S. 288**—*Electric Company—Use of steam-boilers—Permission from Corporation necessary.*

The Electricity Act is not a complete Code. There is nothing inconsistent in the Electricity Act or the licence issued under it to the Electric Company and the City Municipal Act in respect of the use of steam-boiler and the Electric Company are not entitled to use the steam-boiler in their generating station without obtaining the permission of the Commissioner of the Corporation. (*Reilly and Anantakrishna Aiyar, JJ.*) CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS, LTD. **54 Mad. 364 = I.R. 1931 Mad. 417 = 130 I.C. 721 = 1931 M.W.N. 73 = 33 L. W. 224 = A.I. R. 1931 Mad. 152 = 60 M.L J. 551.**

———**S. 288**—*Licence for electric supply—Control over generating station not lost.*

Because the Municipal Committee consents or raises no objection to the issue of a licence for the supply of electricity, within the Municipal boundaries, it does not follow that it gives up its control under S. 288 in respect of the generating station. (*Reilly and Anantakrishna Aiyar, JJ.*) CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS, LTD. **54 Mad. 364 = I.R. 1931 Mad. 417 = 130 I.C. 721 = 1931 M.W N. 73 = 33 L. W. 224 = A.I.R. 1931 Mad. 152 = 60 M.L.J. 551.**

———**Ss. 365 (3) and (10) and 287**—Application for license—Fresh received and chellan isued— Subsequent refusal to issue license on the ground that the application was not a proper one—Direction to close down business—Propriety of. *See* UNDER S. 287, *supra*. **65 M.L.J. 860.**

———**S. 392**—*Complaint—Time-limit.*

Notice of assessment with regard to the license for the second half of 1929-30 was given on 3rd September,

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1930, but the assessee gave no reply to it. Complaint was instituted against him on 7th November, 1930.

Held, that the demand became effective after the time for making objection prescribed in the notice had expired and the complaint was therefore in time. (*Pakenham Walsh, J.*) JAVARAM NAIDU, *In re.* **I.R. 1932 Mad. 563 (2)=138 I C. 378=1932 M W. N. 1220=33 Cr.L J. 601=1932 Cr.C. 663=A.I.R. 1932 Mad. 564.**

———**Sch. IV, Part V, R. 17**—*Reference under—Procedure—Right to begin.*

The nature of the reference is really one in the nature of an appeal; and the party aggrieved by the Court of Small Causes has got the right to begin in these references. (*Reilly and Anantakrishna Ayyar, JJ.*) MADRAS CENTRAL URBAN BANK, LTD. *v.* CORPORATION OF MADRAS. **I R. 1932 Mad. 499=138 I C. 12=1932 M.W N. 75=35 L.W. 573=A.I.R. 1932 Mad. 474=62 M L J 720.**

———**Sch. VI**—*Storing oil—Licence for manufacture, if sufficient.*

For the use of promises for any purpose specified in Sch. VI, the owner must under S. 287 apply for a licence He cannot get a licence for manufacturing oil and then pack or store it without a licence. But it is obviously inequitable to charge a person the same fee for manufacturing and packing or storing. (*Jackson, J.*) SAMARAPURI CHETTY *v.* CORPORATION OF MADRAS **54 Mad. 1034=I.R. 1931 Mad. 573 (1)=32 Cr L J. 779 (1)=131 I C. 621 (1)=33 L.W. 553=1931 M. W N. 401=1931 Cr.C. 552=A.I.R. 1931 Mad. 488=60 M L J. 711.**

MADRAS CITY POLICE ACT (III OF 1888), Ss. 6 and 42—*Warrant under—Power of Deputy Commissioner to issue.*

A Deputy Commissioner of Police has authority to issue a warrant under S. 42 of the City Police Act. This power is conferred on him by the Act; and an order of the Commissioner is not necessary for the purpose, though the Deputy is subject to the control of the Commissioner. (*Cornish, J.*) SUBBIER, *In re.* **58 Mad. 867=154 I.C. 741=7 R.M. 478=1935 M. W.N. 249=36 Cr.L J. 566=40 L W. 841=1935 Cr. C. 151=A.I.R. 1935 Mad. 98=68 M L J. 348.**

———**S. 7**—*Commissioner of Police—Powers—Order under S. 523, Cr. P. Code.*

The Commissioner of Police as Presidency Magistrate can exercise all the powers of an ordinary Presidency Magistrate excepting the powers under the specified chapters of the Code of Criminal Procedure and any of the powers of an ordinary Presidency Magistrate which the Government have already directed or in the future direct, he shall not exercise. Thus he can pass an order under S. 523, Cr. P. Code, regarding property seized during investigation. (*Sundaram Chetty, J.*) DEVIDAN SOWCAR *v.* JANAKI AMMAL. **I R. 1932 Mad. 510=138 I C. 126=33 Cr L J. 539=1932 M.W.N. 106=35 L.W. 625=1932 Cr.C. 409=A.I R. 1932 Mad. 428=62 M L J. 632.**

———**S. 31**—*Commissioner of Police—Power under S. 523, Cr. P. Code, whether can be exercised.*

In his capacity of Presidency Magistrate the Commissioner of Police can exercise the power under S. 523, Cr. P. Code, in the absence of any Government order that he shall not exercise such a power. (*Sundaram Chetty, J.*) DEVIDAN SOWCAR *v.* JANAKI AMMAL. **I.R. 1932 Mad. 510=138 I C. 126=33 Cr.L J. 539=1932 M W N 106=35 L.W. 625=1932 Cr.C. 409=A.I.R. 1932 Mad. 428=62 M L J. 632**

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———**S. 42**—Authority to issue warrant under—Deputy Commissioner, if competent. *See* MADRAS CITY POLICE ACT, SS. 6 AND 42. **58 Mad. 867=A. I.R. 1935 Mad. 98=68 M.L J. 348.**

——**S. 42**—*Contents of warrant—"Reason to believe"—Omission to state—If illegal.*

It is sufficient that a warrant under S. 42 should state that the Deputy Commissioner issued it on information laid before him. It is not necessary for him to state that he had "reason to believe" the information. (*Cornish, J.*) SUBBIER, *In re.* **58 Mad 867=154 I C 741=7 R M. 478=1935 M W.N. 249=36 Cr L. J. 566=40 L.W. 841=1935 Cr.C 151=A.I.R. 1935 Mad. 98=68 M.L.J. 348.**

———**S. 42**—*Erroneous description of premises—If fatal.*

A warrant will only authorise the entry into the premises named therein. But a faulty description of the premises by a number or locality is not fatal if the description is otherwise sufficient to identify the premises named in the warrant. (*Cornish, J.*) SUBBIER, *In re.* **58 Mad 867=154 I.C. 741=7 R M 478=1935 M.W N. 219=36 Cr L J. 566=40 L W. 841=1935 Cr.C. 151=A.I.R. 1935 Mad. 98=68 M.L.J. 348.**

———**S. 43**—*Presumption under—Conditions for applicability.*

Where there is no evidence that a house was searched on a warrant the presumption under S. 43 from the finding of instruments of gaming in that place cannot be raised. (*Pakenham Walsh, J.*) RATHINA GRAMANY, *In re.* **I R. 1932 Mad. 680=139 I C. 435=33 Cr.L. J. 769=1932 M W N. 1077=36 L.W. 208=1932 Cr. C. 833=A.I.R. 1932 Mad 675.**

———**S. 45**—*Keeping common gaming house—Proof—Element of profit or gain to accused.*

Unless there is sufficient evidence on the record to make out the element of profit or gain to the accused a conviction for keeping or using a room as a common gaming house cannot be said to be proved. 1 Weir 918 and 31 Cr.L J. 376, Ref. to. (*Pakenham Walsh, J.*) RATHINA GRAMANY, *In re.* **I R. 1932 Mad 680=139 I C. 435=33 Cr.L J. 769=1932 M.W N 1077=36 L W. 208=1932 Cr C. 833=A.I.R. 1932 Mad 675.**

———**S. 47**—*Forfeiture under—Conditions of.*

The Act does not contemplate forfeiture following seizure as a matter of course. Before ordering forfeiture, the Magistrate must be satisfied that the money or other articles seized were used or intended to be used for gaming. (*Cornish, J.*) SUBBIER, *In re.* **58 Mad. 867=154 I C. 741=7 R M 478=1935 M W N. 249=36 Cr.L J 566=40 L.W 841=1935 Cr.C. 151=A.I. R 1935 Mad 98=68 M.L J. 348**

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922)—*Applicability—Tenancy for fixed period.*

The Act applies to a tenancy for a short period, *e.g.*, a tenancy for five years of a site used as a fire wood depot, though in such a case it may be difficult to suggest in the words of the preamble that the tenant could have "hoped he would not be evicted." (*Curgenven and Bhashyam Ayyangar, JJ.*) C. KANNAMMAL *v.* KANAKASABHAI MUDALIAR. **54 Mad. 845=I R. 1931 Mad. 779=133 I C. 779=33 L W 676=1931 M.W.N. 461=A.I R. 1931 Mad. 629=61 M.L.J. 535.**

———*Preamble—Scope and effect.*

The language of the City Tenants' Protection Act conferring on the tenants rights of compensation and acquisition, is sufficiently clear and explicit. It may be hard,

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it may be unjust, but there is no ambiguity about it. And the preamble when it talks of 'the hope of the tenants that they would not be evicted' is so vague and indefinite and so far from defining any particular class of tenants that the legislature can hardly have intended to make it a qualification for the acquisition of rights under the Act. The preamble of this Act cannot therefore be invoked to restrict the scope of the provisions of the Act. (*Curgenven and Bhashyam Ayyangar, JJ.*) C. KANNAMMAL *v.* KANAKASABHAI MUDALIAR. **54 Mad. 845 = I.R. 1931 Mad. 779 = 133 I.C. 779 = 33 L.W. 676 = 1931 M W.N. 461 = A.I R. 1931 Mad. 629 = 61 M.L.J. 535.**

———*Scope and object of—Landlord's right to increase rent.*

Even under the common law the landlord has no right to increase the rent as he thinks fit without the consent of the tenant. So surely it cannot be argued that an Act like the City Tenants Protection Act which is meant to protect tenants would give the landlords a right which the common law did not give them. Hence a landlord, whether in Madras or elsewhere, has no right to collect rent at a rate higher than the rate agreed upon by the tenant without the tenant's consent. (*Pandrang Row, J.*) BASHIAM NAIDU *v.* CORPORATION OF MADRAS. **158 I.C. 407 = 8 R M 262 = 1935 M.W.N. 745 = 42 L.W. 317 = A.I R. 1935 Mad. 625.**

———**Ss. 2 and 9**—*Applicability—"Tenant" - Usufructuary mortgagee of tenant—Right to purchase site.*

A usufructuary mortgagee from a tenant is a "tenant" as defined by S. 2 of the Act and is entitled to purchase the site under S. 9. It is not necessary that the entire interest or title of the tenant should be transferred before the transferee can be regarded as a tenant. (*Pandrang Row, J.*) KRISHNA RAO *v.* KRISHNADOS LALAH. **156 I.C. 804 = 8 R M. 56 = 41 L.W. 745 = 1935 M.W.N. 352 = A I.R. 1935 Mad. 556.**

———**S. 4**—Application under—When to be made—Application by tenant under S. 9 not finally disposed of. *See* MADRAS CITY TENANTS' PROTECTION ACT, S. 9. **67 M.L.J. 939.**

———**S. 9** *Scope—Separate suits against different tenants—Order for joint payment by all and for forfeiture in default—Legality.*

The sale contemplated in S. 9 of the Act is of the land in the occupation of the tenant from which he is sought to be ejected. An order making different defendants in different suits jointly liable for the payment of the entire land involved in all the suits, and making them also liable to forfeit their right to purchase the land in default of payment by any one of his portion, is not contemplated by S. 9, though the plaintiff may be the same in all the suits, and though the tenants may consent to the order. The Court has no jurisdiction to pass such an order under the section. Nor does such an order finally dispose of the applications made by the tenants, so as to entitle the plaintiff on non-compliance thereof, to apply under S. 4 of the Act for valuation of the improvements. (*Madhavan Nair and Pandrang Row, JJ.*) RAJAGOPAL DOSS *v.* KUPPUSWAMI MUDALIAR. **58 Mad. 293 = 153 I.C. 270 = 7 R.M. 332 = 40 L.W. 890 = 1934 M.W.N. 1288 = A.I.R. 1935 Mad. 93 = 67 M L J. 939.**

———**S. 12**—*Scope.*

S. 12 confers no protection to the landlord where the superstructures have been in existence before the commencement of the tenancy. (*Curgenven and Bhashyam Ayyangar, JJ.*) C. KANNAMMAL *v.* KANAKASABHAI MUDALIAR. **54 Mad. 845 = I.R. 1931 Mad. 779 = 133 I.C. 779 = 33 L.W. 676 = 1931 M.W.N. 461 = A.I.R. 1931 Mad. 629 = 61 M L.J. 535.**

MAD. CIVIL RULES OF PRACTICE, R. 57.

MADRAS CIVIL COURTS ACT (III OF 1873), S. 4-A—*Execution of decree—Transfer—Powers of transferee Court.*

The transferee Court cannot question the power of the transferring Court to order the transfer of a decree for execution. The power to execute decrees transferred to it can be exercised by the Court where the fund sought to be proceeded against had come to its custody, without reference to the limits of its territorial jurisdiction. (*Sundaram Chetty and Paknham Walsh, JJ.*) MALABAR FOREST AND RUBBER CO., LTD. *v.* MANAVIKRAMAN THIMMALPAD. **149 I C. 1212 = 6 R.M. 677 (1) = 1934 M.W N. 1209 = 39 L.W. 447 = A.I.R. 1934 Mad. 266 = 66 M L.J. 418.**

———**S. 13**—*Appeal from order dismissing application to file award—Valuation for jurisdiction—C. P. Code, Sch. II, Para. 20.*

The expression used in S. 13, *viz.*, "the subject matter of the suit" is capable of only one interpretation in the case of a suit which is numbered as such after an application to file an award is made under para. 20 of Sch. II, Civil Procedure Code, and it can only mean the subject-matter of the award; and when the Court to which such an application was made and which numbered it as a suit has dismissed it, and the plaintiff in the suit appeals from that order of dismissal, the subject-matter is the subject matter of the award, and nothing less. (*Pandrang Row, J.*) KUPPUSWAMI CHETTY *v.* AYYAMMAI AMMAL. **1935 M W N 552 = 8 R.M. 79 = 156 I.C. 916 = A.I R. 1935 Mad. 723.**

———**S. 14**—*Suit to redeem mortgage—Jurisdictional value.*

In a suit for redemption of a mortgage and for recovery of surplus profits from the mortgagee the valuation for purposes of jurisdiction is determined by the principal amount of the mortgage. 5 M. 284 and 39 M. 447, Foll. (*Sundaram Chetty, J.*) POTHANNA *v.* SATYANANDACHARYULU. **I R. 1931 Mad. 669 = 132 I.C. 317 = 33 L W. 785 = A.I R. 1931 Mad. 479 = 60 M L J. 698.**

———**S. 29 (1)**—*General Notification of Madras High Court—Effect—Proceedings under Succession Act, 1925—Jurisdiction of Subordinate Judges.*

S. 29 makes it possible to authorise Subordinate Judges to deal not only with proceedings under part IX of the Indian Succession Act but all proceedings under any part of the Act other than those which can be disposed of by a District delegate. (*Reilly and Anantakrishna Ayyar, JJ.*) KARTHIRUMA GOUNDAN *v.* RANGAMMAL. **55 Mad. 701 = I R. 1932 Mad. 531 = 138 I.C 233 = 1932 M.W N. 528 = 35 L.W. 609 = A.I R. 1932 Mad. 456 = 62 M.L.J. 622.**

MADRAS CIVIL RULES OF PRACTICE, Rr. 57 and 59—*Application for commission—Delay in making—Effect—Power to refuse.*

Under R. 57 of the Madras Civil Rules of Practice, the proper time for making an application for a commission is the date of first hearing of the suit. But there is nothing in the Rules to prevent its being made subsequently. Under R. 59, if an application for a commission to examine a witness is made subsequent to the first hearing and an adjournment of the hearing is prayed, the latter will be refused unless it is shown that the application could not have been made earlier. But the application for the issue of a commission cannot itself be rejected on that ground. (*Cornish J.*) MUTHIA CHETTIAR *v.* S. R. M. A. R. RAMANATHAN CHETTIAR **58 Mad. 400 = 153 I C. 452 (2) = 7 R.M. 356 = 40 L.W. 839 = 1934 M W.N. 1370 = A.I.R. 1935 Mad. 21 = 67 M.L.J. 878.**

MAD. CIVIL RULES OF PRACTICE, R. 62.

———**R. 62**—Documents produced at late stage—No explanation—May be rejected. *See* C. P. CODE, O. 13, R. 1 AND CIVIL RULES OF PRACTICE, R. 62. **1931 M.W.N. 310=34 L.W. 528=A.I.R. 1931 Mad. 512.**

———**R. 178**—*Scope—If* ultra vires—*Preliminary decree for partition—Attachment and sale in execution—Legality.*

The High Court has power to make a rule, such as R. 178, Civil Rules of Practice, if it desires to do so, stating that no decree shall be ordered to be sold in execution of another decree, and that is what has been done by R. 178. The rule is not *ultra vires* as being inconsistent with the C. P. Code, in so far as it is applicable to decrees other than those following under Cl. 1 of R. 53 of O. XXI. A preliminary decree for partition cannot be sold in execution of a simple money decree; and an objection based on R. 178 can be raised even by a party who is not the judgment-debtor. (*Madhavan Nair and Cornish, JJ.*) VENKATASWAMI *v.* VENKATRAMANA RAO. **58 Mad. 285=152 I.C. 789=7 R.M. 287=40 L.W. 599=1934 M.W.N. 1001 =A.I.R. 1934 Mad. 692 (2)=67 M.L.J. 669.**

———**R. 187**—*Batta memo.—If a step in-aid.*

A batta memo. for the sale warrant is a step-in aid of execution within the meaning of Art. 182 (5) of the Limitation Act. (*Pakenham Walsh, J.*) NATARAJA MUDALIAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1933 Mad. 369 (2)=144 I.C. 58=1933 M.W.N. 667=38 L.W. 766=A.I.R. 1933 Mad. 438=64 M. L.J. 692.**

MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932), S. 51 (1) (b) and (c)—*Applicability—Dispute between Society and ex-directors—Loss arising from negligence in sanctioning loan—Reference—If competent.*

A dispute between a Co-operative Society and its former directors regarding loss sustained by the Society owing to the negligence of the ex-directors in sanctioning a certain loan is not a dispute falling under S. 51 (1) (*b*) or (*c*), and cannot be referred to the Registrar under the section. The dispute, though it is one touching the business of the Society, cannot be referred under Cl. (*b*) or (*c*) unless the directors are such at the time of the reference, though they are still members of the Society. If such a reference is made and the referee assumes jurisdiction and proceeds with it the High Court will issue a writ of prohibition against any further proceedings on such arbitration. (*King, J.*) NARAYANA AIYAR *v.* CO OPERATIVE URBAN BANK, LTD., TINNEVELLY JUNCTION. **8 R.M 518=159 I.C. 578 =1935 M.W.N. 1235=42 L.W. 912=A.I.R. 1936 Mad. 81=69 M.L J. 726.**

———**S. 51 (1) (c)**—*Director of Co-operative Bank also acting as its vakil—Dispute between bank and vakil—Reference to Deputy Registrar—Validity—Writ of prohibition—Madras Co-operative Societies Act (II of 1912), S. 43 (1)—Rules under—R 68—Legal practitioner being Director of Society—Appearance as vakil of Society—Propriety.*

The Director of a Co-operative Bank, who also acted as its legal adviser and vakil, was called on to account for certain sums of money received by him from the Bank while acting as its vakil and he having failed to do so a reference was made to the Deputy Registrar of Co-operative Societies Act, 1932. The vakil contended that the new Act of 1932 had no application since the acts complained of had occurred before that Act took effect He further pleaded that the Registrar had no jurisdiction to entertain the reference as the dispute did not touch the business of the Society and moved for a writ of prohibition.

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Held, that the matters complained of related to the conduct of the vakil acting as such and not as a member, officer or agent of the Society and the Registrar had therefore no jurisdiction to entertain the reference. Writ of prohibition issued. (*Baseley C.J and Bardswell, J.*) KRISHNA AIYAR *v.* SECRETARY, URBAN BANK, LTD. **56 Mad. 970=6 I.R. (Mad.) 66=145 I.C. 438=1933 M.W.N. 977=38 L.W. 401=A.I.R. 1933 Mad. 682=65 M.L.J. 367.**

MADRAS COURT OF WARDS ACT (I OF 1902), S. 34—*Will by ward—Confirmation by Court of Wards—If to be made before testator's death—Conditional confirmation—Validity.*

S. 34 of the Court of Wards Act does not require that the confirmation of a will after it is made by a ward should be made before the death of the testator. There is no ground for any such limitation in the section itself. The Court of Wards may give its consent subject to the contingency of the Civil Court finding the will valid. The Court, on finding the will to be valid, may also intimate that finding to the Court of Wards so that the latter may confirm the will again. (*Ramesam and Stone, JJ.*) NAVANEETHA KRISHNA MARUDAPPA THEVAR *v.* COLLECTOR OF TINNEVELLY. **160 I.C. 647=8 R.M. 674=42 L.W. 875=1935 M.W.N. 1001 =A.I.R. 1935 Mad. 1017=69 M.L.J. 632.**

———**S. 49**—*Suit under S. 14, Survey and Boundaries Act—Need for notice.*

The statutory suit prescribed by S. 14 of the Survey and Boundaries Act is a suit within the meaning of S. 49 of the Court of Wards Act and not an appeal and the aggrieved party should give the necessary notice. (*Venkatasubba Rao, J.*) RANGASAMI GOUNDAN *v.* ZEMINDAR, K. K. R. M. ERRAPPA GOUNDER. **151 I C. 939=7 R M. 157=1934 M W.N. 1166=40 L.W. 49=A.I.R. 1934 Mad. 537=67 M.L.J. 426.**

MADRAS CRIMINAL RULES OF PRACTICE, R. 85—*Need for compliance—Non-compliance whether renders confession inadmissible.*

R. 85 which prescribed that before recording a confession the Magistrate should question the accused in order to ascertain the exact circumstances in which the confession is made and the extent to which the police had relations with the accused before the confession was made should be strictly followed by every Magistrate. Such non-compliance however does not render the confession inadmissible in evidence. (*Beasley, C.J. and Reilly, J.*) ANNAMALAI PILLAI *v.* EMPEROR. **1932 M.W.N. 714.**

———**R. 129**—*Quorum for bench.*

The minimum number for a Bench in the Madras Presidency is three Magistrates under R. 129 of the Criminal Rules of Practice and Orders. Where, therefore, of the four Magistrates who signed the judgment, only *two* had been present throughout the proceedings, the conviction is illegal and should be set aside (*Burn, J.*) RAMASWAMY AYYANGAR *v.* SUBBUKUTTI AYYAR. **1933 M.W.N. 93.**

MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), Ss. 45 and 46—*Agreement by Municipal Council not properly executed—Restoration of benefit—Contract Act, S. 65.*

The Madras District Municipalities Act (IV of 1884) makes provisions in Ss. 45 and 46 concerning only with contracts, but it is silent with regard to any agreement entered into by a Municipal Council. Therefore, if a Municipal Council makes an agreement and it is found that such an agreement is not enforceable by law as not having been properly executed the agreement becomes void; but when an agreement is discovered to be void

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the Municipal Council, which is a person in law, who has received any advantage under such an agreement is, under S. 65, Contract Act, bound to restore it. (*Jackson and Butler, JJ.*) ARUNACHALA NADAR *v.* SRIVILLIPUTHUR MUNICIPAL COUNCIL. **58 Mad. 65=151 I.C. 46=7 R.M. 109=1934 M.W.N. 1163=40 L.W. 18=A.I.R. 1934 Mad. 480=67 M.L.J. 38.**

———**S. 63 (1) (a)**—"*Public purposes*" — *Building used for educational purposes—School run as proprietary concern—Liability to assessment.*

A building was used as a secondary school which, though open to the public for the purpose of imparting education, was run as a proprietary concern by the headmaster of the school who was entitled to appropriate for himself all the profits arising from the school after meeting the expenses of management. A question having been raised whether the building was liable to be assessed by the Municipality to property tax,

Held, that the building was used for "public purposes" within the meaning of S. 63 (1) (*a*) and was consequently exempt from assessment to property tax. (*Madhavan Nair, J.*) THE MUNICIPAL COUNCIL, TRICHINOPOLY *v.* VENKATARAMA AIYAR. **54 Mad. 495=I.R. 1931 Mad. 225=129 I.C. 225=1930 M.W.N. 1091=32 L.W. 760=A.I.R. 1931 Mad. 55=60 M.L.J. 456.**

———*Scope—Act is* in pari materia *with Madras Local Boards Act* (*XIV of* 1920).

The Madras Local Boards Act (XIV of 1920) is *in pari materia* with the District Municipalities Act. (*Venkatasubba Rao, J.*) MUNICIPAL COUNCIL, KARAIKUDI *v.* THIRUMALAI AYYANGAR. **157 I.C. 977=8 R.M. 194=42 L.W. 199=1935 M.W.N. 521=A.I.R. 1935 Mad. 657=69 M.L.J. 221.**

———**S. 12 and R. 4**—*Rules for the election of Chairman and Vice-Chairman of Municipal Councils —Declaration of result of poll*—Certiorari.

The act of the presiding member in declaring the result of the poll is a purely ministerial or administrative act and a writ of *certiorari* cannot be granted in respect of such an act. (*Ramesam and Cornish, JJ.*) VENKATA NARASIMHA RAO BAHADUR *v.* MUNICIPAL COUNCIL, NARASARAOPET. **33 L.W. 497=130 I.C. 509=1931 M.W.N. 317=A.I.R. 1931 Mad. 122=60 M.L.J 260.**

———**Ss. 44 and 45**—*Non compliance with—Effect of.*

If the provisions of Ss. 44 and 45 of the Act are not complied with the contract is void. 53 Mad. 352 and 97 I.C. 511, Ref. (*Walsh, J.*) SRIVILLIPUTTUR MUNICIPAL COUNCIL *v.* ARUNACHALA NADAR. **6 I.R. (Mad.) 5=144 I.C. 784=37 L.W. 429=A.I.R. 1933 Mad. 332.**

———**Ss. 44 and 45**—*Contract void for want of formalities—Relief under Contract Act, S.* 65.

Where a contract is void for non-compliance of the provisions of Ss. 44 and 45 of the Act, S. 65, Contract Act, has no application and neither the principle of *quantum meruit* nor the principle of *quantum valebat* applies. (Case-law reviewed.) (*Walsh, J.*) SRIVILLIPUTTUR MUNICIPAL COUNCIL *v.* ARUNACHALA NADAR. **6 I.R. (Mad.) 5=144 I.C. 784=37 L.W. 429=A.I.R. 1933 Mad. 332.**

———**S. 45 (1) (c)** — *Rules for the preparation of Electoral Roll—R. 6—Revising authority—Inclusion of name in roll—Objection to—Enquiry*—Certiorari.

No writ of *certiorari* lies as against the revising authority for the preparation of electoral roll on the ground that the petitioner's name has been improperly included in the roll. If an objection is made that a person whose name is included in the roll is not an assessee all that the Revising authority can enquire into is the fact whether he has been assessed. If he has there is an end of the matter so far as the Revising authority is concerned and the question whether the assessee has been illegally or fraudulently assessed is a matter which does not lie within the scope of the Revising authority's enquiry. In respect of such illegal assessment, there are other remedies open to the aggrieved assessee and a writ of *certiorari* is not open to him. (*Beasley, C. J. and Cornish, J.*) SOMASUNDARA MUDALIAR, *In re.* **136 I.C. 319=I.R. 1932 Mad. 287=34 L.W. 903=1931 M.W.N. 1118=A.I.R. 1932 Mad. 171=62 M.L.J. 263.**

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———**S. 49 (2) (f)**—*Effect.*

The effect of S. 49 (2) (*f*) is not merely to disqualify Government Village Officers or part time Government Officers who are subordinate or superiors of sitting councillors. The much more natural meaning is that persons standing in a superior or subordinate position to a sitting councillor and holding office as such, not necessarily Government office, should be excluded. (*Krishnan Pandalai, J.*) KANDASWAMI CHETTIAR *v.* MUNICIPAL COUNCIL OF POLLACHI. **141 I.C. 293=I.R. 1933 Mad. 102 (2)=1932 M.W.N. 1068=37 L.W. 685=A.I.R. 1933 Mad. 260.**

———**S. 51**—*Disqualification of councillor under S 49—Councillor himself whether can invite decision.*

A councillor can under S 51 apply to the District Judge to decide on his own disqualification under S. 49. (*Krishnan Pandalai, J.*) KANDASWAMI CHETTIAR *v.* MUNICIPAL COUNCIL OF POLLACHI. **141 I.C. 293=I.R. 1933 Mad. 102 (2)=37 L.W. 685=1932 M.W.N. 1068=A.I.R. 1933 Mad. 260.**

———**S. 51**—*Order of District Judge—Interference by High Court.*

Provided the District Judge is acting within his jurisdiction his decision, however erroneous on the facts or even on the construction of the rules cannot be revised by the High Court. (*Krishnan Pandalai, J.*) KANDASWAMI CHETTIAR *v.* MUNICIPAL COUNCIL OF POLLACHI. **141 I.C. 293=I.R. 1933 Mad. 102 (2)=37 L.W. 685=1932 M.W.N. 1068=A.I.R. 1933 Mad. 260.**

———**S. 80**—*Preliminary notification calling for objections—No final notification specifying the rate of tax —Validity of assessment.*

Where the Municipality had only issued a preliminary notification under S. 78 intimating its intention to impose a tax and inviting objections or suggestions but no final notification as contemplated by S. 80 was ever made specifying the rate at which the tax will be levied, the Municipality has no jurisdiction to levy the tax. (*Madhavan Nair, Jackson and Curgenven, JJ.*) MUNICIPAL COUNCIL, CONJEEVARAM *v.* MUNISAMI MUDALIAR. **136 I.C. 346 (1)=I.R. 1932 Mad. 298 (1)=34 L.W. 911=1931 M.W.N. 1207=A.I.R. 1932 Mad. 1 (1)=62 M.L.J. 175 (F.B.).**

———**S. 80**—*Publication in the District Gazette—Not a pre-requisite necessity.*

Where the resolution to increase the tax from 1st April was passed a few days before but it was only published in the District Gazette only on the 5th April, the imposition of the tax is not on that account invalid. The publication in the Gazette before the date of levy of the new tax, though desirable, is not a vital and pre-requisite necessity in the sense that if the publication does not precede the date on which the tax is to come into force, the levy of tax from that date would be illegal. (*Reilly and Anantakrishna Ayyar, JJ.*) MUNICIPAL COUNCIL, ANANTHAPUR *v.* S. VASU-

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DEVA RAO. **55 Mad. 207=135 I.C. 311=I R. 1932 Mad. 71=1931 M.W.N. 1097=34 L.W. 719=A.I.R. 1931 Mad. 808=61 M L.J. 642.**

———S. 80—*Scope—Compliance with—Notification as to levy of profession tax—Contents of—Mere reference to rates in rules and schedule—Sufficiency.*

A notification under S. 80 in pursuance of a decision to levy profession tax which merely states that "profession tax at the maximum rates detailed in R. 17, Sch. IV" will be levied does not sufficiently comply with the requirements of the section. The rates must be mentioned in the notification itself. People upon whom tax is about to be levied should be enabled from the notification itself to understand what the tax is and its rate and they should not be driven to look into the Schedule of the Act to gain that information. The fact that R. 17 is mentioned cannot enable people to find out the rates. (*Madhavan Nair, J.*) MUNICIPAL COUNCIL OF TELLICHERRY *v.* MAYAN KUTTI KEYI. **159 I.C. 53=8 R M. 442—1935 M.W N. 1087—42 L.W. 684.**

———S. 83 (a)—"*Choultry*"—*Free gift of food and drink—Place only a chathram, not choultry.*

Where the essential idea underlying the deed of endowment was that the building in question was to be used for the free gift of food and drink, to every paradesi in the day time and on every Dwadesi to Brahmins, and there was no provision for such paradesis staying there at night,

Held, that the building, though intended for charitable purposes, was a "chathram" but not a "choultry" within the exception to S. 83 (*a*) of the Act because the word "choultry" (corruption of "chavadi") connoted a resting place for travellers. (*Krishnan Pandalai, J.*) KOTHANDARAMA PILLAI *v.* MUNICIPAL COUNCIL, TRICHINOPOLY. **6 I R. (Mad) 248—146 I C 307=38 L.W. 642—A.I.R. 1933 Mad. 782=65 M.L.J. 678.**

———S. 83 (a)—*Construction.*

Obiter.—The only places which require that no income should be derived therefrom in order to be entitled to exemption are the last mentioned of the series, namely, play grounds which are open to the public and from which no income is derived. 54 M. 495, Not Foll (*Krishnan Pandalai, J.*) KOTHANDARAMA PILLAI. *v.* MUNICIPAL COUNCIL, TRICHINOPOLY. **6 I.R. (Mad.) 248=146 I.C 307=38 L W. 642=A. I. R, 1933 Mad. 782=65 M.L J. 678.**

———S. 83 (a)—*School run as proprietary concern—Exemption from assessment — Expression "which are open to the public and from which income is derived"—Significance.*

A building was used as a secondary school which, though open to the public for the purpose of imparting education, was run as a proprietary concern by the headmaster of the school who was entitled to appropriate for himself all the profits arising from the school after meeting the expenses of management. A question having been raised as to whether the building was liable to be assessed by the Municipality to property tax,

Held, that the building was exempt from assessment because it was "used for educational purposes" within the meaning of S. 85 (*a*). The words "which are open to the public and from which income is derived" in S. 83 (*a*) are referable only to "libraries and playgrounds" and not to "buildings used for educational purposes." (*Madhavan Nair, J.*) MUNICIPAL COUNCIL, TRICHINOPOLY *v.* VENKATARAMA AIYAR. **54 Mad. 495=I.R. 1931 Mad. 225=129 I.C. 225=1930 M W N. 1091=32 L.W. 760=A.I.R. 1931 Mad. 55=60 M.L.J. 456.**

———S. 85—Charge under — Suit to enforce limitation. *See* LIMITATION ACT, ART. 132. **41 L.W. 457=A.I.R. 1935 Mad. 378.**

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———S 92 (old)—*Company tax—Levy of—Validity of—Company having no paid up capital.*

Where a company or a benefit society carries on business within a municipality, it is to be assessed on its paid-up capital. If it has no paid-up capital, it follows that it cannot be be assessed.

The assessee company was formed with the object of gathering recruits for tea estates. Apart from the subscription and the capitation fee, each estate contributed Rs 75 for the expenses of the recruiters.

Held, that the contributions constituted "income" and not 'capital' and that the Society was not liable to be assessed to company tax. (*Beasley, C.J. and Cornish, J.*) MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* TEA DISTRICTS LABOUR ASSOCIATION. **55 Mad. 282=I. R 1932 Mad. 265=136 I.C. 201=1931 M.W.N. 1321=35 L.W. 28=A.I R. 1932 Mad. 160=62 M.L. J. 662.**

———S. 92 (old)—*Paid-up capital—Meaning of.*

Paid-up capital means so much of the authorised or stated capital of a company which its shareholders or subscribers have paid up (*Beasley, C.J. and Cornish, J.*) MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* TEA DISTRICTS LABOUR ASSOCIATION. **55 Mad 282=I R 1932 Mad. 265=136 I C 201=1931 M.W N. 1321=35 L.W. 28=A I.R. 1932 Mad. 160=62 M. L.J. 662.**

———S. 93 (as amended by Act X of 1930)—*Dividends received from company—Exemption from taxation.*

The dividends received by a person from a company cannot be treated as a source of income for the purpose of levying profession tax under S. 93 of the Madras District Municipalities Act. In the case of companies, the profits belong to the entire body of persons composing it and when profession-tax is levied on such profits from the company, the individual members thereof are not in respect of those same profits again liable. Nor can dividends which represent a share of the profits be appropriately termed as "income from investments". (*Venkatasubbi Rao, J.*) VENKATA NARASIMHA RAO BAHADUR *v.* CHAIRMAN, MUNICIPAL COUNCIL, NARASARAOPET. **58 Mad 949=159 I.C. 372=8 R. M. 495=41 L W. 170 -1935 M W.N. 116=A.I.R. 1935 Mad. 298 (2)=68 M L.J. 162.**

———S. 93—*Principal place of employment—Vakil's clerk—Vakil living outside Municipal limits—Liability of clerk to profession tax*

Where a vakil's clerk was assessed to profession tax under S. 93 on the ground that he was exercising a profession within the municipality and the said clerk contested the levy on the ground that he was only a paid servant of the vakil who was residing outside the municipal limits,

Held, that the clerk could be assessed to tax only at the principal place of their employment, namely, the place of residence of the vakil (*Krishnan Pandalai, J.*) CHAIRMAN, MUNICIPAL COUNCIL, PALAMCOTTAH *v.* THIRUMALAISAMI MUDALIAR. **I.R 1932 Mad. 412=137 I C. 585=1932 M.W.N. 125=35 L.W. 230=A.I.R. 1932 Mad. 292=62 M L.J. 259.**

———S. 93—*Profession-tax—Liability of vakil's clerk.*

A vakil's clerk holding appointment as a paid servant cannot be said to exercise a profession so as to be liable to profession-tax under S. 93 (*Krishnan Pandalai, J.*) CHAIRMAN, MUNICIPAL COUNCIL, PALAMCOTTAH *v.* THIRUMALAISAMI MUDALIAR. **I.R. 1932 Mad. 412=137 I.C. 585=1932 M.W N. 125=35 L.W. 230=A.I.R. 1932 Mad. 292=62 M.L.J. 259.**

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———**S. 93 and Sch. IV**—*Commutation of pension—Profession tax on—Levy of—Legality.*

A retired Government servant who had commuted a portion of his pension for a lump sum of money was assessed to profession-tax on that sum as also on the uncommuted pension.

Held, that the commutation money was not a pension any longer and that the levy of profession-tax on the sum was illegal. Pension is a periodical payment of money for past services. (*Beasley, C. J. and King, J.*) MUNICIPAL COUNCIL, SALEM *v.* GURURAJAH RAO. **58 Mad 469=157 I.C. 608=8 R.M. 157 (1)=41 L.W. 146=1935 M.W.N. 89 (2)=A.I.R. 1935 Mad. 249=68 M.L.J. 118.**

———**S. 93 and Sch. IV, R. 18**—*S. 93 controlled by R. 18.*

S. 93 of the Madras District Municipalities Act is controlled by R. 18 of Sch. IV of that Act. Municipalities cannot levy profession tax from persons carrying on business within their limits except when their principal office or place of employment is also within their own jurisdiction. 52 M. L. J. 360, Foll. (*Krishnan Pandalai, J.*) MUNICIPAL COUNCIL, TUTICORIN *v.* RALLI BROTHERS. **150 I.C. 890=7 R.M. 33=39 L.W. 660=A.I.R. 1934 Mad. 420=67 M.L.J. 566.**

———**S. 98**—*"Let out for hire" is different from "ply for hire"—Difference pointed out.*

There is a well-recognised distinction between "letting out for hire" and "plying for hire." Where the persons who are picked up have previously reserved accommodation and the driver or the person in control of the vehicle does not solicit or wait to obtain passengers, there is a "letting out for hire"; whereas on the other hand, there being no antecedent contract or previous arrangement, passengers are received by some process of soliciting, then there is, what is known as a "plying for hire." It is not correct to say that to constitute a "plying for hire" the carriage must run along a fixed route or that the true test of the letting is that the hirer has the power to control the direction or destination of the vehicle. (*Venkatasubba Rao, J.*) MUNICIPAL COUNCIL, KARAIKUDI *v.* THIRUMALAI AYYANGAR. **157 I.C. 977=8 R.M. 194=42 L.W. 199=1935 M.W.N. 521=A.I.R. 1935 Mad. 657=69 M.L.J. 221.**

———**Ss. 103 and 99 (4)**—*"Kept within the municipality"—Meaning of—Vehicle allowed to stand on the roadside.*

The words "kept within the municipality" in S. 103, District Municipalities Act, does not contain any such limitation as that a person keeps a taxable vehicle only if he has an accommodation to contain it and that if he has no fixed accommodation for it, he is not keeping it within the Municipality. By reason of S. 99 (4) the presumption is that every person having possession, custody or control of a taxable vehicle within the Municipality has "kept" the same within the Municipality for sixty days in the half year until the contrary is shown and the burden of showing to the contrary is on the owner of such taxable vehicle. Where a person is found to have in his custody and possession a motor bus but he has no accommodation for it in the shed and it is found to be standing on the roadside, it cannot be said that it is not 'kept within the Municipality' within the meaning of S. 103. (*Beasley, C. J.*) P. M. R. M.M. SIVASWAMI NADAR *v* MADURA MUNICIPALITY. **159 I.C. 929=8 R.M. 583=A.I.R. 1935 Mad. 1056.**

———**S. 142**—*"Public drain"—Storm-water drain, not maintained by the Municipality.*

A water-course which has been in existence for a very long time, serving as a storm-water drain, is a "public drain" within the meaning of S. 142 of the Act, though it has not been provided, and is not maintained, by the Municipal Council and though it has nothing to do with the water supply. (*Burn, J.*) KELU KUTTI *v.* CALICUT MUNICIPAL COUNCIL. **I.R. 1933 Mad 268=143 I.C. 90 (1)=37 L.W. 465=A.I.R. 1933 Mad. 428.**

MAD. DT. MUNICIP. ACT (1884), S. 300.

———**S. 146**—*Order by Municipal Council to remove new latrine—Latrine alleged to be old—Question not decided—Conviction—Soundness of.*

A conviction for disobedience of an order issued by the Chairman of the Municipal Council calling on the petitioner to remove his newly erected latrine to another place cannot be sustained when the petitioner urged that his latrine had been in existence for over twenty years and that question was not gone into by the Court. (*Curgenven, J.*) CHOKKALINGAM PILLAI *v.* EMPEROR. **1933 M.W.N. 223.**

———**(as amended), S. 177**—*Scope—Future elections if exempted.*

All that S. 177 needed to do and did do was to enable the Government to extend the terms of the existing councillors and the mention of certain specific sections is to make it clear that if during the extension of any of the so extended councillors took Government service or became subject to other disqualifications specified, they would still be liable to be declared disqualified under S 51. There was no intention to exempt future elections from the conditions necessary for all elections. (*Krishnan Pandalai, J.*) KANDASWAMI CHETTIAR *v.* MUNICIPAL COUNCIL OF POLLACHI. **141 I.C 293=I.R. 1933 Mad. 102 (2)=37 L.W. 685=1932 M.W.N. 1068=A.I.R. 1933 Mad. 260.**

———**S. 249**—*Offence under—Requisites—Burden of proof.*

No offence can be said to be committed under S. 249 unless it so proved that working of the mill was dangerous to human health. There is no presumption that all mills are dangerous and the onus to prove that a specific mill is dangerous is upon the prosecution ; not upon the defence to prove the contrary. (*Jackson, J.*) SUBRAMANYAM *v.* EMPEROR. **1931 M.W.N. 517.**

———**S. 250**—*Installing machinery without licence—Daily fine—Offence split into periods of—Validity of.*

The permission to instal a flour mill granted to the petitioner was suspended by the Collector on 3—6—1929 and the petitioner was charged with having disobeyed that order and run the machinery from 24—6—1929 to 29—10—1929, not only under Ss. 250 and 313 but also under Sch. VIII and for this purpose the offence was split into periods of a day.

Held, the charge under Sch. VIII was not sustainable in the absence of a previous conviction under S. 313 before 24—6—1929, that in such case the accused can be convicted in respect of the same machine for the one act of installation only, that the theory of a daily offence was entirely misconceived as also the splitting of a day. The petitioner could only have been charged in one case for the full period within the knowledge of the complaint. (*Jackson, J.*) SUBRAMANYAM *v.* EMPEROR. **1931 M.W.N. 517.**

———**S. 300**—*Madras Government Rules for Vaccination, Rr. 2 (1) and 11 (1)—Notice to produce child—Failure—Conviction—Another notice to discontinue breach—Second conviction—Propriety.*

Where the petitioner had already been convicted for disobeying a previous notice to produce a child for vaccination, and a second notice was served on him to discontinue his breach of the previous notice, the petitioner cannot be convicted on non-compliance for the

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same offence on the same facts. (*Pandalai, J.*) SUBRAMANIA IYER *v.* EMPEROR. **I.R. 1931 Mad. 492=131 I.C. 156=32 Cr.L.J 662=1930 M.W.N. 907=33 L.W. 133=1931 Cr. C. 285=A.I.R. 1931 Mad. 181=60 M.L.J. 299.**

——**S. 300**—*Madras Government Rules, R.* 11—*Conscientious objection.*

Quaere.—If an objection to vaccinating a child on the ground that it was, or was *bona fide* believed to be, injurious to its health can be deemed a reasonable excuse within the meaning of the rule. (*Pandalai, J.*) SUBRAMANIA IYER *v.* EMPEROR. **I.R. 1931 Mad. 492 =131 I.C. 156=32 Cr L.J. 662=1930 M.W N 907 =33 L.W. 133=1931 Cr.C. 285=A.I.R. 1931 Mad. 181=60 M.L.J. 299.**

——**S. 300**—*Madras Government Rules, R.* 11 (2)—*Continuing breach.*

Continuing to neglect to produce a child for vaccination is a continuing breach," an offence under R. 11 (2). *Pilcher* v. *Stafford*, 122 E.R. 651, Dist. (*Pandalai, J.*) SUBRAMANIA IYER *v.* EMPEROR. **I.R. 1931 Mad. 492=131 I.C. 156=32 Cr.L.J. 662=1930 M. W.N. 907—33 L.W. 133=1931 Cr.C. 285=A.I.R. 1931 Mad. 181=60 M.L.J. 299.**

——**S. 306, Bye-law No. 1**—*Scope.*

Bye-law No. 1 is badly drafted. It only says that restaurants shall be constructed of durable materials but it does not prohibit any one from doing anything. It does not authorize the Municipal Chairman to issue to any one any notice of any kind nor does it say that failure to obey a notice is punishable. Hence a person who uses for hotels, etc., any premises not constructed as mentioned in Bye law No. 1 will not be liable to penalty. (*Burn, J.*) MUNICIPAL COUNCIL, DINDIGUL *v.* RAJAMANI AYYAR. **6 I.R. (Mad.) 214 (1)= 146 I.C. 77 (1)=34 Cr.L.J. 1158 (2)=1933 Cr.C. 561 (1)=A.I.R. 1933 Mad. 416.**

——**S. 313**—*Installing machine without licence—Nature of offence.*

The permission to instal a flour mill granted to the petitioner was suspended by the Collector on 3-6 1929 and the petitioner was charged with having disobeyed that order and run the machinery from 24-6-1929 to 19-10-1929, not only under Ss. 250 and 313 but also under Sch. VIII and for this purpose the offence was split into periods of a day.

Held, the charge under Sch. VIII was not sustainable in the absence of a previous conviction under S. 313 before 24-6-1929, that in such case the accused can be convicted in respect of the same machine for the one act of installation only, that the theory of a daily offence was entirely misconceived as also the splitting of a day. The petitioner could only have been charged in one case for the full period within the knowledge of the complaint. (*Jackson, J.*) SUBRAMANYAM *v.* EMPEROR. **1931 M W.N. 517.**

——**S. 321 (2)**—*Licence fee—Reasonableness*—Ultra vires *levy.*

The fee charged for licences should be commensurate with the extra costs entailed by granting the licence and exercising such supervision as may be necessary to see that its terms are complied with. It should not be so assessed as substantially to contribute to the general revenues of the Municipality. Whether a fee is or is not unreasonable depends on the facts of each case. Where the fees charged by the Municipal Council in respect of other licences did not exceed Rs. 30 and ordinarily ranged between Rs. 5 and Rs. 20 for such processes as making fish oil, burning bricks, storing manure, etc., a fee of Rs. 100 for storing so inoffensive

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an article as ground-nut is so disproportionate as to betray a policy of unfair discrimination not justified either by the letter or the spirit of S. 321 (2) of the Act. It is therefore *ultra vires*. 52 M. 764; *Kruse* v. *Johnson*, (1898) 2 Q.B. 91; 5 Rang. 212, Ref. to and Rel. on. (*Curgenven and Bhashyam Ayyangar, JJ.*) MUNICIPAL COUNCIL, KUMBAKONAM *v.* RALLY BROTHERS. **I.R. 1931 Mad. 446=130 I C. 750= 1931 M.W.N. 329=34 L.W. 943=A.I.R. 1931 Mad. 497=61 M.L.J. 748.**

——**S. 345**—Applicability—Suit to enforce charge under S. 85—Limitation. *See* LIMITATION ACT, ART. 132. **41 L.W. 457=A.I.R. 1935 Mad. 378.**

——**S. 354**—*Illegal assessment — Jurisdiction of Court.*

Where a person not liable to assssment is assessed by the Municipality, there is a substantial disregard of the provisions of the Act within the meaning of S. 354 of the Madras District Municipalities Act and the assessment can be impeached in a Court of law. The word "final" in R. 28 of Sch. IV (Taxation and Finance Rules) must be taken to refer to the proceedings before the Municipality and could not have been intended to shut out the jurisdiction of the Courts. (*Venkatasubba Rao, J.*) VENKATA NARASIMHA RAO BAHADUR *v.* CHAIRMAN, MUNICIPAL COUNCIL, NARASARAOPET. **58 Mad. 949=159 I.C. 372=8 R M. 495=41 L.W. 170=1935 M.W.N. 116=A.I.R. 1935 Mad. 298 (2) =68 M L.J. 162.**

——**S. 354 (1)**—*Scope—Revision of assessment—No proper notification—Validity of tax.*

S. 354 (1) only provides that clerical errors or mistakes in respect of the name, residence, place of business or occupation of any person or in the description of any property or thing or in respect of the amount assessed, damaged or charged, shall not be enough for impeaching any assessment or demand for taxes. But where the tax-payers were not, as required by the rules, informed that a revision of the assessment of their property had been completed and that they had an opportunity of coming forward and disputing it, the tax imposed without a compliance with the Act is clearly illegal and a suit is maintainable for a declaration to that effect (*Reilly and Anantakrishna Ayyar, JJ.*) MUNICIPAL COUNCIL, ANANTHAPUR *v.* S. VASUDEVA RAO. **55 Mad. 207=135 I.C. 311=I.R. 1932 Mad 71=1931 M.W N. 1097—34 L.W. 719=A.I. R 1931 Mad. 808=61 M L J. 642.**

——**S. 354 (2)**—"*In substance and in effect, complied with*"—*Licence fee—Rate found to be* ultra vires—*Jurisdiction of Court.*

The question of substantial compliance is one of the fact but where the action of the Municipal Council in fixing the licence fees at an exhorbitant rate is found to be *ultra vires*, it follows that the provisions of the Act have not been in substance and in effect complied with and the bar to the jurisdiction of the Court to entertain a suit impeaching the assessment is removed. 19 M. 10; 24 M. 205; 27 M. 547, Ref. (*Curgenven and Bhashyam Ayyangar, JJ.*) MUNICIPAL COUNCIL, KUMBAKONAM *v.* RALLI BROTHERS. **I.R. 1931 Mad. 446= 130 I.C. 750=1931 M W.N. 329=34 L.W. 943=A. I.R. 1931 Mad. 497=61 M L.J. 748.**

[Rel 1931 M.W.N. 1026 (1028).**]**

——**Sch. IV, Rr. 7 to 9**—*Quinquennial revision—No proper notification—Validity of assessment.*

R. 9 of Sch. IV of the Act provides that in case of a general revision of assessment, the Chairman shall give public notice stating that revision petitions will be considered and that notice shall be affixed to the notice-board of the Municipal Office and also published in the

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Municipality by beat of drum. It is the duty of the Chairman under this rule to issue a notification when he has completed his revision of the assessment books, which will give the tax-payers due notice that they have an opportunity of disputing the revised assessment. A vague notice to the effect that the 'Council proposes to increase the taxes" is not a sufficient notice. When not only the taxes were increased but the assessments were made on a revised basis and a notification in the vernacular which left it in doubt as to what it was that was being done, whether it was the assessment of their property that was being revised, or a higher rate of tax which was being calculated on the assessment fixed, is materially defective and a tax based upon the new assessment is, therefore, illegal. (*Reilly and Ananthakrishna Aiyar, JJ.*) MUNICIPAL COUNCIL, ANANTHAPUR *v.* S. VASUDEVA RAO. **55 Mad. 207=135 I.C. 311=I.R. 1932 Mad. 71=1931 M W.N. 1097=34 L W. 719=A.I.R. 1931 Mad. 808=61 M.L J. 642.**

———Sch. IV, R. 16—*'Office.'*

The office referred to in R. 16 is the office of a company and the office must be something which falls within the category of an head office, principal office or branch office of a company. It is a different thing from a shop of the company. Where a company has its depot where it did nothing except distribute and sell goods which it produced as manufacturers elsewhere and no office work of the company in the proper sense is done there at all, the depot cannot be called an office. (*Pandalai, J.*) EASTERN DISTILLERIES AND SUGAR FACTORIES, LTD. *v.* THE MUNICIPAL COUNCIL, NEGAPATAM. **I. R. 1933 Mad. 416=144 I.C. 486=38 L.W. 226=A.I. R. 1933 Mad. 496.**

———Sch. IV, R. 20 – *Revision.*

The decision on a question whether a particular company which carried on its business within the municipal limits had or had not an office within the meaning of R. 16 is revisable. (*Pandalai, J.*) EASTERN DISTILLERIES AND SUGAR FACTORIES, LTD. *v.* THE MUNICIPAL COUNCIL, NEGAPATAM. **I R. 1933 Mad. 416 =144 I C. 486=38 L.W. 226=A.I.R. 1933 Mad. 496.**

———Sch. IV, R. 28—"Final"—Meaning of—Illegal assessment—Jurisdiction of Court. *See* MADRAS DISTRICT MUNICIPALITIES ACT, S. 354. **68 M.L.J. 162.**

———Sch. IV, Rr. 56 and 58—*Re-opening of audits —Validity of.*

The rules provide for one recurring audit only, as the result of which defaulters can be charged or surcharged. They do not provide for extraordinary audits or the re opening of audits when once they have been closed. The rule in England is that if an act, which prescribes the holding of periodical audits, omits to give power to direct the holding of an extraordinary audit, an account which has been audited and closed at one of the periodical audits cannot be re-opened. So an extraordinary audit of municipal accounts and a surcharge certificate based thereon are not valid. (*Waller and Krishnan Pandalai, JJ.*) TULASI RAM *v.* CHAIRMAN, MUNICIPAL COUNCIL, MADURA. **55 Mad. 298=135 I C. 452=I.R. 1932 Mad. 132=34 L.W. 697=1931 M. W.N. 994=A.I.R. 1932 Mad. 90=62 M.L J. 77.**

———Sch. IV, R. 61—*Extraordinary audit and surcharge—Right of suit—Appeal to Government—Election.*

An extraordinary or supplemental audit not being one contemplated by the rules in Sch. IV a suit by the plaintiff aggrieved by an order of surcharge based thereon is not affected by the remedies provided by those rules, even if those remedies be held to be substituted for the ordinary remedy by suit in cases governed by the rules.

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For the same reason that the surcharge is not governed by the rules, the fact that the plaintiff appealed to Government would not constitute an election on his part and disable him from seeking relief in the Courts. (*Waller and Krishnan Pandalai, JJ.*) TULASI RAM *v.* CHAIRMAN, MUNICIPAL COUNCIL, MADURA. **55 Mad. 298=135 I C. 452=I.R. 1932 Mad. 132=34 L. W. 697=1931 M.W.N. 994=A.I.R. 1932 Mad. 90= 62 M.L.J. 77.**

———Sch. VIII—*Installing machine without licence —Daily fine—Impropriety.*

The permission to instal a flour mill granted to the petitioner was suspended by the Collector on 3-6-1929 and the petitioner was charged with having disobeyed that order and run the machinery from 24-6-1929 to 19-10-1929, not only under Ss. 250 and 313 but also under Sch. VIII and for this purpose the offence was split into periods of a day.

Held, the charge under Sch. VIII was not sustainable in the absence of a previous conviction under S. 313 before 24-6-1922, that in such case the accused can be convicted in respect of the same machine for the one act of installation only, that the theory of a daily offence was entirely misconceived as also the splitting of a day. The petitioner could only have been charged in one case for the full period within the knowledge of the complaint. (*Jackson, J.*) SUBRAMANYAM *v.* EMPEROR. **1931 M.W.N. 517.**

———(V OF 1920)—ELECTION RULES—R. 4 of Rules for election of chairman and vice-chairman of Municipal Councils—Declaration of result of polls—*Certiorari. See* S. 12 AND R. 4 *infra.* **A.I.R. 1931 Mad. 122=60 M.L.J. 260.**

———ELECTION RULES—R. 7 (2)—*Rejection of nomination paper—Application for* certiorari—*Sustainability.*

The Election Officer has exclusive jurisdiction to examine the nomination papers and scrutinise them and listen to objections and then to decide whether the nominations papers should be received or rejected. Where he so rejected the High Court cannot interfere by *certiorari* even if the Officer acted wrongly. The remedy in such a case is by an election petition. (*Beasley, C.J. and Cornish, J.*) GOVINDASWAMI PILLAI *v.* RAMALINGASWAMI. **I.R. 1932 Mad. 456=137 I.C. 868= 1932 M.W.N 61=35 L.W. 360=A.I.R. 1932 Mad. 321=62 M.L J. 644.**

———R. 11 (2)—*Rules for the Conduct of Inquiries and Decision of Disputes relating to elections R. 11 (2) —Exercise of discretion by Commissioner—Interference.*

Where the Election Commissioner holds an election to be void and declares the person who got the next highest number of votes to be duly elected, his order is valid, even though the effect of the order may be to disenfranchise a large number of voters who had voted in ignorance of the disqualification of the candidate whose election has been set aside. Propriety of ordering fresh election in such cases pointed out. (*Bardswell, J.*) SHANMUGA MUDALIAR *v.* SUBBARAYA MUDALIAR. **140 I.C. 540=I.R. 1933 Mad. 21=37 L.W. 162=A. I.R 1933 Mad. 133 (2)=63 M.L.J. 932.**

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———Ss. 3 and 6—*Grant of land for maintenance—Land recorded as ryoti in* 1913 *and cultivated by tenants admitted by grantee—Occupancy rights, if acquired.*

The suit land formed part of a maintenance grant made by the late Raja of Pithapuram in favour of his

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adopted son. Prior to the grant it was private land but in the record of rights of 1913 it was treated as ryoti land with the adopted son as the landholder and two tenants as his ryots. The building which it contained fell down and the whole area was being cultivated with dry crops by the tenants.

Held, (*i*) that the land remained *ryoti* land throughout for the purpose of the Estates Land Act although it was temporarily devoted to a purpose more characteristic of private land; (*ii*) that the owner of a life-estate was a "landholder" within the Act; that on a proper construction of the grant made in favour of the adopted son, a life-estate and not merely a right of residence had been granted to him and as he was the landlord within the meaning of the Act, the tenants admitted by him acquired a permanent right of occupancy. (*Curgenven and Sundaram Chetty, JJ.*) MAHARAJA OF PITHAPURAM *v.* VENKATA MAHIPATHI. **I.R. 1933 Mad. 246 (2) = 142 I.C. 744 = A.I.R. 1933 Mad. 462.**

——**S. 3 (1)**—"*Agricultural purposes*"—*Meaning—Person holding ryoti land for casuarina plantation—Suit by landlord to recover possession and damages—Jurisdiction of Civil Court.*

A person who holds ryoti land in an "estate" for the purpose of casuarina plantation does not hold it "for purpose of agriculture" and is therefore not a ryot within the meaning of the Madras Estates Land Act and a suit brought by the landlord against him to recover possession of the land and for damages can be entertained by the Civil Court. Meaning of the expression "agricultural purposes" discussed.

Per *Reilly, J.*—"Agriculture" cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on. (*Reilly and Anantakrishna Aiyar, JJ.*) CHANDRASEKARA BHARATI SWAMIGAL *v.* DURAISWAMY NAIDU. **54 Mad 900 = I.R. 1931 Mad. 794 = 134 I.C. 42 = 34 L.W. 185 = A.I.R. 1931 Mad. 659 = 61 M.L.J. 648.**

——**S. 3 (2)**—*Burden of proof.*

Where evidence is inconclusive as to whether the inam grant conveyed the kudivaram right or not, the burden of proof that the inam is an estate within the Act is on the defendant because the terms of S. 9, C. P. Code, lay down a general rule in favour of the jurisdiction of the Civil Court, and the burden of proof is on the party who maintains an exception to the general rule. 39 Mad. 21, Rel. on. (*Lord Thankerton.*) RAMAYYA *v.* LAKSHMINARAYANA. **61 I.A. 177 = 57 Mad. 443 = 38 C.W.N. 669 = 1934 M.W.N. 386 = 59 C.L.J. 434 = 1934 A.L.J. 402 = 6 R.P.C. 117 = 148 I.C. 327 = 3 A.W.R. 566 = 11 O.W.N. 468 = 39 L.W. 329 = A.I.R. 1934 P.C. 84 = 67 M.L.J. 1 (P.C.).**

——**S. 3 (2) (e)**—*Estate — Mokhasa—Vizagapatam District.*

Where in the inam fair register of the village of Narava, Narava was mentioned as a Mokhasa village and that its value was included in the assets upon which the Zamindar's peishkush was settled and it also appeared that the village was registered under the head of Jeroyati in the sand-i-milkiyat istimrar granted to the Zamindar it was held that the village was an estate within the meaning of the section, especially having regard to the ruling that when it is proved that the income or revenue of the village is included in the permanent settlement *prima facie* that makes it an estate. The word "Mokhasa" implies a service tenure and falls within the words a village held on permanent under-tenure. To constitute an under-tenure it is not necessary there should be rent-payable in cash or in kind. Service would be rent for such a purpose. (*Anantakrishna Aiyar and Cornish, JJ.*) NARAYANASWAMI BAHADUR *v.* BODA THAMMAYYA. **1930 M.W.N. 945.**

——**S. 3 (5)**—"*Land-holder*"—*Usufructuary mortgagee or person in adverse possession for over 12 years under invalid mortgage.*

A usufructuary mortgagee in possession of an estate under a valid mortgage or a person in adverse possession for over 12 years under an invalid mortgage is entitled to collect the rents and to be recognized as landlord under S. 3 (5), Madras Estates Land Act. (*Walsh and Varadachariar, JJ.*) VALLACHAMI PILLAI *v.* THIRUVAVOOR DEVASTHANAM. **156 I.C. 222 = 7 R.M. 660 = A.I.R. 1935 Mad. 452.**

——**Ss. 3 (10) and 185**—*Private land—Proof—Land described as "seri" and "jeroiti"—Presumption as to land not being private land—If rebutted.*

The plaintiff sued for a declaration that certain lands comprised in his estate were "private lands" within the meaning of S. 3 (10) of the Act. The plaintiff relied on certain documents which referred to the lands as "seri" while the defendants relied on certain other documents wherein the lands were described as "jeroiti".

Held, that the description of the land as "seri" was not sufficient to rebut the presumption under the law that the land was not private land. Meaning of the words "seri" and "jeroiti" discussed. 39 Mad. 341; 27 M.L.J. 718; 31 M.L.J 214; A.I.R 1928 Mad. 58 and A.I.R. 1928 Mad. 786, Ref. (*Beasley, C. J. and Cornish, J.*) APPA RAO *v.* SREERAMAREDDI SANYASAYYA. **157 I.C. 988 = 8 R.M. 186 = 1935 M.W.N 847 = 42 L.W. 29 = A.I.R. 1935 Mad. 583 = 69 M.L.J. 25.**

——**S. 3 (11) (a)**—"*Payable by a ryot as such*"—*Meaning of.*

Fees charged over and above the rent for the costs of collecting rent and not shown in the record of rights or in any patta issued by the landlord or by the Land Settlement Officer cannot be deemed to be rent under S. 3 (ii) (*a*) of the Estates Land Act and hence cannot be recovered by reason of S. 143 of the Act, such fees to be "rent" must be payable not merely with the rent and by the ryot, but by the ryot as such, *i.e.*, it must be payable by him an incident of his holding; and it must further be payable by him to the landlord before the landlord can claim it. A charge for collecting rent cannot be regarded as a payment payable by the tenant as tenant. (*Stone and Pandrang Row, JJ.*) BASUDEVA DOSS *v.* RAZA HARISCHANDARAN JAGADDEVA GARU. **59 Mad. 408 = 159 I.C. 1092 = 8 R.M. 601 = 1935 M.W.N. 1259 = 42 L.W. 851 = A.I.R. 1936 Mad. 126 = 69 M.L.J. 917.**

——**S. 3 (11) (b)**—*Scope — Income from fishery—Exemption from assessment to income tax.*

S. 3 (11) (*b*) merely extends the procedure prescribed in the Act for the recovery of arrears of land rent to the recovery of sums payable by a ryot on account of fishery rents. It does not enable the Zamindar to an exemption of such income from assessment to income-tax. (*Beasley, C.J., Anantakrishna Iyer and Cornish, JJ.*) COMMISSIONER OF INCOME TAX, MADRAS *v.* SEVUGA PANDIA THEVAR. **140 I.C. 450 = 56 Mad. 251 = I.R. 1933 Mad. 1 = 1932 M.W.N. 1207 = 36 L.W. 719 = A.I.R. 1932 Mad. 757 = 63 M.L.J. 634 (S.B.).**

——**S. 3 (16) (a)**—*Tank-bed—Portions temporarily brought under cultivation—Effect.*

Where certain plots of land in the higher portion of a tank-bed situated in a zamindari were submerged in normal times after rainfall every year but were brought under cultivation in other seasons.

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Held, that the lands did not cease to be tank-bed merely because cultivation was so carried on.

Held, further, that the lands did not become 'ryoti' by reason of their assignment by the landholder for purposes of cultivation. A certain land cannot at the same time be both tank-bed and ryoti. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) MEERALLI AMBALAM *v.* SHUNMUGHA RAJESWARA SETHUPATHI. **57 Mad 593 = 1934 M.W.N. 574 = 151 I C. 331 = 7 R.M. 137 = 39 L.W. 334 = A.I.R. 1934 Mad. 221 = 66 M.L.J. 338.**

———**S. 3 (16) (c)**—*Service tenure—Tenants holding under grantee—Acquisition of occupancy rights.*

Where a village is granted on service tenure and the grantee lets tenants into possession of the land after the passing of the Estates Land Act, though the grantee is a landholder and the land is an estate, the tenants do not acquire occupancy rights under S. 6 (1) because the land is excluded from ryoti land under S. 3 (16) (*c*). 46 M L. J. 515, Cons (*Waller and Jackson, JJ.*) SADASIVARAYUDU *v.* VENKATASWAMI. **I R 1932 Mad. 401 (2) = 137 I.C. 496 = 35 L.W. 356 = A.I.R. 1932 Mad. 289 = 62 M.L.J. 598.**

———**S. 4**—*Pada Nazir.*

The Zamindar is entitled to collect Pada Nazir as rent. (*Sundaram Chetty, J.*) RAJAH OF RAMNAD *v.* KUPPAMMAL. **131 I C. 121 (2) = 1930 M W.N. 1235 = A.I.R. 1931 Mad. 206.**

———**S. 4**—*Rent—Right to—Land allowed to lie fallow.*

The claim for rent by the landlord in respect of lands allowed to lie fallow is not sustainable in view of the ruling of the Privy Council in *Rajah of Ramnad* v. *Mangalam*. (*Sundaram Chetty, J.*) RAJAH OF RAMNAD *v.* KUPPAMMAL. **131 I C. 121 (2) = 1930 M.W.N. 1235 = A.I R. 1931 Mad. 206.**

———**S. 4**—*Suit for rent—Plea of lands left waste due to causes beyond control of ryots—Burden of proof.*

Where in a suit for rent, the tenants plead that by custom they were not liable for rent for lands left waste due to causes beyond their control, the burden is on the ryots to prove the circumstances under which the lands could not be cultivated. 7 L W. 47, Rel. on. (*Jackson and Mockett, JJ.*) RAJA OF RAMNAD *v.* PERUMAL MOOPAN. **141 I.C. 29 = I.R. 1933 Mad. 66 = 36 L. W. 795 = A.I R. 1933 Mad. 101 = 63 M.L J. 884.**

———**S. 5**—*Scope—Suit for contribution by a ryot against his co sharer.*

S. 5 declares in effect that subject to any right of Government, the rent of ryoti land shall be a first charge on the holding and on the produce of the holding or any part thereof. That is a charge created for the benefit of the landholder and applies to rent only so long as it is due to him in that character. Where the claim is not for rent but for contribution by a ryot against his co-sharer though the claim arises from the former's payment of rent which the latter was bound to pay, S. 5 has no application. (*Waller and Krishnan Pandalai, JJ.*) VYRAPERUMAL MUDALIAR *v.* ALAGAPPA MANIAGARAR. **55 Mad. 468 = 34 L W. 889 = 135 I.C 609 = 1931 M W.N 1197 = I R 1932 Mad. 177 = A.I R. 1932 Mad 189 = 62 M L.J. 31.**

[R. 34 P.L.R. 28 (30)]

———**S. 6 (1)**—*Service tenure—Tenants holding under grantee—Acquisition of occupancy rights.*

Where a village is granted on service tenure and the grantee lets tenants into possession of the land after the passing of the Estates Land Act, though the grantee is a landholder and the land is an estate, the tenants do not acquire occupancy rights under S. 6 (1), because the land is excluded from ryoti land under S. 3 (16) (*c*). 46 M.L.J. 515, Cons. (*Waller and Jackson, JJ.*) SADASIVARAYUDU *v.* VENKATASWAMI. **I.R. 1932 Mad 401 (2) = 137 I C. 496 = 35 L.W. 356 = A.I.R. 1932 Mad. 289 = 62 M.L.J. 598.**

———**Ss. 7 and 11**—*Stones and boulders—Right of raiyat to remove.*

Land not being defined in the Act, must be taken in its ordinary sense of the solid part of the earth's surface as opposed to water; rock is in this sense just as much land as sand or earth are. The zamindar cannot therefore interfere with a raiyat if he clears the stones and boulders away from his land. All that zamindar can legitimately demand is his customary fee, if any, for the removal of the stones and compensation for such damage as may accrue, in case the stones are removed without his permission. The question, only assumes a new aspect if the raiyat proceeds to quarry a stone of recognized commercial value. In that case the zamindar can reserve his mining rights under S. 7. (*Jackson, J.*) ARULANANDA NADAR *v.* JANAKI BAI AMMAL. **150 I.C. 649 = 7 R.M. 23 = A.I.R. 1933 Mad 525.**

———**S 12**—*Reservation of rights under—Contract—Termination.*

Under S. 12 the reservation of the right is effected by force of custom or by a definite contract to reserve it. In the latter case, unless the contract states that the reservation is in perpetuity it must cease with the ceasing of the contract. (*Wallace, J.*) VALLAYYA *v.* BOMMADEVARA SATYANARAYANA VARAPRASADA RAO. **I R. 1932 Mad. 818 = 140 I.C. 92 = A.I.R. 1932 Mad 554.**

———**S. 13 (3)**—*Applicability—Dry land held on* cropwar *system—Tenants digging wells and raising wet crops—Landlord's rights to charge wet rates.*

S. 13 (3) applies also to lands held by ryots on the *cropwar* system. Such lands are not excluded from the operation of the general rule laid down therein. So in the case of such lands, where the tenants dig up new wells in the fields and raise wet crops with the water therefrom, the landlord is not entitled to charge wet rates for the crops so raised, which are admittedly higher than the dry rates otherwise chargeable. (*Madhavan Nair, J.*) ADINARAYANASWAMI *v.* RAJA SIR ANNAMALAI CHETTIAR. **159 I.C. 779 — 8 R M. 547 = 42 L.W. 863 = 69 M.L.J. 719.**

———**S. 13 (3)**—*Improvement—Fruit trees—Cocoanut plantation before and after Act—Right of landholder to enhance rent.*

The ryots of a certain village had since 1881 been paying a specially high rate on the dry lands held by them if they had grown cocoanuts thereon and they had also during that period signed *muchilikas* agreeing to pay according to the village *riwaz* if they should grow cocoanuts on dry land. There were also other pattahs going back to the year 1868 wherein a similar clause appeared but a patta of the year 1868 was silent on the point and in several of those earlier puttas there was a provision that the ryot should not plant cocoanut trees without the proprietor's permission. The evidence showed that the ryots had been required to pay the same rates for the period before the cocoanut trees came to bearing as after that date. There was also no proof of admission of ryots to the lands after the practice of paying higher rent for cocoanut plantation came into force. The suit was instituted to enforce the landholder's right to charge the higher rate in respect of cocoanut trees planted before and after the passing of the Madras Estates Land Act.

Held, that a cocoanut tree is a fruit tree and the plantation of cocoanut trees an improvement within the

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meaning of the Madras Estates Land Act, and the landholder was by reason of S. 13 (3) of the Act not entitled to claim any enhancement in respect of trees planted after the Act came into force. 50 M. 482, Diss. From.

Held, further, that in respect of the trees planted before the Act took effect, the plaintiff had not succeeded in proving a contract for payment of the enhanced rent and the claim was consequently not sustainable. (*Reilly and Anantakrishna Ayyar, JJ.*) BOMMADEVARA CHAYADEVAMMA BAHADUR *v.* VENKATASWAMY. **I.R. 1932 Mad. 481=138 I.C. 40=1932 M.W.N. 264=35 L.W. 498=A.I.R. 1932 Mad. 343=62 M.L.J. 511.**

——**S. 13 (3)**—"*Improvement at the sole expense of the tenant*"—*Wells sunk by tenants in patta lands.*

Where a well is dug in poramboke land by the tenant, the landholder, by handing over that area to the tenant, may be deemed to have contributed to the cost of the well. But where a well is sunk in patta land by the tenant without any monetary assistance from the landlord, the prospective loss of rent on the area of the site covered by the well cannot be deemed as a contribution by the landholder for he is nevertheless free to charge rent at the prevailing rates for that area also. (*Sundaram Chetty, J.*) ANNAMALAI CHETTIAR *v.* SRI RAMA NARASIMHULU NAIDU. **I.R. 1933 Mad. 86 (2)=141 I.C. 148=1932 M.W.N. 1328=37 L.W. 154=A.I.R. 1933 Mad. 257=64 M.L.J. 18.**

[Rel. 69 M.L.J. 719 (721).]

——**S. 13 (3)**—*Improvement*—Vanpayir *rate*—*Wells dug long ago.*

Where it was found that the wells were dug long ago and that the *Vanpayir* rate was being levied for over a century, the Zamindar's claim for *Vanpayir* is not affected by S. 13 (3) of the Act. (*Sundaram Chetty, J.*) RAJAH OF RAMNAD *v.* KUPPAMMAL. **131 I.C. 121 (2)=1930 M.W.N. 1235=A.I.R. 1931 Mad. 206.**

——**S. 20**—*Ryoti land*—*Tank bed*—*Portions let out for cultivation*—*Effect.*

Where certain plots of land in the higher portion of a tank-bed situated in a Zamindari were submerged in normal times after rain-fall every year but were brought under cultivation in other seasons,

Held, that the lands did not cease to be tank-bed merely because cultivation was so carried on,

Held, further, that the lands did not become 'ryoti' by reason of their assignment by the landholder for purposes of cultivation. A certain land cannot at the same time be both tank-bed and ryoti. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) MEERALLI AMBALAM *v.* SHANMUGHA RAJESWARA SETHUPATHI. **57 Mad. 593=1934 M.W.N. 574=151 I.C. 831=7 R.M. 137=39 L.W. 334=A.I.R. 1934 Mad. 221=66 M.L.J. 338.**

——**Ss. 24 and 30**—*Agreement to pay enhanced rent by tenant*—*Enforceability.*

Rent can be enhanced only as provided in the Act. Hence the landlord cannot enhance it without a suit and independently of the Act by agreement with his tenant. And such an agreement by the tenant to pay enchanced rent is not enforceable. (*Venkatasubba Rao, J.*) APPALANARASIAH CHETTY *v.* CHITTAVADU. **40 L.W. 29=1934 M.W.N. 528=151 I.C. 964=7 R.M. 159=A.I.R. 1934 Mad. 454=67 M.L.J. 199.**

——**S. 24**—*Enhancement*—*Provisional Commutation*—*Subsequent collection of part of rent in kind*—*Validity.*

Where as an act of grace, the Collector originally commuted the rent in kind into cash payment as a provisional measure, the subsequent collection of a portion of the rent in kind is not an enhancement of the rent.

MADRAS ESTATES LAND ACT (1908), S. 26.

(*Sundaram Chetty, J.*) SEENIA PILLAI *v.* TALUQ BOARD OF SERMADEVI. **131 I.C. 124=1930 M.W.N. 1228=33 L.W. 70=A.I.R. 1931 Mad. 200.**

——**Ss. 24 and 30**—*Mandatory provisions*—*Enhancement of rent*—*Agreement between landlord and tenant*—*Enforceability.*

S. 24 is absolute and peremptory. The landholder cannot, independently of the Act and without a suit under S. 30, enhance the rent by agreement with his tenant and it is open to the latter, in proceedings instituted by the landholder under S. 112 to contest the landlord's right of sale on the ground that a portion of the arrear claimed was rent so enhanced, though a pattah and muchilika had been exchanged between the parties. (*Jackson and Mockett, JJ.*) RAGHUNATHA DESIKACHARIAR *v.* RANGASWAMI PILLAI. **56 Mad. 300=I.R. 1932 Mad. 797=139 I.C. 833=36 L.W. 579=1932 M.W.N. 1057=A.I.R. 1932 Mad. 729=63 M.L.J. 575.**

——**Ss. 24 and 30**—*Scope*—*Landlord's claim to additional rent on ground of increase in production owing to better irrigation facilities*—*When sustainable*—*Procedure.*

Under the provisions of Ss. 24 and 30 of the Estates Act, no enhancement of rent can be claimed by the landlord except under the special provisions enacted in that respect; if he wishes to enhance the rent he must do so by filing a suit before the Collector. A claim to additional rent on the ground that the land has become more productive by reason of better irrigation facilities afforded by the landlord—it being alleged that the tenant raised wet crop on dry land and a second crop on wet land by the use of the landlord's water—amounts to an enhancement, having regard to the implications of S. 30 of the Act. Such a claim to enhanced rent cannot be sustained unless the prescribed procedure is followed. (*Ramesam and Venkatasubba Rao, JJ.*) SUNDARAM PILLAI *v.* KARUAPAYEE AMMAL. **59 Mad. 5=160 I.C. 1015=8 R.M. 743=42 L.W. 771=A.I.R. 1935 Mad. 1073=69 M.L.J. 48.**

——**S. 26**—*Applicability*—*Lease of waste lands for thirty years*—*Permanent lease by lessee*—*Execution against original lessee*—*Sale of lessee's rights*—*Demand by purchaser of normal rate*—*Refusal by lessee.*

A person took a lease of waste lands for a period of thirty years under a deed providing that so far as the waste lands in the village were concerned he might give cowles in any way he pleased during the period of lease after which the land would be liable to pay half waram. He made a permanent lease of the suit lands in favour of defendants, though he had no right to give lease for a period extending beyond the period of his own lease. But afterwards he obtained a permanent lease and sometime later, and his rights in them were sold in execution of a decree and purchased by the plaintiff. The plaintiff after waiting up to the termination of the period of thirty years from the date of the first lease demanded of the defendant rent of the normal rate which lands of similar quality would be liable to pay. The defendant refused on the strength of the prior lease in his favour.

Held, S. 26 did not help the defendant; the lease granted to him in contravention of the provision in the first lease was not *bona fide* and so S. 11 of the Rent Recovery Act was also of no avail. (*Ramesam, J.*) CHIDAMBARAM CHETTIAR *v.* CHOKKALINGAM NAICKAN. **I.R. 1931 Mad. 466=131 I.C. 2=1931 M.W.N. 549=34 L.W. 394=A.I.R. 1931 Mad. 571=61 M.L.J. 52.**

——**S. 26**—'*Period.*'

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The word 'period' refers to a section of time and cannot cover a case of perpetuity; so the section applies only to leases for certain periods and not perpetual leases. (*Ramesam, J.*) CHIDAMBARAM CHETTIAR *v.* CHOKKALINGAM NAICKAN. **I.R. 1931 Mad. 466 = 131 I.C. 2 = 1931 M.W N. 549 = 34 L.W. 394 = A.I R. 1931 Mad. 571 = 61 M.L.J. 52.**

——**S. 26**—"*Premium, loan or other valuable consideration*"—*Meaning.*

The premium, loan or other consideration must be something other than the rent reserved by the lease and the rent itself cannot be regarded as such valuable consideration on the ground that nothing was being derived from the land previously. (*Ramesam, J.*) CHIDAMBARAM CHETTIAR *v.* CHOKKALINGAM NAICKAN. **I. R. 1931 Mad. 466 = 131 I.C. 2 = 1931 M.W.N. 549 = 34 L.W. 394 = A.I R. 1931 Mad. 571 = 61 M L.J. 52.**

——**S. 26**—*Scope.*

The first clause which refers to clearing and bringing waste land in the estate into cultivation is not retrospective in its operation. (*Ramesam, J.*) CHIDAMBARAM CHETTIAR *v.* CHOKKALINGAM NAICKAN. **I.R. 1931 Mad. 466 = 131 I C. 2 = 1931 M.W.N. 549 = 34 L.W. 394 = A.I.R. 1931 Mad. 571 = 61 M.L.J. 52.**

——**S. 26 (3)**—"*Ryot*"—*Meaning of—Tenant at-will in possession before grant, if included in the term.*

The term "ryot" in S. 26(3) is not confined to a ryot under the Estates Land Act to whom occupancy rights have been granted; it includes the former tenants of the land who were in possession before the date of the grant paying rent under a contract enforceable at law. Where the agreement by the prior tenants to pay rent is not shown to be bad in law or prohibited by it, the rate of rents which they agreed to pay must, in the absence of any faisal rate, be considered to be a lawful rate. 7 L. W. 376, Dist. (*Beasley, C. J. and Bardswell, J.*) VENTATARAYANIM GARU *v.* THE MAHARAJA OF PITTAPURAM. **56 Mad 486 = I.R. 1933 Mad. 313 = 143 I.C. 608 = 1933 M W N. 258 = 37 L.W. 495 = A. I.R. 1933 Mad. 427 = 64 M L.J. 503.**

[D. 1934 Mad. 160 (161).]

——**S. 30**—*Applicability—Landlord's claim to charge for water—Maintainability.*

The landlord's right to rent under the Estates Land Act must be determined solely with reference to the sections of the Act. The Act contains no provisions to the effect that a charge or cess is payable for the use of the landlord's water. If he desires to enhance the rent, he must bring himself within the terms of S. 30 of the Act. The bare fact that his water has been used is not mentioned in that section as a ground justifying enhancement. Granting that his water has been used he must, under S. 30 read with S. 3 (*iv*), show that the productive power of the land has increased by some positive "improvement" effect by his agency or at his expense; he can make good his claim only by showing a direct conviction between the water so used and the improvement he has effected. "Rent" under the Act, no doubt, includes whatever is payable on account of the use and enjoyment and water supplied or taken for cultivation of land. But the water must be "supplied" or "taken." It is not sufficient to show that some water which the landlord could not prevent from overflowing or the tenant had no option of refusing was used by the tenant. (*Ramesam and Venkatasubba Rao, JJ.*) SUNDARAM PILLAI *v.* KARUPPAYEE AMMAL. **59 Mad. 5 = 160 I.C. 1015 = 8 R.M. 743 = 42 L.W. 771 = A.I.R. 1935 Mad. 1073 = 69 M.L.J. 48.**

——**Ss. 30 & 27**—Enhancement of rent—Agreement between landlord and tenant—Effect. *See* MADRAS ESTATES LAND ACT, SS. 24 AND 30. **A.I.R. 1932 Mad 729 = 63 M.L.J. 575.**

MADRAS ESTATES LAND ACT (1908), S. 55.

——**S. 42 (2)**—*Application under in suit for rent after framing of issues—Power of Collector to vary rent for period prior to application.*

An application filed under S. 42 (2) after issues have been joined in a suit for rent cannot have the effect of validly altering the rent for the previous years for which rent is claimed in the suit itself. S. 42 (2) does not contemplate that such an application to the Collector should have the effect of nullifying the basis of the contractual relationship between the parties for a period prior to the filing of the application. (*Wadsworth, J.*) KRISHNAMARAJU *v.* VENKATAPATHIRAJU. **159 I.C. 594 = 8 R.M. 519 = 1935 M.W N. 1204 = 43 L.W. 206 = A.I.R. 1936 Mad. 10 = 69 M.L J. 809.**

——**Ss. 45, 163, 211 and Sch. B, Art. 7**—*Application under—Limitation.*

The date of occupation mentioned in Art. 7, Sch. B to the Act is the date on which the unauthorized occupation began. If the unauthorized occupation began more than a year before the date of the application under S. 45, the bar of limitation under Art. 7 cannot be got over. In order to interpret Art. 7, Part B, in the schedule to the Act, S. 23, Limitation Act, cannot be invoked in aid. No doubt S. 211 overrides the general provisions of the Limitation Act in S. 29 and it may be possible in a suitable case to apply the principle of S. 23, Limitation Act, but in an application under S. 45, when the date of occupation mentioned in Art. 7 has to be understood only as the date on which the occupation was begun. S. 23, Limitation Act, can be of no avail. If the application under S. 45 is not promptly made within one year from the date of the first occupation, this particular remedy cannot be had by the landholder and he has only to sue the occupant under S. 163 for possession of the land treating him as a trespasser. (*Sundaram Chetty, J.*) VENKATADRI APPA RAO *v.* CHAKRAPANI RAO. **6 I.R. (Mad.) 30 = 144 I.C. 963 = 1933 M.W.N. 1230 = 38 L.W. 214 = A.I.R. 1933 Mad. 521.**

——**S. 52 (1)**—*Scope.*

S. 52 (1) only applies to cases of ryots with occupancy rights in an estate. (*Pakenham Walsh, J.*) KURAMAYYA *v.* SATYANARAYANA. **I R. 1932 Mad. 613 = 138 I.C. 877 = 33 Cr.L J. 704 (1) = 35 L.W. 849 = 1932 Cr.C. 828 = A.I.R. 1932 Mad. 700.**

——**S. 53**—*Continuance of patta—Effect—Enhanced rent—Right of landlord to claim.*

The consequence of a valid patta continuing in force by reason of S. 53 is only that the landholder cannot distrain on the ryot's movables or sell his holding except for the amount mentioned in the patta. Tho only effect of there being a patta so far as suits for rent are concerned is that except in special cases falling under Ss. 25, 30, 42 and 45 which require the order of the Collector for the determination of rent, the rent mentioned in the patta will, under Ss. 27 and 28, be presumed to be the proper rent until the contrary is shown. It is consequently open to the landholder except in more excepted cases to show even in the absence of fresh patta that he is legally entitled to a different amount or rate of rent from that mentioned in the old patta. (*Waller and Krishnan Pandalai, JJ.*) FOULKES *v.* KANDASWAMY PILLAI. **55 Mad. 994 = 1932 M.W.N. 767 = 142 I C. 99 = I.R. 1933 Mad. 191 = 37 L.W. 49 = A.I.R. 1932 Mad. 739 = 63 M.L J. 949.**

——**Ss 55 and 145**—*Subdivision of holding—Right of landlord—Fair rent—Determination—Procedure.*

Under the Madras Estates Land Act the landlord has got the first right to subdivide the holding whenever there is a transfer of a portion. It is both a right and

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a duty, the policy of the Act being that every holding should be liable to a fair and equitable rent. Even if the tenant should fail to file an application under S. 145 of the Act within the prescribed period, the landlord does not acquire a right to fix the rent arbitrarily and the proper rent can be determined incidentally in a suit for patta under S. 55 of the Act. (*Ramesam and Curgenven, JJ.*) VENKATARAMAYYA *v.* MAHARAJA OF PITTAPURAM **152 I.C. 712 = 1934 M.W.N. 881 = 7 R M. 279 = 40 L.W. 296 = A.I.R. 1934 Mad. 601 = 67 M.L.J. 407.**

——**S 59** —"*Established usage*".

The expression "established usage" is not synonymous with custom A usage need not possess the same degree of antiquity as a custom. The usage referred to in the section is not that of the entire estate, but of the particular holding with reference to which the question arises. (*Venkatasubba Rao, J.*) RAJARAM MEHTA *v.* NARAYANASWAMI NAIDU. **55 Mad. 169 = 135 I.C. 32 = I.R. 1932 Mad 64 = 34 L.W. 276 = 1931 M.W.N. 807 = A.I.R. 1931 Mad. 723 = 61 M L J. 357**

——**Ss 61 and 187 (2)**—*Applicability—Pro-note in lieu of rent—Suit on—Nature.*

Ss. 61 and 187, (2) Madras Estates Land Act, only apply if a suit is brought directly on the liability of the raiyat to pay rent But where the raiyat, in lieu a arrears of rent plus interest thereon executes a promissory note in favour of the Zamindar, those sections he no application and the income by way of interest earned by the Zamindar is not agricultural income and is therefore taxable under the income-tax Act. (*Beadey, C. J. Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* INUGENTI RAJACOPALA VENKATA NARASIMHA. **55 Mad. 830 = I R 1932 Mad. 543 (1) = 138 I.C. 289 (1) = 36 L.W. 17 = A.I.R. 1932 Mad. 436 = 63 M L J. 20 (S B.).**

——**S. 75**—*Collector deciding rent payable in cash—Question whether rent is payable in cash or kind is not* res judicata.

(*Obiter*) Although a Collector acting under S. 75 decides that the rent is payable in cash and not in kind, the question is not *res judicata* in subsequent proceedings. 32 I.C. 706, Foll. (*Jackson, J.*) ZAMINDAR OF KHALLIKOTE *v.* SIVARAM BEVARTA PATNAIK. **6 I. R. (Mad.) 54 (2) = 145 I.C. 380 = A.I.R. 1933 Mad. 231 (1).**

——**Ss. 77 and 146**—*Decree against transferring pattadar—Transferee not recognised by landholder—Right of transferee to impeach sale.*

Unless the transferee has under S. 146 obtained recognition from the landholder, the latter is at liberty to deal with the transferring pattadar, as though the transfer had not taken place. The same principle applies where a claim adverse to the pattadar is put forward and is still *sub judice* in civil proceedings. So the real owner of a holding who has not been recognised by the landholder, cannot upset a rent sale under a decree obtained by the landholder against the pattadar under S. 77 of the Act on the ground that in separate civil proceedings they have established their title to the property. (*Curgenven, J.*) SAMSUVAVA ROWTHER *v.* SAYYAD MUHAMMAD ROWTHER. **I.R. 1933 Mad. 328 (2) = 143 I C. 741 = 1933 M.W.N. 1226 = 37 L. W. 633 = A.I.R. 1933 Mad. 495.**

——**S. 77** —*Warapath village—Reverter to waram from money rent—Suit for rent—Fresh patta, if necessary.*

Where in a warapath village the landlord reverted to waram in spite of cash rent being specified in old pattahs and sued to recover the waram rents,

MADRAS ESTATES LAND ACT (1908), S. 112.

Held, that the suit is not rendered unsustainable merely by reason of fresh pattas not having been exchanged (*Waller and Krishnan Pandalai, JJ.*) FOULKES *v.* KANDASWAMY PILLAI. **55 Mad. 994 = 1932 M.W.N. 767 = 142 I.C. 99 = I.R. 1933 Mad. 191 = 37 L.W. 49 = A.I.R. 1932 Mad. 739 = 63 M.L.J. 949.**

——**Ss. 77 (1) and 26 (1) and (3)**—*Suit for recovery of rent—Raiyat claiming exemption—Burden of proof.*

In a suit under S. 77 (1), Madras Estates Land Act (I of 1908), for recovery of rent plaintiff relied on S. 26, Cl. (3) entitling him to recover rent; the burden of proving the conditions mentioned in S. 26, Cl. (3) is on the plaintiff and if he succeeds in discharging the burden imposed on him by Cl. (3), the defendant, if he wants to claim exemption should rely on the provisions of sub-Cl. (1) of S. 26. Where the defendants in a suit for recovery of rent under S. 77 (1), Madras Estates Land Act. claimed that they held the lands rent free, and it was found that for a considerable number of years the lands were being held by the defendants and their predecessors rent free, though it could not be definitely ascertained how they came to hold as such.

Held, that the defendants could, in the absence of a grant to support the right, prove their right by long and continued possession in assertion of such a right and that the right should be presumed to have had a legal origin, if such a legal origin was possible. A.I.R. 1923 Mad. 336; S.A. Nos. 1267 and 1292 of 1931 and A.I.R. 1927 Cal. 210, Rel. on. (*Madhavan Nair, J.*) DURAISWAMI PILLAI *v.* VENKATARAMA PILLAI. **158 I.C. 508 = 8 R.M. 275 = 42 L.W. 626 = A.I.R. 1935 Mad. 572 (2).**

——**Ss. 111 and 112**—*Sale for arrears of rent—Notice to ryot—Failure to serve—Effect—Service by affixture—Validity.*

Notice to the lawful ryot is such an important condition precedent to the holding of a sale under S. 112 of the Act that the want of it must be regarded as making the sale a nullity. Where in a sale of a holding for arrears of rent personal service of notice was neither made nor attempted upon the defaulting ryot, but service by affixture was made,

Held, that the statutory requirement as to notice had not been complied with. The Estates Land Act contemplates service by affixture only if personal service cannot be effected. (*Curgenven and Sundaram Chetty, JJ.*) RAJITAGIRIPATHI *v.* PEDAKOTTAYYA. **57 Mad. 255 = 147 I.C. 196 = 6 R M 328 = 38 L W. 768 = 1933 M.W.N. 1175 = A.I.R. 1933 Mad. 855 = 65 M.L.J. 675.**

——**S. 112**—*Recovery of cist—Suit by purchaser from ryot against landholder—Dispute as to area held —Jurisdiction of Civil Court.*

Where the purchaser from a ryot sued for a declaration and injunction restraining the landholder from taking any proceedings for the recovery of cist on anything more than a particular area alleged to be in his possession.

Held, that such a suit should be brought in the revenue Court and not in the Civil Court. (*Sundaram Chetty, J.*) MAHARAJAH OF VENKATAGIRI *v.* RAMAKRISHNA REDDI. **144 I C. 733 = 6 R.M. 1 = 1932 M.W.N. 1093 = A.I.R. 1933 Mad. 384.**

——**S. 112**—*Right of ryot to question validity of distraint on sale by landlord—Enhancement of rent—Agreement between landlord and tenant—Binding nature.*

MADRAS ESTATES LAND ACT (1908), S. 112.

It is open to a tenant in proceedings instituted by the landholder under S. 112 to contest the landlord's right of sale on the ground that a portion of the arrear claimed was an enhancement not provided by the Act. (*Jackson and Mockett, JJ.*) RAGHUNATHA DESIKACHARIAR *v.* RANGASWAMI PILLAI **56 Mad. 300=I.R. 1932 Mad. 797=139 I.C 833=36 L.W. 579=1932 M.W. N. 1057=A.I.R. 1932 Mad. 729=63 M.L J. 575.**

——**S. 112**—*Sale under—Several co sharers—Notice of sale to some only—Effect on sale.*

The service of notice contemplated by S. 112 is such an essential condition that non-compliance with it will justify the Court in holing the sale void, when there are several co-sharers having distinct shares in a holding, the notice under S. 112 must be served on all of them; and a co-sharer who has not been served with such notice is not bound by the sale. But the sale cannot be held to be a nullity even as regards those who have been served with notice; it can be set aside only as regards the shares of those who have not been served. (*Varadachartar. J.*) THAYAMMAL *v.* SUBRAMANIA GURUKKAL. **159 I.C. 165=1935 M W.N. 1253=42 L W. 699=8 R.M. 452=A.I.R. 1936 Mad. 86=69 M L J. 850.**

——**S. 112**—*Sale—Suit to set aside—Limitation.*

Obiter.—Art. 12 (*b*) of the Limitation Act does not apply to a suit to set aside a sale under the Madras Estates Land Act. 52 M.L.J. 390. Foll.; 45 M.L.J. 840, Doubted. (*Ramesam, J.*) KOOTOORLINGAM PILLAI *v.* SENNAPPA REDDIAR. **I.R. 1931 Mad. 840=134 I.C. 184=34 L.W. 94=A.I.R. 1931 Mad. 724=61 M.L.J. 203.**

——**S. 112**—*Sale without notice—Validity.*

Notice to the lawful ryot is such an important condition precedent to the holding of the sale under S 112 that the want of it renders the sale a nullity. 7 L.W. 468, Ref.; 34 C. 811 and 34 C. 241, Foll. (*Ramesam, J.*) KOOTOORLINGAM PILLAI *v.* SENNAPPA REDDIAR. **I.R 1931 Mad. 840=134 I.C. 184=34 L.W. 94=A. I.R. 1931 Mad. 724=61 M.L J. 203.**

[**F.** 57 M. 255 (257). **R.** 42 L.W. 699 (700, 701).]

——**S. 112**—*Suit by raiyat—Validity of notice—Decree regarding amount admitted.*

A suit was filed by a raiyat under S. 112 contesting the validity of a notice under that section given by the landholder preliminary to the sale of his holding. Plaintiff alleged that the rent claimed by the defendant was larger than was properly due, and the defendant also admitted that only the sum admitted by plaintiff was due to him. The plaintiff then was asked to deposit amount admitted by him which he did.

Held, that the best way of disposing, of the suit was to direct the defendant landholder to take the amount deposited and to order him to pay plaintiff's costs, and not to prolong dispute by refunding plaintiff's deposit. (*Ramesam and Venkatasubba Rao, JJ.*) KAMARAJA PANDIYA NAICKER *v.* MUTHIRULLAPPA PILLAI. **I.R. 1932 Mad. 811=140 I.C. 77=1932 M.W.N. 870=A.I R. 1932 Mad. 528.**

——**S. 112**—*Vendee from pattadar—Items purchased continuing in old patta—Absence of notice to vendee—Effect.*

The non-service of notice required by S. 112 upon a registered pattadar who alone is the defaulter for the purposes of that section is an illegality and on that account the Civil Court has jurisdiction to set aside the sale of the holding. This rule applies to a vendee from the original pattadar who has got a patta in his name for the items purchased. The fact that in spite of the sale the items are retained in the old patta does not render the rule as to notice inapplicable. (*Sundaram Chetty, J.*) NALLAKARUPPAN AMBALAM *v.* VELLAMARUNTHAN AMBALAM. **143 I.C. 245=I.R. 1933 Mad. 282=37 L W. 466=1932 M.W.N. 1114=A.I R. 1933 Mad. 374.**

[**R.** 42 L.W. 699 (700).]

MADRAS ESTATES LAND ACT (1908), S. 128.

——**S. 114**—*Tax paid under protest—Suit for recovery—Limitation.*

The zemindar affixed a notice to the effect that if the tree-tax was not paid within a certain date, the ryot's holding would be sold The latter paid the amount under protest and brought a suit for its recovery more than three months from the date of the notice.

Held, the payment and not the notice constituted the cause of action and as the suit was brought within three months from the date of payment it was in time. (*Krishnan Pandalai, J.*) RAJA OF RAMNAD *v.* RAMANATHA PILLAI. **I R. 1931 Mad 807=134 I.C. 55=1931 M.W.N. 544=A.I R. 1931 Mad 609.**

——**Ss. 116 and 117**—*Non-compliance with—Validity of sale.*

Non-compliance with the provisions of Ss. 116 and 117 of the Estates Land Act amounts to material irregularity which vitiates the sale of all validity. (*Krishnan Pandalai, J.*) KADIRVELU AMBALAM *v.* ALAGAPPAN AMBALAM. **152 I C. 350=40 L.W. 535=1934 M.W.N. 918=7 R M. 218=A.I.R. 1934 Mad. 724.**

——**S. 125** — *Construction—"Encumbrances created before the Act"—If to be by Pattadar.*

The intention of S. 125 of the Estates Land Act will be defeated if it be assumed that the reservation therein must be restricted to encumbrances created by the holder of the patta, independently of the question whether he was a person entitled to hold the land or not. The kind of encumbrances intended to be saved must reasonably be all encumbrances which under the law as it stood prior to 1908 would have been valid. There is no reason to limit them to encumbrances created by a person who would satisfy the definition of a ryot under the Act. Under the older law it was only the real owner of the holding that could create any encumbrance on the property and not the person who happened to hold a pattah for that hold. The section cannot therefore be read as only saving encumbrances created by a ryot as defined in the Act or by the Pattadar. (*Varadachariar, J.*) MUTHUKARUPPA PILLAI *v.* ANNAMALAI CHETTIAR. **157 I C. 896=8 R.M. 173=1935 M W.N. 884=42 L.W. 585=A.I.R. 1935 Mad. 785=69 M.L J. 297.**

——**S. 125**—*Rent decree — Execution — Sale by Revenue Court—Effect.*

The effect of a sale by the Revenue Court in execution of a decree for rent obtained in such Court is that the purchaser gets the holding free of certain encumbrances under S. 125. But that should not be taken to mean that a suit to recover rent is a suit on a mortgage in the ordinary sense. (*Anantakrishna Aiyar, J.*) RAMAKOTI SURYANARAYANA *v.* RAMACHENDRUDU. **I.R 1932 Mad. 709=139 I C. 452=1932 M.W N. 1287=37 L.W. 655=A.I.R. 1932 Mad. 716.**

——**S. 128**—*Applicability—Rent due by one ryot—Payment by another co sharer—Rights acquired thereby.*

S. 128 creates a charge in favour of persons who, like mortgagees and other owners of subordinate interests in the holding would be adversely affected by a sale by a Revenue Court of the holding for rent, *i.e.*, those against whom the purcharer's right would prevail by S. 125. It is a charge given to other persons than the landlord, for a sum different from the rent and only in the particular circumstances mentioned, *i.e.*, that a sale by the Revenue Court has been averted after proclamation for sale by that Court. It does not help a ryot who has, on threat

MADRAS ESTATES LAND ACT (1908), S. 134.

of arrest, paid the rent due by his co-sharer and claims contribution from him. Co sharers like joint pattadars are not within the intent of that section. 51 Mad. 632; 43 Mad. 786, 35 C L.J. 1, Ref. (*Waller and Krishnan Pandalai, JJ.*) VYRAPERUMAL MUDALIAR *v.* ALAGAPPA MANIAGARAR. **55 Mad. 468=135 I.C. 609=I.R. 1932 Mad. 177=34 L.W. 889=1931 M.W.N. 1197=A.I.R. 1932 Mad. 189=62 M L.J. 31.**

———**S 134 (2)**—*Rental agreement not stamped or registered—Illegal distraint—Conviction on basis of—Sustainability.*

Under S. 134 (2) a distraint can only be made in the circumstances mentioned from a tenant from whom the Inamdar has taken a written agreement stating a fixed rent to be paid by the tenant. Where the rental agreement is not on stamped paper and is not registered S. 134 cannot be taken advantage of and there can be no conviction on the basis of illegal distraint. (*Pakenham Walsh, J.*) KURAMAYYA *v.* SATYANARAYANA. **I.R. 1932 Mad. 613=138 I.C. 877=33 Cr.L.J. 704 (1)=35 L.W. 849=1932 Cr.C. 828=A.I.R. 1932 Mad. 700.**

———**Ss. 135 and 137**—*Application by ryots under S. 135—Order of Collector under S. 137—Appeal—Forum.*

From an order of the District Collector under S. 137 directing the landholder to carry out certain repairs to an irrigation tank passed on an application by the ryots under S. 135, an appeal lies only to the Board of Revenue and not to the District Court. (*Venkatasubba Rao, J.*) RAJAH OF VIZIANAGRAM *v.* APPALASWAMI. **54 Mad. 924=134 I C. 1201=I R. 1932 Mad. 17=1931 M.W.N. 870=34 L.W. 259=A.I.R. 1931 Mad. 714=61 M.L.J. 434.**

———**S. 142**—*Application by ryots under S. 135—Order of Collector under S. 137—Appeal—Forum.*

From an order of the District Collector under S. 137 directing the landholder to carry out certain repairs to an irrigation tank passed on an application by the ryots under S. 135, an appeal lies only to the Board of Revenue and not to the District Court. (*Venkatasubba Rao, J.*) RAJAH OF VIZIANAGRAM *v.* APPALASWAMI. **54 Mad. 924=134 I C. 1201=I.R. 1932 Mad. 17=1931 M.W.N. 870=34 L.W. 259=A.I.R. 1931 Mad. 714=61 M.L.J. 434.**

———**Ss. 145 and 55**—*Division of holding—Right of landlord—Fair rent—Determination—Procedure.*

Under the Madras Estates Land Act the landlord has got the first right to subdivide the holding whenever there is a transfer of a portion. It is both a right and a duty, the policy of the Act being that every holding should be liable to a fair and equitable rent. Even if the tenant should fail to file an application under S. 145 of the Act within the prescribed period, the landlord does not acquire a right to fix the rent arbitrarily and the proper rent can be determined incidentally in a suit for patta under S. 55 of the Act. (*Ramesam and Curgenven, JJ.*) VENKATARAMAYYA *v.* MAHARAJA OF PITTAPURAM. **152 I C. 712=1934 M.W.N. 881=7 R.M. 279=40 L.W. 296=A.I.R. 1934 Mad. 601=67 M.L.J. 407.**

———**Ss. 145 and 146**—*Holding subject to several transfers—Recognition—Procedure.*

When a holding is subject to more than one transfer it cannot be said that the intermediate transferee is not entitled to the benefit of Ss. 145 and 146 of the Madras Estates Land Act. In such a case, however, all the transferors and all the transferees should jointly apply to the landlord, and until then the landlord is not bound to recognise the transfer. (*Ramesam and Curgenven, JJ.*) VENKATARAMAYYA *v.* MAHARAJA OF PITTAPURAM. **152 I.C. 712=1934 M W.N. 881=7 R.M. 279=40 L.W. 296=A.I.R. 1934 Mad. 601=67 M.L.J. 407.**

MADRAS ESTATES LAND ACT (1908), S. 168.

———**S. 146**—*Rent sale—Omission to raise dispute before Revenue Court—Effect.*

The policy of the Estates Land Act is to compel any person who has acquired an interest in ryoti land to follow the procedure laid down in S. 146 if he wishes to be treated as a ryot and it have all disputes as to procedure in rent sales enquired into by the Revenue Court. The consequence of the omission to do so would be to bar the asking for a similar relief in a Civil Court by means of a suit. Thus he cannot sue for a declaration and injunction against the landholder who seeks to recover cist on an extent of land not in his possession. (*Sundaram Chetty, J.*) MAHARAJAH OF VENKATAGIRI *v.* RAMAKRISHNA REDDI. **144 I.C. 733=6 R.M. 1=1932 M.W.N. 1093=A.I.R. 1933 Mad. 384.**

———**Ss. 146 and 77**—*Transfer not recognised by landholder—Decree against transferor—Sale—Right of transferee to impeach.*

Unless the transferee has under S. 146 obtained recognition from the landholder, the latter is at liberty to deal with the transferring pattadar, as though the transfer had not taken place. The same principle applies where a claim adverse to the pattadar is put forward and is still *sub judice* in civil proceedings, so the real owner of a holding, who has not been recognised by the landholder, cannot upset a rent sale under a decree obtained by the landholder against the pattadar under S. 77 of the Act on the ground that in separate civil proceedings they have established their title to the property. (*Curgenven, J.*) SAMSUVAVA ROWTHER *v.* SAYYAD MUHAMMAD ROWTHER. **I.R. 1933 Mad. 328 (2)=143 I C. 741=1933 M.W.N.1226=37 L.W. 633=A.I.R. 1933 Mad. 495.**

———**S. 151**—*Applicability—Suit by zamindar against occupancy raiyat for declaration of his right to stones and rocks on the holding.*

A suit by a zamindar for a declaration that only he is entitled, as landowner, to the stones and rocks on the holding of the occupancy raiyats, that they cannot remove them without his leave and also for permanent injunction and damages is not a suit under S. 151, Estates Land Act, or any other section. (*Jackson, J.*) ARULANANDA NADAR *v.* JANAKI BAI AMMAL. **150 I.C. 649=7 R M. 23=A.I.R. 1933 Mad. 525.**

———**S. 164 Ch. XI, et seq.**—*Proceedings under—Nature of—Writ of* certiorari, *if may be issued.*

Though the Board of Revenue in carrying out the provisions of Ch. XI of the Madras Estates Land Act is an execution authority and the preparation of record, of rights including settlement of rent is an executive act, the functions of the Revenue Officer or the Board nevertheless partake of a judicial character having regard to the language of Cls. (2) and (4) of S. 168 and S. 170 (2). The High Court can, therefore, issue a writ of *certiorari* in respect of proceedings of board of Revenue under Ch XI of the Madras Estates Land Act in a fit and proper case. (Case-law disc.)

Pakenham Walsh, J.—But every action of an executive officer under Ch. XI is not liable to be interfered with in *certiorari*. (*Ramesam and Pakenham Walsh, JJ.*) ZAMINDARNI OF MANDASA *v.* RYOTS OF THE MANDASA ZAMINDARI. **56 Mad. 579=148 I.C. 698=6 R.M. 513=1933 M.W.N. 792=38 L.W. 353=A.I.R. 1934 Mad. 231=65 M L.J. 423.**

———**Ss. 168 and 185**—*Claim to pannai lands—Failure by Board to adjudicate upon*—Certiorari.

MADRAS ESTATES LAND ACT (1908), S. 171.

Under S. 185 of Act any document showing that the lands were let out by the Zamindar as pannai lands ought to be considered whenever the question whether a land is pannai or ryoti arises. This fact cannot be ignored. If they are pannai lands, they are execluded from the Act and no record of rights under Ch. XI can be made with regard to them. Where, therefore, the ryots claimed that certain lands were granted to them by a registered document of 1895 on the footing of pannai lands on a permanent favourable rate or rent, the fact whether they are pannai or ryoti must be definitely found and failure by the Board to enquire into this question is failure to exercise a jurisdiction vested under Ch. XI which justifies the issue of a writ quashing the settlement of proceeding with a view to enable the Board to enquire into the question of pannai lands. (*Ramesam and Pakenham Walsh, JJ.*) ZAMINDARNI OF MANDASA *v.* RYOTS OF THE MANDASA ZAMINDARI **56 Mad. 579 = 148 I.C. 698 = 6 R.M. 513 = 1933 M.W.N. 792 = 38 L.W. 353 = A.I.R. 1934 Mad. 231 = 65 M.L.J. 423.**

[**Cons.** 42 L.W. 249 (251).]

———**S. 171**—*Appeal under—Disposal without hearing parties—Legality of—No ground for* certiorari.

The language of S. 171 is in very strong contrast to that of Ss. 169, 170 and 172 and a proviso similar to provisos in those three sections does not appear in S. 171. So the disposal of an appeal under S. 171 by the Board without hearing the parties is not *ultra vires* or bad for illegal exercise of jurisdiction. So no writ can be issued on that ground. (*Ramesam and Pakenham Walsh, JJ.*) ZAMINDARNI OF MANDASA *v.* RYOTS OF THE MANDASA ZAMINDARI. **56 Mad. 579 = 148 I.C. 698 = 6 R.M. 513 = 1933 M.W.N. 792 = 38 L.W. 353 = A.I.R. 1934 Mad. 231 = 65 M.L.J. 423.**

———**S. 172**—*Order of Board of Revenue—Interference by High Court.*

Held (Sundaram Chetty, J., dissenting).—The Revenue Officer when making a settlement of rents under Chapter XI of the Madras Estates Land Act is not a Civil Court. So the Board of Revenue when directing the revision of his proceedings under S. 172 is also not a Civil Court and the High Court cannot either under S. 115, C. P. Code or S. 107, Government of India Act revise an order made or purported to be made under S. 172. (*Beasley, C. J, Ramesam, Reilly, Ananthakrishna Aiyar and Sundaram Chetty, JJ.*) RAJA OF MANDASA *v.* JAGANNAVAKULU. **55 Mad. 883 = I.R. 1932 Mad. 859 = 140 I.C. 331 = 1932 M.W.N. 350 = 36 L.W. 292 = A.I.R. 1932 Mad. 612 = 63 M.L.J. 450 (F.B.).**

———**S. 172**—*Revision of record-of-rights by Board itself—Irregularity—Not* per se *sufficient ground for* certiorari.

Under S. 172 the Board can only direct the revision of record-of-rights by the Revenue Officer and cannot proceed to revise the record itself. If the revision has been made by the Board itself it is an irregularity of procedure but unless the Court is satisfied that the irregularity has led to some substantial injury, a writ will not be issued.

Pakenham Walsh, J.—"The difference between revising the record itself and ordering its revision is largely formal. * * * * Although the power of the Board to revise under S. 172 the settlement of rent at a time when a suit under S. 173 will be barred may deprive the party of some remedy by way of suit under S. 173, it will be only the deprivation of a minor remedy". (*Ramesam and Pakenham Walsh, JJ.*) ZAMINDARNI OF MANDASA *v.* RYOTS OF THE MANDASA ZAMINDARI. **56 Mad. 579 = 148 I.C. 698 = 6 R.M. 513 = 1933 M.W.N. 792 = 38 L.W. 353 = A.I.R. 1934 Mad. 231 = 66 M.L.J. 423.**

MADRAS ESTATES LAND ACT (1908), S. 189.

———**S. 185**—*Claim of private home-farm land—Proof—Evidence necessary.*

It was proved by evidence that the zamindar was letting on lease the suit land from 1877. The tenants were given sagupadi pattahs (pattahs which were not usually given to tenants who claim occupancy rights in the land) and the zamindar was dealing with them as he liked though he had not been turning them out of the land altogether.

Held, that the inference drawn that the zamindar had proved that it was his home-farm land was not wrong. Case-law discussed. 52 M. L. J. 38; 50 M. 201, Dist. (*Madhavan Nair, J.*) CHINNARIGADU *v.* RANGAYYA CHETTY. **161 I.C. 757 = 8 R.M. 870 = A.I.R. 1935 Mad. 789.**

———**S. 187**—*Applicability—Pro-note in lieu of rent—Suit on—Nature.*

Ss. 61 and 187 (2), Madras Estates Land Act, only apply if a suit is brought directly on the liability of the raiyat to pay rent. But where the raiyat, in lieu of arrears of rent plus interest thereon executes a promissory note in favour of the Zamindar, those sections have no application and the income by way of interest earned by the Zamindar is not agricultural income and is therefore taxable under the Income-tax Act. (*Beasley, C. J. Ramesam and Cornish, JJ.*) COMMISSIONER OF INCOME-TAX, MADRAS *v.* INUGENTI RAJAGOPALA VENKATA NARASIMHA. **55 Mad. 830 = I.R. 1932 Mad. 543 (1) = 138 I.C. 289 (1) = 1933 M.W.N. 1012 = 35 L.W. 17 = A.I.R. 1932 Mad. 436 = 63 M.L.J. 20 (S.B.).**

———**S. 189**—*Person holding ryoti land for casuarina plantation—Suit by landlord to recover possession and damages—Jurisdiction of Civil Court.*

A person who holds ryoti land in an "estate" for the purpose of casuarina plantation does not hold it "for purpose of agriculture" and is therefore not a ryot within the meaning of the Madras Estates Land Act and a suit brought by the landlord against him to recover possession of the land and for damages can be entertained by the Civil Court. Meaning of the expression "agricultural purposes" discussed. 38 Mad. 738; 25 M. L. J. 578, Diss; 46 All. 831 (P. C.) and 59 M. L J. 265 (P. B.), Ref.

Per *Reilly, J.*—"Agriculture" cannot be defined by the nature of the products cultivated but should be defined rather by the circumstances in which the cultivation is carried on. (*Reilly and Anantakrishna Aiyar, JJ.*) CHANDRASEKARA BHARATI SWAMIGAL *v.* DORAISWAMI NAIDU. **54 Mad. 900 = I.R. 1931 Mad. 794 = 134 I.C. 42 = 34 L.W. 185 = A.I.R. 1931 Mad. 659 = 61 M.L.J. 648.**

———**S. 189**—*Suit for arrears of rent—Revenue Officer trying—If "Court"—Appeal.*

In disposing of suits for arrears of rent the Revenue Officers act as Courts and their decrees in such suits are appealable to the District Court. (*Bardswell and Burn, JJ.*) MAHANT PRAYAG DOSS JEE *v.* CHINNA RAMA NAIDU. **157 I.C. 1066 = 1935 M.W.N. 633 = 41 L.W. 623 = A.I.R. 1935 Mad. 309 = 68 M.L.J. 324.**

———**Ss. 189 and 192**—*Scope—Jurisdiction of Revenue Courts—Suit under O. 21, R. 63, C. P. Code.*

The section that confers jurisdiction on the Revenue Court to hear suits and applications is S. 189; and suits and applications which a Revenue Court can hear and determine are specified in parts *A* and *B* of the schedule. S. 192 has nothing to do with the jurisdiction of a Court to hear and determine applications. It relates to procedure. It does not extend the jurisdiction to hear and determine suits and applications conferred upon the Revenue Court by S. 189. Hence a Revenue Court has

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no jurisdiction to try a suit under O. 21, R. 63. 51 M. 774 and A.I.R. 1932 M. 716, Rel. on. (*Madhavan Nair, J.*) RAMAKRISHNAYYA *v.* NAGANNA. **6 I.R (Mad) 289=146 I.C. 600=A.I.R. 1933 Mad. 865=65 M L. J. 775.**

———**S. 189 (3)**—*Decision as to title to property—Finality.*

Under S. 189(3) of the Madras Estates Land Act, the decision of a Revenue Court on a matter within its exclusive jurisdiction shall be binding in any civil suit. That is to say that the legislature has provided a cheap and speedy final settlement of such rent disputes as are within the exclusive jurisdiction of the Revenue Court, but of course never intended that larger questions of title and so forth should be summarily settled in this fashion No doubt in settling a rent dispute a Revenue Court may have to consider a question of title. Its decision as regards the rent sued for will be final, but as regards the title, a matter which obviously is not within its exclusive jurisdiction, its decision will not be final. (*Jackson and Butler, JJ.*) RAJAH OF SIVAGANGA *v.* VENKATACHALAM CHETTY. **40 L W. 610=1934 M W.N. 951=152 I C. 24=7 R.M. 206=A.I R. 1934 Mad. 551=67 M L J. 268.**

———**S 192**—*Provisions of O. 21 C.P. Code—Applicability—Execution of rent decree—Claim petition of third party—Substainability.*

By virtue of S. 192 of the Estates Land Act the claim sections of the Civil Procedure Code contained in O. 21 apply to the Revenue Court where a rent decree is sought to be executed and a third person raises an objection as to executability the claim petition can be entertained by the Revenue Court.

Per *Obiter.*—A claim petition cannot be entertaied by a Court which passes the usual mortgage decree directing the property to be sold in default of payment. (*Anantakrishna Aiyar, J.*) RAMAKOTI SURYANARAYANA *v.* RAMACHENDRUDU. **I R. 1932 Mad. 709=1932 M W.N. 1287=139 I.C. 452=37 L.W. 655=A. I.R. 1932 Mad. 716.**

———**Ss. 192 and 205**—Scope—Order by Deputy Collector under O. 21, R. 101, C.P. Code—Revision to District Collector—Competency—Refusal by latter to interfere on the merits—Revision by High Court—Interference—C.P. Code, S. 115. *See* C.P CODE, S. 115 **68 M L.J. 324.**

———**S. 205**—*Scope and effect of—Revisional powers of High Court—If affected.*

S 205 of the Madras Estates Land Act is not and cannot be intended to affect the revssional powers of the High Court in suits which are made appealable to the District Court and the High Court under Part A of the Schedule to that Act. (*Bardswell and Burn, JJ.*) MAHANT PRAYAG DOSS JEE *v.* CHINNA RAMA NAIDU. **157 I C. 1066 - 1935 M.W N. 633=41 L. W. 623=A.I.R. 1935 Mad. 309=68 M.L J. 324.**

———**S. 213**—*Applicability -Tree-tax paid under protest—Suit for recovery of*

A suit for the recovery of a sum of money collected by the use of the procedure laid down for the recovery of rent in the Estates Land Act but which amount was really not due to the landholder as rent falls within the category of suits for damages within the meaning of S. 213. (*Krishnan Pandalai, J.*) RAJA OF RAMNAD *v.* RAMNATHA PILLAI. **I.R. 1931 Mad. 807=134 I. C. 55=1931 M W.N. 544=A.I.R. 1931 Mad. 609.**

———**S. 213**—*Scope.*

The intention of the legislature was to provide a cheap and swift remedy for recovery of damages arising from improper use of the facilities provided by the Act

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and S. 189 bars the jurisdiction of Civil Courts in cases in which resort to S. 213 is possible. (*Krishnan Pandalai, J.*) RAJA OF RAMNAD *v.* RAMNATHA PILLAI. **I.R. 1931 Mad. 807=1931 M.W.N. 544=134 I.C, 55=A.I R. 1931 Mad. 609.**

———**S 213**—*Suit for damages—Wrongful collection of rent by landlord—Suit for refund by tenant—Jurisdiction of Civil Court.*

A suit for refund of money wrongfully collected as arrears of rent under colour of the Act is a suit for damages within the meaning of the Act, and the Civil Courts have no jurisdiction to entertain the same. 3 L. W. 517, Rel. (*Krishnan Pandalai, J.*) RAMJI DAS AIYAR *v.* NAINAR ROWTHEN. **I.R. 1931 Mad. 872=134 I C. 984=34 L W. 915=A.I.R. 1931 Mad. 743=61 M L.J. 395.**

———**Art. 8, Part A**—*Applicability—Proceedings under S. 112.*

The words of Art 8, Part A are wide enough to cover proceedings brought under S. 112 of the Act to contest the right of sale on the ground of excessive rent. (*Venkatasubba Rao, J.*) MUTHIRULAPPA PILLAI *v.* KAMARAJA PANDIA NAICKER. **6 R M. 496=148 I.C. 523=39 L W. 147=A I.R. 1934 Mad. 224.**

———**Sch. I, Part A, Art. 28**—*Tax paid under protest—Suit to recover—Limitation—Starting point.*

The Zemindar affixed a notice to the effect that if the tree tax was not paid within a certain date, the ryot's holding would be sold. The latter paid the amount under protest and brought a suit for its recovery more than three months from the date of the notice.

Held, the payment and not the notice constituted the cause of action and as the suit was brought within three months from the date of payment it was in time. (*Krishnan Pandalai, J.*) RAJA OF RAMNAD *v.* RAMANATHA PILLAI. **I.R. 1931 Mad 807=134 I.C 55=1931 M.W.N. 544=A I.R. 1931 Mad. 609.**

———**Sch. II, Art. 7 and S. 45**—*Unauthorised occupation more than one year before application under S. 45.*

The date of occupation mentioned in Art. 7, Sch. B, to the Act is the date on which the unauthorised occupation began. If the unauthorised occupation began more than a year before the date of the application under S. 45, the bar of limitation under Art. 7, cannot be got over. In order to interpret Art. 7, Part B, in the Schedule to the Act, S. 23, Limitation Act, cannot be invoked in aid. No doubt S. 211 overrides the general provisions of the Limitation Act in S. 29 and it may be possible in a suitable case to apply the principle of S. 23, Limitation Act, but in an application under S. 45, when the date of occupation mentioned in Art. 7, has to be understood only as the date on which the occupation was begun, S. 23, Limitation Act, can be of no avail. If the application under S. 45 is not promptly made within one year from the date of the first occupation, this particular remedy cannot be had by the landholder and he has only to sue the occupant under S. 163 for possession of the land treating him as a trespasser. (*Sundaram Chetty, J.*) VENKATADRI APPA RAO *v.* CHAKRAPANI RAO. **6 I.R. (Mad.) 30=144 I.C. 963=1933 M.W.N. 1230=38 L.W. 214=A.I.R. 1933 Mad. 521.**

MADRAS FOREST ACT (V OF 1882), Ss. 16 and 17—*'Thereupon'—Meaning — Publication of notification—Mandatory provisions.*

The word "thereupon" in S. 17 refers to S. 16, publication in the Fort St. George Gazette, notifying the date from which the forest shall be deemed to be reserved and publication by the forest officer of this notification in

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various places as provided in S. 6. The rule as to publication of notification is mandatory and not purely directory. (*Jackson, J.*) PRATAPRAO BAHADUR GARU *v.* NARAYANA GAJAPATIRAJU. **1932 M.W.N. 922.**

MADRAS GAMING ACT (III OF 1930)—*Retrospective effect.*

The Act is not retrospective. (*Jackson, J.*) BULLI NAGAYYA, *In re.* **I.R. 1931 Mad 879=134 I C. 991 =32 Cr.L.J. 1279=34 L W. 710=1931 M.W.N. 1310=1931 Cr.C. 1033=A.I.R. 1931 Mad 777=61 M.L.J. 474.**

———**S. 5**—*Compliance with—Search warrant—Contents of—Omission to state that the Magistrate has "reason to believe" the information to be true—If fatal to legality of warrant.*

A search warrant issued by a Magistrate under S. 5 of the Act was as follows: "Whereas information has been laid before me that certain premises are being used as a common gaming house and gambling is also going on there and it has been made to appear to me that a search of the premises is necessary. I authorise you.... to search". The warrant was issued on the basis of a letter brought by a Sub-Inspector of Police and after examining the latter on oath

Held, the warrant satisfied the provisions of S. 5 of the Act and that the mere omission to state that the Magistrate had "reason to believe" that the place in question was used as a common gaming house did not render it illegal. (*King, J.*) SUBRAMANIA AIYAR, *In re.* **161 I.C. 32=8 R M. 762=37 Cr L J 380= 43 L.W. 44=1935 M W.N. 1284=1936 Cr C. 54= A.I.R. 1936 Mad. 65=69 M.L.J 835.**

———**Ss. 5 and 6**—*Irregular search warrant—Presumption under S. 6—If arises.*

The presumption referred to in S. 6 of the Act can only apply to searches conducted in pursuance of a warrant issued under S. 5 of the Act, and when the Magistrate issuing the warrant mentions in it that he is satisfied that there was a common gaming house which required to be searched. The remarks of the Magistrate in his judgment in the case, intended to supply the defects and omissions in the warrant itself cannot rank as evidence. (*Pandurang Row, J.*) PUBLIC PROSECUTOR *v.* SUBRAMANIA SASTRI. **155 I.C. 496=7 R. M. 582=36 Cr.L J. 799=1934 M W N. 1170=1935 Cr.C. 927=41 L.W. 679=A.I R 1935 Mad. 648= 68 M.L J. 421.**

———**S. 6**—*Material objects—Evidentiary value.*

The material objects found in a gaming house is presumptive but not conclusive evidence of the offence. But it does not mean that the prosecution cannot succeed without calling other evidence. (*Pakenham Walsh, J.*) ALAGAPPA CHETTIAR *v.* EMPEROR. **I R. 1932 Mad. 720=139 I.C. 473=33 Cr L.J. 790=36 L.W. 620= 1932 M.W.N. 641=1932 Cr.C. 836=A.I.R. 1932 Mad. 678.**

———**S. 9**—*Common gaming house—Meaning of.*

The mere fact that occasionally people play cards in a house, and perhaps for money, does not necessarily make it a common gaming house under S. 9 of the Madras Gaming Act. (*Pandrang Row, J.*) PUBLIC PROSECUTOR *v.* SUBRAMANIA SASTRI. **155 I C. 496 =7 R.M. 582=36 Cr.L.J. 799=1934 M.W.N. 1170= 1935 Cr.C. 927=41 L.W. 679=A.I.R. 1935 Mad. 648 =68 M.L J. 421.**

———**S. 10**—*Order confiscating moneys found on the persons of the gamblers—Legality.*

Under S. 10 of the Gaming Act a Magistrate is not entitled to order confiscation of all the money seized. It is only the money which is or reasonably suspected of having been used or intended to be used for the purpose of gaming which can be forfeited under the section. To order forfeiture of money found on the person of the alleged gamblers also without some kind of material for a finding on the point, is unwarranted under the section. (*King, J.*) SUBRAMANIA AIYAR, *In re.* **161 I.C. 32=8 R M. 762=37 Cr L.J. 380=43 L W. 44=1935 M.W.N. 1284=1936 Cr.C. 54=A.I.R. 1936 Mad. 65 =69 M.L J. 835.**

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———**S. 12**—*'Public place'—Plal of private residence.*

The plal of a private residence is not a public place though it is alongside a public road and accessible from it. 31 Cal. 542, Foll. (*Lakshmana Rao J.*) RAGHUNADHU *v.* EMPEROR. **1933 M.W.N. 1422.**

MADRAS GENERAL CLAUSES ACT (1891), S. 3 (6)—*Applicability.*

The definition of the word "Collector" in S. 3 (6) of the Madras General Clauses Act of 1891 does not apply the Regulation VII of 1928 or to Act II of 1864. (*Waller, Jackson and Krishnan Pantalu, JJ.*) CHITTAYYA *v.* SECRETARY OF STATE. **55 Mad. 453=I.R. 1932 Mad. 337=137 I C. 30 (2)=1932 M.W.N. 1= 35 L.W. 516=A.I.R. 1932 Mad. 377=62 M.L.J. 592 (F B).**

MADRAS HEREDITARY VILLAGE OFFICES ACT (III OF 1895), Ss 3 and 21—*Claim—Village Office—High Court has no revisional power over Board of Revenue.*

The High Court has no revisional powers over the Board of Revenue when the Board of Revenue acts in pursuance of the powers given it by the Act in respect of a claim to one of the offices under S. 3, the High Court's jurisdiction to do so being expressly excluded by S. 21. 41 M.L.J. 548 and 55 M. 942=63 M.L.J. 282, Foll. (*Stone, J.*) VENKATANARAYANA AYYAR *v.* RAMCHANDRA AYYAR. **158 I.C. 624=8 R.M. 290=42 L. W. 249=A.I.R. 1935 Mad. 610.**

———**S. 5**—*Scope—"Khandagutta cowle"—Lease for 33 years—If void—"Transferred" or "encumbered"—Meaning of.*

A "khandagutta cowle," or a lease for a period of 33 years, of the land comprised in a carpenter's service inam, is not prohibited by S. 5 and is not void. A lease would not fall within the scope of the words "encumbered or transferred" in the section. (*Curgenven and Cornish, JJ.*) YERRANNA *v.* SOMMANNA. **156 I.C. 873=8 R M. 70=41 L.W. 271=1935 M.W.N. 515= A.I R 1935 Mad. 320=69 M.L.J. 115.**

———**S. 6 (1)**—*Scope—Abolished offices—Preservation of rights in families of last holders—Suit to vindicate rights—Maintainability in Civil Court.*

S. 6 (1) preserves certain legal rights in the families of the last holders of the abolished offices. The provision in the section that the Collector shall select the persons from among the families of the last holders is mandatory and not merely directory. Where such rights are infringed the persons for whom they are preserved have still a right to sue for their vindication by a declaratory decree and the Civil Court has jurisdiction to entertain such a suit. (*Reilly and Anantakrishna Aiyar, JJ.*) RAMAKRISHNAYYA *v.* VENKATARANGA RAO. **56 Mad. 134=I.R 1932 Mad. 736=139 I.C. 510=36 L.W. 569=1932 M.W.N. 668=A.I.R. 1932 Mad. 724=63 M L.J. 577.**

———**S. 10 (4)**—*Appointee—Rights of—No hereditary rights.*

The person who is put in to do the duties of the dismissed officer under S. 10 (4) is not appointed to an office governed by the Act. When the section says that the Collector may direct that the duties of the office shall be performed by some person until the death of

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return to duty of the last holder, it only prescribes the period of time during which the provision has to be made but does not mean the appointee is to hold office for that period. Such a person is in no better position than any one else who is put in temporarily to do some one else's work. He is liable, therefore, to be sent out by the authority that appointed him or any superior thereof, if, in their opinion, a better substitute was available. (*Krishnan Pandalai, J.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RAGHAVALU. **135 I.C. 459 = I.R. 1932 Mad 139 = 1931 M.W.N. 546 = A.I.R. 1931 Mad. 607.**

———**S. 10 (5)**—*Office of Karnam—Appointment of deputy—Recommendation for—Pecuniary consideration for—Legality of agreement—Contract Act* (1872), *S.* 23.

An agreement for the payment of a monthly sum by the defendant to the plaintiff (the permanent Karnam) in consideration of the plaintiff recommending the defendant to the office the Karnam gumastha during the minority of the plaintiff's heir is opposed to public policy and unenforceable. (*Curgenven, J.*) KARUPPIAH PILLAI *v.* PONNUCHAMI PILLAI. **6 I R. (Mad.) 177 = 145 I C. 972 = 38 L W. 585 = 1933 M.W.N. 1003 = A.I.R. 1933 Mad. 768 = 65 M.L J. 532.**

———**S. 13**—*Plaintiff appointed Karnam by proprietor—Appointment cancelled and defendant appointed instead by Revenue Officer—Suit to set aside order—Maintainability.*

The plaintiff was appointed to the post of a Karnam by the proprietor and discharged his duties as such. His appointment was cancelled by the Revenue Officer on the defendant's application that he was the nearest heir of the last office holder, and the defendant was appointed to that office. Thereon the plaintiff filed a suit for declaration that the order of the Revenue Officer was *ultra vires* and hence null and void. It was held that S. 13 did not apply to the case because the plaintiff did not ask for a declaration that he was the heir to the office in question, or for restoration of his appointment as Karnam but only prayed to set aside the order of the Revenue Officer. So S. 21 was no bar to the maintainability of such a suit. 9 L. W. 90; 33 Mad. 208; 12 L. W. 663, Ref. (*Madhavan Nair, J.*) VENKATARAGAVAIAH *v.* CHENCHU SUBBIAH. **136 I.C. 38 = I.R 1932 Mad. 246 = 33 L.W. 294 = A I.R. 1931 Mad. 502.**

———**S. 13**—*Suit for appointment as Karnam—Power of Court.*

Where in a suit under S. 13, D. 2 is impleaded as a defendant and an issue is framed as to who among the parties is entitled to the post of Karnam to which D.1 agrees and D.2 is appointed karnam, D.1 cannot subsequently raise the objection that a suit under S. 13 can only be either dismissed or plaintiff appointed as Karnam in it and that another cannot be appointed. The objection should be raised as early as possible. (*Bardswell, J.*) SINGARAVELU PILLAI *v.* BOARD OF REVENUE, MADRAS. **149 I.C. 57 = 6 R.M. 597 = 39 L W. 686 = A I.R. 1934 Mad. 333.**

———**Ss. 13 and 14**—Scope—Service inam—Adverse possession of lands by stranger—Rights of succeeding holders of office—If extinguished—Limitation Act, S. 28. *See* LIMITATION ACT, S. 28. **69 M.L.J. 890.**

———**S. 21**—*Abolished offices—Preservation of rights—Suit for vindication of rights—Jurisdiction of Civil Court.*

S. 21 takes away the jurisdiction of the Civil Courts only in cases in which jurisdiction conferred on the Revenue Court by S. 13. Where an old office is abolished

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the appointment to the new office cannot be said to be by virtue of a claim to succeed. Where such rights are infringed the persons for whom they are preserved have still a right to sue in the Civil Court for their vindication by a declaratory decree. (*Reilly and Anantakrishna Ayyar, JJ.*) RAMAKRISHNAYYA *v.* VENKATARANGA-RAO. **56 Mad. 134 = I.R. 1932 Mad. 736 = 139 I.C. 510 = 36 L.W. 569 = 1932 M.W.N. 668 = A.I.R. 1932 Mad. 724 = 63 M.L.J. 577.**

———**S. 21**—*Emoluments of village officer—Suit to recover inams—Forum.*

Suits where the substantial question for decision is whether the lands in question do constitute the Emoluments of the village officer, are suits which are cognizable by Revenue Court only and not by Civil Court. 30 Mad. 126 and 41 Mad. 418, Ref. A suit to recover possession of inam lands on the ground that they were leased to a tenant and the term of the lease was over but that the tenant was holding over would be cognizable by a Civil Court. (*Obiter.*) (*Reilly and Anantakrishna Ayyar, JJ.*) CHINNA NAGIAH *v.* PULLAYYA. **I.R. 1931 Mad. 714 = 133 I.C. 202 = 1931 M.W.N. 1102 = 34 L.W 324 = A I R. 1931 Mad. 610.**

———**S. 21**—*Order cancelling appointment—Suit to set aside—Maintainability.*

A suit to set aside the order of the Revenue Divisional Officer appointing the defendant in the place of the plaintiff as Karnam of a proprietary village is not barred by S. 21. (*Mahavan Nair, J.*) VENKATARAGHAVIAH *v.* CHENCHU SUBBIAH. **136 I. C. 38 = I R. 1932 Mad. 246 = 33 L. W. 294 = A. I. R. 1931 Mad. 502.**

———**S. 23**—*Rules under R.* 16—*Appeal to Board—Hearing party—Duty of Board*

It is only in cases of reference of points of law to the Board of Revenue that it is bound on the request of the parties to hear them. (*Beasley, C. J. and Cornish, J.*) KUMARASWAMI MUDALI *v.* MUNIRATNA MUDALI. **55 Mad. 948 = I.R. 1932 Mad. 559 = 138 I.C. 390 = 1932 M W.N. 524 = 36 L.W. 122 = A.I.R. 1932 Mad. 529 = 63 M L J 282.**

———**S 23 (1)**—*Second appeal to Board of Revenue on a matter of punishment—Scope of—No Revisional jurisdiction to Board—Order enhancing punishment in revision—Validity.*

Under the proviso to S. 23 (1) of Act III of 1895, there can be a second appeal to the Board of Revenue, on a matter of punishment, only in the case of a dismissal of a Village Officer. Where, therefore, on appeal from the Order of a Revenue Divisional Officer dismissing a Karnam, the District Collector modified the punishment to one of suspension for a year, the Board has no jurisdiction to entertain a second appeal. Nor is there any mention in the Act of any revisional power being vested in the Board of Reveune and the Board has no jurisdiction to pass an order converting the suspension into dismissal, purporting to be in revision, either under S. 5 of Regulation I of 1803 or under its inherent powers. Such an order is without jurisdiction and *ultra vires*. (*Beasley, C. J. and Bardswell, J.*) SECRETARY OF STATE FOR INDIA *v* SUBBA RAO. **56 Mad. 749 = I.R. 1933 Mad. 389 = 144 I.C 400 = 1933 M.W.N. 611 = 38 L W. 155 = A.I.R. 1933 Mad. 618 = 65 M.L J. 186.**

MADRAS HIGH COURT APPELLATE SIDE RULES, R. 8—*Jurisdiction—Proceedings against legal practitioner—Bench of High Court—Powers to enquire into.*

Under the Madras High Court Appellate Side Rules a Bench of three judges of the Court can hear and

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dispose of an inquiry against a legal practitioner under Cl. 10 of the Letters Patent. It is not necessary in such cases that the full Court should deal with the matter. (*Waller, Reilly and Ananthakrishna Ayyar, JJ.*) VENKATACHARIAR, *In the matter of.* **54 Mad. 857=I.R. 1931 Mad. 785=134 I C. 33=32 Cr.L.J. 1085=34 L.W. 19=A.I.R. 1932 Mad. 131=61 M.L.J. 148 (F.B.).**

———**R. 41-A**—*Effect.*

R. 41-A does not lay down any absolute rule of limitation. (*Cornish, J.*) LATCHAN NAIDU *v.* RAJA OF BOBBILI. **40 L.W. 358=1934 M W.N. 155=151 I.C. 941=7 R.M. 156=A I.R. 1934 Mad. 548.**

MADRAS HIGH COURT RULES (ORIGINAL SIDE), O. 31, R. 5—*Scope.*

Quaere.—Whether O. 31, R. 5 entitles strangers to come in and make substantive applications to the impleaded as parties in a pending suit for partition among the members of a Hindu joint family. (*Eddy, J.*) RAMASWAMI CHETTIAR *v.* VELLAYAPPA CHETTIAR. **I.R. 1931 Mad. 547=131 I.C. 643=33 L.W. 734=A.I.R. 1931 Mad. 557=60 M.L.J. 229.**

MADRAS HIGH COURT CIVIL RULES OF PRACTICE, R. 199—*Scope—Effect of Sch. I, C. P. Code*

R. 199 of Civil Rules of Practice, to the extent to which it is opposed to, and inconsistent with, the provisions of Sch. I, C. P. Code, cannot take effect. 37 M. 17=24 M.L.J. 637 (F.B.), Foll. (*Venkatasubba Rao, J.*) MURUGAPPA CHETTIAR *v.* RAMASWAMI CHETTIAR. **59 Mad. 342=8 R.M. 473=159 I.C. 228=1935 M.W.N. 792=42 L.W. 564=A.I.R. 1935 Mad. 893.**

MADRAS HIGH COURT FEES RULES—*Suit transferred from City Civil Court to High Court—Court-fee payable—Court-Fees Act (VII of 1870), S. 3.*

Where a suit is transferred from the City Civil Court to the High Court under Cl. 13 of the Letters Patent and tried by the High Court as a Court of Extra-ordinary Original Jurisdiction, the Court-fees payable are those in force in the High Court as a Court of Ordinary Original Jurisdiction (and not those payable under the Court-Fees Act) as the case is expressly governed by S. 14 of the Madras City Civil Court Act (VII of 1892). 30 M. 807=27 M.L.J. 30 (P.C.), Ref. (*Venkatasubba Rao, J.*) ABDUL HAKIM SAHIB *v.* CHATTANADHA AIYAR. **I.R. 1931 Mad. 679=132 I.C. 647=33 L.W. 318=A.I.R. 1931 Mad. 457=60 M.L.J. 435.**

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (I OF 1925), S. 16—*Powers of Government—Committee established under Act of 1863.*

By virtue of S. 79 (1) any committee established under Act of 1862 and in existence at the commencement of the Act of 1925 is regarded as one constituted under the Act of 1925, which the Local Government has the power to vary or abolish. (*Wallace and Krishnan Pandalai, JJ.*) LAKSHMANA AYYAR *v.* R.S. NAVUDU. **I.R. 1931 Mad. 620=132 I.C. 124=1931 M.W.N. 193=A.I.R. 1931 Mad. 340.**

———**S. 53 (4)**—*Schemes settled by Civil Courts—Modification by Board.*

Where applications were severally made to the Religious Endowments Board for modification of schemes which had been settled in respect of certain temples by the Civil Courts and were made on 3rd January, 1927, when Act I of 1925 was still in force and the question was whether the applications under S. 53 (4) of Act I of 1925 did not lie in respect of the schemes settled by Courts before the Act and lay only in respect of schemes settled subsequently.

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Held, that the schemes settled by the Courts under S. 92, C. P. Code, referred to in S. 71 of Act I of 1925 must be only those which had been already settled. (*Krishnan Pandalai, J.*) CHENGAYYA PANTULU *v.* KOTAYYA. **140 I.C. 769=I.R. 1933 Mad. 41=1932 M.W.N. 1120=36 L.W. 883=A.I R. 1933 Mad. 57=63 M.L.J. 780.**

———**S. 59 (2)**—*Scope—Excepted temple—Scheme for—Constitution of separate body of trustees—Powers of the Board.*

In settling a scheme for an "excepted temple", the Board has no power to appoint or constitute a separate body of trustees for administering the temple under S. 59 (2). Having regard to the general scheme of the Act, it cannot be said that S. 59 (2) was not intended to confer special power on the Board in the case of a *math* but merely to make a special restriction when the power under S. 59 (1) is exercised with reference to a *math*. An "excepted temple" is clearly differentiated throughout the Act. (*Pakenham Walsh and Varadachariar, JJ.*) NARANNA NAIDU *v.* VENKATARAMAYYA BHUKTHA GARU. **58 Mad. 862=156 I.C. 953=8 R.M. 91=A I.R. 1935 Mad. 762=1935 M.W.N. 382=68 M L.J. 722.**

———**S. 71**—*Schemes settled by Civil Courts—Application to Board for modification.*

Where applications were severally made to the Religious Endowments Board for modification of schemes which had been settled in respect of certain temples by the Civil Courts and were made on 3rd January, 1927, when Act I of 1925 was still in force and the question was whether the applications under S. 53 (4) of Act I of 1925 did not lie in respect of schemes settled by Courts before the Act and lay only in respect of schemes settled subsequently.

Held, that the schemes settled by the Courts under S. 92, C. P. Code, referred to in S. 71 of Act I of 1925 must be only those which had been already settled. (*Krishnan Pandalai, J.*) CHENGAYYA PANTULU *v.* KOTAYYA. **140 I.C. 769=I.R. 1933 Mad. 41=1932 M. W.N. 1120=36 L.W. 883=A.I.R. 1933 Mad. 57=63 M.L.J. 780.**

———**S. 84 (2)**—*Application under—Jurisdiction of District Court—Procedure applicable—Right of parties to adduce evidence.*

When an application is made to a District Court under S. 84 (2) of the Madras Hindu Religious Endowments Act in respect of a decision arrived at by the Board on the question whether an institution is a math or temple within the meaning of the Act, the jurisdiction of the Court is not restricted to that of an appellate or revisional tribunal and the application being one to which the ordinary procedure of the Court will apply, the parties have the right to produce such evidence as they wish. (*Reilly and Anantakrishna Ayyar, JJ.*) SRI ISHWARANANDA BHARATHI SWAMI *v.* BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS. **56 Mad. 40=I.R. 1932 Mad. 694=139 I.C. 418=1932 M.W N. 729=36 L.W. 673=A.I.R. 1932 Mad. 593=63 M.L.J. 254.**

———**(II OF 1927)**—*Ex parte* order—If opposed to natural justice—Order by Board appointing receiver—Powers of Board to review—Board not moved—Interference. *See* CERTIORARI. **68 M.L.J. 178.**

———Scope and effect—If repeals Charitable and Religious Trusts Act (XIV of 1920). *See* CHARITABLE AND RELIGIOUS TRUSTS ACT. **68 M.L.J. 55.**

———**S. 7 (2)**—*Proceeding under Act of 1925—Continuation.*

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The only provision in Act II of 1927 about continuation of proceeding begun under the Act of 1925 is S. 7 (2). It says that all proceedings taken under the earlier Act may be continued after that Act in so far as they are not inconsistent with the provisions of this Act. There is nothing in S. 75 (4) which is inconsistent with continuing the application presented already. In such cases it is not necessary to convert the applications into suits nor is there any question of Court-fees. (*Krishnan Pandalai, J.*) CHENGAVYA PANTULU *v.* KOTAVYA. **140 I.C. 769 = I.R. 1933 Mad. 41 = 1932 M.W.N. 1120 = 36 L.W. 883 = A.I.R. 1933 Mad. 57 = 63 M.L.J. 780.**

——**S. 9 (5)**—*Excepted temple—Tests—"Has been hereditary"—Meaning of—Actual exercise of right—If necessary.*

In finding whether a temple is or is not an "excepted" temple the Court has to consider not only whether the right to the trusteeship is hereditary, but also whether in fact such right has been exercised by the members of the founder's family. The words "has been hereditary" in S. 9 (5) of the Hindu Religious Endowments Act suggest that the right contemplated is one which has continued to be exercised up to date. What has to be taken account of is the *de facto* exercise of hereditary right and not of a mere presumptive right not exercised for several generations. (*Varadachariar, J.*) KRISHNAMURTHI *v.* MADRAS HINDU RELIGIOUS ENDOWMENTS BOARD. **59 Mad. 245 = 158 I.C. 733 = 8 R. M. 349 = 1935 M.W.N. 781 = 42 L.W. 547 = A.I.R. 1935 Mad. 921 = 69 M.L.J. 384.**

——**S. 9 (11)**—*Kattalai—If endowment.*

A Kattalai is a religious endowment within the meaning of S. 2 (11) (*Beasley, C.J. and Cornish, J.*) PRESIDENT OF THE BOARD OF COMMISSIONERS FOR H.R.E., MADRAS *v.* NAGARATHINA MUDALIAR. **156 I.C 261 = 7 R.M. 674 = 41 L.W. 454 = 1935 M. W.N. 302 = A.I.R. 1935 Mad. 417 = 68 M.L.J. 549.**

——**S. 9 (11)**—*Offerings and gifts—If personal properties of poojaries or trustees.*

Properties consisting of gifts and offerings made to the temple by worshippers are *prima facie* temple properties and not the personal properties of the poojaries or trustees; it is for the latter to prove any rights they claim in them. (*Walsh, J.*) RAMASWAMI POOSARI *v.* MADRAS H.R.E. BOARD. **156 I.C. 932 = 8 R.M. 81 = 41 L.W. 199 = 1935 M.W.N. 127 = A.I.R. 1935 Mad. 755 = 68 M.L.J. 178.**

——**S. 9 (11)**—*Religious endowment—Kattalai—Meaning of.*

The definition of religious endowment in S. 9 (11) is wide enough to include a Kattalai. In the stricter sense, a Kattalai is a religous endowment the object of which is the performance of some kind of religious duty in the temple for the benefit of some other individual or institution outside the temple. In the lesser sense, there is no outside institution or individual who is the beneficiary but the temple itself is the beneficiary. *Ramesam, O.C. J. and Venkatasubba Rao, J.*) VYTHILINGA PANDARA SANNADHI *v.* RANGANADHA MUDALIAR. **57 Mad. 362 = 150 I.C. 448 = 6 R.M. 722 = 1933 M.W.N. 1235 = 39 L.W. 205 = A.I.R. 1934 Mad. 126 = 66 M.L.J. 98.**

——**S. 9 (12)**—*'Temple'—Mere ruins whether sufficient.*

Where there was nothing remaining of a temple except a heap of stones its site and its name and the establishment of the temple had completely disappeared and ceased to be used as a place of public worship at a time long beyond living memory.

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Held, that there was no temple within the meaning of S. 9 (12). (*Beasely, C.J. and Cornish, J.*) HINDU RELIGIOUS EMDOWMENTS BOARD, MADRAS *v.* RUKMINI. **55 Mad 636 = I.R. 1932 Mad. 452 = 137 I.C. 758 = 1932 M.W.N. 442 = 35 L.W. 588 = A.I.R. 1932 Mad. 470 = 62 M.L.J. 594.**

——**S. 18—(As amended by Act IV of 1930)**—*Excepted temple—Board starting scheme proceedings suo motu—Appointment of receiver pending final order—Legality—If* ultra vires—*Writ of* certiorari—*Issue of.*

The Hindu Religious Endowments Board, Madras, started *suo motu* proceedings under S. 62 of Act II of 1927 to frame a scheme for a temple which was an excepted temple according to the amended definition of Act IV of 1930. While the draft scheme was pending consideration by the trustees, the Board, purporting to act under S. 18 of Act II of 1927, appointed an *interim* receiver of the temple for realising the collections and offerings during Fridays in the month of Adi, with a view to ascertain the correct income derived by the temple during the Adi Fridays,

Held, that the order appointing a receiver was *ultra vires*, as the Board had no such powers of interference with the trustees of excepted temples, and that the general principle "that where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employing such means as are essentially necessary to its execution," cannot override the more particular provisions of the Act which defines the powers,

Held, further, that even if no actual relief is possible because the period during which the collections were to be made was already past, the matter was one of such importance, and the order a serious infringement of the rights of the trustees that the case was a proper one in which the High Court should exercise its right of *certiorari*, and the order appointing receiver should be set aside as being in excess of the Board's jurisdiction. (*Walsh, J.*) RAMASWAMI POOSARI *v.* MADRAS H.R. E. BOARD. **156 I.C. 932 = 8 R.M. 81 = 41 L.W. 199 = 1935 M.W.N. 127 = A.I.R. 1935 Mad. 755 = 68 M. L.J. 178.**

—— —**Ss. 20 (1) (a) and (c), 21 and 22**—*Committee constituted under Act of* 1863—*Power of Government to vary.*

Where the strength of a certain Devasthanam committee constituted under the Act of 1863 is varied by certain Government notifications purporting to interfere with and vary the constitution of that committee under the Act of 1927 it means that it was abolished by one of the notifications validly under S. 20 (1) (*c*) and was reconstituted validly under a subsequent notification under S. 20 (1) (*a*) of the Act of 1927. (*Wallace and Krishnan Pandalai, JJ.*) LAKSHMANA AYYAR *v.* R. S. NAYUDU. **I.R. 1931 Mad. 620 = 132 I.C. 124 = 1931 M.W.N. 193 = A.I.R. 1931 Mad. 340.**

——**S. 44**—*Applicability—Service Inams—Failure to perform service—Remedy of trustee against inam holder.*

S. 44 of the Act does not enable the Court to make an order in respect of services to a temple which are remunerated by a service inam. The section refers to the case of an endowment which is clearly in the nature of a charge and a charge only, that is to say, where otherwise ordinary land is made subject to such a charge, the proceeds of which are to be paid by the holder to the institution. In the case of an inam land, no such payment is in question nor any charge securing it and S. 44 has no application thereto. (*Curgenven, J.*) KOTAYYA *v.* YELLAMANDA. **56 Mad 731 = I.R. 1933 Mad. 454 = 144 I.C. 606 (1) = 1933 M.W.N. 508 = 38 L.W. 94 = A.I.R. 1933 Mad. 549 = 65 M.L.J. 54.**

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———**Ss. 44 and 84**—*Order of District Court on application under S. 144—Appeal—Decree.*

A proceeding under S. 44 of the Madras Hindu Religious Endowments Act is not a suit, and no appeal lies from an order passed by the District Judge under S. 84 (2) of the Act either under that Act or under the Civil Procedure Code. Such an adjudication is not a decree under S. 96 read with S. 2 (2), C. P. Code. (*Stone and Pakenham Walsh, JJ.*) VENKATARATNAM *v.* NAGAYYA. **158 I.C. 530 = 1935 M.W.N. 657 = 41 L.W. 682 = A.I.R. 1935 Mad. 373 = 68 M.L.J. 423.**

———**S. 57**—*Order framing scheme under—Binding nature of—Effect—Decision about the temple being non-excepted.*

Under S. 57 of the Act, the order of the Board settling scheme became final in the absence of suit mentioned in it and it is binding on the committee the trustee and all parties having interest. S. 57 applies only to non-excepted temples and when the Board settles a scheme under that section, that act involves the decision on its part that the temple is a non-excepted one. The order settling the scheme, and the decision which it involves are equally binding on all persons having interest and therefore no further enquiry is needed in regard to the temple as distinguished from its properties. (*Venkatasubba Rao, J.*) SESHASAYEE AYYANGAR *v.* GOVINDA PILLAI. **59 Mad 36 = 157 I.C. 925 – 8 R.M. 177 = 1935 M.W.N. 556 = 42 L.W. 45 = A.I.R. 1935 Mad. 612 = 69 M.L.J. 87.**

———**S 63**—*Scheme—Internal management of excepted temple—Interference by Board.*

The policy of the Act is to place mutts and excepted temples in normal conditions under much less direct and detailed interference from the Board in matters of internal management than ordinary temples. This does not mean that in cases of proved mismanagement or incapacity, or in the imperative interests of future good government, such interference may not have to be provided for in a scheme. But in the absence of such special grounds the proper aim in a scheme of administration for an excepted temple is to leave the internal managements as much as possible to the trustees providing only such safeguards as are sufficient to prevent grave misgovernment and to make the power of superintendence of the Board effective. (*Wallace and Krishnan Pandalai, JJ.*) MANAVIKRAMA RAJA *v.* THATHAMANGALATH. **54 Mad. 532 = 131 I.C. 19 = 35 L.W. 817 = A.I.R. 1931 Mad. 328.**

———**S. 63**—*Suit for modification of scheme—Evidence to show how scheme worked admissible.*

In a suit under S. 63 for the modification of a scheme evidence to show how the scheme worked is admissible. The need to amend a scheme may arise as much from the fact that it does not work or has not been worked properly as from previously existing facts such as mismanagement. (*Wallace and Krishnan Pandalai, JJ.*) MANAVIKRAMA RAJA *v.* THATHAMANGALATH. **54 Mad 532 = 131 I.C. 19 = 35 L.W. 817 = A.I.R. 1931 Mad. 328.**

———**S. 67**—*Jurisdiction of Board—Need for existence of temple.*

The Board has no jurisdiction to decide the way in which the income from properties attached to a temple should be applied when the temple has, before the Act came into force, permanently ceased to exist as a place of public worship. The Act is applicable only if there is in existence a temple as defined by S. 9 (12).

Semple:—It may be that a temple which at the time when the Act came into force, had been temporarily abandoned as a place of worship for reasons, such as destruction by fire or flood, would still be a temple to which the Act applied. (*Beasley, C.J. and Cornish, J.*) HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS *v.* RUKMANI. **55 Mad. 636 = I.R. 1932 Mad 452 = 137 I.C. 758 = 1932 M.W.N. 442 = 35 L.W. 588 = A.I.R. 1932 Mad. 470 = 62 M.L.J. 594.**

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———**S. 69**—'*Income*'—Yeomiah *allowance—Levy of contribution.*

Yeomiah allowance granted by the Government to a temple does not come under 'income' and cannot be the basis for levy of contribution under S. 69. (*Madhavan Nair, J.*) KRISHNAVENAMMA *v.* KRISHNA SASTRULU. **I.R. 1932 Mad. 401 (1) = 137 I.C. 510 = 1932 M.W.N. 1062 = 35 L.W. 348 = A.I.R. 1932 Mad. 310 (1).**

———**Ss. 69 and 70**—*Kattalaidar—Assessment of Powers of Board—Execution as decree.*

Since a Kattalai is a religious endowment, S. 70 (1) of the Act authorises the Board to assess the kattalaidar or the trustee of a specific endowment with contribution under S 69 of the Act. S. 70 (2) of the Act further enables the Board to recover the amount so assessed by execution proceedings against such trustee. The executing Court must execute it as a decree and cannot go behind it. (*Beasley, C. J. and Cornish, J.*) PRESIDENT OF THE BOARD OF COMMISSIONERS FOR H. R. E., MADRAS *v.* NAGARATHINA MUDALIAR. **156 I.C. 261 = 7 R.M. 674 – 41 L.W. 454 = 1935 M.W.N. 302 = A.I.R. 1935 Mad. 417 = 68 M.L.J. 549.**

———**Ss. 69 and 70 (2)**—*Contributions—Recovery of — Application to Court by Board—Validity of demand —If can be gone into—Objection on the ground of non-service of notice—Maintainability.*

A Court to which an application is made under S. 70 (2) of the Act has the same powers, and is subject to the same limitations, as would be a Court executing an ordinary civil decree. It must execute the demand made by the Board as it stands and cannot enter into questions of its validity or propriety. In particular, no inquiry can be made into the merits of the decision upon which the demand is based. It is, however, open to the Court to decide in any disputed case whether the property out of which it is proposed to realise the amount is a religious endowment within the meaning of the Act. When notice is served on the archakas, they have no right to dispute the validity of the notice served by the Board on the ground that it was not served on the trustee. If, in fact, there is some other trustee, it is for him to object on that score, if he elects to intervene, and not for the archakas. (*Curgenven and Cornish, JJ.*) RAMIAH *v.* PRESIDENT, H. R. E. BOARD. **58 Mad. 764 = 157 I.C. 818 = 41 L.W. 411 = 1935 M.W.N. 317 = A.I.R. 1935 Mad. 396 = 68 M.L.J. 494.**

———**S 70**—Demand for contribution—Non-compliance—Application to Court under S. 70 (2)—Limitation applicable—Starting point. *See* LIMITATION ACT, ART. 182. **68 M.L.J. 200.**

———**S. 70**—*Proceedings under—If in execution—*Ex parte *decree cannot be set aside in review.*

Proceedings under S. 70 are proceedings in execution of a decree, and therefore it is not open to the persons against whom proceedings are instituted to object to the validity of the orders passed by the Hindu Religious Endowments Board and they are not entitled to have the *ex parte* decree set aside in review. (*Beasley, C.J. and Cornish, J.*) MAHADEVUDU *v.* HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS. **157 I.C. 985 = 8 R.M. 189 = 42 L.W. 497 = 1935 M.W.N. 384 = A.I.R. 1935 Mad. 585.**

———**S. 70**—*Recovery of amount—Application for—Appeal.*

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The words in S. 70 "as if a decree had been passed" attract to the order the whole procedure in execution and the right of appeal provided under S. 47 of the C. P. Code. (*Venkatasubba Rao and Reilly, JJ.*) LAKSHMINDRA TIRTA SWAMIYAR *v.* PRESIDENT, H. R. E. BOARD, MADRAS. **56 Mad. 712=I.R. 1933 Mad 162=141 I.C. 799=37 L.W. 207=1933 M. W.N. 213 · A I.R. 1933 Mad. 305=65 M.L.J. 364.**

[**R.** 58 M. 760 (762); 68 M.L.J. 423.]

——**S. 70**—*Service on executive trustee—Sufficiency of.*

When by usage one of several trustees acts as the managing or executive trustee, the notice served on such trustee must be deemed to be a proper notice as against the institution. (*Venkatasubba Rao and Reilly, JJ.*) LAKSHMINDRA TIRTA SWAMIYAR *v.* PRESIDENT, H. R. E. BOARD, MADRAS. **56 Mad. 712=I R. 1933 Mad. 162=1933 M W N. 213=141 I.C. 799=37 L. W. 207=A.I.R. 1933 Mad. 305=65 M.L.J. 364.**

——**S. 70 (1) and (2)**—Assessment by Board of Kattalaidar—Recovery of contribution assessed—Execution—Power of Court to refuse execution. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, SS 69 AND 70. **41 L.W. 454=1935 M.W.N. 302=68 M.L J. 549.**

——**S. 70 (2)**—*Application under—Jurisdiction of District Judge—Legality of Board's demand—If can be enquired into.*

A District Judge who is moved under S. 70 (2) of the Act is in the same position as any other executing Court and is precluded from deciding whether the demand made by the Hindu Religious Endowments Board was right or wrong He has no jurisdiction to examine the demand on its merits, but is bound to enforce it. (*Beasley, C.J. and King, J.*) PRESIDENT OF THE BOARD OF COMMISSIONERS FOR H. R. E., MADRAS *v.* SHIRUR MUTT. **58 Mad. 760=156 I.C. 747=8 R M. 44=41 L.W. 264=1935 M.W.N. 142=A.I.R. 1935 Mad. 217=68 M L J. 200.**

——**S. 70 (2)**—Application under—Powers of Court—Validity of demand—If can be gone into—Non-service of notice on trustee—Objections as to—Competency. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, SS. 69 AND 70 (2). **68 M.L J. 494.**

——**S. 73**—Applicability and scope—"Religious endowment"—Fund for revocation of temple and for maintenance of Vedapatasala—Amount used for both together without apportionment for severance—If falls under Act. *See* C. P. CODE, S. 92. **69 M L.J. 274.**

——**S. 73**—*'Except as provided by this Act'—Meaning of.*

The expression "except as provided by this Act" should be construed as meaning "contrary to the provisions of the Act". So a suit, if not prohibited by the Act, is not barred even if it be not provided for by the Act. 97 I.C 480, Foll. (*Curgenven and Cornish, JJ.*) VYTHILINGA PANDARA SANNADHI *v.* TEMPLE COMMITTEE, TINNEVELLY CIRCLE. **54 Mad. 1011=I. R. 1931 Mad. 702=133 I C 14=34 L.W. 254=A.I. R. 1931 Mad 801=61 M.L J. 815.**

[**Appr** 57 M. 315 (321); **Expl. & Not F.** 57 M. 362 (366, 367.)]

——**S. 73**—*Scope and effect of.*

The respective spheres of S. 92, C. P. Code, and S. 73 of the Madras Hindu Religious Endowments Act must not be forgotten. The latter Act removes from the ambit of S. 92, C.P. Code, only those religious trusts which amount to "religious endowments" under that Act. Where an endowment or fund is set apart for two

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purposes, namely, for the renovation of a temple and for the maintenance of a vedapatasala not connected with any temple, the entire amount of the fund being devoted to both purposes together without any apportionment or severance, the endowment is not a "religious endowment" falling under the Madras Hindu Religious Endowments Act, because one of the purposes, though religious, is outside the scope of the Act. (*Venkatasubba Rao, J.*) ANNAMALAI CHETTIAR *v.* SOLAVAPPA CHETTIAR. **161 I.C. 177=8 R.M. 793 =1935 M.W.N. 607=42 L.W. 505=A.I.R. 1935 Mad. 983—69 M.L J. 274.**

——**S. 73**—*Scope—Suit by trustees against alienees—Bar.*

The effect of S 73 of the Act is that a suit which could only be instituted by the Advocate-General or by some persons with his consent under S. 92, C.P. Code, must, when it relates to religious endowments governed by the Act, be instituted by the Religious Endowment Board or by some person having an interest and with the consent of the Board. Hence a suit by a trustee to recover trust property from the alienees is outside the scope of S. 73. (*Beasley, C. J. and Cornish, J.*) HAZARIMULL CHANDUK CHAND *v.* VEDACHALA CHETTIAR. **55 Mad. 549=I.R. 1932 Mad. 493=138 I.C. 74=1932 M.W.N. 9=35 L.W. 156=A.I.R. 1932 Mad. 234=62 M.L.J. 180.**

——**S. 73**—*Scope—Suit by trustee against person wrongly in possession of trust property.*

The bar under S. 73, is only in respect of suits relating to the administration or management of the trust, *i.e.*, proceedings against the trustee and not in respect of proceedings against the person who is wrongly in possession of the property in which the trust is interested. Where the claim by the trustee of a temple is for a declaration that defendant 1 had no right under the sale deed taken by him from defendant 2 on the ground that the property is burdened with a service to the temple.

Held, that the suit is not barred by S. 73. 55 M. 549: 62 M.L.J 180. (*Varadachariar, J.*) VENKATACHARYULU *v.* HARIHARA PRASAD. **158 I.C. 883=8 R. M. 376=42 L.W. 757=1935 M.W.N. 903=A.I.R. 1935 Mad. 964.**

——**S. 73**—*Scope—Suit to establish a personal right of hereditary trusteeship.*

A class of suit to which S. 92 of the C P. Code would not relate cannot be brought within the scope of the first part of the S. 73 and a suit to establish a personal right as hereditary trustee cannot be deemed to be a suit in respect of the administration or management of the religious endowment to which the trusteeship appertains and is, therefore, not barred by S. 73. 46 Bom. 101, Ref. (*Curgenven and Cornish, JJ.*) VYTHILINGA PANDARA SANNADHI *v.* TEMPLE COMMITTEE, TINNEVELLY CIRCLE. **54 Mad. 1011=I. R. 1931 Mad 702=133 I.C. 14=34 L.W. 254=A.I.R. 1931 Mad. 801=61 M L J. 815.**

Appr. 57 M. 315 (328); **Disc.** 55 M. 549 (552, 557); **Expl & Not F.** 57 M. 362 (367, 374).]

——**S. 73**—*Suit under—Reliefs payable in.*

S. 73, having regard to the manner in which it has come to be framed and taken with the provisions relating to Court-fees, is confined to cases in which the main relief falls under any of the classes (*a*), (*b*), (*c*) and (*d*) and covers relief only incidental to or *ejusdem generis* with the main reliefs and it is because it is to be confined to suits of such a simplified nature that the Court fee is made definite and limited to Rs. 50. It is not made too costly because it is inexpedient to do so where the relief

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is for the removal of a trustee or to vest property in a Receiver, etc. But when it is sought to recover properties which may be worth lakhs of rupees and to recover monies as a result of taking accounts of gross mismanagement or as damages for some act of default, to permit such suits to be filed with a Court-fee of Rs. 50 seems not to have been intended by the Legislature. Beyond the reliefs expressly mentioned in (*a*), (*b*) and (*c*) of S. 73 and any relief incidental to them no further relief can be prayed for in the suit. (*Ramesam and Cornish, JJ.*) VASUDEVAN ADISERPAD *v.* BHAWADASAN NAMBUDIRI. **57 Mad 315=148 I C. 1155=6 R.M. 586=1933 M.W.N. 1433=38 L.W. 902=A.I.R. 1934 Mad. 115.**

——**S. 73 (2)**—*Construction*—"*Except as provided by this Act*"—*Suit relating to the administration of a kattalai*—*Jurisdiction.*

The words "except as provided by this Act" mean "except under the provisions of this Act". There is no reason to construe the terms as being confined in their application to the procedure governing the suit for in their plain and natural sense, they are intended to lay down the substantive law also. 54 M. 1011; 1927 M. 338, Dist. The words of Cl. (2) exclude the applicability of S. 92, C. P. Code, to a suit for the administration or management of a kattalai which is a religious endowment under the Act. Such a suit is not, therefore, maintainable. (Desirability of amendment suggested.) (*Ramesam, O. C. J. and Venkatasubba Rao, J.*) VYTHILINGA PANDARA SANNADHI *v.* RANGANADHA MUDALIAR. **57 Mad. 362=150 I.C. 448=8 R.M 722=39 L.W. 205=1933 M.W.N. 1235=A.I.R. 1935 Mad. 126=66 M.L.J. 98.**

——**S. 73 (2)**—'*Suit relating to management of religious endowment*'—*Suit for money due on accounts and for damages is not one.*

Per *Ramesam, O C.J.*—Suits merely to recover money found due by the defendant on the taking of accounts and to recover property belonging to the trust but in the possession of the defendant and to recover damages for a tort committed by the defendant would always be maintainable under the general law and may not fall under S. 92, C. P. Code, even and they certainly would not be suits relating to the administration or management of religious endowments, within S. 73 of Madras Act (II of 1927). (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) VYTHILINGA PANDARA SANNADHI *v.* RANGANADHA MUDALIAR. **57 Mad. 362=150 I.C. 448=8 R.M. 722=39 L.W. 205=1933 M.W.N. 1235 =A.I.R. 1934 Mad. 126=66 M.L.J. 98.**

——**S. 75 (4)**—*Proceeding under Act I of* 1925—*Continuation under new Act.*

The only provision in Act II of 1927 about continuation of proceedings begun under the Act of 1925 is S. 7 (2). It says that all proceedings taken under the earlier Act may be continued after that Act in so far as they are not inconsistent with the provisions of this Act. There is nothing in S. 75 (4) which is inconsistent with continuing the application presented already. In such cases it is not necessary to convert the applications into suits nor is there any question of Court-fees. (*Krishnan Pandalai, J.*) CHENGAYYA PANTULU *v.* KOTAYYA. **140 I.C. 769=I.R. 1933 Mad. 41=36 L.W. 883= 1932 M.W.N. 1120=A.I.R. 1933 Mad. 57=63 M.L. J. 780.**

——**S. 75 (4)**—*Scope*—*Applicability to prior proceedings.*

S. 75 (4) was not intended to be retrospective and could apply only to proceedings taken after it had come into force. (*Krishnan Pandalai, J.*) CHENGAYYA

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——**S. 78**—*Application by the fresh trustee for possession*—*Third party's obstruction*—*Power of Court to hold enquiry*—*Discretion*—*Remedy*—*Independent suit*—*Court's power not exhausted after order for delivery*—*Order under whether can be revoked for likelihood of breach of peace if executed*—*Applicability of O.* 21, *Rr.* 97, 98 *and* 99, *C. P. Code, to these proceedings*—*S.* 141, *C. P. Code*—*Effect of.*

A scheme was settled by the Religious Endowments Board in respect of a temple under S. 57 of the Act and the petitioner became the trustee, in virtue of that scheme. He applied to the District Court under S. 78 of the Act against the ex-trustee for being put into possession of the property. In spite of the order of the Court granting his request he was unable to obtain actual possession of either the temple or its properties by reason of resistance offered by two strangers. The lower Court felt that the moment an adverse claim was put forward by a third party, its power came to an end and the trustee should be directed to enforce his remedy by filing a regular suit,

Held, (1) that under S. 78, the Court has power to deal with the question, by whomsoever the obstruction is offered at the outset; whether by the ex-trustee or by stranger. But it does not follow that the Court is in every case bound to hold an investigation, for, in the exercise of its discretion, which the section vests in it, it may decline to do so, directing the trustee to seek his remedy in an independent legal proceeding. (1933) M. W.N. 934 diss. from ; A.I.R. 1933 Mad. 120, followed. (2) If the adverse claim put forward is of a *bona fide* nature or if difficult and complicated questions have to be gone into, the Court may properly refuse to make an enquiry. (3) The power of the Court is not exhausted when, upon a petition directed against the ex trustee, it had made an order directing the delivery of possession. In the present case the trustee procured such an order in the first instance but complained that the execution of it was prevented by reason of the resistance offered by the third parties. (4) The applications mentioned in S. 78 are proceedings in a Court of civil jurisdiction within the meaning of S. 141, C. P. Code. Hence the provisions of O 21. Rr. 97, 98 and 99 become applicable and the Court can in virtue of the power conferred by them make the investigation. *National Telephone Co. Ltd., Postmaster-General*, (1913) A.C. 546, (1933) I L.R. 57 Mad. 35 and 61 M.L.J. 894, referred to. (5) The lower Court ought not to have revoked its original order made in favour of the trustee, directing the delivery to him of the temple on the ground that the execution of the order was likely to be attended with a breach of the peace. (*Venkatasubba Rao, J.*) SESHASAYEE AIYANGAR *v.* GOVINDA PILLAI. **59 Mad. 36 =157 I.C. 925=8 R M 177=1935 M.W.N. 556=42 L.W. 45=A.I.R 1935 Mad. 612=69 M.L J. 87.**

——**S. 78**—Ex parte *order for delivery*—*Third party claiming property*—*Objection by*—*Reconsideration of order*—*Power of Court.*

Where the Court has passed an *ex parte* order under S. 78 of the Madras Hindu Religious Endowments Act, 1927, directing delivery of alleged trust property to a person appointed by the Board to discharge the duties of a trustee, it is open to the Court to reconsider the order on the objection of a party prejudicially affected by it. (*Curgenven, J.*) GURUVAMMAL *v.* ARUMUGA PADAYACHI. **136 I.C. 769=I R. 1932 Mad. 305= 34 L.W. 989=1931 M.W.N. 1204=A.I.R. 1932 Mad. 164=61 M.L.J. 894.**

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——**S. 78**—*Order under—Appeal.*

No appeal lies from an order under S. 78 either before or after the amendment of that section by Act IV of 1930. (*Reilly and Cornish, JJ.*) SAMI REDDIAR *v.* JANIKIRAMA REDDIAR. **1933 M.W.N. 141 (1).**

——**S. 78**—*Order for delivery—Enforcement of—Powers of Court.*

S. 78 which confers on the Court jurisdiction to make orders for the delivery of possession must be held impliedly to confer on the Court the power of doing all acts necessary to the execution of its order, *e.g.*, to remove obstruction and to cause delivery of possession to be made in accordance with its order. *National Telephone Co.'s case*, (1913) A.C. 546, referred to. (*Beasley, C.J. and Bardswell, J.*) NARAYANA IYENGAR *v.* DESIKACHARIAR. **57 Mad. 35=6 I.R. (Mad.) 49 =145 I.C. 335=1933 M.W.N. 363=38 L.W. 399 = A.I.R. 1933 Mad 689=65 M.L.J. 315.**

——**S. 78**—*Right to apply—Trustees holding office on the date of the Act.*

Trustees holding office when the Act came into force are, under S. 51 (4), deemed to have been appointed under it on the date when the Act came into force and so though not appointed by the Committee, they are entitled to apply under S. 78. (*Krishnan Pandalai, J.*) KATAMREDDI RAMIREDDI *v.* SREERAMULU REDDI. **I.R. 1933 Mad. 58=140 I.C. 826=A.I.R. 1933 Mad. 120.**

——**S. 78**—*Scope—Application against strangers in possession—Maintainability—Discretion of Court.*

There is nothing in S. 78 which debars the jurisdiction of the Court to which an application is made under it from trying any question which may be appropriate as between a religious endowment and strangers, provided the question be relevant to the possession of the mutt or temple or its endowments or title-deeds or documents. But the section only confers a discretion. The Court "*may*". The Court is not bound to make an order under the section in circumstances in which a difficult question of title may arise and prolonged investigation be involved. The Court will ordinarily order a separate suit where the dispute is between a temple and a third party who has a genuine and hostile claim. (*Krishnan Pandalai, J.*) KATAMREDDI RAMIREDDI *v.* SREERAMULU REDDI. **I.R. 1933 Mad. 58=140 I.C. 826=A.I.R. 1933 Mad 120**

——**S. 78**—*Scope—Question of title—Enquiry into—Discretion of District Court.*

S. 78 is intended to apply only to the admitted endowments and it is not intended that the District Court should enter into questions of title. Even if it is expected to form its opinion on such questions in a summary petition under S. 78, it could not be intended to be final; it is subject to the result of a civil suit. If, therefore, the District Court refused to go into the question of title and to pass an order under S. 78, the High Court will not, in revision, send the case back to it. (*Ramesam, J.*) SUBRAHMANYAM *v.* SUBBAYI. **150 I.C. 384=8 R.M. 721=1933 M.W.N. 934=A.I.R. 1934 Mad. 143.**

——**S. 79 (1)**—*Committee established under Act of 1863—Committee constituted under S. 16—Power of Local Government to abolish or vary.*

S. 79 (1) means that any committee established under the Act of 1863 and in existence at the commencement of the Act of 1925 is to be regarded by the law as if it were one constituted under the Act of 1925 and therefore is a committee which comes within the definition of "Committee" under S. 5. S. 16 gives the Local Government power to vary or abolish such a committee. What both the sections really mean is that the Local Government takes power if it thinks fit to abolish the old committees under the Act of 1863 and put in their place new committees under the Act of 1925 and that for the transitory period Schedule 3 is to be in operation. (*Wallace and Krishnan Pandalai, JJ.*) LAKSHMANA AYYAR *v.* R. S. NAYUDU. **I.R. 1931 Mad. 620=132 I.C. 124=1931 M.W.N. 193=A.I.R. 1931 Mad. 340.**

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——**S. 84**—*Application under—Dismissal for default—Order refusing to set aside—Appeal.*

An order refusing to set aside the dismissal of an application under S. 84 for default is not appealable. (*Sundaram Chetty and Pakenham Walsh, JJ.*) SRINIVASA AYYAR *v.* BOARD OF COMMISSIONERS FOR THE HINDU RELIGIOUS ENDOWMENTS, MADRAS. **57 Mad. 297—6 R.M. 446=148 I.C. 168 (1)=39 L.W. 197=1934 M.W.N. 671 (1)=A.I.R. 1934 Mad. 258 (1)=66 M.L.J. 247.**

——**S. 84**—*Board deciding status of temple—Power to review.*

Where the question of the status of the temple is raised by the trustees for the purpose of getting the decision of the Board, there is a dispute which the Board is competent to decide under S. 84 (1) and if the Board decides that the temple was an excepted temple according to the law then prevailing and the trustee being satisfied with his decision no application is made to the Court to set aside or modify the Board's order, the order of the Board becomes final. The Board then has no jurisdiction to reverse its order after the amendment of the definition of excepted temple of 1930. (*Cornish, J.*) RAJAGOPALA CHETTYAR *v.* HINDU RELIGIOUS ENDOWMENTS BOARD. **152 I.C. 386=7 R.M. 222—1934 M.W.N. 1125=40 L.W. 288=A.I.R. 1934 Mad. 555.**

——**S. 84**—*Order under sub-S. (2)—Appeal to High Court—Maintainability.*

An order passed by the District Judge under S. 84 (2) of the Act on an application made to the District Court to set aside the decision of the Hindu Religious Endowments Board under S. 84 (1) is not appealable to the High Court either under the Endowments Act or the C. P. Code. A proceeding commenced on such an application is not a suit; an order made thereon is not a decree and is not appealable. (*Madhavan Nair, Jackson and Lakshmana Rao, JJ.*) RAJAGOPALA CHETTIAR *v.* HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS. **57 Mad. 271—147 I.C. 614=6 R.M. 362=1933 M.W.N. 1385—39 L.W. 4=A.I.R. 1934 Mad. 103 (2)=66 M.L.J. 43 (F.B.).**

[**R.** 11 O.W.N. 1533 (1538); 57 M. 297 (298); **Cons.** 68 M.L.J. 423 (424, 425).]

——**S. 84 (1)**—*Jurisdiction of Board—Need for temple being public place of worship.*

The Board has no jurisdiction to decide the way in which the income from properties attached to a temple should be applied when the temple has, before the Act came into force, permanently ceased to exist as a place of public worship. The Act is applicable only if there is in existence a temple as a defined by S. 9 (12).

Semble:—It may be that a temple which, at the time when the Act came into force, had been temporarily abandoned as a place of worship for reasons, such as destruction by fire or flood, would still be a temple to which the Act applied. (*Beasley, C.J. and Cornish, J.*) HINDU RELIGIOUS ENDOWMENTS BOARD, MADRAS *v.* RUKMINI. **55 Mad. 636=I.R. 1932 Mad. 452=137 I.C. 758=1932 M.W.N. 442=35 L.W. 588=A.I.R. 1932 Mad. 470=62 M.L.J. 594.**

——**S. 84 (2)**—*Applicability—Declaration by Board that certain temple falls within S. 9 (12)—Suit to declare order* ultra vires—*Maintainability—Remedy.*

MAD. HINDU RELIGIOU S ENDOWMENTS ACT (1927), S. 84.

Where certain temple has been declared by the Board to fall within the definition under S. 9 (12), a suit for declaration that the order of the Board is *utra vires* does not lie. The remedy is not open to a party to seek redress in a matter of this sort by way of suit, since the remedy provided in the Act is by way of application under S. 84 (2). 54 M. 928=61 M.L.J. 117, Foll.; 51 M. 76; 53 M.L.J. 688 Dist. (*Walsh and Varadachariar, JJ.*) CHINDAN KAIMAL *v.* BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS. **158 I.C. 335=8 R.M. 257=1935 M.W.N. 1088=42 L.W. 207=A.I.R. 1935 Mad. 564.**

———**S. 84 (2)**—*Application under—Scope of—Right of parties to adduce evidence.*

An application under S. 84 (2) of the Madras Hindu Religious Endowments Act is not merely in the nature of an appeal or revision; it is an application which, so far as the Court is concerned, governed by the ordinary procedure of the Court, and on which the parties have the right to produce such evidence as they wish. The fact that the petitioner did not adduce evidence before the Board does not deprive him of the right to adduce evidence before the Court. (*Pandrang Rao, J.*) KRISHNAMACHARIAR *v.* JAGANNATHA NAYUDU. **153 I.C. 386 (1)=7 R.M. 352 (1)=1934 M.W.N. 963=40 L.W. 680=A.I.R. 1935 Mad. 178 (1).**

———**S. 84 (2)**—Application under S. 44—Order of District Judge on—Appeal—If lies. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, SS. 44 AND 84. **68 M.L.J. 423.**

———**S. 84 (2)**—*Bar of suit.*

When by an act of the legislature powers are given to any person for a public purpose from which an individual may receive injury, if the mode of redressing the injury is pointed out by the statute, the jurisdiction of the ordinary Courts is ousted, and, in the case of injury, the party cannot proceed by suit. S. 84 (2) provides a n application to the District Court as the remedy for a person aggrieved by the decision of the Religious Endowments Board under S. 84 (1) and therefore debars him from proceeding by a separate suit. 12 M. 105; 31 B. 604; 36 M. 120, Rel. (*Curgenven and Cornish, JJ.*) ISWARANANDA BHARATHI SWAMI *v.* BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS. **54 Mad. 928=I.R. 1931 Mad. 696=34 L.W. 209=133 I.C. 8=A.I.R. 1931 Mad. 574=61 M.L.J. 117.**

[**R.** 56 M. 40 (46)]

———**S. 84 (2)**—*Order dismissing petition—Appeal.*

No appeal lies against an order dismissing an application under S. 84 (2). 66 M.L.J. 43=57 M. 261 (F.B.), Rel. on. (*Walsh and Varadachariar, JJ.*) CHINDAN KAIMAL *v.* BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS, MADRAS. **158 I.C. 335=8 R.M. 257=1935 M.W.N. 1088=42 L.W. 207=A.I.R. 1935 Mad. 564.**

———**S. 84 (2)**—*Powers of District Court—Remand.*

The District Court has no power under S. 84 (2) of the Religious Endowments Act to direct a remand and rehearing of the case. It has only the power to modify or set aside the decision of the Board or dismiss the application but more than that, it has not got all the powers of an appellate Court. (*Wallace and Madhavan Nair, JJ.*) CHENGAZHISSERI *v.* BOARD OF COMMISSIONERS FOR HINDU RELIGIOUS ENDOWMENTS. **55 Mad. 201=135 I.C. 912=I.R. 1932 Mad. 240=34 L.W. 848=1931 M.W.N. 764=A.I.R. 1932 Mad. 108=61 M.L.J. 862.**

[**R.** 56 M. 40 (42, 48, 54).]

MADRAS IMPARTIBLE ESTATES ACT (II OF 1904), S. 4—*Effect.*

MAD. IRRIGATION CESS ACT (1865), S. 1.

The effect of S. 4 is that in no circumstances can an alienee obtain a title which survives the proprietor who created it. (*Venkatasubba Rao and Curgenven, JJ.*) RAJA OF KALAHASTI *v.* VENKATA LINGAMA NAYANIM BAHADUR. **I.R. 1932 Mad. 673=139 I.C. 444=36 L.W. 195=1932 M.W.N. 529=A.I.R. 1932 Mad. 709.**

———**S. 4**—*Junior members—Rights of.*

In the estates which are governed by the Madras Impartible Estates Act, the legislature has imposed certain limitations on the power of the holder of an impartible estate. The junior members of the family have not only a right to succeed by survivorship but have a right to control the actions of the proprietor in making alienations and incurring debts. In case of improper alienations, they can sue for setting them aside. The proprietor cannot incur debts except within the limits allowed to a karta of a joint Hindu family subject to the Mitakshara law. (*Niamatullah and Bennet, JJ.*) MAHARAJA KUMAR OF VIZIANAGARAM, *In re.* **56 All. 1009=6 R.A. 884=149 I.C. 306=1934 A.L.J. 1237=A.I.R. 1934 All. 818.**

———**S. 7**—*Effect.*

S. 7 only means that the restrictions imposed by the Act cease to operate from the time that the property by force of a permanent alienation lawfully made ceased to form part of an impartible estate. It will not retrospectively affect alienations made before that happens. (*Venkatasubba Rao and Curgenven, JJ.*) RAJAH OF KALAHASTI *v.* VENKATA LINGAMA NAYANIM BAHADUR. **I.R. 1932 Mad. 673=139 I.C. 444=36 L.W. 195=1932 M.W.N 529=A.I.R. 1932 Mad. 709.**

MADRAS IRRIGATION CESS ACT (VII OF 1865), S. 1—"*Belongs*".

The river belongs to the Government within the meaning of S. 1, when the solum of the stream belongs to the Government, which happens when the Government is the proprietor of lands abutting on the river on both sides or when the river is tidal and navigable. (*Viscount Dunedin.*) SECRETARY OF STATE *v.* SUBBARAYUDU. **59 I.A. 56=55 Mad. 268=35 L.W. 238=36 C.W.N. 359=34 Bom.L.R. 500=136 I.C. 413=I.R. 1932 P.C. 109=1932 M.W.N. 480=55 C.L.J. 461=1932 A.L.J. 348=A.I.R. 1932 P.C. 46=62 M.L.J. 213 (P.C.).**

[**F.** 37 C.W.N. 685 (687) 64 M.L.J. 715 (717) (P.C.)]

———**S. 1**—*Government channel passing through inam lands and carrying water to Government lands—Inam lands on a higher level—Right to take water by cross-bunding—Liability to pay cess—Grant, if can be implied.*

Where the Government channel which passes through inam lands carries water-supply to Government village further on, and where the inam lands are on a higher level than the channel, so that it is impossible to draw water from the channel except by means of cross-bunds occasionally put across the channel, a grant of the water in the channel in the sense that the inamdar may draw off water by cross bunding the channel at any place he likes cannot be implied. The inamdar is liable to pay water-cess, especially when the lands were not wet lands at the time of the inam settlement. (*Ramesam and Venkatasubba Rao, JJ.*) SECRETARY OF STATE FOR INDIA *v.* AIYANAR KONE. **159 I.C. 354=8 R.M. 492=1935 M.W.N. 1210=A.I.R. 1936 Mad. 58=69 M.L.J. 552.**

———**S. 1**—*Government stream—Riparian owner—Liability to cess.*

A riparian owner is not liable to pay water-cess to Government for using water of a stream belonging to the Government, land on one side of which belongs to him, and he takes it in respect of a natural, or of an

MAD. IRRIGATION CESS ACT (1865), S. 1.

easement, right. (*Lord Dunedin*) SECRETARY OF STATE *v.* SUBBARAYUDU. **59 I.A. 56=55 Mad. 288 =35 L.W. 238=36 C.W.N. 359=34 Bom.L.R. 500 =136 I.C. 413=I.R. 1932 P.C. 109=1932 M.W.N. 480=55 C.L.J. 461=1932 A.L.J. 348=A.I.R. 1932 P.C. 46=62 M.L.J. 213 (P.C.).**

———**S. 1**—*Right to levy water-cess.*

Under the Madras Irrigation Cess Act as amended the Government is not entitled to levy water cess unless it is shown either that the river from which the water was derived for irrigation belonged to the Government, *i.e.*, that the Government owned the whole bed of the river, or that the water was supplied from works constructed by the Government. (*Lord Atkin.*) SECRETARY OF STATE FOR INDIA *v.* SUBRAMANIA AIYAR. **I.R. 1933 P.C. 129=143 I.C. 150=37 C.W.N. 685=1933 M. W.N. 559=57 C.L.J. 425=38 L.W. 33=A.I.R. 1933 P.C. 169=64 M.L.J. 715 (P.C.).**

———**S. 1**—*Right to levy water-cess—Effecting of repairs by Government—If a ground.*

When the Government is in charge of the whole irrigation system, and when a portion of it is intended specially for the benefit of a particular village the Government is under the duty of keeping it in good repair. Consequently the fact that the Government has kept it in an efficient condition will not entitle them to collect water-cess if otherwise they are not entitled. (*Ramesam and Venkatasubba Rao, JJ.*) SECRETARY OF STATE FOR INDIA *v.* AIYANAR KONE. **159 I.C. 354=8 R. M. 492=1935 M.W.N. 1210=A.I.R. 1936 Mad. 58= 69 M.L.J. 552**

———**S. 1**—*Rules under—R. 5—Validity of.*

The Government can frame rules to regulate the cultivation and the cess. Cultivation can be regulated only by making rules prohibiting cultivation of particular plots where it is found undesirable and the prohibition itself can only be enforced by the imposition of penal cess as it cannot be expected that officers of Government can be present on the spot and prevent misuse of the water. So R. 5 (B. S. Orders, p. 28) imposing penal assessment is not *ultra vires*. (*Ramesam and Venkatasubba Rao, JJ.*) SYED HYDER ALI SAHIB *v.* SECRETARY OF STATE. **1933 M.W.N. 1457.**

———**S. 1 (a) and (b) (as amended in 1930)**—*Applicability and construction—Liability for cess—When arises.*

Where a ryot enjoys the water voluntarily, nothing further need be shown, and his liability to pay cess directly asises under Cl. (*a*) of S. 1 of the Act. But where the enjoyment of the water is involuntary, the ryot can be made liable only if the conditions in Cl. (*b*) are satisfied, the chief of them being that the irrigation has proved beneficial. The distinguishing feature of Cl. (*b*) is the involuntary nature of the enjoyment; and except in the case of voluntary enjoyment, ryotwari holders coming under proviso (2) are not liable for water-cess under the Act. The use of the words "supplied or used" implies that water must be intentionally supplied and voluntarily used. A person having no choice in the matter, *i.e.*, an option either to take or refuse the water, cannot be said to have "used" the water within the meaning of the Act, so as to make him liable for the cess. (*Ramesam and Venkatasubba Rao, JJ.*) KANNIAPPA MUDALIAR *v.* SECRETARY OF STATE. **59 Mad. 107=8 R.M. 462=159 I.C. 13=1935 M.W.N. 1104=42 L.W. 914=A.I.R. 1936 Mad. 42=69 M.L. J. 728.**

———**S. 1 (b)**—*Compliance with—Collector defending suit for refund of tax—Certificate of Collector—Finality.*

Mere defence by the Collector of a suit for refund of tax levied is itself sufficient compliance with S. 1 (*b*) of Irrigation Cess Act; and a certificate from the Collector that the irrigation was beneficial to the crops is final and cannot be questioned in a Civil Court. (*Pakenham Walsh, J.*) RAMACHANDRA RAJU *v.* SECRETARY OF STATE FOR INDIA. **151 I.C. 765 (2)=7 R.M. 133= 40 L.W. 626=A.I.R. 1934 Mad. 689.**

MAD. LAND REV. ASSMNT. ACT (1876), S. 1.

———**S. 1 (b)**—*Levy of water cess—Test of liability.*

In considering the question whether water-cess is leviable, what has to be decided is not whether the water belongs to the Government; but whether it comes from a river or stream that belongs to Government. 55 Mad. 268 (P.C.); 34 Mad. 21, Ref.; 42 Mad. 239 (F.B.), Dist. (*Beasley, C.J. and Bardswell, J.*) AYYANNA *v.* SECRETARY OF STATE FOR INDIA. **56 Mad. 696=6 I R. (Mad.) 110=145 I.C. 594=1933 M.W.N. 517= 38 L W. 208=A I.R. 1933 Mad. 646=65 M.L J. 179.**

———**S. 1 (b)**—*Liability to cess—Test of—Inam settlement prior to Government irrigation project—Liability to cess not saved by.*

Once it is found that water flows from the Government irrigation project into the plaintiff's tank, he is liable to pay the water-cess. As the irrigation project (in this case, the Periyar system) did not exist at the time of the Inam Settlement, the plaintiff's liability to cess is not saved by that Settlement which could only imply a grant free of water-cess to the extent of enjoying the water sources as they existed at that time.

Per *Venkatasubba Rao, J.*—"The Act is not concerned with the question, whether the water has or has not become the property of the person using it." (*Ramesam and Venkatasubba Rao, JJ.*) SYED HYDER ALI SAHIB *v.* SECRETARY OF STATE. **1933 M.W.N. 1457.**

———**(as amended by Act V of 1900), S. 1 (b)**—*Water flowing from Government source into a reservoir and thereafter used for irrigation—Liability to cess.*

Obiter.—Even where water flows from a Government source into a reservoir and is thereafter used for irrigating any land within the Zamindari, water-cess is leviable. 50 Mad. 961, Disappr. (*Beasley, C.J. and Bardswell, J.*) AYYANNA *v.* SECRETARY OF STATE FOR INDIA. **56 Mad. 696=6 I.R. (Mad.) 110=145 I. C. 594= 1933 M W.N. 517=38 L W. 208=A.I.R. 1933 Mad. 646=65 M L.J. 179.**

MADRAS LAND ENCROACHMENT ACT (III OF 1905), S. 14—*Applicability—Eviction of tenant without notice to landlord—Landlord if person "aggrieved"—Suit by landlord—Limitation.*

A zamindar whose tenant is evicted by the Government under the Land Encroachment Act is clearly a person aggrieved by the proceedings under the Act, because the eviction implies that the landlord was not the owner of the land in question. The fact that the landlord receives no notice of the proceedings does not make him any the less an aggrieved person. A suit, therefore, by such a landlord more than six months after his knowledge of those proceedings is barred by limitation. (*Beasley, C.J. and King, J.*) MAHARAJA OF PITHAPURAM *v.* SECRETARY OF STATE FOR INDIA **152 I.C. 707=7 R.M 269=41 L W. 119= 1934 M.W.N. 1390=A.I.R. 1935 Mad. 7=67 M.L.J. 856.**

MADRAS LAND REVENUE ASSESSMENT ACT (1876), S. 1—*Land in permanently settled estate—Sub-division.*

Where land which is part of a permanently settled estate is alienated and is not subject to payment of jodi, kattubadi or poruppu to the zamindar the alienee becomes the absolute owner and he is entitled to sub-division of it. The right to sub-division should not be made to depend upon the test whether the alienee has got the

MAD. LAND REV. ASSMNT. ACT (1876), S. 1.

right to minerals if in all other respects the grant is absolute. (*Ramesam and Venkatasubba Rao, JJ.*) VENKATA KRISHNAMARAJU *v.* SURYANARAYANA RAJU. **57 Mad. 460=151 I.C. 129=7 R.M. 89=39 L.W. 304=A.I.R. 1934 Mad. 373=67 M.L.J. 544.**

——**S. 1**—*Portion of estate—Separate registration—Refusal by Collector—Remedy.*

The Collector's work in refusing or allowing registration of part of an estate is of a mechanical nature and does not partake of the nature of decision. Hence where a Collector refuses separate registration a fresh application is not barred by *res judicata*; even if the owners pay the full peishcush without keeping registration for any length of time they cannot be barred from exercising this right to get separate registration as the alienee of part cannot be said to have acquired a right by prescription that it should never be split up. Further the owner who pays the full peishcush has an inherent right to get a contribution from the owner of the alienated portion. (*Ramesam and Venkatasubba Rao, JJ.*) VENKATAKRISHNAMARAJU *v.* SURYANARAYANARAJU. **57 Mad. 460=151 I.C. 129=7 R.M. 89=39 L.W. 304=A.I.R. 1934 Mad. 373=67 M.L.J. 544.**

——**S. 1**—*Transfer by zamindar of his zamindari—Holders of mokhasa or agraharam villages in zamindari—No right to object to separate registration and apportionment.*

The holders of Mokhasa or Agraharm villages in Zamindari had no right to object to transfer by a zamindar of the whole or part of his zamindari, or to the separate registration and apportionment which is necessary to give effect to it. So far as they are concerned it is mere substitution of one zamindar for another and in no way affects their rights. Villages situated in the zamindari, are presumably the property of the zamindari, but if the holders of the villages are in a position to rebut this presumption and to desire to obtain separate registration and thereby make themselves directly liable for a portion of the Government peishcush, their right to do so will not be affected. (*Sir John Wallis.*) RAMACHANDRA DEO *v.* SRI LAKSHMINARASIMHA BAHADUR. **61 I.A. 218=57 Mad. 837=38 C.W.N. 726=149 I.C. 1=6 R P.C. 149=59 C.L J. 430=40 L.W. 1=1934 M.W.N. 587=A.I.R. 1934 P.C. 123=67 M.L.J. 16 (P.C.).**

MADRAS LEGAL PRACTITIONERS FEE RULES, Rr. 37 (b) and 31—*Suit for declaration and injunction regarding rights of fishery—Pleader's fee.*

A suit for a declaration and injunction regarding rights of fishery is not capable of valuation So R. 31 is inapplicable and R. 37 applies. So a fee of Rs. 50 awarded by the lower Court in a case where there was nothing to show that its value was less than Rs. 1,000 is justified. (*Ramesam, J.*) NAYUDAMMA *v.* ZEMINDAR OF DEVARAKOTA. **I.R. 1931 Mad. 480=131 I.C. 16=A.I.R. 1931 Mad. 640.**

MADRAS LOCAL AUTHORITIES ENTERTAINMENTS TAX ACT (V OF 1927), S. 6—*Tickets ostensibly sold for As. 8 and more—Apportionment of the price into cost of admission and accessory expenses by accused—Permissibility.*

Where the accused got up a dance and sold tickets costing 8 as., 12 as and 1 Re. for which he had paid no tax and when prosecuted, he pleaded that the real cost of admission was only four annas and the rest of the cost of the tickets was to go towards certain accessory expenses and as the cost was only four annas, it was exempt from tax under S. 3 (2).

Held, that such apportionment of the cost by the accused was not permissible and that he was rightly convicted under S. 6 for not complying with S. 4 of the Act. (*Curgenven, J.*) O'HEARN *v.* EMPEROR. **I.R. 1933 Mad. 204 (2)=142 I.C. 191=34 Cr.L.J. 285=1932 M.W.N. 1272=1933 Cr.C. 707 (2)=A.I.R. 1933 Mad. 461 (2).**

MAD. LOCAL BOARDS ACT (1920), S. 41.

——**S. 7**—*Exemption from tax — Claim for—Reference to Local Government—Necessity for.*

Where the levy of profession-tax is objected to under S. 7, Cl. (1) (*d*) before the prosecution was launched, the corporation is bound under Cl. (2) to refer the dispute to the Local Government and so a prosecution without any reference to the Local Government is premature. (*Lakshmana Rao, J.*) R. K. RAO *v.* CORPORATION OF MADRAS. **1931 M.W.N. 1062.**

MADRAS LOCAL BOARDS ACT (XIV OF 1920), S. 3 (18) (c)—"*Public road*"—*Road margin belonging to Government.*

The definitions of street in the Act of 1884 'road' in the amending Act of 1900. 'Public road' in the Act of 1920—all of them convey the same idea of a road or other way over which the public have a right of way and all of them include the marginal spaces on either side between the actual roadway and the adjacent property. Apart from some alterations in the language in describing the limit of the adjacent property, there is nothing in the amendment to suggest that the new definition excludes a road margin belonging to Government which might have been included in it under the older Act. Under both Acts the real question is whether the disputed Government property is really only adjacent to the road and not a part of the road in the sense of being used or treated or intended to be used or treated as part of the road. (*Pandalai, J.*) KANNAYYA CHETTY *v* PRESIDENT, UNION BOARD, TIRUKOILUR. **131 I.C. 117=32 Cr.L.J. 643=33 L.W. 254=1931 M.W N. 269=1931 Cr.C. 472=A.I.R. 1931 Mad 424=69 M.L.J. 462.**

——**S. 13**—*Disqualification under—Adjudication by Lower Court—Interference by High Court in revision.*

The question whether a "Government pleader and Public Prosecutor in the mofussil is a 'salaried officer' under Government" within the meaning of S. 13 of the Madras Local Boards Act of 1920 is a mixed question of fact and law with which the High Court cannot interfere in revision. (*Reilly and Anantarkishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627=I.R. 1931 Mad 353=130 I.C. 177=33 L.W. 168=A.I.R. 1931 Mad. 83=60 M.L J. 191.**

——**Ss 41 and 42**—"*Default*"—*Removal of destruction—Discretionary matter.*

S. 159 confers a discretion on the President of the Local Board or Union in ordering the owner of any premises to remove an obstruction and so, if he elects not to serve a notice, it cannot be said he has made default in performing his duty within the meaning of S. 41 of the Act. The President of the Taluk Board cannot therefore in such a case invoke the powers specified in S. 42 read with S. 41. He has no power, on the refusal of the Union Board, to order the removal of an obstruction, to serve a notice under S. 159 in respect of a road not vested in the Board or to prosecute for failure to comply with that notice. (*Jackson, J.*) SENDIAPPA NADAR *v.* PRESIDENT. DISTRICT BOARD, MADURA. **54 Mad. 595=I.R. 1931 Mad. 671=132 I C. 319=33 L.W. 475=32 Cr.L.J. 895=1930 M. W.N. 1271=1931 Cr.C. 467=A.I.R. 1931 Mad. 419 =60 M.L.J. 495.**

——**Ss. 41 (1) and 42 (b)**—*Failure of Panchayat President to do duty imposed on him—President of District Board—Power to interfere.*

Where a President of Panchayat fails to do a duty imposed on him, the Local Government or the President

MAD. LOCAL BOARDS ACT (1920), S. 54.

of the Taluk Board on its behalf can fix some period within which the Panchayat President should perform the omitted duty, and on his failure to do so, appoint some person to perform it In such a case the President of the District Board has no power to interfere. And any meeting or resolution passed by his interference is not valid. (*Burn, J.*) BAKTHAVATHSALU NAIDU *v.* RAMANUJA NAIDU. **I.R. 1933 Mad. 386=144 I.C. 215=34 Cr.L.J. 677=1933 M.W.N. 730=1933 Cr.C. 393=A.I.R. 1933 Mad. 326.**

———**S. 54 (2)**—*Changes introduced by Act XI of* 1930.

S. 54 of Act. XI of 1930 changes the previous law in two respects. (1) An officer of Government as defined by the Amending Act is disqualified not merely for election but for holding office as member as well; (2) the proviso lays down that not all salaried officers of the Government shall be excluded from election but only those who are whole time servants of the Government. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627=I R 1931 Mad. 353=130 I C. 177=33 L.W. 168=A.I.R 1931 Mad. 83=60 M.L.J. 191.**

———**S. 54 (2) Proviso**—*Retrospective effect—Jurisdiction over pending proceeding if modified.*

An election to the presidenship of a District Board was made in February, 1930. A petition was filed contesting the validity of the election on the ground that the person elected was disqualified to hold the office by virtue of his being a salaried officer within the meaning of S. 13 of the Madras Local Boards Act, 1920. During the pendency of the election petition Madras Act XI of 1930 came into force.

Held, (1) that S. 54 (2) of the Act XI of 1930 is not of declaratory provision so as to apply to an election held under the old Act of 1920. Meaning of declaratory enactment discussed. (2) That even assuming S. 54 is of a declaratory nature, the jurisdiction of the Court to deal with pending proceeding remains unaffected and the procedure prescribed by the second proviso to S. 54 (2) need not be pursued. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad 627=I R. 1931 Mad. 353=130 I.C. 177=33 L.W. 168=A I R. 1931 Mad. 83=60 M L.J 191.**

———**S. 55**—*Petition alleging disqualification—Defamation.*

A petition to the President however malicious that a certain person was suffering from leprosy and therefore not qualified for election as a member of a Local Board under S. 55 of Madras Local Boards Act, does not amount to defamation. (*Jackson, J.*) DORAISAMI NAIDU *v.* KANNIAPPA CHETTI. **I.R 1931 Mad. 558 =131 I.C 654=32 Cr.L.J. 767=1931 M.W.N. 366 =1931 Cr.C. 551=A I.R. 1931 Mad. 487.**

———**S. 56 (h)**—*Scope.*

The failure to attend meeting during three consecutive months is to be computed forward from the date of the first failure and not backward from the last. (*Krishnan Pandalai, J.*) K N.K.R.M. RAMANATHAN CHETTIAR, *In re.* **130 I.C. 511=33 L.W. 75=A.I.R. 1931 Mad. 138.**

———**Ss. 56 (4) and 57**—*Scope—If alternative.*

An application by a disqualified voter for restoration under S. 56 (4) of the Act does not take away his right to apply to the District Judge under S. 57. The rights under these sections are concurrent and not alternative. (*Madhavan Nair, J.*) KULANDAVELU PILLAI *v.* MUTHU MUDALIAR **40 L.W 506=152 I C. 261 (1) =7 R.M 209 (1)=1934 M W.N. 1201 (1)=A.I.R. 1934 Mad. 651=67 M L.J. 406.**

———**Ss. 57 and 56 (4)**—*Scope—Rights under—If alternative.*

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The right to apply to the Court under S. 57 of the Madras Local Boards Act is not taken away by the previous exercise of the right under S. 56 (4) of the Act. The rights under the two sections are concurrent and not alternative. (*Madhavan Nair, J.*) KULANDAVELU PILLAI *v.* MUTHU MUDALIAR. **40 L.W. 506=152 I C. 261 (1)=7 R.M. 209 (1)=1934 M.W.N. 1201 (1)=A.I.R. 1934 Mad. 651=67 M.L.J. 406.**

———**S. 57 (2)**—*Scope—Person declared disqualified—Whether can be deemed to hold office.*

Where a person is held to be disqualified to hold the office of President of a District Board, it cannot be said that he should be deemed to hold office for any term by virture of S. 57 (2). (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627=I.R. 1931 Mad. 353=130 I.C. 177=33 L.W. 168=A.I.R. 1931 Mad. 83=60 M.L.J. 191.**

———**Ss. 60 & 163 A(as amended in 1930)**—*'Public roads"—"Puntas" or village tracks—Trees of spontaneous growth standing on—Rights of Board and of owner of the soil.*

"Puntas" or village tracks are "public roads" within the meaning of S. 60 and they are vested in the Taluq Board under that section. But the vesting of such roads vests in the Local Board such property and such property only as is necessary for the control, protection and maintenance of the street as a highway for public use and not full proprietary rights over the soil of the "puntas." Consequently, although it might be necessary for the Taluk Board to cut down trees of spontaneous growth standing on such "puntas" which obstruct the use of "puntas" or interfere with the safety of those using them, it cannot claim full ownership of all such trees and their usufruct which continue to vest in the owner of the soil. (*Curgenven and King, JJ.*) JAGANNADHA RAJU GARU *v.* THE TALUK BOARD, RAJAHMUNDRY. **157 I.C. 913=8 R.M. 170=1935 M.W.N. 765=42 L.W. 417=A.I.R. 1935 Mad. 810=69 M L J. 269.**

———**S. 77**—*Notification levying tax—Contents of.*

People upon whom a tax is to be levied should be enabled from the statutory notification itself to understand what the tax is and its rate and the local limits of the area in which such tax or toll is to be levied and they should not be driven to look into the schedule of the Act to gain that information. Where in accordance with its resolution to levy company tax, a District Board issued a notification under S 77 stating that company tax would be levied 'at the rate specified in Sch. 4 of the Act.'

Held, that there was not a sufficient compliance with provisions of S 77. 1926 Mad. 800=96 I.C. 690, Foll. (*Beasley, C. J.*) TALUQ BOARD, KOILPATTI *v.* VOLKART UNITED PRESS CO., LTD. **157 I.C. 1030=8 R.M. 208 (1)=42 L.W. 430=1935 M.W.N. 456=A I R. 1935 Mad. 571.**

———**Ss. 79. 88 and 89 (before the amendment of 1930)**—*Intermediate landholder—Test of—Holder of both warams on under-tenure—Cess payable by—Mode of recovery—Madras Estates Land Act (I of* 1908), *S.* **112.**

The respondent was a landholder within the meaning of the Madras Estates Land Act and the appellant, who was a minor inamdar holding under him, had been treated as an intermediate landholder and land-cess calculated on the rental paid to him by his tenants. In 1921, in a suit to which the respondent was not a party, he was found to be an occupancy tenant and he contended that he was liable on that footing to pay only half of the cess under the second proviso, and not the whole of the cess (*less* one-half of the cess assessable on the jodi) under the first proviso to S. 88 of the Local Boards Act. The respondent thereupon proceeded against him

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under S. 112 of the Estates Land Act, In a suit by the appellant contesting his liability under that section

Held, that as between the parties in the present suit, the appellant could be only treated as an intermediate landholder within the meaning of S. 88 of the Local Boards Act because he held on an undertenure created, continued or recognised by the landholder, even though he might be entitled to both the warams.

Held, further, that the effect S. 89 of the Local Boards Act, even before the amendment by Act XI of 1930, was to make the procedure for the realization of rents under the Estates Land Act applicable as against intermediate landholders. (*Waller and Krishna Pandalai, JJ.*) BHUPATHI RAJU *v.* SUBBA RAO. **55 Mad. 646=35 L.W. 673=141 I C. 752=I.R. 1933 Mad. 159=A.I R. 1932 Mad. 410=62 M.L.J. 472.**

——**S. 79 (iii)**—*Scope—Zamindari—Home-farm or pannai lands leased to tenants—Annual rent value—Calculation—Basis of.*

Home farm or pannai lands in a permanently settled zemindari leased out to tenants in the ordinary course, and not occupied by the landholder himself or by non paying rents, fall under S. 79 (*iii*) of the Act, and their annual rent value for the purposes of assessment to land-cess must be calculated on the basis of the rent paid by the tenants, whether they be ryoti lands or private lands; the basis for calculation is not "the assessment fixed on them or similar ryoti lands in the neighbourhood at the permanent settlement. (*Packenham Walsh and Varadachariar, JJ.*) KAMARAJA PANDIYA NAICKER *v.* SECRETARY OF STATE. **162 I C 419=8 R M 991=42 L.W. 931=A.I.R. 1936 Mad. 269=69 M.L J. 695.**

——**S. 86 (3)**—*Scope—Assessment of land-cess—Suit by Zamindar to declare assessment excessive—Jurisdiction of Civil Courts.*

A Civil Court has jurisdiction to entertain a suit by a Zemindar for a declaration that the lands-cess payable by him has been calculated on a wrong basis and has been excessively charged. Such a suit is not barred under the Local Boards Act. The case is one in which the common law right to property is interfered with under colour of statutory powers. The finality contemplated by S. 86 (3) of the Act only amounts to this, that the clause precludes further appeal to the statutory authority from the orders of the Board of Revenue. It does not oust the jurisdiction of the Civil Courts. Further S. 228 of the Act contemplates the existence of a remedy in the Civil Court, and such a remedy is not restricted to cases not falling under S. 88. (*Pakenham Walsh and Varadachariar, JJ.*) KAMARAJA PANDIYA NAICKER *v.* SECRETARY OF STATE. **162 I.C. 419=8 R.M. 991=42 L.W. 931=A.I.R. 1936 Mad. 269=69 M.L.J. 695.**

——**S. 88, Proviss 1 and 2**—*Landholder owning both warams—Lessee—Liability to pay cesses.*

The term landholder as defined in the Madras Local Boards Act includes the landholder as dsfined in the Estates Land Act and also other kinds of landholders not contemplated in that Act. Where the inamdars owned both the warams and the position of the lessee was more that of a tenant than an intermediate landholder,

Held, that the lessee's liability to pay cesses arose under proviso 2 and not proviso 1 of S. 88. (*Sundaram Chetty, J.*) SUBRAMANIA AYYAR *v.* ARUNACHALAM CHETTIAR. **I.R. 1932 Mad. 857=140 I.C. 329=A.I.R. 1933 Mad. 95.**

——**S. 93**—*Double taxation—Avoidance—Policy of Act.*

As regards double taxation all that the Act indicatest

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is that an income derived from a source otherwise taxable within the area must not be taxed twice. But if the lands and houses be outside the area, there is nothing to prevent the income received within the limits of the Board being taxed even though it may have been the subject of taxation at some other place. (*Waller and Krishnan Pandalai, JJ.*) MANICKAVASAGAM CHETTIAR *v.* UNION BOARD OF DEVAKOTTAH. **55 Mad. 853=I.R 1932 Mad 597=138 I.C. 607=1932 M.W. N. 652=36 L.W. 120=A I R. 1933 Mad. 92=63 M.L.J. 741.**

[R. 65 64 M.L.J 779 (781)]

——**S. 93**—*Foreign business—Income received outside Board area—Assessment of resident to profession-tax.*

A resident with the area cannot be assessed to profession-tax if no portion of the income of the foreign businest is actually received by him within the Taluk Board area. (*Sundaram Chetty, J.*) CHOCKALINGAM CHETTIAR *v.* TALUK BOARD, DEVAKOTTAH. **I.R. 1932 Mad 836=140 I.C. 273=1932 M.W.N. 1248=36 L.W. 659=A.I.R. 1933 Mad. 22.**

——**S. 93**—*Foreign business—Income derived within local limits of Board—Liability of resident to profession tax.*

Where a person had a money-lending business at Rangoon but resided within the local limits of the Taluk Board of Devakottah (in the Madras Presidency) and the Board sought to assess him on the basis of the income derived from his business,

Held, that the assessee was liable to be assessed to profession tax but only on that part of the profits that reached him at Devakottah. 43 M. 75 and 45 B. 1286, Rel. (*Waller and Krishnan Pandalai, JJ.*) PERIANAN CHETTI *v.* TALUK BOARD, DEVAKOTTAH. **55 Mad. 848=I.R. 1932 Mad. 600=138 I C. 600=1932 M W.N. 649=36 L.W. 117=A.I.R. 1932 Mad. 509=63 M.L.J. 148.**

[F. 55 M. 853 (854); 1932 M W.N. 1248 (1251).]

——**S. 93**—*Income received—Assessee within limits of local board receiving moneys from agent in Burma.*

If a Chetti residing within the local limits of the Taluk Board receives money from his agents in Burma carrying on money transactions there on his behalf, "there seems no necessity to go to the Oxford Dictionary to see whether he 'receives' it, for in ordinary parlance he undoubtedly does." 49 M. 910, Foll. (*Jackson, J.*) RAMAN CHETTY *v.* TALUK BOARD OF SIVAGANGA. **I.R. 1932 Mad. 751=139 I C. 620=1932 M.W.N. 142=35 L.W. 70=A.I.R. 1932 Mad. 226.**

——**S. 93 and Sch. IV, R. 10**—*Profession-tax—Bus service—Principal office at Madura—Liability to tax at Devakottah—Test of liability.*

Where a motor omnibus proprietor running service from Madura to Devakottah sued the Union Board of Devakottah to recover profession tax paid by him under protest on the grounds that this principal office was at Madura, that he resided with his family only there, and that his agent did the collection of fares from passengers at Devakottah and that only when he resided within the Devakottah area in respect of his calling or profession he could be levied profession tax by the Union,

Held, that it having been found that the principal office of the assessee was in Madura, he was not liable to tax by the Devakottah Union Board. On the question as to whether he could be taxed in respect of the source of income in the Devakottah area for example, the fares collected thereby his agent,

Held, that the right of the Devakottah Board to tax he motor bus proprietor in respect of the Devakottah

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source of income is subject, under S. 93, to the qualification in that assessee "resides in such local area for not less than sixty days in the aggregate"; though it is conceivable that a profession or calling may be exercised by a deputy, and a trade certainly can be carried on by an agent, it is not possible that an individual can reside in a place except in person. (*Cornish, J.*) THE UNION BOARD OF DEVAKOTTAH *v.* THIRUMALAI AYYANGAR. **148 I.C 254=6 R.M. 455=38 L.W. 855=1933 M.W.N. 1380=A.I.R. 1934 Mad. 15=65 M.L.J. 779.**

——**Ss. 159 and 207 (1) and (2)**—Notice under S. 159—Failure to remove the encroachment—Prosecutions for—Acquittal—Subsequent trial for the same offence—Propriety—Further prosecution under S. 207 (2) for "continuing breach" *See* MADRAS LOCAL BOARDS ACT, Ss. 207 (1) and (2), and 159. **58 Mad. 513=A.I.R. 1935 Mad. 56=67 M.L.J. 873.**

——**Ss. 159 and 207**—*Prior discharge—Fresh prosecution regarding same encroachment—Sustainability.*

The offence under Ss. 207 and 159 consists in the failure to obey a requisition issued by competent authority. The fact that the accused had been acquitted when previously charged in respect of the same encroachment does not matter. (*Pakenham Walsh, J.*) MOIDI BEARY *v.* PRESIDENT, TALUK BOARD, MANGALORE. **I.R. 1932 Mad. 583=33 Cr.L.J. 626=36 L.W. 426=138 I.C. 488=1932 M.W.N. 632=1932 Cr.C. 552=A.I.R. 1932 Mad. 535.**

——**S. 159**—*Removal of obstruction—Discretion of President.*

S. 159 confers a discretion on the President of the Local Board or Union in ordering the owner of any premises to remove an obstruction and so, if he elects not to serve a notice, it cannot be said he has made default in performing his duty within the meaning of S. 41 of the Act. Matters of discretion are not considered to be mandatory. So the President of the District Board has no power, on the refusal of the Union Board, to order the removal of an obstruction to serve a notice under S. 159 in respect of a road not vested in the Board or to prosecute for failure to comply with that notice. (*Jackson, J.*) SENDIAPPA NADAR *v.* PRESIDENT, DISTRICT BOARD, MADURA. **54 Mad. 595=I.R. 1931 Mad. 671=132 I.C. 319=32 Cr.L.J. 895=33 L.W. 475=1930 M.W.N. 1271=1931 Cr.C. 467=A.I.R. 1931 Mad. 419=60 M.L.J. 495.**

——**S. 159 (1)**—*Previous acquittal or conviction—Whether bars fresh prosecution.*

A previous acquittal or conviction does not bar a prosecution for disobedience of a fresh notice under S. 159 (1). A.I.R. 1932 Mad. 535 and (1927) M.W.N. 645, Foll. (*Walsh, J.*) PRESIDENT, PANCHAYAT BOARD, VELGODE *v.* CHINNA VENKATA REDDI. **I.R. 1932 Mad. 585=138 I.C. 491=33 Cr.L.J. 629=1932 M.W.N. 860=36 L.W. 429=1932 Cr.C. 525=A.I.R. 1932 Mad. 537.**

——**S. 159 (1)**—*Remedy available under—Proceeding under S. 207 (2) also available—Procedure.*

A complainant may pursue any one of several remedies he has. It cannot therefore be true that because a man can be proceeded against under S. 207 (2) he cannot be proceeded against under S. 159 (1). A.I.R. 1929 Mad. 834, Rel. (*Walsh, J.*) PRESIDENT, PANCHAYAT BOARD, VELGODE *v.* CHINNA VENKATA REDDI. **I.R. 1932 Mad. 585=138 I.C. 491=33 Cr. L.J. 629=1932 M.W.N. 860=36 L.W. 429=1932 Cr.C. 525=A.I.R. 1932 Mad. 537.**

——**S. 163-A**—Public roads—Trees of spontaneous growth standing on—Right of Board in respect of—

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Rights of owner of soil to their usufruct. *See* MADRAS LOCAL BOARDS ACT, SS. 60 AND 163-A. **69 M.L.J. 269.**

——**S. 166**—*License fee—Increase in amount—Legality—Bye-law—Validity—Power of Court to question.*

A license fee must not be imposed or increased as if it were an ordinary tax merely to raise revenue. But the levy would not be illegal merely because it is levied for the purposes of revenue. Where there was a sudden rise in rates in the space of one year and there was no corresponding increase in the expenses of supervision and control.

Held (on a difference of opinion between Waller and Krishnan Pandalai, JJ.), that the Court should decide on the facts whether such increase does not amount to a conversion of the fee into a tax for purposes of raising revenue in which case it would be illegal. The Criminal Court has jurisdiction to question the validity of the bye law which fixes the amount of the licence fee. Courts of law are not precluded from going into its validity. The resonable and equitable nature of bye-laws framed by local bodies is a matter open to the Criminal Court to consider when offenders against the bye laws are put for proseeution before them. (*Wallace, J. on a difference of opinion between Waller and Krishnan Pandalai, JJ.*) KUNHAMBU *v.* LOCAL FUND OVERSEER, CHIRAKKAL. **1932 M.W.N. 873.**

[**R.** 1933 M.W.N 102 (106).]

——**Ss. 166 and 193**—*Scope.*

Both Ss. 166 and 193 are equally mandatory in their terms. (*Bardswell, J.*) SATYANARAYANA *v.* H. B. YORKE. **I.R. 1933 Mad. 17=140 I.C. 524=34 Cr.L.J. 26=1933 M.W.N. 102=37 L.W. 264=1933 Cr.C. 263=A.I.R. 1933 Mad. 148.**

——**Ss. 166, 207 and 223**—Using vehicle for hire without licence—Prosecution for — Limitation. *See* MADRAS LOCAL BOARDS ACT, S. 223. **55 Mad. 432=62 M.L.J. 343.**

——**S. 171**—*Private market—Sheds do not constitute a.*

Where it appeared from the evidence that a few sheds were constructed and let out to some traders during the festival,

Held, that the sheds were nothing more than a collection of shops and did not constitute a private market. 52 B. 780, Foll. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* SUBRAMANIA PANDARASANNADHI. **1933 M.W.N. 1432.**

——**Ss 193 and 212 (9)**—*Notification prescribing licence fees—Unreasonableness of—Jurisdiction of Criminal Court to determine.*

The reasonable and equitable nature of the bye-laws framed by local bodies is a matter open to the Criminal Courts to consider when offenders against the bye-laws are put up for prosecution before them. The matter of reasonableness can also be considered to find out whether there has been a legal and valid order for taking out a licence and whether the fee charged for the licence was reasonable so that its summary recovery could be ordered under S. 212 (9) or whether it was so unreasonable that the Court could refuse to order its recovery. (*Bardswell, J.*) SATYANARAYANA *v.* H. B. YORKE. **I.R. 1933 Mad. 17=140 I.C. 524=34 Cr L.J. 26=1933 M.W.N. 102=37 L.W. 264=1933 Cr.C. 263=A.I.R. 1933 Mad. 148.**

——**S. 193 (1)**—*President of Panchayat Board—Notification regarding rice-mill—Validity.*

An action taken by a properly constituted authority should always be held to be legal unless it is demonstrably not so. When therefore a rice-mill is notified under S. 193 (1) it must be taken that the President of

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the Panchayat Board issued the notification in conformity with the law and cannot be said to be invalid. A. I.R. 1924 Mad. 375, Rel. on. (*Walsh, J.*) PRESIDENT, UNION BOARD, ALANDUR *v.* BALAKRISHNA REDDIAR. **I.R. 1932 Mad 594 (1)=138 I C. 583 (1)=33 Cr.L.J. 655 (1)=1932 M.W.N. 720=1932 Cr. C. 512=A.I.R. 1932 Mad. 508.**

———**S. 194**—*Application under—Form of.*

An application for the construction of a factory should be made to the taluk board and not to the president. (*Burn, J.*) PRESIDENT, TALUQ BOARD, TIRUVANNAMALAI *v.* MOTTAYA CHETTY. **1933 M.W.N. 733.**

———**S. 194**—*Installation of machinery—Meaning of—Cancellation of licence—Continued use of machinery—Conviction—Legality.*

The word 'instal' shows that inspection and not user is contemplated and the offence of installing machinery is not a continuing offence. Where the petitioner obtained permission to instal machinery by virtue of the provisions of Cl. (4) of S. 193, and continued to use the machinery in spite of the refusal to renew the license about one year later, he cannot be convicted under S. 194. Once a factory is installed, its user cannot be said to be a continuous installation. 51 Mad. 122, Foll. (*Jackson, J.*) ARUNACHALAM CHETTY *v.* EMPEROR. **I.R. 1931 Mad. 637 (1)=132 I.C. 141 (1)=32 Cr L.J. 851 (1)=34 L.W. 529=1931 M.W.N. 495=1931 Cr.C. 554 (1)=A.I.R. 1931 Mad. 490 (1).**

———**S. 198**—*Effect of, on S.* 12, *Places of Public Resort Act* (1888)—*Powers of District Magistrate in respect of non-municipal area.*

There is no sufficient basis for the contention that after the enactment of S. 198, Madras Local Boards Act, 1920, the powers of the District Magistrate in respect of non municipal areas, given to him under S. 12 of Act II of 1888, are taken away. The purpose of S. 198, Local Boards Act, is to prescribe the authorities to whom applications under Act II of 1888, should be made and appeals would lie in respect of non-municipal areas. The Local Boards Act merely effected a change in procedure, and there is nothing in its scheme to warrant the suggestion that it was intended to take away the powers of the District Magistrate under S. 12 of Act II of 1888, in respect of non-municipal areas. (*Varadachariar, J.*) GHULAM MOHIDEEN SAHIB *v.* DISTRICT MAGISTRATE OF CHINGLEPUT. **153 I.C. 4=7 R.M. 324=40 L.W. 332=A.I.R. 1934 Mad. 545=67 M.L.J. 217.**

———**S. 199**—*Rules under relating to elections, Rr.* 10, 21 *and* 23—*Gosha ladies—Circular directing unveiling during voting—Validity.*

The High Court will not interfere with an order of the Election Commissioner unless he has acted without jurisdiction or in excess of it. Where the Court has committed only an error of law or facts in the exercise of jurisdiction the superior Court cannot interfere. Where the voters in an area included a large number of gosha ladies and the District Election Officer issued a circular to the polling officers to the effect that if the identity of the Gosha ladies was challenged by the candidates or their female agents they would have to unveil themselves and one of the candidates insisted at the time of election that each one of the ladies should unveil herself and it was alleged that in consequence most of the ladies were scared away from voting,

Held, that the circular was not illegal or *ultra vires* and the candidate was entitled to enforce its observance.

Held, further, that the election petition disclosed no offence and therefore the High Court was competent to issue a writ of *certiorari* quashing the order of the Election Commissioner setting aside the election. (*Beasley, C. J. and Bardswell, J.*) MAHOMED ASAN MARACAIR *v.* BIJLI SAHIB BAHADUR. **57 Mad. 571=6 R.M. 530=148 I.C. 668=39 L.W. 465=A.I.R. 1934 Mad. 269=66 M.L.J. 367.**

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———**S. 202**—*Bye-laws under—Reasonableness of—Enquiry into—Jurisdiction of Criminal Courts.*

The reasonable and equitable nature of bye-laws framed by local bodies is a matter open to the Criminal Courts to consider when offenders against the bye-laws are put up for prosecution before them. (*Bardswell, J.*) SATYANARAYANA *v.* H. B. YORKE. **I.R. 1933 Mad. 17=140 I C. 524=34 Cr.L.J. 26=37 L.W. 264=1933 Cr.C. 263=1933 M.W.N. 102=A.I.R. 1933 Mad. 148.**

———**S. 207**—*Remedy available with under Ss.* 159 *and* 207—*Procedure.*

A complainant may pursue any one of several remedies he has. It cannot therefore be true that because a man can be proceeded against under S. 207 (2) he cannot be proceeded against under S. 159 (1). A.I.R. 1929 Mad. 834, Rel. on. (*Walsh J.*) PRESIDENT, PANCHAYAT BOARD, VELGODE *v.* CHINNA VENKATA REDDI. **I. R. 1932 Mad. 585=138 I C. 491=33 Cr.L J. 629=1932 M.W.N. 860=36 L.W. 429=1932 Cr.C. 525=A.I.R. 1932 Mad. 537**

———**Ss. 207 (1) and (2) and 159**—*Notice under S.* 159—*Failure to remove the encroachment—Prosecution for—Acquittal—Subsequent trial for the same offence—Propriety—Further prosecution under S.* 207 (2) *for "Continuing breach".*

When a person committed an offence in the failure to obey the notice issued under S. 159 of the Madras Local Boards Act to remove or alter the encroachment or in other words it was the failure to remove or alter the encroachment specified in the notice that constituted the offence and the Court once acquitted him but the accused was again charged with the same offence and the Magistrate held that the accused was not liable to be tried again for the same offence in view of S. 403, Cr. P.C.

Held, it would not be right or just when the Court had once decided that there had been no failure to remove an encroachment and acquitted the accused, to make the same person liable to be tried again and again for failure to remove the encroachment simply because the same authority hoped to get a different decision later on by issuing one notice after another. Otherwise there would be no end to such prosecutions. Another separate or distinct is not brought into being by the issue of a subsequent notice when that notice is by the same authority and to the same person and relates to the same encroachment or contains the same direction Once there is such failure to remove an encroachment the offence is complete and failure to perform an act is *ex necessitate rei*, continuous in character. If a person has been convicted for failure to remove an encroachment he is to be prosecuted again, not under sub-section(1) of S. 207 for failure to remove the same encroachment but for "continuing breach" under sub-sec. (2) of that section which provides an effective remedy. (*Pandrang Row, J.*) RANGACHARIAR *v.* VENKATASAMI CHETTI, **58 Mad. 513=153 I.C. 322=7 R.M. 343=1935 Cr.C. 55=36 Cr.L.J. 311=40 L.W. 834=A I.R. 1935 Mad. 56=67 M L.J. 873.**

———**Ss. 207 and 159**—*Prior discharge—Fresh prosecution regarding same encroachment—Sustainability.*

The offence under Ss. 207 and 159 consists in the failure to obey a requisition issued by competent authority. The fact that the accused had been acquitted when previously charged in respect of the same encroachment does not matter. (*Pakenham Walsh, J.*) MOIDI

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BEARY *v.* PRESIDENT, TALUK BOARD MANGALORE. **I.R. 1932 Mad. 583=33 Cr L.J. 626=36 L.W. 426 =138 I.C. 488=1932 M.W.N. 632=1932 Cr C. 552 =A.I.R. 1932 Mad. 535.**

[R. 58 M. 513 (515)]

———**S. 207 and Sch. VIII and S. 212 (9)**—*Summary recovery of licence-fees—Validity of notification —Finding essential.*

A bye-law or rule or order passed by a Local Board relating to the taking out of a licence is not bad merely because the licence-fee is excessive. The question of the legality of ordering that a licence should be taken out and that of the unreasonableness of the fee charged for such licence are separate and independent questions and the legality of the order does not depend on the fees being reasonable. Before deciding whether the licence-fees can be recovered summarily under S. 212 (9), it should be found whether the panchayat had a right to insist on the taking out of licences, whether the manufactures in question were of such a nature that the licences could be legally ordered to be taken out in respect of them. (*Bardswell, J.*) SATYANARAYANA *v.* H. B. YORKE. **I R 1933 Mad. 17=140 I.C. 524= 34 Cr.L.J. 26=1933 M.W.N. 102=37 L.W. 264= 1933 Cr.C. 263=A.I.R. 1933 Mad. 148.**

———**S. 207, 166 and 223**—Using vehicles for hire without license—Prosecution for—Limitation *See* MADRAS LOCAL BOARDS ACT, S. 223. **55 Mad. 432 =62 M L.J. 343.**

———**S. 208**—*Refusal of President to hand over documents to successor.*

A person who has ceased to be President can thenceforth neither act, nor purport to act, though he may pretend to act, as President, and hence if he refuses to hand over the documents to his successor he is guilty under S. 208. (*Burn, J.*) BAKTHAVATHSALU NAIDU *v.* RAMANUJA NAIDU. **I.R. 1933 Mad. 386=144 I.C. 215=34 Cr.L.J. 677=1933 M.W.N. 730=1933 Cr. C. 393 A.I.R. 1933 Mad. 326.**

———**S 212 (9)**—*Conviction under S.* 166 (2)—*Fine and penalty imposed—Legality.*

In prosecutions for offences under S. 166 (2) of the Madras Local Boards Act the trial Court convicted the accused and besides imposing a fine the Magistrate levied a penalty under S. 212 (9).

Held (*on a difference of opinion between Waller and Krishnan Pandalai, JJ.*), that the accused could plead that the penalty was not legally recoverable. (*Wallace J, on a difference of opinion between Waller and Krishnan Pandalai, JJ.*) KUNHAMBU *v.* LOCAL FUND OVERSEER, CHIRARKAL. **1932 M.W.N. 873.**

———**S. 212 (9)**—*Conviction for not taking out licence—Summary recovery of licence fee, not obligatory, when no evidence about amount of fee.*

Under S. 212 (9) of the Act, it is provided that the Court, on convicting a person of failure to take out a licence, shall recover summarily the amount of the fee chargeable for the licence. But it cannot be said that Magistrate was wrong in not enforcing that provision in the absence of any evidence on the record as to the amount of that fee. (*Curgenven, J.*) PRESIDENT, DT. BOARD, TANJORE *v.* NATESA NADAR. **1933 M. W.N. 1144.**

———**Ss. 212 (9) and 193**—*Notification prescribing licence fees—Unreasonableness of—Jurisdiction of Criminal Courts to determine.*

The reasonable and equitable nature of the bye-laws framed by local bodies is a matter open to the Criminal Courts to consider when offenders against the bye laws are put up for prosecution before him. The matter of reasonableness can also be considered to find out whether there has been a legal and valid order for taking out a licence and whether the fee charged for the licence was reasonable so that its summary recovery could be ordered under S. 219 (9) or whether it was so unreasonable that the Court could refuse to order its recovery. (*Bardswell, J.*) SATYANARAYANA *v.* H. B. YORKE. **I.R. 1933 Mad. 17=140 I C 524=34 Cr.L.J. 26= 1933 M.W N 102=37 L.W. 264=1933 Cr.C. 263= A.I.R. 1933 Mad. 148.**

MAD. LOCAL BOARDS ACT (1920), S. 221.

———**Ss. 212 (9), 207 and Sch. VIII**—*Summary recovery of licence-fees—Finding on validity of notification necessary.*

A bye-law or rule or order passed by a Local Board relating to the taking out of a licence is not bad merely because the licence-fee is excessive. The question of the legality of ordering that a licence should be taken out and that of the unreasonableness of the fee charged for such license are separate and independent questions and the legality of the order does not depend on the fees being reasonable. Before deciding whether the license-fees can be recovered summarily under S. 212 (9), it should be found whether the panchayat had a right to insist on the taking out of license, whether the manufactures in question were of such a nature that the licenses could be legally ordered to be taken out in respect of them. (*Bardswell, J.*) SATYANARAYANA *v.* H. B. YORKE. **I.R 1933 Mad. 17=140 I C. 524= 34 Cr L.J. 26=1933 M.W N. 102=37 L.W. 264= 1933 Cr.C. 263=A.I R. 1933 Mad. 148.**

———**S. 212 (xi)**—*Applicability—Construction of factory—Application for.*

S. 212 (xi) does not cover the case of an application for permission to construct a factory; it deals with cases of applications for permission to do something of a temporary nature. The applicant for the construction of a factory is not entitled to proceed with the construction, if for 30 days from his application, he has received no orders on his application. (*Burn, J.*) PRESIDENT, TALUQ BOARD. TIRUVANNAMALAI *v.* MOTTAYA CHETTY. **1933 M.W.N. 733.**

———**S. 216 (1) (c)**—*Applicability—Permanent resident.*

S. 216 (1) (*c*) does not apply to the case of a person who is permanently residing within the local area and who has given his home address as the place to which notices were to be sent but who for purposes of business had temporarily left for a place outside the local area. (*Krishnan Pandalai, J.*) K. N. K. R. M. RAMANATHAN CHETTIAR, *In re.* **130 I.C. 511=33 L.W. 75=A.I.R. 1931 Mad. 138.**

———**S. 219 (b)**—*Gist of the offence.*

The erection of a pandal in a public street without obtaining a licence from the Local Board is by itself punishable under S. 219, cl. (*b*). It is immaterial if the erection caused any inconvenience or obstruction to the public. A notice to remove the pandal is not a condition precedent to the institution of the prosecution. (*Lakshmana Rao, J.*) PUBLIC PROSECUTOR *v.* SUBRAMANIA PANDARA SANNADHI. **147 I.C. 1226 (2)=6 R.M. 424=35 Cr.L J. 553=1933 M.W.N. 912=39 L.W. 196=1934 Cr.C. 687=A.I.R. 1934 Mad. 398=66 M. L J. 179.**

———**S. 221**—*Failure to pay lease amount—Agreement of lease executed under new Act—Procedure under old Act—Validity.*

The accused was convicted for failure to pay a certain sum of money due by him as lessee of a slaughter-house and a temporary market. The agreement was subsequent to the new Act but the proceedings were instituted under the old Act. Before a charge was framed up attempt was made to collect the amount by distraint of the defaulter's property.

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Held, that the proceedings should be under the new Act and that they were irregular as a charge under the new Act could only be framed after an attempt had been made to collect the amount by distraint and after the distraint was proved to be impracticable. (*Pakenham Walsh, J.*) AHMAD HUSSAIN SAHIB *v.* PRESIDENT, UNION PANCHAVAT, PUNGANUR. **I.R. 1932 Mad. 564 = 138 I.C. 370 = 33 Cr.L.J. 603 = 1932 M.W.N. 815 = 1932 Cr.C. 742 = A.I.R. 1932 Mad. 660.**

———**S. 223**—*Limitation for prosecution — Using vehicle for hire without licence.*

If a person uses a vehicle for hire or does an act for which a licence is required and fails to obtain a licence, he may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. (*Curgenven, J.*) PRESIDENT, DT. BOARD, TANJORE *v.* ADAM GHANNI ROWTHER. **55 Mad. 432 = I.R. 1932 Mad. 317 (2) = 136 I.C. 781 (2) = 33 Cr.L.J. 363 = 1931 M.W.N. 1308 = 35 L.W. 316 = 1932 Cr.C. 211 = A.I.R. 1932 Mad. 271 = 62 M.L.J. 343.**

———**S 225**—*Applicability—House tax illegally collected—Suit for refund—Limitation.*

A suit for refund of house-tax collected from the plaintiff by the Union Board, on the ground that the requisite notice prescribed by the Act was not published and that therefore the levy was illegal, falls within the scope of S. 225 of the Local Boards Act and is barred by limitation, if brought more than six months after the date of the cause of action. (*Pandalai, J.*) SWAMY BABU *v.* UNION BOARD, NARASANNAPET. **6 I.R. (Mad.) 280 = 146 I.C. 499 = 38 L.W. 660 = A.I.R. 1933 Mad. 791 = 65 M.L.J. 725.**

———**S. 225**—*Applicability—Suit for refund of profession tax illegally levied.*

A suit for the refund of money illegally collected as profession tax is not a suit for compensation or damages and does not fall within S. 225. Such a suit is virtually one for money had and received and the period of limitation is three years under Art. 62 of the Limitation Act. (*Sundaram Chetty, J.*) TALUK BOARD OF DEVAKOTTAH *v.* CHOCKALINGAM CHETTIAR. **1932 M.W.N. 1089.**

———**S. 225**—*Applicability—Suit for refund of profession tax—Notice—Necessity for.*

The section contemplates only suits for compensation and for damages against the Local Board and a suit for refund of profession tax illegally levied is not a suit of either description. So the motive prescribed by the section is not necessary for such a suit. 16 M. 296, 16 M. 317; 16 M. 474; 32 M. 371, Foll.; 52 M. 207 and 51 Bom. 725 (P. C.), Dist.; 122 I C. 742, Not Foll. (*Madhavan Nair, J.*) LAKSHMANAN CHETTI *v.* UNION BOARD OF DEVAKOTTAI. **I.R. 1931 Mad. 609 = 132 I.C. 113 = 33 L.W. 532 = 1931 M.W.N. 428 = A.I.R. 1931 Mad. 520 = 60 M.L.J. 600.**

[**Diss.** 65 M.L.J. 725 (726, 727). **F.** 1932 M.W.N. 1089 (1090).]

———**S. 225 (1) and (3)**—*Applicability—"Act done or purporting to be done in pursuance of execution, etc."—Tender for lease of tolls—Acceptance by Vice President of District Board—Cancellation by President—Suit for damages—Limitation.*

Plaintiff made a tender for the lease of tolls of a District Board in answer to an invitation for such tenders by the Board. His tender was accepted by the Vice-President as the President was absent. The President however cancelled the plaintiff's tender, being of opinion that the Vice-President's acceptance was unauthorised and he accepted a tender by another person for a larger sum. Plaintiff thereupon sued for damages from the Board on the ground that the President's cancellation of the contract was improper, but he instituted the suit more than six months after the cancellation.

Held, the President's act was an act done in execution of his powers under the Local Boards Act, that the case fell within the terms of Cls. (1) and (3) of S. 225 of the Local Boards Act, and the suit, having been filed more than six months after the accrual of the cause of action, was barred. (*Varadachariar and Burn, JJ.*) ATHIMANNIL MUHAMMAD *v.* MALABAR DISTRICT BOARD. **58 Mad. 746 = 155 I C. 291 = 7 R.M. 560 = 41 L.W. 43 = 1935 M.W N. 25 = A I.R. 1935 Mad. 213 = 68 M. L J. 125.**

MADRAS LOCAL BOARDS ACT (1920), S. 228.

———**S. 227**—*Surcharge Rules 4, 5 and 6—Omission to account for house-tax collected—Order of surcharge against President—Certificate by auditor—Limitation.*

Certain amounts of house tax collected by a bill collector of a Union Board were not brought into account, and though the fact was adverted to in the audit reports of October, 1925, the President of the Board did not remedy the defect. Thereupon the auditor who was empowered by the Local Government issued in June, 1929, a certificate of surcharge against the President with the amount of the loss. The President applied under S. 6 of the surcharge Rules to have the order set aside on the ground that the certificate, having been issued more than three years after the accrual of the cause of action, was illegal.

Held, that the surcharge Rules were not inconsistent with S 227 of the Local Boards Act, that there was no limitation for a certificate of surcharge, and that the same was not illegal.

Held, further, that R. 5 was not *ultra vires*. (*Venkatasubba Rao, J.*) KONDHO RAYAGARU *v.* DT. COLLECTOR OF GANJAM. **58 Mad. 340 = 157 I.C. 503 = 1935 M W.N. 219 = 41 L.W. 254 = A.I R. 1935 Mad. 264 = 68 M.L.J. 232.**

———**S. 227 (a)**—*Proceedings pending at the time of amendment—Commitment without sanction of Local Government—Validity.*

By the amended S. 227 (*a*) of the Local Boards Act which came into force in August 1930, the previous sanction of the Local Government is necessary for the Court to take cognizance of any offence alleged to have been committed by the president or member of a Local Board. Where, however, the Magistrate has taken up the case prior to the amendment when no such sanction was necessary, the order of commitment made by him is not illegal merely because after the initiation of proceeding and prior to the order of commitment, the amendment had come into force. (*Beasley, C.J. and Sundaram Chetty, J.*) BAKTHAVATSALU NAIDU *v.* EMPEROR. **1931 M.W.N. 361.**

———**S. 228**—Scope—Assessment to land-cess—Suit to declare that cess has been calculated on wrong basis and charged excessively—Jurisdiction of Civil Courts. *See* MADRAS LOCAL BOARDS ACT, S. 86 (3). **69 M. L.J. 695.**

———**S. 228**—*Suit for refund of profession tax—Forum.*

A suit for the refund of profession-tax amounting to Rs. 64 is not governed by Art. 35 (*j*) and is cognizable by the Small Cause Court. The notice of demand is not a "legal process" and the claim for interest is not damages for the illegal recovery but damages for detention of money. So no second appeal is competent. 27 Bom. L.R. 447, not Foll.; 31 Bom. L.R. 1307; 3 I C. 429, Foll. (*Ramesam, J.*) UNION BOARD, DEVAKOTTAH *v.* MANIKKAVACHAGAN CHETTI. **1931 M.W.N. 1107.**

MADRAS LOCAL BOARDS ACT (1920), S. 228.

———**S. 228 and Rules under R. 11**—*Profession-tax—Basis of assessment—Income tax assessment—Reference by President to reputed value of assessee's business.*

The President of a Local Board may, in assessing a person to profession-tax, take into consideration the income tax assessment but he is not bound to accept it as the only basis of assessment. He is entitled under R. 11 to take into account a variety of matters as a guide to an assessee's professional income, including the reputed value of his business. (*Cornish, J.*) SWAMINATHA AIYAR *v.* TALUK BOARD, NANNILAM. **6 I.R. (Mad.) 218 = 146 I.C. 116 (2) = 38 L.W. 607 = 1933 M.W.N. 982 = A.I.R. 1933 Mad. 681 = 65 M.L.J. 414.**

———**S. 228 (2)**—*Bar of suit—Person not liable to be taxed under the Act—Exaction of tax from.*

S. 228 is no bar to a suit for refund of profession-tax on the ground that the plaintiff was not liable to be taxed under the Act. As in the case of a tax which has not been legally imposed, so in the case of a tax exacted from a person who is not taxable under the Act it cannot be said that the "provisions of the Act have been in substance and effect complied with." 24 Mad. 205; 27 Mad. 547; 54 M.L.J. 603; 27 L.W. 243; 1931 M.W.N. 329, Foll. (*Madhavan Nair, J.*) BALASURYAPRASADA RAO PANTULU GARU *v.* TALUK BOARD OF CHICACOLE **135 I.C. 462 = I.R. 1932 Mad. 142 = 1931 M.W.N. 1026 = A.I.R. 1931 Mad. 822.**

———**(AMENDMENT) ACT (XI OF 1930)**—*Transitional Rules, R. 5 (3)—Scope—Applicability to election petitions.*

R. 5 (3) of the Transitional Rules deals with applications by or against a Local Board and cannot be applied to litigation between individuals such as election petitions. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627 = I.R. 1931 Mad. 353 = 130 I.C. 177 = 33 L.W. 168 = A.I.R. 1931 Mad. 83 = 60 M.L.J. 191.**

———*Transitional Rules, R. 6—Effect.*

R. 6 of the Transitional Provisions does not enable a disqualified person to hold the office of President for the term of one year even after his election is set aside by a Civil Court. (*Reilly and Anantakrishna Aiyar, JJ.*) PANNIRSELVAM *v.* VEERIAH VANDAYAR. **54 Mad. 627 = I.R. 1931 Mad. 353 = 130 I.C. 177 = 33 L.W. 168 = A.I.R. 1931 Mad. 83 = 60 M.L.J. 191.**

———Effect of Amending Act XI of 1930. *See* MADRAS LOCAL BOARDS ACT, S. 54. **54 M. 627 = 60 M.L.J. 191.**

———**Sch. IV, Rr. 32 and 33**—*If retrospective.*

Rr. 32 and 33 of Sch. IV of the Act are retrospective, and a distraint is not leviable in respect of a tax which has been in arrears for more than the period fixed in R. 32 (3). (*Cornish, J.*) VENKATA SIVAYYA *v.* PRATTIPAD PANCHAYAT BOARD. **159 I.C. 632 = 8 R.M. 527 = 1935 M.W.N. 1206 = 43 L.W. 214 = A.I.R. 1936 Mad. 18**

———**Sch. IV, R. 33 (2)**—*Agreement of lease under new Act—Failure to pay rent—Prosecution under old Act—Legality.*

The accused was convicted for failure to pay a certain sum of money due by him as lessee of a slaughter house and a temporary market. The agreement was subsequent to the new Act but the proceedings were instituted under the old Act. Before a charge was framed up attempt was made to collect the amount by distraint of the defaulter's property.

Held, that the proceedings should be under the new Act and that they were irregular as a charge under the new Act could only be framed after an attempt had been made to collect the amount by distraint and after the distraint was proved to be impracticable. (*Pakenham Walsh, J.*) AHMAD HUSSAIN *v.* PRESIDENT, UNION PANCHAYAT, PUNGANUR. **I.R. 1932 Mad. 564 = 138 I.C. 370 = 33 Cr.L.J. 603 = 1932 M.W.N. 815 = 1932 Cr.C. 742 = A.I.R. 1932 Mad. 660.**

MADRAS LOCAL BOARDS ACT (1920).

———**Sch. IV, R. 33 (2)**—*Refusal to answer notice—Effect.*

The mere refusal to answer notice demanding payment of amount due does not prove that distraint is impracticable within the meaning of R. 33 (2). (*Pakenham Walsh, J.*) AHMAD HUSSAIN SAHIB *v.* PRESIDENT, UNION PANCHAYAT, PUNGANUR. **I.R. 1932 Mad. 564 = 138 I.C. 370 = 33 Cr L J. 603 = 1932 M.W.N. 815 = 1932 Cr.C. 742 = A.I.R. 1932 Mad. 660.**

MADRAS LOCAL BOARDS ACT (V OF 1884)—*Rules for conduct of elections—Rule 5 (2)—Breach—Liability of election to be set aside.*

No breach of the election rules, whether mandatory or directory, invalidates the election unless the result of the election has been materially affected by such breach. The result of the election must be affected in some other way than by the mere breach of the rule and it is a question of fact to be decided by the Election Commissioner. Where an election is sought to be set aside for violation of R. 5, Cl. 2, of the Madras Local Boards Election Rules, it is incumbent on the Election Commissioner to enquire and decide whether the result of the election is in fact materially affected by the breach. (*Lakshmana Rao, J.*) RAJA GOUNDER *v.* SENNIAPPA GOUNDER. **6 R.M. 544 = 1934 M.W.N. 518 = 39 L.W. 516 = 148 I.C. 848 = A.I.R. 1934 Mad. 313.**

———**(XIV OF 1920)**—*Rules for conduct of elections—Rr. 19, 21 and 23—Circular directing gosha ladies unveil, if identity challenged—Validity of.*

A circular issued by the Election authorities that the gosha ladies should unveil if their identity was challenged at the time of voting is not *ultra vires*. It is in consonance with Rr. 19, 21 and 23 which contemplate such a possibility. (*Ramesam, O.C.J.*) BIJLI SAHIB BAHADUR *v.* MAHOMED ASAN MARACAIR. **6 I.R. (Mad.) 283 = 146 I.C. 572 = 39 L.W. 466 = A.I.R. 1934 Mad. 27.**

———*Rules under, for the decisions of election disputes—Rr. 1 (3) and 6—Decision of Election Commissioner—Issue of writ of* certiorari.

Proceedings before the Election Commissioner are of a judicial nature and the High Court is competent to issue a writ of *certiorari* in such a case. Effect of R. 1 (3) of the Local Board Rules considered. (*Curgenven and Pakenham Walsh, JJ.*) THIRUMALA CHETTIAR *v.* CHELLAM PILLAI. **57 Mad. 791 = 1934 M.W.N. 642 = 6 R.M. 483 = 148 I.C. 477 = 39 L.W. 193 = A.I.R. 1934 Mad. 190 = 66 M.L.J. 468.**

———*Rules under, for disputed elections, R. 10 (c)—Meeting of Panchayat—Simultaneous proceedings initiated by Vice-President of Panchayat and President, Taluk Board—Setting aside election—Interference.*

The President of a Panchayat Board resigned and the Vice-President in accordance with the rules took steps for a meeting to be held to elect a new President and sent out notices. But the President of the Taluk Board, being under the impression that the Vice President had taken no steps, proceeded to take action such as can be taken in such an event under S. 42 of the Madras Local Boards Act and wrote to the Vice-President of the Panchayat Board asking him to convene a meeting on 30th March, 1933, for the election of a President. An inadequate time was allowed to the Vice-President for replying to this letter and as no reply was received within the time allowed, the Taluk Board President, acting

MADRAS LOCAL BOARDS ACT (1920), R. 8.

under S. 42, appointed a member of the Panchayat Board to convene meeting for the election of a President on 30th March, 1933. The Vice-President of the Panchayat Board meanwhile went on with his arrangements to hold a meeting on 31st March, 1933. On the 30th March an election took place and the petitioner was unanimously elected. On the following day there was another election arranged by the Vice-President and again the petitioner was elected. The Election Commissioner set aside both the elections and the principal points for consideration were whether by taking an erroneous view of the legal position arising from the facts stated in the orignal petition the Election Commissioner gave himself a jurisdiction which he properly had not got and whether, even allowing that he had jurisdiction, he acted in the exercise of that jurisdiction with material irregularity.

Held, that this was a case in which a writ should be issued quashing the proceedings of the Election Commissioner who came to the conclusion without evidence to justify it, that the result of the election was affected by the refraining of another candidate from standing for election owing to the fact he was misled to believe that the election held on the 30th March would be invalid. If in an enquiry for which there is jurisdiction an error is made which can be regarded as something which went beyond the jurisdiction of the Court or was done without jurisdiction and is not merely a wrong view of the law then the writ can be granted. The decision of the Commissioner on a matter of fact, in proof of which there was no evidence, was beyond the scope of his jurisdiction. (*Bardswell, J.*) SANKARANARAYANA PILLAI *v.* AHMED MIRAN SAHIB. **57 Mad. 582 = 150 I.C. 911 = 7 R.M 38 = 39 L.W. 534 = A.I.R. 1934 Mad. 357 = 66 M.L.J. 601.**

———**R. 8 (a)**—*Electoral roll—New roll not prepared—Continuance of old roll.*

Where the new roll has not been prepared the old roll should be taken to be in force. (*Ananthakrishna Ayyar, J.*) PRESIDENT, UNION BOARD, SAMALKOT *v.* VEERRAJU. **1932 M.W.N. 654.**

———**R. 11**—*District Election Officers and appellate authorities—Nature of jurisdiction.*

The District Election Officers in disposing of objections under R. 11 to entries in the electoral rolls and the appellate authorities who hear appeals from their decisions are in performing those functions acting judicially. (*Reilly and Burn, JJ.*) INSPECTOR OF MUNICIPAL COUNCILS AND LOCAL BOARDS, MADRAS *v.* VENKATANARASIMHAM. **6 R M 404 = 147 I.C. 1052 = 39 L.W. 45 = 1934 M W.N. 662 = A.I.R. 1934 Mad. 140 = 66 M.L.J. 233.**

MADRAS MOTOR VEHICLES TAXATION ACT (III OF 1931)—Taxes due under—If Crown debt—Priority. *See* CROWN DEBT—PRIORITY. **69 M.L.J. 832.**

———**Ss. 4 (1), 5 (1), 6 and 7**—*Liability to tax and penalty for non-payment—Conditions—Proof requisite—Endorsement on registration certificate—If proof of keeping or use.*

It is essential to the liability to pay the tax under S. 5 (1) and to the imposition of the penalty for failure to pay the tax under S. 7 of the Madras Motor Vehicles Act, that there should be proof that the motor vehicle in question was kept or used within the Presidency of Madras for the period for which the tax is claimed to be due. Endorsements on the registration certificate describing the transferee thereof as belonging to the Presidency do not afford an adequate ground for presuming such keeping or use; nor do they furnish presumptive proof of the same. (*Curgenven and Cornish, JJ.*) UNITED MOTOR FINANCE CO., LTD. *In re.* **159 I.C. 432 = 8 R.M. 498 = 37 Cr.L.J. 99 = 41 L.W. 434 = 1935 M.W.N. 183 = 1935 Cr.C. 445 = A.I.R. 1935 Mad. 325 = 68 M.L.J. 336.**

MAD. PERMANENT SETTL. REGN. (1802), S. 4.

———**S. 7**—*Offence under—Accused residing in foreign state—Jurisdiction of British Indian Magistrate to issue warrant of arrest.*

A warrant of arrest issued by a Magistrate of a British Indian Magistrate, directing of the arrest of a resident of a foreign state (Mysore) for the offence of non-payment of taxes under S. 7 of the Madras Motor Vehicles Act. Such a warrant by him is illegal and cannot be executed in the Mysore state. (*Mahadevayya, C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) VENKATARANGAIENGAR *v.* GOVERNMENT OF MYSORE. **12 Mys. L.J. 328 = 39 Mys. H.C.R. 485 (F.B.).**

MADRAS MOTOR VEHICLES RULES, R. 27 (c)—*Report of accident.*

The effective despatch of a report is as good as personal report. (*Jackson, J.*) GOVINDARAJA MUDALIAR *v.* EMPEROR. **1931 M.W.N. 397.**

———**R. 30 (k)**—*Conviction under—Requisites of—Schedule of timings.*

There must be evidence and a finding on the question who is the holder of the *G* permit before the Court convicts the accused for breach of the conditions thereof. The schedule of timings referred to in the rule should be made with reference to particular buses and not with reference to *a* bus when there are several buses run by one service. (*Burn, J.*) G. D. NAIDU *v.* EMPEROR. **1933 M.W.N. 908.**

MADRAS NAMBUDRI ACT (XXI of 1933)—*Scope and effect of—Right of junior member to sue for removal of karnavan—If abrogated.*

In the absence of an express provision in the Nambudri Act of 1933, abrogating the rule of law, custom or usage which enabled a Nambudri Brahmin to sue for removal of a karnavan, that right exists in spite of the Acts which gives a junior member the right to demand a partition. (*Venkatasubba Rao, J.*) NARAYANAN MOOSAD *v.* RANAN MOOSAD. **58 Mad. 811 = 157 I.C. 156 = 8 R.M. 110 = 41 L W. 525 = 1935 M.W.N. 402 = A.I.R. 1935 Mad. 552 = 68 M.L.J. 678.**

MADRAS PERMANENT SETTLEMENT REGULATION (XXV OF 1802), S. 1—*Violation of—Madras Proprietary Estates Village Service Act* (1894), *S. 27 (2) if* ultra vires.

S. 27 of Act II of 1894 is not *ultra vires* of the local legislature. It only provides that the amount deducted at the time of the permanent settlement from the peishkush payable by the proprietors on account of the village establishment which the proprietors had to maintain shall no longer be deducted as they were no longer liable for the payment of the village officers. It is, therefore, no enhancement of the peishkush amounting to a breach of contract or violation of the provision contained in S. 1 of the Regulation XXV of 1902. (*Sundaram Chetty, J.*) GOPALASWAMI CHETTIAR *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.R. 1931 Mad. 626 = 132 I C. 130 = 34 L.W. 333 = 1931 M W.N. 537 = A.I.R. 1931 Mad. 525 = 61 M.L.J. 754.**

———**Ss. 1 and 4**—Fishery income—Whether included in peishkush—Exemption from assessment to income-tax. *See* INCOME TAX ACT, S. 2 (1). **56 Mad. 251 = 63 M.L.J. 634 (F.B.).**

———**S. 4**—*Scope—Pre-settlement inam—Inclusion in the Zamindary settlement—Validity.*

MAD. PRVN. OF ADULTN. ACT (1918), S. 5.

S. 4 should not be read as to preclude the Government from including a village granted prior to the Permanent Settlement in the assets of the Zamindary with a view to settle the same with the Zamindary. It is open to the Government to include such lands in the assets of the Zamindary if for any reason they think it proper to do so. It is a question of fact in each case whether any pre settlement inam is included in the Zamindary or not.

Held, the village of Narava, a pre settlement inam, to have been properly included in the assets of the Vizianagaram Zamindari. (*Ananthakrishna Aiyar and Cornish, JJ.*) NARAYANASWAMI BAHADUR *v.* BODA TAMMAYYA. **1930 M.W.N. 945.**

MADRAS PREVENTION OF ADULTERATION ACT (III OF 1918), S. 5 (1) (b)—'*Offers for sale*'—*Sale through some other person.*

The words "offers for sale" in 5 (1) (*b*) include offering for sale through some other person who might have been allowed by the accused to be in charge of his shop. 34 C.W.N. 114, Ref. (*Pakenham Walsh, J.*) MUNICIPAL PROSECUTOR, CALICUT *v.* ABUBAKKAR. **1933 M.W.N. 428.**

———**S. 5 (1) (b) and (d)**—*Selling milk of inferior quality—Proceeding under sub-Cl.* (1) (b)—*Validity.*

Any person who sells milk which is not of the nature substance or quality which it purports to be would be guilty of a violation of S. 5 (1) (*b*). The special provision in S. 5 (1) (*d*) does not render S. 5 (1) (*b*) a dead letter. (*Burn, J.*) NARAVANA IYER, *In re.* **I.R. 1932 Mad. 842=140 I.C. 260=1932 M.W.N. 1350=1933 Cr.C. 127=34 Cr.L.J. 16=A.I.R. 1933 Mad. 99.**

———**S. 20 (d)**—*Rules under—Extension to Municipality—Proof.*

The rules framed under S. 20 (*d*) can only be applied to any particular area after the Act has been brought into force in that area. Where the Act itself has not been extended to a particular Municipality there is no question of the rules being in force. (*Burn, J.*) NARAYANA IYER, *In re.* **I.R. 1932 Mad. 842=140 I.C. 260=34 Cr.L.J. 16=1932 M.W.N. 1350=1933 Cr.C. 127=A.I.R. 1933 Mad. 99.**

———**S. 20 (d)**—*Rules framed under R. 2—Ghee—Adulteration—Standard of purity.*

A preparation consisting of 36 per cent. and 64 per. cent. animal fat would be "food" as defined in the Act but not "ghee" which must be a preparation exclusively from butter. The word "pure" is not defined in the Act but refers to S. 20 (*e*) which enables Government to prescribe standards of purity for certain commodities. It does not mean "pure" in the sense of "unmixed." If a person advertises or catalogues ghee, he must sell ghee as defined by the Act, or indicate on a label how far ghee falls short of that description. But if without advertisement or catalogue, he sells "Food" 64 per cent. fat and 36 per cent. ghee he is not required to label it for the reason that it is not ghee as defined in the Act. (*Jackson, J.*) AKKANNA CHETTY *v.* CROWN PROSECUTOR. **1931 M.W.N. 1045.**

MADRAS PROPRIETARY VILLAGE SERVICE ACT (II OF 1894), S. 2—*Enfranchisement of inam—Zamindar's suit to set aside—Inclusion in assets—Burden of proof.*

Where the Zamindar sues to set aside an enfranchisement the burden of proof is on the plaintiff to show that the suit lands were included in the assets at the time of the Permanent Settlement and that there was a subsequent grant by him. Where the extent was shown to be 44 acres before 1845 and the extent enfranchised was 170 acres, *held*, that the enfranchisement of the entire plot was not invalid. (*Ramesam and Madhavan Nair, JJ.*) SECRETARY OF STATE FOR INDIA *v.* PARTHASARATHY APPA RAO. **I.R. 1932 Mad. 741=139 I.C. 517=A.I.R. 1932 Mad. 697.**

MAD. PROPTRY. VIL. SER. ACT (1894), S. 17.

———**S. 2**—'Mohtad *inams*'—*Whether fall under "village watchmen or police officers"—Enfranchisement by Government.*

Mohtads do not fall under the heading "village watchmen or police officers" and the Government cannot enfranchise such inams. A declaration by the enfranchising officer that such inams fell under the above expression does not amount to a decision of the Government. (*Ramesam and Madhavan Nair, JJ.*) SECRETARY OF STATE FOR INDIA *v.* PARTHASARATHY APPA RAO. **I.R. 1932 Mad. 741=139 I.C. 517=A.I.R. 1932 Mad. 697.**

———**S. 11 (1)**—*Powers of Revenue Officer—Scope of.*

Where action is taken by the Revenue Officer under sub-section (1) of S. 11 it appears that the right of appointment is conferred on the Revenue Divisional Officer only in respect of cases where the nominee of the proprietor is disqualified under sub S. (1) of S. 10 but does not extend to case where the nominee is not in fact the nearer heir to the last holder of the office, that is the case where the proprietor's appointment contravenes the provisions of sub-S. (2) of S. 10. 9 L. W. 10, Ref. (*Madhavan Nair, J.*) VENKATARAGAVAIAH *v* CHENCHU SUBBAIAH. **136 I.C. 38=I.R. 1932 Mad. 246=33 L.W. 294=A.I.R. 1931 Mad. 502.**

———**S. 11 (3)**—*Right of appeal—Extent of.*

Where the Divisional Officer makes an appointment after taking action under sub-S. (1) of S. 11, this sub section should be understood as confining the right of appeal to cases where the proprietor's appointment is disallowed by the Revenue Divisional Officer on the ground that the proprietor has contravened the provisions of sub-S (1) of S. 10. (*Madhavan Nair, J.*) VENKATARAGHAVAIAH *v.* CHENCHU SUBBAIAH **136 I.C. 38=I.R. 1932 Mad. 246=33 L.W. 294=A.I.R. 1931 Mad. 502.**

———**S. 17**—*Grant annexed to village* karnam *office—Powers of Government—Claim by proprietor of estate—Onus of proof—Land situate within geographical limits of estate—Performance of service by* karnam *to zamindar—If conclusive.*

S. 17 empowers the Government, in the case of a grant of land made or continued by the State in respect of, or annexed to, a village office, such as *karnam*, to free the land from the liability of service and to impose instead a quit rent to be paid by the village officer. But a proviso to the section makes it clear that the legislature did not intend to deprive a private proprietor of his right to recover the land, if it was granted by him or his predecessor in interest. Where the proprietor of an estate lays claim to lands enfranchised under the section and occupied by village *karnams* who are allowed to hold the same on payment of a quit rent, it is for him to prove that they were granted by him or his predecessor. The fact that the disputed property is situated within the geographical limits of his estate does not necessarily lead to the conclusion that it was originally owned by his ancestor and given by him to the *karnams*. Nor does the circumstance, that the *karnams* have been rendering private services to the zamindar, necessitate the inference that the lands held by them are grants from private persons. The zemindar is a person of importance and authority in his estate, and if a *karnam* within the estate does some private work in order to please the landed magnate he does not thereby cease to be a public officer. (*Sir Shadi Lal.*) CHANDRA MOULESWARA PRASADA BAHADUR *v.* SECRETARY OF STATE FOR

MAD. PROPTRY. VIL. SER. ACT (1894), S. 27.

INDIA. **62 I.A. 166=58 Mad. 711=1935 M.W.N. 721=156 I.C. 1=7 R.P.C. 221=42 L.W. 142=A.I.R. 1935 P.C. 115=69 M.L.J. 123 (P.C.).**

——**S. 27**—*Notification for payment of service cess—Date.*

The date notified by the Government as the date from which enfranchisement shall take effect under S. 17 is also the date contemplated under S. 27, on or after which it shall be lawful for the Government to require the proprietor to pay the village service cess. (*Sundaram Chetty, J.*) GOPALASWAMI CHETTIAR *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.R. 1931 Mad. 626=132 I.C. 130=34 L.W. 333=1931 M.W.N. 537=A.I.R. 1931 Mad. 525=61 M.L.J. 754.**

——**S. 27 (2)**—*Legality—Permanent Settlement Regulation (XXV of 1802), S. 1—If violated.*

S. 27 is not *ultra vires* of the local legislature. It only provides that the amount deducted at the time of the permanent settlement from the peishkush payable by the proprietors on account of the village establishment which the proprietors had to maintain shall no longer be deducted as they were no longer liable for the payment of the village officers. It is, therefore, no enhancement of the peishkush amounting to a breach of contract or violation of the provision contained in S. 1 of the Regulation XXV of 1902. (*Sundaram Chetty, J.*) GOPALASWAMI CHETTIAR *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **34 L.W. 333=I.R. 1931 Mad. 626=132 I.C. 130=1931 M.W.N. 537=A.I.R. 1931 Mad. 525=61 M.L.J. 754.**

MADRAS REVENUE BOARD'S STANDING ORDERS—*Order No. 15, Rr. 20 and 23—Assignment of land on dharkhast—Power of revision—Civil Court's power to discuss sufficiency of grounds for orders by Collector.*

The power of revision reserved for a period of three years in the rules laid down in the Board's Standing Orders relating to assignment of lands on dharkhast, is not anything like the kind of revision that one knows in judicial proceedings but was intended to make sure that public interests do not suffer by the act of a Subordinate Revenue Officer. The powers of revision are reserved in pretty wide terms, being available whenever the original assignment was the result of mistake of fact or of fraudulent misrepresentation or was in excess of the limits of authority possessed by the officer making it and the further power of revision secured to the Board of Revenue is in wider terms. These provisions do not relate to the adjudication of rights as between two contesting parties as in an ordinary litigation, but are reservations subject to which alone the power vested in the Governor in Council by Act of Parliament to dispose of immovable property belonging to Government has been delegated to subordinate officers. Where the rules laid down in the Board's Standing Orders for the assignment of lands on dharkhast expressly gave the Collector a power of interference in revision with the order of the Revenue Divisional Officer and the Collector accordingly exercised his powers of revision.

Held, that it was not open to the civil Court to discuss the sufficiency or otherwise of the grounds on which the order of the Collector in revision was passed. Before an order of the Collector passed in revision as provided in the rules laid in Board's Standing Orders for assignment of lands on dharkast is attacked in a civil Court, it must be shown that there has been an abuse of the power of revision or something in the nature of a fraud on the power. (Case-law discussed) (*Varadachariar, J.*) SECRETARY OF STATE *v* VENKATARATNAM. **161 I.C. 38=8 R.M. 759=1935 M.W.N. 851=42 L.W. 529=A.I.R. 1935 Mad. 764=69 M.L.J. 544.**

MAD. REV. RECOVERY ACT (1864), S. 35.

MADRAS REVENUE RECOVERY ACT (II OF 1864)—*'Collector', meaning of.*

The definition of the word 'Collector" in S. 3, cl. (6) of the Madras General Clauses Act of 1891 does not apply to Regulation VII of 1828 or to Act II of 1864. (*Waller, Jackson and Krishnan Pandalai, JJ.*) CHITTAYYA *v.* SECRETARY OF STATE. **55 Mad. 453=I.R. 1932 Mad. 337=137 I.C. 30 (2)=35 L.W. 516=1932 M.W.N. 1=A.I.R. 1932 Mad. 377=62 M.L.J. 592 (F.B.).**

——*Revenue sale—Confirmation by the Deputy Collector—Power of the District Collector to set it aside.*

The District Collector has got power to set aside a revenue sale even though it is confirmed by the Deputy Collector. 14 M.L.J. 433, Approved. (*Waller, Jackson and Krishnan Pandalai, JJ.*) CHITTAYYA *v.* SECRETARY OF STATE. **55 Mad. 453=I.R. 1932 Mad 337=137 I.C. 30 (2)=1932 M.W.N. 1=35 L.W. 516=A.I.R. 1932 Mad. 377=62 M.L.J. 592 (F.B.).**

——**S. 1**—*'Landholder'—Inamdar whether comes under.*

An inamdar is a landholder for purposes of S. 1. His tenants can claim protection under S. 11. (*Waller and Krishnan Pandalai, JJ.*) VENKATARAMA IYER *v.* COLLECTOR OF TANJORE. **55 Mad. 661=I.R. 1932 Mad. 657=139 I.C. 364=1932 M.W.N. 232=35 L.W. 336=A.I.R. 1932 Mad. 692=62 M.L.J. 403.**

——**S. 8**—*Validity of—Vague and indefinite warrant.*

A distraint warrant was not made out to any particular person by name or even by office, but only to "village munsif, resident of Rajahmundry village." There was in fact more than one village munsif in that village. It was not shown that the warrant was furnished to the village munsif by somebody who was empowered to do so under S. 8. It was signed by the Taluk head accountant but it was not clear that the Tahsildar was not available.

Held, that the warrant was vague and indefinite and the village officer could not, in trying to proceed with such a warrant, be said to have been acting as a public servant in the discharge of his duties. (*Bardswell, J.*) SEETHARAMIAH *v.* EMPEROR. **1933 M.W.N 725.**

——**S 11**—*Inamdar—Arrears of revenue—Right of Government to distrain crops—Remedy of kudivaramdar.*

For the purposes of the Revenue Recovery Act the inamdar is a landholder and the kudiwaramdar a tenant. The Government can distrain the crops on the land in order to realise the arrears of quit-rent due by the landholder. The remedy of the kudiwaramdar in such a case is to deduct the value of their crops that have been sold from any rent which may then or later may be due by them to the land owner. (*Waller and Krishnan Pandalai, JJ.*) VENKATARAMA AIYAR *v.* COLLECTOR OF TANJORE. **55 Mad 661=I.R. 1932 Mad 657=139 I.C. 364=1932 M.W.N. 232=35 L.W. 336=A.I.R. 1932 Mad. 692=62 M.L.J. 403.**

——**S. 35**—*"Defaulter"—Registered and not real owner.*

Where one person is the real owner of a share in land and another is the registered proprietor of it, the latter and not the former is the "defaulter" within the meaning of S. 35. 33 Mad. 41, Foll.; 39 Mad. 795, Ref. (*Madhavan Nair, J.*) SAMPATH AYYANGAR *v.* RAJA OF VENKATAGIRI. **I.R. 1931 Mad. 348=129 I.C. 828=33 L.W. 284=A.I.R. 1931 Mad. 51.**

MAD. REV. RECOVERY ACT (1864), S. 39.

———**S. 39**—*Sale by Government—Effect—Interest of mortgagor.*

When on account of the default of the mortgagee in paying the Government revenue the land is sold, the entire right in the property including the right and interest of the mortgagor is sold and no title remains in the owner of the property after the same. 1920 M.W. N. 701, Ref. (*Madhavan Nair, J.*) PANCHANATHA AIYAR *v.* SAMINATHA AIYAR. **1930 M.W.N. 993.**

———**S. 42**—Sale for arrears of income-tax—Prior sale in insolvency by Official Receiver—Priority. *See* INCOME TAX ACT, S. 46 (2) **A.I.R. 1935 Mad. 882.**

———**S. 59**—*Applicability—Illegal act of Government—Suit for declaration and injunction.*

Where the Act of the Government in respect of which a declaration and injunction is sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, that in such a case neither S. 59, Revenue Recovery Act nor Art. 14, Limitation Act, applies, but Art. 120 applies. But if the ground of such a suit is not that the act of Government was *ultra vires* or illegal but a mere irregularity which does not vitiate the main proceedings but relates only to some question of detail such as the exact amount to be collected or something of that kind which does not make the proceedings *ultra vires*, in such a case Art. 14, Limitation Act, may apply or in a case falling under the Revenue Recovery Act, even S. 59, Revenue Recovery Act, may apply. (Case-law reviewed.) (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) THIRUVENKATACHARYULU *v* SECRETARY OF STATE. **57 Mad. 501=154 I C. 990=7 R.M. 523=1934 M.W N. 221=39 L.W. 216=A.I.R. 1934 Mad. 147=66 M.L.J. 715.**

———**S 59**—*Applicability—Irregularities in conducting sale and absence of jurisdiction—Distinction between—Notices under Ss.* 25, 27 *and* 36 *addressed to dead person—Sale—Validity of—Suit to set aside.*

There is a clear distinction between irregularities in publishing and conducting the sale in which case the suit must be brought within six months prescribed by S. 59 and essential preliminary steps which are necessary to give the revenue authorities jurisdiction to conduct the sale, the omission of which makes the sale null and void. In the latter case, S. 59 does not apply. The whole procedure in connection with sale of immovable property is based on the assumption that there is a defaulter living who can receive the notices and avail himself of a chance to avoid the sale of his property by payment of the arrears. So where the village officers knew that the pattadar had long ago died but had not corrected the register and on default of payment, notices of demand, attachment and sale were sent addressed to the dead man and affixed to the property, the sale is void. A suit to set it aside is not subject to the period of limitation prescribed by S. 59 of the Act. **40 I.A. 151=25 M.L.J. 148 (P.C.).** Rel. (*Jackson and Krishnan Pandalai, JJ.*) MARUKKOLANDAYAMMAL *v.* SECRETARY OF STATE FOR INDIA. **55 Mad. 876=I.R. 1932 Mad. 703=139 I.C. 426=1932 M.W.N. 1007=36 L.W. 204=A.I.R 1932 Mad. 664=63 M. L J. 249.**

[R. 57 M. 501 (519).]

MADRAS SALT ACT (IV OF 1889)—*Scope.*

The Act is not self-contained. It contains only a few special additions to the normal procedure of the Criminal Procedure. 1925 M.W.N. 396, Ref. (*Jackson, J.*) SUDARSANAM *v.* EMPEROR **55 Mad. 86=I.R. 1931 Mad. 735=133 I C. 383=32 Cr.L.J. 1035=34 L W. 211=1931 M.W.N. 405=1931 Cr.C. 1025=A.I.R. 1931 Mad. 769=61 M.L.J. 127.**

MAD. SUR. & BOUNDARIES ACT (1897).

———**S. 41**—*Duty on salt—Purchaser from licensee——No personal liability.*

Under S. 41 the licensee is not personally liable for the duty on the salt in the factory. A purchaser from a licensee is similarly not personally liable and the duty cannot be recovered from him by coercive process after he has removed the salt from the factory. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) PARTHASARATHY CHETTY *v.* SECRETARY OF STATE. **55 Mad. 594=I.R. 1932 Mad. 589=138 I.C. 526=1932 M.W.N. 345=35 L.W. 405=A I.R. 1932 Mad. 325=62 M.L.J. 387.**

———**S. 74 (d)**—*Police report—Validity of.*

There is nothing in Ch. VI of the Act restricting the normal duty of the Police report to the Magistracy, nor any indication that the sections taken as a whole compose a self-contained Code of Procedure. So a report by the Police charging the accused with an offence under S. 74 (*d*) of the Salt Act is in order. 1925 M.W. N. 396, Ref. (*Jackson, J.*) SUDARSANAM *v.* EMPEROR. **55 Mad. 86=I.R. 1931 Mad. 735=133 I.C. 383=32 Cr.L.J. 1035=34 L.W. 211=1931 M.W.N. 405=1931 Cr.C. 1025=A.I.R. 1931 Mad. 769=61 M.L J. 127.**

———**S. 74 (f)**—*Scope—Penal Code* (1860), *S.* 117.

The section obviously refers to the direct abetment of particular acts and does not embrace or supersede the graver kinds of abetment, such as for example under S. 117, I. P. Code. 33 Bom.L.R. 56, Ref. (*Jackson, J.*) SATVAVATAMMA *v.* EMPEROR. **55 Mad. 90=I.R. 1931 Mad. 843=134 I.C. 187=32 Cr.L J. 1131=34 L.W. 92=1931 M.W.N. 494=1932 Cr C. 354=A.I.R. 1932 Mad. 371=61 M.L.J. 987.**

———**Ss. 84 and 85**—*Salt Manual* (*as amended*), *S.* 81 (2)—*Purchaser of salt from licensee—Removal of salt after time fixed—Enhancement of salt tax—Recovery of same from purchaser—Legality.*

The plaintiff purchased a certain quantity of salt from a salt licensee but did not remove the salt within the time allowed for that purpose. When he actually removed the salt the salt tax had been enhanced but the extra sum was not collected from him at that time. A demand for the payment of that sum was however made subsequently and the plaintiff, while denying his liability, paid the tax under protest in order to avoid coercive process and then sued to recover the sum so paid.

Held, that though according to the rule framed under S. 85 (2) of the Madras Salt Act, the tax was payable at the rate in force during the removal of the salt, still since the plaintiff had removed the salt and there was no personal liability on his part to pay the enhanced duty, the subsequent recovery of the tax under S. 84 of the Act was illegal and the plaintiff was therefore entitled to recover the amount paid by him. 6 B. 251, Ref. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) PARTHASARATHY CHETTY *v.* SECRETARY OF STATE FOR INDIA. **55 Mad. 594=I.R. 1932 Mad. 589=138 I. C. 526=1932 M W.N. 345=35 L.W. 405=A.I.R. 1932 Mad. 325=62 M.L.J. 387.**

MADRAS SURVEY AND BOUNDARIES ACT (IV OF 1897)—*Decision of Survey Officer under—Effect regarding possession.*

The decision of a Survey Officer is a decision that the successful party is in possession even though the unsuccessful party was really in possession and his decision estops the unsuccessful party from urging later on that he was in possession. Time for purposes of determining adverse possession commences to run from that date. (*Wallace, J.*) RAMAMURTI *v.* SRI RAJA MIRJA SRI PUSHAVATI ALAKA NARAYANA. **56 Mad. 366=I.R.**

MAD. SUR. & BOUNDARIES ACT (1897).

1933 Mad. 106=141 I.C. 307=36 L.W. 847=A.I.R. 1933 Mad. 279 (2)=64 M.L.J. 361.

———*Proceedings under—Decision of Survey Officer and planting of stones—Effect.*

The decision of a Survey Officer or the planting of stones in accordance with it in proceedings under the Act does not *ipso facto* dispossess any party, nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at its date. 16 I..W. 99 and 42 M. 425, Ref. (*Reilly and Anantakrishna Aiyar, JJ.*) AZHAGAPERUMAL PILLAI *v.* RASA PILLAI. **I.R. 1932 Mad. 565=138 I.C. 362=1932 M.W.N. 158=35 L.W. 388 =A.I.R. 1932 Mad. 310 (2)=62 M.L.J. 399.**

[Diss. 56 M. 366 (367).]

———**S. 13**—*Applicability—Order passed under R. 3 of Board's Standing Order No. 31.*

Bar under S. 13 can be held to be good, if it is proved that there was an order passed by the survey and settlement officer under S. 11 of that Act and it is shown that the procedure prescribed under that Act was duly observed. If the order should be deemed to have been passed under R. 3 (1) (*a*) of the Board's Standing Order No. 31, Cl. 7, S. 13 would have no application and the suit for eviction of the defendant would be governed by Art. 120, Limitation Act. 47 M. 572 (P.C.), Rel. on. (*Sundaram Chetty, J.*) RAJAGOPALA GOUNDAR *v.* MARUTHAMUTHU ASARI. **147 I.C. 501=6 R.M. 356 =A.I.R. 1933 Mad. 668.**

———**S. 13**—*Boundary dispute—Meaning—Decision as to character of land.*

A boundary dispute is one about the demarcation of a field arising in the course of survey operations. A dispute about the boundary and extent of the ryoti land in an estate can fall under the heading of boundary dispute. Where the subordinate Survey Officers had demarcated a particular survey field as "subsequent service inam" and in appeal the demarcation and registration of the particular survey number as Mirasi Inam was confirmed.

Held (on a difference between Waller and Krishnan Pandalai, JJ.) that there was a boundary dispute so as to make the order conclusive under S. 13. (*Wallace, J.*) RAMAMURTI *v.* SRI RAJA MIRJA SRI PUSHAVATI ALAKA NARAYANA. **56 Mad. 366=I.R. 1933 Mad. 106=141 I.C. 307=36 L.W. 847=A.I.R. 1933 Mad. 279 (2)=64 M.L J. 361.**

———**S. 13**—*Boundary dispute — Order of survey officer—If conclusive as to title—Effect on adverse possession.*

The order of a survey officer in boundary dispute under S. 13 of the Survey and Boundaries Act, is conclusive proof that the party in whose favour it is made has title to the land in dispute and that the defeated party has no title thereto by adverse possession at the date of the order. The decision of the survey officer is not limited to the correctness of the boundaries determined. The adverse possession of the unsuccessful party, if any, is also interrupted by the order and demarcation consequent thereon. Therefore the successful party is not bound, in a suit for possession against the defeated party, to prove possession within twelve years possession of suit apart from the order of the survey officer. (*Butler, J.*) SEETHARAMARAJU *v.* NARAYANARAJU. **152 I.C. 462=7 R.M. 230=1934 M.W. N. 1251=40 L.W. 536=A.I.R. 1934 Mad. 685.**

———**S. 13**—*Decisions under Act.*

Decisions under the Act if not challenged become *res judicata.* (*Walsh, J.*) SUBBARAYA SASTRI *v.* SEETHA RAMASWAMI. **6 I.R. (Mad.) 214 (2)=146 I.C. 72=**

MAD. TOWN-PLANNING ACT (1920), S. 35.

1933 M.W.N. 1209=38 L.W. 247=A.I.R. 1933 Mad. 664=65 M.L.J. 290.

———**S. 13** — *Scope—Decision of survey officer—Finality of.*

The Court, in a suit to set aside, are modifying the order of demarcation made by the survey officer, is not bound to treat the survey or demarcation as conclusive or final, whether for the purpose of deciding the question of territorial jurisdiction or for the purpose of deciding the correctness of the demarcation or survey on the merits. (*Pandrang Row, J.*) VENKAT RATTAMMA GARU *v.* SRINIVASA JAGANNATHA RAO GARU. **156 I.C. 188=7 R.M. 657=42 L.W. 588=1935 M.W N. 876=A.I.R. 1935 Mad. 592.**

———**S. 14**—*Estate under management of Court of Wards—Form of notice of suit.*

The statutory suit prescribed by S. 14 of the Survey and Boundaries Act is a suit within the meaning of S. 49 of the Court of Wards Act and not an appeal and the aggrieved party should give the necessary notice. (*Venkatasubba Rao, J.*) RANGASAMI GOUNDAN *v.* ZEMINDAR, K. K. R. M. ERAPPA GOUNDER. **151 I. C. 939=7 R M. 157=1934 M.W.N. 1166=40 L.W. 49=A.I.R. 1934 Mad 537=67 M.L.J. 426.**

———**S. 14**—*Order of appellate survey officer— Suit disputing validity—Time-limit.*

A suit impeaching the appellate survey officer's order need not be instituted within one year from the date of the order. (*Venkatasubba Rao, J.*) RANGASAMI GOUNDAN *v.* ZEMINDAR, K. K. R. M. ERRAPPA GOUNDER. **151 I.C. 939=7 R M 157=1934 M.W N. 1166=40 L.W. 49=A.I R. 1934 Mad. 537=67 M. L.J 426.**

MADRAS TOWN NUISANCES ACT (III OF 1889), S. 6—*Sentence—No evidence as to how much money was used for gambling—Rigorous imprisonment and confiscation of all moneys found with accused—Propriety.*

Where the evidence was not clear as to how much of the money found in the house of the accused convicted under S. 6 was used or intended to be used for gambling, a sentence of rigorous imprisonment for three months and confiscation of all moneys found in the house of the accused is not justified especially for a first offence. For these statutory crimes outside the Penal Code imprisonment should be the last resort in cases of contumacy rather than the general penalty. (*Jackson, J.*) BULLI NAGAYYA, *In re.* **I.R. 1931 Mad. 879= 134 I.C. 991=32 Cr.L.J. 1279=1931 M.W.N. 1310 =34 L W. 710=1931 Cr.C. 1033=A.I.R. 1931 Mad. 777=61 M.L.J. 474.**

MADRAS TOWN-PLANNING ACT (VII OF 1920), S. 12—*Time for submission of draft scheme—Power of Government to extend.*

A power to fix a date carries with it a power to extend the date originally fixed and the Local Government has the power to extend the time originally fixed for the Municipal Council to submit a draft scheme under S. 12. (*Ramesam, O.C.J. and Cornish, J.*) SECRETARY OF STATE *v.* NARAYANASWAMI CHETTIAR. **55 Mad. 391=138 I.C. 426=I.R. 1932 Mad. 572=35 L W. 831=1931 M.W.N. 1266=A.I.R. 1932 Mad. 55=63 M.L.J. 962.**

———**S. 35 (2) (a)**—*Date of notification—Draft scheme under S. 12—Extension of time by the Government.*

Where the Municipal Council submitted a draft scheme in pursuance of a requisition, dated 1st February, 1921, by the Government under S. 12, long after the time originally fixed, but the Government apparently condoned the delay, and accepted the draft

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scheme, which was published in the Gazette on 21st September, 1923.

Held (by *Ramesam, O.C.J.*), that the date of the notification with reference to which the market value of the lands should be considered is the date of the final notification, *viz.*, 21st September, 1923.

By (*Cornish, J.*) that the date of the first notification, *viz.*, 1st February, 1921, should alone be considered for purpose of S. 35 (2)(*a*). (*Ramesam, O.C.J. and Cornish, J.*) SECRETARY OF STATE *v.* NARAYANASWAMI CHETTIAR. **55 Mad. 391=138 I.C. 426=I.R. 1932 Mad. 572=35 L W. 831=1931 M.W.N. 1266=A.I. R. 1932 Mad. 55=63 M.L J. 962.**

MADRAS VILLAGE COURTS ACT (I OF 1889) *—Object of—Interference by High Court.*

The idea of the legislature in enacting the Madras Village Courts Act is presumably to provide rough and ready justice in petty cases and the High Court cannot undertake to keep those lower Courts under strict scrutiny. (*Jackson, J.*) VENKATA REDDY *v.* EMPEROR. **1931 M.W.N. 713(1).**

———*Rules framed under—R. 21—Revenue Divisional Officer—Enquiry into election.*

The Revenue Divisional Officer enquiring into objections to the election of a president under R. 21 is not a Court of any kind. (*Pandalai, J.*) LAKSHMI NARAYANA AIYAR *v.* CHINNAPPA GOUNDAN. **I.R. 1931 Mad. 690=133 I.C. 3=32 Cr.L.J. 969=1930 M.W. N. 1109=1931 Cr.C. 556=A I.R. 1931 Mad. 492.**

———**S. 8**—*Order removing member of Village Court —Remedy.*

An order of the Collector removing a member of the Village Court for any of the reasons specified in S. 8 of Madras Act I of 1889 is not a mere departmental or administrative order. A member of the Panchayat Court is not as such a departmental subordinate of the Collector. The right which such member has, concerns his status and is a valuable legal right and any order which has the effect of impairing or taking away such right should *prima facie* be taken to be more of a judicial character rather than that of a mere departmental or administrative character. In respect of such an order a writ of *certiorari* is available if a proper case is made and this power of the High Court is not taken away by the word 'final' in that section. *Rex* v. *Nat Bell Liquors, Ltd.*, (1928) 2 A.C. 128, Foll. In the present case, *held*, that the petitioner having on appeal to the Board of Revenue left it open to the Board to hear or not to hear his Counsel it was not open to him to complain that his appeal was dismissed without hearing his Counsel. (*Anantakrishna Aiyar and Sundaram Chetty, JJ.*) MUNISWAMI CHETTI *v.* BOARD OF REVENUE. **55 Mad 137=135 I.C. 705= I.R. 1932 Mad. 193=1931 M.W.N. 798=34 L W. 448=A.I R 1932 Mad. 33=61 M.L.J. 479.**

———**S. 8**—*Procedure.*

The Act does not prescribe in detail the procedure to be adopted in cases falling within the section. So the authority concerned will have to act according to the rules of 'natural justice' as explained in *Local Government Board* v. *Arlidge*, (1915) A. C. 120. (*Anantakrishna Aiyar and Sundaram Ch-tty, JJ.*) MUNISWAMI CHETTY *v.* BOARD OF REVENUE. **55 Mad. 137=135 I.C. 705=I.R. 1932 Mad. 193=1931 M.W. N. 798=34 L.W. 448=A.I.R. 1932 Mad. 33=61 M. L J. 479.**

———**Ss. 9 (5), 10, 19 and 22**—*Proceedings under—Forwarding of karnam and headman.*

In forwarding the proceedings of a panchayat Court for the election of a president, the village karnam and headman are not performing any official duty cast upon them as members of the panchayat Court but only acting as revenue subordinates of the Revenue Divisional Officer so that with reference to offences committed in connection with it, no sanction of Local Government is necessary under S. 197 of the Cr. Pr Code. (*Pandalai, J.*) LAKSHMI NARAYANA AIYAR *v.* CHINNAPPA GOUNDAN. **I.R. 1931 Mad. 690=133 I.C. 3=32 Cr. L J. 969=1930 M.W.N. 1109=1931 Cr.C. 556=A. I.R. 1931 Mad. 492.**

MAD. VIL. COURTS ACT (1889), S. 76.

———**S. 18**—*Suit in Village Court for portion of debt due under promissory note—Subsequent suit for same debt in Civil Court—Maintainability—C. P. Code (V of 1908), O. 2, R. 2.*

The Madras Village Courts Act (I of 1889) contains in S. 18 a provision similar to O. 2, R. 2 of the C. P. Code and though O. 2, R. 2 may not apply to the Village Courts, a plaintiff who originally sued in the Village Court for a portion of the debt due on a promissory note, is by virtue of S. 18 of the Village Courts Act precluded from bringing a second suit for the same debt in the ordinary Civil Court. (*Ramesam, J.*) SUDALI *v.* VELAYUDHAM PANDARAM. **6 I.R. (Mad.) 226= 146 I.C. 230=1933 M W.N. 1292=38 L.W. 633= A.I.R. 1934 Mad. 99=65 M.L.J. 586.**

———**S. 45**—*Judgment—President expressing opinion before closing of case—Other members also signing—Validity.*

The President of the Village Panchayat, since dead, expressed the opinion and wrote a judgment which he showed to the other members and asked them to affix their signatures. It appeared that further defence evidence was taken the next day.

Held, that the procedure was irregular and that the judgment recorded before the closing of the case could not be upheld. (*Pakenham Walsh, J.*) SRINIVASACHARIAR *v.* EMPEROR. **1932 M.W.N. 648.**

———**S. 73 (as amended)**—*Application under—Provisions of C. P. Code, 1908, if applicable—Disposal of petition—Judge whether bound to state reason.*

A District Munsif disposing of an application under S. 73 of the Madras Village Courts Act is not bound by the provisions of the C. P. Code. No doubt, on general principles, if a petition is allowed some reason for the order must be stated; but no reason need be given in an order of dismissal, especially when there has been a full discussion of the case before the Court. (*Bardswell, J.*) LINGIER *v.* RAMKRISHNIER. **147 I C. 623(2)= 6 R.M. 372=38 L W. 841=1933 M.W.N. 1370= A.I.R. 1934 Mad. 8=65 M L J. 795.**

———**S. 76 (8)**—*"Misconduct"—Want of jurisdiction.*

"Want of jurisdiction" is legal "misconduct" within the meaning of the section. (*Walsh, J.*) NARAYANASWAMI VANNIAR *v.* KARUMBAYIRAM PERIYARI. **58 Mad. 256=154 I C. 602=7 R.M. 458=36 Cr.L.J 550=41 L.W. 708=1934 M W.N. 1022= 1934 Cr.C. 1354=A I.R. 1934 Mad. 716=68 M.L.J. 534.**

———**S. 76 (8)**—*Power of Joint Magistrate to order re-trial.*

The revisional jurisdiction given to the Joint Magistrate under S. 76 (8) of the Act is grater than what he has under S. 439, Cr. P. Code. S. 76 (1) gives him a power of setting aside an order of conviction which he has not got under S. 439, Cr. P. Code, and it cannot therefore be argued that he has not got the further power incidental to that of ordering a re trial. (*Walsh, J.*) NARAYANASWAMI VANNIYAR *v.* KARUMBAYIRAM PERIVARI. **58 Mad. 256=154 I.C. 602=7 R M. 458=36 Cr.L J. 550=41 L.W. 708=1934 M.W.N. 1022=1934 Cr. C. 1354=A.I.R. 1934 Mad. 716=68 M.L.J. 534.**

MAHANT.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT.
(2) RELIGIOUS ENDOWMENT.

MAHOMEDAN LAW.

Acknowledgment.
Administration.
Applicability.
Co-heirs.
Conjugal rights. *See* MAHOMEDAN LAW—MARRIAGE.
Conversion.
Custom.
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Partition.
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Acknowledgment.

See also LEGITIMACY, *infra*.

———Acknowledgment—No presumption of—Irrevocable divorce. *See* DIVORCE, *infra*. **59 I A. 21=54 All. 46=62 M L.J. 405 (P.C.).**

Administration.

———*Administration—Assets of deceased — Liability for funeral expenses.*

According to Mahomedan Law, the assets of the deceased are liable for the money spent on the funeral ceremonies of the deceased, but the amount which may have been spent for securing the peace of the soul of the deceased would not be a charge on the assets. (*Niamatullah and Rachhpal Singh, JJ.*) SAJJAD HUSAIN *v.* MAHOMED SAYID HASAN. **154 I.C. 434=7 R.A. 759 =3 A.W.R. 263=A.I.R. 1934 All. 71.**

Applicability.

———Applicability — Abrogation in favour of special custom in some cases—If proof of general abrogation. *See* CUSTOM (PUNJAB)—ABROGATION OF PERSONAL LAW. **A.I.R. 1935 Lah. 325.**

———Applicability—Birth in Mahomedan faith—No proof of change of faith—Observancy of Hindu ceremonies—Inheritance — Law applicable. **8 O.W.N. 83=A.I.R. 1931 Oudh 301.**

———*Applicability*—Qureshis *of village Rupar Khan Tahsil Fateh Jang, Attock District—Customary law not applicable.*

The initial presumption in the case of *Qureshis* is that they are governed by Mahomedan Law. Where the only evidence to support plea of custom applying was that on the death of one of them his son succeeded to the exclusion of the daughter.

Held, that the evidence was not sufficient to prove the applicability of customary law. (*Bhide, J.*) FAIZ ILAHI *v.* FAZAL ILAHI. **32 P.L.R. 282=I.R. 1931 Lah. 828 (1)=133 I.C. 652 (1)=A.I.R. 1931 Lah. 315 (1).**

———Applicability—Watan land governed by—Grant of sanad—Intention to make watan property private property of the holder. *See* BOMBAY HEREDITARY VILLAGE OFFICES ACT (1874), S. 15. **36 Bom.L.R. 158.**

Co-heirs.

———*Co-heirs — Alienation by one co-heir—Suit by other co heir for declaration of title—Time limit.*

The plaintiff was entitled to a third share in certain property as one of the heirs of the deceased. There was a denial of her right by another co sharer who sold the entire property, but the plaintiff did not challenge the sale, because she continued in joint possession. Subsequently, however, a cloud was thrown upon her title in criminal case and she sued for a declaration of her title.

Held, that the suit having been brought within 12 years of the original sale was maintainable. (*Harrison and Tek Chand, JJ.*) JAILAL DIN *v.* MT. KARAM NUR. **I.R. 1931 Lah. 939=134 I.C. 491=32 P.L.R. 381.**

———*Co-heirs—Debts — Right of creditor to sue heir in possession without impleading other heirs.*

Where there has been no distribution of the estate among the heirs, a creditor can sue one of the heirs who is in possession of the whole or any part of the estate, without impleading the other heirs as defendants, to recover the entire debt. (*Tek Chand, J.*) MT. AMIR BEGUM *v.* AHMED JALAL DIN. **A.I.R. 1935 Lah. 273.**

———*Co-heirs—Decree against some only—Execution against property in hands of non party heirs.*

A creditor of a deceased Mahomedan is not entitled in execution of a money decree obtained by him against some of the heirs of the deceased debtor as his representatives to attach and sell the shares possessed by those heirs who were not impleaded in the case in which the decree sought to be executed was passed. 10 P L.R. 1904, Foll. 32 Cal. 296 (P.C.), Ref. (*Agha Haidar, J.*) BALAK RAM *v.* INAYAT BEGUM. **160 I C 217=8 R. L. 511=37 P L.R. 214=A.I.R. 1935 Lah. 940.**

———*Co-heirs — Dower debt realised entirely from non-taluqdari property—Taluqdari property inherited by defendant uneffected—Liability to contribution.*

On the death of a Mahomedan, the inheritance vests in his heirs according to their respective shares, although in the administration of the estate, the funeral expenses, debts and legacies must be paid first and it is only the residue that is available for distribution among the heirs. "Residue" here means the residue of the partible estate and cannot include any portion of the impartible estate. So even if an entire divisible estate has been exhausted by the satisfaction of debts due from the deceased, this fact cannot create a right in any of the heirs to that estate to rehabilitate their shares by means of contributions from the impartible estate belonging to the same ancestors and inherited by another heir. So where the decree-holder realised the entire dower debt (which, however, was not charged on any specific property) from the non taluqdari property, as a result of which the shares of the heirs in the partible properties were proportionately reduced, the plaintiff is not entitled to maintain a suit for contribution as against the defendant who inherited the impartible taluqdari estate which was not affected by the execution proceedings, because that would be, in effect, under the guise of a suit for contribution, to divide the imparti-

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ble estate with a view to making good the plaintiff's losses in the partible estate. (*Wazir Hasan, C. J. and Smith, J.*) SADIQ ALI KHAN *v.* FAKHR JAHAN BEGAM. **6 R.O. 475=148 I C. 1052=11 O.W.N. 606 =A.I.R. 1934 Oudh 307.**

———*Co-heirs — Entry by one into possession—Presumption—Rebuttal.*

The entry into possession by the adult male heirs of a deceased Mummadan may be presumed to be for the benefit of all the co-owners; but this presumption may be rebutted. (*Macnair, C. J.*) MURADUDDIN *v.* MT. UMRAOBI. **28 N L.R. 282=140 I.C. 831=I.R. 1933 Nag. 14=A.I.R. 1933 Nag. 27.**

———*Co-heirs—Position as co-tenants*

Co heirs under Mahomedan Law are in the position of tenants in common and the possession of one such co-heir must be deemed to be on behalf of all the heirs. (*Harrison and Tek Chand, JJ.*) JALAL DIN *v.* MT KARAM NUR. **I.R. 1931 Lah. 939=134 I.C. 491=32 P.L.R. 381.**

———*Co-heirs — Possession by widow not hostile—Several heirs as joint* Sir *holders.*

Where the heirs under the Mahomedan Law succeeded to the *Sir* land of a deceased holder but the widow alone entered into possession.

Held, that her possession was not exclusive or personal to herself but was on behalf of all the co-heirs who should consequently be entered as *Sir* holders. (*Keane, S.M.*) AMAN BIBI *v.* QUADRATULLAH KHAN. **15 R. D. 390.**

———*Co-heirs — Right of representation — Decree against one—If binds the rest.*

Under the Mahomedan Law one heir cannot represent his co-heirs. A decree against one heir does not therefore bind the rest so as to constitute *res judicata* under S. 11, C. P Code. (*Nanavutty and Zia-ul-Hasan, JJ.*) SAKINA BEGAM *v.* SHAHAR BANO BEGAM. **10 Luck. 443=153 I.C. 42=7 R.O 303=11 O.W.N. 1608=A. I.R. 1935 Oudh 62**

———*Co-heirs—Sale by—Binding nature.*

One of the co-heirs of a deceased Mahomedan in possession of the whole or part of the estate cannot make a sale of the estate which is binding on his co-heirs. 40 M. 243 (F.B.), 43 B. 412, Foll. (*Beaumont, C. J. and Baker, J.*) ALLISAHEB *v.* SHESHO GOVIND. **135 I. C. 489=I.R. 1932 Bom. 105=33 Bom.L.R. 1238= A.I.R. 1931 Bom. 545.**

———*Co-heirs—Undivided property—Alienation of portion by co-heir—Right to declaration of right to joint possession.*

Where one of several heirs of a deceased Mahomedan old the whole of a specific portion of the undivided property, which was very much less than her share in the joint property, it was held, in a suit by a co-heir for a declaration of his right to joint possession over his share in the whole of the property including the portion sold, that he was entitled to a decree (*Kendall, J.*) MANSAB ALI KHAN *v.* NABIUNNISA. **6 R.A. 1101= 150 I C. 443=3 A.W.R. 733=A.I.R. 1934 All. 702.**

Conversion.

———*Conversion—Birth in Mahomedan faith—No proof of changing faith—Mere observance of Hindu ceremonies—Effect of—Inheritance—Law applicable.*

A person who is born in the Mahomedan faith and has never been proved to have adopted any other religion must be held to be a Mahomedan. The mere fact that a Thakur Mahomedan whose families were originally Hindu observe certain Hindu ceremonies does not render the Mahomedan Law of Inheritance inapplicable to them. (*Raza and Pullan, JJ.*) BHAGWAN BAKSH SINGH *v.* DIGBIJAI SINGH. **6 Luck. 487=I.R. 1931**

MAHOMEDAN LAW—Divorce.

Oudh 331=132 I.C. 779=14 O.L.J. 263=8 O.W.N. 83=A.I.R. 1931 Oudh 301.

Custom.

———*Custom—Proof of—Overriding texts of Mahomedan Law—Affidavits by wealthy members regarding their desires—Sufficiency of.*

In order that the texts (of Mahomedan Law) may be overridden by proof of customs and usages, the evidence must satisfy the Court that the majority at least of the given class of persons look upon the customary rule put forward as binding. That must be established by a series of well-known concordant and on thewhole continuous instances, so that the common consent of the class in question is clearly demonstrated by the number of instances proved. A number of affidavits by the leading wealthy members of the community emphasising the desirability of a certain course of conduct in the management of a mosque cannot take the place of proving a custom. (*Tyabji, J.*) AKBARALLY *v.* MAHOMEDALLY. **57 Bom. 551=I R. 1932 Bom. 434=138 I.C. 810=34 Bom.L.R. 655=A I.R. 1932 Bom. 356.**

Divorce.

———*Divorce—Agreement between husband and wife for on a certain event—Legality of.*

An agreement between a husband and wife that if the former married another wife the first wife would be entitled to divorce, a separate residence and maintenance is permitted by the Mahomedan Law and is not opposed to public policy. (*Tek Chand and Coldstream, JJ.*) MT. SADIQA BEGAM *v.* ATA ULLAH. **I.R. 1933 Lah. 491=34 P.L.R. 788 (2)=144 I.C 497=A.I.R. 1933 Lah. 885.**

———*Divorce—Agreement enabling wife to divorce herself—Enforceability.*

An agreement made before or after the marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified conditions is valid if the conditions are of a reasonable nature and not opposed to the policy of Mahomedan Law. When such an agreement is made, the wife may at any time after the happening of the contingency avail herself of what was allowed in the deed and such a divorce will then take effect as if a talak had been pronounced by her husband. Where an agreement provided "I shall not marry another woman in the presence of *A*, and if I do so she is to be held to have been divorced by me, on account of the second marriage, simultaneously with that second marriage, she will be *qatai haram* (absolutely forbidden to my person) and this very divorce by me in her favour would be valid and legal"

Held, that the agreement was valid and amounted to a divorce and was a complete answer to a suit for restitution of conjugal rights by the husband. (*Addison, J.*) MAHOMED AMIN *v.* MT. HIMNA BIBI. **I.R. 1931 Lah. 626=132 I.C 578=32 P.L.R. 181=A.I.R. 1931 Lah. 134.**

———*Divorce—Forms of—Talak bain—Bidaat form —Presence of wife at the time of divorce unnecessary.*

The divorce called talak may be either irrevocable (bain) or revocable (raja). A talak bain, while it always operates as an immediate and complete dissolution of the marriage bond, differs as to one of its ulterior effects according to the form in which it is pronounced. A talak bain may be effected by words addressed to the wife clearly indicating an intention to dissolve the marriage, either; (*a*) once, followed by abstinence from sexual intercourse, for the period called the iddat; or (*b*) three times during successive intervals of purity, *i.e.*, between successive menstruations no intercourse taking place during any of the three intervals; or (*c*) three times at shorter intervals or even in immediate succession;

or (*d*) once, by words showing a clear intention that the divorce shall immediately become irrevocable. The first named of the above methods is called hasan (best), the second hasan (good) the third and fourth are said to be bidaat (sinful), but are, nevertheless, regarded by Sunni lawyers as legally valid. Where the words of divorce addressed to the wife though she was not present, were repeated three times by the husband as follows: "I divorce *A* for ever and render her harm for me," which clearly showed an intention to dissolve the marriage; and followed it by executing a deed of divorce, there can be no doubt that the method adopted was the fourth above described and this is confirmed by the deed of divorce, which stated that the three divorces were given "in the abominable form" *i.e.*, bidaat, the talak being addressed to the wife by name, and in the bidaat form the presence of the wife is unnecessary. 4 Cal. 588, Dist. (*Lord Thankerton.*) SAIYID RASHID AHMAD *v.* ANISA KHATUN. **59 I.A. 21=54 All 46=I.R. 1931 P.C. 42=135 I.C. 762=35 L.W. 106=9 O.W.N. 25=36 C.W N. 305=34 Bom L.R. 475=55 C L.J. 145=1932 A.L.J. 344=A.I.R. 1932 P.C. 25=62 M.L.J. 405 (P.C.).**

———*Divorce—Grounds for.*

Any Mahomedan of sane mind who has attained puberty can divorce his wife without assigning his cause, at his mere whim and caprice. 30 B. 537; 33 Mad. 22, Ref. (*Costello, J.*) AHMAD KASIM MOLLA *v.* KHATUM BIBI. **59 Cal. 833=141 I.C 689=I.R. 1933 Cal. 165=A.I.R. 1933 Cal. 27.**

———*Divorce—Grounds—Desertion by husband—Proof.*

The Mahomedan Law distinctly lays down that a wife is bound to live with her husband and to follow him wherever he desires to go. Where the husband had to quit his domicile in connection with his occupation as a master tailor in the regiment in which he was employed and there was nothing to show that he ever refused to allow his wife to live him or maintain her,

Held, that under the circumstances the wife was not entitled to divorce on the ground of the husband's desertion. (*Tapp, J.*) MT. GHULAM FATIMA *v.* NUR AHMAD. **I.R. 1931 Lah 733=133 I.C. 61=A.I.R. 1931 Lah. 721.**

———*Divorce—Grounds—False charge of adultery—Opportunity for retraction by husband.*

Under the Mahomedan Law, a wife, who has been falsely charged with adultery by her husband is entitled to a divorce. An express opportunity of retraction, even if necessary under the strict forms of Li'an under the Mahomedan Law is not necessary according to the procedure of British Courts. 41 A 278; 48 A. 834; 52 B. 295, Foll. (*Madgavkar and Barlee, JJ.*) AHMED SULEMAN *v.* BAI FATMA. **55 Bom. 160=I.R. 1931 Bom. 125=128 I C. 909=32 Bom.L.R. 1372=A.I.R. 1931 Bom. 76.**

———*Divorce—Grounds for—Failure to provide maintenance, when.*

Mere inability to provide maintenance is no ground for divorce proceedings by wife when a husband is possessed of means and is able to provide for the support of both himself and wife and wilfully refuses to do so and neglects her then only she can apply for divorce. (*Mitter Patterson, JJ.*) KADIR *v.* KOLEMAN BIBI. **62 Cal. 1088.**

———*Divorce—Hanafi school—Execution of deed by husband—Proof of intention and communication.*

According to the Hanafi Law, when the husband executes a document containing a statement that he divorces his wife and the document is properly superscribed and addressed in the usual form, showing the name of the writer and the person addressed, it constitutes a valid pronouncement of divorce, irrespective of the intention with which it is written. Where however the deed was in the form of a declaration and was not addressed to the wife and it was also found that the husband did not intend to effect a divorce.

Held, that the deed did not evidence a valid divorce. (*Broadway and Monroe, JJ.*) RASUL BAKHSH *v.* MT. BHOLAN **13 Lah. 780=I.R. 1932 Lah. 420=138 I. C. 134=33 P L.R. 682=A.I R. 1932 Lah. 498.**

———*Divorce—Hanafi School—Talak—Express words necessary.*

Where a Mahomedan husband wrote a letter to his wife stating: "I give up all relations and would have no connection of any sort.

Held, that the words were not sufficiently express to effect a valid *talak*. Meaning of 'talak' stated. (*Hasan, C. J. and Bisheshwar Nath, J.*) WAJID ALI KHAN *v.* JAFAR HUSAIN KHAN. **7 Luck. 430=I.R. 1932 Oudh 81=136 I.C. 209=8 O.W.N. 1343=A.I.R. 1932 Oudh 34.**

———*Divorce—Irrevocable divorce—No presumption of acknowledgment.*

The legal bar to re-marriage created by an immediate and irrevocable divorce in the bidaat form would equally prevent the raising of the presumption of acknowledgment. 48 C. 856 (P C.). Dist. (*Lord Thankerton.*) SAIYID RASHID AHMAD *v.* ANISA KHATUN **59 I.A. 21=54 All. 46=I.R. 1932 P.C. 42=135 I.C.762=9 O.W.N. 25=35 L.W. 106=36 C.W N. 305=34 Bom.L R. 475=55 C L J 145=1932 A.L.J. 344=A.I.R. 1932 P.C. 25=62 M.L.J. 405 (P.C).**

———*Divorce—Jurisdiction—Test—Cause of action—Domicile, not residence.*

Where a marriage between Mahomedan parties is celebrated in British territory and the husband makes a false charge of adultery against his wife, in the same territory, a suit for divorce by the wife lies in British territory although the parties reside in a Native State, as the cause of action arises in British territory. It is not residence but domicile which governs the jurisdiction in divorce matters. 18 Bom. 316, Foll. (*Madgavkar and Barlee, JJ.*) AHMED SULEMAN *v.* BAI FATMA. **55 Bom. 160=I R. 1931 Bom 125=128 I C. 909=32 Bom L.R. 1372=A.I.R. 1931 Bom. 76.**

———*Divorce*—Khula—*Surrender of dower—Revocation—Time limit.*

Surrender of the dower is a part of the contract of *khula* and in the event of the consideration failing there would be an option to revoke the *khula* (a form of divorce recognized by Mahomedan Law). It is open to the wife to re-claim her dower under those circumstances but she should do so within the period of 'Iddat.' (*Sulaiman, C.J. and Iqbal Ahmad, J.*) QUASIM HUSAIN BEG *v.* KANIZ SAKINA. **54 All. 806=I.R. 1932 All. 564=139 I.C. 371=1932 A.L.J. 781=A.I. R. 1932 All. 649.**

———*Divorce—Procedure—Application—If proper.*

A Mahomedan wife seeking divorce from her marriage must institute a regular suit and an application to the District Judge bearing a Court-fee of twelve annas is not the proper form of procedure. (*M.C. Ghose, J.*) AYESHA BIBI *v.* ABDUL GANI. **59 C.L.J. 466.**

———*Divorce—Shia school—Incompatibility of temperament—Whether entitles wife to divorce.*

Under the Shia law incompatibility of temperament is no ground for dissolution of marriage by decree of Court. (*Raza and Smith, JJ.*) MUSTAFA BEGAM *v.* KAZIM RAZA KHAN. **8 Luck. 204=142 I.C. 46=I.R. 1933 Oudh 93=9 O.W.N. 1089=A.I.R. 1933 Oudh 15.**

MAHOMEDAN LAW—Divorce.

———*Divorce—Suit by wife, aged sixteen—Majority Act* (1875), *S.* 2 (a).

Under Mahomedan Law a woman of sixteen and ever is entitled to sue for divorce, without a guardian by virtue of S. 2 (*a*) Majority Act. 41 Mad. 1026, Rel. on; 18 Bom. 366 and 22 Bom. 430, Dist. (*Madgavkar and Barlee, JJ.*) AHMED SULEMAN *v.* BAI FATMA. **55 Bom. 160 = I.R. 1931 Bom. 125 = 128 I.C. 909 = 32 Bom.L.R 1372 = A.I.R. 1931 Bom. 76**

———*Divorce—Suit by wife for dissolution on the ground of cruelty and desertion—Maintainability—Jurisdiction of District Judge.*

According to the view taken by the modern Mahomedan jurists, a Mahomedan wife has a right to maintain a suit for dissolution of marriage on grounds of desertion and cruelty by her husband. It is open to a District Judge to entertain such a suit on the ground of the husband's cruelty and wilful neglect to maintain his wife. (*Mitter and Patterson, JJ.*) KADU *alias* KADIR *v.* SREEMATI KOLEMAN BIBI. **62 Cal. 1088 = 163 I.C. 188 = 8 R.C. 725 = 61 C.L.J. 342 = 39 C. W.N. 876.**

———*Divorce—Talak — Communication to wife—Necessity for—Claim for dower—Limitation.*

The absence of the wife does not make the pronouncement of talak void and inefficacious for the husband may pronounce a valid talak in her absence. But the question as to when such a talak takes effect immediately or only when it comes to the notices of the wife, is not free from doubt. But it is necessary certainly *for the purpose of her claim to dower* that the fact of the pronouncement of talak should come to her notice. 36 C. 184, Foll. (*Venkatasubba Rao, J.*) KATHIYUMMA *v.* UROTHEL MARAKKAR. **I R. 1931 Mad. 727 = 133 I.C 375 = 1931 M.W.N. 570 = A.I.R. 1931 Mad. 647.**

———*Divorce—Talak—Communication—Wrong date—Estoppel.*

The defendant divorced his wife by valid talak on 21—7—1919, and requested the kazi to communicate it to the plaintiff, his wife. The kazi informed her on 24—8—1919 but stated by mistake that the talak was dated 21—8—1919 instead of 21—7—1919. The plaintiff's suit for deferred dower was filed on 25—7—1922 more than three years from the real date of the talak.

Held, the defendant was estoppel from showing that the date of the talak was earlier than 21—8—1919. He had constituted the kazi as his agent and a representation made by an agent is as effectual for the purpose of estoppel as if it had been made by a principal. (*Venkatasubba Rao, J.*) KATHIYUMMA *v* UROTHEL MARAKKAR. **I.R. 1931 Mad. 727 = 133 I.C. 375 = 1931 M W N. 570 = A.I.R. 1931 Mad. 647.**

———*Divorce—Talak—Effect—Pending maintenance proceedings.*

At any time during the maintenance proceedings, the husband can defeat any attempt on the part of the wife to obtain an order for maintenance by the giving of a talak. If any such maintenance order as in fact been made, it ceases to be effective as soon as a talak is validly given. 19 A. 50, Ref. (*Costello, J.*) AHMAD KASIM MOLLA *v.* KHATUN BIBI. **59 Cal. 833 = 141 I.C. 689 = I.R. 1933 Cal. 165 = A.I.R. 1933 Cal. 27.**

———*Divorce*—Talak *in the absence of wife—Validity.*

A *talak* is valid, where it is made by a written instrument, notwithstanding that it is pronounced in the absence of the wife and is not brought to her knowledge. The only question that may arise is with regard to her maintenance during such period as may elapse until the fact of the execution of the *Talaknama* comes to her knowledge. 36 C. 184; 4 C. 588; 30 B. 537; 44 B. 44; 33 M. 22, Ref. (*Costello, J.*) AHMAD KASIM MOLLA *v.* KHATUN BIBI **59 Cal. 833 = 141 I.C. 689 = I.R. 1933 Cal 165 = A.I.R. 1933 Cal. 27.**

MAHOMEDAN LAW—Dower.

———*Divorce—Talak in bidaat form even in compulsion or jest, effective—Subsequent treatment of divorced wife as wife and birth of children—Effect of.*

The validity and effectiveness of an irrevocable divorce in the bidaat form would not be affected by the husband's mental intention that it should not be a genuine divorce. A talak actually pronounced under compulsion or in jest is valid and effective. Nor would the fact that for about 15 years after the divorce the husband treated the wife as his wife and his children as legitimate, and that the brothers of the husband made certain admissions that she was the wife and her children were legitimate undo the effect of such divorce and confer the status of wife on the divorced woman and make her children legitimate. (*Lord Thankerton.*) SAIYID RASHID AHMAD *v.* ANISA KHATUN. **59 I. A. 21 = 54 All. 46 = I.R. 1932 P.C. 42 = 135 I.C. 762 = 9 O.W.N. 25 = 35 L.W. 106 = 36 C.W.N. 305 = 34 Bom L.R. 475 = 55 C.L.J. 145 = 1932 A.L.J. 344 = A. I.R. 1932 P.C. 25 = 62 M.L.J. 405 (P.C.).**

[R. 13 L. 780 (782)].

———*Divorce — Talak — Marriage of Mahomedan domiciled in British India with Christian lady domiciled in Scotland—Parties settling in British India—Right of husband to divorce wife by talak.*

In 1906, Jessie a Christian lady domiciled in Scotland married Gulam, a Muhammadan domiciled in British India by civil marriage in Scotland. The parties then settled in British India. In 1912 she adopted the Muhammadan faith. In 1922 Gulam divorced his wife by talak. Shortly after, Jessie obtained a declaration from the District Court that she was no longer married to Gulam. In 1923 she married Mancherji, a Parsi convert to Christianity (respondent). In 1933 she filed a petition for dissolution of her marriage with the respondent on the ground of adultery and cruelty The respondent contended that the petitioner's marriage with Gulam had not been validly dissolved and was still subsisting and that his marriage with the petitioner was void.

Held, that (*i*) the declaration obtained by the petitioner from the District Court did not operate as a judgment *in rem* and was not binding on the respondent; (*ii*) the status attaching to the marriage and the rights flowing therefrom are determined by the *lex domicilii*, not *lex loci contractus* and divorce by talak being recognised by the Muhammadan Law of British India, Jessie was validly divorced. (*Beaumont, C. J.*) KHAMBATTA *v.* KHAMBATTA. **149 I.C. 1232 = 6 R. B. 417 = 36 Bom.L R. 11 = A.I.R. 1934 Bom. 93.**

———*Divorce* — Talak — *Validity as against non-Mahomedan wife.*

A Mahomedan can divorce a *kitabia* by *talak* under the Mahomedan Law. (*Blackwell and Broomfield, JJ.*) KHAMBATTA *v.* KHAMBATTA. **59 Bom. 278 = 154 I.C. 1075 = 7 R.B. 387 = 36 Bom.L.R. 1021 = A.I.R. 1935 Bom. 5.**

Dower.

———*Dower—Amount—Mode of fixing.*

No hard and fast rule can be laid down on which to assess the amount of dower which may be claimed by a Mahomedan widow. It has to be done on the broad lines laid down in the Oudh Laws Act with reference to the circumstances of the case, such as the means of the husband and the status of the wife. (*Bisheshwar Nath and Pullan, JJ.*) ABDUL RAHMAN KHAN *v.* INAYAT

MAHOMEDAN LAW—Dower.

BIBI. **I.R. 1931 Oudh 129=130 I.C. 113=7 O.W. N. 1181=A.I.R. 1931 Oudh 63.**

———*Dower—Deferred dower—Wife's right to demand payment of.*

A wife is not entitled as of right to demand the payment of her deferred dower debt and cannot enforce such a claim, but if she does demand it and if the husband thinks fit to pay it or to make a transfer of property in her favour in lieu thereof, he is legally competent to do so and such transfer will be valid. 8 All. 178; 5 I. C 316, Rel. on. (*Thom and Collister, JJ.*) MANGAT RAI HIRA LAL *v.* MT. SAKINA BEGAM. **149 I.C. 1211=6 R.A. 1024=3 A.W.R. 191 =1934 A.L.J. 64=A.I.R. 1934 All. 441.**

———*Dower—Demand—Suit within three years of wife's death.*

The suit brought within three years of the death of the wife when no demand for dower had ever been made by her is not barred. (*Niamatullah and Collister, JJ.*) SABIR HUSAIN *v.* FARZAND HASAN. **56 All. 401= 151 I.C. 304=7 R.A. 135=3 A.W.R. 166=1934 A. L.J. 190=A.I.R. 1934 All. 52.**

———*Dower—Enhancement after marriage.*

No only the amount of dower can be fixed at any time before or after marriage, but the amount so fixed can be increased at any time during the continuance of marriage. 3 All. 266 (P. C.) and A.I.R. 1934 Cal. 210, Rel. on. (*Addison and Din Mohammad, JJ.*) MT. NASIBAN BI *v.* MT. IQBAL BEGAM. **160 I.C. 805=8 R.L. 612 (2)=A.I.R. 1935 Lah. 816.**

———*Dower—Enhancement—Possession of properties by widow—Presumption.*

Under the Mahomedan Law an addition may be made to the dower at any time during continuance of the marriage and the husband's promise to add the dower if accepted by the wife becomes incorporated with the marriage contract and is binding on him. The wife is entitled to hold the husband's properties until her dower debt is paid only if she has lawfully and without free or fraud obtained possession of them. Such possession must initially be obtained by the widow on the ground of her claim for her dower debt. There is a presumption that when the widow continues in possession of property during her lifetime and after, her possession may be deemed to be lawfully obtained. The presumption however is one of fact and not of law. (*Mukerji and Bartley, JJ.*) JAHURAN BIBI *v.* SOLEMAN KHAN. **149 I.C. 1150=6 R.C. 723=58 C.L.J. 251= A.I.R. 1934 Cal. 210.**

———*Dower—Fixing of amount subsequent to marriage.*

Under the Mahomedan Law it is open to a husband to fix the amount of dower at any time subsequent to the marriage. (*Tek Chand, J.*) GANGA RAM *v.* MST. AMIR JAN. **37 P.L.R. 777.**

———*Dower—Interest—Discretion of Court to award.*

Where a claim for dower is decreed it is in the discretion of the Court to award interest on the amount from the date of the institution of the suit till the recovery of the amount. (*Mukerji and Bennet, JJ*) MAIMUNA BEGAM *v.* SHARAFAT ULLAH KHAN. **131 I.C. 115=1931 A.L.J. 197=A I.R. 1931 All. 403.**

———*Dower—Liability of father for dower—Shia Law—Father contracting marriage for his minor son.*

The vicarious liability of the father contracting marriage of minor son for the dower arises not from any substantive rule of Shia Law relating to marriage but is the result of deduction from given circumstances, and as such British Indian Courts are to be guided not by Mahomedan Law but by rules of construction generally applicable or by the Evidence Act. The liability arises

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from a civil contract and should be determined by the law applicable to contracts made by an authorized guardian. The rule of Mahomedan Law thrusting the liability on the father cannot be applied as a rule of justice, equity and good conscience, as it is quite unjust to enable the wife, and even her heirs to follow the property of her husband's father in the hands of his heirs other than the husband. (*Niamatullah and Collister, JJ.*) SABIR HUSAIN *v.* FARZAND HASAN. **56 All. 401=151 I C. 304=7 R.A. 135=3 A.W.R. 166= 1934 A.L.J. 190=A.I.R. 1934 All. 52.**

———*Dower—Liability for—Presents by husband from time to time—No presumption of satisfaction.*

In a claim for dower by wife from her husband's heirs who alleged that the debt was satisfied by payments made to her by the husband in his lifetime, it was admitted that she received sums of money from her husband which in the aggregate exceeded the dower amount, but these payments were made as "presents" from time to time in varying amounts. There was no evidence that the husband allocated any of these payments to the dower debt, nor was there any attempt at the trial to show that the lady accepted them as such. It was not suggested to her in cross-examination that any of these moneys were payments on account of dower. The dower deed was produced by her at the trial, and no payments were endorsed or noted upon it. There was in reality nothing in the evidence to rebut her claim. Reliance was placed on the maxim *debitor non praesumitur donare.*

Held, that it was doubtful if the maxim had any application as between husband and wife—at all events when the relations between them are such as are established in the present case. It was certain that in many cases the husband did make presents to his wife quite irrespective of her dower and it would hardly be presumed that a man in his position would desire to discharge such an obligation by driblets. 7 Beng. L. R. 643, Dist. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=6 Luck. 556=I.R. 1932 P.C. 81=136 I.C. 385=1932 A.L.J. 663=36 C.W.N. 137=35 L.W. 118=8 O.W. N. 1378=62 C.L.J. 326=A.I.R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

———*Dower—Lien—Possession of widow—Execution sale of property—Right of widow if modified.*

A widow who has obtained possession over the estate of her husband in lieu of her dower, can insist that her possession over the estate should not be disturbed at the instance of another creditor of her husband so long as the dower due to her is not paid. The widow is entitled to retain possession till her dower debt is paid. Although a widow cannot say that her charge should be declared over the estate for the simple reason that her right does not amount to a charge, she can certainly ask the Court that at the sale it should be declared that her possession will not be disturbed till the question of her dower is disposed of. A.I.R. 1928 All. 331, Dist.; 14 M.I.A. 377 (P. C.), Rel. on. (*Rachhpal Singh, J.*) MT. GHAFOORAN *v.* RAM CHANDRA DAS. **A.I.R. 1934 All. 168.**

———*Dower—Lien—Widow's lien—Consent of heirs before entering into possession not essential.*

All that is necessary for the widow to retain possession until her dower debt is paid is that she should obtain possession not by force or fraud. She is in the position of a creditor and having obtained possession lawfully she is entitled to hold possession until her dower debt is satisfied. The consent of the heirs is not essential. If she has to depend upon consent of heirs that consent she will seldom get and the rule will become nugatory. 43

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Mad. 214, Foll.; 38 All. 381 (P.C.); 14 M.I.A. 377, Expl. (*Mukerji, A.C.J. and Bennet, J.*) ZAMIN ALI *v.* MT. AZIZUNNISSA. **55 All. 139=I.R. 1933 All. 432=144 I.C. 433=1933 A.L.J. 483=A.I.R. 1933 All. 329.**

———*Dower—Lien—Widow's lien—Transferability.*

The right of a Mahomedan widow to remain in possession of her husband's property until satisfaction of her dower debt does not carry with it the right of selling, mortgaging or otherwise transferring the property. If she alienates and delivers possession of the property to the vendee, the lien must be taken to have been extinguished. The widow's lien no longer remains, nor does it pass to the alienee. (*Nanavutty and Zia-ul-Hasan, JJ.*) FAHIMAN *v.* BULAQI. **10 Luck. 440=153 I.C. 93=7 R.O. 302=11 O.W.N. 1527=A.I.R. 1935 Oudh 68.**

———*Dower—Lien—Widow's right to possession—Consent of husband's heirs, if necessary.*

Where a Mahomedan widow lawfully and peaceably takes possession of her husband's estate without any force or fraud, while her dower debt remains unpaid in whole or in part, she is entitled to retain possession against the other heirs of the husband so long as the debt has not been paid by them or has been satisfied out of the usufruct of the property, and in order to entitle her right to retain possession of the property it is not necessary that her possession should have originated with the consent, express or implied, of her husband or of her husband's heirs. Nature of widow's right to possession in lien of dower discussed. (Case-law reviewed.) (*Sen and Niamattullah, JJ.*) MT. IMTIAZ BEGAM *v.* ABDUL KARIM KHAN. **53 All. 31=I.R. 1931 All. 88=128 I.C. 760=1930 A.L.J. 1587=A.I.R. 1930 All. 881.**

———*Dower—Nature of right—Right of heirs to remain in possession.*

There is nothing to prevent a Mahomedan widow from instituting a suit for her dower for the purpose of obtaining a simple money decree against all the assets of her husband including the property in her possession at least by surrendering possession of such property in her hands. This right is heritable. If the right to receive dower and the right to remain in possession of certain property in lieu of such dower are vested in the same person he cannot be ousted by the heirs of her husband. If however the widow transfers her right to possession of the property itself without transferring her right to receive the dower the transferee cannot defend his right to possession as against the heirs quo the latter's share. The ownership being vested in the husband the only person who can stand between him and what belongs to him in the person who is entitled to the dower and to possession of the property in lieu thereof. (*Pullan and Niamatullah, JJ.*) AMIR HASAN KHAN *v.* MAHOMED NAZIR HASAN. **54 All. 499=I.R. 1932 All 254=1932 A.L.J. 275=136 I.C. 833=A.I.R. 1932 All. 345.**

———*Dower—Post nuptial agreement—Requisites.*

According to Mahomedan Law, a post-nuptial agreement for dower requires the concurrence of both parties, an offer by the husband to give and an acceptance thereof by the wife (*Wild, J.C. and Rupchand, A.J.C.*) MT. HAKIM BIBI *v.* MIR AHMED. **25 S.L.R. 72=I.R. 1931 Sind 20=129 I.C. 900=A.I.R. 1931 Sind 17.**

———*Dower—Prompt dower—Dower postponed until demand by wife.*

A dower the payment of which may be postponed until demanded by the wife would be classed as prompt dower. (*Wort and James, JJ.*) MAHADEO LAL JWALA PRASAD *v.* MT. BIBI MANIRAM. **12 Pat. 297=6 I.R. (Pat.) 142=145 I.C. 213=14 Pat.L.T. 611=A.I.R. 1933 Pat. 281.**

———*Dower—Prompt dower—Fixing of by Court—Consideration.*

The Court should fix the proportion to be treated as the prompt dower having regard to the status of the family, the amount of dower and customs, if any, prevailing in the claimant's family. Where the claimant was shown to belong to a respectable family and the suit was the result of the husband's desire to take a second wife and it appeared that in the case of the sisters of the claimant one-half had been fixed as prompt dower.

Held, that the wife should be allowed one-half of the whole dower as prompt dower. (*Mukerji and Bennet, JJ.*) MAIMUNA BEGAM *v.* SHARAFAT ULLAH KHAN. **131 I.C. 115=1931 A.L.J. 197=A.I.R. 1931 All. 403.**

———*Dower—Prompt dower—When payable—Limitation—Limitation Act, Art. 103.*

Limitation for a suit for dower is governed by Art. 103; it is three years from the date when the dower becomes payable. Although prompt dower may be demanded at any time after the marriage, the wife is under no obligation to make such demand at any specified time during coverture. It is only upon her making such demand that it becomes payable. The demand must be specific and not conditional or ambiguous. No amount of opposition on the husband's part would be sufficient to constitute a cause of action, unless the wife had made a previous demand 8 All. 149; 2 I.A. 235 (P.C.) and 63 P.R. 1892, Appl. A jirga was sent to a woman who had applied for execution of a maintenance decree against her husband, with the idea of getting her return to the husband. She expressed possible readiness to accompany her husband if he would pay her the dower.

Held, that there was not a definite demand for dower so as to set the statute of limitation running against the wife. (*Fraser, J.C. and Saaduddin, A.J.C.*) MT. AMTUL RASUL *v.* KARIM BAKHSH. **I.R. 1933 Pesh. 15=142 I.C. 833=A.I.R. 1933 Pesh. 31.**

———*Dower—Relinquishment by wife—Validity.*

A relinquishment of dower by the wife during deathbed illness is valid only to the extent of one third. It is for the person who sets up the case of relinquishment to show that it was made by her voluntarily. (*Niamatullah and Rachhpal Singh, JJ.*) SAJJAD HUSAIN *v.* MAHOMED SAYID HASAN. **154 I.C. 434=7 R.A. 759=3 A.W.R. 263=A.I.R. 1934 All. 71.**

———*Dower—Right of wife to insist on payment of prompt dower lost after consummation of marriage—Suit for restitution of conjugal rights—Discretion of Court to pass conditional decree.*

The absolute right of a wife to insist on the payment of the portion of her dower before restitution of conjugal rights (except when the husband wants to take her out on a journey to another town) is lost after the consummation of the marriage, unless the consummation took place when she was a minor or of insane mind so as to be incapable of giving consent. But there is no absolute right in a husband to claim restitution of conjugal rights against his wife unconditionally; the Courts have a discretion to make the decree conditional on the payment of her unpaid dower debt or to impose other suitable conditions considered just, fair and necessary in the circumstances of each case. (Case-law reviewed.) (*Sulaiman, C.J. and Thom, J.*) MT. ANIS BEGAM *v.* MALIK MAHOMED ISTAFA WALI KHAN. **55 All. 743=148 I.C. 26=6 R.A. 664=1933 A.L.J. 1079=A.I.R. 1933 All. 634.**

MAHOMEDAN LAW—Family arrangement.

———*Dower—Sunni Law—Prompt and deferred—Presumption.*

Under the Saunni Law, there is no presumption that a dower debt is prompt. Where it is not settled at the time of marriage whether the wife's dower is to be prompt or deferred, part will be prompt and part deferred, the proportion referable to each category being regulated by custom, or in the absence of custom, by the status of the parties and the amount of the dower settled. 33 All. 291, Foll.; 23 Mad 371; 19 W.R. 315, Dist. (*Thom and Collister, JJ.*) MANGAT RAI HIRA LAL *v.* MT. SAKINA BEGAM. **149 I.C. 1211=6 R.A. 1024=1934 A.L.J. 64=3 A.W.R. 191=A.I.R. 1934 All. 441.**

———*Dower—Transfer in lieu of—Nature of—Sale or gift—Registration—Necessity.*

Under the Mahomedan Law a transfer of immovable property by the husband to the wife in exchange for dower is not gift, but is a Hiba-bil-ewaz. It is inreality a sale and nothing but a sale; and when the property transferred is immovable and of the value of or more than one hundred rupees, it has to be effected by a registered instrument as required by S. 54, T.P Act. (*Mitter and McNair, JJ.*) SABURANNESSA *v.* SABDU SHAIKH. **152 I.C. 422=7 R.C. 274=38 C.W.N. 747 =A.I.R. 1934 Cal. 693.**

Family arrangement.

———*Family arrangement — (Shiah school)—Ante-nuptial agreement to give property to wife as* malik mustaqil*—Restriction of alienation to stranger—Validity of.*

By a deed of compromise made between an intending husband and wife (Shiah Muhammadans), certain immovable property was given to the woman as *malik mustaqil* (*i.e.*, as permanent proprietor) and it was provided (*inter alia*) that she "shall not have power to transfer this property to a stranger; but the ownership thereof as family property shall devolve on her legal heirs, from generation to generation." The wife sold and mortgaged all the property to the defendants (strangers to the family) and on her death, the plaintiff, claiming as her heir, sued to recover the property from the defendants to whom it has been so transferred by the deceased wife in direct breach of the agreement.

Held (decreeing the plaintiff's suit, (*i*) that the compromise was not a deed of gift or a conveyance, but was in the nature of a contract and a family arrangement and that family arrangements are specially favoured in Courts of equity; (*ii*) that a partial restriction imposed by the document against alienations outside the family was not void for repugnancy; (*iii*) and that on the construction of the particular document as a whole, the wife took only a life estate in the property and had no power to transfer any part of it to the defendants. (*Sir George Lowndes.*) MAHOMED RAZA *v.* MT. ABBAS BANDI BIBI. **59 I.A. 236=I.R. 1932 P.C 181=7 Luck. 257=1932 M.W.N. 1011=137 I.C. 321=36 C.W.N. 774=34 Bom L.R. 1048=55 C.L.J. 510=9 O.W.N. 577=1932 A.L.J. 709=36 L.W. 69=A.I.R. 1932 P.C. 158=63 M.L.J. 180 (P.C.).**

———Family arrangement—Document styled as wakf—Absence of ultimate gift—Fraction of income allotted for charity—Valid as family arrangement. *See* WAKF VALIDITY OF. *See* **A.I.R 1935 All. 856.**

———Family arrangement—Trust of certain property—Sons appointed trustees—Condition that donor is to remain in possession for life and to be sole trustee during his life time with power to deal with rents and profits as he thinks fit—Family settlement not created. *See* WAKF—CONSTRUCTION. **13 Rang. 679.**

MAHOMEDAN LAW—Gift.

———*Family arrangement—Validity of—Disposal of wakf properties.*

Under the guise of a family arrangement, a party cannot enter into a transaction which he is not under the law competent to do and which is beyond his disposing power. A settlement of such a nature cannot possibly affect any properties which were not the properties of the family but were the properties of an endowment validly created. (*Mukerji and Bartley, JJ.*) SYED ZAINUDDIN HOSSIEN *v.* MOULVI MAHOMED ABDUR RAHIM. **140 I.C. 799=I.R. 1933 Cal. 46= 58C.L.J. 259=36 C.W N. 972=A.I.R. 1933 Cal.102.**

———Family arrangement—Wakf for benefit of poor relations and stated to be for charity—Endowment to charity not substantial—Document representing a family arrangement in the garb of wakf—Invalid as wakf. *See* WAKF—VALIDITY OF. **A.I.R. 1935 Cal. 792.**

Gift.

See also TRUST, *infra.*

APPLICABILITY OF T. P. ACT.
BURDEN OF PROOF.
CONDITIONAL GIFT.
CO-SHARER.
DELIVERY OF POSSESSION.
ESSENTIALS.
HIBA-BIL-EWAZ.
LIFE ESTATE.
MARS UL MAUT.
MUSHAA.
ORAL GIFT.
PATHAN.
PRINCIPLES.
VALIDITY OF.

Applicability of T. P. Act.

———*Gift—Applicability of T. P. Act* (1882).

The rules as to gifts under the Mahomedan Law are contrary to the rules under the T. P. Act and latter do not apply to a Mahomedan gift. (*Wort and Faul Ali, JJ.*) BISHUN PRASAD SHEORATAN *v.* MAHOMED NAYIM. **147 I.C 504=6 R.P. 359=14 Pat L.T 599.**

Burden of proof.

———*Burden of proof—Gift or sale.*

Where what is described as a sale deed is relied upon as a deed of gift under the Mahomedan Law by the plaintiff, it is incumbent on him to show that all the forms necessary for a valid gift were complied with and that the deed of gift is a valid one (*Wild, J. C. and Rupchand, A.J.C.*) MT. HAKIM BIBI *v.* MIR AHMED. **25 S L R. 72=I R. 1931 Sind 20=129 I.C. 900=A. I.R. 1931 Sind 17.**

Conditional gift.

———*Gift—Conditional gift—Possession subject to conditions—Effect.*

Under Mahomedan Law it is open to the donor to revoke the gift before delivery of possession. If before delivering possession, the donor declares certain conditions, subject to which alone the donee can take it, and the latter's guardian with full knowledge of those conditions accepts the gift and takes possession of the property, he must be deemed to have accepted the conditions imposed by the donor. The effect of the modification introduced by the donor at the time of registration of the deed is to regard the donor's declaration, which has been reduced into writing and made part of the registration endorsement, as integral part of the deed, and the conditions added by the donor at the time of registration are admissible and binding on the donee. (*Niamatullah and Rachhpal Singh, JJ.*) IFTIKAR WALI KHAN *v.* SIKANDAR BEGAM. **6 R.A. 716=148 I.C. 528= 3 A.W.R. 51=A.I.R. 1934 All. 179.**

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Co-sharer.

———Gift—Co-sharer—Possession—Constructive delivery.

A gift of a house by one co-sharer in favour or another who is already in possession of the house on behalf of all the co-shares is valid, there being a constructive transfer of possession. Constructive possession can be transferred from one co-heir to another. *Corea* v. *Appuhamy*, (1912) A. C. 230, Appl. (*Bennet, J.*) MAHOMED SAID *v.* MAHOMED HANIF. **I.R. 1932 All. 500 = 138 I C. 841 = A.I.R. 1932 All. 370.**

Delivery of possession.

See also VALIDITY, *infra.*

———Gift—Delivery of possession—Declaration in deed—Effect.

A declaration by the donor that possession has been given to the donee binds the heirs of the donor but it does not mean that such a declaration is conclusive. 16 I.A. 205, Ref. (*Srivastava, J.*) JHUMMAN *v.* HUSAIN. **I.R. 1931 Oudh 81 = 129 I.C. 161 = 7 O. W.N. 1058 = A.I R. 1931 Oudh 7.**

———Gift—Delivery of possession—Deed not 'Hiba-bil-ewaz'.

Where a gift purports to be "*bil-ewaz haq-ul-khidmat*" but the deed is not technically of the nature of a "*Hiba-bil-ewaz*" delivery of possession is necessary to validate it. Cases referred. (*Smith, J*) EWAZ MAHOMED *v.* GHAFOOR KHAN. **6 R.O. 290 - 147 I.C. 867 = 10 O.W.N. 1224 = 17 R D. 1060 = 14 L.R. 889 (Rev) = A.I.R. 1934 Oudh 27.**

———Gift—Delivery of possession—Gift to daughter's son being minor—Delivery to minor's father necessary.

Where the father is alive a gift by a grandfather to the minor son of his daughter is invalid if possession is not transferred to the minor's father as *de jure* guardian. 52 Bom. 316 (P. C.), Rel. on. (*Addison and Agha Haidar, JJ.*) MT SAID UN-NISA *v* INAM ILAHI. **143 I.C 261 = I.R. 1933 Lah. 332 = 38 P.L.R. 77 = A.I.R. 1932 Lah. 316.**

———Gift—Delivery of possession—Gift to infant son — Subsequent conduct of father—Relevancy of.

In the case of a gift by a Mahomedan father in possession of property to his infant son, it is perfectly true that no change of possession, no formal delivery is necessary because the law will presume the subsequent holding of the property to be on behalf of the minor. But the subsequent conduct of the donor, the mode in which he dealt with the profits of the land would nevertheless, be important for the purpose of determining the *bona fides* and completeness of the gift and as throwing light upon the intention of the donor (to make a gift without which no gift is complete, although all the formalities might have been gone through. Where, therefore, in spite of the deed of gift, it was proved: (1) that there was no mutation of the name ofthe son in the landlord's *sheristа*, (2) in the record-of-rights finally published within three years of the deed of gift, there was no entry in the name of the son, but possession was shown with the father, and(3) the father had been subsequently appropriating the rents and profits to his own use, *held*, that there was no *bona fide* intention to make the gift and that the transfer did not take effect. (*C. C. Ghose and Mitter, JJ.*) SULTAN MIYA *v.* AJIBAKHATOON BIBI. **59 Cal. 557 = I.R. 1932 Cal. 498 = 138 I.C. 733 = A.I R. 1932 Cal. 497.**

———Gift—Delivery of possession—Gift to minor child by parent.

Under Mahomedan Law in the case of a gift by a parent to a minor child no acceptance is necessary; the gift is completed by the contract and it makes no difference whether the subject of the gift is in the father's hands

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or in that of a depository. Nor is transmutation necessary for the possession ot the parent is tantamount to that of the child. 2 I.A. 87 and 31 Cal. 319, Rel. on. (*Pullan and Kaza, JJ.*) KHALIQ BUX *v.* MAHABIR PRASAD. **6 Luck. 403 = I.R. 1931 Oudh 111 = 129 I.C. 335 = 7 O.W.N. 1091 = A.I.R. 1931 Oudh 19.**

———Gift—Delivery of possession—Gift to minor son.

In the case of a gift by a father to his minor son, delivery of possession to the son is not necessary as the father can remain in possession on behlf of his son as his guardian. A.I.R. 1928 P.C. 108, Rel. on. (*Addison and Agha Haidar, JJ.*) MAHOMED HASSAN *v.* SAFDAR MIRZA. **14 Lah. 473 = I R. 1933 Lah. 396 = 144 I.C. 45 - 34 P.L.R. 821 = A.I R. 1933 Lah. 601.**

———Gift—Delivery of possession—Gift to minor—Gift by garndfather during lifetime of father.

The general rule of Mahomedan Law that a gift is invalid in the absence of delivery of possession is subject to an exception in the case of a gift to a minor by his father or other guardian. But this exception should be strictly construed. It does not extend to a gift by a grandfather to his minor grandsons if their father is alive and has not been deprived of his right and powers as guardian, even though the minors have always lived with the grandfather and have been brought up and maintained by him. 52 Bom. 316 (P.C.), Appl. (*Das, J.*) SUNA MEAH *v.* S. A. S. PILLAI. **11 Rang. 109 = I.R 1933 Rang. 80 = 143 I.C. 828 = A.I.R. 1933 Rang. 155.**

———Gift—Delivery of possession—Gift to minor—Minor donee being in custody of donor.

No transfer of possession is necessary in a case where the donee is a minor in the lawful custody of the donor. (*Jack and Remfry, JJ.*) ABIA KHATOON *v.* OMAR ALI. **I.R. 1931 Cal. 527 = 132 I.C. 95 = 53 C.L.J. 267.**

———Gift—Delivery of possession—Gift to minor Mode.

A gift in favour of a minor by any person other than the father or guardian of such minor must be accompanied by delivery of possession to the father or guardian of the minor. The right to take possession on behalf of the minor donee belongs to his guardian Where the maternal uncle of the minor executed a deed of gift in favour of the latter while he was under the guardianship of his father but living with the donor.

Held, that delivery of possession to the guardian was necessary to validate the gift. 55 I.A. 171, Ref. (*Srivastava, J*) JHUMMAN *v.* HUSAIN. **I.R 1931 Oudh 81 = 129 I.C. 161 = 7 O.W.N. 1058 = A.I.R. 1931 Oudh 7.**

———Gift—Delivery of possession—Joint possession by donor and donee—Overt act, if necessary—Recital as to delivery of possession in registered deed of gift—Payment of Municipal tax by donee—Inference as to delivery of possession.

Under the Mahomedan Law a gift of immovable property is invalid in the absence of delivery of possession by the donor to the donee. Where the donor and the donee live together at the time of the gift in the gifted property, there must be some evidence to show that possession was transferred by the donor. A mere registered deed effectuating the gift will not be evidence of such transfer; but if the deed shows that possession was intended to be transferred and that the donee has been put in possession also, then effect should be given to this intention as constituting delivery of possession in law unless there is evidence to the contrary. In such a case it is not necessary for the donor to do any overt act to complete the gift. Where a Mahomedan mother conveyed a dewlling house by means of a registered deed of gift to her son and the deed contained a recital to the effect that the property had been delivered to the donee

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and the evidence showed that the donor and the donee continued to live in the house thereafter and the donee continued to pay the Municipal tax as before.

Held, that, under the circumstances, there had been such delivery of possession as the property was capable of and that the subsequent payment of Municipal tax might be taken as a sufficient indication of transfer of possession so as to render the gift valid in law. (Case-law reviewed.) (*Madhavan Nair, J.*) ABDUL RAZAK SAIB *v.* ZAINAB BI. **1932 M W.N. 1178=141 I.C. 843=I.R. 1933 Mad 174=36 L.W. 931=A.I.R. 1933 Mad. 86=63 M.L.J. 887.**

———*Gift—Delivery of possession—Mutation of names.*

Mutation of names in the Revenue Registers in respect of the property gifted by a Muhammadan husband to his wife is in itself presumptive evidence of delivery of possession when mutation has been effected at the husband's instance, but the presumption does not arise where the husband did not pass a deed of gift but passed a deed of sale and had no reason to take care that the gift was a valid one (1926) 5 Rang 7 (P. C.), Dist. (*Wild, J. C. and Rupchand, A. J. C.*) MT. HAKIM BIBI *v.* MIR AHMED. **25 S.L.R. 72=I.R. 1931 Sind 20=129 I.C. 900=A.I.R. 1931 Sind 17.**

———*Gift—Delivery of possession—Mutation of names.*

Neither under the Oudh Estates Act nor under Mahomedan Law can mere mutation of names confer title. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———*Gift—Delivery of possession—Necessity for—Declaration of delivery of possession and delivery of deed—Sufficiency.*

A gift of immovable property must ordinarily be completed by a transfer of possession, and there is no difference on this point between Hanafi and Shiah law. In a gift by a husband to his wife the gift deed contained the statement: "I deliver possession of the gifted property to my said wife;" the deed of gift was handed over to the donee as soon as it was registered.

Held, that the declaration in the deed was binding on heirs of donor and that actual vacation by the husband and an actual taking of separate possession by the wife was not necessary. The declaration made by the husband, followed by the handing over of the deed, was amply sufficient to establish a transfer of possession. 11 All. 460, Rel. on; 9 Bom. 146; 29 Bom. 468 and 28 All. 147, Ref. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=6 Luck. 556=136 I.C. 385=I R 1932 P.C. 81=1932 A.L.J. 663=36 C.W.N. 137=35 L.W 118=8 O.W.N. 1378=62 C.L.J. 326=A.I.R 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

———*Gift—Delivery of possession—Necessity for—Gift to infant.*

In the case of a gift by a Mahomedan father to his infant child no transfer of possession is required; it is only necessary to establish a *bona fide* intention to give. 2 I.A. 87 (P.C.), Foll. Intention held to be sufficiently proved where the donor at the time of the donee's marriage sent the deed in the daughter's name for inspection to her father-in-law in a formal manner. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=6 Luck. 556=136 I.C. 385=I.R. 1932 P.C. 81=36 C W.N. 137=35 L.W. 118=8 O.W.N. 1378=1932 A L.J. 663=62 C.L.J. 326=A.I.R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

[D. 36 Bom.L.R. 1151 (1154).]

———*Gift—Delivery of possession—Property being in possession of usufructuary mortgage.*

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The equity of redemption can be the subject of a valid gift under the Mahomedan Law. Where the land is in the possession of a usufructuary mortgagee actual delivery of possession is not necessary. All that is necessary is that there should be such delivery as the nature of the gift is capable of. (*Mukerji, J.*) MUHARA BIBI *v.* MAHARULLA MONDAL. **6 I.R. (Cal.) 265 (2)=146 I.C. 803=57 C.L.J. 375=A.I.R. 1933 Cal. 785.**

———*Gift—Delivery of possession—Registered deed not delivered—No transfer of possession—Validity of gift—Suit for mere declaration by donor—Maintainability.*

Where in the case of a gift of a house by a registered deed, it is established that neither the deed was delivered to the donee nor the mutation of names effected, nor even a declaration made in the deed transferring possession to the donee, nor had the donor divested herself of either the ownership or the possession of the property in any other manner,

Held, that the gift was not completed by delivery of possession as required by Mahomedan Law and is, therefore, invalid and ineffectual.

Held, further, that in the circumstances of the case, a suit by the donor for a mere declaration that the house is owned and possessed by her, without asking for consequential relief is maintainable, even though it is established that both the donor and the donee were continuing to reside in the house as at the time of the gift, as the possession of the donee was 'naked' (*i.e.*) mere possession without colour of rights, and not "actual." (*Addison and Din Mohammad, JJ.*) QAMARUD-DIN *v.* MST. HASSAN JAN. **16 Lah. 629=159 I C. 968=8 R.L. 442=37 P.L.R. 721=A.I.R. 1935 Lah. 795.**

———*Gift—Delivery of possession—Subsequently made—Effect.*

Ordinarily a gift is not complete under the Mahomedan Law unless possession is taken at the time of gift. But possession taken at a subsequent period may also be effective provided it has been obtained with the consent of the donor. (*Srivastava, J.*) JHUMMAN *v.* HUSAIN. **I.R. 1931 Oudh 81=129 I.C. 161=7 O.W.N. 1058=A.I.R. 1931 Oudh 7.**

———Gift—Delivery of possession—Trust of certain property—Sons appointed trustees—No transfer of possession—Donor to remain in possession of property during his lifetime with power to deal with rents and profits as he thinks fit—Gift invalid. *See* WAKF—CONSTRUCTION. **13 Rang. 679.**

———*Gift—Delivery of possession—What amounts to—Land in possession of lessees.*

Where the donor of a leased property which formed subject-matter of gift or his heirs did not appear in the suit and did not challenge the gift and the donor had placed the documents of title and documentary evidence in the possession of the donee, put in his powers the means to establish title and recover possession from the lessees and had expressly asked the said lessees to give up possession to the donee.

Held, these acts amounted to such delivery of possession as the subject-matter of the gift was capable of and that the gift was valid. (*Mitter, J.*) GANI MIA *v.* WAJID ALI. **156 I.C. 563=8 R.C. 7=39 C.W.N. 882=61 C.L.J. 328=A.I.R. 1935 Cal. 393.**

Essentials.

See also VALIDITY, *infra.*

———*Gift—Essentials.*

In order to constitute a valid gift under Mahomedan Law one of the essentials is to prove the taking possession of the subject-matter of gift by the donee and that the donee had a *bona fide* intention of divesting himself

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in praesenti of his proprietary title in the property gifted. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 = I.R. 1932 Oudh 130 = 8 O.W.N. 349 = A.I.R. 1931 Oudh 177.**

———*Gift—Essentials.*

The three requirements under the Mahomedan Law for the validity of gifts or *hibas* are one : (1) that there must be clear and unambiguous intention of the donor to make a gift, (2) that there must be acceptance of the gift express or implied on the part of the donee, and (3) there must be delivery of possession of the property which is the subject-matter of the gift. But no writing is necessary to validate a gift. (*C.C. Ghose and Mitter, JJ.*) SULTAN MIYA *v.* AJIBAKHATOON BIBI. **59 Cal. 557 = I.R. 1932 Cal. 498 = 138 I.C. 733 = A.I.R. 1932 Cal. 497.**

———*Gift—Essentials—Entries in books of account—Sufficiency of.*

For a gift to be valid under the Mahomedan Law, there must not only be a declaration by the donor of his intention to make the gift, but the subject of the gift must be accepted by and on behalf of the donee, and delivery of possession must be given in such manner as the subject of the gift is capable of. A relinquishment of control over the subject is necessary to complete the gift. Entries in books of account are not sufficient to support a gift in the absence of any evidence to show that the donor intended to make a gift. (*Wadia, J.*) MAHOMED HUSSEIN *v.* AISHABAI. **155 I.C. 334 = 7 R.B. 426 = 36 Bom.L.R. 1155 = A.I.R. 1935 Bom. 84.**

———*Gift—Essentials—Gift in lieu of dower—Conditions for validity—Intention to transfer possession—Proof.*

In order that a gift in lieu of dower may be valid two conditions are necessary : (1) an actual payment of the consideration on the part of the donee, and (2) a *bona fide* intention on the part of the donor to divest himself *in praesenti* of the property and to confer it upon the donee. Though in the case of a *hiba-bil-ewaz* delivery of possession at the time of the gift is not necessary yet the fact that the donor has remained in possession of the property for the last 25 years and has been making transfers of it on the footing of his being the owner shows clearly that there was no *bona fide* intention on his part to divest himself of the property. (*Bisheshwar Nath and Nanavutty, JJ.*) KHAIR-UN NISA *v.* KARAMAT ULLA. **142 I.C. 42 = I.R. 1933 Oudh 97 = 9 O.W.N. 1085 = A.I.R. 1933 Oudh 99.**

Hiba-bil-ewaz.

———*Gift*—Hiba-bil-ewaz—*Money belonging to donee in donor's hands—Gift, if necessarily in lieu of money.*

The mere fact that the donor held in deposit a sum of money belonging to the donee in his hands at the time of the gift cannot lead to the necessary conclusion that the gift was in lieu of this money. (*Srivastava and Rachhpal Singh, JJ.*) ABDUL HAMID *v.* ABDUL GHANI **6 R.O. 440 = 148 I.C. 801 = 11 O.W.N. 592 = A.I.R. 1934 Oudh 163.**

———*Gift*—Hiba-bil-ewaz—*Nature of transaction—Conditions for validity.*

A *hiba-bil-ewaz*, as distinguished from an *heba*, a gift, pure and simple, is a gift for consideration. It is in reality a sale and has all the incidents and conditions of a sale. Possession is not essential for a complete transfer as it is not a case of *heba*. The two conditions for its validity are there must be an actual payment of the consideration on the part of the donee and there must be a *bona fide* intention on the part of the donor to divest himself *in praesenti* of the rights in the property and to confer the same on the donee. (*Mitter, J.*) SATYENDRA NATH RAI CHAUDHURY *v.* FULSOM BIBI. **I.R. 1932 Cal. 622 = 139 I.C. 403 = 36 C.W.N. 486 = A.I.R. 1932 Cal. 625.**

———*Gift*—Hiba-bil-ewaz—*Need for writing and registration.*

All cases of *hiba-bil-ewaz* cannot be held to be sales within the definition given in S. 54, Transfer of Property Act, and writing and registration is not always necessary. A.I.R. 1926 Oudh 186, Rel. on. (*Srivastava and Rachhpal Singh, JJ.*) ABDUL HAMID *v.* ABDUL GHANI. **6 R.O. 440 = 148 I.C. 801 = 11 O.W.N. 592 = A I.R. 1934 Oudh 163.**

———*Gift*—Hiba-bil-ewaz—*Transfer of possession not necessary.*

The provisions of the Mahomedan Law applicable to gifts do not apply to a so-called gift made in lieu of a dower debt, *i.e*, *hiba bil-ewaz* which is really of the nature of a sale. Hence it is not necessary in the case of a *hiba-bil-ewaz* for possession to be transferred. **42** Cal. 361; A.I.R. 1927 Cal. 808 ; A.I.R. 1928 Lah. 516 and 8 All. 178, Ref., 43 I.A. 212, Ref (*Addison and Agha Haidar, JJ.*) MAHOMED HASSAN *v.* SAFDAR MIRZA. **14 Lah. 473 = I.R. 1933 Lah. 396 = 144 I.C. 45 = 34 P.L.R. 820 = A.I.R. 1933 Lah. 601.**

———*Gift*—Hiba-bil-ewaz—*Transfer of possession not necessary.*

The provisions of Mahomedan Law applicable to gifts do not apply to a so called gift made in lieu of a dower debt, that is, *hiba-bil-ewaz*, which is really of the nature of a sale; hence it is not necessary in the case of a *hiba-bil-ewaz* for possession to be transferred. A.I.R. 1933 Lah. 601, Foll. (*Abdul Rashid, J.*) MT. AMINA *v.* LAKHMI CHAND. **154 I.C. 979 = 7 R.L. 624 = A.I.R. 1934 Lah. 705.**

Life-estate.

———*Gift—Life-estate.*

Quaere.—Whether under the Mahomedan Law it is competent for a donor to make a gift of a life-interest in property ? (*Page, C.J. and Mya Bu, J.*) PHUL BEE BEE *v.* R. M. P. CHETTYAR FIRM. **13 Rang. 679 = 8 R.R. 63 (2) = 156 I.C. 1038.**

———*Gift—Life-estate—Guzara for lifetime of donee to be continued in favour of his male heirs—Validity.*

There is nothing contrary to the terms of the Mahomedan Law in a gift by one person to another of a guzara for the lifetime of the latter with a continuance in favour of the male heirs of the donee. An award by an arbitrator and a decree of a Court can be passed laying down similar conditions. 23 All. 383, Dist. (*Raza and Pullan, JJ.*) SARTAJ FATIMA *v.* MAHOMED JAWAD. **6 Luck. 423 = I.R. 1931 Oudh 98 = 129 I.C. 322 = 7 O.W.N. 1095 = A.I.R. 1931 Oudh 6.**

Marz ul-maut.

———*'Gift'*—Marz-ul-maut.

For the application of the doctrine of *marz ul-maut*, it is necessary that the illness must be the immediate cause of death and that there must be an apprehension of death in the mind of the donor. The question as to whether or not in a particular case a gift was made during *marz-ul-maut* will depend on the circumstances of each case and no hard and fast rule can be laid down which will be applicable to all cases. (*Niamatullah and Rachhpal Singh, JJ.*) SAJJAD HUSAIN *v.* MAHOMED SAVID HASAN. **154 I.C. 434 = 7 R.A. 759 = 3 A.W.R. 263 = A.I.R. 1934 All. 71.**

———*Gift*—Marz-ul-maut—*Conditions for validity—Proof of apprehension of death.*

An essential condition of *marz-ul-maut* is that a person suffering from it must be under a preponderance of apprehension of death or in other words, there must be

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the subjective feeling in the mind of the patient that he is not going to recover. This fact is to be proved like any other fact. The statements, if any, made by the patient giving expression to his apprehensions, would no doubt constitute valuable evidence but apart from such statements, the fact can in our opinion be proved in other ways. For instance the nature of the illness and condition of the patient constitute external indicia which can afford valuable evidence on the point. (*Bisheshwar Nath and Nanavutty, JJ.*) MAHOMED AYUB KHAN *v.* GAUHAR BEGAM. **7 Luck. 705=I.R. 1932 Oudh 280=137 I.C. 804 (2)=9 O.W.N. 343=A.I.R. 1932 Oudh 233.**

———*Gift*—Marz-ul-maut—*Conditions of validity.*

The chief ingredients of the doctrine of *marz-ul-maut* are (1) that the illness must be the immediate cause of death; (2) there must be an apprehension of death in the mind of the donor: and (3) that physical weakness must be so great that the persons may be incapable of pursuing their ordinary avocations. (*Niamatullah and Bennet, JJ.*) MUSI IMRAN *v.* IBNE HASAN. **147 I.C. 835=6 R.A. 577=1933 A.L.J. 53=A.I.R. 1933 All. 341.**

[R. A.I R. 1934 A. 71 (72).]

———*Gift* — Marz-ul-maut—*Essentials—Burden of proof.*

The following conditions have to be satisfied before a gift can be declared to be invalid owing to its having been made in *marz-ul-maut* that the donor was suffering at the time of the disposition from a disease which was the immediate cause of his death, that the disease was such as to engender in him the apprehension of death and that the illness incapacitated him from the pursuit of his ordinary avocations and prevented him from saying his prayers while standing. The onus lies on the party pleading *marz-ul-maut* to prove beyond doubt that the conditions were fulfilled.

Held, on the evidence, that the conditions were not proved. (*Bhide and Tapp, JJ.*) ABDUL AHAD KHAN *v.* AHMAD NAWAZ KHAN. **12 Lah 683=I.R. 1931 Lah. 583=132 I.C. 391 (2)=32 P.L.R. 942=A.I.R. 1932 Lah. 229.**

———*Gift*—Marz-ul-maut—*Executant suffering from asthma.*

A Pathan suffering from asthma died on 30th December, 1932. Before his death he executed a deed of gift on 3rd December, 1932, and presented it for registration on 16th December, 1932. This gift was challenged on the ground that it was executed by the donor when he was under the apprehension of death and therefore was invalid by the application of the doctrine of *marz ul-maut.*

Held, that asthma is not a disease from which the sufferer fears death in the nearer future, especially where he has suffered from it for a long time and that therefore the Pathan had no apprehension of death when he executed the document in question and therefore it was valid. (*Mir Ahmad, A.J.C.*) MT. ZAMRO *v.* SHER MAHOMED. **151 I.C. 761=7 R.Pesh 35=A.I.R. 1934 Pesh. 91.**

———*Gift*—Marz-ul-maut—*Gift in consideration of dower—Validity of.*

Should a man, in his last sickness, acknowledge a debt to be due to his wife on account of dower, the acknowledgment will be good to such extent of the property as amounts to her proper dower, or such as it has been customary for her equals in condition to receive, but to no more. If the amount of dower which is the consideration for the gift is equal to the value of the property, then the gift should be entirely upheld. But if it is inadequate it will be upheld only to the extent of the consideration and no more. 2 A. 854 and 42 C. 361, Ref. (*Ramesam, J.*) ZARAB KHAN *v.* LAL BIBI. **135 I.C. 318=I R. 1932 Mad. 78=A.I.R. 1931 Mad. 740.**

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———*Gift*—Marz-ul maut—*Shiah Law—Validity of —Extent of.*

Under the Shiah I aw a gift made in *marz ul-maut* holds good to the extent of only one-third of the donor's estate in spite of delivery of possession prior to his death. (*Niamatullah and Bennet, JJ.*) MUSI IMRAN *v.* IBNE HASAN. **147 I.C. 835=6 R.A. 577=1933 A.L.J. 53=A.I.R. 1933 All. 341.**

———*Gift*—Marz-ul-maut—*Validity of—Executant suffering from tuberculosis*

A person suffering from tuberculosis in its final stages when he has no hope of recovery can be treated as falling within the conditions of *marz-ul-maut*, although it would not necessarily follow that a person in the earlier stages of phthisis, when he may have a very good hope or expectation of recovery, would come under that legal doctrine. (*Niamatullah and Bennet, JJ.*) MUSI IMRAN *v.* IBNE HASAN. **147 I C. 835=6 R.A. 577=1933 A.L.J. 53=A.I.R. 1933 All. 341.**

Mushaa.

———*Gift—Mushaa—Applicability—Undivided share in property capable of partition—When valid—Delivery of possession.*

A gift of an undivided share in property which, though capable of partition, is of such a nature that it can be used to better advantages in an undivided condition, is valid under the Mahomedan Law, and a gift of a share in property, the donee being admitted to possession with the donor and recognized as a person in possession, is also valid, as there is sufficient delivery of possession. These are exceptions to the rule of Mushaa which must be confined within the strict rules. (*Guha and Bartley, JJ.*) ALA BAKSA *v.* MAHABHUT ALI. **159 I C. 678=8 R.C. 340=61 C.L.J. 209=A.I.R. 1935 Cal. 739.**

———*Gift—Mushaa—Joint holding—Donee placed in joint possession—Validity of gift.*

The gift of a share in a holding the donee being admitted to be in joint possession with the donor and recognised by the donor as being in such possession is valid. 38 Cal. 518, Rel. on. (*Jack and Remfry, JJ.*) ABIA KHATOON *v.* OMAR ALI. **I.R. 1931 Cal. 527=132 I C. 95=53 C L.J. 267.**

———*Gift—Mushaa— Limits and applicability of doctrine.*

The original strictness of the technicalities relating to mushaa has no doubt been considerably cut down but the doctrine cannot be altogether ignored or repudiated. Exceptions to the rule requiring delivery of possession have to be strictly construed. Where the subject-matter of the gift consisted of a quarter share in two larger areas or land owned by the donors alone and of an eighth share of two smaller areas of which they owned a half share,

Held, that it could not be said that the property of which a share was given was incapable of partition and the mere fact that some of it may have been cultivated by tenants did not make partition or attornment impossible Gift held to be invalid on ground of omission to deliver possession. (*Addison and Coldstream, JJ.*) ABDULLAH SHAH *v.* HAJI SHAH **I.R. 1931 Lah. 699=132 I.C. 859=A.I.R. 1931 Lah. 620.**

———*Gift—Mushaa—Upkeep of mosque—Validity of —Subsequent change of possession.*

Where a gift or wakf is made of Mushaa for the upkeep of a mosque, and possession is given with it, the gift is valid to the extent of the donor's share even if the property gifted is divisible. Possession once taken under

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a gift is not invalidated as regards its effect in supporting the gift, by any subsequent change of possession. 11 All. 460 (P.C.), Rel. on. (*Baguley, J.*) ABDUL RAHMAN *v.* MAUNG MUTU. **I.R. 1932 Rang. 173 = 138 I.C. 851 = A.I.R. 1932 Rang. 65.**

Oral gift.

———*Gift—Oral gift—Validity.*

A gift may be made orally; it is not necessary that there should be a registered instrument to evidence the gift. (*Bisheshwar Nath and Nanavutty, JJ.*) KHAIRUN NISA *v.* KARAMAT ULLA. **142 I.C. 42 = I.R. 1933 Oudh 97 = 9 O.W.N. 1085 = A.I.R. 1933 Oudh 99.**

Pathan.

———*Gift—Pathan.*

A Pathan can gift away his property to any one he likes. (*Mir Ahmad, A.J.C.*) MT. ZAMRO *v.* SHER MAHOMED. **151 I.C. 761 = 7 R.Pesh. 35 = A.I.R. 1934 Pesh. 91.**

Principles.

———*Gift—Principles — Donations involving* fidei commissum.

A donation involving *fidei commissum* is recognized by the Roman Dutch law and is valid even though made by Moslems in Ceylon and even though the doneee does not take possession as the principles relating to the validity of gift under Mahomedan law are not applicable to it. The first part of a deed executed by a Moslem in Ceylon in favour of his son purported to give the son a gift *inter vivos* absolute and irrevocable of certain land and premises; but the second part provided that the son was to hold the premises subject to the conditions and restrictions therein mentioned, which were to the effect that the father reserved to himself the right to revoke or cancel the gift and to deal with the premises as he thought fit and further that after the father's death the son should not mortgage or sell the premises and that the premises should, upon the death of the son, devolve on his (son's) children as their absolute property.

Held, that the father did not intend to make to the son a gift *inter vivos* as is recognized in Mahomedan law as necessitating donee taking possession of the subject-matter, but that the father intended and did create a valid *fidei commissum*. (*Sir Lancelot Sanderson.*) DON CHARLES WEERASEKERA *v.* HETTIGE DON JOHN PEIRIS. **I.R. 1933 P.C. 134 = 143 I.C. 170 = A.I.R. 1933 P.C. 49 (P.C.).**

Validity of

———*Gift—Validity of—Delivery of possession to donees jointly—Gift when complete.*

A Muhammadan gifted his lands to his two daughters and asked the tenants of the lands to pay the rent direct to his daughters, which was done. Sometime afterwards, he passed a deed of gift to his daughters.

Held, that the gift took effect, for the donor left nothing undone that he could have done, if he had intended to complete the gift and there was a complete transfer of possession to the donees. (*Tyabji, J.*) EBRAHIM ALI BHAI *v.* BAI ASI. **58 Bom. 254 = 149 I.C. 225 = 6 R.B. 340 = 35 Bom.L.R. 1148 = A.I.R. 1934 Bom. 21.**

———*Gift—Validity of—Donee made liable for payment of debts of donors—If void—Non-specification of debts—If void for uncertainty.*

A donee under a deed of gift which contains a specific provision that the entire debts of the donor due by him personally or charged upon the gifted property are to be paid by the donee, is a universal donee, and under S. 128, T. P. Act, he is liable personally for all the debts due by the donor at the time of gift, to the extent of the property comprised in the deed of gift. Such a provision is not void under the Mahomedan

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Law. The fact that the amount of the debts due from the donor is not specified in the deed will not make the same void for uncertainty. (*King, C.J. and Nanavutty, J.*) KRISHNA BEHARI *v* AHMADI. **11 Luck. 199 = 155 I C. 303 = 7 R.O. 574 = 1935 O.W.N. 589 = A.I.R. 1935 Oudh 432.**

———*Gift—Validity of—Joint gift to donees, without division of shares.*

A gift to two or more donees jointly is invalid, notwithstanding that the donor had not divided the shares of the donees, nor given separate possession. A gift may be validly made in India to two donees, notwithstanding the fact that the two donees are to hold the property as tenants-in-common. Whether the shares given to the donees be equal or unequal, once the donor has parted with complete possession in favour of the donees, the donees become the transferees of the property and the gift is complete. (Case-law discussed.) (*Tyabji, J.*) EBRAHIM ALIBHAI *v.* BAI ASI. **58 Bom. 254 = 149 I.C. 225 = 6 R.B 340 = 35 Bom L.R. 1148 = A.I.R 1934 Bom. 21.**

———*Gift—Validity of—Test—Transfer of possession—Enjoyment of benefits of subject-matter.*

In all cases in which the question is raised whether a gift governed by Mahomedan Law has been completed, the most satisfactory method of dealing with the question is to direct attention to the conduct of the donor and the donee after the time when the gift is said to have been completed. If, after that time, the alleged donor continues to take the benefit of the subject of the gift whether it consists of reaping the harvest or the recovery of the rents or profits or actual occupation or of such other benefit, whatever it be, as can accrue to the owner from the ownership of the particular subject of gift, then the possession of the subject of the gift has not been transferred. If the donee is permitted directly or indirectly to receive the benefit, then the possession is transferred. 2 I.A. 87 (P.C.) and 9 Lah. 567, Rel. on. (*Tyabji, J.*) EBRAHIM ALIBHAI *v.* BAI ASI. **58 Bom. 254 = 149 I C. 225 = 6 R.B. 340 = 35 Bom.L.R. 1148 = A.I.R. 1934 Bom. 21.**

———Gift—Validity of—Transfer or delivery of possession—Necessity—Gift by father to sons to take effect in future—Donor retaining both legal and equitable interest in the property—Effect of. *See* DEED—CONSTRUCTION. **13 Rang. 679 = 156 I.C. 1038.**

Guardianship.

———*Guardianship—Alienation by guardian—Mother—Binding nature.*

A Mahomedan mother has no power to alienate the property of her minor sons. In setting aside an invalid alienation by the mother of Mahomedan minors at the instance of those minors the Court has a discretion, having regard to the fact that out of the consideration the plaintiff's deceased father's debts binding on the estate were paid off, to grant a decree to the plaintiffs on condition of their refunding the consideration of the void sale. 30 Cal. 539, Rel. on ; 7 Lah. 35; 28 Bom. 181; 49 Bom. 376, Foll. (*Madhavan Nair, J.*) ABDUL MAJID SAHIB *v.* EAMIZA BIVI SAHIBA. **I.R. 1931 Mad. 489 = 131 I.C. 153 = 1931 M.W.N. 150 = 33 L. W. 312 = A I.R. 1931 Mad. 468.**

———*Guardianship—Alienation by guardian—Mother—Binding nature.*

A Mahomedan mother has no power to alienate the immovable property of the son but at the same time it is not a transaction forbidden by law and void in that sense but rather one outside the powers of the mother though it may be justified by cases of extreme necessity. 45 I.A. 73 (P.C.), Ref. (*Madgavkar, J.*) SHIDDLINGAVA SADEPPA *v.* RAJAVA TANESAHEB.

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I.R. 1931 Bom. 478=134 I.C. 366=33 Bom.L.R. 603=A.I.R. 1932 Bom. 23.

———*Guardianship—Appointment of guardian—Discretion of Court—Wishes of deceased father.*

It may be that *cetris paribus* the Court would be disposed to appoint a guardian of the property of the minors from among the paternal relations when the contest is between paternal and maternal relations; but there is no principle of Mahomedan Law that the Courts are bound so to do except in the case of certain persons who are entitled normally to be appointed guardians of the property of minors under that law. In appointing a guardian the Court should take into consideration the wishes of the deceased father in this respect. Where the contest is between a step-brother of the father of the minors and a brother of the father's first wife and it appears on the evidence that the father of the minors would have preferred that the property should be managed in their interests by the latter, the latter should be appointed guardian of the property of the minors. (*Page, C.J. and Mosely, J.*) MAHOMED SAYEED *v.* ISMAIL BARLLA. **I.R. 1931 Rang. 129 (1)=131 I. C. 497 (1)=A.I.R. 1931 Rang. 66.**

———*Guardianship—Custody of—Child under seven years—Mother's right.*

Under Mahomedan Law of the Hanafi School, the mother is ordinarily entitled to the custody of the child up to the age of seven years. A mother, in the absence of any special disqualification, is undoubtedly the best person to look after a child of tender age, and the mere fact that she has been divorced does not constitute any bar to giving her the custody of her child. (*Mukerji and King, JJ.*) HAIDARI BEGAM *v.* JAWWAD ALI SHAH. **1934 A.L.J. 399=150 I.C. 149=6 R.A. 1053 =3 A.W.R. 787=A.I.R. 1934 All. 722 (2).**

———*Guardianship*—De facto *guardian—Mother—Scope of powers—Reference to arbitration—Validity of —Award acted on for long time—Binding nature of.*

Under the Muhammadan Law, the mother is not (in the absence of an appointment by the father or by the Court under the Guardian and Wards Act) the legal guardian of her minor children. When she is not so constituted the legal guardian, she has no power or authority, in her capacity merely as the *de facto* guardian of the minors, to alienate or otherwise deal with their property, and she is equally incompetent to enter on their behalf into an agreement to refer to arbitration any disputes relating to the division and distribution of the property of their deceased father and an award made on such arbitration would not bind the minors. Even if the scheme of distribution of the property as promulgated in the award so made was acted upon for merely fourteen years, it is not binding on the minors even as a family arrangement. 45 Cal. 878 (P.C) and 47 Cal. 713, Ref. (*Sir Lancelot Sanderson.*) MAHOMED EJAZ HUSAIN *v.* MAHOMED IFTIKHAR HUSAIN. **59 I.A. 92=36 C.W.N. 381=7 Luck. 1=1932 A.L. J. 199=I.R. 1932 P.C. 49=136 I.C. 97=9 O.W.N. 180=34 Bom L.R. 528=35 L.W. 435=33 P.L.R. 403=55 C.L.J. 157=A.I.R. 1932 P.C. 76=62 M.L. J. 410 (P.C.).**

[**Appl.** 9 O.W.N. 1100 (1103). **Rel.** 142 I.C. 189 (190).]

———*Guardianship*—De facto *guardian—Power of, to renew promissory note executed by minor's father.*

It is within the competence and authority of a Mahomedan mother, acting as the *de facto* guardian of her minor son, to renew a promissory note executed by the minor's father, and the minor can be successfully sued upon such renewed promissory note. (*Beasley, C.J.*) VENKATARAYADU *v.* KHASIM SAHEB. **160 I.C. 268**

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=8 R.M. 616=42 L.W. 697=1935 M.W.N. 943=A. I.R. 1935 Mad. 1041.

———Guardianship—Mahomedan father — Buddhist wife divorced—Child brought up in mother's religion for nine years—Mother to be guardian. *See* GUARDIAN AND WARDS ACT (1890), S. 17. **A.I.R. 1933 Rang. 201.**

———*Guardianship — Mother—Consent to bequest to heir—Minor sons, if bound.*

Under the Mahomedan Law the mother is not as such the legal guardian of her minor children; consequently a consent by her to a bequest in favour of an heir is not binding on her minor sons, especially when the bequest is detrimental to the minor's interests. (*Bisheshwar Nath and Smith, JJ.*) BIBI KULSOOM *v.* MARIAM. **143 I C. 108=I.R. 1933 Oudh 159=9 O.W.N. 1100 =A.I.R. 1933 Oudh 97.**

———*Guardianship—Right to—First cousin—Right to be guardian of property.*

The Mahomedan Law does not recognise a first cousin to be a guardian of the property of a minor. (*Shadi Lal, C.J. and Coldstream, J.*) ANWAR HUSSAIN *v.* IBRAHIM. **I.R. 1931 Lah. 984=134 I.C. 776=32 P.L.R. 157=A.I.R. 1931 Lah. 221.**

———*Guardianship—Right to—Minor girl—Maternal grandmother—Priority over father.*

Under the Mahomedan Law, the mother is entitled to the custody of her female child until the latter attains puberty; and failing the mother the mother's mother, how high-so ever, is entitled to be the guardian in preference to the father. (*Shankaranarayana Rao, J.*) NAZIR AHMED MECCAI *v.* NASIR AHMED MECCAI. **12 Mys. L J. 541=39 Mys.H.C.R. 789.**

———*Guardianship—Right to—Minor girl—Maternal grandmother's right.*

The mere fact that the mother of the minor girl has remarried against the wishes of her relatives and she and her second husband stay in the same house as the minor's maternal grandmother, is not a sufficient cause to deprive the preferential right of the maternal grandmother to the guardianship to that of the paternal grandmother. (*Jai Lal, J.*) MT. NUR BEGUM *v.* MT. BEGUM. **149 I.C. 972 (2)=6 R.L. 769 (1)=A.I.R. 1934 Lah. 274 (1).**

———*Guardianship—Right to—Mother of minor girl —Second marriage as disqualification.*

Under the Mahomedan Law the second marriage of the mother of a minor girl to a person not related to the minor within prohibited degrees disqualifies that woman from the guardianship or custody of the child. (*Abdul Qadir, J.*) MEHRAJ BEGAM *v.* YAR MAHOMED. **I. R. 1932 Lah. 418=138 I.C. 148=33 P.L.R. 678=A. I.R. 1932 Lah. 493.**

Joint family.

———*Joint family—Analogy from Hindu Law—Rights of individual members.*

The law does not recognize a Mahomedan joint family as a legal entity, and has not provided rules applicable to the family as such. The rights of its individual members, both as regards the original joint property and its subsequent enlargements must be determined by an appeal to general law. Jointness in mess, residence and property and acquisition by one member in his own name with joint funds will go a long way in attracting the application of those provisions of law which entitle a person to a beneficial interest in the property acquired by another. In the generality of cases in which Mahomedans belonging to the same family live in commensality, own property as tenants-in-common, carry on business jointly and make fresh acquisitions, their rights and those of their heirs

can be determined with reference to express or implied agreement, relation of principal and agent, partnership, constructive trust or the like. Where male members of a family live in union so as to have jointness in mess, business and property, there can be little difficulty in tracing their relations *inter se* to an implied agreement which clothes each with a representative capacity in reference to his co-sharers. Each must be deemed to be acting not only for himself but for all in his dealings with regard to joint property and business. Accordingly any acquisitions made by any one member should be considered to have been made by all through the one who actually made it. In such a case, as among partners, each is the manager or agent of the others. The position is not so simple as regards the heirs whose rights are not recognized by any overt act of the surviving male members. (*Pullan and Niamatullah, JJ.*) SHUKRULLA *v.* MT. ZUHRA BIBI. **54 All. 916=143 I.C. 230=I.R. 1933 All. 207=1932 A.L.J. 1039=A. I.R. 1932 All. 512.**

——*Joint family—Application of law—Joint family business—Hindu social custom—Adoption by Mahomedan.*

There is nothing contrary to law in Mahomedan adult members of a family carrying on a family trade for the benefit of all the members of the family including the minors and the females, and the Courts will therefore uphold it and such legal consequence as in law follow from it, although the Court will not import into it all the legal consequences which would follow from such a family trade when it is conducted by a Hindu joint family or all the legal consequences of a lawful partnership The property of the ancestor will in such a case be held by the several members of the family in the shares to which they are entitled under Mahomedan Law. Practice in Madras Presidency of Mahomedans adopting social ideas of Hindus referred to. (*Wallace and Krishnan Pandalai, JJ.*) MAHOMED ABDUL RAHIM BAIG SAHEB *v.* MAHOMED ABDUL HAKIM BAIG SAHEB **54 Mad. 543=135 I.C. 357=I.R. 1932 Mad. 101=34 L.W. 220=1931 M.W.N. 335=A.I.R. 1931 Mad. 553=61 M.L.J. 139.**

——*Joint family—Business carried on by father—Sons—If become partners—Right by birth if acquired—Liability for father's transactions.*

Under the Mahomedan Law, if a Mahomedan carries on business as a firm, his sons do not become partners with him in the firm by birth. Mahomedan sons do not by birth acquire any interest in the property of their father during his lifetime, and unless it is proved that the father and sons have entered into a contract of partnership, the partnership property remains exclusively that of the father. Nor can the sons be sued in respect of transactions entered into by the father for which he alone is responsible. (*Tyabji, J.*) TARACHAND GHANSHAMDAS *v.* MOHIDEEN ABDUL GAFOOR. **158 I.C. 701 (2)=8 R.B. 137=37 Bom L.R. 654=A.I.R. 1935 Bom 401.**

——*Joint family—Distinction from Hindu family—Acquisition in the name of particular person—Presumption.*

The law does not recognize the existence of a joint Mahomedan family or tenancy-in-common so far as a Mahomedan family is concerned and the presumptions that hold good in the case of acquisitions in the names of individual members of a joint Hindu family have no application to acquisitions made in the names of individual members of a Mahomedan family. Therefore the burden lies on the plaintiff to substantiate his allegations that certain acquisitions that are made in the name of particular persons are acquisitions for the benefit of persons other than those in whose name the acquisitions are made. (*Iqbal Ahmad and Kisch, JJ.*) ABDUL RASHID *v.* SIRAJUDDIN. **6 I.R. (All.) 109=145 I.C. 461=A.I.R. 1933 All. 206.**

——*Joint family—Manager—Trade carried on by eldest son for benefit of the family—Fiduciary relationship.*

A Mahomedan cloth-dealer died leaving two major sons, a widow and some minor sons and daughters. The two major sons on the death of their father continued the cloth trade as a family trade for the benefit of the family and made profits thereby. The widow and the minor sons filed a suit, for account of the profits and division of the same, against the major sons. The eldest son defended the suit.

Held, that the eldest son by his conduct after his father's death put himself in a fiduciary relationship to the widow and the minors and it did not matter whether his position was called that of a trustee *de son tort* or executor *de son tort* and he held the assets not as co-owner but as a trustee.

Held, further, that Ss. 23 (*f*) and 88 of the Trust Act applied to the case and the eldest major son was bound to hold for the other members of the family any advantages he had gained by availing himself of his fiduciary character and by utilising the share of the other members in the father's assets for his own pecuniary advantage. (*Wallace and Krishnan Pandalai, JJ.*) MAHOMED ABDUL RAHIM BAIG SAHEB *v.* MAHOMED ABDUL HAKIM BAIG SAHEB. **54 Mad. 543=135 I.C. 357=I.R. 1932 Mad. 101=34 L.W 220=1931 M.W.N. 335=A I.R. 1931 Mad. 553=61 M.L.J. 139.**

——*Joint family—Presumptions of Hindu Law—Applicability of—Properties standing in the name of managing member—Nature of—Onus.*

Where members of a Mahomedan family live in the commensality, they do not form a joint family in the sense that expression is used with regard to Hindus and under the Mahomedan Law there is not as under the Hindu Law any presumption that acquisitions of the several members are made for the benefit of the joint family But it is different when all the members of a Mahomedan family are not merely living together but possessed the properties in common and in jointness. If under those circumstances the properties stand in the name of the managing member, the onus is on him to show that the properties are not those of the joint family. (*C.C. Ghose and Mitter, JJ.*) AMINADDIN MUNSHI *v.* TAJADDIN. **59 Cal. 541=I R. 1932 Cal. 515=138 I.C. 761=A.I.R. 1932 Cal. 538.**

Legitimacy.

See also MARRIAGE, *infra.*

——*Legitimacy—Acknowledgment.*

Where a plea of legitimacy is raised on the ground that there was no valid marriage between the putative father and the mother it is incumbent on the person putting forth the plea of legitimacy to show that there was a valid marriage and that there was treatment amounting to valid acknowledgment. In order to prove the validity of the marriage the claimant may adduce evidence of continued cohabitation as man and wife between the putative father and the mother. (*Shadi Lal, C.J. and Coldstream, J.*) FATEH MAHOMED KHAN *v.* ABDUL RAHMAN KHAN. **12 Lah. 396=I R. 1931 Lah. 974=134 I.C. 590=32 P.L.R. 68=A.I.R. 1931 Lah. 223.**

——*Legitimacy—Evidence of marriage—Statement of deceased person to prove legitimacy.*

A statement by a deceased person that there was a marriage between him and a certain woman is admissi-

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ble in evidence for the purpose of proving th legitimacy of his children under the provisions of S. 32, sub-S. (5) as a statement as to marriage. The doctrines of Mahomedan Law do not exclude evidence of this nature and the Evidence Act applies in such case. (*Mukherji, A.C. J. and Bennet, J.*) ZAMIN ALI *v.* MT. AZIZUNNISSA. **55 All. 139=I.R. 1933 All. 432=144 I.C. 433=1933 A.L.J. 483=A.I.R. 1933 All. 329.**

———*Legitimacy—Presumption.*

The ordinary principles of Mahomedan Law are in favour of a presumption of legitimacy. 56 I.A. 201, Ref. (*Raza and Smith, JJ.*) SOGHRA BEGAM *v.* NAJMUD DIN. **142 I.C. 883=I.R. 1933 Oudh 138=9 O.W.N. 1043=A.I.R. 1933 Oudh 73.**

———*Legitimacy—Proof of marriage—Presumption.*

In order to raise the presumption as to legitimacy there should be proof of marriage. For that there should be some body of neighbours or some sort of public before habit and repute can be interred. (*Milne, J.C. and Rupchand, A.J.C.*) KARAMALISHAH *v.* HUSSAINALISHAH. **26 S.L.R. 111=I.R. 1933 Sind 19=140 I.C. 724=A.I.R. 1932 Sind 137.**

Maintenance.

———*Maintenance—Widow—Right to—Nature of.*

The right of a Muhammadan widow in possession of her husband's property for dower debt is a personal right given to her by the Islamic Law and does not by any means amount to an interest in the land. As the widow in possession has no interest in the assets of her husband arising from her claim to dower, there is nothing to prevent the assets being utilised for the satisfaction of the husband's debts, subject, of course, to the personal right of the widow to retain possession. The creditor of her husband though not entitled to disturb her possession, can nevertheless attach the house of which she may be in possession, and bring it to sale subject to the personal right of the widow. (*Niyogi, A.J.C.*) KALEKHAN *v.* MT. HOORA. **27 N.L.R. 389=I.R. 1932 Nag. 31=136 I.C. 239=A.I.R. 1932 Nag. 18.**

———*Maintenance—Wife—Right of—Agreement for desertion on second marriage of husband—Validity.*

A Mahomedan wife is not entitled to maintenance where she has voluntarily left her husband. She will be disentitlen to it also when she makes an agreement of desertion on the second marriage of her husband, for such agreement is opposed to Mahomedan Law and also without consideration. (*Bhide, J.*) MAHOMED ALI *v.* MT. GHULAM FATIMA. **160 I.C. 365=8 R.L. 532=A.I.R. 1935 Lah. 902.**

———*Maintenance—Wife—Right of—Wife voluntarily deserting husband.*

Where a Mahomedan wife deserts her husband of her own accord, stays with her parents and does not perform her marital duties, she is not entitled to maintenance, as under Mahomedan Law no wife can claim maintenance unless she is prepared to perform her marital duties and resides with him. (*Bhide, J.*) MAHOMED ALI *v.* MT. GHULAM FATIMA. **160 I.C. 365=8 R.L. 532=A.I.R. 1935 Lah. 902.**

Marriage.

———Marriage— Advancement — Wife, owner of building and site—Husband's deposit in joint names of himself and wife—Building rebuilt with money in deposit — Ownership of superstructure —Presumption. *See* BENAMI. **A.I.R. 1935 All 856.**

———*Marriage—Ante-nuptial agreement— Provision for maintenance in case of dissension or bad relationship —Enforceability.*

In Mahomedan Law marriage is a civil contract and any reasonable condition in an ante-nuptial agreement that the wife would be entitled to separate maintenance

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in case of discussion or bad relationship is enforceable. In such a case the allegations by the husband that the wife was immoral, which however are not supported by evidence, would be sufficient to establish bad relationship and dissension between the parties. (*Addison, J.*) MT. HAMIDAN *v.* MAHOMED UMAR. **I.R. 1931 Lah. 854=133 I.C. 886=32 P.L.R. 702=A.I.R. 1932 Lah. 65 (2).**

[**R** 33 P.L.R. 554 (555).]

———*Marriage—Ante-nuptial agreement—Provisions for securing wife against ill treatment and divorce—Validity of agreement.*

It is competent for the relations of a Mahomedan girl at the time of her marriage or for a Mahomedan woman herself to take measures for her protection in the event of ill treatment or even divorce on the part of the husband. Such an agreement is not void as being against public policy. 43 All. 650, Ref. (*Costello, J.*) AHMAD KASIM MOLLA *v.* KHATUN BIBI. **59 Cal. 833=141 I.C. 689=I.R. 1933 Cal. 165=A.I.R. 1933 Cal. 27.**

———*Marriage—Concept of.*

Marriage in the view of Mahomedan Law is a pure contract, and no particular form is essential to the validity of a Mahomedan marriage. Certain formalities, such as the presence of witnesses, are imposed but the absence of those formalities does not invalidate the marriage. (*Beaumont, C.J.*) KHAMBATTA *v.* KHAMBATTA. **149 I.C. 1232=6 R.B. 417=36 Bom.L.R. 11=A.I.R. 1934 Bom. 93.**

[*See also* 38 C.W.N. 747, Ed.]

———*Marriage—Custom in Berar by which Kazi has right to perform and recover dues, whether he is called or not—Validity.*

The custom in Berar by which the hereditary Kazi has the right to perform marriages and to prevent other persons officiating as Kazi at Mahomedan marriages in the locality is valid and any one who acts as Kazi, contrary to the custom would be liable and the Watandar Kazi would be entitled to recover the fees paid to such person for officiating as Kazi, otherwise his hereditary and exclusive right would be of no avail. (*Staples, A.J.C.*) ABDUL NABI *v.* SYED AJMAT HUSSEIN. **156 I.C. 90=7 R.N. 215=A.I.R. 1935 Nag. 123.**

———*Marriage—Dissolution—Procedure— Suit and not application as the proper course.*

A Mahomedan wife cannot apply for dissolution of marriage in a summary proceeding, the application bearing a Court-fee of 12 annas. The proper procedure is to file a suit for dissolution of marriage in accordance with law. (*Guha, J.*) KABIL GAZI *v.* MADARI BIBI. **6 I.R. (Cal.) 140=145 I.C. 828=57 C.L.J. 106=A.I.R. 1933 Cal. 630.**

———*Marriage—Dissolution of—Renunciation of religion—Effect of.*

A Mahomedan marriage is immediately dissolved on one of the parties to that marriage renouncing the faith of Islam. So where a Mahomedan married woman renounces her religion and is then taken away by other persons they cannot be guilty under S. 498 of the Penal Code. 33 All. 90, Appl. (*Young, J.*) KARAN SINGH *v.* EMPEROR. **6 I.R. (All.) 42=145 I.C. 156=34 Cr. L.J. 869=1933 A.L.J. 733=14 L.R. 201 (Cr.)=1933 Cr.C. 739=A.I.R. 1933 All. 433.**

———*Marriage — Dissolution — Woman baptised to Christianity—Right of.*

A Mahomedan woman is entitled to the dissolution of her marriage on the ground that she has been converted to Christianity and so renounced Islam. After the renunciation has been proved, and the baptism is in itself formal assumption of the new faith, it is immaterial whether the motive for this renunciation was a genuine conversion

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or a mere device to have the marriage dissolved. (*Beckett, J.*) MT. SARDARAN *v.* ALLAH BAKSH. **A.I.R. 1934 Lah. 976.**

———*Marriage—Enticing of wife—Husband's right of suit.*

A Mahomedan husband can maintain a suit for damages against a person enticing away his wife. (*Tyabji, J.*) ABDUL KARIM *v.* AMINABAI. **59 Bom. 426=157 I.C. 694=8 R.B. 86=37 Bom.L.R. 398=A.I.R. 1935 Bom. 308.**

———*Marriage—Evidence of—Presence of witnesses.*

Under the Hanafi Law the presence of witnesses is, of course, an essential ingredient of a valid marriage. But there is no such rule that although a large number of persons who are competent to act as witnesses to a marriage are present, and are witnesses to the requisite consent having been given, the marriage must not be deemed to be valid unless two of them, if males, and if not, one male and two females amongst those who are present are specially asked to act as witnesses. (*Ferrers, J.C. and Rupchand, A.J.C.*) MT. SHAMUL *v.* DOST MAHOMED KHAN. **27 S.L.R. 101=150 I.C. 279=6 R.S 262=A.I.R. 1933 Sind 317.**

———*Marriage—Formalities—Kazi, if necessary—Nature of marriage—Civil contract.*

According to Mahomedan Law, a Mahomedan can have his marriage performed without the Kazi. Strictly speaking, there is no priesthood under Mahomedan Law and the Kazi is only a civil officer appointed by the State to perform functions, which in other religions would be performed by a priest. Marriage, moreover, is really a civil contract, and no priest or Kazi is necessary for its performance. (*Staples, A.J.C.*) ABDUL NABI *v.* SYED AJMAT HUSSEIN. **156 I.C. 90=7 R.N. 215=A.I.R. 1935 Nag. 123.**

———*Marriage—Invalid marriage—Repudiation of—Effect.*

When an invalid marriage is renounced, it has no legal effect on the status of the parties, though it may affect the legitimacy of any issue of the marriage, and also the right of the wife to payment of dower. (*Beckett, J.*) MT. RURO *v.* BAGH SINGH. **157 I.C. 779=A.I.R. 1935 Lah. 23.**

———*Marriage*—Mewa Khori *allowance.*

There is no difference between an allowance for *mewa khori* and an allowance by way of *kharch-i-pandan.* It is a personal allowance to the wife customary among Mahomedan families of rank and high position in society, fixed either before or after the marriage. (*Srivastava and Nanavutty, JJ.*) SIKANDAR ARA AMINA BEGAM *v.* HASAN ARA BEGAM. **1935 O.W.N. 871=A.I.R. 1936 Oudh 196.**

———*Marriage—Minor girl—Contract of marriage—Void or voidable—Ratification on attaining majority.*

Where a minor girl who has no relation who can act as her guardian enters into a marriage contract the marriage takes effect on her attaining the majority and ratifying the contract. Ratification inferred from actual cohabitation for five years. Distinction between void and voidable marriages stated. (*Bhide and Currie, JJ.*) MUNSHI *v.* MT. ALAM BIBI. **I.R. 1931 Lah. 750=133 I.C. 126=34 P.L.R. 214=A.I.R. 1932 Lah. 280.**

———*Marriage—Muta—Parties continuing cohabitation after expiry of term—Presumption.*

When once it is proved that the cohabitation between the parties originated after a muta marriage, the proper inference would, in default of evidence to the contrary, be that the muta continued after the expiry of the original term for which it was contracted, during the whole period of cohabitation and children born during

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such period are therefore presumed to be legitimate. (*King, C.J. and Nanavutty, J.*) SARWAR ARA BEGUM *v.* BAHADUR ALI KHAN. **10 Luck. 577=153 I.C. 803=7 R.O. 394=1935 O.W.N. 212=A.I.R. 1935 Oudh 152**

———*Marriage—Muta—Term of extension by implication.*

The term of a muta marriage can be extended. Hence where two persons have married under muta form for a fixed period but they continue as husband and wife till death of husband, the inference is that the marriage has been extended from time to time till his death. (*R.C. Mitter, J.*) HASANALI MIRJA *v.* NUSHARATALI MIRJA. **157 I.C. 1091=62 C.L.J. 428=A.I.R. 1935 Cal. 572.**

———*Marriage—Nature of—If a civil contract of sale—Dower, if consideration for sale.*

Marriage under the Mahomedan Law is a civil contract and is like a contract of sale. In it the wife is the property transferred and the dower is the price. (*Mitter and McNair, JJ.*) SABURANNESSA *v.* SABDU SHEIKH. **152 I.C. 422=7 R.C. 274=38 C.W.N. 747=A.I.R. 1934 Cal. 693.**

[*See also* 36 Bom.L.R. 11=A.I.R. 1934 Bom. 93.]

———*Marriage—Option of puberty—Exercise before District Judge.*

In order to make the repudiation of marriage by a girl on reaching puberty effective she must make a declaration before the Kazi or Judge and get his order thereon. If the husband denies that there was any repudiation the onus is on her to establish it by evidence. The District Judge is the proper person to perform the functions of the Kazi in this connection, where a District Judge exercised those functions.

Held, that even assuming the Sub-Judge was the person entitled to exercise the powers the order passed by the District Judge would not be a material irregularity justifying interference in revision. (*Jack and Nag, JJ.*) MAFIZUDDIN MONDAL *v.* RAHIMA BIBI. **149 I.C. 1028 (2)=6 R.C. 686=37 C.W.N. 1043=58 C.L.J. 73=A.I.R. 1934 Cal. 104.**

———*Marriage—Option of puberty — Grounds for repudiating marriage.*

A marriage contracted by the father of a minor girl is voidable at her option and is in fact invalid if the same be to her detriment. Where the object of the marriage is prostitution, the marriage is for the detriment of the minor and must be set aside. (*Jai Lal, J.*) MT. SARDAR BEGUM *v.* GHULAM MAHOMED. **I.R. 1931 Lah. 516 (1)=132 I.C. 4 (1)=31 P.L.R. 948.**

———*Marriage—Option of puberty how exercised—Re-marriage.*

The option of puberty may be exercised by the girl either by her re-marriage with another person or by her pleadings in a suit by the husband for restitution of conjugal rights. (*Bhide, J.*) MT. BHAWAN *v.* GAMAN. **6 I.R. (Lah.) 206=146 I.C. 292=34 P.L.R. 283=A.I.R. 1934 Lah. 77.**

———*Marriage—Option of puberty—If lost by consummation by husband without wife's consent.*

Under the Mahomedan Law a minor girl who has been married has the option, on attaining puberty, of repudiating the marriage and the texts lay down that the option must be exercised by the wife immediately on attaining puberty and that she does it if she permits the marriage to be consummated. But if the wife arrives at puberty while she is living with her husband, her option is not determined unless she assents explicitly or by implication to the marriage. Nor is mere consummation sufficient. There must be consummation with the wife's

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consent. (*Tyabji, J.*) ABDUL KARIM *v.* AMINABAI. **59 Bom. 426=157 I.C. 694=8 R.B. 86=37 Bom. L.R. 398=A.I.R. 1935 Bom. 308.**

———*Marriage — Option of puberty—Knowledge—Burden of proof.*

A girl is entitled to exercise her option of puberty with in a reasonable time from her knowledge of marriage or from her knowledge that she has the right to repudiate the marriage on attaining puberty. Where a girl aged 16 years and 8 months sued for a declaration that she was not married and it was not shown that she was aware of her right to exercise the option earlier.

Held, that she was entitled to exercise the option of puberty. (*Jai Lal, J.*) MT. MUKHAN *v.* HAIDAR. **I.R. 1932 Lah. 351=137 I.C. 739=33 P.L.R. 576=A.I.R. 1932 Lah. 449.**

———*Marriage—Option of puberty—Repudiation, if need be express.*

The marriage of a minor girl can be ratified or repudiated by the minor at her option after she attains puberty. Under the Shiah Law at any rate the repudiation does not require a formal order of the Qazi or a Court of Justice. The mere refusal to allow consummation and her remarriage with another person will be more than sufficient evidence of repudiation.

Quaere.—If under the Sunni Law, repudiation can be made out by the mere fact of re-marriage? (*Abaul Qadir, J.*) GHULAM MAHOMED *v.* EMPEROR. **I.R. 1933 Lah. 24=140 I.C. 617=34 Cr.L.J. 77=33 P.L.R. 1062=1933 Cr.C. 164=A.I.R. 1933 Lah. 88.**

———*Marriage—Prohibition of—Subsisting marriage of the women with another—Bar to legitimate connection with another—Legitimacy of children.*

A subsisting marriage between a woman and a man is a bar to any legitimate connexion between her and any other persons and sons born to her of that other person cannot be treated as the legitimate sons of that other. (*Dalip Singh and Abdul Qadir, JJ.*) NIAZ MAHOMED *v.* YUSAF KHAN. **154 I.C. 733=7 R.L. 603=A.I.R. 1934 Lah. 462.**

———*Marriage—Proof — Cohabitation as man and wife.*

Under the Mahomedan Law marriage without any direct proof may be inferred from circumstances. But mere continued cohabitation without more would not raise a presumption of marriage. It should be shown that the cohabitation relied on was between a man and wife and not as between a man and his kept mistress. Case held to fall under the latter class. (*Shadi Lal, C.J. and Coldstream, J.*) FATEH MAHOMED KHAN *v.* ABDUL RAHMAN KHAN. **12 Lah. 396=I.R. 1931 Lah. 974=134 I.C. 590=32 P.L.R. 68=A.I.R. 1931 Lah. 223.**

———*Marriage—Proof—Presumption from long cohabitation—Rebuttal.*

The presumption as to marriage arising from long cohabitation can be rebutted by proof that the connection was illicit in origin or that the marriage was not legally permissible. (*Coldstream and Johnstone, JJ.*) FAZAL DIN *v.* AZIZ. **I.R. 1931 Lah. 993=134 I.C. 785=32 P.L.R. 647.**

———*Marriage—Property of husband—Presumption—Cash and household furniture.*

In a Mahomedan family there is a presumption that cash and household furniture belong to the husband. (*Das and Dunkley, JJ.*) MA KHATUN *v.* MA BI BI. **149 I.C. 654=6 R.R. 304=A.I.R. 1933 Rang. 393.**

———*Marriage—Repudiation of by minor girl on attaining majority—Evidence.*

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A repudiation by the minor on attaining majority is not akin to oral repudiation before witnesses. Where the girl on attaining puberty marries, one man other than the man whom she married when he was a minor,

Held, that there was a valid repudiation of marriage. (*Young, J.*) SHAFI ULLAH *v.* EMPEROR. **150 I.C. 139=1934 A.L.J. 387=6 R.A. 1033=35 Cr.L.J. 1053=3 A.W.R. 598=1934 Cr.C. 756=A.I.R. 1934 All. 589.**

———*Marriage — Restitution of conjugal rights—Cruelty of husband as defence.*

In a suit for restitution of conjugal rights by the husband, both the lower Courts had found that the husband had treated the wife cruelly, though they did not say in their judgment that it would be unsafe for the wife to go back to the husband because of cruelty on his part. Further it was found that several suits, civil and criminal, were instituted by the parties against each other.

Held, though cruelty was not made the ground of the lower Court's order, the wife should not be ordered to return to the husband as the wife's health and safety would be endangered by doing so. (*Ba U, J.*) GUNU MEAH *v.* BEGUMAH BIBI. **148 I.C. 309=6 R.R. 220=A.I.R. 1933 Rang. 322.**

———*Marriage—Restitution of conjugal rights—Suit by husband—Burden of proof.*

The Mahomedan Law gives unfettered powers of divorce to the husband who is enjoined by the Quran "to retain his wife with kindness or separate her with kindness." The law does not in consequence favour suits of a matrimonial nature at the instance of the husband. He is dominant in matrimonial matters. In such cases the Court leans in favour of the wife; and all the necessary facts must be proved by the husband to the satisfaction of the Court. (*Tyabji, J.*) ABDUL KARIM *v.* AMINABAI. **59 Bom. 426=157 I.C. 694=8 R.B. 68=37 Bom.L.R. 398=A.I.R 1935 Bom. 308.**

———*Marriage—Validity—Hanafi sect — Marriage with divorced woman during* iddat*—If void—Children of such marriage—Rights of inheritance.*

A marriage contracted with a divorced woman within the period of *iddat* is only a *fasid* or invalid marriage and not void *ab initio*, according to the Hanafi School of Mahomedan Law. The children of such marriage are therefore legitimate and entitled to inherit to their father. (*Addison and Din Mahommed, JJ.*) MAHOMED HAYAT *v.* MUHAMMAD NAWAZ. **17 Lah. 48=156 I.C. 40=7 R.L. 844=38 P.L.R. 238=A.I.R. 1935 Lah. 622.**

———*Marriage—Validity—Irregular marriage—Absence of formal dissolution—Effect.*

An irregular marriage does not acquire validity in the absence of a formal dissolution and can be repudiated by the parties at any time either before or after consummation. (*Beckett, J.*) MT. RURO *v.* BAGH SINGH. **157 I.C. 779=A.I.R 1935 Lah. 23.**

———*Marriage—Validity—Mahomedan husband and Christian wife—Subequent conversion of wife as Mahomedan— Divorce by* talak.

An Indian Sunni Mahomedan married a Christian lady of Scotland, in Edinburgh General Registry Office in 1904. In 1912, the lady became a Mahomedan and remained so till 1923; and from 1914, the parties were residing in Secunderabad Cantonment. In 1922, the husband pronounced a *talak* against the wife according to the Mahomedan Law; and in 1923, the wife obtained a declaration from the District Court at Secunderabad that she was no longer the wife of the husband. Subsequently she married the respondent under the Special Marriage Act.

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Held, that the prior marriage between the parties was validly dissolved by *talak* before the marriage with the respondent took place. (*Blackwell and Broomfield, JJ.*) KHAMBATA *v.* KHAMBATA. **59 Bom. 278 = 154 I.C. 1075 = 7 R.B. 387 = 36 Bom.L.R. 1021 = A.I.R. 1935 Bom. 5.**

———*Marriage—Validity—Marriage during iddat.*

There may be some doubt on the point whether a marriage celebrated during the period of iddat should be regarded as merely irregular or altogether void although the practice in the Punjab has been to treat such marriages as entirely devoid of any legal effect, so far as the parties themselves are concerned. (*Beckett, J.*) MT. RURO *v.* BHAG SINGH. **157 I.C. 779 = A.I.R. 1935 Lah. 23.**

———*Marriage—Validity—Marriage during woman's* iddat *but consummation after.*

The marriage between the parties if performed during the *iddat* period of the woman is invalid. The mere fact that the marriage is consummated after the expiry of the *iddat* period is not sufficient to validate the marriage and does not entitle the husband to a decree for restitution of conjugal rights. (*Bhide, J.*) MT. BAKH BIBI *v.* QAIM DIN. **154 I.C. 677 = 7. R.L. 597 = A.I.R. 1934 Lah. 907 (1).**

———*Marriage—Validity—Marriage with "chachi".*

A marriage of a Mahomedan with his "chachi" does not invalidate the maraiage on the ground of being within prohibited degrees of consanguinity. (*Beckett, J.*) MT. RURO *v.* BAGH SINGH. **157 I.C. 779 = A.I.R. 1935 Lah. 23.**

———*Marriage—Validity of parties not of the same brathri.*

Among Mahomedans there is no legal bar to the marriage of a woman who though not of the same brathri is a Mahomedan. (*Mukerji, A.C.J. and Bennet, J.*) ZAMIN ALI *v.* MT. AZIZUNNISSA. **55 All. 139 = I.R. 1933 All. 432 = 144 I.C. 433 = 1933 A.L.J. 483 = A.I.R. 1933 All. 329.**

Partition.

———*Partition—Deed leaving certain properties undivided—Disposition of such properties—Creation of estate of inheritance with limitations to heirs—Validity.*

Where property is given for an estate of inheritance to a person or persons accompanied by a limitation to heirs in a line not sanctioned by the law, the disposition in favour of the persons named will stand and the invalid limitation of heirs will drop out. Where on a partition among persons who were Mahomedans governed by Mahomedan Law certain properties were left undivided and allotted to the seven women mentioned therein as Sthreesothu (women's property) to be taken by them and their female descendants existing or to be born thereafter and it was also provided that the properties were to be held in possession and managed by certain males in the order of seniority.

Held, there was nothing illegal whatever except the limitation that the property is to descend to those (female children) that may be born hereafter and the description of the property as belonging to the Sthreesothu tarwad. The rest of the disposition which allots the property to the seven females named as well as their children then existing was perfectly valid because there was nothing to prevent the allotment of property at a partition to members of the family male or female then alive and to their children male or female alive. It is only where it is attempted to create a new line of succession or to constitute a new group of persons called a family or tarwad not known to the personal law of the parties that the latter attempt is rendered futile.

Held, further, that as the partition deed was entered into by all the persons who were entitled to the properties now in question its provisions were binding on them and their successors. (*Pandalai, J.*) KOMBI AVULLA *v.* KOTTAYI MATHA. **161 I.C. 189 = 8 R.M. 787 = 1934 M.W.N. 874 = 41 L.W. 635 = A.I.R. 1935 Mad. 199 = 68 M.L.J. 289.**

———*Partition—Partial partition—Suit for—Maintainability—Death of one defendant—Effect of.*

A suit filed by some of the heirs of a deceased Mahomedan against the other heirs for partition of a part of the property left by the deceased is not incompetent. Hence if one of the defendant heirs dies and his legal representative is not brought on record, the suit abates only as against such defendant but not as a whole as it is open to the plaintiff to sue for partition excluding his share even during his lifetime. A.I.R. 1922 Sind 41 (F.B.), Rel. on. (*Rupchand, J.C. and Mehta, A.J.C.*) MOMANSHAH BUDHAL SHAH *v.* RAJALMAL. **147 I.C. 311 = 6 R.S. 151 = A.I.R. 1933 Sind 384.**

———*Partition—Partition of estate in fact—Same not in accordance with law—Binding nature on parties and representatives.*

Where on the death of a Mahomedan his sons partitioned the ancestral property to the exclusion of daughters and each of them effected mortgages of the property so partitioned, *held*, that the partition though not according to law was binding on the parties and their representatives. (*Mitter, J.*) SHEIKH SIRAJUDDIN *v.* JOHUR JAN BEWA. **I.R. 1931 Cal. 828 = 134 I.C. 888 = 53 C.L.J. 222.**

———Partition—Suit for among co-sharers of Mahomedan family—Limitation—Starting point—Demand and refusal—Period of accountability. *See* LIMITATION ACT, ART. 120—CO-OWNERS. **A.I.R. 1933 Mad. 200.**

Pre-emption.

———*Pre-emption—Applicability—Custom—Entry in wajib ul-arz as to usage and shastras—Meaning of.*

The right of pre-emption is one recognised by the Mahomedan Law and was originally limited to that law. Later on it was adopted by the Hindus and became modified in different places by local usage. In towns, however, the right recognised by the Mahomedan Law has not been modified by local custom. In the absence of any evidence of custom different from, or not co-extensive with Mahomedan Law, that law must be applied. Where a wajib-ul-arz contains an entry as to the right of pre-emption according to the usage of the country and the shastras, it is definite and clear to form proof of a custom of pre-emption, and the Mahomedan Law must be held to apply, because the custom of pre-emption is the custom as understood by the Mahomedan Law. (*Kendall, J.*) JAGANNATH *v.* INDERPAL SINGH. **153 I.C. 172 = 7 R.A. 458 = 4 A.W.R. 1229 = 1935 A.L.J. 108 = A.I.R. 1935 All. 236.**

———*Pre-emption—Applicability—Hindus of Sylhet district.*

The Mahomedan Law of pre-emption prevails in the district of Sylhet as a customary law even among Hindus, and must be judicially recognised as such. (*Suhrawardy and Costello, JJ.*) GIREESHCHANDRA BHATTACHARJYA *v.* RABEENDRANATH DAS. **61 Cal. 694 = 156 I.C. 512 = 7 R.C. 716 = A.I.R. 1935 Cal. 17.**

———*Pre-emption—Buyer as one of several pre-emptors—Procedure.*

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Even when the buyer is himself a pre-emptor, that is, a person who would have the right of pre-emption against an outsider, other persons having a similar right of pre-emption are entitled to claim pre-emption against the buyer; and, in such a case, the right of the claimants to pre-emption should be determined in the same way in which they would have been determined, had the buyer acquired the property by enforcing his right of the pre-emption against a stranger, in the absence of the other pre-emptors and the absentee pre-emptors appeared subsequently and claimed pre-emption. And where both the vendee and the pre-emptor are in the category of pre-emptors the result is not the dismissal of the suit, but the property must be shared by the two claimants. (*Fazl Ali and Rowland, JJ.*) RAMAUTAR SINGH *v.* BRIJ KISHORE PRASAD SINGH. **149 I.C. 931 (2)= 6 R P. 673 = A.I.R. 1933 Pat. 653.**

———*Pre-emption—Collusive sale—Pre-emptor's right if prejudiced.*

No doubt a vendee may defeat pre-emptor's right by any legitimate means; but where the vendor and the vendee collude to disguise a transaction in order to deceive the pre-emptor in that the vendor first sells his kotha only and a week later his whole house to vendee, the apparent two transactions amounting merely to give the vendee a superior right of pre-emption as against the pre-emptor, the two transactions are to be treated as part of one and the same transaction and as such subject to pre-emptor's right of pre-emption as though the property was sold by one sale deed. 100 P. R. 1895, Ref. (*Bhide and Tapp, JJ.*) LABH SINGH *v.* TAJ DIN. **12 Lah. 578 = 135 I.C. 36 = I.R. 1932 Lah. 20 = 32 P.L.R. 801 = A.I.R. 1931 Lah. 436.**

———*Pre-emption—Conditional exchange.*

Under the Mahomedan Law so far as the rights of pre-emption to sales and exchanges are treated on the same footing. Even a conditional exchange with a reservation entitling either party to take back the property would not give rise to a right of pre-emption. Hamilton's Headaya, Chap. XXXVIII, p. 559, Rel. on. (*Sulaiman and Banerji, JJ.*) MAHOMED YUNIS KHAN *v.* MAHOMED SALEH KHAN **53 All. 169 = I.R. 1931 All. 263 = 130 I.C. 295 = 1930 A.L.J. 1478 = A.I.R. 1931 All. 106.**

———*Pre-emption—Right to — Talab — Delay in making—Effect.*

In a suit for pre-emption under the Mahomedan Law, if the element of promptness in making the demand is found against the plaintiff, his suit must be dismissed. (*Mukerji and Mitter, JJ.*) NARESH CHANDRA DUTT *v.* GIRISH CHANDRA DAS. **62 Cal. 979 = 160 I.C. 730 = 8 R.C. 451 = 61 C.L.J. 360 = A.I.R. 1936 Cal. 17.**

———*Pre-emption—Second demand—Mode of invoking witnesses.*

In a case of pre-emption it is not absolutely necessary for the pre-emptor to use words like "be you witness to this," addressed to the witnesses at the time of the second demand. But it must be fully established that there were at least two witnesses present on the occasion who heard the demand and can bear witness to the fact when it is denied by the vendee. (*Sulaiman and King, JJ.*) IMAMUDDIN *v.* MAHOMED RAISUL ISLAM HASHMI. **52 All. 1005 = I.R. 1931 All. 624 = 133 I.C. 304 = 1931 A.L.J. 32 = A.I.R. 1931 All. 736.**

Release.

———*Release of* spes successionis—*Validity.*

The release by a Mahomedan of a *spes successionis* is not valid. (*Milne, J.C.*) TAYABALLY *v.* BIBI FATMA. **I.R. 1932 Sind 17 = 135 I.C. 257 = A.I.R. 1932 Sind 67.**

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Schools of law.

———*Schools of law—Presumptions.*

As the great majority of the Mussalmans in India follow the Hanafi school of Sunni Law, the Courts presume that Muslims in India follow the Hanafi law unless the contrary is alleged and proved. Similarly the presumption is that if the parties are Shiahs, they are governed by the Shiah law. The great majority of Shiahs, in their turn being Ithna Asharis their exposition of the law is enforced, unless the parties show that their particular rule is different. (*Tyabji, J.*) AKBARALLY *v.* MAHOMEDALLY. **57 Bom. 551 = I.R. 1932 Bom. 434 = 138 I.C. 810 = 34 Bom.L.R. 655 = A.I.R. 1932 Bom. 356.**

———*Schools of law—Shiah and Sunni—Points of difference.*

Whereas there is a very definite distinction between the two rival sects, the Shiah and the Sunni, in practice the differences have with the time ceased to be quite as marked as they were originally. The main distinction is that whereas the Sunnis accept all those who actually held the office of Caliphs after the decease of the Holy Prophet, the Shiahs look upon the first three Caliphs, merely, Abu Bakr, Umar and Usman, as usurpers and on all occasions repudiate them and if he is ultra-orthodox or fanatical, he even indulges in abuse of their memory. The Shiahs also repudiate and Abdul Qadir of Baghdad who is accepted by the Sunnis as a great saint. But there is no such thing as a Sunni or a Shiah mosque ; all mosques are open to the members of all sects of the Mahomedan religion. (*Harrison and Addison, JJ.*) IQBAL BEGAM *v.* SYED BEGAM. **I.R. 1933 Lah. 38 = 140 I.C. 829 = 34 P.L.R. 24 = A.I.R. 1933 Lah. 80.**

Succession.

———Succession—Co-heirs. *See* MAHOMEDAN LAW —CO-HEIRS.

———*Succession—Custom of primogeniture regarding ancestral estate—Applicability of custom to personal acquisitions—Presumption—Evidence in rebuttal of.*

In the case of a Mahomedan family, if a custom of primogeniture governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death, and it is for the person who asserts that these properties follow a line of devolution different from that of the taluka to establish it. But the presumption is sufficiently rebutted if it is shown that in at least two cases of succession in the family non-talukdari property has been divided according to Mahomedan law, there being no trace of any claim in either case that it was not so divisible by reason of a family custom, and that the alleged family custom is of comparatively recent origin. 55 I. A. 303, Ref. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1 = 136 I.C. 385 = I.R. 1932 P C. 81 = 6 Luck. 556 = 1932 A.L.J. 663 = 36 C.W.N. 137 = 35 L W. 118 = 8 O.W.N. 1378 = 62 C.L.J. 322 = A.I.R. 1932 P.C. 13 = 62 M.L.J. 320 (P.C.).**

———*Succession—Debts of deceased—Alienation for discharging—Apportionment of liability.*

A voluntary alienation by the heirs of a deceased Mahomedan in possession of the estate for the purpose of paying debts of the deceased for which no decree has been passed is not binding upon the heirs who have not joined in making the alienation. But where they sue for a declaration that the alienation does not bind them and it is proved that the alienation was made to pay off the debts due by the deceased, they ought to be put on terms as a matter of equity and required to pay their

proportionate share of the debt before they are granted the declaration sought for. 12 O. C. 146, Foll. (*Hasan, C.J. and Bisheshwar Nath, J.*) AMIR JAHAN BEGAM *v.* KADIM HUSAIN KHAN. **I.R. 1931 Oudh 235 = 132 I.C. 75 = 14 O.L.J. 314 = 8 O.W.N. 237 = A.I.R. 1931 Oudh 253.**

———*Succession—Debts of deceased—Liability of co-heirs—Share of property taken as basis.*

The heirs of a deceased Mahomedan dividing his estate among themselves are liable only for a share of such debt proportionate to the estate taken by them. Where in a suit on a bond executed by the deceased the plaintiff originally impleaded the widow, father and daughter of the deceased as being his legal representatives holding the property but he subsequently gave up the daughter as a party defendant.

Held, that a decree could be passed in favour of the plaintiff as against the remaining defendants only in proportion to the share taken by them.

Held, further, that the rule as to proportionate liability laid down by the Mahomedan Law was in no way modified by the definition of "legal representative" in S. 2 (*11*), C. P. Code. (*King and Thom, JJ.*) RAM CHARAN LAL *v.* HANIFA KHATUN. **54 All. 796 = I. R. 1932 All. 495 = 138 I.C. 746 = 1932 A.L.J. 727 = A. I. R. 1932 All. 591.**

———*Succession—Debts of deceased—Liability of heirs—Suit dismissed against some—Liability of others.*

A creditor sued the heirs of a deceased Mahomedan to recover certain moneys payable by him. All the heirs were impleaded, but two of them were minors and as they were not properly represented, the suit was dismissed as against them.

Held, that a decree could be passed against the other only for the share of the debt to which they were liable and not for the entire claim. Case-law discussed. (*Mukerji and Guha, JJ.*) ABBAS NASKAR *v.* CHAIRMAN, DISTRICT BOARD, 24 PARGANAS. **59 Cal. 691 = 141 I.C. 871 = I.R. 1933 Cal. 195 = 36 C.W.N. 78 = A.I.R. 1933 Cal. 81.**

———*Succession — Debts of deceased—Sale for discharge—Avoidance—Re-payment of debt due to purchaser.*

A Court has got the discretion to direct that an heir who is not bound by a sale made for the payment of the debts of the deceased, shall pay to the purchaser a proportionate share of the debts, before he can recover possession of the property. (*Shadi Lal, C. J. and Coldstream, J.*) ANWAR HUSSAIN *v.* IBRAHIM. **I.R. 1931 Lah. 984 = 134 I.C. 776 = 32 P.L.R. 157 = A.I.R. 1931 Lah. 221.**

———*Succession—Debts of deceased—Sale of property by heirs—Validity.*

The estate of a Mahomedan is liable for the payments of his debts and the heirs are entitled to sell the estate for the payment of the debts of the deceased. But the sale in order to be binding on the heirs must be made by them or by some persons having the legal authority to dispose of the property on their behalf. A sale of the property of the deceased judgment-debtor after his death by some of his heirs without the intervention of the Court cannot be deemed to be a sale in execution of the decree and cannot be binding on the minor heirs. (*Shadi Lal, C. J. and Coldstream J.*) ANWAR HUSSAIN *v.* IBRAHIM. **32 P.L.R. 157 = I.R. 1931 Lah. 984 = 134 I.C. 776 = A.I.R 1931 Lah. 221.**

———*Succession—Distribution—Death-bed and funeral expenses before debts and legacies.*

Under the Mahomedan Law death-bed and funeral expenses form the first charge on the estate of a deceased person and must be disbursed before payment of debts or legacies. After such expenses have been paid the debts must be discharged and then any valid bequests made by him. It is only after these legal duties have been discharged that the inheritance becomes divisible among the heirs. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **150 I.C. 330 = 6 R.O. 635 = 10 O.W.N. 201 = A.I.R. 1933 Oudh 142.**

———*Succession—Doctrine of representation.*

The doctrine of representation applies only amongst those in the same degree of proximity. (*Milne, J. C.*) TAYABALLY *v.* BIBI FATMA. **I.R. 1932 Sind 17 = 135 I.C. 257 = A.I.R. 1932 Sind 67.**

———*Succession—Missing person—Rights of—Evidence Act, S.* 108.

The presumption of Mahomedan Law that as regards property coming to a missing person by inheritance he must be deemed to have died at the date of his disappearance is not a rule of substantive law but only a rule of evidence and as such must be taken to have been superseded by the provisions of the Evidence Act. 7 All. 297 and 43 All. 673, Rel. on. (*Srivastava, J.*) AZIZUL HASAN *v.* MAHOMED FARUQ. **9 Luck. 401 = 6 R.O 327 = 147 I.C. 973 = 10 O.W.N. 1254 = A.I. R. 1934 Oudh 41.**

———Succession—Mullanki lands—Female heir—Right of—Religious office—Capacity to hold. *See* LAND TENURE—MULLANKI LAND. **37 Bom.L.R. 257 = A. I.R. 1935 Bom. 245.**

———*Succession—Representation of the estate—Position of heirs.*

Under the Mahomedan law, property never remains in a state of abeyance, but on the death of the proprietor it passes at once to the various heirs in their proper shares, and no heir has anything to do with the share of the other heir or heirs. (*Agha Haidar, J.*) DHANPAL SINGH *v.* MT. FAHIMAN. **7 R.L. 477 = 153 I.C. 870 = A.I.R. 1935 Lah. 203.**

———*Succession—Right to—Distant kindred—Full brother's daughter's children.*

According to Mahomedan Law full brother's daughter's children are among distant kindred. (*Abdul Quadir, J.*) MEHRA *v.* FAZLA. **I.R. 1932 Lah. 654 (2).**

———*Succession—Right to—Full and half blood—Preferential right—Custom of* stribant—*Effect.*

In the absence of any express custom to that effect whole blood cannot be said to be preferred to half-blood merely because of the custom of '*stribant*'. An uncle of half-blood therefore succeeds in preference to a cousin of full blood. (*Raza, J.*) KARMAT ALI *v.* SAADAT ALI. **8 Luck. 228 = I.R. 1933 Oudh 31 = 141 I.C. 27 = 9 O.W.N. 1104 = A.I.R. 1933 Oudh 4 (F.B.).**

———*Succession—Right to—Son predeceasing father—Right of grandchildren—Preference to uncles and aunts.*

If any of the children of a man die before the opening of the succession to his estate leaving children behind, the grandchildren are entirely excluded from the inheritance by their uncles and their aunts. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **150 I C. 330 = 6 R.O. 635 = 10 O.W.N. 201 = A.I.R. 1933 Oudh 142.**

———*Succession—Shias—Doctrine of return—Childless widow—Right of, in the absence of other heirs.*

Under the Mahomedan Law of Inheritance applicable to Shias, a childless widow of the deceased is, in the absence of all other heirs, entitled to not only a one-fourth share in her husband's property, but also gets the

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remainder of his property by the doctrine of "return." (*Nanavutty and Zia-ul-Hasan, JJ.*) ABDUL HAMID KHAN *v.* PEARE MIRZA. **10 Luck. 550=7 R O. 341 =153 I.C. 379=1935 O.W.N. 48=A.I.R. 1935 Oudh 78.**

———*Succession—Widow— Competition between brother and grandson—Custom.*

The Mahomedan Law makes a substantial distinction between the rights of a son and a grandson and although there may be a custom that a widow does not succeed in the presence of a son it is entirely insufficient to show that a widow does not succeed to a share in the presence of a grandson on her husband's brother. (No local custom by which male relations of the husband, such as brothers and grandsons, exclude a widow held proved.) A.I R. 1933 Nag. 16 and 45 C. 450 (P.C.), Ref. (*Macnair, J. C.*) ABDUL HAKIM KHAN *v.* ABDUL MAJID KHAN. **29 S.L.R. 168=142 I.C. 27 =I.R. 1933 Nag. 87=A.I.R. 1933 Nag. 118.**

———*Succession—Widow—Share of.*

The widow of the deceased, under the Mahomedan law, is entitled to ¼ the share in her husband's property. (*Agha Haidar, J.*) DHANPAL SINGH *v.* MT. FAHI MAN. **7 R.L. 477=153 I.C. 870=A.I.R. 1935 Lah. 203.**

———*Succession—Widow's share—Daughter excluded from inheritance by statute— Effect—Bombay Watan Act, S. 2.*

The ordinary rule of inheritance that the widow takes one-fourth if there are no children, but one-eighth if there is a child or children is intended for the benefit of the children and not a residuary other than the son and daughter. So where by virtue of S. 2 of the Bombay Watan Act, the daughter is postponed to the paternal uncle and practically excluded from inheritance, the widow's share of one-fourth in the property of her husband is not diminished to one eighth by reason of her having a daughter. (*Patkar and Broomfield, JJ.*) AMINABI *v.* ABASAHEB. **55 Bom. 401=I.R. 1931 Bom. 316=131 I.C. 892=33 Bom.L.R. 469=A.I.R. 1931 Bom. 266.**

Texts.

———*Texts—Commentators—Opinion of.*

The opinion of Abu Yusuf and Muhammad where they agree are generally preferred to the opinion of Abu Hanifa if they differ from him. (*Tyabji, J.*) EBRAHIM ALI BHAI *v.* BAI ASI. **58 Bom. 254=149 I.C. 225=6 R.B. 340=35 Bom.L.R. 1148=A.I.R. 1934 Bom. 21.**

———*Texts—Conflict of opinion—Proper course to be followed by Court.*

Where there is a difference of opinion among the jurists regarding a certain point, the proper course undoubtedly is to abide by the opinions which have been adhered to in the commentaries which are of recognized authority in India and not to decide the point on any general rule of interpretation based on the majority of votes of the ancient jurists. But where the learned commentators content themselves with a mere statement of the conflict of opinion without expressing any definite opinion of their own in favour of one or the other view and without saying anything about the consensus of opinion or the fatwa being in accordance with a particular view, they imply the conflict of opinion was still continuing and that no unanimity or general concurrence had till then been obtained. This would have effect of leaving the question open. The Qazi would then be free to choose whichever of the two opinions appears to him to be the sounder and better

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adapted to the conditions and the needs of the times. (*Sulaiman, C.J. and Thom, J.*) MT ANIS BEGAM *v.* MALIK MAHOMED ISTAFA WALI KHAN. **55 All. 743=148 I.C. 26=6 R.A. 664=1933 A.L.J. 1079= A.I.R. 1933 All. 634.**

Trust.

See also WAKF—TRUST.

———*Trust—Gift to minor daughters and sons-in-law —Transfer of possession—Necessity.*

A gift by a Mahomedan by way of trust in favour of his minor daughters and sons-in-law, constituting himself and another as trustees, is invalid in the absence of transfer of possession. (*Kania, J.*) SUGRABAI *v.* MAHOMEDALLI. **154 I C. 984=7 R.B. 386=36 Bom.L.R. 1151=A.I.R. 1935 Bom. 34.**

———Trust—Trust deed—Power to deal with rents and profits reserved in the executant during his lifetime—Ultimate benefit not reserved for religious or charitable purpose—Provision of certain property for the benefit of the musjid and madrassa as wakf—Valid wakf not created. *See* MAHOMEDAN LAW—WAKF—CONSTRUCTION. **13 Rang. 679.**

Wakf.

See also MUSSALMAN WAKF ACT (XLII OF 1923) AND MUSSALMAN WAKF VALIDATING ACT (VI OF 1913).

ADMINISTRATION.
ALIENATION.
CONSTRUCTION.
CONTINGENT WAKF.
CREATION OF.
CYPRES DOCTRINE.
DEDICATION.
DURGA.
EVIDENCE.
GRAVEYARD.
IMAMBARA.
KHANKAH.
MANAGEMENT.
MEANING OF.
MODIFICATION.
MOSQUE.
MULLA.
MUTAWALLI.
NATURE OF.
OBJECT OF.
PROOF OF.
PUBLIC AND PRIVATE WAKF.
RELIGIOUS OFFICE.
REVOCATION.
SAJJADANASHIN.
SUBJECT-MATTER OF.
TAKIA.
TOMB.
TRUST.
VALIDITY OF.
WAKF-BIL-WASIYAT.
WASIYAT BIL-WAKF.
MISCELLANEOUS.

Administration.

———*Wakf—Administration—Decrease of income— Expenses, if should be proportionately reduced.*

It cannot be stated as a general proposition of law without reference to the terms of the particular deed of trust in question that in case of decrease of income, all the expenses provided for by the *wakf* should be proportionately reduced. Where in the deed itself there is

priority given to some items, and they have to be met in the first instance and the others have to be met out of the balance in hand, it will be impossible to say that the items in all such groups stand on the same footing and they must all be reduced proportionately. (*Sulaiman, C.J. and Ganga Nath, J.*) AHMAD ULLAH KHAN *v.* AHSAN ALI KHAN. **159 I.C. 64=8 R.A. 386=1935 A.W.R. 46=1935 A.L.J. 113=A.I.R. 1935 All. 147.**

Alienation.

See also MUTAWALLI, *infra.*

———*Wakf—Alienation—Dedication—Reservation of right to wakif—Mortgage to pay-off debts—Validity.*

The wakif laid down that he would discharge his previous liability and reserved the right to transfer a part of the dedicated property in order to pay off the previous debts if he was not able to discharge them otherwise. Subsequently the wakif executed a mortgage deed with a view to satisfy those debts.

Held, that the mortgage deed was valid. (*Sulaiman and Young, JJ.*) MAHOMED AHMAD SAEED KHAN *v.* KISHORI LAL. **141 I.C. 114 (2)=I.R. 1933 All. 58=1932 A.L.J. 414=A.I.R. 1932 All. 375.**

———*Wakf—Alienation—Theka of wakf property—Voidable, not void.*

A theka of wakf property is voidable and not void under the Mahomedan Law. (*Oakden, S. M and Smith, J.M.*) GAURI SHANKER SINGH *v.* SAYID ASHRAF KHAN. **15 R.D. 230.**

Construction.

———*Wakf—Construction—Gift of residue to descendants—Effect of.*

The proposition that an assignment of the income means an assignment of the corpus is not of universal application. It depends upon the terms of the grant and its construction. Where a sajjadanashin left a will by which he directed that the balance (of his property) remaining after spending the produce thereof on *sadabrat* (daily alms) at the khankah and on casual visitors and drum-beaters, etc., should be divided among his descendants specified therein, there is no gift or devise of any specific share of the rents or profits. It cannot be construed as the gift of the cropus or as lending any support to the contention that the properties so bequeathed were the private property of the testator and not part of a wakf. The distribution of the remainder among the descendants of the mutawalli is not illegal and is permissible. (*Khaja Mahomed Noor and Scrope, JJ.*) SHAH MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat. L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Construction—Provisions for the expenses of travellers and drum beaters of a Khankah—Residue for the maintenance of grantee and his descendants—Personal grant or pubic trust—Moulanagar Khankah Estate.*

The grant of *pargana* Abhaipur made in favour of a Muhammadan Saint in the early part of the eighteenth century by the then ruler of Bengal and subsequently confirmed by the East India Company recited that it was "granted revenue-free for defraying the expenses of the (*Warid Sadir*) casual visitors to the Moulanagar Khankah and the (*Naubat Nawazan*) drum-beaters appointed by *Huzur* and *madadmash* (maintenance) to Shah Ghulam Moula descendable to the children, etc. In a suit for declaration that the properties are public trust properties with a prayer for the preparation of a scheme and for the removal of the defendant from his office of sajjadanashin and manager.

Held, on a proper construction of the grant and consideration of the usage of the institution: (*i*) That it was a grant to the institution, namely, to the Khankah of Moulanagar and not a grant to the saint personally. (*ii*) That the expenditure mentioned in the grant was not merely a recital of the motive for making the grant but it was the object of the grant. There is nothing in the grant from which it can be inferred that the expenditure mentioned therein represents a mere pious wish. The objects of expenditure mentioned are the objects for carrying out which the grant was made. *Naubat Nawazan* or drum-beaters were a part of the necessary paraphernalia of a Khankah of some schools of sufis. They are attached to be the Khankah. "Urs" anniversary of the death of the saint was one of the necessary ceremonials. The feeding and maintenance of casual visitors to the Khankah was a necessary purpose. *Madadmash* to the saint means maintenance of the saint in the capacity of sajjadanashin. '*Ward Sadir*' and 'madadmash' for sajjadan ashin are valid objects of wakf as well as maintenance of a Khankah. (*iii*) That all of them were proper objects of a wakf under the Mahomedan Law, including the maintenance of the descendants of the saint. (*iv*) That all subsequent documents showed that the expenditure on charities was considered obligatory and that the keeping up of a sajjadanashin or manager did not depend upon the will of the shareholders. (*v*) That it was a public trust, even if it was not taken charge of under Reg. XIX of 1810. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I. C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Construction—Trust of certain property by Mahomedan—Sons appointed trustees—Condition that donor is to remain in possession for life and to be sole trustee during his lifetime with power to deal with rents and profits as he thinks fit—Effect of—Wakf—If created—Gift to sons, if valid—Delivery or transfer of possession—Family settlement.*

A deed executed by a Mahomedan, after setting out the intention of the execution (1) to make provision for a mosque and a *madrassa*, and (2) to make provision for his two sons, who had helped him in acquiring his fortune in business, and their families, provided that certain property of which he was possessed should become wakf for the benefit of the *musjid* and the *madrassa*. For the second object the executant set aside the rest of his property. In the operative part of the deeds, the executant purported thereby to convey to the trustees who were his two sons, the property set out in the schedule to the deed, subject to two conditions. On was to the effect, that during his lifetime he shall remain in possession of the trust property; the second provided that during his lifetime he shall be the "sole trustee of the trust fund and he shall have power to deal with the rents and profits there in such a way as he may deem reasonable."

Held (with respect to the remaining property set apart from the second object, to make provision for his sons), that during the lifetime of the executant both the legal and beneficial interest therein, in other words, both the dominion and the usufruct thereof were to remain in the executant who would retain possession of the property so long as he lived, and that only after his death would his sons be entitled as trustees to the legal estate in the property and also to the usufruct; (2) that no valid *wakf* was created in respect of such remaining property within the Mussulman Wakf Validating Acts of 1913 and 1930, because the ultimate benefit under the deed was not reserved either expressly or impliedly for the poor or for any other purpose recognized by the Mahomedan

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Law as a religious, charitable or pious purpose of a permanent character; (3) that the deed was invalid as a gift under the Mahomedan Law, because possession was not given or taken by the sons as trustees or donees either actually or constructively during the donor's lifetime, and because there was no transfer of possession under the Mahomedan Law, the donor having retained both the legal and equitable interest created under the deed; and (4) that the deed did not also create a family settlement valid in law, because the document was not brought into being for the purpose of settling a family dispute or effecting some compromise or settlement of family claims. The object and intention of the donor was to make a gift to take effect *in futuro* of certain property for the benefit of his two sons and their families. It was a gift, and the document purported to create a gift to such persons and nothing else; and (5) the direction in the deed that the trustees must insure and repair all the building described in the said schedule; imposes upon them a personal obligation to do so, and there is no charge upon the properties in the said schedule for the said purpose and the whole of the property subject to the deed is not made wakf on account of this provision. (*Page, C.J. and Mya Bu, J.*) PHUL BEE BEE *v.* R. M. P. CHETTYAR FIRM. **13 Rang. 679 = 156 I.C. 1038 = 8 R.R. 63 (2).**

Contingent wakf.

See also WAKF—BIL-WASIYAT, *infra.*

———*Wakf—Contingent wakf—Validity—Test.*

According to Mahomedan Law a contingent wakf is not valid. The dedication should be complete and should not depend on a contingency and the appropriation must at once be complete and not suspended on anything. The real test for deciding as to whether or no a particular wakf deed was good would be to see whether the dedication was complete at the time when it was made and not dependent on any contingent event, which may or may not happen, and the mere interposition of an estate would be no reason for saying that the religious appropriation would fail altogether. A stipulation in the valid wakf, therefore, that personal debts of the wakif should be paid out of the property before the income is applied for religious and charitable purposes is valid and the wakf does not become contingent by such a stipulation. 9 Cal. 176 and A.I.R. 1922 Cal. 429, Rel. on; 24 All. 231, Dist. (*Thom and Rachhpal Singh, JJ.*) KHALIL-UL DIN *v.* SRI RAM. **56 All. 293 = 6 R.A. 674 = 3 A.W.R. 190 = 148 I.C. 294 = A.I.R. 1934 All. 176.**

Creation of.

See also GRAVEYARD, *infra.*

———Wakf—Creation of—Appropriation of land to pious and charitable purposes sufficient though the word 'wakf' is not mentioned. *See* MEANING OF, *infra.* **11 Pat. 288 = A.I.R. 1932 Pat. 33.**

———*Wakf—Creation of—Authorisation to widow—Needs a clear language.*

It is an established principle of Mahomedan Law that a person who makes a wakf of a property must sever his connection from it so that from the date of the wakf it should pass into the ownership of God and be dedicated completely to the chariable or religious objects, for which the wakf has been created. A vague document not clearly specifying the powers conferred on a widow who was alleged to have been empowered to create a wakf cannot be the foundation of such a dedication. (*Addison and Agha Haidar, JJ.*) MT. BASHIRAN *v.* NAZAR ABBAS. **I.R. 1932 Lah. 327 = 137 I.C. 287 = 33 P. L.R. 31.**

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———*Wakf—Creation of—Divesting of ownership and delivery of possession necessary—Wakf of mosque—Special rules applicable to—Dedication inferred from long user.*

To create a wakf there must be a declaration of dedication which should be made contemporaneously with the act of dedication. The wakif must divest himself of the ownership of the property; physical delivery is not essential, but such possession as is possible must be given. But special rules apply where mosques ard dedicated as wakf. Where a building has been set apart as a mosque, it is enough to make it wakf if public prayers are once said there with the permission of the owner. Though a declaration of dedication and completion by some act giving practical effect to it are essential, it is not always necessary that there should be any direct evidence of these things. Dedication may be inferred from long user that property was wakf property (*Baker and Broomfield, JJ.*) SAIVAD MAHER HUSEIN *v.* HAJI ALIMAHOMED. **152 I.C. 50 = 7 R.B. 121 = 36 Bom.L.R. 526 = A.I.R. 1934 Bom. 257.**

———*Wakf—Creation of—Essentials.*

In order to constitute a valid dedication, there should be absolute and unconditional transfer of the property in the name of God. such transfer should be perpetual and there should be actual appropriation or complete divesting of the estate of the wakif and vesting thereof in God and also, in the case of creation of wakf *inter vivos*, there should be transfer of possession from the wakif to the mutwalli. (*Jai Lal and Skemp, JJ.*) BADRUL ISLAM ALI *v.* MT. ALI BEGUM. **16 Lah. 782 = 158 I.C. 465 = 8 R.L. 251 = A.I.R. 1935 Lah. 251.**

———*Wakf—Creation of—Essentials of—Validity.*

The word wakf literally signifies detention; technically it means a dedication in perpetuity of some property for a pious purpose or a succession of pious purpose. When a 'wakf' is made of a property, the proprietary right of the grantor is divested therefrom and it remains thenceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings and the subject of the dedication becomes inalienable and non-heritable in perpetuity. Where, however, property left by the ancestor is divided by the descendants as their private property in this way that they divide half of the property among themselves and set apart the remaining half for the expenses of a shrine placing the same under the management of a Sajjadanashin, one of the members of the family, with a condition that they would divide it subsequently in case of mismanagement or misappropriation on the part of the Sajjadanashin, the arrangement does not establish a permanent dedication of the property for any purpose recognised by the Mahomedan Law as religious, pious or charitable and there is no dedication of the property as wakf. (*Raza and Smith, JJ.*) HABIB ASHRAF *v.* SYED WAJIHUDDIN. **I.R. 1933 Oudh 272 = 144 I.C. 674 = 10 O.W.N. 214 = A.I.R. 1933 Oudh 222.**

———*Wakf—Creation of—Form.*

No particular form is necessary; a wakf may be construed from royal grants of properties made in favour of individual persons as long as it was for perpetual, religious, charitable or good purposes. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288 = I.R. 1932 Pat. 81 = 136 I. C. 417 = 12 Pat.L.T. 817 = A.I.R. 1932 Pat. 33.**

———*Wakf—Creation of—Graveyard — Entries in revenue papers.*

Where the entire plot was shown in the records as a graveyard but for the purposes of survey it was measured as a plot consisting of several parcels and the

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first of such parcels was again described as *qabrustan*, *held*, that the entire plot must be deemed to bear the same character. (*Hasan, C.J. and Kisch, J.*) NOOR MAHOMED *v.* BALLABDAS. 7 **Luck. 198=I.R. 1931 Oudh 406=134 I.C. 870=14 O.L.J. 390=8 O.W.N. 579=A.I.R. 1931 Oudh 293.**

———*Wakf—Creation of—Intention—Proof of—Subsequent events—Relevancy of.*

For a valid wakf, a *bona fide* intention to create a wakf is necessary. The intentions of the settlor have to be gathered primarily from the terms of the deed, though attendant circumstances may be looked into, if the intention is not apparent or clear from such terms and subsequent events also, but only if and so far as they throw any light on such intention. (*Mukerji and Bartley, JJ.*) SYED ZAINUDDIN HOSSIEN *v.* MOULVI MAHOMED ABDUR RAHIM. **140 I.C. 799=I.R. 1933 Cal. 46=58 C.L.J. 259=36 C.W.N. 972=A.I.R. 1933 Cal. 102.**

———*Wakf—Creation of no direction for any ultimate benefit to religious or charitable purposes.*

Where a person executed a wakfnama and placed the mutawalli in possession of certain properties but the deed did not contain any direction for any ultimate benefit to religious or charitable purposes,

Held, that valid wakf was not constituted. (*Srivastava, J.*) ABDUL QAVI *v.* MAHBOOB ALI. **6 Luck. 382=I.R. 1931 Oudh 83=129 I.C. 163=7 O.W.N. 1052=A.I.R. 1931 Oudh 133.**

———*Wakf—Creation of—Right of person not owner of property.*

A person who is not owner of any particular property cannot make a valid wakf. (*Zia-ul Hasan, J.*) EHSAN BEG *v.* RAHMAT ALI. **152 I.C. 798=7 R.O. 247=11 O.W.N. 1376=A.I.R. 1935 Oudh 47.**

———*Wakf—Creation of—Wakf created by will.*

A wakf can be made by a will, But the condition regarding transfer of possession cannot be complied with because the wakf has to take effect after the death of the testator and therefore the ownership and possession of property must remain with the testator. In such cases, a clear and unequivocal direction in the will dedicating specified property to God and vesting it in a mutawalli after the death of the testator for such objects as are recognized by the Mussalman Law as proper objects of a wakf is sufficient compliance with law. In addition to the bequest of such a nature in the will, an oral declaration by the testator that he had created a wakf in respect of the property or that after his death the property is to become wakf property is not necessary. Where in a will it was stated that a sarai was being constructed with the intention of wakf for the benefit of the general public, for the performance of certain religious ceremonies, and for the comfort of every man without any rent and it was further stated that it was excluded from the rights of relations, which was the same as "it is hereby excluded from the right of heirs" and in later clauses bequests were made of other properties, income whereof had to be applied to the serai and finally provision was made as to the management of the wakf property" in case of the failure of the male heirs of the testator's brother to carry out the wishes of the testator.

Held, that this amounted to an express declaration creating wakf in respect of the serai and other properties mentioned in the will to take effect after the death of the testator. It was not merely a statement of his intention but an express direction dedicating appropriation of the serai and the other property for the religious and charitable purposes mentioned in the will. (*Skemp*

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and Jai Lal, JJ.) BADRUL ISLAM ALI KHAN *v.* MT. ALI BEGUM. **16 Lah. 782=158 I.C. 465=8 R.L. 251=A.I.R. 1935 Lah. 251.**

———*Wakf—Creation of — Wakfnama registered—Transfer of possession, if necessary—Subsequent inaction of wakf—Effect of.*

A wakf is complete when the wakfnama is executed and registered, and no transfer of physical possession is necessary where the founder of the wakf is also the first mutawalli. The wakf once made cannot be invalidated by the subsequent inaction of the founder of the wakf nor by his mere assertion in a document that he has not acted upon the wakfnama since its registration. (*Hilton and Din Mohammad, JJ.*) MUHAMMAD SAID *v.* MST. SAKINA BEGUM. **16 Lah. 432=159 I.C. 250=8 R. L. 368=37 P.L.R. 772=A.I.R. 1935 Lah. 626.**

———*Wakf—Creation of—When becomes binding.*

According to Abu Yusuf whose tenets hold the field in Bengal, the wakf becomes absolute and binding on the mere declaration of the wakf, and on such declaration being made, his rights in the properties which form the subject matter of the declaration becomes extinguished at once. If it was at its inception a good wakf, it is wholly immaterial whether its provisions were carried out or not, for that is a matter of breach of trust only. (*Mukerji and Bartley, JJ.*) SYED ZAINUDDIN HOSSIEN *v.* MOULVI MAHOMED ABDUR RAHIM. **140 I. C 799=I R. 1933 Cal. 46=58 C.L.J. 259=36 C.W. N. 972=A.I.R. 1933 Cal. 102.**

———*Wakf—Creation of—Will.*

Under the Shiah law, as well as under the Sunni law, a valid wakf can be created by will. 25 A. 236 (P.C.), Ref. (*Wazir Hasan, C.J. and Kisch, J.*) MAHABIR PRASAD *v.* MUSTAFA HUSAIN. **8 Luck. 246=I.R. 1933 Oudh 62=141 I.C. 501=9 O.W.N. 750=A.I.R. 1933 Oudh 107.**

Cypres doctrine.

———Wakf—Cypres doctrine — Applicability. *See* VALIDITY OF, *infra*. **11 O.W.N. 1376.**

———*Wakf—Cypres doctrine—Applicability.*

The *cypres doctrine* applies only when the wishes of the maker of the trust are clear but cannot be carried into effect and cannot come into operation where the bequest is so indefinite that it is impossible to ascertain what were the wishes of the maker of the trust. (*Weld, J.C. and Milne, A.J.C.*) MAHOMEDALI *v.* LAKHMICHAND. **25 S.L.R. 415=I.R. 1931 Sind 44=130 I. C. 556=A.I.R. 1931 Sind 75.**

———*Wakf*—Cypres doctrine—*Applicability —Pious purposes—Funds earmarked for—Diversion to charitable purposes—Propriety of.*

The three-ninths share of the endowed properties was, it is true, earmarked for pious purposes but there is nothing in Indian Statutes or in Mahomedan Law which draws a clear cut distinction between religious or pious purposes on the one hand and charitable purposes on the other. In the absence of proof that payments made by way of charity to poor persons or by way of gratuities to servants who had put in years of service, that such payments made out of that three-ninths share had the effect of curtailing the expenditure for the pious purposes specifically mentioned in the deed of endowment, they cannot be called an improper diversion of the funds. (*Guha and Bartley, JJ.*) GHOLAM HOSSAIN SHAH *v.* SYED MUSLIM HOSSAIN. **150 I.C. 124=6 R.C. 759=58 C. L.J. 356=A.I.R. 1934 Cal. 348.**

Dedication.

See also GRAVE YARD, PROOF OF, TAKIA AND TOMB, *infra*.

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———Wakf—Dedication—Presumption from long user of building as mosque—Right to convert a *katcha* into a *pucca* building. *See* EASEMENTS ACT, S. 2 (*b*). **8 B. A. 59=1935 A.W.R. 1047=156 I.C. 942=A.I.R. 1935 All. 891.**

———*Wakf—Dedication—Succession from preceptor to disciple for thirteen generations.*

Where the property has descended for thirteen generations from preceptor to disciple to the exclusion of natural heirs,

Held, that it may be presumed to have been dedicated to religious uses, even if there was no positive evidence of its actual dedication and that such a presumption was not affected by the fact that in the revenue records the names of the Gaddinashins were shown in the column of 'owners' or by the fact that the property had been mortgaged once or twice by the incumbents as if it was their private property. 1 L. 540, Rel. on. (*Addison and Bhide, JJ.*) MIRAN BAKHSH *v.* GHULAM NABI. **14 Lah. 624=148 I.C. 1133=6 R.L. 645 =34 P.L.R. 482=A.I.R. 1933 Lah. 725 (2).**

Durga.

———*Wakf*—Durga—*Hereditary succession to duties and emolument by members of family—Arrangement as to turns as between groups in family—Settlement or assignment by members of group of rights and duties—Validity.*

Spiritual offices cannot be made the subject of transfer but the rule of public policy may not be applicable to the internal arrangements which a family of worshippers may make to provide for the distribution of religious worship among its members or groups of members. But an arrangement of turns of worship between the members of a group does not confer any transmissible right upon those members. The principle that a *mutawalli* under the Mahomedan Law may nominate his successor cannot safely be imported into the internal arrangements of a family with regard to worship in a shrine. And when it is proved that the rights in an endowment have been enjoyed hereditarily by the members of the family doing service in a *durga*, there is no room left for any member of any group disposing of those rights and duties by assignments and settlements even among members of the same group; and no distinction can be drawn between the duties to be discharged at the *durga* and the emoluments received either from the *durga* or from the endowment granted to the *durga*, although it may be open to the members of the group as a whole to effect a redistribution. (*Curgenven and K. S. Menon, JJ.*) HAKIM KHAN *v.* SAHIBJAN SAHIB. **159 I C. 694= 1935 M.W.N. 1257=8 R.M. 537=42 L.W. 689= A.I.R. 1935 Mad. 1040=69 M.L.J. 722.**

Evidence.

———*Wakf—Evidence—Land recorded as devasthan and partially exempt from assessment.*

The description of the land in record-of-rights as devasthan, and the fact that it has been partially exempted from payment of assessment from before 1874, are important items of evidence. But considered by themselves, they are far from being convincing. Devasthan properties are not necessarily public. There may be private as well as public wakfs and the revenue records do not always distinguish between them. (*Baker and Broomfield, JJ.*) SAIYAD MAHER HUSSEIN *v.* HAJI ALIMAHOMED. **152 I.C. 50=7 R.B. 121=36 Bom. L.R. 526=A.I.R. 1934 Bom. 257.**

Graveyard.

See also PROOF OF AND TAKIA, *infra.*

———*Wakf—Graveyard—Adverse possession by takiadar—What amounts to.*

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Takiadars commonly build huts or *kothris* on cemeteries for their private use and such building cannot be said to amount to the public assertion of a hostile title. The possession of a takiadar certainly starts as a permissive possession and the mere building of *kothris* on the land by the takiadar would not imply renunciation of the takiadar's permissive possession or the open and public assertion of a hostile title. But if a takiadar in possession of a graveyard sells a portion of it to some other person who builds a house and if the Mahomedan community are apathetic in the matter and allow the encroachment to remain for more than twelve years, then it might well be held that the person in possession had perfected his title by adverse possession for more than twelve years over the portion of the graveyard sold to him. But it could not further be held that the takiadars by asserting a right of adverse possession in respect of one portion of the graveyard has thereby perfected his title by adverse possession in respect of the whole graveyard. (*King, C.J.*) RAMZAN *v.* MOHAMMAD AHMAD KHAN. **1935 O.W.N. 96=A.I.R. 1936 Oudh 207.**

———*Wakf—Graveyard—Dedication—Inference from long user.*

It is well established that an express dedication is not necessary to create a wakf and that dedication may be assumed from long user, if it is clear that the intention of the owners was to make the dedication. Where the land in dispute has been used long and without interruption as a graveyard, the fact that the land was recorded as being in possession of the Muhammadan community and it was excluded from the area assessed to land revenue these facts are clear indications that the land was deliberately assigned by its owners for use as a Muhammadan graveyard. (*Coldstream, J.*) MEHAR DIN *v.* DR. HAKIM ALI. **157 I.C. 561=37 P.L.R. 570 and 653=A.I.R. 1935 Lah. 912.**

———*Wakf—Graveyard—Dedication—User.*

The user of a piece of land as a graveyard will establish dedication and the land thereby becomes wakf property and is inalienable. (*Hasan, C. J. and Kisch, J.*) NOOR MAHOMED *v.* BALLABH DAS. **7 Luck. 198=I.R. 1931 Oudh 406=134 I.C. 870=14 O.L.J. 390=8 O.W.N. 579=A.I.R. 1931 Oudh 293.**

[**D.** 11 O.W.N. 428 (430). **R.** 33 P.L.R. 768 (769); 8 O.W.N. 722 (724).]

———*Wakf—Graveyard—Dedication—Use of land as graveyard.*

Where a land has been used as a graveyard from time immemorial, a dedication of the land as wakf for this purpose is to be presumed and it is not necessary in such cases to prove dedication as wakf. (*Young, J.*) JHAO LAL *v.* AHMUDULLAH. **149 I.C. 966=3 A.W.R. 347 =1934 A.L.J. 248=6 R.A. 1006=18 R.D. 157=15 L.R. 179 (Rev.)=A.I.R. 1934 All. 335.**

———*Wakf—Graveyard—Mutawallis entered in record of rights as owners.*

The land forming part of a graveyard set apart for the Mahomedan community is by user from time immemorial wakf. The mere fact that the mutawallis are entered as owners in the settlement papers does not show that they were private owners and not mutawallis of the trust property. 40 Cal. 297 (P. C.), Rel. on ; 51 Cal. 446 (P.C.), Ref. (*Macnair, J. C.*) AZIZUDDIN MUSALMAN *v.* RAMZAN SHAH. **29 N.L.R. 100=6 I.R. (Nag.) 66 (2)=146 I.C. 82=A.I.R. 1933 Nag. 115.**

———*Wakf—Graveyard—Proof—Dedication—Use of plot as cemetery for forty years—But possession and enjoyment with other person—No presumption of dedication by user.*

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Under the Mahomedan Law a wakf is created by dedication but if a piece of land is found to have been used as a graveyard for such a long time that no direct evidence of initial dedication can be available, dedication by user can be presumed. Where, however, it has been found by the lower Court that the grove in dispute was neither the cemetery of their family nor had been used as a family graveyard from the time when their ancestors were proprietors of the village, and that, on the other hand, possession of the plaintiff over the grove had been satisfactorily established, he has been selling the fruit produce thereon and permitting the *riyayas* to take the wood of other trees, and the plot itself had been all along recorded in the village papers as grove.

Held, that the fact that the deceased had been burying the dead members of their family in the grove in suit during the last forty years was not sufficient, under the circumstances, to justify a presumption that it had become wakf property by user. (*Srivastava, J.*) BAQAR KHAN *v.* RAGHVINDRA PRATAP SAHI. **9 Luck. 568=6 R.O. 409=148 I. C. 433=11 O. W. N. 428=A.I.R. 1934 Oudh 263.**

———*Wakf—Graveyard—Public and private—Distinction—Alienability.*

Where land is part of a graveyard, it is wakf property and inalienable. There is no distinction in Mahomedan Law between a public and a private graveyard and it cannot, therefore, be argued that the graveyard is private and all the area which does not actually contain graves is private property and transferable. (*King, C.J.*) RAMZAN *v.* MOHAMMAD AHMAD KHAN. **1935 O.W.N. 96=A.I.R. 1936 Oudh 207.**

———Wakf—Public and private—Distinction—Long user—Dedication. *See* PROOF OF, *Infra.* **6 Luck. 452.**

Imambara.

———*Wakf—Imambara—If a public place of worship.*

An Imambara is not a public place of worship as is a mosque or a temple and it is common for a Mahomedan owner of a house to build a separate Imambara for the use of himself and the members of his family. Where there is no proof that members of the public are at liberty to place their own tazias in the Imambara or to convene a *majlis* therein at their own pleasure and the utmost that has been proved is that members of the public are allowed inside the Imambara when the defendants choose to hold a *majlis* or perform any other ceremony and throw the Imambara open to the public, the acts of the defendant in respect to the Imambara are not in any way inconsistent with the theory of private ownership. (*Niamatullah and Collister, JJ.*) MAHOMED YUSUF *v* MUHAMMAD SHAFI. **153 I.C. 344=7 R.A. 479=1935 A.L.J. 40=4 A.W.R. 878=A.I.R. 1934 All. 1013.**

Khankah.

See also CONSTRUCTION, *supra* AND TAKIA, *infra.*

———*Wakf—Khankah—Meaning of.*

The Khankah is a monastery or religious institution where *darveshes* and seekers of truth congregate for religious instructions and devotional exercises. It is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only acts as *mutawalli* or manager of the institution and of the adjoining mosques but also as the spiritual preceptor of the adherents. 50 I.A. 92, Ref (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Khankah — Takia — Recognition by Mahomedan religion.*

Khankahs and Takias and such like institutions do not come within the strict purview of Mahomedan Law and they are not recognized by the Mahomedan religion strictly interpreted. (*Addison and Din Mohammad, JJ.*) ALI SHAH *v.* FATEH MOHAMMAD. **159 I.C. 237=8 R.L. 365=A.I.R. 1935 Lah. 657.**

Management.

———*Wakf — Management* — Sajjadanashin *and manager—Separation of offices—Powers of Court.*

In preparing a scheme, the Court is not bound to follow either the terms of the grant if any or even the usage which has been in force so far. Thus though till date of suit, the offices of *sajjadanashin* and manager were held by one and the same incumbent, the Court may separate the offices, by appointing another person as manager in view of the incompetency of the present incumbent and allowing the *sajjadanashin* to continue as such till the beneficiaries choose to remove him. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

Meaning of.

———*Wakf—Meaning of—Creation of wakf.*

The term 'wakf' literally means 'detention' or 'stoppage' and the legal meaning of wakf according to the accepted doctrine of the Hanafi school is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind. The appropriation of land or other property to pious and charitable purposes is sufficient to constitute a wakf even though the word 'wakf' is not mentioned and there is no transfer of the property to God. (*Kaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

Modification.

———*Wakf—Modification by later deed—Permissibility.*

Where a Mahomedan executed a deed of wakf for the maintenance of himself and his *aulad* in respect of his entire property and the deed provided that if the wakif's line became extinct, the entire profits of the property were to go towards the propagation of Islam, and the education of the children of Moslems of *B* and the maintenance of the mosque at *B*. By a subsequent deed the wakif modified the gift and authorized a member of his family to appropriate the whole of the income and also gave her powers of alienation. The residents of *B* sued for a declaration that the subsequent deed was null and void.

Held, that the suit was competent. The plaintiffs who are residents of *B* are as such entitled to certain benefits from the provisions of the wakf deed relating to the education of their children and the maintenance of the mosque in the village. As they are deprived of these benefits, for the time being by the subsequent deed they are entitled to maintain the suit. The later deed imposes new conditions and introduces new provisions which are in direct contravention of the provisions contained in the earlier deed. (*Bisheshwar Nath and Nanavutty, JJ.*) NIAMATUL NISSA *v.* HAFIZUL RAHMAN **8 Luck. 482=I.R. 1933 Oudh 245=144 I.C. 473=10 O.W.N. 393=A.I.R. 1933 Oudh 261.**

———*Wakf—Modification under power reserved to wakif—Legality.*

If a provision is expressly made in a deed of wakf it is not open to the wakif to revoke it or derogate from it. But if he has deliberately deferred making provision

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on a particular subject to a future date and does make such provision, such provision should be considered to be part and parcel of the deed itself. (*Pullan and Niamatullah, JJ.*) ABDUL WAHAB *v.* SUGHRA BEGAM. **54 All. 455=I.R. 1932 All. 235=136 I.C. 619=1932 A.L.J. 171=A.I.R. 1932 All. 248.**

Mosque.

See also CREATION OF, *supra.*

———*Wakf — Mosque—Administration of mosque depends on personal law of parties.*

The method in which a mosque is to be administered has to be determined in accordance with the personal law of the particular parties before the Court. Where the personal law is Shiah law, it may be presumed that it is similar to the Shiah Ithna Ashari law unless the contrary is proved. Though every community has its own customs and usages to govern its actions, yet in regard to the administration of a mosque, the law enforced in British India relating to all Muslims is very nearly uniform. This uniformity can be infringed by evidence as to varying customs and usages. In order that the texts may be overridden by proof of custom and usages, the evidence must satisfy the Court that the majority at least of the given class of persons look upon the customary rule put forward as binding. This must be established by a series of well-known concordant and on the whole continuous instances, so that the common consent of the class in question is clearly demonstrated by the number of instances proved. (*Tyabji, J.*) AKBARALLY *v.* MAHOMEDALLY. **57 Bom. 551=138 I.C. 810=I.R. 1932 Bom. 434=34 Bom.L.R. 655=A.I.R. 1932 Bom. 356.**

———*Wakf—Mosque—Essentials—Necessity of Imam or other officer.*

The books speak of an open space of building ground being consecrated as a masjid. Nor it is necessary for the purpose of consecrating a place or building as a Masjid that there should be an Amil or any other religious officer appointed. It is better if there are such officers as an ordained Imam or Amil to lead the prayers, a Mu'azzin to call to prayers a Khatib to pronounce the Khutba, a Khadim to sweep the mosque and keep it clean. Other officers or ministers may also be attached to a mosque. These offices or services or ministrations may be filled or rendered by a larger or smaller number of persons. But the appointment of any specific person for the performance of these or similar duties is not necessary. Nor do the obligatory prayers or other devotional acts even in the mosque demand at any time or on any occasion the lead or intervention of an Imam or Amil or other religious or priestly officer. (*Tyabji, J.*) AKBARALLY *v.* MAHOMEDALLY. **57 Bom. 551=I.R. 1932 Bom. 434=138 I.C. 810=34 Bom.L.R. 655=A.I.R. 1932 Bom. 356.**

———*Wakf—Mosque—Mosque belonging to particular sect of Mussalmans—Right of exclusion.*

In the case of mosques belonging to a particular sect of Mussalmans, there can be a right of exclusion. 7 All. 178, Dist. (*Staples, A.J.C.*) MANSOORALI *v.* TAIYABALI MAHOMED ALI. **157 I.C. 302=8 R.N. 42=A.I.R. 1935 Nag. 156.**

———*Wakf—Mosque—Mosque is dedicated for specified purpos only.*

A mosque, from its very nature, is dedicated for worship and is open to all Muslims, local and others. It is dedicated for a specific purpose and not to the local Muslims for such benefit as they may choose to derive therefrom. They cannot of right claim to use it for any other purpose, however meritorious or beneficial it may be to the members of the local Muslim community.

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(*Niamatullah, J.*) SYED AHMAD *v.* HAFIZ ZAHID HUSSAIN. **153 I. C. 1095=7 R. A. 667=4 A.W.R. 461=A.I.R. 1934 All. 732.**

———*Wakf—Mosque—Person in charge claiming property as private—Removal.*

In Mahomedan Law there cannot be any private mosque. When once a place is dedicated to be a mosque, it becomes public property; it is property of God. Therefore where the person in charge of such a mosque claims the property as his private estate, he is removable under S. 92, C. P. Code. (*Middleton, J.C. and Saaduddin, A.J.C.*) AHMAD SHAH MUBARAK SHAH *v.* ATTA KHAN. **152 I.C. 323=7 R. Pesh. 49=A.I.R. 1934 Pesh. 57.**

———*Wakf—Mosque—Right of every sect to worship—Reservation of mosque to particular sect—Validity of.*

It is a well-recognized principle of Mahomedan Law that a mosque does not belong to any particular sect, and when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God in such a manner as subjects it to the rules of Divine property; the appropriator's right in it is extinguished, and it becomes the property on God by the advantage of it resulting to his creatures. A mosque once consecrated cannot in any case revert to the founder, and every Mahomedan has the legal right to enter it and perform devotion according to his own tenets, so long as the form of worship is in accord with the recognized rules of Mahomedan Ecclesiastical Law. Further, when a mosque is consecrated and it is purported to be reserved for the people of a particular locality or sect, the reservation is void and persons not belonging to that locality or sect are entitled to worship in it, for every person who believes in the unity of God and the mission of Muhammad as a prophet is a Mussalman to whatever sect he may belong. The Shiahs are undoubtedly Mussalmans and entitled to offer their prayers in a mosque, though not built on Shiah land, though they have not contributed to its building and though they have never said prayers there in the past. (*Jai Lal and Abdul Rashid, JJ.*) JIWAN KHAN *v.* HABIB. **14 Lah 518=6 I.R. (Lah.) 2=144 I.C. 658=34 P.L.R. 1096=A.I.R. 1933 Lah. 759.**

———*Wakf— Mosque —Right of worshipper—Suit against trespasser to recover property—Maintainability.*

A Mahomedan worshipper of a mosque is entitled to maintain an action against a trespasser to recover possession of the wakf property which has been misappropriated. (*Jai Lal, J.*) PIR BAKHSH *v.* MAHOMMED IBRAHIM. **I.R. 1932 Lah. 409=138 I.C. 69=33 P.L.R. 468=A.I.R. 1932 Lah. 394 (2).**

———*Wakf—Mosque—Trust for Dawoodi Borahs—Clause in scheme to empower the Mullaji Saheb as sole Amin to manage and regulate services—Permissibility.*

Where a decree in a scheme suit declared that the entire mosque was the subject of a trust for Dawoodi Borahs, with a Board of Trustees to supervise the same, a clause in the scheme to the effect that 'His Holiness the Mullaji Saheb of Dawoodi Borah community shall be the sole Amin and have the sole right to manage, control and regulate the conduct of the religious services and prayers to be performed thereat' is not permissible, in the absence of proof of a binding practice and usage in the community to that effect. That would, in effect, be setting up an authority independent of the trustees and adequate safeguards for the right of all members of the community to pray and offer devotions at the mosque are far more important than a provision for the attendance of an Imam or Amil clothed with plenary powers of excluding particular forms of prayer or mem-

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bers of the community. (*Tyabji, J.*) AKBARALLY *v.* MAHOMEDALLY. **57 Bom. 551=I.R. 1932 Bom. 434 =138 I.C. 810=34 Bom. L.R. 655=A.I.R. 1932 Bom. 356.**

Mulla.

———*Wakf—Mulla—Appointment of—Nass-Jali and Nass-E-Khafi—Distinction between, stated.*

Nass-Jali is an open and clear appointment which leaves no doubt, but Nass-E-Khafi is only a hint or indication of an appointment. Where the person to be appointed has been clearly indicated, the appointment would amount to Nass-Jali and not Nass-E-Khafi. Nass E-Khafi would only be where there is a hint or ambiguous statement insufficient to show clearly the person to be appointed. (*Staples, A.J.C.*) MANSOORALLI *v.* TAIYABALI MAHOMED ALI. **157 I.C. 302= 8 R.N. 42=A.I.R. 1935 Nag. 156.**

———*Wakf—Mulla—Land attached to office of—Partibility.*

Under Mahomedan Law no right of inheritance attaches to an endowment. Each officer succeeds another by appointment. The Mulla's office is a religious one but there is no priestly class among Mahomedans. Mullagiri land is land assigned to the Mulla as remuneration for services useful to the village community has no special character, but is governed by the personal law of the holder and is partible. If it is an assignment by Government for the greater comfort of the Mahomedan community, it would not be a wakf or endowment, but on exactly the same basis as any other of these assignments such as the ones to Joshis or to carpenters and several other classes of village servants who enjoy them. (*Murphy and Wadia, JJ.*) MAKTUMSAB *v.* DADABHAI. **154 I.C. 684 (2)=7 R.B. 364=36 Bom.L.R. 1098= A.I.R. 1934 Bom. 495.**

[**D.** 37 Bom. L.R. 257 (259).]

Mutawalli.

———*Wakf—Mutawalli—Absence of—Suit for possession of property—Plaintiff suing in representative capacity—Right to decree.*

When there is no properly constituted mutawalli of the wakf property, it is justifiable to decree possession of the property in favour of the plaintiffs, who sue in a representative capacity on behalf of the Mahomedan community, because no one has a better title to possession than the plaintiffs. (*King, C.J. and Smith, J.*) MAHOMED ABID *v.* HAJI BAKSHU. **158 I.C. 916=8 R.O. 132=1935 O.W.N. 1149=A.I.R. 1936 Oudh 133.**

———*Wakf—Mutawalli—Alienation— Usufructuary mortgage by* mutawalli *—Validity.*

Under Mahomedan Law, a *mutawalli* who is a Shia may execute a usufructary mortgage of a wakf property. Such a mortgage, even if made without the previous sanction of the Court, is not void if made for a justifying necessity. Its validity depends on whether it was one which should have been sanctioned by the District Judge if an application had been made to him previous to its execution. A usufructuary mortgage executed by a *mutawalli* to pay off a simple mortgage over the wakf property is clearly a transaction which was intended to preserve the wakf property and therefore one which should have received the sanction of the District Judge. (*Bennet and Bajpai, JJ.*) AFZAL HUSAIK *v.* CHHEDI LAL. **57 All. 727=155 I.C. 791=7 R.A. 981=1935 A.L.J. 217=1935 A.W.R. 275=A.I.R. 1935 All. 792.**

———*Wakf*—Mutawalli—*Alienation of wakf property —Validity—Governing principles.*

The doctrine of protection of *bona fide* lender to a shebait or Mohunt under the Hindu Law cannot apply with the same force to a *mutawalli* under the Mahomedan Law. The powers of alienation of a *mutawalli* are no higher than those of an ordinary lay trustee. Where the old trustees had committed fraud in obtaining the sanction of the Court, the alienation cannot be binding on the succeeding trustees. The permission of the Court cannot mean that the Court guarantees repayment of the money which the purchaser may have paid to the seller in case the bargain falls through. The permission merely relieves the purchaser of the necessity to enquire. Where the trustees have a beneficial interest in the trust property, the lender should be deemed to have lent money to the trustees on their personal credit and not on the trust property. Alienations by previous *mutawallis* held to be unenforceable against their successors. (*Mukerji and Guha, JJ.*) SAILENDRA NATH PALIT *v.* SYED HADE KAZA MANE. **59 Cal. 586=I.R. 1932 Cal. 326 =137 I.C. 500=36 C.W.N. 193=54 C.L.J. 328= A.I.R. 1932 Cal. 356.**

[**Disc.** 1935 A.L.J. 217 (225).]

———*Wakf—Mutawalli—Alienation—Validity.*

The position of mutawalli of a mosque is not that of a trustee in the sense of the English Law. Any alienation effected by him cannot enure beyond his lifetime or the termination of his office as a mutawalli. An alienee may remain in possession for number of years, but on the death of the mutawalli who had alienated in his favour, his alienation comes to an end until and unless it is proved to have been effected for the legal necessity of the mosque. A.I.R. 1922 P.C. 123, Foll. (*Middleton, J.C. and Saaduddin, A. J. C.*) AHMAD SHAH MUBARAK SHAH *v.* ATTA KHAN. **152 I.C. 323=7 R. Pesh. 49=A.I.R. 1934 Pesh. 57.**

———*Wakf—Mutawalli—Appointment by congregation of locality.*

In the case of an institution confined to a particular locality such as the graveyard in a mohalla, the congregations of that locality can appoint a mutawalli. 10 Cal. 203, Rel. on. (*Hasan, C.J. and Kisch, J.*) DILAWAR HUSAIN *v.* SUBHAN KHAN. **136 I.C. 241=I.R. 1932 Oudh 97=8 O.W.N. 722=A.I.R. 1931 Oudh 375.**

———*Wakf—Mutawalli—Appointment of—Duty of Court—Wishes of founder.*

The Court is not bound to accept the wishes of the founder of the *wakf* in the choice of the trustee. Its primary duty is to consider the general interests of the general body of the public for whose benefit the trust is created. (*Sulaiman, Ag. C.J. and Bajpai, J.*) MUHAMMAD AHSAN ALI KHAN *v.* IBRAR HUSAIN. **I.R. 1931 All. 641=133 I.C. 401=1931 A.L.J. 1071 =A.I.R. 1931 All. 765.**

———*Wakf—Mutawalli—Appointment of—Mode of.*

A suit under S. 92 of the C. P. Code is not absolutely necessary in all cases of appointing a mutawalli. A Court has power to appoint a mutawalli in certain circumstances and if some mutawallis are living, a notice to them is necessary before appointing a mutawalli. (*Bhide, J.*) ELAHI BAKHSH *v.* MAHOMED GHAUNS. **I.R. 1933 Lah. 75=34 P.L.R. 81=141 I.C. 169 (2)=A.I.R. 1933 Lah. 27.**

———*Wakf—Mutawalli—Appointment of—Mode of— Mutawalli appointed by Committee under Religious Endowments Act*, 1863.

A mutawalli can under the Mahomedan Law be appointed by the creator of an endowment; he can be appointed or nominated by an outgoing mutawalli as his successor-in-office. The appointment of a mutawalli by a committee brought into existence under the Religious Endowments Act, 1863, is unknown to the Mahomedan Law. A mutawalli so appointed is only a servant of the

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Committee and cannot claim the rights of a mutawalli under the general Mahomedan Law. (*Guha and Bartley, JJ.*) GHOLAM HOSSAIN SHAH *v.* SYED ALTAF HOSSAIN. **61 Cal. 80=149 I.C. 1215=6 R.C. 735 =38 C.W.N. 214=58 C.L.J. 333=A.I.R. 1934 Cal. 328.**

———*Waki—Mutawalli—Appointment of—Mutawalli appointed by bhek or order—Appointment influenced by will of last mutawalli—Validity.*

Where succession in a khankah is regulated by and dependent on an election by the bhek or order and a person is appointed mutawalli accordingly, the appointment is valid even though it is influenced by the will of the deceased mutawalli. (*Addison and Din Mohammad, JJ.*) ALI SHAH *v.* FATEH MOHAMMAD. **159 I.C. 237=8 R.L. 365=A.I.R. 1935 Lah. 657.**

———*Wakf—Mutawalli—Appointment of—Preference of members of wakif's family.*

In the case of wakf, members of the family of the wakf ought to be given preference in appointment as trustees. Muslim law does not dread the management of wakfs being retained in the family of the wakf. But this does not mean that the descendants of the wakf have a hereditary right to be mutawallis or that they are protected from removal in case of mismanagement. They should be particularly careful in the administration of the trust and should utilise the funds only in accordance with the principles of Islam. (*Tyabji, J.*) MAHOMED HAJI HAROON KADWANI, *In re.* **59 Bom. 424 =156 I.C. 655=8 R.B. 20 (1)=37 Bom.L.R. 396= A.I.R. 1935 Bom. 254 (1).**

———*Wakf—Mutawalli—Appointment of—Principles—Female, if can be appointed.*

A Court which is called upon to appoint a mutawalli for a Mahomedan *durga* might take into account the wishes of the founder, but subject to that no party has any absolute right to be appointed to the office; the Court must make the appointment in the best interests of the institution. The words "*Naslan bad naslan*" and "*Batnam bad batnam*", when used in a wakfnama in prescribing the line of devolution of the office of mutawalli mean "generation to generation" and do not exclude descendants through females from succession to the said office. Females are not necessarily excluded from appointment to such office, though ordinarily when a competent male is available, it is not desirable to appoint a female as a mutawalli. (*Ramesam and Jackson, JJ.*) SYED MAHOMED GHOUSE *v.* SAYABIRAN SAHIB. **156 I.C. 757=8 R.M. 47=1935 M.W.N. 666 (2)=41 L. W. 498=A.I.R. 1935 Mad. 638=68 M.L.J. 684.**

———*Wakf—Mutawalli—Claim of beneficiary against—Right to interest.*

In a suit by a beneficiary under a deed of wakf against the mutawalli for the payment to her of her share of profits, the payment of which had been unreasonably delayed,

Held, that the plaintiff was entitled to interest on the amount of his claim on "equitable" ground. The mutawalli, though not a trustee, stands in respect of his obligations, in the position of a *quasi trustee*. 40 All. 497 (P.C.); 38 All. 581 (P.C.); 57 M.L.J. 662 (P.C.), Ref. (*Mukerji, A.C.J. and Bennet, J.*) KISHWAR JAHAN BEGAM *v.* ZAFAR MOHAMMAD KHAN. **55 All. 164= 6 I.R. (All.) 322=146 I.C. 733=1933 A.L.J. 21= A.I.R. 1933 All. 186.**

———*Wakf—Mutawalli—Distinction between private and public wakfs—Status of mutawalli in private wakf.*

The estate in the wakf property is in God after the creation of a public wakf; but in the case of a private

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wakf, the estate vests in the beneficiaries. In case of private wakfs the mutawalli is practically speaking the owner, with one limitation and that is, that he cannot make a transfer of the wakf property. But in every respect his position is the same as that of an owner. A mutawalli holding a property in the case of private wakf cannot be said to be a mere manager or a superintendent. A manager holds the property during the pleasure of the proprietor. But the mutawalli in private wakfs holds the property during his life. After his death mutawallship will go to his legal heirs. If there are several heirs, they will all be entitled to the profits of the wakf estate. The mutawalli in the case of a private wakf would not be accountable to any outsider in respect of the income of the wakf property. (*Thom and Rachhpal Singh, JJ.*) MOHAMMAD QAMAR SHAHKHAN *v.* MAHOMED SALAMAT ALI KHAN. **55 All. 512=147 I.C. 926=6 R.A. 583=14 L.R. 450 (Rev.)=17 R.D. 593=1933 A.L.J. 685=A.I.R. 1933 All. 407.**

———*Wakf—Mutawalli ekrarnama disposing of properties of the trust—Minor taking benefits under—Estoppel—Right to sue for the properties as mutawalli.*

Though by reason of having accepted certain benefits under an *ekrarnama* wrongfully disposing of properties belonging to a wakf, a minor may be estopped from questioning the validity of the *ekrarnama* in his personal capacity, it does not preclude him in the capacity of mutawalli, to sue for the recovery of the properties of the endowment wrongfully disposed of under the *ekrarnama*. (*Mukerji and Bartley, JJ.*) SYED ZAINUDDIN HOSSIEN *v.* MOULVI MAHOMED ABDUR RAHIM. **140 I C. 799=I.R. 1933 Cal. 46=58 C.L.J. 259=36 C. W.N. 972=A.I R. 1933 Cal. 102.**

———*Wakf—Mutawalli—Office of—Nature of—Power to nominate successor.*

In the absence of any provision in the wakfnama, the office of a mutawalli is neither heritable nor transferable. A mutawalli has only power to nominate his successor in death-bed, but he has no right to appoint his successor in his own lifetime and in health and withdraw from the management of the wakf or transfer or assign his office during his lifetime and while in good health, unless his powers are "general" or as the authorities put it "unless the consignment was made to him in a general manner". That is to say, such appointment or transfer is valid only when the appointing mutawalli or the mutawalli who is transferring his office had been given at the time of his appointment either by the wakif or the kazi, the power of transferring the trust to another and substituting that other in his own place by a sanadi wakf or wasiat, should necessity arise for it. 37 Cal. 263, Relon. (*Mitter, J.*) MOHAMMAD SOLEMAN *v.* TASADDUQ HOSSAIN. **158 I.C. 544=8 R.C. 192=A.I.R. 1935 Cal. 623.**

———*Wakf—Mutawalli—Position of—If a trustee—Vesting of property.*

Under the Mahomedan Law, the moment a wakf is created, all *rights* of property pass out of the wakif and vest in God Almighty. The curator, whether called mutawalli, sajjadanashin or mujawar, or by any other name, is merely a manager of the wakf. He is not a "trustee" in the technical sense as understood in the English system, nor is any property belonging to the wakf "vested" in him. (*Sir Lancelot Sanderson,*) ALLAH RAKHI *v.* SHAH MAHOMED ABDUR RAHIM. **61 I.A. 50=56 All. 111=6 R.P.C. 80=147 I.C. 887 =38 C.W.N. 400=3 A.W.R. 387=11 O.W.N. 297= 39 L.W. 421=36 Bom L.R. 408=1934 M.W.N. 258 =59 C.L.J. 157=1934 A.L.J. 466=A.I.R. 1934 P.C. 77=66 M.L.J. 431 (P.C.).**

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———*Wakf — Mutawalli—Powers — Modification of provision for servants.*

If the pay or pension of servants is made a valid object of wakf it is not open to any mutawalli to interfere with it by reducing the amount fixed. (*Pullan and Niamatullah, JJ.*) ABDUL WAHAB *v.* SUGHRA BEGAM. **54 All. 455=I.R. 1932 All. 235=136 I.C. 619=1932 A.L.J. 171=A.I.R. 1932 All. 248.**

———*Wakf—Mutawalli—Removal of—Breach of trust—Negligence to repair.*

If a mutawalli, with funds in his hands, neglects to repair the wakf premises and allows it to fall into disrepair, it amounts to a breach of trust, for if he knowingly and intentionally causes damage or loss to the wakf, or if he misdeals with the trust property, he must be removed from his office. The rule is applicable also to those mutawallis who are also Sajjadanashins. (*Dhavle and Saunders, JJ.*) NAJIUDDIN AHMED *v.* AMIR HASAN KHAN. **153 I.C. 557=7 R.P. 361=A.I.R. 1934 Pat. 443.**

———*Wakf—Mutawalli—Removal—Grounds—Arresting hostile title in himself.*

The denial by a mutawalli of the wakf character of the property and his setting up an adverse title to it in himself are sufficient to render him an unfit person to continue in office. 72 I.C. 803 and A. I. R. 1924 Lah. 107, Ref. (*Broadway and Johnstone, JJ.*) FAZLA *v.* ZAIN-UL-AB-DIN. **13 Lah. 162=I.R. 1931 Lah. 488=131 I.C. 632=32 P.L.R. 400=A.I.R. 1932 Lah. 359.**

———*Wakf—Mutawalli—Rights of mutawalli and of beneficiaries.*

A "wakf" property is not vested in the "mutawalli" but the latter is the only individual who has the right of administration vested in him; and so long as he is in charge of the "wakf" property, no outsider has any right of interference. Therefore it is open to the mutawalli to throw open the wakf property for purposes other than those originally intended by the wakf provided that they do not conflict with and in no way prejudice the latter, but he cannot be compelled to do so by those claiming to be the beneficiaries. For, the beneficiaries are entitled merely to participate in the benefit arising from the "wakf" but they cannot arrogate to themselves the right of setting up a committee to displace the authority of the "mutawalli." (*Niamatullah, J.*) SYED AHMAD *v.* HAFIZ ZAHID HUSAIN. **153 I.C. 1095=7 R.A. 667=4 A.W.R. 461=A.I.R. 1934 All. 732.**

———*Wakf—Mutawalli—Succession — Custom and practice—Right of choice—Death-bed nomination not necessary.*

The correct method of ascertaining the succession to a *gadi* is to consider the custom and practice followed in the family or durgah, such practice being proved by testimony. The practice is regulated by the practice of the particular durgah and the neighbouring durgahs, such family practices being taken as indicative of the wishes of the original founder. The eldest son, if qualified, is the natural successor of the father. But where there is evidence of a power of selection the actual observance of seniority even in a considerable series of succession cannot of itself defeat the custom which establishes the right of free choice. Nor is there any rule of law requiring death-bed nomination in case of succession to *gadi*. 19 Cal. 203; 36 Bom. 308; 4 Lah. 15 (P.C.) and 12 M.I.A. 523 (P.C.), Rel. on. (*Wild, J.C. and Aston, A.J.C.*) ZIADIN SHAH *v.* AHSAN SHAH. **25 S.L.R. 511=135 I.C. 260=I.R. 1932 Sind 20=A.I.R. 1931 Sind 128.**

———*Wakf—Mutawalli—Succession—Custom—Proof of.*

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A custom that the office of mutawalli should devolve from eldest son to eldest son or by any other rule of inheritance is opposed to general Mahomedan Law and must be supported by strict proof. 13 Bom. 555, Ref. (*Wild, J.C. and Aston, A.J.C.*) ZIADIN SHAH *v.* AHSAN SHAH. **25 S.L.R. 511=135 I.C. 260=I.R. 1932 Sind 20=A.I.R. 1931 Sind 128.**

———*Wakf—Mutawalli—Succession to office—Rule of—Nomination—Minor.*

No right of inheritance to the office of mutawalli is recognised by Mahomedan Law; the succession is by nomination. The mutawalli may appoint his successor on his death-bed. Where the nomination of a successor was challenged on the grounds that the mutawalli ultimately recovered and that the nominee was a minor on the date of his nomination.

Held, that the first defect was cured by the conduct of the late mutawalli who up to the time of his death treated the nominee as his successor; the second by the nominee having in the interval reached the age of fifteen which was the age of majority. (*Nelson, R.M.*) NIZAMALIKHAN *v.* NAWAB KHAN. **16 N.L.J. 133.**

———*Wakf—Mutawalli—Succession to office—Rules governing—Nomination more according to Sufism than election.*

The question of succession to the office sajjadanashin and mutawalli is usually determined by the direct evidence of a deed of endowment, if any or in the absence of any such document, by the usage of the particular institution. In determining the usage, one should approach the subject from the point of view of Sufism, its doctrines and its teachings and should not allow himself to be influenced by practices of certain modern institutions, the head of which is appointed by election and counting of votes. Sufism may be generally described as the process of purifying the human mind, by curing it of its baser passions, under the guidance of a spiritual preceptor. It is a process of self-discipline and self-control which leads man to the right path. The nomination by the existing sajjadanashin of his successor is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. So the practice of nomination is a more probable custom and more in accordance with Sufism than the practice of election of the successor by the general body of *murdis* and worshippers.

Held, on the evidence in the case, the succession to the office of sajjadanashin of the shrine in Mauza Begampura, Lahore, was regulated by nomination by the last incumbent followed by the formal installation by the electoral body after the death of the last sajjadanashin. (*Addison and Agha Haidar, JJ.*) GHULAM MAHOMED *v.* ABDUL RASHID. **14 Lah. 558=I.R. 1933 Lah. 528=144 I.C. 636=34 P.L.R. 868=A.I.R. 1933 Lah. 905.**

———*Wakf—Mutawalli—Suit to eject trespasser from wakf property—Parties—All mutawallis not impleaded—Effect.*

Where administration of a trust is vested in several persons they all form, as it were, one collective trustee and they must exercise the powers of their office jointly. If a suit has to be brought to recover trust property in the possession of trespasser, all must join as plaintiffs, and only such of them as refuse to join as plaintiffs must be made defendants; all the trustees must be parties to the suit. This principle applies to shebaits and mutawallis. Hence some of the mutawallis alone cannot maintain a suit for recovery of possession of wakf property in possession of a trespasser especially where the property is not admitted to be wakf property. *Luke* v. *South Kensington Hotel Co.*, 11 Ch. D. 121,

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Appl.; 8 Cal. 42 (P.C.); 5 C.L.J. 527 and 11 Cal. 338, Appr. (*Mitter, J.*) MOHAMMAD SOLEMAN *v.* TASADDUQ HOSSAIN. **158 I.C. 544=8 R.C. 192=A.I.R. 1935 Cal. 623.**

———*Wakf—Mutawalli—Transfer of office—Permissibility.*

It is an elementary principle of Mahomedan Law that the office of a sajjadanashin or a mutawalli of a religious endowment cannot form the subject of transfer by sale or mortgage. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN-I-ISLAMIA, PUNJAB. **12 Lah. 590=135 I.C. 56=I.R. 1932 Lah. 40=32 P.L.R. 867=A.I.R. 1931 Lah. 379.**

Nature of.

———*Wakf—Nature of—English and Muhammadan conceptions of trust—Distinction between.*

The distinction between an English trust for charitable and religious purposes and a Muhammadan wakf is more historical than legal. Wakf signifies the extinction of the proprietor's ownership in the thing dedicated and the detention of the thing in the implied ownership of God in such manner that the profits may revert to and be applied for the benefit of mankind. According to the English doctrine historically viewed a trust involves a double ownership and two estates, one legal and the other equitable. As under the English Law, the legal ownership is vested in a human being, he can transfer it subject to the obligation imposed thereon. Under the Mahomedan Law, while the ownership is vested in God, the mutawalli is his manager, he cannot transfer the corpus of the property. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Nature of—Property vested in the Almighty.*

In the case of a Mahomedan wakf the conception exists that wakf property is vested in the Almighty and not in the mutawallis who act merely as representatives and managers. The general principle applicable to Mahomedan wakf is the same as that applicable to the property of a Hindu idol. (*Bisheshwar Nath and Allsop, JJ.*) MUHAMMAD JAFAR *v.* MUHAMMAD TAQI KHAN. **9 Luck. 170=6 I.R. (Oudh) 76=145 I.C. 1003=10 O.W.N. 1163=A.I.R. 1933 Oudh 517.**

Object of.

———*Wakf—Object of—Charitable object—Provision for servants.*

A provision for the salary and pension of servants is a valid object of wakf. (*Pullan and Niamatullah, JJ.*) ABDUL WAHAB *v.* SUGHRA BEGAM. **54 All. 455=I.R. 1932 All. 235=136 I.C. 619=1932 A.L.J. 171=A.I.R. 1932 All. 248.**

———*Wakf—Object of—'Robat' in Mecca.*

The construction of a building in Mecca known as "robat" is a fit purpose for which a wakf can be validly made under Mahomedan Law. (*Tek Chand and Monroe, JJ.*) MAHOMED YUSUF *v.* MUHAMMAD SADIQ. **14 Lah. 431=I.R. 1933 Lah. 431=144 I.C. 271=34 P.L.R. 677 and 972=A.I.R. 1933 Lah. 501.**

Proof of.

See also GRAVEYARD, *supra.*

———*Wakf—Proof of—Income used for shrine—Dedication.*

Where there is nothing to prove that a certain property which was made a present of, to a spiritual guide was ever made wakf or set apart in perpetuity for any pious object by anybody the present must be taken to be in the nature of a personal gift to the spiritual guide and cannot be assumed to be a wakf. The mere fact that the income of the property has long been used for purposes of a shrine is not sufficient proof that it is endowed property. (*Srivastava and Zia-ul-Hasan, JJ.*) AHMAD ASHRAF *v.* MURTAZA ASHRAF. **154 I.C. 1023=7 R.O. 533=1935 O.W.N. 415=A.I.R. 1935 Oudh 299.**

———*Wakf—Proof of—Long user—Dedication.*

Where a plot of land is described as a Takia and has been used for many years as a place for burial by Mahomedans, whether they are members of one family or not, a presumption arises that there is a wakf by user and the property cannot be the subject of an alienation. In such a case there is no distinction between a public and private graveyard. (*Pullan, J.*) CHHUTKAO *v.* GAMBHIR MAL. **6 Luck. 452=I.R. 1931 Oudh 133=130 I.C. 117=7 O.W.N. 1159=A.I.R 1931 Oudh 45.**

[**F.** 7 Luck. 198 (203). **R.** 33 P. L. R. 768 (769). **D.** 11 O.W.N. 428 (430).]

———*Wakf—Proof of—Proof of intention—Conduct of settlor—Dedication.*

The intention of the settlor has to be inquired into in order to make out whether the wakf was real or not and for the purposes of such enquiry, facts and circumstances showing or suggesting that it was never intended to be acted upon are relevant. The conduct of the settlor himself at the time of the transaction as also his subsequent conduct, if it is merely in continuation of his conduct at the time and of a piece with it are relevant in such an enquiry. The question whether in fact the wakf was acted upon or not is not relevant except as a means of or by way of a step for determining that intention; in other words, if the intention that it should be operative is established, the fact that it was not acted upon by the settlor himself would not detract from its validity in the least, but would be only evidence of a breach of trust on the part of the settlor.

Held, on facts, that the wakf was not real but a sham transaction. (*Mukerji and Mallik, JJ.*) EBRATENNESSA BIBI *v.* DEBENDRA NATH SEN. **37 C.W.N. 892=150 I.C. 386=6 R.C. 844=A.I.R. 1934 Cal. 14.**

———*Wakf—Proof of—User—Dedication.*

It is a well-recognised principle of Mahomedan Law that a wakf may be established by the evidence of user. When a long period has elapsed since the origin of the alleged wakf, user can be the only available evidence to show whether the property is or is not wakf. Mausoleum of saint held on the evidence to be wakf. 27 P.R. 1913 (P.C.), Rel. on. (*Shadi Lal, C.J. and Walker, J.*) MEHRAJ DIN *v.* GHULAM MAHOMED. **12 Lah. 540=I.R. 1931 Lah. 940=134 I.C. 492=32 P.L.R. 276=A.I.R. 1931 Lah. 607.**

———*Wakf—Proof of—Usage.*

Usage can be taken into consideration in deciding whether there is a trust of a public nature. 53 Mad. 608; 40 Cal. 297; 11 I.C. 166 and 34 All. 468, Ref. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A I.R. 1932 Pat. 33.**

———*Wakf—Proof of—Wakif himself the mutawalli.*

The wakif himself may be the mutawalli and in such a case when a wakf *inter vivos* is made, there should be indication of change of possession from the wakif as original owner to himself as mutawalli; physical change of possession is not necessary, indeed in such cases that is not possible; but some overt act indicating the change of tenure of the property dedicated is sufficient, such as, for instance, mutation of names in the revenue records, mention of a deed or even actual user of the property for purposes of the wakf. (*Skemp and Jai Lal, JJ.*) BADRUL ISLAM ALI KHAN *v.* MT. ALI BEGUM. **16**

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Lah. 782=158 I.C. 465=8 R.L. 251=A.I.R. 1935 Lah. 251.

Public and private wakf.

———Wakf—Public and private wakf—Distinction between—Status of mutawalli. *See* MUTAWALLI, *supra*. **55 All. 512=A.I.R. 1933 All. 407.**

Religious office.

———*Wakf — Religious office — Asarai Sheriff—Woman, if disqualified.*

A woman is not disqualified from holding the office of Asarai Sheriff where the duties of the office are such as can be performed by a woman. (*Madhavan Nair, J.*) SYED ABDUL HAMEED SAHIB *v.* SYED UNNISSA BIBI. **152 I.C. 630=7 R.M. 264 (1)=41 L.W. 33=1935 M.W.N. 152=A.I.R. 1934 Mad. 692 (1)=67 M.L.J. 907.**

———*Wakf—Religious office*—Khademship — *Woman whether disqualified.*

A religious office can be held by a woman under the Mahomedan Law, unless there are duties of a religious nature attached to the office which she cannot perform by person or deputy and the burden of establishing that a woman is precluded from holding a particular office is on those who plead exclusion.

Quaere.—Whether females can hold the office *khadem* in a shrine. (*Mukerji, J.*) AMIRANNESSA BIBI *v.* HATEMALI KHAN. **6 I.R. (Cal.) 279=146 I.C. 919=37 C.W.N. 697=A.I.R. 1933 Cal. 739.**

Revocation.

———*Wakf—Revocation—Power in favour of settlor—Invalidity of wakf.*

The reservation of a power of revocation in a deed of wakf is inconsistent with the fundamental idea underlying a wakf, that fundamental idea being that the property is treated as vested, not in trustees, but in Almighty God, and therefore a power of revocation in favour of the settlor contained in a deed of wakf renders the deed void and it is immaterial that where there are two settlors the power of revocation is only in favour of one of them when both concur in giving such power. (*Beaumont, C.J. and Blackwell, J.*) ABDUL SATAR *v.* ADVOCATE-GENERAL OF BOMBAY. **143 I.C. 799=I.R. 1933 Bom. 286=35 Bom.L.R. 18=A.I.R. 1933 Bom. 87.**

Sajjadanashin.

See also MANAGEMENT, *supra*.

———*Wakf — Sajjadanashin — Duty to maintain accounts.*

Where certain property was directed to be in the possession of the "Sajjadanashin" for application of the income to the *urs* and *Dargah* and the expenses of the visitors and guests subject to the condition that the descendants of the founder should divide the same in case of mismanagement or misappropriation of the income by the Sajjadanashin,

Held, that it was the duty of the Sajjadanashin as trustee or agent to maintain accounts to show that he was rightly and properly spending the income of the wakf property upon the expenses of the *urs* and *Dargah*. (*Raza and Smith, JJ.*) HABIB ASHRAF *v.* SYED WAJIHUDDIN. **I.R. 1933 Oudh 272=144 I.C. 654=10 O.W.N. 214=A.I.R. 1933 Oudh 222.**

———*Wakf—Sajjadanashin — Mutawalli —Misconduct.*

It is grave misconduct even in a Sufisajjadanashin-mutawalli who spends money on gramophone records so as to fail to pay in time the road cess due on the trust properties. (*Dhavle and Saunders, JJ.*) NAJIHUDDIN AHMED *v.* AMIR HASAN KHAN. **153 I.C. 557=7 R.P. 361=A.I.R. 1934 Pat. 443.**

MAHOMEDAN LAW—Wakf.

———*Wakf—Sajjadanashin—Powers of—Right to control* mutawalli.

The status of a Sajjadanashin is higher than that of a *mutawalli*. He is the head of the institution and as such is not only the teacher of religious doctrines and rules of life but also the manager of the institution and the administrator of its charities. The mutawalli, on the other hand, is merely in charge of the secular affairs of the institution. He is a manager or superintendent, but has no beneficial interest in the endowment and is not connected with the preaching of religious doctrines. Subject to any agreement between them, the management of the properties by the mutawalli is subject to the supervision of the Sajjadanashin and in the exercise of the right of supervision, it is within the rights of the Sajjadanashin to inspect the accounts and to require the mutawalli to submit accounts or furnish necessary information and to issue suitable directions, when necessary. (*Bhide, J.*) SARDAR ALI SHAH *v.* GHENE SHAH. **I.R. 1933 Lah. 278=142 I.C. 847=A.I.R. 1933 Lah. 444.**

———*Wakf—Sajjadanashin—Removability.*

A sajjadanashin is removable if a proper case is made out. Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a sajjadanashin as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior of the sacred shrines and institutions is repugnant and undesirable. (*Khaja Mahomed Noor and Scroope, JJ.*) SHAH MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Sajjadanashin—Right to rents and profits.*

Sajjadanashin held entitled to take by way of remuneration the balance of the rents and profits of the Farrukhsiyari properties after defraying the costs of religious ceremonies, etc. (*Dhavle and Saunders, JJ.*) NAJIUDDIN AHMAD *v.* AMIR HASAN KHAN. **153 I.C. 557=7 R.P. 361=A.I.R. 1934 Pat. 443.**

———*Wakf — Sajjadanashin — Succession —Selection from descendants of founder.*

The office of a Sajjadanashin stands on a special footing: "he is not only a mutawalli but also a spiritual preceptor, and in him is supposed to continue the spiritual line (silsila)." This supposed continuity of the spiritual tradition must obviously be taken into account and, speaking generally, is much more likely to be secured by the selection of a properly qualified descendant of the founder than of a stranger of the family. (*Dhavle and Saunders, JJ.*) NAJIHUDDIN AHMAD *v.* AMIR HASAN KHAN. **153 I.C. 557=7 R.P. 361=A.I.R. 1934 Pat. 443.**

Subject-matter of.

———*Wakf—Subject-matter of—Promissory notes—Recognition of wakf for over 75 years—Income applied to charities—Validity.*

Whether Government promissory notes, being interest-bearing securities can or cannot be the subject of a dedication to God, which is an essential feature of every Mahomedan wakf, where the wakf of promissory notes has been recognized by the members of the family for three quarters of a century or more, and the income of the fund has been applied, at all events in the main, consistently to charitable purposes, the wakf is valid.

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(*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=6 Luck. 556=136 I.C. 385=I.R. 1932 P.C 81=36 C.W.N. 137=35 L.W. 118=1932 A.L.J. 663=8 O.W.N. 1378=62 C.L.J. 326=A.I.R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

Takia.

See also GRAVEYARD *supra.*

———*Wakf—Takia—Dedication to religious objects.*

In order to determine the religious character of a takia and before applying to it the incidents of a Musalman wakf one must, in absence of direct proof of dedication, take into consideration the early history of the institution and the existence of religious associations and a holy atmosphere about it and for this purpose the general setting in which the property claimed to be wakf is placed is of considerable importance. A.I.R 1924 Lah. 58, Ref. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN I-ISLAMIA, PUNJAB. **12 Lah. 590=135 I.C. 56=I.R. 1932 Lah. 40=32 P.L.R. 867=A.I.R. 1931 Lah. 379.**

———*Wakf—Takia—Grant to—Validity.*

Takia is itself an institution recognized by law and a grant or endowment to the same is as valid as wakf as to a khankah, a dargah or a mosque. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN-I-ISLAMIA, PUNJAB. **12 Lah. 590=135 I.C. 56=I.R. 1932 Lah. 40=32 P.L.R. 867=A.I.R. 1931 Lah. 379.**

———*Wakf—Takia—Khankah—Property attached.*

Takis and khankahs properly so called are religious foundations among the Mahomedans and the property attached to them is wakf and therefore tied up in the ownership of God. A.I.R. 1922 P.C. 123, Rel. on. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN-I-ISLAMIA, PUNJAB, **12 Lah. 590=135 I.C. 56=I.R. 1932 Lah. 40=32 P.L.R. 867=A.I.R. 1931 Lah. 379.**

[D. 33 P.L.R. 180 (181).]

———Takias—Recognition by Mahomedan religion—Not coming within the strict purview of Mahomed Law *See* KHANKAS *supra.* **A.I.R. 1935 Lah. 657.**

———*Wakf—Takia*—Takiadar, *Position of.*

A *takiadar* is not necessarily a duly constituted mutawalli. A person may take it upon himself to be a *takiadar*, in the sense that he takes charge of a graveyard, and concerns himself in its management, but it does not necessarily follow that he is a duly constituted mutawalli, or that he has any legal authority to manage the graveyard. (*King, C. J. and Smith, J.*) MAHOMED ABID *v.* HAJI BAKHSHU. **158 I.C. 916=8 R.O. 132=1935 O.WN. 1149=A.I.R. 1936 Oudh. 133.**

———*Wakf—Takia—Use by Muslims as graveyard for several years—Dedication.*

Where the takia in dispute contained the Muslim graveyard which constituted the bulk of the land and which had been in existence there from time immemorial and adjacent to which graveyards there was always a place for saying prayers funeral or otherwise and there also invariably existed a kotha to afford shelter to the Faqir who looked after the graves and the proprietary body thought it fit to divest themselves of the nominal ownership of the site underneath and to acknowledge the takia as the owner thereof, and the revenue authorities corrected the entries to end all future disputes and controversies.

Held, that the takia in suit was meant for the use of the Muslim community alone and was not open to use by the members of all communities and creeds and the mere fact that any wayfarer taking shelter in the kotha was not objected to by the faqir did not show that the proprietary body had some rights left with them. (*Addison and Din Mohammad, JJ.*) JANI *v.* BISHAN SINGH. **161 I.C. 173=8 R.L. 676=38 P.L.R. 349=A.I.R. 1935 Lah. 698.**

Tomb.

———*Wakf—Tomb of saint—Prayers offered—Uras held—Dedication may be presumed.*

Where for a considerable number of years the public have been offering prayers in a mosque close by a tomb of a Mahomedan saint, and an annual uras attended by persons belonging to Momin sect of Mahomedans has been regularly held, it must be presumed that the mosque and the tomb have been duly dedicated and have become wakf by user and that the presumption might fairly be extended to other buildings and land enclosed within a compound wall which might be regarded as appurtenant to the tomb. 40 Cal. 297 (P.C.) and 9 I.C. 358, Rel. on. (*Baker and Broomfield, JJ.*) SAIYAD MAHER HUSAIN *v.* HAJI ALIMAHOMED. **152 I.C. 50=7 R.B. 121=36 Bom.L.R. 526=A.I.R. 1934 Bom. 257.**

———*Wakf—Tomb—Suit for declaration about tomb on defendant's plot—Rights depend on evidence.*

A suit under O. 1, R. 8 of the C. P. Code, was instituted by the plaintiff as representatives of the Mahomedan community for a declaration that they are entitled to keep their shop in the fair held in a certain village that the defendants (Hindus) have no right to accept offerings, to make arrangments for the management of the Durga, etc. It was found that the defendants were the proprietors of the whole village including the plot on which the tomb existed.

Held, that the right of the plaintiffs to obtain any of the reliefs was not one arising out of any rule of law, Mahomedan or general law but that it rested on proof of usage and on the continuous exercise of it for a sufficiently long period of time, both of which were matters of evidence. (*Wazir Hasan, C. J. and Smith, J.*) RASOOL BAKHSH *v.* MANOHAR LAL. **151 I.C. 87=7 R.O. 82=11 O.W.N. 281.**

Trust.

———*Wakf—Trust other than.*

Trust, apart from wakf, is not unknown to the Muhammadan Law. It is known as '*amanat*' 11 I.C. 166, Diss. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33**

Validity of.

———*Wakf—Validity of—Bequest for "Khairayati".*

A bequest for "Khairyati" works is not a valid trust to which the Courts would give effect, 23 Bom. 725 (P.C.) and *Morice* v. *The Bishop of Durham*, (1804) 9 Ves. 399, Appl. In re *Willis*, (1921) 1 Ch. 44; 19 S.L.R. 220; 31 B.L.R. 155, and 1 Luck. 554, Ref.; A.I.R. 1930 Bom. 191 and 36 Bom. 111, Dist. 41 Bom. 111, Not foll. (*Wild. J. C. and Milne A.J.C.*) MAHOMED-ALI *v.* LAKHMI CHAND. **25 S.L.R. 415=I.R. 1931 Sind 44=130 I.C. 556=A.I.R. 1931 Sind 75.**

———*Wakf—Validity—Construction of house in ex-cemetery—Wakf of.*

When a private person builds a house in a cemetery closed for burial and makes a wakf of it, a wakf is constituted of the materials of the house, although no wakf of the land itself is created, because the land does not belong to him. But the house, having been built on wakf property without any right or authority, it cannot be allowed to stand, because a construction illegal at its inception cannot be allowed to continue in contraven

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tion of the original purpose of the wakf, *i.e.*, cemetery. It is quite within the range of possibility that the cemetery though closed at the time, may again be required or used for purposes of burial. (*Zia-ul-Hasan, J.*) EHSAN BEG *v.* RAHMAT ALI. **152 I C. 798=7 R.O. 247=11 O.W.N. 1376=A.I.R. 1935 Oudh 47.**

———*Wakf—Validity of—Dedication for recitation of Koran—Absence of charitable purpose.*

In order to create a valid wakf under the Mahomedan Law there must be a charitable object. Dedication of properties, the income of which is to be devoted to reading the Koran at a private tomb does not create a valid wakf; and the fact that the tomb over which the Koran is to be read is that of a descendant of the Prophet or a *Thangal* makes no difference. (*Beasley, C. J. and King, J.*) KUNHAMUTTY *v.* THONDIKODAN AHMAD MUDALIAR. **58 Mad. 204=154 I.C. 151=7 R.M. 413=1934 M.W.N 1338=40 L.W. 806=A.I.R. 1935 Mad. 29=68 M.L.J. 107.**

———*Wakf—Validity of—Direction in wakf to sell property and apply sale proceeds to wakf.*

It is well settled that a direction to the Mutawalli in the deed of wakf authorizing him to sell the dedicated property and apply the proceeds thereof in carrying out the purpose of a wakf is valid under Mahomedan Law. In such a case the sale of the property is not in contravention of, but is in accordance with, the terms of the endowment, and its object is not to defeat, but to carry out the purpose which the founder had in view. (*Tek Chand and Monroe, JJ.*) MAHOMED YUSUF *v.* MUHAMMAD SADIQ. **14 Lah. 431=I.R. 1933 Lah. 431=144 I.C. 271=34 P.L.R. 677 and 972=A.I.R. 1933 Lah. 501.**

———*Wakf—Validity of—Essentials of.*

The essentials of a valid wakf are: firstly, an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; secondly the appropriation must be at once complete; thirdly, there must be no stipulation in the wakf for sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity must be a necessary condition. It is not necessary for the word 'abad' (perpetual) should be mentioned or that the object in favour of which the dedication is primarily made should be of a continuing and permanent character. 10 Cal. 533, Foll. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat. L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Validity of—Gift to charitable objects illusory—Wakf executed in* 1906.

A wakf executed in 1906 before the Act VI of 1913 came into force, comprised a house worth about Rs. 40,000 and other properties with an annual income of Rs. 600. It provided for the payment of Rs. 158 as personal annuities, Rs. 112 for religious and Rs. 29 for charitable purposes annually and directed the balance to be spent on the repairs of a house in which the mutawallis were to reside.

Held, that the deed was not a valid wakf as the bulk of the income was not dedicated to charitable or religious objects but that a valid charge for the portion of the income dedicated to religious and charitable purposes was created. 54 I. A. 372; 17 I. A. 28; 22 I. A. 76; 27 All. 320, Ref. (*Niamatullah and Bennet, JJ.*) MOHAMMAD IRFAN ALI KHAN *v.* MOHAMMAD TAHIR ALI KHAN. **1933 A.L.J. 97=147 I.C. 173=6 R.A. 417=A.I.R. 1933 All. 277.**

———*Wakf—Validity of — Musha for mosque or burial ground.*

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Under Mahomedan Law, the wakf of a "musha" for a mosque or burial ground is not valid whether the property is capable of division or not. (*Ganga Nath, J.*) BADRUL HAQ RASHIDI *v.* SHAH HASAN AHMAD. **159 I.C. 37=8 R.A. 381=1935 A.W.R. 97=1935 A. L.J. 400=A.I.R. 1935 All. 278 (2).**

———*Wakf—Validity of—No provision for mutawallis in future generations—Fraction of income allotted for charity—Absence of ultimate gift—If valid as family arrangement.*

Where a wakf deed does not make any provision as regards mutawallis in future generations, and the object of the wakf is limited to certain individuals named and the charities exhaust a very small part of the income of the property and there is no provision that after the extinction of the line of the "wakf" the income of the property is to be spent for the benefit of the poor, the so called wakf is not a wakf in law at all. But if the document styled as a "wakf" is proved to be part of a family arrangement, the provisions contained therein are binding on the parties to the agreement. (*Niamatullah and Bajpai, JJ.*) LATIF-UN-NISSA *v.* NAJM-UD-DIN SHAH. **8 R.A. 12 (2)=1935 A.W.R. 1096=156 I.C. 609=A.I.R. 1935 All. 856.**

———*Wakf—Validity of—Omission to appoint mutawalli—Effect of—Shiah Law.*

According to the Shia Law, when a wakf is purported to be created but no mutawalli is appointed or nominated, the wakf takes effect and from the moment of the dedication, the wakf or the subsequent appropriation is transferred so as to become property of the beneficiaries and the wakif as such ceases to have any right in it and the founder has then no power to settle any scheme. (*Tek Chand, J.*) GHULAM ALI *v.* MAHOMED ALI. **I.R. 1933 Lah. 479=144 I.C. 467=34 P.L.R. 763=A.I.R. 1933 Lah. 342.**

———*Wakf—Validity of—Operation—Dedication of property—Title to part of property subsequently defeated—Effect.*

In August, 1912, one *M*, a Sunni Mahomedan, executed a deed of sale in respect of two villages in favour of his mother *R*. He died in September, 1912, and *R* made a wakf of both the villages in June, 1913. In December, 1917, by a judgment of Court the aforesaid sale was declared to be void with the result that *R* took nothing by the sale deed but was entitled as an heir of her son to one-third of the villages.

Held, that in determining what passed by the deed of wakf and in order to ascertain *R*'s intention in executing it, the whole transaction had to be looked at and since the sale was declared to be void the wakfnama fell with it and was inoperative even to the extent of the third share which *R* had acquired as her son's heir.

Quaere—Whether S. 8, T.P. Act, had any application to the case? (*Sir Dinshah Mulla.*) HAR PRASAD *v.* FAZAL AHMAD. **60 I A. 116=55 All. 83=37 L.W. 516=35 Bom.L.R. 496=I.R. 1933 P.C. 53=142 I.C. 217=1933 M.W.N. 291=37 C.W.N 490=1933 A.L. J. 331=A.I.R. 1933 P.C. 83=64 M.L.J. 514 (P.C.).**

———*Wakf—Validity of—Profits to widow forfeited on re-marriage.*

According to the Hanafi law, a wakf may be dedicated for the benefit of the widows of the sharers with the condition superadded that if any of them re-married, she would forfiet the profits under the wakf. The validity of such a provision is not affected by S. 26 of the Contract Act. (*Raza and Smith, JJ.*) LATAFAT-UN-NISSA *v.* SHAHARBANO BEGAM. **I.R. 1932 Oudh 354=139 I.C. 292=9 O.W.N. 105=A.I.R. 1932 Oudh 108.**

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———*Wakf—Validity of—Provision for maintenance of heirs—Fraction of income allotted for charity—Absence of provision regarding ultimate destination of income—Effect.*

The ultimate gift to religious or charitable purposes must be implied from the terms of the document and cannot be implied from the mere fact that the testator was purporting to make a wakf. Where a settlor directed that the dwelling-house should be used by himself and his heirs and as regards income from the properties, he directed that a specified fraction should be spent on charity, the remainder being spent on himself and his heirs but there was no provision as to the destination of the income after the failure of heirs,

Held, that the wakf was invalid both under the Mahomedan Law and under the Musalman Wakf Validating Act. (*Rankin, C. J and Pearson, J.*) TAHIRUDDIN AHMED *v.* MASIHUDDIN AHMED. **60 Cal. 901=147 I.C. 196=6 R.C. 298=37 C.W.N. 741=A.I.R. 1933 Cal. 716.**

———*Wakf—Validity of—Reservation of salary to mutawalli—Executant fixing larger allowance for himself than for successor.*

Where a wakf in making the distinction between himself and the succeeding mutawallis as to the salary to be taken by the mutawallis does not reserve to himself any portion of the profits but merely makes allowances for additional expense which would be incurred during his lifetime in carrying out the purposes of the wakf, the wakf is not invalid merely because the wakif as mutawalli has taken more salary for himself than that allowed to the successor. (*Pullan and Niamatullah, JJ.*) SALONA BIBI *v.* BU ALI KHAN. **I.R. 1932 All. 663=140 I.C. 479=1932 A.L.J. 855=A.I.R. 1932 All. 696 (2).**

———*Wakf—Validity of—Shiah Law—No ultimate disposition of property—Delivery of possession.*

Where in a deed of wakf, there is no ultimate disposition in favour of charity or any religious purpose and the effect of the document is to vest the residue of the property in the hands of the heirs of the executant, the wakf is void. Under the Shiah Mahomedan Law a deed of wakf is not valid unless possession has been given under it. 54 I.A. 33, Ref. (*Bisheshwar Nath and Pullan, JJ.*) ABUL HASAN KHAN *v.* RAJBIR PRASAD. **6 Luck. 614=I.R. 1931 Oudh 193=131 I.C. 433=8 O.W.N. 147=14 O.L.J. 291=A.I.R. 1931 Oudh 124.**

———*Wakf—Validity of—Some objects not legal.*

If there is a substantial dedication for a valid object it will not cease to be a wakf because some objects are mentioned which are not legal objects of wakf. The wakf will be valid and the whole income will be devoted for the valid purposes. The fixing of a proportion between the charitable and non-charitable objects is not necessary for its validity. 50 Cal. 329; 17 C.W.N. 1018; 34 Mad. 12; 40 Mad. 116 and 35 I.C. 880, Ref. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

———*Wakf—Validity of—Wakf-alal-aulad—Widow constituted the first mutavalli with annual salary.*

Under the Shiah law in order that a wakf may be valid it is necessary that there should be no reservation of interest in favour of the Wakif. But the special features of a wakf alal-aulad is that the members of the Wakif's family should be supported out of the profits of the wakf property. So where in pursuance of the directiotesh fon testator to his widow, she created such a wakf and constituted herself as the first mutavalli, the fact that she reserved to herself an annual salary, less than one tenth of the income of the wakf property will not invalidate the wakf. (*Wazir Hasan, C.J. and Kisch, J.*) MAHABIR PRASAD *v.* MUSTAFA HUSAIN. **8 Luck. 246=141 I.C. 501=I.R. 1933 Oudh 62=9 O.W.N. 750=A.I.R. 1933 Oudh 107.**

———*Wakf—Validity of—Wakf for benefit of poor relations and stated to be for charity—Endowment to charity not substantial—Effect.*

From a deed of wakf, it was evident that the wakf was created mainly for the benefit of the poor relations of the wakf. There was however a statement in the deed saying that the wakf was created in the name of God and for purposes of charity, but the endowment made for charitable purposes was found to be illusory and not substantial.

Held, that the document in its true nature represented family settlement in the garb of a wakf and the wakf is not valid. (*Mukerji and S.K. Ghose, JJ.*) SEKENDAR ALI MRIDHA *v.* SADARUDDIN BHUNIYA. **159 I.C. 1008=8 R.C. 373=40 C.W.N. 174=A.I.R. 1935 Cal. 792.**

———Wakf—Validity of—Wakf of rights of groveholder. *See* MUSSALMAN WAKF VALIDATING ACT, S. 2 (1). **1935 A.W.R. 1273.**

Wakf-bil-wasiyat.

———*Wakf—Wakf-bil-wasiyat—Nature of.*

A wakf-bil-wasiyat is a wakf made by the testator himself but suspended or contingent upon the death of the wakif. (*Wazir Hasan, C.J. and Kisch, J.*) MAHABIR PRASAD *v.* MUSTAFA HUSAIN. **8 Luck. 246=I.R. 1933 Oudh 62=141 I.C. 501=9 O.W.N. 750=A.I.R. 1933 Oudh 107.**

Wasiyat bil wakf.

———*Wakf of—Wasiyat-bil-wakf creation of—Direction by testator—Sufficiency of.*

Each case must be decided on its own facts and the Court must determine whether the words used are enough to create a wasiyat-bil-wakf. The main purpose of a wakf-alal aulad is well known to be to provide for the members of the wakif's family, with reversion for charitable or religious purposes on the extinction of the line of the beneficiaries. Where, therefore, the testator was an eminent lawyer, a direction by him that the wakf to be created was to be a wakf-alal-aulad is a sufficient direction as to the nature of the endowment that the testator had in contemplation. It gives the person entrusted with the creation of the wakf the power to draw up the details of the scheme and amounts to a valid wasiyat-bil-wakf. (*Wazir Hasan, C.J. and Kisch, J.*) MAHABIR PRASAD *v.* MUSTAFA HUSAIN. **8 Luck. 246=I.R. 1933 Oudh 62=141 I.C. 501=9 O.W.N. 750=A.I.R. 1933 Oudh 107.**

Miscellaneous.

———*Wakf—Miscellaneous—"Fakir" and "khadim"—Meaning.*

The word "fakir" does not mean a beggar but a religious man who devotes his life to meditation and spiritual exercises. Nor does the word "khadim" mean a servant, it is a mode of describing the peculiar relationship which exists between a spiritual preceptor and his disciple. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN-I-ISLAMIA, PUNJAB. **12 Lah. 590=135 I.C 56=I.R. 1932 Lah. 40=32 P.L.R. 867=A.I.R. 1931 Lah. 379.**

———*Wakf—Miscellaneous—"Raddimazalim" fund.*

The "raddimazalim" fund is an endowment, partly public and partly private, for religious and charitable

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purposes and hence the Trusts Act (1882) will not apply to it. 3 Luck. 521, Rel. on. (*Smith, J.*) MAHOMED SADIQ ALI KHAN *v.* KAZIM ALI KHAN. **9 Luck. 507=150 I.C. 193=6 R.O. 619=11 O.W.N. 323= A.I.R. 1934 Oudh 118 (2).**

Will.

———*Will—Absolute estate — Condition restricting right of transfer—Validity.*

Where by a will an absolute estate was created coupled with a condition that the person taking under it should not transfer the property, the restraint against alienation is void. (*Mosely and Dunkley, JJ.*) MA HMYIN *v.* P. L S. A. R. S. CHETTYAR FIRM. **158 I.C. 848=8 R R. 224=A.I.R. 1935 Rang. 318.**

———*Will—Absolute estate to one heir—Consent of others under mistake of law.*

Where a bequest is made of an absolute estate to one of the heirs and the others have consented to it under a mistake of law, their consent is not vitiated by reason that it was caused by a mistake of law and the bequest takes effect. (*Mosely and Dunkley, JJ.*) MA HMYIN *v.* P L.S.A.R.S. CHETTYAR FIRM. **158 I.C. 848=8 R.R. 224=A.I.R. 1935 Rang. 318.**

———*Will—Bequest to heir—Sunni and Shia Law.*

Under the Sunni Law, a bequest by a testator in favour of one of his heirs is not valid, unless it is consented to by the other heirs after his death, and under the Shia Law, a bequest by a testator in favour of one of his heirs in excess of one third of the estate of the testator is invalid unless it is likewise assented to by the other heirs after his death. (*Rupchand, A.J.C.*) HAVATUDDIN *v.* MT. RAHIMAN. **159 I.C. 427=8 R.S. 80=A.I.R. 1935 Sind 73.**

———*Will—Bequest to heir—Validity—(Hanafi Law).*

Under the Hanafi law, a bequest to an heir is invalid unless assented to by the other heirs after the testator's death. (*Sir George Lowndes.*) GHULAM MAHOMED *v.* SHAIKH GHULAM HUSAIN. **59 I.A. 74=54 All. 93=136 I.C. 454=I.R. 1932 P.C. 118=1932 A.L.J. 245=34 Bom.L R. 510=55 C.L.J. 470=35 L.W. 464 =9 O.W.N. 399=36 C.W.N 310=A.I.R. 1932 P.C. 81=62 M.L.J. 371 (P.C.).**

———*Will—Bequest to heir—Validity — Consent — Effect of—Hanafi Law.*

Under the Hanafi school of Mahomedan Law, bequest to persons who are heirs on intestacy are invalid; but such invalidity is cured by the consent of the heirs. (*Sir John Wallis.*) ABDUL LATIF KHAN *v.* MT. ABADI BEGAM. **61 I.A. 322=9 Luck 421=7 R.P. C. 14=150 I.C. 810=11 O.W.N. 977=60 C.L J. 329 =A.I.R. 1934 P.C. 188=67 M.L.J. 894 (P.C.).**

———*Will—Bequest to heirs—Validity of—Consent of other heirs necessary,*

Under Mahomedan law the power of testamentary disposition of a Mahomedan is very much restricted, and when exercised in favour of heirs the consent of the other heirs is a necessary requisite. (*Sulaiman, C J. and King, J.*) MATULAB HASAN *v.* MT. KALAWATI. **147 I C. 302=6 R A. 472=A.I.R. 1933 All. 934.**

———*Will—Bequest to heirs and stranger—Extent.*

A bequest to an heir is not valid unless the other heirs consent thereto after the death of the testator. A bequest in favour of a stranger, however, will take effect to the extent of one third of the estate unless the heir consented to the whole of the bequest after the death of the testator. (*Shadi Lal, C.J. and Abdul Qadir, J.*) MT. GHULAM JANNAT *v.* RAHMAT DIN. **15 Lah.889=158 I.C. 33 (2)=7 R.L. 378=35 P.L.R. 450=A.I.R. 1934 Lah. 427.**

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———*Will—Bequest of more than one-third—Validity of—Consent of other heirs—Necessity for—(Shiah Law).*

Under the Shiah Law, a testator may leave a legacy to an heir so long as it does not exceed one-third of his estate. To that extent it will be valid without the consent of the other heirs but if it exceeds one-third it is not valid unless the other heirs consent thereto. Such consent may be given either before or after the death of the testator. (*Shadi Lal, C.J. and Abdul Qadir, J.*) MT. NAZO BIBI *v.* HASSAN ALI KHAN. **I.R. 1933 Lah. 514=144 I.C. 610.**

———*Will—Bequest to non-heir—Extent.*

A grandson whose father has died in the lifetime of the testator is a non-heir when he co-exists with a son of the testator and a bequest to him not exceeding a third is valid under the Mahomedan Law. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **150 I.C. 330=6 R.O. 635=10 O.W.N. 201= A.I.R. 1933 Oudh 142.**

———*Will—Consent of heirs—Time for—Subsequent repudiation—Effect of—Prior repudiation and subsequent consent—Validity of.*

Under the Shiah law, the consent of the heirs to testamentary dispositions of property exceeding one-third of the testator s estate may be given either before or after death. If the consent was given at the time of the will, the subsequent repudiation by the heirs cannot invalidate the dispositions. On the other hand, even where the heirs have repudiated the will, there is nothing to preclude such repudiation from being withdrawn; subsequent consent given after previous repudiation is not invalid. (*Wazir Hasan, C.J. and Kisch, J.*) MAHABIR PRASAD *v.* MUSTAFA HUSAIN. **8 Luck. 246= 141 I.C. 501=I.R. 1933 Oudh 62=9 O W.N. 750= A.I.R. 1933 Oudh 107.**

———*Will—Construction—Bequest of property for maintenance of disciples and slaves—Effect of—Legatee if only a trustee or a beneficiary—Wakf.*

A Sunni Muhammadan by his will declared that his elder son (the defendant) "shall remain in proprietary possession" of the property in suit " for the maintenance of disciples and female slaves".

Held, that the effect of the will was not to constitute the defendant a bare trustee but it conferred a beneficial interest in a part of the testator's estate upon the defendant, who was one of his heirs, and as the other heirs were not shown to have consented to the bequest after the testator's death, the will was invalid under the Hanafi School of Mahomedan Law, and that, on the construction of the will, the setting aside of the property in suit for the maintenance of slaves and dependents was not tantamount to the creation of a wakf, there being nothing in the will that could be regarded as a gift of the ultimate residue to charitable purposes. (*Sir George Lowndes.*) GHULAM MAHOMED *v.* SHAIKH GHULAM HUSAIN. **59 I.A. 74=54 All. 93=136 I.C. 454=I.R. 1932 P.C. 118=1932 A L.J. 245=55 C.L. J. 470=34 Bom.L.R. 510=35 L.W. 464=9 O.W.N. 399=36 C.W N. 310=A.I.R. 1932 P.C. 81=62 M.L. J. 371 (P.C.).**

———*Will—Construction—Direction to pay remuneration to executrices—Validity.*

A Mahomedan belonging to the Sunni sect directed his will that each of two executrices (wife and daughter) was to be paid out of the property of the deceased Rs. 400 per month, after the death of the deceased, in lieu of their services as long as the property was administered.

Held, that it was a gratuitous bequest and not a debt, and being payable to heirs, could only be rendered valid by consent of the other heirs, which need not, however,

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be express; and that the direction to pay it out of the property of the testator, made it payable out of the corpus of the estate, it being a valid gift, and not a gift *in futuro*. (*Wadia, J.*) MAHOMED HUSSEIN *v.* AISHABAI. **155 I.C. 334=7 R.B. 426=36 Bom.L.R. 1155=A.I.R. 1935 Bom. 84.**

———*Will—Executor—Power of alienation—Intention of testator.*

The mere fact that the testator intended that the property should not be divided till the minor sons of the testator attained the age of twenty-one years does not give rise to the inference that the testator intended to impose any restriction on the power of alienation of the executor. (*Patkar and Broomfield, JJ.*) AHRONEE SHEMAIL *v.* SHEIKH AHMED OMER. **135 I.C. 817=I.R. 1932 Bom. 129=33 Bom.L.R. 1056=A.I.R. 1931 Bom 533.**

———*Will—Executor—Powers of alienation—Mortgage—Validity.*

Though according to the Mahomedan Law, a Mahomedan cannot dispose of by will more than one-third of the property after payment of his debts and funeral expenses and the remaining two-thirds must go to his heirs unless the heirs consent to the provisions of the will, the matter is now governed by S. 211 of the Succession Act, under which the property of the testator vests in the executor and can be sold and conveyed by him under S. 307 of the Act if there is no restriction by the will on his power of alienation. (*Patkar and Broomfield, JJ.*) AHRONEE SHEMAIL *v.* SHEIKH AHMED OMER. **135 I.C. 817=I.R. 1932 Bom. 129=33 Bom.L.R. 1056=A.I.R. 1931 Bom. 533.**

———*Will—Life estate with remainder—Validity.*

Where a Mahomedan female executed a will under which she gave certain property to her daughter to be enjoyed by her for her lifetime and directed that after the daughter's death her step-son might take the property as absolute owner and the step son died during the daughter's lifetime.

Held, by Beaumont, C.J.—That the daughter took a life interest with a vested remainder to the step-son.

Held by Rangnekar, J.—That a life estate and remainder were unknown to the Mahomedan Law and that the daughter took an absolute estate. (*Beaumont, C.J. and Rangnekar, J.*) RASOOLBIBI *v.* YUSUF AJAM. **57 Bom. 737=148 I.C. 82=6 R.B. 255=35 Bom.L.R. 643=A.I.R. 1933 Bom. 324.**

———*Will—Life estate with vested remainder over—Effect of.*

A life estate with a vested remainder over is unknown to Mahomedan Law. The creation of such an estate by will is a bequest subject to a condition, and in such a case the first legatee takes an absolute interest in the property, and the remainderman gets nothing. (*Mosely and Dunkley, JJ.*) MA HMYIN *v.* P.L.S.A.R.S. CHETTYAR FIRM. **158 I.C. 848=8 R.R. 224=A.I.R. 1935 Rang. 318.**

———*Will—Probate—Necessity.*

There is no statutory obligation on a Mahomedan executor to take out probate of the testator's will. He can establish his right in a Court without taking such probate. (*Wadia, J.*) MAHOMED HUSSEIN *v.* AISHABAI. **155 I.C. 334=7 R.B. 426=36 Bom.L.R. 1155=A.I.R. 1935 Bom. 84.**

MAINTENANCE.

See (i) C. P. CODE, S. 60.
(ii) CR. P. CODE, S. 488.
(iii) DIVORCE ACT.
(iv) HINDU LAW—MAINTENANCE.
(v) MAHOMEDAN LAW—MAINTENANCE.
(vi) MALABAR LAW.

MAL. COMP. FOR TEN. IMPR. ACT (1900).

MAINTENANCE GRANT.

See GRANT.

MAJORITY ACT (IX OF 1875), S. 2 (A)—*Mahomedan wife of sixteen—Right to sue for divorce.*

The right of a Mahomedan wife of sixteen and over to sue for a divorce under the Mahomedan Law is expressly saved by the section. (*Madgavkar and Barlee, JJ.*) AHMED SULEMAN *v.* BAI FATMA. **55 Bom. 160=I.R. 1931 Bom. 125=128 I.C. 909=32 Bom.L.R. 1372=A.I.R. 1931 Bom 76.**

———**S. 2, Exception**—*Mahomedan woman being major under personal law—Relinquishment of dower—Validity.*

A Mahomedan woman who is a major under the personal law is capable of relinquishing the dower as consideration for obtaining *khula*,—khula being a form of divorce recognised by the Mahomedan Law and therefore coming within the exception mentioned in S. 2. (*Sulaiman, C.J. and Iqbal Ahmad, J.*) QASIM HUSAIN BEG *v.* KANIZ SAKINA. **54 All. 806=I.R. 1932 All. 564=139 I.C. 371=1932 A.L.J. 781=A.I.R. 1932 All. 649.**

———**S. 3**—*Court guardian—Minority extended till 21.*

Once a guardian is appointed by Court the minority continues till the age of 21 and any assent to an alienation by the minor is valueless even though the necessity for a guardian may not have continued. (*Bhide and Tapp, JJ.*) MARYAM *v.* SANT SINGH. **I.R. 1931 Lah. 917=134 I.C. 293=32 P.L.R. 373=A.I.R. 1931 Lah. 394.**

———**S. 3**—*Guardian of person and property of minor appointed by Court—Court removing such guardian under Guardians and Wards Act* (1890), *S. 39—Age of majority.*

Where a certain person has been appointed guardian of person and property of a minor under the Guardians and Wards Act and the appointment itself is not set aside on appeal or otherwise, but if at a later period the guardian is removed by the Court in exercise of powers under S. 39 of the Act, then once a guardian having been appointed for a minor the age of majority in the case of that minor is to be taken as 21 years howsoever the appointment terminates afterwards. A.I.R. 1924 Lah. 157, Rel. on. (*Bhide, J.*) RAGHBIR DAS *v.* MADSUDAN DAS. **149 I.C. 504=6 R.L. 698=A.I.R. 1933 Lah. 600.**

MALABAR COMPENSTION FOR TENANTS IMPROVEMENTS ACT (I OF 1900)—*Applicability—Building leases.*

The operation of Act (I of 1900) is not restricted to agricultural tenancies. It applies to building leases as well. The law administered in Courts without any question for over a century has always been to the effect that in Malabar the tenant of a vacant site is always entitled to compensation for dwelling houses that he may have erected on the site. 50 M. 813=53 M.L.J. 224, Rel. (*Wallace and Madhavan Nair, JJ.*) AVARU *v.* ASI BAI. **55 Mad. 151=135 I.C. 897=I.R. 1932 Mad. 225=34 L.W. 477=1931 M.W.N. 1029=A.I.R. 1932 Mad. 8=61 M.L.J. 462.**

———*Procedure—Issuing several commissions—Practice in Malabar Courts condemned.*

The practice of Courts in the Malabar District of issuing several commissions in succession and arriving at valuations regarding the compensation to tenants from the several reports is to be condemned. (*Walter and Krishnan Pandalai, JJ.*) KUNJUNNI NAIR *v.* ACHUTA MENON. **55 Mad. 656=I.R. 1932 Mad. 512=138 I.C. 114=1932 M.W.N. 56=35 L.W. 614=A.I.R. 1932 Mad 482=62 M.L.J. 629.**

MAL. COM. FOR TEN. IMPR. ACT (1900).

———*Scope—Building lease—House erected on kudiyiruppu—Agreement not to claim compensation—Effect.*

Where a lessee of a vacant house site in Cochin town had built a house on the kudiyiruppu and the landlord sued to recover it from him and claimed on an agreement with the predecessor of the lessee that he was not liable to pay compensation for improvements made by the lessee.

Held, that the lessee was entitled to compensation in respect of the house inasmuch as the Malabar Compensation Act applies not only to agricultural tenancies but also to building leases. (*Reilly and Anantakrishna Aiyar, JJ.*) P. C. GEORGE *v.* THITHI UMMA. **I.R. 1931 Mad. 545=131 I C. 641=1931 M.W.N. 294=33 L.W. 407=A.I.R. 1931 Mad. 363=60 M.L. J. 214.**

———**S. 4 (d)**—*Conversion—Evidence and proof of.*

In the case of land which is registered as one-crop land, the fact that a second crop was raised on it for some years does not necessarily show that the land is two crop land. In the absence of definite evidence to prove conversion of one-crop into two crop land no compensation for improvements can be allowed in respect of that land. (*Madhavan Nair and Jackson, JJ.*) NEELAKANTAN NAMBUDRIPAD *v.* ANANTANARA YANA AYYAR. **151 I. C.1091=7 R.M. 170=A.I.R. 1934 Mad. 718.**

———**S. 6**——*Decree for ejectment—Compensation awarded to sub-tenants for improvements—Right of landlord to set off unpaid rent—Payment of rent by sub-lessees to lessee if material.*

Where a suit for ejectment is decreed and the sub-tenants holding the land are awarded compensation for improvements, it is open to the landlord to set off any money due to him for rent in respect of the tenancy as against the sum found due to the sub-tenants for compensation. In such a case the fact that the sub tenants had paid their rent to the lessee is a matter to be settled between them and it would not alter the right of the landlord to claim a set off in respect of the unpaid rent. (*Beasley, C.J. and King, J.*) NARAYANI AMMA *v.* NARAYANAN NAMBUDRIPAD. **155 I.C. 271=7 R.M. 557=1935 M.W N. 105=41 L.W.31.=A.I.R. 1935 Mad. 139=68 M.L.J. 61.**

———**S. 10**—*Compensation for paddy crops.*

Quaere.—Whether compensation under the Malabar Tenancy Compensation Act can be given for paddy crops. A. I. R. 1914 Mad. 225, Ref. (*Walsh, J.*) HARIHARAN PATTAR *v.* NARAYANA MENON. **6 I.R. (Mad.) 31=145 I C. 174=A.I.R. 1933 Mad. 482.**

———**S. 11**—*Houses—Valuation of—Principles.*

The principle to be applied to the valuation of houses which are improvements under the Malabar Compensation for Tenants Improvements Act is as provided in S. 11 thereof, and not to find out what the house and the land will fetch if the property is sold in auction and then give for the house what is found as the sum remaining after deducting from the total amount the value of the land. (*Madhavan Nair, J.*) NARAYANAN NAMBUDRIPAD *v.* GOPALA MENON. **158 I.C. 40=8 R. M. 216=A.I.R. 1935 Mad 693.**

———**S. 18**—*Discretion of Court under.*

Though S. 18 of the Act protects the landlord against over-plantation by tenants, a distinct discretion is vested in the Court whose duty it is to decide whether or not in the circumstances of each case there is over-plantation. (*Madhavan Nair, J.*) NARAYANAN NAMBUDRIPAD *v.* GOPALA MENON. **158 I.C. 40=8 R.M. 216=A.I.R. 1935 Mad. 693.**

MALABAR LAW.

———**S. 19**—*Renewal of kanom—Stipulation in old kanom regarding improvements—Effect.*

The suit was brought on a kanom of 1900 which had been given in renewal of a kanom of 1884. One of the terms of the earlier contract which was repeated in the later was that compensation for improvements should be at half their value.

Held, that the rates in the 1884 contract were enforceable only up the dete of the renewal in 1902 and not after it. 38 Mad. 589 (F. B.) and 115 I. C. 349, considered, (*Waller and Krishnan Pandalai, JJ.*) KUNJUNNI NAIR *v.* ACHUTA MENON. **55 Mad. 656=I.R. 1932 Mad. 512=138 I.C.114=1932 M.W. N. 56=35 L.W. 614=A.I.R. 1932 Mad. 482=62 M.L.J. 629.**

———**S. 19**—*Scope—Trees of spontaneous growth—Stipulation for payment to jenmi of third of income of—Validity.*

A Kychip executed by Kanomdar to a *Jenmi* provided that whenever the growing forests with firewood plonts of spontaneous growth should be leased out, the *Jenmi* should get a third of the price fetched.

Held, that the claim based on the stipulation was opposed to S. 19 of the Malabar Compensation for Tenants. Improvements Act and could not be allowed. (*Madhavan Nair and Jackson, JJ.*) NEELAKANTAN NAMBUDRIPAD *v.* ANANTANARAYANA AYYAR. **151 I.C. 1091=7 R.M. 170=A.I.R. 1934 Mad. 718.**

MALABAR LAW—*Alienation—Assignment by all the adult members of tavazhi—Presumption of necessity—Setting aside by minor members—Equities of alienee.*

An assignment deed exccuted by all the adult members of a tavazhi tarwad may *prima facie* be presumed to be proper and for the benefit or necessity of the tavazhi. But the presumption is not irrebuttable and it is open to the minor members to adduce evidence to the contrary. If, as a result of such rebutting evidence, the Court holds that alienation is not valid and binding on the tavazhi, but it is proved that any portion of the consideration paid by the alienee was for purposes binding on the tavazhe, the alienee would be entitled to be reimbursed the sum so found binding from out of the tavazhi properties. (*Sundaram Chetty, J.*) KRISHNAN *v* RAMA MARAN. **152 I C. 17=7 R. M. 198=1934 M.W.N. 1264=40 L.W. 541=A.I.R. 1935 Mad. 38.**

———*Anubhavam—Test—Grantee paying Government assessment and definite quantity of produce to grantor but taking all rest to himself—Redeemability.*

In determining whether a document created an irredeemable "anubhavam" tenure or not, the question to be decided is whether the substance of the transaction is that the grantee is entitled only to a definite quantity of produce or the grantor is entitled only to a definite quantity, the grantee taking all the rest and not whether arithmetically certain figures can be worked out or not. Where the substance of the transaction was that after paying the Government assessment and delivering certain quantity of paddy to the grantor the grantee retained the whole income of the lands for himself.

Held, that the transaction amounted to an irredeemable "anubhavam" tenure. 29 Mad. 501, Rel. on; 30 Mad. 203; 32 1. C. 982; 43 I. C. 379; 110 I. C. 759; 49 M.L J. 520, Ref.; 27 Mad. 202, Expl. (*Varadachariar, J.*) CHATHANNI RAYIRAN *v.* NARAYANA. **158 I.C. 228=8 R.M. 241=1935 M.W.N. 866=42 L.W. 596=A.I.R 1935 Mad. 682.**

———Chit fund—Provision for immediate payment of all remaining instalments on default of one—If penal. *See* CONTRACT ACT, S. 74—DEFAULT CLAUSE. **A.I. R. 1933 Mad. 252=65 M.L.J. 29.**

MALABAR LAW.

———Kanom—Agreement for renewal—Resistance to suit by lessor for possession—Permissibility—Right of kanomdar to sue for specific performance, if the right is not barred—Stay of the suit for ejectment. *See* LANDLORD AND TENANT—EJECTMENT. **55 Mad. 519=A.I.R. 1932 Mad. 305=62 M.L.J. 525.**

———*Kanom—Incidents.*

A kanom is a combination of both a mortgage and a lease. (*Reilly and Anantakrishna Ayyar, JJ.*) KALYANI *v.* KRISHNAN NAMBIAR. **55 Mad. 519=I.R. 1932 Mad. 489=138 I.C 78=1932 M.W.N. 193=35 L.W. 307=A.I.R. 1932 Mad. 305=62 M.L.J. 525.**

———*Kanom—Incidents—Right of redemption—Implied.*

Where a document purports to be a "kanom", there is *prima facie* the implication of a right of redemption and there should be strong indications in other portions of the document to take away that right. (*Varadachariar, J.*) CHATHANNI RAYIRAN *v.* NARAYANA. **158 I.C. 228=8 R.M. 241=1935 M.W.N. 866=42 L. W. 596=A.I.R. 1935 Mad. 682.**

———*Kanom—Mortgage by Jenmi of equity of redemption—Subsequent renewals of kanoms made by him—Not binding on mortgagee.*

The appellants were tenants on kanom demise from a Jenmi who mortgaged the equity of redemption to the respondents by simple mortgage. Subsequent to the mortgage, the appellants paid further sums and obtained renewals. The respondents brought a suit on their mortgage, purchased the property in execution and then sued to redeem the original kanoms. The appellants contended that the renewals were binding on the respondents as Kanom was the usual and accustomed mode of enjoyment of the property and that the mortgagor was competent to grant such a lease.

Held, (*i*) that the renewals materially diminished the value of the property; (*ii*) that the subsequent advances were in the nature of subsequent mortgages; (*iii*) that kanom, though common, was not the prudent way of enjoying the property. From every point of view, the mortgagor was not competent to grant the renewals which were, therefore, not binding on the respondents. (*Krishnan Pandalai, J.*) MOIDUNNI HAJI *v.* MADHAVAN NAIR. **1933 M.W.N. 347=38 L.W. 921=A. I.R. 1933 Mad. 876=148 I.C. 1115=6 R.M. 575=65 M.L.J. 826.**

———*Kanom—Renewal—Melcharthdar not enquiring about—Postponement—Doctrine of constructive notice.*

In the case of holdings under a kanom kuzhikanom and other similar demises, the tenants do as a matter of fact expect renewals. A melkanomdar therefore who does not make enquiries whether the kanomdar has a renewal in his favour should be deemed to have constructive notice of the renewal and the melcharth cannot be enforced as against the kanomdar. Doctrine of constructive notice discussed. (*Reilly and Anantakrishna Ayyar, JJ.*) KALYANI *v.* KRISHNAN NAMBIAR. **55 Mad. 519=I.R. 1932 Mad. 489=138 I.C. 78=1932 M.W.N. 193=35 L.W. 307=A.I.R. 1932 Mad. 305=62 M.L.J. 525.**

———Kanom—Specific performance of agreement to grant. *See* SPECIFIC PERFORMANCE.

———Karnavan of tarward—Application to withdraw an appeal—Not acting *bona fide*—Application by Anandravans to be added as appellants—Sustainability. *See* C.P. CODE, O. 1, R. 10 (2). **34 L.W. 548=61 M. L.J. 549.**

———*Karnavan—Lease by—Suit to set aside—Junior members—Right of.*

MALABAR LAW.

A pattadharam executed by the karnavan of a tarwad granting a kuzhikanom lease for a period of twelve years is an ordinary act of management within the competence of the karnavan and no suit is maintainable by a junior member of the tarwad to set it aside in the absence of exceptional circumstances. (Case-law discussed.) (*Wallace and Bardswell, JJ.*) KUNHI KUTTI ALI *v.* MUHAMMAD HAJI. **54 Mad. 239=I.R. 1931 Mad. 390=130 I.C. 470=1930 M.W.N. 1113=32 L.W. 827=A.I.R. 1931 Mad. 73=60 M.L. J. 450.**

———*Karnavan—Personal debt—Money expended for illom purposes—Right of creditor against tarwad property.*

Per *Madhavan Nair, J.*—If money borrowed by a karnavan solely for himself is used by him for the discharge of a debt binding on the illom the person who lent the money to the karnavan cannot say that he is entitled to realise from the tarwad of the karnavan the amount of the loan used by him in discharging the admitted tarwad debt. (*Ramesam and Madhavan Nair, JJ.*) PARAMAL BHATTI *v.* NARAYANAN NAMBUDRIPAD. **I.R. 1932 Mad. 391=137 I.C. 450=35 L.W. 452=A.I.R. 1932 Mad. 701.**

———*Karnavan—Powers—Fresh lease before expiry of lease—Mode of effecting.*

Neither a karnavan nor a trustee can grant a fresh lease anticipatively with effect from the expiry of the lease at the time in force because that would tend to fetter the discretion of his successor. But he is entitled to obtain a surrender of the lease before its expiry and thereupon grant a fresh lease from the date of surrender. (*Curgenven, J.*) LAKSHMI AMMA *v.* KUNHI RAMAN NAMBIAR. **1932 M.W.N. 543.**

———*Karnavan—Powers of alienation—Hypothecation debt—Assignment for consideration.*

The karnavan of a Malabar Tarward has extensive, if not absolute, powers of disposal of even movables and properties in the nature of movables including the power of realisation of debts due to the family in any manner he likes and of converting movables into money. This power may possibly be subject in a case where it has been unreasonably exercised to some reservation or safeguard in the interests of the other members of the tarward. 39 M.L.J. 590, referred to. A hypothecation bond may for this purpose be treated as movable property. An assignment of a hypothecation bond for consideration by the karnavan is valid and binding on the other members of the tarwad even if there was no tarwad necessity at least where there is no suggestion of fraud or collusion. 1 Pat. 741 (P.C.), Foll. (*Sundaram Chetty, J.*) GOVINDA PANIKKAR *v.* KARTHIYAYINI. **I.R. 1931 Mad 733=133 I.C. 381=34 L.W. 365=A.I.R 1931 Mad. 726=61 M.L.J. 35.**

———*Karnavan—Powers—Renewal of kanom before expiry of prior demise—Validity—Ratification.*

A karnavan of a Malabar tarward has the power to grant a renewal of a kanom for a proper term and on proper conditions a reasonable time before the expiry of the prior demise; and the length of time which is reasonable will vary with the circumstances of each case. Even if the renewal is made unreasonably long before the current term his act is not void but only voidable either at his own instance or at the instance of the succeeding karnavan. In such a case, if the karnavan who granted the renewal is in office at the date of the expiry of the previous term but does not disavow the transaction, it holds good: (*Jackson, Reilly and Anantakrishna. Aiyar, JJ.*) TRIVIKRAMA KONURAYA *v.* SANKARANARAYANA VAZHUNNAVAR. **56 Mad. 92=I.R. 1932 Mad. 821=140 I.C. 83=36 L.W. 543=**

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1932 M.W.N. 1127=A.I.R. 1932 Mad. 771=63 M.L.J. 743 (F.B.).

———'Kovilagam'—*Decree against manager—If binds* Kovilagam.

A decree against the manager of a "*Kovilagam*" in Malabar obtained in a suit in which he is described as "Marumakkathayam family manager of Netumbrath *Kovilagam*", is binding on the *Kovilagam* and execution can proceed against the *Kovilagam* properties. From the description of the defendant as the manager of the *Kovilagam*, it has to be presumed that he is being sued in his representative capacity. (*Beasley, C. J. and King, J.*) VISHNU NAMBUDRI *v.* UDAVA-VARMA VALIA RAJ . **152 I.C. 765=7 R.M. 283=40 L.W. 644=A.I.R. 1934 Mad. 701=67 M.L.J. 638.**

———*Lease—Building leases—Tenant's right to compensation.*

The law administered in Courts without any question for over a century has always been to the effect that in Malabar the tenant of a vacant site is always entitled to compensation for dwelling houses that he may have erected on the site. 50 M. 813=53 M. L. J. 224, Rel. (*Wallace and Madhavan Nair, JJ.*) AVARU *v.* ASI BAI. **34 L.W. 477=1931 M.W.N. 1029=55 Mad. 151=135 I.C. 897=I.R. 1932 Mad. 225=A.I.R. 1932 Mad. 8=61 M.L.J. 462.**

———*Lease — Verumpattam lease—Term—Presumption.*

The presumption in the case of any verumpattam lease is that it runs for one year only and the burden is upon lessees to show the contrary. (*Beasley, C. J. and King, J.*) DAMODARAN NAIR *v.* ACHUTHAN NAIR. **157 I.C. 1040=1935 M.W.N. 193=41 L.W. 318=A.I.R. 1935 Mad. 190=68 M.L.J. 648.**

———*Limited estate under—If possible.*

What is described as a limited estate under the Hindu Law is unknown to the Malabar Marumakkathayam law; and unless the words of a particular document compel the Court to differentiate powers of testamentary disposition from powers of gift *inter vivos*, it will not be legitimate to introduce any such limitation to that system of law. (*Pakenham Walsh and Varadachariar, JJ.*) UTHE AMMA *v.* MANI AMMA. **157 I.C. 509=8 R.M. 149=41 L.W. 465=1935 M.W.N. 284=A.I.R. 1935 Mad. 337=68 M.L.J. 372.**

———*Maintenance — Amount of—"Menchilavu"—When allowed.*

The claim for maintenance of a member of a Malabar tarwad is not limited to the actual rice and provisions required. "Menchilavu" is also allowable when the income of the tarwad is sufficient for the same. The amount of "menchilavu" varies with the status of the family and members are entitled to it according to the usage in Malabar. (*Anantakrishna Ayyar and Cornish, JJ.*) AMMALU KUTTI AMMA *v.* RAMUNNI MENON. **150 I.C. 952=7 R.M. 54=40 L.W. 35=A.I.R. 1934 Mad. 508=67 M.L.J. 470.**

———*Maintenance—Right to—Possession of separate property by member claiming—If a bar.*

It is no impediment to a claim for a maintenance by a junior member of a tarwad, because he possesses separate properties, if he would be otherwise entitled to claim the same. The possession of separate property would become relevant only when the income of the tarwad properties is insufficient for the maintenance of all the members; nor would it be material in fixing the amount of maintenance payable to the member. (*Anantakrishna Ayyar and Cornish, JJ.*) AMMALU KUTTI AMMA *v.* RAMUNNI MENON. **150 I.C. 952=**

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7 R.M. 54=40 L.W. 35=A.I.R. 1934 Mad. 508=67 M.L.J. 470.

———*Maintenance—Separate maintenance—Right of member living away from tarwad house.*

Under the Malabar Law a member who lives away from the tarwad house is entitled to claim separate maintenance, if he proves that he is living separate for a good and proper cause. Where a female member lives away from the tarwad house with her husband who is employed elsewhere is entitled to separate maintenance for herself and her children, as the living away is for a proper cause. In the same way, a male member who leaves the tarwad house for practising his profession is so doing for a proper cause and can claim separate maintenance, whether he lives near the tarwad house or away from it. (*Anantakrishna Ayyar and Cornish, JJ.*) AMMALU KUTTI AMMA *v.* RAMUNNI MENON. **150 I.C. 952=7 R.M. 54=40 L.W. 35=A.I.R. 1934 Mad. 508=67 M.L.J. 470.**

———*Marriage — Nature of—Right of offspring to maintenance.*

The law of Malabar does not recognize marriage as a legal institution, the relation being in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases. The offspring of such a connection will be entitled to an order for maintenance against the father only if and when the mother's tavazhi or tarwad is unable to maintain them. (*Lakshmana Rao, J.*) RAMAN *v.* PARVATHI. **6 I.R. (Mad.) 178 (1)=145 I.C. 970=1933 M.W.N. 1276=34 Cr.L.J. 1159=1933 Cr.C. 1399=38 L.W. 587=A.I.R. 1933 Mad. 794=65 M.L.J. 629.**

———Nambudris—Applicability of Hindu Law. *See* HINDU LAW—APPLICABILITY. **57 Mad. 725=67 M.L.J. 511.**

———*Nambudri illom—Borrowing by adult member—Binding nature on illom.*

Where the only adult member of a Nambudri illom executed a promissory note for a certain amount carrying a high rate of interest and not only did the note not contain recitals as to necessity but the other circumstances showed that the transaction was in no way beneficial to the illom,

Held, that the debt was not binding on the illom. Incidents of Nambudri illom stated. (*Ramesam and Madhavan Nair, JJ.*) PARAMAL BHATTI *v.* NARAYANA NAMBUDRIPAD. **I.R. 1932 Mad. 391=137 I.C. 450=35 L.W. 452=A.I.R. 1932 Mad. 701.**

———*Nambudri Illom — Ex-communication of male members—Sole surviving widow—Power to appoint heir.*

Where all the male members of a Nambudri illom were declared to be outcastes as a result of a *kalavicharam* (enquiry into conduct) and the widow of the head of the family who was unaffected by the ex-communication appointed an heir with a view to perpetuate the family,

Held, that acccording to usage the sole surviving widow had the inherent power to appoint an heir and the presence of a son who was an outcaste was no bar to such an appointment. (*Madhavan Nair and Reilly, JJ.*) THATHAMANGALATH *v.* KRISHNA NAMBOODRIPAD. **57 Mad. 725=151 I.C. 49=7 R.M. 75=39 L.W. 370=A.I.R. 1934 Mad. 286=67 M.L.J. 511.**

———Nambudiris — Right to sue for removal of karnavan—If abrogated by Nambudri Act. *See* MADRAS NAMBUDRI ACT. **41 L.W. 525=A.I.R. 1935 Mad. 552=68 M.L.J. 678.**

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———*Nambudris—Rules of Hindu Law—Applicability.*

The Nambudris of Malabar are governed by the Hindu Law as laid down in the Mitakshara except so far as it is shown to have been modified by usage or custom having the force of law. (*Madhavan Nair and Reilly, JJ.*) THATHAMANGALATH *v.* KRISHNA NAMBOODRIPAD. **57 Mad. 725=151 I.C. 49=7 R. M. 75=39 L.W. 370=A.I.R. 1934 Mad. 286=67 M.L.J. 511.**

———*Partition — Mode of division — Stirpital or capital.*

Partition of tarwad property under the Malabar Law, which does not allow compulsory partition, should be according to the individuals (*per capita*) and not according to the tavazhies (*per stirpes*). (*Madhavan Nair and Anantakrishna Ayyar, JJ.*) SREEDEVI NETHIAR *v.* PERUVUNNI NAIR. **58 Mad. 36=152 I.C. 524=7 R.M. 240=1934 M.W.N. 1210=40 L. W. 455=A.I.R. 1935 Mad. 71=67 M.L.J. 771.**

———Partition suit by some members of the tarwad—Receiver—Power of Court to appoint. *See* C. P. CODE, O. 40, R. 1. **41 L.W. 353=A.I.R. 1935 Mad. 402.**

———*Tarwad—Maintenance — Allotment for—Duty of karnavan — Personal decree against karnavan—When to be passed.*

A prudent karnavan of a Malabar tarwad ought to make provision, out of the tarwad income, for extraordinary expenses of the tarwad on auspicious or inauspicious occasions. The junior members cannot therefore claim that the whole income should be allotted for maintenance. At the same time the karnavan cannot properly deduct the whole of the extraordinary expenses from a particular years's income. Nor can the karnavan appropriate for his own purpose any definite portion of the income, *e.g.*, half. There is also no hard and fast rule that every minor can get only half of what an adult gets. If the karnavan has misappropriated the tarwad income, a personal decree against him for maintenance of other members may be passed. (*Anantakrishna Ayyar and Cornish, JJ.*) AMMALU KUTTI AMMA *v.* RAMUNNI MENON. **150 I.C. 952=40 L.W. 35=7 R.M. 54=A.I.R. 1934 Mad. 508=67 M.L.J. 470.**

———*Tarwad—Maintenance—Amount—Possession of separate funds—When can be taken into account.*

In awarding maintenance to members of a tarwad the circumstance of each member in respect of his private acquisitions should be taken into account if the income of the tarwad would not be sufficient to provide a suitable subsistance for all the members. The method of dividing the total net income by the number of members in the tarwad without due regard to the real necessities of the several members whereof would not always be a correct method. But customary presents received by the member and his wife and children need not be taken into account. (*Sundaram Chetty, J.*) VASUDEVAN NAMBI *v.* GOVIDAN NAMBI. **37 L.W. 354=142 I.C. 735=1932 M.W.N. 1203=I.R. 1933 Mad. 248=A.I. R. 1933 Mad. 265.**

———*Tarwad— Maintenance— Waiver— Evidence—Mere delay, if sufficient.*

The question whether there was a waiver of the claim for maintenance should be decided on the circumstances of each case. Where the claim for maintenance related to a period of 6 years and 8 months commencing from June, 1920, and the registered notice of demand was sent by the plaintiff only in January, 1927.

Held, that there being no evidence of abandonment the mere delay was not sufficient to disentitle the plaintiff to relief. (*Sundaram Chetty, J.*) VASUDEVAN NAMBI *v.* GOVINDAN NAMBI. **37 L.W. 354=142 I. C. 735=I.R. 1933 Mad. 248=1932 M.W.N. 1203= A.I.R. 1933 Mad. 265.**

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———*Tarwad—Maintenance—Karnavan whether personally liable.*

The karnavan as manager of the tarwad is bound to maintain the other members from out of the family income only. In the absence of proof of malversation or misappropriation of the income by the karnavan it would be most unreasonable to make him personally liable for such dues. (*Sundaram Chetty, J.*) VASUDEVAN NAMBI *v.* GOVINDAN NAMBI. **37 L.W. 354=142 I.C. 735=I.R. 1933 Mad. 248=1932 M.W.N. 1203=A.I.R. 1933 Mad. 265.**

———Tarwad—Partition among members—Deed providing for absolute estate with powers of sale, purchase, etc.—Provision for survivorship among sharers in respect of undisposed of property—Will by sharer—Validity. *See* DEED—CONSTRUCTION. **68 M.L.J. 372.**

———*Tarwad—Partition arrangement entered into by adult members—Binding nature on minor members.*

It is open to the adult members of a tarwad to enter into a partition arrangement and though members who were minors at the time would be entitled to seek appropriate relief on specific grounds it cannot be said that a *bona fide* partition arrangement entered into by all the adult members of the tarwad is void and of no effect for the simple reason that the minors were not specifically mentioned as parties to the document. (*Jackson and Anantakrishna Ayyar, JJ.*) APPA *v.* KACHAI BAYYAN KUTTI. **I.R. 1932 Mad. 389=137 I.C. 458=1932 M.W.N. 975=35 L.W. 444=A.I.R. 1932 Mad. 689.**

———*Tarwad—Property — Ownership — Rights of members.*

The properties of a Malabar tarwad belong to all the members constituting the tarwad. Each member is a co owner of the properties along with the others and, on this co-ownership depends, amongst other rights, his right to be maintained by the Karna and his right to a share of the properties if a partition were made and the tarwad is broken up by common consent. In suits for maintenance and partition each individual can claim for himself or herself and as a rule a *per capita* share is allowed to the claimant by the Court. (*Madhavan Nair and Anantakrishna Ayyar, JJ.*) SREEDEVI NETHIAR *v.* PERUVUNNI NAIR. **58 Mad. 36=152 I.C. 524=7 R. M. 240=1934 M.W.N. 1210=40 L. W. 455=A.I.R. 1935 Mad. 71=67 M.L.J. 771.**

———*Tarwad—Property in possession of junior member—Joint or separate property—Presumption—Applicability to Malabar tarwad.*

The rule of Hindu Law that if nothing appears in the case except that a member of a joint family is in possession of property, the burden of proving self-acquisition lies on such person, applies to property acquired by a junior member of a Malabar tarwad during the course of his *de facto* management. If such person is not shown to have had private funds of his own enabling him to acquire the property, the presumption is that such property belongs to the tarwad. 33 M. 250, Foll. (*Sundaram Chetty, J.*) ISWARAN NAMBUDIRI *v.* VISHNU NAMBUDIRI. **I.R. 1931 Mad. 542=131 I.C. 494=33 L.W. 611=A.I.R. 1931 Mad. 634=60 M. L J. 467.**

———*Tarwad—Property in the possession of junior member—Presumption of Hindu Law—Applicability.*

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possession of property the burden of proving self-acquisition lies on such person, applies to property acquired by a junior member of a Malabar tarwad during the course of his *de facto* management. If such person is not shown to have had private funds of his own enabling him to acquire the property, the presumption is that such property belongs to the tarwad. 33 M. 250, Foll. (*Sundaram Chetty, J.*) ISWARAN NAMBUDIRI *v.* VISHNU NAMBUDIRI. **I.R. 1931 Mad. 542=33 L.W. 611=131 I.C. 494=A.I.R. 1931 Mad. 634=60 M.L.J. 467.**

———*Tarwad—Tavazhi—Compromise decree— Property given to some members only—Validity—Effect.*

Where in a suit by a Karnavan of a Malabar tarwad in respect of certain property, the parties enter into a compromise under which the properties are ultimately to descend to some members only to the exclusion of the rest, the arrangement is not invalid altogether. The effect of the arrangement is that the parties take the properties as tenants-in common, any one of whom can maintain a suit to recover the properties from a trespasser. (*Pakenham Walsh, J.*) RAMUNNI KITAV *v.* KUNHAYAN. **155 I.C. 651=7 R.M. 599=40 L.W. 857=A.I.R. 1935 Mad. 125=68 M.L.J. 112.**

———*Tavazhi—Karar by majority of adult members—Binding nature of.*

A karar to which the majority of the adult members of a tarwad or tavazhi are parties is binding on the tavazhi in general. It is not binding on the dissentient members only to the extent of not depriving them of their right to succeed as karnavan and of not depriving them of their right to maintenance. Apart from these two it is binding even on the dissentient members. If there are no dissentient members, but if all the adult members are present at the spot and the other members are absent and if that was the reason why they were not parties to the karar, the position seems to become somewhat stronger. 38 I.C. 513, Foll. (*Ramesam, J.*) KUNHAMMAVAN *v.* KUNHI SOW. **6 I.R. (Mad.) 132=145 I.C. 758=A.I.R. 1933 Mad. 169.**

MALABAR TENANCY ACT (XIV OF 1930), Ss. 3 (b) and (v) and 17 (a)—"*Kanomdar*"—*Person not named in kanom deed—Right to claim renewal.*

A "Kanomdar" is the person to whom a Kanom is granted, *i.e.*,, the person whose name appears in the document evidencing the Kanom, his legal representative or his assignee; and none else than such person can claim to be a Kanomdar so as to be entitled to renewal. A person who claims to be jointly interested with the person named in the document is not entitled to claim renewal, when he is not named in the document as Kanomdar. (*Beasley, C. J. and King, J.*) ACHAVI *v.* PARAMESWARAN NAMBUDRIPAD. **58 Mad. 334=153 I.C. 249=7 R.M. 327 (2)=1935 M.W.N. 386=40 L.W. 898=A.I.R. 1935 Mad. 92=68 M.L.J. 53.**

———**Ss 3 (o) and 22**—*Construction*—"*Landlord*"—*Melcharthdar, if—Suit for eviction—Application by tenant for renewal—Jenmi, if necessary party.*

First plaintiff, who was the jenmi of the suit property and karnavan of his tarwad granted a melcharth of the said property to his sister, mother of plaintiffs 2 to 4, empowering her to give notice to quit to the tenant, and providing that a suit in ejectment should be filed jointly by the jenmi and the melcharthdar and conducted at the expenses of the latter. But it did not provide for payment of rent to the melcharthdar during the continuance of the original tenant or for collection of rent by the melcharthdar from the tenant. After the death of the melcharthdar a suit in ejectment was instituted by plaintiffs 1 to 4 against the defendant who was in possession.

The latter filed an application under S. 22 of the Malabar Tenancy Act, claiming a renewal, impleading thereto plaintiffs 2 to 4, as respondents but not the 1st plaintiff, the jenmi. It was contended that the jenmi was not a necessary party, because after the grant of the melcharth, the jenmi was not the landlord at all.

Held, as the melcharth did not authorise the melcharthdar to collect rent from the tenant, and as the right to evict the tenant did not vest wholly in him, he could not be regarded as the "landlord" as defined by S. 3 ((*o*) of the Act, and that the 1st plaintiff the karnavan and jenmi was the landlord" to whom notice should be given under S. 22 of the Act and he must therefore be impleaded as a party to the application. (*Varadachariar and Stodart, JJ.*) NETTALIA SEQUERIA *v.* ABDUL KHADER. **59 Mad. 419=158 I.C. 1127=1935 M.W.N. 1101=42 L.W. 617=A.I.R. 1935 Mad. 1048=69 M.L.J. 675.**

———**S. 17 (a)**—Scope—Person not named in Kanom document—Claim to be jointly interested in Kanom with Kanomdar—Right to renewal. *See* MALABAR TENANCY ACT, SS. 3 (*l*) AND (*o*) AND 17 (*a*). **58 Mad. 334=A.I.R. 1935 Mad. 92=68 M.L.J. 53.**

———**S. 33** *—Applicability—Tenant building larger house than allowed by the marupat.*

The fact that the tenant may have built a larger house on the property than he was allowed to build by the marupat is of no avail if he comes within the specific words of S. 33 of the Act. There is no qualification in that section to the effect that he cannot avail himself of that section if his occupation has not been in conformity with the original terms of the lease. (*Pakenham Walsh, J.*) AMBUKUTTI VAIDIER *v.* KOOTTAMBATH KELAN. **I.R. 1933 Mad. 229 (1)=142 I.C. 592=A.I.R. 1933 Mad. 460.**

———**Ss. 33 and 38**—"*Continuous occupation*"—*Meaning—Possession of predecessor-in-interest—If can be tacked on.*

In order to claim the benefit of S. 33 of the Malabar Tenancy Act, it is necessary that the tenant or the members of his family should have been in continuous occupation of the kudiyiruppu for 10 years from before the institution of the suit for eviction by the landlord. The tenant is not entitled to tack on the possession of his assignor or predecessor-in-interest for the purpose of establishing "continuous occupation." (*Curgenven and King, JJ.*) RAJAGAPALA PILLAI *v.* NAMASIVAYAM PILLAI. **58 Mad. 1023=158 I.C. 273=8 R.M. 248=1935 M.W.N. 680=42 L.W. 407=A.I.R. 1935 Mad. 796=69 M.L.J. 325.**

MALICIOUS ARREST. *See* TORT.

MALICIOUS PROCEEDINGS. *See* TORT—MALICIOUS PROCEEDINGS.

MALICIOUS PROSECUTION—*Action for—Complaint—Summary rejection—If actionable.*

Where a complaint has been summarily rejected by the Magistrate without issuing any legal process against the person or persons complained against, the latter cannot from the rejection of the complaint maintain an action for damages founded upon malicious prosecution. (*Sen and Niamatullah, JJ.*) BASANT RAI *v.* LALA GANGA RAM. **I.R. 1932 All. 385=138 I.C. 282=A.I.R. 1932 All. 386.**

———*Action for—Damage necessary to sustain.*

There are three sorts of damages, any one of which is sufficient to support an action for malicious prosecution: (1) damage to a man's fame, as if the matter whereof he is accused be scandalous; (2) damage to his person, as where a man is put in danger to lose his life, limb or liberty; (3) damage to his property, as where he is

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forced to expend money in necessary charges to acquit himself of the crime of which he is accused. (*Rangnekar, J.*) THE MUNICIPALITY OF AHMEDABAD *v.* PANUBHAI. **158 I.C. 31=8 R.B. 108=37 Bom.L.R. 468=A.I.R. 1935 Bom. 355.**

———*Action for—Essentials to be proved—Want of probable and reasonable cause—Onus,*

In a suit for damages for malicious prosecution the plaintiff must establish that there has been a prosecution by the defendant, that the proceeding terminated in plaintiff's favour, that the prosecution was instituted without any reasonable and probable cause and that it was due to a malicious intention on the part of the defendant. Where the complainant (defendant) honestly believes that the accused (plaintiff) has committed the offence of which he complains, although he may not succeed in proving the truth of his allegations to the satisfaction of the Criminal Court, it cannot be held that the accusation was without any reasonable or probable cause. The criterion is the honesty of the complainant's belief and not his failure to establish his case. If the accusation is not brought recklessly with the specific intention of damage to plaintiff's reputation, the complaint is not without reasonable and probable cause. (*Grille, Offg. C.J.*) SURAJMAL *v* FATHULAL. **160 I.C. 479=8 R.N. 199=18 N.L.J. 126.**

———*Burden of proof—Reasonable cause.*

In suits for damages for malicious prosecution the burden of proving absence of reasonable and probable cause, in addition to malice in fact, lies on the plaintiff and not on the defendant. A.I.R. 1929 All. 878, Ref. (*Mahadevayya and Ramachandra Rao, JJ.*) THIMMAPPA *v.* NINGE GOWDA. **37 Mys.H.C.R. 172=10 Mys.L.J. 12.**

———*Burden of proof—Reasonable and probable cause—Absence of.*

In a suit to recover damages for malicious prosecution the Court has to discover what facts have been found upon the evidence and then to decide whether on those facts it can be said that the prosecution was instituted without reasonable and probable cause. A heavy onus lies on the plaintiff in such a case and it would require very strong evidence to show that a defendant had no reasonable cause when impartial public servants after due and deliberate investigation and trial believed the case to be true. Plea of want of reasonable and probable cause held not to be made out. (*Jackson, J.*) SRINIVASA THATHACHARIAR *v.* THIRUVENKATACHARIAR. **I.R. 1932 Mad 464=137 I.C. 829=35 L.W. 495=A.I.R. 1932 Mad. 601.**

———*Cause of action—Application suggesting prosecution for contempt of Court—Applicant stating facts truly but without proper consideration of legal aspect.*

An application by the defendant suggesting a prosecution of the plaintiff for contempt of Court was dismissed by the magistrate after hearing the plaintiff who appeared in answer to the notice issued by him. In a suit for damages for malicious prosecution filed by the plaintiff against the defendant.

Held, that it is doubtful whether it can be said in the circumstances of the case that the defendant did institute a prosecution in any sense of the term against the plaintiff but even if he did so, it cannot be said that the defendant was not in good faith when he made the suggestion which he did make, as the facts stated by him were perfectly true, and that if he, without a proper consideration of the legal aspect of the matter, suggested proceedings against the plaintiff which could not properly be taken, that in itself is not a sufficient ground for passing a decree in the suit. (*Allsop, J.*) MOHAMMAD UMAR KHAN *v.* NAZIR-UD-DIN AHMAD MINAI. **159 I.C. 723=1935 A.W.R. 961=A.I.R. 1935 All. 1011.**

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———*Causes of action—Date of.*

The cause of action in an action for malicious prosecution arises when the plaintiff is acquitted. (*Baker and Nanavati, JJ.*) CHHAGANLAL *v.* MUNICIPALITY OF THANA. **56 Bom. 135=I.R. 1932 Bom. 275=137 I.C. 545=34 Bom.L.R. 143=A.I.R. 1932 Bom. 259.**

———*Cause of action—Jurisdiction of Court.*

The defendant instituted criminal proceedings at place *D* against plaintiff who was residing at place *C*. Summons was served on plaintiff at *C* and as a result of proceedings plaintiff sued to recover special and general damages for malicious prosecution.

Held, that part of the cause of action arose at place *C* and with leave under Cl. 12 of the Letters Patent the Court at *C* had jurisdiction to entertain the suit. (*Lort Williams, J.*) ALEXANDER BRAULT *v.* INDRAKRISHNA KAUL. **60 Cal. 918=147 I.C. 455=6 R.C. 331=A.I.R. 1933 Cal. 706.**

———*Corporation—Liability for.*

An action for malicious prosecution will be against a corporation. (*Baker and Nanavati, JJ.*) CHHAGANLAL *v.* MUNICIPALITY OF THANA. **56 Bom. 135=I.R. 1932 Bom. 275=137 I.C. 545=34 Bom.L.R. 143=A.I.R. 1932 Bom. 259.**

———*Damages—Considerations—Injury to reputation and danger to liberty.*

The Court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff but also the danger to liberty. (*Aston, A.J.C.*) FAKIR MAHOMED *v.* FAKIR MAHOMED NANJI. **I.R. 1932 Sind 53=136 I.C. 757=A.I.R. 1932 Sind 23.**

———*Damages—Damages for period of unemployment.*

That criminal case for misappropriation was proceeding against a person would be a very good reason why he could not obtain service, as employers would naturally be chary of engaging a man against whom there were allegations of misappropriations and breach of trust, and therefore such a person would be entitled to suit for malicious prosecution for damages for loss of service, if any, for the period during which the criminal proceedings lasted. (*Staples, A. J.C.*) RAGHUNATH RAO *v.* MOTIRAM. **147 I.C. 1084=6 R.N. 153=30 N.L.R. 101=A.I.R. 1933 Nag. 299.**

———*Damages—Exemplary damages—Principle.*

Exemplary damages are awarded, rather to express indignation at the defendant's wrong than as representing the plaintiff's loss. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) VENKATAPPAYYA *v.* RAMAKRISTNAMMA. **I.R. 1932 Mad. 187=135 I.C. 619=34 L.W. 898=A.I.R. 1932 Mad. 53=62 M.L.J.107.**

———*Damages—Expenses incurred in defending.*

In a suit for damages for malicious prosecution plaintiff is entitled to legitimate expenses incurred in defending himself in the criminal Court. 31 Cal. 406, Foll. (*Aston, A.J.C.*) FAKIR MAHOMED *v.* FAKIR MAHOMED NANJI. **I.R. 1932 Sind 53=136 I.C. 757=A.I.R. 1932 Sind 23.**

———*Damages—Nominal damages—Summons recorded but modified later—Appearance of accused during interval.*

Where the plaintiff appeared voluntarily after an order for summons under S. 204, Cr. P. Code, was recorded but before it was served on him and the Magistrrare subsequently modified the process into one under S. 202 of the Code.

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Held, that though the plaintiff had a cause of action he was only entitled to nominal damages. (*Faul Ali and Scroop, JJ.*) ZAHIRUDDIN MAHOMED *v.* BUDHI BIBI. **12 Pat. 292=6 I.R. (Pat.) 147=145 I.C. 271 =14 Pat. L.T. 588=A.I.R. 1933 Pat. 292.**

———*Damages—Right to claim—Expenses of defence borne by third party.*

In a suit for damages for malicious prosecution where it is found that the plaintiff has not spent anything towards the expense of defence, the amount being paid by another person, and there being no legal liability to repay the amount so provided, no damages can be awarded, the plaintiff, having failed to prove that he had sustained any damages as the result of the prosecution. (*Raza and Smith, JJ.*) INDAR BAHADUR SINGH *v.* SUKHDEO PRASAD. **142 I.C. 235=I.R. 1933 Oudh 101=9 O.W.N. 1067=A.I.R. 1933 Oudh 94.**

———*Essentials to be proved.*

In an action for malicious prosecution, the plaintiff has to prove (1) that the prosecution was started by the defendant without reasonable and probable cause; (2) that the prosecution was malicious, and (3) that the proceedings complained of terminated in his favour. It is not necessary for the plaintiff to prove his innocence but the acquittal in the criminal case does not dispense with proof of the other two factors. Malice may sometimes be inferred from the absence of reasonable cause but the existence or non-existence of reasonable cause should be determined by the Court on the evidence before it and not on the evidence in the Criminal Court. (*Wort, J.*) MAHOMED HAKOON *v.* ASHAR HUSSAIN. **10 Pat. 842=I.R. 1932 Pat. 46=135 I.C. 526=A.I.R. 1932 Pat. 91.**

———*Essentials to be proved.*

In an action for malicious prosecution, the plaintiff has to prove that (1) he was prosecuted by the defendant; (2) the proceedings terminated in favour of the plaintiff; (3) the prosecution was instituted against him without any reasonable or probable cause, (4) maliciously, not with the mere intention of carrying the law into effect. (*Mahadevayya and Ramachandra Rao, JJ.*) THIMMAPPA *v.* NINGE GOWDA. **37 Mys H.C.R. 172 =10 Mys.L.J. 12.**

———*Essentials to be proved.*

In an action for malicious prosecution the plaintiff has to prove (1) that he was prosecuted by the defendant; (2) that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating; (3) that the prosecution was instituted against him without a resonable and probable cause; and (4) that it was due to a malicious intention of the defendant and not with the intention of carrying the law into effect.

Held, on the facts, that the above essentials had been made out. (*Raza and Smith, JJ.*) INDAR BAHADUR SINGH *v.* SUKHDEO PRASAD. **142 I.C. 235=I.R. 1933 Oudh 101=9 O.W.N. 1067=A.I.R. 1933 Oudh 94.**

———*Essentials to be proved.*

In a suit for malicious prosecution it is necessary for the plaintiff to establish four things: (1) that there has been a prosecution by the defendant; (2) that the proceedings terminated in the plaintiffs favour; (3) that the prosecution has been instituted against him without any reasonable and probable cause; and (4) that the prosecution was due to a malicious intention on the part of the defendant and not merely with the intention of carrying the law into effect. (*Grille, A. J. C.*) AJODHIA PRASAD *v.* PARASHRAM. **141 I.C. 231=I.**

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R. 1933 Nag. 49=28 Nag. L.R. 312=A.I.R. 1933 Nag. 23.

———*Essentials to be proved.*

In order to obtain a decree for compensation for malicious prosecution plaintiff should prove not only the factum of his acquittal but in addition that the charge was false to the knowledge of the defendant or that it was malicious and without reasonable and probable cause; and the judgment of their Criminal Court can be looked at merely to establish the fact of acquittal but the grounds of acquittal cannot be looked at by the Civil Court. (*Jai Lal, J.*) JIWAN DAS *v.* HAKUMAT RAI. **15 Lah. 262=I.R. 1933 Lah. 465=144 I.C. 387=34 P.L.R. 746=A.I.R. 1933 Lah. 461.**

———*Essentials to be proved.*

In a suit for damages for malicious prosecution the plaintiff has a heavy onus thrown on him. He has to establish that he was prosecuted by the defendant, that the proceedings terminated in his favour, that the prosecution was instituted without any resonable and probable cause and that it was instituted with a malicious intention, and lastly he has to prove the damage claimed. (*Sen, J.*) VERTANNES *v.* LAWSON. **13 Rang. 50=7 R.R. 104=151 I.C. 636=A.I.R. 1935 Rang. 6.**

———*Essentials to be proved.*

It is incumbent upon the plaintiff suing for damages for malicious prosecution to prove (1) that his prosecution was caused by the defendant; (2) that it resulted in his acquittal; (3) that in prosecuting him the defendant acted without reasonable and probable cause; and (4) that in so doing he was actuated by malice. (*Page, C.J. and Mya Bu, J.*) NAIKA SINGH *v.* MEHRA SINGH. **157 I.C. 237=8 R.R. 87.**

———*Essentials to be proved—Discharge of accused—Groundlessness of charge, if proved.*

Discharge of the accused cannot by itself be considered as evidence of the groundlessness of the prosecution, but when the accused is discharged and he brings a suit for damages, no obligation is imposed on him to prove affirmatively that he was innocent. 11 Beng. L. R. 321 (P.C.), Foll. (*Aston, A.J.C.*) FAKIR MAHOMED *v.* FAKIR MAHOMED NANJI. **I.R. 1932 Sind 53=136 I.C. 757=A.I.R. 1932 Sind 23.**

———*Essentials to be proved—Judgment of the Criminal Court—Evidentiary value of.*

Besides the fact of the prosecution and of its termination in favour of the plaintiff, it has to be shown that the prosecution was instituted against him without any reasonable and probable cause and that it was due to a malicious intention. The judgment of the Criminal Court is not conclusive of the matter; it lies on the Civil Court itself to undertake an entirely independent enquiry before satisfying itself of the absence of reasonable and probable cause. The judgment of the Criminal Court can only be used to establish the fact that an acquittal has taken place as a fact in issue in the civil suit. The Court cannot take into consideration the grounds upon which that acquittal was based. (*Curgenven and Sundaram Chetty, JJ.*) VENKATAPATHI *v.* BALAPPA. **56 Mad. 641=37 L.W. 623=I.R. 1933 Mad. 335=143 I.C. 825=1933 M.W.N. 1304=A.I.R. 1933 Mad. 429=65 M.L.J. 146.**

———*Essentials to be proved—Malice.*

In an action for malicious prosecution, the plaintiff should prove not only that there was no reasonable and probable cause but also that the prosecution was malicious, that is, it was instituted from an "indirect and improper motive and not in furtherance of justice." (Case-law discussed.) (*Baker and Nanavati, JJ.*)

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———*Essentials to be proved—Malice.*

Malice is a necessary ingredient in a suit for damages in a malicious prosecution. (*Aston, A.J.C.*) FAKIR MAHOMED *v.* FAKIR MAHOMED NANJI. **I.R. 1932 Sind 53=136 I.C. 757=A.I.R. 1932 Sind 23.**

———*Essentials to be proved—Malice and reasonable and probable cause—Terms explained—Burden of proof.*

In suits for damages for malicious prosecution the plaintiff cannot succeed unless he can show either guilty knowledge or some wicked or indirect motive in the defendant and also absence of reasonable and probable cause for the complaint. "Reasonable and probable cause" means a genuine belief based on reasonable grounds that the proceedings are justified. Malice means the presence of some improper and wrongful motive. Malice and reasonable and probable cause must unite in order to produce liability. So long as the legal process is honestly used for its proper purpose mere negligence or want of sound judgment in the use of it creates no liability; and conversely, if there are reasonable grounds for the proceedings no impropriety of motive on the part of the prosecutor is in itself any ground of liability. The burden of proving the absence of reasonable and probable cause lies upon the plaintiff. It is not for the defendant to prove affirmatively, as a defence that reasonable and probable cause existed. (Case ref.) (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) RAPHAL *v.* USMAN SALE. **12 Mys.L.J. 115=39 Mys. H.C.R. 162.**

———*Essentials to be proved—Persisting in prosecution after innocence of accused made clear—No evidence of absence of reasonable cause.*

To support an action for malicious prosecution, that must be both malice in the defendant and a want of reasonable and probable cause. Unless he obtains a finding in his favour on each of the issues, the suit must fail. The two are distinct and proof of the one is not necessarily proof of the other. If the defendant had reasonable and probable cause for prosecuting the plaintiff when he originally set the criminal law in motion, it is immaterial if subsequently in the cause of the proceedings it become clear there was no ground to justify the prosecution of the plaintiff and the defendant nevertheless persisted in the prosecution. That may amount to evidence of malice but not to a negation of the plea of reasonable and probable cause. On the other hand, the fact that malice is proved is not evidence of the absence of reasonable and probable cause. (*Page, C.J. and Mya Bu, J.*) SANKARA IYER *v.* RAMASWAMY CHETTYAR. **10 Rang. 282=I.R. 1932 Rang. 161=138 I.C. 693=A.I.R. 1932 Rang. 80.**

———*Essentials to be proved—'Prosecution'—Dismissal of complaint under S. 203, Cr. P. Code—Effect.*

In order to sustain a suit for damages for malicious prosecution there must be a prosecution. Where the Magistrate does not issue summons to the accused on the basis of the complaint but merely calls for a report, makes a local enquiry and dismisses the complaint under S. 203, Cr. P. Code, there is no prosecution and the person complained against cannot maintain a suit to recover damages for malicious prosecution. (*Mukerji and Bennet, JJ.*) ALI MAHOMED *v.* ZAKIR ALI. **53 All. 771=136 I.C. 369=I.R. 1932 All. 193=1931 A.L.J. 611=A.I.R. 1931 All. 665.**

———*Essentials to be proved—Termination of criminal case—Dismissal of complaint under S. 203, Cr. P. Code.*

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In a suit for damages for malicious prosecution, all that is required for the plaintiff to show is that the criminal proceedings terminated in his favour. If he shows that the Magistrate passed an order in his favour under S. 203, Cr. P. Code, and the defendant falls to show that the proceedings were revived then the plaintiff has shown all that is necessary for the suit. (*Mukerji and Bennet, JJ.*) ALI MAHOMED *v.* ZAKIR ALI. **53 All. 771=136 I.C. 369=I.R. 1932 All. 193=1931 A.L.J. 611=A.I.R. 1931 All. 665.**

———*Liability for.*

The liability of the defendant to an action for malicious prosecution does not depend on his having first set the law in motion. Whether the defendant was in fact the prosecutor or not depends on the facts and circumstances disclosed in the evidence. (*Page, C.J. and Mya Bu, J.*) SANKARA IYER *v.* RAMASWAMI CHETTIAR. **10 Rang. 282=I.R. 1932 Rang. 161=138 I.C. 693=A.I.R. 1932 Rang. 80.**

———*Liability for—Complainant not responsible for trial.*

Where a person has been tried by a criminal Court on its own motion or by mistake or inadvertence and not at the instance of the complainant, the former on his acquittal cannot maintain any action against the complainant for damages founded upon malicious prosecution. (*Sen and Niamatullah, JJ.*) BASANT RAI *v.* LALA GANGA RAM. **I.R. 1932 All. 385=138 I.C. 282=A.I.R. 1932 All. 386.**

———*Liability for—Persons creating false evidence against the plaintiff.*

An action for malicious prosecution can be maintained not only against the individual who set the law in motion against the plaintiff but also every other person whose conduct with reference to the charge or trial points him out as one responsible for the prosecution that a particular person figured as a witness in the criminal case is not the criterion but may be an element to be considered. So the defendants who had, by creating false evidence against the plaintiff before the charge and by giving false evidence during the trial in support of the charge attempted to secure a conviction of the plaintiff, are liable in damages in an action for malicious prosecution 30 All. 525 (P. C.) and 1 Luck. 215 (P.C.), Foll. (*Venkatasubba Rao and Pakenham Walsh, JJ.*) VENKATAPPAYA *v.* RAMAKRISTNAMMA. **I.R. 1932 Mad. 187=135 I.C. 619=34 L.W. 898=A.I.R. 1932 Mad. 53=62 M.L.J. 107.**

———*Liability for—Persons giving false evidence.*

Where there was no reliable evidence to prove that the several defendants had given evidence in pursuance of a conspiracy to obtain the conviction of the plaintiff who later on sued for malicious prosecution,

Held, that damages should not be awarded against such of those who had merely given false evidence but had not been complainants. (*Raza and Smith, JJ.*) INDAR BAHADUR SINGH *v.* SUKHDEO PRASAD. **142 I.C. 235=I.R. 1933 Oudh 101=9 O.W.N. 1067=A.I.R. 1933 Oudh 94.**

———*Malice—Finding of—What constitutes—'Malice'—Meaning of.*

Proof of malice is essential in an action for malicious prosecution and there must be a finding of malice. Malice is an indirect or improper motive. Where a man is deliberately and falsely implicated in a charge, the improper motive is obvious. Such a finding is in fact a finding of malice in law. There is no magic in the word 'malice' and it is quite unnecessary for the Court to use the word 'malice' so long as the facts found by it amount to malice in law. (*Young, J.*) MAHMU

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———*Malice—Proof of.*

Mere carelessness on the part of the defendant in deciding whether there was a reasonable and probable cause will not amount to malice; but where the accusation is made and the prosecution instituted without any basis whatsoever and recklessly, malice may be inferred. (*Grille, A.J.C.*) AJODHIA PRASAD *v.* PARASHRAM. **141 I.C. 231=I.R. 1933 Nag. 49=28 Nag. L.R. 312=A.I.R. 1933 Nag. 23.**

———*Prosecution—Commencement—Accused appearing voluntarily after recording of summons.*

Unless a process is issued and the accused is brought into Court as a result of such process, he has no cause of action for a suit for damages for malicious prosecution. Where no process was actually issued or served but an order for issue of process under S. 204, Cr. P. Code, and of a search warrant was formally recorded and the accused appeared after the passing of such an order.

Held, that the prosecution had technically commenced and the plaintiff had a cause of action. (*Fazl Ali and Scroope, JJ.*) ZAHIRUDDIN MAHOMED *v.* BUDHI BIBI. **12 Pat. 292=6 I.R. (Pat.) 147=145 I.C. 271=14 Pat. L.T. 583=A.I.R. 1933 Pat. 292.**

———"*Prosecution*"—*Dismissal of complaint under S. 203, Cr. P. Code—Powers not issued—Suit for damages for malicious prosecution—Maintainability.*

Until process is issued, the person against whom a complaint is made is not an accused person, nor can he be said to be prosecuted. Where, therefore, on a complaint being made by the defendant against the plaintiff, the Magistrate orders an investigation by the Superintendent of Police, and, on receipt of his report, refuses to issue process against the plaintiff and dismisses the complaint under S 203, Cr. P. Code, there has been no "prosecution' of the plaintiff, and a suit by the latter for damages for malicious prosecution against the defendant does not lie. (*Page, C. J. and Mya Bu, J.*) GOWRI SINGH *v.* VENKANNA. **162 I.C. 125=8 R.R. 540=13 Rang. 764=A.I.R. 1936 Rang. 95.**

———"*Prosecution*"—*Information given to police by one against another—Latter ultimately prosecuted—Former is said to have prosecuted latter.*

So far as India is concerned, a person can be said to have prosecuted if information is given to the police directed against the person who is ultimately prosecuted as a result of the investigation and the decision of the police. 30 All. 525 (P.C.); 1925 P.C. 46, Ref. (*Wort, J.*) RAM KISHUN PRASAD *v.* RAM NARAIN PRASAD. **154 I.C. 219=7 R.P. 451=A.I.R. 1934 Pat. 14.**

———"*Prosecution*"—*Meaning of—Application for vexatious prosecution for resistance to execution.*

The term "prosecution" does not in this connection mean a prosecution in the sense in which it is usually employed in the Cr. P. Code. An application made to the executing Court for prosecution of the plaintiff for resistance to execution by the defendant of a decree obtained by him against the plaintiff's brother is the initial stage in a criminal prosecution and that where it is found to have been made maliciously and without just and reasonable cause, is a sufficient basis for an action for malicious prosecution, even though it is not in fact accompanied by a complaint or prosecution by the Court. 49 Cal. 1035, Foll. (*Dalip Singh, J.*) FAKIR CHAND *v.* KHUSHI RAM. **6 I.R. (Lah.) 207=146 I.C. 291=34 P.L.R. 931=A.I.R. 1933 Lah. 735.**

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———*Prosecution—Proceedings under S. 476, Cr. P. Code—Compliant set aside—Acquittal.*

(1) Proceedings under S. 476, Cr. P. Code, constitute a prosecution for the purpose of founding an action for malicious prosecution. (2) The proceeding can be regarded as a prosecution by the individual, even though the Judge has granted the sanction and signed the complaint, if he had acted maliciously and without reasonable and probable cause. (3) Where the order granting sanction is set aside on appeal and the party is discharged there is virtually an acquittal. (*Ameer Ali, J.*) NAGARMALL CHAUDHURI *v.* JHABARMULL SUREKA. **60 Cal. 1022=148 I.C. 1129=35 Cr.L.J. 925=6 R. C. 490=A.I.R. 1933 Cal. 909.**

———*Prosecution under Municipal Act—Suit against municipality—Maintainability.*

There is a right of action for false and malicious prosecution against a municipality in the case of a prosecution under the Municipal Act. A corporation can be actuated by that kind of malice which is essential to the maintenance of an action for malicious prosecution, instituted by its officers in the scope of their duty, provided the necessary ingredients are made out; and in the assertion of its rights, a corporation may render itself liable for malicious prosecution. (*Rangnekar, J.*) THE MUNICIPALITY OF AHMEDABAD *v.* PANUBHAI. **158 I.C. 31=8 R.B. 108=37 Bom.L.R. 468=A.I.R. 1935 Bom. 355.**

———*Reasonable or probable cause—Burden of proof.*

In cases of malicious prosecution the onus of proving that there was no reasonable or probable cause for prosecution is on the plaintiff in spite of its being negative averment. *Abrath* v. *North Eastern Railway Co.*, (1883) 11 Q.B.D. 79, 440, Rel. on. (*Staples, A.J.C.*) RAGHUNATH RAO *v.* MOTIRAM. **147 I.C. 1084=6 R.N. 153=30 N.L.R. 101=A.I.R. 1933 Nag. 299.**

———*Reasonable and probable cause—Burden of proof.*

It cannot be disputed that in a suit for damages for malicious prosecution the burden of proving absence of reasonable and probable cause for the defendant's action in prosecuting the plaintiff lies on the latter. It is not for the defendant, in the first instance, to prove that the charge which he preferred against the plaintiff was true. The plaintiff must establish *prima facie* that there was no reasonable and probable cause for the defendant to prosecute the plaintiff. Where the lower appellate Court acted on the principle that both parties have indulged in falsehood and some damages ought to be awarded to the accused who were acquitted.

Held, that that was a palpably incorrect view and that the decision could not stand. (*Niamatullah, J.*) MEWA SINGH *v.* BENI MADHO SINGH. **156 I.C. 606=8 R.A. 11=1935 A.W.R. 490=A.I.R. 1935 All. 559.**

———"*Reasonable and probable cause*"—*Meaning of.*

The term "reasonable and probable cause" means an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. *Hicks* v. *Faulkner*, 8 Q.B.D. 167, Ref. (*Page, C. J. and Mya Bu, J.*) SANKARA IYER *v.* RAMASWAMI CHETTIAR. **10 Rang. 282=I.R. 1932 Rang. 161=138 I.C. 693=A.I.R. 1932 Rang. 80.**

———*Reasonable and probable cause—Defendant coming to know, subsequent to prosecution, that plaintiff not guilty.*

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If the defendant had reasonable and probable cause for prosecuting the plaintiff at the time when he filed the complaint and thus set the law in motion against the plaintiff, he should not be deprived *ex post facto* of that ground of defence because subsequently in the course of proceedings the defendant became acquainted with the true facts and if they had been available to him earlier, he would have felt himself not justified in launching the prosecution. The fact that the defendant persisted in prosecuting a false charge against the plaintiff after it had become reasonably clear that there was no ground to justify the prosecution of the plaintiff would be evidence of malice but would not be evidence that at the time when he became the prosecutor the defendant had acted without reasonable and probable cause. (*Page, C. J. and Mya Bu, J.*) SANKARA IYER *v.* RAMASWAMY CHETTIAR. **10 Rang. 282=I.R. 1932 Rang. 161=138 I.C. 693=A.I.R. 1932 Rang. 80.**

———*Reasonable and probable cause—Evidence of—Persistance in prosecution after knowledge that there was no case—Inference from.*

The fact that the defendant in a suit for malicious prosecution persisted in prosecuting a false charge, after he knew that was no ground to justify the plaintiff's prosecution, would amount to evidence of malice; but it would not be evidence that at the time when he prosecuted the plaintiff the defendant had acted without reasonable and probable cause. (*Sen, J.*) VERTANNES *v.* LAWSON. **13 Rang. 50=7 R.R. 104=151 I.C. 636=A.I.R. 1935 Rang. 6.**

———*Reasonable and probable cause—Information furnished by another—Prosecution on the faith of—Justification.*

The question of reasonable and probable cause depends in all cases, not upon the actual existence, but upon the reasonable *bona fide* belief in the existence, of such a state of things as would amount to a justification of the course pursued in making the accusation, whether the belief arises out of the recollection and memory of the accuser or out of the information furnished to him by another. Where the complaint is filed by the defendant on the information given by another, the Court has to see how far the defendant can be said to have reasonably and discreetly trusted the informant. The question whether a reasonable man would or would not act upon the information depends in a great degree upon the opinion to be formed of the position and circumstances of the informant and of the amount of credit which may be due under those circumstances to the person who thus conveys the information. (*Page, C. J. and Mya Bu, J.*) SANKARA IYER *v.* RAMASWAMI CHETTIAR. **10 Rang. 282=I.R. 1932 Rang. 161=138 I.C. 693=A.I.R. 1932 Rang. 80.**

———*Suit for—Maintainability against Municipality.*

A suit for damages for malicious prosecution is maintainable against a Municipal Committee. (*Bhide, J.*) MUNICIPAL COMMITTEE, RUPAR *v.* RAHMAT ILAHI. **A.I.R. 1934 Lah. 907 (2).**

———*Suit for—Master sued as primarily liable found not liable as not acting with malice—Special knowledge of servant—Vicarious liability for.*

In an action for malicious prosecution a defendant who is sued as having instituted the prosecution himself and therefore primarily liable for damages, cannot, when it has been shown that he is not liable because he did not act with malice or without reasonable or probable cause, be held liable on account of any special knowledge of his servant who took part in the prosecution and who withheld that knowledge from his master, provided the master took all reasonable precautions in the matter. A person cannot be sued both as personally liable and vicariously liable as being the master or employer of the servant, who was principally liable. (*Staples, A. J. C.*) RAGHUNATH RAO *v.* MOTIRAM. **147 I.C. 1084=6 R.N. 153=30 N.L.R. 101=A.I.R. 1933 Nag. 299.**

———Suit for—Partly decreed—Appeal by defendant — Cross-objections — Plaintiff dying pending appeal—Effect *See* C. P. CODE, O. 22, R. 3. **30 N.L.R. 186=A.I.R. 1934 Nag. 119.**

———*Suit for—Plaintiffs not giving evidence as witnesses—Effect.*

Where the plaintiffs in a suit for damages for malicious prosecution, though they are women, do not offer themselves as witnesses to the fact that the prosecution was not justified, and they do not offer any explanation as to their failure to appear in Court, they cannot be held to have established their case. (*Grille, J. C.*) AJODHYA PRASAD *v.* MT. TARABAI. **163 I.C. 382=9 R.N. 3=18 N.L.J. 333.**

MALIKANA—*Non-payment of—Presumption.*

By the non payment of malikana for a long period of years the malikana interest does not necessarily disappear. 10 C.W.N. 151, Expl. and 35 All. 185, Ref. (*Wort, J.*) PADHUM LAL *v.* TRIBENI SINGH. **154 I.C. 1043=7 R.P. 518=A.I.R. 1934 Pat. 44.**

MAMLATDAR.

See BOMBAY MAMLATDARS' COURTS ACT (1906).

MANAGER. *See* HINDU LAW—JOINT FAMILY.

MANDAMUS.

See SPECIFIC RELIEF ACT (I OF 1877), S. 45.

MANDATORY INJUNCTION.

See (1) INJUNCTION—LIGHT AND AIR.
(2) SPECIFIC RELIEF ACT (1877), S. 55.

MANIBAM. *See* LAND TENURE.

MANIBHAM LANDS—Cesses — Kanganam and Kulavettu—Liability of tenant to pay only for the latter. *See* LANDLORD AND TENANT—CESSES. **A.I.R. 1935 Mad. 259.**

MAPS. *See* EVIDENCE ACT, SS. 35, 36 AND 83.

MARITIME CONVENTIONS ACT (1 & 2 Geo. V, c. 57), S. 8—*Limitation for suit—Extension of—Discretion of trial Judge—Interference by appellate Court.*

A collusion took place on 16th March, 1930, between the "Malacca Maru" of the plaintiffs and the 'Marienfels" of the defendants. After some indecisive correspondence between the parties, the Marine Court of Enquiry made a report on 16th November, 1930, but their finding was not communicated till June, 1931. There was again desultory correspondence between the parties till 12th March, 1932, on which date, the defendants filed a suit in the Admiralty side claiming damages. On 25th April, 1932, the plaintiffs filed the present cross-suit and also applied under S. 8 of the Maritime Conventions Act for extending the limitation for the suit. The trial Judge refused to extend the limitation on the ground that there was plenty of time from the 12th November, 1931, to the 15th March, 1932, to bring a suit, of which the plaintiffs had failed to avail themselves.

Held, that as the trial Judge had not exercised his discretion on wrong principles, his decision cannot be interfered with on appeal. (1923) P. 85 and 94, Ref. (*C. C. Ghose, A. C. J. and Mallick, J.*) NIPPON YUSEN KAISHA *v.* "MARIENFELS." **61 Cal. 22=151 I.C. 432=7 R.C. 117=A.I.R. 1934 Cal. 438.**

MARITIME JURISDICTION.

See (1) ADMIRALTY.
(2) SHIPPING.

MARRIAGE.

See (1) CUSTOM—GENERAL AND PUNJAB.
(2) EVIDENCE.
(3) EVIDENCE ACT, S. 112.
(4) HINDU LAW—MARRIAGE.
(5) HUSBAND AND WIFE.
(6) MAHOMEDAN LAW—MARRIAGE.

———Evidence of. *See* EVIDENCE ACT, S. 50. **A.I.R. 1933 All. 130.**

———Law governing. *See* INTERNATIONAL LAW.

———*Ceremonies and formalities—Presumption from proof of factum.*

Where the factum of marriage was established, the presumption arises that all the forms and ceremonies necessary to constitute legal marriage had been complied with. 12 Cal. 140; 12 Cal. 706 (F.B.); 38 Cal. 700 and 13 M.I.A. 141 (P.C.), Foll.; 28 Cal. 37 and A.I.R. 1923 Rang. 202, Dist.; 24 Mad. 255, Not Appr. (*Dunkley, J.*) RAM TAPSI *v.* SUNDARI. **160 I.C. 755=8 R.R. 428=A.I.R. 1935 Rang. 507.**

———*Evidence — Non-observance of ceremonies—Opinion of religious expert.*

Per *Sulaiman, C.J.*—Where a marriage is attacked on the ground of non-observance of ceremonies the Court is not bound to accept the opinion of a religious expert, however high he may be placed in church. The duty is on the Court itself to decide as between the parties before it as to whether the marriage was void or not. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428=3 A.W.R. 70=153 I.C. 733=7 R.A. 583=1934 A.L.J. 1129=A.I.R. 1934 All. 273.**

———*Re-marriage of widow—Evidence.*

It is not permissible to draw from the fact that a widow is a loose woman living in sin the inference that she had re-married. (*Oppenheim, J.M.*) AIKRAM *v.* LADDO. **15 R.D. 604=12 L.R. 329 (Rev.).**

———*Validity—Burden of proof.*

Per *Sulaiman, C.J.*—The burden would lie on any party who asserts that any such rules, rites, ceremonies and customs were not observed, to prove not only the omission but also that such rules, rites, ceremonies or customs were absolutely essential and indispensable in the sense that on account of their not being duly performed the marriage itself was void. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428=1934 A.L.J. 1129=3 A.W.R. 70=153 I.C. 733=7 R.A. 583=A.I.R. 1934 All. 273.**

MARRIAGE CONTRACT. *See* CONTRACT ACT, S. 23.

MARRIED WOMEN'S PROPERTY ACT (III OF 1874), S. 6—"*For the benefit of his wife*"—*Intention of assured—Mode of finding out—No particular words necessary.*

In order to constitute a trust "for the benefit of the wife" within the meaning of S. 6 of the Married Women's Property Act, it is not necessary that the words "for the benefit of the wife" or other words equivalent thereto should appear in the policy of insurance. If on a reading of the words used in the policy it appears that the assured has intended, in the event of his death, that the policy should ensure for the benefit of his wife, then the policy may be deemed to be for her benefit. Where by a policy of life insurance the insurer undertook to pay a specified amount upon the happening of a certain event "to the assured or his wife *A* if he predeceased her" and the insured having died his widow sued to recover the amount payable under the policy.

MARTIAL LAW.

Held, that the insurance policy fell within the language of S. 6 of the Married Women's property Act and a statutory trust having been created in favour of the widow she was entitled to claim the money. (*Madhavan Nair, J.*) ABHIRAMAVALLI AMMAL *v.* THE OFFICIAL TRUSTEE OF MADRAS. **55 Mad. 171=141 I.C. 680=I.R. 1933 Mad. 156=35 L.W. 338=A.I.R. 1932 Mad. 220=62 M.L.J. 111.**

———**S. 6**—*Life Insurance Policy—Benefit reserved for wife—Suit to enforce—Form.*

The plaintiff's husband had insured his life for her benefit with a certain company at Calcutta. The business of the said company was subsequently taken over by the defendant company. The insured subsequently obtained a loan from the defendants and he later on surrendered his policy on receipt of a certain amount. After her husband's death the plaintiff sued to recover the insurance amount on the ground that a trust had been created in her favour. She stated that the Official Trustee had refused to move in the matter unless she furnished funds.

Held, that the contract having been completed in Calcutta the proper person to sue was the Official Trustee of Bengal.

Held, further, S. 59 of the Trusts Act had no application because it was not shown that the execution of the trust had become impracticable or that the Official Trustee had disclaimed trusteeship. (*Madhavan Nair and Reilly, JJ.*) LAKSHMI AMMAL *v.* SUN LIFE ASSURANCE CO. **57 Mad. 536=1934 M.W.N. 653=151 I.C. 112=7 R.M. 87=39 L.W. 379=A.I.R. 1934 Mad. 264=66 M.L.J. 667.**

———**S. 6**—*Scope—Insurance money payable to assured—Attachability in execution.*

S. 6 of the Married Women's Property Act contemplates that in order that there may be a valid trust in favour of the wife or the wife and children of the assured, the policy must be expressed on the face of it to be for the benefit of them. The sum payable under an insurance policy was payable at death or at fifty-five to the insured, but in the event of his death before his wife, it was to go to the wife, and failing his wife, to the insured, his executors, etc. The insured having died before he reached fifty-five,

Held, that the policy formed part of his estate, and the amount could be attached in execution of a decree against the deceased. (*Baker and Devatia, JJ.*) DINBAI *v.* BAMANSHA. **58 Bom. 513=36 Bom.L.R. 608=152 I.C. 168=7 R.B. 130=A.I.R. 1934 Bom. 296.**

MARSHALLING.

See (1) MORTGAGE.
(2) T.P. ACT. S. 81.

MARTIAL LAW—*Declaration—Legality—Jurisdiction of High Court to inquire.*

The High Court has jurisdiction after the restoration of normal conditions to decide how far the declaration of martial law was justified. The question however whether martial law was properly declared or not cannot arise in view of S. 11 of Ordinance IV of 1930. In deciding the question of emergency the Court will have regard to the state of fact as disclosed by the evidence.

Per *Madgavkar, J.*—"Firstly, a state of war and armed rebellion or insurrection must exist and not merely a state of riot which could be put down with the aid of the military and other citizens. Secondly, neither the military nor citizens can refuse or impose conditions on such aid. Thirdly, the necessity must be proved, not merely of recourse to the military but also

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the impossibility of functioning of the ordinary civil laws and the necessity of their abolition for the time being, and the Courts have power to go into the question whether such necessity existed. Fourthly, it is only when the existence of war, whether against foreigners or rebels, and necessity are established, that the jurisdiction of the Courts ceases. Fifthly, the powers exercised by the military commonly but incorrectly known as "martial law" in fact are no law at all and would be, if the fact of necessity for a war is not established, illegal, and therefore need Acts of Indemnity, if they are not to be questioned". (*Beaumont, C.J., Madgavkar and Blackwell, JJ.*) EMPEROR *v.* CHANNAPPA SHANTIRAPPA. **55 Bom 263=I.R. 1931 Bom. 196 =129 I.C. 596=32 Cr.L.J. 403=32 Bom.L.R. 1613 =1931 Cr.C. 65=A.I.R. 1931 Bom. 57.**

MASTER AND SERVANT—*Agreement for a term —Suspension of servant—Damages—Mitigation.*

Where, by a written contract, the defendant company agreed to employ the plaintiff for a period of four years on a salary of Rs. 600 a month and there was no provision for giving notice on either side, but within less than a year, the defendant company, alleging that the figure Rs. 600, was a clerical error on their part for Rs. 500, tendered to the plaintiff an agreement with a salary of Rs. 525, a month, which the plaintiff refused to accept and thereupon the defendant company suspended him; in a suit by the plaintiff for damages claiming Rs. 600, a month for a year less a certain sum earned by him in that year,

Held, that the period should certainly be for one year as agreement was for over three years longer.

Held also, that the plaintiff was bound to mitigate the damages by accepting the offer at a salary of Rs. 525, if the finding was that there was mistake and that the plaintiff was entitled to take advantage of it, and the damages would have to be assessed at Rs 75 a month for 12 months less the sum earned, on the ground that any difficulty in accepting the offer of the defendant company was of the plaintiff's own making; and that if the finding was that there was no mistake on the part of the defendant company, it would be unreasonable to expect the plaintiff to accept their offer and the damage should be at the rate of Rs. 600 a month for 12 months and that the rule that damages must be mitigated only required that a reasonable course of action must be taken and certainly did not require the plaintiff to do anything unreasonable or of a speculative nature. (*Remfry, J.*) W.C. BINNS *v.* W. & T. AVERY, LTD. **61 Cal. 548=152 I.C. 117=7 R.C. 240=38 C.W.N. 908=A.I.R. 1934 Cal. 778.**

———*Contract of service—Provision for future increment with retrospective effect—Termination of service —Right of servant.*

Petitioner was in service on Rs. 43 per mensem. He was promised to pay at Rs. 50 per mensem from 1st January, 1932, with retrospective effect from 1st July, 1931. Entry to this effect was made in the staff book. Before the date on which the increment was to be given effect to. his services were dispensed with and he was offered arrears of pay at Rs. 43 per mensem with Rs. 43 in lieu of one month's notice (Rs. 68 in all). But he claimed increased pay at Rs. 50 per mensem.

Held, that the petitioner's right to increment was obviously conditional on his remaining in service on the date on which the increment was to come in force, otherwise there would have been no point in postponing the increment. (*Bhide, J.*) VOLKART BROS. *v.* KUNDAN LAL. **140 I.C. 538=33 P.L.R. 1001=I.R. 1933 Lah. 8=A.I.R. 1932 Lah. 602 (1).**

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———Contract of service—Provision for payment of bonus and gratuity after 10 years—Wrongful dismissal after 8 years—Right of servant to amounts. *See* CONTRACT ACT, S. 53. **39 Mys.H.C.R. 601=12 Mys L.J. 422.**

———*Corporation—Suit by employee for arrears of pay—Liability of members of managing body.*

Where a person sues members of a Managing Committee of an institution for arrears of pay, contending that he was employed and discharged by the said members, he shall be entitled to decree against the assets of the institution in the hands of such members. (*Mohammad Noor, J.*) GARIB MIAN THIKADAR *v.* MOHAMMAD HABIBUL RAHMAN. **I.R. 1933 Pat. 229=144 I.C. 311=14 Pat.L.T. 558=A.I.R. 1933 Pat. 210 (1).**

———*Dismissal of servant—Appointment for term— Power to determine "for cause"—Power to dismiss at pleasure excluded.*

If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" any implication of a power to dismiss at pleasure is excluded. *Gould v. Stuart*, (1896) A.C. 575, Rel. on. (*Lord Atkin.*) CLIFFORD B. REILLY *v.* EMPEROR. **6 R.P.C. 129=148 I.C. 637=39 L.W. 287=1934 A.L.J. 255=3 A.W.R. 600=A.I.R. 1934 P.C. 60=66 M.L.J. 639 (P.C.).**

———*Dismissal of servant—Claim for damages—Sustainability—Office held by servant abolished by statute.*

If further performance of a contract becomes impossible by legislation having that effect the contract is discharged. If therefore the office held by a person is abolished by statute, thenceforward it is illegal for the executive to continue the servant in that office or pay him any salary; and impossible for him to exercise his office. In such a case discharge means that the contract is put an end to and does not mean broken and the servant is not entitled to damages for breach of contract. (*Lord Atkin.*) CLIFFORD B. REILLY *v.* EMPEROR. **6 R.P.C. 129=148 I.C. 637=1934 A.L.J. 255=3 A.W.R. 600=39 L.W. 287=A.I.R. 1934 P.C. 60=66 M.L.J. 639 (P.C.).**

———*Dismissal of servant—Departmental enquiry— Irregularity in, condoned by servant—Claim for damages on score of such irregularity—Maintainability.*

Where a departmental rule of procedure, under which the enquiry leading to the dismissal had to be held, was sufficiently and substantially complied with,

Held, that a claim for damages could not be allowed on the score of an irregularity which was condoned by the plaintiff himself during the progress of the enquiry. (*Guha and Bartley, JJ.*) SECRETARY OF STATE *v.* PROMOTHA NATH GANGULY. **157 I.C. 1116=8 R.C. 144=A.I.R. 1935 Cal. 552.**

———*Dismissal of servant—Dismissal for defence of orders—Suit for damages for wrongful dismissal.*

The plaintiff undertook under a written agreement to serve the railway administration as guard or otherwise in any place situate on the N. W. Railway system. On being served with a notice transferring him from Lahore to Quetta, he applied for cancellation of the order of transfer and after making several protests and excuses finally applied for leave on the ground of his wife's illness but failed to comply with the requirement of a proper medical certificate. As the plaintiff continued to ignore the order of transfer, the Divisional Superintendent for Lahore purported to suspend him but the suspension order was later on cancelled and he was directed to report at Quetta on a certain date and on his

failure to do so was dismissed as from that date. The plaintiff instituted a suit for damages for wrongful dismissal.

Held, that the plaintiff defied his superiors for a period of four months, and made absurd excuses for non-compliance with their orders, and even if the order of suspension gave him an excuse, that ground was completely removed on its subsequent cancellation and that his neglect to obey the order to report at Quetta was a further defiance of his superior officers and following on his previous conduct gave ample justification for his immediate dismissal. (*Jai Lal and Monroe, JJ.*) SECRETARY OF STATE *v.* HOLLINGBREY. **149 I.C. 437 = 6 R.L. 689 = A.I.R. 1934 Lah. 769.**

———*Dismissal of servant—District Board servant—U. P. District Boards Act* (*X of* 1922), *S.* 71.

A District Board servant is under the general disability of other public servants in that he holds his office during pleasure, and he cannot sue the District Board or the Secretary of State in a Court of Law for wrongful dismissal; nor can he sue for a declaration that a resolution removing him is null and void as such a declaration would not come under S. 42, Specific Relief Act. (*Bennet and Allsop, JJ.*) ROSHAN LAL GOSWALA *v.* DISTRICT BOARD, ALIGARH. **58 All. 40 = 158 I.C. 626 = 8 R.A. 320 = 1935 A.W.R. 850 = A.I.R. 1935 All. 802.**

———*Dismissal of servant—Notice—Servant falling ill and unable to work.*

The practice between master and servant is for either side to give a month's notice for termination of their contract, or in lieu of a month's notice, one month's salary must be paid to the servant unless he has been guilty of wrongful conduct. Where the servant falls ill and is unable to work, and there is no specific contract between the parties to cover such a case, the consequence is, that if the servant is unable to perform the duties entrusted to him, that is to say, to carry out his contract to work regularly, he must be held to be guilty of wrongful conduct. (*Kendall, J.*) CHANDRA SHEKHAR DIXIT *v.* BURHWAL SUGAR MILLS. **1935 A.L.J. 994 1935 A.W.R. 977 = 8 R.A. 182 = 157 I.C. 362 = A.I.R. 1935 All. 908.**

———*Dismissal of servant—Notice—Work done subsequent to—Compensation for—Right of servant.*

Where the contract of service did not fix any term or provide for notice, but the respondent was served with a notice to hand over charge on 11th January, 1931, but he could not do so till 25th January, 1931.

Held, that the respondent was entitled for his pay till 25th January, 1931, and not merely till the date of notice (*Subhedar, A.J.C.*) ALEXANDER GREEN *v.* COWELS. **6 I.R. (Nag.) 79 = 146 I.C. 122 = 16 N.L.J. 98 = A.I.R. 1933 Nag. 289.**

———*Dismissal of servant — Reasonable notice—Measure of damages.*

Every master has an inherent right to dispense with the services of his servant with reasonable notice As to what is reasonable notice depends on the nature of the servant's employment. When that is determined, the measure of damages is what the servant would have earned in the employment of his master during the period of the notice. *Addis* v. *Gramaphone Co., Ltd.*, (1909) A C. 488, Ref. (*Lobo, A. J. C.*) ABRAHAM *v.* KARACHI MUNICIPALITY. **113 I.C. 387 = 26 S.L.R. 435 = A.I.R. 1929 Sind 69.**

———*Dismissal of servant—Rule as to—Public officers and servants.*

All offices are held either "at pleasure" or "during good behaviour." Where an office is held at pleasure, the holder thereof is subject to dismissal at any time without any cause being assigned. No notice or framing of any charge is necessary; and the holder is removable at the sole discretion of the appointing authority. Where an office is held during good behaviour, the holder thereof is appointed to all intents and purposes for life and has what is called a freehold office for his life. He can be removed from office only for want of good behaviour. In this case, notice of dismissal should be given and a charge framed and proved. Except where it is otherwise provided by statute, all public officers and servants of the Crown hold their appointments at the pleasure of the Crown; and speaking generally, they are subject to dismissal at any time without cause assigned; and an aciion for wrongful dismissal will not be entertained by a Court of law. (*Bennet and Allsop, JJ.*) ROSHAN LAL GOSHWALA *v.* DISTRICT BOARD, ALIGARH. **58 All. 40 = 158 I.C. 626 = 8 R.A. 320 = 1935 A.W.R. 850 = A.I.R. 1935 All. 802.**

———*Dismissal of servant—Servants of Crown—Liability for termination of service at pleasure.*

In a suit for damages for wrongful dismissal against Secretary of State for India in Council, it is for the plaintiff to show that he enjoyed some peculiar privilege, as the general rule is that all servants of the Crown are liable for termination of service at pleasure. (*Beckett, J.*) LAL SINGH *v.* SECRETARY OF STATE. **158 I.C. 369 (1) = 8 R.L. 246 (1) = A.I.R. 1935 Lah. 965.**

———Dismissal of servant—Servant under the Crown—Prerogative of Crown to dismiss at will—If taken away by term in contract of service. *See* CROWN—SERVANT UNDER—DISMISSAL. **155 I.C. 395 (1) = 37 P.L.R. 370 = A.I.R. 1935 Lah. 669.**

———*Dismissal of servant—What constitutes.*

If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, there is at once a wrongful dismissal. The use of polite instead of peremptory language in calling upon the servant to resign does not make it a resignation. (*Lobo, A J.C.*) ABRAHAM *v.* KARACHI MUNICIPALITY. **113 I.C. 387 = 26 S.L.R. 435 = A.I.R. 1929 Sind 69.**

———*Employee of Devasthanam—Tenure of—If holds office "at pleasure"—Temple trustee—Power to dismiss servant summarily—Public and private service.*

The trustee of a Devasthanam, whose affairs were managed under a scheme which authorized the trustee "to fine, suspend, reduce or remove any servant or official of the Devasthanam," dismissed a servant summarily and the latter sued for damages for wrongful dismissal.

Held, that the servant should be deemed to have been in private service and not public service, that he did not hold office "at pleasure", and was not therefore liable to dismissal without notice and without just and proper cause.

Held, further, that the scheme did not authorize the trustee to dismiss a servant summarily, without notice. (*Varadachariar, J.*) VENKATESWARA AIYAR *v.* SRI MEENAKSHI SUNDARESWARAR DEVASTHANAM. **157 I.C. 873 = 8 R.M. 168 = 1935 M.W.N. 1214 = 42 L.W. 622 = A.I.R. 1935 Mad. 945 = 69 M.L.J. 206.**

———*Government servant — Tenure of—Dismissal—Suit for damages—Maintainability.*

As a general rule a Government servant holds office during pleasure and is liable to be dismissed at any time without notice and without reason assigned. The rule is subject, in India, to statutory exceptions contained in rules under the Government of India Act, for instance, the fundamental rules governing the employment of

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civil servants. A person suing for damages for such dismissal must prove such statutory exceptions and where the general rule applies, the dismissal cannot give rise to an action for damages. (*Broomfield and Macklin, JJ.*) SECRETARY OF STATE FOR INDIA *v.* YADAVGIR. **60 Bom 42=160 I.C. 505=8 R.B. 258 =37 Bom.L.R 931=A.I.R. 1936 Bom. 19.**

———*Liability of master for acts of servant—Liability imposed by statute* — Mens rea *immaterial* — *Burma Forest Act (IV of* 1902), *Ss.* 55 (d) *and* 58 (a).

The appellant obtained from Government a grant of 500 acres of land from forest reserve for the cultivation of Kapok a shrub producing a substance, similar to cotton. The land contained a considerable quantity of teak and other timber. He was allowed to fell and extract the timber and for that purpose he was allowed the use of the property hammer to be impressed on all timber felled within the grant, subject to several restrictions imposed by the Forest Department. The appellant employed a servant who supervised felling of trees and clearing the jungle in the grant area. The servant was also entrusted the use of the property hammer. The servant marked timber with it on numerous occasions in the absence of the appellant and without his orders. Though the condition of the license under which property hammer mark was issued contemplated that the licensee should be permitted to entrust the hammer to an employee only under a written permit, no such permit in fact issued to the servant. It was subsequently discovered that in violation of the conditions of the grant, illicit felling of teak trees had been done on a very extensive scale both in reserve forest and on public forest land and such timber marked with the property hammer and a considerable quantity which was not marked at all with the property mark was found within the appellant's grant. The appellant was prosecuted for (*i*) unlawfully felling teak trees in a reserve forest under S. 55 (*d*) of the Forest Act, (*ii*) unlawfully felling the teak trees on public forest land under S. 58 (*a*) and (*iii*) impressing the property hammer mark on timber which had been unlawfully felled under R. 87 (*b*) (*vi*) read with R. 98.

Held, (1) that under R. 87 the owner of a property mark was responsible for its legitimate use and so the appellant was guilty under R. 87 (*b*) (*vi*) for the improper use of the mark by his servant; (2) that in marking timber his servant was acting within the scope of his employment and as the offences under the Forest Act had nothing to do with *mens rea* of the offender the master was criminally liable by statute for violation of the conditions of the grant by the servant, although such acts of the servant were not authorised by and were done without the knowledge of the master. (*Dunkley, J.*) MAUNG BA CHO *v.* EMPEROR. **12 Rang. 300=154 I.C. 57=7 R. R. 248=36 Cr.L.J. 450=1934 Cr.C. 1077=A.I.R 1934 Rang. 245.**

———*Liability of master—Contract by servant.*

A servant can bind his master only with three cases (*i*) where he is specially authorised to do so; (*ii*) where he is entrusted with duties for the due discharge of which authority to make such contracts is necessary or usual; (*iii*) where third persons have reason to believe from his master's conduct that he has authority to bind his master. In the last case, the belief should be honest and *bona fide*, *i.e.*, entertained after due care and attention. 26 Cal. 701, Ref. (*Wild, J.C. and Milne, A.J.C.*) PARSRAM BULCHAND *v.* JODHPUR BIKANER RY. CO. **I.R. 1931 Sind 129=134 I.C. 385= 25 S.L.R. 253=A.I.R. 1931 Sind 144.**

———*Liability of master—Criminal liability imposed by statute—Knowledge of servant imputed to master—Instances of.*

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Under the ordinary criminal law no conduct is punished as a crime unless it has been produced by some form or other of *mens rea* which may be fairly accurately defined as an intention to do what is known to be illegal. *Actus non facit reun, nisi mens sit rea.* Consequently in the case of all ordinary offences the law does not regard the master as having any such connection with the acts done by his servant as will involve him in any criminal liability for them unless he had himself actually authorised them but nevertheless in a few exceptional cases, for example, under the Licensing Acts, Sale of Food and Drugs Act, Railway Clauses Consolidation Act, Metropolitan Police Act, Opium Act and Arms Act, etc., even when the act is of such kind as not to be punishable unless committed with full knowledge of its circumstances the person is by statute made liable to be punished for it in spite of the fact that it was not he, but only some servant of his that actually knew the circumstances. (*Dunkley, J.*) MAUNG BA CHO *v.* EMPEROR. **12 Rang. 300=154 I C. 57=7 R.R. 248 =36 Cr L J. 450=1934 Cr.C. 1077=A.I.R. 1934 Rang. 245.**

———Liability of master—Criminal liability of master for act of servant. *See* BURMA FOREST ACT (1902), RR. 22 AND 98. **A.I.R. 1934 Rang. 182.**

———*Liability of master to servant—Electric plant on master's premises—Defects in—Injuries caused thereby resulting in servant's death.*

The contract between employer and employed involves on the part of the former the duty of taking reasonable care to protect his servant from unnecessary risk. Where the employer has taken all reasonable steps to ensure that the electrical installation on his premises is in a safe condition, he is under no legal liability in respect of any injury caused by defects in the electric plant resulting in the death of the servant. (*Page, C.J. and Mya Bu, J.*) DHANAL SOORMA *v.* RANGOON INDIAN TELEGRAPH ASSOCIATION, LTD. **13 Rang. 369=160 I.C. 245=8 R.R. 357=A.I.R. 1935 Rang. 401.**

———Liability of master—Tort committed by servant, *See* TORT BY SERVANT, *infra.*

———*Liability of servant—Leaving service without notice—Right to wages for final period of service—Master's right to compensation.*

When a servant whose wages are due periodically leaves service without legal justification or without proper notice, he is not entitled to be paid for the portion of the time during which he served since the last periodical payment. The master would be entitled to a reasonable compensation for breach of the contract of service under the Contract Act. (*Bhide, J.*) AMAR SINGH *v* GOPAL SINGH. **32 P.L.R. 275=I.R. 1931 Lah. 625 (2)=132 I.C. 577=A.I.R. 1931 Lah. 133 (2).**

———Municipal employees. *See* BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), SS. 46 (*e*) AND 184. **26 S.L.R 469.**

———*Negligence of servant—Liability of Government in tort.*

Government itself is not responsible for the misfeasance, or wrongs, or negligence, or omissions of duty of the subordinate officers or agents engaged in the public service. Owing to the negligence of a bailiff in accepting certain security as sufficient, appellant suffered loss for which he filed a suit against the Secretary of State.

Held, that the tort was negligence and that the act complained of was neither directly authorised nor ratified by the Secretary of State or Local Government. (*Baguley, J.*) RAMASAMI *v.* SECRETARY OF STATE FOR INDIA. **6 I.R. (Rang.) 31=145 I.C. 226=A.I. R. 1933 Rang. 113.**

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——**Notice.** *See also* DISMISSAL OF SERVANT, *supra.*

——*Notice—Sufficiency of—No hard and fast rule.*

The respondent was employed as a motor engineer on a pay of Rs. 300 per mensem. The contract of service was not for any fixed term; nor did it provide for notice of termination of services. The respondent served the appellant only for nine months and in previous places where he had served only one month's notice used to be given.

Held, that one month's notice was sufficient to terminate the employment. (*Subhedar, A.J.C.*) ALEXANDER GREEN *v.* COWELS. **6 I.R. (Nag.) 79=146 I.C. 122=16 N.L.J. 98=A.I.R. 1933 Nag. 289.**

——*Relationship—What constitutes—Incidents of—Test to decide.*

The relationship of master and servant is a question of fact. A servant is a person who voluntarily agrees, whether for wages or not, to subject himself at all times during the period of his service to the lawful orders and directions of another in respect of the work to be done by him. That other person who is entitled in law to give orders and to have them obeyed is the master. The relationship therefore exist only in between persons of whom one has the control of the work done by the other. It does not depend merely on the mode of payment for service, or on the time for which the services are engaged, or the nature of those services, or again on the power of dismissal, though these are certainly matters which the Court may take into consideration in deciding the relationship. The test, therefore, is the right of control which a person has in the manner in which the other does the work. (*Wadia, J.*) GOOLBAI *v.* PESTONJI COWASJI. **159 I.C. 363=37 Bom L.R. 410=A I R 1935 Bom. 333.**

——*Right of master—Master's right to dispense with servant's services.*

The master's right to dispense with the servant's services any time cannot be affected by the fact that an increment is to come into effect later on. A.I.R. 1930 Cal. 404, Ref. (*Rhide, J.*) VOLKART BROS. *v.* KUNDAN LAL. **140 I.C. 538=33 P L R. 1001=I R. 1933 Lah. 8=A.I.R. 1932 Lah. 602 (1).**

——*Rights of servant—Wages for period of service—Engagement on fixed pay—Deduction for work not performed.*

A servant who is engaged on a fixed yearly, monthly or daily wage is entitled to that wage for the period during which he works, and the master cannot deduct anything from the wages on account of negligence or non-performance of a part of the servant's duty. If the servant fails to obey, his master's remedy is to discharge him, but as long as the master retains the servant in his service, he must pay him the stipulated wages and cannot make any deduction on account of work not performed. Even in the case of a servant being discharged for improper conduct if he is engaged on a contract of wages to be paid periodically, he is entitled to the wages for the period up to the time of his discharge. (1917) 1 K.B. 9460, Rel. on. (*Staples, A. J. C.*) TIKARAM BANIA *v* GENDALAL. **147 I C. 571=6 R.N. 131=30 N.L.R. 173=A.I.R. 1933 Nag. 247.**

——*Salary of servant—Salary paid in terms of gold—Provision for pension on basis of salary—Transfer to foreign country—Payment in terms of currency of that country—Retirement — Pension— Calculation—Exchange rate—Right to.*

Respondent entered the service of the appellant Bank in Turkey in 1903, and in 1905 he joined the permanent and pensionable staff, under the contract of service, he was to get a pension on the basis of the salary of the year preceding that of retirement. His salarly was *ab initio* expressed in terms of Turkish gold pounds and was paid also in such terms. In 1923 he was transferred to Cyprus where he remained till his retirement in 1931, and while serving there he was paid his salary in Cyprus pounds, calculated as per exchange rates. The salary remained as in Turkish pounds but paid in Cyprus currency. Respondent having retired on 31st December, 1931, in Cyprus, the question arose as to the rate of calculation of pension.

Held, that the respondent was entitled to a monthly pension calculated on the basis of his salary in Turkish pounds on 31st December, 1930, and that the equivalent in Cyprus currency must be calculated according to the exchange rate prevailing on the date of each instalment of the pension. (*Lord Blanesburgh.*) OTTOMAN BANK OF NICOSIA *v.* DASCALOPOULAS. **155 I.C. 108=7 R.P.C. 160=40 L.W. 187 =A.I.R. 1935 P.C. 39. (P.C.)**

——*Strike—Concerted refusal of workmen to work.*

Per *Beaumont, C.J.* (*Obiter.*)—The conduct of the workmen amounting to a concerted refusal to work for the employers as the result of a trade dispute is a strike. A strike is not the less a strike because it does not involve any breach of contract. (*Beaumont, C.J. and Blackwell, J.*) BAKARALLI *v.* SASSOON & ALLIANCE SILK MILLS CO., LTD **58 Bom. 262=151 I C. 229 =7 R.B. 53=36 Bom L.R. 190=A.I.R. 1934 Bom. 126.**

——*Termination of employment—Pay in lieu of notice—Proof of damages necessary.*

Before the servant can be held to be entitled to be a month's pay in lieu of notice it must be shown that he has actually suffered damages. If he is employed in an equally advantageous manner for the whole of the period for which he is entitled to notice he cannot claim damages. *Reid* v. *Explosives Co., Ltd.*, (1887) 19 Q B.D. 264, Rel. on. (*Mackney, J.*) BALDEO SINGH *v.* SACHDEV. **151 I.C. 613=7 R.R. 95 (1)=A.I.R. 1934 Rang. 107.**

——*Termination of service—Notice—Leave period.*

The plaintiff was working under the defendant under an agreement by which the former was entitled to a month's leave every year or a month's pay in lieu of leave. The employer dispensed with the services of the employee by paying him up to the date of dismissal and also a month's pay in lieu of leave and notice. The employee had at the time of dismissal only a month's leave to his credit,

Held, that the employer was entitled to terminate his services by giving him leave on full pay for a month and notice at the same time. (*Baguley, J.*) THEO LAZARUS *v.* DE SOUZA & CO. **6 I.R (Rang) 133=146 I. C. 946=A.I.R. 1933 Rang. 85.**

——*Termination of service—Right of master.*

The right to terminate service of a servant by mere notice without assigning cause is a general right existing in a master under the law of master and servant; and in a case based on contract the servant would have to show that the contract contained a term by which the master gave up such a right. (*Bennet and Allsop, JJ.*) ROSHAN LAL GOSWALA *v.* DISTRICT BOARD, ALIGARH. **58 All. 40=158 I.C. 626=8 R.A. 320= 1935 A.W.R. 850=A.I.R. 1935 All. 802.**

——*Termination of service—Salary till expiry of notice—Right of employee.*

Where an employee terminated his service by one month's notice and the employer accepted the resignation immediately and appointed another in his place.

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Held, that the person who resigned was entitled to claim his salary until the date of the notice. (*Mahadevayya and Ramachandra Rao, JJ.*) GENERAL ASSURANCE SOCIETY, LTD. *v.* TIRUPATI. **38 Mys. H.C.R. 49=11 Mys.L.J. 201.**

——— *Tort by servant—Liability of master for.*

A master is liable for a tortuous or wrongful act of his servant, when the act committed by the servant is expressly authorized by the master or if the wrong done is incidental to such act. In other words, the wrong must be an improper mode of doing an authorized act or incidental to it. (*Wadia, J.*) GOOLBAI MOTABAI *v.* PESTONJI COWASJI. **159 I.C. 363=37 Bom.L.R. 410=A.I.R. 1935 Bom. 333.**

———Tort by servant—Liability of master for—Test of. *See* TORT—VICARIOUS LIABILITY.

——— *Wrongful dismissal—Damages—Measure of.*

The relation of master and servant is one of contract to which the ordinary principles of the law of contract is the same. The measure of damages in all actions for breach of contract is the same; and when a servant has been wrongfully dismissed from service by his master, the measure of damages is the pecuniary loss which the servant has sustained, provided such loss naturally flows from the breach in question. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) BANGALORE WOOLLEN, COTTON AND SILK MILLS CO., LTD *v.* KRISHNASWAMY. **39 Mys.H.C.R. 601=12 Mys.L.J. 422.**

——— *Wrongful dismissal—Meaning of—Wrong procedure adopted for dismissal—Suit for damages—Maintainability.*

Where a servant is dismissed not improperly, but by a wrong procedure, *e.g*, by a person or in a manner not provided for in the contract of service, the dismissal cannot be said to be wrongful so as to entitle him to sue for damages for such dismissal; though the fact that a wrong procedure is adopted may give the servant a right to sue for breach of an independent contract. (*Ameer Ali, J.*) H. A. MURTOUGH *v.* THE COMMISSIONER FOR THE PORT OF CALCUTTA. **39 C.W.N. 1025.**

MATATHIPATHI. *See* HINDU LAW—RELIGIOUS ENDOWMENT.

MATERIAL ALTERATION.

See (1) DEED.
(2) NEGOTIABLE INSTRUMENTS ACT, S. 87.

MATERIAL IRREGULARITY. *See* C. P. CODE, S. 115.

MATH. *See* HINDU LAW—RELIGIOUS ENDOWMENT.

MATRIMONIAL DOMICILE.

See (1) DIVORCE ACT (1869), S. 2.
(2) INTERNATIONAL LAW—MARRIAGE.

MATRIMONIAL JURISDICTION.

See (1) DIVORCE ACT (1869).
(2) INTERNATIONAL LAW—MARRIAGE.
(3) JURISDICTION—RESTITUTION OF CONJUGAL RIGHTS.
(4) RESTITUTION OF CONJUGAL RIGHTS.

MAUFI KHAIRATI—Distinction from Maufi Khidmati. *See* LAND TENURES—MAUFI KHIDMATI.

MAUFI KHIDMATI. *See* LAND TENURES—MAUFI KHIDMATI.

MAURASI SARBARKARI. *See* LAND TENURE—SARBARKARIS.

MAXIMS—Actio personlis moritur cum persona—*Applicability to India.*

Except in so far as it has been modified by statute the rule *actio personalis moritur cum persona* is and

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remains a part of the general law that runs in India (*Page, C.J. and Ba U, J.*) CASSIM & SONS *v.* SARA BIBI. **13 Rang. 385=160 I.C. 715=8 R.R. 413=A. I.R. 1936 Rang. 17.**

———Actio personalis moritur cum persona—Exception to. *See* C. P. CODE, O. 22, R. 1.

———Actus curiae neminem gravabit—*Mistake of Court—Relief.*

Where a decree was by mistake dated 16th February, 1929, instead of 11th February and the decree-holder, being misled thereby, applied for execution on the 15th February, 1932, *held*, *actus curiae neminem gravabit* and that the decree ought to be regarded as having been passed on the 16th February, 1929. (*Jack, J.*) NALINI KANTA RAY *v.* KAMARADI I. **56 C.L.J. 185=141 I. C. 114 (1)=I.R. 1933 Cal. 82=A.I.R. 1933 Cal. 239.**

——— *Approbate and reprobate—Applicability to valuation of suit.*

Where a person values his suit in a particular manner he cannot resile from it for purposes of preferring an appeal to the Privy Council. The rule as to approbate and reprobate will not however apply where the valuation adopted by the plaintiff is only the notional value and the valuation contemplated by S. 110, C. P. Code, is the actual or market value. (*Rankin, C.J. and C.C. Ghose, J.*) MAHENDRA NARAYAN RAY CHAUDHURI *v.* JANAKINATH RAY. **58 Cal. 66=I.R. 1931 Cal. 622=132 I C. 910=A.I.R. 1931 Cal. 417.**

———Caveat emptor—*Applicability to execution sale.*

The ordinary rule of *caveat emptor* applies in the case of auction sales under the orders of Courts. (*Addison, J.*) MAHOMED HAYAT *v.* GULAM NABI. **I.R. 1931 Lah. 598=132 I.C. 201 (2)=32 P.L.R. 390.**

———Debitor non praesumitur donare—*Dower debt.*

It is doubtful if the maxim has any application as between husband and wife; at all events where the Mahomedan husband had been making varying payments as "presents" to his wife without allocating any of them to the dower debt, it cannot be presumed he intended thereby to discharge her dower debt. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A 1=6 Luck. 556=1932 A.L.J. 663=I.R. 1932 P.C. 81=136 I.C. 385=36 C. W.N. 137=35 L.W. 118=8 O.W.N. 1378=62 C.L.J. 326=A.I.R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

——— De minimis non curat lex—*Applicability of—Smallness of amount.*

The smallness of the amount in dispute does not involve the application of the maxim for it frequently happens that a very small sum may involve a very big question of principle which may affect other cases. (*Courtney Terrell, C. J. and Fazl Ali, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMJIWAN SAHU. **I.R. 1932 Pat. 209 =139 I.C. 127 (2)=13 Pat.L.T. 343=A.I.R. 1932 Pat. 237.**

——— *Detur digniori.*

Where the right of the Crown and that of the subject meet at one and the same time, that of the Crown is in general preferred, the rule being "detur digniori". The right of the two attaching creditors and of Government were brought into existence at one and the same time and by the same decree. The assets were realised or rather came into the hands of the Court, before any of the judgment-creditors applied for execution and were held by the Court. The two creditors had obtained attachments but no payment had been made to them. The Crown had also obtained an attachment although on a later date.

Held, that the Crown should *prima facie* be preferred to the other two claims. 5 B. H.C.O.C. 23 and A.I.R.

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1931 Sind 164, Ref. (*Rupchand, J.C*) VASSANBAI TOPANDAS *v.* RADHABAI TIRATHDAS. **147 I.C 863 = 6 R.S. 167 = 27 S.L.R. 444 = A.I.R. 1933 Sind 368.**

———"*Expressio unius exclusio alterius.*"

When the essential, literal meaning of a word is deliberately extended by the framers of an Act for the purpose of that Act in one direction but not in any other that is an indication that they wish to exclude any possibility of the word being extended by interpretation in any other direction. So where the term 'agriculture' is made by the Madras Estates Land Act, to include 'horticulture,' that shows it is not intended to include other things of an analogous nature, planting of trees and fruit gardens. (*Reilly and Anantakrishna Aiyar, JJ.*) CHANDRASEKHARA BHARATHI SWAMIGAL *v.* DURAISWAMI NAIDU. **54 Mad. 900 = I.R. 1931 Mad. 794 = 134 I.C. 42 = 34 L.W. 185 = A I.R. 1931 Mad. 659 = 61 M.L J. 648.**

———Expressio unius est exclusio alterius—*Application of—Caution.*

The maxim "*expressio unius est exclusio alterius*" is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusion is often the result of inadvertence or accident, and the maxim ought not be applied when its application, having regard to the subject matter to which it applies, leads to inconsistency or injustice. *Lawe* v. *Darling & Sons*, (1906, 2 K. B. 772, Ref. (*Aston, Rupchand and Mehta, A.J.Cs.*) PAHLUMAL SANTDAS *v.* NARAINDAS DIPCHAND. **I.R. 1933 Sind 157 = 143 I.C 863 = 27 S.L.R. 121 = A.I R. 1933 Sind 151 (2) (F.B).**

———*Ex turpi causa non oritur actio.*

No litigant is entitled to maintain a suit which has its origin on a disgraceful cause. Thus an award cannot be filed in respect of a claim for a share of bribes taken from the public. (*Thom and Kisch, JJ.*) PEARY LAL *v.* MAHESH CHANDRA. **149 I.C. 396 = 6 R.A. 893 = 3 A.W.R. 415 = 1934 A.L.J. 1256 = A.I R. 1934 All. 493.**

———Factum valet—*Hindu marriage—Conditions for applicability of rule.*

Where a Hindu marriage is an accomplished fact though solemnized without the consent of the paternal uncle, the legal guardian, the application of the doctrine of *factum valet* is an absolute and not a discretionary rule of law. Conditions for applicability of doctrine of *factum valet* laid down. (*Boys and Sen, JJ.*) RAM HARAKH *v.* JAGAR NATH. **53 All. 815 = I.R. 1931 All. 609 = 133 I C. 239 = 1931 A.L.J. 816 = A.I.R. 1932 All. 5.**

———Falsa demonstratio—*Application.*

Where one description, and that an incomplete one, has been added to an already sufficient description the added description may be disregarded under the maxim *falsa demonstratio.* Where certain properties were described as *C* estate and later there was an erroneous enumeration of the properties,

Held, that the later description might be ignored. (*Lort Williams, J*) JALPAIGURI BANKING AND TRADING CORPORATION, LTD. *v.* SAMARESH CHAKRABARTI. **60 Cal. 701 = 6 I.R. (Cal.) 126 = 145 I.C. 666 = A.I.R. 1933 Cal. 535.**

———Falsa demonstratio non nocet—*Scope of the doctrine—Land sold by description and measurement.*

The doctrine *falsa demonstratio non nocet* should not be whittled away so as to make it ridiculous. *Prima facie*, when a piece of land is sold with reference to its boundaries and survey number and its extent is also stated, and the description of the extent is found subsequently to be in excess of its actual extent, the Court will not set aside the contract or give effect to the rule of proportionate compensation if it finds that the measurement was not the governing portion of the description and that the parties intended to convey, and take a conveyance of, the actual plot of land only sufficiently described otherwise. (*Tyabji, J.*) MAHARUDRAPPA *v.* LAKSHMAN. **I.R. 1932 Bom. 311 = 137 I.C. 583 = 34 Bom.L.R. 212 = A.I.R. 1932 Bom. 449.**

———Falsus in uno falsus in omnibus—*Applicability.*

Where the story of the prosecution and the evidence in support of it are so garbled and distorted, and where the true facts of the case are so overlain with a mass of lies that it is practically impossible to disentangle them from the falsehoods in which they lie embedded, then to such a case the maxim *falsus in uno falsus in omnibus* has no applicability whatsoever, and no conviction can be legally based upon such tainted evidence upon which no credence can be placed, and in respect of which the trial Judge or the appellate Court cannot assert what portion of it is true and induces belief in the existence of certain facts and what portions of it are false and unworthy of belief. (*Srivastava and Nanavutty, JJ.*) HAR DAYAL SINGH *v.* EMPEROR. **8 Luck. 397 = 6 I.R. (Oudh) 43 = 145 I.C. 359 = 34 Cr.L.J. 935 = 10 O.W.N. 263 = 1933 Cr.C. 432 = A.I.R. 1933 Oudh 226.**

———*Falsus in uno falsus in omnibus*—Applicability—N.-W. F. Province. *See* CRIMINAL TRIAL—EVIDENCE. **A I.R. 1935 Pesh. 50.**

———Falsus in uno falsus in omnibus—*Application.*

It is generally unsafe to apply the doctrine, *falsus in uno falsus in omnibus* to evidence of witnesses in India. Where the evidence is substantially correct simply because there are deliberate falsehoods in it, it should not be totally rejected. (*Srivastava, J.*) CHHOTE LAL *v.* EMPEROR. **6 I.R. (Oudh) 122 = 146 I.C. 452 = 10 O.W.N. 482 = 1933 Cr.C. 596 = 35 Cr.L.J. 58 = A.I.R. 1933 Oudh 269.**

———*Fatetur facinus qui judicium fugitis.*

The old maxim "fatetur facinus qui judicium fugitis" in not to be applied in India. A I.R. 1915 Lah. 106, Foll. (*Mahomed Noor and Luby, JJ*) EMPEROR *v.* SUAR GOLA. **152 I.C. 1021 = 16 Pat.L.T. 195 = 36 Cr.L.J. 262 = 7 R.P. 289 = 1934 Cr.C. 1189 = A.I.R. 1934 Pat. 533.**

———*Generalia specialibus non derogant.*

A wholly general provision cannot be read as interfering with a specific provision with regard to limitation maxim "generalia specialibus non derogant" applied in construing S. 39 of Ordinance II of 1931 (*Rankin, C. J. and Pearson, J.*) NIL RATAN GANGULI *v.* EMPEROR. **60 Cal. 571 = I.R. 1933 Cal. 478 = 143 I C. 802 = 34 Cr.L.J. 633 = 37 C.W.N. 195 = 1933 Cr. C. 140 = A.I.R. 1933 Cal. 124.**

———*Generalia specialibus non derogant.*

Where there is a conflict between a special Act and a general Act the former should prevail. Effect of S. 12 (1), Oudh Courts Act, on S. 109 (*b*), C. P. Code, considered. (*Hasan, C. J. and Bisheshwar Nath, J*) MAHOMED AZIM KHAN *v.* MUMTAZ ALI KHAN. **I.R. 1931 Oudh 425 = 134 I.C. 1017 = 8 O.W.N. 1207 = A.I.R. 1932 Oudh 163.**

———*Generalia specialibus non derogant*—(*C. P. Code, S.* 148 *and O.* 45, *R.* 7.)

Per *King, J.* (Obiter),—In order to avoid a conflict between O. 45, R. 7, and S. 148, C. P Code, it must be held that O. 45, R. 7 must prevail, both on the principle "generalia specialibus non derogant" and on the principle that the general discretion given by S. 148 is a judicial discretion which can only be exercised according to

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law and not in contravention of law. (*Mukerji, A.C.J., King and Niamatullah, JJ.*) BAHADUR LAL *v.* JUDGES OF ALLAHABAD HIGH COURT. **55 All. 432 =I.R 1933 All. 290=143 I.C. 559=1933 A.L.J. 207 =A.I.R. 1933 All. 241 (F.B.).**

———Generalia specialibus non-derogant—*Doctrine non-inflexible—Terms of the enactment to be looked at.*

When the Legislature has given its consent to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. But in that respect every enactment must be construed according to its own subject-matter and its own terms. The Charter of the City of Montreal was amended in 1910 by 1 Geo. V., c. 48, which specially dealt with the annexation of the town of Longue Pointe as a ward of the City. It conferred on the City the power to macadamise the streets, the cost of it to come out of the general fund of the City. The Charter was again amended by Several Acts in 1911, 1912 and 1914, which provided that "notwithstanding any law to the contrary", the cost of paving shall be apportioned among the proprietors in the respective streets or lanes.

Held, that having regard to the fact that the amendments were all of the statutory Charter and that the special enactment was recognised in the same statute as the general enactment, the latter, though general, enactment modified the earlier Statute and that the City had the power to charge the frontagers. (*Lord Wright.*) CORPORATION OF THE CITY OF MONTREAL *v.* MONTREAL INDUSTRIAL LAND CO., LTD. **I.R. 1932 P.C. 302 (2)=9 O.W.N. 990=36 L.W. 741=139 I.C. 667 =A.I.R.1932 P.C. 252=63 M.L.J. 926 (P.C.).**

———Generalia specialibus non derogant—*Illustration.*

S. 65 of the Contract Act based on the principle of affording relief upon *quantum meruit* is a general rule which does not, however, apply to a case governed by a special statutory provision, *e.g.*, a contract entered into by or with a Municipal Board and required by the statute to be under seal. If it is not under seal, no relief can be granted even upon *quantum meruit*. (*Wazir Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MUNICIPAL BOARD, LUCKNOW *v.* S.C. DEB. **8 Luck. 1=I.R. 1932 Oudh 236=137 I.C. 574=9 O.W.N. 461= A.I.R. 1932 Oudh 198 (F.B.).**

———"*In ea quae fraequentius accidunt praveniunt Jura.*

The presumptions that the Muslims follow the Hanafi Law unless the contrary is alleged and proved that if they are Shiahs, they are governed by the Shiah Law, that the great majority of Shiahs in their turn being Ithna Asharis, their exposition of the law is enforced, unless the parties show that their particular rule is different—are all based on the numbers of the followers of each sect, "on the principle of providing for the ordinary course of things". (*Tyabji, J.*) AKBARALLY *v.* MAHOMEDALLY. **57 Bom. 551=I.R. 1932 Bom. 434=138 I.C. 810=34 Bom L.R. 655=A.I.R. 1932 Bom. 356**

———In pari delicto—Applicability. *See, Infra*, **13 Lah. 713 (F.B.)**

———In pari delicto—*Benami transfer—Intention to defraud not carried out—Transferor, if can repudiate transaction.*

A person who has conveyed property benami to another for the purpose of effecting a fraud on his creditors, cannot, where the fraud has been effected, set up the benami character of the transaction by way of defence in a suit by the transferee for possession under the conveyance. But where the projected fraud has not been carried out the executant may raise the plea that the transfer was nominal. Applicability of the maxim *in*

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pari delicto discussed. (*Sundaram Chetty, J.*) SUBBARAYA NAICKER *v.* VENKATESA NAICKER. **150 I.C. 381=6 R.M. 717=39 L.W. 357=A.I.R. 1934 Mad. 252.**

———In pari delicto malior est conditio possidentis—*Applicability—Parties not aware of the illegality—Central Provinces Land Revenue Act* (1917), *Ss.* 202 *and* 220.

The maxim *in pari delicto malior est conditio possidentis* is not applicable to a case where the parties did not know of the illegality at the time they entered into the contract. So where the parties effected a lease without the sanction of the Deputy Commissioner without knowing that such sanction was necessary, the lessee is entitled to get back the consideration paid by him. **16** N.L.R. 129 and 22 N.L.R. 136, Dist., 20 N.L.R. 87, Foll. (*Niyogi, A.J.C.*) WAHIDMIYA *v.* JANKIPRASAD. **I R 1931 Nag. 153=134 I.C. 281=14 N.L.J. 8 (Rev.)=A.I.R. 1931 Nag. 137.**

———*In pari delicto potior est conditio possidentis.*

A person who has conveyed property benami to another for effecting a fraud cannot, where the fraud has been effected, set up the benami character, of the transaction by way of defence in a suit by the transferee for possession under the conveyance, even though both the parties were privy to the fraud. The maxim *in pari delicto potior est conditio possidentis* has no application to the case; the test is that party must fail who first has to allege the fraud in which he participated. (1916) 32 M.L.J. 484, Foll. (Case-law referred to,) (*Madhavan Nair and Jackson, JJ.*) KOTAYYA NAIDU *v.* MAHALAKSHMAMMA. **56 Mad. 646=6 I.R. (Mad.) 44= 145 I.C. 308=1933 M.W.N 652=37 L.W. 645= A.I.R. 1933 Mad. 457=64 M.L.J. 719.**

———In pari delicto potior est conditio possidentis—*Applicability—Collusive transaction at execution sale.*

Where both parties to an auction sale entered into an agreement not to bid against each other at the auction sale and it appeared that the transaction was entered into fraudulently in order to deprive the rival decreeholder of the benefits of his decree,

Held, that the transaction was hit at by the maxim *in pari delicto potior est conditio possidentis.* (*Bisheshwar Nath and Nanavutty, JJ.*) RAM LAL MISRA *v.* RAJENDRA NATH SANYAL. **8 Luck. 233=I.R. 1933 Oudh 107=142 I.C. 595=10 O.W.N. 1=A.I.R. 1933 Oudh 124.**

———In pari delicto potior est conditio possidentis—*Application of, to third party.*

The maxim *in pari delicto potior est conditio possidentis* does apply to a third party who has purchased right, title and interest in the property in possession of one of the parties to a fraudulent agreement. 1932 Lah. 503 (F.B.), Appl. (*Tek Chand and Abdul Rashid, JJ.*) WALAITI RAM *v.* SHADI RAM. **16 Lah. 27=154 I.C. 1049=7 R.L. 630=37 P.L.R. 798=A.I.R. 1934 Lah. 721.**

———*In pari delicto potior est conditio possidentis*—Inapplicability—Lease exceeding statutory term and therefore void—Lessor's right to possession. *See* CONTRACT ACT, S. 65. **A.I.R. 1935 Nag. 58.**

———In pari delicto valet defendantis causa—*Illustration—Agra Tenancy Act* (*III of* 1926), *Ss.* 23, 34 *and* 86.

Where an ex-proprietary tenant has mortgaged his holding he is not entitled to sue to eject the mortgagee though the transaction is declared void by statute, because of the maxim, *in pari delicto valet defendantis causa.* (*Oppenheim, S.M. and Walton, J.M.*) PITAI *v.* KAREDIN SINGH. **14 L.R. 258 (Rev.)=17 R.D. 370.**

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———Nemo Allegans turpitudinem suam andiendus est —In pari delicto potior est conditio possidentis—*Applicability.*

There is no real conflict between the two maxims. The principle underlying both is the same; one embodies the general rule and the other an exception to that rule. It is one of the fundamental doctrines of all civilized systems of jurisprudence that a Court of law shall not lend its aid to enforce a transaction which is tainted with fraud. A person who has polluted his hands by being a party or privy to a fraudulent transaction shall not be allowed to approach the fountain of justice with his own infamy on his lips and obtain relief on the strength of such a transaction. The moment he relies on such an agreement he will be told *nemo allegans suam turpitudinem audiendus est.* This is the general rule. But its rigid application to all cases regardless of the attendant circumstances, might result at times in giving effect directly or indirectly to the fraudulent design of its authors, and thus defeat the very object for which the rule was framed. In order to avoid such undesirable consequences several exceptions to the rule have been recognized. One such exception arises in the familiar case in which the fraudulent transaction is still executory and the purpose of the fraud has not yet been effected. In such a case one of the parties to the fraud is allowed to approach the Court, repudiate the transaction, and recover money or property which had been handed over by him to the opposite party in furtherance of the transaction. In such circumstances, public policy requires that a *locus penitentiae* be given to one or other of the parties and he be allowed to retrace his steps, state the true facts before the Court, and by revoking the authority of his confederate to carry out the fraudulent scheme, defeat the purpose of the contemplated fraud. Another such case arises where two persons secretly conspire to defraud a third and in order to do so enter into a colourable agreement, and after the purpose of the fraud has been achieved one of the confederates sues the other to enforce the agreement, concealing the real facts. It is obvious that, in a case like this the Court, by preventing the defendant from showing the real nature of the transaction will be making itself the instrument of the plaintiff to give effect to an agreement which is tainted with fraud and which had been brought into existence by the joint act of both the parties. In such circumstances it is found that both the plaintiff and the defendant were in *in pari delicto*, the Court shall stay its hand, and refuse its support to either confederate "letting the estate lie where it fall". 35 Cal. 51 (P.C.), Ref. (*Broadway, Tek Chand, Coldstream, Dalip Singh and Abdul Qadir, JJ.*) QADIR BUKHSH *v.* HAKAM. **13 Lah 713=I.R. 1932 Lah. 547=139 I.C. 17=33 P.L.R. 851=A.I.R. 1932 Lah. 503 (F.B.).**

[Appl. 16 L. 27 (39).]

———Nemo de bet bis vexari—*Offence under Ss* 411 *and* 457, *I. P. Code—Separate sentences—Propriety.*

Technically the offence of being member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them but from a practical point of view separate sentences though legal are not strictly equitable. To give separate sentences comes perilously near the principle of *memo debet bis vexari.* (*Harrison, J.*) SURJAN SINGH *v.* EMPEROR. **I.R. 1932 Lah. 203=136 I.C. 27=33 Cr.L.J. 251=33 P.L.R. 602=1932 Cr.C. 378=A.I.R. 1932 Lah. 298.**

———Nemo debet bis vexari in una et eadem causa—*C. P. Code,* 1908, *O.* 23, *R.* 1 (2).

It is the intention of the law that parties should not be allowed to fight their case twice. This is brought by the maxim *nemo debet bis vexari in una et eadem causa.* This principle is embodied in O. 23, R. 1 (2), C.P. Code. (*Keane, S.M. and Oppenheim, J.M.*) SUKHRAJ SINGH *v.* GHANSHYAM. **15 R.D. 177=12 L.R. 53 (Rev.).**

———Omnia praesumuntur contra spoliatorem—*Application of.*

The doctrine commonly called *omnia praesumuntur contra spoliatorem* or *omnia praesumuntur in odium spoliatorem* applies to India. The presumption against a spoliator is one of the strongest presumptions known to law, and the law allows it against a party who, by his tortious acts, withholds the evidence by which the nature of his case would be manifested. The rigour of the maxim, however, has to be reasonably softened upon the facts and circumstances of each particular case. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———Maxim *omnia praesumuntur rite esse acta*—Application—Presumption about official acts. *See* BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930), S. 3 (2). **62 Cal. 1041.**

———*Omnia praesumuntur rite et solenniter esse acta donee probetur in contrarium.*

There is no justification for presuming that because a person was a member of an association which was lawful, he remained a member of that association after it had been declared unlawful. The law presumes innocence and lawful conduct on the part of the citizens. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* SHRIPAD RAMCHANDRA. **55 Bom. 484=I.R. 1931 Bom. 235=130 I.C. 27=32 Cr.L.J. 472=33 Bom.L.R. 90=1931 Cr.C. 177=A.I.R. 1931 Bom. 129.**

———*Potior est conditio possidentis.*

A defendant can set up the true nature of a transaction reduced to the form of a document, when the plaintiff and defendant have entered into the transaction for the purpose of misleading a third party or depriving him of rights given by law. *Potior est conditio possidentis.* (*Tek Chand and Monroe, JJ.*) RAMLAL *v.* DHIAN SINGH **6 I.R. (Lah.) 122=145 I.C. 689=A.I.R. 1933 Lah. 222.**

———Quicquid plantatur solo solo cedit—*Applicability in India.*

The English maxim *quicquid plantator solo solo cedit* has only a limited application in India. In Oudh there prevails a customary law that the ownership of the superstructure may exist in one person while the ownership of the soil vests in another. (*Wazir Hasan, C.J.*) MIRTUNJAI BAKHSH SINGH *v.* HINGA. **9 Luck. 149=6 I.R. (Oudh) 60=145 I.C. 627=10 O.W.N. 992=A.I.R. 1933 Oudh 468.**

———Renunciant juri pro se introducto—*Estoppel by conduct.*

Where a rule has been enacted solely for the protection of judgment-debtor and their estates and not on grounds of public policy or in the interest of the public generally, the person in whose favour the rule operates may by his conduct debar himself from the right of insisting upon its enforcement. Non-compliance with O. 21, R. 22, C. P. Code condoned. (*Page, C. J. and Mya Bu, J.*) BIMALANANDAN PRASAD *v.* UNITED REFINERIES, LTD. **I.R. 1933 Rang. 57 (2)=143 I.C. 299=11 Rang. 79=A.I.R. 1933 Rang. 52.**

———Res inter alios acta—*Exception to.*

When a judgment has established the right to any property between two parties, it is not open to a third person to set up the right of that party whose title has been found against as against the successful party. Such cases form the exception to the rule of *res inter alios*

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acta. (*Srivastava, J.*) AJODHIA PRASAD *v.* MT. SANJHARI KUAR. **6 Luck. 710=I.R. 1932 Oudh 372 =139 I.C. 631=9 O.W.N. 813=A.I.R. 1932 Oudh 342.**

———Res ipsa loquitur—*Applicability—Conditions for.*

Before the plaintiff can invoke the principle of *res ipsa loquitur*, it must first of all be established that the vehicle causing the damage was at the time of accident as a matter of fact under the management of the defendant or his servant. (*Costello, J.*) BAIJNATH SHAW *v.* CORPORATION OF CALCUTTA. **141 I.C. 248=36 C.W.N. 1147=I.R. 1933 Cal. 96=A.I.R. 1933 Cal. 178.**

———*Tantum prescriptum quantum possessum.*

The title founded by a trespasser on adverse possession will be strictly limited to that area of which he has been in actual possession. (*Lord Macmillan.*) NAGESHWAR BUX ROY *v.* BENGAL COAL CO. **58 I.A. 29=I.R. 1931 P.C. 59=130 I.C. 315=33 Bom.L.R. 425 =10 Pat. 407=12 Pat.L.T. 251=15 R.D. 194=35 C.W.N. 265=1931 A.L.J. 537=1931 M.W.N. 121= 33 L.W. 162=53 C.L.J. 81 and 487=A.I.R. 1931 P. C. 18 and 186=60 M.L.J. 183 (P.C.).**

———Tantum prescriptum quantum possessum—*Adverse possession of gallery coal by trespasser.*

The *maxim tantum prescriptum quantum possessum* applies to the title of a trespasser. So where the defendants who trespassed on plaintiff's mine had taken adverse possession of the gallery coal, their title cannot be said to extend to the pillar coal as well contained in an adjoining mine. 60 M.L.J. 183 (P.C.), Ref. (*Wort and Fazl Ali, JJ.*) BAIJNATH JUGAL KISHORE *v.* MANINDRA CHANDRA NANDI. **I.R. 1931 Pat. 373= 13 Pat.L.T 73=133 I.C. 453=A.I.R. 1931 Pat. 436.**

MAYUKHA. *See* HINDU LAW—TEXTS.

MEDICAL CERTIFICATE. *See* EVIDENCE.

MEDICAL DEGREES ACT (1916), Ss. 4 and 5—*Offence—Running bogus institution.*

Where the accused led people to believe that his college was an allopathic college and awarded certificates as allopathic diplomas and granted "M.M.B." degree, implying that the holder was qualified to practice western medical science.

Held, that the accused was guilty under S. 5. (*Guha, J.*) EMPEROR *v.* SATISH CHANDRA DUTTA. **I.R. 1933 Cal. 443=143 I.C. 567=34 Cr.L.J. 603= 1933 Cr.C. 727=37 C.W.N. 767=A.I.R. 1933 Cal. 456.**

MEDICAL EVIDENCE. *See* CRIMINAL TRIAL.

MEDICAL EXAMINATION. *See* CRIMINAL TRIAL.

MEETING. *See also* COMPANY.

———*Law as to—Chairman—Powers of—Adjournment.*

Apart from any other consideration, the chairman of a meeting has always the power to adjourn it when it is so disorderly that no business can be transacted thereat, otherwise it would make his position awkward when he finds members unruly and bent on mischief. It is not necessary that he should ascertain the "sense of the meeting" before dissolving it. (*Rupchand Bilaram, A.J.C.*) DIAS *v.* ALFONSO. **28 S.L.R. 161=153 I.C. 286=7 R.S. 122=A.I.R. 1934 Sind 180.**

MELWARAM—*Possessory right.*

Per *Wallace, J.*—The melwaram right is a possessory and not merely declaratory right. The holder in such a case can have the possessory right declared against one who has been wrongfully in possession of it. (*Wallace,*

MERCHANDISE MARKS ACT (1889), S. 15.

J.) RAMAMURTHI *v.* SRI RAJA MIRJA SRI PUSHAVATI ALAKA NARAYANA. **56 Mad. 366=I.R. 1933 Mad. 106=141 I.C. 307=36 L.W. 847=A.I.R. 1933 Mad. 279 (2)=64 M.L.J. 361.**

MEMORANDUM OF ASSOCIATION.

See (1) COMPANY.

(2) COMPANIES ACT (1913), SS. 6 AND 30.

MEMORANDUM OF OBJECTIONS. *See* C. P. CODE, O. 41, R. 22.

MERCANTILE AGENT. *See* SALE OF GOODS ACT (1930), S. 2.

MERCANTILE CONTRACT. *See* CONTRACT—CONSTRUCTION.

MERCANTILE USAGE. *See* CUSTOM.

MERCHANDISE MARKS ACT (IV OF 1889), S. 2 (2) (e)—*Applicability—No existing patent or copyright.*

Cl. (*e*), S. 2 (2), does not apply where there is no existing patent, privilege or copyright. 40 Cal. 281, Ref. (*Staples, A. J. C.*) HAFIZULLAH HAMIDULLAH *v.* S. K. PAPA. **6 I.R. Nag. 112=146 I.C. 1084=30 N.L.R. 45=35 Cr.L.J. 373=1933 Cr.C. 1423=A.I. R. 1933 Nag. 344.**

———**Ss. 5 and 6**—*Using handbill intended to mislead—Offence.*

If the means used is a handbill and is intended to mislead, it is as much an offence as the issue of an invoice, or as a matter of that, the placing of a label on the goods themselves; and the scope of the Act is wide enough to punish every such means which contributes to the disposal of goods by one man under the pretence that they are the goods of another. Such an offence will fall under Ss. 5 and 6. (*Rupchand and Mehta, A. J. Cs.*) RAJASINGH *v.* TIKAMDAS. **29 S.L.R. 179 =156 I.C. 321=7 R.S. 242=36 Cr.L.J. 908=1935 Cr.C. 525 (2)=A.I.R. 1935 Sind 107 (2).**

———**S. 6**—*Offence under—Mere imitation is not.*

Mere imitation is no offence unless there is an infringement of a patent or copyright or there is attempt to pass goods as goods of another dealer or manufacturer either by using a false trade mark or false description or a trade mark or description likely to deceive purchasers by a deliberate imitation of a genuine mark or description or by falsely giving out goods as the goods of some other dealers or manufacturer. (*Staples, A. J. C.*) HAFIZULLAH HAMIDULLAH *v.* S. K. PAPA. **6 I.R. Nag. 112=146 I.C. 1084=1933 Cr.C. 1423=30 N.L.R. 45 =35 Cr.L.J. 373=A.I.R. 1933 Nag. 344.**

———**S. 15**—*Continuing infringement—Prosecution—Limitation—Penal Code, S. 482.*

Where the offence of infringement of a trade or property mark is a continuing one, and no discontinuance is proved, the time for prosecution under S. 15 of the Merchandise Marks Act (the offence also falling under S. 482, I. P. Code) runs from the first instance of infringement, or from the first discovery of infringement. (*Broomfield and Divatia, JJ.*) ABDULSATARKHAN KAMRUDDINKHAN, *In re.* **59 Bom. 551=158 I.C. 168=8 R.B. 119=36 Cr.L.J. 1372=37 Bom.L.R. 580=A.I.R. 1935 Bom. 359.**

———**S. 15**—*Limitation for prosecution.*

S. 15 of the Merchandise Marks Act provides that a prosecution for an offence under S. 486 of the Penal Code should be launched within three years from the date of the offence charged. There is nothing in the section to suggest that in a case of series of infringements the prosecution should be commenced within three years from the date of the first offence. A I.R. 1928 C. 495; 1930 C. 275, Foll. (*Jackson, J.*) MUHAMMAD

MERCHANDISE MARKS ACT (1889), S. 15.

AHMAD *v.* VENKANNA. **I.R. 1931 Mad. 608=131 I.C. 848=32 Cr.L.J. 809=1930 M.W.N. 1263=1931 Cr.C. 353 (1)=A.I.R. 1931 Mad. 276.**

———S. 15—"*Offence*"—*Meaning.*

The word "offence" in S. 15 does not mean the very first such offence. If such an interpretation of the section be good law a person infringing another's trade mark may merely do so once, clandestinely, sit quiet for three years and then make a public use of it without any fear of a criminal prosecution. (*Mehta, A. J. C.*) SIRUMAL *v.* EMPEROR. **26 S.L.R. 241=I.R. 1932 Sind 119=139 I.C. 335=33 Cr.L.J. 778=1932 Cr. C. 534=A.I.R. 1932 Sind 94.**

MERCHANT SHIPPING ACT (XXI OF 1923), S. 63—*Proceeding under—Dismissal under S.* 203 *Cr. P. Code—Validity.*

The Cr. P. Code does not apply to an application under the Merchant Shipping Act. Such an application should be enquired into under the provisions of the later Act and cannot be dismissed under S. 203 of the Code. (*C. C. Ghose, A. C. J. and Mallik, J.*) JAFAR ALI *v.* JAMES FINLAY & CO., LTD. **6 I.R. (Cal.) 203 (1)=146 I.C. 333 (1)=37 C.W.N. 1185=58 C.L.J. 116=35 Cr.L.J. 25=1933 Cr.C. 1057 (1)=A.I.R. 1933 Cal. 647 (1).**

MERGER.

See (1) AGRA TENANCY ACT (III OF 1926), SS. 4 (*b*), 36, 196, and 197 *etc.*
(2) C. P. CODE, O 21, R. 16.
(3) LANDLORD AND TENANT—MERGER.
(4) MORTGAGE—MERGER.
(5) TRANSFER OF PROPERTY ACT, (1882), SS. 101 AND 111 (*d*).

MESNE PROFITS.

See also (1) C. P. CODE, S. 2 (12); O. 2 R. 2 and O. 20, R. 12
(2) DECREE—MESNE PROFITS.
(3) HINDU LAW—PARTITION.
(4) MYSORE CIVIL PROCEDURE CODE REGULATION, S. 2 (12).

———*Assessment—Landlord and tenant—Suit for ejectment—Kabuliyat and settlement Khatian—Assessment on basis of—Propriety.*

Where the Court in a suit for ejectment of a tenant determines the mesne profits with reference to the kabuliyat executed by him and the rent recorded in the settlement khatians, the principle of assessment cannot be held to be wrong. (*Guha and Bartley, JJ.*) SHAMSUDDIN AHAMMED *v.* SURESH CHANDRA DEY. **39 C.W.N. 1270=61 C.L.J. 369=160 I.C. 691=8 R.C. 446=A.I.R. 1936 Cal. 22.**

———*Decree for—Joint decree—Apportionment of liability among defendants—Power of executing Court.*

When a decree for mesne profits which is made against various sets of people possessing different interests in the land is sought to be put in execution it is open to the Court to apportion the amount leviable from each of the defendants. (*C. C. Ghose and Pearson, JJ.*) KALIDAS RAKSHIT *v.* KESHABLAL MAJUMDAR. **58 Cal. 1040=I.R. 1932 Cal. 2=134 I.C. 1042=A.I.R. 1931 Cal. 788.**

———Liability for—Decree for specific performance of agreement to sell land—Possession of defendant when wrongful—Defendant not realising profits—If liable. *See* C. P. CODE, O. 2, R. 2. **18 N.L.J. 76.**

———*Liability for—Person out of possession.*

In a suit for mesne profits each occupant is answerable for the time he has been in wrongful possession and cannot be charged with damages for the period he has not been in possession. 25 C. L. J. 140 at 147, Ref. (*Guha and M. C. Ghose, JJ.*) MADAN KAPALI *v.*

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KRISHNA CHARAN KAPALI. **I.R. 1931 Cal. 605=132 I.C. 685=35 C.W.N. 305=A.I.R. 1931 Cal. 663.**

———*Measure of—Suit against trespasser—Assessment of profits—Deductions for expenses.*

In a suit for mesne profits against a trespasser who has sown and raised crops, the actual selling value of a crop is in no way a measure of mesne profits. The value of a crop is the result not only of the use of the land but also of the seeds supplied by the person who cultivates and the labour of cultivation and irrigation and harvesting. The necessary expenditure of producing the crop must therefore be deducted from the price at which it is sold. (*Sulaiman, C. J. and Bennet, J.*) PARTAP *v.* GOPI RAM. **159 I.C. 647=1935 R.D. 403=1935 A.W.R. 1366=A.I.R. 1935 All. 943.**

MIADI SARBARAKAR.

See (i) LAND TENURE—MIADI SARBARAKAR.
(ii) LEASE.

MIGRATION. *See* HINDU LAW—APPLICABILITY.

MILITARY PAY—LIABILITY TO ATTACHMENT. *See* C.P. CODE S. 60.

MILLING CONTRACT. *See* CONTRACT—CONSTRUCTION—MILLING CONTRACT—(RANGOON).

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See also (1) ADVERSE POSSESSION—MINERAL RIGHTS.
(2) GRANT—MINERALS.
(3) LANDLORD AND TENANT.
(4) LAND TENURE—ZAMINDARI.
(5) LIMITATION ACT, ARTS. 142 AND 144.

———*Adverse possession—Different strata of sub soil can be separately owned and possessed.*

There can be separate ownership and separate possession of different strata of the sub soil at all events where minerals are involved. If a yellow ochre found in the sub-soil under a hill is established by the evidence to be a mineral and the deposit of such ochre is a fairly defined stratum, possession of the ochre must be presumed to be with the zemindars until adverse possession by the darputnidars for the statutory 12 years is established. This cannot be presumed from their adverse possession of the superincumbent stratum of stone and gravel because the law strictly confines the title of the trespasser to the property in his actual possession. *Cox* v. *Glue*, 5 C.B. 533; *Rowbotham* v. *Wilson*, 8 E. and B. 123; *Low Moor Company* v. *Stanley Coal Co.*, 34 L.T. (N.S.) 186 and 60 M.L.J. 183 (P.C.), Foll. (*Sir George Lowndes.*) BHUPENDRA NARAYAN SINHA BAHADUR *v.* RAJESHWAR PRASAD BHAKAT. **58 I.A. 228=59 Cal. 80=I.R. 1931 P.C. 194=54 C.L.J. 137=1931 M.W.N. 865=33 Bom.L.R. 1273=35 C.W.N. 870=1931 A.L.J. 566=34 L.W. 1=132 I.C. 610=A.I.R. 1931 P.C. 162=61 M.L.J. 632 (P.C.).**

———*Agricultural lease—Lime stone holders standing on holding—Right to—Removal of stones by third person with consent of tenant—Landlords right to claim value from—Person removing.*

A tenant holding under an agricultural lease has only the right to enjoy the land for agricultural purposes. The property on the land leased remains in the landlord who still continues to be the owner of everything on the surface of the soil, including earth and stones and trees standing on the land. The tenant has only a right to cultivate the land and not to appropriate the soil or anything on the surface. Consequently lime stone holders on the land are the property of the landlord, and a person removing the same, though with the consent of the tenant, is liable to the landlord for their value. The consent of the tenant to such removal is immaterial. The fact that such removal is not a waste does not also

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affect the liability of the person removing. (*Nyogi, A. J.C.*) RAMCHANDRA *v.* THAKUR ONKAR SING. **162 I.C. 757=8 R.N. 285 (1)=18 N.L.J. 344.**

———*Claim by lessee—Onus.*

If a claimant to sub-soil rights holds under the Zamindar or by a grant emanating from him, even though his powers may be permanent, heritable and transferable, he must still prove the express inclusion of the sub-soil rights. 61 M.L.J. 9 (P.C.), Foll. (*Lord Macmillan.*) H. V. LOW & CO. *v.* RAJA BAHADUR JYOTI PRASAD SINGH DEO. **58 I.A. 392=59 Cal. 699=35 C.W.N. 1246=34 L.W. 853=33 Bom.L.R. 1544=135 I.C. 632=I.R. 1932 P.C. 24=54 C.L.J. 366=1931 A.L.J. 1112=A.I.R 1931 P.C. 299=61 M.L.J. 699 (P.C.).**

———*Claim by lessee—Onus.*

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———Grant of surface rights by a Zamindar—Possession of sub-soil—Adverse possession of sub-soil by grantee—Art. 144 applicable. *See* LIMITATION. ACI, ART. 144. **58 I.A. 228=61 M.L.J. 632 (P.C.)**

———*Grant of tenure.*

A grant of a tenure does not include mineral rights. (*Mohammad Noor, J.*) JYOTI PRASAD *v.* BENGAL COAL CO., LTD. **163 I.C. 169=8 R.P. 633 (2)=A.I.R. 1935 Pat. 149.**

———Inam—Inamdar—No right to minerals. *See* GRANT—INAM. **57 Mad. 460=67 M.L.J. 544.**

———*Jamabrit tenure.*

In the case of a grant of a village on Jamabrit tenure, nothing short of express words will convey the mineral rights therein. (*Lord Macmillan.*) NAGESHWAR BUX ROY *v.* BENGAL COAL CO. **58 I.A. 29=10 Pat. 407=130 I.C. 315=33 Bom L R. 425=12 Pat L.T. 251=15 R.D. 194=I.R. 1931 P.C. 59=35 C.W. N. 265=1931 M W N. 121=33 L.W. 162=1931 A. L.J. 537=53 C.L.J. 81 and 487=A.I.R. 1931 P.C, 18 and 186=60 M L J. 183 (P C.).**

———Malguzar—Right to minerals. *See* C. P. LAND REVENUE ACT (1917), S. 218. **29 N.L.R. 148.**

———*Mining—Agreement for—Suit for return of premium—Defective title of lessor—Proof of.*

An agreement for the lease to the appellant of underground coal rights in two mouzas comprised in the respondent's zemindari provided that "if the appellant Company neglect or fail to take such lease except for the reason of the want of the lessor's title to the said mouzas" the *salami* or premium deposited by him would be forfeited to the respondent, the zamindar. In a suit by the appellant to recover the *salami*, on the ground that the respondent had no title to the underground mining rights, the mouzas being held under *debuttar* and *brahmottar* grants made by the respondent's ancestors, *held*, the onus was on the appellant to show that the respondent's title to grant a lease of the mineral rights in the two mouzas was not free from reasonable doubt, that in the absence of any evidence to show the terms of the grants made by the respondent's predecessors, or that they expressly included the underground rights, the onus had not been discharged, and

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that consequently the appellant had forfeited the *salami*. (*Lord Macmillan.*) H. V. LOW & CO. v. RAJA BAHADUR JYOTI PRASAD SINGH DEO. **58 I A. 392=59 Cal. 699=135 I.C. 632=I.R 1932 P.C. 24=34 L.W. 853=33 Bom L R. 1544=54 C.L.J. 366=1931 A.L. J. 1112=35 C.W.N. 1246=A.I.R. 1931 P.C. 299=61 M.L.J. 699 (P.C.).**

———*Putni—Rights of putnidar.*

Sub-soil rights will pass, under a putni as in the case of other permanent, heritable and transferable tenures created by a zemindar, only when granted in express terms and such words of general import that may be found in a grant as for example "with all rights" are not by themselves sufficient to pass those rights to the putnidar 56 C. 1 (P.C.); 45 Cal. 87 (P.C.); 61 M. L.J 9 (P.C), Foll. (*Sir George Lowndes.*) BHUPENDRA NARAYAN SINHA BAHADUR *v.* RAJESHWAR PRASAD. **58 I.A. 228=59 Cal 80=I.R. 1931 P.C. 194=54 C.L.J. 137=1931 M.W.N. 865=33 Bom L. R. 1273=35 C.W.N. 870=1931 A.L J. 566=34 L. W. 1=132 I.C 610=A.I R. 1931 P.C. 162=61 M.L. J. 632 (P.C.).**

———*Rights of grantee of permanent tenure—Proof.*

If a claimant to sub-soil rights holds under the Zamindar or by a grant emanating from him, even though his tenure may be permanent, heritable and transferable, he must still prove the express inclusion of the sub-soil rights. 58 I.A. 125, Foll. (*Lord Russell of Killowen.*) JAGAT MOHAN NATH SAH DEO *v.* PRATAP UDAI NATH SAH DEO. **10 Pat. 877=134 I.C. 1073=54 C.L J. 416=34 L,W 763=8 O.W N. 991=I.R. 1932 P.C. 1=A.I.R. 1931 P.C. 302=61 M.L.J. 532 (P.C.).**

———*Right to—Permanently settled Zamindari—*Lakhirajdar *holding under invalid grant not resumed by Government—Title of as against Zamindar.*

The title to the underground rights, in the case of a *lakhiraj* grant, which, though invalid, has not been resumed by the Government within the statutory period of 60 years from the date of the grant, is in the *lakhirajdar* holding under the invalid grant. Such rights do not vest in the Zamindar within the ambit of whose revenue-paying estate the *lakhiraj* lands lie. (*Mitter and Patterson, JJ.*) RAJKRISHNA PROSAD LAL SINGH *v.* BARABANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A.I.R. 1935 Cal. 368.**

———*Sub-soil rights—Permanently settled Zamindari—Sub-soil rights—Presumption.*

Sub-soil rights in land forming part of a permanently settled Zamindari are presumed at all events when they are not claimed by the Crown to belong to the zemindar. A claimant thereto proving merely possession of surface right since before the Permanent Settlement does not discharge the onus upon him, because he is presumed to hold under a grant from the Zamindar and unless the grant expressly included the sub-soil rights it would not convey them. (*Mahomed Noor and Agarwala, JJ.*) MUKTAKESHI PATRANI *v.* MIDNAPUR ZAMINDARY CO., LTD. **13 Pat. 517=156 I.C. 136=7 R.P. 691 =A.I.R. 1935 Pat. 33.**

———*Zamindar and Jagirdhar—Respective rights.*

As between the Zamindar and Jagirdhar, the Zamindar must be regarded as the owner of the minerals. (*Sir John Wallis.*) BAGESWARI CHARAN SINGH *v.* KUMAR KAMAKHYA NARAIN SINGH. **58 I.A. 9=10 Pat. 296=33 L.W. 277=131 I.C. 325=I.R. 1931 P. C. 101=12 Pat.L.T. 375=35 C.W.N. 233=53 C.L. J. 11=A.I.R. 1931 P.C. 30=60 M.L.J. 253 (P.C.).**

MINES ACT (IV OF 1923), Ss. 3 (f) and 15 (2)— *'Mine'—Meaning of—Surface duties carried on—If amounts to working of mine.*

In addition to excavations, machinery, etc., and works which are incidental to or connected with mining operations clearly fall within the definition of mine in S. 3 (*f*) of the Act. Whether a particular kind of work comes within the mischief of the definition or not must always be a question of fact. Where at the time when the petitioners were alleged to have been carrying on mining work under the management of a manager appointed without sanction, several persons were employed loading wagons and others were employed on the surface, and steam was up.

Held, that the "mine was being worked" within the meaning of S. 15 (2). That term is not confined to actual mining operations, that is to say, such operations as relate to the actual raising of coal. (*Mukerji and Bartley, JJ.*) KESHARDEO GOENKA *v.* EMPEROR. **61 Cal. 445 = 38 C.W.N. 418 = 6 R.C. 479 = 148 I C. 739 = 35 Cr.L J. 742 = 59 C.L.J. 122 = 1934 Cr.C. 528 = A.I.R. 1934 Cal. 387.**

MINING LEASE.

See (1) LANDLORD AND TENANT—ROYALTY.
(2) LEASE—CONSTRUCTION.
(3) MINERALS.
(4) T. P. ACT, S. 105.

MINOR.

See also ADVERSE POSSESSION.
C. P. CODE, 1908, O. 32.
CONTRACT ACT (1872), S. 11.
EVIDENCE ACT, S. 115.
GUARDIAN AND WARD.
GUARDIAN AND WARDS ACT.
HINDU LAW—GUARDIANSHIP.
INJUNCTION.
LIMITATION ACT, ART. 144.
MAHOMEDAN LAW—GUARDIANSHIP.
SPECIFIC PERFORMANCE.
SPECIFIC RELIEF ACT, S. 41.

Acquiescence of guardian.
Alienation by guardian.
Appointment of guardian.
Arbitration.
Bond by minor.
Burden of proof.
Compromise by guardian.
Contract by guardian.
Contract by minor.
Custody of.
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Decree against.
De facto guardian.
Estoppel.
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Liability of.
Misrepresentation.
Negligence of guardian.
Next friend.
Partition suit.
Promissory note by minor.
Ratification.
Remedy.
Suit against.

Acquiescence of guardian.

———Acquiescence of guardian — Not binding on minor. *See* GUARDIAN AND WARD. **37 C.W.N. 237 = A.I.R. 1933 P.C. 20 = 64 M.L.J. 1 (P.C.).**

MINOR—Alienation by guardian.

Alienation by guardian.

———*Alienation by guardian—Christian mother—Alienation of property of minor—Validity.*

A Christian mother, the father being dead, is for many purposes the natural guardian of her minor child. She is, for instance, entitled to the custody of the child and to the guardianship of its property. But she has no power to convey to another any right or interest in the immovable property belonging to the minor. Such an alienation by her would, however, be voidable and not void, and upon such avoidance the minor would have to repay any money advanced for his or her benefit. (*Curgenven and Pakenham Walsh, JJ.*) BANGARAMMAL *v.* LYDIA KENT. **57 Mad. 1062 = 152 I C. 546 = 7 R.M. 249 = 40 L.W. 406 = 1934 M.W.N. 499 = A.I R. 1934 Mad. 605 = 67 M.L.J. 322.**

———*Alienation by guardian*—De facto *guardian—Mother—Avoidance—Recitals in deed—Value.*

Mere recital in a deed is not ordinarily sufficient to prove legal necessity but in the case of a trifling transaction it would be unreasonable to call upon the transferee to produce evidence to prove the accuracy of the statement made by the minor's mother in the sale deed regarding the indebtedness which led her to dispose of the small item of land. (*Oakden, S.M. and Smith, J. M.*) DHARMA NAND *v.* DEBI DUTT. **14 R.D. 635.**

———Alienation by guardian—*De facto* guardian—Setting aside—Equities. *See* GUARDIAN AND WARD—DE FACTO GUARDIAN. **9 Mys.L.J. 196 (F.B.).**

———*Alienation by guardian*—De facto *guardian—Validity.*

An alienation by *de facto* guardian of an Indian Christian is void. 34 All. 213 (P.C.); 45 Cal. 878, Ref. (*Madhavan Nair, J.*) SUNDARA NADAN *v.* ANNAMMAL. **I.R. 1931 Mad. 616 = 132 I.C. 120 = 1931 M.W.N 415 = 33 L.W. 615 = A.I.R. 1931 Mad. 529 = 60 M.L J. 695.**

[**R.** 57 M. 1062 (1066); 34 Bom.L.R. 1483 (1494).]

———*Alienation by guardian*—De facto *guardian—Validity.*

Though a Hindu minor is entitled to ignore the alienation by *de facto* guardian for purposes of limitation, the transaction is not, however, void, because if the alienation was for justifiable necessity, they may be upheld wholly or partially. 1930 M.W.N. 939; 1928 M.W.N. 602, Ref. (*Ramesam, J.*) PURUSHOTTAMMA RATHO *v.* BRUNDAVANA DASS. **I.R. 1931 Mad. 773 = 133 I.C. 773 = 33 L.W. 664 = 1931 M.W.N. 417 = A.I.R. 1931 Mad. 597 (2).**

———Alienation by guardian—*De facto* guardian—Validity—Suit to set aside—Limitation—Buddhist Law (Burmese). *See* GUARDIAN AND WARD—DE FACTO GUARDIAN. **A.I.R. 1931 Rang. 178.**

———*Alienation by guardian—Mortgage—Mortgage invalid and unenforceable—Personal covenant—Liability of estate.*

Where the guardian of a minor executed a mortgage which was found to be invalid and unenforceable as such for want of proper attestation, the personal covenant contained in the deed can be enforced against the estate of the minor if the liability was one binding on the minor under the Hindu Law. 42 Mad. 185; 36 M.L.J. 29 (F.B.), Foll. (*Beasley, C.J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163 = 33 L.W. 95 = 135 I.C. 17 = I.R. 1932 Mad. 49 = A.I R. 1931 Mad. 140 = 60 M.L.J. 56.**

MINOR—Alienation by guardian.

———*Alienation by guardian—Necessity—Burden of proof—Certificate by Court—If conclusive.*

The ordinary law applicable to a person dealing with the property of a person under a disability is that he must make a proper inquiry to satisfy himself of the existence of a legal necessity for the money and of the necessity for a loan or sale to produce the required money. A *bona fide* lender or purchaser may satisfy this obligation by demanding a certificate of the District Judge that the money is required for a legitimate purpose aud sanctioning the loan or a sale to supply the need. But if the lender or alienee is already aware of the facts or has materials which put him on enquiry, he cannot rely upon the certificate. A stranger purchasing from a guardian acting under the authority of the District Judge is entitled to protection so long as he is not shown to have acted in a fraudulent or collusive manner, after knowing that the debts sought to be liquidated by the sale were not lawfully binding on the minor. The burden of proof in such a case is on the person seeking to set aside the alienation. But when the purchaser is himself the creditor, whose debts it was the object of the alienation to liquidate, the onus is shifted on to his shoulders as soon as the plaintiff seeking to set aside the sale establishes a *prima facie* case, because such an alienee has the means of satisfying a Court as to the origin and nature of the debts and of their binding character. (*Courtney-Terrell, C.J and Fazl Ali, J.*) RAJABALLABH MISIR *v.* BISHUN PRASAD SINGH. **155 I.C. 81=7 R.P. 539=15 Pat.L.T. 787=A.I.R. 1935 Pat. 74.**

———*Alienation by guardian—Sale—Suit to set aside on ground of fraud—Onus of proof.*

In order that a sale by a guardian may be impugned on the ground of fraud, it must be established as a fact that the purchaser had knowledge or reasonable notice. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) RAJBALLABH MISIR *v.* BISHUN PRASAD SINGH. **155 I.C. 81=7 R.P. 539=15 Pat.L.T. 787=A.I.R. 1935 Pat. 74.**

———*Alienation by guardian—Suit by transferee from minor to set aside—Withdrawal of minor from—Effect of—Maintainability of suit by transferee alone.*

The father and natural guardian of the minor had transferred the property to the defendant in 1912. The minor attained majority in 1923 and sold the property to the plaintiff No. 1 in 1925. The plaintiff No. 1 and the quandom minor (as plaintiff No. 2) brought a suit in 1926 to set aside the alienation of 1912. Plaintiff No. 2 withdrew from the suit without objection on the part of plaintiff No. 1 and on the question whether the suit was in time.

Held, that Art 44 of the Limitation Act did not apply to the suit. "The question is not whether the suit was barred by limitation, but whether the plaintiff has a right to continue the suit. After the minor had withdrawn, he has virtually elected to acquiesce in the sale by his guardian and the interest of the minor in the property has been extinguished under Art. 44 read with S. 28 of the Act. The plaintiff, therefore, has no right to continue the suit" (*Patkar and Murphy, JJ.*) JHAVERBHAI *v.* KABHAI. **141 I.C. 806=I.R. 1933 Bom. 165=34 Bom.L.R. 1512=A.I.R. 1933 Bom. 42.**

[D. 36 Bom.L.R. 477 (478, 479, 483).]

Appointment of guardian.

———Appointment of guardian — Appointment of adoptive mother or natural father—Preferential right to guardianship—Test of. *See* HINDU LAW—GUARDIANSHIP—ADOPTION. **A.I.R. 1934 Mad. 44.**

———*Appointment of guardian—Father—Fitness of—Immorality of father.*

MINOR—Compromise by guardian.

The question whether the father is fit to be the guardian of his child is a question of fact. By reason of his natural love to his child, all possible allowances should be made in his favour. His immorality is not decisive to show that he is unfit. 46 A. 706, Ref. (*Mahadevayya, J.*) MUNIYAMMA *v.* MUNISAMAPPA. **10 Mys.L.J. 156.**

———*Appointment of guardian—Indian Christians.*

Failing the father and mother and their appointees, no other person is entitled as of right to the custody of an Indian Christian minor or to the guardianship of his property. (*Madhavan Nair, J.*) SUNDARA NADAN *v.* ANNAMMAL. **I.R. 1931 Mad. 616=132 I.C. 120=1931 M.W.N. 415=33 L. W. 615=A.I.R. 1931 Mad. 529=60 M.L.J. 695.**

Arbitration.

See also (1) ARBITRATION—REFERENCE TO.
(2) GUARDIAN AND WARD—ARBITRATION.

———Arbitration—Decree based on—Minor, if bound. *See* MINOR—PARTITION SUIT **37 P.L.R. 112.**

Bond by minor.

———Bond by minor—Suit by lender—Right to equitable relief—Absence of fraudulent misrepresentation as to age. *See* CONTRACT ACT, S. 65. **61 Cal. 1075.**

Burden of proof.

———*Burden of proof—Minority.*

The burden of showing that a person was a minor on the date when he entered into a contract lies heavily upon the person asserting it. (*Sulaiman, C. J, Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **149 I.C. 781=6 R.A. 962=1934 A.L.J. 318=A.I.R. 1934 All. 406 (F.B.).**

Compromise by guardian.

———*Compromise by guardian—Suit for declaration, compromise void—Compromise declared void—Effect on proceedings following compromise.*

C had obtained a decree for money against a minor under the guardianship of his mother and attached some property of the minor. The property was sold and judgment-debtor through mother applied for setting aside sale under O. 21, R. 92. *C* opposed the application but during the pendency of the application the parties appeared and certified a settlement under which *C* had agreed to give judgment-debtor time for payment failing which the sale was to be confirmed and the objection made by judgment debtor under O. 21, R. 92 was to be considered withdrawn. The money was not paid by the date fixed and judgment-debtor applied for extension of time which was refused and sale was confirmed by executing Court. After this, the judgment-debtor through next friend, one *J*, filed a suit for declaration that compromise of settlement as also confirmation of sale should be declared void. The Court decreed the relief that compromise or settlement was void on ground that permission of Court had not been taken to effect a compromise but refused to interfere with order confirming sale. Judgment-debtor thereupon applied to executing Court for order setting aside the order confirming the sale. The application to set aside the order on the strength of declaratory decree was allowed. The declaratory decree was not appealed against by the parties.

Held, (*i*) that the declaratory decree must be held to be binding on the parties that is to say the compromise by which the objection under O. 21, R. 92 was withdrawn and the sale was confirmed must be held null and void, (*ii*) that all that followed from the compromise including the order confirming the sale must also be

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held to be null and void ; (*iii*) that the order of executing Court directing that the objection to the sale shall be adjudicated upon was not without jurisdiction. (*Kendall, J.*) CHARITTER SHUKUL *v.* LAL BEHARI SINGH. **154 I.C. 106=7 R.A. 696=A.I.R. 1934 All. 433.**

———*Compromise by guardian without leave of Court—Validity—Compromise acted upon—Omission to file suit to set aside within period of limitation—Effect.*

Where a compromise is entered into by a guardian on behalf of a minor without the leave of the Court, the minor or his successor must sue to set it aside within three years of the date of the minor attaining majority. But when the compromise has been acted upon and no suit is instituted to have it set aside within the period allowed by law, the compromise is binding and valid on the minor and his representatives. (*Drake Brockman, S. M. and Knox, J. M.*) BINDESARI TEWARI *v.* MAHADEI KUNWAR. **1935 R.D. 360 (1).**

Contract by guardian

———*Contract by guardian—Binding purpose—Decree against minor's estate.*

A decree can be passed against a minor's estate on a contract entered into by his guardian in a case in which the estate would have been liable for the obligation incurred by the guardian under the personal law to which the minor was subject. 42 Mad. 185, Foll. (*Waller and Krishnan Pandalai, JJ.*) MEENAKSHISUNDARAM CHETTY *v.* RANGA AYYANGAR. **I.R. 1932 Mad. 672=139 I.C. 383=35 L.W. 397=A.I.R. 1932 Mad 696.**

———*Contract by guardian—Ratification—Essentials of—Pro note by agent of guardian—Renewal by minor shortly after majority—If ratification.*

It is open to a minor to ratify, after he attains majority, the acts of his guardian or the acts of the latter's agent, for the acts of the guardian's agent may be taken to be those of the guardian. But to amount to ratification, there must be, after majority and after the ex-minor has acquired full knowledge of the nature and effect of the transaction, some promise or other act, which shows an internal acknowledgment of his liability in respect of the act done on his behalf during minority. Renewal by an ex-minor of an old promissory note executed by an agent of his mother and guardian without full knowledge of the nature and effect of such renewal cannot be held to be a ratification by him of the contract of loan, especially when the renewal is effected by him just after majority and at a time when the agent who acted for his guardian is in the service of the payee of the promissory note. From that mere renewal it cannot be inferred that the ex-minor intended to acknowledge liability for the old debt. (*Pollock, A.J.C.*) SHRI RAM *v.* MOHANLAL. **31 N.L.R. 243=155 I.C. 607=7 R.N. 198=A.I.R. 1935 Nag. 127.**

———Contract by guardian—Simple contract debt—Liability of minor. *See* GUARDIAN AND WARD—CONTRACT BY GUARDIAN. **34 Bom.L.R. 1001=A.I.R. 1932 Bom. 480.**

———Contract by guardian—Simple contract debt—Personal liability of minor. *See* GUARDIAN AND WARD—CONTRACT BY MINOR. **34 Bom.L.R. 996=A.I.R. 1932 Bom. 460.**

Contract by minor.

———*Contract by minor—Estoppel—Fraudulent misrepresentation of age—Suit on contract—Plea of infancy.*

Where an infant represents fraudulently or otherwise that he is of age and thereby induces another to enter into a contract with him, then in an action founded on the contract the infant is not estopped from setting up

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infancy. 21 B. 198; 41 B. 480; 46 B. 137; Overr.; 30 Cal. 539 (P.C.); 9 Lah. 701 (F.B.); 38 M. 1071; 55 M.L.J. 88 (P.C.), Rel. (*Beaumont, C.J. Murphy and Broomfield, JJ.*) GADIGAPPA BHIMAPPA *v.* BALANGOWDA. **55 Bom. 741=33 Bom.L.R. 1313=135 I.C. 161=I.R. 1931 Bom. 49=A.I.R. 1931 Bom. 561 (F.B.).**

[F. 139 I.C. 718 (721).]

———*Contract by minor—Misrepresentation of age—Sale set aside—Power of Court to direct refund of consideration.*

Where a minor brings a suit to set aside a sale brought about by him by misrepresenting his age to the vendee, it is open to the Court under S. 41 of the Specific Relief Act, at the time of setting aside the sale, to direct the minor to refund the consideration to the vendee. (*Mukerji, A.C.J. and Bennet, J.*) MT. HAMIDAN BIBI *v.* NANHE MAL. **I.R. 1933 All. 49=141 I.C. 152=A.I.R. 1933 All. 372.**

———Contract by minor—Ratification on attaining majority. *See* CONTRACT ACT, S. 25 (2). **A.I.R. 1934 Pesh. 123.**

Custody of.

———*Custody of—Suit by father for—Maintainability.*

A suit by a Hindu father for recovering the custody of his minor child is maintainable; it is not prohibited by the Guardian and Wards Regulation. (*Mahadevayya, J.*) MUNI YAMMA *v.* MUNISAMAPPA. **10 Mys.L.J. 156.**

Debt by guardian.

———*Debt by guardian—Binding nature of.*

A business had been carried on by the minors' father as licensee up to the time of his death. But when he died the license was obtained in the name of one, a relation of the minors, but in reality for the benefit of the minors and the mother acting as guardian of the minors took a loan on a promissory-note for payment of Government dues under the license.

Held, that it was not a family business; it was a business which was personal to the licensee and the right to carry it on had to be renewed each year and certainly expired when the licensee died and the mother and guardian of the minors had no right to embark on the business of being a licensee and getting relation to become licensee for the benefit of the minors. 62 I.C. 802, Rel on. (*Cornish, J.*) LAKSHMI AMMAL *v.* RATNA NAICKER. **157 I.C 1029=8 R.M. 205=42 L.W. 219=1935 M.W.N. 542 (1)=A.I.R. 1935 Mad. 589 (1)**

———*Debt by guardian—Bond—Time barred debt—Validity.*

A bond by the guardian of a minor (mother of the minor) in lieu of a time-barred debt is unauthorised and unenforceable against the minor. (*Zia-ul-Hasan, J.*) MEDI LAL *v.* RAM GOPAL DAS **152 I.C 466=7 R.O. 234=11 O.W.N. 1381=A.I.R. 1935 Oudh 12.**

———Debt by guardian—Promissory note—Binding nature of. *See* GUARDIAN AND WARD—DEBT BY GUARDIAN. **56 Mad. 879=A.I.R. 1933 Mad. 710 (2)=65 M.L.J. 350.**

Decree against.

———*Decree against—Absence of proper representation in suit—Decree, if null and void—Sale in execution—Validity of—Mortgage suit—Final decree—Minor not represented—Effect.*

A decree against a minor who has not been properly represented in the suit is a nullity, and the purchase of the minor's property at a sale held in execution of such a decree is void. But the failure to have the minor heirs of a deceased judgment-debtor under a mortgage

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decree properly represented at the time of the passing of the final decree, does not render the final decree or a sale held under it void, when the validity of the preliminary decree has not been challenged in any way. (*Patterson, J.*) PRAMILABALA DEBEE *v.* PURNA CHANDRA CHAKRAVARTY. **61 C.L.J. 322.**

———*Decree against—Binding nature—Omission of guardian* ad litem *to contest suit.*

The fact that a guardian *ad litem*, properly appointed for a minor defendant, does not contest the suit is no ground for holding that the decree passed in the suit is invalid or not binding on the minor. (*Srivastava, Ag. C.J. and Zia-ul-Hasan, J.*) SHEO DARSHAN SINGH *v.* MAHESHUR DAYAL. **10 Luck. 293=152 I.C. 839 =7 R.O. 241=11 O.W.N. 1403=A.I.R 1935 Oudh 183.**

———*Decree against* ex parte*—Gross negligence of guardian—Ward of Court—Manager abandoning suit and then allowing application for setting aside decree to be dismissed for default—Right of minor to avoid.*

Where the manager of the Court of Wards who is acting as guardian *ad litem* of a minor defendant in a title suit and having a good defence to the suit makes a show of defence and then abandons the suit, which results in an *ex parte* decree being passed against the minor; and thereafter applies for setting aside the *ex parte* decree, but allows the application to be dismissed for default, it must be held that the guardian *ad litem* is guilty of gross negligence, and the decree can therefore be avoided by the minor and will not operate as *res judicata*. The right of the minor to avoid such a decree is a substantive right, well recognised in English Law, and equally applicable in India, as being founded upon the broad principles of justice, equity and good conscience. (*Khaja Mohammad Noor and Dhavle, JJ.*) MATHURA SINGH *v.* RAMA RUDRA PRASHAD SINHA. **14 Pat. 824=16 Pat.L.T. 484=162 I.C. 235=8 R.P. 522= A.I.R. 1936 Pat. 231.**

———Decree against—*Ex parte* decree—Gross negligence of guardian—Suit to set aside—Limitation—Cause of action—When arises. *See* LIMITATION ACT, ARTS. 95 AND 120. **16 Pat.L.T. 484.**

———Decree against—Representation—Wrong person appointed guardian—Validity of decree. *See* C. P. CODE, O. 32, R. 3. **A.I.R. 1931 Mad. 674.**

———*Decree against—Setting aside of—Grounds—Guardian* ad litem *appointed in suit.*

Where a guardian *ad litem* for a minor defendant has been appointed and a decree is passed against the minor, the minor is not entitled to avoid the decree without proof of the fact that he was not effectively represented in the suit, and that he was prejudiced by the omission of the guardian to raise proper pleas on his behalf. (*Thom and Iqbal Ahmad, JJ.*) GOVIND PRASHAD *v.* SHANTI SWARUP. **155 I.C. 1106=7 R.A. 1020= 1935 A.L.J. 797=1935 A.W.R. 722=A.I.R. 1935 All. 778.**

———*Decree against—Validity.*

So long as decree subsists against a party, it is perfectly valid and can be availed of by the persons interested in every manner that is possible, notwithstanding the fact that the party against whom the decree stands was a minor at the time of the passing of the decree. The only way the law contemplates the protection of the minors against the dishonesty of their guardians is by permitting the minors to challenge the decrees obtained against them and to have them set aside on proof of their guardians' dishonesty or fraud, and unless that is done a minor cannot be allowed to wriggle out of the decrees passed against him, or deprive the successful litigants of the valuable rights they have obtained on the

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basis of that decree. (*Din Mahomed, J.*) SHER MAHOMED *v.* DOST MAHOMED. **157 I.C. 801=A.I. R. 1935 Lah. 44.**

De facto guardian.

———De facto *guardian—Accounting—Person intermeddling with estate in concert with* de jure *guardian—Liability to account.*

A person who is shown to have intermeddled with the estate of a minor by taking part in the management in concert with the *de jure* guardian, not as agent or servant under the latter, but as a person who has arrogated to himself the duties of a guardian *de facto* becomes together with the *de jure* guardian an accounting party. (*Ramesam and Stone, JJ.*) SANKARALINGAM CHETTIAR *v.* KUPPUSWAMI CHETTIAR. **156 I.C.832 =8 R.M. 62=1935 M.W.N. 299=41 L.W. 373=A. I.R. 1935 Mad. 305 (2).**

———De facto *guardian—Agreement by—Binding character.*

It is an established principle of law that a minor cannot enter into any valid agreement on his own behalf, and a *de facto* guardian of a minor who is asserting his title hostile to the minor cannot bind him by the family settlement arrived at by him if he excludes him entirely. (*Hilton and Din Mohammad, JJ.*) MT. SANT KUAR *v.* SARDAR PARTAB SINGH. **158 I.C. 75=A.I R. 1935 Lah. 382.**

———*De facto* guardian—Alienation by. *See* MINOR—ALIENATION BY GUARDIAN.

———De facto *guardian—Powers of—Power to sell for necessity—Hindu Law.*

Held, by the Full Bench, Beaumont, C. J., dissenting. —The *de facto* guardian of a minor can validly sell the property of the minor to a third person for legal necessity. *Hanoomanpersaud's* case relied on. 49 B. 576, Overr. (Case-law exhaustively discussed.) (*Beaumont, C. J., Patkar and Barlee, JJ.*) TULSIDAS *v.* RAISINGJI. **57 Bom. 40=141 I.C 17=I.R 1933 Bom. 53=34 Bom. L. R. 1483=A.I.R. 1933 Bom. 15 (F B.)**

[R. 36 Bom.L.R. 738 (754); 11 O.W.N. 1236 (1247)]

Estoppel.

See MINOR—CONTRACT BY MINOR.

Execution proceedings.

———*Execution proceedings—Decree against father—Death of father pending execution—Minor's mother brought on record as legal representative but minor not impleaded—Validity of execution sale.*

A decree was obtained against the minor's father and on the death of the father, execution was taken and the widow was brought on record as his legal representative, but the minor was not brought on record; and a sale was held in execution of the decree.

Held, that the sale should not be set aside merely on the ground that the minor was not brought on record, as even had he been brought on record he would have been represented only by the widow as his guardian. 6 I. A. 233, Ref. (*Madhavan Nair and Jackson, JJ.*) KOTAYYA *v.* RADHAKRISHNAMURTI. **6 I.R. (Mad.) 260=146 I. C. 372=38 L.W. 588=A I.R. 1933 Mad. 833.**

———Execution proceedings—Decree against father and uncle trespassers—Death of father—Minor, if sufficiently represented by paternal uncle. *See* EXCUTION—MINOR. **A.I.R. 1933 M. 833.**

———*Execution proceedings—Execution sale of minor's ancestral property—Gross negligence of guardian—Sale, if binding on minor.*

Fraud and negligence on the part of a guardian stand on the same footing, and a minor is not bound by an execution sale of his ancestral property where his guardian showed gross negligence by not taking the

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objection that the property being ancestral was not liable to attachment and sale in execution of a decree obtained against the father. (*Agha Haidar, J.*) BHAGAT RAM *v.* BUTA SINGH. **156 I.C. 818 = 8 R.L. 31 = 37 P.L.R. 255 = A.I.R. 1935 Lah. 349.**

———*Execution proceedings — Non-representation—Sale—If void.*

Non-representation of a minor by a guardian in execution proceedings is not necessarily of itself a ground for avoiding an execution sale. (*Patterson, J.*) PRAMILABALA DEBEE *v.* PURNA CHANDRA CHAKRAVARTY. **61 C.L.J. 322.**

———*Execution proceedings—Representation—Guardian* ad litem *absent—Representation by father (co-judgment-debtor)—Validity.*

In an execution proceeding some of the judgment debtors were minors and on their behalf a guarding *ad litem* had been appointed. A petition for adjournment was signed on behalf of the minors by their father, who was also a judgment-debtor in the proceeding as the guardian *ad litem* was absent on that day of hearing. The interest of the minors did not however suffer in any way because of the act of the father which was the only act done by him on behalf of the minor during the proceedings. Previously similar petitions were made and were signed by the guardian *ad litem* on behalf of the minor.

Held, that it could not be said that the minors were not properly represented during the proceeding. (*Fazl Ali and Luby, JJ.*) NAGESHWAR PRASAD MISIR *v.* AMBIKA PRASAD. **160 I.C. 886 = 8 R.P. 384 = A.I.R. 1935 Pat. 483.**

Guardian ad litem.

———*Guardian* ad litem—*Admissions by—How far binding on minor.*

Where in a pre-emption suit, the guardian *ad litem* of the minor sons of the vendor admitted that the sale was for necessity and subsequently the sons sued to set aside the sale on the ground that it was not for necessity.

Held, that in the absence of any proof that this admission was *male fide*, it must be taken that the guardian who was a major, and was presumably well aware of the circumstances leading to the alienation, made an admission that the sale was for legal necessity, because he thought that it was for legal necessity, This admission should in the circumstances of the case shift the onus on to the present plaintiff to prove that the sale was not for legal necessity, especially when coupled with the other circumstances of the case, namely,that the sale was by the father who was not shown to have been a debauchee or hostile to his sons. (*Tek Chand and Dalip Singh, JJ.*) DOST MAHOMED *v.* SHER MAHOMED. **159 I.C. 693 = A.I.R. 1935 Lah. 489.**

———*Guardian* ad litem—*Compromise—Duty of attorneys to carry out instructions.*

If a suit has been compromised by the guardian *ad litem* improperly without the leave of court, that may be a ground for appropriate proceedings by the minor on attaining majority or by another guardian during minority. But the attorneys who received their instructions from the guardian cannot go behind them and continue to represent the minor. (*Mirza, J.*) ABUBAKER MAHOMED *v.* AMIABAI. **I.R 1932 Bom. 367 = 138 I.C. 312 (1) = 34 Bom L R. 614 = A.I.R. 1932 Bom. 401 (1).**

———*Guardian* ad litem—*Gross negligence of guardian—Guardian remaining* ex parte—*Effect of—Decree* ex parte—*If liable to be set aside.*

The mere fact that a guardian *ad litem* of a minor defendant does not appear at the trial of the suit but allows the suit to proceed *ex parte* will not justify the inference that he was grossly negligent in the discharge of his duties in the conduct of the suit. The real test of gross negligence is to find out whether in fact there has been on the guardian's part any act or omission in the conduct of the suit which has caused prejudice to the minor. The guardian is expected to take care of the interests of the minor in the same way as a prudent man would look after his own interests. Where the guardian refrains from contesting the suit and allows an *ex parte* decree to be passed, because there is no valid defence to the suit, it cannot be held that his non-appearance amounts to gross negligence so as to entitle the minor defendant to have the decree set aside. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SIDDAPPA *v.* RANGAPPA. **13 Mys.L.J. 176 = 39 Mys.H.C.R.1131.**

MINOR—Liability of.

———*Guardian* ad litem—*Gross negligence—What amounts to.*

Gross negligence which may be interpreted as culpable neglect of the interest of a minor defendant on the part of his guardian *ad litem* will entitle the minor to the avoidance of proceedings undertaken against him. It is not every kind of negligence nor any kind of negligence which would render proceedings otherwise regular and proper liable to be opened up; it must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully asserted. (*Fazl Ali and James, JJ.*) KALI CHARAN SINGH *v.* HIRDAI NARAIN. **154 I.C. 948 = 7 R P. 504 = A.I.R. 1935 Pat. 24.**

———*Guardian* ad litem—*Irregularity in the appointment of—Prejudice to minor—Inference—If justified.*

The question whether a minor is prejudiced by reason of any irregularity in the appointment of a guardian *ad litem* depends upon the facts and circumstances of the particular case and does not necessarily follow from the existence of any irregularity in the appointment of the guardian. Prejudice is a matter of proof and not a matter of assumption or presumption (*Ramachandra Rao and Shankaranaray ana Rao, JJ.*) SIDDAPPA *v.* RANGAPPA. **13 Mys.L J.176 = 39 Mys.H C.R. 1131.**

———*Guardian* ad litem—*Negligence in conduct of suit—Omission to raise plea—Failure to offer evidence in support of plea—Distinction.*

There is no distinction between the negligence of a guardian *ad litem* of a minor by not raising the necessary plea and negligence by not offering evidence to support the plea whsch is taken. (*Krishnan Pandalai, J.*) AYYA PILLAI *v.* AYYADURAI GOUNDAN. **40 L. W. 823 = 154 I.C. 65 = 7 R M. 404 = A.I.R. 1935 Mad. 81 = 67 M L.J. 927.**

———*Guardian* ad litem—*Negligence—What amounts to—Suit against minor sons on mortgage by father—Guardian defending and questioning necessity for debts.*

Where, in a suit on a mortgage,the guardian *ad litem* of the minor sons of the mortgagor defends the suit and duly takes the point that the debts secured by the mortgagee were not for family necessity and not binding on the minor defendants, but the contention is overruled, no negligence can be imputed to the guardian, so as to entitle the minors to sue to set aside the decree. (*Courtney Terrel, C.J., and Fazl Ali, J.*) DEVANANDAN PRASAD SINGH *v.* HARIHAR PRASAD SINGH. **153 I.C. 1032 = 7 R.P. 392 = A.I.R. 1935 Pat. 140.**

Liability of.

———*Liability of—Agent of guardian—Power to pledge credit of minor—Pro-note by.*

The agent of a guardian of a minor cannot have greater or wider powers to pledge the minor's credit than the guardian from whom he derives his power. The guardian of a Hindu minor who happens to be the sole

MINOR—Liability of.

proprietor of a business cannot have greater or wider powers to pledge the minor's credit than the manager of a joint Hindu family carrying on an ancestral family business; the power of the latter is limited by the rule in Hanuman Prasad's case. When therefore a promissory note is executed by the agent of the minor's guardian, the creditor can succeed in fixing the liability on the minor only if he can show that he, after making reasonable enquiry into the necessity for the loan believed in good faith that there was a real necessity or that the agent was acting for the benefit of the minor's business. (*Beasley, C. J. and Pandrang Rao, J.*) IMPERIAL BANK OF INDIA *v.* VEERAPPAN. **151 I.C. 928=7 R. M. 146 (2)=40 L.W. 311=1934 M.W.N. 1156=A.I. R. 1934 Mad. 595=67 M.L.J. 573.**

———Liability of—Liability for costs—Suit partly contested and partly non contested. Liability only in respect of their interest in coparcenery property—No personal liability—Special provision in regard to costs. *See* C. P. CODE, S. 35. **18 N.L J. 323.**

———Liability of—Money borrowed by adoptive mother —Binding purpose—Burden of proof. *See* HINDU LAW —DEBTS—ADOPTIVE MOTHER. **A.I.R. 1934 Mad. 549=67 M.L.J. 258.**

———Misrepresentation by. *See also* MINOR—CONTRACT.

Negligence of guardian.

———*Negligence of guardian—Decree against guardian—Right to set aside.*

Where a guardian has been formally appointed, but he is grossly negligent in his duties, he ceases to represent the minor property and effectively, and the result is the same as if no proper guardian had been in existence. The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable would not do. The negligence in order to be a good ground for the avoidance of a decree must be of such a nature as to justify the inference that the minor's interests were not at all protected and therefore he was not properly represented. The direct result of the negligence must be a serious prejudice to the minor and the negligence must not be merely such as might be innocently committed even by a reasonable person taking the ordinary precautions which he would have taken in his own case. Where the negligence is so gross as to amount to a clear violation of the duty cast upon the guardian, although not brought to the notice of the Court at the time, the decree can be avoided. The amount of care which a guardian is under obligation to take may vary with the flexible posture of each case. The word "gross" qualifying negligence is not indicative of any standard of negligence. Gross negligence includes inexcusable absence of such ordinary care which under the circumstances of the case a prudent man was bound to take to safeguard his interest or that of a person who was dependent upon him. Where the prudent man abandons his prudence without any excuse in the conduct of any affair affecting the interest of his wards, he must be held to be guilty of negligence. Where negligence is established, liability follows for all resultant consequences. (*Sulaiman, Boys and Sen, JJ.*) MT. SIRAJ FATIMA *v.* MAHOMED ALI. **54 All. 646 =I.R 1932 All. 418=138 I.C. 465=16 R.D. 327= 1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.).**

Next friend.

———*Next friend—Suit by—Dismissal—Costs—Personal liability of next friend.*

MINOR—Suit against.

There is a distinction between the liability of a next friend of a minor whose suit is dismissed, to pay the costs of the successful defendant, as between himself and the latter, and the question as to the position between himself and the minor. The next friend is liable to pay the costs of the defendant who has a right to get them from the next friend irrespective as to whether the action was or was not proper or for the benefit of the minor. The judgment should direct the next friend to pay the costs without prejudice to his right of reimbursement out of the minor's estate, or with liberty to so reimburse himself. But if it appears to the Court that the action was improper or not for the benefit of the minor or that the next friend did not properly conduct it or was guilty of negligence, the order should be to make the next friend personally liable to pay the costs; and in such cases he can have no recourse to the estate of the minor. The Court, however, should clearly state the same in its judgment or order. (*Rangnekar, J.*) BABU *v.* ALIBHAI. **59 Bom. 35=156 I.C. 304= 7 R.B. 498=36 Bom L.R. 1201=A.I.R. 1935 Bom. 112.**

Partition suit.

———*Partition suit—Absence of proper representation —Decree based on award—Minor, if bound.*

Where in a partition suit, a minor is not properly represented, he is not bound by a decree based on an award, even though the reference to arbitration was made with the permission of the Court. (*Addison and Din Mohammad, JJ.*) KALSUM BEGAM *v.* MOHAMMAD ISMAIL. **161 I.C. 390=8 R.L. 741=37 P.L.R. 112=A.I.R. 1936 Lah. 161.**

Promissory note by minor.

———*Promissory note by minor—Suit for money paid —Fraudulent misrepresentation as to age—Effect.*

A suit does not lie for the recovery of money paid to a minor on his executing a promissory note and it makes no difference that the minor had obtained the money by fraudulent misrepresentatton as to his age. (*Pandrang Row, J.*) RANGA RAO *v.* SAIT CHOWGMAL VARADCHAND & CO. **152 I.C. 262=7 R M. 208= 1934 M.W.N. 672=40 L.W. 261=A.I.R. 1934 Mad. 560=67 M.L.J. 257.**

Ratification.

———Ratification—Void Court sale. *See* EXECUTION —SALE—VALIDITY OF **60 Cal. 753=37 C.W.N. 500=A.I.R. 1933 Cal. 627.**

Remedy.

———*Remedy—Fraudulent trustee—Suit for damages or account—Right of minor to elect.*

A minor may elect to sue a fraudulent trustee either for damages or for an account. Where the trustee is assisted in his fraudulent acts by his agents the *cestui que trust* can call on the trustee as well as his agents to render an account. (*Madhavan Nair and Jackson, JJ.*) RAMANATHAN CHETTIAR *v.* ANNAMALAI CHETTIAR. **57 Mad. 1031=150 I.C. 602=7 R.M. 17 =39 L W. 404=1934 M.W.N. 347=A I.R. 1934 Mad. 367=66 M.L.J. 451.**

Suit against.

———Suit against—Additional written statement on becoming major—Permission to file—Right to—Principles—Practice. *See* C. P. CODE, O. 8, R. 9. **68 M. L J. 155.**

———Suit against—Gross negligence of guardian— Decree—If binding on minors. *See* C. P. CODE, S. 11. **67 M.L J. 927.**

———Suit against—Guardian allowing *ex parte* decree to be passed—Setting aside decree. *See* GUARDIAN

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AND WARD—SUIT AGAINST MINOR. **57 Mad. 1069 = A.I.R. 1934 Mad. 428 = 66 M.L.J. 683.**

———Suit against—Guardian not appointed—Decree passed as nullity. *See* C. P. CODE, O. 32, R. 3. **57 Mad. 973 = 66 M.L.J. 609.**

MIRASI INAM. *See* LAND TENURE—MIRASI TENURE.

MIRASI TENURE. *See* LAND TENURE.

MISAPPROPRIATION. *See* PENAL CODE, SS. 408 AND 409.

MISCARRIAGE—Attempt to cause. *See* PENAL CODE, SS. 312 AND 511. **A.I.R. 1933 Cal. 893.**

MISCARRIAGE OF JUSTICE. *See* CR. P. CODE, S. 417.

MISCHIEF. *See* PENAL CODE, S. 426, *etc.*

MISCONDUCT.

See (1) ARBITRATION.
(2) ARBITRATION ACT (1898), S. 14.
(2) BAR COUNCILS ACT (1926), S. 10.
(4) LEGAL PRACTITIONER.
(5) TRUST—TRUSTEE.

MISDESCRIPTION. *See* C. P. CODE, O. 1, R. 10 AND O. 21, R. 66.

MISDIRECTION. *See* CR. P. CODE, SS. 297 AND 298.

MISJOINDER. *See* C. P. CODE, O. 1, RR. 9 AND 13.

MISJOINDER OF CHARGES. *See* CR. P. CODE, SS. 234 AND 235.

MISJOINDER OF PARTIES. *See* C. P. CODE, O. 1, R. 9.

MISREPRESENTATION.

See (1) CONTRACT ACT, SS. 17 AND 19.
(2) T. P. ACT, S. 78.

MISTAKE.

See (1) C. P. CODE, S. 151 AND O. 6, R. 17.
(2) CONTRACT.
(3) CONTRACT ACT, SS. 20, 21 AND 72.
(4) EVIDENCE ACT, S. 92 AND 115.
(5) LIMITATION ACT, S. 5 AND ART. 96.

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See (1) CONTRACT ACT, S. 21.
(2) T. P. ACT, S. 68.

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MOKARRARI.

See (1) LANDLORD AND TENANT—PERMANENT TENANCY.
(2) LEASE—CONSTRUCTION AND MOKARRARI.

MOKARRARI OR MOKBA—Meaning of. *See* LANDLORD AND TENANT—PERMANENT TENANCY. **52 C.L.J. 583 = A.I.R. 1931 Cal. 265 (2).**

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(2) LAND TENURE.
(3) MADRAS ESTATES LAND ACT, S. 3 (2) (e).

MOLESTATION AND BOYCOTTING ORDINANCE (V OF 1932). *See* PREVENTION OF MOLESTATION AND BOYCOTTING ORDINANCE (V OF 1932).

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(2) TRUSTS ACT (II OF 1882), S. 90.

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MORTGAGE.

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Accession.

See aslo T. P. ACT, SS. 63 AND 70.

———*Accession to mortgaged property— Mortgagee's right to sell though not specifically mentioned in decree.*

A mortgagee is entitled to have an accession to the property originally mortgaged sold under a final mortgage decree even though such accession is not specifically mentioned in the decree. 18 Mad. 492 and 52 I.A. 137, Cons. (*Mya Bu, J.*) JAMINI BALA BISWAS *v.* BANK OF CHETTINAD, LTD. **160 I.C. 763=8 R.R. 429=A.I.R. 1935 Rang. 522.**

Accounts.

See also T. P. ACT, SS. 60, 63, 70, 72 AND 76 (G.) AND (H.)

———*Accounts—Suit for redemption— Arrears of rent due from mortgagor in respect of which decrees had been obtained.*

In a suit for redemption, the mortgagee is not entitled to claim any arrears of rent in respect of the mortgaged lands which were left in the possession of the mortgagor as tenant of the mortgagee under the terms of the mortgage deed when the mortgagee has already sued and obtained a decree for such rent and has allowed the decree to become barred by limitation. This principle is applicable to a case where the mortgagee obtains possession through court of certain plots exempted from the mortgage and a decree for arrears of rent. He must be presumed to have enjoyed the profits of the property and made to account therefor in a suit for redemption. (*Wazir Hasan C.J. and Bisheshwar Nath, J.*) SAID AHMAD *v.* RAJA BARKHANDI MAHESH PRATAB NARAIN SINGH. **I.R. 1932 Oudh 339=8 Luck. 40 =139 I.C. 64=9 O.W.N. 253=A.I.R. 1932 Oudh 255.**

[Appl. Luck. 456 (459.)]

———*Accounts—Suit by some—Co-mortgagors for accounts against purchaser.*

In a suit for accounts against the assignee decree-holder who had purchased the mortgaged properties and who had been declared by the Court to hold the properties as trustee for the co-mortgagees who owned distinct interests therein, all the co-mortgagors are necessary parties to the suit and a suit brought by some one of them without impleading the other is bad for non-joinder of parties. (*Sir George Lowndes.*) NABA KUMAR HAZRA *v.* RADHASHYAM MAHIS. **I.R. 1931 P.C. 302=134 I.C. 654=54 C.L.J. 274=34 L.W. 444 =1931 A.L.J. 797=35 C.W.N. 977=A.I.R. 1931 P.C. 229=61 M.L.J. 294 (P.C.)**

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See T. P. ACT, S. 70.

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———Adverse possession—Possession of mortgagee after satisfaction of mortgage. *See* ADVERSE POSSESSION—MORTGAGOR AND MORTGAGEE. **9 O.W.N. 866.**

MORTGAGE—Co-mortgagors.

Anomalous.

See T. P. ACT, SS. 67, 68 (1) (a) AND 98.

Assignment.

See also T. P. ACT, Ss. 54, 59, 60, 68 (e) AND 130.

———Assignment—Deed not registered or completed —Effect—Suit by transferor to recover—Maintainability. *See* T. P. ACT, SS. 54 AND 59. **62 I.A. 115= 57 All. 314=39 C.W.N. 834=155 I.C. 743=A.I.R. 1935 P.C. 108=69 M.L.J. 158 (P.C.)**

Attestation.

See also EVIDENCE ACT, SS. 68, 69 AND T.P. ACT, S. 59.

———Attestation. Mortgage suit—Denial of attestation and execution—Proof—Duty of plaintiff to produce attesting witness. *See* EVIDENCE ACT, S. 68. **62 C.L.J. 25.**

———*Attestation—Presumption regarding witnesses signing after mortgagor.*

Where there is nothing to suggest that the attesting witnesses signed after the mortgagor the Court can rely on the presumption under S. 114 of the Evidence Act and hold that they signed after the mortgagor. (*Jack, J.*) RADHANATH CHAKRABARTY *v.* NAGENDRANATH CHAKRABARTI. **I.R. 1931 Cal. 879=134 I.C. 767= 53 C.L.J. 586=A.I.R. 1931 Cal. 806.**

Charge.

See also C. P. CODE, O. 34, RR. 14 AND 15 AND T. P. ACT, SS. 58 AND 100.

———Charge — Distinction between mortgage and charge. *See* T.P. ACT, S. 100.

———Clog on equity of redemption. *See* EQUITY OF REDEMPTION, *infra* AND T. P. ACT S. 60.

Co-mortgagees.

———*Co-mortgagees—Purchase of equity of redemption by one—Effect.*

The purchase of the equity of redemption by one of the co mortgagees, puts an end to the mortgage. (*Madhavan Nair and Jackson, JJ.*) FALLESATHA BANU *v.* MUHAMMAD RASHIDHUDDIN. **40 L.W. 595=1934 M.W.N. 929=153 I.C. 462=7 R.M. 357=A.I.R. 1934 Mad. 656.**

———*Co-mortgagees—Suit by one—Other added as defendant—Costs of—Refusal to join as co-plaintiff— If a ground for refusing costs.*

One of two co-mortgagees who refuses to join the other in a suit on the mortgage and is therefore impleaded as a defendant cannot be deprived of his cost as against the mortgagor on the ground of such refusal to join as co plaintiff. It is no part of the duty of a co-mortgagee to sue the mortgagor when the other co mortgagee wants to join him. He is not guilty of any misconduct so as to be deprived of his ordinary legal rights. (*Rankin, C.J. and C.C. Ghose, J.*) PULIN KRISHNA ROY *v.* NUNDOLAL ROY. **62 C.L.J. 292.**

Co-Mortgagors.

See also (1) C. P. CODE, O. 34, 4.
(2) T. P. ACT, SS. 60, 65, 83, 92, AND 95—ACCOUNTS, *supra* AND SUBROGATION, *infra.*

———*Co-mortgagors—Execution of sale deed by one in full satisfaction—Sale upheld only as regards transferor—Revival of debt against other co-mortgagor.*

Where one of two co-mortgagors conveys the full property in satisfaction and discharge of the mortgage debt but it turns out that the transferor can only convey her partial interest the mortgage debt is revived in respect of the co-mortgagor who has not joined in the convey

MORTGAGE—Co-mortgagors.

ance. (*Baguley, J.*) MA HME *v.* MA PON. **11 Rang. 112=I.R. 1933 Rang. 78=143 I.C. 829 (2)=A.I.R. 1933 Rang. 92.**

———Co-mortgagor— Mortgage by one co sharer—Suit on resulting in sale—Suit on the mortgage executed by mortgagor jointy with other co-sharers—If barred. **A.I.R. 1934 Cal. 421.**

———*Co mortgagors—Mortgaged property belonging to one—Sale of—Appropriation of proceeds to unsecured debt due from owner—Not permissible.*

Where a certain mortgage is executed by *A* and *B* and the latter has no interest in the mortgaged property, he is entitled to claim that the property should be used for the repayment of the debt before he is personally called upon to make repayment. If, therefore, certain portion of the mortgaged property is sold with the consent of the mortgagee and the sale proceeds are received by him, he is not entitled to appropriate them to the payment of any unsecured debts due by *A* to him without the knowledge and consent of *B*. 40 Mad. 968 (F.B.), Dist. and 33 Cal. 613 Rel. on. (*Dunkley, J.*) MAUNG KYUN *v.* S. R. M. M. A. FIRM. **135 I.C. 325=I.R. 1932 Rang. 37=A.I.R. 1931 Rang. 312.**

———*Co-mortgagors—Purchaser from one paying off simple mortgage—Suit for possession by another co-owner—Right to resist.*

All the co owners had executed a simple mortgage One of the co owners subsequently purported to sell the entire property to the defendant who paid off the simple mortgage and obtained possession. In a suit by one of the other co sharers for possession,

Held, that the defendant was not entitled to resist the suit by setting up the previous mortgage which was not possessory, and that his remedy was by way of a separate suit. 1930 A. L. J. 531 (P. C.) Rel. (*Sulaiman, C, J. and Mukerji, J.*) MAHOMED HASNAIN *v.* RUSTAM ALI. **6. I.R. (All.) 51=145 I.C.277=1932 A.L J. 1116.**

Composite decree.

See C. P. CODE, O. 34, R. 6.

Conditional sale.

See T. P. ACT, Ss. 58 (*c*), and 68 (*d*).

Consideration.

See also T. P. ACT. Ss. 54, 58 (*d*) AND VALIDITY OF, *infra.*

———*Consideration—Fictitious nature — Mortgagee being party to fraud—Mortgage void* in toto.

Where it is found that a portion of the consideration in respect of a mortgage is fictitious and fraudulent, and the mortgagees are proved to have been parties to the fraud, the whole transaction must be declared void and not merely as far as the consideration is fictitious. 4 Lah. 211 and 6 P. R. 1901, Foll. (*Shadi Lal, C.J. and Coldstream, J.*) DIN MAHOMED *v.* UMA DATT HANSRAJ. **I.R. 1931 Lah. 742=133 I.C. 118=32 P. L.R. 201=A.I.R. 1931 Lah. 430.**

Consolidation.

See also T. P. ACT, 59 A, 61, AND 67-A.

———Consolidation—Right of mortgagee—Mortgage by Hindu father—Subsequent mortgage by sons—Stipulation for simultaneous payment of both in lump sum—Effect. *See* T P ACT, SS. 59 A AND 61. **11 O.W.N. 1601=A.I.R. 1935 Oudh 213.**

Construction.

See also (1) DEED—CONSTRUCTION.
(2) T. P. ACT, Ss. 58 (*b*), 67, 67-A, 82 AND 91 (*a*).

———*Construction—Agreement to re-pay on three month's notice—Right to mortgagee to sell on default—Clause if condition precedent to claim money—Limitation.*

A mortgage bond provided that, when the mortgagee is in need of the principal amount, if he gives three months' notice to the mortgagor the latter agrees to pay the aggregate sum of principal, etc. . . . . and that if he failed so to pay, either the mortgagee or his nominees will be entitled as under the section of the T. P. Act, to sell the property either privately or by public auction.

Held, that the provision with regard to the three months' notice was not a condition precedent to the right to claim payment of the money, but referred merely to the exercise of the power of sale which the mortgagee had, and were in accordance with the terms of S. 69 (2), T. P. Act, and that consequently the bond was only an on demand bond, the limitation for suit on which arose on the date of execution. (*Beasley, C.J. and Butler, J.*) KAMALAMBAL *v.* PURUSHOTHAM NAIDU. **152 I.C. 437=7 R.M. 228=40 L.W. 659=A.I.R. 1934 Mad. 644=67 M.L.J. 499.**

———*Construction—Agreement to transfer—Alternative promises—Suit to enforce—When premature—Consideration for agreement.*

Where the heirs of mortgagor executed a sale-deed in favour of the mortgagee and for the balance executed an agreement by which they undertook to transfer certain reversionary property after the reversion opened and in the alternative they promised to transfer certain of their properties ;

Held, that the sale-deed and agreement were part of the same transaction, that the agreement was supported by consideration and that the mortgagee was not entitled to sue on the same before the reversion opened. (*Sulaiman and Kendall, JJ.*) MAHADEO PRASAD SINGH *v.* MATHURA CHAUDHURY. **I.R. 1931 All. 481=132 I.C. 321=1931 A.L.J. 295=A.I.R. 1931 All. 589 (2).**

———Construction—Compound interest—Stipulation for payment of interest annually—Further provision that on default interest shall be added every year to principal and interest to be paid thereon—Mortgagee's right to compound interest. *See* INTEREST—COMPOUND INTEREST. **62 C.L.J. 7.**

———*Construction—Default clause—Term of mortgage, if cut down.*

A mortgage bond provided that the mortgagors should pay the amount after one year that they should pay half-yearly interest failing which the same was to be added to the principal and there was a further clause that if there was default, the mortgagor might realise the entire amount.

Held, that the mortgage term was not cut down and that limitation commenced to run after the expiry of one year. (*Mukerji and Bennet, JJ.*) RAM DAYAL *v.* AMINUDDIN. **I.R. 1931 All. 631=133 I.C. 311=1931 A.L.J. 29=A.I R. 1933 All. 203.**

———*Construction—Interest* post diem—*Right to—Deed fixing time for payment.*

The fact that a mortgage deed fixes a period of nine years for re payment of the loan does not lead to the inference that no interest can be charged after the lapse of that period when there is no provision in the deed that interest would not be so charged. The general principle of construction is that money borrowed on interest carries interest till date of re-payment in the absence of a contract to the contrary. The mortgagee is therefore entitled to *post diem* interest at the stipulated rate up to the date of suit. (*Nanavutty and Zia ul-Hasan, JJ.*) SADA NAND *v.* DAYA SHANKAR SINGH. **153 I.C.**

MORTGAGE—Construction.

307=7 R.O. 319=11 O.W.N. 1601=A.I.R. 1935 Oudh 213.

———*Construction—Interest—Stipulation for—Compound or simple.*

A deed of simple mortgage provided as follows; "Interest on mortgage money at 15 annas per cent. shall be paid half-yearly . . If default be made in paying the interest of any half-year, then the interest which becomes due for the half year shall be added to the principal money and on the aggregate sum also interest at the above rate shall be paid till satisfaction. . . If the mortgage money be not paid at the stipulated time, then from the date of the expiry of the stipulated period till the date of payment, interest at the rate fixed shall be paid."

Held, that under the deed compound interest must be charged until the full amount due under the deed is satisfied. (*Lord Russell of Killowen.*) JAGMOHAN DAS *v.* JUGAL KISHORE. **I.R. 1932 P.C. 188=137 I.C. 475=36 L.W. 85=54 C.L.J. 407=36 C.W.N. 4=A.I.R. 1932 P.C. 99 (P.C.).**

———Construction—Lease and not mortgage. *See* LEASE—CONSTRUCTION. **A.I.R. 1933 Mad. 852.**

———Construction—Mortgage by conditional sale by Hindu father—Subsequent mortgage by sons—Stipulation against redemption of properties without payment of both amounts in lump sum—If agreement of consolidation. *See* T. P. ACT, SS. 59-A AND 61. **11 O.W.N. 1601=A.I.R. 1935 Oudh 213.**

———*Construction—Nature of mortgage.*

The test is not how the mortgage is described but what it is in fact and in law. The mere fact that the word which is translated as "simple" is used does not make the mortgage any the less a pure usufructuary mortgage if on the proper construction that is so. (*Wort, J.*) KIRTI NARAYAN SINGH *v.* SURENDRA MOHAN SINGH. **7 R.P. 269=152 I.C. 897=A.I.R. 1934 Pat. 624.**

———*Construction—Onerous terms—Sale, if constituted.*

Where a document is on the face of it a mortgage deed the mere fact that the conditions of the deed are onerous does not alter the real nature of the transaction. (*Jai Lal, J.*) MILKHI RAM *v.* GUJAR MAD. **141 I.C. 494 (1)=I.R. 1933 Lah. 130=33 P.L.R. 974=A.I.R. 1933 Lah. 104.**

———*Construction—Simple or usufructuary.*

A mortgage document recited that in lieu of the interest the mortgagees were put in possession of certain *sir* land. The document was executed on the stamp which would be necessary for an usufructuary mortgage.

Held, that the transaction was one of usufructuary and not simple mortgage and that the fact that the document was described by the mortgagor in his attestation as a *dastawaz arki* would not alter its character. (*Oppenheim, J.M.*) DUKHI *v* BHAGWAN TEWARI. **12 L.R. 364 (Rev.)=16 R.D. 16.**

———Construction—Term of mortgage—Undertaking by mortgagor to pay amount within five years—If one for five years certain—Redemption before term—Right of. *See* MORTGAGE—REDEMPTION. **13 Mys.L.J. 404=40 Mys.H.C.R. 435.**

———*Construction—Undertaking by vendee to pay off half of mortgage debt—Sale in execution of mortgage—Payment by vendee of entire amount—Rights of vendee.*

The vendee of a half share of certain mortgaged properties had agreed to pay off half the amount due under the mortgage, then calculated at Rs. 22,000. The mortgagee brought the properties to sale and the vendee paid off the entire amount due under that decree. Rs. 47,278 including a sum of Rs. 1,300 paid as compensation to the auction purchaser. In a suit by a prior mortgagee in which the vendee was impleaded as a subsequent mortgagee.

Held, (1) that the vendee was entitled to obtain credit for one-half of the amount which he paid on behalf of the mortgagor but not for the other half which he was bound by the terms of his purchase to pay; (2) that he was not entitled to obtain credit for Rs. 1,300 paid at compensation, since he could have paid up the amount prior to the execution sale; and (3) that his liability under his purchase was not confined to one half of Rs. 22,000 but he was bound to pay one-half of the debt due under the earlier mortgage, whatever it may be at the time of payment. (*Lord Russell of Killowen.*) JAGMOHAN DAS *v.* JUGAL KISHORE. **I.R. 1932 P.C. 188=137 I.C. 475=36 L.W. 85=54 C.L.J. 407=36 C.W.N. 4=A.I.R. 1932 P.C. 99 (P.C.).**

MORTGAGE—Co sharer.

———*Construction—Usufructuary mortgage — Non-delivery of possession—Stipulation for interest—Charge on property.*

A usufructuary mortgage deed provided that "till redemption is made from the prior mortgagee until the present mortgagee gets possession the mortgagors should pay interest from their pockets."

Held, that during the time the property was not redeemed from the hands of the prior mortgagee and possession consequently not delivered to the present mortgagee the liability for interest was personal and was not a charge on the mortgaged property. The charge became operative from the date when the mortgagors redeemed the mortgaged property from the hands of the prior mortgagee but they did not deliver possession of the same to the present mortgagee. (*Hasan, C.J. and Kisch, J.*) HASHMAT ALI *v.* GOBARDHAN DASS. **I.R. 1932 Oudh 124=136 I.C. 332=8 O.W.N. 1368.**

———Construction—Usufructuary mortgage — Subsequent permanent lease to mortgagee—If part of same transaction—Clog on the equity of redemption. *See* T. P. ACT, S. 60, PROVISO. **16 Pat.L.T. 119=A.I.R. 1935 Pat. 353.**

Contribution.

See also T. P. ACT, SS. 82 AND 95.

———*Contribution—Individual rights of defendants not pleaded—Right of plaintiff to joint decree.*

Where in a suit for contribution on account of the excess share of the mortgage discharged by them the plaintiffs did not ask for a definement of the respective liabilities of the several defendants.

Held, that the plaintiffs were not entitled to a decree for a consolidated amount against the defendants jointly. (*Sen and Niamatullah, JJ.*) MURLI PRASAD AWASTHI *v.* SHEO DAT PRASAD. **1931 A.L.J. 349=A.I.R. 1931 All. 625.**

———*Contribution—Subsequent mortgagee of portion purchasing part—Liability to contribute to prior mortgage debt.*

A subsequent mortgagee of a share in property which is already subject to a prior mortgage, who purchases that share in execution of the decree on his mortgage is liable to share in the prior mortgage debt, before he can get his share partitioned and delivered. (*Middleton, J. C. and Almond, A.J.C.*) SADHU SINGH *v.* MT. KHAIR NISSA. **159 I.C. 463=A.I.R. 1935 Pesh. 161.**

Co-sharer.

See also T. P. ACT. SS. 68 (*c*), 70 (*b*) AND 101 AND CO MORTGAGORS, *supra.*

MORTGAGE—Covenant.

Covenant.

See T. P. ACT, Ss. 58 (*d*), 65-A, 77 AND 100 AND PERSONAL COVENANT, *infra*.

———*Covenant for insurance with mortgagee—Consent of mortgagee to change insuring company—Suit on mortgage—Appointment of receivers—Binding nature of covenant for insurance.*

Certain properties were mortgaged by *G* in 1925 with the respondent, an insurance company. It was provided by Cl. 3 that the mortgagor would keep the properties insured with the mortgagee and if he neglected to do so, it was lawful for but not obligatory on the mortgagee to insure and keep insured the property in any manner he may from time to time determine. In January, 1928, the respondent permitted *G* to have the properties insured with another company instead of themselves. In June, 1928, a suit for foreclosure was brought by a subsequent mortgagee of the same properties and receivers were appointed to manage the property. The question was if Cl. 3 of the deed in favour of the respondent company was still binding or had been waived by them.

Held, that the permission given by the respondent company to vary the insurer applied only to the years for which it was given, that in spite of the order appointing receivers the parties were still governed by their contract, that under Cl. (3) the respondent company had the first voice in the selection of the insurers and that the receivers were bound to insure with the respondent company. (*Rankin, C.J. and Pearson, J.*) J. C. GALSTAUN *v.* PRUDENTIAL ASSURANCE CO. **I.R. 1932 Cal. 343=137 I.C. 523=54 C.L.J. 566=A.I.R. 1932 Cal. 366.**

Debt.

See also T. P. ACT, Ss. 54 AND 59.

Decree.

See also C. P. CODE, O. 34 AND MORTGAGE SUIT, *infra*.

Default clause.

See T. P. ACT Ss. 60 AND 67 AND CONSTRUCTION, *supra*, AND INSTALMENT BOND AND INTEREST, *infra*.

———Default clause—Deed fixing period for payment—Default clause making whole amount payable on failure to pay interest annually—Default—Suit by mortgagee—Limitation—Starting point—Right of mortgagor to rely on default clause *See* LIMITATION ACT, ART. 132. **A.I.R. 1935 Mad. 884.**

———*Default clause—Enforcement—Option of mortgagee.*

Where a mortgage deed provides a period for the payment of money but the mortgagee is given an option to sue for the money in case of default to pay interest, such option is meant for the benefit of the mortgagee exclusively and if he does not choose to exercise it, time does not run against him. He can either sue on such default or wait for the expiry of the period fixed in mortgage. Previous notice or some act showing the exercise of his option is not necessary before filing suit on such default. In such cases the option is deemed to have been exercised when the suit is instituted. (*Sulaiman, C.J. and Thom, J.*) ABDUL RAHMAN *v.* SHEO DAYAL. **56 All. 496=151 I.C. 900=7 R.A. 233=1934 A.L.J. 371=A.I.R. 1934 All. 152.**

———Default clause—Privilege of mortgagee—First suit for interest—Second suit for principal, if barred. *See* O. 2, R. 2, C. P. CODE, AND LIMITATION ACT (1908), ART. 132.

———*Default clause—Suit for two instalments—Subsequent suit for entire balance due—Maintainability—Cr. P. Code, O. 2, R. 2—Option of mortgagee.*

MORTGAGE—Equitable.

The amount secured by the mortgage, Rs. 1,000 was repayable in ten annual instalments of Rs. 100 each, together with interest. A clause in the deed provided that if two successive instalments remained unpaid, the mortgagor should, "without having regard to the future instalments, pay all the amount of principal and interest due in one instalment." Two instalments fell into arrears and the mortgagee obtained a decree for their recovery. He subsequently brought a second suit to recover the whole balance due from the mortgagor.

Held, that the second suit was not barred under O. 2, R. 2, C. P. Code. In such a case, the mortgagee has two alternative courses open to him; either to enforce the penalty or to stand on the original deed. If he elects to adopt the latter course, it cannot lie in the mouth of mortgagor to meet his suit on the mortgage with the objection that he is barred because he did not adopt the former 39 M 981 and A.I.R. 1931 Pat. 285, Appr.; 1929 M W.N. 204, Not Foll., Ref.; 56 M.L.J. 580, Ref. (*Waller and Krishnan Pandalai, JJ.*) NARAYYA *v.* SARVAYYA. **35 L.W. 424=138 I.C. 340=I.R. 1932 Mad. 570=1931 M W.N. 1246=A.I.R. 1932 Mad. 245.**

Deposit.

See (1) C. P. CODE, O. 34, R. 7 (2).
(2) T. P. ACT, Ss. 83 AND 84.

Discharge.

See T. P. ACT, Ss. 92 AND 101.

English.

See also T. P. ACT, S. 58 (*e*).

———*English mortgage—Suit for sale—Maintainability—Mortgagee in possession—Effect of.*

Per *Dhavle, J.*—There is no provisions in the T. P. Act, which precludes a sale at the instance of an English mortgagee merely because he may be in possession of a part or even the whole of the mortgaged property, whether with or without freedom from liability to account as mortgagee in possession. (*Wort and Dhavle, JJ.*) RAJA JANKI NATH ROY *v.* SYED ASAD REZA. **14 Pat. 560=158 I.C. 738=8 R.P. 211=16 Pat L.T. 757.**

Equitable.

See also T. P. ACT, Ss. 58 AND 59.

———Equitable mortgage.

See also (1) UNDER REGISTRATION ACT, S. 17 (1) (*b*).
(2) T P. ACT, S. 59.

———*Mortgage—Equitable mortgage—Creation of—Deposit of certified copy of jamabandi entry.*

In no circumstances can the deposit of a mere certified copy of a jamabandi entry constitute an equitable mortgage. To prevent fraud, it is necessary to distinguish between documents creating title and documents evidencing title, and it is desirable to restrict as far as possible to the former category the deeds, the deposit of which can validly create an equitable mortgage. (*Jai Lal and Sale, JJ.*) JOWALA DAS GOBIND RAM *v.* THAKAR DAS. **158 I.C. 562=8 R.L. 275.**

———*Equitable mortgage—Deposit of copy of jamabandi.*

The nature of a jamabandi after all is nothing more than a Government record prepared for the purposes of collection of revenue. Such a record is no doubt by statute declared to be presumptive evidence of title but it cannot be said to be a document of title in any way whatsoever. Hence the deposit of a copy of the jamabandi is not sufficient to constitute an equitable mortgage. (*Dalip Singh and Bhide, JJ.*) PUNJAB & SIND BANK, LTD. *v.* GANESH DAS NATHU RAM. **16 Lah.**

MORTGAGE—Equitable.

1113=38 P.L.R. 145=161 I.C. 429=8 R.L. 745=A.I.R. 1935 Lah. 721.

———*Equitable mortgage—Deposit of copy of title deed.*

No equitable mortgage can be created by the deposit of the copy of the title-deed when there is no proof whatsoever that the original was lost or was not available for the purpose of the deposit. (*Dalip Singh and Bhide, JJ.*) PUNJAB & SIND BANK, LTD. *v.* GANESH DAS NATHU RAM. **16 Lah. 1113=38 P.L.R 145=161 I. C. 429=8 R.L. 745=A.I.R. 1935 Lah. 721.**

———Equitable mortgage—Income of mortgaged properties with receiver—Supervening insolvency of mortgagor—Effect. *See* T. P. ACT, S. 58 (*f*). **54 Mad. 565=61 M.L.J. 111.**

———*Equitable mortgage—Punjab—Creation of, by deposit of copy of original deed.*

An equitable mortgage can be created in the Punjab merely by a deposit of title-deeds. But the doctrine of equitable mortgage requires the mortgagor to deprive himself of the possession of the documents which create his title so as to render him unable to deal with the property upon the assertion that the title is still with him. An equitable mortgage cannot be validly created by deposit of a copy of the original deed which is in existence and the production of which is within the power of the mortgagor. (*Coldstream, J.*) HEM RAJ *v.* SIMLA BANKING AND INDUSTRIAL CO., LTD. **159 I.C. 1085=A.I.R. 1935 Lah. 10.**

———*Equitable mortgage—Right of mortgagee in property covered by title deeds.*

In the case of an equitable mortgage the mortgagee cannot claim any title higher than what the mortgagor has in the different items of property covered by the title-deeds deposited with the mortgagee. (*Guha and Bartley, JJ.*) RAKHAL DAS CHATTOPADHAYA *v.* INDUBALA BASU. **161 I.C. 512=8 R.C. 529=61 C. L.J. 473=A.I.R. 1936 Cal. 125.**

———*Equitable mortgage—Title deeds—Certificate of treasury officer for deposits made in bank for price of site and copies of jamabandi and mutation entries.*

A certificate from treasury officer to the effect that certain deposits were made in the Imperial Bank as purchase price of a particular site is not a document of title. Neither are the copies of jamabandi and mutation entries such documents (*Jai Lal and Sale JJ.*) PUNJAB & SIND BANK, LTD. *v* GURDIT SINGH. **161 I.C. 209=8 R.L. 691=38 P.L.R. 354=A.I.R. 1935 Lah. 957.**

Equity of Redemption.

See also (1) C.P. CODE O, 34, R. 14.
(2) T. P. ACT, SS. 60 AND 66.

MORTGAGE—*Equity of redemption—Assignee of—Liability on personal covenant in usufructuary mortgage.*

In the absence of any express covenant, the assignee of the equity of redemption does not ordinarily become liable under the pe rsonal convenant in the mortgage but he is by implication bound to indemnify the mortgagor against the mortgage debt. *Waring* v. *Ward*, 7 Ves. Jun. 332 and (1912) 1 Ch 231, Foll. (*Ross and Chatterji, JJ.*) JANKI SARAN SINGH *v.* SYED MAHOMED ISMAIL. **I.R. 1932 Pat. 241=139 I.C. 525=13 Pat. L.T. 373=A.I.R. 1932 Pat. 273.**

———*Equity of redemption—Clog on—Covenant that rent, to be paid by mortgagor—provision that, if, on default, mortgagee pays, mortgagee to become owner—Validity.*

Where a mortgage deed provided that the mortgagor would pay the rent of the fields mortgaged to the Zemindar, and that if he failed to so pay it and the mortgagee paid it, the equity of redemption would be lost and the mortgagee would become the owner of the property.

Held, that the clause was a clog on the equity of redemption, but that the mortgagee would be entitled to get the amounts paid by him to Zamindar as rent, from the mortgagor. (*Baipai, J.*) HARDWAR BHAGAT *v.* SITA RAM RAI. **150 I.C. 879=1934 A.L.J. 637=7 R.A. 41=4 A.W.R. 299=A.I.R. 1934 All. 888.**

———Equity of Redemption—Clog on permanent lease entered into at the time of the mortgage. *See* MORTGAGE—LEASE. **A I.R. 1931 Bom. 399.**

———Equity of redemption—Clog on—Permanent lease by mortgagor to mortgagee—Validity. *See* T. P. ACT, S. 60, PROVISO. **16 Pat L.T. 119=A.I.R. 1935 Pat. 353.**

———Equity of redemption—Clog on—Stipulation for payment of *gilsandazi* expenses at time of redemption—If amounts to. *See* T. P. ACT, SS. 60 AND 72. **16 Pat.L.T. 91=A.I.R. 1935 Pat 157.**

Estoppel.

———*Estoppel—Mortgagee's title—Mortgagor and representatives—If Estopped*—Wakf *property—If an exception—Representative possessing independent right—Right to set up such right.*

A mortgagor as well as his personal representative is estopped from denying the mortgagor's title or his right to mortgage the property in a suit for sale or for foreclosure. There is no exception to this rule in the case of a religious endowment; when the mortgagor of the property alleged to be *wakf* has purported to act in his individual capacity and has expressly covenanted that he has a right to alienate the property mortgaged; no such denial of the mortgagor's right to mortgage can be allowed. The mortgagor's representative issued only in his capacity as representing the mortgagor and even if he has any right or title independent of that capacity, the representative is equally estopped. (*Pankridge, J.*) CHAMPABATI DASSEE *v* MAHOMED YAKUB KHAN. **39 C.W.N. 1100=63 Cal. 68.**

———Mortgage—Estoppel—Title of mortgagor—Mortgagee has no right to deny. *See* EVIDENCE ACT, S. 116, MORTGAGE. **A.I.R. 1933 Mad. 635.**

Extinction of.

See also T. P. ACT, S. 101.

———*Extinction—Execution of decree—Omission to mention prior encumbrance—Effect.*

It cannot be said that if a subsequent mortgagee does not have his prior mortgage specifically mentioned in the sale proclamation drawn up in execution of a decree for enforcement of a subsequent mortgage, the prior mortgage is extinguished or that the mortgagee's remedy is barred. (*Pullan and Niamatullah JJ.*) DWARKA PRASAD *v.* ULFAT RAI. **53 All. 631=I.R. 1931 All. 547=132 I.C. 803=1931 A.L.J. 398=A.I.R. 1931 All. 549 (1).**

Foreclosure.

See also T. P. ACT, SS. 67, and 101—SUB-MORTGAGE, *infra.*

———Foreclosure *See also* C. P. CODE, 634.

———Foreclosure—Mortgagee in possession by and one in possession under sale in execution—Difference—If any, in principle, as to rights as against puisne mortgagee. *See* T. P. ACT, S 101. **155 I.C. 498=1935 O.W.N. 684=A.I R 1935 Oudh 411.**

———*Foreclosure—Mortgage suit—Puisne mortgagee—Right lost but impleaded in prior mortgagee's suit—Application for foreclosure—Maintainability.*

A puisne mortgagee whose rights to enforce his mortgage is gone is not entitled to claim in a suit by the prior mortgagee to which he is impleaded as a party to fore-

MORTGAGE—Foreclosure.

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close the mortgagor. (*Beaumont, C. J. and Blackwell, J.*) OFFICIAL ASSIGNEE OF BOMBAY *v.* CHIMNIRAM MOTILAL. **57 Bom. 346=I.R. 1933 Bom. 223=142 I.C. 370=34 Bom.L.R. 1615=A.I.R. 1933 Bom. 51.**

——*Foreclosure—Order absolute—Effect.*

In a properly constituted suit for foreclosure it is competent for the Court to order a foreclosure absolute. The effect of such an order is to vest the ownership of and the beneficial title to, the land in respect of which it is obtained, in the person who previously was a mere incumbrancer. *Casborne* v. *Scarfe*, 1 Atk. 603, Ref. (*Rupchand, A.J.C.*) KALUMAL TOLARAM *v.* AHMED NUR MAHOMED. **25 S.L.R. 405=I.R. 1931 Sind 117=134 I.C. 373=A.I.R. 1931 Sind 107.**

——*Foreclosure—Priority—Rival purchasers under separate mortgage decrees.*

Where during the pendency of a suit by a prior mortgagee for foreclosure, the subsequent mortgagee, who was not a party to the prior mortgagee's suit, obtains a foreclosure decree against the mortgagor, the prior mortgagee does not obtain any title to the mortgaged property by his foreclosure decree. (*Pollock, A.J.C.*) GANPATRAO *v.* VITHABAI. **30 N.L.R. 214=6 R.N. 165=148 I.C. 62=A.I.R. 1934 Nag. 36.**

——*Foreclosure—Reg. XVII of* 1906*—Period of grace—Title of vendee when complete.*

A notice of foreclosure was served by the mortgagees on the mortgagors in accordance with Reg. XVII of 1806, An order to foreclosure was passed but a year's grace was allowed.

Held, that on the expiry of the year the title of the vendee became complete. (*Pullan and Niamatullah, JJ.*) BASDEO RAI *v.* JAI MANGAL RAI. **136 I.C. 69=I.R. 1932 All. 117=1931 A.L.J. 914=A.I.R. 1932 All. 53.**

——*Foreclosure—Settlement of dispute by arbitrator—Absolute foreclosure—Power of arbitrator.*

It is competent to an arbitrator duly appointed by the parties for settlement of disputes regarding foreclosure of mortgage to pass an award foreclosing absolutely the rights of the mortgagor and his award would have the same effect as a decree of the Court. (*Rupchand, A.J.C.*) KALUMAL TOLARAM *v.* AHMED NUR MAHOMED. **25 S.L.R. 405=I.R. 1931 Sind 117=134 I.C. 373=A.I.R. 1931 Sind 107.**

Hindu Joint Family.

See (1) HINDU LAW—JOINT FAMILY AND WIDOW—ALIENATION.
(2) T. P. ACT, SS. 59 A. AND 61.

Improvements.

See also T. P. ACT, S. 63 A.

——*Improvements—Parties—Second mortgagee not impleaded in suit on first mortgage—Court-sale—Subsequent suit by second mortgagee—Temporary structures erected by purchaser—Whether liable to be sold.*

Held, by the majority of the Full Bench (*Sen, J., dissenting*), that an auction-purchaser at a sale held in execution of a decree passed on foot of a prior mortgage to which the second mortgagee was no party, is not entitled to remove the materials of the building erected by him on a site included in the mortgaged property purchased by him and the building is liable to be sold as an accession to the mortgaged property for satisfaction of the second mortgage. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

Indivisibility.

See (1) TRANSFER OF PROPERTY ACT, SS. 60 AND 67 (*d*).
(2) MOTGAGE SUIT—SPLITTING UP.

MORTGAGE—Interet.

Injunctions

—— Injunction—Execution sale—Person claiming title to property—Right to apply for temporary injunction. *See* C. P. CODE, O. 39, R. 1, MORTGAGE SUIT. **85 C.W.N. 910.**

Instalment bond.

——*Instalment bond—Default—Right to call in entire amount, express or implied.*

In an instalment mortgage bond the condition that a mortgagee will be entitled to call in entire money if the debtor makes default in payment of any of the instalments fixed can be expressed in variety of ways, either by express words or by implication. (*Macpherson and Fazl Ali, JJ.*) MUKHDEO SINGH *v.* HARAKH NARAVAN SINGH. **11 Pat. 112=I.R. 1931 Pat. 465=134 I.C. 609=12 Pat.L.T. 755=A.I.R. 1931 Pat. 285.**

Interest.

See also (1) C. P. CODE, O. 34, RR. 2, 4 AND 11.
(2) CONTRACT ACT, S. 74—COMPOUND INTEREST AND ENHANCED RATE OF INTEREST.
(3) INTEREST—MORTGAGE.
(4) MORTGAGE CONSTRUCTION.
(5) T. P. ACT, SS. 76 (*g*), 91 (*a*) AND 94.

——*Interest—Charge for—Right of mortgagee.*

Where a mortgagor executes a lease-deed to the mortgagee in respect of the mortgaged property and agrees to pay rent which is to be credited towards the interest under the mortgage, and the mortgagor pays neither rent nor interest, the mortgagee is entitled to treat the interest due under the mortgage as a charge on the property in the absence of a contract to the contrary and a recital in the mortgage deed that in default of payment of interest, it may be recovered from the person and property of mortgagor does not by itself necessarily mean that interest ceases to be a charge on the property. (*Bhide, J.*) ALIA *v.* RAM CHAND. **I.R. 1933 Lah. 196=142 I.C. 309=34 P.L.R. 345=A.I.R 1933 Lah. 289.**

——*Interest—Charge for—Right of mortgagee—Separate date mentioned for payment of interest.*

As a general rule the mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under the mortgage as a charge on the estate, and it is for those who allege the contrary to displace that general rule. The mere fact that separate date is mentioned for the payment of the interest is not sufficient for this purpose. (*Jai Lal and Skemp, JJ.*) FAZAL KHAN *v.* RAM DAS. **157 I.C. 766=A.I.R. 1935 Lah. 142.**

——*Interest—Charge on property.*

Even if the mortgage deed is silent, a mortgagee is entitled to treat interest due thereunder as a charge upon the mortgaged property provided there is no contract to the contrary. 5 Lah. 422 (P. C.), App. (*Shadi Lal, C. J. and Tapp, J.*) PIRAN DITTA *v.* IQBAL SINGH. **135 I.C. 497=I.R. 1932 Lah. 97=32 P.L.R. 735.**

——*Interest—Construction of deed.*

Where a mortgage provided that (*a*) the mortgagee will remain in possession of the land; (*b*) the mortgage will continue for a term of five years; (*c*) out of Rs. 600, Rs. 300 only will carry interest at the rate of nine per cent. per annum; (*d*) the interest will be paid annually, failing which compound interest will be charged; (*e*) the mortgagor will not be competent to effect an alienation or redemption within the term fixed; (*f*) on the expiry of the term the entire mortgage-money with interest will be paid; and (*g*) the mortgagee will be entitled to recover his dues from the property at any time he liked.

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Held, that the mortgagees were entitled to receive compound interest at the rate of nine per cent. per annum as stipulated for five years and simple interest at the same rate for a period of six years prior to the institution of the suit as damages. (*Hilton and Din Mohammad, JJ.*) BAHADUR SHAH *v.* MULK RAJ. **A.I.R. 1934 Lah. 898.**

———*Interest—Contract rate—Undue influence.*

In a suit on the basis of a mortgage full interest should be given to the mortgagee at the contract rate unless the mortgagor is in a position to make out a case of undue influence as defined in S. 16 of the Contract Act. (*Tek Chand and Agha Haidar, JJ.*) SURGIAN *v.* CHHAJJU KHAN. **I.R. 1931 Lah. 937 (2)=134 I.C. 489 (2)=32 P.L.R. 378.**

———*Interest—Default clause—Tender of mortgage money—Right to future interest.*

N mortgaged without possession seven shops to *S*. It was stipulated that the mortgagor should pay Rs. 600 per annum as interest in half-yearly instalments. In case of non-payment of interest on the due dates compound interest at the rate of 8 annas per cent. per mensem was chargeable. If the mortgagor made default in the payment of interest for four consecutive instalments the mortgagee was to be entitled either to realize the mortgage debt together with interest or to take possession of the mortgaged property. *N* paid interest regularly. After his death his sons paid one instalment and warned *S* that no further interest would be paid and that he must pursue his remedy against the mortgaged property at once.

Held, that the mortgagor could escape liability for payment of interest only by tendering the amount due on the mortgage deed. On his failure to do so it was open to the mortgagee to delay the institution of his suit till default had been made in the payment of four instalments. By giving a warning that they would not be liable for interest in future *N's* sons could not stop the accrual of interest to *S*. No unilateral act of *N's* sons could operate to alter the terms of the registered mortgage deed and *S* was entitled to stipulated interest.

Held, further, that so long as the mortgagor remained in possession they must be taken to be enjoying the rent and profits of the mortgaged property; *S* could not therefore be deprived of interest so long as the mortgage debt remained unpaid. (*Shadi Lal, C. J. and Abdul Rashid, J.*) SAHIBA RAM *v.* MAHOMED ABDULLA KHAN. **6 R.L. 612=148 I.C. 936=A.I.R. 1934 Lah. 99.**

———*Interest—If accessory to principal—Suit for principal barred—Suit for interest, if also barred.*

Where the mortgagee is only given two options by the deed, namely, that he could sue for interest at the end of a year or sue for possession of the land to be held by him as usufructuary mortgagee for the amount of principal and interest due at the time of his suit and if his remedy to obtain a personal decree for the principal has gone and so has his remedy to sue for possession of the land and to obtain a charge upon it to the extent of what was due, the usual principle must be applied, namely, that interest is an accessory to the principal and a subsequent suit for interest must be barred if the suit for principal is barred as well as the suit for possession of the land and to have the interest made a charge upon the land. (*Addison and Din Mahomed, JJ.*) ATTAR SINGH *v.* DALIP SINGH. **158 I.C. 844=8 R.L. 310 =A.I.R. 1935 Lah. 516.**

———*Interest—Mortgagee entitled till date of payment, not only till date of suit.*

In a mortgage suit the plaintiff will be entitled to interest up to the date of payment and not merely till the date of suit. (*C. C. Ghose and Pearson, JJ.*) JNANCHANDRA DUTTA *v.* MAHIM CHANDRA DAS. **135 I.C. 800=I.R. 1932 Cal. 160=35 C.W.N. 654 =A.I.R. 1932 Cal. 83 (1).**

MORTGAGE—Interest.

———*Interest—One of several items of mortgaged property given up—Effect—Claim, if relinquished in part.*

The mortgagor mortgaged two items to the plaintiff and subsequently sold one of them to another person. The plaintiff sued to recover the debt but in the course of the suit his counsel admitted that the item not transferred did not belong to the mortgagor.

Held, that the mortgagee could not be said to have released any part of his claim and that he was entitled to recover the entire debt from the other item which had been transferred to the third person.

Semble.—The transferee is not under those circumstances precluded from recovering contribution from the holder of the other item mortgaged. (*Boys and Smith, JJ.*) BAL KISHAN *v.* BUNDA. **I.R. 1932 All. 215 =136 I.C. 567=1931 A.L.J. 1073=A.I.R. 1932 All. 246.**

———Interest—*Post diem. See also* C. P. CODE, O. 34, R. 11.

———Interest—*Post diem* interest—Not included in the charge. **143 I.C. 750=24 Co. L.R. 314 (F.B.).**

———*Interest—Provision for payment of interest annually—Suit for interest—Cause of action—Limitation—Starting point.*

When the language of a mortgage-deed shows that interest is payable till the principal amount is paid, there is ordinarily but one cause of action for both principal and interest, as from the date when the principal becomes payable. Even if there be a further provision in the deed fixing a date for the payment of interest annually, the Court may consider the circumstances and hold that it was intended for the purpose of enabling the mortgagee to claim interest on interest on default of payment of interest on the due dates, and not to give the mortgagee an independent cause of action in respect of interest at the end of each year so that limitation may be computed from those dates. (*Varadachariar and Burn, JJ.*) SURAMMA *v.* VENKAYYA. **58 Mad. 266=40 L.W. 641=1934 M.W.N. 971= 152 I.C. 617=7 R.M. 256=A.I.R. 1934 Mad. 695= 67 M.L.J. 653.**

———Interest—Rate of—Fairness of. *See* INTEREST —MORTGAGE. **A.I.R. 1933 All. 913.**

———*Interest—Rate of—Fairness.*

In a mortgage transaction, a rate of interest of 25 per cent. per annum compound is *prima facie* excessive in any district and a rate of 12 per cent. per annum simple would be a fair and proper rate. (*Kisch and Bajpai, JJ.*) RUKMINA *v.* MOHIB ALI KHAN. **153 I.C. 695=7 R.A. 566=4 A.W.R. 103=A.I.R. 1934 All. 938.**

———*Interest—Right to compound—Usufructuary mortgage—Income insufficient to cover interest—Mortgage omitting to inform mortgagor—Effect of.*

Where a usufructuary mortgagee fails to inform the mortgagor annually that the income received is not sufficient to cover interest, he is not entitled to compound interest, specially when he has not maintained regular accounts. (*Tek Chand and Currie, JJ.*) CHANDRA *v.* DWARKA DAS. **161 I.C. 984=8 R.L. 835=37 P. L.R. 567=A.I.R. 1936 Lah. 42.**

———*Interest—Rule of* damdupat.

S. 34 of the C. P. Code gives the Court no discretion to award interest in excess of *damdupat* for the period after the date on which the suit was filed, in the case of a decree based on a mortgage to the provisions of which

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the rule of *damdupat* applies. (*Macnair, A. J. C.*) RAMKUAR *v.* RAM RAO. **I.R. 1931 Nag. 63=130 I. C. 159=A.I.R. 1931 Nag. 88.**

———Interest, subsequent to decree—Decree providing for interest for three months and for sale in default of payment—Appeal by mortgagee pending for two years —Right to some interest. *See* C. P. CODE, O. 34, R. 11. **59 Cal. 722=A.I.R. 1932 Cal. 689.**

———*Interest—Usufructuary mortgage—Dispossession of mortgagee—Acquiescence — Claim for interest—Sustainability.*

Where a usufructuary mortgagee of certain properties was dispossessed from some of the items but he did not take steps to obtain additional security for the debt,

Held, that the mortgagee was not entitled to claim interest on the mortgage money on account of such dispossession. 29 I.A. 148, relied on. (*Guha and Bartley, JJ.*) PRASANNA KUMAR HALDAR *v.* GIRISH CHANDRA GHOSH. **149 I.C. 667=6 R.C. 613=37 C.W. N. 1162=58 C.L.J. 80=A.I.R. 1934 Cal. 149.**

———*Interest—Usufructuary mortgage— Mortgagee negligently failing to secure possession of property—Right to interest by way of damages.*

Where, under the terms of the mortgage-bond, the mortgagor does not make himself or the mortgaged property liable for interest and only the profits of the mortgaged property are agreed to be taken and enjoyed by the mortgagee in lieu of interest and the mortgagee on account of his own negligence fails to secure possession of the mortgaged property and recover interest from its usufruct as per terms of the mortgage bond, he is not entitled to any interest by way of damages. (*Subhedar, A.J.C.*) JAIRAM PUNJAJI *v.* JANGU. **159 I.C. 868=A.I.R. 1935 Nag. 249.**

Invalid mortgage.

———*Invalid mortgage—Decree on personal covenant.*

A personal covenant to pay may be proved by a mortgage invalid for defect of attestation or registration and the Court may in a suit on the mortgage, give a decree on the personal covenant which it contains. (*Curgenven and Bhashyam Ayyangar, JJ.*) JAGANNADHAM PILLAI *v.* THE OFFICIAL ASSIGNEE, MADRAS. **I.R. 1931 Mad. 334=129 I.C. 814=32 L.W. 666=A.I.R. 1931 Mad. 124=60 M.L.J. 309.**

———*Invalid mortgage—Execution of mortgage by guardian held invalid—Enforceability of transaction under personal covenant.*

Where the guardian of a minor executed a mortgage which was found to be invalid and unenforceable as such for want of proper attestation, the personal covenant contained in the deed can be enforced against the estate of the minor if the liability was one binding on the minor under the Hindu Law. 42 Mad. 185 ; 36 M. L.J. 29 (F.B.), Foll. (*Beasley, C. J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=33 L.W. 95=135 I.C. 17=I.R. 1932 Mad. 49=A.I.R. 1931 Mad. 140=60 M.L.J. 56**

[**Appr.** 35 L.W. 397 (398). **D.** 56 M. 879 (883).]

———*Invalid mortgage—Mortgage suit—Plea of invalidity of mortgage as being of wakf property—If open.*

A defendant in a mortgage suit cannot be permitted to question the validity of the mortgage on the ground of the property being wakf property and that he has a title independent of or paramount or adverse to the mortgage. (*Panckridge, J.*) CHAMPABATI DASSEE *v.* MAHOMED YAKUB KHAN. **63 Cal. 68=39 C.W. N. 1100.**

MORTGAGE—Keeping alive.

———*Invalid mortgage — Right to recover money under.*

Where in a case of mortgage of occupancy rights the risk of the mortgage being liable to be set aside by the landlord is known both to the mortgagee and the mortgagor, the mortgagee cannot claim a refund of the money on the avoidance of the mortgage by the landlord unless a covenant to that effect has been inserted in the mortgage deed. 61 I.C. 604, Foll.

Per *Obiter*.—It appears that S. 65 of the Contract Act entitles the mortgagee to relief in such cases. (*Jai Lal, J.*) LABH SINGH *v.* JAMNUN. **32 P.L.R. 561=I. R. 1932 Lah. 12=134 I.C. 1116=A.I.R. 1931 Lah. 694.**

———*Invalid mortgage—Suit on—Prayer for money decree—Sustainability.*

Where the plaintiff gave up the mortgage security since he could not avail himself of the provisions in the deed because of S. 9 of the Punjab Alienation Act and claimed a money decree,

Held, that the suit was maintainable and should be determined on the terms of the deed excluding the terms relating to the security of land. (*Coldstream and Bhide, JJ.*) SOCHET SINGH *v.* HADAYAT ULLAH. **13 Lah. 508=33 P.L.R. 815=I.R. 1933 Lah. 44=140 I.C. 863=A.I.R. 1932 Lah. 630.**

———*Invalid mortgage— Suit to recover money — Maintainability.*

A contract for the possessory mortgage of occupancy holdings if permitted would defeat the provisions of the Tenancy Law and is therefore void under S. 23 of the Contract Act. Consequently a covenant enabling the mortgagee to recover money if there was no delivery of possession is not enforceable. (*Sulaiman and King, JJ.*) MAKUND LAL *v.* MT. SUNITA. **I.R. 1931 All. 518 (1)=132 I.C. 422 (1)=A.I.R. 1931 All. 461.**

Kanom.

See MALABAR LAW.

Kat kobala.

———*Kat kobala*—Suit to redeem—Payment of principal and interest—Account of receipts by mortgagee—Case if one of rectification. *See* T. P. ACT, SS. 76 AND 77. **53 C.L.J. 380=134 I.C. 95.**

Keeping alive.

See also T. P. ACT, S. 101.

———*Keeping alive—Money decree—Execution sale—Mortgage charge not mentioned in proclamation.*

In the course of execution proceedings under a money decree, the mortgagee made a statement that the equity of redemption may be sold subject to the mortgage charge but the mortgage charge was not mentioned in the proclamation of sale and the sale certificate and the mortgagee purchased the property himself.

Held, that the purchaser could be taken to have intended to keep the mortgage charge alive even though it was not mentioned in the sale proclamation and sale certificate. 43 All. 703, Ref. (*Bhide, J.*) GURDIT SINGH *v.* HAKUMAT RAI. **135 I.C. 201=I.R. 1932 Lah. 73=32 P.L.R. 759=A.I.R. 1932 Lah. 56 (2).**

———*Keeping alive — Presumption— Mortgage in renewal of prior mortgage.*

Where the mortgagor executes a fresh mortgage in renewal of the old one to the same mortgagee, there is always a presumption in such a case that the mortgagee intends to keep the prior mortgage alive for his benefit. (*Coldstream and Bhide, JJ.*) PUNJAB AND SIND BANK, LTD *v.* KISHEN SINGH GULAB SINGH. **16 Lah. 881=156 I.C. 795 (2)=8 R.L. 20=A.I.R. 1935 Lah. 350.**

MORTGAGE—Lease.

Lease.

See also T. P. ACT, SS. 63, 65-A AND 66.

———*Lease by mortgagee—Permanent lease.*

A mortgagee cannot give a permanent lease. (*Oakden, S.M. and Smith, J.M.*) MAHOMED MIAN KHAN *v.* MAHOMED ISMAIL KHAN. **14 R.D. 585.**

———*Lease by mortgagor—Validity.*

There is no law entitling a mortgagee, whether government or other person, holding a collateral mortgage on land, to object to lease of that land by the owner; the lease does not in any way affect the rights of the collateral mortgagee. (*Irving, F. C.*) JAN MOHAMMAD *v.* GELA RAM. **13 Lah.L.T. 56.**

———*Lease granted by mortgagor during pendency—Validity.*

The powers or a mortgagor to grant leases after the execution of a mortgage are very limited. He may no doubt make a lease in the ordinary course of management for his beneficial enjoyment; but he cannot after the date of the mortgage and in the absence of an express power in that behalf or the concurrence of the mortgagee create a lease or tenancy which will bind the mortgagee. Where during the pendency of a suit instituted by a mortgagee for the sale of the mortgaged property the mortgagor effected a lease of the property,

Held, that the transferee was bound by the decree and the transfer did not affect the mortgagee's rights. (*Narayana Ayyar, C.J. and Ouseph, J.*) JACOB MAMMED KASSIM SAIT *v.* KUNHI THOMA. **142 I.C. 188.**

———*Lease—Permanent lease—Validity.*

A permanent lease entered into at the time of the mortgage would amount to a clog on the equity of redemption whereas a subsequent agreement of permanent lease would be valid. But even in the latter case, if it is found that the terms of the lease were unfair and unconscionable, it cannot be enforced or acted upon by the Courts. *Stantley* v. *Wilde*, (1899) 2 Ch. 474 (*Patkar and Broomfield, JJ.*) PARASHRAM *v.* LAKSHMIBAI. **I.R. 1931 Bom. 509=134 I.C. 701=33 Bom L.R. 755=A.I.R. 1931 Bom. 399.**

Lekha mukhi.

———Lekha mukhi—*Nature and incidents.*

A *lekha mukhi* mortgage is one in which possession is given to the mortgagee who is responsible for the accounts and looks to the produce for the payment of the mortgage-debt. In such a case the possession of the mortgagee may be constructive. (*Coldstream and Dalip Singh, JJ.*) KARAM CHAND *v.* SHERA. **I.R. 1931 Lah. 831=133 I.C. 655=32 P.L.R. 454=A.I.R. 1931 Lah. 498.**

Limitation.

See LIMITATION ACT, ART. 132.

Marshalling.

See also T. P. ACT, SS. 56 AND 81.

———Marshalling—Purchaser of one of many items of mortgaged property—Right of—*Bona fide* purchaser without notice—Who is—Omission to make enquiries—Effect—Sale deed reciting that there are no encumbrances—Value of. *See* T. P. ACT (AS AMENDED IN 1929), S. 56. **61 C.L.J. 560=A.I.R. 1935 Cal. 667.**

Merger.

See also C. P. CODE, O. 34, R. 6 AND T. P. ACT, S. 101.

———*Merger—Purchase of equity of redemption by mortgagee in name of benamidar.*

Where the mortgagee purchases the equity of redemption the mortgagee's rights merge in the proprietary rights and become extinguised; and merely because the purchase is made in the name of benamidar, the mortgagee is not entitled to claim that he intended to keep the mortgage alive. (*Tek Chand and Currie, JJ.*) GOKAL CHAND LAMBA *v.* QANDHARA SINGH. **159 I.C. 1091=37 P.L.R. 611=A.I.R. 1935 Lah 714.**

MORTGAGE—Mortgage suit.

———*Merger—Representative of mortgagor purchasing mortgagee rights.*

Where a representative of a mortgagor purchases the mortgagee rights, the question whether the mortgage ceases to exists is one of intention of the parties. (*Bhide, J.*) RADHA KISHAN *v.* FAKHARUDDIN. **154 I.C. 695=7 R.L. 591 (2)=A.I.R. 1934 Lah. 143.**

———*Merger—Rule prior to the Transfer of Property Act.*

The law relating to merger in India prior to the enactment of the Transfer of Property Act was that where the absolute owner of an estate becomes also the owner of a charge thereon (or *vice versa*) in the absence of an intention either express or presumed on his part, merger or extinguishment of title will take place. 22 I.C 966 and 48 I A. 485, Foll.; (1900) 2 Ch. 368 and 32 Beav. 244, Ref. (*Ross and Fazl Ali, JJ.*) SOMESHWARI PRASAD NARAIN DEO *v.* MAHESHWAR PRASAD NARAIN DEO. **10 Pat. 630=135 I.C. 85=I.R. 1932 Pat. 5=13 Pat.L.T. 347 & 405=A.I.R. 1931 Pat. 426.**

Minor.

———Minor—Deed by—Fraud in getting money advanced—Consideration found binding on minor—Suit by guardian to set aside—Decree setting aside mortgage on condition of payment of mortgage money by guardian—Default in payment—Mortgagee's right to apply for sale. *See* C.P. CODE, O. 34, R. 7. **68 M. L.J. 546.**

Modification of.

See EVIDENCE ACT, S. 92 AND T.P. ACT, SS. 59 AND 82.

Mortgage suit.

See also C.P. CODE, O. 2, R. 2—MORTGAGE.

———Mortgage suit—Burden of proof of execution and good faith—Unregistered mortgage—Suit to enforce against *bona fide* purchaser for value—Formal proof of execution—Sufficiency—Recital as to consideration—Value of. *See* BURDEN OF PROOF—MORTGAGE UNREGISTERED. **157 I.C. 857=A.I.R. 1935 Lah. 953.**

———*Mortgage suit—Composite decree—Validity.*

If a Court passes a composite decree combining a decree for sale and a personal decree, the decree is valid and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt. (*Raza and Allsop, JJ.*) RAGHUBIR SINGH *v.* RANI RAJESHWARI DEVI. **9 Luck. 90=6 I.R. (Oudh) 102=146 I.C. 310=10 O.W.N. 884=A.I.R. 1933 Oudh 466.**

———*Mortgage suit—Composite decree—Validity and effect.*

If a Court passes a composite decree, combining a decree for sale and a personsal decree, the decree is valid and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt. (*Raza and Smith, JJ.*) ALA BAKHSH KHUDA BAKSH *v.* DURGA BAKHSH SINGH. **9 Luck. 162=147 I.C. 961=6 R.O. 334=10 O.W.N. 1087=A.I.R. 1933 Oudh 529.**

———*Mortgage suit—Consent decree—Omission by mortgagor to mention existence of attaching decree-holder—If fraudulent.*

MORTGAGE—Mortgage suit.

Where the mortgagor who is aware of the decree and an order of attachment obtained by a party fails to bring those facts into certain proceedings relating to consent decree in a mortgage suit, his conduct cannot be held to be fraudulent. Whatever interest the attaching creditor had acquired in the right of redemption, having been acquired by him subsequent to the institution of the mortgage suit, a disclosure of these facts by the mortgagor would not have stood in the way of the consent decree being passed. (*Mukerji and Mitter, JJ.*) C.L. KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal. 598=I.R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

——*Mortgage suit—Consent decree — Rights of several mortgages adjusted—Validity of decree.*

In a mortgage suit the Court can pass by consent a combination of several decrees in favour of different mortgagees determining the order in which they were to be paid and incorporating orders which the Court would amply justified in making under S. 57, T. P. Act. (*Mukerji and Mitter, JJ.*) C.L KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal. 598=I.R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

——*Mortgage suit—Costs—Appeal—Costs awarded to mortgagee decree-holder—Enforcement.*

No doubt ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal, in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where costs are awarded to the mortgagee in appeal by some defendants without any mention of other defendants the defendants-appellants are liable to pay the costs of the appeal personally. (*Sulaiman, C.J. and Bajpai, J.*) AZIZ AHMAD *v.* RIAZ-UL HASAN. **151 I.C. 294=7 R.A. 132=1934 A.L.J. 446=A.I.R. 1934 All. 89.**

——*Mortgage suit — Costs — Liability of puisne mortgagee.*

In the ordinary way a puisne mortgage is not made liable for costs in the mortgage suit; if the puisne mortgagee, by his conduct, makes himself liable for the contest, in certain circumstances it may be legitimate to make him pay the costs apart from the costs given in the mortgage decree but the utmost that he can be made liable for is the extra cost, caused by his unnecessary contest. (*Mya Bu and Baguley, JJ.*) DAWSONS BANK, LTD. *v.* OPPENHEIMER. **148 I.C. 255=6 R. R. 210=A.I.R. 1933 Rang. 335.**

——*Mortgage suit—Costs—Order against a stranger to mortgage—Proprtety.*

As between mortgagee and mortgagor, in a mortgage decree no separate order making the defendant mortgagors personally liable for the costs can be passed; but there is nothing illegal in awarding a personal decree for costs against a party to the suit who is not himself the mortgagor and who, alleging himself to be a purchaser of the interest of one of the mortgagors, raised various defences which were found by the Court frivolous and vexatious. (*Wallace and Pandalai, JJ.*) RAMAKRISHNA AYYAR *v.* RAGHUNATHA AYYAR. **I.R. 1931 Mad. 487 (1)=131 I.C. 151 (1)=33 L.W. 263=A.I.R. 1931 Mad. 272.**

——Mortgage suit—Costs—Order for—Puisne mortgagee—Personal liability of. *See* C. P. CODE, O. 34, R. 6. **9 Rang. 186=A.I.R. 1931 Rang. 153.**

——*Mortgage suit—Costs—Personal decree—Personal remedy for mortgage money barred.*

A final personal money decree for costs may be given against the mortgagor for the mortgage-money and interest thereon is time-barred. (*Heald and Mya Bu, JJ.*) MAUNG PO MYA *v.* M.A.S. FIRM. **9 Rang. 186=I.R. 1931 Rang. 241=133 I.C. 225=A.I.R. 1931 Rang. 153**

——*Mortgage suit—Costs—Puisne mortgagee—Liability of.*

Normally a puisne mortgagee is not ordered to pay the costs of the suit unless he has so conducted himself that it is right and proper that he should be ordered to pay the costs. However, if it is sought to make him liable for the costs, the plaintiff should take care that an order against the defendant mortgagee to pay the costs is passed by the Court and inserted in the decree. Where the judgment ordered that "there will be a preliminary decree in the usual form against the two defendants, the decree against the second defendant as subsequent mortgagee and costs against the first defendant".

Held, that the defendant mortgagee was not liable for the costs of the suit. (*Page, C.J. and Mya Bu, J.*) R. M. A. R. M. CHETTYAR FIRM *v.* N. S. P. R. M. CHETTYAR FIRM. **10 Rang. 308=I.R. 1932 Rang. 189=139 I.C. 185=A.I.R. 1932 Rang. 153.**

——*Mortgage suit—Costs—Rule as to—Right of mortgagee to maintain—Suit disputed by defendant.*

In mortgage suits, the amount of costs is usually directed to form part of the mortgage moneys to be realized by sale of the mortgaged property; but when one of the defendants disputes the right of the mortgagee or raises other contentions calculated to negative his right to maintain the suit and fails this rule cannot be insisted on. (*Varadachariar and Burn, JJ.*) LAKSHMI NAIDU *v.* GUNNAMMA. **58 Mad. 418=154 I.C. 1053=7 R.M. 535=1935 M.W.N. 17=41 L.W. 94=A.I.R. 1935 Mad. 101=68 M.L.J. 470.**

——*Mortgage suit—Decree—Amendment of—Omission to describe property to be sold—Intention otherwise clear—Permissibility of amendment.*

The particulars of the mortgage were fully recited in the plaint and in the relief claimed mention was made of the hypothecated property sale of which was prayed for. By a clerical mistake the property was not detailed at the foot of the plaint. The preliminary and final decrees were passed but there was no specification of the mortgaged property. The plaintiff thereupon applied that the plaint and the decree might be amended so as to insert the description of the mortgaged property in the plaint and decrees,

Held, that the amendment of the preliminary and final decrees might be allowed and that the amendment of the plaint was not necessary. (*Niamatullah, J.*) BADRI PANDEY *v.* CHHANGUR PANDEY. **I.R. 1932 All. 608=140 I.C. 113 (1)=A.I.R. 1933 All 102.**

——Mortgage suit—Decree—Burman Buddhists—Purchase of land by—Part consideration paid from joint fund of husband and wife—Mortgage of purchased land for balance of purchase-money by husband alone—Suit against husband alone—Wife not made party—Decree, if binding on wife. *See* BUDDHIST LAW (BURMESE)—HUSBAND AND WIFE. **A.I.R. 1934 Rang. 190 (2).**

——*Mortgage suit—Decree—Construction of terms.*

A decree provided that the mortgagor was to pay a certain amount to the mortgagee within a certain time. It further provided that if he failed to pay the mortgagee would be entitled to realise the decree amount with interest by the attachment and sale of the mortgaged property.

Held, that the decree was a mortgage decree. (*Abdul Qadir, J.*) MAM CHAND *v.* ROSHAN LAL. **14 Lah. 243=142 I.C. 759=I.R. 1933 Lah. 267=33 P.L.R. 975=A.I.R. 1933 Lah. 48.**

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———*Mortgage suit—Decree—Property belonging to husband and wife mortgaged by husband—Wife's interest if bound by mortgage decree.*

Where property belonging to husband and wife is mortgaged by the husband, the wife's interest in the mortgage can be bound by the mortgage-decree provided she is made a party to the suit. A.I.R. 1931 Rang. 262 and A.I.R. 1919 L.B. 111, Ref. (*Baguley, J.*) TAY GYI *v.* MAUNG YAN. **6 I.R. (Rang.) 117=146 I.C. 674=A.I.R. 1933 Rang. 81.**

———*Mortgage suit—Execution of decree—Property acquired by mortgagor* pendente lite—*Non liability—Question whether can be raised in execution.*

When it is not open to the judgment-debtor to prevent the passing of a final decree in a mortgage suit in respect of property acquired by him *pendente lite* under a paramount title, he should not be allowed to be heard in the execution department and prevent the sale of the property covered by the decree passed against himself. (*Sulaiman, A.C.J. and Banerji, J.*) SAHU NAND KISHORE *v.* DHANPAT RAI. **I.R. 1931 All. 758=133 I.C. 902=A.I.R. 1932 All. 49.**

———Mortgage suit—Execution sale. *See also* C. P. CODE, O. 34, R. 13.

———*Mortgage suit—Execution sale—Order in which properties have to be sold—Power of Court to adjust equities.*

A mortgagee decree-holder has not an unfettered right to sell the property at his sweet will and pleasure in any order that he chooses. Upon equitable considerations the Court which has to execute the final decree may and ought to prescribe the order in which the mortgaged properties are to be sold ; when the question as to which of the properties has to be sold first comes up before the Court, the solution of the question will depend upon a determination of the equities between the holders of the properties. (*Sen and Niamatullah, JJ.*) GHASI RAM *v.* RAM DIAL. **I.R. 1931 All. 551 (2)=132 I.C. 807 (2)=1931 A.L.J. 1007=A.I.R. 1931 All. 657.**

———Mortgage suit—Execution sale—Pendency of suit on prior mortgage—Sale in execution of decree on puisne mortgage—Effect. *See* T. P. ACT, S. 52. **1931 A.L.J. 729=A.I.R. 1931 All. 466 (F.B.).**

———*Mortgage suit—Execution sale—Application of party rejected—Whether the order operates as* res judicata *—Court whether can prescribe order at later stage.*

Where before the passing of a preliminary decree, one of the mortgagees applies that his property should not be sold in the first instance and that the property belonging to another transferee should be put up for sale first and the application is rejected, the order does not operate as *res judicata* and it is open to the Court to prescribe the order of sale after the decree is passed. (*Sen and Niamatullah, JJ.*) GHASI RAM *v.* RAM DIAL. **I.R. 1931 All. 551 (2)=132 I.C. 807 (2)=1931 A.L.J. 1007=A.I.R. 1931 All. 657.**

———*Mortgage suit—Final decree—Application adjourned* sine die—*Fresh application against heir—Limitation.*

In a mortgage suit the Registrar fixed the date for payment on 9th September, 1926. On 26th January, 1927, the plaintiff moved a notice of motion against the defendant for a final decree. The matter was adjourned *sine die* on the defendant's attorney stating in Court that the defendant had become insane. Pending a suit for setting aside the preliminary mortgage decree on behalf of the defendant he died and his heir was substituted in the mortgage suit. On 15th August, 1930, the plaintiff gave a notice of motion served on the heir asking for a final decree.

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Held, that the adjournment did not amount to a discontinuance of the suit, that the subsequent application could be treated as a continuation of the earlier one and the same was not barred by limitation. (*Rankin, C.J. and Costello, J.*) MANAKA BALA DASI *v.* HIRALAL GOBINDALAL. **147 I.C. 206=6 R.C. 295=37 C.W.N. 583=A.I.R. 1933 Cal. 816.**

———Mortgage suit—Final decree—Application for final decree—If one in execution. *See* C. P. CODE, O. 22, RR. 3, 4 AND 6. **39 C.W.N. 1284.**

———Mortgage suit—Final decree—Application for—Limitation. *See* LIMITATION ACT (1908), ART. 181.

———*Mortgage suit—Final decree—Application for—Notice to all parties—Necessity.*

Where an application for final decree is made there is no express provision making notice to all parties in such a case compulsory, so that it could not be said that a failure to issue notice would be an illegality which *ipso facto* renders the decree void. But it is open to the Court and in practice it is advisable to issue such notice. If any party is aggrieved by the omission to issue such a notice, he can get the decree set aside upon that ground. A.I.R. 1930 Mad. 105, Rel. on ; A.I.R. 1929 Mad. 393 and 35 M.L.J. 375, Ref. (*Curgenven and Cornish, JJ.*) MUCHI DOLA BEHARA *v.* JUJISTI JANNI. **157 I.C. 758 (2)=A.I.R. 1935 Mad. 716.**

———*Mortgage suit—Final decree—Application for—Notice to judgment debtor—Necessity for.*

While it is not obligatory upon a Court to issue notice to the judgment-debtors on the application of the decree-holder for a final decree on his mortgage, it is nevertheless advisable to do so and the Court will not be acting *ultra vires* in adopting such a course. 1929 M.W.N. 867, Ref. (*Curgenven, J.*) VENKATRAMA CHETTIAR *v.* MARUDACHALA GOUNDAN. **135 I.C. 347=I.R. 1932 Mad. 91=1931 M.W.N. 1002=A.I.R. 1931 Mad. 795.**

———*Mortgage suit—Final decree—Application for—Notice sent to some defendants only—Dismissal of application* in toto*—Legality.*

Where in an application to pass a final decree, notice is sent only to some of the defendants and the defendants to whom no notice has been sent are aggrieved, the application should not be dismissed *in toto*; it should be dismissed only as against those defendants in respect of whom necessary steps have not been taken. (*Curgenven and Cornish, JJ.*) MUCHI DOLA BEHARA v. JUJISTI JANNI. **157 I.C. 758 (2)=A.I.R. 1935 Mad. 716.**

———*Mortgage suit—Final decree—Notification under special Act—Prohibiting sale—Effect.*

Where the defendants were declared to be agriculturists by a Government Notification under the Bundlekand Land Alienation Act after the preliminary decree was passed in a mortgage suit.

Held, that the right to sell would come into effect only after the final decree was made and the Notification having taken effect before that, the property could not be sold. (*Mukerji and Niamatullah, JJ.*) MAHABIR PRASAD *v.* MAHESH PRASAD. **I.R. 1931 All. 121=128 I.C. 825=1931 A.L.J. 45=14 R.D. 586=A.I.R. 1930 All. 856.**

———*Mortgage suit—Form of decree—Several mortgages of different properties sued on—Final decree—Contents of—Position of parties under each mortgage, and money due under each—If to be shown separately.*

Where a mortgagee obtains a final decree in a suit on different mortgages of different properties from the same mortgagor, it is desirable that the exact position of the parties should be set out in the final decree, and the amount due under each of the mortgages should be

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separately set forth. It is not correct to combine all mortgages together as such a procedure is likely to lead to confusion. (*Baguley and Mackney, JJ.*) C.A.C.A. R. CHETTYAR FIRM *v.* C.T.A.C.T. CHETTYAR FIRM. **160 I.C. 588 = 8 R.R. 406 = A.I.R. 1935 Rang. 514.**

———*Mortgage suit—Form of decree—Suit against four persons—One of them puisne mortgagee contesting, others confessing judgment.*

A mortgagee impleaded in a mortgage suit four persons as defendants among whom one was a puisne mortgagee to whom some of the items in the mortgaged property were mortgaged. The three defendants excepting the pusine mortgagee confessed judgment while the pusine mortgagee alone contested.

Held, that the plaintiff was to be given a decree against the three defendants in respect of property not covered by the mortgage of the contesting puisne mortgagee. (*Baguley, J.*) TAY GYI *v.* MAUNG YAN. **6 I.R. (Rang.) 117 = 146 I.C. 674 = A.I.R. 1933 Rang. 81.**

———*Mortgage suit—Form of decree—Suit for sale—Property subject to encumbrance—Form of decree.*

In a suit on mortgage for sale of property, the property should be ordered to be sold, either subject to the encumbrance which may be found in the suit, or sold free of encumbrance and the encumbrance found due attached to the sale price recovered. A decree declaring that, unless the plaintiff redeems certain property by a certain date, his suit should stand dismissed, is incorrect. (*Dalip Singh and Abdul Qadir, JJ.*) AMAR NATH *v.* RALLA RAM. **6 R.L. 659 = 149 I.C. 217 = 35 P.L.R. 463 = A.I.R. 1934 Lah. 527.**

———*Mortgage suit—Holder of two mortgages—Right to sue on each separately—Form of decree.*

Although a holder of two mortgages is entitled to bring a separate suit on each of the mortgages, the form of decree to be passed in such a suit is entirely different question. Where the holder of two mortgages owns the same property and has once foreclosed on the mortgaged property his rights as mortgagee are merged in his rights as owner. He is not entitled to foreclose the same property twice. But the question is different with regard to decree for sale. As a prior mortgagee is not a necessary party to a suit on a pusine mottgage, the property can be sold in a suit on a pusine mortgage subject to the prior mortgage; therefore when a person is holder of two mortgages there can be no objection to sale of the property on second mortgage subject to the first mortgage. A.I.R. 1916 Mad. 934 (F.B.); 23 All. 313 (P.C.), Foll.; 4 Cal. 475 and 11 Bom. 112, Rel. on; 8 N.L.R. 123 = 17 I.C. 129, Overr. It is not however open to holder of two mortgages to have the property sold in execution of first mortgage subject to the second mortgage, because by having the property sold on the first mortgage, must be deemed to have withdrawn that property from the operation of the later mortgage. If therefore the mortgaged property or part of it is sold in execution of one of the mortgages it cannot thereafter be sold again in execution of the other mortgage. 25 Mad. 108; 29 All. 233; 38 B. 369; 19 C.L.J. 590, Rel. on. (*Grille, J.C., Subhedar and Pollock, A.J.Cs.*) LAXMI *v.* KONDBA. **31 N.L.R. 1 (Supp.) = 159 I.C. 758 = A.I.R. 1935 Nag. 226 (F.B.).**

———*Mortgage suit—Limitation—Option given to mortgagor to redeem earlier—Effect regarding right to foreclose.*

Where a mortgage deed fixed a term of three years and at the same time allowed the mortgagee the right to redeem earlier than the stipulated period,

Held, that the stipulation as to earlier redemption was one in favour of the mortgagor and for his benefit and that the mortgagee did not thereby get the right to foreclose before the expiry of 3 years. The period of limitation for foreclosure commenced to run after the expiry of three years' period and not earlier. (*Bisheshwar Nath and Kisch, JJ.*) GANGA PRASAD *v.* BISHUNATH SINGH. **9 O.W.N. 1081 = I.R. 1933 Oudh 129 = 142 I.C. 821 = A.I.R. 1933 Oudh 81.**

———*Mortgage suit—Maintainability—Mortgage by one co-sharer—Suit on resulting in sale—Suit on the mortgage executed by mortgagor jointly with other co-sharers—If barred.*

Where one co-sharer had previously incurred a debt to the mortgagee and for that gave a mortgage of his share and subsequently the same mortgagee sued on the mortgage executed by the mortgagor jointly with other co-sharers,

Held, that the fact that the first mortgage suit had culminated in a purchase by the mortgagee did not bar the subsequent suit. (*Rankin, C.J. and Mitter, J.*) RAJANI KANTA GHOSH *v.* SOWRENDRA NATH MITTRA. **151 I.C. 454 = 7 R.C. 124 = 38 C.W.N. 124 = A.I.R. 1934 Cal. 421.**

———*Mortgage suit—Paramount title.*

Questions of paramount title should not ordinarily be adjudicated upon in a mortgage suit; what eventually will be sold will be the right, title and interest of the mortgagor in the mortgaged property and persons who claim under a paramount title may file a suit for a declaratory decree or they can litigate subsequently with the auction-purchaser, if they so desire. 29 C.W.N. 784, Expl. (*Buckland, J.*) TINKARHI DASEE *v.* NARENDRANATH MUKHERJI. **59 Cal. 548 = I.R. 1932 Cal. 486 = 138 I.C. 671 = A.I.R. 1932 Cal. 512.**

———*Mortgage suit—Paramount title—Plea of—Maintainability—Objection that property is wakf—If can be investigated.*

If a defendant in a mortgage suit has a title independent of the mortgage and paramount or adverse to it, he is not only not bound to set it up in such step, but he should not at all be permitted to set it up; and the Court trying the mortgage suit is not justified in raising an issue of title as between him and the mortgagee. A mortgage suit is limited to an enquiry into the validity of the mortgage and the amount thereon. Pleas that the property mortgaged is *wakf* are therefore outside the scope of the suit and cannot be investigated in the suit. (*Panckridge, J.*) CHAMPABATI DASSEE *v.* MAHOMED YAKUB KHAN. **63 Cal. 68 = 39 C.W.N. 1100.**

———Mortgage suit—Parties. *See* C. P. CODE, S. 11, EXPL. IV AND O. 34, R. 1—PARTIES.

———*Mortgage suit—Parties—Auction purchaser in execution of money decree not impleaded—Effect.*

An auction purchaser of mortgaged properties in execution of a money decree against the mortgagor, who is not a party to a suit on the mortgage, cannot be presumed to have notice of the suit. (*Baker and Wadia, JJ.*) CHIDAMBARGAUDA *v.* CHANNAPPA. **153 I.C. 637 = 7 R.B. 251 = 36 Bom.L.R. 694 = A.I.R. 1934 Bom. 329.**

———*Mortgage suit—Parties—Necessary party impleaded out of time—Dismissal of suit.*

R. 9 of O. 1 of the Code is subordinate to O. 34, R. 1. A mortgage is indivisible and if all the parties entitled to share in the money due on the mortgage are not on the record the suit must be dismissed in its entirety. When a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired the whole suit must be dismissed. 1 Pat. L.J. 468, Foll. (*Mitter and M. C. Ghose, JJ.*) GOVINDA

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[**Dist.** 16 P.L.T. 689 (691).]

———Mortgage suit—Parties—Non-joinder—Effect—Decree—If binding. *See* C. P. CODE, O. 34, R. 1. **153 I.C. 870=A.I.R. 1935 Lah. 203.**

———*Mortgage suit—Parties—Omission to implead Official Receiver being necessary party—Decree and sale binding on parties.*

A judgment debtor cannot have the sale set aside on the ground that the Official Receiver who was a necessary party was not impleaded in the mortgage suit. Official Receiver may not be bound by the sale but the judgment-debtor is bound. (*Sulaiman and King, JJ.*) INAMULLAH KHAN *v.* SHAMBHU DAYAL. **I.R. 1931 All. 277=1931 A.L.J. 62=130 I.C. 485=A.I.R. 1931 All. 159.**

———Mortgage suit—Parties—Persons claiming paramount title—Joinder of—Propriety. *See* C. P. CODE, O. 34, R. 1. **18 N.L.J. 291.**

———*Mortgage suit—Parties—Puisne mortgagee not impleaded—Right against property.*

A puisne mortgagee is entitled to a sale of the property, subject to the rights of the first mortgagee even after the property has been sold in execution of the decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party. 30 Cal. 599, Foll. (*S. K. Ghose, J.*) RAM KINKAR HAZRA *v.* HARERAM HAZRA. **6 I.R. (Cal.) 116=145 I.C. 575=A.I.R. 1933 Cal. 181.**

———Mortgage suit—Plea of invalidity. *See* INVALID MORTGAGE, *supra.*

———*Mortgage suit—Preliminary decree—Appeal by some defendants—Dismissal—Prior application for final decree—Procedure.*

Where an appeal is preferred against a preliminary decree, it is the decree passed by the High Court, which must be considered as the preliminary decree which can be made into a final decree. The mere fact that during the pendency of the appeal the Court below has passed a final decree would not in any way prevent the making of a new final decree in terms of the High Court's preliminary decree. This rule applies even if the appeal is preferred by some defendants only, making others as *pro forma* respondents where the appeal was against the whole decree and the whole suit and the relief claimed was for the dismissal of the entire suit not only as against the defendants who had appealed but against all, and the appeal was in the interest of all. (*Sulaiman, C. J. and Bajpai, J.*) AZIZ AHMAD *v.* RIAZ UL-HASAN. **151 I.C. 294=7 R.A. 132=4 A.W.R. 1519=1934 A.L.J. 446=A.I.R. 1934 All. 89.**

———*Mortgage suit—Preliminary decree—Application for certificate of payment—Refusal—Appeal preferred after final decree.*

Where, after the passing of a preliminary decree an application for certificate of payment is refused and subsequently final decree is passed, it is not necessary that the judgment-debtor should appeal from the final decree itself. He can appeal from the order of refusal of certificate and, if successful, can take advantage of it in execution case against him under the final decree. (*Courtney Terrell, C.J. and Saunders, J.*) RAGHUBIR NARAYAN SINGH *v.* SOTI LAL SAHU. **6 I.R. (Pat) 320=146 I.C. 1018=A.I.R. 1933 Pat. 634.**

———*Mortgage suit—Preliminary decree—Death of next friend—Application for final decree by minor after attaining majority—Limitation.*

A minor represented by next friend sued and obtained a preliminary mortgage decree on 1st December, 1917.

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The next friend died subsequently but steps were not taken to get another next friend appointed. The minor applied within three years of his attaining majority, for a final decree on 30th November, 1928

Held, (1) that S. 6 of the Limitation Act had no application since the proceeding to obtain a final decree was not a proceeding in execution; (2) that having regard to the provisions contained in O. 32, R. 10, C. P. Code, the suit did not abate but was kept in abeyance and it was the duty of the Court to appoint a next friend; and (3) that the application for final decree was maintainable and was within time. (*Guha and M.C. Ghose, JJ.*) PULIN CHANDRA SEN *v.* MUZAFFAR AHMED. **6 I.R. (Cal.) 18=144 I.C. 768=37 C.W.N. 184=A.I.R. 1933 Cal. 508.**

———*Mortgage suit—Preliminary decree for foreclosure attached—Final decree if executable.*

A and his brothers obtained a preliminary decree for foreclosure but before it was made final, *B* and others attached the preliminary decree. On the application of *A* the preliminary decree was made final, overruling the objections of *B*. Subsequently in execution of the decree *A* and others took possession of the property; *B* and others objected that as they had attached the decree, *A* had no right to execute the decree and take possession.

Held, that the effect of the attachment was only to prevent the alienation thereof and that the decree-holders of the attached decree, *viz.*, *A* and others were entitled to execute the decree and take possession. (*Nanavutty, J.*) HAR BAKHSH SINGH *v.* DURGA PRASAD **147 I.C. 428=6 R.O. 266 (2)=10 O.W.N. 665=A.I.R. 1933 Oudh 349.**

———*Mortgage suit—Preliminary decree—Subsequent dismissal of suit for default—Legality.*

Where in a mortgage suit a preliminary decree was passed and the judgment-debtors failed to pay up the amount and thereupon the plaintiff applied for a final decree but the parties were absent on that date and the Court dismissed the suit under O. 9, R. 3, and the plaintiffs subsequently applied under S. 151 praying for the setting aside of the order,

Held, that the Court had no power to dismiss the suit but should have proceeded to pass the final decree.

Held also, that the order of dismissal was an abuse of the process of the Court and could be rectified in an application under S. 115. (*Raza and Nanavutty, JJ.*) PURAN LAL *v.* KOMAL SINGH. **8 Luck. 496=150 I.C. 514=7 R.O. 10=10 O.W.N. 293=A.I.R. 1933 Oudh 229.**

———Mortgage suit—Receiver. *See* MORTGAGE—RECEIVER.

———*Mortgage suit—Right to possession—Mortgaged property purchased by two persons—Right to possess property is with prior purchaser.*

As between two purchasers of mortgaged property, quite apart from the right to redeem, the right to possess the property is with the prior purchaser and it does not make any difference whether the purchaser was the first or the subsequent mortgagee. 5 Cal. 265 and 31 Cal. 737, Rel. on. (*S. K. Ghose, J.*) RAM KINKAR HAZRA *v.* HARERAM HAZRA. **6 I.R. (Cal.) 116=145 I.C. 575=A.I.R. 1933 Cal. 181.**

———Mortgage suit—Right to possession—Plaintiff purchasing property in execution of his decree—Defendant purchasing decree on another mortgage—Duty to intervene in execution proceedings—Auction sale in defendant's favour—Suit for possession by plaintiff. *See* T. P. ACT, S. 52. **A.I.R. 1934 All. 972.**

———*Mortgage suit—Right to possession—Purchase by mortgagee decree-holder—Claim for possession against purchaser of equity of redemption.*

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Where a mortgagee decree-holder purchases the property at the sale, he can successfully claim possession against the purchaser of the right of redemption, whose purchase was not known to the mortgagee and who was not impleaded in the suit. (*Mallik and Jack, JJ.*) NIHAR MALA DEBI *v.* SAROJ BANDHU BHATTACHARJEE. **60 Cal. 948=37 C.W.N. 897=148 I.C. 42=6 R.C. 444=A.I.R. 1933 Cal. 728.**

———*Mortgage suit—Right to possession-Simple money decree holder—Purchaser in execution sale—Subsequent purchase by mortgagee in execution of mortgage decree.*

The defendant had a simple money decree against the mortgagors and had the property attached in execution of their decree shortly before the mortgagee instituted his suit for sale on foot of his mortgage. The sale in execution was not made till after the institution of such suit. The holder of the simple money decree himself purchased at the auction and obtained possession of the property in dispute. Subsequently a decree for sale was passed in favour of plaintiff. The mortgaged property was sold and purchased by the plaintiff himself who took out formal delivery of possession but was opposed in the Revenue Court by the defendant while seeking to obtain mutation, the latter having purchased the property in execution of a simple money decree. Mutation having been refused, the plaintiff sued for recovery of possession.

Held, that the plaintiff was entitled to possession as against the defendant subject however to the defendant's right to redeem and the defendant should have been made a party to the plaintiff's suit on his mortgage. The attaching creditor's right to redeem is not lost when a sale in pursuance of the attachment takes place and he purchases the property during the pendency of the plaintiff's suit on the basis of his mortgage. (*Pullan and Niamatullah, JJ.*) FATIMA BEGAM *v.* BANSIDAR. **I.R. 1932 All. 258=136 I.C. 840=1932 A.L.J. 289=A.I.R. 1932 All. 356.**

———*Mortgage suit—Splitting up—Parties—Claim for share of mortgage money—Other persons interested joined as defendants—Decree whether can be passed.*

Where the plaintiffs sue for their proportion of the mortgage money, the other persons who could have any possible interest in the mortgage security being added as party defendants, there is nothing in S. 67 (*d*), T.P. Act, which prevents the passing of a decree in favour of the plaintiffs. (*Guha, J.*) HAIDAR ALI KHONDKAR *v.* MAHOMED SAFIUDDIN KAZI. **54 C.L.J. 113=134 I.C. 1068=I.R. 1932 Cal. 28=A.I.R. 1932 Cal. 34.**

———Mortgage suit—Splitting up—Splitting up by mortgagee—Partial redemption—Omission to implead persons interested in part in suit on mortgage. *See* REDEMPTION, *supra*. **13 Pat. 364=A.I.R. 1934 Pat. 648.**

———*Mortgage suit—Splitting up—Suit for part of mortgage money—Maintainability.*

Ordinarily a suit on a mortgage bond should be for the whole of the amount of the mortgage in order to avoid multiplicity of suits and neither the mortgage nor the security can be split up without the consent of the parties or permission of the Court. Where however it appears that the other co-mortgagor has no intention of claiming the share of the mortgage money the proper course is to regard the share of the plaintiff as the total amount due under the mortgage bond and decree the suit. 47 Cal. 175, Ref. (*Jack, J.*) RADHANATH CHAKRABARTY *v.* NAGENDRA NATH CHAKRABARTI. **I.R. 1931 Cal 879=134 I.C. 767=53 C.L.J. 586=A.I.R. 1931 Cal. 806.**

MORTGAGE—Movables.

———*Mortgage suit—Title of mortgagor—Enquiry into—Adjudication—Binding nature.*

Per *Raza, J.*—On general ground the question of the title of a mortgagor to the mortgaged property cannot arise in a mortgage suit, but it does not necessarily follow that no question of title to any property can ever arise in a suit of that nature. Much depends upon the pleadings in the suit. If both parties have without protest joined issue on the question of the mortgagor's title and invited the Court to decide the question, the adjudication does not cease to have the binding force of *res judicata* merely because it was not necessary or proper to be tried in a mortgage suit. (*Raza, J., on difference between Wazir Hasan, C.J. and Allsop, J.*) MT. MOOLA *v.* BITHAL DAS. **9 Luck. 291=6 R.O. 342=147 I.C. 984=11 O.W.N. 53=18 R.D. 60=A.I.R. 1934 Oudh 50.**

Mortgagor and mortgagee.

See EVIDENCE ACT, S. 115.

Movables.

———*Movables.*

An oral or written hypothecation is permitted under the law in India. 22 C.W.N. 758, Ref. (*Page, C.J. and Das, J.*) MOOSA ABDUL HABIB *v.* MAUNG TUN KYAING. **9 Rang. 182=131 I.C. 723=I.R. 1931 Rang. 147=A.I.R. 1931 Rang. 201.**

———*Movables—Decree for sale—Subsequent mortgagee of movable and immovable properties—Remedy subject to prior mortgagee's lien.*

Where a mortgagee of movable property obtained a decree for sale and subsequently in a suit to which he was a party another mortgagee of the movable and immovable properties obtained a decree.

Held, that assuming the mortgagee of the movables had only a lien on the property, the subsequent mortgagee decree-holder's right was subject to such lien. (*Madhavan Nair, J.*) BASIVIREDDI *v.* KAMARAJU. **56 Mad. 560=I.R. 1933 Mad. 186=142 I.C. 96=1933 M.W.N. 21=37 L.W. 151=A.I.R. 1933 Mad. 241=64 M.L.J. 86.**

———*Movables—Future property—Hypothecation of—Validity.*

A hypothecation of all the stock that may be brought at any time subsequently upon the business permises is a valid transaction and is in the nature of an agreement to mortgage movable property. It creates a lien which can be enforced as and when the property comes into existence, though the equitable title would not avail against a subsequent transferee without notice of that title. *Holroyd* v. *Marshal*, 10 H. L. 191; *Collyer* v. *Isaacs*, 19 C. D. 342; *Joseph* v. *Lyons*, 15 Q. B. 280; *Hallas* v. *Robinson*, 15 Q. B. 288; 2 B. L. R. A. C. 230; 10 A. 133; 16 Mad. 429; 31 Cal. 667; 75 I. C. 816; 89 I. C. 410, Ref. (*Mukerji and Guha, JJ.*) CO-OPERATIVE HINDUSTHAN BANK, LTD. *v.* SURENDRA NATH DE. **59 Cal. 667=I.R. 1932 Cal. 528=138 I.C. 852=36 C.W.N. 263=A.I.R. 1932 Cal. 524.**

[R. 62 C. 1046 (1051, 1052).]

———*Movables—Hypothecation of—Future property—Validity of.*

A hypothecation not merely of movables existing on the premises at the time but also in respect of movables which might be subsequently acquired and brought there is valid, though it is not governed by the Transfer of Property Act or by the Contract Act. (Case-law referred.) (*Mukerji and Guha, JJ.*) H. V. LOW & CO., LTD. *v.* PULINBIHARILAL SINGHA. **59 Cal. 1372=143 I.C. 193=I.R. 1933 Cal. 372=A.I.R. 1933 Cal. 154.**

———*Movables—Hypothecation of—Validity.*

Though not accompanied by delivery of possession, the validity of hypothecation of movables has been

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recognised in India and though not provided for either in Indian Companies Act or Transfer of Property Act, it has sometimes been enforced even against *bona fide* purchasers without notice. Even the hypothecation of future property—movables to come into existence in future—has been recognised. (*Mukerji and Guha, JJ.*) H.V. LOW & CO., LTD. *v.* PULINBIHARILAL SINGHA. **59 Cal. 1372=143 I.C. 193=I.R. 1933 Cal. 372=A.I.R. 1933 Cal. 154.**

———*Movables—Hypothecation—Validity of.*

Though not accompanied by delivery of possession, the validity of hypothecation of movables has been recognised in India and it has sometimes been enforced even against *bona fide* purchasers without notice. (*Mukerji and Guha, JJ.*) CO-OPERATIVE HINDUSTHAN BANK, LTD. *v.* SURENDRA NATH DE. **59 Cal. 667=I.R. 1932 Cal. 528=138 I.C. 852=36 C.W.N. 263=A.I.R. 1932 Cal. 524.**

———*Movables—Hypothecation of—Validity of.*

A hypothecation of movables without possession though not provided for either in the Contract Act or in the T. P. Act, is nevertheless a valid transaction and enforceable at law. The Acts are not exhaustive and the principles which a Court of equity recognises in England may well apply to such transactions in India. (*Doraswamy Iyer, C.J.*) BANK OF MYSORE, LTD. *v.* MYSORE INDUSTRIAL BANK, LTD. **10 Mys.L.J. 16.**

———*Movables—Movable property—Pledge without possession—Rights of attaching creditor of pledgor.*

A mortgage of movable property without possession is entitled to the security against an attaching creditor of the mortgagor. The attaching creditor gets no title in the goods and has merely a right to move the Court on his behalf to take possession and ultimately bring the goods to sale. Until he exercises it until the actual attachment the person claiming the goods as security has the right to take possession. If he has done so, the attaching creditor cannot get possession. If he has not, the attaching creditor can. This is so whatever the form of the document creating the security. (*Ameer Ali, J.*) MANMOHAN MUKUERJI *v.* KESRICHAND GULABCHAND. **62 Cal. 1046.**

———*Movables—Movable property—Pledge without possession—Rights of pledgee.*

A pledge of movable property cannot exist without possession. Before possession is taken, there is nothing more than an agreement. A transaction which cannot operate as a pledge because no possession has been taken, does not operate as an effective mortgage of movables. A mortgagee under such a mortgage without possession will be deferred to a subsequent pledgee, to a *bona fide* purchaser for value, and to the assignee in insolvency. (*Ameer Ali, J.*) MANMOHAN MUKHERJI *v.* KESRICHAND GULABCHAND. **62 Cal. 1046.**

———*Movables—Nature of.*

A simple mortgage of movables with a power of sale is a mere hypothecation with a stipulation that in the event of the debt not being paid and the mortgage not being redeemed, the mortgaged properties may be realised by sale. It has no analogy to a simple mortgage under the Transfer of Property Act or to a mortgage of movables under the English law. In the case of a mortgage in England the whole legal title passes to the mortgagee conditionally and if there is no redemption, the title becomes absolute. On the other hand, in the case of a pledgee with possession a special property passes to him and he is entitled to detain the goods to secure repayment of the debt due to him. (*Mukerji and Guha, JJ.*) CO-OPERATIVE HINDUSTHAN BANK,

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———*Movables—Power of sale not exercised by mortgagee—Subsequent pledge with possession—Priority.*

Where by way of security for the repayment of a debt, the good will and stock-in-trade of a business were mortgaged with power to the mortgagee to realise his dues by sale of the mortgaged properties and the mortgagee not having exercised his power of sale, the movables forming part of the stock in trade were again pledged with another person who secured possession, the pledge is valid and entitled to priority over the mortgage. (Case law discussed.) (*Mukerji and Guha, JJ.*) CO OPERATIVE HINDUSTHAN BANK, LTD. *v.* SURENDRA NATH DE. **59 Cal. 667=I.R. 1932 Cal. 528=138 I.C. 852=36 C.W.N. 263=A.I.R. 1932 Cal 524.**

———*Movables—Remedy of mortgagee.*

A mortgage of movable property is valid and a decree for sale can be passed in enforcement of that mortgage. Where the decree directs the sale of the mortgaged property the decree-holder can proceed to sell in execution and need not wait till after he files a fresh suit and obtains a personal decree against the mortgagor. (*Madhavan Nair, J.*) BASIVIREDDI *v.* KAMARAJU. **56 Mad. 560=I.R. 1933 Mad. 186=142 I.C. 96=1933 M W.N. 21=37 L.W. 151=A I.R. 1933 Mad. 241=64 M.L J. 86.**

———*Movables—Successive encumbrances—Priority.*

In respect of movable property possession is a symbol of the title and if a person who has accepted a hypothecation of movable property without obtaining possession seeks to enforce his right against subsequent encumbrancers who have exercised the powers which they possess to obtain possession of the property hypothecated to them and have sold the goods in execution of a decree, it is incumbent upon the prior encumbrancer to satisfy the Court that the subsequent encumbrancers had notice of the charge to which the first encumbrancer was entitled. This may be based either on the principle that personal property passes by delivery of possession and it is possession which determines the apparent ownership or on the ground that having clothed the hypothecator with apparent authority to deal with his property the first hypothecatee is estopped as against the subsequent encumbrancer from asserting his priority. The onus is not on the subsequent encumbrancer to show he had no notice of the earlier charge. 28 I.C. 462 and *Dearle* v. *Hall*, 3 Russ. 1, Foll. (*Page, C.J. and Das, J.*) MOOSA ABDUL HABIB *v.* MAUNG TUN KYAING **9 Rang. 182=131 I.C. 723=I.R. 1931 Rang. 147=A.I.R. 1931 Rang. 201.**

——— *Movables—Suit on—Procedure—C. P. C., O. 34.*

The rules of O. 34 of the Code are based on well-settled rules of equity, which in the absence of any statutory provision to the contrary, should be applied to suits on mortgages of movables as well. (*Mukerji and Guha, JJ.*) CO OPERATIVE HINDUSTHAN BANK, LTD. *v.* SURENDRA NATH DE. **59 Cal. 667=I.R. 1932 Cal. 528=138 I.C. 852=36 C.W.N. 263=A.I.R. 1932 Cal. 524.**

Occupancy holding.

See INVALID MORTGAGE, *supra.*

Paramount title.

See C. P. CODE, S. 11, EXPL. IV—MORTGAGE SUIT—PARAMOUNT TITLE, O. 34, R. 1 AND MORTGAGE SUIT, *supra*

Pardanashin lady.

———Pardanashin lady—Execution by during illness—Proof of independent advice and other circumstances—

MORTGAGE—Personal covenant.

Onus. *See* PARDANASHIN LADY. **8 O.W.N. 194=A.I.R. 1931 Oudh 146.**

Personal covenant.

See also T. P. ACT, SS. 58 (*b*), 68 (*a*) AND 98, EQUITY OF REDEMPTION AND INVALID MORTGAGE, *supra* AND USUFRUCTUARY MORTGAGE, *infra*.

———Personal covenant—Decree on—Invalid mortgage. *See* MORTGAGE—INVALID MORTGAGE. **60 M.L.J. 309.**

——— *Personal covenant, if implied.*

In every mortgage there is an implied covenant personally to pay the money if it cannot be recovered from the security unless the deed indicates something to the contrary. (*Mir Ahmad, A.J.C.*) GOPAL SINGH *v.* ISMAIL. **154 I.C. 426 (1)=7 R. Pesh. 81 (1)=A.I.R. 1935 Pesh. 10.**

——— *Personal covenant—Mortgage deed—Presumption.*

In all mortgages a personal covenant to repay the mortgage money must be presumed unless there is something in the nature and the terms of the mortgage deed to negative it; as regards an anomalous mortgage, the Court would not necessarily come to any conclusion by deciding the nature of the deed, as to whether there is or is not a personal liability. The nature of the deed may either raise a presumption for, or a presumption against, the interpretation of the terms, which might otherwise be ambiguous, in favour of or against a personal covenant to pay; but a personal covenant to pay may be express or may be implied in all mortgages whatsoever of any form, the only difference that could arise is that in certain forms of mortgages the Court might, in the absence of an express covenant, demand a much more clearly implied covenant than it might require in other cases. This would particularly be the case in a usufructuary mortgage. (*Addison and Din Mahomed, JJ.*) QADIR PARAST KHAN *v.* MEHR NUR MAHOMED. **16 Lah. 612=158 I.C. 206=34 P.L.R. 709=A.I.R. 1935 Lah. 103.**

Personal decree.

See also C.P. CODE, O. 34, R. AND T.P. ACT, S. 61.

——— *Personal decree—If can be enforced against non-parties.*

There is no law under which a personal decree embodied in an ordinary mortgage decree, whether preliminary or final, can be enforced against persons who were not parties to that suit. A.I.R. 1919 Bom. 61 and A.I.R. 1923 Bom. 411, Rel. on. (*Agha Haidar, J.*) BALAK RAM *v.* INAYAT BEGUM. **37 P.L.R. 214=160 I.C. 217=8 R.L. 511=A.I.R. 1935 Lah. 940.**

Personal liability.

See also T.P. ACT, SS. 58 AND 68.

——— *Personal liability—Decree embodying compromise—No clause reserving leave to plaintiff—Effect of.*

A suit upon a mortgage was compromised and the arrangement between the parties in their own language was given in the schedule attached to the decree. By the terms thereof a certain sum became the decretal amount and an order absolute for sale was made. The decree, however, on certain terms, "will not be executed by sale of the mortgaged properties or otherwise for a period of five years." If the terms were not complied with, the mortgagee was to be entitled "to execute the decree by sale of the mortgaged properties in suit through Court in the usual way." There was, however, no clause expressly giving leave to mortgagee to apply for a personal judgment for the deficiency, if any.

Held, that there was nothing to suggest that the mortgagee intended to give up his right to a personal judgment for the balance due after the sale and that the mere omission of the clause reserving leave had no such effect. (*Lord Thankerton.*) SUNDERMULL *v.* J.C. GALSTAUN. **I.R. 1932 P.C. 215(1)=137 I.C. 672 (1)=36 C.W.N. 109=54 C.L.J. 400=35 L.W. 559=62 M.L.J. 170 (P.C.).**

[R. 59 C. 1314 (1323).]

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———Personal liability—Purchaser from mortgagor—Undertaking to pay mortgage debt to mortgagee—Suit by mortgagee—Right to personal decree. *See* CONTRACT—THIRD PARTY. **68 M.L.J. 159.**

Personal remedy.

See also T. P. ACT, S. 100 AND MORTGAGE SUIT—COSTS, *infra*.

———Personal remedy—Practice—Powers of Court. *See* C.P. CODE, O. 34, R. 6. **36 C.W.N. 109=35 L.W. 559=62 M.L.J. 170 (P.C.).**

——— *Personal remedy—Right to—No personal covenant.*

Where the mortgage deed did not contain an express covenant to pay the money and apart from the stipulations relating to the mortgage there was no covenant from which an implied promise could be deduced,

Held, that the mortgagee could not in such a case ask for a personal decree. (*Shadi Lal, C.J. and Broadway, J.*) PALA *v.* MEHRA. **33 P.L.R. 1072=I.R. 1932 Lah. 657=140 I.C. 430 (1).**

Place of payment.

——— *Place of payment.*

A mortgage debt is payable at the place the mortgagee resides, for unless a particular place be agreed upon for payment of the mortgage debt a personal tender is generally necessary. (*Mitter and M. C. Ghose, JJ.*) DHARANIDHAR ROY *v.* P. D. SETHI. **60 Cal. 782=I.R. 1933 Cal. 476=143 I.C. 785=37 C.W.N. 439=57 C.L.J. 205=A.I.R. 1933 Cal. 379.**

Prior and subsequent.

See also T. P. ACT, SS. 60 AND 67 (*d*) AND SUBSEQUENT MORTGAGES, *infra*.

———Prior and subsequent—Auction-purchaser in execution of decree on prior mortgage—Subsequent mortgagee not impleaded—Rights of parties. *See* C.P. CODE, O. 34, R 1—NON JOINDER. **53 All. 1023=1931 A.L.J. 729=A.I.R. 1931 All. 466 (F B).**

——— *Prior and subsequent—First mortgagee in possession in execution of his decree—Rights of puisne mortgagee.*

The puisne mortgagee's right, when he is not a party to the first mortgagee's suit is limited to a right of redemption or sale of the mortgaged properties subject to the lien of the first mortgagee or auction purchaser on a decree by the latter and he cannot in execution of his decree under O. 21, R. 95 compel the first mortgagee to part with possession without redeeming the first mortgage. A.I.R. 1930 Bom. 221, Rel. on. (*Agarwala, J.*) RAJKISHORE PRASAD NARAIN SINGH *v.* SALIGRAM PRASAD. **A.I.R. 1934 Pat. 215.**

———Prior and subsequent—Foreclosure and possession by former mortgagee—Remedy of latter mortgagee—Suit for foreclosure—Liability to redeem first. *See* T.P. ACT, S 101. **155 I.C. 498=1935 O.W.N. 684=A.I.R. 1935 Oudh 411.**

———Prior and subsequent—Prior charge-holder—Mortgage suit—Omission to set up prior charge in suit by subsequent mortgagee—Decree in that suit operates as *res judicata*—Precluded from falling back on his superior rights or enforcing them against subsequent mortgagee. *See* C.P. CODE, S. 11, EXPL. IV. **18 N.L.J. 274.**

——— *Prior and subsequent—Penal nature of interest in prior mortgage—Subsequent mortgagee, if can plead.*

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It is open to a subsequent mortgagee with notice of the prior mortgage to plead that the stipulation as to interest in prior mortgage is of a penal nature. (*Skemp and Jai Lal, JJ.*) SHUGAN CHAND *v.* PHUL CHAND. **158 I.C. 359=8 R.L. 241=37 P.L.R. 156=A.I.R. 1935 Lah. 456.**

———*Prior and subsequent—Penal provisions in earlier mortgage—Right of subsequent mortgagee to impugn.*

In the case of several mortgages the subsequent mortgagee does not become the absolute owner and he is the representative in interest of the mortgagor only to this extent that he is entitled to redeem the previous mortgage. If the previous mortgage is not invalid or void he cannot challenge the terms thereof on the ground that interest is excessive or penal as he entered into the subseqent mortgage with eyes open. The mortgagor in such cases may be entitled to certain reliefs on equitable considerations prevail in favour of the subsequent mortgagee. (*Abdul Rashid, J.*) PHUL CHAND *v* SHUGAN CHAND. **155 I.C. 1116=7 R.L. 838=A.I.R. 1934 Lah. 799.**

———*Prior and subsequent—Prior mortgage satisfied by private sale of property—Suit by second mortgagee—Sale—Purchase in execution by second mortgagee—Priority.*

On 1-5-1900, item 1 was mortgaged to third defendant; on 25-3-1910, items 1 and 2 were mortgaged to first plaintiff. In 1904, D-3 brought a suit impleading P-1 and the properties to sale in 1905. There were no bidders but D 3 privately purchased the property from the mortgagor. In 1914 P 1 brought a suit impleading D-3 and obtained a decree and purchased the property in Court auction. D-3 claimed that as he was the first purchaser, the rights of P-1 were subject to his prior lien.

Held, that as D-3 had chosen to satisfy his decree so far as the property was concerned by private purchase he was only in possession as representing his mortgagor and could not claim any priority over P-1. (*Pakenham Walsh, J.*) ANNAVI PILLAI *v.* MACHAMMAL. **I.R. 1933 Mad. 403=144 I.C. 365=38 L.W. 190=A.I.R. 1933 Mad. 595.**

———*Prior and subsequent—Prior mortgagee purchasing property in execution of his decree — Suit for redemption by non impleaded puisne mortgagee—Mode by accounting.*

Where a prior mortgagee obtains a decree on foot of his mortgage and purchases the mortgaged property in execution of his own decree, to which the puisne mortgagee was not a party, the sale cannot be considered to be of no effect at all. It effectively transfers the mortgagor's right to the prior mortgagee (auction-purchaser) as between the mortgagor and the prior mortgagee, though the sale is not binding on the subsequent mortgagee, who can, in spite of it, exercise his right of redemption. In the exercise of his right of redemption the puisne mortgagee is entitled to treat the prior mortgage as still subsisting. Not being bound by the decree, he can ignore it. The necessary corollary to this is that account of the mortgage money is to be made up on the basis of the stipulations contained in the mortgage-deed. In redeeming the mortgage he must pay the principal and interest calculated up to date. At the same time, the prior mortgagee, who has been in possession of the mortgaged property by virtue of the auction sale held in execution of his own mortgage decree should account for the usufruct received by him.

In a case where it was not known what amount of principal and interest was due to the prior mortgagee at the time of his obtaining possession and there was no

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evidence to show whether in the years which followed the auction-sale the profits of the property were sufficient to pay the interest each year on the aggregate amount on which interest was running, the Court accepted the prior mortgagee's case that redemption might be allowed to the puisne mortgagee on payment of a sum representing the mortgage money due on the date of the decree passed in favour of the prior mortgagee. (*Niamatullah and Rachhpal, JJ.*) RAMJI LAL *v.* ROSHAN SINGH. **155 I.C. 596=7 R.A. 957=A.I.R. 1935 All. 298(2)=1935 A.W.R. 481=1935 A.L.J. 587=A.I.R. 1935 All. 692.**

———*Prior and subsequent—Prior mortgagee—Right set up as shield—Limitation.*

There is no limitation for the prior mortgagee's setting up his rights as a shield against the puisne mortgagee. (*Bisheshwar Nath and Pullan, JJ.*) MATHURA PRASAD *v.* GHANSHIAM DAS. **I.R. 1931 Oudh 319=132 I C 767=14 O.L.J. 233=8 O.W.N. 179=A.I.R. 1931 Oudh 157.**

———*Prior and subsequent—Right to possession—Execution sale.*

Where a sale in execution of a decree obtained on foot of puisne mortgage takes place during the pendency of a suit on the prior mortgage, apart from the rule of *lis pendens*, if the second mortgagee is the earlier purchaser, the prior mortgagee will have the right to take possession as plaintiff if a suit on his mortgage be not time barred. If the second mortgagee redeems him the second mortgagee will retain the property. If the prior mortgage has become barred by time the prior mortgagee cannot obtain possession.

Per *Mukerji, J.*, dissenting.—Generally it is the first purchaser who gets the property and the question of purchase has nothing to do with the priority or posterity of the mortgage in enforcement of which the property is sold. (*Sulaiman, A C.J., Mukerji, Banerji, Young and Pullan, JJ.*) RAM SANEHI LAL *v* JANKI PRASAD. **53 All. 1023=I R. 1931 All. 769=134 I.C. 1=1931 A.L.J. 729=A.I R. 1931 All 466 (F.B.).**

[**R.** 56 A 134 (138); 63 M.L.J. 394 (403 404); **Rel.** 38 C.W.N. 1178 (1182). **D.** 1932 A.L.J. 1116 (1117); **Appl.** 1933 A.L.J. 934 (936). **Rel.** 62 Cal. 75 (81).]

———*Prior and subsequent—Right of subsequent mortgagee indicated.*

Under the general law the second mortgagee is entitled to redeem the first and the latter cannot sell the property free from the mortgagees unless an opportunity is given to the subsequent incumbrancer to redeem the earlier mortgage. Similarly the second mortgagee's right to sell the property may take one of three shapes. (1) If the first mortgagee or his representative was made a party to the suit he may ask for (a) redemption and a further sale (b) sale free of mortgages with a direction to pay the mortgagees in order of their priority. (2) If the prior mortgagee or his representative was not made a party, he can get a decree for sale subject to the rights of the prior mortgagee. (*Ramesam, Anantakrishna Ayyar and Cornish, JJ.*) NAGENDRAN CHETTIAR *v.* LAKSHMI AMMAL. **56 Mad. 846=6 I R. (Mad.) 9=144 I.C. 833=1933 M W.N 384=38 L W. 169=A.I. R. 1933 Mad. 583=65 M.L.J. 108 (F B).**

———*Prior and subsequent—Rival purchasers in execution of mortgage decrees — Priority—Doctrine of* lis pendens.

In a contest between the plaintiff, who traces his right to the earlier sale in the later suit by the puisne mortgagee, and the defendants, who claim under the later purchase in the earlier action by the prior mortgagee, the plaintiff must be held to have preferential right to possession on the facts, that the mortgages being simple, possession remains with the mortgagor and that a sale

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of his interest, in a suit either by a prior or a puisne mortgagee, must convey to the purchaser the mortgagor's right to possession. Such a right obtained by the plaintiff cannot be affected by *lis pendens* though the purchase under which he claims has been made during the pendency of the suit brought by the prior mortgagee. No suit can operate as a *lis pendens* so as to affect the antecedent transfers which have come into existence prior to it; the transfers being unaffected, the legal proceedings brought to enforce those transfers are likewise immune from the operation of the rule. (*Venkatasubba Rao, J.*) SURAMMA NAYURALU *v.* SURAYYA. **58 Mad 266=40 L.W. 440=1934 M W N. 1079=152 I.C 612=7 R.M. 259=A.I.R. 1934 Mad. 585=67 M.L.J. 312.**

———*Prior and subsequent—Suits by each mortgagee without impleading the other—Decrees and sales—Rights of purchasers.*

When a second mortgagee obtains a decree on his mortgage and in execution of that decree the property is sold and purchased by a third party, the first mortgagee who institutes a suit on his mortgage against the mortgagor alone after the decree on the second mortgage and purchases the property in execution of his decree is not entitled in a suit for possession or declaration of title against the mortgagor and the third person in possession, to a decree for possession as against such third person; nor can his suit be treated as a suit to enforce his mortgage, when his right to do so has become barred by limitation. He can no doubt fall back on his mortgage and bring an appropriate suit subject to the law or limitation; but he cannot claim any deduction of time on the ground that by reason of his purchase there was a fusion of the rights of the mortgagor and mortgagee on him. (*Nasim Ali and Khundkar, JJ.*) JAGAT CHANDRA DE *v.* ABDUL RASHID. **62 Cal. 75=154 I. C. 868=7 R.D. 542=38 C.W.N. 1178=A.I.R. 1935 Cal. 139.**

———*Prior and subsequent—Suit by each mortgagee without impleading the other—Rival purchasers—Purchaser under sale in execution of decree on first—Obstruction to by purchaser under decree on second mortgage—Suit by former—Maintainability.*

A property was mortgaged first to one *B* in 1910 and later on to defendant No. 2 in 1916. The latter sued on his mortgage in 1922 without impleading *B*, and got a decree in execution of which defendant No. 1 purchased the property and got his sale certificate on 30th November, 1927. In 1924, *B* sued on her mortgage without impleading defendant No. 2, and got a decree, in execution of which plaintiff purchased the property on 16th December, 1927. In 1928, plaintiff applied for delivery but was obstructed by defendant No. 1, who was in possession. An application for removal of obstruction having proved unsuccessful, plaintiff in 1928 instituted a suit for sale on the first mortgage, giving the first defendant an opportunity to redeem the mortgage.

Held, that the suit was maintainability and that the omission of the plaintiff to apply to set aside the sale under O. 21, R. 91, C. P. Code, was no bar to it. (*Beasley, C.J. and King, J.*) VENKATASWAMI CHETTIAR *v.* SANKARANARAYANAN CHETTIAR. **58 Mad 825=69 M.L J.566=154 I.C. 623=7 R.M. 69=40 L.W. 734=A I.R. 1935 Mad. 12.**

———*Prior and subsequent—Suit by prior mortgagee without impleading assignee from puisne mortgagee and purchase in execution—Suit by assignee to redeem prior mortgage—Rights of parties.*

The owner of six villages mortgaged one of them to *D* and subsequently all of them to *X*. *D* brought a suit on his mortgage but did not in the first instance implead *X* who assigned his interest to *P*. *X* was afterwards impleaded as a party to the suit, a decree was obtained and *D* purchased the property mortgaged to him. *P* brought the present suit to redeem the prior mortgage of *D*.

Held, that *P* was entitled to redeem the mortgage of *D* but *D* had no right to redeem over against *P*, that the mortgage of *D* should be treated as still subsisting and that *P* could redeem only on the payment of the amount due under his mortgage and not merely the amount which *D* paid for the property in the execution sale. (*Wort and James, JJ.*) MT. SHEORATAN KOER *v.* KAMTA PRASAD. **11 Pat. 415=I.R. 1932 Pat. 198=139 I.C. 78=13 Pat.L.T. 582=A.I.R. 1932 Pat 270.**

———*Prior and subsequent—Suit by second mortgagee without impleading first—Subsequent suit by first impleading second—Decree and sale of entire property in execution—Second mortgagee's right to personal decree.*

Where a second mortgagee files a suit on his mortgage without impleading the first mortgagee to the suit and subsequently the first mortgagee sues on his mortgage impleading the second mortgagee also and obtains a decree in execution of which the entire mortgaged property is sold, without leaving anything to be sold in execution of the decree in the second mortgagee's suit, the latter is entitled to a personal decree in his suit. (*Venkatasubba Rao, J.*) DURAISWAMI *v.* RANGASWAMI AIYANGAR. **152 I.C. 416=7 R.M. 224=1934 M W.N. 1181=40 L.W. 507=A.I.R. 1934 Mad. 726=67 M.L.J. 468.**

———*Prior and subsequent—Suit for sale by prior mortgagee—Rights of subsequent mortgagee.*

In a suit for sale by prior mortgagee, the rights of the second mortgagee are very limited; he has the right to redeem the prior mortgage or to receive his mortgage money out of the surplus sale proceeds after satisfaction of the prior mortgage treating the suit as one for his benefit; but he cannot ask for a sale of the property if the prior mortgagee's claim is satisfied before the sale nor can he ask for the sale of some other property included in his own mortgage; and for either of these purposes he must bring a separate suit for sale on his own mortgage. (*Mosely and Mackney, JJ.*) WAN TAIK YA *v.* M. S. S. CHETTYAR FIRM. **155 I.C. 954=7 R.R. 367=A.I.R. 1935 Rang 26.**

———*Prior and subsequent—Suit on two mortgages without impleading subsequent mortgagee, decree and sale—Purchase of property—Suit by subsequent mortgagee impleading purchaser in possession of property—Right of purchaser to set up two mortgages as shield.*

Two mortgages were effected in respect of property to the same person and subsequently a third mortgage to another. On a suit filed on the two mortgages, the subsequent mortgagee was not impleaded. The suit was decreed and the properties were purchased at auction-sale. The purchaser got possession. The subsequent mortgagee filed a suit on his mortgage impleading the purchaser.

Held, that the purchaser was entitled to set up the mortgages as a shield and to claim that the plaintiff should redeem those mortgages before the property in his possession could be put to sale but that he was entitled not to the amount paid at the auction but the principal amount on the mortgage with interest up to date of possession. 43 All. 469 (P.C.); 52 All. 331 and A.I.R. 1931 All. 466, Rel. on. (*Bennet and Bajpai, JJ.*) SARDA PRASAD *v.* KANHAI LAL. **6 I.R. (All) 53=145 I.C. 304=1933 A.L.J. 934=A.I.R. 1933 All. 412.**

MORTGAGE—Prior and subsequent.

———*Prior and subsequent—Vendee undertaking to pay prior mortgage—Delay in payment—Vendee's right to further interest in suit by subsequent mortgagee.*

Where a vendee who had undertaken to pay off the prior mortgage under his sale-deed and obtained possession of the mortgaged property, delayed payment in consequence of which delay further interest accrued the vendee was entitled to claim credit for the extra interest which had accrued on the prior mortgage, when a suit was brought by the subsequent mortgagee The subsequent mortgagee was not privy to the contract between the mortgagor and the vendee and could not be allowed to take advantage of the terms of that contract. If owing to the delay in payment the mortgagor had suffered any loss, it would be his right to recover compensation from his vendee. But the delay in the payment of a prior mortgage, either by the mortgagor himself or by mortgagor's representantive, would not in any way cause harm to the subsequent mortgagee who should himself have paid off the prior mortgage and claimed subrogation. (*Sulaiman, C.J. and King, J.*) UMED SINGH *v.* BABU RAM. **7 R.A. 47=150 I. C. 937=1934 A.L.J. 887=4 A.W.R. 221=A.I.R. 1934 All. 1035.**

Priority.

See also T. P. ACT, SS. 59 AND 68, AND SUCCESSIVE MORTGAGES, *infra.*

S———*Priority — Arrears of revenue — Sale for—Deposit subsequent to final decree on mortgage by holder of final decree for sale—Priority.*

The holder of a final decree for sale of mortgaged property is entitled to maintain a separate suit to enforce a further charge against such property for payments made to prevent a sale for arrears of revenue which fell due after the passing of the final decree and while execution proceedings were pending. In respect of such payments, he is entitled to priority over a subsequent mortgagee of the same property. 11 M.I.A. 241, Appl. (*Sir John Wallis.*) MANOHAR DAS *v.* HAZARIMULL. **58 I.A. 341=59 Cal. 463=I.R. 1931 P.C. 293=134 I.C. 645=1931 M.W.N. 1163=34 L. W. 472=33 Bom.L.R. 1345=8 O.W.N. 893=35 C. W.N. 1040=1931 A L J 800=54 C.L.J. 125=A.I. R. 1931 P.C. 226=61 M L.J. 343 (P.C.).**

[D. 55 M. 468 (478).]

———*Priority—Attachment—Prohibitory order affixed subsequent to execution of mortgage.*

To render an attachment effectual, the affixing of the prohibitory order on the court-house is absolutely necessary. Where such affixing is later in date than the execution of a mortgage, the mortgage lien is not affected by the attachment even though the attachment was prior to the execution of the mortgage. 55 I. A. 256, Foll. (*Mukerji and Guha, JJ.*) NABADWIP CHANDRA DAS *v.* LOKE NATH ROY. **59 Cal. 1176=36 C.W.N. 733=142 I.C. 452=I.R. 1933 Cal. 293=A.I.R. 1933 Cal. 212.**

Receiver.

See also C. P. CODE, O. 40, R. 1—MORTGAGE SUIT AND T. P. ACT, SS. 58 (*b*) AND 67.

———*Receiver—Appointment— Equitable mortgagee—Right to apply for.*

An equitable mortgagee, though he is not entitled to possession of the mortgaged properties, has the right to ask for the appointment of a receiver in his mortgage suit and a receiver will be appointed if the demands of justice require that the mortgagor should be deprived of possession. (1914) 1 Ch. 954; 47 C. 418, Foll. (*Madhavan Nair, J.*) MAHARAJA OF PITTAPURAM *v.* GOKULDAS GOVERDHANADOSS. **54 Mad. 565=I.**

MORTGAGE—Redemption.

R. 1931 Mad. 744=133 I.C. 504=34 L.W. 165=A. I.R. 1931 Mad. 626=61 M.L.J. 111.

———*Receiver—Equitable mortgagee—Right to apply for appointment.*

An equitable mortgagee can in a proper case apply for the appointment of a receiver. 122 I.C. 483, Rel. on. (*Johnstone, J.*) JASWANT SINGH *v.* PUNJAB NATIONAL BANK, LTD. **I.R. 1931 Lah. 769=133 I. C. 433=A.I.R. 1932 Lah. 82.**

———*Receiver—Mortgage suit—Appointment of—Discretion of trial Court*

No doubt it is true that in a simple mortgage a Receiver should not be ordinarily appointed but as the appointment of a receiver is in the discretion of the Court and unless strong grounds are shown that the Court was wrong in appointing the Receiver, the Court will not ordinarily interfere with a discretion exercised by the lower Court. (*Das and Brown, J.*) GOPAL KRISHNA KUNDU *v.* BANU NARANGROY NAND KISHORE. **I.R. 1933 Rang. 97 (1)=144 I.C. 265=A.I.R. 1933 Rang. 94.**

———*Receiver—Mortgage suit—Appointment of receiver—Mortgagee's title to rents and profits collected—Priority of Crown debts due from mortgagor.*

Both in England and in India, the propriety of appointing a receiver in a suitable case in a mortgage suit cannot be challenged. The property in the hands of such a receiver is in *custodia legis* for the person who can make a title to it. The rents and profits arising out of the mortgaged land in his hands would form part of the mortgage which was created to secure repayment of the loan and the mortgagee has a legal title to them as forming part of his security. It follows, therefore, that they are not payable to the mortgagor, or to the Crown for debt due from the mortgagor, in priority to the mortgagee decree-holder. (*Page, C. J. and Ba U, J.*) MA JOO TEAN *v.* COLLECTOR OF RANGOON. **12 Rang. 437=155 I. C. 776=7 R.R. 356=A.I.R. 1934 Rang. 321.**

———*Receiver— Receiver appointed at instance of equitable mortgagee—Monies realised by receiver—Preferential rights of mortgagee.*

Where a receiver is appointed by Court in respect of certain properties at the instance of a person in whose favour an equitable mortgage of those properties had been created by deposit of title-deeds the equitable mortgagee, in the event of the security proving insufficient will have in regard to any monies realised by the receiver from the properties a preferential right as against the ordinary creditors of the mortgagor to the extent of his debt. 54 Mad. 565, Foll. (*Milne, J. C. and Mehta, A. J. C.*) OFFICIAL ASSIGNEE *v.* PUNJAB NATIONAL BANK, LTD. **26 S L.R. 61=I.R. 1932 Sind 79=137 I.C. 338=A.I.R. 1932 Sind 82.**

———*Receiver—Receiver appointed—Sale of property in execution of money decree—Rights of purchaser to income collected by receiver.*

The appointment of a receiver in a mortgage suit depriving as it does the mortgagor of his right to deal with the income negatives also the right of a Court auction-purchaser in execution of a money decree to it even though the receiver himself was made a party to the execution proceedings and leave of Court was granted to execute the decree against him. (1903) 2 Ch. 727, Foll. (*Venkatasubba Rao and Reilly, JJ.*) PONNU CHETTIAR *v.* SAMBASIVA AYYAR. **56 Mad. 546=1933 M.W.N. 842=I.R. 1933 Mad. 121=141 I.C. 372=37 L.W. 788=A.I.R. 1933 Mad. 293=64 M.L. J. 682.**

Redemption.

See also C. P. CODE, O. 34, R. 7 AND T. P. ACT, SS. 60, 85 AND 91.

MORTGAGE—Redemption.

———*Redemption—Construction of covenant.*

The mortgage-deed provided for the a term 10 years but there was also a clause to the effect that the mortgagor would be entitled to redeem the property if be paid within 10 years.

Held, that the person as to duration having been distinctly mentioned the mortgagor could not sue for redemption before the expiry of 10 years.

Quaere, Whether if the mortgagor could sue for redemption before that period if the mortgagee commits a breach of contract. (*Mukerji and Allen, JJ.*) AKBAR HUSAIN *v.* SHAH AHSAMUL HAQ. **I.R. 1931 All. 843=134 I.C 459=A.I.R. 1932 All. 155.**

———*Redemption—Decree in redemption suit simply providing for dismissal of suit in default of payment—Second suit for redemption—Maintainability.*

The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. If the decree in a redemption suit departs from the form required by S. 92, Transfer of Property Act, and simply provides that in case of default by the plaintiff in payment "his case will stand dismissed" and no payment of the mortgage money is made, the decree cannot be construed to be an order of a Court extinguishing the right to redeem with in the meaning of the proviso to S. 60, and a second suit for redemption is properly maintainable. (*Lord Russell of Killowen.*) RAGHUNATH SINGH *v.* HANSRAJ KUNWAR. **61 I.A. 362=56 All. 561=39 C.W.N. 9=1934 M.W.N. 1065=15 Pat.L.T. 697=60 C.L.J. 337=36 Bom.L.R. 1189=7 R.P.C. 47=151 I.C. 37=11 O.W.N. 1092=40 L.W. 390=1934 A.L.J. 900=4 A.W.R. 368=A.I.R. 1934 P.C. 205=67 M.L.J. 813 (P.C.).**

———*Redemption—Failure to prove specific mortgage—Defendants shown to be mortgagees—Liability to redemption.*

In a suit brought by the plaintiff for redemption of two mortgages executed some thirty years before suit in favour of the defendant's father the evidence showed that the plaintiff's husband had at one time title to the trees (the subject of the mortgages) and that the defendant was in possession as mortgagee under some mortgage but the plaintiff failed to prove the specific mortgages alleged by her or the terms thereof.

Held, the findings were sufficient to entitle the plaintiff to redeem. Once it was shown the defendant was shown to be in possession as mortgagee, it was incumbent on him to prove his title which he had failed to do' 27 Bom. 271, Foll. (*Courtney-Terrell, C. J. and Adami, J.*) KAILASH RAI *v.* MT. JAGA KUER. **10 Pat 417=I.R. 1931 Pat. 390=133 I.C. 678=13 Pat.L.T. 164=A.I.R. 1931 Pat 295.**

———*Redemption—Lease back to mortgagor—Sub-lease by mortgagor—Suit for possession by mortgagee—Sub-lessee's right to resist—Suit by latter to redeem—Maintainability.*

Where a mortgagor who has executed a mortgage takes back the mortgaged property on lease from the mortgagee the latter is entitled, on termination of the lease, to get back possession of the property from the mortgagor lessee; and when the mortgagor himself grants a lease of that property after the mortgage, the lessee who so takes it from the mortgagor is only a sub-lessee and not in the position of one who has a mortgagor's interest entitling him to redeem the property. The sub-lessee cannot therefore resist a suit by the mortgagee or his assignee for possession by himself filing a suit for redemption. (*Madhavan Nair, J.*) KRISHNAN *v.* GOPALA KURUP. **158 I.C. 1073=8 R.M. 428=1935 M.W.N. 748=42 L.W. 261=A.I.R. 1935 Mad. 813=69 M.L.J. 331.**

MORTGAGE—Redemption.

———*Redemption—Mortgage of occupancy holding—Suit for redemption—Defendant setting up different mortgages—Decree on defendant's admission—Agra Tenancy Act* (1901), *S.* 20.

Where in a suit for redemption of mortgage, the plaintiff fails to establish the particular mortgage, which he seeks to redeem, and the terms thereof, he cannot ordinarily be allowed to fall back upon the defendant's admission and to redeem a totally different mortgage. But a suit for redemption of an occupancy holding, illegally mortgaged by the plaintiff, is a suit for possession, the plaintiff offering to pay the sum advanced by the defendant, and if there is no other objection to a suit for redemption of an alleged mortgage of occupancy holding being treated as a suit for possession, a decree may be passed in favour of the plaintiff on the admission of the defendant, who sets up a different mortgage provided the defendant is not taken by surprise and is not otherwise prejudiced. (*Niamatullah, J.*) MT. DUKHI *v.* INDERMAN AHIR. **153 I.C. 903=7 R.A. 647=A.I.R. 1934 All. 656.**

———*Redemption—Mortgage suit—Sale of equity of redemption—Right to redeem put an end to.*

There is nothing in the law in force in Mysore that stands in the way of a mortgagee buying the equity of redemption in execution of a decree obtained by himself for the recovery of arrears of interest due on the mortgage. If such a sale is not in due course set aside within the period of limitation provided for and the sale is in consequence confirmed the mortgagor or his heirs cannot bring a suit for redemption, as the right of redemption is lost by the Court sale. (*Doraswami Iyer, C.J. and Mahadevayya, J.*) SUBBA RAO *v.* SHAME GOWDA. **10 Mys L.J. 478.**

———*Redemption — Partial redemption—Mortgagee relinquishing claim against part purchaser in Court—Right of purchaser of other part to redeem piecemeal.*

Although a mortgagee in a suit on the mortgage relinquishes his claim as a against a purchaser of part of the mortgaged properties in Court, the purchasers of the other portions of the property are not on that ground entitled to redeem piecemeal, *i.e.*, by paying proportionate shares of the mortgage money. In a case where the mortgagee releases a portion of the mortgaged property without any notice of right of a third party who has purchased a portion of the equity of redemption, different considerations might arise. (*Mitter and Patterson, JJ.*) BENGAL COAL CO., LTD. *v.* SITARAM CHATTERJI. **159 I.C. 159=61 C.L.J. 560=A.I.R. 1935 Cal. 667.**

———*Redemption—Partial redemption—Release of part by mortgagor—Right of purchaser of part of equity of redemption.*

A purchaser of a portion of the equity of redemption is not entitled to redeem his portion of the property only, when subsequent to his purchase, the mortgagee without the knowledge of such purchase, released from the mortgage some other of the mortgaged properties. (*Mitter and McNair, JJ.*) PRANBALLAV SAHA *v.* BHAGABAN CHANDRA SEAL. **61 Cal. 894=152 I.C. 429=7 R.C. 272=59 C.L.J. 473=A.I.R. 1934 Cal. 775.**

———*Redemption — Partial redemption—Right of transferee to claim—Conduct of mortgage—Equitable considerations.*

Where a mortgagee releases certain of the items of properties mortgaged to him, a transferee of certain other items, who has no knowledge of the release on the

MORTGAGE—Redemption.

date of the transfer, can apply for redemption of his items on payment of a proportionate part of the debt. Such a transferee is entitled to urge on equitable grounds that when he took the transfer there was one indivisible mortgage and when after he got the transfer the integrity of the mortgage was broken behind his back, he was entitled to claim partial redemption. (*Mukherji, J.*) PRANBALLAV SAHA *v.* BHAGABAN CHANDRA SEAL. **6 I.R. (Cal.) 127=145 I.C. 657=37 C.W.N. 424=A.I.R. 1933 Cal. 588.**

———*Redemption—Partial redemption — Spliting up by mortgagee—Omission to implead persons interested in part in suit on mortgage—Effect.*

Ordinarily a mortgage is no doubt indivisible, but this provision is for the benefit of the mortgagee who can by his act create a situation under which the integrity of the mortgage must be held to have broken up. One well known instance of splitting up is when the mortgagee himself acquires the equity of redemption in a portion of the mortgaged property. In that case persons interested in the remaining portion can insist upon redemption of that portion only on payment of the proportionate mortgage debt. If the mortgagee omits to implead in his suit persons interested in a portion of the property and brings the property to sale and purchases it himself he is bound to allow redemption of the portion concerned on payment of the proportionate amount. (*Khaja Mahomed Noor and Agarwala, JJ.*) BHEKDARI MAHTON *v.* RADHIKA KOER. **13 Pat. 364=16 Pat.L.T. 78=155 I.C. 635=7 R.P. 603 =A.I.R. 1934 Pat. 648.**

———*Redemption—Possession as mortgagee—Right to redeem.*

Where certain persons accept the position of mortgagees, they are precluded from acquiring a title by adverse possession. Possession for however long a period by a mortgagee can give him no title other than the title which he has acquired by his mortgage The owner can in such a case always redeem the mortgage. (*Pullan and Niamatullah, JJ.*) BASDEO RAI *v.* JAIMANGAL RAI. **136 I.C. 69=I.R. 1932 All. 117= 1931 A.L.J. 914=A.I.R. 1932 All. 53.**

———*Redemption—Possessory mortgage — Tacking bond by mortgagor—Suit to redeem—Right of mortgagee to claim bond amount.*

In a suit by a mortgagee for redemption of his possessory mortgage the mortgagee is entitled to insist on the payment of the sum due under the tacking bond, if he is otherwise entitled to it regardless of the question whether his suit on foot of that bond if brought at the time of the redemption suit would be barred by limitation. Redemption cannot be allowed unless the plaintiff pays the principal and interest due under the taking bond. (*Pullan and Niamatullah, JJ.*) PARAS RAM CHAUBEY *v.* SHEO DHAN PANDEY. **I.R 1932 All. 440=138 I.C. 492=1932 A.L.J. 595=A.I.R. 1932 All. 558.**

———Redemption—Right of attaching creditor to redeem—Purchase by him during the pendency of the mortgagee's suit on the foot of his mortgage. *See* MORTGAGE SUIT—RIGHT TO POSSESSION. **1932 A.L. J. 289=A.I.R 1932 All. 356.**

———*Redemption—Right of, before expiry of term.*

If there is nothing in the document to show that the mortgagor is entitled to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. (*Young, C.J. and Rangi Lal, J.*) MOHAMMAD HASAN *v.* CHANDU RAM. **16 Lah. 440=158 I.C. 409=37 P.L.R. 509.**

MORTGAGE—Redemption.

———*Redemption—Right to sue for—Transferee from benamidar mortgagor.*

A transferee from the heirs of a benamidar mortgagor can maintain a suit for redemption. 29 C.L.J. 434 and 45 Cal. 909 (P.C.), Rel. on. (*Sundaram Chetty, J.*) MAHOMED SHERIEF SAHIB *v.* SYYED KASIM SAHEB. **6 I.R. (Mad.) 33=145 I.C. 230=1933 M. W.N. 642=38 L.W. 266=A.I.R. 1933 Mad. 635.**

———*Redemption—Sale of property to mortgagee for mortgage amount—No registered instrument necessary.*

The mortgagee himself was the purchaser under the deed of 3rd January, 1923. The sum of money due to the mortgagee under the mortgage deed from the vendor mortgagor exactly represented the purchase money fixed under the deed of sale which was agreed to be paid by the vendee to the mortgagee.

Held, that the redemption was not required by law to be proved by a registered deed to that effect. The question was one of mere interpretation of the sale of 3rd January, 1923, and the conduct of the parties thereto. The right construction was that the mortgage was redeemed in respect of the vendor. (*Wazir Hasan, C.J. and Raza, J.*) KUNJ BEHARI LAL *v.* BISHESHWAR SINGH. **6 R.O. 379=148 I.C. 68=11 O.W.N. 137= A.I.R. 1934 Oudh 98.**

———*Redemption—Stipulation for payment of mortgage debt "within five years"—Right to redeem before five years—Stipulation not to sell property without mortgagee's permission—Validity.*

A deed of mortgage for Rs. 4,000, which was a combination of an usufructuary mortgage and a mortgage by conditional sale, the mortgagee having the right to take the profits of the property in lieu of interest on the mortgage money, provided, *inter alia*: "We shall get possession of the house delivered to us within a period of five years from this date after paying the said Rs. 4,000 together with the amount which you may have incurred in respect of the payment of 'the house kandayam, repairs and for necessary additional structures, etc., if we do not construct them when requested by you. In case it is necessary for us to sell the scheduled property to others for discharging the above said sum, we shall sell it only with your permission and shall discharge the above debt. If either myself or my son fails to pay up the above said amounts and get the possession of the property returned to us within five years from this date and get the payment of the same endorsed on this deed, we will have no manner of title or interest to the said suit house after the expiry of the stipulated time".

Held, on a construction of the deed, that the mortgagors or a person claiming under them would be entitled to redeem before the expiry of five years and that the term "within five years" could not be interpreted as meaning so many years certain.

Held, further, that the clause in the deed restraining the right to sell the properties without the mortgagee's permission was invalid, whether it was intended to operate after the expiry of five years or within the period of five years. (*Reilly, C.J. and A.S.R. Chari, J.*) NANJUNDAPPA *v* G. M. KRISHNIAH SETTY. **13 Mys.L.J. 404=40 Mys.H C.R. 435.**

———*Redemption—Subsequent mortgagee not party to mortgage suit—Right to redeem.*

A subsequent mortgagee insists upon the right to redeem on the ground that he was not made a party to and therefore not bound by, the decree in the mortgage suit, he can be allowed to redeem only on the terms of the mortgage and on payment of interest at the rate payable under mortgage up to the date of redemption to be fixed in the case. Case law Ref. (*King and Thom,*

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JJ.) LALTA PRASAD *v.* KIFAYAT HUSAIN. **148 I.C. 2=6 R A. 672=A.I.R. 1933 All. 905.**

———*Redemption—Suit for—Burden of proof.*

Where in a suit for redemption, a mortgage is established, *prima facie* the plaintiff is entitled to redemption. But if he alleges that the defendant has gone into possession and his entry upon the land is lawful, the question of limitation arises and the onus lies on the plaintiff himself to show completely and indefeasibly such circumstances as would entitle him to bring the possession of the defendant to end. (*Wort, J.*) MT. KHIRO KUER *v.* SYED NOORUL HUSSAIN. **153 I.C. 761=7 R.P. 379=A.I.R. 1934 Pat 615.**

———*Redemption—Suit for—Failure to prove mortgage—Suit on title to recover possession—Payment of mortgage money.*

The plaintiff sued for redemption but the substantive relief claimed by them was possession. It was found that the mortgage did not exist but the defendants had only pleaded possession as mortgagees for more than 12 years The plaintiff having succeeded in proving his title apart from the mortgage.

Held, that the plaintiff was not entitled to recover possession of the property without paying the amount due to the defendants; but the burden of proving the amount due was on the defendants. (*Sulaiman, A C. J. and Baipai, J.*) HALKA *v.* NANNHON. **I.R. 1932 All. 628=140 I.C. 42=1932 A.L.J 101=A.I.R. 1932 All. 259.**

———*Redemption—Suit for—Proof of subsisting mortgage.*

In a suit for redemption the onus lies on the plaintiff to show that at time of the suit their mortgage was still subsisting, and if they endeavour to rely on an acknowledgment, the onus still lies on them to prove that the acknowledgment was within time, (*Dalip Singh, J.*) GIAN CHAND *v.* SHER MAHOMED. **154 I.C. 773=7 R.L. 608=A.I.R. 1934 Lah. 121.**

———*Redemption—Suit for—Proof of subsisting mortgage—Onus—Acknowledgment—What amounts to.*

The onus in a redemption suit is on the mortgagor to prove that at the time of the suit his mortgage is subsisting; and if he relies on any acknowledgment for the purpose of saving limitation, it is for him to prove that the same was made when the limitation was still alive. The mere making of an acknowledgment does not and cannot imply that it is within time; nor does the mere fact of the mortgagee having claimed this status of a mortgagee and not of an owner at the time of a sale of his rights estop him or his assignee from demanding proof from the mortgagor of the subsistence of his mortgage at the time the mortgagee claimed to be such only. (*Addison and Din Mohammad, JJ.*) SHER MOHAMMAD *v.* KARAM CHAND. **155 I.C. 576=7 R.L. 737=37 P.L.R. 392=A I.R. 1935 Lah. 515.**

———*Redemption—Suit for redemption by subsequent usufructuary mortgagee against prior usufructuary mortgagee—Right to interest.*

Where a subsequent usufructuary mortgagee sues for redemption against a prior usufructuary mortgagee, the former can be made liable for reasonable interest also along with principal amount, only, if the latter can claim interest in a suit under S. 68 coupled with S. 67. (*Curgenven and Sundaram Chetty, JJ.*) KUMARAPPA CHETTIAR *v.* SUPPAN CHETTIAR. **6 I.R. (Mad.) 126=145 I.C. 744=38 L.W. 599=A.I.R. 1933 Mad. 672.**

———*Redemption—Sums received by mortgagee—Credit in favour of mortgagor.*

MORTGAGE—Release.

In account being taken between the mortgagor and the mortgagees sums due from one to the other during the continuance of the mortgage should be included. The principle in such cases is that as money becomes due to the mortgagor any given time it should be deemed to have been recovered by the mortgagor be a corresponding decrease in the amount payable to the mortgagee. 4 A.L.J. 176, Ref. (*Pullan and Niamaetullah, JJ.*) BANWARI SINGH *v.* SAKHRAJ SINGH. **135 I.C. 248=I.R. 1932 All. 72=1931 A.L.J. 421=A.I.R. 1931 All. 585.**

Registration.

See REGISTRATION ACT (1908), SS. 17 (1)(*b*) AND 49 AND T. P. ACT (1882), SS. 58 AND 59.

Reimbursement.

———*Reimbursement—Mortgage suit—Purchaser of portion of mortgaged property purchasing decree obtained by mortgagee—Sale of entire decree by widow of such purchaser and payment of decretal amount by her in execution taken by assignee—Sons of purchaser cannot recover decree amount from legal representative of deceased mortgagor.*

A house which was the exclusive property of *S* was mortgaged with *C*. *G* purchased a portion of the mortgaged property and subsequently purchased the decree obtained by *C* for recovery of his mortgage money. This decree was not a mortgage decree under O. 34, but only a simple money decree though it declared the decretal amount as a charge on the mortgage and other property of the mortgagor. Subsequently *G's* widow sold the entire decree to another and in execution by the assignee, she paid the full decretal amount and *G's* sons sued the legal representatives of *S* for recovery of the decree amount so paid and subsequent costs

Held, that if the decree was to be taken as a mortgage decree, by *G's* purchasing it, the whole mortgage charge would be considered to have been satisfied and there would be nothing left to transfer, that if it was to be considered a simple money decree, the widow or sons of *G* could not be considered to be parties interested in the execution proceedings, as *G* was not a party to the decree that payment made by them was gratuitous and that they were not entitled to sue for its recovery. (*Saaduddin, A.J.C.*) BISHUN DAS JAWAHIRMAL *v.* CHUNI LAL. **6 R. Pesh. 51=148 I.C. 569 (2)=A.I.R. 1933 Pesh. 97 (2).**

———Reimbursement—Prior mortgagee-decree-holder receiving amount under decree—Duty to pay off sub-mortgages—Person interested in property compelled to pay owing to his default. *See* CONTRACT ACT, S. 69. **A.I.R. 1934 Mad. 628.**

Release.

See also T. P. ACT, SS. 60, 67 (d) AND 81.

———*Release—Purchase of part of property by stranger—Agreement by mortgagee to release portion—Onus—General consent to sale—Effect of.*

The mere fact that a mortgagee has given a general approval to an attempt on the mortgagor's part to raise money towards the re-payment of his mortgage debt by selling some of the properties cannot be construed to be an approval of any particular sale. It is incumbent on the purchase of a part of the mortgaged properties, who sets up that that portion has been exempted from liability to the mortgage, to show first, that the mortgagee knew of the sale to him of the particular portion, and secondly, that the mortgagee consented to it. (*Baguley and Mackney, JJ.*) U SAN BA *v.* SAW SHWE ZIN. **151 I.C. 627=7 R.R. 95 (2)=A.I.R. 1934 Rang. 372.**

MORTGAGE—Release.

———Release—Release of one item by mortgagee in favour of purchaser—If requires writing—Registration. *See* EVIDENCE ACT, S. 92 (4). **68 M.L.J. 91.**

———*Release—Release of portion of mortgaged property—Right to recover whole amount from remaining property.*

A mortgagee voluntarily releasing from a suit a portion of the mortgaged peoperty is not bound to abate a proportionate part of the debt and is entitled to recover the whole of the mortgage amount from any portion of the mortgaged property; but the owner of the property is a necessary party to the mortgagee's suit according to the provisions of O. 34, R. 1, C. P. Code, and if the mortgagee fails to implead him, he is not entitled to claim a decree for the entire amount on the mortgage unless he proves that his omission to do so has not actually prejudiced the mortgagors. 40 Mad. 968 (F.B.), Appr. (*Macnair, J. C.*) KISAN *v.* ABDUL MAJID KHAN. **27 N.L.R. 4=130 I.C. 809=A.I.R. 1931 Nag. 44.**

Restitution.

———*Restitution —Preliminary decree reversed in appeal—No appeal from final decree.*

Where the preliminary decree has been varied or reversed by the appellate Court it follows that the final decree passed thereon and all the execution proceedings which have taken place in pursuance of the final decree fall through and there is no necessity for filing an appeal from the final decree. The party who is entitled can claim restitution on the reversal of the preliminary decree. 6 A.L.J. 30, Ref. (*Mukerji and Sen, JJ.*) SHADI LAL *v.* JAGDAMBA SAHAI. **I.R. 1931 All. 734 (2)=133 I.C. 622 (2)=1931 A.L.J. 668=A.I.R. 1931 All. 655.**

Revival of.

———*Revival of—Mortgage bond—Simple bond taken subsequently—Suit on bond dismissed on account of interpolations in it—Novation—Whether the earlier bond is revived.*

The plaintiff sued to enforce a bond of December 12, 1919, executed by the defendants. Subsequent to the transaction on December 9, 1922, there was a simple bond executed by the defendants in favour of the plaintiff for the balance then owing after some payment had been made by the defendants. A suit had been brought on the later bond but the same was dismissed on the ground that the plaintiff had made certain interpolations in the bond. Thereupon the plaintiff sued on the original mortgage bond.

Held, that the original mortgage had come to an end by the novation of the latter contract and that the earlier bond could not be revived by the plaintiff's own act invalidating the latter bond. (*Dalal and Bennet, JJ.*) RAJDHAR *v.* MOHAN. **I.R. 1931 All. 401=131 I.C. 593=1931 A.L.J. 223=A.I.R. 1931 All. 325**

Rights of mortgagee.

———*Rights of mortgagee—Costs of mutation proceedings—Costs of recovering possession, if included.*

Where a mortgage deed provides that the mortgagee is entitled to the costs of the mutation proceedings, the costs so payable includes also the costs of obtaining possession by aid of the Court previous to the mutation of names. (*Hasan, C. J. and Kisch, J.*) HASHMAT ALI *v.* COBARDHAN DASS. **I.R. 1932 Oudh 124=136 I.C. 332=8 O.W.N. 1368.**

———*Rights of mortgagee—Dispossession by mortgagee—Acquiescence of mortgagor—Right to claim profits.*

If a mortgagor is dispossessed from a certain plot comprised in a motagage (or is not given possession of the same under the terms of the mortgage) and acquiescences in such dispossession he should not be heard at the time of redemption in support of his claim as to loss of profits if any. (*Raza and Smith, JJ.*) PRANPATI *v.* HASIBAN. **135 I.C. 892=I.R. 1932 Oudh 76=8 O.W.N. 1322=A.I.R. 1932 Oudh 57.**

MORTGAGE—Rights of mortgagee.

———*Rights of mortgagee—Dispossession of mortgagee with possession—Right to interest.*

Where under the deed of mortgage with possession the mortgagee is to enjoy the mortgaged property in lieu of interest for a period of five years and where he is deprived of his possession without payment of the principal he is entitled to interest even subsequent to the period of five years fixed for redemption and the same can be made chargeable on the mortgaged property. 17 Mad. 469 and 46 Cal. 448, Rel. on (*Sundaram Chetty, J.*) GURUSWAMI THEVAN *v.* GANAPATHI CHETTI. **I.R. 1932 Mad. 319=136 I.C. 783=A.I.R. 1932 Mad. 173.**

———*Rights of mortgagee—Execution sale—Purchase by mortgagor of his own property in execution—Right of subsequent mortgagee.*

If in execution of a decree for sale of the mortgaged property the mortgagor purchases the property for himself, it passes into his hands subject to the right of the subsequent mortgagee, it being his duty as owner of the estate to discharge the debt of the subsequent mortgagee for which he had pledged the estate. The same principle would apply even if there had been intermediate purchasers of the property before it came into the hands of the mortgagor. *Otter* v. *Lord Vaux*, 6 D. M. & G. 638 and 29 Mad. 113, Ref to. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAMANATHAN CHETTIAR *v.* AUDINATHA AYYANGAR. **I.R. 1931 Mad. 642=132 I.C. 290=1931 M.W.N. 760=A.I.R. 1931 Mad. 642.**

———Rights of mortgagee—Holder of decree for sale—Arrears of revenue—Sale for—Deposits subsequent to decree—Charge—Priority over subsequent mortgage. *See* PRIORITY, *Infra*. **35 C.W.N. 1040=61 M.L.J. 343 (P.C.)**

———*Rights of mortgagee—Mortgage of certain property and re-mortgage of share in it to same mortgagee—Possession by mortgagee under first mortgage only—On redemption of that mortgage, mortgagee not entitled to retain possession under subsequent mortgage.*

Where a certain property is mortgaged and then a share in the same property is re mortgaged to the same mortgagee and both the mortgages are with the stipulation that on default in paying the mortgage money the mortgagee is to get possession and the mortgagee has on a default obtained possession under the first mortgage only then on redemption of the first mortgage he cannot claim to retain possession under the second for he has obtained no possession under the second mortgage. (*Srivastava and Rachhpal Singh, JJ.*) HARIHAR BARHSH SINGH *v.* LACHHMAN SINGH. **11 O.W.N. 559=A.I.R. 1934 Oudh 246.**

———*Rights of mortgagee—Mortgage by some co-sharers—Mortgaged land allotted to another co-sharer on partition.*

Where some of the co-sharers had mortgaged the property and that property was allotted on partition to another co-sharer who was not guilty of any fraud and was not a party to the mortgage and was not even aware of it he takes his share free of the mortgage and the mortgagee's remedy is against the land which falls to the share of his mortgagor on partition. 1 I. A. 106; 20 Cal. 533 and 23 Bom. 385, Foll. (*Baker and Divatia, JJ.*) UMAR HUSSAIN *v.* SAKHARAM. **149 I.C. 229=6 R.B. 338=35 Bom. L.R. 1154.**

MORTGAGE—Rights of mortgagee.

———*Rights of mortgagee — Mortgage—Undivided share in joint property—Subsequent partition.*

Where the undivided share in joint property is the subject of a mortgage the mortgagee should after partition pursue his remedy against the share allotted in severalty to the mortgagor. (*Tek Chand and Coldstream, JJ.*) MOHAN LAL *v.* WADHWA SINGH. **149 I.C. 1195=6 R.L. 816=35 P.L.R. 452=A.I.R. 1934 Lah. 660.**

———*Rights of mortgagee—Mortgagee in possession—Insolvency of mortgagor—Mortgagee's right of private sale.*

Where under a floating charge which conferred no right on the mortgagee to possession, the mortgagee was nevertheless permitted by the mortgagor to be in possession, the mortgagee has the right, on the insolvency of the mortgagor, to sell the property without the intervention of Court. (1902) 1 Ch. 579, Ref. (*Kania, J.*) AHMED ALI MAHOMED KHOJA, *In re.* **142 I.C. 56=I.R. 1933 Bom. 172=34 Bom. L.R. 1398=A.I.R. 1932 Bom. 613.**

———*Rights of mortgagee—Mortgagee with powers of sale.*

A mortgagee with a power of sale is, strictly speaking, not a trustee of the power of sale. If he exercises it *bona fide* for realising his mortgage debt, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is low as in itself to be evidence of fraud. (*Ramesam and Cornish, JJ.*) PICHAI MOIDEEN ROTHER *v.* CHATHURBUJA DAS KUSHAL DAS & SONS. **6 I.R. (Mad.) 196=145 I.C. 1023=38 L.W. 507=A.I.R. 1933 Mad. 736=1933 M.W.N. 1033=65 M.L.J. 491.**

———*Rights of mortgagee—Mortgagor giving undertaking to third party subsequent to mortgage—Mortgagee, if bound.*

A mortgagee cannot be bound by any undertaking given by the mortgagor in respect of the mortgaged property to a third party subsequent to the date of the mortgage. (*Agha Haidar, J.*) CHIMAN LAL *v.* PALI RAM. **155 I.C. 394=7 R.L. 705=36 P.L.R. 117=A.I.R. 1934 Lah. 863.**

———*Rights of mortgagee—Partial consideration—Enforceability.*

When a mortgagee has advanced a part but not the whole of the amount stipulated for in the mortgage bond he is entitled to enforce the mortgage for the amount actually advanced by him. (*Doraswamy Iyer, C. J. and Ramachandra Rao, J.*) PUTTU RAO *v.* RUKMAIAH. **11 Mys. L.J. 105.**

———Rights of mortgagee—Rateable apportionment—Doctrine of. Applicability to India—Nature of right. *See* T. P. ACT, S. 81. **34 L.W. 772=61 M.L.J. 512.**

———*Rights of mortgagee—Sale by mortgagor with his knowledge—Payment in part.*

The rights of a mortgagee to enforce his lien cannot be defeated by mortgagor selling some of the mortgaged property and paying him off in part out of the sale proceeds. The mortgagee is not estopped from enforcing his lien even if he has knowledge of the sale so long as he is otherwise entitled to do so. (*Hilton and Rangi Lal, JJ.*) RAMAN MAL *v.* NATHU MAL. **153 I.C. 1010=7 R.L. 496=37 P.L.R. 471=A.I.R. 1934 Lah. 895.**

———*Rights of mortgagee—Sir land—Subsequent occupancy rights*

A mortgagee who is entitled to a decree against the mortgagor's rights in the *sir* land is entitled to claim a decree against what is left of them—the occupancy rights, though the other part—proprietary right, already passed to the mortgagee or some other person. 8 N. L. R. 123, Foll. (*Jackson, J. C.*) CHHITIABAI *v.* HAR SAHAI LAL. **I.R. 1932 Nag. 75=133 I.C. 184=15 N.L.J. 8=A.I.R. 1933 Nag. 81.**

MORTGAGE—Rights of mortgagor.

———*Rights of mortgagee — Subsequent mortgage executed to redeem earlier one—Right of subsequent mortgagee.*

A who had a mortgage in his favour executed by *B* and *C* was badly in need of money and induced *D* to advance loan to *B* and *C* on a mortgage, so that his own mortgage may be redeemed. Accordingly a mortgage was executed by *B* and *C* to *D* and the money was received by *A* who executed an agreement to *D*, that he was responsible for the receipt of the mortgage amount and that in case of default of *B* and *C* to pay the amount, he would be liable to pay it and take assignment of the mortgage from *D*.

Held, that *D* did not possess dual remedy of recovering the mortgage debt from *A* as also of recovering it from mortgagors *B* and *C* by sale of the mortgaged property and that he could not enforce both remedies at the same time. (*Mya Bu and Baguley, JJ.*) A.T.N.A. T. CHETTYAR FIRM *v.* M.A.R. CHETTYAR FIRM. **A.I.R. 1933 Rang. 389.**

Rights of mortgagor.

———*Rights of mortgagor—Damage to property by mortgagee in possession.*

If damage is done to the property by the mortgagee in possession, the proper remedy for the mortgagor is indicated by S. 76 of the T. P. Act, *viz.*, that when accounts are taken in pursuance of a mortgage decree either for redemption or for recovery of the mortgage money, the loss, if any, may be debited against the mortgagee, if he is liable for the waste, unless at the time of delivery of possession, the waste is repaired and the land is restored to its proper condition. Whether or not in any particular case of damage, a separate suit is maintainable at the instance of the mortgagor, where the grievance of the mortgagor is only that the mortgagee dug some pits in the land and allowed the land to remain fallow and uncultivated, the act cannot be considered either destructive or permanently injurious to the property and a suit for damages by the mortgagor is not maintainable. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) SHAMABHATTA *v.* VENKATASUBBIAH. **9 Mys. L.J. 453.**

———*Rights of mortgagor—Mortgagee undertaking to pay off mortgagor's creditors—Default—Debt—Remedy of mortgagor.*

Where the mortgagee has accepted liability to pay off the mortgagor's creditors as a part of the consideration for the mortgage, if he discharges his liability, he would be performing his own part of the agreement. If, on the other hand, he fails to do so, he would be committing a breach of his agreement with the mortgagor. This would give rise to a right in favour of the mortgagor to claim damages; he is not entitled to recover the sum as a debt and it cannot be treated as an actionable claim. Case-law referred. (*Niyogi, A.J.C.*) MOHANLAL LAD *v.* MOTILAL MARWADI. **31 N.L.R. 235=157 I.C. 587=8 R.N. 62=A.I.R. 1935 Nag. 135.**

———*Rights of mortgagor—Revenue due on the property—Enhancement of—Liability of mortgagee.*

In the absence of a contract to the contrary, it is the mortgagee who is liable to pay any enhanced assessment of the Government revenue. Though in a case where

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the liability of the mortgagee was fixed at a specified sum, the excess, if any will have to be borne by the mortgagor, yet if the bond specified that "the mortgagee would pay at the rate of Rs. 6 being the proportionate Government revenue," the figure only represents the then revenue and the mortgagee is liable for any subsequent enhancement as well. 46 A. 269 (P.C.) and A. I.R. 1926 Mad 405, Ref. (*Curgenven, J.*) CHATHU NAMBIAR *v.* KUNHIRAMAN NAMBIAR. **136 I.C. 337 (2)=I.R. 1932 Mad. 289 (2)=34 L.W. 804.**

———*Rights of mortgagor—Simple mortgagee in possession as trespasser—Ejectment—Mortgagor's right—Offer to redeem—If a condition.*

Where a simple mortgagee enters into possession of the mortgaged property, not in virtue of his mortgage, but purely as a trespasser, the mortgagor has a right to sue to eject him without offering to redeem him and to recover possession. (*Macpherson and Varma, JJ.*) MUNI LAL SETH *v.* MAHABIR RAM HALWAI. **156 I.C. 341=7 R.P. 716=A.I.R. 1935 Pat. 174.**

———*Rights of mortgagor—Suit to recover unpaid portion of loan—Maintainability—Proper remedy.*

An unpaid portion of a loan due by the mortgagee to the mortgagor does not constitute a debt from the lender to the borrower which can be sued upon. It is only a contract to lend money which cannot be specifically enforced. The only remedy open to the mortgagor is by a suit claiming damages on account of the failure of the promisor to perform his part of the contract. Under a hypothecation bond for Rs. 3,500 a sum of Rs. 855 was agreed to be left with the mortgagee on condition that the mortgagee would pay to mortgagor 1 the amount within a month with interest at the same rate as stipulated in the hypothecation bond. Mortgagor 1 assigned this sum of Rs. 855 to the plaintiff, who sued the mortgagee for recovery of the amount on the footing of debt due by the mortgagee to the mortgagor,

Held, that the suit as such did not lie. (*Beasley,C.J.*) SOMA PURSA *v.* NARAYANA BHATTA. **43 L.W. 60=159 I.C. 1034=A.I.R. 1935 Mad. 1045=69 M.L.J. 760.**

———*Rights of mortgagor—Undertaking to discharge prior debt—Enforcement.*

Where the mortgagee fails to perform his undertaking to discharge a debt due from the mortgagor, the remedy of the latter is to institute a suit for compensation against the defaulting mortgagee and not by specific performance of the agreement. Specific performance cannot be compelled where compensation is the adequate remedy. (*Sen and Niamatullah, JJ.*) NARAIN PERSHAD *v.* NARAIN SINGH. **52 All. 1037=I.R. 1931 All. 407=131 I.C. 599=1930 A.L.J. 1577=A.I.R. 1931 All. 40.**

Rights of purchasers.

See T. P. ACT, SS. 83 AND 92.

———Rights of purchaser—Decree on mortgage—Purchase by mortgagee—Prior suit for partition between mortgagor and appointment of Receiver—Restoration of possession after disposal of partition suit—Right of mortgagee purchaser as against mortgagors. *See* EXECUTION—MORTGAGE DECREE—SALE. **68 M. L.J. 620.**

———*Rights of purchaser—Decree for sale—Mortgagee-auction purchaser—Later purchaser in execution of another mortgage decree—Rights of parties.*

A mortgagee who is an auction purchaser in execution of his mortgage decree in a suit for sale on a mortgage, to which the purchaser defendant, who purchased a portion of the mortged property after the execution of the mortgage aud prior to the purchase by the plaintiff

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in execution, was not joined as a party, is entitled to institute a subsequent suit for sale against the later purchaser and the mortgagor, whether or not the mortgagee had, at the time of the previous suit, notice of the interest of the later purchaser who had not been joined as a party. 47 M. 551 and 97 I.C. 243, Foll. (*Shadi Lal, C. J. and Walker, J.*) BADARUDDIN QURESHI *v.* KARIM BAKHSH. **32 P.L.R. 384=135 I.C. 732=I.R. 1932 Lah. 72 (2)=A.I.R. 1931 Lah. 438.**

———*Rights of purchaser—Mortgage deed allowing mortgagor to sell—Omission by mortgagor to pay sale proceeds to mortgagee.*

A mortgagor who is at liberty to sell any part of the mortgaged property subject to the condition that he should pay the entire sale proceeds to the mortgagee, conveys a good title to the purchaser free from the mortgage and it is for the mortgagor to pay the proceeds of sale to the mortgage, and where he fails to do so the purchaser could not be held responsible for it. (*Hilton and Rangi Lal, JJ.*) RAMAN MAL *v.* NATHU MAL. **153 I.C 1010=7 R.L. 496=37 P.L.R. 471=A.I.R. 1934 Lah. 895.**

———*Rights of purchaser—Sale in execution—Purchaser in execution—Suit against another purchaser in execution of subsequent mortgage—Proper remedy.*

If a purchaser in execution of a prior mortgagee's decree is not in possession and is suing as plaintiff against the purchaser in execution of a subsequent mortgagee's decree, he can enforce his remedy if limitation on the prior mortgage has not yet run out; but he cannot recover the mortgage money if limitation has run out. His remedy is only to be reimbursed under S. 62, Contract Act, in which case limitation runs from date of payment, and not a charge capable of being enforced within twelve years. (*Sulaiman, C.J. and Collister, J.*) BANSIDHAR *v.* SHIV SINGH. **56 All. 134=147 I.C. 575 (2)=6 R.A. 500=1933 A.L.J. 1564=A.I.R. 1933 All. 908.**

Shield, Doctrine of.

See T. P. ACT, SS. 92 AND 101, AND PRIOR AND SUBSEQUENT, *supra*.

Simple.

See T. P. ACT, SS. 58 (*b*), 67, 68 (*a*).

Splitting of.

See T. P. ACT, S. 60 AND MORTGAGE SUIT, *infra*.

Subject matter.

See also MOVABLES, *Infra*.

———*Subject matter—Future crops—Validity as against third parties.*

A mortgage of future crops is not valid as against third parties. 13 C. 262, Dis. (*Das, J.*) MUTHU KUMARA PILLAY *v.* VEERAPPA. **I.R. 1931 Rang. 141=131 I.C. 509=A.I.R. 1931 Rang. 160.**

———*Subject-matter—Future property.*

A hypothecation of all the stock that may be brought at any time subsequently upon the business premises is a valid transaction and is in the nature of an agreement to mortgage movable property. It creates a lien which can be enforced as and when the property comes into existence, though the equitable title would not avail against a subsequent transferee without notice of that title. *Holroyd* v. *Marshal*, 10 H. L. 191; *Collyer* v. *Isaacs*, 19 C. D. 342; *Joseph* v. *Lyons*, 15 Q. B. 280; *Hallas* v. *Robinson*, 15 Q. B. 288; 2 B. L. R. A. C. 230; 10 A. 133; 16 M 429; 31 C. 667; 75 I. C. 816; 89 I. C. 410, Ref. (*Mukerji and Guha, JJ.*) CO-OPERATIVE HINDUSTHAN BANK, LTD. *v.* SURENDRA NATH DE. **59 Cal. 667=I.R. 1932 Cal. 528=138 I.C. 252=36 C.W.N. 263=A.I.R. 1932 Cal. 524.**

Sub-mortgage.

See also (1) C. P. CODE, O. 34, R. 1 AND T. P. ACT, S. 58 (*f*).

———*Sub-mortgage—Distinction between sub-mortgagee and puisne mortgagee.*

With reference to the effect of non-joinder in a redemption suit on the rights of subsequent mortgagees, there is a distinction between the position of a puisne mortgagee and sub-mortgagee. A puisne mortgagee obtains an interest in the property originally mortgaged; and every puisne mortgagee in his turn has a right to have his claim satisfied out of the property originally mortgaged until it is exhausted. A sub-mortgagee has no direct interest in the property originally mortgaged by his mortgagor's mortgagor. He has only an interest in the mortgage right obtained by his mortgagor a right which he knows is terminable, and when that right has been legally terminated, his security so far is gone. A mortgagor cannot be allowed by redeeming some of his mortgagees to defeat others, but when a mortgagor wishes to exercise his legal right to redeem a mortgage created by him, he cannot be obstructed or delayed by the existence of a sub-mortgage of which he has never had knowledge or notice. (*Reilly and Anantakrishna Ayyar, JJ.*) VISWANATHA AYYAR *v.* CHIMMIKUTTI AMMA. **55 Mad 320=135 I.C. 535 =I.R. 1932 Mad. 119=1931 M.W.N. 1141=34 L.W. 635=A.I.R. 1932 Mad. 115=62 M.L.J. 272.**

———*Sub mortgage—Payment of mortgage amount without notice of sub-mortgage—Rights of sub-mortgagee.*

If a mortgagor, without notice of any sub-mortgagee pays off his mortgagee out of Court, the sub mortgagee cannot, after that redemption, bring the right mortgaged to him to sale. 18 M. L. J. 462; (1917) M. W. N. 111; 29 Bom. 199; 5 Rang 749, Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) VISWANATHA AYYAR *v.* CHIMMIKUTTI AMMA. **1931 M.W.N. 1141=34L. W. 635=55 Mad. 320=135 I.C. 535=I.R. 1932 Mad. 119=A.I.R. 1932 Mad. 115=62 M L.J. 272.**

———*Sub mortgage—Representation by mortgagee—Suit by third party against mortgagor and mortgagee—Sub mortgagee whether bound.*

The mortgagor obtained a sale from the guardian of a minor in 1902. In 1908 the vendee usufructuarily mortgaged the property to another and the latter sub-mortgaged the same to the first defendant. Upon the sub mortgage, a suit was filed impleading the mortgagor and mortgagee a decree was passed and the decree-holder purchased the property in execution. Meanwhile the minor on attaining majority had sued to set aside the alienation impleading the mortgagor and the mortgagee but not the sub mortgagee. He obtained a decree in 1917 and subsequently conveyed the property to the plaintiff who now sued for a declaration of his right to possession and for an injunction.

Held, that the sub-mortgagee was not bound by the adjudication in the ex-minor's suit since he was no party to it but the plaintiff was entitled to succeed subject to the sub mortgagee's rights. Doctrine of representation of sub-mortgagee by mortgagee discussed. (*Curgenven J.*) GOVINDAN ASARI *v.* NAGAYAN CHETTIAR. **I.R. 1932 Mad. 556=138 I.C. 329=1932 M.W.N. 160= 35 L.W. 429=A.I R. 1932 Mad. 238.**

———*Sub-mortgage—Suit for foreclosure of original mortgage—Proceedings defective under Regulation XVII of 1806—Effect of—Amendment changing cause of action—Permissibility.*

Where a sub-mortgagee brought a suit for foreclosure of the original mortgage but no notice of demand was given by the plaintiffs prior to the notice under Regulation XVII of 1806 and the notice issued by the Court did not mention the exact sum due.

Held, that as the foreclosure proceedings under the Regulation were defective, the plaintiffs did not acquire the rights of the original mortgagee and that the suit failed.

Held, further, that the plaintiffs could not be allowed on appeal to amend the plaint so as to sue ont he sub-mortgage because, apart from delay, the cause of action would be different. (*Addison and Bhide, JJ.*) MAHESHA MAL *v.* NATHA MAL. **14 Lah. 640=I.R. 1933 Lah. 463=144 I.C. 390=34 P.L.R. 767=A.I. R. 1933 Lah. 676.**

Subrogation.

See also T. P. ACT, SS. 74, 91, 92 AND 101.

———*Subrogation—Auction purchaser discharging prior mortgage—Right of—Interest.*

An auction-purchaser who discharges a prior encumbrance existing on the property in the ordinary course is entitled to claim subrogation with respect to the amount paid by him together with interest. A.I.R. 1920 Mad. 389, Rel. on. (*Madhavan Nair and Jackson, JJ.*) RAMAMURTHI *v.* RANGAYYA. **6 R.M. 534=148 I.C. 735=1934 M.W.N. 218=39 L.W. 729=A.I.R. 1934 Mad. 268.**

———*Subrogation—Co mortgagor—Payment of prior mortgage debt.*

Where there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor. Where it is manifestly for his benefit it may be presumed that it was his intention to keep the prior mortgage alive. And S. 95 of the T. P. Act does not apply to such a case. (*Macnair, J. C. and Pollock, A. J. C.*) RAMKARAN HIRALAL *v.* JAGESHWAR BHUT. **30 N.L.R. 1=157 I.C. 466=A.I.R. 1934 Nag 97.**

———*Subrogation—Conventional subrogation — Doctrine of.*

A right to conventional subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt, which in the event of default by the debtor, he would be bound to pay or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made with the debtor or creditor, that he would be subrogated to the rights and remedies of the creditor. The doctrine is not applicable to a mere stranger or volunteer who has no agreement for subrogation or interest to protect. (*Sundaram Chetty, J.*) PICHAIYAPPA CHETTY *v.* GOVINDARAJULU MUDALY. **130 I C. 506=1930 M.W.N. 1190=33 L.W. 78=A.I.R. 1931 Mad. 110.**

———*Subrogation—Decree creating charge—Payment of charge by subsequent encumbrancer—Knowledge of charge if material.*

A decree of 1914 obtained in a previous suit provided a charge on the mortgaged properties for Rs. 30,000, and interest thereon in favour of defendants therein enforceable by execution. The 1st respondent took a mortgage in 1915 of the said properties for Rs. 8,000. the deed reciting that there were no prior encumbrances thereon. The appellant took a subsequent mortgage of the same properties, out of the proceeds of which the decree of 1914 was paid off in full. The 1st respondent brought the present suit on her mortgage in 1927 impleading the appellant as a subsequent mortgagee. The appellant claimed priority on the ground of having paid off the previous charge, over the respondent's mortgage which was resisted on the ground of want of notice of the charge.

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Held, (1) that there could be subrogation in respect of a charge. No question of notice could arise, as the respondent's rights came into being pending the previous suit, which for purposes of *lis pendens* continued till the complete satisfaction of the decree, (2) that the claim of the subrogee was not barred though the decree of 1914 might become barred. The amount due under the decree having been paid off, no question of executing the decree could arise. That being so, a suit was his only remedy; (3) that the representation in the mortgage bond as to the absence of previous encumbrances on the property did not estop the appellant from claiming his rights as a subrogee because he claimed the right of subrogation as a legal right which the mortgagor could not have claimed. It is the discharge of the prior encumbrance that entitled him to put forward his claim of subrogation, and this being quite an independent right, there is no substantial foundation for urging the plea of estoppel. (*Madhavan Nair and Jackson, JJ.*) ARAVAMUDHU AYYANGAR *v.* ABIRAMAVALLI AYAH. **150 I.C. 930=7 R.M. 45=39 L.W. 732=1934 M.W.N. 180=A.I.R. 1934 Mad. 353=66 M.L.J. 566.**

———*Subrogation—Essentials—Pleading and proof.*

Where a purchaser under a void sale has, after the sale discharged a previous encumbrance on the property, his *bona fide* belief in the vendor's title and good faith have been considered sufficient to afford relief by applying the doctrine of subrogation. But in such a case, those facts must be distinctly alleged in the pleadings and proved. They are not matters for legal presumption but have to be made out in the particular case. (*Sundaram Chetty, J.*) PICHAIYAPPA CHETTY *v.* GOVINDARAJULU MUDALY. **130 I C. 506=1930 M.W N.1190 =33 L W. 78=A.I.R. 1931 Mad. 110.**

———*Subrogation—Equitable right—Application of rule—Money utilised for discharge of mortgage—Rights of parties.*

V's mortgage contained an undertaking for the discharge of a still prior mortgage for Rs. 500 held by one *M. V* made default in the discharge of that mortgage debt and thereupon the mortgagors executed another mortgage in favour of one *A* for Rs. 700. A portion of the consideration for this mortgage, *viz.*, a sum of Rs. 560 was paid by *A* in discharge of the mortgage debt due to *M*. Subsequently the same property was mortgaged to *K*. A sum of Rs. 700 out of this consideration was paid in discharge of the mortgage to *A*. *K* paid the sum of Rs. 700 towards *A's* mortgage debt as requested by the mortgagors and in pursuance of the agreement for the mortgage entered into between him and the debtors.

Held, that *K* was not a mere volunteer who intermeddled with the estate of another and in whose favour no equitable considerations did arise and therefore *K* had a preferential claim for the amount paid by him which went towards the discharge of *M's* mortgage. It was immaterial that *K* had made payment prior to his mortgage. 36 Mad. 426 and A.I.R. 1929 Mad. 860, Rel on. (*Sundaram Chetty and Pakenham Walsh, JJ.*) VENKATACHARI *v.* KARUPPAN CHETTY. **150 I.C. 1126=7 R M. 64=1934 M.W.N 152=39 L.W. 392 =A.I.R. 1934 Mad. 256=67 M.L.J. 91.**

———*Subrogation—Equitable rule.*

The principle contained in S. 101 of the T.P. Act can be applied to the Punjab as a rule of justice and equity. (*Addison and Bhide, JJ.*) GOPAL SINGH *v.* LADHA MAL. **I.R. 1931 Lah. 241=130 I.C. 49=A.I.R. 1930 Lah. 1063.**

———*Subrogation—Person paying prior mortgage not same as subsequent mortgagee—Keeping alive.*

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Where the person paying off the prior mortgage and the persons who made the subsequent mortgage are not the same, no question of intention to keep debt alive arises. (*Hilton, J.*) JAGANNATH *v.* ABDULLAH. **15 Lah. 746=150 I.C. 366=6 R L. 856 (2)=36 P.L.R. 140=A.I.R. 1934 Lah. 248.**

———*Subrogation—Purchaser of equity of redemption —Discharge of prior encumbrance.*

Where there are several mortgages on a property the owner of the property subject to mortgages may, if he pays off an earlier mortgage treat himself as buying it and stand in the same position as his vendor. (*Ross and Scroope JJ.*) RAMGHULAM SINGH *v.* JANKI NATH. **14 Pat.L.T. 371.**

———*Subrogation—Rationale of doctrine—Mortgagee paying up his own earlier mortgage.*

The doctrine of subrogation is an equitable doctrine founded on principles of natural justice, by no means confined to S. 92 of the T. P. Act. When a particular liability or a burden which a person is liable to satisfy or discharge is satisfied out of the money belonging to another person, it would be contrary to equity and good conscience to hold that such last named person is not entitled to the benefit of the equities existing in favour of the person whose debt has been so discharged. The section does not cover the case where both the persons are the same but the doctrine is wide enough to govern such a case. (*Raza and Bisheshwar Nath, JJ.*) KANHAIYA LAL *v.* GULAB SINGH. **7 Luck 655=I. R. 1932 Oudh 304=138 I.C. 206=9 O.W.N. 387=A. I.R. 1933 Oudh 9.**

———Subrogation—Subsequent mortgagee holding prior mortgage—Keeping alive—Intention—Presumption—Onus. *See* T.P. ACT, S. 91. **153 I.C. 870=A. I.R. 1935 Lah. 203.**

———*Subrogation—Subsequent mortgagee paying off prior mortgage debt—Absence of knowledge of intermediate mortgage—First mortgage whether can be raised as a shield—Presumption applicable.*

Where in pursuance of an agreement between the mortgagor and a subsequent mortgagee the latter paid a certain amount towards the discharge of a prior mortgage debt and it appeared that at the time when the payment was made the mortgagee was not aware of the existence of an intermediate mortgage in favour of another person,

Held, that the subsequent mortgagee who made the payment was entitled to the right of subrogation in respect of the amount he had paid. In such cases the presumption is that when the subsequent mortgagee paid off the prior mortgage he intended to keep that mortgage as a shield against the subsequent mortgagee and the knowledge of the existence of the second mortgage is not a material consideration in pleading the presumption. 10 Cal. 1035 (P.C.); 8 Mad. 246 and 55 M.L.J. 369, Rel. (*Madhavan Nair and Jackson, JJ.*) KRISHNAMURTHI CHETTIAR *v.* SATHAPPA CHETTIAR. **56 Mad. 517=I.R. 1933 Mad. 332=143 I C. 780=1933 M W N. 235=37 L.W. 501=A.I.R. 1933 Mad. 398=64 M.L.J. 523.**

———*Subrogation—Subsequent mortgagee paying off prior mortgage—Priority over intermediate mortgage.*

When a subsequent mortgagee pays off prior mortgages out of the consideration for the mortgage, the question whether he is entitled to priority over an intermediate mortgage which is not disclosed to him at the time of his mortgage is primarily one of intention. The fact that the subsequent mortgagee took back the mortgage deeds from the prior mortgagees when he redeemed the mortgages and retained them with himself, clearly

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shows an intention that he intended to keep the mortgages paid off by him alive for his benefit. 29 Cal. 154 (P.C.), Rel. on. (*Jai Lal, J.*) ABDUL MAJID *v.* BHAGWANT KISHORE. **154 I.C. 706=7 R. L. 602 (2) =A.I.R. 1934 Lah. 806.**

———*Subrogation—Two houses of two different persons mortgaged by one deed—One mortgagor paying full mortgage—Right of.*

Where two houses belonging to two different persons are mortgaged to one person by one deed the mortgage debt being single, the mortgagors are co-debtors. If one of them has paid the full mortgage amount, he is subrogated to the rights of the mortgagee in respect of their mortgage. (*Hilton, J.*) JAGANNATH *v.* ABDULLAH. **15 Lah. 746=150 I.C. 366=6 R.L. 856 (3)=36 P.L. R. 140=A.I.R. 1934 Lah. 248.**

———*Subrogation—Two houses of two different persons mortgaged jointly—Subsequent mortgage of one house by one of them—Decree on both—Payment co-mortgagor of prior mortgage—Rights of.*

The payment of the amount under a mortgage decree by a co-mortgagor into Court and acceptance of that sum by the mortgagee results in the decree being spent and becoming discharged and satisfied. The person who makes the payment does not obtain the status of a decree-holder, but is subrogated to the original rights of the decree-holder as mortgagee. The redeeming co mortgagor does not lose the priority of his mortgage in consequence of the decree on the subsequent mortgage by the other co-mortgagor having been made before the decree on the prior mortgage. 27 All. 325 (P.C.) and A.I.R. 1927 Mad. 631, Rel. on; A.I.R. 1925 Mad. 80, Not foll. (*Hilton, J.*) JAGANNATH *v.* ABDULLAH. **15 Lah 746=150 I.C. 366=6 R.L. 856 (2)=36 P.L. R. 140=A.I R. 1934 Lah. 248.**

———*Subrogation—Volunteer—Purchaser from one without title.*

A mortgaged his property first to *M* and then to *N*. He then sold the property to *N*. After his death his wife sold the same property to *P*, who discharged the mortgage of *M* and claimed to be subrogated to the rights of a prior mortgagee as against *N*. The widow was found to have no interest in the equity of redemption and that the sale to *P* was void. *P* is under the circumstances a mere volunteer or stranger, not entitled to any rights of subrogation. (*Sundaram Chetty, JJ.*) PICHAIYAPPA CHETTY *v.* GOVINDARAJULU MUDALY. **130 I.C. 506=1930 M.W.N. 1190=33 L.W. 78=A.I.R. 1931 Mad. 110.**

Substituted security.

———*Substituted security—Applicability and scope of doctrine—Mortgage of specific property by Hindu co-parcener—No reference that mortgagor is undivided coparcener or that mortgage is only of share—Partition—Allotment of different property —Mortgagee's right against* bona fide *purchaser.*

Where a member of a joint Hindu family purports to mortgage property *A* as his own and subsequently gets property *B* at a partition, a transferee of property *B* from him cannot ordinarily discover that property *B* is subject to any encumbrance. On the other hand, if the original mortgage were to compromise the whole of his undivided share in the joint family property, a search of the registration records will certainly put the subsequent transferee on notice of the prior mortgage. These considerations ought not to be ignored in applying and extending the doctrine of substituted security. Further under the Hindu Law the rights of an undivided member to alienate a specific item of property are by no means absolute. And even in Madras where larger

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powers of alienation are recognized, a distinction is drawn between cases where a member purports to alienate his undivided share generally and cases where he purports to alienate a specific item of property. In the latter case he really deals with property to which he has no title at the time, and it is only as a kind of equity that Courts allow the alienee to claim that at a partition between the alienor and his coparceners the particular item alienated might, if possible, be allotted to the alienor's share. If for any reason the allotment is not so made the transfer will become inoperative and the transferee can only claim compensation against the alienor. But when no reference is at all made to the fact that the mortgagor is only a sharer, and the property is mortgaged as if he was absolute owner thereof, there is even less justification for the application of the doctrine of substituted sscurity, and there are obvious difficulties in extending the doctrine. (*Varadachariar, J.*) RAMANNA CHETTIAR *v.* MANICKAM CHETTIAR. **158 I.C. 1025=8 R.M. 402=1935 M.W.N. 788=42 L.W. 750=A.I.R. 1935 Mad. 1011.**

———*Substituted security—Mortgage of undivided share—Partition among co-sharers—Different share allotted to mortgagor—Right of mortgagee.*

A mortgagee of an undivided share which under a partition has been allotted to another co-sharer, cannot in the absence of fraud be enforced by the mortgagee against the share originally mortgaged, the mortgagee's sole remedy being to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. In such a case the pledge assumes a new form and the security is shifted, as a result of the partition, from the undivided share of the mortgagor on to the property which has fallen to his share. If the property as allotted to the mortgagor is subsequently transferred by him to third parties, that transfer will make no difference as far as mortgagee's rights are concerned, for such transfer will only operate as far as right, title and interest of mortgagor, and the transferee does not and cannot acquire higher rights than those of the mortgagor. (*Tek Chand and Monroe, JJ.*) AMAR SINGH *v.* BHAGWAN DAS. **14 Lah. 749=35 P.L.R. 550=149 I.C. 104=6 R.L. 652 (2)=A.I.R. 1933 Lah. 771.**

———*Substituted security—Mortgage of undivided share—Subsequent partition—Right of mortgagee.*

Where one of joint owners mortgages a part of the joint undivided property the mortgagee is entitled to recover the debt from the whole of the property which may eventually fall to the mortgagor on partition. 2 P.R. 1906, Rel. on. (*Monroe and Rangi Lal, JJ.*) BHAWANI SINGH *v.* NATHU RAM. **160 I.C. 734=8 R.L. 578=A.I.R. 1935 Lah. 936.**

———*Substituted security—Sale proceeds of property —Mortgage decree-holder's right to future interest—Execution against judgment-debtor receiving surplus sale-proceeds.*

The decree-holder filed an application for execution of the final decree calculating interest which had been entered in the decree up to the date of the decree but omitted from his application the interest which had accrued subsequently. As the mortgaged property was ancestral the execution was transferred to the Collector under Sch. III, C. P. Code. He sold the property and after forwarding a portion of the sale-proceeds to the Civil Court for payment of the decree, he paid the balance to the other creditors and the judgment-debtor. The decree-holder having applied to recover future interest,

Held, that the mortgagee had a charge on the substituted security in the form of sale-proceeds and that he

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could apply for execution against the judgment-debtor who had taken a portion of the sale proceeds. (*Sulaiman, A.C.J. and Smith, J.*) A. E. JONES *v.* RAM CHARAN. **I.R. 1931 All. 663=133 I.C. 423=1931 A.L.J. 1064=A.I.R. 1931 All. 700.**

———*Substituted security—Suit on promissory note—Injunction restraining promisor recovering mortgage-debt—Promisor assigning debt—Assignee recovering debt—Right of promisee decree holder against assignee.*

The promisee sued on a promissory note and obtained an order of injunction restraining the defendant promisor from recovering a certain amount secured by mortgage in his favour. The defendant however sold his mortgagee rights to a third person who instituted a suit and obtained a preliminary decree. The promisee thereupon sued the assignee and the mortgagors to obtain a declaration that the transfer was not binding on him but the suit was dismissed and he thereupon preferred an appeal. During that time that decree was assigned by the transferee to another person who obtained a final decree and thereupon transferee of the mortgagor's rights deposited the decree amount in Court. Later on the promisee succeeded in the appeal and enforced the decree against the mortgagee rights of the original promisor. The purchaser in execution sued to recover the amount from the final transferee of the mortgagee's rights who by that time, had withdrawn the money deposited in Court.

Held, that there was no privity of contract between the plaintiff and defendant that the plaintiff who had impugned the assignment of the mortgage could not sue to recover the amount deposited in furtherance of the transfer and that the claim was therefore misconceived. (*Mukerji and Bennet, JJ.*) BINDA PRASAD *v.* RAJA RAM. **I.R. 1931 All. 543=132 I.C. 575=1931 A.L.J. 614=A.I.R. 1932 All. 43.**

———*Substituted security—Surplus sale proceeds after satisfaction of prior mortgage—Right of usufructuary mortgagee to.*

It cannot be denied that the usufructuary mortgagee has an encumbrance on the mortgaged property and if such mortgaged property is converted into cash, the encumbrance is transferred from the property originally mortgaged to the one substituted therefor. The usufructuary mortgagee is certainly entitled to the possession of the substituted security in the same manner as he had a right to the possession of the property originally mortgaged. Accordingly where the defendant who is a third mortgagee attaches the surplus proceeds of sale of the mortgaged property after satisfying the first simple mortgage and recovers it, the plaintiff who is the first simple mortgagee and who has taken a second usufructuary mortgage is entitled to recover the same from the defendant. No question in regard to the usufructuary mortgagee's right to have the mortgaged property sold arises is a case like this. (*Niamatullah, J.*) GANGA SAHAI v. MST. JANKI. **154 I.C. 1002=7 R.A. 846=1935 A.W.R. 430=A.I.R. 1935 All. 497.**

Substitution.

See also T. P. ACT, S. 73.

———*Substitution—Theory, if can be extended to auction-purchaser in execution of money decree*

There is no justification for extending the theory of substitution, which has been enunciated in respect to persons standing in the relation of promisor and promisee, to stranger, such as auction-purchasers in execution of money decrees, who are not entitled to any property other than that which they purchased in Court sale. (*Baker and Wadia, JJ.*) CHIDAMBARGAUDA *v.* CHANNAPPA. **36 Bom.L.R. 694=153 I.C. 637=7 R. B. 251=A.I.R. 1934 Bom. 329.**

MORTGAGE—Successive Mortgage.

Successive mortgages.

See also PRIOR AND SUBSEQUENT, *supra.*

———*Successive mortgages—Payment of first mortgagee by third—Effect on rights of intermediate mortgagee.*

If a third mortgagee is subrogated to the rights of a first mortgagee, he stands in the shoes of the first and his rights are identical with those of the already possessed by the first, although in certain situations modifications in that principle will prevail. But there is no conceivable principle of law by which the rights of an intermediate mortgagee can be adversely affected by anything done without his knowledge by the mortgagor and the first and third mortgagees. The third mortgagee will not be entitled to interest as against the intermediate mortgagee in whose favour a decree has been passed on any amount which he (the 3rd mortgagee) pays off in order to redeem the first mortgagee, if he consents to have the property sold free of the first mortgage to which he has been subrogated. (*Curgenven and King, JJ.*) VENKATESA AIYANGAR *v.* MANIKKAVACHAKAM CHETTY. **41 L.W. 565=1935 M.W.N. 306=A.I.R. 1935 Mad. 660=68 M.L.J. 738.**

———*Successive mortgages—Priority.*

A mortgage bond that is duly registered confers, unless displaced, a valid security in priority to all of later date and therefore the onus lies on the person who claims under a bond of later date to displace the priority. (*Lord Russell of Killowen.*) CATHIRESAN CHETTIAR *v.* NATCHIAPPA CHETTIAR. **I.R. 1933 P.C. 185=143 I.C. 761=A.I.R. 1933 P.C. 191 (P.C.).**

———*Successive mortgages—Purchase of one item of mortgaged property by third mortgagee—Assignment of decree obtained by first mortgagee in favour of third mortgagee—Execution by third mortgagee against other item—Permissibility.*

Certain property consisting of two items was subject to successive mortgages. One of the puisne mortgagees brought a suit and purchased one item in execution. He subsequently obtained an assignment of a decree passed in favour of a prior mortgagee in respect of the other item. As assignee-decree-holder he applied for execution against the other item alone. On objection by another puisne mortgagee,

Held, that on the purchase of one of the items, the mortgage had been discharged *pro tanto* and that the assignee-decree-holder could proceed against the other item, only for the proportionate value of the debt in relation to the mortgage debt; and that an objection of this nature could be taken in execution by the puisne mortgagee. (*Madhavan Nair, J.*) CHINNIAH ROWTHER *v.* MUTHURAMAN CHETTIAR. **I.R. 1933 Mad. 131=141 I.C. 366=A.I.R. 1934 Mad. 250.**

———*Successive mortgages—Separate suits not impleading the other mortgagees—Rival purchasers—First purchaser entitled to possession.*

The plaintiff and defendant were rival purchasers of the same property in mortgage suit filed by the first and second simple mortgagees without impleading each other The plaintiff was a second mortgagee purchaser who purchased in a suit, first instituted, the purchase being later than that of defendant. The defendant was a first mortgagee purchaser who purchased in a later instituted suit, the purchase being earlier than plaintiff. The plaintiff sued to establish his right to unconditional possession of the property.

Held, that the defendant being the earlier purchaser was entitled to possession of the property sold. (*Waller and Krishnan Pandalai, JJ.*) CHINNASWAMY PADAYACHI *v.* DARMALINGA PADAYACHI. **56 Mad. 115=I.R. 1932 Mad. 650=139 I.C. 309=1932 M.W.N.**

MORTGAGE—Successive Mortgage.

742=36 L.W. 253=A.I.R. 1932 Mad. 566=63 M.L. J. 394.

[**Appr.** 56 M. 846 (860, 870, 876) (F.B.)].

———*Successive mortgages—Several mortgages in favour of same person over same property—Joint decree for consolidated amount—Validity.*

Defendant 1 executed mortgage of a certain house in favour of plaintiff and subsequently made a gift of the same to his mother. Later on defendant 1 and his mother executed a second mortgage over the same property in favour of plaintiff. The mortgagees having been sued on the mother claimed a right of residence.

Held, that the Court should not pass a joint decree for the two sums claimed, but the decree should be split up showing the separate sums payable

Held further, that it was open to the parties to the second mortgage to pay off the amount in respect of the second mortgage and the mother could enforce as against the auction-purchaser in execution of the first mortgage a right to reside in a suitable portion of the house having regard to the nature of the property and her requirements. The right of residence was not modified by reason of the gift or the mortgage executed by the son. (*Mukerji and Bennet, JJ.*) KISHUN PIYARI *v.* GOPAL NARAIN. **143 I.C. 303=I.R 1933 All. 219=1932 A.L.J. 795=A.I.R. 1932 All 676.**

———*Successive mortgages—Suits and execution proceedings by them without impleading each other—Rival purchasers—Right to possession—Test of priority*

Where there are several mortgages over the same property, none of them being with possession, the mortgagees have only a right to bring the property to sale. The right to the equity of redemption or possession is with the mortgagor and he may deal with it without regard to the mortgages. If the property is brought to sale by the mortgagees without impleading each other as parties and thereby securing an adjudication settling their respective rights, and if the mortgagees take possession in execution of their decrees, the right to possession rests not on the priority of the mortgages, but on the priority of the sales. Where there were two mortgages over a property and the mortgagees sued and brought the property to sale without impleading each other, *held*, that in a dispute between the rival purchaser for possession, the purchaser at the prior sale was entitled to possession as against the purchaser at the subsequent sale though the latter mortgagee might have been the earlier incumbrancer. (It would be the same where one of the mortgagees obtained possession as receiver in execution proceedings.) (*Ramesam, Anantakrishna Ayyar and Cornish, JJ.*) NAGENDRAN CHETTIAR *v.* LAKSHMI AMMAL. **56 Mad. 846=6 I.R (Mad) 9=144 I C. 833=1933 M.W N. 384=38 L W. 169=A.I.R. 1933 Mad. 583=65 M.L J. 108 (F B).**

Tacking.

See T. P. ACT, S. 80.

Tender.

See T. P. ACT, SS. 83 AND 84.

Usufructuary.

See also T. P. ACT, SS. 58 (*d*), 59, 67, 68 AND 76 AND CONSTRUCTION, INTEREST, AND REDEMPTION, *supra.*

———*Usufructuary mortgage—Deficiency in profits—Decree in respect of before termination of period—Validity.*

Where a mortgagor under a usufructuary mortgagee guarantees a certain sum by way of profits of the property annually, the mortgagee may sue and obtain a decree for deficiency in the profits, when there is a deficiency, even before the termination of the mortgage. The fact that the mortgagee would be entitled to recover the deficiency at the time of redemption does not make the suit premature or the decree invalid. (*Srivastava, Ag.C.J. and Zia ul-Hasan, J.*) SHEO DARSHAN SINGH *v.* MAHESHUR DAYAL. **10 Luck. 293=152 I.C. 839=7 R.O. 241=11 O.W.N. 1403=A.I.R. 1935 Oudh 183.**

———*Usufructuary mortgage—Full consideration not paid—Remedy of mortgagor.*

A mortgagor who has executed a usufructuary mortgage but has not received the full consideration is entitled either to such balance or damages for non payment which may be assessed as the balance due. But he cannot claim proportionate return of the land and mesne profits for such proportion. (*Wort, J.*) WAHID ALI *v.* BIPTU CHAMAR. **159 I.C. 177=A.I.R. 1935 Pat. 125.**

———*Usufructuary mortgage—Mortgage with possession—Non-delivery of possession—Lease deed in favour of mortgagee—Effect.*

Where a mortgage was in form a mortgage with possession and though possession was not taken by the mortgagees by a second document of even date the mortgaged land was leased to the mortgagor for the same term as the mortgage and mutation was duly recorded on the basis of the mortgage,

Held, that the transaction gave rise to a possessory mortgage. (*Sir George Lowndes.*) FEROZ SHAH *v.* SOHBAT. **60 I A 273=14 Lah. 466=I.R. 1933 P. C. 183=38 L.W. 68=1933 M.W.N. 755=37 C.W. N. 993=35 Bom.L R. 877=58 C L.J. 52=1933 A. L J. 1193=143 I.C. 659=A.I.R. 1933 P.C. 178=65 M.L.J. 150 (P.C.).**

[**R.** 58 B 327 (338) (F.B.)]

Validity of.

———*Validity of—Part of consideration invalid.*

There is no ground for holding that because a portion of the consideration for a mortgage is invalid, the entire mortgage is also invalid. (*Srivastava and Zia ul-Hasan, JJ.*) GAPPOO SINGH *v.* HAR CHARAN. **158 I.C 267=8 R.O. 74=1935 O.W.N. 1045=A.I.R. 1935 Oudh 501.**

———*Validity of—Property acquired by adverse possession*

A person who has acquired certain property by right of adverse possession can effect a valid mortgage of the property. (*Raza and Smith, JJ.*) ABDUR RAHMAN KHAN *v.* AHMAD KHAN. **I R. 1933 Oudh 203=143 I C. 831=10 O.W.N. 42=14 L R. 137 (Rev.)=17 R. D. 104=A.I R. 1933 Oudh 427.**

MORTGAGE SUIT. *See* MORTGAGE.

MORTGAGEE IN POSSESSION.

See (1) MORTGAGE - USUFRUCTUARY.
(2) T. P. ACT, S. 76.

MORTGAGOR AND MORTGAGEE.

See (1) ESTOPPEL.
(2) EVIDENCE ACT, S. 115.

———Stipulation by mortgagor not to sell mortgaged property without permission of mortgagee—Validity. *See* MORTGAGE—REDEMPTION. **13 Mys.L.J. 404=40 Mys.H.C.R. 435.**

MOSQUE—*See* MAHOMEDAN LAW—WAKF.

MOTIVE. *See* (1) CRIMINAL TRIAL.
(2) PENAL CODE, SS. 300 302.

MOTOR CAR—Rash Driving. *See* PENAL CODE, SS. 304, 304-A AND 337.

MOTOR COLLUSION. *See* PENAL CODE, S. 304-A.

MOTOR VEHICLES ACT (VIII OF 1914)—*Punjab Motor Vehicles Plying for Hire Rules, R.* 3—*"Plying for hire"—Meaning—Absence of soliciting custom—Conviction—Sustainability.*

MOTOR VEHICLES ACT (1914).

Plying for hire means the act of soliciting custom. Where a person who owned a motor lorry purchased goods at one place and after transporting them to another place sold the goods there to their customers but it did not appear that he solicited custom at any time.

Held, that the owner of the lorry was not liable to be convicted for breach of the Punjab Motor Vehicles Plying for Hire Rules. (*Shadi Lal, C.J.*) KHUSHI RAM SHADI RAM *v.* EMPEROR. **I.R. 1931 Lah. 670 =132 I.C. 702=32 Cr.L.J. 948=1931 Cr.C. 857 = A.I.R. 1931 Lah. 569.**

———*Bombay Motor Vehicles Rules*, 1915, *R.* 19 (1)—*"Ordinarily pass a tram-car"—Effect.*

Although R. 19 (1) refers to a tram-car whether it be going in the same or in the contrary direction the rule covers a tram-car which is stationary. The adverb 'ordinarily' denotes that the rule applies except in a case in which there is some impediment to passing the tram-car on the near side, for example, the road may be up or there may be a long line of slow moving traffic which would make it impossible to pass the tram-car on the near side within a reasonable time. The mere fact that there are foot-passengers which made it difficult for accused to pass a tram-car on the near side and that there is plenty of room to pass it on the right side is not enough to take the case out of the rule. (*Beaumont, C.J. and Murphy, J.*) EMPEROR *v.* RITTOMS. **6 I. R. (Bom.) 24=144 I.C. 923 (1)=34 Cr.L.J. 865 (1) =35 Bom L.R. 483 =1933 Cr.C. 663=A.I.R. 1933 Bom. 229.**

———*Rash driving—Causing death—Offence.*

Semble.—It is not sufficient to absolve drivers of motor vehicles from the consequences of rash driving merely to show that the person to whom or to whose property they have caused injury was himself negligent (*Boys, J.*) DEOTA MISSIR *v* EMPEROR. **I R. 1931 All. 713=133 I.C. 601=32 Cr L J 1061=12 L R. 134 (Cr.)=1931 A L J. 770=1931 Cr.C. 1044=A.I. R. 1931 All. 708.**

———**S. 4**—*Negligence—Test.*

The law or usage of the road is not the criterion of negligence. The test is whether the accident could have been avoided by the accused if he had exercised that care and diligence which ordinarily cautious persons using the road in similar circumstances would have done. (*Vivian Bose, A.J.C.*) EMPEROR *v* HOMNARAIN. **30 N L R. 317=6 R N. 186=148 I C. 541=35 Cr L. J. 696=1934 Cr.C 272=A.I R. 1934 Nag. 65.**

———**S. 4 (b)**—*Failure to respond to signal.*

It is an essential feature of the section imposing a liability on drivers to respond to signals that it is not for them to speculate why the signal was given and to act accordingly. If the applicant disregarded the signals made from a lorry standing at a distance the fact that at a later stage the accident happened in spite of his best efforts is no excuse. (*Grille, A J.C.*) DUTT *v.* EMPEROR. **6 I.R. (Nag.) 80=146 I C. 208=34 Cr. L.J. 1260=1933 Cr C. 690=A.I.R. 1933 Nag. 177.**

———**S 5**—*Error of judgment—Not sufficient for conviction—Criminal negligence—Meaning of.*

An error of judgment alone is not sufficient to convict a man. There must be "criminal negligence" which means "gross or culpable neglect or failure to exercise resonable and proper care." (*Mallick, J.*) H. B. SPIERS *v.* JOHIUDDIN. **59 Cal. 113=I.R 1932 Cal. 419=138 I C. 98=33 Cr.L.J. 549=36 C.W.N. 246 (2)=1932 Cr.C. 451=A.I.R 1932 Cal. 461.**

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———**S. 5**—*Penal Code (XLV of 1860), S. 337—Separate sentence—Legality.*

Separate sentences cannot be passed under S. 5 of the Motor Vehicles Act and S. 337 of the Indian Penal Code for they are the same offences. (*Jackson, J.*) T. V. GOVINDARAJA MUDALIAR *v.* EMPEROR. **1931 M.W.N. 397.**

———**Ss. 5, 16 and 17**—*Charge under wrong sections—Facts fully stated in charge—No prejudice—Validity of conviction.*

Where the offence with which the accused was charged was really one under S. 5 of the Motor Vehicles Act, 1914, but the charge mentioned in Ss. 16 and 17 and fully stated the facts and the offence he was alleged to have committed,

Held, that as the accused knew the charge he had to meet, the mistake in the number of the sections could not be said to have prejudiced the accused. (*Mallick, J.*) H. B. SPIERS *v.* JOHIUDDIN. **59 Cal. 113=I.R. 1932 Cal 419=138 I.C 98=33 Cr L.J. 549=36 C. W.N. 246 (2)=1932 Cr.C. 451=A.I.R. 1932 Cal. 461.**

———**S. 6**—*"Allow"—Meaning of—Liability of owner.*

The word "allow" in S. 6 does not mean "does not prevent". The word ordinarily involves permission, express or implied from the circumstances. Where the owner of a motor-car was charged under S. 6 for having "allowed" his car to be taken by his driver into British India without a license.

Held, that in the absence of evidence that the car had ever been used in that way before or that the owner knew it would be used in that way on the occasion in question, the owner was not liable. (*Beaumont, C.J. and Broomfield, J.*) EMPEROR *v.* SHANTARAM RAMA. **I.R. 1932 Bom. 490 (2)=139 I C. 270=33 Cr L.J. 746 (2)=34 Bom.L R. 897=1932 Cr.C. 602=A I.R. 1932 Bom. 474.**

———**S. 8**—*Offence under—What constitutes.*

Under S. 8 the failure to produce the driving licence on demand by the police officer is an offence but not the mere non carrying of it on person. (*Shadi Lal, C.J.*) BAHADUR SINGH *v* EMPEROR. **I R. 1932 Lah 470= 138 I.C. 400=33 Cr L J. 646 (2)=33 P.L.R. 278= 1932 Cr.C. 492=A.I R 1932 Lah. 363.**

———**Ss. 8 and 16**—*U. P. Motor Rules, 78, 79 and 81—Non renewal of registration or permit by owner—Record showing charge under S 16—No specification of particular in summons — Rules not discussed in judgment—Conviction—Legality.*

The owner of a lorry plying for hire without a renewal of registration or permit and without any directions painted on the body was charged and convicted under S. 16, Motor Vehicles Act. The rules alleged to have been contravened were Rules 78, 79 and 81, U.P. Motor Rules, and S 8 of the Motor Vehicles Act. The judgment did not contain a discussion of the Rules, and it appeared from the judgment that the Magistrate had got confused with Rules 16 and S. 16 of the Act, and that the case proceeded as though the accused was being charged with having contravened R. 16 of the U. P. Motor Rules. The summons merely informed the accused that he had to appear and answer to a charge under S. 16 of the Act.

Held, the proceedings were invalid and must be set aside (*Thomas, J.*) LAL CHAND *v.* EMPEROR. **7 R. O. 75=150 I C 941=35 Cr L J. 1161 (2)=11 O.W. N 828=1934 Cr.C 1156=A.I.R. 1934 Oudh 370 (2).**

———**S. 10**—*Register—Entry in—Mode of proof.*

The proper way of proving an entry in the Register of Motor Vehicles would be either that the Register it-

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self should be produced by a proper official or a duly authenticated copy of the material part of the Register placed before the Court. A mere statement by the Commissioner of Police made in answer to a letter written by the Corporation, without his being called or the Register produced, cannot be accepted in proof of the ownership of a car. (*Costello, J.*) BAIJNATH SHAW *v.* CORPORATION OF CALCUTTA. **141 I.C. 248 = I R. 1933 Cal. 96 = 36 C.W.N. 1147 = A.I.R. 1933 Cal. 178.**

——**S. 10**—"Owner"—Mortgagee in whose mame car is transferred but who has no possession. *See* FATAL ACCIDENTS ACT. **37 Bom L.R. 410 = A.I.R. 1935 Bom. 333.**

——**S. 11**—*Bombay Government Rules, R. 7—Whether* ultra vires.

R. 7 framed by the Bombay Government under S. 11, Motor Vehicles Act, is not *ultra vires* as the words "incidental to registration" in S. 11 are wide enough to cover renewal of certificates. (*Beaumont, C.J., Blackwell and Rangnekar, JJ.*) SYKES *v.* KELLY. **6 I R. (Bom.) 135 = 146 I.C. 6 = 35 Bom.L.R. 1027 = A.I.R. 1933 Bom. 460 (F B.).**

——**Ss. 11 (2) (e) and 16**—*Offence—Plying for hire—Meaning of—Owner taking only petrol charges—If "hiring."*

Taking petrol charges from a person who uses the accused's motor lorry does not amount to hiring. The mere payment to the accused of the cost of petrol used while his lorry is at the disposal of the person so paying such charges is not payment for the use of the lorry. It is equivalent to mere replacement in the petrol tank of the petrol used. The accused therefore cannot be convicted of an offence of plying his lorry for hire, though he had no G. permit. (*Burn, J.*) KADIR MOHIDEEN SAHIB, *In re.* **156 I.C. 325 (1) = 7 R.M 689 = 36 Cr. L.J. 925 (2) = 41 L.W. 498 = 1935 M.W.N. 325 (1) = 1935 Cr.C. 923 = A.I.R. 1935 Mad. 577 = 68 M.L.J. 481.**

——**S. 16**—*Burma Motor Vehicles Rules, R. 60-A—Fine and suspension order—Appeal or revision.*

A taxi driver who was convicted was fined Rs. 60 and was suspended for one year.

Held, that the order of suspension of license was part of the sentence and the conviction was appealable.

Held, fnrther, that no proceedings by way of revision could be entertained where no appeal was brought. (*Baguley, J.*) GARANAND SINGH *v.* EMPEROR. **6 I. R. (Rang.) 103 = 146 I.C. 545 (2) = 1933 Cr.C. 1146 = A I.R. 1933 Rang. 329.**

——**S. 16**—*Charge under—Summons—Specification of Rules contravened — Necessity— Omission to state particulars—Effect.*

S. 16 of the Motor Vehicles Act is a penalty clause, and it is the duty of a Court issuing a summons to specify in it what particular Rules the accused had contravened. The procedure of issuing summonses by Magistrates purporting to charge Motorists, owners or drivers of offences under the Act without giving the slightest particulars of the offence charged, is not justified by law. A summons not in the prescribed form may be disregarded, and proceedings thereon will be invalid. (*Thomas, J.*) LAL CHAND *v.* EMPEROR. **7 R.O. 75 = 150 I.C. 941 = 35 Cr.L.J. 1161 (2) = 11 O.W.N. 828 = 1934 Cr C. 1156 = A.I.R 1934 Oudh 370 (2).**

——**S. 16**—*Motor Vehicle Rules, R. 16—"B" permit—Vehicle driven in another district—Counter-signature of Superintendent of other district necessary.*

The "B" permit granted to the driver is only valid within the district of the Superintendent of Police and

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if it is driven into another district, it must be counter-signed by the Superintendent of the latter district. (*Beaumont, C.J. and Barlee, J.*) EMPEROR *v.* RAMCHANDRA. **151 I.C. 727 = 7 R B. 73 = 35 Cr.L.J. 1400 = 36 Bom.L.R. 366 = 1934 Cr.C. 652 = A.I.R. 1934 Bom. 201.**

——**S. 16**—Number assigned reproduced in Hindi script—If a breach of the rules. *See* U. P. MOTOR VEHICLES RULES, 1928, RR. 3 (*m*) AND 22.

——**S. 16**—*Rules under R. 27—Rash driving—Nature of offence—Conviction under S. 279, I.P. Code.*

S. 16, Motor Vehicles Act, has not any necessary ingredient of rashness or negligence in it and R. 27, Motor Act Rules, merely lays down the rule of the road, breach of which need not necessarily involve rashness or negligence. Consequently where rashness or negligence enters into the offence, the conviction under S. 279 is not only proper but more appropriate. (*Sulaiman, J.*) JIWA RAM *v.* EMPEROR. **I.R. 1932 All. 219 = 136 I.C. 571 = 33 Cr.L.J. 309 = 12 L.R. 168 (Cr.) = 1932 A.L.J. 519 = 1932 Cr C. 89 = A.I.R. 1932 All. 69.**

——**S. 16 and U. P. Motor Vehicles Rules, 1928, Rr. 79 and 81**—*Permit specifying district and route—Lorry plied in other route—R. 79 violated—Maximum number of passengers not specified in permit—R. 81 not violated for carrying more passengers.*

The permit accorded permission to the owner of the lorry to ply within the district and the road on which it was permitted to ply was also specified therein. The permit did not, however, specify the maximum number of passengers. The road on which the lorry was driven was not specified in the permit and it was also then carrying a greater number of passengers than could be taken in a lorry. The owner was thereupon convicted for violation of Rr. 79 and 81 of the U. P. Motor Vehicles Rules.

Held, that (*i*) as the maximum number of passengers was not specified in the permit, the conviction for violation of R. 81 was bad; (*ii*) the words "within the district" were merely descriptive of the route specifically described and did not justify the lorry being plied in other routes within the district and that the conviction for violation of R. 81 was correct. (*Iqbal Ahmad, J.*) SUBHANI *v.* EMPEROR. **I.R. 1933 All. 301 = 143 I.C. 582 = 34 Cr L.J. 620 = 14 L R. 193 (Cr.) = 1933 A.L. J. 499 = 1933 Cr.C. 806 = A.I.R. 1933 All. 465.**

MOTOR VEHICLES (MANITOBA) ACT, S. 62—*Burden of proof—Points to be proved by plaintiff—Plea of no negligence—Proof of—Evidence evenly balanced—Effect of.*

Apart from S. 62, a plaintiff claiming damages for personal injury in a running down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage; hence unless he succeeds in establishing all these matters he must fail. In virtue however of the statue he need only establish the first and the third elements, *i.e.*, that he was injured by the defendant and the extent of his damages. If the establishes those two matters, the onus is removed from him and it is then for the defendant to establish to the resonable satisfaction of the jury, that the loss, damage or injury did not arise through the negligence or improper conduct of himself or his servants. This the defendant may do in various ways, as for instance, by satisfactory proof of a latent defect, or by proof that the plaintiff was the author of his own injury; or by proof that the circumstances were such that neither party was to blame because neither party could avoid the other. But the onus which the section places on the defendant is not

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in law a shifting or transitory onus. It remains on the defendant until the very end of the case when the question must be determined whether or not the defendant has sufficiently shown that he did not in fact cause the accident by his negligence. If, on the whole of the evidence, the defendant establishes this to the satisfaction of the jury, he will be entitled to judgment, if however the issue is left in doubt or the evidence is balanced, even then defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail, because but for the statute the onus would be on him. *A fortiori* the defendant will be held liable, if the evidence actually establishes his negligence. (*Lord Wright.*) WINNIPEG ELECTRIC CO. *v.* JACOB GEEL. **1932 A.C. 690 = I.R. 1932 P.C. 308 = 139 I.C. 663 = A.I.R. 1932 P.C. 246 (P.C.).**

MOVABLES—Applicability of T. P. Act, S. 53. *See* T. P. ACT, S. 53. **9 Rang. 614 = A.I.R. 1932 Rang. 13.**

——Hypothecation of. *See* CONTRACT ACT, S. 172 AND MORTGAGE—MOVABLES.

MUAFI *See* GRANT—MUAFI.

MUKHTARNAMA. *See* DEED—CONSTRUCTION.

MUKHTEAR.

See (1) EVIDENCE ACT, S. 126.
(2) LEGAL PRACTITIONER — MISCONDUCT AND MUKHTEAR.
(3) LEGAL PRACTITIONERS ACT (1879), SS. 13 AND 13 (*b*).

MULLA. *See* BOMBAY HEREDITARY VILLAGE OFFICES ACT, S. 3 AND MAHOMEDAN LAW—WAKF.

MULLAGIRI LAND. *See* LAND TENURE.

MULLANKI LAND. *See* LAND TENURE.

MUNDARIES. *See* HINDU LAW—APPLICABILITY.

MUNICIPALITY.

See also THE FOLLOWING LOCAL ACTS:—
Bengal Municipal Act (*III of* 1884).
Bihar and Orissa Municipal Act (*VIII of* 1922).
Bombay City Municipalities Act (*XVIII of* 1925).
Bombay District Municipal Act (*III of* 1901).
Bombay Local Boards Act (*VI of* 1923).
Bombay Municipal Boroughs Act (*XVII of* 1925).
Burma Municipal Act (*III of* 1898).
Burma Rural Self-Government Act (1921).
Calcutta Municipal Act (*III of* 1923).
C. P. Local Self-Government Act (*IV of* 1920).
C. P. Municipalities Act (*II of* 1922).
Madras City Municipal Act (*IV of* 1919).
Madras District Municipalities Act (*V of* 1920).
Madras Local Boards Act (*XIV of* 1920).
Punjab Municipal Act (*III of* 1911).
U. P. District Boards Act (*IX of* 1922).
U. P. Municipalities Act (*II of* 1916).

——*Bye-laws—Unreasonableness.*

It is a recognized rule of law that bye laws of a Municipality should not be unreasonable and they may be held *ultra vires* for unreasonableness. Bye-law fixing excessive license fee may be unreasonable. (*Sulaiman, C.J. and King, J.*) BRIJ MOHAN LAL *v* EMPEROR. **56 All. 743 = 149 I.C. 11 = 6 R.A. 879 = 35 Cr.L.J. 931 = 1934 A.L.J. 244 = 3 A.W.R. 592 = 1934 Cr.C. 594 = A.I.R. 1934 All 497.**

MURDER. *See* PENAL CODE, SS. 299 and 304-A.

MURSHIDABAD ACT (XV of 1891, amended by Act XXV of 1923)—*Effect of—Nature of rights of Nawab Bahadur—Acquisition of settled properties—Land Acquisition Act* (*I of* 1894), *S.* 32 (1).

The Effect of Murshidabad Act (XV of 1891 amended by Act XXV of 1923) is that in spite of certain powers conferred on the Secretary of State no right of

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ownership or disposition is conferred on the Secretary of State and the Nawab Bahadur continues as a limited owner but with the income intercepted in certain contingencies. Where such lands are possessed to be acquired, the tribunal has jurisdiction to act under S. 32 (1) of the Land Acquisition Act. (*Pearson and Mallik, JJ.*) NAWAB BAHADUR OF MURSHIDABAD *v.* KUMAR DINENDRA MULLIK. **59 Cal 1272 = 36 C.W.N. 848 = I.R. 1933 Cal. 55 = 140 I.C. 866 = A.I.R. 1932 Cal. 844.**

MOORSHEDABAD ACT (XV OF 1891)—*Property settled on Nawab Bahadur of Moorshedabad—Rents and profits of—Appointment of Receiver—Validity of.*

It is competent for the Court to appoint a receiver of the rents, issues and profits of the immovable properties covered by the Moorshedabad Act in execution of money decree obtained against the Nawab Bahadur of Moorshedabad. Though the income of the properties was conferred on the Nawab to enable him to maintain his dignity and station, there was no restraint on anticipation imposed by the statute and no restriction on the enjoyment of the rents and profits by the Nawab. So he has a "disposing power" over the income within the meaning of S. 60 of the C. P. Code and no question of public policy is involved in appointing a receiver of such rents. (*Lord Macmillan.*) WASIF ALI MIRZA NAWAB BAHADUR *v.* KARNANI INDUSTRIAL BANK, LTD. **58 I.A. 215 = 59 Cal. 1 = I.R. 1931 P.C. 215 = 132 I.C. 727 = 35 C.W.N. 791 = 1931 A.L.J. 495 = 35 L.W. 384 = 53 C.L.J. 493 = A.I.R. 1931 P.C. 160 = 61 M.L.J 208 (P.C.).**

[Appl. 1934 A.L.J. 770 (770).]

MUSHA. *See* MAHOMEDAN LAW—GIFT.

MUSSALMAN WAKF ACT (XLII OF 1923)—*Applicability—Wakf admitted but trust denied.*

Where it was admitted that there was a valid wakf and that respondents were the mutawallis thereof, but they only denied that the deed of endowment created any trust to which the Charitable and Religious Trusts Act of 1920 could be applicable, it does not deprive the District Judges of his jurisdiction to proceed under Act XLII of 1923. *Kulwant Sahay and Macpherson, JJ.*) SYED ALI HUSSAIN *v.* BIBI AKHTARI BEGUM. **10 Pat. 506 = I.R. 1931 Pat. 449 = 134 I.C. 417 = 12 Pat. L.T. 793 = A.I.R. 1931 Pat. 354.**

——*Orders under—Appeal—Revision.*

Per *Hasan, C.J. and Raza, J.*—The absence of any provision as to appeal only indicates that the results of an inquiry under the Act are not intended to be final and conclusive. But if the requirements of S. 115, C.P. Code, are fulfilled, a revision from an order under the Act would lie to the High Court under that section. 44 I. A. 261, Ref. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MAHOMED BAQAR *v.* MAHOMED QASIM. **7 Luck. 601 = I.R. 1932 Oudh 321 = 138 I.C. 725 = 9 O.W.N. 538 = A.I.R. 1932 Oudh 210 (F.B.).**

——**S. 2**—*Applicability—Wakf being partly public and partly private.*

Where under the wakfnama one third of the income was devoted to the personal expenses of the founders and the balance in paying the expenses of the students and teachers, in providing food to travellers during Ramzan, etc., and provision was also made for the succession to the mutawalliship.

Held, that the wakf was partly public and partly private and that it came within the Wakf Act of 1923 and not under the Act of 1913. (*Jack and Mitter, JJ.*) ALI BAKHTIYAR *v.* KHONDKAR ALTAF HOSSAIN. **60 Cal. 780 = 6 I.R. (Cal.) 123 = 145 I.C. 638 = 37 C.W. 395 = A.I.R. 1933 Cal. 581.**

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——**S. 2 (c)**—*Appointment of mutawalli—Powers of Court.*

A District Judge has no jurisdiction to pass an order appointing a mutawalli under S. 2 (*c*) of the Act. (*Bhide, J.*) ELAHI BAKHSH *v.* MAHOMED GHAUNS. **I.R. 1933 Lah. 75 = 34 P.L.R. 81 = 141 I.C. 169 (2) = A.I.R. 1933 Lah. 27.**

——**S. 2 (e)**—*Exception—Applicability—Wakf being partly public—Portion of surplus allotted for charities.*

Some of the terms of a wakf were as follows: (1) as long as the founders live they shall appropriate on third of the proceeds of the wakf properties themselves and apply two-thirds or other charities; (2) after their death two-thirds of the wakf properties shall be enjoyed by their children and the remaining one-third should go to meet the charities; and (3) in the event of non existence of any child begotten by the founder such a person from among their relatives as may be most nearly related to them shall be appointed mutawalli and shall get Rs. 10 a month as a salary, shall live in their dwelling-house and shall appropriate the balance of the proceeds of the tank and gardens left after defraying the expenses of persons attached to Madrasha and Khankah.

Held, that the wakf did not come under S. 3 of Act VI of 1913 but came within the exception of 2 (*e*) of the Act of 1923. (*Jack and Mitter, JJ.*) ALI BAKHTIYAR *v.* KHONDKAR ALTAF HOSSAIN. **60 Cal. 790 = 6 I.R (Cal) 123 = 145 I.C. 638 = 37 C.W.N. 395 = A.I.R. 1933 Cal. 581.**

——**Ss. 3, 4 and 5**—*Alleged wakf denied by mutawalli—Jurisdiction of District Judge.*

Per *Hasan, C.J. and Raza, J.* (*Bisheshwar Nath, J.*, dissenting.)—The Court of District Judge has jurisdiction under the Mussalman Wakf Act, 1924 to take proceeding under the same Act when the alleged wakf is, not admitted or denied by the alleged mutawalli. A I.R. 1927 Pat. 189, Diss. 4 Luck. 429, Ref. (*Hasan, C. J., Raza and Bisheshwar Nath, JJ.*) MAHOMED BAQAR *v.* MAHOMED QASRIM. **7 Luck. 601 = I.R. 1932 Oudh 321 = 138 I.C. 725 = 9 O.W.N. 538 = A.I.R. 1932 Oudh 210 (F.B.).**

——**S. 3**—*Applicability—Mixed wakf.*

Where under the wakfnama one-third of the income was devoted to the personal expenses of the founders and the balance in paying the expenses of the students and teachers, in providing food to travellers during Ramzan, etc., and provision was also made for the succession to the mutawalliship.

Held, that the wakf was partly public and partly private, and that it came within the Wakf Act of 1923 and not under the Act of 1913. (*Jack and Mitter, JJ.*) ALI BAKHTIYAR *v.* KHONDKAR ALTAF HOSSAIN. **60 Cal. 790 = 6 I.R. (Cal.) 123 = 37 C.W.N. 395 = 145 I.C. 638 = A.I.R. 1933 Cal. 581.**

——**S. 3**—*Compliance with provisions—Denial of wakf—Permissibility.*

If a mutawalli has complied with the provisions of S. 3 no question as to whether he denies the wakf or admits it can arise because by his conduct in furnishing particulars of the wakf property he must be deemed to have admitted the wakf and his own position as mutawalli. (*Pullan and Niamatullah, JJ.*) NASARULLAH WAJID *v.* ALI. **54 All. 475 = I.R. 1932 All. 244 = 136 I.C. 812 = 1932 A.L.J. 262 = A.I.R. 1932 All. 362.**

——**S. 3 (2)**—*Inquiry under—Scope of,*

Per *Hasan, C. J.*—The sub section provides for an inquiry into the origin, nature and objects of the wakf whether it was made orally or by means of an instrument. The inquiry must, no doubt, be summary and will not be conclusive between the contending parties in any future controversy as regards the origin, nature and objects of the wakf but the Act does not exclude such inquiry altogether. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MAHOMED BAQAR *v.* MAHOMED QASIM. **7 Luck. 601 = I.R. 1932 Oudh 321 = 138 I.C. 725 = 9 O.W.N. 538 = A.I.R. 1932 Oudh 210 (F.B.).**

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——**S. 10**—*Action under—Defendant denying existence of wakf—Jurisdiction.*

Where the existence of the *wakf* is denied by the defendants, the District Judge has no jurisdiction to proceed with an application asking that action under S. 10 of the Mussalman Wakf Act be taken against the defendants. There is nothing in the act to show that any power has been conferred on the District Court to go into the question as to whether or no the properties about which applications are made, are *wakf* properties. If a party denies the existence of *wakf*, the only order that can be passed is that the applicant should get the matter settled by instituting a regular suit. (*Rachhpal Singh, J.*) WAHEED HASAN *v.* ABDUL RAHMAN. **57 All. 754 = 157 I.C. 1089 = 8 R.A. 261 = 1935 A.W.R. 140 = 1935 A.L.J. 307 = A.I.R. 1935 All. 254.**

——**S. 10**—*Default of mutawalli—Gist of offence—Denial of wakf, if material.*

All that is needed to bring home an offence under S. 10 read with S. 3 to a defaulting mutawalli is to establish by evidence that he is a mutawalli in respect of property which is wakf within the meaning of the Act. Whether the character of the property as wakf and his own position as mutawalli are admitted or are established by evidence, if denied, S. 10 is equally applicable. (*Pullan and Niamatullah, JJ.*) NASARULLAH *v.* WAJID ALI. **54 All. 475 = I.R. 1932 All. 244 = 136 I.C. 812 = 1932 A.L.J. 262 = A.I.R. 1932 All. 362.**

[R. 1932 A.L.J. 266.]

——**S. 10**—*Enquiry under—Scope of—Burden of proof.*

In case of prosecution under S. 10, the Magistrate has jurisdiction to proceed with the inquiry as to whether the property is wakf or not. On a prosecution under S. 10 it is clearly necessary in the first place for the prosecution to show that the person charged is a mutawalli of the wakf. If that fact is denied the Magistrate may hear evidence on the point and determine it in the usual way. If he finds that the person charged is a mutawalli, then the next question is whether there has been default under the Act. If the default is proved or admitted and the person charged says that he had reasonable cause for making default, then the burden of proof of that is upon him. 52 All. 167, Foll. (*Beaumont, C. J. and Barlee, J.*) SAYEDNA TAHER SAIFUDIN, *In re.* **58 Bom. 302 = 1934 Cr.C. 546 = 154 I.C. 940 = 7 R.B. 384 = 36 Bom.L.R. 311 = A.I.R. 1934 Bom. 169.**

——**S. 10**—*Interpretation.*

The word 'by' is intended to refer to the provisions of the sections while the word 'under' is intended to refer to an order which the Court may pass under one or other of the sections (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MAHOMED BAQAR *v.* MAHOMED QASIM. **I.R. 1932 Oudh 321 = 138 I.C. 725 = 7 Luck. 601 = 9 O.W.N. 538 = A.I.R. 1932 Oudh 210 (F.B.).**

——**S. 10**—*Penalty of fine—Default—Sentence of imprisonment whether can be passed.*

Under S. 10 the District Judge can impose the penalty of fine but there is no provision in the section for im-

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posing a sentence of imprisonment in default of payment of the fine. (*Pullan and Niamatullah, JJ.*) AFZAL HUSAIN *v.* MAHOMED AHSAN. **I.R. 1932 All. 666 = 140 I.C. 468 = 1932 A.L.J. 266 = A.I.R. 1932 All. 389.**

——— **S. 10**—*Proceeding under—Character of holder of office of mutawalli—Preliminary determination.*

It is necessary for a Court to decide whether the person who is alleged to be in default is or is not the mutawalli of a 'wakf' within the meaning of the Act. The mere fact that the party denies that he is mutawalli is immaterial if there is other evidence to show that he occupies that position. (*Pullan and Niamatullah, JJ.*) AFZAL HUSAIN *v.* MAHOMED AHSAN. **I.R. 1932 All. 666 = 140 I.C. 468 = 1932 A.L.J. 266 = A.I.R. 1932 All. 389.**

——— **S. 10**—*Proceeding under—Forum.*

The District Judge and not the Criminal Court is the proper authority to enforce the provision contained in S. 10. (*Pullan and Niamatullah, JJ.*) NASARULLAH *v.* WAJID ALI. **54 All. 475 = I.R. 1932 All. 244 = 136 I.C. 812 = 1932 A.L.J. 262 = A.I.R. 1932 All. 362.**

MUSSALMAN WAKF VALIDATING ACT (VI OF 1913)—*Applicability—Trust for slaves and dependents.*

A trust for slaves and dependents is not within the terms of the Wakf Validating Act, VI of 1913 or Act XXXII of 1930 giving retrospective effect to the earlier Act (*Sir George Lowndes.*) GHULAM MAHOMED *v.* SHAIKH GHULAM HUSAIN. **59 I.A. 74 = 54 All. 93 = 1932 A.L.J. 245 = 34 Bom.L.R. 510 = 55 C.L.J. 470 = 35 L.W. 464 = 136 I.C. 454 = I.R. 1932 P.C. 118 = 9 O.W.N. 399 = 36 C.W.N. 310 = A.I.R. 1932 P.C. 81 = 62 M.L.J. 371 (P.C.).**

———*Object.*

The Act merely defines what is a valid wakf but it does not purport to deal with the validity or otherwise of wakfs the objects of which are indefinite or uncertain. (*Wild, J.C. and Milne, A.J.C.*) MOHOMEDALI *v.* LAKHMICHAND. **25 S.L.R. 415 = I.R. 1931 Sind 44 = 130 I.C. 556 = A.I.R. 1931 Sind 75.**

———*Wakf made under—Muhammadan Law—Applicability.*

The fact that a wakf is made under Act VI of 1913 does not exclude the principles of Muhammadan Law from application. (*Hilton and Din Mohammad, JJ.*) MUHAMMAD SAID *v.* MST. SAKINA BEGUM. **16 Lah 432 = 159 I.C. 250 = 37 P.L.R. 772 = A.I.R. 1935 Lah. 626.**

——— **S. 1**—*Dedication to charity—Absence of provision for ultimate destination of income—Effect.*

The ultimate gift to religious or charitable purposes must be implied from the terms of the document and cannot be implied from the mere fact that the testator was purporting to make a wakf. Where a settlor directed that the dwelling house should be used by himself and his heirs and as regards income from the properties he directed that a specified fraction should be spent on charity, the remainder being spent on himself and his heirs but there was no provision as to the destination of the income after the failure of heirs,

Held, that the wakf was invalid both under the Mahomedan Law and under the Mussalman Wakf Validating Act. (*Rankin, C.J. and Pearson, J.*) TAHIRUDDIN AHMAD *v.* MASIHUDDIN AHMED. **60 Cal 901 = 147 I.C. 196 = 6 R.C. 298 = 37 C.W.N. 741 = A.I.R. 1933 Cal. 716.**

——— **S. 2**—Wakf—Trust by Mahomedan for making provision for sons and their families—Donor to remain

MUSSALMAN WAKF VALID. ACT (1913), S. 3.

trustee for life in possession with power to deal with rents and profits as he thinks fit—It creates valid wakf. *See* DEED—CONSTRUCTION. **13 Rang. 679 = 156 I.C. 1038.**

——— **S. 2 (1)**—*'Wakf'—Wakf of rights of groveholder—Validity.*

No doubt the essence of a wakf is its permanent character. But it does not follow that the subject-matter of the wakf must necessarily be the full proprietary interest in immovable property. The definition of 'wakf' in S. 2 (1) of the Mussalman Wakf Validating Act is quite general in its character and would certainly include wakf of full groveholder's rights over which the groveholder has a permanent dominion, although the ownership of the site does not vest in him. There seems to be nothing even in the strict Mahomedan Law against the dedication of such permanent rights which amount to a permanent occupation of the land and full proprietary right over the trees that stand on the land, and also the right to maintain the grove as such on the land. (*Sulaiman, C.J. and Bennet, J.*) AMIR AHMAD *v.* MAHOMED EJAZ HUSAIN. **58 All. 464 = 160 I.C. 354 = 8 R.A. 594 = 1935 R.D. 515 = 1935 A.W.R. 1273 = 1935 A.L.J. 1317 = A.I.R. 1936 All. 15.**

——— **S. 3**—*Bequest "for charitable or religious purpose"—Validity.*

A bequest "for charitable or religious purposes" is void for uncertainty. Both these objects are void for uncertainty individually as they are co related with each other; even if one of them be held to be uncertain the entire wakf must fail and such bequests cannot be enforced by the Courts. (*Coldstream and Jai Lal, JJ.*) PUNJAB SINDH BANK *v.* ANJUMAN H. ISLAM. **158 I.C. 937 = 8 R.L. 324 = 37 P.L.R. 766 = A.I.R. 1935 Lah. 596.**

——— **S. 3**—*Disposition in favour of family members—Validity.*

A disposition by wakf in favour of members of the family is valid under S. 3. (*Pullan and Niamatullah, JJ.*) NASIR ALI *v.* MAHOMED MOBIN. **I.R. 1932 All. 485 = 138 I.C. 616.**

——— **S. 3**—*Pious or charitable purposes—Ultimate dedication—Reservation clause—Validity of dedication.*

The executant of a wakfnama provided that the surplus income of certain properties should be utilized towards certain pious works towards the maintenance of a certain private tomb. There was a further clause that the settlor could make arrangement regarding the tank gardens, etc., mentioned in the deed.

Held, that there was an ultimate benefit for a pious or charitable purpose and that the dedication was valid.

Held, also that the reservation clause regarding the tank gardens, etc., did not affect the dedication. Governing principles applicable to the construction of a wakfnama stated. Effect of use of the word 'wakf' indicated. (*Mukerji and Guha, JJ.*) MASUDA KHATUN BIBI *v.* MAHOMED EBRAHIM. **59 Cal. 402 = I.R. 1931 Cal. 721 = 133 I.C. 657 = 35 C.W.N. 1159 = 54 C.L.J. 80 = A.I.R. 1932 Cal. 93.**

[F. 60 C. 901 (905). R. 58 C.L.J. 259 (264).]

——— **S. 3**—*Scope and object of—Absence of charitable object—Wakf—If valid.*

The Mussalman Wakf Validating Act has not effected any change in the law. The proviso to S. 3 of the Act does not make valid a wakf which is religious and pious only without being also charitable. The object of the Act was to declare the rights of Mussalmans to make settlements of property by way of wakf in favour of their families, etc. (*Beasley, C.J. and King, J.*) KUNHAMUTTY *v.* THONDIKODAN AHMAD MUDA-

MUSSALMAN WAKF VALID. ACT (1913), S. 3.

LIAR. 58 Mad. 204=40 L.W. 806=154 I.C. 151=7 R.M. 413=A.I.R. 1935 Mad. 29.

———S. 3—*Wakf—Ultimate dedication to poor.*

The definition of wakf in the Act excludes the view that the mere use of the word 'wakf' is enough to create a dedication in favour of the poor as ultimate beneficiaries. The object of the proviso to S. 3 is that it should appear on the construction of the instrument of wakf that the ultimate benefit is either expressly or impliedly reserved for the poor or for any other purpose recognised by the Mahomedan Law as a religious or charitable purpose of a permanent character. The word wakf' therefore used in S. 3 should not only satisfy the definition of that word given in S. 2 but should also satisfy the limitations of the proviso before a wakf can be adjudged to be lawful within the meaning of the Act. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAMZAN *v.* RAHMANI. 7 Luck. 300=8 O.W.N. 1302=135 I.C. 372=I.R. 1932 Oudh 20=A.I.R. 1932 Oudh 71.

———S. 3—*Wakfnama—Appropriation of major portion for maintenance of mutawalli and his children—Validity of wakf.*

Where the annual profits of the wakf properties were Rs. 700 a year and after deducting the expenses which were specified in the wakfnama the aggregate of which came to S. 225 the balance of R. 475 was to be spent by the mutawallis in equal proportions for the maintenance of themselves and their children.

Held, that that wakf was valid by virtue of Cls. (*a*) and (*b*) of S. 3 of the Musalman Wakf Validating Act provided the requirements of the proviso attached to the section were fulfilled. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAMZAN *v.* RAHMANI. 7 Luck. 300=135 I.C. 372=I.R. 1932 Oudh 20=8 O.W.N. 1302=A.I.R. 1932 Oudh 71.

———S. 3 (a)—*Beneficiary unable to take benefit under wakf by his not being member of family—Validity of wakf.*

The fact that a person cannot take benefit under the wakf on the ground that he is not a member of the family of the wakf, is not sufficient to set it aside in its entirety. (*Jai Lal and Skemp, JJ.*) MUBARIK ALI *v.* AHMAD ALI. 158 I C. 149=A.I.R. 1935 Lah. 414.

———S. 3 (a)—"*Family*"—*Meaning of.*

The word "family" as used in S. 3 (*a*) of the Act includes the brother or the descendants of the brother so as to entitle them to claim to be the subjects of a valid wakf. (*Jai Lal and Skemp, JJ.*) BADRUL ISLAM ALI KHAN *v.* MT. ALI BEGAM. 16 Lah. 782=8 R.L. 251=158 I.C. 465=A.I R. 1935 Lah. 251.

———S. 3 (a)—"*Family*"—*Adopted son.*

From the fact that *M* was adopted by *A* who had executed a wakf and resided with him during his lifetime, he (*M*) must be held to be dependent relation of *A* and therefore comes within the definition of family in S. 3 (*a*). (*Jai Lal and Skemp, JJ.*) MUBARIK ALI *v.* AHMAD ALI. 158 I.C. 149=A.I.R. 1935 Lah. 414.

———S. 3, Proviso—*Essentials of valid wakf.*

Where a person executed a wakfnama and placed the mutawalli in possession of certain properties but the deed did not contain any direction for an ultimate benefit to religious or charitable purposes, *held*, that valid wakf was not constituted. (*Srivastava, J.*) ABDUL QAVI *v.* MAHBOOB ALI. 6 Luck 382=I.R. 1931 Oudh 83=129 I.C. 163=7 O.W.N. 1052=A.I.R. 1931 Oudh 133.

———S. 3, Proviso—*Implied reservation of ultimate benefit—"Wakf fi-sabi-lillah" in perpetuity.*

The reservation of the ultimate benefit contemplated by the proviso to S. of the Wakf Validating Act can either be made expressly or impliedly. The answer to the question whether the reservation of the ultimate benefit for those purposes has been made by a deed of wakf must depend on the intention of the wakf as disclosed by the deed. In a case where the words "wakf fi sabi lillah" have been used and wakf has been created in perpetuity, and there is provision for the appointment of the mutawallis for all times to come, and a portion of the usufruct of the wakf property has been reserved for pious and charitable purposes, and the wakf had in contemplation the possible extinction of the line of his descendants who were to be the principal recipients of the profits of the wakf property, the irresistible conclusion is that the wakf intended by implication to reserve the ultimate benefit for the purposes enumerated in the proviso. (*Thom and Iqbal Ahmad, JJ.*) BAQA ULLAH KHAN *v.* GHULAM SIDDIQUE. 155 I.C. 416=7 R.A. 928=1935 A.L.J. 647=1935 A.W.R. 591=A.I.R. 1935 All. 616.

———S. 8, Proviso—*Object of wakf—General purposes.*

Where the executant of a wakfnama provided that "religious and charitable objects should continue to be performed permanently and in perpetuity so that they may benefit my soul."

Held, that the wakf satisfied the requirements of the proviso to S. 3 even though there was no specification in the deed itself of such religious and charitable objects. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAMZAN *v.* RAHMANI. 7 Luck 300=135 I.C. 372=I.R. 1932 Oudh 20=8 O.W.N. 1302=A.I.R. 1932 Oudh 71.

———S. 4—*Wakf— Validity — Provision regarding residence of family.*

Where the primary object of the testator was to create a wakf for charitable and religious purposes, a provision regarding the residence of the family does not invalidate the wakf. (*Jai Lal and Skemp, JJ.*) BADRUL ISLAM ALI KHAN *v.* MT. ALI BEGUM. 16 Lah. 782=8 R. L. 251=158 I.C. 465=A.I.R. 1935 Lah. 251.

———S. 10—*Scope—District Judge—Power of to impose fine.*

A District Judge has power to impose a fine under S. 10 of the Mussalman Wakf Validating Act. (*Broomfield, J.*) KALEKHAN *v.* KARIM REHMAN MALIK. 156 I C. 263=7 R.B. 491=37 Bom.L.R. 207=A.I.R. 1935 Bom. 207.

———(XXXII OF 1930)—Wakf—Essentials of—Trust for benefit of sons and their families only—If valid wakf. *See* DEED—CONSTRUCTION. 13 Rang. 679=156 I.C. 1038.

MUTA. *See* MAHOMEDAN LAW—MARRIAGE.

MUTATION.

See also (1) C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS.
(2) LANDLORD AND TENANT.
(3) LIMITATION ACT, ART. 144.

———*Alteration—Permissibility.*

A mutation entry cannot be altered especially after *jamabandi* unless if is effected on account of an obvious clerical error or patent fact. (*Irving, F C.*) HARNAM SINGH *v.* ISHAR SINGH. 13 Lah.L.T. 2.

———*Claims by daughter and reversioner—Latter in possession—Preferential right of.*

On the death of a lady there were two claimants to her property, one her daughter and the other a reversioner of her husband (a cousin). The latter was in possession, while the former was not.

Held, that the reversioner in possession was not a trespasser, but a relation claiming title by succession and that mutation should be ordered in his name in preference to the daughter who was out of possession

leaving her to approach the Civil Court for a declaration of her rights, if she felt aggrieved. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KAMMAL MISRA *v.* PARBHAWATI. **1935 R.D. 58.**

———*Correction—Application for—Maintainability—Absence of clerical error and patent fact.*

An application for correction which is contested and which is not based on an obvious clerical error or patent fact should be rejected summarily. (*Irving, F.C.*) IBRAHIM *v.* EMPEROR. **13 Lah.L.T. 17.**

———*Correction—Time-limit.*

A correction made six months after the original entry may be altered if substantial injustice would be done by not doing so. (*Irving, F.C.*) KISHEN SINGH *v.* RODA SINGH. **11 Lah L.T. 33.**

———*Correction of papers—Decision in regular suit—If* res judicata.

Matters which have finally decided in a regular suit cannot be reopened in a case for correction of the papers. (*Oppenheim S. M.*) JAI JAI RAM *v.* RAM SAMIJH PANDE. **18 R.D. 700=16 L.R. 108 (Rev.).**

———*Court of Wards—Mutuation in name of—Parties directed to civil suit.*

In inheritance cases a new entry must be made. The scope of the enquiry must be left to the discretion of the mutation officer but it must necessarily be summary. It will generally be preferable in doubtful cases to follow the rule of possession rather than embark upon an elaborate inquiry into titles. Where the Court of Wards is shown to be in fiduciary possession in a complicated case of inheritance mutation may be ordered in the name of the Court of Wards leaving the Court parties to finally decide the matter in a Civil Court (*Irving, F. C.*) MAMDOT ESTATE, *In the matter of.* **11 Lah. L.T. 39.**

———*Deed*—Prima facie *proof of execution and consideration.*

For purpose of limitation formal effect should be given to a registered deed in spite of receipt of consideration being denied since a deed is *prima facie* proof of both execution and receipt of consideration. (*Irving, F. C.*) NAWAB *v.* GANDAMAL. **11 Lah. L.T. 35.**

———*Duty of Revenue Officers—Decrees of Civil Courts—Binding nature of.*

Revenue Officers should normally give effect to decrees of Civil Courts without question but the order must be clear and free from ambiguity. The officers are not bound by the mistakes of Civil Courts; where the decree itself is so vague as to prove difficult of interpretation, a Revenue Officer is justified in examining the judicial record in order to interpret the vague portions of the decree. (*Calvert, F. C.*) NAWAB KHAN *v.* FATEH SINGH. **12 Lah. L T. 43 (2).**

———*Duty of Revenue Officer—Decree of Civil Court—Duty to give effect to.*

It is not the function of a Revenue Officer in any way to scrutinise the merits of a decree of a Civil Court; and the apparent absurdity of a decision of the Civil Court is no ground for refusing to recognise or give effect to it. Failure to give effect to such a decree is an irregularity which always merits intervention by the Financial Commissioner in revision. (*Irving F. C.*) MOHAMMAD WARIS *v.* EMPEROR. **13 Lah.L.T. 53.**

———*Duty of Revenue Officer—Enforcement of Civil Court's order.*

It is the duty of the Revenue Officer in effecting mutation to give effect to the order of the Civil Court. Where the Civil Court's order is overlooked the Financial Commissioner will interfere in revision. (*Miles Irving, F. C.*) BHAGWANT DASS *v.* PARTAB SINGH. **13 Lah. L.T. 10.**

———*Effect on title and terms of contract between parties.*

A mutation by itself does not confer any title and cannot affect the terms of a written contract between the parties. (*Bhide and Rangi Lal, JJ.*) MULK RAJ *v.* RASAL SINGH. **35 P.L.R. 606.**

———*Entry in Jamabandi—Power of Revenue Authorities to correct.*

According to revenue law as it now stands, an entry in the Jamabandi, however wrong, must not (saving obvious exception of clerical error or patent fact) be corrected except by civil suit. When the Jamabandi is attested, the work of the revenue authorities for good or ill is over. The rest lies with the Civil Courts. (*Irving, J. C.*) LOK NATH *v.* TRUST RAI FATEH CHAND. **35 P. L R. 395.**

———*Entry in* khewat—*Entry of widow's name—Effect.*

It is a matter of common experience that the opposite party in mutation proceedings is ordinarily described as objector. The entry of a Hindu widow's name in the *khewat* after the death of her husband is often done by way of consolation (*Bisheshwar Nath and Nanavutty, JJ.*) SUKHDASI KUAR *v.* FATEH BAHADUR SINGH. **I.R. 1933 Oudh 237=144 I.C. 316=10 O.W.N. 366=A.I.R. 1932 Oudh 283.**

———*Gift—Deed registered after death of donor only—Duty to effect mutation.*

The fact that a deed of gift is not registered during the donor's lifetime is no ground for refusing mutation in respect of it. Where a deed is registered after the donor's death it takes effect from the date from which it would have commenced to have effect if no registration were necessary. The Revenue Officer should therefore act upon it and effect mutation. (*Latif, F. C.*) MT. RAHMATE *v.* ALI BAKSH. **14 Lah.L.T. 7.**

———*Gift—Recital of passing of possession—Subsequent deed cancelling gift—Application for mutation by donee—Maintainability.*

Where the fact of possession having passed under a gift is recited in a registered deed, the Revenue Officer may properly act on the presumption arising from the recital; but when such recital is negatived by a recital in a subsequent deed cancelling the gift and registered before the Revenue Officer is seized of the case, mutation cannot be ordered on the basis of the recital in the first deed. (*Latif, F. C.*) NAZAR HUSSAIN *v.* GHULAM MOHAMMAD. **14 Lah.L.T. 5.**

———*Gift—Undivided share in joint land of donor and donee—Recital of possession—If sufficient.*

Where a registered deed of gift executed by the donor in respect of his undivided share in property held by him jointly with the donee recites that the donor has handed over possession to the donee, the Revenue Officer should act upon it and order mutation. (*Latif, F.C.*) MT. RAHMATE *v.* ALI BAKHSH. **14 Lah.L.T. 7.**

———*Hindu widow—Alienee of grove—Right to obtain mutation.*

Where a Hindu widow transfers her rights in certain grove the transferee is entitled to hold for her lifetime and mutation can be effected for that limited purpose. (*Oakden, S. M. and Keane, J. M.*) BHULAI UPADHIA *v.* BHAGAWANTA. **15 R D. 151=12 L R. 25 (Rev.).**

———*Jurisdiction—Revenue Officer—Decision as to rule of succession.*

Where in a mutation case the Revenue Officer has to decide who is the heir, he should first determine what is the rule of succession. It is true that he need not

enter into any intricate questions of law, but when any party claims it to be governed by personal and not by customary law, he must come to a decision however summary. (*Irving, F. C.*) CHANDAR PARKASH *v.* LAKSHMI NARAIN. **11 Lah.L.T. 15.**

———*Modification on review—Sanction of Collector—Whether can be obtained subsequently.*

Even if the correction is made without the previous sanction of the Collector such approval can be obtained *ex post facto.* (*Irving, F.C.*) KISHEN SINGH *v.* RODA SINGH. **11 Lah L.T. 33.**

———*Nature of proceedings—Concurrent order of lower Courts—Interference by Commissioner in revision.*

In mutation proceedings the Commissioner will not interfere in revision if the concurrent findings of the lower Courts are not perverse. In such proceedings the enquiry must necessarily be of a preliminary and summary character. (*Irving, F.C.*) MT. PARMESHRI *v.* RAM DAS. **11 Lah L T. 68.**

———*Party relying on will—Procedure.*

In a case of mutation based on a will the matter should be dealt with as one of succession and not on the basis of transfer and the mutating officer in deciding the question of title is bound to come to some decision however summary as to the validity of the will. (*Irving, F.C.*) HAKIM *v.* MT. FATIMA BIBI. **35 P.L.R. 231.**

———Proceedings in mutation cases. *See* C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS.

———*Proceedings in mutation cases—Nature of.*

Proceedings in mutation cases are certainly not wholly judicial proceedings but they are quasi-judicial proceedings. (*Hasan, C. J. and Kisch, J.*) TRILOKI NATH *v* RAM MANORATH. **7 Luck. 32=I.R. 1931 Oudh 297=132 I C. 537=14 O.L.J. 494=8 O.W. N. 764=15 R.D. 375=A.I R. 1931 Oudh 296.**

———Property of woman inherited from mother—Death of woman without issue—Claims by sister's sons and husband's heirs—Preference. *See* HINDU LAW—STRIDHAN—SUCCESSION. **1935 R.D. 59.**

———*Purchase by lambardar of property belonging to one co-sharer in proceedings against one.*

A lambardar collecting rent of an estate acts in a representative capacity and his possession is possession on behalf of the rightful co-sharers. Hence where a lambardar purchased at a Court sale part of a property in his estate recorded in the name of two co sharers in proceedings to which one of them was not a party, all that he can get from the Revenue Courts is mutation of his name over that part of the property which stands in the name of the person against whom the proceedings were instituted. He cannot get mutation of his name over the part standing in the name of the other co-sharer. If he has rights to that property, he must establish them in the Civil Courts in a case to which the other co-sharer is a party (*Oppenheim, S.M. and Drake Brockman, J. M.*) LACHMI NARAIN *v.* TASAWAR HUSSAIN. **14 L.R. 577 (Rev.)=17 R.D. 690.**

———*Question of succession — Decision — Power of Court.*

Where in mutation proceedings the question of succession to property arises by reason of death and it is sought to prove that title has devolved by will, the case is nevertheless to be treated as a disputed case of inheritance to be decided after a summary enquiry into the title. (*Irving, F.C.*) MT. ROSHAN BIBI *v.* GHULAM MAHOMED. **13 Lah L.T. 1.**

———Right to—Co-sharers in joint *sir*—Transfer of specific plots—Absence of formal partition—Right of transferee to mutation without possession. *See* AGRA TENANCY ACT, S. 226. **18 R D. 668.**

MUTATION—*Right to—Decree for possession—Person obtaining.*

A person who has only obtained a decree for possession but has not executed it cannot be said to have obtained "possession by transfer" an so cannot claim mutation. (*Drake Brockman, S M. and Holmes, J.M.*) MANOHAR SAHU *v.* RAGHUNATH DAS. **14 L.R. 816 (Rev.).**

———*Summary procedure.*

The mutation procedure is and must be summary. (*Townsend, F.C.*) MANZUR ALI *v.* AMIR ALI KHAN. **10 Lah. L.T. 3.**

———Transfer without—Effect of. *See* LANDLORD AND TENANT—TRANSFER WITHOUT MUTATION.

———*Tribal designation—Change of—Proceedings for—Propriety of.*

Mutation proceedings should not, as a rule, be used for changing tribal designations. The only exception to the rule is when a person threatens to bring a civil suit to declare that he is of another caste; in such a case the Commissioner, if he finds, after enquiry, that the suit is likely to be successful, should obviate unnecessary legal proceedings by ordering a correction. (*Irving, F.C.*) IBRAHIM *v.* EMPEROR. **13 Lah.L.T. 17.**

———*Tribal designation—Review of order as to.*

Effect should be given to a tribal designation, however doubtful, that is of long standing. It is not for the Collector to pursue and review mutations improperly made. (*Irving, F.C.*) IBRAHIM *v.* EMPEROR. **13 Lah L.T. 17.**

MUTAWALLI. *See* MAHOMEDAN LAW—WAKF.

MUTH *See* HINDU LAW—RELIGIOUS ENDOWMENT AND. *See* RELIGIOUS ENDOWMENT.

MUTUAL ACCOUNT. *See* LIMITATION ACT, ART. 85.

MUTUAL MISTAKE. *See* CONTRACT ACT, S. 20.

MYSORE AGRICULTURISTS' RELIEF REGULATION (XVIII OF 1928)—*Construction—Strict construction.*

The Regulation is a special enactment restricting the general rights of creditors to proceed against the property of their debtors to the fullest extent, and must hence receive a strict interpretation. (*Chari, J.*) SHIVALINGAPPA *v.* HOLEBASAPPA GOWDA. **12 Mys. L J. 478=39 Mys H.C.R. 853.**

———**S. 2**—"*Agriculturist*"—*Test.*

The definition in S. 2 does not require that he should earn his livelihood wholly or principally by agriculture or that he should personally engage himself in agricultural labour. It is sufficient if he ordinarily engages in agriculture provided his non-agricultural income does not exceed Rs. 500 and his aggregate income from all sources does not exceed Rs. 1,000. The burden of proving the income lies on the agriculturists. (*Doraswami Iyer, C.J.*) DHARANAPPA *v.* VENKATAPPA. **11 Mys L.J. 17=38 Mys H.C R. 275.**

———**S. 2**—"*Income*"—*Calculation of—Cost of raising crops—If deductible*

In calculating the income of an agriculturist as defined in S. 2 of the Agriculturists Relief Regulation, no allowance can be made for the cost of growing the crops. (*Sreenivasa Rao, J.*) *In the case of* KARE GOWDARA GIRIYAPPA. **13 Mys.L.J. 362=40 Mys. H C.R. 169.**

———**S. 2. Expl. (c)**—*Applicability—Written statement filed before the introduction of the Regulation—Subsequent application to be declared an agriculturist.*

MYS. AGRI. REL. REG. (1928), S. 3.

There is no provision in the Regulation regarding pending suits. Where before the introduction of the Regulation on 1st January, 1929, the written statement had been filed and subsequently the defendant applied to be declared an agriculturist, he cannot be said to have "omitted to raise the question of status though it could have been raised" within the meaning of Expl. (*c*) to S. 2 of the Regulation so as to preclude him from claiming the benefit of the Regulation under S. 14. (*Mahadevayya, J.*) MARIAPPAYYA *v.* DUGGABHATTA. **10 Mys.L J. 279 = 37 Mys.H.C.R. 278.**

———**S. 3**—*Applicability and scope—Decree declaring title to immovable property and for possession and mesne profits—S. 12, if governed by S. 3.*

The suits contemplated by S. 3 of the Regulation relate to the payment of money and fit in with the object of the Regulation which is the relief of agricultural classes from indebtedness. A decree for declaration of title to immovable property for possession thereof and for mesne profits does not come under the Regulation, as it does not directly affect the indebtedness of agriculturists. Nor it is permissible to split up that decree into separate parts, so as to invoke S. 12 in respect of a portion of it. S. 12 is governed by S 3. (*Chari, J.*) SHIVALINGAPPA *v.* HOLEBASAPPA GOWDA. **12 Mys. L.J. 478 = 39 Mys.H C.R. 853.**

———**S. 4**—*Applicability — Suit against firm of traders as such—Claim to privilege of agriculturist by partner—Sustainability.*

The provisions in the Regulation in favour of an agriculturist are purely personal privileges ; and consequently in a suit against a firm of traders as such a partner or partners of the firm cannot claim the privileges of an agriculturist under S. 4 of the Regulation. (*Sreenivasa Rao, J.*) SYED UMAR *v.* SHA TALOKCHAND WHOOLJI CO., RANEBENNUR. **13 Mys.L.J. 493.**

———**S. 4 (2), Proviso**—*Revision—High Court's powers.*

The High Court possesses ample discretionary powers to examine the evidence and pass such orders as it thinks fit,if, in its opinion, the legality or propriety of the finding of the lower Court is open to question. The proviso to S. 4 (2) should be liberally construed. (*Chari, J.*) SHIVALINGAPPA *v.* HOLEBASAPPA GOWDA. **12 Mys. L.J. 478 = 39 Mys.H.C.R. 853.**

———**S. 12**—*Applicability—Decree passed in* 1917.

S. 12 is applicable to a decree passed in 1917. (*Chari, J.*) SHIVALINGAPPA *v.* HOLEBASAPPA GOWDA. **12 Mys.L J. 478 = 39 Mys.H.C.R. 853.**

———**S. 12**—Scope—Decree for declaration of title to and possession of land and for mesne profits—Aid of S. 12—If can be invoked—Decree if can be split up. *See* MYSORE AGRICULTURISTS' RELIEF REGULATION, S. 3. **12 Mys.L.J. 478 = 39 Mys.H.C.R. 853.**

———**Ss. 12 and 26**—*Scope and distinction—Decree passed in* 1917—*Application of S. 12.*

There is a distinction between the terms used in Ss. 12 and 26. Whereas S. 26 is made applicable to all "*suits*" of the nature described in the section, S. 12 refers to any "*decree*" passed before, or after the Regulation comes into force. S. 12 cannot be taken to be governed by S. 26, and the reliefs which may be granted by the Court to an agriculturist under S. 12 are not necessarily limited to decrees passed in suits instituted on or after 1st January, 1926. It cannot therefore be held that S. 12 is inapplicable to a decree passed in 1917. (*Chari, J.*) SHIVALINGAPPA *v.* HOLEBASAPPA GOWDA. **12 Mys.L.J. 478 = 39 Mys.H.C.R. 853.**

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———**S. 26**—Scope—If governs S. 12. *See* MYSORE AGRICULTURISTS' RELIEF REGULATION, SS. 12 AND 26. **12 Mys.L.J. 478 = 39 Mys.H.C.R. 853.**

———**S. 12**—*Power of Court to direct payment in instalments—Agriculturist—Transfer by.*

The Court may at any time direct that the amount of any decree passed, whether or after the Regulation came into force, against an agriculturist, shall be paid by instalments with or without interest. The section only requires that the decree should have been passed against an agriculturist and it does not *prima facie* appear to require that when the order is passed, the judgment-debtor should also be an agriculturist. There is nothing in the Regulation to prevent an agriculturist from transferring his right to another agriculturist. (*Sreenivasa Iyer, J.*) SUBBAYYA *v.* KRISHNAPPA. **9 Mys L.J. 88.**

MYSORE ARBITRATION REGULATION (I OF 1917), S. 5—*Construction—"Submission shall be irrevocable".*

The clause, "a submission shall be irrevocable", in S. 5, Arbitration Regulation, is ambiguous and refers only to the authority of the arbitrator and not to the agreement to refer. (*Mahadevayya, O. C. J. and Shankaranarayana Rao, J.*) CARTER *v.* OAKLEY DUNCAN & CO., LTD. **12 Mys. L.J. 81 = 39 Mys H. C.R. 263.**

———**S. 9**—*Applicability—Contract between parties—Effect.*

S. 9 does not apply to a case where by a contract between the parties a course is provided for the appointment of arbitrators. The section is not intended to override the contract of the parties. (*Mahadevayya, O. C.J. and Shankaranarayana Rao, J.*) CARTER *v.* OAKLEY DUNCAN & CO., LTD. **12 Mys L.J. 81 = 39 Mys. H. C.R. 263.**

———**S. 9**—*Non-compliance with—Award—Legality.*

An award made in an arbitration where the statutory conditions laid down in S. 9 have not been satisfied is illegal and does not bind the parties. (*Mahadevayya, O. C. J. and Shankaranarayana Rao, J.*) CARTER *v.* OAKLEY DUNCAN & CO., LTD. **12 Mys.L.J. 81 = 39 Mys. HC.R. 263.**

———**S. 11 (2)**—*Arbitration out of Court—Award—Mode of enforcing—Suit based on—Maintainability.*

Where an award is passed in arbitration proceedings without the intervention of Court, a suit is maintainable to enforce the terms of the award. The summary procedure prescribed in S. 11 (2) is not the only way of effectuating the terms of the award. 33 Cal. 881; 20 M. 490 and 43 All. 108, Foll. (*Doraiswami Iyer, C.J.*) PARADESIAH *v.* MUDLIAH. **10 Mys.L J. 250 = 37 Mys.H.C.R. 489.**

———**S. 11 (2)**—*Order filing or refusing to file award—Right of appeal.*

An appeal lies under S. 104 (1) (*f*), C. P. Code, against an order filing or refusing to file an award passed in an arbitration without the intervention of the Court. The right of appeal under the Arbitration Regulation is not taken away by S. 104 (1) (*f*), C. P. Code. (*Mahadevayya, O. C. J. and Shankaranarayana Rao, J.*) CARTER *v.* OAKELY DUNCAN & CO., LTD. **12 Mys. L J. 81 = 39 Mys H.C.R. 263.**

———**S. 19**—*Stay of suit—Subsequent award by arbitrators—Effect on attachment before judgment.*

Where a suit in which properties have been attached before judgment is stayed under S 19 and an award is subsequently made in arbitration proceedings in favour of the defendant and filed in Court, the suit must be held

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to have been disposed of by such award in favour of the defendant. The attachment before judgment must therefore be deemed to have come to an end on such termination of the suit, and the defendant is therefore entitled to have it raised. The tact that an appeal has been filed against the decree passed on the award has not got the effect of keeping the original suit alive in the trial Court for the purpose of keeping alive the attachment before judgment.

Quaere.—Whether the stay order under S. 19 operates as a disposal of the suit in favour of the defendant. (*A. S.R. Chari, J.*) CARTER *v.* MESSRS. OAKLEY DUNCAN & CO., LTD. **13 Mys L.J. 509=40 Mys.H.C.R. 388.**

———**S. 19**—"*Step in the proceedings*"—*Meaning of.*

A party who makes any application whatsoever to the Court, even if it is merely an application for time, takes a step in the proceedings Any act in the nature of an application to the Court, which indicates that a party is willing that the suit should proceed would be step in the proceedings under S. 19 of the regulation. (*Mahadevayya, O C.J. and Shankaranarayana Rao, J*) CARTER *v.* OAKLEY DUNCAN & CO., LTD. **12 Mys L J. 81=39 Mys.H C.R. 263.**

MYSORE ARMS REGULATION (VI OF 1890), Ss. 9 and 14 (3)—*Unserviceable gun—Possession of—Offence.*

A gun, through it may not be serviceable for the time being, continues to retain its character as a fire-arm if it can be repaired and made serviceable. Possession of such fire arm is therefore an offence under Ss. 9 and 14 (3) of Mysore Arms Regulation. (*Shankaranarayana Rao, J.*) *In re* LINGAPPIAH. **12 Mys L.J. 537=39 Mys. H.C R. 948.**

MYSORE CHIEF COMMISSIONERS NOTIFICATION (III OF 1878)—*Construction* —"*Criminal processes of whatever description*"—"*Jurisdiction*"—*Meaning.*

The Chief Commissoner's Notification III of 1878 is no doubt expressed in very wide terms, but that does not justify the claim for an unlimited scope for its operation. The term "all criminal processes of whatever description" is very general but it cannot include illegal processes. The expression "jurisdiction" in the notification means jurisdiction also to give the particular direction embodied in the process to be executed. The processes covered by the notification would include valid processes issued by a Court competent to issue them. Non payment of taxes under a fiscal enactment such as the Madras Motor Vehicles Act is neither an extraditable offence nor a "crime" justifying the demand for a surrender of the person who has not paid such taxes; consequently a warrant issued by a British Indian Court for the arrest of a person resident in Mysore for such an offence is illegal and not executable in Mysore; such a process not being covered by the notification in question. (*Mahadevayya, C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) VENKATARANGAIENGAR *v.* GOVERNMENT OF MYSORE. **12 Mys L J. 328=39 Mys.H.C.R. 485 (F.B.).**

———*Scope and effect of in Mysore.*

The Chief Commissioner's Notification of 1878, included in the Instruments of transfer of 1881 as well as in the Mysore Treaty of 1913 must be deemed to have the force of law within the Mysore State, although it was not embodied in a legislative enactment. But the notification is in force in Mysore as an adjective law and deals only with a matter of procedure and does not effect substantive rights of parties, and cannot authorise the Magistrate of a British Indian Court to issue a warrant of arrest to be executed in the Mysore State by arresting a resident of that state for an offence under the Madras Motor Vehicles Act. (*Mahadevayya, C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) VENKATARANGAIENGAR *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 328=39 Mys. H C.R. 485 (F.B.).**

MYSORE CITY MUNICIPALITIES REGULATION (VII OF 1933), Ss. 167 and 245 (3)—*Contravention of S. 167—Prosecution—Commissioner's power to sanction.*

By virtue of S. 245 (3) of the City Municipalities Regulation, the Municipal Commissioner has power to sanction the prosecution of a person offending against the provisions of S. 167 of the Regulation. (*Shankaranarayana Rao, J.*) BANGALORE CITY MUNICIPALITY *v* NAZEER HUSSEIN. **13 Mys. L J.259=40 Mys. H C.R. 165.**

———**S. 245 (3)**—Scope—Contravention of S. 167—Prosecution for—Power of Commissioner to sanction. *See* MYSORE CITY MUNICIPALITIES REGULATION, Ss. 167 AND 245 (3). **13 Mys.L J. 259=40 Mys.H. C.R. 165.**

MYSORE CIVIL COURTS REGULATION (I OF 1883), S. 11—*Applicability—Ejectment suit—Valuation for purpose of jurisdiction the same as that for Court-fee—Court-Fees Regulation (I of* 1908), *S.* 4 (xi) (cc).

S. 11 of the Regulation does not apply to a suit in ejectment by the landlord. In such a suit, the valuation fixed by the plaintiff for purposes of Court-fee under S. 4 (*xi*) (*cc*) of the Court-Fees Regulation is also the valuation for purpose of jurisdiction. (*Doraiswami Iyer, C.J. and Madadevayya, J.*) JAFER KHAN *v.* SYED GHOUSE. **10 Mys.L.J. 25=37 Mys.H C.R. 305.**

———**S. 17 A**—*Admission of claim—Decree passed—Refund of half the institution fee.*

Where on the date fixed for the defendant's appearance he appeared in Court and admitted the claim of the plaintiff whereupon a preliminary decree was passed and the plaintiff was also present on that date.

Held, that under the circumstances the Court might infer an agreement between the parties or at any rate make an enquiry on that point and then grant a refund of half the institution fee. (*Doraiswami Iyer, C. J, Mahadevayya and Ramachandra Rao, JJ.*) CHELUVE GOWDA *v.* KALAMMA. **11 Mys.L.J. 206=38 Mys. H.C.R. 70 (F.B.).**

———**S. 17-A**—*Refund of half institution fee—Condition for—Claim admitted by defendant but compensation claimed for wrongful attachment.*

Refund is permissible under S. 17-A if the subject-matter of the suit is settled by agreement of parties without contest. It does not depend on the pendency of the question relating to the grant of compensation to the defendant under S. 95, C. P. Code. (*Doraiswami Iyer, C.J., Mahadevayya and Ramachandra Rao, JJ.*) CO OPERATIVE SOCIETY, LTD., CHICKBALLAPUR *v.* VENKATASAMI CHETTY. **10 Mys.L J. 418.**

MYSORE CIVIL COURTS REGULATION (II OF 1898), S 17-A—*Refund of half the institution fee—Proof of settlement by appellant—No appearance by respondent.*

S. 17-A of the Regulation is analogous to O. XXIII, R. 23 of the C. P. Code and the intention of the Legislature should be given effect to by reading into S. 17-A the words "it is proved to the satisfaction of the Court" after the word "whenever." Where, therefore, the Court is satisfied about the truth of the appellant's allegation that the appeal has been settled by agree-

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ment of parties and the respondents have not appeared before the Court, the Court can direct refund of half the institution fee. 8 Mys. C.C.R. 282, Ref. (*Doraiswami Iyer, C. J. and Sreenivasa Iyer, J.*) KANCHI VENRATRAMIAH *v.* ADI LAKSHMAMMA. **9 Mys.L.J. 313=36 Mys.H.C.R. 220.**

MYSORE CIVIL PROCEDURE CODE REGULATION (III OF 1911)—*Construction—Rule as to addition of parties and amendment of pleadings.*

The rules as to the addition of parties and the amendment of pleadings should be liberally construed. (*Mahadevayya, Offg. C.J.*) RAJAMMA *v.* GOPALA IYENGAR. **12 Mys.L.J. 390=39 Mys.H.C.R. 992.**

———S. 2 (2)—*'Decree'—Finding that suit barred by limtation—Appeal.*

A finding that the suit is barred by limitation amounts to a decree as defined by S. 2 (2), C. P. Code, and is appealable. (*Mahadevayya, C. J. and Ramachandra Rao, J.*) ABDUL RAHIMAN *v.* FATHIMA BI. **12 Mys.L.J. 508=39 Mys.H C.R. 841.**

———S. 2 (11)—*"Legal representative"—Intermeddler with estate—Trespasser.*

To enable an intermeddler to act as legal representative it must be shown that he intended to represent the estate of the deceased by intermeddling with it. Where the obstructor is a trespasser he is not a 'legal representative' within the meaning of S.2 (11). (*Doraiswami Iyer, C. J, and Ramachandra Rao, J.*) NURKHAN BUDAN KHAN *v.* SANKARANTHI MUNISAMY. **11 Mys L.J. 7=38 Mys.H.C.R. 225.**

———S. 2 (12)—*Alienee from Hindu father—Liability for mesne profits—Extent of.*

Mesne profits are profits which a person in wrongful possession did or might with ordinary diligence receive. An alienation by the manager of a joint family consisting only of himself and his two minor sons, the alienation is not void but only voidable at the instance of the sons. The possession of the alienee is not wrongful till the sons sue to have it set aside and the sons are not entitled to mesne profits from the alienee except from the institution of the suit. 46 Mad. 815 and 48 Bom. 468, Ref. (*Doraiswami Iyer C.J. and Sreenivasa Iyer, J.*) NAGAIAH *v.* MUNIA. **11 Mys.L.J. 422=38 Mys.H. C.R. 379.**

———S. 2 (12)—*Burden of proof.*

The burden of proving the amount of mesne profits actually received is on the person who has received it while that of proving the amount of profits that might with ordinary diligence have been received is on the person claiming them. 47 Mad, 800 and 47 M. L. J. 730, Ref. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) SIDDA REDDI *v.* SUBBAMMA. **10 Mys. L.J. 352=37 Mys. H.C.R. 320.**

———S. 4 (2)—*Revison—Interference—Grounds.*

Under S. 4 (2) the High Court possesses ample discretionary powers to examine the evidence and pass such orders as it thinks fit, if it in its opinion the legality or the properiety of the finding of the lower Court is open to question and has resulted in a failure of justice. (*Doraiswami Iyer C. J.*) DHARANAPPA *v.* VENKATAPPA. **11 Mys. L J. 17=38 Mys. H C.R. 275.**

———Ss. 6 and 95—*Scope—Claim for compensation for wrongful arrest—Amount claimed exceeding pecuniary limits of Court's jurisidiction—Claim, if entertainable.*

S. 6, C. P. Code, does not govern a claim for compensation made under S. 95, C. P. Code, and any Court can award compensation under S. 95 so long as the Court does not award as compensation any amount

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exceeding the limits of its pecuniary jurisdiction. The principle of pecuniary jurisdiction governs the amount actually awarded and not the amount claimed as compensation. (*A.S.R. Chari, J.*) NATHMALL PARTAPCHAND *v.* RAJMAL. **13 Mys.L.J. 511=40 Mys. H. C.R. 392.**

———S. 7 (a) (iii), O. 21, R. 82 and O. 50—*Scope and effect of—Small Cause Court—Attachment of immovable property—Validity.*

An attachment of immovable property made by a Small Cause Court must considered to be a nullity and of no effect whatever, having regard to the provisions of S. 7 (*a*) (*iii*), O. 21, R. 82 and O. 50, C. P. Code. Before a decree of a Small Cause Court can be executed by attachment and sale of immovable property, it must be transferred either to a Court of original jurisdiction or to the original side of a Court exercising dual jurisdiction. S. 12 of the Small Cause Court's Regulation implies a formal transfer of the decree from the small cause side of the Court to the original side. (*Shankaranarayana Rao and A. S. R. Chari, JJ.*) ARASA HANUMANTHIAH GOWDA *v.* VENKATARAMANIAH. **14 Mys. L.J. 27=40 Mys. H.C.R. 430.**

———S. 9—Scope—Insolvency application by debtor—Subsequent by creditor to set aside tranfer by debtor as fraudulent—If barred. *See* MYSORE INSOLVENCY REGULATION, SS. 28 AND 44 (2). **40 Mys. H. C. R. 237.**

———S. 11—*Applicability to enquiry under Legal Practitioners' Regulation.*

The provisions of the Civil Procedure Code Regulation are not applicable to an enquiry under the Legal Practitioners' Regulation. The latter is a consolidated law and self-contained not only as regards the matters to be dealt with under it, but also as regards the procedure to be followed as well as the remedies available to an aggrieved party. (*Mahadevayya, C. J. and Shankaranarayan Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys L.J. 292=39 Mys. H.C.R. 380.**

———S. 11—*Applicability—Razinama decree.*

A razinama decree, for the purpose of *res judicata*, is on the some footing as a decree passed *per invitum*. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) THIMMAPPAIYA *v.* GOVINDIAH. **10 Mys L.J. 184=37 Mys. H.C.R. 112.**

———S. 11—*Execution proceedings—Applicability of* res judicata.

The principle of *res judicata* applies as well to questions decided in execution proceedings as to those decided in suits. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) VENKATA NARASIMHA CHAR *v.* KRISHNAMA CHAR. **12 Mys. L.J. 393=39 Mys. H. C.R. 715.**

———S. 11—*Heard and finally decided—Rent suit—*Ex parte *decree—Issue as to extent of land not decided—Effect in later suit.*

In a suit for recovery of rent the defendant (tenant) pleaded that the entire land covered by the lease had not been put in his possession. The plaintiffs averred that the extent mentioned in the lease was only approximate. An issue was raised on the point; but the defendant having remained *ex parte* on the date of hearing a decree was passed in terms of the plaint, without however, recording express findings on the several issues in the case.

Held, that it did not operate as *res judicata* as to the area of the land in the possession of the tenant in a subsequent suit between the parties. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) DODDAGANGA

MYS. C. P. CODE REG. (1911), S. 11.

REDDI *v.* VENKATARAMIAH. **12 Mys.L.J. 201=39 Mys H.C.R. 236.**

———**S. 11, Expl. VI**—*Applicability—Hindu brothers—Order against some disallowing resistance to execution—If binds minor brother not party to prior order.*

An order disallowing resistance to execution of a decree, offered by two of three joint brothers constituting a joint Hindu family, the third being a minor, is binding on their minor brother as well. The latter is, therefore, precluded by reason of S. 11, Expl, VI, C.P. Code, from resisting delivery in execution on the ground that he was not a party to the prior order. (*Mahadevayya, C J. and Shankaranarayana Rao, J.*) SIVARAMU *v.* SOORYANARAYANA SETTY. **12 Mys. L. J. 381=39 Mys.H.C.R. 875.**

———**S. 11**—*Matter not directly and substantially in issue—Question of title incidentally raised.*

Where in the previous suit the claim of the plaintiff was for three years' produce on the footing that the defendant therein was getting the land cultivated on behalf of the plaintiff and the question as to the share to which the plaintiff was entitled was only incidentally in issue and the razinama decree did not touch that question,

Held, that the question relating to the plaintiff's title was not barred by *res judicata*. (*Doraiswami Iyer, C. J. and Mahadevayya, J*) THIMMAPPAIYA *v.* GOVINDIAH. **10 Mys L J. 184=37 Mys H.C.R 112.**

———**S. 11**—Res judicata—*Competent Court—Prior suit in Munsif's Court—Subsequent proceedings in insolvency involving claim amounting to Rs.* 20,000—*No bar.*

"A decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised." 29 Cal. 707 (P. C.), Foll. So the decision of a Munsif whose pecuniary jurisdiction extended only up to Rs. 2,500 on the same issue between the same parties cannot operate as *res judicata* in subsequent insolvency proceedings where the claim in question amounted to over Rs. 20 000. (*Doraisami Iyer, C. J. and Rama Rao, J.*) BHAGAWANJI *v.* RAJA SAMPANGI RAMA SHETTY. **9 Mys. L J. 1=36 Mys.H.C.R. 39.**

———**S. 20**—*Cause of action—Suit on contract—Place of making of, or place of performance.*

A suit may be instituted where a part of the cause of action arises; and where a right and an infringement have both to be proved before a plaintiff can be entitled to relief, the cause of action arises partly where the right has accrued and partly where it has been infringed. In the case of a suit on a contract, the cause of action may be said to arise at the place where the contract is made or where it is to be performed or its performance completed, and a suit can therefore be filed at any of these places. (*Shankaranarayana Rao, J.*) SURAJMAL MISRIMAL *v* HAJI GANI MOOSA. **12 Mys. L.J. 367 =39 Mys.H.C R. 784.**

———**S. 34**—*Interest on interest—Award from date of suit—Validity.*

Under S. 34 interest on interest is allowed only from the date of the decree and not from the date of the suit. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) MUNDASADA VEERAPPA *v.* SIVALINGAPPA. **11 Mys. L.J. 344=38 Mys. H.C.R. 304.**

———**S. 35 and O. 33, Rr. 10 and 11**—*Discretion of Court—Suit* in forma pauperis—*Partial success—Defendant found responsible for the suit—Liability for full claim.*

MYS. C. P. CODE REG. (1911), S. 47.

The payment of costs by one party to another or the payment of Court fee to Government in a pauper suit is entirely in the discretion of Court. Where the pauper plaintiff has partly succeeded and partly failed, he would only be entitled to proportionate costs from the defendant, even though the latter is found to have been responsible for the suit. (*Doraiswami Iyer, C. J. and Sreenivasa Iyer, J*) BORAYYA *v.* BORIAH. **10 Mys. L.J. 400=37 Mys. H. C. R. 355.**

———**S. 37 (b)**—*Execution—Courts of concurrent jurisdiction.*

S. 37 (*b*) cannot apply where the second Court before which execution is taken out was not competent to entertain the suit on the date of the entertaining of the execution application. (*Mahadevayya O C. J. and Ramachandra Rao, J*) HUTCHEGOWDA *v.* RAMAPRASAD. **11 Mys.L.J. 311=39 Mys H C.R. 745.**

———**S. 47**—*Appeal—Application for stay of execution—Order rejecting—If appealable.*

An order rejecting an application for stay of further execution pending an application for review of the judgment in the suit, the decree in which is under execution, is only an interlocutory order relating to stay of execution which does not conclusively determine the rights of parties, and as it does not amount to a decree, it is not appealable. (*Shankaranarayana Rao and A S. R. Chari, JJ.*) RAGHUNATHA RAO ITAPHE *v.* GANAPATI RAO ITAPHE. **13 Mys L J. 157=39 Mys H C. R. 1195.**

———**S. 47**—*Appeal—Attachment—Objection by person not party to suit—Order on—Appeal.*

An objection to attachment raised by a person who is not a party to the suit or to the execution proceedings does not fall under S. 47; and therefore the order made on such an objection is not appealable. (*Sreenivasa Rao, J.*) DEVAJAMMANNIYAVARU *v.* DEPUTY COMMISSIONER, MYSORE. **13 Mys L.J. 502.**

———**S. 47**—*Appeal—Order directing sale of properties in a certain order—If appealable.*

A question which relates to the order in which the properties referred to in the decree are to be sold in execution is one which falls under S. 47, C P Code, and the order of the executing Court on such a question is appealable. (*Ramachandra Rao and Shankaranarayana Rao, JJ*) RUDRAPPA *v.* ANANTHAYYA. **12 Mys.L.J. 420=39 Mys H.C R. 1033.**

———**S. 47**—*Appeal—Order recording satisfaction of decree—Subsequent application to reopen execution case—Order rejecting—Appeal.*

Where in execution proceedings, satisfaction of the decree is recorded on the admission of the decree holder, and the latter subsequently files an application purporting to be under S. 151 and O. 47, R. 1, C. P. Code, praying that the order recording satisfaction was the result of a mistake might be set aside and that the execution case might be proceeded with, the application must be taken to be one under S. 47, C. P. Code, and an order rejecting it is open to appeal. The question involved is a substantial one affecting the rights of the decree-holder as regards the further execution of the decree, and as such it is only the executing Court that can and ought to decide it under S. 47. A fresh suit is barred. The fact that the application purports to be made under S. 151 and O. 47, R. 1, C. P. Code, will not make it a review application, so as to bar an appeal from the order on such an application. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) DORASWAMIAH *v.* TOPAN DAS NANDARAM DASS SAIT. **13 Mys.L.J. 58=39 Mys.H.C.R. 1111.**

MYS. C. P. CODE REG. (1911), S. 47.

——**S. 47 and O. 21, R. 97**—Applicability—Application for possession under decree—Obstruction by person claiming under judgment-debtor and at his instigation—Application for removal—If one under S. 47 or O. 21, R. 97. *See* MYSORE LIMITATION REGULATION, ART. 167. **40 Mys.H.C.R. 1.**

——**Ss. 47 and 151**—*Applicability—Application to set aside purchase by stranger—Fraud of third party.*

Where the property is purchased in execution by a stranger, an application to set aside the sale is not governed by S. 47 and the fact that the decree-holder subsequently got the property from the stranger-purchaser is immaterial for the purpose. Nor can the application be deemed to be one under S. 151, because O. 21, R. 90 will apply to the case and so long as there is a specific provision of law that is applicable, S. 47 with the aid of S. 151 cannot be invoked. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) KYATA *v.* SRIKANTASROUTI. **10 Mys.L.J. 137.**

——**S. 47**—*Applicability—Resistance to delivery of possession—Order under O. 21, R. 98.*

If the resistance or obstruction was offered not by the judgment-debtor or his representative or by another person at the instigation or on behalf of either but by a person claiming in good faith to be in possession in his own right, the provisions of S. 47 will not apply.

Held, on the facts that the obstructor acted on the instigation of the judgment-debtor and that S. 47 applied. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) NURKHAN BUDAN KHAN *v* SANKARANTHI MUNISAMY. **11 Mys L.J. 7=38 Mys HC.R. 225.**

——**S. 47 and O 21, R. 95**—*Application by decree-holder purchaser to be put in possession—Limitation Regulation, S. 15—Applicability.*

An application by the decree-holder to be put in possession of the properties pruchased by him in the execution sale is one which falls under S. 47, C.P. Code, and the provisions of S. 15 of the Limitation Regulation apply to it. So in computing the period of limitation under Art. 180 of the Limitation Regulation for such an application, the period during which execution of the decree was stayed should be deducted. (*Doraiswami Iyer, C. J and Ramachandra Rao, J.*) VENKATAKRISHNIENGAR *v.* KRISHNIENGAR. **10 Mys.L.J. 208=37 Mys H C.R. 179.**

——**S. 47**—*Powers of executing Court—Award silent about interest—Grant of interest in execution.*

Where the award of the District Judge in Land Acquisition proceedings which has the force of a decree does not mention anything about interest, the Court executing the award has no power to go behind the award and grant interest on the ground that the award ought to have given interest. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) THE LAND ACQUISITION OFFICER *v.* GOWARAMMA. **9 Mys L.J. 55=36 Mys.H. C.R. 48.**

——**Ss. 47 and 145**—*Order against surety—Appeal.*

An order passed in the proceedings against a surety at the instance of the decree holder is appealable as one passed in the course of execution proceedings. 13 Mys. C.C.R 187, Not Foll. (*Rama Rao and Sreenivasa Iyer, JJ.*) SESHANNA GOWDA *v* PUTTAMMA. **9 Mys. L.J. 319=36 Mys H C.R. 268.**

——**S. 47 and O. 21, R. 2**—*Question relating to execution—Application for delivery of possession by decree holder-purchaser—Plea of subsequent adjustment by judgment debtor.*

Where subsequent to his purchase in execution sale, the decree holder applied for delivery of possession and the judgment-debtor pleaded an adjustment subsequent to the sale and applied under O. 21, R. 2 for recording the same.

Held, that the sale was not complete without delivery of possession and as the plea of the judgment-debtor, if proved, would amount to a just cause for resistance by a judgment-debtor to delivery of possession under O. 21, R. 98, it was a question relating to execution which could be gone into under S. 47. (*Srinivasa Iyer and Mahadevayya, JJ.*) NARASAPPA *v.* CHIKKE GOWDA. **10 Mys. L.J. 193=37 Mys.H.C R. 133.**

MYS. C. P. CODE REG. (1911), S. 53.

——**S. 47 and O. 21, R. 90**—*Execution sale—Stranger purchaser—Suit by for possession—Plea of invalidity of sale—If open.*

In a suit by a stranger auction purchaser for possession of the property purchased by him at an execution sale, it is not open to the judgment-debtor or his representative to plead that prior to the sale the decree was satisfied and that the sale was vitiated by fraud and irregularity. A party may be allowed in a proper case to raise a question of the kind referred to in S. 47, C. P. Code, in any subsequent suit either as plaintiff or as defendant, and the Court also may at his request treat such suit or defence as an application in execution; but when the party, being bound to raise such a question at an earlier stage, has failed to do so, or having raised it has failed, such a course cannot be permitted. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) PATNADA RUDRAPPA *v.* BUDIHAL GANGAPPA. **13 Mys.L.J. 75=39 Mys.H.C.R. 1096.**

——**S. 47**—*Scope—Application to set aside sale for fraud—Order on—Second appeal.*

An application to set aside a sale on the ground of fraud and irregularity in publishing and conducting the sale must be dealt with under O. 21, R. 90, C P. Code, and an order passed thereon is appealable under O. 43, R. 1 (*j*), C. P. Code, but is not subject to a second appeal. S. 47, C. P. Code, does not cover such a case; and simply because the Court instead of dealing with the application under O. 21, R. 90, disposes of it wrongly under some supposed power under S. 151, C. P. Code, will not have the effect of taking the matter outside the scope of O. 21, R. 90 and bringing it under S. 47, C. P. Code, so as to confer a right of second appeal. (*Reilly, C. J. and Shankaranarayana Rao, J.*) RANGIAH *v.* REVAIAH. **13 Mys.L J. 271=40 Mys H.C R. 187.**

——**S. 47**—Scope—Surety—Bond by—Enforcement—Procedure—Execution or suit. *See* MYSORE C. P. CODE REGULATION, S. 145. **13 Mys.L J. 124.**

——**S. 50 (1)**—*Scope—Transferee Court—Jurisdiction to entertain application.*

S. 50 (1) does not give an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the names of the legal representatives for a deceased judgment-debtor; and application may also be made to and orders passed by a Court to which a decree has been transferred for execution. In any event the omission to make an application to the Court which passed the decree is only an irregularity which can be cured by S. 99. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) KRISHNAYYA SETTY *v.* NANJA. **10 Mys L.J. 459.**

——**S. 53**—*Decree against father—Pre-partition debt—Execution against son's property—Permissibility.*

In view of S. 53 of the Regulation, the decisions which held that a decree against a father could not be executed against the ancestral property in the hands of the sons and that the only remedy of the decree holder was to institute a regular suit against the sons are no longer law. (*Sreenivasa Iyer, J.*) SURYANARAYANA SETTY *v.* SUBBARAYA. **10 Mys.L J. 8.**

MYS. C. P. CODE REG. (1911), S. 54.

——— **S 54 and O. 20, R. 18**—*Construction and scope —Revenue paying estate—Partition or separation of share— Procedure—Jurisdiction of Civil Court.*

S. 54, C. P. Code, refers to the partition of an estate assessed to the payment of revenue and not necessarily to the partition of an estate accompanied by apportionment of the revenue. S. 54 and O. 20, R. 18, C. P. Code, make it quite clear that a partition of such an estate or the separation of a share therefrom shall be made only by the Deputy Commissioner and not by a Civil Court. All that the Civil Court can do in such a case is to follow the procedure prescribed by O. 20, R. 18. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SIDDALINGIAH *v.* REVAIAH. **13 Mys.L.J. 171 = 39 Mys.H.C.R. 1171.**

——— **Ss. 55 (4) and 145**—*Arrest of judgment-debtor —Release on security—Bond providing for the debtor filing insolvency application and prosecuting same— Insolvency application not prosecuted with diligence— Liability of surety.*

The judgment-debtor brought to Court under arrest was released on furnishing security; the terms of the security bond were far in excess of the provisions of S 55 (4) of the Code. It provided that if the judgment-debtor did not file an application for insolvency within thirty days and prosecute the same to the end, the surety would be liable for the decretal amount. The judgment-debtor applied for insolvency within the time fixed but failed to prosecute the application with due diligence.

Held, that the bond must be deemed to be one taken under S. 145 and not S. 55 (4) and that the surety was not absolved from liability by the mere production of the judgment debtor into Court. (Case law discussed.) (*Ramachandra Rao, J.*) RAMACHANDRA SETTY *v.* VENKATARAMA. **11 Mys L.J. 397 = 39 Mys.H.C.R. 79.**

———**S. 55 (4)**—*Defective insolvency application— Dismissal of—Liability of surety.*

Where on the undertaking of a surety in accordance with the provisions of sub-S. (4), the judgment-debtor was released from arrest and within one month filed an application to be adjudicated an insolvent which being defective in form was directed to be amended and on default dismissed, *held*, that the conduct of the judgment-debtor in omitting to amend the application or take any further steps to have the application restored to file showed he was not *bona fide* in his application and that the surety was not discharged from liability. A.I.R. 1928 Sind 192, Ref. (*Doraiswami Iyer, C.J.*) ABDUL BHALICK SHERIFF *v.* BACHARAVOOTHAR & CO. **9 Mys L.J. 149 = 36 Mys.H.C.R. 51.**

———**S. 55 (4)**—*Surety under—Death of judgment-debtor before applying in insolvency—Liability of surety.*

The undertaking given by a surety for the judgment-debtor was to produce the judgment debtor in Court whenever called upon to do so in the event of the latter failing to apply in insolvency within 30 days, and to be liable for the decree amount in the event of his failure to produce the judgment-debtor in Court when called upon by the Court to do. The judgment-debtor died without applying in insolvency and before the surety was called upon to produce him.

Held, the contract became impossible of performance and the surety was therefore discharged. (*Shankaranarayana Rao, J.*) *In the case of* SRIKANTIAH. **13 Mys.L.J. 336 = 40 Mys.H.C.R. 125.**

———**S. 60**—*Exemption from attachment—Stamp papers.*

MYS. C. P. CODE REG. (1911), S. 64.

Stamp papers entrusted for sale to a licensed stamp-vendor are not exempt from attachment. The vendor has a right to obtain refund from the Government for the unused papers and over this right he has a disposing power which he may exercise for his own benefit. 9 Bom. 518; 10 Bom.L.R. 13; 29 I.C. 339, Ref. (*Rama Rao and Sreenivasa Iyer, JJ.*) SITARAMAIYA *v.* SHAMANNA GOWDA. **Mys.L.J. 341.**

———**S. 60 (1), Proviso (p)**—*Insurance amount— Attachment.*

In reading proviso (*p*) of S. 60 (1) the definition of the word "bonus" as defined in the Mysore State Life-Insurance Reg. has to be borne in mind and the said word has to be understood as including the amount secured by the insurance as being payable to the insured or his nominees or heirs according to the rules. According to the scheme of the State Life Insurance the insured officials are not competent to assign away their policies during their lifetime and the bonus amounts are not liable to seizure by attachment and sale at the instance of creditors. (*Mahadevayya, J.*) NARAYANA SETTY *v.* NAGARATHNA MUDALIAR. **11 Mys.L.J. 335 = 38 Mys.H.C.R. 298.**

——— **S. 63**—*Rival decree holders — Simultaneous attachment — Determination of rights of parties— Jurisdiction.*

Where two rival decree-holders got attached on the same date the identical properties of their common judgment-debtor, the former through the Court of the Munsit and the latter through the Court of Small Causes,

Held, that the rights of the parties should be determined by the Court of superior grade, *viz.*, the Court of the Munsif. Scope of Ss. 63 and 73 compared. (*Shankaranarayana, Rao, J.*) YELLPPA *v.* RUKMANI-AMMA. **11 Mys.L.J. 261 = 39 Mys.H.C.R. 98.**

———**S. 64**—*Applicability — Realization of decree amount by sale of some of the attached properties— Effect on attachment of the rest—Subsequent private sale of such properties—If void.*

Where the entire amount for which execution is sought under a decree is realised by a sale of only some of the attached items of property, the attachment of the remaining item or items must be deemed to be withdrawn under O. 21, R. 55 (*b*), C, P. Code, as no further liability subsists under the execution then taken out. Consequently a private sale by the judgment-debtor of such unsold items after the sale in execution of the other items will not be vitiated by the bar of S. 64, C. P. Code, although the decree-holder chooses to file a fresh execution petition in respect of future liabilities arising under the same decree. In that event a fresh attachment of the items unsold at the original sale is necessary before the Court can order a sale thereof; and the decree-holder cannot therefore claim to avoid the private sale by the judgment debtor. (*A.S R. Chari, J.*) MUNIVENKATAPPA *v.* AKKAYYAMMA. **13 Mys.L.J. 506 = 40 Mys.H C.R. 384.**

———**S. 64**—*Effect.*

Any private transfer or any title created by the judgment-debtor pending the attachment cannot in any way affect the rights of the attaching creditor to have the property sold and delivered free of the title created by the judgment-debtor and no one who gets a title from the judgment-debtor pending attachment can set up that title against the attaching creditor or auction-purchaser. (*Mahadevayya, O.C.J.*) SADA ANANTH-APPA *v.* HEMANNA. **11 Mys.L.J. 388 = 39 Mys.H.C.R. 184.**

MYS. C. P. CODE REG. (1911), S. 73.

——**S. 72**—*Applicability—Attachment before judgment—Deposit of sale proceeds—Subsequent attachment in execution by another decree-holder—Right to rateable distribution.*

Respondent I sued respondent II, and attached before judgment some ground nuts of respondent II, which were sold and the amount of sale proceeds deposited in Court. A decree was passed in favour of respondent I on 19-2-1929 and on 25 9-1929, he withdrew the decretal amount from Court. Petitioner who held a decree against respondent II, attached the amount in deposit on 14-8 1928. He applied to the Court for payment, but his application was rejected on the ground that the money had been earmarked for respondent I.

Held, that in the absence of any title to priority, petitioner was entitled to rateable distribution and that the erroneous payment of respondent I did not confer on the latter any legal right to retain the money. (*Ramachandra Rao, J.*) CHANDRASEKHARIAH *v.* BANUMAYYA. **12 Mys.L.J. 491=39 Mys.H.C.R. 723.**

——**S. 73**—*Rival decree holders — Simultaneous attachment—Mutual rights—Determination by inferior Court.*

Where the sale of certain properties was effected in violation of S. 63 of the Code and the rights of an attaching decree-holder before a higher Court are on that account saved the Court of inferior grade ordering distribution may exercise its inherent power in order to grant relief to that attaching decree holder. (*Shankaranarayana Rao, J.*) YELLAPPA *v.* RUKMANIAMMA. **11 Mys.L.J. 261=39 Mys H.C.R. 98.**

——**S. 80**—*Scope—Suit based on contracts.*

S. 80 of the C. P. Code Regulation is not restricted in its scope to tortious acts and the like. It includes suits based on contracts also. The object of the legislature in enacting the section is to give sufficient opportunity and breathing time to the Government or the public officers concerned to consider their legal position, when the same is challenged and if possible avoid litigation involving public revenues. So there is no reason for any distinction among suits so far as the applicability of the section is concerned. 51 Bom. 725 (P.C.) and 1 Mys.L.J 1, Foll. (*Rama Rao and Sreenivasa Iyer, JJ.*) DEPUTY COMMISSIONER, BANGALORE DT. *v.* SRINIVASAIYA. **9 Mys.L.J. 370.**

——**S. 80**—*Suit for injunction—Necessity for notice.*

In a suit for an injunction against Government or a public officer acting on behalf of Government, notice under S. 80 of the C.P. Code is indispensable. 51 B. 725 (P.C.) and 9 Mys.L.J. 370, Foll. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) SREENIVASA SITARAM KULKARNI *v.* CHENNAGIRI KAREEM SABI. **10 Mys.L.J. 139=37 Mys.H.C.R. 802.**

——**S. 80**—*Suit against State Railway—Notice of claim under Mysore Railways Regulation, not sufficient.*

The special form of procedure prescribed in Ss. 61 and 122 of the Mysore Railways Regulation is not inconsistent with the procedure prescribed in S. 80, C. P. Code. The sections of the Railways Regulation refer to *claims*, and S. 80 of the C. P. Code relates to *suits*, against the Railway administration. Where the plaintiff brought a suit against the Mysore Railways for short delivery in the Small Cause Court and contended that as the Government was not impleaded, no notice of suit under S. 80 of the C. P. Code was necessary.

Held, that (*i*) the Government was a necessary party and the suit laid against the Railways only was incompetent; (*ii*) notice under S. 80, C.P. Code, was necessary; (*iii*) the suit should be heard and determined, under S. 2 of the Railways Regulation, by the Principal Civil Court of Original jurisdiction, *i.e.*, the District Court. (Case law referred.) (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) ABDUL LATIFF TAYAB SAIT *v.* MYSORE RAILWAYS. **10 Mys L.J. 210=37 Mys.H.C.R. 158.**

MYS. C. P. CODE REG. (1911), S. 94.

——**S. 92**—*Applicability—Claims against strangers and trespassers.*

Claims against persons who are strangers to the trust and who set up a title hostile to the trust, such as alienees and trespassers holding adversely to the trust, are not within the purview of S. 92, C. P. Code. (*Mahadevayya, C.J. and Ramchandra Rao, J.*) MUSTAPHA KHAN SAB *v.* SYED ABDUL GAFFOOR SAB. **13 Mys.L J. 98=39 Mys.H C.R. 955.**

——**S 92**—*Procedure—Suit relating to public trust—Institution in Court without jurisdiction—Dismissal—Propriety.*

Where a suit relating to a public trust and asking for reliefs falling under S. 92 (1), C. P. Code, is instituted in a Court other than that of a District Judge, the proper course for the Court, when it finds that the suit falls under S. 92, is to direct the return of the plaint for presentation to the proper Court and not to dismiss it. (*Mahadaveyya, C.J. and Ramachandra Rao, J.*) MUSTAPHA KHAN SAB *v.* SYED ABDUL GAFFOOR SAB. **13 Mys.L J. 98=39 Mys H.C.R. 955.**

——**S. 92**—*Suit under—Death of some plaintiffs—If causes abatement.*

A suit under S. 92, C. P. Code, is a representative suit, and when some of the plaintiffs die, the cause of action survives to the rest, and the suit does not abate as a consequence of the failure to implead the legal representatives of the deceased plaintiffs. It is competent to the surviving plaintiffs to continue the suit or appeal as the case may be and they fully and properly represent the entire public. (*Mahadaveyya, C.J. and Ramachandra Rao, J.*) MUSTAPHA KHAN SAB *v.* SYED ABDUL GAFFOOR SAB. **13 Mys.L J. 98=39 Mys. H.C.R. 955.**

——**S. 92 (1)**—*Scope—Suit to declare property trust property and for a permanent injunction to restrain defendants from interfering with the rights of the plaintiffs and others—Sanction not obtained—Maintainability.*

A relief by way of a declaration that the suit property belonged to the public or that the same may be declared to be trust property, and a relief by way of an injunction restraining the defendants from interfering with the rights of the plaintiffs and others to use the suit property for certain purposes, do not come within any of the clauses of S 92 (1), C. P. Code. A suit with two such prayers is not a suit under S. 92, and is maintainable without the sanction of the Deputy Commissioner. (*Mahadaveyya, C.J. and Ramachandra Rao, J.*) MUSTAPHA KHAN SAB *v.* SYED ABDUL GAFFOOR SAB. **13 Mys.L.J. 98=39 Mys H.C.R. 955.**

——**S. 94**—*Disobedience to temporary injunction—Powers of Court to commit for.*

S. 94 summarizes the general powers possessed by the Court in regard to all interlocutory proceedings. The Court may, in order to prevent the ends of justice from being defeated, in cases of disobedience of orders of temporary injunction, commit the person guilty thereof to the civil prison and order that his property may be attached and had. The powers are indicated in S. 94 (*c*), the details of procedure being relegated to Sch. I. (*Mahadaveyya, J.*) OBALAMMA *v.* KAMANNA. **10 Mys.L.J. 159=37 Mys.H C.R. 405.**

——**S. 94 (c) and O. 39**—Applicability—Municipal election case—Temporary injunction—Jurisdiction to

MYS. C. P. CODE REG. (1911), S. 96.

grant. *See* MYSORE MINOR MUNICIPALITIES REGULATION, S. 11 (2). **39 Mys.H C.R. 1019.**

———**S. 95**—Claim for compensation under—Jurisdiction of Court—Determining factor—Amount claimed or amount awarded. *See* MYSORE C. P. CODE REGULATION, SS. 6 AND 95. **40 Mys H C.R. 392.**

———**S. 96 (3)**—*Consent decree—Appeal—Competency of—Mode of setting aside.*

In so far as a decree purports to have been passed by the Court with the consent of the plaintiffs on the one hand and the defendant on the other, it is a decree passed by consent, and against this decree no appeal lies under the provisions of S. 96 of the C. P. Code. If it is alleged that the compromise is vitiated by fraud, the proper course is either to make an application for review or to institute a suit for setting aside the compromise. So long as the decree purports to have been passed on the basis of the compromise he is not entitled to prefer an appeal therefrom (Case-law referred.) (*Sreenivasa Iyer and Mahadaveyya, JJ.*) NAMA KRISHNIAH CHETTY *v.* VISVANATHA JEWELLERY HALL. **10 Mys.L J. 190=37 Mys H C.R. 121.**

———**S. 96 (3)**—*Consent decree—Appeal—Mode of setting aside,*

Judgment by consent acts as an estoppel and no appeal lies from a decree passed by the Court with the consent of parties. A consent decree may be set aside on any ground which would invalidate an agreemant such as misrepresentation, fraud or mistake. But that cannot be done by an appeal and it must be done by a fresh suit brought for the purpose. (*Mahadaveyya and Ramachandra Rao, JJ.*) BAGUMANE DEVA GOWDA *v.* SITARAMAIYA. **10 Mys.L.J. 175=37 Mys.H.C.R. 438,**

———**S. 99** — *Irregularity—Application under S.* 50 (1) *to transferee Court—Validity.*

S. 50 (1) does not give an exclusive jurisdiction to the Court which passed a decree for the purposes of substituting the names of the legal representatives for a deceased judgment-debtor; and application may also be made to and orders passed by a Court to which a decree has been transferred for execution. In any event the omission to make an application to the Court which passed the decree is only an irregularity which can be cured by S. 99. (*Doraiswami Iyer, C.J. and Mahadeveyya, J.*) KRISHNAYYA SETTY *v.* NANJA. **10 Mys. L.J. 459.**

———**S 104 (1) (f)**—*Order filing or refusing to file award under Arbitration Act—Appeal.*

The right of appeal under S. 104 (1) (*f*), C. P. Code, is not confined to orders made under Sch. II C. P. Code, but applies also to orders under the Arbitration Act, S. 104 (1) (*f*) is worded in the widest possible terms, and hence, an order filing or refusing to file an award is appealable under the said clause. (*Mahadevayya, O C. J. and Shankaranarayana Rao. J.*) CARTER *v.* OAKLEY DUNCAN & CO., LTD. **12 Mys. L J. 81=39 Mys H C.R 263.**

———**Ss. 114 and 148** — *Applicability — Judgment directing production of succession certificate within a fixed period—Direction that on default suit to stand dismissed—Extension of time—Power of Court—Review—Maintainability.*

The judgment in a suit directed that the decree shall not be drawn up until a succession certificate was produced by the plaintiff who was given six months' time for the purposes. If he failed to do so within that time, the suit was to stand dismissed. The plaintiff did not get the certificate in time; so he applied for extension of time by three months. That was not granted. Subsequently he obtained the succession certificate and applied afresh producing the certificate along with the application and also prayed that the application might be treated as one for review and the delay might be excused.

Held, S. 148, C. P. Code, did not apply but that under S. 114 read with O. 47, R. 1, the Court had ample powers to treat the application as one for review and to extend the time for production of the certificate and to draw up a decree. (*Shankaranarayana Rao, J.*) VEERANNA *v.* RAMACHANDRA RAO SINDHE. **13 Mys L.J. 203=39 Mys H CR. 1091.**

MYS. C. P. CODE REG. (1911), S. 115.

———**S. 115 and O. 47. R. 7**—*Application for review—Dismissal of—Revision.*

Revision lies from an order rejecting an application for review, though the interference in revision by the High Court will be limited to cases where the order was passed without jurisdiction. If, however, a Subordinate Court acting within its jurisdiction, refused to review the previous decision on merits, the High Court cannot consider the sufficiency of the grounds on which the Court declined to review. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) SHAMA SASTRI *v.* THOPE GOWDA. **10 Mys L.J 301.**

———**S. 115**—"*Case decided*"—*Order granting or refusing to grant leave to sue* in forma pauperis.

An application *in forma pauperis* is a "case decided" within the meaning of S. 115, C.P. Code, and revision lies whether the application is allowed or rejected. (*Mahadevayya, C.J.*) REVAPPA SATTAPPA *v.* MOHIYUDDIN SHERIFF. **13 Mys.L J 138=39 Mys.H.C. R. 1068.**

———**S. 115**—*Court-fee — Decision favourable to plaintiff—Revision.*

A revision petition is not competent against an order with regard to Court-fee, when the decision is in favour of the plaintiff. (*Mahadevayya, Offg. C.J.*) MUNISWAMAPPA *v.* DASAPPA. **12 Mys.L.J. 452=39 Mys H C.R. 750.**

———**S. 115**—*Discretion—Order under O.* 33, *R.* 9—*Refusal to dispauper plaintiff—Interference.*

Under O. 33, R. 9, C.P. Code, the Court has a discretion as to whether a pauper plaintiff ought to be dispaupered or not, and if in the exercise of that discretion it refuses to dispauper him, the High Court will not interfere in revision with the order of refusal. (*Mahadevayya Offg C.J.*) MUNISWAMAPPA *v.* DASAPPA. **12 Mys. =L J. 452=39 Mys H C R. 750.**

———**S. 115**—*Discretionary orders—Order refusing amendment under Ss.* 151 *and* 152—*Interference.*

The Court's power to allow amendment under Ss. 151 and 152, C.P. Code, is discretionary in the fullest sense; but that does not mean that the High Court has no power to interfere in revision with an order under these sections. S. 115 confers very wide powers on the High Court and if it is shown that the lower Court has wrongly rejected an application for amendment under Ss. 151 and 152, the High Court will interfere. (*A.S. R. Chari, J.*) A. J. RAM *v.* ASIATIC GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. **13 Mys.L. J. 145=39 Mys.H.C R 1079.**

———**S 115**—*Insolvency—Adjudication of—Annulment—Order refusing review—Revision.*

No revision petition is maintainable against an order rejecting an application for review of an order annulling adjudication under S. 43 of the Insolvency Regulation. (*Doraiswami Iyer, C.J.*) CHIKKA BELUSA, *In re.* **9 Mys.L.J. 34=36 Mys. H.C.R. 19.**

MYS. C. P. CODE REG. (1911), S. 115.

———**S. 115**—*Interlocutory order.*

The High Court can interfere with interlocutory order but it is not in every instance of erroneous interlocutory order that the High Court will be disposed to exercise its revisional jurisdiction. 3 Mys.L.J. 180 (F.B.), Ref. The High Court refused to revise the order of the lower Court permitting a witness after he had given his evidence, to furnish his explanation and tender himself for cross examination, if necessary, in regard to certain statements found in his deposition which according to him are incorrect. (*Rama Rao, J.*) APPANNIENGAR, *In re.* **36 Mys.H.C.R. 343=9 Mys.L J. 89.**

———**S. 115**—*Interlocutory order—Order as to admissibility of documents under O. 13, R. 1—Interference.*

The High Court will not under ordinary circumstances interfere with interlocutory orders passed by Subordinate Courts during the pendency of a suit that certain evidence is either admissible or inadmissible. But when the circumstances are peculiar, the High Court will interfere where the lower Court refuses to admit documents which had been filed in Court long before disputes arose. (*Shankaranarayana Rao, J.*) HIS HOLINESS SRIMAT LAKSHMI MANOGNYATHIRTHA SWAMIGALU OF KUNDAPUR VYASARAYA MUTT *v.* PATEL VENKATE GOWDA. **39 Mys.H C.R. 937=13 Mys.L.J. 41.**

———**S. 115**—*Interlocutory order—Rectification of issues.*

The High Court will not interfere in revision in the matter of rectification of issues in a case when, as a matter of fact, there are other issues on which evidence has yet to be recorded. 4 Mys.L.J. 105. Ref (*Doraiswami Iyer, C.J.*) LAKSHMI BAYAMMA *v.* RAMACHANDRA RAO. **37 Mys.H.C.R. 167=10 Mys L.J. 217.**

———**S. 115**—*Order as to Court-fee—Revision.*

When the Court passes an order as to Court fee, favourable to the plaintiff, if cannot be revised by the High Court under S. 115, C.P. Code, it does not matter whether the petitioner for revision is the defendant or the Government. (*Mahadevayya, C.J.*) YALAKKAPPA *v.* VARGAPPA. **39 Mys.H.C.R. 830=12 Mys.L.J. 268.**

———**S. 115**—*Order issuing commission—Revision.*

A Court which issues an order directing a witness to be examined on commission, on grounds other than those laid down in the C.P. Code, acts without jurisdiction, justifying the High Court to interfere in revision. (*Mahadevayya, O.C.J.*) BASAPPA *v* NANJAPPA. **39 Mys.H C.R. 215=12 Mys.L.J. 118.**

———**S. 115**—*Other remedy—Manifestly erroneous order—Interference.*

Where there is a manifest error in the order passed under S. 73 the High Court may interfere in revision and need not necessarily direct the aggrieved party to a regular suit. (*Shankaranarayana Rao, J.*) YELLAPPA *v.* RUKMANIAMMA. **39 Mys H.C.R. 98=11 Mys.L. J. 261.**

———**S. 115**—*Revision—Order permitting an Advocate to appear for a party.*

An order of the lower Court permitting or refusing to permit an advocate to appear for a party in the case is subject to be revised by the High Court. (*Doraiswami Iyer, C.J. and Rama Rao, J*) BANK OF MYSORE, LTD. *v.* SHANKARA RAO. **36 Mys.H.C.R. 311=9 Mys L J. 166.**

———**S. 115**—*Technical objection.*

The revisional jurisdiction is only exercised in the ends of justice and the Court cannot in revision countenance purely technical grounds especially at the

MYS. C. P. CODE REG. (1911), S. 145.

instance of a party who had the assistance of Counsel and who himself was responsible for the course adopted by his opponent and the lower Court. 8 Mys.L.J. 483, Ref. (*Rama Rao, J.*) DODDAMALLAPPA SETTY *v.* KHANDERAYA SETTY. **36 Mys.H.C.R. 392=9 Mys.L.J. 433.**

———**S. 141 and O. 47, R. 1**—*Applicability—Reference under Land Revenue Code—Power of review.*

There is nothing in S. 141, C.P. Code, which justifies the granting of a review in a case of reference by Government under S. 226 of the Mysore Land Revenue Code. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) LINGAPPA *v.* SIR J. W. BHORE. **39 Mys.H.C.R. 942=13 Mys.L.J. 44.**

———**S. 144**—*Execution sale—Setting aside—Slight variance of decree.*

Under S. 144 the Court should place the parties in the position which they would have occupied but for such decree or part thereof as had been varied or reversed. In this connection what has to be looked to is the substance and reality of the matter. Where the decree is varied to a very small extent the Court may refuse to set aside the Court sale held in pursuance of the lower Court's decree. (*Mahadevayya and Ramachandra Rao, JJ.*) VENKATASAMI SETTY *v* SAVAL DAS SAIT. **37 Mys.H.C.R. 501=10 Mys. L.J. 465.**

———**S. 145**—*Applicability—Bond under O. 38, R. 2.*

S. 145 applies to all surety bonds which are executed for the payment of money under an order of the Court. If an order is passed under O 38, R. 2 and if in pursuance of such an order the defendant finds a surety who executes a bond, such bond comes within the purview of S. 145 and the obligation thereunder can be executed against him in the manner provided for the execution of decrees. (*Doraiswami Iyer, C. J. and Mahadevayya, J*) ARTHUR DURHAM *v.* KHAJEE KHALEEL SAHIB. **37 Mys.H.C.R. 138=10 Mys.L J. 197.**

———**S 145**—*Arrest of judgment-debtor—Release on security—Bond providing for the debtor filing insolvency application and prosecuting same—Insolvency application not prosecuted with diligence—Liability of surety.*

The judgment-debtor brought to Court under arrest was released on furnishing security; the terms of the security bond were far in excess of the provisions of S. 55 (4) of the Code. It provided that if the judgment-debtor did not file an application for insolvency within thirty days and prosecute the same to the end, the surety would be liable for the decretal amount. The judgment-debtor applied for insolvency within the time fixed but failed to prosecute the application with due diligence.

Held, that the bond must be deemed to be taken one under S. 145 and not S. 55 (4) and that the surety was not absolved from liability by the mere production of the judgment-debtor into Court. (Case-law discussed.) (*Rama chandra Rao, J.*) RAMACHANDRA SETTY *v.* VENKATARAMA. **39 Mys.H C.R. 79=11 Mys.L J. 397.**

———**S. 145 and O. 38, R. 2**—*Bond imposing obligations in excess of those under Code—Enforceability.*

If in consideration of certain proceedings against another person being stayed, a party undertakes liability more stringent and in excess of that imposed by O. 38, R. 2 there is nothing to prevent the terms of the bond being enforced in full. The surety is not entitled, in spite of the bond, to plead that the terms of the bond should be enforced only so far as they relate to appearance of the judgment-debtor. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) ARTHUR DURHAM *v.* KHAJEE

MYS. C. P. CODE REG. (1911), S. 145.

KHALEEL SAHIB. **37 Mys. H.C.R. 138=10 Mys.L. J. 197.**

———**Ss. 145 and 47**—*Order against surety—Appeal.*

An order passed in the proceedings against a surety at the instance of the decree-holder is appealable as one passed in the course of execution proceedings. 13 Mys. C.C.R. 187, Not Foll. (*Rama Rao and Sreenivasa Iyer, JJ.*) SESHANNA GOWDA *v.* PUTTAMMA. **36 Mys. H.C.R. 268=9 Mys.L J. 319.**

———**S. 145**—*Surety bond as mortgage—Remedy of decree-holder.*

Where a surety bond is in substance executed as a deed of mortgage, the decree-holder can enforce the bond in execution proceedings and need not institute a regular suit on the bond. (*Shankaranarayana Rao, J.*) AHMED SAB *v.* LAKSHMANA SETTY. **11 Mys.L.J. 370.**

———**S. 145**—*Surety for judgment-debtor—Bond by —Enforcement—Procedure—Execution or suit.*

Where a surety for a judgment-debtor executes a security bond to the Court providing that the decree-holder is entitled to realise the decree amount by sale of the properties hypothecated thereunder, and also by proceeding against him personally in the event of there being left any balance, the bond can be enforced in execution proceedings without recourse to a regular suit. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) AHMED SAB *v.* LAKSHMANA SETTY. **39 Mys.H.C.R. 1048=13 Mys.L J. 124.**

———**S. 145**—*Surety — Liability — If affected by amendment of decree.*

The liability of a surety, who executes a bond holding himself liable for the amount of a decree independently of the terms of the decree, and whose liability is legally valid and binding on the date of the bond, cannot be affected by any change of circumstances or decisions as between the decree-holder and judgment-debtor. The amendment of the decree subsequent to the surety bond does not render the bond invalid or unenforceable (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) AYYANNA *v.* CHOWDAMMA. **39 Mys.H.C.R. 597.**

———**S. 146**—Scope—If enlarges scope of O. 22, R. 10—Substitution in proceedings after decree—Powers of Court. *See* MYSORE C. P. CODE REGULATION, O. 22, R. 10. **40 Mys.H.C.R. 341.**

———**S. 148**—*Applicability and scope—Direction to produce succession certificate within a fixed time—Condition that on default suit shall stand dismissed—Extension of time.*

S. 148, C. P. Code, only applies to a case where time is fixed for the doing of an act prescribed or allowed by the Code and not where it is prescribed by a decree in a suit which has become final. The real test to determine whether in a particular case the Court has power to extend the time is to find out whether the proceeding in which the time was originally granted is still pending or has been finally disposed of. Where the judgment or order provides that certain terms or conditions have to be complied with and that in default the suit or application shall stand dismissed, the proceedings must be deemed to have been finally disposed of, as no further order of the Court would be necessary to make the order of dismissal effectual. (*Shankaranarayana Rao, J.*) VEERANNA *v.* RAMACHANDRA RAO SINDHE. **39 Mys H.C.R. 1091=13 Mys L.J. 203.**

———**S. 148**—*Compromise — Execution sale—Agreement by judgment-debtor to pay within specified period —Extension of time—Powers of Court.*

When in the course of proceedings by the judgment-debtor to set aside an execution sale, a compromise was made between the decree holder and the judgment-debtor that on payment of the judgment debt within a prescribed period, the sale should stand cancelled while upon failure to make such payment the sale should stand confirmed, time is of the essence of the agreement and the Court has no power to extend the time fixed for payment. (*Sreenivasa Iyer, J.*) PUTTAYYA *v.* THIMMARANGAYYA. **36 Mys.H.C.R. 433=9 Mys L.J. 461.**

MYS. C. P. CODE REG. (1911), S. 151.

———**S. 149**—*Discretion of Court — Exercise of— Ground for.*

This is an enabling section which vests a discretion in the Court to decide after consideration of all the circumstances of the case and of the reasons for not paying the requisite Court-fee in time, whether or not the party should be allowed time to make up the deficiency. The power to receive the deficient Court-fee and to validate the memorandum of appeal with retrospective effect is therefore a matter of discretion with the Court and not one which a party can claim as a matter of right. Where the insufficiency of the stamp was caused by a *bona fide* mistake or *bona fide* misunderstanding of the law as to the valuation, the discretion of the Court vested under S. 149 can be exercised but not to a case where the amount of Court-fee payable was not open to any doubt and where the under payment was deliberate and intended to suit the convenience of the party. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) NANJUNDIAH SETTY *v.* MAHALINGAPPA. **36 Mys.H.C.R. 79=9 Mys.L.J. 193.**

———**S. 149 and O. 7, R. 11 (c)**—*Plaint insufficiently stamped—Power of Court to grant time for payment of deficient Court-fee.*

The trial Court has ample discretion under S. 149, C. P. Code, to grant time to a plaintiff to make good the deficiency, if any, in the Court-fee paid on the plaint. Cl. (*c*) of O. 7, R. 11, C. P. Code, also implies that it has such discretion. And when the Court so grants time, it is not open to the High Court to interfere with the discretion so exercised by the trial Court even before the plaint was registered as a suit. (*Shankaranarayana Rao, J.*) *In the case of* THIMMIAH. **40 Mys.H.C.R. 139=13 Mys.L.J. 343.**

———**S. 149**—*Scope — Discretion of Court under— Non payment of deficient Court-fee within time—Plea that stamp of particular denomination not available— If maintainable.*

The discretion vested in Courts for allowing a party to make up the deficiency in Court-fee under S. 149, C. P. Code, should be exercised only when the insufficiency is caused by a *bona fide* mistake or *bona fide* misunderstanding of the law as to the valuation, but not when the amount of Court fee payable is not open to any doubt. Where the under-payment if deliberate and intended to suit the convenience of the party, the Court will not grant indulgence. A plea that Court fee stamps of a particular value were not available on a particular day is not a valid plea which will be accepted by the Court as sufficient to excuse the delay in non-payment of the deficiency within the time fixed. (*Ramachandra Rao Shankaranarayana Rao, JJ.*) THIMME GOWDA *v.* MURIGAPPA. **39 Mys H.C R. 850=12 Mys L.J. 621.**

———**S. 151**—*Applicability — Dismissal of suit in preliminary issues—Remand on appeal of whole case without recording findings on issues decided—Appeal.*

In a suit for partition the trial Court framed some preliminary issues, recorded findings on those issues against the plaintiff and dismissed the suit. On appeal, the appellate Court, without coming to any conclusion on the correctness or otherwise of the findings of the

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trial Court on the issues raised by it, and without itself recording findings on those issues, though that the frame of the suit was defective, reversed the decree, and remanded the whole suit directing the trial Court to frame issues and then to decide the case.

Held, that the order of remand was passed under the inherent powers under S. 151 and not under O. 41, R. 23 C. P. Code, and therefore no appeal lay against the order of remand. A Court remanding a suit on appeal must clearly state whether it remands the suit under S. 151 or under O. 41, R. 23 or R. 25. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) SUBBANNA SETTY *v.* VEERANNA GOWDA 39 **Mys.H.C.R. 572.**

——**Ss. 151 and 47**—*Applicability—Application to set aside purchase in execution by stranger for fraud.*

Where the property is purchased in execution by a stranger, an application to set aside the sale is not governed by S 47 and the fact that the decree-holder subsequently got the property from the stranger-purchaser is immaterial for the purpose. Nor can the application be deemed to be one under S. 151, because O. 21, R. 90 will apply to the case and so long as there is specific provision of law that is applicable, S. 47 with the aid of S. 151 cannot be invoked. (*Doraswami Iyer, C. J. and Ramachandra Rao, J.*) KYATA *v.* SRIKANTA SROUTI. **10 Mys.L.J. 137.**

——**S. 151**—*Applicability—Other remedy open.*

S. 151, C. P. Code, cannot be invoked where an appropriate remedy is open to a party under other provisions of the Code. (*A. S. K. Chari and Srinivasa Rao, JJ.*) BALE BHADRASETTY *v.* BALE MADAPPA. **40 Mys.H.C.R. 367 = 13 Mys.L.J. 473.**

——**S. 151**—*Application barred by limitation—Inherent powers, if can be invoked.*

Where the first defendant remaint *ex parte* during the suit and long after the decree, presented an application for review which was dismissed as barred by limitation and it was also held that there were no sufficient grounds for condoning the delay, he cannot invoke the inherent powers of the Court for securing the same relief. 46 All 144; 46 All. 13; 55 Cal 219 Ref. (*Srinivasa Iyer, J.*) BHIMA RAO *v.* ESWARA RAO. **9 Mys.L.J. 184.**

——**S. 151**—*Court fees—Excess paid by mistake—Refund of—Inherent power of Court.*

Though there is no provision in the Court-Fees Regulations for refund of Court-fees paid in excess by mistake the inherent powers of the Court and the provisions of S. 151, C. P. Code, enable a Court to make such a refund when common justice demands it. The petitioner had filed written statement in a previous suit wherein he set up a counter-claim paying the requisite Court-fee. The Court, however, refused to adjudicate upon the counter claim whereupon the petitioner was obliged to bring a fresh suit for the purpose of paying fresh Court fees.

Held, that the ends of justice demanded that the Court-fees paid in the previous case should be refunded to the petitioner. (*Shankaranarayana Rao, J.*) OAKLEY & CO., LTD. *v.* CARTER. **39 Mys.H.C.R. 65 = 12 Mys L.J. 29.**

——**S. 151**—*Decree set aside against one of several defendants—Power to revive whole suit.*

Where a decree passed against several defendants has been set aside at the instance of one of them, the parties are at liberty to apply to revive the whole suit. There is no specific procedure prescribed in the Code for reviving the suit but that does not prevent the Court from exercising its inherent power when invoked to make such orders as may be necessary for the ends of justice and remit the parties to their original rights in the earlier

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suit, on an application made for the purpose. (*Doraiswami Iyer, C.J.*) NANJUNDIAH *v.* PADMARAJIAH. **37 Mys.H.C.R. 181 = 10 Mys.L.J. 124.**

——**S. 151**—*Inherent powers—Powers of High Court.*

Apart from S. 151, C. P. Code, the High Court is competent to rectify a mistake committed by itself. If a Subordinate Court refuses to exercise its inherent power in reference to an order of its own, it is quite open to the higher Court to give the necessary redress. 46 A. 864; 48 A. 356, Ref. (*Mahadevayya, J.*) CHIKKA *v.* SUBBAIYA. **37 Mys.H.C R. 399 = 10 Mys.L.J. 229.**

——**S. 151**—*Inherent powers—Setting aside execution sale—Powers of Court.*

S. 151, C P. Code, cannot be resorted to where the Code itself specifically provides a remedy. Where a judgment-debtor whose property has been sold in execution has a clear remedy under O. 21, R. 90, C. P Code, but, though personally served with notice of sale and have every opportunity to watch the proceedings and to apply in time if he was prejudiced, where he negligently fails to do so, he cannot in a belated application by him ask the Court to come to his rescue by exercising its inherent powers under S. 151, C. P. Code. (*Reilly, C. J. and Shankaranaryana Rao, J.*) RANGIAH *v.* REVAIAH. **13 Mys.L.J 271 = 40 Mys.H.C.R. 187.**

——**S. 151**—*Non-compliance with S. 63—Grant of relief to rectify mistake.*

Where the sale of certain properties was effected in violation of S. 63 of the Code and the right of an attaching decree holder before a higher Court are on that account saved the Court of inferior grades ordering distribution may exercise its inherent power in order to grant relief to that attaching decree-holder. (*Shankaranarayana Rao, J.*) YELLAPPA *v.* RUKMANIAMMA, **39 Mys.H.C.R. 98 = 11 Mys. L.J. 261.**

——**S. 151**—*Other remedy available — Inherent powers—Resort to.*

A Court cannot make use of the special provisions of S. 151 where the applicant had his remedy provided under O. 21, R. 90 of the Code and had neglected to avail himself of it. (*Mahadevayya, J.*) CHANNABASAVIAH, *In re.* **37 Mys.H C.R. 344 = 10 Mys. L J. 364.**

——**S. 151**—*Other remedy available—Inherent powers not to be invoked.*

Where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it, a Court cannot make use of his powers under S. 151 to give relief to him. The inherent powers of Court cannot be invoked in breach of the provisions of the Limitation Act, *e.g*, Art. 168. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KAVERAMMA *v.* NARAYANA RAO. **38 Mys.H C R. 432 = 11 Mys.L.J. 432.**

——**S 151**—*Remand under—Appeal.*

An order of remand passed by an appellate Court under its inherent powers under S. 151, C. P. Code, is not appealable. (*Mahadevayya, O. C. J. and Ramachandra Rao, J.*) SUBBANNA SETTY *v.* VEERANNA GOWDA. **39 Mys.H.C R. 572.**

——**S. 151**—*Restoration of suit—Deficient Court-fee—Non-payment of—Dismissal for default for—Impropriety—Restoration under inherent powers.*

Where the lower Court granted time to the plaintiff to pay additional Court-fee within a certain date and on plaintiff remaining absent on that date, dismissed the suit for default instead of following the correct procedure of rejecting the plaint, the plaintiff who might have felt doubts as to the procedure open to him, is justified in invoking S. 151 for the restoration of the suit. Where

MYS. C. P. CODE REG. (1911), S. 151.

the suit has been so restored without any question of prejudice to the defendant who was then not even served, an objection taken by him as to the propriety of the restoration long after the institution of the suit and nearly when all the evidence has been taken, will not be entertained by the Court. (*Rama Rao and Srinivasa Iyer, JJ.*) THIMME GOWDA *v.* CHALUVA IYENGAR. **35 Mys H C.R. 453 = 8 Mys L.J. 483.**

———**S. 151**—*Scope—Erroneous payment of money by Court—Power to order refund.*

Where an erroneous payment of money has been made to a party by a Court, the Court has inherent power under S. 151, C. P. Code, to direct him to refund the same. (*Ramachandra Rao, J.*) CHANDRASEKHARIAH *v.* BANUMAYYA. **12 Mys.L.J. 491 = 39 Mys H C R. 723.**

———**S. 151 and O. 9, R. 9**—*Scope—Dismissal of suit for default—Setting aside — Grounds—Inherent power.*

The law contemplates that when a suit is dismissed for default, it should be restored only when sufficient cause for default is made out as provided by O. 9, R. 9, C. P. Code. In the absence of such sufficient cause being shown, the Court is precluded from invoking in aid its inherent powers under S. 151, C. P. Code. (*Mahadevayya, C.J.*) HANUMAIYA SETTY & SONS *v.* ABDUL RAZACK. **13 Mys.L.J. 110 = 39 Mys.H.C. R. 1004.**

———**Ss. 151 and 145 and O. 38, Rr. 5 and 6**—*Surety for attachment of property under O. 38, Rr. 5 and 6—Setting aside of surety bond—Mode of suit or application.*

A surety who has executed a bond under O. 38, R. 5, and wishes to avoid the same on the ground of misrepresentation can only do so by a separate suit and not by an application under S 47 or S. 151. 43 Mad. 325; 49 Mad. 323 and 51 All 346, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) BASAPPA *v.* SIVALINGAIAH. **9 Mys L J. 177.**

———**S. 152**—Amendment of decree—Effect on liability of surety under bond executed prior to. *See* C. P. CODE, S. 145. **39 Mys.H.C.R. 597.**

———**S. 152**—*Applicability — Decree agreeing with intention of judgment—Power of Court to amend.*

Where a decree accords with the intention of the judgment, the Court has no power, in the absence of any clerical or arithmetical mistake or accidental slip or omission, to amend it under S. 152 or under its inherent jurisdiction, although the judgment itself is erroneous in law and the error is apparent on the face of the judgment. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) HAKEEM MAHOMED ALI *v.* SULTANKHAN SAHEB. **12 Mys L J. 524 = 39 Mys H.C.R. 825.**

———**S 152**—*Jurisdiction—Decree against several defendant—Appeal by one only—Dismissal—Application to amend—Forum.*

A decree was passed against five defendants making all of them liable for mesne profits. 5th defendant filed an appeal so far as he was concerned without making the other parties to it, but the appellate Court confirmed the original decree. A second appeal against it was also rejected. The other defendants 2 to 4 applied to the trail Court for amendment of the decree in accordance with the judgment making the 5th defendant alone liable for mesne profits.

Held, the decree, so far as defendants 2 to 4 were concerned, had not become merged in the appellate decree, and that the trial Court had, therefore, jurisdiction to amend the decree. (*Ramachandra Rao, J.*) DODDA VENKATARAVAPPA *v.* CHICKKA NANJA. **12 Mys.L.J. 513.**

MYS. C. P. CODE REG. (1911), O. 1, R. 1.

———**S. 152**—*Power of Court— Costs — Omission to award—Subsequent insertion—Legality.*

Where the presiding Judge of Court omits to award costs in his order by inadvertence, it is open to his successor to amend the order by setting right the inadvertent omission in question. S. 152, C. P. Code, applies to the case and enables the Court to rectify the mistake. (*Shankaranarayana Rao, J.*) SHAMBOOMULL GANGA RAM *v.* MUNISWAMI CHETTY. **13 Mys.L J. 118 = 39 Mys.H C.R. 1036.**

———**S. 152**—*Power of Court under—Limitation—Laches of party—Effect of.*

It is no doubt true that no period of limitation is prescribed for applications under S. 152, C. P. Code, and though laches in not necessarily fatal to invoking the power of Court under S. 152, it can nevertheless be taken into account, especially if the circumstances of the case under it inexpedient or inequitable to permit the amendment or if third parties would be prejudicially affected by such an amendment being granted.

Held, that an amendment could not be allowed after the lapse of more than seven years, under the circumstances of the case. (*A. S. R. Chari, J.*) A. J. RAM *v.* ASIATIC GOVERNMEMT SECURITY LIFE ASSURANCE CO., LTD. **13 Mys.L J. 145 = 39 Mys.H.C.R. 1079.**

———**S. 152**—*Right to apply—Party guilty of laches.*

A party who is guilty of laches is disentitled to relief under S. 152 of the Code. 47 A. 44, Foll. (*Mahadevayya, J.*) CHANNABASAVIAH, *In re.* **37 Mys.H.C.R. 344 = 10 Mys.L J. 364.**

———**S. 152**—*Scope — Decree in conformity with judgment—Amendment—Power of Court.*

Where a decree is in accordance with the judgment an amendment cannot be made which will have the effect of making the decree differ from the judgment. If these are made both in the decree and the judgment, both should be amended and not the decree alone. The judgment, containing as it does, a decision on the merits can only be amended in appeal or review and not by way of application under S. 152, C. P. Code. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) HAKEEM MAHOMED ALI *v* SULTANKHAN SAHEB. **12 Mys.L. J. 524 = 39 Mys H.C R. 825.**

———**S. 152**—*Scope—Decree confirmed on appeal—Jurisdiction to amend.*

When a decree of an original Court has been confirmed on appeal, the original Court has no jurisdiction to amend it. The decree becomes merged in the appellate decree. (*Mahadevayya, O. C. J. and Shankaranarayana Rao, J.*) AYYANNA *v.* CHOWDAMMA. **39 Mys.H C.R. 597.**

———**S. 153**—*Applicability—Application long after disposal of suit—Maintainability.*

S. 163, C. P. Code, applies to proceedings in a suit which is pending, the object of the section being to provide for the purpose of determining the real question or issue raised in that suit. Where the suit itself has been disposed of and a decree has been passed, there is no question of any amendment being required for the purpose of determining the real question or issue raised in that suit or depending upon any proceeding in the suit. (*A. S. R. Chari and Sreenivasa Rao, JJ.*) BALE PHADRASETTY *v.* BALE MADAPPA. **13 Mys L. J. 473 = 40 Mys.H.C.R. 367.**

———**O. 1, R 1**—*Scope.*

The scope of O 1, R. 1 under the present Code has been very much enlarged. It now enables several persons having separate and distinct causes of action to join as plaintiffs in one suit, provided that the right to

MYS. C. P. CODE REG. (1911), O. 1, R. 3.

the relief claimed arises out of the same act or transaction or series of acts or transactions, and the case is of such a nature that if such persons brought separate suits, a common question of law or fact would arise. (*Shankaranarayana Rao, J.*) SWAMY NIRMALANANDA, *In re.* **11 Mys. L.J. 418 = 39 Mys.H.C.R. 95.**

——**O. 1, R. 3**—*Joinder of defendants—Rule as to.*

Under O. 1, R. 3, C P. Code, if the right arises in respect of the same Act or transaction or series of Acts or transaction, and if the case is one where if separate suits were brought against the defendants, any common question of law or fact would arise, all persons may be joined as defendants against whom any right to relief is alleged to exist. It is not necessary that all the defendants should be interested in all the reliefs and transactions comprised in the suit or that their liability should be the same. Nor is it necessary that the evidence as regards, or the cause of action against, each of them should be the same. The question of misjoinder has to be determined on the facts alleged in the plaint and not upon the defence set up or on the evidence. (*Mahadevayya, C. J.*) VALAKKAPPA *v.* VARGAPPA. **12 Mys L.J. 268.**

——**O 1, R. 3**—*Scope — Misjoinder of parties—Rules governing.*

The scope of the amended law as contained in O. 1, R. 3 is wider than the old law contained in S. 28. Two things should be borne in mind in deciding a question of joinder of parties. While on the one hand it is an essential principle that the trial should not be embarrassed by the simultaneous investigation of totally unconnected controversies there is also the principle that needless multiplicity of suits should be avoided. The mere fact that there are several defendants is not decisive. If the person is entitled to a relief in respect of an act or series of acts against the defendants jointly, severally or in the alternative andif common questions of fact or law are likely to arise, the suit would not be bad for misjoinder. (*Mahadevayya, Offg C.J.*) SIDDAVVA MARULU *v.* KRISHNASWAMI IYENGAR. **38 Mys H C.R. 365 = 11 Mys.L J. 173.**

——**O. 1, R. 8**—*Applicability—Suit on behalf of Mandali—Two factions in Mandali—Only one authorising plaintiff—Right of plaintiff to maintain suit.*

O. 1, R. 8 does not apply to a suit which is not a representative suit. The right to bring a suit as representing the Mandali may be established in one of two ways, either by showing that the plaintiffs were duly appointed once for all by the Mandali as its chosen representatives, or by a special resolution validly passed authorising them to file the suit. Where a Mandali consisted of two factions, the resolution passed at a meeting by only one section of the Mandali is not binding on all its members and not sufficient to enable the plaintiff to maintain the suit on behalf of the entire Mandali. (*Rama Rao, J.*) MUNISWAMI RAO *v.* BHEEMA RAO. **36 Mys H C R. 474 = 9 Mys L.J. 470.**

——**O. 1, R. 8**—*Representative suit—Death of plaintiff—Failure to implead legal representatives—Effect.*

In a representative suit the death of one of the plaintiffs does not result in abatement of the suit if his heirs are not brought on record as his legal representatives. (*Doraiswami Iyer, C. J.*) MAHOMED IBRAHIM SAB. *In the case of.* **38 Mys.H C.R. 193 = 11 Mys L.J. 240.**

——**O. 1, R. 10**—*Addition of parties—Principle underlying.*

O. 1, R. 10 ought not to be applied to a case where the addition of parties necessitates conflicting claims being adjudicated. A substitution of parties is, in such cases, the more appropriate course to be adopted, if the requirements of the rule are otherwise satisfied. To

MYS. C. P. CODE REG. (1911), O. 1, R. 10.

enable a person to be substituted as co-plaintiff under Cl. (1) of R. 10, it must be shown that the action was commenced in the name of the original plaintiff by a *bona fide* mistake and that the substitution is necessary for the determination of the real matter in dispute. 45 C. L. J. 146, Foll. The plaintiff brought a suit for rent and recovery of possession of a house which he alleged was held by defendant as a tenant. The defendant set up his own right as a donee from the plaintiff. Three years after suit was filed, the petitioner applied to be added as a co-plaintiff. She alleged that the suit house was one in which she had a life interest and the plaintiff the remainder, that the plaintiff had recently relinquished for valuable consideration his reversionary interest in her favour and that therefore she, as full owner, was not bound by any alleged gift by the plaintiff to the defendant.

Held, that the addition of the petitioner as co-plaintiff would not, under the circumstances, altogether be opposed to the principles underlying O. 22, R. 10 or O. 1, R. 10 and that the addition should be allowed on terms as to costs. (*Doraswami Iyer, C. J.*) SAKAMMA *v.* PUTTASANI. **37 Mys. H.C.R. 202 = 10 Mys L.J. 264.**

——**O. 1, R. 10**—*Framing of issues—Subsequent application to implead parties—Maintainability.*

It is not an inflexible rule that the Court is precluded from taking notice of events subsequent to the institution of the suit. The Court may permit an amendment and add new parties if the amendment is likely to shorten litigation. Where in a suit for declaration of title to land and for possession the plaintiff applied after issues were framed to add certain third parties whom he discovered to be in possession of the properties,

Held, that the Court might permit the joinder of those persons as parties. (*Madhdevayya, J.*) NARASIMHA DIXIT *v.* KAMMADA MADAR SAB **38 Mys H.C.R. 194 = 11 Mys.L.J. 241.**

——**O. 1, R. 10**—*Suit for partition—Preliminary decree—Application for addition of parties—Maintainability.*

A suit for partition in spite of the preliminary decree passed therein is to be treated as a pending litigation and an order directing a party to be added can be made in such a suit before the passing of the final decree. 32 C. 483 and 84 I.C. 122, Foll. (*Mahadevayya, J.*) VENKTASUBBA SETTY *v.* RAMIAH SETTY. **37 Mys. H.C.R. 195 = 10 Mys.L.J. 254.**

——**O. 1, R. 10 (2)**—*Necessary party—Who is—Necessary party not on record—Procedure—Limitation—Necessary party added beyond time—Effect of.*

In order that a defendant may be considered a necessary party, there must be some relief against him in respect of the matter involved in the suit and his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The Court will not adjudicate a suit in which no effective decree can be made in the absence of an interested party but the proper procedure, where a necessary party is not before the Court, is not to dismiss the suit but to add such a necessary party and proceed with the determination of all the questions involved in the suit. But the Court acting under O. 1, R. 10 is bound by the provisions of S. 22 of the Limitation Regulation. So if he is brought on record at a time when the claim as against him is barred by limitation, the suit should be dismissed. (*Doraiswami Iyer, C.J and Mahadevayya, J.*) HANUMAPPA NAIK *v.* SIVALINGA SETTY. **10 Mys.L.J. 288.**

——**O. 1, R. 10 (2)**—*Powers of Court—Scope of—Events subsequent to suit—Notice of.*

MYS. C. P. CODE REG. (1911), O. 1, R. 10.

O. 1, R. 10 (2) enables the court to add any person as defendants if it is shown that his presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The Court is not precluded from taking notice of events which had happened subsequent to the institution of the suit, if the case is one to which the rules regarding the addition of parties would apply. Where by reason of subsequent events, if the presence of another party as defendant is found desirable, the Court will permit the addition in order to shorten litigation and prevent unnecessary multiplicity of proceedings. (*Doraiswami Iyer, C.J.*) AKKI THIMMIAH *v* NARASIMHA MOORTHI. **37 Mys. H.C.R. 151=10 Mys.L.J. 222.**

———**O. 1, R. 10 (2)**—*Proper and necessary parties—Meaning—Application by third parties to be joined—Plaintiff opposing application—Procedure.*

O. 1, R. 10 (2) makes provision for two classes of persons being made parties, *viz.*, necessary parties or proper parties, necessary parties being those who ought to have been joined and who are indispensable as without them no decree at all can be made and a proper party being one whose presence enables the court to adjudicate more effectually and completely. Where certain persons applied for addition in order to get their claim as legal representatives decided in the suit and their joinder was opposed by the plaintiff.

Held, that it was not a case for joinder against plaintiff's wishes. (*Shankaranarayani Rao, J.*) RUDRAPPA GOWDA *v.* DEVAMMA. **11 Mys.L.J. 307=39 Mys. H.C.R. 22.**

———**O. 2, R. 2**—*Application for certification—Objection to execution of decree.*

A statement objecting to the execution of a decree applied for within the period of limitation prescribed in Art. 174 or 178-A of the Limitation Regulation can be treated as an application for certification or record under O. 2, R. 2 of the C. P. Code. 34 Mys. C.C. R. 234, Foll. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) MADIAH *v.* SEETHARAMA VARADHA IYER & SONS. **36 Mys H.C.R. 97=9 Mys L.J. 203.**

———**O. 2, R. 2**—*Previous suit for rent—Subsequent suit for recovery of possession—Maintainability.*

The cause of action for rent accrued as it fell due; the cause of action for recovery of possession of the land accrued to the lessor when the tenancy is actually determined. The two are different. So even if a lessor had the right to determine the tenancy on default in payment of the annual rent, if, however, he did not choose to determine the tenancy but contented himself which a suit for rent only and allowed the tenant to hold over, a subsequent suit for recovery of possession against the tenant after giving him due notice is not barred under O. 2, R. 2. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) BALAJI SINGH *v.* BABA RAO. **37 Mys. H.C.R. 175=10 Mys L.J. 205.**

———**O. 2, R. 2**—*Scope*

O. 2, R. 2 is directed against two evils, the splitting of claim and the splitting of remedies. If a man omits from his suit a portion of his claim he shall not afterwards sue in respect of it. If he omits one of his remedies he cannot afterwards pursue it. 97 I.C. 396, Ref. (*Mahadevayya, J.*) VENKATA CHETTY *v.* BASAPPA. **10 Mys.L.J. 10.**

———**O. 6, R. 17**—*Amendment—Introduction of time-barred claim against defendants—Permissibility.*

The plaintiff brought a suit on 30-10-1928 for money due in respect of transactions carried on by the defendant's father in 1925. The father had died in 1925 and the defendant pleaded that his father could not have been pleaded that his father could not have been a party to the suit transactions. In August, 1929, the plaintiff applied to amend the plaint by averring that the purchase was made by a clerk for the defendant's shop and by praying for a personal decree against the defendants, for which a suit would be, at the date of the amendment, barred by time,

Held, in spite of the wide powers of the Court in the matter of permitting amendments the amendment prayed for could not be allowed as it involved the introduction of a new and entirely inconsistent case not arising out of the original pleadings. (*Doraiswami Iyer, C.J.*) CHANDRASEKHARAYYA *v.* BASALINGAPPA. **36 Mys.H C.R. 1=9 Mys.L J. 132.**

MYS. C. P. CODE REG. (1911), O. 6, R. 17.

———**O. 6, R. 17**—*Amendment of plaint—Delay—Claim barred at the date of application for amendment—Effect.*

Where, in spite of objection raised as to the maintainability of the suit at the earliest moment, the plaintiff persisted in his right to proceed with the suit and never applied for amendment in the lower Courts, the High Court will not permit an amendment especially when the claim had become, at that stage, barred by limitation. (*Srinivasa Iyer, J.*) JAWARMUL WAGHAJEE *v.* HAZARIMAL BHIMARAJ. **8 Mys.L.J. 441.**

———**O. 6, R. 17**—*Amendment of plaint—Nature of suit changed—Permissibility of amendment.*

In spite of the enlarged powers under the present C. P. Code, as a general rule the Court will not in the exercise of its discretion allow an amendment converting a suit of one character into a suit of another character. (*Mahadevayya, O.C.J.*) HANUMANTHAPPA. *In re.* **11 Mys.L.J. 479=39 Mys.H.C.R. 154.**

———**O. 6, R. 17**—*Amendment of plaint—Rule regarding.*

It is not an inflexible rule of law that an amendment by which it is sought to modify the original cause of action or add another relief founded upon a different cause of action should be disallowed. If however by allowing the amendment the effect will be to convert the suit as originally laid into one of a different character and if thereby the defendant is likely to be prejudiced or embarrassed in the trial, it is desirable that the amendment should be refused, especially when another suit can be founded on the alternative cause of action without limitation being a bar. (*Doraiswami Iyer, C.J.*) BOMMEGOWDA *v.* CHENNAMMA. **37 Mys.H.C.R. 519=10 Mys.L J. 484.**

———**O. 6, R. 17**—*Applicability—Application under O. 33, R. 1—Amendment to introduce new cause of action—Permissibility.*

O. 6, R. 17, C.P. Code, applies also to an application under O. 33, R. 1 for permission to sue *in forma pauperis* as much as to plaints and in spite of the mandatory character of G 33, R. 5, an application under O. 33, R. 1 may by amended. But where, admittedly, the allegations in the plaint forming part of such an application do not disclose any cause of action, and the cause of action arises only subsequent to the filing of the application, and the amendment sought would really necessitate the re-writing of the entire plaint specifying a new cause of action and a different right to sue, it ought not to be allowed. (*Shankaranarayani Rao, J.*) LAKSHMAIYA *v.* MUNIRAMAIYA. **12 Mys.L.J. 510=39 Mys H C.R. 933.**

———**O. 6, R. 17**—*Powers of amendment—Scope of—Considerations to be kept in view.*

The Courts have power to grant leave to amend the plaint even where the effect of the amendment would be

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to take away from defendant the legal right which has accrued to him by lapse of time if the special circumstances of the case require that the amendment should be allowed. The power of amendment possessed by the Court should be liberally exercised. But in exercising the discretion, it has to be borne in mind: (1) Whether the amendment would put the other party to a disadvantage or injury which cannot be compensated in costs; (2) Whether it will change the nature of the suit as framed; and (3) Whether the application is *bona fide*. (*Mahadevayya, J.*) VENKATASUBBA SETTY. *v.* RAMIAH SETTY. **37 Mys.H.C R. 195=10 Mys. L.J. 254.**

———**O. 6, R. 17**—*Powers of Court under—Exercise of consideration*

The powers of the Court to allow amendment under O. VI, R. 17, C.P. Code, are very wide and leave to amend should always be given unless the party applying for leave is acting *mala fide* or his blunder to some injury to the opponent which cannot be compensated for by costs or otherwise. The main consideration in exercising the discretion under the rule are that rules of procedure have no other aim than to facilitate the task of justice, to avoid multiplicity of suits and to advance the interests of substantial justice. Plaintiff under the orders of Court, applied for amendment of the plaint before the issues were framed. It was not shown that his action was not *bona fide* or that any injustice was likely to be caused to the defendant. The proposed amendment was not also likely to alter the character of the suit.

Held, the amendment should be allowed. (*Mahadevayya, O.C.J.*) DEVARA SASTRI *v.* RAMA. **12 Mys. L.J. 273=39 Mys.H.C R. 332.**

———**O. 6, R. 17**—Power of Courts *under*—If taken away by O. 33, R. 5—Pauper application—Amendment. *See* MYSORE C.P. CODE REGULATION, O. 33, R. 5. **39 Mys. H.C R. 1068.**

———**O. 6, R. 17**—*Scope—Amendment to add party defendant—Powers of Court—Negligence or carelessness of plaintiff—If ground for refusal.*

O. 6, R. 17, C. P. Code, makes it obligatory on the Court to allow all amendments at any stage of the proceedings, if the amendments sought do not work injustice to the other side, and if they are necessary to determine the real questions in controversy between the parties The Court should, whenever possible, assist the plaintiff by adding parties and amending pleadings. However negligent or careless the omission on the part of the plaintiff, and however late the proposed amendment be, if the ends of justice require it and if otherwise the plaintiff would be left without a remedy, the amendment ought to be allowed especially when no injustice will be caused to the opposite party. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HABIB AHAMED MOOSA SAIT *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 18=39 Mys. H C R. 883.**

———**O. 6, R. 17**—*Scope—Amendment—Principles governing.*

O. 6, R. 17 of the new C.P. Code is much wider in its scope than S. 53 of the old Code of 1882, and under the amended rule, an amendment of the pleadings can be allowed at any stage of the proceedings, when the sole result of the refusal to amend would be to drive the plaintiff to a separate suit, the avoidance of which is one of the principal objects of the wider provision embodied in O. 6, R. 17, C.P. Code. The one thing which must not be altered by the amendment is the fundamental character of the suit, namely, the foundation of the suit and not the prayer in the plaint; and when the plaintiff leaves the foundation of the suit entirely unchanged, but

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only seeks to amend the plaint by asking for a different relief, the amendment ought not to be refused. (*Mahadevayya, Offg., C.J.*) RAJAMMA *v.* GOPALA IYENGAR. **12 Mys L.J. 390=39 Mys.H.C.R. 992.**

———**O. 7, R. 11**—*Deficient Court-fee—Date fixed for payment—Absence of plaintiff—Dismissal for default—Propriety.*

Where on a date fixed for payment of deficient Court-fee, the plaintiff remained absent, the correct procedure for the Court is to reject the plaint under O. 7, R. 11 and not to dismiss the suit under O. 9, R. 8. (*Rama Rao and Srinivasa Iyer, JJ.*) THIMME GOWDA *v.* CHALUVA IYENGAR. **8 Mys.L.J. 483.**

———**O. 7, R. 11 (c)**—Construction—Plaint with insufficient stamp—Power of Court to grant time to make up deficiency. *See* MYSORE C. P CODE REGULATION, S. 149 AND O. 7, R. 11 (*c*). **40 Mys H.C.R. 139.**

———**O. 9, R. 6 (c)**—*Late service of summons—Duty of Court*—Ex parte *decree—Validity of.*

Where the summons was served on the defendant late in the evening before the date of hearing and the defendant has no sufficient time to appear on the day fixed, the Court is bound to postpone the suit to a future day. If however in such circumstances the Court passed an *ex parte* decree treating service of the first notice itself as sufficient without assigning any reasons for so treating it, it is invalid in law. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) VENKATARAMANI GOWDA *v.* PADMIAH. **9 Mys.L.J. 219.**

———**O. 9, R. 8**—*Deficient Court-fee—Date fixed for payment—Absence of plaintiff on that date—Rejection of plaint under O. 7, R. 11 is the proper procedure—Not dismissal for default.*

Where on a date fixed for payment of deficient Court-fee, the plaintiff remained absent the correct procedure for the Court is to reject the plaint under O. 7, R. 11 and not to dismiss the suit under O. 9, R. 8 (*Rama Rao and Srinivasa Iyer, JJ.*) THIMME GOWDA *v.* CHALUVA IYENGAR. **35 Mys H.C.R. 430=8 Mys.L.J. 483.**

———**O. 9, R. 9**—*Applicability—Application to set aside sale—Dismissal for default—Restoration.*

O. 2, R. 9 and O. 47, R. 1 are applicable to applications under O. 21, R. 90, C.P. Code. When such an application is dismissed for default the Court has power to restore the same to file. (*Ramachandra Rao, J.*) RAMASWAMI *v.* RAMIAH. **12 Mys.L.J. 515=39 Mys. H.C.R. 838.**

———**O. 9, R. 9**—Scope—If exhaustive—Inherent power to restore suit dismissed for default. *See* MYSORE C.P. CODE REGULATION, S. 151 AND O. 9, R. 9. **39 Mys.H.C R. 1004.**

———**O. 9, R. 9**—*"Sufficient cause"—Plaintiff's absence due to imprisonment in civil jail for decree debt.*

The absence of a plaintiff on the date of hearing caused by his having been arrested in execution of a decree against him and sent to the civil jail, is due to circumstances beyond his control and constitutes "sufficient cause" under O. 9, R. 9, C. P. Code, so as to entitle him to have his suit restored. (*Sreenivasa Rao, J.*) CHICKBYRAPPA *v.* CHICKA RAMANNA. **13 Mys. L.J. 364=40 Mys H.C.R. 173.**

———**O. 9, R. 13**—*Applicability—Decree against minor not properly represented, if an* ex parte *decree.*

If the minor was not properly represented in the prior suit by a duly appointed guardian *ad litem*, he was not in the eye of law, at the time the decree was passed, a party to the suit; as such the decree though inoperative against him, was not strictly speaking an *ex parte* decree

MYS. C. P. CODE REG. (1911), O. 9, R. 13.

which is capable of being set aside under O. 9, R. 13, C. P. Code. (*Doraiswami Iyer, C. J.*) NANJUNDIAH *v.* PADMARAJIAH. 37 **Mys.H.C.R. 181=10 Mys L. J. 124.**

———**O. 9, R. 13**—Applicability to insolvency proceedings—Annulment of adjudication for default of debtor—Power to set aside annulment. *See* MYSORE INSOLVENCY REGULATION, S. 5. **13 Mys.L.J. 500.**

———**O. 9, R. 13**—*Enquiry under—Scope of.*

Equitable considerations are out of place in an enquiry on an application to set aside an *ex parte* decree. The Court has no power to consider any ground other than the non appearance of the applicant at the hearing. (*Doraiswami Iyer, C. J.*) VEERAPPA *v.* NANJA. **10 Mys.L.J. 383.**

———**O. 9, R. 13**—Ex parte *decree—Appeal pending—Application to set aside—Maintainability.*

When once an *ex parte* decree is confirmed, amended or reversed by the Court of Appeal, the decree of the first Court is superseded and the only decree that can have operation is the decree of the appellate Court. Where pending an appeal from an *ex parte* decree, an application was made to the trial Court to set aside the *ex parte* decree and the appellate Court had subsequently reversed the *ex parte* proceedings of the lower Court, an application to set aside the prior *ex parte* decree ought to be allowed by the trial Court. (*Mahadevayya, J.*) CHIKKA *v.* SUBBAIYA. **37 Mys.H.C.R. 399=10 Mys. L.J. 229.**

———**O. 9, R. 13**—*Scope—Remedy under—If exhaustive—Separate Suit—Maintainability.*

Where a defendant is prevented by the fraud of the plaintiff from appearing on the date of hearing and an *ex parte* decree is passed against him in consequence, it is open to the defendant either to avail himself of the remedy provided by O. 9, R. 13, C. P. Code, or to file a regular suit to obtain a relief. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) THIMMIAH *v.* MUDDAMMA **12 Mys. L J. 482=39 Mys.H.C.R. 707.**

———**O. 9, R. 13**—"*Sufficient cause*" —*Plaintiff fraudulently preventing defendant from appearing—If ground for setting aside* ex parte *decree.*

The words "sufficient cause" are not defined in the C. P. Code. It is a question of fact to be determined on the circumstances of each case, and no hard and fast rule can be laid down. The Court must exercise a judicial discretion. Where the plaintiff practises fraud on the defendant assuring the latter that he would get the suit dismissed and thereby induces the defendant not to attend Court on the date of hearing, the defendant must be held to have been prevented by "sufficient cause" from appearing on the date of hearing, and the Court will be right in setting aside the *ex parte* decree under O. 9, R. 13, C. P. Code. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) THIMMIAH *v.* MUDDAMMA. **12 Mys. L.J. 482=39 Mys H.C.R. 707.**

———**O. 11, R. 16**—*Partial transfer—Successive application for execution.*

A partial transfer of a decree is valid and can be recognised by Courts. There is also nothing in the Code to prevent a decree-holder from presenting successive applications for realising different portions of his decree. 58 Mad. 199 Foll. (*Rama Rao and Srinivasa Iyer, JJ.*) VENKATACHALAMIAH *v.* RAMALINGIAH. **36 Mys.H.C.R. 470=9 Mys L.J. 467.**

———**O. 12, R. 6**—*Applicability—Admissions not clear and unequivocal—Decree on basis of—Legality.*

O. 12, R 6, C. P. Code does not apply when the admissions made by a defendant in a suit are not clear and unequivocal and the Court in such a case ought not to decree the suit on the basis of the admissions. The Court must in such case frame the necessary issues on the merits and record evidence and then decide the suit. (*Mahadevayya, C. J. and Shankaranarayana Rao JJ.*) SREEKANTA SHARMA *v.* CHINNAMMAL NANJAPPA. **12 Mys.L.J. 437=39 Mys. H.C.R. 622.**

MYS. C. P. CODE REG. (1911), O. 17, R. 3.

———**O. 13, R. 1**—*Documents produced late—Admissibility—Sufficient cause.*

Plaintiff, a Sanyasi, presiding over a mutt and suing by his agent produced certain account books in Court at a late stage of the suit. The books were in existence and had been filed in Court long before disputes arose between the parties and were books kept in the regular course of business. The entries therein were sought to be put in not so much as direct evidence but as secondary evidence during the cross examination of the defendant.

Held, that an exception to the ordinary rule must be made and there was sufficient cause to excuse the delay in their production and for receiving them in evidence.

Held, further, that the reception of inadmissible evidence would be less injurious to the persons affected thereby than the rejection of admissible evidence. 34 Mys. H. C. R. 285, Appl. (*Shankaranaraayna Rao, J.*) HIS HOLINESS SRIMAT LAKSHMI MANOGNYA THIRTHA SWAMIGALU OF KUNDAPUR VYASARAYA MUTT *v.* PATEL VENKATE GOWDA. **13 Mys. L. J. 41=39 Mys. H.C.R. 937.**

———**O. 13, R. 1**—*Scope and object of—Discretion of Court—Delay in production of documents.*

The object of R. 1 of O. 13, C. P. Code, insisting upon the production of documentary evidence at the first hearing of the suit is to prevent fraud bythe late production of suspicious documents. But the rule does not exclude the discretion of the Court to receive documents even at a subsequent stage of the suit, provided good cause is shown to the satisfaction of the Court for the non-production of the documents earlier. (*Shankaranarayana Rao, J.*) HIS HOLINESS SRIMAT LAKSHMI MANOGNYA THIRTHA SWAMIGALU OF KUNDAPUR VYASARAYA MUTT *v.* PATEL VENKATE GOWDA. **13 Mys. L J. 41=39 Mys. H.C.R. 937.**

———**O. 16, R. 1**—*Duty of Court—Refusal to issue summonses and refusal to adjourn hearing.*

It is the duty of Court to summon the witnesses desired by the party and a Court had no discretion to refuse to issue summons to witnesses on the ground that it is not possible to serve them in time. The only case in which the Court has the power to refuse to do so is where the application is not made *bona fide* and is made from improper motives. But adjournment is a matter of discretion and if a party is not diligent in applying for summons to witnesses, it lies within the discretion of the Court either to grant or refuse an adjournment as it thinks fit according to the circumstances of the case. (*Mahadevayya, J.*) RUKKAMMA *v.* SRINIVASA SETTY. **37 Mys. H.C.R. 212=10 Mys. L.J. 96.**

———**O. 17, R. 3**—*Defendant present in Court—No application by pleader to examine defendant—Power of Court to pass decree.*

Where the defendant, on whom the burden lay of proving his plea of discharge, was present in Court but the defendant's pleader did not evince any desire to examine his client, it is no part of the dury of the Court to call upon him to state whether he would not put his client's evidence on record and the Court is entitled to decree the suit, there being no materials, on which the plea of discharge could be said to have been substantiated. (*Doraiswami Iyer, C. J.*) DYAVAPPA *v.* CKIKKAVEERASETTY. **36 Mys. H.C.R. 271=9 Mys.L.J. 320.**

MYS. C. P. CODE REG. (1911), O. 20, R. 6.

———**O. 20, R. 6**—*Decree—Contents of.*

O. 20, R. 6, C. P Code, requires that the decree should agree with the judgment. The reliefs claimed and the reliefs granted can alone be embodied in the decree; opinions expressed, observations made, or inferences drawn by the Court in support of the conclusion cannot be properly included in the decree. (*Mahadevayya, C. J.*) DURGOOSA *v.* DURGOOSA. **12 Mys.L J. 213=39 Mys H C R. 303.**

———**O. 20, R. 7**—Scope—Decree made long after judgment and bearing date different from that of judgment—If to be deemed to have been made on date of judgment—Limitation for appeal—Starting point. *See* MYSORE LIMITATION REGULATION, ART. 156. **13 Mys.L J. 223.**

———**O. 20, R. 12**—*Application for ascertaining mesne profits—Dismissal—Fresh application if barred.*

Where an application for ascertainment of mesne profits is made in a pending suit for possession and the same is not pressed, the Court may entertain a second application for ascertainment of mesne profits. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) PARAPPA *v.* CHENNA NANJAPPA. **11 Mys. L.J. 392=39 Mys. H C.R. 84.**

———**O. 20, R. 12**—*Direction for ascertaining mesne profits—Decree being defective—Remedy of decree-holder.*

Where the Court intended to make provision for mesne profits in the decree but omitted to make an express direction for the purpose and the decree holder applied under O. 20, R. 12.

Held, that the application could be proceeded with (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) PARAPPA *v.* CHENNA NANJAPPA. **11 Mys L.J. 392=39 Mys. H.C.R 84.**

———**O. 20, R. 18(2)**—*Partition suit—Decree awarding shares—Party failing to apply for share and to pay court-fee in appeal and second appeal—Subsequent application for decree—Maintainability.*

O. 20, R. 18 (2) is applicable only in the case of a preliminary decree passed in a partition suit before the proceedings culminate in a final decree, and not to a decree which, for all practical purposes, is final in itself and does not involve any further enquiry or the giving of further directions to work out the rights of the parties. Where in a partition suit, a party does not apply for a decree to have his share declared, and omits to make such a claim even in second appeal, cannot apply, after nearly 3 years of the second appeal, for a decree in their favour as regards the shares to which they are entitled. An application by such a party under O. 20, R. 18, C. P. Code, is clearly not maintainable. (*A. S. R. Chari and Sreenivasa Rao, JJ.*) BALE BHADRASETTY *v.* BALE MADAPPA. **13 Mys.L.J. 473=40 Mys H C.R. 367.**

———**O. 21, R. 1**—*Payment into Court—Option of judgment-debtor—Due date falling on a holiday—Payment on the next re opening day—Validity of.*

Under the provisions of O. 21, R. 1, it is open to the judgment-debtor to pay the decretal amount either into Court or to the decree-holder. So where, under the terms of a compromise decree, the judgment-debtor undertook to pay the amount within five months and the last date fell in the middle of the midsummer recess of the High Court, the payment by him into Court of the amount on the re-opening day is a valid compliance with the terms of the decree. Although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused, not by any act of their own but by some act of the Court

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itself—such as the fact of the Court being closed—they are entitled to do the act on the first opening day. Further in the present case as one of the plaintiffs was a minor and his next friend was precluded from receiving the money without leave of Court, the judgment-debtor could not have exercised the option of paying the money out of Court. 66 I C. 273, Not foll. 35 Bom. 35; 22 Mad. 179; 48 M.L.J. 596; A.I.R. 1927 Mad. 1196; 18 Cal. 231 and 47 M.L J. 498, Foll. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) KAMBI REVANNA *v.* GANGAPPA. **9 Mys.L.J. 305=36 Mys H.C.R 209.**

———**O. 21, R. 1**—*Payment into Court—Validity of—Payment with condition annexed.*

Where a judgment debtor paid the decretal amount into Court with a condition that the amount should not be paid to the plaintiff, some of whom were minors till the first plaintiff, produced a succession or guardianship certificate authorising him to draw the money.

Held that what was really intended was that as there were minors concerned, the leave of Court should first be obtained, before payment out though the procedure suggested for obtaining the leave was misconceived, that there was legally no other impediment to the plaintiff's withdrawing the money, except compliance with the provisions of O. 32, R. 6 and such compliance was necessary whether the suggestion came from the defendant or not, and that therefore the payment must be deemed to be unconditional. 23 Mys. C.C.R. 139, Dist. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) KAMBI REVANNA *v.* GANGAPPA. **9 Mys L.J. 305=36 Mys. H. C.R. 209.**

———**O. 21, R. 2 and S. 47**—*Adjustment subsequent to sale and prior to delivery of possession—Plea of—Sustainability.*

Where subsequent to his purchase in execution sale, the decree-holder applied for delivery of possession and the judgment-debtor pleaded an adjustment subsequent to the sale and applied under O. 21, R. 2 for recording the same.

Held, that the sale was not complete without delivery of possession and as the plea of the judgment-debtor if proved, would amount to a just cause for resistance by a judgment-debtor to delivery of possession under O. 21, R. 98, it was a question relating to execution which could be gone into under S. 47. (*Sreenivasa Iyer and Mahadevayya, JJ.*) NARASAPPA *v.* CHIKKE GOWDA. **10 Mys L J. 193=37 Mys.H.C R 133.**

———**O. 21, R. 2 (2)**—*Objection to execution—Power of Court to treat it as application for certification.*

A judgment-debtor's objection to execution of a decree may be treated as an application for certification or record under O. 21, R. 2 (2) if it was made within the period prescribed in Art. 174 or 178 (*a*) of the Limitation Regulation. 34 Mys C.C.R. 234, Foll. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) SHADAKSHARAPPA *v.* VENKANNA. **10 Mys.L.J. 252=37 Mys.H.C.R. 491.**

———**O. 21, R. 2 (3)**—*Uncertified payment—Recognition of.*

An executing Court is precluded from recognising an uncertified payment or adjustment. A I.R. 1930 M. 429; 49 B. 548; 46 B. 226; 38 A. 204, Foll. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) SHADAKSHARAPPA *v.* VENKANNA. **10 Mys.L.J. 252=37 Mys.H. C.R. 491.**

———**O. 21, R. 15**—*Scope—Joint decree holders—Payment to one out of Court—If binding on the others.*

O. 21, R. 15, C. P. Code, does not confer an unconditional right on one of several decree-holders to execute

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the decree or to give a valid discharge. Payment to one of several joint decree-holders is not legally binding on the others and does not amount to satisfaction of the decree, even in part, unless the payee is an agent of the others entitled in law to receive the whole amount on their behalf or the shares of the respective decree-holders are determined and unknown. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) VENKATA NARASIMHA CHAR *v.* KRISHNAMA CHAR. **12 Mys. L.J. 393 = 39 Mys H C R 715.**

———**O. 21, R. 16**—*Right to execute decree—Transferee of property included in decree.*

The purchaser of a property included in a decree does not thereby become the assignee decree-holder and does not get the right to execute the decree or to get possession of the property purchased by way of execution. A transfer of property does not amount to a transfer of the decree and the transferee does not thereby become the assignee-decree-holder entitled to execute the decree under O. 21, R. 16. Even if a decree is transferred, it is not until the assignee obtains recognition from the Court that he acquires any rights and till that order is passed, the decree-holder whose name is on the record is the only person competent to execute the decree. (*Rama Rao and Srinivasa Iyer, JJ.*) VENKATACHALAMIAH *v.* RAMALINGIAH. **9 Mys.L.J. 467 = 36 Mys H.C.R. 470**

———**O. 21, R. 19**—*Scope—Execution of decree for smaller sum barred—Right to set off.*

Under O 21, R. 19, C. P. Code, the only party entitled to execute the decree is the holder of the decree for the larger sum, but he is to take out execution only for so much as remains after deducting the smaller sum, and satisfaction of the smaller sum as to be entered on the decree. The holder of the decree for the smaller sum is not himself competent to apply for execution, but even if his right to apply for separate execution is barred by limitation, he is entitled to have the amount set off and to resist the application for execution of the full sum by the holder of the decree for the larger sum. The rule in question contemplates that the decree should be regarded as one indivisible order enforceable for the balance only, that is, the difference between the two sums. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SANJEEVA RAO *v.* SOMAVVA. **12 Mys.L. J. 122 = 39 Mys H C R. 254.**

———**O. 21, R. 22**—*Execution proceeding— Death after issue of notice—Fresh notice, if necessary.*

If the decree-holder has done all that the law requires him to do and if the judgment-debtor, or one of the judgment-debtors where there are many, happens to die during the course of the execution of the sale warrant the sale is not vitiated by the accident of the owner's death before the sale is completed. O. 21, R. 22 applies to the commencement of execution proceedings and legal representatives cannot claim as a matter of right to have fresh notices if their representation of the deceased's estate commences during the progress of carrying out of the process of the Court. The legal representatives cannot treat the processes as invalid for want of jurisdiction. (*Mahadevayya and Ramachandra Rao, JJ.*) NANJUNDA RAO *v.* PUTTUSAMI SETTY. **11 Mys.L. J. 157 = 38 Mys H.C.R. 350.**

———**O 21, R. 35**—*Applicability — Application for possession under decree for possession—Order on—If falls under S. 47.*

Application for possession by the holder of a decree for possession must be held to fall under O. 21, R. 37, C. P. Code, and orders passed thereon would clearly come under S. 47. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) GURUMURTHAPPA *v.* SIDDALINGAPPA. **40 Mys H.C.R. 1.**

———**O. 21, R. 48**—*Scope—Omission to serve notice on Disbursing Officer—Effect— Knowledge of attachment obtained indirectly—If sufficient to make Government liable.*

Before a decree-holder can bind the Government by virtue of sub-R. (3) of R. 48 of O. 21, C. P. Code, the requirements of sub-R. (1) must be strictly complied with. The rule itself is a new provision which did not exist in the prior Regulation, and the effect of sub-R. (3) is that any sum paid by a Disbursing Officer in contravention of the rule can and should be recovered from the Government. Such a penal provision cannot be given effect to at the instance of a decree-holder who fails to have the notice of attachment served on the Disbursing Officer. It is not a sufficient compliance with sub-R. (1) if the order of attachment is in some way brought to the notice of the Disbursing Officer. The order to withhold the salary must be addressed directly to the Disbursing Officer. It is also immaterial if the Disbursing Officer acts upon the indirect information received by him for some time. So long as the warrant of attachment is not directed to the Disbursing Officer, it cannot bind him, and sums not withheld from the salary of the judgment-debtor in such a case cannot be said to be in contravention of O. 21, R. 48. (*A. S. R. Chari, J.*) RAMALINGAM *v.* CHIEF SECRETARY TO THE GOVERNMENT OF MYSORE. **13 Mys.L.J. 106 = 39 Mys H C R. 967.**

———**O 21, R. 50**—*Decree against firm—Adjudication and discharge of firm—Execution against partner—Legality.*

Where a decree against a firm is sought to be executed against one of the partners as such the latter is entitled to plead immunity on the ground that the firm against which the decree had been obtained had been adjudicated insolvents and subsequently discharged. (*Doraiswamy Iyer, C.J. and Rama Rao, J.*) ASLAJI DHIRAJI BROS. *v.* SUNNILAL. **9 Mys.L.J. 157 = 36 Mys.H.C.R. 75.**

———**O. 21, R. 53**—*Applicability—"Decree"—Decree for specific performance—Condition for payment of money to judgment-debtor before execution—Attachability.*

A decree for specific performance whereby the judgment-debtor is to get some consideration amount if the decree-holder executed the decree, is not a decree for the payment of money within the meaning of O. 21, R. 53, C. P. Code, and is not liable to attachment, because the right of the judgment debtor to get the money depends on the decree-holder's executing the decree which by itself is an uncertain factor. (*Mahadevayya, C. J.*) YELAKKAI GOWDA *v* KALACHARI. **13 Mys.L.J. 46 = 39 Mys.H.C.R. 945.**

———**O. 21, R. 53**—*Attachment of decree—Execution of attached decree by attaching decree-holder—Right of original decree-holder to apply for execution kept alive.*

The attaching decree-holder is deemed to be the representative of the original decree holder and an application for execution of the attached decree by the former serves to keep alive the right of the latter to apply for execution of his own decree and prevent it from being barred by limitation. 40 A. 206, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) RAMA IYA *v.* KAVERAMMA. **9 Mys.L.J. 428 = 36 Mys H.C.R. 378.**

———**O. 21, R. 54**—*Scope—Essentials of valid attachment—Strict compliance with rule— Necessity—Presumption as to formalities.*

An attachment of immovable property will be valid only if the procedure prescribed by O. 21, R. 54, C. P.

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Code, has been followed by the Court. But when it is clear from the records before the Court that, in pursuance of an order for attachment, the property has been duly attached, it must be presumed, in the absence of any clear evidence to the contrary, that all the necessary formalities have been complied with. (*Shankaranarayana Rao and A.S.R. Chari, JJ.*) KHALANDAR SHERIFF *v.* SREENIVASA TATACHAR. **13 Mys. L.J. 396=40 Mys.H.C.R. 256.**

———**O. 21 R. 54 (2)**—*Land in inam village—If "land paying revenue to Government"—Copy, if to be affixed in the office of Deputy Commissioner.*

Land situated in an inam village is not land paying revenue to Government under O. 21, R. 54 (2), C. P. Code, it is not therefore necessary in the case that a copy of the order of attachment should be affixed in the office of the Deputy Commissioner. (*Shankaranarayana Rao and A.S.R. Chari, JJ.*) KHALANDAR SHERIFF *v.* SREENIVASA TATACHAR. **13 Mys.L.J. 396=40 Mys.H.C.R. 256**

———**O. 21, R. 55 (b)**—"*Decree*"—*Meaning of.*

The "decree" in R. 55 (*b*) of O. 21, C. P. Code, must be taken to refer to an executable decree and not a decree in respect of which, before it becomes executable, certain other things have to be done or other steps taken. (*A.S.R. Chari, J.*) MUNIVENKATAPPA *v.* AKKAYYAMMA. **13 Mys.L.J. 506=40 Mys.H.C.R. 384.**

———**O. 21, R. 55 (b)**—"*Satisfaction of the decree*"—*Realisation of decree amount by sale of some of the items of attached property—Effect.*

One of the modes by which satisfaction of the decree is made through Court as contemplated by O. 21, R. 55 (*b*) is by the realisation of the decree amount by sale of property belonging to the judgment-debtor. When the amount is realised by sale of some only of the attached properties, the attachment of the rest must, under the rule, be deemed to be withdrawn. (*A.S.R Chari, J.*) MUNIVENKATAPPA *v.* AKKAYYAMMA. **13 Mys.L.J. 506=40 Mys H.C.R. 384.**

———**O. 21, R. 57**—*Attachment of decree—Application to execute attached decree—Dismissal of—Effect on attachment—Subsequent payment by judgment debtor—Validity of.*

In execution of a decree in a Small Cause suit, the decree-holder attached a decree obtained by his judgment-debtor in the Munsif's Court against a third person. He applied for execution in the Munsif's Court but the application was dismissed for default. On a second application for execution, the judgment-debtor pleaded that subsequent to the dismissal of the prior application he had paid a decretal amount to his (own) decree-holder.

Held, the default being in the application for execution of the attached decree in the Munsif's Court. and not in execution of the Original Small Cause decree, O. 21, R. 57 was not applicable, the attachment did not cease the payment was not therefore valid and could not be recognised by the Court. 24 I.C. 795 and A.I.R. 1927 Mad. 1025, Foll. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) LINGIAH *v.* LAKSHMANA SETTY. **9 Mys.L.J. 393=36 Mys H C R. 350.**

———**O. 21, R. 58**—*Claim petition—Subsequent insolvency of judgment-debtor—Effect.*

Where the judgment debtor was adjudged insolvent and discharged after the claim petition was filed,

Held, that the claim petition could be proceeded with. (*Shankaranarayana Rao, J.*) SAMPATHA IYENGAR *v.* KUSU FERNANDEZ. **11 Mys.L.J. 279.**

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———**O. 21, R. 60**—*Scope—If affects S. 52, T. P. Regulation.*

The enquiry contemplated by O. 21, R. 60, C.P Code, is no doubt limited; but the rule cannot be used to defeat the rule of *lis pendens* enacted by the provisions of S. 52, Transfer of Property Regulation (*Sreenivasa Rao, J.*) DEVAJAMMANNIYAVARU *v.* DEPUTY COMMISSIONER, MYSORE. **13 Mys.L.J. 502.**

———**O. 21, R. 89**—*Date of sale—Sale subject to acceptance of bid by Court—Computation of thirty days—Premature confirmation.*

Where a decree-holder is permitted under O. 21, R. 72 to bid at the execution sale, subject to the acceptance of the bid by the Court, the date on which his bid was accepted by the Court and not the date of the sale itself is the material date for computing the thirty days referred to in R. 92. So if the sale is confirmed before the expiration of thirty days from the date of acceptance of the bid by the Court, the confirmation is irregular even though it may have been more than thirty days from the date of the actual sale. 35 A. 65; 2 Pat. 548; 68 I.C. 305; A I.R. 1930 Lah. 41, Foll. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) RACHA *v.* NARASIMHACHAR. **9 Mys.L.J. 160=36 Mys.H.C R. 284.**

———**O. 21, R. 89**—*Right to apply—Execution of attached decree—Interest of holder of attached decree.*

Where a decree in favour of the judgment-debtor is attached and brought to sale, the judgment-debtor is certainly interested in the property sold and the fact that tho right of the judgment-debtor to apply for execution of his own decree is barred by limitation has nothing to do with the question. Even otherwise, if the attaching decree-holder applied for the execution of the attached decree, he is a representative of the holder of the attached decree whose right to apply for execution is thereby kept alive. (*Rama Rao and Srinivasa Iyer, JJ.*) RAMA IYA *v.* KAVERAMMA. **9 Mys.L.J. 428=36 Mys H C.R. 378.**

———**O. 21, Rr. 89 and 92 (2)**—*Time to deposit—Power of Court to extend.*

The Court has no discretion inherent or otherwise to enlarge, of its own accord, the time to make the deposit as provided in O. 21, Rr. 89 and 92 (2) and where by consent of parties the time has been definitely determined, it is not open to the Court to extend the time still further. 35 C.W.N. 381 and A.I.R. 1925 Pat. 691, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) KENCHAPPA *v.* ECHARLA NANJAPPA. **9 Mys.L J. 396=36 Mys.H. C.R. 354.**

———**O. 21, R 90**—*Application to set aside sale for fraud—Limitation.*

An application to set aside a sale in execution for fraud is governed by Art. 166 of the Limitation Regulation. To take the case out of that article, fraud must be imputed to the decree holder and not to a third party. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) KYATA *v.* SRIKANTASROUTI. **10 Mys.L.J. 137.**

———**O. 21, R. 90**—*Application to set aside sale—Summary disposal of—Propriety of.*

An application under R. 90 cannot be disposed of summarily without any investigation. An opportunity must be given to either party to adduce evidence in respect of the allegations made and since the proceeding under the above rule is a judicial one the decision must be based on findings arrived at on legal evidence. (Cases ref.) (*Mahadevayya, O.C J.*) MAHOMED SADICK *v* SEETHAMMA. **12 Mys.L.J. 25=39 Mys.H C R. 561.**

———**O. 21, R. 90**—Application under—Dismissal for default—Power of Court to restore. *See* MYSORE C. P. CODE REGULATION, O. 9, R. 13. **39 Mys.H.C.R. 838.**

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——**O. 21, R. 90**—*Insolvency of judgment-debtor—Omission to implead receiver—Objection by judgment-debtor*—Locus standi.

The judgment debtor has no *locus standi* to object to the validity of the sale on the ground that the receiver appointed in his insolvency has not been brought on record. 1931 A.L.J. 62, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) MARULAPPA *v.* BASAPPA. **9 Mys.L.J. 400 = 36 Mys H C.R. 360.**

——**O. 21, R. 90**—Irregularity in sale proceedings—If can be pleaded in bar of suit by purchaser for possession. *See* MYSORE CR. P. CODE REGULATION, S. 47 AND O. 21, R. 90. **13 Mys.L.J. 75 = 39 Mys H.C.R. 1096.**

——**O. 21, R. 90**—*Sale held before production of succession certificate—Subsequent production with permission of Court—Validity of sale.*

Though a sale directed to be held without the production of a succession certificate (the Court having been under the impression that no such certificate was necessary) cannot be said to be regular when it is subsequently held by the appellate Court that the certificate was necessary, the irregularity can be validated by the Court permitting the decree holder to produce the certificate within a specified time and by the production of the certificate in accordance therewith. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) SRIRANGAPPA *v.* ABDUL KHADER SAB. **10 Mys.L.J. 141 = 37 Mys.H. C.R. 336.**

——**O. 21, R. 90**—*Sale in execution—Setting aside—Substantial injury necessary.*

Even in cases of irregularity or fraud the sale should not be set aside unless the applicant has sustained substantial injury. 64 M.L.J. 439, Foll. (*Mahadevayya, O.C.J.*) MAHOMED SADICK *v.* SEETHAMMA. **12 Mys L J. 25 = 39 Mys H.C.R. 561.**

——**O. 21, R. 90**—*Sale when complete.*

When the highest bidder is declared to be the purchaser and the deposit of 25 per cent. of the price is accepted the sale is complete and the highest bidder is deemed to be the purchaser of the property. (*Mahadevayya, O.C.J.*) MAHOMED SADICK *v.* SEETHAMMA. **12 Mys.L.J. 25 = 39 Mys H C.R. 561.**

——**O. 21, R. 90**—*Scope—Permission to bid obtained fraudulently by decree holder—If affects conduct or publication of sale.*

Where the proclamation of sale has been duly published, the fact that the decree-holder has been guilty of fraud in getting permission to bid for a low amount or that he had tricked the Court into allowing him to bid for a smaller amount than he should have been permitted, can be used only as evidence to strengthen an allegation of fraud in connection with the conduct or publication of the sale, but it cannot, by itself, affect either the conduct or the publication of the sale. (*Reilly, C. J. and Shankaranarayana Rao, J.*) RANGIAH *v.* REVAIAH. **13 Mys.L.J. 271 = 40 Mys.H.C.R. 187.**

——**O. 21, R. 90**—*Scope—Sale—If can be set aside partially.*

There is no bar to an execution sale being set aside in part and confirmed as to part. When the different items of properties are sold separately, and the sale as to some items is set aside, it is not necessary that the sale of the other items ought to be set aside also, when there is neither fraud nor material irregularity with respect to those items. (*Mahadevayya, C. J.*) NANJEGOWDA *v.* KRISHNAMURTHY. **13 Mys.L.J. 11 = 39 Mys.H.C. R. 881.**

——**O. 21, R. 92**—*Premature confirmation—Validity of.*

MYS. C. P. CODE REG. (1911), O. 21, R. 98.

A confirmation of an execution sale by the Court before the expiration of 30 days from the date of sale, does not have the effect of nullifying the sale itself, if the sale is otherwise valid. The confirmation is only liable to be set aside but not the antecedent sale. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) RACHA *v.* NARASIMHACHAR. **9 Mys.L.J. 160 = 36 Mys.H.C. R. 284.**

——**O. 21, R. 93**—*Applicability—Non issue of notice under O. 21, R. 22—Sale cancelled.*

Where an execution sale is cancelled, not on account of any irregularity in publishing or conducting the sale but on the ground that the notice under O. 21, R. 22 was not issued, O. 21, R. 93 does not apply. (*Doraswami Iyer, C. J.*) MUDDAPPA *v.* DASA VISVANATHIAH. **9 Mys.L J. 465 = 36 Mys.H C.R. 458.**

——**O. 21, R. 93**—*Interest on purchase-money—Liability of judgment-debtor.*

The order directing payment of interest can only be made against the person to whom money has been paid. Where it is not alleged that the judgment-debtor received any portion of the purchase-money, he cannot be made liable for the payment of interest. (*Doraswami Iyer, C.J.*) MUDDAPPA *v.* DASA VISVANATHIAH. **9 Mys L J. 465 = 36 Mys H.C.R. 458.**

——**O. 21, R 95 and S. 47**—*Application by decree-holder to be put in possession—Limitation Regulation, S. 15—Applicability.*

An application by the decree-holder to be put in possession of the properties purchased by him in the execution sale is one which falls under S. 47, C. P. Code, and the provisions of S. 15 of the Limitation Regulation apply to it. So in computing the period of limitation, under Art. 180 of the Limitation Regulation for such an application, the period during which execution of the decree was stayed would be deducted. (*Doraswami Iyer, C. J. and Ramachandra Rao, J.*) VENKATAKRISHNIENGAR *v.* KRISHNIENGAR. **10 Mys.L.J. 208 = 37 Mys.H.C R. 179.**

——**O. 21, R. 96**—Applicability—Sale in exenution of decree on prior mortgage—Possession by purchaser—Subsequent sale in execution of second mortgage—Purchaser at—Application for possession as against prior purchaser—Maintainability—Proper remedy. *See* MYSORE, C. P. CODE REGULATION, O. 34, R 1. **40 Mys.H C.R. 304.**

——**O. 21, R. 97 (1)**—*Applicability—Application for delivery under decree for possession—Obstruction by person claiming from judgment-debtor or at his instigation—Application for removal of obstruction—If falls under R. 97 (1)—Limitation.*

O. 21, R. 97, C. P. Code, does not apply to the case of a decree for possession. Though the words "holder of a dectee, etc.," occur in R. 97 (1) in the case of an application for removal of obstruction caused to delivery, a distinction has to be made between resistance offered by a third party claiming in good faith to be in possession of the property, and obstruction offered by a person claiming under a judgment-debtor or at his instigation. In the latter case, the question will fall under S. 47, C. P. Code, and the decree-holder will not be bound to apply within the time limited by Art. 167 of the Limitation Regulation. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) GURUMURTHAPPA *v.* SIDDALINGAPPA. **40 Mys H C.R. 1.**

——**O. 21, Rr. 98 and 99**—*Scope—Order regarding removal of obstruction—Appealability.*

The decree-holder starts with an initial presumption in his favour and it is for the obstructor to satisfy the Court that he had just cause to resist delivery of posses

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sion. If it is not established that the person offering resistance or obstruction had neither the title to the property nor possession during the life of the judgment-debtor the possession obtained by him thereafter cannot be said to be the possession of a person claiming in good faith under an independent title. R. 99 is not meant to favour a person who is found to be in actual possession of the property at the time delivery is sought if his right to remain there on his own account is not built upon good faith.

Held, that the order of removal of obstruction is appealable if passed under O. 21, R. 98 against the judgment-debtor or an obstructor acting under his instigation. (*Doraswami Iyer, C. J. and Ramachandra Rao, J.*) NURKHAN BUDAN KHAN *v.* SANKARANTHI MUNISAMY. **11 Mys L J. 7=38 Mys.H.C.R. 225.**

———**O. 21, R. 100**—*Execution against Hindu father—Application by decree holder for delivery—Suit by the sons and application for injunction to restrain decree-holder from taking delivery—Procedure.*

In execution of a decree against a Hindu father, the decree-holder applied for delivery. The sons had brought a suit to impeach the sale and applied therein for a temporary injunction restraining him from taking delivery. The lower Court ordered delivery in the first petition with a condition superimposed to the effect that the decree-holder should re deliver in case a temporary injunction was granted in the application by the sons. That application was subsequently allowed and the decree holder directed to hand over possession.

Held, the conflict of orders could have been avoided if the lower Court had first disposed of the application for injunction, the decree-holder having acquiesced in the conditional order, he could not be allowed to retain the benefit conferred, and reject the condition imposed, by one and the same order, and that whether such a conditional order, was valid or not, in substance the order for delivery consequent on the injunction could be treated as an order passed in the application for delivery which would not be interfered with in revision. (*Rama Rao, J.*) VAISYARA BHIMAPPA *v.* CHIKKANNA. **9 Mys.L.J. 402=36 Mys.H C.R. 362.**

———**O. 21 Rr. 100 and 101**—"*In possession of his own account*"—*Hindu son.*

A member of a joint Hindu family can be said to be a person in possession of the joint family property on his own account. Where, in execution of a money decree against the father, certain property in the joint possession of the father and son was sold, the son is entitled to joint possession with the purchaser as a person in possession on his own account particularly in view of the fact that in Mysore the previous obligation of the son to discharge his father's debts is not recognised during the father's lifetime. 17 Bom. 718, Not foll.; 18 C.W.N. 695, 3 Mad 81; 53 I.C. 599 and 68 I.C. 174, Foll. (*Doraiswami, Iyer, C. J.*) UDDANDA SETTY *v.* NANJE GOUDA. **9 Mys L J. 303=36 Mys H C.R. 188.**

———**O. 22, Rr. 1 and 2**—Applicability—Representative suit under S. 92—Death of some plaintiffs—If causes abatement. *See* MYSORE C P. CODE, REGULATION, S. 92. **39 Mys H C.R. 955.**

———**O. 22, R. 3**—*Applicability*—Ex parte *decree—Assignment—Death of decree-holder—Recognition of assignment—Subsequent setting aside of* ex parte *decree and restoration of suit—Legal representative of deceased not impleaded—Abatement.*

P obtained an *ex parte* decree against the defendant and assigned to *S* and subsequently died. *S* got the assignment recognised in execution, impleading *P's* legal

MYS. C. P. CODE REG. (1911), O. 22, 4.

representative also as a party to his application. The defendant thereafter applied to have the *ex parte* decree set aside impleading only *S* as a party to his application but not the legal representative of the deceased. The decree was set aside and the suit restored with *S* alone as plaintiff in place of the deceased *P*. The defendant raised the plea that the suit had abated, as no application had been made within six months after the death of *P*.

Held, that there was no abatement, *S* having stepped into the shoes of the deceased *P*, and that *S* having been already brought on the record when the *ex parte* decree was set aside, no fresh application was necessary under O. 22, C. P. Code, at a later stage of the case. (*Sreenivasa Rao, J.*) SUBBA RAO *v.* NADIG BHAGWANTA RAO. **13 Mys L.J. 524=40 Mys.H C R. 410.**

———**O. 22, R. 3**—*Death of plaintiff—Application by some legal representatives in time—If saves limitation as against the rest—Decision as to legal representative—If relates back.*

A *bona fide* application by some only of the legal representatives of a deceased plaintiff or plaintiffs saves the suit or application from abatement as regards the rest also. If, therefore, an application has been made by some legal representatives within time, the Court can afterwards permit the other legal representatives also to join as co plaintiffs, though the latter apply only after the period prescribed by Art. 176 of the Limitation Regulation. There is no abatement in such a case. The decision of the Court as to who is the legal representative of the deceased plaintiff relates back to the date on which an application is first made by a legal representative. (*Shankaranarayana Rao, J.*) MARIAMBI *v.* GHOUSE KHAN. **13 Mys L J. 66=39 Mys H.C.R. 1125.**

———**O. 22, R. 3**—*Rule as to abatement.*

Under O. 22, R. 3 there is nothing to prevent the Court from proceeding with the case if the nature of the suit admits of its being proceeded within the absence of the legal representatives of the deceased plaintiff. Each case depends on its own facts. (*Mahadevayya, O.C.J.*) LINGE GOWDA *v.* MAHALINGIAH. **11 Mys L.J. 382=39 Mys. H.C.R. 540.**

———**O. 22, R. 3 (1)**—*Suit by widow holding life-estate to recover properties of her husband—Death of widow pending—Legatee under husband's will—Right to continue suit.*

Pending a suit by the widow for the recovery of her half share in certain immovable properties of her husband, she died and the petitioner thereupon applied under O. 22, R. 3 (1) for being brought on record as plaintiff in place of the deceased widow alleging that her husband had left a will which provided that she should enjoy his properties during her life time and that after her death they should go to the petitioner,

Held, that the will under which the petitioner claimed having been found to be genuine the legatee was the legal representative within S. 2 (11) of the C. P. Code, on whom the estate devolved on the death of the widow, and entitled to continue the suit. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) RAMARAO *v.* YAMUNABAYAMMA. **12 Mys L.J. 69=39 Mys. H.C. R 668.**

———**O. 22, R. 4**—*Application to add legal representatives—Parties already on record.*

Even where some of the defendants are themselves the legal representatives of the deceased defendant, an application to bring the former on record as legal representatives of the latter is necessary. (*Doraswami Iyer, C.J. and Mahadevayya, J.*) VENKATASUBBANNACHAR *v.* DHARMA. **11 Mys.L.J. 251=38 Mys. H.C.R. 92.**

MYS. C. P. CODE REG. (1911), O. 22, R. 4.

——O. 22. R. 4—*Representative suit—Death of plaintiff—Failure to implead legal representatives—Effect.*

In a representative suit the death of one of the plaintiffs does not result in abatement of the suit if his heirs are not brought on record as his legal representatives. (*Doraswami Iyer, C J.*) MAHOMED IBRAHIM SAB. *In the case of.* **11 Mys.L.J 240=38 Mys. H.C R. 193.**

——O. 22, R. 4—*Suit for possession—Decree in favour of defendants 1 and 5 by trial Court—Death of defendant No. 5 pending appeal—Case against him given up—Remedy as against first defendant.*

In a suit for possession, the trial Court held that defendants 1 and 5 were entitled to retain possession unless the plaintiff paid a sum of money to them. Pending appeal, fifth defendant died and the case as against him was given up by the plaintiff. His claim as against the first defendant was held by the appellate Court to be established and the question was if his appeal was liable to be dismissed *in toto*, by reason of his having given up his case against the fifth defendant.

Held, (*i*) that it was the duty of the Courts to grant relief to the litigants who are actually before it, and avoid hardship if that can be done. 10 Lah. 7, Ref.; (*ii*) that the plaintiff could be granted a decree declaring his right so far as the interest of the first defendant was concerned leaving it to him to work out that right and secure possession of the whole or portion of the house in a separate suit properly framed against the representatives of the fifth defendant. (*Rama Rao and Srinivasa Iyer, JJ.*) ATTAR AHMAD SHERIFF *v.* ABDUL KHUDUS. **9 Mys.L.J. 322=36 Mys. H.C.R. 461.**

——O. 22, Rr. 4 and 9—*Death of defendants—Duty of plaintiff—Mysore Limitation Regulation (IV of 1911), Arts. 177 and 171.*

It is incumbent upon the plaintiff to inform himself about the casualties if any among the defendants and have the legal representatives substituted with due regard to the provisions of Arts. 177 and 171 of the Limitation Regulation which prescribe a period of six months to substitute the names under R. 4, and of sixty days to set aside the abatement, under R. 9 of O. 22. C. P. Code. (*Rama Rao and Srinivasa Iyer, JJ.*) VENKATASUBBANNACHAR *v.* SEENANNA. **9 Mys.L J. 317 =36 Mys H.C.R. 252.**

——O. 22, R. 10—*Applicability to execution proceedings.*

In order to bring a case within O. 22, R. 10, C.P. Code, the application should be in a pending suit; and the Court has no power to make a substitution under the rule at a time after a final decree has been made. The rule is inapplicable to post decree proceedings. Nor can S. 146, C P Code, be read as extending the scope of O. 22, R. 10 as the former is expressly made subject to the other provisions of the Code. (*A.S.R. Chari and Sreenivasa Rao, JJ.*) ADINARAYANA SETTY *v.* PADMANABHA RAO. **13 Mys.L.J. 428=40 Mys. H. C.R. 341.**

——O. 23, R. 3—"*Lawful compromise*"—*Compromise of doubtful claims—Validity of.*

A compromise of doubtful claims is not any the less a lawful compromise and must be upheld, whatever may be the actual rights of the parties. The abandonment by the plaintiff of his claim, though disputed and not well-founded is a sufficient consideration for a compromise between the parties. Though the defendant has raised the plea of limitation as a bar, when the question of limitation is still open on the date of the settlement, there is no case of an agreement to pay a barred debt under S. 25, Contract Act, and the agreement cannot be said to be otherwise than lawful. (*Shankaranarayana Rao, J.*) VISWANATHA SETTY *v.* DODDA RAMAIYA. **12 Mys.L.J. 504=39 Mys.H C.R 1026.**

MYS. C. P. CODE REG. (1911), O. 26, R. 1.

——O. 23, R. 3—*Partial compromise—All parties not joining—If to be recognised.*

A partial compromise prejudicial to the interests of the parties not joining in it should not be recognised by the Court; and when the interests of the several parties to the suit are inseparable, it is not open to some of them alone to compromise the suit. (*Mahadevayya, C. J. and Ramachandra Rao, J.*) SUBBAMMA *v.* KRISHNA RAO. **39 Mys. H.C.R. 699=12 Mys.L.J 488.**

——O. 25, R. 1 (3)—*Security for costs—Female plaintiff—When to be ordered.*

It is not in every case where a woman sues for the payment of money and does not possess sufficient immovable property that she should be called to furnish security for costs. Security under O. 25, R. 1 (3) should not be ordered unless it is shown that the defence is true. (*Ramachandra Rao, J.*) CHANNAPPA, *In re.* **10 Mys.L.J. 420.**

—— O. 26, R. 1—*Commission to examine plaintiff—Propriety.*

While Courts are liberal in allowing defendants to be examined on commission, the defendant having no voice in the choice of *forum* so far as the plaintiff is concerned his choice is usually unrestricted, and therefore it is not proper to order his examination on commission. Where, on the application of the defendants praying that the plaintiff may be ordered to examine his manager as a witness, the Court, in granting the prayer, ordered the manager's examination on commission, though neither party applied for such an order.

Held, that the order was not justified and must be set aside. (*Mahadevayya, O.C.J.*) CHENNEGOWDA *v.* ASPINWALL & CO., LTD. **12 Mys L J. 207= 39 Mys.H.C.R. 250.**

——O. 26, R. 1—*Order issuing commission—Revision.*

An order issuing a commission to examine a witness, otherwise than on the grounds laid down in the C.P. Code, without jurisdiction and will justify the High Court in interfering in revision. (*Mahadevayya, O.C.J.*) BASAPPA *v.* NANAPPA. **39 Mys. H.C.R. 245=12 Mys.L.J. 118.**

——O. 26, R. 1—*Right to commission to examine witness—Conditions—Applicant, a respectable lady—If a ground.*

When the conditions laid down by O. 26, R. 1 have not been fulfilled, no commission can issue for the examination of the witness. The fact that the witness is a very respectable lady is not by itself sufficient to entitle her to be examined on commission or on interrogatories. (*Shankaranarayana Rao, J.*) YEGAMBARA AMMAL *v.* G. S. ACHARYA. **13 Mys. L.J. 9=39 Mys.H.C.R. 878.**

——O. 26, Rr. 1, 4 and 5—*Scope—Commission to examine witness—Grounds for issue of.*

A commission to examine witnesses can only be issued in the cases specified in Rr. 1, 4 and 5 of O. 26, C.P. Code, and in no other case. Mere old age is not sufficient to order a witness to be examined on commission. If sickness or infirmity is alleged as a ground, the character and gravity of the sickness or infirmity must be properly assessed and the Court must be satisfied of the truth of the allegation. Courts should as rule, should be very careful before granting a commission which will

MYS. C. P. CODE REG. (1911), O. 30.

result in depriving the other party of the advantage of having the witness cross-examined before the face of the Court itself, because it is important that the Court should observe the demeanour of the witness and the way in which he answers the questions put to him in cross-examination. (*Mahadevayya, O. C. J.*) BASAPPA *v.* NANJAPPA. **39 Mys.H C.R. 245=12 Mys.L.J. 118.**

———**O. 30**—*Applicability—Joint family business.*

Order 30 applies only to the case of firms and under S. 239 of the Contract Act persons who have entered into a contract of partnership are called collectively a firm. The joint ownership in an ancestral business of a joint Hindu family is created by operation of law and not by contract and as such, outside the purview of the Contract Act or O. 30 of the Procedure Code. (*Srinivasa Iyer, J.*) JAWARMULL WAGHAJEE *v.* HAZARIMALL BHIMARAJ. **8 Mys.L.J. 441.**

———**O. 32, R. 3**—*Absence of formal order appointing guardian—Effect—Decree—If nullity.*

Where a minor defendant is effectively represented by a guardian, with the sanction of the Court, the omission to pass a formal order appointing him as guardian for the suit will not render the decree a nullity; the absence of a formal order is only an irregularity which, in the absence of any prejudice caused to the minor, will not afford a sufficient ground for setting aside the decree. (*Ramachandra Rao and Sankaranarayana Rao, JJ.*) SIDDAPPA *v.* RANGAPPA. **13 Mys L J. 176=39 Mys. H.C.R. 1131.**

———**O 32, R. 3**—*Guardian* ad litem—*Fitness of—Suit against father and son on hypothecation by father—Father as guardian* ad litem *of his son.*

In a suit against a father and his minor son on a hypothecation deed executed by the father, the father should not as a rule be appointed as guardian of his minor son because his interests are adverse to that of the minor but it is a question of fact governed by no hard and fast rule of law and there is certainly no authority to the effect that the father *cannot* in any circumstances be validly appointed. 52 M. 275, Ref. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) HANUMAPPA NAIK *v.* SIVALINGA SETTY. **10 Mys.L.J. 288.**

———**O. 32, R. 4 (4)**—*Sufficiency of representation.*

Where on the refusal of the father to be the guardian, a Court-guardian was appointed and it is neither alleged nor proved that there was any collusion between the defendants and the Court-guardian or that the guardian neglected the interests of the minor, *held*, that the minor was properly represented. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) LANKE HANUMANTHIAH *v.* RAMAYYA. **9 Mys.L.J. 455=36 Mys.H C.R. 416.**

———**O. 33, R 1**—*Inability to pay court-fee—Burden of proof—Applicant admitting receipt of large sum of money.*

When an applicant for leave to sue *in forma pauperis* admits having received a large sum of money a few years before the application, it is for him to show that in spite of that receipt of that money, he is really not in a position to pay the required court-fee. (*Mahadevayya, C. J.*) REVAPPA SATTAPPA *v.* MOHIYUDDIN SHERIFF. **13 Mys L.J. 138=39 Mys H.C R. 1068.**

———**O. 33, R. 1**—"*Sufficient means*"—*Subject-matter of suit—If to be taken into account,*

In determining whether an applicant for leave to sue *in forma pauperis* is possessed of sufficient means to pay the prescribed court fee, if it is found that property which is the subject-matter of the suit is in the possession of the applicant, that should be taken into consideration. (*Ramachandra Rao, J.*) *In the case of* MALLAPPA. **13 Mys.L.J. 136=39 Mys.H.C.R. 1065.**

MYS. C. P. CODE REG. (1911), O. 34, R. 1.

———**O. 33, Rr. 1 and 5**—Scope—Application for leave to sue *in forma pauperis*—Amendment introducing new cause of action and right of suit—Permissibility. *See* MYSORE C.P. CODE REGULATION, O. 6, R. 17. **12 Mys.L.J. 510.**

———**O. 33, R. 3 (4)**—*Scope—Non-compliance with—Omission to issue notices.*

Omission to send notices to a minor defendant or to his natural guardian as required by O. 32, R. 3 (4), C. P. Code, is only an irregularity and does not vitiate the proceedings in the absence of proof that the minor has been prejudiced thereby in his defence. (*Ramachandra Rao and Sankaranarayana Rao, JJ.*) SIDDAPPA *v.* RANGAPPA. **13 Mys.L.J. 176=39 Mys H.C R. 1131.**

———**O. 33, R. 5**—*Scope—Application for leave to use as pauper—Amendment—Power of Court.*

A Court has power to allow an amendment of an application for leave to sue *in forma pauperis* so as to make it conform to the law. O. 33, R. 5, C. P. Code, is not intended to take away the general power of allowing amendments conferred on Courts by O. 6, R. 17. (*Mahadevayya, C. J.*) REVAPPA SATTAPPA *v.* MOHIYUDDIN SHERIFF. **13 Mys.L J. 138=39 Mys.H.C.R. 1068.**

———**O 33, Rr. 10 and 11, and S. 36**—*Costs of suit—Discretion of Court—Pauper suit decreed in part—Liability of defendant for costs—Extent of.*

The payment of costs by one party to another or the payment of court-fee to Government in a pauper suit is entirely in the discretion of Court. Where the pauper plaintiff has partly succeeded and partly failed, he would only be entitled to proportionate costs from the defendant, even though the latter is found to have been responsible for the suit. (*Doraiswami Iyer, C. J and Sreenivasa Iyer, J.*) BORAYYA *v.* BORIAH. **10 Mys. L.J. 400=37 Mys H.C R. 355.**

———**O 34**—Applicability—Charge under Mysore Land Revenue Code, S. 96-A—Enforcement—Procedure—Parties to suit. *See* MYSORE T.P. REGULATION, S. 100. **40 MysH C.R. 374.**

———**O. 34**—*Rule of Damdupat—Applicability.*

The provisions of O. 34, C. P. Code, do not abrogate the rule of Damdupat where the mortgage was entered into subsequent to the passing of the new C. P. Code, 1911. (*Doraiswami Iyer, C.J. Mahadevayya and Ramachandra Rao, JJ.*) PATEL MADE GOWDA *v* BANUMIAH. **11 Mys.L.J. 97=38 Mys H C.R. 181 (F.B.).**

———**O. 34, R. 1**—*Prior and subsequent mortgagees—Suits by and decrees on respective mortgagees—Each not impleading the other as party to his suit—Sales in execution—Purchasers—Rights of—Priority—Determination—Priority of sale—Right and remedy of later purchaser.*

Where suits are filed by a prior and puisne mortgagee against the same mortgagor on mortgages of the same property, each of them not impleading the other as a party to his suit, and decrees are passed and the property is sold and purchased by different persons at the sales held in execution of the decrees, the purchaser at the sale which is first held is entitled to priority of possession over the purchaser at the later sale. The purchaser at the sale gets not only the rights of the mortgagor but also those of the mortgagee as they existed at the date of the first mortgage, when the sale which is held first is in execution of the decree on the first mortgage. The subsequent mortgagee, though not bound by the decree on the first mortgage as he has not been made a party to the suit on that mortgage cannot claim anything more than a right to redeem the prior mortgage or to a sale of the property subject to the lien of the

MYS. C. P. CODE REG. (1911), O. 34, R. 4.

prior mortgagee or of the auction purchaser at the sale under the decree of the first mortgage. The purchaser can therefore shield himself under the first mortgage and his purchase; the later purchaser cannot compel him to part with his possession without redeeming the prior mortgage. Priority in he date of sale carries with it the right to possession. The remedy of the later purchaser is by way of a regular suit, and not by means of an application under O. 21, R. 96, C. P. Code, for removal of obstruction caused by the purchaser at the prior sale. (*Shankaranarayana Rao, J.*) NARASIMHAIYA SETTY *v.* SARANGAPANI MUDALIAR. **13 Mys.L.J. 449=40 Mys H.C R. 304.**

———**O. 34, Rr. 4 and 5**—*Applicability—Compromise decree.*

In compromise decrees wheres the parties fix the mode and time of payment in a manner not in consonance with the form prescribed under O 34, R. 4, C. P. Code, a preliminary decree to be followed under R. 5, by a final decree is unnecessary. The compromise decree is a complete decree in itself and is capable of execution as such. 50 Cal 650; 49 All. 297; 6 Pat. 388, Foll. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) KAMBI REVANNA *v.* GANGAPPA. **9 Mys.L.J 305=36 Mys H C R. 209.**

———**O. 34, R. 5**—*Application under—Duty of Court to pass final decree—Dismissal for default—Justifiability.*

Once an application is made by the plaintiff under O. 34, R. 5, C. P. Code, the Court is bound to pass a final decree so long as no payment in accordance with R. 5 (1) has been made. Nothing further has to be done by the plaintiff in the matter, and the Court has no power to dismiss the application for default of prosecution. Nor will such a dismissal operate as *res judicata* so as to bar a fresh application by the plaintiff. (*A.S.R. Chari, J.*) SUBBA RAO *v.* NAGENDRA RAYA. **13 Mys.L J. 287=40 Mys H C R. 9.**

———**O. 34, R. 14**—*Charge created by compromise—Mode of enforcing.*

A charge created under a compromise decree can be enforced in execution and no separate suit to enforce it is necessary. (Case-law referred.) (*Doraiswami Iyer, C.J.*) DEWANSAB *v.* KOTRAPPA. **10 Mys.L.J 226.**

———**O. 34, Rr. 14 and 15**—*Scope and applicability—Charge under S. 96 A, Land Revenue Code—Procedure for enforcement—Rights of landlord—If affected.*

Per *Sreenivasa Rao, J.*—O. 34, R. 15, C. P. Code, is applicable to a charge created under S. 96-A of the Mysore Land Revenue Code, R. 14 of O. 34; does not take away or in any manner affect the rights that a landlord has under the Land Revenue Code. (*A.S.R. Chari and Srinivasa Rao, JJ.*) NARASIMHACHAR *v.* NANJUNDA SASTRY. **13 Mys L J. 477=40 Mys H. C.R. 374.**

———**O 37, R. 2**—*Leave to defend—Conditional order—Validity of.*

Once the Court come to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases, where for instance the Court entertains a suspicion that the defence is put in only in order to gain time. 31 Mys.C.C R. 31; 46 M.L.J. 255; (1901) 85 L. J. 262 H. L.; Annual Practice 1930, p. 189, Ref. to and Foll. (*Dorai wami Iyer, C. J.*) SIDDAPPA *v.* BASAMMA. **9 Mys L J. 44=36 Mys.H.C.R 226.**

———**O. 38, R. 5**—*Scope—Attachment under—Grounds for—Evidence requisite.*

MYS. C. P. CODE REG. (1911), O. 39, R. 1.

Attachment before judgment is a very severe measure and should only be ordered when it is really shown that it is necessary for the protection of the plaintiff so that the decree which he may obtain may not be defeated by a dishonest defendant. An affidavit with vague and bald allegations is not enough. It must be made out that the defendant, at the time the suit is filed, is trying to dispose of, or intending to dispose of, his property in order to defeat the plaintiff's claim. Evidence that the defendant is in very embarrassed circumstances, or that he mortgaged the whole of his immovable property to a relation eighteen months before suit, is not sufficient to support an application for attachment under O. 38, R. 5. (*Reilly, C.J. and Chari, J.*) BALAKRISHNA RAO *v.* D. V. SUBBA RAO. **12 Mys.L.J. 527.**

———**O. 38, Rr. 5 and 6**—*Applicability—Property already alienated—If can be attached.*

The fact that a property sought to be attached before judgment has been already transferred by a defendant does not deprive the plaintiff of his right to get it attached, if the Court is satisfied, from the affidavit of the plaintiff, that the defendant is about to dispose of the whole or any part of his property with the intention specified therein. Under S. 53, T. P. Act, it is open to a plaintiff to attach the defendant's property which has been fraudulently dealt with or transferred with intent to defeat or delay the creditors. It is open to the alienee, if aggrieved, to prefer a claim and have the attachment raised. (*Shankaranarayana Rao, J.*) RAMAIYA *v.* RAMIAH **12 Mys L.J. 535=39 Mys H.C R. 767.**

———**O. 38, Rr. 5 and 6**—*Attachment before judgment—Conditions—Defendant not shown to attempt alienation—Duty of Court.*

In answer to a notice and conditional attachment before judgment, the defendant filed an affidavit stating that he never alienated or attempted to alienate any of his properties and that he never cherished the idea defrauding the plaintiff of any amount justly due to him. The Court, however, without going into evidence ordered the attachment to stand without assigning any reasons to justify that order.

Held, that there was no sufficient evidence to justify the attachment, and the order could not be supported and must be set aside. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) BASETTAPPA *v.* CHENNAVEERAPPA KALYANAPPA. **13 Mys L.J. 143=39 Mys H C R. 1075.**

———**O. 38, Rr. 5 and 6**—*Surety bond executed under—Setting aside of—Mode of.*

A surety who has executed a bond under O. 38, R. 5 and wishes to avoid the same on the ground of misrepresentation can only do so by a separate suit and not by an application under S 47 or S. 151. 43 Mad. 325; 49 Mad 323 and 51 All 346, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) BASAPPA *v.* SIVALINGAIAH. **9 Mys. L J. 177.**

———**O. 38. R 10**—Attachment before judgment—Deposit of sale proceeds—Subsequent attachment of fund in execution by another decree-holder—Right to rateable distribution. *See* MYSORE C P. CODE REGULATION, S 73. **39 Mys H C.R. 723.**

———**O. 39**—Applicability—Municipal election case—Temporary injunction — Jurisdiction to grant. *See* MYSORE MINOR MUNICIPALITIES REGULATION, S. 11 (2). **39 Mys H C.R. 1019.**

———**O. 39, R. 1**—*Decree against Hindu father—Suit to set aside—Application for injunction restraining delivery to decree-holder—Security by the sons.*

Where in a suit to impeach a decree against their father, the sons applied for a temporary injunction to

MYS C. P. CODE REGN. (1911), O. 39, R. 1.

restrain delivery of the properties sold in execution to the decree-holder,

Held, that the holder of a decree only against the father cannot be entitled to get the whole land before he establishes that the debt and decree or binding on the sons, and that the sons cannot be directed to furnish security while the decree-holder had yet to make out his right to possession of the whole or particular portion of it. (*Rama Rao, J.*) VAISYARA BHIMAPPA *v.* CHIKKANNA. **9 Mys.L.J. 402=36 Mys H.C.R. 360.**

———**O. 39, R. 1**—*Discretion of trial Court—Interference by appellate Court.*

The grant of a temporary injunction is a matter of discretion resting primarily with the trial Court and the Court of appeal ought not lightly to interfere with it. The mere fact that the plaintiff has filed his suit for declaration of his rights over the property which the defendant has in execution of a decree against another person brought to sale is by itself no sufficient ground for the Court of appeal to reverse the order of the trial Court refusing a temporary injunction. (*Rama Rao, J.*) SHADAKSHARAPPA *v.* SYED PEER SAHEB. **9 Mys. L.J. 451=36 Mys.H C.R. 339.**

———**O. 39, Rr. 1 and 4**—*Temporary injunction—Discretion of trial Court—Interference on appeal*

In cases of applications for temporary injunction, an appellate Court will not be justified in lightly interfering with the discretion of the trial Court. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) MIRZA ABDULLA BEIG SAHEB *v.* AYASHA BIBI. **12 Mys.L.J. 178=39 Mys.H.C.R. 72.**

———**O. 39, R. 2 (3)**—*Applicability—Breach of injunction under R.* 1.

O. 39, R. 2 (3) applies also to breach of injunction under R 1, 50 M.L.J. 401, Foll. (*Mahadevayya, J.*) OBALAMMA *v.* KAMANNA. **37 Mys.H.C.R. 405 =10 Mys L J. 159.**

———**O. 39, Rr. 7 (1) (a) and 10**—"*Subject-matter*"—*Suit for possession of house with past and future mesne profits—Injunction as regards rents—Order for deposit in Court—Power of Court to pass.*

In a suit for recovery of possession of a house with part and future mesne profits, the Court has power under O. 39, R. 7 (1) (*a*), C. P. Code, to make an order for the detention and preservation of the rents of the building, such rents being part of the subject matter of the suit. One of the modes of effecting it is to cause the rents, as they accrue, to be paid into Court for delivery to the party that may ultimately be found entitled to the same (*Shankaranarayana Rao, J.*) SHANKARAPPA *v* VENKATRAMANAYYA. **12 Mys.L.J. 539=39 Mys.H C R 808.**

———**O 40, R. 1**—*Appointment of receiver—Grounds.*

A plaintiff applying for the appointment of a receiver must prove that *prima facie* he has a very excellent chance of succeeding in establishing the case made out in the plaint and in the next place he must satisfy the Court that the property in the possession of the opposite party is in danger of being wasted. (*Ramachandra Rao, J.*) RAGHAVACHARI *v.* DEVARAJA URS. **38 Mys H. C.R. 102=11 Mys.L.J. 230.**

———**O. 40, R. 1**—*Scope—Discretion of Court under—Appointment of receiver—Grounds for—Mortgage suit.*

Under O. 40, R. 1, C. P. Code, the appointment of a receiver is entirely within the discretion of the Court and the Court is competent to so appoint whenever it appears to be "just and convenient"; and an appointment will not be interfered with unless the discretion has been improperly exercised. Where, in a mortgage

MYS C. P. CODE REGN. (1911), O. 41, R. 5.

suit besides allegations of waste, it appears that interest amounting to nearly Rs. 8,000, remained unpaid, and it is also admitted that the principal amount too remained unpaid, the Court will be justified in appointing a receiver (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) AEDUL BASID SAB *v.* SAHUKAR SARDAR MULL MULTAN MULL. **12 Mys.L.J. 495=39 Mys. H.C.R. 733.**

———**O. 40, R. 1 (a) and O. 43, R. 1 (s)**—*Order appointing receiver—Appeal.*

The Munsif passed an order discharging a receiver. On appeal the District Judge set aside that order and reinstated the receiver.

Held, that in view of the conflict of authority between the Allahabad and the Calcutta High Courts on the question of the maintainability of an appeal from an order removing a receiver, it could not be said that the conclusion of the District Judge that the appeal was maintainable was illegal so as to justify interference in revision.

Held, further, that the view of the Calcutta High Court that the power of removal is implied in the power of appointment and that the one order is as appealable as the other is in consonance with Ss. 7 and 9 of the Mysore Chief Court Regulation. (*Mahadevayya, O. C J.*) PARVATHAMMA *v.* BANNUR SRI RAMASWAMI CO-OPERATIVE SOCIETY. **12 Mys L.J. 194=39 Mys. H.C.R. 146.**

———**O. 40, R. 4**—*Loss caused by receiver's act—Suit for compensation as remedy.*

When a person claims compensation for the loss sustained by him owing to the act of a receiver the proper procedure is to file a suit and not to apply under O. 40, R. 4, C. P. Code. (*Mahadevayya and Ramachandra Rao, JJ.*) RAJA HUSSAIN *v.* BANK OF MYSORE,LTD. **38 Mys H C.R. 253=11 Mys L.J. 257.**

———**O. 41, R. 5**—*Application for stay—Affidavit—Particulars necessary.*

The mere statement in the affidavit that the appellant would suffer substantial loss if the decree were not stayed is not enough He should also mention how he would suffer substantial loss if the decree is not stayed, so as to enable the appellate Court to judge whether an *interim* stay order should be passed. (*Doraiswami Iyer, C. J.*) B. D. NAIDU *v.* LAKSHMANA RAO. **36 Mys H C.R. 499=9 Mys.L J. 483.**

———**O. 41, R. 5**—*Stay of confirmation of sale—Effect.*

There may be an order for stay of confirmation of sale as distinguished from the stay itself. An order for confismation is only a judicial determination between the purchaser and the judgment-debtor that none of the obligation on which the sale could have been set aside before the confirmation exists in the case. (*Doraiswami Iyer, C. J.*) KOTHANDA REDDY *v.* DODDANAGAMMA. **38 Mys.H C.R. 151=11 Mys.L.J. 214.**

———**O. 41, R. 5**—"*Substantial loss*".

Substantial loss means and includes that even by obtaining restitution, the appellant in the event of his success will not be restored to the full benefits of the decree which may ultimately be passed in his favour, but not the mere temporary deprivation of the use or benefit of the fruits of the decree. Where security is furnished by the successful party for the re-payment of money in the event of the decree being reversed, stay of execution of a money decree should not be granted. **13** Bom. 241. Ref. (*Doraiswami Iyer, C. J.*) B. D. NAIDU *v.* LAKSHMANA RAO. **36 Mys.H C.R. 499=9 Mys. L.J. 484.**

MYS. C. P. CODE REGN. (1911), O. 41, R. 10.

———**O. 41, R. 10**—*Applicability—Pauper appeal.*

The provisions of O. 41, R. 10 are not applicable to appeals preferred *in forma pauperis*. 12 C.W.N. 163; 42 Bom. 5; 3 Lah. 30; *Willie* v. *St. John* (1910), 1 Ch. 701, Foll. (*Srinivasa Iyer, J.*) RAMA CHAR, *In re*. **9 Mys.L.J. 217.**

———**O. 41, R. 23**—Applicability—Dismissal of suit on preliminary issues—Appeal—Reversal and remand of whole case without recording findings on issues decided—Appeal. *See* MYSORE C. P. CODE REGULATION, S. 151. **39 Mys.H.C.R. 572.**

———**O. 41, R. 23**—*Order under—Appeal from—Scope—Power of Court to consider merits of whole case.*

It is not open to the appellate Court in an appeal from an order of remand under O. 41, R. 23, C. P. Code, to enter into the merits of the whole case as in a regular appeal. (*Mahadevayya, O. C. J. and Ramachandra Rao, J.*) SUBBANNA SETTY *v.* VEERANNA GOWDA. **39 Mys.H.C.R. 572.**

———**O. 41, R. 23**—*Remand under inherent power—Appeal.*

When the order of the lower Court remanding a suit for fresh disposal cannot be construed as one under O. 41, R. 23, since the first Court had not disposed of the suit upon any preliminary point but had given its decision after a discussion of the available evidence, the order must be taken to be one passed in the exercise of inherent power of the Court under S. 151, C. P. Code. and no appeal lies under O. 43, R. 1 (*u*) from such an order. 25 Mys. C. C. R. 246; 3 Mys. L. J. 3; 8 Mys. L. J. 201; 48 M. 713; 73 I.C. 915; A.I.R. 1927 Mad. 335, Foll. (*Rama Rao and Srinivasa Iyer, JJ.*) CHICKKANNA SIDDA *v.* SRINIVASA TAVALA. **36 Mys.H.C.R. 381=9 Mys L J. 215.**

———**O. 41, Rr. 23 and 25**—*Remand order—Nature of—Need for stating provision of law.*

It is the duty of an appellate Court, when it remands a case, to state whether the remand was under O. 41, R 23 or O. 41, R. 25 or in the exercise of its inherent power under S. 151, C.P. Code. It should also state whether the appeal is disposed of or retained on its file. Where the Court confirmed the finding of the trial Court on the preliminary points and remanded the case for disposal on the merits,

Held, that the remand was under O. 41, R. 23 and that an appeal lay under O. 43, R. 1 (*u*). (*Doraiswami Iyer, C. J. and Mahadevyya, J.*) KEMPANNA *v.* HANUMANTHAPPA. **38 Mys H.C.R. 44=11 Mys.L. J. 1.**

———**O 41. R. 25**—*Appeal.*

No appeal lies to the High Court from an order under O. 41, R. 25 but the aggrieved party can always dispute the correctness of the order on grounds open to him under S. 105, sub-S. (*1*) C. P. Code, in an appeal from the decree of the appellate Court. Sub S. (*ii*) of S. 105 will not preclude him from disputing the correctness of the order in an appeal from the decree, but a miscellaneous appeal against an order under O 41, R. 25 does not lie. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) NANJAPPA *v.* PUTTAMADAPPA. **36 Mys.H.C R. 165 =9 Mys L J. 279.**

———**O 41, R. 27**—*Additional evidence—Admission.*

Great caution should be exercised in admitting new evidence in appeal. Additional evidence must not be admitted to enable a party to make out a fresh case in appeal. Moreover if one party is allowed to adduce additional evidence the opposite party shall have to be given an opportunity to let in rebutting evidence. (*Mahadevayya and Ramachandra Rao, JJ.*) JAYATHIRTHACHAR *v.* ANANDA RAO. **38 Mys.H.C.R. 245=11 Mys.L.J. 74.**

MYS. C. P. CODE REGN. (1911), O. 44, R. 1.

———**O. 41, R. 33**—*Scope — Relief under R. 22 of O. 41—Power of Court to grant.*

O. 41, R. 33 should be cautiously exercised and generally in cases where but for recourse to it the ends of justice would be defeated. The rule should not be allowed to be invoked in favour of a litigant so as to enable him to evade the provisions of other statutes such as the Limitation Regulation and the Court-Fees Regulation or where the other provisions of the Code will enable him to apply for the requisite relief. Thus may be that in certain circumstances the appellate Court may exercise its discretion under R. 33 and grant a relief which a party may have claimed and obtained under R. 22 but it cannot be said that R. 33 is applicable to every case to which the latter part of R. 22 is applicable. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) RANGANNA *v.* GOVERNMENT OF MYSORE. **10 Mys. L.J. 445.**

———**O. 43, R. 1 (m)**—*Compromise—Order on—Appeal.*

An order recording or refusing to record an agreement or compromise or satisfaction is appealable under O. 43, R. 1, C. P. Code, and a party whose interests are affected by a compromise is not precluded from appealing against such an order, though he is not a party to the compromise. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) SUBBAMMA *v.* KRISHNA RAO. **39 Mys.H. C.R. 699=12 Mys.L J. 488.**

———**O. 43, R. 1 (s)** — *Appointment of receiver—Refusal—Appeal.*

An appeal does not lie from an order rejecting an application for the cancellation of the order appointing a receiver passed under O. 40, R. 1. (*Mahadevayya and Ramachandra Rao, JJ.*) RAJA HUSSAIN *v.* BANK OF MYSORE, LTD. **38 Mys.H.C.R. 256=11 Mys L J. 259.**

———**O. 43, R. 1 (u)** — *Order under O. 41, R. 23—Appealability*

It is the duty of an appellate Court, when it remands a case, to state whether the remand was under O. 41, R. 23 or O. 41, R. 25 or in the exercise of its inherent power under S. 151, C. P. Code. It should also state whether the appeal is disposed of or retained on its file. Where the Court confirmed the finding of the trial Court on the preliminary points and remanded the case for disposal on the merits.

Held that the remand was under O. 41, R. 23 and that an appeal lay under O. 43. R. 1 (*u*). (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) KEMPANNA *v.* HANUMANTHAPPA. **38 Mys H.C R. 44=11 Mys.L. J. 1.**

———**O. 43, R. 1 (u)**—*Remand under inherent power—Appeal.*

No appeal lies from an order of the lower Court remanding a suit in the exercise of its inherent power under S. 151, C P. Code, 8 Mys.L.J. 201; 48 M. 713; 73 I.C. 915; A.I.R. 1927 Mad. 335, Foll. (*Rama Rao and Srinivasa Iyer, JJ.*) CHICKKANNA SIDDA *v.* SRINIVASA TAVALA. **36 Mys.H.C.R. 381=9 Mys.L.J. 215.**

———**O. 44, R. 1**—*Pauper appeal—Order for security—Validity.*

No order for security under O. 41, R. 10 can be passed in a pauper appeal. (*Srinivasa Iyer, J.*) RAMACHAR, *In re*. **9 Mys.L.J, 217.**

———**O. 44, R. 1**—*Scope of enquiry under—Enquiry into evidence—If justified.*

O. 44, R. 1 is an exceptional provision and the proviso to the rule is mandatory; unless the specific conditions laid down are satisfied, permission to appeal *in*

MYS. C. P. CODE REGN. (1911), O. 44, R. 1.

forma pauperis should not be granted. To see whether the decree is contrary to law or otherwise erroneous or unjust, the Court should consider only the decree and judgment and the application for leave. The Court is not required to, or justified in, perusing the evidence recorded and to see whether there has been a misappreciation of evidence. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) *In re* PARVATHAMMA. **39 Mys. H.C.R. 810 = 12 Mys.L.J. 410.**

———**O. 44, R. 1**—*Scope — Permission to appeal as pauper—When to be granted.*

When the matter requires further investigation and the appeal raises a substantial question of law on which it cannot be foretold what view the Judge or Judges disposing of the appeal may take, it would be prejudging the appeal to decide the point at once. In such case leave to appeal should be granted under O. 44, R. 1, C. P. Code, it is not necessary for the purpose of granting such leave that the Court should arrive at a definite and final conclusion that the decree complained against is contrary to law, etc. But when there is substantial question of law involved and the lower Court has not disposed of the case on a preliminary point, such as limitation, and the appellant fails to make out sufficient grounds for filing the appeal *in forma pauperis*, the application for leave to appeal *in forma pauperis* will be rejected. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) AMEER ALI KHAN, *In the case of*. **39 Mys H.C.R. 1154 = 13 Mys.L.J. 192.**

———**O 44, R. 1, Proviso**—*Application to appeal* in forma pauperis — *Ground for misapprectation of evidence.*

Misappreciation of evidence by the lower Court resulting in an erroneous and unjust decision is no ground for admitting an application for leave to appeal *in forma pauperis*. (*Doraiswamy, C.J. and Ramachandra Rao, J.*) *In re* SIDDAMMA. **9 Mys L.J 412.**

———**O. 44, R. 1, Proviso**—*Application to appeal as pauper—Powers of Court.*

The powers of the appellate Court in dealing with applications for permission to appeal *in forma pauperis* are circumscribed by the proviso to R. 1 of O. 44 and the Court cannot look into anything more than the application itself and the judgment and the decree appealed from to see if the decree is contrary to law or is otherwise erroneous or unjust. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KRISHNAPPA, *In re*. **39 Mys H.C.R. 61 = 11 Mys L.J. 273.**

———**O. 46, R. 1**—"*Reasonable doubt*"—*Meaning of.*

A Court cannot be said to entertain a "reasonable doubt" on a question, if it can be decided by the rulings of the High Court. (*Mahadevayya, C.J. and Shankara narayana Rao, J.*) MADAR KHAN *v.* SYED KHALANDAR SAB. **39 Mys H C.R. 704 = 12 Mys.L J. 454.**

———**O. 46, R. 1**—*Scope—Reference—Competency—Conditions.*

O. 46, R. 1, C. P. Code, is intended to enable a Subordinate Court to obtain, in non-appealable cases, the High Court's opinion, *in advance*, on a question of law and thereby avoid the commission of an error which cannot be remedied later on. The right of reference is subject to the conditions specified in the rule, and unless they are fulfilled, the reference is incompetent. The Court making the reference must state his own opinion on the doubt in question and also that his doubt cannot be answered by the reported decisions of the High Court; and there can be no reference in an appealable case. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) MADAR KHAN *v.* SYED KHALANDAR SAB. **39 Mys.H.C.R. 704 = 12 Mys.L.J. 454.**

MYS. COMPANIES REGN. (1917), S. 32.

———**O. 47, R. 1**—Applicability — Application to set aside sale—Dismissal for default—Review—Power of Court to restore. *See* MYSORE C. P. CODE REGULATION, O. 9, R 9. **39 Mys.H.C R. 838.**

———**O. 47, R. 1**—Applicability — Proceedings under Land Revenue Code. *See* MYSORE C. P. CODE REGULATION, S. 141 AND O. 47, R. 1. **39 Mys H.C.R. 942.**

———**O. 47, R. 1**—*Duty of Court.*

Before a Court can exercise a jurisdiction vested in it to grant an application for review on the ground of discovery of new and important matter or evidence, it must be satisfied not only that evidence in question is new and important but also that it was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed. (*Mahadevayya, O.C.J.*) SYED ABDUL WAHAB *v.* THANGAVELU PILLAI. **39 Mys H.C.R. 352 = 12 Mys.L.J. 50.**

———**O 47, R. 1**—"*Error apparent on the face of the record*"—*Meaning.*

An error, in order to be a ground for review under O. 47, R. 1, C.P. Code, must be one apparent on the face of the record, *i.e.*, an evident error which does not admit of extraneous matter to show its incorrectness. A review cannot be ordered merely because the Court is of opinion that a different conclusion of law should have been arrived at. Mistake on a point of law is no ground for review. (*Mahadevayya, C J.*) DURGOOSA *v.* DURGOOSA. **39 Mys H C R 303 = 12 Mys.L.J. 213.**

———**O. 47, R. 1**—Scope—Judgment fixing time for production of succession certificate and providing for dismissal of suit in default—Extension of time—Review—Power of Court. *See* MYSORE C.P. CODE REGULATION, SS. 114 AND 148. **13 Mys.L J. 203 = 39 Mys. H C.R 1091.**

———**O. 47, R. 1**—Scope—Application to set aside order regarding satisfaction and to reopen execution case—Nature of—Order on—Appeal—S. 47. *See* MYSORE C. P. CODE REGULATION, S. 47. **13 Mys. L.J 58 = 39 Mys.H.C.R 1111.**

———**O. 47, R. 7 and S. 115**—*Order rejecting application for review—Revision.*

Revision lies from an order rejecting an application for review, though the interference in revision by the High Court will be limited to cases where the order was passed without jurisdiction. If, however, a Subordinate Court acting within its jurisdiction, refused to review the previous decision on merits, the High Court cannot consider the sufficiency of the grounds on which the Court declined to review. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) SHAMA SASTRI *v.* KOPE GOWDA. **10 Mys L J. 301.**

MYSORE COMPANIES REGULATION (VIII OF 1917), Ss. 32 and 134—*Charge under—Plea that meeting not due to be held and not in fact held—Validity.*

Where the accused pleads that the general meeting of the kind contemplated by Ss. 32 and 134 of the Companies Regulation was not due to be held and had not in fact been held when proceedings are initiated against him, that fact, if true, is a good defence to the charges under Ss. 32 and 134. (*Shankaranarayana Rao, J.*) KRISHNASWAMI KAO *v.* GOVERNMENT OF MYSORE. **13 Mys L J. 36 = 39 Mys.H.C.R. 926.**

——— **Ss. 32 and 134**—*Construction—Liability under—Conditions of.*

The liability for default in complying with the provisions as to the filing of the annual list and balance sheet can arise only when a general meeting has in fact been held. (*Sankaranarayana Rao, J.*) KRISHNA-

MYS. COMPANIES REGN. (1917), S. 32.

SWAMI RAO *v.* GOVERNMENT OF MYSORE. **13 Mys. L J. 36=39 Mys.H.C.R. 926.**

———**Ss 32 (4), 76 (1) and 134 (4)**—*Applicability—Default in holding general meeting—Prosecution—Procedure.*

S. 76 (1) of the Regulation specifically provides for penalty for default in holding a general meeting, while Ss. 32 (4) and 134 (4) require as a condition precedent the holding of the general meeting in the year. In cases of default in holding a general meeting, the more appropriate course is to proceed against the accused under S. 76 (1) than under Ss. 32 (4) and 134 (4). (*Shankaranarayana Rao, J.*) KRISHNASWAMI RAO *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 36=39 H.C.R. 926.**

———**Ss. 32 (4) and 134 (4)**—*Scope—Non-compliance with—Default in holding general meeting—Accused not responsible—Conviction—If sustainable.*

In a prosecution under Ss. 32 (4) and 134 (4) if it is shown that the accused is not a free agent in the matter and that he has not been responsible either for not having arranged to call for a general meeting or in not having complied with the requirements of the sections, a conviction cannot be sustained. (*Shankaranarayana Rao, J.*) KRISHNASWAMI RAO *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 36=39 Mys H.C.R. 926.**

———**S. 76** (1)—Applicability—Default in holding general meeting—Prosecution under Ss. 32 and 144—Maintainability. *See* MYSORE COMPANIES REGULATION, SS. 32 (4), 76 (1) and 134 (4). **13 Mys.L.J. 36=39 Mys H.C.R. 926.**

———**S. 134**—Charge under—Plea that general meeting was not held and was not due to be held—Validity. *See* MYSORE COMPANIES REGULATION, SS. 32 AND 134. **13 Mys.L.J 36=39 Mys.H C.R. 926.**

———**S. 134**—Non-compliance with—Liability—When arises. *See* MYSORE COMPANIES REGULATION SS. 32 AND 134. **13 Mys.L.J. 36=39 Mys H.C.R. 926.**

———**S. 134** (4)—Applicability—Default in holding general meeting—Prosecution - Procedure. *See* MYSORE COMPANIES REGULATION, SS. 32 (4), 76 (1) AND 134 (4). **13 Mys.L J. 36=39 Mys H.C.R 926.**

———**S. 134** (4)—Scope—Accused not responsible for noncompliance—If liable to conviction. *See* MYSORE COMPANIES REGULATION, SS. 32 (4) AND 134 (4). **13 Mys.L J. 36=39 Mys.H C R. 926.**

———**S. 158**—"*Contributory*"—*Meaning—Position of—Liability to pay interest.*

Per *Shankaranarayana Rao, J.*—A contributory as defined in S. 158 of the Companies Regulation is no other than a shareholder in a new garb as it were, and his liability to pay unpaid calls of share amount is nothing more than a resuscitation of his old obligation to pay not only calls as and where required, but also to pay interest thereon. (*Reilly, C.J. and Shankaranarayana Rao, J.*) MYSORE CLAY WORKS, LTD. *v.* RAMACHANDRA RAO. **40 Mys. H.C R. 316=13 Mys.L.J. 384.**

———**S. 156** (iv)—*Construction—Unpaid calls due by contributory—Interest on—If excluded—Discretion of Court to award interest.*

In an application under S. 215 of the Companies Regulation by the liquidator of a company for unpaid calls due from the contributories, the Court can properly pass an order for payment not only of the contributories but also interest thereon at a rate which it thinks proper. There is nothing in S. 156 or 215 which takes away the direction of the Court in the matter of allowing interest on unpaid calls Cl. (*iv*) of S. 156 has not got the effect, either expressly or by implication, of excluding interest on unpaid calls. (*Reilly, C.J. and Shankaranarayana Rao, J.*) MYSORE CLAY WORKS, LTD. *v.* RAMACHANDRA RAO. **13 Mys.L.J. 384=40 Mys H.C.R. 316.**

MYS. COURT-FEES REGN. (1900).

———**S 159**—*Unpaid contribution by shareholder—Liability for interest on—Award of interest as damages—Contract Act, S. 73—Applicability.*

Per *Reilly, C J.*—The liability of a contributory under S. 159 of the Companies Regulation is not a debt arising out of a contract, and therefore, S. 73 of the Contract Act does not apply so as to allow interest to be awarded on unpaid calls by way of damages.

Per *Sankaranarayana Rao, J.*—The liability under S. 159 is in the nature of a debt accruing due from the contributory at the time when his liability commenced but payable at the time when calls are made for enforcing that liability. Once the liability is transformed into a debt, the relationship of debtor and creditor is established between the contributory and the liquidator, and the provisions of S. 73 of the Contract Act are automatically attracted. (*Reilly, C.J. and Shankaranarayana Rao, J.*) MYSORE CLAY WORKS, LTD. *v* RAMACHANDRA RAO. **40 Mys H.C.R. 316=13 Mys.L.J. 384.**

———**S. 215**—Application by liquidator for unpaid calls from contributories—Award of interest on such calls—Discretion of Court. *See* MYSORE COMPANIES REGULATION, S. 156 (*iv*). **40 Mys. H.C.R. 316=13 Mys.L J 384.**

MYSORE CO-OPERATIVE SOCIETIES REGULATION (VII OF 1918 as amended by Regulation VI of 1933), S. 35 (2)—*Powers of Registrar under—Place of production of books.*

Under S. 35 (2) of the Regulation, the Registrar is authorised to summon any one to produce the books only at the headquarters of the particular Co-operative Society, or any branch thereof. The Registrar cannot demand production at any place he may choose to prescribe. (*A.S.R. Chari, J.*) APPU RAU *v.* GOVERNMENT OF MYSORE. **13 Mys L J. 333=40 Mys.H.C.R. 115.**

———**S. 43 G. (3) (as amended by Regulation VI of 1933)**—*Scope — Non-compliance with—Effect — Sanction to prosecute—Omission to give opportunity to show cause—Legality of sanction.*

The provisions of S. 43 G (3) of the Regulation are imperative, and a sanction given by the Registrar for prosecuting an offender without his being heard in the matter or an opportunity being given to him to show cause against the grant of sanction, is invalid. The mere mention in the notice sent to the person concerned of the penalty to which to the person to whom the notice is issued would be liable if he failed to comply with the same is not a sufficient compliance with S. 43-G (3); nor can it take the place of the granting of an opportunity to the accused to be heard before the sanction. (*A. S. R. Chari, J.*) APPU RAU *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 333=40 Mys. H. C.R. 115.**

MYSORE COURT-FEES REGULATION (III OF 1900)—*Memorandum of appeal—Deliberate underpayment of Court fee—Effect of.*

Where the appellant deliberately paid a Court-fee of Rs. 2 knowing full well that the fee requisite was Rs. 1,200, the memorandum of appeal should be rejected, 36 Mys. H. C. R. 79, Foll. (*Rama Rao, O.C.J. and Srinivasa Iyer, J.*) CHANNAPPAIAH *v.* BEREGOWDA. **36 Mys H C.R. 125=9 Mys. L.J. 214.**

———*Refund of Court-fee—Court fee paid on memorandum of objections—Same relief obtainable under*

MYS. COURT-FEES REGN. (1900).

O. 41, R. 33, C. P. Code—Whether good ground for refund.

Where a party files a memorandum of objections and pays Court fee on the same he cannot claim a refund on the ground that the Court might have granted him the same relief under O. 41, R. 33, C.P. Code, without such a memorandum because there is in such a case mistake either of fact or of the law. (*Doraiswami Iyer, C.J.*) *and Ramachandra Rao J.*) RANGANNA *v.* GOVERNMENT OF MYSORE. **10 Mys L J 445.**

———*Scope of suit—Test of.*

Though the form of the suit and the nature of the relief sought may be taken as determining the scope of the suit, still, Courts have to look to the substance of the claim and not the mere shape given to it in the plaint. (*Doraiswami Iyer, C.J.*) ASWATHANARAYANA RAO *v.* MAKAM SURIYA SETTY. **36 Mys H.C.R. 67 = 9 Mys.L.J. 152.**

———**S. 4, Paras. 3 and 4 (a)**—*Suit for bonds and securities—Court-fee payable on market-value.*

A suit for recovey of bonds and securities is a suit for movable property other than money governed by para. III and not IV (*a*). Such of the bonds as do possess a market-value should be valued according to such market-value at the date of presenting the plaint and court-fee paid thereon. (*Doraiswami Iyer, C.J and Rama Rao, J.*) NAGAPPA *v.* DODDAMMA. **36 Mys. H.C.R. 90 = 9 Mys L J 201.**

———**S. 4 (10) (a)**—*Suit for specific performance—Court-fee payable.*

A suit to direct the defendants to re-convey to the plaintiff certain property and to receive the amount legally due to them under an agreement between the parties is a suit for specific performance, in respect of which Court-fee is payable *ad valorem* on the amount of consideration under S. 4 (10) (*a*) and not S. 4 (5) merely for the reason that the suit contains also a prayer for delivery of possession which obviously is a part of the main relief for specific performance. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) CHIKKAMMA *v.* RANGASWAMAPPA. **38 Mys. H.C.R. 403 = 11 Mys. L.J. 434**

———**S. 4 (iv) (c) as amended in 1922**—*Applicability—Suit against Hindu widow for declaration of reversionary right and for injunction to restrain waste—Valuation.*

A suit in which the plaintiff alleges that the plaintiff is the nearest reversioner to the estate held by the defendant, a Hindu widow, and prays for a permanent injunction restraining the widow from committing acts of waste and alienating the properties, falls under S. 4 (*iv*) (*c*) and not 4 (*iv*)(*d*) of the Regulation as amended in 1922. The plaintiff must obtain a declaration that he is a presumptive reversioner as a condition precedent to the grant of the injunction prayed for by him. And when the plaintiff values his suit for purposes of jurisdiction at a certain figure, he must value his suit for Court fees also at that figure and is not entitled to value it at the nominal figure of Rs.100 for purposes of Court-fee. He cannot be permitted to value it at a certain amount for jurisdiction and at the same breadth to value it differently at another figure for Court fee. (*Shankaranarayana Rao, J.*) KARIYANNA *v.* NAGAMMA. **13 Mys. L.J. 291 = 40 Mys. H.C.R. 15.**

———**S. 4 (iv), (c) and (d) and (viii)**—*Suit for injunction restraining defendant from bringing properties to sale—Court fee payable.*

The plaintiff who claimed to be interested in the suit properties sought to be proceeded against in execution filed a suit for a permanent injunction restraining the defendant from selling the properties in execution. He contended that the suit fell under S. 4 (*iv*) (*d*) of the Court-Fees Regulation and that he was at liberty to fix his own valuation on the injunction. The lower Court held that the suit, though in form one for injunction, was, in reality and substance, a suit to set aside an attachment and so the Court-fee should be paid under S. 4, sub-S. (*viii*) of the Regulation.

Held, the suit was virtually one for a declaration that the decree and execution proceedings were not binding on the plaintiff's share and for an injunction by way of consequential relief, that the proper Court-fee payable was under S. 4 (*c*) and as the relief related to immovable property, the Court-fee payable was one-half of the value of the immovable property calculated in the manner provided for in Para. V of the section. A.I.R. 1929 Lah. 566, Dist. (*Doraiswami Iyer, C.J.*) ASWATHANARAYANA RAO *v.* MAKAM SURIYA SETTY. **36 Mys. H.C.R. 67 = 9 Mys. L.J. 152.**

———**S. 4 (v) and Sch. I, Art. 1**—*Applicability—Appeal against mortgage decree—Dispute as to liability of certain properties—Valuation—Court-fee.*

In an appeal from a preliminary decree for sale in a mortgage suit, where the dispute relates to the liability of certain mortgaged properties for the decree amount, and there is no dispute as to the amount of the decree, the subject-matter in dispute is the value of the said properties and Court-fee has to be paid on the amount of the decree or the value of the subject-matter, whichever is less Such value ought to be calculated as prescribed by S. 4 (*v*) of the Court-Fees Regulation (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) NARANAPPA *v* SAKAMMA. **12 Mys.L.J. 456 = 39 Mys.H.C.R. 950.**

———**S. 4 (iv), (c) and Sch. II, Art. 11 (A) (1)**—*Order by Registrar directing registration—Suit for cancellation of.*

A suit for the cancellation of an order made by the District Registrar directing registration of a document is a suit for declaration with a consequential relief, and the Court-fee should be computed under S. (*iv*) (*c*) and not under Art. 11 of Sch. II. (*Doraiswami Iyer, C.J.*) GOURAMMA *v.* NANJAPPA SETTY. **37 Mys.H.C.R. 337 = 10 Mys.L.J. 337.**

———**S. 4 (xi) (cc)**—*Ejectment suit—Valuation for jurisdiction the same as that for Court-fee.*

In a suit by the landlord for ejectment, the valuation fixed by the plaintiff for purposes of Court-fee under S. 4 (*xi*) (*cc*) of the Court Fees Regulation is also the valuation for purposes of jurisdiction. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) JAFER KHAN *v.* SYED GHOUSE. **37 Mys.H.C.R. 305 = 10 Mys.L.J. 25.**

See also ABDULLAH KHAN SAB *v.* GURUSAMI. **10 Mys.L J. 32.**

———**S. 9**—*Reduction of Court-fee—Powers of appellate Court.*

When there is no doubt as to the class or category in which the suit falls or the section of the Court Fees Act which is applicable the decision of the trial Court is not final and the High Court may correct it on appeal. It may even reduce the amount of Court-fee paid on the plaint. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) HANUMAPPA NAICK *v.* SIVALINGA SETTY. **10 Mys. L.J. 288.**

———**S. 15**—*Refund of Court-fee—Inherent power of Court.*

Though there is no provision in the Court-Fees Regulations for refund of Court-fees paid in excess by mistake the inherent powers of the Court and the provisions

MYS. COURT-FEES REGN. (1900), Sch. I, Art. 1.

of S. 151, C. P. Code, enable a Court to make such a refund when common justice demands it. The petitioner had filed written statement in a previous suit wherein he set up a counter-claim paying the requisite Court fee. The Court, however, refused to adjudicate upon the counter-claim whereupon the petitioner was obliged to bring a fresh suit for the purpose of paying fresh Court-fees.

Held, that the ends of justice demanded that the Court fees paid in the previous case should be refunded to the petitioner. (*Shankaranarayana Rao, J.*) OAKLEY & CO., LTD. *v.* CARTER. **12 Mys.L.J. 29=39 Mys H C.R. 65.**

———**Sch. I, Art. 1**—*Appellate decree dismissing suit—Second appeal—Valuation—Basis.*

Where the plaintiff's suit is dismissed by the appellate Court on appeal by the defendant, the valuation of a second appeal by the plaintiff is the amount of his claim on the date of suit and not the value which the defendant had to give for purposes of his appeal to the lower appellate Court. (*Shankaranarayana Rao and A. S R. Chari, JJ.*) VEERANNA, *In re.* **13 Mys. L.J. 432=40 Mys.H.C.R. 249.**

———**Sch. I, Art. 1**—Mortgage decree—Exoneration of share of properties of one defendant—Appeal by plaintiff—Court fee payable—Calculation. *See* MYSORE COURT-FEES REGULATION, S. 4 (*v*) AND SCH. I, ART. 1. **12 Mys. L.J. 456=39 Mys. H.C.R. 950.**

MYSORE CRIMINAL PROCEDURE CODE REGULATION (II OF 1904) —*Appeal—Presentation by ad vocate of accused—Vakalat—Necessity.*

An advocate presenting a criminal appeal on behalf of an accused person murt necessarily file a vakalat authorising him to conduct the appeal. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) RAZACK SABI *v.* GOVERNMENT OF MYSORE. **13 Mys L J. 24=39 Mys. H.C.R. 900.**

———*First information report—Submission — of—Right of accused to appear prior to.*

Persons accused of an offence in the first information report have a right to appear before the Magistrate before the Police place their charge-sheet or "completion report" under S 173 of the Code. They need not wait till they are actually arrested by the police and the Magistrate is also competent to grant bail to the persons named in the first information report even before the Police submit their charge sheet. (*Mahadevayya J.*) MURIGAPPA *v.* GOVERNMENT OF MYSORE. **37 Mys. H.C.R. 385=10 Mys. L.J. 194.**

———*Order under—When justified—Conviction under S. 447, I. P. Code—Absence of criminal force—Order for restoration of property—Legality.*

In the absence of a clear finding of use of criminal force, the mere conviction for an offence of criminal trespass on immovable property under S. 447, I.P. Code will not justify the Court in passing an order under S. 522, Cr. P. Code, for restoration of that immovable property. (*Shankaranarayana Rao, J.*) KARE GOWDA *v.* NARASIMHAIYA. **13 Mys L J. 290=40 Mys. H.C. R. 13.**

———**S. 24**—*Retracted confession—Confession based on—Validity of.*

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted, provided that the Court is convinced that the statement is voluntary and true. (Case-law disc.) (*Sreenivasa Iyer, O C.J. and Mahadevayya, J.*) PADMAMMA *v.* GOVERNMENT OF MYSORE. **37 Mys. H.C.R. 494=10 Mys. L.J. 385.**

MYS. CR. P. CODE REGN. (1904), S. 35.

———**S. 33 (1) (b)**—*Scope—Bench of Magistrate exercising third class powers—Sentence of imprisonment for 10 days in default of fine—Legality.*

Where a Bench of Magistrates, exercising only the powers of a third class Magistrate added a sentence of fine to the substantive sentence of imprisonment, directing that in default of payment of fine that accused should suffer rigorous imprisonment for 10 days more.

Held, the sentence was in contravention of S. 33 (1) (*b*), Cr. P. Code, and was therefore illegal, as sentence ought not to exceed seven days. (*Shankaranarayana Rao, J.*) *In the case of* DALAVOY. **13 Mys. L.J. 209=39 Mys H.C.R. 1206.**

———**S. 35**—*Concurrent sentences—Powers of Court.*

It is only when the punishment consists of imprisonment or transportation that a Court is given the power to direct that they should run concurrently. The Court has no power to give such a direction in the case of imprisonment awarded in default of payment of fine. 27 Bom. L. R. 1351, Foll. (*Ramachandra Rao, J.*) MAHADEVA SASTRY, *In re.* **9 Mys. L.J. 442.**

———**S. 35**—*Concurrent sentences—Powers of Courts.*

S. 35 of the Code does not empower the Courts to pass concurrent sentences of imprisonment in default of fines imposed for 2 or more offences. It empowers only concurrent punishments in the case of imprisonment or transportation. 27 Bom. L. R. 1351, Foll. (*Sreenivasa Iyer O C.J.*) KRISHNAPPA, *In re.* **10 Mys L.J. 238.**

———**S. 35**—*Offences under Ss. 352 and 504, I. P. Code—Single sentence—Legality.*

A Bench of Magistrates convicted the accused persons of offences under Ss. 252 and 504, I. P. Code, and sentenced each of them to pay a fine of Rs. 5.

Held, that though it would have been proper to give separate sentences for the offences,the giving of a single sentence did not vitiate the trial. (*Doraiswami Iyer, C.J.*) SINGAMMA, *In the case of.* **38 Mys. H.C.R. 301 =11 Mys. L J. 342.**

———**S. 35**—*Rioting and hurt—Separate sentences for —Legality of.*

When the accused is guilty of rioting and is also found to have himself caused hurt, he may be punished separately both for rioting and for hurt and the only qualification prescribed under amendment of S. 35 by Act XXVIII of 1923 is that the separate sentences should be subject to the provisions of S. 71 of the Penal Code. This qualification prevents the offender from being punished with a more severe punishment than the Court could inflict for any of the offences coming within the scope of that section. 49 Bom. 916, Foll. (*Mahadevayya, O. C. J.*) MAHOMED AKBAR *v.* GOVERNMENT OF MYSORE. **12 Mys. L.J. 41=39 Mys. H.C. R 576.**

———**S. 35 and Penal Code (XLV of 1860), S. 71**—*Scope.*

Under S. 35 it is permissible subject to the provisions of S. 71 of tha Penal Code to award separate sentences for two or more separate offences of which a person may be convicted at one trial and such sentences may be made to run consequently or concurrently. In the case of consecutive sentences, the maximum term of imprisonment is 14 years. But if the case is tried by a Magistrate, the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict. The combined effect of S. 35 of the Cr. P. Code Regulation and S. 71 of the I. P. Code, is that under S. 35 as amended it is not even necessary that the offences should be distinct in order to enable a Judge or Magistrate to pass consecutive sentences, and if the case fell under

MYS. CR. P. CODE REGN. (1904), S. 35.

S. 71, I. P. Code, the Court cannot award a more severe punishment than it could for any of the offences. 30 Bom.L.R. 383; 49 Bom. 916; A.I.R. 1925 Cal. 1015 and A.I.R. 1929 Lah. 670, Foll. (*Doraiswami Iyer, C. J. and Rama Rao, JJ.*) HANUMANTHAVA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 179=36 Mys. H.C.R. 305.**

———**Ss. 35, 245 (2) and 258 (2)**—*Scope—Conviction under Ss.* 380 *and* 457, *I. P. Code—Single sentence—Legality.*

S. 35, Cr. P. Code, only prescribes the rules for the assessment of sentence and fixes the limits of the Courts powers of punishment and the sequence in which separate sentences, if passed, are to take effect; and though the section provides that,on a conviction for two or more offences at one trial, the Court may sentence the offender to the several punishments, it does not mean that it is optional for the Court to do so. Futher S. 35 is not the section which requires the Magistrate to pass a sentence on conviction of an accused person. It is S. 245 (2) in summons cases and 258 (2) in warrant cases that prescribe that Ss. 245 (2) and 258 (2) read with other sections in Chapters 20 and 21, Cr.P. Code, show that the intention of the legislature is that in respect of each offence there should be a separate sentence on conviction, sentences to be passed being, of course, subject to the provisions of S. 35. A single sentence on convictions under Ss. 457 and 380, I.P. Code, is illegal, in such a case separate sentences should be passed. (*Shankaranarayana, Rao, J.*) CHANNABASAVA. *In the case of.* **13 Mys.L.J. 366=40 Mys.H.C.R. 252.**

———**Ss 35 and 235 (2)**—*Scope—Distinct offences—Offences under Penal Code and under Post Offices Act—Separate sentences—Legality.*

Separate sentences may be passed for distinct offences under S. 35 read with S. 235 (2), Cr. P. Code, so long as the ordinary powers of the convicting Magistrate are not exceeded in the aggregate. Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction and sentence must follow in respect of each. Where an accused is found guilty under two separate enactments, namely, of offences under Ss. 465, 467, 468 and 471, I. P. Code, and also of an offence under S. 52 of the Indian Post Offices Act, a single sentence for all the offences is not sufficient or justifiable though the accused must be awarded separate sentences, one for the offence under the Post Offices Act, and another for the offence under the Penal Code. (*Mahadeveyya, C.J. and Ramachandra Rao, J.*) THIMMAPPA GOWDA *v.* GOVERNNENT OF MYSORE. **12 Mys.L.J. 398=39 Mys.H C.R. 912.**

———**S. 54 (7)**—*Applicability — Essentials—Offence committed in Bansda State—Arrest in Mysore.*

In order to enable a police officer to arrest under S. 54 both parts of the section should be satisfied. The arresting officer has to exercise his own judgment and form his own opinion whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is reasonable complaint or suspicion must at least be founded on some definite fact tending to throw suspicion on the person arrested and not on mere vague surmise or information. Further the act must be one for which there is a present liability to apprehension or detention.

Held, that there was no extradition arrangement between the Bansda State and Mysore and therefore the accused was not liable to be arrested in Mysore for an offence committed in the Bansda State. (*Doraiswami Iyer, C.J.*) KRISHNAMURTHI NAIDU, *In re.* **11 Mys.L.J. 13.**

MYS. CR. P. CODE REGN. (1904), S. 96.

———**S. 61**—*Object—Remand—Jurisdiction of Magistrate.*

The intention of the legislature having regard to Ss. 61 and 167 and to the requirements of justice generally is that an accused person should be brought before a Magistrate competent to try or commit with as little delay as possible. Though according to S. 167 a Magistrate before whom an accused person is produced for remand by the police is empowered to grant remand, whether he has or has no jurisdiction to try the case it is understood that as a general rule the accused should if possible be produced before the Magistrate who has jurisdiction to try the case. (*Mahadevayya, J.*) BABA SAS, *In the case of.* **10 Mys.L.J. 471=37 Mys.H.C. R. 508.**

———**Ss. 69, 70 and 71**—*Non-compliance—Trial, if vitiated.*

Where the summons had not been issued "in dupli cate" and no attempt was made to have it served as prescribed by Ss. 70 and 71,

Held, that the trial was vitiated and that the defect was not cured by S. 537. (*Mahadevayya, J.*) CHENNIAH *v.* GOVERNMENT OF MYSORE. **10 Mys.L.J. 436=37 Mys.H C.R. 422.**

———**Ss. 91 and 92**—*Scope—Accused on bail—Failure to appear—Magistrate ordering arrest of accused—Order of release under S.* 498 *by Sessions Judge—Legality.*

S. 91 of the Cr. P. Code enables the Court to require an accused person to execute a bond, with or without surety, for his appearance in such Court —when he does not so appear as bound under the terms of the bond, S. 92, expressly authorises the Court to issue a warrant of arrest against him and to produce him before the Court. The legality of such an order passed under S. 92, cannot be questioned by the Sessions Judge on the pretext of passing orders on an application under S. 498, Cr. P. Code, the Sessions Judge is not competent under the law to revise such an order passed under S. 92. (*Mahadevayya, C.J.*) VISHAKANTIAH, *In the case of,* **13 Mys.L J. 217=39 Mys H C.R. 1102.**

———**S. 92**—*Scope—Accused on bail—Forfeiture of bond—Power of Magistrate to order arrest—S.* 514.

When an accused person violates the terms of his bail bond and fails to appear before Court, there is nothing in the Cr. P. Code requiring the Magistrate to act only under S. 514 of the Code. It is open to the magistrate not only to forfeit the bond but also to take action under S. 92 of the Code and get the accused arrested and produced before him. The accused can also be proceeded against under S. 174, I. P. Code, notwithstanding the payment of penalty by his surety for the accused's absence. (*Mahadevayya, J.*) VISHAKANTIAH, *In the case of.* **13 Mys.L.J. 217=39 Mys.H. C R. 1102.**

———**S. 96**—*Search warrant—Issue of—Requisites for—General search warrant—Validity of.*

The conditions necessary for the issue of a search warrant are: (*i*) the documents must be distinctly specified; (*ii*) the documents should be necessary for the enquiry; (*iii*) before granting the warrant, the Magistrate must exercise his judicial discretion. The Court must have further reason to believe that the person complained against is not likely to produce the documents in his possession. Where these conditions have not been complied with and no finding recorded by the Magistrate that the accused is not likely to produce them, the issue of a search warrant is illegal. A general search warrant is also illegal. (Case law exhaustively discussed.) (*Mahadevayya, J.*) SIVARUDRAPPA *v.*

MYS. CR. P. CODE REGN. (1904), S. 107.

KARIBASAPPA. **10 Mys.L.J. 366=37 Mys.H.C.R. 468.**

——**S. 107**—*Object—Party fight—Security proceeding—Validity.*

The sections in Chap. VIII of the Code are intended to be preventive and not punitive, the object being to prevent persons from doing something which is likely to occasion a breach of the peace in the immediate or near future. The mere fact that two parties are fighting does not by itself justify an action being taken under S 107. (*Ramachandra Rao, J.*) SRINIVASACHAR *v.* GOVERNMET OF MYSORE. **11 Mys.L.J. 253=38 Mys.H.C. R. 240.**

——**S. 107**—*Proceedings under—Right to copies of statements of witnesses to police officer.*

A person who is proceeded against under S. 107, Cr. P. Code, is not entitled to copies of the statements made by witnesses to a police officer during the investigation. (*Mahadevayya, C.J and Shankaranarayana Rao, J.*) VEERE GOWDA *v.* GOVERNMENT OF MYSORE. **12 Mys L J. 257.**

——**Ss. 107 and 145**—*Scope—Comparison of powers under.*

Though in a general sense the powers under S. 107 are co-extensive with those under S. 145, there is some difference as regards the circumstances in which action should be taken under one or the other of the two sections or of both. Under S. 107, a Magistrate may act on information received about the likelihood of a breach the peace. Under S. 145, however, the existence of a dispute regarding land likely to cause a breach of the peace is a condition precedent to a Magistrate taking action. So the scope of S. 107 is much wider than that of S. 145. If the dispute relates to land, proceedings under S. 145 will be more appropriate than proceedings under S. 107. If, on the other hand, one party is found to be in actual possession and if the opposite party is likely to cause breach of the peace, then action under S. 107 against that party will be more appropriate. If neither party is found to be in possession and breach of peace is feared from both the parties then the appropriate course would be to take proceedings against both under S. 107. But that will not bar the Criminal Court from taking action also under S. 145. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) AVALAPPA *v.* MYSORE CHIKKANNA. **37 Mys H.C.R. 286= 10 Mys L.J. 119.**

——**S. 112**—*Security for good behaviour—Power to reduce period after enquiry.*

Where the Magistrate has, in his discretion, fixed, in the preliminary order, a period not exceeding three years *ex parte*, he is not precluded, after hearing the person. from reducing the period because S. 118 merely prohibits him from making the period longer. (*Doraiswami Iyer, C.J.*) VODDAR RAMA *v.* THE GOVERNMENT OF MYSORE. **35 Mys.H.C.R. 459=8 Mys L.J. 430.**

——**Ss. 118 and 110**—*Amount of security.*

The amount of security should not be excessive or prohibitive and should be fixed under S 118, Proviso (2) with due regard to the circumstances of the case in which the station in life of the person concerned is an important element for consideration. (*Doraiswami Iyer, C.J.*) VODDAR RAMA *v.* THE GOVERNMENT OF MYSORE. **35 Mys.H.C.R. 459=8 Mys L.J. 430.**

——**S. 123(2)**—*Powers of Sessions Judge and High Court to alter the term fixed in preliminary order.*

It is open to the Sessions Judge before whom the proceedings are laid under sub-S. (2) to pass such orders as he thinks fit and in doing so, he is not prevented from fixing the period of imprisonment to a shorter or longer

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term than that indicated in the preliminary order provided the maximum period does not exceed three years. The High Court, in the exercise of its powers of revision or superintendence, has similar powers. (*Doraiswami Iyer, C. J.*) VODDAR RAMA *v.* THE GOVERNMENT OF MYSORE. **35 Mys H.C.R. 457=8 Mys.L J. 430.**

——**S. 144** — *Jurisdiction — Order prohibiting occupation of house—Restoration of possession—Rights of parties—Adjudication upon—Validity.*

After the expiry of an order under S. 144 prohibiting occupation of a house which was the subject of dispute between several members of a family, the Magistrate has no jurisdiction to hold an enquiry into, and adjudicate upon, the rights of the parties and restore possession to one of them. (*Rama Rao, O C. J.*) GURU RAO *v.* BHAGIRATHI BAI. **36 Mys.H.C.R. 122=9 Mys L J. 130.**

——**S. 144**—*Order directing third party to take possession—Validity*

Under S. 144 the Magistrate is empowered only to direct any person to abstain from a certain act and to take certain order with the disputed property. He has no power to direct a third party to take possession of the property. (*Doraiswami Iyer, C. J.*) USMAN KHAN *v.* MARULAYYA. **38 Mys. H. C. R. 146=11 Mys.L.J. 221.**

——**S. 144**—*Order under—Revision.*

The High Court has the power to revise the orders passed under S. 144, Cr. P. Code, even if the order is *ex parte* and the aggrieved party may show cause against it under Cl (4) of the section. (*Rama Rao, J.*) HAKIM ABDUL SATTAR *v.* THE GOVERNMENT OF MYSORE. **9 Mys L.J. 118.**

——**S. 144**— *Preliminary order under — Police report and reference from Health Officer referred to therein—Copies of—Right of accused to.*

On the refusal of a Magistrate to furnish the petitioner with copies of a reference from Health Officer and a Police report referred to by him in the preliminary order passed by him under S. 144 of the Cr. P. Code,

Held, that the Police report was treated as a complaint and submitted in discharge of a duty enjoined by law on the Police Officer concerned and that the petitioner was entitled to a copy thereof ; that the reference by the Health Officer, however, formed part of correspondence between two officers which culminated the submission of the report under S. 144, that it could not properly be held to be a public document under S. 74 of the Evidence Act and that the petitioner was not entitled to a copy thereof. (*Shankaranarayana Rao, J.*) BASAPPA *v.* GOVERNMENT OF MYSORE. **39 Mys. H. C R. 172=12 Mys. L.J. 197.**

——**Ss 145 and 146**—*Applicability—Disputed property in joint possession of both parties—Attachment of legality.*

To a case in which it is clearly established that both the parties to the proceedings have been jointly in actual physical possession of the disputed property claiming under different rights, Ss. 145 and 146, Cr. P. Code, do not apply. The Magistrate cannot therefore keep such property under attachment or pass any order, as if he has no jurisdiction in the matter. (*Srinivasa Rao, J.*) NARASING BHAN *v.* LAKSHMI BAI. **40 Mys.H C R. 160=13 M.L.J. 357.**

——**Ss. 145, 360 and 537**—*Depositions not read over—Illegality.*

Where in proceedings under S. 145, it appeared that the depositions taken down in Court were not read over to the witnesses in compliance with the provisions of S. 360, *held*, that it was a serious irregularity, not

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cured by S. 537 and that it vitiated the entire proceedings. (*Rama Rao, J.*) NANJAPPA *v.* MUDAMMA. **36 Mys.H.C.R. 376 = 9 Mys.L J. 427.**

———**S. 145**—*Duty of Magistrate—Possession under Civil Court decree—Symbolical delivery—Effect of.*

If possession is given under a Civil Court's decree or order it is the duty of the Magistrate to maintain that possession as against a party to the suit if the unsuccessful party seeks to disturb such possession. It is not the object of S. 145 of the Code that one arm of the law should fight the other. Even in case of symbolical possession, the delivery of such possession as between the parties to the suit amounts to a transfer of possession from one party to the other and the absence of the judgment-debtor at the time of giving possession does not affect the validity of the transfer of possession. (*Mahadevayya, J.*) BELATHUR MUNIAPPA, *In re.* **37 Mys. H.C.R. 373 = 10 Mys L.J. 133.**

———**S. 145**—*Enquiry by Magistrate—Scope of.*

The scheme of Ch. XII of the Cr. P. Code contemplates an inquiry solely with reference to the fact of possession irrespective of title. A Magistrate is not therefore at liberty to enter into the merits of the respective claims of the parties before him as regards their right to possession, except so far as they might be helpful in determining the question of actual possession. If, therefore, a Civil Court had declared actual possession to be with one party, the Criminal Court should not go behind it, and set up an independent inquiry. (*Doraiswami Iyer, C. J.*) APPAYYA *v.* RUDRAMMA. **9 Mys.L.J. 349.**

———**S. 145**—*Enquiry under—Question of possession—Order under S. 144—Evidentiary value of.*

The order under S. 144 cannot be treated as substantive evidence of possession in an enquiry under S. 145. It is incumbent on the Magistrate to take evidence and decide the question ignoring the order under S. 144, 88 I.C. 845 ; 27 C. 785 and A.I.R. 1930 Pat. 556, Ref. (*Srinivasa Iyer, J.*) KARIYAPPA *v.* CHITTAPPA. **9 Mys.L.J. 421.**

———**S. 145**—*Order as to possession without taking evidence—Legality.*

In order to decide the question of possession under S. 145, Cr. P. Code, the Magistrate should not only take such evidence as the parties might produce, but is also empowered to take further evidence himself. Where a Magistrate passes an order under the section declaring the possession of a party without any evidence, but merely on the basis of the written statements of the parties, he acts without jurisdiction and the order cannot stand. (*Ramachandra Rao, J.*) A REFERENCE FROM SESSIONS JUDGE, MYSORE. **12 Mys.L.J. 233 = 39 Mys.H.C.R. 259**

———**S. 145**—*Order of Civil Court—Duty of Criminal Court to give effect to.*

If a Civil Court has passed an order in respect of the possession of any immovable property, a Criminal Court must in a proceeding under S. 145 of the Court give effect to it by ordering possession to remain with that party in whose favour the Civil Court has passed the order, even if it was only for symbolical delivery of possession. (*Ramachandra Rao, J.*) SANNA BHATTA *v.* RAMIAH. **10 Mys.L.J. 147.**

———**S. 145**—*Order under—Need for evidence.*

The Magistrate in order to decide who was in possession should not only take such evidence as the parties might produce but is also given the further power to take the evidence himself. Where a Magistrate declared the possession of the second party merely on their written statement and without any evidence.

MYS. CR. P. CODE REG. (1904), S. 145.

Held, that the order was passed without jurisdiction. (*Ramachandra Rao, J.*) NINGA, *In re.* **11 Mys.L.J. 361.**

———**S. 145**—*Preliminary order—Cancellation without further enquiry—Impropriety.*

Where a preliminary order has been passed under S. 145 by a Magistrate, it is not proper for the succeeding Magistrate to cancel that order upon a mere review of the materials already existing without any further enquiry and declare that one or other of the parties is in possession. (*Rama Rao, J.*) NANJUNDIAH *v.* NANJUNDEGOWDA. **9 Mys.L.J. 431 = 36 Mys.H.C.R. 383.**

———**S. 145**—"*Possession*"—*Nature of—Possession by vendee of property from owner—Right of owner's manager to dispute.*

A vendee of immovable property who takes a registered sale deed from the owner of the property and is also put in possession by the vendor, is *prima facie* to be regarded as having established his possession. A person claiming to be the manager of the property cannot set up his possession, in proceedings under S. 145, Cr. P. Code, against that of the owner who has parted with it to the vendee or against the latter. (*A.S.R. Chari, J.*) LINGAMMA *v.* CHITTEGOWDA. **13 Mys. L.J. 317 = 40 Mys.H.C.R. 80.**

———**S. 145**—*Scope—Powers of Court—Attachment of property—Bonds for produce of property—Enforcement—Procedure—Power of Criminal Court to enforce.*

S. 145, Cr.P. Code, provides that the Magistrate may attach the subject of dispute if he considers the case as one of emergency and may also make the necessary orders for the proper custody of the crops or other produce. But it does not specifically provide for a bond or *mutchalika* being taken in respect of such crops or produce in consideration of the annulment of the attachment. Such attachment, the appointment of a receiver of the property and all orders incidental thereto in proceedings under the section are intended for the benefit of the party who may ultimately be declared entitled to the property. If a bond is, however, taken by the Court in such proceedings, that too enures to the benefit of the party who may be so declared. The Code, however, contains no provision authorising the Magistrate to enforce such a bond by way of execution, and if such proceedings are taken, they are *ultra vires*. All that the Court can do after the case is finally disposed of to pass such administrative orders as may be necessary in the furtherance of the action already taken for the preservation and custody of the property. It is inappropriate and inexpedient for a Criminal Court to undertake to enforce the bond by way of execution in summary proceedings ; and an adjudication by the Criminal Court in such a matter may not also be legal; the appropriate procedure for the Court is to direct and authorize the party who is ultimately declared entitled to the property to take suitable action in a Civil Court to enforce the bond. (*Shankaranarayana Rao, J.*) MUNISWAMI *v.* KRISHNACHAR. **13 Mys.L.J. 120 = 39 Mys H C.R. 1042.**

———**Ss. 145 and 146**—*Scope—Magistrate unable to decide possession—Attachment—Legality.*

Where a Magistrate finds himself unable to come to a definite conclusion on the question of possession in proceedings under S. 145, Cr. P. Code, he is justified in directing an attachment of the property in dispute under S. 146. S. 146, Cr.P. Code, is a corollary to S. 145 and comes into operation if the Magistrate is unable to satisfy himself as to which of the parties is in possession. (*Mahadevayya, Offg. C.J.*) RAMAKRISHNA JETTAPPA, *In re.* **13 Mys.L.J. 2 = 39 Mys.H.C.R. 757.**

MYS. CR. P. CODE REG. (1904), S. 145.

——**Ss. 145 and 439**—*Severed crops—Order of attachment—Legality of—Revision.*

Whether severed crops are movable or immovable property is a question on which the High Courts have differed. Where, therefore, the Magistrate who had ordered such crops to be attached under S. 145 subsequently raised the attachment relying on the decision in 30 Cal. 110.

Held, that the Magistrate could not be said to have acted illegally in having raised the attachment and as the case did not involve any manifest injustice or irreparable damage it did not justify interference in revision. (*Mahadevyya, O.C J.*) CHICKAMMA *v.* GANGAMMA. **12 Mys. L J. 199 = 39 Mys H C.R. 182.**

——**S. 145**—*Proceedings under—Stay of—Ground for—Institution of civil suit.*

When once a Magistrate takes cognizance of a dispute under S. 145 he can stay further proceedings only when a party thereto succeeds in showing that such a dispute does not exist. The mere institution of a suit in a Civil Court after the commencement of the criminal proceeding is by itself no proof that the likelihood of a breach of the peace has ceased to exist so as to entitle the party who has instituted the suit to secure a stay of the proceedings before the Criminal Court. (*Ramachandra Rao, J.*) AMIR JAN SALE, *In re.* **10 Mys.L.J. 300.**

——**Ss. 145 and 439**—*Factum of possession—Interference in revision.*

In order to interfere with an order under S. 145, the Magistrate must have acted illegally or in an irregular manner. The High Court cannot interfere with the decision of the trial Court on the factum of possession merely on the ground that on an examination of the evidence it would have come to a different finding. (*Mahadevayya, J.*) *In the case of* VENKATA RAO. **10 Mys L J. 283.**

——**Ss. 145 and 107**—*Scope—Comparison of powers under.*

Though in a general sense the powere under S. 107 are co-extensive with those under S. 145, there is some difference as regards the circumstances in which action should be taken under one or the other of the two sections or of both Under S. 107 a Magistrate may act on information received about the likelihood of a breach of the peace. Under S. 145, however, the existence of a dispute regarding land likely to cause a breach of the peace is a condition precedent to a Magistrate taking action. So the scope of S. 107 is much wider than that of S. 145. If the dispute relates to land, proceedings under S. 145 will be more appropriate than proceedings under S. 107. If, on the other hand, one party is found to be in actual possession and if the opposite party is likely to cause breach of the peace, then action under S. 107 against that party will be more appropriate. If neither party is found to be in possession and breach of peace is feared from both the parties, then the appropriate course would be to take proceedings against both under S 107. But that will not bar the criminal Court from taking action also under S. 145. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) AVALAPPA *v.* MYSORE CHIKANNA. **10 Mys L.J. 119 = 37 Mys H C.R. 286.**

——**S. 145 (4)**—*Non-examination of witness—Effect—Revision.*

The mere non examination by the Court of witnesses of one of the parties to the proceedings under S. 145, Cr. P. Code does not entitle the High Court to interfere in revision with the order of the lower Court, when no prejudice has been caused to the party thereby, especially when the order has been passed on undisputed facts.

MYS. CR. P. CODE REG. (1904), S. 155.

(*A. S. R. Chari. J.*) LINGAMMA *v* CHITTEGOWDA. **13 Mys L J. 317 = 40 Mys.H.C.R. 80.**

——**S. 145 (8)**—*Scope—Receiver—Power of Magistrate to appoint.*

An attachment placed by a Magistrate under S. 145 enables him to pass an order under sub Sec. (8) for the proper custody and sale of crop or other produce the subject of dispute pending the inquiry. In other cases where he apprehends that a breach of the peace is likely to occur in either party trying to get possession of the attached property he has the inherent power to prevent, such a breach to take possession of the property and manage it by entrusting the property in its administrative capacity to an agent (*Doraiswami Iyer, C. J.*) NARAYANA REDDI *v.* SRIKANTAIYA. **11 Mys.L.J. 51.**

——**S 146 (1)**—*Attachment by magistrate—Subsequent decision by Civil Court Right of successful party to have attachment released.*

Under S. 146 (1) of the Code the Magistrate may attach property which is the subject-matter of the proceedings under the circumstances referred to in that subsection only until a competent Court has determined the rights of the parties thereto and the person who has secured the decision of a competent Court in his favour is entitled to have that attachment released. (*Shankaranarayana Rao, J.*) CHENNE GOWDA *v.* LINGE GOWDA. **11 Mys L J. 409 = 39 Mys. H C R. 133.**

——**S. 148 (3)**—*Order of costs—Absence of evidence—Parties not present—Legality of order.*

An order for costs under S. 148 (3), Cr. P. Code Regulation, can be passed only in the presence of the parties who have a right to be heard, and it must be based on proper materials. When there is nothing to show that the amount was actually incurred or how it was calculated and when the parties are not present, if the Court passes such order, it is without jurisdiction. (*Mahadevaya, O. C. J.*) SONNAPPA *v.* LAKKARPA. **39 Mys. H C R 595.**

——**S. 155 (2)**—"*Police report*"—*Report of the police on investigation under S.* 155 (2).

A report submitted on an investigation made under S. 155 (2) is not a "Police-report" in the narrow sense in which that expression is used in Chapter 14 as having reference to cognizable offences only. It is however "the report of the police officer" in the wider sense of including within its scope the report by a police officer of a non-cognizable offence also. (*Doraiswami Iyer, C. J., Rama Rao and Srinivasa Iyer, JJ.*) HARIVAYYA, *In re.* **35 Mys. H C.R. 476 = 8 Mys. L.J. 452.**

——**S. 155 (2)**—*Powers of Police—Permission to investigate.*

A police officer can make a repert of a non-cognizable offence and ask *suo motu* a Magistrate, competent under S. 155 (2), for permission to investigate. (*Doraiswami Iyer, C. J., Rama Rao and Srinivasa Iyer, JJ.*) HARIYAYYA, *In re.* **35 Mys. H C.R. 476 = 8 Mys. L.J. 452.**

——**Ss. 155 (2) and 202 (1)**—*Investigation into non-cognizable offences—Powers of police—Investigation under S.* 155 *and S.* 202—*Distinction.*

The Police have the power to investigate into non-cognizable offences under S. 155 (2) independently of any investigation directed by a Magistrate under S. 202 (1) The one is distinct from the other. The investigation contemplated in S. 202 can be ordered by a Magistrate of the first or second class authorised to take cognizance under S. 190, to be made by a police officer for the purpose of ascertaining the truth or falsehood of the complaint irrespective of the offence complained of

MYS. CR. P. CODE REG. (1904), S. 157.

being cognizable or non-cognizable, provided that a *complaint* of facts constituting such offence is received by him. The other kind of investigation, contemplated in S. 155 (2) may be also made by a police officer if the information received by him discloses the commission of a non-cognizable offence, but he cannot make the investigation of his own accused; he can only do so if directed by a Magistrate of the first or second class. Points of distinction between the two kinds of investigation pointed out. (*Doraiswami Iyer, C. J., Rama Rao and Srinivasa Iyer, JJ*) HARAYAYYA, *In re.* **35 Mys H C R. 476=8 Mys.L.J. 452.**

———**S. 157**—*Destruction of F. I. R. owing to lapse of time—No inference against the complainant.*

It is not correct to draw an adverse inference against the truth of the complainant's case by the destruction owing to lapse of time of the F I. R (*Mahadevayya, O.C.J.*) BABU *v.* GOVERNMENT OF MYSORE. **11 Mys. L.J. 475=39 Mys.H.C R. 75.**

———**S. 157**—*First information report—Evidentiary value of—Mode of tendering it in evidence.*

A F. I. R. taken down by a police officer amounts to an entry in an official record stating a fact in issue and made by public servant in the discharge of his official duty and falls within the scope of S. 35 of the Evidence Act and is a relevant fact. But it is not a substantive piece of evidence and is no evidence of the existence of the facts which it mentions. It can be used merely by way of corroboration or contradiction and not any further. The reports do not prove themselves but they have to be tendered under one or other of the provisions of the Evidence Act and the usual course for the prosecution is to tender them as corroboration under S. 157 of the Evidence Act. (*Mahadevayya, O.C.J.*) BABU *v.* GOVERNMENT OF MYSORE. **11 Mys. L.J. 475=39 Mys H.C R. 75.**

———**Ss 162 and 172**—*Police enquiry—Statements of witness—Copies of—Right of accused to.*

The accused is entitled to copies of the statements in writing made by the witnesses before the police during the enquiry or trial for the purpose of cross-examination, even if the statements be recorded in the police special diary. There is no distinction in this respect between a statement recorded under S. 162 and a statement recorded under S. 172 if a police officer purports to record a statement under the latter section. 35 Mys. C.C.R. 216; A.I R. 1927 Cal. 644, 6 Rang. 672; A I.R. 1928 Cal. 260, Foll. (*Srinivasa Iyer, J.*) KEMPEERI NANJAIYA *v.* GOVERNMENT OF MYSORE. **9 Mys.L J. 353=36 Mys H.C R. 385.**

———**S. 162**—*Scope—Previous statement of witness during police investigation—Use of—Procedure.*

The proper procedure under S 162, Cr. P. Code, when it is desired to contradict a witness at the trial by the record of what he stated before the police in the investigation of the case at an earlier stage, is to confront him with such record, It is unfair not to so confront him, and at a later stage to examine the police officer and ask him to give oral evidence of what the witness stated To so examine the police officer, without giving the witness an opportunity of seeing or hearing the record of what he stated on a previous occasion, is clearly against the provisions of S. 162 (*Reilly, C. J. and Chari, J.*) GOVINDA SINGH *v.* GOVERNMENT OF MYSORE. **13 Mys L J. 94=40 Mys H.C.R. 106.**

———**S. 162**—*Statements made during investigation—Use of.*

The statement of witnesses to the police in the course of an investigation can only be used for only one purpose, *i.e.*, as mentioned in the provisos to S. 162, Cr. P. Code. They cannot be used as evidence in order to convict the author of that statement. (*Mahadevayya, J.*) RUDRAPPA *v.* GOVERNMENT OF MYSORE. **11 Mys.L.J. 438=38 Mys H.C.R. 412.**

MYS. CR. P. CODE REG. (1904), S. 167.

———**S. 162**—*"Such enquiry or trial"—Proceedings under S. 107—Right of accused to copies of statements of witnesses before police officer.*

The expression "such inquiry or trial" in S. 162, Cr. P. Code, means an inquiry or trial in respect of any offence under investigation at the time when a statement is made; and the investigation under S. 162 refers to the investigation with regard to the commission of either a non-cognisable offence in which a Magistrate orders a police officer to investigate or a cognisable offence in which a police officer can investigate without the Magistrate's order. Therefore a person who is proceeded against under S. 107, Cr. P. Code, is not entitled to copies of the statements made by witnesses before the police officer daring the investigation. (*Mahadevyya, C. J. and Shankaranarayana Rao, J.*) VEERE GOWDHA *v.* GOVERNMENT OF MYSORE. **12 Mys L.J. 257.**

———**S 164**—*Confession—Certificate—Defects in—Effect on admissibilty of confession.*

The certificate appended to a confession must state that the confession was voluntarily made. But a defect in the certificate appended to a confession recorded under S. 164, Cr. P. Code, does not render it inadmissible if the Court is satisfied that the Magistrate who recorded the same has otherwise complied with the provisions of the section. (*Mahadevayya, C. J. and Shankaranarayana Rao, J*) RAMA *v.* GOVERNMENT OF MYSORE **12 Mys.L.J. 353=39 Mys.H.C.R. 996.**

———**S. 164 (3)**—*Confession containing memorandum under—Proof of.*

When a confessional statement contains a memorandum as required under S. 164, Cl. (3) of the Cr. P. Code, a presumption arises that all the formalities have been performed and it is admissible without further proof. When the confession is tendered by the Sessions Court it proves itself under S. 80 of the Evidence Act without calling upon the Magistrate who recorded it. 89 I.C. 897; 53 Cal 350; 119 I.C. 193; 119 I.C. 325 and 120 I.C. 257, Foll. (*Sreenivasa Iyer, O.C.J. and Mahadevayya, J.*) PADMAMMA *v.* GOVERNMENT OF MYSORE. **10 Mys.L.J. 385.**

———**S. 164**—*Record of confession—Compliance with formalities—Presumption as to.*

When a confessional statement contains a memorandum as required by S. 164, a presumption arises that all the formalities have been performed and the confessional statement is admissible without further proof. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) RAMA *v.* GOVERNMENT OF MYSORE. **12 Mys. L. J. 353=39 Mys H.C.R. 996.**

———**S. 164**—*Recording of confession—Formalities—Defect—If cured.*

A Magistrate recording a confession under S. 164, Cr. P. Code, made to him in the course of a police investigation, must, before recording it, question the person making it as to whether he was making it voluntarily. The omission to do so is fatal. But S. 533 of the Code cures a defect, if it is of a formal character, (*Mahadevayya C.J. and Shankaranarayana Rao, J*) RAMA *v.* GOVERNMENT OF MYSORE. **12 Mys. L. J. 353=39 Mys H C R. 996.**

———**S. 167** — *Object — Remand— Jurisdiction of Magistrate.*

The intention of the legislature, having regard to Ss. 61 and 167 and to the requirements of justice generally is that an accused person should be brought before a

MYS. CR. P. CODE REG. (1904), S. 174.

Magistrate competent to try, or commit with as little delay as possible. Though according to S. 167 a Magistrate before whom an accused person is produced for remand by the police is empowered to grant remand, whether he has or has no jurisdiction to try the case, it is understood that as a general rule the accused should if possible be produced before the Magistrate who has jurisdiction to try the case. (*Mahadevayya, J.*) BABA SAB, *In the case of.* **10 Mys L.J. 471 = 37 Mys.H C. R. 508.**

———**S. 174**—*Inquest report—Copies of—Accused's right to—Extent of.*

An accused is entitled as of right to copies of only questions Nos. 4, 6 7 (except 7 *a*), 10, 11, 17, 18 and 19 and the answers thereto contained in the inquest report and not to any other questions or answers in it, under S. 174, Cr. P. Code Regulation. (*A.S.R. Chari and Sreenivasa Rao, JJ.*) LAKKE GOWDA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 444.**

———**Ss. 177, 179, 181 (2) and 188**—*Jurisdiction of Mysore Court—Criminal breach of trust—Sums received in Mysore.*

The ordinary rule is that the area within which the offence is committed, and not the place where the offence may be found that determines the Court which has jurisdiction to try the offence. But in cases of criminal breach of trust, the offence may be tried either at the place where the offence was committed, or at the place where the property was received or retained. So where the amounts forming the subject-matter of the charge were withdrawn by a company and received in Mysore and entered to the credit of the Mysore Development Syndicate, the Court at Mysore within whose jurisdiction the accounts of the Head Office are kept and maintained, has jurisdiction to try the offence, (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) SITARAMACHAR *v.* THE GOVERNMENT OF MYSORE. **8 Mys.L.J. 385 = 35 Mys.H.C.R. 319.**

———**S. 188**—*Applicability.*

Where the proceedings do not disclose any intention on the part of the police or the Magistracy to deal with the alleged offender in the Mysore State itself as if the offence itself had been committed in Mysore.

Held, that S. 188 cannot apply. (*Doraiswami Iyer, C. J.*) KRISHNAMURTHI NAIDU *In re.* **11 Mys L. J. 13.**

———**S. 188**—*Defamation—Publication originally alleged within Mysore—Publication proved to be outside Mysore—Resort to S. 188 in revision—Permissibility.*

The accused was originally charged with defamation in Mysore State and convicted. In revision, it was proved that the publication of the alleged defamatory publication matter had taken place outside Mysore State. Thereupon the prosecution sought to support the conviction by referring to S. 188, Cr. P. Code.

Held, this amounted to a new and different version of the case, which the petitioners had no opportunity to meet in the trial Court and so could not be allowed in revision. 45 M.L.J. 754; 30 C. 402; 15 Bom. 491, Ref. (*Rama Rao, J.*) DODDA DASAPPA *v.* DASAPPA. **9 Mys.L.J. 86 = 36 Mys.H.C R. 269.**

———**S. 190 (1) (b)**—*Powers of Magistrate—Police report of non-cognizable offence.*

It is not permissible for a Magistrate to take cognizance of a non-cognizable offence on a police report under S 155 (2) seeking permission to investigate. But when a report of facts constituting a non-cognizable offence is made by a police officer under S. 190 (1) (*b*) whether after investigation under S. 155 (2), or before the Magistrate to whom the report is sent if otherwise competent may take cognizance of the offence. 51 Bom. 498, Ref. (*Doraiswami Iyer, C.J., Rama Rao and Srinivasa Iyer, JJ.*) HARIYAYYA, *In re.* **35 Mys H.C. R. 476 = 8 Mys.L.J. 452.**

MYS. CR. P. CODE REG. (1904), S. 195.

———**Ss. 195 and 476**—*Right to apply for sanction—Private party.*

It is not open to a private person under the amended Code to ask for sanction to prosecute but he can move the Court to take action. Nor is it open to a private person to take proceedings himself after taking the sanction of Court under the old S 195 of the Code. (*Doraiswamy Iyer, C. J. and Ramachandra Rao, J.*) SHAMANNA GOWDA *v.* SRIRANGAPPA RANGASAMAPPA. **9 Mys.L.J. 423.**

———**S. 195 (1) (a)**—*Offence under S. 186 I. P. Code—Obstruction to Revenue peons and patel—Absence of complaint by them—Effect—Defect—If curable—Examination as witnesses of public servants concerned—If can validate complaint.*

In the case of an offence under S. 186, I. P. Code, for causing obstruction to Revenue peons and the patel in the discharge of their duties as public servants, S. 195 (1) (*a*) requires that a complaint should be made by the public servants concerned, namely the Revenue peons and patel or the Revenue Inspector or Amildar to whom they are subordinate. In the absence of such a complaint the Magistrate has no jurisdiction to take cognisance of the offence. The mere fact that on the report of the Revenue Inspector the Amildar forwards it to a Police Inspector and the latter in terms places a charge-sheet would not be a sufficient compliance with S. 195 (1) (*a*). Nor can the fact that the public servants who ought to have made the complaint are examined as witnesses for the prosecution cure the defect in the complaint. S. 537, Cr. P. Code, cannot cure the defect in view of the mandatory provisions of S. 195 (1) (*a*). (*Srinivasa Rao, J.*) MARI LINGA *v.* GOVERNMENT OF MYSORE. **13 Mys L J. 464 = 40 Mys H.C.R. 348.**

———**S. 195 (1) (b)**—*Applicability—False charge—Dismissal of complaint on Police "B" Report—Prosecution under S. 211, I. P. Code—Sanction of Magistrate—Necessity.*

A complaint of theft was made to the Village patel. On investigation by the police it was found to be false and malicious and the police sent a "*B*" report to the Magistrate, who, accepting that report, dismissed a complaint. The complainant was then prosecuted for an offence of false charge under S. 211, I. P. Code and the plea was raised that sanction had not been obtained under S. 195 (*b*), Cr. P. Code, from the Magistrate who dismissed the complaint of theft.

Held, that the Magistrate's act in accepting the "*B*" report was not a judicial proceeding and therefore his sanction was not necessary for the prosecution of the complainant under S. 211, I. P. Code. (*A S. R. Chari, J.*) RAMAPPA, *In the case of.* **13 Mys.L.J. 293 = 49 Mys.H.C.R. 18.**

———**S. 195 (1) (b)**—*Applicability—Offence under S. 199, I.P. Code—False declaration to currency officer—Prosecution — Complaint by currency officer— If necessary.*

In the case of an offence under S. 199, I. P. Code, it is only if the offence has been committed in relation to a proceeding in Court, that a complaint as required by S. 195 (1) (*b*) Cr. P. Code, is necessary. But when the offence is committed before a public servant who is not the presiding officer of a Court, *e.g.*, a currency officer who is authorised by the rules under the Paper Currency Act to take evidence, such a complaint is not necessary.

MYS. CR. P. CODE REG. (1904), S. 195.

An accused who sends a false declaration to the currency officer alleging loss of a half-note and fraudulently claiming the value of the note, he can be prosecuted for an offence under S. 199 without the complaint of the currency officer. S. 195 (1) (*b*) does not apply to such a case. (*Ramachandra Rao, J.*) PARASURAM SAIT *v.* GOVERNMENT OF MYSORE. **12 Mys L.J. 467.**

———**S. 195 (1) (b)**—*Applicability—Police enquiry—No proceeding in Court.*

The offence contemplated in S. 211, I. P. Code, must be divided into two parts, one is where the report made to the police investigation which in turn led to a proceeding in a Criminal Court and the other is where the report led merely to a police enquiry but not to any proceeding in Court. To the former case S. 195 (1) (*b*) of the Cr. P. Code will apply but not to the latter case. 24 Mys. C C.R. 52 ; 46 A. 906 ; 9 Lah. 408 ; A. I.R. 1929 Sind 115 ; 53 Cal. 824, Ref. to. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) MUDDARANGA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 112=36 Mys.H. C.R. 238.**

———**S. 197**—*Chairman of village Panchayat—Prosecution—Previous sanction of Local Government.*

Previous sanction of the Local Government is necessary to launch a prosecution against the chairman of a village Panchayat. (*Ramachandra, Rao, J.*) SUBBA RAO *v.* GOVERNMENT OF MYSORE. **11 Mys. L.J. 353=36 Mys. H C.R. 385.**

———**S. 197**—*Public servant charged with bribery—Need for sanction.*

Where an Inspector of Police was charged under S. 161, Indian Penal Code, for bribery.

Held, that the offence could be committed only by a public servant acting as such and that sanction to prosecute was necessary. (*Doraiswami Iyer, C. J.*) SRINIVASA ROW, *In re.* **10 Mys. L.J. 474=37 Mys. H.C.R. 514**

———**S. 200**—*Object of examination of complainant.*

The statutory obligation to examine the complainant under S. 200 is a valuable safeguard contemplated by law. The examination should be sufficient to satisfy the Magistrate about the veracity of the complainant and to enable him to ascertain if there is a *prima facie* case. It is not a mere form. (*Mahadevayya, J.*) SIVARUDRAPPA *v.* KARIBASAPPA. **10 Mys.L.J. 366=37 Mys.H.C.R. 468.**

———**S 202**—*Scope—Notice to accused before summon—Propriety—Discretion—Accused—Meaning.*

It is not anywhere laid down in the Cr. P. Code, that a magistrate should issue a notice to the accused to show cause before the issue of summonses. Not only is the issue of such a notice unauthorised under the Code, but the practice of making the accused a party to proceedings under S. 202, Cr. P. Code, ought to be condemned. A person complained against is not an "accused" before the issue of process to him, and the issue of a notice to him and hearing him by pleader are unwarranted and improper. The Magistrate has a wide discretion to grant or refuse processes, and he is not bound to furnish an explanation for judicial orders passed by him in the intermediate stages of a case. (*Mahadevayya, C. J.*) RANGAPPA, *In re.* **12 Mys.L.J. 262=39 Mys.H.C R. 674.**

———**S. 203**—*Dismissal of complaint under—Fresh complaint—If barred.*

The dismissal of a complaint under S. 203, Cr. P. Code, does not bar the filing of a fresh complaint on the same facts, notwithstanding that the order of dismissal has been confirmed by a superior Court. When the order of dismissal has been passed without reference to the merits, a Magistrate is competent to reopen the case. (*Shankaranarayana Rao, J.*) *In re* NARAYNAPPA. **12 Mys.L.J. 409=39 Mys H.C.R. 869.**

MYS. CR. P. CODE REG. (1904), S. 233.

———**S. 204**—*Issue of process—Ground for—Apprehension of offence.*

The very definition of complaint implies that an offence has been committed and not that a suspicion exists that an offence may have been committed or is about to be committed. S. 204 requires that the Magistrate should be satisfied that a *prima facie* case has been committed before he can proceed to issue process. He is not competent to issue process in *anticipation* of an offence being committed. (*Mahadevayya. J.*) SIVARUDRAPPA *v.* KARIBASAPPA. **10 Mys.L.J. 366=37 Mys H.C.R. 468.**

———**S. 204**—*Reserving cross-examination—No right of accused.*

The ordinary rule according to the Evidence Act is that the witnesses should be examined in chief, cross-examined and re examined; there is no express provision for postponing the cross-examination of witnesses till all the prosecution witnesses have been examined in chief. There is no right conferred upon the accused by the Cr. P. Code Regulation to reserve cross-examination. (*Mahadevayya, O.C.J.*) RAMASETHU IYER, *In re.* **12 Mys.L J. 1=39 Mys.H.C.R. 581.**

———**S. 205**—*Wrong issue of warrant—Modification into summons.*

Where the Magistrate has by mistake issued a warrant instead of a summons he can on discovering the mistake make an order discharging the bail and directing the major process of warrant to take effect as a minor process of summons (*Ramachandra Rao, J.*) VISVAMANYA THIRTHA SREE PADANGALAVARU *v.* NARAYANAPPA. **11 Mys. L.J. 251=38 Mys.H.C.R. 92.**

———**S. 213**—*Order of commitment—Contents of—Reasons to be recorded.*

The section is imperative and directs the Magistrate to give reasons for commitment, which in a case triable both by the Magistrate and the Court of Sessions obviously include reasons showing why it becomes necessary that the superior tribunal should deal with it. 42 Mad. 83, Ref. (*Rama Rao and Srinivasa Iyer, JJ.*) ABDUL SUBAN, *In re.* **8 Mys L J. 437=35 Mys.H. C R. 265.**

———**(as amended), S. 221**—*Previous conviction—Whether should be stated in charge.*

Where the previous conviction renders the accused liable to enhanced punishment more severe than that provided for in the Penal Code for the particular offence charged or to punishment of a different kind it is necessary to state such conviction in the charge. Where however the previous conviction is used not for the purpose of affecting the punishment to which the accused is legally liable but merely to influence the Court in determining the quantum of punishment adequate to the circumstances of the particular case the previous conviction need not be stated in the charge. (*Doraiswami Iyer, C J and Ramachandra Rao, J.*) MURIGA, *In the case of.* **10 Mys L J. 456.**

———**S. 225**— Applicability — Joint trial on single charge for separate offences— Legality—Effect on conviction. *See* MYSORE CR. P. CODE REGULATION, S.233. **13 Mys L J. 48.**

———**S. 233**—*Scope—Distinct offences—Different acts of dacoity in respect of different sets of persons—Joint trial—Legality—Ss. 225 and 537.*

There were two incidents of dacoity in which all the accused were involved. The evidence was that the

MYS. CR. P. CODE REG. (1904), S. 233.

accused, 7 in number, waited on a road and waylaid a body of persons in the early part of the night, and after an interval, they waylaid another party of persons on the same road, committing the offence of dacoity in each case. But there was only one trial on one charge, the charge not suggesting the two incidents.

Held, the two dacoities were not part of the same transaction, but separate ones, and that the conviction on a single charge and single trial was illegal and must be set aside.

Held further, that neither S. 225 nor S. 537 applied to the case. The charge is the foundation of a trial and if the charge does not comply with the rule in S. 233, subject to the exceptions provided, then the foundation for the trial is gone. (*Reilly, C.J. and Shankara narayana Rao, J.*) SANJEEVA *v* GOVERNMENT OF MYSORE. **13 Mys L.J. 48 = 40 Mys.H.C.R. 45.**

———**S. 233**—*Scope and effect of—Exceptions to rule in—Construction of.*

S. 233, Cr. P. Code, enacts a general rule that for every distinct offence there must be a separate charge and that every such charge must be separately tried. But to this rule, there are certain exceptions, which like any other statutory exception to a general rule, must be strictly construed. If the general rule, which is a most important and salutary rule, is violated by the exceptions being overstepped, then the whole trial is illegal. (*Reilly, C.J. and Shankaranarayana Rao, J.*) SANJEEVA *v.* GOVERNMENT OF MYSORE. **13 Mys.L J. 48 = 40 Mys H C R. 45.**

———**S. 235**—*Offences under Ss.* 352 *and* 504, *I. P. Code—Single sentence—Legality.*

A Bench of Magistrates convicted the accused persons of offences under Ss. 352 and 504, I. P. Code, and sentenced each of them to pay a fine of Rs. 5.

Held, that though it would have been proper to give separate sentences for the offences, the giving of a single sentence did not vitiate the trial. (*Doraiswami Iyer, C.J.*) SINGAMMA, *In the case of.* **11 Mys L J. 342 = 38 Mys H.C.R 301.**

———**S. 235** (2)—Distinct offence—Offences under Penal Code and Post Offices Act—Separate sentences—Necessity for. *See* MYS CR. P. CODE REGULATION, SS. 35 AND 235 (2). **12 Mys.L J. 398.**

———**Ss 236, 237 and 423**—*Conviction for substantive offence of forgery—If can be altered into one of abetment.*

Where it is found that a person who has been convicted of the offence of forgery cannot be dealt with as the principal offender, his conviction can still be maintained as an abettor, having regard to the charge framed in the case and the defence put forward. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) VENKATARAMANAYYA *v.* GOVERNMENT OF MYSORE, **13 Mys L.J. 182 = 39 Mys H.C.R. 1140.**

———**S. 238**—*Applicability.*

There is no reason to control or limit the provisions of S. 238, Cr. P. Code, as inapplicable to cases tried by the jury. A.I.R. 1927 Lah. 519; A.I R. 1926 Bom. 134; A.I R. 1926 Cal. 1059 and 6 Mys.C C.R. 80, Ref. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) SRIRAMA BHATTACHAR *v.* GOVERNMENT OF MYSORE. **9 Mys. L.J. 142 = 36 Mys H C R. 30.**

———**S. 238**—*Charge of dacoity—Conviction for robbery—Propriety.*

Since the offence of robbery under S. 392 is a minor one the ingredients of which are contained in the graver offence of dacoity under S. 305, it is permissible to the jury, in a case where the accused are charged with dacoity, to convict them with robbery even though no charge was framed specifically with reference to it. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) SRIRAMA BHATTACHAR *v.* GOVERNMENT OF MYSORE. **9 Mys. L.J. 142 = 36 Mys H.C.R. 30.**

MYS. CR. P. CODE REG, (1904), S. 241.

———**S. 239**—*Joinder of charges—Test of legality—Strength or weakness of evidence adduced.*

Charges against different persons cannot be tried at the same trial unless there is a genuine attempt on the part of the prosecution to bring in evidence to show that they are charges which under S. 239, Cr. P. Code, can be tried together. If there is a genuine attempt at so proving, the fact that the evidence when tested at the trial turns out to be weak or insufficient or untrue does not make the trial illegal. The question whether a joinder of charges, is legal or not cannot be tested by the strength or success of the evidence brought to support them. (*Reilly, C.J. and Shankaranarayana Rao, J.*) NAGAPPA *v.* GOVERNMENT OF MYSORE. **40 Mys H.C.R. 399.**

———**S. 239**—*One complaint regarding three distinct offences—Joint trial—Validity of.*

Where the offences with which the three accused were charged were quite separate and distinct and could not be treated as parts of the same transaction, the mere fact that one complaint was presented in respect of all of them is not sufficient by itself to warrant a joint trial under the law. 50 M. 735 and A.I.R. 1927 Lah. 274, Foll. (*Ramachandra Rao, J.*) GULOJI, *In re.* **10 Mys.L.J. 118.**

———**S. 239**—"*Same transaction*"—*Attack on different members of a procession—Complaints by attacked persons—Joint trial—Legality.*

Two brothers, who were members of a procession, when returning along with the other members of the procession, were abused by the accused who also attacked one of them. The other who went to his brother's rescue was also attacked and beaten in turn Two complaints were preferred by the two brothers and both of them were clubbed together and a joint trial was held resulting in conviction. No question of prejudice was raised until both sides had closed their cases.

Held, in revision, that the acts were parts of the same transaction, and the joint trial was not illegal, no prejudice having been shown to have resulted as a result thereof. (*A.S R. Chari, J.*) YELLIAH *v.* YELLIAH. **13 Mys L J. 314 = 40 Mys.H C.R. 75.**

———**S. 239**—"*Same transaction*"—*Test.*

Two or more persons can be tried together for offences committed in the course of the same transaction; it is not necessary that the offences should have been committed simultaneously or within a short interval of each other, but there must be a continuity of purpose or action running through all of them. The determining factor as to the legality of a joint trial is not its result (Case law discussed.) (*Mahadevayya, J.*) SUBBE GOWDA, *In re.* **10 Mys.L.J 342.**

———**S. 241**—*Scope—Trial begun as warrant case for two offences—Subsequent substitution of procedure for summons case—Legality.*

Where the trial of a case has begun as a warrant case, it is not open to the magistrate to convert it into that of a summons case. The fact that the complainant whose complaint discloses two offences, one a summons case and the other a warrant case, does not choose to press his case as regards the latter, does not justify the magistrate to adopt the procedure for summons cases in the middle of the trial. The question as to the procedure depends on the complaint laid and the notices issued to the accused as well as the commencement of

MYS. CR. P. CODE REG. (1904), S. 243.

the case by the magistrate, and not on what section of the Penal Code the accused can be convicted. (*A.S.R Chari, J.*) CHITTA *v.* KAMA BOYI. **13 Mys.L.J. 311 =40 Mys.H.C R 60.**

———**(as amended), S. 243**—*Summons case—Place of guilt—Discretion of Magistrate not to accept.*

Under S. 243 as amended the Magistrate now possesses a discretion in summons cases as to convicting an accused who pleads guilty. In recording the plea of guilty it is necessary for the Magistrate to be satisfied that the plea was properly made after the nature of the offence was explained to and understood by the accused so that the plea may amount to a confession of guilt. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) MAHOMED ISSUFF, *In re.* **11 Mys.L J. 291.**

———**S. 245**—*Order of release—Validity.*

Where the accused pleads guilty to a charge and the Magistrate does not proceed under S. 349 and S. 562 is inapplicable to the case, an order releasing the accused after admonition cannot be passed under S. 245. (*Srinivasa Iyer J.*) *In re*, CHINTAMANI. **9 Mys. L.J. 65.**

———**S. 245 (2)**—Scope and effect of—Convictions under Ss 457 and 380, I. P. Code—Separate sentences to be passed. *See* MYSORE CR. P. CODE REGULATION, SS. 35, 245 (2) AND 258 (2). **13 Mys.L.J. 234 =40 Mys H C R. 252.**

———**S. 247**—*Absence of complainant—Dismissal of complaint.*

A Magistrate is not bound to wait till the end of the day to apply the provisions of S. 247. In a proper case however the High Court may interfere with an order of dismissal based on the complainant's absence. (*Shankaranarayana Rao, J.*) RAGHAVENDRAIYA *v.* DASTAGIRI SAB. **11 Mys.L.J. 318.**

———**S 247**—*Case closed—Death of complainant—No abatement.*

Where by the time the complainant died the case had been finally closed after the examination of all the witnesses on both sides and nothing remained to be done, there is no question of abatement of the case even though the complainant died before the judgment was pronounced and the effences of which the accused were convicted were compoundable. (*Shankaranarayana Rao, J.*) DYANNA, *In re.* **11 Mys L J. 454.**

———**S. 247**- *Summons to accused returned unserved —Order of acquittal—Validity of.*

The Court has jurisdiction to acquit the accused under S. 247 from non-appearance of the complainant. When the summons issued for the appearance of the accused is not served on him, the provisions of the section are attracted if the Court has issued summons, it is not necessary that the accused should have been served. 40 Mad. 976, 34 Mad. 253 and 53 Bom. 693, Foll (*Doraiswami Iyer, C.J.*) AKKAMMA *v.* NANJUNDAPPA. **9 Mys L.J. 397 = 36 Mys. H C R. 356.**

———**S. 250**—*Award of compensation—Subsequnt enhancement to make order appealable—Validity of order.*

The Magistrate has no right to pass a final order for compensation without hearing the complainant in the matter. Nor it is proper, after once awarding compensation, to enhance it subsequently to make the order appealable. (*Ramachandra Rao, J.*) SUBBAMMA *v.* SHANKARANARANAYYA. **11 Mys.L.J. 458 = 38 Mys. H.C.R. 355.**

———**S. 250**—*Non compliance—Recording of reasons.*

The policy of the legislature in requiring that reason should be recorded is obviously to afford an opportunity to the appellate or revising tribunal to consider the sufficiency of the reasons so recoeded. In the absence of such

MYS. CR. P. CODE REG. (1904), S. 251.

recording of reasons it may be said that there is no compliance with S. 250. A complaint ought not to be dismissed merely because the complainant is unable to prove his case. (*Mahadevayya, O.C.J.*) EERAMMA *v.* EERU. **11 Mys L J. 375 = 39 Mys.H.C.R. 567.**

———**S. 250**—*Right to compensation—Conditions for.*

To justify an order of compensation to the accused, the complaint should be false and either frivolous or vexatious but it does not mean that because a complaint is frivolous or vexatious, it is also false. The final opinion of the Court should be that the case was false and frivolous and not that the explanation of the complainant was unsatisfactory. 89 I.C. 159 and 115 I.C. 334, Ref. (*Mahadevayya, J.*) KEMPIAH, *In re.* **10 Mys.L J. 94 = 37 Mys.H C R. 275.**

———**S. 250**—"*Vexatious charge*".

A "vexatious charge" means a charge which is intended to harass the accused and not one made to further the ends of justice. 87 I.C. 921 and 94 I.C. 271, Ref. (*Mahadevayya, J.*) KEMPIAH, *In re.* **10 Mys L.J. 94 =37 Mys.H.C.R. 275.**

———**S 250 (1) (as amended in 1927)**—*Construction —'showing cause' against award of compensation— Complainant's right to adduce fresh evidence.*

The proceedings consequent on Court calling on the complainant to show cause why he should not pay compensation under S. 250, Cr.P. Code, are not separate or independent proceedings, but a part and continuation of the case ending in the discharge or acquittal of the accused. It is, therefore, open to a complainant who has been called upon to show cause to adduce fresh evidence to show that his complaint is not false, frivolous or vexatious. The complainant can only make representations or advance arguments against an order for compensation being made and on the evidence already on record in the case and not by means of additional evidence. (*A S.R. Chari, J*) NAIKA GAVIAH *v.* SUBBIAH. **13 Mys.L.J. 253 = 40 Mys H C.R. 36.**

———**S. 250 (2)**—*Order for compensation—When to be made—Mere discharge or acquittal—If a ground.*

The mere discharge or acquittal of the accused in a case is not a sufficient ground for making an order of compensation under S. 250, Cr.P.Code. There must be sufficient evidence or probabilities to show that the complaint was not only false, but also frivolous and vexatious. (*A S.R. Chari, J.*) NAIKA GAVIAH *v.* SUBBIAH. **13 Mys.L J. 253 = 40 Mys.H.C R. 36.**

———**(as amended), S. 250 (2 A)**—*Order for compensation—Non compliance—Simple imprisonment up to 30 days.*

It is competent for a Magistrrate passing an order for compensation under S. 250 to direct that in default of payment the person ordered to pay shall suffer simple imprisonment for a period not exceeding 30 days. 5 Mys.L.J. 321, distinguished as being a case prior to amendment. (*Doraiswami Iyer, C.J.*) MAGANNA SETTY, *In re*, **11 Mys.L.J. 24.**

———**S. 250 (2-A)**—*Scope—Order for compensation— In default, imprisonment for one month—Legality.*

An order for compensation under S. 250, Cr.P. Code with a direction that in default of payment of the same, the complainant should suffer simple imprisonment for one month is illegal as it is not in conformity with S. 250 (2-A), as one month might exceed thirty days. (*A.S.R. Chari, J.*) NAIKA GAVIAH *v.* SUBBIAH. **13 Mys.L.J. 253 = 40 Mys H.C.R. 36.**

———**S. 251**—Procedure under—Trial of case commenced under—Substitution by summons case—Procedure in the middle of trial—Legality. *See* MYSORE CR. P. CODE REGULATION, S. 241. **40 Mys.H.C.R. 60.**

MYS. CR. P. CODE REG. (1904), S. 252.

——**Ss. 252 and 253**—*Non-cognizable offence—Absence of complaint—Trial based on police report.*

It is not illegal for a Magistrate to charge or convict an accused of any non-cognizable offence even though the trial began only on a police report and there is no complaint of such offence in the first instance. (*Ramachandra Rao, J.*) MUNISAMAPPA, *In the case of.* **11 Mys.L J. 235=38 Mys H C.R. 92.**

——**Ss. 252 (2) and 253 (2)**—*Powers of Magistrate.*

The fact that the Magistrate, after examining the prosecution witnesses present before the Court, refused to adjourn the case for examining two more witnesses and discharged the accused, is no ground for the High Court to interfere in revision with the discharge. (*Doraiswami Iyer, C.J.*) GANGHARAPPA, *In re.* **8 Mys.L.J. 432=35 Mys.H.C R. 442**

——**S. 254**—*Framing a charge—Stage for—Examination of all witnesses not necessary.*

It is nowhere laid down in the Code that a Magistrate should never frame a charge under S. 254 before all the prosecution witnesses have been cross examined by the accused. Even at any previous stage, *i.e* as soon as he finds a *prima facie* case made out, he is entited to frame a charge. (*Mahadevayya, O C.J.*) RAMASETHU IYER, *In re.* **12 Mys.L J. 1=39 Mys H.C R. 581.**

——**S. 254**—*Scope—Facts in charge sheet amount to offence under S.* 199, *I.P. Code—Section not mentioned—Charge under S.* 199—*Power of Court.*

The charge-sheet against the accused referred to facts which covered an offence under S. 199, I.P. Code. The Court, proceeding on the basis of the charge sheet, found that there was evidence to support a charge under the section and thereupon framed such a charge, though there was no reference to S. 199 in the complaint or charge sheet

Held, that the Court had power under S. 254, Cr. P. Code, to frame the charge. (*Ramachandra Rao, J.*) PARASURAM SAIT *v.* GOVERNMENT OF MYSORE. **12 Mys L J. 467.**

——**S. 256 (as amended)**—*Procedure—Duty of Court to fix date for next hearing.*

Where the Magistrate did not comply with the procedure laid down in S. 256, Cr.P. Code, inasmuch as, after the charge was farmed, he forthwith proceeded to question the accused whether he wished to cross-examine the prosecution witnesses without fixing a date for the next hearing or regarding any reasons for the course adopted by him.

Held, that the procedure was irregular as the accused was deprived of the benefit of an interval of time to which he was entitled under S. 256 and that as the accused has been prejudiced thereby, the conviction should be set aside. (*Rama Rao, J.*) SONAPPA *v.* GOVERNMENT OF MYSORE. **36 Mys. H C R. 395=9 Mys. L J 235.**

——**Ss. 256 and 537**—*Scope of S.* 256—*Non-compliance with—Irregularity.*

The provisions contained in S. 256 are merely directory and are not provisions relating to the mode of trial but only lay down a rule of procedure; therefore the non-compliance with those provisions is no more than an irregularity in procedure which can be cured by S. 537, Cr. P. Code. (*Mahadevayya, O C.J.*) RAMASETHU IYER, *In re.* **12 Mys L J. 1=39 Mys H C.R. 581.**

——**S. 257**—*Issue of process—Discretion of Magistrate.*

Though S. 257 is in terms mandatory, the Magistrate has discretion to refuse the application if he is satisfied that it is made for the purpose of vexation or delay or for defeating the ends of justice. The omission to issue summons will not vitiate the trial in the absence of proof of prejudice to the accused. (*Shankaranarayana Rao, J.*) SRINIVASIAH *In the case of.* **11 Mys.L.J. 350=38 Mys. H C.R. 329.**

MYS. CR. P. CODE REG. (1904), S. 263.

——**S. 258 (2)**—Scope and effect of—Convictions under Ss. 457 and 380, I.P. Code—Separate sentences—Necessity for. *See* MYSORE CR. P. CODE REGULATION, SS. 35, 245 (2) AND 258 (2). **40 Mys. H.C.R. 252.**

——**S. 259**—De novo *trial—Power of Magistrate to order discharge.*

When a *de novo* trial if granted the prior proceeding are entirely wiped out. The original charge goes and the Magistrate who takes up the fresh trial may discharge the accused under S. 259. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) DYAVANNA, *In re.* **11 Mys. L.J. 314 =39 Mys H C.R. 693 N.**

——**(as amended in 1927), S. 259**—*Interpretation.*

The words in S. 259, "or is not a cognisable offence", added by the amending Code of 1927, should be read as disjunctive. It means that the offence should be one that is lawfully compoundable *or* one which does not amount to non-cognisable offence *or* the offence may both be lawfully compoundable as well as non cognisable. (*Doraiswami Iyer, C.J.*) CHIKKA THIMMIAH *v.* HOSAMANE BASAPA. **10 Mys. L.J. 70=37 Mys. H. C.R. 40.**

——**S. 260 (m)**—*Applicability—Cattle Trespass Act, S.* 24—*Summary trial of offence under—Legality,*

S. 260 (*m*), Cr. P. Code, only provides for cases falling under S. 20 of the Cattle Trespass Act. Summary trial of a charge under S. 24 of the Cattle Trespass Act is therefore illegal. (*Shankaranarayana Rao, J.*) MUNIAPPA *v.* BETHAMANGALA KHADER SAB. **13 Mys. L. J. 1=39 Mys. H.C.R. 766.**

——**S. 260 (2)**—*Summary trial — Descretion of Magistrate.*

S. 260 gives discretion to the Magistrate to decide whether to try the case summarily or in a regular manner. Where the complaint did not specify the offences which, according to him, the acts attributed to the accused constituted under the law, nor at the time of the issue of process did he represent to the Magistrate that the case fell under S. 355, Penal Code requiring a regular trial, nor did he during the progress of the summary trial request the Magistrate for a regular trial, the discretion of the Magistrate in adopting a summary trial cannot be interfered with. (*Ramachandra Rao, J.*) SUBBAMMA *v.* SHANKARANARANAYYA. **11 Mys L J. 458=38 Mys. H.C.R. 355.**

——**S. 262 (h)**—*Summary trial—Reasons for conviction—Statement of—Necessity for.*

In the case of a conviction under S. 263, it is obligatory for the Magistrate to give a brief statement of the reasons for conviction. This provision should be strictly complied with, as without such safeguards the Court of revision will not be in a position to arrive at the conclusion, whether the order of the Magistrate was right or wrong. The reasons should show that there was evidence to prove the existence of the ingredients necessary to constitute the offence of which the accused is convicted. 18 Bom. 97, Ref. (*Doraiswami Iyer, C.J.*) BYRAPPA *v.* KEMPIAH. **9 Mys. L.J. 316=36 Mys. H.C.R. 224.**

——**Ss. 263 and 342**—*Scope—Summary trial—Examination of accused—Procedure.*

Where it is clear from the order sheet of a summary trial that after the close of the prosecution case the accused were examined and their pleas recorded again after the charges were framed against them, there is

MYS. CR. P. CODE REG. (1904), S. 263.

sufficient compliance with the procedure laid down in the Cr. P. Code, even though the pleas of the accused have not been separately recorded in the form of questions and answers. S. 263, Cr. P. Code, considerably modifies the normal procedure prescribed in the case of ordinary trials and if the conditions laid down in that section are complied with, there is no irregularity merely because S. 342, Cr. P. Code, has not been literally complied with (*Shankaranarayana Rao, J.*) GANGI REDDY *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 214=40 Mys H.C.R. 119.**

———S. 263 (*h*)—*Strict compliance necessary.*

S. 263 (*h*) should be strictly complied with in order to enable the revision Court to satisfy itself that the necessary ingredients constituting the offence have been proved. (*Doraiswami Iyer, C.J.*) CHIKGANTLAPPA *v.* GOVERNMENT OF MYSORE. **11 Mys. L.J. 426=38 Mys. H.C R. 384.**

———Ss. 269, 418 and 536—*Scope—Offence under S. 149, I.P. Code—Trial by jury instead of with assessors—Validity—Appeal—Interference—Limits.*

Before a jury can find any person guilty or liable under S. 149, I P. Code, they must find him guilty of being a member of an unlawful assembly; and the question whether a person is guilty of being a member of an unlawful assembly in the state of Mysore is not triable by jury. Consequently a trial of an offence under S. 149, I.P. Code, by a jury is irregular. But the trial not being invalid altogether by reason of S 536, Cr P. Code, the appellate Court can only interfere with the verdict of the jury on a question of law and not on a question of fact, as S. 418, Cr. P. Code, provides for no appeal on a matter of fact in such a case. (*Reilly, C. J. and A.S.K. Chari, J.*) MAHOMED IMAM *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 370=40 Mys.H C R. 200.**

———S. 288—*Statements of witnesses before committing magistrate—Us. of—Procedure—Right of Public Prosecutor to cross examine—Prosecution witnesses.*

It is a wholly unjustifiable procedure to allow the Public Prosecutor to cross examine his own witnesses in the course of their examination-in-chief, without any special permission to do so and without suggesting any hostile attitude or untruthfulness on their part, by confronting them with their statements before the Committing Magistrate. The proper procedure, if the Sessions Judge thinks it proper or necessary to treat those statements as evidence in the case, is to bring the whole of their depositions into the record under S. 288, Cr. P. Code, and to let the Public Prosecutor ask the witnesses whether they had not made prior statements, which were not in accordance with their evidence in the Sessions Court. To do so is wholly improper. (*Reilly, C.J. and Chari, J.*) MANCHA NAIKA *v.* GOVERNMENT OF MYSORE. **13 Mys L J 132=40 Mys H C.R. 208.**

———S. 271—*Scope—Murder charge—Plea of guilty—Conviction on—Propriety—Proper procedure.*

It is very unusual and undesirable that a plea of guilty to a charge of murder should be accepted and an accused person convicted upon it without trial. Under S. 271, Cr. P. Code, an accused may be convicted on a plea of guilty; but the Court is not bound to do so and convict him on the plea of guilty alone. In a murder charge even if the accused pleads guilty, a plea of not guilty should nevertheless be entered for him in order that all the evidence in the case may be before the Court and that it may be fully threshed out. (*Reilly, C J. and Shankaranarayana Rao, J.*) RUKKAPUJARY *v.* GOVERNMENT OF MYSORE. **13 Mys.L J. 393.**

———S. 288—*Statement before Committing Magistrate retracted in Sessions Court—Evidentiary value of.*

MYS. CR. P. CODE REG. (1904), S. 307.

The statement of a witness made before the Committing Magistrate and transferred to the Sessions record in accordance with the provisions of S. 288 of the Criminal Procedure Code is not restricted to purposes of contradiction or corroboration of the evidence given before the Sessions Judge, but can be acted upon as substantive evidence to base a conviction. It should be accepted with great caution but it is evidence and the object and effect of S. 288 of the Code is to place the deposition of a witness before the Committing Magistrate on exactly the same footing as the deposition in the Sessions Court. 46 B. 97; 45 M 766; 47 M 232; 53 Cal. 181; 47 A. 276; 49 A. 251 and 6 Lah. 199, **Foll.** (*Sreenivasa Iyer, O.C.J. and Ramachandra Rao, J.*) NAGAPPAYYA *v.* GOVERNMENT OF MYSORE. **10 Mys.L.J 162.**

———S. 297—*Misdirection — Charge of dacoity—Failure of Judge to call attention of jury to the part in the crime of each of the accused—Verdict for robbery—Validity of.*

S. 238 permits a conviction for a minor offence where in the course of a trial for a graver offe ce, all the particulars a combination of which constitutes the minor offence happen to be completely proved, even though the accused were not specifically charged with the minor offence. Ordinarily there may be no difficulty but it is necessary for the Judge to be careful when a person is to be convicted not for the substantial offence in respect of an act done directly by himself but constructively for acts done through others. For example, the offence of dacoity can be committed not only by the persons that actually rob, but also by those who abet and are present in furtherance of the common purpose. So if out of five persons charged with dacoity, two of them are found to have had nothing to do with it, it is imperative for the Judge to call the attention of the jury to the parts in the crime to be assigned to each of the remaining accused and to the evidence thereon with a view to convicting them of robbery. Failure of the Judge so to do amounts to a misdirection vitiating the verdict and the conviction. 34 Mys. C.C R. 333 and 26 Mys. C.C.R. 113, Ref. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) SRIRAMA BHATTACHAR *v.* GOVERNMENT OF MYSORE. **9 Mys. L.J. 142=36 Mys. H.C R. 30.**

———S. 307—*Reference—Competency—Sessions Judge not disposed to agree with verdict of jury—If a ground.*

The mere fact that a Sessions Judge is not disposed to agree to or accept the Jury's verdict is not a sufficient reason for him to make a reference to the High Court under S. 307, Cr. P Code. To justify a reference, the Judge must not only disagree with the verdict of the Jury or the majority of Jury, but must also be clearly of opinion, that it is necessary for the ends of justice to submit the case to the High Court. In other words, the verdict of the Jury must be one which the Judge would not himself have found, had it been his duty to come to a finding in the case, and further the verdict must in his opinion be perverse, or unreasonable, or unwarranted in such a way that no jury, reasonably, carefully and properly considering the case could have come to such a verdict. (*Reilly, C. J. and Shankaranarayana Rao, J.*) HANUMANTHAGADU, *In the case of.* **13 Mys L.J 214=39 Mys H.C.R. 1213.**

———S. 307—*Reference under—Competency—Judge disagreeing with unanimous verdict of jury—Reference—Competency — Interference by High Court — Principles.*

It is not in every case of doubt nor in every case in which a view different from that of the jury can be

MYS. CR. P. CODE REG. (1904), S. 337.

entertained on the evidence, that a reference is to be made to the High Court under S. 307, Cr. P. Code, but only when the verdict is manifestly wrong, and the High Court will not interfere in every such case of doubt or difference of views; and very strong grounds must be made out before the High Court will upset the unanimous verdict of the jury in the absence of any misdirection in the charge. (*A. S. R. Chari and Sreenivasa Rao, JJ.*) *In re* CHINNAPPODU. **13 Mys.L J. 418.**

———**S. 337**—*Charges under Ss.* 302 *and* 325, *I. P. Code—Pardon to one of the accused—Acquittal of the accused on charge under S.* 302 *-Admissibility of approver's evidence on the charge under S.* 325.

The validity of the pardon tendered to one of the accused depends upon the charges framed against the accused and not upon the result of the trial. Where the accused persons were charged with offences under Ss. 302 and 325 of the Penal Code and one of them was granted a pardon and turned approver, the fact that the accused were acquitted of the major offence under S. 302 closes not invalidate the pardon nor does it make his evidence inadmissible against the accused on the charge under S. 325, though the offence under S. 325, Penal Code, is not one in respect of which a pardon can be granted under S. 337 of the Cr. P. Code. Once a pardon is validly granted, the approver is an approver with regard to the whole case, as against all the accused and on all the charges. A. I. R. 1926 All. 590; 81 I. C. 881 ; 87 I. C. 965, Foll. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) NEELAPPA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 57.**

———**S. 342**—*Duty of accused under—Statement—Object and value of.*

The accused in a criminal case is under no duty to make any statement in defence. But if he does make a statement under S. 342, Cr. P. Code, it can be taken into consideration by the Court to determine whether the guilt is proved or not, and to that extent it stands on the same footing as other evidence in the case. The object of the section is not only for the benefit of the accused alone, but it also enables the Court to find out the truth. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L J. 133 = 39 Mys.H.C R. 406.**

———**S. 342**—*Non-compliance with—Effect of.*

Non-compliance with the provisions of S. 342, Cr. P. Code, will render the proceedings null and void. It is not a mere irregularity which can be cured by S. 537 of the Code. (*Mahadevayya, J.*) PARAKAJEE. *In the case of.* **37 Mys H C.R. 271 = 10 Mys.L.J. 276.**

———**S. 342**—*Object of.*

S. 342 is framed for the benefit of the accused and also to enable the Court to discover the truth. The intention is that the Court should put aside all counsel and pleaders and call upon the accused to state in his own way anything he may desire so that the Court may hear his defence from his own lips. The filing of a written statement by the accused cannot be said to absolve the Court from the obligation to examine him. 28 Cr.L J. 417 and 20 A. 264, Foll. (*Mahadevayya, J.*) PARAKAJEE, *In the case of.* **37 Mys.H.C.R. 271 = 10 Mys.L J. 276.**

———**S. 342**—Scope—Compliance with— Procedure in summary trials. *See* MYSORE CR. P. CODE, SS. 263 AND 342. **13 Mys L.J. 244.**

———**S. 342**—*Scope—Examination of witness by Court* suo motu *at late stage—Subsequent non-examination of accused—If vitiates trial.*

Under S. 342, Cr. P. Code, the accused should be given every facility to offer such explanation as he likes

MYS. CR. P. CODE REG. (1904), S 344.

after the evidence against him has been recorded ; and it is but fair that even when witnesses are examined by the Court *suo motu*, during the later stages of a trial, the accused should be given an opportunity of the kind referred to in S. 342, if, as a result of the evidence so recorded new facts are elicited or appear against him. But it does not necessarily follow that the omission to so examine the accused afresh in such a case vitiates the trial. S. 342 casts an obligation on the Court to examine the accused at the particular stage, specified, and not at any later stage. (*Shankaranarayana Rao, J.*) MARI GOWDA *v.* HALE GOWDA. **13 Mys.L.J. 346 = 40 Mys.H.C.R. 143.**

———**S. 342**—*Scope—Non-compliance with—Omission to examine accused—If vitiates trial.*

The omission to examine the accussd after the close of the evidence of the prosecution and before the framing of the charge, as required by S. 342, Cr. P. Code, is a serious illegality which vitiates the trial and the conviction following on such charge. (*A. S. R. Chari, J.*) HONNURAMMA *v.* SURYANARANAPPA. **13 Mys.L.J. 295 = 40 Mys H.C.R. 21.**

———**S. 342**—*Scope—Question to the accused specifically on particular points not necessary.*

All that is made obligatory on the Court by S. 342 is to question the accused *generally* on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. Before drawing an inference adverse to the accused from his failure to offer an explanation as regards the presence of soot in the barrel, it would no doubt be more satisfactory if a question had been specifically put to the accused drawing his attention to the point. But the failure to put such a specific question is not a serious omission, where the accused has been questioned generally on the case after the examination of the prosecution witnesses. (Case law discussed.) (*Mahadevayya, O C. J. and Shankaranarayana, Rao, J.*) RAMAPPA *v.* GOVERNMENT OF MYSORE. **12 Mys L.J. 73 = 39 Mys H C.R. 320.**

———**S. 342**—*Statement of accused—Probative value of.*

S. 342 is a part of the system for enabling the Court to discover the truth. A statement made under S. 342, though it cannot form the basis of a conviction, may nevertheless be taken into consideration along with other evidence in the case. The fact that the accused subsequently retracted his confession is by itself no sufficient ground for not relying on it where it is clear that the confession was voluntarily made without any external pressure. (*Mahadevayya and Ramachandra Rao, JJ.*) GOVERNMENT OF MYSORE *v.* BASAPPA GOWDA. **10 Mys.L J. 304.**

———**S. 342**—*Undefended accused—Duty of Judge as to examination.*

When an accused person is undefended, it is the duty of the Judge to call the accused's attention to each important piece of evidence against him and ask him what is explanation is; at the same time he must carefully void anything in the way of cross examining the accused. (*Reilly, C.J. and Shankaranarayana Rao, J.*) NAGAPPA *v.* GOVERNMENT OF MYSORE. **13 Mys.L. J. 516 = 40 Mys H.C.R. 399.**

———**S. 344**—*Civil suit pending—Adjournment of criminal case—Rule relating to.*

As a general rule it is not desirable to stay proceedings in a criminal case or to go on adjourning the case from time to time under S. 344 of the Code on the ground that a civil dispute is pending between the parties in a Civil Court, in the absence of anything to show that the enquiry before the Magistrate is in any way likely to

MYS. CR. P. CODE REG. (1904), S. 344.

prejudice the trial of the civil suit or that the criminal complaint has been filed to coerce the accused to enter into a compromise regarding the dispute. (*Mahadevayya, O. C. J.*) NAGI REDDY *v.* ADI REDDY. **11 Mys. L.J. 420 = 39 Mys.H.C.R. 544.**

——— **S. 344**—*Power of Court to stay proceedings—Case remedy for judgment—Stay pending civil suit—Legality—S. 561-A.*

S. 344, Cr. P. Code, does not confer any authority on a Court trying a criminal case to adjourn the case *sine die* pending decision of a civil suit. When the trial of a case has been completed and the case posted for judgment, and the judgment is also ready, the trying magistrate has no power to adjourn or stay further proceedings in the case until disposal of a civil suit. The ordinary rule is that a criminal case should be disposed of with the utmost expedition. It is only the High Court that can adjourn the proceeding under S. 561-A, and that too under exceptional circumstances ; *e. g.*, where the Court is satisfied that the object of the criminal proceeding, where the prosecutor is a private party, to prejudice the trial of the civil suit or to coerce the accused into a favourable compromise of the civil litigation, that criminal proceedings are stayed. (*Shankaranarayana Rao, J.*) MALLAKKA *v.* ERAK YATAPPA. **13 Mys.L J. 350 = 40 Mys H.C.R. 149.**

——— **S. 344**—*Scope—Costs of adjournment—Power of Court to order—"If it thinks fit"—Effect of.*

Criminal Court have power under S. 344, Cr.P. Code, to allow costs of adjournment in proper cases. The words "as it thinks fit" in the section confer such power on the Courts. That power should, however, be exercised only where the circumstances are exceptional and where for some reason or another the ordinary every day method of conducting criminal case, has to be departed from. (*Shankaranarayana Rao, J.*) FATIMUNNISSA *v.* MAHOMED KHALEEL. **13 Mys.L.J. 26 = 39 Mys. H.C.R. 903.**

——— **S. 345 (1)**—*Composition—Burden of proof.*

The burden is on the person alleging a compromise to prove that it was a real and valid one. 21 C. 103 and 29 Bom. L. R. 718, Ref. (*Mahadevayya, J.*) BORALINGIAH *v.* B. P. SARAF. **10 Mys.L.J. 20 = 37 Mys H.C.R. 315.**

——— **S. 345 (1)**—*Composition—Consent of both parties necessary.*

The composition contemplated under S. 345 (1) of the Code requires the co-operation of both parties. It implies an actual arrangement arrived at by both the complainant and the accused. It is a completed and not an incomplete agreement. A representation made by the complainant alone and not by the accused is not sufficient for the Court to record a compromise. (*Mahadevayya, J.*) BORALINGIAH *v.* B. P. SARAF. **10 Mys.L.J. 20 = 37 Mys.H.C.R. 315.**

——— **S. 345 (1)**—*Composition—Legal effect of.*

A composition operates as an acquittal and a Magistrate has no power to deal with the case further. A composition out of Court is legal and effective. It is complete on execution and effects an acquittal, though no petition recording it is filed in Court, and though one party subsequently resiles from it. (*Mahadevayya, J.*) BORALINGIAH *v.* B. P. SARAF. **10 Mys.L.J. 20 = 37 Mys.H.C.R. 315.**

——— **S. 345, sub-S. 5 (A)**—*Scope of—Revision from interlocutory order—Permission to compound offence—Power of High Court to grant.*

The effect of sub S. 5 (A) of S. 345 is that if the lower Court refused to grant permission in a case where without permission the offence could not be compounded

MYS. CR. P. CODE REG. (1904), S. 350.

or if the lower Court convicted an accused person of an offence which is compoundable with the permission of the Court and the matter of conviction comes up in revision before the High Court, the High Court sitting as a Court of revision can interfere and grant permission for compounding the offence, if it considers fit and proper. The section does not, however, enable the High Court to grant the permission when dealing with an application to revise an interlocutory order, *e.g.* order refusing to examine certain witnesses on commission. (*Doraiswami Iyer. C. J.*) VASUDEVA RAO *v.* RAJA IYENGAR. **10 Mys L J. 267 = 37 Mys H C.R. 227.**

——— **S. 348**—*Scope—Accused with previous conviction—Trial magistrate incompetent to pass adequate sentence—District Magistrate not empowered under S. 30—Procedure.*

Where a Magistrate trying an accused who has been previously convicted is not competent to pass an adequate sentence on the accused, and the District Magistrate is not invested with powers under S. 30, Cr. P. Code, the only course open to the trial Magistrate is to commit the accused to the Court of Sessions. (*Ramachandra Rao, J.*) HANUMANTHA, *In the case of.* **13 Mys.L.J. 97 = 39 Mys H.C R. 953.**

——— **S. 348**—Scope and object of—Habitual offenders—Sentence—Principles. *See* PENAL CODE, S. 25. **12 Mys L.J. 385.**

——— **S. 350**—De novo *trial—Grant of—Prior charge, if wiped out.*

The commencement of *de novo* proceedings under S. 350, Cr. P. Code, has the effect of wiping out all the prior proceedings including the charge framed by the prior Magistrate. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) MUNIYAJI RAO *v.* BASAVANYAPPA. **12 Mys L J. 358 = 39 Mys H.C R. 687.**

——— **S. 350**—De novo *trial—Prior charge wiped out.*

When a *de novo* trial is granted the prior proceedings are entirely wiped out. The original charge goes and the Magistrate who takes up the fresh trial may discharge the accused under S. 259. (*Mahadevayya, O. C J and Ramachandra Rao, J.*) DYAVANNA, *In re.* **11 Mys L J. 314 = 39 Mys H C R. 693-N.**

——— **S. 350**—*Scope*—De novo *trial—Rule as to—Warrant case—Trial—When commences.*

S. 350, Cr. P. Code, embodies the principle that an accused person has a right to insist that he should not be convicted by a magistrate who has not himself heard the evidence. But there is a material difference between the power of the succeeding magistrate under S. 350 (1) and the right of the accused under the proviso thereto. Whereas the magistrate may start the proceedings *de novo*, the accused can only demand, and that too only in a trial, not in an inquiry, that the witnesses be re-summoned and re-heard. In a warrant case, the trial must be deemed to commence from the time when the accused appears before the Court and the magistrate starts proceedings. There is no warrant for splitting up the proceedings in such a case into an "enquiry" and a "trial". The accused is entitled to the privilege under S. 350 (1) in all trials, irrespective of the stage reached. Where the new magistrate decides either *suo motu* or at the instance of the accused, to re-commence the trial, the prior proceedings including the charge framed are wiped out. But the position would be different if the new magistrate elects to act on the evidence recorded by his predecessor and to proceed from the stage already reached or the accused exercises his right under the proviso. (*Shankaranarayana Rao, J.*) THIMMIAH, *In re.* **12 Mys.L.J. 499 = 39 Mys.H C.R. 738.**

MYS. CR P. CODE REG. (1904), S. 360.

———Ss. 360, 145 and 537—*Depositions not read over—Illegality.*

Where in proceedings under S. 145, it appeared that the depositions taken down in Court were not read over to the witnesses in compliance with the provisions of S. 360 *held*, that it was a serious irregularity, not cured under S 537 and that it vitiated the entire proceedings. (*Rama Rao, J.*) NANJAPPA *v.* MUDAMMA. **9 Mys L J 427=36 Mys H C R 376.**

———S. 360—*Non-compliance with—Illegality.*

The provisions of S. 360 are mandatory and an omission to substantially comply therewith is an illegality not curable by the provisions of S. 537 of the Code. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) THAYAMMA, *In re.* **12 Mys L.J. 174=39 Mys H C.R. 37.**

———S. 360—*Proper procedure.*

A correct interpretation of the deposition by the Bench Clerk to the witness in the presence of the accused, in the language known both to the deponent and the accused or his pleader under the direct supervision of the Judge or the Magistrate who recorded it, will, therefore, be a sufficient compliance with the provisions of the section, as it affords an opportunity to all concerned, to satisfy themselves that the evidence has been correctly recorded and to enable them to promptly bring inadvertent omissions, if any, to the notice of the Court, with a view to immediate correction thereof. (*Mahadevayya, O C. J. and Shankaranarayana Rao J.*) THAYAMMA, *In re.* **12 Mys L.J. 174=39 Mys.H C.R 37.**

———S. 364—*Applicability—Statement by accused, in answer to questions.*

S. 364, Cr. P. Code, apply to all statements made by the accused, whether voluntary or in answer to questions put by the Court (*A S. R Chari, J.*) N. SUBBARAYA, *In the case of.* **13 Mys L J. 104=39 Mys.H.C.R. 963.**

———S. 364—*Scope and object of.*

The provisions of S. 364, Cr. P. Code, are enacted in the interests of the accused and to enable an appellate Court to know exactly what was stated by the accused. The Court must record in full in the language in which the accused is examined or in the language of the Court or in English, the whole of such examination including every question put to him and every answer given by him Where the Magistrate simply notes down, that the accused does not wish to cross-examine any other prosecution witness and that he pleads guilty to the charge is not a legal compliance with the section. (*A S. R. Chari J.*) N. SUBBARAYA *In the case of.* **13 Mys.L. J. 104=39 Mys H C R. 963.**

———S. 366—*Bench of Magistrates—Delivery of judgment by one—Differing judgment by other Magistrate not delivered—Effect*

Where the Bench consists of more than one Magistrate, the delivery by one of them of a judgment written by him will not be a valid judgment when the other member who has written a separate and differing judgment has not pronounced that judgment. Both the judgments must be delivered in Court when the Court is sitting. 52 Mad. 237, Ref. (*Doraiswami Iyer, C. J.*) NANJAPPA *v.* MUNISWAMI. **9 Mys. L. J. 107=36 Mys H C R 115**

———S 367—*Appellate judgment—Contents of—No statement of reasons—Propriety.*

The appellate judgment should contain sufficient materials to enable the Revision Court to see readily whether the appellate Judge has or has not devoted his judicial attention to the case tried by him

Where the judgment contained no statement of reasons and no indication that the facts of the particular

MYS. CR. P. CODE REG. (1904), S. 367.

case and the points raised and urged were in the mind of the learned Magistrate at all when he reached the conclusion, it is a proper ground to remit the appeal to the District Magistrate for re-hearing and fresh disposal by recording a proper judgment. 16 I C 520; 2 Lah. 308; 76 I C. 177; 81 I.C. 437; A. I. R. 1926 All. 318; Cr. R. P. No. 4 of 1928, 29; Cr. R. P. No. 197 of 1929, 30, Foll. (*Rama Rao, J.*) RAMAYYA *v.* GOVERNMENT OF MYSORE. **9 Mys.L J. 210=36 Mys H.C.R. 93.**

———S 367—*Applicability—Judgment in revision petition.*

S. 367, Cr. P. Code, does not apply to the case of a revision petition and the order in such a case need not conform to the requirements of the section. (*Mahadevayya, C. J.*) MUNIBEERAPPA *v.* DODDA HANUMA. **13 Mys.L J. 140=39 Mys.H.C.R. 1072.**

———S 367—*Contents of judgment.*

Where there was no independent discussion or consideration of the evidence on the side of the prosecution and no opinion had been expressed in the judgment as to why that evidence was entitled to be accepted as a satisfactory basis for convicting the accused,

Held, that the judgment not being in strict compliance with Ss. 367 and 424 was not a legal judgment (*Ramachandra Rao, J.*) CHICKA PUTTA *v.* GOVERNMENT OF MYSORE **11 Mys L J. 323=38 Mys.H.C.R. 281.**

———S. 367—*Contents of judgment—Failure to state reasons—Irregularity.*

Where in a case tried with the aid of assessors the accused pleaded guilty at a later stage of the case and the Judge convicted the accused but did not specify in the judgment the reasons therefor,

Held, that the judgment was defective but it amounted to irregularity under the circumstances. (*Ramachandra Rao, J.*) VENKATAPATHY *v.* GOVERNMENT OF MYSORE. **11 Mys L.J. 216=38 Mys.H.C.R. 132.**

———S. 367—*Criminal appeal—Contents of judgment.*

The judgment in a criminal appeal should be self-contained and the discussion of the evidence appearing therein must be such as to indicate that the appellate Court has also examined the evidence on record and come to a definite conclusion as to the correctness or otherwise of the decision of the trial Court. (*Shankaranarayana Rao, J.*) NARANAPPA *v.* RAMASWAMIAH. **11 Mys L J. 303=39 Mys H C R. 111.**

———Ss. 367 and 424—*Judgment in appeal—Duty of Sessions Judge to write—Dictation to stenographer—Legality.*

A Sessions Judge hearing an appeal is bound, under Ss. 367 and 424, Cr. P. Code, to write the judgment himself in the language of the Court or in English. Dictation of the judgment to a stenographer is irregular. But in the absence of anything to show that the irregularity has in fact occasioned failure of justice, no further action is called for. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) BHANGI RAMA, *In re.* **12 Mys L J. 412=39 Mys H.C R. 696.**

———S 367—*Judgment written by Judge after retirement—Delivery by successor—Validity.*

Where in a sessions case the Sessions Judge wrote out the judgment after his retirement and the same was pronounced by his successor,

Held, that the judgment was *ultra vires* and inoperative in law.

Held, further, that S. 537 of the Code did not cure the defect. (*Ramachandra Rao, J.*) AIYANNA *v.* GOVERNMENT OF MYSORE. **11 Mys.L.J. 244=38 Mys.H.C.R. 203.**

MYS. CR. P. CODE REG. (1904), S. 367.

———**S. 367**—*Judgment written by a Magistrate and delivered by succession—Validity.*

It is not necessary that the presiding officer of the Court who wrote the judgment should be the same person as the presiding officer who is required to date, sign and pronounce it in open Court. It follows that one Magistrate may write a judgment and his successor may pronounce it, dating and signing it at the time of pronouncement and for this purpose it is immaterial whether the preceding Magistrate had also signed and dated it. 18 M.L.J. 197 ; 81 I.C. 899; 40 Mad. 108, Foll ; 47 All 284, Ref ; 50 C. 664 ; A.I.R. 1926 Cal. 537 ; A.I.R. 1923 Rang. 44, Not foll. Even if this be an irregularity it is cured by S. 537 as there is no prejudice to the accused. A.I.R. 1923 All. 276, Ref. (*Doraiswamy Iyer, C.J.*) NANJAPPA *v.* MUNISWAMI. **9 Mys L.J. 107=36 Mys H.C.R. 115.**

———**S. 367**—*Offences under Ss.* 352 *and* 504, *I. P. Code—Single sentence—Legality.*

A Bench of Magistrates convicted the accused persons of offences under Ss. 352 and 504, I. P. Code and sentenced each of them to pay a fine of Rs. 5.

Held, that though it would have been proper to give separate sentences for the offences, the giving of a single sentence did not vitiate the trial. (*Doraiswami Iyer, C.J.*) SINGAMMA. *In the case of.* **11 Mys.L.J. 342 =38 Mys H C.R. 301.**

———**Ss. 369 and 468**—*Reduction of sentence on appeal to period already undergone—No period already undergone in fact—Power of Court to correct its former order—Procedure in such cases.*

On appeal from a conviction, the Sessions Judge reduced the sentence to the period already undergone. The accused was undergoing imprisonment in another case and the sentence in the present case had not begun. When this matter was brought to notice of the Sessions Judge, he varied his former order by reducing the sentence to a period of one month.

Held, that in passing the second order, the Judge practically reviewed his first order, which was prohibited by S. 369 of the Cr. P. Code ; as soon as the error was brought to his notice the proper course for him would have been to refer the matter to the High Court under S. 438 which does not preclude a reference by the Judge regarding the legality of his own order. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SOTTA, *In the case of.* **12 Mys.L.J. 210=39 Mys.H.C.R. 190.**

———**S. 397**—*Powers under—If exercisable by High Court in revision.*

The High Court can in the exercise of its reversional powers under S. 439, act under S. 397 of the Cr. P. Code, and can direct separate sentences passed in different cases to run concurrently. (*Shankaranarayana Rao, J.*) VENKATAKRISHNA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 210=39 Mys.H.C.R. 1208.**

———**S. 403 (1) and (2)**—*Scope—Different charges on same facts—Distinct offences—Defamation against two persons—Complaint by one resulting in acquittal—Fresh complaint by other—If barred.*

Where an accused is prosecuted at the instance of one of two persons who were defamed by him and acquitted owing to insufficiency of evidence, it does not bar a prosecution by the other person defamed, because though the charges may be said to arise out of the same transaction, there are two distinct offences in respect of two different individuals, though falling under the same section of Penal Code. Each of the two persons is clearly entitled to file a separate complaint and the accused might be charged, convicted and sentenced separately in each case. Moreover the nature of the evidence to be adduced and the defences open in the one case might be different from those in the other. Nor can the default of the complainant in one case to adduce sufficient evidence for a conviction, be permitted to prejudicially affect the complaint in the other, who may have a separate and individual grievance against the accused. The decision on a question like this ought to depend on the facts and circumstances of each particular case. (*Shankaranarayana Rao, J.*) NAGAVVA *v.* HUTCHAMMA. **12 Mys.L.J. 370=39 Mys.H.C.R. 859.**

MYS. CR. P. CODE REG. (1904), S. 420.

———**S. 407 (1)**—*Conviction by second class Magistrate—Appeal to Sessions Judge—Jurisdiction to decide—Cr. P. Code, S.* 530.

An appeal from a conviction in a trial held by a second class Magistrate lies only to the District Magistrate and not to the Sessions Judge and the latter has no jurisdiction to entertain such an appeal. If the Sessions Judge erroneously entertains such appeal and quashes the conviction, the acquittal is void and *ultra vires* under S. 530. But it is, however, not imperative that the High Court should interfere and order a fresh trial in every such case. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) BHANGI RAMA, *In re.* **12 Mys.L.J. 412=39 Mys.H.C.R. 696.**

———**Ss 412, 418 and 423 (2)**—*Scope of.*

The combined effect of Ss. 412, 418 and 423 (2) is that the unanimous verdict of the jury should not be altered or reversed unless there was a misdirection to the jury or misunderstanding of the law and an appeal will lie only in the latter event. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) HANUMANTHAYA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 179=36 Mys.H.C.R. 305.**

———**S. 417**—*Appeal against acquittal—Maintainability—Grounds.*

Under S 417, Cr. P. Code Regulation, it is only on behalf of the Government that an appeal against an order of acquittal can be presented, and the High Court has no authority to entertain such an appeal except by the Local Government, the Government will not, as a rule, direct an appeal to be preferred against an acquittal where the case is trifling or where the acquittal does not involve an erroneous principle of law and is not of much public importance requiring correction by the High Court. (*Mahadaveyya, O.C.J. and Ramachandra Rao, J.*) DYAVAMMA, *In re.* **12 Mys.L.J. 253.**

———**Ss. 417 and 438**—*Appeal from acquittal—Practice—No appeal by Government—Reference to High Court by District Judge—Propriety of.*

The usual practice that obtains in preferring appeals from acquittals is for the District Magistrate to move the Government to take action under S. 417. In the absence of an appeal by Government, to permit reference under S. 438 of the Cr. P. Code at the instance not of a private complianant but of a District Magistrate, without insisting upon the usual procedure laid down by S. 417, will have the effect not only of preventing Government from exercising its right to determine whether or not to appeal against the order of acquittal but also of indirectly evading the provisions of S. 439 (5) of the Cr. P. Code. (*Shankaranarayana Rao, J.*) SIDDA, *In re.* **39 Mys H.C.R. 317=12 Mys.L.J. 45.**

———**S. 418**—Scope—Trial by jury of offence triable with assessors — Appeal — Interference — Powers of appellate Court. *See* MYSORE CR. P. CODE REGULATION, Ss. 269, 418 AND 536. **40 Mys H C.R. 200.**

———**S. 420**—*Jail appeal—Power of appellate Court to order the attendance of the appellant in person.*

MYS. CR. P. CODE REG. (1904), S. 423.

If the appellate Court disposing of a jail appeal thinks it necessary for satisfying the ends of justice and for enabling itself properly to dispose of the appeal to hear the appellant in person, the appellate Court has the power to require the attendance of such appellant before it. (*Mahadevayya, O.C.J and Ramachandra Rao, J.*) PRABHAKARIAH *In re.* **12 Mys L.J. 35.**

———**S. 423**—*Powers of appellate Court—Charge under S.* 457, *Penal Code—Conviction under S.* 456.

An appellate Court has got ample powers under S. 423, Cr. P. Code, to alter the conviction to one for an offence not charged by the trial Court, provided the evidence is such as to establish a charge that might have been made. Also, when an offence is composite, the accused may be convicted of any element of it. So where the accused is charged under S. 457, the appellate Court is competent to sentence him under S 456 of the Penal Code. (*Mahadevayya, J.*) KRISHNAPPA, *In re.* **10 Mys.L. J. 91 = 37 Mys H.C R 369.**

———**S. 424**—*Judgment—Contents.*

Where there was no independent discussion or consideration of the evidence on the side of the prosecution and no opinion had been expressed in the judgment as to why that evidence was entitled to be accepted as a satisfactory basis for convicting the accused,

Held, that the judgment not being in strict compliance with Ss. 367 and 424 was not a legal judgment. (*Ramachandra Rao, J.*) CHICKA PUTTA *v.* GOVERNMENT OF MYSORE. **38 Mys.H C.R. 281 = 11 Mys L. J. 323.**

———**S. 424**—Judgment in criminal appeal—Sessions Judge's power to dictate to stenographer. *See* MYS. CR. P. CODE REGULATION, SS. 367 AND 424. **39 Mys.H.C.R. 696 = 12 Mys.L.J. 412.**

———**S. 426**—*Applicability—Bail—Appellate Court's powers—Considerations.*

Appellate Courts in granting bail are governed by S. 426, Cr P. Code, and not by S. 497 or 498. The special provisions of S. 426 are intended for special circumstances only, and in the absence of such special grounds, no bail should be granted. (*Mahadevayya, C. J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **39 Mys H.C.R 403 = 12 Mys L.J. 309.**

———**Ss. 435, 436 and 437**—*High Court—Revision—Order under S.* 517.

It is no doubt the practice of the High Court not to entertain revision petitions in the first instance under the provisions of Ss 435, 436 and 437 of the Code but that practice has not been extended to the exercise of revisional powers in matters other than those expressly provided for in Ss. 436 and 437. The High Court will entertain a revision petition against an order of the First Class Magistrate under S. 517 even though the District Magistrate may have concurrent jurisdiction on the matter. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) ABDUL KARIM SAB *v* GOVERNMENT OF MYSORE. **37 Mys H.C.R 115 = 10 Mys L.J. 185.**

———**Ss. 435, 436 and 439**—*Sessions Judge—Powers of revision.*

The powers of a Sessions Judge in revision are co-extensive with those of a District Magistrate under Ss. 435 and 436 which are set out in 6 Mys L J. 459. The High Court will be acting within its powers in judging the legality, propriety and correctness of the order passed by the Sessions Judge. (*Doraiswami Iyer, C.J.*) SUBBA RAO *v.* SIDDARAMAPPA. **9 Mys L.J. 120.**

———**S. 436**—*Discharge by Magistrate — Sessions Judge setting aside—No finding that discharge was improper—Validity of the order of Sessions Judge.*

MYS. CR. P. CODE REG. (1904), S. 437.

The trying Magistrate who issued processes against the accused under Ss. 352 and 506 of the Penal Code tried the case summarily. He discharged the accused and directed the complainant to pay compensation to the accused. On appeal, the Sessions Judge set aside both the order of discharge and the order for compensation and directed further enquiry. On revision,

Held, that as it was not the case of dismissal of complaint under S. 203 or S 204 (3), and as there was no finding by the Sessions Judge that the order discharging the accused of offences under Ss. 352 and 506 of Penal Code was erroneous, the order of the Sessions Judge was without jurisdiction. If the Sessions Judge felt the Magistrate should have taken cognizance of an offence under S. 355 of the Penal Code and should not have adopted a summary procedure, the Sessions Judge should have referred the matter to the High Court under S. 438 of the Cr. P. Code. 52 All. 257, Ref. (*Ramachandra Rao, J.*) SUBBAMMA *v.* SHANKARANARAYYA. **38 Mys H C.R. 355 = 11 Mys.L.J. 458.**

———**S 436**—*Powers of revision—Order of discharge—Setting aside—Misappreciation of evidence.*

Though a mere difference in the appreciation of evidence is not a sufficient justification for setting aside an order of discharge and directing a further enquiry, the powers of the revising Court are very wide and if the Sessions Judge has carefully examined the evidence and is of opinion that there is a gross misappreciation of evidence, he is entitled to set aside the order of discharge. 87 I.C. 111; 104 I C. 633, Ref. (*Mahadevayya and Ramachandra Rao, JJ.*) CHANNE GOWDA *v.* MELE GOWDA. **37 Mys H C R. 155 = 10 Mys.L.J. 220**

———**S. 436**—*Revision—District Magistrate to be moved first.*

According to the practice of the Mysore High Court, it is the District Magistrate who has concurrent jurisdiction with the High Court in revision that should be first moved. (*Doraiswami Iyer, C J.*) CHIKKA THIMMIAH *v.* HOSAMANE BASAPPA. **37 Mys.H.C.R. 40 = 10 Mys.L J. 70.**

———**Ss. 437 and 439**—*Discharge—Revision—Interference—Grounds.*

The mere fact that in the opinion of revising Court the prosecution evidence should be appreciated in a way different from that of the trial Court is no reason whatever for ordering further enquiry or for interference in revision with an order of discharge, especially when the order under revision cannot be said to be either perverse or vitiated by exceptional circumstances. (*Mahadevayya C.J.*) MUNIBEERAPPA *v.* DODDA HANUMA. **39 Mys.H C.R. 1072 = 13 Mys.L.J. 140.**

———**Ss 437 and 438**—*Power of District Magistrate to order committal—Offence not exclusively triable by Sessions Court—Convenience of joint trial, insufficient to ground jurisdiction.*

In a case in which the two accused were charged under S. 304, I. P. Code, the Magistrate committed the first accused to the Sessions and as regards the second accused, the Magistrate was of opinion that it was an offence under S. 323 triable by himself. The District Magistrate, on the motion of the prosecuting Inspector, directed both of them should be tried together at the Sessions.

Held, (*i*) as the offence under S. 324, I.P. Code, which the District Magistrate though the account was guilty of, was not one exclusively triable by the Sessions, the District Magistrate ought to have referred the matter for the orders of the High Court under S. 438 instead of taking upon himself the responsibility

MYS. CR. P. CODE REG. (1904), S. 438.

of ordering the committal. 24 M. 136, Ref.; (*ii*) so far as the prosecution was concerned, the better procedure would have been to apply to the First Class Magistrate before passed the final orders in the case and invoke his power under S. 347 instead of applying to the District Magistrate because it is not advisable to interfere with the discretion of the first Court before it had applied its mind to the matter and definitely refused to exercise the discretion; (*iii*) the mere convenience to try all the accused together or the need for an enhanced sentence by itself cannot invest the District Magistrate with jurisdiction to pass an order of committal under S. 437. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) MUNISAMI *v.* GOVERNMENT OF MYSORE. **36 Mys.H.C R. 24=9 Mys.L J 94.**

———**S** 438—*Acquittal—Reference—Competency.*

A reference by the District Magistrate to the High Court under S. 438, Cr. P. Code Regulation, against an order of acquittal is not competent. When the Local Government does not prefer an appeal againts an acquittal, the High Court ought not to interfere with the same in revision under S. 438. (*Mahadevayya, O. C. J. and Ramachandra Rao, J.*) DYAVAMMA, *In re.* **12 Mys. L.J. 253.**

———**Ss. 438 and 417**—*Order of acquittal—No appeal by Government—Reference to High Court by District Judge—Propriety of.*

The usual practice that obtains in preferring appeals from acquittals is for the Dirtrict Magistrate to move the Government to take action under S. 417. In the absence of an appeal by Government, to permit reference under S. 438 of the Cr. P. Code at the instance not of a private complainant but of a District Magistrate, without insisting upon the usual procedure laid down by S. 417, will have the effect not only of preventing Government from exercising its right to determine whether or not to appeal against the order of acquittal but also of indirectly evading the provisions of S. 439 (5) of the Cr. P. Code. (*Shankaranarayana Rao, J.*) SIDDA, *In re.* **12 Mys L.J. 45=39 Mys.H.C.R. 317.**

———————**S. 438**—*Order under S. 562—Power to interfere.*

Where the trial magistrate improperly applies S. 562, Cr. P. Code, and releases an offender on probation, the High Court has power in revision to set aside the order and to substitute a sentence of imprisonment. (*Mahadevayya, C.J.*) SIDDALINGAYYA, *In re.* **12 Mys.L. J. 286=39 Mys.H.C.R. 362.**

———**Ss. 438 and 369**—*Reduction of sentence on appeal to period already undergone—No period already undergone in fact—Power of Court to correct its former order—Procedure in such cases.*

On appeal from a conviction the Sessions Judge reduced the sentence to the period already undergone. The accused was undergoing imprisonment in another case and the sentence in the present case had not begun. When this matter was brought to the notice of the Sessions Judge he varied his former order by reducing the sentence to a period of one month.

Held, that in passing the second order the Judge practically reviewed his first order, which was prohibited by S. 369 of the Cr. P. Code; as soon as the error was brought to his notice the proper course for him would have been to refer the matter to the High Court under S. 438 which does not preclude a reference by the Judge regarding the legality of his own order. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SOTTA, *In the case of.* **12 Mys.L.J. 210=39 Mys H.C.R. 190.**

———**S. 438**—*Reference—Power of District Magistrate on matters of fact.*

MYS. CR. P. CODE REG. (1904), S. 439.

It is not open to a District Magistrate to make a reference to the High Court in every case. The power of reference is not for the instruction of the Magistrate. A reference should not be made unless it appears that the case involves material and important errors of law or procedure. There can be no reference on matters of fact. Nor is it open to the referring magistrate to raise a plea on behalf of the accused which he himself has not yet raised in the case. (*Mahadevayya, C J.*) RANGAPPA, *In re.* **12 Mys.L.J. 262=39 Mys.H.C.R. 674.**

———**S. 439**—*Acquittal—Interference with—Delay—Effect of.*

Though the High Court has ample power to interfere with an order of acquittal, the Court will confine its interference to cases of exceptional circumstances or where there is an error of law or where the trial has been radically and incurably defective. Where, however, a long time as elapsed from the acquittal, the High Court will refuse to order a re-trial if a re-trial is not, in its opinion, desirable at that stage. (*Sreenivasa Iyer, J.*) RAMACHANDRA RAO *v.* MAHOMED ABBAS KHAN. **10 Mys.L.J. 421.**

———**S. 439**—*Acquittal—Revision—Interference in—Principles governing.*

Though the High Court has jurisdiction under S. 439 to set aside an order of acquittal, it will not ordinarily interfere at the instance of a private prosecutor. Such jurisdiction can only be exercised if there has been some illegality or radical or incurable irregularity causing a failure of justice in the trial which resulted in the acquittal. The mere fact that the High Court takes a different view of the evidence and probabilities from that of the trial Court will be no justification for interference in revision with an order of acquittal. 42 C. 612; 1 I. C. 238; 102 I. C. 219; 5 Pat. 28 and 8 Rang. 663, Foll. (*Mahadevayya, J.*) DEVOOBAVAMMA, *In re.* **10 Mys.L.J. 82=37 Mys.H.C.R. 347.**

———**S. 439**—*Acquittal—Revision—Interference.*

In cases of orders of acquittal, the revisional powers of the High Court, under S. 439, Cr.P. Code Regulation, should be sparingly exercised and confined only to cases of an exceptional character involving grave injustice. The High Court should not convert a finding of acquittal into one of conviction. Nor can a revision be entertained at the instance of a party who could have appealed. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) DYAVAMMA, *In re.* **12 Mys L J. 253.**

———**S. 439**—Discharge—Interference — Grounds—Trial Court appreciating evidence differently from revising Court—If justifies interference. *See* MYSORE CR. P. CODE REGULATION, SS. 437 AND 439. **13 Mys.L.J. 140=39 Mys H.C.R. 1072.**

———**S. 439**—*Dismissal of complainant—Interference.*

A Magistrate is not bound to wait till the end of the day to apply the provisions of S. 247. In a proper case however the High Court may interfere with an order of dismissal based on the complainant's absence. (*Shankaranarayana Rao, J.*) RAGHAVENDRAIYA *v.* DASTAGIRI SAB. **11 Mys.L J. 318.**

———**S. 439**—*Framing of charge—Interference in revision.*

Where there is no case at all made out on the evidence for the prosecution the Chief Court may interfere and quash the charge to prevent continuance of unnecessary criminal proceedings. (*Mahadevayya, Offg. C. J.*) LAKSHMAN SETTY *v.* GOVERNMENT OF MYSORE. **11 Mys L.J. 49.**

———**S. 439**—*Interference with orders under S. 144—Rule stated.*

MYS. CR. P. CODE REG. (1904), S. 439.

The order under S. 144 continues to be of an executive nature. Ordinarily it will not be disturbed provided the material facts are stated in it and from the special circumstances the Local Magistrate feels satisfied that immediate prevention or speedy remedy is desirable. 27 Mys. C.C R. 201; 7 Mys. L. J. 398; 23 Mys. C. C. R. 302, Ref. (*Rama Rao, J.*) HAKIM ABDUL SATTAR *v.* THE GOVERNMENT OF MYSORE. **9 Mys L J. 118.**

——**S. 439**—*Order directing further enquiry—Acquiescence of party—Interference in revision.*

Where no objection was taken to an order by the District Magistrate directing further enquiry under S. 145 either at the time or subsequently, the petitioner having evidently acquiesced in the subsequent proceedings leading to the order sought to be revised, the High Court in revision will not lend its aid to a purely technical objection to the validity of that order, when no prejudice or injustice has been thereby occasioned. 35 Mys. H.C.R. 274 and 35 C.W.N. 374, Ref. (*Rama Rao, J.*) KEMPE GOWDA *v* SUBBARAYAPPA **9 Mys.L. J. 391 = 36 Mys H C.R. 348.**

——**S. 439**—*Order granting bail—Revision.*

An order admitting the accused person to bail made by a Magistrate is not revisable by the District Magistrate. 22 B. 549 and 12 Cr. L.J. 244, Foll. (*Mahadevayya, J.*) MURIGAPPA *v.* GOVERNMENT OF MYSORE. **37 Mys H C R. 385 = 10 Mys L J 104.**

——**S. 439**—*Misappreciation of evidence—If a ground for revision.*

Misappreciation of evidence is not a sufficient ground for interference in revision. (*Mahadevayya, Offg. C.J.*) RAMAKRISHNA JETTAPPA, *In re.* **13 Mys. L.J. 2 = 39 Mys.H C.R. 757.**

——**S. 439**—*Order of acquittal—Revision—Power of High Court.*

The High Court has no doubt the power in a proper case to revise orders of acquittal under S. 439, Cr. P. Code, but such powers should be sparingly used and confined to cases of an exceptional character where there has been grave injustice (Cases referred.) (*Shankaranarayana Rao, J.*) SIDDA, *In re.* **12 Mys. L.J. 45 = 39 Mys.H.C.R. 317.**

——**S. 439**—*Order for costs under S. 344—Interference.*

An order for costs under S 344, Cr. P. Code, is within the discretion of the Court to pass, and if it is not unreasonable, the High Court will not interfere in revision. But if there is no justification whatever for such an order, it will be set aside in revision. (*Shankaranarayana Rao, J.*) FATIMUNNISSA *v.* MAHOMED KHALEEL. **13 Mys L J. 26 = 39 Mys. H C R. 903.**

——**S. 439**—*Power of High Court—Quashing of conviction—Grounds for.*

The High Court can interfere at any stage in a case pending before a subordinate criminal Court and quash the entire proceedings, when there are exceptional circumstances justifying such a course. But the mere fact that it would be embarrassing for a party in a civil proceeding to be proceeded against criminally during the pendency of the civil proceeding is no ground for quashing the criminal proceeding altogether. (*Ramachandra Rao, J.*) SEETHARAMIAH *v.* SANNATHAMMANNA. **12 Mys. L.J. 464 = 39 Mys H.C.R. 729.**

——**S. 439**—*Revision—Order under S. 144.*

The High Court has the power to revise the orders passed under S. 144, Cr. P. Code, even if the order is *ex parte* and the aggrieved party may show cause against it under Cl. (4) of the section. (*Rama Rao, J.*) HAKIM

MYS. CR. P. CODE REG. (1904), S. 488.

ABDUL SATTAR *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 118.**

——**S. 439**—Scope—High Court's power to act under S. 397. *See* MYSORE CR. P. CODE REGULATION, S. 397. **13 Mys.L.J. 210 = 39 Mys H C R. 1208.**

——**S 439**—Scope—Order by District Magistrate under S. 417—No appeal to Sessions Judge—Revision to High Court—Maintainability. *See* MYSORE CR. P. CODE REGULATION, S. 520. **13 Mys L J. 207 = 39 Mys.H C.R. 1203.**

——**Ss. 439 and 145**—*Severed crops—Order of attachment—Legality of—Revision.*

Whether severed crops are movable or immovable property is a question on which the High Courts have differed. Where, therefore, the Magistrate who had ordered such crops to be attached under S. 145 subsequently raised the attachment relying on the decision in 30 Cal 110,

Held that the Magistrate could not be said to have acted illegally in having raised the attachment and as the case did not involve any manifest injustice or irreparable damage it did not justify interference in revision. (*Mahadevayya, O.C.J.*) CHICKAMMA *v.* GANGAMMA. **12 Mys L J. 199 = 39 Mys H C R 182.**

——**S. 476**—*Notice and preliminary enquiry—Necessity for.*

It rests entirely with the discretion of the Court concerned whether a preliminary enquiry should be held and whether a notice should be issued before directing the prosecution. Where the District Judge had every material available before him and his order showed there was no need for further investigation, an order passed by him directing prosecution is not invalid merely because the Judge did not think it necessary to hold a preliminary enquiry or to issue a notice. 14 Bom. L.R. 587, Foll. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) MADAPPA *v.* MADHAVA RAO. **12 Mys. L J. 183 = 39 Mys H C R. 194.**

——**Ss. 476 and 195**—*Right to apply for sanction—Private party*

It is not open to a private person under the amended Code to ask for sanction to prosecute but he can move the Court to take action. Nor is it open to a private person to take proceedings himself after taking the sanction of Court under the old S. 195 of the Code. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) SHAMANNA GOWDA *v.* SRIRANGAPPA RANGASAMAPPA. **9 Mys.L.J. 423.**

——**S. 476-B**—*Appeal—Application to take action—Refusal of lower Court.*

A miscellaneous appeal lies to the High Court, when the application to direct a prosecution was made to and refused by a Sub-Judge sitting as a Civil Court. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) SHAMANNA GOWDA *v.* SRIRANGAPPA RANGASAMAPPA. **9 Mys.L.J. 423.**

——**S. 477 A**—*Criminal breach of trust by Government servant—Sentence.*

The offence of criminal breach of trust of Government moneys by a Government servant merits along term of imprisonment which should ordinarily be rigorous and not simple. (*Mahadevayya, O.C.J. and Shankaranarayan Rao, J.*) SARMA, *In re.* **12 Mys. L.J. 48.**

——**S. 488**— *Refusal to maintain— Mahomedan minor girl living with maternal grandmother—Father stipulating that child should live with him—Order for maintenance—If justified.*

Where a minor Mahomedan girl lives with her maternal grandmother, who is her lawful guardian under the

MYS. CR. P. CODE REG. (1904), S. 488 (8).

Mahomedan Law, her mother being dead, a condition imposed by the father of the child, that he would maintain the child only if the latter went to live with him, amounts to a refusal to maintain the child and justifies the Court in passing an order under S. 488, Cr.P. Code. (*Shankaranarayana Rao, J.*) NASIR AHMED MECCAI *v.* MISS NAZIR AHMED MECCAI. **12 Mys.L J. 541 = 39 Mys H C.R. 789.**

———**S. 488 (8)**—"*Residence*"—*Temporary residence.*

A temporary residence of the defendant extending for over two months within the limits of the local jurisdiction of a Court constitutes "residence" within the meaning of S. 488 (8) of the Cr P. Code, so as to give that Court jurisdiction to entertain an application for maintenance under the section. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) YASODAMMA *v.* NARAYANASWAMY. **12 Mys.L.J. 462 = 39 Mys. H.C R. 683.**

———**S. 488 (9)**—*Jurisdiction—Casual stay of husband.*

Where the husband has a fixed place of residence, a casual or temporary residence in any other place would not confer jurisdiction on the Court situate at that place. (*Srinivasa Iyer, J.*) CAREW *v.* HILDA CAREW. **8 Mys.L J. 447 = 36 Mys H.C.R. 262.**

———**S 495 (4)**—*Applicability to Excise Officer.*

The prohibition contained in S 495 (4), Cr. P. Code, does not apply to an Excise Officer under the Exise Regulation. It cannot be interpreted, by any means to include an Excise Officer. Therefore an Excise Inspector who takes part in the investigation of the Excise offence, is not on the ground incompetent to conduct the prosecution. (*Mahadevayya, O.C.J. and Ramachandra Rao, J.*) DHONDE GOWDA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 283 = 39 Mys.H.C.R. 358.**

———**S. 496**—*Applicability—Accused released on bail—Failure to appear on hearing dates—Cancellation of bail.*

S. 496, Cr. P. Code, does not apply to a case where the accused, having been released on bail and having executed a bond undertaking to appear before the Court on every successive date of hearing, fails to appear without sufficient cause. Nor does the section give an absolute right to bail to any person who appears or is brought before the Court and is not charged with a non-bailable offence. The section must be read along with other special provisions disentitling him to it. If an accused forfeits his bond and absconds, S. 496 will not entitle him as of right to be on bail. Again, if upon further evidence adduced, a case is made out against him, it cannot be held that his bail should not be cancelled. (*Mahadevayya, C. J.*) VISHAKANTIAH, *In the case of.* **13 Mys.L J. 217 = 39 Mys.H.C.R. 1102.**

———**Ss. 497 and 498**—*Applicability—Bail by Appellate Court—Considerations.*

The considerations justifying the grant of bail to an accused under S. 497 or 498, Cr. P. Code, do not apply after such person has been tried and convicted by a competent Court and an appellate Court is governed by S 426, which enacts special provisions as to bail for special circumstances only. In the absence of very special cause, no order for bail suspending the sentence should be passed. (*Mahadevayya, C.J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 309 = 39 Mys.H C R. 403.**

———**S. 498**—Jurisdiction of Sessions Judge under—Accused on bail—Failure to appear—Warrant of arrest by Magistrate—Application to Sessions Judge under S. 498—Order of release—Legality. *See* MYSORE CR. P. CODE, SS. 91 AND 92, **13 Mys.L.J. 217 = 39 Mys.H. C.R. 1102.**

MYS. CR. P. CODE REG. (1904), S. 517.

———**S. 509**—*Medical witness—Examination in Sessions Court—Procedure—Reading of deposition given in committing Magistrate's Court and cross-examination—Propriety.*

S. 509 perscribes a procedure which can be applied only when the medical witness is not called as a witness; and the section proceeds on the assumption that the medical witness is not present as a witness at the trial in the sessions Court. But when the witness is called actually as a witness in the Sessions Court trial, there is no justification for treating him in a different way from any other witness. It is quite undesirable that a medical officer should be allowed to give his evidence by merely saying that he has made a previous deposition before the committing Magistrate, and then having the whole of his deposition read and brought on record *en bloc*, instead of giving his evidence in answer to questions at the trial. A medical officer should give his evidence orally and clearly in the presence of assessors or jurors. To elicit from him by a leading question that he made a previous deposition and, after reading that evidence to allow him to be cross-examined, is quite improper. (*Reilly, C.J. and Shankaranarayana Rao, J.*) MUNIAPPA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 260 = 40 Mys.H C R. 176.**

———**S. 510**—*Report of Chemical Examiner—Admissibility.*

A Chemical Examiner's certificate can, under S. 510, Cr. P. Code, be received as part of the evidence in the case even if the Chemical Examiner is not examined as a witness at the trial. But it is useless to produce a certificate from him or try to make any use of his evidence unless the chain of evidence connecting his certificate with the articles in respect of which it is to be used is exact and complete. (*Reilly, C.J. and Chari, J.*) MANCHA NAIKA *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 162 = 40 Mys H.C.R. 208.**

———**S. 514**—*Bond for appearance—Power to forfeit—Proper Court.*

The Court ordering the forfeiture of a bond for appearance under S. 514, Cr P. Code, must be the Court before which the accused has to appear and not any other Court which happens to take the recognisance of bond. (*A.S R. Chari, J.*) SURYANARAYANA SASTRI *v* GOVERNMENT OF MYSORE. **13 Mys L.J. 352 = 40 Mys. H.C.R. 152.**

———**S. 514**—Scope—Bail bond—Failure of accused to appear—Procedure—If confined to S. 514—Power of Magistrate to order arrest. *See* MYSORE CR. P. CODE, S. 92. **13 Mys.L.J. 217 = 39 Mys H.C.R. 1102.**

———**S. 517**—*Discharge of accused—Return of property seized—Discretion of Court.*

There is no rule that in every case which does not end in conviction, the property should invariably be delivered to the party from whom it was seized or is alleged to have been seized. Irrespective of the discharge or acquittal of the accused the Magistrate possesses sufficient power under S. 517 of the Code to pass an order regarding the disposal of the property produced in the case. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) ABDUL KARIM SAB *v.* GOVERNMENT OF MYSORE. **37 Mys.H.C.R. 115 = 10 Mys. L.J. 185.**

———**S. 517**—*Discretion of Court—Exercise of—Principles—Power of confiscation.*

Under S. 517, Cr. Code, the Court, after the conclusion of a trial may make such order as it thinks fit for the disposal of the property produced before it, and one of such orders is confiscation. But the discretion

MYS. CR. P. CODE REG. (1904), S. 517.

vested in the Court under the section must be exercised judicially, *i.e.*, according to sound and well-recognised principles and not in an arbitrary manner.(*Shankaranarayana Rao, J.*) RAMACHANDRIAH *v.* GOVERNMENT OF MYSORE. **13 Mys L.J. 340=40 Mys H.C.R. 131.**

———**S. 517**—*Order as to disposal of property several months after conclusion of enquiry—Legality.*

An order under S. 517, Cr. P. Code, as to disposal of property must be passed immediately at the conclusion of the enquiry or trial or within a reasonable time thereafter. An order passed after the lapse of several months subsequent to the conclusion of the enquiry is without jurisdiction and liable to be set aside in revision. (*A.S.R. Chari, J.*) SHIVAPPA *v.* BASAPPA. **13 Mys. L.J 207=39 Mys H C.R. 1203.**

———**S. 517**—*Order relating to disposal of property—Appeal—Revision.*

An order of the trial Court relating to the disposal of property is not, apart from any appeal, reference or revision from the conviction, acquittal or discharge, appeal able. But the superior Court has the power to interfere with the order in revision (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) ABDUL KARIM SAB *v.* GOVERNMENT OF MYSORE. **10 Mys.L J. 185=37 Mys.H. C.R. 115.**

———**S. 517**—*Order under—Revision—Forum—High Court.*

The High Court will entertain an application to revise an order of the First Class Magistrate under S. 517 of the Code, even though the District Magistrate may have concurrent jurisdiction. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) ABDUL KARIM SAB *v.* GVERNMENT OF MYSORE. **10 Mys.L.J. 185=37 Mys.H.C.R. 115.**

———**S. 517**—*Powers of Court under—Money ordered to be paid on conviction—Subsequent retrial and acquittal—Power to order restitution.*

S. 517, Cr. P Code, gives very wide powers to a Court in regard to the disposal of the property relating to the case before it. Where the Court has ordered certain moneys to be handed over to a party on a conviction of the accused and the conviction is set aside, and a retrial ends in acquittal, such retrial is only a continuation of the previous proceeding, and the Court is therefore not deprived of its jurisdiction as regards the moneys ordered to be handed over, although the same had been taken by the party under the prior order. The party who had taken the same is bound to obey an order for restitution of the money so taken by him; and the Court has undoubted power to pass an order for restitution in favour of the party from whom the moneys were taken. (*Shankaranarayana Rao, J.*) PARKAJEE *v.* MAHOMED BEIG. **13 Mys.L.J. 437=40 Mys.H.C. R. 263.**

———**S 520**—*Order under S. 517 as to disposal of property—Revision—Forum—Order by District Magistrate—Revisional power of High Court.*

Where an order is passed under S. 517, Cr. P. Code, as to disposal of property by a District Magistrate, the Court of Session is a Court of appeal to which the aggrieved party must approach for redress under S. 520, before approaching the High Court in revision. But the High Court is not, however, precluded from entertaining a revision petition against such an order in ths first instance. (*A.S.R. Chari, J.*) SHIVAPPA *v.* BASAPPA. **13 Mys.L J 207=39 Mys.H.C.R. 1203.**

———**S. 520**—*Order under S. 517 by Assistant Sessions Judge—Revision—Jurisdiction of Sessions Judge.*

The Sessions Court is a Court of appeal in respect of convictions by an Assistant Session Judge, where the

MYS. CR. P. CODE REG. (1904), S. 526 (8).

sentence of imprisonment does not exceed a term of four days and it has therefore jurisdiction under S. 520, Cr. P. Code, to entertain and dispose of an application in revision against an order for disposal of property made by an Assistant Sessions Judge under S. 517. (*Shankaranayana Rao J.*) RAMACHANDRIAH *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 340=40 Mys. H.C.R. 131.**

———**S. 520**—*Order under S. 517—Interference with—Appeal.*

No appeal lies from any order of a Criminal Court except as provided by the Code. An order under S. 517 relating to the disposal of property is not, apart from any appeal, reference or revision from the conviction, acquittal or discharge, appealable but it can, nevertheless, be interfered with in revision. (*Doraiswami Iyer, C. J and Mahadevayya, J.*) ABDUL KARIM SAB *v.* GOVERNMENT OF MYSORE. **37 Mys H.C.R. 115=10 Mys.L.J 185.**

———**S 522**—*Offence under—Use of force at later stage.*

S. 522 does not specify as to the stage at which criminal force or show of criminal force or criminal intimidation must have been used in connection with the act of dispossession. It is a question of fact in each case as to whether the act of trespass on the immovable property was or was not attended by criminal force or show of force or by criminal intimidation. Where the accused managed to get into the house when the occupier was absent and when the latter returned he was driven out by force,

Held, that S. 522 applied to the facts of the case. (*Shankaranarayana Rao, J.*) KENGE GOUDA *v.* BORAMMA. **11 Mys. L J. 163.**

———**S. 526**—*Counter cases—Magistrate discharging a cused in one and characterising prosecution witnesses as unsatisfactory, unconvincing and prevaricating—If ground for transfer of other case.*

A Magistrate trying one of two counter-cases discharged the accused in it and characterised the evidence of the prosecution witnesses therein as hardly satisfactory or convincing and the evidence of one of the witnesses as prevaricating The complainant, who was the accused in the other counter-case applied for a transfer of that case on the ground that the prosecution witnesses who had been characterised by the Magistrate were his witnesses for his defence in the case, and that he apprehended that they may not be believed by the Magistrate when figuring as defence witnesses.

Held, that there were sufficient grounds for a transfer (*A. S. R. Chari, J.*) VENKATASAMAPPA *v.* YERRAPPA. **13 Mys. L J. 299=40 Mys H C.R. 41.**

———**S. 526**—*Power of High Court under—Transfer from Court without jurisdiction to one with jurisdiction.*

The High Court has power under S. 526, Cr. P. Code, to transfer a case to the Court having jurisdiction to try it from a Court not having jurisdiction. (*Mahadevayya, C. J. and Ramachandra Rao, J.*) PUJARI MARIYAPPA, *In the case of.* **13 Mys. L.J. 29=39 Mys H.C R 907.**

———**S. 526 (8)**—*Applicability—Transfer application made to District Magistrate.*

S. 526 (8) applies only where the complainant notifies the Court before which his case is pending of his intention to make an application for transfer to the High Court and the onus lies on the applicant to show that the information required by S. 526 was given to the trial Magistrate. The clause does not apply where the accused notifies the Court of his intention to apply to the

MYS. CR. P. CODE REG. (1904), S. 526 (8).

District Magistrate for transfer of the case. (*Ramachandra Rao, J.*) DESIKACHAR *v.* KRISHNAPPA. **38 Mys.H.C.R. 326=11 Mys L.J. 22.**

———**S. 526 (8)**—*Scope—Second application for transfer after refusal of first—Application for adjournment—Refusal on ground of* mala fides—*Trial and conviction without cross examination of prosecution witnesses—Legality.*

Accused once got adjournment for purposes of transfer and did apply for transfer. But that application was dismissed by the District Magistrate, a later application to the High Court sharing the same fact. In spite of this, accused filed another transfer application to the District Magistrate and kept on sending applications by post to the trial Court for further adjournment. The trial Court refused the adjournment, proceeded with the trial and convicted the accused, although most of the prosecution witnesses had not been cross-examined and the accused had not entered on the defence,

Held, that the applications made by the accused were not *bona fide*, having been made with intent to delay and obstruct the progress of the trial, and that the trial Court's refusal to grant the adjournment was not, under the circumstances, illegal, but only an irregularity curable under S. 537, Cr. P. Code.

Held, further, that since it appeared that most of the prosecution witnesses had not been further cross-examined and the defence witness lists had not been filed, it was necessary in the interests of justice to set aside the conviction and to order a retrial, the evidence on the record being incomplete. (*Shankaranarayana Rao, J.*) GUDDADIAH *v.* GOVERNMENT OF MYSORE. **12 Mys L.J.375=39 Mys.H C.R. 865.**

———**S. 528**—*Notice to accused.*

Though S. 528 does not expressly require the issue of a notice to the accused before the transfer of a case, it is desirable that notice should be given to the opposite party so as to afford an opportunity to show cause against the granting of an application for transfer. So a transfer of the case at the instance of the Prosecuting Inspector without notice to the accused is irregular. (*Mahadevayya, J.*) MURIGAPPA *v.* GOVERNMENT OF MYSORE. **37 Mys H.C R. 385=10 Mys.L.J. 104.**

———**S. 530**—Scope—Appeal from conviction by 2nd class Magistrate—Entertainment and decision by Sessions Judge—Effect—Order for retrial—If necessary. *See* MYSORE CR. P. CODE REGULATION, S. 407 (1). **12 Mys.L J 412=32 Mys.H.C R. 696.**

———**S. 533**—Scope—Defects in recording confession under S. 164—If cured. *See* MYSORE Cr. P. CODE REGULATION, S. 164. **12 Mys.L J. 353.**

———**S. 536**—Trial by jury of offence triable with assessors—Effect on powers of appellate Court to interfere. *See* MYSORE CR. P. CODE REGULATION, SS. 269, 416 AND 536. **40 Mys H.C.R. 200.**

———**S. 537** — Applicability — Separate offences—Single charge and joint trial—Legality—Conviction—Sustainability. *See* MYSORE CR. P. CODE REGULATION. S. 233. **13 Mys. L.J. 48.**

———**S. 537**—*Connected cases—Separate trials—Evidence of same occurrence—One judgment—Propriety.*

Where two cross-cases of rioting and hurt, in which two parties were charged for their attacks of each other in the same occurrence, were separately tried, the accused in the one case were examined as witnesses in the other and *vice versa*, and the Magistrate delivered two judgments but gave his reasons in only one judgment and in the other judgment merely referred to the connected judgment.

MYS. CR. P. CODE REG. (1904), S. 537.

Held, that the procedure, though irregular, did not prejudice the accused in their defence and so did not vitiate the conviction. (*Mahadevayya, J.*) NARAYANA SINGH *v.* GOVERNMENT OF MYSORE. **9 Mys. L J. 439.**

———**S. 537**—*Contents of judgment—Failure to state reasons—Irregularity*

Where in a case tried with the aid of assessors the accused pleaded guilty at a later stage of the case and the Judge convicted the accused but did not specify in the judgment the reasons therefor,

Held, that the judgment was defective and it amounted to a mere irregularity under the circumstances. (*Ramachandra Rao, J.*) VENKATAPATHY *v.* GOVERNMENT OF MYSORE. **38 Mys.H C R. 132=11 Mys.L. J. 216.**

———**Ss 537, 145 and 360**—*Depositions not read over—Illegality.*

Where in proceedings under S. 145, it appeared that the depositions taken down in Court were not read over to the witnesses in compliance with the provisions of S. 360, *held*, that it was a serious irregularity, not cured by S 537 and that it vitiated the entire proceedings. (*Rama Rao, J.*) NANJAPPA *v.* MUDAMMA. **36 Mys H.C.R. 376=9 Mys L J. 427.**

———**S 537**—*Erroneous order of committal—No objection taken and no prejudice—Validity of trial.*

Where in spite of an erroneous order of a committal passed by the District Magistrate under S. 437, no objection was taken by the accused to the order before the Sessions Court, no misjoinder involved in the joint trial and no prejudice occasioned thereby, it was held that irregularity due to an incorrect *interim* order of the District Magistrate could not be allowed to vitiate the entire trial. 7 C. 662; 30 C.W.N. 276; 14 C. 355, Ref. (*Doraiswamy Iyer, C.J. and Rama Rao, J.*) MUNISAMI *v.* GOVERNMENT OF MYSORE. **36 Mys.H.C.R. 24=9 Mys L.J. 94.**

———**S. 537**—*Illegality—Service of summons—Non-compliance with Ss. 69, 70 and 71.*

Where the summons had not been issued "in duplicate" and no attempt was made to have it served as prescribed by Ss. 70 and 71,

Held, that the trial was vitiated and that the defect was not cured by S. 537. (*Mahadevayya, J.*) CHENNIAH *v.* GOVERNMENT OF MYSORE. **37 Mys.H.C.R. 422=10 Mys.L.J 436.**

———**S 537**—*Judgment written by a Magistrate and delivered by his successor—Irregularity.*

Even if the delivery by a Magistrate of a judgment written by his predecessor be an irregularity, it is cured by S. 537. A.I.R. 1923 All. 276, Ref. (*Doraiswami Iyer, C.J.*) NANJAPPA *v.* MUNISWAMI. **36 Mys.H. C.R. 115=9 Mys.L J. 107.**

———**S 537**—*Non-compliance with S. 360—Effect of.*

The provisions of S. 360 are mandatory and an omission to substantially comply therewith is an illegality not curable by the provisions of S. 537 of the Code. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) THAYAMMA, *In re.* **12 Mys.L.J. 174=39 Mys.H.C. R. 37.**

———**S. 537**—*Non-compliance with S. 367—Illegality.*

Where in a sessions case the Sessions Judge wrote out the judgment after his retirement and the same was pronounced by his successor,

Held, that the judgment was *ultra vires* and inoperative in law.

Held, further, that S. 537 of the Code did not cure the defect. (*Ramachandra Rao, J.*) AIYANNA *v.* GOVERNMENT OF MYSORE. **38 Mys.H C.R. 203=11 Mys.L.J. 244.**

MYS. CR. P. CODE REG. (1904), S. 537.

——**Ss. 537 and 256**—*Scope of S. 256—Non-compliance with—Irregularity.*

The provisions contained in S. 256 are merely directory and are not provisions relating to the mode of trial but only lay down a rule of procedure; therefore the non-compliance with those provisions is no more than an irregularity in procedure which can be cured by S. 537, Cr. P. Code. (*Mahadevayya, O C.J.*) RAMASETHU IYER, *In re.* **12 Mys.L J. 1 = 39 Mys.H.C R 581.**

——**S. 537**—Scope—Application for transfer—Refusal to adjourn case—Effect—If curable. *See* MYSORE CR. P. CODE REGULATION, S. 526 (8). **12 Mys L J 375.**

——**S. 537**—Scope—Complaint by unauthorised person—Defect—If cured. *See* CATTLE TRESPASS ACT, S. 21. **39 Mys.H.C.R. 1023.**

—— **S. 537** (a)—Scope—Absence of complaint as required by S. 195 (1) (*a*)—Defect—If curable. *See* MYSORE CR. P. CODE REGULATION, S. 195 (1) (*a*). **40 Mys H.C.R. 348.**

——**S. 547**—*Applicability—Order for refund of money paid under S. 517.*

An order passed by a Court under S. 517, Cr. P. Code, for refund or restitution of money paid under a prior order clearly comes within S 547, Cr. P. Code (*Shankaranarayana Rao, J.*) PARKAJEE *v.* MAHOMED BEIG. **13 Mys.L.J. 437 = 40 Mys.H C.R. 263.**

——**S. 552**—*Applicability—Conditions—Minor girl—Mother arranging marriage against father's wishes—Application by father—Maintainability.*

Before action can be taken under S. 552, Cr. P. Code, it must be established (1) that there is an abduction or unlawful detention of a woman or of a female child under the age of 16 years; and (2) that the purpose of such detention is unlawful. An application under the section by a Hindu father on the ground that the mother of the girl was trying to dispose of the girl in marriage against the wishes of the father, is not maintainable, because the detention is not unlawful. The proper remedy of the father in such a case is to apply to the Civil Court for redress. (*Shankaranarayana Rao, J.*) CHIKKAMMANNI *v.* PATEL NARAYANA GOWDA. **12 Mys.L.J. 475 = 39 Mys H.C.R. 654**

——**S. 552**—"*Unlawful detention*"—*Meaning—Minor Hindu girl—Mother having custody—Attempt to marry against father's wishes—Order under section—If justified.*

A Hindu mother who detains custody of her minor daughter with the object of disposing of her in marriage against the wishes of the father, the lawful guardian under the Hindu Law cannot be said to be "unlawfully detaining" the girl. The purpose contemplated by S. 552, Cr. P. Code, must in itself be unlawful and can not include purposes which, though not in themselves unlawful, might become so only when entertained towards a child in opposition to the wishes of its guardian. An order under the section in such a case is not justified. (*Shankaranarayana Rao, J.*) CHIKKAMMANNI *v* PATAL NARAYANA GOWDA. **12 Mys.L.J. 475 = 39 Mys.H.C R 654.**

——**S. 561-A**—*Applicability—Powers under—Reference to High Court on difficult questions of law—Competency.*

S. 561-A, Cr. P. Code, does not confer on the High Court an unrestricted and undefined power to make any order, and cannot be invoked by a District Magistrate to seek the opinion or instructions of the High Court on difficult questions of law that arise for decision before himself or before subordinate magistrates. When such questions arise for decision, the magistrates are bound to pass orders on their own responsibility; the Cr. P. Code does not authorise the District Magistrate to transfer such questions to the High Court for "opinion" or disposal. Such a reference by him is incompetent. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) A REFERENCE BY THE DISTRICT MAGISTRATE, MYSORE. **39 Mys H C.R 365.**

MYS. CR. P. CODE REG. (1904), S. 562.

——**S. 561 A**—Power to stay proceedings pending civil suit—Principles. *See* MYSORE CR. P. CODE REGULATION, S. 344. **40 Mys.H C R. 149.**

——**S. 561 A**—*Scope—Warrant issued to head of religious institution—Order permitting appearance by pleader.*

The inherent jurisdiction of the Chief Court cannot be invoked for the purpose of doing an act which would conflict with any of the provisions of the law or the general principles of criminal jurisprudence.

Held, however, under the peculiar circumstances, that the Court should order the head of a religious institution to whom a warrant had been issued to appear by a pleader. (*Ramachandra Rao, J.*) VISVAMANYA THIRTHA SREE PADANGALAVARU *v.* NARAYANAPPA. **38 Mys.H.C.R 92 = 11 Mys L J. 251.**

——**(IV OF 1904 as amended by Act XVIII of 1923), S. 561 A**—*Scope—Powers of Court.*

S. 561 A, Cr. P. Code, does not confer on the High Court an unrestricted and undefined power to make any order; it cannot be invoked by a District Magistrate to seek the opinion or instructions of the High Court on questions arising for decision in cases before himself or before Subordinate Courts. The Court cannot by invoking its inherent powers extend the powers given to it by statute. (*Mahadevayya, C.J and Ramachandra Rao, J.*) KRISHNASWAMI MUDALIAR, *In re.* **12 Mys.L. J. 109.**

——**S. 562**—*Applicability—Accused convicted of burglory.*

Burglary is a serious crime; the person convicted of such a crime must be given a deterrent punishment and it is not proper to release him on probation of good conduct under S. 562 of the Code. (*Mahadevayya, O C.J.*) NAGARAJIAH *v.* GOVERNMENT OF MYSORE. **11 Mys.L.J. 403.**

——**S. 562**—*Applicability—Accused sentenced after conviction—Release on probation on appeal—Legality.*

Where an accused person has not only been convicted, but also sentenced, S. 562, Cr. P. Code, becomes inapplicable to the case. The word "released" indicates that the object of the section is to prevent an offender's committal to jail. (*Mahadevayya, C.J.*) CHANDRACHARI, *In the case of.* **13 Mys L J. 130 = 39 Mys.H. C.R. 1056.**

——**S. 562**—*Applicability — Conditions — Serious offence—Offender having criminal propensities.*

The provisions of S. 562, Cr. P. Code, should not be applied where the offender has shown a criminal propensity rather than mere thoughtlessness and general character of craft and deceit. Nor should the section be applied in cases of serious offences such as burglary, etc. (*Mahadevayya, C.J.*) CHANDRACHAKI, *In the case of.* **13 Mys L.J. 130 = 39 Mys H.C.R. 1056.**

——**S. 562**—*Applicability — Considerations for—Youth of accused—Nature of offence—Serious nature of the consequences.*

No invariable rule can be laid down regarding the applicability of the section. The mere fact that the accused is aged only 22 is no ground for leniency when he is sufficiently grown up, literate and fairly intelligent and fully conscious of the gravity of the offence. Nor

MYS. CR. P. CODE REG. (1904), S. 562.

is the fact that the particular act in question did not bring about any special harm of any importance, because the Court has to bear in mind the nature of the offence, the effect of the sentence on persons similarly employed and that such acts are likely to lead to serious consequences. (1908) 14 Mys.C.C R. 47; A.I R 1927 C. 245, Ref. (*Rama Rao, J.*) GOVERNMENT OF MYSORE *v.* RAMASWAMI. **9 Mys.L.J. 84=36 Mys. H.C R. 337.**

———**S. 562**—*Applicability — Power of appellate Court to reduce sentence under.*

S. 562, Cr. P. Code, cannot be applied by an appellate Court for the purpose of reducing the sentence passed on an offender who has been convicted. If the appellate Court thinks the sentence is unduly severe, it can reduce it under S. 423. But it cannot invoke S. 562 for the purpose To do so is to misapply the section and is illegal. (*Mahadevayya, C.J.*) CHANDRACHARI, *In the case of.* **13 Mys L J 130=39 Mys.H C R. 1056.**

———**S. 562**—*Applicability—Principles—Conviction for burglary.*

Where the crime committed is by no means a simple one, nor due to thoughtlessness, but to criminality combined with deliberate design and deceipt, the provisions of S. 562 should not be applied. Burglary is a serious offence affecting a public safety, and S. 562 should not be applied to such a case. Where the accused, the family poojari in the complainant's house, entered the house at night by removing some planks in the loft above the God's room where the deity was worshipped, and removed the properties,

Held, it would be misplaced leniency to apply the provisions of S. 562 and to release him on probation of good conduct (*Mahadevayya, C.J.*) SIDDALINGAYYA, *In re.* **12 Mys.L J. 286=39 Mys H C R 362.**

———**S. 562**—*Bench of Magistrates—Power to pass under S 562.*

A Bench of Magistrates exercising the powers of a Magistrate of the third class cannot itself pass an order under S. 562 but should submit the proceedings after recording its findings to a Magistrate of the first class or Sub-Divisional Magistrate (*Shankaranarayana Rao, J.*) BYRAPPA, *In re* **11 Mys L J. 161=38 Mys H. C R. 239.**

———**S. 562**—*Order of Bench of Magistrates—Interference in revision.*

If the order of a Bench of Magistrates is one passed under S. 562 the Chief Court can in revision pass a sentence by virtue of the power vested in it under S. 562 (3). Even if it is not an order under S. 562 the Court may proceed to pass a sentence by way of remedying the illegal omission made by the Bench. (*Shankaranarayana Rao, J.*) BYRAPPA, *In re* **11 Mys.L J. 161=38 Mys H C R. 239**

———**S. 562**—*Order under—Revision.*

The High Court has power, under Cl. (3) of the amended S. 562, to set aside in revision an order of release under the section and to substitute therefor a sentence of imprisonment. (*Mahadevayya, C. J.*) SIDDALINGAYYA, *In re.* **12 Mys L J. 286=39 Mys H.C R 362.**

———**S. 562**—*Previous conviction—Three offences tried together.*

Where the three offences of theft in respect of which the accused had been convicted, though committed on different dates, were tried together, it cannot be said that there has been any previous conviction in regard to any of these three offences and the benefit of the section can nevertheless be given to the accused.

MYS. CR. TRIBES REG. S. 24.

(*Doraiswami Iyer, C.J.*) ABDUL RASHID, *In re.* **10 Mys.L J. 122.**

———**S. 562**—*Several convictions on the same day—If can be treated as "first offender" in respect of all the convictions.*

S. 562 will apply only to cases where no previous conviction is proved against the offender. It makes no difference that the judgments in all the cases are pronounced on the same day, because at the precise point of time at which judgments in the later cases are delivered, the Magistrate knows that the accused has been already convicted in the previous cases. So if several convictions are passed against the accused on the same day, the accused cannot be placed on probation for any of the subsequent offences. A.I.R. 1926 Lah. 651; 32 Bom.L.R. 356, Ref. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) KHAJA PEER *v.* GOVERNMENT OF MYSORE. **10 Mys L J. 333.**

———**S 562 (1)**—*Applicability.*

S, 562 (1) applies only to certain offences under the Penal Code and does not apply to offences under other laws or to an offence punishable only with fine. So the accused prosecuted for an offence under S. 56, Cl. (*a*) of the Mysore Police Regulation cannot be dealt with under this section. (*Sreenivasa Iyer, J.*) CHINTAMANI, *In re.* **9 Mys.L.J. 65.**

———**S. 562 (1)**—*Applicability—Offence under S. 454, Penal Code.*

It is essential that, before the section can be held to apply, certain conditions should be satisfied: (*i*) the accused must not be under 21 years of age; (*ii*) the offence of which he has been convicted must be one punishable with imprisonment for not more than seven years. An offence under S. 454, being punishable with imprisonment which may extend to 10 years, is not within the section and the Court has, in such a case, no power to proceed under S. 562 (1). (*Ramachandra Rao, J.*) CHANNABASAVA, *In re* **10 Mys.L.J. 320.**

———**S. 562 (1-A)**—*Applicability—Offence under special law.*

S. 562 (1-A) can be applied only to the offences named therein and other offences under the Penal Code punishable with not more than two years' imprisonment. It has no application to offences made punishable under any special or local law such as the Police Regulation. (*Shankaranarayana Rao, J.*) BYRAPPA, *In re.* **11 Mys.L J. 161-38 Mys.H.C R 239.**

———**S. 562 (1 A)**—*Jurisdiction — Second Class Magistrate—Power to release accused after admonition.*

A Second Class Magistrate is incompetent, unless specially empowered by the Government in that behalf to discharge a first offender after admonition. The proviso applies to the whole section and controls not only sub S. (1) but also sub-S. (1 A). 27 Bom.L. R. 1019 and A.I R. 1928 Nag. 343, Foll. (*Doraiswami Iyer, C.J.*) CRIMINAL REVISION CASE NO. 13 OF 1929-30. **8 Mys.L J. 450=35 Mys H.C.R. 308.**

MYSORE CRIMINAL TRIBES REGULATION, S 24 (1) (a) and (b)—"*Special reasons to the contrary*"—*Conviction under Ss.* 457 *and* 380 *based on presumption under S.* 114 *Evidence Act.*

The presumption arising from possession of stolen property extends only the offence of committing theft or receiving stolen property. It does not extend to the offence of house breaking under S 457. Where the accused is convicted under Ss. 457 and 380 of the Penal Code, the fact that his conviction under the former section is based solely upon the presumption under S. 114, Evidence Act, which is not applicable to that offence

MYS EXCISE REG. (1901).

and the fact that neither S 380 nor S. 411 of the Penal Code is specified in the schedule annexed to the Criminal Tribes Regulations and special reasons why the punishment indicated in S. 24 (1) (*b*) of the Criminal Tribes Regulation should not be imposed on the accused 50 M. 474; 60 I.C. 1005, Ref. to. (*Doraiswami Iyer C J. and Rama Rao, J*) VENKATASWAMY *v* GOVERNMENT OF MYSORE. **9 Mys.L.J. 25=36 Mys H.C. R. 24.**

MYSORE EXCISE REGULATION (V OF 1901)—*Excise Officer investing offence—Competency to conduct prosecution.*

There is nothing to show that an Excise Officer under the Excise Regulation is on the same footing for all purposes as a police officer; and there is no provision in the said Regulation or in the Cr. P. Code which prevents any officer from conducting the prosecution in an Excise case in the investigation of which he has taken part. The analogy of S. 495(4), Cr. P. Code, cannot be invoked. (*Mahadevayya, O.C.J. and Ramachandra Rao J.*) DHONDE GOWDA *v.* GOVERNMENT OF MYSORE. **12 Mys L J. 283 = 39 Mys H C R. 358.**

——— *Offence under—Punishment—Nature of.*

Punishments in cases of violation of the Excise Laws must be deterrent. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SYED HUSSEIN *v.* GOVERNMENT OF MYSORE. **13 Mys L.J. 32=39 Mys H.C R 921.**

——— *Prosecution under—Illegality in search—Effect of.*

Illegality or irregularity in the search proceedings would not relieve the accused from liability to prosecution under the Excise Regulation. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SYED HUSSEIN *v* GOVERNMENT OF MYSORE. **13 Mys L.J. 32=39 Mys H C R 921.**

——— *Rules framed under—R. 16—Applicability—Partnership with licensee—Suit for share of profits by partner—Maintainability.*

The plaintiff and defendant entered into a partnership agreement providing that the defendant should take the excise contract from Government to vend liquor, the plaintiff should furnish a capital, the defendant should manage the shops, maintain proper accounts and render the same to plaintiff and the plaintiff should get a certain percentage of the profits of the business. The plaintiff brought the present suit for his share of profits which, the defendant contended, was prohibited by R. 16 of the Rules framed by the Government under the Act.

Held, that the contract of partnership in the present case did not amount to a 'transfer' within the meaning of the rule and that the suit was, therefore, maintainable. Case law discussed. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J*) GANTE GOWDA *v.* ANKAM THIMMAPPA SETTY. **37 Mys. H C.R. 101=10 Mys L.J. 1.**

——— **S 55** —Conviction and sentence under—Fine of Rs. 200 and in default rigorous imprisonment for two months—Legality—Penal Code. S. 65. *See* PENAL CODE, S. 65. **13 Mys L J. 235.**

——— **S. 55 (a) and (h)**—*Scope.*

Unless S 56 which is expressly restricted to the case of the licence-holder, S. 55 is comprehensive enough to include all offenders generally, not excepting the servants of a licence holder. (*Doraiswami Iyer, C J. and Rama Rao J*) GOVERNMENT OF MYSORE *v.* GODIYAPPA. **36 Mys. H.C.R. 247=9 Mys.L.J. 225.**

——— **S. 64**—*Presumption under—Grounds for raising—Presence of incriminating articles in house—Owner's failure to explain.*

MYS. FACTORIES REG. (1914), S. 49.

Where the accused, the head of the family fails to explain the presence in his house of a large quantity of illicit liquor and of several other articles used for the purpose of manufacturing such liquor, the presumption under S. 64 of the Excise Regulation can be raised. Nor would any illegality or irregularity in the search proceedings relieve the accused from liability to prosecution under the Regulation. (*Ramachandra Rao and Shankaranarayana Rao, JJ*) SYED HUSSEIN *v.* GOVERNMENT OF MYSORE. **39 Mys. H C.R. 921=13 Mys.L J. 32.**

——— **S. 64 (2)**—*Licence-holder—Liability for acts of employees—Extent of.*

For the protection of public revenue and other purposes, S. 64 (2) holds the licence holder responsible for the conduct of his employees in cases when he does not take all due and reasonable precautions to prevent the commission of offences under the act. The precautions necessary will vary in each case. While it will not be for the licence holder to merely assert that his responsibility ceased when he took an undertaking from his employee and gave him the requisite instructions at the commencement of his appointment, the prosecution also cannot be allowed to maintain that in each and every case the licence holder must be held liable for the acts of his employees without any qualifications and irrespective of the precautions taken by him The criminal intent which is necessary ingredient is, by virtue of the section, presumed in the first instance till it is rebutted. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) GOVERNMENT OF MYSORE *v.* GODIYPPA. **36 Mys H C.R. 247=9 Mys L.J. 225.**

MYSORE FACTORIES REGULATION (III OF 1914), S. 2 (2)—*"Employed"—Meaning of—Persons working in factory though not employed by factory itself—If persons "employed."*

The definition of "employed" in S. 2 (2) of the Factories Regulation is wide enough to include even volunteers who work gratuitously and without wages. Hence persons found working in a rice mill *i.e*, placing rice in bags on behalf of the owners of the rice, though not employed by the factory itself, must be deemed to be persons "employed" in the factory within the meaning of S. 2 (2) of the Regulation. (*A S.R. Chari, J.*) RAMCHANDRA RAO *v.* GOVERNMENT OF MYSORE. **40 Mys. H.C R. 287=13 Mys.L.J 425.**

——— **S. 2 (3)**—*"Factory"—Essentials to be proved—Declaration by government that a certain mill is a factory—If conclusive.*

A declaration by the Government under S. 2 (3) that a certain rice mill is a "factory" is not conclusive as regards the mill being a factory as defined by the Act. It has to be proved affirmatively that on any one day in the year not less than 10 persons were simultaneously employed in the premises (*A.S.R. Chari, J*) RAMACHANDRA RAO *v.* GOVERNMENT OF MYSORE. **40 Mys. H C R. 287=13 Mys.L.J. 425.**

——— **S. 41 (f) and (i)**—*Offences under—Prosecution—Limitation.*

The offences under S 41 (*f*) and (*i*) of the Regulation are in the nature of continuing offences, and they must be deemed to have been committed and continued on the day when they are last discovered; and any prosecution launched within six months from that date will not be barred under S. 49 of the Regulation. (*A.S.R. Chari, J.*) RAMACHANDRA RAO *v.* GOVERNMENT OF MYSORE. **40 Mys. H.C.R.287=13 Mys L J. 425.**

——— **S. 49**—Offences under S. 41 (*f*) and (*i*)- Prosecution for—Starting point of limitation. *See* MYSORE FACTORIES REGULATION, SS 41 (*f*) AND (*i*). **40 Mys H.C.R. 287=13 Mys L.J. 425.**

MYS. FACTORIES REG (1914), S. 49.

——S. 49—*Offences under Ss.* 41 (*h*) *and* (*i*) *and* 43 (*c*)—*Prosecution—Limitation—Starting point.*

Offences under Ss. 41 (*h*) and (*i*) and 43 (*c*) of the Regulation are continuing offences, and each day on which the omissions in question occur, has to be regarded as the date of commission of the offences. A prosecution instituted within six months from the date on which the omissions are last noticed will be in time under S. 49 of the Regulation. (*A.S.R. Chari, J.*) ABDUL MAZEED *v.* GOVERNMENT OF MYSORE. **40 Mys. H. C.R. 312 = 13 Mys.L.J. 422.**

MYSORE FOREST REGULATION (1900), S. 2 (9)—*Gomal lands.*

Gomal lands in Mysore attached to unalienated villages are lands "at the disposal of Government" and the proprietary interest therein, apart from the right of pasturage, does not vest in the villagers. (*Doraiswami Iyer, C.J.*) GOVERNMENT OF MYSORE *v.* RAMA RAO. **10 Mys.L.J. 110.**

——S. 24—*Amount of fine—Jurisdiction of Magistrate*

Under S. 24 the Magistrate must find on the material before him what the damage is and only if such damage exceeds Rs. 25 he would be justified in imposing an enhanced sentence. (*Ramachandra Rao, J.*) PAPEY GOWDA *v.* GOVERNMENT OF MYSORE. **38 Mys. H. C.R. 357 = 11 Mys L.J. 150.**

MYSORE GENERAL CLAUSES REGULATION (1899), S 26—*Applicability—Distinct offences.*

S 26, General Clauses Regulation, is not applicable when the offences are distinct. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) THIMMAPPA GOWDA *v.* GOVERNMENT OF MYSORE. **39 Mys H C R. 912 = 12 Mys.L.J. 398.**

MYSORE GENERAL RULES AND ORDERS (CRIMINAL), Vol I. paras. 4, 5 and 6—Habitual offender—Sentence on conviction — Principles. *See* PENAL CODE, S. 75. **12 Mys.L J. 385.**

MYSORE GUARDIAN AND WARDS REGULATION (V OF 1911)—*Custody of child—Suit by father for—Maintainability.*

A suit by a Hindu father for recovering the custody of his minor child is maintainable; it is not prohibited by the Guardian and Wards Regulation. (*Mahadevayya, J.*) MUNIYAMMA *v.* MUNISAMAPPA. **10 Mys.L.J. 156.**

——Ss. 6 and 9—*First application for appointment of guardian dismissed as a result of compromise—Compromise not acted upon—Second application for same purpose—Maintainability of.*

Where the first application for the apppointment of a guardian was dismissed as a result of compromise between the parties but subsequently the compromise not having been acted upon, the second application for the same purpose was put in.

Held, that the second application was maintainable and that it was not barred by *res judicata*, having regard to the fact that the first application was not disposed of on the merits and the refusal on the part of the opponents to abide by the terms of the compromise furnished an additional ground which was not available to the petitioners at the time they made the previous application. (*Ramachandra Rao and Shankara narayana Rao, JJ.*) LAKSHMANA CHARI *v.* SUBBAMMA. **39 Mys H.C.R 198 = 12 Mys.L J. 180.**

——S. 8—*Jurisdiction—Temporary residence—If sufficient.*

Temporary residence of the minor for a period of about 4½ months at a particular place is not sufficient to make that place the ordinary residence of the minor within the meaning of S. 8 of the Guardians and Wards Regulation, so as to give to the Court of that place jurisdiction to entertain an application for guardianship. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) RUDRAPPA *v.* SIVARUDRAPPA. **13 Mys.L.J. 133 = 39 Mys. H.C.R. 1061.**

MYS. INAM SETTLEMENT RULES (1867), R. 20.

——S 11—*Powers of Court—Delivery of minor's property to guardian.*

When a Court in exercise of its powers under S. 11 of the Regulation takes the properties of the minor into its custody through any of its agents, as for instance through commissioners and makes some arrangements for their protection it is capable of handing over possession of such properties to the guardian as soon as the appointment is made without putting the minor's estate to any expense by compelling the guardian to have recourse to a suit for the purpose. (*Ramachandra Rao, J.*) MUDDAMMA *v.* NARATE GOWDA. **10 Mys.L.J. 414.**

——S. 46—*Order passed by Subordinate Court—Appeal to District Court or High Court.*

When an order is passed under the Guardian and Wards Regn. by a Munsif the appeal lies to the High Court and not to the District Court. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) DESIKACHAR *v* CHAKAVARTHI IYENGAR. **38 Mys. H.C.R. 408 = 11 Mys L J. 368**

MYSORE HINDU LAW WOMEN'S RIGHTS REGULATION (X OF 1933)—*Applicability and scope—Property inherited prior to Regulation—Alienation by widow—Suit by reversioner for declaration of invalidity—Subsequent coming into effect of regulation—Effect.*

A Hindu widow who had inherited her husband's estate alienated the properties. The reversioners sued for a declaration that the said alienation was not valid and binding on them. In appeal it was held that the plaintiffs were entitled to the declaration and a decree was accordingly passed. The widow and the alienee appealed to the Chief Court on 9 12 1930 and on 1-1-1931, the Hindu Law Women's Rights Regulation came into force, and the appellants applied to the Chief Court for permission to take an additional ground to the effect, that under the Regulation the widow became full owner of the properties and consequently the reversioners were not entitled to the declaration prayed for.

Held, that the appellants were entitled to raise the said contention, and that immediately the Regulation came into force, the widow became absolutely entitled to the properties of her husband—it being conceded that there was no daughter or daughter's son alive at the time of the inheritance—and consequently the rights of the plaintiffs reversioners ceased and that the declaration claimed could not be granted. (*Shankaranarayana Rao and Chari, JJ.*) SIDDALINGAMMA *v.* MUDDUMALLE GOWDA. **13 Mys L J. 79 = 40 Mys H.C R. 85.**

——Ss. 10 and 11—"Stridhana"—*Property inherited from husband—Powers in respect of.*

Under S. 10 (2) (*g*) of the Hindu Law Women's Rights Regulation, which came into force on 1st January 1934, *stridhana* includes property inherited by a female from her husband except where there is a daughter or a daughter's son of the propositus alive at the time the property is so inherited; and under S. 11 (1), a female owning *stridhana* property shall have over it absolute and unrestricted powers both of enjoyment and of disposition *inter vivos*. (*Shankaranarayana Rao and Chari, JJ.*) SIDDALINGAMMA *v.* MUDDUMALLE GOWDA **13 Mys L J. 79 = 40 Mys. H.C R. 85.**

MYSORE INAM SETTLEMENT RULES (1867), Rr. 20, 21 and 22—*Scope—Decision of Inam Commissioner—Finality—Jurisdiction of Civil Court.*

MYS. INCOME-TAX REG. (1923), S. 2 (14).

The settlement contemplated by, and to be made under the Inam Settlement Rules, is not only a settlement of the extent of the land concerned and of the extent of the revenue remitted, but also one which determines the person entitled to the benefit of the inam, *i.e.*, as to whom the inamdar is; under R. 21 of the Rules the decision of the Inam Commissioner that a certain person was not the inamdar cannot be contested in a suit in the Civil Court. *Reilly, C.J. and Shankaranarayana Rao, J.)* VENKATARAMANA JOIS *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 468 = 40 Mys H.C R. 354.**

MYSORE INCOME TAX REGULATION (V OF 1923), S. 2 (14)—*Partnership—Registration of Enquiry into reality of firm—Powers of Income-tax Officer.*

A set of persons purporting to constitute a firm as described by S 2 (14) of the Regulation cannot get themselves registered as such of right by merely making an application in the prescribed form with the instrument of partnership enclosed. The Income-tax Officer has power to investigate the reality of the instrument produced, and to refuse registration if such instrument does not represent the reality of the constitution of a firm. 57 Cal. 1336, Foll.. *(Doraiswami Iyer, C.J. and Mahadevayya, J.)* MANICKAVELU MUDALIAR & SON *v.* COMMISSIONER OF INCOME-TAX, MYSORE. **10 Mys.L.J 316.**

———**S. 2 (16)**—Unregistered firm—Agreement of partnership—Combination of property, labour or skill —Extra rights and powers of control given to one partner—Nature of relationship. *See* CONTRACT ACT, S. 239. **12 Mys L J. 404 = 39 Mys H.C R 1012.**

———**Ss. 10 and 13**—*Assesment—Basis—System of accounting adopted by company.*

Where a company has chosen to adopt a particular mercantile basis of accountancy in keeping its accounts it being fairly well recognised in mercantile institutions, it is upon that basis and upon that alone, that it has to be assessed income-tax under Ss. 10 and 13 of the Mysore Income-tax Regulation. *(Mahadevayya, O.C. J., Ramachandra Rao and Shankaranarayana Rao. JJ.)* COMMISSIONER OF INCOME-TAX, MYSORE *v.* BANK OF MYSORE, LTD. **12 Mys L.J. 245 = 39 Mys. H.C.R. 772 (F.B.).**

———**S. 10 (1)**—*Co operative societies—"Profits"—Income from property and bank investments—Exemption from income-tax—Mysore Government Notification dated 4th Jan.* 1928.

Investments on property and in bank are not within the scope of the ordinary business of a co-operative society and the income therefrom cannot be regarded as profits or gains of its normal business within the meaning of S. 10 (1) of the Income-tax Regulation and as such, the exemption granted by the Mysore Government Notification of the 4th Jan 1928 does not cover the case. *(Doraiswami Iyer, C.J. and Srinivasa, Iyer J.)* THE COMMISSIONER OF INCOME TAX IN MYSORE *v.* THE APEX BANK, LTD. **8 Mys.L J. 426.**

———**S 10 (2)**—*Business allowance—Bank with branch outside State—Deposits in branch remitted to Head Office—Interest paid on such deposit by head office to branch—If deductible.*

The Bank of Mysore which had branches in different parts of the State had a branch in the C. & M. Station of Banglore. This branch maintained separate accounts, received deposits, and remitted all surplus funds including the deposits to the Head Office. The latter treated such remittances as loans to it by the branch, allowing interest thereon at 5 per cent. per annum, and debited the said interest in its accounts as business expenditure The branch at the C. & M. Station treated their interest

MYS. INCOME TAX REG. (1923), S. 23 (2).

as income in its accounts and on that basis calculated its profits which were assessed to income-tax in the station. The Head Office, for the purpose of calculating its profits for income tax in Mysore, deducted their profits calculated by the branch from its total profit as a business allowance.

Held, that the payment of interest to the branch at C. & M, Station, Banglore, on the deposits remitted by it to the Head Office, is a business allowance within the meaning of S. 10 (2) (*iii*) of the Mysore Income-tax Regulation and as such deductable in the calculation of the total profits The existence of the juridical relationship of debtor and creditor between the Head Office and branch was not necessary for recognising the payment in question as a business allowance. *(Mahadevayya, O.C.J., Ramachandra Rao and Shankaranarayana Rao, JJ.)* COMMISSIONER OF INCOME TAX, MYSORE *v.* BANK OF MYSORE, LTD. **12 Mys L J 245 = 39 Mys H.C R. 772 (F B.).**

———**S 10 (2) (iii)**—*Firm—Advance of money by partner—Interest on—If deductible.*

Interest paid by a partnership to a partner in the year of assessment, on amounts advanced by him as loans to the firm, must be deducted under S. 10 (2) (*iii*) of the Income tax Regulation, in computing the profits or gains of the partnership. *(Ramachandra Rao and Sankaranarayana Rao, JJ.)* COMMISSIONER OF INCOME-TAX IN MYSORE *v.* MARADI SUBBIAH. **12 Mys L J. 404 = 39 Mys. H C.R. 1012.**

———**S. 10 (2) (vi)**—*Depreciation—Private company taken over by assessee company—Building plant and machinery—Basis for calculation of depreciation—Difference between English and Indian Law*

The depreciation under S 10 (2) (*vi*) of the Mysore Income-tax Regulation should be allowed on the original cost to the assessee company *bona fide* paid or incurred in respect of buildings, plant or machinery where the assessee company has acquired and succeeded to the business of a private company, and not on their value as it stood in the books of the previous owner. 56 M.L.J. 451, Not Foll. The terms of the Income-tax Act (which are followed in the Mysore Regulation) are of different language and scope from those of the English Acts. Under S. 10 (2) (*vi*) of the Indian and Mysore Acts, the deduction on account of depreciation should be based, not as in the English Act on what might appear to the Tax Commissioners just and reasonable as representing the diminished value by reason of wear and tear during the year, but on such definite percentage rates on the original cost of the building, machinery and plant to the assessee. In such calculation the original cost to the previous owner (the old company which has been taken over) does not, under the Indian and Mysore Acts, seem to be an element which should be taken into consideration. *(Doraiswami Iyer, C. J and Rama Rao, J.)* COMMISSIONER OF INCOME-TAX, MYSORE *v.* KAISER-I-HIND WOOLEN, SILK AND COTTON MILLS, LTD. **9 Mys L J. 242 = 36 Mys H.C.R. 365.**

———**S. 23 (2)**—*Notice calling upon assessee to produce accounts and other evidence before special auditor —Validity of.*

Although an assessee may be called upon to produce his accounts and documents at the Income-tax Officer's office, either before the Special Auditor or any other member of his establishment, there should be a proper investigation by the Income-tax Officer himself, and the assesssee should be given the opportunity of a hearing in support of his return, unless the Income tax Officer has accepted the correctness of the return furnished on a consideration of the accounts and documents produced

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in his office in compliance with the notice issued under S. 23 (2). A notice issued by the Deputy Commissioner of Income-tax called upon the assessee, with a view to test the correctness of his return, to produce all accounts, documents and other evidence on which he might rely in support of the return of his income.

Held, that so far as the production of accounts before the special auditor was concerned the notice was not invalid; but that so far as it directed the production of other evidence before the Auditor, it was invalid. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) COMMISSIONER OF INCOME-TAX, MYSORE *v.* SEE THIAH SETTY. **10 Mys.L.J. 239.**

———**S. 30**—*Appeal from order of assessment—Order under S. 33, no bar to re considering question.*

An order of the Commissioner under S. 33 of the Regulation is no bar to his re-considering the question when it is brought before him in appeal under S. 30 against an order of assessment. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) MANICKAVELU MUDALIAR & SON *v.* COMMISSIONER OF INCOME-TAX, MYSORE. **10 Mys.L J. 316.**

———**Ss 33 and 34**—*Applicability—"Escaped assessment"—Additional assessment by Commissioner after notice to assessee—If escaped assessment.*

S. 34 of the Income-tax Regulation applies (1) to a case where the income has escaped assessment in any year and (2) to a case where the income has been assessed at too low a rate in any year. Where the assessee has already furnished all the materials necessary to make a proper assessment of the income before the Deputy Commissioner and has been assessed by the latter, and on a perusal of the records the Commissioner, after notice to the assessee and hearing his Counsel and examining the accounts and other materials furnished before the Deputy Commissioner, comes to the conclusion that the income under a particular head has been under-rated and then proceeds to calculate the actual income on the identical materials, his order modifying the assessment by the Deputy Commissioner and directing the latter to issue the necessary demand notice is one passed under S. 33 and not under S. 34. (*Mahadevayya C. J and Shankaranarayana Rao, J.*) COMMISSIONER OF INCOME-TAX IN MYSORE *v.* GURUSWAMI. **13 Mys L J. 195=39 Mys H.C.R. 1181.**

———**S. 66**—*Omission to urge point of law before Commissioner—Right to urge in High Court.*

If a point of law is not urged by the assessee in time before the Commissioner, he cannot at a later stage be allowed to ask the High Court to consider such point or to require the Commissioner to state a case. But the High Court in such cases must look not merely to the form but to the substance of the real contentions urged. (*Mahadevayya, O. C. J., Ramachandra Rao and Shankaranarayana Rao, JJ.*) COMMISSIONER OF INCOME TAX, MYSORE *v.* BANK OF MYSORE, LTD. **12 Mys L.J. 245=39 Mys H C.R. 772 (F.B.).**

———**S. 66 (2)**—*Reference—Scope—Finding of fact—Interference—High Court's powers.*

The High Court in a reference under S. 66 (2), Income-tax Regulation, is not a Court of appeal, as the section does not give the assessee a right of appeal. The jurisdiction of the High Court is consultative. The findings of fact arrived at by the Commissioner of Income tax are binding on it, and it has no jurisdiction to consider the correctness or otherwise of the same. But at the same time, the High Court has power to examine what is the proper legal effect of a proved fact or facts, which is a question of law, and it is therefore open to it to examine the evidence in order to find out whether the findings of the Commissioner could be legally justified. (*Mahadevayya, O. C. J. Ramachandra Rao and Shankaranarayana Rao, JJ.*) COMMISSIONER OF INCOME TAX, MYSORE *v.* BANK OF MYSORE, LTD. **12 Mys L.J. 245=39 Mys.H.C.R. 772 (F B.).**

———**S. 66 (3)**—*Order by Commissioner under S. 33—High Court's power to direct statement of case.*

There is nothing in S. 33 of the Income-tax Regulation which prevents the Commissioner of Income-tax from enhancing the assessment made on the materials available; and when he acts under S. 33 and makes an order prejudicial to the assessee, the High Court has no power, at the instance of the assessee, to direct the Commissioner to state a case. (*Mahadevayya, C.J. and Shankaranarayini Rao, J.*) COMMISSIONER OF INCOME TAX IN MYSORE *v.* GURUSWAMI. **13 Mys.L. J. 195=39 Mys.H.C R. 1181.**

MYSORE INSOLVENCY REGULATION (VI OF 1911), S. 4 (2)—*Scope—Adjudication of firm as insolvent—Decision holding a particular person to be partner of firm—Finality.*

A decision by the Insolvency Court, that a particular person is a partner of a firm which has been adjudicated an insolvent, must be held to be final and binding for all purposes, as between the firm and its creditors under S. 4 (2) of the Mysore Insolvency Regulation. (*Shankaranarayana Rao, J.*) PANNALAL AND BROS. *v.* CHOGMUL HEMAJI. **12 Mys.L.J. 532=39 Mys.H. C R. 794.**

———**XI OF 1925**)—*Firm—Adjudication of—Propriety.*

The term 'debtor' in the Insolvency Regulation includes also a firm and the adjudication of a firm as insolvents is legal. (*Doraiswami Iyer, C.J and Rama Rao, J.*) ASLAJI DHIRAJI BROS. *v.* SUNNILAL. **9 Mys L.J. 157=36 Mys. H.C R. 75.**

———*Firm—Adjudication of—Subsequent discharge—Liability of partners composing firm.*

Insolvency proceedings against the firm are really against the partners composing it. 100 I.C. 112; 89 I. C 493 and 55 I.C. 186, Ref. Where a decree against a firm is sought to be executed against one of the partners as such, the latter is entitled to plead immunity on the ground that the firm against which the decree had been obtained had been adjudicated insolvents and subsequently discharged. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) ASLAJI DHIRAJI BROS. *v.* SUNNILAL. **9 Mys.L J. 157=36 Mys.H.C.R. 75.**

———**S. 5**—*Powers of insolvency Court to review orders—Annulment of adjudication for default—Power to set aside—S. 10 (2)—If a bar—C. P. Code Regulation O 9, R. 13.*

Under S. 5 (1) of the Insolvency Regulation, the insolvency Court has power to review its orders. Where the Court annuls an order of adjudication on the ground that the insolvent fails to appear on the date fixed for his examination on his application for discharge, the Court can, on an application made by the debtor, set aside the order of annulment under the powers conferred on it under S. 5 of the Regulation. S. 10 (2) of the Regulation has not got the effect of depriving the insolvency Court of its powers under S. 5 or of making O. 9, R. 13, C. P. Code, inapplicable. (*Sreenivasa Rao, J.*) CHENNIAH *v.* PUTTASAMIAH. **13 Mys L J. 500.**

———**S 10 (2)**—Scope and effect of—Annulment of adjudication for default of debtor—Setting aside annulment—Powers of Court to review its orders. *See* MYSORE INSOLVENCY REGULATION, S. 5. **13 Mys L.J. 500.**

MYS. INSOLVENCY REG. (1925), S. 28.

———**Ss. 28 and 44 (2)**—*Applicability and scope—Insolvency application by debtor—Suit by creditor to set aside transfer as being fraudulent under S. 53, T. P. Regulation—Maintainability.*

So long as proceedings in insolvency are pending against a debtor, a creditor is not entitled to enforce any of his rights against the debtor by means of a suit except with the permission of the Insolvency Court, as required by S. 28 of the Insolvency Regulation. A creditor therefore is not competent to sue to set aside a transfer by the debtor, as being in fraud of creditors under S. 53 of the Transfer of Property Regulation, after the debtor has filed an insolvency petition to which the plaintiff himself is a party. Such a suit is barred both by S. 44 (2) of the Insolvency Regulation and also under S. 9, C. P. Code Regulation. (*Shankaranayana Rao and A. S. R. Chari, JJ.*) MAHADEVAPPA *v.* NARAPPA. **40 Mys H C R. 237 = 13 Mys L.J. 380.**

———**S. 28 (2)**—*Bar under—Ignorance of insolvency proceedings—It can be pleaded.*

Once an adjudication is made, a creditor cannot, under S. 28 (2) of the Mysore Insolvency Regulation, commence any suit or other legal proceeding, except with the leave of the Court. That leave must be obtained before the commencement of the suit or proceeding. A creditor cannot plead want of notice or ignorance of the adjudication or insolvency proceedings to escape the bar. (*Shankaranarayana Rao, J.*) PANNALAL *v.* CHOGMUL HEMAJI. **39 Mys.H.C.R. 794 = 12 Mys.L. J. 532.**

———**S. 28 (7)**—*If controls S. 53.*

S. 28 (7) of the Insolvency Regulation should be construed as governing and controlling S. 53 of the Regulation. (*Shankaranarayana Rao and Sreenivasa Rao, JJ.*) CHOWDA SETTY *v.* KASIMKHAN. **40 Mys H. C.R. 470 = 13 Mys.L J. 495.**

———**S. 42**—*Application for discharge—Dismissal—Second application, if barred.*

The Insolvency Court has very wide discretion as to whether or not to grant the application for discharge and if so subject to what terms and conditions. It cannot be said that because an application for discharge was once dismissed the party cannot again apply for the same relief. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KRISHNA PANDIT *v.* VENKATARAMANA CHETTY. **39 Mys.H.C.R. 348 = 11 Mys.L.J. 372.**

———**S. 43**—*Order of annulment—Review—Revision.*

The Insolvency Regulation does not in terms provide for reviews of orders passed and even if a review can be had, no revision petition lies against an order rejecting a review. (*Doraiswami Iyer, C. J.*) CHIKKA BELUSA, *In re.* **36 Mys.H.C.R. 19 = 9 Mys.L.J. 34.**

———**S. 53**—*Limitation under—Starting point.*

The *terminus a quo* for the calculation of the period of two years under S. 53 of the Insolvency Regulation is the date of presentation of the application on which an adjudication is made and not the date of the adjudication. If a transfer is therefore within two years of the date of the application, it comes under the section, though it is beyond two years of the date of adjudication order. S. 53 is controlled by S. 28 (7) of the Regulation. (*Shankaranarayana Rao and Sreenivasa Rao, JJ.*) CHOWDA SETTY *v.* KASIMKHAN. **40 Mys H. C.R. 470 = 13 Mys.L J 495.**

———**S. 61 (4)**—*Adjudication of firm.*

The term "debtor" includes a firm and an order of adjudication can be passed against a firm. The test is if the application was treated as a suit, the suit would be bad for multifariousness; if not the application for adjudication is maintainable. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) BHAGAWANJI *v.* RAJA SAMPANGI RAMA SHETTY. **36 Mys.H.C.R. 39 = 9 Mys L.J. 1.**

MYS. LAND ACQUISITION REG. (1894), S. 12.

———**S. 61 (4)**—*Decree against firm—Subsequent adjudication and discharge of firm — Liability of partner.*

Where subsequent to a decree against a firm, the firm was adjudicated insolvent and discharged, the decree cannot be executed against any individual partner thereof. The discharge of the firm is really the discharge of its constituent members. 100 I.C. 112; 89 I.C. 493; 55 I.C. 186, Ref. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) ASALAJI BROS *v.* SUNNILAL. **36 Mys H.C. R. 75 = 9 Mys.L J. 222.**

———**S. 68**—"*Person aggrieved*"—*Insolvent.*

The insolvent is not a "person aggrieved" within the meaning of S. 58 and he has no *locus standi* to file an application complaining of the sale by Official Receiver on the ground of irregularity and inadequate price. (*Mahadevayya, J.*) RAMIAH *v.* MUNISAMY. **10 Mys. L.J. 246.**

———**S. 75**—*Right of appeal—Forum.*

Under S. 75 the right of appeal is to the District Court were the order in insolvency is made by a Court subordinate to the District Court. (*Mahadevayya, O.C. J. and Ramachandra Rao, J.*) BAPU SAHIB *v.* KECUBCHAND BAPNA. **38 Mys.H.C.R. 362 = 11 Mys L.J. 317.**

———**S. 79 (2) (c)**—*Adjudication of firm.*

The term 'debtor' includes a firm and an order of adjudication can be passed against a firm. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) BHAGAWANJI *v.* RAJA SAMPANGI RAMA SHETTY. **36 Mys H.C R. 39 = 9 Mys.L.J. 1.**

MYSORE LAND ACQUISITION REGULATION (IV OF 1888)—*Compulsory acquisition—Compensation—Value of land—Rules applicable.*

In order to determine the value of land compulsorily acquired three methods may be adopted: (1) the opinion of valuator or experts, (2) the price paid within a reasonable time in *bona fide* transactions of purchase of the lands acquired or the lands adjacent to the land acquired and possessing similar advantages, and (3) a number of years' purchase of the actual or immediately prospective profits from the land. Two or more methods may be applied in a given case. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) MUNIYAPPA *v.* MUNICIPAL COMMISSIONER, BANGALORE CITY. **39 Mys.H.C.R. 117 = 11 Mys L J. 296.**

———**(VII OF 1894)**—*Agricultural land—Acquisition by Government—Mode of valuation.*

The owner is entitled in the case of compulsory acquisition to the value of the property in its actual condition at the time of expropriation with all its then existing advantages and with all its future possibilities excluding only any advantage due to the carrying out of the scheme for the purposes for which the property was being acquired. The Court in taking into consideration such advantages ought not to be oblivious of the drawbacks attaching to the property. Due allowance must therefore be made to the liability for payment of fine in addition to reassessment leviable under the Land Revenue Code on the conversion of agricultural land into building sites. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) HOME GOWDA *v.* ASSISTANT COMMISSIONER AND LAND ACQUISITION OFFICER, MYSORE DIVISION. **11 Mys.L.J. 93.**

———**Ss. 12 (2) and 18**—*Scope—Application for reference—Limitation.*

MYS. LAND ACQUISITION REG. (1894), S. 18.

The longer of period of six months is curtailed under S. 18, Land Acquisition Act, if the period of 6 weeks following a notice under S. 12 (2) expires before the expiry of 6 months from the date of the award. This provision of the bar of limitation of applications filed beyond 6 months of the date of the award is altogether unconnected with provision for the issue of notice under S. 12 (2) or with the service of such notice when issued. (*Ramachanara Rao and Shankaranarayana Rao, JJ.*) SREENIVASA RAO *v.* TREASURY ASSISTANT COMMISSIONER AND LAND ACQUISITION OFFICER, SHIMOGA. **39 Mys.H.C.R. 844 = 12 Mys L.J. 517.**

——— **S. 18**—*Application beyond time—Reference—If* ultra vires.

A reference under S. 18, Land Acquisition Regulation, can only be made on an application by the party; and when the application is barred by time according to the statute, a reference made on such an application is *ultra vires* and invalid. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SREENIVASA RAO *v.* TREASURY ASSISTANT COMMISSIONER AND LAND ACQUISITION OFFICER, SHIMOGA. **39 Mys H.C.R. 844 = 12 Mys.M J. 517.**

——— **S. 18**—Scope—Reference — Application for—Limitation. *See* MYSORE LAND ACQUISITION REGULATION, SS. 12 (2) AND 18. **39 Mys H.C R. 844 = 12 Mys.L.J. 517.**

——— **S. 23 (1)**—*Market value—Ascertainment—Mode—Annual rent as basis—Shop in city—Calculation of value.*

There are three recognised modes of determining the market value of a property which is compulsorily acquired under Land Acquisition proceedings: (1) by ascertaining the price or prices at which the property acquired has been purchased or sold in recent years; (2) by ascertaining the nett annual income of the property and by taking a certain number of years' purchase of that income, according to the nature of the property; and (3) by ascertaining the price at which properties in the vicinity have been sold or purchased, and making all due allowance for situation and circumstances of each particular sale. In the case of a shop in Bangalore City, in an important and growing locality, the nett annual rent of the shop after making due deductions for annual repairs, Municipal taxes, etc., for a period of 16 $\frac{2}{3}$ years plus 15 per. cent. for compulsory acquisition represents a fair amount of compensation to be awarded, but 20 years' purchase is too high. (*Mahadevayya and Rama chandra Rao, JJ.*) MANDI HARIYANNA *v.* LAND ACQUISITION OFFICER, BANGALORE CITY. **12 Mys L.J. 186.**

——— **S. 54**—*Award confirmed* ex parte—*Order refusing to set aside—Appealability.*

An order refusing to set aside an award confirmed *ex parte* under O. 9, R 9, C P. Code, is not appealable. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) NARAYANA SETTY *v.* MUNICIPAL PRESIDENT AND LAND ACQUISITION OFFICER, BANGALORE CITY. **38 Mys.H.C.R 129 = 11 Mys.L.J. 208.**

——— **S. 54**—*Order deciding person entitled to compensation but amount left to be determined—Appeal.*

Where on a reference under the Land Acquisition Regulation, the District Judge passed an order that claimant No. 1 and not claimant No. 2 was entitled to compensation, but the suit had yet to proceed on the question as to the amount of compensation.

Held, that the order was only interlocutory and not appealable. 10 C.W.N. 195, Ref. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) VEERAPPACHARI *v.* SUGUNA MURTHY ACHAR. **38 Mys.H.C.R. 406 = 11 Mys L J. 436.**

MYS. LAND REVENUE CODE (1888), S. 86.

——— **S. 79**—*Amendment of* 1928—*Scope of.*

The new Regulation of 1928 which curtails the period necessary to raise a presumption of kadim tenancy under the old Code is not a declaratory one. There is nothing in the new Regulation itself to indicate that the new clause should receive a retrospective operation. Where there is no proof of the cash rent paid to the jodidar and even as regards the amount of rent the evidence was not consistent and the evidence regarding possession by the tenants for a number of years was very vague.

Held, no presumption of kadim tenancy arose under S. 79 of the old Code. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) SUBBIAH *v.* LAKSHMINARASIMHA SASTRY. **11 Mys L J. 404.**

MYSORE LAND REVENUE CODE (IV OF 1888)—*Jurisdiction of Inam Superintendent—Alienation effected prior to inam settlement—Effect of settlement on.*

The swami of a certain mutt holding lands in a sarwamanya village gifted a portion of those lands in 1730 to the ancestor of the defendant in consideration of services rendered by him in recovering for the mutt the village in question which had been lost to it. In the inam settlement of 1853, the said gift was confirmed free of tax by the Inam Superintendent.

Held, that the gift had not been set aside or otherwise affected by the settlement. There is no provision of law under which the Inam Superintendent is competent to interfere with the legal relation of parties existing long anterior to the settlement operations or to convert a proprietary right into that of a tenancy (*Mahadevayya, C J. and Shankaranarayana Rao, J.*) SRI SATYA DHYANA THIRTHA SRI PAIYANGAI AVARU *v.* BAPU SHAMA RAO. **12 Mys.L J. 417 = 39 Mys.H. C.R. 1038.**

——— *'Land"—Minerals.*

The right to minerals is immovable property and included in the word "land' under the Mysore Land Revenue Code. (*Sreenivasa Iyer, O. C. J. and Mahadevayya, J.*) GOVERNMENT OF MYSORE *v.* ANANDARAYA MUDALIAR. **10 Mys L.J. 323.**

——— **S. 38 (4)**—*Claim for minerals—Limitation—Age of majority in Mysore.*

If a person entitled to prefer a claim for minerals was a minor on the date of the passing of the Regulation, he must prefer his claim within five years after the passing of the Regulation or within 3 years after he attains majority. There is no legislative provision in Mysore fixing the age of majority as is embodied in the Indian Majority Act but majority in Mysore is attained only on the completion of the 19th year. So an application presented more than three years after the claimant attained majority is barred by limitation. (*Sreenivasa Iyer, O. C. J. and Mahadevayya, J.*) GOVERNMENT OF MYSORE *v.* ANANDARAYA MUDALIAR. **10 Mys.L. J. 323.**

——— **Ss. 54 and 96 A**—*Relative scope and effect of—Nature of charge created.*

S. 96 A of the Land Revenue Code in no way creates in all respects in favour of a superior holder a paramount charge similar to S. 54 of the Code (*A. S. R Chari and Sreenivasa Rao, JJ.*) NARASIMHACHAR *v.* NANJUNDA SASTRY. **13 Mys L.J. 477 = 40 Mys.H.C.R 374.**

——— **Ss. 86 and 87**—*Scope—Claim to abatement of rent—Prior enhancement under S.* 86 (a) *and* (b)—*If condition precedent.*

MYS. LAND REVENUE CODE (1888), S. 96 A.

A prior enhancement of rent on any of the grounds mentioned in Cls. (*a*) and (*b*) of S. 86 of the Mysore Land Revenue Code, is an essential pre-requisite to a claim for abatement of the rent under S. 87 (3) of the Code. When there has been no such enhancement, there is a legal impediment to the tenant's claim for abatement. (*Ramachandra Rao and Shankaranarayana Rao, J.*) PILLAPPA *v.* VENKATACHELLIAH. **13 Mys. L J. 7=39 Mys.H C.R. 1116.**

———**S. 96-A**—Charge of superior holder under—Nature—Suit to enforce—Procedure—Parties—Omission to implead person interested in holding sought to be charged—Effect. *See* MYSORE T. P. REGULATION, S. 100. **40 Mys.H.C.R. 374.**

———**S. 156**—*Distraint of movables.*

There is no provision in the Code to warrant the contention that distraint of movables can only be resorted to, after coercive measures against the land and standing crops had been taken (*Doraiswami Iyer, C.J.*) NARAYANA SETTY *v.* GOVERNMENT OF MYSORE. **9 Mys. L.J. 237.**

———**S. 160 and R. 96**—*Distraint order in proper form—Specific reference to movable property, not necessary.*

Reading S.160 and R. 96 together it is obvious that a warrant in the form given in Appendix J can only refer to movable property and not to other kinds of property. There is no necessity, however, for specific reference to movable property in the warrant. (*Doraiswami Iyer, C. J.*) NARAYANA SETTY *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 237.**

———**S. 160 and R. 96**—*Distraint order—Validity of—Order issued by Amildar but executed by Sheikdar out of his jurisdiction.*

Where a distraint order is issued by a the amildar having jurisdiction over the whole taluk including the place of residence of the defaulter, the fact that the distraint was effected by a Sheikhdar out of his jurisdiction does not affect the validity of the warrant. (*Doraiswami Iyer, C. J.*) NARAYANA SETTY *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 237.**

———**S 187**—*Applicability—Arrears of Takavi Loan—Recovery of—Procedure.*

The provisions of S. 187, Mysore Land Revenue Code, are not inapplicable to cases of recovery of a Takavi Loan. There is no justification for giving a section a restricted interpretation or operation. S. 197 of the Land Revenue Code distinctly provides that an advance made under the Land Improvements Loans Regulation shall be recoverable as if it were an arrear of land revenue. A sale for arrears of Takavi Loan and delivery of the land sold are therefore perfectly valid and binding and not void. (*Mahadevayya, C. J.*) VENKATACHAR *v.* REDDAPPA. **13 Mys L J. 112=39 Mys.H.C R. 1006.**

———**S. 187**—*Delivery proceedings under—Binding nature of.*

Delivery proceedings conducted by a competent Revenue Officer under the Revenue law must be deemed to be legally binding on the parties to the said proceedings. (*Mahadevayya, C. J.*) VENKATACHAR *v.* REDDAPPA. **13 Mys.L.J. 112=39 Mys.H C.R. 1006.**

———**S. 194**—Takavi loan—Recovery of—Procedure—S. 187—Applicability of. *See* MYSORE LAND REVENUE CODE REGULATION, S. 187. **13 Mys L.J. 112=39 Mys H C.R 1006.**

———**Ss 217 and 221(f)**—*Order relating to waste land—Suit to impeach—Maintainability—Regulation VII of 1923, S. 2.*

MYS. LAND REVENUE CODE (1888), S. 226.

Where the Government passed orders under the Darkast rules affirming the order of Revenue Commissioner dividing certain waste or vacant lands equally between the plaintiff and the defendant and it was admitted that the land was still in the possession of Government at the time the order was passed.

Held, that the order fell under the Land Revenue Code and that a suit was not maintainable to impeach the same under S. 2 of the Regulation VII of 1923. **14** Mys. C. C. R. 255, Ref. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) MALLE GOWDA *v* NANJE GOWDA. **36 Mys. H C.R. 493=9 Mys.L J. 358.**

———**S. 221**—*Regulation of water supply—Right of Government.*

The duty of regulating the water supply to wet lands from a Government source rests exclusively in the executive officers of Government and the owners of lands classed as dry in the settlement, even if willing to pay water rates, have no preferential right over holders of wet lands under that source. (*Doraiswami Iyer, C.J., Mahadevayya and Ramachandra Rao, JJ.*) BHOSE *v.* LINGAPPA. **38 Mys. H.C.R. 467=11 Mys. L.J. 26 (F.B).**

———**S. 221 (c)**—*Applicability—Default in payment of quit-rent by some vrittidars—Sale of entire village—Suit to declare null and void—Bar of.*

A suit to declare null and void the sale of an entire village for default of certain jodidars of the village only in payment of their share of the quit-rent, and praying that the purchaser may be directed to deliver back possession of the plaintiff's share of the lands is barred under S 221 (*c*) of the Mysore Land Revenue Code. The suit is one "to set aside the sale," notwithstanding that the plaintiff asks only that it may be declared "null and void." The Government cannot be held to be in wrongful possession of the lands sold within the meaning of S. 2 of the Mysore Regulation VII of 1923. (*Mahadevayya, O. C J. and Ramachandra Rao, J.*) SURAPPA *v.* GOVERNMENT OF MYSORE. **39 Mys. H C.R. 547.**

———**S. 221, (f)**—*Bar to jurisdiction — Government waste land—Sale and delivery of possession—Sale subsequently set aside by Deputy Commissioner—Suit for specific performance by alienee—Maintainability.*

Certain unassessed Government waste land liable to be given to private individuals on sale on darkhast was sold to the appellant by the Amildar, saguvali chit given and possession delivered to him. This was confirmed by the Sub Divisional Officer but subseqently on discovery of certain other matters connected with the sale, the Deputy Commissioner, on the recommendation of the Sub-Divisional Officer, cancelled the sale and that was in turn confirmed by the Revenue Commissioner and the Government. The appellant brought the present suit for specific performance of the alleged contract between him and the Amildar.

Held, that the Civil Courts had no jurisdiction to entertain the suit as it was barred by S. 221 (*f*) of the Land Revenue Code. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) SREERAMA SEETHARAMA SETTY *v.* THE GOVERNMENT OF MYSORE. **37 Mys. H C R. 299=10 Mys.L.J. 47.**

———**S. 226**—Reference under—Power of Court to review order on. *See* MYSORE C. P CODE REGULATION, S. 141 AND O. 47, R. 1. **39 Mys. H.C R. 942.**

———**S 226**—*Question as to water rate—Reference—Validity.*

The Mysore Land Revenue Code is a consolidating Act and its provisions must be taken to be a complete codification of the law on the subject. The expression

MYS. LAND REVENUE CODE (1888), S. 236.

"land revenue" in Ch. XIV means all sums and payments in money or in kind received or claimable by or on behalf of Government from any person on account of land held or vested in him and any cess or rate authorized by Government under the provisions of any law for the time being in force. Water rate levied on lands in respect of Government water comes under land revenue and where the suit raised a question as to principle of the levy of cess the Government can make a reference (*Doraiswami Iyer, C.J., Mahadevayya and Ramachandra Rao, JJ.*) BHOSE *v.* LINGAPPA. **38 Mys. L.J. 467 (F.B)=11 Mys L J. 26 (F.B).**

——**Ss. 236 and 237**—*Inam Villages—Survey settlement—Introduction of—Effect on previous leases and contracts.*

The introduction of survey settlement in inam villages does not affect or supersede the prviously existing leases or contracts between the superior and inferior holders of land in the villages. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) VEKATARAMANA *v.* JAYACHAR. **12 Mys. L.J. 129.**

——**S. 237**—*Applicability—If confined to* kadim *tenants.*

S. 237, Mysore Land Revenue Code, applies only to *kadim* tenants. In the case of the other tenants,the pro viso makes it clear that their position is unaffected by the settlement. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) VENKATRAMANA *v.* JAYACHAR. **12 Mys L J. 129.**

MYSORE LEGAL PRACTITIONERS' REGULATION—*Enquiry into misconduct—Charge of—Misappropriation — Criminal prosecution — If condition precedent.*

It is not necessary, to attract the provisions of the Legal Practitioners' Regulation that the act of misconduct should be a "crime." Nor is it open to a legal practitioner charged with appropriation of his client's money to ask the Court to order his criminal prosecution before holding an enquiry under the Regulation. Such a claim is not only untenable, but also opposed to the policy underlying the Regulation. A legal practitioner is an officer of the Court and owes the duty of good faith and honourable dealing to the Courts before which he practises, and his vocation demands that he must cooperate with and assist the Court to do justice. When, therefore, he is found guilty of misconduct which makes him unfit or unsafe, he becomes unfit to discharge the duties of his office and unworthty of confidence, whether or not the misconduct amounts to a "crime." (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys. L.J. 292=39 Mys. H C.R. 380.**

——**(III of 1884)**—*Order under—Review.*

The Legal Practitioners' Act is a self-contained enactment and as it does not provide for review no application for review of an order under the Regulation is maintainable. (*Mahadevayya, O.C.J.*) RANGA RAO, *Inre.* **11 Mys. L.J. 385=39 Mys.H.C.R. 217.**

——*Proceedings under — Applicability of — C. P Code.*

The Legal Practitioners' Regulation is a consolidated law relating to legal practitioners, and is self-contained not only as regards the matters to be dealt with but also as regads the procedure to be adopted as well as the remedies open to an aggrieved party. The provisions of the C. P. Code, are not applicable to an enquiry under the Legal Practitioners' Regulation. (*Mahadevayya, C. J., Shankaranarayana Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys. L.J. 292=39 Mys. H.C.R. 380.**

MYS. LEGAL PRACTI. REG. (1884), S. 11 (f).

——*Proceedings under—Necessity for promptness and expedition.*

Proceedings under the Legal Practitioners' Regulation must be prompt and expeditious. Judges ought to give their first attention to such case and quickly dispose of them. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO *In the case of.* **12 Mys. L. J. 292=39 Mys. H.C.R. 380.**

—— *Proceedings unaer—Revision of interlocutory order in.*

A petition for revision of an interlocutory order passed by a Subordinate Judge in an inquiry under the Legal Practitioners' Regulation is not maintainable under the law. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO, *In the case of.* **12 Mys. L.J.292=39 Mys H.C R. 380.**

——**Ss. 9 and 11**—*Appearance without renewal of sanad.*

Appearance in Court and conducting cases on behalf of clients without obtaining renewal of sanad is highly unworthy of a legal practitioner and requires severe condemnation. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) A PLEADER, *In the matter of.* **36 Mys. H. C.R. 383=9 Mys. L.J. 481.**

——**S. 11 (as amended by X of 1928)**—*Misappropriation by advocate client's money—Fraud—Misconduct—False plea at enquiry—Liability to be proceeded against.*

An advocate of the High Court, acting dishonestly in his dealings with his clients, took a larger sum from them by making a false representation regarding the Court-fee payable to the Court and subsequently neglected their case. At the enquiry into his conduct he raised inconsistent and false pleas and acted dishonourably in his conduct towards the advocate for his former client and also towards his own advocate.

Held, that the advocate was guilty of fraud and gross misconduct, and that his character was such as to unfit him to be a member of the profession, and that he was liable to disciplinary action under S. 11 of the Legal practitioners' Regulation. (*Mahadevayya O. C. J. and Ramachandra Rao, J.*) PRAGAJI JETHAJI & CO. *v.* RANGA RAO. **12 Mys.L.J. 222=39 Mys. H. C. R. 203.**

——**S. 11**—*Preliminary enquiry—If mandatory.*

A preliminary enquiry is not mandatory under S. 11, Mysore Legal Practitioner's Regulation; the question is entirely in the discretion of the High Court. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) B. SRINIVASA IYENGAR. *In the case of.* **12 Mys.L.J. 311=39 Mys.H.C R. 461.**

——**S. 11**—*Proceedings under—Nature of—Applicability of C. P. Code and Cr. P Code—Formal charges —If to be framed.*

Proceedings under S. 11, Mysore Legal Practitioners' Regulation are special proceedings resulting from the inherent power of the Court over its officers, the provisions either the C. P. Code or the Cr. P. Code are inapplicable to such proceedings, S. 11 does not contemplate the framing of formal charges as in the case of accused persons. The form of procedure in such cases is not of controlling importance so long as the essentials of fair notice and opportunity to be heard are present. The Court has inherent power to adopt such rules of procedure as will ensure a fair trial. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) B. SRINIVASA IYENGAR, *In the case of.* **12 Mys.L.J. 311=39 Mys. H.C R. 461.**

——**S. 11 (f)**—*Improper conduct—Signing and filing pleadings containing scandalous and reckless allegations—Propriety of.*

MYS. LEGAL PRACTI. REG. (1884), S. 13-B.

A legal practitioner who signs and files in Court on behalf of his client a written statement containing reckless and scandalous allegations against a party, which are quite unnecessary for the purpose of the case acts improperly. He is an office of the Court and ought not to allow his client to indulge in such allegations. Nor is he to act merely as the mouthpiece of his client without acting on his own independent judgment and responsibility. Nor can a legal practitioner disown responsibility on the ground that he mechanically signed the statement without reading it and presented it before the Court. (*Mahadevayya, C. J and Shankaranarayana Rao, J.*) CHINNAMMAL NANJAPPA *v.* VENKATA RAO. **39 Mys.H C.R 627=12 Mys L J. 441.**

——**S. 13 B** —*Disciplinary jurisdiction of the High Court—Scope of—"Any other reasonable cause"—Meaning of.*

A High Court in the exercise of its powers of disciplinary jurisdiction over the advocates or pleaders enrolled by it, is not restricted to taking cognizance of merely acts of professional misconduct such as are expressly specified in the Legal Practitioners' Regulation The words "any other reasonable cause" in the section are wide enough to include acts other than those done in a professional capacity. Thus the High Court can disenrol an advocate for including the public into hatred and contempt of the Government.

But the purpose of the jurisdiction is not in any way vindictive Its main object is not to allow a person to practise in Courts, when he himself is counselling disobedience to the law and order enforced by the Courts; when, however, the person who may have offended in that way comes before the Court and honestly expresses his regret and intention to assist the administration of justice, there is no reason why he should not be given an opportunity of showing that his intentions are as he expresses them. 49 Cal. 845 (P.C.) and 45 M. L. J. 718, Ref. (*Doraiswami Iyer, C. J., Rama Rao and Sreenivasa Iyer, JJ*) DISTRICT MAGISTRATE, BANGALORE *v.* BHASHYAM IYENGAR. **36 Mys.H.C R. 229= 9 Mys L.J. 262 (F.B.).**

MYSORE LIMITATION REGULATION (IV OF 1911), Ss 4 to 25 —*"Prescribed"—Meaning.*

The only reasonable interpretation of the word "prescribed" in Ss. 4 to 25 of the Limitation Regulation is "prescribed by the first Schedule to the Regulation." (*Reilly, C. J. and A.S R. Chari, J.*) MOTIRAM LALA *v.* DEPUTY COMMISSIONER AND MUZRAI OFFICER, MYSORE DT. **13 Mys.L.J. 456=40 Mys.H C.R. 330.**

——**S. 5** —*Second appeal—Interference with the discretion of the lower Court.*

Whatever inferences the High Court, setting as a first appellate Court, may draw regarding the causes urged for the delay, it should not upset the decision of the lower appellate Court, if it is based upon a proper exercise of its discretion. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) THIMME GOWDA *v.* KEMPARASA. **10 Mys.L.J. 117.**

——**Ss. 5 and 14**—*Time taken up in unsuccessful application for review and revision—Delay—Condonation of.*

Where a party who ought to have appealed was, however, advised to apply for review and did so *bona fide*, and, on the rejection of that application, applied in revision and the Court rejected his application for rejection on the ground that his proper remedy was by way of appeal and he then filed the appeal long after the period

MYS. LIMITATION REG. (1911), S. 15.

Held, that in the circumstances the time taken up in the infructuous proceedings may either be deducted under S. 14 or the delay condoned under S. 5 of the Limitation Regulation. (*Doraiswami Iyer C.J. and Sreenivasa Iyer, J.*) BAGUMANE DEVA GOWDA *v.* SITARAMAIYA. **37 Mys.H C R 438=10 Mys.L J 173.**

——**Ss. 6 and 9**—*Death of decree-holder—Minority of legal representative—S. 6 not applicable.*

The benefit of S 6 can be availed of only when the person entitled to institute a suit or make an application for execution is, at the time from which the period of limitation is to be reckoned, a minor If, therefore, the decree-holder entitled to execute the decree was a major and on his death, his legal representatives happened to be minors, they are not entitled to the benefit of S. 6. Time having once began to run under S 9, no subsequent disability could stop it. 27 All. 704; 36 Bom. 498; 40 All 630 (F.B.). Foll. (*Rama Rao and Sreenivasa Iyer, JJ*) LAKKEGOWDA *v.* KEMPA. **36 Mys. H C.R. 340=9 Mys.L.J. 389.**

——**S. 12**—*Application for copies made after expiry of time for appeal—Date of signing decree—Computation of time from—Appellant not entitled.*

If an application for copies had been made before the decree was signed, the appellant would be entitled to Court in his favour the period between the date of the application and the date of signing the decree. But if the application for copies is made after the expiry of the period prescribed for an appeal, the appellant is not entitled to compute the time from the date of signing the decree. To claim the benefit of S. 12, the application for copy must be made before the time prescribed for appeal expires and the time requisite for obtaining the copy does not begin till the application for copy is made. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) BASAVACHARI *v.* NARASINGH. **37 Mys.H C.R 216= 10 Mys.L.J. 23.**

——**S 15**—*Applicability—Application under O. 21, R. 95, C P. Code, by decree-holder purchaser to be put in possession.*

An application by the decree-holder to be put in possession of the properties purchased by him in the execution sale is one which falls under S. 47, C. P. Code, and the provisions of S. 15 of the Limitation Regulation apply to it. So in computing the period of limitation, under Art. 180 of the Limitation Regulation for such an application, the period during which execution of the decree was stayed would be deducted. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) VENKATAKRISHNIENGAR *v.* KRISHNIENGAR. **37 Mys H.C R. 179= 10 Mys.L J. 208.**

——**S. 15**—*Applicability—Order in effect preventing further execution—Time taken in—Exclusion of.*

S. 15 is not confined to cases of direct stay or injunction but also applies to orders which indirectly but very proximately and effectually cause a stay. In order to determine whether execution has been stayed the substance and not the mere form of the orders must be looked at. Where in proceedings for execution of a decree against the judgment-debtor and the surety, the first Court overruled the objections of the surety and permitted the entire decree to be satisfied by the attachment of the surety's properties and on appeal by the surety, his liability was restricted to a portion, the order of the first Court is in effect one of stay and the time taken up by the proceedings against the surety must be deducted in computing the time for an application for execution for the balance against the judgment debtor. (*Doraiswami Iyer, C. J and Ramachandra Rao, J.*) VENKATAKRISHNA SETTY *v.* MAHOMED SAIT. **10**

MYS. LIMITATION REG. (1911), S. 15.

——**S. 15**—*Applicability— Prohibitory order preventing decree-holder from realising decree debt—If injunction.*

A prohibitory order restraining the decree holder from realising the decretal amount (the amount being unspecified) in effect prevents the decree-holder from realising the debt in the only way allowed by law, namely by seeking execution amounts to an injunction or order directing him not to put the decree in execution under S. 15, Limitation Regulation. S. 15 applies to such a case and the decree-holder is entitled to a deduction of time during which the prohibitory order is in force (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) PUTTANARASAYYA *v.* NARASIMHA MURTHI. 13 **Mys.L J. 126 = 39 Mys.H.C.R. 1051.**

——**S. 15**—*Scope—Stay of execution of part of decree—Deduction of period.*

An order staying execution of part of a decree is within S. 15, Limitation Regulation, and entitles the decree holder to deduct the period during which such order is in operation. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) PUTTANARASAYYA *v.* NARASIMHA MURTHI. **13 Mys L.J. 126 = 39 Mys H.C.R. 1051.**

——**S. 15 (2)**—*Applicability—Suit under Muzrai Regulation—Period of notice to Muzrai Officer—If deductible.*

In a suit under the Muzrai Regulation, the plaintiff is not entitled to a deduction of the time taken by a notice to the Muzrai Officer under S. 80, C. P. Code Regulation. To give a plaintiff the benefit of S. 15 (2) of the Limitation Regulation or a corresponding provision in order to exclude from the period of limitation prescribed fixed by a special law, such as the Muzrai Regulation, the time necessary for such a notice would be to affect the period of limitation so fixed by the special law. Prescribed in S. 16 (2) of the Limitation Regulation means prescribed by the first schedule to the Regulation and not prescribed by the Muzrai Regulation or by any special law. (*Reilly, C. J. and A. S. R. Chari, J.*) MOTIRAM LALA *v.* DEPUTY COMMISSIONER AND MUZRAI OFFICER, MYSORE. **13 Mys.L.J. 456 = 40 Mys H.C.R. 330.**

——**S. 18**—*Applicability—Benefit under—Right to—Burden of proof.*

When a party to a litigation has established fraud on the part of the other party beyond any doubt and alleges and proves distinctly that he knew of the fraud only two or three days prior to making his application, the burden is shifted to the party guilty of fraud to show that the first party had knowledge of the fraud beyond the period of limitation so as to exclude the operation of S. 18 of the Limitation Regulation. (*Mahadevayya C.J. and Shankaranarayana Rao, J.*) THIMMIAH *v.* MUDDAMMA. **12 Mys.L.J. 482 = 39 Mys H.C.R. 707.**

——**S. 19**—*Acknowledgment — Admission of liability.*

Where the defendant admitted having issued to the plaintiff a registered notice wherein he acknowledged his liability to pay to the plaintiff such sum as might be found due on a settlement of accounts

Held, that the notice may be said to contain a valid acknowledgment. (*Shankaranarayana Rao, J.*) MYDIN KUTTI *v.* ARKULA HAMMAD BERI. **11 Mys.L. J. 380 = 39 Mys.H.C.R. 92.**

——**S. 19**—*Acknowledgment—Sufficiency of.*

An endorsement on the agreement of the parties ran as follows:—"On 24-1 1927 I have delivered 40 pictures as specified in this bond and have received Rs. 202 8 0 being the balance after giving deduction to Rs. 40 in respect of these picture". The endorsement was in the

MYS. LIMITATION REG. (1911), S. 20.

writing of some other person and bore the signature of the defendant.

Held, that the endorsement amounted to an acknowledgment of liability under S. 19 (though not under S. 20) of the Limitation Regulation. (*Shankaranarayana Rao, J.*) GUNDACHARI *v.* RAMASETTY. **12 Mys.L. J. 37 = 39 Mys.H.C.R. 127.**

——**S. 19**—*Effect of acknowledgment—Substitution of new contract—Question of fact.*

An acknowledgment under S. 19 cannot be construed as a fresh contract in the same way in which a novated contract is construed so as to give rise to a fresh cause of action. It has the effect of extending the period of limitation for a like period which is provided for in regard to the recovery of the debt acknowledged. Whether there was an agreement to substitute a new contract or not is a question of fact. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) CHELUVE GOWDA *v.* KALE GOWDA. **11 Mys.L J. 196 = 38 Mys.H.C.R. 97.**

——**S. 19**—*Endorsement not stamped properly—Validity as acknowledgment.*

An endorsement is not inadmissible in evidence on the ground that it is not duly stamped as required by Art. 1, Sch. I of the Mysore Stamp Regulation, if it amounts to an acknowledgment under S. 19 of the Limitation Regulation. The word "acknowledgment" is used in two different senses in the Limitation Regulation and in the Stamp Act and an acknowledgment which is valid under the former may not amount to one under the latter. (*Shankaranarayana Rao, J.*) GUNDACHARI *v.* RAMASETTY. **12 Mys L.J. 37 = 39 Mys.H.C.R. 127.**

——**S. 19**—*Mortgage—Sale of mortgaged properties—Mortgagor ceasing to be liable under mortgage—Subsequent acknowledgment—Sufficiency of.*

An acknowledgment made by a mortgagor after all the mortgaged properties have been sold away and after he has ceased to be liable under the mortgage contract is not a valid acknowledgment and is of no avail to the mortgagee creditor; for an acknowledgment involves an admission of a subsisting relation of debtor and creditor and an intention to continue such relationship. That cannot exist when the mortgagor has ceased to be personally liable and has also no subsisting interest in the mortgaged properties. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) PATTABHIRAMACHAR *v.* PUTTABASAPPA. **13 Mys.L J. 153 = 39 Mys.H.C.R. 1165.**

——**S. 19, Expl. 1**— *Acknowledgment — Admission made in pleadings—Effect.*

A promise to pay is not a necessary ingredient of a valid acknowledgment. All that is required is a definite admission of liability. Admission in pleadings in prior suit held to amount to a valid acknowledgment. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) SAKAMMA *v.* NAGARAJIAH. **11 Mys.L.J. 90 = 38 Mys. H.C.R. 198.**

——**S. 20**—"*Agent duly authorized*"—*Acquisition of mortgaged property by Government—Payment of compensation money to mortgagee by Court—If saves limitation.*

A Court which makes a payment under Land Acquisition proceedings to a mortgagee in apportioning compensation money awarded in such proceedings between the mortgagor and mortgagee cannot be said to be the mortgagor's "agent duly authorized" within the meaning of S. 20 of the Limitation Act. Such a payment cannot therefore be used by the mortgagee to save the bar of limitation under the section. (*Reilly, C.J. and Shankaranarayana Rao, J.*) KARKHANE ABDUL RAHIMAN

MYS. LIMITATION REG. (1911), S. 20.

v. KHATIZABIYAMMA. **13 Mys.L.J. 87=40 Mys.H. C.R. 63.**

——**S. 20**—*Payment towards interest.*

The question whether a payment was made towards interest as such is one of fact and no hard and fast rule is possible. It is no doubt too broad a statement to make that whenever interest is due to a creditor a payment made by the debtor must be deemed to have been intended to do go in discharge of interest; yet whether a particular payment was for interest as to be decided or a consideration of all the circumstances of the case. The actual appropriation by the creditor is no criterion. (*Rama Rao and Ramachandra Rao, JJ.*) VEERABHADRADEVARU *v.* KADA. **8 Mys.L.J. 438=35 Mys H C.R. 273.**

——**S. 29 (b)**—'*Special law*"—*Meaning of—Muzrai Regulation—If special law.*

The "special law" contemplated by S. 29 (*b*) of the Limitation Regulation need not be a complete Code in itself; there is no justification for reading into S 29 (*b*) the words such as "complete Code in itself" in construing the words 'special law." The Mysore Muzrai Regulation (VI of 1913) is a special law within the meaning of S. 29 (*b*), though it is not a complete Code in itself. (*Reilly, C.J and A.S.R. Chari, J.*) MOTIRAM LALA *v.* DEPUTY COMMISSIONER AND MUZRAI OFFICER, MYSORE DT. **13 Mys L.J. 456=40 Mys.H.C.R. 330.**

——**Art. 14**—*Applicability—Executive order.*

An executive order by the Deputy Commissioner prohibiting a procession on the highway does not fall within Art. 14 and a suit for a declaration of the plaintiff's right to conduct the procession is not barred, even if brought more than one year from the date of that order. 32 I.C. 1107 and A.I.R. 1927 Mad 1167. (*Doraiswami Iyer, C.J and Sreenivasa Iyer, J.*) MADHAVA RAO *v.* THIRUKKAPPA. **9 Mys L.J. 417.**

——**Arts. 47 and 142**—*Simultaneous application of—Respective scope—Suit for possession by vendee of immovable property—Order under S. 145, Cr. P. Code, in favour of defendant—Suit by plaintiff—Limitation—Proof of possession within 12 years—Necessity.*

The effect of Art. 47 of the Limitation Regulation is that if a person brings a suit of the kind described in Art. 142 of the Regulation, he must bring it within the time prescribed by that article, but if he happens to be subject to a particular disqualification, *viz.*, that he is bound by an order under S. 145, Cr. P. Code, than he is under a disability which would not apply to an ordinary plaintiff bringing a suit under Art. 42 he must also bring his suit within three years of the Magistrate's order are required by Art. 47. He does not get any advantage out of Art. 47, which cannot be used to extend the period of limitation in his favour. On the contrary he is subject to a restriction not applicable to an ordinary plaintiff under Art. 142. The plaintiff must show both that he comes within time under Art. 47 and that he comes within time under Art. 142. In other words more than one bar of limitation can simultaneously exist, and both Arts. 47 and 142, can apply to a plaintiff at the same time; and the plaintiff coming to Court within three years of the order under S. 145, Cr. P. Code will not be absolved from proving possession and dispossession within 12 years. (*Reilly, C.J. and Shankaranarayana Rao, J.*) DADE SABI *v.* SANNA NINGAPPA. **13 Mys L.J 281=40 Mys.H.C. R. 291.**

——**Art. 52**—*Starting point under—Goods sent by railway—Suit for price of—"Date of delivery Meaning of.*

MYS LIMITATION REG. (1911), Art. 120.

In the case of goods sent by railway, it is the date of delivery of the railway receipt to the consignee that constitutes the "date of delivery of the goods" for purposes of Art. 52 of the Limitation Regulation. (*Shankaranarayana Rao, J.*) VASUDEVA SETTY *v.* LAKSHMINARAYANA SETTY. **13 Mys.L.J. 201=39 Mys.H. C.R. 1178.**

——**Art. 75**—*Instalment bond—Default clause—Starting point of limitation—Waiver—Acceptance of overdue instalment.*

Where a bond provides for payment by instalments and the creditor is empowered to recover the whole sum in the event of default in the payment of any instalment, the right to sue accrues, in the absence of a waiver on the part of the creditor on the date of the first default. Waiver may be implied from the conduct of the creditor which is inconsistent with the continuance of the right. Payment by the debtor after the due and acceptance by the creditor of the overdue instalment is sufficient evidence of waiver within the meaning of Art. 75. (Case law discussed.) (*Mahadevayya, J.*) KEMPEGOWDA *v.* CHANNEGOWDA. **10 Mys.L J. 348**

——**Art. 85**—*Starting point under—Account not kept according English or Hindu calendar year.*

Ordinarily, under Art. 85, Limitation Regulation, the starting point of limitation is the close of the year in which the last item proved or admitted is entered in the account. But in the case of an account in which the parties have not adopted either the English or the Hindu calendar year, is the date of the last item admitted or proved is the starting point of limitation. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) MOHAMED ZIYAULLA SAB *v.* KATUKARA HAYATH SAB. **12 Mys.L J. 459=39 Mys.H C.R. 638.**

——**Art. 85**—*Test of mutuality—Shifting balance—Striking of balance—Effect of.*

An account consisting of transactions on each side, creating independent obligations on the other and not merely receipt of money by one party and payment on account of the other, and indicating a course of business such as to give rise to reciprocal demands between the parties is a "mutual" open and current account. The test of a shifting balance is not always decisive of mutuality; nor is the absence of shifting balance conclusive proof against mutuality. Though there are striking of balances from time to time, when the dealings continue even after such striking of balances, the account is open and currentt, (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) MOHAMAD ZIYAULLA SAB *v.* KATUKARA HAYATH SAB. **12 Mys.L.J. 459=39 Mys.H.C. R 638.**

——**Art 116**—*Applicability—Registered sale deed—Discharge by vendee of vendor's liabilities—Sale void—Suit for refund of—Limitation—Starting point.*

Where a vendee under a registered deed of sale discharges the vendor's liabilities as required by the vendor in the sale deed, and sale is found to be void, because the vendor had no title to the properties sold, a suit by the vendee for recovery of the amounts paid by him is governed by Art. 116 of the Limitation Regulation, and the cause of action arises when the amounts are paid by him to discharge the debts of the vendor. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KRISHNAMACHAR *v.* KASAVACHAK. **12 Mys L.J. 288=39 Mys. H C.R. 374.**

——**Art. 120**—*Suit on quasi contract.*

A suit for relief under S. 70 of the Contract Act based on the obligation implied from the benefit conferred on the defendant falls under Art. 120. Art. 115 applies only to actions *ex contractu* and not to cases of

MYS. LIMITATION REG. (1911), Art. 127.

quasi contracts. 62 I.C. 615 and 43 M. L. J. 271, Ref. (*Doraswami Iyer, C.J. and Srinivasa Iyer, J.*) VENKATANARANAPPA *v.* ABDUL HUKH SAB. **9 Mys.L.J. 364.**

———**Art. 127**—*Hindu joint family—Exclusion of member—Adverse possession when complete.*

The position of a member of a Hindu joint family is much stronger than that of a co owner and in such a case his total exclusion from the joint family estate for more than the statutory period of 12 years is necessary. "Exclusion" in order to be effective involves not merely the actual physical act of ouster coupled with an intention to keep a person out of possession but also knowledge on the part of the person sought to be excluded. (*Mahadevayya, O.C.J. and Sankaranarayana Rao, J.*) GURULINGAPPA *v.* DYAVIAH. **11 Mys.L.J. 186.**

———**Art. 132**—Purchaser of part of mortgaged property—Payment of whole mortgage debt—Suit for contribution against purchasers of other part—Limitation—Starting point. *See* MYSORE T. P. REGULATION, S. 95. **40 Mys.H.C.R. 298.**

———**Art. 139**—*Determination of tenancy.*

The starting point under Art. 139 is when the tenancy is actually determined and not when the right to determine the tenancy accrued to the landlord. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) BALAJI SINGH *v.* BABA RAO. **37 Mys.H.C.R. 175=10 Mys L J. 205.**

———**Art. 142**—Applicability—Suit for possession after order under S. 145, Cr P. Code—Suit in time as regards order under Art. 145, Cr. P. Code—Possession and dispossession within 12 years—If to be proved. *See* MYSORE LIMITATION REGULATION, ARTS. 47 AND 142. **13 Mys.L J. 281=40 Mys.H.C.R. 291.**

———**Arts. 142 and 144**—*Applicability—Vendee of immovable property—Dispossession under order of Magistrate under S. 145, Cr P. Code—Suit for possession—Allegation that plaintiff as well as vendor in actual possession until dispossession.*

A suit for possession by a vendee of immovable property who has been dispossessed by the defendant under an order passed under S. 145, Cr. P. Code, alleging that the plaintiff's vendor and after his purchase the plaintiff were in actual possession of the property until the dispossession in pursuance of the Magistrate's order, is governed by Art. 142 and not Art. 144 of the Limitation Regulation. Art. 144, being a residuary article, should be applied only when no other article of the Regulation applies. To apply Art. 142, it is not necessary that the dispossession complained of should be at the instance of the defendant. The Article also covers a case discontinuance of possession from any cause whatever (*Reilly, C.J. and Shankaranarayana Rao, J.*) DADE SABI *v.* SANNA NINGAPPA. **13 Mys.L.J. 281=40 Mys.H.C.R. 291.**

———**Art. 144**—Applicability—Vendee of immovable property—Adverse order under S. 145, Cr. P. Code—Suit for possession—Allegation that plaintiff and before him, vendor were in actual possession until order of Magistrate—Limitation. *See* MYSORE LIMITATION REGULATION, ARTS. 142 AND 144. **13 Mys. L.J. 281=43 Mys H C.R. 291.**

———**Art. 144**—*Onus.*

A suit based on title against the defendants who were proved to be in possession thereof for some years as lessees is governed by Art. 144. In such a suit, the initial onus of the plaintiff is to establish only his title and he is not under an obligation to prove his possession within twelve years of the suit. On the contrary, when plaintiff's title has been proved, or is admitted, the

MYS. LIMITATION REG. (1911), Art. 166.

burden is on the defendant to establish that he or persons through whom he claims have been in possession adverse to the plaintiff or to plaintiff's predecessors for over twelve years before suit. The defendant must also prove *when* his possession became adverse. (Case-law referred.) (*Mahadevayya and Ramachandra Rao, JJ.*) BACHAPPA *v.* SONAPPA. **12 Mys.L.J. 171=39 Mys.H.C.R. 7.**

———**Art. 156**—*Starting point under—Date of decree—Decree bearing date different from date of judgment—Computation of time.*

The time limited for filing an appeal under Art. **156** of the Limitation Regulation from the date that the decree bears, and it is from that time has to be computed, although the decree bears a date different from that of the judgment and although the decree is drawn up more than two years after the judgment. The starting point of time does not in any way depend upon the rules of the C.P. Code as to what should be done in drawing up judgments and decrees, *i.e.*, O. 20, R. 7, C. P. Code, which says that the decree must bear the same date as the judgment cannot alter the starting point or period of limitation in a case where the decree bears a different date from that of the judgment. The decree cannot be regarded as having been made, by some fiction, on the date of the judgment itself. (*Reilly, C J. and Srinivasa Rao, J.*) ADINARAYANA SETTY *v.* VENKATARAMANIAH. **13 Mys L.J. 223=40 Mys H.C.R. 455.**

———**Art. 164**—*'Knowledge of the decree'—Meaning.*

The expression 'knowledge of the decree' in Art. 164 means knowledge of the particular decree though it does not include the knowledge of all the contents of the decree. The fact that the information available might have put the party on enquiry does not impose on him any obligation to enquire further. What is 'knowledge of the decree' is always a question of fact, knowledge imputed from the date when the party obtained copies of the decree. (*Shankaranarayana Rao, J.*) HUGOVINA RAMAKKA *v.* SAKALA SANJEEVIAH. **11 Mys.L.J. 193=38 Mys.H.C.R. 396.**

———**Art. 166**—*Applicability—Application to set aside execution sale for fraud.*

An application to set aside a sale in execution for fraud is governed by Art. 166 of the Limitation Regulation. To make the case out of that article, fraud must be implied to the decree-holder and not to a third party (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) KYATA *v.* SRIKANTASROUTI. **10 Mys L.J. 137.**

———**Arts. 166 and 181**—*Application to set aside execution sale—Allegation of fraud in estimating value of the property—Limitation.*

An application for setting aside an execution sale on the ground of fraud in estimating the value of the property is governed by Art. 166 and not 181 of the Limitation Regulation. Fraud in estimating the value of the property, which is to be regarded as fraud in the publication or conduct of the sale falls under Art. 166 and not under Art. 181. (*Reilly, C.J. and Shankaranarayana Rao, J.*) RANGIAH *v.* REVAIAH. **13 Mys L.J. 271=40 Mys H.C R 187.**

———**Art. 166**—*Date of sale—Bid subject to acceptance by Court.*

Where at an execution sale the decree-holder is permitted to bid, subject to the acceptance of his bid by the Court, the date on which his bid was accepted by the Court and not the date of the sale itself is the starting point of limitation under Art 166. 35 A. 65; 2 Pat. 548; 68 I. C. 305; A. I. R. 1930 Lah 41, Foll. (*Doraswami Iyer, C. J. and Rama Rao, J.*) RACHA. *v.* NARASIMHACHAR. **9 Mys.L.J. 160=36 Mys.H.C.R. 284.**

MYS LIMITATION REG. (1911), Art. 166.

———**Art. 166**—*Application under O. 21, R. 90 of C. P. Cod —Objections of judgment-debtor disallowed—Appeal and interim stay—Stay subsequently discharged —Sale—Application to set aside—Limitation.*

Where the objections preferred by the judgment-debtor to the execution sale were disallowed by the lower Court which directed the sale to be held on the 14th July. The sale was actually held on that date but on the 21st July, the judgment-debtor who had filed an appeal obtained interim stay which, however, was discharged on 13th September as the judgment-debtor did not furnish security. After several other infructuous proceedings, the present application under O. 21, R.90 was presented nearly four years later.

Held, that what was stayed by the High Court was the confirmation of the sale and not the sale itself which had already taken place, that the application was governed by Art. 166 and out of time (*Doraswami Iyer, C.J. and Ramachandra Rao J.*) SRIRANGAPPA *v.* ABDUL KHADER SAB. **10 Mys L.J. 141=37 Mys H. C.R. 336.**

———**Art. 167**—*Applicability—Decree for possession—Application for delivery—Obstruction by person claiming under judgment debtor and at his instigation—Subsequent application for delivery—Fresh obstruction —Application for removal—Limitation.*

The holder of a decree for possession who is obstructed in taking delivery of possession of the property under O. 21, R. 35, C. P. Code, by a person claiming under a judgment-debtor or at his instigation is not bound to apply for removal of the obstruction within the period of 30 days rescribed by Art. 67 of the Limitation Regulation. Even after the period of 30 days of such obstruction he is entitled to file as many applications as might be necessary, and can also apply for removal of obstruction caused on a second or subsequent occasion. His application for removal of such obstruction falls not under O. 21, R 97, C. P. Code, but under S. 47, C. P. Code. (*Ramachandra Rao and Shankaranarayana Rao JJ.*) GURUMURTHAPPA *v.* SIDDALINGAPPA. **40 Mys H.C.R. 1.**

———**Art. 176**—*Applicability—Execution proceedings.*

Art. 176 of the Limitation Regulation applies only to applications in the course of a suit or appeal and not to applications in execution proceedings. (*Sreenivasa Rao. J.*) SUBBA RAO *v.* NADIG BHAGWANTA RAO. **13 Mys L J. 524=40 Mys H C.R. 410.**

———**Art. 176**—Death of plaintiff—Application by some only of the legal representatives in time—Application by others beyond time—If saved—Order—If relates back. *See* MYSORE C P. CODE REGULATION, O. 22, R. 3. **13 Mys.L.J. 66=39 Mys.H C R. 1125.**

———**Art. 181**—*Applicability—Application for final decree in mortgage suit.*

The limitation applicable to an application for a final decree for sale in a mortgage suit is Art. 181 of the Limitation Regulation. (*A S R. Chari, J.*) SUBBA RAO *v.* NAGENDRA RAYA. **13 Mys L.J. 287=40 Mys. H C.R. 9.**

———**Art. 181**—Applicability — Application to set aside sale—Fraud in estimating the value of the property *See* MYSORE LIMITATION REGULATION, ARTS. 166 AND 181 **13 Mys L.J. 271=40 Mys H.C.R. 187**

———**Art. 181**—*Application by purchaser for refund of purchase money—Starting point of limitation.*

When an execution purchaser makes an application for refund of purchase-money on the ground of want of interest of the judgment debtor in the property sold, the case falls within Art. 181 of the Limitation Regulation and time runs from the date of the final decision that the sale passed no saleable interest to the purchaser. 47 M. 288 and 54 C. 419, Ref. (*Mahadevayya, J.*) HULEKERE SANGAPPA, *In re.* **10 Mys.L.J. 298.**

MYS. LIMITATION REG. (1911), Art. 182.

———**Art. 181**—*Application for execution against judgment-debtor and surety— Application allowed against surety and that against judgment debtor dismissed—Subsequent application against judgment debtor— Application to revive prior application.*

The decree-holder applied for execution of his decree against the judgment debtor and the surety. The surety paid the amount in Court but claimed his liability was confined to a portion only of the decree. His objection was overruled by the Munsif who recorded satisfaction of the entire decree and dismissed the application against the judgment-debtor. On appeal, the surety's liability was reduced and the decree-holder thereupon applied for execution for the balance against the judgment-debtor,

Held, that the time taken up in proceedings against the surety should be deducted under S. 15; and that the second application should be deemed to be a continuation or revival of the earlier application, even though the earlier application had been dismissed. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) VENKATAKRISHNA SETTY *v.* MAHOMED SAIT. **10 Mys. L.J. 410.**

———**Art. 182 (2)**—"*Appeal*"—*Meaning —Order of revision petition—If creates fresh starting point.*

An order passed by the High Court in revision is not an order on an "appeal" under Art. 182 (2), Limitation Regulation, so as to create a fresh starting point of limitation. (*Ramachandra Rao and Shankaranayana Rao, JJ.*) SANJEEVA RAO *v.* SOMAYYA **12 Mys. L.J. 122=39 Mys.H C.R. 254.**

———**Art. 182 (5) (as amended by Regulation V of 1928)**—*Application for execution barred under old regulation—Amendment extending period of limitation—Effect.*

Where a remedy is barred under the existing enactment it cannot be revived by a subsequent amending enactment. So if the right to apply for execution has become barred under Art. 182, Cl. (5) as having been made more than three years after the last step in-aid, the subsequent amendment of the section extending the period of limitation to three years from the date of the *final order* passed on the application does not enable the right to be revived. (Case-law discussed.) (*Doraswami Iyer, C.J. and Rama Rao. J.*) KADUR KALAPPA *v.* KARE GOWDA. **36 Mys.H.C.R. 424=9 Mys. L J. 328.**

———**Art. 182 (5)**—"*Application in accordance with law*"—*Salary exempt from attachment—Application for attachment of—Validity of.*

If the particulars required by O. 21, Rr 11 to 14 were furnished, an application is one in accordance with law. It does not cease to be so merely for the reason that it prayed for the attachment of a salary which, under S. 60 (*j*) of the C. P. Code, was exempt from attachment. (*Ramachandra Rao, J.*) MAHOMED HUSSAIN SAB *v.* MAHOMED ISAK ABDUL RAHIMAN AHAMAD SAIT CO. **10 Mys. L.J. 339.**

———**Art. 182 (5)**—*Step-in aid of execution—Application by assignee for recognition of assignment.*

An application by an assignee for recognition of his assignment is a step in-aid of execution and the fact that it is thrown out finally is of no consequence. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) VENKATAPPA *v.* MANJANATHA PURANIK. **38 Mys.H.C.R. 171=11 Mys. L J. 238.**

MYS. LIMITATION REG. (1911), Art. 182.

———**Art. 182 (5)**—*Step in-aid of execution—Application for execution of decree against surety.*

An application for execution of a decrree against the surety for a judgment-debtor can be taken to be a step in aid of execution as against the judgment-debtor himself. The proceedings against the surety is but one of the several means by which money is realised from or on behalf of the judgment-debtor. (*Rama Rao and Srinivasa Iyer, JJ.*) MAHADEVAKKA *v.* MAHADEVAPPA. **36 Mys.H.C.R. 483=9 Mys.L J. 479.**

———**Art. 182 (6)**—*Step-in-aid—Application under S.* 50 (1) *to transferee Court.*

An application under S. 50 (1) to bring on record the legal representatives of the deceased made to the Court to which the decree is transferred for execution is a step-in aid of execution. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) KRISHNAYYA SETTY *v.* NANJA. **10 Mys.L J. 459.**

MYSORE MINOR MUNICIPALITIES REGULATION (IX OF 1933), S. 11—*Appeal—Order refusing injunction—If appealable.*

There is no right of appeal from an interlocutory order passed by the Court under S. 11 of the Mysore Minor Municipalities Regulation, refusing to grant a temporary injunction in an election dispute. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) ABDUL AZEEZ SAB *v.* BASHEER AHMED. **13 Mys.L.J. 116=39 Mys.H C.R. 1019.**

———**S. 11 (2)**—*Jurisdiction of Civil Court to grant injunction in election cases.*

The jurisdiction exercised by a Civil Court in respect of elections under S. 11 of the Mysore Minor Municipalities Regulation is of a very restricted character. S. 11 (2), no doubt, lays down that the C.P. Code, shall, as far as possible, be followed in inquires under that section. But the granting of a temporary injunction in such proceedings is not for the purposes of, or in furtherance of, the inquiry which a Court is authorized to hold under the section; and in the absence of clear words to that effect, the powers conferred on a Civil Court under S. 94 (*c*) and O. 39, C.P. Code, cannot be exercised within the limited jurisdiction conferred by S. 11 (2). (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) ABDUL AZEEZ SAB *v.* BASHEER AHMED. **13 Mys.L J. 116=39 Mys.H C.R. 1019.**

MYSORE MOTOR VEHICLES REGULATION (XVI OF 1928), S. 16—*Motor Vehicle Rules* (1924), *Rr.* 13 *and* 27—*Infringement of—Single sentence for both offences—Legality.*

On a conviction under S. 16, Motor Vehicles Regulation, for offences for infringement of Rr. 13 and 27 of the Motor Vehicles Rules, a single sentence of fine for both offences is not legal. The Magistrate must award separate sentences for each of the offences, as there is nothing in common between them. (*A.S.R. Chari, J.*) ANJANAPPA *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 330=40 Mys H.C.R. 102.**

———**S. 16**—*Rules framed under—R.* 27—*Violation of—Punishable.*

A rule issued by an executive authority in exercise of the power conferred by statute must be deemed to be a part of the law as if it had been incorporated within the body of the statute. The violation of R. 27 of the Rules framed under S. 16 of the Motor Vehicles Regulation is punishable under the Regulation. (*Mahadevayya, J.*) RAMACHANDRIAH, *In re.* **10 Mys.L.J. 225.**

———**S. 16**—*Motor Vehicles Rules* (1924), *R.* 27-*H*—*Violation of condition* 3 *of "G" permit and condition* 7 *of "H" permit—Offence—Liability of conductor to conviction.*

MYS. MUNICIPAL REG. (1906), S. 59.

The conductor of a motor bus cannot be convicted of an offence under S. 16 of the Motor Vehicles Regulation for breach of condition 3 of the "G" permit or of condition 7 of "H" permit, for failure to carry the "G"permit on the vehicle or for failure to produce it when demanded by the police. (*A.S.R. Chari, J.*) MANJAPPA *v* GOVERNMENT OF MYSORE. **13 Mys.L.J. 298=40 Mys.H C.R. 25.**

MYSORE MOTOR VEHICLE RULES, R. 26—*"G" permit—Condition* 6—*Period allowed for plying without examination.*

An examination as to the fitness of the vehicle must take place once at least in 3 months and the maximum period during which it can be plied for hire after one examination and before another is three months. (*Doraswami Iyer, C.J. and Rama Rao, J.*) GOVERNMENT OF MYSORE *v.* PEER SAB. **35 Mys C.C.R. 402 =8 Mys. L.J. 428.**

———**R. 27**—*Infringement of offence—Conviction—Sustainability—Absence of absolute prohibition of passengers in "G" permit—Effect.*

When there is no absolute prohibition in the "G" permit for the conveyance of passengers a conviction for a violation of R. 27 of the Motor Vehicle Rules cannot stand. (*A S. R. Chari, J*) ANJANAPPA *v.* GOVERNMENT OF MYSORE. **40 Mys.H.C.R. 102=13 Mys L.J. 330.**

MYSORE MUNICIPAL REGULATION (VI OF 1906), S. 3 (8)—*"Building"—Cross-wall in hall inside a building.*

S. 3 (8), Mysore Municipal Regulation, does not make a distinction between internal and external walls. The construction of cross walls in a hall within a building, so as to make the hall into several rooms amounts to the construction of a building within the meaning of S. 3 (8) (*Mahadevayya, C.J.*) ANDANOOR MUPPANNA *v* MUNICIPALITY, DEVANGERE. **39 Mys.H.C.R. 1160 =12 Mys.L J. 449.**

———**S. 48 (1) (jj)**—*Vehicle kept within municipality but used outside—Non-registration—Offence—Liability to conviction.*

Under S. 48 (1) (*jj*) of the Municipal Regulation, all vehicles which are kept within the municipal limits for use as distinct from those kept for purposes of display or advertisement or merely for sale, have to be registered ; and failure to do is an offence punishable under the clause. It is not necessary to sustain a conviction under the section that the vehicle must also be used within the municipal limits. (*Shankaranarayana Rao, J.*) BASAVARAJ URS *v.* MYSORE CITY MUNICIPALITY. **40 Mys H C.R. 167=13 Mys L.J. 360.**

———**Ss. 59 (b) (iii) and 48 (1) (jj)**—*Car kept for sale—Exemption.*

A car kept by the accused, a dealer in cars, solely for sale is exempt from taxation and the fact that is sometimes used for purpose of demonstration does not render the accused guilty of an offence under R 1 of the rules framed under S. 48 (i) (*jj*) of the Regulation. (*Doraswami Iyer, C. J. and Srinivasa Iyer, J.*) GOVERNMENT OF MYSORE *v.* GARUDACHAR. **36 Mys.H.C. R. 301=9 Mys.L.J. 91.**

———**Ss. 59 (b) (iii) and 48 (1) (jj) and rules framed thereunder**—*"Kept for use"—Spare bus kept ready to replace any bus in repair—Necessity of registration.*

The respondent who was carrying on the business of a bus service was keeping for hire nine buses and a tenth bus as a standy to replace any one of the buses which might temporarily be disabled for service. He had not taken a licence for the spare bus and claimed

MYS. MUNICIPAL REG. (1906), S. 92.

exemption that the spare bus, if and when used, was only in replacement of another licensed bus.

Held, the tenth bus must be deemed to have been 'kept for use' within the Municipality and required registration under the rules framed under S. 48. *London County Council* v. *Fairbank*, (1911) 2 K. B. 32, Foll. (*Duraswami Iyer, C. J. and Srinivasa Iyer, J.*) GOVERNMENT OF MYSORE *v.* GARUDACHAR. **36 Mys.H.C.R. 301=9 Mys.L.J. 91.**

———**S. 92**—*Condition regarding set back of frontage—No regular line prescribed—No proof of projected—Conviction for breach of condition—Legality of.*

The Municipal Council has, under S. 92, power to require that when a portion of a building projects beyond the regular line of a public street, such building when being rebuilt, shall be set back to or towards the regular line. But such power can be exercised where a regular line of a public street has already been prescribed or any new alignment for the future has been determined upon, as required by law Where the Municipality has neither prescribed a regular line of street nor taken any steps to prescribe any such line in future and there is nothing to show that the newly constructed wall projected beyond the front of any adjoining line but on the other land it was proved that the rebuilt wall was only a continuation of another part of the same wall already in existence, the condition imposed by the Municipality is not legal and the conviction of the petitioner for violation of such a condition cannot be sustained. (*Shankaranarayana Rao, J.*) SANJEEVIAH *v.* BANGALORE CITY MUNICIPALITY. **39 Mys.H.C.R. 176=11 Mys.L.J. 463.**

———**S. 96**—*Land in inam within municipal limits—License to build upon—Necessity for.*

The accused was an inamdar. He constructed a room in his own land without obtaining a license from the Municipality under S. 96 of the Municipal Regulation. He was thereupon prosecuted for an offence under S. 96 of the Regulation.

Held, that by virtue of the notification of Government under S. 4 of the Municipal Regulation including the village in question within the limits of the Bangalore Municipality, the Municipality must be deemed to have acquired a statutory right to administer the newly constituted area for municipal purposes including sanitation, public health, etc., and that it was not open to the owner of a land to defy the powers of the Municipality and set up the rights of the inamdar as against the Municipality. Proprietary rights have to be distinguished from the rights of the Municipality with respect to the Municipal matters such as sanitation and public health. While the legislature has conferred statutory authority on the Municipality to exercise jurisdiction over the village in question for Municipal purposes there is no need for the Municipality to derive any rights from the inamdars for the purpose of discharging their statutory functions. The accused was therefore guilty of an offence under S. 96 for having built upon the land even though it was in his inam village. (*Mahadevayya, O.C.J. and Shankaranarayana Rao J.*) GOVERNMENT OF MYSORE *v.* SHAMANNA. **12 Mys L.J. 21.**

———**S. 96 (1) and (5)**—*Material alteration—Construction of cross-walls in hall—Notice—Necessity.*

There was only one hall in the house of the accused with one zinc sheet partition. Accused put up three brick walls inside the hall and converted the hall into four rooms. He did not give notice to the Municipality under S. 96 (1) of the Municipal Regulation, and when the Municipality served a notice on him to stop the construction, he did not stop it, but proceeded with the same. In a prosecution under S. 96 (5) of the Municipal Regulation, the accused pleaded that the alterations were only internal and not external and did not affect any drainage or ventilation or other sanitary arrangements, etc.

MYS. MUNICIPAL REG. (1906), S. 151.

Held, that the alterations were a material alteration, requiring notice under S. 96 (1), and that the accused was guilty under S. 96 (5) of the Municipal Regulation. (*Mahadevayya, C. J.*) ANDANOOR MUPPANNA *v.* MUNICIPALITY DEVANGERE. **39 Mys.H.C.R. 1160=12 Mys L.J. 449.**

———**S 96 (2)**—*Condition prohibiting opening of doors—Validity of.*

A condition in a license for construction prohibiting the applicant from opening new doors is not justified under S. 96 (2) when it cannot be said to be objectionable from the point of view of either sanitation or ventilation. (*Shankaranarayana Rao, J.*) SANJEEVIAH *v* BANGALORE CITY MUNICIPALITY. **39 Mys. H.C.R. 176=11 Mys.L.J. 463.**

———**S. 96 (5)**—*Construction of house—Conditions as to set-back imposed by Municipality—Breach of—Prosecution for—Validity of conditions to be proved.*

The petitioner was convicted under S. 96 (5) of the Mysore Municipal Regulation for constructing his house in violation of two conditions imposed by the Municipality in two respects: (*i*) by not setting back the wall; (*ii*) by opening two big shop doors facing a lane in spite of a direction to the contrary. The petitioner pleaded not guilty. No witnesses were examined; the accused was not examined under S. 342 but he was sentenced to a fine of Rs. 100.

Held, that as the accused should be presumed to be innocent until the charge is brought home by the prosecution, that the lower Court erred in assuming that the Municipality had the power to direct the set back and to prohibit the opening of doors under S. 92 and in the absence of any such proof, the conviction should be set aside. (*Shankaranarayana Rao, J.*) SANJEEVIAH *v.* BANGALORE CITY MUNICIPALITY. **39 Mys H.C.R. 176=11 Mys L J. 463.**

———**Ss. 120 and 135**—*Distinction.*

There is a broad difference between Ss. 120 and 135. The former is intended to provide for the cleansing of wells and tanks or other sources of water-supply used for drinking and S. 135 to wells or tanks or other stagnant water injurious to the health of the neighbourhood. The one is distinct from the other and any action taken or attempted to be taken under S. 135, coupled with S. 155 (*Duraswami Iyer, C.J. and Sreenivasa Iyer, J.*) GOVERNMENT OF MYSORE *v.* M.L. VASUDEVAIYA. **36 Mys H.C.R. 13=9 Mys.L. J. 135.**

———**S. 122 (1)**—*Encroachment—Nature of offence.*

The offence of building a projection encroaching on Municipal land is not continuing offence and so a prosecution under S. 122 (1) should be commenced within six months from the date it was built. 51 Bom. 818, Dist.; 56 Cal. 126, Foll; A.I.R. 1930 Bom. 320, Ref (*Duraswami Iyer, C. J. and Sreenivasa Iyer, J.*) VENKATRAMIAH *v.* BIRUR MUNICIPALITY. **35 Mys.H.C.R. 453=8 Mys.L J. 479.**

———**Ss. 151 and 152 (3)**—*Storing firewood without licence.*

The only conditions for a conviction under S. 152 (3) are (*i*) using without a license any place in the Municipality, for bye-laws have been framed requiring such license to be obtained; and (*ii*) the purpose for which the place is used must be one of the purposes mentioned in S 151. Storing of firewood without license comes within the meaning of Cl. (*n*) of S. 151 about storing of

MYS. MUNICIPAL REG. (1906), S. 161.

various combustible materials including wood and is an offence punishable under the section which has nothing to do with the question whether storing of firewood in a particular locality is or is not dangerous to the neighbours. (*Doraswami Iyer, C. J. and Sreenivasa Iyer J.*) GOVERNMENT OF MYSORE *v.* UMMAR KHAN. **9 Mys.L.J. 276.**

———**S. 161**—*Limitation—Notice under S.* 120—*Subsequent notice under S.* 135—*Prosecution more than six months after first notice.*

The Municipality issued a notice to the owner of a pond in 1927 under S. 120 and another notice under S. 135 in February, 1928, and in April, 1928, prosecuted him under S. 135. It was held as the notice under S. 135 was unconnected with that under S. 120, the period of six months for the prosecution under S. 135 must be computed from the date of the failure to comply with the requisition under S. 135 and so the prosecution was in time. (*Doraswami Iyer, C.J. and Sreenivasa Iyer, J.*) GOVERNMENT OF MYSORE *v.* M. L. VASUDEVAYYA. **36 Mys H.C.R. 13=9 Mys.L.J. 135.**

———**S. 161**—*Offence under Regulations—Prosecutions—Procedure.*

Under S. 161, the Municipal Council alone has the power to direct prosecutions for the offences named in that section. Such a direction can be proved by a resolution directing prosecution. (*Ramachandra Rao, J.*) KRISHNA RAO *v.* GOVINDA SING. **11 Mys.L.J. 268.**

———**S. 161**—*Offence under—Prosecution — Time limit.*

In the case of an offence under the Municipal Regulation the prosecution must show that the offence was committed within six months prior to the filing of the complaint. (*Ramachandra Rao, J.*) KRISHNA RAO *v.* GOVINDA SING. **11 Mys.L.J. 268.**

———**S. 161**—*Prosecution for encroachment—Limitation for—Extension of time by Municipality—Effect.*

A prosecution for so constructing a house has to project over Municipal land should be commenced within six months from the date of construction and no extension of time granted by the Municipality for cutting off the projection is effectual to save a prosecution commenced more than six months from the date of the construction from the bar of limitation 34 Cal 909; 37 Cal. 545; 48 Mad. 870, Ref. (*Doraswami Iyer, C J. and Rama Rao, J.*) VENKATRAMIAH *v.* BIRUR MUNICIPALITY. **35 Mys H.C.R. 453=8 Mys.L.J. 479.**

———**S. 162**—*Construction—"Defect"—Meaning of—Warrant of attachment unauthorized—Material defect if—Execution against wrong person—Assault by latter—Offence—Conviction under S.* 353, *I. P. Code—Sustainability.*

The "defect" or want of form in a warrant of attachment referred to in S. 162 of the Municipal Regulation is only one of form and not one that goes to the root of the matter. But a warrant issued under the Regulation has to be executed only against the person named in it and not against any one else; and an employee of a Municipality who takes action on the basis of a warrant issued by a person having no authority to issue it. or executes it against a person not named in it, or executes a warrant which is illegal in consequence of any material defect cannot but be deemed to be a trespasser. The employee in such a case cannot be held to be acting in the discharge of his duty as a public servant, and therefore the person committing an assault on the employee cannot be convicted under S. 353, I. P. Code, though he will be guilty of an offence under S. 352, I. P. Code.

MYS. NEG. INSTRUMENTS REG. (1917), S. 29.

(*Shankaranarayana Rao, J.*) SREENIVASA IYENGAR *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 376=40 Mys.H.C.R. 221.**

———**S. 167**—*Notice—Necessity for—Suit for injunction restraining the Municipality from demolishing building.*

In accordance with the permission granted by the Municipal Council, the plaintiff constructed a latrine. Subsequently the permission was cancelled and the plaintiff was served with a notice by the Municipality threatening him, if he failed to remove the latrine within fifteen days, it would be demolished departmentally. The plaintiff thereupon brought the present suit for an injunction to restrain the Municipal Council from demolishing the latrine. He contended that as the suit was only to restrain an apprehended injury with the future and not in respect of "anything done or purported to have been done," no notice was necessary under S. 167.

Held, that the construction applied to S. 80, C. P. Code, was equally applicable to S. 167 of the Municipal Regulation, that the words of the section included not only an act but also a threat to do an injurious act, that the threatened demolition was in pursuance of a prior resolution already communicated to the plaintiff—a past act which gave rise to a cause of action that notice under S. 167 was necessary. 51 Bom. 725 (P.C.), Foll. (*Doraswami Iyer, C. J. and Srinivasa Iyer, J.*) BANGALORE CITY MUNICIPALITY *v.* RAMASWAMIAH. **36 Mys H C R. 106=9 Mys.L.J. 187.**

MYSORE MUZRAI REGULATION (VI OF 1913), S. 12—Suit under—Limitation—Computation—Time taken for notice to Muzrai Officer—If can be excluded. *See* MYSORE LIMITATION REGULATION, S. 15 (2). **40 Mys.H.C.R. 330.**

———**S 19**—*Applicability—Trust in favour of temple—S.* 38—*Applicability.*

Where certain land was not conveyed to the temple but there was only a transfer of property to another person with a declaration of trust in favour of the temple, the land cannot be said to "belong" to the temple and Ss. 19 and 38 of the Regulation have no application to the case. (*Rama Rao and Srinivasa Iyer, JJ.*) NARAYANA BHATTA *v.* HALAPPA GOWDA. **36 Mys.H.C.R. 477=9 Mys.L.J. 472.**

———**S. 19**—*Scope.*

The words "may be recovered" denote that the provisions are not mandatory but enabling and permissive. (*Rama Rao and Srinivasa Iyer, JJ.*) NARAYANA BHATIA *v* HALAPPA GOWDA. **36 Mys.H.C.R. 477=9 Mys L.J. 472.**

———**S. 38**—*Applicability—Construction.*

S. 38 does not apply to a case where action is not taken under S. 19. Where two courses are open for the recovery of rent due to a Muzrai institution and the Regulation prohibits a Civil Court from taking cognizance of suits where one course is adopted by the officers of Government, the Regulation cannot be held to be applicable to cases which are outside the purview of that course. A statute which purports to oust the jurisdiction of the Civil Court must be very strictly construed. When there is no prohibition for the recovery of rent under ordinary law and no provision is made in regard to the recovery of rent due under a trust, the jurisdiction of Civil Courts cannot be held to have been taken away. (*Rama Rao and Srinivasa Iyer, JJ.*) NARAYANA BHATTA *v.* HALAPPA GOWDA. **36 Mys.H.C.R. 477=9 Mys L.J. 472.**

MYSORE NEGOTIABLE INSTRUMENTS REGULATION (VII OF 1917), S. 29—*Hindu widow—Endorsement of promissory note—Need for succession certificate or letters of administration.*

MYS. NEG. INSTRUMENTS REG. (1917), S 35.

The widow of a deceased Hindu dying without issue cannot negotiate a promissory note by endorsement but can do so only by obtaining letters of administration or a succession certificate. (*Doraswami Iyer. C. J.*) VENKATAPPA GOWDA *v.* VENKATACHAR. **11 Mys.L. J. 67.**

——**S. 35**—*Liability of indorser without notice of dishonour—Relevant considerations.*

Before an indorser who has not restricted recourse against himself can be held liable on the pro-note in the event of default by the maker even without any notice of dishonour, it must be distinctly found (*i*) whether there was any contract to the contrary as regards the liability of the indorser to the indorsee without a notice of dishonour; (*ii*) whether notice of dishonour was dispensed with by the indorser; (*iii*) whether the indorser could not suffer any damage for want of notice of dishonour; and (*iv*) whether the indorser, knowing the facts of the case, promised unconditionally to pay the amount due on the indorsement to the indorsee. (*Doraswami Iyer, C. J and Sreenivasa Iyer, J.*) GUNDAPPA *v.* BALAPPA SETTY. **37 Mys.H.C.R. 362 = 10 Mys L J. 405.**

——**S 46**—*Instrument delivered conditionally—Validity of.*

Under S. 46 as between parties standing in immediate relation, it may be shown that the instrument was delivered conditionally or for a special purpose only and not for the purpose of transferring absolutely the property therein. So a plea that a promissory note was after execution delivered to the plaintiff on the understanding that it should not be negotiable until after five years from the date of deposit may be permitted to be proved by evidence. (*Srinivasa Iyer, J.*) PALANIVELU MUDALIAR *v* MANICKAVELU MUDALIAR. **9 Mys L J 351**

——**S 52**—*Indorser—Personal liability—Exclusion of—Procedure.*

An indorser of a promissory note who intends to exclude his own liability as such on the instrument must follow the procedure laid down therefore in S. 52 of the Negotiable Instruments Regulation, III (*a*) of that section prescribes the nature of the indorsement to be made in such a case (*Mahadevayya, O C.J. and Shankaranarayana Rao, J.*) MUNISUBBIAH *v.* MUNGU MULL JESSASING SAIT. **12 Mys.L.J. 279 = 39 Mys H.C.R. 342**

——**S. 94**—*Notice of dishonour—Form of.*

It is only a formal notice of dishonour that is required, and under S. 94, Negotiable Instruments Regulation, it may even be oral. It may also be partly written and partly oral, and when written, may be supplemented or validated by oral communications. It may also be given in person. It may be in any form, no particular form or set of words being necessary. It is sufficient if the party sought to be made to be liable is informed, either in express terms or by implication, that the instrument has been dishonoured and that the holder looks to him for payment of the amount. (*Mahadevayya, O. C. J and Shankaranarayana Rao, J.*) MUNISUBBIAH *v* MUNGUMULL JESSASING SAIT. **12 Mys L J. 279 - 39 Mys H C R. 342.**

MYSORE PANCHAYAT REGULATION (II OF 1926), S 62—*Assault on Panchayat Inspector—Prosecution under Penal Code—Propriety.*

If sufficient punishment cannot be given under the special law, there is legally no prohibition to the sentence prescribed under the Penal Code being given by charging the accused with an offence under the Penal Code also. In case of an assault on the Panchayat Inspector while he was on duty, S. 62 of the Mysore Panchayat Regulation does not apply and a prosecution under the Penal Code is justified by S. 5 of the Penal Code, especially when S. 62 of the former Regulation does not prohibit prosecution under any other enactment. (*Doraswami Iyer, C. J.*) VEERABHADRACHARI, *In re.* **36 Mys H C.R. 72 = 9 Mys.L J. 156.**

MYSORE PARTITION REGULATION—*Act if exhaustive—Inherent power of Court—Refusal to divide property.*

The Court has independent of the Partition Regulation an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) SIDDAPPA SETTY *v.* KRISHNA SETTY. **11 Mys.L.J. 152.**

——**S 4**—"*Dwelling-house*"—*Meaning.*

The expression "a dwelling-house belonging to an undivided family" is intended to include a house belonging to the undivided family and fit for dwelling whether it is actually so used by it or not. It is the ownership of the dwelling house and not its occupation that brings the operation of S. 4 into play. (*Doraswami Iyer, C. J. and Mahadevayya, J.*) SIDDAPPA SETTY *v.* KRISHNA SETTY. **11 Mys L.J. 152.**

MYSORE POLICE REGULATION (V OF 1908), S. 4 (h)—*Street—Meaning*

The word 'street' is comprehensive enough to bring within its scope any place accessible to the public whether a thoroughfare or not. The only test to determine whether a place is a street or not is its accessibility to the public. (*Ramachandra Rao, J.*) RAMA SARMA *v.* GOVERNMENT OF MYSORE. **11 Mys.L.J. 86.**

——**Ss. 4 (1) and 63**—"*Common gaming house*"—*Ingredient necessary.*

One of the necessary ingredients of a common gaming house is that the owner or occupier charges some profit or gain for the use of the place or instruments of gaming. If the evidence does not establish that the instruments of gaming or the house were kept either 'for' or 'with a view to' the profit or gain of the person owning or occupying it, a conviction under S. 63 cannot be sustained. (*Doraswami Iyer, C.J.*) SANNAPPA *v.* GOVERNMENT OF MYSORE. **10 Mys L J. 99.**

——**S 38**—*Illegal warrant—Defective description of property—Effect of.*

If the house to be searched or the occupant thereof is not properly or correctly described in the warrant, the warrant is defective, and the presumption, which the explanations to S 63 give rise to, does not arise. But that does not prevent the prosecution from establishing by evidence in the ordinary way that on the facts proved, the accused was guilty of the offences charged. 50 B. 344: 37 Bom. 402 and 89 I.C. 396, Ref. (*Doraswami Iyer, C.J.*) SANNAPPA *v.* GOVERNMENT OF MYSORE. **10 Mys.L.J 99.**

——**S. 38**—*Warrant under—Validity of.*

It is not necessary for the validity of a warrant that the information given by the Inspector of Police should be made the basis for the issue of a warrant. All that is necessary is that the District Superintendent should certify that he had "reason to believe," *i.e.*, he acted upon credible information. It is immaterial from what source the information came. (*Doraswami Iyer, C.J.*) SANNAPPA *v* GOVERNMENT OF MYSORE. **10 Mys. L J 99.**

——**S. 38**—*Warrant under—Validity of.*

A warrant is not defective merely because it states that the information conveyed to the District Superintendent of Police was to the effect that gambling was going

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on and not that the house in question was used as a common gaming house. (*Doraswami Iyer, C.J.*) SANNAPPA *v.* GOVERNMENT OF MYSORE. **10 Mys.L. J. 99.**

——**S. 39**—*Order prohibiting picketing by non-peaceful methods—Presence of accused near liquor shop—Offence, if committed.*

Dissuading persons from visiting liquor shops by non-violent and peaceful methods with a view to improve their material and moral well being cannot be an offence. Where the object of the District Magistrate's order was to prevent the people from resorting to non-peaceful methods in furtherance of picketing which were likely to lead to a disturbance of the public peace or the commission of an offence,

Held, that the mere presence of the accused near the liquor shops in order to do picketing did not amount to a violation of the order. (*Shankaranarayana Rao, J.*) VITHOBA RAO *v.* GOVERNMENT OF MYSORE. **39 Mys.H.C.R. 221=11 Mys.L.J. 364.**

——**S. 39**—*Order under—Validity of.*

The District Magistrate, Mysore, passed an order under S. 39 of the Regulation, prohibiting the petitioner and another for a period of six months from delivering speeches within Mysore City in support of or sympathy with any foreign or local political movement as "such action" was likely to lead to disturbance of the public peace and to the resistance to or contempt of the law and lawful authorities.

Held, that the order was clear, self-contained and exhaustive and that the accused was guilty of an offence in having disobeyed the order. (*Mahadevayya, J.*) RAJAGOPALA IYENGAR, *In the case of.* **37 Mys. H.C R. 252=10 Mys.L J 271.**

——**S. 56**—"*Breach of the peace*" *- Meaning.*

There is no definition in the Penal Code or in the Cr. P. Code, of the expression "breach of the peace". But that phrase must be taken to convey the accepted meaning, namel , that it implies some offence against the public. (*Ramachandra Rao, J.*) RAMA SARMA *v.* GOVERNMENT OF MYSORE. **11 Mys.L J. 86.**

——**S. 56 (a)**—*Charge under—Cr. P. Code, S. 562 (1)—Procedure under—Applicability.*

The accused prosecuted for an offence under S. 56, Cl. (*a*) of the Mysore Police Regulation cannot be dealt with under S. 562 (*1*) of the Cr. P. Code, as the latter is confined to offences under the Penal Code and does not also apply to offences punishable only with fine. (*Sreenivasa Iyer, J.*) CHINTAMANI, *In re.* **9 Mys.L J. 65.**

——**S. 63**—*Presumption under—Illegal warrant—Effect of.*

If the house to be searched or the occupant thereof is not properly or correctly described in the warrant, the warrant is defective, and the presumption, which the explanations to S. 63 give rise to, does not arise. But that does not prevent the prosecution from establishing by evidence in the ordinary way that on the facts proved, the accused was guilty of the offences charged. 50 B. 344; 37 Bom. 402 and 89 I.C. 396, Ref. (*Doraswami Iyer, C.J.*) SANNAPPA *v.* THE GOVERNMENT OF MYSORE. **10 Mys.L J. 99.**

——**Ss 63 and 4 (1)**—*Common gaming house—Test of.*

One of the necessary ingredients of a common gaming house is that the owner or occupier charges some profit or gain for the use of the place or the instruments of gaming. If the evidence does not establish that the instruments of gaming or the house were kept either 'for' or 'with a view to' the profit or gain of the person owning or occupying it, a conviction under S. 63 cannot be sustained. (*Doraswami Iyer, C. J.*) SANNAPPA *v.* THE GOVERNMENT OF MYSORE. **10 Mys L J. 99.**

MYS. RAILWAYS REG. (1923), S. 122.

——**S. 69 (3)**—*Offence under—Sentence — Fine—Validity of.*

A sentence of imprisonment is obligatory in case of an offence under S. 69 (3). A sentence of fine is unauthorized and not provided for in the section. (*Doraswami Iyer, C.J.*) HAMID SAB, *In re.* **10 Mys.L. J. 14.**

MYSORE PROBATE AND ADMINISTRATION REGULATION, S. 50—*Minor—Right to citation.*

A minor whose interests are affected by the Probate or Administration proceedings is entitled to special citation. The propounder of a will must take special steps for the appointment of a guardian *ad litem*. Where no such guardian is appointed, the mere issue of a notice to the minor is of no avail. A.I.R. 1925 Cal. 223 and 24 C.W.N. 538, Foll. (*Doraswami Iyer, C.J. and Ramachandra Rao, J.*) DHANASAMI PILLAI *v.* OOLAGANATHAN. **10 Mys L.J. 381**

MYSORE RAILWAYS REGULATION (VII OF 1923), S. 2—*Suit against Railway—Government, a necessary party—Forum.*

The special form of procedure prescribed in Ss. 61 and 122 of the Mysore Railways Regulation is not inconsistent with the procedure prescribed in S. 80, C.P. Code. The sections of the Railways Regulation refer to *claims*, and S. 80 of the C.P. Code, relates to suits, against the Railway administration. Where the plaintiff brought a suit against the Mysore Railways for short delivery in the Small Cause Court and contended that as the Government was not impleaded, no notice of suit under S. 80 of the C.P. Code was necessary.

Held, that (*i*) the Government was a necessary party and the suit laid against the Railways only was incompetent; (*ii*) notice under S. 80, C.P. Code, was necessary; (*iii*) the suit should be heard and determined, under S. 2 of the Railways Regulation, by the Principal Civil Court of Original Jurisdiction, *i.e.*, the District Court. (Case law referred.) (*Doraswami Iyer, C.J. and Mahadevayya, J.*) ABDUL LATIFF TAYAB SAIT *v.* MYSORE RAILWAYS. **37 Mys.H.C.R. 158=10 Mys.L J. 210.**

——**Ss. 61 and 122**—*Notice of claim under—Notice of suit under S. 80 not dispensed with—S. 2—Forum.*

The special form of procedure prescribed in Ss. 61 and 122 of the Mysore Railways Regulation is not inconsistent with the procedure prescribed in S. 80, C.P. Code. The sections of the Railways Regulation refer to *claims*, and S 80 of the C. P. Code, relates to suits, against the Railway administration. Where the plaintiff brought a suit against the Mysore Railways for short delivery in the Small Cause Court and contended that as the Government was not impleaded, no notice of suit under S. 80 of the C. P. Code was necessary.

Held, that (*i*) the Government was a necessary party and the suit laid against the Railways only was incompetent; (*ii*) notice under S. 80, C. P. Code, was necessary; (*iii*) the suit should be heard and determined, under S. 2 of the Railways Regulation, by the Principal Civil Court of Original Jurisdiction, *i.e.*, the District Court. (Case law referred.) (*Doraswami Iyer, C.J. and Mahadevayya, J.*) ABDUL LATIFF TAYAB SAIT *v* MYSORE RAILWAYS. **10 Mys.L J. 210=37 Mys. H C R. 158.**

——**Ss. 122 and 61**—Suit against Railways. *See* MYSORE RAILWAYS REGULATION (VII OF 1923), SS. 61 AND 122.

MYSORE REGISTRATION REGULATION (I OF 1903), S. 17—*Agreement to sell—Execution of a registered sale-deed contemplated—Necessity for registration—Possession given in anticipation of sale.*

Where the document purported to be an agreement to sell in that it did not transfer the ownership and expressly contemplated the execution of a separate registered sale-deed after payment of the balance of consideration in accordance with the agreement, so that it merely created a right to obtain in future another document bestowing title, it does not require registration, even if in anticipation of the sale, possession was given to the purchaser. (*Rama Rao and Srinivasa Iyer, JJ.*) RAMASWAMI JOIS *v.* SUBBARAYA. **9 Mys.L J. 334.**

——**Ss. 17 and 49**—*Instrument of partition—What is—Panchayatdars' decision reciting partition—Registration.*

A triplicate copy of panchayatdars' decision reciting the fact of partition and embodying the details of the said partition and signed by the panchayatdars and the parties is not an instrument of partition and does not therefore require registration and is admissible in evidence without registration. (*Mahadevayya C.J. and Ramachandra Rao, J.*) SIDDAMMA *v.* CHENNABASAPPA. **12 Mys L J. 236.**

——**S. 17**—*Partition—Copies of patti recording the details.*

Copies of the patti prepared at the time of partition of the members of a joint Hindu family which do not purport to be deeds of partition and do not bear the signatures of the persons among whom the property was divided are not compulsorily registrable. (*Doraswami Iyer, C.J. and Rama Rao, J.*) THIMMAKRISHNA RAO *v.* MARISETTAPPA. **9 Mys.L J. 290=36 Mys H.C.R. 199.**

——**S. 17**—*Registered mortgage bond—Endorsement of payment and of agreement as to non-liability of mortgagor for future interest—If to be registered.*

Though an endorsement on a registered mortgage bond reciting payment of a sum of money towards interest and part of the principal amount does not require registration, in view of S. 17 (*o*) of the Registration Regulation, a stipulation in such endorsement absolving the mortgagor from liability to pay future interest does not fall under Cl. (*o*) but falls under Cl. (*b*) of S 17 of the Registration Regulation; and unless registered, it would be invalid in law. (*A S R. Chari and Srinivasa Rao, JJ.*) LINGEGOWDA *v.* JAVARASETTY. **13 Mys L.J. 452=40 Mys.H.C R. 358**

——**S. 17 (b)**—*Receipt containing an agreement postponing right to sue—Registration—Necessity for.*

A document which purports to be not only a receipt but contains an agreement by which the right of the mortgagee to sue upon the bond is postponed for a period of three years, is compulsorily registrable under S. 17 (*b*). The agreement is not enforceable in the absence of registration. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) ADINARANAIAH *v.* KRISHNIAH SETTY. **11 Mys.L.J. 400=39 Mys.H. C.R. 68.**

——**S 49**—*Collateral purpose—Partition deed—Admissibility without registration.*

An unregistered deed of partition may be received in evidence for the purpose of proving a division in status as well as the nature of possession of the properties. (*Mahadevayya, C.J. and Ramachandra, Rao, J.*) SIDDAMMA *v.* CHENNABASAPPA. **12 Mys L J. 236.**

——**S 49**—*Partition—Triplicate copy of Panchayatdars' decision.*

A triplicate copy of panchayatdars' decision reciting the fact of partition and embodying the details therefore is not an instrument of partition requiring registration and can be received in evidence though unregistered. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) SIDDAMMA *v.* CHENNABASAPPA. **12 Mys L.J. 236.**

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——**Ss. 72 and 73**—*Applicability—Refusal to register for non appearance of executant—Remedy—Appeal to Registrar.*

The refusal of a Sub-Registrar to register a document on the ground of non-appearance of the executant is not refusal to register on the ground of denial of execution; the proper remedy of the claimant is therefore to appeal under S. 72 and not apply under S. 73 of the Registration Regulation. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) RAGHAVENDRACHAR *v.* SRINIVASACHAR. **13 Mys.L.J. 21=39 Mys H.C.R. 895.**

——**Ss. 72 and 87**—*Scope—Non-appearance of executant—Refusal by Sub-Registrar to register—Appeal*—Ex parte *order of registration by Registrar—If illegal.*

In an appeal under S. 72 of the Registration Regulation against the Sub-Registrar's refusal to register a document on the ground of the executant's non-appearance, the Registrar ordered notice to issue the executant and on his failure to accept service, treated him *ex parte* and directed registration of the document without holding any enquiry.

Held, that the procedure was no doubt irregular, but that it was only a defect in procedure and was cured by S. 87 and that the irregularity did not vitiate the registration. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) RAGHAVENDRACHAR *v.* SRINIVASACHAR. **13 Mys L J. 21=39 Mys.H.C.R. 895.**

——**S 87**—'Defect in procedure'—Registrar ordering registration in appeal *ex parte* without enquiry—If illegal. *See* MYSORE REGISTRATION REGULATION, SS. 72 AND 87. **13 Mys.L J 21=39 Mys.H.C.R. 895.**

MYSORE REGULATION (VI OF 1899 as amended by Regulation II of 1927)—*Conviction—Sentence—Award of rigorous imprisonment in default of fine—Legality—Penal Code, S. 67.*

An offence under Regulation VI of 1899 as amended by Regulation II of 1927, being punishable with fine only, a sentence of rigorous imprisonment in default of payment of the fine inflicted on a conviction, is illegal in view of the provisions of S. 67, I. P. Code, the imprisonment that can be awarded in such case is only simple imprisonment. (*Shankaranarayana Rao, J.*) HANUMANTHAPPA, *In the case of.* **13 Mys.L.J. 338=40 Mys H.C.R. 129.**

MYSORE REGULATION (REGULATION TO PROVIDE FOR SUIT AGAINST GOVERNMENT) (VII OF 1923)—*Scope—Suit against Government—Maintainability—"Suit for rectification or cancellation of any instrument"—Meaning of.*

The right to bring suits against the Government in the Mysore State is given and restricted by Regulation (VII of 1923), which specifies six classes of suits that may be brought against it in the Civil Courts. The class of suits under the head "suits for rectification or cancellation of any instrument," does not include a suit by a party in respect of any Government order concerning the party who may find the order inconvenient. In a suit by a claimant to the office of *Matathipathi* of a *Math*, for a declaration of his right to succeed to that office, the plaintiff has no right to implead the Government as a party, on the ground that the Government has recognised a rival claimant as the *Matathipathi* of the *Math* in question, and include a prayer for cancellation of the Government order recognising the rival candidate. Nor can such a suit be regarded as a suit for can-

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cellation of an instrument as contemplated by the Regulation. Such a suit so far as the Government is concerned, is not maintainable. The act of the Government recognising a person as the rightful successor to the office of *Matathipathi* of a *Math* is an act of prerogative not liable to be questioned in the Civil Courts. (*Reilly, C.J. and Srinivasa Rao, J.*) BALAKRISHNA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 228=40 Mys. H.C.R. 277.**

———**S. 2**—Lands sold for failure to pay quit-rent—Government "in wrongful possession" of. *See* MYSORE LAND REVENUE CODE, S. 221 (*c*). **39 Mys.H.C.R. 547.**

———**(IV OF 1933)**—*Scope—If retrospective—Pending proceedings—Workmen's Breach of Contract Act—Case filed before Regulation—Order passed after—Legality—Jurisdiction.*

The intention of the legislature in passing Regulation IV of 1933 was to take away in its entirety the jurisdiction vested in the Courts of the State under the workmen's Breach of Contract Act of 1859, which the Regulation repealed, as from 1st October, 1933 Consequently an order by a Court under the repealed Act after that date is without jurisdiction, though the complaint itself was instituted before the repeal, when the Court has, prior to such repeal, done nothing except taking cognizance of the complaint. (*Shankaranarayana Rao, J.*) KANNIR IYTHA MAISTRI *v.* COLACO. **13 Mys.L.J. 279=40 Mys H.C R. 136.**

MYSORE RELIGIOUS AND CHARITABLE INSTITUTIONS REGULATION (VII OF 1927), Ss. 3, 5, 6 and 40—*Muzrai institution—Private management—Right of—Suit for declaration of—Maintainability.*

It is clear from the provisions of Chapter 11 of the Regulation that the legislature has vested the control and management of Muzrai institutions in the Government and private individuals can, if appointed under S. 6 or under S. 7, exercise only such powers as may be delegated to them by the Government. No other right of management in a private individual of a Muzrai institution is recognised in the Regulation, and an exclusive right of management of a Muzrai institution in a private individual cannot exist. Under S. 40 of the Regulation, the Civil Courts have no jurisdiction to entertain a suit for a declaration of the plaintiff's right to the exclusive management of a Muzrai temple or to question the right of Government to appoint Dharmadarsis and vest the management in them. (*Rama Rao and Sreenivasa Iyer, JJ*) NAGAPPACHARI *v.* GOVERNMENT OF MYSORE. **9 Mys L.J. 164.**

MYSORE REPRESENTATIVE ASSEMBLY REGULATION (1923)—*Election Rules—Irregularities regarding—Effect.*

The scoring out of the 'symbol' amount to scoring out of the names. The instructions regarding voting should be taken to be substantially complied with when the names are scored out in black ink instead of with the copying, blue or red pencil and there is no rule to render the noting paper invalid if a tick mark or other mark is put by the voter. Nor does a vote become invalid merely because the horizontal line is not placed exactly on the name or between English and Kannada lines or does not extend throughout or covers only the description or part of it. (*Mahadevayya and Ramachandra Rao, JJ.*) JAYATHIRTHACHAR *v.* ANANDA RAO. **38 Mys H.C.R. 245=11 Mys.L.J. 74.**

———**Rules under R. 4 (1)**—*Objection to votes—Allegation of corrupt practice—Need for particulars.*

MYS. STAMP REG. (1900), S. 2.

Where an allegation is made on behalf of an unsuccessful candidate that he had a majority of lawful votes a list of the votes intended to be objected to or sought to be added to and of the heads of the objection of each such vote should be filed before the trial; where no such lists are filed the Court has no power to extend the time or to allow evidence regarding the votes. The Rules require full particulars regarding the allegation of corrupt practice. The appellant cannot ask the Court to scrutinize and recount the votes recorded in favour of the respondent. (*Mahadevayya and Ramachandra Rao. JJ.*) JAYATHIRTHACHAR *v.* ANANDA RAO. **38 Mys. H.C.R. 245=11 Mys L.J. 74.**

———**Rules under R. 7 (5)**—*Effect.*

The findings of the District Judge on questions of fact are conclusive. (*Mahadevayya and Ramachandra Rao, JJ.*) JAYATHIRTHACHAR *v.* ANANDA RAO. **38 Mys.H.C.R. 245=11 Mys.L.J. 74.**

MYSORE SMALL CAUSE COURTS REGULATION (VIII OF 1909), Sch. 1, Art. 6 and S. 6—*Jurisdiction—Title incidentally involved in suit on lease—Power to decide.*

Though when a question relating to title to immovable property is raised, it is open to the Small Cause Court to return the plaint, the Court has nevertheless jurisdiction to decide on the plaintiff's title to the suit land incidentally in a suit on a lease. (*Doraiswami Iyer, C.J.*) CHIK CHENNAIYA, *In re.* **36 Mys.H.C.R. 65 =9 Mys.L.J. 73.**

———**Sch. 1, Cl. 22**—*Ejectment suit—Valuation for court fees—Jurisdiction of Small Cause Court.*

In a suit for ejectment by the landlord, the valuation fixed by the plaintiff for purposes of Court-fee under S.4 (*xi*) (*cc*) of the Court Fees Regulation is also the valuation for purposes of jurisdiction. If the value of the subject-matter so computed does not exceed the pecuniary jurisdiction of a Court of Small Causes, the suit is within the cognisance of such a Court. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) JAFER KHAN *v.* SYED GHOUSE. **37 Mys.H.C.R. 305=10 Mys.L.J. 25.**

———**(VIII OF 1911), S. 12**—Decree of Small Cause Court—Attachment and sale of immovable property—Legality—Transfer to original Court or original side of Court of dual jurisdiction— Necessity. *See* MYSORE C. P. CODE REGULATION, S. 7 (*a*)(*iii*), O. 21, R. 82 AND O. 50. **40 Mys H C.R. 430.**

———**Sch. I, Cl. 16**—*Suit for damages for use and occupation—Jurisdiction.*

A Small Cause Court has jurisdiction to entertain a suit for compensation for use and occupation against a trespasser. (*Doraiswami Iyer, C.J.*) HUSSAIN BI *v.* ABDUL RAHIMAN SAHIB. **35 Mys. H.C.R. 437=8 Mys.L.J. 443.**

———**Sch. I, Arts. 6 and 16**—*Tenant holding over—Damages for use and occupation—Suit for—Jurisdiction of Small Cause Court.*

A suit for damages for use and occupation against a tenant holding over now falls under Sch. I, Art. 16 as amended in November, 1927, and is cognisable by the Small Cause Court. It does not fall under Art. 6 which relates to suits for rent as such. (*Shankaranarayana Rao, J.*) NAGAMMA, *In re.* **11 Mys.L.J. 478=39 Mys.H.C.R. 175.**

MYSORE STAMP REGULATION (II OF 1900), S. 2 (5) (b)—*Non-negotiable promissory note.*

For the purposes of the Stamp Regulation, an attested non-negotiable promissory note has to be treated as a bond and can therefore, if unstamped, be admitted in

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evidence on payment of duty and penalty. 33 Mys. C. C. R. 169, Foll. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) CHOWDAMMA *v.* DANAYYA. **36 Mys. H.C. R. 289 = 9 Mys.L J. 382.**

———**S. 2, Cls. (14) and (15)**—*Instrument of partition—Record of details of a completed transaction.*

A triplicate copy of panchayatdar's decision reciting the fact of partition and embodying the details thereof is nothing more than a mere record of the details of a completed transaction and does not amount to an "Instrument of Partition" as defined in S. 2, Cls. (14) and (15) of the Stamp Regulation. (*Mahadevayya, C. J. and Ramachandra Rao, J.*) SIDAMMA *v.* CHENNABASAPPA. **12 Mys.L.J. 236.**

———**Sch. I, Art. 1**—*Acknowledgment not properly stamped—Validity as acknowledgment under Limitation Regulation, S. 19.*

An endorsement is not inadmissible in evidence on the ground that it is not duly stamped as required by Art. 1, Sch. I of the Mysore Stamp Regulation, if it amounts to an acknowledgment under S. 19 of the Limitation Regulation. The word "acknowledgment" is used in two different senses in the Limitation Regulation and in the Stamp Act and an acknowledgment which is valid under the former may not amount to one under the latter. (*Shankaranarayana Rao, J.*) GUNDACHARI. *v.* RAMASETTY. **12 Mys. L.J. 37 = 39 Mys. H. C. R. 127.**

———**Sch. I-A, Arts. 4 (c) and 42**—*Agreement or release—Deed styled receipt—Recital that maintenance claim fully satisfied—Relinquishment of right against properties—Stamp duty.*

A document which is styled a receipt, but under which this executant recites that she has received a certain sum in full satisfaction of her claim for maintenance under a decree and relinquishes her entire right against certain properties is not a mere agreement under Art. 4 (*c*), but a release as defined by Art. 42 of Sch. I-A, Mysore Stamp Regulation, chargeable with a stamp duty of Rs. 7-8 0. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) NARASAMMA, *In re.* **12 Mys.L.J. 260.**

MYSORE SUCCESSION CERTIFICATE REGULATION (VII OF 1901)—*Enquiry under—Scope of—Grant of certificate—Principles.*

The enquiry contemplated by the Succession Certificate Regulation is only a summary one and not an elaborate or lengthy one. The Court in such an enquiry is not called upon to decide intricate questions of law and fact; and it can grant the certificate to an applicant who has *prima facie* the best title thereto, when it cannot decide the right to the certificate without determining questions of law or fact. (*A. S. R. Chari, J.*) NAN JUNDIAH *v.* AMMANAMMA. **13 Mys. L. J. 471 = 40 Mys.H.C.R. 365.**

———**S. 4**—*Applicability—Assignment of bond under partition—Suit to enforce bond.*

S. 4 cannot apply to a case where a plaintiff sues on a bond executed in favour of a deceased person and assigned to plaintiff under a deed of partition. (*Ramachandra Rao, J.*) MUNISAMI *v.* MUNISAMAPPA. **11 Mys L J. 211 = 38 Mys.H C.R. 149.**

———**S. 4**—*Scope—Execution ordered without succession certificate—Sale—Subsequent production of certificate—Validity of sale.*

The section is mandatory but its provisions are only intended to facilitate the collection of debts and afford protection to parties paying debts to the representatives of deceased persons. An order for execution by the lower Court without the production of a succession certificate is not, however, void; it is capable of being validated by the subsequent order of a superior Court directing the production of a succession certificate within a specified time and by the production in accordance therewith. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) SRIRANGAPPA *v.* ABDUL KHADER SAB. **10 Mys.L.J. 141 = 37 Mys.H.C.R. 336.**

MYS. T. P. REG. (1918), S. 52.

———**S. 7 (3)**—*Doubt as to rights of parties—Procedure.*

The Succession Certificate Regulation contemplates only a summary enquiry and no elaborate or lengthy enquiry is required. The Court may grant the certificate to the person who it considers is *prima facie* the heir of the deceased and as such entitled to the assets. BHAGEERATHI BHAI *v.* VENKOO BAI. **11 Mys. L.J. 378 = 39 Mys.H.C.R. 558.**

———**S. 16**—*Grant of certificate—Effect.*

The effect of a certificate under S. 16 is that it is conclusive as against the debtor and affords him full indemnity. The debtor would be acting wrongly if he refused to make payment to the certificate holder. (*Doraiswami Iyer, C. J. and Ramachandra Rao J.*) MUNDASADA VEERAPPA *v.* SIVALINGAPPA. **38 Mys. H.C.R. 304 = 11 Mys L.J. 344.**

MYSORE TRANSFER OF PROPERTY REGULATION (IV OF 1918), S. 3—*Notice—Agreement to sell—Purchaser in possession.*

The possession of the purchaser is constructive notice of an agreement to sell in pursuance of which he acquired possession. (*Rama Rao and Sreenivasa Iyer, JJ.*) RAMASWAMI JOIS *v.* SUBBARAYA. **9 Mys.L.J. 334.**

——— **S. 10**—*Scope—Family partition—Gift to relation—Condition that in case desired to alienate it, he should alienate it to member of family—If void.*

Where at a family partition, certain property is gifted to a relation of the coparcener with a condition that in case the donee desired to alienate it, he should sell it to one of the coparceners for a certain sum, the agreement is not void under S. 10, Mysore Transfer of Property Regulation, because the agreement is only a personal contract; the agreement further is not one absolutely restraining the transferee but only in the nature of a partial restraint on transfer. (*Shankaranarayana Rao and A. S. R. Chari, JJ.*) BORIAH *v.* HANUMANTHAPPA. **14 Mys.L.J. 21 = 40 Mys. H.C. R 421.**

———**S. 39**—*Mortgage of joint family property—Notice of the right of widow to maintenance—Decree and execution—Effect of—Good faith of alienee.*

Under S. 39, if the transferee of the joint family properties took the mortgage with full notice of the right of a widow to maintain out of that property, it is not open to him to deprive her of the right by colluding with the other members and merely going through the suit and execution proceedings. If all or practically all the family properties are taken away by the alienee with the knowledge of the right of maintenance, considerable doubt attaches to his alleged *bona fides* and he cannot be permitted to say that he acquired a title freed from that claim. (Case-law referred.) (*Doraiswami Iyer, C. J. and Rama Rao, J.*) MANJAMMA *v.* HANUMANAICKA. **9 Mys L J. 413.**

———**S. 48**—*Priority of mortgages—Test.*

Ordinarily the priority of mortgages depends on the dates on which they are created, the earlier in date having priority over the later one under S. 48. (*Doraiswami Iyer, C.J. and Mahadevayya, J.*) PESOOMAL HARBHAGVANDAS SAIT *v.* BANGALORE BANK, LTD. **11 Mys L.J. 139.**

———**S. 52**—*Applicability—Execution sales.*

MYS. T. P. REG. (1918), S. 52.

The doctrine of *lis pendens* applies to even execution sales and other transfers of an involuntary character. (Cases ref.) (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KOTTURA SETTY *v.* VENKATADASAPPA. **11 Mys.L.J. 428=38 Mys.H.C.R. 390.**

———**S. 52**—*Applicability— Maintenance suit*—Lis pendens.

S. 52, T. P. Regulation, applies to suits for maintenance in which a charge is expressly claimed for maintenance on properties specified in the schedule to the plaint. The right of the plaintiff to a charge on such properties is directly and specifically in question in such a suit and any transfer of such property pending the suit will be affected by the rule of *lis pendens*. (*Sreenivasa Rao, J.*) DEVAJAMMANNIYAVARU *v.* DEPUTY COMMISSIONER, MYSORE. **13 Mys.L.J. 502.**

———**S. 53**—Fraudulent transfer—Subsequent attachment before judgment—If can be ordered—Procedure. *See* MYSORE C. P. CODE REGULATION, O. 38, RR. 5 AND 6. **39 Mys.H.C.R. 767.**

———**S. 53**—Suit under, after insolvency petition by debtor—Right of creditor to maintain. *See* MYSORE INSOLVENCY REGULATION, SS. 28 AND 44 (2). **40 Mys H.C.R. 237.**

———**S. 54**—*Non-payment of consideration—Effect on passing of title.*

When once a sale is completed it cannot be rescinded on the ground of non-payment of consideration unless such a right is expressly reserved in the document. According to the definition in S. 54, the consideration for sale is the price paid or promised or part paid or part-promised. Neither the inadequacy of the consideration nor its non-payment can affect the validity of the sale. If the vendee merely promises to pay the price it does not prevent the title from passing to him on the completion of legal formalities. He may then sue for possession and leave the vendor to sue for his money. (Case-law ref.) (*Mahadevayya, O. C. J. and Ramachandra Rao, J.*) BORA NAIKA *v.* NAGAPPA. **11 Mys. L.J. 471=39 Mys.H C.R. 149.**

———**S. 72**—*Improvements by mortgagee—Compensation for.*

In order that the mortgagee may be entitled to compensation, the improvements must be such as are both necessary and proper. They should be necessary in the sense that they had to be effected for the preservation of the property and proper in the sense that they are suitable to the nature of the property. Where, however, the cost of the building on the mortgaged land is nearly twice the amount of the mortgage-money, to compel the mortgagor to pay that amount would be to place a clog on the equity of redemption, "to improve a mortgagor out of his estate". (*Doraiswami Iyer, C. J and Rama Rao, J.*) MUNISWAMY *v.* RAMASWAMIENGAR. **11 Mys L J. 445=38 Mys. H.C.R 333.**

———**S. 76**—*Damage to property by mortgagee in possession—Right of mortgagor—Separate suit—Maintainability.*

If damage is done to the property by the mortgagee in possession, the proper remedy for the mortgagor is indicated by S. 76 of the T. P. Act, *viz.*, that when accounts are taken in pursuance of a mortgage decree either for redemption or for recovery of the mortgage money, the loss, if any, may be debited against the mortgagee, if he is liable for the waste, unless at the time of delivery of possession, the waste is repaired and the land is restored to its proper condition. Whether or not in any particular case of damage, a separate suit is maintainable at the instance of the mortgagor, where the grievance of the mortgagor is only that the mortgagee dug

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some pits in the land and allowed the land to remain fallow and uncultivated, the act cannot be considered either destructive or permanently injurious to the property and a suit for damages by the mortgagor is not maintainable. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) SHAMABHATTA *v.* VENKATASUBBIAH. **9 Mys.L.J. 453.**

———**S. 76 (1)**—*Interest on profits—Liability of mortgagee to pay.*

S. 76 (*s*), T. P. Regulation, contains no provision for payment of interest by a mortgagee remaining in possession after the tender or deposit. The Court cannot therefore order him to pay interest on the profits payable by the mortgagee under the sub section. (*Reilly, C. J. and A. S. R. Chari, J.*) NANJUNDAPPA *v.* G M. KRISHNIAH SETTY. **13 Mys.L.J. 404=40 Mys.H.C.R. 435.**

———**S. 76 (1)**—*Mortgagee's liability to account for profits—Right to deduct public taxes paid by him.*

A mortgagor who is liable to account for the profits of the mortgaged property under S. 76 (*s*), T. P. Regulation, is entitled to a deduction of the public taxes, *e.g.* municipal tax paid by him in respect of mortgaged property from the receipts for which he is accountable. (*Reilly, C.J. and A. S. R. Chari, J.*) NANJUNDAPPA *v.* G. M. KRISHNIAH SETTY. **13 Mys.L.J. 404=40 Mys H.C.R. 435.**

———**S. 76 (c)**—*Mortgage of Kodagi inam lands—No provision for government assessment—Subsequent resumption by government—Liability for land revenue.*

Where certain Kodagi inam lands granted rent free were mortgaged and the parties did not have any idea, at the time of the mortgage, of future resumption or enfranchisement, and so the mortgage did not contain any provision as regards the payment of government assessment.

Held, that an implied term should be read into the document that neither party was liable to pay any assessment; in such circumstances under the general law the owner of the property was primarily liable to pay the land revenue due on it, especially when such a course was not against the equity and justice of the case. The mortgagor was therefore liable for the quit rent and were the mortgagee has paid it, he is entitled to be reimbursed by the mortgagor (*Doraiswami Iyer, C. J. and Rama Rao, J.*) MUNISAMY *v.* RAMASWAMIENGAR. **38 Mys.H.C.R. 333=11 Mys.L.J. 445.**

———**S. 78**—*'Gross neglect'—Meaning—Postponement of prior mortgagee.*

'Gross neglect' in S. 78 means and involves a failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrancer being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority. Each case must be decided on its own facts. Where the prior mortgagee did not take into his possession the title deed of the property hypothecated to him and there was undue delay in the registration of the mortgage deed.

Held, that the conduct of the mortgagee did not amount to gross negligence. (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) PESOOMAL HARBHAGVANDAS SAIT *v.* BANGALORE BANK, LTD. **11 Mys.L J. 139.**

———**S. 78**—*Prior mortgagee—Postponement—Gross negligence—Parting with title-deeds.*

No definite rule can be laid down that the parting with the title-deeds by a prior mortgagee who holds a registered mortgage amounts in every case to such gross negligence as to justify the postponing of his prority in favour of a subsequent mortgage taken on the strength

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of the production by the mortgagor of the title-deeds. Where the title-deeds were taken back by the mortgagor from the mortgagee by means of a misrepresentation and a second mortgage was effected.

Held, that the first mortgagee was not guilty of gross negligence so as to be postponed to the subsequent mortgagee, (*Doraiswami Iyer, C. J. and Mahadevayya, J.*) KENCHAPPA *v.* REBELLO. **38 Mys.H.C.R. 313 =11 Mys.L.J. 337.**

———**S. 82**—*Applicability—Merger of interest in one of the properties mortgaged—Purchase free from encumbrances.*

S. 82 contains the statutory provision by which contribution as between owners of equities of redemption subject to a common mortgage is regulated. If therefore the equity of redemption in any one of these properties and the mortgagee's interests get merged into one another by the same person enquiring the equity of redemption *plus* the mortgagee's interests in that property, the principle underlying the statutory provision may be extended so as to apply to such a case. Where, however, three out of the five mortgaged properties were sold for default in the payment of arrears of revenue and purchased by a third party and from him by the plaintiff, free from all incumbrances, and the mortgagees subsequently assigned the interest to the plaintiff, who brought the present suit to realise the mortgage amount by the sale of the remaining two properties.

Held, that as the price paid by the purchaser (plaintiff was intended to represent the value of the entire interest in the three properties, and not merely of the equity of redemption, the question of contribution between the mortgagee and the mortgagor did not arise. 9 Mys. C. C. R. 139, Foll.; 59 M. L. J. 177 (P. C.), Ref. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) NANJAPPA *v.* PATTAMADAPPA. **36 Mys.H.C.R. 165=9 Mys.L. J. 279**

———**S. 83**—*Deposit under—Mortgagee repudiating right to redemption as premature—Withdrawal and suit for redemption—Payment of amount to mortgagee in course of suit—Right of mortgagor to profits from date of deposit.*

The amount due under a mortgage was deposited in Court under S. 83 of the T. P. Regulation, but the defendant mortgagee refused to accept it and surrender possession of the properties on the ground that he was not liable to be redeemed before the expiry of five years. The plaintiff (puisne mortgagor) thereupon withdrew the amount and filed a redemption suit the same day, stating in his plaint that he was ready to produce the amount whenever called on to do so. Peuding the suit plaintiff paid the amount to the defendant before the Court and got possession. The Court held that the mortgage could be redeemed before the expiry of five years, thus negativing the objection raised by the defendant in the proceedings under S. 83.

Held, that the withdrawful of the deposit from Court by the plaintiff prior to suit did not show that he was not always ready and willing to pay and therefore plaintiff was entitled to recover from the defendant the profits of the property from the date of the original deposit until the date on which he got possession on payment before Court. (*Reilly, C.J. and A. S. R. Chari, J.*) NANJUNDAPPA *v.* G. M. KRISHNIAH SETTY. **13 Mys.L.J. 404=40 Mys.H.C.R. 435.**

———**S. 91, (a)**—*Right to redeem—Reversioner, during the lifetime of the widow.*

The interest referred to in S. 91, Cl. (*a*) is a present interest, *i.e.*, an interest in existence at the time the suit is instituted and not a mere contingent interest such as a reversion possesses. The reversioner during the widow's lifetime has no present interest in the property and apart from special cases where it is made to prevent property being permanently lost, under ordinary circumstances any payment made by the reversioner towards the mortgage executed by the widow must be regarded as a payment made by a volunteer. To such a person, the doctrine of subrogation does not apply. 30 All. 497; 51 I.C. 985 ; 36 M. 426 ; 44 Mad. 951 and 41 Cal. 69, Ref. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) THIMMAPPA *v.* KEROJI. **36 Mys.H.C.R. 190=9 Mys. L.J. 297.**

MYS. T. P. REG. (1918), S. 108 (c).

———**S. 95**—*Scope— Co-mortgagor — Purchaser of part of mortgaged property—Payment of entire mortgage debt—Suit for contribution—Limitation.*

A purchaser of some of several items of mortgaged property who pays off the entire mortgage debt obtains, by such payment, the rights and privileges of the mortgagee in the sharers of the co mortgagors in the property for their proportions of the mortgage money under S. 95 of the Mysore Transfer of Property Regulation. He is in the position of a co mortgagor himself so far as the items he has purchased are concerned. And when he pays off the whole mortgage debt, he acquires, even apart from S. 95, a right to contribution and a charge against the items covered by the mortgage other than those which he has purchased. The purchasers of such items, who are also in the position of co mortgagors as regards those items are liable to contribute towards the payment made by the redeeming co-mortgagor. The period of limitation for enforcing the right of contribution which a redeeming co-mortgagor has as against the other co-mortgagors is 12 years, and limitation commences to run from the date of the payment made by the redeeming co-mortgagor. (*Reilly, C.J. and Sreenivasa Rao, J.*) SHANBOGUE HANUMANTHA RAO *v.* SUDDULA SHANKARAPPA. **13 Mys.L.J. 440=40 Mys.H. C.R. 298**

———**S. 99**—*Charge created by consent decree—Enforcement of—Mode of.*

A charge created under a compromise decree can be enforced in execution and no separate suit to enforce it is necessary. (Case-law referred.) (*Doraiswami Iyer, C. J.*) DEWANSAB *v.* KOTRAPPA. **10 Mys.L.J. 226.**

———**S. 100**—"*Charge*"—*Charge under S. 96 A, Land Revenue Code— Enforcement— Procedure—Parties to suit.*

The definition of a charge as given in S. 100, Mysore Transfer of Property Regulation, is sufficiently wide to include the charge created in favour of a superior holder by S. 96 A of the Mysore Land Revenue Code. Whatever rights such a superior holder may have under S. 97 of the Land Revenue Code for recovery of rent, if he seeks to recover the rent by enforcing his charge, he must do so under O. 34, C. P. Code, and in view of O. 34, R. 15, C. P. Code and S. 100, Mysore Transfer of Property Regulation, it is incumbent on the plaintiff-superior holder to implead in a suit for enforcement of his charge all persons having an interest in the holdings sought to be charged as parties to the suit. The omission to so implead any such party renders the decree and the execution proceedings inoperative as against the persons not so made parties. (*A. S. R. Chari and Sreenivasa Rao, JJ.*) NARASIMHACHAR *v.* NANJUNDA SASTRI. **13 Mys.L.J. 477=40 Mys.H.C.R. 374.**

———**S. 108 (c)**—*Covenant for quiet enjoyment—Scope of.*

A covenant for quiet enjoyment protects the lessee only against the lawful entry eviction or interruption of any other person but not against trespass or wrongful

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acts on the part of a third party. 15 Mad 111; 25 B. 269; 2 Mys.L.J. 200; 117 I.C. 838, Foll. (*Mahadevayya, J.*) JAVALI GANGAPPA *v.* HUCHANNA. **9 Mys.L.J. 344.**

———**S. 111**—*Applicability—Agricultural lease.*

S. 111 does not apply to agricultural leases and the overt act required by the sections showing the landlord's intention to determine the lease on the ground of forfeiture is not necessary in the case of an agricultural lease. 25 M.L.J. 486; 25 M.L.J. 315, Ref. (*Sreenivasa Iyer and Mahadevayya, JJ.*) RAJA RAO *v.* VENKATACHAR. **37 Mys.H.C.R. 142=10 Mys.L.J. 200.**

———**S. 112**—*Waiver—Mere knowledge of forfeiture insufficient.*

Mere knowledge and acquiescence in an act constituting a forfeiture does not amount to a waiver; there must be some positive act affirming the tenancy. (*Sreenivasa Iyer and Mahadevayya, JJ.*) RAJA RAO *v.* VENKATACHAR. **37 Mys.H.C.R. 142=10 Mys.L.J. 200.**

———**S. 114**—*Denial of title—Forfeiture—Relief against—Power of Court.*

The Court will only relieve against forfeiture for non-payment of rent but not against forfeiture occasioned by denial of title. 42 Mad. 654 and 41 Mad. 629, Foll. (*Sreenivasa Iyer and Mahadevayya, JJ.*) RAJA RAO *v.* VENATACHAR. **37 Mys.H.C.R. 142=10 Mys. L.J. 200.**

———**S. 116**—*Forfeiture of lease—Denial of title.*

The conditions which have to be fulfilled before forfeiture can be availed of by the landlord are (1) that the repudiation of the landlord's title must have been made by the tenant before the date of suit, (2) that this must have been brought to the knowledge of the landlord and that the latter must have done some overt act showing his intention to determine the lease. The denials of title must be unambiguous and unequivocal. (*Shankaranarayana Rao, J.*) ANANTHARAJU *v.* CHENGAMMA. **11 Mys L.J. 286=39 Mys H.C.R. 43.**

MYSORE WORKMEN'S BREACH OF CONTRACT ACT. S. 1—*Enquiry under—Order passed in—Review—Power of Court.*

The enquiry directed by S. 1 of the Workmen's Breach of Contract Act is not one under Ch. XX of the Criminal Procedure Code. As there can be no offence till an order under the provisions of the Breach of Contract Act has been really disobeyed, an order dismissing a complaint for default of appearance of the complainant is not an order passed under the Criminal Procedure Code and there is nothing to prevent the Magistrate from reviewing the order if he sees cause to do so. But the Courts would not exercise this power of review arbitrarily and capriciously but in an equitable and rational manner having regard to the *bona fides* of the application. (*Daraiswami Iyer, C.J. and Rama Rao, J.*) SANNA HUTCHA *v.* THIMMA SETTY. **9 Mys.L.J. 229=36 Mys.H.C.R. 438.**

MYSORE WORKMEN'S COMPENSATION REGULATION (XIV OF 1928), S. 8 (1) and (6)—*Commissioner's power of review.*

A Commissioner for workmen's compensation has no power under S. 8 (6) of the Workmen's Compensation Regulation to review an order for payment of compensation made by him under S. 8 (1). (*Reilly, C.J. and A S. R. Chari, J.*) MALLAMMA *v.* MYSORE GOLD MINING CO. OF INDIA, LTD. **13 Mys.L.J. 369=40 Mys H.C R 198.**

NAMBUDRIS.

See (1) HINDU LAW—APPLICABILITY.
(2) MALABAR LAW.

NEGLECT—Gross.

NATTUKOTTAI CHETTIYARS.

See (1) CUSTOM (GENERAL)—ADATH SYSTEM.
(2) PRINCIPAL AND AGENT.

NATURAL RIGHTS.

See (1) EASEMENTS ACT, S. 7.
(2) RIPARIAN RIGHTS.

NATURAL WATER. *See* RIPARIAN RIGHTS.

NAVIGABLE RIVER.

See (1) MADRAS IRRIGATION CESS ACT (1865), S. 1.
(2) RIPARIAN RIGHTS.
(8) WATERS AND WATER-COURSES.

NAYABAD RULES. *See also* U. P. NAYABAD RULES.

———*Revision—Revenue Board's powers.*

The Boards of Revenue have no power of revision in a case under the Nayabad Rules; the said rules had their origin in the preservation of forest lands which are not primarily the concern of the revenue authorities and therefore of the Board of Revenue. (*Oppenheim, S. M. and Drake Brockman, J.M*) MADHO SINGH *v.* PREM BALLABH BELWAL. **18 R.D. 427=15 L.R. 542 (Rev.).**

———**S. 36**—*Scope—Suit claiming that land should be included in a certain village—Civil or Revenue Court jurisdiction.*

Though a regular suit that a particular land should be included in the boundaries of a particular village ordinarily falls within the jurisdiction of the Civil Court in Kumaun, the dispute comes within the purview of the Nayabad Rules and therefore the suit is liable only by the Revenue Court. (*Drake Brockman J.M.*) GOPAL DAS *v.* KEDAR SINGH. **18 R.D. 406 (2)=15 L.R. 509 (Rev.).**

———**S. 36**—*Suit under— Revision by Board of Revenue.*

In suits which are specifically brought under S. 36 of the Nayabad Rules the Board of Revenue have no revisional jurisdiction. (*Drake Brockman, J.M.*) KUSHAL SINGH *v.* DEBI DUTT. **18 R.D. 430 (1)=15 L.R. 541 (Rev.).**

———**S. 36**—Suit under—Reversional jurisdiction of Board of Revenue. *See* AGRA TENANCY ACT, S. 252—REVISION. **18 R.D. 406 (2).**

NAZARANA CONTRACT—Nature of. *See* CONTRACT ACT, S. 30. **A.I.R. 1932 Lah. 356.**

NECESSARY PARTY *See* C.P. CODE, O. 34, R. 1.

NECESSITY.

(1) EASEMENT OF. *See also* EASEMENTS ACT, 1882, S. 13.
(2) HINDU LAW.
(*i*) JOINT FAMILY—ALIENATION.
(*ii*) RELIGIOUS ENDOWMENT—ALIENATION.
(*iii*) WIDOW—ALIENATION.

NEGI—*Succession—Rules governing—Appointment of minor—Punjab Land Revenue Rules, Rr.* 5, 7, 15 *and* 17.

Succession to the office of *negi* is governed by Rr. 5 and 7, and not Rr. 15 and 17 of the Punjab Land Revenue Rules. The only difference between the appointment of a *negi* and the appointment of a zaildar is that in the former case it is not necessary that the candidate should be a lambardar. It follows that a minor can be appointed if he is only a suitable candidate. (*Irving F.C.*) BHAWANI SINGH *v.* HARI SINGH. **11 Lah. L.T. 106.**

NEGLECT—Gross.

———Gross. *See* (i) T. P. ACT, S. 78.
(ii) TRUST—TRUSTEE.

NEGLIGENCE.

———Of guardian. *See* GUARDIAN AND WARD.

See (1) LEGAL PRACTITIONERS.
(2) LIMITATION ACT, S. 5.
(3) MINOR—NEGLIGENCE OF GUARDIAN.
(4) MOTOR VEHICLES ACT.
(5) RAILWAYS ACT, S. 72.
(6) TORT—NEGLIGENCE.

———Collecting Bank—Liability for negligence. *See* NEGOTIABLE INSTRUMENTS ACT, S. 131. **9 Rang. 585.**

———Criminal. *See* PENAL CODE, SS. 279, 282 AND 304-A.

———Gross negligence—Agent's liability. *See* CONTRACT ACT, S. 211. **A.I.R. 1931 Lah. 302 (2).**

NEGOTIABLE INSTRUMENT.

See also (1) C. P. CODE, O. 37.
(2) NEGOTIABLE INSTRUMENTS ACT.
(3) PROMISSORY NOTE.

———**S. 118 and Evidence Act, S 114 (c)**—Relative scope and difference—Nature of presumption under—Presumption as to quantum of consideration—If justified. *See* EVIDENCE ACT, S. 114, ILL. (*c*). **58 Mad. 841.**

———*Hundi—Not payable to order or bearer—Effect as bond.*

Where a document written on hundi paper was treated by the parties as a hundi but it contained no promise to pay to the order of any person or to bearer, and the drawer and the drawee were the same person,

Held, that the document was a bond and fell within the purview of S. 2 (5) (*b*) of the Stamp Act. (*Coldstream and Jonstone, JJ.*) MOHINDAR SINGH *v.* MAGINA MAL BHANA RAM. **32 P.L.R. 753=135 I.C. 191=I.R. 1932 Lah. 63=A.I.R. 1932 Lah. 22.**

———*Plea that payee is* benamidar—*Maintainability.*

A plea of *benami* is only a plea in the nature of a resulting trust and there is nothing in the Negotiable Instruments Act which justifies a payee, who is in the position of a trustee, insisting that the beneficiary should be precluded from proving that he is only a trustee. It is one thing to say that the promisor cannot, in a suit on a promissory note, plead that somebody other than the payee is the person entitled to sue, nor plead discharge by payment to the alleged real owner, and a wholly different thing to say that as between the payee named in the instrument and persons other than the promisor there is any rule which precludes the admissibility of evidence to show that the payee was only a *benamidar* for another. (*Beasley, C.J., Varadachariar and King, JJ.*) VENKATARAMA REDDIAR *v.* VALLI AKKAH. **58 Mad 693=153 I.C. 944=7 R.M. 384=1935 M.W.N. 1=41 L.W. 15=A.I.R. 1935 Mad. 181=68 M.L.J. 81 (F.B.).**

———*Shah Jog hundi—Forged endorsement—Payment to Shah—Liability of drawee to owner.*

The drawee of a Shah Jog hundi who pays the amount to a Shah is not absolved from liability to the owner, if the Shah has no title to the hundi, that is, when the indorsement is forged. (*Beaumont, C.J., Rangnekar and Wadia, JJ.*) MADHAVDAS JETHABHAI *v.* DEVIDAS VARDASA. **59 Bom. 97=152 I.C 609=7 R.B. 163=36 Bom.L.R 929=A.I.R. 1934 Bom. 400 (F.B.).**

———*Shah Jog hundi—Indorsement forged—Receipt of payment by Shah without title—Liability to reimburse drawee—Nature of—If one of indemnity—Remedy of drawee—Suit or third party notice.*

The cause of action against a Shah, who receives payment on a forged Shah Jog hundi, to reimburse the drawee is one for money had and received to the use of the plaintiff, based either on the money having been paid under a mistake of fact, or without consideration; and

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does dot arise upon any implied covenant for indemnity. The remedy of the drawee to recover the money from the Shah is to bring a suit against him, and not proceedings on a third party notice under R. 139 of the Bombay High Court Rules. (*Beaumont, C.J. and Rangnekar, J.*) MADHAVDAS JETHABHAI *v.* SITARAM RAMNARAYAN. **59 Bom. 97=36 Bom.L.R. 941=A.I.R. 1934 Bom. 402.**

———Suit on—Relief on original consideration—Permissibility. *See* PROMISSORY NOTE.

NEGOTIABLE INSTRUMENTS ACT (XXXVI OF 1881)—*Applicability to hundis.*

The Negotiable Instruments Act does not apply to hundis. (*Tek Chand and Monroe, JJ.*) HAR NARAIN SAHIB RAM *v.* BIHARI LAL CHARANJI LAL. **13 Lah. 800=34 P.L.R. 92=142 I.C. 729=I.R. 1933 Lah. 251=A.I.R. 1932 Lah. 582.**

———*Scope—Contract Act, if modified.*

The Contract Act is a general statute dealing with contracts. The Negotiable Instruments Act is a statute dealing with a particular form of contract, and the law laid down for special cases must always overrule the provisions of a general character. (*Baguley, J.*) KWONG HIP LONE SAW MILL, CO. *v* C.A.M.A.L. FIRM. **6 I.R. (Rang.) 16=144 I.C. 866=A.I.R. 1933 Rang. 131.**

———**S. 4**—*Construction—"Unconditional undertaking"—Meaning of—Pro-note by guardian—Liability under.*

Unconditional undertaking or unconditional personal liability means that the liability mentioned in the note should not be made contingent on some event, for otherwise it will not conform to the definition of a promissory note. But a pro note is not the less unconditional, simply because when the matter goes to a Court of law and the defendant raises some defence, the plaintiff has got to establish certain facts, and in the case of a note by a guardian, that the transaction is for the benefit of the minor, before he can succeed against the minor. That fact does not make the liability a conditional liability. (*Beasley, C.J., Ramesam and King, JJ.*) SATYANARAYANA *v.* MALLAYYA. **58 Mad. 735=7 R.M. 591 155 I.C. 581=1935 M.W.N. 349=41 L.W. 514=A.I.R. 1935 Mad. 447=68 M.L.J. 540 (F.B.).**

———**Ss. 4, 9 and 13**—*Debentures issued by the City of Bombay Improvement Trustees—Forged endorsements—Acquisition of title through—Surrender of old debentures and issue of new ones by way of "renewal"—Effect—New contract—Holder in due course—Right to the new debentures.*

Certain debentures of the City of Bombay Improvement Trust, belonging to the appellants were entrusted by them to one *F* for collection of interest thereon. By means of forged endorsements in his own favour, *F* pledged the debentures with the Alliance Bank, endorsing them over to that Bank as security for debts owing by him to the Bank. Subsequently, the Alliance Bank surrendered the debentures to the Improvement Trustees, who issued in lieu thereof fresh debentures in the name of the Alliance Bank. the transaction being described in the present proceedings as a 'renewal' of the old debentures. Thereafter, the Alliance Bank, acting on *F's* instructions, endorsed over the new debentures in favour of the present respondents, the Mercantile Bank, to whom *F* has transferred his Loan Account. In a suit by the appellants, claiming as owners of these new debentures, delivery and transfer to them of these instruments by the respondents, the Mercantile Bank,

Held, (1) that the so-called debentures were promissory notes as defined in S. 4 and so negotiable instru-

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ments under S. 13 of the Negotiable Instruments Act; (2) that the new debentures issued by the Trustees in exchange for the old ones, though called "renewals" were in form and substance new and independent obligations and constituted in effect new contracts; (3) that the respondents, the Mercantile Bank, having no reason to believe that there was any defect in the title of their transferors, the Alliance Bank, were holders in due course against whom the appellant had no right of action. 24 Bom. 65, Overr. (*Sir George Lowndes.*) JULIO MASCARENHAS *v.* MERCANTILE BANK OF INDIA, LTD. **58 I.A. 433=56 Bom. 1=34 Bom.L.R. 1=1932 M W.N. 100=1931 A.L J. 1136=136 I.C. 126=I.R. 1932 P.C. 78=35 L.W. 379=54 C.L.J. 419=36 C.W.N. 35=A.I.R. 1932 P.C. 22=61 M.L.J. 837 (P.C.).**

———**S. 4**—*Promissory note — Document held to be mere acknowledgment.*

The mere fact that a person chooses to give a certain title to a document by no means makes it that document. A document provided as follows: On June, 25, 1925, Rs.....were found due from me to *P* about February 27, 1923, and as the money cannot be given at present hence it has been agreed that I would pay interest at 1 per cent. per annum. Therefore this pro note payable on demand has been executed so that it may serve as evidence and may be useful in time.

Held, that the document was a mere acknowledgment of debt coupled with an agreement to pay a debt and not a promissory note. Effect of use of words "on demand" discussed. (*Sulaiman and Young, JJ.*) RATAN SINGH *v.* PIRBHU DAYAL. **131 I.C. 135=1931 A.L. J. 230=A.I.R. 1931 All. 302.**

———**Ss. 4 and 5**—"*Promissory note*"—*Document setting out debt owing from father of executant—Provision for payment in instalments.*

Where a document sets out the fact of the amount of debt being owing from the father of the executant and then states that the amount will be paid in four instalments on dates fixed in four years with interest at a certain rate, it amounts to an unconditional promise to pay and therefore the document is a promissory note within the meaning of S. 4. (*Bennet, J*) LAKHMI DAS *v.* LAKHO RAM. **154 I C. 517=7 R.A. 771=1935 A.L. J. 651=1935 A.W.R. 366=A I.R. 1935 All. 410.**

———**S. 4**—*Promissory note—Essentials.*

One of the most essential characteristics of a promissory note is certainty—certainty both as regards the person by whom and to whom payment is to be made appears to be insisted on for reasons of public policy, for any uncertainty in such matters would tend to restrict credit and to hamper commerce. (*Suhrawardy and Patterson, JJ.*) HARKISHORE BARUA *v.* GURA MIA CHOWDHURY. **58 Cal. 752=I.R. 1931 Cal. 458 =131 I C. 570=35 C.W.N. 53=53 C.L.J. 37=A.I.R. 1931 Cal. 387.**

———**S. 4**—*Promissory note—Instrument containing words "I am liable to pay" without any undertaking.*

An instrument which contains the words "I am liable to pay" without any undertaking to pay is not a promissory note. (*Pandalai, J.*) VAIDINATHA CHETTIAR *v.* THIRUMALAI REDDYAR. **6 R.M. 535=148 I.C. 759=39 L.W. 354=A.I.R. 1934 Mad. 220=1934 M. W.N. 1154=66 M.L J. 315.**

———**S. 4**—*Promissory note—Letter offering to pay debt due by another after limited period on demand.*

The nature of a document must be determined by its cantents, and the description of it given in the plaint cannot change its character or legal effect. A person wrote to another that he would be liable for payment of

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principal amount with interest due on promissory notes executed by his brother to the latter that he would pay the whole amount on demand after certain period and that his brother should not be asked for the amount.

Held, that the letter was only a proposal and not a promissory note. (*Shadi Lal, C.J. and Abdul Rashid, J*) TULSI SHAH *v.* TAFAZUL HUSSAIN SHAH. **6 R.L. 615=148 I.C. 964=A.I R. 1934 Lah. 93.**

———**S. 4**—'*Promissory note*"—*What is—Name of payee—Where to be inserted.*

Where an instrument clearly indicates the promisor and the promisee, and contains a definite promise to pay it amounts to a promissory note. There is no rule laying down in which part of the document the payee is to be named or by what kind of language. A signed letter which is in the following terms, namely, 30th Panguni Siddharti-Kallal A. T. N. A. T. credit, the same place R. M. M. R. M. debt for two hundis taken by me and sent for Penang Firm on the 13th idem Rs. 9500, at Rs. 55 (exchange rate) 3 months Thavanai 11 annas interest, rings 10,000, for these 10.000 rings adding from Thavanai, Thavanai interest and principal will be paid and this letter taken back by me is a promissory note. (*Varadachariar and Burn, JJ.*) CHOCKALINGAM CHETTIAR *v.* PALANIAPPA CHETTIAR. **58 Mad 261 =155 I.C. 184=7 R.M. 553=1934 M.W.N. 1261= A.I R. 1935 Mad. 23=67 M.L.J. 595.**

———**S. 4, Ill. (b)**—*Note payable to a particular person.*

A promissory note payable to a particular person and not containing words prohibiting transfer is an instrument payable to order. 25 N. L. R. 173, Ref. (*Bose, A. J. C.*) GULABGIR *v.* NATHMAL. **27 N.L.R. 327.**

———**S. 5**—Shah jog *hundi*.

A *shah jog* hundi is not a hundi payable to bearer; it is payable to a 'respectable bearer, and that only when it is endorsed by the last endorsee. 6 Bom.H.C.R. 24; 7 Bom. L. R. 275; 26 A. 493; 1 Lah. 429, Foll.; 50 B. 765, Ref. (*Tek Chand and Agha Haidar, JJ.*) MURLIDHAR SHANKAR DAS *v.* HUKUM CHAND JAGADHAR MAL. **143 I.C 257=I.R. 1933 Lah. 327=33 P.L.R. 19=A.I.R. 1932 Lah. 312.**

[*See also* Medhavdas Jethabhai *v.* Devidas, 36 Bom. L.R. 929=A.I.R. 1934 B. 400 (F.B.); Madhavdas Jethabhai *v.* Sitaram, 36 Bom.L.R. 941.]

———**S. 6**—*Post-dated cheque—Negotiability.*

A cheque is a bill of exchange and as such it is negotiable. The mere fact that the date of payment of a cheque is postponed to a future date does not make the cheque payable "otherwise than on demand." It is payable on demand after the due date. Therefore, a person who is holder in due course of a cheque without notice of any defect, is entitled to payment from the drawer. (*Young, J.*) PARTAB CHAND RATAN CHAND *v.* GILBERT. **151 I.C. 287=7 R.A. 128 (1)= 1934 A.L.J. 892=4 A.W.R. 455=A.I.R. 1934 All. 695 (1).**

———**S. 7**—*Acceptance by drawee—Proof—Mercantile usage in Karachi.*

The plaintiff alleged that when the *hundi* was presented the defendants made an entry thereof in their register and noted the register number on the *hundi*, that they did not dishonour within 3 days and that they had money available for payment. The other evidence did not establish the plea that the *hundi* could be regarded as accepted according to mercantile usage in Karachi.

Held, that there was no acceptance within the meaning of S. 7. (*Broadway and Johnstone, JJ.*) GURDAS MAL RAM CHAND *v.* KHEM CHAND PREM SINGH. **13 Lah. 31=I.R. 1932 Lah. 390=137 I.C. 873=33 P.L.R. 363=A.I.R. 1932 Lah. 274.**

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——**S. 7**—*"Drawer"—Definition, if exhaustive.*

The definition of "drawer" in S. 7 is not exhaustive and the maker of a promissory note can also be called a drawer. (*Abdul Rashid, J.*) SHIV NATH *v.* BISHAMBAR DAS. **7 R.L. 354 (1)=152 I.C. 1006=36 Cr. L.J. 217=37 P.L.R. 31=1935 Cr.C. 239=A.I.R. 1935 Lah. 153.**

——**S. 7**—*Oral acceptance—Validity of.*

Apart from any mercantile usage, there cannot be an oral acceptance of a hundi or bill of exchange. The acceptance must be in writing and must be written on the hundi itself. (*Staples, A.J.C.*) SURAJMAL *v.* KASHIPRASAD. **6 I.R. (Nag.) 29=144 I.C. 914=A. I.R. 1933 Nag. 389.**

——**S. 8**—"Holder"—Purchaser of a promissory note. *See* NEGOTIABLE INSTRUMENTS ACT, S. 37. **1935 O.W.N. 295=A.I.R. 1935 Oudh 264.**

——**S. 8**—"Holder"—Transferee of promissory note under sale deed. *See* S. 43 *Infra*. **1935 A.W.R. 1217=1935 A. 1041.**

——**Ss. 8 and 78**—*Promissory note—Assignment—Assignee's right to sue in his own name, without endorsement.*

A promissory note is a written acknowledgment of debt with a promise to repay. It is also a memorandum of contract and evidence of a chose in action. Thus it may be transferred by assignment and the assignee thereby gets such title as the assignor had in the note and in addition, the right to have the endorsement of the assignor and this includes the right to sue on the assignment in his own name and recover the amount due under the note from the parties liable. A promissory note is also a negotiable instrument and under the Negotiable Instruments Act, it is transferable merely by endorsement and delivery. As such, it is clothed with certain incidents intended to facilitate the business of merchants. The Negotiable Instrument Act has not affected the transferability of a promissory note by assignment as a chose in action, apart from endorsement. (*Lort Williams and M.C. Ghose, JJ.*) SURATH CHANDRA SAHA *v.* NARAYEN CHANDRA CHAUDHURY. **61 Cal. 425=150 I.C. 925 (2)=38 C.W.N. 465=7 R.C. 45=A I.R. 1934 Cal. 549.**

——**S. 8**—*Right to sue—Benamidar.*

A benamidar or a person claiming to be the real owner cannot sue an a negotiable instrument but it is not correct to say that no person not named in the instrument can ever sue. There can be a valid assignment of the instrument as a chose in action and the assignee can, subject to the provisions of S. 130 of the Transfer of Property Act, maintain an action on the instrument. A I. R. 1928 Nag. 54, Ref. 30 Mad. 88; 24 Mad. 654; 17 M.L.J. 393, Foll. (*Bose, A.J.C.*) GULABGIR *v.* NATH MAL. **137 I.C 33=I.R. 1932 Nag. 53=27 N.L.R. 327=A.I.R. 1932 Nag. 23.**

——**S. 8**—*Right to sue on promissory note.*

No one can maintain a suit on a promissory note except the holder thereof. The fact that the holder has been made a party and has admitted that he is only the plaintiff's benamidar makes no difference.

Semble.—It may be that the suit can be proceeded with if it had been based on the consideration and not on the note. (*Suhrawardy and Patterson, JJ.*) HARKISHORE BARUA *v.* GURA MIA CHOWDHURY. **58 Cal. 752=I.R. 1931 Cal. 458=131 I C. 570=35 C. W.N. 53=53 C.L.J. 37=A I.R. 1931 Cal. 387.**

——**S. 13 (1), Explanation and S. 48**—*Promissory note—Right of suit on—Allotment of note in partition—Right of allottee to sue on.*

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The payee of a promissory note is the only person who can sue on it; a person claiming to be owner thereof cannot sue on it in the absence of an indorsement in his favour by the holder. A person to whose share a promissory note in another's name is allotted on a partition cannot sue on it in the absence of an endorsement in his favour by the person in whose name it is executed. The partition does not operate as an assignment by operation of law. (*Murphy and Divatia, JJ.*) VIRAPPA *v.* MAHADEVAPPA. **36 Bom. L.R. 807=153 I.C. 352=7 R.B. 230=A.I.R. 1934 Bom 356.**

——**S. 14**—*Negotiation—What amounts to.*

It is not every transfer of a promissory note that amounts to a negotiation. It is a negotiation only when the transfer is such as to constitute the person entitled to the instrument the holder thereof, as defined in S. 8. (*Sulaiman, C.J. and Bennet, J.*) PARSOTAM SARAN *v.* BANKEY LAL. **159 I C. 788=8 R.A. 509=1936 A. L J. 454=1935 A.W.R. 1217=A.I.R. 1935 All. 1041.**

——**S. 15**—*Promissory note in favour of person agent—Endorsement by principal.*

Whereupon a true construction of a promissory note itself, it is plain that the payee's name is mentioned therein as a payee in his capacity as agent of his firm and not in his personal capacity, the proprietor of that firm is really the true payee and can therefore endorse the promissory note under the provisions of S. 15 of the Negotiable Instruments Act. (*Dunkley, J.*) CHINAMAN YO WAH *v.* LETCHUMANAN CHETTYAR. **153 I.C. 168=7 R.R. 198=A.I.R. 1934 Rang. 289.**

——**S. 16**—*Promissory note—Endorsement—Forum.*

Where a person in whose favour a promissory note is executed makes an endorsement to the effect that he has sold the promissory note for a certain amount to the person named by him and that he has no further interest left in it, the endorsement is a perfectly good one, although it does not bear the words that the person named will be entitled to realise the amount by bringing a suit against the maker. S. 16 of the Act does not lay down any specific form or words which are necessary for an endorsement. (*Thomas, J.*) BABU LAL *v.* BUDDHOO. **10 Luck. 732=154 I.C. 575=7 R.O. 487=1935 O.W.N. 295=A.I.R. 1935 Oudh 264.**

——**S. 16 (1)**—*Endorsement of promissory note—Effect.*

An endorsement while it transfers the property in the note to the endorsee as the new holder does not operate as an assignment to the endorsee of the debt due by the maker to the original payee. (*Cornish, J.*) SEHAYVA *v.* SANJIVARAYUDU. **150 I.C. 885=7 R.M 36=1934 M W.N. 16=39 L.W. 579=A.I.R. 1934 Mad. 350=67 M.L.J. 393.**

——**S. 17**—*Right of election under—Whether modified by Stamp Act, S. 6.*

The right of election given by S. 17 of the Negotiable Instruments Act to the holder of an instrument to treat it as a promissory note or as a bill of exchange is a privilege which he must have the full advantage of and that benfit should not be taken away by anything contained in the Stamp Act. S. 17 should in effect be read as a proviso to S. 6 of the Stamp Act. (*Sundaram Chetty, J.*) ALAGAPPA CHETTY *v.* NARAYANAN CHETTIAR. **I.R. 1932 Mad. 843=140 I.C. 315=1932 M W N. 1171=36 L.W. 599=A.I.R. 1932 Mad. 765=63 M.L.J. 548.**

——**S. 20**—*Blank instrument—Decree on.*

It is open to the payee whose name does not appear on an instrument to fill in the blank instrument but unless he does so, he is not entitled to obtain any decree. 17

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I. C. 915 Ref. (*Dhavle, J.*) BRIJBHUSAN PANDE *v.* RAMJANAM KUER. **13 Pat.L.T. 506=142 I.C. 163= I.R. 1933 Pat. 127=A.I.R.1932 Pat. 324.**

———**S. 22**—"*Maturity*"—*Promissory note payable on demand.*

The term "maturity" used in this section can have no application to a promissory note payable on demand. (*Sundaram Chetty, J.*) HEMADRI *v.* SESHAMMA. **I. R. 1931 Mad. 397=130 I.C. 477=1930 M.W.N.1232 =A.I.R. 1931 Mad. 113.**

———**Ss. 26, 27 and 28**—*Action on promissory note—Liability of undisclosed principals.*

In an action on a promissory note against a person whose name properly appears as party to the instrument it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. The sections of the Contract Act relating to the liability of an undisclosed principal do not override Ss. 26 to 28 of the Act. (*Sundaram Chetty and Pandurang Rao, JJ.*) MUHAMAD ALIYAR ROWTHER *v.* GNANA AMMAL. **39 L.W. 551=150 I C. 91=6 R. M. 684=A I.R. 1934 Mad. 327=66 M.L.J. 671.**

———**S. 27**—*Liability—Note signed by member of joint family trading firm—Liability of firm.*

The name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or back of the document. It is not sufficient that the principal's name should be "in some way" disclosed ; it must be disclosed in such a way that on any fair intrepretation of the instrument his name is the real name of the person liable on the document. 46 C. 663 and 54 C. 380, Foll. So where a promissory note was executed by *K*, described as son of *P* (who with the other members of his family constituted a joint family firm) and there was no reference in the document to the firm of *P*, *held* the firm was not liable on the document. (*Page, C.J, and Mya Bu, J.*) P.R.M.P.R. CHETTYAR *v.* MUNIYANDI SERVAI. **10 Rang. 257=I.R. 1932 Rang. 194=139 I.C. 460=A.I.R. 1932 Rang. 97.**

[D. 145 I.C. 573 (R.). F. 144 I.C. 866 (R.)]

———**S 27**—*Partner in firm—Promissory note executed in individual capacity—Liability of other partners.*

Where a partner of a firm executes a promissory note in his individual capacity and not on behalf of the firm the executant alone is liable under the note. (*Patkar and Murphy, JJ.*) SHARANBASAPPA *v.* RACHAPPA. **I.R. 1933 Bom. 256=142 I.C.837=35 BomL.R. 68= A.I.R. 1933 Bom. 101.**

———**S 27**—*Promissory note—Executant described as proprietor of firm—Liability of firm.*

The name of a person or firm to be charged upon a negotiable instrument must be clearly stated on the face or the back of the instrument, so that the responsibility is made plain and can be instantly recognised. The mere fact that the name is disclosed in "some way" is not sufficient. Consequently the mere fact that a person executes a promissory note describing himself as the proprietor of a firm or writes on a newspaper with the name and description of a firm printed on it, cannot be held to be sufficient to hold the firm liable on the promissory note. (*Bhide and Rangi Lal, JJ.*) MANMOHAN NATH DAR *v.* RADHA KISHAN. **15 Lah. 901 7 R.L. 400=153 I.C. 208=35 P.L.R. 590=A.I.R. 1934 Lah. 815.**

———**S. 27**—*Pro-note by manager of Hindu joint family—Suit against other members—Maintainability.*

The mere consideration that it would be difficult, if not impossible, for all the members of the joint family to join in the execution of promissory note cannot defeat the provisions of S. 27. A suit therefore based on a promissory note executed by the manager of the joint family is not tenable against the other members of the joint family. (*Niyogi, A J.C.*) MOTILAL *v.* PUNJAJI. **I.R 1933 Nag. 242=144 I.C. 411=29 N.L.R. 312= A.I.R. 1933 Nag. 160.**

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———**S. 27**—*Pro-note executed by manager of joint family—Liability of other members.*

The rule that, in order to make a person liable on a promissory note, the liability must appear on the face of the document does not apply to promissory notes executed by the managing member of a joint Hindu family and if it is established that liability was incurred by the manager of the family for the benefit of the family or for family business, then it is not open to the other members of the family to plead that as their names did not appear in the note and it was not specified that the liability was incurred for the purposes of or on behalf of the joint family, they are not liable. Their liability follows from the authority of the managing member to make the other members liable for the contracts made by him for the benefit of the family or for carrying on legitimate business of the family. 46 C. 668 ; A I R. 1925 Cal. 1153 ; A.I.R. 1928 Lah. 722 and A.I.R. 1924 All. 8, Ref. (*Coldstream and Jai Lal, JJ.*) BHAGWAN SINGH & CO. *v.* BAKHSHI RAM. **149 I.C. 556=6 R.L. 705=A.I.R. 1933 Lah. 494.**

———**S. 27**—*Promissory note by partner of firm—Liability of firm.*

The name of the person or firm to be charged on a negotiable document must be clearly stated on the face or on the back of the document. No exception is made with regard to trading firms. A member of a leading firm executed a promissory note. Nowhere in it was the name of the firm mentioned.

Held, that the firm was not liable. (*Baguley, J.*) KWONG HIP LONE SAW MILL CO. *v.* C.A.M.A.L. FIRM. **6 I.R. (Rang.) 16=144 I.C. 866=A.I.R. 1933 Rang. 131.**

———**S. 28**—*Applicability—Suit on consideration.*

S. 28 does not apply where the suit is brought not on the promissory note but on the consideration. In such a case the suit can be maintained against the principal as well. 46 Cal. 663 (P.C.), Ref. (*Staples, A.J.C.*) JAG MOHAN PRASAD *v.* FIRM OF SAMPATLAL MULCHAND. **27 N L.R. 324=135 I.C. 401=I.R. 1932 Nag. 1=A.I.R. 1932 Nag. 27.**

———**S. 28**—*Hindu minors—Pro-note by mother as guardian—No description as guardian in signature—Liability of minors—Guardian's liability—If excluded.*

Plaintiff instituted a suit on a promissory note executed to him by the mother and guardian of two Hindu minors. The note which was in renewal of a prior note by her (which itself was in renewal of an earlier one executed by the father of the minors) described the minors in the body of the note "as represented by their mother and guardian," but he signed the note without any such description attached to her name.

Held, that the intention of the maker, which could be inferred from the surrounding circumstances, the debt being one incurred by the fateer originally, was to exclude her own personal liability and to make the wards (minors) liable ; that the liability of the minors under the Hindu Law was not affected by the mere fact that the promissory note evidencing the debt was by a guardian ; and consequently the plaintiff was entitled to a decree against the minors. (*Beasley, C.J., Ramesam and King, JJ.*) SATYANARAYANA *v.* MALLAYYA. **58 Mad. 735=7 R.M. 591=155 I.C. 581=1935 M.W.N. 349=41 L.W. 514=A.I.R. 1935 Mad. 447=68 M.L. J. 540 (F.B.).**

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———**S. 28**—*Promissory note—Description in the body and signature of executant as Chairman of Co-operative —Society—No exclusion of personal liability.*

The promissory note in favour of the plaintiff was executed by "Damodar, Chairman of the Weavers' Society," in respect of balance due on accounts which stood in the name of Damodar. It was signed by 'Damodar, Chairman, W. Society." It was not stated in the body of the promissory note that he was passing the note on behalf of or on account of the Weaving Society nor did he expressly exclude his personal liability.

Held, that the word "Chairman" was only a word of description and that Damodar was personally liable on the instrument. *Dutton* v. *Marsh*, (1871) L.R 6 Q.B 361; 4 B. 275; 52 B. 610; 46 I.A. 33; 38 M. 482. Foll. *Alexander* v. *Sizer*, (1869) L.R. 4 Ex. 102 and *Lindus* v. *Melrose*, (1858) 3 N. & N. 177, Dist. *Elliot* v. *Bax Iron Side*, (1925) 2 K.B. 301, Ref. (*Patkar and Nanavati, JJ.*) DAMODAR KESHAV *v.* RAMNATH. **140 I.C. 734=34 Bom.L.R. 1327=A.I.R. 1932 Bom. 607.**

———**S. 28**—*Promissory note—Executant signing his own name and also signing as guardian—Personal liability.*

The material part of the promissory notes was as follows :—"The balance is Rs. 400. This sum of rupees four hundred we have agreed to pay you and so we owe you. On demand we promise to pay you or your order this sum with interest thereon at one anna per mensem and get this returned. To this effect is the promissory note executed with our consent and in the handwriting of T. V. S., the guardian." Then defendant 2 (T. V. S.) signed his name alone across the stamp and again below the stamp as guardian for minor *S*.

Held, that the guardian also made himself personally liable. (*Walsh, J.*) SESHAGIRI RAO *v.* SESHAGIRI RAO. **154 I.C. 582=7 R.M. 452=A.I.R. 1935 Mad. 160.**

———**S. 29**—*Scope—Express limitation of liability.*

Under S. 29 the liability should be expressly limited and not merely impliedly. Where a promissory note head "Estate of *B. H.*" was executed by the defendants who were described as the executors of the said estate and it was signed by them as executors,

Held, that there was no express limitation of liability to the extent of the assets received by the defendants as executors and that they were personally liable under it. (*Beaumont, C.J. and Rangnekar, J.*) HIRJIBHOY BEHRAMJI *v.* RATANBAI. **6 I.R. (Bom.) 135 (1)= 146 I.C. 979=35 Bom.L.R. 969=A.I.R. 1933 Bom. 444.**

[D. 36 Bom.L.R 807 (812).]

———**S. 32**—*Seller and buyer—Endorsement of bills through bank—Right as endorsee superseding right as seller.*

Under a C.I.F. contract transactions were carried on in the following manner: The purchaser ordered certain goods. The seller after accepting the order despatched the goods at the same time drawing bills of exchange directing the purchaser to pay *C* Bank a sum representing the cost of goods freight and insurance. The Bank tendered to the purchaser the bills of exchange, invoices, bills of lading and other documents. The purchaser accepted the bills of exchange and gave the necessary instructions for clearance of goods The bills were then presented on maturity to the purchaser. The particular agreement permitted the sellers to draw drafts on the buyers, the latter being in the position of guarantors. The agreement furtner provided that disputes arising out of the transaction should be referred to arbitration. The buyers in the particular case accepted the bills before maturity and became liable to the Bank and the Bank endorsed the bills to the sellers.

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Held, that the sellers could sue on the accepted bills and the transaction being one independent of the contract itself the agreed procedure regarding arbitration was inapplicable. (*Pullan and Niamatullah, JJ.*) BHIRAJ LAL RAM PRASAD *v.* JACOB BEHRENS & SONS **1932 A.L.J. 1055=I.R. 1933 All. 236= 143 I.C. 385=A.I.R. 1933 All. 74.**

———**S. 32**—*Unqualified acceptance—Liability of acceptor—Failure of consideration—Plea of—Not open.*

Where the first defendant accepted without qualification a bill drawn on him by the plaintiffs for goods sold by them to the second defendant and failed to pay the bill at maturity, it is no defence that according to the contract between the plaintiffs and the second defendant the payment was to be made against delivery of documents and on the due date, the plaintiffs had no documents to deliver. As between the plaintiffs and the first defendant the only contract was the bill of exchange which did not on its face show that the payment was to be made against delivery of documents, the bill having been accepted unconditionally. (*Zafar Ali and Dalip Singh, JJ.*) JACOB BEHRENS AND SONS *v.* SOHAN LAL NIADAR MAL. **34 P.L.R. 645.**

———**S. 35**—*Applicability—Promissory note payable on demand.*

The section does not apply to a promissory note payable on demand. 47 M.L.J. 475 and C R.P. No. 301 of 1927, Ref. The last paragraph of the section cannot be taken to mean that the indorser is liable even without a notice of dishonour being given to him by the indorsee, since that would be in conflict with the mandatory provisions of S. 93. It only means that after dishonour, the indorser is liable as upon an instrument payable on demand, that liability is akin to that of the maker but the liability is subject to the condition fixed in the proviso embodied in the first part of the section. (*Sundaram Chetty, J.*) HEMADRI *v.* SESHAMMA. **I.R. 1931 Mad. 397=130 I.C. 477=1930 M.W.N. 1232 =A.I.R. 1931 Mad. 113.**

———**S. 35**—*Applicabiliiy—Promissory note payable on demand.*

S. 35 applies only to instruments which are endorsed before maturity and as a promissory note payable on demand is always at maturity, this section cannot apply. (*Bhide and Dalip Singh, JJ.*) OFFICIAL RECEIVER, LAHORE *v.* AMRITSAR NATIONAL BANK. **8 R.L. 607=160 I.C. 791=A.I.R. 1935 Lah. 825.**

———**S. 35**—"*Contract to the contrary*"—*Apparently unqualified endorsement—Exclusion of personal liability —Inference.*

The indorser of a negotiable instrument who indorses without restricting his liability in the indorsement by express words makes himself liable to the indorsee as surety for the amount of the instrument in case of dishonour. The rule is however subject to any 'contract to the contrary' by which although the indorsment is *ex facie* unrestricted, tne indorser as between himself and the indorsee, by agreement either express or to be inferred from the nature of the transaction excluded his personal liability. Where at a partition of family properties a promissory note executed by a third party in favour of the father was indorsed by him in favour of his adult son as part of the assets allotted to the latter,

Held, that the lower Court was justified in drawing an inference from the nature of the transaction that the father intended to exclude his personal liability as indorser and that the son had no right of recourse against the father on default by the maker. (*Krishnan Pandalai, J.*)

NEG. INSTRUMENTS ACT (1881), S. 35.

SATTAMUTHU CHETTIAR *v.* ABDUL KAREEM MARACAYAR. **36 L.W. 777 = 1932 M.W N. 1149 = 141 I.C. 70 = I.R. 1931 Mad. 68 = A.I.R. 1933 Mad. 61 = 63 M.L J. 880.**

———**S. 35**—*Transfer by delivery—Rights and liabilities.*

A transfer by delivery of a negotiable instrument is not liable on the instrument to a subsequent holder under S. 35 of the Act nor is he entitled, in the event of dishonour to enforce liability on the instrument against a prior party to it. (*Beasley, C.J. and Cornish, J.*) VALJEE KANJEE & Co. *v.* HARSOOKDAS BALAKRISHNADOSS. **I.R. 1932 Mad. 462 = 137 I.C. 838 = 35 L.W. 269 = A.I.R. 1932 Mad. 323 = 62 M.L.J. 239.**

———**S. 37**—*Accommodation note—Holder with no notice of the nature of the note—Indulgence to payee—Maker, if discharged.*

If the holder of an accommodation note having no notice of its true character at the time of his taking the note but after notice thereof gives indulgence to the payee (the party accommodated) he does not thereby discharge the maker (the accommodation party). Mere knowledge on the part of the endorsee of the fact that the bill or note is one for accommodation whether the knowledge is at the time of the endorsment or afterwards appears to be absolutely irrelevant under S. 37 unless there is "a contract to the contrary" (English cases cons.) (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) BANK OF HINDUSTAN, LTD. *v.* GOVINDARAJULU NAIDU. **57 Mad. 482 = 1934 M.W.N. 52 = 147 I C. 1146 = 38 L.W. 961 = 6 R.M. 411 = A.I.R. 1934 Mad. 75 = 66 M L.J. 180.**

———**Ss. 37 and 38**—*Cheque payable to bearer—Person paid as holder.*

Where the cheque is payable to the bearer, the person to whom the payment is made is a holder and thus a surety under Ss. 37 and 38. He can therefore be made a party with the principal person. (*Kaul Mir Ahmad, A.J.C.*) MAHOMED ABDUL AZIZ *v.* FRONTIER BANK, LTD., KOHAT. **6 R. Pesh. 58 = 148 I.C. 851 (1) = A.I. R. 1934 Pesh. 10.**

———**S. 37**—*Promissory note executed without consideration—Liability of maker to its purchaser.*

Under S. 37, the maker of a promissory note is liable to its purchaser, who is a holder within the meaning of S 8 of the act. A holder who has paid consideration for the note can recover the amount due on it, even if it was originally made without consideration. (*Thomas, J.*) BABU LAL *v.* BUDDHOO. **10 Luck. 732 = 154 I. C. 575 = 7 R.O. 487 = 1935 O.W.N. 295 = A.I.R. 1935 Oudh 264.**

———**Ss. 37 and 38**—*Pro-note executed by* A *to* B—*B endorsing it to* C, *a Bank, and taking fixed deposit receipt—Suit by* C *on note*—A's *signature proved to be forged—Liability of* B.

A promissory note payable on demand was executed by *A* in favour of *B* who endorsed it to *C*, a Bank for valid consideration. The consideration was that a fixed deposit receipt was given to *C*. *C* filed a suit on the note wherein *A* contended that it was not executed by him and that it was a forgery. His contention was upheld and decree was passed against *B*. In an appeal by *B*,

Held, that the mere fact that the consideration was given by the plaintiff Bank in the shape of a fixed deposit only or that the Bank had gone into liquidation could not help *B* so far as the claim on the basis of the pro-note was concerned. The fixed deposit was a good consideration in law and it was open to *B* to claim the amount due to him on the fixed deposit receipt in the course of the liquidation proceeding. Nor can the fact that the execution of the pro-note had been held to be not proved or the possibility that it was forgery help *B*.

Held, further, that the liability of *B* to *C* was not merely that of a surety, but of a principal debtor and consequently the question of the liability of the maker was immaterial. (*Bhide and Dalip Singh, JJ.*) OFFICIAL RECEIVER, LAHORE *v.* AMRITSAR NATIONAL BANK. **160 I.C. 791 = 8 R.L. 607 = A.I.R. 1935 Lah. 825.**

NEG. INSTRUMENTS ACT (1881), S. 44.

———**S. 39**—*Accommodation note—Indulgence granted to maker—Surety not discharged.*

Entering into an agreement with the principal-debtor granting him time will not discharge the surety if the right against the surety is reserved. The mere fact that S. 39 provides in respect of a Bill of Exchange for such reservation does not show that the main principle recognised as part of the law of contracts does not apply to other Negotiable Instruments. S. 39 would appear to be a provision inserted *ex-abundanti cautela*. In the case of a promissory note for accommodation the endorsee does not lose his rights againt the maker-surety by reason of an indulgence to the payee (principal debtor) if the rights of the endorsee have been expressly reserved as against the surety. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) BANK OF HINDUSTAN, LTD. *v.* GOVINDARAJULU NAIDU. **57 Mad. 482 = 38 L.W. 961 = 1934 M.W.N. 52 = 147 I.C. 1146 = 6 R.M. 411 = A.I.R. 1934 Mad. 75 = 66 M.L.J. 180.**

———**S. 43**—*Hire purchase agreement — Vendor cancelling contract—Liability of hirer for stopping payment of cheque.*

On a contract of hire-purchase, a motor car was given to the defendant for Rs. 2,100. Rs. 1,000 was to be paid in advance and the balance was to be paid in instalments in the course of eight months and the property in the car was pass to the hirer only on the full payment of the amount. The hirer paid Rs. 50 cash and a cheque for Rs. 950 and took the car but intimated after two days that the car was defective and that he had stopped payment of the cheque till the matter was settled. The owner had the car seized through his agent, and filed a suit on the cheque.

Held, that no breach was committed by the hirer but that the agreement was cancelled by the owner when he seized the car, that the cheque not being supported by consideration S. 43 applied and that the owner was not entitled to recover either on basis of agreement or on the cheque *Brooks* v. *Beirnstein*, (1909) 1 K. B. 98 and A.I.R. 1929 Mad. 884, Dist. (*Jai Lal, J.*) COMMERCIAL CREDIT CORPORATION, LTD *v.* MD IDRIS. **I. R 1933 Lah. 482 = 144 I.C. 484 = A.I.R. 1933 Lah. 470.**

———**Ss. 43 and 8**—*Transferee of promissory note under sale deed—Right of.*

Where the amount due under a promissory note is transferred under a sale deed, the transferee is not a holder of the negotiable instrument within the meaning of S. 8 and cannot enforce the rights conferred on such a holder by S. 43 of the Act. (*Sulaiman, C.J. and Bennet, J.*) PARSOTAM SARAN *v.* BANKEY LAL. **159 I C. 788 = 8 R.A. 509 = 1936 A.L.J. 454 = 1935 A.W. R. 1217 = A.I.R. 1935 All. 1041.**

———**S. 44**—*Applicability—Suit on pro-note—Execution of fresh note for amount due and Court costs—Suit withdrawn—Amount paid by defendant towards prior note not given credit—Liability under renewed note—Proportionate reduction of.*

A suit on a pro-note having been executed, the defendant executed a fresh note to the plaintiff for the amount due and full costs of the suit, and the suit was with-

NEG. INSTRUMENTS ACT (1881), S. 44.

drawn. In a suit on the renewed note, it was found, that though defendant had paid plaintiff Rs. 1,000 which was not given credit to in the settlement of the figure arrived at when the fresh note was executed, and defendant claimed that his liability under the renewed note should be proportionately reduced.

Held, the case fell under S. 44 and though the payment could not be pleaded in "discharge" of the renewed note, the plea of partial failure of consideration was well founded and that the defendant's liability under the renewed note should be reduced *pro tanto*. (*Varadachariar, J.*) BALASUBRAMANIA CHETTIAR *v.* VENKATARAMA CHETTIAR. **40 L.W. 706=1934 M.W.N. 1382=154 I.C. 579=7 R.M. 453=A.I.R. 1935 Mad. 253=67 M.L.J. 650.**

——**Ss. 44 and 118**—*Applicability and scope—Promissory note—Suit on — Defendant young man and junior member of rich family—Presumption as to consideration—Quantum of consideration advanced—Onus of proof.*

The defendant, a junior member of a rich family but not in possession or management of its properties, got into bad ways and began to borrow recklessly, under the influence of bad companions, when he was aged only about 19 years and a few months. During a period of eight months he was away from home and from his people, he executed the suit pro-notes in favour of the plaintiffs, which purported to be for more than Rs. 23,000 in all. It was found that the plaintiffs did not make any enquiries of the father or other elder members of the defendant's family, though the latter were well known to the lenders, and that they were or must have been aware of the kind of life that defendant was leading and the purposes for which he required moneys.

Held, under the circumstances, that no presumption could be drawn under S. 118 of the Negotiable Instruments Act as to the quantum of consideration advanced under the notes, that the creditors were bound to prove by affirmative evidence, beyond the production of the notes themselves, the amounts actually advanced by them, and that if the evidence established payments only of smaller amounts than those stated in the notes, the case would be clearly governed by S. 44 and a decree could be passed only for the amount actually found to have been advanced. (*Varadachariar and Burn, JJ.*) NARASAMMA *v.* VEERAJU. **58 Mad. 841=1935 M.W.N. 528 (2)=160 I.C. 768=8 R.M. 716=42 L.W. 321=A.I.R. 1935 Mad. 769.**

——**S. 47**—*Transfer by delivery—Rights and liabilities.*

A transfer by delivery of a negotiable instrument is not liable on the instrument to a subsequent holder under S. 35 of the Act, nor is he entitled, in the event of dishonour, to enforce liability on the instrument against a prior party to it. (*Beasley, C.J and Cornish, J.*) VALJEE KANJEE & CO. *v.* HARSOOKDAS BALAKRISHNADOSS. **I.R. 1932 Mad. 462=137 I.C. 838=35 L.W. 269=A.I.R. 1932 Mad. 323=62 M.L.J. 239.**

——**S. 48**—*Oral assignment of pro-note in Punjab—Validity.*

There can be an oral assignment of a pro note in the Punjab at least as a chose in action. 29 P.R. 1919 and 28 Mad. 544, Rel. on; 22 I.C. 500; 10 L.B.R. 96, Dist. (*Bhide, J.*) LACHA RAM *v.* HEM RAJ. **134 I.C. 121=33 P.L.R. 120=I.R. 1931 Lah. 889=A.I.R. 1932 Lah. 30 (2).**

——**Ss. 48 and 13 (1). Expl.**—*Pro-note—Right of suit on—Allotment on partition to person other than payee—If assignment by operation of law.*

NEG. INSTRUMENTS ACT (1881), S. 59.

A suit on a pro note can only be maintained by the person named as the payee; and none claiming to be the owner thereof can sue on it without an endorsement by the payee. Therefore a person to whose share a pro-note in another's name is allotted on partition cannot sue on it without an endorsement by the original payee, as the partition does not transfer the pro-note to the allottee by operation of law. (*Murphy and Divatia, JJ.*) VIRAPPA *v.* MAHADEVAPPA. **36 Bom.L.R. 807=153 I.C. 352=7 R.B. 230=A.I.R. 1934 Bom. 356.**

——**S. 50**—*Promissory note — Endorsement—If amounts to assignment of debt due by maker to original payee.*

Plaintiffs sued for the recovery of an amount due on a promissory note executed by the first defendant in favour of the third defendant. The promissory note was endorsed over to the deceased father of the plaintiffs by the 3rd defendant, along with a letter of security. Before this endorsement, the first defendant sold some properties to the 2nd defendant and in the sale deed it was recited that the amount due under the promissory note was undertaken to be paid by the 2nd defendant and one of the witnesses to the document was the 3rd defendant. The plaintiffs sought to make the 2nd defendant liable on the promissory note on the strength of the recital in the sale-deed.

Held, that assuming that there was privity of contract between the 2nd and the 3rd defendants, inasmuch as there was no assignment by the 3rd defendant of the agreement between him and the 2nd defendant in favour of the plaintiff's father, their father was only the endorsee of the promissory note and not an assignee of the rights under the agreement and that the endorsement, while it transferred the property in the note to the endorsee as the new holder, did not operate as an assignment of the debt due by the maker to the original payee and that, therefore, the plaintiffs were not entitled to a decree against the 2nd defendant. (*Madhavan Nair, J.*) PERIAKARUPPAN CHETTI *v.* MOTTAYYA MUDALI. **156 I.C. 455=8 R.M. 5=1935 M.W.N. 210=41 L.W. 177=A.I.R. 1935 Mad. 240=69 M.L.J. 30.**

——**S. 50**—*Transferee of Hundi without consideration—Rights of.*

A transferee of a hundi for no consideration has got the rights of the transferor and can sue the maker, but he cannot have rights of a holder in due course. (*Dalip Singh, J.*) RANG LAL *v.* AMOLAK CHAND MEWA RAM. **147 I.C. 679 (2)=6 R.L. 426 (2)=35 P.L.R. 184 (2)=A.I.R. 1933 Lah. 1014 (2).**

——**S. 59, Proviso**—*Defendants drawing pro-notes in favour of X for accommodation—X depositing them with plaintiff as security for his debt—X subsequently endorsing them to plaintiff—Plaintiff's right to recover full amount from defendants.*

The defendants drew three promissory notes in favour of one *X* without consideration and for his accommodation. The promissory notes were for Rs. 600 each payable on different dates. After the maturity of the three promissory notes in suit, *X* who was indebted to the plaintiff in a sum of Rs. 1,650 deposited them with the plaintiff as security, and subsequently endorsed them to him. In a suit by the plaintiff against the defendants,

Held, that the plaintiff became the holder of the promissory notes in good faith and for consideration and is, therefore, entitled to recover the full amount due under the notes from the defendants and not merely the amount of *X*'s indebtedness to the plaintiff.

NEG. INSTRUMENTS ACT (1881), S. 60.

Held also, that even upon the view that the plaintiff held the promissory notes as collateral security only, the plaintiff would be entitled at common law to recover the full amount of the promissory notes from the defendants, the person entitled to the balance outstanding, after the amount due to the plaintiff from *X* had been liquidated, being at liberty to recover the same in an action for money had and received. (*Page, C.J. and Mya Bu, J.*) A.R.M. JAMAL *v.* ALBERT JOSEPH & SONS **13 Rang. 696=161 I.C. 798=8 R.R. 512 =A.I.R. 1936 Rang. 149.**

———**S. 60**—*Satisfaction of note at maturity—Subsequent endorsement—Right of holder in due course*

On payment of satisfaction of a promissory note at or after maturity by the maker of a promissory note, it ceases to be negotiable. If it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument. (*Krishnan Pandalai, J.*) VENKANNA *v.* SUBBAYYA. **I.R. 1933 Mad. 78=141 I.C. 136=37 L.W. 117=1933 M.W.N. 1201=A.I.R. 1933 Mad. 300=64 M.L.J. 241.**

———**S. 60**—*Satisfaction of note at maturity—Note retained wrongfully by third party—Endosement—Rights of holder*—Lickbarrow *v.* Mason—*Ruling in—Applicability of.*

Where in spite of satisfaction of the promissory note at maturity the note was not returned to the maker and was wrongfully retained by the wife of the payee who, after the payee's death, endorsed it to another person.

Held, that the holder in whose favour, "the waste paper" was endorsed was not entitled to succeed on the basis of the ruling in *Lickbarrow* v. *Mason* (*viz.*, of two innocent persons, he who occasioned the third party's fraud must suffer), because the payee could not be said to have facilitated his wife's wrong doing. (*Krishnan Pandalai, J.*) VENKANNA *v.* SUBBAYYA. **I.R. 1933 Mad. 78=141 I.C. 136=37 L.W. 117=1933 M.W.N. 1201=A.I.R. 1933 Mad. 300=64 M.L.J. 241.**

———**S. 61**—*Liability of acceptor—Hundi not presented on the due date.*

The liability of the acceptor, maker or drawee of a hundi is not affected by that the hundi was not presented for payment on the due date. 32 Bom. 247; 10 Lah. 755; 52 All. 696, Foll.; 59 I.C. 604, Not Foll. (*Addison and Agha Haidar, JJ.*) DEVI DITTA MAL KIRPAL *v.* PARTAP SINGH HARNAM SINGH. **I.R. 1933 Lah. 110=141 I.C. 379=34 P.L.R. 505=A.I.R. 1933 Lah. 176.**

———**Ss. 64 and 76 (d)**—*Bill of exchange—Drawer and drawee same person—No presentation necessary.*

By reason of the word "respectively" used in S. 64 of the Negotiable Instruments Act, the word "maker" has reference to promissory notes, the word "acceptor" to bills of exchange and the word "drawee" to cheques. If this view is correct, no presentation is necessary in the case of a bill of exchange if there is no acceptor of the bill. Even assuming that S. 64 applies to the case of a drawee of a bill of exchange, where the same person is the drawer as well as the drawee, S. 76 (*d*) can be invoked to dispense with the necessity of presentment for payment as against the drawer, as from the nature of the case the drawer could not suffer damage from the want of such presentment. (*Srivastava, J.*) CHANDRA DATT BAJPEI *v.* CHANDRA SEN DULI CHAND. **6 R. O. 500 (1)=148 I.C. 1167=11 O.W.N. 660=A.I.R. 1934 Oudh 254.**

———**S 64**—*Exception — Note payable at specified place—Presentment necessary.*

NEG. INSTRUMENTS ACT (1881), S. 64.

Presentment of a promissory note, which is payable at a specified place, is necessary to render the maker liable under it. A.I.R. 1929 Lah. 240, Ref. (*Broadway and Abdul Qadir, JJ.*) JAGAN NATH LUTHRA *v.* DEWAN CHAND KAKKAR. **135 I.C. 598=I.R. 1932 Lah. 134=33 P.L.R. 639=A.I.R. 1931 Lah 758.**

———**S. 64**—*Non presentment—No notice of dishonour—Damage—Onus of proof.*

No dishonour can possibly occur unless the instrument is presented for payment by the holder to the drawee as required by the first part of S. 64 of the Act, which is mandatory. The second part of the same section provides the penalty for non-presentment by stating in unequivocal terms that in default of such presentment the other parties thereto are not liable thereon to such holder. Where however it is alleged that no notice of dishonour was necessary as the party charged could not suffer damages for want of it the onus of proving that the other party could not suffer damage is on the party who wants to excuse himself for the non-presentation. 33 All. 4; 39 All. 364 and 10 I.C. 405, Ref. (*Subhedar and Grille, A.J.Cs.*) SHRIDHAR BALWANT *v.* BAXIRAM RODMAL SHOP, AKOLA. **28 N.L.R. 134 =I.R. 1932 Nag. 102=139 I.C. 805=A.I.R. 1932 Nag. 55.**

———**S. 64**—"*Other parties thereto*"—*Meaning of.*

In the case of a promissory note, the words "the other parties thereto" do not mean parties other than the maker of the promissory note, for in S. 69, Negotiable Instruments Act, it is specifically laid down that a promissory note made payable at a specified place must, in order to charge the maker thereof, be presented for payment at that place. (*Middleton, J.C. and Almond, A. J.C.*) SHER MOHAMMAD KHAN *v.* HAJI AHMAD. **158 I.C. 89=8 R. Pesh 48=A.I.R. 1935 Pesh. 132.**

———**S. 64**—*Payability of note at specified place—Onus.*

It is for the parties contesting liability to show that the note is payable at a specified place, in order to render presentment necessary. (*Beckett, J.*) MEHR BAKSH *v.* HARI CHAND. **160 I.C. 536=8 R.L. 549=A.I.R. 1935 Lah. 623.**

———**S. 64**—*Presentment—Promissory note payable on demand.*

Presentment for payment is necessary to make the indorser of a promissory note payable on demand liable to the indorsee. (*Sundaram Chetty, J.*) HEMADRI *v.* SESHAMMA. **I.R. 1931 Mad. 397= 130 I.C. 477=1930 M.W.N 1232=A.I.R. 1931 Mad. 113.**

———**S. 64**—*Presentment—What amounts to.*

A mere demand for the money does not amount to presentment of the note; the holder must exhibit the note and offer to hand it over on receiving payment. (*Middleton, J.C. and Almond, A.J.C.*) SHER MOHAMMAD KHAN *v* HAJI AHMAD. **158 I.C. 89=8 R. Pesh. 48=A.I.R. 1935 Pesh. 132.**

———**S. 64**—*Pro note payable at specified place—Liability of maker before presentment.*

Where a promissory note is payable at a specified place, the maker cannot be charged thereon until and unless the note is duly presented. A.I.R. 1929 Lah. 240 and A.I.R. 1931 Lah. 758, Foll. (*Dalip Singh and Bhide, JJ.*) KRISHEN LAL RAM LAL *v.* ABDUL GHAFUR KHAN. **17 Lah 275=160 I.C. 513=8 R.L. 557=38 P.L.R. 633=A.I.R. 1935 Lah. 893.**

———**S. 64**—"*Specified place*" — *Note payable at a particular town.*

Negotiable instruments are generally made payable at a particular town. Hence where a note is payable in

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Peshawar, it is payable at a specified place within the meaning of S. 64, even though the note does not specify some particular place in Peshawar. (*Middleton, J.C and Almond, A.J.C.*) SHER MOHAMMAD KHAN *v.* HAJI AHMAD. **158 I.C. 89=8 R. Pesh. 48=A.I.R. 1935 Pesh. 132.**

———**Ss. 64 and 76 (a)**—"*Specified place*"—*Meaning of—Promissory notes payable in Sialkot on demand—Presentment, if necessary.*

If there is to be presentment in the ordinary sense of the word, there must be some quite definite place where the holder of the note can attend with a reasonable chance of finding the maker of the note. In other words, the place specified for payment must be equivalent to what would be called in ordinary language an address which would enable the maker to be found by the exercise of reasonable diligence, provided that the holder himself chooses to attend at the place named for payment. Whether the place named for payment in a negotiable instrument constitutes a specified place for this purpose, must be a question to be decided according to the circumstances of each case. If the maker of the the pro-note has an ordinary place of business known to the parties concerned, the mere entry of the town in which it is situated may provide a sufficient address; but if the town is large and there are no other means of ascertaining where the maker is to be found, then there is no place at which the holder can be expected to attend for the purpose of presenting the note for payment. In the case of a note payable on demand, no difficulty is likely to arise in the ordinary way. In order to insist on the necessity for presentment, the maker or some one authorized to make payment must attend at the place named for payment during the ordinary business hours. In other words, since the note is payable at any time, he would in fact be carrying on a regular business at the place. If he fails to do so, no presentment would be necessary in view of S. 76 (*a*) of the Act. Where the promissory notes were made payable in Sialkot but were payable on demand.

Held, that no presentment was necessary as a large town like Sialkot was not a specified place far payment. (*Beckett, J.*) MEHR BAKSH *v.* HARI CHAND. **160 I.C. 536=8 R.L. 549=A.I.R. 1935 Lah. 623.**

———**S. 64, Excep. and S. 76 (c)**—*Promissory note payable on demand and at specified place—Part payment made—Presentment not necessary.*

Under the exception to S. 64, where the promissory note payable on demand and at a specified place presentment is necessary in order to charge the promisor, but where the promisor makes a part payment on account of the amount due such presentment is not necessary. (*Tapp, J.*) PEOPLES INSTALMENT AND SAVINGS BANK, LTD. *v.* RAM NATH. **6 I.R (Lah.) 49 (1)=144 I C. 1024=34 P.L.R. 804=A.I.R. 1933 Lah. 133.**

———**S. 66**—*Endorser tenant—Need for presentment for payment.*

Where the drawer of a hundi is also the drawee, presentment for payment is unnecessary. This rule however does not apply in the case of the indorser of a hundi. 15 N.L.R. 128, Dist. (*Subhedar and Grille, A.J.Cs.*) SHRIDHAR BALWANT *v.* BAXIRAM ROD MAL SHOP, AKOLA. **28 N L R 134=I.R. 1932 Nag. 102=139 I.C. 305=A.I R. 1932 Nag. 55.**

———**S. 70**—*Promissory note—Place of payment—Duty of debtor to seek out creditor—Rule as to—If applies.*

Under the provisions of S. 70 payment due under a promissory note must, in the absence of a contract to the contrary, ordinarily be made at the usual place of business of the maker or at his residence. The general principle that a debtor must find out the creditor and make the payment due to him as the latter's place of business or residence is not applicable to the case of a negotiable instrument. The place where the maker of a promissory note resides or carries on business is the only place where a suit on the note can be instituted. The Court there, is the proper Court having jurisdiction. (*Subhedar, A.J.C.*) GOPIKISAN SHEONARAIN *v.* JETHMAL GOVERDHANDAS. **155 I.C. 953=7 R.N. 206=A.I.R. 1935 Nag. 144.**

NEG. INSTRUMENTS ACT (1881), S. 76 (d).

———**S. 76 (c)**—*Construction*—"*Promises to pay*"—*Express promise—If necessary.*

The words "promises to pay" in Cl. (*c*) of S. 76 of the Act do not mean that an express promise is necessary so as to dispense with presentation for payment. A promise may be express or implied. Where in answer to a telegraphic communication by the creditor to the debtor stating that as the promissory note was about to be barred by limitation the debtor should confirm the balance and that otherwise a suit will be instituted, the debtor confirms the loan by means of a letter, the acknowledgment contained in the letter amounts to a promise to pay the amount due within the meaning of S. 76 (*c*), and no presentation for payment is necessary (*Young, C.J. and Abdul Rashid, J.*) PUNJAB CO-OPERATIVE BANK, LTD., LAHORE *v.* PARMA NAND. **17 Lah. 287=38 P.L.R. 620=157 I.C. 875=8 R.L. 159.**

———**Ss. 76 (c) and 64, Excep.**—*Promissory note payable on demand and at specified place—Part payment made—Presentment not necessary.*

Under the exception to S. 64, where the promissory note is payable on demand and at a specified place presentment is necessary in order to charge the promisor, but where the promisor makes a part payment on account of the amount due such presentment is not necessary. (*Tapp, J.*) PEOPLES INSTALMENT AND SAVINGS BANK, LTD. *v.* RAM NATH. **6 I R. (Lah.) 49 (1)=144 I.C. 1024=34 P.L.R. 804=A.I.R. 1933 Lah. 133.**

———**Ss. 76 (d) and 64**—*Bill of exchange—Drawer and drawee same person—No presentation necessary.*

By reason of the word "respectively" used in S. 64, the word "maker" has reference to promissory notes, the word "acceptor" to bills of exchange and the word "drawee" to cheques. If this view is correct, no presentation is necessary in the case of a bill of exchange if there is no acceptor of the bill. Even assuming that S. 64 applies to the case of a drawee of a bill of exchange, when the same person is the drawer as well as the drawee, S. 76 (*d*) can be invoked to dispense with the necessity of presentment for payment as against the drawer, as from the nature of the case the drawer could not suffer damage from the want of such presentment. (*Saivastava, J.*) CHANDRA DATT BAJPEI *v.* CHANDER SEN DULI CHAND. **6 R.O. 500 (1)=148 I.C. 1167 =11 O.W.N. 660=A.I.R. 1934 Oudh 254.**

———**S. 76 (d)**—"*Drawer*"—*If includes maker of a promissory note.*

The word "drawer" in S. 76 (*d*) includes the maker of a promissory note and the definition of "drawer" in S. 7 is not exhaustive. (*Abdul Rashid, J.*) SHIV NATH *v.* BISHAMBAR DAS. **7 R L. 354 (1)=152 I. C 1006=36 Cr.L.J. 217=37 P.L.R. 31=1935 Cr.C. 239=A.I.R. 1935 Lah. 153.**

———**S. 78 (d)**—*Presentment—When not necessary.*

S. 76 (*d*) applies to a case where the drawer has no funds with the drawee at the time the bill is being

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drawn or when it should have been presented, as also to a case where the drawer has no reasonable expectation that the drawee will accept for his accommodation. (*Tek Chand, J.*) KHAZANA MAL KHUB CHAND *v.* G. DE LA RUE BROWN. **158 I.C. 90 = A.I.R. 1935 Lah. 413.**

——**S. 76 (d)**—*Settlement of accounts between drawer and drawee before bill due—Presentment for payment unnecessary.*

Where the drawer of hundis payable at sight after 61 days has settled his accounts with the drawees long before the suit by the payee and has taken back all the money that was due by them to him the drawer does not suffer any damage from the payee's failure to present the hundis for payment on maturity and the case falls within exception (*d*), S 76. The payee is entitled to sue the drawer for the recovery of the amount due on the hundis (*Tek Chand, J.*) RAMJAS MAL BINJ RAJ *v.* SHEOJI RAM GANGA RAM. **6 I.R. (Lah.) 81 = 145 I.C. 208 = A.I.R. 1933 Lah. 97.**

——**Ss. 78 and 32**—*Benami assignment of pro-note—Release of maker by real owner—Assignee not entitled to sue on note.*

Negotiable instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the Act, and transfer of the rights of a party under a note to order to some one else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise. Where therefore a pro-note is assigned by the real owner and the benamidar executes an acknowledgment admitting that he was merely a benamidar and the assignor was real beneficiary, the assignee is not entitled to sue on the pro-note, specially when the payee of the note has expressly released the maker. No consideration is required for such a release and the fact that it was collusive is immaterial. (Case-law discussed.) (*Courtney Terrell, C. J. and Varma, J.*) PEARY PASI *v.* GAURI LAL. **13 Pat. 655 = 151 I.C. 694 = 7 R.P. 121 = 15 Pat.L.T. 576 = A.I.R. 1934 Pat. 382.**

——**S. 78**—*Benami promissory note—Rights of real creditor—Mode of adjustment.*

Where a promissory note is executed in favour of one person in lieu of consideration advanced by another, the promisor cannot pay money to the latter and be rid of his liability. But in a suit brought by the real creditor to which the debtor and the holder of the promissory note are parties, a decree can be passed against the debtor for what is due from him with a clear proviso that payment shall be made by the debtor to the holder or to his credit and that it is made by deposit in Court if money is recovered in execution shall be to the credit of the holder. (*Sen and Niamatulla, JJ.*) SEWA RAM *v.* HOTI LAL. **53 All. 5 = I.R. 1931 All 314 = 130 I.C. 698 = 1930 A.L.J. 1509 = A.I.R. 1931 All 108.**

[**D.** 14 L. 19 (21); 61 C. 425 (427). **R.** 36 Bom.L.R. 807 (811).]

——**S. 78**—*Firm as promisee—Right of member of firm to realise debt.*

The holder of a promissory note is entitled to realize the debt although the consideration had really come from a firm of which the holder was a member for the consideration need not come from the promisee. (*Bhide, J.*) JASWANT SINGH *v.* GOBIND RAM. **14 Lah. 19 = I.R. 1932 Lah. 674 = 140 I.C. 13 = 33 P.L.R. 937 = A.I.R. 1992 Lah. 620 (2).**

——**S. 78**—"*Holder*"—*Pro-note in name of Hindu father—Suit by son after father's death as survivor entitled to joint family property—Maintainability.*

A Hindu son or other coparcener who becomes entitled by survivorship to the joint family property of the

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family to which he belongs cannot sue on a promissory note or other negotiable instrument payable to his deceased father or other deceased member of the family or his order; for he cannot give a valid aud proper discharge to the maker, by reason merely of the operation of law. He does not represent the estate of the deceased coparcener. He gets the property by survivorship in his own right, and not as a representative of the deceased. But a legal representative can sue as a representative, because in law he represents the estate of the deceased. A coparcener is neither the holder nor the payee under the instrument; nor can he nogotiate the instrument (*Wadia, J.*) KAMALAKANT GOPALJI *v.* MADHAVJI VAGHJI. **59 Bom. 573 = 158 I.C. 145 = 8 R.B. 109 = 37 Bom.L.R. 405 = A.I.R. 1935 Bom. 343.**

——**S. 78**—*Promissory note—Right to sue on.*

No one can maintain a suit on a promissory note except the holder thereof. The fact that the holder has been made a party and has admitted that he is only the plaintiff's benamidar makes no difference.

Semble.—It may be that the suit can be proceeded with if it had been based on the consideration and not on the note. (*Suhrawardy and Patterson, JJ.*) HARKISHORE BARUA *v.* GURA MIA CHOWDHURY. **58 Cal. 752 = I.R. 1931 Cal. 458 = 131 I.C. 570 = 35 C.W.N. 53 = 53 C.L.J. 37 = A.I.R. 1931 Cal. 387.**

[**D.** 61 C, 425 (427). **Rel.** 58 B 536 (542); 36 Bom.L.R. 807 (811, 812); 1934 R. 280 (282).]

——**S. 78**—*Promissory note allotted to share of person by award—Right of such person to sue on note without endorsement.*

A promissory note was allotted to the share of a person in a partition by an award. There was a further provision that the promisee was to endorse and hand over the note to the person.

Held, that the award operated as a transfer *inter alia* of the promissory note and as such he was entitled to maintain a suit on it even though it was not endorsed. The further provision did not operate so as to make the transfer conditional on such endorsement or postpone the effect of the transfer till such endorsement was actually made. This provision was an additional and a further provision made with the object mentioned therein, namely, in order to facilitate the collection of the amount due under the promissory note. (*Pandrang Row, J.*) SUBBARAYUDU *v.* SUBBARAYUDU. **156 I.C. 335 = 7 R.M. 685 = 1935 M.W.N. 282 = A.I.R. 1935 Mad. 473.**

——**Ss. 78 and 8**—*Promissory note—Assignment—Assignee's right to sue in his own name, without endorsement.*

A promissory note is a written acknowledgment of debt with a promise to repay. It is also a memorandum of contract and evidence of a chose in action. Thus it may be transferred by assignment and the assignee thereby gets such title as the assignor had in the note and in addition, the right to have the endorsement of the assignor and this includes the right to sue on the assignment in his own name and recover the amount due under the note from the parties liable. A promissory note is also a negotiable instrument and under the Negotiable Instruments Act, it is transferable merely by endorsement and delivery. As such, it is clothed with certain incidents intended to faciltate the business of merchants. The Negotiable Instruments Act has not affected the transferability of a promissory note by assignment as a chose in action, apart from endorsement. (*Lort Williams and M. C. Ghose, JJ.*) SURATH CHANDAR SAHA *v.* NARAYAN CHANDRA CHAUDHURY. **61 Cal. 425 = 38 C.W.N. 465 = 150 I.C. 925 (2) = 7 R.C. 45 = A.I.R. 1934 Cal. 549.**

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———**S. 78**—*Promissory note benami—Suit by real owner impleading payee—Maintainability.*

A suit on a promissory note by a person who claims to be the real payee alleging that the payee named in the instrument is only a benamidar for himself, is not maintainable, although the benamidar payee is also impleaded as a party. (*Pakenham Walsh, J.*) CHINNAKUZHANDAI AMMAL *v.* VEERASAMI MUDALIAR. **159 I.C. 458=1935 M.W.N. 221=41 L.W. 281=A.I.R. 1935 Mad. 312=68 M.L.J. 713.**

———**S. 78**—*Promissory note—Beneficial owner—Right to sue.*

A beneficial owner cannot sue for recovery of money due on the basis of a promissory note, which is in favour of a benamidar. (*Srivastava and Nanavutty, JJ.*) SUNDAR LAL *v.* MAULA BAKHSH. **10 Luck 705=154 I.C 317=7 R.O. 469=1935 O.W.N. 269=A.I.R. 1935 Oudh 278.**

———**S. 78**—*Promissory note executed in favour of one partner—Right of another partner to sue.*

The holder of a promissory note is the only man who can give a valid discharge within the meaning of S. 78. Therefore one partner cannot sue on a promissory note which was executed in favour of another partner. (*Ba U, J.*) K. S. V. CHETTYAR FIRM *v.* MAHOO. **152 I.C. 410=7 R.R. 152=A.I.R. 1934 Rang. 280.**

———**S. 78**—*Promissory note — Liability under—Maker paying 'real" holder not named—If discharged from liability to payee named.*

The Negotiable Instrument Act was enacted for the benefit of trade and commerce and the principle underlying it is that promissory notes, bills of exchange, and cheques should be negotiable as apparent on their face without reference to secret title to them. Where the maker of a promissory note pays the "real" holder, he will yet be liable to the person whose name appears in the note and who is the holder within the meaning of the Act and the maker in such a case would find himself in peril. Therefore the "real" holder cannot sue on a note whereon the name of another person appears as payee. The proper procedure for the person claiming to be interested in such cases is to make a kind of secret arrangement to protect his interest by making a contract with the benamidar whereby the benamidar is required to lend his name in any proceeding necessary to enforce the payment, and if the benamidar refuses to sue or lend his name for any proceeding on the note, equity can, and will, compel him so to lend his name so that the suit can be properly constituted and the money recovered by the person really interested. 58 C 752, Appr.; 53 A. 5, Dist.; 58 M. 693, Rel. on; A.I.R. 1934 Cal. 391 and 30 Mad. 88, Not Foll. (Case-law discussed,) (*Stone, J.*) PAKIATHAMMAL *v.* VAIVAPURI UDAYAN. **160 I.C. 417=8 R.M. 636=1935 M.W.N. 1129=A.I.R. 1935 Mad. 880.**

———**S. 78**—*Promissory note—Plea of benami—Sustainability—Payment to holder.*

In a suit on a negotiable instrument (promissory note) by the payee named therein or the indorsee it is not open to the defendants to plead that such endorsee or payee is a mere benamidar. The payment in such a case should be made to the holder of the instrument and nobody else. (*Subhedar, A.J.C.*) NARAYAN *v.* UTTAMRAO. **141 I.C. 330 (1)=I.R. 1933 Nag. 57=15 N.L.J. 45.**

———**S. 78**—*Right to sue—Beneficiary.*

Though it cannot be said that a beneficiary can maintain a suit in all cases on the allegation that the holder was the plaintiff's benamidar, yet in a suit in which the holder, though not a plaintiff, is a party and the plaintiff who claims to be the real beneficiary is in a position to give to the drawer, through the holder, a discharge, there is no reason why the suit should not be allowed to be maintained. 55 C. 551 and 11 Pat. L. T. 255, Ref. 30 M. 88; 46 C. 663; 44 A. 290, Dist. (*Khaja Mahomed Noor and Dhavle, JJ.*) SURAJMAN PRASAD MISRA *v.* SADANAND MISRA. **11 Pat. 616=I.R. 1933 Pat. 3=140 I.C. 572=A.I.R. 1932 Pat. 346.**

[F. 15 P.L.T. 102 (103). R. 36 Bom.L.R. 807 (811.)]

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———**S. 78**—*Suit by beneficial owner—Maintainability.*

A beneficial owner who is not the holder or endorsee cannot sue on the note. (*Curgenven, J.*) SOMU NAIDU *v.* SANYASAYYA. **149½I.C. 1210=6 R.M. 674 (1)=1934 M.W.N 596=39 L.W. 520=A.I.R. 1934 Mad. 391.**

———**S. 78**—*Suit by beneficiary—Competency of—Beneficiary's right not disputed by promisee.*

If the beneficiary is in a position to give a valid discharge the fact that the promissory note does not stand in his name will not disentitle him to a decree in the suit. If the person in whose name the document stands is a party to the litigation and does not dispute the plaintiff's right to recover the loan and give a valid discharge there is no reason why the suit should not be maintainable and why a decree should not be made in favour of the beneficiary. (*Courtney Terrell, C. J. and Kulwant Sahay, J.*) RAMNAGINA PRASAD *v* BISHWANATH PRASAD **6 R.P. 373=147 I.C. 726=15 Pat.L.T. 102=A.I.R. 1934 Pat. 85.**

———**Ss. 79 and 80**—*Instruments of debt—Interest not mentioned—Claim of interest in the plaint—Operation of S. 80 of the Negotiable Instruments Act not excluded by O. 37, R. 2, C. P. Code.*

The operation of S. 80 is not excluded by O. 37, R. 2 of the C. P. Code. On the other hand, O. 37, R. 2 makes S. 79 or 80, as the case may be, specifically applicable to a case filed under O. 37 of the C. P. Code. Where a person claimed in the plaint 33½ per cent. interest on instruments of debt which contained no agreement as to the exact rate of interest.

Held, interest should be awarded at the rate of 6 per cent. from the date of hundis to the date of decree and subsequent interest also at the same rate thereafter. (*Madhavan Nair and Jackson, JJ.*) COIMBATORE SRI VENKATACHALAPATHI NIDHI, LTD. *v.* NANJAPPA GOUNDAN. **56 Mad 398=I.R. 1933 Mad. 164=141 I.C. 809=1933 M.W.N. 125=37 L.W. 104=A.I.R. 1933 Mad. 299=64 M.L.J. 117.**

———**S. 79**—*Rate of interest—Discretion of Court under Usurious Loans Act to reduce.*

The Negotiable Instruments Act must be read with other enactments passed subsequent thereto. If under the Usurious Loans Act which was passed after the Negotiable Instruments Act but before the suit promissory note was executed, the Court has a discretion to reduce interest in a proper case there is nothing in S. 79 which excludes such a discretion. (*Pullan and Niamatullah, JJ.*) SHEOBANS RAI *v.* SHAH MADHO LAL. **53 All. 776=136 I.C. 78=I.R. 1932 All. 126 (1)=1931 A.L.J. 645=A.I.R. 1931 All. 662.**

———**S. 79**—*Scope—Promissory note expressly stating rate of interest—Right to interest up to date of realisation—Power of Court.*

In a suit on a promissory note which expressly specifies the rate of interest payable, the Court cannot reduce such rate to be paid up to a date fixed by it after the institution of the suit, unless it is exorbitant or penal or otherwise offends against the law. At the same time it is not necessary that the Court should allow the stipulated rate up to the date of realisation. The requirements of S. 79 are sufficiently complied with, if interest

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at the rate specified is allowed up to the date of decree of the trial Court and thereafter at 6 per cent. per annum up to the date of realisation. (*Shah Lal, C.J. and Abdul Rashid, J.*) BHAGWANTI *v.* ATMA SINGH. **154 I.C. 470 = 7 R.L. 577 (2).**

———**S. 80**—*Applicability—Document declared not to be promissory note.*

Once it is held that a document is not a promissory note the provisions of S. 80 cease to be applicable. (*Tek Chand and Agha Haidar, JJ.*) NARAIN DATT *v.* KIRPA KISHEN. **13 Lah. 516 = 33 P L R. 809 = I R. 1933 Lah. 48 = 140 I.C. 869 = A.I.R. 1932 Lah. 616.**

———**S. 80**—*Effect.*

The effect of S. 80 is that when the rate of interest is not specified in the negotiable instrument, interest cannot be allowed at more than 6 per cent. per annum. (*Bhide, J.*) LOCHA RAM *v.* HEM RAJ. **I R. 1931 Lah. 889 = 134 I.C. 121 = 33 P.L.R. 120 = A.I.R. 1932 Lah. 30.**

———**S. 80**—*Interest—Proof of usage.*

The Negotiable Instruments Act does not apply to hundis and it is therefore permissible to the plaintiff to set up and prove a usage for the payment of interest at a rate exceeding 6 per cent. per annum notwithstanding the provisions of S. 80. (*Tek Chand and Monroe, JJ.*) HAR NARAIN SAHIB RAM *v.* BEHARI LAL CHARANJI LAL. **13 Lah. 800 = 34 P.L.R. 92 = 142 I. C. 729 = I R. 1933 Lah 251 = A.I.R 1932 Lah. 582.**

———**S. 80**—*Interest when no rate is specified in instrument—Date from which it should be calculated.*

Under S. 80, where no rate of interest is specified in the written instrument, then notwithstanding any contract to the contrary the interest is to be calculated at the rate of 6 per cent. per annum, and the date from which such interest should be calculated should be the date on which the principal amount ought to have been paid, that is, it becomes payable. The word 'same' in the section should be understood to refer to the amount due on the instrument and not to the interest on that amount. (*Sulaiman, C.J. and Bennet, J.*) NATH SAH *v.* DURGA SAH. **58 All 382 = 161 I.C. 317 (2) = 8 R. A. 717 = 1935 A.W R. 1264 = 1935 A.L.J 1256.**

———**S. 80**—*Interpretation—Promissory note payable on demand—Interest, from what date payable.*

The words "the same" in S. 80 relate to the amount due on the instrument, and not to the interest on that amount. In the case of a promissory note payable on demand which contains no provision for interest, interest is payable under the section at the rate of 6 per cent. per annum from the date of its execution and not from the date of the demand. 52 Bom. 88 (F.B.), Foll.; 23 Mad. 18 and 58 Cal 290, Not Foll. (*Srivastava and Smith, JJ.*) AMAR SINGH *v.* PRATAP SINGH. **157 I.C 950 = 8 R.O. 54 = 1935 O.W.N. 971 = A.I.R. 1935 Oudh 518.**

———**S. 80**—*Promissory note—No covenant for interest—Interest payable.*

Where in a promissory note, there is no mention of any covenant to pay interest, interest is payable under S. 80 at the rate of 6 per cent. per annum and such interest runs from the date of the execution of the promissory note. (*Allsop, J.*) WILLIAMS *v.* KALLU MAL MAGAN LAL. **154 I.C 523 = 7 R A 773 = 1935 A.L. J. 333 = 1935 A.W.R. 265 = A I R. 1935 All. 451.**

———**S 80**—*Pro note—Rate of interest not mentioned—Court's award at 1 per cent. per mensem—Legality*

S. 80 is quite clear that when the rate of interest is not specified in the negotiable instrument, interest cannot be allowed at more than 6 per cent. per annum. If a Court allows interest at 1 per cent. per mensem it acts

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illegally. (*Bhide, J.*) LACHA RAM *v.* HEM RAJ. **I. R. 1931 Lah 889 = 134 I.C. 121 = 33 P.L.R. 120 = A. I.R. 1932 Lah. 30 (2).**

———**S. 87**—*Instrument bearing traces of alteration—Onus of showing that it has not been improperly made.*

Where a party sues on an instrument which, on the face of it, appears to have been altered, it is for him to show that the alteration has not been improperly made. (*Ba U, J.*) C. S PILLAY *v.* K. K. KONAR. **159 I.C. 70 (1) = 8 R R. 245 (1) = A I.R. 1935 Rang. 131.**

———**S. 87**—*Promissory note—Addition of a person as an executant by forging his signature—Forgery by or at instance of payee—Promissory note, if void even against real executants.*

Where below the signatures of the executants of a promissory note, the name of another person is forged by or at the instance of the payee without the consent of the real executants, and the addition of the new name is not made in order to carry out the common intention of the original parties, the promissory note is void even as against the real executants who are not consenting parties to the material alteration made in the promissory note. (*Srivastava and Nanavutty, JJ.*) IQBAL BAHADUR NIGAM *v.* DOORGA PRASAD NIGAM. **156 I.C. 17 = 7 R O. 642 = 1935 O.W.N. 661 = A.I.R. 1935 Oudh 434.**

———**S. 92**—*Promissory note—Absence of notice of dishonour—Liability of indorsee.*

In absence of notice of dishonour, the endorsee of a promissory note is not liable unless a special contract to the contrary is proved. (*Wilsh, J.*) KAILASAM PILLAI *v.* CHIDAMBARAM PILLAI. **152 I C. 129 = 7 R M. 187 (2) = 40 L W. 666 = 1934 M.W.N. 1337 = A I.R. 1935 Mad. 22 (2).**

———**S 93**—*Notice of dishonour—Promissory note payable on demand.*

Notice of dishonour should be given to the indorser of a promissory note payable on demand in order to make him liable on the instrument. (*Sundaram Chetty, J.*) HEMADRI *v.* SESHAMMA **I.R 1931 Mad. 397 = 130 I C. 477 = 1930 M.W N. 1232 = A.I.R. 1931 Mad. 113.**

———**S. 98**—*Notice of dishonour—Failure to give—No damage—Onus of proof.*

No dishonour can possibly occur unless the instrument is presented for payment by the holder to the drawee as required by the first part of S. 64 of the Act, which is mandatory. The second part of the same section provides penalty for non-presentment by stating in unequivocal terms that in default of such presentment the other parties thereto are not liable thereon to such holder. Where, however, it is alleged that no notice of dishonour was necessary as the party charged could not suffer damages for want of it the onus of proving that the other party who wants to excuse himself for the non presentation. 33 All. 4; 39 All. 364 and 10 I.C. 405, Ref. (*Subhedar and Grille, A J Cs.*) SHRIDHAR BALWANT *v.* BAXIRAM RODMAL SHOP, AKOLA. **28 N L.R. 134 = I R. 1932 Nag. 102 = 139 I.C. 305 = A.I. R. 1932 Nag 55.**

———**S. 118**—*Contsruction and scope—Consideration—Presumption as to quantum of—If justified—Recitals in instrument—Value of—Inference from—Rebuttal—Onus.*

S 118 must be understood in the light of the reason of the rule. There is no reason to think that it lays down anything more than the rule reproduced in S. 30 of the English Bills of Exchange Act, namely, that each party whose signature appears on a bill is

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prima facie deemed to have become a party thereto for value. Neither the earlier case law nor the language of the section justifies any presumption being made as the quantum of consideration. The words "until the contrary is proved" in S. 118 must be read in the sense of "until the contrary appears or at least appears probable." The section only justifies a presumption as the existence of consideration; any presumption as to the quantum of consideration as distinguished from the mere existence of consideration, has to be drawn only from the recitals, in any, contained in the instrument. Such recitals, being *prima facie* evidence against the parties to the instrument, may operate to shift on to the party pleading the contrary the burden of rebutting the inference raised by them. But the weight due to recitals varies according to circumstances and the burden of rebutting them may become very slight, especially when the Court is not satisfied that the transaction was not honest or *bona fide*. (*Varadachariar and Burn, JJ.*) NARASAMMA *v.* VEERRAJU. **58 Mad. 841=1935 M.W.N. 528 (2) =160 I C. 768=8 R.M. 716=42 L.W. 321=A.I.R. 1935 Mad. 769.**

———**S. 118**—*Presumption—Applicability of—Promissory note payable to bearer.*

The presumptions under S. 118 of the Act do not arise in the case of a promissory note which, by reason of not specifying the name of the payee at all, is not a negotiable instrument within the definition in S. 4 of the Act. (*Dhavle, J.*) BRIJBHUSAN PANDE *v.* RAMJA NAM KUER. **142 I.C. 163=I R. 1933 Pat. 127=13 Pat.L.T. 506=A.I.R. 1932 Pat. 324.**

———**S. 118**—*Presumption as to consideration—Scope and extent of.*

It is no doubt true that the ordinary rule is that every negotiable instrument is to be presumed to be for consideration and the burden of proof rests on the defendant admitting execution to prove that it was not for consideration, but in a case where the parties go to trial on the question of want of consideration and the trial Court which hears the evidence and notes the demeanour of the witnesses forms an opinion against the plaintiff, the question as to any presumption of consideration passing under the instrument does not arise.

Further, if the defence is minority at the time of the execution of the instrument and there are other suspicious circumstances, *viz.*, the fact that the plaintiff has failed to produce his account books although he admits that he keeps regular accounts, the presumption cannot be availed of. (*Nanavutty and Zia-ul Hasan, JJ.*) LATAFAT HUSSAIN *v.* ONKAR MAL. **10 Luck. 423= 7 R O. 272=152 I.C. 1042=11 O.W.N. 1589=A.I.R. 1935 Oudh 41.**

———**S. 118**—*Presumption under—Failure to draw—Illegality.*

In a suit on a promissory note the defendants contended that they had affixed their signature to a blank paper, that there was no cash consideration and that they had induced plaintiff to give evidence in a case by affixing their signature to the note. The Court thereupon cast the burden of proving consideration on the plaintiff.

Held, that the Court erred in not taking into account the presumption under S. 118, Negotiable Instruments Act, and in casting the onus on the plaintiff. (*Kendall, J.*) JAGMOHAN MISIR *v.* MENDHAI DUBE. **54 All. 375=I.R. 1932 All. 65=135 I.C. 241=A.I.R. 1932 All 164.**

[**Disc.** 57 A. 895 (897).]

———**S. 118**—*Presumption under—If rebutted by the fact that executant is profligate young man and creditor is money lender.*

NEG. INSTRUMENTS ACT (1881), S. 188.

In suits on simple loans it is open to a Court to determine in every case whether person who denies consideration has succeeded in supporting his denial by such direct or circumstantial evidence which may be sufficient in itself to rebut the presumption laid down in S. 118 of the Act. Merely because the debtor is a profligate young man and the creditor is a money-lender, the presumption under S. 118 is not rebutted so as to shift the burden of proof on to the criditor. (*Addison and Din Mohammad, JJ.*) BANNU MAL *v.* MUNSHI RAM. **159 I.C. 61= 17 Lah. 107=38 P.L.R. 552=8 R.L. 350=A.I.R. 1935 Lah. 599.**

———**S. 118**—*Pro note—Consideration—Onus of proof.*

Once the execution of a promissory note is proved, the consideration for it is to be presumed under S. 118 of the Negotiable Instruments Act; and the onus is on the executant to show that there was no consideration. (*M. C. Ghose, J.*) KEDAR NATH BASU *v.* RADHANATH NATH. **61 C.L.J. 17.**

———**S 118**—*Promissory note—Execution and consideration—Burden of proof.*

The plaintiff brought a suit on the basis of a pro note purporting to have been executed by the defendant The defendant denied having borrowed any money from the plaintiff.

Held, that it was for the plaintiff who alleged that the defendant had executed the pro-note in suit, not only to prove the execution but also the passing of consideration. (*Nanavutty, J.*) NANDO *v.* DULARA. **6 I R. (Oudh) 175 (1)=146 I.C. 709=10 O.W.N. 839=A.I. R. 1933 Oudh 394 (1).**

———**S. 118**—*Promissory note—Plea by debtor that it is part of a series of transactions—Onus.*

A debtor who desires to show that there is nothing due on a promissory note executed by him, which is in the creditor's passession with no mark on it showing that it has been discharged, has a very heavy burden of proof. Even if there are a series of transactions between the same parties, if one of them sues upon a promissory note, as a rule it is no answer for the defendant to say that the claim is a matter of account. (*Baguley and Mackney, JJ.*) U BA OHN *v* U MAUNG MAUNG. **151 I.C. 582 =7 R.R 92=A.I.R. 1934 Rang. 358.**

———**S. 118 and Evidence Act, S. 114, Illus. (c), Expl.**—*Scope and effect of— Presumption as to consideration.*

S. 114, Evidence Act, was enacted in 1872 and then came the Negotiable Instruments Act, nine years later. What was merely permissible in 1872 was converted into a statutory obligation in 1881. Hence it cannot be said that when it was enacted in S. 118, Negotiable Instruments Act, that until the contrary was proved, it should be presumed that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it had been accepted, endorsed, negotiated or transferred, was accepted, endorsed, negotiated or transferred for consideration, it did not in any way affect the provisions of Illus. (*c*) to S. 114, Evidence Act. From the later modification of the rule laid down in Illus. (*c*) to S. 114 of the Act it can be inferred that the subsequent alteration was intended to replace the previous enactment. Further all that the explanation to Illus. (*c*) lays down is that while applying the maxim enacted in Illus. (*c*) the Court shall duly consider the fact that the acceptor of a bill of exchange was completely under the money-lender's influence. In other words, the explanation merely sounds a warning that the rule laid down in Illus. (*c*) was not intended in any way to override the general provisions of law that a contract entered into under undue influence was bad. (*Addison*

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and Din Mohammad, JJ.) BANNU MAL *v.* MUNSHI RAM. **17 Lah. 107=38 P.L.R. 552=159 I.C. 61=8 R.L. 350=A.I.R. 1935 Lah. 599.**

———**S. 118**—*Scope—Promissory note—Consideration—If can be presumed to be for necessity.*

Under S. 118 the only presumption that can be raised is that a promissory note has been executed for consideration, *i.e.*, that the amount for which it is executed was advanced. But the section does not raise the further presumption that the amount was advanced for legal necessity. The burden of proving legal necessity for the loan is on the payee. (*Pollock, A. J. C.*) SHRI RAM *v.* MOHANLAL. **31 N L.R. 243=155 I.C. 607=7 R. N. 198=A.I R. 1935 Nag. 127.**

———**Ss. 118 to 122 (Chap. 13)**—*Special rules of evidence—Scope and effect of—General law—How far modified.*

The Negotiable Instruments Act lays down certain special rules of evidence and certain presumptions and precludes certain pleas being raised in particular cases; but it cannot be said that beyond the scope of such rules or necessary implications therefrom, the applicability of the general principles of law or the ordinary rules of evidence is excluded. (*Beasley, C. J., Varadachariar and King, JJ.*) VENKATARAMA REDDIAR *v.* VALLI AKKAL. **58 Mad. 693=153 I.C. 944=7 R.N. 384=1935 M W.N. 1=41 L.W. 15=A.I.R. 1935 Mad. 181=68 M L J. 81 (F.B.).**

———**S. 118 (a)**—*Absence of consideration—Plea of—Burden of proof.*

Where defendants plead want of consideration in a suit on a promissory note, in discharging the burden of proof, it is not always necessary for them to prove want of consideration by producing definite evidence on their own behalf. It is open to them to rely upon the facts and circumstances of the case and also to refer to the flaws in the evidence of the plaintiff himself and then to argue that, on the record of the case as it stands, the burden has been discharged by them. Whether a party had discharged the burden of proof laid upon him is a question for the Court to decide and each case depends upon its own peculiar facts and circumstances. (*Addison and Agha Haidar, JJ.*) BISHAMBAR DAS *v.* ISMAIL. **149 I.C. 605=6 R L. 721=A.I.R. 1933 Lah. 1029.**

———**S. 118 (a)**—*Presumption under—Applicability.*

Under S. 118 (*a*) there is a presumption that every negotiable instrument was made or drawn for consideration. Presumption applied. (*Niamatullah and Bennet, JJ.*) RAM NATH *v.* RAM CHANDRA MAL. **3 A. W.R. 361=158 I.C. 193=A.I.R. 1935 All. 154.**

———**S. 118 (a)**—*Presumption under—Applicability—Plaintiff leading evidence in first instance to prove consideration.*

S. 188 is imperative and the Court is bound to draw the initial presumption that every negotiable instrument was made for consideration, when its execution is admitted. Where the plaintiff has led evidence in the first instance to prove the consideration for a promissory note and has failed to establish the passing of consideration, he can fall back on the initial presumption in his favour. But where the Court has after a consideration of the entire evidence recorded a clear finding one way or the other, then the finding is based not on a mere presumption but on the evidence, and has to be accepted in second appeal. (*Sulaiman, C. J and Bennet, J.*) LAL GIRWAR LAL *v.* DAU DAYAL. **57 All. 895=158 I.C. 197=8 R.A. 292=1935 A.L.J. 834=1935 A.W. R. 503=A.I.R. 1935 All 509.**

———**S. 118 (a)**—*Pro-note—Absence of consideration—Onus of proof.*

NEG. INSTRUMENTS ACT (1881), S. 131.

Under S. 118 (*a*) if a pro-note is genuine, there is a presumption that there has been consideration, and the onus of proving want of consideration is on the party who pleads want of consideration. (*Pakenham Walsh, J.*) KADIR MOHIDEEN ROWTHER *v.* ASIARU. **40 L.W. 682=152 I.C. 641=7 R.M. 257=A.I.R. 1934 Mad. 702=67 M.L.J. 658.**

———**S 118 (a)**—*Promissory note—Transfer for collection—Burden of proof.*

R was brought on record as a creditor holding a pro-note executed by the insolvent. *G* was then brought on record in *R's* place as assignee of the pro note who remained *ex parte*. *S* applied to be substituted for *G* on the ground that the transfer of the note by *R* to *G* was only for collection and that *R* had subsequently transferred the note to him by a settlement deed.

Held, that the order of substitution was *res judicata* against *S*. An affidavit by *R* was inadmissible in evidence. The burden of proving that the transfer was for collection only was on *S* under S. 118 (*a*). (*Sundaram Chetty and Pakenham Walsh, JJ.*) GOVINDASWAMI PILLAI *v.* SIVARAMA RAO. **6 R.M. 504 (1)=148 I C. 592=39 L.W. 486=1934 M.W.N. 159=A.I.R. 1934 Mad. 292.**

———**S. 118 (g)**—*Presumption—When rebutted.*

S. 118 raises a presumption in favour of the possessor of the negotiable instrument that he is a "holder in due course," unless contrary is proved. But this presumption is not conclusive and is often very easily shifted. It will stand rebutted if it is shown by the maker of the instrument that it had been obtained by means of fraud, or an offence, or for unlawful consideration or that the transferee of it had sufficient cause to believe that some defect existed in the title of the transferor. (*Niamatullah and Rachhpal Singh, JJ.*) RAZA ALI KHAN *v.* RAHAT HUSAI KHAN. **6 I R. (All.) 208=145 I.C. 951=1933 A.L.J. 1241=A.I.R. 1933 All. 754.**

———**S. 118-A**—*Presumption under—Applicability—Suit on pro-note executed by insolvent—Onus of proof of consideration.*

Notwithstanding S. 118 the burden of proving consideration for a promissory note executed by the insolvent is on the insolvent and not the Official Assignee-(*Aston, A. J. C.*) MCCURLEY, *In re*. **26 S. L. R. 279=141 I.C. 470=I.R. 1933 Sind 56=A.I.R. 1932 Sind 197.**

——— **S. 120**—*Promissory note subject to conditions—Proof of conditions in repudiation of liability—Permissibility.*

Though S. 120 precludes the maker of promissory note from denying the validity of the note, where money is not advanced as a simple loan unconditionally upon the promissory note, but is advanced after the note had been executed and on certain conditions previously agreed upon, the promisor is entitled to prove circumstances in repudiation of his liability. (*Tek Chand and Coldstream, JJ*) BACHAN SINGH *v.* DHARAM ARTH BANK. **I.R. 1933 Lah. 340=143 I.C. 348=34 P.L.R. 470=A.I.R. 1933 Lah. 456.**

———**S. 131**—*Collecting Bank—Liability for negligence—Standard of test—Cheque drawn in favour of a public body—Tender for collection and payment into a clerk's account—Illegible endorsement by a non existent official—Forwarding bank—Liability of.*

In considering the liability of a collecting Bank in receiving payment on behalf of a customer of a cheque the title to which is defective, the test of negligence is whether the transaction of paying in any given cheque coupled with circumstances antecedent and present was

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so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiry *Commissioners of Taxation* v. *E.S. & A. Bank*, (1920) A. C. 683, Foll. A crossed cheque for Rs. 2,361 drawn by the appellant in favour of the Corporation of Rangoon was tendered at the respondent Bank, by a person known to them as a mere clerk, for collection and payment into a small savings bank account of his. The cheque purported to bear an endorsement with a rubber stamp, "Chief Superintendent, Corporation of Rangoon" and an illegible scribble purporting to be the name of that Official in ink under the ruboer stamp. The respondent Bank did not, however, guarantee the endorsement but passed the cheque on to the paying Bank ; it was duly cleared; the proceeds were paid into the clerk's account and withdrawn by him the next day. And the clerk, of course, absconded. In an action for negligence against the respondent Bank,

Held, that the most casual perusal of the cheque, having regard to its form and its endorsement the circumstances in which it was tendered for collection, ought to have put the bank on enquiry as to the genuineness of the endorsement, that the bank, in abstaining from even the slightest enquiry, was guilty of negligence under S. 131 and liable for the amount of the cheque.

Held, further that the usage of bankers in Rangoon pleaded in defence to the effect that in the absence of a guarantee signed by the forwarding Bank the paying Bank pays at its peril, had not been proved. *Ross* v. *L. C. W. and P. Bank* (1919) 1 K.B. 678 and *Underwood Ltd.* v. *Bank of Liverpool and Martins*, (1924) 1 K.B 776, Appl. (*Page, C.J. and Sen, J.*) ROBINSON *v.* THE CENTRAL BANK OF INDIA, LTD. **9 Rang. 585=I. R. 1932 Rang. 82=136 I. C. 825=A. I. R. 1932 Rang. 6.**

NEGOTIABLE SECURITY.

See DEBTOR AND CREDITOR.

NEGOTIATIONS.

See EVIDENCE ACT, SS. 91 AND 92.

"NEOTA"—*Nature of.*

"Neota" is not a legal but a social obligation and is therefore not recoverable by means of a suit. 141 P.R. 1883, Foll (*Dalip Singh, J.*) MOHAN LAL *v.* RAHMAT. **148 I C. 70 (1)=6 R.L. 500 (2)=34 P.L.R. 218=A.I.R 1933 Lah. 317 (1).**

NEW ACT. *See* INTERPRETATION OF STATUTES.

NEW CASE

See (1) C. P. CODE, SS. 100 AND 115 AND O. 6, R. 17.
(2) CRIMINAL TRIAL.
(3) PRACTICE.

NEW PLEA. *See* (1) APPEAL.
(2) C. P. CODE, SS. 100 AND 115.
(3) PRACTICE.

NEW POINT. *See* (1) APPEAL.
(2) PRACTICE.

NEWS PAPER—Articles in—Publication—Contempt of Court. *See* CONTEMPT.

———Extract of—Admissibility. *See* EVIDENCE ACT, S. 78. **A I.R. 1931 All. 12.**

NEW ZEALAND LAND AND INCOME-TAX ACT (1923), **S 80** (2)—Private company—Fees for directors—Deduction of. *See* INCOME TAX ACT (INDIAN) S. 10 (2) (*ix*).

NEXT FRIEND.

See (1) C. P. CODE, O. 32.
(2) MINOR.

NISKAR TITLE. *See* B. T. ACT (1885), S. 105.

NORTHERN INDIA FERRIES ACT, S. 34

NOABAD SETTLEMENT. *See* BENGAL NOABAD SETTLEMENT.

NOABAD TALUQS. *See* LAND TENURE—NOABAD TALUQS.

NON-ACCESS. *See* EVIDENCE ACT, S. 112.

NON-JOINDER.

See (1) C. P. CODE, O. 1, RR. 9 AND 13 AND O. 34, R. 1.
(2) PRACTICE.

NON MOKURARI. *See* B. T. ACT (1885), Ss. 50 105 AND 115.

NON-TRANSFERABLE HOLDING.

See (1) B. T. ACT (1885), Ss. 22, 23, 146-A, 148-A AND 167.
(2) LANDLORD AND TENANT.
(3) T. P ACT, S. 43.

NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII OF 1873), S. 68—*Failure to give notice—Effect.*

If the Divisional Officer omits to serve notice on any of the parties interested in the enquiry under S. 68, his proceedings must be held to be vitiated on that account. (*Jai Lal, J.*) BURA MAL *v* NUR ILAHI. **I R 1933 Lah. 31=140 I.C. 772=34 P.L.R. 143=A.I.R. 1933 Lah. 76**

———**S. 68**—*Order of Divisonal Officer attacked—Onus of proving illegality.*

In suit for a declaration that the order of the Divisional Officer was illegal or otherwise improper the onus is on the plaintiffs to prove the illegality or impropriety. (*Tek Chand, J.*) ISHAR SINGH *v.* JIWAN SINGH. **I.R. 1932 Lah. 672.**

———**S 68**—*Proceeding for revision of* warabandi—*Non service of notice on some defendants—Irregularity.*

In a proceeding for revision of the *warabandi*, notice had not been served on some of the defendants but those persons did not complain of the order.

Held, that the non-service of notice was a mere irregularity and did not vitiate the proceedings. (*Tek Chand, J.*) ISHAR SINGH *v.* JIWAN SINGH. **I.R. 1932 Lah 672.**

———**S 70**—*Stream—Diversion of water—Temporary damage caused—Nature of offence.*

In order to prove an offence under S. 430 it is necessary to prove mischief as defined in S. 425 and it is also necessary to prove that the act committed is likely to cause a diminution of the supply of water for the various purposes mentioned in the section. Where all that was proved was that the accused has forcibly opened the canal distributory and they apparently diverted the flow of the water but there was nothing to show that they permanently diminished the utility of the distributory or affected it injuriously or that they practically diminished the supply of the water.

Held, that the accused were liable to be convicted under S. 70 of the Northern India Canal and Drainage Act and not under S. 430, I. P. Code. (*Kendall, J.*) MEVA RAM *v.* EMPEROR. **150 I C 1048=7 R A 96 =35 Cr L J. 1250=3 A W.R. 585=1934 Cr.C. 865 (2)=A I R. 1934 All. 687 (2).**

NORTHERN INDIA FERRIES ACT, S. 14—"*Approach*".

The word "approach" includes an approach from the highway to the landing place. It is not limited to the distance between the landing place and the river bank. (*Dalip Singh, J.*) JETHU RAM *v.* DT. BOARD, AMBALA. **6 I R. (Lah.) 6=144 I.C. 662=A.I.R. 1933 Lah. 890.**

———**S. 34**—*Suit for refund of money wrongfully recovered, not barred.*

N.W.F.P. COURT'S REG. (1931), S. 6.

S 34 speaks of the compensation and abatement of rent allowable under the Act and refers to Ss. 10 11 and 15 and similar sections. It does not mean a suit for refund of money wrongfully recovered by one side or the other from one party to the contract. Hence the jurisdiction of the Civil Court is not barred by S. 34 in respect of such a suit. (*Dalip Singh, J.*) JETHU RAM *v.* DT. BOARD, AMBALA. **6 I.R. (Lah.) 6 = 144 I.C. 662 = A.I.R. 1933 Lah. 890.**

NORTH-WEST FRONTIER PROVINCE COURT'S REGULATION (1931), S. 6 (2) and Cr. P. Code (V of 1898), S. 528 (5)—*Failure to plead status of European British subject—Effect of—Jurisdiction of Judicial Commissioner's Court.*

Where a European British subject has waived his right to be tried as such he loses his right to be so tried in all subsequent stages of the case; so that S. 6, sub-S. (2) of the Regulation is inapplicable and the Court of the Judicial Commissioner of Peshawar and not the High Court at Lahore has jurisdiction to entertain a reference arising from the trial of a European British subject. (*Fraser, J.C. and Saaduddin, A.J.C.*) EMPEROR *v.* PRIVATE JOHNSON. **141 I.C. 445 = 1933 Cr.C. 148 = A.I.R. 1933 Pesh. 6.**

——**S. 10**—*Jurisdiction of Judicial Commissioner.*

The powers of revision of the Judicial Commissioner's Court having been specially provided for in S. 34 must be within the limits allowed by that section and not beyond that. Under S. 10 of the Regulation, the Judicial Commissioner's Court has not got the same power of superintendence and control as is vested in the Chartered High Courts under S. 107, Government of India Act. (*Middleton, J.C. and Saaduddin, A.J.C.*) UNION INSURANCE SOCIETY OF CANTON *v.* MAHOMED KARAM ILLAHI KHAN. **150 I.C. 314 = A.I.R. 1934 Pesh. 37.**

——**Ss 34 and 10**—*Judicial Commissioner's power of revision.*

The powers of revision of the Judicial Commissioner's Court having been specially provided for in S. 34 must be within the limits allowed by that section and not beyond that. Under S. 10 of the Regulation, the Judicial Commissoner's Court has not got the same power of superintendence and control as is vested in the Chartered High Courts under S. 107, Government of India Act. (*Middleton, J.C. and Saaduddin, A.J.C.*) UNION INSURANCE SOCIETY OF CANTION *v.* MAHOMED KARAM ILLAHI KHAN. **150 I.C. 314 = A.I.R. 1934 Pesh. 37.**

——**S. 34 (a)**—*Irregularity—Failure to consider law.*

In failing to consider the law, the lower appellate Court commits an irregularity justifying interference in revision. (*Middleton, J. C.*) ACHARAJ SINGH *v.* SANT SINGH. **156 I.C. 146 = 7 R. Pesh. 118 = A.I.R. 1935 Pesh. 57.**

——**S. 34 (1) (b)**—*Scope—Revision of interlocutory orders on preliminary issues.*

Cl. (1) (*b*), S. 34 relates "to case decided" within the meaning of S. 115, C.P. Code. Consequently an interlocutory order on a preliminary issue cannot be revised. (*Middleton, J.C. and Saaduddin, A.J.C.*) UNION INSURANCE SOCIETY OF CANTON *v.* MAHOMED KARAM ILLAHI KHAN. **150 I.C. 314 = A.I.R. 1934 Pesh. 37.**

——**S. 34 (1) (b) Provisso**—*Scope.*

Where an important question of law is involved and the reasoning of the trial Court is erroneous and based on a misapprehension of the law, a revision application is not barred by any of the provisos to S. 34 (1) (*b*).

N.W.F.P. LAW & JUSTICE REG. (1901), S. 84.

(*Almond, J.C.*) VAISHNO DAS *v.* MUKARRAM. **153 I.C. 905 = 7 R. Pesh 75 = A.I.R. 1934 Pesh. 94.**

N. W. FRONTIER CRIMES REGULATION (III OF 1901), S. 30—*Adultery—Proof.*

In a charge of adultery it is necessary to prove by direct evidence either the commission of adultery or such circumstances as raise an irresistible conclusion that adultery has been committed. This cannot be done by merely alleging that the woman is of bad character and that another person has been visiting her father with whom she had been residing. (*Jai Lal, J.*) MT. SABHAI *v.* EMPEROR. **13 Lah. 585 = I.R. 1932 Lah 243 = 136 I.C. 707 = 33 Cr.L.J 333 = 33 P.L.R. 392 = 1932 Cr.C 582 = A.I.R. 1932 Lah 436.**

——**Ss. 48 and 49**—*Scope—Case tried under S. 59—Revisional jurisdiction of High Court.*

The application of the provisions of Ss 48 and 49 is only to orders passed by the Deputy Commissioner and the Commissioner acting under the express provisions of the Regulation. The High Court has jurisdion to revise the order of the Sessions Judge and the Magistrate in a case tried under S. 59. (*Jai Lal, J.*) MT. SABHAI *v.* EMPEROR. **13 Lah. 585 = I.R. 1932 Lah. 243 = 136 I.C. 707 = 33 Cr. L.J 333 = 1932 Cr. C. 582 = 33 P.L.R. 392 = A.I.R. 1932 Lah. 436.**

N.W.F.P. LAW AND JUSTICE REGULATION (1901), S. 27—*Interpretation—Awans—Woman's property—Succession after husband's heirs.*

The plain reading of S. 27 of N. W.F.P. Law and Justice Regulation means that custom is not a complete substitute for Mahomedan Law and that where there is no particular custom applicable, then the parties are governed by the principles of Mahomedan Law. As there is no custom among Awans of Peshawar District as to who shall succeed in the case of a woman's property after the husband's heirs, the persons who are heirs under Mahomedan Law would certainly succeed. A first cousin of such woman is therefore entitled to succeed to the property after her death and as such he is entitled to a right of pre emption under N. W.F.P. Pre emption Act, S. 16 (*a*) (*Almond, J.C.*) MULLIK SULEMAN *v.* AKBAR KHAN. **152 I.C. 261 = 7 R. Pesh. 58 = A.I.R. 1934 Pesh. 98.**

——**S. 84**—"*Case decided*"—*Order refusing to amend issue.*

An interlocutory order of intermediate proceedings cannot be included in the term "case decideed" in S. 84 of Law and Justice Regulation and such orders are excluded from the cognizance or revisional jurisdiction. Hence no revision lies from an order of the Court refusing to amend issue. (*Fraser, J.C. and Saad ud din, A.J.C.*) LAL CHAND *v.* KARAM CHAND. **A.I.R. 1935 Pesh. 33**

——**S. 84**—*Exercise of revisional power—If discretionary.*

The exercise of revisional powers is discretionary with the Court. Even in cases of revisions against final decision, the Court is not bound to interfere if in its opinion substantial justice has been done, even though material irregularity be established. Revisional jurisdiction is an extraordinary jurisdiction and is exercised in furthering justice and only in cases where irreparable injury is done or where non-exercise of such jurisdiction will lead to failure or miscarriage of justice. This then is a test which has to be applied to all revision cases, irrespective of the fact whether they are against final decision or intermediate or interlocutory orders. (*Fraser, J.C. and Saad ud din, A.J.C.*) LAL CHAND *v.* KARAM CHAND. **A.I.R. 1935 Pesh. 33.**

N.W.F.P. LAW & JUSTIC REG. S. 84.

———**S. 84**—*Powers of revision outside section.*

Powers of revision in N.-W.F.P. Judicial Commissioner's Court circumscribed and only arise within the four corners of S. 84. It is precluded from drawing upon the general powers of superintendence vested in the High Courts by the Charters or under S. 107, Government of India Act (*Fraser, J.C. and Saad-ud-din, A.J.C.*) LAL CHAND *v.* KARAM CHAND. **A.I.R. 1935 Pesh. 33.**

N.W.P. RENT ACT (X OF 1859), S. 6—*Muhammadan Law of inheritance—Applicability—Inheritance shared with sisters—If permitted.*

The inheritance contemplated by the section is not an inheritance governed by the rules of Hindu or Muhammadan Law; the complicated laws of Muhammadan inheritance were not intended to apply to the ryots mentioned in S. 6. The inheritance contemplated by the Act is an inheritance by a son or a near relative and not an inheritance shared with sisters who lived far away from the family home. (*Oppenheim, S.M. and Walton, J.M.*) ABDUL BARI *v.* RAGHU KURMI. **14 L.R. 84 (Rev.) =17 R.D. 134.**

———**(XII OF 1881)**—*Abandonment by tenant—Re-taking of possession by zamindar—Procedure.*

The tenant mortgaged his holding and then left the village. The mortgagee never got possession and never exercised effective possession and the zamindar thereupon made arrangements for the cultivation of the land on his own account.

Held, that there was nothing in. N.-W. P. Rent Act then in force prescribing any particular procedure to be taken by the landholder in cases of abandonment and that he was justified in protecting his own interests as regards rent. (*Drake Brockman, S.M.*) RAGHUNANDAN KOHAR *v.* GUR CHARAN PRASAD. **14 L.R. 702 (Rev.)**

———**S. 7**—*Mortgage of* sir *land—Effect.*

A zamindar who makes a usufructuary mortgage of his zemindari including his *sir* lands does not so lose or part with his proprietary rights within the meaning of S. 7 of N.W.P. Rent Act so as to become an ex proprietary tenant of his *sir* land. 16 All. 327 (F. B.), Ref. (*Mears, C J. and Sen, J.*) RAM DAS *v.* PARMANAND GIR. **I.R. 1931 All. 349=131 I.C. 45=15 R D. 341=12 L R. 148 (Rev.)=1931 A.L.J. 162=A.I.R. 1931 All. 238.**

———**S. 7**—Sale of part of share—Occupancy rights, if acquired. *See* AGRA TENANCY ACT, S. 14 (2). **1935 R.D. 303 (2).**

———**S. 9**—*Mortgage of* sir *land—Validity.*

Prior to the passing of the Agra Tenancy Act zemindar who made a usufructuary mortgage of his zemindari without *sir* could validly mortgage his *sir* land subsequently and such a mortgage did not offend against the provisions of S. 9 (2) of the N.W P. Rent Act. (*Mears, C.J. and Sen, J.*) RAM DAS *v*, PARMANAND GIR. **I.R. 1931 All. 349=131 I C 45=15 R D. 341=1931 A L.J. 162=12 L.R. 148 (Rev.)=A.I.R. 1931 All.** 238.

———**S. 9**—Occupancy tenant—Succession—Claim by collaterals on death of widow—Sharing in cultivation—Necessity. *See* AGRA TENANCY ACT, S. 22. **1935 R. D. 314.**

———**S 9**—*Succession—Death of male tenant before Agra Tenancy Act*, 1901—*Death of widow after Act—Right of daughter to succeed.*

OATHS ACT (1873).

Where the last maleholder died before the Agra Tenancy Act came into force and the surviving widow died in 1924.

Held, that succession opened as on the death of the male tenant and the daughter was entitled to succeed. (*Kendall, J.*) AJODHIA *v* RAJNA. **152 I.C. 114 (1) =7 R.A. 267=18 R.D. 256=15 L.R. 387 (Rev.)=A. I.R. 1934 All. 875.**

N.W.P. TENANCY ACT (1881), S. 9—*Mortgage by sub-tenant of grove—Validity.*

There is nothing in the Tenancy Act which makes a mortgage of a grove by a tenant illegal as the prohibitions refer to tenants of agricultural land. Therefore a mortgage by a sub-tenant of his grove in 1885 is a valid and legal mortgage. (*Mukerji and Bennet, JJ.*) ARJUN SINGH *v.* MAHESHA NAND. **I.R. 1932 All. 391=138 I.C. 366=1932 A.L.J. 474=13 L.R. 337 (Rev.)=16 R.D. 463=A.I.R. 1932 All. 437.**

NOTICE.

See (1) C. P. CODE, O. 21, R. 16.
(2) CR. P. CODE, S. 526.
(3) CRIMINAL TRIAL.
(4) MASTER AND SERVANT.
(5) NEGOTIABIE INSTRUMENTS ACT, SS. 93 AND 98.
(6) T. P. ACT, SS. 3, 39 AND 59.
(7) TRUSTS ACT (1882), S. 91.

———Some intimation required—Knowledge, if sufficient. *See* B. T. ACT, S. 167. **59 Cal. 911.**

NOTICE OF MOTION. *See* BOMBAY HIGH COURT RULES, (ORIGINAL SIDE), RR. 340, 341 AND 348.

———Affidavit and not petition in support. *See* CALCUTTA HIGH COURT INSOLVENCY RULES. **36 C.W.N. 337=A.I.R. 1932 Cal. 621.**

NOTICE TO QUIT.

See (1) C. P. CODE, S. 80.
(2) LANDLORD AND TENANT.
(3) T. P. ACT, SS. 106 AND 111 (*g*) AND (*h*) AND 113.

NOTIFICATION BY GOVERNMNT. *See* EVIDENCE ACT. SS. 57 (9), 78 AND 81.

NOTIFICATION UNDER ACT. *See* INTERPRETATION OF STATUTES.

NOVATION.

See (1) CONTRACT.
(2) CONTRACI ACT, S, 62.

NUISANCE.

See (1) C. P. CODE, S. 91.
(2) CR. P. CODE, Ss. 133, 137 AND 139-A, ETC.
(3) PENAL CODE, SS. 268, 283 AND 290.
(4) TORTS.

———High way—What constitutes nuisance on—Music. *See* RELIGIOUS PROCESSION. **53 All. 484.**

OATH. *See* OATHS ACT.

OATHS ACT (X OF 1873)—*Application under—Conditions whether can be imposed by plaintiff.*

An application for an oath under the Oaths Act must be an application without any conditions such as if the Court does not hold the evidence to be sufficient then defendants should take an oath. It is not open to a party to ask the Court to adjudicate and if the Court adjudicate against them then ask the Court to start a separate proceedings under the Oaths Act. (*Mukerji and Bennet, JJ.*) CHAND REKHA *v.* JANKI PRASAD. **I.R. 1932 All. 464=138 I.C. 606=1932 A.L.J. 481=A.I R. 1932 All. 404.**

———*Refusal to take oath—Inference.*

A party may have a perfectly true case and yet for peculiar reasons be unwilling to bind his conscience by

OATHS ACT (1873), S. 6.

a particular form of oath. The refusal to take the oath in such cases can be considered merely as a piece of evidence and as not proving the falsity of that party's claim. 22 Bom. 680, Rel. on. (*Coldstream and Johnstone, JJ.*) JUMMA KHAN *v.* ALLAH BAKHSH. **135 I.C. 45=I.R. 1932 Lah. 29=32 P.L.R. 716=A.I.R. 1932 Lah. 25.**

———**Ss. 6 and 13**—*Child as witness—Duty to administer oath—Omission, if curable.*

If a Court thinks that a child, though of tender years, is capable of informing the Court of what it has seen or heard, it is obligatory on it to administer oath to the child as in the case of any other witness. Where the Court fails to do so on the ground that the child is not capable of realising the significance of an oath, the defect would be cured by S. 13 of the Oaths Act. (*Sulaiman, C. J. and Bennet, J.*) EMPEROR *v.* SAHDEO RAM. **58 All. 23=156 I.C. 849=8 R.A. 41=36 Cr.L.J. 1013=1935 A.L.J. 618=1935 A.W.R. 777=1935 A.Cr.C. 145=1935 Cr.C. 598=A.I.R. 1935 All. 579.**

———**Ss. 8 and 9**—*Applicability—Agreement to abide by statement of third person—Liberty to resile from.*

The parties to the suit stated that they constituted a third person, *J*, as a *Munhasir Ilahi* and that they would be bound by his decision but before he was examined, the plaintiff stated that he would not be bound, unless a special kind of oath was administered to *J*. That request was refused, *J's* statement recorded and in accordance therewith the plaintiff's suit dismissed.

Held, that it was open to the plaintiff to resile from the agreement before the statement of *J* was recorded without assigning any reasons, S. 8 of the Oaths Act not being applicable on the ground that the parties had in the first instance never intended to administer any oath at all to *J*. 1931 A. L. J. 393, Foll. (*Baipai, J.*) RAMDEO AHIR *v.* NAIPAL AHIR. **6 I.R. (All.) 308=146 I.C. 569=1933 A.L.J. 69=A.I.R. 1933 All. 184.**

———**S. 8**—*Initiative to come from parties.*

Under S. 8 of the Oaths Act, the initiative should come from the parties and not from the Court. The dismissal of a suit was accordingly set aside on the ground that the lower Court might have been influenced by the refusal of the plaintiff to swear touching sacred books. (*Jack, J.*) KABEDALI MANDOL *v.* DASURA MURA. **I.R. 1932 Cal. 661=139 I.C. 836 (1)=56 C.L.J. 77=36 C.W.N 786=A.I.R. 1933 Cal. 116.**

———**Ss. 8, 9 and 10**—*Power to act under—Terms of Mukhtarnama—Construction.*

Where the *mukhtarnama* gave the *mukhtar* authority to make a compromise, confess judgment or make a reference to arbitration.

Held, that the powers were sufficiently wide to include authority to take action under Ss. 8, 9 and 10 of the Oaths Act. (*Bisheshwar Nath, J.*) JASODA *v.* GOPAL. **136 I.C. 246=I.R. 1932 Oudh 102=8 O.W.N. 880=A.I.R. 1931 Oudh 350.**

———**S. 9**—*Offer of special oath—Withdrawal before acceptance—Permissibility.*

Per *Guha, J.*—The principle that an offer can be withdrawn before it is accepted is applicable to an offer made under the Oaths Act. (*Guha and M.C. Ghose, JJ.*) KHAN MAHOMED *v.* SYED ALI. **I.R. 1931 Cal. 602=132 I.C. 682=35 C.W.N. 130=A.I.R. 1931 Cal. 549.**

———**S. 9**—*'Party'—Meaning.*

The word 'party' under S. 9 includes a duly authorised agent. (*Bisheshwar Nath, J.*) JASODA *v.* GOPAL. **136 I.C. 246=I.R. 1932 Oudh 102=8 O.W.N. 880=A.I.R. 1931 Oudh 350.**

OATHS ACT (1873), S. 11.

———**S. 9**—*Party offering to be bound by oath of other party—Right to resile.*

A party offering to be bound by oath of the other party is entitled to resile at any time before the statement on oath is taken and it is not necessary that the Court should be satisfied that the party had good reasons for resiling. (*Bennet, J.*) RUP SINGH NAYAL *v.* MRS. ARJUN SEN. **7 R.A. 565=153 I.C. 686=1935 A.W.R. 78=1935 A.L.J. 212=A.I.R. 1935 All. 276.**

———**S. 9**—*Plaintiff not ready to abide by special oath—Procedure as to special oath, if applicable.*

Where the plaintiff does not offer to be bound by the statement on oath made by the defendant then the plaintiff's application to offer a special oath to the defendant would not come within the terms of S. 9 and the Oaths Act would not apply. (*Mukerji and Bennet, JJ.*) CHAND REKHA *v.* JANKI PRASAD. **I.R. 1932 All. 464=138 I.C. 606=1932 A.L.J. 481=A.I.R. 1932 All. 404.**

——**S. 9**—*Pleader—Authority in respect of oath—Client whether bound.*

If a pleader has been expressly authorised to make an offer on behalf of his client to be bound by the oath of the other parthy his action in that respect would be binding on the client. (*Jai Lal, J.*) HATA *v.* SAMAIL. **I.R. 1932 Lah. 387=137 I.C. 810 (2)=33 P.L.R. 470=A.I.R. 1932 Lah. 414.**

———**S. 9**—*Statement by one of several defendants—Whether binding on person not being party to agreement.*

The statement made by one of several defendants in pursuance of an agreement made under the Oaths Act is binding only as against the parties who had offered to be so bound. Where however the rights and liabilities of the defendants in a particular case are inseparable a decree can be passed even against the defendant, who was not a party to the agreement. 27 A.L.J. 1095, Cons. (*Bisheshwar Nath, J.*) JASODA *v.* GOPAL. **136 I.C. 246=I.R. 1932 Oudh 102=8 O.W.N. 880=A.I.R. 1931 Oudh 350.**

———**S. 10**—*Defendant agreeing to be bound, if plaintiff took oath in presence of six specified persons—Five only present—Oath not binding.*

Where defendant agrees to a decree being passed against him in case plaintiff takes oath in presence of six specified persons but only five of such persons are present, he is entitled to object to the administration of the oath in the absence of the sixth person. And the objection being perfectly valid one no inferences can be drawn against the defendant. (*Broadway, J.*) UDMI RAM *v.* DURGA DAS. **6 I.R. (Lah.) 125 (2)=145 I.C. 704=A.I.R. 1933 Lah. 452.**

———**S. 10**—*Offer accepted—Revocation of.*

A party cannot revoke an offer to abide by the oath of another after the offer is accepted by the other side although the oath is not actually taken. (*Niamatullah, J.*) SIVA RAM DASS *v.* JAGANNATH. **55 All. 298=I.R. 1933 All. 443=144 I.C. 719=1933 A.L.J. 588=A.I.R. 1933 All. 463.**

———**S. 11**—*Agreement to abide by statement of a witness—Legality of.*

The parties to a suit can validly agree, even apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit; and they can leave the decision of all points including costs arising in the case to be made according to the statement. (*Sulaiman, C.J., Mukerji and King, JJ.*) AKBARI BEGAM *v.* RAHMAT HUSAIN.

OATHS ACT (1873). S. 12.

56 All. 39=6 I.R (All.) 232=146 I C. 84=1933 A. L.J. 1127= A.I R. 1933 All. 861 (S B.).
[R. 1934 A.L.J. 92 (94).]

——**S. 12**—*Failure to take oath as agreed upon—Procedure.*

Where the form of the oath agreed to involve the participation of the person who agrees to be bound by the oath of the other side and where the failure to take the oath is wholly attributable to the act or omission of the person who agreed to be bound by the oath the result should be as if the oath had been taken. Otherwise it would be open to him to resile from his offer to be bound by the oath at any time he pleases and for no reason whatever. Where the non-taking of the oath by the defendant was not due to any unreasonable conduct of the plaintiff, the person to be bound by the oath, but due to an unexpected cause which neither side was prepared to meet at the time the oath was to be taken and there was no subsequent attempt made actually by the defendant to take the oath, nor did the trial Court direct the issue of fresh commission for the purpose of taking the oath and direct the plaintiff to be present at the time in order to co operate in the taking of the oath as agreed to.

Held, that the dismissal of the suit at that stage was improper and that the proper course for the trial Court was to issue a commission at the cost of the defendant directing the taking of the oath as agreed upon on a day to be fixed and direct the plaintiff to be present on that occasion and that if the plaintiff fails to be present then the trial Court should deal with the case as if S. 12, Oaths Act, applied. 17 M.L.J. 99; 52 I.C. 619 and 17 I.C. 339, Ref (*Pandrang Row, J.*) BHAGHAVATHI VANNAN *v.* VEERA VANNAN. **158 I C. 107=8 R M. 224=42 L.W. 370=1935 M.W N. 372=A I.R. 1935 Mad. 591.**

——**S. 12**—*Refusal to make oath—Power to compel oath—Power of Court.*

If a party refuses to make the oath, the Court has no power to compel him to make it. The duty of the Court is to record as part of the proceeding, the nature of the oath proposed, the facts that he was asked whether he would make it and that he refused it together with any reason which he may assign for his refusal. (*Sreenivasa Iyer, J.*) KRISHNAPPA *v.* VARAGAPPA SETTY. **36 Mys H.C.R. 126=9 Mys L J. 362.**

——**S. 12**—*Refusal to take special oath—Not conclusive.*

No doubt the refusal to take a special oath is conduct which the Court is entitled to consider along with other evidence in the case but the refusal should not automatically be allowed to outweigh the positive evidence which has been adduced. Where therefore the plaintiff has produced his account-books which the defendant called on him to produce and he has given all the evidence necessary to support his case, his refusal to take a special oath offered by the defendant which the plaintiff considered derogatory should not be taken as reflecting on the truth of his claim. (*Grille, A J.C.*) RAMESHWARDAS *v.* GOPIJI. **I.R. 1933 Nag. 92=142 I.C. 137=A I.R. 1933 Nag. 52.**

——**S. 13**—Child as witness—Duty to administer oath—Omission, if curable. *See* OATHS ACT, S. 6. **1935 A L J. 618=A.I.R 1935 All. 579.**

OBITER DICTA. *See* PRECEDENTS.

OBSCENE PUBLICATION. *See* PENAL CODE, S. 292.

OBSTRUCTION.
——Of highway. *See* HIGHWAY.
——Of pathway. *See* CR. P. CODE, S. 133.

OPIUM ACT (1875), S. 3.

——Of public servant. *See* PENAL CODE, SS. 186 AND 189, ETC.
——To ancient light. *See* EASEMENTS ACT (1882), SS. 15, 16, 33 AND 35.

OCCUPANCY HOLDING.
See (1) B. T. ACT (1885), SS. 22, 25, 87 AND 89, ETC.
(2) C. P. TENANCY ACT (1920), SS. 6, 12 AND 13.
(3) LANDLORD AND TENANT.

OCCUPANCY RAIYAT.
See (1) BENGAL PATNI REGULATION (1819).
(2) B. T. ACT.

OCCUPANCY RIGHT.
See (1) AGRA TENANCY ACT, SS. 17, 18, 35, 99 AND 191, ETC.
(2) BENGAL TENANCY ACT.
(3) CHOTA NAGPUR TENANCY ACT (1908), S. 16.
(4) LANDLORD AND TENANT.
(5) MADRAS ESTATES LAND ACT, S. 3 (16) (*c*).

OCCUPANCY TENANT.
See LANDLORD AND TENANT.

OFFENCE. *See* PENAL CODE, S. 40.

OFFER AND ACCEPTANCE.
See CONTRACT ACT (1872), S. 7.

OFFERINGS—Share in—Liability to attachment and sale *See* C. P. CODE, S. 60—SHARE IN OFFERINGS.

OFFICER'S REPORTS.
See EVIDENCE ACT, S. 35.

OFFICIAL ACTS.
See EVIDENCE ACT ,SS. 114 AND 114, ILL. (*e*).

OFFICIAL ASSIGNEE.
See (1) C. P. CODE, S. 80 AND O. 22, R. 10.
(2) INSOLVENCY.
(3) PRESIDENCY INSOLVENCY ACT (1909).

OFFICIAL DOCUMENTS—Privilege. *See* EVIDENCE ACT, S. 123.

OFFICIAL DUTY—Meaning of. *See* CR. P. CODE. S, 197—CONSTRUCTION. **62 Cal. 275=A.I.R. 1934 Cal. 838.**

OFFICIAL RECEIVER.
See (1) C. P. CODE, S. 80 AND O. 22, R. 10.
(2) INSOLVENCY.
(3) PROVINCIAL INSOLVENCY ACT (1920).

OFFICIAL RECORD.
See EVIDENCE ACT, S. 35.

OPINION. *See* EVIDENCE ACT, SS. 32, 45 AND 51.

OPIUM ACT (I OF 1875)—*Possession—Proof of—Master of the house.*

When at a search conducted by the Excise Inspector, a packet of opium was recovered from a box in a room of the house of which the accused was the master, he must be held to be the person in possession of opium. It is not necessary for the prosecution to prove who put it in that box. (*Pandalai, J.*) LAZAR FERNANDO *v.* EMPEROR. **I.R. 1931 Mad. 689=133 I.C. 1=32 Cr. L.J. 967=1930 M.W.N. 1103=34 L.W. 660=1931 Cr.C. 554 (2)=A.I.R. 1931 Mad. 490 (2)=61 M.L. J. 854.**

——**Ss. 3 and 9**—*"Import"—Meaning of—Accused despatching opium from foreign territory to himself within British territory.*

If the goods once come across the border of the British territory into such territory, if they come for and on account of the accused with his consent—let alone his procurement—the offence of 'importing' is complete. Where the accused, a native of Assam went to Cooch

OPIUM ACT (1878).

Behar and posted a parcel of opium ostensibly to a friend of his in Assam but in effect to himself.

Held, that the accused was guilty of having 'imported' opium, though he may also have been the person who 'exported' it from the foreign territory. 20 A. L. J. 198 and 46 All. 146, Ref. (*Rankin, C. J. and C. C. Ghose, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* LUDUR CHANDRA DAS. **59 Cal. 1065=36 C.W.N. 456=I.R. 1932 Cal. 185=136 I.C. 137=33 Cr.L.J. 267=1932 Cr.C. 455 =A.I.R. 1932 Cal 465.**

———*Possession—Wife of house owner.*

A wife cannot be held to be in joint possession with her husband of anything found in the house. 15 A. 129 and 40 C. 898, Ref. (*Pandalai, J.*) LAZAR FERNANDO *v* EMPEROR. **I.R 1931 Mad. 689=133 I C. 1=32 Cr.L J. 967=1930 M W.N. 1103=34 L W. 660= 1931 Cr C. 554 (2)=A.I.R. 1931 Mad. 490 (2)=61 M.L.J. 854.**

———**S. 3**—"*Opium*" *does not include beinsi and beinchi.*

"Opium" as defined in S. 3 does not include opium prepared or in course of preparation such as beinsi and beinchi. Hence a person in possession of both beinsi and beinchi is not guilty under S. 9, Opium Act, but is guilty under S. 10 (*b*), Dangerous Drugs Act. (*Page, C. J. and Das, J.*) EMPEROR *v.* AH KIM. **11 Rang. 436=6 I.R. (Rang) 58=145 I C. 825=34 Cr.L.J. 1085=1933 Cr.C. 997=A I.R. 1933 Rang. 258.**

———**S. 9**—*Possession of beinsi and beinchi—Offence, if constituted.*

"Opium" as defined in S. 3 does not include opium prepared or in course of preparation such as beinsi and beinchi. Hence a person in possession of both beinsi and beinchi is not guilty under S. 9, Opium Act, but is guilty under S 10 (*b*), Dangerous Drugs Act. (*Page, C J. and Das, J.*) EMPEROR *v.* AH KIM. **11 Rang. 436=6 I.R. (Rang) 58=145 I C. 825=34 Cr.L J. 1085=1933 Cr.C. 997=A.I R. 1933 Rang. 258.**

———**S. 9**—*Possession of husband—If connotes that of wife also.*

The possession of the husband does not necessarily connote that the wife is also liable under S. 9, Opium Act. Where opium was discovered on a search being made in the house in which the accused lived,

Held, that the husband alone was liable under S. 9 and it cannot be presumed that the wife also was jointly in possession with him. (*Mir Ahmad, A.J C*) WAZIR *v.* EMPEROR. **158 I C. 598=8 R. Pesh. 60 (2)=36 Cr.L.J. 1437=1935 Cr.C. 449 (1)=A.I.R. 1935 Pesh. 68.**

———**S. 9**—*Proof of possession—Evidence.*

The case for the prosecution was that a bundle containing opium was in the appellant's room and was thrown out from that room as soon as the raiding party arrived. P. W. 1, the Excise Inspector, in his evidence stated that while he was searching the appellant's room, P. W. 2 shouted out to him from his room that while he was bathing he saw a man throwing out a bundle P. W. 2, however, did not say that he made any such statement and his evidence showed that he heard a window opened with a bang and saw a bundle falling to the ground. He further stated that he saw a bald head flash fast appellant's window and that he thought that it must be the appellant as he heard he was a smuggler. He however had to admit that immediately after that when he was taken by P. W. 1 to the appellant's room, he could not then say that the forehead which he saw was appellant's. The prosecution relied on the evidence to the effect that the bundle was found lying on the ground just below the appellant's window. The search list however did not state that it was found there.

Held, that the evidence in the case might raise some suspicion but suspicion could not be the basis of a conviction and that the prosecution had failed to substantiate the charge against the appellant by any reliable and satisfactory evidence. (*Nasim Ali, J., on difference of opinion between Lort Williams and M. C. Ghose, JJ.*) AMIN SHARIFF *v.* EMPEROR. **7 R C. 65=151 I.C. 66 =35 Cr L.J. 1220.**

———**S. 9 (a)**—*Illegal possession punishable—Illegality of search immaterial.*

The Opium Act contains no provision directing that a certain presumption shall be drawn on a search being made. It is the mere illegal possession that is punishable, and that possession does not rest on any presumption that the law orders to be drawn. Persons who make a search illegally render themselves liable to be sued for damages but their illegal action does not affect the question whether the person whose property was illegally searched has committed an offence under the Opium Act 4 L. B. R. 121, Relon. (*Dunkley, J.*) KYI YAR *v.* EMPEROR. **148 I C 1045 (1)=1934 Cr. C. 515 (1)=A.I.R. 1934 Rang. 83.**

———**S. 9 (c)**—*Possession of smoking materials.*

The mere possession of the paraphernalia of opium smoking is not in itself an offence under S. 9 (*c*). (*Carr, J*) AH SHAUNG *v.* EMPEROR. **I.R. 1931 Rang. 111=130 I.C. 367=1931 Cr.C. 16=32 Cr.L.J. 506=A.I.R. 1931 Rang. 14.**

———**S. 14**—*Search by Excise Inspector—Unlawful procedure—Assistance to—Conviction for—Legality of.*

In a case of assault or criminal force to deter public servant from discharge of his duty the test is whether the officer at the time of the assault was lawfully discharging a duty imposed on him by law as such. Was he doing what it was his duty to do, when he was assaulted? Unless the Excise Engineer had been authorised to enter a building and search, unless he had reduced to writing the information received by him as required by S. 14, Opium Act, he would not be acting in the lawful discharge of a duty imposed on him by law as an Inspector in attempting to make a search, and an assault committed on him would not be an assault committed on him in the execution of his duty and therefore the person assaulting such Inspector cannot be convicted under Penal Code, S. 353. 18 All. 246 and *Queen* v. *Roxborough*, 12 Cox. C. C. 8. Rel. on. (*Ferrers, J. C. and Aston, A. J. C.*) EMPEROR *v.* BHOPO. **6 I R. (Sind) 53=146 I.C 43=34 Cr.L.J 1147=27 S.L.R. 209=1933 Cr C. 538=A.I.R 1933 Sind 174.**

———**Ss. 14 and 20**—*Information to be reduced to writing.*

S. 14 read with S. 20 requires an Excise Inspector, where a search is made in consequence of information received, that the information should be reduced in writing. (*Ferrers, J.C and Aston, A.J.C.*) EMPEROR *v.* BHOPO. **6 I.R. (Sind) 53=146 I.C. 43=34 Cr L. J. 1147=27 S.L.R. 209=1933 Cr.C. 538=A.I.R. 1933 Sind 174**

ORAL EVIDENCE—Admissibility. *See* EVIDENCE ACT, S. 92.

ORDINANCE

See INTERPRETATION OF STATUTES.

———Deposed chiefs—Removal ordinance.

See UNDER ACT OF STATE. **A.I.R. 1931 P. C. 248 (P C.)**

ORIGINATING SUMMONS

See (1) CALCUTTA HIGH COURT RULES. (O. S.) CH. XIII.

(2) PRACTICE.

ORISSA TENANCY ACT (II OF 1913), Ss. 3 (3), 4, 74 and 236 (2)—*Scope and effect of*—Chandnadar—*Status of—If tenants-at-will—Liability to ejectment—Ejectment suit by* lakhiraj bajiaftidar *against* chandnadar—*Burden of proof.*

A *chandna* tenancy is essentially a non agricultural tenancy, and if nothing further were known about it, the *chandnadar* tenant will have to be considered as holding from year to year and liable to be ejected by a proper notice to quit; and the *chandnadar* in such circumstances could only resist a suit in ejectment by proving a custom entitling him to continue in occupation. But the scheme of the Orissa Tenancy Act suggests that the legislature could never have contemplated that a *chandnadar* should be in a worse position than even a *non-occupancy* raiyat as regards his liability to ejectment S. 236 (2) of the Act, which provides that the incidents of the tenancy of a *chandnadar* shall be regulated by local custom, does not itself indicate whether the local custom or usage regulating the ejectment of a *chandnadar* is to be proved by the landlord or by the *chandnadar*; but having regard to the status of the *chandnadar* as gathered from the definition in S. 3 (3), and his express inclusion in Ss. 4 and 74, and to the fact that all other tenants under the Act are protected from eviction except on specified grounds, S. 236 (2) ought to be taken to provide in effect that while the landlord is not entitled to eject the *chandnadar* for arrears of rent, his right to eject him on other grounds shall be regulated by local custom or usage, and will only be available so far as is permitted by local custom or usage. The onus of proof that in ordinary suits for ejectment shifts to the tenant on the landlord proving his title as such thus shifts again to the landlord in view not only of the way in which the Act has dealt with the rights of the landlord to eject by confirming it to specified grounds in the case of all other tenants, but also of the protection which the Act was designed to give to the *chandnadar* together with the measure of permanence expressly conferred on him by S. 74 of the Act. The landlord is therefore not entitled to eject a *chandnadar* except when he proves a local custom or usage in support. Where, therefore, a *lakhiraj bajiaftidar* in a temporarily settled estate sues to eject a *chandnadar* after service of a notice to quit, it is for the plaintiff to prove a local usage or custom in support of his claim to eject, even though he proves his title and not for the defendant to prove a custom to defeat the claim. 16 P.L.T. 858 and 16 P.L.T. 861, Overr. (See *infra.*) (*Courtney-Terrell, C.J., Dhavle and Agarwala, JJ.*) JAHABAJ KHAN *v.* SRI KRISHNA DEY. **16 Pat.L.T. 864=A.I.R. 1936 Pat. 29 (F.B.).**

———**S. 4**—*Chandnadar*—Status and rights of—If tenant at-will—Liability to ejectment. *See* ORISSA TENANCY ACT, SS 3 (3), 4, 74 AND 236 (2). **16 Pat. L T. 864=A.I.R. 1936 Pat. 29 (F.B.)**

———**S. 4**—*Scope*—Chandnadar—*Position and status of—Nature of tenancy.*

Chandnadars are recognized as tenants in S. 4 of the Orissa Tenancy Act, but they are neither tenure holders, nor raiyats, nor under raiyats. The incidents of the tenancy of the *chandnadars* are not to be found in the Act itself, but are left to be regulated by local custom or usage. (*Das and Foster, JJ.*) KEDAR NATH MULLICK *v.* BIKAL PRUSTI. **16 Pat L.T 861.**

———**Ss. 4 and 236**—*Scope of*—Chandnadar—*Position and rights of—Nature of tenancy—Permanent tenancy—Custom—Onus of proof.*

The Orissa Tenancy Act has avoided an enumeration of the incidents of a *chandna* tenure and has left the whole matter to be regulated by local custom or usage. The *chandnadars* did not belong to the agricultural classes but were shop-keepers, artisans and labouring classes; and originally they were only tenants at will unless the contract between them and their landlords gave them higher rights. A *chandnadar* who claims permanent rights to remain on the land and resists his landlord's suit for ejectment on that ground has the burden on him to establish that either under contract or under custom he holds a permanent right. It is not for the landlord plaintiff to prove that there is no such local custom or usage. (*Das and Foster, JJ.*) KRISHNA CHARAN MAHANTY *v.* PUNAI. **16 Pat.L.T. 858.**

ORISSA TENANCY ACT (1913), S. 193 (b).

———**S. 31**—*Purchase of holding—Landlord not aware at the time—Suit for registration fee—Limitation.*

A landlord, who becomes aware of the purchase of a holding at the time, cannot at once sue the purchaser for ejectment or registration fee; S. 31, Orissa Tenancy Act gives the purchaser one year for applying to the landlord for registration. The period of limitation for a suit in ejectment or for recovery of registration fee would therefore begin to run only one year after the transfer. But the position would be different when the landlord is not shown to be aware of the purchase at the time and the purchaser has not asserted a right to hold on his own account until very shortly before suit. Since subletting or mortgaging for not more than nine years is permissible under the Act without the landlord's consent, and since the landlord may accept rent from any agent of the raiyat, when it is paid on behalf of the raiyat, such acceptance of rent cannot indicate or imply recognition of his part of the interest or possession of the person making the payment, much less can he be held to be aware of any intention, on the part of the transferee to claim under a purchase, irrespective of the landlord's consent. A suit for registration fee is on the same footing as a suit in ejectment, so far as limitation is concerned, under the Orissa Tenancy Act. (*Dhavle, J.*) NALINI KANTA MUKERJI *v.* GOBINDA RAMANUJ DAS. **6 R.P. 709=150 I.C. 102=A.I.R. 1934 Pat. 458.**

———**S. 74**—Scope and effect of—Ejectment of *chandnadar*—Suit by *lakhiraj bajiaftidar*—Burden of proof—Permanent right of occupancy. *See* ORISSA TENANCY ACT, SS. 3 (3), 4, 74 AND 236 (2). **16 Pat.L.T. 864=A.I.R. 1936 Pat. 29 (F.B.).**

———**S. 193**—*Applicability—Suit for ejectment of* Chandnadar—*Jurisdiction of Civil Court.*

A suit for ejectment of a *chandnadar* is not a suit "under any portion of this Act", within the meaning of S. 193 of the Orissa Tenancy Act. The Act contains no provisions for ejectment suits as against *chandnadars* and the incidents of their tenancy are not to be found in the Act itself, but are left to be regulated by local custom or usage. S. 193 has no application to a suit for ejectment of a *chandnadar*, and the Civil Court consequently has complete jurisdiction to deal with the matter. (*Das and Foster, JJ.*) KEDAR NATH MULLICK *v.* BIKAL PRUSTI. **16 Pat.L.T. 861.**

———**S. 193 (b)**—*Scope—Suit against tahsildar in respect of rent collected and paddy-lending and money-lending business carried on by him—Jurisdiction—Civil or revenue.*

Under S. 193 (*b*) of the Orissa Tenancy Act the jurisdiction of the civil Court cannot be ousted unless the subject of dispute is exclusively within the jurisdiction of the revenue Court. Hence, when a suit is filed for accounts against a tahsildar who had collected rent and had also carried on a paddy-lending and money-lending business on behalf of his principal, part of the claim is cognisable by the civil Court and part by the Revenue

ORISSA TENANCY ACT (1913), S. 193 (h).

Court, and consequently the suit could be properly instituted in the civil Court. (*Dhavle and James, JJ.*) PADMA CHARAN NAIK *v.* ASHUTOSH CHANDRA MITRA. **13 Pat 510 = 6 R.P. 701 = 150 I.C. 56 = A.I.R. 1934 Pat. 439.**

———**S. 193 (h)**—*Suit by zamindar against agent for accounts—Items received by agent in management of landed estate—Jurisdiction of Civil Court.*

Where in a suit for accounts by a principal against his agent the majority, if not all of the claim, is in respect of money received or account kept by defendant as an agent employed in the management of a landed estate in the course of his employment as such, the suit in so far as it refers to moneys received in respect of paddy lending and money-lending is maintainable in the Civil Court; but so far as it refers to money received on account of rent collections it is within the exclusive jurisdiction of the Revenue Court. An order by Civil Court granting the plaintiffs liberty to withdraw that portion of the claim is proper order. (*Rowland, J.*) SUSILA BALA DASI *v.* UDAYNATH MAHANTY. **I.R. 1933 Pat. 197 = 143 I.C. 342 = A.I.R. 1933 Pat. 90.**

———**S. 228**—*Purchaser prior to execution sale—Whether can set aside sale.*

A purchaser of the holding prior to an execution sale can apply to the Court to set the sale aside after the judgment-debtor has withdrawn a deposit which he has previously made and the Court has directed the sale to be set aside. (*Agarwala, J.*) DHANESWAR RAUT *v.* RAGHUNATH JENA. **I.R. 1933 Pat. 208 = 143 I.C. 655 = A.I.R. 1933 Pat. 88.**

———**S. 232**—*Applicability—Compromise regarding disputed occupancy right—If illegal.*

S. 232 of the Orissa Tenancy Act has no application to cases where the existence of the occupancy right itself is in dispute between the landlord and tenant, and a compromise is effected settling that dispute either by affirming or denying the right. The section only invalidates contracts between a landlord and tenant if they take away an occupancy right existing at the date of the contract. (*Dhavle, J.*) MADHUSUDHAN MAHANTY *v.* NOROTTAM BARIK. **154 I C 849 = 7 R.P. 495 = 16 Pat L T. 122 = A.I.R. 1935 Pat. 206.**

———**Ss. 232 (1) (c) and 74**—Chandnadar *not a raiyat—Transferability of rights—Consent of landlord necessary—Local custom.*

A *chandnadar* whose interest has been recorded in the record-of rights is not a mere tenant-at-will liable to ejectment on a mere notice to quit from his landlord. The right of transfer of occupancy holding subject to the payment of certain property of the purchase-money to the landlord was expressly conferred on occupancy raiyats by the Orissa Tenancy Act. But there is nothing in the Act conferring such a right on *chandnadar*. The rights of a *chandnadar* are not transferable without the consent of the landlord and the onus lies on the transferee to prove the existence of the local custom or usage by which the tenancy is transferable. Where no such local usage has been proved and *chandnadar* has abandoned his tenancy the landlord is entitled to eject the trespassers that may have got into possession and re-enter into direct occupation of land. If a person who has acquired by purchase is described in the Record of rights as a chandnadar the onus is cast upon the person who attempts to eject him of proving local usage which rebuts the entry in the record-of-rights and the Civil Court should require strong evidence to rebut the presumption of correctness attached to the record-of-rights. (*Dhavle and James, JJ.*) CHINTAMONI ROUT *v.* SRIRAM CHANDRAKAR. **6 R.P. 658 = 149 I.C. 805 = A.I.R. 1934 Pat. 422.**

OUDH CIVIL RULES, Ch. II, R. 72 (2).

———**S. 236**—Chandnadars—*Classes of.*

Under S. 236 of the Orissa Tenancy Act two classes of *chandnadars* are defined. The first is the *chandnadar* who is a raiyat holding his homestead otherwise, than as a part of his holding as a raiyat in which case the incidents of his tenancy are regulated, generally speaking, by the provisions of the Act applicable to land held by a raiyat. The second class is that of the ordinary *chandnadar* who is not a raiyat. The incidents of his tenancy are regulated by local custom or usage and his rent is liable to re assessment on each revision of land revenue settlement. (*Dhavle and James, JJ.*) CHINTAMONI ROUT *v.* SRIRAM CHANDRA KAR. **6 R.P. 658 = 149 I.C. 805 = A.I.R. 1934 Pat. 422.**

———**S. 236**—Chandnadars—*Incidents of tenancy—Custom or usage.*

Chandnadars were originally shop-keepers, artisans and labouring classes, who having no arable land in the village, pay rent for homestead lands only. Their position as tenants is recognized in the Orissa Tenancy Act, but they are neither tenure-holders nor raiyats nor under raiyats, under S. 236 of the Act, their incidents are to be regulated by custom or usage. (*Das and Foster, JJ.*) KEDAR NATH MULLICK *v.* BIKAL PRUSTI. **16 Pat.L.T. 861.**

———**S. 236**—Chandnadars—*Status—Local usage.*

There is no bar in the Tenancy Act to the accrual of occupancy rights in a homestead held by a raiyat otherwise than as part of his holding as a raiyat. It is nowhere expressly laid down that a *chandnadar* is a tenant-at-will. The incidents of his tenancy are to be regulated by the local custom or usage. The mere fact that they are liable to be assessed to separate rent is not inconsistent which the incidents of a right of occupancy in view of S. 236 (1). (*Rowland, J.*) SANATAN SAHN *v.* BHAJA SAHU. **I.R. 1933 Pat. 194 = 143 I.C. 271 = 14 Pat.L.T. 688 = A.I.R. 1933 Pat. 92.**

———**S. 236 (2)**—Construction and scope—*Chandnadar*—Incidents of tenancy—Local custom or usage—Onus of proof in suit for ejectment. *See* ORISSA TENANCY ACT, SS. 3 (3), 4, 74 AND 236 (2). **16 Pat. L.T 864 = A.I.R. 1936 Pat. 29 (F.B.).**

OTHER REMEDY OPEN.

See (1) CERTIORARI.
(2) C. P. CODE, S. 115 AND O. 47, R. 1.

OUDH CHIEF COURT RULES, Chap. III—*Reading in Chimbers of practising Advocate—Need for compliance with rule before applying for enrolment.*

The object of the rule is to prescribe the necessity of reading in the Chambers of a practising Barrister or Advocate, irrespective of the fact whether it is done before or after the call to the bar, but it should be done before making an application for enrolment as an Advocate. (*Hasan, C.J. and Pullan, J.*) ASHAFAQUE HUSAIN, *In re.* **6 Luck. 254 = 14 O.L.J. 297 = I.R. 1931 Oudh 146 = 130 I.C. 338 = 8 O.W.N. 155 = A.I.R. 1931 Oudh 16.**

OUDH CIVIL RULES, Ch. II, R. 72 (2)—*Date fixed more than one month ahead for examination of witnesses—Summons not applied for within 10 days—Plaintiff not entitled to adjournment.*

When a date more than one month ahead is fixed for the examination of witnesses, and the plaintiff does not within 10 days thereof apply for summons to his witnesses, he cannot legally claim any right to have his case adjourned if his witnesses were not served before the date fixed for hearing of the case. (*Nanavutty, J.*) SITAL PRASAD *v.* SIDDHI. **149 I.C 983 = 6 R.O. 606 = 11 O.W.N. 278 = A.I.R. 1934 Oudh 366.**

OUDH CIVIL RULES, R. 190.

——**R. 190**—"*Ancestral land*"—*Grandson with life interest under will of Talukdar—Interest of—Execution against—Jurisdiction of Civil Courts.*

The Talukdar of an estate had made a will by which he bequeathed his properties to his son for life and then to his grandsons. One of the grandsons was the judgment-debtor but the will conferred only a life-estate on him without powers of transfer. It was held by the Sub Court that by reason of S. 15 of the Oudh Estates Act, the interest of the judgment-debtor had ceased to be an 'estate' within the meaning of the Act or ancestral land' within the definition in R. 190 of the Oudh Civil Rules and that the Civil Court had jurisdiction to entertain an application for execution.

Held, that the judgment-debtor was, if not the immediate, a possible heir within Cl. (2) of S. 13 (*a*) of the Oudh Estates Act, that S. 14 applied and not S. 15, that the property was part of an estate as defined in the Act and 'ancestral' within the meaning of R. 190 and that the execution should be transferred to the Collector. (*Srivastava and Kisch, JJ.*) ADVA DAT RAM *v.* LALA GOPAL DAS. **6 Luck 697=I R. 1932 Oudh 370=139 I.C. 633=9 O.W.N. 847=A.I.R. 1932 Oudh 313.**

——**R. 190 (a)**—*Applicability—Ancestor shown to have been mortgagee at the first regular settlement—Mortgage subsequently foreclosed—Property, if "ancestral".*

In order to make out that the land is "ancestral" within the meaning of Cl. (*a*) of R. 190 of the Oudh Civil Rules, it is necessary for a party to show that he or his ancestor was the full proprietor at the time of the first regular settlement. The mere fact of the ancestor having been a mortgagee at that time and the mortgage having subsequently been foreclosed, would not make the property "ancestral" within the meaning of R. 190. (*Srivastava and Nanavutty, JJ.*) AJAY VARMA *v.* SHYAM BEHARI SAHGAL. **6 R.O. 507 (1)=11 O W. N. 759=148 I.C. 1205 (1)=A.I.R. 1934 Oudh 359.**

——**R. 190 (c)**—*Construction—'Directly or indirectly inherited"—Ancestral property—Gift to son in-law—Inheritance by his sons—It becomes ancestral.*

Where an ancestral estate is gifted by a landholder to his son in-law, and after his death, is inherited by his sons, the latter, though grandsons of the donor, cannot be said to inherit it from their maternal grandfather "directly or indirectly"so as to make itancestral in their handswithin the meaning of R. 60(*c*) of the Oudh Civil Rules (*Nanavutty and Thomas, JJ.*) JANG BAHADUR SINCH *v.* EWAZ MOHAMMAD. **10 Luck 459=7 R.O 367=153 I.C. 612=11 O.W.N. 1626=A.I.R. 1935 Oudh 156.**

——**R 211**—Sale by Collector in execution of decree of Civil Court—Sale, when complete. *See* LIMITATION ACT, ART. 166. **1935 O.W.N. 208=A I.R. 1935 Oudh 131.**

——**R. 239**—Probate proceedings—Transfer by District Judge to Subordinate Judge—Proceedings becoming contentious after transfer—Jurisdiction of Subordinate Judge. *See* SUCCESSION ACT (XXXIX OF 1925), S. 265. **1935 O.W.N. 555=A.I.R. 1935 Oudh 415.**

——**R 239**—Subordinate Judge as District Delegate—Jurisdiction in contentious cases—Succession Act. Ss. 265 and 286. *See* SUCCESSION ACT, SS. 265 AND 286. **151 I.C. 843.**

——**R. 240**—Subordinate Judge District Delegate—Transfer of contentious proceedings to—Legality. *See* SUCCESSION ACT, SS 265, 272 AND 286. **11 O.W. N. 1481=A.I.R. 1935 Oudh 38.**

OUDH COURTS ACT (1925), S. 12 (1).

——**Ch VII, R. 285**—"*Advocate of not less than 10 years' standing in Oudh*"—*Interpretation.*

An advocate cannot be considered to be an Advocate of ten years' standing inOudh unless he has been enrolled as an *advocate* of the Judicial Commissioner's Court or of the Chief Court for a period of ten years. The period during which he was enrolled *as a pleader* cannot be taken into account. (*King, C.J. and Zia-ul Hasan, J.*) MR. HARI KRISHNA LAL MANUCHA, *In re.* **159 I.C. 261=8 R.O. 168=1935 O.W.N. 1225=A.I.R. 1936 Oudh 115.**

——**R. 287 (iv)**—*Applicability—Pleader enrolled as advocate*

Rule 287 (*iv*) of the Oudh Civil Rules does not apply to a pleader who is enrolled as an advocate under the Indian Bar Councils Act, though he was originally enrolled as a pleader. (*Srivastava and Zia-ul-Hasan, JJ.*) ASGHAR HUSAIN *v.* HAR PRASAD SAND. **1936 Cr C 25=158 I C 278=8 R.O. 82=1935 O.W.N. 1029=A.I.R. 1936 Oudh 18.**

——**R. 289 (2)**—*Certificate of pleader's fee—When to be filed.*

The rule dealing with pleader's fee should be strictly observed. Hence, where a certificate of pleader's fee is filed only after the commencement of arguments the fee should not be allowed in the costs of the suit of the party. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **10 O W N. 201=150 I.C. 330=6 R.O. 635=A I R. 1933 Oudh 142.**

——**R. 289. (10)**—*Pleader's fee—Vakalatnama filed on first date fixed for hearing.*

Where the vakalatnama is filed on the first date fixed for hearing of the case but not before that date the Court may tax half the ordinary fee. (*Bisheshwar Nath and Kisch, JJ.*) SURAJ BALI *v.* MAHADEO PRASAD. **7 Luck. 250=137 I.C. 678=I R. 1932 Oudh 259=8 O.W.N. 1153=A I.R. 1932 Oudh 46.**

——**Appendix D, Form 3**—*Applicability — No negligence on part of decree-holder.*

Where no negligence on the part of the decree-holder is proved, Form No. 3 of Appendix D at p 97 of the Oudh Civil Rules cannot apply. (*Nanavutty, J.*) BENI MADHO *v.* BINDESRI SINGH. **I.R 1933 Oudh 169=143 I.C. 189=10 O.W N. 263=A.I.R. 1933 Oudh 225.**

OUDH COURTS ACT (IV OF 1925), S.7—*Pecuniary jurisdiction—Government Promissory Notes—Face value.*

Where the subject-matter of a suit consists of a fund consisting of five Government Promissory Notes of the total face value of Rs. 5,43,000 and of the market value of Rs. 3,32 587 8. the face value determines the jurisdiction. (*Smith, J.*) MAHOMED SADIQ ALI KHAN *v.* KAZIM ALI KHAN. **9 Luck. 507=150 I.C. 193=11 O W.N. 323=6 R.O. 619=A.I.R. 1934 Oudh 118 (2).**

——**S. 12 (1)**—Application under S 34 Trusts Act—Order dismissing—Appeal. *See* APPEAL—TRUSTS ACT, S. 34. **11 O.W N. 1533=A.I.R 1935 Oudh 72.**

——**S. 12 (1) and (2)**—Applicability—Order of single Judge granting review—Appeal—Judge not certifying case as fit one for appeal. *See* C.P. CODE, O. 43, R. 1 (*w*) AND OUDH COURTS ACT, S. 12 (1) AND (2). **11 O W N. 1287.**

——**S 12 (1)**—*Decision of single Judge of Oudh Chief Court—Appeal to Privy Council—Permissibility.*

The provisions of S. 109 of the Code should be read subject to the special jurisdiction conferred under S. 12

OUDH COURTS ACT (1925), S. 12 (2).

(1) of the Oudh Courts Act. Consequently an application for leave to appeal to the Privy Council from the decision of a Single Judge of the Chief Court. (*Hasan, C.J. and Bisheshwar Nath, J.*) MAHOMED AZIM KHAN *v.* MUMTAZ ALI KHAN. **I R. 1931 Oudh 425 =134 I.C. 1017=8 O.W.N. 1207=A.I R. 1932 Oudh 163.**

———**S. 12 (2)**—Appeal under—Memorandum of cross-objection—Right of defendant—Leave of Court —Necessity. **1935 O.W N. 8=A.I.R. 1935 Oudh 88.**

———**S. 12 (2)**—*Further appeal—Certificate of fitness —Grant of.*

A decision which is neither opposed to any general principle of law, nor involves a question of public interest, nor is contrary to any recognized precedent, is not a fit one for a further appeal under S. 12 (2) of the Oudh Courts Act. (*Nanavutty, J.*) IBRAHIM BEG *v.* AZIMAN. **1935 O.W.N. 1388=A.I R. 1936 Oudh 192.**

———**S. 12 (2)**—*Third appeal—Ground for—Judgment in accordance with Privy Council decision.*

A judgment of a single Judge based upon a decision of the Privy Council is not fit for a third appeal under S. 12 (2), even if the question involved is one of general and public importance. (*Nanavutty, J.*) JAI DEBI KUAR *v.* SRIPAL SINGH. **6 R.O. 367 (2)=147 I.C. 1225=11 O W.N 264 (1)=A.I.R. 1934 Oudh 130.**

———**S. 20**—*Enrolment of advocate—Reading in chambers of advocate.*

The object of the rule is to prescribe the necessity of reading in the chambers of a practising Barrister or advocate, irrespective of the fact whether it is done before or after the call to the bar, but it should be done before making an application for enrolment as an advocate. (*Hasan, C.J. and Pullan, J.*) ASHFAQUE HUSSAIN, *In re.* **6 Luck 254=14 O L.J. 297=I R. 1931 Oudh 146=130 I.C. 338=8 O.W.N. 155=A.I.R. 1931 Oudh 16.**

———**S. 31 (1)**—Probate proceedings—Transfer by District Judge to Subordinate Judge—Proceedings becoming contentious after transfer—Jurisdiction of Subordinate Judge. *See* SUCCESSION ACT (XXXIX OF 1925), S. 265. **1935 O.W.N. 555=A.I.R. 1935 Oudh 415.**

———**S. 31 (2) and Oudh Civil Rules, R. 240**—Subordinate Judge District Delegate—Transfer of contentious proceedings to—Legality. *See* SUCCESSION ACT, SS. 265, 272 AND 286. **11 O.W.N. 1481=A.I.R. 1935 Oudh 38.**

OUDH ESTATES ACT (I OF 1869)—*Effect—Vested rights, if affected.*

The Oudh Estates Act does not divert rights which had already been granted by the Government before the passing of the Act. 26 All. 119 (P.C.), Rel. on. (*Lord Wright.*) RAJA MOHAN *v.* NISAR AHMAD KHAN. **60 I.A. 103=8 Luck. 65=I R. 1933 P.C. 156=143 I C. 395=1933 M W N. 303=10 O W.N. 601=A.I.R. 1933 P.C 95=64 M L J. 455 (P.C.).**

———*Sanads—Limitation to nearest male heir—Meaning and effect of.*

The limitation in the sanads to the nearest male heir is a limitation to males claiming through males, or in other words, to male agnates. (*Sir John Wallis.*) ABDUL LATIF KHAN *v.* MT. ABADI BEGAM. **61 I A 322=9 Luck. 421=7 R.P C. 14=150 I C. 810=11 O W N. 977=60 C L J. 329=A I.R. 1934 P.C. 188=67 M.L J 894 (P.C.).**

———*Scope—Trusts and equitable obligations—Enforceability against registered talukdar.*

OUDH ESTATES ACT (1869), S. 3.

The Oudh Estates Act confers on the registered talukdar the absolute legal title as against the State and against adverse claimants to the talukdari but it does not relieve the talukdar from any equitable rights and obligations to which with a view to the completion of the settlement he might have subjected himself by his own valid agreement. Where trusts or equitable obligations of this character (*e.g.*, in the nature of a family arrangement) are established they would be binding upon and enforceable as against the registered talukdar. (*Lord Wright.*) RAJA MOHAN *v.* NISAR AHMAD KHAN. **60 I.A 103=8 Luck. 65=I R. 1933 P.C. 156=143 I.C. 395=1933 M.W.N. 303=10 O.W.N. 601=A.I.R. 1933 P.C. 95=64 M.L J. 455 (P.C.).**

———*Succession to non-taluqdari property—Single heir descent.*

Held, that according to the family custom of single heir descent the title to the non-taluqdari property also vested in the same person in whom it had vested as regards the taluqdari estate under the sanad. (*Wazir Hasan, C.J. and Pullan, J.*) EJAZ ALI KIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS **6 Luck. 106=I.R. 1931 Oudh 113 (2)=130 I.C. 65 (2)=7 O. W.N 988=A.I R. 1930 Oudh 510.**

[Affirm. 68 M.L J. 397=1935 O.W.N. 178 (P.C.)**].**

———**Ss. 2 and 10**—*"Will"—Declaration made by taluqdar.*

A declaration made by the taluqdar in answer to the circular letter issued by the Chief Commissioner of Oudh in which the taluqdar expressed his wishes with respect to the devolution of his property after his death constitutes a will within the meaning of the Act. 31 I.A. 259, Ref. (*Wazir Hasan, C.J. and Smith, J.*) GAYA BAKHSH SINGH *v.* DEO SINGH. **9 Luck 484=150 I.C 495=7 R.O. 1=11 O.W.N. 351=A.I.R. 1934 Oudh 190.**

———**S. 3**—*'Estate"—Non-taluqdari property.*

Non-taluqdari property is not an estate within the meaning of S. 3. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C 642=I R 1932 Oudh 130=8 O.W. N. 349=A I.R. 1931 Oudh 177.**

———**S 3**—*"Estates"—Villages settled on the taluqdar and decreed by the first settlement of Oudh.*

Where the second summary settlement in respect of certain villages was made with the taluqdar between 1—4—1853 and 10—10—1859 and those villages were decreed to him by the first regular settlement of the province of Oudh.

Held, that these villages constituted an estate within the meaning of the definition of that word in the Act. 40 I. A. 170, Ref. (*Wazir Hasan, C.J. and Smith, J.*) GAYA BAKHSH SINGH *v.* DEO SINGH. **9 Luck. 484 =7 R.O 1=150 I.C. 495=11 O.W N. 351=A.I.R. 1934 Oudh 190.**

———**S. 3**—Scope—Talukdar — Status of—Sanad—Effect of—Entries in *khewat* at revisional settlement—If can alter rights conferred by section. *See* U.P. LAND REVENUE ACT, S. 32. **11 O.W.N. 1064.**

———**S. 3**—*Taluqdari villages—Whether include villages awarded by settlement decree.*

The expression "Taluqdari villages" is not confined merely to the villages mentioned in the list attached to the sanad but includes villages which may subsequently have been awarded by what is known as a settlement decree, and the best evidence on this point is to be found in the settlement record of rights. 3 Luck. 326, Ref. (*Hasan, C.J and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010= A.I.R. 1930 Oudh 481.**

OUDH ESTATES ACT (1869), S. 3.

——(**Amended by Act, 1910**) **S. 3, Expl.**—*Scope and effect of.*

The explanation to S. 3 of the Oudh Estates Act was inserted *ex abundanti cautela*, because of a groundless apprehension that the Crown Grants Act (1895) might be held to nullify the provisions of S. 22 and the amendment to S. 3 of the Act; but it no way affects the amendment in the body of S. 3, which secures that succession to impartible estates should be exclusively governed by S. 22, and that limitation in the sanads should be wholly superseded. (*Sir John Wallis*) ABDUL LATIF KHAN *v.* MT. ABADI BEGAM. **61 I. A. 322=9 Luck. 421=7 R P.C. 14=150 I.C.810=11 O.W N. 977=60 C.L J. 329=A.I.R. 1934 P.C. 188=67 M.L.J. 894 (P.C.).**

——**S. 4**—*Execution sale of taluqdari property—Purchase by another taluqdar—Rights of purchaser.*

Where in execution of a decree against a taluqdar, another taluqdar purchases some of the taluqdari villages, the transaction amounts to a transfer by one taluqdar in favour of another taluqdar and therefore under S. 4 of Act I of 1869, the purchaser is entitled to hold the property subject to the same conditions as the transferor, and the villages must be treated as part of the taluqdari estate of the auction-purchaser. (*Hasan, C. J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck 282=I.R 1931 Oudh 305=132 I.C. 753=7 O.W.N.1010=A.I.R.1930 Oudh 481.**

——**S. 8**—*Lists—Entry of dead man's name—Effect on status and rights.*

It is a matter of familiar knowledge that entries of dead men's names in the lists framed under S. 8 of the Oudh Estates Act are not uncommon, but the death of a talukdar before the promulgation of the statute makes no difference in his status or in his rights. (*Sir Shadi Lal.*) EJAZ ALI QUIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **1935 A. W.R. 258=154 I.C. 27=41 L.W. 242=7 R.P C. 138=61 C.L.J. 102=1935 O.W.N. 178=1935A.L.J. 744=A I.R. 1935 P.C. 53=68 M.L.J. 397 (P.C.).**

——**S. 8**—*List under—Entry of name of deceased person.*

Entry of deceased taluqdars' names in the lists prepared under S. 8 was not an uncommon event. 31 I.A. 30; 321 I. A. 203; 11 I.A. 51 and 43 I. A. 269, Ref. (*Wazir Hasan, C.J. and Pullan, J.*) EJAZ ALI KIDEWAI *v.* SPECIAL MANAGER, COURT OF WARDS. **6 Luck. 106=I.R. 1931 Oudh 113 (2)=130 I.C. 65 (2)=7 O.W.N 988=A.I.R. 1930 Oudh 510.**

——(**as amended**)**S.8**—*Succession—Right of cousin of deceased to succeed.*

A Mahomedan legal owner of an estate governed by the rule of primogeniture cannot create any title in his cousin in the estate by associating his name in all his legal transactions or even by keeping him in his joint possession, when the cousin's name has not been entered in revenue papers by the authorities. Mere volition on his part is wholly ineffectual. 25 I. A. 161 and 45 I.A. 134, Ref. (*Wazir Hasan, C. J. and Pullan, J*) EJAZ ALI KIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS. **6 Luck 106=I.R. 1931 Oudh 113 (2)=130 I.C. 65 (2)=7 O.W.N. 988=A.I.R. 1930 Oudh 510.**

——**S. 8**—*Widow constituting herself trustee notwithstanding sanad—Decree for under-proprietary rights against her—If binds beneficiaries—Widow gifting property before suit—Effect of.*

Where a widow, notwithstanding the grant of a sanad in her favour with absolute title followed by the entry of her name in the lists prepared under S. 8 of Act I of 1869, constitutes herself a trustee on behalf of the remainderman and her co widow for the purpose of carrying into effect the will of her husband, a decree for under-proprietary rights obtained against her binds the remainderman and those who derive title from him. The fact that the widow had parted with her life estate before the suit by executing a deed of gift in favour of her nephew, is immaterial, because, she still represented the estate held by her as a trustee on behalf of the remainderman and her co widow. Just as a trustee cannot set up any title adverse to that of the *cestui que trust*, so also the beneficiary cannot repudiate the *bona fide* acts of the trustee entered upon for the benefit of the beneficiary or the *cestui que trust*. (*Nanavutty and Zia-ul-Hasan, JJ.*) SHER BAHADUR SINGH *v.* SRI MADHO PRASAD SINGH. **11 Luck. 209=155 I C. 1087=7 R. O. 634=1935 O.W.N. 674=A.I.R 1935 Oudh 394.**

——**Ss. 8 and 10**—*List No. 1—Entry of name of deceased taluqdar in—Effect of.*

Where a taluqdar died in 1863 but when the lists prescribed by S. 8 of the Act came to be prepared his name is entered in the lists, it must be held that he was the taluqdar of those estates within the meaning and for the purposes of the Act. The entry of the names of deceased taluqdars in the lists is an incident of common occurrence. (*Wazir Hasan, C.J. and Smith, J.*) GAYA BAKHSH SINGH *v.* DEO SINGH. **9 Luck. 484=150 I.C. 495=7 R.O. 1=11 O.W.N. 351=A.I.R. 1934 Oudh 190.**

——**S. 8**—*List second—Family custom of descent to single heir—Presumption applicable.*

On the death of a talukdar whose name is entered under S. 8 in list second (a list of the talukdars whose estates according to the custom of the family on and before the 13th February, 1856, ordinarily devolved upon a single heir) there is a rebuttable presumption of a family custom that property outside the talukdari estate descends in the same way as the taluka, namely to a single heir. 38 All. 552 (P. C.), Ref. to. (*Lord Wright.*) RAJA MOHAN *v.* NISAR AHMAD KHAN. **60 I.A. 103=8 Luck. 65=I.R. 1933 P C.156=10 O.W. N. 601=143 I.C. 395=1933 M.W.N. 303=A.I.R. 1933 P.C. 95=64 M L J. 455 (P.C.)**

——**S. 8**—*List second—Recital in, as to family custom—Presumption applicable.*

A recital of family custom contained in the second list framed under S. 8 of the Oudh Estates Act, is conclusive evidence only as to succession to the talukdari property. As regards the non-talukdari property, it merely raises a presumption in favour of the existence of the custom, but the presumption can be rebutted. (*Sir Shadi Lal.*) EJAZ ALI QUIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **1935 A.W R. 258=154 I C 27=7 R P C. 138=41 L. W. 242=1935 A.L.J. 744=61 C.L.J. 102=1935 O. W.N. 178=A.I.R. 1935 P.C. 53=68 M.L.J. 397 (P.C.).**

——**S. 8**—*List No. 3—Talukdari estate entered in—Accretions by talukdar—Rule of succession—Absence of custom of single heir rule—Absence of declaration by zamindar—Effect of.*

In the case of a talukdari estate entered in list No. 3 of the lists prepared under S. 8 of the Oudh Estates Act, when there is no custom of single heir succession in the family of the talukdar, the rule of succession as regards purchaser and accretions made by the talukdar, in the absence of a declaration by him of his intention to make them a part of his talukdari estate, is his personal law. A subject has no right to impose upon land or other property any limitation of descent at

OUDH ESTATES ACT (1869), S. 10.

variance with the ordinary law of descent of property applicable to his case. But the Crown in British India has power to grant or transfer lan ls, and by the grant or on transfer, to limit in any way it pleases the descent of such lands. (*Nanavutty and Zia ul Hasan, JJ.*) SAKINA BEGAM *v.* SHAHAR BANO BEGAM. **10 Luck. 443=153 I.C. 42=7 R.O. 303=11 O.W.N.1608=A. I.R. 1935 Oudh 62.**

——**S. 10**—*Entry of name in both lists—Effect of.*

By S. 10 the entry of a person's name in the lists is conclusive evidence that he was a talukdar to whom the provisions of the Act applied; the effect of the inclusion of his name in the second list is a statutory declaration that the talukdari estate by family custom ordinarily devolved upon a single heir. 43 I.A. 269, Ref. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=6 Luck. 556=1932 A.L J. 663=136 I.C. 385=I R. 1932 P.C. 81=36 C.W.N. 137=62 C L.J. 326=35 L.W. 118=8 O.W. N.1378=A.I.R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

——**S. 10**—*Personal acquisitions—Succession to—Presumption—Custom of primogeniture—Evidence in rebuttal of.*

In the case of a Mahomedan family, if a custom of primogeniture governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death, and it is for the person who asserts that these properties follow a line of devolution different from that of the taluka to establish it. But the presumption is sufficiently rebutted if it is shown that in at least two cases of succession in the family non talukdari property has been divided according to Mahomedan Law, there being no trace of any claim in either case that it was not so divisible by reason of a family custom, and that the alleged family custom is of comparatively recent origin. 55 I.A. 303, Ref. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=136 I C. 385=I.R. 1932 P.C. 81=6 Luck. 556= 1932 A L J. 663=36 C.W.N 137=35 L.W. 118= 8 O.W N 1378=62 C.L.J. 326=A.I.R. 1932 P. C. 13=62 M.L.J. 320 (P.C.).**

——**S. 10**—*Person dying before Act—Name entered in lists—Effect.*

Where a person dies before the passing of the Act but his name is entered in the lists prepared thereunder he is a taluqdar within the meaning of the Act. (*Hasan, C. J. and Raza, J.*) DAL BAHADUR SINGH *v.* HAR BAKSH SINGH. **6 Luck. 730=I.R. 1931 Oudh 337= 132 I.C 785=8 O.W.N. 772=A I.R. 1931 Oudh 327.**

——**Ss 13 14 and 15**—*Ancestral estate—Gift to son-in law—If remains ancestral.*

A son-in-law is not an heir to his father-in law either under the Hindu Law or under the Oudh Estates Act. When therefore an ancestral estate is gifted to a son in-law, it ceases to be ancestral any longer. (*Nanavutty and Thomas, JJ.*) JANG BAHADUR SINGH *v.* EWAZ MOHAMMAD. **10 Luck. 459=7 R O. 367=153 I.C. 612=11 O W.N.1626=A.I.R. 1935 Oudh 156.**

——**S. 13**—*Mutation of names—Effect.*

Neither under the Oudh Estates Act nor under Maho medan Law can mere mutation of names confer title. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v* RAJA SAIVID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 =I R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

——**S. 13**—*Will by talukdar—Bequest to junior widow—Validity—Estate taken.*

By a will dated 26th March, 1883, a talukdar bequeath ed one half of his property to his senior wife and his daughter by her,and the other half to his junior wife who was childless. He died on 18th April, 1883. The will was

OUDH ESTATES ACT (1925), S. 14.

objected to as invalid under S. 13, Oudh Estates Act, it having been made with three months of the testator's death, on the ground that the junior widow was not a person entitled to succeed on intestacy, and that since the senior widow would under S. 22 (7) take a life estate on intestacy, the junior widow did not take an interest.

Held, that the jun or widow did take an interest within the meaning of S. 22 of the Act, and that the bequests in favour of both the widows were valid and conferred absolute estates on them (*Sir John Wallis.*) ABDUL LATIF KHAN *v.* MT. ABADI BEGAM. **6 I.A. 322=9 Luck. 421=7 R.P.C. 14=150 I.C. 810=60 C L J. 329=11 O.W.N. 977=A.I.R. 1934 P.C. 188= 67 M.L J. 894 (P.C.).**

——**S. 13**—*Will by taluqdar—Bequest of Taluqdari property to junior wife—Validity.*

Where a senior widow succeeds in case of intestacy under Cl. (7) of S. 22 for her lifetime only she does not succeed to the estate or to a portion thereof but only to an interest therein and thus there would still be left a residue which must vest in some other person and that person is indicated first by Cl. (8) and in default of such a person by Cl. (9), that is, the junior wife. Such a residue is clearly an interest in the estate within the meaning of S. 13 of the Oudh Estates Act, 1869. The junior wife in such circumstances has a remainder or reversion expectant on the decease of the senior wife. According to general law such an estate for life is a vested remainder and capable of being trausferred by a deed of grant. Such an estate is also an interest in the estate within the meaning of S. 13-A (1), and can be the subject-matter of a bequest by a taluqdar in favour of his junior wife. 31 I.A. 132, Ref ; 15 I.A. 127, Foll. (*Hasan, C. J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

[**Affirmed** on different grounds and with variations, 61 I.A. 322=9 Luck. 421 (P.C.). **R.** 9 Luck. 115 (118)]

——**S. 14**—*Deed of gift in respect of Taluqdari property—Effect of cancellation of deed.*

Where a taluqdar makes a gift of certain taluqdari villages but subsequently brings a suit to have the deed of gift cancelled and the deed is cancelled accordingly, the villages comprised in the deed of gift cannot be deemed to have passed out of the estate so as to be treated as non-taluqdari property. (*Hasan, C. J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHLILA KHAN. **6 Luck. 282=I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

——**Ss. 14 13 (A) (2), and 15**—*Grandson with life interest under will of talukdar—Interest of—"Estate". —"Ancestral land"—Oudh Judicial Rules, R.* 190—*Execution—Jurisdiction of Civil Courts.*

The talukdar of an estate had made a will by which he bequeathed his properties to his son for life and then to his grandsons. One of the grandsons was the judgment-debtor but the will conferred only a life-estate on him without powers of transfer. It was held by the sub-Court that by reason of S. 15 of the Oudh Estates Act the interest of the judgment-debtor had ceased to be an 'estate' within the meaning of the Act or 'ancestral land within the definition in R. 190 of the Oudh Civil Rules and that the Civil Court had jurisdiction to entertain an application for execution.

Held, that the judgment was, if not the immediate a possible heir within Cl. (2) of S. 13 (A) of the Oudh Estates Act, that S. 14 applied and not S. 15, tha the property was part of an estate as defined in the Act and 'ancestral' within the meaning of R. 190 and that the execution should be transferred to the Collector. (*Srivastava and Kisch, JJ.*) ADYA DAT RAM *v.*

OUDH ESTATES ACT (1869), S. 14.

LALA GOPAL DAS. **6 Luck. 697 = I R. 1932 Oudh 370 = 139 I.C. 633 = 9 O.W.N. 847 = A.I R. 1932 Oudh 313.**

——**Ss. 14 and 15**—*Interpretation—Will made and become operative before the Act—Succession to estate—Rules governing—"Heir"—Meaning of—Heir in any degree of descent.*

The intendment of Ss. 14 and 15 is to give retrospective effect to rules of succession to an estate after the death of a person who has acquired it under a will which was made and has come into effect before the Act of 1869. As those sections refer to the provisions of the Act, it must be assumed that the testator, *i.e*, the taluqdar, died after, even though in fact he died before, the passing of the Act and the rules of succession to such an estate are laid down in S. 22 of she Act. The same rules apply to subsequent succession, because the words "his heir" mean "his heir in any degree of descent who has inherited property under the special provisions of this Act" (*Wazir Hasan, C. J and Smith J.*) GAYA BAKHSH SINGH *v.* DEO SINGH. **9 Luck. 484 = 150 I.C. 495 = 7 R.O. 1 = 11 O.W.N. 351 = A I.R. 1934 Oudh 190.**

——**S. 15**—*Alienation of part of estate to non-taluqdar—Subsequent acquisition by taluqdar's widow in her own right—Effect.*

A Taluqdar's widow partly gifted and partly sold two of the Taluqdari villages to her grandson *A* These villages were sold in execution of a decree against *A* and purchased by *M* and subsequently resold by *M* to another widow of the taluqdar.

Held, that the villages must be deemed to have completely passed out of the estate when they were purchased by *M* and the subsequent acquisition by the other widow of those villages must be held to be in her own interest and they could no longer be treated as forming a portion of the Taluqdari estate. (*Hasan, C.J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck 282 = I.R 1931 Oudh 305 = 132 I.C. 753 = 7 O.W.N 1010 = A.I R. 1930 Oudh 481.**

[**Affirmed** on different grounds and with variations. 61 I.A. 322]

——**S. 19**—*Applicability—Will made after exclusion of talukdar's name in lists but before approval.*

The provisions of S. 19 apply to wills made after the passing of the Act by taluqdars of the statutory class prescribed by S. 10, and they apply even to wills, at the time of making of which the talukdar's name was included in the lists made up for the purpose of subsequent approval and publication, so that, if unattested as required by S. 50, Succession Act, 1865, such wills are invalid as wills. (*Lord Thankerton.*) DULAHIN JADUNATH KUAR *v.* RAJA BISHESHAR BAKHSH SINGH. **I R 1931 P C 50 = 130 I.C. 306 = 14 O.L.J. 1 = 8 O. W N. 258 = A I R. 1931 P C. 24 (P.C.).**

——**S. 21 (11)**— *Primogeniture sanad— Widow holding estate—Succession—Conditions of sanad as part of ordinary law.*

Where certain property was held under a primogeniture sanad and the last holder having died his widows entered into possession and the question of succession was raised on their death, *held*, that only a person establishing title to the estate in accordance with the limitation, of the sanad can succeed and that the conditions of the sanad should be given effect to as part of the ordinary law. 7 O.W.N. 1010, Foll. (*Hasan, C. J. and Raza, J.*) DAL BAHADUR SINGH *v.* HAR BAKSH SINGH. **6 Luck 730 = I R 1931 Oudh 337 = 132 I C. 785 = 8 O W N 772 = A.I.R. 1931 Oudh 327.**

[**F.** 7 Luck. 564 (571)].

——**S. 22**—*Applicability— Absence of declaration under S. 32-A—Effect—Rule of succession.*

OUDH ESTATES ACT (1869), S. 22.

Unless a taluqdar complies with the provisions of S. 32 of the Oudh Estates Act (I of 1869) as amended by Act III of 1910, and executes a document declaring that immovable property in the U. P in which he has a separate, permanent, heritable and transferable right is part of his estate for purposes of the Act, no purchase and no accretions made by him to the parent estate can be governed by the rule of succession contained in S. 22 of the Act (*Nanavutty and Zia ul-Hasan, JJ.*) SAKINA BEGAM *v.* SHAHAR BANO BEGAM. **10 Luck. 443 = 153 I C 42 = 7 R.O. 303 = 11 O.W.N. 1608 = A. I.R. 1935 Oudh 62.**

——**S. 22 and Oudh Settled Estates Act (1917), Ss 16 and 17**—*Applicability and scope—Bequest of settled estate to widow—Validity—Powers of transfer.*

A widow is settled to succeed under S. 22 of the Act of 1869 and the Act of 1917, as is clear from the language of S. 22 (1) of the latter Act, contemplates a widow succeeding to a settled estate. Therefore a widow can succeed as the holder of a settled estate and hold it according to the provisions of the Act of 1917. Under S. 22 of the Act of 1869, a widow gets only a life interest, and Ss. 16 and 17 of the Act of 1917 give to the holder of a settled estate certain limited powers of transfer only. But the Act of 1917, being a special Act relating to a special class of estates, in case of a conflict between the power conferred on a widow succeeding under S. 22 of the old Act and the power given to the holder of a settled estate under the new Act of 1917, the provisions of the special Act of 1917 must override those of the former. A will by a taluqdar bequeathing his settled estate to his widow is not invalid. (*King, C.J. and Zia ul Hasan, J.*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **10 Luck 606 = 153 I.C 878 = 7 R.O. 409 = 1935 O W.N 68 = A.I.R. 1935 Oudh 198.**

—— **(as amended by Local Act III of 1910), S 22**—*Applicability—Succession to Gangwal Estate in Bahraich District.*

The succession to the Gangwal Estate in Bahraich District is governed by S. 22. Oudh Estates Act, as amended by Local Act, III of 1910, and in order that a person may claim title to the estate under this clause, he must establish every element of his title as required by that clause, *i.e.*, he must show that he is the nearest male agnate according to the rule of lineal primogeniture. (*Wazir Hasan, C J. and Raza, J.*) HARI HAR PARTAB BAKSH SINGH *v.* BIBHESHWAR BAKHSH SINGH. **9 Luck. 121 = I R 1933 Oudh 247 = 144 I. C. 529 = A I.R. 1933 Oudh 197.**

——**Ss. 22 and 23**—*Non-taluqdari property—Succession.*

S. 22 of the Act applies only to an "estate" as defined in the Act; and non taluqdari property is not an "estate" within the meaning of the definition given in S. 3. The rule of succession to non-taluqdari property is governed by S. 23 of the Act, that is, by ordinary law, modified by custom, if any, proved in the case. Regarding non-taluqdari property the presumption that it is governed by the rule of single heir succession in the case of list II estate is rebuttable, but there is no presumption that the rule of male lineal primogeniture would govern such non-taluqdari property in the case of list II estate. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIVID MAHOMED SAADAT ALI KHAN. **I.R. 1932 Oudh 130 = 136 I.C. 642 = 8 O.W.N. 349 = A.I.R. 1931 Oudh 177.**

——**S 22**—*Succession to taluqdari estate—Principles governing—Primogeniture—Meaning.*

The taluqdari sanad is the fountain head of the talukdar's title to his estate and the conditions of the

OUDH ESTATES ACT (1869), S. 22 (7).

sanad must be applied in construing "ordinary law" in so far as they are not inconsistent with the provisions of Act I of 1869. The expression "the nearest male heir" according to the rule of primogeniture as used in the talukdari sanad means that the person selected should be not only of the male sex but that he should also as such be the nearest heir according to the rule of primogeniture; and the expression "the rule of primogeniture" means the rule of lineal primogeniture ; in other words, the person of male sex who is the nearest inheritable blood of the male line. The intention of the grantor of the sanad was to introduce and to emphasise the conception of the English Law as to the preference of line in two respects, the line of the male heirs and the line of the first born amongst such heirs. 32 I.A. 203 and 49 I.C. 276, Ref.; 5 I.A. 1, Dist; 37 I A. 168, Foll. (*Hasan, C.J.and Pullan, JJ.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

[**Affirmed**. 61 I.A. 322=9 Luck. 422 (P.C.). **F.** 6 Luck. 730 (739); 7 Luck 564 (571); 8 O.W.N. 772 (780); **R.** 146 I.C. 651 (o).]

———**S. 22 (7)**—Scope—Will within three months of death—Bequest to senior and junior wifes—Validity—Estates taken. *See* OUDH ESTATES ACT, S. 13. **67 M L J. 894 (P.C.).**

———**S. 22 (10)**—"*Male agnate.*"

The meaning of "male agnate" for the purposes of the section cannot be determined without recourse to the ordinary law which would govern the succession apart from the statute. (*Lord Thankerton.*) DULAHIN JADUNATH KUAR *v.* BISHESHAR BAKHSH SINGH. **59 I.A. 173=I.R. 1932 P.C. 145=136 I.C. 747=1932 A.L.J. 632=36 C.W.N. 1073=56 C.L.J. 204=1932 M.W.N. 1037=9 O.W.N. 478=A.I.R. 1932 P.C. 142 =63 M.L.J. 287 (P.C.).**

———**S. 22 (11)**—*Applicability—Estate under List II —Succession—Rule as to—Limitation in* sanad—*Applicability of.*

In the case of a taluqdari estate granted to a Hindu taluqdar in Oudh before the passing of Act I of 1869, under a *sanad* containing primogeniture terms, the rule of succession applicable is that contained in the *sanad* and not the rule of Hindu Law or that provided by the Oudh Estates Act. (*Lord Blanesburgh.*) DAL BAHADUR SINGH *v* HAR BAKHSH SINGH. **163 I.C. 748 =9 R.P.C. 56=11 O.W. N. 1641 (P C.).**

———**S. 22 (11) (Amended by Act III of 1910), S. 22 (10)**—*Applicability and scope—Limitation to male agnates in sanad—Operation of.*

After the Amending Act III of 1910, there can no longer be any question of bringing in the limitation of Cl. (11) of S. 22 of the Act of 1869 as part of the ordinary law of the religion and tribe, and the clause must be restricted to other heirs such as females and those claiming under them who, but for the earlier limitations in the section, would have been entitled to succeed to an impartible estate under their personal law. The limitation to male agnates in Cl. (10) of the new S. 22 gives statutory effect to the limitation in the sanad as to collateral successions. (*Sir John Wallis,*) ABDUL LATIF KHAN *v.* MT. ABADI BEGAM. **61 I.A. 322 =6 Luck. 421=7 R.P.C. 14=150 I.C. 810=11 O.W. N. 977=60 C.L J. 329=A.I.R. 1934 P.C. 188=67 M.L.J. 894 (P.C.).**

———**S. 22 (11)**—*Death of last holder—Primogeniture sanad—Succession—Hindu Law or sanad.*

Where on the death of the last holder of property under a primogeniture sanad, cl. (11) of S. 22 of the Oudh Estates Act, becomes applicable, the terms of the

OUDH ESTATES ACT (1869), S. 29.

sanad form part of the "ordinary law" and govern the succession to the estate and not the rules of Hindu Law. 49 I. A. 276; 7 O. W. N. 1019; 8 O.W.N. 772, Foll. (*Wazir Hasan, C.J. and Raza, J.*) GANESH BAKSH SINGH *v.* AJUDHIA BAKSH SINGH. **7 Luck. 564=I. R. 1932 Oudh 230=137 I.C. 349=9 O.W.N. 304= A.I.R. 1932 Oudh 172.**

———**S. 23**—*Succession to non talukdari property—Proof of custom.*

Under S. 23 of the Oudh Estates Act, succession to non talukdari property is regulated by the ordinary law, but the expression "ordinary law" includes such custom as may be found to exist. (*Sir Shadi Lal.*) EJAZ ALI QUIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **1935 A.W.R. 258=154 I.C. 27=41 L.W. 242=7 R.P.C. 138=61 C.L.J. 102= 1935 O.W.N. 178=1935 A.L.J. 744=A.I.R. 1935 P. C. 53=68 M.L.J. 397 (P.C.).**

———**S. 29**—*Adoption—Childless widow of Mahomedan talukdar—Adoption of daughter's or sister's son.*

A childless widow of a Mahomedan talukdar can make an adoption for her daughter's son or sister's son under provisions of S. 29 provided she has no natural son born to her from her husband and provided she has not already adopted a son. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **8 O.W.N. 349=136 I.C. 642=I.R. 1932 Oudh 130=A.I.R. 1931 Oudh 177.**

———**S. 29**—*Adoption—Childless widow of Mahomedan taluqdar—Authorization by husband necessary.*

Under S. 29, the widow of a Mahomedan taluqdar is allowed to make an adoption only in those cases in which it is permissible for a Hindu to do so. The Oudh Estates Act is a purely secular enactment and has nothing to do with the peculiar notions of Hindus and Mahomedans on the subject of adoption. It merely lays down that in those cases in which a Hindu widow could adopt, a Mahomedan widow of a Taluqdar could also do so. It does not touch the question of the qualifications of the boy to be adopted. A childless Hindu widow may, with the authority of her husband, make an adoption and the same power is given to the widow of a Mahomedan talukdar by Act I of 1869. A Hindu widow who has a son born to her by her husband cannot legally adopt and similarly a Mahomedan widow, if she has a son by her husband could also not adopt under Act I of 1869. Adoption like marriage in Hindu law, is in the nature of a religious sacrament, but no religious ceremony is necessary under Mahomedan law for the purpose of making an adoption which is unknown to Islamic Law. The only condition of Hindu Law which is imposed upon a widow of a Mahomedan Taluqdar by Act I of 1869 is that the latter must be a childless widow and authorised by her husband to make an adoption during her widowhood. 55 I.A. 139, Foll. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642 =I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———**S. 29**—*Adoption — Power to adopt—Life estate is not* sine qua non *for exercise.*

S. 29 of the Oudh Estates Act, 1869, confers the power of adoption upon every widow of a Mahomedan taluqdar and it nowhere lays down that it is necessary for the widow to be in possession for life of the estate of her husband before she can make a valid adoption under the Oudh Estates Act. This Act does not make the possession of a life estate by a Hindu widow or a Mahomedan widow the "*sine qua non*" or a pre-requisite condition before she can validly exercise the authority conferred upon her by her deceased husband.

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(*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **8 O.W.N. 349=136 I.C. 642=I.R. 1932 Oudh 130=A.I.R. 1931 Oudh 177.**

——**S. 29**—*Adoption—Will executed by childless taluqdar—Power to adopt—Exercise by widow—Nature of estate taken by adopted son.*

Ordinarily a life estate vests in the widow of a Hindu or Mahomedan Taluqdar who dies intestate, but where a childless taluqdar has executed a valid will giving his widow authority to adopt and making his adopted son the absolute owner of the estate the absolute estate vests in the adopted son from the moment he is adopted but enjoyment of it may be postponed or deferred till the termination of the life estate of the widow. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **8 O.W.N. 349=136 I.C 642=I.R. 1932 Oudh 130=A.I.R. 1931 Oudh 177.**

——**S. 29**—"*For the purposes of this Act*"—*Meaning.*

The expression "for the purposes of this Act" cannot very well be restricted to mean "only for the purposes of intestacy." L.R. Supp. Vol. 47 (66); 16 I.A. 29, Rel. on. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

——**S. 29**—*Power of adoption — Effect of re-marriage.*

The widow of a Mahomedan talukdar has, under the terms of S. 29, no power to adopt a son after her remarriage. (*Sir George Lowndes.*) ABDUL HAMID KHAN *v* SAADAT ALI KHAN. **59 I A. 202=7 Luck. 194=1932 A.L J. 593=55 C.L J. 494=1932 M W.N. 690=36 L W. 108=I.R 1932 P C. 159=136 I.C. 745=36 C W N. 660=9 O.W.N 474=A.I.R. 1932 P.C. 137=63 M.L.J 8 (P.C).**

——**S. 29**—*Will coupled with power to adopt—Devolution of estate, provision for—Validity.*

A testator who is a Mahomedan taluqdar can confer on any widow of his the power to adopt without conferring on her also a life estate; and if the testator by his will lays down that on the adoption being effected the adopted son should come into immediate possession of the estate then the life-estate, if any, of the adopted mother would be cut off at once. It is clear that if the testator is authorised by law to make a testamentary disposition of his property he can exercise that right and legally make a will contrary to the devolution of the estate on intestacy laid down in Act I of 1869, provided his will does not offend against the rule of perpetuity incorporated in that Act. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **8 O W N 349=136 I.C. 642=I.R. 1932 Oudh 130=A.I.R. 1931 Oudh 177.**

——**S. 32 A**—*Effect of.*

Apart from the provisions of S. 32-A of the Act of 1869, as amended in 1910, no incorporation of other property in the talukdari estate is possible. 45 I.A. 134, Foll. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A. 1=6 Luck, 556=1932 A.L.J. 663=I R. 1932 P.C. 81=136 I.C 385=62 C.L J. 326=36 C W.N. 137=35 L W. 118=8 O W.N. 1378=A.I R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

——**S. 32-A (as amended by Act III of 1910)**—Non compliance with—Effect—Rule of succession. *See* OUDH ESTATES ACT, S. 22. **11 O.W.N. 1608=A.I. R. 1935 Oudh 62.**

OUDH LAWS ACT (1876), S. 5.

——**S. 33**—*Award passed by British Indian Association—Not filed in Court—Enforceability of.*

Where the award passed by the British Indian Association has not been filed in the Financial Commissioner's Court within six months after the passing of the Oudh Estates Act, it is not enforceable as a decree under S 33 of the Act. (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **143 I.C. 692=8 Luck. 168=I.R. 1933 Oudh 194=9 O.W.N. 900=A.I.R. 1932 Oudh 336.**

——**S. 33**—*Award passed by British Indian Association—Section not complied with—Effect.*

Where an award passed by the British Indian Association is not shown to have received the approval of the Financial Commissioner as required by S 33, the award cannot be treated as a decree of a Court of competent jurisdiction. (*Bisheshwar Nath and Kisch, JJ.*) KESHO PRASAD *v* UPPER INDIA BANK, LTD. **141 I.C 474=I R. 1933 Oudh 55=9 O.W N. 1037=A. I. R. 1933 Oudh 76.**

OUDH LAND REVENUE ACT (1876), S. 40—*'Village communities"—Construction—Perpetual lessee with heritable and transferable rights—Right of pre-emption—Oudh Laws Act* (1876), *Ss.* 7 (a) *and* 9 (3).

The expression "village communities" in S. 7 (*a*) of the Oudh Laws Act is wider in its scope than proprietary or under-proprietary communities. Hence a perpetual lessee with heritable and transferable rights is a member of village community within the meaning of S 40 and entitled to a right of pre emption. (Case-law reviewed.) (*Raza and Srivastava, JJ.*) BINDESHWARI PRASAD UPADHYAY *v.* KRISHNA MURARI. **9 Luck. 670=149 I.C. 550=6 R O. 585=11 O.W.N. 430=18 R D. 213—A.I.R. 1934 Oudh 145.**

OUDH LAWS ACT (XVIII OF 1876), S. 3—*Justice, equity and good conscience—Ante-nuptial agreement conveying properties to wife—Restriction against alienation to strangers—Breach of—Title of alience.*

An ante-nuptial agreement provided that the wife to whom certain immovable properties were conveyed "shall not have power to transfer it to a stranger." The wife, however, sold it to strangers who, in a suit by the heirs of the wife, pleaded that the agreement conferred an absolute estate on her and that the partial restriction against alienation was not binding on her.

Held, that under the law prescribed by S. 3 of the Oudh Laws Act, the Courts should act according to justice, equity and good conscience; and that "where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement could hardly support their claim by an appeal to these high-sounding principles." (*Sir George Lowndes.*) MAHOMED RAZA *v.* MT. ABBAS BANDI BIB. **59 I A 236=7 Luck. 257=I. R 1932 P.C. 181=137 I C. 321=36 C.W N 774=34 Bom.L.R. 1048=55 C.L J. 510=9 O.W N. 577=1932 A L J. 709=36 L W. 69=1932 M W.N. 1011=A I R 1932 P C. 158=63 M.L J. 180 (P.C).**

——**S. 5**—*Dower of Mahomedan widow—Mode of fixing.*

No hard and fast rule can be laid down on which to assess the amount of dower which may be claimed by a Mahomedan widow has to be done on the broad lines laid down in the Oudh Laws Act with reference to the circumstances of the case, such as the means of the husband and the status of the wife. (*Bisheshwar Nath and Pullan, JJ.*) ABDUL RAHMAN KHAN *v.* INAYAT BIBI. **I.R. 1931 Oudh 129=130 I.C. 113=7 O.WN. 1181=A.I.R. 1931 Oudh 63.**

OUDH LAWS ACT (1876), S. 7.

——**Ss 7 and 9**—*Village community—Meaning of.*

"The village comunity" has not been defined by the Act. The meaning of those words depends upon the construction of S. 7 (*a*) in the light of the following sections. The village community contemplated by S. 7 (*a*) refers to persons having proprietary or under-proprietary rights in the village. It does not include any one who happens to reside in the village but has no proprietary interest therein. S. 7 (*a*) contemplates a proprietary village community as distinguished from an under proprietary village community (1874 to 1898) Sel. Cases, J. C. (Oudh) P. 96, Appr. (*Sir Lancelot Sanderson.*) BIRENDRA BIKRAM SINGH *v.* BRIJ MOHAN PANDE. **61 I.A. 235=9 Luck. 407=1934 A L.J. 732=151 I C. 74=7 R.P.C. 26=4 A.W.R. 611=60 C.L.J. 143=40 L W. 784=11 O.W.N. 843 =38 C.W N. 989=A.I R. 1934 P.C. 153=67 M.L.J. 149 (P C.).**

——**S. 7 (a)**—*Pre-emption—Right of pre emption is presumed to exist among heritable and non transferable leases.*

The last part of S. 7 (*a*) must be held to mean that the right of pre emption shall be presumed to exist among holders of heritable and non-transferable leases. (*King, C.J. and Zial-ul-Hasan, J.*) JAGADAMBA *v.* MATA PARSAD. **A.I.R. 1935 Oudh 427.**

——**S. 7 (a)**—*Qabzadari land is liable to pre-emption.*

A qabzadar has a right to pre empt qabzadari land; otherwise the last part of S 7 (*a*) would be meaning less. (*King, C.J. and Zia-ul-Hasan, J.*) JAGADAMBA PARSAD *v.* MATA PARSAD. **A.I.R. 1935 Oudh 427.**

——**Ss. 7 (a) and 9 (3)**—*"Village communities"—Meaning of—Perpetual lessee with heritable and transferable rights—Right to pre-emption.*

The expression "village communities" in S. 7 (*a*) of the Oudh Laws Act is wider in its scope that proprietary or under proprietary communities. Hence a perpetual lessee with heritable and transferable rights is a member of village community within the meaning of S. 40 and entitled to a right of pre-emption. (Case-law reviewed.) (*Raza and Srivastava, JJ.*) BINDESHWARI PRASAD UPADHYAY *v.* KRISHNA MURARI. **149 I.C. 550=9 Luck. 670—6 R.O. 585=11 O.W N 430=18 R D. 213=A.I R. 1934 Oudh 145.**

——**S. 9**—Perpetual lease—Lessor conferring full under-proprietary rights without right of re entry—Pre-emption—Right, if arises. *See* DEED—CONSTRUCTION—SALE OR LEASE. **11 O.W.N. 1494=A.I.R. 1935 Oudh 217.**

——**S. 9**—*Separate maps and files for each mohal and each village retaining separate boundaries—Amalgamation of two villages does not constitute village community.*

Where an estate is subdivided into mohals and one of such mohals comprises villages and each village retains its separate boundaries and separate maps, and separate books are prepared for each mohal, an amalgamation of the villages does not constitute one village community. A.I.R. 1928 Oudh 501, Dist. (*Raza and Srivastava, JJ.*) BINDESHWARI PRASAD UPADHYAY *v.* KRISHNA MURARI. **9 Luck. 670=149 I.C. 550=6 R.O 58= 18 R.D. 213=11 O.W.N. 430=A.I.R. 1934 Oudh 145.**

——**S. 9**—*Share of tenure—Interest for life.*

S. 9 shows that in order to entitle a plaintiff to a decree for pre-emption the property sold or foreclosed must be a proprietary or under-proprietary tenure "or a share of such a tenure". If the property foreclosed is only an interest for life it cannot be regarded as a proprietary tenure. 32 I. C. 228, Rel. on. (*Raza and Bisheshwar Nath, JJ.*) SWAMI DAYAL *v.* RAMADHAR. **6 Luck. 715=I.R. 1931 Oudh 401=134 I.C. 865=8 O.W.N. 566=A.I.R 1931 Oudh 358.**

OUDH LAWS ACT (1876), S. 13.

——**S. 9, Cls. (1) and (3)**—*Sub-division split into two—Separate entry and assessment of khewat—Right to pre-empt—Common right with members of village community.*

Where it appeared from a later khewat that a joint khata had been split up into two, one in favour of the vendor, the other in favour of the pre-emptor and the rent had been apportioned between the two and the apportionment had never been questioned by the pre-emptor.

Held, that the parties had ceased to be co-sharers of the subdivision and that the pre-emptor could claim pre emption not under Cl. (1) but under Cl. (3) of S. 9 as members of a village community. (*Hasan, C.J. and Bisheshwar Nath, J.*) MAHOMED HANIF *v.* GOBARDHAN DAS. **8 O W.N. 294=15 R.D. 180=131 I C. 901=12 L R. 114 (Rev.)=14 O.L.J. 339=A.I.R. 1931 Oudh 316.**

——**S. 9 (3)**—*Talukdari mahal of several villages—Sale of—Members of under-proprietary village community—No right to pre-empt.*

Where the whole talukdari mahal containing of several villages has been sold by one deed, the members of the under-proprietary village community of different villages have not, a right of pre-emption under the Oudh Laws Act. Where the portion of the superior tenure is for the sale, no right of pre emption exists to an under-proprietor. A. I. R. 1930 Oudh 428, Reversed. (*Sir Lancelot Sanderson.*) BIRENDRA BIKRAM SINGH *v.* BRIJ MOHAN PANDE. **61 I A. 285=9 Luck. 407= 151 I.C. 74=7 R.P.C. 26=4 A.W R. 611=50 C.L.J. 143=40 L W. 784=1934 A L J. 732=11 O W.N. 843=38 C.W N. 989=A.I.R. 1934 P.C. 153=67 M.L J. 149 (P.C.).**

——**Ss. 10, 11 and 13**—*Property compulsorily acquired by Secretary of State—Auction sale—Claim for pre-emption—Sustainability.*

Where certain property which had been acquired by the Secretary of State under the Land Acquisition Act was sold in Court auction.

Held, that the sale was immune from a claim for pre-emption in view of the provisions of S. 3 of the Crown Grants Act. (*Raza, Bisheshwar Nath and Smith, JJ.*) GUR BAKHSH SINGH *v.* HARNAM SINGH. **8 Luck 322=I.R. 1933 Oudh 111=142 I.C. 566=10 O.W.N. 113=A.I R. 1933 Oudh 134 (F.B.).**

——**S. 13**—*Pre-emption suit—Price fixed in sale deed found to be fictitious—No notice of intended sale—Price payable by pre emptor.*

Even if no notice has been given of the intended sale, the Court should fix the fair market-value, if the price fixed in the sale deed is found to be fictitious or not fixed in good faith. The price to be paid by the pre-emptor is the fair market-value and not the sum actually paid by the purchaser. (*King, C.J. and Nanavutty, J.*) LALLOO SINGH *v.* JAGJIWAN PRASAD. **8 R O 198=159 I C. 609=1935 O.W.N. 1348=A.I. R. 1936 Oudh 100.**

——**S. 13**—*Right to pre empt—Date of suit, not date of sale material.*

The words "entitled to a right of pre-emption as used in S. 13 must be construed as meaning entitled at the date of suit." There is nothing in the language of the section to support the interpretation that a person entitled to a right of pre-emption at the date of sale may bring a suit to enforce such rights even after he has ceased to be so entitled. The plaintiff in a suit for

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pre-emption must show that he possessed the necessary qualifications not only at the date of sale but also at the date of suit. (*Hasan, C.J. Raza and Bisheshwar Nath, JJ.*) MAHOMED IBRAHIM *v.* ZAHUR AHMAD. **7 Luck 51=I.R. 1931 Oudh 265=132 I.C. 265=14 O.L.J. 529=8 O.W.N. 688=A.I.R. 1931 Oudh 281 (F.B.).**

——**S. 13**—*Rights of pre-emptor and vendee to purchase money—Mode of determination—Dates of sale and suit material.*

The question referred to the Full Bench was as follows: "Should the respective claim of the pre-emptor and the vendee as regards the preferential right to purchase money be determined with reference to the position of their co-sharership at the date of sale or with reference to the position as it exists at the date of suit."

Held, that the claims of the pre-emptor must be determined with reference to the position of his co-sharership not only at the date of sale but also at the date of suit and that the position claimed by the vendee must be determined only with reference to his position as a co sharer at the date of sale. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) MAHOMED IBRAHIM *v.* ZAHUR AHMAD. **7 Luck. 51=I.R. 1931 Oudh 265=132 I.C. 265=14 O L.J. 529=8 O.W.N. 688=A.I.R. 1931 Oudh 281 (F.B.).**

——**S. 15**—*'Decree'—Meaning.*

The word "decree" as used in S. 15 must be read as meaning the final decree passed in the case. It would be contrary to sound principle to compel the plaintiff to pay the amount decreed by the trial Court and to subject him to the penalty of losing his right of pre-emption if he fails to do so when he has a right to question the correctness of the amount made payable by the trial Court by means of an appeal against it.

Semble : If a plaintiff in that position is unsuccessful in his appeal and the appellate Court refuses to extend the time for payment the position would be different. (*Raza and Bisheshwar, JJ.*) BANKEY BEHARI LAL *v.* ABDUL RAHMAN. **7 Luck. 350=135 I.C. 695=8 O.W.N. 1267=I.R. 1932 Oudh 55=A.I.R. 1932 Oudh 63.**

——**S. 19**—*Applicability—Evidence of witness given in Urdu but recorded in English—Need for explaining same to witness.*

S. 19 applies to a prosecution regarding a proceeding before the Chief Court and under that section it is necessary to interpret the evidence recorded in English to a witness who gives his evidence in another language such as Urdu and does not understand English, if the witness requests that his deposition be interpreted to him. (*Kisch, J.*) HAZARI *v.* EMPEROR. **I.R. 1931 Oudh 270=132 I.C. 270=32 Cr.L.J. 851(2)=8 O.W.N. 685=1931 Cr.C. 817=A.I.R. 1931 Oudh 385.**

OUDH RENT ACT (XXII OF 1886)—*Policy of the Act.*

The policy of the Rent Act is to keep the relationship of landlord and tenant subsisting in spite of either or both of them and it can be terminated only in the manner provided by the Act. (*Hasan, C.J. and Kisch, J.*) AMAR NATH SINGH *v.* HAR PRASAD SINGH. **7 Luck 425=I.R. 1932 Oudh 125=136 I.C. 333=13 L.R. 20 (Rev.)=8 O.W.N. 1359=15 R.D. 785=A.I.R. 1932 Oudh 79.**

——**S. 3**—Sir *land*—Shikmi *tenant—Ejectment—Plantation of trees whether continues valid defence.*

Certain plots have been recorded as *sir* with another as *shikmi* tenant. The *sir* entry dated from the former settlement and was repeated in the recent settlement.

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Held, that the *shikmi* tenant could not resist ejectment on the ground of having established a guava plantation.

Semble :—If the tenant had proved that the trees had been planted by his ancestors or that he had received the Zemindar's permission to establish a guava plantation the case would be different. (*Smith, J.M. and Oakden, S.M.*) KUSHHER SINGH *v.* MADRA. **15 R.D. 19.**

——**Ss. 3 and 107 H**—*Creation under proprietary rights by under-proprietor apart from S. 107-H—Permissibility.*

The acquisition of under proprietary rights under S. 107-H is the result of a special provision in a statute and apart from that special provision, the law in Oudh contemplates only two proprietary rights in respect of landed property. Because the legislature has thought fit to confer the status of under proprietor on a certain class of persons holding subordinate to an under-proprietor, it does not follow that an under-proprietor can create the same right by means of a contract without wiping out his own under-proprietary rights. Hence where an under-proprietor carves out another interest out of his own but reserves to himself the rent and malikana dues, the transferee is not an under-proprietor. (*Raza and Srivastava, JJ.*) BINDESHWARI PRASAD UPADHYAY *v.* KRISHNA MURARI. **149 I.C. 550=6 R.O. 585=11 O.W.N. 430=18 R.D. 213=A.I.R. 1934 Oudh 145.**

——**S. 3 (5)**—*"Rent"—Weighment dues.*

A sum payable for weighment dues does not come under the definition of rent and a suit for its recovery is cognizable by the Civil Court. 1 O.C. 103, Foll. (*Srivastava, J.*) BASHIR AHMAD *v.* LAL NAR SINGH PARTAB BAHADUR SINGH. **159 I.C. 126=8 R.O. 163=1935 R.D. 544=1935 O.W.N. 1223=A.I.R. 1936 Oudh 74.**

——**Ss. 3 (10) and 19-A**—*Applicability—Zemindari property—Lessee of—Right to remission of rent.*

It is clear from S. 19-A of the Oudh Rent Act, read with S. 3 (10) that the provisions of the Act relating to remission of rent are not intended to apply to the case of lessees of zemindari property. A lessee of such property is not therefore entitled to any remission of lease money consequent upon the reduction in rent by Government. His liability has to be determined with reference to the terms of the contract between him and his zemindar. S. 56 of the Contract Act cannot be invoked by the lessee in such a case. (*King, C.J. and Zia-ul Husan, J.*) ANGNOO *v.* MOHAN LAL. **10 Luck. 357=156 I.C. 44=7 R.O. 648=1935 O.W.N. 824=1935 R.D. 391=A.I.R. 1935 Oudh 433.**

——**S. 3 (10) and Ch. 7 A**—*Person holding at favourable rate of rent—Transfer—Validity.*

A person holding at a favourable rate of rent within the meaning of Ch. 7-A must technically be regarded as a tenant under the definition given in S. 3, Cl. 10 yet for all practical purposes he is bracketed with a person holding rent free, and they stand in a class by themselves, and are governed by the provisions of Ch. 7-A. If such a person must be described as a tenant, he is not a statutory tenant and can only be regarded as a tenant of a special nature. Whether they have power of transfer or not will depend upon the incident of the grant in each case ; but there is no general provision on the subject in the Rent Act which may be applicable to this class of persons. The mere absence of any provision authorizing them to make a transfer would not justify the inference of a rule forbidding the transfer of their rights. The transferee will, of course, possess no better rights than the transferor, and if the landlord has a

OUDH RENT ACT (1886), S. 3 (10).

right to question the transfer he is at liberty to do so. But in the absence of any provision showing the rights to be untransferable, the transfers are not unlawful and therefore void *ab initio*. Such transfer could at best be voidable at the option of the landlord but could not be questioned by the transferor or his representative. (*Raza, Srivastava and Smith, JJ.*) HAKIM HUSAIN *v.* MUSHTAQ HUSAIN. **6 I.R. (Oudh) 136=146 I.C. 482=10 O.W.N. 1330=18 R.D. 15=15 L.R. 42 (Rev.)=A.I.R. 1933 Oudh 542 (F.B.).**

——**S. 3 (10)**—*Status of thekadar—Suit for profits by co-sharer—Forum.*

The status of a thekadar being merely that of a tenant it is open to the co-sharer who has given a theka of his share to sue for profits in a Revenue Court under S. 108, Cl. (15) of the Act. (*Kisch, J.*) RAMESHWAR *v.* ACHHAIBAR SINGH. **8 O.W.N. 1050=135 I.C. 381 =I.R. 1932 Oudh 29=15 R.D. 676=12 L.R. 373 (Rev.)=A.I.R. 1931 Oudh 403 (1).**

——**S. 3 (10)**—*Thekadar—Status of.*

The thekadar of the Oudh Rent Act is a lessee of proprietary rights and his name is or should be recorded in Oudh in the *khewat*, that is the proprietary *khewat* the register maintained under S. 32 (*a*), Land Revenue Act. (*Drake Brockman, S. M. and Knox, J. M.*) MAHOMED ASGHAR ALI *v.* NAWAB ALI. **1935 R.D. 364=1935 O.W.N. 733.**

——**S. 3 (10)**—*Thekadar—Transferee of under proprietary rights from Collector—U.P Land Revenue Act, S. 152.*

A person to whom a share in under-proprietary right is transferred by the Collector under S. 152, U. P. Land Revenue Act. is not a thekadar within the meaning of S. 3 (10) of the Oudh Rent Act, and cannot be treated as a tenant after the expiry of the period of transfer. (*Oppenheim, S. M. and Drake Brockman, J. M.*) BABOO LAL *v.* MANNU SINGH. **11 O.W.N. 1559= 18 R.D. 673=16 L.R. 127 (Rev.).**

——**S. 3 (17)**—*Ex-proprietary rights in sir land—Suit for declaration.*

It is only in the case of lands falling under Cls. (*b*), (*c*) and (*d*) that the element of cultivation comes in. So far as Cl. (*a*) is concerned, it is not necessary for a case to be brought under it that the land should have been in the actual cultivation of the proprietor. The question regarding ex proprietary rights in a grove plot falls under Cl. (*a*) of S. 3 (17). (*Bisheshwar Nath and Pullan, JJ.*) ANGNEV *v.* ABID HUSAIN. **I.R. 1931 Oudh 131=130 I.C. 115=12 L.R. 6 (Rev.)=14 R.D. 706=7 O.W.N. 1162=A.I.R. 1931 Oudh 62.**

——**S. 3 (17) (c)**—*Land recorded as khudkasht—Only small portion cultivated and the rest fallow—Land not demarcated—Liability of tenant to ejectment.*

Certain land had been entered as the khudkasht of 1328 and 1329 F. But in 1328 F. of the whole land in suit 3 biswas were under rice and 16 biswas were fallow and so except a small area, the land was not actually under the cultivation of the landlord. In a suit for ejectment,

Held, that the tenant was a statutory tenant over the land though he may be a *shikmi* in respect of 3 biswas and as the land was not demarcated, he could not be ejected from the small area of 'sir' land. (*Walton, J.M.*) KAMAKHYA DAT RAM *v.* HUB LAL KURMI. **14 L.R. 66 (Rev.)=17 R.D. 88.**

——**S. 3 (18)**—*Construction and scope — Heir of statutory tenant—When becomes statutory tenant.*

The law does not mean that any heir of a statutory tenant can become a statutory tenant if only he can by any dubious means manage to retain possession for eight years in spite of legal efforts to dislodge him. Tenancy involves some sort of admission or acquiescence by the landlord ; and if the landlord has, before eight years are completed, taken active legal steps to exercise his right to eject the tenant, the latter is liable to ejectment. The fact that the period of eight years has expired before the ejectment process ends does not make any difference. (*Oppenheim, S.M. and Drake Brockman, J.M.*) UMA NATH BUX SINGH *v.* JAGANNATH PRASAD. **11 O. W.N. 1492=18 R.D. 675.**

OUDH RENT ACT (1886), S. 4 (3).

——**S. 3 (18)**—*Contract of tenancy—Receipt of rent under mistake—Effect.*

The mere acceptance of rent by a landholder is not necessarily proof of the admission of the occupant to statutory tenancy ; the circumstances under which the rent was accepted must be taken into account : where a person is allowed to remain in possession under the mistaken idea that he is the heir of the deceased the acceptance of rent by the landholder does not create a contract of tenancy. (*Oppenheim, S. M. and Walton, J.M.*) KANIR ABID TALUQDARIA *v.* MAHABIR. **16 R.D. 416.**

——**S. 3 (18)**—*Statutory tenancy—Admission of wrong person as heir—Acceptance of position by both parties—Claim to statutory tenancy—Estoppel.*

On the death of statutory tenant the landlord accepted his brothers as his heirs instead of his widow who was existing. Both the landlord and the brothers accepted the position as correct, namely, that they were heirs.

Held, that the brothers could not be allowed to resile from that position and to claim that they were statutory tenants. (*Oppenhim, S. M. and Drake Brockman, J. M.*) MATA BADAL *v.* BHAGWATI DIN. **18 R.D. 715 =16 L.R. 111 (Rev.).**

——**S. 4**—*Illegal enhancement of rent— Liability of tenant—Extent of.*

Where a kabuliyat is executed agreeing to pay an enhanced rent but the enhancement is illegal and the landlord sues for arrears at the enhanced rate, the tenant is not bound to pay at the illegal enhanced rate but must pay according to the legal enhancement of rent. (Cases ref.) (*Nanavutty, J.*) GAYA DIN *v.* MOIN-UDDIN. **150 I.C. 843=7 R.O. 61=11 O.W.N. 812=18 R.D. 394=A.I.R. 1934 Oudh 288.**

——**S. 4 (1)**—*Effect.*

Ss. 4 (1) and 52 clearly indicate that an effectual ejectment of a tenant can only take place when the procedure with reference thereto as prescribed by the Act has been adopted and this will be so in spite of any agreement between the landlord and the tenant to the contrary. (*Hasan, C.J. and Kisch, J.*) AMAR NATH SINGH *v.* HAR PRASAD SINGH. **7 Luck. 425=I.R. 1932 Oudh 125=136 I.C. 333=13 L.R. 20 (Rev.)=8 O.W.N. 1359=15 R.D. 785=A.I.R. 1932 Oudh 79.**

——**S. 4 (1)**—*Scope.*

S. 4 (1) does not limit the rights of the landlord as regards a contract. It only prevents the tenant from contracting himself out of the benefits conferred on him by the Act. (*Smith, J. M.*) LAL JOGENDRA BUX SINGH *v.* BIJOY BAHADUR SINGH. **14 R.D. 559=7 O.W.N. 969.**

——**S. 4 (3)**—*Applicability—Admission by parties—Effect of—If can be withdrawn in second appeal.*

The application of S. 4 (3) of the Oudh Rent Act to a particular case depends upon (1) the fact of the land not having been previously cultivated and (2) on the fact of the land having been let out either after being reclaimed by the landlord at his expense or for the purpose of being reclaimed by the tenant. When the defendant admits that the land in suit is governed be

OUDH RENT ACT (1886), S. 4 (3).

S. 4 (3), the admission is not one on a question of law, but one of mixed law and fact, binding on him, and cannot be withdrawn in second appeal. (*Srivastava, Ag. C. J.*) HARIHAR DUTT *v.* KAPURTHALA ESTATE. **153 I.C. 850=7 R.O. 407=18 R.D. 669=11 O.W.N. 1428=A.I.R. 1935 Oudh 163.**

——S 4 (3)—*Lease of* nautor *land—Privileges of tenant—Contract to the contrary.*

Under S. 4 (3) of the Oudh Rent Act, the parties to a lease of *nautor* land can contract themselves out of the provisions of the Act for a period of 14 years. But the rights given to statutory tenants, under S. 37 of the Act, do not apply to tenants of *nautor* land. The effect of S. 4 (3) is that the rights given to tenants by S. 37, may be modified or nullified by private agreement between the parties during the first 14 years. But in the absence of such a contract, tenants of *nautor* land have the same rights and privileges conferred by the Act as in the case of land of old cultivation. (*King, C.J. and Thomas, J.*) NARAIN SINGH *v.* JAGAT JIT SINGH. **10 Luck. 490=153 I C. 609=7 R O. 365=11 O.W. N. 1565=1935 R.D. 41=A.I R. 1935 Oudh 90.**

——S. 5—*Mortgage of occupancy right—Validity of.*

A mortgage of occupancy right not arising under S. 5 is not void *ab initio*. A.I.R. 1928 Oudh 500; A. I. R. 1931 Oudh 352 and 14 O. C. 144, Rel. on. (*Rachhpal Singh, J.*) TIKAM SINGH *v.* BHAGWAN DIN. **150 I. C. 840=7 R.O. 62=18 R D. 432=11 O.W.N. 1032=A.I.R. 1934 Oudh 264.**

——S. 5—*Occupancy rights—Acquisition by tenants—Transfer—Validity—Comparison with acquisition of such rights under compromise decree.*

There is a clear distinction between occupancy rights arising under S. 5 of the Oudh Rent Act and occupancy rights arising under a decree of Court based on a compromise with the taluqdar which has been uniformly recognised in Oudh. In the former case there is a statutory prohibition against transfer based on considerations of policy. Any transfer in contravention of the statute would be absolutely void inasmuch as the consideration or object of such transfer being forbidden by law it would be unlawful within the meaning of S. 23 of the Contract Act. In the latter case the conditions which are frequently to be found in decrees passed by Settlement Courts have generally been construed as conditions imposed for the benefit of the superior proprietor. If a transfer is made contrary to those conditions the transfer is not void but only voidable at the instance of the superior proprietor. (*Bisheshwar Nath and Kisch, JJ.*) GAYA PRASAD *v.* BENI MADHO. **7 Luck. 11=I.R. 1931 Oudh 376=134 I.C. 472=8 O.W.N. 785=15 R.D. 412=A.I.R. 1931 Oudh 352.**

——S. 5—*Proprietor—Whether includes bhaiyachara holder—Person holding under—Acquisition of occupancy rights.*

A proprietor holding under a bhaiyachara tenure is a proprietor within the meaning of S. 5 and a person holding under him can acquire occupancy rights provided the conditions necessary are fulfilled. (*Oppenheim, S. M. and Knox, J.M.*) TAJAMMUL HUSAIN *v.* RAO RAGHO INDRA PRATAP SAHI. **16 R.D. 212=13 L.R. 137 (Rev.).**

——S. 5—*Relinquishment of occupancy rights under the guise of a lease—Validity of.*

A transaction by which the occupancy tenant purported to grant a lease in favour of another for a nominal rent of one rupee per annum reserving no right of reentry is in reality an out and out sale and is void, being opposed to the provisions of S. 5. Against the statutory prohibition, no estoppel can arise. (*Nanavutty, J.*)

OUDH RENT ACT (1886), S. 7-A (3).

PARAM SUKH *v.* SHEO MURAT. **147 I.C. 430=6 R.O. 269=10 O.W.N. 660=17 R D. 686=14 L.R. 539 (Rev.)=A.I R. 1933 Oudh 363.**

——S. 5—*Tenants—Descendants of* muqaddams—*Occupancy rights conferred.*

Where land is held by the descendants of *muqaddams* and they are given occupancy rights by a settlement decree they are not tenants under S. 5 but the rent is liable to enhancement. (*Oppenheim, J. M.*) JAGAN NATH *v.* RAM CHARAN LAL. **15 R.D. 722=12 L.R. 398 (Rev.).**

——Ss. 5 and 6—*Transferee of occupancy tenant—Status of—Landlord recognising him as tenant—If estopped from challenging his status as occupancy tenant.*

Occupancy right in Oudh, where it is not acquired under S. 5 of the Oudh Rent Act, can only be acquired under S. 6 by grant from the landlord by registered document. A transferee of an occupancy tenant on whom there has been no conferment of this right by the landlord who has treated him as a tenant, is nothing but a statutory tenant of the land. The landlord who has been treating him as a tenant is, therefore, not barred either by estoppel or limitation from challenging his status as an occupancy tenant. (*Oppenheim, S.M. and Drake Brockman, J.M.*) JAI NARAIN MISRA *v.* BANSIDHAR. **1935 O.W.N. 1257=1935 R.D. 558.**

——S. 6—*Scope—Conferring occupancy rights.*

S. 6 allows the conferring of occupancy rights. Where the landlord sues for enhancement under S. 33 alleging that the tenants were occupancy tenants a summary finding of the Commissioner declaring their status is of no effect. (*Keane, S.M. and Oppenheim, J.M.*) RAM PHAL *v.* LAL SRI SARAN. **15 R.D. 693.**

——S 7-A—*Accrual of ex-proprietary rights in* sir *land*—Sir *land subject to a charge for plaintiff's maintenance allowance—Liability to pay such allowance.*

Where by operation of law, a person becomes an ex-proprietary tenant of his once *sir* lands which are subject to a charge for payment of a maintenance allowance in favour of the plaintiff, his liability to pay the maintenance allowance ceases with the extinction of his title as proprietor. Whatever profits are realised by the new ex-proprietary tenant from his sub-tenants cannot be touched by the plaintiff as there is no privity of contract between them. The plaintiff can only look to the new proprietor for the payment of his maintenance allowance and the new proprietor is only liable to pay out of the ex-proprietary rent which he realises from the new ex-proprietary tenant. The plaintiff is not entitled to a personal decree against him but can in execution of the decree which he might obtain for the amount due to him, attach and sell the lands for the realisation of the amount. (*Nanavutty, J.*) AKBAR HUSSAIN *v.* HUSAIN JAHAN BEGAM. **155 I.C. 40=7 R.O. 540=1935 R.D. 214=1935 O.W.N. 437=A.I.R. 1935 Oudh 309.**

——S. 7-A—"*Voluntary alienation*"—*Partition by Civil Court.*

A partition by an order of the Civil Court is not a voluntary alienation under S. 7-A of the Oudh Rent Act. Therefore the parties to a partition suit cannot be said to be making voluntary alienations and as such would not become ex-proprietary tenants in the *sir* lands allotted to one another. (*Oppenheim, S. M. and Drake Brockman, J. M.*) SHEO PALTAN MISIR *v.* SARJU MISIR. **11 O.W.N. 1467=18 R.D. 672.**

——S. 7 A (3)—*Mortgage of ex-proprietary holding—Illegality—Right of mortgagee to obtain refund of mortgage money.*

OUDH RENT ACT (1886), S. 8.

The mortgage of an ex-proprietary holding is void and *ab initio* because it is in contravention of S. 7-A, sub S. (3) of the Oudh Rent Act. Such a transaction is unlawful within the meaning of S. 23 of the Contract Act and by virtue of S. 24 of the same Act the consideration for the mortgage is also unlawful. Consequently the mortgagee cannot claim relief for the recovery of the mortgage money. 3 O.W.N. 217, Rel. on.

Per *Curiam.*—Had the sum of money which the mortgagee advanced as consideration of the mortgage transaction represented an independent transaction of loan between the parties, it might have been possible to give some relief to the plaintiff for the recovery of that sum of money. (*Hasan, C.J. and Kisch, J.*) MAHOMED MUZZAFAR HUSAIN *v.* MADAD ALI. **6 Luck 689=I.R. 1931 Oudh 303=132 I.C 543=14 O.L.J. 464=8 O.W.N. 718=15 R.D. 351=A.I.R. 1931 Oudh 309.**

———**Ss. 8 and 9**—*Under-proprietor*—Naukar holder *calling himself under proprietor—If becomes such.*

Regarding oneself as having a certain right, namely under-proprietary right, cannot create that right or be sufficient to show a *prima facie* case of under-proprietary right. A person who is only a *naukar-holder* with no rent to pay on certain land, though he may be called himself an under proprietor, cannot be held to be an under-proprietor. (*MacNair, J. M.*) UDAI NARAIN *v.* BIHARI LAL. **1935 R.D. 493.**

———**S. 18**—*Area of holding diminished by fluvial action—Abatement of rent—Suit for—Date of cause of action.*

The cause of action for a suit for abatement of rent under S. 18 of the Oudh Rent Act on the ground that the area of the holding has diminished by the fluvial action of the river arises every year and not only when the erosion started. (*Oppenheim, S. M.*) HUNTER *v.* RAMPAL. **11 O.W.N. 443=18 R.D. 208.**

———**S. 19**—*Fall in prices — Remission of rent—Right of tenant.*

When rent is fixed by order of Court in a suit for enhancement on the basis of rates evolved on rentals obtaining before an economic slump intervened, the tenant is entitled to claim a temporary remissions of not on the ground of a fall in prices. (*Oppenheim, S. M. and Drake Brockman, J. M.*) UMA NATH BUX SINGH *v.* CHANDRA PAL SINGH. **11 O.W.N. 1562=18 R. D. 646=16 L.R. 66 (Rev.).**

———**S. 19-A**—*Thekadar—Right to remission of rent.*

The provision relating to remission of rents contained in S. 19-A does not apply to thekadars. Where by his kabuliat, a thekadar binds himself to pay the arrears of rent "without raising any objection as to earthly or heavenly calamities" he is not entitled to any remission of rent. (*Srivastava and Zia ul-Hasan, JJ.*) ZAMIN ALI KHAN *v.* SANKATA PRASAD. **158 I.C. 714=6 R.O. 115=1935 R.D. 487=1935 O.W.N. 1128=A.I. R. 1936 Oudh 83.**

———**S. 19 A**—*Thekadar—Right to remission of rent—Kabuliyat—Construction.*

A thekadar cannot obtain remission of rent under S. 19-A of the Oudh Rent Act and his rights and liabilities must be determined by the terms of the Kabuliyat. Where the Kabuliyat provides that he would be liable to pay rent irrespective of any calamity which might occur "whether on earth or from heaven" he is bound to pay irrespective of anything which might happen in the shape of failure of the crops for one reason or another. (*Srivastava, J.*) ANGNO *v.* MOHAN LAL. **6 R.O. 505=148 I.C. 1207=18 R.D. 301=11 O.W. N. 763=A.I.R. 1934 Oudh 239.**

OUDH RENT ACT (1886), S. 33.

———**S. 20**—*Claimant to tenancy—Occupation of holding with permission of landlord—Liability for compensation.*

The proper criterion for the assessment of compensation is the amount of rent which the landlord would have realised from the land, where the claimant preferred an appeal to the Board as regards his right to succeed to the tenancy and at the same time offered to the landlord to vacate the land but the landlord asked him to continue in possession.

Held, that the claimant was liable to pay compensation for the year preceding but not for the year succeeding the offer by him to vacate the land. (*Oppenheim, S. M. and Drake Brockman, J. M.*) LAL JAGDISH BAHADUR SINGH *v.* AJODHIA PRASAD. **11 O.W.N. 349=18 R.D. 156.**

———**S. 20**—*Scope—Oral relinquishment of land.*

S. 20 does not prohibit an oral relinquishment of land by the tenant; it deals only with the question of the method in which a tenant avoids liability to pay rent. (*Oppenheim, J. M.*) BHAGWATI PRASAD *v.* SUMJHAWAN. **13 L.R. 1 (Rev.)=16 R.D. 83.**

———**S. 23**—*Section excluded by S. 29 (2) (b) of the Limitation Act.*

S. 29 (2) (*b*) of the Limitation Act as amended in 1922 clearly excludes the application of S. 23 of the Rent Act. (*Oakden, S.M. and Smith, J. M.*) GOURI SHANKER *v.* BHAGWAN DIN. **15 R.D. 6.**

———**Ss. 31 and 32**—*Rent—Estimate—Omission of zamindar to have his share appraised—Effect.*

If the rent of a holding is taken by an estimate or appraisement of the standing crop it is the duty of the zamindar to proceed to have his share of the crop estimated while the crop was standing and if he fails to do so he cannot subsequently bring a suit for arrears of rent which could not be estimated at the time of the suit, the crop being no longer in existence. (*Nanavutty, J.*) KASIM KHAN *v.* MAHBUB KHAN. **I.R. 1931 Oudh 283=132 I C. 347=12 L.R. 159 (Rev.)=8 O. W.N. 681=15 R.D. 313=A.I.R. 1931 Oudh 271.**

———**S. 31**—*Scope—Nature of rent payable—Jurisdiction of Court to settle dispute.*

The wording of S. 31 indicates that it was the intention of the law to allow Courts to settle disputes between the landlord and tenants as to whether the rent of the tenants was *batai* or *kankut*. (*Oppenheim, S.M.*) RAMCHARAN *v.* MUNNU. **16 R.D. 217=13 L.R. 118 (Rev.).**

———**S. 32 B**—*Suit for arrears of rent—Preliminary request for fixing rent—Appeal—Forum.*

Where the suit is for arrears of rent with a preliminary request that the rate of rent should be determined the relief regarding determination of rent is merely ancillary to the getting of a decree for arrears. In such a case an appeal in the main suit would lie to the District Judge and a party cannot appeal to the Commissioner on the subordinate claim. (*Oakden, S. M.*) MAHOMED MEHDI *v.* BACCHA SINGH. **15 R.D. 79=12 L.R. 22 (Rev.).**

———**S. 33**—*Heirs of* muqaddams—*Occupancy rights conferred—Enhancement of rent.*

Where land is held by the defendants of *muqaddams* and they are given occupancy rights by a settlement decree, they are not tenants under S. 5 but the rent is liable to enhancement. (*Oppenheim, J. M.*) JAGAN FATH *v.* RAM CHARAN LAL. **15 R.D. 722=12 L.R. 398 (Rev).**

———**S. 33**—*Object.*

S 33, Oudh Rent Act, and S. 49, Agra Tenancy Act, 1926, are based on the general axiom that the lien of

OUDH RENT ACT (1886), S. 33.

Government upon the produce of land in order to pay the revenue cannot be affected by private contract to which Government is not a party. Freedom of contract is restricted by these provisions which are designed to prevent land being tied down at a fixed rent for ever. (*Oppenheim, J. M.*) JAR BANDHAN SINGH *v.* RAI BAJRANG BAHADUR SINGH **15 R.D. 764=13 L.R. 132 (Rev.).**

——**S. 33**—*Summary proceeding—Declaration of status of tenants—Effect.*

S. 6 allows the conferring of occupancy rights. Where the landlord sues for enhancement under S. 33 alleging that the tenants were occupancy tenants, a summary finding of the Commissioner declaring their status is of no effect. (*Keane, S.M. and Oppenheim, J. M.*) RAM PHAL *v.* LAL SRI SARAN. **15 R.D. 693.**

——**S. 33 (1)**—*Agreement precluding enhancement of rent—Unregistered lease—Agreement contained in—Admissibility.*

An agreement contained in a lease which ought to have been, but which is not, registered, is inadmissible in evidence and does not preclude the enhancement of rent under S. 33 (1) of the Oudh Rent Act. Nor is the doctrine of part performance as contained in S. 56-A, T. P. Act, apply to the case especially when there is no express provision in it restraining enhancement though it may be that no enhancement was claimed up to the date of the suit. (*Drake Brockman, J.M.*) DALCHAND *v.* BABBOO SINGH. **18 R.D. 572.**

——**S. 33 (2)**—*Contract against enhancement—Liability to enhancement under S. 87, U. P. Land Revenue Act.*

Tenants are liable to enhancement under S. 87, Land Revenue Act, on the general principle that all contracts regarding revenue paying lands are liable to adjustment at the settlement. It is difficult to see S. 87 was enacted if not to catch people whose rent cannot be enhanced under S. 33(2) of the Rent Act by reason of the contract made against enhancement. (*Walton, J M.*) MAHOMED ALI KHAN *v.* IRSHAD HUSAIN TALUQDAR. **13 L.R. 191 (Rev.)=16 R.D. 446.**

——**S. 33 (2)**—*Occupancy tenants falling under—Enhancement of rent.*

In the case of occupancy tenants falling under S. 33 (2) the rent can be enhanced under S. 35. (*Oppenheim, S. M. and Walton, J.M.*) JARBANDHAN SINGH *v.* BAJRANG BAHADUR SINGH. **16 R.D. 235.**

——**S. 35**—*Applicability—Tenants falling under S. 33 (2).*

In the case of tenants falling under S. 33 (2) there can be an enhancement under S. 35. (*Oppenheim, J.M.*) JAR BANDHAN SINGH *v.* RAI BAIJRANG BAHADUR SINGH. **15 R.D. 764=13 L.R. 132 (Rev.).**

——**S. 35**—*Object—Agreement fixing perpetual rent—Validity.*

S. 35 is based on the general axiom of law that the lien of Government upon the produce of land in order to pay revenue cannot be affected by private contract to which the Government is not a party. A contract which is designed to tie down land at a fixed rent would be void under S. 23, Contract Act. (*Oppenhim, S.M. and Walton, J.M.*) JARBANDHAN SINGH *v.* BAJRANG BAHADUR SINGH. **16 R.D. 235.**

——**S. 35**—*Occupancy tenants under S. 33 (2)—Enhancement of rent.*

In the case of occupancy tenants falling under S. 33 (2) the rent can be enhanced under S. 35. (*Oppenheim, S.M. and Walton, J.M.*) JARBANDHAN SINGH *v.* BAJRANG BAHADUR SINGH. **16 R.D. 235.**

OUDH RENT ACT (1886), S. 36.

——**S. 35**—*Rents calculated on the basis of revenue—Enhancement of.*

With the severe reduction in the percentage of assets taken as land revenue all rents calculated on the basis of the revenue are not capable of material enhancement, if they are capable of enhancement at all. (*Drake Brockman, S.M.*) KEDAR NATH *v.* SHYAMA CHARAN. **14 L.R. 698 (Rev.)**

——**(as amended), Ss. 36 and 37**—*Admission to tenancy—Proof.*

On the death of a statutory tenant the landlord thinking that the widow of the son of the deceased was entitled to succeed treated her as the heir of a statutory tenant. Subsequently he ascertained the correct legal position and thereafter did not treat her as heir.

Held, that there had been no contract of tenancy under which the widow could be considered to be a statutory tenant. (*Oppenheim, J.M.*) MT. RANI KUMAR *v.* SRI THAKURJI. **12 L.R. 378 (Rev.)=16 R.D. 7.**

——**(as amended) Ss. 36 and 37**—*Heir of occupancy tenant—Landlord permitting occupation—Effect.*

Either the tenant's statutory period comes to an end after the Amendment Act and the heir becomes a statutory tenant or if the tenancy is put an end to earlier the heir becomes a statutory tenant by reason of the landlord permitting him to occupy the land on payment of rent. (*Oppenheim, S.M. and Knox, J.M.*) AZIMULLAH *v.* DHARAM RAJ SAHU. **16 R.D. 193=13 L.R. 100 (Rev.).**

——**Ss. 36, 62-A (1) (e), Proviso 1, and 108 (4)**—*Oudh Rent (Amending Act), 1921—Pahikasht tenant cultivating before 1921 Act—Ejectment, suit for—Computation of period—Rule.*

A Pahikasht tenant, who is not proved to have held for 10 years before the commencement of Act, 1921, may be deemed to have had his statutory period ended by 1329 Fasli and could be ejected in a suit brought in 1339 Fasli. (*Oppenheim, S. M. and Walton, J.M.*) GUDDI SINGH *v.* CHHANGUR LOHAR. **14 L.R. 341 (Rev.)=17 R.D. 465.**

——**(as amended), Ss. 36 and 37**—*'Sub-tenant'—Person holding from 'muafidar'.*

The word 'sub-tenant' means a man holding from a tenant. A *muafidar* is not tenant and a man holding from him is not a sub-tenant. (*Keane, S.M. and Oppenheim, J.M.*) BHIKHARI *v.* RAM BHARDSAY. **15 R.D. 804=12 L.R. 379 (Rev.)**

——**S. 36**—*Tenants holding under special agreement—Suit for enhancement of rent.*

The tenants had held the suit land for nearly a century. In the *wajib-ul-arz* of 1863 it was noted that the land was liable to rent if the landlord wished that rent should be paid. It was also noted that the amount of rent payable in the future was liable to be limited to a payment equal to tho revenue plus 20 per cent. It appeared that since 1880 the tenants had been paying a certain amount as rent.

Held, that the tenants should be classified for purposes other than ejectment as statutory tenants and that rent in respect of the holding could be enhanced within the limits of the agreement as contained in the *wajib-ul arz*. (*Keane, S.M. and Oppenheim, J.M.*) PIRBHU DAYAL *v.* JAI INDER BAHADUR SINGH. **16 R.D. 157.**

——**S. 36**—*Under-proprietary share being small—Acquisition of statutory rights under Amending Act.*

Where a person held under-proprietary rights when the Amending Act took effect, he cannot acquire statutory rights even though his under-proprietary share may be small. (*Keane, S.M.*) SHEO SHANKAR *v.* BAISHNATH SARAN SINGH. **15 R.D. 636=12 L.R 269 (Rev.).**

OUDH RENT ACT (1886), S. 36.

——**S. 36**—*Words "admitted to the occupation of the holding"—Meaning.*

The words "admitted to the occupation of the holding" in S. 30 clearly imply a voluntary act on the part of the landlord where the landlord allowed the tenant to take possession of the holding and to retain possession of it under the impression that he was entitled in law to be maintained in possession for a certain period,

Held, that there was no voluntary act on the part of the landlord. (*Srivastava, J.*) MAHABIR *v.* JAGANNATH BAKHSH SINGH. **9 Luck. 282=6 R.O. 255=147 I.C. 349=17 R.D. 1128=10 O.W.N. 1259=14 L.R. 898 (Rev.)=A.I.R. 1934 Oudh 14.**

——**S. 37**—Applicability—Lease of *nautor* land—Privileges of tenant—Contract to the contrary. *See* OUDH RENT ACT, S. 4 (3) *supra*. **153 I.C. 609=11 O.W.N. 1565=A.I.R. 1935 Oudh 90.**

——**Ss. 37 and 38**—*Effect.*

The law prescribes that a change in rent will constitute a new admission but makes an exception in favour of enhancement carried out according to the terms of S. 38. It is not for the Court to change the terms of the exception. (*Knox, J.M.*) OUDH CHARITRA PRATAB NARAIN SINGH *v.* ABLAKH. **16 R.D. 170=13 L.R. 56 (Rev.).**

——**S. 37**—*Object—Addition to holding—Question of fact—New contract relating to separate holding.*

The main part of S. 37 deals with additions to areas of holdings and changes in rent. That provision was designed to protect tenants whose statutory holdings were changed by the landlord. The question whether any particular transaction is a transaction adding land to an old holding and increasing the rent or a separate transaction constituting a new holding is in every case a question of fact. As a general rule where there is an addition to a holding or a change in the rent there would be a fresh contract of tenancy but there would be no justification for taking the view that a landlord and tenant are not allowed to enter into a new contract about different land and that the effect of such a contract would not be the creation of a new holding. Evidence held to support a new contract. (*Oppenheim, S. M. and Walton, J. M.*) SITAL *v.* JALILUR RAHMAN. **16 R.D. 576=13 L.R. 379 (Rev.).**

——**S. 37**—*Scope.*

Section 37 merely states that a tenant who is admitted to the occupation of a holding after the commencement of the Act shall be entitled to retain the same. There is no proviso that the admission shall not have been made by reason of a misapprehension. (*Keane S.M.*) KANDHAI PRASAD *v.* MANTURA. **15 R.D. 708.**

——**S. 37**—*Variance of rent and holding—Ejectment of tenants.*

Where the areas of the holdings and their rentals have been varied the tenants are entitled under S. 37 to the status of statutory tenants and cannot be ejected by notice. (*Walton, J. M.*) RAGHURAJ SINGH *v.* AULAD ALI. **16 R.D. 513=13 L.R. 307 (Rev.).**

——**S. 38**—*Agreement for enhancement of rent—Proof.*

A written agreement for enhancement of rent cannot be proved without production of the *Kabuliyat* executed by the tenant or other estate papers. (*Nanavutty, J.*) RAHAM SHER KHAN *v.* COURT OF WARDS BALRAMPUR ESTATE. **6 R.O. 385=148 I.C. 241 (1)=18 R.D. 41=11 O.W.N. 69=A.I.R. 1935 Oudh 212.**

——**S. 38**—'*Written agreement*' — Patta *and* qabuliat, *if.*

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Though a *qabuliyat* is a counter-part of a lease and is not strictly a written agreement under S. 38 of the Oudh Rent Act, there is no reason why a written agreement under the section should not take the form of a *patta* and a *qabuliat*. (*Oppenheim, S. M. and Drake Brockman, J. M.*) JAGANNATH BUX SINGH *v.* BAHADUR SINGH. **11 O.W.N. 1370=18 R.D. 567.**

——**Ss. 39 (2) and 48**—*Issue of patta to heir of statutory tenant—Increase of rent—Notice of ejectment after five years—Right to contest.*

When a landholder issues a pattah to the heir of a statutory tenant on an increased rent, it inevitably suggested that there is a fresh admission to statutory tenancy. But when there is a clause in the patta itself stating that the lease was only for the period of five years allowed to the heirs under S. 48 of the Oudh Rent Act, the landholder can validly issue to the heir a notice of ejectment; and the latter cannot maintain a suit to contest such notice. (*Oppenheim, S. M. and Drake Brockman, J. M.*) JAGANNATH BUX SINGH *v.* BAHADUR SINGH. **11 O.W.N. 1370=18 R.D. 567.**

——**S. 43**—*Suit to contest notice of enhancement of rent—Claim to hold at favourable rate of rent—Onus of proof.*

Where a statutory tenant institutes a suit to contest a notice of enhancement of rent, claiming to hold the land at a favourable rate of rent, it is incumbent on the tenant to show that the land was granted to him to hold at such a rent at the time it was granted and that it has been continuously so held since. (*Drake Brockman, S. M. and Knox, J. M.*) UMA NATH BAKHSH SINGH *v.* BADRI. **1935 R.D. 325=1935 O W.N. 828.**

——**S. 43**—*Tenants holding under special agreement—Enhancement of rent.*

The tenants had held the suit land for nearly a century. In the *wajib-ul-arz* of 1863 it was noted that the land was liable to rent if the landlord wished that rent should be paid. It was also noted that the amount of rent payable in the future was liable to be limited to a payment equal to the the revenue plus 20 per cent. It appeared that since 1880 the tenants had been paying a certain amount as rent.

Held, that the tenants should be classified for purposes other than ejectment as statutory tenants and that rent is respect of the holding could be enhanced within the limits of the agreement as contained in the *wajib-ul-arz*. (*Keane, S. M. and Oppenheim, J. M.*) PIRBHU DAYAL *v.* JAI INDER BAHADUR SINGH. **16 R.D. 157.**

——**S 48**—*Applicability—Land held by patta.*

Where the lands are held by a patta, S. 48 cannot apply. (*Oakden, S. M.*) LALTA SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, AJUDHYA ESTATE. **15 R.D. 34.**

——**S. 48**—*Brahman statutory tenant—Right of daughter to succeed—Avoiding escheat to Crown.*

The daughter of a Brahman statutory tenant in pergana Amsin of the Fyzabad District is entitled to succeed her father as heir under S. 48 if in the alternative the property would escheat to the Crown. (*Oppenheim, S. M.*) MT. RAM RAJI *v.* DIN MAHOMED. **16 R.D. 164=13 L.R. 46 (Rev.).**

——**S. 48**—*Death of tenant—Persons other than heirs separately admitted to tenancy—Right of landlord to eject.*

After the death of a statutory tenant the *khata* came to be shown in the papers as divided into three separate *khatas*. It appeared that the landlord had consent to such separate holdings even though two of them were not heirs and had also received rent.

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Held, that the landlord having made an admission to tenancy of persons who were not technical heirs could not eject them. (*Keane, S. M.*) NAGESHWAR BUX SINGH *v.* MATA SAHAI. **15 R.D. 276.**

——**S 48**—*Object—Enjoyment for five years—Claim for extended period—Sustainability.*

The object of S. 48 to allow an heir the enjoyment of the land for five years. Where he has occupied the land for that period he cannot lay claim to extension on the ground that the tenant died after 15th May. (*Oppenheim, S. M.*) SRI DUTT SHUKLA *v.* NAWAB CHHANGAN. **16 R.D. 390=13 L.R. 175 (Rev.).**

——**(as amended), S. 48**—*Occupancy tenant—Right of heir.*

The heir of an occupancy tenant is entitled to occupy the land for five years after the death of the original tenant on the same terms. (*Oppenheim, S. M. and Knox, J. M.*) SYED KAZIM HUSAIN *v.* MAHESH. **16 R.D 199=13 L.R. 95 (Rev.).**

——**S. 48**—*Scope.*

S. 48 deals with the rights to succession to a tenancy as between the tenant and the zamindar. It can have no application to a dispute between co heirs to a tenancy to which the zamindar is no party. (*Kisch, J.*) ZAHIDA BEGAM *v* AKHTAR JAHAN. **I.R. 1931 Oudh 359=134 I C 407=8 O.W N 883=15 R.D. 427=12 L.R. 213 (Rev.)=A.I.R. 1931 Oudh 346.**

——**S. 48**—*Sister—Right to succession.*

A sister is not a collateral but an heir just as much as a brother, entitled to succeed without proof of co-sharing. (*Walton, J. M.*) RAM SAROOP SINGH *v.* MAHARAJI. **14 L.R. 784 (Rev.).**

——**Ss. 48 and 55**—*Several holdings forming one tenure—Separate notices—Necessity.*

There is nothing in the provisions of the Oudh Rent Act, which prohibit a single notice of ejectment in respect of a number of holdings when the tenure is one and the same. It is not necessary that there should be a separate notice in respect of each holding. (*Oppenheim, S. M. and Drake Brockman, J. M.*) RAGHAVENDRA PARTAP SAHI *v.* ALI AFZAL KHAN. **1935 O.W N. 37 =1935 R.D. 1=16 L.R. 167 (Rev.).**

——**S. 48**—*Succession—Nephew—Sharing in cultivation not proved—Nature of right.*

Where the claimant is the nephew of the deceased but did not share in the cultivation, he is not an heir under the Oudh Rent Act but holds in his own right. (*Keane, S M.*) KAMTA PRASAD *v.* RAMESHWAR. **15 R.D. 251.**

——**S. 51 (a) and (g)**—*Enhancement of rent—Rate—Economic slump—If justifies low rate.*

It is not open to a Court to give any sort of enhancement it thinks fit. It must enhance the rent, if there is to be an enhancement, in accordance with the law, *i.e.* S. 51 (*g*) of the Oudh Rent Act, To grant a too low enhancement on the ground of economic slump is not justifiable. (*Oppenheim, S. M. and Drake Brockman, J. M.*) UMA NATH BUX SINGH *v.* CHANDRA PAL SINGH. **11 O.W N. 1562=18 R.D. 646=16 L.R. 66 (Rev.).**

——**S. 51-A.**—*Agreement for enhanced rent—Recording rate.*

Where an agreement is one to enhance rent there is no justification for drawing from the part payments the inference that those payments represent the legal amount payable. Where some of the enhancements are higher than those permissible under S. 51-A the enhanced rent cannot be legally recorded. (*Oppenheim, S. M. and Drake Brockman, J. M.*) ROSHAN *v.* FARIDDUNNISSA. **11 O.W.N. 409=18 R.D. 197.**

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——**S 51-A.**—*Enhancement of rent—Increase in area.*

S. 51-A allows latitude for special enhancement on account of increase in area. An increase in assessable area is a sufficient ground for enhancement, (*Keane, S. M. and Oppenheim, J. M.*) SHYAM BEHARI MISRA *v.* SALIG RAM. **15 R.D. 802.**

——**S. 52**—*Effect.*

Ss. 4 (1) and 52 clearly indicate that an effectual ejectment of a tenant can only take place when the procedure with reference thereto as prescribed by the Act has been adopted and this will bs so in spite of any agreement between the landlord and the tenant to the contrary. (*Hasan, C.J. and Kisch, J.*) AMAR NATH SINGH *v.* HAR PRASAD SINGH. **7 Luck 425=I R. 1932 Oudh 125=136 I C. 333=13 L.R. 20 (Rev.)= 8 O.W.N. 1359=15 R.D. 785=A.I R. 1932 Oudh 79.**

——**S. 52**—*Ejectment proceedings—Tenant holding under special agreement—Enhancement of rent—Decree against tenant for arrears—Rent deposited in Court—Ejectment of defendant as an occupancy tenant—Permissibility.*

Where a tenant who is holding under a special agreement under which he is to be ejected only on the rent falling into arrears, suffers a decree to be passed against him for such arrears, and deposits the amount to Court he cannot he ejected on the ground of his failing to pay rent at an enhanced rent at the suit of the landlord, as though he were an occupancy tenant. (*Walton, J. M.*) SHYAM BIHARI MISIR *v.* RAM SUNDAR. **14 L.R. 360 (Rev.)=17 R D 488.**

——**S. 52**—*Proceedings under—Applicability of O. 21, R. 2, C. P. Code—Payment of arrears out of Court.*

Proceedings under S. 52 (2), Oudh Rent Act, are not proceedings in execution of the decree for arrears of rent and O. 21, R. 2 (3), C. P. Code, does not apply to such a case. It is therefore open to a party to prove payment of the arrears out of Court. (*Oppenheim, J. M.*) DEBI PRASAD *v.* MAHIPAL SINGH. **15 R.D. 776.**

——**S. 52**—Tenant holding under special agreement—Ejectment—Grounds. *See* OUDH RENT ACT, S. 108 (4). **1935 R.D. 364=1935 O.W.N. 733.**

——**S. 52 (2)**—*Decree for arrears remaining unsatisfied for 15 days—Decree for ejectment—Misstatement of amount of decree by decree-holder—Effect of.*

S. 52 allows ejectment of an occupancy tenant if a decree for arrears against him remains unsatisfied for 15 days. If this condition is fulfilled, a decree for ejectment is justifiable, and is not vitiated by any misstatement of the amount of the decree by the decree-holder. (*Drake Brockman, S.M. and Knox, J.M.*) BISHAMBAR NATH SRIVASTAVA *v.* BINDESHURI PRASAD. **1935 O.W.N. 1318=1935 R.D. 555.**

——**S. 52 (2)**—*Decree for arrears of rent unsatisfied—Suit for ejectment—Decree satisfied pending—Tenant not liable to ejectment.*

In a suit for ejectment under S. 52 (2) on the ground that a decree for arrears of rent remained unsatisfied, the defendant claimed he was under-proprietor. Pending the suit, the decree was satisfied.

Held, that the defendant, having satisfied the decree, should not be evicted, even though his claim to under-proprietary right, may have been negatived. (*Oppenheim, S.M. and Drake Brockman, J.M.*) MUNNA LAL *v.* DAN BAHADUR SINGH. **11 O.W.N. 479=18 R.D. 211.**

——**S. 52 (2)**—*Ejectment—Discretion of Court.*

S. 52 does not say that a Court *shall* eject an occupancy tenant because he fails to satisfy a decree for

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arrears of rent for 15 days, but that he *may* eject. Presumably discretion is allowed to a Court to eject or not to eject according to circumstances. (*Drake Brockman, S M. and Knox, J.M.*) BISHAMBAR NATH SRIVASTAVA *v.* BINDESHURI PRASAD. **1935 O.W. N. 1318=1935 R.D. 555.**

———**S. 52 (2)**—"*The tenant*"—*Meaning—Ejectment of tenant—Nature of decree.*

The words "the tenant" in Cl. (2) refer to S. 52 (1). An occupancy tenant can be ejected only if the decree has been given against him as a tenant. (*Holmes, J. M.*) DEPUTY COMMISSIONER OF SULTANPUR *v.* BALWANT SINGH. **14 L.R. 886 (Rev.).**

———**S. 52 (3)**—*Settlement decree—Provision for payment of increased rent by thekadar—Right of Taluqdar to resume or charge exorbitant rent.*

A settlement decree provided as follows: "The claim of the plaintiffs to be under-proprietors is dismissed. A decree is passed for 'daswandh' and for the theka of the village. As regards this theka the taluqdar is to have power to fix a new jama or to assess or amend the jama in accordance with the practice prevalent in Shahi times. In any year in which the talukdar is himself in charge of the property or in which the plaintiffs refuse the theka the plaintiff will be entitled to receive 'daswandh' from the assets of the village."

Held, that it was the intention of the decree that the tenants should be in occupation so long as they paid jama in accordance with the practice prevalent in the Shahi days and that it was not intended that the land could be resumed at the option of the taluqdar or that the taluqdar could charge an exorbitant rent. He can sue for ejectment only under Ss. 52 and 71 for non-payment of rent. (*Smith, S.M. and Oppenheim, J M.*) LAKHPAT *v.* JAGDAMBA DEVI. **15 R.D. 593=12 L. R. 299 (Rev.).**

———**S. 53**—*Notice of ejectment—Service on person who is not a tenant—Right to contest.*

A person who is not a tenant to whom S. 53 (2) of the Oudh Rent Act applies is competent to contest a notice of ejectment served on him by suit. A notice which issues to a man who is not a tenant of the land is worthless and must be cancelled when it comes before the Court. (*Oppenheim, S.M. and Drake Brockman, J. M.*) AMIR KHAN *v.* NANNHA. **18 R.D. 702=16 L. R. 110 (Rev.).**

———**Ss. 53 (2), 61 and 107 (e)**—*Ejectment—Tenant holding land at favourable rate of rent—Remedy of landholder for arrears of rent.*

A tenant holding at a favourable rate of rent does not come within S. 53 (2) and the landlord should proceed against them under the Resumption Chapter VII-A and cannot have him ejected under S. 61 of the Act. (*Drake Brockman, J.M.*) GAYA SINGH *v.* PARTAB. **14 L.R. 379 (Rev.)=17 R.D. 484.**

———**S 55**—Construction—Several holdings in one tenure—Separate notices of ejectment—Necessity. *See* OUDH RENT ACT, SS. 48 AND 55. **1935 O.W.N. 37.**

———**Ss. 55 and 56**—*Notice of ejectment—Date of filing.*

A notice filed with the Tahsildar in time for service before the 15th November would be invalid if the Tahsildar has failed to serve it by that date. But it must be served by such a date that there is reasonable time left to bring to a conclusion a suit filed by the tenant to contest it and possession to be delivered by the 30th June and the landholder must show that in the event of some contretemps he took steps to get a fresh notice served. (*Drake Brockman, S.M. and Holmes, J.M.*) JASODA *v.* MAHOMEN IBRAHIM. **14 L.R. 854 (Rev.).**

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———**S. 55**—*Thekadar—Breach of conditions of lease—Notice to eject.*

Where the thekadar commits a breach of the conditions of the lease, the landlord can eject by notice under Ss. 55 and 68, Oudh Rent Act. (*Keane, S.M.*) BALDEO PRASAD *v.* MAHOMED ISHAQ. **15 R.D. 725 =12 L.R. 359 (Rev.).**

———**S. 56**—*Notice of ejectment—Failure to contest—Suit to recover possession—Bar.*

The tenant whether he files a suit under S. 56 or not provided it is not decreed against him can file a suit under S. 108 (10) for recovery of possession if he thinks his ejectment was illegal on any ground. (*Drake Brockman, S.M. and Holmes, J.M.*) JASODA *v.* MAHOMED IBRAHIM. **14 L.R. 854 (Rev.).**

———**Ss. 56 and 61**—Theka *providing for ejectment for default in payment of rent—Ejectment—Mode of.*

Where the *theka* contains a clause that he would be liable to ejectment if he failed to pay his rent in time, it is open to the landlord to eject the thekadar by notice under S. 56 of the Act. (*Oppenheim, S.M. and Drake Brockman, J.M.*) DEO DAT MISRA *v.* BALESHWAR SINGH. **11 O.W.N. 466=18 R.D. 202=15 L.R. 160 (Rev.).**

———**S. 56**—'*Year*'—*Meaning—Ordinary tenants—Notice to vacate before 15th May—Validity.*

In dealing with subletting cases the word 'year' means agricultural year. In regard to ordinary tenants whose period expire in June a notice reminding them to vacate the land before 15th May is good. (*Oppenheim, S.M.*) SRI DUTT SHUKLA *v.* NAWAB CHHANGAN. **16 R.D. 390=13 L.R. 175 (Rev).**

———**S. 60**—*Notice of ejectment under—Sufficient service—Affixture.*

A notice under S. 60, Oudh Rent Act, served by affixture when the person sought to be served is away at another place, is not an adequate service; and when there is a doubt as to the service of a notice of ejectment under the section, the benefit of that is generally given in favour of the person alleging non-service of notice on him. (*Oppenheim, S.M. and Drake Brockman, J.M.*) BABOO LAL *v.* MUNNU SINGH. **11 O.W.N. 1559=18 R.D. 673=16 R.L. 127 (Rev.).**

———**S. 61**—*Arrears of rent—Ejectment—Appellate Court—Power to extend time.*

S. 61 is the section essentially for enforcing payment through a threat of ejectment. The tenant must pay the amount within the period allowed by the Court in order to avoid execution of the decree for ejectment. The appellate Court hearing an appeal against such a decree could in virtue of its inherent powers and in view of the special circumstances in the case allow a reasonable time after that period allowed in the original Court's decree expired, if it thought this necessary. (*Oppenheim, S.M. and Drake Brockman, J.M.*) JHAOO LAL *v* BHOLA SINGH. **18 R.D. 320=11 O.W.N. 840.**

———**S. 61**—*Consent decree for ejectment—Decree not to be executed, if decretal amount is paid within a month—Power of Court to extend time for payment.*

Where a Zemindar obtains a consent decree for the ejectment of his occupancy tenant with the proviso that the decree should not be executed for a month, and that if the decree money were paid during this time of grace, the decree should not be executed at all, and more than six months later the judgment-debtor applies for permission to pay the decretal sum into Court but the Court accepts the application of the decree-holder for execution of the decree and orders ejectment.

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Held, that the decree has become final by the failure to pay up the amount within the time fixed and the Court has no authority to grant further extensions. (*Darke Brockman, S.M. and Knox, J.M.*) MAHARAJA *v.* HUB LAL. **1935 R.D. 66=1935 O.W.N. 207.**

———**S. 61**—*Ejectment suit—Claim of under-proprietary rights—Proof.*

Where in a suit for ejectment on ground of arrears of rent the defendant claimed under-proprietary rights but it was shown that cash *namkar* was not set-off against the rent of the holding but was assigned to another.

Held, that the defendant was not an under-proprietor. (*Drake Brockman, S.M. and Holmes, J.M.*) BABU LAL *v.* TIRBHAWAN BAHADUR SINGH. **14 L.R. 892 (Rev.).**

———**S. 61**—*Rents concealed for defrauding Government—Non-payment of—Ejectment for.*

No person is entitled to take advantage of his own fraud and so the landlord cannot be permitted to sue for ejectment of tenants for non payment of rents which the landlord had concealed to defraud the Government. (*Holmes, J.M.*) INDER KUAR *v.* BANSIDHAR **14 L.R. 815 (Rev.).**

———**S 61**—*Payment of decree amount out of Court—Validity.*

The tenants should be compelled to abide by the strict provisions of the law which were framed for their advantage. The law requires them to pay the amount into Court and is not concerned to make enquiries as to whether they paid it out of Court. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KANHAIYA LAL *v.* KUNDAN LAL. **11 O.W.N. 930=18 R.D. 325.**

———**S. 61**—*Scope—Suit for arrears of rent of part of holding—Maintainability.*

There is nothing in the Oudh Rent Act which bars a suit being brought for arrears of rent in respect of several holdings or of a part of holdings where different portions of the holding constitute but a single holding at a lump rent. While it is true that a suit under S 61 of the Act is not the medium for deciding the status of the holder of particular portion of any land included in one holding, it would be open to the Court to specify in the decree separately what is due for the particular portion, so that in case the tenant satisfied the decree to that extent, the decree need not be executed in respect of such portion. (*Drake Brockman, J.M.*) BANDI DIN *v.* MATHURA PRASAD. **11 O.W.N. 1255=18 R.D. 527.**

———**S. 61**—*Suit for ejectment—Claim to under-proprietary rights.*

Where a tenant's predecessors have been recorded as Sirdars and he himself as an ordinary tenant, no proprietary right can be claimed, though it may well be that he has some kind of under-proprietary rights. (*Oppenheim, S. M. and Walton, J.M.*) BALDEO SINGH *v.* KANDHYA LAL. **14 L.R. 369 (Rev.)=17 R.D. 490.**

———**S. 61**—*Suits under—Court-fees.*

Court-fees are chargeable in suits under S. 61, Oudh Rent Act, on only one year's rent. (*Oppenheim, S.M. and Drake Brockman, J.M.*) BHAWANI *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **1935 O.W.N. 93—1935 R.D. 32.**

———**S 61**—*Word "due"—Meaning—Arrears of rent—Recovery.*

The word "due" in S. 61 means the same as recoverable and arrears up to three years are recoverable in the Courts. (*Fremantle, S.M.*) BHIKHA *v.* PRAGDAS. **18 R.D. 227 (1)=11 O.W.N. 792.**

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———**S. 61 (1)**—*"Arrear of rent"—Meaning of.*

The arrear of rent mentioned in S. 61 (1) means the arrears of rent recoverable by the landlord under S. 132. The law clearly intended that a landlord should be enabled under S. 61 to recover all the arrears due to him at the time of the institution of the suit for ejectment.

Per *Drake Brockman, J.M.*—The decreed costs in any (previous) suit for recovery of arrears are not to be included in the amount which the tenant is required to pay in order to avert ejectment; but only the arrear of rent and interest if any. (*Oppenheim, S.M. and Drake Brockman, J.M.*) MIAN INDER SINGH *v.* NANAK CHAND. **11 O.W.N. 505=18 R.D. 245=15 L.R. 287 (Rev.).**

———**S. 61 (2)**—*Decree under—Specification of arrears.*

A decree framed under S. 61 (2) of the Oudh Rent Act, must specify the whole of the arrears and interest (if any) due thereon legally recoverable by the landlord on the date of the suit. But when the arrears of previous years have been paid, it is only necessary to specify the arrears of the last year. (*Oppenheim, S.M.*) RAM NARESH SINGH *v.* HANUMAN DAIT. **11 O.W.N. 957 =18 R.D. 406 (1).**

———**Ss. 62 and 62 A**—*Agreement between landlord and tenant—Recognition of statutory tenancy—Effect of—Prior illegal sub-letting condoned.*

A landlord and his tenants came to an agreement under which the tenants agreed to pay rents in future at the full figures (which had been recorded in the patwaris papers) and in return, the landlord agreed to recognise as statutory tenants those who were recorded as heirs of statutory tenants. In a suit for ejectment for illegal sub-letting before the date of the agreement,

Held, that the agreement should be taken to be a condonation of illegal sub-letting prior to its date and created a new tenancy and so the suit should be dismissed. (*Holmes, J.M.*) INDER KUAR *v.* BANSIDHAR. **14 L.R. 808 (Rev.).**

———**S. 62**—*Female heir of statutory tenant—Liability to ejectment.*

The provisions of S. 68-A do not apply to the female heir of a statutory tenant and therefore she is not liable to ejectment under S. 62 (*Keane, S.M.*) HUNTER *v.* SADDIQUNNISA. **15 R.D 608=12 L.R. 327 (Rev.).**

———**S. 62**—*Sub lease for period—Notice issued by tenant to sub-tenant to vacate—Sub-tenant holding on—Tenant whether liable to ejectment.*

If a tenant sublets a plot of land for two years expecting the sub-tenant to vacate at the end of that period he is not liable to ejectment under S. 62 in case the sub-tenant refuses to vacate at the time agreed upon though he has been called upon by a notice issued by the tenant to vacate. (*Smith, J.M.*) SRI THAKURJI *v.* SHAMBHU. **15 R.D. 133.**

———**S. 62 (2)**—*Transfer by unregistered deed—Transferee let into possession—Liability of tenant to ejectment.*

Where a tenant commits a breach of the contract of tenancy by effecting a transfer and delivering possession, the landlord is entitled to eject the tenant even though the transfer was not validly effected by a registered document and no evidence regarding the same is admissible. (*Oppenheim, J.M.*) GHIRAOO LAL *v.* VIRANDRA VIKRAM SINGH. **15 R.D. 775.**

———**S. 62-A (1)**—*Suit for ejectment—Death of defendant—Survival of cause of action.*

Where the landlord sued under S. 62-A (1) of the Oudh Rent Act for ejectment on the ground of illegal sub-letting and the defendant died during the pendency

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of the case leaving an adult son who was made his legal representative under O. 22, R. 4.

Held, that the suit did not abate and that the son could plead rights as successor of father and not in his personal capacity. (*Oppenheim, S.M. and Drake Brockman, J.M.*) MAHOMED SHAFI KHAN *v.* RAM SUKH. **18 R.D. 238=11 O.W.N. 554.**

——(as amended by Act IV of 1921), S. 62-A (1) (b)— *Retrospective effect.*

The provisions contained in S. 62-A (1) (*b*) have no retrospective effect and can apply only to a case where sub-letting has been effected after the new Act came into force. (*Keane, S.M.*) HUNTER *v.* SURAJ BAKSH SINGH. **15 R.D. 466.**

——S. 62-A (1) (b) and S. 108 (4)—*Suit for ejectment on ground of sub-letting—Tenant issuing notice of ejectment to sub-tenant before suit—Tenant, if liable to be ejected.*

Where a tenant has sub-let a part of his holding and such part is in the possession of a sub-tenant at the time of the institution of the suit for ejectment under S. 62-A (1) (*b*) read with S. 108 (4), the tenant is liable to ejectment though he has issued notice of ejectment to the sub-tenant before the suit is filed against him. (*Drake Brockman, S. M. and Knox, J. M.*) PARMESHAR SINGH *v.* LAL BAHADUR SINGH. **1935 O.W.N. 1358=1936 R.D. 5.**

——S. 62-A (1) (e)—*Applicability—Change of proprietary rights.*

While the law does not specifically provide for cases where proprietary rights change hands, it is one of the principles of the Oudh Tenancy law as amended in 1922 that landlords should be able to get rid of *pahikasht* tenants, if they want the land for a resident tenant of their own village. There is no reason to suppose that when circumstances changed, as *e.g.*, on a change of proprietary rights, the law intended to deprive an incoming landlord of his right to get rid of a *pahikasht* tenant. (*Oppenheim, S.M. and Drake Brockman, J.M.*) SHANKAR SAHAI *v.* BALWANT SINGH. **11 O.W.N. 260=18 R.D. 147**

——S. 62-A (1) (e)—"*Statutory period*"—*Meaning of—Transfer of ownership.*

While some difficulty arises over the precise meaning to be attached to the words "statutory period" in a case where there has been transfer of ownership, the most equitable interpretation of the intention of the law is that when the ownership is transferred, a man who is a statutory *Pahikasht* tenant becomes liable to ejectment at the suit of the incoming landlord, but is entitled to hold for ten years from the date on which he becomes subject to the provisions of S. 62-A (1) (*e*)—in other words from the date or from the beginning of the agricultural year in which the transfer of ownership took place. (*Oppenheim, S.M.and Drake Brockman, J M.*) SHANKAR SAHAI *v.* BALWANT SINGH. **11 O.W N. 260=18 R.D. 147.**

——S. 62-A (1) (e)—*Suit for ejectment—Intended lease to resident tenant—Proof.*

In a suit for ejectment under S. 62-A (1) (*e*), the landlord should state that he wants to let the land who ordinarily resides in the village and prove his desire and intention. (*Oppenheim, S.M. and Drake Brockman, J. M.*) SHANKAR SAHAI *v.* BALWANT SINGH. **11 O. W.N. 260=18 R.D. 147.**

——(as amended), S. 67—*Inheritance of under-proprietary rights—Person subsequently becoming tenant-in-chief—Acquisition of statutory rights.*

Where a person inherited under-proprietary rights in F. 1333 and he subsequently became a tenant-in-Chief in F. 1335.

OUDH RENT ACT (1886), S. 67 (1) (b).

Held, that he acquired statutory rights under S. 67. (*Walton, J. M.*) RAMESHWAR TEWARI *v.* RAM HARAKH. **16 R.D. 240=13 L.R. 124 (Rev.).**

——S. 67—*Scope—Section modified by S. 107-G of the Act.*

S. 67 is a general provision over which the special provisions of S. 107-G must prevail. (*Smith, J. M.*) MOHAMMAD ALI MAHOMMAD KHAN *v.* HANWANT SINGH. **15 R.D. 225.**

——S. 67 (b)—*Admission of tenants—Understanding not to treat as non statutory tenants—Acceptance of* nazarana—*Effect.*

There was an understanding at the time of the admission of certain tenants that they should not be treated as non statutory tenants. The *nazarana* paid was considerable and came to four times the recorded annual rent.

Held, that the landlord was estopped from asserting that the tenants were non-statutory tenants. (*Oppenheim, J.M.*) JAIRAJ KUER *v.* SHEOPAL SINGH. **15 R.D. 695.**

——S. 67 (b)—*Partition proceeding—Compromise decree—Suit by owner for ejectment—Objection as to notice.*

In 1924 the appellant bought $\frac{1}{3}$ of the under-proprietary rights in a mahal and the respondent bought the remaining $\frac{2}{3}$ in 1929. Respondent then sued for partition in the Civil Court; the parties came to terms and a decree was passed in accordance with the agreement. The fields in dispute fell to the share of the respondent who then issued a notice of ejectment on appellant under S. 67 (*b*).

Held, that the holding was a new holding and the appellant could not object to the notice as he was a party to the partition. (*Holmes, J.M.*) JANKI MURAO *v* ABDUS SATTAR. **15 L.R. 18 (Rev.).**

——S. 67 (1) (b)—*Compromise—Tenants treated as statutory tenants—Ejectment.*

Where under a compromise the landlord enjoyed right to enhanced rent and the tenants were treated as statutory tenants,

Held, that the landlord could not resile from the arrangement and issue another notice of ejectment. (*Holmes, J.M.*) TARAK NATH BISWAS *v.* FATEH BAHADUR SINGH. **11 O.W.N. 284=18 R.D. 134 (2)=15 L.R. 570 (Rev.).**

——S. 67 (1) (b)—*Disqualification under—Applicability to tenant—Mortgagee of under-proprietary rights.*

A mortgagee of under-proprietary rights is not disqualified from acquiring statutory rights. (*Oppenheim, S M. and Walton, J.M.*) BAKHAT BALI *v.* DAYA SHANKAR. **16 R.D. 521=13 L.R. 309 (Rev.).**

——S. 67 (1) (b)—*Non-statutory tenant—Acquisition of statutory rights—Mistaken entry, if sufficient.*

A person who owned under-proprietary rights in a village and who was a non-statutory tenant made a gift of his under-proprietary rights. The partition showed him by mistake as a statutory tenant and the landlord also acted on the erroneous assumption.

Held, that no statutory rights were created in favour of the tenant. (*Oppenheim, S.M.*) MAHIPAT SINGH *v.* INDERBALI PANDEY. **16 R.D. 176=13 L.R. 61 (Rev.).**

——S. 67 (1) (b)—"*Possesses*" — *Meaning of—Tenant who is mortgagee—If disqualified from acquiring statutory rights.*

The word "possesses" in S. 67 (1) (*b*) of the Oudh Rent Act does not include a mortgagee in possession Accordingly a tenant who is merely a mortgagee and

OUDH RENT ACT (1886), S. 68.

not a complete owner is not disqualified by reason of his mortgage from the acquisition of statutory rights. (*Drake Brockman, S.M. and Knox, J.M.*) GUR DAYAL *v.* GUR DAYAL. **1935 O.W.N. 291 = 1935 R.D. 130.**

——(as amended), S. 68—*Illegal subletting—Person holding after two years.*

The appellant claimed that a portion of his holding was sub let under the old Act and that since the new Act had sub-let certain other portions of the holding. As regards the latter plots the period of two years had been completed.

Held, that the latter numbers had been illegally sub-let. (*Oppenheim, S.M. and Knox, J.M.*) AMBIKA PRASAD *v.* THAKURAIN BACHCHI KUER. **16 R.D. 207 = 13 L.R. 89 (Rev.).**

——S. 68—*Thekadar—Breach of conditions of lease—Notice to eject.*

Where the thekadar commits a breach of the conditions of the lease, the landlord can eject by notice under Ss. 55 and 68, Oudh Rent Act. (*Keane, S.M.*) BALDEO PRASAD *v.* MAHOMED ISHAQ. **15 R.D. 725 = 12 L.R. 359 (Rev.).**

——S. 68-A—*Applicability—Sub-tenant ceasing to cultivate part of holding—Reduction of rent—Cause of action.*

In a case where a sub-tenant merely ceases to cultivate a portion the holding with a corresponding reduction of rent there is no new sub-letting so as to support a cause of action under S. 68 A. (*Keane, S.M.*) HUNTER *v.* RAM PHALI. **15 R.D. 713.**

——S 68 A—*Female heir of statutory tenant—Liability to ejectment.*

The provisions of S. 68 A do not apply to the female heir of a statutory tenant and therefore she is not liable to ejectment under S. 62. (*Keane, S.M.*) HUNTER *v.* SADDIQUNNISA. **15 R.D. 608 = 12 L.R. 327 (Rev.).**

——S. 68-A—*Permission to sub-let—Authority of agent of landlord to grant.*

Under S. 68-A it is necessary to obtain the written consent of the landlord. Ordinarily it would not be sufficient to obtain the written consent of the agent of the landlord. It is however permissible for a landlord to delegate his powers by a power of attorney.

Held, on the fact that delegation of authority by landlord should be inferred. (*Oppenheim, J.M.*) UDAI BHAN SINGH *v.* SUKH DIN. **15 R.D. 14.**

——S. 68-A—*Prohibition as to sub-letting—Object—Cultivation of plots by ploughman in lieu of wages—Sub-tenancy not created.*

Sub-letting has been penalized partly in the interest of the landlord in order to prevent the growth of middlemen who would annex some of the landlord's legitimate profits and partly in order to keep holdings in the hand of the actual cultivators. Consequently the sub letting referred to in S. 68 A must be a real sub-letting implying a real contract of sub-tenancy. The same condition governs sub-Cl. (2). There must be a definite contract of sub-tenancy coupled with a remission of rent The cultivation of a few biswas by a ploughman or other person in the service of the tenant as part of his wages does not create a sub tenancy. (*Oakden, S.M. and Oppenheim, J.M.*) BINDBASNI KUER *v.* KUDAL. **15 R.D. 236 = 12 L.R. 123 (Rev.).**

——S. 68-A—*Sub-letting of different portions of holding—Liability to ejectment.*

It cannot be said that there is no illegal sub letting when the two sub-lettings are of different portions of the holding. Even when there is sub letting of a portion the tenant is liable to be ejected from the entire holding, (*Oakden, S.M.*) JEODHAN *v.* OUDH PAL SINGH. **15 R.D. 38.**

——S. 68-A—*Sub-letting—Proof—Bit of land not used by tenant—Occupation by another without permission.*

Where the tenant did not bother about a little bit of land which was of no use to him and the same was occupied by another person without obtaining the permission of any one.

Held, that the tenant could not be said to have sub-let the holding. (*Oppenheim, J.M.*) RAMRAJI *v.* GAYA DIN. **15 R.D. 601 = 12 L.R. 333 (Rev.).**

——S. 68-A (1)—*Applicability—Fresh subletting before 11th February, 1922.*

A subletting which is made within two years of a previous sub-letting, but which is effected before 11th February, 1922, is not hit at by S. 68-A (1). (*Keane, S.M.*) HUNTER *v.* SURAJ BAKSH SINGH. **15 R.D. 466.**

——(as amended by Act IV of 1921), S. 68-A (1)—*Retrospective effect.*

The provisions contained in S. 68-A (1) have no retrospective effect and can apply only to a case where sub-letting has been effected after the new Act came into force. (*Keane, S.M.*) HUNTER *v.* SURAJ BAKSH SINGH. **15 R.D. 466.**

——S. 68-A (3)—*Applicability—Holding with minor co-tenant—Sub-letting—If permissible.*

Sub-letting is not permissible in a holding where the co-tenants includes a minor; because the privilege as regards sub-letting mentioned in S. 68-A (3) of the Oudh Rent Act is not applicable to a case of joint tenancy, unless all the joint tenants are one or more of the descriptions specified. The object of the section is mainly to protect from ejectment tenants incapable of cultivating the land themselves and not to protect holdings in which there are tenants capable of cultivating themselves. (*Oppenheim, S.M. and Drake Brockman J.M.*) RUDRA PRATAP SINGH *v.* HUBBA. **11 O.W.N. 1211 = 18 R.D. 526 = 15 L.R. 623 (Rev.).**

——S. 69—*Life tenancy—Effect of later amending Act.*

A lease conferring a tenancy for life in 1910 which is valid under the Act before amendment is not rendered invalid on account of the subsequent amendment of the Act S. 6 (*c*) of the General Clauses Act relied on. (*Oppenheim, J.M.*) BANSIDHAR *v.* SADDHU SINGH **15 R.D. 710.**

——S. 71—*Thekadar—Provision for increased rent settlement decree—Enforcement—Liability to ejectment.*

A settlement decree provided as follows: The claim of the plaintiffs to be under-proprietors is dismissed. A decree is passed for "daswandh" and for the theka of the village. As regards this theka the taluqdar is to have power to fix a new jama or to assess or amend the jama in accordance with the practice prevalent in Shahi times. In any year in which the taluqdar is himself in charge of the property or in which the plaintiffs refuse the theka the plaintiff will be entitled to receive daswandh from the assets of the village.

Held, that it was the intention of the decree that the tenants should be in occupation so long as they paid jama in accordance with the practice prevalent in the Shahi days and that it was not intended that the land could be resumed at the option of the taluqdar or that the taluqdar could charge an exorbitant rent. He can sue for ejectment only under Ss. 52 and 71 for non-payment of rent. (*Smith, S.M. and Oppenheim, J.M.*) LAKHPAT *v.* JAGDAMBA DEVI. **15 R.D. 593 = 12 L.R. 299 (Rev.).**

OUDH RENT ACT (1886), S. 100.

———**S. 100**—*Mistake as to area—Effect.*

A mistake in a few area is not material where it could have misled a party. (*Oakden, S. M.*) LALTA SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, AJUDHYA ESTATE. **15 R.D. 34.**

———**S. 107**—*Groveholder—Interests of—Transferability.*

Subject to any custom or contract to the contrary, the interest of a groveholder in Oudh is transferable by voluntary transfer or in execution of a decree of a Civil or Revenue Court or otherwise. (*Zia Ul-Hasan, J.*) BINDESHURI DEVI *v.* SARDAR KHAN. **11 O.W.N. 1365 = 18 R.D. 621.**

———**S. 107**—*Inapplicability—Land in respect of which under proprietary rent has been fixed by Assistant Settlement Officer on compromise by parties.*

The provisions of S. 107 of the Oudh Rent Act relating to resumption of *muafi* or rent-free grants have no applicability where under-proprietary rent has been fixed by the Assistant Settlement Officer under S. 79 of the Land Revenue Act, on a compromise arrived at by the parties. (*Nanavutty and Thomas, JJ.*) MANZOOR HUSAIN *v.* DAWAR ALI. **155 I.C. 295 = 7 R.O. 577 = 1935 R.D. 247 = 1935 O.W.N. 537 = A.I.R. 1935 Oudh 409.**

———**S. 107 (e), 53 (2) and 61**—*Ejectment—Tenant holding land at favourable rate of rent—Remedy of landholder for arrears of rent.*

A tenant holding at a favourable rate of rent does not come within S. 53 (2) and the landlord should proceed against him under the Resumption Chapter VII-A and cannot have him ejected under S. 61 of the Act. (*Drake Brockman J.M.*) GAYA SINGH *v.* PARTAP. **14 L.R. 379 (Rev.) = 17 R.D. 484.**

———**Ss. 107-B and 107 G**—*Suit for assessment of rent—Abatement—Fresh cause of action—Accrual.*

The special cause of action which is given to a certain person on the expiry of a term of settlement is a right contingent or intended to be contingent on a settlement of the land revenue. When a suit for assessment of rent abates no fresh cause of action can arise till a re-settlement has taken place. (*Oppenheim, S. M. and Knox, J. M.*) RAM DAS *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **13 L.R. 134 (Rev.) = 16 R.D. 238.**

———**S. 107 G**—*Grant of land free of revenue—Land to remain with grantee* "naslan bad naslan"—*No right of transfer—Death of grantor—Liability of land to assessment of rent.*

A father executed a document in favour of his daughter by which he purported to "gift" her certain acres of land. The document says that the land is to remain with her "*naslan bad naslan*" but that she is not to have the right of transfer and that the revenue is to be always borne by the rest of his estate. A grandson of the grantor sued the daughter's son for assessment of rent on this land under S. 107 G of the Resumption chapter.

Held, that the donor did not intend to create full proprietary rights in favour of his daughter as is clear from the fact that he distinctly laid down that she was to have no right of transfer, and that by the same stipulation, he deprived her even of under proprietary rights; that the grant is subject to the law of resumption which only gives the grantee unqualified protection during the lifetime of the grantor or until the settlement of the tract in which the grant is situated is revised, and that it is inevitable therefore that the land should be assessable to rent and that the grantee should be only a statutory tenant under S. 107-G. (2) and 3 (*Drake Brockman J.M.*) KAMTA PRASAD *v.* LAL BAHADUR. **1935 R.D. 561 = 1935 O.W.N. 1290.**

OUDH RENT ACT (1886), S. 107 I.

———**S. 107-G**—*Rent assessed on rent-free grantee who was also under proprietor—Status of grantee.*

Where rent is assessed under S. 107 G on a rent-free grantee, who is also an under-proprietor, the rent-fee grantee becomes a statutory tenant. (*Oppenheim, S. M. and Walton, J. M.*) MUNIR AHMAD *v* SUBHAN KHAN. **13 L.R. 418 (Rev.) = 17 R.D. 43.**

———**S. 107-G**—*Section overrides S. 67 of the Act.*

S, 67 is a general provision over which the special provisions of S. 107 G must prevail. (*Smith, J. M.*) MOHAMMAD ALI MOHAMMAD KHAN *v.* HANWANT SINGH. **15 R.D. 225.**

———**S. 107-G**—*Under-proprietor enjoying rent-free grant—Assessment to rent—Suit for ejectment—Maintainability.*

The under-proprietors of a village who enjoyed a rent-free grant which the proprietor has had assessed to rent under S. 107-G. He then issued a notice for their ejectment.

Held, that by getting the rent-free land assessed to rent the proprietor converted them into statutory tenants and he cannot afterwards turn round and plead that statutory rights have not accrued because they held under-proprietary rights in the village. (*Smith, J. M.*) MOHAMMAD ALI MOHAMMAD KHAN *v.* HANWANT SINGH. **15 R.D. 225.**

———**S. 107-H**—*Acquisition of* Sir *rights in* khudkasht—*Time limit.*

Where the declaration as to under-proprietary rights was made in 1908 and the holder conveyed his rights in 1918,

Held, that the *khudkasht* had not on the latter date ripened into *Sir* and that he did not become an under-proprietary tenant. (*Walton, J.M.*) FIDA HUSAIN *v.* QIFAYAT ULLAH. **16 R.D. 508 = 13 L.R. 347 (Rev.)**

———**S. 107-H**—*Person declared under-proprietor—Effect.*

Per *Smith and Allsop, JJ.*—A person declared to be under-proprietor under S. 107-H becomes an under-proprietor from the time when the declaration is made, and not before. The fact therefore that a person has been declared to be an under-proprietor does not affect the question of his father's status at the time when the mortgage-deeds by him were executed. (*Raza, Srivastava and Smith, JJ.*) HAKIM HUSAIN *v.* MUSHTAQ HUSAIN. **6 I.R. Oudh 136 = 146 I.C. 482 = 10 O.W.N. 1330 = 18 R.D. 15 = 15 L.R. 42 (Rev.) = A.I.R. 1933 Oudh 542 (F.B.).**

———**S. 107-H**—*Under proprietary rights in specific plots—Evidence—Assessment of rent.*

The respondents had lost their share in the under-proprietary *mahal* or *patti* but they had retained their rights in specific plots; *held* that it was reasonable to assume that there was some family understanding and that the retention of the latter was consideration of the loss of the former. In any case they are entitled to under-proprietary rights in the plots and rent should be assessed under S. 107 H. (*Oakden, S. M.*) JAGAT NARAIN *v.* SESHMAN PRASAD. **15 R.D. 153 = 12 L.R. 26 (Rev.).**

———**S. 107 I**—'*Land held at favourable rate of rent*'—*Proof.*

Where the rent payable was ten annas but the revenue payable was Re. 1-14 2 and it was found that at the circle rates the rent would work out nearly at five rupees.

Held, that the land was held 'at a favourable rate of rent.' (*Oppenheim and Knox, J M.*) GAJADHAR PRASAD *v* SIRDAR NIHAL SINGH. **16 R.D. 174 = 13 L.R. 60 (Rev.).**

OUDH RENT ACT (1886), S. 108.

——**S. 108**—*Scope.*

Sec. 108 bars the cognizance of a suit for the recovery of possession of any land from which an under-proprietor or a tenant has been illegally ejected by the landlord. It has no effect on the general jurisdiction of the Court to grant a declaration in favour of a person as to his under-proprietory rights in certain lands. It is not necessary that a party should be driven to a civil suit as regards the latter claim. (*Hasan, C. J. and Bisheshwar Nath, J.*) RAM SEWAK TEWARI *v.* SUKHDEI. **I.R. 1931 Oudh 287=132 I.C. 351=12 L.R. 75 (Rev.)=14 O. L.J. 180=15 R.D. 115=8 O.W.N. 163=A.I.R. 1931 Oudh 244.**

——**S. 108**—*Death of statutory tenant—Sub-tenant in possession—Ejectment by heir—Right of landlord to step in.*

When a statutory tenant dies the heir succeeds to the interest of his predecessor to the extent allowed by the Act. The landlord can no more step in at the juncture and declare a charge on the quality of the possession of the sub-tenant than he could have done during the life-time of the statutory tenant. The possession of the sub-tenant remained that of a statutory sub-tenant and nothing more and the statutory tenant or the statutory tenant's heir despite of any paper written by the landlord must be entitled to issue a notice in the Revenue Courts for the ejectment of such sub-tenant. If this were not so it would lay the tenant open to continuous harassment which is neither good policy nor good law. (*Keane, S. M. and Oppenheim, J. M.*) HARPAL SHUKAL *v.* SITAL DIN. **15 R.D. 263=12 L.R. 139 (Rev.).**

——**S. 108 (2)**—*Claimant to tenancy—Occupation of holding with permission of landlord—Liability for compensation.*

The proper criterion for the assessment of compensation is the amount of rent which the landlord would have realised from the land. Where the claimant preferred an appeal to the Board as regards his right to succeed to the tenancy and at the same time offered to the landlord to vacate the land but the landlord asked him to continue in possession;

Held, that the claimant was liable to pay compensation for the year preceding but not for the year succeeding the offer by him to vacate the land. (*Oppenheim, S. M. and Drake Brockman, J. M.*) LAL JAGDISH BAHADUR SINGH *v.* AJODHIA PRASAD. **11 O.W.N. 349=18 R.D. 156.**

——**S. 108 (2)**—*Finding of fact—Failure to give possession.*

Where the lower Court gave a finding based on admissible evidence to the effect that the landlord did not allow the tenant to cultivate the land for a certain number of years,

Held, that the finding could not be interfered with in second appeal. (*Nanavutty, J.*) RAM PAL SINGH *v.* ABDUL HAMID. **6 R.O. 494=18 R.D. 66.**

——**S. 108 (4)**—*Addition to holding or new holding—Question of fact—Separate transaction constituting different tenancy.*

Even during the subsistence of a contract of tenancy the landlord may enter into a separate contract with the tenant and a new holding will be constituted. It depends on the facts whether the new transaction constitutes a separate holding or a mere addition to an existing holding. (*Oppenheim, S. M. and Walton, J. M.*) SITAL *v.* JALILUR RAHMAN. **16 R.D. 576=13 L.R. 379 (Rev.).**

——**Ss. 108 (4), 36 and 62-A (1) (e), Proviso 1**—*Oudh Rent (Amending) Act, 1921—Pahikasht tenant cultivating before 1921 Act—Ejectment, suit for—Computation of period—Rule.*

A Pahikasht tenant, who is not proved to have held for 10 years before the commencement of Act 1921 may be deemed to have had his statutory period ended by 1329 Fasli, and could be ejected in a suit brought in 1339 Fasli. (*Oppenheim, S. M. and Walton, J. M.*) GUDDI SINGH *v.* CHHANGUR LOHAR. **14 L.R. 341 (Rev.)=17 R.D. 465.**

OUDH RENT ACT (1886), S. 108 (9) (c).

——**S. 108 (4)**—*Tenant holding under special agreement—Ejectment—Grounds.*

Tenants holding under a special agreement could only be ejected on such grounds as would justify ejectment under agreement under which they hold. Failure to pay the rent due would obviously be an implied ground under the agreement in the absence of any specific contract to the contrary. They would not, however, be liable to ejectment for transferring the land covered under their lease by mortgage, if there is no provision express or implied in their agreement that the lease would be forfeited in case of transfer by mortgage. But a permanent alienation would justify re-entry of the landlord against the transferee and the same would apply if the rights of the lessees disappeared in any transaction arising out of the mortgage. (*Drake Brockman, S.M and Knox, J. M.*) MAHOMED ASGHAR ALI *v.* NAWAB ALI. **1935 R.D. 364=1935 O.W.N. 733.**

——**S. 108 (8)**—*Suit for ejectment—Cause of action, if recurring.*

There is no annually recurring cause of action as regards the ejectment of a tenant of Oudh on the ground that he holds proprietary rights in the village. If an ejectment is once claimed on that ground and the claim if contested fails, the zamindar is estopped from renewing his pursuit. (*Oakden, S. M. and Smith, J. M.*) HEERA *v.* KALI PRAKASH. **14 R.D. 540=7 O.W.N. 929.**

——**S. 108 (8)**—*Suit to contest notice of enhancement of rent—Relation of rent to revenue—Considerations—Test—Holding to be taken as a whole.*

In considering the relation of the rent to the revenue, in a suit under S. 108 (8) of the Oudh Rent Act to contest a notice of enhancement of rent, it is essential to take the holding as a whole and not to consider the rent and revenue of individual plots. (*Drake Brockman, S. M. and Knox, J. M.*) UMA NATH BAKHSH SINGH *v.* BADRI. **1935 R.D. 325=1935 O.W.N. 828.**

——**S. 108 (9)**—*Suit for compensation—Mode of fixing compensation.*

In the case of wrongful dispossession the Rent Act allows him to sue for compensation within one year and does not specify him the compensation is to be calculated. The Court should decide the question of compensation after taking evidence as to the loss actually caused to the plaintiff with regard to the whole period of his dispossession. (*Oakden, S. M. and Smith, J. M.*) GOURI SHANKER *v.* BHAGWAN DIN. **15 R.D. 6.**

——**S. 108 (9) (c)**—*Ejectment decree—Reversal on appeal—Restitution—Procedure.*

Where the tenant was ejected in execution of an ejectment decree and the decree having been set aside in appeal he sought to recover compensation by way of restitution.

Held, that the procedure was to apply under S. 144, C. P. Code, and not to file a suit under S. 108 (9) (*c*) of the Oudh Rent Act. (*Oppenheim, S. M. and Walton, J. M.*) NARINDRA BAHADUR SINGH *v* GOVIND DAYAL. **16 R.D. 503=13 L.R. 293 (Rev.).**

——**S. 108 (9) (c)**—*Suit under—Cause of action—Date of accrual.*

OUDH RENT ACT (1886), S. 108.

A suit for compensation under S. 108 (9) (*c*) of the Oudh Rent Act must be instituted within one year from the date of the accrual of the cause of action, that is, from the date when possession was actually restored to the objector. (*Oakden, S. M. and Smith, J. M.*) GOURI SHANKER *v.* BHAGWAN DIN. **15 R.D. 6.**

———**S. 108 (10)**—*Applicability—Case of doubtful title and possession.*

S. 108 (10) provides for suits by under-proprietors for the recovery of the occupancy of any land from which an under-proprietor has been illegally ejected by the landlord. Where it cannot possibly be said that the parties were in possession and their title is doubtful, a suit does not lie under the section. (*Keane, S. M.*) RACHPAL SINGH *v.* BHAGWANT. **15 R.D. 629=12 L.R. 273 (Rev.).**

———**S. 108 (10)**—*Illegal dispossession by landlord and new tenants—Suit to recover possession—Jurisdiction of Civil Court.*

Where the landlord and the new tenants are responsible for the dispossession a suit to recover possession by the old tenants is cognizable by the Civil Court. To such a case S. 138 (10) does not apply. (*Keane, S. M. and Oppenheim, J. M.*) RAMPUR TEWARI *v.* DUBARI AHIR. **16 R D. 279.**

———**S. 108 (10)**—*Lease by one co-sharer—Tenant suing for possession impleading all co sharers—Decree by Revenue Court—Jurisdiction of Civil Court.*

If one co sharer executes a lease in favour of a certain person as a tenant, the lease is not necessarily invalid and ineffectual merely because it has not been executed by every one of the co sharers jointly. In the absence of proof that the tenants of the co sharers were all divided between the co sharers, it is difficult to say that a tenant of a holding in the *patti* should not be considered in the eye of the law as being a tenant of the joint body of co-sharers. Where a tenant brings a suit under S. 108, Cl. (10) of the Oudh Rent Act against his lessor and also the other co sharers in the *patti* for recovery of possession and the Revenue Court grants a decree, no suit can be maintained in a Civil Court for ejectment of the tenant as a trespasser on the ground that the lease in his favour is invalid. When a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by the Court, as between the parties, no subsequent suit will lie in a Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. (*King, C. J.*) RAM HET *v.* PRITHI NATH. **10 Luck. 682=154 I.C 87=7 R.O. 432=1935 R.D. 102=1935 O.W.N. 257=A.I.R. 1935 Oudh 229.**

———**S. 108 (10)**—*Notice of ejectment—Failure to contest—Suit to recover possession—Bar.*

The tenant whether he files a suit under S. 56 or not provided it is not decreed against him can file a suit under S. 108 (10) for recovery of possession if he thinks his ejectment was illegal on any ground. (*Drake Brockman, S. M. and Holmes, J. M.*) JASODA *v.* MAHOMED IBRAHIM. **14 L R. 854 (Rev.).**

———**S. 108 (10)**—*Oral relinquishment—Burden of proof.*

In a suit by the tenants against the landlord for recovery of possession under S. 108 (10), Oudh Rent Act, the landlord pleaded that the tenants had voluntarily relinquished their land.

Held, that there is nothing in the law to prevent a tenant giving up his land by oral relinquishment; but the burden of proof lies on the landlord to prove the relinquishment. (*Oppenheim, J.M*) BHAGWATI PRASAD *v.* SUMJHAWAN. **13 L.R. 1 (Rev.)=16 R.D. 83.**

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———**S. 108 (10)**—*Scope—Prior decree for ejectment operative—Suit for illegal dispossession—Maintainability.*

It is a misuse of S. 108 (10) to use it for revising a previous decree which is operative. Where such a decree is challenged the proper procedure is to have the same set aside and not to nullify its effect by a suit for illegal dispossession. (*Oakden, S. M.*) NOOR MAHOMED KHAN *v.* MAHOMED MEHDI ALI KHAN. **15 R.D. 146.**

———**S. 108 (10)**—*Suit against landlord and rival tenants—Plaintiff not ejected by landlord—Jurisdiction of Civil Court.*

Where the plaintiff was not illegally ejected by the landlord, a suit by him against the landlord and the rival tenants for recovery of possession of land is not affected by the provisions of S. 108, Cl. (10) of the Oudh Rent Act, and the Civil Court is therefore, not debarred from entertaining such a suit. (*Srivastava and Smith, JJ.*) SATROHAN SINGH *v.* BHARAT SINGH. **158 I. C. 484=8 R. O. 106=1935 R. D. 454=1935 O.W.N. 1013.**

———**S. 108 (10)**—*Suit against landlord and strangers—Relief as to recovery of possession—Forum.*

Where a person sues for recovery of possession against two di-possessing cultivators and the landlord, the suit is partly cognizable by the Civil Court and should therefore be instituted in the Civil Court and not in the Revenue Court. 6 O. W. N. 1095, Appl. (*Keane, S. M.*) DURGA UPHADHIA *v.* RAJESHWARI PRASAD. **15 R.D. 482=12 L R. 229 (Rev.).**

———**S. 108 (10)**—*Suit under—Objection—Waiver—Receipt of rent in ignorance.*

Where a person is allowed to be in possession under the mistaken belief that he was the heir of the late tenant the receipt of rent by the landholder does not prevent him from raising an objection later on that the trespasser cannot maintain a suit under S. 108 (10). (*Oakden, S.M. and Keane, J.M.*) SYED MAHOMED MEHDI *v.* RAM DEI. **15 R D. 158=12 L.R. 31 (Rev.).**

———**S. 108 (10)**—*Suit under—Prior decision by Revenue Court—Effect.*

Where a Revenue Court decided a question relating to expungement of *sir* entry and a suit was subsequently filed under S. 108 (10) in violation of a previous agreement to ex-proprietary rights.

Held, that the later suit was not barred. (*Oakden, S. M. and Oppenheim, J.M.*) RAM NATH BUX SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, KATESAR ESTATE. **15 R D. 91=12 L R 1 (Rev.).**

———**(as amended by Act IV of 1921), S. 108 (10-a)**—*Applicability—Suit for possession by thekadar who was never in possession.*

S. 108 (10 *a*) of the Oudh Rent Act applies only to suits contemplated by proviso (3) to S. 37-A. It has no application to a suit for possession against the landlord by a thekadar who had never been in possession of the holding. (*Srivastava, Ag.C.J.*) ANANT SINGH *v.* GANGA BAKHSH SINGH. **151 I.C. 1010=7 R.O 156 =11 O.W.N. 1184=18 R.D. 487=A.I.R. 1934 Oudh 447.**

———**S. 108 (15)**—*Co-sharer collecting less than his own share of rent—Liability to render accounts.*

Per *Full Bench.*—Though a co sharer who has collected less than his own share of rent cannot always be made liable to render accounts and to surrender a portion of the amount collected by him to the other co-sharers, he should be so made liable in cases in which on account of special reasons, justice and equity require

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it. (*King, C.J., Srivastava and Zia-ul-Hasan, JJ.*) NAWAB ALI KHAN *v.* BASANT LAL. **11 Luck. 248 = 156 I. C. 95 = 7 R. O. 656 = 1935 R. D 336 = 1935 O.W.N. 689 = A I.R. 1936 Oudh 117 (F.B.).**

——**S. 108 (15)**—*Co sharers collecting rent under agreement with lambardar—Collections amounting to less than their share—Liability to account to other co-sharers.*

Per *King, C.J. and Zia-ul-Hasan, J.*—Where the lambardar makes an agreement with certain co-sharers authorizing them to make collections of rent in the village and in pursuance of this agreement they collect rents, they are liable to account for the collections to the other co sharers even though they do not realise more than their own share of the rents.

Per *Srivastava, J.*—The rights and duties of the lambardar are of a personal character and are not capable of being delegated to another. However, a lambardar can act through an agent but in such cases the agent is under no liability to the co-sharers. On the other hand, the lambardar as principal is responsible for the acts of his agent. If the co-sharers are treated to have made the collections as agents of the lambardar, no decree for profits can be made against them for collections made as such agents by the Revenue Court under S. 108, Cl. (15) of the Oudh Rent Act. A suit under this section against a lambardar can be maintained only against the particular individual appointed as such and not against any other person as his representative. (*King, C.J., Srivastava and Zia ul Hasan, JJ.*) NAWAB ALI KHAN *v.* BASANT LAL. **11 Luck. 248 = 156 I. C. 95 = 7 R. O. 656 = 1935 R. D. 336 = 1935 O.W.N. 689 = A.I.R. 1936 Oudh 117 (F.B.).**

——**S. 108 (15)**—*Co-sharers—Suit for profits—Parties—All co-sharers, if necessary.*

There is no statutory provision that all the co-sharers must be impleaded in a profit suit and the fact that some of the co-sharers were impleaded as defendants beyond the period of limitation does not bar the entire suit. The implication of all the co sharers is desirable, but not absolutely necessary. (*Thomas, J.*) AJAI PAL SINGH *v.* HINDPAL SINGH. **1935 O.W.N. 398 = 1935 R D. 169 = A.I.R. 1936 Oudh 193.**

——**S. 108 (15)**—*Co-sharers—Suit for share of profits—Excess collection by one—Refund.*

Plaintiff, a co-sharer sued the lambardar and other co-sharers for share of profits. It was found that each co-sharer used to collect his own share of the profits which included the rent of the land in the cultivation of the respective parties.

Held, that as long as the defendants' collections during the years in suit were less than the share of the gross rental to which they were entitled the defendants cannot be called to account in the absence of any evidence to show that there was nothing except the less diligence displayed by the defendants in making collections that prevented them from collecting as large a share of the profits of their own shares as the plaintiffs succeeded in collecting out of the profits of their shares. (*Kisch, J.*) SRIPAL SINGH *v.* NAGESHWAR SINGH. **147 I.C. 1047 = 6 R.O. 349 = 14 L R. 406 (Rev.) = 17 R.D. 544 = A.I R. 1933 Oudh 280.**

——**Ss. 108 (15) and 126**—*Co-sharers — Collection of profits individually and by lambardar—Liability to account—Mode of adjustment.*

Amongst co-sharers, if some of them collect in each year rent which is more than the share actually due to them, the amount realized in excess should be paid over to the other co-sharers. Although collection is made individually, the lambardar or the other co sharers may

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be called upon to account to a co sharer. In all cases the account should be settled as a whole. (*Raza and Nanavutty, JJ.*) NAGESHWAR SINGH *v.* SRIPAL SINGH. **14 L.R. 408 (Rev.) = 17 R.D. 546.**

——**S. 108 (15)**—*"Profits"—Meaning of.*

The word "profits" means not only rent of the year to which the suit relates but also to such arrears of rent as are actually realised during that year. So a person who is entitled to the whole interest of the testator in the suit villages can, in a suit for profits, include his right to the share of profits which had become due to him in his lifetime. 46 All 791 (F.B.), Foll. (*Hasan, C.J. and Bisheshwar Nath, J.*) SHAMBHU RATAN *v.* BADRI NARAIN. **8 Luck. 283 = 141 I.C. 261 = 13 L. R. 392 (Rev.) = I.R. 1933 Oudh 49 = 9 O.W.N. 1005 = 16 R.D. 569 = A.I.R. 1933 Oudh 67.**

——**S. 108 (15)**—*Suit by co-sharer against lambardar—Costs of collections—Rate allowable to lambardars.*

In a suit by a co-sharer to recover his share of profit, the defendant lambardar cannot get more than 10 per cent. on account of costs of collections over and above 5, per cent, lambardari dues. (*Raza and Bisheshwar Nath, JJ.*) AMINA BIBI *v.* UMME ASIA. **7 Luck. 171 = I.R. 1931 Oudh 357 = 134 I C. 405 = 12 L.R. 156 (Rev.) = 14 O.L.J. 522 = 8 O.W.N. 647 = 15 R.D. 307 = A.I.R. 1931 Oudh 318.**

——**S. 108 (15)**—*Share of profits decreed to co-sharer—Interest on arrears of profits whether can be granted.*

Where a co-sharer is allowed a share of profits against the lambardar on the basis of gross rental the co-sharer is not further entitled to recover an interest on the arrears of profits. 3 O.W.N. 695, Rel. on. (*Raza and Bisheshwar Nath, JJ.*) AMINA BIBI *v.* UMME ASIA. **7 Luck. 171 = I.R. 1931 Oudh 357 = 134 I.C. 405 = 12 L.R. 156 (Rev.) = 14 O L.J. 522 = 8 O.W.N. 647 = 15 R.D. 307 = A.I.R. 1931 Oudh 318.**

——**S. 108 (15)**—*Suit by co-sharer for profits—Different subject-matter — Defendant lambardar whether can plead set-off.*

Where a co sharer sued a lambardar for his share of the profits and the latter pleaded a set-off in respect of amounts paid in satisfaction of certain decrees which were binding on plaintiff also,

Held, that the set-off pleaded arose out of a different subject-matter and that the same could not be allowed to be pleaded in that suit. (*Raza and Bisheshwar Nath, JJ.*) AMINA BIBI *v.* UMME ASIA. **7 Luck. 171 = I.R. 1931 Oudh 357 = 134 I.C. 405 = 12 L.R. 156 (Rev.) = 14 O.L.J. 522 = 8 O.W.N. 647 = 15 R.D. 307 = A.I.R. 1931 Oudh 318.**

——**S. 108 (15)**—*Thekadar—Suit by co-sharer for profits—Maintainability in Revenue Court.*

The status of the thekadar being merely that of a tenant it is open to the co sharer who has given a theka of his share to sue for profits in a Revenue Court under S. 108, cl. (15) of the Act. (*Kisch, J.*) RAMESHWAR *v.* ACHHAIBAR SINGH. **135 I.C. 381 = I.R. 1932 Oudh 29 = 8 O.W.N. 1050 = 15 R.D. 676 = 12 L.R. 373 (Rev.) = A.I.R. 1931 Oudh 403 (1).**

——**S. 108 (16)**—*Sale-deed—Construction—Sale of entire share with all rights—Reservation of certain plots as* bila lagani*—Right of vendee to sue vendor for arrears of revenue.*

Where a sale deed began by saying that the entire share of the vendor had been sold with all the rights appurtenant to it, and this was followed by a reservation in respect of certain plots which were described as *bila lagani*.

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Held, that the correct construction to be placed upon the document is that the rights reserved by the vendor in the excepted plots of land are those of an under proprietor and not that of a full proprietor, and that the relationship between the vendor and the vendee is not that of co-sharers, and that, therefore, a suit by the vendee against the vendor for arrears of revenue under S. 108, Cl. (16) is not maintainable. (*Srivastava, J.*) SURAJ PRASAD *v.* SHANKAR DAYAL. **159 I.C. 59=8 R.O. 154=1935 R.D. 519=1935 O.W.N. 1209=A.I.R. 1936 Oudh 79.**

——**S. 108 (16)**—*Suit by pattidar to recover arrears of revenue—Limitation.*

A suit under S. 108, cl. (16) by a pattidar for arrears of revenue payable through him by the co sharers whom he represents is governed by S. 132 of the Oudh Rent Act. (*Tullan, J.*) NIL KANTHA *v.* SURAJ PRASAD. **6 Luck. 395=I.R. 1931 Oudh 113=130 I.C. 65 (1)=7 O.W.N. 1089=11 L.R. 397 (Rev.)=14 R.D. 667=A.I.R. 1931 Oudh 32.**

——**S. 108 (18)**—*Assignee of Government Revenue—Suit for arrears—Right to interest.*

In a suit by the assignee of Government Revenue against the lambardar, he is entitled to recover his arrears of land revenue with interest. A.I.R. 1929 All. 29, Rel. on; 23 All. 5, Ref. (*Nanavutty, J.*) SHAMS ARA BEGAM *v.* AMBIKA DUTT RAM. **149 I.C 901=18 R.D. 307=6 R.O. 602=11 O.W.N. 754=A.I.R. 1934 Oudh 259 (2).**

——**S. 113**—*Suit under Ss. 127 and 108 (2)—Jurisdiction of Assistant Collector, Second Class.*

Owing to the provisions of S. 113 of the Oudh Rent Act, an Assistant Collector of the Second Class is not empowered to try a suit under Ss. 127 and 108 (2) for recovery of arrears of rent, for determination of the rent and for ejectment of the defendants. S. 15, C. P. Code, cannot be invoked to make the suit cognisable by him as it is inconsistent with S. 113 of the Oudh Rent Act. (*Srivastava and Zia-ul-Hasan, JJ.*) FAZAL MOHAMMAD KHAN *v.* MOHAMMAD HABIB. **10 Luck. 562=154 I C. 91=7 R.O. 437=1935 R D. 86=1935 O.W.N. 242=A.I.R. 1935 Oudh 251.**

——**S. 116**—*Administrative orders of Commissioner—Power of Board in second appeal to interfere with.*

Whith the administrative orders passed by the Commissioner, the Board has no concern. But where such an order was passed by him accepting an appeal under S. 116 of the Oudh Rent Act, and the matter was brought to the judicial notice of the Board in second appeal, the Board are entitled to interfere and pass such orders as are judicially justified. (*Oppenheim, S.M. and Drake Brockman, J.M.*) RAGHUBAR DAYAL *v.* RAM PAL SINGH. **14 L.R. 530 (Rev.)=17 R D. 698.**

——**S. 116**—*Finding of fact—Interference.*

The Commissioner's finding of fact based on reasonable grounds cannot be challenged in second appeal. (*Keane, S.M*) HARNAM SINGH *v.* BASANT. **15 R. D. 632=12 L.R. 268 (Rev.).**

——**S. 119**—*Suit under S. 127—Decree for ejectment only—Forum of appeal.*

Where in a suit under S. 127 of the Oudh Rent Act, an Assistant Collector of the first class dismisses the plaintiff's suit as regards arrears of rent and passes a decree for ejectment only, an appeal lies against the decree under S. 119 to the District Judge, as the suit under S. 127 in so far as it is a suit for rent is a suit of the description under S. 108 (2) and the fact that the decree passed by the trial Court is for ejectment only is immaterial. (*King, C.J.*) BHAGWAN DUTTA *v.* BALBHADDAR. **10 Luck. 648=154 I.C. 263=7 R.O. 457 (2)=1935 R.D. 104=1935 O.W.N. 235=A.I.R. 1935 Oudh 252.**

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——**S. 120-A**—*Board's powers of review.*

The powers of review given to the Board under S. 120-A of the Oudh Rent Act, are very much wider than the powers given in S. 114, C. P. Code, and the Board have unlimited powers. (*Drake Brockman, S.M. and Knox, J.M.*) KAMTA PRASAD *v.* LAL BAHADUR. **1935 R.D. 87=1935 O.W.N. 219.**

——**(as amended), S. 120-A**—*Review of orders—Jurisdiction of Board.*

Under S. 120 A the Board have unlimited powers to review their orders. (*Oppenheim, S.M. and Knox, J. M.*) AZIMULLAH *v.* DHARAM RAJ SAHU. **16 R.D. 193=13 L.R. 100 (Rev.).**

——**S. 124-B**—*Appeal ordinarily lying to District Judge—As per notification preferred to first Subordinate Judge—Latter can proceed under S. 124 B.*

If in the ordinary course an appeal lies to the District Judge the mere fact that under the notification the first Subordinate Judge is vested with the powers of deciding appeals cannot alter the obvious interpretation of the provisions of S. 121-B. The test laid in S. 124-B is whether an appeal does lie or does not lie to the District Judge and not whether it is preferred to the District Judge. (*Wazir Hasan, C.J.*) SANGAM LAL *v.* BARMHADIN. **6 R.O. 381 (1)=148 I C. 239=11 O.W. N. 67=18 R.D. 48=A.I.R. 1934 Oudh 95.**

——**S. 126**—*Collections made by co-sharers—Effect on rights of lambardar.*

The mere fact that co sharers made their own collections in a joint estate does not amount to a division of land among them and does not take the case out of the provisions of S. 126 of the Oudh Rent Act and disentitle the lambardar from collecting the rents and doing all necessary acts relating to the management of the estate for the common benefit of all the co-sharers. (*Raza and Nanavutty, JJ.*) NAGESHWAR SINGH *v.* SRIPAL SINGH. **8 Luck. 665=150 I.C. 437=10 O. W.N. 1286=14 L.R. 408 (Rev.)=17 R.D. 546=A.I. R. 1934 Oudh 189.**

——**Ss. 126 and 108 (5)**—*Co-sharers—Collection of profits individually and by lambardar—Liability to account—Mode of adjustment.*

Amongst co-sharers, if some of them collect in each year rent which is more than the share actually due to them, the amount realised in excess should be paid over to the other co sharers. Although collection is made individually, the lambardar or the other co-sharers may be called upon to account to a co-sharer. In all cases the account should be settled as a whole. (*Raza and Nanavutty, JJ.*) NAGESHWAR SINGH *v.* SRIPAL SINGH. **8 Luck. 665=150 I.C. 437=10 O.W.N. 1286=14 L.R. 408 (Rev.)=17 R.D. 546=A.I.R. 1934 Oudh 189.**

——**S. 126 (d)**—*Lambardar—Authority to issue notice of ejectment.*

Where the lambardar of the mahal is not shown to have collected the tenants' rents or to have had authority to act as sole agent of the proprietary body, he is not entitled to issue a notice of ejectment without the consent of the other co-sharers. (*Oakden, S.M. and Smith, J.M.*) BHUP *v.* KALKA SINGH. **14 R.D 720.**

——**S. 126 (1)**—*Decree obtained by deceased lambardar—Right of one of his sons to execute.*

S. 126 (1) of the Oudh Rent Act is a bar to the execution of a decree obtained by a deceased lambardar, by one of his sons, in the absence of evidence that he is acting on behalf of the coparcenary body in executing

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the decree. (*Knox, S.M. and Grant, J.M.*) TOREY *v.* HAR PRASAD. **1935 O W.N. 1192=1935 R.D. 506.**

———**S. 126 (1)**—*Manager.*

The manager referred to in Cl. (1) must be the lambardar. (*Raza and Nanavutty, JJ.*) NAGESHWAR SINGH *v.* SRIPAL SINGH. **8 Luck. 665=150 I C. 437 =10 O.W.N. 1286=14 L.R. 408 (Rev.)=17 R.D. 546=A.I.R. 1934 Oudh 189.**

———**S. 126 (1)**—*Right to sue in ejectment—Pakhtadari mahal—No manager appointed—Right of lambardar.*

In a joint estate in which division of land has not been made, if the sharers have not appointed a manager, it must be presumed that they have accepted the lambardar as their manager and authorized him to collect rents and ejectment being one of the functions of the manager, the lambardar can issue notice of ejectment. By analogy, even in a pukhtadari mahal, in the absence of any manager, the lambardar has the powers of a manager under S. 126 (1) of Oudh Rent Act. (*Oppenheim, S.M. and Walton, J.M.*) MAHOMED RAZA *v.* BABAR ALI. **14 L R. 116 (Rev.)=17 R.D. 193.**

———**S. 126 (3)**—*Local custom—Plea of—Not open in appeal.*

A plea of local custom or special contract cannot for the first time be raised in appeal. (*Raza and Nanavutty, JJ.*) NAGESHWAR SINGH *v.* SRIPAL SINGH. **8 Luck 665=150 I.C. 437=10 O.W.N. 1286=14 L.R. 408 (Rev.)=17 R.D. 546=A.I.R. 1934 Oudh 189.**

———**S. 127**—*Applicability—Acquisition of title by adverse possession.*

Where the defendant has acquired title to a land by adverse possession the plaintiff cannot invoke the assistance of S. 127 of the Rent Act to deprive the defendant of the land (*Kisch, J.*) SHEORAJ NARAIN *v.* JAGANNATH PRASAD. **I R. 1931 Oudh 324=132 I.C. 772 =12 L.R. 193 (Rev.)=15 R.D. 424=8 O.W.N. 854 =A.I R. 1931 Oudh 381.**

———**S. 127**—*Applicability*—Bona fide *claimant—Question of title involved.*

S. 127 is not meant to authorize Revenue Courts to inquire into question of disputed title and to decide questions of a civil nature between persons who are *bona fide* claimants of the property. Where the defendant appeared to be a *bona fide* claimant and the question involved were essentially questions of title which should be decided by the Civil Court,

Held, that S. 127 is inapplicable to such a case. (*Raza, J.*) KRISHNAPAL SINGH *v.* RAMESHWAR BAKSH SINGH. **I R. 1931 Oudh 322=132 I.C. 770= 12 L.R. 183 (Rev.)=15 R.D. 422=8 O W.N. 849= A.I.R. 1931 Oudh 401.**

———**S. 127**—*Applicability—Defendant admitted to be owner in possession—Mistake of partition officer—Defendant shown as tenant—Liability to ejectment.*

Where defendant has been admitted by plaintiff to be owner of a grove and defendant is in possession of same, simply because by a mistake of the partition officer, plaintiff is shown as the owner and defendant as the tenant, defendant cannot be deemed to be a trespasser or tenant of the plaintiff and S. 127 has no application. Hence plaintiff cannot treat a defendant as trespasser, and sue for ejectment and rent. (*Nanavutty, J.*) MANNI LAL *v.* LAL BAHADUR. **9 Luck 631=6 R.O. 465=18 R.D 272=148 I.C. 911=11 O.W.N. 519= A.I.R. 1934 Oudh 174.**

———**S. 127**—*Applicability—Defendant setting probable claim of adverse possession.*

Where in an ejectment suit the defendant sets up adverse proprietary possession of the suit land and the

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claim of the defendant appears to be a probable one he cannot be treated as a person coming under S. 127. (*Kisch, J.*) SRI AUTAR *v.* SPECIAL MANAGER, COURT OF WARDS, BERWA ESTATE, GONDA. **135 I.C. 376=I.R. 1932 Oudh 24=8 O.W.N. 1101=15 R D. 673=12 L.R. 375 (Rev.).**

———**S. 127**—*Decree for arrears of rent and for ejectment—Appeal against decree for arrears of rent—Court-fee, if payable on relief relating to ejectment.*

Where in a suit instituted under S. 108, Cl. (2) read with S. 127, sub-S. (1) of the Oudh Rent Act for arrears of rent, a decree for arrears of rent is passed under S 127 (1), and also a de ree for ejectment under S. 127 (2), and the defendant appeals against the decree, no Court-fee is payable on the relief relating to ejectment. Although the decree in question is a decree both for arrears of rent and for ejectment, in the appeal the defendant can only challenge the decree for arrears of rent. If he succeeds in his appeal, it would no doubt follow that the decree for ejectment would have to be set aside along with the decree for arrears of rent, as the decree for ejectment is only consequential upon the decree for arrears of rent. Nevertheless the appeal cannot be regarded as an appeal against the decree for ejectment as no such appeal would lie. (*King, C. J. and Zia-ul-Hasan, J.*) PUTTAN *v.* TRUST MAHMUDABAD ESTATE. **158 I C. 49=1935 R.D. 434=8 R.O. 61= 1935 O.W.N. 966=A.I R. 1936 Oudh 13.**

———**S. 127**—*Dispute as to title—Decree whether can be passed.*

Where in a suit under S. 127 the plaintiff took his stand on a partition proceeding which was concluded in 1915 and the defendants contended that he had been in possession since before the year 1905 and they challenged the plaintiff to turn them out,

Held, that there was a dispute as to title and not a mere attempt to challenge a partition proceeding and that a decree could not be passed under S. 127 (*Pullan, J.*) PRAG PRASAD *v.* SRI NATH. **I.R. 1931 Oudh 152=130 I.C. 344 (1)=14 O.L J. 86=12 L.R. 37 (Rev.)=8 O.W.N. 23=15 R D. 13=A.I.R. 1931 Oudh 71.**

———**S. 127**—*Grove land—Right of tenant to possession.*

It is established law that the right of a tenant to retain possession of grove land lasts only so long as he maintains it as a grove but when he occupies it for the purpose of cultivation the grove tenure ends and the landlord is at liberty to treat him as a trespasser. (*Kisch, J.*) SHIVA SHANKAR BAKHSH SINGH *v.* RUH ULLAH. **134 I C 1104=12 L R 377 (Rev.)=I.R. 1932 Oudh 16=8 O.W.N. 1103=15 R D. 675=A.I.R. 1932 Oudh 59.**

———**S. 127**—*Receipt of rent—Mistake of talukdar—Effect.*

The circumstances under which rent was accepted must be taken into account before they can be construed as an admission of tenancy or as carrying an implication of consent. Receipt of rent under the mistaken impression that the party was entitled to hold as an heir does not debar the talukdar from taking proceedings under S. 127. (*Srivastava, J.*) MAHABIR *v.* JAGANNATH BAKHSH SINGH. **9 Luck 282=6 R.O. 255=17 R. D. 1128=10 O W N. 1259=147 I.C. 349=14 L.R. 898 (Rev.)=A I.R. 1934 Oudh 14.**

———**S. 127**—*Trespasser in possession—Suit by rent free grantee for rent—Exaggerated claim—Whether liable to be dismissed.*

Where there is no difficulty in deciding about a fair and equitable rate of rent to be paid by a trespasser in

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possession the fact that the rent free grantee claims a very high rate does not deprive the latter of his right to obtain the amount due to him. (*Keane, S. M. and Oppenheim, J. M.*) PARMESHWAR DIN *v.* SHEO SAHAI. **15 R D. 305=12 L R. 98 (Rev.).**

——**S. 127 (2)**—*Decree for ejectment—When can be passed.*

Under S. 127 (2), Oudh Rent Act, a decree for ejectment can only be passed as a consequential relief, on the application of the plaintiff, if a decree for arrears of rent has already been passed under sub-S. (1). If therefore the Court fails to pass a decree for arrears of rent under sub S. (1), it has no jurisdiction to pass a decree for ejectment. (*King, C. J.*) BHAGWAN DUTTA *v.* BALBHADDAR. **154 I.C. 263=7 R.O. 457 (2)=1935 R.D. 104=1935 O.W.N. 235=A.I.R. 1935 Oudh 252.**

——**S. 129**—*Applicability—Payment by pattidar—Suit to recover same.*

An arrear of revenue means an arrear not from the point of view of the Government but from the point of view of the person who ought to have paid it. Where the pattidar paid the revenue on behalf of the defendant and sued to recover the same.

Held, that the suit was one to recover arrear of revenue and is governed by S. 132 and not by S. 129 of the Oudh Rent Act. (*Pullan, J.*) NIL KANTHA *v.* SURAJ PRASAD. **6 Luck. 395=I.R. 1931 Oudh 113=130 I.C. 65 (1)=7 O.W N. 1089=11 L.R. 397 (Rev.) 14 R.D. 667=A.I R. 1931 Oudh 32.**

——**S. 129**—*Suit under S.* 108 (9) (c)—*Date of accrual of cause of action.*

A suit for compensation under S. 108 (9) (*c*) of the Oudh Rent Act must be instituted within one year from the date of the accrual of the cause of action, that is, from the date when possession was actually restored to the objector. (*Oakden, S.M and Smith, J M.*) GOURI SHANKER *v.* BHAGWAN DIN. **15 R.D. 6.**

——**S. 132**—*Arrear of revenue—Meaning—Payment by pattidar—Suit to recover same.*

An arrear of revenue means an arrear not from the point of view of the Government but from the point of view of the person who ought to have paid it. Where the pattidar paid the revenue on behalf of the defendant and sued to recover the same.

Held, that the suit was one to recover arrear of revenue and is governed by S. 132 and not by S. 129 of the Oudh Rent Act. (*Pullan, J.*) NIL KANTHA *v.* SURAJ PRASAD. **6 Luck. 395=I.R. 1931 Oudh 113=130 I.C. 65 (1)=7 O.W.N. 1089=11 L.R. 397 (Rev.)=14 R.D 667=A.I.R. 1931 Oudh 32.**

——**S. 135**—*C. P. Code, O.* 21, *R.* 100—*Applicability to Revenue Court.*

The provisions of O. 21, R. 100, C. P. Code, are applicable to Revenue Courts in Oudh and the fact that a person has an alternative remedy by a suit under S. 108, Cl. (10) of the Oudh Rent Act does not bar his right of making an application to the Revenue Court under O. 21, R. 100. (*King, C. J. and Nanavutty, J.*) THAKUR BAKHSH SINGH *v.* ABHAIDAT SINGH. **11 Luck. 283=155 I.C. 1082=7 R.O. 639=1935 R.D. 346=1935 O.W.N. 698=A.I.R. 1935 Oudh 462.**

——**S. 135**—Suit not cognisable by Assistant Collector, second class owing to S. 113—S. 15, C. P. Code, if can be invoked. *See* OUDH RENT ACT, S. 113. **1935 O.W.N. 242=A.I.R. 1935 Oudh 251.**

——**S. 141**—*Decree for arrears of rent—Future interest—C. P. Code, S.* 34.

S. 141 of the Oudh Rent Act does hot control the discretion possessed by the Court under S. 34, C. P. Code, to allow future interest at such rate as the Court deems reasonable. (*Srivastava, J.*) ANGNO *v.* MOHAN LAL. **6 R.O. 505=148 I.C. 1207=18 R.D. 301=11 O.W.N. 763=A.I R. 1934 Oudh 239.**

OUDH RENT ACT (1886), S. 151.

——**S. 141 (as amended by Act IX of 1934)**—*Retrospective operation of.*

The Oudh Rent Amendment (Act IX of 1934) which reduces the rate of interest in S. 141 of the Oudh Rent Act from Re. 1 to 12 annas has not been given retrospective effect. (*Srivastava and Zia-ul-Hasan, JJ.*) ZAMIN ALIKHAN *v.* SANKATA PRASAD. **158 I C. 714=1935 R D 487=8 R O. 115=1935 O.W.N. 1128=A.I.R. 1936 Oudh 83.**

——**S. 145**—*Applicability—Separate liabilities of judgment-debtors for less than Rs.* 500.

For the application of S. 145 of the Oudh Rent Act, what has to be looked at is the total amount which the decree involves, even where the decree determines the liabilities of the judgment-debtors *inter se* for lesser amounts. The section does not apply in the case of a decree where the separate liability of each of the judgment-debtors is less than Rs 500 (*Thomas and Smith, JJ.*) SAHAI LAL *v.* THE DEPUTY COMMISSIONER, SITAPUR. **10 Luck 260=152 I C. 457=7 R.O 224=11 O.W.N. 1294=18 R.D. 554=A.I.R. 1935 Oudh 9 (2).**

——**S. 145**—*Decree for arrears of rent amended—Execution application within three years of amended decree not barred.*

Where a decree passed for arrears of rent is amended, a process of execution applied for, three years after the original but within three years of the amended decree is not barred by the three years' rule of limitation as provided by S. 145, Oudh Rent Act. 3 O.W.N. 982, Foll. (*Kachhpal Singh, J.*) NAROTTAM DASS *v.* ATUL CHANDRA. **150 I C. 947=7 R.O. 76=11 O.W. N. 814=18 R.D. 396=A.I R. 1934 Oudh 289.**

——**S. 145**—*Rent decree for less than Rs.* 500—*Execution petition for attachment and sale of movables—Fresh application after three years to attach immovables—If barred by limitation.*

Under S. 145 of the Oudh Rent Act a holder of a rent decree for a sum not exceeding Rs. 500 is not entitled after the expiration of a period of three years from the date of the decree, to ask the Court to execute the same in a manner different from that asked for in the application already pending. Where, therefore, in execution of such a decree by attachment and sale of the movables, it was reported that they could not be discovered, a fresh application for the realization of the decretal amount from the immovable property, made three years after the passing of the decree is barred by limitation. (*Smith, J.*) RAJESHWARI PRASAD *v.* KHATUMAN. **158 I.C 295=1935 R D. 473=8 R.O. 80=1935 O.W.N. 1084=A.I R. 1936 Oudh 113.**

——**S. 145**—*Scope—Pending execution application—Amendment—Limitation.*

When a rent decree for an amount less than Rs. 500 is under execution, an application by the decree-holder for amendment of the pending application, made after three years from the date of the decree cannot be allowed, if the amendment sought necessitates the issue of fresh process. (*Zia-ul Hasan, J.*) LALJI SINGH *v.* CHHOTKAU. **10 Luck. 258=152 I.C. 322=7 R.O. 206=18 R.D. 569=11 O.W.N. 1306=A.I.R. 1935 Oudh 29.**

——**S. 151**—*Decree for arrears of rent—Execution against immovable property.*

In execution of a decree for arrears of rent, the decree-holder proceeded against the movable property of the judgment-debtors. After an imperfect investigation

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into the question what movable property, if any, was in the possession of the judgment-debtors, the attachment was not proceeded with. Afterwards an execution application was made, asking that certain immovable property should be attached. Objection was taken by the judgment-debtor on the ground that the requirements of S. 151 of the Oudh Rent Act had not been properly complied with and that there was movable propery available for the satisfaction of the decree. It was found that a fresh execution application would be barred under S. 145 of the Oudh Rent Act.

Held, that under the circumstances equity demands that the attachment of the immovable property should be maintained and that the question whether there is any movable property available for the satisfaction of the decree should be gone into and if there is any such movable property, the decree-holder must be required to enforce his decree if possible against it and if there is no such movable property, the immovable property which has been attached can be sold. (*Smith, J.*) SHEO BARAN SINGH *v.* RAM KALI KUNWAR. **157 I.C. 644 = 8 R.O. 34 = 1935 R D. 422 = 1935 O.W.N. 931 = A.I.R. 1936 Oudh 145.**

———**S. 151**— *Immovable property — Execution against—When permitted.*

The decree holder can attach the immovable property of the judgment-debtor in execution of a money decree but he cannot put it to sale unless and until he has satisfied the Court that the amount of the decree sought to be executed cannot be realized from the movable property of the judgment debtor. (*Wazir Hasan, C.J. and Nanavutty, J.*) SURENDRA NARAIN SINGH *v.* RAJA LAL BAHADUR SINGH. **9 Luck. 378 = 147 I C. 1088 = 11 O.W.N. 109 = 18 R.D. 70 = A.I.R. 1934 Oudh 59.**

———**S. 154 (2)**—*Applicability—Involuntary transfers.*

An auction purchaser of under-proprietary rights cannot be held liable under Cl. (2) of S 154 of the Oudh Rent Act for arrears of rent that accrued due before his purchase of the under-proprietary rights, as that clause has no application to involuntary transfers. (*King, C.J. and Zia-ul Hasan, J*) BISHUNATH SARAN SINGH *v.* GHANSHYAM DAS. **159 I C. 264 = 1935 R D 551 = 8 R.O. 166 = 1935 O.W N. 1229 = A.I.R. 1936 Oudh 106.**

———**S. 154 (2)**—*Decree for arrears of rent against whole body of under-proprietors—Decree-holder subsequently purchasing rights of some of them—Duty to give credit for proportionate amount of decree.*

Where a talukdar obtained a decree for arrears of rent jointly and severally against the whole body of under-proprietors and subsequently purchased the entire rights and interests of some of the judgment debtors amounting to an eight annas share in the under-proprietary tenure with respect to the rent of which he had obtained the aforesaid decree, and put into execution his entire decree against the judgment-debtors other than his vendors.

Held, that although the decree-holder cannot be deprived of his right to execute the decree by reason of his purchase of the eight annas share in the under proprietary tenure, it would be only just and equitable that he should be required to give credit for half of the amount of the decree for which he has become liable under S. 154 of the Oudh Rent Act, and the amount for which execution is sought should, therefore, be reduced by half. (*Srivastava and Zia-ul-Hasan, JJ.*) GUR PRASAD *v.* UDAI BHAN PRATAP SINGH. **157 I.C. 651 = 8 R O. 37 = 1935 R.D. 419 = 1935 O.W.N. 887 = A.I.R. 1935 Oudh 449.**

OUDH SETTLED ESTATES ACT (1917), S. 22.

———**S. 156**—Scope—Agricultural lease reserving annual rent—Term not fixed—Validity without registration. *See* REGISTRATION ACT, S. 17 (1) (*d*). **11 O. W.N. 1565 = A.I.R. 1935 Oudh 90.**

———**S. 157, Sch. D (3)**—*Waste land—Grant by Government—Statutory rights, accrual of.*

Land granted by the Government as a waste land retains that character until it is notified by the Government that it should no longer come within that category. So long as no such notification has been issued, statutory rights cannot accrue therein. (*Oppenheim, S. M.*) GANGA KURMI *v.* SECRETARY OF STATE FOR INDIA. **14 L.R. 323 (Rev.) = 17 R D. 474.**

———**S. 188**—*Admission to tenancy under misapprehension—Landlord whether bound.*

If a person not entitled to a holding and not admitted to it by the landlord is allowed to remain in possession and rent is accepted under the mistaken idea that he was an heir to the deceased tenant, the acceptance of rent does not find the landholder or amount to his being treated as a tenant. (*Oppenheim S.M. and Walton, J. M*) RANI KANIZ ABID TALUQDARIA *v.* MAHABIR. **13 L.R. 234 (Rev.).**

———**Chap. VII-A**—*Applicability—Land entered as rent free since* 1887.

Where land was recorded in 1887 as rent free and was since then had been so recorded, it is governed by Chap. VII-A. (*Oppenheim, J.M.*) NAZIM HUSAIN *v.* BANSI SARAN. **15 R.D. 661.**

———**Chap. IX**—*Rules regarding limitation of suits—Applicability to civil suits.*

The rules regarding litmitation of suits enacted in Chap. IX of the Oudh Rent Act apply only to suits under that Act and can, in no circumstances, govern suits instituted in the Civil Court. (*King, C.J. and Nanavutty, J.*) THAKUR BAKHSH SINGH *v.* ABHAIDAT SINGH. **11 Luck. 283 = 155 I.C. 1082 = 7 R. O. 639 = 1935 R.D. 346 = 1935 O.W.N. 698 = A.I.R. 1935 Oudh 462.**

OUDH SETTLED ESTATES ACT (1917), Ss. 15, 16, 17 and 22—*Bequest of settled estate to widow absolutely—Creation of charges—Conferment of powers of will and gift—Validity—Estate taken.*

Where a taluqdar executes a will of his settled estate bequeathing it to his wife, purporting to confer on her an absolute estate, creating certain charges, and giving her powers to make a will or gift in favour of certain persons the will should be construed as conferring only a "statutory estate" on the legatee *i.e.*, such an estate as the holder of a settled estate can possess under the Settled Estates Act of 1917. The charges as well as the power of will and gift are void, bus the inclusion in the will of these provisions which are invalid will not make the whole will invalid. (*King, C.J. and Zia-ul-Hasan, J*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **10 Luck. 606 = 153 I.C. 878 = 7 R. O. 409 = 1935 O.W. N. 68 = A.I.R. 1935 Oudh 198.**

———**Ss. 16, 17 and 22**—Applicability and scope—Bequest of settled estate to widow—Validity. *See* OUDH ESTATES ACT (1869), S. 22 AND OUDH SETTLED ESTATES ACT, SS 16 AND 17. **1935 O.W. N. 68 = A.I.R. 1935 Oudh 198.**

———**S. 22**—*Scope—Bequest to widow—Validity.*

It cannot be laid down as a general proposition that no bequest of a settled estate can be made in favour of any person, like a widow who is incapable of constituting a fresh stock of descent. (*King, C. J. and Zia-ul-Hasan, J.*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **10 Luck. 606 = 153 I.C. 878 = 7 R. O. 409 = 1935 O.W.N. 68 = A.I.R. 1935 Oudh 198.**

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——**S. 22 (2)**—*"Stranger"—Widow of* taluqdar, *if.*

The widow of a *taluqdar* belongs to one of the classes specified in S. 22 of the Oudh Estates Act, 1869, and is not a "stranger" within the meaning of S. 22 (2) of the Oudh Settled Estates Act, 1917 (*King, C. J. and Zia ul Hasan, J.*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **10 Luck. 606=1935 O.W.N. 68 =153 I.C. 878=7 R.O. 409=A.I.R. 1935 Oudh 198.**

OUDH SETTLEMENT ACT (1866), S. 4—*Settlement—Nominal increase in assessment — Proportionate increase in rent payable by under proprietor.*

It is part of the duty of a Settlement Officer to reassess all permanently settled mahals, although the purpose of that re assessment is not any alteration in the amount of revenue actually payable, just as it is a part of his duty to reassess *mahals*, the revenue of which has been assigned or redeemed. A new revenue whether nominal or partly nominal is declared in either case and this declaration amounts to a "settlement" even though the actual effect on the proprietor is merely to vary the amount payable as cesses.

Held, that the rent of the under-proprietor is liable to enhancement in proportion to the increase in the nominal assessment of the *mahal*. (*Smith, J. M.*) SHEO CHARAN SINGH *v.* EMPEROR. **15 R.D. 233.**

OUDH SUB-SETTLEMENT ACT (XXVI OF 1866), Sch., R. 10—*Under proprietary title—Proof of.*

One of the conditions laid down in R. 10 as necessary to establish under-proprietary title is that the land in question has been held by the claimant or his ancestors as *sir* or *nankar* when they were in proprietary possession. Where, on the other hand, the land was admittedly *abadi*, and there was no express grant at any under proprietary rights by the taluqdar, there is no presumption of a grant of under proprietary rights (*Bisheshwar Nath, J.*) JAMWANTI KUNWAR *v.* CHETAN DAS. **8 Luck. 129=141 I C. 706=I R. 1933 Oudh 75=9 O. W.N. 745=16 R.D. 499=13 L.R. 328 (Rev.)=A.I. R. 1932 Oudh 290.**

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See (1) ADVERSE POSSESSION.
(2) CO-SHARER.
(3) LIMITATION ACT, ART. 144—ADVERSE POSSESSION.

OUTCASTE *See* CASTE DISABILITIES REMOVAL ACT, (1850).

OWNERSHIP. *See* EVIDENCE.

PACCA ARAT PAKKA ADATIA. *See* PRINCIPAL AND AGENT—PAKKA ADATIA.

PAKKI ADAT. *See* CONTRACT—PAKKI ADAT.

PANCHAN SYSTEM *See* B. T. ACT, S. 180-A.

PANCHAYAT COURT

See (1) CR. P. CODE, S. 195.
(2) MADRAS VILLAGE COURTS ACT (1889), SS. 9, 10, 45, ETC.

PANNAI LANDS. *See* MADRAS ESTATES LAND ACT, SS. 168 AND 185.

PAPER CURRENCY ACT (X OF 1923), S. 25—*Effect—Promissory note not properly drawn up—Admissibility.*

There is no provision in the Paper Currency Act which forbids the admissibility in evidence of a promissory note which has been drawn up in a from condemned by S. 25 of the Act. (*Mears, C.J., Mukerji and Young, JJ.*) NAZIR KHAN *v.* RAM MOHAN. **53 All. 114=I.R. 1931 All. 627=133 I.C. 307=1931 A. L.J. 64=A I.R 1931 All. 183 (F.B.).**

——**S. 25**—*Promissory notes payable to bearer—Validity of.*

Promissory notes payable to bearer on demand, unless drawn on bankers, shroffs or agents, are prohibited by

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S. 25 and no suits can be maintained on them. 40 M. 585 and 42 I.C. 706, Ref. (*Dhavle, J.*) BRIJBHUSAN PANDE *v.* RAMJANAM KUER. **142 I.C. 163=I.R. 1933 Pat. 127=13 Pat.L.T. 506=A.I.R. 1932 Pat. 324.**

——**S. 25**—*Promissory note payable to named person or bearer—Validity.*

A promissory note which is payable to a named payee or bearer is invalid as contravening the provisions of S. 25. (*Rankin, C. J. and Buckland, J.*) H. V. LOW & CO., LTD. *v.* SUDHANNA KUMAR CHAKRVARTI. **58 Cal. 1453=35 C W.N. 587=135 I.C. 288=I.R. 1932 Cal. 96=A.I R. 1931 Cal. 791 (1).**

——**S. 29, R. 1**—Currency Officer—If public servant authorised to receive evidence. *See* PENAL CODE, S. 199. **12 Mys.L J. 467.**

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——*Admission—Deed executed by Pardanashin lady—Binding nature of.*

Though an admission is usually a very good piece of evidence and binding upon the party who makes it, in the case of an admission contained in a deed executed by a pardanashin lady it cannot be held to be binding on her or conclusive. (*Nasim Ali, J.*) BHOLANATH CHATTOPADHAYA *v.* MRITYUNJOY CHATTOPADHAYA. **153 I.C. 532=7 R C. 286=59 C.L.J. 532=A.I R. 1934 Cal. 851.**

——*Burden of proof—Suit for restoration of G. P. notes against guardian—Plea of having delivered notes to ward.*

Where in a suit against the guardian of an illiterate pardanashin lady who had since attained majority, for the restoration of certain G. P. Notes belonging to the ward, the guardian pleaded that he had already made them over to her and produced a receipt singned by her, in accordance with the principles applicable to pardanashin ladies, it is incumbent upon the guardian to prove that the contents of the receipt were explained to, and understood by her, when she signed it. (*Mitter and Mc Nair, JJ.*) HEERALAL CHAKRBURTY *v.* MANASHAMOYEE DEVI. **152 I.C. 1073=38 O.W N. 438=7 R. C. 343=A.I R. 1934 Cal. 520.**

——*Decree against—Independent advice—Necessity for—Decree passed against the lady by misrepresenting her case—No contract by the lady in question—Applicability of the rule of protection.*

The rule requiring free and independent advice to a pardanashin lady can directly arise only if there was a contract or agreement entered into by the lady which was sougat to be impugned or if the decree passed in the case had been a compromise decree. Where the case of the lady way that a decree had been obtained against her by keeping her in ignorance of the suit, by representing to the Court that a pleader was authorised to appear for her, whereas in fact he was not and by using before the Court a deposition which did not contain her full and free statement.

Held, it was a case of fraud upon the Court and on the lady and not a case of undue influence in which the special rule of protection for pardanashin ladies need be invoked. (*Wort and Fazl Ali, JJ.*) PURNIMA DEBYA *v.* NAND LAL OJHA. **11 Pat. 50=I R. 1932 Pat. 113=136 I.C. 577=12 Pat.L.T 582=A.I.R. 1932 Pat. 105.**

——*Deed by—Binding character—Proof requisite.*

Whereas a Court will suppose, in the absence of evidence to the contrary, that an adult person who has executed an instrument intends to be bound by its terms, it will make this exception in favour of a pardanashin

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lady that it will make no supposition of this kind but will consider her bound by the terms of the instrument which she has executed only if it is positively satisfied by direct evidence or by evidence of the circumstances which obtained at the time that she did thoroughly understand what she was purporting to do and that she executed the instrument with full knowledge of its effects. A.I.R. 1929 All. 824 ; 1925 P.C. 204, 28 Cal. 546 and 36 All. 81, Ref. (*Niamatullah and Allsop, JJ.*) SAJJANPAL SINGA *v.* MT. HARNARAINI KUNWAR. **157 I.C. 192 = 8 R.A. 129 = 1935 A.L.J. 695 = 1935 A.W.R. 442 = A.I.R. 1935 All. 285.**

———*Deed by—Burden of proof.*

The party relying upon a deed executed by a pardanashin lady must prove that the deed was the free and intelligent act of the executant. (*Raza and Smith, JJ.*) RAJESHAR BALI *v.* HAR KISHAN BALI. **150 I C. 346 = 6 R.O. 639 = 10 O.W.N. 147 = A.I.R. 1933 Oudh 170 (2).**

———*Deed by—Burden of proof.*

The burden of proving that a deed executed by a pardanashin lady was executed freely and was an intelligent act of the lady is on those who found on the deed. (*Nanavutty and Zia-ul-Hasan, JJ.*) RUDRA PARTAB NARAIN SINGH *v.* GAJRAJ KOER. **152 I.C. 977 = 7 R.O. 261 = 11 O.W.N. 1414 = A.I.R. 1935 Oudh 165.**

———*Deed by—Burden of proof—Knowledge and understanding—Explanation of the terms of the deed—Sufficiency of.*

It is for the party setting up the deed of a pardanashin lady to satisfy the Court that it has been not only explained to but understood by her. Where the evidence showed that though the deed was read to her, the meterial clauses were not explained to and understood by her, the onus resting on the mortgagee has not been discharged. (*Raza and Smith, JJ.*) LAKSHMI NARAIN *v.* MOHAMADI BEGAM. **7 Luck. 454 = I.R. 1932 Oudh 205 = 137 I.C. 102 = 9 O.W.N. 60 = A.I.R. 1932 Oudh 123.**

———*Deed by—Essentials for validy.*

In the case of a document executed by a pardanashin woman and which is challenged, it must be shown that the executant was in a position to obtain disinterested and independent advice. (*Tapp, J.*) NATHU RAM *v.* MT. DHAN DEVI. **6 I.R. (Lah.) 18 = 144 I.C. 720 = 34 P.L.R. 304 = A.I.R. 1933 Lah. 451.**

———Deed by—Guilding principles—Knowledge and understanding — Explanation of the nature of the document to the lady—Sufficiency of. *See* CONTRACT ACT, S. 16. **11 Pat. 227 = 58 I.A. 450 = 62 M.L.J. 60 (P.C.).**

———*Deed by—Knowledge of contents—Ignorance of intimate family matters—If can be presumed.*

There are certain matters of which a pardanashin lady may well not be aware, but it is improbable that she would not know about intimate family matters concering relationship. (*Niamatullah and Allsop, JJ.*) SAJJANPAL SINGH *v.* MT. HARNARAINI KUNWAR. **157 I.C. 192 = 8 R.A. 129 = 1935 A.L.J. 695 = 1935 A.W.R. 442 = A.I.R. 1935 All 285.**

———*Deed by—Knowledge and understanding—Competent advice—Meaning—Compromise of disputed claim.*

The Court when called on to deal with a deed executed by a pardanashin lady must satisfy itself upon the evidence first, that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do; secondly, that she had full knowledge of the nature and effect of the transaction; and thirdly, that she had independent

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and disinterested advice in the matter. Independent and competent advice, however, does not mean independent and competent approval. It simply means that the advice should be entirely removed from the suspected atmosphere and should be clear in language and proceed from an independent person free from any taint of interest. This independent advice is not however essential. In a case where there is no independent advice, the Court will have to consider the probable effect of such advice if it had been given, on the mind of the lady. The rules laid down by Courts for determining whether a pardanashin lady understood the nature and effect of a document executed by her are rules of prudence rather than of law and their application depends on the facts of the case. In the case of a compromise of a disputed claim in a pending suit, considerations arise rather different from those applicable to the transfer of vested properties. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359 = 6 I. R. (Pat) 17 = 145 I. C. 1 = 14 Pat.L.T. (Sup.) 1 = A I R. 1933 Pat 306.**

———*Deed by —Knowledge and understanding—Proof.*

In the case of a document executed by a pardanashin woman, it is not sufficient to show that the document was read over to her; it must further be proved that she understood its nature and effect. To ascribe, however, to a pardanashin woman ignorance, week-mindedness and incapacity to understand her affairs because of her living in exclusion or sitting behind the pardah is impossible. (*Addison and Din Mohammad, JJ.*) MT. HUKAM DEVI *v.* SALIG RAM. **159 I.C. 405 = 37 P.L R. 1 = A.I.R. 1935 Lah. 184.**

———*Deed by—Onus of proof.*

In the case of a document (as, for instance, a mortgage) executed by a pardanashin woman, it is not sufficient to show that the document was read out to her; it must further be proved that it was explained to her, and that she really understood the nature and effect of the transaction. The onus of proof is on the party seeking to enforce the document against the pardanashin lady. (*Sir Shadi Lal.*) KALYAN MAL *v.* AHMAD UDDIN KHAN. **151 I. C. 45 = 4 A.W.R. 353 = 7 R. P.C. 54 = 40 L.W. 415 = 1934 A.L.J. 909 = 38 C. W.N. 1157 = 60 C.L.J. 128 = 36 Bom L.R. 981 = 1934 M.W.N. 976 = 11 O.W.N. 1081 = A.I.R. 1934 P.C. 208 = 67 M.L.J. 361 (P.C.).**

———*Deed by—Proof of explanation and understanding—Document written in language understood by her.*

Where a document executed by a pardanashin lady was written in a language fully understood by her and it was a simple document relating to a matter with which a lady in her position is expected to be familiar and there is nothing in it which was beyond her comprehension, it cannot be held that the document was not satisfactorily explained to and fully understood by her when she executed it. (*Srivastava and Nanavutty, JJ.*) SIKANDAR ARA AMINA BECAM *v.* HASAN ARA BEGAM. **1935 O.W.N. 871 = A.I.R. 1936 Oudh 196.**

———*Deed by—Setting aside—Parties on equal terms—Equity—Principles—Subsequent events—Relevancy.*

When a transaction entered into by a pardanashin lady is found to be one between parties on equal terms, the question whether it should be set aside as inequitable would depend on circumstances at the time when it was made and not upon subsequent events. (*Nasim Ali, J.*) PURNA CHANDRA CHAUDHURI *v.* SAROJINI CHOUDHURANI. **60 C.L.J. 25.**

———*Deed by—Validity—Onus of proof.*

In cases of transaction by pardanashin lady, the disposition made must be substantially understood and must

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really be the mental act, as its execution is the physical act, of the person who makes it. The parties relying on it must satisfy the court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it, under circumstances which establish adoption of it with full knowledge and comprehension. Mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension is in itself no real proof of a true understanding mind in the executant. (Case-law discussed.) (*Mukerji and M. C. Ghose, JJ.*) BENOY KRISHNA SADHUKHAN *v.* PANCHANAN SADHUKHAN. **159 I.C. 133=8 R.C. 275=40 C.W.N. 45=62 C.L.J. 99=A.I.R. 1935 Cal. 671.**

———*Definition of.*

A pardanashin lady is "a woman of rank living in seclusion, shut in the zenana, having no communication except from behind the pardah with any male person save a few privileged relations and dependants;" but a lady who is an inexperienced woman and who appears in Court and before Registration and Revenue Officers is not a pardanashin lady. A.I.R. 1929 Lah. 309, Ref. (*Tapp, J.*) NATHU RAM *v.* MT. DHAN DEVI. **6 I.R. (Lah.) 18=144 I.C. 720=34 P.L.R. 304=A.I.R. 1933 Lah. 451.**

———*Definition of.*

A pardanashin is a " woman of rank " who lives in seclusion shut in the "Zenana" having no communication except from behind the pardah or screen with any male persons have a few privileged relations or dependants. A woman whose position in life is quite humble and who goes about freely though hiding her face in public is not a pardanashin in the strict sense of the word. (*Addison and Din Mohammad, JJ.*) MT. HUKAM DEVI *v.* SALIG RAM. **159 I.C. 405=37 P.L.R.1=A.I.R. 1935 Lah. 184.**

———*Definition of—Position not isolated or subservient.*

A respectable lady who does not appear in public or before strangers unveiled, but whose position is manifestly not one of isolation and subserviency, where she is likely to be imposed upon by the exertion of undue influence over her, cannot be regarded as a *pardanashin* lady in the true sense of the term. (*Shadi Lal, C.J. and Coldstream, J.*) BARKHURDAR SHAH *v.* SAT BEHARI. **36 P.L.R. 371=I R. 1931 Lah. 705 (2)=132 I.C. 881 (2)=A.I.R. 1931 Lah. 677.**

———*Disposition by—Burden of proof.*

Dispositions of property by a pardanashin lady are *prima facie* not binding upon her unless it is established that she knew and understood thoroughly the meaning and effect of the document, the *onus probandi* being upon the party setting up the document. (*Lord Salvesen*) SHEOPRASAN SINGH *v.* MUNSHI NARSINGH SAHAY. **35 L.W. 783=13 Pat.L.T. 561=9 O.W.N. 915=140 I.C. 547=I R. 1932 P.C. 337 (2)=36 C.W.N. 597=34 Bom.L.R. 890=55 C.L.J. 323=A.I.R. 1932 P.C. 134=62 M.L.J. 649 (P.C.).**

[**R.** 8 Luck. 538 (551).]

———*Gift by—Knowledge and understanding—Proof—Proof of independent advice.*

In a case of a transaction by a pardanashin lady, the important question is whether she understood the transaction and acted as a free agent. If she did, absence of independent advice will not detract from the validity of the gift. In a case of a gift by an old woman in favour of her minor grandson it is important to consider whether the disposition is one which a person in her position is likely to make and whether a lady of her experience, intelligence and character was likely to be over-reached by her son (father of the donee) or any person interested in him. (*Niamatullah and Rachhpal Singh, JJ.*) IFTI KHAR WALI KHAN *v.* SIKANDAR BEGAM. **6 R.A. 716=148 I.C. 528=3 A.W.R. 51=A.I.R. 1934 All. 179.**

———Knowledge and understanding. *See* PARDANASHIN LADY—DEED BY.

———*Knowledge of transaction—Evidence.*

Where the applications for mutation were read over to the ladies and they were made to understand the matter and it also appeared that the parties were fully aware of their rights and there was nothing complicated about the transaction,

Held, that the transaction was binding on the pardanashin ladies. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAJPATI *v.* PARBATI. **I R. 1933 Oudh 229=144 I.C. 283=10 O.W.N. 336=A.I.R. 1933 Oudh 295.**

———Lease by—Darpatni lease—Lessee, cousin of deceased husband—Under influence—Inference. *See* CONTRACT ACT, S. 16. **60 C.L.J. 25.**

———*Lease by—Undue influence—Proof—Execution of lease.*

The plaintiff, a wealthy pardanashin lady who observed parda as a matter of position and not as a matter of caste and who was shown to be an active and intelligent woman was shown to have executed certain leases of her own free will. It was alleged that the defendant a *Patwari* in Government service who was acquainted with her husband dominated her will and brought about the transaction.

Held, that the evidence was insufficient to prove undue influence. (*Grille, A.J.C.*) GAHENABAI *v.* RAGHUNATH. **141 I.C. 515=I.R. 1933 Nag. 75=15 N.L.J. 101.**

———*Mortgage by—Execution during illness—Proof of independent advice and other circumstances—Onus.*

Where a mortgage deed is executed by a pardanashin lady while ill in consequence of an attack of paralysis and therefore while not of full understanding, where the document is merely read over to her but the details of the deed are not explained to her nor also the full bearing of the transaction upon her own interests is made clear to her and there is no evidence of independent advice being given to her and the lady does not derive any personal benefit from the transaction at all, the burden lies heavily on the mortgagees to show that the lady entered into the transaction voluntarily and executed the deed intelligently with full comprehension of her position with respect to it and of its bearing upon her interests and that the transaction is free from fraud or undue influence. (*Hasan, C.J. and Bisheshwar Nath, J.*) CHANDRANI KUER *v.* SHEO NATH. **6 Luck. 619=I R. 1931 Oudh 273=132 I.C. 337=14 O.L.J. 34=8 O.W.N. 194=A.I.R. 1931 Oudh 146.**

[**R.** 9 Luck. 12 (20).]

———*Mortgage by—Knowledge and understanding—Proof.*

In order that a deed executed by a pardanashin lady may be valid it is necessary that she should have intelligently executed it. A lady who was both pardanashin and illiterate was said to have executed a mortgage deed which was in a large measure designed for the payment of her husband's debts and in which the property mortgaged belonged exclusively to her having been given along with other property in lieu of her dower. It was in evidence that her husband was a man of violent temper and was addicted to drink and prostitutes. Further he had retained a sufficient portion of his property in his own hands for the payment of his debts. All that was proved was that there was a draft and that it had been read to the lady who instead of applying

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her mind to the contents of the deed as it was in the end written out, contended herself with an assurance that it was in accordance with the draft.

Held, that there was no intelligent execution of the deed (*Wazir Hasan, C.J. and Smith, J.*) MUSHAR RAFI BEGAM *v.* KUNDAN LAL. **9 Luck. 12=6 I.R. (Oudh) 12=144 I.C. 860=10 O.W.N. 724=A.I.R. 1933 Oudh 365.**

———Presumption in favour of—Applicability to every illiterate woman. *See* CONTRACT ACT, S. 16. **10 Mys. L.J. 217.**

——— *Rule applicable to—If restricted to that class.*

The rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should not be restricted to that class only, but should be applied to the case of poor women who are equally illiterate and ignorant. Outside the class of regular pardanashin women, it must depend in each case on the character and position of the individual woman, whether those who deal with her are or are not bound to take special precautions that her action should be intelligent and voluntary. (*Addison and Din Mohammad, JJ.*) MT. HUKAM DEVI *v.* SALIG RAM. **159 I.C. 405=37 P. L.R. 1=A.I.R. 1935 Lah 184.**

———*Wakf deed—Execution with full knowledge and consent—Absence of independent advice if material.*

A wakf deed by a pardanashin lady is not bad for want of proof that she had independent advice, where the deed was explained and was executed with full knowledge and consent and it appeared from the settlements in favour of her sons, etc., that she would not have acted differently even if she had independent advice.

Held, that the wakf was valid. (*Pullan and Niamatullah, JJ.*) NASIR ALI *v.* MAHOMED MOBIN. **138 I.C. 616=I.R. 1932 All. 485.**

———*Who is not.*

A lady who appears in Court and gives evidence and who is intelligent and knows her business very well cannot be considered a pardanashin lady incapable of understanding the nature of her act. (*Young, J.*) MT. GOVINDI *v.* GANGA PRASAD. **147 I.C. 1256=6 R.A. 632=A.I.R. 1933 All. 955.**

PARDON. *See* CR. P. CODE, SS. 337-339.

PARENTAGE.

See (1) EVIDENCE ACT, S. 112.
(2) MAHOMEDAN LAW—LEGITIMACY.

PARJANTDAR *See* LAND-TENURE.

PAROL EVIDENCE. *See* EVIDENCE ACT, SS. 91-100.

PARSI MARRIAGE AND DIVORCE ACT (XV OF 1865), S 26—*Objection to jurisdiction, raised late—Sustainability of.*

On an application under S. 44 of the Act, an objection that the suit was brought in the wrong place cannot be allowed to prevail, if it was not taken at the initial stage of the application. 13 I.A. 124, Rel. on. (*Ferrers, J.C.*) ARDESAR NANABHAI *v.* BIKHIBAI. **150 I.C. 793=7 R.S. 29=27 S.L.R. 280=A.I.R. 1934 Sind 1.**

———**S. 44**—*Application for the custody of minor—Service on the minor, if necessary.*

It is no doubt true that if the minor is old enough to form an intelligent preference, the Court may consider that preference. But where the minor has not been made a party to the application, it is not necessary to serve the minor with notice of an application under S. 44. There is no obligation to bring the minor before the Court nor does the Act provide any machinery by which such a thing can be done. (*Ferrers, J.C.*)

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ARDESAR NANABHAI *v.* BIKHIBAI. **150 I.C. 793=7 R.S. 29=27 S.L.R. 280=A.I.R. 1934 Sind 1.**

———**S. 44**—*Infant residing out of jurisdiction—Jurisdiction of Court to entertain the application.*

If the two requisites mentioned in S. 44 are fulfilled, *i.e.*, the child is under 16 and the marriage of its parents is the subject of the suit, the Court has got jurisdiction to entertain an application with reference to the custody, maintenance and education of the child, even though the child may reside outside the territorial jurisdiction of the Court. The limits of the jurisdiction of a Court constituted under this Act are otherwise expressed than in the Guardian and Wards Act (*Ferrers, J.C.*) ARDESAR NANABHAI *v.* BIKHIBAI. **150 I.C. 793=7 R.S. 29=27 S.L.R. 280=A.I.R. 1934 Sind 1.**

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See (1) HINDU LAW—PARTITION.
(2) PARTITION.

PARTIAL REDEMPTION.

See (1) MORTGAGE.
(2) T. P. ACT, S. 60.

PARTIES.

See (1) C. P. CODE, O. 1 AND O. 34.
(2) CONTRACT—PARTIES

PARTIES AND REPRESENTATIVES. *See* C. P. CODE, SS. 11 AND 47.

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See also (1) AGRA TENANCY ACT (1926), S. 37.
(2) BENGAL ESTATES PARTITION ACT (1897).
(3) CO-SHARERS—PARTITION.
(4) HINDU LAW—PARTITION.
(5) LIMITATION ACT, ART. 142.
(6) PARTITION ACT (1893).

———*Binding nature—Person not being party—Rights if affected.*

The rights of a tenant cannot be affected in any way by the orders passed in the course of a partition to which he was not a party. (*Keane, S.M. and Oppenheim, J. M.*) JANKI RAMJANA *v.* JARKHANDI SINGH. **15 R.D. 727=12 L.R. 405 (Rev.).**

———*Binding nature—Person not being party—Whether bound.*

A person who is not a party to a partition is not bound by the partition. (*Raza, J.*) BISHAMBHAR NATH *v.* NISAR ALI. **8 O W.N. 1281=15 R.D. 751.**

———*Burden of proof.*

Where plaintiff's case is based on the fact that there has been a partition, the onus of proving the time at which partition took place is on him. (*Niyogi and Grille, A.J.Cs.*) MT. MOHANKUAR *v.* BHAGATRAM. **29 N.L.R. 350=149 I C. 622=6 R.N. 235=A.I.R. 1933 Nag. 340.**

———*Confirmation of—Alteration of proceeding subsequent to—Jurisdiction.*

Neither the Additional Commissioner nor the Collector has jurisdiction to alter a partition proceeding after it has been confirmed. The correct procedure is to refer the case to the Board. (*Oppenheim, S.M.*) JAGDEO PRASAD *v.* JAWAHIR. **14 L.R. 221 (Rev.)=17 R.D. 331.**

———Confusion of boundaries—Obliteration by party in permissive possession—Equitable interference by Court—Decree for fresh partition. *See* BOUNDARIES. **A.I.R. 1931 Mad 19=60 M.L.J. 85.**

———*Co-owners—Improvements by one co-owner—Allotment of enhanced value.*

Where it is possible to divide a house by metes and bounds and it is contended by one of the parties that he has spent money on improvements or additions, it is not lawful to direct that the other parties should make com-

pensation in money to the party making the improvements in order to equalise the burden. It is true that an equity has been created in favour of the party who has made the improvements but in such a case the only way to recognise his equity is for the Commissioner if that be possible to allot to him that portion of the premises upon which the improvements and additions have been made. If that cannot fairly be done, then the party making the improvements must lose the value of his equity. In a case where it is impossible to divide the premises by metes and bounds, if it is known that the price which may be obtained has not been increased by the amount of the value of the improvements then the total received by the sale should be divided equally. If on the other hand the value has increased, the enhanced value should be deducted before the divisible value is ascertained. (*Lort Williams, J.*) AMULYA CHARAM *v.* PRAKASH CHANDRA. **60 Cal 591=6 I.R. Cal. 93 =145 I C 313=A.I R. 1933 Cal. 502.**

———*Co owners—Party wall.*

A claim by a co-owner to partition of a party wall cannot ordinarily be resisted even where the claim causes inconvenience and difficulty of partition. In the case of a party will it is impracticable to take any action under S. 2, Partition Act. (*Abdul Rashid, J.*) MANSA RAM *v.* NANAK CHAND. **155 I.C. 223=7 R.L. 657=A.I. R. 1934 Lah. 893.**

———*Co-owners—Reservation of easement.*

The proprietor of an estate constructed an irrigation tank in about 1813. The estate was partitioned into two estates in 1864 but the tank bund and a considerable part of the tank bed were kept common to the two estates. It appeared that from the date of its construction till about 1878, the tank was inundating the adjacent lands.

Held, that as a result of the partition an apparent and continuous easement to submerge the adjacent lands was reserved in favour of each of the estate holders. (*Kumaraswami Sastri and Reilly, JJ.*) GAJAPATHI KRISHNA CHANDRA DEO *v.* RAJA OF VIZIANAGARAM. **135 I.C. 349=I.R. 1932 Mad. 93 =1931 M W N. 23=33 L.W. 771=A.I.R. 1931 Mad. 561=60 M.L J 662.**

———*Co-sharers*—Haquiats mutfarikas—*Two classes—Division.*

Where there were two sets of *haquiats matfarikas* in a mahal, namely, those pertaining to the *mahal* itself and those irregularly created by individual co-sharers at a later date,

Held, those of the second class will be included in the lots of the co-sharers who created them but those of the first class were part and parcel of the *mahal* and must be distributed among the co sharers proportionately. (*Oakden, S.M.*) RAM BATTAN *v.* BADRI CHAUBEY. **15 R.D. 243.**

———*Co-sharer—Suit for partition—Shares of other co-sharers—Power of Court to award.*

The Court in a plaintiff's suit for partition has undoubtedly jurisdiction to award the other sharers their shares if they want to avail themselves of such a decision. (*Krisnan Pandalai, J.*) MUHAMMAD SAHOOB LEVVAI SAVABU *v.* MAYAMAD AMMAL. **6 I.R. (Mad.) 174=145 I.C. 968=1933 M W.N 1295=38 L.W. 568 =A.I.R. 1933 Mad. 789=65 M.L J. 582.**

———*Costs—No provision for—Proceedings terminated—Power to order costs rateably subsequently.*

Where there was no definite provision in the partition proceeding that costs were finally to be adjusted over the two parties in proportion to their shares but it appeared that the respondent was the owner of by far

the greater share of the village and resisted the application of a small co-sharer in the most determined fashion, there is no reason why the Court should not order him to pay his rateable share of the costs. (*Oppenheim, S.M. and Walton, J.M.*) MEHRI KUAR *v.* LAIQ SINGH. **14 L.R. 39 (Rev.)=17 R.D. 49.**

———Court-fee in suit for. *See* (1) COURT-FEE.
(2) COURT-FEES ACT, S. 7 (*IV*) (*b*), SCH. I, ART. I AND SCH. II, ART. 17-A AND B.

———Decree for. *See* DECREE.

———Deed of. *See* DEED—CONSTRUCTION.

———*Deed of—Distinction from release.*

A deed by which co-owners divide property in severalty is a deed of partition and merely because mutual release is an incident of the division, the partition deed does not become a release. Moreover a deed of release is a one sided document and binds the executant alone while a partition is an agreement between two or more persons who are all bound by it. (*Irving, F.C.*) RAM LAL *v.* EMPEROR. **11 Lah. L T. 157.**

———*Effect—Partition in fact—Same not in accordance with law—Binding nature.*

Where on the death of a Mahomedan, his sons partitioned the ancestral property to the exclusion of daughters and each of them effected mortgages of the property so partitioned, *held*, that the partition though not according to law was binding on the parties and their representatives. (*Mitter, J.*) SHEIKH SIRAJUDDIN *v.* JOHUR JAN BEWA. **I.R. 1931 Cal. 888= 134 I C. 888=53 C.L.J. 222.**

———*Effect—Rights of individual members* inter se—*Determination.*

A partition is final as regards proprietary rights and as regards the class of tenancy in so far as it affects the partition but is not final as regards the right of individual members of a recorded joint tenancy. For partition purposes, all that is relevant is the fact that there was an occupancy tenancy. In such a case which of the claimants is the occupancy tenants does not arise. (*Oakden, S.M.*) HARJAS *v* SARUP. **15 R.D. 253.**

———*Effect—Transferee from one co-sharer landlord—Land allotted to another at partition—Right of transferee*

Where a person is inducted on the land by a co-sharer landlord as part proprietor he cannot continue on the land after the partition when the land had been assigned to another landlord. His right if any will be according to S. 99 of the Estates Partition Act. And a landlord who gets a piece of land on partition does not take it subject to the encumbrances created on it by other co-sharers and not by him. (*Mahomed Noor, J.*) GANPAT SINGH *v.* AHIBARAN SINGH. **14 Pat. L.T 138=150 I.C. 185=6 R.P. 713=A.I.R. 1933 Pat. 220.**

———*Entries in partition papers—Occupancy land.*

The mere entry of a person's name as a co-occupancy tenant in the partition papers is not sufficient proof that he is really an occupancy tenant. The landlords cannot be tied down to the extent of admitting that every man's name which is entered in an occupancy holding is a correct entry. (*Keave, S. M. and Smith, J. M.*) MAHARAJ SINGH *v.* MEGH NARAIN SINGH. **15 R.D. 516=12 L R. 189 (Rev.).**

———*Mode—Casting of lots—Adoption of* qura andaz i *procedure—Legality.*

In case of partition by a Revenue Officer, the mode of partition must be a fair and just one. Where *qura andazi* was resorted to in the absence of some of the shareholders and it further appeared that the area

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under the *ahadi* was ordered to be decided by lots, a procedure not justified by the circumstances,

Held, that a fresh partition should be directed. The several fields should be dealt with separately unless the proprietors agreed to their being treated as one unit. *Held* also that *qura andazi* should be avoided. (*Townsend, J. C.*) DAMAN *v.* PHERU SHAH. **10 Lah. L. T. 1.**

——*Mode—Demarcation—Map not the only basis.*

Demarcation cannot be made solely on the basis of the partition map without regard to the areas allotted at the partition. It is possible that in drawing up the map, the lines demarcating the *paths* were not drawn with strict accuracy and were only intended to indicate the direction in which the areas specified in the partition papers were situated. (*Keane, S. M. and Oppenheim, J. M.*) PURSHOTTAM DAS *v.* NANDAN. **15 R.D. 283=12 L. R. 89 (Rev).**

——*Mode—Possession of parties.*

Partition should be effected with due regard to the possession of the parties. (*Addison and Hilton, JJ.*) JAI DAYAL *v.* NARAIN DAS. **I.R. 1932 Lah. 222 (2) =136 I.C. 270 (2)=32 P.L.R. 854=A.I.R. 1932 Lah. 127.**

——*Onus of proof—Date of partition—Survey entry—Rebuttal.*

Where at the time of the partition alleged by a party, the family is shown to be joint by the survey entry, the onus of proving the date of partition is on the party who alleges it. (*Macpherson and Agarwala, JJ.*) RAMGAHAN MISSIR *v.* MT. RAMDASI KUAR. **148 I. C. 413=6 R P. 469=A.I R. 1933 Pat. 627.**

——*Partial partition—Omission to include item—Subsequent suit for partition—Maintainability.*

A partition deed between a sister and brother of their mother's property mentioned that they had effected partition of the undermentioned properties and that neither should claim anything in future in respect of the said properties. One of the properties left by the mother was in possession of the brother and it was not included in the partition deed.

Held, that sister could claim her moiety in it and that she was not precluded from so doing by the partition deed. (*Lord Tomlin.*) MAUNG MAUNG GYI *v.* MA NYI MA GYI. **I.R. 1933 P.C. 98=142 I.C 550=37 L W 635=1933 M.W.N. 465=A.I.R. 1933 P.C. 106 (P.C.).**

——*Partial partition—Permissibility.*

Where both the parties have interested in a particular plot, it can be partitioned even though certain other plots are not partitioned. (*Suhrawardy and Graham, JJ.*) MOTI LAL DEY SARKAR *v.* KAMAKSHYA CHARAN DEY SARKAR. **59 Cal. 301=35 C.W.N. 1072 136 I C. 594=I R. 1932 Cal. 226=54 C.L.J. 234=A.I.R 1932 Cal. 209.**

——*Partial partition—Property held jointly by co-parceners—Suit for partial partition not maintainable.*

As a general rule a partition should embrace all the joint property. In some cases the rule may possibly be relaxed Where however the property sought to be partitioned is held jointly with descendants, a suit for partial partition is not competent. A.I.R. 1923 Cal 501, Cons. (*Broadway and Johnstone, JJ.*) LACHMAN DAS *v.* SHANKAR DAS. **I. R. 1931 Lah. 776=133 I.C. 440 =32 P L R 289.**

——*Partial partition—Rule against—Principle—Alienee from Hindu coparcener of share in a portion of joint family property—Suit for partition of portion only—Maintainability.*

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The ordinary rule is that a suit for partition must embrace all joint properties owned by the parties thereto. But there is also the complementary rule that a suit for partition cannot include properties in which each of the parties does not claim an interest. The general rule againt partial partition does not belong exclusively to Hindu Law. It is primarily based on considerations of equity and convenience and as such it belongs more to the province of adjective than substantive law can be relaxed in favour of an alienee from a co-sharer of a portion of the joint family property, when no prejudice or inconvenience to the other co-sharers (defendants) is proved to be caused by allowing partial partition. (*Nasim Ali, J.*) TARINI CHARAN CHAKERBATTY *v.* DEBENDRA LAL DEY. **62 Cal. 655=39 C. W. N. 1044=163 I.C. 583=9 R.C. 35.**

——*Partition decree — Delivery of possession of party's share not complete—Order for fresh delivery of possession—Jurisdiction.*

In execution of a final decree for partition *A's* share was delivered, but it was found that *A* could not get actual possession of his share as some huts belonging to the other co sharers were standing on it.

Held, that the Court's order for a fresh delivery of possession by removing the huts was within jurisdiction. (*Lort Williams and M. C. Ghose, JJ.*) ABDUL HAMID *v.* PROKASH CHANDRA NANDI. **152 I.C. 764=7 R.C. 313=38 C.W.N. 832=A.I.R. 1934 Cal. 793.**

——*Partition record—Finality—Rights not reserved under partition—Party whether can plead.*

The partition record defines the rights of the parties to the partition as against each other finally and exhaustively and no party to partition is entitled to deny the accuracy of the partition record when to do so would be injurious to any other party. It is not open to a party to assert ex-proprietary or cognate rights when such rights have not been given to them in the partition proceedings, 17 A.L.J. 1072, Ref- (*Kisch, J.*) NANAK PRASAD *v.* CHANDRIKA PRASAD. **135 I C. 698=I.R. 1932 Oudh 58=8 O.W.N. 1023=15 R.D. 637=A.I R. 1932 Oudh 8.**

——*Powers of Court—Subsequent events.*

Partition suits are an exception to the general rule that the rights of the parties in a suit must be ascertained as at the date of the action brought. In partition suits the Court, in determining the rights of the parties may, in order to settle these rights completely and finally, have regard to events occurring subsequent to the date of the institution of the suit. 9 S.L.R. 61. Rel. on. (*Rupchand, J. C. and Lobo, A. J. C.*) MT. GHULAM FATMA *v.* ABDUL AZIZ. **27 S L.R. 411=149 I.C. 608=6 R.S. 225=A.I.R. 1933 Sind 371.**

——*Preliminary decree—Appeal from—Proceedings for partition by metes and bounds—Stay of—Practice.*

The usual practice of the Lahore High Court is to stay the proceeding for the partition of the property by metes and bounds pending the decision of the appeal preferred from the preliminary decree. (*Shadi Lal, C. J.*) MT. TAJ BIBI *v.* MAHOMED HUSSAIN. **I.R. 1933 Lah. 518=144 I.C 596 (1)=34 P.L.R. 579 and 788 (1)=A.I.R. 1933 Lah. 790.**

——*Preliminary decree—Effect of — Action still pending.*

Where a preliminary decree for partition of property and for determination of mesne profits is passed, the decree cannot be considered as terminating the action which is therefore still pending *Duke of Buccleuch*, (1892) P. 209, Ref. (*Rupchand, J.C. and Lobo, A.J.C.*) MT. GHULAM FATMA *v.* ABDUL AZIZ. **27 S.L.R.**

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411=149 I.C. 608=6 R.S. 225=A.I.R. 1933 Sind 371.

———*Preliminary decree—Not obligatory.*

In a consent decree no preliminary decree is obligatory in a partition suit, and where the parties have by means of an execution petition treated it as a final decree, it is not open to either of them to object that it is only a preliminary decree. 11 Bom. 153 and 36 Cal. 193, Ref. (*Walsh, J.*) GANAPATHY IYER *v.* SUBRAMANIA IYER. **I R. 1933 Mad. 374=144 I.C. 95=A. I.R. 1933 Mad. 516.**

———*Preliminary decree—Subsequent dismissal of suit—Permissibility.*

After a preliminary decree in a partition suit has been passed, it is not competent to the Court to dismiss the suit subsequently. The preliminary decree can only be reversed on appeal and whatever default there may be in the subsequent stages of the suit, that preliminary decree itself cannot be vacated. A.I R. 1924 P.C. 198; A.I.R. 1928 Mad. 914 and A.I.R. 1925 Pat. 433, Foll.; A.I.R. 1928 Mad. 963, Ref. (*Kamesam, O. C. J. and Cornish, J.*) SUNDARARAJAMMA *v.* RAMULU CHETTY. **I.R. 1932 Mad. 789=139 I.C. 761=36 L. W. 414=A.I.R. 1932 Mad. 519.**

———*Preliminary decree—Subsequent objection before Commissioner as to nature of property.*

It is open to a party to a suit for partition to raise an objection before the Commissioner to the effect that certain property should be treated as property with disputed title, although such objection has not been raised in Court before the passing of the preliminary decree. (*Mukerji and S.K. Ghose, JJ.*) RASUL BIBI *v.* MOOSA SOLEMAN SALEJI. **164 I.C. 258=9 R.C. 178=62 C.L.J. 85.**

———*Pre-partition transaction—Mortgage by joint owner prior to partition—Liability of his share in the hands of his transferee.*

When a son mortgages joint property belonging to him and his father and then there is a partition, the property which falls to the share of the son is liable even in the hands of the transferees from the son. 2 P. R. 1906 and A. I. R. 1929 Lah. 684, Rel. on. (*Coldstream and Jai Lal, JJ.*) BULAQI MAL *v.* ABDUL KARIM. **6 I.R. (Lah) 102=145 I.C. 432=34 P.L.R. 844=A.I.R. 1933 Lah. 682.**

———*Pre-partition transaction—Mortgage by joint owner prior to partition—Rights of mortgagee.*

Where the property is joint at the time of the execution of a mortgage by a joint owner, he could only mortgage his undivided share in the property and such a right is always subject to the right of the other co-owners to effect a partition and when such partition is carried out, the mortgagee can only enforce his rights against such property as falls to the share of his mortgagor unless he can show that the partition was fraudulent. It is not essential that the mortgagee should have been made a party to the partition proceedings. (*Dalip Singh and Bhide, JJ.*) DIWAN CHAND *v.* MANAK CHAND. **16 Lah. 392=155 I.C. 938=7 R.L. 802 (2)=36 P L.R. 185=A.I.R. 1934 Lah. 809.**

———*Procedure—Order during absence of one party—Validity.*

It is a gross irregularity on the part of a Revenue Officer to sanction a partition in the absence of one of the parties. (*Irving, F.C.*) LACHHMI NARAIN *v.* DHANNA RAM. **11 Lah.L.T. 45.**

———*Procedure—Partition binding only on parties.*

In a partition case the natural and usual procedure to be followed is the procedure based on existing entries. A decision in a partition case is also binding only on the parties to it. (*Oppenheim and Keane, J. M.*) KHAIRAT HUSAIN *v.* RAJAB ALI. **16 R.D. 52.**

———*Proceedings for—Arrangement incorporated in—Right of party to resile from.*

Where a somewhat peculiar agreement of partition is entered into and by agreement of the parties incorporated in the partition proceeding, the parties cannot be permitted to resile from it in subsequent proceedings. (*Drake Brockman, J. M.*) SAFITULNISA BIBI *v.* ALICE BIRD. **14 L.R. 480 (Rev.)=17 R.D. 618.**

———*Proceedings for—Confirmation—Binding nature of transaction.*

The terms of a partition proceeding when once confirmed are binding on the parties irrespective of any change subsequently brought about by the introduction of the Tenancy Act. Where the parties refrain from claiming new *sir* rights, they cannot subsequently claim the same. (*Oakden, S. M. and Smith, J. M.*) VAIDYA NATH KISHORE *v.* RAJENDRA KISHORE. **14 R.D. 697.**

———*Proceeding for—Correction of papers found necessary—Procedure.*

In a partition proceeding the Assistant Collector passed the following order:—"The correction of the papers concerned should at once be taken in hand and the appellant should be informed when those corrections have been completely finished so as to enable him to file another partition application if he wishes so to do."

Held, that the order was not a proper one. The proper course was to have kept the case pending until the papers had been corrected and not to drive the party to a fresh partition. (*Oakden, S.M. and Oppenheim, J. M.*) SADHOSARAN MANI *v* RAM RAJI. **15 R.D. 99 =12 L.R. 10 (Rev.).**

———*Proceeding for—Ex-proprietary tenancy admitted—Right of co-sharer to impugn same.*

Ordinary rights may be considered such as to pass unnoticed or as requiring no challenge during the course of partition proceedings. But the same cannot be said to be true of ex-proprietary rights. The entry as ex-proprietary tenant cannot be challenged by a co-sharer who was a party to the partition proceeding and admitted the ex-proprietary nature of the tenancy. (*Keane, S. M.*) PIAREY LAL *v.* SURJO. **15 R.D. 270=12 L.R. 136 (Rev.).**

———*Proceedings for—Irregularity*—De novo *proceeding.*

Where partition proceedings are badly drawn up, they may be quashed and proceedings started *de novo* but there should be as little disturbance as possible of any agreement or orders passed in the prior proceedings. (*Drake Brockman, S. M. and Holmes, J. M.*) ABDUL AZIZ KHAN *v.* MAHOMED ZAMAN KHAN. **15 L.R. 57 (Rev.)=18 R.D 6=11 O.W.N. 94.**

———*Proceedings for—Mistake—Valuable rights lost—Rectification of mistake—Duty of Revenue Court.*

Although parties to a partition are bound by the result thereof, still if on account of a mistake valuable rights are lost, a party is entitled to have it rectified in a subsequent proceeding, especially when he was no more than a *pro forma* party. (*Oppenheim, S. M. and Walton, J. M.*) BHOLA TEWARI *v.* RAM BHAROSE. **14 L.R 327 (Rev.)=17 R.D. 455.**

———*Revenue partition — Cancellation— Power of parties to cancel by agreement.*

Where a partition of a mahal has in fact taken place, it cannot be subsequently cancelled by a mere agreement between the parties. (*Smith, J.*) ABDUL RAHMAN KHAN *v.* LACHHMI NARAIN. **158 I.C. 802=8 R.O.**

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124=1935 R.D. 520=1935 O.W.N. 1183=A.I.R. 1936 Oudh 65.

———Sir *land—Party in possession—Whether can claim superior right.*

In the absence of any specific provision in the partition proceeding laying down that certain *sir* land is to be considered the severalty of the proprietor in possession of it and is to be allotted to his patti there is no justification for holding that he has any better claim to it than any of the other proprietors to whom it belongs (*Oppenheim, J.M.*) NATHU SINGH *v.* UMRAO SINGH. **15 R.D. 510=12 L.R. 173 (Rev.).**

———Sir *land—Valuation—Statutory rates.*

In a partition case, the fairest method of valuing *sir*, which is transferred and becomes the subject of ex-proprietary rights, is at statutory rates. It would be unfair to the proprietor to value it at *shikmi* or competition rates. On the other hand it would be unfair to the other co-sharers to value it at ex proprietary rates for those rates represent its value on transfer only and not its value to the proprietor. (*Oakden, S.M. and Oppenheim, J.M.*) BANKEY SARAN *v.* JAWALA DATT. **15 R.D. 237=12 L.R. 125 (Rev.).**

———*Subordinate tenure-holders—Application* inter se *for partition—Maintainability.*

Partition at the instance of a subordinate interest-holder among persons holding their subordinate interests will not be binding upon the superior proprietor but that is no reason why it cannot be effected among the tenants. It will enure till the interest of the party seeking partition lasts. The right of partition as a right to possession, is a right of property, and does not depend upon the co-ordination of interests of parties concerned but on the fact of their being in joint possession. The fact that one of the tenants claiming partition has also an interest in the superior interest does not matter. (Case-law discussed). (*Suhrawardy and Graham, JJ.*) MATILAL DEY SARKAR *v.* KAMAKSHYA CHARAN DEY SARKAR. **59 Cal. 301=35 C.W.N. 1072=54 C.L.J. 234=136 I.C. 594=I.R. 1934 Cal. 226=A.I.R. 1932 Cal. 209.**

———Suit for. *See* C. P. CODE, O. 10 AND O. 2, R. 2.

———*Suit for—All Properties to be included, unless abandoned.*

Ordinarily in a suit for possession by partition of a share in joint property, the plaintiff is bound to bring into the hotch pot the entire joint property, but when he abandons his claim in respect of a certain item which is admitted by him to be joint, it is not necessary that he should include it also. (*Jai Lal and Abdul Rashid, JJ.*) MT. HAJRAN *v.* MAHOMED SHAFI KHAN. **I.R. 1933 Lah. 534=34 P.L.R. 772=144 I.C. 614=A.I.R. 1933 Lah. 780 (2).**

———*Suit for—Commissioner—Delegation of Court's duty—Permissibility.*

In a partition suit the proper duty of a Commissioner is to form and allot *takhtas* according to the shares of the parties as already admitted or found and it is entirely outside his duty to decide the shares of the parties, this power being part of the judicial duty of the Court itself. Where the Court ordered that the Commissioner should proceed with the partition according to his view after hearing the parties and that the Court would look into the matter if objections were raised against the Commissioner's final report.

Held, that there was an entirely unjustifiable delegation of the Court's duties to the Commissioner. (*Dhavle and Saunders, JJ.*) RAM BAHADUR *v.* SITARAMJI MAHARAJ. **6 I.R. (Pat.) 254=146 I.C. 353=A.I.R. 1934 Pat. 32.**

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———*Suit for—Defendant asking for separation of his share—Liability to pay Court-fees.*

In a partition suit, each party stands in the position of a plaintiff with reference to the others, and the Court cannot refuse the prayer of the defendant for separation of his share. It is not necessary that he must either come into Court as a plaintiff or first pay proper Court-fees before a partition decree could be drawn up in his favour. Such a decree would fall within the definition of an instrument of partition within the meaning of S. 2 (15) of the Stamp Act, and under S. 29 (*g*) of that Act, it is the duty of the Court to decide the proportion of the stamp payable by each person who desires his share separated. It would, of course, be impossible for any of the parties to execute the decree until the stamp duty was first levied and paid. It is, however, not necessary for the defendant who claims execution under such a stamped decree also to pay court-fees. (*Addison and Mahomed, JJ.*) MAQBUL AHMAD *v.* MT. AFZAL-UL-NISA. **16 Lah. 901=37 P.L.R. 878=160 I.C. 206=8 R.L. 508=A.I.R. 1936 Lah. 1.**

———Suit for—Dismissal for default—Second suit—Maintainability. *See* C. P. CODE, O. 9, R. 9. **41 L.W. 397=A.I.R. 1935 Mad. 458.**

———*Suit for—Duty of Court—When not bound to partition.*

In a suit for partition, it is not incumbent on the Court to effect a partition of the property only if the parties agree to abide by the partition or agree to the appointment of a particular person as a local Commissioner. (*Abdul Rashid, J.*) MUMTAZ JAHAN BEGAM *v.* MANNU LAL. **151 I.C. 612=7 R.L. 157=36 P.L.R. 258=A.I.R. 1934 Lah. 965.**

———*Suit for—Inadvertent omission to partition one item—Subsequent suit—Bar.*

Even after decree has been passed in a suit for partition of family property, a subsequent suit may be brought in respect of some portion of the property which had inadvertently been omitted in the former suit. (*Grille, A. J. C.*) GAPULAL *v.* GAJASA. **I.R. 1932 Nag. 74=138 I.C. 186=15 N.L.J. 15=A.I.R. 1932 Nag. 92.**

———*Suit for—*Miras *property—Parties—Persons of status inferior to that of zemindar—If necessary parties.*

In a suit for partition of *miras* property, the plaintiff is not bound to implead as a party to the suit any persons of status inferior to that of the zamindars in respect of the *miras* property, which is the subject-matter of the suit. (*Guha and Lodge, JJ.*) RAJANI KANTA RAY *v.* KAILASH CHANDRA SHAHA. **62 C.L.J. 225.**

———*Suit for—Omission to include certain items—Effect.*

The fact that a person does not ask for partition of some property in defendant's possession does not non-suit him. (*Rowland, J.*) PANIKA *v.* LOCHAN NAIK. **I.R. 1933 Pat. 195=143 I.C. 272=A.I.R. 1933 Pat. 93.**

———*Suit for—Preliminary decree—Carrying into effect.*

When a Court passes a preliminary decree for partition it is not the Court's duty, whether the parties take steps or not, to see that the preliminary decree is carried into effect. (*Rankin, C.J. and Pearson, J.*) ELOKESHEE DASEE *v.* KUNJABIHARI BASAK. **60 Cal 940=147 I.C. 779=6 R.C. 358=A.I.R. 1933 Cal. 696.**

———*Suit for—Rights of defendants* inter se*—If should be decided.*

It is no doubt usual in partition suits to decide the shares of all the parties. But where the defendants agreed to a preliminary decree being passed in favour

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of the plaintiff for partition of his share without their rights being decided and the preliminary decree was not appealed against, it is not open to the defendants in subsequent proceedings to contend that their rights *inter se* should have been decided. (*Addison and Beckett, JJ.*) HASSAN MAHOMED *v.* HUKAM CHAND. **36 P. L.R. 112=155 I.C. 469=7 R.L. 719=A.I.R. 1934 Lah. 872.**

———*Suit for—Suit by holder of fractional share in jote—Maintainability—Defendants being* maliks *also—Effect.*

It cannot be said that a suit for partition can only be maintained by one who has some sort of permanent interest in the property in suit.

Held, that a person who owns a fractional share in a jote can bring a suit for partition against persons who hold similar interest in the property even though the latter might also be *maliks* as regards certain shares. (*Suhrawardy and Graham, JJ.*) MOTILAL DEY SARKAR *v* KAMAKSHYA CHARAN DEY SARKAR. **59 Cal. 301=35 C.W.N. 1072=136 I.C. 594=I.R. 1932 Cal. 226=54 C.L.J. 234=A.I.R. 1932 Cal. 209.**

PARTITION ACT (IV OF 1893)—*Inherent power of Court.*

Apart from the Act, the Court has an inherent power to refuse to divide the property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition. (*Venkatasubba Rao, J.*) SUBBAMMA *v.* VEERAYYA. **1931 M.W.N. 1040=136 I.C. 203=I.R. 1932 Mad. 267=34 L.W. 730=A.I.R. 1932 Mad. 15=61 M.L.J. 552.**

———**S. 2**—*Applicability—Action under when to be taken.*

In the absence of a finding that a division of the property cannot reasonably or conveniently be made, action cannot be taken under S. 2 of the Partition Act. (*Abdul Rashid, J.*) MUMTAZ JAHAN BEGUM *v.* MANNU LAL. **151 I.C. 612=7 R.L. 157=36 P L.R. 258=A.I.R. 1934 Lah. 965.**

———**S. 2**—*Inapplicability—Party wall.*

A claim by a co-owner to partition of a party wall cannot ordinarily be resisted even where the claim causes inconvenience and difficulty of partition. In the case of a party wall it is impracticable to take any action under S. 2, Partition Act. (*Abdul Rashid, J.*) MANSA RAM *v.* NANAK CHAND. **155 I.C. 223=7 R.L. 657—A.I.R. 1934 Lah. 893.**

———**S. 2**—*No requisition under—Validity of sale.*

Where on the report of the Official Commissioner recommending a sale, notice is issued to all the parties and the sale is held, it should not be set aside for want of a requisition under S. 2 of the Act, if it is valid otherwise. (*Mehta, A.J.C.*) DOST MAHOMED *v.* MAHOMED SHARIF. **I.R. 1933 Sind 108=142 I.C. 461=A.I.R. 1933 Sind 40.**

———**S. 2**—*Solatium to auction-purchaser.*

On an auction being set aside, the Court allowed by way of equitable measure 5 per cent. of the purchase-money to the auction-purchaser as a solatium. (*Mehta, A.J.C*) DOST MAHOMED *v.* MAHOMED SHARIF. **I.R. 1933 Sind 108=142 I.C. 461=A.I.R. 1933 Sind 40.**

———**Ss. 2 and 3**—*Scope.*

Section 3 comes into play only when a sale has been applied for under S. 2 by a shareholder or shareholders interested to the extent of at last one-half of the property. It is at that stage and before the sale is actually ordered that the right to apply for leave to buy at a valuation can be exercised under S. 3. But that can be done only by a shareholder other than the larger shareholder who applied for sale under S. 2. The effect, curiously enough, is to favour the smaller shareholder at the expense of the larger and that explains why Ss. 2 and 3 have been so strictly construed by the Courts.

If a sale is directed under S. 2 and S. 3 does not apply either because the application was not of the nature, or the applicant was not the one, specified in the section, then the sale is nevertheless one governed by the Partition Act and S. 6 relates to such a sale and shareholders and strangers alike may bid at the sale. (*Venkatasubba Rao, J.*) SUBBAMMA *v.* VEERAYYA. **136 I.C. 203=I.R. 1932 Mad. 267=1931 M.W.N. 1040=34 L.W. 730=A.I.R. 1932 Mad. 15=61 M.L.J. 552.**

———**S. 4**—*Applicability.*

S. 4 applies only if (1) the suit relates to a dwelling-house of an undivided family, (2) some share in it has been transferred to a stranger, and (3) the stranger transferee has sued for partition. (*Venkatasubba Rao, J.*) SUBBAMMA *v.* VEERAYYA. **1931 M.W N 1040=136 I.C 203=I.R. 1932 Mad. 267=34 L.W. 730=A. I.R. 1932 Mad. 15=61 M.L.J. 552.**

———**S 4**—*Applicability—Essentials—Meaning of word 'family'—Son in law whether member of family.*

The element which must to co-exist in order to attract the operation of S. 4 are (1) that the dwelling-house should belong to an undivided family, (2) that the share thereof should have been transferred to a person who is not a member of such family, and (3) that the transferee should sue for partition. The word 'family' as used in the Act should be construed liberally so as to include not merely a body of persons who trace their descent from a common ancestor but also a group of persons related in blood who live in one house or under one head of management Sometimes a son-in-law who actually resides in the family of his mother in-law for a number of years and has practically taken up his home with his father-in-law is regarded as a member of the father-in-law's family. (*Mitter and Henderson, JJ.*) LATIFANNESSA BIBI *v.* MOULVI ABDUL RAHAMAN. **6 R C. 700=149 I.C. 1088=58 C.L.J. 174=38 C.W.N. 46=A.I.R 1934 Cal. 202.**

———**S. 4**—*Applicability—Mahomedans.*

S. 4 is of general application and Mahomedans are not excluded from the benefit of the section. (*Mitter and Henderon, JJ.*) LATIFANNESSA BIBI *v.* MOULVI ABDUL RAHAMAN. **58 C.L J. 174=149 I.C. 1088=6 R.C. 700=38 C.W.N. 46=A.I.R. 1934 Cal. 202.**

———**S. 4**—*Construction — Interference with legal rights—Principles.*

S. 4 was enacted for the benefit of defendants in a partition suit, but as it involves a statutory interference with the legal rights of the plaintiff, it should be strictly construed so as to limit such interference. (*Walsh, J.*) SUBRAMANYA SASTRY *v.* SHEIK GHANNU. **A.I.R. 1935 Mad 628.**

———**S. 4**—*"Dwelling-house"—Hut capable of being used as dwelling house but not used as such.*

A hut which has not actually been used by an undivided family as a dwelling house for a number of years is not a "dwelling house" within the meaning of S. 4 even though it is still capable of being so used. (*Kentall, J.*) IQBAL UDDIN *v.* RAM NATH. **157 I.C. 172=8 R.A. 124 (1)=1935 A.L.J. 997=1935 A. W.R. 968=A.I.R. 1935 All 894.**

———**S. 4**—*Partition suit—Decree that defendant to pay certain sum in Court and plaintiff to execute sale deed to defendants and plaintiff to recover said amount from Court in lieu of share—Default by defendant—Effect.*

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Where in a former partition suit it was decreed under S. 4, Partition Act, that on payment by defendants of a certain sum of money into Court, the plaintiff should execute a sale-deed in favour of the said defendants of the share purchased by him in a dwelling-house belonging to an undivided family and that the plaintiff do recover from Court the said sum in lieu of his share in the property but the defendants did not do so.

Held, that the decree read with the relevant portion of judgment in that suit postponed execution of the sale deed to the payment of the said sum and made it conditional upon it; that the defendant not having done so, the plaintiff or his representatives continued to be the owners of the property and that the defendant or his representatives had no interest in the property entitling them to claim the benefit of S. 4 (*Walsh, J.*) SUBRAMANYA SASTRY *v.* SHEIK GHANNU. **A.I.R. 1935 Mad. 628.**

———**S. 4**—"*Transfer*"—*Surrender by tenant.*

The surrender of his tenancy by one of the tenants to the landlord who was not a member of the undivided family of the tenants is not a "transfer" within the meaning of the Act, so as to entitle the landlord to sue for partition. (*Guha and Bartley, JJ.*) MAKHAN LAL LAHA *v.* NAGENDRA NATH ADICARY **60 Cal. 379=144 I.C 812 (2)=6 I.R. (Cal.) 31=37 C.W.N. 119=A.I R. 1933 Cal. 467.**

———**S. 4**—"*Transfer*"—*Whether includes Court-sale.*

The word "transfer" in S. 4 includes an auction sale and there can be application for partition when the undivided share of a co parcener in a dwelling-house is sought to be sold in Court auction. (*Pullan and Niamatullah, JJ.*) SOHNI *v.* RAJ KUMAR SINGH JAIN. **54 All. 840=141 I C. 118=I.R. 1933 All. 55=1932 A.L J. 809=A.I.R. 1932 All. 678.**

———**S. 6**—*Failure of Court to fix reserved bidding —Sale not to be confirmed.*

It is incumbent upon the Court whether it is moved in that behalf or not, to fix a reserved bidding under S. 6 and the non-observance of such a statutory provision which results in the realization of an inadequate price is a sufficient ground where minors are concerned, to refuse to confirm the sale. (*Mehta, A J.C.*) DOST MAHOMED *v* MAHOMED SHARIF. **I R. 1933 Sind 108=142 I C. 461=A.I.R. 1933 Sind 40.**

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See also (1) C P. CODE, O. 2, R. 2
(2) CONTRACT ACT, SS. 239 AND 266.
(3) HINDU LAW—JOINT FAMILY—BUSINESS AND TRADING PARTNERSHIP.
(4) PARTNERSHIP ACT (1932).

———*Accounts—Action for—No prayer for dissolution —Maintainability.*

The principle that no suit for accounts can be maintained by one partner against another without a prayer for dissolution of partnership has no doubt, been considerably relaxed in England but the plaintiff suing only for accounts during the currency of the partnership has got to allege special grounds for seeking that relief alone and the defendant should have an opportunity of showing cause against. 9 All. 120; 33 M.L.J. 509; 32 Mad. 76, Ref. to. (*Curgenven and Bhashyam Aiyangar, JJ.*) KRISHNASWAMI NAIDU *v.* JAYALAKSHMI AMMAL. **54 Mad 671=I.R. 1931 Mad. 462=130 I.C. 766=1931 M W.N 497=33 L.W. 307=A.I.R. 1931 Mad. 300=60 M.L.J. 315.**

———*Accounts—Assignee from partner—Mortgagee—Rights to accounts.*

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The assignee or mortgagee of the share of a partner is entitled to receive a share of the profits to which the assigning partner would be entitled and the assignee must accept the accounts of profits agreed to by the partners. He cannot ordinarily require any accounts of the partnership transactions before dissolution or interfere in any way with the management or administration of the partnership 34 I.C. 543; 87 I,C. 812, Ref. That is the law as laid down in S. 31 of the (English) Partnership Act, 1890, and that represents the law in India, although there is no statutory provision to that effect. Exceptional circumstances under which the right to accounts alone has been recognised also indicated. (*Wort and Fazl Ali, JJ.*) GOA PETHA *v.* N. H. MOOS. **10 Pat 792=I.R. 1931 Pat. 312=133 I C. 40=12 Pat.L.T. 361=A.I.R. 1932 Pat. 15.**

———*Accounts—Assignee from partner—Right to sue for accounts before dissolution.*

A receiver appointed at the instance of an assignee of the share of a partner cannot, any more than the assignee himself, sue the other partners for accounts before dissolution. (*Wort ant Fazl Ali, JJ.*) GOA PETHA *v.* N. H. MOOS. **10 Pat. 792=I.R. 1931 Pat. 312=133 I.C. 40=12 Pat.L T. 361=A.I.R. 1932 Pat. 15.**

———*Accounts—Place of suing.*

A suit for partnership accounts may be filed at the place where the contract of partnership is entered into. Such a contract may be taken to have been entered into at the place where it was executed. (*Bhide, J.*) NIHAL CHAND *v.* JAI RAM DAS. **I.R. 1931 Lah. 554=132 I.C. 218=32 P.L R. 464=A.I.R. 1931 Lah. 673.**

———*Accounts—Suit for—Accounts barred—Subsequent settlement of accounts—Agreement to abide by—Consideration for.*

It is open to all the partners of a dissolved partnership to meet together and come to a final settlement of the partnership accounts, although a suit for rendition of those accounts has then become barred by time under Art. 106 of the Limitation Act. There is ample consideration in such a case, namely, in the mutual promises made by the partners to abide by such settlement, and a suit, on the basis of the settlement thus arrived at, is maintainable. (*Lord Atkin.*) ROCHI RAM *v.* FAIZULLAH KHAN. **I.R. 1933 P.C. 100=142 I.C. 549=37 C.W.N. 580=37 L.W. 746=57 C.L.J. 273=35 Bom. L.R. 745=1933 A.L.J. 545=1933 M.W.N. 406=A.I.R. 1933 P.C. 120=64 M.L.J. 596 (P.C.).**

———*Accounts—Suit for—Death of partner—Continuance of business as of old by survivors and son of deceased partner—Limitation.*

A partnership is, no doubt, dissolved in law on the death of a partner. But when the course of conduct of the parties shows that after his death the business has been continued as before under the old firn name in the same premises, and the accounts continued to be written in the same books, and the son of the deceased partner is also taken in as a new partner, that indicates that, though there was a technical dissolution by the death, there is a subsisting partnership going on, and no question of limitation arises as regards a suit for accounts. (*Tek Chand and Abdul Rashid, JJ.*) BANSI RAM *v.* JAGAN NATH. **7 R L. 486=153 I C. 969=A.I.R. 1935 Lah. 209.**

———*Accounts—Suit for—Decree—Binding nature—* Ex parte *defendant—Declaration by Court on taking of accounts—Effect of.*

Where, in a suit for accounts of a dissolved partnership, the Court passes a preliminary decree directing accounts, and a Commissioner goes into the accounts and submits a report on which the Court passes a decree

declaring the amounts due to and by the several parties, that binds all the parties including parties who remain *ex parte* in the suit as well as before the Commissioner. A party who could, if he chose, have asked for a decree in his favour for the amount that may be found due to him, but does not do so, would be bound by the result of the accounts taken by the Commissioner and accepted by the Court, notwithstanding that he did not appear before the Commissioner or before Court. He could equally claim to take advantage of what happened in the suit, because he was a party to the action, though *ex parte*. The accounts of a partnership can only be taken and must be taken once for all, in a suit to which all the partners or their representatives are parties, and the law does not contemplate successive suits for accounts taking at the instance of the various partners. (*Beasley, C.J. and Varadachariar, J.*) RATHAN CHAND KUMAJI *v.* AMICHAND **40 L.W. 792=1934 M.W.N. 539=156 I.C. 264=7 R.M. 669=A.I.R. 1934 Mad. 665=67 M.L.J. 413.**

———Accounts—Suit for—Limitation. *See* LIMITATION ACT, ART. 89.

———*Accounts—Suit for—Maintainability.*

A partner can under certain circumstances bring a suit for accounts without suing for dissolution. (*Dalip Singh, J.*) SHIB RAM *v.* CHINTA HAR. **147 I.C. 875=6 R.L. 439=A.I.R. 1933 Lah. 1032.**

———Accounts—Suit for—No prayer for dissolution—Contract imposing obligation to render annual accounts—Maintainability of suit. *See* ACCOUNTS—PARTNERS **29 N.L.R. 34=A.I.R. 1933 Nag. 127.**

———Accounts—Suit for—No prayer for dissolution—Maintainability. *See* ACCOUNTS—PARTNERS. **29 N. L.R. 34=A.I.R. 1933 Nag. 127.**

———*Accounts—Suit for—Relief by way of dissolution, if open.*

In a partnership suit like a partition suits, either side may claim a dissolution in the alternative to any other pleas that he may raise. In a suit for accounts of partnership, defendant denied the partnership, but prayed in the alternative that it may be dissolved in case it was proved to be existing.

Held, that a decree for dissolution could be granted dating from the time when the defendant put in his written statement and asked for dissolution. (*Dalip Singh, J.*) SHIB RAM *v.* CHINTA HAR. **147 I.C. 875=6 R.L. 439=A.I.R. 1933 Lah. 1032.**

———Accounts—Suit for a separate item of liability—If maintainable without a general suit for accounts. *See* ACCOUNTS—PARTNERS. **38 L.W. 316=A.I.R. 1933 Mad. 755.**

———*Accounts—Suit for—Term—Continuance after death of partner—Limitation.*

Where one of the partners had died in 1920 and a suit for dissolution and taking of accounts was filed in 1925.

Held, that the suit was barred under Art. 106, as it was in substance one for the taking of accounts of an already dissolved partnership.

Held, further, that even if the contract of partnership extended the term of partnership, the Court may refuse to enforce the same. (*Ramesam, O.C.J. and Venkatasubba Rao, J.*) KOTHANDAPANI CHETTI *v.* SREEMANEVEDAN RAJA **57 Mad. 378=151 I.C. 81=7 R.M. 80=1934 M.W.N. 22=39 L.W. 164=A.I.R. 1934 Mad. 162=66 M.L.J. 625.**

———*Agreement between two firms—Effect.*

Where one firm enters into an agreement of partnership with another, what happens in law and in fact, is that the individual partners of the one firm join with the individual partners in the other firm, the result being that all the individual partners of the two firms become partners individually in the new firm. (*Lort Williams and Jack, JJ.*) GHISULAL GANESHILAL *v.* GUMBHIRMALL PANDHYA. **62 Cal. 510=164 I.C. 111 (2) =9 R.C. 137=39 C.W.N. 606.**

———Authority of partners. *See* CONTRACT ACT, S. 251.

———*Authority of partner—Promissory note executed by one partner—Liability of other partners.*

Where one of partners of a firm signs a promissory-note, in order that all the partners are liable under it, it is necessary that not merely the firm's name should be disclosed "in some way" but it must be disclosed in such a way that on any fair interpretation of the instrument the firm must be the real person liable upon the bill. One of the partners of a firm signed a pro-note describing himself as "Proprietor, Punjab Aliance Auction Rooms, Lahore".

Held, that this description was not sufficient to justify the other partners in the firm being held liable. (*Coldstream and Bhide, JJ.*) PUNJAB UNITED BANK, LTD., LAHORE *v.* MAHOMED HUSAIN. **15 Lah. 652=152 I.C. 626=7 R.L. 300=36 P.L.R. 325=A.I.R. 1934 Lah. 358.**

———*Authority of partner—Reference to arbitration—Binding nature on other partner.*

The partner of a firm cannot enter into an agreement to refer on behalf of a firm unless all the parties join. Where one of the partners was a joint Hindu family and it did not appear that the manager had as such given a power-of attorney to the other partner.

Held, that the arbitration consented to by the partner who was so empowered was not binding on the other partner. (*Johnstone, J.*) DIWAN CHAND *v.* PUNJAB NATIONAL BANK, LTD., SIALKOT. **I.R. 1931 Lah. 798=133 I.C. 558=A.I.R. 1932 Lah. 291.**

———*Authority of partner—Reference to arbitration by one partner—Validity.*

One partner of a firm cannot enter into an agreement to refer a matter in dispute to arbitration on behalf of a firm unless all parties join in it. (*Abdul Rashid, J.*) JASKARAN DAS MUL CHAND *v.* RAM CHAND GOPI CHAND. **148 I.C. 1080=6 R.L. 631=35 P.L.R. 417=A.I.R. 1934 Lah. 483.**

———*Authority of partner—Representation by one—If binds others.*

Any representation by one of the partners will not bind the other partner. (*Mitter and Edgley, JJ.*) RATI LAL NANJI *v.* UTTAM LAL SARCAR. **155 I.C. 842 (2)=7 R.C. 630=A.I.R. 1935 Cal. 275.**

———Authority of partner—Restriction—Person dealing with knowledge—Right against firm. *See* CONTRACT ACT, S. 251. **58 C.L.J. 48=A.I.R. 1934 Cal. 177.**

———Contribution—Suit by a partner in respect of a separate item of liability—Maintainability. *See* ACCOUNTS—PARTNERS. **A.I.R. 1933 Mad. 755.**

———*Creation of—Christian family living together—Carrying on trade—Doctrine of implied agency—Applicability.*

The mere fact that a number of Indian Christians with ties of relationship are living together in a house and have a common mess would not confer on such a group of persons the rights and obligations recognised by Hindu Law in respect of a joint Hindu family nor can the family be treated as a partnership in the legal sense if some members thereof have been carrying on some trade. In the absence of an express or implied agency a debt borrowed by the managers of the trade

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by executing a promissory note is not binding on the other members. (*Sundaram Chetty and Pandurang Row, JJ.*) MUHAMED ALYAR ROWTHER *v.* GNANA AMMAL. **150 I.C. 91=6 R.M. 684=39 L.W. 551=A.I.R. 1934 Mad. 327=66 M.L.J. 671.**

———Creation of—Manager of Hindu joint family entering into business of strangers—Whole family, not partner. *See* HINDU LAW—JOINT FAMILY—BUSINESS. **38 C.W.N. 1185=A.I.R. 1934 P.C. 192=67 M.L.J. 366 (P.C.).**

———*Date of commencement—Presumption, when deed is executed.*

Prima facie every instrument takes effect from the date of its execution provided there is no expression in the document indicating an intention to postpone its operation to a future date. A deed of partnership must also be governed by a similar rule, and therefore, unless there is something in the deed to show that the partnership evidenced by it was not to commence till a future date, the presumption is that the partnership came into existence on the very date of the execution of the deed, and not on the date on which the business was commenced. (*Thom and Iqbal Ahmad, JJ.*) SHIAM LAL *v.* SHIAM LAL. **159 I.C. 433=1935 A.L.J. 1251=1935 A.W.R. 1208=A.I.R. 1935 All 1008.**

———*Debt by one partner to another—Action upon—Maintainability—Partnership dealings—Difference.*

In exceptional cases, one partner can sue another upon an individual debt, when, for example one partner gave to his co-partner a note which bound him only and not the firm and the demand in respect of which it was given was isolated from the general partnership account. But with reference to the partnership dealings, one partner cannot be deemed a creditor of the other, until on a settlement of accounts something is found due to the former. *Beecham* v. *Smith*, (1858) E. B. E. 442, Ref. to. (*Curgenven and Cornish, JJ.*) THIRUNAVUKKARASU CHETTI *v.* MUTHUKRISHNAN. **1931 M.W.N. 467.**

———*Debt by one partner to another—Money advanced to acquire share in partnership property—Lien on debtor partner's share.*

Each partner has a right to have the property of the partnership applied in payment of the debts and liabilities of the firm, before it can be seized by a creditor of one of the partners. If after satisfying the claims against the firm, there is any surplus, then the share of each partner in the surplus may be applied in payment of his separate debts. When the money due to one partner by the other is not a debt of the partnership, it cannot be recovered from the partnership property. The mere fact that the creditor partner advanced the money to the debtor partner to enable him to acquire his share in the partnership property does not alone give the former a lien on the latter's share in the partnership property. He is not on a higher footing than the other creditors. (*Shadi Lal, C.J. and Abdul Rashid, J.*) BASHESHAR NATH GOELA *v.* SHIBBA MAL. **15 Lah. 474=151 I.C. 383=7 R.L. 120=36 P.L.R. 303=A.I.R. 1934 Lah. 336.**

———*Decree against partners—Joint decree against partners for debt due by partnership—Liability of partners.*

In a suit for dissolution and rendition of accounts, the shares of the plaintiffs and defendants were declared by the preliminary decree; but a joint decree for the full amount of the debts due by partnership was passed against the partners.

Held, that they were liable only proportionate to their shares. (*Tek Chand and Monroe, JJ.*) HIRA NAND *v.* DULA RAM. **147 I.C. 634=6 R.L. 409=A.I.R. 1933 Lah. 1022.**

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———Dissolution. *See* CONTRACT ACT, S. 254 (2).

———*Dissolution—Accounts—Charge for services rendered by partners.*

The general rule is that in the absence of a contract to the contrary, partners in taking the partnership accounts cannot be allowed to charge for services rendered by them, and the fact that services rendered by the partners have been exceedingly unequal is immaterial. In such cases the question of remuneration is considered as left to the honour of the partner. Where a surviving partner carries on the business for the benefit of the firm, after the death of his partner, he is entitled to remuneration for his trouble. But the circumstances would have to be very exceptional to justify a Court allowing a partner remuneration for his services in winding up the partnership after dissolution, *e.g.*, deliberate or wilful withholding of services by other partners, (Case law discussed.) (*Aston, A.J.C.*) KHEMCHAND MEWARAM *v.* MULCHAND ASSANMAL. **26 S.L.R. 385=I.R. 1932 Sind 129=139 I.C. 614=A.I.R. 1932 Sind 126.**

———*Dissolution—Death of partner—Continuance by surviving partner—Valuation of assets—Fixing of—Power of Court—Procedure in case of difference.*

When after the death of a partner, the surviving partner takes over the assets of the business at his own valuation and continues the business, there being no agreement of the parties in that respect, and the legal representrtive of the deceased partner complains that the valuation is too low, the Court can only direct a sale of the property unless the surviving partner is willing to take over the business at what the Court may consider a fair value. The Court cannot thrust upon him a purchase which he has never contracted to take, although it is open to the Court to scrutinise the valuation given by him. In case his valuation, which is an offer by him, is not accepted by the Court or the heir of the deceased, the Court can only direct a sale. (*Ramesam and Cornish, JJ.*) SIVAGNANATHAMMAL *v.* NALLPERUMAL PILLAI. **155 I.C. 783=7 R.M. 609=1934 M.W.N. 1325=A.I.R. 1935 Mad. 165=67 M.L.J. 880.**

———*Dissolution—Inference from circumstances—Partnership at will.*

In the case of a partnership at will, the intention to dissolve may be inferred from circumstances showing that one of the partners had abandoned his interest in the concern. (*Tek Chand and Coldstream, JJ.*) OFFICIAL RECEIVER, INSOLVENTS ESTATE, LAHORE *v.* DIN MAHOMED. **35 P.L.R. 557=153 I.C. 49 (1)=7 R.L. 363 (2)=A.I.R. 1934 Lah. 557.**

———Dissolution—Interest—Charging of. *See* PARTNERSHIP—INTEREST.

———*Dissolution—Suit for—Appointment of receiver—Rule governing.*

In all cases of partnership, the true rule is that a Receiver is generally appointed for realizing the assets of the *Karbar* with a view to its winding up and for that purpose, to carry on the business in so far as is necessary and incidental to such winding up. The Court does not take upon itself the management of a partnership except as incidental to winding up. (*Mitter and McNair, JJ.*) RADHA KANTA PAL *v.* BENODE BEHARI LAL. **6 R.C. 462=148 I.C. 459=A.I.R. 1934 Cal. 444.**

———*Dissolution—Suit for—Parties.*

A suit for dissolution of partnership and accounts cannot be tried in the absence of all the alleged partners. (*Mahomed Noor and Saunders, JJ.*) PARAS DAS *v.* PREM CHAND. **159 I.C. 586=A.I.R. 1935 Pat. 456.**

———*Dissolution—Suit for—Party as receiver—Appointment of—Rule governing.*

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The ordinary rule that no party is appointed as receiver except by consent has been departed from only in exceptional cases, as for instance, in a case of partner ship where there are no allegations of fraud and where the carrying on the business depends on the personal credit of one of the members of the firm. (*Mitter and McNair, JJ.*) RADHAKANTA PAL *v.* BENODE BEHARI PAL. **6 R.C. 462=148 I.C. 459=A.I.R. 1934 Cal 444.**

——*Dissolution—Sums received after dissolution—Application.*

Sums received after dissolution must be devoted first to reduction of interest and not of capital. (*Aston, A.J.C.*) KHEMCHAND MEWARAM *v.* MULCHAND ASSANMAL. **26 S.L.R. 385=I.R. 1932 Sind 129=139 I.C. 614=A.I.R. 1932 Sind 126.**

——Essentials — Agreement to combine property, labour or skill—Joint ownership—If essential—One partner given control and extra rights and powers—If inconsistent with partnership. *See* CONTRACT ACT, S. 239. **12 Mys.L.J. 404.**

——*Evidence of.*

The question whether certain persons are partners in the legal sense depends upon the legal relations proved. (*Milne, J.C. and Aston, A.J.C.*) FIRM OF KHANUMAL *v.* KARIM MAHOMED & CO. **I.R. 1932 Sind 161=139 I.C. 860=A.I.R. 1932 Sind 78.**

——*Evidence of—Sharing in profits and losses—presumption from.*

Once it is established beyond doubt that a person is sharing in profits and losses in a fixed proportion in a firm, there arises a strong presumption in favour of his being a partner, and it lies on him to explain or get rid of that presumption. When it is further shown that he has acted as manager of the firm and has a powerful voice in its affairs, there is no shadow of doubt of his being a partner. (*Tek Chand and Abdul Rashid, JJ.*) BANSI RAM *v.* JAGAN NATH. **7 R.L. 486=153 I.C. 969=A.I.R. 1935 Lah. 209.**

——Execution of decree against. *See* C. P. CODE, O. 21, R. 50.

——*Firm—Status of—If a legal entity—Scope and effect of.*

Under the law as it stood before the Partnership Act a firm as such had no existence in law. The law regarded only the individual partners. The Partnership Act has to some extent recognized the attitude and view of commercial men that the firm is some sort of legal entity apart from the partners. (*Lort Williams and Jack, JJ.*) GHISULAL GONESHILAL *v.* GUMBHIRMALL PANDHYA **62 Cal. 510=164 I.C. 111 (2)=9 R.C. 137=39 C.W.N. 606.**

——Insolvency—Adjudication of two out of three partners—Debt due to insolvent partner—Proof of insolvency. *See* INSOLVENCY. **12 Rang. 699=A.I.R. 1935 Rang 35.**

——*Interest—Advance by partner—Right to interest.*

A partner advancing money by way of loan to the partnership is entitled to get interest thereon at a reasonable rate from the partnership as a whole and not merely from the other partners. Interest awarded at nine per cent (*Tek Chand and Coldstream, JJ.*) IQBAL MAHOMED *v.* RALLA RAM. **I R. 1932 Lah. 301=137 I.C. 162=33 P.L.R. 945=A.I.R. 1932 Lah. 389.**

——*Interest—Computation from date of final decree.*

In the case of dissolution of a partnership, interest is payable from the date of the final decree and not between the date of dissolution and the date of final decree. A. I.R. 1930 P.C. 185, Ref.; 18 Cal. 616, Dist. (*Aston, A.J.C.*) KHEMCHAND MEWARAM *v.* MULCHAND ASSANMAL. **26 S L.R. 385=I.R. 1932 Sind 129=139 I.C. 614=A.I.R. 1932 Sind 126.**

——*Interest—Drawings by partners—Interest on—Charging of interest.*

When a partnership is dissolved and accounts are made up no interest should, as a general rule, be debited against the partners on their drawings or overdrawings or amounts of the partnership money which they may have in their hands. But where the partners do not profess to have kept these amounts as partners or to have used them or intended to use them for any partnership purpose, but they claim that they were amounts due to them as advances made by them to the partnership in the capacity of creditors of the firm entitled to interest on their advances and they were retaining these amounts in satisfaction of those advances and that claim is found to be false, they cannot resist the claim for interest on such amounts and are liable to pay interest on the same to the firm. (*Reilly, C.J. and Srinivasa Rao, J.*) ADINARAYANA SETTY *v.* VENKATARAMANIAH. **13 Mys.L.J. 223=40 Mys H.C R. 455.**

——*Interest—Partner's overdrawings—Rate.*

As to the overdrawings of a partner in the case of a dissolution of a partnership, interest on overdrawings should be allowed at 6 per cent. up to date of dissolution. A.I.R. 1930 P.C. 185, Ref. (*Aston, A.J.C.*) KHEMCHAND MEWARAM *v.* MULCHAND ASSANMAL. **26 S.L.R. 385=I.R. 1932 Sind 129=139 I.C. 614=A.I.R. 1932 Sind 126.**

——*Interest—Whether can be allowed.*

In the absence of an agreement no interest should be charged after dissolution. Interest should however be allowed at 6 per cent. up to date of dissolution. *Barfield* v. *Loughborough*, (1872) 8 Ch. App. 1, Foll. (*Aston, A.J.C.*) KHEMCHAND MEWARAM *v.* MULCHAND ASSANMAL. **26 S.L.R. 385=I.R. 1932 Sind 129=139 I.C. 614=A.I.R. 1932 Sind 126.**

——*Joint Hindu family—If constitutes—Agreement between managers of two joint families.*

A joint Hindu family cannot be a partnership of itself; nor can two joint families be brought into relation with one another by an agreement to be a partnership. But there can be a partnership between the managing member of one joint family, and the manager of another family, the partnership being between the two persons and not between the families. (*Amir Ali, J.*) UDAY CHAND PANNALAL *v.* THANSING KARAM CHAND. **62 Cal. 586=157 I.C. 937=8 R.C. 138=39 C.W.N. 357=A.I.R. 1935 Cal. 537.**

——Legality—Partnership in contravention of Madras Abkari Act illegal. *See* COTRACT ACT, SS. 23 AND 24. **58 Mad. 727=68 M.L.J. 570 (F.B.).**

——*Loan by partner to firm—Right to interest on.*

The general rule is that interest is not allowed between partners. But when a partner advances moneys of his own to the partnership over and above the amount of his capital, such advances will be treated as loans by him, and he is entitled to interest on the same in the absence of a stipulation to the contrary. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) COMMISSIONER OF INCOME-TAX IN MYSORE *v.* MARADI SUBBIAH. **12 Mys.L.J. 404=39 Mys.H.C.R. 1012.**

——*Managing partner—Assignment of actionable claim—Remedy of other partners.*

The mere fact that a party makes no reference to his partners or sharers in the profits does not really affect his right in assigning the actionable claim, for as a managing partner he has a right to assign such a claim, and the only remedy of the partners or sharers in the firm is by a suit for accounts against the managing pro-

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prietor. *Marchant v. Morton Down & Co.*, (1901) 2 K. B. 829 and *Fraser* v. *Fraser*, (1906) 2 K. B. 249, Ref. (*Aston and Havelwala, A.J.Cs.*) MAMOOJI MOOSAJI *v.* TAYEBALI. **6 I.R. (Sind) 76=146 I.C. 730=A.I. R. 1933 Sind 210.**

———Members of—Name of one brother used also as name of firm—Name mentioned as partner in agreement—Firm as partner. *See* CONTRACT ACT, S. 247. **38 L W. 849.**

———*Partnership debt—Right of surviving partner to recover.*

A surviving partner can file a suit without impleading the representatives of a deceased partner for the recovery of a partnership debt which accrued due during the lifetime of the deceased partner. (*Doraiswami Iyer, C. J. and Ramachandra Rao, J.*) MUNDASADA VEERAPPA *v.* SIVALINGAPPA. **38 Mys.H.C.R. 304=11 Mys L.J. 344.**

———*Profit and loss—Liability for—Presumption.*

Where in a partnership the profits are shared in a certain proportion, the fair inference is that losses also are to be shared in that proportion in the absence of a contract to the contrary; the onus of proving that they are not liable for loss is on the persons asserting the same. (*Ramesam and Madhavan Nair, JJ.*) PITCHIAH CHETTIAR *v.* SUBRAMANIAM CHETTIAR. **58 Mad 25=7 R.M. 27=150 I.C. 777=1934 M.W.N. 457=40 L W. 60=A.I.R. 1934 Mad. 494=67 M.L. J. 182.**

———Suit against—Procedure. *See* C. P. CODE, O. 30.

———*Suit against—Infringement of trade mark—Cause of action prior but suit filed subsequent to dissolution.*

If the cause of action for infringement of trade mark arises against a partnership prior to its dissolution, a suit for injunction and damages against the partnership is competent even though filed subsequent to its dissolution. (*Walton, J.*) THOMAS BEAR & SONS, LTD. *v.* KULIA RAM **6 R.L. 599=148 I C 763=A.I.R. 1934 Lah. 625.**

———*Suit between partners—Maintainability before dissolution.*

In certain circumstances a suit will lie between partners without dissolution. Thus a suit can be maintained for recission of a contract entered into between them and for damages on the ground of false representation. (*Shadi Lal, C. J and Walker, J.*) MINCK *v.* ROSHAN LAL SHOREY. **I.R 1931 Lah, 324=32 P. L R. 235=130 I C 644=A.I.R. 1931 Lah. 390.**

———*Suit between partners—Relation of partners.*

Partners are not, as regards partnership dealings, considered as debtor and creditor *inter se* until the concern is wound up or accounts settled. One partner has, therefore, no right of action against another for the balance owing to him until after final settlement of accounts; but he can proceed against another for a debt which is independent of the partnership account. The only suit possible between the parties is one for partnership accounts. (*Lort Williams and Jack, JJ.*) GHISULAL GONESHILAL *v.* GUMBHIRMALL PANDHYA. **62 Cal. 510=164 I.C. 111 (2)=9 R.C. 137=39 C.W. N. 606**

———*Suit brought not in firm name—All partners must be impleaded.*

If a suit is not brought in the name of a firm, all the partners should be impleaded.

Obiter.—A suit by a person as the sole owner of a firm at the time of the institution of the suit cannot be said to be one on behalf of the firm. (*Rangi Lal, J.*) TRIKHA RAM *v.* DURGA PARSHAD. **35 P L R. 616=155 I.C. 314=7 R.L. 689=A.I.R. 1934 Lah. 459.**

PARTNERSHIP ACT (1932), S. 42.

———Suit—British subject-entering into partnership in a foreign country—Suit in relation thereto—No submission to jurisdiction of the foreign Court. *See* C. P. CODE, S. 13. **63 M.L.J. 761.**

———Test of. *See* CONTRACT ACT (1872), S. 239.

———*Test of—"Firm"—Status of.*

A "firm" is not a legal personality but a mere partnership. One of the tests of partnership is whether there is a binding contract of mutual agency between the partners. (*Courtney-Terrell, C. J. and Dhavle, J.*) JANKI NATH PAUL *v.* DHOKAR MALL KEDAR BUX. **156 I.C. 200=7 R.P. 698=16 Pat.L.T. 897=A.I.R. 1935 Pat. 376.**

———What is. *See* CONTRAT ACT, S. 239.

PARTNERSHIP ACT (IX OF 1932), S. 4—*Firm—Legal status of—If a person or corporation—Capacity to sue or be sued.*

In the eye of law a firm has no existence apart from the members constituting the firm. It is not a person either natural or artificial and it is not a person who can sue or be sued. The definition of "firm" under S. 239 of the Contract Act has been repealed and replaced by the Partnership Act, and the definition of the term "firm" has been made clearer. The name under which partners carry on a particular business is in fact the name of the partners taken as a whole. Firm is not a *juristic persona* to be taken cognisance of as such by the law, such as, an idol or a corporation is. When a suit is instituted by or against a firm, it is really a suit by or against a group of individuals, and the name of the firm is the collective name of the individuals. (*Khaja Mohammad Noor and Saunders, JJ.*) RAMDAS *v.* RAM BABU. **158 I.C. 25=8 R.P. 170=16 Pat.L. T. 649=A.I.R. 1936 Pat. 194.**

———S 4—*Hindu joint family business—If partnership.*

A Hindu joint family which carries on a trade or business is not a partnership under S. 4 of the Act, (*McNair, J.*) GOBINDLAL MOHTA, *In re.* **164 I.C. 428 (1)=9 R.C. 206=39 C.W.N. 275.**

———S. 5—*Partners—Members of joint Hindu family business.*

The members of a joint Hindu family carrying on a family business are not partners within the meaning of S. 5. (*Buckland, A. C. J.*) LALCHAND AMONMAL *v.* M. C. BOID & CO. **61 Cal 975=152 I.C. 991=7 R.C. 339=38 C.W.N. 914=A I.R. 1934 Cal. 810.**

———S. 6—*Partnership—Proof—Mere co-ownership of land.*

Mere co-ownership of land does not make the co-owners partners nor the mere receipt of their share of income. Where two of the co-owners not only shared the profits out of the land between themselves but jointly worked the land, jointly engaged coolies and both took active part in raising the crops.

Held, that they were partners. (*Mya Bu and Brown, JJ.*) P. L. S. A. R. S. CHETTYAR FIRM *v.* R. M. P. CHETTYAR FIRM. **6 I.R. (Rang.) 17=144 I.C. 1007=A I R. 1933 Rang. 120.**

———S. 30 (3)—*Minor—Extent of liability.*

In a suit against a partnership firm, there cannot be a personal decree against the minor partners. They would be liable only to the extent of their interest in the assets of the firm. (*Jai Lal and Monroe, JJ.*) NANAK CHAND BAIJ NATH *v.* PARMESHRI DAS. **35 P.L.R. 539.**

———S. 42—*Death of one of partners—Continuance of business with legal representatives—Inference from conduct.*

PARTNERSHIP ACT (1932), S. 42.

The dissolution of a firm on the death of one of partners is subject to contract between the parties and the intention to continue the business in partnership with the legal representative may be gathered from the conduct of the parties. (*Coldstream and Bhide, JJ.*) PUNJAB AND SIND BANK, LTD. *v.* KISHEN SINGH GHULAB SINGH. **16 Lah. 881 = 156 I.C. 795 (2) = 37 P.L.R. 883 = 8 R L. 20 = A.I R. 1935 Lah. 350.**

——— **S. 42**—*Partnership for fixed term—Dissolution—Presumption.*

A partnership constituted for a fixed term stands dissolved by the expiry of that term, unless it could be shown that the parties by express or implied agreement consented to continue the partnership business (*Thom and Iqbal Ahmad, JJ.*) SHIAM LAL *v.* SHIAM LAL. **159 I C. 433 = 1935 A.L J. 1251 = 1935 A.W.R. 1208 = A.I.R. 1935 All. 1008.**

——— **S. 69**—*Applicability—Firm of father and son forming a joint Hindu family.*

S. 69 does not apply to a firm of father and son who form a joint Hindu family and therefore a suit by such a firm is maintainable even though the firm is not registered (*Bennet, J.*) HARDEO RAM *v.* GHIRDHAR LAL KANHAYIA LAL. **153 I C. 510 = 7 R A. 515 = 1935 A.W.R. 32 = 1935 A L.J. 260 = A.I R. 1935 All. 280.**

——— **S. 69**—*Applicability to Burma—Notification No. 17-C (15) 132 of Government of India of 8 10 1932—Effect of.*

Under Department of Commerce Notification No. 17-6 (15) 132 of the Government of India of 8th October, 1932 (p. 1155, Gazette of India, Part 1, 1932) the Governor-General in Council under S 56, has directed that the provisions of Ch. 7 (which includes S. 69) of the Act should not apply to any part of Burma, other than the towns of Rangoon, Akyab, Bassein, Moulmein and Mandalay. (*Mosely, J.*) P. R. M. A. C. T. V. R. CHETTIAR FIRM *v.* MAUNG DAUNG. **160 I.C. 425 (1) = 8 R.R. 382 = A I.R. 1935 Rang. 501.**

——— **S. 69**—*Construction and scope—Unregistered firm—Suit after Act on cause of action arising before—Maintainability.*

A suit by an unregistered firm to enforce a contractual claim accruing before the commencement of Partnership Act and instituted after its commencement is barred under S. 69 of the Act, S. 69 is not affected by S. 74 (*a*) of the Act. (*M Nair, J.*) BASANTA KUMAR PAL *v.* DURGADAS AKRUR CHANDRA BANIK. **163 I C. 703 = 9 R.C. 58 = 39 C.W N. 1080.**

——— **Ss. 69 and 74 (b)**—*Operation of S. 69.*

S. 69 applies to suits for enforcement of claims accrued before the commencement of the Act, if such suits are started after S. 69 begins to operate. S. 69, being an enactment which deals with procedure only may be considered as retrospective in its operation and may be held to apply *prima facie* to all actions, pending as well as future. Therefore the pending litigations in respect of rights already accrued are saved from the operation of S. 69 under S. 74 (*b*). But S. 74 (*b*) does not save litigations started after the 1st day of October, 1933. (*Nasim Ali and Khundkar, JJ.*) SURENDRA NATH DE *v.* MANOHAR DE. **62 Cal. 213 = 39 C.W N. 67 = 153 I C. 671 = 7 R C. 396 = A.I.R 1934 Cal. 754.**

——— **S. 69**—*Plaint filed before obtaining certificate of registration—Subsequent amendment—Effect of.*

The plaintiff, purporting to be a firm, entered a plaint two days after the application for registration was made. Sometime later, an application was made to amend the plaint after having obtained a certificate to the effect that the firm had been registered in accordance with

PARTNERSHIP ACT (1932), S. 74.

S. 59 of the Act, and the same was allowed. The trial Court rejected the plaint, among others, on the ground that the suit as framed was barred by S. 69 of the Act. On revision,

Held, that the provisions of S. 69 are mandatory and that the plaintiff was bound to follow the procedure prescribed therein although his right to realise money from the defendant had accrued before the Act came into force.

Held, also, that it could not be said that the suit was instituted only when the plaint was amended and that it was undoubtedly instituted before the provisions of the Act had been complied with. (*Kendall, J.*) RAM PRASAD THAKUR PRASAD *v.* KAMTA PRASAD SITA RAM. **157 I C. 154 = 8 R.A. 113 = 1935 A L.J. 1243 = 1935 A.W R. 1051 = A.I R. 1935 All. 898.**

——— **Ss. 69 and 74**—*Scope and effect—Suit brought by unregistered firm after 1st October, 1933—If barred.*

A suit brought after the 1st October, 1933, by an unregistered firm is barred by S. 69. S 74 is intended to apply to substantive rights and not to matters of procedure and the procedure laid down by S. 69 must be followed in a suit which is filed after 1st October, 1933. (*Sulaiman, C. J. and Bennet, J.*) DANMAL PARSHOTTAM DASS *v.* BABU RAM CHHOTE LAL. **1935 A.L.J. 1245 = 1935 A.W.R. 1268.**

——— **S. 69**—*Suit filed pending proceedings before Registrar of firms—Maintainability.*

The Court has no jurisdiction to entertain a suit, if it is filed by a firm which has not been registered at the time. The registration of a firm does not relate back to the date on which the firm applies for it. Accordingly, a plaint filed during the pendency of the proceedings before the Registrar of firms, in order to save limitation, will be rejected. (*Middleton, J. C. and Mir Ahmad, A.J.C.*) DOST MOHAMMAD *v.* JAI RAM. **158 I.C. 971 = 8 R. Pesh. 71 = A.I.R. 1935 Pesh 151.**

——— **S. 69**—*Suit by unregistered firm—Liability to dismissal—Fresh suit after registration—If barred.*

S. 69 clearly says that no suit falling with its purview shall be instituted. It is the institution of the suit that is barred. Hence an unregistered firm cannot file a suit nor can it after filing get the suit stayed till it gets itself registered. The suit must be dismissed; but the dismissal of the suit will be no bar to a fresh suit after registration, if it is within time. (*Dalip Singh and Bhide, JJ.*) KRISHEN LAL RAM LAL *v.* ABDUL GHAFUR. **17 Lah. 275 = 160 I.C. 513 = 8 R.L. 557 = 38 P.L R. 633 = A.I.R. 1935 Lah. 893.**

——— **S. 69 (2)**—*Applicability—Suit on promissory note executed in favour of firm.*

Although the provisions of the Contract Act are subject to those of Negotiable Instruments Act, when the contract is embodied in the form of a negotiable instrument. All the same a promissory note is a species of contract and consequently a suit to enforce a right arising from such a contract would appear to be within the purview S. 69. In the absence of any provisions to the contrary, the provisions of the Negotiable Instruments Act, must be taken to be subject to those of the Partnership Act, when a negotiable instrument is executed by or in favour of a firm. (*Dalip Singh and Bhide JJ.*) KRISHEN LAL. RAM LAL *v.* ABDUL GHAFUR. **17 Lah. 275 = 160 I.C. 513 = 8 R.L. 557 = 38 P.L.R. 633 = A.I.R. 1935 Lah. 893.**

——— **Ss. 74 and 69**—Scope and effect—Suit brought by unregistered firm after 1st October, 1933—If barred. *See* PARTNERSHIP ACT, S. 69. **1935 A.W.R. 126.**

PARTNERSHIP ACT (1932), S. 74.

——**S. 74**—Scope and effect—If controls S. 69—Unregistered firm—Suit after Act on cause of action arising before—Bar of. *See* PARTNERSHIP ACT, S. 69. **39 C.W.N. 1080.**

——**S. 74 (a)**—"*Right*"—*Meaning of.*

The word "right" in S. 74 (*a*) should be taken in the sense of a right to or in some property. It does not include a right to institute a suit. (*Dalip Singh and Bhide, JJ.*) KRISHEN LAL RAM LAL *v.* ABDUL GHAFUR. **17 Lah. 275=160 I C. 513=8 R.L. 557=38 P.L.R. 633=A.I.R. 1935 Lah. 893.**

PART-PAYMENT. *See* LIMITATION ACT, S. 20.

PART PERFORMANCE. *See also* T.P. ACT (1882), S. 53-A.

——*Applicability—Agreement of sale—Subsequent unregistered assignment—Possession under—Effect of.*

An agreement of sale made in 1919 was never put into effect and was later on set aside by consent of the parties and replaced by a deed of assignment in 1923 which was executed by the vendor in favour of the wife of the promisee under the agreement. But the vendee never got it registered. At a time when a suit for specific performance was barred by time, the vendor repudiated the assignment.

Held, the doctrine of part performance did not apply and the vendee could not therefore rely on it to resist the claim of the vendor under the law in force prior to the enactment of S. 53-A, T. P. Act, which partially imported into India the English equitable doctrine of part performance. (*Murphy and Sen, JJ.*) NEMTULLA *v.* SAFIABU. **156 I C. 779=8 R.B. 30=37 Bom.L.R. 82=A.I.R. 1935 Bom. 208.**

——*Applicability—Compromise decree—Money paid under—Party repudiating other terms—Permissibility.*

Where, during the execution of a money decree an agreement was arrived at between the parties to the effect that a certain amount was to be paid then and there, the balance to be paid in cash at a later date and the remaining amount would be registered with certain trustees who had been appointed by the judgment debtors to pay off their creditors and on that amount the decree holder was to receive rateable distribution from the trustees and the spot cash was paid then and there, *held*, that it was not open to the decree-holder to repudiate the other terms. By accepting the cash and the benefit of the compromise under the compromise decree he is clearly barred by the rule of estoppel and the doctrine of part performance from repudiating the other terms which are part in no way illegal. (*Tek Chand, J.*) THE BOMBAY CO., KARACHI *v* ROSHANDAS RADHAKISHAN. **35 P.L.R. 315=A.I.R. 1934 Lah. 423.**

——*Applicability—Contract should be specifically enforceable—Minor's property—Contract for sale of.*

One of the necessary conditions for applying the doctrine of part performance is that the contract to which the doctrine of part performance refers must be such as in its own nature is enforceable. Agreement of sale of immovable property of a Hindu minor entered into on his behalf by his guardian is not binding on the minor and enforceable specifically against him, even though the debts binding on the minor are discharged by the consideration paid for the sale and consequently the doctrine of part-performance does not apply to such a contract. (Case law disc.) (*Madhavan Nair, J.*) NARASAYYA *v.* SOMAYYA. **150 I.C. 660=7 R.M. 24=A.I.R. 1933 Mad. 364.**

——*Applicability—Non observance of statutory provisions.*

The doctrine of part performance has no application where the non-observance of the statutory provisions

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make the transaction ineffective. A.I.R 1926 P.C. 273; 26 A.L.J. 752 (F.B.), Foll. (*Raza and Kisch, JJ.*) AFSAR JEHAN *v.* BECHE LAL. **7 Luck. 16=I R. 1931 Oudh 226=132 I.C. 66=14 O.L.J. 156=8 O.W.N. 279=A.I.R. 1931 Oudh 288.**

——*Applicability—Suit in ejectment—Plea of oral contract of sale—Sustainability.*

An averment of the existence of a contract of sale is not a relevant defence to an action in ejectment. If the contract is still enforceable, the defendant may found upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part performance will not avail him to any effect. Plaintiff purchased 17 plots of land which he leased to the defendants for a term. On the expiry of the lease, plaintiff demanded possession and got possession of 8 plots only. He sued for possession of the 9 plots, in answer to which the defendant pleaded a settlement between the plaintiff and himself under which it was orally agreed that half the lands should remain with the defendant as owner and the other half only should be delivered to the plaintiff.

Held, that the plea did not avail the defendant and could not be proved. (*Murphy and Sen, JJ.*) CHAND AHMEDALLI *v.* RAVJI TANAJI. **37 Bom L.R 246.**

——*Doctrine of—Applicability to N.W.F. Province.*

The doctrine of part performance can be applied in the N.W.F. Province as elsewhere in India, but it cannot be applied so as to override the provisions of the statutory law, *e.g.*, S. 49, Registration Act. Reference to the terms of the unregistered agreement in support of the claim for a permanent right of occupation is prohibited. (*Middleton, J.C.*) ILAM DIN *v.* SAFIULLAH NUR DIN. **6 R.Pesh. 57=148 I.C 853=A.I.R. 1934 Pesh. 17.**

——*Lease—Lessee all along in possession—Fresh agreement of lease registered—Patta contemplated but never executed—Liability of lessee to ejectment—Equity.*

Equity holds people bound by a contract which, though deficient in some requirement as to form, is nevertheless an existing contract. Where there was a complete and concluded contract between the parties concerned, in the suit for ejectment, that contract was evidenced by a registered instrument, and had been followed up by performance of the material terms and conditions contained therein and the lessee, who had been all along in possession, continued to remain in possession after the expiration of the pre-existing lease, the mere fact that the contract contemplated the execution of a formal document, a patta which was never done within 3 years and so a suit for specific performance of the contract for lease by the execution of a patta would have been barred by limitation, does not entitle the lessor to eject the lessee. Equity will hold the lessor bound by the contract for lease.

Held, on the facts, in view of the conduct of the parties there having been no refusal at any time in the matter of execution of a patta, time was not of the essence of the contract so far as the executions of a patta was concerned, the defendants right to specific performance of the contract for lease was not barred by effluction of time on the date, on which the suit for ejectment was instituted by the plaintiff. (*Guha and Bartley, JJ.*) SUBIMALCHANDRA CHATTERJEE *v.* RADHANATH RAY **60 Cal. 1372=149 I C. 1000=6 R.C. 679=A.I.R. 1934 Cal. 235.**

——*Lease—Possession by lessee after expiration of pre-existing lease—Treatment as part-performance.*

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Where possession had been obtained before the agreement, the lessee having continued to be in possession all along by virtue of an existing lease, possession after the expiration of the pre-existing lease, is only referable to a contract for renewal and may be treated as part performance of such contract. *Dowell* v. *Dew* 12 L.J. Ch. 158, Foll. (*Guha and Bartley, JJ.*) SUBIMAL CHANDRA CHATTERJEE *v.* RADHANATH RAY. **60 Cal. 1372=149 I.C. 1000=6 R C. 679=A.I.R. 1934 Cal. 235.**

———*Lease—Verbal contract to give permanent lease—Buildings erected when contract specifically enforceable—Suit for ejectment—Right to specific performance barred—Effect.*

In 1913 a verbal agreement was made between appellant and respondent, for the grant to the respondent by the appellant of a permanent lease of a small parcel of land at a total rent of Rs 80 per month. In anticipation of the execution of the lease, the respondent was let into possession in June, 1913, and shortly thereafter, he erected certain structures on the land with the knowledge and approval of the appellant. At sometime in the course of the year 1914 the parties agreed that the lease should be a lease for five years. No lease was ever executed but in October, 1922, the appellant served upon the respondent a notice to quit, asserting that he was a monthly tenant, and requiring the premises to be vacated by the 1st November, 1922. This not being done, the suit was instituted in the month of April, 1923. The structures were erected not in any mistaken belief by the respondent of his rights, which he correctly believed to be his; not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

Held, that the respondent having allowed his right to enforce his contract to become barred was not entitled to resist the appellant's claim to possession, by referring to a title the acquisition of which is forbidden by statute. If, on the other hand, the defendant's right to enforce specific performance of the agreement had been subsisting at the date of the suit for ejectment, the defendant could claim to have executed in his favour by the plaintiff an instrument in writing which he could duly have registered, the plaintiff's suit being stayed in the meantime. But having allowed that right to become barred, he cannot invoke the aid of the doctrine of part performance. (*Lord Russell of Killowen.*) ARIFF *v.* JADU NATH MAJUMDAR. **58 I.A 91=58 Cal 1235=I R. 1931 P.C. 154=131 I.C. 762=33 Bom L.R. 913=1931 M W N. 480=33 L W. 586=35 C.W.N. 550=53 C L.J. 359=8 C W.N. 739=15 R.D. 354=A.I.R. 1931 P.C 79=60 M L J. 538 (P.C.)**

[Disc 14 P. 672 (695, 696, 715) (F.B.). **F.** 13 R. 274 (F.B.). **R.** 61 I.A. 388 (390, 395, 366) (P.C.).]

———*Scope of doctrine.*

An equitable doctrine like part-performance cannot operate so as to nullify the statutory requirement of a registered instrument. A I.R. 1931 P.C. 79, Foll. (*Mahomed Noor and Luby, JJ.*) MUKTESWAR TRIGUNAIT *v.* BARAKAR COAL CO., LTD. **152 I.C. 498=7 R.P. 205=A.I.R. 1934 Pat. 546.**

PARTY WALL.

See also (1) CO-OWNER.
(2) CO-SHARER.
(3) EASEMENT.

———*Rights of neighbouring owners—Erection of new wall on portion of party wall—Legality.*

In the case of a party wall, the adjoining owners are tenants-in common and the wall cannot be treated as a wall divided longitudinal into two strips one belonging to each of the neighbouring owners. One owner is entitled to the use of the whole width of the top of the wall subject to a similar right of the defendants. The construction of a new wall on half the width will amount to an ouster of the other owner. 3 E. and B. 1 and 14 Ch. D. 192, Ref. to. (*Shah Lal, C J. and Walker, J.*) GANPAT RAI *v.* SAIN DAS. **12 Lah. 542=I.R. 1931 Lah. 393=131 I C. 233=32 P.L.R. 340=A.I.R. 1931 Lah. 373.**

PASSING OFF. *See* TRADE MARK—PASSING OFF.

PATENT—*Infringement—Attitude of courts—Article of utility.*

Where in an action for infringement of patent it is found that the patent contains both subject-matter and utility, the Court should approach the case with a desire to uphold the patent as valid. (*Lord Hanworth.*) JAMES LEWIS KRAFT *v.* OLIVER KENNETH MC ANULTY. **I R. 1931 P.C. 312=134 I.C. 664=1931 A.L J. 1140=34 L.W. 923=A.I R. 1931 P.C. 279 (P C.).**

———*Infringement—Injunction—Grant of—Conditions—Duty of Court.*

In a patent action, the Court before issuing an injunction, will enquire as to what constitutes the essence of the invention as claimed, and as to whether the defendant has infringed the patent, by taking the "pith and marrow" of the invention as claimed. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom 261=8 R.B. 346=161 I.C. 393 (2) =37 Bom L R. 665=A.I R 1936 Bom. 99**

———*Proof by patentee—Nature of.*

The principle in patent law is clear that the patentee must define the nature of the invention and disclose a process which produces the result to be aimed at. If the patentee claims protection for a process for producing a result and that result cannot be produced by the process, the consideration (for the patent) fails and the protection which is purchased by the promise of results cannot survive the proved failure of the promise. (Case-law discussed.) (*Lord Hanworth.*) JAMES LEWIS KRAFT *v.* OLIVER KENNETH MCANULTY. **I R. 1931 P C. 312=134 I C 664=1931 A.L J. 1140=34 L.W. 923=A I.R. 1931 P C. 279 (P C.).**

PATENTS AND DESIGNS ACT (II OF 1911) S. 2 (8)—*"Invention"—Meaning — Subject-matter of patent—Combination of things.*

The question whether there is an invention is a question of fact. A new and useful application of an old principle may be a good subject-matter of patent. An improvement on something known may also afford subject-matter, so also a new combination of different matters already known. A patentable combination is one in which the component elements are so combined as to produce a new result or to arrive at an old result in a better or more expeditious or more economical manner. If the result of the combination is either a new article or a better or a cheaper article than before, the combination may afford subject-matter for a patent. The mere collocation of two or more things, without some exercise of inventive faculty, is not, however, a subject-matter for a patent. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom. 261=8 R B 346=161 I.C. 393 (2)=37 Bom.L.R. 665=A.I. R. 1936 Bom. 99.**

PATENTS AND DESIGNS ACT (1911), S. 2.

———**Ss. 2 (8) and 10**—*"New manufacture"—Meaning of—"Invention."*

A new manufacture means not only a new article of manufacture, but also a new process or method of manufacturing something new. It does not mean a new principle of manufacture—a principle cannot be an invention—but means a new application of the principles so as to produce a new method or a new manufac-

PATENTS AND DESIGNS ACT (1911), S. 2.

ture. (*Beaumont, C. J. and Rangnekar, J.*) LALLUBHAI CHAKUBHAI *v.* SHAMALDAS SANKAL CHAND. **153 I.C. 481 = 7 R.B. 234 = 36 Bom.L.R. 881 = A.I.R. 1934 Bom. 407.**

——**S. 2 (10)**—"*Manufacture*"—*Meaning of.*

"Manufacture," as defined by S. 2 (10) comprehends not only the production of an article but also the means or method of producing it, so that a new process or an improvement of an old process can be a manufacture. The subject matter of a patent must be a new manufacture or art, for if there is no new manufacture or art, there is no subject matter and therefore no invention. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom. 261 = 8 R.B. 346 = 161 I.C. 393 (2) = 37 Bom.L.R. 665 = A.I.R. 1936 Bom. 99.**

——**S. 2 (14)**—'*Proprietor*'—*Meaning.*

The proprietor must be the author or one who has acquired the design from the author or a person on whom such rights have devolved. (*Niamatullah and Bennet, JJ.*) MAHOMED ABDUL KARIM *v.* MAHOMED YASIN. **56 All. 1032 = 153 I.C. 214 = 7 R.A. 470 = 1934 A.L.J. 664 = 4 A.W.R. 1094 = A.I.R. 1934 All. 798.**

——**S. 2 (14) (b)**—"*Acquire a design*"—*Meaning.*

To acquire a design within the meaning of S. 2 (14) (*b*), means the transfer of proprietary rights in a design and not merely learning a design. (*Niamatullah and Bennet, JJ.*) MAHOMED ABDUL KARIM *v.* MAHOMED YASIN. **56 All. 1032 = 153 I.C. 214 = 7 R.A. 470 = 1934 A.L.J. 664 = 4 A.W.R. 1094 = A.I.R. 1934 All. 798.**

——**S. 4**—*Specification of patent—Duty of patentee.*

It is incumbent on the patentee to particularly describe and ascertain the nature of his invention in the specification, as the ambit of his invention is circumscribed by the claims. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom. 261 = 8 R.B. 346 = 161 I.C. 393 (2) = 37 Bom.L.R. 665 = A.I.R. 1936 Bom. 99.**

——**S. 9**—"*Application*"—*Undertaking not to proceed with the matter till decision of application—If continues till decision on appeal.*

An "application" under S. 9 also includes an appeal from an order thereon; where the Controller of Patents gives an undertaking not to proceed with the matter till "the decision of this application," the undertaking does not come to an end with the decision of the original Court. The decision of this application must be construed to mean the final decision, *i.e.*, decision of the appellate Court; the undertaking will remain in force until then, or until the time for filing the appeal runs out. (*Lort Williams and Jack, JJ.*) DORMAN LONG & CO., LTD., *v.* JAGADISH CHANDRA MAHINDRA. **62 Cal 596 - 39 C.W.N. 573.**

——**S. 9**—*Controller of patents—Discretion to grant or refuse the issue of subpoenas—*"*After hearing the applicant and the opponent*" *whether includes witnesses*

The Controller of Patents must under S. 9 issue subpoenas on witnesses, if asked for by either of the parties; the words "after hearing the applicant and the opponent" in S. 9 cannot be read as meaning that the controller need only hear the applicant and the opponent and can refuse to hear any evidence which either or both wish to adduce. "Hearing" means "hearing the party and his evidence." (*Lort Williams and Jack, JJ.*) DORMAN LONG & CO., LTD. *v.* JAGADISH CHANDRA MAHINDRA. **62 Cal 596 = 39 C.W.N. 573.**

——**S. 9 (3)**—*Appeal under—Governor-General's power to remand.*

PATENTS AND DESIGNS ACT (1911), S. 17.

The Governor-General has, in an appeal against an order of the Controller, power to remand the case to the Controller. The power of remand is not specifically given under the Patents and Designs Act. But all the Courts of appeal have inherent powers of remand, and the Governor-General in Council, as a Court of appeal has such power. (*Lort Williams and Jack, JJ.*) DORMAN LONG & CO., LTD. *v.* JAGADISH CHANDRA MAHINDRA. **62 Cal. 596 = 39 C.W.N. 573.**

——**S. 15 (4)**—*Reference under—Fresh petition to Court—Necessity.*

Under S. 15, when a petition is referred for decision to the High Court under sub S. (4), it is the petition originally submitted to the Governor-General in Council which the High Court should dispose of. The applicant need not file a second or fresh petition in the High Court. Such a procedure is misconceived. (*Kania, J.*) INDIAN CASABLANCAS HIGH DRAFT COMPANY *v.* MILLOWNERS' ASSOCIATION OF AHMEDABAD. **59 Bom. 564 = 157 I.C. 385 = 8 R.B. 64 = 37 Bom.L.R. 187 = A.I.R. 1935 Bom. 195.**

——**S. 15 (4)**—*Scope—Proceedings under—Nature of—Procedure—Amendment—Additional objections—If can be urged.*

On a reference to the High Court by the Governor-General in Council, the matter ceases to be merely administrative and becomes a judicial proceeding, the parties to it being the patentee on the one hand and the objectors on the other; the Controller of Patents has also the right of audience. In such a proceeding, in the absence of any separate or special procedure, the ordinary rules of procedure followed by the High Court, devoid of its technicalities, should be adopted so far as they are applicable to the particular case. The High Court has jurisdiction to allow the objectors to file fresh objections adding further grounds of objection, if that can be done under the law relating to the amendment of pleadings; and leave to amend the amendments ought to be given when the petitioner is not taken by surprise. (*Kania, J.*) INDIAN CASABLANCAS HIGH DRAFT COMPANY *v.* MILLOWNERS' ASSOCIATION OF AHMEDABAD. **59 Bom. 564 = 157 I.C. 385 = 8 R.B. 64 = 37 Bom.L.R. 187 = A.I.R. 1935 Bom. 195.**

——**S. 15 (5)**—*Enquiry under—Scope of—Profits made in foreign countries—If to be considered.*

In considering an application for extension of a patent, it would be legitimate for the Court to inquire what profits the inventor had made since its registration, and that inquiry may not be limited to what the inventor earned in his country but might include profits made by him in all countries where the invention was registered or exploited. The Court in such case insists on a full disclosure of the profits made by the inventor or his assignees, and if the Court believes that there has not been a full or *bona fide* disclosure, it may summarily reject the application. (*Kania, J.*) INDIAN CASABLANCAS HIGH DRAFT COMPANY *v.* MILLOWNERS' ASSOCIATION OF AHMEDABAD. **59 Bom. 564 = 157 I.C. 385 = 8 R.B. 65 = 37 Bom.L.R. 187 = A.I.R. 1935 Bom. 195.**

——**S. 17 (1) and (6)**—*Application to Controller for amendment of specification—Powers of Controllers—Interference by Court—Principles.*

In application under S. 17 for amendment of specification, made to the Controller of Patents, the latter has absolute powers to decide whether the amendment sought would make the specification claim an invention larger than and substantially different from that claimed in the original unamended specification. This power of the Controller is, under S. 17 (6), subject to an appeal

PATENTS AND DESIGNS ACT (1911), S. 17.

to the Governor-General in Council. In such a case it is quite impossible for the Court to investigate the matter, and then by anticipation to prohibit the Controller from proceeding, on the assumption that his decision, when given, will be erroneous. To do so would be an usurpation on the part of the Court of the jurisdiction which the law has given to the Controller. (*Panckridge, J.*) NATIONAL CARBON CO. AND BRIGHT STAR BATTERY CO., *In re.* **61 Cal. 450 = 152 I.C. 914 = 7 R.C. 329 = 38 C.W.N. 729 = A.I.R. 1934 Cal. 725.**

PATENTS AND DESIGNS ACT (II OF 1911), S. 17 (1) and (7)—*Applicant for amendment of specification—Burden and nature of proof.*

An applicant for amendment of his specification has upon him the burden of showing that his amendment falls within one or other of the three categories of disclaimer, correction or explanation and that he is not claiming an invention which is substantially larger than or different from that originally claimed. The onus is not discharged unless his amendment is unambiguous and he establishes with sufficient certainty either that this claim is merely one of those already covered by some one or more of the old claims upon which he relies or that it does not comprise an invention substantially larger than or substantially different from that covered by the unamended specification (*Lord Tomlin.*) NORMAN LETHBRIDGE COWPER *v.* PAPER SACKS PROPRIETARY, LTD. **1932 A.C. 709 = I.R. 1932 P.C. 312 = 139 I.C. 657 = A.I.R. 1932 P.C. 266 (P.C.).**

——**S. 17 (9)**—*Suit, when pending—Appeal, if 'suit'.*

After judgment was pronounced by the Court in a suit for infringement of patent, an application was presented under S. 17 of the Patents and Designs Act, to the Controller of Patents for leave to amend the specification of the amendment. The application was duly advertised under S. 17 (3) of the Act. Subsequently an appeal was filed against the decree in the suit. Objection was raised to the maintainability of the application on the ground that S. 17 (9) of the Act deprived the Controller of all jurisdiction in the matter, as the action for infringement was still to be regarded as pending.

Held, that the suit for purposes of S. 17 (9) terminated the moment the Court pronounced its judicial decision and could not be regarded as pending when the application was presented to the Controllor of Patents; that "suit" did not inculde an appeal from the decree in a suit for infringement, under S. 17 (9), that an action for infringement meant action before judgment and that the filing of an appeal did not deprive the Controller of jurisdiction to deal with an application already presented to him under S. 17 (1). (*Panckridge, J.*) NATIONAL CARBON CO. AND BRIGHT STAR BATTERY CO., *In re.* **61 Cal, 450 = 152 I.C. 914 = 38 C.W.N. 729 = 7 R.C. 329 = A.I.R. 1934 Cal. 725.**

——**S 18 and Civil Procedure Code, O. 23, R. 1**—*Application to Court for amendment of specification under S. 18—Withdrawal without leave—Fresh application to Controller of Patents—If barred.*

A patentee made an application to Court under S. 18, Patents and Designs Act, for amendment of specification, which was, however, dismissed as the same was not proceeded with. Subsequently they presented an application for amendment, substantially to the same effect, to the Controller, and objection was raised that though there was no *res judicata* yet the application had in effect been withdrawn without leave of Court and therefore barred the present appplication to the Controller, under the principles of O. 23, R. 1, C. P. Code.

PATENTS AND DESIGNS ACT (1911), S. 38.

Held, that the Civil Procedure Code was not applicable to proceedings before the Controller, though the principles of the Code had to be observed by him as being an authority exercising judicial or quasi-judicial functions; and that the question whether and how far the patentee prejudiced his rights by his conduct in respect of the proposed application to the Court was for the Controller to decide. (*Panckridge, J.*) NATIONAL CARBON CO. & BRIGHT STAR BATTERY CO., *In re.* **61 Cal. 450 = 152 I.C. 914 = 38 C.W.N. 729 = 7 R.C. 329 = A.I.R. 1934 Cal. 725.**

——**S. 23**—*Offence under—Mere imitation is not—Infringement or passing off necessary to constitute offence.*

Mere imitation is no offence unless there is an infringement of a patent or copyright or there is attempt to pass goods as goods of another dealer or manufacturer, either by using a false trade mark or false description or a trade mark or description likely to deceive purchasers by a deliberate imitation of a genuine mark or description or by falsely giving out goods as the goods of some other dealers or manufacturer. (*Staples, A.J.C.*) HAFIZULIAH HAMIDULLAH *v.* S. K. PAPA. **30 N.L.R. 45 = 35 Cr.L.J. 373 = 6 I.R. (Nag.) 112 = 146 I.C. 1084 = 1933 Cr.C. 1423 = A.I.R. 1933 Nag. 344.**

——**S. 29**—*Infringement of patent—What constitutes—Suit for damages—Onus of proof.*

A patent may be infringed in several ways, one of which is by using the invention or any colourable imitation thereof in the manufacture of articles or by putting the invention in practice in any other way. A patent may sometimes be infringed by taking a part only of the invention, but that depends on whether the part for which protection is asked is a new and material part, especially in the case of a combination. The question of infringement is a mixed question of law and fact. The plaintiff in a patent action has got to prove that his process has been counterfeited or imitated by the defendant. It is necessary for him to give the particulars of the breaches constituting the alleged infringement of his patent rights. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO **60 Bom. 261 = 161 I.C. 393 (2) = 8 R.B. 346 = 37 Bom L.R. 665 = A.I.R. 1936 Bom. 99.**

——**S. 38**—*Patent—Essentials of validity—Public user and private user—Distinction.*

The two features necessary to the validity of a patent are novelty and utility, but the real test is the novelty of the invention. Novelty is essential, for otherwise there would be no benefit to the public and consequently no consideration moving from the patentee. A plea of want of novelty also includes the plea of want of subject-matter. Under S. 38 of the Patents and Designs Act there must be an absence of prior publication or of prior public user; and if the user is secret or experimental, the profits made by the inventor from his invention must not be excessive. There is a distinction under the section between public user and private user as also between public user of the invention by working it commercially and public user of the invention from the point of view of publication. The public user of the invention for purposes of trade may, in certain cases, defeat a patent for want of novelty quite apart from the question of publication. It is also clear that if the public has once become possessed of the knowledge of the invention before the date of the application, no patent subsequently granted is valid. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom. 261 = 161 I.C. 393 (2) = 8 R.B. 346 = 37 Bom. L.R. 665 = A.I.R. 1936 Bom. 99.**

PATENTS AND DESIGNS ACT (1911), S. 38.

——**S 38**—*Scope—Public and private user.*

S. 38 distinguishes clearly between public user and private user. Whether a process has been publicly used or not is a question of fact. (*Beaumont, C.J. and Rangnekar, J.*) LALLUBHAI CHAKUBHAI *v.* SHAMALDAS SANKALCHAND. **153 I C 481=7 R.B. 234 =36 Bom L R. 881=A.I.R. 1934 Bom. 407.**

——**S. 38 (1)**—"*Public user*"—*What amounts to.*

Under S. 38 if an article manufactured under a secret process is of such a character that no one by examining it can find out the secret of that manufacture, then the sale of that article in public cannot amount to public user of the process. Public use does not mean use by the public but use in a public manner and not secretly. Public user which would invalidate an invention or rather on account of which an invention shall not be treated as a new invention must be the use of the invention in public. (*Beaumont, C.J. and Rangnekar, J.*) LALLUBHAI CHAKUBHAI *v.* SHAMALDAS SANKALCHAND. **153 I C. 481=7 R.B. 234=36 Bom.L R. 881=A.I.R. 1934 Bom. 407.**

——**S. 38 (1) (a)**—*Public user or publication—What constitutes.*

Public user does not mean a user or exercise of the invention by the public, but a user or exercise in a public manner, and that is a question of fact. If the invention is being put into practice before and at the date of the grant, the grant will not be for a new invention or manufacture, whether the invention is being practised by the patentee himself or by others. A use of the invention for purposes of trade may constitute a prior user invalidating the patent, and a prior public sale of goods or articles treated according to the invention is a public user of the invention, the sale being strong evidence of the user being commercial and not experimental. But to constitute evidence of public user the sale must be open and in the ordinary way of business. The publication of an invention by sale of the articles treated by it for purposes of trade by the patentee or by others may constitute a prior user even if there is no publication. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom. 261=161 I.C. 393 (2)=8 R.B 346=37 Bom.L R. 665=A I R. 1936 Bom. 99.**

——**S. 38 (1) (b)**—*Scope—Experimental user—User for profit—Distinction — Excessive profits—Test.*

A prior user might be of an experimental nature, *i.e*, what was genuinely necessary for the inventor to satisfy himself as to the practicability of his invention If it exceeds such limits and is carried on for profits, such user will defeat the subsequent patent. But a distinction has to be drawn between the use of an invention for profit and the carrying out of experiments which turn out successful and only incidentally bring in profit to the inventor. There is no test or authority laying down the limit beyond which the profits made by the inventor out of his invention are deemed excessive. It is the inventor's profit alone that has to be considered. (*Wadia, J.*) LALLUBHAI CHAKUBHAI *v.* CHIMANLAL CHUNILAL & CO. **60 Bom. 261=161 I.C. 393 (2)=8 R.B. 346 =37 Bom L R. 665=A.I.R. 1936 Bom 99.**

——**S. 38 (1) (b)**—*Secret use of invention—Right to patent.*

When there has been no more than a secret use of the invention by the inventor with a view to taking out a patent or the manufacture for the inventor and under injunctions as to secrecy by a manufacturer, the patent will be good. But this will not be the case where the secret process has been used for profit or where the invention was communicated to a third person in a manner which both in law and in equity allowed him to do what he liked with the invention. S. 38 allows a secret user for a reasonable profit. (*Beaumont, C.J. and Rangnekar, J.*) LALLUBHAI CHAKUBHAI *v.* SHAMALDAS SANKALCHAND. **153 I.C. 481=7 R B. 234=36 Bom. L.R. 881=A.I.R. 1934 Bom. 407.**

PATENTS AND DESIGNS ACT (1911), S. 53.

——**Ss. 43 and 53**—*Effect of registration—Suit for infringement—Plea in defence that design is neither new nor original.*

No registration under S. 43 is effective, unless the design or configuration sought to be protected is new and original and not of a pre-existing common type. In a suit for damages for infringement of a registered design under S. 53, the defendant can be allowed to raise in defence a plea that the design is neither new nor original. (*Abdul Rashid, J.*) QADAR BAKHSH *v.* GHULAM MAHOMED. **155 I.C. 319=7 R.L. 691=35 P.L R. 731=A.I.R. 1934 Lah. 709.**

——**S 46 (3)**—*Person entered as proprietor—Evidentiary value.*

Where a person is entered as a proprietor of registered design, there is not under the Act conclusive proof from the entry that the plaintiff is the proprietor of the design but that is *prima facie* evidence that he is the proprietor. The plaintiff in a suit for injunction and damages for infringement of registered design, has therefore the advantage that if no evidence at all is given, then the certificate is sufficient evidence that he is the proprietor. (*Niamatullah and Bennet, JJ.*) MAHOMED ABDUL KARIM *v.* MAHOMED YASIN. **56 All. 1032=153 I.C. 214=7 R A. 470=4 A.W.R. 1049=1934 A.L J. 664=A.I R. 1934 All. 798.**

——**S. 53**—*Infringement of registered design—Suit for injunction and damages—Pleas open to defendant.*

Where a suit is filed for injunction to restrain defendants from using a certain design which plaintiff has registered and for damages, it is open to the defendant to plead that the plaintiff was not the proprietor of the particular design and that it was not a new invention or design of the plaintiff on the date of his registration. The onus of proving this is on the defendants. 25 All. 493, Rel. on. (*Niamatullah and Bennet, JJ.*) MAHOMED ABDUL KARIM *v.* MAHOMED YASIN. **56 All 1032=153 I.C 214=7 R.A. 470=1934 A.L. J. 664=4 A.W.R. 1094=A I.R. 1934 All 798.**

——**S. 53**—*Offence under—Damage.*

The question of actual damage must always be seriously considered when allotting penalties for the various offences under this section. (*Cunliffe, J.*) CALICO PRINTERS' ASSOCIATION, LTD. *v.* HAJEE YUSOOF FATEH MAHOMED. **148 I.C. 315=6 R.R. 217=A.I.R. 1933 Rang. 240.**

——**Ss. 53 and 2 (14)**—'*Registered proprietor*'—*Meaning.*

The words 'registered proprietor' mean a person who is in fact the proprietor and who has also been registered as such and not merely a person who is registered as a proprietor. (*Niamatullah and Bennet, JJ.*) MAHOMED ABDUL KARIM *v.* MAHOMED YASIN **56 All. 1031=153 I.C. 214=7 R.A. 470=1934 A.L.J. 664=4 A.W.R. 1094=A.I.R. 1934 All. 798.**

——**Ss. 53 and 43**—Suit for infringement of registered design—Plea in defence that design is neither new nor original. *See* PATENTS AND DESIGNS ACT, SS. 43 AND 53. **35 P.L R. 731=A.I.R. 1934 Lah. 709.**

——**S. 53 (2)**—*Notice—Contents.*

It is not necessary in a notice under S. 53 (2) (*b*) warning the defendants of their liabilty that the words

PAT. H. C. GEN. RULES AND CIR. ORDERS (CIVIL), Pt. 1, Ch. 1, R. 13.

of the statute should be rigidly followed. It is enough if the defendants are not under any misapprehension when they receive the notice. (*Cunliffe, J.*) CALICO PRINTERS' ASSOCIATION, LTD. *v.* HAJEE YUSOOF FATEH MAHOMED. **148 I.C. 315=6 R.R. 217=A.I. R. 1933 Rang. 240.**

PATNA HIGH COURT GENERAL RULES AND CIRCULAR ORDERS (CIVIL) PART 1, Ch. 1, Rr. 13 and 15—*Effect—Sheristadar of Munsif Court—Power to administer oath.*

District Judges have power under R. 15 and S. 139 (*c*), C. P. Code, to appoint Commissioners to administer oath on affidavit generally and without restriction to a particular area or class of a case. If there is such an order the Sheristadar of a Munsif Court has authority to receive and attest affidavit referring to an appeal pending in the Court of the District Judge. If a Sheristadar of a Munsif Court receives the affidavit in exercise of the powers conferred on him *ex officio* by R. 13, then no doubt his jurisdiction is limited to matters arising within and subject to the jurisdiction of that Munsif. But the issue of process of the District Judge's Court through the Nazarat of the Munsif is a matter arising within and subject to the Munsif's jurisdiction and the Sheristadar can receive and attest an affidavit in that matter. (*Rowland, J.*) BANKEY LAL *v.* RAM PADARATH SINGH. **14 Pat.L.T. 635=1933 Cr.C. 1536=147 I.C. 712 (2) =6 R.P. 370=35 Cr.L.J. 459=A.I.R. 1933 Pat. 713.**

PATNA HIGH COURT RULES—*Review—Application for—Copy of judgment filed after limitation—Sufficiency—Limitation Act, S.* 5

The rules of the Patna High Court do not expressly provide that in the case of an application for review, the application should be accompanied by a copy of the judgment or order sought to be reviewed although the practice of the Court has been not to consider the application as competent without a copy of the judgment or order sought to be reviewed. Early steps should be taken for the necessary amendment of the rules so as to bring them into conformity with the existing Practice of the Court. Where an application for review is filed in time without a certified copy of the judgment accompanying the application, and such copy is filed beyond time (an uncertified copy originally filed with the application having been objected to as insufficient), and an application under S. 5 of the Limitation Act is also filed for extending the period of Limitation.

Held, under the special circumstances of this case, the application under S. 5 of the Limitation Act should be granted and the application for review should be held to be competent. (*Fazl Ali, J.*) MAHABIR SINGH *v.* BALDEO SINGH. **157 I.C. 965=8 R.P. 166 =16 Pat.L.T. 595=A.I.R. 1935 Pat. 486.**

———**Ch. II, R. 13 (IX)**—*Application under O.* 41, *R.* 8, *C. P. Code—Registrar—Power to hear.*

The Registrar of the Patna High Court has no power, under the High Court Rules, to hear an application under O. 41, R. 8, C. P Code. (*Kulwant Sahay and Scroope, JJ.*) NARKU MAHTON *v.* KAMAKHYA NARAIN SINGH. **I.R. 1932 Pat. 177=138 I.C. 334= 13 Pat L.T. 254=A.I.R. 1932 Pat. 217.**

———**Ch. III, R. 12**—*Affidavit—Sufficiency of.*

Where in support of an application for stay, the affidavit of the clerk of the petitioner's advocate was filed to the effect that he believed in the truth of the information contained in certain letters received by him from an Advocate in the mofussil and from the petitioner,

Held, that it was a good affidavit within the meaning of R. 12. (*Kulwant Sahay and Scroope, JJ.*) NARKU MAHTON *v.* KAMAKHYA NARAYAN SINGH. **I.R. 1932 Pat. 177=138 I.C. 334=13 Pat. L.T. 254=A. I.R. 1932 Pat. 217.**

PAWN BROKER.

———**Ch V, R. 11.**—*Validity of.*

S. 33, C. P. Code merely states that the decree shall follow the judgment; it in no way precludes the Court from following the practice of preparing a decree when an application is made, and it does not preclude the High Court from making a rule, that where a decree is unnecessary no decree be prepared. 42 Cal. 999, Rel. on. (*Wort and Varma, JJ.*) LACHMINARYAN TEKRIWALA *v.* JOGESH CHANDRA LAHARE. **13 Pat. 371=149 I.C 142=6 R.P. 570=15 P.L.T. 649=A. I.R. 1934 Pat. 266.**

———**Ch. VI, R. 5**—Scope—Appeal—Scheme suit—High Court in appeal directing District Judge to frame scheme—Order of District judge appointing Mutawalli —Appeal by unsuccessful candidate—Competency. *See* C. P. CODE, S. 92. **14 Pat 236.**

———**Ch. VII, R. 2**—*Letters Patent appeal—Limitation for—Time taken in obtaining copy of judgment—Deduction of—Permissibility—Limitation Act* (1908), *Ss.* 12 *and* 98 (*as amended*).

The amended S. 29 of the Limitation Act makes S. 12 applicable to all special and local laws but the rules of the High Court do not come under that category. Under the Patna High Court Rules, a copy of the judgment or decree is not necessary for filing a Letters Patent appeal and so the time taken for obtaining a copy cannot be deducted in computing the period of limitation for a Letters Patent appeal (*i.e.* thirty days). (*Courtney Terrel, C. J. and Varma, J.*) MUKUND MAHTO *v.* NIRANJAN CHAKRAVARTY. **151 I.C 107=7 R.P. 64=15 P.L.T 301=A.I.R. 1934 Pat. 353.**

———**Ch. VII, R 19**—*Decision of Stamp Reporter—Re-opening during hearing of appeal—Permissibility.*

Under R. 19 of Chapter VII of the Patna High Court Rules, the Stamp Reporter would be required to take action if he found that a memorandum of appeal which was insufficiently stamped had been accepted by mistake or inadvertence as sufficiently stamped and it cannot be said that when the appeal is once admitted and registered, the functions of the Stamp Reporter are necessarily at an end. Where the law was changed after the decision of the Reporter by reason of a Bench decision of the High Court and additional Court-fee was sought to be levied under the later decision,

Held, that the action of the Stamp Reporter was valid in law. (*James, J.*) SIDESHWARI PROSAD *v.* RAM KUMAR RAI. **12 Pat. 694=6 I.R. (Pat) 2 (2) =144 I.C. 684=14 Pat.L.T. 180=A.I.R. 1933 Pat. 234.**

PATNI. *See* (1) BENGAL PATNI REGULATION (VII OF 1819).
(2) B. T. ACT (1885), SS. 178, 179 AND 195.
(3) LAND TENURE.

———Minerals—Rights of Patnidar. *See* MINERALS. **58 I.A. 228=61 M.L.J. 632 (P.C.).**

———Rent. *See* B.T. ACT, SCH. III.

PATNI REGULATION (VIII OF 1819). *See* BENGAL PATNI REGULATION.

PATNI SALE. *See* B. T. ACT, SS. 167 AND 195.

PATTA—Evidentiary value of. *See* LAND TENURE. RYOTWARI TENURE. **A.I.R. 1931 Mad. 613.**

PAUPER—Appeal. *See* C. P. CODE, O. 44, R. 1.

———Suit. *See* C. P. CODE, O. 33.

"PAWN BROKER"—Meaning of. *See* BURMA MUNICIPAL ACT (1898), SS. 142 AND 140. **13 Rang. 32=A.I.R. 1935 Rang. 104.**

PAYMENT INTO COURT.

See (1) C.P. CODE, O. 34.
(2) T. P. ACT, S. 83.

PEDIGREE. *See* EVIDENCE ACT, S. 32.

PENAL ACT. *See* INTERPRETATION OF STATUTES.

PENAL CLAUSE. *See* COMPROMISE.

PENAL CODE (XLV OF 1860)—*Special law—Offence under Salt Act, 1882—Whether punishable under Penal Code.*

Doing anything in contravention of the Salt Act or of any rule made thereunder is not a separate offence under Penal Code. Similarly the abetment of an act in contravention of the Salt Act or of any rule made thereunder is not a separate offence under the Penal Code. 6 O.C. 153, Ref., 6 Mad. 249, Dist. (*Wazir Hasan, C.J. and Pullan, J.*) MOHANLAL SAKSENA *v.* EMPEROR. **7 O W N. 895=128 I C. 221=32 Cr.L.J. 104=1930 Cr.C. 1161=A.I R. 1930 Oudh 497.**

———**Ss. 3 and 4**—*Conspiracy to cheat committed outside British India—Conspirators cannot be tried in British India.*

Where persons are foreigners, residing outside British India, before they can be tried for any offence by a Court in British India, such offence should have been committed by them in British India. Where therefore the offence of conspiracy to cheat is committed outside British India, *prima facie*, they cannot be tried for that offence in British India. (*Rupchand, J C. and Lobo, A.J.C.*) GOKALDAS AMARSEE *v.* EMPEROR. **.27 S. L.R. 392=148 I.C. 135 (2)=6 R.S 180=35 Cr.L J. 585=1933 Cr C. 1130—A I.R. 1933 Sind 333.**

[R. 28 S.L.R. 119 (134).]

———**S. 4**—*Place of crime governs nature of offence.*

The doctrine that the law of the country where a crime has been committed governs the nature of the offence and that the Courts of that country alone have jurisdiction to try the offender is a well established principle of international law. (*Rupchand, J C. and Lobo, A.J C.*) GOKALDAS AMARSEE *v.* EMPEROR. **27 S.L R. 392- 148 I C 135 (2)=6 R S 180=35 Cr. L.J. 585=1933 Cr C 1130=A I R 1933 Sind 333.**

——— **S 4 and Criminal Procedure Code, S. 188**—Scope and effect of—Act committed beyond British India—Offence, if triable in British India—Procedure. *See* CR. P. CODE, S. 188. **37 Bom.L R. 885=A.I.R. 1935 Bom 437.**

———**S. 5**—*General and special Acts—Offence falling under both—Procedure.*

It cannot be laid down as a general rule of law that where there is a special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts, and both may be applicable simultaneously, and the offender may be prosecuted and convicted under either Act. But where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather than fall back upon a more general law which prescribes a heavier penalty. S. 16 and Rule 27 of the Motor Vehicles Act and S. 279 I P.C., considered. (*Sulaiman, J.*) JIWA RAM *v.* EMPEROR. **I R. 1932 All. 219=136 I.C. 571=33 Cr L J. 309=1932 A L J. 519=12 L.R. 168 (Cr.)=1932 Cr C. 89=A.I R. 1932 All 69.**

———**S. 5**—*General and special law—Offence under Salt Act, 1882—Conviction under Penal Code.*

Where an act is an offence under specific law and such an offence can also be punished under that specific law, that law and not the general law would apply.

PENAL CODE (1860), S. 21.

(*Wazir Hasan, C.J. and Pullan, J.*) MOHANLAL SAKSENA *v* EMPEROR. **7 O.W.N. 895=123 I.C. 221 = 32 Cr.L.J. 104=1930 Cr.C. 1161=A.I.R. 1930 Oudh 497.**

———**S. 5**—*Mysore Panchayats Regulation (II of 1926), S. 62—Assault on Panchayat Inspector—Prosecution under Penal Code—Propriety.*

If sufficient punishment cannot be given under the special law, there is legally no prohibition to the sentence prescribed under the Penal Code being given by charging the accused with an offence under the Penal Code also. In case of an assault on the Panchayat Inspector while he was on duty, S. 62 of the Mysore Panchayat Regulation does not apply and a prosecution under the Penal Code is justified by S. 5 of the Penal Code, especially when S. 62 of the former Regulation does not prohibit prosecution under any other enactment. (*Doraiswami Iyer, C J.*) VEERABHADRACHARI, *In re.* **36 Mys. H.C R. 72=9 Mys L.J. 156.**

———**S. 19**—Judge—Member of village panchayat. *See* CR. P. CODE, S. 197. **18 N.L J 177.**

———**S. 21 (10)**—*Construction—"For any secular" common purpose of any village, town or district—Meaning and effect of.*

The clause, "for any secular common purpose of any village, town or district," in S 21 (10), I.P. Code, governs the section; and the money must be received or expended for a public purpose (*Murphy and Sen, JJ.*) EMPEROR *v.* SHRIDHAR MAHADEO PATHAK. **36. Cr L J. 532=7 R B. 352=1935 Cr C 70=154 I.C. 70=36 Bom.L R. 1133=A I.R. 1935 Bom. 36.**

———**S. 21 (10)**—"*Public servant*"—*Chairman of Co-operative Society.*

A Chairman of a Co operative Society is not a "public servant" within the meaning of S. 21 (10), I.P. Code. (*Murphy and Sen, JJ*) EMPEROR *v.* SHRIDHAR MAHADEO PATHAK. **36 Cr L.J 532=7 R B 352= 1935 Cr C. 70=154 I.C. 000=36 Bom L.R. 1133=A. I R 1935 Bom. 36.**

———**S. 21**—*Public servant—Lambardar.*

A lambardar performs the public duty of collecting land revenue and is remunerated by a commission known as "pachotra." Therefore a lambardar is a public servant within the meaning of S. 21. But a lambardar engaged in collecting "*haq hua*" or a village cess and no other due does not act in the execution of his duties as a Government servant. "*Haq hua*" is a due coming within the definition of village cess and is therefore not recoverable as land revenue (*Middleton, J.C.*) SAID MUHAMMAD *v.* EMPEROR. **160 I.C 193=37 Cr.L J. 283=8 R Pesh. 103=1935 Cr.C. 1311=A I R 1935 Pesh. 189.**

———**S. 21**—"*Public servant*"—*Municipal Councillor.*

A Municipal Councillor, prior to the amendment of S 45, Bombay District Municipalities Act (III of 1901), by Bombay Act XXIV of 1930, was a public servant within the meaning of S. 21, Penal Code. 5 B H.C. Cr. 10 and 8 B.H.C Cr. 39 (F.B.), Ref.; 3 Cal. 758. Expl. (*Ferrers, J.C. and Aston, A.J C.*) SUGAN CHAND *v.* NARAINDAS. **141 I.C. 530=I R. 1933 Sind 60=34 Cr L J. 171=1932 Cr C. 792=A I R. 1932 Sind 177.**

———**S 21**—*Public servant*—'*Specifically authorized*" — *Person acting as candidate peon executing warrant.*

The complainant who had for some time been enrolled as a candidate peon in accordance with R. 30 of the Patna High Court General Rules and Circular Orders but who got no pay or remuneration and had the chance of being appointed as a civil court process server when a vaccancy occurred was entrusted with the service of a

PENAL CODE (1860), S. 21.

warrant of attachment of movable properties, which had been issued in execution of a decree. He went to the house of the judgment-debtor and attached his movable property and while so acting was assaulted by the son of the judgment debtor who also took back the property

Held, that the complainant was a 'public servant' within the meaning of S. 21, I.P. Code. (*Scroope and Agarwala, JJ.*) EMPEROR *v.* RAM CHANDRA SAHU. **12 Pat. 184 = I.R. 1933 Pat. 156 = 142 I.C. 588 = 34 Cr.L J. 391 = 14 Pat.L.T. 16 = 1933 Cr.C. 518 = A.I.R. 1933 Pat. 187.**

———**S. 21**—*Public servant—Taluq Board President.*

The President of a Taluq Board is a public servant. 52 M. 446, Foll (*Ferrers, J.C. and Rupchand, A.J.C.*) HIDAYATULLAH *v.* EMPEROR. **I.R. 1933 Sind 63 = 141 I.C. 583 = 34 Cr.L.J. 191 = 27 S.L.R. 3 = 1933 Cr.C. 525 = A.I.R. 1933 Sind 161.**

———**S. 21**—*Schoolmaster—If 'public servant'.*

A schoolmaster is an officer of the education depart ment maintained out of the State Revenues, and is a "public servant" under S. 21, I.P. Code. (*Mahadevayya, C J. and Sankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 133 = 39 Mys. H.C.R. 406.**

———**S. 21 (10)**—*Public servant—Toll contractor and servant under him.*

A toll contractor and also servants employed by him under S. 11 of the Bombay Tolls Act are public servants within the meaning of S. 21 (10), I.P. Code. (*Murphy and Sen, JJ.*) EMPEROR *v.* SULEMAN ABBA. **1935 Cr.C. 25 (2) = 154 I.C. 557 = 7 R B 337 = 36 Cr.L.J. 516 = 36 Bom.L R. 1124 = A.I.R. 1935 Bom. 24.**

———**S. 24**—*'Dishonestly'—Intention to convert to one's own use not necessary.*

Where the accused manifestly took away certain bamboos with the intention of causing wrongful loss to the proprietors who were entitled to them the intention of the accused is dishonest within the meaning of the word as used in the Penal Code, and the fact that the accused had no intention of converting the bamboos to their own personal use is immaterial. (*James, J.*) LAL MAHOMED *v.* EMPEROR. **I.R. 1931 Pat. 219 = 131 I.C. 539 = 32 Cr L.J. 739 = 12 Pat L.T. 566 = 1931 Cr.C. 785 (2) = A.I R. 1931 Pat. 337 (2).**

———**S. 24**—*'Dishonestly' Meaning.*

The word "dishonestly" in S. 24, I.P.C., is used in a technical sense which is at variance with its popular significance as implying deviation from probity. A dishonest intention may be presumed only if an unlawful act is done or if a lawful act is done by unlawful means. (*Bajpai, J.*) SARSAR SINGH *v.* EMPEROR. **151 I C. 366 = 7 R A. 153 = 35 Cr.L.J. 1307 = 1934 A.L J. 749 = 3 A.W.R. 682 = 1934 Cr.C. 901 = A.I.R 1934 All. 711.**

———**S. 24**—*Dishonest—Test.*

The question whether the act of the accused was dishonest or not does not as a matter of fact depend on the question whether wrongful gain or loss was actully caused. The determining factor is the intention with which payment is made. A.I.R. 1915 Mad. 600, Ref. (*Ferrers, J.C. and Aston, A.J.C.*) DHARAMDAS LILARAM *v.* EMPEROR. **140 I.C 647 = I.R. 1933 Sind 1 = 34 Cr.L.J. 51 = 1932 Cr.C. 733 = A.I.R. 1932 Sind 169.**

———**S. 28**—*Counterfeiting—What is.*

It cannot be said that counterfeiting is an offence which is made up of parts of possessing the mould for counterfeiting and the act of counterfeiting. (*Jack, J.*) ABDUL SOVAN *v.* JITENDRANATH DUTTA. **I.R. 1933 Cal. 830 = 134 I.C. 446 = 32 Cr.L.J. 1171 = 1931 Cr.C. 597 = A.I.R. 1931 Cal. 445.**

PENAL CODE (1860), S. 32.

———**S. 28**—*Infringement of trade mark—Evidence.*

Where in a case of alleged counterfeiting of a trade mark, the trade mark similar to that of the complainant had been moulded in the glass of the bottles on which the name of the hair oil had also been moulded,

Held, that according to S. 28 it must be presumed that the accused intended to sell that hair oil in those bottles and thereby cause deception. In this case, the onus was on the accused to show that in making these bottles he had no fraudulent intention. (*Jack, J.*) ABDUL SOVAN *v.* JITENDRANATH DUTTA. **I R. 1931 Cal. 830 = 134 I C. 446 = 32 Cr L J. 1171 = 1931 Cr.C 597 = A.I.R. 1931 Cal. 445.**

———**S. 29**—"Document"—Definition of—Applicability to Press (Emergency Powers) Act. *See* EVIDENCE ACT, S. 3 "DOCUMENT". **4 A.W R 488.**

———**S. 30**—"Valuable security"—Bill for goods with endorsement of receipt of payment by cheque—If valuable security. *See* PENAL CODE, S. 420. **39 C.W.N. 1182.**

———**S. 30**—*Valuable security—Promissory note got by force from minor.*

A promissory note which minor boy was forced to execute after being beaten is a valuable security within the meaning of S. 383 read with S 30. On the face of it the document created a legal liability and it is immaterial that it might subsequently upon certain evidence being given, be held to be of no effect against the executant. For this purpose, no distinction exists between void and voidable documents. (*Macpherson, J.*) RAM NARAIN SAHU *v.* EMPEROR. **6 I.R (Pat.) 270 = 146 I.C. 519 (1) = 35 Cr.L J. 123 15 P.L.T. 66 = 1933 Cr C 1363 (1) = A.I.R 1933 Pat. 601 (1).**

———**S. 30**—*Valuable security—Transit pass under S. 40, Assam Forest Regulation—"Original" and "duplicate".*

The original transit pass under S. 40, Assam Forest Regulation is a valuable security within the meaning of S. 30 of the Penal Code for it creates a right to transport forest produce, an action which without the transit pass is an offence punishable with fine and imprisonment. The 'original' of the pass is therefore a valuable security, though it is only the duplicate that is intended to be used. (*Panckridge and M.C. Ghose, J.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v* DAULAT RAM MUDI. **59 Cal. 1233 = I.R. 1932 Cal. 504 = 138 I.C. 705 = 33 Cr.L J. 685 = 36 C.W N. 505 = 55 C.L.J. 349 = 1932 Cr.C. 337 = A.I.R. 1932 Cal. 390.**

———**S. 30**—*'Valuable security'—What constitutes.*

An administrative order of the Superintendent of a Court of Session addressed to the Nazir directing him to release an accused on bail is not a 'valuable security.' (*Bromfield and Dwarka, JJ.*) EMPEROR *v.* SHER ALAM KHAN. **35 Bom.L R. 1062 = 1933 Cr.C. 1598 = 147 I C 879 = 6 R.B 221 = 35 Cr.L J. 479 = A I.R. 1933 Bom. 494.**

———**S. 32**—*'Act'—When includes omission.*

Under S. 32, I.P. Code, an omission is no doubt included in an act, but it is incumbent that such an omission must be illegal and the onus lies on the prosecution to show that the omission which is being treated as an act, was either an offence or was prohibited by law or was one which furnished grounds for a civil action as required by S. 43. An inaction which is not shown to be illegal would never amount to an act under the Penal Code. (*Din Mahomed, J.*) BASHARAT *v.* EMPEROR. **36 P.L R 37 = 153 I C. 222 = 7 R.L. 407 = 36 Cr L.J. 308 = 1934 Cr.C. 1127 = A.I.R. 1934 Lah. 813.**

PENAL CODE (1860), S. 32.

——**S. 34**—*'Act'—Meaning of—Series of acts in pursuance of common intention.*

The word "Act" includes a series of acts, and S. 34 contemplates, amongst other things, a series of acts done by several persons, some perhaps by one of those persons and some by another, but all in pursuance of a common intention. Where the accused who was in the company of others who had fired shots did not try to run away or even to try to prevent his companions doing what they did but he was seen putting his hand on his waist belt where lay a dagger to wound those who were surrounding him.

Held, he also was guilty of the murder like his companions. (*Patterson and Coutliffe, JJ.*) EMPEROR *v.* MOTILAL MALLIK. **157 I.C. 829 = 36 Cr.L.J. 1220 = 1935 Cr.C. 902 = 39 C.W.N. 199 = A.I.R. 1935 Cal. 526.**

——**S. 34**—Applicability—Author of injuries not known—Constructive liability for offence under S. 304. *See* PENAL CODE, S. 304 **A.I.R. 1933 Rang. 340.**

——**S. 34**—*Applicability—Death due to assault by more than one.*

When more persons than one assault another, the result of which is the death of that man, it is not necessary to prove which particular wound was caused by which particular accused and who inflicted the fatal wound. Such evidence in most cases will not be available. S. 34, I.P. Code, has been enacted to prevent miscarriage of justice in such cases and all are responsible for the death, if assault is made in furtherance of common intenion. (*Mahomed Noor and Luby, JJ.*) MAHABIR SINGH *v.* EMPEROR. **152 I.C. 591 = 15 Pat L.T. 819 = 36 Cr.L.J. 146 = 7 R.P. 208 = 1934 Cr. C. 1218 = A.I.R. 1934 Pat. 565.**

——**S. 34**—*Applicability—Joint assault with hatchets and dangs—Common intention—Inference of.*

When two or more persons set on to another armed with hatchets and dangs, it may safely be assumed that their common intention was to give him a thorough hiding and it may also be safely assumed that all were cognizant of the fact that the hatchets will be used and that very serious injuries were likely to be inflicted. S. 34 of the Penal Code is properly applicable to such a case. (*Broadway, J.*) ZULFIKAR *v.* EMPEROR. **6 I.R. Lah 45 (1) = 144 I.C. 1018 = 34 Cr.L.J 911 = 34 P.L.R. 801 = 1933 Cr.C. 1386 = A.I.R. 1933 Lah. 927.**

——**S. 34**—Applicability—Knowledge that another is in illegal possession of arms—S. 34 not applicable—No conviction. *See* ARMS ACT (1878), S. 19 (*f*). **60 Cal. 618 = A.I.R. 1933 Cal. 132.**

——**S. 34**—*Applicability—Mere presence at the time of offence.*

The mere presence of a person at the time of the commission of an offence by his confederates is not in itself sufficient to bring his case within the purview of S. 34, I. P. Code, unless the community of design is proved against him. (*Din Mahomed, J.*) BASHARAT *v.* EMPEROR. **36 P.L.R. 37 = 1934 Cr.C. 1127 = 153 I.C. 222 = 7 R.L. 407 = 36 Cr.L.J. 308 = A.I.R. 1934 Lah. 813.**

——**S. 34**—*Applicability—Robbery with attempt to cause deaths or grievous hurt.*

It is necessary to find each individual accused using a deadly weapon and it is not sufficient to fall back upon the provisions of S. 34 in order to convict those who were unarmed at the time of the occurrence of the crime. In other words, S. 34 has no application to the provisions of S. 397. A.I.R. 1924 Cal. 643 and 28 All. 404, Foll.; 21 All. 263, Diss. From. (*Wort and Scroope, JJ.*) LABEDAN SAIN *v.* EMPEROR. **I.R. 1931 Pat. 171 = 130 I.C. 267 = 32 Cr.L.J. 476 (2) = 1931 Cr.C. 145 = A.I.R. 1931 Pat. 49.**

PENAL CODE (1860), S. 34.

——**S. 34**—*Applicability—Sudden quarrel.*

Where the altercation is the result of a sudden quarrel, it is difficult to hold that S. 34 applies. (*Harrison, J.*) LAL CHAND *v.* EMPEROR. **I.R. 1931 Lah. 478 = 131 I.C. 382 = 32 Cr.L.J. 734 = 1931 Cr C. 747 (1) = A.I.R. 1931 Lah. 523 (1).**

——**S. 34**—*Applicability—Test of joint responsibility—Common intention and not common act.*

The view that S. 34 applies only where a criminal act is done by several persons, of whom the accused charged thereunder was one, and not where the act is by a person other than the latter is not a correct view. S. 34 applies equally to those cases in which the criminal act done in furtherance of a common intention of several persons is the act of single individual. The existence of a common intention is the sole test of the joint responsibility under S. 34. Common intention must be gathered from the facts of each case and the surrounding circumstances. (*Young and Rachhpal Singh, JJ.*) IRSHADULLAH KHAN *v.* EMPEROR. **55 All. 607 = 6 I.R. (All.) 281 = 146 I.C. 264 = 34 Cr.L.J. 1234 = 14 L.R. 365 (Cr.) = 1933 A.L.J. 1292 = 1933 Cr.C. 863 = A.I.R. 1933 All. 528.**

[F. 13 R 210 (213).]

——**S. 34**—*Application—Participation in crime—Proof—Finding regarding definite acts by several accused.*

In order to attract the operation of S. 34 and fix constructive guilt on each of the several accused under that section, there must be participation in action to commit the crime, with a common intention, although the different accused might have taken different parts; and quite unlike under S. 149, before any of them can be convicted for the offence read with S. 34, the Court must arrive at a finding as to which of the accused took what part, if any, in furtherance of the common intention. A conviction without such finding is illegal. (*Rankin, C. J. and Graham, J.*) FAZOO KHAN *v.* JATOO KHAN. **35 C.W.N. 463 = 134 I.C. 1198 = 33 Cr.L.J. 92 = I.R. 1932 Cal. 78 = 1931 Cr. C. 843 = A.I.R. 1931 Cal. 643.**

——**S. 34**—*Application of—Sudden fight.*

Where there is a sudden fight between the parties, S. 34 has no application. (*Middleton, J. C. and Mir Ahmad, A. J. C.*) MASTI KHAN *v.* EMPEROR. **155 I.C. 276 = 7 R.Pesh. 99 = 36 Cr.L.J. 800 = 1935 Cr. C. 350 = A.I.R. 1935 Pesh. 41.**

——**Ss. 34 and 114**—*Attack by two people—Intention to kill expressed by one—Liability of other.*

When two people attack another armed with das, and there is evidence that one of them announced his intention of killing, both these persons are liable for the act committed by one of them under S. 34, Penal Code. And even if S. 34 does not apply S. 114 will be applicable. (*Mya Bu and Ba U, JJ.*) NGA SHWE DIN *v.* EMPEROR **149 I.C. 33 = 6 R.R. 281 = 35 Cr.L.J. 905 = 1934 Cr.C. 519 = A.I.R. 1934 Rang. 98.**

——**S. 34**—*Charge for offences under Ss.* 193, 467 *and* 34, *I. P. Code—Acquittal of some accused—Remaining persons convicted under Ss.* 193 *and* 467 *only—Legality.*

Where several persons were charged for offences under Ss. 467 and 193 read with S. 34, I.P. Code, and some of them having been acquitted the rest were convicted under Ss. 467 and 193, I. P. Code only.

Held, that the conviction was invalid in law.

Held, further, that even if S. 34 should be treated as constituting a separate offence, the accused could still be convicted for the other offence alone, (*Suhrawardy,*

PENAL CODE (1860), S. 34.

and Mallik, JJ.) EMPEROR *v.* DASTARALI. **58 Cal. 822=I R. 1931 Cal. 654=133 I.C. 190=32 Cr.L J. 1004=1931 Cr.C. 809=A.I.R. 1931 Cal. 625.**

———**S. 34**—*Common intention.*

Where five men assault at one and the same time, each of them seeing that the other four are assaulting also, they may be regarded as having a common intention to hurt the victim of the assault, though the impulse to assault may have arisen independently. (*Bagu ley, J.*) EMPEROR *v.* EBRAHIM. **1931 Cr.C. 1007=136 I.C. 836=33 Cr.L J. 360=I.R. 1932 Rang. 91=A.I.R. 1931 Rang. 321.**

———**Ss. 34 and 304**—*Common intention of accused to beat deceased's party—Liability of all for culpable homicide.*

Where there is a common intention on the part of the accused persons to beat the opposite party with *lathis* and the deceased who is a member of that party dies as a consequence of a blow struck in that beating. All the accused are responsible under S. 304/34, I. P. Code. (*Bennet, J.*) HAIDER *v.* EMPEROR. **154 I. C. 628=7 R.A. 780=36 Cr L J. 549=1935 A.W.R. 336=1935 Cr.C. 510=A.I.R. 1935 All. 504.**

———**S. 34**—*Common intention—Act done in pursuance of—Test of—Common object to abduct and to escape—Culprits pursued—Grievous hurt caused by one—Liability of others.*

The three accused went together armed with deadly weapons with the object of abducting a woman from the house of the deceased and to use force if necessary for attaining their object and for making good their escape. Before they could do anything more than trespassing into the house of the deceased, latter caught hold of one of the culprits, threw him down and two others who had in the meantime come to his help pursued the culprits. All the culprits tried to escape and when followed by the pursuers, one of the culprits caused grievous hurt to one of the pursuers.

Held, that the other two culprits were also guilty of grievous hurt which was committed in pursuance of a common intention. (*Ferrers, J.C. and Rupchand, A.J. C.*) PHOTO *v.* EMPEROR. **27 S L.R. 269=147 I.C. 264=6 R.S. 140=35 Cr.L.J. 357=1933 Cr.C. 1540=A I.R.1933 Sind 407**

———**Ss. 34 and 302**—Common intention to commit robbery—Different acts committed by different accused in furtherance of common intention—Liability of each for all such acts. *See* PENAL CODE, SS. 302 AND 34 CONSTRUCTIVE MURDER. **34 P.L R. 1003=A.I.R 1933 Lah. 819**

———**S. 34**—*Common intention to commit robbery—Some robbers armed with deadly weapons—Intention to commit murder.*

It would be going very far to hold that, because a man takes part in a robbery in which some of the robbers are armed with deadly weapons, it can be presumed that he thereby becomes a party to an intention to kill any person who may happen to resist them in carrying out the robbery. Of course, when a man accompanies robbers, who are armed with such weapons he must know it to be likely that a murder will be committed, if the attempt to rob is resisted, but further than that, it is not safe to go. Hence if the common intention is to commit robbery and not murder, such intention cannot be presumed by applying S. 34. *Cunliffe and Dunkley, JJ.)* SANLAYDO *v.* EMPEROR. **1933 Cr.C. 919=147 I.C. 49=35 Cr.L.J. 262=A.I R.1933 Rang. 204.**

———**Ss. 34, 323 and 325**—*Common intention only to cause simple hurt—One accused exceeding common intention and causing grievous hurt — Liability of other accused.*

PENAL CODE (1860), S. 34.

Where the intention of the two applicants was only to cause simple hurt and the common intention ot their party extended only to the causing of simple hurt, the mere fact that one of the servants of one of the applicants exceeded that common intention by causing grievous hurt, to *B*, to whom the applicants did not cause any grievous hurt, cannot make the applicants guilty of an offence under S. 325 of the Penal Code. (*Nanavuty. J.*) SANKATA PRASAD *v.* EMPEROR. **6 R O. 266 (1)=147 I C 403=35 Cr L J. 410=1935 Cr.C. 301=11 O.W.N. 86=A.I R 1935 Oudh 178.**

———**S. 34**—*Common intention—Inference from circumstances.*

Whether or not "a criminal act is done by several persons in furtherance of the common intention of all", is a question of fact to be determined on a consideration of the facts in each case and the common intention may be inferred from the circumstances disclosed in the evidence and need not be the subject of an express agreement between the persons concerned. In such cases the question of fact does not depend upon a legal presumption but upon the inference that the Court draws from the evidence adduced at the trial. (*Page, C.J., Mya Bu and Baguley, JJ.*) EMPEROR *v.* NGA AUNG THEIN. **13 Rang 210=154 I.C. 881=7 R R. 325=36 Cr.L. J. 605=1935 Cr.C. 264=A.I R. 1935 Rang. 89 (F. B.).**

———**S. 34**—*Common intention—Proof of—Necessity for.*

The mere fact that several persons took part in a crime in the absence of a common intention is not sufficient to convict them of that crime. The section can only be applied if it is proved what the common intention was and that the common act for which the accused were to be made responsible was acted upon in furtherance of that common intention (*Subdhedar, A.J.C.*) SULEMAN *v.* EMPEROR. **I R. 1933 Nag. 134=142 I. C 741=34 Cr L J. 404=15 N.L.J 129.**

———**S. 34**—*Common intention—Test.*

The question whether the accused acted with a common intention or not is a question of fact which depends upon the inference that the Court draws from the evidence adduced at the trial. If a man knows that a certain course of action in which he is taking part will under certain circumstances most probably result in death being caused, and still with that knowledge, persists in his course of action, and death is caused owing to the eventuality which he has foreseen taking place, it may give rise to a legitimate deduction that he intended the causing of death if that eventuality did occur, and he would then be liable as though he had caused that death himself. A.I.R. 1935 Rang. 89, Rel. on. (*Dunkley, J.*) NGA THA AYE *v* EMPEROR. **158 I.C. 441=8 R.R. 168=36 Cr.L J 1380=1935 Cr.C. 995=A. I.R. 1935 Rang. 299.**

———**S 34**—*Crime committed or held to be murder—Conviction of accused under S. 326 read with S. 34—Legality.*

The common intention referred to in S. 34 is an intention to commit the crime actually committed. Hence where the crime committed is held to be murder, the Judge cannot convict the accused under S 326 read with S. 34. A I R. 1931 Rang. 1 and A.I.R. 1935 Rang. 89, Rel. on. (*Dunkley, J.*) NGA THA AYE *v.* EMPEROR **158 I.C. 441=8 R R. 168=36 Cr.L.J. 1380=1935 Cr.C. 995=A I.R. 1935 Rang. 229.**

———**Ss. 34, and 114** — Distinction between. *See* PENAL CODE SS. 114 AND 34. **11 Rang. 354=A.I.R. 1933 Rang. 236.**

PENAL CODE (1860), S. 34.

———**S. 34**—*Fatal injury caused by some of the accused in sudden fight—Author of injuries not known—All accused, if and when guilty.*

Where fatal injuries are caused by some of the accused but the author of the injuries is not known, each of the accused can be held responsible only for his own act and not for those of his co-accused, unless S. 34 is applicable to the case. (*Monroe, J.*) SADHU SINGH *v.* EMPEROR. **6 I R. (Lah.) 187 (2)=146 I.C. 221 (1) =34 Cr.L.J. 1210=1933 Cr.C. 1112=A.I.R. 1933 Lah. 865.**

———**S. 34**—*Firing by two persons with common intention—One of shots being effective—Both guilty.*

If two persons fire at a particular individual and a shot hits with the result that an offence is committed, then the case of both would come within the purview of S. 34, provided there is common intention. (*Agha Haidar, J.*) SHARIF *v.* EMPEROR. **6 I.R. (Lah.) 123 =145 I.C. 702 : 34 Cr.L.J. 1051=1933 Cr.C. 549= A.I.R. 1933 Lah 315.**

———**S. 34**—*Gradation of offence—Offence of murderous assault, in furtherence of common intention, cannot be so graded as to hold some guilty, of murder and others of grievous hurt.*

The liability for a criminal act done by several persons in furtherence of a common intention is allotted to each of such persons as if he alone and unaided had done that act. In such circumstances, each of such persons is guilty of the one offence and it is not possible to so grade this offence as to hold, in the case of a murderous assault committed in furtherence of a common intention, that some are guilty of murder and others only of causing grievous hurt. (*Bhide, J.*) SULTAN *v.* EMPEROR. **32 P L R 925=A.I.R. 1931 Lah. 749.**

———**S 34**—*Incitement to cause death—Death caused—Liability to conviction.*

The appellant with a number of other persons, armed with das and spears attacked a house; the appellant incited the others to set fire to the building; those others acted on this incitement; the appellant then in the presence of the deceased incited the others to cut her; and they cut her to death accordingly.

Held, that the appellant took an actual part in the assault; that under the provisions of S. 34, he was as much guilty of murder as the actual persons who delivered the blow. (*Das and Brown, JJ.*) NGA PO KYONE *v.* EMPEROR. **11 Rang. 354=6 I R. (Rang.) 93=146 I.C. 392=35 Cr.L.J. 41=1933 Cr.C. 907=A.I.R. 1933 Rang. 236.**

———**Ss. 34 and 325**—*Joint attack by both accused—No proof who struck the blow—Both guilty under S.* 325.

Where it was established that *A* armed with an axe accompanied *B* who was armed with a spear and with *B* made a concerted attack on *C*, but no particular blow was proved to have been struck by *A*.

Held, that the mere fact that no particular blow was proved to have been struck by *A* did not absolve him from the charge under S. 325 on which he was tried. A.I.R. 1925 All. 185, Foll. (*Coldstream, J.*) KHUDA DAD *v.* EMPEROR. **I.R. 1933 Lah. 437=144 I.C. 300 =34 Cr.L.J 724=34 P.L.R. 699=1933 Cr.C. 547= A.I.R. 1933 Lah. 313.**

———**Ss. 34 and 302**—Murder by several accused—Common intention — Method of ascertaining. *See* PENAL CODE, SS 302 AND 34—INTENTION. **33 P.L. R. 1=A.I.R 1932 Lah. 189.**

———**Ss 34 and 302**—*Murder committed by one of robbers—Liability of all for murder.*

Per *Baguley, J.*—If from the evidence as a whole, and all the surrounding circumstances of the case, the Court is of opinion, that a legitimate deduction may be made that at the time the robbery occurred, the band of robbers or any of them, had formed the intention of committing roberry, and, if necessary, of killing in order to carry out the robbery successfully, each and all of the robbers who had formed that common intention are liable to be "convicted under S. 302 of the Penal Code." (*Page, C.J., Mya and Baguley, JJ.*) EMPEROR *v.* NGA AUNG THEIN. **13 Rang. 210=154 I.C. 881= 7 R.R. 325=36 Cr.L.J. 605=1935 Cr. C. 264=A.I. R. 1935 Rang. 89 (F.B.).**

———**S. 34**—*Offence under—Evidence.*

The evidence against the accused who was charged under S. 457 and 34, I. P. Code, consisted of the following facts: (1) that he went in the company of *S. M* who was conclusively proved to have stolen two bottles of lemonade, (2) that he had no business in that street at that time, and (3) that he along with *SM* asked to be pardoned,

Held, that while the evidence raised a very strong suspicion against the accused, it was not safe to base a conviction on such materials. (*Jai Lal, J.*) ABDUL SATAR *v.* EMPEROR. **12 Lah.L.J. 321.**

———**S. 34**—*Offence under S.* 300, *I. P. Code—Proof of intention to join in act of murder—Conviction for murder.*

In all cases, whether the crime is committed by a single person or by several persons acting together, the Court has to determine what was the intention of the accused person and must in all cases determine this by presumption from the acts done by him and must take into consideration all the circumstances of the case. The question of intention, in any case, is a question of fact and it must be decided on the proved facts of that case. No general rule can be laid down upon such a subject. And if in so determining the common intention of a number of persons, the facts are such as to lead to a conclusion that some of those persons had such an intention as would make the offence murder, but in the case of others the intention did not go so far, then these latter persons are liable to conviction for such offence as would be constituted by the acts of the combination if done with the intention held by themselves individually. If that is so, then those persons whose intention can be held to be such as would make the offence murder, are liable to conviction of that offence, while others are liable only for some lesser offence, which must be determined by a consideration of the intention attibutable to them. Thus where one accused who is present when the fatal blow was struck and shares with the other the intention to cause death or injury sufficient in the ordinary course of nature to cause death, he can be justly convicted of murder, even though there is no proof that he struck any blow to the person murdered and that the person was killed by the blows struck by the other alone. (*Carr, Cunliffe and Otter, JJ.*) NGA E *v.* EMPEROR. **8 Rang. 603=I.R. 1931 Rang. 99 =130 I.C. 355=32 Cr L.J. 495=1931 Cr.C. 17=A. I.R. 1931 Rang. 1 (F.B.).**

———**S. 34**—*Pre arranged murder—Liability of all participants.*

While a murder is pre-arranged, all participants are guilty under S. 34; and it is immaterial whether the accused was alone and actually fired the short or whether he was with others and one of them fired the fatal shot. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) KHAISTA KHAN *v* EMPEROR. **156 I C. 433=7 R.Pesh. 126 =36 Cr.L.J. 958=1935 Cr.C. 454=A.I.R. 1935 Pesh. 75.**

PENAL CODE (1860), S. 34.

———**S. 34**—*Scope.*

S. 34 does not create a new offence but it is a rule of law and applies only when a criminal act if done by several persons of whom the accused charged thereunder was one. If it is proved that the other persons had no hand in committing the offence, but it was committed by the accused himself or if the prosecution fails to prove that the other persons committed the offence, but succeeds in proving that one of the accused did it or had a part in committing it, there is no reason why he cannot be convicted for committing the offence himself. (*Suhrawardy and Mallik, JJ.*) EMPEROR *v.* DASTARALI. **58 Cal. 822=I.R. 1931 Cal. 654=133 I C. 190=32 Cr.L.J. 1004=1931 Cr.C. 809=A.I.R. 1931 Cal. 625.**

———**S. 34**—*Scope—Offence under S. 379 and under S. 379 read with S. 34—Distinction.*

There is in law no distinction between a charge under S. 379, I. P. Code, and one under S. 379 read with S. 34, as is sometimes apparently thought. S. 34 is a mere statement of an explanation attached to any section which deals with a criminal offence. (*Courtney Terrell, C.J. and Luby, J.*) HARI LAL *v.* EMPEROR. **14 Pat. 225=156 I C. 921=8 R.P. 43=36 Cr.L.J. 1026=16 Pat L.T. 380=1935 Cr.C. 749=A.I.R. 1935 Pat. 263.**

———**S. 34**—Scope—Unlawful assembly—Conviction under Ss. 149 and 34—Legality. *See* PENAL CODE, SS. 149 AND 34. **A.I.R. 1934 Mad. 565=67 M.L J. 355.**

———**S. 34**—*Several accused—Fatal blow by one—Offence not premeditated — Others, if constructively guilty.*

If there was no common intention to cause hurt to the deceased and fatal blow dealt by one of them was an unpremeditated act springing from his mind alone, then the other persons, who may have struck one or more blows, are not constructive participators in that act and cannot be held constructively liable for the offence of murder or even for the lesser offence of grievous hurt. They can be held liable only for causing simple hurt. In such a case, the guilt of the person who dealt the fatal blow and that of the other persons should be separately dealt with. (*Bhide and Tapp, JJ.*) SULTAN *v.* EMPEROR. **12 Lah. 422=I R. 1931 Lah. 1001=134 I.C. 793=32 Cr.L.J. 1219=1931 Cr.C. 1054=A.I.R. 1931 Lah. 749.**

———**Ss. 34 and 302**—*Two factions—Partisans of one faction going to attack those of other with sticks—Companions of latter joining them with spears and hatchets—One of former group thrust with spear resulting in his death on spot—No right of private defence to latter group—Others present at assault could be convicted under S. 302 read with S. 34.*

There was enmity between the two factions, who resided in one village. Some members of one faction went to the school in the village, armed with sticks with the intention of causing injuries to three men of the other faction who had already gone there. The partisans of these three, when they learnt of this, came armed with hatchets and spears. They were six or seven in number, whereas their opponents were five. Three persons who had already gone before joined their partisans and attacked the five members of the other faction, with the result that one of the latter group received a spear thrust, and died on the spot. Commuting the sentence of death passed on assailant to that of transportation for life as the party attacked were initially the aggressors.

Held, that the plea of private defence was not available to the person thrusting the spear in the body of the deceased and the partisans of the person dealing the spear thrust or any of them present at the assault could be convicted of murder by applying S. 34 even if it be held that he did not actually strike the deceased. (*Jai Lal and Bhide, JJ.*) RAN BAZ *v.* EMPEROR. **151 I.C. 887=7 R L. 213=35 Cr.L.J. 1441=1934 Cr.C. 30=A.I.R. 1934 Lah. 11.**

PENAL CODE (1860), S. 40.

———**Ss 34, 114 and 302**—*Two persons going armed with guns and ammunition to commit robbery—Large number of shots fired by them while retreating and trying to escape—One of pursuers killed by one of shots from one of them—Other is also guilty under S. 302 read with Ss. 34 and 114.*

Where the two accused, who were armed with guns and had plenty of ammunition entered a shop for the purpose of committing robbery, they were disturbed in their act by a large number of villagers; they decided to retreat and in so retreating they fired a large number of shots and one of the pursuers was killed by one of the shots fired by one of them.

Held, that though their primary intention was to effect their escape and not to kill any of their pursuers, still it must be concluded from the circumstances that their intention was to effect their escape even though, for that purpose it was necessary to shoot any of the pursuers mortally, and that the other accused should be convicted under S. 302 read with Ss. 34 or 114. (*Ameer Ali and M. C. Ghose, JJ.*) MUKUNDA MURARI PAL *v.* EMPEROR. **61 Cal 190=155 I.C. 599=7 R.C. 603=36 Cr. L J. 803=1934 Cr C. 26=A.I.R. 1934 Cal. 10**

———**S. 40**—*"Criminal act"—Picketing.*

If any object, which is not unlawful in itself, be carried out by criminal means, it becomes criminal. Thus peaceful picketing is no offence; but when accompanied by violence, it becomes criminal. (*Wort and Scroope, JJ.*) GANESH PRASAD *v.* EMPEROR **I R. 1931 Pat. 173=130 I C. 269=32 Cr.L.J. 478=1931 Cr. C. 148=A.I.R. 1931 Pat. 52.**

———**S. 40**—*Criminal act—Test of criminality and morality—Relation between.*

"Criminal law" means the criminal law in its widest sense. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality, unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It is of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence," for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished. (*Lord Atkin.*) PROPRIETARY ARTICLES TRADE ASSOCIATION *v.* ATTORNEY GENERAL OF CANADA. **I R 1931 P C. 177=132 I.C. 593=32 Cr.L.J. 899=1931 Cr. C. 512=A.I.R. 1931 P.C. 94 (P.C.).**

———**S. 40**—*Effect.*

The effect of S. 40 is to make everything punishable under a special law, an offence within the meaning of the Penal Code. (*Mears, C.J. and Sen, J.*) JOTI PRASAD GUPTA *v.* EMPEROR. **53 All. 642=1932 Cr**

PENAL CODE (1860), S. 40.

C. 27=(2) 136 I.C. 91=33 Cr. L.J. 236=I.R. 1932 All. 139=1931 A.L.J. 986=A.I.R. 1932 All. 18.

——**S. 40**—Offence under S. 451—Construction—Every offence punishable under the Penal Code included. *See*, PENAL CODE S. 451. **A.I.R. 1931 Lah. 405.**

——**S. 43**—"*Legally bound*"—*Meaning of—Scope of the section.*

Having regard to the definition of "legally bound" in S. 43, that section covered a breach of contract and not merely a tort; the breach of contract should be one which furnishes ground for a civil action, that is to say, in respect of which damages could be obtained under S. 73 of the Contract Act or which would be enforced specifically. (*Beaumont, C. J. and Barlee, J.*) EMPEROR *v.* GANPAT SUBRAO. **58 Bom. 491=151 I.C. 867=7 R.B. 85=35 Cr. L.J. 1429=36 Bom.L. R. 373=1934 Cr. C. 653=A.I.R. 1934 Bom. 202.**

——**Ss. 44 and 503**—Injury—Threat of social boycott—Not threat of 'injury'. *See* PENAL CODE, S. 503. **1933 M.W.N. 736 (1).**

——**S. 52**—"*Due care and attention*"—*Meaning of—Burden of proof—Justification by public servant.*

The phrase 'due care and attention' imples genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. Where therefore a question arises as to whether a person acted in good faith, then it devolves upon him to show not merely that he had a good intention, but that he exercised such care and skill as the duty reasonably demanded for its due discharge. Where the question is whether a public servant was justified in doing a certain thing, his justification must have a better foundation than his mere private belief, for a man may be very foolish in believing himself justified, but the law could not adopt so vague and unsafe a criterion. (*Nanavutty, J.*) GAYA DIN *v.* EMPEROR. **9 Luck. 517=6 R.O 448=148 I C. 870 11 O.W.N. 337=35 Cr.L.J. 804=1934 Cr. C. 429=A.I R 1934 Oudh 124.**

——**S 52**—'Good faith'—Search by police—Non-compliance with S 165, Cr. P. Code. *See* CR. P. CODE, 165. **10 Pat. 821=A.L.R. 1932 Pat. 66.**

——**Ss. 52 and 500, Except. 2, 3 and 9**—"*Due care and attention*".

It is certainly not using due care and attention to publish defamatory statements about a person and also to publish his denial and let the public take their choice. (*Bennet and Kisch, JJ.*) EMPEROR *v.* CHATTERJI. **6 I.R. (All.) 47=145 I.C. 126=34 Cr L.J. 926=1933 A.L J. 1493=14 L R. 119 (Cr.)=1933 Cr. C. 740=A.I.R. 1933 All. 434.**

——**S 53**—*Imprisonment—Technical offence.*

A breach of the peace, even if involving an assault on a public officer of a mild character, unless there be some elements of criminality in it should not ordinarily be punished by sentences of imprisonment. So far as possible the jails should be kept for the reception of persons who perform criminal acts of not merely a technical but of a criminal character. (*Courtney-Terrell, C.J.*) ANANDA PARHI *v.* EMPEROR. **I.R. 1931 Pat. 464=134 I.C. 432=32 Cr.L.J. 1116=12 Pat. L.T. 791=1931 Cr.C. 790=A.I.R. 1931 Pat. 342.**

——**S. 53**—*List of punishments—Whether exhaustive.*

The list of punishments given in S. 53 is not exhaustive. Other punishments besides those mentioned in the section can be inflicted by Criminal Courts in certain case, *e.g.*, whipping, detention in Borstal Institute or a Training School, an order under S. 565, Cr. P. Code. (*Baguley, J.*) GARANAND SINGH *v.* EMPEROR. **6 I.R. (Rang.) 103=146 I C. 545 (2)=35 Cr.L.J. 116=1933 Cr.C. 1146=A.I.R. 1933 Rang. 329.**

PENAL CODE (1860), S. 64.

——**S. 53**—*Sentence of fine and imprisonment—Propriety.*

It is altogether inappropriate to add a fine to a substantial term of imprisonment. It is only in very exceptional circumstances that it is suitable and appropriate to inflict a fine as well as a substantial term of imprisonment, such as in cases where the Court thinks that the justice of the case will be met by inflicting a substantial fine, but at the same time thinks that a short term of imprisonment in addition will serve as a salutary lesson to the accused or in cases where it is desired to compensate the complainant or in cases where the accused has profited financially by his misdeeds. (*Lort Williams and S. K. Ghose, JJ.*) ISLAM *v.* EMPEROR. **134 I.C. 1136=35 C.W.N. 519=53 C.L.J. 455=33 Cr.L. J. 31 (1)=I R. 1932 Cal. 48=1931 Cr.C. 990 (2)=A. I.R. 1931 Cal. 710 (2).**

——**S. 64**—*Appropriation of fine—Conviction under different sections—Fines of varying amounts—Payment of portion—Appropriation.*

Where an accused, who is convicted under one section to a fine of Rs. 200, in default to three months' imprisonment and also under two other sections to a fine of Rs. 15 or in default to one month's imprisonment for each offence, pays into Court Rs 30 and requests the Court to credit the accounts against the two smaller fines, the amounts should be so appropriated. (*Wild, J.C. and Milne, A.J.C.*) YAKOOB *v.* EMPEROR. **24 S L.R. 437=I.R. 1931 Sind 91=132 I.C. 475=32 Cr. L.J. 922=1931 Cr.C. 383=A.I.R. 1931 Sind 73.**

——**S. 64**—*Offence under S.* 391, *Calcutta Municipal Act—Sentence of imprisonment in default of fine—Legality.*

S. 64, I. P. Code, read with S. 26, General Clauses Act, makes it clear that the Court may impose a sentence of imprisonment in default of payment of fine imposed for breach of a statutory rule, such as the necessity for taking out a licence under S. 391, Calcutta Municipal Act. (*Cuming, J.*) U. K. MITRA *v.* CORPORATION OF CALCUTTA. **58 Cal. 1293=1932 Cr C. 11=136 I.C. 465=33 Cr L.J. 303=I.R. 1932 Cal. 193=35 C.W. N. 865=A.I.R. 1932 Cal. 63.**

——**S. 64**—*Order of detention under S.* 123—*Subsequent conviction under Penal Code, S.* 379, *for offence committed prior to first order—Running of sentences—Date of.*

Where the accused was first sentenced to one year's rigorous imprisonment in default of furnishing security under S. 123, Cr. P. Code, and again convicted under S. 379, Penal Code, for an offence committed prior to the previous order and sentenced to pay a fine of Rs. 75 or in default to three months' rigorous imprisonment and the fine was not paid,

Held, that the three months' imprisonment in default of fine passed in the second case must run from the expiry of the order of detention passed under S. 123, Cr. P. Code. (*Baguley, J.*) EMPEROR *v.* NAN E. **9 Rang. 612=I R. 1932 Rang. 52=135 I.C. 644=33 Cr.L.J. 174=1932 Cr.C. 210=A.I.R. 1932 Rang. 50.**

——**S. 64**—*Scope—Sentence of imprisonment to run concurrently with sentence in default of fine—Validity.*

S. 64 prohibits only the concurrent running of sentences of imprisonment to which the offender has previously been sentenced. Where, therefore, a person is sentenced to six months' imprisonment and it is directed that it should run concurrently with the sentence in default which that person was then serving, the order cannot be illegal, but it is opposed to the spirit and the intention of S. 64. Therefore Courts should not ordinarily order a sentence of imprisonment in default of fine

PENAL CODE (1860), S. 64.

to run concurrently with any other sentence of imprisonment, whatever the orders in which the sentences may have been passed. (*Carr, J.*) EMPEROR *v.* EBRAHIM. **I.R 1931 Rang. 125=131 I.C. 61=32 Cr.L.J. 637 (2) =1931 Cr.C. 153 (1)=A.I.R. 1931 Rang. 51 (1).**

———**S. 64**—*Sentence of imprisonment and fine—Release of prisoner on expiry of substantive sentence—Subsequent arrest to serve sentence in lieu of fine—Legality.*

Where the petitioner who was convicted and sentenced to imprisonment and fine was released after he had undergone the substantive sentence on his producing a surety who undertook to pay the amount of the fine by instalments and some fine was paid by the surety after which he made default and the Magistrate issued a warrant for the petitioner's arrest and sent him to jail to serve the proportionate sentence in lieu of the unpaid portion of the fine.

Held, that there was no law under which the petitioner could be sent back to jail and that he should be released.

Held, also, that the original order releasing the petitioner was illegal. (*Dalip Singh, J.*) TEJA SINGH *v.* EMPEROR. **37 P.L.R. 45=1936 Cr C. 268 (1)=161 I.C. 886=37 Cr.L.J. 503 (1)=8 R.L. 810 (2)=A.I.R. 1936 Lah. 348.**

———**S. 65**—*Applicability—Conviction under Mysore Excise Regulation—Sentence of fine under S. 55, Excise Regulation—Imprisonment in default—Limit of.*

S. 65, I.P. Code, clearly applies to punishments under Mysore Excise Regulation. On a conviction, therefore, under S. 55 of the Regulation, the sentence of imprisonment which the Court can award in default of payment of fine is only one-fourth six months, which is the maximum punishment prescribed by S. 55. A sentence of two months' rigorous imprisonment in default of fine is therefore illegal. (*Shankaranarayana Rao, J.*) NAGARAJU, *In the case of.* **13 Mys.L.J. 235.**

———**S. 65**—*Imprisonment in default of fine—Limit—Conviction under S. 18, Press Emergency Powers Act.*

Under S. 18 of the Press Emergency Powers Act, the maximum sentence of imprisonment being six months, a sentence of six months rigorous imprisonment in default of payment of fine is illegal. The term for which the Court under S. 65, can direct imprisonment in lieu of fine is only six weeks, *i e*, one-fourth of the maximum. (*Bajpai, J.*) SATYAWAN ACHARYA *v.* EMPEROR. **4 A W.R. 488=153 I.C. 411=7 R.A. 496=36 Cr.L.J. 335=1934 Cr.C. 1338=A.I.R. 1934 All. 1031.**

———**S. 65**—*Offence under S. 160—Imprisonment in default of fine—Limit to.*

The alternative sentence of 15 days' imprisonment in default of payment of fine for an offence under S. 160 of the Penal Code is opposed to the provision of S. 65. (*Doraiswami Iyer, C.J.*) CHIKGANTLAPPA *v.* GOVERNMENT OF MYSORE. **38 Mys.H.C.R. 384=11 Mys.L.J. 426.**

———**S. 67**—Applicability—Conviction under Mysore Regulation (VI of 1899 as amended in 1927)—Sentence of fine—Award of rigorous imprisonment in default—Legality. *See* MYSORE REGULATION (VI OF 1899 AS AMENDED BY REGULATION II OF 1927). **40 Mys. H.C.R. 129.**

———**S. 70**—*Fine not leviable under—Imprisonment in default—Legality.*

Where the fine is admittedly no longer leviable under S. 70, imprisonment in default of fine cannot be inflicted. (*Dalip Singh, J.*) TEJA SINGH *v.* EMPEROR. **1936 Cr. C. 268 (1)=161 I.C. 886=37 Cr.L.J. 503 (1)=8 R.L. 810 (2)=37 P.L.R. 45=A.I.R. 1936 Lah. 348.**

PENAL CODE (1860), S. 71.

———**S. 71** — *Applicability — Conspiracy under S. 120-B,*

S. 71 does not apply to conspiracy, as defined in S. 120-B, in connexion with an offence committed in consequence of a conspiracy; the conspiracy to commit an offence and the actual commission of the offence are two separate and distinct transactions. S. 120-B provides punishment for conspiracy; and persons can be punished under that section, even if besides conspiring they actually proceed to commit the offence. A. I. R. 1924 Cal. 771 and 16 Cal. 442, Dist. (*Staples, A. J.C.*) BALA HUDDAR *v.* EMPEROR. **148 I.C. 157=6 R N. 167=35 Cr.L J. 594=1933 Cr.C. 936=A I.R. 1933 Nag. 252.**

———**S. 71**—*Applicability—Offences under Bombay Abkari Act, S. 43, Cls. (1) (a) and (h)—Separate sentences—Legality.*

The offences dealt with by Cl. (*a*) and Cl. (*h*) of sub-S. (1) of S. 43 of the Bombay Abkari Act are quite distinct. While one deals with possession and dealing with an excisable article, the other deals with the possession of material for the manufacture of that article. S. 71, I. P. Code, does not therefore apply to the case of a person charged with those two offences; and he can therefore be legally convicted and sentenced at one trial for both the two offences. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v* DEORAO BHIVAJI. **156 I.C 399=7 R B. 510=36 Cr.L J. 924 (1)=37 Bom.L.R. 191=1935 Cr C. 589=A.I R. 1935 Bom. 202.**

———**S. 71**—*Applicability—Offences under S. 147 and under Ss. 304 and 149, I. P. Code—Separate sentences—Legality*

Where a person is charged with rioting under S. 147 and then by reason merely of being a party to the riot or unlawful assembly commits a fatal assault upon another person in prosecution of the common object, the case comes under S. 71, I. P. Code and separate sentences are forbidden under each of the two charges. (*Rankin, C.J. and C. C. Ghose, J.*) KITABDI *v.* EMPEROR. **I.R. 1931 Cal. 567=132 I C. 247=32 Cr.L.J. 990=35 C. W.N. 184=1931 Cr.C. 602=A.I.R 1931 Cal. 450.**

[F. 35 C.W.N. 345 (346).]

———**S. 71**—*Applicability—Offence under Ss. 239 and 240.*

Offences made punishable under Ss. 239 and 240 are separate and distinct offences and S. 235, Cr. P. Code permits of double conviction and consecutive sentences, for in this case S. 71, I.P. Code is obviously not applicable; S. 71 applies only where there is an offence made up of parts, any of which parts is itself an offence. (*Middleton, J. C. and Saaduddin, A.J.C.*) GOPICHAND *v.* EMPEROR. **146 I.C. 7=6 I.R. Pesh. 12=1934 Cr.C. 7=A.I.R. 1933 Pesh. 99.**

———**S. 71**—*Charge for offences under S. 147 and under Ss. 149 and 325, I.P. Code—Separate sentence—Legality.*

It is not legal to pass a separate sentence when the accused is charged both under S. 147 and also under S. 325 read with S. 149, I.P. Code. (*Lord Williams and S. K. Ghose, JJ.*) HARENDRA BARMAN *v.* EMPEROR. **134 I.C 1041=35 C.W.N. 345=1931 Cr.C. 758=33 Cr.L.J. 1=I.R. 1932 Cal. 1=A.I.R. 1931 Cal. 606.**

———**S. 71**—*Charge for offence under Ss. 224 and 383—Conviction for one offence.*

The accused brandished a crowbar at the police and effected his escape. He was convicted of offences under Ss. 383 and 224, I. P. Code, and sentenced to a separate punishment for each offence.

Held, in revision, that the double sentence could not be upheld and that there should be only one sentence.

PENAL CODE (1860), S. 71.

(*Pakenham Walsh, J.*) RAJU CHETTI *v.* EMPEROR. **1932 M.W.N. 547.**

———**S. 71**—*Conviction under—U P. Excise Act, S.* 60 (b) *and* (f)—*Separate sentences under each clause —Propriety of.*

When a man is found guilty of the major offence of illicity manufacturing excisable articles, it is unreasonable that he should be severely punished for keeping in his possession materials for manufacturing those articles and for possessing them. The one offence includes all the others. (*Young, J.*) EMPEROR *v.* MAHOMED ALI KHAN. **55 All. 557=I.R. 1933 All. 333=143 I.C. 781=34 Cr.L J. 641=14 L.R. 197 (Cr)=1933 A.L J. 746=1933 Cr.C. 744=A I R. 1933 All. 438.**

———**S. 71**—Criminal Law Amendment Act, S. 17 (*1*) —Ordinance for the prevention of Molestation and Picketing (Ordinance V of 1932), S. 4—Charge of picketing foreign cloth-shops—Conviction—Two separate sentences—Legality of. *See* CRIMINAL LAW AMENDMENT ACT (1908), S. 17 (1). **A I.R. 1933 Mad. 337=64 M L J. 351.**

———**S 71**—Offences under Ss. 30 (*a*) and 37 of the Burma Excise Act—Separate sentences for—Legality of. *See* BURMA EXCISE ACT (1917), S. 16. **10 Rang. 396=A I.R. 1932 Rang 184.**

———**S. 71**—*Offences under Ss.* 147, 323, 149 *and* 325, *I.P. Code—Separate conviction and sentences—Legality.*

The accused were convicted of offences under Ss. 147, 323, 149 and 325, I.P. Code and separate sentences were passed under Ss 147 and 323, I. P. Code, on the one part and Ss. 142 and 325 on the other.

Held, that the separate convictions were proper but not the separate sentences passed, S. 35, Cr. P. Code, should in this connection be read subject to the provisions of S. 71, I. P. Code. 16 Cal 442 (F.B.), Rel. on. (*Beasley, C. J. and Bardswell, J.*) PONNIAH LOPES, *In re.* **57 Mad. 643=150 I.C. 977=7 R.M 61=35 Cr L.J. 1226=1934 M.W.N. 8=39 L.W. 566=1934 Cr.C 684=A.I R. 1934 Mad. 388=66 M L J. 572.**

———**Ss. 71, 147 and 323**—*Rioting and hurt—Separate sentences for—Legality of.*

When the object of an unlawful assembly is to cause hurt, a member of that unlawful assembly can, in addition to being convicted under S. 147, also be convicted and separately sentenced under S. 323 if he is proved himself to have caused hurt. 53 M.L J. 656, Diss. from; 53 M.L.J. 653; 20 Cr.L.J. 653; 16 C. 725; 40 C. 511; 17 B. 260 (F B), Foll. (*Beasley, C. J. and Birdswell, J.*) SOTHAVALAN *v.* RAMA KONE. **56 Mad. 481=I R. 1933 Mad. 180=142 I C. 31=34 Cr.L.J. 273=1933 M.W.N. 254=37 L W. 250=1933 Cr.C. 441=A.I R 1933 Mad. 338=64 M.L.J. 314**

[R. 57 M. 643 (646); 12 R. 419 (423).]

———**S. 71**—*Scope.*

The combined effect of S. 35 of the Cr. P. Code and S. 71 of the I.P. Code, is that under S. 35, as amended, it is not even necessary that the offences should be distinct in order to enable a Judge or Magistrate to pass consecutive sentences and if the case fell under S. 41, I. P. Code, the Court cannot award a more severe punishment than it could for any of the offences. 30 Bom. L. R. 383; 49 Bom 916; A. I. R. 1925 Cal. 1015 and A. I. R. 1929 Lah. 670, Foll. (*Doraiswami Iyer, C. J. and Rama Rao, J.*) HANUMANTHAGA *v.* GOVERNMENT OF MYSORE. **36 Mys.H.C.R. 305=9 Mys.L.J. 179.**

———**S. 71**—*Scope—Separate sentences on separate convictions—If prohibited.*

S. 71, only prohibits punishment more severe than that which the Court could award for any one offence. It does not prohibit multifarious sentences following upon multifarious convictions. (*Mahadevayya, C.J. and Ramachandra Rao, J.*) THIMMAPPA GOWDA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 398=39 Mys H.C R. 912.**

PENAL CODE (1860), S. 75.

———**S. 71**—*Separate sentences for offences under S.* 143 *and Ss.* 341 *and* 149, *I P. Code.*

Where an accused is convicted under S. 143 and under Ss. 341 and 149, I.P. Code, there should not be two sentences but one. (*Harrison, J.*) EMPEROR *v.* ABDUL QADIR KASURI. **I.R. 1931 Lah. 157=129 I.C. 221=32 Cr.L J. 249=1930 Cr.C. 1220=A.I.R. 1930 Lah. 1044.**

———**Ss 71, 147 and 347**—Separate sentences under Ss. 147 and 347, perfectly legal. *See* PENAL CODE, SS. 147 AND 347. **A.I.R. 1932 Pat. 335.**

———**S 71**—*Several injuries inflicted in pursuance of common object—Separate sentences under Ss.* 147 *and* 323—*Legality of.*

As soon as the first injury is caused to any person, force is used and the offence of rioting is complete. Subsequent injuries, though inflicted in pursuance of the same common object, would be distinct injuries justifying a conviction under S. 323, I. P. Code. Hence separate sentences under Ss. 147 and 323 are valid. (*Bajpai, J.*) SAHEBRAJ SINGH *v.* EMPEROR. **6 I.R. (All.) 205=145 I.C. 913=14 L R 420 (Cr)=34 Cr.L.J 1099=1933 Cr C. 1417 (2)=1933 A.L.J. 1178=A.I.R. 1933 All. 819.**

———**S. 71**—*Several offences—Single trial—Separate sentences.*

Where more than one offence is proved in respect of which the accused has been charged and tried, a conviction for each such offence must follow, whether S. 71 applies or not, and a separate sentence must be passed in respect of each such conviction. (*Ferrers, J. C. and Aston, A J.C.*) EMPEROR *v* DHARAMDAS. **I.R. 1933 Sind 46=1933 Cr.C. 33=141 I.C 280=34 Cr.L.J. 143=26 S.L.R. 416=A.I R. 1933 Sind 9.**

———**Ss 71, Ill. (a), 323 and 325**—*Conviction for one beating both under S* 323 *and S.* 325—*Legality.*

Where the offence consisted of only one beating, the accused should be convicted only under S. 325 and not also for an offence under S. 323 inflicted in the course of the same beating. (*Burn, J.*) MURUGAN *v.* EMPEROR. **1933 M.W.N. 244.**

———**S. 75**—*Applicability—Conviction for attempt to commit theft—Accused guilty of previous conviction—Enhanced sentence—If to be passed.*

S. 75 does not apply to a conviction for the offence of attempt to commit theft, since it falls under Ch XXIII, I. P. Code, and therefore the accused is not liable under S. 75 to enhanced punishment. But at the same time if a previous conviction is brought to the notice of the Court, the Court can consider the nature of that conviction, and if it constitues a proper ground for enhanced sentence, it can pass enhanced sentence, though it should not refer to S. 75, I. P. Code. (*Ramachandra Rao, J.*) DEVAPUTRA, *In re.* **12 Mys.L.J. 415**

———**S. 75**—*Applicability—Single previous conviction long time ago.*

S. 75 should not be applied in the case of an accused person, who has only one previous conviction and that too about 10 years before. (*Ferrers, J. C. and Aston, A. J. C.*) JUMO IDRIS *v.* EMPEROR. **28 S.L R. 199=1934 Cr C. 1405=153 I.C. 316=7 R.S. 127=36 Cr. L.J. 326=A.I R 1934 Sind 195.**

———**S. 75**—*Attempt.*

Attempts do not come within the perview of S. 75. (*Addison, J.*) NANHUN *v.* EMPEROR. **6 I. R (Lah.) 162=146 I C. 20 (1)=34 Cr.L.J. 1181=34 P.L.R. 906=1933 Cr. C. 973=A.I. R.1933 Lah. 433 (1).**

PENAL CODE (1860), S. 75.

———**S. 75**—*Conviction—Order under S. 110, Cr. P. Code.*

An order under S. 110, Cr. P. Code, cannot be correctly described as a conviction so as to bring an offender within the ambit of S. 75, I. P. Code. (*Ferrers, J. C. and Aston, A. J. C.*) JUMO IDRIS *v.* EMPEROR. **28 S L R. 199=1934 Cr. C. 1405=153 I C. 316=7 R.S. 127=36 Cr.L.J. 326=A.I R. 1934 Sind 195.**

———**S. 75**—*Enhancement.*

Accused were found guilty of a trivial offence under S. 379 of stealing cotton, and in view of their having been already sentenced to two years' rigorous imprisonment, were sentenced to five years' rigorous imprisonment and a fine of Rs. 100 and were placed under police surveillance for three years on the expiry of the sentence.

Held, that the sentence imposed tended to be severe, but that a substantial reduction should not be made, and that two years' rigorous imprionment without the order as to fine and police surveillance would be sufficient. (*Tapp, J.*) UJAGAR SINGH *v.* EMPEROR. **6 I R. (Lah.) 152=145 I C. 1002=34 Cr L J. 1153=34 P. L.R. 903=1933 Cr C. 269=A.I.R. 1933 Lah. 147.**

———**S. 75**—*Habitual offender—Trivial offence—Sentence.*

A person cannot be sentenced to an altogether incommensurate punishment for a trivial offence merely because he has been convicted many times before. There must be some proportion between the punishment and the offence. To transport a man for life for picking a pocket is extremely harsh. (*Burn, J.*) KUPPUSWAMI CHETTY *v.* EMPEROR. **1933 M.W.N. 1259.**

———**S. 75**—Previous convictions—Proof—Mode of. *See* CR. P. CODE, S. 511. **36 P.L R. 7.**

———**S. 75**—Previous conviction—Proof. *See* CR.P. CODE, S. 511. **A.I R. 1934 Lah. 693.**

———**S. 75**—"*Punishable*"—*Meaning of—Previous conviction by Court-martial—If can be taken into account for enhancing sentence.*

The word "punishable" should be read as if it were followed by the words 'by a Court administering the Indian Penal Code." Consequently previous convictions of an accused before the Court-martial cannot be taken into account to enhance punishment under S. 75, I.P. Code. (*Fraser, J. C. and Saaduddin, A. J. C.*) EMPEROR *v.* PRIVATE JOHNSON. **141 I.C. 445=1933 Cr.C. 148=A.I R. 1933 Pesh. 6.**

———**S. 75**—*Scope—Habitual offenders—Necessity for severe sentences—Mysore Cr. P. Code, S.* 348

S. 75, I. P. Code, shows that the policy of the Criminal Law demands frequent resort to the section in the case of habitual offenders against property. S. 348, Mysore Cr. P. Code Regulation, provides that habitual offendars shall be committed to the Court of Session or sent to the District Magistrate invested with powers under S. 30, Cr. P. Code, and the provisions of S. 348 have been particularly emphasised in the General rules and orders (criminal). A sentence of three months' rigorous imprisonment, on conviction under S. 380, I. P. Code, for an accused who is a habitual offender and professional thief is wholly inadequate. (*Mahadevayya, C.J.*) ANTHONY, *In re.* **12 Mys.L J. 385.**

———**S. 75**—*Scope—Previous conviction not falling under S. 75—Enhanced sentence—Duty of Court—Procedure.*

There are many cases in which the law does not prescribe enhanced maximum punishment for a second conviction, but in which it is nevertheless necessary to pass a heavier sentence because the accused has previous convictions for similar or other offences indicating moral turpitude. A Court is bound, when a previous conviction not falling under S. 75, is brought to its notice, to consider the nature of that conviction, and if it thinks that it constitutes proper ground for a heavier sentence than would be awarded for the offence charged, to take evidence as to such previous conviction. It may enter the previous conviction in the charge so that the accused may understand that it will be taken into consideration in passing the sentence The Court, however, should not refer to S 75, unless it is competent to give enhanced sentence under the section (*Ramachandra Rao, J.*) DEVAPUTRA, *In re.* **12 Mys.L J. 415.**

PENAL CODE (1860), S. 84.

———**Ss. 76 and 79**—*Letter by Advocate to Magistrate demanding return of bribe—Alleged instructions of client, no defence.*

No instructions can justify the action of an Advocate in threatening a Magistrate with the proper legal consequences of his illegal actions, if he does not comply with a demand made and promising to hush up the matter if the demand is met. Where therefore an Advocate writes a letter to a Magistrate demanding the return of the bribe alleged to be paid to him and promising to hush up the matter in case of compliance with the demand, the Advocate makes himself a party to compound an uncompoundable offence and cannot shelter himself behind alleged instructions of his client. A.I.R. 1925 Rang. 15, Ref. (*Dunkley, J.*) U SAN WIN *v.* U HLA. **I R. 1931 Rang. 185=132 I C. 553=32 Cr L.J. 934=1931 Cr.C. 371=A.I.R. 1931 Rang. 83.**

———**Ss. 77, 499 and 500**—*Exemption of Judge from liability—Words* prima facie *defamatory.*

The very existence of the exceptions to S. 499 indicates that the provisions of S 77 cannot by themselves cover the case of remarks made by a Judge or Magistrate in the course of his office, so as to exempt him from any liability under S. 500. Where the words complained of themselves are *prima facie* defamatory and do not bear directly on the matter in hand, there is a *prima facie* case against the accused and the complaint should be admitted. (*Grille, J.C.*) KAMLA PATEL *v.* BHAGWANDAS. **30 N.L.R. 234=149 I.C. 140=6 R N. 220=35 Cr L J 947=17 N.L.J. 43=1934 Cr.C. 515 (2)=A.I R. 1934 Nag. 123.**

———**S. 79**—Pardanashin lady in debtor's house—Decree-holder accompanying bailiff—Door pushed open without notice to lady and injuries caused by him—Guilty under S. 352, I. P. Code—S. 79 of no avail. *See* I. P. CODE, S. 352. **145 I.C. 259.**

———**S. 79**—*Scope.*

Whereas S. 79 of the Penal Code can only be applied, when all the facts are known, *i.e.*, when the trial is over, S. 132 of the Criminal Procedure Code can only operate before the trial begins. Protection given by S. 79 is a protection against conviction while the protection given by S. 132, Cr. P. Code, is a protection against trial. (*Burn, J.*) SCHAMNAD *v.* RAMA RAO. **I R. 1933 Mad. 271 (2)=143 I.C. 115=34 Cr.L J. 528=1932 M.W.N. 1225=1933 Cr.C. 371=A.I.R. 1933 Mad. 268.**

———**S. 80**—*Voluntary drunkenness—When can be a defence.*

In a case of voluntary drunkenness where the evidence falls short of a proved incapacity in the accused to form the intent necessary to constitute the crime, the presumption that a man intends the natural consequences of his act does not stand rebutted. (*Shadi Lal, C. J. and Monroe, J.*) BISHNA *v.* EMPEROR. **I R. 1932 Lah. 283 (1)=137 I.C. 86 (1)=33 Cr L J. 378=33 P.L.R. 130=1932 Cr.C. 256=A.I.R. 1932 Lah. 244.**

———**S. 84**—*Father killing children—No motive—Inference of mental derangement.*

PENAL CODE (1860), S. 84.

For a father to kill his three young children is certainly a most unnatural act and where no clear motive can be shown, some mental derangement should be inferred. (*Niyogi and Staples, A. J. Cs.*) LOCAL GOVERNMENT *v.* SITRYA ARJUNA MAHAR. **30 N. L.R. 9=6 I.R. (Nag.) 72=146 I.C. 118=34 Cr.L.J. 1168=1933 Cr.C. 1265=A.I.R. 1933 Nag. 307.**

———**S. 84**—*Insanity—Exemption from liability—Onus.*

The onus rests on the accused to establish the plea of unsoundness of mind as contemplated by S. 84. The section makes it clear that exemption from criminal liability can be allowed only, where the accused claiming to be insane is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law at the time of the act. (*Shadi Lal, C.J. and Monroe, J.*) SARDAR BAKHSH *v.* EMPEROR. **151 I.C. 672=7 R.L. 179=35 Cr.L.J. 1398=35 P.L.R. 703.**

———**S. 84**—*Insanity—Evidence—Previous conduct.*

The mere fact that the accused committed certain unusual acts in the past does not lead to the inference of insanity of the accused at the time of the commission of the offence. In order to avail of the plea of insanity under S. 84, it must be shown that the accused was incapable of understanding the nature of his act at the time when the act in question was committed. Where the accused found guilty under S. 302, I.P. Code, made no attempt to run away, kept on wearing the blood-stained clothes till the police came and was shown to have previously been acting in an eccentric manner.

Held, that the acts though unusual did not necessarily lead to an inference of insanity especially when they related to acts in the past. (*Shadi Lal, C.J. and Abdul Qadir, J.*) CHANDGI *v.* EMPEROR. **I.R. 1932 Lah. 508=138 I.C. 532=33 Cr.L.J. 634 (2)=33 P.L.R. 211=1932 Cr.C. 325=A.I.R. 1932 Lah. 260.**

———**Ss. 84 and 302**—Murder of children—Unsound mind—Accused, not, however, ignorant of his wrongful act—Sentence. *See* PENAL CODE, SS. 302 AND 84. **A.I.R. 1933 Lah. 123.**

———**S. 84**—Murder—Mere unsoundness of mind—Effect. *See* PENAL CODE, S. 302. **A.I.R. 1933 Rang. 144.**

———**S. 84**—*Plea of insanity—Counsel raising at late stage—Court, if bound to try question as preliminary issue.*

Where no plea of insanity was raised at the trial until the concluding stage when the plea was suggested by the Counsel for the accused.

Held, that it was not the duty of the Sessions Judge to try a preliminary issue regarding sanity of the accused especially when there was no indication that he was suffering from unsoundness of mind. (*Shadi Lal, C. J. and Agha Haidar, J.*) EMPEROR *v.* SAJJAN SINGH. **I.R. 1931 Lah. 506=131 I.C. 746=32 Cr.L.J. 816.**

———**S. 84**—*Plea of insanity—Onus of proof.*

The onus of proving the exception enacted by S. 84 is on the prisoner. (*Shadi Lal, C.J. and Agha Haidar, J.*) EMPEROR *v.* SAJJAN SINGH. **I.R. 1931 Lah. 506=131 I.C. 746=32 Cr.L.J. 816.**

———**S. 84**—Plea of insanity—Onus of proof. *See* EVIDENCE ACT, S. 105. **1935 O.W.N. 53=A.I.R. 1935 Oudh 143.**

———**S. 84**—*Plea of insanity—Onus of proof—Principles applicable—Plea not made out—Procedure under S. 401, Criminal Procedure Code*, 1898.

Under S. 84 exemption from criminal liability can be allowed only when the accused is incapable of realising the nature of the act or knowing that he is doing what is either wrong or contrary to law. It is not therefore, every person suffering from mental disease that can avoid responsibility for a crime by invoking the plea of insanity. A man may be suffering from some form of insanity in the sense in which the word is used by a medical man but may not be suffering from unsoundness of mind as defined in the section. There is a clear distinction between a 'medical insanity' and a 'legal insanity' and the Courts are concerned only with the legal and not the medical view of the question. Moreover to establish a defence on the ground of insanity it must be shown that the mental condition referred to in the section existed at the time when the act was committed. If a man is insane six or seven hours after committing the murder, it raises no presumption that he was of unsound mind at the time of the committing of the murder. The onus of establishing the plea of insanity is undoubtedly on the accused. Plea of insanity held on the facts not to be made out. Owing to exceptional circumstances, however, case forwarded to the Local Government for the Governor to take such action under S. 401, Cr. P. Code, as might be deemed right and proper. (*Shadi Lal, C.J. and Agha Haidar, J.*) BAGGA *v.* EMPEROR. **I.R. 1931 Lah. 981=134 I.C. 773=32 Cr.L.J. 1230=1931 Cr.C. 532=32 P.L.R. 331=A.I.R. 1931 Lah. 276.**

———**S. 84**—*Plea of insanity—Sustainability—Test.*

The accused who did not enjoy good bodily health and used to act at times in an eccentric manner, was proved to have murdered a young woman whom he loved, in tussle with her relations.

Held, that the accused was not shown to be incapable of knowing the nature of his act and that the plea of insanity was not maintainable. (*Raza and Smith, JJ.*) RAM ADHIN *v.* EMPEROR. **7 Luck. 341=8 O.W.N. 1221=1932 Cr.C. 50=135 I.C. 384=33 Cr.L.J. 163=I.R. 1932 Oudh 32=A.I.R. 1932 Oudh 18.**

———**S. 84**—*Plea of insanity—Sustainability.*

Where all that was shown was that the accused was moody, irritable and conceited and may be said to have been peculiar but at no time did he suffer from insanity of such nature and degree as to preclude him from knowing the nature of his acts or to obscure the distinction between right and wrong and there was other evidence to show that he was not lacking in intelligence.

Held, that the accused, who was prosecuted for an offence under S. 302, I.P. Code, could not on those facts raise a plea of insanity. (*Harrison and Dalip Singh, JJ.*) UMAR KHAN *v.* EMPEROR. **32 P.L.R. 804=1932 Cr.C. 21=135 I.C. 666=I.R. 1932 Lah. 122=33 Cr.L.J. 186=A.I.R. 1932 Lah 11.**

———**S. 84**—*Plea of insanity—What must be proved—Onus.*

The legal conception of insanity differs considerably from the medical conception. In order to be a good defence, the burden of proof lies on the defence to show that the accused at the time of committing the offence was "by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law." All other forms of insanity and minor aberrations of mind which are recognised by the medical sciene as amounting to madness are excluded in the eye of the law.

Held, that the evidence in the case did not bring the case of the accused, who was charged with murder within the exemption. (*Sulaiman and Niamatullah, JJ.*) EMPEROR *v.* PANCHA. **I.R. 1932 All. 536=139 I.C. 147=33 Cr.L.J. 714=13 L.R. 31 (Cr.)=1932 Cr.C. 231=A.I.R. 1932 All. 233.**

———**S. 84**—*Plea of insanity—When available to accused.*

PENAL CODE (1860), S. 84.

It is not every person mentally diseased who is exempted from criminal responsibility. The rule enacted by S. 84 prescribes that such exemption is allowed only where accused is "incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law." A man may be suffering from some sort of insanity in the sense in which the expression is used by medical man but may not be suffering from unsoundness of mind as contemplated by law. If he is capable of knowing the nature of the act or of realising that the act is wrong or contrary to law, he must be held to be guilty. His liability will not be diminished simply because he did the act under the influence of some delusion or in order to redress or avenge some real or supposed grievance. (*Shadi Lal, C.J. and Agha Haidar, J.*) EMPEROR *v.* SAJJAN SINGH. **I.R. 1931 Lah. 506 = 131 I.C. 746 = 32 Cr.L.J. 816.**

———**S. 84**—*Plea of insanity—When available—Onus.*

It is not every form of unsoundness of mind that would exempt a person from criminal responsibility, but only such "unsoundness of mind as would materially impair the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility—the nature and extent of the soundness of mind required, being such as would make the offender incapable of knowing the nature of his act or that he is doing what is wrong, or contrary to law." The presumption of law is that every person who has arrived at the age of discretion is sane and is accountable for his actions unless the contrary is proved. The burden of proof is upon the person setting up the defence of unsoundness of mind, who must not merely prove mental derangement but that particular and appropriate kind of derangement recognised by law—that is to say—a disease of the mind which deprives him at the time of committing the act, of the faculty of distinguishing right from wrong, or of discerning the nature and quality of his act. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) PADMAVATHAMMA *v.* GOVERNMENT OF MYSORE. **9 Mys.L.J. 28.**

———**S. 84**—*Proof of insanity—Desperation on account of starvation.*

The mere fact that the accused was driven to desperation on account of starvation does not amount to proof of insanity at the time when she committed the deed in question. (*C.C. Ghose, Panckridge and Patterson, JJ.*) MABAJJAN BIBI, *In the matter of.* **I.R. 1932 Cal. 339 = 137 I.C. 511 = 33 Cr.L.J. 476 = 1932 Cr.C. 650 = A.I.R. 1932 Cal. 658.**

———**S. 84**—*Proof of insanity—Eccentricity of accused—Inadequate motive for crime.*

Where the accused was shown to have been eccentric a few years before he committed the double murder but it appeared that he had never been considered to be unfit for work and was performing responsible duties of office.

Held, that the mere fact that the murders were committed with an inadequate motive was not sufficient for finding that the accused was insane. (*Raza and Pullan JJ.*) MAHOMED ISLAM *v.* EMPEROR. **I.R. 1931 Oudh 99 = 129 I.C. 323 = 32 Cr.L.J. 327 = 7 O.W.N. 1100 = 1931 Cr.C. 133 = A.I.R. 1931 Oudh 77.**

———**S. 84**—*Proof of insanity—Unbalanced mind.*

The fact that the accused had an attack of insanity before the occurrence and another one in jail during the period between the inquiry in the Committing Magistrate's Court and the opening of the trial in the Sessions Court is not sufficient to prove that it was in a fit of insanity that he committed the assault. Proof of an unbalanced state of mind is not the same as that of unsoundness of mind; the former may be material in the matter of sentence but is not sufficient to give the benefit of S. 84 to the accused. (*Kisch, J.*) NABI AHMAD KHAN *v.* EMPEROR. **I.R. 1932 Oudh 283 = 137 I.C. 800 (2) = 33 Cr.L.J. 542 = 9 O.W.N. 355 = 1932 Cr.C. 373 = A.I.R. 1932 Oudh 190.**

PENAL CODE (1860), S. 86.

———**S. 84**—*Religious delusion—Human sacrifice to please Goddess—Sufficiency of defence.*

The accused was the pujari of a Mari Amman Temple. While invoking the deity for the purpose of curing an attack of small-pox, he professed to become inspired, snatched the five months old baby of P. W. 1 and killed it.

Held, though he might have been labouring under a delusion that the sacrifice was necessary to please the Goddess, it was not shown that he did not know what he was doing when he killed the child. On the other hand, he knew that he was killing the child to appease the Goddess, and so he could not be said to be insane within the meaning of S. 84. (*Beasley, C.J. and Sundaram Chetty, J.*) NARAYANASWAMI GOUNDAN *v.* EMPEROR. **1931 M.W.N. 719.**

———**S. 84**—*Temporary insanity—Evidence.*

There was strong evidence that the accused was insane a few days after the murder. There was also evidence that even prior to murder, he was insane. When he was put on trial, it was urged that he was a lunatic. After inquiry was made, three of the four assessors came to the conclusion that he was lunatic. The fourth was doubtful. The accused was then sent to Mental Hospital. The Superintendent of the Mental Hospital then wrote that "accused was feigning insanity." On this, the successor of the Sessions Judge relying on the letter of the Superintendent convicted the accused. The letter however was not proved. Nor was the Superintendent examined as a witness.

Held, that the accused was insane when he killed the deceased and his case fell within the scope of S. 84. (*Coldstream and Monroe, JJ.*) IBRAHIM *v.* EMPEROR. **6 R.L. 619 = 148 I.C 987 = 35 Cr.L.J. 869 = 1934 Cr. C. 239 (2) = A.I.R. 1934 Lah. 123.**

———**S. 86**—*Drunkenness—Effect on liability for consequences of acts.*

An accused person who claims the benefit of S. 86, must make out that somebody else was responsible for his intoxication. Evidence of drunkenness which falls short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishes that his mind was affected by drink so that he more readily gave way to some violent passion, is not sufficient to rebut the presumption that a person intends the natural consequences of his acts. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) HOTTE KENCHA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 363 = 39 Mys H C.R. 760.**

———**S. 86**—*Drunkenness—Test.*

The correct test for deciding how far drunkenness is a good plea in defence of an accused is not whether the accused knew what he was doing was wrong or was able to appreciate the nature and quality of his act, but whether by the reason of his drunkenness, the accused person is incapable of forming an intention of committing the offence. *King* v. *Beard*, (1920) A. C. 479, Rel. on. Where, though the accused was drunk at the time, he committed the murder of the girl with which he was charged, it was nevertheless clear he was aware of the nature of the act done by him and the evidence showed he was able to run away and to follow the little girl with a knife in his hand and thereafter to stab her mother as well, the defence of drunkenness is of no

PENAL CODE (1860), S. 86.

avail. (*Beasley, C.J. and Pakenham Walsh, J.*) MUTHU GOUNDAN *v.* EMPEROR. **1931 M.W.N. 113.**

———**S. 86**—*Scope.*

The section deals only with the question of the knowledge possessed by an accused person at the time he commits the offence and leaves quite open the question of intention. (*Beasley, C.J. and Pakenham Walsh, J.*) MUTHU GOUNDAN *v.* EMPEROR. **1931 M.W.N. 113.**

———**S. 86**—*Voluntary drunkenness—Effect on criminal liability.*

In cases of voluntary drunkenness, an intoxicated person shall be dealt with as if he had the same knowledge as he would have had if he had been sober; but evidence of drunkenness which renders the accused incapable of forming the specific intention necessary to constitute the offence charged should be taken into consideration to determine whether he had that intention; in such case, the question of intention must be determined in each case according to the actual facts proved; but evidence of drunkenness falling short of a proved incapacity in the accused to form the necessary intention does not rebut the presumption that the accused, intends the natural consequences of his acts, although the drunkenness may be taken into consideration as an extenuating circumstance in passing sentence (*Mya Bu and Dunkley, JJ.*) NGA SEIN GALE *v.* EMPEROR. **12 Rang. 445=152 I.C. 1054=1934 Cr.C. 1326=36 Cr.L.J. 228=7 R.R. 188=A.I.R. 1934 Rang. 361.**

———**Ss. 88, 92 and 326**—*Accused thrusting heated ladle into a woman's mouth to exorcise devil—Offence.*

Where the accused believing that a certain woman was possessed of a devil attempted to exorcise it by thrusting a heated ladle right into her mouth and thereby caused grievous hurt to her, he is guilty of an offence under S. 326, I. P. Code, and is not protected either by S. 88 or S. 92, I. P. Code. (*Kendall, J.*) PAN SINGH *v.* EMPEROR. **7 R.A. 501=153 I.C. 425=36 Cr.L.J. 346=1935 A.W.R. 57=1935 A.Cr.C. 12=1935 Cr.C. 268=A.I.R. 1935 All. 282.**

———**Ss. 89, 350 and 352**—*Hindu husband forcibly dragging his minor wife from her father's house—Offence.*

Though under the Hindu Law the husband is a lawful guardian of his minor wife, he has no right to obtain possession of her by force without recourse to the Courts. If a husband forcibly drags his wife who is under 12 years of age and who is at the time living with her father, he causes injury, fear and annoyance to her within the meaning of S. 350, I. P. Code, and is, therefore, guilty of using criminal force under S. 352, I. P. Code. He cannot obtain the benefit of S. 89 as it cannot be considered that the obtaining possession of the minor by him would be for her benefit as Act XIX of 1929 clearly provides that such marriages shall not take place. (*Bennet, J.*) NANKU *v.* EMPEROR **159 I.C. 183=8 R.A. 400=1935 A.L.J. 1096=1935 A.Cr.C. 232=1935 A.W.R. 1081=1935 Cr.C. 1133=37 Cr.L.J. 35=A.I.R. 1935 All. 916.**

———**S. 90**—*Object and effect.*

The object and effect of S. 90 obviously was not to lay down that a child under 12 years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of person may afford a defence to a criminal charge, such consent must be a real consent, not vitiated by immaturity, fear or fraud. (*Page, C.J., Das, Mya Bu, Brown and Dunkley, JJ.*) KHALILUR RAHMAN *v.* EMPEROR. **11 Rang. 213=I.R. 1933 Rang. 81=143 I.C. 872=34 Cr.L.J. 696=1933 Cr.C. 573 (2)=A.I.R. 1933 Rang. 98 (F.B.).**

PENAL CODE (1860), S. 95.

———**Ss. 90 and 366**—Distinction between "against will" and "without consent"—Absence of valid consent does not raise presumption as to intention. *See* PENAL CODE, S. 366. **11 Rang. 213=A.I.R. 1933 Rang. 98 (F.B.).**

———**Ss. 92, 88 and 326**—Accused thrusting heated ladle into a woman's mouth to exorcise devil—Offence. *See* I. P. CODE, S. 88. **1935 A.W.R. 57=A.I.R. 1935 All. 282.**

———**S. 94**—*Applicability—Accused voluntarily subjecting himself to threats.*

Where an accused did, of his own accord, place himself in the situation by which he became subject to the threats of another owing to which he alleged that he committed the offence of robbery, the provisions of S. 94 can avail him nothing. (*Cunliffe and Dunkley, JJ.*) SANLAYDO *v.* EMPEROR. **1933 Cr.C. 919=147 I.C. 49=35 Cr.L.J. 262=A.I.R. 1933 Rang. 204.**

———**S. 94**—*Offence under S. 121—Plea of compulsion.*

Compulsion is not a defence in British India to a charge under S. 121, I. P. Code. (*Page, C.J., Mya Bu and Baguley, JJ.*) AUNG HLA *v.* EMPEROR. **9 Rang. 404=1931 Cr.C. 875=135 I.C. 849=35 Cr.L.J. 205=I.R. 1932 Rang. 65=A.I.R. 1931 Rang. 235.**

———**Ss. 95 and 504**—*Applicability—Mere vulgar abuse uttered in anger—Offence—Conviction—Propriety.*

Where the words uttered are mere vulgar abuses uttered in anger without an intention to provoke, the complaint should be dismissed on the principle of *de minimis non curat lex* embodied in S. 95. A conviction under S. 504 is not proper in such cases. (*Pollock, A.J.C.*) EMPEROR *v.* J. NASH. **160 I.C. 420 (1)=37 Cr.L.J. 296=8 R.N. 188 (1)=18 N.L.J. 170.**

———**S. 95**—*Charge of insult—Vulgar abuse not meant to be taken literally.*

At a meeting of the shareholders of a Company, it was proposed to expel some of the members one of whom was the accused. Thereupon the accused got angry and said that not even the Governor-General could expel members from the Company and then left the room muttering "You damn bloody bastards and cads", which was overheard by some of the members.

Held, that breach of good manners though it may be, it was not likely to provoke a breach of public peace, that as the term was applied generally to all the members present, of whose antecedents the accused presumably knew nothing, he could not be supposed to have intended to reflect on the chastity of their mothers and that there was no intentional insult. (*Beaumont, C. J. and Broomfield, J.*) EMPEROR *v.* PHILIP RANGEL. **56 Bom. 196=I.R. 1932 Bom. 239=137 I.C. 186=33 Cr.L.J. 463=34 Bom.L.R. 282=1932 Cr.C. 297=A.I.R. 1932 Bom. 193.**

———**S. 95**—*Observations made by Court—Complaint for defamation—Trivial offence—Dismissal of complaint.*

In the course of a civil suit pending before a Judge, a petition was presented to him by a number of persons whose parentage and place of residence were not noted therein. Instead of simply returning the petition, the Judge observed in a fictitious vein that there was only one person known to him in history whose miraculous birth gave rise to the Christian dogma of immaculate conception and that surely the applicants did not claim that divine origin. He further observed that the Urdu application was written so badly that the name of one of the applicants Gupta could be read as *Kutta* (dog). The petitioners thereupon preferred complaints to the District Magistrate for offences under Ss. 500 and 504, I. P. Code.

PENAL CODE (1860), S. 95.

Held, that the complaints should be dismissed under S. 95, I. P. Code. (*Nanavutty, J.*) BHAGIRATH *v.* SAIYID ALI HAMID SAHIB. **I.R. 1931 Oudh 335 = 132 I C. 783 = 32 Cr.L J. 991 = 8 O.W.N. 157 = 14 O.L.J. 20 = 1931 Cr.C. 824 = A I.R. 1931 Cal. 392.**

———**S. 95**—*Offence of defamation—Truth no defence —Procedure—Under S. 95.*

During the course of quarrel between the accused and the complainant, the accused was alleged to have stated that the complainant and his family were badmashes and convicts. It appeared that the allegations were true as the complainants and his brother had been convicted for gambling.

Held, that though truth was not an absolute defence in a prosecution for defamation and public benefit has also to be taken into account, the matter was not one for conviction. The case would also fall under S. 95 of I. P. Code. No person of ordinary sense and temper would have complained of the harm caused in such circumstances. It would be so slight as to be negligible. When both sides were quarrelling, the matter was not one for conviction. (*Bose, A.J.C.*) JEORAKHAN SONAR *v.* NANAKRAM. **17 N.L J. 66.**

———**S. 96**—*Applicability—Person assailing and injuring another out of revenge—No apprehension of attack.*

Where in a scuffle a person could not actually have entertained any apprehension whatever that he was going to be attacked by the opposite party whom he evidently assails and injures actuated by revenge, he cannot be deemed to have acted in exercise of the right of private defence. (*Shadi Lal, C.J. and Tapp, J.*) JOGINDRA SINGH *v.* EMPEROR. **1931 Cr.C. 854 = 33 Cr.L.J. 315 = 136 I C 721 = I R. 1932 Lah. 257 = 33 P.L.R. 952 = A.I.R. 1931 Lah. 566.**

———**S. 96**—*Applicability—Primary object of both parties to fight—Both fully prepared for same.*

Where each party anticipated resistance from the other and had fully prepared itself for a violent clash and the relations between the parties had become so estranged and embittered that they could not but think of trying conclusions with each other in a free fight and the dispute as to the insignificant field of five acres was picked up only to furnish a ground for a final encounter which would decide the major and more important issue relating to the village as a whole.

Held, that the primary object of both parties was to fight and the vindication of their right to property was merely a pretext and there could be no question of private defence. (Case-law referred.) (*Niyogi, A J.C.*) BHAIROSING *v.* EMPEROR. **31 N.L R. 380 = 156 I.C. 120 = 7 R.N. 217 = 36 Cr.L.J. 861 = 1935 Cr.C. 660 = A.I.R. 1935 Nag. 141.**

———**Ss. 96 and 148**—*Both parties determined to vindicate their rights to property by unlawful force—Plea of private defence—Proof of.*

Where both parties are determined to vindicate their rights or supposed rights by unlawful force, and they engage in fight, the party who wants to plead private defence successfully should show that he was in peaceful possession of the property and that he was not the aggressor. (Case-law referred.) (*Rupchand, J.C. and Mehta, A.J.C.*) ALI MAHOMED JUMO *v.* EMPEROR. **147 I.C. 70 = 35 Cr.L.J. 257 = 27 S.L.R. 433 = 1933 Cr.C. 1426 = A.I.R 1933 Sind 386.**

———**Ss. 96 and 160**—*Conviction under S. 160—Plea of private defence to be first found against.*

S. 160 is controlled by S. 96 and where a right of private defence is set up by the accused, they should not be convicted unless the plea is examined and found to be not established. (*Curgenven, J.*) RATNAM PILLAI *v.* EMPEROR. **1933 M.W.N. 721.**

PENAL CODE (1860), S. 97.

———**S. 96**—*Pitched battle—Theory of private defence —Applicability.*

If there is a pitched battle both sides would be guilty under S. 147, I. P. Code, and neither would be entitled to the right of private defence.

Held, however, on the facts, that there was no pitched battle and that the theory of private defence could be sustained by the accused. (*Addisson, J., on difference of opinion between Harrison and Dalip Singh, JJ.*) AHMAD SHER *v.* EMPEROR. **I.R. 1931 Lah. 573 = 132 I.C. 381 = 32 Cr.L.J. 868 = 1931 Cr.C. 737 = A.I.R. 1931 Lah. 513.**

———**S. 96**—*Plea of self-defence—When can be raised in appeal.*

The plea of self-defence can be raised for the first time in appeal, if the facts on the record would justify such a plea. (*Abdul Qadir and Monroe, JJ.*) NUR DAD *v.* EMPEROR. **33 P.L.R. 718 = I R. 1933 Lah. 290 = 142 I C. 901 = 34 Cr.L J. 462 = 1932 Cr.C. 820 = A.I. R. 1932 Lah. 606.**

———**S. 96**—*Unlawful assemblies fighting with each other—Right of private defence.*

Where two unlawful assemblies fight with each other, there can be no question of private defence and everybody who is proved to have taken part in the fight is liable to be punished for the offences committed by him. (*Coldstream and Jai Lal, JJ.*) MANNA *v.* EMPEROR. **151 I.C. 980 = 7 R L. 233 = 35 Cr L.J. 1462 = 1934 Cr C. 444 = A.I.R. 1934 Lah. 209.**

———**S. 97**—*Applicability—Parties engaged in determined fight.*

Where both parties have engaged themselves in a determined fight, neither party can claim the private defence of person or property. (*Nanavutty, J.*) MATA DIN *v.* EMPEROR. **6 I R. (Oudh) 62 = 145 I.C. 637 = 34 Cr.L.J. 1016 = 10 O.W.N. 383.**

———**S. 97**—*Assaulting public servant—Justification —Wrongful demand of toll.*

The right of private defence only exists against acts amounting to an offence against person or property and within the limits of S. 97 and the following sections of the Penal Code. That the Municipality has no right to collect toll is no justification for beating the peon who comes to demand it. (*Rowland, J.*) SAWAL SETH *v.* EMPEROR. **I.R. 1933 Pat. 221 (1) = 144 I.C. 178 = 34 Cr.L J. 726 (1) = 1933 Cr.C. 314 = A.I.R. 1933 Pat 144.**

———**Ss 97 and 325** — *Attachment by Amin acting honestly but erroneously—Right of private defence.*

An Amin through inexperience or negligence failed to notice that the duration of his warrant had expired, but proceeded to attach, honestly believing that he was entitled to do so under the warrant.

Held, he could neither be treated as a robber nor could be grievously hurt or even killed by the owner of the property in justifiable exercise of the right of private defence, as the accused has no right of private defence under such circumstances. (*King and Iqbal Ahmad, JJ.*) EMPEROR *v.* SHIB LAL. **55 All. 617 = 14 L R. 417 (Cr.) = 1933 A L.J. 917 = 147 I.C. 809 = 6 R.A. 567 = 1933 Cr.C 992 = A.I.R. 1933 All. 620.**

———**Ss. 97 and 99**—*Mischief—Right of private defence—Recourse to public authorities, if necessary.*

S. 97 gives a right of private defence of property against an act which amounts *inter alia* to an offence of criminal trespass or mischief. If the act of mischief has already begun there is more than an apprehension of danger to the property and the right of private defence

PENAL CODE (1860), S. 97.

has come into existence. If the right of private defence has already arisen, it is not expected that a person entitled to exercise it should have recourse to the permission of the public authorities. He is entitled to defend it himself. (*Niamatullah, J.*) ABDUL HADI *v.* EMPEROR. **6 R.A. 755=148 I C. 649=35 Cr.L.J. 730=1934 A.L.J. 689=4 A.W.R. 271=15 L.R. 147 (Cr.) =1934 Cr.C. 1012 (2)=A.I R. 1934 All. 829 (2).**

———**S. 97**—Possession by tenant under colour of title —Entry into land by him to cut crops—Right of private defence of rival claimant to such land. *See* PENAL CODE, S. 441. **1935 A.W.R. 509.**

———**S. 97**—*Private defence—Abuse of right—Effect of.*

The right of private defence, even if originally available, is lost where the party who were attacked, were far outnumbered and overwhelmed by the attacking party and the violence used by the former was far in excess of the occasion. (*Bisheshwar Nath and Kisch, JJ.*) AJODHIA *v.* EMPEROR. **1933 Cr.C. 81 (2)=142 I C. 665 =I.R. 1933 Oudh 121=34 Cr.L.J. 387=9 O.W.N. 997=A.I.R. 1933 Oudh 41.**

———**Ss. 97 and 99**—*Private defence—Accused himself aggressor—No right to invoke private defence.*

The right of private defence is available if the accused was acting in the lawful exercise of his right over property at the time when he was attacked. Where, however, the accused was not doing a lawful act when he was attacked but he was himself the aggressor and commenced beating others, he cannot invoke the right of private defence. (*Nanavutty, J.*) JOKHU RAM *v.* EMPEROR. **6 R.O. 445=148 I.C. 804=35 Cr.L.J. 801=11 O.W. N. 425=1934 Cr.C. 661=A.I.R. 1934 Oudh 207.**

———**S. 97**—*Private defence—Conditions and extent of right.*

The entire jote of a tenant was purchased by the land lord at a sale in execution of a rent decree, and possession was delivered; but despite the sale the tenant and his sons grew paddy on three of the plots in the jotes and the crops were standing at the date of the delivery. Subsequently the tenant and his sons cut and removed the paddy on one of the plots and stored the same in a Khamar adjoining their homestead. Thereupon the manager of the landlord had the crops on the other two plots reaped and removed to the landlord's cutchery, and proceeded to the house of the tenant to recover the paddy cut and stored by the latter previously. While so engaged, the manager who was unarmed and his cartmen were set upon by the tenant and his sons and others; the cartmen who were assaulted ran away, but the manager was thrown to the ground, tied hand and foot and kept underground for several hours. It was, however, admitted that the tenant had a share in the crops,

Held, (1) that the crops belonged to the landlord and the removal of the same by the manager of the landlord was no offence, and, therefore, the tenant had no right of private defence of property; and (2) that the right of private defence of property was not subsisting at the time of the attack on the manager, the cartmen having run away. (*Patterson and Guha, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BHAGIRATH MAHATO. **61 Cal. 991=59 C.L J. 482=151 I.C. 662=7 R.C. 147=35 Cr.L.J. 1367=38 C.W.N. 854=1934 Cr.C. 908=A.I.R. 1934 Cal. 610.**

———**S. 97**—*Private defence—Right of—Accused aiming below at deceased in self defence resulting in fracture of skull.*

PENAL CODE (1860), S. 97.

The deceased lost his temper with his brother, the accused, and threatened him with a scythe. The accused, apprehending that he was about to be hit on the head with the scythe, aimed a blow at the deceased in self-defence.

Held, in the absence of any other evidence to the contrary, it cannot be held that the accused exceeded the right of private defence. (*Young, C.J. and Sale, J.*) ATA MOHAMMAD *v.* EMPEROR. **36 Cr.L.J. 415=1934 Cr.C. 1378=153 I.C. 622=7 R.L. 448=A.I.R. 1934 Lah. 995.**

———**S. 97**—*Right of private defence.*

Where the accused and his companions were given *lathi* blows by the opposite party before he struck any blow, the accused was justified in inflicting simple hurt on them in the exercise of the right of private defence. (*Abdul Rashid, J.*) DURGA PARSHAD *v.* EMPEROR. **36 P.L.R. 300=1934 Cr.C. 167=147 I.C. 604=6 R.L. 406=35 Cr.L.J. 439=A.I.R. 1934 Lah. 84 (2).**

———**Ss 97 and 100** — *Right of private defence—Abatement of nuisance —Apprehension of grievous hurt —Infliction of grievous hurt by accused justified.*

The accused were entitled to flow of water from the canal and in trying to remove a dam wrongfully obstructing the flow, came into conflict with the complainant's party. In the course of the fight one of the accused received injuries from which he died. Two of the complainant's party also received injuries which caused their death.

Held, that the accused were exercising their right in abating the nuisance caused by the dam across the river and when the complainant's party who had no right to place a dam across the river came and attacked them, they had a right to defend themselves, and that right included the right to inflict such injuries as grievous hurt including death. 20 I C. 623, Appl. (*Ferrers, J.C. and Aston, A.J.C.*) HASHIM KHAIR MAHOMED *v.* EMPEROR. **I.R. 1933 Sind 187=144 I C. 431=34 Cr.L.J. 768=1933 Cr.C. 340=A I.R. 1933 Sind 142.**

———**Ss. 97 and 102** — *Right of private defence—Extent.*

Under S. 94, a person has the right not only to defend his own body but to defend the body of any other person; and under S. 101, this right can be exercised as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit any of the offences mentioned in Ss. 100 and 101. The appellant was only about a yard away from the co-accused when the deceased advanced towards the latter in a threatening manner raising an iron starting handle of the motor car above his head as if he was going to strike him with it. When the deceased was within an arm's length from the co-accused, the appellant stabbled the deceased with a knife as the co-accused had no weapon in his hand when the deceased for a second time made preparation to strike him with the iron handle.

Held, that the appellant's case fell well within the provision of S. 100, and that the appellant had not exceeded the limit provided by S. 99.

Held, further, that the law did not require a person labouring under a reasonable apprehension of death or grievous hurt to his companion to postpone his right of defending the body of his companion until it is seen that the latter unaided, failed to eradicate the source of danger. (*Mya Bu, J.*) NGA THAN *v.* EMPEROR. **6 I.R. (Rang.) 82=146 I.C. 212=34 Cr.L.J. 1248=1933 Cr.C. 1017=A.I.R. 1933 Rang. 273.**

———**S. 97**—*Right of private defence—Extent of—Causing of death, when justified.*

PENAL CODE (1860), S. 97.

Where the deceased was a man previously convicted of murder and sentenced to transportation and a member of the dangerous Khoso tribe and when pursued by the head constable, he adopted a threatening attitude with his hatchet.

Held, that the right of private defence of the head constable extended to and justified the firing of a fatal shot (*Ferrers, J. C. and Aston, A.J.C.*) NAWAZALI GHULAM MAHOMED *v.* EMPEROR. **I. R. 1933 Sind 177=144 I.C 328=34 Cr.L.J. 751=27 S.L.R. 24=1933 Cr.C. 708=A.I.R. 1933 Sind 193.**

———**S. 97**—*Right of private defence—Judgment-debtor assaulting auction-purchaser who was put in possession by Civil Court.*

It is preposterous to claim for a judgment-debtor, whose property has been sold in execution of a decree, a right to assault the auction-purchaser who has been put in possession of the property by the Civil Court and was protected by the Criminal Court in keeping that possession, when he goes to the land armed with the delivery of possession and supported by the orders of the Criminal Courts. Even if the judgment-debtor managed surreptitiously to plant some paddy in some of the lands in dispute, that would not give him such a possession as would justify any Court to give him any right of private defence. An isolated act of trespass does not constitute possession of the wrongdoer as against the rightful owner in possession. (*Mahomed Noor and Luby, JJ.*) MAHABIR SINGH *v.* EMPEROR. **15 Pat L.T. 819=36 Cr.L.J. 146=152 I.C. 591=7 R.P. 208=1934 Cr.C. 1218=A I.R. 1934 Pat. 565.**

———**S. 97**—*Right of private defence and plea of* alibi—*Mode of pleading.*

The right of private defence may be pleaded even alternatively with the plea of *alibi*, and it should not be denied to an accused person merely because he does not specially plead it, provided that circumstances found by the Court are such as clearly entitle him to the exercise of that right. (*Fazl Ali and Saunders, JJ.*) JANKI MAHTO *v.* EMPEROR. **35 Cr.L.J. 92=6 I.R (Pat.) 271=146 I.C. 533=1933 Cr.C. 1342=A.I.R. 1933 Pat. 568.**

———**S. 97**—*Right of private defence—When does not avail.*

Where both parties wanted a fight and they had it and it is impossible to determine which side attacked first, the question as to who were the aggressors and which party acted in self-defence does not arise. (*Agha Haidar, J.*) GHULAM HAIDAR *v.* EMPEROR. **151 I.C. 737=7 R.L. 182 (2)=35 Cr.L.J. 1393=35 P.L.R. 381=1934 Cr.C. 804=A.I.R. 1934 Lah. 512.**

———**Ss. 97 and 99**—*Scope.*

S 97 which gives a right of private defence of persons and property is subject to the restrictions contained in S. 99. (*Nanavutty and Smith, JJ.*) RAJA RAM TEWARI *v.* EMPEROR. **6 I.R. (Oudh) 188=146 I.C. 888=10 O.W.N. 835=35 Cr.L.J. 185=1933 Cr. C. 1245=A.I.R. 1933 Oudh 399.**

———**S. 99**—*Applicability—Public servant acting without jurisdiction.*

S. 99, I. P. Code, cannot obviously have any application where the power under which the public servant purports to act is without jurisdiction or *ultra vires*. (*Shankaranarayana Rao, J.*) SREENIVASA IYENGAR *v.* GOVERNMENT OF MYSORE. **40 Mys.H.C.R. 221=13 Mys.L.J. 376.**

———**S. 99**—*Applicability—Warrant of attachment signed by Deputy Collector instead of by Collector—Attachment effected by kurk amin in good faith under colour of office.*

PENAL CODE (1860), S. 99.

A warrant of attachment was signed by the Deputy Collector instead of being signed by the Collector. It was valid in all other respects and no objection even to this was taken by the accused when it was shown to him before effecting attachment. The kurk amin effected the attachment of an ox of the accused whereupon the accused with his friends formed an unlawful assembly and resisted the attachment and in so doing caused grievous hurt to decree holder's brother.

Held, that the kurk amin who was a public servant was acting in good faith under colour of his office under a warrant which appeared to him to be perfectly valid, that there was no apprehension in the minds of the accused that death or grievous hurt would be caused to them, that the accused had no right of private defence and that they were guilty under Ss. 147 and 325, I. P. Code. (*Nanavutty, J.*) SUNDAR LAL *v.* EMPEROR. **I.R. 1933 Oudh 222=144 I.C. 256=34 Cr.L.J. 732=10 O.W.N. 671=1933 Cr.C. 601=A.I.R. 1933 Oudh 276.**

———**S. 99**—Arrest by police officer *bona fide* under colour of office—Absence of written authority to arrest—Right of private defence—Assault by person arrested—Offence. *See* CR. P. CODE, SS. 54 AND 56 (1). **13 Rang. 754.**

———**S. 99**—*Attachment by Vakil employed under O. 21, R. 105, C. P. Code—Omission to record reason for such employment—Right of private defence.*

A vakil employed under O. 21, R. 105, C. P. Code, to make an attachment is at the time of making the attachment a public servant acting in good faith under colour of his office and the mere omission to record the reasons for his employment in the order appointing him as required by the rule, does not give rise to any right of private defence. (*Bennt, J.*) TEJ SINGH *v.* EMPEROR. **154 I.C. 631=7 R.A. 778=36 Cr.L.J. 545=1935 A.L.J. 367=1935 A.W.R. 206=1935 Cr.C. 532=A.I.R. 1935 All. 490.**

———**S. 99**—*Both parties anticipating opposition and prepared for it—No right of private defence.*

Where the Court found that the party of the accused went to the disputed spot on a river for fishing knowing that they would meet opposition and taking with them a large body of men to defeat that opposition and the party of the prosecution appeared to have done exactly the same thing.

Held, that in the circumstances, neither party could claim any right of private defence and the assemblies of men on both sides were unlawful. (*Courtney-Terrell, C. J. and Rowland, J.*) MATTE MANDAL *v.* EMPEROR. **I.R. 1932 Pat. 156=137 I.C. 693=33 Cr.L.J. 509=13 Pat.L.T. 193=1932 Cr.C. 415=A.I.R. 1932 Pat. 189.**

———**S. 99**—*Defence of property—Extent of force—Need for definite finding.*

Even if it appears that it was necessary for the accused to use force in order to defend their property from mischief, even then it is necessary to show that it was necessary for them to use such force as resulted in grievous hurt or that grievous hurt did not result from his act. It is necessary for the Magistrate in such cases to record a definite finding on one or other of the points. (*Wallace, J.*) PUSARI MOOPAN *v.* KOMBAI. **1932 M.W.N. 452.**

———**Ss. 99 and 100**—*Deceased brought up by accused from infancy—Deceased attempting to violate wife of accused*—Gandasa *blows inflicted by accused and causing death—Right of private defence, if exceeded.*

The deceased was an orphan aged 30 brought up from his infancy by the accused. He got suddenly drunk and

PENAL CODE (1860), S. 99

in the dead of night attempted to violate the wife of the accused. Hearing the cries of his wife, the accused rushed to the spot and finding the deceased on top of his wife gave him a number of blows with the *gandasa*, which resulted in his death.

Held, that the case was covered by Ss. 99 and 100, rather than the 1st Exception to S. 300 of the Penal Code. 17 I.C. 1001, Foll. (*Kisch, J.*) SURAJ NARAIN LAL *v.* EMPEROR. **6 I R. (All.) 33=144 I C. 1010=34 Cr.L J. 882=14 L R. 42 (Cr.)=1933 A.L J. 472=1933 Cr.C. 369=A.I.R. 1933 All. 213.**

——S. 99—*Execution of bailable warrant by police officer—Refusal by him to give opportunity of giving bail—Right of private defence.*

Where a police officer who is entrusted with the execution of a bailable warrant issued against a certain person, deliberately fails to communicate the fact that the warrant is bailable and refuses to give that person an opportunity of giving bail, he is not acting in good faith, and the provisions of S. 99 are, therefore, not applicable, and there is a right of private defence. (*Allsop, J.*) RAMJI LAL *v.* EMPEROR. **158 I C. 1049=8 R A. 365 -36 Cr.L.J. 1501=1935 A.Cr C. 195=1935 A.W.R 935=1935 A.L.J. 950 (2)=1935 Cr.C. 1129 =A.I.R. 1935 All. 913.**

——S. 99—*Good faith—Sub-Inspector dressed in uniform—No inference of good faith.*

The mere fact that Sub-Inspector is dressed up in his uniform does not justify one in saying that he was acting in good faith, when, as a matter of fact, he was acting in entire bad faith and in the most illegal and reprehensible manner. (*Nanavutty, J.*) GAYA DIN *v.* EMPEROR. **9 Luck. 517- 6 R.O. 448=148 I.C. 870=35 Cr L J. 804=11 O.W.N. 337=1934 Cr.C. 429=A.I. R. 1934 Oudh 124.**

——Ss. 99 and 186—*Illegal warrant—Obstruction to execution—Offence—Private defence.*

Where the warrant, the execution of which by the process-server was resisted, is illegal, because of its having been issued by a Court which had no power under law to issue it, no offence under S. 186, I. P. Code, is established, because the essential ingredient is absent. The question as to whether there was a right of private defence under S. 99, I. P. Code, is irrelevant and does not arise unless and until the essential ingredients of an offence under S. 186 are made out. (*Pandrang Row, J.*) SURYANARAYANA *v* SIMHADRI **152 I.C. 481=7 R.M. 234 (1)=36 Cr.L.J. 111=1934 M.W N. 1230=40 L.W. 594=1934 Cr C. 1287 (1)=A.I.R. 1934 Mad 664 (2)=67 M.L.J. 510.**

——S. 99—*Party in possession—Right of defence.*

A party in possession of a property is entitled to resist by force an attack made on his property provided there is no time to have recourse to the public authorities for protection. The accused can defend themselves with sharp instruments when the aggressors are armed with similar weapons. (*Scroope and Agarwala, JJ.*) SUBEDAR SINGH *v.* EMPEROR. **6 I R. (Pat.) 203=145 I.C. 794=34 Cr L J 1075=14 Pat.L.T. 228=1933 Cr.C. 972=A.I.R. 1933 Pat. 434.**

——S. 99—*Private defence—Illegal search—Resistance to.*

A search made by the Police Inspector without complying with the preliminary requirements of S. 165, Cr. P. Code, and not under circumstances which made it impossible for him to do so cannot be said to have been made in 'good faith' and so the accused is justified in pushing the Inspector back to prevent the search. (*Macpherson and Dhavle, JJ.*) GOPI MAHTO *v.* EMPEROR. **10 Pat. 821=I.R. 1932 Pat. 60=136 I.C. 60=33 Cr.L.J. 233=13 Pat.L.T. 62=1932 Cr.C. 99=A.I.R. 1932 Pat 66.**

PENAL CODE (1860), S. 99.

——S. 99—*Private defence—Limits of the right.*

The extent of force that may be used in the exercise of the right of private defence depends on the circumstances of each case. The nature of the attack, the danger apprehended, the imminence of the apprehended danger and the real necessity of inflicting harm by retaliation for the purpose of self-defence are all matters to be taken into consideration in deciding whether the right has been exceeded. Where certain sub lessees (P.Ws.) claiming under one of two lessees attempted to take possession of their half share and the accused retorted with a most provocative abuse whereupon the accused was hit and pushed down by P.W. 2 and none of the prosecution party was armed with any deadly weapon and there was no reason at all to apprehend death or grievous hurt,

Held, the use of guns by the accused and his party was under the circumstances, far in excess of the necessity of the situation. (*Beasley, C. J. and Sundaram Chetty, J.*) MARUDOCHELA GOUNDAN *v.* EMPEROR. **1931 M.W.N. 646.**

——S. 99—*Resistance to public servant—Right of private defence—Extent of.*

S. 99 protects the public servant against the right of private defence even if the authority be defective in minor particulars or even if the officer exceeds his duty in a minor particular and it merely leaves the right of private defence open when the alleged authority is no authority at all and is wholly defective in form or the officer goes clearly and widely outside the duties imposed on him. If the authority has no defect, the section has no operation. 21 M 296 and 8 All. 293, Rel. (*Courtney-Terrell, C.J.*) PUNA MAHTON *v.* EMPEROR. **11 Pat. 743=13 Pat L.T. 502=142 I.C. 160=I R. 1933 Pat. 125=34 Cr.L.J. 269=1932 Cr.C. 853=A.I.R. 1932 Pat 315.**

——Ss. 99 and 100—*Right of private defence—Deceased made helpless by being disarmed.*

Where the accused has made the deceased helpless by disarming him, he has no right of private defence by causing injuries to the deceased for an assault made previous to the disarming. (*Almond, J.C. and Mir Ahmad, A J.C.*) JUMMA KHAN *v.* EMPEROR. **156 I.C. 6=7 R.Pesh 113=36 Cr.L.J 914=1935 Cr.C. 357 (2)=A.I.R. 1935 Pesh. 59.**

——S. 99—*Right of private defence, not exceeded on the facts.*

The evidence made it clear that the complainant's party took the initiative and were the aggressors. They trespassed on the lands of the accused in small numbers and were driven away. Then they returned to the land of the accused in larger numbers, to enforce their supposed right of cutting grass and were again driven away by the party of the accused and a number of the complainant's party suffered injuries, grievous hurt in the case of one, simple hurt in other cases.

Held, that under the circumstances, the accused could not be said to have exceeded their right of private defence. (*Young and King, JJ.*) ASMATULLAH *v.* EMPEROR. **56 (All.) 188=35 Cr.L.J 236=6 I.R. (All.) 380=146 I C. 914=1933 A L J. 1119=14 L. R. 379 (Cr.)=1933 Cr.C. 1526=A.I.R. 1933 All. 896.**

——S. 99—*Scope—If controls S.* 183.

S. 99 is designed to protect a public servant and to limit the amount of resistance which may be offered to him. S. 183, on the other hand, is not intended for the protection of the public servant, but enables him to take

PENAL CODE (1860), S. 99.

the offensive and prosecute anybody who resists the taking of property by lawful authority. S. 99 does not control or extend the operation of S. 183, as there are no words in the latter similar to those in S. 99. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* SAKHARAM RAWAJI PAWAR. **59 Bom. 545=157 I.C. 859=8 R.B. 88=36 Cr.L.J. 1263=37 Bom.L.R. 362=1935 Cr C. 658=A.I.R. 1935 Bom. 233.**

———**Ss. 99 and 97**—*Scope.*

S. 97 which gives a right of private defence of persons and property is subject to the restrictions contained in S. 99. (*Nanavutty and Smith, JJ.*) RAJARAM TEWARI *v.* EMPEROR. **6 I.R. (Oudh) 188=146 I.C. 888=10 O.W.N 835=35 Cr.L.J. 185=1933 Cr.C. 1245=A.I.R. 1933 Oudh 399.**

———**S. 99**—*Wrongful arrest—Right of defence.*

The provocation that will bring a case within Exception I to S. 300 must not be provocation given by anything done in obedience to the law or by a public servant in the exercise of his powers. Under the first two paragraphs of S. 99 on the other hand the right of private defence is not available against acts done or directed by public servants acting in good faith under colour of their office, even though such acts may not be strictly justifiable by law. An arrest or attempted arrest by a private person if not strictly justifiable by law is not outside the provocation mentioned in Exception I.

Semble.—The right of private persons to arrest offenders is more restricted in India than in England. (*Dhavle and Rowland, JJ.*) ABDUL AZIZ *v.* EMPEROR. **14 Pat L T 464=1933 Cr.C. 1079=148 I. C. 574=6 R.P. 490=35 Cr.L J. 725=A I.R. 1933 Pat. 508.**

———**S 100**—*Accused attacked by person armed with blunt weapon—Right of private defence—Scope of.*

Where the accused while resisting the attack of a man armed with a blunt weapon happens to hit him with a stick on the head, rather harder than perhaps he intended to have done and thus kills him, he cannot be said to be exceeding his rights of self-defence. In the excitement and confusion of the moment, it is not to be expected that an average man would weigh the means that he intends to adopt at the spur of the moment for self-defence in golden scales, though the counter-attack should not be out of all proportion to the force employed in the original attack (*Din Mahomed, J.*) ALLAH DITTA *v.* EMPEROR. **35 P.L.R. 725=1934 Cr C. 1010=7 R.L. 403=153 I.C. 209=36 Cr.L.J. 305=A.I.R. 1934 Lah. 696.**

———**S. 100**—*Accused attacked by persons armed with hatchets—Life of accused in danger—Right of private defence—Scope of.*

Where the accused was waylaid and attacked by two persons, who were armed with hatchets and the accused snatched a hatchet from one of them and hit them to save his own life, he cannot be held guilty of any offence. When his life was in danger every moment, he could not be expected to modulate his defence at every step or be able to gauge the precise force or number of blows which would have been just sufficient to save his life. (*Bhide and Currie, JJ.*) FAZAL HUSSAIN *v.* EMPEROR. **I.R. 1933 Lah. 345=143 I.C. 362=34 Cr.L.J. 584=1933 Cr.C. 887=A.I.R. 1933 Lah. 665.**

———**S 100**—*Accused not admitting having stabbed—Right to the benefit of right of private defence.*

Where the prosecution evidence, and the circumstantial evidence in particular, lead the Court to believe that the fatal blow was delivered by the accused after an attack had been made upon him, the Court cannot deny

PENAL CODE (1860), S. 100.

him the benefit of S. 100, on the ground that the accused at the trial did not admit having stabbed and did not raise the plea that he acted in self-defence. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) GUL HABIB *v.* EMPEROR. **158 I.C. 635=8 R.Pesh. 62=36 Cr. L J. 1455.**

———**S 100**—*Assault on accused's wife with intention of committing rape—Private defence—Extent of right.*

The right of private defence of the body of the accused's wife extends to the voluntary causing of death where the offence which occasioned the exercise of the right was an assault with the intention of committing rape. (*Din Mahomed, J.*) MAHOMED SHAFI *v.* EMPEROR. **35 P.L.R. 659=1934 Cr.C. 945=153 I C. 19 (1)—7 R.L. 372=36 Cr L.J. 281=A.I R. 1934 Lah. 620.**

———**Ss. 100 and 302**—Blow given in self-protection—Accused not guilty under S. 302. *See* PENAL CODE, S. 302. **A.I.R. 1933 Lah. 1053.**

———**Ss 100 and 103**—Charge of murder—Plea of private defence—Burden of proof. *See* EVIDENCE ACT, S. 105. **154 I.C. 697=1935 O.W.N. 311=A.I. R. 1935 Oudh 281.**

———**S. 100**—Infringement of right of property—Right of private defence—Offence under S. 304. *See* PENAL CODE, S. 304. **A.I.R. 1933 Rang. 310.**

———**S. 100**—*Peaceful citizens attacked with deadly weapons—Right of private defence—Extent of.*

When peaceful citizens are attacked by a body of men armed with deadly weapons it cannot be said that the right of private defence is exceeded, if those attacked in their turn use similar weapons in their defence; nor can it be said if in using those weapons one of the aggressors is killed that that would necessarily be exceeding the right of private defence. (*Young, J.*) MAN SINGH *v.* EMPEROR. **I.R. 1933 All. 426=144 I.C. 383=34 Cr.L.J. 765=14 L.R. 109 (Cr.)=1933 A.L. J. 581—1933 Cr.C. 684=A.I.R. 1933 All. 401.**

———**S 100**—*Plea of private defence—Need not be specifically raised.*

If the circumstances show that the right of private defence was legitimately exercised, the Court should take it into consideration, even though self defence was not specifically pleaded. (*Raza, J.*) BAHADUR KHAN *v.* EMPEROR. **1933 Cr.C. 103=I.R. 1933 Oudh 130=142 I C. 818=34 Cr.L J. 373=9 O.W.N. 1019=A. I.R. 1933 Oudh 63.**

———**S. 100**—*Private defence—Scope of the right.*

The extent to which the exercise of the right of self-defence is justified depends not on the actual danger but whether there was even a reasonable apprehension of such danger. (*Raza, J.*) BAHADUR KHAN *v.* EMPEROR. **1933 Cr.C. 103=I.R. 1933 Oudh 130=142 I C. 818=34 Cr L.J. 373=9 O.W.N. 1019=A.I.R. 1933 Oudh 63.**

———**S. 100**—*Right of private defence—Accused attacked by persons armed with lathis.*

Where the accused, when attacked by a number of persons who were drunk and some of whom were armed with lathis, kills one of them, he cannot be said to have exceeded his right of private defence. (*Jai Lal, J.*) BALWANT SINGH *v.* CROWN. **37 P.L R. 561.**

———**Ss. 100 and 304**—*Right of private defence—Accused face to face with powerful adversary armed with lathi—Murder committed in the course of the fight—Liability.*

If a man is entitled to protect his own life by using a lathi, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, 'in golden scales' and to adjudicate with great nicety as to the

PENAL CODE (1860), S. 100.

exact amount of force which would be justified. Where the accused was confronted with the deceased who was a big, strong and robust pahlwan armed with an iron bound lathi with which the deceased hit him upon his head, the accused could not be expected to judge too nicely the weight or effect of the blows inflicted by him in warding off the attack and if in the course of the fight the accused caused the death of his adversary, he cannot be said to have acted in excess of his right of self-defence. 45 A. 250, Foll. (*Bisheshwar Nath, J.*) RAM ADHIN *v.* EMPEROR. **1933 Cr.C. 99=141 I. C. 751=34 Cr L.J. 243=I.R. 1933 Oudh 82=9 O.W. N. 1146=A.I.R 1933 Oudh 59.**

——**S. 100**—*Right of private defence—Deceased assaulting accused's pregnant wife.*

B armed with a weapon, broke the door and rushed into *A's* hut and assaulted *A's* pergnant wife violently. *A* came in with an axe, struck *B* several blows, but when *B* fell down, his skull being fractured, *A* gave him water and allowed him to go home, whence he was carried to hospital but died on the way.

Held, that *A* was justified in protecting his wife and had no intention to murder *B* and that he had not abused the right of private defence, and therefore could not be convicted either under S. 302 or 304, I. P. Code. (*Courtney Terrell, C J. and Agarwala, J.*) URASN BHUMIJ *v.* EMPEROR. **1934 Cr.C. 1245=153 I C. 301=7 R.P. 322=36 Cr.L.J. 316=A.I.R. 1934 Pat. 588.**

——**S. 100**—*Right of private defence—Deceased being aggressive.*

Where the deceased and accused both had lathis and the first blow was given to the accused by the deceased whereupon the accused gave one on the head of the deceased,

Held, that accused's act was covered by the right of private defence and that he did not exceed that right. (*Smith, J.*) CHHEDA *v.* EMPEROR. **6 I.R. (Oudh) 121=146 I.C. 436=10 O.W.N. 750=35 Cr.L J. 55 =1933 Cr.C. 1097=A.I.R. 1933 Oudh 380.**

——**Ss 100 and 300, Excep.** (2)—Right of private defence exceeded *See* PENAL CODE, SS. 300, EXCEP. 2 AND 100. **A.I.R. 1933 Lah 227.**

——**S. 100, 'Secondly' and 304, Part 1**—*Right of private defence, exceeded.*

A was armed with a dang and *B* with a knife. *A* tried to strike at *B*, but missed. Thereupon they grappled with each other in which process *A* was unarmed but he managed to throw down *B*. *B* then struck *A* with his knife and inflicted several wounds. *A* collapsed and died under the shock.

Held, that though *B* had the right of private defence he exceeded such right and that he should be convicted under S. 304, Part 1, Penal Code. (*Bhide and Currie, JJ.*) WAZIR MUHAMMAD *v.* EMPEROR. **1934 Cr. C. 17=6 R.L. 535=148 I.C. 243 (2)=35 Cr.L.J. 639=A.I.R. 1933 Lah. 1048.**

——**S. 100**—*Right of private defence—Person attacked managing to get weapon from attacker and using in self-defence.*

It would be circumscribing the right of private defence of the body with meticulous and unjustifiable restrictions if it were to be held that, when the person attacked has managrd to obtain the weapon from the grasp of the attacker, he is not to be allowed to use that weapon in his defence in order to prevent the attacker from regaining possession of it. (*Dunkley, J.*) NGA NI U *v.* EMPEROR. **159 I.C. 925=37 Cr.L.J. 186=1935 Cr. C. 1114=A.I.R. 1935 Rang. 391.**

——**S. 100**—*Right of private defence—Scope.*

PENAL CODE (1860), S. 102.

It is difficult to lay down any hard and fast rule to determine the amount of harm which is legally justifiable or permissible in the exercise of the right of private defence. Every case is to be considered on its own facts and before giving any accused person the benefit of the right of private defence, a Court of Law must be satisfied that his case is clearly covered by the general exception. If a person is armed with a hatchet and disables his adversary by the infliction of one blow on his head, it cannot be urged that he has any reasonable apprehension left that if he did not repeat his blow, grievous hurt will be the consequence. (*Din Mahomed, J.*) ABU ZAR *v.* EMPEROR. **35 P L.R. 783=1934 Cr.C. 1097 =153 I.C. 113=7 R L. 384=36 Cr.L.J. 283 (2)=A. I.R. 1934 Lah. 748.**

——**S. 100**—*Right of private defence—Scope of.*

When a man is suddenly attacked by two or more persons it is not fair to weigh his actions in golden scales. Where a person finds himself in a very dangerous situation and it is a case of two to one against him, and in all probability three to one and he has every reason to apprehend that a grievous hurt would be inflicted, the right of private defence extends to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence. (*Milne, J.C. and Aston, A.J.C.*) SHAHAN MAHOMEDALI *v.* EMPEROR. **I R. 1933 Sind 183=34 Cr.L J. 760=144 I.C. 413=1933 Cr.C. 336=A.I.R. 1933 Sind 138.**

——**Ss. 101 and 104**—*Applicability—Forcible trespass on land of accused—Latter defending property and members of his party against attack—Causing of simple hurt—Offence—Right of private defence.*

Where the complainant and the members of his faction trespass upon the land of the accused and resist the endeavours of the latter and his partisans to get back into possession and also assault them, the accused and his partisans are entitled to rely on their right of private defente of both person and property. If, in defending the property and the members of his party against an attack by the opposite faction, the accused commits simple hurt on the complainant and the members of his party, the acts are covered by Ss. 101 and 104, I. P. Code. (*Shankaranarayana Rao, J.*) MALALI GOWDA *v.* GOVERNMENT OF MYSORE. **13 Mys.L. J. 256=40 Mys. H.C.R. 111.**

——**S. 101**—*Mutual fight—Right of private defence.*

Where both parties deliberately engaged themselves in a mutual fight, neither of them was entitled to a right of private defence and it was immaterial as to who gave the first blow in such a fight. (*Abdul Kashid, J.*) MAHOMED *v.* EMPEROR. **35 P.L.R. 673=1934 Cr.C. 1092=153 I.C. 474=7 R.L. 443= 36 Cr.L.J. 411=A.I R. 1934 Lah. 740.**

——**S. 102**—*Right of private defence—Extent of.*

It is difficult to judge the extent of the right of private defence by any hard and fast rule and the accused cannot be expected to regulate the extent of force to be used by him by any precise standard. In deciding whether the right of private defence has been exceeded, regard must be had to the comparative physical strength of the accused and the deceased respectively and also to the antecedents of the deceased and his conduct at the time of the occurrence. Where the deceased, who was a strong man of dangerous character and brutal nature and reputed to have killed a man previously had some quarrel with the accused and

PENAL CODE (1860), S 102.

entered the shop of the accused who was comparatively a weakling, threw him on the ground, pressed his neck and bit on his hand and chest, and the accused, when extricated, struck three blows on the head of the deceased with a light hatchet as a result of which he died after three days.

Held, that the whole conduct of the deceased was aggressive and that the accused did not exceed the right of private defence. (*Jai Lal, J.*) KALA SINGH *v.* EMPEROR. **6 I.R. (Lah.) 159=146 I.C. 27=34 Cr. L.J. 1175 (2)=34 P.L.R. 259=1933 Cr.C. 312=A.I. R. 1933 Lah. 167.**

———**Ss. 102 and 105**—*Right of private defence—Plea, when available—Parties preparing to fight on pretext of securing possession of property—Person in lawful possession—Force used by—If unlawful—Invitation to fight—If consistent with right of private defence.*

There can be no question of a right of private defence when two parties are equally determined to fight on the pretence of securing their respective possession over a field. There can be no room for the plea of defence of person or property when either party invites the other to the contest. Force used by a person in lawful possession of property to ward off aggressors cannot be characterised as unlawful. It is not therefore correct to say that men who are determined to vindicate their rights, if lawful, use unlawful force, except in the sense of using it in excess of what is required to eject the invader. (*Niyogi, A.J.C.*) BHAIRO SINGH *v.* EMPEROR. **31 N.L.R. 380=156 I.C. 120=7 R.N. 217=36 Cr.L.J. 861=1935 Cr.C. 660=A.I.R. 1935 Nag. 141.**

———**S. 102**—*Right of private defence—Presence of other persons.*

The mere presence of persons who do not take steps to protect the accused from the assault of the deceased does not take away the right of private defence of the accused. (*Jai Lal, J.*) KALA SINGH *v.* EMPEROR. **6 I.R. (Lah.) 159=146 I.C. 27=34 Cr.L.J. 1175 (2)=34 P.L.R. 259=1933 Cr.C. 312=A.I.R. 1933 Lah. 167.**

———**Ss. 104 and 304**—*Accused beating deceased mercilessly, suspecting him of committing theft—Death as result of injuries—Offence.*

Where the accused, suspecting that the deceased had come to his field for the purpose of committing theft, beat him mercilessly, and the deceased died on the spot as a result of the injuries,

Held, that conceding that the accused had a right of private defence under S. 104, he had exceeded that right in causing the injuries which resulted in the death of the deceased, and that considering the fact that most of the injuries were on vital parts of the body, namely, the head and face, the accused must be imputed with constructive knowledge of the fact that the injuries inflicted by him were likely to cause death and he was, therefore, guilty under S. 304, I. P. Code. (*Srivastava, J.*) BACHCHU LAL *v.* EMPEROR. **157 I. C. 641=8 R O. 32 (2)=36 Cr.L.J. 1209=1935 Cr C. 1112=1935 O.W.N. 934=A.I.R. 1935 Oudh 442.**

———**S. 104**—*Stab wounds — Exceeding right of private defence—Nature of offence.*

When two persons are in a field and one of them is entitled to immediate possession and the other is not, the person in lawful possession is the former and the latter is a trespasser. Where the trespasser prevents the ploughing and attacks the other party with sticks, he is guilty of unlawful conduct. The degree of force which the other party would be entitled to use to resist the attack depends on the circumstances of the attack.

PENAL CODE (1860), S. 108.

Slight injuries with stick or knife may not call for punishment. Where however the party inflicts stab wounds ultimately resulting in death, he is liable to be convicted under S. 326 though not under S. 302, I P. Code. (*Waller and Krishnan Pandalai, JJ.*) NANJAPPA GOUNDAN *v.* EMPEROR. **1932 M.W.N. 67.**

———**S. 105**—*Thief throwing away property before attacked and killed—Right of private defence.*

Where the accused continued to chase a thief after he had thrown away the stolen property and assaulted and killed him, the assault was committed not with a view to recover the property but to capture the thief which is not contemplated by S. 105, I.P. Code, and the accused is not protected by the right of private defence of his property. (*Din Mahomed, J.*) RAKHIA *v.* EMPEROR. **35 P.L.R. 664=1934 Cr C. 923=153 I.C. 27 (2)=7 R.L. 374=36 Cr.L.J. 292=A.I.R. 1934 Lah. 595.**

———**S. 107**—Applicability—Prosecution under Child Marriage Restraint Act—Bridegroom not proved to be below 18—Girl under 14—Prosecution of bridegroom's father for abetment—Maintainability. *See* CHILD MARRIAGE RESTRAINT ACT, S. 6. **16 Pat.L.T. 629 =A.I.R. 1935 Pat. 474.**

———**S. 107**—Causing injuries—Offence under S. 325, I.P. Code—Abetment by presence. *See* PENAL CODE, S. 325. **8 O.W.N. 755=A.I.R. 1931 Oudh 274.**

———**S. 107 (3)**—*Person aiding in disposal of stolen property—Accomplice.*

A person who knowingly aids in the disposal of stolen property falls under the clause 'thirdly' in S. 107 and is an accomplice. (*Pakenham Walsh, J.*) MAVUTHALAYAN, *In re*. **58 Mad. 86=155 I.C. 74=7 R. M. 544=36 Cr.L.J. 633=40 L.W. 873=1934 M.W. N. 1140=1934 Cr.C. 1400 (2)=A.I.R. 1934 Mad. 721=67 M.L.J. 693.**

———**S. 108**—*Abduction—Motor used for—Owner of motor whether an abettor.*

The fact that a person's motor car was used for the purpose of abduction in question is no evidence that the motor car was used with his knowledge or under his orders, and the mere fact that his motor car was used does not bring him within the definition of abetment. (*Dunkley, J.*) MAUNG BA YONE *v.* MA HLA KIN. **6 I.R. (Rang.) 96=146 I.C. 402=35 Cr.L J 52=1933 Cr.C. 1128=A.I.R. 1933 Rang. 297.**

———**S. 108, Expl. 2**—*Abetment when complete.*

To constitute the offence of abetment, it is not necessary that the act abetted should be committed. The offence of abetment is complete notwithstanding that the person abetted involuntarily fails in doing the act abetted, or is interrupted before the act is complete. The offence of abetment by instigation depends upon the intention of the person who abets and not upon the act which is actually done by the persons abetted. (*Ferrers, J.C.*) MINWALLA *v.* EMPEROR. **156 I.C. 189=7 R.S. 226=36 Cr L.J. 877=1935 Cr C. 302 (2)=A.I.R. 1935 Sind 78.**

———**S. 108, Expl. 3**—*Scope.*

Expl. 3 applies to abetment generally; there is nothing to indicate that it applies only to abetment by instigation and not to other kinds of abetment. (*King and Kisch, JJ.*) EMPEROR *v.* DINKAR RAO. **55 All. 654=I.R. 1933 All. 306=143 I C. 661=34 Cr. L.J. 623=14 L.R. 353 (Cr.)=1933 A.L.J. 1481= 1933 Cr.C. 853=A.I.R. 1933 All. 513.**

———**S. 108, Expl. 4**—*Person instigating another to bribe a public servant.*

A person who instigates another to offer a bribe to a public servant is guilty of an abetment of the offence

PENAL CODE (1860), S. 109.

under S. 161, I.P. Code. (*Almond, J.C. and Mir Ahmad, A.J.C.*) GHAZI KHAN *v.* EMPEROR. **152 I.C 890=1934 Cr.C 1315=36 Cr.L.J. 278=7 R.Pesh. 64=A I R. 1934 Pesh. 110.**

———**S. 109**—Blowing of bugle in public place—Disobedience to police directions—Liability of President of meeting—Illegal omission. *See* CALCUTTA POLICE ACT (1886), S. 62-A (1). **36 C.W.N. 722=A.I.R. 1933 Cal. 36.**

———**S. 109**—*Contravention of Act—Leasing tank for fishing—Lessor, if liable.*

Accused 1 leased a tank to accused 2 for fishing. Accused 2 was convicted under S. 21 (*b*) and accused 1 was convicted for abetment simply because he had leased the tank.

Held, that in the absence of proof of any instigation, conspiracy or aid by accused 1 in accused 2's use of the unauthorized fishing implement, the charge of abetment against accused 1 must fail. (*Mya Bu, J.*) ABDUL RAHAMAN *v.* EMPEROR. **6 I R. (Rang.) 111=146 I.C 644=1933 Cr.C. 1138=35 Cr L J. 120=A I.R. 1933 Rang. 311.**

———**S. 109**—Conviction of females for abetment of the offence under S 6 (1), Calcutta Suppression of Immoral Traffic Act. *See* CALCUTTA SUPPRESSION OF IMMORAL TRAFFIC ACT (1923), S. 6 (1). **59 Cal. 1260.**

———**Ss. 109 and 302**—Giving poison for being administered to *A*—Poison given to *A*, *B* and *C*—*B* and *C* died—Offence—Conviction under Ss. 115 and 302 sustainable. *See* I. P. CODE, SS. 115 AND 302. **58 Cal. 1228=A.I R. 1931 Cal. 757.**

———**S. 109**—Offence under S. 325, I P. Code—Abetment by presence. *See* PENAL CODE, S. 325. **8 O. W.N. 755=A I R. 1931 Oudh 274.**

———**S. 109**—*Scope.*

S. 109 has no application where the offence is never committed. (*Dunkley, J.*) MAUNG BA YONE *v* MA HLA KIN. **6 I.R. (Rang.) 96=146 I.C. 402=35 Cr. L J. 52=1933 Cr C 1128=A.I R. 1933 Rang 297.**

———**Ss. 109 and 302**—*Abetment of murder—Death caused in raid—Person instigating leader.*

Any person who instigates a raider, or leader of the raid in which death has been caused is guilty of abetment of murder. (*Panckridge, Ameer Ali and M. C. Ghose, J.*) EMPEROR *v.* SURJYA KUMAR SEN. **6 R C. 304=35 Cr L J. 334=1934 Cr.C. 315=147 I.C. 32 =A I.R. 1934 Cal. 221 (F.B.).**

———**Ss. 109, 115 and 307**—Applicability and scope—Abetment of murder under S. 307 read with S. 109—Sentence of death — Legality—Proper sentence. *See* BENGAL CRIMINAL LAW AMENDMENT ACT (IX OF 1925) S. 6 (AS AMENDED BY ACTS OF 1932 AND 1934). **39 C.W N. 334 (F B.).**

———**Ss 109 and 342**—Applicability—Arrest of judgment-debtor exempted from arrest—Identification by decree-holder—Offence—Abetment. *See* PENAL CODE, S. 342. **39 C.W.N. 318.**

———**S. 109**—Conviction under—Basis of—Charge of abetting, aiding, detenuing in contravening order under Criminal Law Amendment Act—Order not served on accused—Knowledge or order—Necessity for proof of. *See* BENGAL CRIMINAL LAW AMENDMENT ACT, S. 6. **A I R. 1935 Cal. 681.**

———**Ss. 110, 111 and 114**—*Scope of—Quarrel between accused and another woman—Accused calling out to her son—Son striking the other with lathi and causing her death—Offence committed by accused.*

Where during a quarrel between the accused and another woman, the accused called out to her son who hit the other with a lathi and caused her death and the trial Judge convicted the accused under S. 304 read with S. 114 or 111, I. P. Code.

Held, on appeal, that S. 114 has no application to the case, as it applies to those cases only in which the accused, if absent, would be liable to be punished as an abettor, and that in the present case the accused, if she had been absent, could not have been liable as an abettor as there was no conspiracy between her and her son and as there was no instigation on her part beforehand.

Held, also, that the case is not governed by S. 111 which is applicable only when the act done is a probable consequence of the abetment and all that the accused intended by calling out to her son was that the latter should give some chastisement to the deceased and that she could not even have intended to cause grievous hurt to her, much less her death, so that it cannot be said that what actually happened was the probable consequence of her abetment. She is liable only for what she herself intended.

Held, further, that the case clearly comes under S.110 and therefore she can be convicted under 323 110, I. P. Code. (*Zia ul-Hasan, J.*) MUMTAZ ALI *v.* EMPEROR. **157 I C. 372=8 R O 21=36 Cr.L J. 1201= 1935 O.W.N. 909=1935 Cr.L J 1147=A.I R. 1935 Oudh 473.**

———**S. 111**—*'Act.'*

The word 'act' in S. 111 means criminal act. (*Wort and Scroope, JJ.*) GANESH PRASAD *v.* EMPEROR. **I.R. 1931 Pat. 173=130 I C. 269=32 Cr. L.J. 478=1931 Cr.C. 148=A.I.R. 1931 Pat. 52.**

———**S. 111**—*'Probable consequence'—Meaning.*

Under S. 111, I.P. Code, and abettor may be liable for a different act than the one he instigated, provided the different act was a probable consequence of the abetment and was committed under the influence of instigation. A probable consequence of an act is one which is likely or which can reasonably be expected to follow from such an act Where a person instigated another to chastise or thrash the deceased with a lathi and that person killed the deceased by stabbing him with a spear-head, the existence of which was not known to the instigator, the abettor is not liable for abetment of murder, as the act of stabbing, though committed under the influence of the instigation, was not a probable consequence of the intigation to thrash. (*Harries and Rachhpal Singh, JJ.*) GIRJA PRASAD SINGH *v.* EMPEROR. **57 All. 717=153 I C. 999 (2)=7 R.A 655= 1935 A.W.R. 64=1935 A Cr.C. 19=1935 A.L.J. 54= 36 Cr.L.J. 438=1935 Cr.C. 413=A.I.R. 1935 All. 346 (2).**

———**S. 114**—*Abetment—Essentials of offence.*

The language of S. 114 indicates that there must be evidence of abetment, that is instigation, conspiracy or aid, independent of and prior to anything done by the accused when present at the scene of crime. The section cannot apply when the abetment alleged consists solely of things done at the time of the commission of the offence. (*Murphy and Broomfield, JJ.*) EMPEROR *v.* AHMAD HASHAM. **57 Bom 329=I R. 1933 Bom. 264=143 I.C 273=34 Cr.L J. 559=35 Bom.L.R. 240=1933 Cr C. 474=A.I.R. 1933 Bom. 162.**

———**S. 114**—*Abetment of offence—When complete.*

In order to bring a case under S. 114 the abetment must be complete, apart from the presence of the abettor, in other words, the act of abetment must have taken place at a time prior to the actual commission of the offence itself, that the operation of S. 114 would be attracted. Where it has not been proved as to what was the act of abetment which might be imputed to the

PENAL CODE (1860), S. 114.

accused prior to the commission of an offence under S. 376, I. P. Code, the case does not come within the purview of S. 114. (*Agha Haidar, J.*) MIAN GUL *v.* EMPEROR. **I R. 1932 Lah. 422=138 I.C. 191=33 Cr L.J. 564=33 P.L.R. 679=1932 Cr.C. 621=A.I.R 1932 Lah. 483.**

[R. 36 P.L.R. 37 (39).]

———**S. 114**—*Applicability—Abettor — Conviction of as principal—If bars to conviction of principal.*

S. 114, I.P. Code, applies only in those cases in which there is evidence of prior abetment, that is to say, where the person, even if not present, would be liable to be punished as an abettor and he is also present. The abettor in such a case is liable to be treated and punished as a principal. But it does not necessarily follow that the person who does the act is not liable as a principal also. (*S. K. Ghose and Henderson, JJ.*) MAHENDRA NATH CHAKRAVARTY *v* EMPEROR. **62 Cal. 629=39 C.W N. 396.**

———**S. 114**—*Applicability—Conditions.*

S. 114, I. P. Code, applies to those cases only in which not only is the abetter present at the time of the commission of the offence, but the abetment has been completed prior to and independently of his presence. The words "who if absent would be liable to be punished as an abettor," clearly show that abetment to come under S. 114 must be one which is prior to the commission of the offence and complete by itself and not an abetment which is done immediately before or at the time of the commission of the offence, for in the latter case, the abettor would not have committed the abetment if he had not been present and would not therefore have been liable to punishment as an abettor. (*Zia Ul-hasan, J.*) SITAL *v.* EMPEROR **157 I.C. 370=8 R O. 18=36 Cr.L J. 1151=1935 O.W.N. 902=1935 Cr.C. 1130=A.I.R. 1935 Oudh 468.**

———**Ss 114 and 34**—*Attack by two people—Intention to kill expressed by one—Liability of other.*

When the people attack another armed with das, and there is evidence that one of them announced his intention of killing, both these persons are liable for the act committed by one of them under S. 31, Penal Code. And even if S. 34 does not apply, S. 114 will be applicable. (*Maya Bu and Ba U, JJ.*) NGA SHWE DIN *v.* EMPEROR. **149 I.C. 33=6 R R. 281=35 Cr.L.J. 905=1934 Cr C. 519=A.I.R. 1934 Rang. 98.**

———**Ss. 114, 116 and 377**—*Conviction under Ss.* 114 *and* 337—*Proof required.*

Before a conviction under Ss. 114 and 377 can be recorded, it must be proved, both that the offence was committed, and that the abettor was present. If however the Magistrate's conclusion is that accused is guilty of no more than an attempt, the conviction of abettor who is present should be under S. 377 read with S. 116, I.P. Code. (*Ferrers, J C.*) MINWALLA *v.* EMPEROR. **156 I.C. 189=7 R.S. 226=36 Cr.L.J. 877=1935 Cr. C. 302 (2)=A.I.R. 1935 Sind 78.**

———**Ss. 114 and 34**—*Distinction between.*

The distinction between the effect of Ss. 114 and 34 is a very fine one. S. 114 is evidentiary, not punitory. Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by S. 114 brings the case within the ambit of S. 34. (*Das and Brown, JJ.*) NGA PO KYONE *v.* EMPEROR. **11 Rang. 354=6 I.R. (Rang.) 93=146 I.C. 392=1933 Cr.C. 907=35 Cr.L.J. 41=A.I.R. 1933 Rang 236.**

———**Ss. 114 and 323**—*Conviction under—Accused present at the time of the crime—Evidence of previous conspiracy, not necessary.*

PENAL CODE (1860), S. 115.

It is not necessary to sustain a conviction under S. 323 read with S. 114 that there should be any evidence of previous conspiracy between the abettor and the person abetted, when the finding is that both of them were present when the offence which they abetted was committed. (*Burn, J.*) JAKRI BEARI *v.* EMPEROR. **1933 M.W.N. 715.**

———**Ss. 114, 302 and 34**—Conviction under—Two persons going armed with guns and ammunition to commit robbery—Large number of shots fired by them while retreating and trying to escape—One of pursuers killed by one of shots from one of them—Other is also guilty under S. 302 read with Ss. 34 and 114. *See* PENAL CODE, SS. 34, 114 AND 302. **61 Cal. 190=A.I R. 1934 Cal. 10.**

———**S. 114**—*Offence of bigamy—Abetment—Essentials of offence.*

In order to succeed in a prosecution for abetment of bigamy the prosecution must prove that the person who is alleged to have committed bigamy was married lawfully once and has gone through a second marriage ceremony. Thirdly, that the person alleged to have abetted the bigamy knew when he arranged or assisted at the second marriage that the person who was remarried had contracted a valid first marriage or the wife of the first marriage was still living. Where the first marriage is not a valid marriage, or has been repudiated by a party to it, a conviction for abetment of bigamy cannot be sustained. (*Young, J.*) SHAFI ULLAH *v.* EMPEROR. **150 I.C. 139=A L.R. 1934 All 416=1934 A.L J. 387=6 R.A. 1033=35 Cr.L J. 1053=3 A.W.R. 598=1934 Cr.C. 756=A I.R 1934 All. 589.**

———**S. 114**—*Scope.*

In order to bring a case within S. 114, the abetment must be complete, apart from the presence of the abettor at the time of the commission of the offence. In other words the act of abetment must have taken place at a time prior to the actual commission of the offence. (*Din Mahomed, J.*) BASHARAT *v* EMPEROR **36 P.L.R. 37=153 I.C. 222=7 R.L. 407=36 Cr.L J. 308=1934 Cr.C. 1127=A.I.R. 1934 Lah. 813.**

———**S. 114**—Scope of—Quarrel between accused and another woman —Accused calling out to her son—Son striking the other with lathi and causing her death — Offence committed by accused. *See* PENAL CODE, SS. 110 AND 111. **1935 O.W.N. 909=A.I.R. 1935 Oudh 473.**

———**Ss. 114 and 467**—Forged document—Person taking document in his name—Liability to conviction for substantive offence. *See* PENAL CODE, S. 467. **13 Mys.L.J. 182=39 Mys. H.C.R. 1140.**

———**S. 115**—*Applicability.*

Section 115 applies only when the abetment is not punishable under another provision of the Code. So, if S. 117 applies, the offence would not fall under S. 115. (*Bhide, J.*) SANTA SINGH KAMAL *v.* EMPEROR. **6 I R. (Lah.) 187 (1)=146 I.C. 222=34 Cr.L.J. 1207=1933 Cr.C. 882=A.I.R. 1933 Lah. 660.**

———**Ss. 115 and 302**—*Offence under—Evidence.*

The accused gave *aconite* to a girl for being administered to her husband with the object of gaining his love. The girl mixed the powder-cooked food and served the same to her husband, father-in-law and brother-in-law. The first did not die but the others died. The accused was prosecuted for offence under Ss. 302 and 109, I.P. Code.

Held, that the Judge should have left as a question of fact to the jury the question whether the giving of the poison to the father in-law and brother-in law was a probable consequence of the accused having given the

PENAL CODE (1860), S. 115.

girl the substance with a view to her administering the same to her husband.

Held, further that though the conviction of the accused under Ss. 302 and 109, I.P. Code, could not be sustained, a conviction under Ss. 302 and 115, I.P. Code should be substituted. (*Rankin,C J. Mullik and Guha, JJ.*) EMPEROR *v.* AMODE ALI SIKDAR. **58 Cal. 1228=I.R. 1931 Cal. 896 (2)=134 I.C. 896 (2)=35 C W.N. 573=33 Cr.L.J. 79=1931 Cr.C. 1021=A.I R. 1931 Cal. 757.**

——**S. 115**—*Scope—"Express provision"—S. 117, I.P.C., whether comes under—Incitement to murder—Offence.*

Abetment under S. 115 must be abetment of the commission of an offence by any particular person against any particular persons. It may include abetment of the commission of an offence by unspecified persons against a class or number of other persons described generallyand not particularly specified. The words "express provision" in the section refers to sections in which specific cases of abetment of offences punishable with death or trans portation for life are dealt with. S. 117 is not an express provision. Where the accused was shown to have excited people assembled at a meeting to emulate the example of certain political assassins,

Held, that the accused was guilty under S. 115. (*Jack and M.C. Ghose, JJ.*) EMPEROR *v.* DWARIKA NATH GOSWAMI. **60 Cal 427=I R. 1933 Cal. 138 =141 I C. 578=34 Cr L J. 164=37 C.W.N. 91= 1933 Cr.C. 61=A.I.R. 1933 Cal. 47.**

——**Ss. 116 and 161**—*Abortive attempt to give bribe—Offence.*

S. 116 makes an abortive attempt at giving a bribe an offence from the point of view of the person who offers it. (*Mir Ahmed, A.J.C.*) QAZI RAHIMULLAH *v.* EMPEROR. **154 I.C. 910=36 Cr.L J. 626=7 R. Pesh. 91=1935 Cr.C. 173=A.I.R. 1935 Pesh. 26.**

——**S. 117**—*Abetment of offence under Salt Act*, 1882 —*Legality of conviction under Penal Code.*

The punishment under S. 177, I.P. Code, for abetment of an act which is an offence under the Salt Act and not an offence under Penal Code is illegal for the reason that the Salt Act, prescribes in S. 9-A specific punishment for the abetment of such an offence. It is illegal to proceed under S. 117, I.P. Code, which allows a higher punishment for abetment of an offence for the punishment of which a lighter and separate penalty is provided by the provisions of S. 9, Salt Act (*Wazir Hasan, C.J. and Pullan, J.*) MOHAN LAL SAKSENA *v.* EMPEROR. **7 O.W.N 895=128 I.C. 221=32 Cr. L.J. 104=1930 Cr.C. 1161=A.I.R. 1930 Oudh 497.**

——**S. 117**—*Applicability — Abetment of offence under the Salt Law—Madras Salt Act (IV of 1889), S. 74.*

S. 117 is not superseded by S. 74 of the Madras Salt Act and the accused who is guilty of having instigated more than ten persons to commit an offence under the Salt Act is liable under S. 117. The gravamen of a charge under S. 117 is the abetment itself, the instigation to general lawlessness, not the puarticular offence of which the commission is instigated. 33 Bom.L.R. 56, Ref. (*Jackson, J.*) SATYAVATAMMA *v.* EMPEROR. **55 Mad. 90=I R. 1931 Mad. 843=134 I.C. 187=32 Cr.L.J. 1131=34 L.W. 92=1931 M.W.N. 494= 1932 Cr.C. 354=A.I.R. 1933 Mad. 371=61 M.L.J. 987.**

——**S. 117**—Applicability—Offence under S. 47 of the Bombay Salt Act—Conviction under S. 117, I.P. Code—Legality. *See* BOMBAY SALT ACT (1890), S. 47. **55 Bom. 233=A.I.R. 1931 Bom. 140,**

PENAL CODE (1860), S. 120.

——**S. 117**—*Conviction under—Essentials of—Intention insufficient—Possibility of public being incited necessary.*

A mere intention or preparation to instigate is neither instigation nor abetment. Where the accused is charged with having posted a leaflet, it is necessary that either the public should read the offending leaflet or that it should have been posted in a public place at a time when it was possible for the public to read the same. Where, therefore, the leaflets were posted by the accused at dead of night and immediately it was removed by the police, *held*, as the public did not and could not have read it, the accused were not guilty under S. 117, and the police officers themselves could not be classed as the public. (*C.C. Ghose and Costello, JJ.*) EMPEROR *v.* PARIMAL CHATTERJEE. **60 Cal. 327=I.R. 1933 Cal. 44=34 Cr L J. 78=140 I.C. 787=36 C.W.N. 982=1932 Cr. C. 803=A.I R. 1932 Cal. 760.**

——**S. 117**—Criminal Law (Amendment) Act, S. 17 (1)—Offence under—Trial as a summons case. *See* CRIMINAL LAW AMENDMENT ACT (1908), S. 17 (1). **A.I.R. 1931 Bom. 199.**

——**S. 117**—*Public meeting—Revolutionary songs sung—President—Liability for abetment.*

The mere circumstance that the accused presided at a public meeting in which revolutionary songs, which were a direct incitement to murder, were sung, is not sufficient to charge him with abetment, without any more evidence of positive permission or assent on his part to the singing of the song which he had reason to believe would be objectionable. (*Panckridge, J.*) EMPEROR *v.* BEPIN BEHARI GANGULY. **I.R. 1932 Cal. 519= 138 I.C. 763=33 Cr.L J. 699=36 C.W.N. 191=1932 Cr C. 549=A.I.R. 1932 Cal. 549.**

[F. 36 C.W.N. 722 (726).

——**S. 117**—*Railway strike—Accused urging workers to lie on Railway line—Offence.*

Where the accused was shown to have instigated Railway workers in the event of a strike to lie on the railway line.

Held, that he was guilty of an offence under S. 117 and it was immaterial whether he was urging an immediate or contingent strike. (*Pakenham Walsh, J.*) SUBRAMANIA AYYAR *v.* EMPEROR. **1932 M.W.N. 1153.**

——**S. 117**—Special Act—Offence under S. 9 (*a*), Salt Act—Abetment—Conviction under S. 117, I. P. Code proper. *See* SALT ACT (1882), S. 9 (*a*). **1931 A.L.J. 986.**

——**Ss. 117 and 302**—*Speech inciting large audience to murder—Offence.*

Where a speech was addressed to a large audience wherein the speaker incited the audience to murder Englishmen and Government officials.

Held, that the more appropriate section to be charged with was S. 117 read with S. 302. (*Bhide, J.*) SANTA SINGH KAMAL *v.* EMPEROR. **6 I. R. (Lah.) 187 (1) =146 I.C. 222=34 Cr.L.J. 1207=1933 Cr.C. 882= A.I.R 1933 Lah. 660.**

——**S. 120-A**—*Co-accused—Evidence as to conspiracy.*

It is not necessary in a case of criminal conspiracy for one conspirator to be aware of all the acts of his fellow conspirators committed in pursuance of the conspiracy. (*Aston and Rup Chand, A.J.Cs.*) DUR MAHOMED *v.* EMPEROR. **28 S.L.R. 119=151 I.C. 494=7 R.S. 55 =35 Cr.L.J. 1337=1934 Cr.C. 628 (2)=A.I.R. 1934 Sind 57.**

——**S. 120-A**—Conspiracy under—Applicability of S. 71. *See* PENAL CODE, S. 71. **A.I.R. 1933 Nag. 252.**

PENAL CODE (1860), S. 120.

——**Ss. 120-A and 192**—*Conspiracy—Fabricating false evidence—Knowledge of conspirators.*

No doubt it is possible that the offence of fabricating evidence to obtain a capital conviction can be committed though the offender believes the accused to be guilty, and indeed though the accused is in fact guilty. And if the offence can be so committed in like manner a conspiracy so as to commit the offence may be established. But if one set of alleged conspirators know the charge to be false and the other alleged conspirator has no such knowledge but believes the charge to be true and it is his duty if true to pursue it, the inference of any concert between the two sects of conspirators is so far weakened as, measured by the standard of proof required in a criminal case, to disappear. (*Lord Atkin.*) DWARKANATH VARMA *v.* EMPEROR. **I.R. 1933 P.C. 65=142 I.C. 335=37 C.W.N. 514=34 Cr.L.J. 322=37 L.W. 584=1933 M.W.N. 409=1933 Cr.C. 442=35 Bom. L.R. 507=14 Pat L.T. 305=14 L.R. 81 (Cr.)=1933 A.L.J. 645=57 C.L.J. 177=10 O.W.N. 522=A.I.R. 1933 P.C. 124=64 M.L.J. 466 (P.C.).**

[R. 1933 M.W.N. 528 (534).]

——**S. 120 A**—*Conspiracy—Proof.*

It is perfectly true that it is upon the prosecution to prove a case of conspiracy. Nevertheless where groups of persons are found in constant communication and each group appears to have a single form of activity which is characteristic of the group, the communication between the two must receive the interpretation that the common objective of the two groups is the subject thereof unless a satisfactory explanation is offered. (*Courtney Terrel, C.J. and Agarwala, J.*) BHABESH CHANDRA HAZRA *v.* EMPEROR. **152 I.C. 285=7 R.P. 165=1934 Cr.C. 1240=36 Cr.L.J. 7=A.I.R. 1934 Pat. 575.**

——**S. 120-A**—*Construction—Offence—When complete—If ends when agreement is made.*

It is true that a mere agreement may bring the conspiracy into existence but nowhere is it said in the Code that after that the offence no longer exists. Criminal conspiracy may come into existence, and may persist and will persist so long as the persons constituting the conspiracy remain in agreement and so long as they are acting in accord, in furtherance of the object for which they entered into the agreement. (*Costello and M.C. Ghose, JJ.*) ABDUL RAHMAN *v.* EMPEROR. **62 Cal. 749=156 I.C. 678=8 R.C. 21=36 Cr.L.J. 982=1935 Cr.C. 467=A.I.R. 1935 Cal. 316.**

——**S. 120-A**—*Criminal conspiracy, charge of—Proof required.*

To establish a charge of criminal conspiracy, the prosecution must prove an agreement between two or more persons to do, or cause to be done, some illegal act, or some act which is not illegal by illegal means, provided that where the agreement is other than one to commit an offence the prosecution must go further and prove that some act besides the agreement was done by one or more of the parties in pursuance of it. Where the agreement therefore is one to do, or cause to be done, an act which is itself an offence, no overt act, *i.e.*, any act done by one of the parties to the agreement in pursuance of it, need be proved. The crime of criminal conspiracy is established once such an agreement is proved. Where, therefore, the conspiracy alleged is one to commit a series of serious crimes, mere proof of agreement between the accused is sufficient to sustain a conviction. (*Harries and Rachhpal Singh, JJ.*) BACHCHA BABU *v.* EMPEROR. **155 I.C. 369=7 R.A. 908=36 Cr.L.J. 684=1935 A.W.R. 1=1935 A. Cr. C. 26=1935 Cr.C. 214=A.I.R. 1935 All. 162.**

——**S. 120-A**—*Criminal conspiracy — Proof of offence.*

PENAL CODE (1860), S. 120.

The essence of the offence of criminal conspiracy is agreement between two or more persons to commit an offence or do any of the other acts mentioned in S. 120-A in the matter described therein. This being so, it is often difficult, if not impossible, to obtain direct proof of the alleged agreement between the various accused and in most cases the question becomes a matter of inference "deduced from acts of the persons concerned done in pursuance of an apparent criminal purpose in common between them." *R.* v. *Brisac*, 4 East 164; *Mulcahy* v. *Reg.* 3 H. L. 306 and *R.* v. *Duffield*, 5 Cox 404, Ref. (*Tek Chand and Monroe, JJ.*) PUNJAB SINGH UJAGAR SINGH *v.* EMPEROR. **15 Lah. 84=35 Cr.L.J. 322=35 P.L.R. 51=147 I.C. 2=6 R.L. 339=1933 Cr.C. 1467=A.I.R. 1933 Lah. 977.**

——**S. 120-A**—*Date of offence—Proof by Crown.*

In cases of criminal conspiracy, it would be unreasonable to require the Crown to establish with accuracy when the conspiracy began or ended. These facts are best known to the conspirators. And there is no objection to approximate dates being entered in the charge. (*Aston and Rup Chand, A.J.Cs.*) DUR MAHOMED *v.* EMPEROR. **28 S.L.R. 119=151 I.C. 494=7 R.S. 55=35 Cr.L.J. 1337=1934 Cr.C. 628 (2)=A.I.R. 1934 Sind 57.**

——**S. 120-A**—*Gist of conspiracy is agreement between parties—Jurisdiction—Test of.*

The gist or the offence of conspiracy lies not in doing the act or effecting the purpose for which the conspiracy is formed, nor in attempting to do any of the acts nor in inducing others to do them, but in the forming of the scheme or agreement between the parties. It is not the act done in pursuance of the conspiracy but the place where the conspiracy was formed or made, which determines the jurisdiction of the Court. (Case law discussed). (*Rupchand, J.C. and Lobo, A.J.C.*). GOKALDAS AMARSEE *v.* EMPEROR. **1933 Cr.C. 1130=27 S.L.R. 392=148 I.C. 135 (2)=6 R.S. 180=35 Cr.L.J. 585 =A.I.R. 1933 Sind 333.**

——**S. 120-B**—*Absence of proper complaint or charge—Conviction—Legality.*

In the absence of a proper complaint or charge under S. 120-B, a conviction under the section is illegal. (*Fazl Ali and James, JJ.*) BHIKHARI SINGH *v.* EMPEROR. **13 Pat. 729=152 I.C. 282=7 R.P. 168 =15 P.L.T. 523=1914 Cr.C. 1215=36 Cr L.J. 17= A.I.R. 1934 Pat. 561.**

——**S. 120-B**—Absence of sanction for prosecution—Conviction—Legality. *See* CR. P. CODE, S. 196-A. **15 P.L.T. 523.**

——**S. 120-B**—Charge under S. 120-B read with Ss. 19 and 20 of the Arms Act—Accused absconding and found with arms at the time of arrest—Separate proceedings—Competency of. *See* ARMS ACT, SS. 19 AND 20. **A.I.R. 1933 Lah. 231.**

——**Ss 120-B and 395**—*Conspiracy to commit robbery—Proof of—Participation in one dacoity.*

Proof of one offence of dacoity or robbery is not sufficient to support a charge of conspiring to commit robberies and dacoites. (*Nanavutty, J.*) JAGAN *v.* EMPEROR. **6 R.O. 470=148 I.C. 929=11 O.W.N. 208 =35 Cr.L.J. 796=1934 Cr.C. 334=A.I.R. 1934 Oudh 106.**

——**Ss. 120-B and 420**—*Conspiracy to obtain money by false pretences from public—Offiences in pursuance of conspiracy.*

Where the accused have conspired to obtain money from public by subtle means and devices and false pretences, acts committed with this object or to clear the criminal actions are offences committed in pursuance of

PENAL CODE (1860), S. 120.

the conspiracy and the charges for the different offences may be tried together. (*Aston and Rup Chand, A.J.Cs*) DUR MAHOMED *v* EMPEROR. **28 S.L.R. 119=151 I.C. 494=7 R.S 55=35 Cr L.J. 1337=1934 Cr.C 628 (2)=A I R. 1934 Sind 57.**

———**S. 120 B**—*Constructive liability.*

Where a general charge has not been framed against the accused under S. 120-B, of being members of a conspiracy in pursuance of which certain acts had been committed, and the evidence in the case of any individual is insufficient to prove the specific act with which they have been charged, it is impossible to fall back on evidence relating to other activities in which he was concerned and hold that he was a member of the party and thus constructively liable: (*Dalip Singh and Currie, JJ.*) JAHANGIRI LAL *v.* EMPEROR. **1935 Cr C. 396=7 R.L 58=150 I.C. 1056=35 Cr.L J. 1180=A.I.R. 1935 Lah. 230.**

———**Ss. 120 B and 149**—*Conviction and sentence for act constituting conspiracy—Separate sentence for offence under S. 120-B not necessary.*

Even the act of the accused in entering into a conspiracy to beat, rob arms and to escape is *per se* an offence under S. 120 B, if they have been convicted and sentenced separately for the several acts which constitute such conspiracy, separate sentence for offence under S. 120-B is not called for. (*Tek Chand and Monroe, JJ.*) PUNJAB SINGH UJAGAR SINGH *v.* EMPEROR. **1933 Cr.C 1467=15 Lah. 84=147 I.C. 2=6 R L 339=35 P.L.R. 51=35 Cr L.J. 322=A.I.R 1933 Lah. 977.**

———**S 120-B** and S. 3 of the Bengal Criminal Law Act (XXI of 1932)—Sentence of transportation—Propriety. *See* BENGAL CRIMINAL LAW ACT (XXI OF 1932), S. 3. **62 Cal. 483=A.I.R. 1935 Cal. 561 (S.B.).**

———**S. 121**—*Compulsion, no defence.*

Compulsion is not a defence in British India to a charge under S. 121. (*Page, C.J., Mya Bu and Baguley, JJ.*) AUNG HLA *v.* EMPEROR. **9 Rang. 404=1931 Cr C. 875=135 I C. 849=33 Cr.L.J. 205=I.R. 1932 Rang 65=A I.R. 1931 Rang. 235.**

———**S. 121**—*Levying war—Meaning.*

There are two kinds of levying war; one against the person of the king; to imprison, to dethrone, or to kill him; or to make him change measure, or remove counsellors; the other, which is said to be levied against the Majesty of the King, or in other words, against him in his legal capacity; as when a multitude rise and assemble to attain by force and violence any object of a general public nature; that is levying war against the Majesty of the King; and most reasonably so held because it tends to dissolve all the bonds of society, to destroy property, and to overturn Government, and by force of arms, to restrain the King from reigning according to law. Where the object of rebels who had formed into an association was to take action generally against Government and its supporters and they were recruiting people into their organisation and punishing those who refused to join and help the rebel Cause.

Held, that they were guilty of waging war as their object was to overthrow the existing established Government. (*Brown and Ba U, JJ.*) NGA AUNG PA *v.* EMPEROR. **6 I R. (Rang.) 32=145 I.C. 251=34 Cr L.J. 929=1933 Cr.C. 641=A.I.R. 1933 Rang. 116.**

———**Ss 121, 121-A and 302**—*Plot against Government—Plans vigorously put into operation—Accused personally responsible for death of innocent persons—Sentence.*

Ever since the accused's release from internment he had been planning and plotting against the King's Government and his plans were put into active operation on a certain date and up to the date of his arrest, they were pursued with complete ruthlessness and disregard for the sanctity of human life and he had further been found to be personally responsible for the deaths of two innocent persons and he was also responsible for the deaths of the victims of what was known as the Armoury Raid.

PENAL CODE (1860), S. 121.

Held, that he was rightly convicted under Ss. 121 and 121-A, with murder and with abetment of murder and that the sentence of death was rightly passed on him, (*Panckridge, Ameer Ali and M.C. Ghose, JJ.*) EMPEROR *v.* SURJYA KUMAR SEN. **6 R.C. 304=35 Cr.L.J 334=1934 Cr.C. 315=147 I.C. 32=A.I.R. 1934 Cal. 221 (F.B).**

———**S. 121**—"*Waging war*"—*Test of offence.*

"In order to constitute the offence of waging war against the king, it is neither the number engaged, nor the force employed, nor the species of weapon with which they may be armed that will constitute the overt act of treason. To prove the offence it is the purpose and intention, the object which they have in view, which congregates and assembles them together. It is that which constitutes treason and distinguishes the crime from that of riot or any other rising for any private purpose." With reference to this offence, there is no distinction between principal and accessory. "In rebellions it is frequent that few are let into the real design but yet all that join it are guilty of the rebellion." An organised attack on the forces of the Crown with a view to prevent the collection of the capitation tax by force and violence amounts to waging war against the king. (*Page, C.J., May Bu and Baguly, JJ.*) AUNG HLA *v.* EMPEROR. **9 Rang. 404=1931 Cr.C. 875=135 I.C. 849=33 Cr.L J. 205=I.R. 1932 Rang. 65=A.I.R. 1931 Rang. 285.**

[R. 30 N.L.R. 269 (273); 145 I.C. 251 (R).]

———**S. 121 A**—*Conspiracy—Member of—Intention to use violence if necessary.*

Where a conspiracy was in action of existence and the accused was still a member of it and it was his intention to use violence when occasion demanded it and he did use violence, he was a rebel in arms against the Crown and in the unlawful possession of deadly weapons.

Held, that it was immaterial whether the accused used those weapons in acts of aggression or resistance. (*Panckridge, Ameer Ali and M C. Ghose, JJ.*) EMPEROR *v.* SURJYA KUMAR SEN. **6 R.C. 304=35 Cr. L.J. 334=1934 Cr.C. 315=147 I.C. 32=A.I.R. 1934 Cal. 221 (F.B.).**

———**S. 121 A**—*Criminal conspiracy—Communists—Sentence—Principle of punishment.*

In the case of political offences arising out of the beliefs of the accused, severe sentences defeat their object. In practice, such sentences confirm the offenders in their beliefs and create other offenders thus increasing the evil and the danger to the public. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I.C. 481=34 Cr.L J. 967=14 L R. 259 (Cr.)=1933 A L.J. 799=1933 Cr.C. 1202=A I.R. 1933 All. 690.**

———**S. 121-A**—*Criminal conspiracy—Ingredients of the offence.*

The offence of criminal conspiracy is complete as soon as two or more persons agree to do or cause to be done an illegal act, or an act which is not illegal by illegal means. For the purpose of S. 121-A it is not necessary that any act or illegal omission shall take place in pursuance of the conspiracy. The agreement in itself is enough to constitute the offence. (*Sulaiman, C.J. and Young, J.*) JHAB WALA *v.* EMPEROR. **55 All. 1040**

PENAL CODE (1860), S. 121.

=6 I R. (All.) 65=145 I.C. 481=34 Cr.L J. 967= 14 L.R. 259 (Cr.)=1933 A.L.J. 799=1933 Cr.C. 1202=A.I.R. 1933 All. 690.

——Ss. 121 A and 120-B—*Facts falling within S. 121-A—Procedure under S. 120 B—Validity.*

Even when the facts alleged and proved can be brought within the ambit of S. 121-A, it is not incumbent on Government to prosecute under that section. Government may consider that it would be impossible to prove facts which would bring the offence under that section and may be content to advance evidence of such conspiracy (*e g.*, S. 120-B) as they feel competent to prove. (*Grille, J.C.*) MAGANLAL BAGDI *v.* EMPEROR. **30 N.L R. 269=150 I.C. 623=7 R.N. 10=35 Cr L.J. 1097=1934 Cr C. 276=A.I.R. 1934 Nag 71.**

——S. 121 A—*Gist of offence.*

For the purpose of S 121-A. it is not necessary that any act or illegal omission should take place in pursuance of the conspiracy. The agreement is in itself enough to constitute the offence. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040 =6 I R. (All.) 65=145 I.C 481=34 Cr L.J. 967=14 L.R. 259 (Cr.)=1933 A.L.J. 799=1933 Cr.C. 1202= A.I.R. 1933 All. 690.**

——S. 121 A—*Holding of communist beliefs—Not* per se *punishable.*

The mere holding of communist beliefs or doctrines is not punishable *per se*. A theoretical communist or a student of communism cannot be said to be guilty of an offence. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I R. (All.) 65=145 I C. 481=14 L R. 259 (Cr.)=1933 A L J 799=34 Cr.L. J. 967=1933 Cr.C. 1202=A.I.R. 1933 All. 690.**

——S. 121 A—*'Queen'—Meaning of—Not merely the then sovereign.*

In law, the King never dies. It is enough for the prosecution to prove that there was a conspiracy to deprive the King-Emperor of the sovereignty of British India. It is not necessary to show further that the accused were conspiring for such deprivation to take place within the lifetime of His Majesty the present King-Emperor. (*Sulaiman, C. J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I R. (All.) 65=145 I C. 481=14 L R. 259 (Cr.)=34 Cr L J. 966 =1933 A L.J 799=1933 Cr.C. 1202=A.I.R. 1933 All. 690.**

——S. 121-A—*Revolutionary party—Accused members of the Communist Party of India—Overthrow of existing government by means of force.*

The accused knowingly became members of the Communist Party of India. The report of the Executive Committee stated that the party was confined to such members as subscribed to the programme of the Communist International. The minimum programme prescribed by the party was complete national independence of India. The Communist International openly advocated the violent overthrow of the Bourgeois order by means of the Communist revolution and its tactics comprised strikes, demonstrations, organisation of the masses into militant bodies, finally armed insurrection against the State power of the Bourgeoisie.

Held, that the accused, as members as such a body, formed a revolutionary body with the proposed object of overthrowing the present order of society and bringing about the complete independence of India by means of force and that they were rightly convicted under S. 121-A. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I.C. 481=34 Cr.L.J. 967=14 L.R. 259 (Cr.)=1933 A.L.J. 799=1933 Cr.C. 1202=A.I.R. 1933 All. 690.**

PENAL CODE (1860), S. 124.

——S. 121-A—*Sentence.*

In practice the severity of the sentence for an offence under S. 121 A would vary with the decree of the seriousness of the acts done by each accused who is convicted. (*Sulaiman, A.J.C., Young and King, JJ.*) JOGLEKAR *v.* EMPEROR. **54 All. 115=135 I C 113=33 Cr L.J. 94=I.R. 1932 All. 1=1931 A.L.J. 773=1931 Cr C. 892=A.I.R. 1931 All 504.**

——S. 121 A—*Sovereign of the United Kingdom and the Government of India—Distinction between.*

The section obviously draws a distinction between the sovereign for the time being of the United Kingdom and the Government of India or the Local Government. A conspiracy to charge the form the Government of India or of any Local Government, even though it may amount to an offence under another section of the Code, would not be an offence under S. 121-A, unless it is a conspiracy to over-awe such Government by means of criminal force or show of criminal force. (*Sulaiman, C.J. and Young, J.*) JHABWALA *v.* EMPEROR. **55 All. 1040=6 I.R. (All.) 65=145 I C. 481=14 L.R. 259 (Cr.)=34 Cr.L.J. 967=1933 A.L.J. 799=1933 Cr.C. 1202=A.I.R. 1933 All. 690.**

——S. 121-A—*Waging war — Institute used by Europeans—Attack of.*

Where an institute has been attacked because the persons using it are Europeans and Anglo-Indians who might be expected to be supporters of the Government, the mere fact that only one of the persons present there was an official would not make the raid on the institute anything less than waging war. (*Pancksridge, Ameer Ali and M. C. Ghose, JJ.*) EMPEROR *v.* SURJYA KUMAR SEN. **6 R.C. 304=35 Cr.L.J. 334=1934 Cr. C. 315=147 I C. 32=A.I.R. 1934 Cal 221 (F.B.).**

——S. 124 A—*Charge of partiality against the Government—Government alleged to side with capitalists as against labourers.*

The accused was a social worker. In a speech delivered at a labour meeting, she expressed the solidarity of the working class and its determination to fight and destroy the capitalist system; she referred to the resolve of the workers to fight against retrenchment and wage-out launched by the capitalists by organising a general strike. The labourers were asked to unite to fight the two enemies, the capitalists and the Government who being afraid of labour, were alleged to be vindictive towards leaders of labourer, and siding with capitalists as against the starving labourer. She emphasised the ultimate object as the establishment of the labour Raj by the methods of Mr.M.N. Roy.

Held, that the charge of gross partiality against the Government was calculated to inspire feelings of enmity and disaffection towards the Government and that was an offence under S. 124 A ; in the absence of any proof as to what were exactly the methods of Mr.M.N. Roy, the accused could not however be imputed with the intention of displacing the existing Government by any unlawful means. (*Beaumont, C.J. and Nanavati, J.*) EMPEROR *v.* MANIBEN LILADHAR. **57 Bom. 253= 34 Bom.L.R. 1642=1933 Cr C. 182=141 I C. 780= 34 Cr.L J. 231=I.R. 1933 Bom. 153=A.I R. 1933 Bom. 65.**

——S. 124-A—Charge under—Forum of trial—Discretion of Magistrate. *See* CR. P. CODE, S. 347 AND SCH. II. **56 Bom. 61=33 Bom.L R. 1515.**

——S. 124-A—*"Government established by law in British India"—Executive power in action.*

The Government established by law in British India includes the executive power in action and does not mean merely the constitutional frame work. It incudes

PENAL CODE (1860), S. 124.

the Local Governments as well as the Central Government. (*Panckridge and M. C. Ghose, JJ.*) KSHITHIS CHANDRA RAY CHOWDHURY *v.* EMPEROR. **59 Cal. 1197 = I R. 1932 Cal. 513 = 138 I.C. 766 = 33 Cr.L.J. 690 = 36 C.W.N. 510 = 1932 Cr.C. 547 = A.I.R. 1932 Cal 547.**

——S. 124-A—*Hatred and contempt—Illustration.*

A journalist may comment expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, but he must do so without attempting to excite hatred and disaffection. The "Liberty" published several articles to the following effect. The Government was accused of weeding out the Congress workers on the plea of suppression of terrorism. The Hijli, Dacca and Chittagong incidents were described as successive stages of a well thought out scheme of terrorisation of the masses—a scheme to crush the manhood of the province and to make the province safe for bureaucratic administration and British Commerce. The people were exhorted to carry out the programme chalked out at the Berhampore Provincial Conference. "It is better that the Bengali people become extinct than they should live in ignominy * * * We cannot possibly wait for uncertain constitutional developments to nature. Truce or no truce we must have the elementary rights of civilised human beings."

Held, that the articles were seditious. (*Mallik and Patterson, JJ.*) SATYARANJAN BAKSHI *v.* EMPEROR. **I.R. 1932 Cal 526 = 138 I C. 790 = 33 Cr.L J. 702 = 1932 Cr C. 801 = A.I.R. 1932 Cal. 758.**

——S. 124 A—*Hatred or contempt—Speech to be taken as a whole.*

Where the speaker did use strong or undesirable language at places but there is no doubt that the trend of the speeches as a whole was in support of the agitation with respect to a particular grievance which he had in view and which he wanted redressed and the speeches were not calculated to bring the Government established by law into hatred or contempt, such speeches do not come within the purview of S. 124-A. (Case-law referred) (*Abdul Qadir, J.*) SECRETARY, HIGH COURT BAR ASSOCIATION, LAHORE *v.* EMPEROR. **I. R 1932 Lah. 606 = 139 I C. 696 = 33 Cr.L.J. 831 = 33 P.L R. 911 = 1932 Cr.C. 713 = A.I.R. 1932 Lah. 559.**

——S. 124-A—*Hatred or dissatisfaction—Indictment against Imperialism.*

The terms "Imperialism" and "Imperialistic Government" and Government as used in an article were interchangeable and it was in that interchangeable character that the writer used them when writing the article. The passages in which "reckless oppression, free exploitation" and other acts were attributed to "Imperialism" were well calculated to excite disaffection and hatred towards the author thereof and Government was meant to be the author thereof.

Held, that the article was seditious. (*Mallik and Patterson, JJ.*) ZAMAN *v.* EMPEROR. **I.R 1933 Cal. 255 = 142 I.C 202 = 34 Cr.L.J. 309 = 1933 Cr.C. 201 = A I R. 1933 Cal 140.**

——S 124-A—*Incitement to violence—Sentence.*

Where the accused in congratulating a political offender recited a poem which contained a line to the effect that 'a stream of blood will flow,' *held*, that the accused was rightly convicted under S. 124 A but that a sentence of two years rigorous' imprisonment was sufficient. (*Abdul Qadir, J.*) LACHHMAN DAS *v.* EMPEROR. **I. R. 1931 Lah. 335 = 130 I.C. 655 = 32 Cr.L J. 588 = 31 P.L.R. 918 = 1931 Cr C. 116 = A.I.R. 1931 Lah. 52.**

——S. 124-A—*Offence under—Evidence—Author of book—Intention gathered from comments.*

PENAL CODE (1860), S. 124.

Where the writer and publisher of a book are tried under S. 124 A and the preface of it, though written by another person, throws a light on the intention of the writer and the book itself contains life-sketches, at the end of which something is written by the author showing his approval of the conduct of persons who violated the law and were condemned by judicial Courts after being duly tried of serious offences including murder and dacoity and it is obvious that the objects of those comments is to induce others to behave in a similar manner, the accused are guilty under S 412-A. (*Abdul Qadir, J.*) KIRPAL SINGH *v.* EMPEROR. **131 I.C. 219 = 1931 Cr. C. 170 = 32 Cr.L.J. 649 = A.I.R. 1931 Lah. 106.**

——S 124 A—*Offence under—Seditious article.*

When reading an article as a whole, it is clear that whatever may have been meant by the opening paragraph referred to British Government throughout the rest of the article, the Government established by law in British India is referred to, it can be held without evidence to that effect that the readers of the article would regard the whole as an attack upon the British Government in India. A.I.R. 1930 Cal. 244, Rel. on. (*Jack and M.C. Ghose, JJ.*) JAGAN NATH TRIPATHI *v.* EMPEROR. **I.R 1933 Cal. 254 = 142 I.C. 293 (2) = 34 Cr.L.J. 310 = 1933 Cr.C 202 = A.I.R. 1933 Cal. 141.**

——S. 124-A—*Proprietor—Intention—Proof—Seditious publication—Proprietor being away—Conviction.*

"Intention" is an essential ingredient of the offence under S. 124-A and a person accused under S. 124-A cannot be attributed the requisite intention if he was not even aware of the contents of the seditious publication. When a pamphlet containing seditious matter is published in a press in the absence of the proprietor and keeper of the press, and there is no evidence to show that the keeper had any knowledge of the pamphlet before its publication, nor is there any evidence showing that he had absented himself in bad faith, the proprietor and keeper of the press cannot be convicted under S. 124-A. That the accused is the declared keeper of the press can be only taken into consideration along with other circumstances, in coming to a conclusion as to whether he has any knowledge of the contents of the pamphlet. (*Bhide, J.*) CHUNI LAL *v.* EMPEROR. **12 Lah. 483 = I.R. 1931 Lah. 401 = 131 I.C 273 = 32 Cr.L J. 681 = 32 P.L.R 740 = 1931 Cr.C. 302 = A.I.R. 1931 Lah. 182.**

——S. 124-A—*Proprietor—Presumption as to knowledge of facts—Rebuttal—Onus.*

In an offence under S. 124-A, the man who is the proprietor and owner of the press and the publishing house connected with it cannot be allowed to contend that he can shut his eyes to everything going on upon his premises and then pretend that he has no knowledge of the contents of the publications printed and issued by him. If there is a complete *prima facie* case against him then it is for him to call evidence to show that in spite of this circumstantial evidence against him, in fact he was away from the premises during the whole time that the book was being printed and published and that he had not been informed either of the printing and publication or of the contents of the book. (*Lort Williams and S. K. Ghose, JJ.*) BRAJA BEHARI DURMAN *v.* EMPEROR. **131 I.C. 671 = 32 Cr.L J. 742 = 53 C.L.J. 182 = 1931 Cr.C. 413 = A.I.R. 1931 Cal. 349.**

——Ss. 124 A and 153-A—*Question of law—Interpretation of speech.*

The question of the applicability of appropriate sections of law to a particular speech is a question of law or at any rate a question both of law and fact and if a Court has gone wrong in applying the aw to any speech

PENAL CODE (1860), S. 124.

which does not really offend against S. 124-A and S. 153 A, any party objecting to the wrong application of the law is entitled to seek the help of an authority empowered to revise the orders passed. The interpretation of the speech cannot be treated merely as a question of fact. (*Abdul Qadir, J.*) SECRETARY, HIGH COURT BAR ASSOCIATION, LAHORE *v.* EMPEROR. **I.R. 1932 Lah. 606 = 139 I.C. 696 = 33 Cr L J. 831 = 33 P.L.R. 911 = 1932 Cr.C. 713 = A.I.R. 1932 Lah. 559.**

———**S. 124-A**—*Scope—Recommending Bolshevism as preferable to present form of Government and encouraging youths to join Bengal Youth League—If offence.*

To suggest some other form of Government is not necessarily to bring the present Government into hatred or contempt. Where the accused made a speech recommending Bolshevik form of Government as preferable to the present one, and encouraged by his speech young men to join the Bengal Youth League and asked them to carry on propaganda to obtain supporters of the idea of communism as represented by the Bolshevik system in Russia.

Held, that the speech was a long way from coming within the provisions of S. 124 A and it was not wise to institute prosecution against the makers of speeches of this kind. (*Lort Williams and Jack, JJ.*) KAMAL KRISHNA SARKAR *v.* EMPEROR. **158 I.C. 204 = 8 R. C. 177 = 36 Cr.L J 1370 = 39 C.W.N. 1245 = 62 C.L. J. 116 = 1935 Cr.C. 1043 = A I.R. 1935 Cal. 636.**

———**S. 124 A**—*Sedition—Language indicating that law has been employed as weapon of tyranny.*

Where the words, written on the occasion of the execution of a Bengal revolutionary youth, expressed the view that the law had been employed as a weapon of tyranny and that those responsible for its administration viewed with pleasure executions carried out in pursuance of the law, they constitute an offence under S. 124 A. (*Panckridge and M.C. Chose, JJ.*) KSHITISH CHANDRA RAY CHOWDHURY *v* EMPEROR. **59 Cal. 1197 = I.R. 1932 Cal. 513 = 138 I.C. 766 = 33 Cr.L J. 690 = 36 C.W.N. 510 = 1932 Cr.C. 547 = A.I.R. 1932 Cal. 547.**

———**S. 124-A**—*Seditious speech—Government's policy in preserving law and order condemned—Offence made out.*

Where a person delivers a speech that the Government has wounded the feelings of the Sikhs in the matter of Sis Ganj Gurdwara at Delhi and any one could see the grief provoking picture showing thousands of bullet marks on the wall of the Gurdwara and that in the name of law and order bullets have been showered from the second and third storeys of the Kotwali, the reference to the Sis Ganj Gurdwara and to the motive of the authorities to rain bullets under the cover of maintaining law and order is undoubtedly such as to bring the Government established by law in British India into hatred and the speech is such as to render the speaker liable to conviction under S. 124 A. (*Agha Haidar, J.*) NARINJAN DAS *v.* EMPEROR. **I.R. 1931 Lah. 303 = 130 I.C. 431 = 32 Cr.L.J. 538 = 1931 Cr.C. 95 (2) = A.I.R. 1931 Lah. 31 (2).**

———**S. 124 A**—*Seditious speech—Preaching boycott of British goods and removal of slavery.*

The accused made a speech in support of a revolution urging the boycott of British goods and he was alleged to have referred to the causes of the slavery of the people and the means by which they could get rid of the same and to have suggested that the only way to freedom was the boycott of the British goods. The speaker was also alleged to have said that persons who

PENAL CODE (1860), S. 141.

wished to participate in the movement should be prepared to make sacrifices.

Held, that there was nothing seditious in the speech. (*Jai Lal, J.*) JAGAN NATH LUTHRA *v.* EMPEROR. **I.R. 1931 Lah. 934 = 134 I.C. 486 = 32 Cr.L.J. 1172 = 1932 Cr.C 17 = A.I.R. 1932 Lah. 7.**

———**S. 124-A**—*Sentence—Circulation of paper, age and education of accused.*

A paper had not any wide circulation and there were only 750 copies printed of the issue in which the seditious article was published. The Editor was a young man of about 22 only with not very great education. In appeal, the sentence of one year was reduced to the term already undergone. (*Mallik and Patterson, JJ.*) ZAMAN *v.* EMPEROR. **I.R. 1933 Cal. 255 = 142 I.C. 292 = 34 Cr.L J. 309 = 1933 Cr.C. 201 = A.I R. 1933 Cal. 140**

———**S. 124-A**—*Sentence—Mitigating circumstances—Inexperience of author.*

Where the author is an inexperienced young man who does not realize that he is bringing himself in the clutches of law in publishing the sketches like those which appeared in some other publications of the same kind and against which no action was taken by the Government, he should be treated leniently. (*Abdul Qadir, J.*) KIRPAL SINGH *v.* EMPEROR. **131 I.C. 219 = 32 Cr.L.J. 649 = 1931 Cr.C. 170 = A.I.R. 1931 Lah. 106.**

———**S 124-A** — *Sentence — Publisher's liability greater than another.*

Just as receivers are probably worse than thieves because without receivers there would be less thieves, so the position of printers of documents which are seditious is probably worse than that of the authors because the seditious acts of the author would be far less extensive in the operation if it were not for the existence of persons able and willing to print and publish them. (*Lort Williams and S.K. Ghose, JJ.*) BRAJA BEHARI BURMAN *v.* EMPEROR. **131 I.C. 671 = 53 C.L J. 182 = 32 Cr.L.J. 742 = 1931 Cr.C 413 = A.I.R. 1931 Cal. 349.**

———**Ss. 124-A and 153-A**—*Sentence—Test.*

Where the question is whether a sentence passed upon the accused on his conviction under Ss. 124-A and 153-A, I. P. Code, is unduly severe or not, the test to be applied is whether his speech was a violent one and whether his intention was to excite people to commit violence. Where the accused exhorted people of a Railway union and brought in the examples of Soviet Russia and Ireland to run down the Zamindars and taluqdars, a sentence of two years' rigorous imprisonment under Ss. 124-A and 153-A, I. P. Code, is not unduly severe. (*Thomas, J.*) MUNSHI SINGH *v.* EMPEROR. **10 Luck. 712 = 154 I.C. 671 = 7 R.O. 494 = 36 Cr.L.J. 541 = 1935 O.W.N. 301 = 1935 Cr.C. 680 = A.I.R. 1935 Oudh 347.**

———**S. 141**—*Defence—Claim of title—Assembly for enforcing a right and assembly for maintaining existing right—No distinction between.*

Unless a right of private defence is established, a claim (even *bona fide*) of title or a claim (even *bona fide*) of possession will avail nothing. There is no distinction in this respect between forming an assembly to enforce a right or supposed right within the meaning of S. 141 (fourthly) and forming an assembly forcibly to maintain an existing right. 16 Cal. 206, Foll. (*Courtney-Terrell, C.J. and Rowland, J.*) GHYASUDDIN AHMAD *v.* EMPEROR. **11 Pat. 523 = I.R. 1932 Pat. 251 = 139 I.C. 616 = 33 Cr.L J. 864 = 13 Pat.L.T. 288 = 1932 Cr.C. 496 = A.I.R. 1932 Pat. 215.**

[D. 14 P.L.T. 228 (229).]

———**S. 141**—"*Execution of any Law*"—*Order under S. 30 (2) of Police Act—Disobedience to.*

PENAL CODE (1860), S. 141.

The promulgation of an order under S 30 (2) of the Police Act to the effect that persons directing or promoting assemblies should get the permission of the District Superintendent of Police is not a "legal process" but it is the execution of the law as laid in S. 30 of the Police Act. So the accused in directing the procession after the promulgation of the notice by the police and after they were aware of such a notice must be held to have resisted the execution of the law. For a conviction under Ss. 141 and 143 it is not necessary that there should be a refusal to comply with an order to disperse at all. 2 Pat. 134 (F.B., Ref. (*Beasley, C. J. and Cornish, J.*) PUBLIC PROSECUTOR *v.* SATYANARAYANA. **54 Mad. 1025 = I R. 1931 Mad. 604 = 131 I C. 844 = 32 Cr.L. J. 806 = 33 L W. 671 = 1931 M.W N. 489 = 1931 Cr C. 548 - A.I R. 1931 Mad. 484 = 61 M.L J. 842.**

——S. 141—*Five or more persons—Number convicted and not number charged as the test.*

Where the number of persons charged is more than five, but some of them are found not to have been present on the spot, the remaining persons if less than five cannot be said to have constituted an unlawful assembly. (*Harrison, J.*) EMPEROR *v.* ABDUL QADIR KASURI. **I R. 1931 Lah. 157 = 129 I.C. 221 = 32 Cr. L J. 249 = 1930 Cr C. 1220 = A.I.R. 1930 Lah 1044.**

——S. 141—"*Legal process*"—*Order under the Police Act.*

The disobedience of a notification under the Police Act is resistance to the execution of a 'legal process' within the meaning of S. 141. 2 Pat. 134, Foll. (*Mirza and Baker, JJ.*) EMPEROR *v.* RAMCHANDRA. **55 Bom. 725 = 134 I C. 1226 = 33 Bom.L.R. 1169 = 33 Cr.L.J. 64 = I.R. 1932 Bom. 10 = 1931 Cr.C. 952 = A.I.R. 1931 Bom. 520.**

——S. 141—*Order prohibiting procession—Resistance to police—Offence constituted.*

When an order prohibiting a procession on a particular day and in a particular place is lawfully made under the provisions of a statute, that order is law and if the police are trying to execute that law by preventing the procession from proceeding, the resistance by a body of persons consisting of more than five brings each of them within the provisions of S. 141. (*Lort Williams and S.K. Ghose, JJ.*) RAMENDRA CHANDRA ROY *v* EMPEROR. **58 Cal. 1303 = I R. 1931 Cal. 558 = 132 I.C. 174 = 32 Cr L.J. 844 = 35 C.W.N. 716 = 1931 Cr.C. 536 = A.I.R. 1931 Cal. 410.**

——S 141—*Rival claimants for possession—One party taking peaceful possession—Right of other to re-enter.*

If any one else is in wrongful possession of property the decree holder purchaser must not take possession by means of criminal force or show of criminal force. But if he can obtain it in a peaceable and easy manner he has every right to do so, even though that may involve the peaceable ejectment of another. Where he has thus got into possession, the ejected person has no right to re-enter and use force for that purpose. (*Lort Williams and M.C. Ghose, JJ.*) RAM SUMER AHIR *v.* EMPEROR. **151 I.C. 409 = 35 Cr.L J. 1313 = 7 R.C. 111 = 38 C.W. N. 77 = 1934 Cr.C. 397 = A.I R 1934 Cal. 273.**

——S. 141—*Unlawful assemblies fighting each other—Right of private defence.*

Where two unlawful assemblies fight with each other there can be no question of private defence and every body who is proved to have taken part in the fight is liable to be published for the offences committed by him. (*Coldstream and Jai Lal, JJ.*) MANNA *v.* EMPEROR. **151 I.C. 980 = 7 R.L. 233 = 35 Cr.L.J. 1462 = 1934 Cr.C. 444 = A.I.R. 1934 Lah. 209.**

PENAL CODE (1860), S. 141.

——S. 141—*Unlawful assembly—Sacrifice of cow by Mahammadans—Hindu assembling for using force and violence and to prevent.*

The members of one community cannot be allowed with impunity to take their *lathis* and assemble for the purpose of using force and violence to prevent the sacrifice of a cow by members of the opposite community. Such an assembly would be unlawful even if the other community had in fact intended to perform such a sacrifice and such an act would have been illegal. There is no provision of law whatsoever which gives any person or body of persons a right to use force and violence to prevent their feelings being wounded by an illegal act. (*Harries and Collister, JJ.*) EMPEROR *v.* BHAGGAN AHIR. **159 I.C. 26 = 1935 A.W.R. 1075 = 1935 A Cr. C. 225 = 1935 Cr.C. 1177 = 37 Cr.L.J. 39 = A.I.R. 1935 All 931.**

——Ss. 141 (4) and 147—*Applicability—Maintaining right not enforcing supposed right.*

The common object of an assembly is unlawful only when it is to enforce right but, not when possibly beyond doubt it is to maintain a right and to prevent another from enforcing his right or supposed right. Where certain persons are merely acting in maintenance of an existing peaceful possession, no matter whether the possession is with or without title, they cannot be said to have been enforcing any right or supposed right and therefore cannot be held to form an unlawful assembly within the meaning of S. 141, Cl. (4). Hence S. 147 cannot apply to a case where a person in lawful possession of any property proposes to use force in order to maintain his possession, for in such a case, his object to prevent a trespass. He is not enforcing a right but preventing a wrong. (*Raza, J.*) EMPEROR *v.* MAHOMED IDRIS. **I R. 1933 Oudh 228 = 144 I.C. 262 (1) = 34 Cr.L.J. 748 = 1933 Cr.C. 604 = A.I.R. 1933 Oudh 279.**

——S 141 (4)—*Defence of possession.*

The section applies only when the common object is to take or obtain possession of any property by means of criminal force. It does not refer to maintaining possession, or resisting an attempt by another to take possession. So if the accused was in possession of the property (rightly or wrongly) the accused and his party cannot be said to form an unlawful assembly, even if in anticipation of a disturbance by the opposite party, they had proceeded to the spot armed with guns and sticks, etc., for maintaining their possession. 24 C. 686; 36 C. 865; 51 Mad. 81, Foll. (*Beasley, C. J. and Sundaram Chetty, J.*) MARUDOCHELA GOUNDAN *v.* EMPEROR. **1931 M.W.N. 646.**

——S. 141 (4)—*Hire purchaser—Default—Attempt by vendor company to recover possession by force—Resistance by purchaser's servants—Injuries caused—No unlawful assembly.*

A purchaser of a lorry committed default in payment of instalment of the purchase price; under the agreement of purchase the vendor company was entitled to recover possession of the lorry. While the servants of the purchaser were in peceful possession, the agents of the company tried to recover possession by the use of force. They were resisted by the servants of the purchaser and in the course of the alteraction, the agents of the company received some injuries.

Held, that the company had no legal right to use force, their right was only to recover possession and damages through Civil Court, the servants of the purchaser were justified in resisting their attempt to regain possession by force and so the servants could not be convicted under S. 147 of the Penal Code. (*Nanavutty,*

PENAL CODE (1860), S. 141.

J.) NAWAB RAZA *v.* EMPEROR. **6 R O. 427=148 I.C. 696=35 Cr.L.J 740=11 O.W.N. 288=1934 Cr. C. 336=A.I R. 1934 Oudh 108.**

——— **S. 141 (5)**—*Public procession—Obstruction of—Unlawful assembly.*

If a party of men assemble with the determination of compelling another party of men passing along a public street in a lawful manner by means of criminal force, to omit to proceed in the direction in which they wanted to go, the former party will constitute members of an unlawful assembly under Cl. (5) of S. 141. (*Devadoss Iyer, C.J.*) DODDAMADA NAICKA, *In re.* **36 Mys. H.C.R. 431=9 Mys L J. 347.**

——— **Ss. 142 and 149**—*Unlawful assembly—Person physically present in crowd—Burden of proving innocent intention.*

S. 142 shows that it is sufficient for the offence of riot to be proved against an individual that that individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful. The word "continues" means physical presence as a member of the unlawful assembly, that is, to be physically present in the crowd. Therefore in a case of riot, if the defence is that a particular person was present among the rioters with an innocent intention, then the burden of proving that innocent intention lies upon the defence. (*Thom and Bennet, JJ.*) EMPEROR *v.* SHEO DAYAL. **55 All. 689=147 I.C. 15=6 R.A 437=35 Cr. L.J. 360 =1933 Cr. C. 870=A.I R. 1933 All 535.**

——— **Ss. 143, 144 and 430**—*Charge under S. 430 and also under Ss. 143 and 144—Acquittal under S. 430—Effect of.*

Certain persons were charged under S. 430, I. P. Code, for committing mischief by cutting a bandh of a river and thus causing a diminution of the supply of water for agricultural purposes. They were also charged under Ss. 143 and 144 for being members of an unlawful assembly, the common object of which was to commit mischief by cutting the bandh. The Magistrate did not convict them under S. 430 because he felt that no diminution in the supply of water was caused.

Held, that the accused were entitled to an acquittal even under Ss. 143 and 144. (*Varma, J.*) DODRAJ MAHTON *v.* EMPEROR. **1934 Cr.C. 1098=153 I C 767=7 R.P. 383=36 Cr.L J. 416=A.I R 1934 Pat. 505.**

——— **S. 143 and Criminal Law Amendment Act, S. 7 (1) (b)**—Scope—Procession halts for distributing handbills—Offence—"Loitering". *See* CRIMINAL LAW AMENDMENT ACT (1932), S. 7 (1) (*b*). **18 N.L J. 22.**

——— **S. 145**—*Applicability—No order to disperse.*

Where there is no evidence that the accused acted together with others with the common object of resisting the execution of the Police Superintendent's order, and no evidence of an order to disperse, of a refusal to such an order and no overt act of resistance, the accused cannot be convicted under S. 145. (*Beasley, C. J. and Cornish, J.*) PUBLIC PROSECUTOR *v.* SATYANARAYANA. **54 Mad. 1025=I.R. 1931 Mad. 604=131 I C. 844=32 Cr.L.J. 806=33 L.W. 671=1931 M.W N. 489=1931 Cr.C. 548=A.I.R. 1931 Mad. 484=61 M. L.J. 842.**

——— **S. 145**—*Charge under—Failure to specify common object—Validity of trial.*

The failure to specify the common object in a charge under S. 145 is not fatal to the trial if it can be shown that there was ample evidence on the record to prove what the common object of the assembly was. 21 Cal. 827 and 39 Cal. 781. Foll. (*Mirza and Baker, JJ.*) EMPEROR *v.* RAMCHANDRA. **55 Bom. 725=134 I.C. 1226=33 Bom. L.R. 1169=33 Cr. L.J. 64=I.R. 1932 Bom. 10=1931 Cr. C. 952=A.I.R. 1931 Bom. 520.**

PENAL CODE (1860), S. 147.

——— **S. 145**—*Offence under—Congress processionists refusing to take different route and refusing to disperse.*

People in a Congress procession were ordered to take a different route, but they refused to do so and sat on the ground. On being asked to disperse they refused to do that either.

Held, that the conduct of the accused coupled with the fact that the procession was animated by hostility to the established Government showed that they were determined to disregard and disobey any lawful order and that the conviction under S. 145 was proper. (*Panckridge and Patterson, JJ.*) AMBIKA CHARAN DE *v.* EMPEROR. **6 I R. (Cal.) 8=144 I C. 691 (2)=34 Cr. L.J. 814=1933 Cr. C. 497=A.I.R. 1933 Cal. 361.**

——— **S. 145**—*Order under the Police Act—Meeting in defiance of—Order to disperse—Continuing to remain in the Assembly.*

Where, in defiance of an order under S. 42 of the Bombay District Police Act, the accused insisted on taking out a Prabhat Pheri and refused to disperse when ordered by the Sub-Inspector of Police and the Magistrate, the common object of the Assembly being to commit an offence under the latter part of S. 188, the assembly is unlawful and remaining in it when it was ordered to disperse constitutes an offence under S. 145. (*Mirza and Baker, JJ.*) EMPEROR *v.* RAMCHANDRA. **55 Bom. 725=134 I C. 1226=33 Bom. L.R. 1169=33 Cr. L.J 64=I R. 1932 Bom. 10=1931 Cr. C. 952 =A.I.R. 1931 Bom. 520.**

——— **S. 146**—*Rioting—Forcible removal of crop—Questions of possession and cultivation not gone into—Correctness of conviction.*

Where the accused were convicted for rioting and the charge against them was that they formed themselves into an unlawful assembly with the object of forcibly carrying away a cumbu crop and the Court considered it unnecessary to go into the questions of possession and cultivation of the field.

Held, that the conviction cannot be sustained without a finding that the accused were not carrying away the crop raised by themselves upon lands which were in their own possession. (*Curgenven, J.*) KRISHNAPPA NAICK *v.* EMPEROR. **1933 M.W.N. 221.**

——— **S. 146**—*'Violence'—Burning cattle-shed.*

Burning hayricks and cattle sheds constitutes violence within the meaning of S. 146. 40 C. 367 and 44 M L.J. 407. Rel. on. (*Madhavan Nair, J.*) SANKARAPANDIA THEVAR *v.* EMPEROR. **1933 M.W.N. 1138.**

——— **S 146**—*"Violence"—If includes violence to an inanimate object.*

The force or violence mentioned in the definition of rioting may be force or violence directed against an inanimate object. (*Middleton, J.C.*) MIR BAYYAN KHAN *v.* EMPEROR. **156 I.C. 239=7 R. Pesh. 120 =36 Cr.L.J. 933=1935 Cr.C. 449 (2)=A.I.R. 1935 Pesh. 65 (2).**

——— **Ss. 147 and 186**—Applicability—Execution of decree beyond one year of last prior execution—Notice fixing date for showing cause—Issue of attachment warrant before such date and without recording reasons —Warrant—If illegal—Resistance or obstruction by a number of persons to execution of warrant—Offence. *See* C. P. CODE, O. 21, R. 22. **16 Pat. L.T. 872.**

——— **Ss. 147 and 452**—*Charge under—Common object stated to be to "overawe" complainant—Charge, if defective.*

PENAL CODE (1860), S. 147.

Where in a charge under Ss. 147 and 452, the common object of an unalawful assembly is stated to be to "overawe" the complainant, the word "overawe" is tantamount to the word "intimidate" which enters into the definition in S. 441 of the offence of criminal trespass which is involved in the offence of S. 452, I. P. Code, and such a charge, therefore, is not in any way defective. (*Bennet, J.*) GANGA SINGH *v.* EMPEROR. **155 I C. 541 = 7 R.A. 937 = 36 Cr.L J. 763 = 1935 A. L.J. 423 = 1935 A.W.R. 333 = 1935 Cr.C. 650 = A.I. R. 1935 All. 647.**

———**Ss. 147, 149 and 307**—*Charge under—Conviction under S 326—Legality.*

In a trial of several persons on charges under Ss. 147, 149 and 307, the Court disbelieved the evidence as regards unlawful assembly and the common object to murder. But it convicted one of the accused under S. 326.

Held, the conviction was not bad. An accused person who is charged by implication under S 147 can be convicted of a substantive offence. (*Ferrers, J. C. and O'Sullivan, A.J.C.*) GHOUSBUX *v.* EMPEROR. **1935 Cr.C. 163 = 154 I C. 915 = 7 R S. 174 = 36 Cr. L.J. 598 = 28 S.L R. 304.**

———**S. 147**—*Common object—Incidental fight with third party—Whether forms part of common object.*

The two accused assisted by a band of armed men attacked another party who were cutting crops. The latter fled to another man's house and the first party thereupon chased them into that house and when the owner intervened gave him a beating. Subsequently they turned their activities to the disputed field.

Held, that the charge under S. 452, in respect of the injuries caused to the owner of the house was no part of the attack on the field and the offence under S. 452 was not part of the common object of the accused and their men. (*Bisheshwar Nath, J.*) GHAZIUDDIN KHAN *v.* EMPEROR. **8 Luck. 199 = 9 O W N 1109 = 1933 Cr.C. 57 = 142 I C 684 = I.R 1933 Oudh 127 = 34 Cr L J. 393 = A.I R. 1933 Oudh 19.**

———**S. 147**—*Conspiracy—Proof of—Circumstantial evidence.*

To establish the fact of an unlawful assembly, prior open conspiracy need not always be proved nor in such a conspiracy the sole test of rioting, though it may be one of several factors that may go to prove it. To establish a charge of conspiracy, there must be agreement, there need not be proof of direct meeting of combination nor need the parties be brought into each other's presence. The agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. 37 C. 467, Foll. (*Mahadevayya, J.*) SUBBE GOWDA, *In re.* **10 Mys.L.J. 342.**

———**S. 147**—*Conviction under—Need for finding as to common object.*

Before a conviction can properly be maintained for the offence of rioting, it is necessary that there should be a clear finding as to the common object of the unlawful assembly and also that the common object so found should have been stated in the charge in order that the accused persons might have an opportunity of meeting it. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) ALLAHRAKHIO *v.* EMPEROR. **152 I.C 1061 = 36 Cr. L.J. 231 (2) = 7 R.C. 110 = 1934 Cr.C. 1266 = A.I.R. 1934 Sind 164.**

———**Ss. 147 and 427**—*Encroachment on public road—No right of abatement to private person—Demolition of encroachment—Offence—Persons with common intention of demolition—Rioting.*

PENAL CODE (1860), S. 147.

There is no statutory provision in India justifying a private person in demolishing a building and causing loss to another person by way of abating a nuisance. Where, therefore, a portion of the superstructure of a house built by the complainants encroached on a portion of the public street and the accused gathered together for the purpose of abating what they considered to be a public nuisance and demolished a portion of the terrace,

Held, that the accused were guilty of the offence of mischief and as their common object in gathering on the scene was for causing wrongful loss to the complainants, they may be deemed to have been guilty of rioting also. (*Sundaram Chetty and Pakenham Walsh, JJ.*) NARASIMULU *v.* NAGUR SAHIB **57 Mad. 351 = 38 L.W. 996 = 147 I.C. 553 = 6 R.M. 376 = 35 Cr.L.J. 437 = 1934 Cr C. 434 = 1933 M.W.N. 905 = A.I.R. 1934 Mad. 95 = 66 M.L.J. 31.**

———**S. 147**—*Free fight—Meaning.*

Per *Harrison, J.*—A free fight is one when both sides mean to fight from the start, go out to fight and there is a pitched battle. The question of who attacks and who defends in such a fight is wholly immaterial and depends upon the tactics adopted by the rival commander. It cannot be said that there is a free fight merely because the Magistrate cannot make up his mind as to who began the battle. (*Addison, J.*, on difference of opinion between *Harrison and Dalip Singh, JJ.*) AHMAD SHER *v.* EMPEROR. **I.R. 1931 Lah 573 = 132 I.C. 381 = 32 Cr L.J. 868 = 1931 Cr. C. 737 = A.I.R. 1931 Lah 513.**

———**S. 147**—*Offence under—Essentials.*

In order to punish persons for rioting it is not sufficient to show that they were members of an unlawful assembly but it should also be made out that force or violence was used by any member thereof in prosecution of the common object of such assembly. Where the specific acts of violence attributed to the accused have been disbelieved and the rest of the accused have all been acquitted, the conviction of the former is irregular and not sustainable. (*Sundaram Chetty, J.*) KUPPUSWAMI MUDALI *v.* EMPEROR. **I.R. 1932 Mad. 563 (1) = 138 I. C 383 = 33 Cr. L J. 598 = 1932 M.W. N. 431 = 36 L.W. 407 = 1932 Cr. C. 505 = A.I.R. 1932 Mad. 501.**

———**S. 147**—*Offence under—Essentials.*

Even if it appears that it was necessary for the accused to use force in order to defend their property from mischief, even then it is necessary to show that it was necessary for them to use such force as resulted in grievous hurt or that grievous hurt did not result from his act. It is necessary for the Magistrate in such cases to record a definite finding on one or other of the points. (*Wallace, J.*) PUSARI MOOPAN *v.* KOMBAI. **1932 M.W.N. 452.**

———**S. 147**—*Offence under—Finding that more than five took part—Conviction of only three—Legality.*

In a trial for offence under S. 147, the fact that the Judge is not able to convict five persons does not mean that the offence is not made out. Where the Court finds that more than five persons took part in the riot, the mere fact that the evidence is not sufficient to convict five persons would not result in the acquittal of the convicted persons under S. 147. (*Bajpai, J.*) SADHO *v.* EMPEROR. **152 I.C. 108 = 7 R.A. 256 = 15 L R. 103 (Cr) = 4 A.W.R. 783 = 35 Cr.L.J. 1494 = 1934 A. L. J. 640 = 1934 Cr. C. 1114 = A.I.R. 1934 All. 881.**

———**S. 147**—*Offence under—Obstruction by lessee to auction purchasers.*

Where it was proved that the auction-purchasers were given only symbolical possession of the fields and when

PENAL CODE (1860), S. 147.

they tried to take actual possession, were resisted by the previous owner's lessee whose crops were standing.

Held that the lesssee and his men did not commit any offence and their conviction under S. 147 was bad. (*Subhedar, A.J.C.*) LAXMANRAO NARAINRAO *v.* EMPEROR. **150 I.C. 1028=7 R.N. 45=35 Cr. L.J. 1213=1934 Cr C. 704 (2)=A.I.R. 1934 Nag. 172.**

———**Ss. 147 and 149**—Offence under—Separate convictions and sentences—Legality. *See* PENAL CODE, S. 71. **57 Mad. 643=66 M.L.J. 572.**

———**S. 147**—*Party fight—Inconclusive evidence—Acquittal.*

Where in a case of a fight between two parties, the circumstances are not such as to lead unhesitatingly to the conclusion that there was a pitched battle, or free fight, and it did not appear who were the aggressors and whether the injuries were inflicted in self defence,

Held, that the accused were not liable to be convicted under Ss. 325 and 147, I. P. C., for the injuries inflicted on some members of the other party. There is no question that if there was a pitched battle, both sides would be guilty and neither would be entitled to the right of private defence. (*Addison, J.*, on difference of opinion between *Harrison and Dalip Singh, JJ.*) AHMED SHER *v.* EMPEROR. **I.R. 1931 Lah. 573=132 I.C. 381=32 Cr. L.J. 868=1931 Cr. C. 737=A.I.R. 1931 Lah. 513.**

———**S. 147**—*Party fight—Person armed with dangs—Presumption regarding intended offence.*

Per *Dalip Singh, J.*—Though if a large number of persons go to assault one man with dangs, it may be held that death is likely to ensue, the presumption does not apply with the same force in the case where a large number of people are assaulting a similarly large number of people even though some of them are armed with dangs and sticks. (*Addison, J.*, on difference of opinion between *Harrison and Dalip Singh, JJ.*) AHMED SHER *v.* EMPEROR. **I.R. 1931 Lah. 573=132 I.C. 381=32 Cr.L.J. 868=1931 Cr.C. 737=A.I.R. 1931 Lah. 513.**

———**Ss. 147 and 148**—*Party of people—Some being armed—Others whether can be charged.*

It is only the actual persons who are armed with deadly weapons who can be charged under S. 148. When among 8 persons, some were armed with deadly weapons and some only with lathis.

Held, that it was safer to convict the latter under S. 147. (*Nanavutty and Smith, JJ.*) RATAN LAL *v.* EMPEROR. **8 Luck. 570=6 I.R. (Oudh) 107=146 I.C. 381=10 O.W N 557=1933 Cr.C. 780=35 Cr.L. J. 45=A.I.R. 1933 Oudh 333.**

———**S. 147**—*Possession delivered by Court—Effect of—Defence of irregular execution—Sustainability.*

A delivery of possession by the Court passes possession to the party and must be treated as doing so even though the other side may allege the delivery of possession to be of doubtful legality. So where after delivery of possession by Court to the decree-holder, his possession is forcibly disturbed by the judgment-debtor and others at his instigation, the plea that the delivery of possession is void inasmuch as no notice required by O. 21, R 22 (1) (*a*) of the C. P. Code was served on the judgment-debtor is of no avail. 41 Cal. 43, Foll. (*Macpherson and Rowland, JJ.*) KARU MAHTO *v.* EMPEROR. **I.R. 1932 Pat. 246=139 I.C. 585=33 Cr.L. J. 862=13 Pat L.T. 395=1932 Cr.C. 641=A.I.R. 1932 Pat. 244.**

———**S. 147**—*Prohibitory order—Publication—Proof.*

When the order made by the Commissioner of Police prohibiting procession or public assembly had been published in several newspapers and by distribution of leaflets, and that the prisoner had been personally served with a copy of it, and that the police officer again drew his attention to it in the presence and hearing of his supporters and of those members of the procession who crowded round him,

Held, that the five persons had knowledge. (*Lort Williams and S. K. Ghose, JJ.*) RAMENDRA CHANDRA RAY *v.* EMPEROR. **58 Cal. 1303=I.R. 1931 Cal. 558=132 I.C. 174=32 Cr.L J 844=35 C.W.N. 716=1931 Cr.C. 506=A.I R. 1931 Cal. 410.**

———**Ss. 147, 323 and 71**—Rioting and hurt—Separate sentences for—Legality of. *See* PENAL CODE, SS. 71, 147 AND 323. **56 Mad. 481=A.I.R. 1933 Mad. 338=64 M L.J. 314.**

———**S. 147**—*Rioting—Omission to state in charge that accused formed an unlawful assembly or to give finding thereon—Irregularity, if curable.*

Where a charge-sheet simply charges the accused with "rioting and voluntarily causing simple hurt" without explaining what rioting means and without mentioning that the accused formed an unlawful assembly and there is no prejudice to the accused, the irregularity in the charge-sheet is cured by the provisions of S. 535 or 537, Cr.P. Code. Again, even though the Court has not come to a definite finding that the accused formed an unlawful assembly but the examination of the judgment however shows that there was no real doubt on this point, the conviction under S. 147, I. P Code, is not liable to be quashed if the accused has not been prejudiced in any way by the failure of the Court to express itself clearly. (*Kendall. J.*) DIP CHAND *v.* EMPEROR. **157 I.C. 915=8 R.A. 233=36 Cr.L.J. 1260=1935 A. L J. 666=1935 A.Cr.C. 126=1935 A.W.R. 685=1935 Cr.C. 641=A.I.R. 1935 All. 627.**

———**S. 147**—*Rioting—Requisites of the offence.*

A preliminary to the commission of the offence of rioting is the formation of an unlawful assembly. Hence in the absence of proof of formation of an unlawful assembly, an isolated or independent assault by some of the canditates and their supporters for an election, cannot be deemed to be actuated by any common object and all the people cannot be convicted for rioting. (*Shadi Lal, C.J.*) AFZAL BEG *v.* EMPEROR. **I R. 1933 Lah. 499=144 I.C 518=34 Cr.L.J. 782=1933 Cr.C. 355 (2)=A I.R. 1933 Lah. 235 (2).**

———**Ss. 147, 149 and 323**—Rioting—Separate sentences for rioting and hurt—No justification. *See* PENAL CODE, SS. 323, 147 AND 149. **1933 M.W.N. 1275.**

———**S. 147**—Sentences—Several injuries inflicted in pursuance of common object—Separate sentences under Ss. 147 and 323—Legality of. *See* PENAL CODE, S. 71. **A.I.R. 1933 All. 819.**

———**Ss. 147 and 347**—*Separate sentences—Legality of.*

Separate convictions under Ss. 147 and 347 of the Penal Code are perfectly legal, though the aggregate sentences cannot be in excess of what can be imposed for the offence more heavily punishable. (*Macpherson, J.*) BATISA SINGH *v.* EMPEROR. **140 I C. 752=13 Pat L T. 588=I.R. 1933 Pat. 19=34 Cr.L J. 81=1932 Cr C. 852=A.I.R. 1932 Pat. 335.**

———**S. 147**—*Unlawful assembly—Rioting—Use of force to violence.*

An assembly may be perfectly lawful in its inception but it may become suddenly unlawful without previous concert among its members. The summary suppression of riotous assemblies by armed force and the use for that purpose of any amount of violence are justifiable on grounds of State necessity. For an offence under

PENAL CODE (1860), S. 147.

S. 147 the use of the least amount of force is sufficient. Where it is found by the Court that the member of persons who committed the offence was five or more the acquittal of some of the accused cannot dispel the application of S. 147. Meaning of the words "force" and "violence" discussed. (*Doraiswami Iyer, C. J., Mahadevayya and Ramachandra Rao, JJ.*) SUBRAMANYAM *v.* GOVERNMENT OF MYSORE. **38 Mys H C. R. 423 = 11 Mys.L.J. 110.**

——**Ss. 147 and 141 (4)**—Unlawful object—Maintaining right as distinct from enforcing supposed right. Preventing wrong. *See* PENAL CODE, SS. 141 (4) AND **147. A.I.R. 1933 Oudh 279.**

——**S. 148**—*Conviction of persons not armed with deadly weapons—Legality.*

Under S. 148, only those members of an unlawful assembly can be convicted who are actually armed with deadly weapons and not the others. (*Rangi Lal, J.*) FORDIL *v.* EMPEROR. **35 P L.R. 518 = 153 I.C. 132 = 7 R.L. 391 = 36 Cr.L.J. 296 = 1934 Cr.C. 967 = A.I. R. 1934 Lah. 632.**

——**S. 148**—*"Deadly weapon"—Crowbar used to destroy bridge.*

In order to maintain a conviction under S. 148 against any person, it must be proved that he was carrying a deadly weapon. A crowbar or spade may well be a deadly weapon if used as a weapon for offence, but if it is merely used to destroy a bridge, it certainly cannot be described as a weapon of any sort. (*Middleton, J.C.*) MIR BAYYAN KHAN *v.* EMPEROR. **156 I. C. 239 = 7 R. Pesh. 120 = 36 Cr. L. J. 933 = 1935 Cr. C. 449 (2) = A.I.R. 1935 Pesh 65 (2).**

—— **S. 148**—*Deadly weapons*—Lathis.

Lathis have been held to be lethal or deadly weapons under S. 148. (*Nanavutty and Zia-ul-Hasan, JJ.*) RAGHUNANDAN *v.* EMPEROR. **10 Luck. 320 = 153 I C. 96 = 7 R. O. 296 = 36 Cr. L. J. 268 = 11 O.W.N. 1456 = 1935 Cr.C. 97 = A.I R. 1935 Oudh 52.**

——**Ss 148 and 149**—*Offence of rioting—Evidence being conclusive—Marks of injury on accused as test.*

Where in a case of free fight between two parties, the evidence was conflicting and the parties were shown to have produced before the Court perjured evidence and the motive of the parties could not be ascertained with any reasonable certainty. *Held*, that under the circumstances, the Court could go upon the marks of injury upon the persons charged with the offence. (*Young and Sen, JJ.*) EMPEROR *v.* BALDEO KOERI. **I. R. 1931 All. 747 = 133 I.C. 795 = 12 L.R. 98 (Cr.) = 1931 Cr C. 1048 = 32 Cr. L. J. 1073 = 1931 A.L.J 1002 = A.I.R. 1931 All. 712.**

——**S. 148**—*Offence under—Proof—Conflicting evidence—Marks of injury relevant.*

In a case under S. 148, where the evidence is entirely conflicting where both the parties have consciously produced before the Court perjured evidence and where the real motives, which led to the fight between the parties cannot be known nor can it be ascertained with anything like reasonable certainty as to whose *lathi* or spear struck whom, the one sure ground upon which the Judge can proceed is by the marks of injury upon the persons of those who are charged with the offence. (*Young and Sen, JJ.*) EMPEROR *v.* RAM ADHIN SINGH. **1931 Cr.C. 711 = A.I.R. 1931 All. 439.**

—— **S. 148**—*Party fight—Four persons charged—Conviction under S. 148—Propriety.*

Four persons were convicted for injuries caused during a scuffle arising from disputed possession of land. There was no evidence that there were other persons accompanying them.

PENAL CODE (1860), S. 149.

Held, that the accused were not liable to be convicted under S. 148. (*Waller and Krishnan Pandalai, JJ.*) NANJAPPA GOUNDAN *v.* EMPEROR. **1932 M. W. N. 67.**

——**S. 148**—*Property in possession of trespasser—Right to possession—No justification.*

Where a trespasser or stranger is in possession of a property, a plea of right to possession of such property by another is no answer to a charge of rioting against such person by making forcible entry thereon. 6 Mad. 245, Rel. on; A. I. R. 1927 Sind 92; A.I.R 1926 Pat. 433 and 10 Bom. L. R. 285, Ref. (*Rupchand, J C. and Mehta, A J. C.*) ALI MAHOMED JUMO *v.* EMPEROR. **147 I C. 70 = 35 Cr. L. J 257 = 27 S. L. R. 433 = 1933 Cr. C. 1426 = A.I R. 1933 Sind 386.**

——**Ss. 148 and 324**—*Rioting and hurt—Separate sentences—Legality.*

A person convicted both under Ss. 324 and 148 I.P. Code, can be sentenced only under one or the other of the two sections. (*Shadi Lal, C.J.*) KEHAR SINGH *v.* EMPEROR. **35 P.L R. 587 = 1934 Cr.C. 944 (1) = 153 I.C. 198 (1) = 7 R. L. 396 = 36 Cr. L. J. 294 = A.I.R. 1934 Lah. 614 (1).**

——**Ss. 149, 302 and 364**—All accused in Court proved to have been taken part in abduction of deceased —Person by whom subsequent murder was committed not known—Ingredients necessary under S. 149 not proved—Accused entitled to benefit of doubt on charge of murder. *See* PENAL CODE, SS. 302, 364 AND 149. **A.I.R. 1933 Lah. 1035 (2).**

——**Ss. 149 and 325**—*Applicability—Injuries not inflicted in pursuance of common object.*

Where the common object of the accused was the abducting and murdering of *S* and the injuries inflicted on the person of *G* were not in pursuance of that common object.

Held, that all the accused cannot be constructively held liable for an offence under S. 325 in virtue of the provisions of S. 149 and that only those actually inflicting injuries should be convicted. (*Bisheshwar Nath and Nanavutty, JJ.*) RATAN *v.* EMPEROR. **8 Luck. 301 = I.R 1933 Oudh 154 = 143 I.C 55 = 34 Cr L.J. 491 (2) = 10 O.W.N. 7 = 1933 Cr.C. 279 = A.I R. 1933 Oudh 148.**

——**S. 149**—*Applicability—Offence under S* 396.

Ordinarily S. 149 is inapplicable to an offence under S. 396. But when an unlawful assembly had existed from the very outset before the dacoity with murder was committed and it was in the course of the riot that the offence of dacoity with murder was committed, the trial Court would be well-advised to make clear the joint and constructive responsibillity of all the rioters for the offence of dacoity with murder committed in the course of the riot. (*Nanavutty and Thomas, JJ.*) BISHUNATH *v.* EMPEROR. **153 I.C. 978 = 7 R O. 423 = 1935 O. W. N. 145 = 1935 Cr.C. 279 = A.I.R. 1935 Oudh 190.**

——**S. 149**—*Assault with lathis conducted by a number of persons—Guilt of each member.*

Where a number of persons take part in an assault with *lathis* on a particular individual, then all the persons taking part in that assault are equally guilty, and as a general rule, no distinctions can be drawn in regard to the particular person whose *lathi* does actually cause the fatal injury. (*Thom and Bennet, JJ.*) RAHAT HUSAIN *v.* EMPEROR. **6 I.R. (All.) 370 = 146 I.C. 896 = 14 L.R. 225 (Cr.) = 1933 Cr.C 926 = 35 Cr.L.J. 208 = A.I R. 1933 All. 562.**

——**S. 149**—*Assault with lathis by number of men—Guilt of each.*

PENAL CODE (1860), S. 149.

Where more than five persons make an attack with lathis on certain men and one of those men is killed, all the men making the attack are guilty under S. 149, I. P. Code, and other sections. It is not a matter of importance whose lathi blow actually injures the deceased. (*Bennet, J.*) GOVERDHAN *v.* EMPEROR. **159 I. C. 409 = 1935 A.W.R. 1064 = 1935 A. Cr C. 215 = 1935 A.L J. 1114 = 37 Cr.L J. 85 = A.I R 1935 All 930.**

———**Ss 149 and 302**—*Common intention—Inference from several men plunging their spears into body of victim.*

If a number of men armd with spears rush at another and plunge their spears into his body and kill him, then there is only one inference in law, and indeed in fact, which can be drawn and that is that the common intention of the assailants was to kill their victim and all of them are liable to be convicted under S. 302 read with S. 149. (*Thom and Harries, JJ.*) BHARAT SINGH *v.* EMPEROR. **159 I. C. 155 (2) = 8 R.A. 397 = 1935 A W R. 53 = 1935 A.Cr.C 6 = 1935 Cr. C. 362 = 37 Cr.L.J. 32 = A.I.R. 1935 All 362.**

———**Ss. 149 and 302**—*Common object and intention—Onus.*

A perfectly lawful assembly of citizens may become later a riotous mob and in the mob there will be a number of innocent people who do not share the common object of the rioters. When a person however is found to be amongst a mob of rioters, the law presumes that he shares their common object and intention. If he does not share that common object and intention, the onus is upon him to prove his innocence. What the common object and intention of a mob is can only be inferred from its actions. Thus where a mob murdered certain men, the only inference which can be drawn is that the common object of the mob was murder. Therefore if any of the accused did not share that common object, it was for him to prove that fact. And if his defence practically is not that he was amongst the gathering of villagers with an innocent intention but that he was not there at all, he is bound to rebut the presumption that he shared in the common object of the mob. (*Thom and Kisch, JJ.*) RAMHIT *v.* EMPEROR. **149 I C. 210 = 6 R A 872 = 35 Cr.L.J. 919 = 4 A.W.R. 191 = 15 L.R. 173 (Cr.) = A.I.R. 1934 All. 776.**

———**Ss. 149, 302 and 396**—Conspiracy to commit dacoity—Murder by one—Others not be convicted under S. 302/149—Conviction under S. 396. *See* PENAL CODE, SS. 396, 149 AND 302. **A.I.R. 1933 Lah 977.**

———**S. 149**—*Construction—"Prosecution of the common object."*

The words "in prosecution of the common object, of the unlawful assembly" in S. 149, do not mean "during the prosecution of the common object," but only mean that the offence committed must be immediately connected with the common object of the unlawful assembly of which the accused were members. The act must be one which on the evidence appears to have been done with a view to accomplish the common object imputed. (*Nanavutty and Zia-ul-Hasan, JJ.*) RAGHUNANDAN *v* EMPEROR. **10 Luck. 320 = 153 I.C. 96 = 7 R.O. 296 = 36 Cr L.J. 268 = 11 O.W.N. 1456 = 1935 Cr.C. 97 = A.I R. 1935 Oudh 52**

———**Ss 149 and 326**—*Conviction under S.* 148 *set aside—Conviction under Ss.* 326 *and* 149*—Legality of*

All that the Court has got to satisfy itself under S. 149 is that there was an unlawful assembly with a common object and that the substantive offence was committed in prosecution of that object. This condition can be satisfied without any actual condition under one of the riot ing sections such as S. 148. The mere fact that the Court

PENAL CODE (1860), S. 149.

thought it necessary to set aside the conviction under S. 148 on a technical point and not on a finding that the facts would not warrant such a conviction is no obstacle to applying the provisions of S 149 and so the conviction of the accused under Ss. 326 and 149 is perfectly legal. (*Curgenven, J.*) AMMU SHETTY *v.* BAPA. **6 I.R. (Mad.) 265 = 146 I.C. 478 = 1933 M.W.N. 109 = 1933 Cr.C. 1519 = 39 L.W. 63 = 35 Cr.L.J. 75 = A.I.R. 1933 Mad. 842 = 65 M.L.J. 797.**

———**S. 149**—*Free fight—Proof of.*

A free fight means a fight when both parties intend to fight from the very beginning and go out for the purpose and then there is a pitched battle. Simply because in a fight between two parties the same number of injuries is received by both sides, the existence of a free fight cannot be inferred and the accused cannot be convicted on that score where the prosecution evidence is unreliable. A. I. R. 1931 Lah. 513, Rel. on (*Rhide, J.*) PIRAN DITTA *v.* EMPEROR **6 I.R. (Lah.) 208 = 146 I.C. 321 = 34 P.L.R 950 (2) = 1933 Cr.C. 1101 = 35 Cr.L. J. 69 = A.I.R. 1933 Lah. 808.**

———**Ss. 149 and 302**—Gang of dacoits with fire arms —Pursuit by police—One of the pursuers shot dead by a dacoit—Liability of others for murder. *See* PENAL CODE, SS. 302 AND 149—CONSTRUCTION—LIABILITY. **9 O.W.N. 977.**

———**S. 149**—*Knowledge of offence commonly intended —Inference.*

Where an unlawful assembly of five or more persons is responsible for a murder, it is sufficient under S. 149 that the members of such assembly knew that the murder is likely to result in prosecution of the common object such an inference can easily be drawn when dacoits go armed with guns. (*Addison, J.*) BHAN SINGH *v.* EMPEROR. **I.R. 1932 Lah. 323 = 137 I.C. 196 = 33 Cr.L J 460 = 1932 Cr.C. 485 = 34 P.L.R. 449 = A.I.R. 1932 Lah. 367.**

———**Ss. 149 and 302**—*Number of people attacking man and causing his death—Part taken by each not distinguishable.*

Where a number of people attack a man and cause his death, and it is not known what individual action any one particular man took, and it is not possible to assume a common intention to kill, it should be held that the death was caused by the body of persons as a whole and the persons should be charged under S. 149 read with S. 302. (*Baguley and Macney, JJ.*) NGA BA DIN *v.* EMPEROR. **1935 Cr.C 1190 = 159 I.C. 1050 = 37 Cr.L.J. 196 = A.I.R. 1935 Rang. 406.**

———**S. 149**—Offence—Conviction for—Ingredients to be proved. *See* MYSORE CR. P. CODE REGULATION, SS. 269, 418 AND 536. **40 Mys H.C R. 200.**

———**S. 149**—*Offence under—Common object—Omission to state—Irregularity.*

It is no doubt very desirable that the common object should in cases under S. 149, I.P. Code, be mentioned so as to give the accused clear notice of the charge against them but the omission to do so is nothing more than an irregularity. (*Bhisheshwar Nath, J.*) GHAZIUDDIN KHAN *v* EMPEROR. **8 Luck. 199 = 1933 Cr.C. 57 = 142 I.C. 684 = I R. 1933 Oudh 127 = 9 O.W.N. 1109 = 34 Cr.L.J. 393 = A I.R. 1933 Oudh 19.**

———**Ss. 149 and 302**—*Offence under—Sentence—Transportation for life as the minimum.*

Where the accused are found guilty under S. 302 read with S. 149, the law precludes the infliction of any lesser penalty than transportation for life. 1 Pat. 753, Ref. (*Coldstream and Jai Lal, JJ.*) BAHAWAL *v.* EMPEROR. **1932 Cr.C 15 = 135 I.C. 670 = I.R. 1932 Lah. 126 = 32 P.L.R. 810 = 33 Cr.L.J. 184 = A.I R. 1932 Lah. 5 •**

PENAL CODE (1860), S. 149.

——**Ss. 149, 147 and 329**—Offence under—Separate convictions and sentences—Legality. *See* PENAL CODE, S. 71. **57 Mad. 643=66 M.L.J. 572.**

——**S. 149**—Offence under S. 325—Sentence—Distinction between persons inflicting injury and others who did not join in the act. *See* CRIMINAL TRIAL—SENTENCE. **35 C.W.N. 345=A.I.R. 1931 Cal. 606.**

——**S. 149**—*Oral evidence—Value of.*

In all riot cases, the oral evidence must generally be approached with caution and carefully scrutinized. (*Thom and Kisch, JJ.*) RAMHIT *v.* EMPEROR. **149 I.C. 210=6 R.A. 872=35 Cr.L.J. 919=4 A.W.R. 191=15 L.R. 173 (Cr)=A.I.R. 1934 All. 776.**

——**Ss. 149, 302 and 436**—*Rioting—Proof by prosecution—Part taken by each accused need not be proved.*

In a case of rioting, murder and arson, the prosecution is not called on to prove the part which each accused person took in the riot. The prosecution has to prove in the first place that there was an unlawful assembly and that the unlawful assembly committed various offences of riot, looting, arson and murder. Having proved this, the prosecution has to prove that each accused person was a member of the unlawful assembly. The prosecution has not proved anything further. When so much is proved the provisions of S. 149, I. P. Code, apply, and every member of unlawful assembly is guilty of offences committed in the prosecution of the common object of the unlawful assembly. (*Thom and Bennet, JJ.*) EMPEROR *v.* SHEO DAYAL. **55 All. 689=147 I.C. 15=6 R.A. 437=1933 Cr.C. 870=A.I.R. 1933 All. 535.**

——**Ss. 149, 147 and 323**—Rioting—Separate sentences for roiting and hurt—No justification. *See* PENAL CODE, SS. 323, 147 AND 149. **1933 M.W.N. 1275.**

——**Ss. 149 and 302**—*Scope—Common object—Riot—Death caused by one member—All, if guilty.*

The common object of an unlawful assembly was to beat the members of an opposite party. But one of the members thrust a spear into the abdomen of a person of the opposite party, but the act was quite unpremeditated and unintended, though it resulted in the death of the victim.

Held, that the intention to commit murder could not be imputed to all the members of the assembly and the member who inflicted the injury was alone guilty. (*Nanavutty and Ziaul-Hassan, JJ.*) RAGHUNANDAN *v.* EMPEROR. **10 Luck. 320=153 I.C. 96=7 R.O. 296=36 Cr.L.J. 268=11 O.W.N. 1456=1935 Cr.C. 97=A.I.R. 1935 Oudh 52.**

——**Ss. 149 and 302**—*Scope—Riot—Assault by several persons with* lathis—*Death ensuing—All, if guilty of murder.*

When several persons, armed with *lathis* and *kautas*, assault a single person and strike him several times on a vital part of the body so as to cause his death, not only the person who actually struck the fatal blow but all of them are guilty of causing his death, because death is caused in prosecution of the common object, and the rioters must be taken to have known that death was likely to be caused. (*Nanavutty and Thomas, JJ.*) CHAIT SINGH *v.* EMPEROR. **153 I.C. 81=7 R.O. 286=36 Cr.L.J. 249=11 O.W.N. 1543=1935 Cr C. 200=A.I.R. 1335 Oudh 110.**

——**Ss. 149 and 396**—Shooting by dacoits to remove opposition—All dacoits guilty of murder. *See* PENAL CODE, SS. 396 AND 149. **A.I.R. 1934 Rang. 30.**

——**S. 149**—*Unlawful assembly—Common object to beat—Commission of offences under Ss.* 302 *and* 396—*Constructive liability.*

PENAL CODE (1860), S. 153.

Where in the beginning the object of an unlawful assembly was merely to beat a certain person but as events developed, the right assumed a more serious complexion with the result that the rioters committed dacoity and when the police party arrived, they killed the Sub-Inspector and grievously injured the constables, all the members of the unlawful assembly in virtue of the provisions of Ss. 396 and 302 read with S. 149, I. P. Code, rendered themselves legally liable to punishment for the offence of murder and dacoity, even if it be assumed that the Sub-Inspector and the constables had not arrived while the rioters were committing dacoity. (*Nanavutty and Thomas, JJ.*) BISHUNATH *v.* EMPEROR. **153 I.C. 978=7 R.O. 423=1935 Cr.C. 279=1935 O.W.N. 145=A.I.R. 1935 Oudh 190.**

——**Ss 149, 225 and 332**—Unlawful assembly—Common object not to commit grievous hurt—Grievous hurt caused but by whom caused not known—Conviction only under S. 332. *See* PENAL CODE, SS. 332, 225 AND 149. **A.I.R 1933 Lah. 159.**

——**Ss. 149 and 142**—Unlawful assembly—Person physically present in crowd—Burden of proving innocent intention. *See* PENAL CODE, SS. 142 AND 149. **55 All. 689=A I.R. 1933 All. 535.**

——**Ss. 149 and 34**—*Unlawful assembly—Several persons convicted—Legality.*

A conviction under S. 34 does not imply that each of the persons convicted thereunder has been guilty of a substantive offence. When a charge is made of an offence under S. 149 it will not be illegal to convict the accused of that offence read with S. 34, I. P. Code, if not prejudice is occasioned to the accused persons in their defence. (*Bardswell, J.*) RAMA BOYAN *v.* EMPEROR. **36 Cr. L.J. 113=40 L.W. 476=152 I.C. 554=7 R.M. 253=1934 M.W.N. 241=1934 Cr.C. 1287 (2)=A.I.R. 1934 Mad. 565=67 M.L.J. 355.**

——**Ss. 150 and 65**—*Offence under S.* 160—*Imprisonment in default of fine—Limit to.*

The alternative sentence of 15 days' imprisonment in default of payment of fine for an offence under S. 160 of the Penal Code is opposed to the provisions of S. 65. (*Doraiswami Iyer, C.J.*) CHIKGANTLAPPA *v.* GOVERNMENT OF MYSORE. **38 Mys. H.C.R. 384=11 Mys L.J. 426.**

——**S. 150 B and Arms Act, S. 14**—Conspiracy to possess onus—Sentence of transportation for life—If justified. *See* BENGAL CRIMINAL LAW AMENDMENT ACT (1932), S. 3. **39 C.W.N. 334 (F B.).**

——**S. 151**—*Applicability.*

S. 151 does not apply to cases in which the assembly was unlawful from its inception or had become so before the command for dispersal was given. (*Tek Chand, J.*) MAHOMED ABDULLAH *v.* EMPEROR. **15 Lah. 610=150 I.C. 24=6 R.L. 835=35 Cr L.J. 1094=36 P.L R. 126=1934 Cr C. 466=A I.R. 1934 Lah. 243.**

——**S. 151**—*Police command under S.* 127, *Cr. P. Code, on peaceful procession—Disobedience to—Not an offence.*

In the absence of requisite conditions as contained in S. 127 of the Cr.P. Code, a command by the Sub-Inspecter of Police on a peaceful procession to disperse is not lawful and the disobedience thereof is not an offence under S 151 of the Penal Code. (*Niyogi, A.J.C.*) YESHWANT *v.* EMPEROR. **I R. 1933 Nag. 215=144 I.C. 232=34 Cr L.J. 705=1933 Cr.C. 1068=A.I.R 1933 Nag. 277.**

——**S. 153**—*Scope—Provocation resulting in rioting—Charge for abetment.*

The fact that the offence under S. 153 is punishable with a maximum of six months' imprisonment indicates.

PENAL CODE (1860), S. 153-A.

that the section was intended to apply to such provocative words or acts as do not amount directly to instigation or abetment. Provocation which results in rioting may or may not amount to instigation or abetment of that offence. If it does, it is obviously more appropriate to charge abetment, which is the more serious offence. (*Murphy and Broomfield, JJ.*) EMPEROR *v.* AHMED HASHAM. **57 Bom. 329 = I R. 1933 Bom. 264 = 143 I.C. 273 = 34 Cr.L.J. 559 = 35 Bom L.R. 240 = 1933 Cr.C. 474 = A I R. 1933 Bom. 162.**

——— **S. 153 A**—*Applicability—Criticism of British Imperialism.*

While there were criticisms in an article of British Imperialism and the Rulers of India accusing them of exploiting and crushing the "workers" and the proletariat, the article could not be said to be calculated to promote feelings of enmity or hatred between the Europeans as Europeans and the Indians as Indians.

Held, that a charge under S. 153-A cannot be sustained. (*Jack and M.C. Ghose, JJ.*) ZAMAN *v.* EMPEROR. **I.R. 1933 Cal. 252 = 142 I C. 299 = 34 Cr.L.J. 305 (1) = 1933 Cr.C. 200 = A.I R. 1933 Cal. 139.**

——— **S. 153 A**—*"Classes"— Capitalists — Inspiring feelings of hatred against—If an offence.*

The accused was a social worker. In a speech delivered at a labour meeting she expressed the solidarity of the working class and its determination to fight and destroy the capitalist system; she referred to the resolve of the workers to fight against retrenchment and wage cut launched by the capitalists who were referred to as "blood-suckers" and charged with exploiting labour taking advantage of the labourers' work and paying inadequate wages.

Held, that the accused could not be convicted for promoting enmity and hatred against a class within the meaning of S. 153 A of the Penal Code as the term "capitalists" was altogether too vague to denote a definite and ascertainable class of sabjects.

Per *Beaumont, C.J.*—The speech was not also sufficiently strong to promote enmity or hatred against the capitalists.

Per *Nanavutty, J.*—The word "class' connotes a well-defined group of His Majesty's subjects. The first ingredient in the connotation of the term is that it should be well-defined and readily ascertainable; secondly, there should be some element of permanence or stability in the group, and thirdly, the group must be sufficiently numerous and widespread to be designated a class. The word "capitalists" is shifting in its meaning and relative in its connotation and cannot be taken to denote a class of subjects. (*Beaumont, C. J. and Nanavutty, J.*) EMPEROR *v* MANIBEN LILADHAR. **57 Bom. 253 = 1933 Cr.C. 182 = 141 I.C. 780 = 34 Cr L J. 231 = I.R. 1933 Bom. 153 = 34 Bom.L.R. 1642 = A.I.R. 1933 Bom. 65.**

[D. 35 P.L.R. 40 (43); 1934 All. 717 (718).]

——— **S. 153-A**—*Offence under—Attack against Police force.*

The police force form part of the Government established by law and where the Police are attacked as a whole and not as individual officers and the words used tend to bring into hatred or contempt the Government, the accused may be proceeded against for an offence under S. 153-A. (*Addison, Monroe and Agha Haidar, JJ.*) "ZAMINDAR" NEWSPABER, *In the matter of.* **149 I.C. 370 = 6 R.L. 669 = 35 Cr L.J. 966 = 35 P.L. R. 40 = 1934 Cr.C. 450 = A.I R. 1934 Lah. 219.**

——— **S. 153-A**—*Offence under—Evidence—Scurrilous attack on religion.*

Where the words naturally, clearly and indubitably have an intention to promote enmity between classes, it must be presumed that the writer intended the natural result of the words employed; and it is permissible to take into consideration, the facts and circumstances of the time, the persons for whom the words were written, and the existing state of feelings between the two communities, as evidence of the intent to promote or attempt to promote feeling of enmity or hatred between the two communities. It is immaterial whether the statements were supported by authority. A scurrilous and vituperative attack on a religion or its founder would require a considerable amount of explanation to take it out of the substantive part of the section and bring it within the four corners of the explanation. (*Addison, Coldstream and Hilton, JJ.*) CHAMUPATI *v.* EMPEROR. **I R. 1933 Lah. 297 = 142 I.C. 792 = 34 Cr.L.J. 473 = 13 Lah. 152 = 33 P.L.R. 431 = 1932 Cr.C. 119 = A.I R. 1932 Lah. 99 (F.B.).**

——— **S. 153 A**—Question of law—Interpretation of speech—Applicability of appropriate sections of law. *See* PENAL CODE, SS. 124-A AND 153-A. **33 P.L.R. 911 = A.I.R. 1932 Lah. 559.**

——— **Ss. 153-A and 124-A**—Sentence—Test. *See* PENAL CODE, S. 124-A. **154 I.C. 671 = 1935 O.W.N. 301.**

——— **S. 157**—*Essentials of offence.*

It is not enough a for conviction for the accused to have harboured certain persons but it must further be proved that they were 'hired or engaged, or employed'. A hotel keeper cannot therefore be convicted under this section for harbouring certain volunteers who tried to make salt out of sea water unless he knew they were engaged or hired by somebody to form an unlawful assembly. (*Jackson, J.*) SAMUEL AARON *v.* EMPEROR. **I R. 1931 Mad. 495 = 131 I.C. 159 = 32 Cr.L. J. 664 (1) = 1931 M W N. 326 - 33 L W. 571 = 1931 Cr.C. 488 = A.I.R. 1931 Mad. 440.**

——— **S. 157**—*Offence under—Harbouring persons forming unlawful assembly in the past.*

Section 157 refers to some unlawful assembly in the future. It provides for an occurrence which may happen, not which has happened. Where the accused was charged for having harboured certain persons who were alleged to have formed an unlawful assembly in the past for the commission of an offence,

Held, that the accused could not be convicted under S. 157. (*Cuming, J.*) RADHARAMAN SAHA *v.* EMPEROR. **58 Cal. 1401 = 134 I C. 1278 (2) = 35 C W.N. 720 = 1931 Cr.C. 992 = 33 Cr.L.J. 62 (1) = I.R. 1932 Cal. 62 (2) = A.I R. 1931 Cal. 712.**

——— **S. 159**—*Affray—Gist of offence.*

Where one person attacks and the other defends himself, it is legally correct to say that the two persons are fighting and the case comes under the definition of affray. The gist of the offence consist in the terror it causes the public. (*Bennet, J.*) BABU RAM *v.* EMPEROR. **53 All. 229 = I R. 1931 All 850 = 134 I C. 834 = 32 Cr.L.J. 1269 = 12 L.R. 9 (Cr.) = 1931 A.L.J. 891 = 1931 Cr.C. 8 = A.I.R. 1931 All. 8.**

——— **S. 159**—*Requisites of offence—Affray.*

Before being convicted of an affray the accused should have had clear notice as to the person or persons with whom he was fighting, that the place was a public place and that the public peace was disturbed. (*Pakenham Walsh, J.*) BALUCHAMI PILLAI *v.* EMPEROR **6 I.R. Mad. 266 = 146 I.C. 475 = 1933 M.W N. 718 = 38 L. W. 760 = 1933 Cr.C. 1520 = 35 Cr.L.J. 76 = A.I.R. 1933 Mad 843 = 65 M L.J. 723.**

——— **S. 159**—*Requisites of offence—Affray.*

To support a conviction for affray, it must be shown that each person concerned in it had been fighting in a

PENAL CODE (1860), S. 160.

public place and no question of mere constructive liability enters into it; in other words, the Court must be satisfied that each one of the accused took an active physical part in the process of fighting. (*Curgenven, J.*) RATNAM PILLAI *v.* EMPEROR. **1933 M W.N. 721.**

———**Ss. 160 and 96**—*Conviction under S. 160—Plea of private defence to be first found against.*

S. 160 is controlled by S. 96 and where a right of private defence is set up by the accused, they should not be convicted unless the plea is examined and found to be not established. (*Curgenven, J.*) RATNAM PILLAI *v.* EMPEROR. **1933 M.W.N. 721.**

———**Ss. 161 and 108, Expl. 3**—*Abetment of bribe—Taking—No guilty intention on the part of the Judge—Offer of bribe to Judge, if an offence.*

Under the Explanation 3 to S. 108 it is not necessary that the person abetted should have any guilty knowledge or intention. So the bribe-givers are guilty of the offence of abetment although they only complied with a demand made by the public servant and although the public servant had no intention of receiving the money as a bribe. 38 I.C. 439, Foll. (*King and Kisch, JJ.*) EMPEROR *v.* DINKAR RAO. **I.R. 1933 All. 306 = 55 All. 654 = 143 I C. 661 = 34 Cr.L J. 623 = 14 L.R. 353 (Cr.) = 1933 A.L J. 1481 = 1933 Cr.C. 853 = A.I.R. 1933 All. 513.**

———**S. 161**—*Bribe—Persons negotiating the bribe—Evidence of—Value of.*

Persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices and it is highly unsafe to base a conviction under S. 161 on their testimony without independent corroboration (*Tek Chand, J.*) MANGAL SAIN *v.* EMPEROR. **147 I.C. 557 = 6 R.L. 417 = 35 Cr.L.J. 452 = 34 P.L.R. 836.**

———**S. 161**—*Offence under—Abetment of—Statement regarding the willingness of another person to offer a bribe.*

A statement, made to the Judge that the plaintiff in a pending litigation would be willing to offer a bribe to the Judge does not amount to the abetment of an offence under S. 161. (*King and Kisch, JJ.*) EMPEROR *v.* DINKAR RAO **55 All 654 = I R. 1933 All 306 = 143 I.C. 661 = 34 Cr.L J. 623 = 14 L R 353 (Cr.) = 1933 A.L.J. 1481 = 1933 Cr.C. 853 = A.I.R. 1933 All. 513.**

———**S. 161**—*Offer of bribe to public servant for rendering service with another public servant—Abetment.*

The Divisional Forest Officer in his official capacity was holding a departmental inquiry in which *M*, a public servant, was cited as a witness. The accused offered a sum of Rs 100 to *M* as illegal gratification as a motive or reward for rendering him a service in the proceedings before the Divisional Forest Officer by not giving evidence against him or so shaping his evidence as not to injure him, or generally by influencing the Divisional Forest Officer in appellant's favour in connexion with the allegation against him (appellant).

Held, in doing so, he was attempting to bribe a public officer to render him service with another public servant who was acting as such and that he was guilty of an abetment of offence under S 161. (*O'Sullivan and Lobo, A.J.Cs.*) EMPEROR *v.* ALLAUDIN AHMED FAKHRUDIN AHMED. **158 I C. 992 = 8 R S. 62 = 1935 Cr C 48 = A.I.R. 1935 Sind 7.**

———**S 161**—*Person instigating another to bribe a public servant—S. 108, Expl. 4.*

A person who instigates another to offer a bribe to a public servant is guilty of an abetment of the offence under S. 161, I. P. Code. (*Almond, J. C. and Mir Ahmad, A.J.C.*) GHAZI KHAN *v.* EMPEROR. **152 I.C. 890 = 1934 Cr C. 1315 = 36 Cr.L.J. 278 = 7 R. Pesh. 64 = A.I.R. 1934 Pesh. 110.**

———**S. 161**—*Policy of tripping accused, deprecated.*

The plan of tempting and trapping the accused into bribing a public servant is objectionable and should not be resorted to by an officer of Judicial Department. (*King and Kisch, JJ.*) EMPEROR *v* DINKAR RAO. **55 All. 654 = I.R 1933 All 306 = 143 I.C. 661 = 34 Cr L J. 623 = 14 L R 353 (Cr) = 1933 A.L.J. 1481 = 1933 Cr.C. 853 = A I.R. 1933 All. 513.**

———**S. 161**—*Public servant functus officio when bribe is offered—Offence.*

No offence under S. 161 is committed where the public servant to whom the bribe is offered is at the time when the offer is made *functus officio* as to the matter in respect of which the bribe is offered. (*Mir Ahmad, A.J.C.*) QAZI RAHIMULLAH *v.* EMPEROR. **154 I C. 910 = 7 R. Pesh 91 = 36 Cr.L.J. 626 = 1935 Cr.C. 173 = A I R. 1935 Pesh. 26.**

———**S. 168**—*Offence under—Previous sanction of Local Government if necessary.*

S. 197, Cr. P. Code, does not require previous sanction for taking cognizance of a complaint regarding an offence described in S. 168, I. P. Code (*Macnair, J. C.*) DULLOOMIYA *v* TULARAM. **28 Nag.L.R. 156 = 140 I C 711 = 1932 Cr.C 669 = I.R 1933 Nag. 10 = 34 Cr.L J. 70 = A I.R. 1932 Nag 133.**

———**S. 170**—*C. I. D. constable pretending to be police officer and demanding production of* rahdari *paper.*

Where the accused, a C. I. D. constable, pretended to be a police officer and as such police officer demanded the production of the *rahdari* papers from people who had cattle with them.

Held, he was guilty under S. 170. (*Agha Haidar, J.*) ROSHAN *v.* EMPEROR. **159 I C. 353 = 37 Cr.L J. 81 = 1935 Cr C. 87 = A I R. 1935 Lah. 92.**

———**S 171 (c)**—*Gosha voters—Candidate insisting on their unveiling themselves—No offence.*

Where, at an election where there was a large number of gosha lady voters, the candidate insisted that the voters should unveil themselves before voting for the purpose of identification and for preventing personation and expressed also his opinion that the better thing for gosha ladies to do would be to remain at home.

Held, that no offence under S. 171 (*c*) of the Penal Code was committed. (*Rameam, O.C.J.*) BIJLI SAHIB BAHADUR *v.* MAHOMED ASAN MARACAIR. **6 I.R. (Mad) 283 = 146 I C. 572 = A.I.R. 1934 Mad. 27.**

[Affirmed 57 Mad. 571.]

———**S. 171 (g)**—Applicability—Election manifesto—General imputations of misconduct—Nature of offence. *See* PENAL CODE, S. 500. **55 Mad. 791 = A.I.R. 1932 Mad. 511 = 63 M.L.J 380.**

———**S 174**—Applicability—Accused on bail—Failure to appear—Proceedings under S. 174—If open. *See* MYSORE CRIMINAL PROCEDURE CODE S. 92. **13 Mys L J. 217 = 39 Mys H C R. 1102.**

———**S. 174**—*Disobedience of summons—Competency of Magistrate to try—Cr. P. Code, S. 487.*

An offence under S. 174, I. P. Code, cannot be tried by a Magistrate, in whose Court the accused as a witness in another case failed to appear. The prohibition under S. 487, Cr. P. Code, is absolute and the consent of the accused is immaterial. (*Shiti Lal, C J.*) MAHOMED DIN *v.* EMPEROR. **35 P L.R. 454 = 153 I C 514 (1) = 7 R.L. 442 (1) = 36 Cr L J 407 (2) = 1934 Cr.C. 865 (1) = A.I.R. 1934 Lah 545 (1).**

———**S. 176**—Oil mill—Explosion caused by explosive substances—Failure to give notice—Factory in charge

PENAL CODE (1860), S. 176.

PENAL CODE (1860), S. 176.

of manager—Conviction of owner—Sustainability—"Occupier"—Meaning of. *See* EXPLOSIVES ACT, S. 8. **18 N.L.J. 235.**

———**S. 176**—*Scope.*

S. 176 is intended to apply to parties who commit an intentional breach of obligation to report and not where the public servant has already obtained the information from other sources. 4 Cal. 623, Foll. (*Tek Chand, J.*) DHARA SINGH *v.* EMPEROR. **I.R. 1933 Lah. 456 (2) = 144 I.C. 343 = 1933 Cr.C. 774 = 34 P.L.R. 712 = A.I.R. 1933 Lah 515.**

———**S. 177**—*Doctor employed by Municipality—Municipality under contract with Government to submit* post mortem *reports—False report by doctor—If an offence under S. 177—Doctor not legally bound to Government.*

The accused was a medical officer employed by the Municipality of Barsi. There was an arrangement between the Government and the Municipality by which a fee of Rs. 4 was to be paid to the medical officer for every medico legal case sent to him on behalf of the Government. Under the Civil Medical Code, R. 9, every *post mortem* examination should be complete. Two bodies were sent to the officer for such examination and the officer sent reports about them without in fact examining the bodies and with reference at least with one of the bodies, the medical officer should have known his report was false. On prosecution of the officer under S. 177 of the Penal Code.

Held, that (*i*) having regard to the definition of 'legally bound' in S. 43, Penal Code, that section covered a breach of contract and not merely a tort; the breach of contract should be one which furnishes ground for a civil action, that is to say, in respect of which damages could be obtained under S. 73 of the Contract Act or which could be enforced specifically. Here the contract to examine the body was one between the officer and the Municipality and as there was no evidence that the Municipality had suffered any damage by breach of the contract, it could not give rise to a civil action or to a prosecution under S. 177 of the Penal Code. 14 Mad. 484, Foll.; (*ii*) there was no contract between the officer and the Government and no obligation, therefore, on the officer to furnish information to Government within the meaning of S. 177 of the Penal Code, (*iii*) the conviction should be set aside. (*Beaumont, C. J. and Barlee, J.*) EMPEROR *v.* GANPAT SUBRAO. **58 Bom. 491 = 151 I.C. 867 = 7 R.B. 85 = 35 Cr.L.J. 1429 = 36 Bom. L.R. 373 = 1934 Cr.C 653 = A.I.R. 1934 Bom. 202.**

———**S. 177**—*Filing false income-tax return without being served with notice—No offence.*

A person cannot be convicted under S. 177, I.P. Code, for furnishing a false return to the Income tax officer if he had not been served with a legal notice under S. 22 (2) of the Income tax Act, as in the absence of such notice, he is not legally bound to furnish the return. (*Addison, J.*) HARICHAND *v.* EMPEROR. **15 Lah. 832 = 36 Cr.L.J 176 = 152 I.C 682 = 7 R.L. 319 = 35 P.L.R. 544 = 1934 Cr.C 964 = A.I.R. 1934 Lah. 626.**

———**S. 177**—*Offence under—False income-tax return—Sentence.*

Assessable income was deliberately kept out of the return by a lawyer and so far from being ready and willing to put matters right, the assessee persisted in maintaining what he ought to have known to be a false defence to the charges that were preferred against him. It was found that if the assessee had included this income in the return, the income-tax leviable would have increased by Rs. 3,000. He was fined only Rs. 1,000 by the District Judge.

PENAL CODE (1860), S. 182.

Held, that the offence should be regarded as a serious one, that it might have a deleterious effect upon the position of the general body of tax payers unless other persons were deterred from acting in like manner, that a mere fine of Rs. 1,000 was not sufficient and that in addition to fine one month's simple imprisonment should be awarded. (*Page, C.J. and Mya Bu, J.*) PATEL *v.* EMPEROR. **6 I R. (Rang.) 113 = 146 I.C. 653 = 35 Cr.L.J. 131 = 1933 Cr.C. 1123 = A.I.R. 1933 Rang. 292.**

———**S. 179**—Applicability—Oral questions put under S. 126, U. P. District Boards Act. *See* U. P. DISTRICT BOARDS ACT, S. 126 (*2*). **A.I.R. 1935 All. 620 (1).**

———**S. 179**—*Complainant refusing to answer questions—Offence.*

A complainant is bound when examined as a witness to answer all relevant questions and is punishable under S. 179, I.P. Code, for refusing to do so. (*Bennet, J.*) MOTI LAL *v.* EMPEROR. **153 I.C. 907 = 36 Cr L.J. 446 = 1935 A.W.R. 123 = 1935 A.L.J. 299 = 1935 Cr.C. 267 = A.I R. 1935 All. 267.**

———**S. 179**—*Offence under—Evidence—Denial of knowledge by witness.*

A witness was asked in cross-examination as to what was the result of a particular case. Instead of saying "yes" or "no" the witness said: "I do not know," but subsequently said that the case was dismissed. The witness was then prosecuted and convicted under S. 179.

Held, that the Magistrate was not justified in assuming that the witness before him was aware of the result of the case and deliberately stated that he did not know. Besides the witness could not, by any stretch of language, be considered to have refused to answer the question put to him. He gave perfectly rational answers and there was no reason for the Magistrate to hold that the witness declined to answer it. (*Niamatullah, J.*) BHARDUL KURMI *v.* EMPEROR. **149 I.C. 1061 (1) = 1934 A.L.J. 427 = 6 R A. 1015 (1) = 35 Cr.L.J. 1036 (1) = 4 A.W.R. 542 = 1934 Cr C. 192 = A.I.R. 1934 All. 186.**

———**S. 180**—Accused refusing to answer questions and refusing to sign record—Offence. *See* CR. P. CODE, S. 364 (2). **1935 Cr.C. 652 = A I.R. 1935 All. 652.**

———**S 181**—*Perjury—Incorrect statement does not amount to.*

A witness may in good faith say what in fact is incorrect: but this will not expose him to the penalty of perjury. A lie is more than a mere untruth. It is untruth spoken with a deliberate intention to deceive. (*Ferrers, J.C. and Rupchand, A.J.C.*) GHANSHAMDAS PURSUMAL *v.* EMPEROR. **147 I.C. 1019 = 6 R. S. 171 = 35 Cr.L.J. 519 (2) = 1933 Cr.C. 1545 = A.I.R. 1933 Sind 412.**

———**S. 182**—*Burden of proof.*

In order to bring a case within S. 182, it is necessary for the prosecution to establish not merely that the information given by the accused was in fact false but that the circumstances in which the information was given were such that the only reasonable inference to be drawn is that he knew or believed it to be false. The fact that an information is shown to be false does not cast upon the party who is charged with an offence under this section the burden of showing that when he made it he believed it to be true. (*Mahadevayya, J.*) RAMA DOSS *v.* GOVERNMENT OF MYSORE. **37 Mys. H C R. 71 = 11 Mys L J. 483.**

———**S. 182**—*Case under—Complaint of Police Officer—Accused if need be given opportunity to prove his case—Legality of conviction without it.*

PENAL CODE (1860), S. 182.

There is no provision in law that before a Magistrate can enquire into a case under S. 182 on the complaint of Police Officers, the accused person must have an opportunity of proving his case. Such a provision is unnecessary and even when the accused asks the Magistrate by a petition that his case might be investigated, conviction without such preliminary opportunity being given, is not illegal, at the most it may amount to error of discretion and is not error of law. The accused person in such a case has ample opportunity to prove his case when he is called upon to enter upon his defence and the requirement that the accused in such a case must have an opportunity to have the truth or falsity of his informa tion determined in a proper tribunal is satisfied when he gets such an opportunity. 14 C. 707 (F.B.); 14 C.W.N. 765, Expl. (*Cuming, J.*) EMPEROR *v.* BABAR ALI BISWAS. **58 Cal. 1065=I.R. 1931 Cal. 919=134 I. C. 919=32 Cr.L J. 1241=35 C.W.N. 378=1931 Cr. C. 834=A.I.R. 1931 Cal. 634.**

——— **S. 182**—*Case under—Inquiry by Magistrate—Opportunity to accused.*

There is no provision in the law that before a Magistrate can enquire into a case under S. 182 on the complaint of a Police Officer, he must give the accused party an opportunity of proving the truth of his case and that if the accused person is convicted without any prelimin ary opportunity being given to prove the truth of his case the conviction is not illegal on that account. Desirability of giving such opportunity pointed out. (*M. C. Ghose, J.*) NISHI KANTA CHATTERJI *v.* EMPEROR. **60 Cal. 656=6 I.R. (Cal.) 130=145 I.C. 660=34 Cr. L J. 1059=37 C.W.N. 368=1933 Cr.C. 891=A.I.R. 1933 Cal. 532.**

———**Ss. 182 and 499** - Charge under—Absence of sanction for prosecution—Effect—Trial for offence under S. 499—If illegal. *See* CR. P. CODE, S. 195. **11 O.W.N. 1389.**

———**S. 182**—*Complaint for offence under—Accused filing* naraji *petition—Duty of Court to dispose of petition first.*

The petitioner lodged an information to the police in respect of a burglary. The Sub Inspector who investigated the case reported it to be false and asked for sanction for the prosecution of the petitioner under S. 182. The petitioner appeared in Court and filed *naraji* petition against the report of the police. The Magistrate dismissed the *naraji* petition without holding an enquiry and the petitioner was tried and convicted.

Held, that it was the duty of the Magistrate to have stayed the proceedings under S. 182, and to have enquired into the *naraji* petition and to dispose of it. Conviction set aside. (*Mitter, J.*) SHEKANDAR MIA *v.* EMPEROR. **6 I.R. (Cal.) 143=145 I.C. 824=34 Cr. L.J. 1077=37 C.W.N. 399=1933 Cr.C. 1000=A.I.R. 1933 Cal. 614.**

———**S. 182**—*Complaint to police of non cognizable offence—Prosecution—Maintainability.*

If a person merely makes a complaint to the police of a non-cognizable offence, then the police cannot take any action in respect of that offence and no prosecution under S. 182, I. P. Code, can legally be maintained in respect of such information whether that information be true or not. Accused verbally complained to the Superintendent of Police that certain people had abducted his wife and were going to marry her to another. Thereupon the police officer wrote that if a cognizable offence be found to have been committed by the persons alleged, then action should be taken.

Held, that from the order of the police officer it was clear that the information supplied by the accused was not in respect of a cognizable matter and that no prosecution under S. 182 could be maintained. (*Nanavutty, J.*) GANGA DAYAL *v.* EMPEROR. **6 I.R. (Oudh) 73=145 I.C. 819=34 Cr.L.J. 1149=10 O.W.N. 755=1933 Cr.C. 1051=A.I.R. 1933 Oudh 374.**

PENAL CODE (1860), S. 182.

———**S. 182**—Distinction between Ss. 182 and 211. *See* PENAL CODE, S. 211. **9 Mys.L.J. 112.**

———**S. 182**—*False information that buffalo is missing.*

The giving of a false information to the police that a buffalo is missing, not being the report of a cognizable offence and not in itself calling for any action on the part of the police does not justify a conviction under S. 182 of the Penal Code. 18 A.L. J. 636, Foll. (*Wort, J.*) MOSAHIR SINGH *v.* EMPEROR. **I.R. 1932 Pat. 111 (1)=136 I.C. 447 (1)=33 Cr.L.J. 314=13 Pat. L T. 83=1932 Cr.C. 311(1)=A.I.R. 1932 Pat. 170 (1).**

———**S 182**—"*Information*" *given to public servant—Statement made by witness to police under S.* 161, *Cr.P. Code*

A statement made by a witness to the police under the provisions of S. 161, Cr. P. Code, is not 'an information given to a public servant, within the meaning of S. 182, I. P. Code. (*Dunkley, J.*) MAUNG BO NI *v.* EMPEROR. **159 I.C. 95=8 R.R. 248 (1)—37 Cr.L.J. 9 (2)=1935 Cr.C. 306=A I.R. 1935 Rang. 97.**

———**S. 182**—"*Information*"—*Statement made to police officer during investigation.*

A person can be legally convicted under S. 182 in respect of a statement made to a police officer in the course of investigation. (*Saunders, J.*) BODHAN GARAIN *v.* EMPEROR. **6 I.R. (Pat.) 246 (1)=146 I. C. 234=34 Cr.L.J. 1216=14 Pat.L.T. 541=1933 Cr. C. 1268 (1)=A.I R. 1933 Pat 555 (1).**

———**S. 182**—*Issue of summons—Omission to dismiss petition—Validity of procedure.*

The petitioner lodged an *ejahar* before the Police bringing a charge of theft against a certain person. The police enquired into the matter and submitted their report. The petitioner filed before the Magistrate a *naraji* petition on which the matter was forwarded to an Honorary Magistrate for enquiry and report. After receiving the report the Magistrate passed an order summoning the petitioner under Ss. 211 and 182, I. P. Code.

Held, that the order issuing summons was invalid, because the Magistrate had not dismissed the *naraji* petition. (*Mallik and Patterson, JJ.*) LACHMI SHAW *v.* EMPEROR. **I.R. 1932 Cal. 395 (1)=137 I.C. 849=33 Cr.L J. 514 (1)=36 C.W.N. 15=1932 Cr.C. 312 (1)=A I R. 1932 Cal. 383 (1).**

[F. 36 C.W.N. 794 (795).]

———**S. 182**—*Offence under—Giving false information to public servant—Jurisdiction of Court.*

The accused was charged with having given false information to the District Superintendent of Police, Tanjore, by means of a letter which was posted at Kumbakonam and which reached the addressee at Tanjore.

Held, that the offence was committed at Tanjore for jurisdictional purposes because it was completed when the information reached the public servant. (*Sundaram Chetty, J.*) RATHINAM PILLAI, *In re.* **I.R. 1932 Mad. 379 (2)=33 Cr.L.J. 452 (1)=137 I C. 333=1932 M.W.N. 451=35 L.W. 451=1932 Cr C. 408=A.I.R. 1932 Mad. 427.**

———**S. 182**—*Offence under—Ingredients.*

It is essential, in order to secure a conviction under S. 182, I. P. Code, that the information given by the accused must have been known or believed to be false

PENAL CODE (1860), S. 182.

by him at the time when he gave it. (*Dunkley, J.*) MAUNG BO NI *v.* EMPEROR. **159 I.C. 95=8 R.R. 248 (1)=1935 Cr.C. 306=37 Cr.L.J. 9 (2)=A.I.R. 1935 Rang. 97.**

——**Ss. 182 and 211**—*Sanction for prosecution—Complainant not examined on oath—Order for prosecution based on Police report—Legality.*

A Magistrate has no jurisdiction to order an enquiry by the police and to sanction the prosecution of the complainant under Ss. 182 and 211, I. P. Code, on the basis of the police report, when he has not examined the complainant on oath. (*Kendall, J.*) BHAGWAN DAS *v.* EMPEROR. **58 All. 129=155 I.C. 1070=7 R.A. 1024=36 Cr.L.J. 860 (2)=1935 A. Cr.C. 168=1935 A.W.R. 796=1935 A.L.J. 1067=1935 Cr.C. 888=A.I.R. 1935 All. 745.**

——**S. 182**—*Scope.*

The offence contemplated under S. 182 consists in the giving of false information with the intent described in the two clauses. The question depends upon the *bona fides* of the accused. If he is reckless but honest, the section saves him for it does not punish those who merely blunder into giving false information but those who do it with an ulterior object in view, that object being to make a public servant to do or omit anything which such public servant ought not to do or omit or to use his lawful power to the injury of any person. It is the intention in the mind of the informant which forms an essential ingredient of the offence; it does not depend upon what is done or omitted to be done by a public servant on such false information. It is not enough to find that the accused had acted without due care or enquiry; it must be definitely proved that the accused *knew* there was *no just or lawful ground* for proceeding. (*Mahadevayya, J.*) RAMA DOSS *v.* GOVERNMENT OF MYSORE. **37 Mys.H.C.R. 71=11 Mys.L.J. 483.**

——**S. 182**—*Trial of an offence under—Opinion of investigating officer—If legal evidence.*

Where the accused is tried for an offence under S. 182, the opinion of the investigating officer is not legal evidence and cannot be made the basis of a finding that the report made by him to the police was false. (*Iqbal Ahmad, J.*) ROGI *v.* EMPEROR. **37 Cr.L.J. 44=159 I.C. 22=1935 A.L.J. 1145=1935 A.W.R. 1088=1935 A.Cr.C. 239=1935 Cr.C 1200=A.I.R. 1935 All. 981.**

——**S. 183**—*Amin seizing third party's cattle—Resistance by owner—Offence if constituted.*

The Amin has authority to seize the judgment-debtor's cattle but not those of a stranger who had no concern with the decree. If resistance is offered by the real owner of the sheep to their taking when the Amin attempts to seize them, the Amin cannot be deemed to have been exercising a lawful authority and no offence is committed under S. 183. (*Sundaram Chetty, J.*) NACHIAPPA GOUNDAN *v.* EMPEROR. **1932 M.W.N. 247.**

——**S. 183**—*Applicability—Act of public servant not legally justifiable—Resistance—Offence.*

S. 183, I. P. Code, plainly applies to resistance to the taking of property by lawful authority of a public servant, but it does not extend to acts which are not strictly justifiable by law. The section is not controlled by the language of S. 99, I. P. Code. Resistance to the act of a public officer acting *bona fide* though in excess of his authority may give rise to some charge in the nature of assault, but it cannot afford any foundation for a prosecution under S. 183. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* SAKHARAM RAWAJI PAWAR. **59 Bom. 545=157 I.C. 859=8 R.B. 88=36 Cr.L.J. 1263=37 Bom.L.R. 362=1935 Cr.C. 658=A.I.R. 1935 Bom. 233.**

PENAL CODE (1860), S. 186.

——**S. 185**—Bona fide *bidder—Failure to deposit earnest money—Default not wilful—No offence.*

Where the accused was proved to have made a *bona fide* bid at the time of the auction sale, and had no intention of shirking his obligations but owing to circumstances beyond his control, he was subsequently unable so deposit the earnest money due from him, he cannot be deemed guilty of an offence under S. 185, (*Nanavutty, J.*) KALI CHARAN *v.* EMPEROR. **9 Luck. 594=6 R O. 434 (2)=148 I.C. 784=35 Cr.L.J. 789=11 O.W.N. 473=1934 Cr.C. 582=A.I R. 1934 Oudh 186.**

——**S. 186**—*Attachment of movables—Warrant for—Attempt by executing officer to seal up premises of third party—Resistance to—If punishable.*

The executing officer, armed with an ordinary warrant for the attachment of movables under O 21, R. 46, C. P. Code, attempted to seal up the premises of a third party containing, according to the decree holder, the goods belonging to the judgment-debtor. The third party resisted the Nazir and the peon in doing so and was prosecuted under S. 186, Penal Code.

Held, that the possession having been in fact found to be with the third party, the procedure adopted by the Nazir in attempting to seal up the premises of the third party was wrongful and that the accused was justified in resisting an unlawful proceeding. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) NAGARMAL MARWARI *v.* EMPEROR. **11 Pat. 493=I.R. 1932 Pat. 257=139 I.C. 834=33 Cr.L.J. 883=13 Pat.L.T. 689=1932 Cr.C. 723=A.I.R. 1932 Pat. 279.**

——**Ss. 186 and 99**—Illegal warrant—Resistance to execution—Offence — Private defence. *See* PENAL CODE, SS. 99 AND 186. **A.I R. 1934 Mad 664 (2)=67 M.L.J. 510.**

——**S. 186**—Illegal warrant — Resistance to and obstruction to the execution of—No offence—Attachment before judgment—Form incomplete and defective. *See* C. P. CODE, O. 38, R. 5 AND APP. F. FORM NO. 5. **55 All. 985=A.I.R. 1933 All. 759.**

——**S. 186**—"*Obstruction*"—*If includes constructive obstruction to judicial officers—Execution before Subordinate Judge—Complaint of obstruction to* naib nazir *—Enquiry by subordinate Judge and order for complaint under S.* 186, *I. P. Code—Bar of Cr. P. Code, S.* 95 (1) (a).

S. 186, I. P. Code, does not contemplate constructive obstruction to a judicial officer in the discharge of his judicial functions, even when they are of a quasi executive character or when the proceedings before him are in execution. In execution proceedings, on receipt of an application purporting to be an application under Ss. 195 and 476, Cr. P. Code, relating to resistance to the *naib nazir* in attaching the judgment-debtor's property a Subordinate Judge held a sort of judicial enquiry and directed a complaint to be filed against the obstructors under S. 186, I. P. Code.

Held, that S. 195 (1) (*a*) of the Cr. P. Code, was a bar to the cognisance of the complaint under S. 186, I. P. Code, and it could not be taken cognisance of. (*Macpherson, J.*) THAKUR PARSAD *v.* EMPEROR. **37 Cr.L.J 104 (2)=1936 Cr.C. 103=8 R.P. 291=159 I.C. 503=16 Pat L.T. 808=A.I R. 1936 Pat. 74.**

——**S. 186**—"*Obstruction*"—*Threats of violence.*

Obstruction or no obstruction is essentially a question of fact depending on the facts and circumstances of each case, Mere threats of violence may not, in all cases, be sufficient evidence of obstruction. The real question is

PENAL CODE (1860), S. 186

whether the action or attitude of the accused was such as to prevent the public servant in carrying out his duties. Where it is solely a matter of threats, they must be of such a nature so as to affect the public servant concerned as to cause him to abstain from proceeding with the execution of his duties. Threats by themselves *may* easily amount to an obstruction, if coupled 'with an aggressive or menacing attitude on the part of the persons uttering the threats and still more so if they are accompanied by the flourishing or even the exhibition of some kind of weapon capable of inflicting physical injury. 29 Cr L.J. 645, Ref. (*Costello, J.*) NAFAR SARDAR *v.* EMPEROR. **(60 Cal. 149=36 C.W.N. 1038=141 I.C. 636=I R. 1933 Cal. 153=34 Cr.L.J. 181=1932 Cr.C. 893=A.I.R. 1932 Cal. 871.**

———**S. 186**—*Obstruction—Threats, when amount to.*

The question of whether an offence under S. 186 of the Penal Code has or has not been committed must depend upon the particular facts and circumstances of each case. Mere threats by themselves would not in all cases amount to obstruction; but threats of violence made in such a way as to prevent a public servant from carrying out his duty may easily amount to an obstruction of the public servant, particularly if such threats are coupled with an aggressive or menacing attitude on the part of the person uttering the threats or a show of physical force. A.I.R. 1932 Cal. 871, Foll. When the Commissioner along with the plaintiff and his pairokars went to defendant's house to attach his property, the defendant and his sons (the accused) came out, armed with lathis, adopted an offensive attitude and said that they would break the head of any one who should point out the property for attachment. The Commissioner apprehended an assault and retired but one of the plaintiff's men was actually assaulted.

Held, that the conduct of the accused amounted to obstruction of a public servant within the meaning of S. 186 of the Penal Code. (*King and Collister, JJ.*) EMPEROR *v.* TOHEA. **55 All. 985=6 I.R. (All.) 272=146 I.C. 183=34 Cr.L.J. 1211=1933 A.L.J. 952=1933 Cr C. 1324 A.I.R. 1933 All. 759.**

———**S. 186**—*Obstruction—Verbal objection.*

A person objecting to the search of his house by the Police without using force or threatening language or other overt act of obstruction is not guilty of an offence under S. 186, Penal Code. Case-law Ref. (*Bagnley, J.*) AH CHOUNG *v.* EMPEROR. **9 Rang. 601=I.R. 1932 Rang. 61=135 I.C. 653=33 Cr.L J. 175=1932 Cr.C. 111=A.I.R. 1932 Rang. 21.**

———**Ss. 186 and 332**—*Octroi officer—Refusal to show bundle for inspection—Attack on and causing injury to such officer—Offence.*

Accused travelled by train from an outside place to a place within a Municipality and after alighting at the Railway station was proceeding to their houses which were outside the Municipality They had with them a bundle, and at the Octroi station the Naka peon asked them to show the bundle, suspecting that it contained dutiable articles. They refused and when the Naka Munshi came up and demanded the bundle for inspection, the accused instead of complying with it, attacked him, causing injuries The Municipality in question was levying an octroi tax, under S. 59 (*a1*) of the Bombay District Municipal Act, on goods imported within the Municipal limits.

Held, (1) that the contents of the bundle being liable to terminal tax as they were in transit, in case they were dutiable goods. The Naka Munshi was acting with his authority when he demanded the bundle for inspection and the refusal of the accused constituted an obstruction

PENAL CODE (1860), S. 187.

to the discharge of his public functions, punishable under S. 186, I. P. Code; (2) that the attack on him, causing him injuries, rendered the accused liable also to conviction under S. 336, I. P Code. (*Rupchand and Mehta A J.Cs*) SAJAN AHMAD *v.* EMPEROR. **29 S. L.R. 54=159 I.C 665=1935 Cr C. 1308=8 R S. 91=37 Cr.L.J. 148=A.I.R. 1935 Sind 245.**

———**S. 186**—*Offence under—Evidence.*

In order to substantiate the charge under S. 186 it is necessary for the prosecution to establish that the public servant was acting in the discharge of his public functions. (*Srivastava, J.*) LACHMAN SINGH *v.* EMPEROR. **I.R. 1933 Oudh 189=143 I.C. 686=34 Cr.L. J. 614=10 O.W.N. 553=1933 Cr.C. 672=A.I.R. 1933 Oudh 281.**

———**S. 186**—*Offence under—"Public servant"—Obstruction to toll contractor and servants—Offence.*

Accused, a licensed motor driver, plying a motor bus in order to avoid payment of toll drove his bus between 3rd July, 1933 to 8th July, 1933, on every day by a side track, before reaching the main bar, and after going along it for about three furlongs, again took the main road; and on being signalled to stop at a checking bar further up the road, he passed the bar without stopping to pay the toll, although he was signalled to stop every time that he passed. On a prosecution under S. 186,

Held, that the accused prevented the toll contractor or his servant—who were public servants—from collecting the tolls under the Tolls Act and thus obstructed him in the discharge of his duty and was therefore guilty of an offence under S. 186. (*Murphy and Sen, JJ.*) EMPEROR *v* SULEMAN ABBA **1935 Cr C. 25 (2)=154 I.C. 557=7 R B 337=35 Cr.L.J. 516=36 Bom.L.R. 1124=A.I.R. 1935 Bom. 24.**

———**S. 186**—*Public Servant—Sanitary Inspector under Bengal Food Adulteration Act.*

The obstruction to a Sanitary Inspector examining food believed to be adulterated is not an offence under Ss. 21 and 12 (2) of the Bengal Food Adulteration Act if the Inspector is not duly authorised to perform the duties under Ss. 10 and 12 of the Act. The obstruction is however punishable under S. 186, I.P. Code, the Sanitary Inspector being a public servant. (*Panckridge, J.*) SHAILESH CHANDRA LAHIRI *v.* NEHAICHAND MARWARI. **59 Cal. 234=I R 1932 Cal. 384=137 I C. 812=33 Cr.L J 521=36 C.W.N 134=1932 Cr.C. 452=A.I.R. 1932 Cal. 462.**

———**S. 186**—*Warrant authorising seizure—Resistence to Nazir—Rules of Court regarding attachment not strictly adhered to.*

If a public officer does no more than act upon the official instructions he has received and if those official instructions are not of such a kind as to be obviously and patently illegal, then he acts properly in carrying out such orders. If the *Naib Nazir* is armed with a warrant authorising him to seize the property and keep it in his custody, resistance to his carrying out his orders is an offence under S. 186 and it is no justification for the accused that under the rules framed by the Court for attachment the attaching officer was directed to give an opportunity to the debtors to have the property kept in safe custody and that the *Nazir* in the present instance failed to adopt that procedure. (*Courtney-Terrell, C. J.*) BIRDHI CHAND JAIPURIA *v.* DARBARI JAYASWAL. **142 I.C. 144=I R 1933 Pat. 122=34 Cr L.J. 263=13 Pat.L T. 480=A.I R. 1932 Pat. 276.**

———**S 187**—*Arrested person refusing to move—Assistance of accused demanded by Police Officer but refused—Nature of offence committed.*

PENAL CODE (1860), S. 188.

Where a person who was arrested by a Police Officer lay down on the ground and refused to move, and the Police Officer demanded the assistance of the accused who however refused it.

Held, that the assistance demanded of the accused was to prevent the escape of the arrested person, and that the accused having refused it was guilty of an offence under S. 187, I P. Code. (*Boys, J.*) EMPEROR *v.* AMBIKA PRASAD. **I R. 1932 All. 527=139 I.C. 106=33 Cr.L J 736=13 L.R. 89 (Cr.)=1932 Cr.C. 594=A.I R 1932 All 506.**

——**S. 188**—*Charge under—Complaint in writing under S. 195, Cr. P. Code - Whether dispensed with by S. 11 of the Ordinance V of* 1930.

Where the parties convicted were under S. 188 of the I. P. C, for disobedience of an order by the District Magistrate, and there was no complaint in writing of the public servant concerned; *i.e.*, in this case of the District Magistrate, under S. 195, Cr. P. Code.

Held, the requirements of S. 195 are not abrogated by S. 11 of the Ordinance (V of 1930) and the Magistrate had no power to take cognizance of the offence on the report of the Police and the Proceedings are therefore null and void and the conviction is invalid. (*Beaumont C.J. and Barlee, J.*) EMPEROR *v.* GANESH VASUDEV MAVLANKAR. **55 Bom 322=I. R. 1931 Bom 252=130 I.C. 396=32 Cr.L J. 507=33 Bom.L.R. 59-1931 Cr.C. 183=A.I.R. 1931 Bom. 135.**

——**S. 188**—*Conviction under—Requisites for—Knowledge of likelihood of breach of peace, sufficient—Finding about each accused, not necessary*

Provided the accused knew that their disobedience of the order promulgated under S. 144 of the Cr. P. Code was likely to produce harm in the sense of creating a breach of the peace, a conviction under S. 188 of the Penal Code is not bad merely because there was no definite finding of the Magistrate that the action of each accused led to or caused a breach of the peace 32 C. 793, Diss. from. (*Nanavutty, J.*) EMPEROR *v* NIAZU KHAN. **9 Luck. 543=6 R O. 419=148 I C. 518=35 Cr L J. 699=11 O W.N. 384=1934 Cr C. 509=A I.R. 1934 Oudh 162.**

——**S. 188**—*Disobedience of lawful order under S. 133, Cr. P. Code—Validity of order cannot be questioned.*

The validity of a final order passed under S. 133 of the Cr P. Code cannot be questioned at the trial of the accused for disobedience of that order under S. 118 of the Penal Code. (*Guha and Bartley, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* KHODA BAKSHA SHAH **60 Cal. 1336=6 R C. 484=148 I C 808=35 Cr L J. 778=1934 Cr. C. 364 (1)=A.I R 1934 Cal. 242 (1).**

——**S. 188**—*Disobedience of order—Offence when constituted.*

Under S. 188 mere disobedience of an order does not constitute an offence in itself. There must be a disobedience of the order and then it must be shown that the disobedience has a certain consequence or tends to some result. It is not right, under S. 188, to classify the accused in the graver category merely upon the general consideration that now-a-days, if any one is arrested, it may lead to a riot or affray. (*Rankin, C.J and Mallik, J.*) LACHMI DEVI *v.* EMPEROR. **58 Cal. 971=I R. 1931 Cal 369=130 I.C. 241=32 Cr. L.J. 511=53 C.L J. 461=35 C.W.N. 257=1931 Cr. C. 154=A.I R. 1931 Cal. 122.**

——**S. 188**—*Disobedience of order by relative of accused—Burden of proof.*

PENAL CODE (1860), S. 188.

In order to satisfy the requirements of S. 188, there must be proof that a person having knowledge of the order and being thereby directed to abstain from a certain act has disobeyed such direction. Where after a notice served on the accused forbidding him to remove the crop, it was found that the crops had been removed by the nephew of the accused, it is for the prosecution to prove that the nephew was aided or abetted by the accused and not for the accused to show that the removal of the crops by the nephew was without his consent. (*Ferrers, J.C. and Aston A.J.C.*) LALCHAND *v.* EMPEROR. **I.R. 1933 Sind 103=142 I.C. 591=34 Cr L.J 362=1933 Cr.C. 228 (1)=A.I.R. 1933 Sind 93 (1).**

——**S 188**—*Disobedience of order under S. 144, Cr. P. Code—Knowledge of order—Proof.*

Where the accused is prosecuted for disobedience of an order promulgated under S. 144, Cr. P. Code, it is undoubtedly not sufficient for the prosecution to prove that the order has been promulgated but it must further prove that the accused had knowledge of the promulgation of the order. But the question of knowledge of the accused must be a matter of evidence and the prosecution can only prove the circumstances which will enable the Court to infer either that the accused knew of the order or that he did not know of it. (*Kendall, J.*) SHANDER SHANKER *v.* EMPEROR. **155 I C. 185=7 R.A. 901=36 Cr L.J. 639=1935 A. Cr.C. 122=1935 A.W R. 590=1935 Cr C. 570=A.I R. 1935 All. 552.**

——**S. 188**—Disobedience of order under S. 144, Cr. P. Code—Prosecution for—Offence, if triable by Magistrate passing original order—Necessity for complaint by Magistrate. *See* CR. P. CODE, S. 144—MANDATORY ORDER. **39 C.W.N. 1053.**

——**S. 188**—Erroneous order under S. 144, Cr. P. Code—Disobedience—No offence committed. *See* CR. P. CODE S. 144—MANDATORY ORDER. **A.I.R. 1933 Cal. 734.**

——**S. 188**—Offence under—Disobedience of order under S 144, Cr. P. Code—Order not duly promulgated—Conviction—Sustainability. *See* CR. P CODE, S. 144—SERVICE OF ORDER. **39 C.W.N. 141=A.I.R. 1935 Cal. 251.**

——**S. 188**—Offence under—Need for complying with S. 195, Cr. P. Code—Effect of Ordinance V of 1930. *See* CR. P. CODE, S. 195—COMPLAINT. **58 Cal. 971=A I R. 1931 Cal. 122.**

——**S. 188**—*Order of Commissioner of Police under S. 62-A (4), Calcutta Police Act, and S. 93-A, Suburban Police Act—Breach—Offence constituted.*

Breach of a lawful order issued by a Police Commissioner under S. 62 A (4), Calcutta Police Act, and S. 93 A, Suburban Police Act, is an offence under S. 188, Penal Code, if such disobedience causes or tends to cause annoyance or injury, or risk as such, to any person lawfully employed, or causes or tends to cause danger to human life, health or safety or causes or tends to cause a riot or affray. If such disobedience is described in the charge as offence under S. 62 A (6), Police Act, it also being an offence under S. 183, I.P.C. the description given must be treated as incomplete, alternatively it is supererogatoy and the provisions of Ss. 225, 232 and 337, Cr. P. Code, apply. (*Lort Williams and S K. Ghose, JJ.*) RAMENDRA CHANDRA RAY *v.* EMPEROR. **58 Cal 1303=I R. 1931 Cal. 558=132 I.C. 174=32 Cr.L J. 844=35 C.W.N. 716=1931 Cr. C. 506=A I R. 1931 Cal. 410.**

——**S. 188**—Order under S. 144, Cr. P. Code—Disobedience. *See* CR. P. CODE, S. 134—DISOBEDIENCE OF ORDER. **1932 M.W.N. 1073.**

PENAL CODE (1860), S. 138.

———**S. 188**—Prior proceedings under S. 291, I.P. Code—Acquittal—Subsequent proceedings for offence under S. 188—Bar. *See* CR. P. CODE, S. 403—APPLICABILITY. **A I.R 1930 Lah. 1055.**

———**S. 188**—*Process under—Issue of—Legality—Narazi petition of complainant—Enquiry into.*

The Court ought not to issue process against the complainant under S. 188 of without enquiring into his narazi petition questioning the correctness of the police report to the effect that his case was false 35 C.W.N. 1210; 36 C.W.N. 15 and 14 C. 707 (F.B.). Rel. (*Mallik and Remfry, JJ.*) CHARLES JOHNS *v.* EMPEROR. **I.R. 1932 Cal. 602=139 I.C. 217=33 Cr. L.J. 724=36 C.W.N. 794=1932 Cr.C. 550=A.I.R. 1932 Cal. 550.**

[R. 37 C.W.N. 399 (400).]

———**S. 188**—"*Promulgated*"—*Order under S. 144 served on an individual.*

Quaere. Whether an order under S. 144 served on an individual directing him to abstain from the construction of a building can be said to be "promulgated" within the meaning of the section. (*Costello, J.*) CHUNILAL MATILAL *v* EMPEROR. **I.R. 1932 Cal. 648=139 I.C. 739=33 Cr L.J. 829=39 C.W.N. 792 =1932 Cr.C. 892=A I.R. 1932 Cal. 868.**

———**S. 188, Para. 3**—*Disobedience to order under S. 144, Cr.P. Code—Tendency to cause affray.*

Where the accused was charged with having disobeyed an order under S. 144 of the Code directing him to abstain from proceeding with the construction of a building and the Magistrate came to the conclusion that it tended to cause an affray on the ground that "such conduct always tends to cause affray, specially when it is in open defiance of a Magistrate's order,"

Held, that it was wrong to argue from the general to the particular and that the Magistrate ought to have come to the conclusion from the actual facts of the case as to whether or not there was a tendency for an affray to be caused. (*Costello, J.*) CHUNILAL MATILAL *v.* EMPEROR. **I.R. 1932 Cal 648=139 I.C 739=33 Cr.L J. 829=36 C.W.N. 792=1932 Cr.C. 892=A.I. R. 1932 Cal. 868.**

———**S. 189**—*Obstruction of public servant—Threat to the Revenue Inspector not to enter by particular door.*

Where the petitioner was alleged to have threatened harm to the Revenue Inspector only if he went through a particular door but he said nothing to deter the Revenue Inspector from getting at the cattle by another available door and attaching them,

Held that the conviction under S. 189 was not sustainable. (*Burn, J.*) SUNDARARAMANUJA REDDI *v.* EMPEROR. **1933 M.W.N. 1271 (2).**

———**S. 189**—*Offence under—Evidence.*

Two police constables went at night to the house of a *dagi* who was under surveillance under the Bengal Police Regulations and called him out from a public street. The brother of the *dagi* came out with a *lathi* in his hand and enquired why they came. After the facts were explained, the accused threatened the constables with breaking their heads. While this happened, the *dagi* came out and stood by.

Held, that the accused was guilty of an offence under S. 189, 27 Mad. 52, doubted and dist (*Suhrawardy and Costello, JJ.*) EMPEROR *v.* YAR MUHAMMAD. **58 Cal. 392=I.R 1931 Cal. 840=134 I.C. 536=32 Cr. L J 1181=1931 Cr.C. 600=A I.R 1931 Cal. 448.**

———**Ss. 191 and 193**—*Charge of perjury—Proof required.*

The rule of law is perfectly clear that in order to establish a charge of perjury, it is necessary to prove not only that the prisoner made a statement which was false, but also that he knew or believed it to be false or did not believe it to be true. In other words, the statement must be proved to be intentionally false. There are cases in which a person might honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time he might be convinced that he was wrong and swear to the reverse without meaning to swear falsely on either of the two occasions. (*Shadi Lal, C.J.*) TAJ MAHOMED *v.* EMPEROR. **15 Lah. 407=36 P.L R. 527=29 P.L.R. 14=107 I C. 100= 29 Cr.L J. 100=A.I.R. 1928 Lah. 125.**

———**Ss. 191, 192 and 193**—*Construction—Accused—If entitled to special protection.*

On the language of Ss. 191 193 it cannot be held that the accused is in any more privileged position than an ordinary person. To so hold would be dangerous and would put a premium on the fabrication and manufacture of false evidence. There is therefore no warrant for holding that any special protection is intended to be afforded to accused persons who can escape from the penalty imposed, by S. 193, by reason only of being accused persons. (*Sulaiman, C.J. and Rachhpal Singh, J.*) BHAGIRATH LAL *v.* EMPEROR. **1934 A.L.J. 1064=4 A.W.R. 535=1934 Cr. C. 1314=57 All. 403 =153 I.C. 619=7 R A. 544=36 Cr.L.J. 379=A I.R. 1934 All. 1017.**

———**S. 191**—Requisites of offence—False evidence given intentionally. *See* CR. P. CODE, S. 477—COMPLAINT. **A.I.R. 1933 All. 318.**

———**Ss. 192 and 120 B**—Conspiracy—Fabricating false evidence—Knowledge of conspirators. *See* PENAL CODE, SS. 120 B AND 192. **37 C.W.N. 514=A.I.R. 1933 P C. 124=64 M.L.J. 466 (P.C.).**

———**S. 192**—*Entering false record in Police diary—Offence if constituted.*

Quaere: Whether to enter a false record in a police diary can be said to be fabricating evidence at all especially as Ss. 162 and 172, Cr. P. Code, appear to negative the admissibility of the entry as evidence save for the purpose of contradicting a witness whose statement is recorded in writing or of contradicting the police officer himself. (*Lord Atkin.*) DWARKANATH VARMA *v.* EMPEROR **I.R. 1933 P.C. 65=142 I.C. 335=37 C. W.N. 514=34 Cr.L J. 322=37 L.W. 584=1933 M. W.N. 409=1933 Cr.C. 442=35 Bom. L.R. 507=14 Pat L.T. 305=14 L.R. 81 (Cr.)=10 O.W.N. 522= 1933 A L J. 645=57 C L.J. 177=A.I.R. 1933 P.C. 124=64 M.L J. 466 (P.C.).**

———**S. 193**—*Contradictory statements before committing Magistrate and Sessions Court—Prosecution for—Expediency of.*

Even when the evidence of the witnesses is found to be false, it is not incumbent on the Courts to order prosecution, without exercise of proper judicial discretion having due regard to its reaction on the administration of justice. Where therefore a witness makes false statements before the police under S. 164, and before the Committing Magistrate, but retracts the same in the Sessions Court as being false and the retracted statements are found to be false, the prosecution of such witness under S. 193, Penal Code, is expedient in the interests of justice. (Case law considered). (*Niyogi, A.J.C.*) BAJI RAO *v.* EMPEROR. **I.R 1933 Nag. 182=143 I. C. 747=34 Cr.L.J. 649 (2)=1933 Cr.C. 698=A.I.R. 1933 Nag. 179.**

———**S. 193**—*Enquiry by Magistrate on police report against headman—Witness making false statement—Conviction for perjury—Legality—Cr. P. Code, S. 45.*

PENAL CODE (1860), S. 193.

Where upon a police report against the headman of a village, the Magistrate held an enquiry during the course of which a witness made a false statement, a conviction of the witness under S. 193, I. P. Code, could not be sustained as the orders of a Magistrate in respect of such matters are executive orders and as the Magistrate had no power to administer oath to the witness when he was examined before him. (*Sulaiman, C J. and Rachhpal Singh, J.*) DAYA RAM *v.* EMPEROR. **57 All. 407 = 153 I.C. 133 (1) = 7 R.A. 447 (2) = 36 Cr.L.J. 264 = 16 L.R. 5 (Cr.) = 1934 A.L.J. 1087 = 4 A.W R 816 = 1934 Cr.C. 1306 (1) = A.I.R. 1934 All. 988 (2).**

———**S. 193**—*Essentials—Intention—Necessity—Fabrication for screening oneself—If sufficient.*

Per *Jack, J.*—An accused could only be guilty under S. 193, if he had the intention of fabricating evidence in order that it should appear in evidence in a judicial proceeding or in a proceeding taken by law before a public servant, as such, or an arbitrator as laid down in S. 192. The prosecution must therefore show that there was such an intention and that the accused did not fabricate evidence merely to screen himself in the belief that his conduct would result in no proceedings whatever being taken. (*Lort Williams and Jack, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* TARAK NATH CHATTERJEE. **162 I.C. 910 = 37 Cr.L J. 698 = 8 R.C. 663 = 62 Cal. 666 = 1935 Cr C. 491 = A.I.R. 1935 Cal 304.**

———**S. 193**—Fabrication of electoral roll—Insertion of certain names—Dishonest means—Offence under Ss. 193 and 465. *See* PENAL CODE, S. 465. **A.I.R. 1934 Cal. 838.**

———**S. 193**—*Forged receipt—Conviction of person using and attestors.*

Where it was shown that when the 1st accused was sued for a debt, he produced a receipt alleged to be given by the creditor but which was in fact a forgery attested by 2nd and 3rd accused and written by the 4th accused,

Held, that all the accused were liable to be convicted under S. 193,

Held further, that the 1st accused and not the rest can be convicted under S. 471, since the latter did not use the forgery in any judicial proceeding, (*Krishnan Pandalai, J.*) BOMMIREDDI KAREPPA *v.* EMPEROR. **1932 M.W N. 454.**

———**S. 193**—*Intention of accused—If material.*

The intention of the accused is an essential ingredient in the constitution of the offence of perjury. The question of intention goes to the root of the matter and if the applicant has proved that he did not intentionally make any false statement, he is entitled to an acquittal. (*Nanavutty, J.*) ANANDI PRASAD *v.* EMPEROR. **6 R.O. 262 = 11 O.W.N. 87 = 147 I.C. 395 = 35 Cr.L.J. 390 = 1934 Cr.C. 234 = A.I.R. 1934 Oudh 65.**

———**S. 193**—Offence under—Charge and counter-charge—Affidavit evidence—Value — Enquiry under S. 476, Cr. P. Code. *See* CR.P. CODE, S. 476—LEGALITY OF ORDER. **58 Cal. 1211 = A.I.R. 1931 Cal, 344**

———**Ss. 193 and 465**—*Offences under—Electoral roll—Alteration after final publication—If amounts to.*

One of the purposes of an electoral roll may very well be the furnishing of evidence in an election dispute which may come up for decision in a Court of law; and some at least of the consequences which might follow the unauthorised alteration of an electoral roll after its final publication would be to cause damage or injury to the public or to any person. Therefore such an alteration of an electoral roll may amount to an offence under S. 193 or 465, I.P Code. (*Lort Williams and Khundkar, JJ.*) MOULVI NUR AHAMMED *v.* JOGESH CHANDRA SEN. **62 Cal. 275 = 1934 Cr.C. 1359 = 153 I.C. 657 = 7 R.C. 392 = 36 Cr. L.J. 385 = 39 C.W.N. 20 = A.I.R. 1934 Cal. 838.**

———**S. 193**—*Offence under—Isolated answer in Court proceeding—Notice to accused.*

There had been unhappiness and mutual recrimination between the husband and wife which resulted in divorce proceedings. The husband some time later lodged a complaint of theft of money among some other things against the wife and during examination, when asked as to wherefrom he got the money, stated that he had taken it as a loan from a lady with whom he was living as a paying guest. The lady, when subsequently examined, was asked several other questions and in the course of such examination, one isolated question was put to her whether she had lent money to the husband. She replied the she had not done so as far as she could remember. On this the Magistrate came to the conclusion that the husband's statement was a deliberate falsehood and made a complaint under S. 125, Cr. P. Code, for prosecuting the husband under S. 193, Penal Code, for perjury.

Held, that the charge of perjury was a serious charge and should not be lightly made or based upon a mere isolated answer as in this case, that though the Magistrate had discretion as to whether or not he should give the accused an opportunity to show case as to why a complaint should not be made, still the Magistrate ought to have given notice to the accused so that he might have explained the circumstances under which he gave his evidence and that people are not to be trapped for purpose of prosecution for perjury but should be prosecuted only after a proper examination. (*Lort Williams and McNair, JJ.*) JAMES *v.* EMPEROR. **6 I.R. (Cal.) 50 = 144 I.C. 846—34 Cr.L J. 833 = 1933 Cr.C. 970 (2) = A.I.R. 1933 Cal. 606 (2).**

———**S. 193**—*Offence under—Proof—More than single witness, if necessary.*

The English common law rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury does not apply to India are Courts which are bound by the Statute law. Under S. 134 of the Evidence Act no particular number of witnesses is required in any case. This rule applies to a prosecution for an offence under S. 193, I.P. Code. (*Kendall, J.*) ARJUN SINGH *v.* EMPEROR. **53 All. 598 = I.R. 1931 All. 402 (2) = 131 I.C. 594 (2) = 32 Cr.L J. 780 = 12 L.R. 50 (Cr.) = 1931 Cr.C. 618 = A.I.R. 1931 All. 362.**

———**Ss. 193 and 199**—*Offence under—Onus of proof.*

In prosecutions under Ss. 193 and 199, it is not sufficient for the prosecution to show that the statement is false and thus throw a burden of proof on the accused to establish good faith as a defence but the prosecution must show affirmatively the knowledge that the evidence given or declaration made was false or else belief in its being false or absence of a relief in its truth. The real question in such cases is the state of mind of the accused at the time of filing the affidavit. (*Rowland J.*) JAGAT SINGH *v.* EMPEROR. **6 I R. (Pat.) 139 = 144 I.C. 1011 = 1934 Cr.C. 289 = 34 Cr.L.J. 917 = A.I.R. 1934 Pat. 133.**

———**S. 193**—*Perjury—Essentials of offence.*

In order to establish the offence of perjury, the prosecution must prove not only that the statement was false but also that the person making the statement either knew or believed it to be false or did not believe it to be true. It is not necessary that the statement alleged to

PENAL CODE (1860), S. 193.

be false must be material to the issue. (*Shadi Lal, C. J.*) MAHBUB ELAHI *v.* EMPEROR. **I.R. 1932 Lah 667.**

——**S. 193**—*Perjury—Witnesses believed by trial Court—Appellate Court ordering prosecution—Opinion of trial Court to be considered.*

The fact that the trial Judge felt himself able to accept the statements of the witnesses sought to be proceeded against for perjury is a point to be taken into account in their favour where the prosecution is at the instance of the appellate tribunal. Prosecutions for perjury should not be launched unless there is some proof likely at least to satisfy a Court that the statements made by the person charged are false statements. (*Pullan, J.*) YAR MAHOMED *v.* BANSI SINGH. **13 L.R. 122 (Cr.) = 1932 Cr.C. 826 = 141 I C. 146 (2) = I.R. 1933 All. 54 = 34 Cr.L.J. 105 = A.I.R. 1932 All. 674.**

——**S. 193**—*Proceedings contemplated—Onus.*

If the charge is that the evidence has been fabricated in connection with proceedings which are only contemplated by the accused; then the burden is on the Crown to prove the fact that proceedings were contemplated. (*Beaumont, C. J. and Broomfield, J.*) INDRA CHAND BACHRAJ, *In re.* **56 Bom. 213 = I R. 1932 Bom. 219 = 137 I.C. 134 = 33 Cr L J. 386 = 34 Bom.L.R. 294 = 1932 Cr C. 244 = A.I R. 1932 Bom. 185.**

——**S. 193**—Proceedings in Court of Law contemplated—Offence in relation to—Complaint from Court under S. 195, Cr. P. Code, not necessary. **56 Bom. 213 = I.R. 1932 Bom. 219 137 I.C. 134 = 34 Bom. L.R. 294 = 33 Cr.L J. 386 = 1932 Cr.C. 244 = A.I.R. 1932 Bom. 185.**

——**Ss. 193 and 471**—Promissory note entrusted to clerk for filing suit—Suit filed after limitation period but with an endorsement found to be forged—Offence constituted. *See* CR. P. CODE, S. 195 (1) (*b*) AND (*c*) —COMPLAINT. **A.I R. 1933 Mad. 413.**

——**Ss. 193 and 194**—*Prosecution for perjury in respect of statements recorded under S. 164 of the Cr. P. Code—Validity of.*

In recording a statement under S. 164 of the Cr. P. Code a Magistrate is empowered to administer to the deponent an oath or solemn affirmation and the statement so recorded can form the subject of an alternative charge under the perjury sections of the Penal Code. (*Broadway and Abdul Qadir, JJ.*) EMPEROR *v.* PARMA NAND. **14 Lah. 507 = I.R. 1933 Lah. 303 = 142 I C. 776 = 34 Cr.L.J. 469 = 34 P.L.R. 421 = 1913 Cr.C. 564 = A.I.R. 1933 Lah. 321.**

——**S. 193**—*Sentence — Perjury in Magistrate's Court—Accused setting matters right before tribunal.*

The accused committed perjury in the Magistrate's Court but had done his best to put the matter right before the tribunal. He had been actually in the lock-up for almost 18 months. He was a student when he was arrested and five years of his life had been wasted. He might have been prosecuted for failing to comply with the terms under which he was tendered a pardon but he had not in fact been prosecuted.

Held, that the sentence of 18 months was too severe and should be reduced to six months. (*Young, C. J.*) BRAHM DATT *v.* EMPEROR. **1934 Cr.C. 1375 = 16 Lah. 153 = 153 I.C. 547 = 7 R L. 446 = 36 Cr L.J. 402 = 37 P.L R. 534 = A.I R. 1934 Lah. 981.**

——**S. 193**—*Witness reverting to truth—Advisability of prosecution.*

It is inadvisable to prosecute under S. 193, if a witness reverts to the truth in the course of a trial, more especially when the witness was not a willing witness or the previous statement was given under circumstances

PENAL CODE (1860), S. 199.

indicating that pressure might have been used. (*Ferrers, J. C. and O'Sullivan, A.J. C.*) MT. JANI *v.* EMPEROR. **152 I.C. 254 = 7 R.S. 78 = 36 Cr.L.J. 10 = 1934 Cr.C. 1147 = A.I R. 1934 Sind 155.**

——**S. 193, Expl. 2**—*Evidence in judicial proceeding—Statement under S. 164, Cr. P. Code.*

A statement under S 164, Cr.P. Code, is not evidence in a stage of a judicial proceeding within the meaning of Expl. II to S. 193. (*Dalip Singh, J.*) SAJAWAL *v.* EMPEROR. **I.R. 1932 Lah. 297 = 137 I.C. 131 = 33 Cr.L.J. 413 (2) = 33 P.L R. 179 = 1932 Cr.C. 278 (1) = A.I R. 1932 Lah 254 (1).**

——**S. 193, Expl. (2)**—*Judicial proceeding—Investigation under S. 164, Cr. P. Code—Statements made during.*

Statements recorded by a Magistrate in the course of a Police investigation under S. 164, Criminal Procedure Code, are evidence in a stage of judicial proceeding within the meaning of Expl. 2 to S. 193 of the Penal Code. (*Burn, J.*) MAROMMA, *In re.* **I.R. 1933 Mad. 43 = 140 I.C. 756 = 34 Cr.L.J. 92 = 1933 M.W. N. 100 = 1933 Cr.C. 157 = A.I.R. 1933 Mad. 125.**

——**S. 199**—*Applicability — "Declaration which public servant is authorised by law to receive as evidence"—Application to currency officer—False allegation of loss of half note—Fraudulent request for value of note—Offence.*

Under the rules framed under the Paper Currency Act, the Currency Officer who is a public servant is authorised by law to receive as evidence any declaration made to him by a claimant to value of a currency note and to act upon it. Where, therefore, the accused applies to him for value of a note, sending a half-note and alleging that the other half has been lost, and the allegation and claim are found to be false and fraudulent, he is guilty of an offence under S. 199, and liable to punishment thereunder. (*Ramachandra Rao, J.*) PARASURAM SAIT *v.* GOVERNMENT OF MYSORE. **12 Mys.L J. 467.**

——**S. 199**—*Applicability—Execution application.*

S. 199 does not apply to applications for execution of decrees containing false averments. 10 B. 288, Foll. (*Nanavutty, J.*) ANANDI PRASAD *v* EMPEROR. **6 R O. 262 = 11 O.W N. 87 = 147 I.C. 395 = 35 Cr.L.J. 390 = 1934 Cr.C. 234 = A.I.R. 1934 Oudh 65.**

——**S. 199**—Applicability—Revenue Court—Proceedings in, under Land Revenue Act—Swearing to false affidavit—Offence. *See* C. P. LAND REVENUE ACT, S. 201. **155 I.C. 557 = A.I.R. 1935 Nag. 125 (1).**

——**Ss. 199 and 200**—*Declaration—Affidavit being inadmissible owing to informality.*

An affidavit which is inadmissible on the ground of some informality is still a declaration within the meaning of Ss. 199 and 200. (*Rowland, J.*) SHAHZAD KHAN *v.* EMPEROR. **6 I.R. (Pat.) 134 = 144 I.C. 857 = 34 Cr.L J. 912 = 14 Pat.L T. 679 = 1933 Cr.C. 1162 (2) = A.I.R. 1933 Pat. 513.**

——**S. 199**—*Offence under—Ingredients—Burden of proof.*

The prosecution must bear the burden of proving every ingredient which is comprised in the definition of an offence. In the case of an offence under S. 199, I. P. Code, it is the duty of the prosecution to show that at the time of making the statement, the accused either knew or believed it to be false or did not believe it to be true. (*Rowland, J.*) SHAHZAD KHAN *v.* EMPEROR. **6 I.R. (Pat.) 134 = 144 I.C. 857 = 34 Cr.L.J. 912 = 14 Pat.L.T. 679 = 1933 Cr.C. 1162 (2) = A.I.R. 1933 Pat. 513.**

——**S. 199**—Special Marriage Act, S. 21—Formal renunciation by a born Christian not necessary. *See*

PENAL CODE (1860), S. 201.

SPECIAL MARRIAGE ACT (1872), S. 21. **11 O.W.N. 404 = A.I.R. 1934 Oudh 155.**

——— **S. 201**—*Applicability—Charge of murder—Acquittal—Conviction for causing disappearance of evidence.*

Section 201 has no application where a person causes the disappearance of evidence of an offence committed by himself. It applies to cases where a person, who without being concerned in the main offence assists the actual criminal in escaping the penal consequences of his act So where a person was charged with, and acquitted of murder, a conviction under S. 201 is not sustainable when there was no other person charged with the offence of murder and whom the accused could be held to have screened from justice. (*Doraiswami Iyer, C.J. and Sreenivasa Iyer, J.*) ABDUL KAREEM *v.* THE GOVERNMENT OF MYSORE. **35 Mys H.C.R. 427 = 8 Mys. L J. 467.**

——— **S. 201**—*Applicability—Principal accused.*

The section does not relate to the principal offender but to persons other than the actual criminal who, by causing the evidence of the offence to disappear, assists the principal to escape the consequences of his offence. 7 W.R. (Cr.) 52; 8 Bom.H.C.R. (Cr.) 126; 7 All. 749; 8 All. 252; 46 Cal. 427, Foll ; 6 Lah. 226 (P C.); 30 C.W. N. 816, Ref.; 49 All. 57, Diss. (*Fazl Ali and Scroope, JJ.*) RUP NARAIN KURMI *v.* EMPEROR. **10 Pat 140 = I.R. 1931 Pat 300 = 132 I.C. 876 = 32 Cr L J. 975 = 12 Pat L.T. 746 = 1931 Cr.C. 460 = A.I R. 1931 Pat. 172**

[F. 56 M. 63 (83).]

——— **S. 201**—*Conviction under—Accused held not to have committed murder.*

Where an offender is held not to have committed the murder, he can be punished for the offence which he is proved to have committed, namely, that of concealing the corpse. (*Ferrers, J.C. and Mehta, A.J C.*) FATEH MAHOMED *v.* EMPEROR. **152 I.C 376 = 28 S L R 387 = 36 Cr.L.J. 83 = 7 R.S. 92 = 1934 Cr C. 1070 = A.I.R. 1934 Sind 139.**

——— **S. 201**—*Conviction under—Basis of—Statement by accused admitting burial of implements used in committing murder—If sufficient.*

A conviction under S. 201, cannot be legally sustained on the bare admission by the accused that they had buried certain implements in their fields, when there is no evidence to show that those implements were used in the commission of the offence of murder or that they knew or had reason to believe that the murder was committed. (*Pollock, A.J.C.*) PHULUA *v.* EMPEROR. **18 N.L J 116 = 31 N.L R. 256 = 1936 Cr.C. 130 = 161 I C. 8 = 8 R.N. 207 = 37 Cr L.J. 460 = A I R. 1936 Nag. 23.**

——— **S. 201**—*Conviction under—Causing disappearance of evidence of suicide.*

No conviction under S. 201, I. P. Code can be had against an accused person who has done nothing more than to cause to disappear the evidence of suicide. (*Ferrers, J.C. and Mehta, A.J.C.*) FATEH MAHOMED *v.* EMPEROR. **152 I.C. 376 = 1934 Cr C. 1070 = 7 R.S. 92 = 28 S.L.R. 387 = 36 Cr L.J. 83 = A.I R. 1934 Sind 139.**

——— **S. 201**—*Conviction under—Essentials for—Causing dead body to be buried—No proof of criminal offence whereby death was caused.*

Before there can be a conviction under S. 201, it must be proved that an offence the evidence of which is caused to disappear has actually been committed. Where, however, it was only established that the accused who was a Police Inspector caused the dead body of a man, who was shot, to be buried without taking charge of the same, he cannot be convicted under S. 201 unless it is proved that the death was caused by a criminal offence and not by an accident. (*Mallik and Ramfry, JJ.*) EMPEROR *v.* MATHURA NATH DE. **I.R. 1932 Cal. 561 = 139 I C. 89 = 33 Cr.L.J. 657 = 1932 Cr.C. 881 = A.I R. 1932 Cal 850.**

——— **Ss. 201 and 302**—Evidence showing one or other might have committed the murder—No evidence as to who committed it—Proof of offence under S. 201 only—Procedure—Accused liable to be convicted under S. 201. *See* PENAL CODE, SS. 302 AND 201—MURDER OR CAUSING DISAPPEARANCE OF EVIDENCE. **A.I.R. 1932 Mad. 748 = 64 M.L.J. 153.**

——— **S. 201**—*Offence under—Case of murder—Removal of corpse from particular place.*

To constitute an offence under S. 201, there must be disappearance of some evidence of the commission of an offence. Where the offence committed was murder and the evidence that was caused to disappear was the fact that the corpse was lying at a particular house,

Held, that the fact that the corpse was at a particular place and at no other was no evidence of the commission of the offence of murder and that a conviction under S. 201 was not sustainable. (*Mallik and Patterson, JJ.*) NAGENDRA BAKTA *v.* EMPEROR. **37 C W N. 348 = 1934 Cr C. 200 (1) = 147 I C. 1028 (1) = 6 R.C. 389 = 35 Cr.L.J. 535 = A.I R. 1934 Cal 144.**

——— **S. 201**—*Offence under—Ingredients of.*

The essential ingredient of an offence under S. 201, I.P. Code, is causing disappearance of evidence of the commission of an offence with a view to screen the offender from legal punishment When the only acts proved against an accused are that he caught hold of the tuft of the deceased just before his co accused fatally stabbed, and that he took part in tying the deceased with a rope and dragging along for some distance, these acts do not constitute an offence under the section. (*Pandrang Row, J.*) PERIASWAMI THEVAN, *In re.* **40 L.W. 770 = 152 I.C. 696 (2) = 7 R M 278 = 1934 M.W.N. 1281 = 1935 Cr.C. 34 = 36 Cr.L J. 143 = A.I. R. 1935 Mad. 36 = 67 M.L.J. 631**

——— **S. 201**—*Person secretly burying murdered person—Liability of—Knowledge or conviction of murderer unnecessary.*

A person who secretly buries the headless body of man just murdered is *prima facie* guilty under S. 201 unless he can establish that his act was innocent. It is not necessary for a conviction that the accused should be aware of the identity of the offender whom he intends to screen nor need the offender himself have been convicted. 16 I.C. 755 and 9 Lah. 671, Rel on (*Coldstream, J.*) NAWAB DIN *v.* EMPEROR. **I.R. 1933 Lah. 412 (1) = 144 I.C. 12 = 34 Cr.L J. 683 = 34 P.L.R. 637 = 1933 Cr C. 769 = A.I R. 1933 Lah. 516.**

——— **Ss. 201 and 302**—*Proof of murder—Sufficiency of—Motive for murder proved—Place of hidden dead body shown by accused—Inference.*

Where apart from the uncorroborated testimony of an approver, the prosecution had only proved that the accused had a motive to commit the murder, that when questioned about the disappearance of the deceased the accused denied the commission of the offence but left the village the next day and after the arrest by the police he conducting the investigating party to his field and pointed out the place wherefrom the cropse of the deceased was exhumed.

Held, that the circumstances were compatible with the hypothesis that the accused disposed of the dead body after the deceased had been killed by the approver but did not necessarily point to the conclusion that the accused himself participated in the commission of the murder and so the accused should only be convicted

PENAL CODE (1860), S. 201.

under S. 201, I. P. Code for causing the disappearance of the evidence of the murder and the conviction under S. 302 should be set aside (*Shadi Lal, C.J and Monroe, J.*) JIWAN SINGH *v.* EMPEROR. **34 P.L.R. 866=1934 Cr.C. 41=147 I.C. 215=6 R.L. 360=35 Cr.L J. 352=A I.R. 1934 Lah. 23 (2).**

———**S. 201**—*Scope—Accused charged with murder—Acquittal—Conviction for concealment of evidence—Propriety.*

The accused cannot escape conviction under this section merely because he has been charged also with the principal offence or because there are some grounds for suspicion that he might be the principal culprit. If the accused is acquitted of the graver offence under S. 302, he may nevertheless be convicted under this section. Nor is it necessary to justify a conviction under this section that the principal offender should be some known person. 6 Lah. 226 (P.C.); 20 C.W.N. 166, Ref. (*Fazl Ali and Sc oope, JJ.*) RUP NARAIN KURMI *v.* EMPEROR. **10 Pat. 140=I.R. 1931 Pat. 300=132 I.C. 876=32 Cr.L J. 975=12 Pat.L T. 746=1931 Cr.C. 460=A.I R. 1931 Pat. 172.**

———**S. 205 and Registration Act, S. 82 (c)**—*Offence under—Ingredients.*

In all meterial parts, the wording of S. 82. (*c*), Registration Act, is identical with that of S. 205, I. P. Code, and under the latter section, it is not enough to prove merely the assumption of a fictitious name. It is essential to prove further that the assumed name was used as a means of falsely representing another individual. (*Burn, J.*) EMPEROR *v.* RANGAMMAL. **159 I.C. 155 (1)=1935 M W.N. 1162=42 L.W. 662=1935 Cr. C. 1254 (1)=A.I.R. 1935 Mad. 913.**

———**Ss 206 and 424**—Dishonest removal of attached property—Complaint—Necessity for sanction, though the accused may be convicted under S. 206. *See* PENAL CODE, SS. 424 AND 206. **1933 M. W. N. 722.**

———**S. 209**—*Affirmative proof by prosecution necessary.*

In a prosecution based on the allegation that the accused preferred a false claim, it should be proved affirmatively that the claim or the accused was false. It is not enough for the prosecution to show that the plaintiff in the civil suit (accused) failed to discharge the burden of proof. (*Rowland, J.*) HIRALAL SARDA *v.* EMPEROR. **I R. 1932 Pat. 245=139 I C. 543=33 Cr L.J. 860=13 Pat. L T. 370=1932 Cr. C. 640=A. I.R. 1932 Pat. 243.**

———**S. 209**—"Court of justice"—Manager of estate under Chota Nagpur Encumbered Estates Act disposing of claim—Preferring of false claim before—Offence. *See* CR. P. CODE, S 195. **16 Pat. L.T. 693=A I.R.1935 Pat. 515.**

———**S. 209**—*Fraudulent application to execute decree for sums not due—Order of attachment obtained—Nature of Offence.*

Where a fraudulent application is made to execute a decree for a sum not due and there an order of attachment is passed and subsequently set aside, the case comes under S. 209. (*Mukerji and Bennet, JJ.*) HIKMATULLAH KHAN *v.* SAKINA BEGAM. **53 All. 416=I R. 1931 All. 136=32 Cr. L. J. 367=129 I.C. 264—1931 A.L.J. 117=1931 Cr. C. 449=A.I.R. 1931 All. 305.**

———**S. 210**—*Fraudulent application to execute decree for sum not due—Order of attachment obtained—Nature of offence.*

Where a fraudulent application is made to execute a decree for a sum not due and there is on order of attachment passed which was set aside on objection being made, the case comes under S. 210. 23 Cal. 971, Dist. (*Mukerji and Bennet, JJ.*) HIKMATULLAH KHAN *v.* SAKINA BEGAM. **53 All. 416=I.R. 1931 All. 136=32 Cr. L. J. 367=129 I.C. 264=1931 A.L.J. 117=1931 Cr. C. 449=A.I.R. 1931 All. 305.**

PENAL CODE (1860), S. 211.

———**S. 211**—*Applicability—Offence under—What constitutes.*

Falsely charging a person with having committed an offence is an offence under S. 211. The question of causing criminal proceedings to be instituted does not arise when the charge is specific and deliberate. (*Grille, O. J. C. and Pollock, A. J. C.*) LOCAL GOVERNMENT *v.* MT. GUJI. **1935 Cr. C. 339=17 N.L.J 189=A.I. R. 1935 Nag. 69.**

———**S. 211**—*Burden of proof.*

In a case under S. 211, it is for the prosecution to prove in the first instance that the complaint was false and that there was no just or lawful ground for filing such complaint. It is not for the accused to make out that his report was true until it has been clearly traversed by prosecution evidence showing that it was false. (*Mahadevayya, J.*) RUDRAPPA *v.* GOVERNMENT OF MYSORE. **38 Mys H.C.R, 412=11 Mys. L.J. 438.**

———**S. 211**—*Charge made—Offence under S. 211 is complete—Subsequent complaint by informant does not necessitate complaint of Court.*

As soon as the informant makes a false charge, the offence under S. 211 is complete and the injured party can file a complaint against him under S. 211 even though two months after this complaint, the informant files a complaint in Court. It cannot be said, merely because of the subsequent complaint, that the offence was committed in or in relation to any proceeding in Court so as to necessitate a complaint in writing of such Court under S. 195 (*b*), Cr. P. Code. 51 All. 382 and 11 Pat. 155, Foll. (*Ba, U, J.*) NGA BA SHEIN *v.* EMPEROR. **151 I.C. 185=7 R R. 43=35 Cr.L.J. 1259=1934 Cr. C.182=A.I R. 1934 Rang. 21.**

———**Ss. 211 and 500**—*Charge of rape by woman—Charge found to be false—Offience committed by woman.*

Where a woman laid a report at the Police Station that she was raped by some persons who were not named and she gave their names only subsequently in the complaint filed in Court and the charge was found to be false and the persons charged filed a complaint against the woman for defamation.

Held, that what she was doing was not defaming these persons but bringing a (possibly false) charge against them. If her complaint was a false one, her object in making it was not to defame these persons so much as to harass them and cause them the inconvenience of being subject to criminal proceedings. For such an offence S. 211, Penal Code, is the appropriate section and the Magistrate must comply with S. 195, Cr. P. Code. (*Mackney, J.*) SWEE ING *v.* KOON HAN. **156 I.C 598=8 R.R. 27=36 Cr L.J. 970=1935 Cr.C. 626 =A.I.R. 1935 Rang. 163.**

———**S 211**—*Charge—Report to police and insistence on Court proceedings.*

Where a person does not confine himself to reporting what he knew of the facts, stating his suspicions and leaving the matter to be further investigated by the police, but definitely alleges his belief in the guilt of certain persons and insists that Court proceedings should be taken against them, it amounts to a charge within S. 211. (*Ba U, J.*) NGA BA SHEIN *v.* EMPEROR. **151 I C. 185=7 R.R. 43=35 Cr.L.J. 1259=1934 Cr.C, 132=A.I.R. 1934 Rang. 21.**

———**S. 211**—*"Charges"—Statements made during investigation under Ch. XIV, Cr. P. Code.*

PENAL CODE (1860), S. 211.

Statements made in the course of an investigation under Ch. XIV, Cr. P. Code, are not "charges" as contemplated by S. 211. 1 Weir, p. 193 and 31 Mad. 506, Ref. (*Jackson, J.*) KODANGI *v.* EMPEROR. **34 L.W. 860=1931 M.W N. 1138=1932 Cr.C. 4=135 I.C.= 590 (1)=33 Cr.L.J. 173=I.R. 1932 Mad. 174 (1) =A.I.R. 1932 Mad. 24=61 M.L.J. 858.**

———**S. 211**—*Complaint under—Delay in filing—If ground for dismissal.*

In charges under S. 211 great delay should not be tolerated and such delay alone is a sufficiently good reason for refusing to proceed with the complaint, for it is not in the public interest that persons should be allowed to come forward after such delay after an alleged false charge has been made and to require a Court to enquire into such matter. (*Mackney, J.*) MURUGAPPA CHETTYAR *v.* K P. R. M. RAMAN CHETTYAR. **1935 Cr.C. 1259=160 I.C. 150 (2)=37 Cr. L.J. 243=8 R. R. 345=A.I.R. 15 Rang. 485.**

———**S. 211**—*Complaint under—No sanction necessary.*

No sanction or authority of any Court is necessary to the filing of the complaint under S. 211, but if any proceedings before a Court have preceded the filing of the complaint under S. 211, it cannot be filed at all except by the Magistrate who had the conduct of the original proceedings 44 Cal. 970, Dist. (*Dunkley, J.*) U SEIN YWET *v* U MAUNG GYI. **6 R.R 257=148 I.C. 845=35 Cr.L.J. 802=1934 Cr.C 263=A.I R. 1934 Rang. 40.**

———**S. 211**—*Distinction between Ss.* 211 *and* 182 *I.P. Code.*

Where a false charge is made to the police of a cognizable offence against a definite person, it will fall under S. 211. For an offence under S. 182, it is only necessary, that the information given by the accused to a public servant should be false to his knowledge, whereas to constitute an offence under S. 211, it is necessary that the accused should institute or cause to be instituted some criminal proceedings against another named person, or should falsely charge that person with having committed an offence. 24 Mys. C. C. R. 52; (1917) M. W.N 875, 21 A.L.J 805; 46 A. 906; 9 Lah. 408, Ref. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) MUDDARANGA *v.* GOVERNMENT OF MYSORE. **36 Mys. H C.R. 238=9 Mys. L.J. 112.**

———**S. 211**—*False charge against two persons—Only one offence.*

Where a person makes a false charge against two persons, he commits only one act and the act is in laying a false charge and therefore he commits only one offence and not two, in spite of the fact that he made a charge against two persons. (*Ba U, J.*) NGA BA SHEIN *v.* EMPEROR. **1934 Cr. C. 182=151 I.C. 185=7 R.R. 43=35 Cr.L.J. 1259=A.I.R. 1934 Rang. 21.**

———**S. 211**—*False charge—False accusation made to Police found to be false—Offence.*

A false accusation to the police by a person who was not it all present at the alleged occurrence complained of, which is found to be false, is an offence under S. 211 (*Ferrers, J. C. and Rupchand, A. J. C.*) EMPEROR *v.* VERHOMAL KAKUMAL. **157 I.C. 792=8 R.S. 34= 36 Cr.L.J. 1289.**

———**S. 211**—*False charge—Institution of criminal proceedings—Meaning of—Report to police.*

A false charge and institution of criminal proceedings are not exclusive though they are not co extensive. A report to the police of a cognisable offence is institution of criminal proceedings. But a false charge to the Police of a non cognisable offence is a false charge not amounting to institution of criminal proceedings. On the other hand, if report of a cognisable offence is made to the police, the machinery of the law is set in motion by the report, and criminal proceedings are instituted within the meaning of S. 211, (*Almond, J. C. and Mir Ahmad, A.J.C.*) FAIZ ALAM *v.* EMPEROR. **151 I.C. 816=7 R Pesh. 37=35 Cr L J. 1410=1934 Cr.C. 1317=A. I.R. 1934 Pesh. 112.**

PENAL CODE (1860), S. 211.

———**S. 211**—*False charge—Petition to Superintendent of Police to protect petitioners from extortion by Police Inspector.*

Where the petitioners had sent in a petition to the Superintendent of Police making allegations of extortion and bribery against a Police Sub Inspector and praying him to protect the petitioners and the Sub-Inspector was put on his trial and acquitted and the petitioners were prosecuted under S. 211,

Held, that whether the allegations made by the petitioners amounted to a false charge would depend on whether they made them with the object of setting the criminal law in motion and as their prayer for protection could have been granted by means of some departmental action against the Sub Inspector without a criminal trial the allegations made by petitioners could not be held to amount to a false charge. (*Lort Williams and Mallick, JJ*) ABDUL HAKIM KHAN CHAUDHURI *v.* EMPEROR. **59 Cal. 334=I R. 1932 Cal. 465=138 I.C. 551=33 Cr L J. 631=1932 Cr.C. 440=A.I R. 1932 Cal. 511.**

———**S. 211**—*Instituting maliciously false case—Proof of.*

The failure to prove a case by the complainant is not the same thing as the institution of a maliciously false case so as to make him liable for an offence under S. 211. (*Mahadevayya, J.*) RUDRAPPA *v.* GOVERNMENT OF MYSORE. **38 Mys.H.C.R. 412=11 Mys. L J. 438.**

———**S. 211**—*Institution of Criminal Proceedings—Application to Magistrate under S.* 144, *Cr. P. Code.*

A person who applies to a Magistrate for an order under S. 144, Cr. P. Code, against another person institutes a criminal proceeding against that person within the meaning of S. 211 of the Penal Code. (*Burn, J.*) VENKATARAMANJULU CHETTY *v.* KANNIAH CHETTY. **1933 M.W.N. 1263.**

———**S. 211**—*Institution of criminal proceedings—Investigation by police.*

Investigation by a police is not criminal proceeding against any person and therefore setting the criminal law in motion by making a charge to the police of a cognizable offence against a person does not amount to the institution of criminal proceedings against that person within the meaning of the second part of S. 211. 17 Cal. 574; 20 Mad. 79 and 4 P. 472, Not foll.; 2 N.L. R. 119. Overr. (*Macnair, J.C., Jackson and Subhedar A.J.Cs.*) SULTAN AHMAD *v.* EMPEROR. **27 N.L. R. 275=I.R. 1931 Nag. 126=133 I.C. 398=32 Cr. L.J. 1009=1931 Cr.C. 721=A.I.R. 1931 Nag. 134 (F.B).**

———**S. 211**—*Institution of criminal proceeding—Making false charge—Police investigation—Proceeding instituted.*

The making of a false charge to the police of a cognizable offence is the institution of criminal proceedings within the meaning of S, 211. Where the accused by making a report caused the police to make an investigation.

Held, the accused may be said to have instituted a proceeding Case law reviewed. (*King and Bennet, JJ.*) EMPEROR *v.* JOHRI. **1931 A.L.J. 177=136 I.C. 277 =33 Cr.L.J. 256=I.R. 1932 All. 165=1931 Cr.C. 429=A.I.R. 1931 All. 269.**

PENAL CODE (1860), S. 211.

——S. 211—Issue of summons—*Naraji* Petition—Omission to dismiss—Validity of procedure. *See* PENAL CODE, S. 182. **36 C.W.N. 15 = A I.R. 1932 Cal. 383 (1).**

——S. 211—*Offence under—Essentials.*

In order successfully to prosecute a person under S. 211, it is necessary for the Crown to establish that his primary intention when he made the statement was to cause injury to the police officers mentioned by him. The test is whether the person making the charge intended to set the criminal law in motion against the person charged. (*Jai Lal, J.*) BHAWANI SAHAI *v.* EMPEROR. **13 Lah. 568 = I.R. 1932 Lah. 299 (2) = 137 I C. 157 = 33 Cr.L J. 409 = 33 P.L R. 174 = 1932 Cr.C. 258 = A I.R. 1932 Lah. 246.**

——S. 211—*Offence—Test of.*

In the case of an alleged false report, the real question for decision is whether the report made to the police is substantially true and what is false is merely a fringe to the petition or whether the substantial complaint is false and what is true is a mere fringe or in other words a mere accessory circumstance. This is a question of fact. 5 C.W.N. 727, Foll. (*Doraiswami Iyer, C J. and Sreeni asa Iyer, J.*) MUDDARANGA *v.* GOVERNMENT OF MYSORE. **36 Mys H.C.R. 238 = 9 Mys. .J. 112.**

——S. 211—*Proceedings under—Need for affording opportunity to accused.*

Ordinarily a person ought to be given an opportunity to show cause before he is ordered to be prosecuted under S. 211. Where it appears that the accused never knew before he was actually served with notice what the report of the police on his information before them had been and an application filed by him the next day impugning the report was rejected, *held*, that the proceedings against the accused should be quashed. (*Mallik and Patterson, JJ.*) SHAIKH ABDULLA *v.* EMPEROR. **35 C W.N. 1210 = 1932 Cr C. 213 = 137 I.C. 133 = 33 Cr L.J. 406 = I R. 1932 Cal. 266 = A.I R. 1932 Cal. 287.**

[F. 36 C.W.N. 794 (795). R. 37 C.W.N. 399 (400)]

——S. 211—*Prosecution—Complaint in writing—Cr. P. Code, S.* 195 (1) (*b*)—*Applicability.*

The offence contemplated by S. 211, I.P. Code, must be divided into two parts, one is where the report made to the police led to the police investigation, which in turn led to a proceeding in a Criminal Court and the other is, where the report led merely to a police enquiry but not to any proceeding in Court. To the former case, S. 195 (1) (*b*) of the Cr. P. Code will apply, but not to the latter case. 24 Mys.C.C.R. 52; 46 A. 906; 9 Lah. 408; A.I.R. 1929 Sind 115; 53 Cal. 824, Ref. to (*Doraiswami Iyer, C.J. and Sreenivasa Iyer, J.*) MUDDARANGA *v.* GOVERNMENT OF MYSORE. **36 Mys.H C R 238 = 9 Mys L.J. 112.**

——S. 211—*Right of accused to prove his allegations first—Conviction without such opportunity—Validity of.*

It is true that a man charged under S. 211, should be given an opportunity of proving his allegations first, if he insists on proving them. But the conviction of an accused is not illegal and need not be set aside if he be not given an opportunity of proving his allegations first. (*Ba U, J.*) NGA BA SHEIN *v.* EMPEROR. **1934 Cr. C. 182 = 151 I C 185 = 7 R.R. 43 = 35 Cr.L.J. 1259 = A.I.R. 1934 Rang. 21.**

——S 211—*Sentence.*

A sentence of imprisonment is obligatory only if any criminal proceeding is instituted on a false charge made to the police under the latter part of S. 211. But under the former part of the section, a sentence of fine only is permissible. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) MUDDARANGA *v.* GOVERNMENT OF MYSORE. **36 Mys H C R. 238 = 9 Mys.L.J. 112.**

PENAL CODE (1860), S. 215.

——Ss. 212 and 216-B—*Offences under—"Harbouring"—Meaning of.*

Mere knowledge of the whereabouts of an alleged offender does not amount to "harbouring" him. A person who does not himself produce an offender or give information to the police of his whereabouts but who produces him without delay when so demanded by the police, is not guilty of the offence of harbouring. (*M.C. Ghose, J.*) JAGADISH CHANDRA MAITY *v.* EMPEROR. **157 I.C 1030 = 39 C.W.N. 317 = 1935 Cr C. 942 = A I R. 1935 Cal. 550.**

——S. 215—*Conviction under—Evidence of criminal offence resulting in loss of property—Necessity for.*

Before a conviction under S. 215 can be sustained, there must be evidence to show that the loss of the property was by means of the commission of an offence punishable under the Penal Code. (*Macpherson and Khwaja Mahomed Noor, JJ.*) BAGESHWARI AHIR *v.* EMPEROR. **11 Pat. 392 = I.R 1932 Pat. 201 = 139 I C. 76 = 33 Cr L J. 709 = 13 Pat L.T. 732 = 1932 Cr.C. 638 = A I.R. 1932 Pat 241.**

——S. 215—*Essentials of offence—Evidence not supporting conviction.*

It is necessary in order to maintain a conviction under S. 215 to prove that the complainant had been deprived of the property by an offence punishable under the Code. The complainant, who was the owner of bullocks, stated in the first information report that they had gone astray. Before the trial Magistrate he said that the bullocks had been stolen and that he had made a report to the police. It appeared that after filing the report he had gone to a certain person, and paid him money in order to secure the restoration of bullocks.

Held, that the evidence was wholly insufficient to prove exclusively that an offence punishable under the Penal Code had been committed in respect of the missing bullocks. 6 I C. 250 and 9 P.R. of 1915, Ref. (*Agha Haidar, J.*) AKBAR *v.* EMPEROR. **I.R. 1931 Lah 465 = 131 I.C. 369 = 32 Cr L.J. 729 = 92 P.L.R. 38 = 1931 Cr.C. 269 = A.I R. 1931 Lah. 157.**

——S. 215—*Offence under—Evidence—What prosecution should prove.*

Where the accused merely undertakes to endeavour to trace out and restore the lost property on payment of some remuneration, then upon this circumstance alone the accused cannot be said to be guilty of an offence under S. 215, unless over and above that, the prosecution proves that the property has been lost by the commission of an offence and that the accused is endeavouring to screen the offender from justice and is not using all means in his power to cause the offender to be apprehended and convicted of the offence which he has committed. Offence held not to be made out on facts. (*Bajpai, J.*) RAM NARESH RAI *v.* EMPEROR. **I.R. 1931 All. 752 = 133 I.C. 800 = 32 Cr.L J 1072 = 1932 A.L.J. 103 = 1931 Cr C. 1046 = A.I.R. 1931 All 710.**

——S. 215—*Offence under—Ingredients.*

The important point under S. 215 is that the offender should know the criminal and screen him from justice. It is not an offence to take money from another in order to help him to find stolen property and to convict the thief. In order that the act should come within the scope of S 215, there should be evidence *first*, that the property has been stolen, *second*, that the accused knew the criminal, and *third*, that he has failed to use all means in his power to cause the offender to be apprehended. (*Ferrers, J.C. and Rupchand A.J.C.*) HAJI

PENAL CODE (1860), S. 215.

JAN MOHAMAD *v.* EMPEROR. **158 I.C. 498 = 8 R.S. 53 = 36 Cr.L.J. 1464 = 1935 Cr.C. 523 = A.I.R. 1935 Sind 105.**

———**S. 215**—*Offence under—What should be proved.*

Where it was clear that money was demanded and paid on account of helping the complainant to recover his stolen boat,

Held, that the case fell under S. 215 and that it was not necessary for the prosecution to prove further that the accused had screened or attempted to screen the persons concerned in the theft of the boat from legal punishment. (*Packridge and Patterson, JJ.*) ARMAN ULLA *v.* EMPEROR. **6 I.R (Cal.) 117 = 145 I.C. 569 = 34 Cr.L J. 1015 = 37 C.W.N. 360 = 1933 Cr.C. 963 = A.I.R. 1933 Cal. 599.**

———**S. 215 Exception** — *Applicability—Onus of proof.*

Once the elements of an offence under S. 215 have been established by evidence, the onus of proving that the person charged is entitled to the benefit of the exception is on the defence. (*Panckridge and Patterson, JJ.*) ARMAN ULLA *v.* EMPEROR. **6 I.R. (Cal) 117 = 145 I.C. 569 = 34 Cr.L J. 1015 = 37 C.W.N. 360 = 1933 Cr.C. 963 = A I.R. 1933 Cal. 599.**

———**Ss 217 and 218**—*Conviction under—Essentials for—No proof of definite offence committed necessary.*

It is not necessary, for a conviction under Ss. 217 and 218 to establish, as in the case of a charge under S. 201 that an offence had actually been committed. It is sufficient if the circumstances are such that a reasonable inference can be drawn therefrom that the accused had a certain knowledge at the time he did the act, namely, a knowledge that he was likely by his act to save a person from legal punishment. Whether the accused had this requisite knowledge or not can be inferred only from the circumstances of the case. (*Mallik and Remfry, JJ.*) EMPEROR *v.* MATHURANATH DE. **I.R. 1932 Cal. 561 = 33 Cr L J. 657 = 139 I.C. 39 = 1932 Cr.C. 881 = A. I.R. 1932 Cal. 850.**

———**S. 218**—*False entry in* Khasra *by patwari—Offence.*

Where a patwari who is responsible under R. 98 of the Land Records Manual for the accuracy of all entries in the *Khasra* omits to show the possession of a certain person which was actually delivered to him by the Civil Court Amin in the patwari's presence, and instead makes an entry showing no change of possession, he is guilty of an offence under S. 218. (*Bennet, J.*) CHANDRABHAN LAL *v.* EMPEROR. **159 I.C. 531 = 1935 A.W. R. 1066 = 1935 A.Cr.C. 216 = 1935 A.L J. 1083 = 37 Cr.L J 131 = 8 R.A. 463 = 1935 Cr.C. 1198 = A.I.R. 1935 All. 968.**

———**S. 223**—*Offence—Negligence—Onus of proof—Duty of prosecution to prove duties of public servant (accused)—Failure to prove—Conviction—If sustainable.*

Under S. 223 it must be shown that there was negligence on the part of the public servant who is accused of the offence and that the escape was the consequence of such negligence; and before the question of negligence can be decided the Court must know what the duties of the public servant in question are. The burden of proving the same is on the prosecution, and if the prosecution fails to prove the same, the Court cannot find negligence In such a case no conviction under S. 223 can be sustained. (*Lord Williams and Jack, JJ.*) RUR SINGH *v* EMPEROR. **164 I.C. 265 = 37 Cr.L.J. 918 = 9 R C. 184 = 40 C W.N. 61.**

———**Ss. 244 and 225**—*Arrest by police-officer—Resistance to invalid warrant—Effect of.*

PENAL CODE (1860), S. 225.

Per *Dhavle, J.*—If a constable in effecting an arrest specifies a certain power which proves to be wanting, resistance to him or escape from his custody constitutes no offence. So if a constable notified to the accused that he was executing a warrant for his apprehension, and that warrant turns out to be invalid, the arrest is not validated by the fact that under S. 54 (1), the police officer was empowered even without the aid of any warrant. Resistance by the accused to such arrest constitutes no offence, 47 M. 442, Foll. (*Stroope and Dhavle, JJ.*) KARTIK CHANDRA MAITY *v.* EMPEROR. **I R. 1932 Pat. 190 = 138 I.C. 844 = 33 Cr.L.J. 706 = 13 Pat.L.T. 135 = 1932 Cr.C. 347 = A.I.R. 1932 Pat. 171.**

———**Ss. 224, 225 and 353**—*Essentials for proof by prosecution.*

It is essential for convictions under Ss. 224, 225 and 353 that the prosecution should show that the apprehension or arrest made or attempted by the police officer was lawful in every way.

Per *Dhavle, J.* (*Scroope, J.*, contra):—Where the warrant of arrest was signed—not by the Magistrate who took cognizance of the case—but by another 'for' him, the warrant is invalid and the accused cannot be convicted for resistance to lawful authority. (*Scroope and Dhavle, JJ.*) KARTIK CHANDRA MAITY *v.* EMPEROR. **I R 1932 Pat 190 = 138 I.C. 844 = 33 Cr L.J. 706 = 13 Pat.L.T. 135 = 1932 Cr.C. 347 = A.I.R. 1932 Pat. 171.**

———**S. 224**—*Resistance to apprehension by police—Offence constituted.*

Where a person resists being apprehended by not allowing the police to remove him in respect of an alleged offence, he is guilty under S. 224. (*Jai Lal, J.*) PARTAP SINGH *v.* EMPEROR. **I R 1932 Lah 712 = 140 I.C. 442 = 1932 Cr.C. 922 = 34 Cr.L.J. 25 = 33 P. L.R. 1071 = A I.R. 1932 Lah. 615 (2).**

———**Ss. 224 and 225**—*Warrant signed by one Magistrate 'for' another—Execution—Resistance to.*

Per *Courtney-Terrell, C. J.* (concurring with *Scroope, J.* and dissenting from *Dhavle, J.*):—A warrant signed by a Magistrate duly empowered in that behalf during the absence of the Magistrate who took cognizance of the offence and directed the issue of the warrant is legal and resistance to the execution of that warrant is an offence under the Penal Code. (*Courtney-Terrell, C.J.*) KARTICK CHANDRA MAITY *v.* EMPEROR. **13 Pat.L.T. 167 = 142 I C. 192 = I.R. 1933 Pat. 129 = 1932 Cr.C. 351 = A.I.R. 1932 Pat. 175.**

———**S 224, Expl.**—*Scope—Sentence under section—If to be consecutive to that for main offence.*

There is nothing in the Explanation to S. 224, which requires that a sentence of imprisonment under S. 224 must be made to run consecutively to a sentence imposed for the main offence of which the accused is convicted. A concurrent sentence is none the less an additional sentence; and therefore a distinct and separate sentence under the section made to run concurrently with that for the main offence is not illegal. (*Beaumont, C.J and Mackisn, J.*) EMPEROR *v.* CHOKHU YESU. **36 Bom. L.R 963 = 153 I C 34 = 7 R B. 211 = 36 Cr L J. 282 (1) = 1934 Cr.C. 1332 = A.I R 1934 Bom. 462 (1).**

———**S. 225**—*Lawful custody—Custody of Village Chaukidar (C.P.).*

A Village Chaukidar is a police officer under the Chota Nagpur Rural Police Act, 1914, entitled to receive into custody a person arrested under S. 59 of the Code of Criminal Procedure and to rescue the accused from his custody is an offence under S. 225 of the Penal

PENAL CODE (1860), S. 225.

Code. (*Rowland, J.*) CHOTU HAJJAM *v.* EMPEROR. **I.R. 1932 Pat. 171 (1) = 138 I.C. 95 = 33 Cr.L.J. 572 = 13 Pat.L.T. 321 = 1932 Cr.C. 495 = A.I.R. 1932 Pat. 214.**

——**Ss. 225, 332 and 149** — Unlawful assembly—Common object not to commit grievous hurt—Grievous hurt caused but by whom caused not known—Conviction under S. 332. *See* PENAL CODE, SS. 332, 225 AND 149. **144 I C. 67 = A.I.R. 1933 Lah. 159.**

——**S 225 B**—*Attempt to escape—Refusal to accompany bailiff.*

Where a person after arrest by the bailiff refused to accompany him but sat on the ground, his action is a mere passive one and does not constitute an attempt to escape, (*Harrison and Dalip Singh, JJ.*) SANTA SINGH *v.* EMPEROR. **I R. 1933 Lah. 370 = 143 I.C. 649 = 34 Cr. L J. 632 = 34 P L R. 668 = 1933 Cr. C. 221 (1) = A.I.R. 1933 Lah. 128 (1).**

——**S. 225-B**—*Complaint—Right to make.*

Although in cases under S. 225-B the proper person to make the complaint is the officer from whom the escape or rescue has been effected, still a complaint by another person aware of the facts is not a nullity. (*Coldstream, J.*) MEHR SINGH *v.* EMPEROR. **6 I R (Lah) 222 = 144 I.C. 387 = 34 P.L R. 1020 = 35 Cr. L.J. 86 = 1933 Cr. C. 1178 (2) = A.I.R. 1933 Lah. 884**

——**Ss. 225-B and 353** -Illegal Warrant—Practice to sign in absence of authorization—No conviction under Ss. 225-B and 353. *See* PENAL CODE S. 353. **A.I.R. 1934 Mad. 206 = 66 M.L.J. 408.**

——**S. 225-B**—*Invalidity of warrant—Omission to mention name of accused—Release of person arrested.*

A warrant must be issued to some person for execution and where no name or description of that person is given in the warrant, the person arrested can have no knowledge that the persons, who present the warrant, are legally authorised to do so. It is immaterial that the person who is arrested is unable to read the warrant and has no knowledge as to whether the warrant is or is not properly filled up but it is the duty of the Court to issue a warrant in proper form and where a warrant is incomplete the subsequent release of a person arrested under such a warrant is not an offence under S. 225-B (*Pullan and Thom, JJ.*) FATTU *v.* EMPEROR. **1932 A.L J. 1073 = 14 L.R. 9 (Cr.) = I R. 1933 All. 139 = 142 I C. 887 = 34 Cr.L.J. 455 = 1932 Cr.C. 940 = A.I. R. 1933 All. 692.**

——**S. 225 B** — *Lawful apprehension — Illegal warrant—Resistance to execution—Offence whether constituted.*

Where there is no proper delegation by the officer empowered to execute a warrant of arrest, there would be no lawful apprehension within the meaning of S. 225-B and a person resisting or obstructing the execution of the warrant cannot be convicted under S. 225-B. (*Sulaiman, J.*) JAGANNATH *v.* EMPEROR. **I R. 1932 All. 611 = 140 I C. 118 = 33 Cr.L.J. 887 = 13 L. R 85 (Cr.) = 1932 A.L.J. 179 = 1932 Cr. C. 225 = A.I. R. 1932 All. 227.**

——**S. 225-B**—*Lawful custody—Order directing debtor to pay detention batta for two days—Batta paid—Escape of debtor.*

The order under O. 21, R. 40 of the C. P. Code need not be in writing and when the Court acting under the proviso to rule 40 (5) directs the judgment-debtor, when arrested, to pay detention batta for two days, it means he is allowed two days in order to allow him an opportunity to satisfy the decree but he is in the custody of the officer. If he escapes during that period, he is guilty of an offence under S. 225-B of the Penal Code. (*Bardswell, J.*) AUDINARAYANA REDDI *v.* EMPEROR **I.R. 1933 Mad. 206 (2) = 142 I.C. 242 (1) = 34 Cr. L. J. 284 = 1932 M.W.N. 1222 = 1933 Cr. C. 346 (1) = A.I.R. 1933 Mad. 278.**

——**S. 225-B**—*Resistance to public servant—Validity of—Mistake by executing Court—Warrant not defective in form.*

Even though under O. 21, R. 37 the Court might have acted in an entirely unjudicial manner in issuing a notice to the debtor to appear and also a warrant for his arrest at the same time, where, however, the warrant is complete in itself and exhibits no defect of form, it is no duty of the officer of Court to review the discretion of the Court. His duty *prima facie* is to execute the warrant and it is no justification for resistance to the public servant that the executing Court made a mistake in issuing the warrant. 8 C. W. N. 548, Foll. (*Courtney-Terrell, C.J.*) PUNA MAHTON *v.* EMPEROR. **11 Pat. 743 = 13 Pat. L.T. 502 = 142 I.C. 160 = I.R. 1933 = Pat. 125 = 34 Cr. L.J. 269 = 1933 Cr. C. 853 = A.I.R. 1932 Pat. 315.**

——**S. 227**—*Conditionally released prisoner—Violation of terms—Power of jail authorities.*

Under S. 227 it is for Court to decide whether a conditionally released prisoner had violated the conditions on which remission was granted to him and until he has been found guilty under S. 227 it is not for the jail authorities to say that he had committed an offence. (*Baguley, J.*) EMPEROR *v.* NGA PO MIN. **I.R. 1933 Rang. 45 = 142 I.C. 728 = 34 Cr. L.J. 447 = 1933 Cr.C. 275 = A.I.R. 1933 Rang. 28.**

——**S. 228**—*Proceedings for contempt—Nature and stage of judicial proceeding—Specification necessary—Criminal Procedure Code (V of 1898), S. 481 (2).*

For initiating proceedings for contempt under S. 228, I. P. Code. It is necessary to bear in mind the mandatory provisions of S. 481 of the Cr. P. Code. The record must cleary show the nature and the stage of the judicial proceedings in which the interruption or insult occurred. Omission to set forth the particulars as required by S. 481 (2) is not merely an irregularity but is fatal to the proceedings. (*Niyogi, A.J.C.*) RAM LAL *v.* EMPEROR. **I.R. 1931 Nag. 172 = 134 I.C. 684 = 32 Cr. L.J. 1221 = 14 Nag.L.J. 106 = 1931 Cr . C. 831 = A.I.R 1931 Nag. 193.**

——**S. 228**—*Disobedience of order of Court—Offence whether constituted.*

The widowed mother of a minor girl had remarried and thereupon her sister applied to the Court stating that the minor girl should be removed from the custody of the mother. The applicant was directed to take charge of the minor and she undertook not to marry the minor without the permission of the Court. Subsequently the mother under whose custody the minor continued got the minor married without the permission of the Court.

Held, (1) that the mother was not guilty of an offence under S. 228, I. P. Code; the insult or interruption of a public servant while sitting in a judicial proceeding is not a phrase which applies to mere disobedience of an order of the Court; (2) that the accused might be proceeded against under the Contempt of Courts Act. Contempt proceedings not launched. (*Courtney-Terrell, C. J. and Rowland, J.*) KAULASHIA *v.* EMPEROR. **12 Pat. 1 = I.R. 1933 Pat 231 = 144 I.C. 351 = 34 Cr. L.J. 770 = 14 Pat. L.T. 605 = 1933 Cr. C. 313 = A.I.R. 1933 Pat. 142.**

——**S. 228**—Insult to Court—Assessor appearing in improper dress—Offence. Offence under S. 228, I. P.

PENAL CODE (1860), S. 229.

Code and 480 CR. P. Code, *See* CR. P. CODE, S. 480. **35 Bom. L.R. 1025 = A.I.R. 1933 Bom. 478.**

——**Ss. 229 and 300**—*Culpable homicide and murder*

An offence may amount to culpable homicide but not murder even though none of the exceptions in S. 300, I.P. Code, are applicable to the case, as where the accused, when he strangled the deceased, may be imputed the intention of causing such bodily injury as is likely to cause death, yet it is defficult to say that he acted with the intention of causing such bodily injury as he knew to be likely to cause death, or as is sufficient in the ordinary course of nature to cause death. (*Srivastava and Thomas, JJ.*) RAJA RAM *v.* EMPEROR. **10 Luck. 664 = 154 I.C. 93 = 7 R.O. 434 = 36 Cr L J. 454 = 1935 O.W.N. 140 = 1935 Cr. C. 439 = A.I R. 1935 Oudh 239.**

——**S. 235**—*Possession — Box containing counterfeiting materials accessible to accused as well of others.*

A police party raided a certain kotha belonging to the accused. A tin box was found in it and a number of articles which are used for the purpose of counterfeiting coins, were found in the tin box. One other person was also living in the kotha of the accused. He was a grown up man and had got a wife and two children. The kotha was accessible both to the accused as well as to that other person,

Held, that it could not be said with any degree of certainty that the kotha was in the possession of the accused alone. No articles having been recovered from the box which would go to connect the accused with it, and there being no evidence whatsoever to show that the accused was in any way aware of the contents of the tin box, the conviction under S. 235 could not be upheld (*Agha Haidar, J.*) MAHOMED BAKHSH *v.* EMPEROR. **1935 Cr C. 39 = A.I R. 1935 Lah. 39.**

——**S. 235**—*Resident of house—Liability of subordinate member of family.*

Where instruments and materials are found in the house and it is sought to fix responsibility upon any member of the family except the head of it, it is necessary to prove that possession and control were with the subordinate member alone or with him also This rule applies in the case of a wife living with her husdand. The mere fact that she knew that certain implements and materials were in the possession of her husband and also where they were to be found does not necessarily indicate that she herselt was in subordinate possession or in any kind of possession of them. (*Macpherson and Agarwala, JJ.*) LACHMINIYA THAKURAIN *v.* EMPEROR. **6 I.R. (Pat.) 267 (1) = 146 I.C. 474 (1) = 14 Pat. L.T. 256 = 35 Cr. L.J. 9 = 1933 Cr. C. 738 = A.I. R. 1933 Pat. 272.**

——**Ss. 239 and 240**—*Offences under these sections separate and distinct—Double conviction and consecutive sentences proper.*

Offences made punishable under Ss. 239 and 240 are separate and distinct offences and S. 235, Cr. P. Code, permits of double conviction and consecutive sentences, for in this case S. 71, I.P. Code,is obviously not applicable; S. 71 applies only where there is an offence made up of parts, any of which parts is itself an offence. (*Middleton, J. C. and Saaduddin, A J.C.*) GOPI CHAND *v.* EMPEROR. **6 I.R. (Pesh.) 12 = 1934 Cr. C. 7 = 146 I.C. 7 = A.I.R. 1933 Pesh. 99.**

——**S. 243**—*Offence under—Proof— Discovery of counterfeit coins.*

Where certain silver pieces of the size of a rupee were found along with counterfeit rupees all bearing the same year and it was shown that all the coins were concealed under *bhusa* in a locked room of which the accused had the key,

PENAL CODE (1860), S. 268.

Held, that S. 114 of the Evidence Act created a presumption of guilt against the accused and that he was liable to be convicted under S. 243, I. P. Code. (*Raza and Smith, JJ.*) EMPEROR *v.* SANGRAM. **I.R. 1933 Oudh 167 = 143 I.C. 152 = 34 Cr.L.J. 545 (2) = 9 O. W.N. 1198 = 1933 Cr.C. 113 = A.I.R. 1933 Oudh 85.**

——**S. 243**—*Requisites of offence—Presence in house containing counterfeit coins.*

The mere fact that the accused resided in the house in which the counterfeit coins were found without anything more to show that the accused was aware of the existence of those coins is not sufficient to justify a conviction under S. 243. (*Burn, J.*) MAHALAKSHMI *v.* EMPEROR. **1933 M W.N. 222 (2).**

——**S. 263**—*"Used"—Meaning of—Offence under—Ingredients.*

For an offence under the 1st part of S. 263, I. P. Code, it is necessary to prove fraud or an intent to cause loss to Government; under the 2nd part of the section, it is sufficient to prove that the person in whose possession the stamp is found knew that the mark put upon it for the purpose of denoting that it has been used had been erased or removed from it. It is not necessary to prove that his possession was fraudulent or with intent to cause loss to Government. Nor is it necessary to prove that the erasure of marks or impressions was done by the accused or that he had any connection with that. But it has to be proved that the stamp had been affixed to some document and had been used for revenue purposes; "used" in the section means used upon documents requiring to be stamped in accordance with law, *i.e.*, documents which by-law are required to be stamped. (*Lort Williams and Jack, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BAZLAR RAHAMAN. **164 I.C. 12 = 37 Cr.L.J. 923 = 9 R.C. 193 (2) = 39 C.W N 542.**

——**S. 265**—*Use of false weight—Proof of fraudulent intention necessary.*

The gist of the offence under S. 265 consists in the fraud and the intention to cheat. Such knowledge of falsity of weight and the intention to cheat may often be incapable of direct and positive proof, and may have to be gathered from the attendant circumstances as well as the conduct of the accused. Though it is the primary duty of a vendor to take reasonable care that the weights he employs are correct and *prima facie* the use of incorrect measures may give rise to suspicion if not a presumption against the accused, the adverse inference is always open to rebuttal, as otherwise every case of possession or user of wrong weights and measures will necessarily have to end in conviction. (*Rama Rao and Srcenivasa Iyer, JJ.*) GOVERNMENT OF MYSORE *v.* CHENNAVEERIAH. **36 Mys.H.C.R. 334 = 9 Mys. L J. 387.**

——**S. 266**—*Offence under—Intention to defraud—Proof.*

Under S. 266 it is necessary to prove that the measure was known by the accused to be false and that he intended to use it fraudulently and it is open to doubt whether the mere possession of a false measure by itself could be held to be sufficient evidence of fraud. (*Mahadevayya, O. C. J. and Ramachandra Rao, J.*) MAHOMED ISSUFF, *In re.* **11 Mys.L.J. 291.**

——**S. 268**—*Annoyance—Meaning.*

Per *Mukerji, J.*—The sort of annoyance which S. 268 contemplates is not the kind of annoyance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public such as the playing of music by Hindus at the time of worship. (*Mukerji and Bennet, JJ.*) JANKI-

PENAL CODE (1860), S. 268.

PRASAD *v.* KARAMAT HUSAIN. **53 All. 836=137 I.C 587=I.R 1932 All. 333=1931 A.L J. 624=A.I. R. 1931 All 674.**

———**S. 268**—*Offence under—What constitutes—When complete.*

The offence of public nuisance as defined in S. 268, I. P. Code, consists in the doing of any act or illegal omission which causes any injury, danger or annoyance, etc. and the offence is complete when an act of the nature is committed or when there has been an illegal omission of the kind. (*Pandrang Row, J.*) SREERAMAMURTHY, *In re* **154 I C. 146=7 R M 416=36 Cr.L.J 467=41 L W. 82=1935 Cr.C. 227=A.I.R. 1935 Mad. 189=68 M.L.J. 211.**

———**S 268**—*Public—It includes a community.*

In view of the definition of the word "public" in S. 12, I. P. Code, the Muslim community or the Muslims of the neighbourhood would be included in the word 'public' which is used in the expression "public nuisance" in S. 268, I. P. Code (*King, C.J. and Zia-ul-Hasan, J.*) RAGHUBAR *v.* MADARI. **157 I C 638=8 R O. 28=1935 O.W.N. 899=A I R. 1936 Oudh 154.**

———**S. 268**—*Public nuisance—Making constructions upon public road.*

Making constructions upon a road which is used as of right by the public would constitute a public nuisance. (*King, C.J. and Zia ul-Hasan, J.*) RAGHUBAR *v.* MADARI **157 I C. 638=8 R.O. 28=1935 O.W.N. 899=A.I R 1936 Oudh 154**

———**S. 273**—Prosecution under—Proceedings resulting in destruction of food under S. 287, Bihar and Orissa Municipal Act. *See* BIHAR AND ORISSA MUNICIPAL ACT, S. 287. **A.I.R. 1934 Pat. 113.**

———**S. 273**—*Sale of noxious food — Prosecution under Municipal Act—Whether bars prosecution under Penal Code.*

The object of Ss. 287 and 288 of the Bihar and Orissa Municipal Act is not so much the punishment of the persons in possession of the noxious food as the prevention of its sale to the public and such action cannot affect the liability of a person found selling such food to be proceeded against under S. 273, I. P. Code. (*Fazl Ali, J.*) MADAN LAL *v.* EMPEROR. **147 I.C. 457=6 R P. 354=35 Cr.L.J. 431=14 Pat L T. 669.**

———**S. 279**—*Applicability—Driving vehicle to the danger of its occupants.*

S. 279 is designed to punish persons who drive vehicles or ride on any public way, to the danger not only of the persons on the road, but also to the passengers in the vehicle itself which is being rashly or negligently driven. The words "any other person" in the section are wide enough to include the occupants of the vehicle itself (*Smith, J.*) EJAZ AHMAD *v* EMPEROR. **158 I C. 335=8 R.O. 86=36 Cr L.J. 1352=1935 O.W.N. 1026=1936 Cr.C 270=A.I R. 1936 Oudh 148.**

———**S 279**—*Criminal negligence defined—Accident in spite of precautions.*

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen, it was the imperative duty of the accused person to have adopted. The appellant was on the wrong side of the road, but he took all possible precautions by driving his car slowly and by putting his hand up to give his signal to the complainant when he saw the complainant's car coming on from the opposite direction at an excessive speed ; but in spite of all this, the unfortunate accident occurred. This accident would not have occurred if the complainant had not been driving his car at an excessive speed.

Held, that accused was not guilty of negligence. 3 All. 776, Appl.; A.I R. 1926 Cal. 300, Ref. (*Ba U, J.*) ROBSON *v.* EMPEROR. **152 I C. 699=36 Cr.L.J. 178=7 R R 170=1934 Cr.C. 838=A I.R. 1934 Rang. 194.**

PENAL CODE (1860), S. 282.

———**S. 279**—*Person using road must allow also others to do so—Persons loitering on road are expected to make way to motorist especially when he is seen approaching—Driver is not bound to stop because he is signalled—Person cannot stand on the way while driver is pulling up—High way.*

There is a duty on every user of the road to make a reasonable use of it for the purposes of passing along it, and to allow others to do so also. A person driving a motor car has a right to expect that the persons negligently loitering on the road would make way for him, especially when he sees that they are aware of his approach. Even when they signal to him to stop he is not bound to do so. He has the right to assume that they would get out of the way when they see him ignore their signals. A man is not expected to stand obstinately in the way while a driver is in the process of pulling up. A car cannot be stopped in a few feet, especially when it is a heavy one like a motor lorry. (*Viman Bose, A.J.C.*) EMPEROR *v.* HOMNARAIN. **30 N L R. 317=6 R.N. 186=148 I C. 541=35 Cr L J. 696=1934 Cr.C. 272=A.I R. 1934 Nag, 65.**

———**S 279**—*Rash driving—Driving on wrong side.*

It is not always necessarily rash and negligent to drive on the wrong side of the road. Much would depend upon other conditions. (*Smith and Allsop, JJ.*) RAM SEWAK *v.* EMPEROR. **6 I.R. (Oudh) 79=146 I.C. 28=34 Cr L J 1154=10 O W.N. 823=1933 Cr. C. 1275 A.I.R. 1933 Oudh 391**

———**S. 279**—*Rash driving—Speed of* 30 *miles in straight and open road.*

On a straight and open road, a speed of 30 miles cannot necessarily and of itself be described as an excessive and rash speed (*Smith and Allsop, JJ.*) RAM SEWAK *v.* EMPEROR. **6 I R (Oudh) 79=146 I.C. 28=36 Cr L.J. 1154=10 O W N. 823=1933 Cr.C. 1275=A.I.R. 1933 Oudh 391.**

———**S. 279**—*Rash or negligent act—Driving motor car in violation of rules—Nature of offence.*

S. 16, Motor Vehicles Act, has not any necessary ingredient of rashness or negligence in it and R. 27, Motor Act rules, merely lays down the rule of the road, breach of which need not necessarily involve rashness or negligence; consequently where rashness or negligence enters into the offence, the conviction under S. 279, I.P. Code is not only proper but more appropriate. (*Sulaiman, J*) JIWA RAM *v.* EMPEROR. **I.R 1932 All. 219=136 I C. 571=33 Cr L J. 309=1932 A.L.J. 519=12 L R. 168 (Cr.)=1932 Cr.C. 89=A.I.R. 1932 All. 69.**

———**S. 282**—*Overloading by boatman—No precaution by lessee to prevent—Criminal negligence.*

Where the lessee of the fishery did not take proper precations to ensure that his *manjhis* did not overload the boats and though he knew that overloading was very common and that in monsoon time, it would be dangerous, he allowed the *manjhis* to load the boats in any way they liked *held*, that it was culpable negligence on his part to leave the loading to the boatman and that he was rightly convicted under S 282 of the Penal Code. (*Nasim Ali J.*) TOFAIL AHMMED MIA *v* EMPEROR **151 I C. 660=61 Cal 253=38 C.W.N. 200=35 Cr L.J. 1373=7 R.C. 153=1934 Cr.C. 696=A.I.R 1934 Cal. 490.**

PENAL CODE (1860), S. 283.

———**S. 283**—*Offence under—Intention—If a necessary ingredient — Public nuisance — Obstruction to traffic—Placing of charpoy on road—Offence.*

S. 283, I. P. Code, does not refer to any public nuisance or to the intention of the accused. It deals with an offence affecting the public health, safety, convenience, decency and morals, and it is enacted to protect persons in the exercise of their public right. A public nuisance may be caused without any deliberate intention of causing it; and neither S. 283 nor S. 290 refers to any intention on the part of the accused. An obstruction may be caused by negligence. Where the accused therefore places a *charpoy* on a public road, and it obstructs the right of way of person passing along the road, he is guilty of an offence under S. 289, though he may not deliberately intend to cause obstruction. (*Kendall, J.*) RAM KRISHNA *v.* EMPEROR. **7 R A. 1049=156 I.C. 39=36 Cr.L J. 893=1935 A Cr.C. 162=1935 A.W.R. 814=1935 A.L.J. 1057=1935 Cr.C. 875 (1) =A.I.R. 1935 All. 746 (1).**

———**S. 290**—*Letting of clean water on to public Road —Whether amounts to public nuisance.*

The original complaint was that the water let out into the public steet was "filthy." That case the lower court did not accept but convicted the accused on its own opinion that the letting out of any kind of water, clean or dirty, on to the public road would constitute a public nuisance.

Held, that it was not open to the lower Court thus to give evidence, so to speak and that the conviction could not be supported. Whether letting of clean water on to a public road is a public nuisance will depend on various matters, *e g.*, the quantity, the frequency of the act, the locality, the feelings of the ordinary public who frequent the locality, etc. (*Wallace, J.*) MANIKKAM PILLAI *v.* EMPEROR. **1932 M.W.N. 111.**

———**S. 290**—Public nuisance—Conviction for—Intention—If necessary. *See* PENAL CODE, S. 283. **156 I.C. 39=A.I.R. 1935 All. 746 (1).**

———**S. 291**—*Proceedings for offence under—Acquittal —Fresh proceeding for offence under S. 188, I.P. Code —Need for sanction.*

Where a person has been proceeded under S. 291, Penal Code. for flagrant disobedience of an order of the Court to discontinue a nuisance and acquitted before anything can be done against such person under S. 188, Penal Code, a complaint is necessary under S. 195, Cr. P. Code and S, 403 is no bar to such proceedings. (*Harrison, J.*) CHUHAR *v.* EMPEROR. **I.R. 1931 Lah 160=129 I.C 224=32 Cr.L J. 253 (1)=1930 Cr. C. 1231=A.I.R. 1930 Lah. 1055.**

———**S. 292**—*Test of obscenity.*

The test of obscenity is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". The test is not whether the book has a harmful effect on men of wide culture and character, but how does it affect the young of either sex whose minds are impressionable. If the bulk of the book is taken up with obscene and indecent details bout unnatural sexual vices, the impression created in the reader's mind is not counteracted by pious remarks occasionally interspersed as to the ruinous effect of the vices (*Jack and Mitter, JJ.*) KAILASH CHANDRA ACHARJYA *v.* EMPEROR. **60 Cal. 201=I R. 1932 Cal. 623=139 I.C. 461=33 Cr.L J. 771=56 C.L J. 123=36 C W.N. 985=1932 Cr C. 608=A.I.R 1932 Cal. 651.**

———**S. 292**—*Test of obscenity—Motive.*

The motives which the accused had in publishing the book are irrelevant in considering the obscenity of the book. The motives may be taken into account as regards the question of sentence : but whether it is obscence or not depends on the material itself and not upon the reasons for its publication. "That you shall not do evil that good may come is applicable in law as well as in morals" (*Jack and Mitter, JJ.*) KAILASH CHANDRA ACHARJYA *v.* EMPEROR. **60 Cal. 201=I R. 1932 Cal. 623=139 I C. 461=33 Cr.L J. 771=56 C.L.J. 123=36 C.W.N. 985=1932 Cr.C. 608=A.I.R. 1932 Cal. 651.**

PENAL CODE (1860), S. 294-A.

———**S. 294 A**—*Applicability—Lottery—Allotment of prizes to subscribers—Benefit reserved to every subscriber —Validity of transaction.*

Where a gramphone dealer got a list of persons who were to subcribe one rupee each every week and at the end of the week prizes were to be drawn and one of them was to get a gramophone and go out of the transaction and it was arranged that the subscription should go on increasing till the 20th week when all the non-prize winners were to get a gramophone each, and some of the subscribers having defaulted in paying subscriptions the dealer sued to recover the same,

Held, that the transaction did not offend against S. 294-A, I. P. Code or S. 30 of the Contract Act and the plaintiff was entitled to recover. (*Ramesam, J.*) VENKATARAMANA *v.* SANYASAYYA. **149 I.C. 489=6 R.M. 649=A.I R. 1934 Mad. 136=66 M.L.J. 76.**

———**S. 294 A**—*Company—Scheme—Benefits conferred by lot.*

A scheme which purports to confer a benefit the recipients whereof are to be chosen by lot is illegal under S. 294 A, I. P. Code. (*Stone, J.*) PIONEER MUTUAL BENEFIT AND FRIEND-IN NEED SOCIETY, LTD., MADRAS *v.* ASST. REGISTRAR OF JOINT STOCK COMPANIES, MADRAS. **63 M.L.J. 917.**

———**S. 294-A** — Company — Scheme — Lottery— Offence constituted. *See* COMPANIES ACT, 1913, S. 162. **56 Mad. 26=A.I.R. 1933 Mad. 16=63 M.L.J. 554.**

———**S. 294 A**—"*Drawing any lottery.*"

A newspaper published a notice of a proposal for an alleged lottery managed by a Bank. The scheme was that the Bank issued a lac of ten rupee bonds which were redeemable at the end of 20 years by every holder who would receive Rs. 10-8 0. This money was to be invested and from interest a series of prizes were to be allotted yearly. Every bond holder who died within the ensuing year was treated as a prize winner. For the distribution of the rest of the prizes the number of the bond held by the deceased holder, whose death was first reported to the bank, was to be taken and ten added thereto, *e.g.*, if the deceased's bond was No. 813, then the first prize winner would be the holder of the bond No. 823 and the remaining prizes were distributed by adding ten, *e.g.*, 833, 843, 853, etc , until the prizes were exhausted. The prizes although allotted by chance were not drawn in the manner generally accepted and were derived entirely from interest and not capital.

Held, that the scheme published was a lottery but there was however no physical or mechanical 'drawing' to determine the lucky lots which depended on an original number to be determined on a sort of arithmetical progression based on an original number to be determined merely by the chance of a bond holder and that the publication of a scheme involving such a lottery was therefore no offence. (*Addison, J.*) GURBAKSH SINGH *v.* EMPEROR. **16 Lah. 51=155 I.C. 590=7 R.L. 738 =36 Cr.L.J. 785=35 P.L.R. 753=1934 Cr.C. 1182 =A.I.R. 1934 Lah. 840.**

PENAL CODE (1860), S. 294-A.

———**S. 294-A**—"*Drawing*" *any lottery.*

In the offence provided for under S. 294-A. I.P. Code the actual drawing is an essential ingredient. The word 'drawing' is used in this section in its physical sense and the only form of lottery envisaged by the legislature was a lottery run on the usual lines in which the winning numbers are actually drawn out of an urn, box or other receptacle. (*Ferrers, J.C.*) HARDER *v.* EMPEROR. **152 I.C. 911 = 1934 Cr.C. 1141 = 36 Cr.L J. 219 (2) = 7 R.S. 103 (2) = A I R. 1934 Sind 149.**

———**S. 294-A**—*Irish sweep stake—Running lottery—Offence if constituted.*

The Irish sweep stake is not authorised by the Government of India. Where the accused was concerned in making collections for the lottery in connection with the Irish [illegible] stake.

Held, that the case came within S. 294-A I. P. Code. (*Mitter, J.*) RAJENDRA NATH DHAR *v.* EMPEROR. **I.R. 1933 Cal. 336 = 143 I.C. 113 = 34 Cr.L.J. 518 = 56 C.L J 539 = 1933 Cr.C. 411 = A.I.R. 1933 Cal. 332.**

———**S. 294-A**—"*Lottery.*"

Where in a scheme every person who purchased a ticket at the entrance of a show was by so doing contributing to the common fund from which the prizes were to be taken and every such purchaser of an entrance ticket had an equal chance to draw back four hundred times as much as he had put in.

Held, that the scheme comes within the meaning of the word 'lottery.' A lottery is a scheme for distributing prizes by lot or chance. In its simplest form, the adventurers contribute to a fund which they agree among themselves shall be unequally divided upon the happening of an agreed event. But it is not essential that the fund out of which the prizes are provided should consist only of sums contributed by the adventurers. Nor does the fact that every adventurer in any event obtains some, or even full, value for his subscription prevent the scheme from being a lottery (*Ferrers, J.C.*) HARDER *v.* EMPEROR. **152 I C. 911 = 1934 Cr.C. 1141 = 36 Cr L J. 219 (2) = 7 R S. 103 (2) = A.I R. 1934 Sind 149.**

———**S. 294-A**—*Lottery—Chit fund.*

A subscription by a number of persons to a fund for the purpose of dividing that fund between them by chance and unequally is a lottery. Hence where a person subscribes to a chit fund every month and the arrangement is that the prize winner every month as a result of a draw will be paid a lump sum after which he was not required to subscribe, *held* it is a lottery (*Beasley, C. J. and Butler, J.*) UDUMALPET NIDHI LTD., *In re.* **57 Mad. 844 = 152 I.C. 440 = 7 R M. 227 = 1934 M.W. N. 318 = 40 L W. 56 = A.I.R. 1934 Mad. 482 = 67 M. L.J. 445.**

———**S. 294 A**—"Lottery"—*Chit fund—Provision for drawing of prizes—Winner to be paid prize without liability for future subscriptions—Offence.*

The word "*lottery*" though it has not been defined in S. 294-A, is used in the widely accepted signification, namely a scheme for distribution of prizes by lot or by chance, *i.e.*, a scheme in which the right to a prize is made wholly dependent upon the drawing or casting of lot A subscription by a number of persons to a fund for the purpose of dividing them by chance and unequally would amount to a *lottery*. Therefore, a chit fund or Kuri, the terms of which provide that a subscriber whose number is taken from the drawing will be given Rs. 50 without further liability to pay any subscriptions thereafter, is a lottery within the meaning of S. 194-A. (*Shankaranarayana Rao, J.*) GNANASUNDARAM SETTY *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 484.**

PENAL CODE (1860), S. 296.

———**S. 294-A**—*Lottery—Issue of donation bonds—Bonuses out of interest distributed by lot—Original subscription never returned.*

The accused advertised in the newspaper inviting the public to subscribe to an Association ; one of the objects of which was stated to be the maintenance of charitable institutions. The Association issued donation bonds of Rs. 10 each; the amount of the bonds was to be utilised for granting loans. Out of the interest the Association gets every year on the said donation amount, one-sixth was to be utilised for maintaining charitable institutions and the balance was to be utilised for granting cash bonuses of varying amounts, the distribution of which was to be by lot. The money which the members had originally paid, they could never see again.

Held, the transaction amounted to a 'lottery" within the meaning of S. 294-A. (Case-law discussed). (*Bagaley, J.*) A. D. RAJ *v.* EMPEROR. **10 Rang. 232 = I.R 1932 Rang. 166 = 138 I C. 687 = 33 Cr..L.J. 696 = 1932 Cr.C. 706 = A.I R. 1932 Rang. 143.**

[R 28 S.L.R 112 (117).]

———**S. 294-A**—*Lottery—Purchaser of sweets getting also ticket entitling him to try his luck.*

The applicant shopkeeper invited very customer of his to try his luck for half an anna. It was given out that the purchaser of every packet of sweets for half anna was entitled to a separate ticket and each ticket meant a separate chance in a lottery.

Held, that what was purchased by each customer of the applicant was not only the packet of sweets but also a chance in the lottery, that the customers collectively contributed towards a certain fund out of which the accused was able to give away prizes, the fact that the fund is called his profits or a separate prize made no difference and that the transaction was a lottery within the meaning of S. 294-A. (*Mehta, A.J C.*) DHANA *v.* EMPEROR. **28 S L.R. 112 = 150 I.C. 1093 = 7 R.S. 39 = 35 Cr L.J. 1249 = 1934 Cr.C. 638 = A.I R. 1934 Sind 69.**

———**S. 294-A**— '*Lottery*'—*Shop keeper conducting chit—Prize winners given articles at monthly drawings—Non-prize winner given articles at the end of chit period.*

The accused, who was a cycle and gramophone dealer, conducted two chits at his shop after having invited the members of the public to take part in them. There were to be a hundered members for each chit and the subscriber was to pay a subscription of Rs. 3 for twenty months. Every subscriber was offered a gramophone or a cycle as he chose at the time of becoming a subscriber. There was to be a drawing every month and the subscriber whose name was drawn was at once given the article he wanted and he was relieved from liability to pay further subscriptions. In the twenty first month the subscribers who did not win prizes were each given a cycle or a gramophone.

Held, that the chit business was clearly a lottery and the accused was liable to be convicted under S. 294-A. 66 M.L.J. 76, Disappr. (*Beasley, C.J. and Butler, J.*) PUBLIC PROSECUTOR *v.* MUNISAMI NAIDU. **57 Mad. 923 = 150 I.C. 1119 = 7 R M. 66 = 35 Cr.L.J. 1232 = 1934 M.W.N. 265 = 40 L.W. 26 = A.I.R. 1934 Mad. 464 = 67 M L.J. 163.**

———**Ss. 296 and 341**—*Blocking passage to temple, if an offence under.*

To constitute an offence under S. 296 of the Penal Code it has to be established that the offender caused disturbance to an assembly lawfully engaged in the performance of religious worship. Completely blocking the passage into the temple by lying down or standing across and thereby preventing the devotees from going

PENAL CODE (1860), S. 296.

into the temple to offer worship and refusing to clear the passage when asked to do, so, does not constitute an offence under S. 296 because no disturbance is caused to the assembly engaged in worship within, though it may be an offence under S. 341 of the Penal Code. (*Dora swami Iyer, C.J.*) MALLEGOWDA *v.* GOVERNMENT OF MYSORE. **38 Mys.H.C.R 346=11 Mys.L.J. 455.**

——**S. 296**—*Right to take possession—Communal dispute—Nature of offence.*

A tazia possession was taken by some Mahomedans through a private grove. It was found that they had no established right to take the procession through that grove. A dispute ensued between the Mahomedans and the Hindus as a result of which the accused were convicted for an offence under S. 296.

Held, that no offence under S. 296 was committed. 34 All. 78, Dist. (*Nanavutty, J.*) BULGAR SINGH *v.* EMPEROR. **I.R. 1933 Oudh 257—144 I.C. 540=34 Cr.L J. 778=10 O.W.N. 582=1933 Cr.C. 383=A.I.R 1933 Oudh 196.**

——**S. 297**—"*Trespass*"—*Demolition of graves on one's own land.*

The word "trespass" as used in S. 297 has not the same meaning as that attached to the expression "criminal trespass" as defined in S. 441. It means "any violent or injurious act committed in such place and with such knowledge or intention as is defined in that section."

Although the accused were found by the Civil Court to be the owners of the land in question, and although they were given *kahs* possession thereof by the Civil Court, that does not entitle them to disturb any graves that may be found existing in that land or to damage any structure that may have been raised over such graves, if by such act or acts the feelings of any person interested in the graves are likely to be wounded. If they do so, they are guilty of an offence under S. 297. (*Patterson, J.*) ABDUL KADER *v.* ABDUL KASIM. **I.R. 1932 Cal. 392=137 I.C. 872=33 Cr.L J 517=36 C.W.N. 514=1932 Cr.C. 449=A.I.R. 1932 Cal. 459.**

——**Ss 299 and 302**—*Accused drunk—Deliberately going out armed and shouting intention to kill—Threatening and following and cutting person attempting to pacify—Offence.*

Accused who was very drunk but could walk with a staggering gait and knew what he was about stated his intention to cut a man whom he supposed to be his enemy, and went out deliberately arming himself with a *da* shouting out abuses and also his intention to cut his enemy. He met on his way the deceased who tried to pacify the accused and to induce him to go home. But the accused was quarrelsome and not only threatened to cut the deceased, but followed him to the place to which deceased retreated and cut him on the head and threatened the persons who came to assist the deceased.

Held, that the facts showed that the accused was capable of forming an intention to inflict injuries with his *da* and must be presumed to have intended the natural consequences of this act, and was therefore guilty of murder, and that under the circumstances, there was no extenuating circumstance. (*Mya Bu and Dunkley, JJ.*) NGA SEIN GALE *v.* EMPEROR. **12 Rang. 445=152 I.C. 1054=36 Cr.L J. 228=7 R.R. 188=1934 Cr. C. 1326=A.I.R. 1934 Rang. 361.**

——**Ss. 299, 302, 304 and 325**—*Applicability—Murderous attack by seven people on one—Several injuries before and after the deceased falls down—Offence.*

PENAL CODE (1860), S. 299.

Accused, seven in number, made a murderous assault on the deceased and mercilously assaulted him. They deliberately attacked him and caused his death by fracturing his ribs and rupturing his spleen and inflicting on his head three injuries which left him unconscious and which might, according to the medical evidence, have also resulted in death. There were 24 injuries on the deceased, of which about 20 were inflicted after the deceased fell down and became unconscious.

Held, assuming that the accused had no intention of committing wilful murder punishable under S. 302, I.P. Code, they must be held to have intended such bodily injuries as were likely to cause death or with the knowledge that they were likely by such acts to cause death, within the meaning of S. 299, and were therefore guilty of culpable homicide punishable under S. 304, if not under S. 302. The offence would certainly not fall under S. 325. (*Srivastava and Nanavutty, JJ.*) EMPEROR *v.* SAT NARAIN **11 Luck. 51=154 I.C. 808=7 R.O. 500—36 Cr L J. 573—1935 O.W.N 343=1935 Cr.C. 841=A I.R 1935 Oudh 381.**

——**S. 299**—*Culpable homicide—Injuries only remote cause of death—Death due to unskilful treatment.*

In order that a person should be guilty of culpable homicide, it is indispensable that the death of deceased should be connected with the act of violence or other primary cause, not merely by a chain of causes and effect but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances. Where death was due to the ignorance of the deceased and the unskilful treatment which he received and the injuries were only the remote causes of death.

Held, that accused was not responsible for causing death and as such was not guilty of culpable homicide. (*Dunkley, J.*) NGA BA MIN *v.* EMPEROR. **159 I C. 1032=37 Cr.L.J. 205=1935 Cr.C. 1205—A.I.R. 1935 Rang. 418.**

—— **Ss. 299 and 300**—*Culpable homicide, when does not amount to murder.*

S. 299, clearly defines "the offence of culpaple homicide" Culpable homicide may not amount to murder: (*a*) where though the evidence is sufficient to constitute murder, one or more of the exceptions to S. 300 apply; or (*b*) where the decree of *mens rea* specified under S. 299 is present but not the special degrees referred to by S. 300. (*Ferrers, J C. and O'Sullivan. A.J.C.*) MAHOMED HASAN *v.* EMPEROR. **152 I.C. 271=17 R.S. 80=1934 Cr.C. 1137=36 Cr.L J. 22=28 S.L.R. 353=A.I.R. 1934 Sind 145.**

——**Ss. 299 and 300** — *Distinction — Culpable homicide—When murder—Blows inflicted on abdomen with gandasa or chopper—Offence.*

The distinction between an offence of culpable homicide under S. 299, I.P. Code, and that of murder under S. 302, though fine, is clear. Culpable homicide is murder not merely if the act causing death is done with intent to cause death, but also in cases where the act causing death is done with the intention of causing such bodily injury as the offender knew to be likely to cause death, and also if the act is done with the intention of causing bodily injury which is sufficient in the ordinary course of nature to cause death. Where blows are inflicted on the abdomen with a gandasa or chopper, the offence is not merely culpable homicide under S. 304 but murder under S. 302. (*Srivastava, Nanavutty and Rachhpal Singh, JJ.*) BHIKHARI *v.* EMPEROR. **7 R O 44= 35 Cr.L.J. 1113=150 I.C. 819=11 O. W.N. 851=1934 Cr.C. 1228=A.I.R. 1934 Oudh 405.**

PENAL CODE (1860), S. 299.

——**Ss. 299, Expl. 2 and 304**—*Applicability—Accused causing simple injury to deceased—Death due to sepsis consequent to bad treatment.*

Where in an ordinary village quarrel due to the grazing of cattle, the accused gave a blow with a lathi and caused a simple injury on the head of the deceased and the evidence shows that the immediate cause of death was septic meningitis and that the sepsis was due to the neglect in treatment and the application of some village poultice, the case is one of the death being caused by the use of wrong remedies and unskilful treatment and Expl. 2 of S. 299, I.P. Code, is, therefore, inapplicable; nor is the accused guilty under S. 304. (*Srivastava, J.*) SOBHA *v.* EMPEROR. **157 I.C. 667=8 R.O. 43=36 Cr.L.J. 1262=1935 Cr.C. 1094=1935 O.W.N. 940=A.I.R. 1935 Oudh 446.**

——**S. 300**—*Applicability—Gunshot during dacoity—Death caused—Offence.*

During the course of a dacoity at night, while a victim after freeing himself, was running off, a gunner among the dacoits shot at him with a shot gun aided by the flash of a torch light cast by his light man. The victim ran some distance and then staggered and fell unconscious. He was taken to a Railway hospital the next morning and given first treatment and pellets were extracted. After 3 hours he regained consciousness, his dying declaration was recorded and he was sent at 8 p.m to Calcuta by train. After arrival there the next morning another operation was performed on him but he died at 7 p.m. that day. The death was due to acute peritonitis caused by the perforation of the gun by a shot entering his body. It was found that the intention of the gunner in shooting was only to cause some injury as would disable the victim from going away or offering resistance and that the light was flashed only to spot out the victim. It was also found that shots were directed towards a comparatively lower part of the body and that killing was not the intention of the party. The injury too was not such as would in the ordinary course be sufficient to cause death. The medical evidence was that death was due to exhaustion as the result of injuries;

Held, that the act did not amount to 'murder' within the meaning of S. 300. (*Mukerji, Patterson and Guha, JJ.*) EMPEROR *v.* PRAN KRISHNA CHAKRAVARTY. **158 I.C. 176=8 R.C. 166=36 Cr.L.J. 1322=39 C.W.N. 188=1935 Cr.C. 1004=A.I.R. 1935 Cal. 580 (S.B).**

——**S. 300**—*Constructive guilt—Sentence—Brutal assassination of witnesses by accused persons.*

Neither principle not approved practice can be adduced in favour of the view that a capital sentence should not be passed when the offenders are constructively guilty of murder. Each case is to be considered on its own facts. Where the accused were responsible for the brutal assassination of witnesses who were about to depose against them and it is impossible to differentiate between the accused persons, all of them deserve to be hanged and there is no reason or principle for sentencing them to transportation for life. "It is indisputable that the lesser penalty of transportation for life has now quite ceased to be deterrent even among better controlled men like these *dtara* Ahirs." (*Macpherson and James, JJ.*) MOSADDI RAI *v.* EMPEROR. **11 Pat. 807=13 Pat L.T. 702=1933 Cr C. 253=I.R. 1933 Pat. 180=142 I.C. 841 (2)=34 Cr.L.J. 427=A.I.R. 1933 Pat. 100.**

——**Ss. 300 and 299**—Distinction—Culpable homicide when murder—Blows inflicted on abdomen with gandasa or chopper. *See* PENAL CODE, SS. 299 AND 300. **A.I.R. 1934 Oudh 405.**

PENAL CODE (1860), S. 300.

——**S. 300**—*Intention to murder—Proof of, from nature of assault.*

It a man, who is armed with a deadly weapon like a sela, thrusts that weapon into the chest of his victim and causes instantaneous death, he can have only one intention, namely, intention to murder. (*Addison and Agha Haidar, JJ.*) CHAND SINGH *v.* EMPEROR. **35 P.L.R. 715=1934 Cr C. 1093=155 I.C. 275=7 R.L. 680=36 Cr.L.J. 696=A.I.R. 1934 Lah. 741.**

——**S. 300**—*Intention—Proof—Reference to nature of wound.*

The deceased had received an incised wound $7\frac{1}{2}$" long, 3" broad and $3\frac{1}{2}$" deep beginning at the level of the left nostril and $1\frac{1}{2}$" deep below the left ear.

Held, that the assailant must be presumed to have had the intention necessary for murder. (*Mya Bu and Brown, JJ.*) NGA KAN HTU v. EMPEROR. **I.R.1933 Rang. 99=144 I C. 282=34 Cr.L J. 747=1933 Cr.C. 577=A.I.R. 1933 Rang. 95.**

——**S. 300**—*Motive—Prosecution if need prove Inadequate motive—Sentence.*

In every case of murder the motive for the murder can hardly be deemed to be adequate in the sense of justifying the commission of that murder, for if that were the case the offence would be taken out of the category of wilful murder and be reduced to the crime of culpable homicide or even, in certain special cases it might be held to be justifiabie homicide. When the motive alleged by the prosecution is not ridiculously inadequate and serves to explain the conduct of the accused, the conviction cannot be set aside on the ground that the motive for the crime is wholly inadequate. (*Nanautty and Smith, JJ.*) RATAN LAL *v.* EMPEROR. **8 Luck. 570=6 I.R. (Oudh) 107=146 I C. 381=10 O.W.N 557=1933 Cr.C. 780=35 Cr.L.J 45=A.I.R. 1933 Oudh 333.**

——**S. 300**—*Murder—Attack with sickle causing severe wounds—Intention—Offence.*

A man who inflicts on another severe wounds with a sickle must be taken to intend, either to kill his victim or to inflict upon him such bodily injuries as he must know are likely to cause his victim's dhath. The act would be murder, unless the offence can be brought within one or other of the exceptions to S. 300, I. P. Code. (*Reilly, C.J. and Sreenivasa Rao, J.*) CHAMA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 248=40 Mys. H.C.R. 242.**

——**S. 300**—*Murder—Injuries sufficient to cause death of old man.*

Where the accused attacked his father-in-law, an old man of fifty, when the latter was asleep and beat him with lathi, causing manifold injuries on his body, as a result of which the old man died.

Held, that the accused was guilty of murder under S. 300 and punishable under S, 302 and not under S. 304, as the injuries were sufficient in the ordinary course of nature to cause death. (Distinction between murder and culpable homicide pointed out. (*Bishesh-war Nath and Nanavutty, JJ.*) EMPEROR *v.* RATAN. **7 Luck. 634=I.R. 1932 Oudh 287=138 I.C. 123=33 Cr.L.J 561=9 O.W.N. 285=1932 Cr.C. 443=A.I.R. 1932 Oudh 186.**

——**S. 300**—*Murder—Plunging knife into vital part of body—Death caused.*

A person plunging a dangerous weapon like a knife into a vital part of the body should be deemed to have Intended to cause such injury as he knew was likely to cause death. The offence therefore amounts to murder where death is caused on account of the injury. (*Shadi*

PENAL CODE (1860), S. 300.

Lal, C.J. and Monroe, J.) MAHOMED *v.* EMPEROR. **I.R. 1932 Lah. 273=137 I.C. 65=33 Cr.L.J. 375=33 P.L.R. 145=1932 Cr.C. 278 (2)=A.I.R. 1932 Lah. 254 (2).**

———S. 300—*Offence under—Mere intention to beat deceased.*

Evidence of an intention to beat the deceased does not in itself go far towards proving the guilt of the accused on the capital charge of murder. *(Nanavutty and Smith, JJ.)* RATAN LAL *v.* EMPEROR. **8 Luck. 570=6 I.R. (Oudh) 107=146 I.C. 381=10 O.W.N. 557=35 Cr. L.J. 45=1933 Cr.C.780=A.I.R. 1933 Oudh 333.**

———S. 300—*Possoning—Death caused by—Questions for determination.*

In case of of alleged poisoning, the two material questions requiring determination are, firstly, did the deceased die of the poison and secondly had the poison been administered to the deceased by the accused. *(Wazir Hasan, C.J. and Srivastava, J.)* MT. GAYA KUNWAR EMPEROR. **6 R.O, 421=148 I.C. 600=35 Cr.L.J. 700=11 O.W.N. 312=1934 Cr.C 231=A.I.R. 1934 Oudh 62.**

———S. 300—*Premeditation.*

If a man is proved to have taken a spear and run straight to the deceased and given him a fatal stab it is deliberate murder. Premeditation does not mean the long harbouring of a design. *(Wallace, and Jackson, JJ.)* PICHUMMA NAIDU *v.* EMPEROR.

1930 M.W.N. 1211.

———S. 300—*Several persons joining with common object—Proof of intention to commit murder—Liability of persons actually present.*

Where one of the accused is shown to have been present when the fatal blow was struck and it is further proved that he shared with the others the intention to cause death or injury sufficient in the ordinary course of nature to cause death he can be justly convicted of murder, even though there is no proof that he struck any blow to the person murdered and that the person was killed by the blows struck by the other persons alone. *(Carr, Cunliffe and Otter, JJ.)* NGA E *v.* EMPEROR. **8 Rang. 603=I.R. 1931 Rang. 99=130 I C. 355=32 Cr. L J. 495=1931 Cr.C. 17=A.I.R. 1931 Rang. 1 (F.B.).**

———S. 300—*Offence under—Striking another's head with sharp edge of axe.*

A person who strikes another's head with the sharp edge of an axe with sufficient force to break it must be held to have acted with the intention described in S. 300, 'secondly' and 'thirdly'. *(Coldstream, and Jai Lal, JJ.)* BAHAWAL *v.* EMPEROR. **32 P L.R. 810=1932 Cr C. 15=135 I.C. 670=I.R. 1932 Lah. 126=33 Cr.L.J. 184=A.I.R. 1932 Lah. 5.**

———S. 300—*Thirdly—Sufficient to cause death—Blows with lathis—Skull fractured—Offence.*

Where two men together repeatedly strike another on his head with lathis with sufficient force to break his skull in several places, their offence must be held to fall under S, 300 (thirdly) for their intention could not be other than to inflict such injury as is sufficient in the ordinary course of nature to cause death. *(Addison and Coldstream, JJ.)* ILAM DIN *v.* EMPEROR. **I.R. 1931 Lah. 909=134 I.C. 205=32 Cr L.J. 1127=32 P.L.R. 401.**

———S. 300—*'Thirdly' and 'Fourthly'—'Applicability—"Murder"—Grievous hurt—When amounts to.*

If a person deals such a grievous hurt to another that death takes place and the person responsible for the act knows that it is likely to take place or should know it unless he is mentally unsound, then he is guilty of murder.

PENAL CODE (1860), S 300, Excep. 1.

This is the effect of cls.(3) and (4) of S. 300. *(Patterson and Cunliffe, JJ.)* EMPEROR *v.* MATILALMULLICK **157 I.C. 829=36 Cr.L.J.1220=39 C.W.N.199=1935 Cr.C. 902=A.I.R. 1935 Cal. 526.**

———S. 300—*Fourthly—Use of knife—Intention to cause death.*

The use of a pocket knife in a sudden fight does not necessarily mean that the accused intends to cause death or that he knows it to be likely that death will follow. Every case has to be decided on its own merits. It depends on the way the weapon is used and part of the body selected for the purpose and not only on the nature of the weapon. The violent use of a pocket knife on a vital part of the body would necessarily imply the knowledg that the act committed was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. *(Middleton, J.C. and Mir Ahmad, A.J.C.)* NIHAL SINGH *v.* EMPEROR. **159 I.C 284=1935 Cr C. 1120=37 Cr L J. 87=A.I. R. 1935 Pesh. 155.**

———S. 300—*Exceptions—Applicability—Burden of proof.*

The burden of proving that the act of the accused comes within any of the exceptions to S, 300 lies on the accused. *(Bisheshwar Nath and Nanavutty, JJ.)* RATAN *v.* EMPEROR. **8 Luck. 301=I R. 1933 Oudh 154=143 I.C. 55=34 Cr L.J. 498 (2)=10 O.W.N. 7=1933 Cr.C, 279=A.I R, 1933 Oudh 148.**

———S. 300, Exceptions—*Applicability—Burden of proof of extenuating circumstances—Prosecution evidence—Whether can be relied on.*

In a murder trial, once it is proved that the killing comes within the definition of murder, the onus of proving that the act never the less comes within one of the exceptions to S. 300, I P. Code, is ordinarily on the accused. He has to make out that the offence is only culpable homicide. In some cases, even if the accused does not put forward such a plea, it may be justifiable when the prosecution evidence itself shows or makes it appear that the act comes within one of the exceptions to S, 300 to find that his act is not murder but only culpable homicide. But when there is no such evidence to that effect it is not justifiable for the judge or Jury to adopt a theory not set up by the accused and at variance with his own explanation of the act. *(Reilly, C.J. and Chari, J.)* MANCHA MAIKA *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 162=40 Mys.H,C.R. 208**

———S. 300, Exceptions—*Benefit of—Accused can rely on prosecution evidence.*

Where death results from the injuries caused by the accused, the burden of proving the circumstances which entitled him to kill the deceased so as to bring his case under any of the exceptions in the Penal Code is on him; but if he can establish that such circumstances appear from the prosecution evidence, he would be equally entitled to their benefit *(Coldstream and Jai Lal, JJ.)* MAHOMED RAFIQ *v.* EMPEROR. **1934 Cr. C. 19=147 I C. 722=6 R.L. 436=35 Cr L.J. 470=A.I.R. 1933 Lah. 1055.**

———S. 300, Exception I—Applicability—Deceased attempting to violate wife of accused—Gandasa blows inflicted by accused and causing death—Case governed by Ss. 99 and 100 rather by the explanation. *See* **PENAL CODE, Ss. 99 and 100. A.I.R. 1933 All. 213.**

———S. 300 Exception (1)—*Applicability—Deceased raping near relative of accused—Offence committed under sudden provocation.*

Where the deceased committed rape on the sister-in-law of the accused and the accused on being informed of

PENAL CODE (1860), S. 300, Excep. 1.

it then and there lost self-control attacked the victim and caused death.

Held, that the case came under exception (i) to S. 300. (*Fawcett, J.C. and Aston, A.J.C*) SUMAR KHAMISO *v.* EMPEROR. **26 S L.R. 266 = I.R. 1932 Sind 143 = 139 I.C. 772 = 33 Cr.L.J. 870 = 1932 Cr.C. 741 = A.I.R. 1932 Sind 168.**

——**S. 300, Excep. 1**—*Applicability—Grave and sudden provocation.*

The accused had worked in his fields since the morning during the month of June and at midday he was resting. The weather was sultry on account of a downpour of rain the previous night. The father of the accused asked him to prevent the bullocks which were entering the fields of others from entering the fields, which the accused refused to do. Thereupon the father threw a lump of clay at the accused and abused him with the result that the accused assaulted him with a stick and in consequence the father died. The father knew full well that the intelligence of the accused was not of a normal kind.

Held, that the accused acted under grave and sudden provocation so as to bring Excep. 1, S. 300, into play. (*Rowland and Varma, JJ.*) BHURANGA URAON *v.* EMPEROR. **1935 Cr C. 1288 = 160 I.C. 18 = 37 Cr.L. J. 221 = A.I.R. 1935 Pat. 506.**

——**S. 300, Excep. 1**—*Applicability—Offence of adultery.*

The accused knew that his sister had gone to meet the deceased, with whom she had illicit connexion, and deliberately went to the spot with the intention of killing the culprit if he found him with his sister,

Held, that the provocation was no doubt grave but not sudden. The accused expected to find at the spot before he left his house what he afterwards found there. There was therefore no suddenness about the discovery of his sister in the company of the deceased and the accused could not be said to have been deprived of the power of self-control. On the other hand, he sought the provocation by deliberately going to the scene of the meeting. (*Coldstream and Jai Lal, JJ.*) MEHRA MISTAK *v.* EMPEROR. **151 I.C 751 = 7 R.L. 184 = 35 Cr.L.J. 1378 = 1934 Cr.C. 197 = A.I.R. 1934 Lah. 103.**

——**S. 300, Excep. 1**—*Applicability—Provocation grave but not sudden.*

The accused killed his wife under provocation, which was grave but not sudden.

Held, he could not claim the benefit of exception (1) of S. 300 (*Raza and Bisheshwar Nath, JJ.*) BHOPAL *v.* EMPEROR. **I.R. 1931 Oudh 388 (2) = 134 I C. 596 (2) — 32 Cr.L.J. 1244 (1) = 14 O L J. 256 = 8 O.W.N. 528.**

—— **S. 300, Excep. 1**—*Grave and sudden provocation—Accused asked by deceased to go out to fields with him—Accused interpreting it to be an offer for unnatural intercourse.*

The accused was asked by the deceased to go out to the fields with him. The accused, interpreting this to be an offer of unnatural intercourse, used his dagger on the deceased with fatal results.

Held, that the accused had not received grave and sudden provocation and as such his case was not covered by Excep. 1 of S. 300. (*Almond, J.C. and Mir Ahmad, A.J.C.*) JUMMA KHAN *v.* EMPEROR. **156 I C. 6 = 7 R. Pesh. 113 = 36 Cr.L.J. 914 = 1935 Cr.C. 357 (2) = A.I.R. 1935 Pesh. 59.**

——**S. 300, Excep. 1**—*Grave and sudden provocation—Accused finding his mistress in the arms of another lover.*

PENAL CODE (1860), S. 300, Excep. 1.

Where the accused murdered his mistress in consequence of gave and sudden provocation on finding her in the arms of her former lover and the lower Court convicted him under S. 302 on the ground that the woman being only his mistress and not his wife, he was not entitled to the exclusive possession of her person.

Held, that the considerations of social morality ought not to be applied purely to psychological problem and the accused ought to have been convicted under S. 304. But in view of the fact that the accused took a long time to search for a knife and then committed the murder, the conviction under S. 302 was confirmed. (*Waller and Krishnan Pandalai, JJ.*) POTHARAJU *v.* EMPEROR. **1932 Cr C. 5 (1) = 35 L.W. 141 = 136 I C. 314 = 33 Cr.L J. 273 = I.R. 1932 Mad. 282 (1) = 1931 M.W N. 1137 = A.I R. 1931 Mad. 25 (1).**

——**S. 300, Excep. 1**—*Grave and sudden provocation—Confession of adultery by wife—Murder of paramour by husband—Ruling in* King v. Palmer.

In *King* v. *Palmer* (1913) 2, K. B. 29, it was laid down that if a wife suddenly confessed to her husband that she has committed adultery, it may be treated as equivalent to the discovery of the act itself and if the husband forthwith kills her, the offence is only one of culpable homicide not amounting to murder.

Held, this ruling had no application to the murder by the husband of the paramour with whom his wife had confessed to have committed adultery.

Held, further, in the present instance that the husband had for long a suspicion almost amounting to certainty; there was therefore no scope for surprise by the confession or suddenness for the provocation. (*Bardswell and Lakshmana Rao, JJ.*) IMBICHI KOYA *v.* EMPEROR. **39 L.W. 190 = 1934 Cr.C. 328 (2) = 148 I C. 590 = 6 R.M. 499 = 35 Cr.L J 694 = 1933 M. W.N. 543 = A.I.R. 1934 Mad. 176 = 66 M L J. 213.**

——**Ss. 300, Excep. 1 and 304**—*Grave and sudden provocation—Deceased about to indulge in immoral ways—Attempt to check—Insolent reply—Provocation*

Deceased, accused's younger sister, who had left her husband and was living under the care of accused was suspected to be of immoral character. On the night or the murder at about 3 A.M. she had gone to meet a stranger in the wara at the back of the house for a clandestine purpose. When the accused asked the deceased why she did not give up her evil ways she refused to listen to him and gave an insolent reply. Thereupon the accused gave a blow with a hatchet which caused her death,

Held, that the provocation received by the accused was in the circumstances almost as "grave and sudden" as it would have been had he seen the deceased in the act of sexual intercourse with a stranger and it was further aggravated by the insolent reply given by the deceased and that the case properly fell within the purview of S. 304, Part 1, I. P. Code. (*Bhide and Currie, JJ.*) INAYAT *v.* EMPEROR. **6 I.R. (Lah.) 215 = 146 I.C 357 = 34 P.L.R. 935 = 35 Cr.L.J. 74 = 1933 Cr.C. 1114 (2) = A.I.R. 1933 Lah. 869 (2).**

——**S. 300, Excep. 1**—*Grave and sudden provocation—Sufficiency.*

Accused not finding his wife in the house went out with an axe to the fields very near the house and saw her with another man with whom she was carrying on an intrigue. He attacked the man with the axe and coming back to his wife who had gone to the house, took a knife and cut her throat as a result of which she died.

Held, that the accused acted under grave and sudden provocation and that the mere fact that when killing his wife, he substituted a knife for the axe was scarcely

PENAL CODE (1860), S. 300, Excep. 1.

sufficient to prove deliberation, as his passion had not calmed down by the time he came to the house from the field. (*Fraser, J.C. and Saaduddin, A.J.C.*) ABDUL HAMID *v.* EMPEROR. **I.R. 1933 Pesh. 34=144 I.C. 160=34 Cr.L.J. 804=1933 Cr.C. 589=A.I.R. 1933 Pesh. 38.**

———**S. 300, Excep. 1**—'*Grave and sudden provocation*'—*Test.*

The test whether a person had acted under a grave and sudden provocation is whether the provocation given was in the circumstances of the case likely to cause a normal reasonable man to lose control of himself to the extent of inflicting the injury or injuries that he did inflict. (*Dalip Singh and Abdul Rashid, JJ.*) SARAJ DIN *v.* EMPEROR. **153 I.C. 204=7 R.L. 399 (2)=36 Cr.L.J. 306=35 P.L.R. 588=1934 Cr.C. 927=A.I.R. 1934 Lah. 600.**

———**Ss. 300, Excep. 1 and 304**—*Grave and sudden provocation—What amounts to.*

Accused complained to P. W. 6 to the effect that the deceased had gone to his house one evening knocked at the door, pushed his wife and attempted to seduce her, while he (accused) was absent at a shandy, and asked P. W. 6 to convene a panchayat. The panchayat was convened, and the accused laid his complaint. The deceased denied the charge, the accused's wife who was sent for stated that somebody had knocked at her door the previous night, but that on opening it, she found nobody nor found the deceased. The deceased then asked accused why he had come with a false complaint on which the accused abused him in filthy language. The deceased returned the abuse and caught hold of the accused's tuft of hair and also gave him a blow with his fist on the accused's back. Both of them closed with each other, the accused also catching hold of the deceased's tuft of hair. Before they could be separated by some persons, who approached, the deceased fell down saying that he was stabbed by the accused who ran away. The medical evidence showed that the stab wound caused the death,

Held, that under the circumstances, the offence fell under the first part of S. 304, being covered by Exception I to S. 300. (*Pakenham Walsh, J.*) THIRUPATHURAN, *In re* **40 L W 777=1934 M.W N. 1358 1934 Cr.C. 1398=155 I.C. 408=7 R M. 579=36 Cr L.J. 790=A.I R. 1934 Mad. 722=67 M.L.J. 674.**

———**S. 300, Excep. 1** *Grave and sudden provocation—What constitutes—Act, when not murder.*

In order to get the benefit of Excep. (1) to S. 300. an accused person must show that he acted under grave and sudden povocation which deprived him of the self-control. Grave provocation which a man may have suffered for a long time may be stirred up by something into sudden provocation. But the provocation which will reduce what would otherwise be murder to some lesser offence under Excep. (1) of S 300, must be grave and sudden it must deprive the offender of his self-control and the act for which the benefit of the Exception is claimed must be committed while the offender is still deprived of his self control by the grave and sudden provocation. (*Reilly, C.J. and Sreenivasa Rao, J.*) CHAMA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 248=40 Mys.H C.R. 242.**

———**S. 300, Excep. 1**—*Grave and sudden provocation—Whether need be caused by accused.*

It is not necessary that the grave and sudden provocation within the meaning of Exception 1 to S. 300 must come from the victim within the hearing or sight of the offender. The only questions which arise under Exception (1) is whether the provocation caused by the victim was grave enough or sudden enough to deprive the offender of self control. (*Ferrers, J. C. and Aston, A. J. C.*) SUMAR KHAMISO *v.* EMPEROR. **26 S.L. R. 266=I.R 1932 Sind 143=139 I.C. 772=33 Cr.L. J. 870=1932 Cr.C. 741=A.I.R. 1932 Sind 168.**

———**S. 300, Excep. 1**—*Mere vulgar abuse—Provocation not grave—Sentence.*

A mere vulgar abuse is not such a grave and sudden provocation as is contemplated in Exception 1 to S. 300. It may however be taken with account in awarding sentence. (*Shadi Lal, C. J. and Agha Haidar, J.*) ABDULLAH *v.* EMPEROR. **I.R. 1932 Lah. 251=136 I.C. 715=33 Cr L J. 338=33 P.L.R. 382=1932 Cr. C. 487=A.I.R. 1932 Lah. 369.**

———**S. 300 Excep. 1**—*Provocation created by conduct of accused himself, no defence.*

That the accused lost his self control owing to provocation is no defence, where the accused himself started the quarrel and the abuses by the other party were only made in response to the abuses by the accused. (*Subhedar, A. J. C.*) SULEMAN *v.* EMPEROR. **I.R. 1933 Nag. 134=142 I.C 741=34 Cr.L J. 404=15 N.L.J. 129.**

———**S. 300, Excep. 1**—*Provocation—Elements of defence.*

Exception (1) to S. 300 only applies when the act is committed without premeditation in a sudden right in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner. (*Reilly, J.*, on a difference of opinion between *Waller and Pandalai, JJ.*) PUBLIC PROSECUTOR *v.* SATYAM. **1931 M W.N. 873.**

———**S. 300—Excep. 1**—*Provocation not grave and sudden—Sentence.*

Where the evidence disclosed that the accused committed the murder in a fit of temper but the provocation could not be called grave and sudden.

Held that the case was not brought within any of the exceptions to S. 300, that the conviction for murder was correct, but that in view of the provocation and that it was not premeditated, the accused should be sentenced only to tranportation for life. (*Beasley, C.J. and Sundaram Chetty, J.*) RAJAVELU MUDALI *v.* EMPEROR. **1931 M.W.N. 134.**

———**S. 300, Excep. 1**—*Right to benefit under—Offender giving provocation.*

Once the provocation is given by the offender himself, he cannot subsequently urge that the opposite party had acted in a provocative manner. (*Middleton, J. C. and Mir Ahmad, A. J. C.*) NIHAL SINGH *v.* EMPEROR. **159 I.C. 284=1935 Cr.C 1120=37 Cr.L J. 87=A. I.R. 1935 Pesh. 155.**

———**S. 300, Excep. 1**—*Scope—Grave and sudden provocation—Homicide — Husband finding wife in sexual intercourse with paramour—Attack resulting in death—Offence.*

There can be no no higher provocation than that of finding one's wife in actual sexual intercourse with her paramour Court generally treats the husband who kills his wife under such circumstances with special leniency. Homicide committed under such circumstances must certainly be punished, but not as severely as murder nor visited with the highest penalty of the law. In treating provocation as a mitigation of the crime, the law respects the infirmities of human nature. But a man who claims the benfit of this indulgence of the law must prove that his act was not the result of a cool, deliberate judgment or previous malignity of heart. It is mainl. on those principles that Excep. 1, to S. 300, is framed (*Mahadevayya, O. C. J. and Ramachandra Rao, J.*)

PENAL CODE (1860), S. 300, Excep. 1.

CHOWDA *v.* GOVERNMENT OF MYSORE. **39 Mys. H.C.R. 536.**

——**Ss. 300, Excep. 1 and 304**—*Sentence—Murder under grave and sudden provocation.*

Accused, on seeing the deceased having sexual intercourse with his (accused's) wife, killed him. He was convicted under S. 304-I and sentenced to transportation for life,

Held, that a man who acts under grave and sudden provocation of this nature cannot be put on the same terms as an actual murderer, that the sentence was far too severe and that it should be reduced to imprisonment already undergone. (*Harrison and Dalip Singh, JJ.*) MAHOMED ZAMAN *v.* EMPEROR. **6 I.R. (Lah.) 155 (1)=145 I.C. 1009=34 Cr.L.J. 1161 (2)=34 P.L.R. 899=1933 Cr.C. 310=A.I.R. 1933 Lah. 165.**

——**S. 300, Excep. 1**—*Wrongful arrest—Use of force to avoid—Justification.*

The provocation that will bring a case within Excep. 1 to S 300 must not be provocation given by anything done in obedience to the law or by a public servant in the exercise of his powers. Under the first two paragraphs of S. 99 on the other hand, the right of private defence is not available against acts done or directed by public servants acting in good faith under colour of their office even though such acts may not be strictly justifiable by law. An arrest or attempted arrest by a private person if not strictly justifiable by law is not outside the provocation mentioned in Excep. 1.

Semble.—The right of private persons to arrest offenders is more restricted in India than in England. (*Dhavle and Rowland, JJ.*) ABDUL AZIZ *v.* EMPEROR. **14 Pat L.T. 464=1933 Cr.C. 1079=148 I.C. 574=6 R.P. 490=35 Cr.L.J. 725=A.I.R. 1933 Pat. 508.**

——**S. 300, Exceps. (1) and (4)**—*Applicability—Fight arising without premeditation—Accused provoked by deceased's party.*

Where the fight arose without premeditation on the part of the accused who were themselves provoked by the party of the deceased and the blows were struck in the heat of passion upon a sudden quarrel without their having taken undue advantage or acting in a cruel or unusual manner, the accused must receive the benefit of Excep. 1 or of Excep. 4 to S. 300. (*Kendall, Ag. C.J. and Harries, J.*) BHAGWAN DAS *v.* EMPEROR. **58 All. 129=155 I.C. 560=1935 A.L.J. 385=7 R.A. 944=36 Cr.L.J. 773=1935 A.W.R. 210=1935 Cr.C. 919=A.I.R. 1935 All. 717.**

——**S. 300, Excep. 2**—*Applicability—Deceased having intrigue with accused's wife and singing provocative song.*

Deceased was having an intrigue with wife of accused for a long time and used to sing provocative songs tantamount to declaration of his intrigue.

Held, that the relations between the accused the deceased and the accused's wife were such as to constitute a continuing grave provocation; the song mentioned in evidence was of a nature to give sudden and grave provocation every time it was sung by the deceased in the presence of the accused; the mere fact that he had managed to control himself on previous occasions when provoked, was no reason for refusing to give him the benefit of Excep. (2) to S. 300. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) BAHADUR *v.* EMPEROR. **156 I.C. 427=7 R. Pesh. 122=36 Cr.L.J. 938=1935 Cr.C. 457=A.I.R. 1935 Pesh. 78.**

——**S. 300, Excep. 2**—*Applicability—Deceased's party using fists.*

PENAL CODE (1860), S. 300, Excep. 2.

When in a quarrel the party of the deceased is merely using fists while attacking, the accused can have no reasonable apprehension that he will be grievously hurt by his adversary. He may have an apprehension, but it cannot by any stretch of reasoning be considered reasonable. (*Middleton, J. C. and Mir Ahmad, A. J. C.*) NIHAL SINGH *v.* EMPEROR. **159 I.C. 284=37 Cr.L.J. 87=1935 Cr.C 1120=A.I.R. 1935 Pesh. 155.**

——**S. 300, Excep. 2**—*Evidence.*

The deceased came in a state of great excitement with a lathi determined to use violence against his erring wife or her lover or both and the lover snatched the lathi from him and struck him twice on the head which resulted in his death.

Held, that Exception (2) to S. 300 was applicable and the conviction under S. 302 should be altered to one under S. 304. (*Coldstream and Jai Lal, JJ.*) INDAR SINGH *v.* EMPEROR. **14 Lah. 814=6 I.R. (Lah.) 149=145 I.C. 921=34 Cr.L.J. 1160=34 P.L.R. 886 1933 Cr.C. 267 (1)=A.I.R. 1933 Lah. 144.**

——**S. 300, Excep. 2**—*Private defence—Proof—Exceeding the right.*

In order to avail himself of the right of private defence the accused must show that he had a reasonable apprehension of being killed or of suffering some grievous bodily harm and that what he did was necessary to protect himself. Where the evidence showed that when the deceased, the older and stronger of the two, assaulted the accused, the latter had reasonable apprehension of serious personal injury and in fact received several injuries before he inflicted the stabs on the deceased, *held* the offence amounted only to culpable homicide not amounting to murder. (*Curgenven and Cornish, JJ.*) RAMASWAMI MAIDU *v.* EMPEROR. **1931 M.W.N. 606.**

——**S. 300, Excep. 2**—*Private defence and provocation—Burden of proof—Duty of Court.*

If an accused person wishes to take advantage of one of the Exceptions to S. 300, the burden is primarily on him to show that his act falls within the exception concerned. However when an ignorant or ill-defended person is being tried, it is open to the Court and proper for the Court to examine the evidence in order to see whether it discloses facts which will bring the act of the accused within any of the Exceptions. But if the accused does not set up such a plea, it is not for the Court to speculate upon mere possibilities. There must certainly be some basis found for the plea in the evidence. (*Reilly, J.*, on a difference of opinion between *Waller and Pandalai, JJ.*) PUBLIC PROSECUTOR *v.* SATYAM. **1931 M.W.N. 873.**

——**Ss. 300, Exception 2 and 100**—*Right of private defence exceeded.*

Deceased who was a notorious bully and older than the accused along with another assaulted the accused and attacked him with their fists. After the scuffle which lasted for 10 minutes in which accused got some slight injuries, accused drew a knife and stabbed the deceased.

Held, there was no justification for the accused to draw a knife and stab, that he had exceeded the right of private defence which he had and that in the circumstances of the case, sentence may be reduced from 5 years' rigorous imprisonment to three years' rigorous imprisonment. (*Currie, J.*) MAHOMED SHAFI *v.* EMPEROR. **6 I.R. (Lah.) 168=146 I.C. 34=34 Cr.L.J. 1170=1933 Cr.C. 347=A.I.R. 1933 Lah. 227.**

——**S. 300, Exception 2**—*Right of private defence—Free fight between two persons.*

PENAL CODE (1860), S. 300.

When there is a free fight between two persons, no right of private defence accrues to either of them. (*Shadi Lal, C.J. and Abdul Rashid, J.*) PARMESHRI DAS *v.* EMPEROR. **151 I.C. 469=7 R.L. 141=35 Cr.L.J. 1319=1934 Cr.C. 559=A.I.R. 1934 Lah. 332.**

———**S. 300, Exception 3 and S. 302**—*Blow likely to cause death—No intention to cause death- Covictton for murder—Validity.*

Though the accused had no intention of causing the death of the accused, yet if he gave the accused such a blow which in the normal and natural course of the events was likely to cause his death, and it did cause the death, the accused must be deemed to have intended to cause death and should be convicted under S. 302. 1 N.L.R. 134, Foll. (*Subhedar, A. J. C.*) SULEMAN *v.* EMPEROR **I. R. 1933 Nag. 134=142 I. C. 741=34 Cr.L.J. 404=15 N L.J. 129.**

———**S. 300, Exception 4**—*Applicability—Abuse leading to sudden fight—Stabbing with knife—Offence.*

The accused and the deceased exchanged abuses and grappled with each other and during the struggle, the accused suddenly took out his knife and stabbed the deceased under the armpit, piercing the lung and causing death. Motive for murder was not clearly established. In the District to which the parties belonged knives were commonly carried.

Held, the accused having, suddenly and without realising the consequences, stabbed the deceased in the heat of passion, the offence fall under Excep. 4 to S. 300, I. P. Code. (*Young, C J. and Addison, J.*) HUSSAIN *v.* EMPEROR. **7 R.L. 1=150 I.C. 640=35 Cr.L J. 1165 =1934 Cr.C. 1152=A.I.R. 1934 Lah. 818**

———**S. 300, Exception 4**—*Applicability—Accused acting in a cruel manner and taking undue advantage.*

For the application of Exception 4, the elements that the offence was committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, not alone sufficient. It must also be found that the offender did not take any undue advantage and did not act in a cruel or unusual manner. Accused gave a violent lathi blow on the head of the deceased which felled him to the ground, without premeditation in a sudden fight, in the heat of passion, and upon a sudden quarrel. But after the deceased had been brought to the ground, the accused gave him three or four blows, one of which was on his head—and a violent one too.

Held, that the accused acted in a cruel manner and that he could not be given the benefit of Exception 4. (*Raza and Smith, JJ.*) RAM NATH *v.* EMPEROR. **6 I R (Oudh) 145 (1)=146 I.C. 563=10 O.W N. 986=1933 Cr.C. 1323=35 Cr.L J. 115=A I.R. 1933 Oudh 438.**

———**S. 300, Exception 4**—*Applicability—Conditions of.*

Exception 4 to S. 300 only applies to persons who take no undue advantage in a fight and who do not act in a cruel and unusual manner. Where in the course of a fight, the accused takes a knife out of his pocket and stabs the deceased causing a fatal wound, though there may be no deliberation on his part, yet he cannot be said to have acted otherwise than in a cruel and unusual manner, when neither the accused nor any one opposed to the accused has any weapon in their hands. His act is not covered by Excep. 4, and clearly amounts to murder. (*Reilly, C.J. and Shankaranarayana Rao, J.*) PEREERA *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 309=40 Mys.H.C.R. 56**

———**S. 300, Exception 4**—*Applicability—Considerations—Number of wounds and the position of the combatants with regard to their arms.*

PENAL CODE (1860), S. 300.

The number of wounds is not the criterion, but the position of the combatants with regard to their arms and the use of those arms are the considerations to be kept in mind when applying Excep. 4 to S 300. Hence where the deceased was not armed bu. the accused was and he caused grievous hurt to the deceased by causing only one wound, he is not protected by Exception 4 and the offence is murder. (*Almond, J.C. and Mir Ahmad, A.J.C.*) JUMMA KHAN *v.* EMPEROR. **156 I.C. 6=7 R. Pesh. 113=36 Cr.L.J. 914=1935 Cr.C. 357 (2)=A.I.R. 1935 Pesh. 59.**

———**S. 300, Exception 4**—*Applicability—Conditions —Offence committed in cruel manner.*

In order to take advantage of exception (4) to S. 300, it must be shown that the offender did not take under advantage or act in a cruel or unusual manner. Offence held to be committed in cruel manner. (*Abdul Qadir and Monroe, JJ.*) NUR DAD *v.* EMPEROR. **33 P.L. R. 718=1932 Cr C. 820=I.R. 1933 Lah 290=142 I.C. 901=34 Cr.L.J. 462=A.I.R 1932 Lah. 606.**

———**S. 300, Exception 4**—*Applicability—Fatal blow being premeditated.*

Where there was an altercation and exchange of hot words and abuses between the accused and the deceased but the fatal blow with a large knife was shown to be premeditated.

Held, that the fourth exception to S. 300 had no application. (*Dhavle and Rowland, JJ.*) ABDUL AZIZ *v.* EMPEROR. **14 Pat.L T. 464=1933 Cr C. 1079=148 I.C. 574=6 R P. 490=35 Cr.L.J. 725= A.I.R. 1933 Pat. 508.**

———**S. 300, Exception 4**—*Applicability—Simultaneous fight.*

Where the accused and deceased made simultaneously preparation to assault each other with deadly weapons and immediately fought and there was no premeditation

Held, that the case came within the purview of Excep. 4 to S. 300. (*Mya Bu and Brown, JJ.*) NGA BA SHIN *v.* EMPEROR. **I R. 1933 Rang 109=144 I.C 420= 34 Cr.L.J.783=1933 Cr.C. 732=A.I.R. 1933 Rang. 142.**

———**S 300, Exception 4**—*Applicability—Sudden fight—Death due to two blows.*

Where two young men, presumably both equally matched, were fighting and one of them dealt two blows on the other in quick succession and thereby caused death,

Held, that Exception 4, applied. Conviction altered to one under S. 304, Part I. (*Harrison and Addison, JJ.*) KHUDA BAKHSH *v.* EMPEROR **I.R. 1932 Lah. 625 (2).**

———**S. 300, Exception 4**—*Applicability—Sudden quarrel—Injuries inflicted in cruel manner on unarmed person.*

Where it is clear that the deceased has as many as six injuries on his head it is difficult to hold that the case falls within Excep. (4), to S. 300, because even assuming that the quarrel was sudden, it would seem that the accused acted in a cruel manner in so assaulting and causing all these injuries to a man who was unarmed and who is not shown to have assaulted the accused in any way and caused any injuries. (*Dalip Singh and Abdul, Qadir, JJ.*) KHAIR DIN *v.* EMPEROR. **I.R. 1931 Lah. 1021=134 I C. 829=32 Cr. L.J. 1254=1931 Cr.C. 536=A.I.R. 1931 Lah. 280.**

———**S. 300, Exception 4**—*Applicability—Use of knife by accused in trivial fight.*

In a trivial fight with fists and hands, the use of a knife by the accused clearly amounts to the taking of undue advantage and makes the act unusual and cruel. (*Middleton, J. C. and Mir Ahmad, A.J.C.*) NIHAL

PENAL CODE (1860), S. 300.

SINGH *v.* EMPEROR. **159 I.C. 284=37 Cr.L.J. 87=1935 Cr.C. 1120=A.I.R. 1935 Pesh. 155.**

———**S. 300, Exception 4**—*Sudden fight—Assailants armed with spears taking undue advantage.*

Where there were at least five persons armed with spears and two with lathis on the accused's side and two on the other side, one of whom was killed and no grievous injury was inflicted by the other party it cannot be held that the assailants did not take undue advantage or that they did not act in a cruel and unusual manner and the offence committed by them is not covered by Exception 4 to S. 300, even though it is clear from the evidence that the killing of the deceased was perpetrated without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. (*Thom and Harries, JJ.*) BHARAT SINGH *v.* EMPEROR. **159 I C 155 (2)=8 R.A. 397=1935 A W.R. 53=1935 A.Cr.C. 6=37 Cr. L.J. 82=1935 Cr.C. 362=A.I R. 1935 All. 362.**

———**S. 300, Exception 4**—*Sudden fight between two parties—Each trying to hit one of the opposite side—Deceased killed in such fight—Offence.*

Where the deceased died as a result of blows received in the course of a sudden fight between two parties in which every one was trying to hit one of the opposite side and nobody thought about any private right of self defence and it was not clear as to which party were the aggressors, the offence committed comes within the fourth exception to S. 300. (*Kendall, J.*) SUNDAR LAL *v.* EMPEROR. **157 I. C. 422=8 R A. 188=36 Cr.L J. 1145=16 L R. 46 (Cr.)=1935 A Cr.C. 90=1935 A.W.R. 340=1935 Cr.C. 529=A.I.R. 1935 All 438.**

———**S. 300, Exception 4**—*Sudden quarrel—Accused armed with* aruval *taking undue advantage—Murder.*

The deceased started the quarrel by striking the accused with his stick and in the course of the quarrel the deceased was given no less than 7 injuries by the accused with the *aruval*.

Held, that the quarrel was sudden and the murder was committed in the heat of passion without any premeditation, the accused took an undue advantage and acted in a cruel and unusual manner towards the deceased and so he was guilty of murder. (*Beasley, C.J. and Bardswell, J.*) RAJAMANI NADAR *v.* EMPEROR. **1933 M.W.N. 1430=1934 M.W.N. 47.**

———**Ss. 300, Exception 5, 302 and 304**—*Culpable homicide not amounting to murder—Death caused at the request of the victim.*

Where the murder with which the accused is charged is found to have been committed by him at the request of the deceased woman, the proper conviction should be under S. 304 for culpable homicide not amounting to murder and not under S. 302. (*Beasley, C.J. and Walsh, J.*) KANAGA KOSAVAN, *In re*. **54 Mad. 504=I.R. 1931 Mad. 483=131 I.C. 147=32 Cr.L.J. 659=33 L W. 218=1931 M.W.N. 393=1931 Cr.C. 484=A.I R. 1931 Mad. 436=60 M.L J 616.**

———**Ss. 301 and 307**—*Accused shooting at A but wounding B—Offence.*

Section 301 lays down that a person who wishes to kill *A* and by mistake kills *B* is as much guilty of murder as if he had killed *A* himself. S. 307 provides for the punishment of a person who intends to commit murder but fails in achieving his object. The effect of the two sections read together is that an accused person who shoots at *A* and wounds *B* by mistake would be guilty under S. 307, although he has not been able to get the person whom he intended to injure. (*Mir Ahmad, A J.C.*) AMIR SADAT SHAH *v.* EMPEROR. **158 I.C. 648=8 R. Pesh. 65=37 Cr. L.J. 25=1935 Cr.C. 453=A.I.R. 1935 Pesh. 74.**

PENAL CODE (1860), S. 302.

———**S. 301**—*Intention to murder another person instead of the victim—No charge—Effect.*

If five men are charged with plotting to murder *D* and it is then found that they never plotted to kill *D* at all two of them cannot be held constructively guilty of his murder simply because they probably had a different object in their minds—the murder of *S*—when they have never been charged with such a common object. (*Wallace and Jackson, JJ.*) SANNA IMAM SAHIB *v.* GOPAL RAO. **1930 M.W.N. 1254.**

———**S. 302.**

Abetment.
Benefit of doubt.
Concerted attack.
Constructive murder.
Distinction between Ss. 302 and 304.
Drunkenness.
Evidence.
Extenuating circumstances.
Intention.
Motive.
Murder.
Murder or causing disappearance of evidence
Murder or culpable homicide.
Murder or hurt.
Poisoning.
Private defence.
Provocation.
Sentence.
Sudden fury.
Sudden quarrel.
Unsound mind.

Abetment.

———**S. 302**—*Abetment—Person instigating others to beat deceased and in whose presence injuries are inflicted by such others.*

One of the accused was instigating others to beat the deceased and while so instigating and in his presence, the other accused inflicted several injuries on the person of the deceased with a *toka* which caused his death.

Held, that the accused could not escape responsibility for abetment of murder committed by others and that he should be convicted under S. 302. (*Broadway and Abdul Qadir, JJ.*) MACHHIA *v.* EMPEROR **147 I.C. 109=6 R.L 331=35 Cr.L.J 301=1933 Cr.C. 1387=A.I.R. 1933 Lah. 928=A.I.R. 1934 Lah. 409.**

———**Ss. 302, 117 and 115**—*Abetment—Speech inciting a large audience to murder.*

Where a speech was addressed to a large audience wherein the accused incited the audience to murder Englishmen and Government officials.

Held, that the more appropriate section to be charged with was S. 117 read with S. 302. S. 115 applies only when the abetment is not punishable under another provision of the Code. So if S. 117 applies, the offence would not fall under S. 115, Indian Penal Code. (*Bhide, J.*) SANTA SINGH KAMAL *v.* EMPEROR. **6 I.R. (Lah.) 187 (1)=146 I.C. 222=34 Cr. L.J. 1207=1933 Cr.C. 882=A.I.R. 1933 Lah. 660.**

Benefit of doubt.

See also POISONING, *infra*.

———**S. 302**—*Benefit of doubt.*

Where the salient facts of the case as proved and the confession of the prisoner cannot be reconciled, a conviction for murder cannot be upheld. (*Boys and Sen, JJ.*) EMPEROR *v.* PATEY SINGH. **12 L.R. 117 (Cr.)=I. R. 1931 All. 705=133 I.C 593=32 Cr. L.J. 1052=1931 A.L.J. 1000=1931 Cr.C. 961=A.I.R. 1931 All. 609.**

PENAL CODE (1860), S. 302.

———**Ss. 302 and 304**—*Benefit of doubt.*

Where the case is on the border line between murder and culpable homicide not amounting to murder, the accused is entitled to benefit of reasonable doubt and he can be convicted only under S. 304. (*Dunkley, J.*) NGA PO EIN *v.* EMPEROR. **150 I.C. 599=7 R.R. 1=35 Cr. L.J. 1112=1934 Cr.C. 573=A.I.R. 1934 Rang. 110.**

———**Ss. 302 and 304**—*Benefit of doubt—Accused giving sound blows to one of three culprits—Apprehension of grievous hurt by accused—No offence.*

The statement was that on the night of the murder the accused saw three thieves coming to his cattle-shed. One of them united a buffalo and was taking it away. He shouted out to the thieves and gave two blows with a chuha to the culprit who was taking away the buffalo. The other culprits escaped.

Held, that as there were three culprits the appellant may have felt reasonable apprehension of death or grievous hurt if he did not use adequate force promptly and that the accused could not even be convicted for culpable homicide. (*Bide and Currie, JJ.*) GODHA WARYAM *v.* EMPEROR. **6 I.R. (Lah.) 260=146 I.C. 648=34 P.L.R. 1000=1933 Cr.C. 1287=A.I.R. 1933 Lah. 899.**

———**Ss. 302, 364 and 149**—*Benefit of doubt—All accused in Court proved to have taken part in abduction of deceased—Person by whom subsequent murder was committed not known—Ingredients necessary under S. 149 not proved—Accused entitled to benefit of doubt on charge of murder.*

All the accused before the Court were proved to have taken part in the abduction of the deceased but it was doubtful who, if any, of them had committed the subsequent murder and there was possibility of some others having joined in the offence of murder. Further, none of the ingredients under S. 149 were proved.

Held, that the accused could be not convicted of murder, but should be given benefit of doubt. (*Coldstream and Abdul Qadir, JJ.*) AHMAD *v.* EMPEROR. **147 I.C. 401=1934 Cr.C. 14=6 R.L. 393=35 Cr. L. J. 426=A.I.R. 1933 Lah. 1035 (2).**

———**Ss. 302 and 304**—*Benefit of doubt—Death by strangulation—Absence of direct evidence—Intention to cause death doubtful.*

Knowledge that pressure applied to the neck is likely to cause death must be attributed, at least to every adult and an accused who is a man of thirty cannot plead ignorance on the ground of youth or inexperience; but it remains with the Court to determine whether the circumstances show that the accused intended to cause death. Where therefore it is evident that the accused was violent and intended to be so, but if a doubt still remains whether so far as his intention went the deceased's death was not accidental, the accused is entitled to the benefit of that doubt. In this case, such a benefit was given and the conviction under S. 302 was altered to one under S. 304. (*Abdul Qadir and Monroe, JJ.*) JAHANA *v.* EMPEROR. **6 I.R. (Lah.) 189=146 I.C. 224=34 Cr.L J. 1213=1933 Cr C. 768=A.I.R. 1933 Lah. 511.**

———**S. 302**—*Benefit of doubt—Evidence capable of two constructions—Evidence necessary for conviction—Mere suspicion not sufficient.*

When a set of circumstantial evidence is capable of two constructions, one in favour of the accused and one against him, the accused is at least entitled to the benefit of the doubt. In order to convict persons charged with murder, there should be unimpeachable evidence of reliable witnesses, bringing home the guilt of the accused beyond reasonable doubt. But if the proof adduced at best leads to strong suspicion but falls short of the requisite standard of certainty, the Court is bound to give the benefit of the doubt to the accused. (*Beasley, C J. and Sundaram Chetty, J.*) VENKATASUBBA REDDI, *In re.* **54 Mad. 931=134 I.C. 1143=1931 M.W.N. 1177=33 Cr.L.J. 51 (2)=I.R. 1932 Mad 7=34 L.W. 128=1931 Cr.C. 929=A.I.R. 1931 Mad. 689=61 M.L.J. 608.**

———**S. 302**—*Benefit of doubt—Evidence—Mere suspicions.*

Where there was no eye-witness to the actual commission of the murder and there were strong suspicions,

Held, that mere suspicions could not be the basis of a conviction under S. 302. (*Bisheshwar Nath and Nanavutty, JJ.*) RATAN *v.* EMPEROR. **8 Luck. 301=I. R. 1933 Oudh 154=143 I.C. 55=10 O.W.N. 7=34 Cr.L J. 498 (2)=1933 Cr.C. 279=A.I.R. 1933 Oudh 148.**

———**Ss. 302 and 304**—*Benefit of doubt—Injury inflicted without premeditation—Benefit of doubt.*

Where from the evidence it appeared to be not unlikely that the accused inflicted the injury without any premeditation and in a sudden fight, in the heat of passion, having also acted in self-defence in consequence of an attack made upon him by the deceased himself,

Held, that the accused was entitled to the benefit of the doubt as regards the charge under S. 302 and that the conviction should be altered into one under the latter part of S. 304. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J.*) ABDUL KARIM *v.* GOVERNMENT OF MYSORE. **11 Mys.L.J. 412=39 Mys.H.C.R. 227.**

Concerted attack.

———**S. 302**—*Concerted attack—Attack by several persons on unarmed person—Beating with lathies after knocking him down—Each, if guilty.*

Obiter.—Where eight persons deliberately attack another who is alone and unarmed, and even after he has been knocked, the assailants continue to beat him with lathies, each of the assailants is guilty of murder under S. 302, I. P Code. (*Nanavutty and Zia-ul-Hasan, JJ.*) RAJ BAHADUR *v.* EMPEROR. **152 I.C. 103=7 R.O. 182=35 Cr.L.J. 1496=11 O.W.N. 1309=1934 Cr.C. 1379=A.I.R. 1934 Oudh 499.**

———**S. 302**—Converted attack—Blows on head with dangs—Death caused—Nature of offence—Person causing the trivial blow liable under S. 325 other liable under S. 325. *See* PENAL CODE, S. 325. **32 P.L.R. 401.**

———**S. 302**—Concerted attack—Common intention to murder—Sentence. *See* SENTENCE *infra*. **A.I.R. 1935 Lah. 337.**

———**Ss. 302 and 34**—*Concerted attack—Intention—Murder by several accused—Mode of ascertaining common intention.*

The question of finding out the intention of a particular person, who together with others, has admittedly committed a crime of violence, is always a difficult matter. In the absence of direct evidence of the common intention which is available only in rare cases, such an intention can only be ascertained by a consideration of the established facts and the surrounding circumstances. Where all the accused had joined in beating their victim mercilessly to death but it was not shown who inflicted the fatal blow, the accused may be sentenced to transportation for life instead of to death. (*Tek Chand and Agha Haidar, JJ.*) TARA SINGH *v.* EMPEROR. **I.R. 1932 Cal. 328=33 Cr.L.J. 457=137 I.C. 282=33 P.L.R. 1=1932 Cr.C. 173=A.I.R 1932 Lah. 189.**

PENAL CODE (1860), S. 302.

———**Ss. 302, 304 and 323**—*Concerted attack—Murder or hurt—Attack by four persons in concert with a view to murder—Fatal stab by one of them—All guilty of murder.*

Four coolies in an Assam Tea gardens—persons of very primitive belief and rudimentary understanding—attacked the accused one night who was supposed by them to have practised sorcery and caused one of them to become dumb. All of them struck him blows causing the accused to fall down helpless and dragged him to a well. One of the accused took out a knife from the pocket of the victim and stabbed him on the back. The jury found the person who used the knife guilty under S. 304 and the others under S. 323.

Held, that all four of them were guilty under S. 302 of the Penal Code. (*Rankin, C.J., C.C Ghose and Costello, JJ.*) LAKHAN SAWRA, *In the matter of.* **I.R. 1932 Cal. 570=139 I.C. 81=33 Cr.L.J. 663=1932 Cr.C. 861=A.I.R. 1932 Cal 815 (F.B.).**

———**S. 302**—Concerted attack—Riot—Several persons armed with *lathies*—Assault by—Death caused—All, if guilty. *See* PENAL CODE, SS. 149 AND 302. **11 O.W.N. 1543=A.I.R. 1935 Oudh 110.**

———**S. 302**—*Concerted attack—Several persons joining in causing injuries with dangs—Injured person dying shortly after—Nature of offence.*

When several persons armed with dangs joined in beating another unarmed person regardless of consequences and the latter died shortly after as a result of the injuries and it further appeared that the enmity between the parties was of over two years standing and that the attack did not take place upon a sudden quarrel,

Held, that the several persons who joined in inflicting the injuries were guilty of murder. 45 A. 727, Ref. (*Abdul Qadir and Addison, JJ.*) SIKANDAR *v.* EMPEROR. **131 I.C. 122=32 Cr L J. 645=32 P.L.R. 414=1931 Cr.C. 776=A.I.R. 1931 Lah. 536.**

Constructive murder.

See also SENTENCE *infra.*

———**S. 302**—*Constructive murder—Charge under S. 302 read with S. 149.*

Where the accused were charged under S. 302 read with S. 149 of the Penal Code but the jury found them guilty of murder substantively and the Judge, accepting their verdict, convicted them under S. 302,

Held, that as there was so consequent disadvantage to the accused and the accused would have had to adduce no further evidence, the conviction under S. 302, even without a substantive charge of murder framed against them under that section alone was not improper. The constructive charge framed under Ss. 302 and 149 actually required them to prove more than if this had been directly charged with murder. 11 P. L. T. 111, Appl. (*Courtney-Terrell, C.J. and Dhavle, J.*) EMPEROR *v.* RASHBEHARI LAL. **I.R. 1933 Pat. 27=34 Cr L J. 83=140 I.C. 846=13 P.L.T. 440=1932 Cr C. 774=A.I R. 1932 Pat. 302.**

———**Ss. 302 and 34**—*Constructive murder—Common intention to commit robbery—Murder by one—Liability of other for.*

The common intention of the culprits was to commit robbery and in furtherance of that intention different acts were committed by different persons. While *S* one of the accused had gone to fetch *K* for carrying out that common intention, another accused shot down the deceased who was the son of *K* in furtherance of the same.

Held, that although *S* was not actually present at the time of murder, still as he was also one of the participators in the joint criminal action in the course of which the murder was committed, he was also constructively guilty under S. 302. (*Bhide and Currie, JJ.*) INDAR SINGH GURMUKH SINGH *v.* EMPEROR. **6 I.R. (Lah.) 216=146 I.C. 376=34 P.L.R. 1003=35 Cr.L.J. 72=1933 Cr.C. 1063=A.I.R. 1933 Lah. 819.**

PENAL CODE (1860), S. 302.

———**Ss. 302, 149 and 396**—*Constructive murder—Conspiracy to commit dacoity—Murder by one—Others not to be convicted under Ss. 302 and 149.*

Where the object of a conspiracy is to commit a dacoity and not to commit a murder, and if murder is committed by one of the dacoits in the commission of the dacoity, all the others can be convicted only under S. 396 but not under Ss. 302 and 149. (*Tek Chand and Monroe, JJ.*) PUNJAB SINGH UJAGAR SINGH *v.* EMPEROR. **15 Lah. 84=147 I.C. 2=6 R.L 339=35 P.L.R. 51=35 Cr.L.J. 322=1933 Cr.C. 1467=A.I.R. 1933 Lah 977.**

———**Ss. 302 and 149**—*Constructive murder—Dacoits—Murder by one—Liability of others.*

Where the common object of the gang was only to commit dacoity though they carried arms to over awe the people of the village and when pursued by the police, one of the dacoits fired and shot one of the pursuers dead,

Held, the other dacoits cannot be convicted under S 149 read with S. 302, in the absence of anything to attribute the murder by one of them to the common object of the gang. (*Bisheshwar Nath and Kisch, JJ.*) LEKHA SINGH *v.* EMPEROR. **9 O.W.N. 977=I.R. 1933 Oudh 26=140 I.C 892=33 Cr.L.J. 101=1933 Cr.C. 93=A.I.R. 1933 Oudh 53.**

———**S. 302**—*Constructive murder—Incitement to cause murder—Causing death—Liability under S. 34.*

The appellant with a number of other persons, armed with das and spears, attacked a house; the appellant incited the others to set fire to the building; those others acted on this incitement; the appellant then in the presence of the deceased incited the others to cut her; and they cut her to death accordingly,

Held, that the appellant took an actual part in the assault; that under the provisions of S. 34 he was as much guilty of murder as the actual persons who delivered the blow. (*Das and Brown, JJ.*) NGA PO KYONE *v.* EMPEROR. **11 Rang. 354=6 I.R. (Rang.) 93=146 I.C 392=35 Cr.L.J. 41=1933 Cr.C. 907=A.I.R. 1933 Rang. 236.**

———**Ss. 302 and 149**—Constructive murder—Riot—Object of assembly to beat rival faction—Death caused by one member—All, if guilty. *See* PENAL CODE, SS. 149 AND 302. **11 O.W.N. 1456=A.I.R. 1935 Oudh 52.**

———**S. 302**—*Constructive murder — Sentence — Transportation for life as the minimum.*

Where the accused are found guilty under S. 302 read with S. 149, the law precludes the infliction of any lessor penalty than transportation for life. 1 Pat. 753, Ref. (*Coldstream and Jai Lal, JJ.*) BAHAWAL *v.* EMPEROR. **32 P.L.R 810=1932 Cr.C. 15=135 I.C. 670=I.R. 1932 Lah. 126=33 Cr.L.J. 184=A.I.R. 1932 Lah. 5.**

———**S. 302**—*Constructive murder—Several accused—Fatal blow by one as unpremeditated Act—Others inflicting blows—Nature of offence.*

If there was no common intention to cause hurt to the deceased and the fatal blow dealt by one of them was an unpremeditated act springing from his mind alone then the other persons who may have struck one or more blows are not constructive participants in the offence of murder. In such a case the guilt of the person who dealt the fatal blow and that of the other persons should be

PENAL CODE (1860), S. 302.

separately dealt with. (*Bhide and Tapp, JJ.*) SULTAN *v.* EMPEROR. **12 Lah. 442 = I.R. 1931 Lah. 1001 = 32 Cr.L.J. 1219 = 134 I.C. 793 = 32 P.L.R. 925 = 1931 Cr.C. 1054 = A.I.R. 1931 Lah. 749.**

——S. 302—Constructive murder—Two factions—Partisans of one faction going to attack those of other with sticks—Companions of latter joining them with spears and hatchets—One of the former group thrust with spear resulting in his death on spot—No right of private defence to the latter group—Other persons present liable to be convicted under S. 302 read with S. 34. *See* PENAL CODE, S. 34. **A.I.R. 1934 Lah. 11.**

——Ss. 302, 34 and 114—Constructive murder—Two persons going armed with guns and ammunition to commit robbery—Large number of shots fired by them while retreating and trying to escape—One of pursuers killed by one of shots from one of them—Other is also guilty under S. 302 read with Ss. 34 and 114. *See* PENAL CODE, SS. 34, 114 AND 302. **61 Cal. 190 = A.I.R. 1934 Cal. 10.**

Distinction between Ss. 302 and 304.

——S. 302—Distinction between Ss. 302 and 304. *See* PENAL CODE, SS. 302 AND 304—INTENTION. **A.I.R. 1933 Rang. 338.**

Drunkenness.

See also SENTENCE, *infra.*

——Ss. 302 and 304—*Drunkenness—Blow given during drunken brawl resulting in death—Offence.*

Where there was a fight at the accused's house in which he, his brothers and the deceased took part, and in that drunken brawl the accused gave the deceased only one blow which ultimately resulted in the death.

Held, that no offence under S. 302 or S. 304 but one under S 326 was committed. (*Shadi Lal, C. J. and Monroe, J.*) GOKALCHAND *v.* EMPEROR. **151 I.C. 760 = 7 R L 223 = 35 Cr.L J. 1407 (2) = 36 P.L.R. 88 = 1934 Cr.C. 763 = A.I.R. 1934 Lah 477.**

——S. 302—*Drunkenness—Drunken brawl—Fatal injuries inflicted—Sentence.*

Accused challenged the deceased to fight with him and on the refusal of the latter pushed his head and asked him to assault the accused. Thereupon the deceased gave him a blow. Immediately the accused drew a knife and inflicted several fatal wounds as a result of which deceased died immediately.

Held, that the accused was guilty of murder as an intention to cause death could be inferred from the nature of the injuries but that as the parties were drunk and as the first blow was struck by the deceased, the lesser penalty should be imposed. (*Mya Bu and Baguley, JJ.*) NGA SEIN GE *v.* EMPEROR **149 I C. 1176 = 6 R R. 376 = 36 Cr.L J. 228 = 7 R.R. 188 = 35 Cr.L.J. 1065 = 1934 Cr C. 76 = A I.R. 1934 Rang. 10.**

——S. 302—*Drunkenness—Voluntary drunkenness—Sentence—Discretion of Court.*

Drunkenness, though voluntary, can be taken into consideration as an extenuating circumstances justifying the imposition of the lessor penalty for murder. It cannot be laid down that in no case of a conviction for murder can voluntary drunkenness amount to an extenuating circumstance, for that would be fettering the discretion of the Courts in an unjustifiable way. Each case must be treated on its merits according to the proved facts. (*Mya Bu and Dunkley, JJ.*) NGA SEIN GALE *v.* EMPEROR. **12 Rang. 445 = 152 I C. 1054 = 36 Cr L J. 228 = 7 R.R. 188 = 1934 Cr.C. 1326 = A.I.R. 1934 Rang. 361.**

Evidence.

See also BENEFIT OF DOUBT, *supra.*

——S. 302—*Evidence.*

PENAL CODE (1860), S. 302.

It is inevitable that a brutal murder should go unpunished where satisfactory evidence is not forthcoming as to who were the guilty parties. (*Wazir Hasan, C.J. and Smith, J.*) KEHRI *v.* EMPEROR. **6 R.O. 406 = 148 I.C. 259 = 35 Cr.L.J. 681 (2) = 11 O.W.N. 77 = 1934 Cr.C. 79 = A.I.R. 1934 Oudh 13.**

——S. 302—*Evidence — Accused in possession of bloodstained cloths—Presumption.*

The fact of a man having blood in cloths in his possession is not always of much importance; but his failure to give any explanation for it may be sufficient corroboration of the evidence of the accomplice against him. (*Niyogi and Staples, A.J.Cs.*) MALLU MARHETA *v.* EMPEROR. **6 I.R. (Nag.) 93 = 146 I C. 701 = 16 Nag L.J 186 = 35 Cr.L J. 213 = 1933 Cr. C. 1451 = A.I.R. 1933 Nag. 352.**

——S. 302—*Evidence—Approver's testimony—Need for corroboration.*

Where in a case of murder there is considerable suspicion but not sufficient evidence to convict the accused with the crime, the accused cannot be convicted on the basis of the approver's evidence unless it is corroborated in the material particulars. (*Doraiswami Iyer, C.J. and Mahadevayyi, J.*) VENKATAGIRIAPPA *v.* GOVERNMENT OF MYSORE. **11 Mys.L J. 223 = 38 Mys.H.C. R. 161.**

——S. 302—*Evidence—Circumstantial evidence—Value.*

The question of the soundness or unsoundness of the evidence is a matter to be taken into consideration before the verdict. There is no rule of law that if there be no eye-witness to the murder, the accused cannot be sentenced to death. Circumstantial evidence may be, and often is, more cogent than the evidence of an eye-witness. (*Courtney Terrel, C.J. and Scroope, J.*) TULSI GANGOTA *v.* EMPEROR. **I.R. 1933 Pat 165 = 142 I.C. 613 (2) = 34 Cr L J. 395 = 14 Pat.L.T 96 = 1933 Cr.C. 511 = A.I.R. 1933 Pat. 180.**

——S. 302—*Evidence—Conviction for murder—Medical evidence against violent death.*

Where the medical evidence does not support that the deceased met with a violent death, no charge of murder can be brought home to any one. (*Nanavutty and Rachphal Singh, JJ.*) SUBKARAN *v.* EMPEROR. **6 R O. 564 = 149 I.C. 473 = 35 Cr.L J 992 = 11 O.W.N. 722 = 1934 Cr.C. 779 = A.I.R. 1934 Oudh 286.**

——S. 302—Evidence—Conviction under the section—Basis of—Evidence—Necessity—Moral conviction of Judge—Sufficiency. *See* CRIMINAL TRIAL—CONVICTION—BASIS OF. **152 I C. 832 = A.I.R. 1935 Pat. 19.**

——S. 302—*Evidence—Conviction under the section—Body of murdered person not found.*

The mere fact that the body of the murdered person has not been found, is not a ground for refusing to convict an accused person of murder; but when the body of the person said to have been murdered is not forthcoming, the strongest possible evidence as to the fact of the murder should be insisted on before the accused is convicted. (*Ferrers, J.C. and Mehta, A J C.*) FATEH MAHOMED *v.* EMPEROR. **152 I C. 376 = 7 R.S. 92 = 28 S L.R. 387 = 36 Cr.L.J. 83 = 1934 Cr.C. 1070 = A.I.R. 1934 Sind 139.**

——S. 302—*Evidence—Duty of prosecution—Person found last with deceased—Inference as to guilt.*

It is against human experience that a man who intends to commit a serious crime like murder should go about openly canvassing for help. It cannot also be said that when two persons are seen together and shortly afterwards one of them is found to have been murdered, that the survivor has to give an explanation as to how

PENAL CODE (1860), S. 302.

the deceased met his death. And the fact that the accused denies all knowledge of the crime or of the circumstances connected therewith cannot be treated as any evidence whatsoever of his guilt. The burden of establishing the guilt of the accused is throughout on the prosecution and they must prove every link in the chain of evidence against him from the beginning to the end. (*Shadi Lal, C. J. and Agha Haidar, J.*) HAYAT *v.* EMPEROR. **I R. 1932 Lah. 291=137 I C. 59=33 Cr.L.J 411=33 P.L.R. 23=1932 Cr.C. 255=A.I.R. 1932 Lah. 243.**

——**S. 302**—*Evidence—Mode of leading.*

In a capital case, it is important that the more important of the witnesses should be examined, in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events; the facts which the witnesses saw or the acts which they did and also the reasons which actuated them to do the acts being narrated in an intelligent fashion. It is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and the jury. (*Derbyshire, C. J., Mukerji and Costello, JJ.*) RAFIQUEUDDIN AHMAD *v.* EMPEROR. **62 Cal. 572 =7 R C. 606=36 Cr. L J. 808=155 I.C. 687=39 C. W.N. 368=1935 Cr.C. 241=A.I.R. 1935 Cal. 184 (S.B.).**

——**S. 302**—*Evidence — Post-mortem certificate—Contents.*

It is most essential that the time of the post-mortem should be recorded as in many cases it assists the Court in determining whether death took place at the time alleged or not. (*Raza and Pullan, JJ.*) DWARKA *v.* EMPEROR. **6 Luck. 475—I R. 1931 Oudh 199=32 Cr L J. 697=14 O L J. 210=131 I.C. 439=8 O W. N. 107=1931 Cr.C. 241=A.I.R. 1931 Oudh 119**

——**S. 302**—*Evidence—Proof of death of alleged victim.*

In murder cases it is essential to establish that the person with whose murder the accused is charged is dead. It is unnecessary that the corpse should be identified, but there must be evidence to bring conviction to the mind of the Court that the alleged victim is dead. (*Young, C.J. and Abdul Rashid, J.*) MEHR SINGH *v.* EMPEROR. **1935 Cr C. 1165=160 I.C 187=37 Cr L J. 250=8 R.L. 505=38 P.L.R. 138=A.I.R. 1935 Lah. 805.**

——**S. 302**—*Evidence—Rival factions—Witnesses belonging to family of deceased—Need for corroboration.*

Where a case is between two rival factions in a village and all the witnesses against the accused belong to the family of the deceased, some corroboration must be looked for as a matter of prudence, especially where the hanging of the accused would result in valuable property coming back to the party of the complainants, and if there is no such corroboration, accused is entitled to the benefit of doubt. (*Young, C. J. and Din Mohammad, J.*) SOHAN SINGH *v.* EMPEROR. **159 I.C. 418 =37 Cr.L.J. 83=1935 Cr.C. 189=A.I.R. 1935 Lah. 130.**

——**S. 302**—*Evidence—Sufficiency to base conviction.*

Evidence consisting of one unsatisfactory eye-witness corroborated by two equally unsatisfactory witnesses, is not enough on which to base a conviction for murder. (*Young, C. J. and Rangi Lal, J.*) KANSHI RAM *v.* EMPEROR. **157 I.C. 735=36 Cr L J. 1195=37 P.L. R. 83 =1935 Cr.C. 648=A.I.R. 1935 Lah. 433.**

PENAL CODE (1860), S. 302.

Extenuating circumstances.

See also DRUNKENNESS *supra* AND SENTENCE *infra.*

——**S. 302**—*Extenuating circumstances— Accused belonging to peaceful community.*

The law does not grant immunity from capital punishment to the members of a particular class or community.

Held, that the fact that the accused belongs to the Brahmin caste who are a peaceful community singularly free from criminal proclivities is no ground for inflicting the lesser penalty in a grave case of murder.

Semble: The Court cannot recognise new heads of extenuating circumstances not already recognised. (*Shadi Lal, C J. and Agha Haidar, J.*) LACHHMI NARAIN *v.* EMPEROR. **I.R. 1932 Lah 347=137 I. C. 691=33 Cr. L. J. 497 (2)=33 P. L. R 580=1932 Cr.C. 664=A.I.R. 1932 Lah. 500.**

——**S. 302**—*Extenuating circumstances—Blow on the skull.*

Striking so violently on the skul three times and twice on each side of the face as to cause the death of the victim is murder and the accused must be taken to have known that to do so was an act so imminently dangerous that it must in all probability cause death. Where, although the accused must be taken to have known that his act must in all probability cause the death of the deceased, he in striking the blow had no real intention in the strict sense of the word to kill the deceased, that is an extenuating circumstance to justify the imposition of the lesser sentence. (*Beasley, C. J and Sundaram Chetty, J.*) KESAVA CHETTY *v.* EMPEROR. **130 I.C. 847=32 Cr.L J. 623 (2)=1931 M W N. 266=34 L.W. 631=1931 Cr. C 468=A.I. R. 1931 Mad 420.**

——**S. 302**— *Extenuating circumstances— Murder committed with inadequate motive—Accused proved to have been eccentric sentence.*

Where the accused who was guilty of double murder was shown to have been eccentric in the past and it appeared that the double murder of which he was guilty had been perpetrated with an inadequate motive.

Held, that they were not sufficient grounds for not passing the extreme penalty of death. (*Raza and Pullan, JJ.*) MAHOMED ISLAM *v.* EMPEROR. **I.R. 1931 Oudh 99=129 I.C. 323=32 Cr L.J. 327=7 O. W.N. 1100=1931 Cr.C. 133=A I.R. 1931 Oudh 77.**

——**S. 302**—*Extenuating circumstances—Person of weak mind sentence.*

The accused was shown to be a person of weak intellect subject to fits and was not possessed of a normal mind. It was possible that owing to some feeling of revenge he was impelled by some uncontrollable impulse to attack the deceased brutally.

Held, that under the circumstances the sentence of transportation for life and not the sentence of death was the appropriate one. (*Sulaiman and Niamatullah, JJ.*) EMPEROR *v.* PANCHA. **I. R. 1932 All. 536= 139 I C. 147=33 Cr. L.J. 714=13 L.R. 31 (Cr.)= 1932 Cr.C. 231=A.I.R. 1932 All. 233.**

——**S. 302**—*Extenuating circumstances—Youth led astray by mischievous literature.*

Where an educated young man who has attained majority, has been convicted of murder the mere fact that he was encouraged to commit the crime by reading the mischievous literature and that his motive was not personal, but was to attack only the highest officer of the State, does not justify a refusal to enforce the ordinary punishment for murder, which is death and awarding the lesser punishment of transportation for life, because neither of the grounds is sufficient for

PENAL CODE (1860), S. 302.

leniency being shown to the accused and as also youth alone does not constitute an extenuating circumstance for the award of the lesser punishment. A.I.R. 1928 Lah. 855, Ref. (*Coldstream and Johnstone, JJ.*) HARI KISHAN *v.* EMPEROR. **I.R. 1933 Lah. 443=144 I. C. 294=34 Cr.L.J. 720=34 P.L.R. 691=1933 Cr.C. 540=A.I.R. 1933 Lah. 305.**

Intention.

———Ss. 302 and 304, Part 2—*Intention—Assault unpremeditated—Blow not aimed at vital part of the body—Intention of killing the deceased.*

Where the assault was entirely unpremeditated, and was committed by an impulsive young man as a result of sudden excitement, where neither of the blows was aimed at a vital part of the body and where it could not have been present to the mind of the accused that a stab on the frontal prominence of the hip would penetrate the abdominal cavity.

Held, that the accused had no intention to cause death or such bodily injury as was likely to cause death and that at the most the accused can be burdened with the knowledge that his act was likely to cause death, conviction under S. 304, Part 2 is proper. (*Shadi Lal, C. J. and Abdul Raza, J.*) PARMESHRI DAS *v.* EMPEROR. **151 I.C. 469=7 R.L. 141=35 Cr.L.J. 1319=1934 Cr.C. 559=A.I.R. 1934 Lah. 332.**

———S. 302—*Intention—Blow on head with iron shod* dang*—Death caused—Nature of offence.*

A person inflicting a violent blow on the head of his victim with a *lethal* weapon such as an iron-shod *dang* must be presumed to intend to cause his death or to cause such bodily injury as he knew was likely to cause death. Presumption held not to be rebutted under the circumstances of the case. (*Shadi Lal, C. J. and Monroe, J.*) BISHNA *v.* EMPEROR. **I.R. 1932 Lah 283 (1)=137 I. C. 86 (1) -33 Cr. L.J 378-33 P.L. R. 130=1932 Cr. C. 256=A.I.R. 1932 Lah. 244.**

———S. 302—*Intention—Blows with rise pounder on head.*

A man who delivers two blows in quick succession on or in the neighbourhood of the head with a heavy weapon (rice pounder) must be regarded, in the absence of any extenuating circumstance, to intend to cause injury sufficient in the ordinary course of nature to cause death. (*Baguley and Mackney, JJ.*) NGA MYE *v.* EMPEROR. **37 Cr. L J. 181=1935 Cr.C. 1201 (2)=A.I.R. 1935 Rang. 427.**

———Ss. 302 and 304, Part 2—*Intention—Merciless and determined beating—No bones broken and only hands and feet used—Conviction must be under S.* 304, *Part 2.*

Where though the beating given to the deceased was of a most merciless and determined nature and a large number of injuries were inflicted, no bones were broken and no weapon other than hands and feet were used by the accused.

Held, that the accused must be held to know that by administering such a thrashing he was likely to cause death and that the offence would fall under Part 2, S. 304. (*Bhide and Currie, JJ.*) NUR MAHOMED ROSHEN DIN *v.* EMPEROR. **6 I R (Lah.) 210=35 Cr.L J. 65=146 I C. 326=34 P.L R. 933=1933 Cr. C. 1177=A.I.R. 1933 Lah. 883.**

———S. 302—*Intention — Proof of—Striking with sharp instrument and brain penetrated.*

The ordinary rule in criminal cases is that intention is to be inferred from a person's acts. Where a man strikes another on the head with a sharp instrument with such force as to penetrate to the brain, the only possible intention that can be inferred is an intention to cause an injury which the accused knew would be likely, and indeed bound, to cause death. 41 B. 27 disapproved. (*Beaumont, C.J. and Barlee, J.*) EMPEROR *v.* SAMAT KALA **6 R.B. 316=148 I.C. 1004=35 Cr.L.J. 829=36 Bom L.R. 219=1934 Cr.C. 543=A.I.R. 1934 Bom. 156.**

———Ss. 302 and 304—*Intention—Single blow with weapon—Causing death—Nature of offence.*

Roughly, the distinction between S. 302 and S. 304, I. P. Code, is this: Where the intention to kill is present, the act amounts to murder; where such an intention is absent, the act amounts to culpable homicide not amounting to murder. To determine what the intention of the offender is, each case must be decided on its own merits. No hard and fast rule can be laid down. Accused gave only one blow on the spur of the moment with a wooden handle of a hoe measuring 3 feet 10 inches and weighing 82 tolas on the thinner part of the head,

Held, that the weapon was not a formidable one, that the intention to kill should not be presumed and that the accused was guilty only under S. 304. (*Ba U and Dunkley, JJ.*) NGA PO NYEIN *v.* EMPEROR. **6 I.R. (Rang.) 91=146 I C. 315=35 Cr.L J. 43=1933 Cr.C. 1148 - A.I R 1933 Rang. 338.**

———S 302 — *Intention—Stabbing in the chest or abdomen with knife.*

If a person stabs another in the chest or abdomen with sufficient force to penetrate such structures he must be held to have intended such bodily injury as is sufficient in the ordinary course of nature to cause death. (*Dhavle and Rowland, JJ.*) ABDUL AZIZ *v.* EMPEROR. **148 I C. 574=6 R.P. 490=35 Cr L.J. 725=14 Pat. L.T. 464=1933 Cr C. 1079-A.I.R. 1933 Pat. 508.**

———S. 302—*Intention—Striking on the head—Intention to cause such injury as is likely to cause death.*

When a man strikes another on the head with a formidable lathi and fractures the skull, it may safely be assumed that he intended to cause such an injury as would be likely to cause death. (*Broadway and Abdul Qadir, JJ.*) LANGAR GEHNA *v.* EMPEROR. **6 I R. (Lah) 240=146 I.C. 496=35 Cr.L.J. 101=1933 Cr.C. 1389=A.I R. 1933 Lah. 930.**

———S. 302—*Intention—Wounds on head and neck with a hatchet—Offence.*

Where several wounds are caused on the head and neak with a sharp cutting weapon such as hatchet, they are inflicted with the intention of causing death and the crime is murder. (*Ferrers, J C. and O'Sullivan, A.J. C.*) BHOJO *v.* EMPEROR **152 I.C. 1032=36 Cr.L.J. 223=7 R.S. 106=29 S.L R. 1=1934 Cr.C. 1274=A.I.R. 1934 Sind 172.**

Motive.

See also POISONING, *infra.*

———S. 302—*Motive.*

In a trial for an offence under S. 302 the Court should not first consider the evidence establishing a motive for the murder. The proper course to adopt is to examine the evidence as to the commission of the crime. The motive may never be discovered and the suggestion of a motive, possibly a wrong motive, may well lead the Court astray. (*Raza and Pullan, JJ.*) DWARKA *v.* EMPEROR. **6 Luck. 475=I.R. 1931 Oudh 199=131 I.C. 439=32 Cr.L J. 697=14 O L J. 210=8 O.W.N. 107=1931 Cr.C 241=A.I.R. 1931 Oudh 119.**

———S. 302—*Motive—Death of child due to opium—Suspicious circumstances—Sentence.*

The accused contracted illicit intimacy with another and became pregnant on that account. She was alone

PENAL CODE (1860), S. 302.

at the time of the birth and had every motive to do away with the child. She admitted that she had been in possession of opium some four days before the occurrence. The death of the child was proved to be due to opium.

Held, that the only reasonable inference was that the accused administered opium to the child and thereby committed an offence under S. 302, I. P. Code.

Held, further that it was pre eminently a case in which the Local Government should exercise its prerogative and reduce the sentence. (*Harrison and Dalip Singh, JJ.*) ALAM BIBI *v.* EMPEROR. **I.R. 1932 Lah. 318 = 33 Cr.L.J. 448 = 137 I.C. 259 = 33 P.L.R. 223 = 1932 Cr C. 377 = A.I.R. 1932 Lah 297.**

——**S. 302**—*Motive—Proof of.*

In the case of a trial for murder, it is not the duty of the prosecution to prove an adequate motive in every case. (*Tek Chand and Agha Haidar, JJ.*) CHANAN DAS *v.* EMPEROR. **151 I.C. 238 = 7 R.L. 113 = 35 Cr. L.J. 1283 = 1934 Cr C. 617 (2) = A.I.R. 1934 Lah. 368.**

——**S. 302**—*Motive when immaterial.*

Where there is direct evidence of murder, absence of proved motive is immaterial. (*Coldstream and Abdul Qadir, JJ.*) MAHOMED ARAF *v.* EMPEROR **147 I.C. 409 = 6 R.L. 395 = 35 Cr.L.J. 420 = 1933 Cr.C. 1516 = A.I.R. 1933 Lah. 1005 (2).**

Murder.

See also PENAL CODE, 300.

——**Ss. 301 and 300, Exception (4)**—*Murder—Applicability—Accused armed with spears and sharp-edged weapons—Fatal injuries.*

Men who go to attack their opponents with spears and vaholas must be held to have, if not the definite intention of killing, at least the knowledge that they are likely to inflict such injuries as will result in death. The accused were armed with spears and other sharp edged weapons and lathis while persons on the other side were armed with lathis only. It was clear from the nature of the injuries sustained, which were inflicted with spears in the side of breast and abdomen, that the accused had the intention of causing death.

Held, that the offence of the accused was one of murder punishable under S. 302 and was not covered by Exception (4) to S. 300. (*Bhide and Currie JJ.*) MUZAFFAR *v.* EMPEROR **148 I.C. 36 = 6 R.L. 528 = 35 Cr.L.J. 626 (2) = 1933 Cr.C. 396 = A.I.R. 1933 Lah. 296.**

——**S. 302** — *Murder—Brutal attack—Victim 'a petty tyrant'.*

Where the accused brutally attacked the deceased with lathis inflicting several injuries on his head and other parts of the body and practically killed him on the spot.

Held, that it was a clear case of murder—not of only culpable homicide not amounting to murder and the fact the deceased was a harsh landlord—"petty tyrant"—was no justification for the offence, though it may be a ground for sentencing them only to transportation for life. (*Raza and Bisheshwar Nath, JJ.*) EMPEROR *v.* PATAN. **I.R. 1932 Oudh 275 = 137 I.C. 817 = 33 Cr.L.J. 537 = 9 O.W.N. 350.**

——**Ss. 302 and 34**—*Murder—Concerted attack—Liability of all for murder.*

Where both the accused persons were engaged in a concerted attack upon the police and either of them was armed with a deadly weapon and used it to kill a police officer, they are both equally guilty of murder. It is wholly unnecessary to establish which of them attacked which of the policemen or indeed to show what particular weapons were used by either of them. (*Young, C.J. and Sale, J.*) HANS RAJ *v.* EMPEROR. **16 Lah. 345 = 1936 Cr.C. 264 = 161 I.C. 90C = 37 Cr.L.J. 504 = 8 R.L. 811 = A.I.R. 1936 Lah. 341.**

——**S. 302**—*Murder — Continuous act resulting in death.*

Where the action, which ultimately results in the death of a person, is continuous and it is impossible to resolve the different incidents into wholly separate actions, inspired by different motives and committed for different reasons, the person, who did that act, must be deemed as having done it with the intention of causing death and as having succeeded in carrying out his object and must therefore be held to be guilty of murder. 15 Bom. 194; 42 Mad. 547, Dist. (*Harrison and Abdul Qadir, JJ.*) EMPEROR *v.* GAJJAN SINGH. **I.R. 1931 Lah 257 = 130 I.C. 321 = 32 Cr.L.J. 483 = 1931 Cr.C. 91 = A.I.R. 1931 Lah. 27.**

——**Ss. 302 and 304**—Murder or culpable homicide —Attack by seven persons in one deliberately—Death caused by fracture of ribs and rupture of spleen—Offence. *See* PENAL CODE, SS. 299, 302, 304 AND 325. **1935 O.W.N. 343 = A.I.R 1935 Oudh 381.**

——**S. 302**—*Murder—Death of victim one month after attack.*

Where accused has given a severe blow on the head of the deceased with a deadly weapon causing extensive fracture of the skull, he is guilty of murder and the fact that deceased died only a month after the commission of the offence is immaterial. (*Young, C.J. and Rangi Lal, J.*) INAYAT KHAN *v.* EMPEROR. **16 Lah. 589 = 158 I.C. 336 = 36 Cr.L.J. 1335 = 37 P.L.R. 705 = 1935 Cr.C. 92 = A.I.R. 1935 Lah. 94.**

——**S. 302**—*Murder—Firing shot-gun with fatal effect—Intention—Nature of offence.*

A conviction under S. 302 cannot possibly be avoided when it is proved that the shot-gun was fired by the accused at such a close range that it would not have other than a fatal effect. Where the accused after firing at a person and fatally wounding him reloads his gun and fires a shot at another person, that is a clear indication of his intention to commit murder and his offence cannot come under S. 304. (*Courtney Terrell, C.J. and Scroope, J.*) RAJENDRA PRASAD SINGH *v.* EMPEROR. **6 I.R. (Pat) 202 = 145 I.C. 771 = 34 Cr.L.J. 1071 = 1933 Cr.C. 402 (2) = A.I.R. 1933 Pat. 147.**

——**S. 302**—*Murder—Grievous hurt to old man of seventy.*

If a party of men deliberately and without provocation attack an old man of 70, and intending and knowing that they are likely to cause grievous hurt, cover him with bruises and break his thigh, so that he dies, it is murder. It cannot possibly be argued that persons committing such a grievous assault upon an old man did not know it to be so imminently dangerous that it must in all probability cause death. (*Jackson, J.*) ABBASE *v.* EMPEROR. **1931 M.W.N. 132.**

——**S. 302**—*Murder—Injury caused on head with axe penetrating right into brain.*

The wound on the head of deceased was inflicted with an axe on the right side of the top of the head. There was a clean cut fracture of the skull along the whole length of the wound nearly 2 inches and penetrating to the depth of about 2 inches right into the brain.

Held, that accused was guilty of murder. (*Courtney Terrell, C.J. and Luby, J.*) BALAI BAURI *v.* EMPEROR. **36 Cr.L.J. 184 (2) = 152 I.C. 636 = 7 R.P. 226 = 1934 Cr.C. 1255 = A.I.R. 1934 Pat. 603.**

——**Ss. 302 and 460**—*Murder—Murder committed with object of stealing—Conviction under S. 460—Propriety.*

PENAL CODE (1860), S. 302.

Where murder is committed in a house with the object of stealing the valuables belonging to the deceased, if any of the accused persons are guilty, they would certainly be guilty of murder and not only of an offence under S. 460, I.P. Code. (*Sulaiman, C.J. and Harries, J.*) BANSIDHAR *v.* EMPEROR. **1934 A.L.J. 1160=4 A.W.R. 788=153 I.C. 364=7 R.A. 481=36 Cr.L.J. 322=16 L.R. 30 (Cr.)=1934 Cr.C. 1339=A. I.R. 1934 All. 1032.**

——**Ss. 302 and 307**—*Murder—Murder of a person by strangulation as well as placing the body on the railway line in order to be run over by a running train—Slight traces of struggle on the body—Evidence of intention to kill—The two acts of strangulation and placing the body on the line intimately connected—Ignorance as to the person being alive or dead when the body was placed on the line, whether could save accused from being guilty of murder.*

Where two accused persons decoyed a woman under pretence of taking her to see another person, strangled her on the way and put her body on the railway line so that the train might run over it thereby obliterating all traces of their crime and the train ran over her body and killed her and the following facts emerged out of the case, namely, (1) that an intention to kill the woman was clearly proved, (2) that it was in pursuance of a deliberate plan, (3) that the accused placed her body across the railway line, (4) that it was that act which caused her death, (5) that the accused did not put forward the case that they believed the woman to be dead when her body was put on the railway track, (6) that the marks of a struggle and the body having been dragged and the discovery of a woman's *thali* at that spot proved nothing more than a struggle, and (7) that there was some slight medical evidence regarding marks of strangulation,

Held, that the accused were guilty of murder. The intention with which the accused struggled with the woman cannot be separated from the intention with which they put her body across the line, that the two acts were intimately connected with each other and the latter act followed immediately upon the former, that both the acts of the accused must be treated as being only one transaction, the transaction being to kill the woman, and that the most favourable inference that could possibly be drawn in favour of the accused is that they acted with a reckless indifference and ignorance as to whether the woman was alive or dead at the time when her body was put across the railway line. If the accused intended to cause the death of a person and in furtherance of that intention did an act which did not in fact cause the death of that person, but in the belief that the act has caused death, the accused did another act, for example, for the purpose of hiding the traces of his crime and such act resulted in death, the accused should be convicted of murder and not any lesser offence. If a man stabs, shoots or hangs a person recklessly indifferent as to whether the body he handles is alive or dead, he should suffer the consequences of his act. The intention to kill is manifest; the two acts follow closely upon one another and must be treated as one transaction. If it has resulted in death, the accused is guilty of murder. (*Beasley, C.J. and Bardswell, J.*) KALIAPPA GOUNDAN *v* EMPEROR. **57 Mad 158=1933 M.W N. 745=38 L.W. 522=148 I.C 953=34 Cr L J 1109=1933 Cr.C. 1400=A I R. 1933 Mad. 798=65 M.L.J. 597.**

——**S. 302**—*Murder — Single fatal blow—Two assailants armed with* kirpans*—Identity of person dealing blow not known—Nature of offence.*

PENAL CODE (1860), S. 302.

Where both the assailants were proved to have been armed with *kirpans* and to have used them but there was only a single fatal blow dealt on the deceased and it was not apparent which of them had dealt the same,

Held, that the offence was one under S. 302 and not under S. 304 (*ii*) or S. 325, I.P. Code. Sentence of transportation for life passed. (*Shadi Lal, C.J. and Abdul Qadir, J.*) SHER SINGH *v.* EMPEROR. **I.R. 1931 Lah. 855=133 I C. 887=32 Cr.L.J. 1083 =32 P.L.R 537=1931 Cr.C. 778=A.I.R. 1931 Lah. 538.**

——**S. 302**—*Murder—Stabbing in abdomen—Likely to cause death.*

A stab wound which penetrates the wall of the abdominal cavity ought to be held to be one which is sufficient to cause death in the ordinary course of nature. (*Baguley and Mackney, JJ.*) MAUNG PYAN *v.* EMPEROR. **1935 Cr.C. 1172=159 I.C. 1058=37 Cr.L.J. 214=A.I.R. 1935 Rang. 408.**

——**S. 302**—*Murder—Stab wound puncturing liver and diaphragm.*

Where a person was killed by a stab wound between the 9th and 10th ribs which punctured the liver and diaphragm,

Held, that in the absence of extenuating circumstances, the man who inflicted this wound must be guilty of murder. (*Cunliffe, A.C.J and Baguley, J.*) NGA TIN HAN *v.* EMPEROR. **1933 Cr.C. 1532 (2)=147 I.C. 74=6 R.R. 146=35 Cr L.J. 434=A.I.R. 1933 Rang. 423.**

Murder or causing disappearance of evidence.

——**Ss. 302 and 201**—*Murder or causing disappearance of evidence—Evidence showing one or other might have committed the crime—No evidence as to who committed it—Conviction under S.* 302*—Liability for conviction under S.* 201.

Accused 1 and 2, mother and daughter, were charged with the murder of a boy. The husband of the 2nd accused had proposed to adopt the boy and the accused had not liked the idea. At the time when the boy disappeared, the husband of the 2nd accused was away from home and the two women were alone. Two days later the 1st accused was observed throwing the dead body of the boy from her roof on to the adjacent roof and the 2nd accused attempting to screen her with a cloth. The house was then searched by the Police and found to contain traces of the body having been buried in a decomposed condition. The 2nd acoused was produced before a Magistrate and she made a statement as a witness attributing the murder to her mother and repudiating her own complicity in it.

Held (by *Curgenven, J.*, agreeing with *Pandalai, J.*) (*i*) that the statement was not admissible against the 1st accused and in the absence of any other evidence to show who actually committed the murder or that both had acted in concert in killing the child, neither of them could be convicted of murder and the facts proved appeared compatible with the theory that either might have killed the child without the assistance of the other, (*ii*) that the fact that one of the two was the principal offender was no bar to the conviction of both of them under S. 201 of the Penal Code. (*Curgenven, J.*, on a difference of opinion between *Waller and Krishnan Pandalai, JJ.*) PUBLIC PROSECUTOR *v.* VENKATAMMA. **56 Mad. 63=I.R. 1932 Mad. 776=139 I.C. 725=33 Cr.L J. 814=1932 M.W N. 461=36 L W 798=1932 Cr.C. 923=A.I.R. 1932 Mad.748 =64 M L.J. 153.**

[D. 56 M. 231 (243).]

PENAL CODE (1860), S. 302.

———**Ss. 302 and 201**—Murder or causing disappearance of evidence—Proof of murder—Sufficiency of—Motive for murder proved—Place of hidden dead body shown by accused—Conviction under S. 201, not under S. 302. *See* PENAL CODE, SS. 201 AND 302. **34 P. L.R. 866.**

Murder or culpable homicide.

See also SUDDEN QUARREL *infra.*

———**Ss. 302 and 304**—*Murder or culpable homicide—Heat of fight—Random blow.*

Where the accused struck a more or less random blow in the heat of a fight which proved fatal, *held*, the accused ought to be convicted under S. 304 (2) and not under S. 302. (*Waller and Krishnan Pandalai, JJ.*) PUTHAN PURAYIL MATHAL KUTTI *v.* EMPEROR. **1931 M.W.N. 1320.**

———**Ss. 302 and 304, Part 2**—*Murder or culpable homicide—One of accused giving blow on head fracturing skull while other accused giving one blow each—Offence.*

Accused went armed with heavy lathis to give a beating to the deceased in return for what he had done to the sister of one of them. One of them gave a blow on the head fracturing the skull, while the other two gave one blow each,

Held, that the former must be convicted under S. 302 but that the latter two should be convicted only under S. 304, Part 2. (*Broadway and Abdul Qadir, JJ.*) LANGAR GEHNA *v.* EMPEROR. **35 Cr.L J. 101=6 I. R. (Lah.) 240=146 I.C. 496=1933 Cr.C. 1389=A.I.R. 1933 Lah. 980.**

——— **Ss. 302 and 304**—*Murder or culpable homicide—Party of accused attacked by others—Superior number of accused—Fight—Culpable homicide and not murder.*

Where it appeared that it was the other party who started the fight, but were overwhelmed by the party of the accused by reason of their superior number, the offence is most properly one under S. 304 than under S. 302, though the accused were also prepared for a fight and by reason of disparity of numbers, it looked more like a massacre than a fight. (*Bisheshwar Nath and Kisch, JJ.*) AJODHIA *v.* EMPEROR. **9 O W.N. 997 =1933 Cr.C. 81 (2)=142 I.C 665=I.R. 1933 Oudh 121=34 Cr.L.J. 387=A I.R. 1933 Oudh 41.**

———**Ss. 302 and 304**—*Murder or culpable homicide—Proof of intention—Right of private defence exceeded—No intention of serious injury.*

In all cases where death results as a result of blows given on head with a blunt weapon such as a stick, the intention of the assailant must be judged by the circumstances under which the blows were delivered, the weapon used, the force with which the blows were inflicted, and the extent of injuries caused. Accused struck the deceased two blows on the head with a stick. It was found that though accused had a right of private defence he had exceeded that right; further neither the accused nor anybody else thought that the deceased was seriously injured.

Held, intention to cause death or an injury sufficient in the ordinary course of nature to cause death cannot be imputed to the appellant and that he was guilty only of culpable homicide not amounting to murder. (*Dunkley, J.*) NGA PO EIN *v.* EMPEROR. **150 I.C. 599=7 R.R 1=35 Cr.L.J. 1112=1934 Cr.C. 573=A.I.R. 1934 Rang. 110.**

———**S. 302**—*Murder or culpable homicide—Stabbing with* churri—*Nature of offence.*

Where death was caused by stabbing with a *churri*, *held*, that the offence was murder and not culpable homicide. (*Broadway and Jai Lal, JJ.*) HARI SINGH *v.* EMPEROR. **I.R. 1932 Lah. 465=138 I.C. 321=33 Cr.L J. 577=33 P.L.R. 154=1932 Cr.C. 382=A.I. R. 1932 Lah. 302.**

Murder or hurt.

See also CONCERTED ATTACK *supra.*

———**S. 302**—*Murder or hurt—No intention to kill.*

Where the accused did not want his father to return two bulls which they thought of buying and when the father untied the two bulls and started to drive them away, the accused hit him on the head with a crowbar and killed him, *held*, as the accused had no intention of causing his father any serious injury but merely meant to beat him, he was not guilty of an offence under S. 302, but only under S. 324. (*Jackson and Cornish, JJ.*) MUTHU GOUNDAN *v.* EMPEROR. **1931 M.W. N. 765.**

———**Ss. 302 and 326**—*Murder or hurt—Common intention to inflict grievous hurt—Blow on head given with* chhavi *by one accused causing death—Offence.*

The common intention of the accused was merely to inflict grievous hurt on the deceased; one of the accused gave blow on head of deceased with a *chhavi* which resulted in his death,

Held, that they were guilty only of an offence under S. 326 read with S. 34. (*Addison and Abdul Rashid, JJ.*) THAKAR SINGH *v.* EMPEROR. **1935 Cr.C. 150 =A.I.R. 1935 Lah. 97.**

———**S. 302**—*Murder or hurt—Death due to meningitis and compression of brain—Injuries not necessarily sufficient to cause death—Nature of offence.*

In a trial under S. 302 the medical evidence was, that the injuries were not necessarily sufficient in the ordinary course of events to cause the death and that the death was due to meningitis and compression of the brain, but they had no direct connexion with the injuries caused.

Held, that the offence fell under S. 326 and not under S. 302. (*Tek Chand and Agha Haidar, JJ.*) CHANAN DAS *v.* EMPEROR. **151 I.C. 238=7 R.L. 113=35 Cr.L.J. 1283=1934 Cr.C. 617 (2)=A.I.R. 1934 Lah 368.**

———**S. 302**—*Murder or hurt—Evidence—Five persons assaulting two—Grievous hurts resulting in death of one five days later.*

Five persons took part in beating one *T* and another *F* which resulted in *F* sustaining grievous hurt, and *T* dying five days afterwards. There was no evidence of motive for the beating. Medical evidence showed that *T* had severe injuries on the head and one injury fracturing the ulva bone, the rest of the injuries being simple, and that *F* had one grievous and rest all simple.

Held, that the conviction under Ss. 302-49 for causing death of *T* was wrong. Proper conviction was under S. 325 as regards both *T* and *F* with conviction under S. 147. (*Dalip Singh and Currie, JJ.*) MOHAN SINGH *v.* EMPEROR. **151 I.C. 391=7 R.L. 123 (2)=35 Cr. L.J. 1355=1934 Cr.C. 767=A.I.R. 1934 Lah. 486.**

Poisoning.

———**S. 302**—*Poisoning—Administration of dhatura seeds proved—Proof of fatal dose, if necessary.*

Where the *post mortem* examination revealed that dhatura seeds had been administered to the deceased, it may be presumed that the deceased died in consequence thereof and it is not necessary for that purpose to prove that a fatal dose was administered. (*Niyogi and Grille, A.J.Cs.*) SARABAI *v.* EMPEROR. **I R. 1933 Nag. 130=142 I.C. 714=34 Cr.L.J. 398=16 Nag.L. J. 35=1933 Cr.C. 1261=A.I.R. 1933 Nag. 303.**

PENAL CODE (1860), S. 302.

——— **S. 302**—*Poisoning—Charge of arsenic poisoning—Proof of—Evidence of* post mortem *examination insufficient.*

In a charge of murder by arsenic poisoning, it is essential for the prosecution to prove (*a*) that the person alleged to have been murdered died of arsenic poisoning, and (*b*) that the accused person administered arsenic to the deceased with intent to murder. The evidence of the Civil Surgeon making the *post mortem* examination of the stomach and intestines of the deceased that from the history and the *post mortem* appearance of the stomach and intestines he was of opinion that death was due to an irritant poison of the nature of arsenic, is not sufficient to prove death by arsenic poisoning. It is not possible to be certain by a naked eye *post mortem* examination of the stomach and intestines that death was due to arsenic poisoning. *Post mortem* appearances similar to those observed in undoubted cases of arsenic poisoning are also similar to those produced by certain natural diseases, and other irritant poisons. It is just possible that under certain conditions they might be produced by the action of the digestive gastric juices of the stomach upon the tissues after death. (*Young and Collister, JJ.*) HAPPU *v.* EMPEROR. **1933 Cr.C. 1463 = 146 I.C. 1089 = 56 All. 228 = 1934 A L.J. 173 = 35 Cr.L.J. 280 = A.I.R. 1933 All. 837.**

——— **S. 302**—Poisoning—Giving of aconite—Consequence. *See* PENAL CODE, SS. 115 AND 302. **58 Cal. 1228 = A I R. 1931 Cal. 757.**

——— **S. 302**—*Poisoning—Murder by—Points to be proved—Proof of motive alone insufficient.*

In a case of murder by poison, there are three main points to be proved: firstly, did the deceased die of the poison in question; secondly, had the accused got the poison in question in his or her possession: and thirdly, had the accused an opportunity to administer the poison in question to the deceased. If these three points are proved, a presumption may under certain circumstances be drawn by the Court that the accused did administer poison to the deceased and did cause the death of the deceased. The evidence of motive which is frequently given in these cases is of subsidiary importance, and the mere fact that the accused had a motive to cause the death of the deceased is not a fact which will dispense with the proof of the second and third points that the accused had the poison in his or her possession, and, that the accused had an opportunity to administer the poison. (*Niamatullah and Bennet, JJ.*) MT. GAJRANI *v.* EMPEROR. **I.R. 1933 All. 414 = 144 I.C. 357 = 34 Cr.L.J. 754 = 14 L.R. 162 (Cr.) = 1933 A.L.J. 1617 = 1933 Cr.C. 664 = A.I.R. 1933 All. 394.**

——— **S. 302**—*Poisoning—Wife charged with murder of husband—Administration of* dhatura *seeds—Possibility of self-administration—Benefit of doubt.*

The deceased was proved to have died of *dhatura* poisoning. It could have been administered either by his wife or by himself. The wife and husband had some misunderstanding but no serious differences marred their outwardly normal relationship. It was just possible that the deceased might have determined to end his own life, having got tired with it.

Held, that the benefit of doubt should be given to the accused (wife). (*Niyogi and Grille, A.J.C.*) SARABAI *v.* EMPEROR. **I.R. 1933 Nag. 130 = 142 I.C. 714 = 34 Cr.L.J. 398 = 16 Nag.L.J. 35 = 1933 Cr.C. 1261 = A.I.R. 1933 Nag. 303.**

Private defence.

See also PENAL CODE, S. 300, EXCEPTION 2.

PENAL CODE (1860), S. 302.

——— **Ss. 302 and 100**—*Private defence—Blow given in self protection—Accused not guilty under S. 302.*

The deceased and another who had already attacked a cousin of accused came forward armed with ballam and barchhi bent upon attacking the accused and his people. The accused gave the deceased a blow in his stomach as a result of which he fell down.

Held, that the accused was justified in protecting himself and his people as he was under apprehension of a further attack on himself and his people and consequent death and that he was not guilty under S. 302. (*Addison and Agha Haidar, JJ.*) WAZIR *v.* EMPEROR, **1934 Cr C. 1 = 147 I.C. 705 = 6 R.L. 432 = 35 Cr.L.J. 468 = A.I.R. 1933 Lah. 1053.**

——— **S. 302**—*Private defence—Stabbing over the heart with knife—Injuries in the person of the accused.*

If a man stabs another over the heart deliberately with a knife capable of causing his death the offence is murder. The accused however, was shown to have injuries in his person and so he was held to have acted in self-defence and acquitted. (*Dalip Singh, J.*) FAQIR MAHOMED *v.* EMPEROR. **I.R 1932 Lah. 431 = 138 I.C. 217 = 33 Cr.L.J. 570 = 33 P.L.R. 287.**

——— **S. 302**—Private defence—Stab wounds—Exceeding right of private defence—Nature of offence. *See* PENAL CODE, S. 100. **1932 M.W.N. 67.**

Provocation.

See also PENAL CODE, S. 300, EXCEPTION I AND SENTENCE, *infra.*

——— **S. 302**—*Provocation—Accused having illicit connection with deceased for* 11 *years—Deceased changing paramour—Provocation—Sentence.*

The accused had illicit relations with a woman with the connivance of her husband for about 11 years. After the death of the husband, the woman commenced intrigues with another man. The accused remonstrated with her, but she did not mind. The woman was thereupon killed by the accused.

Held, that although the relations between the accused and the deceased were illicit but having regard to human nature it was natural that after a long period of years the accused should look on deceased as his woman and as a woman who was bound to render him fidelity. Under these circumstances the commencement of an intrigue between the woman and another man was a matter which would cause provocation to the accused. The sentence should therefore be reduced from one of death to transportation for life. (*Bennet and Bajpai, JJ.*) SHEO BARAN SINGH *v.* EMPEROR. **6 I.R. (All.) 379 = 146 I.C. 929 = 1933 A.L.J. 784 = 14 L.R. 215 (Cr.) = 35 Cr.L.J. 232 = 1933 Cr. C. 868 = A.I.R. 1933 All. 533.**

——— **S. 302**—*Provocation—Accused prompted by jealousy.*

Held, that the mere fact that the accused was suffering the pangs of jealousy, which drove him to commit the murder did not furnish any ground for saying that he received any provocation at all of any kind. The fact that the deceased fell in love with same woman with whom the accused was in love, and the fact that deceased was not prepared to give up his illicit connexion with the woman at the bidding of accused could hardly be said to be a conduct which gave provocation to the accused. (*Nanavutty and Smith, JJ.*) EMPEROR *v.* SHANKAR. **6 R.O. 514 = 149 I.C. 69 = 11 O.W.N. 636 = 35 Cr.L. J. 894 = 1934 Cr.C. 273 = A.I.R. 1934 Oudh 222.**

——— **S. 302**—*Provocation—Altercation and quarrel between accused and his two brothers—Fatal blow struck by accused on deceased with a* bhala*—Accused opposed by two brothers and getting provoked—Offence—Sentence.*

PENAL CODE (1860), S. 302.

Accused, his brother the deceased and another brother of theirs quarrelled about the proceeds of their joint cultivation in the course of which accused inflicted a *bhala* blow on the deceased who died immediately. The cause of the quarrel was that deceased and his brother removed some of the proceeds from the room in which the accused had locked the same. The accused had some provocation because two of his brothers stood against him and there was an altercation between the parties before the assault.

Held, that the case clearly fell under S. 302, and though the provocation was not such as to take the offence out of the provisions of S. 302, I. P. Code, in the circumstances of the case, a sentence of transportation for life would meet the ends of justice. (*Varma and Rowland, JJ.*) EMPEROR *v.* LALJI RAI. **1936 Cr.C. 6 = 160 I.C. 181 = 37 Cr.L.J. 235 = 8 R.P. 344 = 16 Pat.L.T. 730 = A.I.R. 1936 Pat. 11.**

——S. 302—*Provocation—Grave provocation—Deceased found to have criminal intimacy with the wives of the accused—Sentence.*

Where the deceased was a man of immoral character and had criminal intimacy with the wives of the accused, it is a case of grave provocation and the smaller sentence of transportation for life is more appropriate than that of death. (*Macnair and Sukhelar, A.J.Cs.*) MAHADEO *v.* EMPEROR. **I.R. 1931 Nag. 95 = 131 I.C. 431 = 32 Cr.L.J. 712 = 13 N.L.J. 107.**

——S. 302—*Provocation—Grave and sudden provocation—Burden of proof.*

In a prosecution for an offence under S. 302, I. P. Code, the onus of proving grave and sudden provocation as to reduce the offence to one under S. 304, is on the accused (*Harrison and Dilip Singh, JJ.*) UMAR KHAN *v.* EMPEROR. **I.R. 1932 Lah. 122 = 33 Cr.L.J. 183 = 1932 Cr.C. 21 = 135 I.C. 666 = 32 P.L.R. 804 = A.I.R. 1932 Lah. 11.**

——S. 302—*Provocation—Sentence—Murder committed under sudden provocation.*

Where the offence committed is one under S. 302, I. P. Code, but it was committed as the result of sudden provocation and without premeditation, the Court may impose the lesser sentence. (*Thom and Harries, JJ.*) BHARAT SINGH *v.* EMPEROR. **159 I.C. 155 (2) = 8 R.A. 397 = 1935 A.W.R. 53 = 1935 A.Cr.C. 6 = 37 Cr.L.J. 32 = 1935 Cr.C. 362 = A.I.R. 1935 All. 362.**

——S. 302—*Provocation—Single blow with stick—Premeditated act—Death caused—Nature of offence.*

The accused dealt a single blow from behind on the head of the deceased and thereby caused his death. It appeared that the act was premeditated, having been the result of provocation. *Held*, that the offence was one under S. 302, I. P. Code. (*Shadi Lal, C.J. and Abdul Qadir, J.*) NAWAB *v.* EMPEROR. **I.R. 1932 Lah. 486 = 138 I.C. 410 = 33 Cr.L.J. 580 = 33 P.L.R. 279 = 1932 Cr.C. 422 = A.I.R. 1932 Lah. 308.**

Sentence.

See also DRUNKENNESS, PROVOCATION AND EXTENUATING CIRCUMSTANCES, *supra* AND SUDDEN QUARREL, *infra*.

——S. 302—*Sentence—Abnormal mentality of accused—Lesser sentence.*

When it was proved that the murder with which the accused was charged was not premeditated and that the mental of the accused was abnormal, these circumstances may be taken into consideration for sentencing the accused to be transported for life. (*Beasley, C.J. and Pakenham Walsh, J.*) PUBLIC PROSECUTOR *v.* SANJIVA REDDI. **1931 M.W.N. 105.**

PENAL CODE (1860), S. 302.

——S. 302—*Sentence—Accused acting in excess of zeal—Absence of premeditation.*

There was a fight going on between two men both unarmed. The weaker one called to the villagers to separate them and the accused came up and stabbed the man who had got the better of the struggle. There was no premeditation at all, merely an excess of zeal, possibly due in part at any rate, to the fact that the accused had been drunk.

Held, that this was a case where extreme penalty was not called for. (*Baguley and Mackney, JJ.*) MAUNG PYAN *v.* EMPEROR. **1935 Cr.C. 1172 = 159 I.C. 1058 = 37 Cr.L.J. 214 = A.I.R. 1935 Rang. 408.**

——Ss. 302 and 304—*Sentence—Accused lying in wait—Armed—Offence—Deceased intriguing with girl betrothed to accused.*

Where the accused expected to find the deceased to come to a particular place to prosecute his intrigue with a girl who was betrothed to one of them and were lying in wait, armed with spears and intended to murder him, if he did, the provocation is not sudden and the accused are not deprived of their power of self-control, the accused in such a case are guilty of murder. But the fact that the deceased had given provocation to the accused by persisting in his intrigue with the girl who was betrothed to one of them would justify not giving capital sentence. 7 P. R. 1890 (Cr.), Rel on. (*Bhide and Currie, JJ.*) NUR ILAHI *v.* EMPEROR. **151 I.C. 1012 = 7 R.L. 236 = 35 Cr.L.J. 1476 = 1934 Cr.C. 459 = A.I.R. 1934 Lah. 239.**

——S. 302—*Sentence—Accused prompted by superstition.*

Where an illiterate and ignorant young woman, under the urge of a wicked superstition of which she was a helpless victim, picked up the child of her sister in-law and caused its death,

Held, that the lesser penalty of transportation for life provided by S. 302 should be imposed and not the extreme penalty. (*Addison and Agha Haidar, JJ.*) MT. SARDARAN *v.* EMPEROR. **6 I.R. (Lah.) 193 = 146 I.C. 228 = 34 Cr.L.J. 1251 = 1933 Cr.C. 904 = A.I.R. 1933 Lah. 718.**

——S. 302—*Sentence—Accused wanting to break off her illicit connection—Deceased persisting in carrying on sexual intercourse—Murder by poisoning.*

Where the accused was disgusted with the deceased and wanted to break off her connection with him and she was being maltreated by her husband in order that she might give up her connection with the deceased, while the deceased persisted in carrying on sexual intercourse with her even when she was ailing and as a result of the harassment to which she was subjected by the deceased she made up her mind to get rid of him by poisoning him.

Held, that in the above circumstances, it was not a fit case in which the extreme penalty permissible under the law should be exacted. (*Abdul Rashid and Rangi Lal, JJ.*) MT. PATHANI *v.* EMPEROR. **152 I.C. 1077 = 35 P.L.R. 559 = 1934 Cr.C. 999 = 36 Cr.L.J. 247 = 7 R.L. 361 = A.I.R. 1934 Lah. 673.**

——S. 302—*Sentence—Administering arsenic in milk—Husband's jealousy.*

Deceased was carrying on an illicit intrigue with the wife of the accused. Accused showed no grudge or enmity towards deceased, butdecoyed him on a pretence of helping him with a loan and there gave him milk containing arsenic to drink.

Held, that accused was punishable under S. 302, but that as the accused had illicit intrigue with his wife, transportation for life would be sufficient. (*Smith and*

PENAL CODE (1860), S 302.

Allsop, JJ.) SARABJIT *v.* EMPEROR. **6 I.R. (Oudh) 185 = 146 I.C. 817 = 10 O.W.N. 771 = 1933 Cr.C. 1099 = 35 Cr.L.J. 189 (2) = A I.R. 1933 Oudh 382**

——— **S. 302**—*Sentence—Boy of* 15 *or* 16—*Inhuman and horrible murder in cold blood.*

An inhuman and horrible murder was perpetrated in cold blood by an accused, a boy of 15 or 16.

Held, that however horrible the crime, a boy of 15 or 16 years should not be hanged, that at the age of 15 and 16 when a boy had just come to the age of puberty he may do many things then which he would never dream of doing when he was older and that sentence of death should be remitted to transportation for life.

Held, further, that it was inadvisable for a boy of this age to be kept in an ordinary jail. (*Young and Collister, JJ.*) GHUNNAI *v* EMPEROR, **1934 A.L.J. 143 = 3 A W.R. 419 = 6 R.A. 230 = 147 I.C. 630 = 35 Cr.L.J. 448 = 1934 Cr.C. 180 = A.I.R. 1934 All 132.**

——— **S. 302**—*Sentence—Boy of* 16—*Extreme youth—Lesser sentence.*

Youth may not in itself be a reason for not hanging a murderer, but extreme youth may be such a reason. Accused aged about 16, sentenced to transportation for life. (*Addison and Coldstream, JJ.*) MOHAN LAI *v.* EMPEROR. **I.R. 1931 Lah. 404 (2) = 131 I.C 276 (2) = 32 Cr.L.J. 682 = 1931 Cr C. 297 = A.I R. 1931 Lah. 177.**

——— **S. 302**—*Sentence—Boy of* 16—*Tender age—Recommendation to Local Government under S.* 401, *Cr. P. Code.*

The accused who was of tender age (not more than 16 years) was shown to have committed murder being provoked by the outrageous conduct of the deceased in having sexual intercourse with a female relative of his in an open and bare-faced manner 3 days before the occurrence. The Court while upholding the conviction and sentence of transportation for life recommended the case to the local Government for a consideration of the sentence under S. 401, Cr. P. Code. (*Shadi Lal, C. J. and Abdul Qadir, J.*) NAWAB *v.* EMPEROR. **I.R. 1932 Lah 486 = 138 I C. 410 = 33 Cr L J. 580 = 33 P.L.R. 279 = 1932 Cr.C. 422 = A.I.R. 1932 Lah. 308**

——— **S. 302**—*Sentence—Boy of* 17 *committing murder under influence of others.*

Where a boy of 17 years of age was engaged in a murder under the influence of people very much older than himself, there is justification for a sentence of transportation for life in spite of the fact that he took an actual part himself in the murder (*Young, C. J. and Addison, J.*) CHARACH DIN *v.* EMPEROR. **36 P. L.R. 40 = 1934 Cr C. 1121 (2) = 153 I C. 228 = 7 R. L. 411 = 36 Cr L.J. 313 = A.I.R. 1934 Lah 786.**

——— **S. 302**—*Sentence—Boy of* 17 *committing murder without premeditation and under sudden impulse.*

A boy of 17 committed the murder of a person between whom and the boy's family there was ill feeling and bad blood. The murder was committed without premeditation and under sudden impulse.

Held, the boy should be given a *locus penitentiae* and that the irrevocable sentence of death should not be passed on him. (*Shadi Lal, C.J. and Agha Haidar. J.*) YARA DOST MOHAMMAD *v.* EMPEROR. **I R. 1933 Lah. 233 (2) = 142 I C. 654 = 34 Cr L J. 375 = 34 P L. R. 414 = 1933 Cr.C. 349 = A.I.R. 1933 Lah. 229.**

——— **S. 302**—*Sentence—Brutal attack.*

The lesser penalty provided for the offence of murder is not an adequate sentence where the attack is brutal and deliberate. (*Coldstream and Jai Lal, JJ.*) NAWAB *v.* EMPEROR. **I.R. 1938 Lah. 213 = 142 I.C. 577 = 34 Cr.L.J. 443 = 1933 Cr.C. 247 = A.I R. 1933 Lah. 131.**

PENAL CODE (1860), S. 302.

——— **S. 302**—*Sentence — Capital sentence—Grounds for not awarding—No personal grudge against accused.*

The fact that the accused had no personal grudge against the deceased and was either a hired murderer or one who was ready to kill another to please his master or landlord is no ground for not awarding the capital sentence in a case of wanton and cold-blooded murder. (*Abdul Qadir and Monroe, JJ.*) ASA RAM *v.* EMPEROR. **I.R. 1933 Lah. 225 = 142 I C. 620 = 34 Cr L. J. 372 = 34 P.L.R. 427 = 1933 Cr C. 879 = A I.R. 1933 Lah 623.**

——— **S. 302**—*Sentence — Cold-blooded and brutal murder—Extreme penalty.*

Where a Judge finds that the murder was premeditated, cold-blooded and brutal in the extreme and suggests no extenuating circumstance, he is not justified in imposing anything short of the extreme penalty. (*Shadi Lal, C J and Monroe. J.*) AMIR SINGH *v.* EMPEROR. **I.R. 1932 Lah. 463 = 138 I C. 327 = 33 Cr L J. 576 (2) = 33 P.L.R. 158 = 1932 Cr C. 257 = A.I.R. 1932 Lah 245.**

——— **Ss. 302 and 34**—*Sentence—Common intention to murder—No proof as to who inflicted fatal wound.*

The mere fact that it is impossible to say which of the accused actually inflicted the fatal wound is no reason at all for refraining from passing the death sentence, where the Court is satisfied that there was a common intention to murder, brutally carried out, and that all took part in the beating the result of which was death. (*Young, C.J. and Abdul Rashid, J.*) MEWA *v.* EMPEROR. **156 I.C. 786 = 8 R.L 24 = 36 Cr L.J. 1001 = 16 Lah. 1131 = 38 P.L R. 109 = 1935 Cr C. 571 = A. I.R. 1935 Lah. 337.**

——— **S. 302**—Sentence—Court not passing sentence of death—Duty to record reason. *See* CR P. CODE, S. 367 (5). **1935 O.W.N. 321 = A.I R. 1935 Oudh 265.**

——— **S. 302**—*Sentence—Crime unpremeditated and in hot blood.*

Where crime was unpremeditated, committed in hot blood and in the course of a dispute, the sentence of death is not called for. (*Bagulay and Mackney, JJ.*) NGA MYE *v.* EMPEROR. **1935 Cr C 1201 (2) = 159 I C. 902 = 37 Cr L J. 181 = A.I R. 1935 Rang 427.**

——— **S. 302**—*Sentence—Deliberate and cruel murder.*

Accused were comparatively young men, one being 20 years of age and the other 22, but the murder was deliberate and cruel and there were no extenuating circumstances which would justify reducing the sentence.

Held, that capital sentence was proper. (*Sir Vastava and Allsop JJ.*) JANGLI *v.* EMPEROR **6 R.O. 384 = 148 I.C. 475 = 35 Cr.L J. 664 = 11 O.W.N. 119 = 1934 Cr C. 99 = A.I R. 1934 Oudh 19.**

——— **S. 302**—*Sentence—Deliberate fratricidal assassination—Extreme penalty.*

In a case of deliberate fratricidal assassination for the basest of all motives, the Court should inflict the death penalty. (*Courtney Terrell, C. J. and Scrope, J.*) TULSI GANGOTA *v.* EMPEROR, **I R 1933 Pat. 165 = 142 I.C 613 (2) = 34 Cr.L J. 395 = 14 Pat L.T. 98 = 1933 Cr C. 511 = A.I R. 1933 Pat. 180.**

——— **S. 302**—*Sentence—Deliberately planned murder.*

Where a murder is deliberately planned and carried out by a young man and there are no extenuating circumstances justifying mitigation of the sentence, sentence of death is proper. (*Bhide and Currie, JJ.*) MOTI RAM BHOJA RAM *v.* EMPEROR. **6 R.L. 423 = 147 I C. 692 = 35 P L.R. 201 = 35 Cr L.J. 488 = 1933 Cr.C. 1513 = A.I.R. 1933 Lah. 998.**

PENAL CODE (1860), S. 302.

——S. 302—*Sentence—Discovery of dead body if material.*

In a case of murder once the Court is satisfied, that the murder has been committed and that the accused person has committed it, the question of sentence must be determined upon the gravity of the offence irrespective of the circumstance whether the body has or has not been discovered. 1 Luck. 327 and 23 A.L.J. 821, Foll. (*Abdul Qadir and Walker, JJ.*) MUNDA *v.* EMPEROR. **I.R 1931 Lah. 267=130 I.C. 331=32 Cr.L.J. 493=1931 Cr.C. 89=A I.R. 1931 Lah. 25.**

——S 302—*Sentence—Discretion of Sessions Judge—Interference by High Court.*

Ordinarily when an accused person is convicted of murder, the sentence of death results but where there are mitigating circumstances shown or proved, then the lesser sentence of transportation for life can, in the discretion of the Sessions Judge, be inflicted. The High Court will not interfere with that discretion unless it is clear that the only possible sentence in the case is a sentence of death. (*Beasley, C.J. and Bardswell, J.*) PUBLIC PROSECUTOR *v.* VAYYAPPA ASARI. **1933 M.W.N. 1420.**

——S. 302—*Sentence—Doubt about the guilt of accused—Relevancy of.*

A Judge should not sentence a person accused of murder to transportation for life, instead of death, merely on the ground that the evidence is not strong enough to justify an irrevocable sentence. If the Court has any doubt as to the guilt of the accused, it should acquit him. 9 Pat 474, Foll. (*Macpherson and James, JJ.*) MOSADDI RAI *v.* EMPEROR. **11 Pat. 807=13 Pat.L.T. 702=1933 Cr.C. 253=I.R 1933 Pat 180=142 I.C. 841 (2)=34 Cr L J. 427=A I.R. 1933 Pat. 100.**

——S. 302—*Sentence—Drunkeness—Fight between deceased and accused—Following up injured man—Nature of offence.*

The assault was begun by the accused and when his first weapon had broken, he acted with such determination that he armed himself with another weapon and chased the deceased into the compound of one *T* and there assaulted him further with his second weapon and the second assailant only joined in the assault after the deceased had fallen to the ground.

Held, that his action, in so following up the injured man and repeatedly striking him with these weapons, did show that, apart from any intention which the second assailant may have shared with him, he himself had the intention of causing injury sufficient in the ordinary course of nature to cause death. But as the accused had been drinking shortly before the occurrence and the attack was entirely unpremeditated and the weapons used were not such weapons as any man would use who had formed a prior intention of killing his enemy, he should be sentenced to transportation for life. (*Mya Bu and Dunkley, JJ.*) NGA KYIN BAW *v.* EMPEROR. **6 I. R. (Rang.) 79=146 I.C. 216=34 Cr.L.J. 1245=1933 Cr.C 1022=A I.R. 1933 Rang. 278.**

——S 302—*Sentence—Faction fight—Death caused without premeditation—Transportation for life.*

Where death was caused during the course of a fight between two factions but it appeared that the complainant's side deliberately provoked a conflict being themselves armed and that the accused had no previous intention of killing anybody.

Held, that under the circumstances the accused should be sentenced to transportation for life under S. 302. (*Coldstream and Jai Lal, JJ.*) BAHAWAL *v.* EMPEROR. **32 P.L.R. 810=1932 Cr.C. 15=135 I.C. 670**

PENAL CODE (1860), S. 302.

=I.R 1932 Lah. 126=33 Cr.L.J. 184=A.I.R. 1932 Lah. 5.

——S. 302—*Sentence—Judge disagreeing with assessors—No reason for lesser sentence than death.*

The duty of a Sessions Judge under S. 367 (5) is to pass sentence of death in cases of conviction of murder under S. 302, I. P. Code, unless there are reasons for not passing such sentence. The fact that the assessors gave their opinion that the accused was not guilty is no reason for passing the lesser sentence. Assessors are meant to assist the Judge in arriving at a conclusion whether the accused before the Court is guilty or not, but the responsibility for the sentence rests with the Judge and the Judge alone, and, having once made up his mind to differ from the assessors as regards conviction, he should not let their opinion weigh with him with regard to sentence. 1 Rang. 751, Rel on. (*Niyogi and Staples, A.J. Cr.*) LOCAL GOVERNMENT *v.* SITRYA ARJUNA MAHAR. **30 N.L.R. 9=6 I.R. (Nag) 72=146 I.C. 118=34 Cr L.J. 1168=1933 Cr.C. 1265=A.I.R. 1933 Nag. 307.**

——S. 302—*Sentence—Lesser penalty on the ground of doubt—Propriety.*

The Code provides two penalties for murder, namely, death and the lesser penalty of transportation. The lesser sentence was never intended to be imposed in a case where there appears to be some doubt. If the Court at the end of a case is left in any reasonable doubt about the matter, it must acquit, but on the other hand, if it is left in no reasonable doubt concerning the guilt of the accused, the appropriate penalty must in all cases be imposed. Where there is a doubt in a murder case the Court should not and cannot pass a sentence of transportation for life. If the doubt amounts to a reasonable doubt, the accused must be acquitted. (*Harries and Rachhpal Singh, JJ.*) JADDU AHIR *v.* EMPEROR. **158 I.C. 1041=8 R A. 362=36 Cr.L J. 1496=1935 A.W.R. 806=1935 Cr.C. 1136=A.I.R. 1935 All. 919,**

——S. 302—*Sentence—Measure of — Intention of accused should be considered.*

Sentence should not be measured by the number of blows dealt in a case where the consequence leads to death. A single blow can be as effective and fatal as several blows. It is the intention behind the blow and other concomitant circumstances by which the sentence should be determined. The reason given by the Sessions Judge for not awarding the capital sentence. *viz*, that probably a single blow was dealt, is no extenuating circumstance. (*Bhide, J.*) SULTAN *v.* EMPEROR. **12 Lah 442=134 I.C. 793=32 Cr L.J. 1219=1931 Cr C. 1054=32 P L.R. 925=I.R. 1931 Lah. 1001=A.I.R. 1931 Lah. 749.**

——S. 302—*Sentence—Mitigation — Killing for unchastity under custom of Baluchis.*

A custom among the Baluchis of killing for unchastity cannot be taken into consideration in the mitigation of sentence. (*Ferrers, J.C. and Mehta, A.J.C.*) KAIM *v.* EMPEROR. **28 S.L R 279=1935 Cr.C. 187=153 I.C 976=7 R.S. 151=36 Cr.L.J. 497=A.I.R. 1935 Sind 44.**

——S. 302—*Sentence—Murder by accused of suspected poisoner of his child.*

The accused belonged to an aboriginal tribe. The deceased on the day of the occurrence presented a piece of roti to the only child of the accused who was about a year old in presence of both the parents. After the visitor had left, the child, though previously perfectly well and paying about, began to be ill after having eaten the bread given to it and eventually died about the time of the night-meal. The accused believing his only child

PENAL CODE (1860), S. 302.

to have been poisoned by their visitor took his balua, proceeded to the deceased's house and without a word dealt her at least five violent blows with the balua, one at least of which was necessarily fatal.

Held, that the accused was beset himself with grief and having connected his bereavement with the gift of bread by the deceased rushed away before he had any time to think and committed the crime. The reason for passing the lesser sentence was express and adequate. A.I.R. 1930 Pat. 247, Rel. on. (*Macpherson and Agarwala, JJ.*) EMPEROR *v* RAMESHWAR BINJHIA. **150 I.C. 543 (2)=7 R P. 1=35 Cr.L.J. 1128=1934 Cr C. 796=A.I.R. 1934 Pat. 356**

———**S. 302**—*Sentence—Murder of child—Accused driven to desperation by starvation.*

Where the accused, driven to desperation on account of starvation, killed her infant daughter by cutting her throat by means of a *katari*,

Held, that the case did not call for the infliction of capital sentence and that the ends of justice would be sufficiently met by sentencing the accused to transportation for life. (*C.C. Ghose, Panckridge and Patterson, JJ.*) MABAJJAN BIBI, *In the matter of*. **I.R. 1932 Cal. 339=137 I.C. 511=33 Cr.L.J. 476=1932 Cr.C. 650=A.I.R. 1932 Cal. 658.**

———**S. 302**—*Sentence—Murder under semi compulsion by elder brother.*

Where a youth aged 18 committed murder under instructions and semi compulsion by his elder brother who was the prime mover and who alone was to benefit by the murder,

Held, that there was sufficient reason for not inflicting the extreme penalty. (*Mya Bu and Brown, JJ.*) MI HEIN *v.* EMPEROR. **6 I.R. (Rang.) 11=144 I C. 829 =34 Cr.L.J. 835=1933 Cr C. 720=A.I.R. 1933 Rang. 134.**

———**S. 302**—*Sentence—Provocation—Remorse after crime—Accused only son of a widow—If grounds for lesser sentence.*

On a conviction for murder under S. 302, the fact that the accused is the only surviving son of his widowed mother or that was sincerely penitent and filled with remorse after the murder, cannot be taken as a sufficient ground for imposing the lesser sentence. But where it appears that the accused, a young man of 22 or 23, was overcome with passion at the insults heaped upon him by the deceased in the presence of others to such an extent that he lost self-control and committed the act under provocation that is fit case for awarding the lesser penalty of transportation for life, although the provocation might not be such as could operate to convert the offence from one of murder to one of culpable homicide. (*Patterson and Cunliffe, JJ.*) MOMINADDI SARDAR *v.* EMPEROR **158 I C. 67=36 Cr.L J. 1254 =39 C.W.N. 262=1935 Cr.C. 1015=A.I.R. 1935 Cal. 591.**

———**S. 302**—*Sentence—Several serious injuries caused with sharp-edged and pointed weapon of formidable nature—Refusal of deceased to have unnatural intercourse with accused being motive—Accused aged* 18 *or* 19 *—Death sentence proper*

Accused aged 18 or 19 made indecent overtures to the deceased and asked him to have unnatural intercourse which the latter refused. Accused though rebuked by the mother of the deceased and his own grandfather still molested the deceased and on the deceased's refusal to allow accused to play with him, accused got a churri and gave several stabs causing serious injuries to the deceased.

PENAL CODE (1860), S. 302.

Held, that in view of the most objectionable motive which accused had and the number of injuries caused and the nature of weapon used, death sentence was quite proper even though the accused was a youth of 18 or 19. (*Jai Lal and Abdul Qadir, JJ.*) BHAGWAN CHAND *v.* EMPEROR. **6 R.L 512=148 I.C. 191=35 Cr.L.J. 619=1934 Cr. C. 38=A.I.R. 1934 Lah. 20.**

———**S. 302**—*Sentence—Strength of evidence—Whether material.*

The strength of the evidence against the accused is a matter to be considered before but not after conviction. Where the Sessions Judge convicted the accused of a murder by assassination but sentenced them to imprisonment for life instead of to death and stated his reason to the effect that the evidence was not of a sufficiently convincing character to justify the latter punishment.

Held, that the reason for passing the lesser sentence was utterly wrong. (*Courtney Terrel, C.J., Stroope and Agarwalla, JJ.*) SANTOKHI BELDAR *v.* EMPEROR. **12 Pat. 241=I.R. 1933 Pat. 139=142 I.C. 474=34 Cr L J. 349=14 Pat L.T 82=1933 Cr.C. 404=A.I.R. 1933 Pat. 149 (S.B.).**

———**S. 302**—*Sentence—Tender age—Relevancy of.*

Age is no doubt a circumstance to be taken into consideration but only along with the other circumstances of the case. In the case of a murder of an extremely cowardly character committed on an Englishman who had done no injury to any human being, the fact the accused was of tender years cannot be allowed to prevent the Court from passing a sentence of death. (*C.C. Ghose, Jack and M C. Ghose, JJ.*) PRODYOT KUMAR BHATTACHRIYA *v.* EMPEROR. **I.R. 1932 Cal. 673= 1933 Cr C. 21=140 I.C. 80=33 Cr.L.J. 837=A.I.R. 1933 Cal. 1 (F B.).**

———**S. 302**—*Sentence—Transportation is minimum.*

The sentence of transportation for life is the minimum sentence that can be legally passed for an offence under S. 302. (*Nanavutty and Smith, JJ.*) RAJARAM TEWARI *v.* EMPEROR. **6 I R. (Oudh) 188=146 I.C. 888=10 O.W.N 835=1933 Cr C. 1245=35 Cr.L.J. 185=A.I.R. 1933 Oudh 399.**

———**S. 302**—*Sentence— Unpremeditated attack.*

Where the attack was altogether unpremeditated and accused acted under the impulse of the moment,

Held, that extreme penalty of law should not be passed. (*Young, C.J. and Rangi Lal, J.*) INAYAT KHAN *v.* EMPEROR. **16 Lah. 589=158 I.C. 336=36 Cr L J. 1335=37 P L.R. 705=1935 Cr.C. 92= A.I.R. 1935 Lah. 94.**

———**S 302**—*Sentence—Youth of accused.*

Youth alone is not in every case such an extenuating circumstance as would justify the imposition of the lesser penalty in cases of murder, but it should be taken into consideration with the other facts of the case.

The accused was aged about 18. His attack on the deceased was made in consequence of a petty dispute which had occurred about a fortnight before and was obviously premeditated. The murder was prepetrated in a cold-blooded manner. While the deceased was peacefully engaged in his daily occupation of ploughing the fields and was unarmed, the accused approached him stealthily and cut him down from behind with a most savage blow. Under the circumstances, it was held that his youth was no sufficient ground to mitigate the sentence of death. (*Maung Ba and Dunkley, JJ.*) TIRI *v.* EMPEROR. **9 Rang. 81=I.R 1931 Rang. 204 =132 I.C. 716=32 Cr.L.J. 941=1931 Cr.C. 667= A.I.R. 1931 Rang. 171.**

———**S. 302**—*Sentence—Youth of accused—If ground for mitigation.*

PENAL CODE (1860), S. 302.

Where the crime appears to be a heinous one, and is carefully planned and carried out in a treacherous and cruel manner, the accused's youth alone cannot be considered to be an adequate ground for mitigation of punishment. (*Bhide and Currie, JJ.*) ALLAH BAKHSH *v.* EMPEROR. **6 I R. (Lah) 313=146 I.C. 1061= 1933 Cr C. 1411=35 P.L R. 115=35 Cr L.J. 288= A.I R. 1933 Lah. 956.**

——**S. 302**—*Sentence— Youth of accused—If sufficient to justify lesser penalty.*

The fact that the age of accused is only 20 will not be sufficient to justify the Court in refraining from imposing the maximum penalty prescribed by law, a man of twenty being of a sufficient age to be fully able to realize the nature of his acts. (*Patterson and Cunliffe, JJ.*) EMPEROR *v.* MOTILAL MALLIK. **157 I.C. 829=36 Cr L J. 1220=39 C.W.N. 199=1935 Cr.C. 902= A.I R. 1935 Cal. 526.**

——**S. 302**—*Sentence—Youth of accused—Relevancy of.*

There is no law which justifies a Court in not passing a sentence of death any person merely because he is young. All persons who can understand the nature of their act are liable to the extreme penalty of the law. Youth may be a circumstance to be taken into consideration in offences where the accused person is not fully able to understand the nature of his act or has been influenced by older persons, but not in a case where a youth deliberately murders a small boy for the motive of greed, being prompted to the crime by his own base nature. It is not the intentention of the legislature to reform murderers and the sentence of transportation for life is imposed only where there are some extenuating circumstances and where sentence of death is not necessary in the interests of public at large. (*Bisheshwar Nath and Raza, JJ.*) BHAWANI *v.* EMPEROR. **1933 Cr.C 92=141 I.C. 747 (1)=34 Cr L.J. 250=I R. 1933 Oudh 83=9 O.W.N. 1161=A.I.R. 1933 Oudh 52.**

——**S. 302**—*Sentence—Youth of accused—Relevancy of.*

There is no reason for not imposing the extreme penalty when the accused, though a youth, is shown to have acted with deliberation and premediation. (*Bennet and Bajpai, JJ.*) SHEO DIN *v.* EMPEROR. **14 L R. 179 (Cr.)=1933 Cr C. 1559=6 R A. 542 (2)=147 I.C. 676 (2)=35 Cr.L.J. 464=A.I.R. 1933 All. 939.**

——**S. 302**—*Sentence—Youth of accused—Relevancy of.*

Where the accused belongs to a dangerous band of hired assassins, he is not entitled to any leniency in the matter of sentence even though he be aged only 25. (*Bennet and Bajpai, JJ.*) RAM BHAROSEY *v* EMPEROR. **148 I.C. 913=35 Cr L J. 762=6 R.A. 821=14 L R. 184 (Cr.).**

——**S. 302**—*Sentence—Youth of accused—Youth of 19 influenced by elder brother—Transportation for life.*

It has been held that youth is not in itself a sufficient ground for reducing the punishment for murder from death to transportation for life. This is certainly correct where a youth deliberately by himself, sets out to kill another man. But where a youth is associated with older persons it may be proper in certain cases to infer that he was influenced by the older and more mature persons. Sentence of transportation for life inflicted on the accused aged 19 who was influenced in his act by his elder brother, aged 22. (*Abdul Qadir and Addison, JJ.*) SIKANDAR *v* EMPEROR. **131 I.C. 122=32 Cr. L.J. 645=32 P.L.R. 414=1931 Cr C. 776=A I.R. 1931 Lah. 536.**

PENAL CODE (1860), S. 302.

Sudden jury.

——**S. 302**—*Sudden jury—Knife thrust into abdomen—Sentence.*

A person who thrusts a knife into the abdomen of another must be presumed to have intended to inflict an injury which he knows to be likely to cause the death of that person. But it was done in a great rage in the course of a hand to-hand fight, the sentence of death should be commuted into one of transportation for life. (*Coldstream and Jai Lal, JJ.*) BHAGWANA *v.* EMPEROR. **I R. 1933 Lah. 455=144 I C. 292=34 Cr.L J. 711=34 P.L R. 255=1933 Cr C. 675=A.I R. 1933 Lah. 434.**

Sudden quarrel.

——**S. 302**—*Sudden quarrel—Death caused with winnowing instruments— Nature of offence.*

Where the quarrel which led to the fight was sudden and it appeared that death was caused by certain persons having dealt blows with the winnowing instruments which they had with them in connection with agricultural operations.

Held, that the case was one of culpable homicide falling under S. 304 and not S. 302, I P. Code. (*Dalip Singh and Abdul Qadir, JJ.*) ABBAS KHAN *v.* EMPEROR. **32 P.L.R. 513=1932 Cr.C. 13=A.I.R. 1932 Lah. 3.**

——**S. 302**—*Sudden quarrel—No deliberate intention—Sentence.*

Only one blow was struck by the appellant on the head of deceased. It was further found that abusive language was exchanged just before the blow was struck and that the blow was given in a sudden quarrel without any deliberate intention and without the appellant having taken undue advantage or having acted in a cruel or unusual manner. As soon as the deceased fell down the appellant refrained from inflicting any other injury upon him.

Held, that a sentence of five years' rigorous imprisonmant was excessive and that it should be reduced to one of two years' rigorous imprisonment. (*Abdul Rashid, J.*) FARIDA *v.* EMPEROR. **6 I.R. (Lah.) 268=146 I.C. 695=34 P.L R. 993=35 Cr L.J. 174 (2)=1933 Cr.C. 1107=A.I.R. 1933 Lah. 851 (2).**

Unsound mind.

——**S. 302**—*Unsound mind—If available as defence—Conditions—Relevancy for sentence.*

A finding that the accused was of unsound mind at the time of commission of the offence is *per se* insufficient to bring the case within the provisions of S. 84, I. P Code, for unless it is shown that the appellant was by reason of such unsoundness of mind incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law, he is not exempted from criminal responsibility for the act. But such circumstance can be taken as a ground for not inflicting extreme penalty under S. 302. (*Mya Bu and Brown, JJ.*) NGA KAN THA *v.* EMPEROR. **I.R. 1933 Rang. 111=144 I.C 437=34 Cr.L.J. 791=1933 Cr C. 734=A.I.R. 1933 Rang 144.**

——**Ss. 302 and 84**—*Unsound mind—Murder of children—Accused not ignorant that act was wrongful sentence.*

A person was tried for murdering his two children and convicted under S. 302. At or about the time when the accused committed the murderous attack upon his two little children, his mind was unsound, but it could not be said with any degree of certainty that he did not know that what he was doing was wrong or contrary to law within the meaning of S 84.

PENAL CODE (1860), S. 303.

Held, that the sheer brutality of the assault in the absence of any provocation was a circumstance which would lead to the inference that the mind of the accused was in fact unhinged and far from normal. Under these circumstances while upholding the conviction of the accused under S. 302. it was not a case in which capital sentence should be imposed. (*Shadi Lal C J. ana Agha Haidar, J.*) MITHA *v.* EMPEROR **6 I.R. Lah.) 54 (2) = 145 I C 119 = 34 Cr L J 909 = 1933 Cr C. 228 (2) = 34 P.L.R. 1044 = A.I.R. 1933 Lah. 123.**

——**S. 303**—*Applicability— Dacoits liable under S.* 396.

S. 303 has no application to the case of persons, other than the actual murderer, who are liable to enhanced punishment for the act of one of their associates under the special provisions of S 396. Such persons cannot be said to have been convicted of "murder"; the offence of which they have been found guilty is "dacoity," though they are liable to enhanced punishment by reason of their complicity in a dacoity in the commission of which one of the members of the gang had committed murder under S. 302. (*Tek Chand and Monroe, JJ.*) PUNJAB SINGH UJAGAR SINGH *v.* EMPEROR. **15 Lah. 84 - 147 I C. 2 = 6 R L. 339 = 35 P L R 51 = 35 Cr.L.J. 322 = 1933 Cr C. 1467 = A I R. 1933 Lah. 977**

——**S 304**—Accused beating deceased mercilessly, suspecting him of committing theft—Death as result of injuries—Offence. *See* PENAL CODE, S. 104. **1935 O.W N 934 = A.I R. 1935 Oudh 442.**

——**S. 304**--*Applicability.*

Death caused at the request of the victim is only culpable homicide not amounting to murder falling under S. 304. (*Beasley, C.J. and Walsh, J.*) KANAGA KOSAVEN, *In re.* **54 Mad 504 - I R. 1931 Mad 483 = 131 I.C. 147 = 32 Cr L J 659 = 1931 M W N 393 = 33 L. W. 218 = 1931 Cr C. 484 = A.I.R. 1931 Mad 436 = 60 M.L.J. 616**

——**S. 304**--Applicability—Accused causing simple injury to deceased—Death due to sepsis consequent to bad treatment. *See* PENAL CODE, S 229, EXPL. 2. **1935 O.W.N. 940 = A.I.R. 1935 Oudh 446.**

——**S. 304**—Blow with thakwa—Death due to septocaemia—Offence under S. 326. *See* PENAL CODE, S. 326. **A.I R. 1931 Lah 103.**

——**Ss. 304 and 34**—Common intention of accused to beat deceased's party—Liability of all for culpable homicide, *See* PENAL CODE, S. 34. **154 I C. 628 = 1935 A W R. 336 = A I R 1935 All. 504.**

——**S. 304**——*Deceased attacked by four accused—Whose blow was fatal not known—All can be convicted under S.* 304.

If four persons struck the deceased together and it could not be known whose lathi caused the fatal injury still they can all be held guilty under S. 304. (*Bennet, J.*) MAHADEO SINGH *v*, EMPEROR. **151 I C. 364 = 7 R A. 154 = 35 Cr L J. 1302 = 1934 Cr C. 940 = A I. R. 1934 All. 739.**

——**Ss. 304 and 325**—Fatal blow by one accused—Grievous hurt caused by other accused subsequently—Offence falling under S. 325—No culpable homicide not amounting to murder *See* PENAL CODE, SS. 325 AND 304. **A I R. 1934 Oudh 87 (2).**

——**Ss. 304 and 302**—*Father and son— Quarrel between—Sudden lathi attack on father—No intention to cause death—Offence.*

There was a quarrel between the father and son. The latter got suddenly enraged, struck the former in the heat of passion and caused three or four injuries, one of which proved fatal.

PENAL CODE (1860), S. 304.

Held, there was no ground for attributing to the assailant the intention contemplated by S. 304, Part 1 of the Penal Code and the conviction should be altered from one under S. 302 into one under S. 304, Pat 2 of the Code. (*Shadi Lal. C.J. and Monroe, J.*) WALI *v.* EMPEROR. **6 I R. (Lah.) 180 = 146 I.C. 172 = 34 Cr. L J. 1173 = 34 P L.R. 330 = 1933 Cr C. 886 = A.I.R. 1933 Lah. 664.**

——**S. 304**--*Firing gun intentionally—Nature of offences.*

A conviction under S. 302 cannot possibly be avoided when it is proved that the shotgun was fired by the accused at such a close range that it would not have other than a fatal effect. Where the accused after firing at a person and fatally wounding him re-loads his gun and fires a shot at another person that is a clear indication of his intention to commit murder and his offence cannot come under S. 304. (*Courtney Terrel, C.J. and Stroope, J.*) RAJENDRA PRASAD SINGH *v.* EMPEROR. **6 I R. (Pat) 202 = 145 I.C 771 = 34 Cr L J. 1071 = 1933 Cr.C. 402 (2) = A.I R 1933 Pat 147.**

——**Ss. 304 and 325**—Hurt and not culpable homicide—Object of accused only to rescue cattle—Injuries inflicted only on arms and legs without knowledge of physical infirmity of deceased—Accused old man of sixty—Conviction under SS. 325 and not under S. 304. *See* PENAL CODE, S. 325 AND 304. **9 O.W.N. 655 = A.I. R. 1932 Oudh 279.**

——**Ss 304 and 302**—Murder or culpable homicide. *See* PENAL CODE, SS. 302—MURDER OR CULPABLE HOMICIDE.

——**S. 304**—*Offence under—Death caused but with no intention of causing death or such bodily injury likely to cause death.*

Where the accused had no intention to cause death or such bodily injury as was likely to cause death but unfortunately death was the consequence;

Held, that the case fell within the second part of S. 304, I. P Code. (*Srivastava, J.*) CHHOTE LAL *v*, EMPEROR. **6 I R. (Oudh) 122 = 146 I C. 452 = 10 O. W N 482 = 1933 Cr C. 596 = 35 Cr L J. 58 = A.I.R. 1933 Oudh 269.**

——**S. 304**--*Premeditation is not necessary ingredient.*

Premeditation is not a necessary ingredient of S. 304, I. P. Code. Therefore, mere absence of specific evidence that the accused had come prepared to cause death is no ground for convicting the accused under that section. (*Bennet, J.*) MAHADEO SINGH *v.* EMPEROR. **151 I C. 364 = 7 R A. 154 = 35 Cr L.J. 1302 = 1934 Cr C. 940 = A I.R. 1934 All. 739.**

——**Ss. 304 and 100**—Private defence—Accused confronted with powerful adversary armed with lathi—Murder committed in the course of the fight—Liability. *See* PENAL CODE, SS. 100 AND 304. **9 O W N. 1146.**

——**S. 304**—*Private defence—Right of— Defence of property—Exceeding right and causing death—Nature of offence.*

Paddy sheaves belonging to accused were removed by some persons who had absolutely no *bona fide* right to them and who had been convicted before for offences in connection with the same land. Accused attacked the cartmen in whose cart the sheaves were being carried The cartmen jumped out and began to run. Accused thereupon began to chase them as also the other persons and inflicted injuries which caused death.

Held, that though accused had right of private defence of property, that right ceased when the property was left in their possession when the cartmen jumped and tried to escape and that accused were guilty under S. 304,

PENAL CODE (1860), S. 304.

Held, further, it was not a case of exceeding the right of private defence as such right had ceased and that all the accused were constructively liable under S. 304 even though the author of the injuries was not known. (*Dunkley, J.*) NGA PU KE *v.* EMPEROR. **147 I.C. 74 = 6 R.R. 146 = 35 Cr. L.J. 267 = 1933 Cr. C. 1150 = A.I R. 1933 Rang. 340.**

——**S. 304**—*Provocation—Sentence mitigated.*

Where the accused caused death by stabbing with a *churri* and it appeared that he acted under some provocation caused by the deceased.

Held, that though the provocation was not sufficient to reduce his guilt to an offence under S. 304 it was a sufficient ground for not sentencing him to death. Sentence of transportation for life confirmed. (*Broadway and Jai Lal, JJ.*) HARI SINGH *v.* EMPEROR, **I.R. 1932 Lah. 465 = 138 I.C. 321 = 33 Cr. L J. 577 = 33 P.L.R. 154 = 1932 Cr. C. 382 = A.I.R. 1932 Lah. 302.**

——**S. 304**—*Scope.*

The first part of S. 304 applies where there is guilty intention and the second part applies where there is no such intention but there is guilty knowledge. (*Lort Williams and S.K. Ghose, JJ.*) IFATULLAH *v.* EMPEROR. **58 Cal. 1138 = I.R. 1931 Cal. 404 = 35 C.W. N. 456 = 130 I.C 884 = 32 Cr. L J. 598 = 1931 Cr. C. 409 = A.I.R. 1931 Cal. 345.**

——**S. 304**—*Sentence—Death caused by fracture of skull—Assault not deliberate—Provocation from deceased—Nature of offence.*

Where the accused struck the deceased twice in quick succession on the head with a stick, causing two injuries on the front part of the left parietal region and the right temporal region respectively he is guilty under S 304 I. But where the case is not one of deliberate assault and the accused had some sort of provocation from the deceased before he assaulted him, the sentence of transportation for life is excessive (sentence reduced to seven years rigorous imprisonment). (*Tek Chand and Jai Lal, JJ.*) SAIMAHOMED *v.* EMPEROR. **150 I.C. 656 = 7 R.L. 4 = 35 Cr.L J. 1163 (1) = 1934 Cr.C. 564 = A I.R. 1934 Lah. 345.**

——**S. 304**—*Sentence—Illicit intercourse — Death caused in heat of passion.*

The accused actually caught the deceased (his married sister) in the act of sexual intercourse with a stranger. He was enraged and gave a number of blows which caused her death.

Held, that the circumstances of the case justified a reduction of sentence from five years' rigorous imprisonment to three years. (*Bhide, J.*) ALLAH DITTA *v.* EMPEROR. **151 I.C. 898 = 7 R L. 224 (1) = 35 Cr.L J. 1445 (1) = 1934 Cr. C 468 (1) = A.I.R. 1934 Lah. 428 (2)**

——**S. 304**—*Sentence—Use of provocative and abusive language by deceased—Death caused by single blow.*

Where it appeared that the deceased used abusive and provocative language and the accused was proved to have dealt a single blow, which however proved fatal.

Held, that conviction under S. 304, Part II was valid but that under the special circumstances a sentence of three years' R. I. was sufficient. (*Walker, J.*) GHAUNS *v.* EMPEROR. **I.R 1931 Lah 842 (1) = 133 I.C. 874 (1) = 32 Cr L J. 1082 = 32 P L.R. 387 = 1931 Cr. C. 747 (2) = A I R. 1931 Lah. 523 (2).**

——**S. 304**—*Single blow with dang—Victim's death shortly after— Nature of offence.*

The accused inflicted a blow on the head of the victim with his *dang* with the result that the wounded man fell down on the ground and became unconscious. In the afternoon he expired while he was being taken to hospital.

Held, that the offence was one of culpable homicide not amounting to murder. (*Shadi Lal, C. J. and Hilton, J.*) GURCHARAN SINGH *v.* EMPEROR. **35 P.L.R. 371 = 1934 Cr C. 762 = 155 I C 77 (1) = 7 R.L. 636 = 36 Cr. L J. 629 = A.I.R 1934 Lah. 467.**

——**S. 304**—*Sudden fight—Altercation and fight—Unpremeditated attack in the heat of passion—Offence.*

Accused and the deceased were sitting and having refreshments in a hotel when an altercation started as to the deceased having been responsible for unsuccessful raid in a gambling house where accused was present. Accused threatened to kill deceased if the latter again attempted to capture him, when the deceased got up and said that the accused could not and could try if he could. Accused thereupon picked up an ice-breaking instrument, and thrust it into the stomach of the deceased, which resulted in his death.

Held, the crime was unpremeditated, that there was a sudden altercation and fight and the thrust was made in the heat of passion and that the offence amounted to culpable homicide not amounting to murder, punishable under S. 304, I P. Code. (*Young, C. J. and Aldison, J.*) ABDUL MAJID *v.* EMPEROR. **7 R.L. 339 = 152 I.C. 860 = 36 Cr. L J. 190 = 1935 Cr.C. 238 = A.I.R. 1935 Lah. 149.**

——**S. 304 and 34**—*Unlawful assembly—Conviction under Ss. 149 and 34—Legality.*

A conviction under S. 34 does not imply that each of the persons convicted thereunder has been guilty of a substantive offence. When a charge is made of an offence under S 149, it will not be illegal to convict the accused of that offence read with S. 34, I P. Code, if no prejudice is occasioned to the accused persons in their defence (*Bardswell, J.*) RAMA BOYAN *v* EMPEROR. **40 L W. 476 = 152 I.C 554 = 7 R.M 253 = 1934 M.W N 241 = 1934 Cr. C 1287 (2) = 36 Cr. L.J. 113 = A.I. R. 1934 Mad. 565 = 67 M L J. 355.**

——**Ss. 304, Part 1 and 302**—*Deceased 67 years old going drunk—Accused on exchange of words hitting with firewood on head—Death caused—Offence held committed under S. 304 firstly and not under S. 302.*

The deceased, who was 67 years old, went out of his house drunk and made a nuisance of himself to the bazaar sellers. He went to a place where the accused was standing. Accused and he exchanged a few words, when the accused picked up a piece of firewood 22 to 28 inches long, $6\frac{3}{4}$" to $8\frac{1}{2}$" in circumference and struck the deceased on the head once with it. The deceased fell and died on the following day on his way to the hospital without regaining consciousness.

Held, that when the accused delivered the blow, he had only the intention of causing such bodily injury as was likely to cause death within the meaning of Part 1 of S. 304; A.I.R 1928 Rang. 64 Foll (*Ba U.J.*) NGA SHWE DUN *v* EMPEROR. **6 I.R. (Rang.) 76 = 146 I. C. 191 = 34 Cr. L J. 1182 = 1933 Cr. C. 1014 = A.I.R. 1933 Rang. 270.**

——**Ss. 304 Part 1, and 300**—Exception I—Grave and sudden provocation—Deceased about to indulge in immoral ways—Attempt to check—Insolent reply—Provocation—Case falling under S. 304. *See* PENAL CODE, SS 300 EXCEPTION I, AND 304. **A.I.R. 1933 Lah. 869 (2).**

——**S. 304. Part 1**—*Offence under—Sudden quarrel—Death caused with winnowing instruments.*

Where the quarrel which led to the fight was sudden and it appeared that death was caused by certain persons

PENAL CODE (1860), S. 304.

having dealt blows with the winnowing instuuments which they had with them in connection with agricultu ral operations.

Held, that the case was one of culpable homicide fall- in under S. 304 and not S. 302. (*Dalip Singh and Abdul Qudir, JJ.*) ABBAS KHAN *v.* EMPEROR. **1932 Cr.C. 13 34 Cr.L.J. 535=143 I C. 125=I.R. 1933 Lah. 310 (2)=32 P.L R 513=A.I.R. 1932 Lah. 3.**

———**S. 304, Part 1**—Private defence—Right of, exceeded. *See* PENAL CODE, SS. 100 AND 304, PART 1. **A.I.R. 1933 Lah. 1048.**

———**S. 304, Part 1 and S. 100, secondly**—*Private defence—Right of, exceeded.*

A was armed with a dang and *B* with knife. *A* tried to strike at *B*, but missed. Thereupon they grap- pled with each other in which process *A* was unarmed but he managed to throw down *B*. *B* then struck *A* with his knife and inflicted several wounds, *A* collapsed and died under the shock.

Held, that though *B* had the right of private defence he exceeded such right and that he should be convicted under S. 304, Part. I (*Bhide and Currie, JJ.*) WAZIR MUHAMMAD *v.* EMPEROR. **1934 Cr.C. 17=35 Cr L J. 639=148 I.C. 243 (2)=6 R.L 535=A I.R 1933 Lah. 1048.**

———**S. 304, Part I**—*Provocation—Grave provocation —Deceased found ravishing wife of accused.*

The accused caught the deceased in the act of ravish- ing the former's wife and in his fury killed him. Hav- ing regard to the grave provocation the sentence of transportation for life is too severe and should be al tered into one of rigorous imprisonment for one year. (*Beasley, C.J. and Sundaram Chetty, J.*) GOVINDAPPA *v.* EMPEROR. **1931 M.W N. 553.**

———**S. 304, Part I**—*Sentence—Exceeding right of private defence—Use of weapon in hand.*

Where the accused who is convicted under S. 304, Part I, I.P. Code, is punished for having exceeded the right of private defence, a sentence of transportation for life is too severe, especially when the accused is shown to have used a weapon which he had already in his hand (*Shadi Lal, C. J. and Abdul Qadir, J.*) MUSTAFA *v* EMPEROR. **I.R. 1932 Lah. 490=138 I C. 418=33 Cr.L.J. 587=33 P.L R. 282=1932 Cr. C. 425=A.I. R. 1932 Lah. 344.**

———**S. 304, Part I**—*Sentence—Offence committed in the heat of passion—Sentence.*

Where the offence under S 304 (1) was committed in the heat of passion and on the spur of the moment, after the accused's patience had been strained by the deceased (immoral wife) to the utmost, the sentence was reduced from ten years to one of rigorous imprisonment for five years. (*Bhide, J.*) HIRA SINGH *v.* EMPEROR **6 I.R. (Lah) 147 (2)=145 I C. 926=34 Cr.L J. 1159 (1)=34 P.L.R 889=1933 Cr.C. 221 (2)=A I.R. 1933 Lah. 126(2).**

———**S. 304, Part 1**—*Sudden quarrel Right of private defence exceeded—Sentence.*

The accused was an occupancy tenant of a field adjoining the field of the deceased. There was a kikar tree near the boundary of two fields about which there was dispute between the parties. An altercation took place, in connexion with the collecting of leaves and branches of the tree lopped off by the deceased and his maternal uncle, in the course of which the accused gave a blow with an iron bound stick on the head of the deceased which proved fatal. *Prima facie* the accused was the owner of the tree and was entitled to the branches and leaves. The accused was convicted under S. 304, part I and sentenced to rigorous imprisonment for eight years.

PENAL CODE (1860), S. 304.

Held, that the accused had exceeded his right of private defence, but since the offence was committed in the course of sudden quarrel and in the heat of the moment the sentence was excessive and the sentence of two years' rigorous imprisonment was sufficient to meet ends of justice (*Bhide, J.*) ZIDA *v.* EMPEROR. **35 P.L R 195=35 Cr.L J. 461=147 I C. 681=6 R.L. 428 (2)=1933 Cr.C. 1582 (2)=A I.R. 1933 Lah. 1052.**

———**S. 304, Part. (2)**—*Applicability.*

When injuries are inflicted on the deceased with the intention of causing hurt, Part 2, S. 304 has no application at all (*Dunkley, J.*) NGA NI U *v.* EMPEROR. **159 I C 925=37 Cr.L.J. 186=1935 Cr.C. 1114=A.I.R. 1935 Rang. 391.**

———**Ss. 304, Part 2 and 302**—*Death during affray—Party being armed—Nature of offence.*

Where some persons concerned in an affray had absconded, some had died during the inquiry and the remaining persons stood their trial and it had not been established that any of the appellants was definitely responsible for causing the death, nor could it also be said with any certainty whether any of the accused was armed with a sharp edged weapon or whether the sharp- edged weapons were wielded by the absconders or per- sons who died during the course of the inquiry, and where the fact that no incised grievous wound was inflicted on the head or any vital part of the body of any of the rival group indicated that the persons armed with sharp edged weapons did not intend to cause death of such bodily injury as was likely to cause death.

Held, that the offence committed by the accused falls under S. 304, Part 2. (*Currie and Abdul Rashid, JJ.*) NADAR SINGH *v.* EMPEROR. **151 I.C. 449=7 R.L. 135=35 Cr.L J. 1376=1934 Cr.C. 562=A I.R. 1934 Lah 341**

———**S 304, Part 2**—*Intention—Striking* dang *blow —Intention to cause injury, not death—Nature of of- fence—Sentence.*

Where the intention of the accused was not to com- mit murder but it was shown that it was his intention to cause such injury as he knew was likely to cause death by striking a *dang* blow on the deceased who had refused to pay him his money and insulted him,

Held, that the accused was guilty of an offence under S. 304, Part II and that a sentence of seven years' rigor- ous imprisonment was sufficient. (*Shadi Lal, C.J. and Dilip Singh, J.*) WALIA *v.* EMPEROR. **I.R 1932 Lah. 305=137 I.C. 239=33 P.L.R. 474=33 Cr.L. J. 445=1932 Cr.C. 490=A I.R. 1932 Lah. 372.**

———**S. 304, Part 2**—*Land dispute—Death caused by lathi blow—Nature of offence.*

The accused and the deceased, who was his uncle lived in adjoining premises On the day of the occur- rence an altercation ensued between them on account of the deceased digging some earth on the pathway and the accused struck the deceased with a lathi and caused death.

Held, that the offence fell under S. 304, Part II (*Shadi Lal, C J. and Abdul Qadir, J.*) NAWAB *v.* EMPEROR **I.R 1932 Lah 317=137 I.C. 267=33 Cr.L.J. 446=33 P.L.R. 546.**

———**S. 304, Part 2**—*Provocation—Serious injury resulting in death—Nature of offence.*

The Superintendent of a jail acting under grave and sudden provocation was proved to have inflicted a serious injury in the rectum of a prisoner which ultimately caused his death.

Held, the offence fell under S. 304, Part 2 and not under S. 325, I. P. Code. (*Tek Chand, J.*) BHOLA NATH *v.* EMPEROR. **I R. 1932 Lah. 235 (2)=136 I.**

PENAL CODE (1860), S. 304.

C. 729 (2) = 33 Cr L.J. 365 = 33 P.L.R. 49 = 1932 Cr. C. 220 = A.I R. 1932 Lah 199.

——— **S. 304, Part 2**—*Scope—Intention to cause only grievous hurt.*

The common intention of the assilants was only to cause grievous hurt; there was only one serious blow on the head and the other blows on the head and the other parts of the body were of a comparatively slight nature.

Held, it cannot be held that the assailants intended to cause the death of their victim or to cause such bodily injury as was likely to cause death The case therefore fell within the purview of the second Part of S. 304 and not under the first part. (*Addison and Abdul Rashid, JJ.*) ALA SINGH *v.* EMPEROR, **1935 Cr.C. 94 = A I. R. 1935 Lah. 80.**

——— **S. 304, Part 2**—*Single fatal blow—Two assailants armed with* kirpans—*Identity of person inflicting blow not known—Nature of offence.*

Where both the assailants were proved to have been armed with *kirpans* and to have used them but there was only a single fatal blow dealt on the deceased and it was not apparent which of them had dealt the same,

Held, that the offence was one under S. 302 and not under S. 304, Part 2 or S. 325, I.P Code. Sentence of transportation for life passed. (*Shadi Lal, C.J. and Abdul Qadir, J.*) SHER SINGH *v* EMPEROR. **I.R. 1931 Lah. 855 = 133 I.C. 887 = 32 Cr L J. 1083 = 32 P.L R. 537 = 1931 Cr C. 778 = A.I R. 1931 Lah 538.**

——— **S. 304, Part. 2**—*Unpremeditated fight—Criminal death—Nature of offence.*

When the deceased who was grazing his sheep hit the dog of the accused with a stick for having molested his sheep, whereupon the accused seized hold of him in a sudden temper and took the turban of the deceased from his head and strangled him to death and there had been no enmity between the two and it was a sudden and unpremeditated attack.

Held, that the accused was guilty of the offence of culpable homicide punishable under S. 304, Part 2 and not of murder punishable under S. 302. It could not be held that the injury which the accused intended to inflict was sufficient in the ordinary course of nature to cause death, but the act of the accused was done with the knowledge that he was likely to cause death. (*Addison and Coldstream, JJ.*) NANAK *v.* EMPEROR. **I R 1931 Lah. 967 = 134 I C. 583 = 32 Cr.L.J. 1205 = 1931 Cr. C. 309 = A I.R. 1931 Lah 189.**

——— **S. 334 A**—Dragging boy by the neck with safa—Death caused—Nature of offence—Offence under S. 357, not under S. 304 A. *See* PENAL CODE, S. 357. **A I R. 1931 Lah. 275.**

——— **S. 304 A**—*Driving car recklessly and knocking down pedestrian—Offence—Negligence on part of pedestrian—If can excuse negligence of driver.*

Velocity of a vehicle is not the only criterion of rash and negligent driving. Driving a car recklessly until it comes so close to a pedestrian that it is impossible to save a collision cannot but be characterised as rash and negligent driving. Mere negligence on the part of a pedestrian can not excuse negligence on the part of a driver of such a fast and dangerous vehicle as a motor bus. As between the pedestrian and a driver of a motor vehicle the responsibility of the latter is greater. He has a duty to keep better outlook than a pedestrian. A driver of a motor vehicle who is himself negligent cannot plead in his defence the negligence of a pedestrian whom he knocked unconscious and killed. The deceased while coming from the opposite direction along his right side of the road was knocked down by a bus driven by the accused. The road was straight and absolutely clear of traffic so as to give the accused a full view of the road over a considerable distance and a careful driver could well have seen a pedestrian coming from opposite direction and have avoided the risk of a collision by swerving the car in time. It was quite possible for the accused to have averted the collision in spite of the negligence of the deceased by leaving a sufficient margin for the man to pass.

Held, that the accused was guilty under S. 304 A, as the inference was irresistible that the collision was directly due to his reckless and negligent conduct. A. I. R. 1933 All. 232, Dist. (*Niyogi, A.J C.*) MAHOMED BUX *v* EMPEROR **31 N L R. 26 (Supp.) = 138 I C. 330 = 36 Cr L J 1368 = 8 R N. 74 = 1935 Cr C. 1097 = A.I.R. 1935 Nag. 200.**

——— **S. 304-A**—*Motor car—Rash driving—Causing death—Offence.*

A person driving a motor car is under a duty to control that car; he is *prima facie* guilty of negligence if the car leaves the road and dashes headlong into a tree and it is for the person driving the car to explain the circumstances under which the car came to leave the road. Those circumstances may be beyond control and may exculpate him but in the absence of such circumstances the fact that the car left the road is evidence of negligence on the part of the driver Accused found guilty under S. 304-A. (*Bardswell, J.*) RATNAM MUDALIAR *v.* EMPEROR. **6 R M. 498 = 148 I C. 573 = 35 Cr L J. 691 = 39 L W. 344 = 1934 M W N. 102 = 1934 Cr.C. 405 = A.I R. 1934 Mad. 209 = 66 M LJ 318.**

——— **S. 304 A**—*Motor car—Rash driving—Death caused—Offence—Neligence of person injured, if material.*

The accused who was a motor driver was proved to have driven his motor lorry rashly and in swerving on the wrong side in order to avert a collision due to the negligence of the driver of a bullock cart coming in the opposite direction the car overturned and one of the passengers was killed.

Held, that the accused was guilty. The accused was not absolved of the consequences of his rash driving merely by showing that the person who drove the cart was negligent.

Obiter.—The result will be the same if the injury was caused to persons who were neligent. (*Boys, J.*) DEOTA MISIR *v.* EMPEROR. **I.R 1931 All. 713 = 133 I C. 601 = 32 Cr L J 1061 = 12 L R 134 (Cr) = 1931 A.L. J. 770 = 1931 Cr C. 1044 = A.I R. 1931 All. 708.**

——— **S. 304-A**—*Motor car—Rash driving—Liability of driver—Requisites of.*

A driver of a motor bus is required to exercise that degree of care which is expected of a parson charged with the responsibilities of a carrier. The mere fact that he lost his head is not of itself sufficient to absolve him unless an unforeseen emergency suddenly occurred, which for the time being made him lose his presence of mind or rendered him incapable or fully exercising his faculties. 53 Cal. 333 Ref. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) GOVERNMENT OF MYSORE *v.* SYED HAYATH. **36 Mys.H.C R. 101 = 9 Mys.L.J. 207.**

——— **S. 304-A**—*Motor collision—Reckless driving.*

Where two drivers of rival motor-buses caused a collision by driving in opposite directions at a reckless speed as a result of which several passengers were killed and some injured, and the only intention that was proved against them was an intention to drive the buses in an entirely selfish way keeping to the centre of the road with an entire disregard for the safety of themselves and the passengers, the accused should be convicted only under S. 304-A and not under S. 304 (2). The

PENAL CODE (1860), S. 304-A.

charge of murder made against them is entirely wrong as no intention to kill can be made out. (*Beasley, C. J. and Sundaram Chetty, J.*) BALIAH *v.* EMPEROR. **1931 M W.N. 556.**

———**S. 304 A**—*Offence under—Sub Inspector firing four shots in air while running on uneven ground in rapid succession—Causing death—Sentence.*

A Sub-Inspecter of Police while pursuing a party of gamblers fired four shots in the air. A person was injured, who died immediately. The revolver which the Sub-Inspector used was a powerful weapon having a range of 100 yards. He fired the first shot from a distance of 49 cubits and the last shot 34 cubits from the crowd. The four shots were fired in succession while running and the surface of the ground where he ran was not level.

Held, that the Sub-Inspector had acted hastily and was liable to be convicted under S 304-A. Sentence of fine made. (*Ba U J.*) EMPEROR *v.* NGA SAN WIN. **1933 Cr.C. 1284=147 I.C. 60=35 Cr L.J. 248 =A I R. 1933 Rang 326.**

———**S. 304 A**—*Rash act—Meaning.*

The term "rash act" connotes the want of proper care and caution; in other words, it means an overhasty act. (*Ba U, J.*) EMPEROR *v.* NGA SAN WIN. **147 I.C. 60=35 Cr L J. 248=1933 Cr.C. 1284=A.I.R. 1933 Rang 326.**

———**S. 304 A**—*Rash and negligent act—Criminal liability for—Death should be direct result.*

To impose criminal liability under S. 304, it is necessary that the death should have been the direct result of a rash and negligent act of the accused, and that act must be the proximate and efficient cause without the intervention of another's negligence. It must be the *causa causans*. It is not enough that it may have the *causa sine qua non*. Hence where death is caused due to a collision, in order to impose criminal liability on the accused, it must be found as a fact that the collision was entirely or at least mainly due to the act of the applicant. It is not sufficient if it is only found that the accused was driving fast. 4 Bom.L R. 679, Foll. (*Bajpai, J.*) SATNARAIN PANDEY *v* EMPEROR. **55 All 233=6 I.R. (All) 134=145 I.C. 612=34 Cr L.J. 1013=1933 A L J 205=14 L R. 77 (Cr.)=1933 Cr. C. 389=A.I.R 1933 All. 232.**

———**S 304-A**—*Rash and negligent act—Overloading motor lorry.*

To overload a lorry may no doubt be an offence under the Motor Vehicles Act but it cannot be regarded as a rash and negligent act within the meaning of S. 304 A, I. P. Code. (*Broadway, J*) JAIMAL SINGH *v* EMPEROR I.R. 1932 Lah. 319=137 I.C 262=33 Cr. L J 436=33 P.L.R 492=1932 Cr.C. 484=A.I.R. 1932 Lah. 366.

———**S. 306**—*Abetment of suicide—Permitting widow to become sati.*

On the death of the husband, the accused who were his relatives desired his wife to become sati, although ostensibly pretending to desist her from doing so.

Held, that the accused were rightly convicted under S. 306. (*Banerji, J.*) KINDER SINGH *v* EMPEROR. **6 I.R (All.) 181=145 I.C. 880=34 Cr.L J 1069= 1933 A.L J 7=14 L R. 36 (Cr)=1933 Cr C. 303= A.I.R. 1933 All. 160.**

———**S 307**—*Accused in possession of loaded revolver—Pursuit by police—Shots aimed at police—Intention*

Where the accused, who was subsequently found to be in possession of a stolen revolver and cartridges, when pursued by the police, fired three shots at the pursuing party.

PENAL CODE (1860), S. 307.

Held, that the accused was properly convicted under S. 307 and the defence that the object of the accused was not to injure anybody but simply to frighten the pursuers was of no avail nor the fact that none was injured as a result of the shots. (*Bajpai, J.*) REOTI *v.* EMPEROR. **6 I R. (All) 135=145 I.C. 609=34 Cr. L J. 1018=14 L.R. 63 (Cr.)=1933 A.L J. 523=1933 Cr.C. 761=A.I R. 1933 All. 461.**

———**S 307**—Accused shooting at *A* but wounding *B*—Offence. *See* PENAL CODE, S 301. **A.I.R. 1935 Pesh. 74.**

———**Ss. 307 and 325**—*Accused taking boy away and performing act of magic and attacking him in a very savage manner—But subsequently bandaging injuries—Offence.*

Accused took a boy away and by practising magic on him caused several injuries on his body the most serious of which was an incised wound on back of neck. But subsequently he bandaged the injuries and took him back.

Held, that though there were good reasons for believing that accused intended actually to kill the boy, yet as he subsequently changed his mind, he was entitled to benefit of doubt and that the conviction should be altered from one of attempted murder to the less serious offence of causing grievous hurt, which he undoubtedly committed (*Kendall, J.*) MULLU *v.* EMPEROR. **1935 A W.R. 812=1935 A.Cr.C. 159=160 I.C. 525=37 Cr.L J 305=8 R.A. 634=1935 Cr C. 636=A.I.R. 1935 All. 614.**

———**S. 307**—*Applicability—Essentials—Injuries inflicted not capable of causing death according to medical evidence—Conviction—Sustainability—Intention—Inference.*

For a conviction under S. 307, there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things; and if it is not of that description the assailant is not guilty of the offence of attempt to murder. Where the doctor treating the injuries, who is the best person to describe the exact nature of the injuries and their natural effect, does not say that the injuries inflicted by the accused are sufficient in the ordinary course to cause death, an intention to cause death cannot be deduced from the nature of the injuries and their natural and probable consequences. In the absence of evidence to show an intention to kill, a conviction under S. 307 is not justified. The accused can only be convicted under S. 326. (*Subhedar, A.J.C.*) EMPEROR *v.* BALLI. **155 I.C. 1014=7 R N. 207=36 Cr.L J. 854=A.I R. 1935 Nag. 177.**

———**S. 307**—*Conviction under—Essentials.*

The scope of S. 307 is very clear. The intention or knowledge, which is necessary to constitute murder, may exist combined with an act which falls short of the complete commission of that offence. The murderer may do an act towards the commission of the murder, but may involuntarily fail or be intercepted, or prevented from consummating the crime. To justify a conviction under S 307, therefore, it is not essential that actual injury capable of causing death should have been inflicted. Although the nature of the injuries caused may often give considerable assistance to a Court in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even in some cases be ascertained without reference at all to the actual wounds inflicted upon the person attacked. (*Srivastava and Nanavutty, JJ.*) RAMESHWAR *v.* EMPEROR. **154 I.C. 697=7 R.**

PENAL CODE (1860), S. 307.

O. 488=36 Cr.L J. 534=1935 O.W.N. 311=1935 Cr. C. 582=A.I.R. 1935 Oudh 281.

——**Ss. 307 and 106**—*Firing at police officer who was attempting to effect arrest — Intention only to frighten—Burden of proof.*

If a man fires off a firearm while a police officer is attempting to arrest him, the natural conclusion is that he is attempting to shoot the police officer and is guilty under S. 307; if the defence is that he had merely the intention of frightening the police officer by firing in the air, then the burden of proving that fact is upon the defence. (*Thom and Bennet, JJ.*) YASHPAL *v.* EMPEROR. **55 All. 681=14 L.R. 233 (Cr.)=147 I.C. 1193=6 R.A. 629=35 Cr.L J. 573=1933 Cr.C. 1006 =A.I.R. 1933 All. 627**

——**Ss. 307 and 506**—*Intention to kill not proved—Object only to scare police—Proper conviction.*

Unless it is proved that the accused had the intention to kill and an intention or knowledge that he would be causing death by his act is made out, the accused cannot be convicted under S. 307. Where the accused, who fired a shot, was however not shown to have had any intention of killing the Police Inspector but only to scare him away, the proper conviction should be not under S. 307 but for criminal intimidation falling under the latter part of S. 506. (*Beasley, C.J. and Sundaram Chetty, J.*) SUKKIRAPPA GOUNDAN *v.* EMPEROR. **1931 M.W.N. 861.**

——**S. 307**—*Offence of rioting —Evidence being inconclusive—Marks of injury on accused as test.*

Where in a case of free fight between two parties, the evidence was conflicting and the parties were shown to have produced before the Court perjured evidence and the motives of the parties could not be ascertained with any reasonable certainty,

Held, that under the circumstances the Court could go upon the marks of injury upon the persons charged with the offence. (*Young and Sen, JJ.*) EMPEROR *v.* BALDEO KOERI **12 L.R. 98 (Cr.)=I R. 1931 All. 747=133 I.C. 795=32 Cr.L J. 1073=1931 A.L.J. 1002=1931 Cr C. 1048=A.I.R. 1931 All. 712.**

——**S. 307**—*Offence under—Ingredients.*

An offence under S. 307 is committed when the accused does an act which must in the ordinary course of events cause death. 24 I.C. 881, Ref, to. (*Agha Haidar, J.*) FATTA *v.* EMPEROR. **I.R. 1931 Lah. 329=130 I.C. 649=32 Cr.L.J. 582 (2)=31 P.L.R. 1004=1931 Cr.C. 143=A.I.R. 1931 Lah. 63.**

——**S. 307**—*Offence under—Persons pursued by constables—Turning round and firing.*

Where certain persons who are clearly in fear of being apprehended by the police and find that they are being followed turn round and fire at the constables they commit an offence under S. 307. The circumstance that they did not succeed in hitting anybody is no reason for supposing that the cartridges were blank. Nor is the fact that they did not hit anybody or that the bullets were not found is material. (*Rankin, C.J. and Costello, J.*) SUDHINDRA KUMAR ROY *v.* EMPEROR. **60 Cal. 643=I.R. 1933 Cal. 450=143 I.C. 593=34 Cr L J. 611=37 C.W N. 312=1933 Cr.C. 490=A.I. R. 1933 Cal. 354.**

——**S. 307**—*Scope and applicability—Act capable of causing death—Act that did not cause death in fact.*

If the accused does an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact beyond the control of the accused the act would have amounted to murder in the normal course of events, he is guilty under S. 307. The words "under such circumstances" refer only to facts which would introduce a defence to a charge of murder, for instance that the accused was acting in self defence or in the course of military duty. It does not mean that because an act done by the accused did not in fact cause death, it is not an act capable of causing death The accused fired two shots from a powerful revolver at point blank range at His Excellency Sir Ernest Hotson, the Ag. Governor of Bombay. He missed his aim; no injury was in fact occasioned to His Excellency.

Held, the the accused was guilty under S. 307. 4 B. H. C. R. (Cr. C.) 17, Doubt.; 14 All. 38 Appr. (*Beaumont, C.J. and Broomfield J.*) EMPEROR *v.* VASUDEO BALWANT. **56 Bom 434=I.R. 1932 Bom. 388=138 I C. 503=33 Cr L.J.613=34 Bom.L R. 571 =1932 Cr.C. 391=A.I R. 1932 Bom. 279.**

——**Ss 307 and 324**—Shooting—Simple injury only caused—Offence only under S. 324—Offence under S. 324 and not S. 307. *See* PENAL CODE, SS. 324 AND 307. **A.I.R. 1933 Lah. 315.**

——**S. 307**—Whether can be read with S. 109, I. P. Code, for purpose of S. 6 of the Bengal Criminal Law Amendment Act—Sentence of death—Legality. *See* BENGAL CRIMINAL LAW AMENDMENT ACT, S. 6. **62 Cal. 433=A.I.R. 1935 Cal. 561 (S.B.).**

——**S. 309**—*Sentence—Exercise of discretion—Case of family discord.*

The law confers on the Court a very wide discretion in the matter of punishment and it is not necessary to inflict a sentence of imprisonment on a person who on account of family discord, destitution, loss of a near relation or other cause of a like nature overcomes the instinct of self-preservation and decides to take his life. In such a case the accused should be either released on probation of good conduct or sentenced to a fine. The rule should apply with greater force to the case of a woman who attempts to commit suicide under similar circumstances. (*Shadi Lal, C.J.*) MUSAMMAT BARKAT *v.* EMPEROR. **15 Lah. 872=155 I.C. 283=7 R.L. 678=36 Cr L.J 682=35 P.L.R. 439=1934 Cr.C 805 =A.I.R. 1934 Lah. 514.**

——**Ss. 312 and 511**—*Attempt to cause miscarriage —Evidence.*

Intention alone or intention followed by preparation is not sufficient to constitute an attempt. But intention followed by preparation, followed by any act done towards the commission of the offence is sufficient. Where the accused intended to administer something which was capable of causing a miscarriage and the evidence showed that he administered a harmless substance.

Held, that he was not guilty of an attempt to commit an offence under S. 312. (*Lort Williams and McNair, JJ.*) ASGAR ALI PRADHANIA *v.* EMPEROR. **61 Cal. 54=6 I.R. (Cal.) 237=146 I.C. 590=35 Cr. L.J. 97 =1934 Cr.C. 2=37 C.W.N. 1151=A.I.R. 1933 Cal. 893.**

——**S 318**—*Applicability—Offence under—Facts to be proved.*

Where the birth took place in the Medical School and Hospital and was attended by nurses and others in the Hospital who were well aware that she had given birth to twins and it was known to two women whom the nurses endeavoured to persuade to adopt the children and further, it was known to the third accused and there was no evidence that the twins died.

Held, that there was no concealment of the birth and that the case did not come within S. 318. (*Lort Williams and Jack, JJ.*) SAILABALA DASI *v.* EMPEROR. **62 Cal. 1127=158 I.C. 761=8 R.C. 216= 36 Cr L J. 1460=62 C.L.J. 260=39 C.W.N. 990= 1935 Cr.C. 881=A.I.R. 1935 Cal. 489.**

PENAL CODE (1860), S. 318.

———**S. 318**—*Conviction under—Conditions for.*

In order to convict a woman of attempting to conceal the birth of her child, the dead body must be found and identified as that of the child of which she is alleged to have been delivered. (*Lort Williams and Jack, JJ.*) SAILABALA DASI *v.* EMPEROR. **62 Cal. 1127=158 I.C. 761=8 R.C. 216=36 Cr.L.J. 1460=62 C.L.J. 260=39 C.W.N. 990=1935 Cr.C. 881=A.I.R. 1935 Cal. 489.**

———**S. 319**—*Offence under*—Bona fide *claim to property as defence.*

A person who has a *bona fide* claim to property even though it might be unfounded in law or fact cannot be held to be guilty of the offence of theft unless the claim was a mere pretence. The question whether a person has a *bona fide* claim to title in the property must be determined on the facts and circumstances of each case. (*Bisheshwar Nath, J.*) GUDAR *v.* EMPEROR. **I.R. 1933 Oudh 170=143 I.C. 208=34 Cr.L.J. 547=9 O.W.N. 1196=1933 Cr.C. 90=A.I.R. 1933 Oudh 50.**

———**S. 323**—Applicability—Police constable arresting accused under orders of investigating officer—Absence of written authority or warrant—Assault by accused—Offence. *See* CR. P. CODE, SS. 54 AND 56 (1). **13 Rang. 754.**

———**Ss 323 and 332**—*Applicability—Police constable as mere spectator—Assault on—Offence.*

Where a police constable who is present at a fair not in pursuance of any duty for which he had been detailed, but simply as a spectator, an assault on him does not fall under S. 332, I. P. Code, but falls only under S. 323. A conviction under S. 332 in respect of such assault is therefore incorrect and must be altered to one under S. 323. (*Grille, Offg. J.C.*) MEGHRAJ *v.* EMPEROR. **161 I.C. 12=8 R.N. 205=37 Cr.L.J. 375=18 N.L.J. 188.**

———**Ss. 323, 325 and 71**—*Conviction for one beating both under S. 323 and S. 325—Legality.*

Where the offence consisted of only one beating, the accused should be convicted only under S. 325 and not also for an offence under S. 323 inflicted in the course of the same beating. (*Burn, J.*) MURUGAN *v.* EMPEROR. **1933 M.W.N. 244.**

———**Ss. 323 and 325**—*Different offences committed to different persons in same transaction—Separate convictions proper.*

Where accused commits different offences in respect of injuries caused to different persons in the same transaction, separate convictions are proper. (*Nanavutty, J.*) MENDI LAL *v.* EMPEROR. **6 R.O. 538=149 I.C. 231=11 O.W.N. 680=35 Cr.L.J. 935=1934 Cr.C. 708=A.I.R. 1934 Oudh 244.**

———**Ss. 323 and 325**—*Hurt caused by young man on an old man—Brittle skull—Death of old man—No intention to cause death.*

The accused was a youth aged 21, who in a fit of temper, hit an old man on his turbaned head with a stick. The blow fractured the brittle skull of the old man who died. The accused had no intention to do more than to hurt the old man.

Held, under the circumstances, the conviction under S. 323 was right and though a more severe sentence may be appropriate to the case than six months' rigorous imprisonment, there was no reason to alter it, in view of the precepts of Government that the Courts should as far as possible avoid prolonged detention of young persons in jail. (*Jackson, J.*) PUBLIC PROSECUTOR *v.* DIRAVIA THEVAN. **1931 M.W.N. 1152.**

———**Ss. 323, 304 and 302**—Hurt or murder—Attack by four persons in concert with a view to murder—Fatal stab by one of them—All guilty of murder. *See* PENAL CODE, SS. 302, 304 AND 323—CONCERTED ATTACK. **A.I.R. 1932 Cal. 815 (F.B.).**

PENAL CODE (1860), S. 324.

———**S. 323**—*Offence under—Evidence.*

The accused were alleged to have entered into a mango grove and plucked mangoes. The watchman and his son having remonstrated, the accused were alleged to have beaten them and removed the mangoes. The accused pleaded that the mangoes had been taken from another grove belonging to him but there was no reliable evidence to support his plea.

Held, that the facts and circumstances of the case pointed to the commission of an offence under S. 323 and not under S. 395. (*Nanavutty, J.*) BASDEO PRASAD *v.* EMPEROR. **8 Luck. 474 - I.R. 1933 Oudh 120=142 I.C. 702=34 Cr.L.J. 385=10 O.W.N. 134=1933 Cr.C. 317=A.I.R. 1933 Oudh 162.**

———**Ss. 323, 147 and 71**—Rioting and hurt—Separate sentences for—Legality of. *See* PENAL CODE, SS. 71, 147 AND 323. **56 Mad. 481=A.I.R. 1933 Mad. 338=64 M.L.J. 314.**

———**Ss. 323, 147 and 149**—*Rioting—Separate sentences for rioting and hurt—Legality.*

Where the common object was assaulting P. W. 1 and the only physical violence, *i.e.*, the hurt was a necessary element in the act of rioting.

Held, the imposition of two separate sentences one for rioting under S. 147, I. P. Code, and the other for hurt under S. 323 cannot be justified. (*Curgenven, J.*) PICHAIKANNU *v.* EMPEROR. **1933 M.W.N. 1275.**

———**S. 323**—Sentence—Several injuries inflicted in pursuance of common object—Separate sentences under Ss. 147 and 323—Legality of. *See* PENAL CODE, S. 71. **A.I.R. 1933 All. 819.**

———**S. 324**—Fatal injury—No intention to kill. Guilty under S. 324 and not S. 302. *See* PENAL CODE, S. 302—MURDER OR HURT. **1931 M.W.N. 765.**

———**S. 324**—*Firing towards ground to scare pursuers—Injury caused—Nature of offence.*

Accused fired a shot towards the ground in the direction where no one was standing with the object of scaring away pursuers. The shot struck the ground and one of the pellets rebounded and struck a person.

Held, that the accused had no intention of causing voluntary hurt within the meaning of S. 324 nor did the case fall within S. 327. (*Srivastava, J.*) CHHOTE LAL *v.* EMPEROR. **6 I.R. (Oudh) 122=146 I.C. 452=10 O.W.N. 482=1933 Cr.C. 596=A.I.R. 1933 Oudh 269.**

———**Ss. 324 and 148**—*Hurt and rioting—Separate sentences—Legality.*

A person convicted both under Ss. 324 and 148, I. P. Code, can be sentenced only under one or the other of the two sections. (*Shadi Lal, C. J.*) KEHAR SINGH *v.* EMPEROR. **35 P.L.R. 587=36 Cr.L.J. 294=153 I.C. 198 (1)=7 R.L. 397=1934 Cr.C. 944 (1)=A.I.R. 1934 Lah. 614 (1)**

——— **S. 324**—*Sentence—Husband branding wife—Chastisement as object—Sentence if need be deterrent.*

The accused was found guilty of an offence under S. 324 for having branded his wife. It appeared however that he did so as a sort of chastisement so that his wife may obey him. The trial Court passed a sentence of Rs. 10 fine or in default 15 days' simple imprisonment. The matter having been referred for enhancement of sentence,

Held, that the punishment was not so grotesquely inadequate as to call for interference.

Semble:—It is erroneous to assme that a sentence can never be adequate unless it is of imprisonment. (*Subhe-*

PENAL CODE (1860), S. 324,

dar, A.J.C.) EMPEROR *v.* DUKHALA. **141 I.C. 861 =I.R. 1933 Nag 85=34 Cr.L.J. 271=15 N.L.J. 46.**

———**Ss 324 and 307**—*Shooting by soldier at grandmother—Simple injury caused—Nature of offence.*

Accused who was a soldier and practised in the use of firearms fired at his grandmother in the course of a quarrel. The bullet hit a fleshy part of her body and she recovered from the simple injury caused by the shot.

Held, it is very doubtful, that the accused intended to murder her as he would have chosen a more vulnerable and vital part if he had so intended and that he was guilty only under S. 324 and not S. 307 (*Aghi Haider, J.* SHARIF *v.* EMPEROR **6 I.R. (Lah.) 123=145 I.C. 702=34 Cr.L.J. 1051=1933 Cr.C. 549=A.I.R. 1933 Lah. 315.**

———**S. 325**—Accused taking boy away and performing act of magic and attacking him in a very savage manner—But subsequently bandaging injuries—Offence *See* PENAL CODE, S. 307. **1935 Cr.C. 636=A.I.R. 1935 All. 614.**

———**Ss. 325 and 97**—Amin attaching property honestly believing that he is entitled to do so—Right of private defence *See* PENAL CODE, SS. 97 AND 325. **55 All 617=A.I.R. 1933 All. 620.**

———**S. 325**—Applicability—Murderous assault by seven persons on one—Death due to fracture of ribs and rupture of spleen—Injuries inflicted both before and after deceased falls down—Offence—Intention. *See* PENAL CODE, SS 299 302, 304 AND 325. **1935 O.W.N. 343=A.I.R. 1935 Oudh 381.**

———**S 325** - *Causing injuries—Abetment by presence—Conviction under Ss. 325 and* 109.

Where the evidence clearly establishes that the accused came to the spot aimed with a lathi and that he used the lathi against some of the injured persons, even if he did not inflict any of the injuries himself, he at any rate intentionally aided the infliction of such injuries and is thus guilty of an offence under Ss. 325 and 109, I. P. Code. (*Bisheshwar Nath and Kisch, JJ.*) KHUMAN *v.* EMPEROR. **7 Luck. 102=I.R. 1931 Oudh 289=132 I.C. 529=32 Cr.L.J. 905=8 O.W.N. 755=1931 Cr.C. 631=A.I.R. 1931 Oudh 274.**

———**Ss. 325 and 304, Part 2**—*Conviction in alternative under Ss. 325 and 304, Part 2 not proper.*

A conviction in the alternative under Ss. 325 and 304, Part 2 is not proper, if the evidance shows that an offence under S. 304, Part 2 has been committed, it is unnecessary to mention S. 325; if the evidence does not show an offence under S. 304, Part 2, this section should not be mentioned. (*Monroe, J.*) SADHU SINGH *v.* EMPEROR. **6 I.R. (Lah.) 187 (2)=146 I.C. 221 (1) =34 Cr.L.J. 1210=1933 Cr.C. 1112=A.I.R. 1933 Lah 865.**

———**Ss. 325 and 304**—*Culpable homicide or hurt—Object of accused only to rescue cattle—Injuries inflicted only on arms and legs—Accused not aware of physical infirmity of deceased—Proper conviction.*

The main object of the accused was to rescue his cattle and to give the deceased for his refusal to surrender the cattle when he was asked to do so. Not a single injury was inflicted on the head or any other vital part of the body. All the injuries were either on the arms or on the legs. The accused had no knowledge that the accused was suffering from a badly enlarged heart. There was no evidence that the deceased was physically infirm.

Held, that the mere fact the deceased was an old man of sixty was not sufficient under the circumctances to justify the inference that the offence was one of culpable homicide not amounting to murder, and that the accused

PENAL CODE (1860), S. 325.

should be convicted under S. 325 and not under S. 304 of the Penal Code. (*Bisheshwar Nath, J.*) BHARAT SINGH *v.* EMPEROR. **140 I.C. 703=9 O.W.N. 655=I.R. 1933 Oudh 20=34 Cr.L.J. 99=140 I.C. 706=1932 Cr.C. 697=A.I.R. 1932 Oudh 279.**

———**S. 325**—Dragging boy by the neck with safa—Death caused—Nature of offence—Offence under S. 357 committed—No intention to cause grievous hurt, which was the natural consequence of his act. *See* PENAL CODE, S. 357 **A.I.R. 1931 Lah. 275.**

———**Ss 325 and 304**—*Fatal blow by one accused—Grievous hurt subsequently caused by other accused—Offence.*

The thrusting of a lathi into the anus of a man is causing grievous hurt which endangers life. One *B* caused the fracture of the skull which resulted in the death of *D*. *M S* and *U* came up after *B* had knocked *D* down with the fatal blow on the head. *M*, *S* and *U* dragged the fallen *D* some distance and *M* and *S* held his legs while *U* thrust a lathi into the anus of the deceased, which resulted in dilatation of the anus and abrasion of the rectum.

Held, that *M*, *S* and *U* could not be guilty of the offence of culpable homicide not amounting to murder. Their offence came within the purview of S. 325. (*Nanavutty, J.*) MAKKA *v.* EMPEROR. **35 Cr.L.J 467=6 R.O 296=147 I.C. 734=11 O.W.N. 32=1934 Cr.C. 257 (2)=A.I.R. 1934 Oudh 87 (2).**

———**S 325**—*Grievous hurt caused by thrusting lathi into the rectum—If caused voluntarily.*

No doubt a person is said "voluntarily to cause grievous hurt" when not only is the hurt which is caused grievous but also he intends to cause or knows himself likely to cause grievous hurt. A person who forcibly thrusts a lathi into the rectum of another must at least know that he is likely thereby to cause grievous hurt to the victim as the rectum is very tender part of the human body, even if it be supposed for a moment that he did not thereby intend to cause grievous hurt. (*Ziaul Hasan, J.*) SITAL *v.* EMPEROR. **157 I.C. 370=8 R.O 18=36 Cr.L.J 1151=1935 O.W.N. 902=1935 Cr.C. 1130=A.I.R. 1935 Oudh 469.**

———**S 325**—*Grievous injury of minor nature—Sentence.*

Where the injuries were of a very minor nature and detected only after four or five days after involving a fracture of a metacarpal bone in the right hand, the sentence need not be severe. (*Tapp, J.*) ALTAF HUSSAIN SHAH *v.* EMPEROR. **34 P.L.R. 68=147 I.C. 1226 (1)=6 R.L 491 (2)=35 Cr.L.J. 605 (1)=1933 Cr.C. 545 (1)=A.I.R. 1933 Lah 311 (1)**

———**Ss 325 and 34**—Joint attack by both accused—No proof who struck the blow—Both guilty under S 325. *See* PENAL CODE, SS. 34 AND 325. **A.I.R. 1933 Lah 313.**

———**S. 325**—*Offence under—Accused striking on head of deceased by dang.*

Where the only inference possible from all the circumstances of the case was that the accused did not intend anything more than causing grievous hurt to the deceased under sudden impulse by striking him on the head by a dang which was lying some ten or twelve karams away, S 325 applies (*Abdul Qadir and Rangi Lal, JJ.*) GAMA *v.* EMPEROR **151 I.C. 390=7 R.L. 122 =35 Cr.L.J. 1348=36 P.L.R. 313=1934 Cr.C. 561 =A.I.R. 1934 Lah. 335.**

———**Ss 325 and 149**—Offence under—Constructive liability—Injuries not inflicted in pursuance of a common object. *See* PENAL CODE, SS. 149 AND 325. **8 Luck. 301=A.I.R. 1933 Oudh 148.**

PENAL CODE (1860), S. 325.

——**S. 325**- *Offence under—Proof—Simple injuries—Detention in hospital for more than twenty days—Sufficiency.*

In framing charge because of the fact that the medical evidence showed that the assaulted person had remained under treatment in the hospital for more than 20 days the Court should see that there is some evidence before it either that the injured person was in severe bodily pain for that period or was unable to carry on his ordinary avocations. The mere fact of remaining in hospital without any evidence on either of those points, is not sufficient for proving that injuries otherwise simple, did amount to a grievous hurt in the eye of the law. (*Dalip Singh and Abdul Qadir, JJ.*) KHAIR DIN *v.* EMPEROR. **I R. 1931 Lah 1021 = 134 I C 829 = 32 Cr. L.J. 1254 = 1931 Cr C. 536 = A I.R 1931 Lah. 280.**

——**S 325**—*Offence under—Serious injuries resulting in death later.*

Five persons took part in beating one *T* and another *F* which resulted in *F* sustaining grievous hurt, and *T* dying five days afterwards There was no evidence of motive for the beating. Medical evidence showed that *T* had severe injuries on the head and one injury fracturing the ulva bone, the rest of the injuries being simple, and that *F* had one grievous and rest all simple,

Held, that the conviction under Ss. 302 and 149 for causing death of *T* was wrong. Proper conviction was under S. 325 as regards both *T* and *F* with conviction under S. 147. (*Dalip Singh and Currie, JJ.*) MOHAN SINGH *v.* EMPEROR **151 I.C 391 = 7 R L 123 (2) = 35 Cr.L J. 1355 = 1934 Cr.C. 767 = A I.R. 1934 Lah. 486.**

——**S.** 325—Party fight—Inconclusive evidence—Injuries inflicted on some members of the other party—No conviction under Ss. 325 and 147. *See* PENAL CODE, S 147. **A I R. 1931 Lah. 513.**

——**S. 325**—*Sentence—Hurt not of serious character committed under misguided zeal.*

Where the grievious hurt caused was not of serious nature and it was committed by the accused under a misguided zeal with the object of helping his master,

Held, that a sentence of three years' rigorous imprisonment was sufficient. (*Srivastava, J.*) CHHOTE LAL *v.* EMPEROR. **6 I.R (Oudh) 122 = 146 I C 452 = 10 O W.N. 432 = 1933 Cr.C. 596 = A.I.R 1933 Oudh 269.**

——**S.** 325—*Sentence—Imposition of fine only—Legality—Interference in revision.*

Where a Magistrate convicted the accused under S. 325, but passed a sentence of fine only,

Held, that the sentence should have been one of imprisonment.

Held, however, that notwithstanding that the sentence was irregular, the High Court need not interfere in revision, the revisional powers being intended for the redress of genuine grievances and not of mere formal defects. (*Courtney Terrell, C. J. and Scroope, J.*) RAMCHANDER RAI *v.* RAM BELAS TEWARI. **I R. 1933 Pat 161 (1) = 142 I.C. 624 = 34 Cr L.J 407 = 14 Pat L T. 71 = 1933 Cr.C. 510 (1) = A.I.R. 1933 Pat. 179 (1).**

——**S. 325**—*Sentence—Sudden fight—Person who struck fatal blow uncertain.*

Where there is nothing on the record to show who actually struck the fatal blow on the h a l of the deceased which caused his death and the fight was sudden and it was not known which of the assailants hit the deceased on his head, the sentence of seven years was reduced to four years. (*Nanavutty J.*) MAHOMED NABI KHAN *v.* EMPEROR. **6 R.O 551 = 149 I.C. 343 = 35 Cr.L.J. 943 = 11 O.W.N. 698 = 1934 Cr.C. 710 = A I.R. 1934 Oudh 251.**

PENAL CODE (1860), S. 326.

——**S. 325**—*Sentence—Sudden and unpremeditated fight.*

Where the accused threw a stone at the deceased in a sudden and unpremeditated fight and caused death, he is guilty under S. 325. But as the stone was not thrown deliberately, a sentence of seven years' imprisonment was reduced to four years. (*Bhide, J.*) SHAN *v.* EMPEROR. **151 I.C. 968 = 7 R L 231 = 35 Cr.L.J. 1456 = 35 P.L. R. 301 = A.I.R. 1934 Lah. 111.**

——**S.** 325—Sentence— Unlawful assembly—Murderous assault—Certain persons alone inflicting injury—Reduced sentence on the rest. *See* CRIMINAL TRIAL—SENTENCE. **35 C.W.N. 345 = A.I.R. 1931 Cal. 606.**

——**S.** 325—Serious injury resulting in death—Nature of offence—Offence under S. 304, Part. II and not under S. 325. *See* PENAL CODE, S. 304, PART II. **A.I R. 1932 Lah. 199.**

——**S. 325**—*Single blow with axe—Slight injury—Blows caused by others resulting in death—Nature of offence committed by person who dealt single blow.*

During the course of an altercation between two parties the deceased who was aged 17 was hit on the thigh with an axe by *D* The deceased sustained a trivial wound but fell down. Thereupon two other persons set on him with their dangs striking him several blows on the head and fracturing his skull. He died next afternoon.

Held, that *D* who had dealt the trivial blow was liable to be convicted only under S. 325 though the others were liable to be convicted for murder. (*Addison and Coldstream, JJ.*) ILAM DIN *v.* EMPEROR. **I R. 1931 Lah. 909 = 134 I.C. 205 = 32 Cr.L J. 1127 = 32 P L.R. 401.**

——**S. 325**—*Single fatal blow— Two assailants armed with* kirpans*—Identity of person dealing blow not known—Nature of offence.*

Where both the assailants were proved to have been armed with *kirpans* and to have used them but there was only a single fatal blow dealt on the deceased and it was not apparent which of them had dealt the same.

Held that the offence was one under S. 302 and not under S. 304 (*ii*) or S. 325, I P Code. Sentence of transportation for life passed. (*Shadi Lal, C J. and Abdul Qadir, J*) SHER SINGH *v.* EMPEROR **I R. 1931 Lah. 855 = 133 I C 887 = 32 Cr.L J 1083 = 32 P.L R. 537 = 1931 Cr C 778 = A I R. 1931 Lah. 538.**

——**S** 325—*Stone thrown from unknown distance—Conviction for simple hurt—Additional punishment for grievous hurt, if necessary.*

Where two or more persons are tried for simple hurt and for grievous hurt caused by a stone thrown from an unknown distance, *held* that even if a certain man was identified as the person who threw the stone, no extra punishment was called for because the stone was not thrown at very close quarters.

Semble.—The throwing of a stone is not as serious an offence as the wielding of a lathi. (*Harrison, J.*) MAHOMED BAKSH *v.* EMPEROR **I R. 1931 Lah 159 = 129 I C 223 = 32 Cr L J. 252 = 31 P L R. 1017 = 1930 Cr.C. 1230 = A I.R. 1930 Lah. 1054.**

——**Ss. 326, 88 and 92**—Accused thrusting heated ladle into a woman's mouth to exorcise devil—Offence *See* I. P. CODE, S. 88. **1935 A.W R. 57 = A.I R 1935 All. 282.**

——**S.** 326—Applicability — Injuries inflicted not likely to cause death—Absence of intention to kill—Offence. *See* PENAL CODE, S. 307. **155 I.C. 1014 = A.I.R. 1935 Nag. 177.**

PENAL CODE (1860), S. 326.

——S. 326—*Blow with thakwa—Death due to septocaemia—Nature of offence.*

Where only one blow with a thakwa was struck on the head of the deceased, who had given provocation and no further advantage was taken of the fallen man and the injury by itself could not be called dangerous to life and it was more probable than not that the injured man would recover from the injuries and where it could not be said whether poison was introduced at the time when the would was inflicted or subsequently and the deceased died of septocaemia long after the wound was inflicted after keeping a normal temperature for a long time.

Held, that the offence fell clearly under S. 326 and was neither murder nor culpable homicide as the injury was not likely to cause death as a matter of fact and the person inflicting the injuries could not have known that it would. (*Harrison and Abdul Qadir, JJ.*) GAJJAN SINGH *v.* EMPEROR. **1931 Cr C. 167=135 I.C. 668 =I.R. 1932 Lah 124=33 Cr L J. 183=A.I.R. 1931 Lah. 103.**

——S. 326—Charge under Ss. 147, 149 and 307—Conviction under S. 326—Legality. *See* PENAL CODE, SS. 147, 149 AND 307. **28 S.L R. 304.**

——Ss. 326 and 149—Conviction under S. 148 set aside—Conviction under Ss. 326 and 149, legal. *See* PENAL CODE, SS. 149 AND 326. **A.I.R. 1933 Mad. 842=65 M L.J. 797.**

——Ss 326 and 324—Conviction under—Separate sentences—Legality of. *See* BURMA PREVENTION OF CRIME ACT (1930), S. 25. **12 Rang. 344**

——Ss. 326 and 304, Part 2—*Deceased being aggressor—Accused making ferocious attack without knowledge that wounds inflicted were likely to cause death—Conviction.*

Where the deceased and his son were the aggressors who made an attack on the accused and the accused even though his life was not in danger, attacked the deceased with ferocity but had no knowledge that the wounds he inflicted were likely to cause death,

Held, that the conviction must be under S. 326 and not under S. 304, Part. 2. (*Monroe, J.*) TEJA SINGH *v.* EMPEROR **6 I.R. (Lah.) 224=146 I C. 420=35 Cr L.J. 90=34 P.L.R. 961=A.I.R. 1933 Lah. 733.**

——S. 326—Dispute about possession—Exceeding right of private defence—Nature of offence—Stab wounds resulting in death—Offence under S. 326 and not under S. 302. *See* PENAL CODE, S. 104 **1932 M.W.N 67.**

——S. 326—*Evidence—Dying declaration—Corroboration.*

A conviction under S. 326 ought not to be based on the uncorroborated dying declaration of the deceased person. (*Mahadevayya and Ramachandra Rao, JJ.*) DODDA NANJIAH *v.* GOVERNMENT OF MYSORE. **38 Mys.H.C R 288=11 Mys L.J 328.**

——S. 326—Grievous hurt by one of three accused in pursuance of common intention—Others also guilty of grievous hurt. *See* PENAL CODE, S. 34. **27 S L.R. 269.**

——S. 326—*Injuries not sufficient to cause death—Death due to other causes—Nature of offence.*

In a trial under S. 302 the medical evidence was, that the injuries were not necessarily sufficient in the ordinary course of events to cause the death and that the death was due to meningitis and compression of the brain, but they had no direct connexion with the injuries caused.

Held, that the offence fell under S. 326 and not under S. 302. (*Tek Chand and Agha Haidar, JJ.*) CHANAN DAS *v.* EMPEROR. **151 I.C. 238=7 R.L. 113=35 Cr.L J. 1283=1934 Cr.C. 617 (2)=A.I.R. 1934 Lah 368.**

PENAL CODE (1860), S. 332.

——S. 326—*Offence under—Single blow in drunken brawl.*

Where there was a fight at the accused's house in which he, his brothers and the deceased took part, and in that drunken brawl the accused gave the deceased only one blow which ultimately resulted in death.

Held, that no offence under S. 302 or S. 304 but one under S 326 was committed. (*Shadi Lal, C. J. and Monroe, J.*) GOKAL CHAND *v* EMPEROR. **151 I C. 760=7 R.L. 203=35 Cr L J. 1407 (2)=36 P.L R. 88=1934 Cr.C. 763=A.I.R. 1934 Lah. 477.**

——S 326—"*Substance*"—*Causing of grievous hurt by means of heated ladle.*

A laddle comes under the category of "substance" and a person who voluntarily causes grievous hurt by means of a heated ladle is guilty of an offence under S. 326, I. P. Code. (*Kendall, J.*) PAN SINGH *v.* EMPEROR. **7 R A. 501=153 I.C. 425=36 Cr.L J. 346=1935 A. W.R 57=1935 A Cr.C. 12=1935 Cr.C. 268=A.I.R. 1935 All 282.**

——S. 327—Applicability—Firing towards ground to scare pursuers—Injury caused—Nature of offence—Case not falling under S. 324 or 327. *See* PENAL CODE, S. 324. **6 I.R. (Oudh) 122=A I.R. 1933 Oudh 269.**

——S. 328—*Administering poison at the instance of another—Accused capable of improving—Conviction under S. 328 instead of under S. 307.*

Where the accused was a youth of about twenty years of age who, in administering poison to his brother through food, of which his brother's son and daughter also partook, was acting under the instigation of a person who had absconded and owing to ready help by neighbours none of the three succumbed, the High Court, considering the possibility that the accused may after discipline become fit to be a safe member of society, convicted him under S. 328 instead of under S. 307. (*Courtney-Terrell, C. J. Kulwant Sahay and Dhawle, JJ.*) EMPEROR *v.* ISRAIL MAHTO. **I.R. 1931 Pat. 495=134 I.C. 639=32 Cr L.J. 1228= 1931 Cr.C. 794=A.I R. 1931 Pat. 346 (S.B.)**

——Ss 329, 147 and 149—Offences under—Separate convictions and sentences—Legality. *See* PENAL CODE, S. 71. **57 Mad. 643=66 M L J. 572.**

——S. 332—*Applicability—Procedure not authorised by law—Resistance to*

S. 332 does not apply where the procedure adopted by the public servant is not authorised by law and is invalid. In such a case, no official can seek the shelter of S. 332. (*Abdul Qadir, J.*) NURU *v.* EMPEROR. **I R. 1933 Lah. 292=142 I C. 897=34 Cr.L.J. 460= 33 P.L.R. 1065=1933 Cr.C. 307=A.I.R. 1933 Lah. 162.**

——S. 332—*Beating constable—Offence committed under grave provocation—Sentence.*

A party of villagers headed by the accused had decided on a feast and obtained special pass from Government for the purpose of getting liquor. At the time of the feast, a police constable interfered with the use of liquor and the party even enraged and assaulted the constable.

Held, that the accused were guilty of an offence under S. 332. Sentence reduced to fine and imprisonment alreay undergone (*Bose, A. C. J.*) NATHU GAOLI *v.* EMPEROR **17 N L.J. 78=1934 Cr.C 1120=36 Cr.L J 317=153 I.C. 211 (2)=7 R.N. 126=A.I.R. 1934 Nag. 247.**

——S. 332—Octroi Officer demanding inspection of bundle suspected to contain dutiable goods—Refusal

PENAL CODE (1860), S. 332.

and assault by person carrying bundle—Offence. *See* PENAL CODE, SS. 186 AND 332. **29 S.L.R. 54=A.I. R. 1935 Sind 245.**

———**S. 332**—*Public servant entering house with owner's implied consent—Assault—Offence.*

Where a public servant in order to discharge his or her public duties knocked at the front door and the door behind a house and it became known to the inmates of the house as to who was seeking admission and the public servant waited for five minutes, during which time admission was not refused and the door was not closed from inside and the public servant entered.

Held, that in the circumstances the public servant should assume that he or she had the implied consent of the house owner to enter and if he or she was assaulted, an offence under S. 332, was made out. (*Bajpai, J.*) KALLAN KHAN *v.* EMPEROR. **153 I C. 469=7 R A. 505=36 Cr L J 356=1935 A.L J. 175=1935 A.W. R. 71=1935 A.Cr.C. 10=1935 Cr C. 212=A.I.R. 1935 All 160.**

———**S. 332**—*Search by police—Resistance by occupant being kept out—Offence if constituted.*

An occupant of a house searched must be permitted to attend search and if in contravention of the mandatory provisions of S. 103, Cr P. Code, the public servant insists on keeping the occupant out and does not allow him to go inside the house searched and the occupant causes hurt to the public officer in attempting to go into his house on physical resistance being offered by the public officer who is not justified in doing so, he cannot be held guilty of an offence under S 332 I. P. Code. (*Niamatullah, J.*) BHIKUQIR *v.* EMPEROR. **1932 A. L.J. 530=13 L R. 92 (Cr.)=1932 Cr.C. 570=I R. 1933 All 147=142 I.C. 790=34 Cr L.J. 439=A.I. R. 1932 All. 449.**

———**Ss. 332, 225 and 149**—*Unlawful assembly—Common object not to commit grievous hurt—Grievous hurt caused but by whom caused not known—Conviction.*

Ss. 225 and 332 are to be read with S. 149 where the common object of an unlawful assembly is not to commit grievous hurt but to release a person from arrest and grievous hurt is caused, but it is not known by whom it is caused, conviction of all must be only under S. 332 and not under S. 225. (*Harrison and Dalip Singh, JJ.*) EMPEROR *v.* KALU. **I R 1933 Lah. 402=144 I.C. 67=34 Cr L J 679 (2)=1933 Cr C. 304=A.I. R. 1933 Lah. 159.**

———**S 333**—*Accused causing grievous hurt to a Sub-Inspector for having made reports against them—Conviction—Legality.*

S. 333, I. P. Code, provides that a person causing grievous hurt to a public servant can be convicted under three circumstances: (1) When grievous hurt is caused while the public servant is in the discharge of his duty as such public servant; in this case motive and object are irrelevant; (2) when a public servant is prevented or deterred from discharging his duty as such public servant; in this case, it is necessary that the object of the accused should be to deter the public servant from discharging his duty, but it is not necessary to prove any motive; (3) when the public servent is assaulted in consequence of anything done or attempted to be done by that public servent in the discharge of his duty; in this case, it is not necessary that the public servant should be discharging his duty at the time of the assault. The object too is irrelevant. The only thing that has got to be seen is the motive. Where grievous hurt is caused to a Sub-Inspector of Police by the accused who assaulted him for having made several reports against them, the third circumstance mentioned above clearly applies. (*Harries and Baipai, JJ.*) BANDHOO *v.* EMPEROR. **156 I.C. 602=8 R A. 7=36 Cr L.J. 964 =1935 A.W R. 463=1935 A.Cr.C. 100=1935 Cr.C. 590=A.I.R. 1935 All. 563.**

PENAL CODE (1860), S. 338.

———**S. 335**—*Sentence—Grave offence.*

The accused was convicted under S. 335 of completely severing with a razor one year of his wife and cutting off a portion of the other under the influence of grave and sudden provocation,

Held, that the offence was a grave one and that the accused should be sentenced to two years' rigorous imprisonment and a fine of Rs 100 (*Harrison, J.*) EMPEROR *v.* GHULAM NABI. **I.R. 1932 Lah. 270= 136 I C. 734=33 Cr L J. 368=33 P.L R. 72=1932 Cr.C. 215=A I R. 1932 Lah. 194.**

———**S. 336**—"*Any act*"—*Throwing bricks into residential house—Nature of offence.*

The throwing of bricks by the accused into the house of the complainant is an act which would endanger the personal safety and amounts to an offence under S. 336. Meaning of words "any act" discussed. (*Bennet, J.*) MAHADEO PANDEY *v.* EMPEROR. **I R. 1932 All. 600 (2)=140 I.C. 99=33 Cr.L J. 889=13 L.R. 95 (Cr.)=1932 A.L J. 224=1932 Cr.C. 291=A.I.R. 1933 All. 322.**

———**S. 337**—*Motor accident—Negligence—Presumption.*

Magistrates trying motoring cases must not judge that negligence must have been present merely because a car hit something else. It is always possible accidents may occur for some other reasons. (*Bagulay, J.*) GARANAND SINGH *v.* EMPEROR. **6 I R. (Rang.) 103=146 I.C. 545 (2)=1933 Cr.C. 1146=35 Cr.L J. 116=A. I R 1933 Rang. 329**

———**S. 337**—*Motor car—Rash driving—Liability of driver—Requisites of.*

A driver of a motor-bus is required to exercise that degree of care which is expected of a person charged with the responsibilities of a carrier. The mere fact that he lost his head is not of itself sufficient to absolve him unless an unforeseen emergency suddenly occurred, which for the time being made him lose his presence of mind or rendered him incapable of fully exercising his faculties. 53 Cal. 333, Ref. (*Doraiswami Iyer, C. J. and Sreenivasa Iyer, JJ.*) GOVERNMENT OF MYOSRE *v.* SYED HAYATH. **36 Mys H.C R. 101=9 Mys.L.J. 207.**

———**S. 337**—*Motor Vehicles Act* (*VIII of* 1914), *S. 5—Separate sentences—Legality.*

Separate sentences cannot be passed under S. 5 of the Motor Vehicles Act and S. 337 of the I. P. Code, for they are the same offences. (*Jackson, J.*) GOVINDARAJA MUDALIAR *v.* EMPEROR. **1931 M.W.N. 397.**

———**S. 337**—*Shooting expedition—Accident.*

Where in a shooting expedition, gunshot escaped the animal which was intended to be shot and hit at the leg of a member of the party and where the accused was not guilty of any rashness or negligence, *held*, that the shot was purely accidental. Shooting pigs on foot always carries with it a certain amount of risk and if by chance, a shot hit one of the beaters, or spectators the matter must be treated as that of pure accident. (*Shadi Lal, C. J.*) SHAKIR KHAN *v* EMPEROR. **I.R. 1931 Lah. 334=130 I.C. 654=32 Cr.L J. 587=31 P.L.R. 955=1931 Cr C. 118=A.I R. 1931 Lah. 54.**

———**S. 338**—Prosecution of motor driver under—Detention of motor car—Legality. *See* CR. P. CODE, S 516-A. **A I.R. 1931 Lah. 565.**

———**S. 338**—*Rash and negligent driving of motor cars—Sentence.*

PENAL CODE (1860), S. 338.

Cases of accident due to rash and negligent driving of motor cars should be adequately punished. Accused was convicted for driving rashly and negligently and sentenced to one month's rigorous imprisonment and a fine of Rs. 150, it was found that accused did not drive at more than 25 miles an hour and he appeared to be in a repentant mood.

Held, that the sentence should be reduced to imprisonment of five days already undergone but that the fine should be maintained. (*Srivastava, J.*) GANGA BUX *v.* EMPEROR. **6 R O 293 (1) = 147 I.C. 698 (1) = 10 O W.N. 1349 = 1934 Cr C. 80 = A I R. 1934 Oudh 18.**

———**S. 338**—*Sentence—Three months' rigorous imprisonment and fine.*

Accused was found guilty of both rashness and negligence by which the accident was caused. Further he was drunk while driving the motor car and getting into the wrong side. He was sentenced to three months' rigorous imprisonment and a fine of Rs. 150.

Held, that under the circumstances, the sentence was excessive and was reduced to a fine of Rs. 100 only, in default three months' rigorous imprisonment. (*Raza, J.*) CHAUDHRI *v.* EMPEROR. **147 I.C 122 = 6 R.O. 232 (1) = 35 Cr L J. 296 = 1933 Cr C. 1582 (1) = A.I. R. 1933 Oudh 508.**

———**S. 339**—*Applicability—Restraint of vehicle or cart—If offence.*

Voluntary obstruction of a vehicle or cart cannot be held to amount to wrongful restraint under S. 339, I P. Code, when there is nothing to show that either the carters or any human being is prevented from proceeding along the public road or wherever else they might have wished to go S. 339 only makes punishable wrongful restraint of a *person*. (*Patterson, J.*) DURGAPADA CHATTERJEE *v.* NILMANI GHOSH. **155 I.C. 444 (1) = 36 Cr L J. 740 = 7 R.C. 586 = 39 C.W N 143 = 60 C L.J. 472 = 1935 Cr.C. 331 = A.I R. 1935 Cal. 252.**

———**Ss. 339, 340 and 365**—*Applicability—Child of tender age unable to walk—If can be the subject of wrongful confinement.*

The word "proceed" in Ss. 339 and 340, is not confined to the case of a person who can walk on his own legs or can move by physical means within his own power. It includes the case of proceeding by outside agency, which in the case of a child of tender age must mean the agency of its natural protector or guardian. Such a child can therefore be the subject of wrongful confinement, and an offence under S. 365, is capable of being committed in respect of child unable to walk. (*S. K. Ghose and Henderson, JJ.*) MAHENDRA NATH CHAKRAVARTY *v.* EMPEROR. **62 Cal. 629 = 39 C W.N. 396.**

———**S. 341**—Charge for offence under—Magistrate framing charge under S. 506 also—Legality. *See* PENAL CODE, S. 506. **A.I.R. 1931 Oudh 73.**

———**S. 341**—*Procession—Wrongful restraint—Proof of offence.*

In order to sustain a conviction under S. 341 for having wrongfully restrained the complainant from taking out a procession, it is necessary, in the first instance, to prove that the complainant had the right to take the procession in the manner he did. (*Ramachandra Rao, J.*) SIDDALINGE GOWDA *v.* GOVERNMENT OF MYSORE. **14 Mys L J. 248.**

———**Ss. 341 and 342**—*Prosecution of public servants—Summary trial—Propriety.*

A Magistrate has no jurisdiction to try an offence under S. 342 summarily and he cannot create a jurisdiction by charging for the lesser offence under S. 341.

Semble.—Even if nothing more than an offence under S. 341 is alleged it is not advisable to try public servants whose whole career may depend upon the result summarily. (*Jackson, J.*) D'SOUZA *v.* ANNAPPA SHEREGARA. **1932 M.W.N. 478.**

PENAL CODE (1860), S. 349.

———**S. 341**—*Public right of procession—Obstruction of—Defence of absence of mamool*

Where one community in attempting to take their cattle out in procession in public streets was confronted with obstruction by another sect who pleaded that the former had no right to do so by mamool and that they *bona fide* believed they had a right to obstruct,

Held, that every one had an inherent natural right to take out processions and that it was for the accused to prove that by a valid custom they had acquired a right to obstruct others from doing so. 26 M. 376, Rel. on (*Doraiswami Iyer, C. J.*) VENKATAPPA *v.* MUNISWAMI. **37 Mys H C.R. 207 = 10 Mys L.J. 258.**

———**S. 342** — *Applicability—Arrest of judgment-debtor exempted from arrest—Offence.*

Accused No. 1 was a Civil Court peon and accused No. 2 a holder of a decree against the complainant. In execution of that decree complainant was arrested under a warrant by accused No. 1 at 3 P.M. within the Court house compound on a day on which he had attended Court in connection with his criminal case which was going on. Accused No. 2 identified the complainant as the judgment-debtor to be arrested. He was taken to the Civil Court, but as the Judge was busy otherwise, he was detained till 5 P.M., when he was produced in Court. The Judge, after hearing him ordered him to be released under S. 135 (2), C. P. Code. Complainant then instituted complaints under S. 343, I. P Code, against accused No. 1 and under Ss. 342 and 109, I. P. Code, against accused No. 2.

Held, (1) that there was no wrongful detention of the complainant by accused No. 1 under S 342, I. P. Code, in having detained the complainant till 5 P M., nor did he act criminally in effecting the arrest as it was not his duty to enquire into the truth or otherwise of the complainant's allegation of exemption from arrest; (2) that the act of the peon not being an offence, the decree-holder too was not guilty of any abetment of an offence. (*M C. Ghose, J.*) KADAMALI *v.* EMPEROR. **157 I C 1004 = 36 Cr L.J 1252 = 39 C.W.N 318 = 1935 Cr C. 943 = A.I R. 1935 Cal. 551.**

———**S. 347**—*Thumb impression forcibly taken on blank paper—Conviction for—Correctness of.*

When a man is compelled by force to affix his thumb impression to a blank piece of paper, the reasonable inference is that the paper is intended to be converted into a valuable security and the accused who by means of force and wrongful confinement, extorted the thumb impression on blank paper can properly be convicted under S. 347. (*Macpherson, J.*) BATISA SINGH *v.* EMPEROR. **140 I C. 752 = 13 Pat. L T 588 = I R. 1933 Pat. 19 = 34 Cr. L J 81 = 140 I.C. 752 = 1932 Cr. C. 852 = A.I.R. 1932 Pat. 335.**

———**Ss. 347 and 147**—Separate sentences—Legality of. *See* PENAL CODE, Ss. 147 AND 347. **A. I. R. 1932 Pat. 335.**

———**S 349**—"*Force*"—*Meaning.*

In S. 349 force is defined as being applicable to force when used in connection with human body. It means force to a person and not force to property. (*Niyogi, A. J. C.*) SUKHLAL *v.* MT. LADKIBAI. **17 N.L J. 27.**

———**S. 349**—"*Force*"—*Meaning.*

"Force" as defined in S. 349 contemplates the presence of the person to whom it is used, that is to say, it contemplates the presence of the person using the force and of the person to whom the force is used. (*Jai Lal,*

PENAL CODE (1860), S. 350.

J.) BIHARI LAL *v.* EMPEROR. **15 Lah. 786 = 36 Cr. L J 59 = 152 I. C. 162 = 7 R L. 255 = 36 P. L. R. 91 = 1934 Cr.C. 702 = A.I R. 1934 Lah. 454.**

——**Ss. 350 and 352** – Hindu husband forcibly dragging his minor wife from her father's house—Offence. *See* PENAL CODE, S. 89. **1935 A.L.J. 1096 = A.I.R. 1935 All. 916.**

——**S. 351**—*Examination of accused by doctor by way of a second search—Absence of consent—Offence if committed.*

The examination of an arrested person in hospital by a doctor not for the benefit of the prisoner's health but simply by way of a second search is not provided for by the Code and in such a case the doctor may not examine the prisoner without his consent.

Per *S. K. Ghose, J.*— Mere absence of consent however would not indicate an assault.

Lort Williams, J.—Any examination without the consent of the accused would amount to an assault. *Lort Williams and S.K. Ghose, JJ.*) EMPEROR *v.* BHONDAR PRODHAN. **134 I.C. 1053=35 C.W.N. 1212 = 1931 Cr C. 753 = 33 Cr. L J. 11 = 54 C.L.J. 499 = 134 I.C. 1053 = I R. 1932 Cal. 13 = A.I R. 1931 Cal. 601.**

——**Ss. 352 and 353** – Applicability—Warrant of attachment under Municipal Regulation—Material defect in—Execution against wrong person—Assault by latter —Offence *See* MYSORE MUNICIPAL REGULATION, S. 162. **40 Mys. H C R 221.**

——**S 352**—*Assaulting peons seeking to recover tax—Demand of tax not in proper form—Offence of assault punishable.*

In pursuance of a communication from the Sanitation Committee, the *Tahsildar* endorsed the same with an order that the *Jamadars* should appoint a suitable *chaprasi* to realise the taxes due. Two peons accompanied by the chowkidar went round with the endorsed list and collected the arrears from other defaulters but when they demanded the money from the accused they were told to come again after half an hour. When they returned, one of the accused asked to be shown the list and on receiving the same tore it up and all the accused roughly buffeted the peons out of the premises knocking off the turban of one of them It appeared that the customary procedure for realisation of the tax was not observed.

Held that as there was no demand in legal or proper form, the peons were not acting in execution of a duty imposed by law and therefore no offence punishable under S. 353, I. P. Code, was committed.

Held however, that the accused were guilty of an offence under S. 329. I P Code because they had assaulted the peons. (*Coldstream J.*) MAHOMED IBRAHIM *v* EMPEROR. **I R 1931 Lah 550 = 132 I C. 214 = 32 Cr. L.J. 853 = 1931 Cr. C. 748 = A I R. 1931 Lah. 524.**

——**S. 352**—*Decree-holder accompanying bailiff—Pardanashin lady in premises—Door pushed open and injuries caused—Offence.*

When a warrant was being executed at the instance of the applicant (judgment-creditor), the judgment-debtor was not in the house; but his pardanashin lady was. The applicant was warned that she would resent intrusion. In spite of it, the applicant pushed open the door and the lady who was behind the door fell down and received injuries.

Held, that the applicant, being merely a person executing a decree accompanying the person executing process and not being himself the person executing process, was not entitled to push open the door; it was for the bailiff to take such action as was necessary

PENAL CODE (1860), S. 353.

under S. 62 of the C.P. Code and so the applicant was guilty of an offence under S. 352 of the Penal Code.

Per *Mehta, A.J.C.*—Even if the applicant thought he was justified in considering himself as a person executing the warrant, S. 79 of the Penal Code could not avail him since he did not give the notice to the lady required by Cl. 3 of S. 62 of the C.P. Code. (*Aston and Mehta, A.J.C's.*) KALURAM MENURAM *v.* EMPEROR. **6 I R. (Sind) 30 = 145 I.C. 259 = 1934 Cr. C. 508 = 145 I.C. 259 – 34 Cr. L J. 963.**

——**Ss. 352 and 353**—*Public servant acting not in accordance with law—Assault on—Offence committed—Nature of.*

If the acts of the public servant are not strictly justifiable, if he is not discharging a duty imposed on him by law, if he is not doing what it is his duty to do as a public servant, and an assault is committed on him, the offence does not fall under S. 353. It falls under S. 352 S. 99 does not cure the defect caused by the irregularity. The effect of S. 99 is merely to remove certain rights of private defence. 18 All. 246, Foll., 19 Mad. 349 and 7 Bom. H. C. R. 50, Not foll. (*Ferrers, J C. and Aston, A J C.*) EMPEROR *v* BHOPO. **6 I.R. (Sind) 53 – 146 I C 43 – 34 Cr L J. 1147 = 27 S.L.R. 209 = 1933 Cr. C 538 - A.I.R 1933 Sind 174.**

——**Ss. 352 and 353** –*Scope of—Act of public servant not strictly justifiable.*

If the acts of the public servant are not strictly justifiable, if he is not discharging a duty imposed on him by law, if he is not doing what it is his duty to do as a public servant, the offence does not fall under S. 353. It falls under S. 352 S 99, I P Code, does not come the defect caused by the irregularity. The effect of S. 99 is merely to remove certain rights of private defence. A I R. 1933 Sind 174, Appl. (*Collister, J.*) CHHOTE LAL *v.* EMPEROR. **160 I C 1089 = 8 R A 702 = 37 Cr L J 382 = 1936 A.L.J. 427 – 1936 Cr. C. 100 = 1935 A.W.R. 1318 = 1935 A. Cr. C. 292 = A.I R. 1936 A. 74.**

——**S. 353** –Applicability— Police constable arresting accused for cognisable offence under orders of investigating officer—Absence of written authority—Assault and force by accused—Offence—Conviction Legality. *See* CR.P. CODE, Ss. 54 AND 56 (1). **13 Rang. 754.**

——**S. 353**—*Arrest by police officer—Assault by accused—Invalid warrant—Effect of.*

Per *Dhavle, J.* If a constable in effecting an arrest specifies a certain power which proves to be wanting, resistance to him or escape from his custody constitutes no offence. So if a constable notified to the accused that he was executing a warrant for his apprehension, and that warrant turns out to be invalid, the arrest is not validated by the fact that under S. 54 (1) the police officer was empowered even without the aid of any warrant. Resistance by the accused to such arrest constitutes no offence. 47 M. 442, Foll. (*S roope and Dhavle, JJ.*) KARTIK CHANDRA MAITY *v.* EMPEROR. **I.R. 1932 Pat. 190 = 138 I.C 844 = 33 Cr.L J. 706 = 13 Pat. L. T. 135 = 1932 Cr.C 347 = A.I.R. 1932 Pat. 171.**

——**S. 353**—*Assault on public servant—Time on warrant extended—Execution before expiration of extended period.*

Where the time on a warrant had been extended by the Amildar and was noted in the warrant itself and the execution of the process was effected before the expiration of the extended period, an assault on the person executing such warrant is an offence under S. 353 of the Code. (*Doraiswami Iyer, C.J.*) NARAYANA SETTY *v.* GOVERNMENT OF MYSORE. **9 Mys. L.J. 237.**

PENAL CODE (1860), S. 353.

———**S. 353**—*"Assault"—Threat—Person armed and in angry mood approaching near public officer—Offence.*

Whether a particular act does or does not amount to an assault depends upon the circumstances of each case; a particular act may not amount to an assault in one case, but the same act taken along with the other surrounding circumstances may amount to an assault in another case. Where the accused interposed between the attaching officers and the cattle attached, and when he was caught hold of and removed from the place by a constable, flew into a temper and went away threatening that he would return and teach them a lesson, and thereafter re appeared on the scene with a lathi in his hand followed by others, and approached within 10 or 12 paces of the place where the officers were.

Held, that he came sufficiently close to the officers so as to raise in their minds a reasonable apprehension that actual force was likely to be used, and that it amounted to an assault. (*Khaja Mohammad Noor, James and Agarwalla, JJ.*) RAM SINGH *v.* EMPEROR. **155 I.C. 421 (2) = 7 R.P. 580 = 36 Cr.L.J. 714 = 16 Pat.L.T. 295 = 1935 Cr.C. 577 = A.I.R. 1935 Pat. 214 (S.B.).**

———**S. 353**—*Conviction under—Requisites for.*

Before a Magistrate proceeds to convict an accused under S. 353, he should specifically deal with the question of guilty knowledge on the part of the accused and should also record a finding on the question whether the accused was aware that the person assaulted was a public servant. (*Ferrers, J.C. and Aston, A.J.C.*) EMPEROR *v.* BHOPO. **6 I.R. (Sind) 53 = 146 I.C. 43 = 34 Cr.L.J. 1147 = 27 S.L.R. 209 = 1933 Cr.C. 538 = A.I.R. 1933 Sind 174.**

———**S. 353**—*Essentials for proof by prosecution—Invalid warrant—Resistance to.*

It is essential for convictions under Ss. 224, 225 and 353 of the Penal Code that the prosecution should show that the apprehension or arrest made or attempted by the Police Officer was lawful in every way.

Per *Dhavle, J.* (*Scroope, J., contra*).—Where the warrant of arrest was signed not by the Magistrate who took cognizance of the case but by another 'for' him, the warrant is invalid and the accused cannot be convicted for resistance to lawful authority. (*Scroope and Dhavle, JJ.*) KARTIK CHANDRA MAITY *v.* EMPEROR. **I.R. 1932 Pat. 190 = 138 I.C. 844 = 33 Cr.L.J. 706 = 13 Pat.L.T. 135 = 1932 Cr.C. 347 = A.I.R. 1932 Pat 171.**

———**S. 353**—*Execution of warrant—Warrant signed by one Magistrate 'for' another—Validity—Resistance to.*

Per *Courtney Terrell, C.J.* (*concurring with Scroope, J. and disagreeing with Dhavle, J.*)—A warrant signed by a Magistrate duly empowered in that behalf during the absence of the Magistrate who took cognizance of the offence and directed the issue of the warrant is illegal and resistance to the execution of that warrant is an offence under the Penal Code. (*Courtney Terrell, C.J.*) KYRTIK CHANDRA MAITY *v.* EMPEROR. **13 Pat.L.T. 167 = 1932 Cr.C. 351 = A.I.R. 1932 Pat. 175.**

———**S. 353**—*Illegal warrant—Practice to sign in the absence of authorisation.*

Where the warrant of arrest the execution of which has been resisted is clearly an illegal one, the accused cannot be convicted under Ss. 225-B and 353. The fact that it had been the practice for a considerable time for such warrants to be signed by the Deputy Nazir cannot make the signing of them by that officer legal, in the absence of authorization. (*Bardswell, J.*) SUBBARAMIAH *v.* EMPEROR. **6 R.M. 542 = 148 I.C. 818 (2) = 35 Cr.L.J. 782 = 1934 M.W.N. 399 = 39 L.W. 388 = 1934 Cr.C. 351 (1) = A.I.R. 1934 Mad. 206 = 66 M.L.J. 408.**

PENAL CODE (1860), S. 353.

———**S. 353**—*Offence under—No legal demand for tax—Resistance to demand if illegal.*

In pursuance of a communication from the Sanitation Committee, the *Tahsildar* endorse the same with an order that the *Jamadars* should appoint a suitable *chaprasi* to realise the taxes due. Two persons accompanied by the Chowkidar went round with the endorsed list and collected the arrears from other defaulters, but when they demanded the money from the accused, they were told to come again after half an hour. When they returned one of the accused asked to be shown the list and on receiving the same tore it up and all the accused roughly buffeted the peons out of the premises knocking off the turban of one of them. It appeared that the customary procedure for realisation of the tax was not observed.

Held, that as there was no demand in legal of proper form, the peons were not acting in execution of a duty imposed by law and therefore no offence punishable under S. 353, I.P. Code was committed.

Held, however, that the accused were guilty of an offence under S. 329, I.P. Code, because they had assaulted the peons. (*Coldstream, J.*) MAHOMED IBRAHIM *v.* EMPEROR. **I.R. 1931 Lah. 550 = 132 I.C. 214 = 32 Cr.L.J. 853 = 1931 Cr.C. 748 = A.I.R. 1931 Lah. 524.**

———**S. 353**—*Offence under—Proof of—Duty of prosecution.*

There can be no presumption under S. 114 of the Evidence Act so as to relieve the prosecution of its duty. When the prosecution sets out to prove that an accused person has assaulted an officer of the Board while engaged in the performance of his duties as such officer, it must establish that the said officer was in fact performing a duty which was legally imposed upon him. (*Collister, J.*) CHHOTE LAL *v.* EMPEROR. **160 I.C. 1089 = 8 R.A. 702 = 37 Cr.L.J. 382 = 1936 A.L.J. 427 = 1936 Cr.C. 100 = 1935 A.W.R. 1318 = 1935 A. Cr.C. 292 = A.I.R. 1936 A. 74.**

———**S. 353**—*Offence under—Threat of assaulting authorities.*

Where it was found that the accused had threatened to assault the authorities and no assault had actually been made,

Held, that the accused were not guilty under S. 353. (*Kendall, J.*) MEVA RAM *v.* EMPEROR. **150 I.C. 1048 = 7 R.A. 96 = 35 Cr.L.J. 1250 = 3 A.W.R. 585 = 1934 Cr.C. 865 (2) = A.I.R. 1934 All. 687 (2).**

———**S. 353**—*Officer acting illegally—Assault on.*

An officer exercising his official duties with gross illegality and in an outrageous manner cannot be deemed to be a public servant in the execution of his duty so as to bring an assault against such officer within the purview of S. 353. (*Dunkley, J.*) NGWE YON *v.* EMPEROR. **I.R. 1931 Rang 199 = 132 I.C. 711 = 32 Cr.L.J. 939 = 1931 Cr.C. 665 = 17 A.I.Cr.R. 32 = A.I.R. 1931 Rang. 169.**

———**S. 353**—*Resistance to execution.*

Where a Court peon executing a warrant of arrest was resisted by the accused, *held*, that an offence under S. 353 was constituted. (*Rankin, C.J. and Mallik, J.*) RAJANI KANTA SAHA *v.* EMPEROR. **58 Cal. 940 = I.R. 1931 Cal. 564 = 132 I.C. 244 = 32 Cr.L.J. 886 = 35 C.W.N. 228 = 1931 Cr.C. 595 = A.I.R. 1931 Cal. 443.**

———**S. 353**—*Resistance to execution—Warrant not complying with O. 21, R. 24 (3), C.P. Code.*

PENAL CODE (1860), S. 353.

An execution warrant sought to be executed is bad if the date on or before which it is to be executed and the date on or before which it is to be returned to the Court is not specified in it. Thus the warrant being illegal, a person resisting its execution by the amin commits no offence under S. 353, I.P. Code. (*Collister, J.*) KISHORI LAL *v.* EMPEROR. **153 I.C. 157=36 Cr L. J. 295=1934 Cr.C. 1313= =A.I.R. 1934 All. 1016.**

———**S. 353**—*Resistance to public servant—Justification—Mistake by executing Court—Warrant not defective in form.*

Even though under O. 21, R. 37 the Court might have acted in an entirely unjudicial manner in issuing a notice and a warrant at the same time, where, however, the warrant is complete in itself and exhibits no defect of form, it is no duty of the officer of Court to review the discretion of the Court His duty *prima facie* is to execute the warrant and it is no justification for resistance to the public servant that the executing Court made a mistake in issuing the warrant. 18 Cal. W. N. 548, Foll. (*Courtney-Terrell, C.J.*) PUNA MAHTON *v.* EMPEROR. **11 Pat. 743=13 Pat.L.T. 502=142 I.C. 160=I.R. 1933 Pat. 125=34 Cr.L.J. 269=1932 Cr.C. 853=A.I.R. 1932 Pat. 315.**

———**S. 353**—Search by Excise Inspector—Procedure unlawful—Resistance to—Conviction under S. 353 not legal. *See* OPIUM ACT (1878), S. 14. **27 S.L.R. 209 =A.I.R. 1933 Sind 174.**

———**S. 353**—*Sentence.*

Obstruction to attachment in execution of decrees is fairly common and should be severely dealt with, especially when there was been any use of criminal force in furtherance of the obstruction. Sentence of Rs. 100 fine was upheld. (*Staples, A.J.C.*) ASHGAR *v* EMPEROR. **147 I C 702 (1)=6 R.N. 137=35 Cr.L.J. 447=1933 Cr.C. 1580 (1)=A.I.R. 1933 Nag. 392.**

———**S. 353**—*Tahsildar acting under C.P. Land Revenue Act* (1917), *S* 219—*Notification No.* 332-341-*XII of 29th January*, 1931—*Assault on Tahsildar.*

By Government Notification No. 332 341-XII, dated 29th January, 1931, the Governor in Council has invested all Tahsildars with the powers of a Deputy Commissioner under S. 219 and hence a Tahsildar can act on his own authority. A Tahsildar therefore while removing unauthorized encroachments is acting in the execution of his duty as a public servant. (*Grille, A.J.C.*) DINANATH PATIRAM *v* EMPEROR. **148 I C. 803= 6 R.N. 206=35 Cr L J. 746=1933 Cr.C. 1067= A.I.R. 1933 Nag 295.**

———**S 353**—*Use of criminal force to constable assisting other constables in the arrest of gamblers—Offence.*

On information that gambling was going on in a certain public thoroughfare, certain constables proceeded to arrest the gamblers. On their way they met the complainant, a police constable, whom they asked to accompany them and assist in arresting the gamblers. The accused who used criminal force to the complainant and prevented him from proceeding to the place of gambling was convicted under S. 353, I. P. Code. It was contended in revision that though the complainant was a constable and as such a public servant, yet when he accompanied the constables to arrest the gamblers he was not in the execution of his duty and that he was not discharging any duty as a public servant.

Held, confirming the conviction, that the complainant was a police officer who had received information that gambling was going on in a public thoroughfare and who was therefore entitled under S. 13 of the Public Gambling Act to apprehend and the gamblers without warrant and that the accused by preventing him from proceeding

PENAL CODE (1860), S. 354.

in that direction by use of criminal force, deterred him from discharging his duty which was to arrest the gamblers. (*Bajpai, J.*) RAMDEO *v.* EMPEROR. **154 I C. 740=7 R.A. 789=36 Cr.L.J. 558=1935 A. Cr. C. 105=1935 A.W.R. 469=1935 Cr.C. 542=A.I.R. 1935 All. 516.**

———**Ss. 353 and 358**—*Using criminal force to canal patrol on being abused—Charge under S.* 353—*Conviction under S.* 358—*Propriety.*

A person can be convicted under S. 358, I. P. Code, for assaulting or using criminal force to a canal patrol on grave and sudden provocation given by the patrol who abused him, even though he was charged under S. 353, I. P. Code. (*Bajpai, J.*) DIP CHAND *v.* EMPEROR. **155 I.C. 540 (1)=36 Cr.L.J. 766=7 R. A. 399=3 A.W.R. 699=1934 Cr.C. 1081=A.I.R. 1934 All. 872.**

———**S. 353**—*Vague and indefinite distraint warrant—Illegal attachment—Resistance to—No offence.*

A warrant which is vague and indefinite and which does not appear to have been signed by the proper authority as required by S. 8 of the Madras Revenue Recovery Act is invalid and where a village officer in pursuance of such a warrant attached the doors of a defaulter's house, resistance by the defaulter, when it is not shown to have been excessive, does not constitute an offence under S. 353 of the Penal Code. (*Bardswell, J.*) SEETHARAMIAH *v.* EMPEROR. **1933 M.W.N. 725.**

———**S. 353**—*Warrant of arrest being illegal—Obstruction to execution—Offence whether constituted.*

Where the warrant of arrest issued is illegal, the officers executing the warrant cannot be considered to be acting in the discharge of their duty as such public servants and a person obstructing the execution of the warrant cannot be convicted under S. 353. (*Sulaiman, J.*) JAGANNATH *v.* EMPEROR. **I.R. 1932 All 611 —140 I.C. 118=33 Cr.L.J. 887=13 L.R. 85 (Cr.)= 1932 A.L.J. 179=1932 Cr.C. 225=A.I.R. 1932 All. 227.**

———**Ss. 354, 376 and 511**—Attempt at rape—Prevention by intervention of other people—Offence under S. 376/511 and not under S. 354. *See* PENAL CODE, SS. 376, 511 AND 354. **A.I.R. 1933 Lah. 1002 (1).**

———**S. 354**—*Essentials of offence—Intention to outrage or knowledge that assault is likely to outrage modesty of girl.*

A little girl of five and half years was playing with a boy of her age and the accused put his finger into her private parts and caused a mark on them. After a few hours she complained to her mother of a burning pain in her private parts and the mother saw a red mark there. When questioned, the girl said that the accused poked her there with his finger.

Held, per *Jack, J.*—Under S 354, it must be shown that the assault was made intending to outrage or knowing it to be likely to outrage the modesty of the girl. The conduct of the girl showed that in fact her modesty was not outraged. There was no suggestion that she had any hesitation in telling her mother exactly what had happened. It was therefore doubtful whether in fact the modesty of the girl was outraged, and that therefore the conviction ought not to have been under S. 354. As a matter of fact the charge might have been under S. 323. Medical evidence showed that there was injury. In view of the nature of the offence, the sentence should be maintained but it should be under S. 323.

Per *M. C. Ghose, J.*—On the facts as found by the Magistrate S. 354 would apply. No authority has been shown for the contention that a man who puts his finger

PENAL CODE (1860), S. 354.

into the private parts of a girl of five and half years of age is not guilty under S. 354 but is guilty under S. 352 inasmuch as she has not developed a sense of modesty Such action on the part of a man would tend to destroy the formation of a sense of modesty in the girl. (*Jack and M C Ghose, JJ*) SOKO *v.* EMPEROR. **I R 1933 Cal. 253 142 I C. 297=34 Cr.L J. 308=1933 Cr.C. 203=A I.R. 1933 Cal. 142.**

——**S. 354**—Following a girl in a motor car—Attempt to snatch her gold chain—Offence under S. 366/511. *See* CR. P. CODE, SS. 436 AND 437. **A.I R. 1933 Rang. 214.**

——**S. 354**—Sentence—Criminal assault of a daring nature on innocent woman—Substantial sentence of imprisonment proper. *See* CR. P. CODE, S. 562. **A.I R. 1934 Lah. 36 (2).**

——**S. 357**—*Offence under—Dragging boy by the neck with safa—Death caused—Nature of offence.*

In order to compel a boy to go in any direction against his will it is a common practice to put a pagri round his neck and to drag him, and though it may no doubt be somewhat dangerous, if he resists overmuch, or if the ground over which he is taken is hilly or broken, still, generally speaking, the practice leads to no more evil consequences than a swollen neck; and it cannot be said as a fact that it is imminently dangerous to life. Where therefore the accused put his safa round the neck of a boy on his refusal to accompany him to a certain place and proceeded to drag him for a distance of about 50 or 60 yards as a result of which the boy subsequently died.

Held, that an offence under S 357 had been committed by the accused and not one under S. 304-A. Although the conduct of the accused was reprehensible and constituted a criminal offence he could not be saddled with a knowledge necessary to constitute an offence under S. 304, Part 2, nor could he be presumed to have intended to cause a grievous hurt inasmuch as such grievous hurt was not the natural consequence of his act. (*Harrison and Dalip Singh, JJ*) EMPEROR *v.* SHAH ALAM. **I R 1931 Lah. 980=134 I C 772=32 Cr L J. 1248=1931 Cr.C. 531=A.I.R. 1931 Lah. 275.**

——**S 358**—Conviction under, on a charge under S. 353, Indian Penal Code—Propriety. *See* PENAL CODE, SS. 353 AND 358. **A.I.R. 1934 All. 872.**

——**S. 361**—Bona fide *belief that girl was over sixteen years—If valid defence under.*

The fact that the accused *bona fide* believed that the girl was over sixteen years cannot be urged as a valid defence to a charge under S. 361, I. P. Code. Any one dealing with such a girl does so at his peril, and if it turns out that the girl was under 16 years, the accused must take the consequences (*Mahadevayya, C J. and Shankaranarayana Rao, J*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys L.J. 133=39 Mys.H. C.R 406.**

——**S. 361**—"*Lawful guardian.*"

The words "lawful guardian" in S. 361 are used in a wider sense. They are made by the explanation to that section to include any person lawfully entrusted with the care or custody of a minor. (*Agarwala and Saunders, JJ.*) JANGLI MIAN *v.* EMPEROR. **35 Cr L J. 814=6 R P 507 148 I C 791=15 Pat.L T. 229=1934 Cr.C. 367 A I.R. 1934 Pat. 170.**

——**S 361**—"*Lawful guardian*"—*Meaning of.*

Temporary guardianship does not oust the lawful guardian's rights. "Lawful guardian" includes any person lawfully entrusted with the care or custody of a minor. The term does not exclude a person with whom

PENAL CODE (1860), S. 361.

the minor by consent of the legal guardian resides; and such *de facto* guardianship is sufficient to sustain a prosecution under S. 361. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L.J. 133=39 Mys H.C.R. 406.**

——**S. 361**—*Presence of accused at time of kidnapping—No overt act proved—Liability of accused.*

Where all that was shown against one of the accused was that he happened to be present when the girl was kidnapped and it was not suggested that any overt act was done by him or that he uttered any words or made any remarks which would show his complicity in the crime, he cannot be held to be guilty under S. 361. (*Bisheshwar Nath, J*) RAMESHWAR TEWARI *v.* EMPEROR. **9 O.W.N. 1049=1933 Cr.C. 102=I R. 1933 Oudh 132=142 I.C. 813=34 Cr.L J. 377 (2)=A I R. 1933 Oudh 62.**

——**S. 361—Explanation**—*Minor girl leaving protection of guardian—If goes out of "keeping" of the guardian—"Taking"—Meaning of.*

The mere fact that the minor leaves the protection of her guardian does not put her out of the guardianship's keeping, and so long as the girl has an opportunity of going back to her guardian, the relationship of guardianship continues. The physical control of the minor is not always necessary to constitute "keeping" or custody. A girl under 16 is incapable of acting on her own consent or withdrawing from the guardian's protection. A girl who has no intention of starting life independently and who leaves her house for the purpose of seeking refuge with another relation, cannot be deemed to have passed out of the "keeping" of her natural guardian under the Explanation to S. 361, until she has, by some overt act, passed into the keeping of some one else. "Taking" is not confined to mere physical taking. (*Mahadevayya C.J. and Shankaranarayana Rao, J*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys.L. J. 133=39 Mys H C.R. 406.**

——**S. 361, Explanation**—*Scope—Real civil guardian whether can be convicted.*

Section 361, Explanation, cannot be used to mean that as against a person who, in fact, is the civil guardian of the minor, mere *de facto* guardianship can be set up so as to convict the real civil guardian under S 361. The expression 'Lawful guardian' is extended to include any person lawfully entrusted with the care or custody of a minor, or other person. Where, by consent of the relatives, a minor has been allowed to be in the custody of a particular relative, the consent of the relatives would be quite sufficient to make the guardianship lawful guardianship, though there may be no definite transaction of entrustment. (*Rankin, C. J. and Costello, J.*) SAHARALI MAHAMMAD *v.* KAMIZUDDIN MAHAMMAD. **58 Cal 897=I.R 1931 Cal. 566=132 I C. 246—32 Cr L.J. 888=35 C.W.N. 195=1931 Cr C. 598=A.I.R. 1931 Cal 446.**

——**S 361, Exception**—*Burden of proof—Illegitimate child—Removal by father—Onus of proving unlawful purpose.*

In a case in which the kidnapper is the father of the illegitimate child kidnapped, it is for the prosecution to show that the act was committed for an immoral or unlawful purpose (*S. K. Ghose and Henderson, JJ.*) MAHENDRA NATH CHAKRAVARTY *v.* EMPEROR. **62 Cal. 629=39 C.W.N. 396.**

——**S. 361, Exception**—*Illegitimate child—Removal by father for concealing birth—Offence—"Unlawful"—Meaning of.*

The word "unlawful" is not synonymous with "illegal", or "immoral". It means what is not justifi-

PENAL CODE (1860), S. 361.

able by law. A father of an illegitimate child who removes it, that was only 10 days old from its mother for the purpose of hushing up the scandal and not to serve its welfare, does so not in good faith, but *mala fide* and unlawfully. He is not protected by the exception to S 361. (*S. K. Ghose and Henderson, JJ.*) MAHENDRA NATH CHAKRAVARTY *v.* EMPEROR. **62 Cal 929 = 39 C.W.N. 396.**

———**S. 361, Exception**—*Unlawful purpose—Intention to give child in marriage in contravention of Act XIX of* 1929.

An intention to give a child in marriage in contravention of Act XIX of 1929 is an "unlawful purpose" within the exception to S 361 upon the simple but sufficient ground that if the purpose is carried out, the person giving the child in marriage is liable to conviction and punishment for a criminal offence. (*Page, C. J., Das, Mya Bu, Brown and Dunkley, JJ.*) KHALILUR RAHMAN *v.* EMPEROR. **11 Rang 213 = 1 R. 1933 Rang 81 = 143 I C 872 = 34 Cr L J. 696 = 1933 Cr.C. 573 (2) = A I.R. 1933 Rang. 98 (F B)**

———**S. 363**—*Offence of kidnapping—Age of person kidnapped—Effect of S* 361.

Held, (by the majority of the Full Bench, *Beaumont, C.J.* dissenting) S. 361 must be read with S. 363 and the offence of kidnapping from lawful guardianship penalised by the latter section is the offence which is defined in S. 361, *i.e.*, the person against whom the offence is committed must be under the age of 14 if a male and under the age of 16, if a female.

Per *Beaumont, C.J.*—There is no justification for the assumption that to constitute the offence of kidnapping from lawful guardianship it must be proved that the minor is under the ages specified in S. 361. The words of S. 363 being perfectly plain, the Court cannot read in the Section words which are not there. (*Beaumont, C.J., Murphy and Rangnekar, JJ.*) EMPEROR *v.* ISMAIL SAYAD SAHEB. **57 Bom 537 = 6 I R. (Bom.) 139 = 146 I.C. 248 = 34 Cr L J. 1239 35 Bom.L R. 886 = 1933 Cr.C. 1289 (2) = A.I.R 1933 Bom. 417 (F B.)**

———**Ss. 363 and 368**—*Offence under—Proof of—Maintenance of kidnapped child.*

Where it was only shown that the accused had been maintaining a minor child left with him by his brother for over 2 months and there was no evidence to show that he had anything to do with kidnapping the child,

Held, that the accused was not guilty under either S. 363 or 368. (*Abdul Qadir, J.*) ABDUL RAHMAN *v.* EMPEROR. **6 I R. (Lah.) 164 = 146 I.C. 42 = 34 Cr L J. 1117 = 1933 Cr C. 636 = A I.R. 1933 Lah 392.**

———**S. 363**—*Removal of minor from custody of mother—Consent—Subsequent kidnapping—Nature of offence.*

Kidnapping is not a continuing offence; the sole question which must be decided in cases of kidnapping is when did the act of kidnapping actually take place. *K*, who lived with her mother, was taken by her sister *F* to a mill, a mile away from the house of the mother, for helping her to carry flour. *F's* husband *K* put the girl on a camel and rode away with her. *K* was convicted and sentenced under S. 363.

Held, that the taking by *F* of her sister *R* from her mother's house must be taken to be with the permission and consent of the mother and cannot, therefore, be called an act of kidnapping and that the act of kidnapping took place when *R* was taken from the custody of her sister, who had the girl with her, with the consent and permission of her mother, the lawful guardian of the child. 6 Pat. 471, Ref. (*Agha Haidar, J.*) KHUSHAL *v.* EMPEROR. **I.R. 1931 Lah. 350 = 130 I.C. 782 = 32 Cr.L J. 615 = 1931 Cr.C. 117 = A.I.R. 1931 Lah. 53.**

———**Ss 363 and 366**—*Scope and object of—Non-protest by temporary guardian of minor girl—If valid defence.*

Ss. 363 and 366, I P. Code, are intended not only to protect the rights of parents and lawful guardians of girls under the age of 16 years, but also to protect the girls themselves, and present persons taking improper advantage of their youth and inexperience; the willingness of the girls concerned is not of any avail to the accused. The consent or non protest by the temporary guardian is no defence to a charge under the Sections, because the offences are a trespass against the rights of the lawful guardian which the Sections seek to protect. (*Mahadeviyya, C.J. and Shankaranarayana Rao, J.*) LAS BABA *v* GOVERNMENT OF MYSORE **12 Mys.L.J. 133 = 39 Mys H C.R. 406.**

———**Ss. 364, 149 and 302**—All accused in Court proved to have taken part in abduction of deceased—person by whom subsequent murder was committed not known—Ingredients necessary under S. 149 not proved—Accused entitled to benefit of doubt on charge of murder. *See* PENAL CODE, SS. 149, 302 AND 364. **A.I.R. 1933 Lah. 1035 (2).**

———**S. 364**—*Kidnapping of adult.*

There can be no offence of kidnapping if a person of age is conveyed from one place to another. If, however, it is shown that the adult person had been by deceitful means induced to go from one place to another, it amounts to kidnapping. (*Raza and Bisheshwar Nath, JJ.*) PUTTU *v.* EMPEROR. **I.R 1932 Oudh 225 = 33 Cr L.J. 514 (2) = 137 I.C 290 - 9 O.W.N. 243.**

———**S. 364**—*Offence under—Proof.*

Where the nature of the assault made on the deceased shows that the accused intended to murder him, but this assault was made before the abduction, and there is no evidence to show whether the deceased had died or was alive when he was abducted, the accused cannot be properly convicted under S. 364, I. P. Code. (*Srivastava and Zia-Ul-Hasan, JJ.*) SHEO NARAIN SINGH *v.* EMPEROR. **158 I.C. 945 = 8 R O. 148 = 37 Cr L.J. 12 = 1936 Cr C. 29 = 1935 O.W.N. 1177 = A I.R. 1936 Oudh 44.**

———**S. 366**—*Abduction without intention—Offence.*

Abduction is in itself no offence. It is only when the intention of either marrying the woman against her will or forcing her to subject herself to illicit intercourse is proved that abduction becomes an offence under S 366, I. P. Code. Otherwise the mere act of assault and outraging the modesty of a woman is covered by S 354 and not by S. 366, I. P. Code. 75 I C. 297; 109 I C. 127, Rel on. (*Mir Ahmad, A J.C.*) GHARIB SHAH *v.* EMPEROR. **151 I C. 103 = 7 R Pesh 12 = 35 Cr.L. J. 1273 = 1934 Cr.C 952 = A.I.R. 1934 Pesh 69.**

———**S. 366**—*Applicability—Accused taking girl to continue intrigue already begun.*

If a girl is carrying on an intrigue with the accused and then the accused takes her away to continue that intrigue, S. 366 does not apply. (*Abdul Rashid, J.*) NURA *v.* EMPEROR. **151 I C. 741 (2) = 7 R L. 191 = 35 Cr.L.J. 1386 = 1934 Cr.C. 458 = A I.R. 1934 Lah. 227.**

———**S. 366**—*Applicability of S.* 90, *I. P. Code—Absence of valid consent—Presumption as to intention.*

Every Act done "against the will" of a person, no doubt, is done "without his consent," but an act done "without the consent" of a person is not necessarily

PENAL CODE (1860), S. 366.

"against his will" which expression imports that the act is done in spite of the opposition of the person to the doing of it. Hence the provisions of S. 90 are not to be applied to S. 366 unless the intent of the accused is to compel the woman, whatever her age may be, to marry against her will, that is, in spite of her opposition to the marriage, or unless he knows that it is likely that she will be compelled to marry against her will, no offence under the first part of S. 306 has been committed. Hence where the accused had kidnapped a little girl under 12 years of age with intention to give her in marriage a *presumptio juris et de jure* does not arise that the accused kidnapped the child with intent to compel her, or knowing that it to be likely that she will be compelled to marry "against her will". (*Page, C.J., Das, Mya Bu, Brown and Dunkley, JJ.*) KHALILUR RAHMAN *v.* EMPEROR. **11 Rang. 213=I.R. 1933 Rang. 81=143 I.C. 872=34 Cr.L.J. 696=1933 Cr C. 573 (2)=A.I R. 1933 Rang. 98 (F.B.).**

———**S. 366**—*Charge for sexual offence—Evidence.*

In cases arising out of a sexual matters when charges are made against a man by a woman, it is dangerous to convict upon her evidence. The jury should require corroboration of her story before they bring in a verdict of 'guilty'. The kind of corroboration required must be independent evidence. The statement of a witness that he saw the girl coming out of the house of the accused weeping may be relied on as corroboration. (*Lort Williams and M. C. Ghose, JJ.*) NUR AHMED *v.* EMPEROR. **38 C.W.N. 108=36 Cr L J. 796=1934 Cr. Cas. 23=155 I.C. 584=7 R C. 600=A.I.R. 1934 Cal. 7.**

———**S. 366**—*Charge of kidnapping—Finding as to age of person kidnapped—Need for.*

The charge under S. 366, I. P. Code, should cover the words contained in the section "kidnaps or abducts." But if the charge which the accused prisoner is called upon to answer says nothing about abduction, then before he is convicted of the offence of kidnapping, the trying Court must give a specific finding on the cardinal point that the person kidnapped, if a female, is under 16 years of age. (*Ferrers, J.C. and Mehta, A. J. C.*) SULTAN *v.* EMPEROR. **28 S.L R. 285=1934 Cr.C. 960=151 I.C. 984=7 R.S 74=A I.R. 1934 Sind 119.**

———**S. 366**—*Charge under—Accused—If must know who guardian is.*

For a conviction under S. 366, I. P. Code, it is not necessary that the accused should know definitely who the guardian of the minor girl is. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys L J. 133=39 Mys. H.C.R. 406.**

———**S. 366**—*Charge under—Consent of girl or temporary guardian—If defence.*

In a charge under S. 366, I. P. Code, the consent of the minor girl or of her temporary guardian is no defence The lawful guardian's rights cannot be affected by any act on the part of the temporary guardian. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) LAS BABA *v.* GOVERNMENT OF MYSORE. **12 Mys L. J. 133=39 Mys.H.C.R. 406.**

———**Ss. 366 and 368**—*Complaint by husband under—Conviction under S. 497—Legality—Cr. P. Code, S. 199.*

If a complaint by a husband, described in its heading as one under Ss. 366 and 368, I. P. Code, fulfils all the requirements of a complaint under S. 497, I. P. Code and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required by S. 199. Cr. P. Code. (*Coldstream, J.*) SAIN *v.* EMPEROR. **36 P.L.R 209=1934 Cr.C. 1333=36 Cr.L.J. 789=155 I.C. 595=7 R.L. 742=A.I.R. 1934 Lah. 945.**

PENAL CODE (1860), S. 366.

———**S. 366**—*Consent of girl—Evidence.*

Per *Walker, J.*—It is difficult to believe that a grown up girl would have submitted to being carried about and raped without protesting, especially, when it appears that she was every now and then left by herself. (*Walker, J.*) NATHU *v.* EMPEROR. **I.R. 1931 Lah. 800=133 I.C. 560=32 Cr.L.J. 1041 (2)=32 P.L.R. 98=1931 Cr.C. 641=A.I.R. 1931 Lah. 401.**

———**S. 366**—*Construction—"Seduced to illicit intercourse."*

The expression "seduced to illicit intercourse" in S. 366 cannot be deemed to include a case where a man takes back a woman with whom he had been living until very recently for a period of several months during which he had been indulging in illicit intercourse with her. (*Agarwala and Saunders, JJ.*) JANGLI MIAN *v.* EMPEROR. **6 R.P. 507=148 I C. 791=35 Cr.L.J. 814=15 Pat.L.T. 229=1934 Cr.C. 367=A.I.R. 1934 Pat. 170.**

———**S. 366**—*Construction—"Seduced to illicit intercourse"—Intrigue while girl is in lawful custody—Offence if constituted.*

In order to make S. 366 applicable, the act of seduction alleged must be subsequent to the kidnapping. The Section cannot apply to a case where the accused is said to have been carrying on an intrigue with a girl under 16 while she is in the custody of her lawful guardian and goes away with her because obstacles are thrown in the way of that intrigue even though when he so goes away with her it was with the intention of illicit intercourse. The phrase 'seduced to illicit intercourse' implies two distinct stages in the acts of the accused, the seduction and the illicit intercourse. There must be two distinct acts, though they may follow on immediate sequence. The words or actions of the accused which induced the girl to submit to the illicit intercourse must precede the actual act. The term 'seduction' can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile, or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man. (*Boys and Young, JJ.*) EMPEROR *v.* BAIJNATH. **54 All 756=I.R. 1932 All 488=138 I.C. 609=33 Cr.L J. 669=1932 A.L.J 493=13 L R. 81 (Cr.)=1932 Cr.C. 513=A.I. R. 1932 All. 409.**

[Disc. 60 C. 1457 (1462) **R.** 1934 L. 227 (228).]

———**S. 366**—*Construction—"Seduced to illicit intercourse"—Prior immoral conduct—Relevancy.*

The expression "seduced to illicit intercourse" in S. 366 cannot be intended to be restricted to inducing a girl to surrender her chastity for the first time. It is used to indicate a distinction between "seduction" in the popular, usual or ordinary sense and that which S. 366 was intended to cover. "illicit intercourse" seems to be intended, to be synonymous with "unlawful sexual intercourse". "Seduced to illicit intercourse" means "induced to surrender or abandon a condition of purity from unlawful sexual intercourse." Therefore an accused cannot be convicted of the offence under S. 366 unless it is proved that the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. It is not necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have

PENAL CODE (1860), S. 366.

surrendered it in the past, and thereafter have resumed a life of purity. On the other hand if she is already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping, it cannot be said that she was kidnapped "in order that she might be seduced to illicit intercourse" within the meaning of the section In such a case the accused could not have kidnapped her in order that she might be led astray in conduct, or drawn away from the right course of action into a wrong one, because she was already astray, and was pursuing a wrong course at the time of the kidnapping. (Case-law discussed.) (*Lort Williams and McNair, JJ.*) SHAHEBALI *v.* EMPEROR. **60 Cal. 1457=1933 Cr C. 1268 (2)=147 I.C. 79=6 R.C. 289=35 Cr.L.J. 307 =A.I R 1933 Cal. 718.**

[Same case reported also as *Taki Mia* v. *Emperor.*]

———**S. 366**—*Construction—"Seduce"—Meaning of—If applies only to first act of illicit intercourse.*

"Seduce" in S. 366, means enticing or tempting. It is used in the general sense and not in the limited sense of committing the first act of illicit intercourse. S. 366 would therefore apply to a person who has had sexual intercourse with the kidnapped girl even before the alleged kidnapping takes place, and such a person can be charged under the Section. It is the illicit nature of the intercourse for which the kidnapping or abduction takes place that constitutes the aggravation of the offence and not the priority in point of time of such intercourse. (*Divatia, J.*) EMPEROR *v.* LAKSHMAN BALA. **59 Bom 652=158 I C. 1048=36 Cr.L J. 1509=8 R.B 149=37 Bom.L R. 176=1935 Cr.C 490=A.I.R 1935 Bom. 189.**

———**S. 366**—*Construction — "Seduction"—Meaning —Woman who has already surrendered her chastity—Abduction of—Offence.*

There can be 'seduction" within the meaning of S. 366, even in the case of a woman who had at one time surrendered her chastity, provided that at the time of the adduction she had returned to a life of chastity. "Seduction" does not mean "inducing a girl to surrender her chastity for the first time." (*Subhedar, A J.C.*) LOCAL GOVERNMENT *v* BALIRAM, ETC. **160 I.C. 255=37 Cr.L.J. 270=8 R.N. 169=18 N.L.J. 49.**

———**S. 366**—*Construction—"Will"—Reference.*

The 'will' referred to in the first part of S. 366, means the will of the girl and not the will of her guardian. Where the Judge said "the girl being a minor can have no will of her own in law and that in law her will was presumed to be the same as her guardian's will,"

Held, that there was a misdirection to the jury vitiating the trial. (*Lord Williams and Patterson, JJ.*) FULCHAND TEPRIWALLA *v.* EMPEROR. **I.R. 1932 Cal. 382=137 I.C. 819=33 Cr.L.J. 512=36 C.W.N. 49= A.I.R. 1932 Cal. 442.**

———**S. 366**—*Essentials of offence.*

Under S. 366, I.P. Code, the object of the abduction must be an enforcement or compulsion or seduction to illicit intercourse. The section is inapplicable to a case where the idea of the accused is to bring such influence to bear on the woman or her family that a certain case which is pending ugainst him would be withdrawn or seriously prejudiced. (*Kendall, J.*) NARAIN *v.* EMPEROR. **155 I.C. 662=36 Cr L J. 826=7 R A. 969= 1935 A.L.J. 670=1935 A. Cr.C. 143=1935 A.W R. 695=1935 Cr.C. 664=A.I.R 1935 All. 665.**

———**Ss. 366 and 366-A**—*Essentials of offence—Abduction of married woman.*

The essential ingredient of an offence under S. 366 or S. 366-A is that the accused intended or knew that it was likely that the abducted woman might or would be

PENAL CODE (1860), S. 366.

compelled to marry a person against her will or that she might or would be forced or seduced to illicit intercourse. An offence under S. 366 is not committed where a married woman is abducted from her husband's home. (*Bisheshwar Nath and Nanavutty, JJ.*) EMPEROR *v.* PARAG. **I.R. 1933 Oudh 77=141 I.C. 741 =34 Cr L J. 220=9 O.W.N. 1181=1933 Cr.C. 85= A.I.R. 1933 Oudh 45.**

———**S. 366**—*Essentials of offence—Intention to take away.*

In order that an offence under S. 366 may be proved it is necessary to show that the girl or woman had been kidnapped or abducted from lawful guardianship. A man who commits sexual intercourse with a girl in a field near her own house without having any intention of taking her away with him is not guilty of an offence under S. 366. (*Pullan. J.*) EMPEROR *v.* ABDUL. **1932 A.L J. 776=13 L R. 140 (Cr.)=34 Cr.L.J. 100 =141 I.C. 127=L R. 13 All. 127=I.R. 1933 All. 59 =1932 Cr C 698=A.I.R. 1932 All. 580**

———**Ss 366 and 511**—Following a girl in motor car —Attempt to snatch her gold chain—Offenced under S. 366/511. *See* CR. P. CODE, SS. 436 AND 437. **A.I R. 1933 Rang. 214.**

———**S 366**—*Gist of offence – Intention of accused.*

The intention of the accused is the basis and the gravamen of an offence under S. 366. In considering whether an offence has been committed under this section, the volition, the intention and the conduct of the woman are *nihil adrem* except in so far as they bear upon the intent with which the accused kidnapped or abducted her. If the accused kidnapped or abducted the woman with the necessary intent, the offence is complete whether or not the accused succeeded in effecting his purpose, and even if in the event the woman in fact consented to the marriage or the illicit intercourse taking place. (*Page, C. J., Das, Mya Bu, Brown and Dunkley, JJ.*) KHALILUR RAHMAN *v.* EMPEROR. **11 Rang. 213=I.R. 1933 Rang. 81=143 I C. 872= 34 Cr.L J. 696=1933 Cr C. 573 (2)=A.I.R. 1933 Rang 98 (F.B).**

———**S. 366**—*Kidnapping girl from lawful guardianship of husband—Proof of marriage—Duty of prosecution.*

In a charge of kidnapping a girl from the lawful guardianship of her husband, it is the duty of the prosecution to prove a binding and legal marriage between the girl and her alleged husband. If no marriage is proved, the prosecution will fail. (*Kendall, J.*) MST. WASIMA *v.* EMPEROR. **156 I C. 914=8 R A 56=36 Cr.L.J 1031=1935 A.W.R 515=1935 A.Cr.C. 115= 1935 Cr.C. 592=A.I R. 1935 All. 566.**

———**S. 366**—*Offence—Criminal intent—If essential.*

Mere abduction without criminal intent of one of the kinds specified in the Penal Code is not recognized as an offence. (*Abdul Rashid, J*) NURA *v.* EMPEROR. **151 I C. 741 (2)=7 R.L. 191=35 Cr L J. 1386=1934 Cr C. 458=A.I.R. 1934 Lah 227.**

———**S. 366**—*Offence under—Absence of marriage—Duty of prosecution to prove.*

When the law presumes the affirmative, then the negative is to be proved. Thus where it is admitted by the complainant that there had been sexual intercourse between a man and a woman, the mere cohabitation affords an inference of greater or less strength that a marriage has been solemnized between them. The law therefore presumes against vice and immorality and on this ground the presumption is strongly in favour of marriage. Hence under S. 366, it is for the prosecution to prove the negative of this presumption, *viz.*, that the man and woman were not married. (*Ferrers, J.C. and*

PENAL CODE (1860), S. 366.

Mehta, A.J.C.) SULTAN *v.* EMPEROR. **28 S.L.R. 285=151 I C 984 · 7 R.S. 74=1934 Cr.C. 960=36 Cr L.J. 62 (2)=A I.R. 1934 Sind 119.**

——**S. 366**—*Offence under—Hindu brother getting sister married without mother's consent.*

Under the Hindu Law, the eldest brother of a girl is the person who has the right to arrange for her marriage, if the father is not alive. His right is superior to that of a mother. He cannot, therefore, be convicted under S. 366, I P. Code, for getting his sister married without the mother's consent, merely because the girl afterwards says that she was not a consenting party. (*Allsop, J.*) NEK RAM *v.* EMPEROR. **158 I C 1047=8 R.A. 363=36 Cr.L.J. 1498=1935 A Cr C 200=1935 A W.R 939=16 L.R. 62 (Cr)=1935 Cr.C. 1137=A.I.R. 1935 All. 920.**

——**S. 366**—*Offence under—Need for proof of deceit.*

There must be some reliable and convincing evidence, from which it can be unmistakably inferred that a person has been guilty of deceitful conduct before he can be convicted under S. 366 for abducting a woman with the intention, knowledge or purpose mentioned therein. (*Agha Haidar, J.*) UMRA *v.* EMPEROR. **I.R 1931 Lah. 133 129 I.C 197=32 Cr.L J. 258=32 P L R. 101=1930 Cr C. 1185 - A.I.R. 1930 Lah. 1024.**

——**S 366**—*Offence under—Proof of age of girl—Onus of prosecution.*

In a prosecution for an offence under S 366 it is for the prosecution to establish that the girl was under 16 years of age (*Walker, J.*) NATHU *v.* EMPEROR. **I.R. 1931 Lah. 800=133 I.C. 560=32 Cr.L.J. 1041 (2)=32 P.L.R. 98=1931 Cr C. 641=A.I.R. 1931 Lah. 401.**

——**S. 366**—*Removal of minor daughter from father's custody by mother and accused to have girl married against his wish.*

A mother cannot have the custody of her minor children adversely to that of the father and ordinarily the custody of the mother is the custody of the father. Hence where the mother and the accused take the minor daughter from the father in order to marry her without the father's consent and against his wish, the act amounts to taking out of the keeping of the lawful guardianship of the father and the accused is guilty. A. I. R. 1925 C. 578 and 8 C. 969, Rel on; 1 W. R. 348, Dist. (*Nanavutty, J.*) HULLA *v.* EMPEROR. **6 R O. 297 - 1934 Cr C. 259=147 I C. 670=35 Cr.L. J. 469=11 O.W.N. 30 - A I.R. 1934 Oudh 89.**

——**S. 366-A**—*Construction—'Induces' — Meaning of.*

To induce means "to lead into." It connotes a leading of the woman in some direction in which she would not otherwise have gone. There must be a change of mind caused by an external pressure of some kind. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) ALLARAKHIO *v.* EMPEROR. **152 I C. 1061=36 Cr. L J 231 (2)=7 R.S. 110=1934 Cr.C. 1266=A.I R 1934 Sind 164.**

——**S 366 A**—*Continuing offence—Forum for prosecution.*

An offence under S. 366-A is a continuing offence. Where the offence and abetment are committed at different places by the participants the accused may be jointly tried in the place where the offence was first committed. (*Mears, C J. and Sen, J.*) EMPEROR *v.* NANHUA DHIMAR. **53 All. 140=I.R. 1931 All. 358=131 I C 246=32 Cr L.J 690 (2)=12 L R. 18 (Cr.)=1930 A.L.J. 1485=1931 Cr.C. 127=A.I.R. 1931 All. 55.**

PENAL CODE (1860), S. 368.

——**S. 366 A**—*Offence under—Accused believing that girl was unmarried—Effect.*

The absence of evidence that the accused knew that the girl was married would not affect his criminal liability. (*Agha Haidar, J.*) KESAR MAL *v.* EMPEROR. **I R 1932 Lah. 512=138 I.C. 597=33 Cr L J 673=33 P.L R. 727=1932 Cr.C. 719=A.I.R. 1932 Lah. 555.**

——**S. 366 A**—*Offence under—Inducing girl between 16 and 18 to leave residence—Object being illicit intercourse.*

The person who induces a girl of an age between the years of 16 and 18 without force or fraud to go from any place with the intention that she will have illicit intercourse with himself does not commit any offence. The new section however makes it an offence in the case of such girl if she is induced by a person to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person. (*Rankin, C.J. and Costello, J.*) ABBAS BAHARA *v.* EMPEROR. **I.R. 1933 Cal 261=142 I C 308=34 Cr L J 341=37 C. W.N. 317=1933 Cr C. 498=A.I R. 1933 Cal. 362**

——**S 366 A**—*Offence under—When complete.*

The offence under S. 366-A is complete when the accused have induced the minor to leave her place and what happens subsequently does not constitute a fresh offence. (*Agha Haidar, J.*) KESAR MAL *v* EMPEROR. **I.R 1932 Lah. 512=138 I C. 597=33 Cr L.J. 673=33 P.L.R. 727=1932 Cr C. 719=A.I.R. 1932 Lah. 555.**

——**Ss. 366-A, 372 and 376**—*Order regarding custody of minor girl after trial is over—Jurisdiction.*

Where the Sessions Judge accepted the majority verdict of not guilty given by the jurors in respect of the offences alleged to have been committed by the accused of a minor girl and purporting to act under his inherent powers passed an order that she should be kept in a Refuge or Home till the legality of her marriage either with the complainant or the accused was established in Civil Court

Held, that there was no justification for such a direction after the trial was over and the order made was wholly without jurisdiction. (*Guha and Bartley, JJ.*) KHER SINGH *v.* HARI PUNJABI. **152 I C. 973=36 Cr.L J 231 (1)=7 R C. 338 - 38 C.W.N. 1211=1934 Cr C. 1164=A.I.R. 1934 Cal. 756.**

——**Ss 366-A and 498**—Prosecution and charge under S. 366-A—Husband giving evidence though he gave no complaint—Conviction under S. 498, bad. *See* PENAL CODE, SS. 496 AND 366-A **A.I.R. 1933 All. 626.**

——**S. 368**—*Conviction under—Proof required.*

To sustain a conviction under S. 368, I.P. Code, it is not enough to show that the accused was concealing or confining in his house the girl who was kidnapped or abducted. It must further be proved that he knew that she had been kidnapped or abducted. (*Kendall, J.*) KHAZAN SINGH *v.* EMPEROR. **157 I.C 168=8 R.A. 126=36 Cr.L.J. 1089=1935 A.W.R. 788=1935 A. Cr C 156.**

——**S. 368**—*'Knowledge'—Meaning.*

Knowledge means the state of mind entertained by a person with regard to existing facts which he has himself observed or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. Held on the facts that knowledge could not be inferred. (*Raza and Smith, JJ.*) EMPEROR *v.* ZAMIN. **1932 Cr C. 60=136 I.C 243=33 Cr. L.J. 275=I R. 1932 Oudh 99=8 O.W.N. 1325=A. I.R. 1932 Oudh 28.**

PENAL CODE (1860), S. 368.

——**S. 368**—*Wrongfully concealing kidnapped girl for forcing her to illicit intercourse—Offence, if exclusively triable by Court of Session.*

An offence under S. 368, I.P. Code, is not exclusively triable by a Court of Session even though the prosecution case is that the kidnapped or abducted girl was wrongfully concealed for the purpose of forcing her to illicit intercourse. No doubt, in such circumstances, the accused would be liable to punishment in the same manner as an accused under S. 366, I.P. Code, an offence under which is exclusively triable by a Court of Session. But the words used in S. 368 are "shall be punished in the same manner" and not "shall be *tried* and punished in the same manner". (*Bajpai, J.*) SARNAM SINGH *v.* EMPEROR. **152 I.C. 550 = 36 Cr. L J. 117 = 1934 A L J. 1234 = 1935 Cr C. 105 = 7 R. A. 360 = 4 A.W R. 949 = A.I R. 1935 All. 63.**

——**S. 372**—*Scope—Selling woman as mistress—Offence if constituted.*

S. 372 penalises the selling of a woman under the age of 18 years with intent that such person shall be employed or used for the purpose of prostitution or illicit intercourse. To sell a woman as a mistress comes within the section as that is an immoral purpose. (*Bennet, J.*) GIRDHARI *v.* EMPEROR. **6 R A 616 = 147 I C. 1102 = 35 Cr L.J. 571 = 1934 Cr.C. 408 = A.I. R. 1934 All 324.**

——**S. 373**—*Age of girl—Strict proof by prosecution.*

On a charge under S. 373, it is incumbent on the prosecution to prove beyond a shadow of doubt that the girl is under the age of 18 years. (*Lort Williams and S.K. Ghose, JJ.*) BHOLA SARDAR *v.* EMPEROR. **138 I.C. 111 = 33 Cr.L J. 553 = I R. 1932 Cal. 414 = 35 C. W.N. 316 = A I R. 1932 Cal. 417.**

——**S 373**—"*Obtains possession*"—*Meaning of.*

To bring a case within S. 373, possession need not be obtained from a third party. A person who steals a minor girl under eighteen years of age with the requisite intention should be held to have obtained possession of such minor within S. 373, 45 Bom 529, Foll.; 5 M H C. R. 473 (F.B.), Diss. from. (*Beaumont, C.J. and Barlee, J.*) EMPEROR *v.* BHAG CHAND. **58 Bom 498 = 151 I.C 877 = 7 R.B. 89 = 35 Cr L.J. 1437 = 36 Bom L.R. 379 = 1934 Cr.C. 651 = A I R 1934 Bom. 200.**

——**S. 373**—'*Possession*'—*Meaning of.*

Possession in S 373 indicates possession with a power of disposal. It is something more than such possession as is obtained for the purpose of a single act of sexual intercourse Where, however, the girl had been in the complete control of the accused for a week, the accused had possession of the girl within the meaning of the section. 5 M.H.C.R. 473 (F.B.), Ref. (*Beaumont, C J. and Barlee, J.*) EMPEROR *v.* BHAG CHAND. **58 Bom. 498 = 151 I.C. 877 = 7 R B. 89 = 35 Cr L.J 1437 = 36 Bom.L.R. 379 = 1934 Cr.C. 651 = A.I.R 1934 Bom. 200.**

——**S. 376**—*Age of girl—If material—No suggestion that sexual intercourse was with girl's consent.*

In the case of an offence under S. 376, where there is no suggestion that the sexual intercourse was with the consent of the girl, the question whether she is over or under 14 years of age is not of vital importance. (*Kentall, J.*) HARIHAR *v.* EMPEROR. **157 I C 147 = 8 R.A. 111 = 36 Cr.L J 1095 (2) = 1935 A.W.R. 597 = 1935 A. Cr.C. 123 = 1935 Cr.C. 595 = A.I.R. 1935 All 590.**

——**S. 376**—*Attempt to commit rape—Boy of ten, if can be convicted.*

PENAL CODE (1860), S. 376.

A boy of ten who has attained sufficient maturity of understanding to judge the nature and consequences of his conduct can be convicted of an attempt to commit rape. A.I.R. 1918 L.B. 96 and 37 A. 187, Rel. on. (*Dunkley, J.*) EMPEROR *v.* NGA NYUN. **159 I C 450 = 1935 Cr C. 1116 = 37 Cr.L.J. 94 = 8 R R. 267 = A.I.R. 1935 Rang. 393.**

——**Ss. 376 and 511 and S. 354**—*Attempt at rape—Prevention by intervention of other people—Offence.*

The accused got hold of a girl and attempted to have intercourse with her. The girl resisted and her screams attracted other people and on their arrival, the accused ran away.

Held, that the accused was guilty of an offence under S. 376/511 and not merely of a 'preparation' under S. 354, of the Penal Code. (*Tek Chand, J.*) BHARTU *v.* EMPEROR. **34 P L R. 832 = 147 I C. 560 = 6 R L. 420 = 35 Cr L J. 432 (1) = 1933 Cr.C. 1515 (1) = A.I R. 1933 Lah. 1002 (1).**

——**Ss. 376 and 511**—*Attempt to commit rape—Proof of offence.*

In a prosecution under S. 376 & 511, I. P. Code, for attempting to commit rape on the complainant, it is unsafe to convict the accused on the testimony of the prosecution witnesses who cannot be characterised as impartial witnesses especially when the prosecution version of the facts is impossible and no marks of injury are found on the person of the complainant who is a woman of loose morals. (*Iqbal Ahmad, J.*) JEEWAN *v.* EMPEROR. **1935 A.W R. 1404 = 1935 A Cr.C. 299.**

——**S. 376**—*Charge of rape—Medical examination of complainant—Duty of police officer—Complainant's omission to offer herself for examination—Effect.*

When a charge of rape is made it is the duty of the police officer before whom the woman alleged to have been raped is produced to ask her whether she was willing to submit to a medical examination, although it may be doubtful whether such an examination would be of any value after several days of the occurrence in the case of a woman who had borne several children. The fact that the woman does not offer herself for medical examination cannot weigh against her, in a charge against her for making a false charge under S. 211, I P. Code (*Grille, O.J.C. and Pollock, A.J.C.*) LOCAL GOVERNMENT *v.* MT. GUJI. **1935 Cr. C. 339 = 17 N L J. 189 = A.I.R 1935 Nag. 69.**

——**S 376**—*Charge for sexual offence—Evidence.*

In cases arising out of a sexual matters when charges are made against a man by a woman, it is dangerous to convict upon her evidence. The jury should require corroboration of her story before they bring in a verdict of 'guilty'. The kind of corroboration required must be independent evidence. The statement of a witness that he saw the girl coming out of the house of the accused weeping may be relied on as corroboration. (*Lort Williams and M C. Ghose, JJ.*) NUR AHMED *v.* EMPEROR. **155 I C. 584 = 1934 Cr C. 23 = 7 R.C. 600 = 36 Cr L J. 796 = 62 Cal. 527 = 38 C W.N. 108 = A I.R. 1934 Cal. 7.**

——**S. 376**—*Consent of minor girl—Effect.*

A man who has intercourse with a minor girl even with her consent is guilty of an offence under S. 376. (*Pullan, J.*) EMPEROR *v.* ABDUL. **141 I.C 127 = I.R 1933 All. 59 = 34 Cr L J. 100 = 1932 A.L J. 776 = 13 L R. 140 (Cr.) = 1932 Cr.C. 698 = A.I.R. 1932 All. 580.**

——**S. 376**—*Evidence—Statement of girl raped—Need for corroboration.*

In a case of rape, it is the duty of the Judge to warn the jury not to accept evidence of the girl raped unless

PENAL CODE (1860), S. 376.

they find that it is corroborated in some material particular implicating the accused. He should also tell them that if in spite of his warning they come to the conclusion that they believe the girl and think the accused guilty, then they have the right to convict him on her uncorroborated evidence. In such cases before a jury are justified in accepting the testimony of the complainant, they should be satisfied that she is a witness of truth and if they find that she is a person of bad or loose character they will be reluctant to accept her evidence. (*Lort Williams and Henderson, JJ.*) SURENDRA NATH DAS *v.* EMPEROR **1933 Cr C. 1493=147 I C 999 (2)=6 R C. 381=35 Cr.L.J. 508=38 C.W.N. 52=A I.R. 1933 Cal. 833.**

——**S. 376**—*Offence under—Proof—Solitary statement of complainant—Conviction for rape—Whether conviction for adultery can be substituted for.*

A conviction for the offence of rape cannot be supported upon the solitary statement of the complainant, namely, the woman alleged to have been raped. A conviction for adultery cannot be substituted for a conviction for rape. (*Nanavutty, J.*) BAJI *v.* EMPEROR. **I.R 1933 Oudh 153=143 I.C. 73=34 Cr.L.J. 496=10 O.W.N. 107=1933 Cr.C. 318—A.I.R. 1933 Oudh 163.**

——**S. 376**—*Offence under—Proof—Uncorroborated testimony of girl.*

In the absence of any corroboration, it would not be proper to convict a person under S. 376, on the bare testimony of the girl alleged to have been raped. (*Din Mahomed, J.*) AMAR SINGH *v.* EMPEROR. **153 I. C. 894=1935 Cr C. 7=7 R L 470=36 Cr.L.J. 428=35 P.L R. 638—A I.R. 1935 Lah. 8.**

——**S. 376**—*Sentence—Offence committed with great brutality—Exemplary punishment.*

Where the act of the accused was an extremely high-handed one and they were armed with deadly weapons and by a show of brute force they overawed the girl and dragged her away practically at the point of the gun to some remote hills and raped her in circumstances of great brutality,

Held, that exemplary punishment should be given. Sentence enhanced from three to five years' rigorous imprisonment (*Agha Haidar, J.*) MIAN GUL *v* EMPEROR. **I R 1932 Lah 422=138 I.C 191=33 Cr. L.J. 564=33 P.L R. 679=1932 Cr.C. 621=A.I R. 1932 Lah. 483**

——**S 376**—*Vulval penetration—Sufficiency.*

Vulval penetration with or without violence is as much rape as vaginal penetration. It is not necessary that the hymen should be ruptured in every case. The statute merely requires medical evidence of penetration and this may occur and the hymen remain intact. (*Din Mahomed, J.*) MT. JANTAN *v.* EMPEROR. **36 P L.R. 35=1934 Cr C. 1125=153 I C. 218=7 R.L. 404=36 Cr.L.J. 310—A.I R. 1934 Lah. 797.**

——**S. 377**—*Attempt to commit sodomy—Offence—Requirements.*

The offence made punishable under S. 377, requires that penetration, however little, should be proved strictly. Thus an attempt to commit this offence should be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of accused in that particular direction ought to be proved strictly. A mere preparation for the operation should not necessarily be construed as an attempt. Where there was an intention on the part of the accused to satisfy his lust by a carnal intercourse against the order of nature and he made every prepartion to satisfy that lust, but before he could thrust his organ in he spent himself

PENAL CODE (1860), S. 378.

Held, he had not done any act which might be construed as attempt to commit the offence of sodomy. (*Mehta, A.J.C.*) NOWSHIRWAN IRANI *v* EMPEROR. **28 S L R 330=7 R.S 189=155 I.C. 435=36 Cr.L. J. 718=1934 Cr.C. 1411=A.I.R. 1934 Sind 206.**

——**S. 377**—*Compliance—Duty of Court.*

All Subordinate Courts should comply fully and carefully with the requirements of S. 377. Every officer, who has a judgment to write, will do well to set forth the points for decision in such shape that at a first glance it may be apparent both to himself and also to any appellate tribunal that nothing which is material has been overlooked. (*Frrers, J.C. and Astone, A.J. C.*) UDHARAM *v.* EMPEROR. **I R. 1932 Sind 170=140 I.C 23=33 Cr L.J. 900=1932 Cr.C. 587=A I. R. 1932 Sind 143.**

——**S. 377**—Prosecution under—Complainant shown to be willing party to offence—Conviction on uncorroborated testimony of—Sustainability. *See* EVIDENCE ACT, SS. 144, ILL (*b*) AND 133. **61 C.L J. 583=39 C.W.N. 1051.**

——**S. 377**—*Sentence.*

Sodomy is one of those offences for which there can be hardly any extenuating circumstances; and even if so, it cannot justify an over-lenient sentence of 4 months' rigorous imprisonment. Ordinarily such cases are committed to the Sessions Court so that the accused might receive condign punishment, the powers of a First Class Magistrate being restricted to giving only two years. In the present case, having regard to S. 439 (*iii*), Cr. P. Code, the High Court felt constrained to limit its powers and enhance the sentence to two years' rigorous imprisonment. (*Ferrers, J C. and Mehta, A. J.C.*) EMPEROR *v.* MAHOMED YOUSIF MAHOMED. **I R. 1933 Sind 131=143 I C 605=34 Cr.L.J. 618=1933 Cr C. 215=A I.R. 1933 Sind 87.**

——**S 377**—*Unnatural offence—Sexual intercourse with animal.*

Where the accused was proved to have had carnal intercourse by placing his penis inside the nostril of a bullock,

Held, that he was guilty of an offence under S. 377. (*Abdur Qadir, J.*) KHANDU *v.* EMPEROR. **150 I.C. 320=6 R.L. 851 (1)=95 Cr.L.J 1096=35 P.L.R. 73—1934 Cr 489=A I R 1934 Lah. 261.**

——**S. 378**—*Absence of* bona fide *claim—No finding as to absence of belief of right—Conviction—Sustainability.*

The accused had no *bona fide* claim of right, but there was no finding that they did not *bona fide* believe that they had such a *bona fide* claim.

Held, that the accused were not guilty of theft. A.I. R. 1917 Cal. 648, Foll. (*Lort Williams and Jack, JJ.*) MATI LAL DE *v.* EMPEROR. **159 I C 36=8 R. C. 256=1935 Cr.C 1117=37 Cr.L J. 1=1935 Cr.C. 1117=A.I.R 1935 Cal. 675.**

——**S. 378**—Essentials of offence—Dishonest intention—Intention to convert to one's own use not necessary. *See* PENAL CODE, S. 24. **A.I R. 1931 Pat. 337 (2).**

——**S. 378**—*Jungle in Dhalbhum estate in Patna—Raiyat paying jungle dues and taking forest produce openly—No dishonest intention.*

Where a raiyat in the Dhalbhum estate in Patna has paid his jungle dues, and takes away forest produce from the jungle of the estate, outside the boundaries of the village for *bona fide* domestic and agricultural use, in the time-honoured manner without permit and did so openly and not stealthily, there is no trace of dishonest intention to bring the raiyat within the purview of the definiton of 'theft' in S. 378. In such a case the consideration of the expediency of preserving jungle is irrele-

PENAL CODE (1860), S. 378

vant and only tends to judicial error. (*Macpherson, J.*) ISWAR PANDA *v.* EMPEROR. **130 I.C. 806 = 32 Cr.L. J. 617 = 12 Pat.L T. 577 = 1931 Cr.C. 227 = A.I.R. 1931 Pat. 99.**

———**Ss. 378 and 379**—*Offence—Ingredients—Removal from temporary possession—Revenue Inspector holding up and detaining carts of fuel without license under mahazar and sending to Amildar in charge of village officials—Forcible driving away of carts—offence.*

Accused were driving carts loaded with full. A Revenue Inspector along with the village Patel and other village officials detained the carts, as the fuel under transit was not covered by licence, under a mahazar and sent the carts with a report to the Amildar in charge of the village servants. When they were thus being taken to the Amildar, accused forcibly drove the carts away in spite of protest by the village servants.

Held, that the act of the accused in driving away the carts amounted to theft punishable under S. 379, I. P. Code, as the removal was from the temporary and lawful custody of village servants, and as the intention of the accused in so removing must be deemed to be *prima facie* dishonest. (*Shankaranarayana Rao, J.*) GANGI REDDY *v.* GOVERNMENT OF MYSORE. **13 Mys.L J. 244 = 40 Mys H C.R. 119.**

———**S. 378**—*Offence under—Property in crops not passing from judgment-debtor—Removal of produce, if punishable.*

Where attachment of movable crops is made merely by beat of drum and the procedure prescribed by O. 21, R. 44, C. P. Code, is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into the possession of the Court. If, therefore, the judgment debtor's relatives cut and remove on behalf of and with the consent of the judgment-debtor such crops, they cannot be held guilty of theft. (*Viamtullah, J.*) RAM SAKAL SINGH *v.* EMPEROR. **I R. 1931 All 203 = 32 Cr.L.J. 437 = 129 I.C. 715 = 1931 Cr.C. 208 = A.I.R. 1931 All. 142 (1).**

———**S. 379**—*Assertion of limited right to property.*

A man may be guilty of theft even if he be asserting a right to property which he believes to be a valid right. He will commit theft, if in the assertion of such right he does something which he knows that he has no right to do. For example, if the accused, on his own showing, was only entitled to a 12 annas share but he removed the entire produce, he is guilty of theft of the 4 annas share. A.I.R. 1928 Rang. 113, Ref. (*Ferrers, J. C. and Mehta, A. J. C.*) JIANDALSHAH *v.* EMPEROR. **I R 1933 Sind 106 = 142 I.C. 584 = 34 Cr.L.J. 366 = 1933 Cr.C. 218 = A.I.R. 1933 Sind 90.**

———**S. 379**—*Attachment of buffaloes under decree—Rescue of buffaloes from amin's custody by real owners—No offence.*

Where certain buffaloes were attached under a decree by an amin and handed over to two persons on their furnishing security and the respondents rescued the buffaloes and it was found by the Court that the latter in fact belonged to the respondents and not to the judgment debtor,

Held, that the respondents were not guilty of theft. 48 A. 368, Not Foll. (*Curgenven, J.*) RAMASWAMY NAICKEN *v.* DANDAKARAN. **1933 M.W N. 110 = 38 L W. 875 = 1933 Cr.C. 1517 = 147 I.C. 738 = 6 R M. 388 = 35 Cr.L.J. 673 = A.I.R. 1933 Mad. 840 = 65 M. L.J. 732.**

———**S. 379**—*Auction-purchaser of holding—Delivery of possesson—Effect of—Removal of bamboo clumps by persons formerly in possession.*

PENAL CODE (1860), S. 379.

After the auction-purchaser, at a rent execution sale, of a holding took delivery of possession, the accused cut and removed certain bamboo clumps standing on the land and contended that the delivery of possession of the land did not pass the right to possession over movable property on the land,

Held, that when the purchaser-complainant acquired the land, he acquired the bamboos also and that the accused were properly convicted under S. 379. (*Rowland, J.*) JAGMOHAN SINGH *v.* EMPEROR. **142 I.C. 504 = I. R. 1933 Pat. 151 (1) = 34 Cr L.J. 355 = 13 Pat.L.T. 519 = A.I R. 1932 Pat. 344.**

———**S. 379**—Bona fide *claim—Removal of property—Claim unfounded in law.*

The removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and fact, does not constitute theft, although a colourable pretence to obtain or keep possession of property would not avail as a defence. Whether a claim is *bona fide* or not must be determined upon all circumstances of the case and a Court ought not to convict unless it holds that the claim is a mere colourable pretence (*Ferrers, J. C. and O'Sullivan, A. J. C.*) BHURASING *v.* EMPEROR **29 S.L R 121 = 158 I C. 282 = 36 Cr.I. J. 1310 = 1935 Cr.C. 494 = A.I.R. 1935 Sind 115.**

———**S. 379**—Bona fide *claim—Interference from open act.*

Thefts are not always committed secretly. And *bona fide* claim cannot be inferred from the fact that the accused acted openly while cutting the timber not owned by them. (*Dhavle, J.*) SHIB LAL DAS *v.* EMPEROR. **36 Cr.L.J. 120 = 152 I.C. 477 = 7 R.P. 202 = 1934 Cr. C. 1075 = A.I R. 1934 Pat. 491.**

———**S. 379**—Bona fide *claim—Unlawful act done in exercise of—Sentence.*

Where in asserting a right to some property which a person believes to be good, he does something which he knows he has no right to do, *e.g.*, he takes the law into his own hands and removes the property in question from the possession of his opponent who claims the property for himself, he is guilty of theft, though the technical nature of the offence may be taken into account when passing the sentence. (*Addison, J.*) GHULAM MAHOMMAD *v.* EMPEROR. **6 I.R. (Lah.) 19 = 144 I C 718 = 34 Cr L.J. 843 (1) = 34 P.L.R. 276 = 1933 Cr.C. 737 = A.I R 1933 Lah. 481 (1).**

———**S. 379**—Charge under—Effect of S. 34—If makes distinct charge. *See* PENAL CODE, S. 34. **14 Pat. 225 = 16 Pat L.T. 380 = A I.R. 1935 Pat 263.**

———**S. 379**—Crops—Court sale—Symbolical delivery of possession to purchaser—Third party in actual possession—Removal of crops by purchaser—Offence—Plea of *bona fide* claim of right. *See* C P. CODE, O. 21, RR. 96 AND 100. **39 C.W.N. 1306.**

———**S. 379**—*Crops — Removal of crops illegally attached.*

Where the attachment of crops is illegal by reason of non-compliance with the formalities prescribed by O. 21, R. 44, C. P. Code, the property does not pass from the possession of the judgment-debtor into the possession of the Court and a person who removes the crops with the consent of the judgment-debtor cannot be convicted of theft. (*Baipai, J.*) BENI *v.* EMPEROR. **57 All. 660 = 7 R.A. 499 = 153 I C. 428 = 1935 A.L.J. 63 = 36 Cr. L J. 340 = 1935 A.Cr C 14 = 1935 A.W.R. 59 = 1935 Cr.C 257 = A.I.R. 1935 All. 214.**

———**S. 379**—*Crops—Theft of—Acquittal on the ground of* pattis *not having been demarcated—Question of possession not gone into—Validity of acquittal.*

The accused *N* and others had been convicted under S. 379 for theft of a crop grown by *R* on land included

PENAL CODE (1860), S. 379.

in his *patti*, of which he was in possession. The conviction was set aside on appeal on the ground that the plot in question was in the *patti* of *R*.

Held, that the acquittal by the lower appellate Court was erroneous since there had been an earlier demarcation of the *pattis* of the complainant and the accused and the questions as to possession and who grew the crop not having been considered by the Court, the acquittal should be set aside and the case remanded. (*James, J.*) KESHO PRASAD SINGH *v.* NANDJI SINGH. **6 R.P. 386 (2)—147 I C. 1017=35 Cr L.J. 537—1934 Cr.C 671=A.I.R. 1934 Pat. 302.**

———**S. 379**—*Evidence—Information leading to discovery of stolen property.*

When the only incriminating circumstance against an accused is that his information led to the discovery of stolen property from a place (a well) not belonging to him he cannot be convicted either of being a thief or a receiver of stolen property. The mere fact that the accused had a previous conviction 20 years before or that he had gone to the house of the complainant previous to the house breaking "to sell mangoes" in his professional rounds is not at all a suspicious circumstance to warrant his conviction. (*Subhedar, A.J.C.*) MANGALYA RAGHO *v.* EMPEROR. **6 R.N. 164=147 I C. 1188=35 Cr.L J 581—16 N.L J. 246=1934 Cr.C. 202—A. I.R. 1934 Nag 54.**

———**S** 379—Fishing in private waters—Fish not in exclusive possession of complainant—Nature of offence—Not liable for theft but under S. 3 of Bengal Private Fishery Act. *See* BENGAL ACT FOR THE PROTECTION OF FISHING IN PRIVATE WATERS (II OF 1889), S. 3. **35 C.W.N. 455=A.I.R. 1931 Cal. 358 (1).**

———**S. 379**—*Hire purchase—Payment of an instalment overlooked and machine seized under agreement—Mistake and no dishonest intention.*

Where the complainant had obtained a Singer Sewing Machine under a hire-purchase agreement which provided that in the event of default of payment of an instalment, the company would be entitled to retake possession of the machine or its accessories and the employees of the company, overlooking the payment of an instalment due, had seized some of the parts of the machine under a *bona fide* mistake of fact, and were convicted under S. 379.

Held, that as there was no dishonest intention on their part, the conviction should be set aside. (*C. C. Ghose, A. C. J. and S. K. Ghose, J.*) MAHOMED ABDUL KHOVER *v.* ASGUR KHAN. **6 R C. 487=148 I.C. 892—35 Cr L J 761=58 C L J. 434.**

———**S. 379**—*Landlord—Right to complain.*

A landlord has no right to prosecute in respect of a theft of trees in the possession of his tenant (*Sundaram Chetty, J.*) NATARAJA MUDALIAR *v.* DAIVASIGAMANI MUDALIAR. **I.R. 1931 Mad. 541=131 I. C. 493=32 Cr L J. 757=1930 M.W.N. 914—1931 Cr C. 361=A I.R 1931 Mad 241.**

———**S 379** -Landlord and tenant—Trees in holding -Accused cutting and removing at landlord's instance without consent of raiyat -Offence. *See* LANDLORD AND TENANT—TREES. **16 Pat L T. 891.**

———**S. 379**—*Occupancy tenant—Cutting of trees in holding—Conviction—Legality—Possession.*

A tenant was prosecuted at the instance of his landlord for theft of a *bark* tree apparently included in his holding. The accused pleaded that as the tree stood on his *raiyati*, he had a right to cut it and remove the wood according to the village custom.

Held, the offence of theft being an offence against possession, and the tenant-accused being unquestionably

PENAL CODE (1860), S 379.

in possession of the tree, he could not be legally convicted for an offence under S. 379, I. P. Code.

Held, further, that where there may arise difficult questions of what a tenant may or may not do to trees standing on his holding, the criminal law is not the appropriate law to apply. (*Dhavle, J.*) RAM BRICH LAL *v.* EMPEROR. **159 I C. 346=16 Pat L T. 645=1935 Cr C. 1174=8 R P. 272=37 Cr.L J. 91 (1)=A. I R. 1935 Pat. 472**

———**S. 379**—*Presumption—Person found in possession of stolen property.*

Where a person is found in possession of stolen property shortly after it was stolen, the Court may presume, under S 114, Ill. (*a*), Evidence Act, that he is a thief, the presumption however is not to be made invariably. A Sessions Judge cannot therefore expunge the charge under S. 379, without going into evidence. (*Niamatullah, J.*) EMPEROR *v.* ZAHIR NAT. **150 I. C. 558=7 R A. 4—35 Cr L.J. 1092=1934 Cr C. 524 =A I.R 1934 All. 455 (2).**

———**Ss. 379 and 392**—*Removal of property after a quarrel.*

S. 392 contemplates that the accused should have, from the very start, the intention to deprive the complainant of the property and should for that purpose either hurt him or place him under wrongful restraint. Where the inception of the struggle was only a quarrel and it was at the end that the accused found a chance of taking the chaplis and the sheet of complainant in order to ensure the payment of the money due to him.

Held, the offence was one under S. 379 and not under S. 392. (*Mir Ahmad, A. J. C.*) MIR BAZ *v.* EMPEROR **155 I.C 952=7 R. Pesh 105=36 Cr.L. J. 894=1935 Cr.C. 350=A I.R 1935 Pesh. 49.**

———**Ss 379 and 411**—*Scope—Offences under—Nature of proof required—Alternative charges under against deaf and dumb person—Accused found with property alleged to be stolen—Offence.*

Accused, a deaf and dumb person was charged under S. 379, and alternatively under S. 411. The evidence was to the effect, that a suit case, which was the subject-matter of the charge, had been stolen from a railway compartment between two stations, *i. e.*, it was missing. Accused was found trying to force open the lock of the suit-case at the passenger-hall of a station situate between the two stations. Some time had elapsed between the alleged theft and the time at which the accused was found with the box. The trying Magistrate made signs to the accused but it was impossible to know whether the accused realised what the Magistrate was attempting to communicate to him

Held, that it was impossible on the evidence to come to the conclusion that the accused stole the suit case that as it was not shown that the accused knew that the suit-case was stolen, it was also impossible to hold him guilty of receiving stolen property, and that under the circumstances the accused ought to be discharged. (*Wort and Fazl Ali, JJ.*) EMPEROR *v.* A DEAF AND DUMB. **159 I C. 577 (2)=16 Pat. L.T 568=37 Cr.L J. 107 =8 R.P. 292=1935 Cr.C. 1168=A I.R. 1935 Pat. 451.**

———**S. 379**—*Servants acting under employer's orders—Proof of guilty knowledge.*

Where the istimrardar had pointed out to the servants of daristimrardar that they could not cut the tree without the permission of the istimrardar and that notwithstanding this, they went on cutting the tree.

Held, that to follow daristimrardar's orders in such circumstances was to take the risk of being visited with the consequences and that in cutting the tree, these men

PENAL CODE (1860), S. 379.

had the guilty knowledge required under S. 379. (*Dhavle, J.*) SHIB LAL DAS *v.* EMPEROR. **36 Cr L. J. 120 = 152 I.C. 477 = 7 R P. 202 = 1934 Cr.C. 1075 = A.I.R. 1934 Pat. 491.**

——**S. 379**—*Stealing property to bring pressure to restore other property—Offence.*

Nobody has the right to steal the property of another in order to bring pressure to restore other property. Where the accused stole the bullock of another who had stolen an ass in order to bring pressure to restore the ass.

Held, that offence was more than a purely technical offence though it was not an heinous one but that sentence of about three months would be suitable. (*Skemp, J.*) EMPEROR *v.* SALIHON. **1935 Cr C. 1059 (1) - 37 Cr L.J. 230 (1) = 160 I.C. 118 = 8 R L. 493 - A.I. R. 1935 Lah. 769.**

——**S 379**—Theft of electric energy—Persons authorised to prosecute. *See* ELECTRICITY ACT (1910), SS. 39 AND 50 **35 P.L.R. 758 — A.I.R. 1935 Lah. 191 (1)**

——**Ss. 379 and 390**—Theft when amounts to robbery. *See* PENAL CODE, SS. 390 AND 379. **A.IR. 1933 Lah. 407.**

——**S. 383**—*Valuable security—Promissory note executed by minor by force.*

A promissory note which is forced to be executed by a minor boy of force is a valuable security within the meaning of S. 383 read with S. 30. (*Macpherson, J.*) RAMNARAIN SAHU *v.* EMPEROR. **35 Cr.L J 123 - 15 P.L.T. 66 - 6 I R (Pat) 270 - 146 I C. 519 (1) = 1933 Cr.C. 1363 (1) - A I R. 1933 Pat 601 (1).**

——**S. 387**—*Putting a person in fear of death with a view to extortion.*

Where several persons were charged with house breaking, only one of them was shown to have threatened the occupant of the house with fear of death to induce him to deliver the keys of the iron safe and it was not shown that this was in furtherance of a common object of theft, a conviction of all of them for house breaking and extortion is not sustainable Where the evidence showed it was a petty affair and the outcome of a village quarrel, a conviction for criminal trespass would be sufficient (*Jackson, J.*) RAMANNA *v.* EMPEROR. **1931 M.W N. 129.**

——**S 387**—"*Uses*"—*Meaning of.*

The word "uses" in S 387 should not be confined merely to cutting, stabbing or shooting but also to carrying the weapon for the purpose of overawing the victims of the dacoity. 92 I.C. 750, Foll. (*Agha Haidar, J.*) NAGAR *v.* EMPEROR. **I R 1933 Lah. 10 - 140 I C 528 - 34 Cr L J. 45 - 33 P.L.R. 1081 = 1933 Cr.C. 115 - A.I.R. 1933 Lah. 35.**

——**S 390**—*Essentials of offence.*

It is necessary in order to convict the accused of the offence of robbery, that hurt or wrongful restraint should have been caused for the purpose of the theft. (*Beasley, C.J. and Walsh, J.*) DURAISWAMI NAICKEN *v.* EMPEROR. **I.R. 1931 Mad 695 - 133 I C. 7 - 32 Cr L J 973 = 34 L W. 349 = 1930 M W N. 1142 = 1931 Cr C. 545 = A I.R. 1931 Mad. 481 = 60 M.L.J. 691.**

——**Ss. 390 and 379**—*Theft when amounts to robbery—Hurt distinct from act of theft necessary*

In order that theft may amount to robbery, it must be shown that hurt was caused in order to commit the theft or in carrying away or attempting to carry away the property obtained by theft. The hurt contemplated must be a concious and voluntary act on the part of the thief for the purpose of overpowering resistance on the

PENAL CODE (1860), S. 395.

part of the victim, quite separate and distinct from the act of theft itself. A woman was sitting in a railway station waiting-room holding a bundle with her hands. Accused caught hold of the bundle and tried to run away with it. The woman however kept her grip on the bundle and was dragged 2 or 3 karams along with it as the accused made good his escape with it.

Held, that the hurt caused to the woman was only an accidental circumstance, that it was not caused voluntarily for committing theft and that accused was guilty only of theft but not of robbery. *Thomas Gnosil*, (1824) 1 C & P. 304 and *Edwards*, (1843) 1 Cox 32, Rel. on. (*Agha Haidar, J.*) KARMUN *v.* EMPEROR. **147 I C 99 = 6 R L 333 = 35 Cr.L J. 297 = 35 P.L.R. 186 = 1933 Cr.C. 648 = A I R 1933 Lah. 407.**

——**S. 391**—*Dacoity—Evidence as to identification.*

In cases of dacoity, evidence adduced as to inentification of dacoits ought not to be accepted too readily, but should be looked at with great caution. 4 O.L J. 83, Ref. (*Raza and Bisheshwar Nath, JJ.*) EMPEROR *v.* MAQBUL AHMAD KHAN. **7 Luck. 511 = I.R. 1932 Oudh 383 = 139 I C 751 = 33 Cr L J. 920 = 9 O.W.N. 3 = 1932 Cr C. 872 = A.I.R 1932 Oudh 317.**

——**S. 391**—*Essentials of offence — Five persons charged—One acquitted—Others also concerned—Conviction under S. 392—Propriety.*

Where the charge itself only charged five persons with the offence of dacoity and one of them was acquitted, but the Court believed that there were other persons concerned in the dacoity themselves committing robbery with violence, the offence is complete as the persons who were assisting them would bring up the number to five or more a conviction of the four persons under S. 391 is not improper. (*Beasley, C.J. and Walsh, J.*) RAHU *v.* EMPEROR. **1930 M.W.N. 1138.**

——**Ss 392 and 406**—*A giving money to B enclosed in envelope—B changing original envelope—Attempt to misappropriate—Technical offence—Sentence.*

A had enclosed some currency notes in a closed envelope and handed it over to *B* to write certain address on it. *B* tried to substitute another envelope in place of the original one and wrote the address on that envelope. *B* was charged under S 392 and was sentenced to 15 months' rigorous imprisonment

Held, that the offence of roberry was only technical and that *B* should really have been charged for attempting to criminally misappropriate the notes. The sentence was severe and hence should be reduced to one for six months' rigorous imprisonment. (*Rupchand and Mehta A.J.Cs*) RABU SABH *v.* EMPEROR. **I R. 1933 Sind 189 = 144 I C 427 = 34 Cr.L J. 802 = 1933 Cr. C 337 = A I R. 1933 Sind 139.**

——**S. 392**—Removal of property after a quarrel—Offence. *See* PENAL CODE, S. 379. **1935 Cr.C. 350 — A.I R. 1935 Pesh 49**

——**Ss. 392 and 75** *Sentence.*

Where the accused, an ex convict, has been charged with an offence under S. 392, read with S. 75, the sentence of seven years' rigorous imprisonment inflicted upon him is by no means too severe. (*Nanavutty, J.*) SHUBRATI *v.* EMPEROR. **6 R O. 366 = 147 I C. 1176 = 35 Cr L J. 566 = 11 O.W.N. 202 = A.I.R. 1934 Oudh 122 (1).**

——**S 395** — *Charge under—Number of persons taking part not shown to be five—Splitting of charge into two charges under S. 302 and S. 392—Permissibility.*

Where five persons were charged under S. 395 for dacoity but as there was no evidence of conspiracy, the Judge split the charge into two charges, one under S. 302 and another under S. 392 and convicted the accused,

PENAL CODE (1860), S. 395.

Held, although the original charge under S 395 contained also an incidental reference to a charge of murder, the accused should not have been convicted of murder without a specific charge under S. 302 and that the convictions should be set aside. (*Rankin, C.J., C. C. Ghose and S. K. Ghose, JJ.*) MADHUSINGH KAIVARTA *v.* EMPEROR, **36 C.W.N. 880=1933 Cr.C. 391=143 I.C. 14=I.R. 1933 Cal. 339=34 Cr. L.J. 524 (2)=A.I.R. 1933 Cal. 294 (S.B.).**

———**Ss. 395 and 109**—*Dacoity—Abetment of—Feeding dacoits.*

(*Obiter*) Although a person might not have taken part in the actual dacoity but if he actually met the band of dacoits just prior to the commission of the dacoity and brought them food, he is guilty of abetment. (*Dunkley, J.*) NGA PYAUNG *v.* EMPEROR. **6 R.R. 273=35 Cr.L.J. 863=148 I.C. 1064=1934 Cr.C. 243 =A.I.R. 1934 Rang. 30.**

———**S. 395**—*No resistance offered and no violence required—If offence ceases to be dacoity*

A dacoity in which no resistance is offered by the inmates seeing the large number of dacoits and so no violence required, does not on that account cease to be a dacoity and should not be treated as a theft. (*Pullan and Thom, JJ.*) RAM CHAND *v* EMPEROR. **55 All. 117=146 I C. 790—I.R. 1933 All. 142 (1)=34 Cr.L. J. 448—1932 A.L J. 1078=14 L.R. 6 (Cr.)=1933 Cr.C. 209 =A.I.R. 1933 All. 114.**

———**S. 395**—*Offence of dacoity—Evidence.*

Accused was convicted in connexion with a dacoity. No stolen property was recovered from him but some of it was given up by his step-father with whom accused was living. There was no other evidence against him.

Held, that he should not be convicted (*Smith, J.*) MAHABIR *v.* EMPEROR. **6 I.R. (Oudh) 175 (2)=146 I C. 708=10 O.W.N 842 =35 Cr.L.J. 165=1933 Cr. C. 1289 =A I R 1933 Oudh 423 (1)**

——— **S. 395**—*Offence under — Criminal intention essential.*

Where, though the accused had, strictly speaking, no right to detain the produce of the land, it appeared that they did so in the *bona fide* belief that they were justified in this action as no receipts were given to their satisfaction, *held*, that the requisite criminal intention for a charge under S. 395 had not been establish. (*Bhide, J.*) NURA *v* EMPEROR. **6 I.R. (Lah) 204=34 P.L R. 956—34 Cr L.J. 1258=146 I C. 295.**

———**S. 395**—Plucking mangoes in grove—Accused pleading that he plucked in another grove—Accused beating watchman—Offence under S 323, not under S. 395. *See* PENAL CODE, S. 323. **8 Luck. 474=A. I.R. 1933 Oudh 162.**

———**S. 396**—*Charge under—Sentence of transportation for 14 years—Legality.*

A sentence of 14 years' transportation in respect of a charge under S. 396, I. P. Code, is illegal and ought not to be imposed. (*Nanavutty and Rachhpal Singh, JJ.*) LAL BEHARI SINGH *v.* EMPEROR. **7 R.O. 12=150 I.C. 509=35 Cr.L.J. 1066=11 O.W.N. 831=1934 Cr.C. 1049=A.I.R. 1934 Oudh 354.**

———**Ss 396, 149 and 302**—*Conspiracy to commit dacoity—Murder by one—Others not to be convicted under Ss.* 302 *and* 149.

Where the object of a conspiracy is to commit a dacoity and not to commit a murder, and if murder is committed by one of the dacoits in the commission of the dacoity, all the others can be convicted only under S. 396 but not under S. 302, 149. (*Tek Chand and Monroe, JJ.*) PUNJAB SINGH UJAGAR SINGH *v.* EMPEROR **15 Lah. 84=147 I.C. 2=6 R.L. 339=35 P.L.R. 51=35 Cr.L.J. 322=1933 Cr.C. 1467=A.I.R. 1933 Lah. 977.**

PENAL CODE (1860), S. 396.

———**S. 396**—Dacoity committed in British India that murder committed soon after in Native State—Trial in British India without certificate under Cr. P. Code (1898), S. 188. *See* CR. P. CODE S. 188. **15 Lah. 84=A.I R. 1933 Lah. 977.**

———**S. 396**—*Death penalty—Failure to impose—Reasons.*

As S. 396 is one for which the death penalty can be imposed, it is necessary to give reasons for not imposing it. A dacoity was started in a normal fashion with no particular savagery, and the appellants were taking part in a normal way; and then one of the dacoits other than the appellants, who was watching outside, seems to have shot at a woman who was running away, and happened to kill her.

Held, that a general disregard for life against all of them cannot be imputed and that the appellants should not be given death penalty. (*Baguley and Brown, JJ.*) NGA SEN TUN *v.* EMPEROR. **I.R. 1933 Rang. 85= 144 I.C. 146=34 Cr.L.J. 699=1933 Cr.C. 456=A.I. R. 1933 Rang. 61 (1).**

———**S. 396**—"*In committing dacoity*"—*Dacoits pursued in hot haste—Booty abandoned—Murder by one of the dacoits turning at bay.*

Immediately after the dacoity, the culprits were hotly pursued by all the villagers. The dacoits abandoned the booty and at length finding further flight very difficult, turned round and one of them stabbed one of the pursuers.

Held, that the fact that the booty had been abandoned did not affect the applicability of the Section and that the murder was committed in the course of the dacoity for the purpose of completing it. (*Rankin, C.J., C. C. Ghose and Costello, JJ.*) MONORANJAN BHATTACHARJVA *v.* EMPEROR. **I.R. 1932 Cal 603=139 I.C 213=33 Cr L J. 722=1932 Cr.C 857=A.I.R. 1932 Cal. 818 (F.B.).**

———**S. 396**—*Murder committed by one of dacoits in attempting to carry away stolen property soon after dacoity—Every one of dacoits liable.*

Where in attempting to carry away the stolen property one of the dacoits commits a murder, within a very short time of the commission of the dacoity, the murder must be held to have been committed "in the commission of the dacoity" within the meaning of S. 396, and every one of the dacoits is liable to be punished with death, transportation for life or rigorous imprisonment which may extend to ten years. And in order to render the other dacoits liable under S. 396 for the act of one of their associates, it is not necessary that murder should have been within the contemplation of all or some of them when the dacoity was planned, nor is it necessary that they should have actually taken part in, or abetted its commission; indeed they may not have been present at the scene of murder, or may not have known even that murder was going to be, or had in fact been, committed. But none the less they all will be liable for enhanced punishment, provided a person is in fact murdered by one of the members of the gang in the commission of the dacoity. (*Tek Chand and Monroe, JJ.*) PUNJAB SINGH UJAGAR SINGH *v.* EMPEROR. **15 Lah. 84= 147 I C 2=6 R.L. 339=35 P.L R. 51=35 Cr.L J. 822=1933 Cr.C. 1467=A.I.R. 1933 Lah. 977.**

———**S. 396**—*Pursuit of dacoits—Attempt to escape—Murder—No extenuating circumstances.*

The fact that the murder was committed by the dacoits when they were being brought to bay and in their desire to escape is no extenuating circumstance.

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(*Rankin, C.J., C.C. Ghose and Costello, JJ.*) MONORANJAN BHATTACHARJYA *v.* EMPEROR. **I.R. 1932 Cal. 603=139 I.C. 213=33 Cr.L J. 722=1932 Cr.C. 857=A.I.R. 1932 Cal. 818 (F.B.).**

——**S. 396**—*Scope and object of—Dacoity with fire-arms—Commission of murder—Sentence.*

Where murder is committed not in self defence, nor in retreat but wantonly in order to intimidate the house-owner and the neighbouring villagers in the course of a dacoity by using heavy fire-arms, the extreme penalty of law should be inflicted. S. 396 was expressly enacted in order to punish with the utmost severity of the law, crimes of this very description. (*Mosely and Mackney, JJ.*) EMPEROR *v.* NGA THA HMWE. **37 Cr L J. 267 =160 I.C. 234 - 8 R.R. 355 - 1935 Cr.C. 1300=A.I. R. 1935 Rang. 504.**

——**Ss. 396 and 149**—*Shooting by dacoits for removing opposition—All guilty of murder.*

Where the shooting is resorted to in order to the committing of theft from the house of person shot, it is done with the object of removing the opposition which the owner and his companion raised to the approach of the dacoit band to the house and hence the murder of the owner is committed in committing dacoity, and therefore S. 396 is applicable and every member of the dacoit band is guilty of the murder by reason of the provisions of S. 149 and S. 396. (*Dunkley, J.*) NGA PYAUNG *v.* EMPEROR. **6 R.R. 273=148 I C. 1064=35 Cr.L.J. 863=1934 Cr.C. 243=A.I.R. 1934 Rang. 30.**

——**S. 397**—*Applicability.*

S. 397 can only be applied to persons who actually use deadly weapons at the time of the commission of the dacoity or cause or attempt to cause death or grievous hurt at the time. (*Staples, A.J.C.*) BALA HUDDAR *v.* EMPEROR. **1933 Cr.C. 936-148 I.C. 157=6 R.N. 167-35 Cr L J. 594-A.I.R. 1933 Nag. 252.**

——**S. 397**—*Conviction under—Property—Some of the accused unarmed at the time of robbery.*

It is unnecessary to find each individual accused using a deadly weapon and it is not sufficient to fall back upon the provisions of S. 34 in order to convict those who were unarmed at the time of the occurrence of the crime. In other words, S. 34 has no application to the provisions of S. 397. A.I.R. 1924 Cal. 643 and 28 All. 404, Foll.; 21 All. 263, Diss. from. (*Wort and Scroope, JJ.*) LABEDAN SAIN *v.* EMPEROR. **I.R. 1931 Pat. 171=130 I.C. 267=32 Cr L.J. 476 (2)=1931 Cr.C. 145=A.I R. 1931 Pat. 49.**

——**S. 397**—*Scope—Conviction under section alone—Legality—Joint liability.*

S. 397 does not contain the definition of a substantive offence, and no person can therefore be charged or convicted under the section separately, though it may be read with S. 395. The section does not also provide for joint liability as S. 149, I.P. Code, does. (*Kendall, J.*) ABDUL SALAM *v.* EMPEROR. **154 I.C. 1015=7 R.A 853=36 Cr.L.J. 617=16 L.R. 7(Cr.)=4 A W. R. 1171=1935 Cr.C. 185=A I.R. 1935 All. 132.**

——**S. 397**—*Sentence—Offence committed in brutal manner.*

Where the dacoity is shown to have been a brutal one, a sentence of seven years' rigorous imprisonment by no means errs on the side of severity. (*Sulaiman, J.*) NANHE *v.* EMPEROR. **I.R. 1931 All 304=130 I.C. 640=32 Cr.L. J. 567=1931 Cr.C. 623=A.I R. 1931 All. 367.**

——**S. 397**—*'Used'—Actual use if need be proved.*

If a robber or dacoit carries with him a gun or sword and by that means overawes his victim, he is using that gun or sword although he may not actually fire the gun or wound or stab the person attacked with the sword. He can consequently be convicted under S. 397. (*Sulaiman, J.*) NANHE *v.* EMPEROR. **I R. 1931 All. 304= 130 I.C. 640=32 Cr.L.J. 567=1931 Cr.C. 623=A I. R. 1931 All. 367.**

PENAL CODE (1860), S. 399.

——**S. 397**—*"Use"—Interpretation.*

S. 397, I.P. Code, is intended to cover the case of a person who displays a deadly weapon to frighten his victims or their neighbours or who makes use of any deadly weapon for other similar purposes. Its operation is not confined to cases where the weapon is used actually for causing injury or for attempting to cause an injury to another. (*Jai Lal, J.*) INDER SINGH *v.* EMPEROR. **35 P.L R. 555 - 1934 Cr.C. 808=153 I.C. 51=36 Cr.L J. 251=7 R L. 365=A.I.R. 1934 Lah. 522.**

——**S. 397**—*"Use" of deadly weapon—Intention to over awe sufficient.*

The expression "uses" should be construed in a broad sense to include the weapon being carried or employed to overawe and not necessarily to inflict an injury. 14 I.C. 651 and 130 I.C. 640, Rel. on (*Curgenven, J.*) VELLACHAMI THEVAN *v.* EMPEROR. **1933 M.W.N. 727.**

——**S. 397**—*Use of deadly weapon—Levelling revolver—Firing not necessary.*

The words "uses any deadly weapon" are wide enough to include a case in which a person levels his revolver against another person in order to overawe him It is not necessary that the person using a revolver must fire it. (*Srivastava, J.*) CHANDRA NATH *v.* EMPEROR. **7 Luck. 543-I. R. 1932 Oudh 387=139 I.C. 742= 33 Cr.L.J 926=9 O.W.N. 152=1932 Cr C. 166=A. I.R. 1932 Oudh 103.**

——**S. 398**—*Applicability—Robbery actually committed—Sentence.*

S. 398 is applicable only to a case of an attempt to commit robbery and has no application to a case in which the robbery has actually been committed. But as in cases where the offender is armed with a deadly weapon the legislature has prescribed the minimum sentence of 7 years for an attempt to commit robbery, it would not be proper exercise of discretion to inflict a lesser punishment if the offender is found guilty of robbery. (*Srivastava, J.*) CHANDRA NATH *v.* EMPEROR. **7 Luck 543=I.R 1932 Oudh 387=139 I.C. 742=33 Cr L.J. 926=9 O.W.N. 152=1932 Cr.C. 166=A.I.R. 1932 Oudh 103.**

——**S. 398**—*Scope—Actual offenders alone liable to conviction.*

Under S. 398 only the actual offenders armed with deadly weapons can be convicted of the offence of dacoity. (*Addison, J.*) BHAN SINGH *v* EMPEROR. **I.R. 1932 Lah. 323-137 I.C. 196=33 Cr.L.J. 460= 34 P.L.R. 449=1932 Cr.C. 485=A.I.R. 1932 Lah. 367.**

——**S. 399**—*Accused armed with lathis, gun, etc., found concealed in room—Lawful purpose—Burden of proof.*

The appellants who were convicted under S. 399, I.P. Code, were found concealed in the day time in a room armed with lathis, spear, gun, cartridges, etc., and they also had sabris and electric torches. When the Sub Inspector opend the door of the room, one of them fired his gun but the Sub-Inspector escaped death. Upholding their convictions,

Held, that under these circumstances, the burden of proof lay heavily upon the appellants to show that their intentions were innocent and that they had assembled in the house not for the purpose of committing any dacoity but for some other ostensible lawful purpose. (*Nana-*

PENAL CODE (1860), S. 399.

nutty, J.) BHAGWAN BAKHSH *v.* EMPEROR. **156 I. J. 815=8 R O. 4=36 Cr L.J. 1003=1935 O.W.N. 770=1935 Cr.C 1145=A I.R. 1935 Oudh 471.**

——**S. 399**—*Preparation for committing dacoity—Proof.*

A group of persons were warming themselves round a fire in the open fields. Some of them got up and ran when the headman's party with guns, sticks and dahs approached, and two of the group were found carrying fire-arms and cartridges hidden in Shan bags. There was no evidence as to why these people had met together or as to what their common intention was.

Held, that these facts cannot amount to proof of preparation for committing dacoity. (*Dunkley, J.*) NGA LIN *v.* EMPEROR. **158 I C. 500=8 R R. 173=36 Cr.L.J. 1384 (2)=1935 Cr.C. 990=A.I.R. 1935 Rang. 294.**

——**S. 401**—*Offence under—Receipt of stolen property—Proof of being member of gang.*

It cannot be laid down as a general proposition that a person who receives stolen property from a gang of the character described in S. 401 is a member of the gang. Consequently the mere fact that the accused are found to have received stolen property from the gang on a number of occasions is not sufficient to convict them under S. 401. (*Bhide, J.*) ARJAN DAS *v.* EMPEROR. **..R. 1932 Lah. 488=138 I.C. 424=33 Cr L.J. 584=33 P.L R. 736=1932 Cr.C. 624=A I.R. 1932 Lah. 86.**

——**S. 402**—*Assembly for purpose of dacoity—Proof f.*

Where four of the accused were found in the company of the others who had made obvious preparations for committing dacoity and none of them was able to give a satisfactory account of his presence there, it is a reasonable inference that they belonged to the same party of dacoits. (*Bisheshwar Nath and Kisch, JJ.*) LEKHA SINGH *v.* EMPEROR. **I R. 1933 Oudh 26=140 I C. 892=33 Cr L J. 101=1933 Cr.C. 93=9 O.W.N. 977=A.I.R. 1933 Oudh 53.**

——**S. 403**—*Ceylon Penal Code, S. 386—Trustee—Failure to account—Offence when constituted.*

While an hypothecary action to enforce the mortgage was instituted by two trustees, one of the defendants who was anxious to obtain a postponement of the hypothecary action wrote to one of the trustees, *A*, a letter to the following effect: "that provided you were paid Rs. 10,000 on account of accumulated interest you would get the case to lay by for one year and that during that period the balance interest should be paid from time to time. Further, that you would undertake not to certify or record any payments made by me on account, should it become necessary for you to enforce writ for the recovery of the claim. Of course, if the amount realized by the sale of the property does not fetch the amount of your claim, then you could appropriate the moneys paid by me towards the deficiency." The whole of the accumulated interest amounting to Rs. 23,000 was paid to *A* who however failed to account for the same Whereupon the beneficiary procured the launching of the prosecution against *A* under S 386, Ceylon Penal Code (Criminal Misappropriation).

Held, on the construction of the letter that it afforded no evidence that the moneys were paid to *A* as agent for the beneficiary or that such moneys by reason of the payment to *A* became property of the beneficiary and hence *A*'s conviction under S. 386 should be quashed. (*Lord Tomlin.*) ALBERT GODAMUNE *v.* THE KING. **I.R. 1933 P C. 140=143 I C. 224=34 Cr.L J 550=1933 Cr C. 130 (2)=A.I.R. 1933 P.C. 7=64 M.L.J. 290 (P.C.).**

PENAL CODE (1860), S. 405.

——**S. 403**—*Criminal misappropriation—Proof of—Receipt of sums by accused and his failure to account for them—Sufficiency of.*

In a case of alleged misappropriation, it is not enough for the prosecution to show that the accused received certain sums of money and failed to account for them. Unless and until the prosecution can point to a state of facts which lead inevitably to the conclusion that the accused was guilty, the prosecution has failed to discharge the onus which lies on them. 45 C.L.J. 207 and 33 All 249, Diss. from. (*Lort Williams and Henderson, JJ.*) ROBERT STUART WANCHOPE *v.* EMPEROR. **6 R.C 257=58 C L J. 405=38 C W N. 187=1933 Cr C 1375 (2)=146 I.C. 767=61 Cal. 168=A.I.R. 1933 Cal. 800.**

——**S. 403**—*Stay order by appellate Court—In absence of communication of such order, party taking delivery in pursuance of lower Court's order for restoration—Disposal of the property—No offence under S. 403.*

Order was passed by appellate Court staying delivery of certain property to complainant. This order was by mistake not communicated to the lower Court. In pursuance of the lower Court's order, complainant was served with notice by the police that he should take delivery of the property would be forfeited to Government. The complainant took delivery though knowing of the stay order and afterwards disposed of it in such a way as to make it impossible of being returned to the other party if the appellate Court would so order return.

Held, that the action of the complainant did not amount to an offence under S. 403. (*Mukerji and S K Ghose, JJ.*) NAGENDRA NATH SINHA *v.* EMPEROR. **149 I.C. 36=6 R C. 499=35 Cr L.J 886=1934 Cr.C. 620=A.I.R 1934 Cal. 454.**

——**S. 405**—*Agent and principal—No final settlement of accounts—Specific items—Prosecution for.*

The rule that a prosecution does not lie where the account between the agent and the principal was a running account and no final settlement has yet taken place does not apply where the prosecution is laid in respect of specified, identifiable and ascertainable sums and not of a general deficit in the account. 29 Cr.L.J 407; 30 Cr. L.J 185, Dist. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) SITARAMACHAR *v.* THE GOVERNMENT OF MYSORE. **35 Mys.C.C R 319=8 Mys L J. 385.**

——**Ss. 405 and 406**—*Burden of proof—Accused admitting receipt of money but pleading payment to proper persons—Onus of proving misappropriation or non-payment.*

In a trial under S. 406 where the accused admits having received the money alleged to have been misappropriated by him but defended himself by saying that he had made it over to the proper person the onus does not lie on him to prove payment but on the prosecution to prove non payment, for it is only when the latter is proved that the presumption will arise of misappropriation or breach of trust. (*Ferrers, J C.*) BHIKCHAND GANGARAM *v.* EMPEROR. **28 S.L R. 84=1934 Cr C. 220=155 I.C 439=7 R.S. 191=36 Cr.L.J. 818=A. I.R. 1934 Sind 22.**

——**S. 405**—*Burden of proof—Criminal breach of trust—Plea of payment by accused—Onus on prosecution to negative possibility of payment.*

The onus remains always on the prosecution to prove its case in its entirety and it does not change merely because the prosecution has succeeded in proving one part of its case. All the elements making up the offence have to be proved. Where in a trial for criminal breach of trust, the accused pleaded that he had

PENAL CODE (1860), S. 405.

repaid the amounts, it is incumbent on the prosecution to prove not only that the accused had received the amounts but also, by producing all the *pucca* books of the estate and the entire book of challans, to prove that no other amounts were paid or could have been paid by him. (*Mukerji and S. K. Ghose, JJ.*) BOLAI CHANDRA KHERA *v.* BISHNU BIJOY SRIMANI. **6 R.C. 467 = 148 I.C 559 = 35 Cr L J. 715 = 38 C.W.N. 474 = 1934 Cr C. 537 = A I.R. 1934 Cal. 425.**

——**S. 405**—*Construction*—"*Entrusted*".

The terms of S. 405, I. P. Code, are very wide. The words "in any manner" in the section show that the entrustment of property with the accused may be brought about in various ways. The word "entrusted is not necessarily a term of law. It may have different implications in different contexts. In its most general signification. it imports a handing over the possession for some purpose which may not imply the conferring of any proprietary right at all. Where certain bonds are handed over by the complainant to the accused temporarily for a specific purpose and for a definite period and endorsed over to the accused for the said purpose the agreement being that they are to be returned to the complainant after accomplishing the purpose, there is "entrustment" within the meaning of S. 505, I. P. Code. (*Madhavan Nair and Burn, JJ.*) CROWN PROSECUTOR *v.* MAC IVER. **159 I.C. 656 = 1935 M.W.N. 914 – 42 L.W. 923 = 37 Cr L J. 142 = 8 R.M. 529 = 1935 Cr.C. 1314 = A.I.R. 1936 Mad. 1 = 69 M.L.J. 681.**

——**S. 405**—*Construction—Entrustment.*

The term entrustment is not necessarily a term of law It may have different implications in different contexts. In its most general signification all it imports is handing over the possession for some purpose which may not imply the conferring of any proprietary right at all *Lake v. Simonds*, (1917) 97 L.J.K.B. 261, Foll. (*Mya Bu and Baguley, JJ.*) N N. BURJORJEE *v.* EMPEROR **1935 Cr C. 1210 = 37 Cr.L.J. 190 = 159 I.C. 952 = 8 R.R. 301 = A I.R. 1935 Rang. 453.**

——**Ss. 405 and 406**—*Criminal breach of trust—Jewels taken on "approval"—Pledge of.*

Where the accused took for approval from a dealer certain jewels after signing his name for the articles in the amanath book kept by the dealer (no price being then fixed) and pledged them with another, without paying the dealer of the same.

Held, that the property in the jewels continued to remain with the owner till the person entrusted with them chose to exercise his option or approved of them and the accused not having signified the exercised of his option before he pledged them, he was guilty of criminal breach of trust. (*Mahadevayya, J.*) VISVANATHA SASTRI, *In re.* **10 Mys.L.J. 395.**

——**S. 405**—*Essentials of the offence under.*

Under S. 405 the property entrusted or part of it must be actually misapplied. Where the fraudulent action of the accused did not result in actual misappropriation.

Held, that there was no offence. (*Coldstream and Monroe, JJ.*) EMPEROR *v.* AHMAD DIN. **152 I C. 615 = 7 R.L. 296 = 1934 Cr.C. 1184 = 36 Cr.L J. 165 = A.I. R. 1934 Lah. 843.**

——**S. 405**—*Essantials of the offence*—Bona fide *claim of right—Claim unfounded—Effect of.*

A taking under a colour of right under a *bona fide* claim would not be an offence however much the claim turns out to be unfounded. Though of course it is not correct to say that wherever a right is alleged, it must always be taken to be *bona fide*, the intention being the gist of the offence it must be shown that the accused acted not only with intention of causing wrongful gain to some other persons but also with the intention of causing wrongful loss to others or wrongful gain to themselves. (*Ramesam, J.*) SESHACHALAM *v.* BAPANAYYA. **1933 M.W.N. 246.**

——**S. 405**—*Partnership—Criminal breach of trust by partner—Duty of Court.*

The section is wide enough to cover the case of a partner. When one partner is given authority by the other partners to collect moneys or property of the firm, he is entitled with dominion over that property and if he dishonestly misappropriates it, he comes within the section. 13 Ben. L. R. 307 (F B.) and 6 Bom. L. R. 553, Ref. But the Court ought to be very careful in cases against partners of criminal breach of trust. In many cases it is impossible to say what the share of the accused in the assets of the firm may be, whether he is indebted to the firm or the firm is indebted to him. In the latter case, there may be no dishonest intent. If there is any doubt, the accused should have the benefit of the doubt. (*Beaumont, C.J. and Barlee, J.*) EMPEROR *v.* JAGANNATH. **1932 Cr.C 81 = 136 I C. 493 = 33 Cr.L.J. 317 = 33 Bom.L R. 1518 = I.R. 1932 Bom. 189 = A I.R 1932 Bom. 57.**

[**Not. F** 60 C. 1316 (1327). **R.** 35 Bom.L.R. 1054 (1059). **Rel.** 28 S.L R. 84 (93, 94).]

——**Ss. 405 and 406**—*Essentials of offence—Meter installed by electric company—Failure to produce—Inference.*

S. 406 does not embrace the case of a man who has taken an article on hire and fails to produce it. There must be some evidence that he acted dishonestly. The mere fact that the owner of a house is unable to produce the meter installed by an electric company cannot constitute criminal breach of trust. (*Pullan, J.*) MANNI LAL *v.* EMPEROR. **I R. 1932 All. 623 = 140 I. C. 78 = 33 Cr L J. 866 = 1932 A.L J. 213 = 13 L.R. 41 (Cr.) = 1932 Cr C. 293 = A.I.R. 1932 All. 324.**

——**S. 405**—*Evidence.*

Petitioner who had entered into a supurdnama was convicted under S. 405. It was found that he brought the cattle in question to the tahsil and was willing to produce them.

Held, in such circumstances he could not be held to have dishonestly used the cattle in violation of the terms of the supurdnama. (*Addison, J.*) SARDAR KHAN *v.* EMPEROR. **6 I R. (Lah) 147 (1) = 145 I.C. 936 = 34 Cr.L J. 1163 (1) = 34 P.L R. 883 = 1933 Cr.C. 355 (1) = A I.R. 1933 Lah 235 (1).**

——**S. 405 and 406**—*Immovable property—Subject of criminal misappropriation or criminal breach of trust.*

Quaere.—If immovable property can be the subject of criminal misappropriation or breach of trust? The general current of authority is against it. 6 B. H C.R. 33; A I.R. 1926 Lah. 478 and A.I.R. 1930 Rang. 158, Ref. (*Pakenham Walsh, J.*) NATESA MUDALIAR *v.* SRINIVASALU NAIDU **1932 M.W.N. 1353.**

——**Ss. 405 and 406**—*Offence under—Executor* de son tort.

It is wrong to say that the accused became guilty of criminal breach of trust simply because he became an executor *de son tort*. (*Rankin, C.J., C.C. Ghose, Mukerji, Mallick and Guha, JJ.*) EMPEROR *v.* SUSEN BEHARI ROY. **58 Cal. 1051 = I R 1931 Cal. 529 = 132 I.C. 145 = 32 Cr.L J. 836 = 35 C W.N. 425 = 1931 Cr.C. 248 = A.I R. 1931 Cal. 184 (F.B.).**

—— **Ss. 405 and 406**—*Offence under—Proof of dishonesty.*

Where in payment of cloth valued at Rs. 43-12 0 purchased from the accused, the complainant sent him a hundred rupee note but the former did not send back

PENAL CODE (1860), S. 405.

any change alleging that money was due to him and refusing to give the change until the account was settled,

Held, that the conduct of the accused was not dishonest and an offence under S. 406 was not constituted. (*Rowland, J.*) BAIJNATH MARWARI *v.* EMPEROR. **6 I R. (Pat.) 136=144 I.C. 918=34 Cr.L.J. 915=1933 Cr.C. 1248=A.I R. 1933 Pat. 554.**

———**Ss. 405 and 406**—*Offence under—Property handed over to a person who pawned it—Proof of dishonesty.*

Owner had handed over property years before and had taken no more interest in it. It was handed over for use and the only stipulation was that it was to be returned when required by the owner. Owner fell out with the person entrusted with the property who had pawned it. Owner launched a prosecution under S. 406, I.P. Code.

Held, in the circumstances it was perfectly reasonable and legitimate for the person entrusted with the property to think that he could pawn the property and no offence of criminal breach of trust was established and that Court should not lend aid to such malicious prosecution. (*Mackney, J.*) MA KAUNG *v.* EMPEROR. **1935 Cr. C. 1085=A.I R. 1935 Rang. 361.**

———**Ss. 405 and 477-A**—*Partnership—Complaint against co-partner—Proof required.*

The complainant prosecuted his co-partner and a clerk of the firm under Ss. 405 and 774-A, I. P. Code, in respect of an entry in the account books to the effect that a certain sum was paid to persons employed in the Audit Department. It was not disputed that the accused partner who was the manager partner was vested with very wide powers in carrying on the partnership business.

Held, quashing the proceedings, that even assuming that the complainant examines every person employed in the Audit Department to depose that he never received a bribe, and assuming also that every person who gives that evidence speaks the truth, the complainant will not prove much thereby and that this evidence will not be sufficient to establish dishonest conversion under S. 405, nor will it be sufficient to bring the case under S. 477-A and that the complainant will have to establish that the clerk who is co-accused falsified the account book wilfully and with intent to defraud the complainant and that the accused partner abetted that offence. (*Ferrers, J.C. and Rup Chand Bilaram, A.J.C.*) GIRDHARIDAS KIMATRAO *v.* KHEWAL RAM DEWANDAS. **157 I C. 208=8 R.S. 28=36 Cr L.J. 1112.**

———**S. 405**—*Partnership—Criminal misappropriation by partner—Proof.*

Partners are joint owners or co-owners of the partnership property. Each partner is co-owner of the whole of the common stock though he receives or pays only a share only in profits and losses arising therefrom and though his share in the partnership property is only the value of his original contribution increased or diminished by his share of profit or loss. It is difficult to conceive how he can be said to have been entrusted with partnership property or with dominion over it or to have misappropriated or converted it to his own use. Where the prosecution case was that the partner had acted without authority,

Held, that there was no entrustment within the meaning of S. 405. (*Lort Williams and McNair, JJ.*) BHUPENDRA NATH SINHA *v.* GIRIDHARI LAL. **60 Cal. 1316=6 I R (Cal.) 106=145 I.C. 416 (2)=34 Cr.L J. 953=37 C.W.N. 982=1933 Cr.C. 953=A.I. R. 1933 Cal. 582.**

———**S. 405**—*Proof of dishonesty—Another's money used without his consent and contrary to purpose for which possession is given.*

PENAL CODE (1860), S. 408.

Where a person makes use of money belonging to another without the latter's consent, and contrary to the purpose for which possession thereof has been given by the latter to the former, the intention of the person so making use of that money must *prima facie* be dishonest within the meaning of S. 24. (*Mya Bu and Baguley, JJ.*) N. N. BURJORJEE *v.* EMPEROR. **159 I.C. 952=8 R.R. 301=37 Cr.L.J. 190=1935 Cr C. 1210=A. I.R. 1935 Rang. 453.**

———**S 405**—*Proof required for the offence under.*

It is incumbent upon the prosecution in order to establish a charge of breach of trust to prove (1) that the accused was entrusted with property and (2) that he dishonestly misappropriated or converted to his own use that property. These facts like any other fact, may be proved either by direct evidence or by circumstantial evidence. (*Mya Bu and Baguley, JJ.*) N. N. BURJORJEE *v.* EMPEROR. **159 I.C. 952=37 Cr.L J. 190=8 R.R. 301=1935 Cr.C. 1210=A.I.R. 1935 Rang. 453.**

———**Ss. 405 and 406**—*Property attached by Civil Court—Entrustment to surety—Refusal to produce—Offence.*

If a surety, to whom property attached by a Civil Court is entrusted, deliberately refuses to produce the same when called upon to do so, such refusal amounts to a repudiation of his trust and he is guilty of the offence of criminal breach of trust. (*Addison, J.*) CHANAN SINGH *v.* EMPEROR. **7 R.L. 282=152 I.C. 513=36 Cr.L.J. 119=1935 Cr.C. 21=A.I.R. 1935 Lah. 31.**

———**Ss. 406 and 409**—*Applicability—Chairman of Co-operative Society—Breach of trust by—"Public servant."*

A chairman of a Co-operative Society is not a "public servant," as defined by S. 21 (10), I P. Code. An offence of criminal breach of trust by him is therefore punishable under S. 406 and not S. 409, I. P. Code. (*Murphy and Sen, JJ.*) EMPEROR *v.* SHRIDHAR MAHADEO PATHAK. **36 Bom L R. 1133=1935 Cr. 70=154 I C. 600=36 Cr.L.J. 532=7 R.B. 352=A.I. R. 1935 Bom. 36.**

———**Ss. 406 and 420**—*Construction—Accused inducing complainant to deliver bonds on false representation—Subsequent disposal for different purpose and misappropriation of proceeds—Offence.*

Where a person dishonestly induces another to hand over to him certain bonds pretending that he requires them for a certain purpose, his act amounts to an offence under S. 420. But if he further disposes of the bonds dishonestly in violation of the contract with the owner of the bonds, by using them for a totally different purpose without the knowledge or consent of the owner and misappropriates the proceeds, he is also gulity of the offence of criminal breach of trust under S. 406. (*Madhavan Nair and Burn, JJ.*) CROWN PROSECUTOR *v.* MCIVER. **159 I.C. 656=1935 M.W.N. 914=42 L.W. 923=37 Cr L J. 142=8 R.M. 529=1935 Cr C 1314=A I.R. 1936 Mad. 1=69 M.L.J. 681**

———**S. 408**—Charge of misappropriation—Failure to account—Proper Court for prosecution. *See* CR. P. CODE, S. 181 (2).

———**S. 408**—*Charge under—Accused producing suspicious receipt and statement of account—Failure of prosecution to prove that they are forged and bogus—If fatal—Duty of Court to consider whether accused failed to credit and remit money at due time.*

Accused, who was the *patwari* of a village, who had to collect rent and remit it periodically to the estate, to grant receipts from counterfoil books and to prepare *shiahas* in counterfoil, sending one copy with chalan to

PENAL CODE (1860), S. 408.

the estate, was charged with criminal breach of trust under S. 408, I. P. Code, in respect of Rs. 47 made up of a number of items, said to have been misappropriated by him, and prosecuted on the ground that there were discrepancies between the receipts granted by him to the tenants on the one hand the counterfoils and *shiahas* on the other. Accused produced a receipt purporting to be granted by the proprietor of the estate and a *shiaha* for a corresponding amount. The Magistrate thought that the receipt was suspicious, the signature thereto being not genuine and that the *shiaha* was unreal and in the result convicted him. On appeal, the appellate Court recorded an order of acquittal on the order sheet, considering that though the receipt and *shiaha* were highly suspicious direct evidence of their being forgeries was lacking, and that the absence of proof of the *shiaha* being bogus and the receipt being a forgery was fatal to the prosecution case.

Held, that the appellate Court had not considered the effect of explanation I of S. 403, I. P. Code, and, that it ought to have considered whether the receipt and *shiaha*, even if true afforded a complete answer to the charge; that the question had still to be considered whether in respect of items covered by the *shiaha* and receipt there was failure to credit the money at the time when it ought to have been credited and to remit it at the due time ; and that there having been no proper trial of the appeal, the acquittal ought to be set aside, and the appeal remanded with a direction to take further evidence, if necessary, as to the genuineness or otherwise of the receipt. (*Rowland, J.*) GENA LAL *v.* TURANTLAL CHOUDHURY. **8 B.P. 192=36 Cr.L J. 1375=1935 Cr.C. 1264=158 I.C. 332=A.I.R. 1935 Pat. 495.**

———**S. 408**—*Conviction under—Legality—Salary if agent not paid—Refusal by him to pay monies collected—Contract Act, S.* 221.

An agent whose salary is not paid, and who, therefore, refuses to pay the monies collected by him on behalf of his principal, cannot properly be convicted under S 408, I.P. Code, as under S. 221 of the Contract Act, he is entitled to retain goods or other property of his principal until the amount due to him for services in respect of the same has been paid or accounted for to him. (*Collister, J.*) ROSHAN LAL *v.* EMPEROR. **8 R.A. 611=37 Cr L.J. 308=160 I.C 382=1935 A.W. R. 930=16 L.R. 51 (Cr.)=1935 A.Cr.C. 189=1935 Cr.C. 1139=A I.R. 1935 All. 922**

———**S. 408**—*Criminal breach of trust—Place of.*

In the circumstances of any particular case, where a clerk or servant entrusted with money under S. 408, dishonestly misappropriates the property with which he has been entrusted, it may be impossible to determine at any rate, until the facts have been fully investigated where or when the offence of criminal breach of trust was in fact committed. It is a question of fact to be determined in each case upon the evidence at the trial. (*Page, C.J. and Dunkley, J.*) ALI MAHOMED KASIM *v.* EMPEROR. **9 Rang. 338=134 I.C. 209=1931 Cr.C. 660=32 Cr.L.J 1120=A.I.R. 1931 Rang. 164.**

———**S. 408**—*Duty of prosecution to prove entrustment or that money was outstanding with accused.*

There can be no misappropriation under S. 408, I. P. Code, where no amount has been left with the accused or entrusted to him as a servant. Unless the prosecution proves that there was an advance outstanding with the accused, there can be no misappropriation. (*Pollock, A.J.C.*) SHEOCHARAN LAL *v.* EMPEROR. **18 N.L. J. 345=163 I.C. 657=37 Cr.L.J. 856=9 R.N. 13.**

PENAL CODE (1860), S. 408.

———**S. 408**—*Elements to be proved.*

In a case of alleged misappropriation, it is generally impossible for the prosecution to follow the money in the hands of an accused person and prove that he spent a certain specific sum in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts. 8 A.L J. 88, Foll. (*Pullan, J.*) SHIAM SUNDAR *v.* EMPEROR. **6 Luck. 435=I.R. 1932 Oudh 193=136 I.C. 810=33 Cr L J. 343=9 O. W.N. 216=1932 Cr.C. 222=A.I.R. 1932 Oudh 145.**

———**S. 408**—*Entrustment—Servant supplied with waterproof—On loss or damage servant to pay for it—Servant pawning it guilty under S.* 408.

Where a waterproof is supplied to railway servant on condition that on being damaged or lost, it will be renewed at the cost of the person to whom it was issued, the contract is a bailment and delivery of the waterproof coat is an entrustment within the meaning of Penal Code. If therefore the servant pawns it he is guilty under S. 408. 6 L.B.R. 62, Dist. (*Mackney, J.*) NGA AUNG THEIN *v.* EMPEROR. **6 R.R. 253=148 I C. 814=35 Cr.L J. 788 (2)=1934 Cr.C. 264=A.I. R. 1934 Rang. 41.**

———**S. 408**—*Explanation by accused about missing property—Sufficiency of.*

It is not necessary for the accused to show exactly what has become of the missing property he was entrusted with. If he cannot produce it but has given a credible and probable account of its disappearance, he need do nothing more than that. 2 R. 976, Dist. (*Mackney, J.*) NGA BA MYAT *v.* EMPEROR. **6 R.R. 267=148 I.C. 1035 (2)=35 Cr L.J. 849=1934 Cr.C. 265=A.I.R. 1934 Rang. 42.**

———**S. 408**—Offence under—Applicability of S. 179 Cr. P. Code—Loss to one person not an essential ingredient. *See* CR P. CODE, S. 178. **9 Rang. 338=A.I. R. 1931 Rang. 164.**

———**S. 408**—Offence under—Trial for embezzlement of lump amount between specified dates—Subsequent trial in respect of different sum embezzled during same period—Bar. *See* CR. P. CODE, S. 222 (2). **53 All. 411=A.I.R. 1931 All. 209.**

———**S. 408**—*Partnership—'Clerk' or 'servant'—Working partner with no contribution in partnership business.*

A working partner, who has not contributed anything to the partnership business is a 'servant' or 'clerk' within the meaning of S. 408 and can be held to be guilty of either criminal misappropriation or breach of trust. (*Ferrers, J C.*) BHIKCHAND GANGARAM *v.* EMPEROR. **7 R.S. 191=36 Cr.L J. 818=155 I.C. 439=28 S.L.R. 84=1934 Cr.C. 220=A.I.R. 1934 Sind 22.**

———**S. 408**—*Partnership—Dispute between partners—Conviction for criminal breach of trust—Validity.*

Where the relationship between the complainant and the accused was one of partnership and the case was the outcome of a dispute as regards their respective liabilities and it was further shown that the complainant had executed a receipt to the accused in which he had admitted that the accused had paid up all dues and also undertaken that he would not take criminal or civil proceedings against the accused, the conviction of the accused under S. 408 is not sustainable. (*Ross and Scroope, JJ.*) RAGHO PROSAD GUPTA *v.* EMPEROR. **130 I.C. 833 (2)=32 Cr.L.J. 620=12 Pat.L.T. 355=1931 Cr.C. 399=A.I.R. 1931 Pat. 159.**

———**Ss. 408, 467 and 477-A**—*Supervisor of Co-operative Society—Misappropriation by—Affixing of*

PENAL CODE (1860), S. 409.

thumb-impression of one person and certifying it to be that of another—False debit entry—Offence.

Accused, a Supervisor of a Co-operative Society, took out of the funds of the Society, Rs. 2, purporting to be the monthly pay of a sweeper-woman, debited the amount in the accounts of the Society as her pay, took a thumb-impression of a young nephew of his, certifying it to be that of the sweeper woman as against the debit entry, and without paying the amount to the sweeper woman, converted it to his own use.

Held, that the accused was guilty under S. 408, I. P. Code, inasmuch as he obtained a wrongful gain of Rs. 2, it having been done in a secret manner, and also caused wrongful loss to the Society, the amount having been spent in a manner not authorised by the Society, that he was guilty under S. 467 of forgery, in respect of the affixing of the false thumb impression and that he was also guilty of falsification of accounts under S. 477-A, in respect of the false debit entry in the accounts. (*Murphy and Sen, JJ.*) EMPEROR *v.* KESHAVRAO. **36 Bom L R. 1120=1935 Cr C. 29=154 I.C. 559=7 R.B. 340=36 Cr.L J. 522=A.I.R. 1935 Bom 30.**

———**S. 409**—*Agent with authority to lend—Loan to himself.*

An agent, authorised to lend his master's money, commits an offence if he lends to himself without his master's permission. (*Burn, J.*) RAMANATHAN CHETTIAR *v.* DURAISWAMI AYYANGAR. **1933 M.W. N. 256.**

———**S. 409**—*Applicability—Entrustment to company—Prosecution of Managing Director.*

It is not necessary that the property should have been entrusted to the accused directly. If the accused has obtained or assumed the control of the property of another person under circumstances whereby he becomes entrusted or whereby his receipt becomes receipt for or on account of another person and fraudulently converts it or the proceeds, then he has committed an offence within the meaning of the section. So where property was entrusted to a company, the Director of the company as the person active in the financial affairs of the company may be prosecuted for misappropriation of that property. (*Doraiswami Iyer, C.J. and Srinivasa Iyer, J.*) SITARAMACHAR *v.* THE GOVERNMENT OF MYSORE. **35 M C.C.R. 319=8 Mys L.J. 385.**

———**S. 409**—Bona fide *conduct—Exoneration of accused—Public servant.*

A public servant was responsible in law for the proper expenditure of certain sum of money in respect of which he had no dominion other than passing orders for payment in writing and into whose hands money never actually came. He could not file all vouchers regarding expenditures owing to the sudden death of the person who actually spent the money; but he proved pieces of work being done for which no vouchers were on record. Further the owner of the money, that is the Municipal Board, had exonerated him from every liability, civil or criminal Criminal proceedings for alleged embezzlement were taken against him after a delay of nearly three years.

Held, that there was no case of criminal misappropriation nor even reasonable ground for suspicion against the accused and that the proceedings should be quashed. (*Wazir Hasan, C.J.*) ABDUL WALI *v.* EMPEROR. **6 I R (Oudh) 155=146 I C. 661=10 O.W.N. 807=9 Luck 61=35 Cr.L J. 148=1933 Cr.C. 1088=A.I. R. 1933 Oudh 387.**

———**S. 409** — *Criminal misappropriation — Money entrusted to accused for particular purpose not utilised therefor—Manner of misappropriation — Prosecution need not prove.*

On a charge under S. 409 it is not necessary for the prosecution to prove in what manner the money alleged to have been misappropriated has actually been spent by the accused. If it be shown that money entrusted to the accused or received by him for a particular purpose, was not returned by him in accordance with his duty, it lies on the accused to prove his defence Criminal breach of trust is not an offence which counts, as one of its factors, the loss that is the consequence of the act; it is the act itself which in law amounts to an offence. Where the money entrusted to be used for a particular purpose was not used for such purpose and the money had been retained for such a length of time that, taken with the other circumstances of the case, an intention to convert the money to his own use has been made out, the offence is complete. (*Guha and Nasim Ali, JJ.*) AKSHOY CHANDRA BOSE *v.* EMPEROR. **59 C L J. 306=151 I C. 22=7 R.C. 89=35 Cr L J 1279=38 C. W.N. 467—1934 Cr.C. 793—A.I.R. 1934 Cal. 532.**

———**S. 409**—*Dispute in the nature of accounting—Proper remedy.*

Where the dispute between the parties is one in the nature of accounting, the proper remedy is to file a civil suit for recovery of the amounts due and not a prosecution under S. 409, I. P. Code. (*Nanavutty, J.*) MUNNOO LAL *v.* EMPEROR. **154 I C. 258=7 R O. 459=36 Cr L.J. 477=1935 O.W. N. 126=1935 Cr. C. 442=A.I.R. 1935 Oudh 241.**

———**S. 409**—*Entrustment of goods—Trust regarding sale proceeds—Property.*

The views that an entrustment of goods creates no trust on the sale proceeds of the goods and that where goods have been entrusted for sale as soon as they are sold the trust cases because the purchaser pays the money clothed with no trust are both fallacious. Where property is delivered under a trust the sale proceeds of property entrusted are also subject to the trust "property" will include cash into which it is converted; if there is as express or implied term in the agreement or trust. The suggestion that it is the intention or knowledge with which the money is ultimately paid to the agent by a third party which governs the question whether there is a trust or not is fallacious. The question whether the goods only were entrusted or whether the sale proceeds of the goods were governed by the trust depends on the express or implied terms of the agreement or trust. (*Ferrers, J.C. and Aston, A J.C.*) DHARAMDAS LILARAM *v.* EMPEROR. **140 I C. 647=1932 Cr C. 733=I R. 1933 Sind 1=34 Cr.L.J. 51=A.I.R. 1932 Sind 169.**

———**S. 409**—*Head constable enquiring into theft, finding out property but entering into agreement with possessor and reporting case as not traceable—Offence.*

Where a head constable, in the enquiry into a theft case found out the property but entered into an agreement with the person with whom it was found and reported the case as not traceable,

Held, that he had dominion over the property on behalf of Government, whether he formally seized it or not, and that in abuse of that dominion, he misappropriated the property and committed a criminal breach of trust in his capacity as a public servant. A.I.R. 1931 Rang. 294; 37 Mad. 55 and 39 Mad. 781, Ref. (*Staples, A J.C.*) EMPEROR *v.* ABASALI.I. **31 N L R. 312=156 I C. 184=7 R N 224=36 Cr.L.J. 867=1935 Cr. C. 667=A.I.R. 1935 Nag. 139.**

———**S. 409**—Lambardar *making collections—Same not forwarded to treasury—Offence, if constituted.*

PENAL CODE (1860), S. 409.

A *lambardar* who had made collections of revenue did not pay the same into the treasury for two months and when approached by the police paid a certain sum though he had made larger collections. It appeared however that he had deposited the collections in a secure place because he knew that the Tahsildar would probably refuse to take anything except the full amount.

Held, that the *lambardar* was not guilty of criminal breach of trust. (*Addison, J.*) LACHMAN SINGH *v.* EMPEROR. **131 I.C. 910=32 Cr.L.J. 811=1931 Cr. C. 692=A.I.R. 1931 Lah. 468.**

———**S. 409**—*Manager—Court of Wards—Appointment by Collector—Right to prosecute.*

Where a manager was appointed for an estate by the Collector as representing the Court of Wards he can be prosecuted in respect of any alleged criminal breach of trust only with the sanction of the Court of Wards through the Collector who appointed him since the estate was entrusted to the manager by the Collector as representing the Court of Wards; the executor of the estate to whom it is subsequently handed over by the Board of Revenue can only apply to the Collector to take action against the manager; he cannot prosecute the manager himself, much less authorise another to do so on his behalf. (*Adami, J.*) YOGANAND DAS *v.* EMPEROR. **I R 1931 Pat 191=130 I C 543=32 Cr.L.J. 555=12 Pat.L T 421=1931 Cr.C. 206= A I.R. 1931 Pat. 86.**

———**S. 409**—*No entrustment.*

Where an accused in capacity of an accountant of a Municipality puts up cheques drawn to self for the Chairman's endorsement persuading the Chairman who is ignorant of English that they were for contractors, draws the money from the sub-treasury and misappropriates it, he might have cheated other people but he was never entrusted with the funds and so he cannot be convicted under S 409. (*Jackson, J.*) SUBRAMANIA AYYAR *v.* EMPEROR. **I R. 1931 Mad. 525 (1)=131 I.C. 461=32 Cr L.J. 756=1931 M.W.N. 399=1931 Cr C. 487=A.I.R. 1931 Mad. 439.**

———**S. 409**—*Offence by public servant in course of his duty—Sentence.*

The offence under S. 409 is a very serious one, when committed by a responsible public servant in the course of his duty. A sentence of one year's rigorous imprisonment and Rs. 49 fine was awarded.

Held, that a severer sentence should be inflicted; a sentence of rigorous imprisonment for two years and a fine of Rs. 50 was ordered. (*Staples, A.J.C.*) EMPEROR *v.* ABASALLI. **31 N L.R 312=156 I.C. 184=7 R.N. 224=36 Cr.L.J. 867=1935 Cr.C. 667=A.I.R. 1935 Nag. 139.**

———**S. 409**—*Offence under—Condonation—Negligence of superior officer.*

A servant acting within the scope of his employment cannot in oder to defraud his master set up breach of his master's regulations in his own favour. A public servant is expected to discharge his duties honestly whether his movements be properly supervised or not, and it would be setting a very bad principle, if embezzlement by him is condoned merely on account of the negligence of those who were in duty bound to control his action. (*Din Mahomed, J.*) ALLAH DITTA *v.* EMPEROR. **16 Lah. 44=153 I.C. 887=7 R.L. 468= 36 Cr.L.J. 424=35 P.L.R. 649=1934 Cr.C. 1003= A I R. 1934 Lah. 677.**

———**S. 409**—*Scope.*

S. 409 does not include an intention to misappropriate at some future date. (*Coldstream and Monroe, JJ.*) EMPEROR *v.* AHMAD DIN. **152 I.C. 615 (2)=7 R.L. 296=36 Cr.L.J. 165=1934 Cr.C. 1184=A.I.R. 1934 Lah. 843.**

PENAL CODE (1860), S. 411.

———**S. 411**—*Charge under—Proof.*

Where stolen property is recovered at the instance of the accused, and there is also evidence of witnesses who prove that the accused had with him stolen articles for sale, it is for the accused to explain as to how he came into possession of such property; and when he offers no explanation, it must be held that the charge under S 411 is fully made out. (*Nanamutty and Rachhpal Singh, JJ.*) EMPEROR *v.* ABDUL RAHIM. **150 I C. 845 (2)=7 R O. 59=35 Cr.L.J. 1130=11 O.W.N. 905 =1934 Cr.C 1324=A.I.R 1934 Oudh 399.**

———**Ss. 411 and 414**—*Conviction under—Whether bars proceeding under Arms Act.*

Where three persons are at various times in possession of the stolen revolver, the fact that they are convicted in respect of its possession under S. 411 or under S. 414, is no bar to their being convicted in respect of it under S. 19 (*f*), Arms Act, also. (*Smith, J.*) EMPEROR *v.* MUNNOO. **6 I R. (Oudh) 104=146 I C 354 (2)=10 O.W.N 895=35 Cr L.J. 36=1933 Cr.C. 1393 (2)= A I.R. 1933 Oudh 470.**

———**S. 411**—*Failure to account for possession—Dishonesty—Presumption.*

When some property is proved to be stolen property and the person who is found in possession of it cannot account for its possession especially when he is found in possession of it soon after the theft of the property, it is only reasonable to conclude not only that he was in possession knowing or having reason to believe it to be stolen property but also that his possession of it was dishonest. (*Zia-ul-Hasan, J.*) SHAKUR *v.* EMPEROR. **157 I.C. 562=8 R.O. 23=36 Cr.L J. 1206=1935 O W N. 911=1935 Cr C. 1149=A.I.R. 1935 Oudh 475.**

———**S. 411**—*Failure to disclose names of thieves.*

Failure to disclose at once the names of thieves from whom the accused purchased "toria" is not in itself sufficient ground for his conviction under S. 411. It must also be proved that he purchased the article dishonestly, knowing it to be stolen property. (*Addison, J.*) GURANDITTA *v.* EMPEROR. **6 I.R (Lah) 91 (1)=145 I.C. 284=34 Cr L J. 957=1933 Cr.C 881 (2)=A I.R. 1933 Lah. 596 (2).**

———**S. 411**—*Five thefts—No proof that proceeds of each theft were received on different occasions—Convictions on five chalans—Legality*

Where there is no proof whatsoever that the accused had received the proceeds of five different thefts on five different occasions and on the other hand it was more likely that the thief or thieves may have passed on the stolen property to the accused at one and the same time, the accused cannot be convicted under five separate chalans for the offence of being in possession of stolen property under S. 411. (*Agha Haidar, J.*) JALAL *v.* EMPEROR. **I R. 1933 Lah. 289 (2)=142 I C 884= 34 Cr.L.J. 458=34 P.L.R. 433=1932 Cr.C. 921= A.I.R 1932 Lah. 615 (1).**

———**S 411**—*Joint criminal possession.*

Two accused persons were bringing the stolen property towards the patrol and when questioned claimed them falsely to be their own.

Held, that the presumption was that they were both in possession of the stolen property and this possession not being explained by them, both were guilty. (*Coldstream and Jai Lal, JJ.*) EMPEROR *v.* DIWAN SINGH. **I.R. 1933 Lah 354=143 I.C. 463=34 Cr.L J. 604 (1)=34 P L.R 576=1933 Cr.C. 270 (1)=A.I.R. 1933 Lah. 148 (1).**

PENAL CODE (1860), S. 411.

———**S. 411**—*Knowledge of whereabouts of stolen property—No proof of offence.*

Two days after a theft of a mare, a search party accidentally met the accused whom they informed of the loss of the mare. He promised them to make inquiries for which he was paid money in advance. He took them near a pilgrim camp and fetched another man with the stolen mare. There was no other evidence against the accused to show that he was in joint possession with such person,

Held, that accused might have come to know that the stolen mare was in the possession of another, that he used the knowledge to obtain an advantage for himself and that he could not be convicted under S. 411. (*Rupchand, J.C. and Lobo, A.J.C.*) PIRANO LAKHO *v.* EMPEROR. **6 I.R. (Sind) 70=146 I.C. 649=35 Cr. L.J. 153=1933 Cr.C. 1180=A.I.R. 1933 Sind 352.**

———**S. 411**—*Offence—Receipt of proceeds of sale of stolen property—Conviction for receiving stolen property—Sustainability.*

The receiving of proceeds realised from the sale of stolen property is not receipt of stolen property, so as to render the receiver of such proceeds liable to conviction under S. 411. To sustain a conviction for receiving stolen property, it must be shown that the property was stolen. (*Grille, J. C.*) BALIRAM *v.* EMPEROR. **8 R. N. 285 (2)=37 Cr.L.J. 718=162 I.C. 779=18 N.L.J. 342.**

———**S 411**—*Offence under—Burden of proof—Knowledge of theft.*

In a prosecution under S. 411, I. P. Code, the prosecution has to prove that the accused had knowledge as to the article being a stolen article; and unless the prosecution proves that, the suit cannot be brought home to the accused. (*Niyogi, A.J.C.*) PALTOORAM *v.* EMPEROR. **18 N L.J. 237.**

———**S. 411**—*Offence under—Evidence—Meaning of word "believe."*

Circumstantial evidence in order to justify conviction under S. 411 must be such as would unmistakably lead to the inference of guilt and be reasonably inconsistent with any theory about the innocence of the accused. The fact that the persons who sold the articles were of 18 and 20 and that they could hardly be supposed to be owners of the articles may be evidence of suspicion but it cannot be said that the accused must have believed that the articles were stolen property. Meaning of the word "believe" discussed. (*Bisheshwar Nath. J.*) GAYA PRASAD *v.* EMPEROR **6 Luck. 658=1932 Cr. C. 592=I.R. 1931 Oudh 353=134 I.C. 401=32 Cr. L.J. 1184=14 O.L.J. 199=8 O.W.N. 517=A.I.R. 1932 Oudh 251 (2).**

[R. 9 O.W.N. 1169 (1170).]

———**S. 411**—*Offence under—Fine less than value of stolen property—Adequacy.*

Accused who was convicted of offence under S. 411 was sentenced only with fine, which was less than the value of the stolen property.

Held, that the sentence which was inflicted was so light as to form a direct encouragement to other persons who may wish or be tempted to indulge in cattle theft or in the sale of stolen cattle. One year's rigorous imprisonment was awarded. (*Middleton, J. C.*) EMPEROR *v.* NISAR. **157 I C. 169=8 R. Pesh. 9 (a)=36 Cr.L J. 1138=1935 Cr.C. 874=A.I.R. 1935 Pesh. 100.**

———**S. 411**—*Offence under—Ingredients—Conviction—Proof of knowledge—Necessity.*

Under S. 441, it is necessary to prove that the property was stolen and that the accused knew or had reason to believe the same to be stolen property; when such proof is lacking, no conviction under S. 411 can be recorded. (*Wort and Fazl Ali, JJ.*) EMPEROR *v.* A DEAF AND DUMB. **159 I.C. 577 (2)=16 Pat.L.T. 568=1935 Cr C. 1168=36 Cr.L.J. 107=8 R P. 292=A.I.R. 1935 Pat. 451.**

———**S. 411**—*Offence under—Proof of guilty knowledge—Suspicion—If sufficient.*

A conviction for an offence under S. 411, is not legally sustainable in the absence of evidence on the record to show that the accused knew or had reason to believe that the property in question was stolen property. "Believe" in the section means much more than suspicion. (*Nanavutty, J.*) BHAGGAN *v.* EMPEROR. **154 I.C. 901=7 R O. 518=36 Cr.L.J. 602=1935 O.W.N. 408=1935 Cr.C. 684=A.I.R. 1935 Oudh 327.**

———**S. 411**—*Offence under—Proof—Pointing out stolen property—Inference of possession from.*

The mere pointing out or production of stolen property is not in all cases sufficient to fasten guilty knowledge. Each case depends on the peculiar circumstances under which the prosecution relies on the pointing out or the production of the property as evidence of possession. No hard and fast rule can be laid down for inferring from the mere fact of pointing out or production of stolen property that the knowledge of the person pointing out or producing is attributable to the fact that he is in conscious possession of stolen property. (*Mehta, A.J.C.*) GANDALAL KALIDAS *v.* EMPEROR. **28 S.L.R. 41=154 I.C. 1038=7 R.S. 181=36 Cr.L.J. 704=1934 Cr. C. 1261=A.I.R. 1934 Sind 159.**

———**Ss. 411 and 457**—*Offence under—Separate sentences—Propriety.*

Technically the offence of being a member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them but from a practical point of view separate sentences though legal are not strictly equitable. To give separate sentences comes perilously near the principle of "*nemo de bet bis vexari.*" (*Harrison, J.*) SURJAN SINGH *v.* EMPEROR. **I.R. 1932 Lah. 203=136 I.C. 27=33 Cr. L J. 251=33 P.L.R. 602=1932 Cr.C. 378=A.I.R. 1932 Lah. 298.**

———**S. 411**—*Onus.*

Where neither the receiving nor the retention of stolen property is established beyond reasonable doubt, the accused is not under any necessity to prove that he had no knowledge, or that he had no reason to believe that the property found in his shop is stolen property. (*Rupchand, J. C. and Mehta, A. J. C.*) KESHOWDAS UTTAMCHAND *v.* EMPEROR. **6 I.R. (Sind) 100=146 I.C. 952=1933 Cr.C. 1335=35 Cr.L.J. 206=A.I.R. 1933 Sind 359.**

———**S. 411**—*Onus—Lapse of time—Burden of proof not shifted by.*

Because the distance of time between the theft and the recovery of the stolen property from the possession of the accused is short, the burden cannot shift on the accused to prove affirmatively that he came by the possession of the property in an innocent manner. (*Baipai J.*) HORI LAL *v.* EMPEROR. **56 All. 250=1933 A.L.J. 1534=148 I.C. 141=6 R A. 649=35 Cr.L.J. 621=1933 Cr.C. 1523=A.I.R. 1933 All. 893.**

———**S. 411**—Possession of stolen revolver without licence—Separate charges under Penal Code and S. 19, Arms Act—Propriety of. *See* GENERAL CLAUSES ACT (X OF 1897), S. 26. **1933 A.L.J. 523=A.I.R. 1933 All. 461.**

———**S. 411**—*Possession of stolen goods—Presumption when justified.*

A man who is in possession of stolen goods soon after the theft may be presumed to be either the thief or has

PENAL CODE (1860), S. 411.

received the goods knowing them to be stolen unless he can account for his possession. In order that this presumption may be raised there must be possession by the person, against whom it is to be raised, of recently stolen goods. Mere physical relation arising from the possession of the object is insufficient to amount to possession which connotes control over the object possessed. The possession of the stolen property should be exclusive as well as recent. 6 Bom. 731, Rel. on. (*Mya Bu, J.*) RAJALINGAM *v.* EMPEROR. **149 I.C. 31=6 R.R. 300=35 Cr.L.J. 994=1934 Cr.C. 512=A.I.R. 1934 Rang. 80.**

———**S. 411**—Presumption under Evidence Act (I of 1872), S. 114, Ill. (*a*)—Nature of—Explanation by accused—Onus on the crown. *See* EVIDENCE ACT, S. 114, ILL. (*a*). **35 C.W.N. 291=A.I.R. 1931 Cal. 617.**

———**S. 411**—*Presumption of knowledge—Possession long after theft—Necessity for independent evidence.*

The presumption under S. 114, Ill. (*a*) of the Evidence Act, is by itself insufficient, without other evidence to convict the accused who was found to be in possession of a stolen animal nine months after its loss. 11 Cal. 160, Rel. on. (*Dhavle, J.*) SUCHIT AHIR *v.* EMPEROR. **I.R. 1931 Pat. 208=130 I.C. 800=32 Cr. L. J. 614=12 Pat. L. T. 350=1931 Cr.C. 205=A.I.R. 1931 Pat. 85.**

———**S 411**—Probable explanation for his possession set up by accused—Presumption under S. 114, Ill. (*a*) of Evidence Act, no longer available to prosecution. *See* EVIDENCE ACT, S. 114, ILL. (*a*). **56 All. 250=A.I.R. 1933 All 893.**

———**S. 411**—*Proof of guilt—Accused found in possession of stolen articles shortly after theft—No explanation offered—Inference.*

Where the stolen article was found in the possession of the accused within 24 hours of the theft and he refused to disclose the name of the person from whom he received it without assigning any reason for his refusal, the Court is justified in holding him guilty of an offence under S. 411. (*Bisheshwar Nath, J.*) BABOO LAL *v.* EMPEROR. **9 O.W.N. 1169.**

———**S. 411**—*Proof of theft—Sale of ornaments a month after theft.*

Per *Abdul Qadir, J.*—It will not be safe to draw the inference that certain ornaments are the proceeds of a burglary from the mere fact that they were sold by the accused more than a month after a theft. (*Abdul Qadir, J.*, on difference between *Coldstream and Jai Lal, JJ.*) AMRIT LAL *v.* EMPEROR. **1933 Cr.C. 1503=148 I.C. 400=6 R.L. 550=35 Cr.L.J. 654=A.I.R. 1933 Lah. 987.**

———**S. 411**—*Stolen property found in house occupied by family—Liability of the head of family.*

It is wrong to assume that property found in a house occupied by several male and female members residing therein should be considered to be in possession of the head of the family. This assumption can have no place in cases in which possession and criminal intent form the essential elements of an offence. It is equally unwarranted to assume that everyone residing in the house should be deemed to be in possession of an article recovered from it. (*Niamatullah, J.*) RAM CHARAN *v.* EMPEROR. **6 I.R. (All.) 50=145 I.C. 130=34 Cr. L.J. 930=14 L.R. 239 (Cr.)=1933 A.L.J. 1338=1933 Cr.C. 743=A.I.R. 1933 All. 437.**

———**S 412**—*Burden of proof under.*

In cases of receiving stolen property, the onus of proof never passes to the accused. The Crown must prove guilty knowledge. (*Lort Williams and Jack, JJ.*)

PENAL CODE (1860), S. 415.

DAUD SHAIK *v.* EMPEROR. **9 R.C. 265=164 I.C. 721=37 Cr.L.J. 976=62 C.L.J. 257=40 C.W.N. 159.**

———**S. 414**—*'Believe'—Meaning.*

The word 'believe' in S. 414 is much stronger than the word 'suspect' and involves the necessity of showing that the circumstances were such that a reasonable man must have felt convinced in his mind that the property with which he was dealing was stolen property. It is not sufficient in such a case to show that the accused person was careless or that he had reason to suspect that the property was stolen or that he did not make sufficient enquiry to ascertain whether it had been honestly acquired.

Held, that the mere fact that a European soldier is in possession of jewelry ordinarily worn by Indian women is not sufficient to prove that the accused had reason to believe that the jewelry was stolen. (*Tek Chand, J.*) GIAN CHAND *v.* EMPEROR. **I.R. 1932 Lah. 586=139 I.C. 442=33 Cr.L.J. 764=33 P.L.R. 572=1932 Cr.C. 580=A.I.R. 1932 Lah. 434.**

———**S 414**—*"Disposing of"—Spending money stolen by another—No offence.*

The intention of the section is to punish persons who, subsequent to the commission of the offence, either conceal it or make away with it by destroying, or otherwise dispose of it. The section is clearly intended to penalize persons who deal with stolen property in such a way that it becomes impossible to identify it or use it as evidence. It cannot apply to the case of a man spending money stolen by another. (*Currie, J.*) AMAR NATH *v.* EMPEROR. **158 I.C. 835=36 Cr.L.J. 1459=8 R.L. 309=1935 Cr.C. 968=A.I.R. 1935 Lah. 587.**

———**S. 415**—*Gist of offence—Lorry transferred in the name of the accused by misrepresentation—No offence.*

Under S. 415 unless and until damage or harm is proved the offence of cheating is not completed. Where a lorry was transferred to the name of the accused on the basis of a writing signed by the complainant but the latter contended that the writing was procured by misrepresentation.

Held, that the accused was not liable to be convicted under S. 420. (*Saaduddin, A.J.C.*) SIRIKRISHAN *v.* EMPEROR. **6 R.Pesh. 65=148 I.C. 690=35 Cr.L. J. 872=1934 Cr C. 285=A.I.R. 1934 Pesh. 5.**

———**S. 415**—*Offence under — Encumbered land offered as security—Representation that it was free from encumbrance—Intention to cause damage.*

Applicant stood surety to a fishery lessee for the due payment of fishery revenue due from the latter and offered certain lands purported to be free from encumbrances, as part of the security. As a matter of fact, a portion of the land offered as security was heavily mortgaged. On default of the lessee to pay an instalment, proceedings were taken against the surety and his property was sold, but the sale was set aside on the surety paying the purchase-money interest and cost. The lease was cancelled as a result of the above default and the fishery was resold, and the deficit caused thereby was sought to be recovered from the surety, who could pay only a part of the deficit amount. The surety was prosecuted and convicted under S 417, I.P. Code.

Held, setting aside the conviction, that the proceedings did not show that the applicant had any intention of causing damage or harm by his act; nor could it be shown that his act was even likely to cause damage or harm, as it might well be that in spite of the fact that his land was encumbered, the applicant was confident of his ability to pay up any amount which might be due

PENAL CODE (1860) S. 415.

in respect of the fishery, and as it had not been shown that at the time that he entered into his bond, he must have known that it would be impossible for him to fulfil it or unlikely that his assets would be inadequate to fulfil it owing to the fact of his land being encumbered. (*Mackney, J.*) ABDUL HAMED *v.* EMPEROR. **157 I.C. 241=8 R R. 93=36 Cr.L J. 1136.**

———**S. 415**—*Offence under—Letter sent by insured post to creditor—Letter containing blank papers—Nature of offence.*

The accused sent a letter to his creditor and insured it for a sum of money but when the addressee received it and signed the acknowledgment it was discovered to contain nothing but blank sheets of paper.

Held, that the accused was liable to be convicted under S. 415. (*James, J.*) BAIJNATH SAHAY *v.* EMPEROR. **6 I R. (Pat.) 198=145 I C. 671=34 Cr. L.J. 1020=14 Pat L T. 48=1933 Cr.C. 514=A I.R. 1933 Pat. 183.**

———**S 415**—*Offence under—Prosecution must prove fraud or dishonesty on part of accused.*

In case of an offence under S. 415, the burden is on the prosecution to prove fraud or dishonesty on the part of accused. Every ingredient which is included in the definition of the offence must be established by the prosecution. (*Rowland and Saunders, JJ.*) MAHOMED RAFI *v.* EMPEROR. **6 I R. (Pat.) 276=146 I.C. 580 =1933 Cr.C. 1360 (2)=35 Cr.L J. 95=A.I.R. 1933 Pat. 598.**

———**S. 415**—*Offence under second part of—Requisites.*

In order to bring a case within the second part of S. 415, damage or harm caused, or likely to be caused, must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom, and the law does not take into account remote possibilities that may flow from the act. (*Tek Chand, J.*) RATAN SINGH *v.* EMPEROR. **35 P L.R. 666=153 I C. 30=7 R.L. 376=36 Cr.L. J. 274=1934 Cr C. 1180=A.I.R. 1934 Lah 833.**

———**S. 415**—*Requisites of offence—No allegation of dishonesty—No offence made out.*

Where a charge was framed "that you on or about the third day of November at Karachi cheated the complainant taking Rs. 3,300 as per award and not acting according to the award,"

Held, that as the charge did not contain any allegation that the accused acted dishonestly or that he deceived the complainant, the charge should be set aside and the proceedings quashed. (*Ferrers, J.C. and Aston, A.J.C.*) VARUMAL LAHRUMAL *v.* EMPEROR. **6 I R. (Sind) 36=145 I C. 617=34 Cr.L.J. 1049=1933 Cr.C 533=A.I.R. 1933 Sind 169.**

———**S. 415**—*Sub lease of garden—Disposal of fruits by lessee in fraud of sub-lessee—Offence.*

The petitioner was the lessee of a mango garden. He negotiated with the complainant for a sub lease and it was settled that the sub-lessee should pay the rent which the lessee was liable to pay and take the produce of the trees. Some time later, the agreement was registered but when the sub-lessee attempted to pay the rent, he found that not only the rent had already been paid by the lessee but that the produce itself had been sold by the lessee. On a prosecution under S. 415, the first Court found that the accused was trying to get out of a bad bargain.

Held, that was not a finding that from the beginning the accused had intended to defraud the complainant, and that at the time, he entered into the contract of sub-lease there was nothing to indicate that he wanted to cheat the sub-lessee. Taking the fruit and selling it after the sub-lease of course constituted an offence but it was not within the scope of the present charge. (*James, J.*) REAZUDDIN *v.* EMPEROR. **6 R P 366=147 I. C. 674 (2)=35 Cr L J. 456=15 Pat.L.T. 621=1934 Cr.C 460=A.I R. 1934 Pat. 231.**

PENAL CODE (1860), S. 420.

———**S. 417**—False representation by process-server of Court—Inducement to put thumb-mark on back of bond—Representation that it was suit summons—Intent to concoct endorsement of payment. *See* PENAL CODE, SS. 463, 467 AND 511. **40 Mys.H.C R 88.**

———**Ss. 417 and 420**—*Obtaining money by cheating.*

Where a person is alleged to have obtained money by cheating, the offence committed is one under S. 420 and not merely under S. 417. 10 Lah. 513, Ref. (*Tek Chand, J.*) KHUDA BAKHSH *v* EMPEROR. **147 I.C. 737—6 R.L 444=35 Cr.L.J. 514=35 P.L.R. 289= 1933 Cr C. 1554=A I R 1933 Lah. 1009.**

———**S. 417**—*Offence under—Deceiving creditor.*

A person commits an offence punishable under S. 417 if by deceiving his creditor he obtains from him a document not necessarily a legal quittance or a valuable security but such a document as is likely to facilitate the evasion of payment by the debtor and to cause embarrassment to the creditor when he seeks to enforce the claim. (*James, J.*) BAIJNATH SAHAY *v.* EMPEROR. **6 I R. (Pat.) 198=145 I C 671=34 Cr.L.J. 1020= 14 Pat.L.T. 48=1933 Cr C. 514=A.I R. 1933 Pat. 183.**

———**Ss. 417 and 420**—*Offence under—Fraud—Proof.*

Where serious charges of fraud are made, the facts must be sworned to by the person who alleges them. In such cases it is absolutely essential that there should be clear evidence to defraud or to cheat. Where there was some suspicion regarding the conduct of the accused but there was no evidence of a *prima facie* case of cheating,

Held, that criminal prosecution could not be sustained. (*Lort Williams and S.K. Ghose, JJ.*) PASHUPATI BANERJI *v.* MAHARAJKUMAR NRIPENDRA NARAYAN SINGHA. **I.R. 1931 Cal. 805=134 I C. 309—32 Cr.L.J 1133=53 C L.J. 457=1931 Cr.C. 604=A I.R. 1931 Cal 452.**

———**Ss. 418 and 420**—*Sale deed—False representation as to encumbrances—Offence constituted—Existence of civil remedy whether bars prosecution.*

The existence of a civil remedy need not necessarily exclude trial by a Criminal Court of an offence. Where it was alleged that the vendor had deceived the purchaser into believing that there was only one encumbrance on the property, whereas in fact another encumbrance was also discovered subsequently,

Held, that the facts suggested the offence of cheating and that the Magistrate should not throw out the case merely because there was a covenant in the sale deed to recover any further moneys for which the land might be liable presumably in a civil suit. (*Boys, J.*) LAL BAHADUR *v.* EMPEROR. **I.R. 1932 All. 600 (1)= 140 I.C. 97 (2)=33 Cr.L J. 884=1933 Cr C. 52 (1)= A.I.R. 1933 All. 42.**

———**Ss. 419 and 109**—*Cheating by personation—Subsequent false statement in support thereof—Offence.*

Where long after an alleged offence of cheating by personation has been committed, a person makes a false statement in order to support the false personation, he cannot be convicted under Ss. 419 and 109 (*Kendall, J.*) MST. WASIMA *v.* EMPEROR. **156 I C. 914=8 R A. 56=36 Cr.L J. 1031=1935 A.W.R. 515=1935 A.Cr.C. 115=1935 Cr C. 592=A.I.R. 1935 All. 566.**

———**Ss. 420 and 511**—*Accused writing letter to another containing false statements—Latter parting*

PENAL CODE (1860), S. 420.

with valuable security induced by other circumstances also—Offence committed

Accused wrote a letter to another containing a definitely false statement with a view to get certain valuable security from the other person and caused that letter to reach such other's hands ; but it was not proved beyond all reasonable doubt that it was that letter and the deception contained therein alone which induced the other to put the security under accused's control.

Held, the accused was not guilty of cheating but as he had done all he could to bring about that result, he was guilty of an attempt to commit the offence of cheating. (*Mya Bu and Baguley, JJ.*) N. N. BURJORJEE *v.* EMPEROR. **37 Cr.L J. 217=159 I.C. 1065=8 R.R. 321=1935 Cr.C. 1213=A.I.R. 1935 Rang. 456.**

———**S. 420**—*Applicability—Bill or invoice—Payment by cheque—Subsequent dishonour of cheque—Offence—"Valuable security."*

A person who pays a bill by means of a cheque (whether post dated or not) and gets the bill with the endorsement "received by cheque," duly stamped as a receipt, cannot be held to dishonestly induce another to deliver any property or valuable security within the meaning of S. 420, when later on the cheque is dishonoured when presented for payment. Nor is the receipt, property or valuable security within the meaning of the section. Since it does not extinguish or release any legal right and does not purport to be an acknowledgment of payment, as it amounts only to an acknowledgment that a cheque had been received. It is not also a valuable security under S. 30, I.P. Code. (*Lort Williams and Jack, JJ.*) H. K SHAW *v.* EMPEROR. **39 C.W.N. 1182=62 C L.J. 119=1936 Cr C. 579=37 Cr L.J. 828=163 I.C. 232=8 R.C. 730 (2)=A.I.R. 1936 Cal. 324.**

———**Ss 420 and 511**—*Attempt to cheat—Essentials—Application to Currency Officer for value of Currency Note alleged to have been lost—If merely preparation.*

Where an accused tries to get the value of a currency Note by sending half of the note, falsely alleging that the other half has been lost and requesting payment of the value of the note, the sending of the application by the accused is a definite act on his part towards the commission of the offence of cheating, and constitutes an attempt to cheat under S. 511 read with S. 420. It is not merely a preparation for cheating (*Ramachandra Rao, J.*) PARASURAM SAIT *v.* GOVERNMENT OF MYSORE. **12 Mys.L J. 467.**

———**S. 420**—*Cheating—Bangles pawned described as "gold bangles"—Bangles found to be of alloy of gold.*

Where a person pawns bangles describing them as "gold bangles" he is not supposed to have meant "pure gold" bangles. It is a case of *caveat emptor*, *i.e.*, for the pawnee to test the articles before he takes them, and the pawner is not guilty of the offence of cheating merely because the bangles are found to be of alloy of gold. (*Mosely, J.*) MAUNG TIN *v.* EMPEROR. **37 Cr L J 179=159 I.C. 789=8 R.R. 283=1935 Cr.C. 1201 (1)=A I.R. 1935 Rang. 426.**

———**S. 420**—*Cheating—Refusal to sign agreement or return it.*

The respondent alleged in his complaint that he approached the petitioner to drop certain criminal proceedings against him (respondent) and also to withdraw the proceedings relating to the execution of the decree against him (respondent) on receipt of a certain amount. The petitioner having agreed to his suggestion, an agreement to that effect was written out by a petition-writer and also a promissory note. The respondent signed the compromise, but the petitioner took it back from the petition writer without signing it, saying that he had to consult a friend before signing the document. The petitioner never returned the document.

Held, the above facts do not constitute an offence under S. 420, that the matter is of such a doubtful nature both on the facts and in law that no criminal proceedings should be taken on the allegations made in the complaint and that the dispute, if at all, was one which was eminently suitable to be decided in Civil Courts. (*Jai Lal, J.*) RAM NATH *v* RAJA RAM. **6 I.R. (Lah.) 215=146 I.C 552=35 Cr.L.J. 103=1933 Cr.C. 370=A.I.R. 1933 Lah. 215.**

———**S. 420**—*Cheating—"Snow ball" scheme—Company for advancing loans—Speculative and risky conditions—No misrepresentation—Fraud not proved—Conviction for cheating not sustainable.*

Accused No. 1 was the promoter of "The Delhi Syndicate, Ld."; accused 2 and 3 were agents. The Articles of Association, Memorandum and forms of applications for loans contained all the conditions governing the grant and the refund of loans. The object of the company was to advance money to poor and needy persons at one and half per cent. per annum, repayable after about 5 to 8 years. The main idea of the scheme was to grant loans by four unequal instalments to each applicant. As soon as fifteen loan candidates were registered, loans would be advanced to each candidate in turn, by drawing lots; if a candidate was not able to get the full loan nor free cash bonus nor any part loan, he would be refunded his candidature fee on an application for refund.

Held, that although the scheme may be very highly speculative and in a sense somewhat chimerical, still nothing was concealed from the public and everything was disclosed, not only as to how the loans were to be granted but also as to how it was to be refunded. The scheme might be speculative and the public, if they invested any money, ran a risk of losing their money but it could not be said that it was started with a dishonest intention of cheating the public. In the absence of any misleading or deceptive representations, therefore, the accused could not be convicted for cheating. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* DURGADAS. **6 R B. 286=148 I C. 271=35 Cr L J. 644=35 Bom L R. 1181=1934 Cr.C. 245=A.I.R. 1934 Bom. 48.**

———**S. 420**—*Civil dispute—Conduct amounting to sharp practice.*

Complainant whose cattle was with the accused took two respectable elders to demand the return of the cattle. Those people without having the matter referred to them decided that Rs. 50 would be the proper sum to be paid to get them back. Complainant accepted the decision and paid Rs 50 to accused. The accused accepted the Rs. 50 and demanded the balance of debt due to him.

Held, on the above facts, that though accused's conduct was a sharp practice, he cannot be made criminally responsible under S. 420 and that the matter was really a case of a civil dispute. (*Baguley, J.*) RAM RUP PANDEY *v.* EMPEROR. **6 I R (Rang) 71=146 I.C. 41=34 Cr.L.J. 1197=1933 Cr.C. 939=A.I.R. 1933 Rang 215.**

———**Ss. 420 and 120 B**—Conspiracy to obtain money by false pretences from public—Offences in pursuance of conspiracy—Trial of charges for different offences proper. *See* PENAL CODE, SS. 120 B AND 420. **28 S.L.R. 119=A I R. 1934 Sind 57.**

———**S. 420**—Deception without motive—No advantage gained—No loss to the other side not guilty under

PENAL CODE (1860), S. 420.

S. 420 or S. 476. *See* PENAL CODE, S. 476. **A.I.R. 1933 Rang. 114.**

———**S. 420**—*False representation—Proof of—Deception by conduct.*

It is not necessary that there should be any words used to constitute false representation. From the facts that the accused wore a *Khaki* shirt and threatened to take the complainant to the *Thana*, it could not be doubted that the accused gave the complainant to understand that he was a police officer which he was not and that he had the authority to take him to the *Thana* which authority he did not possess. That amounts to deception. (*Mallik and Remfry, JJ.*) ALI HUSSAIN *v.* EMPEROR. **56 C.L.J. 73=1933 Cr C. 408=143 I.C. 120=I.R. 1933 Cal. 343=34 Cr.L.J. 530=A.I.R. 1933 Cal. 308.**

———**S. 420**—*Mortgage reciting that there was no mortgage or sale—Prior charge created by a mortgagor.*

M executed a mortgage in favour of *G*. Prior to this transaction in a suit against *M* filed by one *T*, *M* had suffered a decree for about Rs. 2,000 by creating a charge upon the mortgage property. In the mortgage deed, it was recited that the mortgaged property was not under "mortgage or sale" anywhere. *G* then lodged a complaint under S. 420.

Held, that by suppressing the fact of the charge from *G*, *M* could not be said to have committed any deception leading to cheating as defined in S. 415. *M* was not bound to disclose the charge. (*Subhedar, A. J. C.*) RAMKRISHNA NANDRAM *v.* GANESH NARAIN. **30 N.L.R. 303=150 I C. 20=6 R N. 270=35 Cr.L.J. 1063=1934 Cr.C. 658=A.I.R. 1934 Nag. 149.**

———**S. 420**—*Offence under—Criminal intent—Necessity for proof of—Mere breach of contract—If offence.*

The mere breach of a contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating depends upon the intention of the accused at the time of the alleged inducement which may be judged by his subsequent act, but of which the subsequent act is not the sole criterion In the absence of clear and conclusive evidence of the criminal intention of the accused at the time of the alleged commission of the offence, and when the aggrieved party has an alternative remedy in the Civil Court, the matter should not be allowed to be fought in the Criminal Court; a conviction under S. 420 in such cases cannot be upheld. (*Fazal Ali, J.*) SHEOSAGAR PANDEY *v.* EMPEROR. **8 R P. 250=37 Cr.L J. 38=159 I.C. 167 (1)=16 Pat.L.T. 553.**

———**S. 420**—*Offence under—Evidence.*

The accused were charged under S. 420 for having induced the office of the I. G. Police to transfer a lorry to their name from the name of *F*, by producing a doubtful receipt signed by *F*,

Held, that it being admitted that the document was signed by *F* so far as the office of the I. G. Police was concerned, that was sufficient authority for them to transfer the lorry in the name of the accused. Neither the I. G. Police nor his subordinates were incurring any legal liability by effecting such transfer nor the I. G. Police or his office suffered damage or harm in body, mind, reputation, or property. The accused could not therefore be convicted. (*Saaduddin, A. J. C.*) SIRI KRISHAN *v.* EMPEROR. **6 R Pesh. 65=148 I C. 960=35 Cr L J. 872=1934 Cr.C. 285=A.I.R. 1934 Pesh. 5.**

———**S 420**—*Offence under—Money paid for bribing public servant.*

Certain persons were being tried for an offence. The accused representing that he could influence the Court in their favour received money from those persons. The accused was prosecuted for cheating. It was urged for the defence that the money having been paid for an illegal purpose a prosecution for cheating in regard to that money could not be maintained.

Held, that the plea was untenable. (*Mya Bu, J.*) YACOOB *v.* EMPEROR. **6 I.R. (Rang.) 85=146 I.C. 240=34 Cr.L J. 1255=1933 Cr.C. 804=A.I.R. 1933 Rang. 199.**

———**S. 420**—*Ordering goods on credit—Intention not to pay—Proof of—Embarrassed circumstances at time of purchase.*

If a man carrying on a retail trade orders goods from his wholesale dealer and then becomes insolvent before he is able to pay for them, the Court is not entitled to infer he had a dishonest intention of not paying for them. A man in embarrassed circumstances is not bound to disclose all his circumstances to people with whom he deals on credit. Of course he is not entitled to make any untrue statement. If, for instance, he orders goods on credit and promises expressly or impliedly to pay for them on a particular date and the prosecution proves that at the date of the contract the circumstances of the accused were such that he must have known that it was practically impossible that he would be able to pay for the goods, then that would be a case of cheating. But the mere fact that the accused was in embarrassed circumstances at the date of contract is not sufficient, without more, to prove an intention to cheat.

Per *Broomfield, J.*—It is not, however, necessary for the prosecution to prove an absolute impossibility of payment; it is sufficient to show that the accused had no reasonable expectation of being able to pay within a reasonable time. (*Beaumont, C.J. and Broomfield, J.*) EMPEROR *v.* MOHSINBHAI FATEALI. **56 Bom. 204=I.R. 1932 Bom 224=137 I.C. 142=33 Cr.L J 401=34 Bom.L R. 313=1932 Cr C. 385=A.I.R. 1932 Bom. 273.**

———**S 420**—*Requisites of offence.*

An offence under S. 420 does not consist merely in a fraudulent or dishonest representation but also requires the delivery of property by the victim. (*Dhavle, J.*) ABDUR RAHIM *v.* EMPEROR. **I.R 1931 Pat. 204=130 I C. 796=32 Cr.L J. 611=12 Pat.L.T. 12=1931 Cr C. 230=A.I.R. 1931 Pat. 102.**

———**S. 420**—*Sentence—Collections for charity—Misappropriation of.*

A person who extracts subscriptions from the charitably minded public for a charitable institution and pockets the proceeds himself does not deserve any reduction of sentence. (*Macpherson and Agarwala, JJ.*) KEDAR NATH SAHAY *v.* EMPEROR. **150 I.C. 927 (2)=7 R.P. 39=35 Cr.L.J. 1167=15 Pat.L.T. 318=1934 Cr.C. 300=A.I.R. 1934 Pat. 114.**

———**S. 420**—*Sentence—Punishment for cheating—Imprisonment obligatory.*

Under S. 420, a sentence of imprisonment is obligatory though the Court has a discretion to add or refrain from adding a fine. 94 I.C. 130 and 114 I.C. 733, Ref. (*Mahadevayya, J.*) PUTTABASAPPA *v.* LINGAPPA. **37 Mys.H.C.R. 259=10 Mys.L.J. 274.**

———**Ss. 420 and 511**—*Setting fire to car and false information to insurance company—Offence—Punishment—Deterrent sentence.*

Accused set fire to a car which was insured and then submitted a false information to the company to obtain money.

Held, that the offence fell under S. 420/511.

Held, further, that offences of such nature should be dealt with rather severely. It is very difficult to catch these motor insurance frauds and when once a man is

PENAL CODE (1860), S. 420.

caught, he should be given deterrent punishment. (*Mir Ahmad, A.J.C.*) DASRAT LAL *v* EMPEROR. **151 I.C. 249=7 R.Pesh. 18=35 Cr.L.J. 1345=1934 Cr.C. 950 (2)=A I.R. 1934 Pesh. 67.**

———**S. 420**—*Trial of case under S. 420 by Second Class Magistrate—Validity of.*

A Magistrate who holds only second class powers has no jurisdiction to try a case under S. 420, Penal Code ; this is a matter which goes to the very root of the case, and is not an irregularity which is covered by S. 537, Cr. P. Code. (*Tek Chand, J.*) KHUDA BAKHSH *v.* EMPEROR. **1933 Cr C. 1554=147 I.C. 737=6 R.L. 444=35 Cr.L.J. 514=35 P.L.R 289=A.I.R. 1933 Lah. 1009.**

———**S. 423**—*Applicability—False recital in deed—Object being to cheat creditor.*

Where the judgment-debtors executed a *kobala* with a false recital as to the consent of the decree-holder to take the land at a stated price and it appeared that this was done fraudulently with the intention of supporting at a later stage a case of satisfaction of the complainant's decree and the statement relating to the consideration was false,

Held, that the judgment-debtors were guilty of an offence under S. 423. (*Rowland, J.*) AMIRI SINGH *v.* EMPEROR. **6 I.R. (Pat.) 16=144 I.C. 791=34 Cr.L J. 846=1933 Cr.C. 1029=A I.R. 1933 Pat. 495.**

———**S. 424**—"*Dishonestly*"—*Meaning — Attachment of crops—Copy of writ not affixed to residential house of judgment-debtor—Removal of crops—If offence.*

Where in pursuance of a writ of attachment of growing crops under O. 21, R. 44, C P. Code, a copy of the writ has not been affixed on the residential house of the judgment debtor, the attachment is not legal or effective; consequently the judgment-debtor removing such crops contrary to such attachment cannot be convicted of an offence under S 424, I. P. Code. The judgment debtor is entitled to remove the crops which have not been validly attached and which have not, therefore, passed out of him to the Court, and the removal by him of such crops does not prove that he has done so dishonestly Dishonest intention must be proved and cannot be presumed unless an unlawful act is done or a lawful act done by unlawful means. A person cannot be said to do anything "dishonestly", if he merely intends to cause wrongful loss to some one, when he cannot or does not in fact cause any such wrongful loss. (*Mehta, A.J.C.*) WALI MAHOMED ABDULLAH *v.* EMPEROR. **29 S.L.R. 190=37 Cr.L.J. 485=1936 Cr. C. 125=161 I.C. 553=8 R.S 157=A.I.R. 1936 Sind 20.**

———**S. 424**—*Dishonest removal of crop.*

Where it was found that the harvesting and removal of the crop was dishonest, a conviction under S. 424 is justified. It is immaterial if the accused was entitled to the exclusive possession of the crop till division or that in the event of removal, the produce was to be deemed to have been as full as the fullest crop of the same description in the neighbourhood on similar land for that harvest. 26 M. 481, Foll. (*Lakshmana Rao, J.*) PERIANA THEVAN *v.* KARUPPIAH THEVAN. **1931 M.W.N. 1049.**

———**Ss. 424 and 206**—*Dishonest removal of attached property—Complaint—Necessity for sanction.*

Dishonest removal of movable property, after attachment has been effected, would constitute an offence either under S. 379, 424 or 206 and as an offence under S. 206 is one which cannot be entertained without sanction of Court, a complaint without sanction is invalid and vitiates the trial even though the accused might have been convicted, not under S. 206, but under S. 424.

PENAL CODE (1860), S. 425.

(*Burn, J.*) SUBBAYYA HEGDE *v.* SIDDHU SHETTY. **1933 M.W.N. 722.**

———**S. 424**—Execution of process after specified date—Legality of—Resistance to, no offence. *See* C. P. CODE, O. 21, R. 24 (3). **55 All 119=A.I.R. 1933 All. 46.**

———**S. 424**—*Landlord and tenant—Illicit removal of crops by tenant—Offence if constituted.*

A landlord of a village lodged a complaint that the accused who were tenants holding land under "varam tenure" reaped the crops without delivering his share and in order to defeat his rights as determined by decree,

Held, that the complaint for an offence under S. 424, I. P. Code, was sustainable and that the complainant need not be driven to an unnecessary civil suit (*Pakenham Walsh, J.*) VENKATAMADHAVRAO *v.* EMPEROR. **1932 M.W.N 639.**

———**S. 424**—*Offence under—Dishonesty or fraud—Need for proof.*

After a decree had been passed against a person, he executed a deed of gift in respect of his Zemindari property in favour of his wife who obtained mutation in her favour. When the decree-holder attached the aforesaid property, the judgment debtor raised an objection, but it was disallowed on the ground that he had no *locus standi* to raise the objection. The execution proceedings were thereafter transferred to the Deputy Commissioner under S. 68, C. P. Code. The wife of the judgment-debtor filed an objection which was rejected by the Deputy Commissioner who referred her to the Court which passed the decree. As she continued to collect rents after the attachment, the Deputy Commissioner prosecuted her and some of the tenants who had paid rent to her under S. 424, I. P. Code, and the prosecution resulted in their conviction.

Held, that one of the necessary elements of S. 424, I.P. Code, is that some dishonesty or fraud should be made out against the accused, that as there had been no decision or adjudication as regards the deed of gift in her favour being invalid, it was impossible to say that she acted dishonestly or fraudulently in making collections and that no dishonesty or fraud could be imputed to the tenants also when the person to whom they paid the rent was the recorded owner of the property, and that the convictions should, therefore, be set aside. (*Srivastava, J.*) EMPEROR *v.* HALIM-UN-NISSA. **1935 O.W.N. 879.**

———**S. 424**—*Refusing to return.*

Refusing to return property is not contemplated by S. 424. (*Pullan, J.*) GURDIAL *v.* EMPEROR. **55 All. 119=I.R. 1933 All. 368=144 I.C. 32=1933 A.L J. 1=14 L.R. 34 (Cr.)=1933 Cr.C. 52 (2)=A.I.R. 1933 All. 46.**

———**S 424**—*Removal by accused of his crops not validly attached.*

A person cannot be convicted under S. 424, I. P. Code, for removing his crops not validly attached. If the provisions of the law were not complied with, the attachment would be illegal and the property would not pass from the judgment-debtor to the Court. (*Bajpai, J.*) SARSAR SINGH *v.* EMPEROR. **1934 A.L.J. 749=151 I.C. 366=7 R.A. 153=35 Cr.L.J. 1307=3 A.W. R. 682=1934 Cr.C. 901=A.I R. 1934 All. 711.**

———**S. 425**—*Co-sharers—One co sharer wrongfully digging land and removing earth.*

One of several co sharers in constructive possession of joint land has no right to dig part of it with a view to apportioning it for his exclusive use. If he does, in the teeth of opposition by another who is also in construc-

PENAL CODE (1860), S. 425.

tive possession, the act amounts to criminal trespass. In such a case the other co sharer can exercise his right of private defence. (*Niamatullah, J.*) ABDUL HADI *v.* EMPEROR. **6 R A. 755 = 148 I.C. 649 = 35 Cr.L.J. 730 = 1934 A.L.J. 689 = 4 A.W.R. 271 = 15 L.R. 147 (Cr.) = 1934 Cr C. 1012 (2) = A I.R. 1934 All. 829 (2).**

———**S. 425**—*Cutting ripe crops grown to be cut is not mischief.*

To cut ripe crops which are grown to be cut is not to destroy them or affect them injuriously within the meaning of S. 425 and is not mischief. (Cases referred). (*Nanavutty, J.*) PAHALWAN SINGH *v.* EMPEROR. **10 Luck. 1 = 6 R.O. 467 = 148 I C. 937 = 35 Cr L.J. 797 = 11 O.W.N. 508 = 1934 Cr.C. 578 = A.I.R. 1934 Oudh 182.**

———**Ss. 425 and 426**—*Mischief—Knowledge of wrongful loss sufficient—Building house under tree and then cutting off tree.*

A person commits mischief if he causes destruction of property knowing that he is likely to cause wrongful loss or damage to the public or any person even if an intention to cause that damage is not made out Where the tree belonging to the District Board has been in existence for a long time and the petitioner built his house underneath some of its extending branches and cut off the tree on the ground of its overhanging his house, *held*, that the petitioner was properly convicted under S. 426. (*Macpherson, J.*) KASTUR CHAND *v.* EMPEROR. **150 I C. 1033 = 35 Cr.L J. 1304 = 7 R.P. 70 = 15 Pat L.T. 107 = 1934 Cr.C. 441 = A.I R. 1934 Pat. 221.**

———**S 425**—*"Wrongful loss or damage"—Meaning of.*

"Wrongful loss or damage" in S. 425 means loss or damage by unlawful means. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v* PUNJAJI BAPUJI. **59 Bom. 177 — 156 I C 459 = 7 R B. 514 = 36 Cr L J. 940 = 37 Bom. L.R. 96 = 1935 Cr C. 324 = A.I.R. 1935 Bom. 164.**

———**S. 426**—*Essentials of offence—Party wall—*Bona fide *assertion of right.*

To sustain a conviction under S. 426 it is necessary to establish that the accused with the intention to cause or knowledge that he would likely cause, wrongful loss or damage to the complainant, destroyed or brought about such a change in the party wall as to diminish its value or utility or affect it injuriously. And where the alleged mischief consisted of pulling out some stones from and inserting a stone slab in a party wall in which both the complainants and the accused possessed rights of ownership, the real test is not whether the accused did the act without obtaining the consent of the complainant, but whether it was not done by the accused in the *bona fide* assertion of his right. If so, the accused is not guilty of a criminal offence. 1 Weir 490; 26 Bom. L.R. 978, Ref (*Doraiswami Iyer, C. J.*) RUDRAPPA *v* GANGANNA. **36 Mys H.C.R. 21 = 9 Mys. L.J. 140.**

———**S. 426**—*Essentials of offence—Protection against neighbour's invasion*

Unless it is found that by the exercise of the ordinary rights of his property, the accused has infringed the rights of his neighbour with the intention or knowledge to cause damage to the latter's property, a conviction under S 426 cannot be sustained. Where all that was shown was that the accused had built up a wall on one side of his house, as a result of which the water from the neighbour's roof which had hitherto found its way to the house of the accused could no longer do so and it was not shown that the neighbour had any right of ease ment which was infringed, the accused cannot be convicted of mischief. (*Doraiswami Iyer, C. J.*) MADIAH *v.* MALLARAJE URS. **36 Mys.H.C.R. 73 = 9 Mys.L. J. 47.**

PENAL CODE (1860), S. 430.

———**S. 426**—*Offence of mischief—What constitutes—Erection of engine on one's own property—Damage to neighbouring house by vibration—Offence—"Wrongful loss or damage"—Meaning.*

Accused owning a building installed an oil engine in it The complainant who was the owner or occupier of a neighbouring building alleged that the accused so used his engine as to cause damage to his house by means of vibration and instituted a complaint.

Held, that there was nothing unlawful in the accused installing an oil engine in his own property and working it in the way he chose; that if his working caused damage to the neighbour's property, the accused would only be liable for damages in a civil suit; and that the working of the engine by the accused in his own house being a lawful act, he was not guilty of the offence of mischief and could not be convicted under S 426. (*Beaumont, C J. and Wadia, J.*) EMPEROR *v.* PUNJAJI BAPUJI. **59 Bom 177 = 156 I C. 459 = 7 R B. 514 = 36 Cr L J. 940 = 37 Bom L.R. 96 = 1935 Cr.C. 324 = A.I.R. 1935 Bom 164.**

———**S. 427**—*Adjoining owners—Removal of roof under* bona fide *claim of right—Offence, if constituted.*

The accused and the complainant were neighbours and there was a dispute as regards the boundary between them which was not demarcated. The accused had put up a wall and the complainant sent a notice saying that he encroached on his side. To this the accused retorted stating that the complainant's roof encroached upon his plot and there was possibility of rain water falling on his newly built boundary wall and each of them ordered the other to remove the encroachment on his land. It appeared that the accused had cut away the roof under a *bona fide* claim of right.

Held, that the accused was not liable to be convicted under S. 427, the matter being one entirely for the Civil Courts to decide. (*Pakenham Walsh, J.*) SEBASTIAN LOBO *v.* MINGEL D'SOUZA. **I R. 1932 Mad. 596 = 33 Cr L. J 655 (2) = 37 L. W. 149 = 138 I C. 608 — 1932 M W N. 645 = 1932 Cr.C. 834 = A.I.R. 1932 Mad. 676.**

———**Ss. 427 and 147**—Encroachment on public road —Public nuisance—No right of private abatement— Demolition of encroachment constitutes mischief— Guilty of rioting also. *See* PENAL CODE, SS. 147 AND 327. **1933 M.W.N. 905.**

———**S. 427**—*Intent to cause wrongful loss not made out—Building on one's own land—No offence.*

The accused had built a house on his own land up to the border thereby interfering with a drain leading from the adjoining land of the complainant to that of the accused. The former had, however, no right of easement. In consequence of the building, water was retained in complainant's land and a crack was caused in a building thereon.

Held, that the accused had no intent or knowledge that he was likely to cause wrongful loss to his neighbour and was not guilty of an offence under S. 427. (*Macpherson, J.*) FAKIR CHAND SAO *v.* EMPEROR. **6 R.P. 360 (1) = 147 I C 538 = 35 Cr L.J. 430 (2) = 1934 Cr.C. 383 = A.I.R. 1934 Pat. 199 (2).**

———**S. 430**—*Water-supply—Causing diminution of —Intent, not material.*

The act which causes diminution of water supply need not have been a want on act of waste or one prompted by a malicious motive. The accused might have cut the *bandh* of the complainant merely to save his own fields

PENAL CODE (1860), S. 430.

from inundation. But if the cutting was without any sort of right and if the result was a diminution of supply to the complainant, the offence under S. 430 is complete. 1 M. 262 (F.B.), Rel. (*Rowland, J.*) RAGHUNATH THAKUR *v.* EMPEROR. **I.R. 1932 Pat. 128=136 I. C. 592=33 Cr.L.J. 313=13 Pat L.T. 162=1932 Cr. C. 407=A.I.R. 1932 Pat. 224.**

———**Ss 430, 143 and 144**—Charge under S. 430 and also under Ss. 143 and 144—Acquittal under S. 430—Accused entitled to an acquittal under Ss. 143 and 144. *See* PENAL CODE, SS. 143, 144 AND 430. **A.I R. 1934 Pat. 505.**

———**S. 430**—Essentials of offence—Diverting stream —Permanent injury not caused—Nature of offence—Conviction not under S. 430 but S. 70—Northern India Canal and Drainage Act. *See* NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII OF 1873), S. 70. **A.I.R. 1934 All. 687 (2).**

———**S. 430**—*Water supply—Throwing a bund across supply channel—Motive—Relevancy of.*

To throw a bund across a supply channel is to destroy its utility as such and constitutes mischief. That the accused did so to take the water into their own canal may be their motive which, however, has no bearing on their intention in bunding up the channel. (*Burn, J.*) NARIAH *v.* NARASAYYA. **1933 M.W.N. 427.**

———**S. 436**—*Offence of arson—Sentence.*

Arson in an Indian village is a crime which cannot be too heavily punished, as it causes incalculable damage to innocent persons who can ill afford to lose the little property that they possess. Chief Court refused to interfere with a sentence of five years' rigorous imprisonment on accused. (*Raza and Pullan, JJ.*) GHAFOOR KHAN *v* EMPEROR. **6 Luck. 539=I.R. 1931 Oudh 196=32 Cr.L.J. 694=14 O.L.J. 218=131 I.C. 436= 1931 Cr.C. 276=8 O.W.N. 101=A.I.R. 1931 Oudh 116.**

———**S. 441**—*Applicability to movable property— Ferry boat—If property.*

The word "property" in S. 441, I. P Code, is sufficiently wide to cover any kind of property, either movable or immovable, and includes a ferry boat. (*Costello, J.*) DHANANJOY DHARA *v.* PROVAT CHANDRA BISWAS. **6 R C. 590=149 I.C 431=35 Cr.L J. 949 =1934 Cr C 688=38 C.W.N. 665=A.I.R. 1934 Cal. 480.**

———**S. 441**—Bona fide *claim—Plea of.*

In a prosecution for criminal trespass the plea of a *bona fide* claim only arises in cases where the trespass is not of an aggravated kind and is supported by at least a plausible show of title or by such circumstances as would justify the inference that the intention of the accused was not to commit an offence or to insult, intimidate or annoy the person in possession, but merely to vindicate what he considers to be his legal right. (*Mahadevayya, J.*) MALAGE RUDRAPPA *v.* BENAKAPPA. **37 Mys H C.R. 294=10 Mys.L J. 243.**

———**Ss 441 and 447**—*Civil trespass—Absence of finding as to intent to annoy or intimidate—Conviction —Sustainability.*

Where the finding of the Magistrate was to the effect that the intention of the accused primarily was to take possession of the field in dispute, and there was no finding that the accused committed trespass with intent to intimidate, insult or annoy the person in possession,

Held, that the act of the accused amounted only to a civil trespass for which substantial damages could be claimed by the complainant in a Civil Court and a conviction under S. 447, could not be sustained. (*Nanavutty, J.*) BISHAN DAYAL *v.* BRIJ BEHARI. **6 I.R. Oudh**

PENAL CODE (1860), S. 441.

(61)=145 I C. 625=34 Cr.L.J. 1014=10 O.W.N. 266 =1933 Cr.C. 390=A.I R. 1933 Oudh 179.

———**Ss. 441 and 448**—*Criminal house trespass— Ingredients of—Intention to annoy—Necessity to prove —Act done in assertion of supposed legal right—Offence.*

In order to establish a charge of criminal trespass under S. 441, I. P. Code, it is essential for the prosecution to prove the intention laid down in the section, *i.e.*, intent to annoy, etc. Intention must always be gathered from the circumstances of the case. One matter which has to be considered is no doubt the consequences which naturally flow from the act complained of, because a man is usually presumed to intend the consequences of his own act. But that is only one element from which the Court has to discover the intention of the party trespassing. The Court must find out what the real intention is, *i.e.*, whether it was to annoy or something else, and whether the annoyance is a mere consequence, possibly foreseen, but not intended or desired. If it is the latter, there is no offence. Where the act of trespass is committed with the intention of asserting a supposed legal right, there is no offence which will justify a conviction under S. 448, I. P. Code. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* S. D'CUNHA. **59 Bom. 738=37 Bom.L R. 880=37 Cr.L J. 309 (2) =1936 Cr.C. 64=160 I.C. 515=8 R.B. 263=A.I.R. 1936 Bom. 15.**

———**S. 441**—*Criminal trespass— Mere entry not sufficient.*

The mere entry does not render the accompanying trespass a criminal trespass. It must therefore be proved by the prosecution that the accused had the intention to intimidate, insult or annoy when he made the entry, nor is it enough that the prosecution should ask the Court to infer that the entry is bound to cause intimidation, insult or annoyance to the person in possession of the property. (*Rajpai, J.*) BALDEWA *v.* EMPEROR. **1933 A.L J. 1418=1933 Cr.C. 1415=56 All. 33=147 I C 119=35 Cr.L J. 347=6 R.A. 401=A.I.R. 1933 All. 816.**

———**S. 441**—*Essentials of offence—Intention.*

It is the intention of the accused that is the deciding factor under S. 441 to constitute an offence of trespass. Where the accused first took settlement for grazing cattle of certain khas mahal land but at the end of the lease they remained on the land and proceeded to cultivate it.

Held, that the accused did not commit an offence under S. 441, their intention being to cultivate the land and not to annoy the Government. (*Cuming, J.*) SAFAR ALI *v* EMPEROR. **130 I.C. 500=32 Cr. L.J. 568=1931 Cr.C. 296=A.I.R. 1931 Cal. 264.**

———**S. 441**—*Exclusive occupation by one member— Trespass.*

Although a member of a joint family does not commit an offence of criminal trespass by entering the house which forms the joint property, he may be guilty of that offence when he entered the room ordinarily occupied by another member of the family. 15 W.R. Cr. 6, Rel. on. (*Rupchand, J.C. and Lobo, A. J.C.*) LALCHAND PITUMAL *v.* EMPEROR. **1933 Cr. C. 1436=147 I.C. 66=6 R S. 123=35 Cr.L J. 270=28 S.L.R. 22=A.I. R. 1933 Sind 396.**

———**S. 441**—*Gist of offence—Actual entry by lawful owner, if necessary.*

To constitute criminal trespass there must either be entry upon property in the possession of another or unlawful continuance thereon after a lawful entry. It cannot be said that a lawful owner, who merely goes near to the land, can be said to have re-entered on the land.

PENAL CODE (1860), S. 441.

Semble : It would probably amount to re-entry if the true owner entered upon the land while the trespasser remained her. (*Macnair, J.C.*) SAIBAJ *v.* GHAFFOOR. **28 N.L.R. 57=I.R. 1932 Nag. 114 (2)=139 I.C. 609=33 Cr.L.J. 861=1932 Cr.C. 500=A.I.R. 1932 Nag. 112.**

———**S. 441**—*Intention to annoy—Party in possession not present at the time of trespass.*

Constructive possession is included in the word "possession"; so that the trespasser cannot be heard to say he could not have caused annoyance merely because the party in possession of the trespassed premises was absent at the time of the trespass. 2 All. 465, Diss; 60 M.L.J. 336, Appr. (*Jackson, J.*) SHEIK HYDER SAHIB *v.* SABJAN SAHIB. **1931 M.W.N. 328=34 L.W. 527=135 I C. 542=33 Cr.L.J. 145 (1)=I.R. 1932 Mad. 126=1931 Cr.C. 624=A.I.R. 1931 Mad. 560.**

———**S. 441**—*Intention to commit offence or to intimidate must be proved—Knowledge that annoyance is likely not enough—Landlord entering upon land to compel tenant to give up possession*

For an offence under S. 441, actual intention to commit an offence or to intimidate, etc., must be proved; and for intention some definite act of volition is necessary, Knowledge that the act is likely to intimidate or annoy. etc., is not sufficient nor is the rule that a person is to be presumed to intend the natural consequences of his action applicable. The complainant who was found to be in possession of the land was claiming occupancy rights. The accused, landlords, entered upon the land with intent to intimidate him and thereby compel him to give up possession.

Held, that accused were guilty under S. 441. (Case-law reviewed.) (*Mohammad Noor and James, JJ.*) BIRD *v.* EMPEROR. **13 Pat. 268=151 I.C. 844=7 R.P. 128=35 Cr.L J. 142=15 Pat. L.T. 392=1934 Cr.C. 355=A.I.R. 1934 Pat. 158.**

———**S. 441**—*Intention—Proof of—Intention to squat—Offence.*

Under S. 441 mere knowledge on the part of the accused that his act is likely to annoy insult or intimidate is not sufficient. The required intention must exist. Such knowledge coupled with other facts may legitimately give rise to an inference that the accused had the requisite intention but there must always be an express finding regarding the intention and a conviction is not sustainable in the absence of such a finding. The only intention of "making the complainant's property his own," in otherwards, an intention to squat does not fall within the purview of S. 441. (*Ferrers, J. C. and O'Sullivan, A.J.C.*) SITARAM *v.* EMPEROR. **154 I. C. 552=7 R.S. 164=36 Cr.L.J. 577=1935 Cr. C. 131=A.I.R. 1935 Sind 20.**

———**S. 441**—"*Intimidate*".

The word "intimidate" in S. 441 must be understood in its ordinary sense to overawe, to put in fear, by a show of force or threats or violence and it may include use of actual force unaccompanied by threats. (*Mohammad Noor and James, JJ.*) BIRD *v.* EMPEROR. **13 Pat. 268=151 I C. 844=7 R P. 128=35 Cr.L.J. 142=15 Pat.L.T. 392=1934 Cr.C. 355=A.I.R. 1934 Pat. 158.**

———**Ss. 441 and 447**—*Knowledge that annoyance will be caused by act—Sufficiency.*

A person who must have known that he would cause annoyance by his act can be held to have committed offence of criminal trespass. (*Allsop, J.*) MATA DAYAL *v.* SALIG RAM. **6 I.R. (Oudh) 152=146 I.C. 630 (2)=10 O.W.N. 1078=35 Cr.L.J. 124=1933 Cr.C. 1393 (1)=A.I R. 1933 Oudh 469.**

PENAL CODE (1860), S. 441.

———**S. 441**—Landlord and tenant—Tenant ejected in execution of decree—Tenant unaware of ejectment—If guilty of criminal trespass on re-entry. *See* AGRA TENANCY ACT, 1926, SS. 93 AND 95. **1935 A.W.R. 1067=1935 A.L.J. 1108=A.I.R. 1935 All. 938.**

———**Ss. 441 and 447**—*Offence—"Possession"—Possession obtained by auction-purchaser through Court—Lessee obstructed by judgment-debtor and his men—Latter, if guilty of criminal trespass.*

An auction purchaser at a Court sale who gets delivery of possession through the Civil Court is lawfully in possession of the property as the lawful owner thereof; and such possession is not lost merely because trespassers come on the property without license and plough it. If therefore the lessee of such purchaser is obstructed by the judgment-debtor or his men, the latter are guilty of criminal trespass under S. 441, I. P. Code, and are liable to conviction under S. 447, I. P. Code. (*Pollock, A. J. C.*) EMPEROR *v.* AMRU. **37 Cr L.J. 720=162 I. C. 813=8 R.N. 286=18 N.L J. 307.**

———**Ss. 441 and 447**—*Order closing down cattle slaughter house—Intentional disabedience—Offence.*

Where certain persons who were aware that by reason of the Municipality's order certain premises had been closed down for use as a slaughter house for cattle, killed cattle in that place by way of demonstration,

Held, that they were guilty of an offence under S. 447 as they intended to challenge and annoy the Municipal Committee within the meaning of S. 441. (*Pollock, A. J. C.*) SHEIKH AMIR *v.* MANDLA. **141 I.C 543 (1)=34 Cr.L.J. 224 (2)=I.R. 1933 Nag. 73=15 N.L.J. 89.**

———**Ss. 441 and 447**—*Possession--Delivery of possession though Court—Interference with offence.*

Possession given even for a few minutes by a process-server in execution of a decree constitutes possession under S. 447. When a person knows that possession has been delivered in execution of a warrant obtained against him, his possession is at an end. If this were not the case, it would, in very many cases, be useless to obtain and execute a decree. The object of the formal delivery of possession is that, after such delivery, the decree-holder may have possession, interference with which is prohibited by the criminal law. (*Macnair, J. C.*) SITARAM *v.* TILOKCHAND. **1933 Cr.C. 78=141 I.C. 273=34 Cr L.J. 145=I.R. 1933 Nag. 55=28 N. L.R. 298=A.I.R. 1933 Nag. 26.**

———**S. 441**—*Possession—Delivery of possession under decree—Effect of—Absence of judgment debtor at the time of delivery of possession.*

If possession is given under a Civil Court's decree or order, that possession binds a party to the suit who was formerly in possession. Even symbolical delivery amounts to a transfer of possession as between the parties to the suit and even the absence of judgment-debtor at the time of giving possession does not affect the validity of the transfer of possession or afford a justification for trespass by him. (*Mahadevayya, J.*) MALAGE RUDRAPPA *v.* BENAKAPPA. **37 Mys.H.C.R. 294=10 Mys L.J. 243.**

———**S. 441**—'*Possession*'—*Meaning of—Constructive possession, if included.*

Possession referred to in S. 441 is physical and not merely constructive possession as the act intended to be done which makes the trespass criminal, must be done to the persons in possession and on the property. (*Rupchand, J.C. and Lobo, A.J.C.*) LALCHAND PITUMAL *v.* EMPEROR. **147 I.C. 66=6 R.S. 123=35 Cr.L.J. 270=28 S.L.R. 22=1933 Cr.C. 1436=A.I.R. 1933 Sind 396.**

PENAL CODE (1860), S. 441.

——**S. 441**—*Possession — Meaning of—Dominion and consciousness of it unnecessary.*

Possession implies dominion and consciousness in the mind of the person having dominion over an object that he has it and can exercise it. A person cannot be said to be in possession of a thing unless it is shown by evidence that he had dominion over it and knew that he had it. The mere fact that a thing is found in a house occupied by a person in common with others or at a place in the house which is as much accessible to others as to him is no proof that he was in possession of it. (*Niamatullah, J.*) RAM CHARAN *v.* EMPEROR. **6 I.R. (All.) 50 = 145 I.C. 130 = 34 Cr.L.J. 930 = 14 L.R. 239 (Cr.) = 1933 A.L.J. 1338 = 1933 Cr C. 743 = A.I.R. 1933 All. 437.**

——**S. 441**—*Possession by tenant under colour of title —Entry into land by him to cut crops—If offence—Right of private defence of rival claimant to such land.*

If a tenant who is in possession of land under colour of a title enters it for the purpose of cutting the crop which he himself has sown, his action does not amount to a criminal trespass, and therefore no question of private defence arises in favour of a rival claimant to that land. (*Kendall, J.*) RAM SINGH *v.* EMPEROR. **156 I.C. 961 = 8 R.A. 69 (2) = 36 Cr L J. 1052 = 1935 A.W.R. 509 = 1935 A.Cr.C. 109.**

——**S. 441**—*Scope—Trespass committed with knowledge as to causing annoyance—Offence.*

S. 441 does not contain the words "with the sole and deliberate intent to insult or annoy" and those words cannot be read into the section. If a man commits trespass with the knowlege that his action will cause annoyance it must inevitably be held that he intended to cause annoyance although he may also have had other intentions and is guilty of an offence under S. 441. (*Allsop, J.*) EMPEROR *v.* RAM SUKH. **6 I.R. (Oudh) 63 = 145 I.C. 626 = 34 Cr.L.J. 1055 = 10 O.W.N. 1075 = 1933 Cr C. 1321 = A I R. 1933 Oudh 436.**

——**S 441**—*"With intent"—Meaning of.*

The words "with intent" in S. 441 do not mean "with knowledge." There is a distinction between these two phrases, which is obvious from the fact that, in certain other sections of the Penal Code, both expressions are used as meaning different sets of circumstances. (*Bajpai, J.*) BALDEWA *v.* EMPEROR. **1933 A.L.J. 1418 = 1933 Cr C 1415 = 35 Cr.L.J. 347 = 147 I.C. 119 = 6 R.O. 401 = A.I.R. 1933 All. 816.**

——**S 441**—*Unlawful entry followed by unlawful continuance.*

An unlawful entry followed by unlawful continuance of occupation is punishable under S. 441, I. P. Code. A. I. R. 1928 Pat. 124, Rel. on. (*Bajpai, J.*) BALDEWA *v.* EMPEROR. **1933 A L.J. 1418 = 35 Cr.L.J. 347 = 147 I.C. 119 = 6 R.O. 401 = 1933 Cr.C. 1415 = A.I.R. 1933 All. 816.**

——**S. 442**—*'Vessel'—Ferry boat, if.*

A ferry boat cannot be held to be a "vessel" within the meaning of S. 442, in the absence of evidence that the boat was ever used as a human dwelling. (*Costello, J.*) DHANANJOY DHARA *v.* PROVAT CHANDRA BISWAS. **6 R.C 590 = 149 I.C. 431 = 35 Cr.L.J. 949 = 38 C.W.N. 665 = 1934 Cr.C. 688 = A.I.R. 1934 Cal. 480.**

——**Ss. 442 and 448**—*Temporary absence of owner from house—Forcible entry—Criminal trespass.*

Even when the complainant is temporarily absent from his home at the time when forcible entry is effected into it by the accused, the accused is guilty of the offence of criminal trespass. It cannot be said that the house was vacant and hence no offence in the eye of the law was committed. (*Nanavutty, J.*) BALDEO PRASAD *v.* EMPEROR. **6 R.O. 561 = 149 I.C 368 = 35 Cr.L.J. 964 = 11 O.W.N. 733 = 1934 Cr.C. 777 = A.I.R. 1934 Oudh 281.**

PENAL CODE (1860), S. 447.

——**S. 445**—*House-breaking and extortion — No common object proved—Only one guilty of extortion—Conviction of all—Validity.*

Where of several persons charged with house-breaking, only one of them was shown to have threatened the occupant of the house with fear of death to induce him to deliver the keys of the iron safe, and it was not shown that this was in furtherance of a common object of theft, a conviction of all of them for house-breaking and extortion is not sustainable. Where the evidence showed it was a petty affair and the outcome of a village quarrel, a conviction for criminal trespass would be sufficient. (*Jackson, J.*) RAMANNA *v.* EMPEROR. **1931 M.W.N. 129.**

——**S. 445**—*House-breaking—Opening fastened door —Illustration.*

Where the complainant deposed that he heard the kitchen door fall down and saw people entering and identified some of them but his report to the headman contained no specific names and no one saw the accused lift the door of its hinges, the charge should be under S. 445, *sixthly*. (*Jackson, J.*) RAMANNA *v.* EMPEROR. **1931 M.W.N. 129.**

——**S. 447**—*Adandonment by tenant—Entry by owner —No offence.*

The complainant who was a tenant and living in the house of the accused left the premises when the house fell down. The accused entered upon the vacant land.

Held, that he was entitled to do so as owner of the land and that no offence was committed by him (*Addison, J.*) SONDU *v.* RAMA. **6 I.R. (Lah.) 214 = 146 I.C. 359 (2) = 34 P.L.R. 953 = 35 Cr L J. 77 = A.I.R. 1933 Lah. 734.**

——**Ss. 447 and 448**—*Applicability—Trespass in respect of ferry boat.*

For an offence of criminal trespass in respect of a ferry boat, the conviction should be under S. 447, and not under S. 448, when there is no evidence to show that the boat was ever used as a human dwelling. (*Costello, J.*) DHANANJOY DHARA *v.* PROVAT CHANDRA BISWAS. **6 R.C. 590 = 149 I C. 431 = 35 Cr.L.J. 949 = 38 C.W.N. 665 = 1934 Cr.C. 688 = A.I.R. 1934 Cal. 480.**

——**S. 447**—*Convition under—Intention to cause intimidation, etc., proved—Proof—Necessity.*

The words of the S. 447, must be closely adhered to and there must in all cases be found an intent to cause intimidation, insult or annoyance. A conviction cannot follow merely because one can pronounce with certainty that the accused must have known that his act would as one of its inevitable incidents cause annoyance. Each case must be dealt with on its own facts and on its own merits. Where there is a dispute with regard to a wall and there is a false attempt to bolster up title and there is an entry upon the land and actual demolition of the wall, there is no reason whatever to interfere with the conviction under S. 447, because there was quite certainly an intention to commit mischief. A.I.R. 1925 All. 540, Foll. (*Davis. J. C, and Lobo, A. J. C.*) RAMZAM *v.* EMPEROR. **29 S.L.R. 424 = 37 Cr L.J. 106 = 8 R S. 85 = 159 I.C. 466 = 1935 Cr.C. 1122 = A.I.R. 1935 Sind 203.**

——**S. 447**—*Criminal trespass—Intention to annoy —Presence of the party in possession unnecessary.*

In order to fix the accused with an intention to annoy it is not necessary that the party in possession of the property should be actually present on the property at

PENAL CODE (1860), S. 447.

the time of the trespass. 1 Weir 578, Dist,; 47 All. 855, Ref. (*Krishnan Pandalai J.*) VENKATESAN *v.* KESAMMA. **54 Mad. 515 = I.R. 1931 Mad. 519 = 131 I.C. 455 = 32 Cr.L.J. 749 (2) = 1931 M.W.N. 182 = 33 L.W. 291 = 1931 Cr.C. 327 = A.I.R. 1931 Mad. 231 = 60 M.L.J. 336.**

———S. 447—*Criminal trespass—Sale of land for arrears of takavi loan—Delivery of possession—Trespass by debtor—Offence.*

Land of the accused was sold by the Revenue Authorities for arrears of takavi loan due by him and purchased by the complainant, who duly obtained a certificate and possession of the land thereunder. But in spite of such delivery, accused trespassed on the land and obstructed the tenant of the complainant while he was cultivating the land. The Magistrate, on a prosecution of the accused under S. 447, I. P. Code, acquitted him on the ground that the sale and delivery of possession were illegal and void.

Held, that the order of acquittal was illegal and unsustainable, and that the case ought to be tried as the facts disclosed an offence of trespass. (*Mhatevayya, C.J.*) VENKATACHAR *v.* REDDAPPA. **13 Mys.L.J. 112 = 39 Mys H C R. 1006.**

———S. 447—*Labourers' sowing fields at instance of trespasser—Conviction—Legality.*

Labourers who were asked by a trespasser to sow the fields trespassed upon cannot be convicted under S. 447, I. P. Code, in the absence of evidence that they were aware of the true state of affairs and having entered into a conspiracy with the trespasser had made an attempt to further his cause. (*Baipai, J.*) MAHADEO *v.* EMPEROR. **1934 A.L.J. 1061 = 36 Cr.L.J. 328 = L.R. 16 A. 25 Cr. = 153 I.C. 407 = 7 R.A. 489 = 4 A.W.R. 794 = 1934 Cr C 1335 = A.I.R. 1934 All. 1025.**

———S. 447—*Offence under—Evidence.*

The complainant who had obtained a licence to build on his premises began to dig the foundation when the accused prevented the work from being proceeded with, the first accused by sitting on the foundation and the second by filling up the portion dug up with earth.

Held, that the accused were liable to the be convicted under S 447. (*Doraiswamy Iyer, C J.*) HONNAMMA *v.* GOVERNMENT OF MYSORE. **11 Mys L J. 4.**

———S. 447—*Offence under—Intention of accused—Inference from circumstances.*

To constitute an offence uuder S. 447, I. P. Code, an intention to commit an offence or to insult,intimidate or annoy on the part of the accused must be proved by the prosecution and the mere fact that he might have the knowledge that his act would annoy, insult or intimidate the person in possession would not be sufficient, but at the same time the intention might be proved by circumstances. Where the complainant had obtained mortgagee possession over the property by virtue of a mortgage executed by the elder brother and mother of the accused during his minority and he had remained in possession of the property for a number of years when the accused suddenly took into his head to grab the property without bringing a suit for the avoidance of the mortgage in a Court of law, the circumstances point indubitably to an intention to commit an offence or to insult,intimidate or annoy and they are not consistent with a *bona fide* assertion of title. (*Baipai, J.*) MAHADEO *v.* EMPEROR **1934 A L J. 1061 = 4 A.W R 794 = 1934 Cr.C 1335 = 36 Cr L J 328 = L R 16 All. 25 Cr. = 153 I C 407 = 7 R A 489 = A.I.R. 1934 All. 1025.**

———S. 447—*Sub-tenants of mortgagee wrongly ejected—Complaint by mortgagee—If competent.*

PENAL CODE (1860), S. 448.

A magistrate iu entitled to take cognisance of a complaint under S. 447, I. P. Code, filed by a person entitled to the possession of certain plots under a mortgage which is subsisting and which he had let out to certain sub-tenants who were ejected wrongly by the accused. (*Baipai, J.*) MAHADEO *v.* EMPEROR. **1934 A.L.J. 1061 = 4 A.W.R. 794 = 36 Cr L J. 328 = L.R. 16 All. 25 Cr. = 153 I.C. 405 = 7 R.A. 489 = 1934 Cr.C. 1335 = A.I.R 1934 All. 1025.**

———S. 448—*Applicability—Certificate sale and writ of delivery of possession—Grant of time to debtor and recall of writ at debtor's instance—Entry into property by debtor in pursuance of—Offence.*

The purchaser at a certificate sale under the Public Demands Recovery Act obtained a writ of delivery of possession which was taken by the Nazir on 9-10-1934 to the house which was sold On the following day the debtors prayed for time to remove their things and were granted three weeks time. On 11-10-1934, they applied to have the sale set aside and on that the Collector recalled the writ for delivery. On 12 10 1934, the debtors entered into the house. The Nazir did not deliver actual possession of the house on the 9th; he simply caused a beat of drum and put up a notice. A complaint was made on 31-10 1934 against the debtors for criminal trespass in respect of their entry into the house on 12-10-1934. The application of the debtors for setting the sale aside was subsequently rejected.

Held, that the debtors had not committed any act of criminal trespass which would render them liable under S. 448, I. P. Code. (*James J.*) RAM JANAM SINGH *v* MOHAN LAL AHIR. **155 I.C. 908 = 7 R.P. 635 = 36 Cr L J. 860 (1) = 16 Pat.L.T. 361 = 1935 Cr.C. 985 = A.I R. 1935 Pat. 355**

———S. 448—*Conviction — Basis of—Intention to annoy—Necessity for proof—Inference of intention—Permissibility.*

In the absence of a proper finding of an intention to annoy, a conviction under S. 448, I. P. Code, is unsustainable and must be set aside. Intention cannot be properly inferred and certainly not at all from something done after the complainant's possession of the place in question has come to an end. (*Dhavle, J.*) GANAURI MIA *v.* EMPEROR. **162 I.C. 22 = 37 Cr.L.J. 513 = 16 Pat.L.T. 847 = 1936 Cr.C 288 = A.I.R. 1936 Pat. 248.**

———S. 448—*Conviction under — Sustainability—Essentials—Trespass into house in assertion of legal right under order of Court—Offence—Intention to annoy—If can be inferred.*

The complainant, who had obtained a mortgage decree against accused No. 1, obtained, in execution of that decree, an order for delivery of possession of the mortgaged house. Accused 2 and 3, who were the children of the 1st accused, subsequently got an order staying delivery. On the same day, however, the complainant got possession of the house in execution through the bailiff. Later in the day, accused arrived at the house and were left in the verandah of the house. During the night as it was wet and raining, the accused got into the house by forcing open a door which was bolted from inside. Accused having been convicted under S. 448, I. P. Code, for the offence of criminal trespass.

Held, in revision, acquitting the accused, that the act of trespass was not done with intent to commit an offence or to intimidate, insult or annoy any person in possession of the property, but was done with the intention of asserting a supposed legal right, and the accused were therefore not guilty of the offence of criminal tres-

PENAL CODE (1860), S. 448.

pass. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* S. D'CUNHA. **59 Bom. 738 = 37 Bom.L.R. 880 = 37 Cr.L.J. 309 (2) = 1936 Cr.C. 64 = 160 I.C. 515 = 8 R. B. 263 = A.I.R. 1936 Bom. 15.**

——**S. 448**—*Conviction under—Sustainability without proof of intention to commit offence, etc.*

In the absence of any evidence to prove an intention on the part of the accused to commit an offence or other requisite intention, the mere entry into the room of the complainant does not amount to house trespass, and the accused cannot therefore be convicted under S. 448. The intention cannot be assumed from the fact that the accused is caught in the room at night. (*Macpherson, J.*) NEPAL NONIA *v.* EMPEROR. **158 I.C. 279 = 8 R.P. 186 = 36 Cr.L.J. 1351 = 1935 Cr.C. 1281 = A.I.R. 1935 Pat. 523.**

——**S. 451**—*"Offence"—Every offence under Penal Code included—Offence of assault taken into account.*

For the purpose of S. 451, I. P. Code, any offence punishable under the Penal Code is an "offence." It is only an offence which is punishable under a special or local law that must be punishable with imprisonment of six months or more before it can be considered to be an offence within the meaning of S. 451. Offence of assault taken into account for convicting accused under S. 451. (*Jai Lal, J.*) HARKISHAN LAL *v.* EMPEROR, **I.R. 1931 Lah. 477 = 131 I.C. 381 = 32 Cr L.J. 732 (2) = 1931 Cr.C. 645 = A.I.R. 1931 Lah. 405.**

——**Ss. 452 and 147**—Charge under—Common object stated to be "overawe" complainant—Charge, if defective. *See* PENAL CODE, S. 147. **1935 A.L.J. 423 = 1935 A.W.R. 333 = A.I.R. 1935 All. 647.**

——**S. 457**—*Accused placing hand across top of fence—Completion of offence.*

The offence of house trespass is completed by the accused putting his hand across the top of the railing. And the offence under S. 457, I. P. Code, is technically completed by the accused trying the pattis on the top of the fence and in doing so placing his hand across the top of the fence. (*Bennet, J.*) JAN ALI *v.* EMPEROR. **152 I.C. 804 = 7 R A. 396 = 4 A.W.R. 99 = 36 Cr.L. J. 180 = 1934 Cr C. 1027 = A.I.R. 1934 All. 833.**

——**S. 457**—*Attempt to commit offence—Climbing wall.*

An accused makes the movement towards committing the offence under S. 457, I.P. Code, at the time when he begins to move up the wall by climbing it and it is not necessary that he should climb twice. (*Bennet, J.*) JAN ALI *v.* EMPEROR. **152 I.C. 804 = 7 R A. 396 = 4 A.W.R. 99 = 1934 Cr.C. 1027 = 36 Cr.L.J. 180 = A.I. R. 1934 All. 833.**

——**S. 457**—*Entering building—Going on roof of house.*

Going on to the roof of a house is certainly not entering a building. The appellant reached the roof of a house and had started to go down the ladder towards the court-yard which was a building within the meaning of S. 457. He had not gone far when he retracted his foot steps and jumped down from the back of the roof.

Held, that he cannot be said to have entered into the building though he was guilty of attempt to commit offence of house-breaking. (*Addison, J.*) NANHUN *v.* EMPEROR. **6 I.R. (Lah.) 162 = 146 I.C. 20 (1) = 34 P.L.R. 906 = 34 Cr L.J. 1181 = 1933 Cr.C. 673 = A.I. R. 1933 Lah. 433 (1).**

——**S. 457**—*Evidence.*

The evidence against the accused who was charged under Ss. 457 and 34, I. P. Code, consisted of the following facts: (1) that he went in the company of

PENAL CODE (1860), S. 457.

S.M. who was conclusively proved to have stolen two bottles of lemonade, (2) that he had no business in that street at that time, and (3) that he along with *S.M.* asked to be pardoned.

Held, that while the evidence raised a very strong suspicion against the accused, it was not safe to base a conviction on such materials. (*Jai Lal, J.*) ABDUL SATAR *v.* EMPEROR. **12 Lah L.J. 321.**

——**S. 457**—*House-breaking — Presumption from possession of stolen property.*

The presumption of guilt arising under S. 114 of the Evidence Act from the possession of stolen property does not extend to the offence of house-breaking under S. 457 of the Penal Code. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) VENKATASWAMY *v.* GOVERNMENT OF MYSORE. **36 Mys.H.C.R. 24 = 9 Mys.L.J. 25.**

——**S. 457**—*House breaking—Proof of—Information by accused as to place where stolen property was found.*

Where the only evidence against the accused was that he took the Police Inspector to a well out of which an iron box was taken out which contained the stolen articles.

Held, that it was not sufficient for convicting the accused for theft or house breaking. 17 All. 576 and A.I.R. 1930 Lah. 91, Rel. on. (*Subhedar, A. J. C.*) MANGLIA MAHAR *v.* EMPEROR. **16 N L J. 246 = 1934 Cr.C. 202 = 147 I.C. 1188 = 35 Cr.L.J. 581 = 6 R.N. 164 = A.I.R. 1934 Nag. 54.**

——**Ss. 457 and 459**—*Lurking house trespass—Grievous hurt caused in court-yard—Court yard not proved to be part of the house—Offence.*

Where the accused committed house-trespass and also inflicted grievous hurt in the court-yard, but it was not clear whether the court-yard was a part of the house in which the criminal trespass had been committed.

Held, that the accused should have been convicted under S. 457 and not under S. 459. (*Guha and Nasim Ali, JJ.*) ENAYET ALI *v.* EMPEROR. **38 C.W.N. 446 = 154 I.C. 981 = 7 R.C. 546 = 36 Cr.L J. 619 = 1934 Cr C. 789 (2) = A.I.R. 1934 Cal. 557.**

——**S. 457**—*Offence under—Evidence.*

The prosecutrix alleged that the door of the shed in which she was sleeping was open and that the person who had come there to commit adultery on her had stolen her ornaments and skirt. There was no reliable evidence in support of her case and her conduct rendered her statement unworthy of belief.

Held, that a conviction under S. 457 could not be sustained on such evidence. (*Nanavutty, J.*) BAJI *v.* EMPEROR. **I.R. 1933 Oudh 153 = 143 I C. 73 = 10 O.W.N 107 = 1933 Cr.C. 318 = 34 Cr.L J. 496 = A.I. R. 1933 Oudh 163.**

——**S. 457**—*Offence under—Sentence—Release on probation—Propriety.*

The offence of burglary under S. 457, I.P. Code is a serious crime for which the accused must be given deterrent punishment, it is not proper to release such an offender on probation of good conduct under S. 562 of the Cr. P. Code. (*Mahadevayya, C.J.*) SIDDALINGAYYA, *In re.* **12 Mys L.J. 286 = 39 Mys H.C.R. 362.**

——**Ss. 457 and 411**—Offence under—Separate sentences—Propriety. *See* PENAL CODE, SS. 411 AND 457. **33 P L.R. 602 = A.I.R. 1932 Lah. 298.**

——**S. 457**—Possession of stolen things—Inference as to guilt. *See* EVIDENCE ACT, S. 114, ILL. (*a*). **A.I.R. 1933 Oudh 117.**

PENAL CODE (1860), S. 457.

———**S. 457**—Sentence—Order of fine only—Legality—Appeal. *See* CR. P. CODE, S. 562 (1-A). **58 Mad. 517 = A.I.R. 1935 Mad. 157 = 69 M.L.J. 101.**

———**S. 457**—*Sentence—Release on probation of good conduct—Propriety.*

Burglary is a serious crime and whenever it is detected the person concerned must be given a deterrent punishment. It is not proper to release the burglars on probation of good conduct. Such sentence means no punishment and emboldens persons to commit the crime because they rightly think that they can easily escape. (*Addison, J.*) EMPEROR *v.* SARDADA. **I R. 1932 Lah. 346 = 137 I.C. 716 = 33 Cr.L.J. 500 = 33 P.L.R 215 = 1932 Cr.C. 323 = A.I.R. 1932 Lah. 258.**

———**S. 460**—*Conviction under—Murder with object of committing robbery—Sentence.*

Where in a case of deliberate murder with the object of committing robbery there were no extenuating circumstances and the accused were not charged owing to some mistake with the offence of murder but were tried and convicted under S. 460, I. P. Code, a sentence of transportation for life is by no means severe and is the only appropriate sentence which could be passed. (*Sulaiman, C.J. and Harries, J.*) BANSIDHAR *v.* EMPEROR. **1934 A.L.J. 1160 = 4 A.W.R. 788 = 153 I.C. 364 = 7 R.A. 481 = 36 Cr.L.J. 322 = 16 L.R. 30 (Cr.) = 1934 Cr.C. 1339 = A.I.R. 1934 All. 1032.**

———**Ss. 460 and 302**—*Murder committed with object of stealing—Conviction under S. 460—Propriety.*

Where murder is committed in a house with the object of stealing the valuables belonging to the deceased, if any of the accused persons are guilty, they would certainly be guilty of murder and not only of an offence under S. 460, I. P. Code. (*Sulaiman, C. J. and Harries, J.*) BANSIDAR *v.* EMPEROR. **1934 A.L.J. 1160 = 4 A.W.R. 788 = 153 I.C. 364 = 7 R.A. 481 = 36 Cr. L.J. 322 = 16 L.R. 30 (Cr.) = 1934 Cr C. 1339 = A.I. R. 1934 All. 1032.**

———**Ss. 463, 467 and 511**—*Applicability—Process-server of Court falsely representing to executant of time-barred bond that a suit has been filed against them and inducing them to put their thumb-mark on back of document—Representation made that it was suit summons—Intent to concoct acknowledgment—Offence.*

Accused, a process-server of a Court, went to the executants of bond, which was time-barred and took their thumb impressions on the back of the bond below a blank space, on which an acknowledgment of payment was to be made. He induced the executants to put their thumb-impressions by falsely representing to them that they were affixing their thumb-impressions to summonses issued to them by Court in a suit filed against them.

Held, the act would not amount to forgery by itself within the meaning of S. 463, I. P. Code, but that it would amount to an attempt to commit forgery under S. 467, read with S. 511, I. P. Code.

Held, further, that he was also guilty of cheating under S. 417, I.P. Code. (*Reilly, C J and Shankaranarayana Rao, J.*) NANJUNDAPPA *v.* GOVERNMENT OF MYSORE. **13 Mys. L J 321 = 40 Mys. H C.R. 88.**

———**S. 463**—*Applicability—Scribe of document—If can be convicted of forgery—"Making".*

The definition of forgery under S. 463, I. P. Code, includes the making of a part of a document also, and provided the requisite intention is present, a scribe of a document can be brought within its purview and be convicted of the offence. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) VENKATRAMANAYYA *v.* GOVERNMENT OF MYSORE. **13 Mys L.J. 182 = 39 Mys H.C.R. 1140.**

PENAL CODE (1860), S. 463.

———**Ss. 463 and 464**—*"Dishonestly or fraudulently"—False entries in police diary by Police Inspector to save himself.*

A Police Sub-Inspector, who was charged with having caused hurt for extorting a confession and with wrongful confinement, altered his case diary so as to make it appear that he had not kept the suspected persons under surveillance. On a conviction under S. 465 as well, addition to conviction under Ss. 330 and 348,

Held, that there being no wrongful gain or wrongful loss, and no infringement of any legal right and no intent to defraud, the offence did not amount to forgery. (*Baker and Broomfield, JJ.*) EMPEROR *v* SANJIV RATNAPPA. **56 Bom 488 = 34 Bom. L R. 1090 = I.R 1933 Bom. 237 = 142 I.C. 386 (2) = 34 Cr. L.J. 357 = 1932 Cr. C 777 = A I.R. 1932 Bom. 515**

———**S. 463**—*Forgery — Intention —Ante-dating of document—Offence.*

When a person becomes a party to ante-dating a document, his intention is obviously to make the act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have; the act therefore amounts to forgery. When a man is charged with the doing of an act of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing of the act. (*Mahadevayya, C.J. and Shankaranarayano Rao, J.*) VENKATRAMANAYYA *v.* GOVERNMENT OF MYSORE. **13 Mys.L.J. 182 = 39 Mys. H.C.R. 1140.**

———**S. 463**—"*Intent to commit fraud*"—*Act done to hide—Neglect of duty.*

An intent to commit fraud involves an intent to cause injury, it involes something more than mere deceiving. Where process-server forged names on the notices with a view to save himself from the consequences of his neglect of duty or to save himself trouble.

Held, that it did not amount to intent to commit fraud. (*Mackney, J.*) NGA TUN SEIN *v.* EMPEROR. **156 I.C. 888 = 8 R.R. 55 = 36 Cr. L.J. 1025 = 1935 Cr. C. 747 = A.I.R. 1935 Rang. 203.**

———**S. 463**—*Person making forged document—Physical poesence during completion of document if necessary.*

Under S. 436 not only the maker of the forged document but the maker of a part of such document is declared to be guilty of forgery if he has made such document or any part of it with the requisite intent. It is therefore immaterial if the person who makes a part of the forged document was present or not at the time when the forged document was completed. (*Milne, J. C. and Rupchand, A.J.C.*) MOOLCHAND BACHOMAL *v.* EMPEROR. **1933 Cr C. 166 = 142 I C. 74 = I.R.1933 Sind 82 = 34 Cr.L.J. 305 (2) = 26 S.L R. 105 = A.I.R. 1933 Sind 37.**

———**S. 463**—*Proof of fraud—Nature of evidence necessary.*

Proof of fraud by positive and express evidence cannot be expected in the large majority of cases of forging a document and in such cases circumstantial evidence is the only means available. But such evidence must not fall short of proof and no conviction can rest on mere suspicion or conjecture however strong these may be. (*Tapp, J.*) GOWARDHAN LAL *v.* EMPEROR. **I.R. 1933 Lah. 440 = 144 I.C. 301 = 34 Cr.L.J. 714 = 34 P. L.R 694 = 1933 Cr.C. 542 = A.I.R 1933 Lah. 308.**

———**S. 463**—*Standard of comparison— Imitation closely copied from disputed writing.*

PENAL CODE (1860), S. 464.

It is hardly conceivable that a suspected forger will deliberately imitate the forged writing and create evidence against himself and consequently a specimen not written from dictation but closely copied from the disputed writing cannot afford a proper standard for comparison. (*Tapp, J.*) GOWARDHAN LAL *v.* EMPEROR. **I.R. 1933 Lah 440=144 I.C. 301=34 Cr. L.J. 714=34 P.L.R. 694=1933 Cr.C. 542=A.I.R. 1933 Lah. 308.**

———**Ss. 464 and 465**—*Forgery—Person whose signature is made present at the time—Authorisation, if implied.*

The definition of a false document in S. 464, I.P. Code, shows that for forgery a signature must be made by a person who knows that he has not got authority from the person whose siguature he purports to make on it. Where a person is present when his signature is made by another on a document, the former must be held to have authorised that proceeding and there can be no question of want of authorisation or forgery in law. (*Bennet, J.*) LAKSHMI DAS *v.* LAKHO RAM. **154 I C. 517=7 R.A. 771=1935 A.L.J. 651=1935 A.W. R. 366=A.I.R. 1935 All. 410.**

———**S. 465**—*Essentials of offence.*

In order to constitute the offence of forgery, it his not necessary that the wrongful gain or loss should be actually caused. It is sufficient that there should be the intention of causing it where certain co sharers applied for entry in the revenue papers so as to include certain additional names therein and it appeared that the signatures of certain parties were put as though it was authorised. *Held* that the accused were liable to be convicted under S. 471, though not under S. 466,I.P. Code. (*Bennet, J.*) CHUNKU *v.* EMPEROR. **I.R. 1931 A. 284=130 I.C. 492=32 Cr.L J 559=1930 A.L.J. 1451=12 L.R. 85 (Cr.)=1931 Cr C. 418=A.I.R. 1931 All 258.**

———**S. 465**—*Fabrication af electoral roll.*

Procuring by dishonest and fraudulent means an entry in an electoral roll, of the names of persons who were not legally eligible to vote and wilfully and improperly omitting from the electoral roll the names of persons entitled to vote and fraudulently and dishonestly altering the electoral roll, after its final publication, by inserting certain names therein without lawful authority, are offences punishable under Ss. 123 and 465. (*Lort Williams and Khundkar, JJ.*) NUR AHMAD *v.* JOGESH CHANDRA SEN. **1934 Cr C. 1359= 62 Cal. 275 =153 I.C. 657=7 R C. 392=36 Cr. L J. 385=A.I R. 1934 Cal 838.**

———**Ss. 465 and 477-A**—*Offence under—Evidence—Partners—Falsification of accounts—Admissions of party.*

There was a firm consisting of two partners *A* and *B*. *A* was in charge of the account books and used to keep accounts. He made a deposit with the firm but the entry in the account books was made in the name of a third person *C*. The entries in katcha rokar and in the pacca rokar showed that the deposit was really made by *A* but were entered in the account books proper as made by *C*. *A* admitted having changed the name of the depositor from *A* to *C* but could not give proper explanation for it. *C* had in the meantime recovered the amount standing in his name from the firm in a small cause suit. In that suit *B* had made no allegations against *A*. Subsequently *B* filed a criminal complaint against *A* under Ss. 477 and 465. The complaint was dismissed as the magistrate thought that the same question could not be tried again, having been considered in small cause suit.

PENAL CODE (1860), S. 467.

Held, that though the omission to raise the point in the civil proceeding raised a difficulty, it was not a case for discharge especially in view of the admissions made. (*Milne, J.C.*) JETHANAND *v.* PARTABRAI. **25 S L.R. 471=33 Cr.L.J. 328=136 I.C 766=I.R. 1932 Sind 62=1932 Cr.C. 194=A.I R. 1932 Sind 53.**

———**Ss. 465 and 193**—Scope—Alteration of electoral roll after final publication—If offence under. *See* PENAL CODE, SS. 193 AND 465. **39 C.W.N. 20.**

———**S. 467**—*Antedating document—Person taking documents—If liable to conviction—S.* 114.

A person who takes in his name a document which is antedated, though he cannot be deemed to have "made" the document, will nevertheless be liable as the principal offender, because he is the person benefited by it; and he will be responsible for bringing the deed into existence when he is himself present at the time. He will therefore be liable to conviction as the principal offender under S. 467 read with S. 114, I.P. Code. (*Mahadevayya, C.J. and Shankaranarayana Rao, J.*) VENKATRAMANAYYA *v.* GOVERNMENT OF MYSORE. **13 Mys. L.J. 182=39 Mys.H.C R. 1140.**

———**Ss. 467 and 464**—*Essentials of offence—No fraudulent intention.*

The essentials of the offence are that the document should be altered, that the alteration should be done with the intention of causing injury or damage to some person and that it should be done dishonestly or fraudulently. Where, in a case in which the President of the Union Board is charged with having made an incorrect entry in the minutes of proceedings, recording—what was not a fact—a resolution by the Board sanctioning a sum of Rs.50 for legal expenses it and was not shown that he did anything more than expediting the payment of the sum which was really due or that he tried to get the sum out of the funds of the Board to the Vakil, to which the Vakil was not entitled, no offence can be said to have been made out either under S. 467 or under S. 167. (*Beasley, C.J. and Sundaram Chetty, J.*) BAKTHAVATSALU NAIDU *v.* EMPEROR. **1931 M.W.N. 361.**

———**S. 467**—*Forged document—Proof—Comparison of handwriting.*

Ordinarily in determining whether a document is forged or genuine, comparison of handwriting is a valuable aid. (*Rowland, J.*) EMPEROR *v.* KAMESWAR LAL. **6 I.R. (Pat) 12=144 I.C 872=34 Cr.L.J. 828 =1933 Cr.C. 1010=A.I.R. 1933 Pat. 481.**

———**S. 467**—*Forged document—Proof—Evidence of hand-writing expert.*

The opinion of an expert should not ordinarily be accepted as conclusive to prove the facts deposed to by him and a conviction for forgery cannot be sustained merely on the evidence of a hand-writing expert. (*Jai, Lal, J.*) PRABH DIAL *v.* EMPEROR. **I.R. 1932 Lah. 492=138 I C. 368=33 Cr.L.J. 593 (1)=33 P.L.R. 697=1932 Cr.C. 628 (1)=A.I.R. 1932 Lah. 490 (1).**

———**S. 467**—*Forgery—Sufficiency of proof.*

The mere fact that judicial papers on which a document is executed could not have been obtained on the dates on which the documents purport to have been executed is not sufficient to support a charge of forgery in the absence of evidence that the papers could not have been issued to the public or manufactured, at the date the document bore. (*Kangi Lal, J.*) ABDUL MAJID *v.* EMPEROR. **152 I.C. 860=36 Cr.L.J. 190=1935 Cr. C. 238=7 R.L. 339=35 P.L.R. 599=A.I.R. 1935 Lah. 149.**

———**S. 467**—*Gist of offence—Partners—Use of blank signed paper—Absence of fraud—No offence.*

PENAL CODE (1860), S. 467.

The essence of forgery is fraud and the prosecution must prove fraud. The accused, who was the local representative of a firm, sent a petition to the Municipal Council praying for restoration of his name as voter or for registering his name as the authorised nominee of the firm entitled to vote for the firm. It appeared that he had used a blank paper already containing the signatures of his other partner, the latter being in the habit of giving such blank papers in the course of business for the purpose of Civil Court proceedings. The evidence however disclosed that the accused had *carte planche* to use as he chose the blank signed papers sent to him, provided they were used for the firm's business.

Held, that the user of the blank papers for sending petition to the Municipality was legitimate, there was no deceit or fraud, and the prosecution of the accused for offences under Ss. 467 and 471, I. P. Code, was not sustainable. (*Wallace, J.*) GURULINGIAH *v.* EMPEROR. **1932 M.W N. 117.**

——**Ss. 467 and 471**—*Nature of user.*

To constitute an offence under S. 467 or 471 the nature of the user is not material. (*Panckridge and M.C. Ghose, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* DAULATRAM MUDI. **59 Cal. 1233 = I.R. 1932 Cal. 504 = 138 I.C. 705 = 33 Cr.L.J. 685 = 36 C.W.N. 505 = 55 C.L J. 349 = 1932 Cr.C. 337 = A.I.R. 1932 Cal. 390.**

——**S. 467**—*Scope—Nature of document fabricated.*

S. 467 provides punishment for forgery not only of a document purporting to be a valuable security but also of any document which purports to give authority to any person to receive or deliver any money. (*Rowland, J.*) SACHCHIDANAND PRASAD *v.* EMPEROR. **6 I.R. (Pat.) 130 = 144 I C. 936 = 34 Cr L J. 892 = 14 Pat. L.T. 580 = 1933 Cr.C. 1030 = A.I.R. 1933 Pat. 488.**

——**Ss. 467 and 511**—Time-barred bond—Inducement by process-server of Court to put thumb-mark on back—False representation to executants that it is suit summons—Blank space left for concocting endorsement of payment—Offence. *See* I. P. CODE, SS. 463, 467 AND 511. **40 Mys H.C.R. 88.**

——**S. 468**—*Offence under—Unused Court-fee stamp—Alteration of name—Dishonesty or fraud not proved—Benefit of doubt.*

A stamp was purchased for a client across which the stamp-vendor wrote the client's name. Eventually it was not used. Instead of obtaining refund the accused altered the name on the stamp and used it for another client for the first time.

Held, that as it was not quite clear whether he did so dishonestly or fraudulently or merely to save himself trouble, the accused should have the benefit of doubt and his conviction should be set aside. 11 I.C. 840, Ref. (*Harrison, J.*) EMPEROR *v.* ABDUL HAKIM. **I R. 1931 Lah 821 = 133 I.C. 645 = 32 Cr.L J. 1051 = 32 P.L.R. 432 = 1931 Cr.C. 465 = A.I.R. 1931 Lah. 337.**

——**S. 471**—*Forged document—Production of certified copy—Offence, if constituted.*

The production of a certified copy of a forged document is a use of the document so as to constitute an offence under S. 471. (*Milne, J.C. and Mehta, A.J.C.*) HAYAT KHAN *v.* EMPEROR. **26 S L R. 73 = I.R. 1932 Sind 77 = 137 I.C. 341 = 33 Cr L.J. 452 (2) = 1932 Cr C. 530 = A.I R. 1932 Sind 90.**

——**S. 471**—Forged receipt—Document not used in judicial proceedings—No conviction under S. 471. *See* PENAL CODE, S. 193. **1932 M.W.N. 454.**

——**S. 471**—Gist of offence—Partners—Use of blank signed paper—Absence of fraud—No offence. *See* PENAL CODE, S. 467. **1932 M.W.N. 117.**

PENAL CODE (1860), S. 471

——**Ss. 471 and 467**—Nature of user not material. *See* PENAL CODE, SS. 467 AND 471. **58 Cal. 1233 = A.I.R. 1932 Cal. 390.**

——**S. 471**—*Offence under—Document put in evidence by prosecution—Defence counsel's cross examination on—If user.*

If a document is produced and put in evidence by one of the witnesses for prosecution and the pleader of the accused cross-examines the witness upon this evidence, the cross-examination cannot be held to be user within the meaning of S. 471. (*Lort Williams and Jack, JJ.*) EMPEROR *v.* TARAK NATH BAIDYA. **63 Cal. 481 = 159 I C. 149 = 39 C W.N. 1309 = 8 R C. 281 = 37 Cr. L.J. 30 = 1935 Cr.C. 1079 = A.I R. 1935 Cal. 687.**

——**S. 471**—*Offence under—Evidence.*

In order to constitute the offence of forgery it is not necessary that the wrongful gain or loss should be actually caused. It is sufficient that there should be the intention of causing it Where certain co-sharers applied for entry in the revenue papers so as to include certain additional names therein and it appeared that the signatures of certain parties were put in as though it was authorised.

Held, that the accused were liable to be convicted under S. 471. (*Bennet, J.*) CHUNKU *v.* EMPEROR. **I.R. 1931 All. 284 = 130 I.C. 492 = 32 Cr L J. 559 = 1930 A.L.J. 1451 = 12 L.R. 85 (Cr.) = 1931 Cr.C. 418 = A.I.R. 1931 All. 258.**

——**Ss. 471 and 193**—Promissory note entrusted to clerk for filing suit—Suit filed after limitation period but with an endorsement found to be forged—Offence constituted. *See* CR. P. CODE, S. 195 (1) (*b*) AND (*c*)—COMPLAINT. **A.I.R. 1933 Mad. 413.**

——**Ss. 471**—*User—Filing document in Court without tendering it in evidence.*

The filing of a document as the basis of a plaint is "user" for the purpose of S. 471, whether that document is acted upon by the Court or used in evidence or not, whether the party files the document personally or through a representative (pleader). Such representative will be presumed to have filed the document with the knowledge and authority of his client until the contrary is shown. (*Panckridge and M.C. Ghose, JJ.*) ALI AHMED *v.* EMPEROR. **140 I C. 544 = 55 C.L.J. 336 = I.R. 1933 Cal. 11 = 34 Cr L.J. 39 (2) = 1932 Cr.C. 545 = A.I.R. 1932 Cal. 545.**

——**S. 471**—"*User*"—*Meaning of.*

The only evidence of user within the meaning of S. 471 was that at the previous trial accused put in a written statement in his defence in which he referred to certain documents which had been filed and also referred to the Istafanama alleged to be a forged document. The Istafanama was neither filed nor produced nor put in evidence by the accused or on his behalf. It was produced and put in evidence by one of the witnessess for the prosecution. In cross-examination, the Istafanama was referred to by the pleader appearing on behalf of the accused.

Held, that this could not be held to be user within the meaning of S. 471. (*Lort Williams and Jack, JJ.*) EMPEROR *v.* TARAK NATH BAIDYA. **63 Cal. 481 = 37 Cr.L.J. 30 = 8 R.C. 281 = 159 I.C. 149 = 39 C.W.N. 1309 = 1935 Cr.C. 1079 = A.I.R. 1935 Cal. 687.**

——**S. 471**—"*Uses*"—*Filing receipts in Court without attempting to prove them.*

If, in a suit for arrears of rent, the defendant files certain receipts in Court to prove payment of the amounts alleged to be due from him, he must be held to have used the receipts within the meaning of S. 471, I.P. Code, even though when the receipts are denied by the

PENAL CODE (1860), S. 471.

plaintiff, he does not put in an appearance as defendant to the suit and makes no attempt to prove that they are genuine. (*Allsop, J.*) KEDAR NATH *v.* EMPEROR **157 I.C. 557=36 Cr.L.J. 1199=8 R A. 214=1935 A. L.J. 493=1935 A.Cr.C. 128=1935 A.W.R. 628= 1935 Cr.C. 546=A.I.R. 1935 All. 521.**

——**S. 471**—*'User'—Production of document under order of Court—If amounts to.*

The use of a document contemplated by S. 471, I. P. Code, must be a voluntary one, and not the mere production of the document in compliance with an order of the Court which must be obeyed. (*Mulla, J.*) KEDAR NATH *v.* EMPEROR. **159 I C. 287=1935 A.W.R. 1453=1935 A Cr.C. 306=37 Cr.L J. 46=8 R.O. 415 =1935 Cr.C. 1186=A.I.R. 1935 All. 940.**

——**S. 476**—*Deception without motive—Offence.*

A on behalf of his tenants sent an application for agricultural loan bearing the signature of tenants but actually signed by him; and similarly the receipt and security bonds were also signed by him; but the money was received by the tenants and it was duly returned to the Government.

Held, that though *A* by impersonating the tenants practised deception, as there was no gain or advantage to him nor any loss or injury to the Government he was not guilty either under S. 476 or under S. 420 nor even of abetment as there cannot be abetment when the substantive offence itself is not proved.

Held further, that even if the accused is held guilty the offence was only of a technical nature and that the punishment already undergone would be sufficient. (*Ba U, J.*) NGA PO THEIN *v.* EMPEROR. **6 R R. 29= 145 I.C. 229=34 Cr.L.J. 922=1933 Cr.C. 645=A.I. R. 1933 Rang. 114.**

——**S. 476**—*Sentence—Circumstances in mitigation.*

Where an attorney was proved to have temporarily misappropriated his client's moneys,

Held, having regard to the fact that the amounts were subsequently made good and the probability of his being dealt with in the exercise of the disciplinary jurisdiction of the High Court, a sentence of one month's simple imprisonment and a fine of Rs. 1,000 would be sufficient. (*Guha and Nasim Ali, JJ.*) AKSHOY CHANDRA BOSE *v.* EMPEROR. **59 C L J. 306=151 I. C. 22=7 R.C. 89=38 C.W.N. 467=35 Cr.L.J. 1279=1934 Cr.C. 793=A.I.R. 1934 Cal. 532.**

——**Ss. 476, 478 and 482**—*Trade-mark—Test of invented word—Question of fact.*

A mere ordinary addition to, or mis-spelling or variation of, a word in use in the English language does not make the word so formed an invented word but the question in each case is one of fact. The test of an invented word is that it must have been substantially new at the date of registration; or have been substantially new when first used by the applicant and have been only used to denote his goods down to the date of registration. It is not necessary that its production should have involved any great ingenuity or anything like invention in the sense in which the term is used in patent law. The word "Aguerine" not being an ordinary English word nor a combination of two ordinary English words must be regarded as a fit subject of a trade-mark. The fact that the word coined by the complainant to denote the name of his fever mixture and registered as a trade-mark has been copied by another does not absolve the accused from the consequences of copying it. A person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting the trade-mark, even though the registered trade-mark of the one be

PENAL CODE (1860), S. 477-A.

different from that of the other. Tht expression "trade-mark" as defined in S. 478 includes the whole design on the box and the label pasted on it. Where therefore there is no dispute in the fact that there is a striking similarity in the design of the complainant's bottle and that of the accused, it is perfectly clear that the accused has used a false trade-mark within the meaning of S. 482. 24 I.C. 834 and 30 I.C. 1007, Ref. (*Mehta, A.J.C.*) SIRUMAL *v.* EMPEROR. **26 S.L.R. 241= I.R. 1932 Sind 119=139 I.C. 335=33 Cr.L.J. 778= 1932 Cr.C. 534=A.I.R. 1932 Sind 94.**

——**S. 477**—*Offence under—Destruction of valuable security.*

In order that the accused may be *prima facie* guilty of the offence under S. 477 the document destroyed must amount to a 'valuable security'.

Held, that an administrative order of the superintendent of a Court of session addressed to the Nazir directing him, to release an accused on bail is not a 'valuable security'. (*Broomfield and Divatia, JJ.*) EMPEROR *v.* SHER ALAM KHAN. **35 Bom.L.R. 1062=147 I.C. 879=6 R.B. 221=35 Cr.L.J. 479=1933 Cr.C. 1598= A.I.R. 1933 Bom. 494.**

——**S. 477**—*Secretion of documents—Essentials of offence.*

A person may secrete a document not only when the existence of the document is unknown to other persons and for the purpose of preventing the existence of the document coming to the knowledge of anybody but also when the existence of the document is known to others. In the latter case he may secrete it for the purpose, for example, of preventing it being produced in evidence or for the purpose of raising difficulties in the way of its being produced in evidence. But it is not necessarily enough to show that upon an occasion upon which it became his duty to produce the document he failed to discharge that duty, even though this may be cogent evidence in certain circumstances. The fact that a man perjures himself by denying the existence of a document which to his knowledge is in his custody would be a still more cogent piece of evidence. But whether the offence of secreting the document is committed or not depends on the circumstances.

Per *Mallik, J.*—Suppression of a document may amount to a secretion. (*Rankin, C. J., C. C. Ghose, Mukerji, Mallik and Guha, JJ.*) EMPEROR *v.* SUSEN BEHARI ROY. **58 Cal. 1051=35 C.W.N. 425=1931 Cr.C. 248=I.R. 1931 Cal. 529=132 I.C. 145=32 Cr. L.J. 836=A.I.R. 1931 Cal. 184 (S.B.).**

——**S. 477**—*Secretion of will—Conduct of accused.*

The question whether the conduct of the accused was a fraudulent and dishonest one is one of the matters to be considered in deciding whether there was a secretion of the will under S. 477, I. P. Code. If, however, there was no secretion in fact then nothing further need be considered. Where it appeared that the accused was advised by his legal adviser that he was entitled to the property left by the testator subject to the legacies and annuities *de hors* the will and he applied for withdrawal of certain land acquisition amount and therein stated in affidavit that the deceased died intestate,

Held, that there was no secretion in law. (*C. C. Ghose, A. C. J. and S. K Ghose, J.*) NUKUR CHANDRA SARKAR *v.* RANJIT KUMAR MULLICK. **1934 Cr C. 311 (2)=148 I.C. 587=6 R.C. 469=35 Cr.L.J. 716=58 C.L.J. 283=A.I.R. 1934 Cal. 217.**

——**S. 477-A**—*Applicability—Partner in charge of books.*

The mere fact that a partnership subsisted between the parties is no answer, in a properly proved case, to a

PENAL CODE (1860), S. 477.

charge of falsification of accounts by one partner who is in charge of the books. (*Pearson and Mallik, JJ.*) MONINDRA MOHAN BISWAS *v.* SRISH CHANDRA DAS. **I.R. 1932 Cal. 447=138 I C. 339=33 Cr.L.J. 597=36 C.W.N. 303=1932 Cr C. 454=A.I.R. 1932 Cal. 464.**

———**S. 477-A**—Complaint against co-partner—Proof required. *See* PENAL CODE, S. 405. **157 I.C. 208=36 Cr.L.J. 1112.**

———**S. 477-A**—*Falsification of entries by gumastah—Defence that entries were made on the authority of the partner—No denial by prosecution—Conviction—Sustainability of.*

The accused was the gumastah of the complainant's firm. His defence was that the entries in question were merely in the nature of adjustment entries, made on the authority of the complainant's father, a partner of the complainant's firm. There was no finding by the Magistrate on the question whether the father of the accused was or was not a partner and so far as the question of the entries having been made by his a thority was concerned, the Magistrate disposed of it by saying that it was the accused's defence and that he has not given any evidence in support of it.

Held, that that was not the true position. It was the duty of the prosecution to call some of the partners to give a positive denial of the allegation of the accused and that not having been done, the conviction should be set side. (*Mukerji and Bartly, JJ.*) INDRA KUMAR HAZRA *v.* EMPEROR. **59 C L J. 83=152 I.C. 226=36 Cr.L J. 74=7 R.C. 258=1934 Cr.C. 712=A.I.R. 1934 Cal 500.**

———**S. 477-A**—*Fraud already committed—False document to conceal fraud—Maker of document guilty under S. 477-A.*

If a document is prepared with the intention of concealing a fraud that has already been committed, and thus to enable the person who has made "wrongful gain" to retain the property that he has acquired by unlawful means, it amounts to a false document and the person making the document is guilty of forgery and can rightly be convicted under S. 477-A. 11 Mad. 411; 22 Cal. 313; 35 Cal. 450 and 37 Bom. 666, Foll.; A.I.R. 1922 All. 214; 5 All. 221 and 8 All. 653, Diss. From. (*King and Iqbal Ahmad, JJ.*) EMPEROR *v.* RAGHO RAM. **55 All. 783=6 I R. (All.) 158=145 I.C 749=34 Cr.L.J. 1056=14 L.R. 241 (Cr.)=1933 A.L.J. 1372=1933 Cr.C 850=A.I.R 1933 All. 525.**

———**S. 477 A**—*Intention to defraud—Falsification of accounts.*

An intention to defraud so as to form the subject of an offence under S. 477-A can be inferred from the accused effecting false entries with the object of screening a previous fraudulent act. (*Doraiswami Iyer, C. J.*) VENKATAKRISHNAIYA, *In re.* **38 Mys H.C. R. 272=11 Mys L J 321.**

———**Ss 477-A and 465**—Offence under—Partners—Falsification of accounts—Admissions—Failure to raise plea in civil proceedings—Effect—Not a case for discharge. *See* PENAL CODE, SS. 465 AND 477-A. **A.I. R. 1932 Sind 53.**

———**S 477 A**—*Offence under—Sanction, if necessary.*

The provisions of S. 477-A Penal Code, are not covered by the provisions of S. 195 (1) (*c*), Cr. P. Code. (*Milne, J. C.*) JETHANAND *v.* PARTABRAI. **I.R. 1932 Sind 62=25 S L.R. 471=33 Cr L.J 328=136 I.C. 766=1932 Cr C. 194=A I R. 1932 Sind 53.**

———**S. 480**—*Using false trade-mark—Meaning.*

Not only whosoever marks any goods or package or receptacle containing goods, but also whosoever uses any

PENAL CODE (1860), S. 486.

such package or receptacle with any such mark thereon is said to use a false trade-mark, if the whole thing is done in a manner reasonably calculated to cause it to be believed that the goods are of a certain manufacture whereas thay are not of that manufacture. 38 Cal. 110, Ref. (*Mehta, A. J. C.*) SIRUMAL *v.* EMPEROR. **26 S.L.R. 241=139 I.C. 335=33 Cr L J. 778=I.R. 1932 Sind 119=1932 Cr.C. 534=A.I.R. 1932 Sind 94.**

———**S. 482**—*Mere imitation—No offence.*

Mere imitation is no offence unless there is an infringement of a patent or copyright or there is attempt to pass goods as goods of another dealer or manufacturer either by using a false trade mark or false description or a trade mark or description likely to deceive purchasers by a deliberate imitation of a genuine mark or description or by falsely giving out goods as the goods of some other dealers or manufacturer. (*Staples, A. J. C.*) HAFIZULLAH HAMIDULLAH *v.* S. K. PAPA. **6 I.R. (Nag.) 112=1933 Cr.C. 1423=35 Cr L.J. 373=30 N.L.R. 45=146 I.C. 1084=A.I.R. 1933 Nag. 344.**

———**S. 482**—Trade mark—Infringement—Continuing offence—Prosecution—Limitation. *See* MERCHANDISE MARKS ACT, S. 15. **37 Bom.L.R. 580=A.I.R. 1935 Bom. 359.**

———**Ss. 483 and 28**—*Infringement of trade-mark—Evidence.*

Where in the case of alleged counterfeiting of a trade-mark the trade-mark similar to that of the complainant had been moulded in the glass of the bottles on which the name of the hair oil had also been moulded.

Held, under the proviso to S. 28, I. P. Code, it shall be presumed, until the contrary is proved that the person so causing one thing to resemble the other thing intended by means of that resemblance to practise deception or knew it to be likely that deception would thereby be practised and in the circumstances of this case, the onus was on the accused to show that in making these bottles he had no faudulent intention and in the absence of such evidence, it cannot be said that he had no such intention, when appearances are so much against him. (*Jack, J.*) ABDUL SOVAN *v* JITENDRANATH DUTTA. **I.R. 1931 Cal. 830=134 I.C 446=32 Cr.L.J. 1171=1931 Cr.C. 597=A.I.R. 1931 Cal. 445.**

———**S. 483**—*Offence under—Evidence.*

Where in a prosecution for counterfeiting trade-mark it appeared that the labels used were not similar as to deceive a literate person or even an illiterate person who had an opportunity of comparing the two and it further appeared that the complainant could not establish that he had an exclusive right in main features of the design of the label.

Held, in spite of slight resemblances that the accused were not liable to be convicted under Ss. 483 and 486, I.P. Code. (*Kisch, J.*) PALLI RAM *v.* EMPEROR. **I.R. 1931 Oudh 381=134 I C. 477=32 Cr.L.J. 1177=8 O.W.N. 827=1931 Cr.C. 637=A.I.R. 1931 Oudh 277.**

———**S. 486**—Counterfeiting trade-mark—Prosecution for—Slight resemblance—Labels not so similar as to deceive—No exclusive right—No conviction under Ss. 486 and 483. *See* PENAL CODE, S. 483. **8 O.W.N. 827=A I.R. 1931 Oudh 277.**

———**S. 486**—*Counterfeiting trade-mark—Test of similarity.*

A person who employs a label which in general resembles the label used by another manufacturer is guilty of counterfeiting a trade-mark under S. 486, I. P. Code, irrespective of the circumstances that the regis-

PENAL CODE (1860), S. 486.

tered trade-mark of the one is quite different from the trade-mark of the other. No trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The test is not, whether a literate purchaser would be deceived if he had the two marks side by side, but whether an ordinary unwary purchaser would be deceived. (*Addison, J.*) FAQIR CHAND *v.* EMPEROR. **16 Lah 114=155 I.C 270=7 R.L. 672=36 Cr.L.J. 776=35 P.L R. 749=1934 Cr C. 1005=A.I.R. 1934 Lah. 687.**

———**S. 486**—Offence under—Prosecution for—Limitation—Series of acts. *See* MERCHANDISE MARKS ACT (IV OF 1896), S. 15. **A.I R. 1931 Mad. 276.**

———**S. 489-B**—*Guilty knowledge or intention—Proof of—Possession of counterfeit currency note.*

No guilty knowledge or intention can be inferred from the mere circumstance that the accused was found in possession of a counterfeit currency note. (*Jai Lal, J.*) CHAUDHRI RAM *v.* EMPEROR. **6 I.R. (Lah.) 153=145 I.C 1013=34 Cr L J. 1156=34 P.L R. 890=1933 Cr.C 881 (1)=A.I.R. 1933 Lah. 596 (1).**

———**S. 494**—*Abetment of bigamy—Essentials of offence.*

In order to succeed in a prosecution for abetment of bigamy, the prosecution must prove that the person who is alleged to have committed bigamy was married lawfully once and has gone through a second marriage ceremony. Thirdly, that the person alleged to have abetted the bigamy knew when he arranged or assisted at the second marriage that the person who was remarried had contracted a valid first marriage and that the husband or wife of the first marriage was still living. Where the first marriage is not a valid marriage or has been repudiated by a party to it a conviction for abetment of bigamy cannot be sustained. (*Young, J.*) SHAFI ULLAH *v.* EMPEROR. **150 I.C 139=1934 A.L J. 387=6 R A 1033=35 Cr.L J. 1053=3 A.W.R. 598=1934 Cr.C. 756=A.I.R. 1934 All. 589.**

———**S. 494**—*Abetment of bigamy—Extent of proof.*

For abetment under S. 494 there must be evidence that the person accused of abetting the offence knew that the person he married was the wife of another man. (*Addison and Coldstream, JJ.*) HAMAD *v.* EMPEROR. **I.R. 1931 Lah. 973=134 I.C 589=32 Cr.L J. 1210=1931 Cr.C. 314=A.I.R. 1931 Lah. 194.**

———**Ss. 494 and 109**—*Bigamy—Proof of offence—Previous marriage in secrecy.*

Where the prior marriage of the woman was a secret marriage and was a hole in the corner affair which the (second) husband could not be expected to know he could not be convicted for abetting bigamy. (*Addison, J.*) MT. SAIDAN *v.* EMPEROR. **147 I.C. 1223=6 R L. 490=35 Cr.L.J 597 (1)=33 P.L.R. 1060=1933 Cr.C. 309=A.I.R. 1933 Lah. 164.**

———**S. 494**—*Hindu male marrying Christian woman in England—Second marriage in Hindu form in India—No bigamy.*

Where a Hindu male has contracted his first marriage with a Christian woman in England in Christian form, and subsequently marries for a second time while his first Christian wife is living, a Hindu female in Hindu form, it cannot be said that he has committed bigamy under the Penal Code. (*Currie, J*) SAINAPATTI *v.* SAINAPATTI **I R. 1932 Lah. 214=136 I.C. 262=33 P.L.R. 339=1932 Cr.C. 96=A.I.R. 1932 Lah. 116.**

———**S. 494**—*Mahomedan girl—Option of puberty—Second marriage—Not an offence.*

If a Mahomedan woman who has exercised the option of puberty were to contract another marriage, believing

PENAL CODE (1860), S. 497.

that she was entitled to do so, she is not guilty of an offence under S. 494 read with S. 109 of the Penal Code. 19 Cal. 79, Foll. (*Abdul Qadir, J.*) GHULAM MAHOMED *v.* EMPEROR. **I.R. 1933 Lah. 24=140 I.C. 617=34 Cr L J. 77=33 P.L.R. 1062=1933 Cr.C. 164=A.I.R. 1933 Lah. 88.**

———**S. 494**—*Second marriage—First marriage not annulled—Caste custom permitting such marriage—Offence if constituted—Effect of subsequent divorce.*

The custom of a second marriage during the lifetime of the first husband and without the first marriage being annulled by divorce or in some formal manner recognized by caste usage equivalent to divorce (the mere wish of the woman against that of her husband being insufficient) is invalid as being opposed to public policy. A party contracting such a marriage is liable to be convicted under S. 494, I. P. Code, and the offence cannot be obliterated by a subsequent divorce or settlement with the first husband. (*Walsh, J.*) GEDALU NARAYANA, *In re.* **I.R. 1932 Mad 591=138 I.C. 518=33 Cr.L. J. 647=1932 M.W.N. 1082=36 L.W. 237=1932 Cr. C. 660=A I.R. 1932 Mad. 561.**

———**S. 494**—*"Void"—Meaning.*

The word "void" which appears in S. 494 is not used in the technical sense in which it is used in Mahomedan Law and the Penal Code makes no distinction between a void and an invalid marriage. The term "void" used there covers marriage of both classes. A.I.R. 1928 Lah. 844, Foll. (*Addison and Coldstream, JJ.*) HAMAD *v.* EMPEROR. **I.R. 1931 Lah 973=134 I.C. 589=32 Cr.L.J. 1210=1931 Cr.C. 314=A.I.R. 1931 Lah. 194.**

———**S. 497**—*Conviction under, on complaint by husband under Ss.* 366 *and* 368—*Legality—Cr. P. Code, S.* 199.

If a complaint by a husband, described in its heading as one under Ss. 366 and 368, I. P. Code, fulfils all the requirements of a complaint under S. 497, I. P. Code, and clearly makes an accusation of an offence under that section, then, if the adultery complained of is proved, a conviction under that section will not be illegal on the ground that there has been no complaint as required by S. 199, Cr. P. Code. (*Coldstream, J.*) SAIN *v.* EMPEROR. **155 I.C. 595=7 R.L. 742=36 Cr L.J. 789=36 P.L.R. 209=1934 Cr C. 1333=A.I.R. 1934 Lah. 945.**

———**Ss. 497 and 498**—*Offences distinct.*

There is a clear difference between the elements constituting an offence under S. 497 and those constituting an offence under S. 498 and a conviction under S. 498 may be sustainable in an appropriate case even though a conviction under S. 497 is not. (*Doraiswami Iyer, C.J.*) CHICKAPOORA *v.* VENKATARAYAPPA. **10 Mys.L.J. 286=37 Mys.H.C.R. 231.**

———**S. 497**—*Offence under—Connivance of husband—Effect.*

The husband was driven out from his house by his wife and he was supplanted by the accused with whom the wife lived. The husband saw this but preferred no complaint promptly; but after 18 months, filed a complaint, and his silence for this period was not properly explained.

Held, that the husband might be said to have connived at the adultery, that he was not the aggrieved husband who can have the adulterer convicted under S. 497 and the accused could not be convicted under that section. (*Mehta, A.J.C.*) GUL MAHOMED *v.* EMPEROR. **6 R.S. 202=148 I.C. 753=35 Cr.L J. 816=27 S.L.R. 482=1934 Cr.C. 95=A.I.R. 1934 Sind 10.**

PENAL CODE (1860), S. 497.

——Ss. 497 and 498—*Offence under—Proof of marriage.*

Under Ss. 497 and 498, marriage must be strictly proved and it is not permissible to base a conviction on the presumption of marriage arising fom co-habitation for a number of years. (*Mehta, A. J C.*) GUL MAHOMED *v.* EMPEROR. **6 R.S. 202=148 I C. 753 =35 Cr.L.J. 816=27 S.L.R. 482=1934 Cr.C. 95= A.I.R. 1934 Sind 10.**

——S 498—*Construction—"Conceals or detains".*

Rupchand, A.J.C.—The words "conceals or detains" must be taken to extend to the enticing or inducing a wife to withhold or conceal herself from her husband and assisting her to do so, as well as to physical restraint or prevention of will or action. (*Aston and Rupchand, A.J.C.*) ABDUL KAYUM *v.* EMPEROR. **28 S.L R. 140=151 I.C. 175=7 R S 43=35 Cr.L.J. 1254=1934 Cr.C. 625=A.I.R. 1934 Sind 72.**

——S 498 — *Construction—"Detains" — Married woman living as wife of another—Second husband if guilty of offence.*

The word 'detains' means by derivation and according to the ordinary use of language 'keeps back'. But there may be various ways of keeping back. It need not necessarily be by physical force, it may be by persuasion or by allurements and blandhishment. But the use of the word requires that there should be something in the nature of control or influence which can be properly described as a keeping back of the woman. Where a married woman was taken away from her husband by her brother and was given in *natra* marriage to the accused with whom she continued to live as wife,

Held, that the accused was not guilty of an offence under S. 498. The conduct amounts to an exclusion or obstruction of the husband does not amount to a detaining of the wife. The woman had entire freedom and the accused did not obstruct or prevent her from going wherever she liked (*Broomfield and Dwarka, JJ.*) EMPEROR *v.* MAHIJI FULA. **58 Bom. 88=35 Bom. L R. 1046=147 I C. 43=6 R. B 184=35 Cr. L. J. 376=1933 Cr.C. 1593=A I R. 1933 Bom. 489.**

——S. 498—*Construction—"Taking or enticing"— Meaning—Taking girl from mother with latter's consent—If offence.*

A person who takes a girl from her mother who has care of the girl and with the mother's consent does not "take or entice away" the girl within the meaning of S. 498, I. P. Code. (*Lort Williams and Jack, JJ.*) ABDUL RAHMAN *v.* EMPEROR. **39 C. W. N. 1055.**

——S. 498— *Construction — "Taking" — Person actively assisting woman to get away—If guilty.*

The word "taking" is intended to mean something different from enticing. It cannot mean taking by force, because this would amount to abduction. A case under S. 498 is sufficiently established, if it can be shown that the accused personally and actively assisted the wife to get away from her husband's house or from the custody of any person who was taking care of her on behalf of the husband. Of course the taking must be with the "intention" stated in the section. Where the accused not only provided the means by which she got away from her relation's house, namely, the boat, but he brought it to the house and himself went away with the girl in the boat from the house and both of them stayed in another house at night.

Held, that he "took" the girl away within the meaning of the section. The fact that accused and the girl stayed together at night at the house was sufficient to show that there was criminal intent within the meaning of the section. (*Lort Williams and Jack, JJ.*)

PENAL CODE (1860), S. 498.

JNANENDRA NATH DEY *v.* KSHITISH CHANDRA DEY. **159 I.C. 140=8 R.C. 280=39 C.W.N. 1280=37 Cr. L.J. 28=1935 Cr.C. 1069=A.I.R. 1935 Cal. 677.**

——S 498—*Enticement—Proof.*

The mere fact that the girl is living in the same house with the accused and his relatives does not prove that she was enticed away by any or all of them. *Addison, J*) LUQMAN *v.* EMPEROR. **149 I C. 1106 (1)=6 R L 805=35 Cr.L.J. 1032=1934 Cr.C. 168=A.I.R. 1934 Lah. 86.**

——S. 498—*Enticement—What constitutes.*

The enticement of the wife must be from the control of the husband before the enticer can be convicted under S. 498. If however there is no such control at all of the husband over the wife then it is difficult to say that the enticement of the wife would be punishable under the section. There was not any inducement or seduction by the accused at the initial stage. The wife feeling a preferential fondness for the accused, drove the complainant husband out of the house and then permitted the accused to visit her and even to live with her.

Held, that the accused could not be convicted under S. 498. (*Mehta, A.J.C.*) GUL MAHOMED *v.* EMPEROR. **6 R S. 202=148 I.C. 753=35 Cr.L.J. 816=27 S.L.R. 482=1934 Cr. C. 95=A.I.R. 1934 Sind 10.**

——S. 498—*Essentials of offence.*

Before a conviction can take place under S. 498, it must be established that the person accused knew or had reason to believe the person enticed away to be the wife of some other man. (*Addison and Coldstream, JJ.*) HAMAD *v.* EMPEROR. **I.R. 1931 Lah. 973=134 I C. 589=32 Cr. L.J. 1210=1931 Cr. C. 314=A.I.R. 1931 Lah. 194.**

——S. 498—*Marriage dissolved—Mahomedan wife renouncing religion and then taken away by accused— No offence committed.*

A Mahomedan marriage is immediately dissolved on one of the parties to that marriage renouncing the faith of Islam. So where a Mahomedan married woman renounces her religion and is then taken away by other persons they cannot be guilty under S. 498, 33 All. 90. Appl. (*Young, J.*) KARAN SINGH *v.* EMPEROR. **6 I. R. (All) 42=145 I.C. 156=34 Cr. L.J. 869=14 L. R. 201 (Cr.)=1933 A.L.J. 733=1933 Cr. C. 739= A.I.R. 1933 All 433.**

——S. 498—*Marriage void by personal law—Enticing for such purpose—Offence constituted.*

According to the Mahomedan Law, the re-marriage of a married woman is only invalid and not void but as that woman does not become the wife of the person she re-marries, therefore any intercourse between the re-married woman and the person she re-marries is illicit and as the intention of the person enticing away the woman is to re-marry her, the intent would, therefore, be that she should have illicit intercourse. A person who entices away a married woman to dispose of her in marriage always commits an offence under S. 498. 28 I. C. 651, Rel. on. (*Addison and Coldstream, JJ.*) HAMED *v.* EMPEROR. **I R. 1931 Lah. 973=134 I C. 589=32 Cr. L J. 1210=1931 Cr. C. 314=A.I.R. 1931 Lah. 194.**

——S. 498—*Married woman choosing to remain in accused's house of her own freewill for immoral purpose—Accused not guilty under S.* 498.

If a married woman ot her own freewill chooses to remain in the accused's house for an immoral purpose, the accused cannot be held to be guilty under S. 498. (*Nanavutty, J.*) MAHOMED HUSAIN KHAN *v.* LEKHAI. **6. R.O. 535=149 I.C. 228=35 Cr. L.J. 932= 11 O.W.N. 672=1934 Cr. C. 764=A.I R. 1934 Oudh 258.**

PNEAL CODE (1860), S. 498.

———**S. 498**—*Offence under—Consent or willingness of wife if immaterial.*

The mere fact that the wife may have willingly gone to the accused or that she consented to live with him would not be sufficient to take the case out of the provisions of the section. (*Aston and Rupchand A. J. Cs.*) ABDUL KAYUM *v.* EMPEROR. **28 S L R 140 = 151 I.C. 175 = 7 R.S 43 = 35 Cr. L.J. 1254 = 1934 Cr. C. 625 = A.I.R 1934 Sind 72.**

———**S. 498**—*Offence under—Evidence.*

Where there was no proof of the accused kidnapping or abducting the girl and there was no evidence showing that accused knew or had reason to believe that the girl was married, and it was also not satisfactorily proved that he had intended to have illicit intercourse with the girl,

Held, that the accused was not liable to be convicted under S. 498. (*Raza, J.*) DORI *v.* EMPEROR. **6 I.R. (Oudh) 93 (1) = 146 I.C. 40 (2) = 34 Cr. L.J. 1196 = 10 O.W.N. 833.**

———**S. 498**—*Offence under—Consent of woman if material—Evidence of enticing or taking—Necessity.*

In cases under S. 498 consent is immaterial. But it is essential to see that there is evidence that the accused took or enticed away the woman within the meaning of the section. The mere fact that the wife went away of her own accord from her husband's house and was accompanied a part of the way by the accused, is not sufficient to show that the accused took or enticed the woman away within the meaning of the section. There must be some tangible evidence of taking or enticing. (*Lort Williams and Jack, JJ.*) NORMAN O'CONNOR *v.* EMPEROR. **159 I C. 314 = 1935 Cr. C. 484 = 37 Cr.L.J. 73 = A.I.R. 1935 Cal. 345.**

———**S. 498**—*Offence under—Evidence—Interference with wife's fidelity.*

Accused at first detained the complainant's wife with a view to having illicit intercourse with her. Having been seduced by the accused, she felt some reluctance to return to her husband and declined to do so.

Held, that the accused was guilty under S. 498. (*Smith, J.*) GANESH PARASAD *v.* TULSHI RAM. **I.R 1933 Oudh 221 = 10 O.W.N. 784 = 144 I C. 213 = 34 Cr. L.J. 729 = 1933 Cr. C. 561 (2) = A.I.R. 1933 Oudh 256.**

———**S. 498**—*Offence under—Marriage—Proof.*

In a prosecution under S. 498 mere presumption that the accused must have known that the woman was married without proof of knowledge is not enough. Where the marriage is disputed there should be proof that the marriage was celebrated strictly in accordance with the requirements of custom and law applicable to the parties. (*Lort Williams and McNair, JJ.*) AKSHAY KUMAR MAITI *v.* EMPEROR. **6 I.R. (Cal.) 157 = 145 I.C. 874 (2) = 34 Cr.L J. 1092 = 38 C W.N. 113 = 1933 Cr. C. 1530 = A.I R. 1933 Cal. 880.**

———**S. 498**—Procedure—Complaint by father of girl—Sustainability. *See* C. P. CODE, S. 199. **A.I.R. 1933 Cal. 144 (1).**

———**S. 498**—Procedure—complaint by the person who had custody of the girl—Husband keeping quiet—objection is an irregularity not cured by S. 537, Cr. P. Code. *See* CR. P CODE, S. 199. **A.I.R. 1933 Cal. 880**

———**S. 498**—*Procedure—Complaint by father—Husband stating that complaint was instituted with his consent.*

Where a complaint under S. 498 is filed by the father of the girl and the husband, after all the evidence had been recorded, make a statement that the complaint was instituted with his consent, the conviction under S. 498 is bad in law in that the complaint and the evidence on which the accused has been convicted had been made by a person who was not authorized in law to make such a complaint at all. (*Dalip Singh, J.*) MAHANDI *v.* EMPEROR. **1934 Cr.C. 239 (2) = 36 Cr.L.J. 423 = 153 I.C. 721 = 7 R.L. 451 = A.I.R. 1934 Lah. 122.**

PENAL CODE (1860), S. 499.

———**Ss. 498 and 336 A**—*Procedure—Prosecution and charge under S. 366 A—Conviction under S. 498 without complaint by husband—Validity of.*

The appellants were prosecuted by the Police as a result of a report which was made under S. 367-A and they were charged under that section They were however convicted under S. 498 although no complaint was made by the husbands of women in respect of whom the offence is said to have been committed as required by S. 199, Cr. P. Code.

Held, the conviction was bad even though the husband had come forward to give evidence. 5 All. 233, 27 Mad. 61 and 29 Cal. 415, Rel. on; 20 Cal. 483, Not Foll. (*Kendall, J.*) JAGDAMBA PRASAD *v.* EMPEROR. **55 All. 871 = 6 I.R. (All.) 211 = 145 I.C. 922 = 34 Cr. L.J. 1227 = 14 L.R. 350 (Cr.) 1933 A.L.J. 701 = 1933 Cr. C. 1005 = A.I.R. 1933 All. 626.**

———**S. 498**—*Scope—"Enticement"—Girl going of her own accord—If material.*

In cases under S. 498 the fact that the girl went away of her own accord is immaterial. (*Lort Williams and Jack, JJ.*) JNANENDRA NATH DEV *v* KSHITISH CHANDRA DEV **159 I C. 140 = 8 R.C. 280 = 39 C. W N. 1280 = 1935 Cr.C. 1069 = 37 Cr.L.J. 28 = A.I.R. 1935 Cal. 677.**

———**S 498**—*Sentence.*

Accused who was found guilty of an offence under S. 498 was sentenced to six months' rigorous imprisonment. Further it was found that though he had promised to return the complainant's wife, he did not do so but concealed her.

Held, that a sentence of six months' rigorous imprisonment was not excessive and that the imprisonment of one month and 12 days which he had already undergone was not an adequate punishment for the aggravated offence which he had committed. (*Shadi Lal, C.J.*) GHULAM MAHOMED *v* EMPEROR. **6 I R. (Lah.) 228 (1) = 146 I.C 444 = 34 P.L.R. 966 (2) = 35 Cr.L. J. 16 = 1933 Cr C. 1391 = A I.R. 1933 Lah 932.**

———**Ss. 499 and 500.**

Caste panchayat.
Civil proceedings.
Civil suit for damages. *See* LAW APPLICABLE.
Collection of persons.
Company.
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Criminal proceedings.
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Fair comment.
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Judge
Law applicable.
Lawful complaint.
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Sentence.
Truth. *See* DEFENCE.
Witness.

PENAL CODE (1860), S. 499.

Caste Panchayat.

——**Ss. 499 and 500**—*Caste panchayat—Report of proceedings in caste meeting.*

Where a caste leader signed a vernacular document containing an innocent statement of what had passed at a caste meeting to the effect that certain honours were not to be accorded to the complainant and that the latter had been ex-communicated, no case of defamation has been made out. (*Jackson, J.*) RANGIAH CHETTY *v.* ABHOY CHETTY. **1931 M.W.N. 407.**

——**S. 499, Exception 9**—*Caste panchayat—Ex-communication by panchayat—Good faith—Inference from circumstances.*

At a particular meeting of the panchayat of a particular community, the complainant was ex-communicated. It appeared that this was done after charges had been made against the complainant and after he was given full opportunity to meet the charges, though he did not avail himself of such opportunity. The punches were prosecuted for an offence under S. 499 in having communicated the resolution to others.

Held, that good faith could be presumed under the circumstances and that the accused were not liable to be convicted in the absence of direct evidence of malice. (*Batpai, J.*) DASAI *v.* EMPEROR. **I.R. 1932 All. 332 = 137 I.C. 499 = 33 Cr.L.J. 472 (2) = 1932 A.L.J. 75 = 13 L.R. 63 (Cr.).**

——**S. 499, Exception 9**—*Caste panchayat—Information given to—Imputation contained in—Offence.*

Accused received information that complainant had committed theft at his house. Being satisfied that the information was true, he communicated the same in that *bona fide* belief to the leaders of his caste panchayat who outcasted the complainant.

Held, the case fell under the ninth exception to S. 492, I. P. Code, as there was nothing objectionable in the accused warning his caste people about the complainant's conduct so as to induce the latter to mend the latter's ways, although the imputation was one of commission of an offence.

Held, further, that the question whether the panchayat had jurisdiction or not was immaterial, as the imputation was made in good faith for the protection of the public in general. (*Niyogi, A.J.C.*) EMPEROR *v.* MT. DULARIBAI. **18 N.L.J. 204.**

——**S. 499, Exception 9**—*Caste panchayat—Statement as to person being outcasted—Ex-communication by panchayat as defence.*

To say that a man is outcasted when he is not so is defamation. It is established law that the members of the caste cannot as individuals take the law into their hands and declare a person to be outcasted. Where the caste panchayat gave every one full liberty to dine or not to dine with the complainant and the accused asserted, in spite of contradiction, that the complainant had been ex communicated by the panchayat, which they knew was not correct,

Held, that they could not claim the benefit of exception 9 to S. 499. (*Grille, A.J.C.*) BABULAL *v.* TUNDILAL. **28 N.L.R. 106 = I.R. 1932 Nag. 112 = 33 Cr.L.J. 835 = 139 I.C. 401 = 1932 Cr.C. 519 = A.I.R. 1932 Nag. 97.**

——**S. 499, Exceps. 9 and 10**—*Caste panchayat—Person charged with social offence—Communication to panchayat.*

The control of the panchayat is beneficial and that control cannot be exercised unless the conduct of the offender is brought to the notice of the panchayat. Hence a person who brings to the notice of the panchayat the behaviour of a person who is guilty of a social offence is not guilty under S. 499, but comes under Exceptions 9 and 10 of S. 499. (*Allsop, J.*) BHAGWANT *v.* EMPEROR. **6 I.R. (Oudh) 183 = 146 I.C. 821 = 10 O.W.N. 778 = 1933 Cr.C. 1094 = 35 Cr.L.J. 180 = A.I.R. 1933 Oudh 377.**

Civil proceedings.

——**Ss. 499 and 500**—*Civil proceedings—Complaint in respect of proceedings in Civil Court—Duty of Court.*

It is undesirable that people should be hampered in their access to the Courts and in getting justice by the fear that if they are unsuccessful they may be prosecuted for defamation. All Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court to see whether the provisions of S. 209, I.P. Code, read with S. 195 (*b*), Cr. P. Code, have not been evaded. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) KALUMAL *v.* KISSUMAL. **156 I.C. 219 = 7 R.S. 228 = 36 Cr.L.J. 881 = 1935 Cr.C. 367 = A.I.R. 1935 Sind 81.**

——**S. 499**—*Civil proceedings—Defamation complaint in respect of Civil Court proceedings—Duty of Court.*

As a general rule it is undesirable that people should be hampered in their access to the Courts and in getting justice by the fear that if they are unsuccessful they may be prosecuted for defamation, and therefore all Courts should be careful when a complaint of defamation is filed in respect of proceedings in a Civil Court to see whether the provisions of S. 209, I. P. Code and of Cr. P. Code generally have not been evaded. A.I.R. 1925 Sind 263, Foll. (*Ferrers, J. C. and Kupchand, A.J.C.*) GHANSHAMDAS GIANCHAND *v.* NENUMAL. **28 S.L.R. 251 = 152 I.C. 346 = 7 R.S. 85 = 36 Cr.L.J. 78 = 1934 Cr.C. 955 = A.I.R. 1934 Sind 114.**

——**Ss. 499 and 500**—*Civil proceedings—Defamatory statements in—Complaint in respect of—Maintainability.*

A Criminal Court is not debarred from entertaining a complaint in respect of defamatory statements made in the course of civil proceedings during the pendency of those proceedings. So long as the ingredients of the offence of defamation are present, a Magistrate is bound to receive the complaint and proceed according to law. When a person is charged with defamation, his guilt or innocence must be determined solely with reference to the I. P. Code. (*Ramachandra Rao, J.*) SEETHARAMIAH *v.* SANNATHAMMANNA. **12 Mys.L.J. 464 = 39 Mys. H.C.R. 729.**

Collection of persons.

——**S. 499, Expl 2**—*Collection of persons—Defamatory article against girls of a college—Prosecution instituted by some of the girls—Maintainability.*

The essence of the offence of defamation is the publication of an imputation with the knowledge that it will harm the reputation of the person defamed. Where the defamatory articles published in a paper imply that the girls of a certain college are habitually guilty of the misbehaviour described in the articles, the inevitable effect on the reader must be to make him believe that it is habitual with the girls of the college to behave in this way. That being so, all the girls in the college collectively and each girl individually must suffer in reputation. A prosecution for defamation instituted by some of the girls of the college is, therefore, maintainable. (*Kendall, J.*) WAHID ULLAH ANSARI *v.* EMPEROR. **155 I.C. 638 = 7 R.A. 961 = 1935 A.W.R. 698 = 36 Cr.L.J. 816 = 1935 A.Cr.C. 141 = 1935 A.L.J. 676 = 1935 Cr.C. 887 = A.I.R. 1935 All. 743.**

Company.

——**Ss. 499 and 500**—*Company—Imputation of deceitful conduct—Offence.*

PENAL CODE (1860), S. 499.

Where a letter suggests that a company gives guarantees which are worthless and that it endeavours to avoid its liability under the guarantees given, it suggests that the company is a deceitful company and that persons dealing with that company should be on their guard and take particular care to see that they are not cheated. Such imputations are undoubtedly defamatory. (*Mackney, J.*) C.T.N.R. NARAYANAN CHETTIAR *v.* EMPEROR. **37 Cr.L.J. 328 = 160 I.C. 746 = 8 R.R. 424 = 1935 Cr.C. 1295 = A.I.R. 1935 Rang. 509.**

———**Ss. 499 and 500**—*Company—Imputation of dishonesty—Justification—Grounds.*

The accused bought a watch of a company, who executed guarantee for 2 years. The watch was out of order within 6 months ; so he took it to the company for repairs as per guarantee. Company agreed to do the repairs on payment. Thereupon he published a letter in newspaper defaming the company.

Held, that the mere fact that when he took the watch to the company and asked to have it repaired they demanded a fee for repairing it, did not justify him in imputing dishonesty to them. (*Mackney, J.*) C.T.N. R. NARAYANAN CHETTYAR *v.* EMPEROR **37 Cr.L. J. 328 = 160 I C. 746 = 8 R.R. 424 = 1935 Cr.C. 1295 = A.I.R. 1935 Rang. 509.**

Corporation.

———**S. 499**—*Corporation—Prosecution for libel—Right to maintain.*

A corporation may maintain a prosecution or an action for a libel affecting its property, but not for a libel merely affecting personal reputation, as a corporation has no reputation apart from its property or trade. The words complained of must reflect on the management of its business and must injuriously affect the corporation, as distinct from the individuals who compose it. The alleged libel must attack the corporation in its method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position. It cannot bring a prosecution for words which merely affect its honour or dignity. Moreover it cannot maintain a prosecution for words which reflect, not upon it as a body, but upon its members individually, unless special damage has thereby been caused to it. (*Dunkley, J.*) MAUNG CHIT TAY *v.* MAUNG TUN NYUN. **13 Rang. 297 = 156 I.C. 441 = 36 Cr.L.J. 953 = 8 R.R. 1 = 1935 Cr.C. 317 = A.I.R. 1935 Rang. 108.**

Criminal proceedings.

———**Ss. 499 and 500**—Criminal proceedings—Charge of rape by woman—Charge found to be false—Complaint of defamation by accused against woman—If competent. *See* PENAL CODE, S. 211. **A.I.R. 1935 Rang. 163.**

———**Ss. 499 and 500**—Criminal proceedings—Proceedings in Magistrate's Court—Answer to interrogatories containing defamatory matter about Magistrate—Offence—Procedure—Complaint or contempt proceedings. *See* CONTEMPT OF COURTS ACT **1935 A.L. J. 950 (1) = 156 I.C. 542 = A.I.R. 1935 All. 896.**

DEFENCE. *See* FAIR COMMENT AND PRIVILEGE, *infra.*

———**S. 499**—*Defence—Burden of proof—Power of Court to decide on exception, though not pleaded by the accused.*

Whether in publishing a libel, the accused acted in good faith believing after giving due case and circumspection in the truth of his allegations or in the fairness of his comments is a question of fact and though under S. 105 of the Evidence Act the burden of proving an exception lies on the accused, the Court is not precluded from considering whether there are in the evidence on

PENAL CODE (1860), S. 499.

record facts elicited or admitted, which would go to establish the exception in favour of the accused, even though he does not specifically rely upon any exception. A.I.R. 1929 Cal. 346, Ref. (*Doraiswami Iyer, C.J.*) SUBBA RAO *v.* K. SIDDARAMAPPA. **9 Mys.L.J. 120.**

———**Ss.499 and 500**—*Defence—Truth of allegation.*

During the course of quarrel between the accused and the complainant, the accused was alleged to have stated the complainant and his family were budmashes and convicts. It appeared that the allegations were true as the allegation was concerned as the complainant and his brother had been convicted for gambling, regards the complainants and his brother were convicts

Held, that though truth was not an absolute defence to a prosecution were defamation, and public benefit had also to be taken into account the matter was not one for conviction. The case would also fall under S. 95, I. P. C. (*Bose, A.J.C.*) JEORAKHAN *v.* NANAKRAM. **17 N.L.J. 66.**

———**S. 499, Exception 1**—*Defence—Truth of the statement.*

Under the first exception to S. 499 the accused has to prove two points ; that the statement was true and that it was made for the public good. Where in respect of the appointment of a mukia, the accused was alleged to have stated that the complainant was a bad character and a previous convict and the statement was substantially true.

Held, that the exception applied. (*Bennet, J.*) EMPEROR *v.* MURAT SINGH. **152 I.C. 1057 = 3 A W.R. 243 = 7 R.A. 441 = 36 Cr.L.J. 260 = 1934 Cr.C. 1129 = A.I.R. 1934 All 904.**

———**S. 499, Exceptions 1, 8 and 9**—*Defence—Truth of statement—Relevancy of.*

Under the first exception to S. 499, Penal Code, the accused has to establish not only that the imputation which he made was for the public good but also that it was true. And the question whether the accused had good reason for believing the imputations to be true would be relevant to the question of good faith in Exceptions 8 and 9 to S. 499. (*Milne, J.C. and Aston, A. J.C.*) TULSIDAS BHAVANMAL *v.* EMPEROR. **I.R. 1933 Sind 169 (1) = 144 I C. 63 (1) = 34 Cr.L.J. 667 = 1933 Cr.C. 1538 = A.I R. 1933 Sind 403.**

Fair comment.

———**S. 499**—"*Fair comment*"—*Meaning of.*

Fair comment is not an expression used in any of the exceptions to the section. It may, however, be taken to convey the same idea which the expression "to express in good faith any opinion" in exceptions 2, 3, 5 and 6 of the section is meant to convey. (*Doraiswami Iyer, C.J.*) SUBBA RAO *v.* K. SIDDARAMAPPA. **9 Mys. L J. 120.**

———**S. 499**—*Fair comment—Test of—Fact and comment intermingled.*

Where the alleged defamatory matter is a confused mass, a medley of facts, inferences and deductions, incapable of being distinguished one from the other, the two questions that have to be separately considered and on which a definite finding has to be recorded are ; (*i*) what are the allegations of fact made against the complainant? are they true or false? (*ii*) whether the comment based on those facts was malicious or *bona fide* English cases referred to. (*Doraiswami Iyer, C.J.*) SUBBA RAO *v.* K. SIDDARAMAPPA. **9 Mys.L.J. 120.**

Good faith.

———**S. 499, Exceptions (2) and (9)**—*Good faith—Burden of proof.*

Whether the case of the accused comes under Exception 2 or Exception 9, the accused has to establish tha

PENAL CODE (1860), S. 499.

he expressed his opinion or made the imputation in good faith for one or other of the purposes mentioned in those exceptions. (*Doraiswami Iyer, C.J.*) SUBBA RAO *v.* K. SIDDARAMAPPA. **9 Mys L J. 120.**

———**S. 499, Exception 9**—*Good faith—Burden of proof.*

The burden of proving that the accused acted in good faith lies on him. If he acted on information furnished to him, the burden of proof lies on him to show what precise materials he based his imputation upon. He must satisfy the Court that as a result of *bona fide* enquiries which he had made regarding the truth of the imputation, he had sufficient information which he honestly believed to be true, before he made the imputation. If the materials on which he acted were very flimsy or at any rate such that no prudent man will act on the assumption that they are sufficient, he cannot be said to have made the imputation in good faith. (*Doraiswami Iyer, C.J.*) SHARMA *v.* ABDUL KHADER. **10 Mys.L.J. 390.**

———**S. 499, Exception 9**—'*Good faith*',—*Person getting information that some persons are about to do him harm—Report by him to police without making any inquiry.*

If a person receives information that other persons are about to do him harm, he is surely entitled to go to the police and ask for protection without himself conducting an inquiry ; and if he can show that he did receive this information it cannot be held that he did not act in good faith and was not acting in protection of his own interests ; and hence no prosecution for defamation for reporting to police is maintainable. (*Mackney, J.*) YEO CHEONG CHEW *v.* EMPEROR. **158 I.C. 93 = 8 R.R. 146 = 36 Cr L.J. 1307 = 1935 Cr.C. 993 = A.I. R. 1935 Rang. 297.**

———**S. 499, Exception 9**—*Good faith—Proof of—Apology—Relevancy of.*

An expression of regret for publishing a libellous matter through inadvertence is not an apology to the public servant whose character was badly assailed and injured. It may go towards the mitigation of the punishment but it cannot be regarded as a substitute for proof that the imputation was made in good faith and for public good. (*Doraiswami Iyer, C J.*) SHARMA *v.* ABDUL KHADER. **10 Mys.L J. 390.**

Imputation as to character.

———**Ss. 499 and 500**—*Imputation as to character—Complainant alleged to have been turned out at public auction—Offence of defamation.*

At a public auction of the Government forest produce the officer asked that persons not bidding should go away. The accused subsequently in the presence of witnesses said that the complainant was turned out by the officer.

Held, that the words "*nikal diya*" or turned out in the above circumstances amounted to defamation of the complainant. (*Staples, A.J.C.*) SAMRATHMAL MARWADI *v.* EMPEROR. **141 I.C. 438 = 34 Cr.L.J. 154 = I.R. 1933 Nag. 63 = 1932 Cr.C. 863 = A.I.R. 1932 Nag. 158.**

———**Ss. 499 and 500**—*Imputation as to character—Election manifesto—General allegations of misconduct.*

In an election manifesto the rival candidate was described in the following terms: "This is to inform all that *K* and his son have no property. They will not shrink from committing even murder. *K* has been making forgeries. They are doing many kinds of harm to the poor and eating unjustly Government and temple money. They are doing many other improper acts."

PENAL CODE (1860), S. 499.

Held, that the bulk of the document contained general imputations of misconduct and not statements of fact within the meaning of Sect. 171 (*g*), I.P.Code, and that the accused was liable to be proceeded against under S. 500 and not S. 171 (*g*) in respect of the defamatory statements. (*Waller and Krishnan Pandalai, JJ.*) RADHAKRISHNA AYYAR, *In re.* **55 Mad. 791 = I.R. 1932 Mad 598 = 138 I C. 604 = 33 Cr.L.J 665 = 1932 M.W N. 1086 = 35 L.W. 753 = 1932 Cr.C. 515 = A.I. R. 1932 Mad. 511 = 63 M.L J. 380.**

Judge.

———**Ss. 499 and 500**—Judge—Observations made by Court in a civil suit—Trivial offence. *See* PENAL CODE, S. 95. **8 O.W.N. 157 = A.I.R. 1931 Oudh 392.**

———**Ss. 499, 500 and 77**—Judge—Remarks by, in the course of his office—If exempt from liability—Words *prima facie* defamatory—*Prima facie* case again—Applicability of S. 77. *See* PENAL CODE, SS. 77, 499 AND 500 **30 N.L.R. 234 = A.I.R. 1934 Nag. 123.**

Law applicable.

———**S. 499**—*Law applicable—Civil suit for damages.*

A civil suit for damages for a defamatory statement made on oath or otherwise by counsel, party or witness in a judicial proceeding is governed not by S. 499 of the Penal Code but by the principles of justice, equity and good conscience, which are identical with the corresponding rules of English Common Law. (*Grille, A. J.C.*) MANMOHANSING *v.* BISHAL SING. **I.R. 1933 Nag. 58 = 141 I.C. 362 = 15 N.L J. 149 = 29 N.L.R. 24 = 1933 Cr.C. 191 = A.I.R. 1933 Nag. 47.**

Lawful complaint.

———**S. 499, Exception (8)**—*Lawful complaint—Petition to—President of Union Board alleging leprosy and his disqualification.*

A petition to the President, however malicious, that a certain person was suffering from leprosy and therefore not qualified for election as a member of a Local Board under S. 55 of Madras Local Boards Act, does not amount to defamation. (*Jackson, J*) DORAISAMI NAIDU *v.* KANNIAPPA CHETTI. **I R. 1931 Mad. 558 = 32 Cr.L J. 767 = 131 I.C. 654 = 1931 Cr.C. 551 = 1931 M.W.N. 366 = A.I R. 1931 Mad. 487.**

Legal practitioner.

———**S. 499**—*Legal practitioner—Privilege—Advocate charged with defamation—Statement made by him as party and not as advocate—Burden of proof.*

Where an advocate is charged with defamation in respect of a statement made by him as a party in a departmental proceeding before the Deputy Commissioner and embodying his personal opinion concerning the allegation contained in a latter written by him to a Magistrate that he (Magistrate) had accepted a bribe, burden is on him of proving that the statement is covered by one of the exceptions to S. 499. (*Dunkley, J.*) U SAN WIN *v.* U HLA. **I.R. 1931 Rang 185 = 132 I.C 553 = 32 Cr L.J. 934 = 1931 Cr.C. 371 = A.I.R. 1931 Rang. 83.**

———**Ss. 499 and 500**—*Legal Practitioner—Pleader asking question under instructions—Absence of malice—Offence.*

The presumption in the case of pleaders asking questions in cross-examination is that such questions are put in good faith for the protection of his client's interests within the exception to S. 499. Where therefore a pleader asks a question in cross examination in his client's interest under instructions, he cannot be convicted under S 500 especially when the complainant admits that the pleader has no malice or grudge against him. (*Pearson and M. C. Ghose, JJ.*) NARAYAN

PENAL CODE (1860), S. 499.

CHANDRA GANGULI *v.* HARISH CHANDRA SAHA. **6 I R. (Cal.) 65=144 I C. 935=34 Cr.L.J. 865 (2)= 1933 Cr C. 231=A.I.R. 1933 Cal. 185.**

———**S. 499**—Legal practitioner—Privilege—Extent of—Presumption of good faith—Defamatory statement about third parties—Duty to withdraw statement, when shown to be untrue—Onus on him to bring the case within the terms of Except. 9. *See* LEGAL PRACTITIONER—PRIVILEGE. **34 Bom.L.R. 910=A.I.R. 1932 Bom. 490.**

Malice.

———**S. 499, Exception 8**—*Malice—Proof of.*

When a statement *prima facie* defamatory has been made by the accused, it is not necessary for the complainant to prove actual malice or personal animosity of the accused *de hors* the statement complained of. 31 B. 293, Ref. (*Sreenivasa Iyer, J.*) RAMACHANDRA RAO *v.* MAHOMED ABBAS KHAN. **10 Mys.L.J. 421.**

Newspaper.

———**Ss 499 and 500**—*Newspaper—Duties of editor.*

Before any editor publishes matter which is clearly defamatory on the face of it, he should certainly take steps to have an inquiry made by some member of his staff or some reliable person on the spot, and he should only publish the matter if he considers that he has sufficient evidence available to bring himself within the provisions of the exceptions to S 500, I. P Code. (*Bennet and Kisch, JJ.*) EMPEROR *v.* CHATTERJI. **6 I.R. (All) 47=145 I.C. 126=34 Cr L J 926=1933 A.L. J. 1493=14 L.R. 119 (Cr.)=1933 Cr.C. 740=A I R. 1933 All. 434.**

———**Ss. 499 and 500**—*Newspaper—No special privilege.*

A newspaper is in no better position in regard to the law for defamation than a private individual. (*Bennet and Kisch, JJ.*) EMPEROR *v.* CHATTERJI. **6 I R (All) 47=145 I C 126=34 Cr L J. 926=1933 A L. J 1493=14 L R. 119 (Cr)=1933 Cr.C. 740=A.I.R. 1933 All 434.**

———**Ss 499 and 500**—*Newspaper—Printer—Liability of.*

A printer is liable under the law for defamatory matter printed by him. (*Bennet and Kisch, JJ.*) EMPEROR *v.* CHATTERJI **6 I R (All.) 47=145 I.C. 126=34 Cr L J. 926=1933 A L J 1493=14 L.R. 119 (Cr.)=1933 Cr.C 740=A I.R. 1933 All. 434**

Privilege.

———Privilege. *See also* LEGAL PRACTITIONER *supra* AND WITNESS *infra.*

———**S. 499**—*Privilege—Privileged occasion—Decision as to.*

In a criminal prosecution, the question whether a statement was made on a privileged occasion or not must be decided with reference to S. 499, Penal Code, and S. 105, Evidence Act. (*Dunkley, J.*) U SAN WIN *v* U HLA. **I R. 1931 Rang 185=132 I C 553=32 Cr.L. J. 934=1931 Cr.C. 371=A.I R. 1931 Rang. 83.**

Procedure.

———**S. 499**—Procedure—Complaint by agent of defamed lady—Absence of leave of Court—Effect on trial and conviction. *See* CR. P. CODE, S. 198. **11 O.W.N. 1389.**

Protection of interest.

———**S. 499, Excep. 9**—*Protection of interest—Defamation of Tahsildar—Words uttered to protect his own interest and as protest against conduct of Tahsildar.*

The accused had filed a criminal complaint under S. 323 against the servants of the complainant. Under pressure from the Tahsildar the accused agreed not to press his complaint, but when he was compelled to appear before the complainant, he said he was not prepared to settle the matter. Thereupon a verbal altercation followed and in the heat of the moment the accused told the Tahsildar that though the complainant was an Honorary Magistrate, he had no faith in his justice and that he did not wish to see his face again He further said that the complainant was in the habit of telling lies and that he feared that he might get him (the accused) murdered through his servants,

Held, that these remarks were uttered by way of protest against the conduct of the Tahsildar and for the protection of the accused's interest in the criminal charge that he had brought. The accused was therefore clearly protected by the provisions of Excep. 9 to S 499. (*Nanavutty, J.*) BISHUNATH SINGH *v.* EMPEROR. **6 R O 420=148 I.C. 514=35 Cr.L J 703=11 O.W. N. 382=1934 Cr.C 511=A I.R. 1934 Oudh 169.**

PENAL CODE (1860), S. 499.

Publication.

———**Ss. 499 and 500**—"*Publication*".

If *A* and *B* conspire to draw up a document defaming *Z* and leave it with *B* there is no publication. (*Jackson, J.*) DORAISAMI NAIDU *v.* KANNIAPPA CHETTI. **I R. 1931 Mad. 558=131 I.C. 654=32 Cr L J. 767=1931 M.W.N. 366=1931 Cr.C. 551=A I.R. 1931 Mad. 487.**

———**Ss. 499 and 500**—*Publication—Delivery of letter containing defamatory matter to complainant—If publication—Conviction—If sustainable*

The delivery to the complainant of a letter written by the accused and containing defamatory matter about the complainant is not such a publication as would render the accused liable to conviction under S. 500, I.P. Code, because the letter cannot have injured the complainant in the estimation of others to whom the contents were not made known. (*Nazim Ali, J.*) ABDUL AZIZ *v.* MOULANA SYED MUHAMMAD ARAB SAHEB. **159 I.C 527=37 Cr.L.J 133=8 R C. 325=61 C.L.J. 205 =1935 Cr C 1188=A I R. 1935 Cal. 736.**

———**Ss. 499 and 500**—*Publication—If separate offence.*

Every publication or circulation of libel constitutes a fresh and distinct act and therefore a separate offence. (*Subhedar, A J.C.*) DIWAN SINGH *v.* EMPEROR. **155 I C. 450=7 R N. 176=36 Cr.L.J. 744=1935 Cr.C. 418=A.I.R. 1935 Nag. 90.**

———**S. 499**—*Publication—Sending letter containing defamatory matter about President to President of Committee—Letter read by other members.*

For publication it is sufficient if the accused intentionally does an act which has the quality of communicating the alleged libel to a third person or persons generally. Accused sent a letter to a President of a Committee by way of reply to a notice containing defamatory matter about the President. The President put this reply on the records of the Committee and it was read by the other members of the Committee.

Held, that the act of the President in putting it on the records was not a gratuitous or a voluntary act on his part but it was an act which had to be done in the course of official routine and that there was publication within the meaning of the section. 7 All. 205, Dist. (*Raikes, J.*) SUKHDEO *v.* EMPEROR **55 All 253= 6 I R (All.) 61=145 I C. 392 34 Cr L J. 952 (2)= 14 L.R. 74 (Cr.)=1933 Cr C. 866=1933 A L.J. 266 =A.I R 1933 All. 210.**

Sentence.

———**Ss 499 and 500**—*Sentence—Defamation extremely malicious and published in cunning manner—Fine of Rs. 400 not excessive.*

Where the defamation was an extremely malicious one, and the means of publication employed were chosen with great cunning.

PENAL CODE (1860), S. 499.

Held, that the sentence of fine of Rs. 400, in default, six months' imprisonment, was not excessive. (*Mackney, J.*) J G.G FERNANDEZ *v.* EMPEROR. **1935 Cr.C. 1258 = 37 Cr.L.J. 256 = 160 I.C. 215 = 8 R.R. 352 = A.I.R. 1935 Rang. 484.**

Witness.

——**Ss. 499 and 500**— Witness—Answer to question by Court in criminal case—Prosecution for defamation in respect of—Liability of witness. *See* EVIDENCE ACT, S. 132. **11 O.W.N. 1075.**

——**S.499**—*Witness—Defamation against—Finding not given on his evidence—Permissibility of complaint.*

No complaint for defamation against a witness should be permitted until the Court before whom the witness gave evidence in answer to questions put to him which are relevant to the inquiry has expressed its opinion on such evidence. (*Ferrers, J.C. and Rupchand, A.J.C.*) GHANSHAMDAS GIANCHAND *v.* NENUMAL. **28 S. L R 251 = 152 I C. 346 = 7 R S. 85 = 36 Cr.L.J. 78 = 1934 Cr C. 955 = A.I R. 1934 Sind 114.**

——**Ss. 499 and 500**—*Defamation—Witness—Examination of—Putting improper question to witness and making imputation out of malice—Such question approved by pleader—If offence.*

Where the accused in the course of cross-examination of the party's wife asked her whether her husband was not a habitual offender who was restricted under the Habitual Offender's Act and this was not at all true nor necessary for testing the veracity of the witness but was made out of malice,

Held, that the accused was guilty under S. 500, Penal Code.

Held, further, that the mere fact that the pleader approved of the question did not affect the case. Because his pleader failed to appreciate his duties properly and failed to advise his client that such a question was an improper question, the question was not made by any the less improper, nor did it excuse the intent of the accused in requesting his pleader to put such a question. (*Mackney, J.*) MAUNG NYI BU *v.* EMPEROR. **A I.R. 1935 Rang 293.**

——**S. 499**—*Witness—Immunity of, from action for defamation—Evidence Act* (1872), *S.* 132.

The question of immunity of witness from a charge of defamition must be decided by the Penal Code and the Evidence Act and not by any maxim, however excellent that maxim may be, of English law. 29 All. 685, Foll. (*Ferrers, J. C. and Rupchand, A. J. C.*) GHANSHAMDAS GIANCHAND *v.* NENUMAL. **28 S.L.R. 251 = 152 I.C. 346 = 7 R.S 85 = 36 Cr.L.J. 78 = 1934 Cr C. 955 = A.I.R 1934 Sind 114.**

——**S. 499**—*Witness—Privilege.*

In India the English rule of absolute privilege cannot be claimed by a witness in respect of words spoken by him in the course of judicial proceedings. (*Ferrers, J. C. and O'Sullivan A J C.*) KALUMAL *v.* KISSUMAL. **156 I C. 219 = 7 R S. 228 = 36 Cr.L J. 881 = 1935 Cr. C. 367 = A I.R. 1935 Sind 81.**

——**S. 499**—*Witness Privilege—Statments made in judicial proceedings.*

When an accused person is charged with the offence of defamation, his guilt or innocence is to be determined solely with reference to the provisions of the Penal Code and it is not permissible to import into the case principles based on grounds of public policy and borrowed from the Common Law of England. So a witness cannot claim absolute privilege for the statements made by him in a judicial proceeding. (*Sreenivasa Iyer, J.*) RAMACHANDRA RAO *v.* MAHOMED ABBAS KHAN. **10 Mys. L.J. 421.**

PENAL CODE (1860), S. 504.

——**S. 500**—*No defamation—Imputation of inconsistency.*

An imputation that a person has the evil habit of changing his opinions to suit circumstances cannot be said to amount to defamation. (*Jackson, J.*) DAMODARAM *v.* KUMARAN. **1931 M.W.N. 714.**

——**Ss. 503 and 506**—*Criminal intimidation—Threat of picketing.*

Where the applicant, with a view to prevent sale of foreign cloth, asked a dealer in foreign cloth to execute an agreement to the effect that he would not import any more foreign cloth for at least one year and pay a fine of Rs. 10 if he fails to carry out the agreement and in default of his executing the agreement the applicant threatened to picket his shop, the accused is guilty of criminal intimidation. (*Dalal, J*) RAGHUBAR DAYAL MISRA *v.* EMPEROR. **53 All. 407 = I R. 1931 All. 241 = 12 L.R. 44 (Cr.) = 32 Cr.L.J. 465 = 130 I.C. 193 = 1931 Cr.C. 423 = A.I.R. 1931 All. 263.**

——**S. 503**—*Threat of injury—Threat of excommunication or social boycott.*

If the accused has the power, according to caste customs, to ex-communicate, it is not an injury to threaten excommunication. If he has no such power, it is no more than a threat of social boycott which cannot be treated as a threat of "injury" as defined in the Penal Code. Nor is a threat of 'labour boycott' a threat of an 'injury' because there is no law to prevent any one from dissuading casual labourers from working for any particular person. (*Burn, J*) ARUMUGA MUDALIAR *v.* MUTHIAH MUDALIAR. **1933 M.W.N. 736 (1).**

——**S. 504**—*Abuse—No likelihood of breach of peace—Offence.*

Accused said to an Assistant Sub Inspector of Police during an investigation: "You are a tyrant. Justice cannot be expected from you".

Held, that Police are entitled to all legal support in the execution of their duties, but that words such as these are not likely to cause a Police officer the rank of A. S. I. to commit a breach of the peace and that though the act of abusing them is most reprehensible, it does not in general necessarily involve an offence under S 504. (*Middleton, J.C.*) NASIR KHAN *v.* EMPEROR. **157 I C. 753 (1) = 8 R. Pesh. 32 = 36 Cr L.J. 1210 = 1935 Cr.C. 931 (1) = A.I.R 1935 Pesh. 122.**

——**S. 504**—*Abusive language—Intentional use—Offence when constituted.*

If abusive language is used intentionally and is of such a nature as would in the ordinary course of events lead the person insulted to break the peace or to commit another offence under the law, the case is not taken away from the purview of S. 504 merely because the insulted person exercised self-control or being terrified by the insult, or overawed by the personality of the offender, did not actually break the peace or commit another offence. (*Tek Chand, J.*) KANSHI RAM *v.* FAZAL MAHOMED. **14 Lah. 92 = I R 1932 Lah. 412 = 138 I.C. 120 = 33 Cr L J 548 = 33 P.L R. 695 = 1932 Cr. C. 618 = A.I.R. 1932 Lah. 480.**

——**S. 504**—Complaint against magistrate—Insulting language to witness—Sanction of Local Government—Necessity. *See* CR. P. CODE, S. 197. **4 A.W.R. 666.**

——**S. 504**—*Conviction under—When justified.*

S. 504 provides a remedy for abusive and insulting language, and it requires an intention to insult and thereby to give provocation to the person insulted and an intention that such provocation should cause or the knowledge that the provocation is likely to cause the

PENAL CODE (1860), S. 504.

person so insulted to break the public peace or commit any other offence. Where the complainant came to the shop and there became engaged in a dispute with the owner as a result of which he was asked to leave the shop, the owner having used certain provocative expressions,

Held, it did not justify a conviction under S. 504. (*Ferrers, J. C. and Rup Chand, A. J. C.*) CHAINRAI VALIRAM *v.* EMPEROR. **158 I C. 608 = 8 R.S. 52 = 36 Cr.L.J. 1461 = 1935 Cr.C. 525 (1) = A.I.R. 1935 Sind 107 (1).**

———S. 504—'*Insult*'—*What amounts to.*

The provocation given by the use of insulting language need not actually result in a breach of the peace or the commission of an offence. It is enough if from the surrounding circumstances it can be reasonably inferred that the offender intended or knew that the provocation given by him was such as would be likely to result in a breach of the peace or the commission of an offence. As to what constitutes insult depends on the calm dispassionate opinion of the Judge whether the act complained of from its nature and attendant circumstances was calculated to insult and was done with intent to insult the complainant and it does not depend on the sensitive feelings of the complainant. (*Mahadevayya, Offg. C. J.*) GUBBIAPPA *v.* GANGADHARIAH. **11 Mys L.J. 167.**

———S 504—*Nature of offence under.*

An offence punishable under S. 504 does not necessarily involve a breach of the peace. It involves only an intention to provoke a breach of the publice peace or knowledge that the provocation given is likely to cause a breach of the public peace. (*Raza and Smith, JJ.*) LODHA RAM *v.* EMPEROR. **135 I C. 691 = 33 Cr L.J. 193 = 8 O.W.N. 1286 = I.R. 1932 Oudh 51.**

———S 504—*Offence under—Elements—Intention—Inference.*

The intention required for the offence under S. 504, may be inferred from the circumstances attending the insult. But the offence under the section does not depend upon the mere sensitive feeling of the offended person. It depends upon the intention or knowledge of the offender. In the absence of proof of such intention or knowledge, there can be no conviction under the section. (*Nazim Ali, J.*) ABDUL AZIZ *v.* MOULANA SYED MUHAMMAD ARAB SAHEB. **159 I C. 527 = 61 C L J 205 = 1935 Cr C. 1188 = 8 R.C. 325 = 37 Cr.L.J. 133 = A.I.R. 1935 Cal 736**

———S. 504—*Offence under—Use of word 'behoda'.*

The word 'behoda' is an offensive expression particularly when it is uttered in the course of a debate. Accused convicted under S. 504 for using the expression "why do you explain like a fool." (*Subhedar, A.J C.*) MAHADEO JAGOBA *v.* RAM LAL. **151 I O 777 (2) = 7 R.N. 67 = 35 Cr L.J. 1420 = 17 N L J. 131 = 1934 Cr C. 1091 = A.I R. 1934 Nag. 239.**

———S. 504—*Vulgar abuse—Insult.*

In order to substantiate a charge of insult, the words must amount to something more than "mere vulgar abuse". If abusive language is used in such circumstances that the Court comes to the conclusion that it cannot possibly have been intended and cannot have been understood by those to whom it was addressed to have been intended, to be taken literally, then the language cannot be held to amount to an intentional insult. At a meeting of the shareholders of a company, it was proposed to expel some of the members one of whom was the accused. Thereupon the accused got angry and said that not even the Governor-General could expel

PENAL CODE (1860), S. 506.

members from the company and then left the room, muttering "you damn bloody bastards and cads." which was overheard by some of the members,

Held, that breach of good manners though it may be it was not likely to provoke a breach of public peace, that as the term was applied generally to all the members present of whose antecedents the accused presumably knew nothing, he could not be supposed to have intended to reflect on the chastity of their mothers and that there was no intentional insult. (*Beaumont, C.J. and Broomfield, J.*) EMPEROR *v.* PHILIP RANGEL. **56 Bom. 196 = I.R. 1932 Bom. 239 = 33 Cr.L.J. 463 = 137 I C 186 = 34 Bom. L.R. 282 = 1932 Cr.C. 297 = A.I. R. 1932 Bom 193.**

[D. 1934 Nag 239 (240).]

———S 504—Vulgar abuse—No intention to provoke—Offence—Conviction—Propriety. *See* PENAL CODE, SS. 95 AND 504. **18 N.L.J. 170.**

———S 506—*Charge for offence under S.* 341, *I. P. Code—Magistrate framing charge under S.* 506 *also—Legality.*

Where the accused are charged under S. 341, Penal Code, only the trying Magistrate is justified in charging them under that section as well as under S 506, Penal Code, and his procedure in doing so is perfectly regular. 4 O.W.N. 283 (P.C.), Foll. (*Raza and Pullan, JJ.*) SACHCHIDANAND *v.* EMPEROR. **I R. 1931 Oudh 86 = 129 I C 166 = 32 Cr.L J. 330 = 7 O.W.N. 1048 = 1931 Cr.C. 129 = A.I.R. 1931 Oudh 73.**

———S. 506—*Conviction under—Propriety of.*

Accused was convicted under S. 506, I. P. Code. It was found that the complainant was intimidated, that the language used fell within the ambit of S. 503, I. P, Code, and that the complainant was alarmed by the threat used towards him.

Held, that the conviction cannot be interfered in revision. A.I.R. 1931 Lah. 288, Dist. (*Broadway, J.*) KISHORI LAL *v.* EMPEROR. **6 I.R. (Lah.) 157 = 146 I. C 17 (1) = 34 Cr L J. 1167 = 34 P.L.R. 968 = 1933 Cr C. 754 = A.I R. 1933 Lah. 497.**

———S. 506—*Criminal intimidation—Recommendation by Managing Committee to general body to rescind grant made to member of society.*

It is competent for the Managing Committee to pass a resolution recommending to general body that a certain grant made by the general body to one of its members on certain considerations be rescinded as those considerations had failed. The passing of such a resolution cannot possibly be said to be an offence or an act prohibited by law or to afford a ground for a civil action. A person by becoming a member of the Society submits himself to the authority of the general body. A proposal by the Managing Committee to refer to the judgment of the general body of an act done by one of it members cannot be regarded as a threat to cause any illegal harm. 30 Cal. 418 and A. I. R. 1923 Cal. 590, Dist. (*Ferrers, J. C. and Rupchand, A. J. C.*) JHAMANDAS THAWERDAS *v* KHEMCHAND. **6 I.R. (Sind) 18 = 145 I C. 136 = 34 Cr L J 884 = 27 S L.R. 214 = 1933 Cr.C. 711 = A.I.R. 1933 Sind 196.**

———S. 506—*Evidence.*

Where the conviction of the accused is based only on the two threats uttered by him, *viz.*, (1) that the complainant would be socially boycotted and (2) on his death no one would carry his dead body to the place of burial if he continued to deal in foreign cloth, such threats do not amount to an offence under S. 506 and the conviction cannot be sustained. The fact that the complainant is a pious Mahomedan is immaterial. (*Agha Haidar, J.*) GHULAM MAHOMED *v.* EMPEROR. **13 Lah. 16 = 33 P.L.R. 401 = I.R. 1931 Lah. 943 (1) =**

PENAL CODE (1860), S. 506.

134 I.C. 495 (1)=32 Cr.L.J. 1176 (1)=1931 Cr.C. 544=A I.R. 1931 Lah. 288.

——**S. 506**—Intention to kill not proved—Object to search police—Conviction under S. 506 and not S. 307. *See* PENAL CODE, SS. 307 AND 506.

1931 M.W.N. 861.

——**S. 511**—*Attempt—What constitutes—Attempt to cause miscarriage—Evidence.*

Intention alone or intention followed by preparation are not sufficient to constitute an attempt. But intention followed by preparation followed by an act done towards the commission of the offence are sufficient. Where the accused intended to administer something which was capable of causing a miscarriage and the evidence showed that he administered a harmless substance,

Held, that he was not guilty of an attempt to commit an offence under S. 312. (*Lort Williams and MacNair, JJ.*) ASGAR ALI PRADHANIA *v.* EMPEROR. **61 Cal. 54=1934 Cr.C. 2=35 Cr L.J. 97=6 I.R. (Cal) 237=146 I.C. 590=37 C.W.N. 1151=A I.R. 1933 Cal. 893.**

——**Ss. 511 and 366**—Evidence—Following a girl—Attempt to snatch her gold chain—Offence under Ss. 366, 511. *See* CR. P. CODE, SS. 436 AND 437. **A.I.R. 1933 Rang. 214**

——**S. 511**—Offence under—What constitutes—Act and preparation—Application to Currency Officer requesting payment of value of note alleged to be lost—Sending of half-note along with application—Offence—Penal Code, S 420. *See* PENAL CODE, SS. 420 AND 511. **12 Mys.L.J. 467.**

——**S. 511**—*Preparation and attempt—Distinction—Possession of opium with intent to transport—Offence, if constituted.*

The accused was found travelling in a bus to Tranquebar carrying certain quantity of opium for delivery to a certain person in French territory. He had to leave the bus at Tranquebar and make a journey of 6 or 7 miles. The accused having been prosecuted under Ss. 7 and 20 of the Dangerous Drugs Act,

Held, that the acts of the accused amounted to preparation and not attempt and that at any rate he should be given the benefit of the doubt that he might have repented of his intention before reaching French territory. (*Pakenham Walsh, J.*) NARAYANASWAMI PILLAI *v.* EMPEROR. **I R 1932 Mad 547=138 I.C. 286=33 Cr L J. 582=36 L W. 127=1932 Cr.C. 511=1932 M W N. 545=A I R. 1932 Mad. 507.**

PENAL PROVISION. *See* INTERPRETATION OF STATUTES.

PENALTY.

See (1) CONTRACT.
(2 CONTRACT ACT, S. 74.

PENSION.

See (1) C. P. CODE, S. 60
(2) PENSIONS ACT (1871).

PENSIONS ACT (XXIII OF 1871)—"*Pension*"—*Meaning of.*

The word "pension" in the Pensions Act 1871, and in C.P Code, S 60 and in the Transfer of Property Act S. 6 implies periodical payments of money by Government to the pensioner. 26 A. 617, Appr. (*Lord Macmillan.*) WASIF ALI MIRZA NAWAB BAHADUR *v.* KARNANI INDUSTRIAL BANK, LTD. **58 I.A. 215=I R 1931 P C 215=59 Cal 1=35 L W 384=132 I C 727=35 C W N 791=1931 A L J 495=53 C L J. 493=A.I R. 1931 P.C. 160=61 M L J. 208 (P.C)**

——**S. 4**—*Applicability—Grant of soil—Suit to recover assessment.*

Where the grant is not one of land revenue only, but of the soil also, S. 4 does not apply and no certificate is necessary for a suit to recover assessment or land revenue of the village. (*Baker, J.*) SWAMIRAO SRINIVAS *v.* BHIMABAI PANDAPPA. **141 I.C. 360=I.R. 1933 Bom. 79=34 Bom L.R. 1455=A I.R. 1933 Bom. 23.**

——**Ss 4, 11 and 12**—*Applicability—Grant of heritable and transferable estate.*

The provisions of the Pensions Act have no application to a grant which is not a mere assignment of land revenue but conveys a heritable and transferable estate. (*King, C.J. and Zia-ul-Hasan, J.*) SHAMS ARA BEGAM *v.* FAKHR JEHAN BAGAM. **159 I.C. 311=8 R.O. 170=1935 O. W.N. 1232=A.I.R. 1936 Oudh 121.**

——**S. 4**—*Pension—Meaning of—Pension held and accumulated by Government, if ceases to be pension.*

"Pension" as used in the Pensions Act includes periodical payments made out of the revenues of the Government of India on account of past services or particular merits or as compensation to dethroned princes, their families and dependants. Moneys paid under a treaty obligation are also included within the term. A pension which is held by the Government and accumulated for purposes of their own, does not cease to be such; the accumulation retains its original quality and remains a pension for purposes of S. 4 of the Act. (*Murphy and Barlee, JJ.*) NASIRUDDIN AHMED KHAN *v* SECRETARY OF STATE **160 I C 846=8 R.B. 282=37 Bom. L R. 763=A.I.R 1935 Bom 439.**

——**S. 4**—*Scope—Certificate of Collector—If a condition precedent—Production in appeal—If sufficient.*

In a suit relating to a cash allowance, the non production of the Collector's certificate under S. 4 at the time of the filing the suit is not fatal. It is sufficient if it is produced even in appeal in the High Court. (*Murphy and Barlee, JJ.*) VINAYAK GANESH *v.* NARAYAN SHANKAR. **156 I.C. 626=8 R B. 8=37 Bom L.R. 343=A.I.R. 1935 Bom 227.**

——**S. 4**—*Scope—Stipend granted under treaty with East India Company—Claim in respect of—Jurisdiction of Civil Court.*

A pension or stipend which the Government has granted under a treaty with the East India Company is the outcome of an Act of State So also a political pension granted in consideration of such pension relates to an Act of State for probably they could be withheld without those re ipients having any remedy in the Civil Courts, Any claim arising out of treaty relates to an Act of State and cannot be made the subject of adjudication in Civil Courts. (*Murphy and Barlee, JJ.*) NASIRUDDIN AHMED KHAN *v.* SECRETARY OF STATE. **160 I.C. 846=8 R.B. 282=37 Bom. L.R. 763=A.I.R. 1935 Bom. 439**

——**S. 4**—*Suit for—Desaigiri cash allowance—Certificate under S. 6—Necessity for.*

The plaintiff was the purchaser from a widow of an allowance computed in respect of Desaigiri Haq. He applied to the Collector to have his name entered in the register under the Watan Act but he was informed that his name had been entered only during the lifetime of the widow. He brought a suit for a declaration that he was the full owner of the allowance and not merely during the lifetime of the widow.

Held, that the suit cannot be entertained without a certificate under S. 6 of the Act 1 B. 75, 37 B 91; 28 Bom. L R 1477, Foll. (*Madgavkar and Murphy, JJ.*) GANGAGIR JANKIDAS *v.* SECRETARY OF STATE **33 Bom. L R 1029=131 I.C. 1217=I.R. 1932 Bom. 1=A I.R. 1931 Bom. 505.**

PENSIONS ACT (1871), S. 4.

———**Ss. 4 and 6**—*Suit for partition of lands granted by Government on account of services—Certificate, if necessary.*

A suit for partition of lands granted by Government on account of services rendered cannot be said to be one relating to any pension or grant of money or land revenue conferred or made by the British or any former Government; and a certificate under the Act is not necessary for the maintainability of the suit. (*Findlay, J.C. and Prideaux, A.J.C.*) MUKUNDRAO *v.* RAGHUNATHRAO. **17 N.L.J. 118.**

———**S. 6**—*Bar of suit—Suit to recover* toda giras haq.

A suit for a declaration of the plaintiff's rights to a share of the *toda giras haq* paid to the defendants by the Government is maintainable where the plaintiff has got a certificate from the Collector authorising the suit in spite of S. 6 of the Pensions Act. The decree declaring that the plaintiff is entitled to a certain share in the cash allowance is one which does not affect the liability of the Government to pay; it only affects the plaintiff's right to share in the amount if and when Government pays it. (*Madgavkar and Baker, JJ.*) DOLATSINGH HAMIRSING *v.* JORAVARSING NARANSING. **I.R. 1931 Bom. 435 = 133 I.C. 851 = 33 Bom. L.R. 783 = A.I.R. 1931 Bom. 473.**

———**S. 6**—*Certificate, of Collector—Fresh suit—Second certificate, if necessary.*

In 1883 the predecessors-in-interest of the plaintiff had obtained a certificate from the Collector for instituting a suit against the defendant's predecessors and had got a decree. In 1931 the plaintiff instituted a suit against the defendant without a fresh certificate.

Held, that the original certificate ceased to have any effect after the decision of that suit and that a fresh certificate was necessary for the institution of the second suit. (*Jai Lal, J.*) DURGA DAS *v.* GURDAS. **14 Lah. 48 = I.R. 1932 Lah. 670 = A.I.R. 1932 Lah. 336.**

———**S. 6**—Dismissal of officer who was on invalid pension—Suit for declaration of wrongful dismissal and for damages—Whether maintainable against Secretary of State. *See* GOVERNMENT OF INDIA ACT (1915). S. 96-B (1). **57 Mad. 857 = 67 M.L.J. 123.**

———**S. 6**—*Government allowance to Durga—Right to share—Suit for*

A suit for a declaration that the plaintiff is entitled to get his name entered in place of the last manager of a Durga which is in receipt of a cash allowance from the Government is not maintainable for two reasons: (1) The right of entering the names rests exclusively with the Collector, and none else; (2) The declaration entails a corresponding liability on the Government to pay and a suit to enforce it is barred by S. 6. (*Baker, J.*) HAIDER SAHEB *v.* MUNIRODDIN. **55 Bom. 119 = I.R. 1931 Bom 238 = 130 I.C. 30 = 32 Bom. L.R. 1420 = A.I.R. 1931 Bom. 144.**

[D, 33 Bom. L.R. 783 (792).]

———**S. 6**—*Sanad granting in perpetuity a percentage of Government assessment—Subsequent substitution of fixed annual sum*, ultra vires—*Suit by grantee—Remedies available.*

Where it is found that the act of the Government in substituting a fixed annual sum in the place of a percentage of Government assessment granted to plaintiff's ancestor is *ultra vires* and invalid, the plaintiff cannot, in view of S. 6, be entitled to an order for payment: he is only entitled to a declaration of his rights. (*Lord Russell of Killowen.*) SECRETARY OF STATE *v.* PARASHRAM MADHAV RAO. **61 I.A. 190 = 58 Bom. 306 = 36 Bom.L.R. 551 = 1934 M.W.N 437 = 1934 A.L.J. 438 = 38 C.W.N 568 = 39 L.W. 748 = 59 C.L.J. 282 = 6 R.P.C. 137 = 148 I.C. 796 = 3 A.W.R. 663 = A.I.R. 1934 P.C. 108 = 66 M.L.J. 614 (P.C.).**

PENSIONS ACT (1871), S. 12.

———**Ss. 11 and 12**—Applicability—Grant of heritable and transferable estate. *See* PENSIONS ACT, S. 4. **159 I.C. 311 = 1935 O.W.N. 1232 = A.I.R. 1936 Oudh 121.**

———**S. 11**—Jaghir—*Grant of land revenue—Exemption from attachment.*

In the case of grant of land revenue in a *jaghir* the property is not exempt from attachment either under S. 11 of the Pensions Act or under S. 60, C. P. Code. (*Curgenven, J.*) RAMA RAO *v.* SRINIVASIAH. **I.R. 1932 Mad. 449 = 137 I.C. 799 = 1932 M.W.N. 202 = 35 L.W. 395 = A.I.R. 1932 Mad. 417.**

———**S. 11**—*Scope—Mortgage decree.*

S. 11 is wide enough to include cases where the property is to be sold in exection of a mortgage decree and cannot be limited to cases of simple money decrees. It draws no distinction between a case where the property is directed to be sold by a decree or is directed to be sold in pursuance of an attachment made by the order of a Court. (*Niamatullah and Rachhpal Singh, JJ.*) TAHIR HASAN *v.* CHANDER SEN. **58 All. 98 = 157 I.C. 511 = 8 R.A. 190 = 1935 A.W.R. 867 = A.I.R. 1935 All. 678.**

———**S. 12**—*Suit in Civil Court for share of political pension—Decree in terms of compromise—Claim to pension abandoned under compromise, in lieu of monthly allowance—Validity of compromise.*

The plaintiff's predecessor sued the defendant's predecessor for a declaration of his right to a share of a political pension. Permission was obtained by him under S. 6 of the Pensions Act from the Collector for this suit to be heard by the Civil Court. The suit terminated by a decree in terms of a compromise entered into by the parties. Under the compromise, it was agreed that the plaintiff's predecessor and his representatives were entitled to get a monthly allowance generation after generation from the defendant's predecessor and his representatives, in lieu of the plaintiff's predecessor abandoning his claim not only to his alleged share in the political pension but also to his share in the property inherited by the defendant's predecessor. In a suit by the plaintiffs against the defendants for arrears of the monthly allowance,

Held, by Bennet, J., that the particular part of the compromise by which the plaintiff's predecessor relinquished all his right to the pension would be null and void in view of the provisions of S. 12 of the Pensions Act, but that the compromise would still be a valid compromise as the consideration of relinquishment of right to the property was a perfectly good consideration, and that the compromise was binding on the defendants to the extent of the property in their hands left by their predecessor.

Held, by Sulaiman, C.J., that the compromise decree was not hit by the provisions of S. 12 at all, as an abandonment of the claim to have the question of right to the pension tried by the Court would not in itself amount to an assignment of any share in the political pension, but merely the withdrawal of the suit in lieu of the consideration offered, and that the offer made by the plaintiff's predecessor to abandon his claim to the property as well as to the pension to which he might have been entitled when made in a pending suit which had been instituted after obtaining the certificate of the Collector and which was in every way cognizable by the Civil Court, was not unlawful or invalid, and that the compromise decree was binding on the defendants to the extent of the property which was in their possession.

PERCOLATING WATER.

(*Sulaiman, C.J. and Bennet, J.*) AHMAD ALI KHAN *v.* RIYASSAT ALI KHAN. **158 I C. 1106=8 R.A 366 =1935 A.L J. 910=1935 A.W.R. 1034=A.I.R. 1935 All 862.**

PERCOLATING WATER. *See* EASEMENTS ACT (1882) S 4.

PERJURY. *See* PENAL CODE, S.19.

PERMANENT DETERIORATION. *See* B. T. ACT, SS. 30(*b*) AND 38(*a*).

PERMANENT LEASE. *See* B.T. ACT, SS. 10, 18, 48, 60 AND 67 ETC.

PERMANENT SETTLEMENT— *Claim against zemindar to lands included in zemindari at Permanent Settlement—Burden of proof is on claimant—Evidence of title to surface soil will not give right to subsoil—Minerals.*

In the case of any claim against the zemindar to lands which were included in his zemindari at the Permanent Settlement the burden of proof is upon the claimant, but though the long possession by the claimants might well be good evidence of their title to surface rights the question as to subsoil rights stands upon a different footing. These at all events, where not claimed by the Crown, will be assumed to be in the zemindar If a claimant to subsoil rights holds under the zemindar, or by a grant emanating from him, even though his powers may be permanent, heritable and transferable, he must still prove the express inclusion of the subsoil rights. 44 C. 841 (P.C.) and 44 C. 585 (P.C.), Ref. to. (*Sir George Lowndes.*) GOBINDA NARAYAN SINGH *v.* SHAM LAL. **58 I A 125=58 Cal 1187=53 C L J. 333=35 C.W.N. 521=1931 M.W.N. 435=I.R. 1931 P.C 145=131 I.C. 753=33 Bom.L.R 885=33 L.W. 707=A I.R 1931 P.C 89=61 M.L.J. 9 (P.C.).**

PERMANENT TENANCY.

See (1) LANDLORD AND TENANT.
(2) T. P. ACT, S. 111(*g*).

PERMANENT TENURE. *See* B. T. ACT, SS. 3 (8) AND 10.

PERMANENT WORK. *See* EASEMENTS ACT, S. 60.

PERMISSIVE POSSESSION.

See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ART. 144.

PERPETUAL INJUNCTION. *See* SPECIFIC RELIEF ACT (1877), SS. 54 AND 55 ETC

PERPETUAL LEASE.

See (1) AGRA TENANCY ACT (1926), SS, 4, 7, 8, 23, 24, 43 AND 45, ETC.
(2) LEASE.

PERPETUITY. *See* T. P ACT, S. 14

PERSONA DESIGNATA. *See* BOMBAY CITY MUNICIPAL ACT (XVIII OF 1925). S. 198. **55 Bom 544.**

———Judge—Bombay City Municipalities Act, 1925. *See* C. P. CODE, S. 115. **35 Bom.L.R. 89=A.I.R. 1933 Bom 105.**

———Judge. *See* BOMBAY LOCAL BOARDS ACT (1923) S. 19(3)(*b*). **A I R. 1934 Sind 110.**

———Test. *See* C. P MUNICIPALITIES ACT (1922), S. 58. **31 N L.R 1=A I.R. 1935 Nag. 5.**

PERSONAL COVENANT. *See* T. P. ACT, S. 40.

PERSONAL DECREE.

See (1) C. P. CODE, S. 145 AND O. 35, R. 6.
(2) MORTGAGE.

PERSONAL EXAMINATION. *See* CR. P. CODE, S. 205.

PERSONAL INTEREST. *See* CR. P. CODE, S. 556.

PLACES OF PUBLIC RESORT ACT (1888), S. 12.

PERSONAL LIABILITY.

See (1) DEBTOR AND CREDITOR.
(2) DEED—CONSTRUCTION.
(3) MORTGAGE.

PESHAWAR CANTONMENT—Title to lands situate within cantonment. *See* CANTONMENT. **A.I. R. 1933 Pesh. 56.**

PHOTOGRAPHS See EVIDENCE.

———Value of as proof. *See* EVIDENCE—PHOTOGRAPHS. **A.I.R. 1931 P.C. 189 (P.C.).**

PIOUS OBLIGATION.

See HINDU LAW—
(1) DEBTS.
(2) PIOUS OBLIGATION.

PIRACY—Crime of. *See* INTERNATIONAL LAW **A.I.R 1934 P C 220 (P.C.).**

PLACE OF INQUIRY. *See* CR. P. CODE, S. 179.

PLACES OF PUBLIC RESORT ACT (II OF 1888) Ss 6, 7, 9 10(4) and 12—*Application for grant of license—Writ of prohibition—Application for, to prohibit District Magistrate from dealing with the matter—Maintainability.*

An application for license under the Places of Public Resort Act was made to a Local Panchayat and was first dealt with by the President of the Panchayat and later on, by the Panchayat itself Subsequently the applicant moved the District Magistrate under S. 12 of the Act. An application having been made to the High Court for a writ of prohibition to stop further proceedings.

Held, it was doubtful whether the District Magistrate was acting judicially or as a Court when exercising powers under the Places of Public Resort Act; assuming that the officer concerned is one to whom the writ could be issued, when it is found that the proceedings are entirely within the jurisdiction and powers of the District Magistrate, and there is no question of usurpation or excess of jurisdiction, there is no ground for the issue of a writ of prohibition (*Varadachariar, J.*) GHULAM MOHIDEEN SAHIB *v.* DT. MAGISTRATE OF CHINGLEPUT. **40 L W 332=153 I C 4=7 R M. 324=A.I R. 1934 Mad 545=67 M.L.J 217.**

———**S 10(4)**—*Powers of appellate authority.*

Under S. 10(4) the appellate authority is given the same power as the first authority in the matter of disposal of applications for licenses. (*Varadachariar, J.*) GHULAM MOHIDEEN SAHIB *v.* DT. MAGISTRATE OF CHINGLEPUT. **40 L.W 332=153 I C 4=7 R M. 324=A I.R. 1934 Mad. 545=67 M L J. 217**

———**S. 12**—*Applicability—"Authority holding the proceeding"—If includes appellate authority.*

The powers under S 12 can be invoked not only in cases where an application for license has been disposed of by the authority to which the application is made, but also in cases in which there has been an appeal. The words, "the authority holding the proceeding," will equally apply to the appellate authority. (*Varadachariar, J.*) GHULAM MOHIDEEN SAHIB *v.* DT. MAGISTRATE OF CHINGLEPUT. **40 L W. 332=153 I C. 4=7 R.M. 324=A.I R. 1934 Mad 545=67 M.L. J. 217.**

———**S 12**—*Application under—Jurisdiction to deal with after expiry of period of license applied for.*

An application for a licence does not lapse merely by reason of the lapse of the period for which the licence is applied for. Assuming that under the rules or in practice licenses are issued only for periods of one year at a time, it cannot be held that, if for any reason final orders are not passed on a licence application either within the official year or before the lapse of one year from the date of the application, the proceeding *ipso*

PLACES OF PUBLIC RESORT ACT (1888), S. 12.

facto terminates or that it takes away the District Magistrate's jurisdiction to deal with the matter. (*Varadachariar J.*) GHULAM MOHIDEEN SAHIB *v.* DT. MAGISTRATE OF CHINGLEPUT. **40 L.W. 332=153 I.C. 4=7 R.M 324=A.I.R. 1934 Mad. 545=67 M. L.J. 217.**

———**S. 12**—*District Magistrate acting under—If "Court."*

It is doubtful whether a District Magistrate in exercising powers under S. 12 is acting judicially or as a Court. (*Varadachariar, J.*) GHULAM MOHIDEEN SAHIB *v.* DT. MAGISTRATE OF CHINGLEPUT. **40 L W. 332=153 I.C. 4=7 R M. 324=A I.R. 1934 Mad. 545=67 M.L.J. 217.**

———**S. 12 and Madras Local Boards Act (XIV of 1920), S. 198**—*Non-municipal area—Powers of District Magistrate.*

The power of the District Magistrate in respect of non municipal areas under S. 12 of the Places of Public Resort Act still subsists notwithstanding S. 198, Madras Local Boards Act. There is nothing in the scheme of the Local Boards Act to suggest that in respect of such areas, it must have been intended to take away the powers of the District Magistrate under S 12 of the Act II of 1888. (*Varadachariar, J.*) GHULAM MOHIDEEN SAHIB *v.* DT. MAGISTRATE OF CHINGLEPUT. **40 L. W. 332=153 I.C. 4=7 R.M. 324=A.I.R 1934 Mad. 545=67 M.L.J. 217.**

PLAIN MEANING. *See* INTERPRETATION OF STATUTES.

PLAINT. *See* C. P. CODE, O. 6 AND O. 7.

PLEA OF LIMITATION. *See* LIMITATION ACT, S 3.

PLEADER.

See (1) C. P. CODE, O. 3.
(2) LEGAL PRACTITIONER.
(3) LEGAL PRACTITIONERS' ACT.
(4) LIMITATION ACT, S. 5.

PLEADER'S CLERK. *See* LIMITATION ACT, S. 5.

PLEADER AND CLIENT.

See (1) COMPROMISE.
(2) EVIDENCE ACT, S. 26.
(3) LEGAL PRACTITIONER.
(4) LEGAL PRACTITIONERS' ACT (1879).

———*Agreement—Mistake committed by Pleader—Proof—Wrong exercise of judgment by Counsel—Agreement not vitiated.*

If a Counsel gives his consent to a decree on a misunderstanding that would be good reason for the Court refusing to enforce the agreement; where however the Counsel himself does not complain of having acted on a misunderstanding, the Court cannot presume that he had not acted. If the client is negligent in giving instructions and if the Counsel's exercise of judgment is not very sound, the agreement arrived at cannot be impeached on those grounds. (*Rankin, C. J. and Buckland J.*) GHASIRAM GOENKA *v* HARIBUX GOVERDHONEDAS. **59 Cal 31=35 C.W N. 674=54 C.L J. 558=136 I.C. 535=I.R. 1932 Cal. 215=A.I.R. 1932 Cal. 231.**

———*Authority to compromise—Express authority—Necessity.*

A Pleader does not require an express authority to file a petition of compromise. His position as Pleader of a party authorises him to file any petition on behalf of his client; and where a Pleader is authorised to sign a petition of compromise on behalf of his client, his signature on such a petition is in law the signature of his client, and the decree passed on such a petition of compromise binds the client. (*Mitter, J.*) NIBARAN CHANDRA SHAHA *v.* MOTILAL SHAHA. **62 Cal. 642 =61 C.L J. 193=39 C.W.N. 938=164 I.C. 561=9 R.C. 249.**

PLEADINGS.

———*Compromise—Statement by Pleader—Contradiction by party—Permissibility.*

When a Pleader, who is authorised by his vakalatnama to appear for a party, does appear and makes a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not materially sufficient to contradict his pleader. (*Mukerji and Bennel, JJ.*) SHEO NATH SINGH *v.* LALA BANSIDHAR. **136 I.C. 622=I R. 1932 All. 238=A.I.R. 1931 All. 415 (2).**

———*Disability of Pleader—Rule in* Palmer *v.* Carter *—Applicability.*

Where it appeared that the pleader did not use his confidential position to his advantage in arranging a sale on behalf of his client,

Held, that the case did not come within the ruling in *Carter* v. *Palmer*, 8 Cl. & F. 657. (*Mukerji and Guha, JJ.*) AMRITA LAL BAISYA *v.* PRATAP CHANDRA CHAKRABARTY **I R. 1931 Cal 417=130 I.C. 897=52 C L.J 492=A.I.R. 1931 Cal. 144.**

———*Duties—Client, if bound to go to Advocate and see to the work being done.*

Per *Costello, J.*—It is not the duty of a client to frequent the office of his solicitor or Advocate or his residence for the purpose of keeping him up to the mark, *i.e.*, for the purpose of seeing that he is doing the work which he has undertaken to do and for which necessary funds have been provided. (*Costello, Lort Williams and Henderson, JJ.*) *In re* AN ADVOCATE. **62 Cal. 158 =157 I C 374=8 R C. 98=36 Cr.L.J. 1130=1935 Cr C 876=A I R. 1935 Cal. 484 (S B).**

———Lien—Non payment of fees due to pleader—Right to lien on papers of client. *See* LEGAL PRACTITIONERS' ACT, S. 14. **69 M.L.J. 802.**

———*Negligence of pleader—Client—If to be penalised.*

It is not desirable that owing to a slip on the part of an Advocate, whereby he fails to ask for something that he should have asked for, a litigant should be debarred from pursuing a claim. (*Stone, J.*) KRISHNA AYYANGAR *v.* JANAKI AMMAL **158 I C 790=8 R.M. 352=1935 M.W.N. 863=42 L.W. 655=A.I.R. 1935 Mad. 878.**

——— Unprofessional conduct—Giving false information to client. *See* LEGAL PRACTITIONERS' ACT, S. 13 (*b*). **39 C W.N. 283.**

PLEADINGS. *See also* CRIMINAL TRIAL.

———*Acceptance of—Defendant not contesting plaintiff's plea—Inference.*

A defendant who does not contest a claim must be deemed to have accepted it. To accept the proposition that a defendant can prove in a separate proceeding that the plaintiff had no case against him would be to offend against one of the cardinal principles governing litigation. (*Oppenheim, S.M. and Drake Brockman, J. M.*) QUTBUDIN *v.* KHAZAN SINGH. **18 R.D. 171=15 L.R. 229 (Rev.).**

———*Admission in—Court whether can ignore.*

When the plaintiffs in an amended plaint admit that certain deed was merely an agreement to sell and set up a subsequent oral sale in their favour, it is not open to the Court to go behind the pleadings of the parties and to hold contrary to the pleading that the document was a complete sale. (*Tek Chand and Walker, JJ.*) RAM ASRA *v.* ALLAH JAWAYA. **I R 1931 Lah. 822=133 I C. 646=32 P.L.R 278=A.I.R. 1931 Lah. 595.**

———*Admission in—To be taken as a whole.*

PLEADINGS.

It is an ordinary rule that a statement in a pleading should be taken as a whole ; and it is not permissible for the Court to dissect that pleading *(Mitter and Patterson, JJ)* GOURHARI SABHASUNDAR *v.* SHYAMA SUNDARI SABHASUNDAR. **38 C.W.N. 977=153 I.C. 1055=7 R.C. 418=A.I.R. 1934 Cal. 824.**

———*Admission in—Use of—If to be taken as a whole.*

If a party seeks to rely on an admission made by the other party in his pleadings, he must take the whole of the admission. He cannot be allowed to dissect it and use a part of it and reject the rest. *(R. C. Mitter, J.)* SURENDRA NATH MAJUMDAR *v.* HARIPADA SARDAR. **163 I C. 440=9 R.C. 23=61 C L.J. 80=39 C.W.N. 722.**

———Admission of—Omission to file written statement —If amounts to admission of facts stated in plaint. *See* C. P CODE, O. 8, R. 5. **14 Pat. 70.**

———Adverse possession—Plea of—Clear allegations necessary. *See* ADVERSE POSSESSION—PLEA OF. **13 Lah. 677=A.I.R. 1933 Lah. 25.**

———*Adverse possession—Plea of title whether includes.*

The plea of adverse possession need not be specifically pleaded as it is included in the plea of title. 24 Mad. 387 (P.C.), Rel. on. *(Mukerji and Bennet, JJ.)* MUNICIPAL BOARD, ETAWAH *v.* MT. RAM SRI. **I.R. 1931 All. 570=133 I.C. 26=A.I.R. 1931 All. 670.**

———*Allegations in—Responsibility of pleader and party.*

There is a difference between the responsibility of a party and that of his lawyer in respect of allegation in a pleading. While the party makes himself responsible for the truth of the allegation, the pleader is only to satisfy himself that the allegation has foundation. *(Mahomed Noor, James and Varma, JJ)* KEDAR NATH LAL, *In the matter of.* **152 I C. 313=14 Pat 10=36 Cr L.J 1=7 R.P. 170=15 Pat.L.T. 560 =A I.R. 1934 Pat 598 (S.B).**

———*Alternative defences—Right to raise—Absence of evidence or use of false evidence—If a bar.*

A defendant is not precluded from urging an alternative defence simply because he cannot support his other defence by credible evidence or attempts to support it by false evidence. Nor can it be held that a person would be precluded from urging any defence, or that it would absolve the plaintiff from proving his case, simply because in an earlier suit of a different nature relating to the same matters, the defence had been rejected on the ground that it was sought to be supported by false evidence or fabricated evidence. *(R.C. Mitter, J.)* SURENDRA NATH MAJUMDAR *v.* HARIPADA SARDAR **163 I.C. 440=9 R.C. 23=61 C.L.J. 80=39 C.W.N. 722.**

———*Amendment—Amendment in plaint allowed subject to costs—Other side accepting costs—Effect.*

Where an amendment of the plaint is allowed subject to the payment of a certain amount as costs to the defendant and the defendant accepts that amount, it does not lie in his mouth to turn round and to attack the amendment. *(Agha Haidar, J.)* GHULAM QADAR *v.* MT. FATEH BANO. **156 I C. 342=7 R.L. 895=36 P.L R. 264=A.I.R. 1934 Lah. 974.**

———*Amendment—Amendment of plaint—Claim to recover money from Hindu son as having been borrowed for family necessity—Right to fall back on pious obligation—Amendment of plaint—If necessary.*

In a suit to recover money borrowed by a Hindu father from his sons on the ground that the debt was borrowed for purposes of the family, when that allegation is not made out, the creditor can prosecute his claim against the sons, as sons, and no amendment of the plaint is necessary. The absence of an express allegation of pious obligation in the plaint does not in any way prejudice the defendants-sons. *(Wadia, J.)* MULCHAND HEMRAJ *v.* JAIRAMDAS CHATURBHUJ. **159 I.C. 911=8 R.B 232=37 Bom.L.R. 288=A.I.R. 1935 Bom 287.**

———*Amendment—Amendment of plaint—Principles —Limitation.*

Unless an amendment would defeat a right which has accrued by limitation, a plaintiff should be allowed to amend his plaint to base his claim upon what is found to be the only ground on which he can succeed. *(Weston.)* GANESHI LAL MANNA LAL *v.* B. B. & C. I. RAILWAY CO. **1935 A.M.L.J. 38.**

———Amendment—Application for leave to sue *in forma pauperis*—Introduction of new cause of action—Permissibility. *See* MYSORE C. P. CODE REGULATION, O. 6, R. 17. **12 Mys L.J. 510.**

———*Amendment—Delay—Suit for bare declaration—Objection to maintainability at earliest stage—Application for amendment at very late stage in appeal—If can be allowed.*

In a suit for a bare declaration, an objection was taken at the earliest possible moment that it was not maintainable without a prayer for possession. But the plaintiff ignored the objection and did not choose to add the prayer for possession. Ten years later, in appeal, the plaintiff prayed for leave to amend the plaint by adding a prayer for possession.

Held, that the plaintiff having deliberately refused to amend his plaint where the defect was brought to his notice immediately after the plaint was filed, it would be improper to allow an amendment at that late stage; and in the absence of any exceptional reason to overlook the plaintiff's determination to maintain the suit in its original form up to that moment, the Court would not be justified in allowing the amendment prayed for at that very late stage. *(Reilly, C. J. and Srinivasa Rao, J.)* BALAKRISHNA *v* GOVERNMENT OF MYSORE. **13 Mys.L J. 228=40 Mys.H.C.R 277.**

———"Amendment"—If includes addition of claim. *See* C. P CODE, O. 6, R. 17. **156 I.C. 479=A.I.R. 1935 Pat. 365.**

———Amendment—New cause of action—Introduction of basis on subsequent events—Rule as to. *See* PRACTICE—SUBSEQUENT EVENTS. **152 I.C. 308=A.I.R. 1935 Oudh 22.**

———Amendment — Principles. *See* MYSORE C. P. CODE REGULATION, O. 6, R. 17. **12 Mys L.J. 390.**

———Amendment—Principles — Defence—If can be looked into—Suit for injunction on title by partition—Amendment to include declaration of title by adverse possession—If allowable. *See* C. P. CODE, O. 6, R. 17. **41 L.W. 37=A.I.R. 1935 Mad. 137.**

———*Amendment—Suit on hundi—Hundi found inadmissible in second appeal—Amendment*

A suit based mainly on a hundi went up in second appeal where it was found that the document was inadmissible in evidence. A request for amendment was made to the appellate Court and it was also found that an application for amendment of plaint was already made to the lower appellate Court which forwarded it to the trial Court for disposal with the suit but was pending there in view of the appeal.

Held, that it was not right that the plaintiff should be deprived of all remedies merely because it was found at a late stage as in appeal that the hundi was not admissible in evidence and hence the amendment prayed for should be allowed. *(Pandrang Row, J.)* ABDUL

PLEADINGS.

WAHEB SAHEP *v.* ANJANEYALU. **8 R.M. 468=159 I.C 23=1935 M.W.N. 1041=42 L.W. 574=A.I.R. 1935 Mad 888.**

———*Amendment—Valuation—Suit valued grossly high—Appeal—Request for amending valuation—If permissible.*

Where a grossly high value has been put on the subject-matter of the suit not *bona fide* and a request for amendment of valuation is made at the stage of appeal, the amendment should not be allowed. (*Pandrang Row, J.*) ACHUTA MOOTHAN *v.* KRISHNA MOOTHAN. **158 I.C 1023=8 R M. 398=1935 M.W.N. 1174=A I R. 1935 Mad. 874.**

———*Cause of action—Court's power to go beyond allegations.*

The Court in considering whether allegations do or do not show a cause of action, is at liberty to go beyond the allegations pleaded as a cause of action. It is not precluded from taking into consideration other allegations in the plaint in determining whether or not the allegations as a whole do or do not show a cause of action. (*Mya Bu and Bagulcy, JJ.*) U PO KHA *v.* MA GYI. **160 I.C. 824=8 R.R. 436=A.I.R. 1935 Rang. 497.**

———*Cause of action— Mistake in statement of cause of action in plaint—If fatal.*

Meticulous accuracy in drafting plaints ought not to be demanded in India. Mistake or inaccuracy in stating the date of the cause of action for the suit is not sufficient to justify dismissal of the suit. (*Allsop, J.*) ABDUL SHAKUR KHAN *v.* RAJENDRA KISHORE SARAN. **155 I C. 1092=7 R.A. 1029=1935 R.D. 345=1935 A.W.R. 818=1935 A.L.J. 966=A.I.R. 1935 All. 759.**

———*Cause of action—Plea of.*

Where a plaintiff stated facts but did not say expressly that the facts constituted part of cause of action, the Court allowed him to plead that the facts constituted part of cause of action. (*Leach, J.*) A. M. M. MURUGAPPA CHETTIAR *v.* GALLIARA. **13 Rang. 330 =8 R.R. 251=159 I C. 142=A.I.R. 1935 Rang. 367.**

———*Chur lands—Title to lands as accretion—Relief as lands reformed* in situ*—Permissibility.*

In the case of Chur lands which are constantly going under water and reforming it is very difficult, until a full investigation based on a proper survey and comparison of maps is made, to premise with any degree of certainty whether a claim would really lie on the ground of a new formation as being reformation *in situ* or a contiguous accretion. The pleadings in such a case should not be construed too strictly in the absence of some good very reason; and the plaintiff ought not to be precluded from claiming title to the lands as accretion, merely because in his plaint he only prayed for a declaration of his title to them as reformation *in situ* of his mouzah. (*Mukerji and Guha, JJ.*) SARAT CHANDRA ROY CHOUDHURY *v.* BHUPENDRA NARAIN RAI CHOUDHURY. **142 I.C. 525=I.R. 1933 Cal. 297= 56 Cr.L J. 263=A.I.R. 1933 Cal. 199.**

———Co-defendant—Confession of judgment by one defendant—If binds co-defendant. *See* EVIDENCE ACT, S. 18. **39 C.W.N. 277.**

———*Co-defendants—Confession of judgment by one —Right of other to plead same defence.*

When one of two defendants has confessed judgment and has admitted the correctness and validity of the claim of the plaintiff, the other defendant is not competent to take up the case on behalf of the former and to urge pleas which the former alone could take up. (*Nanavutty and Thomas, JJ.*) GAURA DEI *v.*

PLEADINGS.

MOHAMMAD YASIN ALI KHAN. **7 R.O. 352=153 I. C. 585=11 O W.N. 1571=A.I.R. 1935 Oudh 121.**

———*Construction—Duty to grant proper relief.*

The pleadings in the Moffusil in this country have never been so strictly construed by the Courts in India or by their Lordships of the Judicial Committee of the Privy Council, as to deny a relief to a party to which he may be held to be entitled for the reason that there was some defect or other in the wording of the prayer made in a plaint. In a suit the relief claimed was a declaration as to the existence of a custom but what really was meant by the plaintiff was a declaration that the villagers had the right based upon custom.

Held, that the plaintiff ought to be granted the relief meant though not exactly claimed by him. (*Guha and Lodge, JJ.*) DINANATH KAR *v.* JITENDRA NANDAN DAS. **40 C.W N. 468=160 I C. 121=8 R.C. 407= A.I.R. 1935 Cal. 744.**

———*Construction—Fair notice of case given—Strict construction of pleadings not to be adopted.*

Their Lordships of the Privy Council will be disinclined to stress the structure of the pleadings in a suit too strictly, if fair notice of the case to be made by the plaintiff has been given, and issue has been joined on an enquiry but faintly adumbrated in the pleadings. *McLean* v. *McKay*, 5 P.C 327, Ref. (*Lord Atness.*) SOMESHWAR DUTT *v.* TIRBHAWAN DUTT. **61 I.A. 224=9 Luck. 178=38 C.W N. 806=40 L.W. 5=59 C.L.J. 454=36 Bom.L R. 652=1934 A.L J. 585= 6 R P C. 151=149 I C. 480=3 A W R. 865=1934 M.W N 647=11 O.W.N. 784=A.I.R. 1934 P.C. 130 =67 M.L J. 7 (P.C.).**

———*Construction—Liberal construction—Pleadings in Punjab.*

Pleadings in the Punjab should not be construed too strictly but in a liberal manner so as to do substantial justice between the parties. (*Agha Haidar, J.*) AMRU *v.* SANTA. **A.I.R. 1935 Lah. 441.**

———*Construction—Meaning of words—"Not known" does not amount to "not admitted."*

A pleading "not known' cannot be held tantamount to a pleading "not admitted." A defendant stating in the written statement that the contents of a paragraph in the plaint were not known to him cannot be held to have made the correct pleading laid down by O. 8, R. 5, C. P. Code. (*Mukerji and Bennet, JJ.*) LAKHMI CHAND *v.* RAM LAL KAPOOR. **I.R. 1931 All. 654 =133 I.C. 414=A.I.R. 1931 All. 423.**

———*Construction—Mofussil pleadings.*

Pleadings in the mofussil are not drawn up with that preciseness with which one is familiar in the Presidency towns and they should not be strictly construed. (*Rangnekar, J.*) MALLANGOUDA *v.* DANDAPAGOUDA. **I.R. 1932 Bom. 515=139 I.C. 602=34 Bom.L.R. 1009= A.I.R. 1932 Bom. 529.**

———*Construction—Mofussil pleadings— "Immemorial used"—Word not found in the plaint—Whether it can be relied on.*

The pleadings in India should be construed somewhat liberally notwithstanding the fact that lawyers in general in the mofussil now are more fully equipped than the average mofussil lawyers of half a century ago. Where the plaint stated that the plaintiffs and their ancestors have been using the disputed land as a path way for over 40 or 50 years, the plaintiff is entitled to rely on immemorial user. even though the words "immemorial user" are not found in the plaint. (*Mitter, J.*) KUMAR MANMATHA NATH MITTER *v.* RAKHAL CHANDRA MANDAL. **I.R. 1933 Cal. 291=142 I.C. 458=56 C. L.J. 274=A.I.R. 1933 Cal. 215.**

PLEADINGS.

———Construction—Novation of contract or mere acknowledgment. *See* LIMITATION ACT. S. 19—FRESH CONTRACT. **8 O. W. N. 126=A.I.R. 1931 Oudh 97.**

———*Construction—Plaint—Claim to proprietary possession.*

The plaintiff said that he was in possession of the land as a proprietor. He then went on to say that he had acquired rights by adverse possession. The actual words were "Muddaiyan Pabiz hain" and "Muddaiyan mukhalifana qabiz hain".

Held, that the plaintiff had pleaded that he was in proprietary possession. (*Oppenheim, S.M. and Knox, J.M.*) RAM PHAL *v.* BHYA KESHO DAT RAM PANDE. **16 R.D. 206=13 L.R. 90 (Rev.).**

———*Construction—Strict construction—Plaintiff a practising lawyer.*

Where a plaintiff is a practising lawyer and he is represented by a pleader, his pleadings must be construed strictly. (*Bagulay, J.*) RAMAN CHETTYAR *v.* U BA THIT. **148 I.C. 18=6 R. R. 204=A.I.R. 1933 Rang. 357.**

———*Construction—Strict construction — Technical defence.*

Where a party to a mortgage suit is setting up a technical defence against a just claim, that defence must be strictly established and consequently the pleadings must be strictly construed. (*Dunkley, J.*) P.L.N.K L. CHETTYAR FIRM *v.* KO LU DOKE. **152 I.C. 395=7 R.R. 150=A.I.R. 1934 Rang. 278.**

———*Contents.*

The law of pleadings may be tersely summarised in four words, "Plead facts, not law." It is the duty of the parties to state only the facts on which they rely for their claim. It is for the Court to declare the law arising out of those facts. (*Ferrers, J.C.*) KARACHI BANK, LTD. *v.* SHEWARAM. **I.R. 1933 Sind 147=143 I.C. 713=A.I.R. 1933 Sind 103.**

———*Contents—Plaint—Date of cause of auction—Need for specification.*

It cannot be said as a general proposition that a paragraph in the plaint stating the plaintiff's cause of action arose on such and such a date is either wholly insufficient or useless or unnecessary. That will be the case if the date upon which the cause of action arose is otherwise alleged specifically. If that has not been done the plaintiff should be required to allege the date specifically though whether he does so in a separate paragraph is of little account. 58 Cal. 419, Cons. (*Buckland, J.*) KALYANI DASSI *v.* GANESH CHANDRA. **59 Cal. 448 =137 I.C. 353=I.R. 1932 Cal. 319=35 C.W.N. 990 =A.I.R. 1932 Cal. 259.**

———*Contents—Plaint—Defendant supporting plaintiff—Separate written statement necessary.*

Where in a suit for ejectment a third party who is added as defendant supports the plaintiff's case it is necessary that the defendant should file written statement to that effect and lay out his defence properly in the written statement replying to a properly laid case. Where the defendant files a petition for amendment and admits certain paragraphs in the plaint and says, that she adopts the rest of the plaint for the purpose of these proceedings (not that they are true that she will treat them for all purposes as true), *i.e.*, merely in so far as they serve the purpose of ejecting the other defendants, and the Court made the order that she was to be added as plaintiff and struck out from the list of defendants with consequent amendments of the plaint.

Held, it was impossible to try the suit on this plaint and that the application should have been dismissed. It was for the defendant by her written statement to say whether she would object or not object to the plaintiff's claim, and whether she objected or not, the plaintiff had to show title in himself in order to succeed. It is an erroneous procedure for the plaint to state what the defendant intends to plead. It is undesirable to try questions of title except upon proper pleadings. (*Rankin, C.J. and C.C. Ghose, J.*) JOHN BOISOGOMOFF *v.* MANMATHA NATH MULLICK. **58 Cal. 561=I.R. 1931 Cal. 300=129 I.C. 860=52 C.L.J. 357=A.I.R. 1931 Cal. 76.**

———*Definiteness—Alienation by Hindu father—Suit by son contesting—General allegation of immorality—Permissibility—General paragraph to be struck out*

A general charge of immorality is not permitted in a pleading. The immorality must be pleaded with particularity; in a suit by the son impeaching the alienation by a Hindu father, the pleading must show with precision how exactly it came about at the particular time that the particular money was needed and used for the particular immorality charged. The duty of the Judge is to have the whole of the general paragraph struck out. (*Mears, C J. and Sen, J.*) JAGDISH NARAIN *v.* HAZARI LAL. **I.R. 1932 All. 671 (1)=140 I.C. 535 =1932 A.L J. 309=A I.R. 1932 All. 467.**

———*Definiteness—Need for—Question as to existence of nearer reversioners—Court calling upon defendant to name them—Propriety.*

It is necessary that the pleadings should be definite in order that evidence should be produced bearing on the issues. Where the question is whether there are any nearer reversioners of the deceased than a certain person named, the Court is correct in requiring the defendant before the plaintiff produces his evidence to state whom he claims to be nearer heirs, as then alone the plaintiff would be able to produce evidence showing exactly who those people are. (*Bennet, J.*) KANHAIYA LAL *v.* MT. CHAMPA DEVI. **153 I.C. 545=7 R.A. 536=4 A.W. R. 1458=A.I R. 1935 All. 203.**

———Drafting of—Reckless charges of fraud—Improper conduct of Advocate. *See* LEGAL PRACTITIONER—DUTIES. **69 M.L J. 250.**

———Duty of Counsel—Drafting of—Grave and serious allegations. *See* LEGAL PRACTITIONER—DUTIES. **A.I.R. 1935 All. 425 (F.B.).**

———*Ejectment suit—Suit for possession by person dispossessed—Omission to sue—Person dispossessed not under S. 9, Specific Relief Act—Proof of title—Necessity.*

If a person has entered into possession lawfully and peaceably and if his possession is attempted to be disturbed by a person who has no title, he can maintain his possession by an injunction from the Court. If however he is dispossessed and does not sue for possession under S. 9, Specific Relief Act he can only succeed on the strength of his own title. 12 All. 51 (P.C.), Expl. (*Nasim Ali and Henderson, JJ.*) JOY GOPAL SINGH *v.* PROBODH CHANDRA. **158 I.C. 445=8 R.C. 185= 40 C.W N. 81=A I.R. 1935 Cal. 646.**

———*Ejectment suit—Suit for rent and ejectment—Title, if to be set up.*

In a suit for rent as in a suit for ejectment against a tenant, alleging the existence of the relationship of landlord and tenant, it is not necessary for the plaintiff to set out his own title, because the tenant is estopped from denying that his landlord who put him in possession of the land then had title to do so or that he had title to receive the rent. The question may arise whether in a suit for rent the ordinary rule should be relaxed that a

plaintiff is not bound to anticipate a defence that his title would be denied. The fact that a defendant in an ejectment suit can raise all legal defences under a plea of possession has been regarded as taking the case out of the general rule, that a plaintiff is bound to anticipate a defence. (*Mitter and Patterson, JJ.*) KUMAR RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARABANI COAL CONCERN, LTD. **62 Cal 346=159 I.C. 98=8 R.C. 257=60 C L.J. 477=A.I.R. 1935 Cal 368.**

———Estoppel—Plea of, *See* EVIDENCE ACT, S. 115.

———*Estoppel — Specific averments in pleadings necessary.*

In order to sustain the plea of estoppel, which is a mixed question of fact and law, there should be distinct pleadings by the defendants stating the facts on which an estoppel could be founded. (*Subhedar, A.J.C.*) KANHAILAL *v.* BHAIYALAL. **149 I.C. 1031=6 R.N. 259=16 N L J. 248=A.I.R. 1934 Nag. 51.**

———*Estoppel— Specific plea necessary.*

If the plaintiff wants to rely on an estoppel either as a rule of evidence or as part of the substantive law, he must set up such a plea specifically in the plaint making the necessary averments therein. (*Curgenven and Sundaram Chetty, JJ.*) MANIKYA NAYANIM VARU *v.* LAKSHMINARASIMHA SASTRULU. **I.R. 1932 Mad. 716=37 L.W. 199=139 I.C. 465=A.I.R. 1933 Mad. 43=63 M.L.J. 319.**

———*Fraud—Decree challenged on ground of—Precision necessary.*

If fraud is relied upon for the purpose of vacating a decree, the fraud must be specifically pleaded and proved. (*Rupchand, A.J.C.*) SHAGANLAL *v.* HARIRAM TILOOMAL. **147 I.C. 528=6 R.S. 163=A.I.R. 1933 Sind 304.**

———*Fraud —Particulars.*

Where the plaintiff alleges fraud, he must specify and describe it and then he will have an opportunity to establish it. (*Harrison and Tekchand, JJ.*) BAL MOKAND *v.* RAM LAL. **I.R. 1931 Lah. 835=133 I.C. 867=32 P.L R 407.**

———*Fraud—Particulars —Specification of—Necessity for.*

If a regular suit is brought to set aside a decree upon the ground that it was obtained by fraud, the plaintiffs must clearly and specifically set out the fraud that is alleged. A prior judgment cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where and in what way the fraud was committed. 41 Cal. 900, Foll. (*Page, C.J. and Das J.*) GOPATAR *v.* ABDUL AZIZ. **9 Rang. 135=I.R. 1931 Rang 263=133 I.C. 487=A.I R. 1931 Rang 212.**

———Fraud—Party to fraud—Right to plead his own fraud— Transfer to defeat creditors—Fraud carried out —Right of transferor to assert title to property transferred. *See* BENAMI—FRAUDULENT TRANSFER. **42 L.W. 452=A I R. 1935 Mad. 947.**

———*Fraud—Proof.*

A charge of fraud must be substantially proved as laid; and when one kind of fraud has been charged, another kind of fraud cannot be substituted for it on failure of proof. (*Wadia, J.*) KRISHNARAO RAGHUNATH *v.* CHAMAN GHAMA. **155 I.C. 249 (2)=7 R.B. 418=36 Bom.L.R. 1074=A.I.R. 1935 Bom. 144.**

———*Fraud—Suit based on—Particulars of fraud to be clearly specified.*

In a suit to set aside a decree on the ground that it was obtained by fraud, the plaintiff is bound to specify in his plaint the facts which constitute the fraud in a clear and definite manner. In order to entitle the plaintiff to succeed, the fraud alleged must be satisfactorily established and it must be proved how, when, where, and in what way the fraud was committed, since a prior judgment cannot be upset on general allegations of fraud or collusion. (*Mahadevayya and Ramchandra Rao, JJ.*) RANGAPPA *v.* MOODLAPPA. **37 Mys.H. C.R. 450=10 Mys.L.J. 233.**

———*Ignorance of law—Plea of—Maintainability.*

It cannot be presumed that a party who has attempted to comply with the law, comprehending the correct law, is ignorant of the law. Such a plea cannot be entertained. (*Jackson and Pakenham Walsh, JJ.*) GANGU NAIDU *v.* MUTTENNA. **151 I.C. 777 (1)=7 R.M. 135 (2)=1935 M.W.N. 89=40 L.W. 623=A.I.R. 1934 Mad. 664 (1).**

———*Inconsistent pleas—Right of ownership and easement.*

There is no objection to a man pleading in the alternative that he is the owner of a piece of land and that if he is not the owner, he is entitled to an easement over it. (*Beaumont, C.J. and Rangnekar, J.*) TAMANBHAT *v.* KRISHTACHARYA **6 I R. (Bom.) 33=144 I.C. 998=35 Bom L.R. 144=A.I.R. 1933 Bom 122.**

———*Inconsistent pleas—Right set up as owner and as holder of easement—Dismissal of suit not proper.*

Plaintiff cannot be allowed to take the impossible position of being the owner of and of having a simultaneous right of easement over the same land. But where the reliefs claimed upon the ownership and upon the right of easement in respect of the same property are not claimed simultaneously, but in the alternative, the action of the plaintiff must be condemned, but the plaintiff should not be penalized by a total dismissal of the suit. (*Sen and Niamatullah, JJ.*) DWARKA *v.* RAM JATAN. **53 All. 16=I.R. 1931 All. 83=128 I.C. 755=1930 A.L J. 1537=A.I.R. 1930 All. 877.**

———*Inconsistent pleas—Suit on antecedent debt—Decree on basis of promissory note.*

A party cannot plead an antecedent debt and acknowledgment and then complain of gross irregularity because he is not given a decree on the promissory note. (*Jackson, J.*) VENKATAKRISHNA REDDI *v.* BATCHA REDDI. **57 Mad. 783=151 I.C. 241=1934 M.W.N. 474=7 R.M. 117=39 L.W. 582=A.I R. 1934 Mad. 500=66 M.L.J. 703.**

———*Inconsistent pleas—Suit for declaration and possession—Whether can be converted into one for redemption.*

A suit for declaration of right and possession cannot be converted into a suit for redemption because such a course involves inconsistent pleas being taken up. (*Nanavutty, J.*) DAL BAHADUR SINGH *v.* SARABJIT TEWARI. **7 Luck. 94=I.R. 1931 Oudh 345=132 I C. 793=14 O.L.J. 452=8 O.W.N. 732=A.I.R. 1931 Oudh 378.**

———Jurisdiction—Insolvency petition—Allegation of fact giving jurisdiction erroneous—Facts admitted or proved giving jurisdiction—If can be relied on to assume jurisdiction *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 11. **39 C.W.N. 324.**

———*Pleadings—Jurisdiction—Point to be taken in written statement.*

The proper way to plead to the jurisdiction of the Court is to take the plea in the written statement and as a substantive part of the defence. (*Rankin, C.J. and Pearson, J.*) SECRETARY OF STATE FOR INDIA *v.* GOLABRAI PALIRAM. **59 Cal 150=135 I C. 873=I. R. 1932 Cal. 169=35 C.W.N. 930=A.I R. 1932 Cal. 146.**

———*Mesne profits—Suit for—Cause of action—Maintainability without prayer for possession.*

PLEADINGS.

It is perfectly open to a plaintiff to claim mesne profits by showing that the defendant is in wrongful possession and that he himself is entitled to possession even if he does not claim possession in the suit. The cause of action for mesne profits is quite distinct from that for possession. (*Gruer, A.J.C.*) BHARAT *v.* FIRANTA. **156 I.C. 68 = 7 R.N. 210 = 31 N L.R. 180.**

———*Minority—Plea of—Suit by minor—Exemption from limitation on ground of minority—If to be raised as an issue of fact.*

The law which prescribes that a certain class of suits shall be instituted within a certain time provides the circumstances under which certain other periods will apply. Where it appears on the face of the record that the plaintiffs are minors, and it is clear from the pleading itself that the cause of action arose during their minority, the decision of the question of the right to exemption from limitation on the ground of minority does not depend upon the determination of any issue of fact which ought to have been stated and which the defendant could not disprove. It cannot be contended by the defendant in such a case that the plea of minority to save limitation was not raised in the plaint and that it came to him as a surprise at the time of argument. (*Khaja Mohammad Noor and Saunders, JJ.*) RAMDAS *v.* RAM BABU. **158 I.C 25 = 8 R.P. 170 = 16 Pat.L.T. 649 = A I.R. 1936 Pat. 194.**

———Mofussil pleadings. *See* PLEADINGS—CONSTRUCTION.

———Mortgage suit—Suit on mortgage—Mortgage executed to defeat creditor—Mortgagee knowing and being party to fraud—Plea by mortgagor that mortgage is sham and without consideration—If open—Estoppel. *See* ESTOPPEL. **69 M.L.J. 788.**

———*New case.*

The determination of a cause must be founded upon a case either to be found in the pleadings, or involved in or consistent with the case thereby made. (*Ba U and Dunkley, JJ.*) MG SAN MYINT *v.* MA THEIN NWE. **150 I.C 317 = 6 R.R. 388 = A.I.R 1933 Rang. 374.**

———*New case—Variance with pleadings—If can be allowed.*

A defendant cannot be allowed to set up a new case at complete variance with or in total defiance of, the pleadings contained in the written statement. (*Nanavutty and Ziaul Hasan, JJ.*) RUDRA PARTAB NARAIN SINGH *v.* GAJRAJ KOER. **152 I C. 977 = 7 R.O. 261 = 11 O.W.N. 1414 = A.I.R. 1935 Oudh 165.**

———*New plea.*

It is not open to a party to a suit to rely on a contention which was never raised by it in the pleadings. (*Milne, C.J and Astone, A.J.C.*) FIRM OF KHANUMAL *v.* KARIM MAHOMED & CO. **I.R 1932 Sind 161 = 139 I.C. 860 = A.I.R. 1932 Sind 78.**

———*New plea—If can be allowed at late stage—Belated plea raised in late stage—Plaintiff not given an opportunity to meet—Interference in revision.*

Where a defendant deliberately abstains from setting out in his pleading a fact of which he is then aware, he cannot be allowed to bring it in at a late stage in the evidence, and after the plaintiff has closed his case. Where the plaintiff is not given an opportunity to meet the belated plea, and the plaintiff's case is allowed to be outweighed by such a belated defence set up, the High Court will interfere in revision. (*Grille, A J C.*) SHEIKH KHANOO *v.* MST. JASODABAI. **160 I.C. 609 = 8 R.N. 191 = 18 N.L.J. 97.**

———New plea—Suit against trustee for breach of trust and wilful default—Charges—Formulation of—

PLEADINGS.

When to be made—Breaches of trust not pleaded—If can be alleged or relied on at trial—Procedure. *See* TRUST—TRUSTEE. **37 Bom.L.R. 946 = A.I.R. 1936 Bom. 30.**

———*Obscurity of—Duty of Court.*

The fact that the pleadings in a case are obscure so as to lead to confusion does not excuse the Court from insisting on the parties properly explaining them and dealing with the points that arise in a judicial and adequate manner. (*Oppenheim, S. M. and Drake Brockman, J. M.*) DWARIKA SINGH *v.* SAIDA BIBI. **18 R.D. 516 = 15 L R. 652 (Rev.).**

———*Particulars—Suit by Official Receiver—Statement of particulars.*

The Official Receiver should never in a plaint describe himself merely as "The Official Receiver"; he should invariably state that he is suing as Receiver of the estate of some person, to be mentioned particularly by name, who is insolvent. Where the Official Receiver for the estate of the insolvent, one S. M. R., sued on a promissory note in favour of S.M.K. firm by the defendant but it was not mentioned in the plaint as to how the Official Receiver obtained the right to sue on the note and it was not mentioned as to whether the adjudication was of the firm or only of S.M.R. in his personal capacity.

Held, that the plaint should be amended and that above particulars should be given. If S. M. R. was adjudicated *qua* managing partner on a petition to adjudicate the S.M.R. Firm, debts due by the firm would be provable in his insolvency and all the property of the firm would vest in the Receiver, including the shares of the minor partners, and the shares of the latter would be available to satisfy the debts due by the firm as such, but not the debts due by S.M.R. personally. (*Mosely and Dunkley, JJ.*) R. N. BANERJEE, OFFICIAL RECEIVER *v.* S M.N. AHMED. **158 I C. 570 = 8 R.R. 186 = A.I.R. 1935 Rang 327.**

———*Plaint defective—If can be set right by written statement.*

A suit must be tried on the cause of action as laid in the plaint; and any inherent defect in it cannot be supplied by a written statement in the suit. (*Mitter, J.*) DEBJI GHELABHAI & BROS *v.* MEHTA & CO. **155 I.C. 721 = 7 R C 622 = 60 C.L.J. 396 = 39 C.W N. 139 = A.I.R 1935 Cal. 255.**

———*Plaint defective—Incoherent plaint as basis of suit.*

A plaint which is absolutely incoherent, should not be allowed to form the basis of a suit. (*Baguley, J.*) U PO KHAN *v.* U BA. **159 I.C. 45 = 8 R.R. 240 = A.I.R. 1935 Rang. 118.**

———*Plaint defective—Procedure.*

If a pleading is not quite in order the reasonable thing for the Judge to do would be to order particulars to be given or to order an amendment of the plaint. He should not order the plaint to be taken off the file or withdraw the leave granted under Cl. 12 of the Letters Patent (Calcutta). (*Rankin, C.J. and C.C. Ghose, J.*) ENGINEERING SUPPLIES, LTD. *v.* DHANDHANIA & CO. **58 Cal 539 = I R. 1931 Cal. 769 = 134 I.C. 65 = A.I.R. 1931 Cal. 659.**

———*Pleadings or evidence—Statement made by party to Court.*

A statement of a party before Court but not on oath is only part of the pleading and not legal evidence. (*Tek Chand and Agha Haidar, JJ.*) MT. SUBAN *v.* MAHOMED KHAN. **35 P.L.R. 99 = A.I.R. 1934 Lah. 234.**

PLEADINGS.

———*Pleadings and proof—Evidence substantially different from case in written statement—Defendant, if can base his case on such evidence.*

Where the case disclosed in the course of the evidence led by the defendant after the plaintiff's case had closed, is substantially different from his case in the written statement and is such as to take the plaintiff by surprise, the defendant should be limited to the case which is pleaded in the written statement. (*Niamatullah and Allsop, JJ.*) MAGAN LAL *v.* KRISHNA BIBI. **153 I. C. 1068=7 R.A 670=1935 A.W.R. 301=1935 A.L. J. 729=A.I.R. 1935 All. 303.**

———*Pleadings and proof—Plea not put forward—Evidence on—If can be looked into.*

No amount of evidence can be looked into upon a plea which was never put forward in the pleadings. (*Subhedar and Pollock, A. J. Cs.*) GOPAL PRASAD TIWARI *v.* THAKUR DEEN DAYAL SINGH. **163 I.C. 961=9 R N 18=18 N.L.J. 291.**

———*Pleadings and proof—Suit for possession—Failure to prove specific case—Right to fall back on theory of constructive possession.*

Where the plaintiff in his plaint sets up a specific case of exclusive possession and fails to prove it, he cannot be allowed to fall back upon the theory of constructive or joint possession. (*Nasim Ali, J.*) KRISHNA CHANDRA DAS *v.* PURNA CHANDRA DAS **62 Cal 305=39 C W.N. 159=155 I C 987=7 R.C. 650=60 C.L.J. 232 =A.I.R 1935 Cal. 195.**

———*Pleadings and proof—Variance between—New case.*

The plaintiff is not entitled to throw over the case of negligence which he has alleged and spoken to in evidence and then ask the appellate Court to find negligence established on a quite different *species facti*. To permit this might work grave injustice to a defendant who had properly directed his evidence to the case which he had been told he had to meet. (*Lord Macmillan.*) RAYMOND LINCOLN *v* ALICE POUPINEL DE VALENCE **I R. 1932 P C. 115=136 I C. 451=36 L. W. 431=A.I R. 1932 P C. 95=63 M L J. 275 (P.C).**

———*Pleadings and proof—Variance between—Partition suit—Claim of joint acquisitions not made out—Finding of blending of incomes—Power to pass decree.*

Parties must be tied down to their pleadings and it is not permissible to the Court to make out a new case for them. Where in a partition suit it is claimed that the properties in suit are the joint acquisitions, but the Court finds they are not, finding at the same time on the evidence that there was blending of self-acquisitions with joint family estate, there is nothing to prevent the Court from decreeing partition on the footing that the properties are joint by reason of blending (*Mitter and Mc Niir, JJ.*) NANILAL DAS *v.* NUTBEHARI DAS. **38 C.W N. 861.**

———*Pleadings and proof—Variance between—Suit on agency—Decree on foot of partnership—Propriety.*

The plaintiff brought a suit for accounts against the defendants as her agent in respect of a particular business but the trial Court found they were partners and gave the plaintiff a decree for accounts on that basis.

Held the finding was inconsistent with the case both of the plaintiff and the defendant. Though in view of one of the issues in the cases raising the question of the terms of the agreement between the parties, there was no surprise to the defendant, still the suit based; as it was, on a specific legal relation of agency cannot be converted into one based on an entirely different relation —that of partnership. 50 Cal. 292; 48 C. 832 (P.C.); 17 C.W.N. 427 (P.C.); 22 C.W.N. 104. Referred to. (*Curgenven and Bhashyam Aiyangar, JJ.*) KRISHNASWAMI NAIDU *v.* JAYALAKSHMI AMMAL. **54 Mad. 671=I R. 1931 Mad 462=130 I.C. 766=1931 M.W. N 497=33 L.W. 307=A.I.R. 1931 Mad. 300=60 M.L.J. 315.**

———*Pleadings and proof—Variance between—When fatal.*

A slight variance between pleadings and proof would not be fatal to the plaintiff's suit only when it does not relate to the integral part of the action and does not hamper defence. *A*, a Mahomedan lady, instituted a suit for declaration that a certain house which was attached in execution of a decree against her son belonged to her husband and that on his death she inherited one fourth share in it. The lower Court found that the house was given to *A* in lieu of her dower by her father-in law although *A* never averred that such was the case and claimed the house by inheritance from her husband.

Held, that variance between the pleadings and the proof was fatal to *A's* suit inasmuch as the defendant was never called out to meet the case of assignment to *A* of the house by her father-in law. 46 I.C. 471; 3 I.C. 408 and 43 I.C. 29, Ref. (*Bhide, J.*) GHULAM MUSTAFA *v* MT. AZIM BIBI. **I.R. 1932 Lah 593= 139 I.C. 662=33 P.L.R. 909=A I R. 1932 Lah. 570.**

———*Pleadings and proof—Weakness of defendant's case—If adds to strength of plaintiff's case.*

The plaintiff has to prove his own case before he can succeed. The weakness of the defendant's case cannot add to the strength of the plaintiff's case. (*M. N. Mukerji, J.*) KARIMANNESSA BIBI *v.* JURAN MONDAL. **59 C L.J. 318.**

———*Power: of Court—Court whether can go behind party's pleadings.*

When the plaintiffs in an amended plaint admit that certain deed was merely an agreement to sell and set up a subsequent oral sale in their favour, it is not open to the Court to go behind the pleadings of the parties and to hold contrary to the pleadings that the document was a complete sale (*Tek Chand and Walker, JJ.*) RAM ASRA *v.* ALLAH JAWAYA. **I R. 1931 Lah. 822= 133 I C 646 32 P L R. 278=A.I.R. 1931 Lah. 595.**

———*Powers of Court—Suit for money deposited—No case of either party that money being deposit, demand was made at a date which time barred suit—Court cannot decide the point not raised on statement extracted from plaintiff's witness in cross-examination—Practice—Duty of Court.*

Where it is not a part of either the plaintiff's or the defendant's case that the money claimed by the plaintiff being a deposit there was a demand at a date which time barred the suit, the Judge cannot, merely on a statement extracted from the plaintiff's witness in cross-examination, decide the case on a point which was neither raised in the pleadings nor the subject-matter of an issue. This, in India, is a very dangerous proceeding. The witness might be bribed to make a statement in cross examination contrary to this party's interest. (*Young and Rachhpal Singh, JJ.*) MT. LUGDI *v* HAR PRASAD **3 A.W R. 176=154 I.C. 415=7 R.A. 754=A I.R 1934 All 11.**

———*Power of Court—Suit on contract—Plea of wager—Need for being specifically raised.*

Where neither party to the suit has put forward the case of wagering contract which is a mixed question of fact and law, it is not proper for the Court to base its judgment on any such hypothesis. (*Sulaiman and Young, JJ.*) MUKAT LAL *v.* GULAB SINGH PRAN

PLEADINGS.

MAL. I R. 1931 All. 518 (2) = 132 I.C. 422 (2) = 1931 A.L.J. 363 = A.I.R. 1931 All. 229.

———*Relief.*

The determination of a cause must be founded upon a case either to be found in the pleadings or involved in or consistent with the case made thereby. (*Baguley and Ba U, JJ.*) BANK OF CHETTINAD, LTD. *v.* C. T. A. C. T. FIRM. 150 I.C. 692 = 7 R.R. 8 = A.I.R. 1933 Rang. 392.

———*Relief—Duty of Courts to mould according to the facts proved.*

The pleadings of the parties should not be too strictly construed. It is therefore the duty of the Courts to mould the relief to be granted to the plaintiff according to the facts proved which however should not be inconsistent with his pleadings. (*Broadway, Harrison and Jai Lal, JJ.*) MEHAR CHAND *v.* MIIKHI RAM 13 Lah. 618 = I R. 1932 Lah. 396 = 138 I.C. 47 = 33 P.L R. 649 = A I R. 1932 Lah. 401 (F.B.).

———*Relief—Setting out facts which entitle a party to relief.*

It is the duty of a suitor to set forth in his plaint the facts which he considers entitle him to relief. In the majority of cases he need do no more than suggest the relief which he considers himself entitled in law. It is for the Court to decide as a matter of law, when it has decided the question of fact, what relief the plaintiff is entitled to. (*Courtney-Terrell, C.J. and Saunders, J.*) NAGE MANJHI *v* KINI MAHATANI. 150 I.C. 242 = 6 R.P. 729 = A.I.R. 1933 Pat. 695.

———*Relief at variance with.*

A party must be held strictly to his pleadings and cannot be allowed reliefs at variance with their pleadings. (*Drake Brockman, S.M.*) RAM PARTAP LAL *v.* BINDRABAN RAM. 14 L R. 601 (Rev).

———Res judicata—Plea of. *See also* C. P.CODE, S. 11.

———Res judicata—*Plea of.*

A plea of *res judicata* cannot be seriously considered where the written statement merely asserts that the suit is barred by *res judicata* without asserting what the issues involved in the previous suit were, what the Court decided and how that decision bars the determination of any of the questions in controversy in the subsequent suit and where further no copy of the pleadings or judgment of the previous suit has been produced. (*Niamatullah, J.*) KAILASH NATH *v.* CHANDRA BHAN. 156 I.C. 970 = 8 R A. 65 (2) = 1935 A.W.R. 500.

———*Trade usage contrary to Contract Act—Need for setting out incidents and details of usage.*

If a party relies on a usage at variance with the Contract Act, its incidents and details ought to be indicated with clearness and precision. (*Sen and Niamatullah, JJ.*) SITAL PRASAD *v.* RANJIT SINGH. 136 I C. 158 = I R 1932 All. 158 = 1931 A.L.J. 390 = A.I.R 1931 All 583.

———*Traversal of statement.*

It is enough to say in the written statement that a fact is not admitted in order to put the plaintiff to proof of it. (*Curgenven, J.*) VENKATASWAMI *v.* RAMAMURTHY. 151 I.C. 932 = 7 R M 151 (2) = 1934 M.W. N. 252 = 40 L.W. 366 = A.I.R. 1934 Mad. 579 = 67 M. L J. 327

———*Undue influence—Absence of plea—Relief—Power of Court.*

If there are facts on the record to justify the inference of undue influence, the Court has power to administer relief notwithstanding inartistic pleadings. All that the Court has to see is that the adversary of the party pleading undue influence is not taken by surprise.

POLICE ACT (1861), S. 23.

(*Niyogi, A J.C.*) SHEOCHARAN *v.* CHANNULAL. 27 N.L.R. 19 = I.R. 1931 Nag. 100 = 132 I.C. 452 = A.I. R. 1931 Nag. 63.

———*Usage—Precision necessary.*

A party who relies upon an usage must set it out with particularity in his pleading. (*Page, C.J. and Das, J.*) K. S. R. M. CHETTIAR FIRM *v.* A. T. K. P. L. S. P. CHETTIAR FIRM. 12 Rang. 7 = 151 I.C. 804 = 7 R. R. 118 (2) = A.I.R. 1934 Rang. 61.

PLEDGE.

See (1) CONTRACT ACT (1872), SS. 172-178.
(2) MORTGAGE—MOVABLES.

PLOT PROPRIETOR.

See AGRA TENANCY ACT (1926), S. 186.

POISONING.

See PENAL CODE, SS. 300 AND 302.

POLICE ACT (V OF 1861)—*Police Regulations, R.* 1067—*Legality.*

Rule 1067 of the Police Regulations is *ultra vires* and illegal. (*Cuming, J.*) RAM GOPAL ADHICARY *v.* EMPEROR. 58 Cal. 1132 = I.R. 1931 Cal. 891 = 33 Cr.L.J. 15 = 1932 Cr.C. 153 = 134 I.C. 891 = 35 C.W. N. 547 = A.I.R. 1932 Cal. 285.

———S. 7—*Confinement and suspension—Validity—What constitutes confinement.*

S. 7 provides confinement for a term not exceeding 15 days as an alternative punishment for suspension. The Section does not contemplate confinement in addition to suspension and certainly not indefinite confinement. To order a police officer to live in the police lines until further orders and not to leave the lines without permission is to confine him in those lines. Such an order is clearly illegal. (*Cuming, J.*) RAM GOPAL ADHICARY *v.* EMPEROR. 58 Cal. 1132 = I.R. 1931 Cal. 891 = 33 Cr L.J. 15 = 1932 Cr.C. 153 = 134 I C. 891 = 35 C.W. N. 547 = A.I.R. 1932 Cal. 285.

———S 7—*Order confining police officer to police lines—Reasonableness.*

Where a police officer against whom an order of suspension had already been made was ordered to live in the police lines until further orders and by reason of the later order the police officer was prejudiced in conducting his defence.

Held, that assuming the order was legal, it was an unreasonable one. The police officer should, on the other hand be given every opportunity to prepare his defence and not be hampered. (*Cuming, J.*) RAM GOPAL ADHICARY *v.* EMPEROR. 58 Cal. 1132 = I.R. 1931 Cal. 891 = 134 I.C. 891 = 35 C.W N. 547 = 33 Cr. L J. 15 = 1932 Cr.C. 153 = A.I.R 1932 Cal. 285.

———S. 16—Tax imposed under—Member of joint family—Warrant for realisation—Attachment of family property—Legality. *See* CR. P. CODE, S. 386. 16 Pat L T. 295 = A.I.R. 1935 Pat. 214 (S.B.).

———S. 23—*'Orders lawfully issued'—Oral order made under S.* 165, *Cr. P. Code.*

An oral order of a City Inspector under S. 165, Cr. P. Code, requiring a subordinate officer to make a search of a house is not an order lawfully issued. (*Pollock, A. J C.*) HIRALAL *v.* RAMDULARE. 160 I C. 306 = 31 N.L.R. (Supp.) 66 = 8 R.N. 183 = A.I.R. 1935 Nag. 237.

———S. 23—*Scope—Invalid warrant.*

S. 23 does not cover the execution of invalid warrants or extend a constable's powers of arrest. (*Scroope and Dhavle, JJ.*) KARTIK CHANDRA MAITY *v.* EMPEROR. I.R. 1932 Pat. 190 = 138 I.C. 844 = 33 Cr.L.J. 706 = 13 Pat.L.T. 135 = 1932 Cr.C. 347 = A.I.R. 1932 Pat. 171.

POLICE ACT (1861), S. 29.

———**S. 29**—*Illegal order under S. 7—Disobedience—No offence.*

Where the order under S. 7 of the Act is illegal, no conviction under S. 29 can be sustained for disobeying such an order. (*Cuming, J.*) RAM GOPAL ADHICARY *v.* EMPEROR. **58 Cal 1132 = I R. 1931 Cal. 891 = 33 Cr.L.J. 15 = 134 I.C. 891 = 35 C.W.N. 547 = 1932 Cr. C. 153 = A.I.R. 1932 Cal. 285.**

———**S. 30**—*Procession—Meaning explained.*

Procession is the action of a body of persons going or marching along in orderly succession in a formal or ceremonial way, especially as a religious ceremony or on a festive occasion. Where an image was merely carried down the ghat by four or five carriers and immersed in the river and there was nothing to be described as a body of persons going or marching along in orderly succession in a formal or ceremonial way, it is not correct to say that it was carried in a procession. (*Cuming, J.*) HARI KISHORE SAHA *v.* EMPEROR. **I.R. 1931 Cal. 367 = 130 I C. 239 = 32 Cr.L.J. 482 = 1931 Cr.C. 160 = A.I.R. 1931 Cal. 128.**

———**S. 30**—*Procession—Power of Police to forbid—Taking out procession after refusal of license—If an offence.*

It is the right of a citizen to use the public thoroughfares, provided that he commits no offence in doing so and the taking out of a procession is not in itself an offence, nor does it require a special license, except as provided by S. 30 of the Police Act. That is a section which empowers the Superintendent of Police to control processions, and the manner in which they are to be controlled, if it is necessary to control them, is set forth in sub-S. (2). It is impossible to read into the section any authority for absolutely forbidding the taking out of a procession. Accordingly it is no offence to take out a procession merely because an application for license was rejected. (*Kendall, Ag C.J. and Harries, J.*) QASIM RAZA *v.* EMPEROR. **57 All. 790 = 7 R.A. 954 = 36 Cr.L J. 782 = 155 I.C. 605 = 1935 A.L J. 386 = 1935 A.W.R. 314 = 1935 Cr.C. 665 = A.I R. 1935 All. 657.**

———**S 30**—*Scope—General notice—Legality.*

S. 30 does not empower the police officer to issue a general notice that any one taking out a procession passing a mosque must take out a license. It does not contemplate his taking any action until he is satisfied that it is intended to take out a procession which is the opinion of the Magistrate, if uncontrolled would be likely to cause a breach of the peace. (*Cuming, J.*) DEBENDRA NATH MONDAL *v.* EMPEROR. **58 Cal 879 = I.R. 1931 Cal. 656 = 133 I.C. 192 = 32 Cr.L J. 1005 = 35 C.W.N. 187 = 1932 Cr.C. 212 = A.I.R. 1932 Cal. 286.**

———**S 30**—*'Thoroughfare'—Parshottam Das Park.*

Held, that as the Parshottam Das Park was not intended to be exclusively used as a thoroughfare, or as a way by which people passed and as that was not its chief or primary object, the whole of the park could not be said to be a thoroughfare within the meaning of S. 30. (*Kendall, J.*) EMPEROR *v.* R. N. BASU. **55 All. 862 = 6 I R. (All) 161 = 145 I C. 738 = 34 Cr.L.J 1062 = 14 L.R. 455 (Cr.) = 1933 A.L.J. 1197 = 1933 Cr.C. 986 = A.I.R. 1933 All. 614.**

———**S. 30 (2)**—*Notice requiring conveners to apply for licence—Validity.*

Quaere.—Whether a notice under S. 30, sub-S. (2) requiring conveners, collectors, directors, promoters of assemblies or processions of five or more men in the jurisdiction of a particular police station to apply to Assistant Superintendent of Police for a licence for such assemblies or processions is valid? (*Panckridge and Patterson, JJ.*) BOYMKESH CHATTERJI *v.* EMPEROR. **I.R. 1933 Cal. 519 = 144 I.C. 185 = 34 Cr.L J. 688 = 1933 Cr.C. 489 = A.I.R. 1933 Cal 353.**

———**S. 30 (2)**—*Order under—Disobedience to—Penal Code, Ss. 141 and 143.*

Disobedience to an order under S. 30 (2) of the Police Act constitutes resistance 'to the execution of any law' within the meaning of S. 141, Penal Code. (*Beasley, C J. and Cornish, J*) PUBLIC PROSECUTOR *v.* SATYANARAVANA. **54 Mad. 1025 = I R. 1931 Mad. 604 = 131 I C. 844 = 32 Cr.L J 806 = 1931 M. W.N. 489 = 33 L W. 671 = 1931 Cr C. 548 = A.I.R. 1931 Mad. 484 = 61 M.L.J. 842**

———**S. 30 (2)**—*Ordinary members of procession—Conviction - Legality.*

Persons can only be properly convicted under S. 30 (2) if it is established that they were directors or promoters of a procession and were as such under an obligation to apply for a licence for it. If they were merely ordinary members of the procession, S. 30, sub-S. (2) does not apply to them. The mere fact that they were at the head of the procession and wearing garlands is not sufficient. (*Panckridge and Patterson JJ.*) BOYMKESH CHATTERJI *v.* EMPEROR. **I R 1933 Cal. 519 = 144 I.C 185 = 34 Cr.L.J. 688 = 1933 Cr.C. 489 = A.I. R. 1933 Cal. 353.**

———**S. 31**—*Powers of police under—Right to demand entrance into private houses.*

The police have no right, in the discharge of their duties under S. 31 to enter upon private property in order to facilitate the discharge of their duties. A police officer has consequently no authority to demand entrance into the house of a private person unconnected with a procession on the public road; and the refusal to accede to such a request, though the request be reasonable, is not an offence for which the person refusing can be convicted under S. 32. The criterion for a conviction under S. 32 is not whether the order alleged to have been disobeyed is reasonable or not. (*Weston, J.*) JAWAND LAL DUIT *v.* EMPEROR. **1935 A.M.L.J. 1.**

———**S. 31**—*Procession—Order for dispersal—Legality.*

Under S. 31 the police have power to pass any order reasonably necessary for "keeping order" or "preventing obstruction." But the question whether a particular order could be held to be legally justifiable under the section must depend on the facts of each case. Where the processionists were not disorderly and all that was alleged was that there was some obstruction to traffic, which the police could have easily prevented by ordering the processionists to make room for the traffic,

Held, that under the circumstances, the Sub-Inspector of Police exceeded his powers in giving an order for the dispersal of the procession. 50 I.C. 489, Ref (*Bhide, J.*) BALI RAM *v.* EMPEROR. **I.R. 1931 Lah. 297 = 130 I C. 425 = 1931 Cr.C. 97 = 32 Cr.L.J. 532 = 32 P. L R. 52 = A.I.R. 1931 Lah. 33.**

———**S. 32** — Conviction under — Sustainability—Reasonableness of order disobeyed—If relevant—Refusal to allow police entry into private house—If offence. *See* POLICE ACT, S. 31. **1935 A.M L J. 1.**

———**S. 32**—*Idol taken by four or five men for being immersed in river—Licence if necessary.*

Where the Superintendent of Police under S. 30 had prohibited processions without a license being taken out from the police, and the accused took out an idol carried by four or five men and immersed it in the river and there was nothing to indicate that this was done in a formal and ceremonious way.

POLICE ACT (1861), S. 32.

Held, that the finding of the Magistrate that the image was carried in a procession and that a license was required for the same was unsustainable. (*Cuming, J.*) HARI KISHORE SAHA *v.* EMPEROR **I.R 1931 Cal. 307 = 130 I C 239 = 32 Cr.L.J. 482 = 1931 Cr.C. 160 = A.I.R. 1931 Cal. 128.**

———**S. 32**—Ultra vires—*Order—Disobedience thereof—No offence.*

Where the order of the police under S. 30 is illegal the accused cannot be convicted under S. 32 for disobedience of the order. (*Cuming, J.*) DEBENDRANATH MONDAL *v.* EMPEROR **58 Cal 879 = I.R. 1931 Cal. 656 = 133 I.C 192 = 1932 Cr C. 212 = 32 Cr.L.J. 1005 = 35 C.W.N. 187 = A I.R. 1932 Cal. 286.**

———**S. 42**—"*Action*", *meaning of—Necessity of notice for criminal prosecution*

"Action" means a civil action and notice of a criminal prosecution is not required by S. 42. (*Pollock, A J. C.*) EMPEROR *v.* ALFRED EDMOND. **30 N.L R. 348 = 151 I C. 759 = 7 R N. 66 = 35 Cr.L.J. 1416 = 1934 Cr.C. 900 = A.I.R. 1934 Nag. 206.**

———**S. 42**—*Scope of.*

S. 42 applies to actions brought for anything done or intended to be done under the provisions of the Police Act or under the general police powers given by the Act. It does not refer to action brought for anything done under the Cr. P. Code. (*Pollock, A.J.C.*) HIRALAL *v.* RAMDULARE. **31 N.L R. (Supp) 66 = 160 I.C 306 = 8 R.N. 183 = A.I R. 1935 Nag 237.**

———**(III OF 1888), Ss 2 (3) and (4)**—*Railway Police—Powers of.*

The Railway Police have all the powers of the General Police within their Special District and can set the law in motion. (*Patkar and Barlee, JJ*) EMPEROR *v.* ALLI HASSAN. **34 Bom L.R 1662 = 1933 Cr.C. 180 = 141 I.C. 790 = 34 Cr.L J. 225 = I R. 1933 Bom. 151 = A.I R. 1933 Bom. 63.**

———**(III OF 1888), S. 2 (4)** — Railway Police—Powers of. *See* Bombay Public Conveyances Act (1920). **34 Bom.L R 275 = A.I R. 1932 Bom 256.**

POLICE DIARY. *See* CR. P. CODE, S. 162.

POLICE INVESTIGATION. *See* CR. P. CODE, Ss. 155, 162, 195, etc.

POLICE OFFICER. *See* CR. P. CODE, S. 162.

POLICE RECORD. *See* EVIDENCE ACT, S. 35.

POLICY OF INSURANCE. *See* INSURANCE.

PORAMBOKE—*Land registered as cattle-stand—Effect of—Government's rights of transfer.*

The registration of land as cattle-stand in the settlement registers does not imply any grant nor does it imply that the Government can only transfer it without prejudicing the rights of the villagers by diminishing the cattle stand beyond what is required by the villagers. The needs of the village should be left to the judgment of the revenue officials and their judgment cannot be questioned by the Civil Courts. S A 692 of 1926. Foll. (*Pakenham Walsh, J*) RUDRAPPA MAYAK *v.* DASAN **I.R 1933 Mad 363 = 144 I C. 20 = 1933 M.W.N 952 = 38 L W. 83 = A I.R. 1933 Mad. 610.**

PORTS ACT (XV OF 1908) S 36—*Port officer dismissing clerk—If acts on behalf of Secretary of State.*

The Port officer, in his capacity as officer in charge of the Port office and the clerks employed in the Port office, is not a man appointed under a certain Act to carry out the provisions of that Act, but is the agent or servant of the Local Government appointed by the Local Government to carry out the duties prescribed in S. 36 of the Indian Ports Act. All his actions under S. 36 must be attributed to him as a Government servant and not as a private individual, and his actions as a

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Government servant must be regarded as being actions performed on behalf of the Secretary of State Where, therefore, the Port officer employs a clerk and subsequently dismisses him, he must be regarded as having acted on behalf of the Secretary of State. (*Page, C. J. and Baguley, J.*) SECRETARY OF STATE *v.* D'ATTAIDES **12 Rang 556 = 154 I.C. 212 = 7 R.R. 285 = A.I. R 1934 Rang 381.**

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See (1) ADVERSE POSSESSION.
(2) CONTRACT ACT, S. 178.
(3) CO SHARER.
(4) CR. P CODE, S. 145.
(5) EJECTMENT.
(6) LANDLORD AND TENANT.
(7) LIMITATION ACT, ARTS. 142 AND 144.

———Constructive Possession—Applicability to cultivable land. *See* UNDER ALLUVION AND DILUVION. **A I R. 1933 Pat 468**

———*Joint possessory title—Rights* inter se.

Where it is not possible to come to a definite conclusion as to the original ownership of the property, which is "shrouded in long past" and both the parties had a joint possessory title in it, and had been using it for a very long time, neither of them has the right to interfere with the other's lawful user of it. (*Tek Chand and Currie, JJ.*) ILAM DIN *v* DASONDHI. **159 I C. 861 = 8 R.L. 432 = A I.R. 1935 Lah. 857.**

———Meaning of. *See* PENAL CODE, SS. 373 AND 441.

———*Melwaram right — Melwaram holder—Possessory right—Declaration of right.*

Per *Wallace, J*—The melwaram right is a possessory and not merely declaratory right. The holder in such a case can have the possessory right declared against one who has been wrongfully in possession of it. (*Wallace, J.*) RAMAMURTHI *v.* SRI RAJA MIRJA SRI PUSHAVATI ALAKA NARAYANA. **56 Mad 366 = I.R. 1933 Mad. 106 = 141 I C. 307 = 36 L.W. 847 = A.I.R. 1933 Mad. 279 (2) = 64 M.L J. 361.**

———*Nature of right—Remedy by way of injunction.*

Possession in a law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title. A claim for permanent injunction can be based on the plaintiff's possession (*Mahadevayya, J.*) DODDA VENKATAPPA *v.* NAGARI. **38 Mys H.C.R. 296 = 11 Mys L J. 333**

———*Possession of land—Incidental rights*

The possession of land carries with it possession of everything which is attached to or under that land and in the absence of a better title, the right to possess it also except in the case of articles found in a public place. 31 Mad. 397, Foll. (*Suhrawardy and Graham JJ*) RAM RANJAN MALLIK *v.* SECRETARY OF STATE **59 Cal. 21 = I.R 1931 Cal. 622 = 133 I.C. 564 = A.I.R 1931 Cal. 430.**

———*Possession follows title—Evidence.*

Per *S K. Ghose, J.*—It is doubtful if any land is altogether incapable of enjoyment. In any case it is not necessary before plaintiff can raise in his favour the presumption that possession follows title, that he must show that the land was incapable of enjoyment. He can get the benefit of that presumption if he succeeds in showing even by the evidence on the side of defence, that as a matter of fact no act of enjoyment has been exercised. (*Cuming and S. K Ghose, JJ*) JIRA BEWA *v.* UMA CHARAN SAHA. **I R. 1931 Cal. 815 = 134 I.C. 319 = 53 C.L.J. 411 = A.I.R. 1931 Cal. 501.**

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———*Possessory title.*

A person in possession cannot be dispossessed by any other person, unless that other person establishes his title to the property. (*Allsop, J.*) SARFARAZ ALI *v.* ABDULLA. **6 I.R. (Oudh) 202=146 I.C. 1022=17 R.D 939=10 O.W.N. 1017=A.I.R. 1933 Oudh 473.**

———*Possessory title—Declaration of title on basis of—Defendant not having better title.*

Where in a suit for declaration of title to waste land and injunction, the plaintiffs were found to have been in exclusive possession of the land, they are entitled to a declaration of their right to possession on the basis of their possessory title as against the defendants with no better title, although in the plaint they alleged to have been in possession from time immemorial and claimed to be the absolute owners of the land but failed to prove the duration of their possession. (*Beasley, C. J. and Bardswell, J.*) RAMALINGA PANDARAM *v.* ANTHONI MUTHU VATHIAR. **6 R.M. 508=148 I.C. 631=1934 M W N. 656=39 L.W. 436=A.I R. 1934 Mad 274=66 M.L J. 358.**

———*Possessory title—Ejectment—Trespasser.*

Where certain persons who were in peaceable possession under colour of title were ousted by a trespasser and the former sued for ejectment of the latter.

Held, that the plaintiff's possessory title was sufficient to entitle them to a decree. (*Page, J.*) SATISH CHANDRA DE *v* MADAN MOHAN JATI. **58 Cal. 29=I.R. 1931 Cal. 618=132 I.C. 906=A.I.R. 1931 Cal. 483 (2).**

———*Possessory title—Judgment-debtor in possession—Dispossession by stranger pending execution—Auction-purchaser—Right to possession.*

Where some time during the pendency of the execution proceedings, while the decree holder was endeavouring to sell the shops, a stranger wrongfully dispossesses the judgment-debtor who possibly is not very eager to maintain possession over the property which was going to be sold, the judgment-debtor being wrongfully dispossessed by the stranger, the title in the absence of proof must be presumed to be that of the judgment-debtor and the auction-purchaser who stands in the shoes of the judgment debtor can recover possession from the stranger. (*Dalip Singh, J.*) BHAGAT RAM *v.* NANAK SINGH. **151 I.C. 512=7 R.L. 578—A.I.R. 1934 Lah. 202.**

———*Possessory title—Prior possession by plaintiff for a short time and not peaceful—Sufficiency for decree.*

So far as the Calcutta High Court is concerned (the Bombay, Allahabad, Madras and Patna High Courts *contra*), mere previous possession will not entitle a plaintiff to a decree for recovery of possession except in a suit under S. 9 of the Specific Relief Act If it had been of a peaceful nature and for a long period of time, it may under certain circumstances give rise to an inference of title in the plaintiff as against a trespasser and entitle him to obtain a decree for recovery of possession against such a trespasser who has no right to possession whatsoever. Where, on the other hand, the plaintiff's possession was neither peaceful nor for long, his suit must fail. (*Mullick and Jack, JJ.*) KIRON CHANDRA ROY *v.* PRASANNA KUMAR CHAKRAVORTY. **61 Cal. 419=150 I.C 723=7 R.C. 41=38 C.W.N. 435=A.I. R. 1934 Cal. 561.**

———*Possessory title—Right to set up as defence.*

Possession is a good title against all except the rightful owner. Where a person purchased certain property in execution of a simple money decree against a Hindu father and it was not provided that the debt for which the property was sold was tainted with illegality or immorality.

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Held, that he could defended his possession by contesting a suit on a mortgage executed by the father on the ground that it was executed for an immoral or illegal purpose. (*Sen and Niamatullah, JJ.*) MADAN LAL *v.* CHIDDU. **53 All. 221=I.R 1931 All. 125=128 I.C. 829=1930 A.L.J. 1528=A.I.R. 1930 All 852.**

———*Possessory title—Trespasser — Possessory right as defence to ejectment.*

Even a trespasser can exercise acts of ownership except as against the legal owner. Where a person who had a mere right of enjoyment transferred his property and the transferee was sought to be ejected by a third person.

Held, that the transferee could depend on his transferor's possessory right and resist the ejectment. (*Pullan and Niamatullah, JJ.*) RAM NATH *v.* NANAK CHAND. **1932 A. L J. 821=143 I.C. 61=I.R. 1933 All. 166=A.I.R. 1932 All. 686.**

———*Suit for confirmation of—No disturbance alleged—Maintainability.*

Where the plaintiff alleged that a certain plot of land was erroneously recorded in the record of rights as belonging to two tenzis jointly, that he in fact was the real owner thereof and that he had been in possession all along but he did not specify any definite act of disturbance from the defendant.

Held, that the plaintiff had no cause of action. (*Pearson and Mullick, JJ.*) NAGENDRA KISHORE ROY CHOWDHURY *v.* BROJENDRA KISHORE ROY. **I. R 1932 Cal 650—139 I C 759=56 C.L.J. 316=36 C.W N 783=A.I R. 1932 Cal. 842**

———*Suit for—Encroachment by defendant—Principles for granting mandatory injunction—Applicability of.*

Where the defendants encroached on Government land and erected buildings and the Secretary of State sued for possession of the land.

Held, that the principles for giving mandatory injunction did not apply and that plaintiff was entitled to stand upon his strict rights. (*Addison and Din Mohammad, JJ.*) SECRETARY OF STATE *v.* LABHA RAM. **16 Lah. 1060=38 P.L.R. 113=156 I.C. 1028=8 R. L 68=A.I.R. 1935 Lah. 389.**

———Suit for, on basis of title—Decree on basis of possessory title. *See* SPECIFIC RELIEF ACT, S. 9. **154 I.C. 570=1935 O.W.N. 230=A.I.R. 1935 Oudh 268.**

———*Suit for—Plaintiff must succeed on strength of his own title.*

The plaintiff in a suit for possession must succeed on the strength of his own title and not on the weakness of the defendant's case. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN-I-ISLAMIA, PUNJAB. **12 Lah. 590=32 P L R. 867=135 I.C. 56=I.R. 1932 Lah. 40=A.I.R. 1931 Lah. 379.**

———*Suit for, by subsequent purchaser with notice of prior contract of sale—Prior vendee, if can set up her possession.*

Where the subsequent purchaser had clear notice of prior vendee's rights over the same property, the prior vendee is entitled to set up her possession under the contract of sale from the vendor as a valid defence to the subsequent purchaser's suit for possession. (*Dunkley, J.*) MAUNG YAN *v.* MAN MAI WI. **154 I.C. 80=7 R R. 258=A.I R 1934 Rang. 310 (2).**

———*Suit relating to—Evidentiary value of revenue papers.*

Entries in revenue documents are not conclusive, but their importance in a case for possession cannot be denied. (*Otter and Brown, JJ.*) MAUNG SIN *v.*

POSSESSION.

MAUNG SO MIN. **8 Rang. 556=I.R. 1931 Rang. 79 =129 I.C. 511=A.I.R. 1931 Rang. 40.**

———*Tortious possession—Presumption against.*

The law will not construe a possession as tortious except from necessity. (*Coldstream and Johnstone, JJ.*) HARDIT SINGH *v* KHUSHI RAM. **I.R. 1931 Lah. 846=133 I.C. 878=32 P.L.R. 700=A.I.R. 1932 Lah. 68.**

POSSESSORY TITLE.

See (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ARTS. 142 AND 144.
(3) POSSESSION—POSSESSORY TITLE.

POST DIEM INTEREST. *See* INTEREST.

POSTHUMOUS SON. *See* HINDU LAW—PARTITION—SUBSEQUENTLY BORN SON.

POST OFFICE ACT (VI OF 1898), S. 6—*'Default' —Meaning.*

The word 'default' in S. 6 means 'failure in duty, care etc., as the cause of some outward event.' (*Boys and Niamatullah, JJ.*) RIKHAI LAL BINDESHRI PRASAD *v.* BANARSI SINGH. **1931 A.L.J. 961=I.R. 1932 All. 217=136 I.C. 569=A.I.R. 1932 All. 139.**

———**S. 6**—*Default—Finding of fact—Interference.*

Just as a finding of negligence is a finding of fact, so ordinarily speaking is a finding as to whether a default was or was not the cause of the loss. This, however, does not mean that a finding as to default can never be attacked as a finding on a point of law. But if the question has been approached from the proper legal standpoint, it is a finding of fact. (*Boys and Niamatullah, JJ.*) RIKHAI LAL BINDESHRI PRASAD *v.* BANARSI SINGH. **1931 A.L.J. 961=I.R. 1932 All. 217=136 I.C. 569=A.I.R. 1932 All. 139.**

———**Ss. 6 and 33**—*Liability of Secretary of State—Loss of contents of registered envelope—Suit for compensation by addressee—Maintainability.*

Where the contents of a registered envelope were found missing at the place of destination and in a suit to recover compensation filed by the addressee it was found that the Post Office had been criminally negligent.

Held that the suit by the addressee was not maintainable in the face of the provisions of Ss. 6 and 33 of the Post Office Act and that the proper person to sue was the sender.

Held further that the addressee could not recover compensation under the orainary law apart from the Post Office Act. 28 Mad. 213, Considered. (*Oakden, S. M. and Keane, J.M.*) SECRETARY OF STATE FOR INDIA *v.* GULAB SAHU SHEO PRATAP. **15 R.D. 172 =12 L.R. 49 (Rev.).**

———**S. 33**—Post Office Manual, Vol. V, R. 29—Loss of contents of registered envelope—Suit by addressee to recover compensation — Maintainability. *See* POST OFFICE ACT, SS. 6 AND 33. **15 R.D. 172=12 L.R. 49 (Rev.).**

POWER

See also (1) DEED CONSTRUCTION.
(2) LEGAL PRACTITIONER.

POWERS—*English Law—Applicability to India.*

The English Law as to powers should not be applied to India. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

POWER OF ATTORNEY.

See also (1) C. P. CODE, O. 3, RR. 2 AND 4 DEED—CONSTRUCTION—POWER OF ATTORNEY.
(2) PRINCIPAL AND AGENT—AUTHORITY OF AGENT.

———*Construction—Agent authorised to file suits, written statements and applications and affidavits in Civil, Revenue and Criminal Courts and other Government departments—Agent's power to sign and verify income-tax return.*

A *Mukhtarnama* executed by a principal contained *inter alia* a clause which ran as follows:—"Therefore I appoint . . . . as my Mukhtar-i-ams and any suits filed by them in Civil Courts, Revenue Courts, Collectorates Criminal Courts, Appellate Courts, in the Settlement Department, Cantonment, Police, Municipalities in British India, Chief Court, High Court, Commissioner's Court, Board of Revenue and other Government Departments, or any applications filed by them on my behalf . . . . or plaints, memoranda of appeal, or written statements, or affidavits filed in support of any application. . . All such proceedings shall be accepted by me as having been done by me personally." A Mukhtar of the principal filed an Income-tax return on the former's behalf, the return having been signed and verified by the Mukhtar himself. The Income-tax Officer called upon the assessee (principal) to produce the accounts which were accordingly produced by the agent who filed the return.

Held, (1) that though the *Mukhtarnama* did not expressly mention the Income-tax Department, yet the words "other Government departments," were wide enough to include that department; but the power of attorney did not, however, give the agent any authority to sign or verify the return of income for the purposes of assessment of income-tax and that the said return could not be regarded as an application or written statement; (2) that the powers conferred upon the agent having been definitely set forth in the document, there was no justification for going outside its terms; (3) that the act of the principal in causing the accounts to be produced in accordance with the notice of the Income-tax Officer, did not constituted a ratification of the act of the agent in respect of the return; and (4) that the Income-tax authorities not having in any way changed their position for the worse on account of any implied representation of the assessee as to the agent's authority to sign and verify the return, no question of estoppel arose against the assessee. (*Srivastava and Zia-ul-Hasan, JJ.*) *In the matter of the* COMMISSIONER OF INCOME TAX, CENTRAL PROVINCES AND UNITED PROVINCES. **155 I.C. 180=7 R.O. 564=1935 O.W. N. 490=A.I.R. 1935 Oudh 305.**

———*Construction—Authority conferred to represent in Courts—If includes power to incur debts.*

An agent of a guardian of a Hindu minor holding a power-of-attorney, authorising him to represent the members of the minor's family in Civil, Criminal and Revenue Courts and in registration and mutation proceedings, has no power to borrow money on behalf of the minor, even though he is managing the estate of the minor. In any case, being merely the agent of the guardian, he cannot borrow so as to bind the minor, because even the guardian has no power to borrow except for legal necessity. (*Pollock, A.J.C.*) SHRI RAM *v.* MOHANLAL. **31 N.L.R. 243=155 I.C. 607 =7 R.N. 198=A.I.R. 1935 Nag. 127.**

———*Construction—Power to appoint Pleader.*

From the fact that a person holding power of-attorney is directed to appear in person and to appoint a substitute for himself it follows that he is given power to appoint a Pleader. (*Sulaiman and King, JJ.*) MAHOMED SULAIMAN *v.* MAZHAR. **I.R. 1931 All. 718= 133 I.C. 606=1931 A.L.J. 904=A.I.R. 1931 All. 320 (1).**

———*Construction — Power to purchase goods—If includes power to borrow.*

A power-of-attorney authorising the agent to purchase goods cannot be construed as conferring a power to

POWER OF ATTORNEY.

borrow for that purpose. An authority to purchase does not necessarily imply an authority to borrow. There is a strong improbability that a principal intends to give his agent to power to borrow money if he does expressly state it; and when there is evidence to show that the principal has made other special arrangements for the supply of funds that the agent might require, the authority to borrow is clearly negatived and the borrowing by the agent is not authorised by the power of attorney. (*Varadacharıar, J.*) VIJIATHAMMAL *v.* KADIR SULTAN. **158 I.C. 242=8 R.M 247=42 L. W. 185=1935 M.W.N. 511=A.I.R. 1935 Mad. 599 =69 M.L.J. 179.**

———*Construction—Power to take all proceedings connected with litigation—Whether includes power to prefer appeal.*

Where a power-of-attorney began by stating that the executant could not himself prosecute his suit and therefore empowered the agent to attest and present the pleas, etc., and the final clause said: "in short the agent is authorised to take all proceedings connected with the litigation."

Held, that the agent had been given full authority to lodge an appeal, if necessary, because the appeal was merely the continuation of the suit. (*Shadi Lal, C J. and Coldstream, J.*) BISHEN SINGH *v.* KARAM ILAHI. **I.R. 1931 Lah. 719=132 I.C. 895=32 P.L. R. 7.**

———*Power in favour of a counsel—Death of person giving—Effect.*

A power-of-attorney in favour of Counsel ceases to be in force on the death of the party. Where the Counsel desires to act for the widow of the deceased he should get a fresh power. (*Bhide and Tapp, JJ.*) PARJA *v.* DUMANUN. **I.R. 1931 Lah. 845=133 I.C. 877=32 P.L.R. 389.**

———Right of agent of guardian to act as guardian on behalf of prinicipal—Right to institute suit. *See* GUARDIAN AND WARD—POWERS OF GUARDIAN. **A.I.R. 1930 All. 875.**

POWERS OF ATTORNEY ACT (VII OF 1882), S. 3—*Scope.*

S. 3 does no more than indemnify the holder of a power-of-attorney for actions done by him in good faith if the determination of his power by the death of the person granting it was unknown to him at the time. (*Grille, J. C. and Subhedar, A. J. C.*) MT. RADHABAI *v.* MANGIA **31 N.L.R. 57=153 I.C. 251=7 R.N. 129=A.I.R. 1934 Nag. 274.**

———**S. 5**—*Scope.*

The words of the section are prefectly general and there is nothing which limits the generality of those words and so, notwithstanding S. 183 of the Contract Act, minor married women are empowered to appoint attorneys on their behalf to execute such documents and do such acts as they are themselves competent to execute or do. So the husband of a minor married woman acting under a power-of-attorey from her can apply under S. 73 (1) of the Registration Act. (*Krishnan Pandalai, J.*) CHINNAMMI *v.* VENKAYAMMA. **I.R. 1933 Mad. 232 (2)=1933 M.W.N. 636=142 I.C. 646=37 L.W. 471=A.I.R. 1933 Mad. 407=64 M.L.J. 449.**

PRACTICE. *See also* CRIMINAL TRIAL.

Abandonment of plea.
Abstract questions.
Adjournment.
Affidavit.
Amendment.
Appeal.
Appearance of party.

PRACTICE—Abandonment of plea.

Appellate Court.
Attorney.
Benami transaction.
Case-law. *See* PRECEDENTS.
Civil and criminal cases.
Commissions.
Contempt proceedings.
Conversion.
Costs.
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Criminal trial.
Delay.
Duty of Counsel.
Duty of Court.
Ejectment suit.
English Law.
Equitable set off.
Equity.
Evidence.
Execution.
Expert evidence.
Fraud.
Full Bench. *See* HIGH COURT, INFRA.
Hand-writing.
High Court.
Inconsistent pleas.
Injunction.
Insolvency.
Inspection of documents.
Interlocutory orders.
Issues.
Judge and jury.
Judgment.
Jurisdiction.
Justice, equity and conscience.
Leave to sue.
Letters Patent Appeal.
Local inspection.
New case.
New plea.
Originating summons.
Parties.
Partition suit.
Plea.
Pleader's fee.
Pleadings. *See* PLEADINGS.
Power of Court.
Precedents *See* PRECEDENTS.
Privy Council Procedure.
Relief.
Quia time action.
Remand.
Remedy.
Review.
Revision.
Rule nisi.
Second appeal.
Stay.
Subsequent events.
Suit.
Summons.
Taxation.
Miscellaneous.

Abandonment of plea.

———*Abandonment of plea—Judgment mentioning specifically points argued before him—Scope of presumption that other points in memorandum of appeal are abandoned—Practice.*

Where a Judge mentions specifically certain points which were argued before him and the judgment is silent on other points taken in the memorandum of appeal, it

PRACTICE—Abandonment of plea.

may be presumed that such points have been abandoned; but where the Judge after mentioning the points specifically argued before him, states that on merits too there is no force in the objections taken, it cannot be held that the other points have been abandoned. A.I.R. 1923 Lah. 124 and A. I. R. 1924 Lah. 107 Dist. (*Currie J.*) HANS RAJ *v.* KARAM CHAND. **6 I R. (Lah.) 49 (2) = 145 I C. 113 = A.I.R. 1933 Lah. 570.**

———*Abandonment of plea—Objections disallowed by first Court—Some only considered by the appellate Court—Presumption.*

Several objections had been taken to an execution sale in the first Court which rejected the objections but set aside the sale on some technical ground. The appellate Court had confirmed the sale but had not considered any of the other objections to the sale. Those objections had been disallowed by the Munsif, and had not been pressed before the appellate Court by either side.

Held, that the petitioners ought to have pressed all their objections in the appellate Court, in case the appellate Court decided against them differing from the lower Court, and so it should be presumed that those objections had been abandoned by the petitioners in the lower appellate Court. A. I. R. 1923 Lah. 124, Ref. (*Sundaram Chetty, J.*) VASAMSETTI SWAMI *v.* TATAYYA. **6 I R. (Mad.) 60 = 145 I.C. 394 = A I.R. 1933 Mad. 179.**

———*Abandonment of plea—Plea of legal necessity—Second appeal.*

The questions whether certain item out of consideration for alienation by widow was for legal necessity or not involves first an inquiry into the facts, into the nature of the loan and the reason for it and the pressure upon the estate at the time. Where therefore this inquiry is shut out in the lower appellate Court by the omission of the appellant to challenge the same, the matter cannot be re opened in second appeal (*Bose, O. A. J C.*) FULSING *v.* GANESH PRASAD. **I.R. 1931 Nag 118 = 133 I.C. 390 = 14 N.L.J. 84 = A.I.R 1931 Nag. 147.**

———*Abandonment of plea—Plea of limitation given up by Counsel—Plea if open on appeal.*

Counsel for the defendant definitely gave up the plea regarding limitation after the evidence of all the issues had been taken.

Held, that the question was one of law, that the party was not bound by the statement of his Counsel and that as the opposite party was not prejudiced the plea can be taken in appeal by the party. (*Addison and Rhide, JJ.*) DES RAJ HUKAM CHAND *v.* LACHHI RAM PRABH DAYAL. **147 I C. 57 = 6 R L. 324 = A.I R. 1933 Lah. 404.**

———*Abandonment of plea—Plea of* res judicata.

If a party does not put forward a plea of *res judicata*, he must be taken to have waived it and to have intentionally invited the Court to decide the case on the merits and a subsequent compromise between the parties is binding on them. 48 C. L. J. 577, Ref. (*S. K. Ghose, J.*) NAGENBALA DASEE *v.* SRIDAM MAHTO **59 Cal. 513 = I R. 1933 Cal. 202 = 141 I.C. 858 = A.I.R. 1933 Cal 69.**

———*Abandonment of plea by pleader—Effect of.*

If it is a mere question of law that has to be argued, a statement by the pleader "that he does not press it though he does not abandon it" may not stand in the way of the question being re-argued in the Appellate Court. But if it involves a question of fact and one does not press it, merely saying that he does not abandon it is of no avail and the question cannot be allowed to be ragued afresh. (*Ramesam, J.*) NAPU *v.* SAN BIBI.

PRACTICE—Amendment.

I.R. 1931 Mad. 525 (2) = 131 I.C. 461 (2) = A.I.R. 1931 Mad. 632.

Abstract questions.

———*Abstract questions—Reference to courts—Advisability.*

The advisability of propounding for the consideration of the Court abstract question or questions involving considerations of debatable fact is, to say the least, doubtful; and it is undesirable that the Court should be called upon to express opinions which may affect the rights of persons not represented before it or touching matters of such a nature that its answers must be wholly ineffectual with regard to parties who are not and who cannot be brought before it, for example, foreign Governments. (*Lord Chancellor.*) ATTORNEY GENERAL OF CANADA *v.* ATTORNEY-GENERAL OF ONTARIO. **I.R. 1932 P.C. 34 = 135 I C. 754 = A.I R. 1932 P C. 36 (P.C.).**

Adjournment.

———*Adjournment—Duty of Court.*

It is better to allow a case to take a little longer time than to run the risk of a remand by the appellate Court. (*Niamatullah and Rachhpal Singh, JJ.*) GAMBHIRMAL PANDYA *v.* GEORGE ANTHONY JOHN. **154 I.C. 391 = 7 R A. 748 = A.I.R. 1934 All 37 (2).**

———*Adjournment — Income tax — Adjourned date—Ordinarily assesses must find out.*

Ordinarily it may be the duty of the assesse who applies for an adjournment to find out the date fixed, but when the Income-tax Officer tells the assessee that an adjournment will be allowed and that the adjourned date will be intimated to him, it is not incumbent on the assessee to find out that date but he is entitled to await the promised information. (*Subhedar and Pollock, A J Cs.*) COMMISSIONER OF INCOME TAX *v.* BAXIRAM RODMAL. **30 N.L R. 340 = 151 I.C 56 = 7 R.N. 49 = A I R. 1934 Nag. 175.**

———*Adjournment* sine die*—Effect.*

"Adjournment *sine die*" differs altogether from discontinuance. It is after all an adjornment, an adjournment to a date not fixed at the moment. (*Rankin, C. J. and Costello, J.*) MENAKA BALA DASI *v.* HIRALAL GOBINDALAL. **147 I C 206 = 6 R.C. 295 = 37 C W.N. 583 = A.I.R 1933 Cal. 816.**

Affidavit.

———*Affidavit—Distinction from solemn affirmation.*

The difference between solemn affirmation and affidavit is that the applicant is to solemnly affirm the statements made in the petition are true to his knowledge whereas in the case of an affidavit it may be sworn by any person acquainted with the facts. The solemn affirmation should be made before a person who is entitled to verify the affirmation and whether affirmed or not, the affidavit should bear the court-fee of Rs. 2 under Chap. XII, R. 3 of the Calcutta High Court, Appellate Side Rules. (*Suhrawardy and Graham, JJ.*) UPENDRANATH GALOWA *v.* HEMCHANDRA KOLEY. **58 Cal 1389 = I.R. 1932 Cal. 158 = 135 I.C. 798 = A.I R 1932 Cal. 160.**

———*Affidavit—Rebuttal—Verbal statement whether can be acted on.*

The Court is not justified in Acting on the verbal statement of a party in preference to a sworn affidavit put in by the other side. (*Niamatullah, J.*) RAMA SHANKAR *v.* IQBAL HUSAIN. **141 I C. 113 = I.R. 1933 A. 47 = 1932 A.L J. 480 = A.I.R. 1932 All. 450.**

Amendment.

———Amendment of decree—Inherent powers—Degree agreeing with intention of judgment—Power of Court. *See* MYSORE C. P. CODE REGULATION, S. 152. **39 Mys. H.C.R. 825.**

PRACTICE—Amendment.

———*Amendment—Clerical mistake in plaint and decree—Appeal filed—Jurisdiction of trial Court to amend.*

The mere fact of an appeal being filed does not oust the jurisdiction of the Court to amend the plaint and decree on the ground of clerical error. The case however will be different where the trial Court's decree has been affirmed in appeal and thereby merged in the Appellate decree. (*Sulaiman and Baipai, JJ.*) KODAI MISIR *v.* REVAZUL HAQ. **135 I.C. 848 = I.R. 1932 A. 112 = 1931 A.L.J. 536 = A.I.R 1931 All. 766 (1).**

Appeal.

See also (1) APPEAL.
(2) PRACTICE—CONVERSION.

———*Appeal—Abatement of—Misconceived application to set aside—Effect when no substitution for substitution is required in law.*

Where the substitution of the legal representatives of a deceased respondent in an appeal in not required under the law, a misconceived application for substitution or to set aside an imaginary abatement would not affect the competency of the appellant's appeal. (*R. C. Mitter, J.*) SAMARENDRA NATH SAHA ROY *v.* HARENDRA KUMAR SAHA. **157 I.C. 224 = 8 R.C. 87 = 39 C.W.N. 303 = 60 C.L.J. 556 = A I R. 1935 Cal. 413.**

———*Appeal—Addition of parties—Persons interested in result of appeal.*

Where certain persons who are interested in the result of the appeal are not impleaded by the appellant, the Court can itself make them respondents even if no application is made for their joinder. (*Subhedar and Pollock, A.J.Cs.*) KISAN RAO *v.* NANAJI. **31 N L R 223 = 157 I C 793 = 8 R.N. 66 A I R. 1935 Nag. 182.**

———Appeal—Appeal against decree on same cause of action pending—Second suit—Practice. *See* CEYLON CIVIL PROCEDURE CODE (1889), S. 207. **36 C W N. 1 = 61 M.L.J. 420 (P.C.).**

———*Appeal—Appeal filed against dead man—Power of Court to extend time to implead legal representatives.*

Where an appeal is filed against a dead person no question of abatement arises. The Court may in such cases excuse time and permit the legal representatives to be impleaded. (*Johnstone, J.*) MEHAR SINGH *v.* LABH SINGH. **I.R. 1932 Lah. 469 = 138 I.C 277 = 33 P.L.R. 116 = A I.R. 1932 Lah. 305.**

———*Appeal—Burden of proving that judgment is wrong.*

In an appeal, the burden of proving that the judgment appealed from is wrong rests upon the appellant, and he does not discharge that onus by merely showing that there is an equal possibility of the judgment in favour of one party or the other being correct. (*Sir Shadi Lal*) KALYAN MAL *v.* AHMAD UDDIN KHAN. **151 I.C. 45 = 4 A W.R 353 = 11 O W N. 1081 = 7 R P C. 54 = 40 L.W. 415 = 1934 A.L J. 909 — 38 C.W.N. 1157 = 60 C.L J. 128 = 36 Bom. L R. 981 = 1934 M.W.N. 976 = A.I R. 1934 P.C. 208 = 67 M L. J. 361 (P.C.).**

———*Appeal—Company—Mode of preferring appeal.*

When a Company is convicted under the Companies Act, an appeal against the conviction should be preferred by the Company through a properly authorised agent. An individual such as the Managing Director of the Company cannot as such file the appeal. (*Costello, J.*) AJIT KUMAR CHATTERJEE *v.* EMPEROR, **147 I.C. 848 = 6 R.C. 373 = 35 Cr.L.J. 492 = 37 C.W.N. 1159 = 1934 Cr. C. 42 = A.I.R 1934 Cal. 63.**

———Appeal—Competency—Party taking properties under partition decree—Right to appeal. *See* ESTOPPEL —APPROBATE AND REPROBATE. **68 M.L.J. 255.**

PRACTICE—Appeal.

———*Appeal—Decree on foot of mortgage—Collector altering same into usufructuary mortgage—Omission to forward decree—Effect of irregularities.*

C obtained a decree for possession on a mortgage in 1912 The Tahsildar decided in 1928 that the mortgage should be redeemed The Collector on an application filed for *C* reversed the order and changed the mortgage decree into a usufructuary mortgage for 21 years. The Civil Court failed to send to the Deputy Commissioner a copy of the decree.

Held, that the proper course to adopt was to leave the matters as they were in spite of the irregularities regarding the alteration of the decree and the failure to communicate the same. (*Dobson, F C.*) PALWAL *v.* SHIB LAL. **11 Lah.L.T. 3.**

———Appeal—Discretion—Breach of contract—Award of reasonable compensation—Interference on appeal. *See* CONTRACT ACT, S. 74. **A.I.R. 1935 Mad. 1072 = 69 M L J. 841.**

———*Appeal—Discretion—Interference.*

Where a discretion exercised by trial Court is interfered with by the lower appellate Court on misapprehension of facts, the High Court will interfere with the exercise of discretion by the lower appellate Court. (*Iqbal Ahmad and Kisch, JJ.*) RAM TAWAKAL TEWARI *v.* MT DUJARI. **154 I.C. 412 = 7 R A. 756 = A.I R. 1934 All. 469.**

———Appeal—Duty of Court—Absence of pleader to send for him. *See* DUTY OF COURT *infra*. **16 R.D. 56**

———*Appeal—Duty of Court—Inadmissible evidence not objected to.*

An appellate Court which has the duty to weigh the evidence on both sides afresh and for its own satisfaction is not bound to act upon inadmissible evidence merely because no objection to its admissibility was taken in express terms in the lower Court. It is the duty of the appellate Court to ignore such a document if it is satisfied that it is not legally admissible. (*Sulaiman, C J., Young and King, JJ.*) MT. NAIMA KHATUN *v* BASANT SINGH. **56 All. 766 = 3 A W.R. 529 — 149 I.C. 781 — 6 R A. 962 = 1934 A.L.J. 318 = A.I R. 1934 All. 406 (F B.).**

———*Appeal—Filing after Court hours at Judge's house.*

If a Judge finds there was sufficient reason for the appellant for not presenting the appeal within Court hours that day, he can receive the appeal at his residence after Court hours. (*Bhide, J.*) BALA DAS *v.* MULA SINGH. **I R 1931 Lah. 778 (1) = 133 I.C. 442 (1) = 32 P.L R. 417 = A.I.R. 1931 Lah. 671.**

———Appeal—Inconsistent pleas—Not open in appeal. *See* APPEAL INCONSISTENT PLEA. **A.I.R. 1933 Lah. 1045.**

———*Appeal—Maintainability—Absence of necessary party.*

In the absence of a necessary party an appeal cannot proceed. (*Middleton, J.C. and Mir Ahmad, A J C.*) RAMCHAND DALI MAL. *v* BADRI NATH. **157 I.C. 502 = 8 R. Pesh. 27 = A.I R. 1935 Pesh. 106.**

———*Appeal—Maintainability—Finding on a question of jurisdiction.*

In an ordinary civil suit no appeal, not even a revision, lies from a mere finding on the question of jurisdiction. (*Sulaiman and Young, JJ.*) JATHALI BHUL *v.* NADIA. **I R. 1932 All. 390 = 138 I.C. 347 = 1932 A.L.J. 468 = 16 R D. 413 = A.I.R. 1932 All. 415.**

———*Appeal—Maintainability—Order as to costs only—Appeal not provided for against order on the merits.*

PRACTICE—Appeal.

No appeal would lie against a decision relating to costs only when no appeal would lie from the order passed on the merits in the proceedings in relation to which the question of costs arises. (*Anantakrishna Iyer, J.*) SOMASUNDARAM PILLAI *v.* MUTHUMANICKA NADAR. **I.R. 1932 Mad. 632=139 I.C. 167=1932 M.W.N. 1244=36 L.W. 646=A.I.R. 1932 Mad. 714.**

———Appeal—Maintainability—Question of costs—Appeal and second appeal on—Competency. *See* C. P. CODE, S. 100. **16 Pat.L.T. 811.**

———*Appeal—Nature of order—Substance not form material.*

Where the provision of the law quoted in dismissing the suit is O. 11, R. 21 of the Code but everything points to the order itself in substance and in intention having been one under O. 6, R. 5, in judging of the appealability of an order the Court has to look to the substance of it rather than to the provisions of law under which it purports to have been made. (*Curgenven, J.*) VASUDEVAN NAMBIYAR *v.* NADUNGATHIRIPAD. **I.R. 1932 Mad. 460=137 I.C. 842=1932 M.W.N. 301=A.I.R. 1932 Mad. 316.**

———*Appeal—New case.*

The Judge of an appellate Court is not justified in making out a new case for a party which he has not taken in the lower Court. (*Bhide, J.*) UDHO DAS *v.* MEHR BAKSH. **I.R. 1933 Lah. 457=144 I.C. 340 (2) =34 P.L.R. 714=A.I.R. 1933 Lah. 262.**

———*Appeal—New case not raised in pleadings—Decision on—Propriety.*

A party to a suit must be strictly held to his pleadings in the suit; and an appeal should not be decided on the basis of findings on pleadings which were never raised in the suit out of which the appeal arose, but raised in another suit not between the same parties. (*Oppenheim, S.M. and Drake Brockman, J.M.*) BHOLA RAM *v.* GANESH. **18 R.D. 513.**

———*Appeal—New case—Permissibility.*

It is not open to the plaintiff to change his ground in the Court of first appeal and his case must be adjudged on proof of the title which he originally pleaded as the ground of his claim for the recovery of the possession of the land in suit. (*Wazir Hasan, C.J. and Raza, J.*) MAULA BAKHSH *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **6 R.O. 347=147 I.C. 1011=10 O.W.N. 1263=17 R.D. 1132=14 L.R. 908 (Rev.)=A.I.R. 1934 Oudh 47.**

———*Appeal—New case—Power of Court to make out.*

An appellate Court has no justification to make at the appellate stage a new case for the defence which has not only not been set up but is inconsistent with the defence set up in the trial Court. (*Mitter, J.*) ATUL CHANDRA ROY *v.* SARODA SUNDARI DHUPI. **161 I.C. 187=8 R.C. 486=61 C.L.J. 143=39 C.W.N. 581=A.I.R. 1936 Cal. 49.**

———*Appeal—New issue—Raising of—Procedure.*

An issue may be raised before the appellate Court in the grounds of appeal or by an application in writing made to the Court by one of the parties. An issue cannot properly be brought before the appellate Court by oral argument of Counsel on behalf of the parties. The Code requires that the pleadings of the parties either in an original or in an appellate Court must be in writing It does not contemplate that there should be oral pleadings. (*Bennet, J.*) SUKHDEO BEHARI LAL *v.* RAMA NAND DWARKA DAS. **153 I.C. 497=7 R.A. 511=4 A.W.R. 1484=A.I.R. 1935 All. 268.**

———*Appeal—New issue—Whether it can be raised.*

The normal rule is that an issue need not be discussed in appeal unless it was raised in the original suit and *a fortiori* it need not be discussed in a further appeal when it has not been raised at any earlier stage. (*Boyd, F.C.*) JAWAHARI *v.* HAKU. **12 Lah.L.T. 40.**

———*Appeal—New plea.*

An objection relating to the execution and registration of a document will not be permitted to be raised for the first time in appeal, where if such objection had been raised in the lower Court, it might have been possible for the opposite party to adduce some evidence which might have had material bearing on the objection. (*Srivastava and Nanavutty, JJ.*) SIKANDAR ARA AMINA BEGAM *v.* HASAN ARA BEGAM. **165 I.C. 70=1935 O.W.N. 871=A.I.R. 1936 Oudh 196.**

———*Appeal—New plea.*

A plea involving a question of law and fact not taken in the trial Court cannot be taken in appeal. (*Addison and Agha Haidar, JJ.*) HARJAS RAI ARJAN DAS *v.* HANS RAJ. **6 I.R. (Lah.) 232=146 I.C. 513=34 P.L.R. 983=A.I.R. 1933 Lah. 150.**

———*Appeal—New plea.*

A plaintiff cannot be permitted to give a complete go bye to the case on which he went to trial and set up a new case in appeal. The practice of making out a new case in arguments and thereby springing a surprise on the opposite party must be deprecated, and no amount of evidence can be looked into upon a plea which was never put forward. Where the plaintiff's case in the first Court was that her deceased husband sold certain property to her for Rs. 20,000 being part of the dower, alleged to have been fixed at Rs. 40,000 at the time of the marriage and it was found by the trial Court that the dower was fixed at Rs. 500 only and paid by the husband during his lifetime, plaintiff could not be permitted to urge in appeal that the recital in the sale-deed may be deemed to amount to an agreement by the deceased to increase the dower to Rs. 40,000 as it was within the competence of the deceased to do so. 24 S.L. R. 138, Ref. (*Wild, J.C. and Rupchand, A.J.C.*) MT. HAKIM BIBI *v.* MIR AHMAD. **25 S.L.R. 72=I.R. 1931 Sind 20=129 I.C. 900=A.I.R. 1931 Sind 17.**

———*Appeal—New plea.*

Where the party set up a new plea in third appeal to the effect that the resumption chapter of the Oudh Rent Act was not applicable.

Held, that the plea could not be permitted to be raised at the stage. (*Oakden, S.M.*) JAGAT NARAIN *v.* SESHMAN PRASHAD. **15 R.D. 153=12 L.R. 26 (Rev.).**

———*Appeal—New plea.*

An appeal should not be allowed on an entirely new plea, not even urged in the memo. of appeal and without amendment of the pleadings. (*Drake Brockman, S.M. and Holmes, J.M.*) BRIJ KISHORE *v.* ABDUL RAHMAN. **14 L.R. 627 (Rev.).**

———*Appeal—New plea.*

The Court of final appeal should be very chary of entertaining an argument which has not been sifted in the Court below on a question, especially when there is no unanimity of opinion among the different Courts on the subject. (*Mitter and Henderson, JJ.*) BARODA PROSAD SAHA *v.* KRISHNA CHANDRA SAHA. **151 I.C. 268=7 R.C. 98=38 C.W.N. 33=A.I.R. 1934 Cal. 414.**

———*Appeal—New plea.*

A plea which has not been taken in the written statement and on which evidence would have been taken by the trial Court, if raised there, ought not to be allowed to be raised in appeal. (*Page, C.J. and Das, J.*) BHAGWANDAS BAGLA *v.* S. P. K. A. A M. CHETTYAR FIRM. **150 I.C. 697=7 R.R. 6 (2)=A.I.R. 1933 Rang. 385.**

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———*Appeal—New plea.*

A point not dealt with in the order under appeal, and not mentioned in the written memorandum of appeal, if raised at the preliminary hearing of the appeal and noted at the time notice is issued to the respondents does not take the respondents by surprise, and can be considered in appeal specially when it is a question of law apparent on the face on the record. (*Middleton, J.C.*) TIKAYA RAM KHUSHAL RAM *v.* GHANSHAM DAS. **6 R. Pesh. 41 = 147 I.C. 837 = A.I.R. 1934 Pesh. 3.**

———*Appeal—New plea.*

Where the appellants did not take a plea in the lower Court nor raised it in the grounds of appeal but submitted it as an additional ground of appeal, the appellants were not allowed to raise this new point on appeal for deciding which it was necessary to take evidence. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ARJAN SINGH BHAJAN SINGH *v.* SURJAN SINGH. **155 I.C. 1006 = 7 R. Pesh. 106 = A.I.R. 1935 Pesh. 44.**

———*Appeal—New plea—Alternative case on admitted facts.*

It is not open an appellant to urge a point for the first time in the High Court which has not been urged in any of the Courts below. But a new point can be agitated as an alternative case provided it proceeds on admitted or proved facts. (*Mukerji and Bennet, JJ.*) DILA RAM *v.* KURA MAL. **I.R. 1931 All. 833 = 134 I C. 449 = A.I.R. 1932 A. 289.**

———*Appeal—New plea—Correctness of entries in settlement records.*

A plea that certain entries in the settlement records were in correct cannot be permitted to be raised for the first time in appeal. (*Rankin, C.J. and Guha, J.*) APCAR COLLERIES, LTD. *v.* RAJA JYOTI PRASAD SINGH. **35 C.W.N. 597.**

———*Appeal—New plea—Court if precluded from entertaining—Plea of estoppel.*

Per *Sulaiman, A.J.C.*—It is doubtful if the Full Bench case of *Ram Kinka Rai* v. *Tufani Mir*, 1930 A. L.J. 1601, intended to lay down or could have laid down an exhaustive list of all possible cases in which alone a new point can be allowed to be raised in first or second appeal or in letters Patent appeal. There is however nothing to suggest that although a party cannot claim permission to raise a new point of law, the Court itself is precluded from deciding the case on such a new point. Plea of estoppel allowed to be raised. (*Sulaiman, A.C.J., Boys and Banerji, JJ.*) MAHABIR SINGH *v.* NARAIN TEWARI. **54 A. 25 = I.R. 1931 All. 812 = 134 I.C. 236 = 1931 A.L J. 715 = A.I.R. 1931 All. 490 (F.B.).**

———*Appeal—New plea—Different titles.*

Where the ptaintiff in both the lower Courts fought out his case on the basis of his title as donee but in appeal fought to raise his title as heir.

Held, that the latter plea could not be allowed to be raised. (*Srivastava, J.*) JHUMAN *v.* HUSSAIN. **I.R. 1931 Oudh 81 = 129 I.C. 161 = 7 O.W.N. 1058 = A.I.R. 1931 Oudh 7.**

———*Appeal—New plea—Direction to jurisdiction.*

An objection as to jurisdiction cannot be raised for the first time in second appeal. (*Oakden, S.M. and Keane, J.M.*) SYED MAHOMED MEHDI *v.* RAM DEI. **15 R D. 158 = 12 L.R. 31 (Rev.).**

———*Appeal—New plea—Framing of fresh issue and remand.*

Where a new plea would necessitate a remand, the framing of a fresh issue and a trial of a totally new point, it could not be allowed at the appellate stage. (*Broadway and Abdul Qadir, JJ.*) PRITAM SINGH *v.* SUNDAR SINGH. **6 R.L. 508 = 148 I.C. 171 = A.I.R. 1934 Lah. 34 (2).**

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———*Appeal—New plea—Fraud.*

Where no case of fraud has been set up in the pleadings nor has an amendment been asked for at any stage, the appellate Court has no jurisdiction to entertain the plea of fraud. (*Virman Bose, A.J.C.*) MAKHANLAL *v.* PANCHAMLAL. **152 I.C. 398 = 7 R.N. 101 = 18 N.L. J. 27 = A I.R. 1934 Nag. 226.**

———*Appeal—New plea—Interference in second appeal.*

An appellate Court will not be justified in decreeing a claim on a footing wholly unwarranted by the pleadings of the parties Thus a plea of joint family status not definitely raised in the plaint cannot be entertained for the time in appeal. Where such a plea was entertained the High Court interfered in second appeal. (*Sen and Naimatullah, JJ.*) GAURI SHANKAR SHARMA *v.* THAKUR MEWA RAM. **I.R. 1931 All. 369 = 131 I.C. 513 = A.I.R. 1931 All. 600.**

———*Appeal—New plea—Limitation.*

It is open to a party to reagitate a plea of limitation in second appeal on the admitted fact even though he did not press it in the lower appellate Court. (*Pullan and Naimatullah, JJ.*) RAM CHARITTER MISIR *v.* SURAJ TELI. **53 A. 738 = 136 I.C. 71 = I.R. 1932 A. 119 = 1931 A.L.J. 997 = A.I.R. 1932 A. 108.**

———*Appeal—New plea—Limitation.*

Even though the applicability of a particular article of Limitation Act may not be raised in either of the lower Courts by the plaintiff, it can be raised for the first time in second appeal provided the defendants are not prejudiced by the fact that the question of applicability was not raised earlier. (*Jack and Remfrey, JJ.*) HARI CHARAN BHUNYA *v.* SM. KAMAL KUMARI DASI. **I R. 1931 Cal. 604 = 132 I.C. 684 = 35 C.W. N. 307 = A.I.R. 1931 Cal. 670.**

———*Appeal—New plea—Limitation—Plea of limitation apparent on record.*

A plea of limitation which is apparent on face of record can be taken in appeal, though not taken in trial Court, where such plea has not been waived. (*Dalip Singh, J.*) RAM CHAND *v.* DIWAN CHAND. **147 I.C. 507 (1) = 6 R.L. 398 (1) = A I.R. 1933 Lah. 1044 (1).**

———*Appeal—New plea—Limitation—Question of law.*

Where a plea of special limitation is raised for the first time in appeal the High Court can enter into the question in so far as it raises a point of law. (*Kulwant Sahay and Macpherson, JJ.*) JURAWAN SINGH *v.* RAMSAREKH SINGH. **12 Pat. 261 = 149 I.C. 561 = 6 R.P. 620 (2) = 14 Pat.L.T. 113 = A.I R. 1933 Pat. 224.**

———*Appeal—New plea—Maintainability.*

The appellate Court will not interfere with the finding of the trial Court on a plea not raised in the trial Court regarding which there is no cogent evidence. (*Drake Brockman, S. M. and Holmes, J.M.*) HARAK CHAND *v.* BHAGIRATHI. **15 L.R. 21 (Rev.).**

———*Appeal—New plea—Maintenance—Claim for—Plea of waiver.*

Where a person entitled to claim maintenance from a particular date makes a demand for it only at a later date, it does not mean that her right to maintenance for the period anterior to the demand is lost, in the absence of proof of waiver. The question of waiver depends on facts, and when it is not pleaded or put in issue in the lower Court, it cannot be raised for the first time in appeal. (*Anantakrishna Aiyar and Cornish, JJ.*) AMMALU-KUTTI AMMA *v.* RAMUNNI MENON. **150 I.C. 952 =**

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7 R M. 54=40 L.W. 35=A.I.R. 1934 Mad. 508=67 M.L.J. 470.

———*Appeal—New plea—Non observance of O.* 18, *R.* 8, *C.P. Code—Objection taken for first time in third appeal—Sustainability.*

Where an objection was taken for the first time in third appeal that the collector had not made a memorandum of the substance of what each witness deposed as required by O. 18, R. 8, C P. Code.

Held, that the objection could not be entertained. (*Oppenheim, J M*) JIRAJ *v.* PREMA. **15 R.D. 600=12 L R 298 (Rev.).**

———*Appeal—New plea—Objection to admissibility of document—Objection raised in appeal—Sustainability.*

Where a document is admitted without objection in the trial Court, objections to lack of formal proof of loss of the original, etc., cannot be taken for the first time in appeal. (*Dalip Singh J.*) KRISHAN LAL *v.* MT. MIRZAN BIBI. **150 I.C 240=6 R.L. 842=35 P.L.R. 74=A.I.R. 1934 Lah 271 (1).**

———*Appeal—New plea—Objection for being impleaded not raised in trial Court.*

Where the respondents did not raise any objection to their being joined as defendants in the trial Court, but submitted to the jurisdiction of that Court,

Held, they ought not to have been allowed to raise this objection for the first time on appeal. (*Dunkley, J.*) DAW AYE MYA *v.* U KWE NYO. **154 I.C. 465=7 R.N. 307=A.I.R. 1935 Rang. 23.**

———*Appeal—New plea—Objection under S.* 66, *C.P. Code.*

A plea of bar under S. 66, C. P. Code, which goes to the root of the suit does not depend upon disputed facts and may be allowed to be taken at any stage and the Court is bound to give effect to the plea. (*Mitter, J.*) HARENDRA CHANDRA ROY *v.* RAM KUMAR ROY. **136 I.C. 538=I R. 1932 Cal 218=35 C.W.N. 940=54 C L J. 147=A.I.R. 1932 Cal. 170.**

———*Appeal—New plea—Objection under O.* 8, *R.* 6.

Where an objection under O. 8, R. 6 is not taken in the trial Court the High Court will not permit the same to be raised for the first time in second appeal. (*Suhrawardy and Jack, JJ.*) NARENDRA KRISHNA CHAKRABURTY *v.* ASHUTOSH BHATTACHARJI. **35 C.W.N. 17=132 I.C. 195=A I R. 1931 Cal 358 (2).**

———*Appeal—New plea—Plea of adverse possession.*

A plea of adverse possession is a mixed question of law and fact, and if the plaintiff wants to base his title on it he should specifically advance this plea in the first Court, when an issue would be framed and finding given. Where no such issue is framed by the trial Court and no evidence is given, the plea of adverse possession cannot be entertained in appeal. (*Nanavutty J.*) RAJANA *v.* MUSAHEB ALI **11 Luck 82=155 I.C. 23=7 R.O. 547=1935 O.W.N. 423=A.I.R. 1935 Oudh 387.**

———*Appeal—New plea—Plea involving admitting of additional evidence—Not open.*

A new plea in respect of which no issue was framed in trial Court and which raises a mixed question of law and fact, and involves admission of additional evidence, cannot be raised in appeal. (*Raza and Srivastava, JJ.*) BINDESHWARI PRASAD UPADHYA *v.* KRISHNA MURARI. **9 Luck. 670=149 I.C. 550=6 R.O. 585=11 O. W.N. 430=18 R D. 213=A.I.R. 1934 Oudh 145.**

———*Appeal—New plea—Plea not raised in trial Court or grounds of appeal and depending on facts—Dismissal of suit on—Propriety.*

A plea not raised by the defendant either in his written statement in the trial Court or in his memorandum

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of appeal cannot be raised by the appellate Court when such a plea requires investigation into the facts. The dismissal by the appellate Court of the suit on such a plea is neither proper nor justified. An appellate Court has no business to make new case for a defendant. (*Mitter, J.*) NIRODA CHANDRA SINGHA SARMA *v.* SANKAR CHANDRA SHAHA. **162 I C. 138=8 R.C. 569=61 C.L J. 189=A I.R. 1936 Cal. 176.**

———*Appeal—New plea—Plea of*—Res judicata.

A plea of *res judicata* may be entertained by a Court of appeal though not raised in the pleadings in a case where the necessary materials for the decision are on the record. (*Bisheshwar Nath and Smith, JJ.*) DURBALI PANDE *v.* SHIVA CHARAN. **143 I C. 338=I R. 1933 Oudh 178=9 O.W.N. 1052=A.I.R. 1933 Oudh. 104.**

———*Appeal—New plea—Question of fact*

The appellate Court will not express opinion on a question of fact which is raised for the first time in the appeal and for the decision of which there is no material on the record. (*Bhide, J.*) ABDUL AZIZ KHAN *v.* CO-OPERATIVE BANK, LTD., LAHORE. **6 I.R. (Lah.) 99=145 I.C. 386=34 P.L.R. 851=A.I.R. 1933 Lah. 383.**

———*Appeal—New plea—Question of fact—If can be raised at late stage.*

A question of fact which has not been raised either in the pleadings in the lower Court, or in the grounds of appeal, cannot be urged at a late stage of the case in appeal. (*Subhedar A. J. C.*) MANRAKHANLAL *v.* PARMANAND. **158 I.C. 263=8 R.N. 70=18 N.L.J. 149=A.I R 1935 Nag. 185.**

———*Appeal—New plea—Question of jurisdiction.*

The objection that the civil Court has no jurisdiction to entertain the suit but must be brought in the revenue Court can be entertained in second appeal as the point goes to the root of the matter and is one of jurisdiction and as an appeal would lie to the commissioner if a suit were filed in the Revenue Court. (*Sulaiman, C.J. and Banerji, J.*) SHRI KISHAN LAL *v.* BIJAI SINGH. **54 A. 998=141 I.C. 110 I.R. 1933 A. 46=1932 A.L J. 857=16 R.D. 564=13 L.R. 357 (Rev.)=A.I.R 1932 All. 701.**

———*Appeal—New plea—Question of jurisdiction—If can be raised for the first time.*

A question of jurisdiction is a question of law, but it cannot always be allowed to be raised for the first time in appeal; and an appellate Court should always be chary of entertaining points which are not sifted in the Court below. (*Mitter and Patterson, JJ.*) KADU *alias* KADIR *v.* SREEMATI KOLEMAN BIBI. **62 Cal. 1088=163 I C 188=8 R.C. 725=61 C.L.J. 342=39 C.W.N. 876.**

———Appeal—New plea—Question of jurisdiction—Objection to jurisdiction raised at late stage—Maintainability. *See* C. P. CODE, S. 21. **16 Pat. L.T. 103=A.I.R. 1935 Pat. 160.**

———*Appeal—New plea—Question of law.*

A point of law can be taken for the first time in appeal even though it has not been taken in the written statement. (*Baker and Shingne, JJ.*) SAYAMMA DATTATRAYA *v.* PUNAMCHAND. **57 Bom. 678=147 I.C. 1096=6 R.P. 243=35 Bom. L.R. 850=A.I.R. 1933 Bom. 413.**

———*Appeal—New plea—Question of law.*

A question of law can certainly be raised by a Court for the first time in appeal. (*Almond, A.J.C.*) AHMAD *v.* ACHARAJ RAM. **157 I.C. 953=8 R. Pesh. 44=A.I.R. 1935 Pesh 113.**

———*Appeal—New plea—Question of law.*

The plaintiff who sued for possession of certain property asked for mesne profits up to the date of the

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institution of the suit but did not ask for mesne profits for the period till recovery of possession. He brought a second suit for mesne profits for this period. The defendant raised an objection under O. 2, R. 2 for the first time in appeal.

Held, that the question being one of pure law could be raised in appeal and that the suit was barred. (*Mukerji and Sen, JJ.*) GANGA RAM *v.* MUTFSRA. **54 All 65=141 I.C. 575 (1)=I.R. 1933 All. 67=A.I R. 1932 All. 510.**

———*Appeal—New plea — Question of law—Facts alleged in plaint—Plea of* res judicata.

It is not necessary for the plaintiff to do more in his plaint than set forth the facts on which he can rely for the application of a rule of law. It is open to him when he has pleaded the proper facts to argue before the High Court in appeal that under a rule of law he is entitled to a certain finding. Plea of *res judicata* allowed to be raised. (*Mukerji and Bennet, JJ.*) RAM REKHA MISRA *v.* LALLU MISIR. **53 All. 568=I.R. 1931 All. 676=133 I C. 468=15 R.D. 322=1931 A L J. 307=A.I.R 1931 All. 462.**

———*Appeal—New plea—Question of public policy.*

It is undoubtedly open to the appellate Court to raise the question of public policy for the first time. (*Almond, A.J.C.*) FAZAL RAHIM *v* NUR MAHOMED **157 I.C. 736=8 R. Pesh. 30=A I R. 1935 Pesh. 121.**

———*Appeal—New plea—Question of public policy—Plea of estoppel affecting jurisdiction*

Per *Boys, J.*—A new point can be taken when it is a matter of public policy. A plea of estoppel affecting jurisdiction can be so taken. (*Sulaiman, A.C.J., Boys and Baneji, JJ.*) MAHABIR SINGH *v* NARAIN TEWARI. **54 A. 25=I R 1931 All. 812=134 I C. 236=1931 A.L.J. 715=A.I.R. 1931 All. 490 (F.B.).**

———*Appeal—New plea raised in reply for first time—No permission to argue.*

If after the respondent's counsel had finished his arguments, the counsel for appellant, while replying, seeks permission to raise new points on behalf of the appellant and the counsel for respondent objects to their being raised even on payment of costs, the permission should be refused to argue them for the first time in reply. (*Subhedar and Pollock, A.J.Cs.*) MT. CHUNNIBAI *v* GIRDHARI LAL. **30 N.L R. 62 150 I.C. 1007 =7 R.N. 33=16 N.L.J. 319=A I.R. 1934 Nag. 1.**

———*Appeal—New plea—Rent suit—Claim for additional rent.*

Where there was no claim for additional rent for excess area of which the tenant was in possession and the Court refused to grant the same, *held*, that the claim for additional rent could not be entertained in appeal. (*Suhrawardy and Costello, JJ.*) KUMAR PRATIVA NATH ROY *v.* BONOMALI SARKAR. **I R. 1931 Cal. 689=133 I.C. 561=35 C.W.N. 212=A I.R. 1931 Cal. 565.**

———*Appeal—New plea—Suit on basis of trust—Denial of trust in appeal—Permissibility.*

Where the case had proceeded in the lower Court on the footing that a trust existed and that the defendants should be made liable as trustees,

Held, that the appellant could not take up a new plea in appeal as to the existence of the trust itself. (*Mukerji and Guha, JJ.*) SAILENDRA NATH PALIT *v.* SYED HADE KAZA MANE. **59 Cal 586=I R. 1932 Cal. 326 =137 I.C. 500=36 C.W.N. 193=54 C.L.J. 328=A.I.R. 1932 Cal. 356.**

———*Appeal—New point.*

A ground which is not taken in the lower Court nor even in the grounds of appeal cannot be raised at the time of argument. (*Currie, J.*) HAZURA SINGH *v.* KISHAN SINGH. **149 I C. 977=6 R.L. 773=A.I.R. 1933 Lah. 447.**

———*Appeal—New point of law.*

A point of law may be taken at any time, provided that for the decision of that point no fresh finding be necessary. If the facts admitted or if the findings of the Court be enough for the decision of the point of law, the appellate Court is bound to hear it and if necessary, give effect to it. 52 C. 408 (P.C.); 1932 A. L. J. 182 and 706 (P.C.), Foll.; 1930 A. L. J. 1601 (F.B.) deemed no longer good law. (*Mukerji and King, JJ.*) PARBHU LAL *v* BADRI. **6 R.A. 889=149 I.C. 315=3 A.W.R. 611=A I.R. 1934 All. 719.**

———*Appeal—New point—Non joinder.*

In an appeal it was alleged that the suit was bad for non-joinder of parties as *G*, a member of a joint Hindu family, to which the defendants belonged had not been made a party to the suit. The objection was not raised at any previous stage of the litigation and was raised for the first time in appeal.

Held, that the opposite party (plaintiff) could not be bound by the allegations made by the defendants and cannot be deprived of a decree merely because the defendants alleged that another person, *G*, had some connection with the family and that the suit could not proceed in the absence of *G* and that the suit should fail for non-joinder of a necessary party. (*Fazl Ali and Luby, JJ.*) BACHU TANTI *v.* NATHUNI SINGH. **159 I.C. 716=8 R.P. 301=A I R. 1935 Pat. 476.**

———*Appeal—New point—Point indicated in pleading but not made subject of issue or submitted to judgment of trial Court—If can be raised in appeal.*

A Court of appeal should be very chary of entertaining an argument which has not been sifted in the Court below. A point which was indicated in the pleadings but on which no issue was joined or evidence let in and which was not subjected to the judgment of the trial Court cannot be allowed to be raised for the first time in appeal. (*Mitter and B. N. Rau, JJ.*) TRAILOKYA NATH DAS *v.* KENARAM DAS. **163 I.C. 663=9 R.C. 51=61 C.L J. 551.**

———*Appeal—New point—Point not arising on pleadings or taken at hearing of suit—If can be raised in appeal.*

A point, though good, which does not arise on the pleadings and which has not been taken in the written statement or raised in any way at the hearing of the suit, cannot be urged in appeal. A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. (*Broomfield and Macklin, JJ.*) SECRETARY OF STATE FOR INDIA *v.* VADAVGIR. **60 Bom. 42=160 I C 505=8 R B. 258=37 Bom. L R. 931=A.I.R. 1936 Bom. 19.**

———*Appeal—New point—Point not pressed in the trial Court—Right to urge.*

It is not a desirable practice that one or more points should be taken in the trial Court and another point of considerable importance and material gravity should be kept in the background until the parties are before the Court of appeal. But when the point has not been abandoned, it is desirable that in the interests of justice that the point should be allowed to be argued in appeal. (*Costello and Lort Williams, JJ.*) KATHERINE STIFFLES *v.* CARR MACKERTICH MARTIN. **164 I.C. 732=9 R.C. 268=39 C.W.N. 174.**

———*Appeal—New point—Validity of surrender by widow.*

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Where the validity of a deed of surrender is not challenged on a certain ground in the trial Court, the point cannot be raised for the first time in the appellate Court. (*Abdul Rashid, J.*) AMAR SINGH *v.* INDA. **A.I.R. 1934 Lah. 988.**

———*Appeal—Objection as to—Admissibility of evidence—Certified copy admitted in trial Court without objection.*

Where a certified copy of a document has been admitted in evidence in the trial Court without objection, its admissibility cannot be challenged in the appellate Court. (*Din Mohammad, J.*) MANGAL SAIN *v.* MEHR CHAND. **A.I.R. 1935 Lah. 172.**

———*Appeal—Objection to admissibility of document—Document admitted to be genuine in trial Court—Effect.*

When a party admits the genuineness of a document, he is bound by his admission and cannot be allowed in appeal to go back upon it. But the question as regards the admissibility of the document is still open to him if there has been no contrary admission in express language and no waiver. (*Sulaiman, C. J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **56 All 766=6 R.A. 962=149 I.C. 781=3 A.W.R. 529=1934 A.L.J. 318=A.I.R. 1934 All. 406 (F.B.).**

———*Appeal—Objection that document was not properly proved.*

The question of proof is a question of procedure and the appellate Court cannot reject documents which are not inherently inadmissible and which are relevant on objection being taken that they were not properly proved in the Court below, when no such objection was taken in that Court. (*Bajpai, J.*) AJODHYA PRASAD DUBE *v.* MAHABIR. **159 I.C. 39=8 R.A. 380=1935 A.W.R. 196=1935 R.D. 88=1935 A.L.J. 401=A.I.R. 1935 All. 293.**

———*Appeal—Order vacated—Termination of consequential proceedings.*

When an order of a Court is vacated in appeal all the proceedings taken in consequence of the vacated order fall to the ground. (*Courtney-Terrell, C.J. and Mohammad Noor, J.*) TOM SMITH *v.* TATA IRON AND STEEL CO., LTD. **I.R. 1933 Pat. 228=144 I.C. 309=A.I.R. 1933 Pat. 209.**

———*Appeal—Parties—Suit for sale on mortgage—Appeal by one defendant interested in one item only—Other defendants not impleaded—Maintainability.*

In a suit for sale on a mortgage executed by the father of defendants 1 and 2, the other defendants were interested in the various items of the mortgaged property. The 8th defendant claimed to have purchased a portion of the hypotheca in an auction sale held in execution of a decree against defendants 1 and 2 and their father and others. The suit having been decreed, 8th defendant appealed from the decree making only the plaintiff as a party respondent to the appeal and without impleading the sons of the mortgagor (defendants 1 and 2) or the other defendants.

Held, the appeal was not incompetent and that the 8th defendant was entitled to prefer an appeal so far as the item with which he was concerned was sought to be exonerated from the decree, and that the other defendants need not be made parties. (*Anantakrishna Ayyar and Cornish, JJ.*) SUBRAMANIA AYYAR *v.* SWAMINATHA AYYAR. **153 I.C 1013=7 R.M. 392=1934 M.W.N. 321=40 L.W. 576=A.I.R. 1935 Mad. 121.**

———*Appeal—Partition suit—Final decree in—Appeals by plaintiffs and defendants—Abatement of one—If can be continued—If can be treated as memo. of cross-objections to the other appeal.*

PRACTICE—Appeal.

From a final decree for partition two separate appeals were preferred, one by the defendants and another by the plaintiffs, each, however, relating to a different subject-matter, though out of the same decree. The former having abated owing to non substitution of heirs on the death of one of the plaintiffs-respondents.

Held, the two appeals could not be treated as forming one case, and in the absence of substitution of heirs the appeal by the defendants could not be continued along with the other appeal; nor could the former appeal be treated as a memo. of cross-objections to the appeal by the plaintiffs, when the conditions required for the entertainment of cross-objections as laid down in the C. P. Code were not satisfied. (*Mukerji and S. K. Ghose, JJ.*) JNANENDRA NATH BERA *v.* BIJOY KUMAR ADDYA. **62 C.L.J. 139.**

———*Appeal—Presentation—Rule regarding.*

An appellant is entitled to present an appeal during the hours that the Courts are open. As a matter of convenience both for Courts and for Counsel it is customary for appeals to be presented at certain fixed hours. But if an appellant is unable to present his appeal at the hour fixed he would not be debarred from presenting it during the time that the Court is open. (*Oppenheim, S. M. and Knox, J. M.*) GOVIND NATH *v.* BADRI KOHAR. **16 R.D. 165=13 L.R. 119 (2) (Rev.).**

———*Appeal—Presentation—Vakalatnama—Omission to fill in particulars—Correction out of time—Validity of presentation.*

The counsel who presented an appeal had a power of attorney from the party but his name had not been entered in it nor was it specified in the heading for which of the parties the counsel appeared The power-of-attorney was however signed both by counsel and the party. The defect was pointed out to the counsel and was rectified by him but after the period for filing an appeal had expired.

Held, that the omission regarding proper authorisation was merely accidental, that it did not invalidate his acts and that the appeal should be deemed to have been properly filed on its first presentation. 19 I.C. 674, Not Foll. (*Jai Lal, J.*) MANGAL SINGH *v.* BABU SINGH. **I.R. 1931 Lah. 882=134 I. C. 114=33 P.L.R. 74=A.I.R. 1932 Lah. 134.**

———*Appeal—Printing of record—Omission to print important document—Dismissal of appeal.*

Where in a suit on a contract the appellant omitted to print the document which contained the contract between the parties, *held*, that the appeal might be dismissed on that ground alone. 27 P.L.R 301 and 48 A. 815, Ref. to. (*Broadway and Johnstone, JJ.*) GURDIT SINGH *v.* SECRETARY OF STATE. **I.R. 1931 Lah. 340=130 I.C. 772=A.I.R. 1931 Lah. 347.**

———*Appeal—Propriety—Decree capable of amendment.*

Where the Court can amend the decree, the proper course is to apply for amendment and not to appeal. Omission to appeal does not bar an application for amendment. 25 W.R. 63 and 1927 Rang. 57, Appr. (*Nasim Ali and Henderson, JJ.*) HEMANTA KUMAR GHOSE *v.* RAJENDRA MONDAL. **63 Cal. 181=158 I.C. 436=8 R.C. 186=62 C.L.J. 79=39 C.W.N. 1295=A.I.R. 1935 Cal. 619.**

———*Appeal—Reversal of trial court's judgment—Cogent reasons necessary.*

In the absence of cogent reasons the appellate court will not reverse the judgment of the trial Court. (*Addison and Hilton, JJ.*) KEHAR SINGH *v.* SURJAN SINGH. **I.R. 1932 Lah. 337=137 I.C. 301=33 P.L.R. 41.**

PRACTICE—Appeal.

———*Appeal—Right to—Judgment.*

There can be no appeal against a mere judgment. An appeal is competent if and when a decree is passed. (*Hilton, J.*) FAZAL KARIM *v.* DES RAJ. **35 P.L.R. 471.**

———*Appeal—Right to—Person being party in first Court but not in appeal—Right to prefer second appeal.*

Where one of the parties to a suit is no party to the first appeal it is not competent for the defendants or plaintiffs who are not parties to the appeal in the Court below to file a second appeal. To permit such an appeal would really amount in effect to permitting an appeal against the decree of the trial Judge. (*Banerji and King, JJ.*) RAGHULAL *v.* ARJUN SINGH. **1931 A. L.J. 271=132 I.C. 205=A.I.R. 1931 All. 766 (2).**

———Appeal—Right to—Person not party to action. *See* C. P. CODE, S. 92. **14 Pat. 236.**

———*Appeal—Right to—Test—Form of order or substance.*

When a Judge purports to act under an order which is appealable, an appeal lies, even though he ought to have acted on some other order which is not appealable. No doubt in considering whether an appeal is admissible the Court always looks to the substance rather than the form of the order so as not to deny a party his right of appeal. But it would be very dangerous to deny a party the right of appeal on the ground that only the substance and not the form has to be looked into. (*Jackson and Butler, JJ.*) RAMAN NAMBYAR *v.* RAYIRAM NAMAN. **57 Mad. 777=150 I.C. 98=1934 M.W.N. 412=6 R. M. 692=39 L.W. 738=A.I.R. 1934 Mad. 484=67 M.L.J. 43.**

———*Appeal—Right to—When exists.*

A right of appeal cannot be assumed to exist in every matter coming under the consideration of a Judge ; such right must be given by statute or by some authority equivalent to a statute. (*Wort and James, JJ.*) SHAH ZAHIRUL HAQUE *v.* SYED RASHID AHMAD. **14 Pat. 236=157 I.C. 477=A.I.R. 1935 Pat. 261.**

———*Appeal—Trial Court accepting plea not specifically raised—Interference.*

The plaintiff who were reversioners sued to set aside certain alienations on the ground that the alienors had no title to the property and that the sales were fictitious and without consideration. The trial Court held that the land was not ancestral but decreed the suit on the ground that the alienors were incompetent to effect the transfer. On appeal the District Judge held that the suit should have been thrown out on the simple ground that the land was not ancestral.

Held, that if the District Judge considered that the plaint did not expressly profess to attack the alienations on the ground of incompetency of the so called alienors, then he should have allowed an amendment of the plaint and remanded the suit for re-trial as he had found that the defendants had been taken unawares as to the nature of the suit as found by the trial Judge, specially in view of the fact that the trial Judge understood the suit to be of that description and the plaintiff asserted it to be such. (*Jai Lal, J.*) GHULAM KHAN *v.* AHMAD KHAN. **6 R.L. 397=147 I.C. 491=A.I.R. 1934 Lah. 196 (2).**

———*Appeal—Vakalatnama—Irregularity in execution—Effect.*

An appeal would not be vitiated by the fact that the pleader who filed it had been authorised by his brother on his behalf and not by himself. (*Drake Brockman, S. M. and Holmes, J. M.*) BAL KISHORE SINGH *v.* RAHIMULLAH SHEIKH. **15 L.R. 69 (Rev.)=18 R. D. 56.**

PRACTICE—Appellate Court.

Appearance of party.

———*Appearance of party—Order for—Non service—Issue of warrant of arrest and imprisonment—Legality.*

In a civil suit the question was raised whether plaintiff was the daughter of defendants. On an application by certain other plaintiffs the Court ordered the production of the alleged mother for medical examination. The other defendants were asked to be present to watch the medical examination. The party not having appeared on the dates fixed, the Judge issued warrants of arrest on the alleged father and mother. The process could not be served as the house was locked and the Court thereupon issued warrants of arrest and sent them to the civil prison.

Held, that the procedure adopted was wholly illegal and highhanded. The Court has no power to arrest any person or send him to jail forthwith without any proper trial. (*Sulaiman and Niamatullah, JJ.*) PADARATH TEWARI *v.* DULHIN TAPESHA KUERI. **I. R. 1932 All. 191=136 I.C. 367=1932 A.L.J. 221=A. I. R. 1932 All. 524.**

———*Appearance of party—Party having knowledge—Duty to appear.*

It is the duty of a party who has certain facts relating to his case within his personal knowledge, to appear before the Court at a very early stage of the case as a witness and to give evidence relating to those facts and submit himself to cross-examination by the other side. (*Broadway and Agha Haidar, JJ.*) MAHOMED AHTRAM ULLAH KHAN *v.* DELHI MOTOR AND FURNITURE WORKS. **I. R. 1932 Lah. 616=139 I.C. 712=33 P.L.R. 906=A.I.R. 1933 Lah. 243.**

Appellate Court.

See also (1) APPEAL—PRACTICE.
(2) PRACTICE—SUBSEQUENT EVENTS.

———*Appellate Court—Duty to consider evidence and record independent findings.*

A Court of first appeal, as the final authority on questions of fact, must carefully weigh the evidence and assess it and comes to independent findings of its own. It is not sufficient for it to report the findings of the trial Court. (*Oppenheim, S.M. and Drake Brockman, J.M.*) BANSBAHADUR DASS *v.* MAHDEI. **18 R. D. 661=16 L.R. 71 (Rev.).**

———*Appellate Court—Duty of—Decision on all points raised.*

When several questions are raised by the memorandum of appeal, the Court of Appeal should not ordinarily dispose of the appeal by dealing with one of them, leaving the other questions at issue between the parties undecided. Fragmentary decisions of this character are most inconvenient and tend to delay the administration of justice. (*Sir George Lowndes.*) SETH NANHELAL UMRAO SINGH. **58 I.A. 50=I.R. 1931 P.C. 94=27 N.L.R. 95=33 L W. 449=1931 M.W.N. 281=1931 A.L J. 257=8 O.W.N. 585=130 I.C. 686=33 Bom. L R. 450=53 C.L.J. 187=14 O.L.J. 383=14 N.L.J. 28=35 C.W.N. 381=A.I.R. 1931 P.C. 33=60 M.L. J. 423 (P.C.).**

———*Appellate Court—Findings of trial Judge.*

Where the Assistant Sessions Judge who had the advantage of seeing and hearing the witnesses was satisfied that they were telling the truth and no important discrepancies between their depositions were pointed out on appeal.

Held, the findings of the Assistant Sessions Judge should be accepted. (*Saunders and Luby, JJ.*) IBRAHIM *v.* EMPEROR. **153 I.C. 466=7 R.P. 341=36 Cr.L.J. 348=1935 Cr.C. 208=A.I.R. 1935 Pat. 95.**

PRACTICE—Appellate Court.

———Appellate Court— Fresh evidence— Power of Court to admit—Limit to. *See* C. P. CODE, O. 41, R. 27. **18 R D. 665.**

———Appellate Court—Interference — Admission of inadmissible document for collateral purpose and not for basing main finding—If vitiates judgment. *See* EVIDENCE—IMPROPER ADMISSION OF. **156 I.C. 15 (1) = A I.R. 1935 Lah. 560.**

———Appellate Court—Interference—Appreciation of evidence. *See* APPEAL — PRACTICE — APPELLATE COURT. **38 C.W.N. 438 = A.I.R. 1934 Cal. 520.**

———Appellate Court —Interference—Appreciation of evidence—Credibility of witness—Opinion of trial Judge not to be differed from, without convincing reasons. *See* APPEAL—PRACTICE—APPELLATE COURT. **134 I.C. 321 = A I R. 1931 P C. 265 (P.C).**

——— *Appellate Court—Interference—Appreciation of evidence—Question of fact—When justified.*

In a case where there is a simple question of fact involved, the appellate Court cannot differ from the view taken by the trial Court which has heard and seen the witnesses, unless there is something to show that the trial Court has not weighed the evidence fairly and properly. (*Sulaiman, C. J. and Bennet, J.*) MAHENDRA SINGH *v.* SHANKAR DAYAL SINGH. **8 R A. 525 = 1935 R D 567 = 1935 A.W.R. 1422 = 159 I C. 903 = A.I R. 1936 All. 124.**

———*Appellate Court—Interference—Credibility of witnesses—Opinion of trial Court.*

It is dangerous for an appellate Court to differ from an original Court on the question of the credibility of witnesses and base its opposite decision on mere inference from the statements which the witnesses are recorded to have made which an appellate Court cannot make with such certitude as can the Court which originally heard the witnesses. (*Mackney, J.*) DAW MIN BAW *v.* A.V. P. L. N. CHETTYAR FIRM **155 I.C. 511 = 7 R R. 347 = A.I R. 1935 Rang. 39.**

———*Appellate Court—Interference—Decision of trial Court on question of fact.*

It is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends upon the credit which attaches to one or the other of conflicting witnesses. Nor should his pronouncements with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. (*Raza and Smith, JJ.*) ABDUL BARI KHAN *v* NASIR AHMAD KHAN. **150 I C 330 = 6 R.O. 635 = 10 O.W. N. 201 = A I R. 1933 Oudh 142.**

———Appellate Court—Interference—Discretionary relief—Grant of declaration under S. 42, Specific Relief Act—When to be reversed. *See* SPECIFIC RELIEF ACT, S. 42. **16 Pat.L.T. 236 = A I.R. 1935 Pat. 256.**

———*Appellate Court—Interference—Finding of fact.*

An Appellate Court will not be justified in interfering with the findings of fact arrived at by a trial Court upon the evidence, except for every strong reasons. (*Mya Bu and Baguley, JJ.*) MA HLA KHIN *v* U KHIN MAUNG U. **154 I.C. 535 = 7 R.R. 310 = A.I.R. 1935 Rang. 30.**

———*Appellate Court—Interference—Finding of fact.*

According to well established rules great regard is to be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him On appeal the whole case including the facts is no doubt within the jurisdiction of the appellate Court. But generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has had an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credibility which attaches to one or other of conflicting witnesses. (*Raza and Smith, JJ.*) CHOTEY LAL *v.* MAHOMED AHMAD ALI KHAN. **8 Luck. 315 = 6 I.R (Oudh) 27 = 144 I.C. 983 = 10 O.WN. 173 = A.I.R. 1933 Oudh 128.**

———*Appellate Court—Interference—Finding of fact.*

The finding of the trial Court as to the credibility of the witnesses, whom it had the advantage of seeing in the witness-box, cannot be lightly disturbed. (*Kisch and Baipai, JJ.*) BARKAT ULLAH *v.* NISAR HUSAIN. **1935 A.W R. 1197.**

———*Appellate Court—Interference—Finding of fact.*

It is true that the whole case including the facts is within the jurisdiction of the appellate Court but generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has the opportunity of noting the demeanour, especially in cases where the issue is simple and depends on credit which attaches to one or other set of conflicting witnesses. Nor should his pronouncement with respect to credibility be set aside on a mere calculation of probabilities by a Court of Appeal. Finding as to identity of parties based on alleged similarity affirmed. (*Bisheshwar Nath and Nanavutty, JJ.*) ANAND BAHADUR SINGH *v.* DEPUTY COMMISSIONER, BARABANKI. **I.R. 1933 Oudh 184 = 10 O.W.N. 412 = 143 I.C. 568 = A.I R. 1933 Oudh 242.**

———*Appellate Court—Interference with findings of fact.*

The Courts of appeal should be most reluctant to reverse findings of fact, more especially when the trial Court has had an opportunity of seeing the witnesses and the case requires the expression of opinion as to the credibility of the witnesses called. (*Courtney Terrell, C.J. and Kulwant Sahay, J.*) BALGOBIND JHA *v.* LOKNATH JHA. **6 R P. 483 = 148 I.C. 498 (1) = A.I.R. 1934 Pat. 30.**

———*Appellate Court—Interference—Finding of fact—Rules applicable.*

According to well-established rules, great regard should be paid to the findings of a Judge who has decided matters of fact deposed to by witnesses at the trial before him. On appeal the whole case including the facts are no doubt before the jurisdiction of the appellate Court But generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends upon the credibility which attaches to one or other of conflicting witnesses. (*Raza and Smith, JJ.*) RAJESHAR BALI *v.* HAR KISHEN BALI. **150 I C 346 = 6 R O. 639 = 10 O.W.N. 147 = A.I R. 1933 Oudh 170 (2).**

———*Appellate Court—Interference—Order as to costs—Discretion of Court.*

It is a well-established rule that an appellate Court will not interfere with the lower Court's discretion in the matter of costs unless there is any question of principle involved. (*Varadachariar and Stodart, JJ.*) MUTHIA CHETTIAR *v.* RAMAMOORTHI. **159 I.C 867 = 8 R.M. 574 = 42 L W. 802 = A.I.R. 1935 Mad. 1072 = 69 M.L. J. 841.**

———Appellate Court—Interference—Order as to costs—Power of appellate Court to interfere. *See* COSTS—PRINCIPLES. **158 I.C. 1023 = A.I.R. 1935 Mad. 874.**

———*Appellate Court—Interference—Orders passed during trial—Order relating to substituted service—Legality of, if can be considered.*

PRACTICE—Appellate Court.

On appeal the whole case is before the appellate Court and it is within its powers to examine the legality as well as the propriety of all orders passed in the course of the trial including those relating to service of the defendants, passed by the trial Court. The appellate Court will, of course, be slow to interfere in matters which were within the discretion of the trial Courts, but there is no provision of law which bars its jurisdiction to consider them. In a matter like this, it is not possible to lay down any hard and fast rule as to when and under what circumstances the appellate Court ought to interfere. It is for the Court in each case to determine on its peculiar facts whether substituted service had or had not been properly ordered. (*Tek Chand, J.*) MANGAT RAM NANAK CHAND *v.* RAM RACHHPAL SHIV NATH RAI. **158 I C. 92=A.I.R. 1935 Lah. 169.**

———*Appellate Court—New case—Plea of rescission not raised at any stage of the case—Finding of rescission by appellate Court—Impropriety.*

Certain properties were purchased by *R* in December 1921. One, *M*, alleged that the vendors of *R* had agreed to sell the very properties to him in June 1921. *R*, in his written statement, alleged prior contract in May 1921. The High Court found that the owners had contracted to sell the properties to *R* in May 1921, but this contract was rescinded by mutual consent. Neither in the plaint nor in the whole course of the proceedings was there any statement by *M* of the plea of rescission. No question was asked of *R's* witnesses as to whether the contract in May 1921 had been rescinded by mutual consent. Even in the memorandum of appeal to the High Court there was no indication of any such contention.

Held, that the High Court's judgment could not be supported. (*Lord Salveson.*) RAGHUNANDAN RAM SAHU *v* RAMSUNDER DAS. **137 I C 332=I.R. 1932 P.C. 177=A I.R. 1931 P C. 309 (P.C.).**

———*Appellate Court—Question of fact not raised before—Investigation of.*

Though the appellate Court will be reluctant to investigate facts for the first time in appeal yet there is nothing in law to prevent such facts being investigated when the interests of justice so require. (*Macpherson and Fazl Ali, JJ.*) SHESHAIYER RAJAMANNAR AIYAR *v.* MADAN MOHAN PATNAIK. **11 Pat 513=I.R. 1932 Pat. 259=139 I.C 843=13 Pat L.T. 623=A.I.R. 1932 Pat. 286.**

———*Appellate Court—Question of fact not raised in first Court.*

It is not usual for the appellate Court to investigate an allegation of fact which either was not made before the Court of first instance or which that Court was not invited to examine. (*Wort and Fazl Ali, JJ.*) SRI CHANDRA CHUR DEO *v.* MT. SHYAM KUMARI. **11 Pat. 445=I R 1932 Pat. 229=139 I.C. 397=13 Pat. L. T. 719=A.I.R. 1932 Pat. 261.**

———*Appellate Court—Relief—Obstruction to easement—Lower Court ordering injunction and restoration of* status quo—*Interference.*

Where in a case of obstruction of an easement of light and air into a kitchen the lower Court granted injunction and also directed restoration of the former conditions so that the easement may be enjoyed.

Held, that the discretion of the lower court that injunction and not damages was the proper remedy need not be interfered with. (*Rankin, C.J. and Pearson, J.*) JOTINDRA MOHAN MITTER *v.* PROBODH KUMAR DUTT. **59 Cal. 260=138 I C. 193=I R. 1932 Cal. 434=35 C.W.N. 963=A.I.R. 1932 Cal. 249.**

PRACTICE—Commission.

———*Appellate Court—Relief—Suit premature in inception*

No doubt it is competent to the appellate Court to decree a suit which is premature in its inception but is competent at the date of the appeal. But in exercising this discretion the Court must be guided by one very clear principle, *viz.*, that no injustice should be done to the defendants. (*Beasley, C.J. and King, J.*) DAMODARAN NAIR *v.* ACHUTHAN NAIR. **1935 M W.N. 193=41 L.W. 318=157 I.C. 1040=A.I.R. 1935 Mad. 190=68 M L.J. 648.**

———*Appellate Court—Scrutiny of evidence.*

Per *Buckland, J.*—It is not the duty of an appellate Court by its judgment to scrutinise the evidence with the same elaboration of detail as is to be expected from a Court of first instance. (*Buckland, J.*) SHOBHARANI DATTA *v.* SANDOSH KUMAR BAKSHI. **61 Cal 365=152 I.C. 597=7 R.C. 302=A.I R. 1934 Cal 633.**

Attorney.

———*Attorney—Appearance for limited purpose—Validity.*

There is no warrant either under the Civil Procedure Code, or the High Court Rules or the practice of the Court, for an Attorney of the High Court to file an appearance for a limited purpose only in an ordinary cause under the original civil jurisdiction of the High Court. (*Mirza, J.*) KODOOMAL JETHANAND *v.* HIRANAND VISHINDAS. **154 I C. 159=7 R.B. 285=36 Bom L R. 987=A.I R 1934 Bom. 450.**

———Attorney—Right of party to change—Attorney's rights regarding unpaid costs. *See* LEGAL PRACTITIONER—ATTORNEY. **35 Bom. L R. 298=A.I.R. 1933 Bom. 182.**

Benami transaction.

———Benami *transaction—Right of parties to plead and prove—Intention to act dishonestly.*

There is nothing to prevent a party from alleging that a particular transaction entered into in the name of another was for his own benefit in the absence of any rule of law which precludes him from being heard to say that he intended to act dishonestly. In the case of a *benami* transaction, unless the object of the transaction is fraudulent and succeeds, the parties can prove their actual intentions. (*Remfry, J.*) *In the goods of* TARUNKUMAR GHOSH. **62 Cal. 114=157 I.C. 975 =A I R 1935 Cal. 509.**

Civil and criminal cases.

———Civil and criminal cases—Same point raised—Stay of criminal case. *See* CRIMINAL TRIAL—STAY OF CRIMINAL PROCEEDINGS. **A I R. 1932 Nag. 86.**

———Civil and criminal cases—Stay of criminal case pending decision of civil case—Rule as to. *See* CRIMINAL TRIAL—STAY OF CRIMINAL PROCEEDINGS. **A I.R 1933 Lah. 37.**

Commission.

See also C.P. CODE, O. 26.

———Commission—Evidence taken on—Mode of admission. *See* EVIDENCE—COMMISSION EVIDENCE. **A.I. R. 1933 Cal. 412.**

———*Commission—Issue of—Application made after conclusion of hearing.*

After the hearing of the case had come to an end in the trial Court, when nothing remained but to hear arguments, the defendants applied for the issue of a commission to examine the state of the works for protection and irrigation in the village, but the Judge rejected the application as made too late.

Held, that it could not be said that the discretion of trial Court was wrongly exercised when the application for issue of commission was made at so late a stage. (*Macpherson, James and Varma, JJ.*) RAMBRICH

PRACTICE—Commission.

LAL *v.* SYED MOHAMMAD. **154 I.C. 853=7 R.P. 491 (2)=16 Pat. L.T. 342=A.I.R. 1935 Pat. 56.**

———*Commission—Malabar Courts—Improvement cases.*

The practice of Courts in the Malabar District of issuing several commissions in succession and arriving at valuations regarding the compensation to tenants from the several reports is to be condemned. (*Waller and Krishnan Pandalai, JJ.*) CUNJUNNI NAIR *v.* ACHUTA MENON. **55 Mad. 656=I.R. 1932 Mad. 512=138 I.C. 114=1932 M.W.N. 56=35 L.W. 614 =A.I.R. 1932 Mad. 482=62 M.L.J. 629.**

Contempt proceedings.

———Contempt proceedings—Rule *nisi*—Need for setting out grounds of charge—Insufficient grounds—Duty of Court to discharge rule. *See* CONTEMPT. **35 C.W. N. 1267.**

Conversion.

———Conversion—Appeal barred—Conversion into revision application—Propriety. *See* C. P. CODE, S. 115. **A I.R. 1935 Pat. 177.**

———*Conversion—Appeal barred—Power to treat as cross-objection.*

A time-barred appeal may be converted into a cross-objection while the appeal of the opposite party is pending. (*Hilton, J.*) MIHAN SINGH *v.* TILAK RAM. **15 Lah. 641=6 R.L. 846=150 I.C. 273=36 P.L.R. 67=A.I.R. 1934 Lah. 273.**

———*Conversion—Appeal—Conversion into revision —Appeal against order granting review.*

Where an ordinary appeal does not lie against an order granting review in view of the restrictive provisions of O. 47, R. 7, C. P. Code, the Court has power to treat the petition of appeal as a revision. (*Agha Haidar, J.*) JAN MOHAMMAD *v.* AMOLAK RAM. **161 I.C. 765=8 R.L. 798=37 P.L.R. 387=A.I.R. 1936 Lah. 301.**

———*Conversion—Appeal—Conversion into revision petition and* vice versa.

Court has power to treat an appeal as a petition in revision and to treat a petition in revision as an appeal if necessary for the ends of justice. 48 I C. 779, Foll. (*Rowland, J.*) RAM DASS *v.* BHAGWAT NARAIN SINGH. **I.R. 1931 Pat. 213=131 I.C. 533=12 Pat. L.T. 505=A I.R. 1931 Pat. 97.**

———*Conversion—Appeal—Conversion into revision—Powers of High Court.*

Where an appeal is not maintainable it is open to the High Court to treat the memorandum of appeal as an application for revision and grant relief. (*Guha and Bartley, JJ.*) KHORSHED ALI BEPARI *v.* PROBHAT CHANDRA DAS. **6 I.R. (Cal.) 78 (2)=145 I.C. 183= 37 C.W.N. 190=A.I R. 1933 Cal. 496.**

———*Conversion—Suit—Application under C.P.Code, S.* 47.

Where a party to suit filed in a Small Cause Court objects to an attachment made in execution of the decree taken in the Small Cause Court itself and such objection is dismissed and the objector files a declaratory suit in a Munsif's Court, the suit must be dismissed and the Munsif's Court cannot treat the suit as a petition under S. 47 as such an application can be made only in execution proceedings in the Small Cause Court. (*Kendall, J.*) PADAM PRASAD *v.* SAMBHU DAYAL. **153 I C. 851=7 R A. 641=A.I R. 1934 All. 699.**

———*Conversion—Suit—Lower Court altering character of suit—Interference in revision.*

Where a suit for recovery of a specific sum of money alleged to have been acknowledged to be due to the plaintiff on a particular date after a dissolution of the partnership, has been converted by the lower Court into a suit for dissolution of partnership and for an account, the High Court can interfere in its exercise of its power of revision. (*Mahomed Noor and Saunders, JJ.*) PARAS DAS *v.* PREMCHAND. **159 I.C. 586=8 R.P. 300=A.I.R. 1935 Pat. 456.**

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Costs.

———Costs—Administration suit—Principles. *See* ADMINISTRATION—SUIT FOR GENERAL ADMINISTRATION OF WHOLE ESTATE. **37 Bom. L.R. 57= A.I.R. 1935 Bom. 178.**

———*Costs—Advocate-General appearing in support of bequest in favour of charity under a will—Costs of—Order for—Power of Court.*

Where the Advocate-General appears to support a bequest under a will in favour of a charity, the Court can properly order his costs as between attorney and client to be paid out of the estate. (*Blackwell, J.*) HARI LAL *v.* BAI MANJOOLA. **160 I.C. 194=8 R.B. 249=37 Bom. L R. 901=A.I.R. 1936 Bom. 13.**

———*Costs—Appellant succeeding on point which could have been rectified by lower Court.*

Where an appellant succeeds only on a point which could have been rectified by an application to the lower Court for amendment of the decree but fails in the appeal, he must pay the costs of the respondent. (*Dunkley, J.*) MAUNG BA KYWE *v.* MA NYEIN. **155 I.C. 234=7 R.R. 342=A.I.R. 1935 Rang. 24.**

———*Costs—Apportionment—Two defendants appearing by same solicitor—Party appearing in different capacities.*

Where two defendants appear already as receivers, one of them cannot appear separately in another capacity, such as that of a partner. A person cannot appear in two different capacities by separate solicitors or separate counsel and claim costs in two capacities from the unsuccessful party. In such a case, if one of the parties, so appearing as receivers, wishes to appear personally, he should sever from his co-receiver, and if he does not do so, his appearance separately must be treated as a nullity and the costs incurred by him in his personal capacity must be ignored in the taxation of costs. (*Beaumont, C.J. and Rangnekar, J.*) IBRAHIM F. LALJI *v.* HUSSEINBHOY A. LALJI. **158 I.C. 579=8 R B. 135= 37 Bom. L.R. 49=A.I.R. 1935 Bom. 119.**

———*Costs—Bill of costs—Taxation—Application made six years after disposal of suit—Delay due to gross negligence of party and Counsel—If can be excused.*

The right to recover costs in a proceeding was reserved till after the final disposal of the suit and the bill of costs was not presented within three months, as required by rules, of the disposal of the suit in appeal. The application for taxing of costs was made after six years of the appellate decree, the disgraceful delay being caused principally due to gross negligence on the party of the party to whom costs were awarded, and to that of his Counsel in not getting the costs taxed within a reasonable period.

Held, the rule fixing three months' time for carrying in a bill of costs for taxation is a rule of practice which ought to be enforced. To excuse a departure from the rule in such circumstances as appear in the present case would be to put a premium on gross negligence and delay. To allow Counsel's negligence as an excuse where a client has been content to sit down for six years under his lawyer's deception would be an altogether unreasonable indulgence. (*Beasley, C.J. and Cornish, J.*) JAMAL NOOR MAHOMED SAIT *v.* ANANDARAYA MUDALIAR & CO. **158 I.C. 546=8 R.M. 277=43 L. W. 701=A.I.R. 1935 Mad. 791=69 M.L.J. 483.**

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———*Costs—Bill of costs—Taxation—Taxing officer's discretion—Interference by Court.*

The Court is always averse from interfering with the discretion exercised by the taxing officer, and particularly the Court will not interfere where the only question raised is a question of quantum. (*McNair, J.*) NEMAI CHANDRA DEY *v.* BROJENDRA NATH. **159 I.C. 376 = 8 R.C. 306 = 40 C.W.N. 577 = A.I.R. 1935 Cal. 723.**

———*Costs—Common defence — Order for separate costs.*

Where the defence of two defendants is the same and one adopts the argument of the other, separate costs cannot be awarded. (*Bisheshwar Nath and Nanavutty, JJ.*) ANAND BAHADUR SINGH *v.* DEPUTY COMMISSIONER, BARABANKI. **I.R. 1933 Oudh 184 = 143 I.C. 568 = 10 O.W.N. 412 = A.I.R. 1933 Oudh 242.**

———*Costs—Income-tax reference—Assessee successful—Right to recover deposit.*

All fiscal enactments must be construed in favour of the subject and it cannot be said that if an assessee has not been properly taxed and if he succeeds on a reference in the High Court, yet he must lose a sum of Rs. 100 simply because the Income tax Officer has chosen to make an assessment. (*Mukerji and Bennet, JJ.*) RADHEY LAL BALMAKUND, *In re.* **52 All. 991 = I. R. 1931 All. 298 — 130 I.C. 634 = 1930 A.L.J. 1548 = A.I.R. 1931 All. 23.**

———*Costs—Interlocutory orders—Taxation.*

According to the English practice in the King's Bench Division as inherited from the Common Law Division costs are not taxed till the termination of the action. This practice did not apply to the orders of the Court of Appeal. According to the Indian practice a person to whom costs have been awarded in interlocutory applications has a choice between proceeding with taxation and execution at once and leaving both taxation and execution until after final determination of the suit. (*Lort Williams, J.*) DAULATRAJ *v.* KALICHARAN GHOSH. **59 Cal. 1358 = 142 I.C. 76 = I.R. 1933 Cal. 222 = A.I.R. 1933 Cal. 19.**

———*Costs—Judicial separation—Decree obtained by husband.*

Where a decree of judicial separation is passed against the wife at the instance of the husband, the costs of the wife need not always come out of the husband, and the Court has a discretion in the matter. (*Srivastava and Zia-ul Hasan, JJ.*) AVIS KATHERINE NIBLETT *v.* ROBERT HOWARD NIBLETT. **10 Luck. 627 = 7 R.O. 378 = 153 I.C. 751 = 1935 O.W.N. 103 = A.I.R. 1935 Oudh 133.**

———*Costs—Maintenance claim— Partial success—Proportionate costs.*

In a suit by a Hindu widow claiming maintenance, the fair order as to costs is to allow proportionate costs to the plaintiff upon the relief granted. (*Curgenven and Sundaram Chetty, JJ.*) VENKATARATNAMMA *v.* SEETARATNAM. **I.R. 1932 Mad. 529 = 138 I.C. 237 = 35 L.W. 611 = A.I.R. 1932 Mad. 408.**

———*Costs—Mortgage suit—Appeal—Costs awarded to mortgagee decree-holder—Enforcement.*

No doubt ordinarily costs awarded to a mortgagee decree-holder in a mortgage suit or appeal, in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where costs are awarded to the mortgagee in appeal by some defendants without any mention of other defendants, the defendants-appellants are liable to pay the costs of the appeal personally. (*Sulaiman, C. J. and Bajpai, J.*) AZIZ AHMAD *v.* RIAZ-UL-HASAN. **151 I.C. 294 = 7 R.A. 132 = 4 A.W.R. 1519 = 1934 A.L.J. 446 = A.I.R. 1934 All. 89.**

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———*Costs—Mortgage suit—Nature of claim for costs.*

The costs in a mortgage suit are not like an award of damages but are to be regarded as a liquidated amount capable of ascertainment. (*Rankin, C.J. and Costello, J.*) PRADYUMNAKUMAR MALLIK *v.* GOPENDRA MALLIK. **60 Cal. 19 = I.R. 1933 Cal. 462 = 143 I.C. 679 = A.I.R. 1933 Cal. 251.**

———*Costs—Order as—Dismissal of suit by trustee—Liability of trustee for costs.*

Where the decree dismissing the trustee's suit against strangers directs him to pay the costs of the defendants without stating that the costs should be paid out of the trust's estate, the costs are executable personally against the trustee. (*Bajpai, J.*) HAR KISHAN DAS *v.* PARSHOTAMANAND GIR. **151 I.C. 952 = 7 R.A. 238 = 1934 A.L.J. 225 = 3 A.W.R. 576 = A.I.R. 1934 All. 793.**

———*Costs—Party found to be non-existent—Liability of solicitor filing case.*

Once a solicitor is on record, the opposing party is entitled to look to him, if successful for his costs, if it turned out that the so-called plaintiff is a non-existent person. (Case-law discussed.) (*Beaumont, C.J. and Rangnekar, J.*) DHANRAJGIRJI *v.* PAYNE & CO. **58 Bom. 1 = 6 I.R. (Bom) 101 = 145 I.C. 641 = 35 Bom. L.R. 554 = A.I.R. 1933 Bom. 317.**

———Costs—Pleader's fees—Actual payment necessary. *See* ALLAHABAD HIGH COURT GENERAL RULES, CHAP. 21, R. 1. **54 All. 490 = A.I.R. 1932 All. 337.**

———*Costs—Pleader's fee—Fixing of—Court's power to fix arbitrarily.*

In a suit involving an amount of over Rs. 5,000, which is partly contested and partly non-contested, there is no justification in fixing the pleader's fee arbitrarily at a low figure, such as Rs. 50 only. (*Grille, J.C.*) MAROTRAO *v.* PASUSAO. **162 I.C. 848 = 8 R.N. 288 = 18 N.L.J. 323.**

———*Costs—Pleader's fees—Value fixed for purposes of jurisdiction as basis.*

Where the plaintiff had valued the suit for purposes of jurisdiction at Rs. 21,000 and for purposes of Court-fee at Rs. 3,132,

Held, that in taxing the pleader's fees towards costs the value for purposes of jurisdiction should be taken into account. (*Raza and Smith, JJ.*) RAJESHAR BALI *v.* HAR KISHEN BALI. **150 I.C. 346 = 6 R.O. 639 = 10 O.W.N 147 = A.I.R. 1933 Oudh 170 (2).**

———Costs—Solicitor's bill of costs—Carbon copy—Charge for—Same copy used in successive briefs. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. XXXVI, R. 91, ITEM 13. **62 Cal. 966.**

———*Costs—Stay of execution.*

In the absence of special circumstances, the general rule is that the costs of an application for stay of execution pending an appeal should be costs in the appeal. (*Beaumont, C.J., Rangnekar and Nanavati, JJ.*) YESHWANT KASHINATH *v* GENAJEE VENAJEE & CO. **56 Bom. 276 = I.R. 1932 Bom. 244 = 137 I.C. 375 (1) = 34 Bom.L.R. 230 = A.I.R. 1932 Bom. 127 (F.B.).**

———*Costs—Successful party directed to pay.*

Where an appeal became necessary only because of the successful party's bad drafting of the plaint it is open to the Court to direct the successful party to pay the costs of the other side. (*Addison and Agha Haidar, JJ.*) LADHA RAM *v.* VIRAN BAI **13 Lah. 375 = I.R. 1932 Lah. 583 = 139 I.C. 375 = 33 P.L.R. 424 = A.I.R. 1932 Lah. 452.**

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———*Costs—Suit for defamation—Unsustained plea of justification by successful defendant.*

In a defamation suit it is legitimate to consider the conduct of the defendant right up to the time of the verdict and an unsustained plea of justification is a good ground for depriving a party of his costs though he succeeds on other pleas (*Vivian Bose, A. J. C.*) MAKHANLAL *v.* PANCHAMLAL. **152 I.C. 398=7 R. N. 101=18 N.L J. 27=A I.R. 1934 Nag. 226.**

———Costs—Suit by next friend of minor—Dismissal—Order as to costs—Duty of Court. *See* MINOR—NEXT FRIEND. **59 Bom. 35=36 Bom L.R. 1201=A.I R. 1935 Bom. 112.**

———*Costs—Suit to recover—Maintainability.*

No suit lies for recovery of costs incurred in a former litigation between the parties. (*Broadway and Addison, JJ.*) HAFIZ ABDULLAH *v.* MANGAL SAIN. **13 Lah. 551=I R 1932 Lah. 473=138 I.C. 392=33 P L.R. 234=A.I.R. 1932 Lah. 257.**

———*Costs—Taxation—Fees of junior Counsel—Two thirds scale.*

It is a most undesirable practice for the taxing officer to assess the fees allowed to junior Counsel on the basis of market value of such Counsel. It is much safer that some sort of recognised scale should be adopted by the taxing officers. The most practical rule is the rule one prevalent in English and Irish Courts, namely, to fix the fees of the junior Counsel according to the two-thirds scale. Whether the profession in general adopt that rule or not is immaterial (*Lort Williams, J.*) *In re* GOPALCHANDRA SINGHA. **58 Cal. 505=I R. 1931 Cal. 700=133 I.C. 572—1931 Cr C. 675=A I.R. 1931 Cal. 523.**

———Costs — Taxation—Solicitor's bill of costs—English practice—Applicability — Right to amend or substitute bill—Discretion of Court—Costs—Disallowance of—Grounds for. *See* BOMBAY HIGH COURT RULES (O. S.), R. 559. **37 Bom.L R. 39=A.I.R. 1935 Bom 150.**

———Costs — Travelling expenses of party giving evidence—Power of Court to award as costs. *See* C. P. CODE, O. 16, R. 21. **68 M.L J. 203.**

———*Costs—Two defendants—Judgment not specifically awarding separate costs.*

Where the judgment does not specifically award separate costs to the two defendants, it cannot be taken to mean the award of separate costs to two defendants. The usual practice is to draw up decrees giving separate costs only in those cases where the judgments specifically award such separate costs. (*Dhavle, J.*) JAGDISH PRASAD NARAYAN SINGH *v.* MATHURA PRASAD SINGH. **154 I.C. 618=7 R P. 480=A.I R. 1935 Pat. 41.**

Counter-claim.

———*Counter claim—Plea in mofussil Courts—Maintainability—Suit on lease by lessee—Plea of undue influence and misrepresentation—Maintainability.*

In a suit instituted by a lessee, out of possession, on the basis of a lease executed in his favour by the defendant, the owner of the property the latter pleaded that the deed of lease was obtained from him by undue influence and misrepresentation and that the plaintiff should be non suited.

Held, that there was nothing to prevent a defendant in a mofussil Court from raising a defence of the nature of a counter claim; that the defendant did not want to support his title as he was admittedly the owner of the property; that his plea only amounted to saying that he could not be driven out of possession of the property as he had a better title than the plaintiff, the claim made by the plaintiff being under an instrument which was voidable and which was obtained from him by undue influence and misrepresentation; and that consequently the defendant was not precluded from raising the said plea. (*Rangnekar, J.*) GOPAL BHAURAO *v.* JAGANNATH PANDIT. **59 Bom. 502=159 I C 213=8 R B. 175=37 Bom.L.R. 471=A.I.R. 1935 Bom. 326.**

———*Counter-claim—Whether can be set up in mofussil Courts*

In the Mofussil Court a counter-claim is incompetent and the defendant must enforce any such claim by a separate suit. (*Lord Thankerton.*) CURRIMBHOI & CO., LTD. *v.* CREET. **60 I.A. 297=60 Cal. 980=57 C.L J. 264=1933 A L.J. 611=I R. 1933 P C. 15=141 I C. 209=37 L W. 253=35 Bom L R 223=37 C. W N. 265=1933 M.W.N. 10=A.I R. 1933 P.C. 29=64 M.L J. 103 (P.C.).**

Criminal trial.

———*Criminal trial.*

Every member of the public has a right to set the law in motion by complaint. 7 S.L.R. 77 and 13 Bom 600, Rel. on. (*Wild, J.C. and Milne, A.J.C.*) MAHOMED RAFIQ *v.* EMPEROR. **25 S L R. 9=I R. 1931 Sind 156=134 I C. 1004=33 Cr.L.J. 41=1931 Cr.C. 734=A.I R. 1931 Sind 116.**

Delay.

———*Delay—Effect of—Right to remedies.*

Delay, by itself, is not sufficient to deprive a party of his remedies, if such delay does not amount to waiver, acquiescence or abandonment of his claim or has not created a corresponding right in his opponent on extinguishment of his own. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711=154 I C 479=7 R.C. 459=A.I R 1935 Cal. 39.**

———*Delay—Ignorance of law—Reason for delay—Excuse.*

Per *Sulaiman, J.*—Although ignorance of law is no excuse yet it may explain the reason why objection is taken at a belated stage. (*Sulaiman and Niamatullah, JJ.*) SHEO TAHAL RAM *v.* BINEAK SHUKUL. **53 All 747=136 I C. 353=I R. 1932 All. 177=1931 A.L.J. 653=A I.R. 1930 All. 689.**

———*Delay—Inference.*

A plaintiff who sleeps over his rights cannot expect a law Court to believe his story when he files his plaint more than two decades after the alleged deception practised upon the Court of Wards and claims relief on the ground that the defendant defeated his rights by making some fraudulent representations to the Court of Wards. (*Bisheshwar Nath and Nanavutty, JJ.*) ANAND BAHADUR SINGH *v.* DEPUTY COMMISSIONER, BARABANKI. **I R. 1933 Oudh 184=143 I.C. 568=10 O.W.N. 412=A.I.R. 1933 Oudh 242.**

Duty of Counsel.

———*Duty of Counsel—Framing of issues.*

It is true that is the duty of the Court to frame issues which arise out of the pleadings of the parties, but it is also the duty of Counsel to get the proper issues framed. (*Jai Lal and Skemp, JJ.*) BADRUL ISLAM ALI KHAN *v.* MT. ALI BEGUM **16 Lah. 782=158 I C. 465=8 R.L. 251=A.I.R. 1935 Lah. 251.**

———*Duty of Counsel—Inability to attend—Obligation to return brief.*

It is an unwritten rule of the bar that where two Counsels have been briefed, one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on. **33 Bom. 475,** Ref. (*Blackwell, J.*) ABDULLABHAI

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v. ISABHAI. **141 I.C. 402=I R. 1933 Bom. 81=34 Bom.L.R. 1425=A.I R. 1932 Bom. 634.**

Duty of Court.

———*Duty of Court.*

Court should not hold themselves fettered by any in correct description or by any informality in procedure, which can have no practical influence on the result. 24 Bom. 135, Foll. (*Pollock, A.J.C.*) MT. CHANDRI *v.* HIRALAL. **29 N.L.R. 89=6 I.R. (Nag.) 4=144 I.C. 663=A.I.R. 1933 Nag. 73.**

———*Duty of Court—Appeal—Absence of pleader—Duty of Court to send for him.*

Where there are pleaders in a case it is a salutary practice for the Court to send for them. Especially in appeals where it is not absolutely necessary that the parties should be present in person it is conducive to good work that pleaders are sent for. Appeal restored on this ground. (*Mukerji, J.*) AJAI VERMA *v.* BALDEO PRASAD. **16 R.D. 56.**

———*Duty of Court—Application of correct provisions of law.*

It is the business of the Court to know the law and it is only incumbent upon the litigant to come before the Court and state the facts in respect of which he seeks the remedy. He must ask for such remedies as he requires and there is no obligation on him to inform the Court under which Statute or Rule he is entitled to claim those remedies. If he does not state the Statute or the Rule or if he states a wrong Statute or wrong Rule that in no way relieves the Court of the obligation of itself applying the appropriate rule or section. A proper recitation of the appropriate Section or Rule is not necessary for obtaining a remedy. (*Courtney-Terrell, C.J. and Agarwala, J.*) MT. KABUTRI *v.* RAM PRASHAD SAHU. **155 I.C. 225=7 R.P. 568=15 Pat.L T. 829=A.I R. 1934 Pat 683.**

———*Duty of Court—Application of correct law—Omission to indicate in plaint basis of relief—If fatal.*

The duty of the parties is to state facts in their pleadings and it is for the Court to apply the law. No doubt it is desirable that the basis on which the plaintiff relies for his relief be indicated in the plaint, but if all the facts are stated, the suit cannot fail for its omission. Certain property belonging to *H* devolved on his death on his son *K*. On the death of *K*, his mother came in possession of the property and held it as a life-tenant. She alienated part of the properties and a suit was brought by *K's* sister's son who was the reversioner questioning the alienation of the life estate holder. The claim was based as being the maternal grandson of *H* instead of as heir of *K* being his sister's son. The plaint however definitely stated that the property belonged to *H* and on his death devolved upon *K* and was in possession of *K's* mother as a life-estate holder. It also stated the relationship of plaintiff with *H*, namely, that he was his maternal grandson.

Held, that it clearly followed that the plaintiff was *K's* sister's son and it is the duty of parties to state facts in their pleadings and it is for the Court to apply the correct law and decide whether or not the plaintiff is the heir of *K*. No doubt it is desirable that the basis on which the plaintiff relies for his relief be indicated in the plaint, but if all the facts are stated, the suit cannot fail for its omission. (*Mohamad Noor, J.*) MOTI MAHTON *v.* DEBAL MAHTON. **159 I.C. 966=17 Pat. L.T. 67=8 R.P. 318=A.I.R. 1935 Pat 503.**

———*Duty of Court—Application of law as it is.*

Law is not always a logical Code and, where the law is clear, it is not permissible to attempt to widen or to abridge its scope, simply to bring it into line with what,

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according to one's conception, the law should have been. (*Iqbal Ahmad and Kisch, JJ.*) LALTA PRASAD *v.* GAJADHAR SHUKUL. **55 All. 283=149 I C. 181=6 R.A. 852=1933 A.L.J. 550=A.I.R. 1933 All. 235.**

———*Duty of Court—Application of law as it is.*

A Judge cannot attempt to ease the law in order to avoid unpleasant consequences. (*Baguley and Mackney, JJ.*) BANK OF CHETTINAD *v.* SAW YU BYAN. **160 I.C. 861=8 R.R. 440=A.I R. 1935 Rang. 498.**

———*Duty of Court—Application of law as it is.*

A Court may think that the law should be amended, but while the provision of law exists, it is for the Court to follow it. (*Oppenheim, S.M and Drake Brockman, J.M.*) GOORDIN *v.* CHET RAM. **18 R.D. 647=16 L.R. 65 (Rev.).**

———Duty of Court—Application under wrong provision of law—Duty of Court to look to the essence and apply correct provision of law. *See* BENGAL TENANCY ACT, S. 173. **154 I.C. 721=16 Pat.L.T. 216=A.I.R. 1935 Pat. 210.**

———*Duty of Court—Compromise of dispute to be given effect to.*

When the parties have entered into a valid contract to settle their disputes by means of an agreement or compromise, it would be most equitable and conducive to justice to give effect to such contract. (*Hasan, C. J. and Bisheshwar Nath, J.*) BASAOO *v* JAGANNATH. **6 Luck. 591=I R 1931 Oudh 203=131 I.C. 443=8 O.W.N. 71=14 O.L J. 184=A.I.R. 1931 Oudh 127.**

———*Duty of Court—Decision on plea raised*

When the defendant clearly raises a plea that the right, if any, of one of the plaintiffs cannot be assigned and that the assignment in favour of the other co-plaintiffs is invalid, a proper decision should be given upon that plea. (*Staples, A. J. C.*) NAVNITDAS *v.* MANCHARSA. **30 N.L R. 213=6 R.N. 210=148 I C. 822=A.I.R. 1934 Nag. 78.**

———*Duty of Court—Decision—Suspicion—If sufficient.*

A Court should take care to rest its decision not upon suspicion, but upon legal grounds established by legal testimony. (*Nanavutty and Zia ul-Hasan, JJ.*) RUDRA PARTAB NARAIN SINGH *v.* GAJRAJ KOER. **152 I.C. 977=7 R O. 261=11 O.W.N. 1414=A.I.R. 1935 Oudh 165.**

———*Duty of Court—Decrees to be clear and self-contained.*

Decrees should be clear and self-contained so that there may be no room for interpretation (*Beasley, C J., Ramesam, Reilly, Anantakrishna Aiyar and Sundaram Chetty, JJ.*) PANKUNNI MENON *v.* RAMAN MENON. **54 Mad 955=1931 M W.N. 576=135 I.C. 305=I R. 1932 Mad. 65=34 L W 305=A.I.R. 1931 Mad 650=61 M L J. 596 (F.B.).**

———*Duty of Court—Illegal transaction—Illegality not objected to by defendant—Court nevertheless bound to refuse relief.*

If the illegality of a transaction is brought to the notice of the Court, the Court should not assist the person who invokes its aid even though the defendant has not pleaded the illegality and does not wish to raise the objection. This is based on grounds of public policy (Cases discussed.) (*Madhavan Nair, J.*) NARAYANAMURTHI *v* RAMALINGAM. **6 I R. (Mad.) 107=145 I.C. 599=A.I.R. 1933 Mad. 187.**

———*Duty of Court—Injunction forbidding sale—Duty of other Court to gave effect to order.*

Where a Court issued an injunction to another Court directing that certain property should not be sold.

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Held, that the other Court, even though of superior grade, should comply with the order. (*Broadway, A.J.C.*) MANDAR DAS *v.* ATMA RAM. **I.R 1932 Lah. 575 = 139 I.C. 342 = 33 P.L.R. 667 = A.I.R. 1932 Lah. 515.**

———*Duty of Court—Legal rights—Application of equitable principles—Propriety.*

There is no scope for the application of equitable principles when the question is one of legal rights. (*Patterson, J.*) APTABUDDIN KHAN *v.* JOHAR ALI KAZI. **155 I.C. 75 = 7 R.C. 557 = 60 C.L.J. 213 = A.I.R. 1935 Cal. 201.**

———*Duty of Court—Litigant deliberately concealing material information.*

Where a party institutes a suit for the recovery of money due upon the basis of a promissory note he must produce that promissory note or give a satisfactory explanation as to why he is unable to produce it, and in the absence of such explanation he is not entitled to rely upon a relative and ancillary document such as a receipt which formed part of the same document upon which both the promissory note and the receipt were inscribed. Courts should refuse to exercise their powers in favour of a litigant who is deliberately concealing important material and relevant information. (*Thom and Kisch, JJ.*) MIRZA MURAD BEG *v.* SHIPLEY. **151 I.C. 123 = 7 R.A 91 = A.I.R 1934 All. 837.**

———*Duty of Court—Misquoting of provision of law—If material—Court to award suitable relief.*

The proper duty of a party coming to the Court for relief is to set forth the facts and ask for the remedy which he desires. It is quite immaterial whether in the course of the argument he states that he relies on a particular rule or enactment to give him the remedy, and it is meaningless to state that the application he makes is made "under such and such rule." The mere fact that his application is headed with the number and name of a particular statute or rule is entirely immaterial. It is the duty of the Court to proceed to consult the law and find out if it has power in the circumstances to award the relief or any suitable relief which the applicant may have asked for. The constant use of the words in making an application "under such and such a rule" is much to be deprecated and leads to a great deal of misunderstanding. (Per *Courtney-Terrell, C. J.*) (*Courtney Terrell, C. J. and Agarwala, J.*) BHIMRAJ KANAI LAL *v.* MUNIA SETHANI. **14 Pat. 799 = 156 I.C. 1050 = 8 R.P. 56 = 16 Pat L.T. 280 = A.I.R. 1935 Pat. 243.**

———*Duty of Court—Motives of litigant.*

The motive of a person for having recourse to the law is irrelevant and immaterial. A Court has no concern with the motives of a litigant howsoever malicious they may be. A Court will certainly exercise a discretion and refuse to assist a party where there is an apparent abuse of the process of the Court or a fraud on the Court but previous circumstances unconnected with the actual institution or carrying on of the proceedings cannot be taken into consideration. (*Ferrers, J C. and O'Sullivan, A J. C.*) JETHANAND MURIJMAL *v.* GHANSHAM DAS. **29 S L R. 265 = 8 R.S. 95 = 159 I.C. 745 = A I R. 1935 Sind 53.**

———*Duty of Court—Notice of receipt of record after remand—No obligation on Court.*

There is no obligation on the trial Court to notify to the parties or their pleaders about the receipt of records on remand of the case by the Court of appeal. So where the appellate Court passed an order directing a retrial if the costs were paid by the plaintiff "within two months from the date of the arrival of the record in the Original Court" and providing that it it were not so paid "the suit shall be dismissed," and the plaintiff paid the amount more than two months from the date of the receipt of the record under an *ex parte* order obtained from the trial Court condoning the delay.

Held, (*i*) that it was the duty of the party to enquire —and not that of the Court to notify—about the receipt of the records, that the failure of the Court so to notify was no excuse for the default to pay in time; (*ii*) that on default of the party, the suit stood automatically dismissed by virtue of the order of the appellate Court and the trial Court had no jurisdiction to proceed with the case; (*iii*) that the dismissal was not affected by the fact that the defendant subsequently took the money out of Court and returned it before the hearing. (*Rankin, C.J., and C.C. Ghose, J.*) BANSHI DEWAN *v.* MAJAHAR UDDIN TALUKDAR. **141 I C. 877 = I.R. 1933 Cal. 193 = 36 C.W N 693 = A.I.R. 1933 Cal. 83.**

———*Duty of Court—Order passed without jurisdiction—Power of succeeding Judge to modify.*

Where a Judge for the time being discovers that an order has been passed without jurisdiction either by himself or by his predecessor in office, it is his duty to undo that order so far as it may lie in his power. (*Mukerji and Bennet, JJ.*) INDRANI, *In the matter of.* **53 All. 422 = 130 I.C. 498 = 1931 A.L J. 36 = A I R. 1931 All. 212**

———Duty of Court—Point of jurisdiction not raised by either party. *See* JURISDICTION *infra.* **A.I.R. 1935 Rang. 174.**

———Duty of Court—Protracted examination of witnesses—Irrelevant questions, deprecated. *See* LEGAL PRACTITIONER— CROSS-EXAMINATION OF WITNESSES. **A.I.R. 1932 P C. 69 = 62 M.L.J. 457 (P.C.)**

———*Duty of Court—Rectification of mistake—Refund of money wrongly paid out.*

It is the duty of a Court to rectify its own mistakes, and when it has paid out moneys which were under attachment, it must get them refunded. (*Jackson and Butler, JJ.*) PRIANAN CHETTIAR *v.* LAKSHMANAN CHETTIAR. **156 I C. 525 = 8 R.M 17 = 1934 M.W.N. 727 = 41 L.W. 325 = A.I.R. 1935 Mad. 212 = 68 M.L.J. 265.**

———*Duty of Court—Subordinate Courts—Duty to follow rulings of High Court.*

It is not in good taste or proper for a Subordinate Court to question the soundness of a decision of the High Court to which it is subordinate. Their duty is only to follow the rulings, if they are applicable to the case before them. 1915 M.W.N. 514 (P.C.); 30 B. 226, Ref. (*Anantakrishna Aiyar and Sundaram Chetty, JJ.*) RAGHAVALU NAIDU *v.* THANDAVAROYA PILLAI. **I R. 1931 Mad. 366 = 130 I.C. 190 = 1930 M.W.N. 955 = A.I R. 1931 Mad. 71.**

———*Duty of Court—Subordinate Courts—Duty to record findings on all issues.*

Courts whose decisions are liable to appeal ought to record their finding on all the issues arising in the case so that if on appeal the decision on any one of the points be reversed, there may be no necessity to make a remand. (*Kulwant Sahay and Khaja Mahomed Noor, JJ.*) WALEYATUNNISSA BEGAM *v.* CHALAKHI. **10 Pat. 341 = I.R. 1931 Pat. 260 = 132 I.C. 100 = 12 Pat.L.T. 28 = A.I.R. 1931 Pat. 164.**

———*Duty of Court—Suit—Decision of unnecessary questions.*

Per *Page, C.J.*—It is a wholesome rule of judicial practice that a Court ought to decide only such questions as are necessary for the due determination of the suit before it. (*Page, C. J., Mya Bu, Sen, Ba U and*

PRACTICE—Duty of Court.

Dunkley, JJ.) V. E. R. M. N. C. T. CHETTYAR *v.* A. R. A. R. R. M. CHETTYAR FIRM. **12 Rang. 370 = 151 I.C. 519 = 7 R.R. 79 = A.I.R. 1934 Rang 250 (F.B.).**

———*Duty of Court—Technical irregularity—Waiver of objection—Duty of Court.*

"The Court sits to administer justice according to law and whenever it is possible to do so, the Court ought to refuse to permit mere technicalities to override the substance of the law. The Court should move along the broad stream of law and not allow itself to be enticed into side rivulets where the water is neither deep nor clear and it is easy to run aground." Non compliance with O. 21, R. 22, C. P. Code, exonerated. (*Page, C.J. and Mya Bu, J.*) BIMALANANDAN PRASAD *v.* UNITED REFINERIES, LTD. **11 Rang. 79 = I R 1933 Rang. 57 (2) = 143 I.C. 299 = A.I.R. 1933 Rang. 52.**

———*Duty of Court—Trial Court fixing a date for steps.*

It is undesirable for the Court of first instance to note in the order sheet that a date is fixed for taking steps without specifying what the steps are, which the party is required to take. (*Rowland, J.*) DECRUZE *v.* PITTS. **147 I.C. 179 = 6 R.P. 345 = A.I.R. 1933 Pat. 557.**

Ejectment suit.

———*Ejectment suit—Failure to prove title—Decree on basis of adverse possession—If justified.*

In a suit for ejectment, a plaintiff failing to prove his title is entitled to succeed if he can show that the previous possession of himself and his predecessors, for more than 12 years, had all along the characteristic of adverse possession and was sufficient to extinguish the title of any other owner; but he would not be so entitled to succeed on mere possession for less than 12 years. (*Mukerji and R. C. Mitter, JJ.*) KANAULLA *v.* BEPIN CNANDRA GUPTA. **62 C.L.J. 205.**

———Ejectment suit- Holding containing lands in separate mahals—Single suit—If bad. *See* AGRA TENANCY ACT (1926)—JOINDER OF CLAIMS—EJECTMENT. **18 R.D. 709.**

———Ejectment suit—Parties—Suit to eject trespasser from wakf property—All Mutawallis—If necessary parties. *See* MAHOMEDAN LAW—WAKF. **A.I.R. 1935 Cal. 623.**

———*Ejectment suit — Plaintiff must succeed on strength of his own title.*

In an action for ejectment, the plaintiff must succeed on the strength of his own title and not on the absence of any title in the defendants. (*Nazim Ali and Henderson, JJ.*) JOY GOPAL SINGH *v.* PROBODH CHANDRA. **158 I C. 445 = 8 R.C. 185 = 40 C.W.N. 81 = A.I.R. 1935 Cal. 646.**

———*Ejectment suit—Rent free grantee—Suit by, to eject recorded tenant—Plea of title in third party—If can be gone into.*

In a suit by a rent-free grantee or *bhondadar*, to eject his sub-tenant, the question of title as between the plaintiff and a third party, who is alleged to be sub-tenant of the proprietor, is irrelevant and cannot be gone into, although such third party has been impleaded as a party at his own instance. (*Drake Brockman, S. M. and Knox, J.M.*) RASHID AHMAD *v.* PHUL SHAH. **1935 R.D. 288.**

———Ejectment suit—Suit on basis of defendant being trespasser—Finding of non occupancy tenancy in second appeal—Decree for ejectment on that basis—Propriety. *See* C. P CODE, O. 41, R. 33. **18 R.D. 618.**

———*Ejectment suit—Suit on basis of tenancy—Decree on title—Permissibility.*

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Where a plaintiff, who sues for ejectment of the defendant setting up a case of tenancy on an agreed rent, fails to prove his case, he cannot be allowed a decree for ejectment on the basis of title. If he wishes to sue on title, he must do so by a separate suit, and cannot be allowed a decree in the suit as framed. (*Weston, J.C.*) UMRAO *v.* MAHADEVI. **1935 A.M.L. J. 4.**

English law.

———*English Law—Reference for construction of Indian Code—Permissibility.*

Where the Law in India is codified, it is not open to the Courts in India to ignore the enacted law and follow the English Law, simply because in certain cases the enforcement of law might create a hard case. (*Mears, C.J., Mukerji and Young, JJ.*) NAZIR KHAN *v* RAM MOHAN. **53 All. 114 = I R. 1931 All 627 = 133 I.C. 307 = 1931 A.L J. 64 = A.I R. 1931 All. 183 (F B.).**

Equitable set off.

———*Equitable set off—Right to claim apart from C P. Code.*

An equitable set-off can be claimed independently of the specific provisions of the C P. Code. **27 All. 145,** Foll. (*Sulaiman and Kendall, JJ.*) RAM DAS *v.* DWARKA DAS. **I R. 1931 All 91 = 128 I.C. 763 = A I.R. 1930 All. 875.**

Equity

———*Equity—Applicability—Confiscation of private property—Principles.*

In the absence of any positive law or established local usage, it is not permissible to confiscate or destroy private property either wholly or partially on general principles of equity and justice. (*Nazim Ali and Henderson, JJ.*) PROKASH CHANDRA SIL *v* ABDUL JABBAR. **159 I.C. 756 = 8 R C. 345 = 40 C.W.N. 345 = A I R. 1935 Cal 711.**

———*Equity—Principles of equity as applied in Courts of England should be applied in absence of law laying down different procedure.*

The principles of equity, as applied to the practice of the Courts of England should be observed in the Court of this country in cases in which there is no law extant which lays down a different procedure. **23** Bom. 653, 11 Bom. 551 (P.C.) and 1932 A.I R. P. C. 158, Ref. (*Jack and Khundker, JJ.*) NABAKUMAR SINGH *v.* FATEH SINGH NAHAR. **61 Cal. 986 = 38 C.W.N. 1054 = 60 C.L J 14 = 154 I. C. 108 = 7 R.C. 432 = A. I R. 1935 Cal. 33.**

———*Equity—Who can invoke.*

If equity is to be invoked, it should be only in favour of persons shown to have acted disinterestedly and in good faith with no intention of securing any unfair advantage to themselves. (*Agarwala and Saunders, JJ.*) BABAN MISRA *v.* BISHANATH PANDE. **155 I.C. 870—7 R.P. 631 = A.I.R. 1934 Pat. 681.**

———*Equity—Who can invoke — Partition deed—Clause that "one party shall not purchase holdings allotted to another"—Breach—Suit on basis of clause—Maintainability.*

A partition between *G* and *K* of joint property was effected by a registered partition deed. There was a clause in the partition deed to the effect that if one party purchased a raiyati or under-raiyati holding allotted to the other, either in his own name or benami, such other person in whose share the holding came could treat the purchase as void. Both the parties had violated this term. *K* brought a suit to declare such purchase by *G* to be void by praying for possession of the holding. *G* contended that as *K* also had violated the term in the partition deed he could not claim any relief as "one who seeks equity must come with clean hands".

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Held, that if *K* had purchased raiyati or under-raiyati holding in contravention of the terms of the partition deed *G* could sue him if in time, but that was no defence to the action of *K* claiming under a right derived from the partition deed. (*R. C. Mitter, J.*) JADUNATH GUHA ROY *v.* KASISWAR GUHA ROY. **160 I.C. 250 = 8 R.C. 419 = A.I.R. 1935 Cal. 779.**

Evidence.

———Evidence — Commission evidence — Mode of admission. *See* EVIDENCE—COMMISSION EVIDENCE. **A.I.R. 1933 Cal. 412.**

———*Evidence—Court stopping further evidence—Appeal—Reversal—Opportunity to adduce evidence.*

Where a party is prepared to give further evidence as to his case but refrains from doing so owing to an expression of opinion by the Judge that such evidence was not necessary, the Court of appeal should not reverse the decision except on giving the party another opportunity to let in the further evidence.

Semble:— Judges ought not to stop the parties from calling further evidence unless the evidence is manifestly unnecessary. (*Beaumont, C.J.*) YELLAPPA *v.* FAKIRA. **6 I.R. (Bom.) 10 = 144 I.C. 754 = 35 Bom L R. 578 = A.I.R. 1933 Bom 303.**

———Evidence—*De bene esse* examination. *See* EVIDENCE. **34 Bom.L R. 611 = A.I.R. 1932 Bom. 405.**

———*Evidence—Documents—Affixing seal of Court—Procedure.*

There are two stages relating to documents. One is the stage when all the documents on which the parties rely are filed in Court. The next stage is when the documents are proved and formally tendered in evidence. It is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved, then the seal of the Court is put on them giving certain details laid down by law, otherwise the documents are returned to the party, who produced them with an endorsement thereon to that effect. The practice of putting the seal on the documents immediately on their production and thereby exhibiting them prevailed in this province previously but has been stopped under the orders of this Court. (*Jai Lal, J.*) BALDEO SAHAI *v.* RAM CHANDER. **13 Lah. 126 = I.R. 1931 Lah. 593 = 132 I.C. 481 = 32 P L R 482 = A.I.R. 1931 Lah. 546.**

———*Evidence — Documentary evidence — Mode of admission.*

Where a document is used to contradict a witness the statement by which the contradiction is sought to be proved must be put to the witness (*Wort, J.*) NATHU SINGH *v.* ISHAR DAYAL. **147 I.C. 1190 = 6 R.P. 405 = A.I.R. 1933 Pat. 702.**

———*Evidence—Examination of witness—Defendant as plaintiff's witness—Procedure.*

If a party appear as a witness on behalf of the opposing party the Court should before proceeding to record his statement, question him or his Counsel as to whether he does not propose to appear as his own witness. If that party then declares that he does not propose to appear as his own witness, the Court should point out to the party producing him that ordinarily speaking the matter should be left as it is and the Court be left to draw any adverse inference which may justifiably be drawn from the refusal of the party to appear in the witness box and subject himself to cross-examination. If however the party insists on examining the opposite party as his own witness, the Court should be careful not to allow him to cross examine his own witness unless he is declared hostile. (*Dalip Singh, J.*) PURAN SING RELU SING *v.* MATHRA DAS. **6 R.L. 628 = 148 I.C. 1040 = 35 P.L.R. 28 = A.I.R. 1934 Lah. 126.**

PRACTICE—Execution.

———Evidence—Matrimonial suits—Evidence on affidavit—Propriety of taking. *See* C. P. CODE, O. 19, R. 1. **62 Cal. 541.**

———*Evidence—Onus of proof—Importance of when evidence is fully adduced.*

The question on whom the initial onus lies is of no importance after the parties have had full opportunities of placing before the Court all their evidence in support of their respective contentions. (*Guha and Bartley, JJ.*) SHAMSUDDIN AHAMMED *v.* SURESH CHANDRA DEY. **160 I.C. 691 = 8 R C. 446 = 39 C.W N. 1270 = 61 C.L. J. 369 = A.I.R. 1936 Cal. 22.**

———*Evidence—Party knowing facts—Duty to give evidence—Failure—Effect.*

It is the bounden duty of a party who personally knows all the circumstances of the case to give evidence in the suit and be subjected to cross examination; and his non-appearance as a witness is the strongest point going to discredit the truth of his case. (*Srivastava and Smith, JJ.*) SHAH MAHOMED KHAN *v.* AHMAD ALI KHAN. **153 I.C. 987 = 7 R O. 417 = 11 O.W.N. 880 = A.I.R 1935 Oudh 170.**

———*Evidence—Party on whom the onus lies must produce all available necessary evidence.*

Where the burden of proving a particular fact lies upon a person, it is his duty before he closes his evidence to produce all the evidence which he thinks it to be necessary to produce and which is available. (*Sulaiman, C.J., Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **149 I.C. 781 = 6 R A. 962 = 56 All. 766 = 3 A.W R. 529 = 1934 A.L.J. 318 = A.I.R. 1934 All. 406 (F.B.).**

———*Evidence—Record of evidence of plaintiff after defendant's evidence.*

In a suit the question was whether certain letters written by the defendant were acknowledgments. The defendant admitted that they were written by him but professed ignorance as to whether they referred to the amount in dispute. Upon this the plaintiff wanted to give evidence to explain these letters. But the trial Court refused to allow him to do so.

Held, that the trial Court should have recorded the evidence and then drawn any adverse inference, if it thought fit to do so, from the circumstances in which the evidence was given and that in refusing to record evidence which was material for the decision of the case, the trial Court had acted illegally. (*Bhide and Din Mahomed, JJ.*) NIHALU RAM CHELA RAM *v.* RADHU RAM HUKMI RAM. **16 Lah. 258 = 155 I.C. 1074 = 7 R.L. 833 = 37 P.L.R 478 = A.I.R. 1934 Lah. 835.**

———*Evidence—Right to engage Counsel for examination.*

If a party is entitled to take part in or to conduct an examination, the ordinary rule must prevail that he is entitled to do so with the help of a Counsel. There is no authority for holding that the assistance of Council is barred for an inquiry under S. 195, Companies Act. (*Jai Lal, J.*) HARIBANS PRASAD *v.* NATIONAL SUGAR MILLS, LTD., DELHI. **I.R. 1931 Lah. 279 = 130 I.C. 407 = A.I.R. 1931 Lah. 8.**

Execution.

———*Execution—Procedure—"Striking off" execution for purposes of quarterly returns—Propriety of.*

It is improper for a Court to "strike off" or "dismiss for the present" an execution case which cannot be proceeded with because of an injunction. Though such an order passed for the quarterly returns improves the list of the Court passing it, it causes a good deal of

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difficulty to the decree holder. Such an order is one for which there is no warrant in law. (*Henderson and R. C. Mitter, JJ.*) KRISTO KAMINI DEBI *v.* GIRISH CHANDRA MONDAL. **63 Cal. 57 = 162 I.C. 654 = 8 R. C. 628 = 39 C.W.N. 1030 = A.I.R. 1936 Cal. 239.**

———Execution —Refund of poundage —Execution sale—Setting aside. *See* EXECUTION—SALE—SETTING ASIDE. **67 M.L.J. 99.**

———Execution—Sale by sheriff—Deduction of arrears of municipal taxes out of the proceeds of sale—Legality of. *See* CALCUTTA HIGH COURT—ORIGINAL SIDE. **40 C.W.N. 41.**

Expert evidence.

———*Expert evidence—No application by parties for expert witness.*

Whether an expert, in handwriting is examined or not generally depends on whether the parties apply to have one examined, and in cases where there is no such application it cannot be said that the Court's procedure was wrong in not invoking the services of an expert. (*Rowland, J.*) DEODUTT MISSIR *v.* BENOD BEHARI. **16 Pat.L.T. 844 = 158 I.C. 155 = 8 R.P. 177 = A.I.R. 1935 Pat. 482.**

Fraud.

———Fraud. *See also* PLEADINGS.

———*Fraud.*

If a person charges another with fraud or misrepresentation, it is incumbent on him to substantiate his allegations by making a statement on oath and by giving the other party an opportunity of cross-examining him. (*Shadi Lal, C.J. and Abdul Rashid, J.*) PUNJAB NATIONAL BANK, LTD., LAHORE *v.* ARORA. **149 I.C. 1124 = 6 R.L. 807 = A.I.R. 1933 Lah. 1024.**

———*Fraud.*

A party is not entitled to succeed on any other ground of fraud than that pleaded by it. (*Tek Chand and Abdul Rashid, JJ.*) MAHOMED BAKHSH *v.* RAWALPINDI CLUB, LTD. **A.I.R. 1935 Lah. 222.**

———Fraud—Fraud in service of notice—Misrepresentation about the nature of proceedings —How invalidates. *See* AGRA TENANCY ACT (1926), SS. 99 AND 230. **A.I.R. 1935 All. 499.**

———Fraud—Plea of —Precision necessary. *See* FRAUD. **10 Mys.L.J. 151.**

———*Fraud—Plea of—Proof—Bare assertion—If enough.*

A bare assertion by a party is not sufficient to prove that he or she was the victim of fraud. (*Agarwala and Saunders, JJ.*) RAJIB NAIN LAL *v.* MT. BINDESHWARI DAI. **15 Pat.L.T. 596.**

Handwriting.

———*Handwriting—Disputed handwriting—Duty of Court in regard to—Procedure as to proof—Judge himself doing the work of handwriting expert—Propriety—No plea of forgery—Court comparing signatures for finding as to forgery—Desirability.*

A Judge should not take upon himself the duties of handwriting expert or an expert of disputed documents, but should form his own judgment as the genuineness or otherwise of a document after an intelligent perusal and appreciation of the evidence adduced by the parties, such evidence being subjected to cross-examination and other checks provided by law to enable the Court to assess the evidence at its proper value. If a Judge should, however, take it entirely on himself to examine a document and form an opinion as to its genuineness in the privacy of his chamber, he puts the party against whom he decides at a considerable disadvantage, as he is deprived of his right of cross-examination. And when there is nothing on the record to suggest that the signature in a document is alleged by any party to be a forgery, it is all the more undesirable for a judge to find whether there has been any forgery in a case. (*Agha Haidar, J.*) BARKAT ALI *v.* KARTAR SINGH. **156 I.C. 253 = 7 R.L. 883 = A.I.R. 1935 Lah. 555.**

PRACTICE—High Court.

High Court.

———*High Court—Bench decision—Interference by another Bench.*

A Bench of the High Court cannot interfere in revision with the correctness of a decision based upon a Bench decision of the same High Court. (*Curgenven and Pakenham Walsh, JJ.*) RARICHAN *v.* KUNHAMU. **57 Mad. 808 = 150 I.C. 113 = 6 R.M. 693 = 39 L.W. 639 = A.I.R. 1934 Mad. 392 = 67 M.L.J. 762.**

———*High Court—Calcutta High Court Original side—Rules of C. P. Code—If can be abrogated by practice—Applicability to original side.*

O. 11, R. 21 of C. P. Code is part of the rules of the High Court, unless the Court has made a rule of itself expressly or by implication abrogating it. In the absence of any such rule, an order under O. 11, R. 21 can be enforced against a minor, in a matter arising on the original side. A practice of the Court cannot be allowed to abrogate the rules applicable to the Court. (*Remfry, J.*) MOHINI MOHAN SHAHA *v.* NIRMAL CHAND BURAL. **39 C.W.N. 1029.**

———*High Court—Calcutta High Court (Original Side Rules)—Rule making power—Applicability of C. P. Code*, 1908.

The High Court has the power to make rules inconsistent, if that be necessary with the rules in the second schedule, C. P. Code. But until it does so, the orders and rules of the C. P. Code apply, to the Original Side. Any 'practice' of the Original Side inconsistent with the Code which applies is contrary to law. Where a rule of the Code owing to the operation of the rules framed by the High Court cannot be applied exactly, it must be applied as reasonably as possible; where it can be applied strictly it must be so applied. (*Remfry, J.*) ASHUTOSH BASU *v.* SUDHANGSHUBHUSHAN MUKHERJI. **58 Cal. 510 = I.R. 1931 Cal. 715 = 133 I.C. 587 = A.I.R. 1931 Cal. 688.**

———*High Court—Duty to interpret and not to make law.*

The function of the Judges of High Court is to interpret the law and not to make it *jus dicere* and not *jus dara*. (*Broadway and Tek Chand JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367 = I.R. 1931 Lah. 291 = 130 I.C. 419 = 31 P.L.R. 842 = A.I.R. 1930 Lah. 1034.**

———*High Court—Full Bench—Reference to—Certain question decided in order of—That question no longer open.*

Certain questions in an appeal was fully argued at the time of hearing the appeal and it was decided in the order of reference to the Full Bench on certain other questions, and was not referred to the Full Bench for decision,

Held, that the question decided in the reference order was no longer open to decision. (*Wazir Hasan, C.J. and Smith, J.*) KAMTA SINGH *v.* RUDRA PRATAP SINGH. **6 R.O. 305 = 147 I.C. 800 = 10 O.W.N. 1249 = A.I.R. 1934 Oudh 24.**

———*High Court—Full Bench—Ruling of—Division Bench doubting—Procedure.*

Per *Beasley, C.J., and Reilly, J.*—When a Division Bench doubts the correctness of the ruling of a Full Bench the proper procedure is to refer the matter to the Chief Justice and it is for him to consider whether the question should be considered by a larger Bench. It is

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not open to the Division Bench itself to make the reference. (*Beasley, C.J., Ramesam, Reilly, Anantakrishna Ayyar and Sundaram Chetty, JJ.*) RAJA OF MANDASA *v.* JAGANNAYAKULU. **55 Mad. 883=I.R. 1932 Mad. 859=140 I C 331=1932 M.W.N. 350=36 L.W. 292 =A.I.R. 1932 Mad. 612=63 M.L.J. 450 (F.B.).**

———*High Court—Function.*

The function of the High Court is '*jus dicere*' and not '*jus dara*'. (*Rupchand, A.J.C.*) KALUMAL TOLARAM *v.* AHMED NUR MAHOMED. **25 S.L.R. 405=I R. 1931 Sind 117=134 I.C. 373=A.I.R. 1931 Sind 107.**

———High Court—Law applicable—Madras High Court—Ordinary Original Civil Jurisdiction—English Law. *See* ENGLISH LAW. **55 Mad. 727=A.I.R 1932 Mad. 445=62 M.L.J. 608.**

———*High Court—Opinions on all issues.*

It is the duty of the High Court Judges to pronounce their opinions on all important issues in cases before them. 10 M.I.A. 476 (P.C), Ref. (*Mitter and Patterson, JJ.*) SOURISH CHANDRA ROY BAHADUR *v.* SAROJ RANJAN SINGHA. **150 I.C. 1019=7 R.C. 53 =38 C.W.N. 707=60 C.L.J. 353=A.I.R. 1934 Cal. 571**

———*High Court—Power of expunging unnecessary findings.*

A Subordinate Judge held that he had no jurisdiction to entertain the suit but gave certain findings on the merits of the dispute. In appeal it was prayed that these findings be expunged from the judgment or at least declared to be *obiter dicta* not binding on parties.

Held, that there was no provision under which on an appeal those findings could be expunged but that the High Court could merely declare that those findings were not binding on the parties having been made by a Court which had no jurisdiction to entertain the suit. (*Jai Lal and Abdul Rashid, JJ.*) ZAFAR ALI SHAH *v.* AMIR SHAH. **I.R. 1933 Lah. 519=144 I.C. 620= A.I.R 1933 Lah. 678 (2).**

———*High Court—Power of—Injunction order against person not within its jurisdiction.*

The order of one Indian Court may be effective against a person within the jurisdiction of another Indian Court. Injunction order issued by Calcutta High Court against person seeking to institute proceedings in the Court at Agra (*Lort Williams, J.*) A. MILTON & CO. *v.* OJHA AUTOMOBILE ENGINEERING COMPANY **57 Cal 1280=I R. 1931 Cal. 380=130 I.C. 252=A.I.R. 1931 Cal. 279.**

———*High Court—Punjab High Court—Rules—Criminal case—Right of counsel to take copies from records—Need for amendment of rules*

According to the rules which are in force in the Punjab High Court a Counsel appearing for petitioner, or an appellant in a criminal case, even while his client is in jail, is not allowed to make copies even for the limited purpose of arguing his appeal, unless he applies for certified copies. Also, copying of the document *in extenso* during the inspection of record is not allowed, but only taking of short notes of the documents is permitted. Need for amendment of rules on the lines of the Allahabad High Court rules indicated in view of the prohibitive cost of obtaining copies. (*Agha Haidar, J.*) UMRA *v.* EMPEROR. **I.R 1931 Lah 133=129 I.C. 197= 32 Cr L J 258=32 P.L R. 104=1930 Cr.C. 1185= A.I.R. 1930 Lah 1024.**

———*High Court—Selection of Judges—Right of litigant to object.*

The belief that a litigant has got a right to submit that his case may not be heard by a particular Bench is

PRACTICE—Inconsistent pleas.

unwarranted. No litigant is entitled to have any say in the selection of the Judges who are to constitute any Bench. (*Broadway, C.J , Coldstream and Monroe, JJ.*) SHAM LAL. *In the matter of.* **I.R. 1932 Lah. 543= 138 I. C. 878=33 Cr. L J. 675=33 P.L.R. 785= 1932 Cr.C. 679=A.I R 1932 Lah. 502 (F.B.).**

———High Court—Suit to be tried by Sub ordinate or High Court itself—Inherent powers of transfer. *See* C.P. CODE, SS. 22 AND 23. **1933 A.L.J. 1507.**

Inconsistent pleas.

See also PLEADINGS.

———*Inconsistent pleas—Claim to property as "kanwin" property failing—Subsequent claim based on interest in very property bought by his wife during marriage—Permissibility.*

One distinct cause of action cannot be substituted for another. Where therefore a Burmese husband claims a declaration based on the assertion that the land was "*kanwin*" property but fails, he will not be allowed to substitute for it a claim based on his interest in that property as bought by his wife during marriage; for the two claims are entirely different. 1922 P.C. 249, Applied. (*Mackay, J.*). MAUNG KYAW KIN *v.* L.R. M. FIRM. **160 I.C. 592=8 R R. 409=A.I R. 1935 Rang 496.**

———Inconsistent pleas—Party breaking provision of law—S. 17 of Presidency Towns Insolvency Act—Right to set up same provision to prevent Court from interfering. *See* PRESIDENCY TOWNS INSOLVENCY ACT, (1909), S. 17. **A.I.R. 1934 All. 1011.**

———*Inconsistent pleas—Permissibility.*

As between the same litigants one party cannot defeat the claim of the other by a plea negativing a contention advanced by him successfully in a former suit. A party who has obtained an order of the Court and has succeeded under it cannot after he has enjoyed a benefit under that order say that it was valid for one purpose and invalid for another. (*Ferrers, J. C. and Rupchand, A. J.C.*) SALAMATMAL *v.* MT. NURKHATUN. **I.R. 1933 Sind 166=144 I C. 50—A I.R. 1933 Sind 119.**

———*Inconsistent pleas—Permissibility.*

Litigants cannot be allowed to blow hot and cold. Hence when a person who got execution Court to hold that a certain decree was a declaratory one cannot subsequently take the plea that the decree is one for possession and is capable of execution. (*Addison and Sale, JJ.*) THANA RAM *v.* HIMTU RAM. **157 I.C. 816= A.I R. 1935 Lah. 96.**

———*Inconsistent pleas—Permissibility.*

Where in a suit to enforce a charge the Court refused the plaintiff's application for a personal decree and on appeal by the plaintiff, the defendants raised a preliminary objection that the appeal had then become infructuous by reason of the sale after which the claim was made for a personal decree having been set aside by the High Court, and the Court definitely said that by reason of subsequent events the parties had been relegated to the position which they occupied immediately after the final decree was passed and then dismissed the appeal, on a subsequent application by the plaintiff for a personal decree under O. 34, R. 6, C. P. Code, after a fresh sale had been held, the defendants could not be permitted to take up a contrary position on general principles of law and contend that the application was barred by *res judicata* owing to the dismissal of the plaintiff's appeal, and if anything had been decided between the parties to the appeal it was that the plaintiff had obtained a fresh right to apply. (*Kisch and Bajpai, JJ.*) BABU RAM *v.* INAM ULLAH. **157 I C. 533=57 All. 797=8 R A. 205=1935 A.L.J. 279=1935 A.W.R. 344=A.I.R. 1935 All. 411.**

PRACTICE—Inconsistent pleas.

———Inconsistent pleas—Plea of ownership and easement in alternative—Permissibility of. *See* EASEMENTS ACT (1882), S. 15. **29 N.L.R. 330 = A.I.R. 1933 Nag. 257.**

———*Inconsistent pleas—Suit based on possession and subsequent dispossession—Plaintiffs found to have never been in possession—Relief on that basis—Permissibility.*

The plaintiffs, having set up in the lower Court a case of possession after the widow's death and subsequent dispossession to get over the special period of limitation prescribed by Sch. III, Art. 3 of the Bengal Tenancy Act cannot turn round on appeal and take their stand on the finding of the lower Courts that they were never in possession after the widow's death. (*Patterson, J.*) NANDA LAL SAHA *v.* SAILESH NATH BISHI. **151 I. C. 630 = 7 R.C. 143 = 38 C.W.N. 539 = A.I.R. 1934 Cal. 617.**

Injunction.

———Injunction—Power of High Court—Injunction order against person not within its jurisdiction. *See* PRACTICE—HIGH COURT. **57 Cal. 1280 = A.I.R. 1931 Cal. 279.**

Insolvency.

———*Insolvency—Bombay High Court—Notice of motion by creditor for annulment—Order by Judge adjourning—Direction that debtor is to apply for discharge within a month and in default—Adjudication to stand annulled—Failure to apply for discharge—Order of Chief Clerk annulling adjudication—Validity.*

After certain dividends had been declared in insolvency, a creditor took out a notice of motion before the insolvency Judge for an order that an adjudication order be annulled in the ground that the debtor had failed to apply for his discharge within the prescribed time. The Judge on that motion passed an order adjourning the notice of motion for a month and directing that if the insolvent in the meanwhile failed to apply for his discharge, the adjudication order would stand annulled. The insolvent did not apply within that time and on expiry of the period the Chief Clerk in Insolvecy issued a certificate to the effect that the insolvent had not till then filed his application for discharge and that the order of adjudication was annulled and also that the notice of motion was made absolute.

Held, the Chief Clerk had no jurisdiction to make the order in question, and that the notice of motion could only be made absolute by the Court. (*Beaumont, C.J. and Rangnekar, J.*) SIDICK HAJI HUSEIN *v.* OFFICIAL ASSIGNEE OF BOMBAY. **59 Bom. 600 = 157 I.C. 930 = 8 R.B. 90 = 37 Bom.L.R 449 = A.I.R. 1935 Bom. 310.**

———*Insolvency—Calcutta High Court—Original Side—Order of Registrar in Insolvency—Appeal to Court—Procedure for—Notice of motion.*

In the absence of any rule providing for affidavits in support of appeals, affidavits in opposition and in answer, the better procedure in the case of appeals from orders passed by the Registrar in Insolvency, would be that the appeals should be on notice of motion supported by an affidavit setting out the grounds on which the applicant contends that the order appealed from is incorrect. (*Mc Nair, J.*) *In re* SATISH CHANDRA ROY. **39 C.W. N. 1227.**

Inspection of documents.

———*Inspection of documents—Place of—Guiding principle—Balance of convenience.*

In deciding a question as to the place where the inspection of documents is to be given, *i.e.*, whether it is to be at the place of suing or at the place where the documents are, the Court should be guided by the balance of convenience. (*McNair, J.*) INDRACHAND KEJRIWAL *v.* BASROPAN SHAW. **164 I.C. 791 = 39 C.W.N. 667.**

———*Inspection of documents—Privilege—State documents—South Australian Rules of Court, O. 31, R. 14 (2).*

Order 31, Rule 14 (2), South Australian Rules of Court, which is in the same form as O. 31, R. 19-A (2) of the Rules of the English Supreme Court, is to the effect that where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a Judge to inspect the document for the purpose of deciding as to the validity of the claim and there is no reason why the privilege relating to state papers should be excluded from the connotation of the word as there used. *Ehrmann* v. *Ehrmann*, (1896) 2 Ch. 826 and *Asiatic Petroleum Co., Ltd.* v. *Anglo-Persian Oil Co*, (1916) 1 K. B. 822, Ref. (*Lord Blanesburgh.*) HENRY GREER ROBINSON *v.* STATE OF SOUTH AUSTRALIA. **35 C.W.N. 1121 = 34 L.W. 575 = 1931 A.C. 704 = 135 I.C. 625 = I R 1932 P C. 17 = A.I.R. 1931 P.C. 254 = 61 M L J. 943 (P.C.).**

Interlocutory orders.

———*Interlocutory orders—Power of single judge—Mysore Chief Court.*

It is the practice in the Mysore Chief Court for single Judges to pass orders regarding the granting of temporary injunctions, appointment of receivers, attachment before judgment and other interlocutory orders of a similar nature. (*Mahadevayya, O.C.J. and Shankaranarayana Rao, J*) VENKATESIAH *v.* GOVERNMENT OF MYSORE. **11 Mys.L J 271.**

———Interlocutory order by consent—Variation of. *See* COMPROMISE—CONSENT ORDER. **56 Bom. 231.**

Issues.

See also C. P. CODE, O, 14.

———*Issues—Amendment by Court in the course of judgment—Propriety.*

It is not proper for a Court to virtually alter an issue in the course of the judgment. To do so may entirely alter the complexion of the case and prejudice the side who would presumably lead evidence on the point in issue had he known that the issue was in that form. (*Stone and Pakenham Walsh, JJ*) MURUGAPPA CHETTY *v.* RAMANATHAN CHETTY. **157 I C. 274 = 8 R.M. 133 = 1935 M.W.N. 559 = 41 L.W. 536 = A.I.R. 1935 Mad. 734.**

———*Practice—Issues—Duty of Court—Precise and definite issues.*

It is the duty of the Court to frame precise and definite issues. (*Oppenheim, S.M. and Knox, J.M.*) RAM PHAL *v.* BHYA KESHO DAT RAM PANDE. **16 R.D. 206 = 13 L R. 90 (Rev.).**

———*Issues—Finding on all—Duty of Subordinate Court.*

As a general rule the Subordinate Judge ought not to dismiss an action on a preliminary issue but ought to try the preliminary issue and then try out the other issues as well except in cases where the record is a very heavy one and the trial of the other issues would take a long time. (*Beaumont, C.J. and Murphy, J.*) BHAGVAN GOKULJI & CO. *v.* BALKU BABAJI. **136 I.C. 497 = I.R. 1932 Bom. 193 = 33 Bom.L.R. 1291 = A.I.R. 1932 Bom. 1.**

———Issues—Parties pressing issue as to necessity for alienation by widow—Court, if bound to decide issue as to *bona fide* enquiry also. *See* HINDU LAW—WIDOW—ALIENATION BY. **A.I. R. 1935 Pat. 351.**

PRACTICE—Judge and Jury.

Judge and jury.

———*Judge and jury—Sufficiency of evidence.*

A Judge, confronted by a jury, can indeed say in proper cases what evidence is in law not sufficient to be considered by a jury, but he cannot decide that the evidence is such that it is sufficient to satisfy the jury, nor can he non-suit a plaintiff because he thinks the defendant has discharged the onus which rests upon him. *Ryder* v. *Wombwell*, (1868) 4 Ex. 32 and *Ranbury* v. *Bank of Montreal*, (1918) A.C. 626, Rel. on. (*Lord Wright.*) WINNIPEG ELECTRIC CO. *v.* JACOB GEEL. **1932 A.C. 690=I.R. 1932 P.C. 308=1933 A.L.J. 618=139 I.C. 663=A.I.R. 1932 P.C. 246 (P.C.).**

———*Judge and jury—Verdict of jury—Construction.*

The language of a jury in explaining the reasons for their verdict ought not to be construed too narrowly. (*Lord Wright.*) PAUL PRONEK *v.* WINNIPEG RY. CO. **I.R. 1932 P.C. 333=140 I.C. 447=37 L.W. 18=A.I.R. 1932 P.C. 275=64 M.L.J. 27 (P.C.).**

Judgment.

———*Judgment—Judgment reserved—Endeavour to cite authorities* ex parte *deprecated.*

The practice of endeavouring by *ex parte* application to cite additional authorities after judgment has been reserved is to be deprecated. (*Ferrers, J.C. and Aston, A.J.C.*) KARACHI MUNICIPALITY *v.* NARAIN DAS. **6 I.R. (Sind) 44=145 I.C. 795=A.I.R. 1933 Sind 57.**

———*Judgment—Order in case not pending.*

An order passed in no pending case is without jurisdiction and cannot be taken advantage of by a party specially when it is passed without notice to the other side. (*Baguley, J.*) MAUNG LAT *v.* MAUNG KYAW THA. **147 I.C. 130=6 R.R. 167=A.I.R. 1933 Rang. 8.**

———*Judgment—Pleadings.*

The decision in a case must be founded on the pleadings or on a case inconsistent therewith. (*Dunkley, J.*) MANGE MA *v.* MAUNG PO YIN. **I.R. 1931 Rang. 239=133 I.C. 95=A.I.R. 1931 Rang. 177.**

———*Judgment—Point not appearing in—If deemed to have been given up.*

A point which does not appear in the judgment under appeal should be taken to have been given up there. (*Addison and Din Mohammad, JJ.*) MAHOMED ALI *v.* GHULAM NABI. **159 I.C. 633=8 R.L. 406=37 P.L.R. 103=A.I.R. 1936 Lah. 290.**

———*Judgment—Recording of judgment before closing of case—Propriety.*

The President of the Village Panchayat, since dead, expressed the opinion and wrote a judgment which he showed to the other members and asked them to affix their signatures. It appeared that further defence evidence was taken the next day.

Held, that the procedure was irregular and that the judgment recorded before the closing of the case could not be upheld. (*Pakenham Walsh, J.*) SRINIVASA CHARIAR *v.* EMPEROR. **1932 M.W.N. 648.**

———*Judgment—Remark on chastity of man or woman—Propriety.*

It is not proper for a Judge to make remarks in the judgment about the chastity of a man or woman when there is no evidence at all especially where the matter is quite irrelevant. (*Walsh, J.*) KRISHNA AYYAR *v.* MUTHULAKSHMI AMMAL. **150 I.C. 1137=7 R.M. 69=39 L.W. 701=A.I.R. 1934 Mad. 169=66 M.L.J. 342.**

———*Judgment—Signed by after retirement—Same pronounced by succeeding Judge—Legality.*

PRACTICE—Justice, equity and good conscience.

A District Judge retired from office on 4th October, 1927. The judgment was signed by him on 9th October, 1927 and the same was pronounced in Court by his successor on 17th October, 1927.

Held, that the judgment was valid in law. (Case-law discussed.) (*Mukerji and Bennet, JJ.*) BARAMDEO PANDEY *v.* DEBI DAT SINGH. **53 All. 133=I.R. 1931 All. 271=130 I.C. 303=1930 A.L.J. 1566=A.I.R. 1931 All. 90.**

———*Judgment—Suit upon—Right of—Limits to.*

The right to sue for enforcement of rights declared in a former judgment or decree is not restricted to cases where the former judgment or decree fixes a definite amount as payable by one party to another, because the rights of parties may be declared in several ways. (*Beasley, C.J. and Varadachariar, J.*) RATHAN CHAND KUMAJI *v.* AMICHAND. **156 I.C. 264=7 R.M. 669=40 L.W. 792=1934 M.W.N. 539=A.I.R. 1934 Mad. 665=67 M.L.J. 413.**

———*Judgment—Use of crude colloquialisms—Propriety.*

Where a Sessions Judge stated in his judgment that "his evidence has left me cold."

Held, that the tone of the judgment was not improved by such colloquialisms. (*Grille, O. J. C. and Pollock, A.J.C.*) LOCAL GOVERNMENT *v.* MT GUJI. **17 N.L.J. 189=1935 Cr.C. 339=A.I.R. 1935 Nag. 69.**

Jurisdiction.

See also DUTY OF COURT, *supra.*

———*Jurisdiction—Date of hearing—Court taking up case on another date—Disposal behind back of parties—Propriety.*

Where on a date other than that fixed for hearing, while the parties did not appear in Court either in person or through their pleaders, the Court took up the case and behind the back of the parties, dismissed the suit by accepting the sworn testimony of the referee to whom the parties had referred the matter.

Held, that the Court had no jurisdiction to take up the case on that date and to pass orders behind the back of the parties and that the decree should on that ground be set aside. 44 All. 334, Cons. (*Sen and Niamatullah, JJ.*) BASDEO SINGH *v.* RAM RAJ SINGH. **I.R. 1932 All. 291=137 I.C. 263=1932 A.L.J. 71=A.I.R. 1932 All. 166.**

———Jurisdiction—Plea as to—Maintainability in revision for first time. *See* REVISION—NEW PLEA. **68 M.L.J. 55.**

———*Jurisdiction—Point of jurisdiction not raised by either party—Court entitled to raise it.*

A Court is entitled to raise a point with regard to its own jurisdiction even at the time of delivering judgment though it has not been taken by either party. (*Mya Bu and Baguley, JJ.*) MA YAN *v.* MAUNG THIN. **160 I.C. 223=8 R.R. 349=A.I.R. 1935 Rang. 174.**

———Jurisdiction—Suit relating to public trust—Institution in Court without jurisdiction—Dismissal—Propriety. *See* MYSORE C.P. CODE REGULATION, S. 92. **39 Mys.H.C.R. 955.**

Justice, equity and good conscience.

———*Justice equity and good conscience.*

Per *Fazl Ali, J.*—Where the law on a particular subject has been codified in the form of a statute, it is preferable to rest the decision on some statutory provision of law than merely on the broad principle of equity justice and good conscience. (*Ross and Fazl Ali, JJ.*) BHAGWATI SARAN SINGH *v.* MIVAN MURAT MATI KUER. **10 Pat. 528=I.R. 1931 Pat. 427=134 I.C. 139=13 Pat.L.T. 21=A.I.R. 1931 Pat. 394.**

PRACTICE—Justice, equity & good conscience.

———*Justice, equity and good conscience—Meaning.*

Courts in India are enjoined to apply the rule of equity, justice and good conscience where there is no rule of law applicable to the facts but that is far from saying or meaning that each Judge may decide a case as he thinks fit and bound by no rules, but they must be rules and the decision of the case cannot depend upon caprice. Often the rules of justice, equity and good conscience means a rule of the common law of England or rules of equity, not as binding on Indian Courts but as a guidance in determining matters which come before them in which there is no rule of Indian Law. (*Wort and Fazl Ali, JJ.*) PATTISON *v.* BINDHYA DEBI. **12 Pat. 216=6 I.R. (Pat.) 225=146 I.C. 56=14 Pat.L.T. 149=A.I.R. 1933 Pat. 196.**

———*Justice, equity and good conscience—Rule of—Applicability—Interest—Award of—Principles.*

Under the Mysore High Court Regulation and the Civil Courts Regulation, Courts in the Mysore State must, when there is no specific enactment or rule, act according to justice, equity and good conscience, and that means, that rules of English law so far as they are applicable to Indian society and Indian circumstances can be taken to be a proper guide. But Courts in Mysore are not bound to follow the old rules of English law which are being abrogated in England, because they are now considered antiquated, unjust or defective. Interest can therefore be awarded on unpaid debts, whether arising from contract or otherwise, unfettered by the restrictions imposed by Lord Tenterden's Act in England or the Indian Interest Act in British India. (*Reilly, C.J. and Shankaranarayana Rao, J.*) MYSORE CLAY WORKS, LTD. *v.* RAMACHANDRA RAO. **40 Mys.H.C.R. 316.**

Leave to sue.

———Leave to sue company—Grant of *ex parte*—Propriety of. *See* COMPANIES ACT, S. 171. **39 C.W.N. 1259.**

———Leave to sue—Madras City Civil Court—Defendant living outside Madras—Leave to sue—When to be obtained. *See* MADRAS CITY CIVIL COURT ACT, S. 8. **68 M.L.J. 205.**

Letters Patent appeal

———*Letters Patent appeal—New case.*

A new point cannot be raised in an appeal under the Letters Patent. (*Shadi Lal C.J. and Broadway, J.*) MEWA SINGH *v.* TARA SINGH. **6 I.R. (Lah.) 100=145 I.C. 416 (1)=34 P.L.R. 853=A.I.R. 1933 Lah. 685.**

———*Letters Patent appeal—New plea.*

A new point which has not been argued before the first Court cannot be taken in an appeal under the Letters Patent. 20 All. 258, Foll. (*Broomfield and Wadia, JJ.*) GOPAL SHANKER *v.* RAI SINGH PREMJI. **151 I.C. 767=7 R.B. 78=36 Bom.L.R. 510=A.I.R. 1934 Bom. 266.**

———*Letters Patent appeal—New plea*

A plea of want of jurisdiction can be raised in the Letters Patent appeal, even though it does not appear to have been passed before a single Judge of the High Court in second appeal. (*Sulaiman, C.J. and Bennet, J.*) MUNICIPAL BOARD, BENARES *v.* KRISHNA & CO. **57 All. 916=156 I.C. 281=7 R.A. 1060=1935 A.L.J. 635=1935 A.W.R. 585=A.I.R. 1935 All. 760.**

———Letters Patent appeal—New plea—Maintainability. *See* APPEAL—NEW PLEA. **1934 A.L.J. 848=A.I.R. 1934 All. 893.**

———Letters Patent appeal—New plea—Plea of jurisdiction. *See* JURISDICTION—CIVIL AND REVENUE COURTS. **155 I.C. 569=1935 R.D. 182=1935 A.W.R. 474=A.I.R. 1935 All. 746.**

PRACTICE—New case.

———*Letters Patent appeal—New plea—Plea of jurisdiction.*

A point involving a question of jurisdiction can be taken up in the Letters Patent appeal even for the first time. (*Sulaiman, Mukerji and Boys, JJ.*) GOBARDHAN DAS *v.* DAU DAYAL. **54 All. 573=I.R. 1932 All. 467=138 I.C. 583 (2)=13 L.R. 199 (Rev.)=1932 A.L.J. 365=16 R.D. 293=A.I.R. 1932 All. 273 (F.B.).**

———*Letters Patent appeal—New question of fact.*

A question of fact not raised in the pleading or at the trial Court cannot be raised in Letters Patent appeal. (*Macpherson, James and Varma, JJ.*) RAMBRICH LAL *v.* SYED MOHAMMAD. **154 I.C. 853=7 R.P. 491 (2)=16 Pat.L.T. 342=A.I.R. 1935 Pat. 56.**

Local inspection.

See also C. P. CODE, O. 18, R. 18.

———*Local inspection—Court should decide case on evidence.*

A Court should decide a case on the legally admissible evidence placed before it and not in the light of the observation made by it at the time of a local inspection. (*Ba U, J.*) U SAN MYA *v.* U TIN. **158 I.C. 1092=8 R.R. 238=A.I.R. 1935 Rang. 129.**

———*Local inspection—Use of—Duty of Judge.*

A Judge can make a local inspection only for the purpose of understanding the evidence in the case. He cannot use it for the purpose of coming to the conclusion whether the plaintiff's evidence or the defendant's evidence was true, as that would be substituting his own view of the matter for the evidence in the case. (*Wort, J.*) GUJU MAHATO *v.* JOGENDRANATH. **157 I.C. 480 (1)=8 R.P. 156 (1)=A.I.R. 1935 Pat. 457.**

New case.

See also (1) C. P. CODE, SS. 100 AND 115.
(2) PLEADINGS.
(3) PRACTICE—APPEAL, LETTERS PATENT APPEAL AND SECOND APPEAL.

———New case—Claim to price of timber cut based on agreement—Agreement not proved—Decree on basis of right to trees as owner of land—Case set up not inconsistent with the prior case. *See* EASEMENT—BURDEN OF PROOF. **16 Pat.L.T. 192=A.I.R. 1935 Pat. 188.**

———*New case—If open to the Court to make.*

In a case which has been tried on the question whether the petitioner is an idiot or not, it is not open to a trial Court to make a new case based on the ground that, although the petitioner was not an idiot, he was a feeble-minded man who could not have entered into a contract. (*Sulaiman, C.J. and Mukerji, J.*) MT. TITLI *v.* ALFRED ROBERT JONES. **56 All. 428=153 I.C. 733=7 R.A. 583=1934 A.L.J. 1129=3 A.W.R. 70=A.I.R. 1934 All. 273.**

———*New case—Parties aware of case they had to meet and leading evidence to rebut same.*

Where the defendants are fully aware from the very beginning of the trial as to the case which they have to meet and the defendants have tried to rebut that very case in their evidence, it cannot be said that the defendants are taken by surprise or that the Courts have set up a new case which the defendant had no opportunity of meeting, merely for the reason that there is a slight discrepancy between pleading and evidence. (*Tek Chand, J.*) GHULAM ALI *v.* MAHOMED ALI. **I.R. 1933 Lah. 479=144 I.C. 467=34 P.L.R. 763=A.I.R. 1933 Lah. 342.**

PRACTICE—New plea.

New plea.

See also (1) APPEAL—NEW PLEA.
(2) C. P. CODE, SS. 100 AND 115—NEW PLEA.
(3) PLEADINGS—APPEAL.
(4) PRACTICE—APPEAL, LETTERS PATENT APPEAL, REVISION AND SECOND APPEAL.
(5) PRIVY COUNCIL APPEAL—NEW PLEA.

———*New plea—Limitation.*

A question of limitation, which arises from the facts of the case, can be raised at any stage of the proceeding and, if so raised, must be considered and decided even by the appellate Court. 53 All. 65 (F B.), Dist. (*Staples, A.J.C.*) MAHARAJ SAI *v.* KEDAR NATH. **29 N L R. 272=6 I R. (Nag) 34=144 I.C 948=A. I.R. 1933 Nag. 130.**

———*New plea—Point not taken in defence but fully discussed in arguments—No surprise—Plea, if open.*

Where the plea that the transfer was void as having been made by an undischarged insolvent, though not specifically taken in defence was raised and discussed in the course of arguments of the trial and appellate Courts there was no question of surprise; the materials on record were quite sufficient to enable the court to give a decision on a pure question of law *held*, that the Court was justified in accepting the plea. (*Raza and Kisch, JJ.*) BUDDHU LAL *v.* RAM SAHAI **8 Luck. 87=I. R. 1932 Oudh 332=138 I C. 808=9 O.W.N. 523=A.I.R. 1932 Oudh 244.**

New point.

See also (1) APPEAL—NEW POINT.
(2) PRACTICE—REMAND AND REVISION.

Originating summons.

———*Originating summons—If maintainable against debtor of estate of deceased.*

When a question arises in the administration of the estate of a deceased person, and there is no disputed question of fact, an originating summons lies at the instance of the administrator of the estate for account against a debtor of the estate. (*Rempfry J.*) ELIZA MARTIN, *In the goods of.* **62 Cal. 120=157 I.C. 936=A.I.R. 1935 Cal. 511.**

———Originating Summons—Nature and scope of proceedings—Plaintiff claiming *de hors* the will—Recourse to originating summons. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. XIII. **62 Cal 1062.**

———Originating summons — Person dealing with fund as executor—Enforcement of liability to account —Procedure. *See* SUCCESSION ACT, S. 303. **62 Cal. 120=A.I.R. 1935 Cal. 511.**

———*Originating summons—Question of granting probate.*

The question whether a certain document should be admitted to probate cannot be decided upon an originating summons. It is not until the probate Court has decided the matter finally that it is given to any one to know what the dispositions made by the testator are. (*Rankin, C.J. and C.C. Ghose, J.*) ELIZABETH ANNA *v.* OFFICIAL TRUSTEE OF BENGAL. **130 I.C. 217=52 C L.J. 475=A.I.R. 1931 Cal. 138.**

Parties.

———*Parties—Hindu widow—Tenant—Surrender to landlord of Bhaoli land—Suit by reversioner—Land lord not made party—Effect.*

A reversioner cannot be allowed to impugn the validity of a surrender of Bhaoli lands made by a Hindu widow in favour of the landlord, when the landlord has not been made a party to the suit by the reversioner. (*Faal*

PRACTICE—Partition suit.

Ali and Rowland, JJ.) BASUDEO MANDAR *v.* BAIDYANATH MANDAR. **156 I.C. 774=8 R.P. 23=A.I. R. 1935 Pat. 175.**

———*Parties—Joint landlords—Suit by one—All proprietors if parties.*

Two proprietors who had a share in a certain separate account in a taluq leased the land in question to tenants who later on sold it to one of the lessors. The other having sued for joint khas possession of the land,

Held, that it was not necessary to make all the proprietors of the taluk parties to the suit. (*Henderson.*) NALINI KUMAR ROY *v.* KAMINI KUMAR ROY. **154 I.C. 712=7 R.C. 518=60 C.L.J. 34=A.I.R. 1935 Cal. 93.**

———Parties—Misjoinder—Suit under S. 92, C P. Code—Addition of prayer for relief against stranger with other claims—Effect *See* C. P. CODE, S. 92. **39 C.W.N. 1103=A I.R 1935 Cal 805.**

———Parties—Mortgage suit—Insolvency of mortgagor pending suit—Official Receiver—If to be added as party. *See* C. P. CODE, O. 34, R 1. **39 C W.N. 384.**

———*Parties—Non joinder—Dispute as to succession to shebaitship of idols—Idols not made parties—Effect—Non-joinder.*

In a suit which raises questions as to the right of succession to the shebaitship of idols, the idols are necessary parties or at any rate proper parties; and in the absence of the idols the questions cannot be rightly agitated. The suit would be bad for defect of parties. (*D. N. Mitter and Patterson, JJ.*) RAI SUNDARI DASYA *v.* BENODE BEHARY SAHA. **163 I.C. 595=9 R C. 38=39 C.W N. 1264.**

———*Parties—Non-joinder—Suit to enforce charge—Trust receipt—Suit by holder to enforce charge—Omission to implead subsequent mortgagee—Effect*

In a suit by the holder of a trust-receipt to enforce his charge, a subsequent mortgagee is a necessary party; and if the plaintiff does not make him a party, though he has knowledge of the mortgage, the decree which he obtains in such suit is valueless in law as against such subsequent mortgagee. (*Cunliffe, J.*) BUDHSING BALCHAND *v.* ARNHOLD & CO. **39 C.W.N. 1018.**

———*Parties—Suit involving validity of adoption—Adopted son not impleaded—Effect.*

In a suit involving a question as to the validity of an adoption, the adopted son is a necessary party; and if he has not been made a party the question whether he has been validly adopted cannot be decided; such a suit is bad for non-joinder of parties. (*D. N. Mitter and Patterson JJ.*) RAI SUNDARI DASYA *v.* BENODE BEHARY SAHA. **163 I C. 595=9 R.C. 38=39 C.W. N. 1264.**

———Parties—Suit by landlord against recorded tenant —Defendant *karta* of Hindu joint family—Minor coparceners—If necessary parties. *See* HINDU LAW—JOINT FAMILY. **16 Pat.L.T. 122=A.I.R. 1935 Pat. 206.**

Partition suit.

See also APPEAL, *supra.*

———*Partition suit—Co sharer not impleaded—Decree—If can be passed.*

No decree can be passed for partition in a suit therefor in the absence of even a single co sharer. (*Muhammad Noor and Dhavle, JJ.*) CHURAMAN MAHTO *v.* BHATU MAHTO. **154 I.C 856=7 R.P. 491 (1)=16 Pat.L.T. 308=A.I.R. 1935 Pat. 241.**

———*Partition suit—Preliminary decree—Appeal by plaintiff on some matter—New plea by defendant as to non maintainability of suit—Subsequent contention by him that preliminary decree is final except with regard to matter on which plaintiff has appealed.*

PRACTICE—Partition suit.

Where a preliminary decree is passed on a partition suit and in appeal by the plaintiff the defendant's application for permission to raise a new plea as to non-maintainability of the suit on the ground of non inclusion of certain item of property is allowed, it is not open to him to contend that the preliminary decree is final except with regard to the particular matter on which the plaintiff has appealed. The whole suit has been re-opened by them especially when they have got fresh issue raised which cuts at the root of the decree. (*Walsh, J.*) SEETHARAMA AIYAR *v.* SUBBA IYER. **156 I.C. 799 =8 R.M 53=A I.R. 1935 Mad. 445.**

———Partition suit—Preliminary decree for partition—Enquiry before Commissioner—Objection that certain property is of disputed title—Sustainability. *See* PARTITION—PRELIMINARY DECREE. **62 C.L.J 85.**

———*Partition suit—Preliminary decree passed—Subsequent dismissal of suit—Permissibility.*

After a preliminary decree in a partition suit has been passed, it is not competent to the Court to dismiss the suit subsequently. The preliminary decree can only be reversed on appeal and whatever default there may be in the subsequent stages of the suit, that preliminary decree itself cannot be vacated. (*Ramesam, Offg. C.J. and Cornish, J.*) SUNDARARAJAMMA *v.* RAMULU CHETTY. **I.R. 1932 Mad. 789=139 I.C. 761=36 L. W. 414=A.I.R. 1932 Mad. 519.**

———*Partition suit—Subsequent events—Power of Court to take into account.*

Partition suits are an exception to the general rule that the rights of the parties in a suit must be ascertained as at the date of the action brought. In partition suits the Court in determining the rights of the parties may, in order to settle these rights completely and finally have regard to events occurring subsequent to the date of the institution of the suit. 9 S.L.R. 61, Rel on. (*Rupchand, J.C. and Lobo, A.J.C.*) MT. GHULAM FATMA *v.* ABDUL AZIZ. **27 S.L.R. 411=149 I.C. 608 =6 R.S. 225=A.I.R. 1933 Sind 371.**

Plea.

———*Plea—Exemption in statute set up by party—Onus of proof.*

It is one of the recognised canons of jurisprudence that a person who seeks to take advantage of an exception has to prove affirmatively that his case falls within the scope of that exception. (*Tek Chand and Agha Haidar, JJ.*) KANHAYA LAL *v.* DEVI DAS JAGANNATH. **12 Lah. 328=I.R. 1931 Lah 417=131 I.C. 289=32 P.L.R 40=A.I.R. 1931 Lah. 227.**

———*Plea—Powers of court—Fundamental questions.*

The Court has an inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. (*Raza and Kisch, JJ.*) BUDDHU LAL *v.* RAM SAHAI. **8 Luck. 87=I. R. 1932 Oudh 332=138 I C. 808=9 O.W.N. 523= A.I.R. 1932 Oudh 244.**

———*Plea raised at late stage—Sustainability.*

The question of abandonment of a holding by a tenant is a mixed question of fact and law. Such a question cannot be allowed to be raised at the time of the argument or at a subsequent stage of the litigation (*Suhrawardy and Jack, JJ.*) RUHINI KUMAR DAS *v.* AMINUDDIN KAVIRAJ. **137 I C. 668=I.R. 1932 Cal. 347=35 C.W.N. 648=A.I.R. 1932 Cal. 405.**

Pleader's fee.

———*Pleader's fee—Calculation—Suit for administration and accounts of fund alleged to be trust fund—Valuation for pleader's fee.*

PRACTICE—Procedure.

In a suit in which the plaintiff prays for an account and administration of what is alleged to be a trust fund, and for his share in the fund, pleader's fee must be paid on the amount of the fund, as determined by the market value of the securities in which the fund is invested at the date of suit. (*Murphy and Barlee, JJ.*) NASIRUDDIN AHMEDKHAN *v.* SECRETARY OF STATE. **160 I. C. 146=8 R.B. 282=37 Bom.L.R. 763=A.I.R. 1935 Bom. 439.**

Power of Court.

———*Power of Court—Calcutta High Court—Original side—Order made but not perfected—Power to reconsider and recall.*

An order passed by a Judge and drawn up, but not completed or filed is not an order which has been perfected, and can therefore be reconsidered by the Judge who made it and also recalled by him. (*McNair, J.*) *In the matter of* THE STEEL CONSTRUCTION CO, LTD. **39 C.W.N. 1259**

Privy Council.

See PRIVY COUNCIL—PRACTICE.

Procedure.

———Procedure—Application to continue suit *in forma pauperis*—Dismissal of suit—Subsequent granting of leave to sue as pauper on basis of application—Legality. *See* C. P. CODE, S. 11—FORMER SUIT. **60 C.L.J 587.**

———Procedure—Application for leave to appeal under Letters Patent—Refusal of leave—Application if convertible as review petition. *See* C. P. CODE, O. 47, R. 1. **A.I.R. 1935 Lah. 330 (1).**

———*Procedure—Civil and criminal Courts—Application against religious leader.*

It is not desirable that religious leaders should be brought into criminal Courts where the matter can be disposed of by the Civil Courts (*Bennet, J.*) HAIDARI BEGAM *v.* JAWAD ALI. **154 I C. 638=7 R.A. 783= 36 Cr.L J. 554=1935 Cr.C 36=1934 A.L.J. 946=4 A.W R. 1406=A.I.R. 1935 All 55.**

———Procedure—Court fee—Determination—Time for—Deficient Court-fee—Order for after dismissal of suit—Propriety. *See* COURT-FEES—QUESTION AS TO. **152 I.C 799=A I R. 1935 Lah. 75.**

———Procedure—Divorce—Suit by wife against husband—Intervener by alleged adultress—Procedure. *See* INDIAN AND COLONIAL DIVORCE (JURISDICTION) ACT, S. 1 (4) AND R. 9. **62 Cal. 82=39 C.W.N. 95 =A.I.R. 1935 Cal. 456.**

———*Procedure*—Ex Parte *decree against several defendants—Application to set aside by one only—Power to set aside entire decree.*

There cannot be any doubt that a Court has power, on the application of one of the defendants, to set aside an *ex parte* decree in its entirety. (*Mitter, J.*) PRAFULLA SUNDARI ROY CHOUDHURANI *v.* AZIZONNESSA. **40 C.W.N. 34=62 C.L.J. 295.**

———*Procedure—General and special Acts—Applicability.*

When there is a Special Act dealing with a special subject, resort should be had to that Act instead of to a general provision, especially when the general Act contains no special provisions to indicate to the Court how it should proceed and it is more convenient that the case should be considered under the special Act. (*Bennet, J*) HAIDARI BEGAM *v.* JAWAD ALI. **154 I.C. 638=7 R A. 783=36 Cr.L J. 554=1934 A.L.J. 946=4 A.W.R. 1406=1935 Cr.C. 36=A.I.R. 1935 All. 55.**

———*Procedure laid down by statute—Court's power to substitute different procedure.*

PRACTICE—Procedure.

When the Legislature has in a special statute expressly laid down a specific procedure to be followed by the Court, the Court will not be justified in disregarding that procedure and substituting a different procedure not authorised by the statute, merely because the aggrieved party considers it more advantageous to him. (*Mahadevayya, C. J. and Shankaranarayana Rao, J.*) HANUMANTHA RAO, *in the case of*. **12 Mys. L.J. 292=39 Mys. H.C.R. 380.**

———*Procedure—Law applicable to suit.*

The rights of parties with regard to a suit should be determined upon the law as it stands at the date of the institution of the suit. (*Mukerji, J.*) KUMAR DEBENDRA LAL KHAN *v.* SUDHARAM RAY. **162 I.C. 271 =8 R.C. 583=61 C.L J. 127=A.I.R. 1936 Cal 173.**

———Procedure—Memorandum of appeal and revision —Frame of—Contents of grounds—Setting out of legal arguments—Propriety. *See* C. P. CODE, O. 41, R. (1), (2). **68 M L J. 218.**

———*Procedure—Plaint filed by pleader without written authority—Irregularity—How cured.*

The presentation of a plaint by a pleader with an oral authority and without a written power is an irregular presentation. The matter can be regularised only in one manner, *i. e.*, by an order of Court The plaintiff must apply to the Court for permission to remedy the defect, and if the Court grants his application, the plaint must be taken to be presented duly on the date of presentation. But, if the Court refuses the request, the plaint must be taken off the file. A party cannot be allowed to put the matter in order by altering or correcting the record himself without reference to the Court. Nor is it a right procedure to allow the defect to remain, and to throw out the suit later on the ground that the suit is out of time on the date when the plaintiff cures the defect. (*R. C. Mitter, J.*) CHANDRA KANTA HAZRA *v.* RAJANI KANTA DAS **164 I.C. 442=9 R C. 211=39 C.W.N. 534=62 C.L.J. 277.**

———Procedure—Public right of way—Obstruction— Suit by individual in respect of Procedure. *See* C. P. CODE, O. 1, R. 8. **39 C.W.N. 590.**

———*Procedure—Rent suit against two persons— Denial of liability by one—Admission by other—Dismissal of suit* in toto—*Propriety.*

In a suit for rent against two tenants one of whom denies his liability and the other admits, the suit ought not to be dismissed, entirely when the plaintiff does not prove his case, A decree should be granted to the plaintiff against the defendant admitting liability, on the basis of the general prayer in the plaint, though no specific relief is claimed against such defendant. A decree should be granted on the admission of liability. (*Mitter, J.*) HARI PADA DUTT *v.* GOBINDA CHANDRA DAS. **60 C.L J. 220=A.I.R. 1935 Cal. 193.**

———*Procedure—Selection of forum—Courts of different rank.*

It is a general rule of procedure that where Courts of different rank have jurisdiction, then an application should be made in the lowest Court which has jurisdiction. (*Bennet, J.*) HAIDARI BEGAM *v.* JAWAD ALI. **154 I.C. 638=7 R A. 783=36 Cr L.J 554=1934 A.L J. 946=4 A.W.R. 1406=1935 Cr.C. 36=A.I.R 1935 A 55.**

———Procedure—Shah Jog Hundi—Payment to Shah under forged indorsement—Liability to reimburse drawee—Enforcement—Suit or third party notice. *See* NEGOTIABLE INSTRUMENT—SHAH JOG HUNDI—INDORSEMENT FORGED. **36 Bom.L.R. 941.**

PRACTICE—Procedure.

———Procedure—Suit under Agra tenancy Act—Delay in substitution of heirs of deceased defendant—Technical defects—If fatal. *See* AGRA TENANCY ACT (III OF 1926)—PROCEDURE. **1935 R.D. 5.**

———*Procedure—Suit based on observation by Judge —Maintainability apart from law.*

Where a suit was instituted by plantiff relying on the strength of a remark made by the Judge in previous proceeding though the suit was incompetent in law.

Held, that there was no legal principle on which that remark could be allowed to override the provisions of the law. (*Varadachariar, J*) MACHAMMA *v.* KANAKAMMA. **158 I.C 410=8 R.M. 260=1935 M.W.N. 785=A.I.R. 1935 Mad. 923.**

———*Procedure—Suit for compensation for breach of contract—Distinction from a suit for accounts.*

A suit for acccounts is essentially different from a suit for compensation for breach of contract. In the former, if the accounts should ultimately show something *due* to the *defendant*, a decree can at once be given to him; this is not possible in the latter class of suits. 14 C. 147 (P.C.); 42 M. 873; 15 B. 155 (P.C.); 20 M. 418, 23 C. 884; 27 A. 374; 32 A. 525; 22 A. L .J. 783, Ref. (*Reilly and Ananthakrishna Ayar, JJ.*) ANNU AVATHANIGAL *v.* SOMASUNDRA AVATHANIGAL. **54 Mad. 654 =I.R 1931 Mad. 501=131 I C. 165=1930 M.W.N. 1199=33 L.W. 1=A.I.R. 1931 Mad. 185 (2)=62 M. L J. 45.**

———*Procedure—Suit—Dismissal for want of prosecution after issues are fixed and after examination of some witnesses and when parties are present—Propriety.*

Suits should not be dismissed for want of prosecution after issues have been fixed, and after evidence of some witnesses have been recorded, and when parties are present, on the sole ground that witnesses fail to appear. The witnesses who fail to appear should be compelled to give their evidence under warrants of arrest, if necessary. (*Knox, S.M. and Grant, J. M.*) MAKUND LAL *v.* SAHAI AHIR. **1935 R.D. 500.**

———*Procedure—Suit for injunction—Absence of prayer for declaration—Amendment—Dismissal of suit —Propriety.*

Where a suit brought on behalf of a minor for an injunction to restrain the defendant from interfering with his possession of the suit property, in pursuance of a decree obtained by the defendant to which the minor was a party, and which was not alleged to have been obtained by fraud or collusion or negligence of the guardian, was dismissed by the lower Courts, holding that the suit was not maintainable in the absence of a prayer for a declaration that the decree was not binding on the minor.

Held, though the plaintiff was bound to ask for a declaration, the suit should not have been dismissed, but that an opportunity should be allowed to amend the plaint by adding the necessary declaration on payment of costs. (*Lakshmana Row, J,*) MEGAVARNAM CHETTIAR *v.* KRISHNAN CHETTIAR. **40 L.W. 340=152 I.C. 340 =1934 M.W.N. 1024=7 R M. 216 (1)=A.I.R. 1934 Mad 600=67 M.L.J. 245.**

———*Procedure—Suit for possession of wakf property by mutawallis—Plaintiffs not found to be mutawallis— Maintainability.*

A suit for possession of wakf property framed by plaintiffs as a suit not by persons having an interest in the wakf and filed in a representative capacity but by the plaintiffs as mutawallis is not maintainable, where it is found that they are not mutawallis. (*Mitter, J.*) MOHAMMAD SOLEMAN MOLLA *v.* TASADDUQ HOSSAIN. **158 I.C. 544=8 R.C. 192=A.I.R. 1935 Cal. 623.**

PRACTICE—Procedure.

———Procedure—Suit for rent under lease—Lease inadmissible for want of registration—Procedure—Decree for compensation for use and occupation—Power of Court to decree. *See* U. P. LAND REVENUE ACT, S. 36. **1935 R.D. 299.**

———Procedure — Summoning record. *See* C. P. CODE, O. 13, R. 10. **A.I.R. 1931 Lah. 119.**

———Procedure—Surety for judgment-debtor— Enforcement of liability—Execution of suit. *See* MYSORE C. P. CODE REGULATION, S. 145. **13 Mys.L.J. 124.**

Quia Timet Action.

See QUIA TIMET ACTION.

Relief.

See also (1) PLEADINGS AND
(2) PRACTICE—APPELLATE COURT AND SECOND APPEAL.

———*Relief—Alternative claim against two defendants—Election of decree against one—Appeal claiming relief against other—Bar of.*

Where a plaintiff claims a decree against two persons, not jointly, but in the alternative, and elects to take a decree against one of them, he is precluded from appealing against the decree and claiming therein a decree against the other. (*Page, C.J. and Mya Bu, J.*) U PO SEIN *v.* E. M. BODI. **13 Rang 189=8 R.R. 253=159 I.C. 167 (2)=A.I.R. 1935 Rang 397.**

———*Relief—Claim against two defendants in the alternative—Election to take decree against one—Subsequent claim against other—Estoppel.*

Where a plaintiff claims relief against a particular person or in the alternative against another person, the liability of the two being alleged to be not joint but only in the alternative, and elects to take a decree against one of them for the full claim, he is precluded from subsequently claiming a decree against the other. (*Page, C.J. and Mya Bu, J.*) U PO SEIN *v.* E.M. BODI. **13 Rang 186=8 R.R. 253=159 I.C. 167 (2)=A.I.R. 1935 Rang 397.**

———*Relief—Conditional offer refused—Even offered sum cannot be claimed.*

Where the plaintiff refuses the defendant's offer, which is only made on certain conditions, he cannot claim that the sum offered should have been decreed to him in any case, as if it has been offered unconditionally. (*King, J.*) FOOTWEAR *v.* N.W. RAILWAY. **6 I.R. (All.) 45=144 I.C 1029=A I.R.1933 All. 348.**

———*Relief—Decree different from prayer in plaint.*

It is wrong for a Judge to pass a decree which is entirely different from the prayer in the plaint. (*Dunkley, J.*) MEYAPPA CHETTYAR *v.* VENKATACHALAM CHETTYAR. **155 I.C. 997=7 R R. 374=A. I.R. 1935 Rang. 34.**

———*Relief—Decree in excess of plaint claim—Validity.*

Where the plaint only asks for a declaration as regards land which is ancestral, the Court has no power to grant the plaintiffs a decree also with regard to the self-acquired property. (*Addison and Hilton, JJ.*) MT. PARBATI *v.* JEWAN MAL. **I.R. 1932 Lah. 336=137 I.C. 239=33 P.L.R. 39=A.I.R. 1932 Lah. 251.**

———Practice—Relief—Decree for specific performance of land—Suit for mesne profits as such for period after decree—Decree for damages—If can be passed. *See* C. P. CODE, O. 2, R. 2. **18 N.L.J. 76.**

———*Relief—Duty of Court.*

Where the plaintiff asks for possession of one-fourth of a land, the Court cannot allow him to take possession of the whole land. (*Addison and Agha Haidar, JJ.*) FAZAL DIN *v.* MILKHA SINGH. **6 I R. (Lah.) 68=145 I.C. 182=34 P.L.R. 1037=A.I.R. 1933 Lah. 193.**

PRACTICE—Relief.

———*Relief—Duty of Court—Particulars fully set out in plaint—Grant only of part—Propriety.*

Where the relief portion of a plaint clearly sets out the detailed particulars of the claim made by the plaintiff in the suit, and the defendant does not dispute it, it is manifestly illegal for Court to give a decree to the plaintiff for a part only without assigning any reason for disallowing the rest of the claim. Nor is it open to the Court to grant a relief which is not asked for in the pleadings either by the plaintiff or by the defendant. (*Makedevayya, C. J.*) N. O. MANDRE *v.* BASAPPA KOLIWAD. **12 Mys.L.J. 383.**

———Relief—Easement—Obstruction to—Lower Court ordering injunction and restoration of *status quo*—Interference in appeal. *See* PRACTICE—APPELLATE COURT. **35 C.W.N. 963.**

———*Relief—Equitable defence not made in pleadings.*

The general rule is that the Court could give effect to an equitable defence which in a suit brought for the purpose would entitle the defendant to rectification of a document although no suit for it had been filed and although no claim has been made for it in the pleadings. (*Remfry, J.*) W. C. BINNS *v.* W. & T. AVERY, LTD. **61 Cal. 548=152 I.C. 117=7 R.C. 240=38 C.W.N. 908=A.I R. 1934 Cal. 778.**

———*Relief—Facts found different from facts alleged—No relief.*

Parties should really consider what their case is before they actually come to Court. In a suit for damages for conversion plaintiff confined his case to certain quantity of goods found and attached from defendant; but he failed to prove his title to the same. It was however found that the defendant had committed conversion in respect of some goods which he intermixed with his own.

Held, that the plaintiff was not entitled to any damages. (*Wort, J.*) SITARAM SHAM NARAYAN *v.* ISWARI CHARAN SARANGI. **154 I.C. 198=7 R.P. 442=A.I.R. 1934 Pat. 57.**

———*Relief—Facts found different from recitals in plaint.*

Where plaintiff sues for return of money paid to defendant the fact that the circumstances under which money was paid to defendant are different from those alleged in the plaint is not tantamount to changing the cause of action and a Court cannot refuse to adjudicate on the technical ground that the recitals made by him in the plaint are false. (*Saaduddin, A. J. C.*) FAZAL QADIR *v.* FIRM MIAN HAFIZ NASIR AHMAD. **I.R. 1933 Pesh. 17=142 I.C. 769=A.I.R. 1933 Pesh. 37.**

———*Relief—Finding contrary to plea in written statement—Validity.*

The usual procedure is to bind down a party to the plea originally taken But where the finding is the outcome of a careful and critical examination of the evidence, it is not bad merely on account of its being in contravention of the plea in the written statement. (*Oppenheim, J.M.*) NAWAB SYED ASHGAR ABBAS *v.* MOHAN. **13 L.R. 5 (Rev.).**

———*Relief—Form of suit being defective—Discretion of Court to grant relief.*

A mortgage debt as such can be dissociated from security for the repayment of the debt; and if there is no bar to the admissibility of a document for the purpose of showing the transfer of the debt itself, apart from the security, the appropriate relief, which ought to be given to the transferee should not be denied to him. (*Sundaram Chetty and Pakenham Walsh, JJ.*) LAKSHMANA NAICKER *v.* JAYARAM NAICKER **150 I C. 18=6 R.M. 708=39 L.W. 153=A.I.R. 1934 Mad. 178=66 M. L.J. 380.**

PRACTICE—Relief.

———Relief—Inconsistent with prayer—Power of Court to award—Right of ownership and right of easement. *See* C. P. CODE, O. 7, R. 7. **A.I.R. 1933 Lah. 267.**

———*Relief—Plaintiff claiming ownership in well—Relief on the basis that he is a licensee.*

Where the plaintiff sued for a declaration that he was the owner of a certain share in a well but the Court found that his position was that of a licensee and that he was entitled to use the well to irrigate his fields, it may grant a declaration of his right to irrigation, even though the plaint did not lay any claim to such a right. There is no reason why, if the Courts are not in a position to grant the whole of the relief they should not grant part of it. (*Kendall, J.*) BALWANT *v.* KEHRI. **151 I.C 830 (2)=7 R.A. 229=18 R.D. 164=15 L R. 221 (Rev.)=3 A W.R. 485=A.I.R. 1934 All. 619.**

———*Relief—Plaintiff has to succeed on strength of his own case.*

A plaintiff has to succeed on the strength of his own case and not on the weakness of the defendant's case. (*Addison and Agha Haidar, JJ.*) SHAM DAS *v.* MAHABIR DAS. **149 I C. 1187=6 R.L. 811=36 P. L.R. 129=A.I.R 1933 Lah. 916.**

———*Relief—Plaintiff's allegation not proved—Facts proved—Relief based on—Grant of.*

Where the plaintiff brought a suit based upon the allegation that the property in question was the personal property of the deceased female holder to which he was entitled as her nearest reversioner and though he failed to prove that allegation or that he was entitled to the whole of it, it was nevertheless found he was entitled to at least one-third of that property, there is no reason why he should not be granted the declaration to which he was entitled in that suit instead of being referred to another suit (*Madgwkar and Baker, JJ.*) DOLAT SINGH HAMIR SINGH *v.* JORAVARSINGH NARAN SINGH. **I R. 1931 Bom. 435=133 I. C. 851=33 Bom L R. 783=A.I.R. 1931 Bom. 473.**

———*Relief— Plea not taken in plaint— Power of Court to award relief.*

In general the decree cannot go beyond what is claimed in the plaint, the basis of this being that the other party has a right to know from the outset what he has to meet. Where however the substantial plea is in the plaint and the defence is not taken unawares, the Court can award relief on a point not expressly set out in the plaint. (*Irving, F. C.*) RAM KHETRI *v.* KULDIP CHAND. **11 Lah. L.T. 114.**

———*Relief—Right to—Shady transaction to circumvent law.*

It is no part of the business of the Courts to help out and relieve persons who enter into shady transactions to circumvent the clear provisions of the law. (*Drake Brockman, J.M.*) SUKHRAJ *v.* BARAN. **18 R.D. 416=15 L R. 560 (Rev.).**

———*Practice—Relief asked for on specific ground—Right to relief on inconsistent ground.*

The plaintiff in a suit against a municipality prayed for compensation on the ground that the municipality had unlawfully removed certain obstructions and plat forms and steps, etc., in front of his house and claimed compensation for the materials of the structures which had been removed contrary to the provisions of the statute But this ground failed at the trial. Plaintiff, however, claimed compensation in appeal on the ground that the statute itself allowed compensation for removal of the structures in certain cases.

Held, that what was prayed for in the plaint was not compensation under the statute, but compensation for acts contrary to the provisions of the statute, and that having failed, the plaintiff could not be awarded compensation under the statute in appeal. (*Dhavle, J.*) PRABHU DAYAL *v.* COMMISSIOERS OF ARRAH MUNICIPALITY. **156 I.C. 468=8 R.P. 4=16 Pat.L. T. 49=A.I.R. 1935 Pat. 105 (2).**

———*Relief—Suit on bond—No dispute as to amount—Decree for less amount—Propriety.*

Where in a suit on a bond the defendant does not dispute the amount due, the Court cannot decree the suit for lesser amount. (*R. C. Mitter, J.*) MANORAMA DEBI *v.* WAJADI ACAN. **157 I C. 1038=8 R.C. 145 =61 C L.J. 93=A.I.R 1935 Cal 559.**

———*Relief—Suit by co-sharer in individual capacity—Decree whether can be passed as co-sharer.*

Where the plaintiff sues for ejectment in his individual capacity and the Court finds that the holding belongs to the plaintiff and other proprietors the Court should not pass a decree in favour of the plaintiff on behalf of all the co sharers. A I.R. 1926 Lah. 545, Ref. (*Addison and Hilton, JJ.*) SAPURAN SINGH *v.* KHAWAJA KHAN. **I.R. 1932 Lah 560=139 I.C. 133 =33 P L.R. 124=A.I.R. 1933 Lah. 241.**

———*Relief—Suit for declaration and injunction on the basis of ownership—Plaintiff found to be only lessee—Relief on that basis—Permissibility*

In a suit for declaration of plaintiff's right to certain property and injunction to restrain defendants from interfering with the plaintiff's enjoyment thereof, even if the plaintiff is found to be only the lessee and not the owner, the Court may grant him the declaration and injunction on the footing that he was lessee entitled to peaceful possession. The test is if the defendant was taken by surprise and where the defendant himself raised the contention that the plaintiff was only a lessee, relief on that basis may properly be granted. 20 C W. N. 446, Foll. (*Doraiswami Iyer, C J. and Rama Rao, J.*) CHINNAPPA *v.* SONAPPA. **9 Mys.L J 408.**

———Relief—Suit for declaration of title and ejectment—Decree for joint possession—If sustainable. *See* CO-OWNERS—JOINT PROPERTY. **60 C L.J. 324=A. I R. 1935 Cal. 256.**

———*Relief—Suit held to be defective—Interim orders passed—Cancellation.*

If the suit is held to be wrongly framed and unmaintainable, any interim orders passed against the defendants are vacated automatically. (*Grille, O.J.C.*) RAMLAL SHEOLAL *v* JAMNADAS **150 I.C. 1142=7 R N. 48=17 N.L J. 5=A.I.R. 1934 Nag. 169 (2).**

———*Relief—Suit for injunction—Power to grant declaratory decree.*

Where in a suit for injunction, the Court considers it to be futile to grant a decree for injunction, it can substitute therefor a declaration. (*Sularman, C. J. and Rachhpal Singh, J.*) MAHOMED IKRAM KHAN *v.* MIRZA MAHOMED BAQAR. **152 I C. 817=7 R A. 401 =4 A W.R. 1392=1935 A.L.J. 139=A I.R. 1935 All 106.**

———*Relief—Suit for injunction—Prayer to restrain putting up of dam and for damages—Determination of right to injunction—Question of damages when can be gone into.*

Plaintiffs filed a suit for a declaration that they were entitled to the free and uninterruped supply of water and for an injunction restraining the defendants from putting a dam across the river and also for damages for injury to the plaintiffs by failure of crops. There were 21 and 26 witnesses on either side and in order to avoid loss of time plaintiffs put in a petition when only one witness had been examined praying that evidence regarding loss and damages be reserved till the decree is passed. The

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Court acceded to it and there was no objection raised by the defendants. A decree was passed accordingly leaving the question of damages and loss to be determined by a petition. On appeal the High Court confirmed the decree but dismissed the claim for damages on the ground that the plaintiffs had failed to prove the amount of damages till date of suit which they should have done.

Held, that the course adopted by the trial Court was a very usual, a very proper and very convenient course, that the trial Court had an inherent jurisdiction in determining as to how the suit should be conducted and that the claim for damages should be allowed. (*Lord Wright.*) NARESH MOHAN THAKUR *v.* BRIJMOHAN MISRA **I R 1933 P.C 30=141 I C. 756=37 C.W.N. 355=1933 M W.N. 133=1933 A.L.J. 573=37 L.W 361=57 C.L J 109=14 Pat.L T. 219=A.I.R. 1933 P.C. 43=64 M L.J. 228 (P C.).**

———*Relief—Suit for possession—Plaintiff must succeed on strength of his own title.*

In a suit for possession of property the plaintiff must succeed on the strength of his own title and not on the weakness of the defendant. (*Wort, J.*) BAIJNATH MANDAR *v.* RAM ADHIM RAY. **150 I.C. 896=7 R. P. 36=A I.R. 1934 Pat 64**

———*Relief—Trust property—Power of Court to award relief not asked for.*

Where the suit relates to *wakf* property the Chief Court has jurisdiction to pass such an order as may be just and proper in all the circumstances of the case and is not bound to the granting of the relief of ejectment asked for by the plaintiff mutawalli. Property declared to be *wakf* and status of defendants declared to be that of tenants paying rent. (*Hasan, C J. and Krisch, J*) DILAWAR HUSAIN *v.* SUBHAN KHAN. **136 I.C 241 =I.R 1932 Oudh 97=8 O.W.N. 722=A.I.R. 1931 Oudh 375.**

Remand.

———Remand. *See also* C. P. CODE, S. 107, O. 41, Rr. 23 AND 25

———*Remand—Appeal—Court not applying its mind properly—Remand.*

Where the appellate judgment did not refer to the material points for consideration in the case and it appeared that the judgment proceeded on an entire misapprehension of the trial Court's decision,

Held, that a fresh disposal of the appeal should be directed inasmuch as the appellate Court had not applied its mind to the case fully. To such a case the provisions of S. 99, C. P. Code, do not apply. (*Guha and M. C. Ghose, JJ.*) MOHENDRA NATH PAL *v.* PARAMESHWAR MAITY. **130 I C. 573=52 C.L J. 566=A.I.R. 1931 Cal. 164.**

———*Remand—Appellate Court—Remand by—Indicating order to be passed by trial Court—Impropriety.*

"It is hardly in accordance with precedent that a Court of appeal should, after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard and without considering what defences may be available against him) to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties." (*Lord Russell of Killowen.*) TUAN MAN *v.* CHE SOM. **I.R. 1932 P.C.136=136 I C. 632=36 L W. 135=A.I.R. 1932 P.C. 146=63 M.L.J. 369 (P.C.).**

———*Remand—Court not specified—Procedure.*

Where the Commissioner frames an issue and remands a case but the Court to which it is remanded is not specified, the proper course to be taken is to move the Commissioner to specify the Court in his

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order and not to move the Board of Revenue for that purpose. (*Keane, S.M.*) RAJ NARAIN *v.* MAHADEO. **15 R.D. 398.**

———Remand—Inherent power—Patent case under Patents and Designs Act—Appeal to Governor-General—Power of remand. *See* PATENTS AND DESIGNS ACT, S. 9. **62 Cal. 596=39 C.WN. 573.**

———*Remand—Judge should give his own conclusion on report of Commissioner.*

On a remand order to a Subordinate Judge to determine certain questions, for his assistance in the determination of those questions he has jurisdiction to appoint a Commissioner. But that does not excuse him from coming to a conclusion on these matters himself. It is necessary for him to investigate the Commissioner's report and to consider the objections of the parties to that report and to come to an independent conclusion. (*Wort and Fazl Ali, JJ*) DARGAHAN BIBI *v.* JYOTI PRASAD SINGH **154 I.C. 344=7 R.P. 453=A I.R. 1934 Pat. 35.**

———Remand—Onus wrongly cast by the lower Court—Appellate Court's procedure—Remand. *See* C. P. CODE S. 151. **A.I.R. 1931 Lah. 299 (1).**

———*Remand—Order in council directing retrial of suit on merits—Proceedings in India contrary to—Legality of.*

In a suit for partnership accounts, final decree was passed by the subordinate Court. A sum of money was found to be due to one *M* by the respondents. On appeal the decree was set aside by the Judicial Commissioner's Court, directing a retrial by District Judge with a proviso that the respondents would only be entitled to dispute the liability for the sum decreed as due to *M*. On appeal to the Privy Council, the Judicial Commissioner's order was set aside and a fresh trial by the trial Court was ordered. Meanwhile the fresh trial had proceeded in India under the order of the Judicial Commissioner, by the District Judge as if no appeal were pending before the Privy Council. The District Judge drew a decree finding a considerable sum due from *M* to the respondents. Appeal against this, before the Judicial Commissioner, was dismissed. *M* appealed to the Privy Council.

Held, that the intention of the Privy Council in their prior decision was that the whole order of the Judicial Commissioner directing a re-trial by District Judge should be set aside, that the subsequent proceedings in India, taken in pursuance of this order of the Judicial Commissioner were *coram non judice* and void and that the case must be sent back to India for re trial in accordance with the previous order in Council. (*Lord Macmillan.*) MAULADAD KHAN *v.* FAIZULLAH KHAN. **6 R P.C. 59=147 I.C. 555=36 Bom.L R. 227=59 C L J. 49=39 L.W. 300=11 O.W.N. 308=1934 M.W N. 312=35 P.L R. 297=38 C.W.N. 258=A.I.R 1934 P.C. 87=66 M.L.J 155 (P.C.).**

———*Remand—Point not expressly pleaded in trial Court or in grounds of appeal before District Judge.*

Where in the written statement of the defendant it was pleaded that the property had beeen attached to the mosque for 50 years and was in the possession of the Mohammedan community and it was not expressly pleaded that the property was wakf and no issue was drawn and no evidence was produced and in the grounds of appeal to the District Judge no issue on this point was asked for, it is too late to have a remand on second appeal to deal with this point. (*Tek Chand and Skepm, JJ.*) LAL SHAH *v.* NATHU SHAH. **37 P.L.R. 454.**

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Review.

———*Review—New point—If can be raised.*

A new case different from the one brought and tried cannot be allowed to be sprung up in review. (*Mahadevayya, C.J.*) DURGOOSA *v.* DURGOOSA. **12 Mys. L.J. 213=39 Mys.H.C R. 303.**

———Review—Order dismissing suit under Rule 36, Calcutta Original Side—Ch. X—Application to set aside—If one for review. *See* CAL. H. C. RULES ORIGINAL SIDE, CH. X, R. 36. **39 C.W.N. 1196.**

———Review. *See also* C. P. CODE, S. 151 AND O. 47.

Revision.

———Revision—Mysore High Court—Case under Agriculturists' Relief Regulation—Power of High Court to consider propriety of finding. *See* MYSORE AGRICULTURISTS' RELIEF REGULATION, S. 4 (2), PROVISO. **39 Mys H.C.R. 853.**

———*Revision—New plea.*

A new plea that the sale was made without sufficient advertisement, etc., when not alleged in the lower Court cannot be admitted for the first time in revision. (*Mukerji and Bennet, JJ.*) SARBHU LAL *v.* MAHESHDAS. **I.R. 1931 All. 189=129 I.C. 557=1931 A.L.J. 102=A.I.R. 1931 All. 224.**

———*Revision—New plea.*

A party is not entitled to raise the question of registration in revision, simply because it is apparent on the face of it, though it has not been raised in the Courts below. Moreover the contention that because the liability of the document to registration is apparent on the face of it, the Courts are bound to notice the objection of registration *suo motu* is untenable. It is the duty of the plaintiff to raise this issue (*Saaduddin, A. J. C.*) MAHOMED *v.* SAMANDAR. **151 I.C. 105=7 R. Pesh. 11=A I.R. 1934 Pesh. 50.**

———*Revision—New point—Decree—Amendment without notice to judgment-debtor—Omission to appeal—Revision by decree holder from order in execution—Objection by judgment-debtor to amendment—Competency—Cross objection—If lies.*

Where a decree is altered without notice to the judgment-debtor to his prejudice, by substituting a larger amount than originally awarded, it is open to him to appeal against it. But when he fails to so appeal, he cannot afterwards raise the objection in a revision filed by the decree holder from an order in execution proceedings.

Quaere, whether a cross objection can be lodged in an application for revision (*Drake Brockman, S.M. and Knox, J. M.*) BHOPAL *v.* MANSAPURI. **1935 R.D. 353.**

———Revision—New point as to jurisdiction—Maintainability for first time in revision. *See* JURISDICTION—OBJECTION. **18 R.D, 406 (2).**

———Revision—New point—Revision against appellate decree—Plea of non maintainability appeal—Maintainability. *See* AGRA TENANCY ACT (1926), S. 252. **1935 R D. 378.**

———Revision—Powers of Court—Distinction between ordinary and extraordinary powers. *See* JURISDICTION—REVISION. **59 Bom. 663=37 Bom.L.R. 658=A.I.R. 1935 Bom. 393**

———*Revision—Proceedings under S. 476, Cr. P. Code—Revision against appellate order—Procedure—S. 115, C. P Code or S. 439, Cr. P Code.*

Where a Civil or Revenue Court initiates proceedings under S. 476, Cr. P. Code, the High Court can in revision interfere with an order of the appellate Court only under S. 115, C. P. Code, but where a Criminal Court takes such proceedings, the appellate order can be revised only under S. 439, Cr. P. Code. (*Nanavutty and Zia-ul-Hasan, JJ.*) MEMDI LAL *v.* RAM ADHIN. **10 Luck. 335=153 I.C. 104=7 R.O. 291=36 Cr.L.J. 254—11 O.W.N. 1469=1935 Cr.C. 113=A.I.R 1935 Oudh 59.**

———*Revision—Right of—Waiver—Order set aside on payment of costs—appearance of costs.*

Quaere.—Where an order is set aside on the payment of costs to the opposite side, whether the acceptance of such costs amounts to waiver of the right of revision. (*Kendall, J*) ABDUL RASHEED KHAN *v.* BALLI RAM. **154 I.C. 15=7 R.A. 700=A.I.R. 1934 All. 107.**

Rule nisi.

———*Rule nisi—What is—Effect of.*

A *rule nisi* is a rule obtained on motion *ex parte* to show cause against the particular relief sought. It does not mean that a notice issued by the Court is not a *rule nisi* unless it is accompanied by an *ex parte ad interim* order which is to operate pending the hearing of the application. The apparent effect of a *rule nisi* is that the party against whom it is made has a right to begin and open the case when the rule comes on for hearing, and the rule is made absolute unless good cause (*nisi*) is shown against it. (*Rupchand Bilaram, A.J.C.*) DIAS *v.* ALFONSO. **28 S.L.R. 161=153 I C. 286=7 R.S. 122=A.I.R 1934 Sind 180.**

Second Appeal.

———Second appeal. *See also* PRACTICE—ABANDONMENT OF PLEA.

———*Second appeal—Civil Court—Finding of fact—Criminal Court coming to contrary conclusion—Interference in second appeal.*

Where in an account suit the District Judge found as fact that the loss of certain *bahis* was not proved but the Criminal Court subsequently came to a contrary conclusion.

Held, that the finding of the District Judge was binding on the High Court in second appeal. (*Shadi Lal, C J. and Broadway, J.*) MAYA SINGH GANDA SINGH *v.* MALANG SHAH. **I.R. 1933 Lah. 27=140 I.C. 677=33 P.L R. 628.**

———*Second appeal—Evidence not challenged in lower Courts—Right to challenge in second appeal.*

Where the parties fought out the case on the ground that the evidence adduced was not sufficient to prove a custom and the documentary and other evidence were not challenged in any manner,

Held, that it was not open to one party to contend in second appeal that the documents, etc., were not legally proved. 20 I.C. 162, Ref. (*Ju Lal, J.*) MANGAL SAIN *v.* PUNJAB SINGH. **I R. 1931 Lah. 801=133 I.C. 625=A I R 1932 Lah. 130.**

———*Second appeal—Inconsistent pleas—Master and servant sued as principals—Plea of vicarious liability cannot be raised in second appeal.*

Where master and servant are both sued for malicious prosecution as principals and not as principal and agent, a plea cannot be taken in second appeal as a point of law that the master was liable vicariously for acts of his servant because, apart from the fact that it clearly contradicts the stand that was taken in the trial Court it is a mixed question of law and fact and is a new case set up in appeal. After the master has been exposed to the claim as being personally liable, it would be unjust that he should be exposed to the claim in appeal on a totally new ground which was not taken in either of the lower Courts. 33 Bom. 35, Rel. on. (*Staples, A. J. C.*) RAGHUNATH RAO *v.* MOTIRAM. **30 N.L R. 101=147 I.C. 1084=6 R.N. 153=A.I.R. 1933 Nag. 299.**

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———*Second appeal—Inconsistent pleas—Suit for ground-rent—Assertion of proprietary title by defendants—Plea negatived—Subsequent claim of irrevocable license in second appeal—Permissibility.*

In a suit by the plaintiff claiming as lessee from Cantonment Authorities for ground-rent, the defendants claimed that they were in occupation for over 100 years as a matter of right without any liability to pay rent. That plea of proprietary title was found against. The lower Court found that the defendants were licensees who were allowed to build their houses with the consent of the Cantonment Authorities.

Held, in second appeal, they were not entitled to relief on those findings on the basis of an irrevocable license which was contrary to their pleadings in which they had only claimed proprietary title by adverse possession. (*Mukerji, Ag. C. J. and King, J.*) PURAN *v.* MANSUKH RAM. **6 I.R. (All.) 312=146 I.C. 584 =14 L.R. 262 (Rev.)=17 R.D. 306=A.I.R. 1933 All. 632.**

———*Second appeal—Interference by Board of Revenue.*

The Board of Revenue will not in general interfere with concurrent findings of fact. But it will interfere where there is no evidence in support of the finding. (*Oakden, S. M. and Oppenheim, J. M.*) SUKHPAL SINGH *v.* SHIVA SINGH. **12 L.R. 3 (Rev.)=15 R.D. 96.**

———*Second appeal—New case.*

A party cannot in second appeal set up a new case and place reliance on a different cause of action than the one mentioned in the plaint. (*Abdul Rashid, J.*) KHEM CHAND *v.* KRISHAN KUMAR. **152 I.C. 773=35 P.L. R. 494=A.I.R 1934 Lah. 633.**

———*Second appeal—New case.*

A plaintiff cannot be allowed in second appeal to set up an alternative case when he finds that his case has been disbelieved by the lower Court. (*Mahomed Noor, J.*) RAMDEYAL MAHANTI *v.* PITAM BOWRI **6 I.R. (Pat.) 194=145 I.C. 613=A.I.R. 1933 Pat. 269.**

———*Second appeal—New case.*

A party cannot be allowed to set up a new case in second appeal. (*Allsop, J.*) RAM SHANKAR *v* SHEO DUTT. **6 I R. (Oudh) 198=146 I.C. 987=10 O.W. N. 1011=A.I.R. 1933 Oudh 462.**

———*Second appeal—New case—Suit based on dispossession on certain date—Allegation found against plaintiff's right to fall back on possession and dispossession within 12 years—Constructive possession—If can be relied on.*

Where the plaintiff's suit is from the beginning based upon a definite allegation of fact, and that allegation, namely, dispossession on a particular date, has been disbelieved by the Court of first instance and also by the Court of first appeal, the plaintiff cannot in second appeal or Letters Patent appeal rely upon a case which has not been set up in the plaint, namely, that he had been in possession in fact within a period of 12 years and had been dispossessed within that time. Plaintiff cannot also rely on constructive possession when the necessary facts have not been pleaded or evidence directed to that issue. It is not open to him to make a new case in Letters Patent appeal. (*Courtney Terrell, C. J. and Fazl Ali, J.*) NANDLAL MAHTON *v.* RASDHARI LAL. **16 Pat.L.T. 659.**

———Second appeal—New plea. *See also* C.P. CODE, S. 100—NEW PLEA.

———*Second appeal—New plea.*

A conclusion of the lower appellate Court which is based on nobody's pleading and on nobody's responsibility for any such pleading cannot be accepted in second appeal. (*Mukerji and Bennet, JJ.*) JOTI PRASAD *v.* BARU SINGH. **I.R. 1931 All. 522=132 I.C. 426= A.I.R. 1931 All. 219.**

———*Second appeal—New plea.*

A point which may necessitate the calling of further evidence by the opposite party cannot be allowed to be raised for the first time in second appeal. (*Abdul Rashid, J.*) MOTI RAM *v.* HANS RAJ. **160 I.C. 777=8 R.L. 598=37 P.L.R. 576=A.I.R. 1935 Lah. 702.**

———*Second appeal—New plea.*

A plea in favour of a purchaser from the manager of a joint Hindu family founded on S. 41 of the Transfer of Property Act, if not taken in the first instance in the pleadings and issues, cannot be allowed to be raised in second appeal. 5 Bom. L. R. 784 and *ibid.* 991, Ref. (*Tyabji, J.*) FAKIRAPPA BABAPPA *v.* RUDRAPPA RACHAPPA. **I R. 1932 Bom. 256=137 I.C. 367=34 Bom L R. 354=A.I.R. 1932 Bom. 255.**

———*Second appeal—New plea.*

Where no objection as to suit being bad for defect of parties has been taken in the written statement, or in the grounds of appeal in the lower Court, it cannot be raised in second appeal. (*Scroope, J.*) CHANDRA NATH SAHAI *v.* JANKI PRASAD SAHU. **6 I.R. (Pat.) 160=145 I.C. 325=A.I.R. 1933 Pat. 270.**

———*Second appeal—New plea.*

Where the object of the suit was to have the question of title decided and no plea based on possessory title was taken in the lower courts or in the memorandum of appeal, *held*, that the plea could not be allowed to be raised in second appeal. (*Raza and Kisch, JJ.*) BUDDHU LAL *v.* RAM SAHAI. **8 Luck. 87=I R. 1932 Oudh 332=138 I.C. 808=9 O.W N. 523=A.I.R. 1932 Oudh 244.**

———*Second appeal—New plea of adverse possession.*

Where adverse possession was never pleaded and there is no issue upon it and it has never been discussed, it is a matter of evidence and cannot be dealt with in second appeal. (*Young, J.*) PEARE LAL *v.* NATHI SINGH. **151 I.C. 355=7 R.A. 160=18 R D. 165= 15 L R. 181 (Rev.)=3 A.W.R. 486=A.I.R. 1934 All. 692.**

———*Second appeal—New plea—Applicability of S. 173, B. T. Act—If can be raised.*

The question whether S 173, Bengal Tenancy Act, was applicable to a particular application should not be allowed to be raised in second appeal for the first time. (*Guha and M.C. Ghose, JJ.*) PARTHASARATHI RAY *v.* AHINDRA NATH ROY. **154 I.C. 347=7 R.C. 445 =60 C.L.J. 36=A.I.R. 1935 Cal. 89.**

———*Second appeal—New plea—Plea abandoned in lower Court.*

It is not open to a party in second appeal to raise again a point which was abandoned before the lower appellate Court, even if the point is a pure point of law. (*King, C.J. and Zia-ul-Hasan, J.*) PARSHADI LAL *v.* BRIJ MOHAN LAL. **159 I.C. 117=8 R.O. 159=1935 O.W.N. 1217=A.I.R. 1936 Oudh 52.**

———*Second appeal—New plea—Estoppel—If can be raised in second appeal.*

The question of estoppel is not a pure question of law; when the plea of estoppel, therefore, has not been raised in the Courts below, it cannot be raised for the first time in second appeal. (*Nasim Ali and Henderson, JJ.*) SUDHAMOYEE BASU *v.* BHUJENDRA NATH BISWAS. **159 I.C. 370=8 R.C. 302=A.I.R. 1935 Cal. 713.**

———*Second appeal—New plea—Plea of estoppel.*

A plea in the nature of an estoppel depending upon evidence cannot be allowed to be raised for the first

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time in second appeal. (*Rangnekar, J.*) GOPAL BHANRAO *v.* JAGANNATH PANDIT. **59 Bom. 502 = 159 I.C. 213 = 37 Bom.L.R. 471 = 8 R.B. 175 = A.I.R. 1935 Bom. 326.**

———*Second appeal—New plea—Plea of estoppel.*

A plea of estoppel depends for its decision very largely upon the facts of each case. Where no issue of estoppel was raised in the suit and no reference to it made in the judgments of the lower Courts, it cannot be allowed to be urged for the first time in the second appeal. (*Madhavan Nair, J.*) KRISHNASWAMI PILLAI *v.* EKAMBARESWARAR DEVASTHANAM. **A.I.R. 1935 Mad. 725.**

———*Second appeal—New plea—Plea of estoppel—If can be raised in second appeal.*

Estoppel is not a pure question of law. When a question of estoppel, though raised and decided in the trial Court, is not agitated in the lower appellate Court or raised in the memorandum of second appeal, it cannot be raised in second appeal at a late stage. (*Nasim Ali, J.*) KUMAR PRATIVA NATH ROY *v* BENODE BEHARI GHOSE. **162 I.C. 296 = 8 R.C. 588 = 61 C.L. J. 75 = A.I.R. 1936 Cal. 181.**

———*Second appeal—New plea—Plea of jurisdiction.*

A point involving a question of jurisdiction, which was neither raised in the written statement nor in the grounds of appeal before the District Judge, can for the first time be allowed to be raised in the second appellate Court in the interest of justice, if it can be decided without entering into questions of fact. (*Thomas, J.*) KHUD MUKHTAR BANK, UTRAWAN *v.* BHAGWAN DIN. **11 Luck. 106 = 155 I C. 92 = 7 R.O. 552 = 1935 R D. 238 = 1935 O.W.N. 487 = A.I.R. 1935 Oudh 325.**

———*Second appeal—New plea—Plea not raised in lower Courts—Maintainability.*

Where a plea based on notice of the nature of a claim made in a previous suit was made against a party in second appeal, and the plea was not raised in the lower Courts, neither was there anything on record of the present case showing the nature of the notice, nor was there any finding of the Courts below as to whether any notice was actually served on party.

Held, that the plea could not be raised for the first time in the second appeal. (*Nasim Ali and Henderson, JJ.*) SUDHAMOYEE BASU *v.* BHUJENDRA NATH BISWAS. **159 I C. 370 = 8 R C. 302 = A.I.R. 1935 Cal. 713.**

———*Second appeal—New plea—Plea not taken in lower Courts—Maintainability.*

Where a point as to legality of a certain tax by a Municipality is not raised before the primary Court or before the Subordinate Judge on appeal, it cannot be allowed to be raised in second appeal. (*Guha and Lodge JJ.*) CHAIRMAN OF COMMISSIONERS OF THE BARUIPORE MUNICIPALITY *v.* SIVADAS ROY. **159 I. C. 542 = 62 C.L J. 479 = 8 R.C 327 = A.I.R. 1935 Cal. 726.**

———*Second appeal—New plea—Plea of* res judicata *—Maintainability.*

A plea of *res judicata* which has not been raised in the Courts below cannot be allowed to be raised for the first time in second appeal, when there are no materials on the record on which the question can be decided. (*Nasim Ali and Henderson, JJ.*) SUDHAMOYEE BASU *v.* BHUJENDRA NATH BISWAS. **159 I.C. 370 = 8 R.C. 302 = A I.R. 1935 Cal. 713**

———*Second appeal—New plea—Plea that suit is barred by S. 47, C. P. Code—Maintainability in appeal*

A plea that a suit is barred by reason of S. 47, C. P. Code, cannot be raised for the first time in appeal, when

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it has not been raised in the first Court. (*Grille, Offg. J.C. and Pollock, A.J.C.*) MAHANGUSINGH *v.* JHUMAKLALSINGH. **161 I.C. 43 = 8 R.N. 209 = 18 N.L. J. 110.**

———*Second appeal—New plea—Point abandoned in lower appellate Court.*

A ground of appeal which was raised in the lower appellate Court but was abandoned cannot be allowed to be raised in the course of second appeal. (*Thom and Iqbal Ahmad, JJ.*) MEGHRAJ ROORMAL *v.* FIRM, ANUP SINGH. **159 I.C 984 = 8 R A 529 = 1936 A L. J. 475 = 1935 A W.R. 1185 = A.I.R. 1935 All. 1004**

———*Second appeal—New plea—Point of law.*

A new point of law may be urged in second appeal provided the facts found are sufficient for the determination of the point. (*Mukerji, J.*) LEKHRAJ *v.* CHANDRA PRAKASH. **151 I.C. 256 = 18 R.D. 159 = 15 L R. 207 (Rev.) = 7 R.A. 121 = 3 A.W.R. 456 = A.I R. 1934 All 722 (1).**

———*Second appeal— New plea— Point as to maintainability of suit not raised in the pleadings—If can be urged.*

A plea that the suit is not maintainable because it is not brought in a representative capacity as it should be, must be raised in the pleadings; and when it is not so raised, it being a point of procedure, must be held to have been waived by the defendant, he cannot be allowed to urge that point at a late stage in second appeal. (*Barlee and Sen, JJ.*) WAMAN RAMKRISHNA *v.* GANPAT MAHADEO. **60 Bom. 34 = 160 I.C. 242 = 8 R.B. 255 = 37 Bom.L.R. 925 = A I.R. 1936 Bom 10.**

———*Second appeal—New plea—Question as to acknowledgment of liability.*

A point as to an acknowledgment of liability on the part of the defendants, which is not raised in either of the Courts below, nor referred to in the plaint as required by O. 7, R. 6, C. P. Code, cannot be raised for the first time in second appeal. (*Thom and Iqbal Ahmad, JJ.*) SHIAM LAL *v.* SHIAM LAL. **159 I C. 433 = 8 R. A. 453 = 1935 A L.J. 1251 = 1935 A.W R. 1208 = A.I. R. 1935 All. 1008.**

———Second appeal—New plea—Question of law raised for first time in second appeal—Sustainability. *See* C. P CODE, S. 100—NEW PLEA. **53 All. 65 = A.I.R. 1931 All. 35 (F B).**

———*Second appeal—New plea—Raised but not decided in first appeal—Open in second appeal.*

A point not raised in the trial Court but which was raised in the first appeal and not decided can be raised in second appeal. (*Baguley, J.*) MAUNG BA *v.* MAUNG THA YIN. **135 I C. 328 = I.R. 1932 Rang. 40 = A.I. R. 1931 Rang. 314.**

———*Second appeal—New plea—Refusal to entertain in second appeal.*

The plaintiff's suit was dismissed by the lower Court on the ground that there were nearer reversioners as between whom and the plaintiffs no collusion was proved. In second appeal, it was sought to be argued that the plaintiffs though on the pedigree put forward by them, they were more remote in degree than other relations, still according to the custom of the family as recorded in the *wajib-ul-arz* were entitled to share in the reversionary estate with the nearer reversioners.

Held, that the plaintiffs could not be allowed to raise such a new plea in second appeal. (*Hasan, C.J. and Bisheshwar Nath, J.*) MOHAMMAD IDRIS *v.* BATULAN. **I R. 1931 Oudh 301 = 132 I.C 541 = 8 O.W N. 716.**

———*Second appeal—New plea—Respondent whether can raise*

It is not open to the respondent to raise a plea for the first time before the second appellate Court. (*Raza and*

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Nanavutty, JJ.) JALESAR SINGH *v.* MAHADEO BAX SINGH. **I.R. 1931 Oudh 238=132 I.C. 78=14 O.L. J. 329=8 O.W.N. 243=A.I.R. 1931 Oudh 242.**

———Second appeal—New plea—Suit for mesne profits —Failure to produce accounts—Decree on basis of gross rental—Claim to statutory deduction and collection charges in second appeal—If can be allowed in second appeal. *See* AGRA TENANCY ACT (1926), S. 226. **1935 R.D. 396=A.I.R. 1935 All 976.**

———*Second appeal—New plea—Suit by principal against agent's heirs—Alteration of basis of accounting —Permissibility in second appeal.*

A suit by the principal against the heirs of the agent was fought out in the Courts below on the basis of the actual collections made by the deceased. In second appeal however the claim was sought to be made also in respect of the sums which the deceased ought to have collected.

Held, that the alteration of the claim amounted to a new plea which could not be set up in second appeal. (*Pullan and Niamatullah, JJ.*) BASDEO PRASAD *v.* SAKINA BEGAM. **I R. 1932 All. 603=140 I.C. 106= A.I.R. 1933 All. 73.**

———*Second appeal—New plea —Sustainability.*

A new plea which does not arise out of the pleadings and cannot be decided on the evidence on the record cannot be entertained for the first time in second appeal. (*Raza and Kisch, JJ.*) ASHIQ ALI *v.* BISHESHWAR DIN. **135 I.C. 703=I.R. 1932 Oudh 63=8 O.W.N. 1028.**

———*Second appeal—New plea— Whether can be raised.*

Where the case was dealt with in the lower Courts on the footing that the defendant was a surety and in second appeal the plea was taken that he was a co-obligor.

Held, that the new plea could not be allowed to be raised. (*Beasley, C.J. and Bardswell, J.*) VAIVAPURI PANDARAM *v.* SETHARAMA CHETTIAR. **152 I C. 464=7 R M. 232=1934 M.W N. 118=40 L.W. 479 =A.I R. 1934 Mad 639.**

———*Second appeal—New point.*

A new point, which is a point of law, can be taken for the first time in second appeal, when it is not necessary to take evidence or to make assumptions in favour of the appellant before the point could be decided. (*Henderson, J.*) MATI LAL DAS *v.* ADITYA CHANDRA DAS. **155 I.C. 720=7 R.C 617=60 C.L J. 18= 38 C.W N. 1209=A.I.R. 1935 Cal. 179.**

———*Second appeal—New point—Failure to object in first appeal—Right to agitate in second appeal.*

Where the plaintiffs have not appealed to the District Judge against the decree of the trial Court upholding the transaction to a certain extent which they sought to set aside, it is not open to the plaintiffs to re agitate that point in second appeal. (*Tek Chand and Coldstream, JJ.*) ABDUL RAHIM KHAN *v.* ZAJJA RAM. **148 I.C. 1091=6 R.L 634=A I R. 1934 Lah. 598.**

———Second appeal—New point not pleaded in plaint or in grounds of appeal—Remand to deal with. *See* PRACTICE—REMAND. **37 P.L.R 454**

———*Second appeal—New point—Objection to maintainability of suit—If can be raised for first time in second appeal.*

A contention on the part of the defendant that the plaintiff is not entitled to maintain the suit, which is not set up either in the trial Court or in the first appellate Court cannot be allowed to be raised in second appeal. (*Rangnekar, J.*) SHANKAR VISHVANATH *v.* SHRINI VAS. **156 I.C. 607=8 R B. 4=37 Bom.L.R. 355= A.I.R. 1935 Bom. 254 (2).**

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———*Second appeal—New point—Objection to trial Court's decree in second appeal for first time—Maintainability.*

It is not open to an appellant who has acquiesced in the decree of the trial Court, and who has omitted to file an appeal or cross-objection against it to the lower appellate Court, to impeach the trial Court's decree for the first time in second appeal. (*Niyogi, A.J.C.*) SUNDERSA *v* CHOTMAL. **163 I C 954=9 R.N 19=18 N.L.J. 220.**

———*Second appeal—New point—Points involving investigation of facts in second appeal.*

Points involving investigation of facts cannot be allowed to be raised for the first time in a second appeal. (*R C. Mitter, J.*) JADU NATH GUHA ROY *v.* KASISWAR GUHA ROY. **160 I C. 250=8 R.C. 419=A.I.R. 1935 Cal. 779.**

———*Second appeal—New point—Point not raised in first appeal—Maintainability.*

When a party fails to raise a point in first appeal, which he could have raised by way of cross objection, he cannot be allowed to raise that point in his second appeal (*Knox, J.M*) RAM TAPESA PANDE *v.* BRIJ KUMAR PANDE. **1935 R.D. 124 (1).**

———Second appeal—New point—Point not raised in memorandum—Sustainability—Objection to place of suing—Interference by lower appellate Court. *See* C.P. CODE, O. 41, R. 2. **A.I.R. 1931 All. 556.**

———*Second appeal—New point—Small cause suit—Trial as original suit without objection—Objection in second appeal—Maintainability*

When a small cause suit is tried by a Court without small cause powers as a regular suit, without any objection on the part of the defendant, who does not raise any objection either in the trial Court or in appeal, he cannot be allowed to raise that point in second appeal. (*Rangnekar, J.*) SHANKAR VISAVANATH *v.* SHRINIVAS. **156 I.C 607 -8 R B. 4=37 Bom.L.R. 355= A I.R. 1935 Bom. 254 (2).**

———*Second appeal—Omission to plead incompetency of appeal before lower appellate Court—Estoppel.*

An omission on the part of a party to contend in the lower appellate Court that the other party was not competent to file an appeal from a decree which did not adversely affect him, does not estop him in any manner from taking up the objection in second appeal, as the objection goes to the very root of the appeal preferred against him by the other party. (*Niamatullah, J.*) GOVIND CHAND *v* GAJADHAR. **151 I.C 25=7 R. A. 110=3 A.W R. 737=A.I R. 1934 All. 677.**

———*Second appeal—Question of fact—Decision of.*

No doubt where the question of fact is of a complicated character or the evidence is voluminous, it is desirable to call for a finding thereon from lower appellate Court. But where the question is simple and evidece is scanty, it can be decided by the second appellate Court. (*Pandrang Row, J.*) SOMASUNDARAM CHETTI *v.* NACHAL ACHI. **158 I.C. 573=8 R M. 274=1935 M.W.N. 967=42 L.W. 342=A.I.R. 1935 Mad. 707.**

———*Second appeal—Reference to Bench of two Judges.*

Where in a second appeal, the appellate Court is constituted by a single Judge and the matter is of some difficulty for decision, yet it is not necessary that it should be referred to a Bench of two Judges. The decision of a single Judge, if so permitted, is open to appeal to such a Bench and unless there is a special reason, the ordinary rule of procedure should be followed in every case. (*Dalal, J.*) BRIJ MOHAN DAS *v.* BHIKHUJI.

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I.R. 1931 All 205=129 I.C. 717=1931 A.L.J. 267 =A.I.R. 1931 All. 207.

———*Second appeal—Relief—Change of claim in second appeal.*

A person cannot be allowed to change the whole nature of his claim at the stage of second appeal from what he had either in the trial or in appellate Court. (*Middleton, J.C. and Mir Ahmad, A. J. C.*) BOOTA MAL *v.* FARID KHAN. **157 I.C. 994=8 R. Pesh. 45= A.I.R 1935 Pesh. 126.**

———*Second appeal—Re-trial—All necessary materials placed on record.*

Where all the available evidence has been brought on the record, the High Court does not order re-trial but decides the case itself. (*Mir Ahmad, A.J.C.*) RAGHUMAL KISHENDAS, AMRITSAR *v.* OFFICIAL RECEIVER, PESHAWAR **7 R. Pesh. 67=153 I.C. 90=A.I.R. 1934 Pesh. 126.**

———Second appeal—Right of—Suit of small cause tried as original suit—Second appeal—If open. *See* C.P. CODE, S. 102. **37 Bom L.R. 355=A.I.R. 1935 Bom. 254 (2).**

———*Second appeal—Single suit—Separate appeals by defendants—Single second appeal by plaintiff—Maintainability.*

There was one original suit, against the decree in which in favour of the plaintiffs, two appeals were preferred to the lower appellate Court by two sets of defendants. The result of the appeals was that the suit was dismissed by the lower appellate Court and a decree dismissing the suit was passed.

Held, that in such circumstances it was enough if the plaintiff filed one second appeal and need not file two second appeals. 16 M.L.J. 411, Foll. (*Jackson and Anantakrishna Ayyar, JJ.*) APPA *v.* KACHAI BAYYAN KUTTI. **I R. 1932 Mad. 389=137 I.C. 458—1932 M.W.N. 975=35 L.W. 444=A.I.R. 1932 Mad. 689.**

———*Second appeal—Two similar suits decreed—Two appeals heard by different Judges, one of which is allowed and the other is dismissed—Second appeal from both—Duty of Judge*

Where two similar suits by a party are decreed by the Munsiff, but the two appeals from the decree are heard by two different Judges and one of the appeals is allowed and the other is dismissed and both the second appeals from them came before the same Judge, what the Court has to determine is whether there is ground for interference with either judgment taken by itself. (*Kisch, J.*) HARAKH CHAND *v.* MAHOMED ABDUL BARI. **I.R. 1933 Oudh 125=142 I.C. 696 (2)=10 O.W.N. 1313 =A.I.R. 1933 Oudh 115.**

———*Second appeal—U.P. Government Notification No. 63 A dated 14th July, 1879—Compensation proceedings—Interference by Board.*

In compensation proceedings the Board cannot interfere with concurrent findings of facts recorded by the lower Courts. Effect of Notification No. 63 A, dated 14th July, 1879, considered. (*Oakden, S.M. and Keane, J.M.*) SECRETARY OF STATE FOR INDIA *v.* GULAB SAHU SHEO PRATAB. **15 R D. 172=12 L.R. 49 (Rev.).**

Stay.

———*Stay—Agreement to refer to arbitration—Suit to set aside.*

In a suit attacking the original agreement to refer to arbitration the subject-matter is not the same as in the reference to arbitration and the suit attacking the agreement should not be stayed. (*Jai Lal, J.*) GAYAN CHAND *v.* BHARAT CHAMBER OF COMMERCE, LTD., DELHI. **A.I.R. 1934 Lah. 162.**

PRACTICE—Subsequent events.

———Stay—Foreign adjudication in insolvency—Effect—Later execution proceeding—Stay order. *See* INSOLVENCY—FOREIGN ADJUDICATION. **57 Mad. 616= A.I.R. 1934 Mad. 344=67 M.L.J. 59.**

———Stay of suit—Arbitration—Reference—Dispute involving difficult points of law—Procedure. *See* ARBITRATION—STAY OF SUIT. **37 Bom.L.R. 46=A.I.R. 1935 Bom. 155.**

———*Stay of suit—Pendency of second appeal—Power High Court to stay later proceeding.*

An application for stay of a subsequent suit in the lower Court because a previous suit in its second appellate stage is pending before the High Court can be made on the principle of S. 10, C. P Code But the attempt should first be made in the Court below to have the suit stayed and failing that, the application may be made to the High Court. (*Suhrawardy and Patterson, JJ.*) MAKHANLAL CHAUDHURY *v.* CHANDI NATH MAJUMDAR. **I.R. 1931 Cal 670 (1)=133 I.C. 222 (1) =53 C.L.J. 619=A.I.R 1931 Cal. 779 (1).**

Subordinate Courts.

See also DUTY OF COURT, *supra.*

Subsequent events.

See also PARTITION SUIT, *supra.*

———*Subsequent events—Appellate Court—Duty of.*

As a general rule the Court of appeal in considering the correctness of the judgment of the Court below will confine itself to the state of the case at the time such judgment was rendered and will not take notice of any facts which may have arisen subsequently but the Court will in exceptional cases depart from this rule and take notice of subsequent events on the principle that it is the duty of the Court which still retains control over the judgment to take such action as will shorten litigation, and preserve the rights of the parties. 11 C.W.N. 732, Foll. (*Wort, J.*) RASH BEHARI SINGH *v.* JAIPER GASH PANDE. **6 R.P. 322=146 I.C. 1037=A I.R. 1934 Pat. 21.**

———*Subsequent events — Appellate Court — If can take notice of subsequent events—Right to give retrospective effect to legislation passed after decree of trial Court—Interference with rights of parties.*

Appellate Courts do take and are entitled to take into account changes of circumstances which occur between the date of the decree of the lower Courts and the date of hearing of the appeal, and will, if necessary, give retrospective effect to legislation, even, if by so doing, they are obliged to interfere with the rights given to parties by decrees. A Court of appeal is not merely a Court of error, and when a change of circumstances or of law has taken place between the date of the decree under appeal and the hearing of the appeal, it is entitled to take such change into consideration and pass orders accordingly. (*Barlee and Sen, JJ.*) SHANTINIKETAN CO-OPERATIVE HOUSING SOCIETY, LTD. *v.* MADHAVLAL. **60 Bom. 125=161 I.C. 96=8 R.B. 311=37 Bom.L.R. 955=A.I.R. 1936 Bom. 37.**

———*Subsequent events—Appellate Court—Power to consider subsequent events.*

It is permissible for an appellate Court hearing an appeal against a subsequent suit for recovery of possession to exercise the powers that were inherent in it when it was hearing the appeal in the original case and to give extension of time for the payment of arrears of rent. (*Oppenheim, S.M. and Drake Brockman, J. M.*) JHAOO LAL *v.* BHOLA SINGH. **11 O.W.N. 840= 18 R.D. 320.**

———*Subsequent events—Power of appellate Court to consider.*

PRACTICE—Subsequent events.

The terms of a kanom permitted the jenmi to re-enter on the breach of certain conditions imposed on the kanomdar, or without such breach after six years, the full terms being 12. The first Court held that there had been a breach of two conditions and decreed forfeiture refusing to relieve against it. The district Judge did not consider whether there had been a breach entailing forfeiture, but held that the six years term, having expired at the date of the appeal, the jenmi was entitled to re-enter without proving a breach of the conditions.

Held, the order of the appellate Judge was correct, as a Court is entitled to take into consideration events subsequent to date of plaint, provided this could be done without prejudice to the parties. (*Butler, J.*) JANAKI *v.* KALLIANI AMMA. **152 I.C. 643=7 R.M. 261=A.I.R. 1934 Mad. 675.**

———*Subsequent events—Appellate Court's power to take note of.*

In special circumstances an appellate Court can take notice of facts material to the decision of the case, which have arisen subsequent to the decision of the suit. (*Bhide, J.*) SAWAN SINGH *v.* HAVALI SHAH SARDARI LAL. **152 I.C. 611=7 R.L. 299=A.I.R. 1935 Lah. 32.**

———*Subsequent events—Court whether can consider.*

The Court can take into consideration any event which is subsequent to the institution of the suit if that is necessary in order to enable the Court to pass an appropriate decree. (*Sundaram Chetty and Pakenham Walsh, JJ.*) LAKSHMANA NAICKER *v.* JAYARAM NAICKER. **150 I C. 18=6 R.M. 708=39 L.W. 153=A.I.R. 1934 Mad. 178=66 M.L.J. 380.**

———*Subsequent events—If to be considered.*

A Court may, in suitable cases, take into consideration facts which come into existence during the pendency of the litigation, in order to avoid multiplicity of suits, although, as a general rule, the decision of a case must be based on the state of facts as they existed at the time the suit was instituted. A new cause of action can only be introduced, if at all, by an amendment of the pleadings; in which case the defendant must be allowed an opportunity to raise appropriate defences to it. These formalities can only be dispensed with in cases where no complications arise and where there is no fear of causing injustice to the opposite party. (*Srivastava, Ag. C. J. and Thomas, J.*) RANI KUER *v.* AJUDHIA. **10 Luck. 270=7 R O. 201=152 I.C. 308=11 O.W.N. 1353=A.I.R. 1935 Oudh 22.**

———*Subsequent events—Power of Courts to grant relief on basis of.*

The Court is entitled to give relief to the parties with due regard to incidents that may have happened after the institution of the suit or even after its decision, if this course is desirable or essential in the interest of justice. A suit for house rent was dismissed on the ground that the plaintiff was not entitled to rent since the house was sold in execution proceedings against him; the plaintiff went in revision and the sale was subsequently set aside.

Held, that the sale having been set aside, in order to prevent a multiplicity of suits, it was desirable to take notice of events that happened after the suit was dismissed and which revived the undoubted right of the plaintiff to recover the rent from the defendant. (*Jai Lal, J.*) ANGLES *v.* RAE. **149 I.C. 978=6 R.L. 774 (2)=A.I.R. 1934 Lah. 201.**

———*Subsequent events—Power of Court to take into account—Suit filed without cause of action—Subsequent accrual of cause of action—Power of Court to decree on basis of.*

PRACTICE—Subsequent events.

The happening of a subsequent event should be taken notice of by the Courts only in suitable cases where this would not lead to further complications. A suit cannot be decreed on a cause of action which arises subsequent to the filing of the suit. When the plaintiff has no cause of action on the date of filing the suit, the accrual of the cause of action subsequently cannot enlarge the right of the plaintiff so as to enable him to maintain the suit which is premature. (*A.S.R. Chari, J.*) NATHMALL PARTAPCHAND *v.* RAJMAL. **40 Mys.H.C.R. 392.**

———*Subsequent events—Powers of Court to take note of.*

Where in a suit brought by a *de facto* shebait to set aside certain alienations, his competency to bring the suit was questioned, the Court can take into account the circumstance that during the pendency of the suit the plaintiff had become the *de jure* shebait and permit him to maintain the suit. The power of Court to take cognizance of events subsequent to the institution of the suit can and ought to be exercised to shorten litigation and do complete justice between the parties. (*Suhrawardy and Graham, JJ.*) GIRIS CHANDRA SAW *v.* UPENDRA NATH GIRI DAS. **135 I.C. 273=I.R. 1932 Cal. 81=35 C.W.N. 768=54 C.L.J. 544=A.I.R. 1931 Cal. 776.**

———*Subsequent events—Suit based on oral release—Oral release found against—Release in writing obtained in the course of the suit—Admissibility.*

In certain cases Courts have given permission to parties to cure formal defects in their alleged title and even to put forward new grounds of title but whether such permission should be granted or not would depend on the special circumstances of each case. The plaintiff brought a suit for the possession of a religious office, basing his title on an oral release in his favour by the person preferentially entitled to the office. Subsequently in the course of the suit, he obtained from the same person a registered release-deed but the plaintiff did not put in any additional statement mentioning the release-deed. The oral release relied on in the plaint was found against by the Court and thereupon the plaintiff sought to prove the registered release deed. It was held that he cannot be permitted to rely upon it as it was obtained after the suit was filed. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAYA PILLAI. **I.R. 1931 Mad. 705=133 I.C. 193=1931 M.W.N. 8=A.I.R. 1931 Mad. 505.**

———*Subsequent events—Whether can be looked into by Court.*

Where a decree-holder purchased the tenure of the darpatnidar in Court auction and the sepatnidars later applied to be restored to possession but before the hearing the decree-holder annulled the sepatni by notice under S. 167, B. T. Act,

Held, that the Court should take notice of the subsequent events and should have dismissed the application. Duty of Court in such matters indicated. (*Jack and Mitter, JJ.*) PRIYAMBADA DEBI *v.* BHOLANATH BASU. **60 Cal. 685=6 I.R. (Cal) 129=145 I. C. 663=37 C.W.N. 339=A.I.R. 1933 Cal. 534.**

———*Subsequent events—Whether can be taken into account.*

There is no rigid rule that matters arising after the institution of the suit and before decree cannot be regarded by the Court at the time of making the decree. Subsequent events in suit under S. 46, B. T. Act, 1885, looked into. (*Rankin, C J. and Mukerji, J.*) KINU GAZI *v.* KIRANBALA DEBI. **60 Cal. 990=6 I. R. (Cal.) 165=145 I. C. 885=37 C. W. N 586=A.I.R. 1933 Cal. 653.**

PRACTICE—Suit.

Suit.

———Suit—What constitutes — Application to file agreement referring dispute to arbitration. *See* C. P. CODE, S. 26. **13 Lah. 672=A.I.R. 1932 Lah. 374.**

Summons.

———Summons by registered post returned 'refused'——Sufficiency of service—Onus of proof of non-service. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. VIII, R. 11. **39 C.W.N. 934.**

Taxation.

See (1) BOMBAY HIGH COURT RULES (ORIGINAL SIDE).
(2) CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH. XXXVI.
(3) PRACTICE—COSTS.

Miscellaneous.

———*Action for money had and received—Scope and essentials of.*

An action for money had and received—an equitable action—is in truth an action which is derived from the old action for debt. It is one of the actions on the case and for it to lie there must be circumstances which raise an express or implied contract to pay or what has been described as a fictitious contract to pay, *i.e.*, the circumstances must be such that by the fiction of a contract, the law will impose the obligation to pay an imaginary debt. Moneys paid under an agreement *ultra vires* cannot be recovered back by an action for money had and received, because an *ultra vires* contract is null and void, and the basis for an action of the sort does not exist in such a case. (*Ramesam and Stone, JJ.*) SREE MINAKSHI MILLS, LTD. *v.* CALLIANJEE & SONS. **156 I.C. 570 =8 R.M. 20=1935 M.W.N. 568=41 L.W. 527= A.I.R. 1935 Mad 799=68 M.L.J. 510.**

———*Application supported by affidavit—Materials furnished in reply affidavit—Practice condemned.*

It is a very bad practice to make an application on almost no materials, waiting until the opposite party has adduced lengthy reasons against the application and then at the time when it is not possible for the opposite party to deny anything to reply with a lengthy series of charges based on new materials. (*Rankin, C.J. and Buckland, J.*) FORRESTER *v.* FORRESTER **57 Cal. 1350=I.R. 1931 Cal. 374=130 I.C. 246=A.I.R. 1931 Cal. 206.**

———Attachment before judgment—Subsequent arbitration and stay of suit followed by award in favour of defendant—Effect on attachment. *See* MYSORE ARBITRATION REGULATION, S. 19. **40 Mys.H.C.R. 388.**

———Burden of proof—Suit for specific performance—Alternative prayer for refund of earnest money—Contract of sale found against—Right of plaintiff to claim refund of money—Plaintiff failing to discharge the onus—If he can rely on the admission of the defendant in written statement. *See* BURDEN OF PROOF. **134 I.C. 921=54 C.L.J. 110.**

———*Court—Expression of opinion by way of advice—Binding nature.*

The mere expression of opinion by a Court dismissing a suit that another suit will lie cannot possibly be binding on the parties. (*Rankin, C. J and Pearson, J.*) ABDUL HAMID SARDAR *v.* BIJOY CHAND MAHATAP. 136 I.C. 472=36 C.W.N. 238=54 C.L.J. 302=A.I.R. 1932 Cal 108.

———Decree—Death of party—Validity of decree. *See* DECREE—VALIDITY OF.

———*Defence—Improbability of—If ground for refusing permission.*

A party who has defence to put forward will not be ordinarily debarred or forbidden by the Court from putting it forward on the ground that his defence is improbable and *prima facie* unconvincing. It if were otherwise, many written statements might have to be rejected. (*Rowland, J.*) MACKENZIE & CO., LTD *v.* TATANLAL SURAJMAL. **157 I.C. 764=8 R.P. 164= A.I.R. 1935 Pat. 463.**

———*Function of judicial officer to deal with travelling allowances.*

The question of the payment of travelling allowances is entirely a matter to be dealt with by the judicial officer who functions as a Magistrate, such dealing being something incidental to judicial proceedings. It is in no sense a matter with which any executive officer is concerned. (*Costello and Jack, JJ.*) HEM CHANDRA GANGULY, *In the matter of.* **I.R. 1933 Cal. 407=143 I.C. 359=56 C.L.J. 595=1933 Cr.C. 416=A.I.R. 1933 Cal. 344.**

———*Government servant— Departmental punishment—Notice to person in fault—Fundamental Rules, R.* 16 (1).

Under R. 16 (1) of the Fundamental Rules it is not necessary for the Deputy Commissioner to inform the person proceeded against of the punishment it is proposed to inflict but he cannot when he has limited before hand the nature of the penalty overstep those limits. (*Irving, F.C.*) ILAHI BAKHSH *v.* EMPEROR. **11 Lah.L.T. 71.**

———Partners—Action between—Suit for accounts alone, if maintainable. *See* PARTNERSHIP — ACCOUNTS. **54 Mad. 671=60 M.L.J. 315.**

———*Preliminary point raised in trial—Mode of disposal.*

A preliminary point must be decided as a preliminary point and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case. (*Mukerji and Banerji, JJ.*) MITHAI *v.* HASAN ALI. **I.R. 1931 All. 123=128 I.C. 827=A.I.R. 1930 All. 863.**

———*Procedure—Order of Court—Compliance—Day specified happening to be holiday—Compliance on next Court day—Sufficiency.*

Where parties are prevented from doing a thing in Court on a particular day not by any act of their own but by the Court itself, they are entitled to do it at the first subsequent opportunity. 46 A. 328, Rel. on. (*Jai Lal and Abdul Qadir, JJ.*) FATEH KHAN *v.* CHHAJU. **I.R. 1931 Lah. 770=133 I.C. 434=32 P.L.R. 255=A.I.R. 1931 Lah. 386.**

———Suit against Government — Maintainability — Suit to declare plaintiff's right to succeed to office of matathipathi and questioning Government's recognition of a rival claimant as successor—Maintainability. *See* MYSORE REGULATION (VII OF 1923). **13 Mys.L.J. 228.**

PRADHANI TENURE. *See* LAND TENURE.

PREAMBLE *See* INTERPRETATION OF STATUTES.

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———*Absence of ruling of High Court—Reference to decisions of other High Courts—Desirability.*

If there is a conflict of judicial opinions on a particular point, the Courts are bound to follow the decisions, if any, of the local High Court. In absence of any pronouncement by the said High Court, it is the duty of the Courts to study the law as laid down by other High Courts for the purpose of coming to a proper decision. It is very undesirable to reject a plea simply because there is no ruling on it by the local High Court (*Agha Haider, J.*) AHAMAD ALI *v.* EMPEROR. **I.R. 1931 Lah. 164=129 I.C. 276=32 Cr.L.J. 271=32 P.L.R. 92=1930 Cr.C. 1227=A.I.R. 1930 Lah. 1051.**

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———*Application—Mode.*

To understand and apply a decision of any Court, it is necessary to see what were the facts of the case in which the decision was given and what was the point which had to be decided. (*Raza and Smith, JJ.*) BABU SINGH *v.* RAMESHWAR BAKHSH SINGH. **7 Luck. 360=I.R 1932 Oudh 65=135 I.C. 881=8 O. W N. 1400=A.I.R. 1932 Oudh 90.**

———Authorized report—Duty of Subordinate Court to follow, if there are conflicting decisions. *See* CONFLICTING DECISIONS, *infra*. **9 Rang. 561.**

——— *Authorized report—Preference to.*

A Court should follow the authorized reports of the decisions of its own High Court rather than the un authorized reports. (*Ma·kney, J.*) MAUNG CHIT TUN *v.* MA PWA SEIN. **6 R.R. 259=148 I.C. 908 (2)=35 Cr.L.J. 813=1934 Cr.C. 262=A.I.R. 1934 Rang. 39.**

———*Change by legislature—No inference that previous decisions were wrong.*

An alteration by the Legislature of the law as settled by the decisions of the Courts does not raise any inference that those decisions were wrong or even that those who had proposed the alteration were of that opinion. (*Sir John Wallis.*) BHARAT INSURANCE CO., LTD. *v.* INCOME-TAX COMMISSIONER, PUNJAB **61 I A. 41=15 Lah. 224=6 R P.C. 100=147 I.C. 899=39 L. W. 250=38 C.W.N. 375=3 A.W.R 333=11 O.W.N. 242=1934 A.L.J. 236=36 Bom L R. 401=1934 M W.N. 193=59 C.L.J. 175=36 P.L.R. 318=A I.R. 1934 P.C. 45=66 M.L.J. 391 (P.C.).**

———*Conflicting decisions—Authorized reports—Duty of Subordinate Courts to follow.*

Where there is conflict between two decisions of the same High Court one of which is officially reported and the other is reported in an unofficial report, the Courts subordinate to such High Court can rightly follow the one which is officially reported. (*Carr, J.*) M. S. M M. CHETTYAR FIRM *v.* MAUNG SEIN. **9 Rang. 561=135 I.C. 326=I.R. 1932 Rang. 38=A.I.R. 1931 Rang. 279.**

———*Conflicting decisions — Duty of Subordinate Courts.*

When there is a direct decision of a High Court on any particular point Courts subordinate to that High Court ought to follow that decision in preference to a contrary decision of the other High Courts on the same point. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MAHADEO PRASAD SINGH *v.* JAGARNATH PRASAD. **13 Pat. 303=150 I.C 34=6 R.P. 721=15 Pat.L T. 255=A.I.R 1934 Pat. 173.**

———*Conflicting decisions—Rule as to.*

Where there are two conflicting decisions fixing different amounts as the rents payable, the latter one must prevail especially when it is by a superior Court and discusses the earlier decision. 8 All. 122, Foll (*Drake Brockman, S.M. and Holmes, J.M.*) GHANSHIAM *v.* MITTER SEN. **14 L R. 662 (Rev.).**

———Construction of Act—Decision construing Act—Relevancy in construing Act of another country. *See* INTERPRETATION OF STATUTES—INCOME-TAX ACT. **69 M.L J. 190 (P.C.).**

———*Construction of deed.*

It it always dangerous to make an attempt to interpret one document with the aid of another and unless a question of principle is involved it is no use of referring to any case as an authority. (*Mukerji, J.*) SURAJ & SONS *v.* J. O. BRIN. **I R. 1931 All. 607=133 I.C. 159=A.I R. 1931 All. 759.**

———Construction of deed—Decision construing document—Relevancy in construing similar documents. *See*

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REGISTRATION ACT, S. 17 (1) (*b*). **A.I.R. 1935 Lah. 448.**

———Construction of deeds—English decisions—Value of. *See* DEED—CONSTRUCTION. **40 L.W. 875=A. I.R. 1935 Mad. 107 (2).**

———*Division Bench—Ruling of.*

A Division Bench of the High Court is bound to follow the decision of the Division Bench of the very Court unless it is satisfied that that decision is incorrect and unless a reference is made to a Full Bench. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) RAMNAGINA PRASAD *v.* BISHWANATH PRASAD. **6 R P. 373 =147 I.C. 726=15 Pat.L.T. 102=A. I. R. 1934 Pat. 85.**

———*Division Bench—Ruling of—Binding nature of.*

The decision of a Division Bench of a High Court is binding not only on the Subordinate Courts but also on the other Division Benches of that Court so long as that decision is not overruled by a Full Bench of that High Court or on appeal by the Privy Council. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) MAHADEO PRASAD SINGH *v.* JAGARNATH PRASAD. **13 Pat. 303=150 I.C. 34=6 R.P. 721=15 Pat L.T. 255= A.I.R. 1934 Pat. 173.**

———*Division Bench—Ruling of—Later Bench differing—Procedure.*

It is a fundamental principle of the constitution of the Court, that where one Bench of the Court in unambiguous terms has laid down the law in a certain sense it is not competent for another Bench of equal standing to refuse to follow the earlier decision, or to give to the language used therein a meaning contrary to that which the words used would naturally bear. The proper, and the only available course open to the latter Bench in such circumstances is to refer the question upon which there is a difference of opinion for determination by a Full Bench of the Court. (*Page, C. J., Mya Bu, Raguley, Sen and Mosely, JJ.*) EMPEROR *v.* NGA LUN THAUNG. **13 Rang. 570=158 I.C. 784=8 R.R. 202 =36 Cr L J. 1487=1935 Cr.C. 1088=A.I.R. 1935 Rang. 370 (F B).**

———*Duty of Court—Earlier ruling overruled by later ruling.*

A Court has no power to prefer an earlier ruling of the Financial Commissioner to one that categorically overrules it. (*Irving, F.C.*) LOK NATH *v.* TRUST RAI FATEH CHAND. **35 P.L.R. 395.**

———*English decisions under Bankruptcy Act—Reference—Permissibility.*

The Provincial Insolvency Act is nothing more than a copy of the Bankruptcy Act of England regarding notice of suspension of payment and that being so, the authorities which have been decided from time to time on this provision in the English Act are necessarily authorities for the Court. (*Wort, A.C.J. and Kulwant Sahay, J.*) LAKHI PRASAD SINGHANIA *v.* UGRAH MISRA. **13 Pat. 78=148 I C. 39=6 R.P. 434=14 Pat.L.T. 691=A.I.R. 1933 Pat. 461.**

———*English decisions—Value of.*

The Interest Act and Lord Tenterden's Act being indistinguishable cases under the English Law are relevant for the decision of questions under the former Act. (*Wort and Fazl Ali, JJ.*) PATTINSON *v.* BINDHYA DEBI. **12 Pat 216=6 I R. (Pat.) 225= 146 I.C. 56=14 Pat.L.T. 149=A.I.R. 1933 Pat. 196.**

———*English decisions—Value of—Suit on mortgage.*

Per *Reilly, J*—Indiscrimate citation of English decisions in mortgage suits in this country is one of the surest roads to confusion. (*Venkatasubba Rao and*

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Kelly, JJ.) PONNU CHETTIAR *v.* SAMBASIVA AYYAR. **56 Mad. 546=I.R. 1933 Mad. 121=141 I.C. 372=1933 M.W.N. 842=37 L.W. 788=A.I.R. 1933 Mad. 293=64 M.L.J. 682.**

———*English decision—Value in interpreting Indian Acts.*

The practice of citing English decisions to interpret Indian Statutes is seldom a profitable one. (*Cuming, J.*) U. K. MITRA *v.* CORPORATION OF CALCUTTA. **58 Cal. 1293=136 I.C. 465=33 Cr.L.J. 303=I.R. 1932 Cal. 193=35 C.W.N. 865=1932 Cr.C. 11=A.I.R. 1932 Cal. 63.**

———*Full Bench case—Binding nature.*

So long as a latest Full Bench case is not overruled, it has to be followed if it cannot be distinguished. (*Sulaiman, Boys and Sen, JJ.*) MT. SIRAJ FATIMA *v,* MAHOMED ALI. **54 All. 646=I R. 1932 All. 418=138 I.C. 465=16 R.D. 327=1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.).**

———*Judicial decisions—Modification of plain reading of statute by.*

It is always dangerous to modify the plain reading of a statute by what, it is claimed, can be inferred from various judicial rulings. (*Jackson, J.*) THIRAPATIRAYUDU *v.* SECRETARY OF STATE. **154 I.C. 614=7 R.M. 463=40 L.W. 755=A.I.R. 1935 Mad. 70.**

———Obiter dictum—*Value.*

The portion of a judgment although *obiter* has great value if the reasoning is cogent and convincing. (*Harrison and Dalip Singh, JJ.*) EMPEROR *v.* KALU. **I.R. 1933 Lah. 402=144 I.C. 67=34 Cr.L.J. 679=1933 Cr.C. 304=A.I.R. 1933 Lah. 159.**

———*Observations based on facts—Applicability to other cases.*

It is dangerous to take certain observations made in a certain case with reference to the particular facts of that case and apply them indiscriminately to the facts of some other case that is being tried. (*Nanavutty and Smith, JJ.*) BINDA *v.* EMPEROR. **152 I.C. 85=7 R.O 177=35 Cr.L.J. 1489=11 O.W.N. 1224=1934 Cr.C. 1348=A.I.R. 1934 Oudh 485.**

———*Privy Council—Dictum of—Long course of Indian decision—Departure from.*

The Courts in India must not depart from a long consistent course of decisions simply on the basis of a dictum or a supposed dictum of their Lordships of the Privy Council on a matter which was not directly necessary for their Lordships to decide in the case. 46 A. 95, Ref. to. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I.C. 119=I.R. 1932 All. 7=1931 A.L.J 122=A.I.R 1931 All. 162 (F B.).**

———*Privy Council—Rulings of—Duty to follow.*

It is the duty of the High Court to loyally follow the decisions of the Judicial Committee, and to accept the principles of law laid down by that tribunal even if they be at variance with the customary law or the accepted and settled opinion of the Courts in India. (*Page, C. J., Das and Maung Ba, JJ.*) MAUNG KUN *v.* MA CHI. **9 Rang. 217=I.R. 1931 Rang. 172=132 I.C. 284=133 I.C. 234=I R. 1931 Rang. 250=A I.R. 1931 Rang. 113 (F.B.).**

———*Reported decision—Citation.*

Whenever it is necessary to cite a reported decision care should always be taken to cite it correctly and not to attribute to it a proposition of law which it does not support. (*Rowland and Dhavle, JJ.*) EMPEROR *v.* WAJID SHEIKH. **147 I.C. 1160=6 R.P. 402=A.I.R. 1933 Pat. 500.**

———*Revenue Courts—Preference of earlier to later decision—Propriety.*

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It is very unusual for a subordinate revenue authority to prefer an earlier ruling to a later ruling by the Financial Commissioner on the same subject; such a practice is not to be defended. (*Dobson, F.C.*) AMAR SINGH *v.* KARAM SINGH. **14 Lah.L.T. 19.**

———*Revenue Courts in Punjab—Reliance on judgments of Courts outside.*

A resort to judgments outside the province in revenue cases is to be generally deprecated. It is not necessary for Revenue Courts in the Punjab to seek guidance outside the rulings of the High Court of Lahore or the Financial Commissioners. (*Irving, F.C.*) BABU *v.* SHIB NATH. **13 Lah.L.T. 25.**

———*Stare decisis.*

It would be dangerous for Courts to go back upon a course of decisions and not to adhere to the well-recognized principle of *stare decisis.* (*Sulaiman, C.J. and Thom, J.*) MT. ANIS BEGAM *v.* MALIK MAHOMED ISTAFAWALI KHAN. **55 All. 743=148 I.C. 26=6 R A. 664=1933 A.L.J. 1079=A.I.R. 1933 All. 634.**

———Stare decisis—*Long course of decisions affecting property—Act ambiguous—Duty of Court.*

Where decisions are directly contrary to a statute, it is the duty of a Full Bench to overrule the previous decisions even though they might have stood for a very long time even where they affect rights in property. But where the Act is at least ambiguous and the Court does not feel absolutely able to overrule them, it would be unsafe to disturb the course of rulings. (*Sulaiman, C.J., Mukerjee and King, JJ.*) BHOLA UMAR *v.* MT. KANSILLA. **55 All. 24=I R. 1933 All. 1=140 I.C. 631=1932 A L.J. 941=A.I.R. 1932 All. 617 (F.B.).**

———Stare decisis—*Old authorities—Not to be easily overruled.*

The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property. A.I.R. 1931 Pat. 241 (F.B) and 5 I.C 309, Foll.; *Young v. Robertson,* 4 Macqueen 314, Ref. (*Macpherson and Fazl Ali, JJ.*) MUKHDEO SINGH *v.* HARAKH NARAYAN SINGH. **11 Pat. 112=I.R. 1931 Pat 465=134 I.C 609=12 Pat L.T. 755=A.I.R. 1931 Pat. 285.**

———*Subordinate Courts—Criticism by—Impropriety.*

It is highly improper for a Subordinate Judge to criticise rulings by which he is bound and especially to criticise them in disrespectful language. (*Young, C J. and Rangi Lal, J*) KANSHI RAM *v.* EMPEROR. **157 I.C. 735=36 Cr.L.J. 1195=37 P.L R. 83=1935 Cr.C. 648=A.I.R. 1935 Lah. 433.**

———*Subordinate Courts—Duty of.*

The decision of even a single Judge of its own High Court should be followed by the Subordinate Court in preference to that of the other High Courts. (*Khaja Mahomed Noor and Dhavle, JJ.*) SURAJMAN PRASAD MISRA *v.* SADANAND MISRA. **11 Pat. 616=I.R. 1933 Pat. 3=140 I.C. 572=A.I.R. 1932 Pat. 346.**

———*Subordinate Courts—Duty of.*

When there is a ruling of the highest Court of the province published, a Subordinate Court is bound to follow it. (*Mya Bu and Baguley, JJ*) S.K.R.M. CHETTYAR *v.* V.E.R. CHETTYAR. **14 Rang. 16=160 I.C. 490=8 R.R. 393=A.I.R. 1935 Rang. 525.**

———*Subordinate Courts—Rulings of chief appellate Courts of its own province to be followed.*

A Subordinate Court is bound to follow the rulings of the chief appellate Courts of its own province and it should not rely on the authority of decisions of Courts

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outside the province. (*Fraser, J.C. and Saaduddin, A. J.C.*) HAIDER *v.* MT. ALLAHDITTI. **A.I.R 1934 Pesh. 116.**

———*Unofficial reports—Reference.*

Courts should only fall back on unofficially reported cases when they can find no officially reported ruling on the point in issue. (*Baguley, J.*) BANDEALLY JAFFER *v.* PEER MAHOMED. **6 I.R. (Rang.) 72=146 I.C. 124=A.I.R. 1933 Rang. 75.**

———*Unpublished reports—Refusal of Judge to follow —Propriety.*

It is desirable that a Judge who has not access to all unpublished reports should refuse to exercise his Judgment when one such report is brought to his notice. It may be that in another unpublished judgment the opposite view has been taken. (*Macnair, J.C.*) HAJI KARIM NUR MAHOMED *v.* RAHMAN. **28 Nag.L.R. 116=141 I.C. 156=I.R. 1933 Nag. 35 (2)=A.I.R. 1932 Nag. 137 (2).**

———*Value of.*

It is a fiction regarding case-law that Judges deciding cases do not legislate; they are merely declaring the law. (*Aston, A.J.C.*) BHAGWANJI GOVINDJI *v.* PUNA GOPAL. **150 I.C. 839=7 R.S. 32=A.I.R. 1934 Sind 95.**

———*Value of.*

A case is authority only for what it actually decides. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. *Quinn* v. *Leathem*, (1901) 1 App. Cas. 495, Foll. (*Nanavutty, J.*) MAHOMED AZIM KHAN. *v.* RAJA SAIYED MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———*Value of.*

A decision is an authority only for that which it specifically decides and the fact that every possible argument was not advanced does not detract in any way from the authority, of the decision on the specific point. (*Wort and Mohamed Noor, JJ.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **13 Pat. 486=152 I.C. 301=7 R.P. 185=15 Pat.L.T. 237=A.I.R. 1934 Pat. 292.**

———*Value of—As aid to construction of statutes.*

Decided cases effectively construe the words of an Act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the Statute may come to be unduly extended and attention may be diverted from what has been enacted to what was judicially said about the enactment. (*Lord Chancellor.*) ATTORNEY-GENERAL OF CANADA *v.* ATTORNEY-GENERAL OF ONTARIO. **I.R. 1932 P.C. 34=135 I.C. 754=A.I.R. 1932 P.C. 36 (P.C.).**

———*Value of— Authority only for what the case acually decides.*

A case is only an authority for what it actually decides and that every judgment must be read as applicable to the particular facts proved or assumed to be proved. (1901) A.C. 495, Rel. on. (*Banerji and King, JJ.*) KAMTA RAI *v.* RANI JADURAJ KUNWARI. **I.R. 1931 All. 603=133 I.C. 155=A.I.R. 1931 All. 398.**

———*Value of—Authority only for what the case decides.*

A case is an authority only for the proposition that it decides and not for every proposition that may appear to follow logically from the decision. (1901) A. C. 495, Rel. on. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I.C. 119=I.R. 1932 All. 7=1931 A. L.J. 122=A.I.R. 1931 All. 162 (F.B.).**

———*Value of—Case under Provinicial Insolvency Act (V of 1920)—Applicability of rulings under Presidency Towns Insolvency Act.*

There is nothing in the Provincial Insolvency Act corresponding to S. 52 (2) (*b*) of the Presidency Towns Insolvency Act but the omission does not furnish any ground that a ruling based on S. 52 (2) (*b*) does not apply to the Provincial Insolvency Act 47 Mad. 84 and other cases referred to. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All 239=135 I.C. 119=I.R. 1932 All. 7=1931 A.L.J. 122=A.I.R. 1931 All. 162 (F.B.).**

———Value of—Decision as to custom—Evidentiary value of. *See* CUSTOM—PROOF. **1935 R.D. 283.**

PRE-EMPTION.

See also (1) AGRA PRE-EMPTION ACT (1922).
(2) BENGAL TENANCY ACT (1885), SS. 24-F, 26-C, 26-E, 26-F AND 185.
(3) CO-SHARER.
(4) EVIDENCE ACT, S. 115.
(5) MAHOMEDAN LAW PRE-EMPTION.
(6) OUDH LAWS ACT (1876), S. 7 (*a*).
(7) PUNJAB PRE-EMPTION ACT (1913).

Agra Pre-emption Act (XI of 1922).
Basis of claim.
Circumvention of.
Co-sharer.
Custom.
Decree for
Exchange. *See* TRANSFER, NATURE OF, *infra.*
Fraud.
Joint Hindu family.
Joint vendees.
Lis pendens.
Loss of right.
Mahomedan Law.
Nature of right.
Object of law.
Pre-emption of part of property.
Pre-emption sale.
Pre-emptor.
Price
Right to.
Rival pre-emptors.
Subject-matter.
Suit for.
Time for pre-emption.
Transfer, nature of.
Waiver of right.
Wajib-ul arz.
Who can pre-empt.

Agra Pre-emption Act (XI of 1922).

———*Agra Pre-emption Act, S 16—'Entitled to pre-empt'—Meaning—Rights of pre-emption under Mahomedan Law and under Act—Right not exercisable under Mahomedan Law—Claim under Act can be proceeded with.*

S. 16 does not contemplate the exercise of a right in areas to which the Act is expressly made not applicable. The expression "entitled to pre-empt" in the section does not include the right to pre empt which the plaintiff may possess in areas to which the Act is not applicable. Where certain shares of Zemindari property in a

PRE EMPTION—Agra Pre-emption Act (XI of 1922).

village along with a house in the city of Moradabad were sold under one sale deed to the defendants and the plaintiff sued to pre-empt the Zemindary property by virtue of his right under the pre-emption Act and to pre-empt the house property under the Mahomedan Law, and the Courts held that the plaintiff did not properly exercise his right under the Mahomedan Law.

Held, that the suit need not be dismissed in its entirety and the claim under the Act could be proceeded with. (*Sulaiman and Young, JJ.*) AMJAD ALI KHAN *v.* SAADAT BEGAM. **53 All. 524=132 I C. 193=1931 A.L.J. 269=A.I.R. 1931 All. 317.**

———*Agra Pre emption Act, S. 19, proviso (added by Act IX of 1929)—Applicability—Vendee obtaining voluntary transfer of property after institution of suit.*

Under S 19, the crucial date is the date of the decree and any rule or change in the law that came into existence before that date would govern the suit. And hence pending a pre emption suit, a vendee cannot defeat the plaintiff's right, such as it had existed on the date of suit, by obtaining a voluntary transfer of the property in his own favour. (*Mukerjee, A C.J. and Pachhpal Singh, JJ.*) BALDEO SINGH *v.* HARGAYAN SINGH. **6 I.R. (All.) 60=145 I.C. 396=1933 A.L.J. 82=A.I. R. 1933 All. 217.**

Basis of claim.

———*Basis of claim—Claim based on relationship with insolvent—Sale by receiver with consent of insolvent.*

Where the property vests in the receiver and he effects the sale of the land in dispute with consent of the insolvent who was a member of an agricultural tribe, and the consideration for the sale is paid to the receiver by the vendee, whereupon possession of the land is delivered to him, it is the receiver who is the vendor of the land in dispute and not the insolvent. In such circumstances, the plaintiff must be deemed to have failed to prove a right of pre-emption superior to that of the vendee if he claims pre-emption only on account of his relationship with the insolvent. (*Tek Chand and Abdul Rashid, JJ.*) NEK MAHOMED *v.* JAGAT SINGH. **A.I. R. 1934 Lah 821.**

———*Basis of claim—Right to—Donee from permanent lessee—Member of village community.*

A village community under the Oudh Laws Act consists of the whole body of persons possessing rights as proprietors, under-proprietors or heritable lessees in village lands.

Held, that the donee holding from a perpetual lessee with heritable and transferable rights is a member of the village community and as such entitled to enforce his right of pre emption against stranger-vendees (*Raza and Smith. JJ.*) BHAGWATI PRASAD *v.* BALGOBIND **8 Luck 377=I R. 1933 Oudh 136=142 I C. 885=14 L R. 113 (Rev)=17 R.D. 160=10 O.W.N. 55=A I.R. 1933 Oudh 161.**

Circumvention of.

———*Circumvention of—Resort to evasive means.*

Pre emption can be defeated by any legitimate means. There is nothing to debar the parties from resorting to any legitimate method by which they can avoid the operation of the law of pre-emption. (*Mir Ahmad, A. J C.*) BHAI KHAN *v.* FAIZULLAH KHAN. **160 I.C. 75—8 R Pesh 99=A.I.R. 1935 Pesh. 191.**

———*Circumvention of—Sale disguised as gift—Duty of Court to look to real nature of transaction—Circumstantial evidence—Admissibility.*

Where the parties have really entered into a transaction of sale, but have disguised it under the mask or cloak of a different transaction, such as a *shankal-*

PRE-EMPTION—Co-sharer.

pa nama or gift, the Court must look to the real nature of the transaction for determining whether the right of pre emption can be claimed or not; and for this purpose, the Court can rely on circumstantial evidence. (*Zia-ul-Hasan, J.*) BHAGWAN DUTT *v.* BRIJ BHUKHAN. **10 Luck. 289=7 R O. 311=152 I.C. 666=11 O.W. N. 1378=A.I.R. 1935 Oudh 27.**

———*Circumvention of—Sale or perpetual lease—Nature of transaction.*

It is open to a person to circumvent the law of pre-emption be cloaking a transaction into which he enters in such a way that transaction cannot legally be held to be an out and out sale. In trying to achieve this object all devices are permissible but, at the same time, it is open to the Court to scrutinise all such devices very closely and to see if the transaction into which the parties have entered does really amount to a sale or not. If it does not amount to a sale in law then the device succeeds and the right of pre-emption is defeated. If on the other hand, it does amount to a sale, the device fails and the right of pre-emption is not circumvented. A transaction was cloaked as a perpetual lease for which ostensible rent was reserved to the lessor. No right of re-entry was reserved to the executant and the lessor divested himself of all rights and gave his lessee the right to transfer, sell, mortgage or gift away the plots ostensibly leased to him.

Held, that though the words "malikana" and Nazrana were used, they were mere devices and that the transaction was an out and out sale. (Case law discussed.) (*Nanavutty, J.*) RAM ANAND *v.* RAM DAS. **I.R. 1933 Oudh 217=143 I C. 887=14 L.R. 581 (Rev.)=17 R.D. 706=10 O.W.N. 613=A.I.R. 1933 Oudh 329.**

[**R** 11 O.W.N.1494 (1506) (F.B.)].

———*Circumvention of—Suit for pre emption—Appeal—Acquisition of property—Pending appeal by exchange from persons competent to transfer—Claim can be resisted.*

Pending an appeal from a decree in a pre-emption suit, the vendees-defendants acquired the properties sought to be pre-empted by means of exchange and contended that they had become co sharers with the plaintiff.

Held, that the claim for pre-emption could be resisted even though there might be a remote possibility of a suit being instituted later on by the minor members of the vendees family, for the cancellation of the transfer of the family properties made by the vendees in favour of the exchangers, as the vendees had acquired the properties from persons having full power to transfer the same. (*Sulaiman, C.J. and Mukerji, J.*) JAMUNA BHAGAT *v.* OUDH BEHARI MAL. **6 I R. (All.) 305=146 I C. 511 (2)=1933 A.L.J 1049=A.I.R. 1933 All. 733.**

Co-sharer.

———*Co-sharer—Adjustment of shares.*

In the ordinary course, co sharer landlords applying to pre empt should be entitled to pre empt to the extent of equal shares or according to their interest in the superior right. (*Jack, J.*) KHOSAL CHANDRA DAS *v.* UPENDRA NATH GHOSAL. **136 I.C. 544=1 R. 1932 Cal. 224=35 C.W.N 1058=A.I.R. 1932 Cal. 220.**

———"*Co-sharer*"—*Purchaser of specific fields in Khata—If a co-sharer.*

A person who owns a definite fractional share in a Khata is no doubt a co-sharer but not one who has purchased some specific fields in the Khata. (*Agha Haidar, J.*) MAHLA SINGH *v.* HARNAM SINGH. **157 I.C. 964 =37 P.L.R. 276.**

PRE-EMPTION—Custom.

Custom.

———*Custom—Kumaun—Joint Hindu family—Property held has tenant in common—Pre-emption of brother's share.*

Members of a joint Hindu family in Kumaun hold property as tenants-in-common, according to local custom, and hence one brother can pre-empt his brother's share which had been sold by the latter to a stranger. (*Mukerji, Ag. C.J and Rachhpal Singh, J*) CHANDRAMANI *v.* MATHARA DATT. **6 I.R. (All.) 58=145 I.C. 379 (2)=1933 A.L.J. 81=A.I.R. 1933 All. 216.**

———*Custom—Kumaun—Preferential right of relatives—Co-sharer.*

Under the customary law prevalent in Kumaun a relative of the vendor within the third degree has a right of pre emption againt any purchaser who is an unrelated or more distantly related co-sharer. Where the claimants were the step-brothers of the vendor and the vendees were descended from the same common ancestor,

Held, that there was no preference *inter se* because the parties were within the third degree. (*Sulaiman, A.C. J and Banerji, J.*) BHIM SHAH *v.* UDE RAM SHAH. **I.R 1931 All. 848=134 I C. 464=1932 A. L.J. 108=A.I.R. 1932 All. 133.**

———*Custom—Kumaun—Relative of vendor's husband—Preferential rights.*

In order to have a preferential right of pre-emption in Kumaun, the plaintiff should be a relative of the vendor within the third degree and not merely a relative of the deceased husband of the vendor. (*Sulaiman, C. J. and Mukerji, J*) BACHAULI *v.* UDAI SINGH. **55 All. 487=I.R. 1933 All. 428=144 I.C. 389=1933 A.L.J. 502=A.I R. 1933 All. 391.**

———*Pre emption— Co-sharer— Kumaun— Sale of property by legitimate son—Plaintiff, a son by* dhanti *woman—Vendee, a co sharer of equal status—Plaintiff's right to preference as brother of vendor.*

A son by a *dhanti* wife cannot be regarded as a relative of a legitimate son within the meaning of the custom which entitles a relative to pre empt as against a co sharer on an equal footing who is not a relative. Accordingly, on a sale of property by a legitimate son, the plaintiff who is a son by a *dhanti* woman cannot claim pre-emption in preference to the vendee who is a co-sharer on an equal footing, on the ground that he is the brother of the vendor. (*Sulaiman, C.J. and Bennet, J.*) JAI DATT TEWARI *v.* DAYA RAM PANT. **160 I. C. 912=8 R.A. 672=1935 A.W.R. 1335=A.I.R 1936 All. 78.**

———*Custom—Mohalla Tumbrian or Pirzadgan.*

The custom of pre-emption exists in Mohalla Tumbrian or Pirzadgan. (*Jai Lal, J.*) BADURUDDIN *v.* JHANGIR KHAN. **I.R. 1932 Lah. 594 (1)=139 I.C. 656=33 P.L.R. 781=A.I.R. 1932 Lah 608.**

———*Custom—Proof—Instances of sales to strangers without claim—Right, if disproved.*

Proof that in a number of instances transfers took place to strangers without a right of pre emption being claimed is not sufficient to disprove the existence of a custom of pre-emption or to prove that that such custom has fallen into disuse. (*Kendall, J.*) JAGANNATH *v.* INDERPAL SINGH. **153 I.C. 172=7 R.A. 458=4 A. W.R. 1229=1935 A.L.J. 108=A.I.R. 1935 All. 236.**

Decree for.

———*Decree for—Execution of—Failure of vendee to pay third person—Reduction of pre-emption money, if permissible in execution.*

The plaintiff who has obtained a decree for pre-emption cannot in execution be allowed to deduct from the pre-emption money the amounts reserved for payment to the vendor's creditors and not so paid. That question should be raised and decided in the suit before decree and not after the decree in the execution department. (*Mukerji and Bennet, JJ.*) UMRAO SINGH *v.* KANWAL. **I.R. 1933 All. 30=141 I.C. 15=A.I.R. 1933 All. 113.**

PRE-EMPTION—Joint vendees.

Fraud.

———*Fraud—X having no right of pre-emption setting up Y to exercise his right—Decree in favour of Y—Plea by X that Y obtained decree for X's benefit—Permissibility.*

Where *X* who has no preferential right of purchase as against the vendee of a certain property sets up *Y* who has such right to institute a suit for pre-emption and the Court treating *Y* as the real pre-emptor passes a decree in his favour and puts him into possession, the vendee has been clearly defrauded as, if the real nature of the arrangement had been disclosed in the pre emption suit, the vendee would have defeated the claim of *Y*. It is doubtful if the Courts will recognize a benami pre-emption; but assuming that such a thing is permissible, *X* having perpetrated a fraud on the vendee, the law of pre emption and the Court and the purpose of the fraud having been fulfilled, it is not permissible for *X* or his representatives in interest to say that the pre-emptor obtained the decree for his benefit. (*Niamatullah, J.*) MT. JOERA BIBI *v.* MT. FATIMA. **157 I C. 610=8 R.A 215=1935 A.L.J. 638=1935 A.W.R. 600=A.I. R. 1935 All. 656.**

Joint Hindu family.

See also CUSTOM, *supra.*

———*Joint Hindu family—Member taking interest under sale—Right to pre empt.*

Where property had been purchased by the family on behalf of all the members including the plaintiff who was an undivided member of the family.

Held, that the sale-deed had been acquired in the interest of all and the plaintiff himself had a share in it and therefore he was not entitled to pre-empt the property. (*Sulaiman and Young, JJ.*) JAMNA PANDEY *v.* SAHDEO PANDEY. **I R. 1931 All. 395 (1)=131 I.C. 555 (1)=1931 A L.J. 341=A I.R. 1932 All. 80.**

———*Joint Hindu family—Sale by Hindu father—Right of minor son to pre-empt.*

A Hindu minor son has no right of pre emption in respect of a sale by his father of joint Hindu family property. (*Dalip Singh and Bhide, JJ.*) KHUDA BAKHSH *v.* LAHORI MAL. **156 I.C. 15 (1)=7 R.L. 877 (1)=A.I.R. 1935 Lah. 560.**

Joint vendees.

See also PRE EMPTION OF PART OF PROPERTY, *infra.*

———Joint vendees—Pre-emptor with superior right joining with person having inferior right—Effect. *See* AGRA PRE-EMPTION ACT (1922), S. 21. **A.I.R. 1933 All. 788.**

———*Joint vendees—Purchase by person with superior right along with stranger—Suit by person with inferior right—Purchase of stranger's rights by person with superior right prior to suit—Effect of.*

A person with a superior right cannot resist the claim of a person with an inferior right to pre-empt if he associates a stranger in the purchase by him, and even if prior to the suit by the person with the inferior right, he purchased the rights of the stranger. (*Jai Lal, J.*) MANGA *v.* IMAM DIN. **I.R. 1933 Lah. 71 (2)=141 I.C. 187=34 P L.R. 125=A.I.R. 1933 Lah. 117.**

———*Joint vendees—Purchaser having right of pre-emption associating with stranger in the purchase—Plaintiff with no superior claim.*

PRE-EMPTION—Joint vendees.

If a purchaser having a right of pre-emption associates with himself in the purchase a person who has no right to pre-empt, he is not entitled to resist the claim of a pre-emptor to enforce his rights even as to his share of the purchase, although such pre-emptor has no superior claim to pre-empt compared with himself. (*Addison and Beckett, JJ.*) BHAGWANA *v.* SHADI. **16 Lah. 408=7 R.L. 758=155 I.C. 654=36 P.L.R. 114 =A.I.R. 1934 Lah. 878.**

———*Joint vendees—Sale to three persons—Shares of each vendee specified.*

Where a sale is effected to three persons and the share of each is specified in the sale-deed itself, the transaction of sale is indivisible in spite of the fact that the fractional share of each of the purchasers is specified in the deed. This specification is merely an arrangement between the purchasers *inter se* and does not affect the oneness of the transaction so far as the vendor is concerned. Hence the right of the pre emptor is not defeated. (*Addison and Din Mohomed, JJ.*) HAYAT BAKHSH *v.* MANSABDAR KHAN. **160 I.C. 826=8 R. L. 616=37 P.L.R. 873=A I.R. 1935 Lah. 529.**

Lis pendens.

See also CIRCUMVENTION OF, *supra.*

———*Lis pendens*—Applicability of. *See* T. P. ACT, S. 52. **32 P L.R. 283=A I.R. 1931 Lah. 435.**

———Lis pendens—*Devolution of right —Purchaser from pre-emptor subsequent to accrual of right.*

Quaere.—Whether a right of pre-emption devolves on a stranger to the family who, after the sale that it is sought to pre-empt, obtains the property of the person entitled to pre-empt by purchase or by a decree of the Court. (*Raza and Kisch, JJ.*) ASHIQ ALI *v.* BISHESHWAR DIN. **135 I.C. 703=I.R. 1932 Oudh 63=8 O.W.N. 1028.**

———Lis pendens—*Loss of right—Vendee's acquisition of share in village by gift pending suit—Agra Pre-emption Act* (1922), *S.* 19.

When a sale has taken place to a stranger the vendee's acquisition by gift of a share in the village, pending a co-sharer's suit for pre emption instituted before the passing of the Agra Pre-emption Act, 1922, defeats that co-sharer's claim for pre emption. The decisive date as regards the rights of the co-sharer to pre empt is the date of the decree. 42 All. 268, Appr. (*Sir George Lowndes.*) HANS NATH *v.* RAGHO PRASAD SINGH. **59 I.A. 138=54 All. 189=I.R. 1932 P.C. 98=136 I.C. 402=1932 A.L.J. 190=35 L.W. 343=55 C.L.J. 276=9 O.W.N. 127=A.I.R. 1932 P.C. 57=62 M.L. J. 544 (P.C.).**

———Lis pendens—*Suit on basis of preferential right —Vendee acquiring equal right—Pending suit—Effect of.*

The actual acquisition by a pre-emptor is made not at the time when the property is sold to another, nor at the time when the suit is instituted but at the time when the decree is made. The preferential right that a person possesses at the time of the sale and retains till the institution of the suit merely entitles him to move the Court in his favour, but in order to succeed he must retain this position up to the time of obtaining the decree Hence where a pre-emptor files a suit for pre-emption on ground of his preferential right over the vendee, but the vendee pending suit gets his defect removed and clothes himself with equal right as that of the pre-emptor, the pre emptor has no preferential right at time of passing of decree and as such cannot succeed. A.I R. 1933 Lah. 117; 91 P.R. 1909, Diss. from; A.I.R. 1933 Lah. 481, Appr. (*Addison and Din Mahomed, JJ.*) HAYAT BAKHSH *v.* MANSABDAR KHAN. **160 I.C. 826=8 R. L. 616=37 P.L.R. 873=A.I.R. 1935 Lah. 529,**

PRE-EMPTION—Nature of right.

———Lis pendens—*Vendee acquiring status for co-sharer during pendency of suit—Effect of.*

If a vendee acquires the status of a co sharer equal to that of the plaintiff pre-emptor, after the institution of the suit and before the decree is passed, he can successfully defeat the plaintiff's claim. (*Sulaiman, C.J. and Mukerji, J.*) SHEO BALAK *v.* RAM SARAN. **55 All. 975=6 I.R. (All.) 338=146 I.C. 775=1933 A.L.J. 1625=A.I.R. 1933 All. 788.**

———Lis pendens—*Vendee parting with property in favour of superior pre-emptor during pendency of suit for pre-emption—Effect of—Doctrine of* lis pendens.

It is no doubt true that a vendee can defeat a pre-emptor by parting with the property in favour of a superior pre emptor even during the pendency of the pre-emption suit. But in order to avoid the applicability of the doctrine of *lis pendens*, such transfer must take place within the period of limitation provided for pre-emption suits, otherwise the transfer will be bad in law and not sufficient to defeat the claim of the pre-emptor. (*Addison and Din Mohammad, JJ.*) JAS RAJ JUNIWAL *v.* GOKAL CHAND JAINI. **160 I.C. 349=8 R.L. 530=37 P.L.R. 630=A.I.R. 1935 Lah. 808.**

Loss of right.

See also LIS PENDENS, *supra.*

———*Loss of right—Acquiescence—Application for exchange of plots, if amounts to.*

Where a sale an undivided share in a property was effected and the purchaser of that share had been substituted as a party in place of the vendor in a suit for partition of that property and the pre-emptor, long after making the pre-emption demands and long after filing the suit for pre emption of that share, had applied to the Court conducting the partition suit, for an exchange of certain plots allotted to the purchaser's share.

Held, that under the circumstances, the pre-emptor's application for the exchange of plots did not amount to an acquiescence in the sale and there had been nothing in his act which would defeat the right of pre-emption. (*Ross and Scroope, JJ.*) RAMBISHUN SINGH *v.* KULDIP SINGH. **I.R. 1931 Pat. 149=130 I.C. 165= 13 Pat.L.T. 38=A.I.R. 1931 Pat. 72.**

Mahomedan Law.

See also MAHOMEDAN LAW—PRE EMPTION.

———Mahomedan Law—Custom—Entry in *wajib-ul-arz* as to pre-emption according to usage of the country —Mahomedan Law—Applicability. *See* MAHOMEDAN LAW—PRE-EMPTION. **4 A.W.R 1229=A.I.R. 1935 All. 236.**

Nature of right.

———*Nature of right.*

The right of pre-emption is, in essence, one of substitution and not of re-purchase, the pre-emptor being bound to take the place of the vendee in the original contract. 7 All. 775, Rel. on. (*Middleton, J.C. and Saaduddin, A J.C.*) MAHOMED AZIM *v.* SHER ALI KHAN. **6 I.R. (Pesh.) 7=145 I.C. 739=A.I.R. 1933 Pesh. 74.**

———*Nature of right.*

Pre-emption is primarily a right of substitution, and, if an agreement of sale has really taken place and a price has been fixed, the person entitled to pre-emption can claim the benefit of that agreement and can enjoy all conditions of the agreement including the price. It is only where the price has not been fixed in good faith that the Court should go into the matter and determine the market value or fair consideration, the reason being that the price is usually not fixed in good faith so as to

PRE-EMPTION—Nature of right.

defeat the right of pre-emption. (*Staples, A.J.C.*) NATHUSINGH GANAPATSINGH *v.* NARAYANSINGH. **159 I.C. 497=8 R.N. 126=A.I.R. 1935 Nag. 195.**

———*Nature of right—Strict application.*

The right of pre-emption is a special and peculiar one based on custom and tending to limit freedon of alienation and to deprive parties to a contract of the fruits of their contract; therefore its exercise should be limited strictly to that recognized by law and not be extended so as to encroach on the rights of contract further than is unavoidable. (*Middleton, J.C. and Saaduddin, A.J.C.*) MAHOMED AZIM *v.* SHER ALI KHAN. **6 I.R. (Pesh.) 7=145 I.C. 739=A.I.R. 1933 Pesh. 74.**

Object of law.

———*Object of law.*

The object of the law of pre-emption is to keep out strangers and any transaction whether of sale, mortgage or lease may be pre empted if it offends against the local conditions of that law. (*Courtney Terrell, C.J. and Kulwant Sahay, J.*) SHAKAL KUER *v.* PARMANAND. **6 I.R. (Pat.) 307=146 I.C. 963=14 Pat.L.T. 473=A.I.R. 1933 Pat. 523.**

Pre-emption of part of property.

———*Pre-emption of part of property—If allowed—Pre emption only of whole bargain—No right to pick and choose.*

The pre-emptor must take over the whole bargain and cannot be allowed to pick and choose portions thereof. The only limitation to this rule is that, in cases where land belonging to the pre-emptor has been included in the sale, he can exclude that portion and seek pre emption for the remainder, generally at a proportionate price. Hence where lands belonging to the vendor, to third parties, and to the pre-emptor have all been included in a sale by the vendor, the would-be pre-emptor must follow the general rule, that pre emption must include the whole transaction except that he may exclude his own lands; this exception being based on the impossible position that the pre-emptor would be forced to pre empt tne whole. 5 All. 382, Ref.; 102 P.R. 1894, Not foll. (*Middleton, J.C. and Saaduddin, A J.C.*) MAHOMED AZIM *v.* SHER ALI KHAN. **6 I.R. (Pesh.) 7=145 I.C. 739=A.I.R. 1933 Pesh. 74.**

———*Pre emption of part of property—Rule against.*

A pre emptor, whose right extends over the entire property sold, must take over the bargain in its entirety and has no right to pre empt a part of the property sold on payment of a proportionate part of the price. Where one half of the property is sold to a collateral and the other half to a stranger and no terms are specified in the deed as regards individual payments of the money, another collateral is not entitled to treat the transaction as divisible and sue to pre empt the one-half sold to the stranger. (*Currie, J.*) DHALA *v.* KHANU. **160 I.C. 576 (1)=8 R.L. 569 (1)=37 P.L.R. 131=A.I.R. 1935 Lah. 635.**

———*Pre-emption of part of property—Rule against—Property split up by vendee.*

A pre-emption suit was filed in respect of a sale; but the vendee sold the property in equal shares to two other persons who also claimed to be pre emptors thereof. The sub-vendees were also impleaded in the pre emption suit and it was contended by the plaintiff that as the pre-emptor, sub vendees, had not each pre empted the whole property, and as the bargain was split up they should be deemed to have waived their right of pre-emption.

Held, that the principle that a pre emptor whose right extends over the entire property sold must take over the whole of the bargain and that he is not entitled to pre-empt only a part of the property has no application to

PRE-EMPTION—Pre-emptor.

this case as the vendee himself had broken up the bargain and sold the whole property to two pre emptors and that a sale of this character did not involve a breaking as contemplated by the general rule. A.I.R. 1924 Lah. 431, Ref. (*Shadi Lat, C.J. and Abdul Qadir, J.*) TIRATH RAM *v.* DINA NATH. **14 Lah. 810=6 I.R (Lah.) 121=145 I.C. 629=34 P.L.R. 826=A.I.R. 1933 Lah. 774 (2).**

———*Pre emption of part of property—Rule against—Sale deed in favour of two vendees—Share of each vendee specified but not amount contributed by each.*

The right of pre emption is not a right of re-purchase either from the vendor or the vendee, but is one of substitution for the vendee in the original sale. Therefore a plaintiff suing to pre empt a sale which had been effected by one sale-deed in favour of two vendees jointly, he is bound to take over the bargain in its entirety. He cannot sue against one of the joint purchasers only and claim possession of a fraction of the property sold on payment of the proportionate share of the purchase price. For the purposes of pre-emption, a sale transaction is regarded as indivisible in those cases, where the purchase money is paid in one lump sum without any specification of the amount paid by the various vendees, and the mere fact that the shares to be taken by the vendees respectively are specified in the sale-deed does not alter the nature of the transaction, it being at most an arrangement among the purchasers *inter se*, which does not affect the vendor. (*Tek Chand and Coldstream, JJ.*) MAHOMED SHAFI *v.* ALLAH DIN. **153 I C. 128=7 R.L. 387 (2)=35 P.L.R. 513=A.I.R. 1934 Lah. 429.**

———*Pre-emption of part of property—Suit relating to part of property sold—Maintainability.*

A person seeking pre-emption must sue to pre-empt all the property included in the conveyance of which he claims the benefit and in respect of which his right of pre-emption exists whether such right is a superior one giving him a preferential right of purchase or only an equal right to be exercised by the drawing of lots. Where the property sold lies in two pattis, *R* and *S*, the plaintiff is himself a co sharer in patti *R*, but he is not a co sharer in patti *S*, and he sued to pre-empt a portion of the property in patti, *R*, and failed to sue for pre emption of the portion sold in patti *S*, his suit must fail altogether, as no person can sue for pre-emption of a portion of the property sold, and as a co-sharer in patti *R*, he has an equal right of pre emption in patti *S* along with the vendee who is like himself a co sharer in the mahal. (*Pullan, J.*) MANBODH SINGH *v.* BRIJ BHUKHAN. **I.R. 1931 Oudh 97=129 I.C. 321=7 O.W.N. 1098=14 O.L.J. 62=A.I.R. 1931 Oudh 52.**

Pre-emption sale.

———*Pre-emption sale—Nature of—Covenant of title.*

A pre emption sale is a voluntary sale with an implied covenant for title, for the breach of which an action for damages is maintainable. (Case-law ref.) (*Niyogi, A. J.C.*) SHEIKH ABDUL *v.* KISAN. **27 N.L.R. 392=136 I.C. 879=I.R. 1932 Nag. 39=14 N.L J. 48=A. I.R. 1931 Nag. 166.**

Pre-emptor.

———*Pre-emptor—Suit for pre-emption—Decree—Deposit in Court in accordance with—Right of pre-emptor to possession—Attachment of deposit by creditors of decree-holder—Effect of.*

When a pre-emptor has deposited the amount in Court in accordance with the terms of the decree, he becomes entitled to the land from the date of such payment and the mere fact that the amount deposited by the decree-holder is erroneously attached and taken away by some

PRE EMPTION—Pre-emptor.

of the creditors of the decree-holdor is no ground for refusing delivery of possession to him. (*Bhide, J.*) NATHA SINGH *v.* FATEH KHAN. **6 I.R. (Lah.) 1 = 144 I.C. 695 = A.I.R. 1933 Lah. 791.**

———*Pre emptor—Usufructuary mortgagee—Right to be redeemed by pre emptor.*

If an usufructuary mortgagee was in possession of the property by virtue of his mortgage before the sale-deed, his actual possession cannot be disturbed by the pre-emptor without redeeming him. (*Sulaiman, A.C.J. and Banerji, J.*) SHAMSUDDIN *v* ALAUDDIN. **I.R. 1931 All. 846 = 134 I.C. 462 = 1931 A.L.J. 1083 = A.I.R. 1932 All 138.**

Price.

———*Price—Costs—Deduction of.*

The plaintiff is entitled to deduct the sum of money due to him for costs from the pre emption money. (*Mukerji and Bennet, JJ.*) UMRAO SINGH *v.* KANWAL. **I.R. 1933 All. 30 = 141 I.C. 15 = A.I.R. 1933 All. 113.**

———*Price—Fixation of—Market value—Duty of Court to consider.*

Where the Court finds that the price has not been paid or fixed in good faith, it should proceed to consider the market value of the property in dispute. (*Tapp, J.*) TOTA SINGH *v.* LABHOO SINGH. **I.R. 1933 Lah. 456 (1) = 144 I.C. 306 (1) = 34 P.L.R 199 = A.I.R. 1933 Lah. 332.**

———*Price—Land built upon by purchaser* bona fide *—Value of the land and the cost of the buildings to be paid.*

Two persons exchanged lands and on application for mutation, owing to the absence of one of the parties, mutation was refused to be effected in his name. Such person believed in good faith to be the owner of the land and erected a building thereon. When mutation was refused, the opposite party who had given the land in exchange executed a sale deed in favour of the person who had built on it. Thereupon a collateral of the vendor applied for pre emption

Held, that he was entitled to do so only on the payment of the price of the land, for which it was sold and the value of the buildings erected thereon and that S. 51, T. P. Act, applied to the case. (*Addison and Bhide, JJ.*) QAIM *v.* GHULAM DIN. **6 I.R. (Lah.) 167 = 146 I.C. 36 - A.I.R. 1933 Lah. 540.**

———*Price—Nominal inclusion of other item—Consideration amount—Determination.*

Per *Sulaiman, J.*—Where the plaintiff's property has been intentionally included either to defraud him or to embarrass him, the consideration paid may be treated as the consideration for the property which in reality belonged to the vendor, but where the vendee has acted in good faith, it may well be argued that the total consideration paid by him must be paid by the pre emptor, even though a part of his own property was included. (*Sulaiman and Young, JJ.*) HANKAR KUNWARI *v.* ISHWAR DAYAL SINGH. **I.R 1932 All 381 = 138 I.C. 251 = 1932 A.L.J. 313 = A.I.R. 1932 All. 469.**

———*Price—Pre emptor—Right to question consideration.*

A pre-emptor who doubts whether the consideration has been truly expressed in a sale deed of property of which he seeks pre-emption, is entitled to have the question determined by a Court of Law. 11 W.R 71; 10 Cal 1008; 11 W.R 275; 3 All. 236 and 16 All 247, Ref. (*Ross and Scroope, JJ.*) RAMBISHUN SINGH *v.* KULDIP SINGH. **I.R 1931 Pat 149 = 130 I.C. 165 = 13 Pat.L.T. 38 = A.I.R. 1931 Pat. 72.**

PRE-EMPTION—Rival pre-emptor.

———*Price—Suit for pre-emption—Decree—Vendor getting decree for greater amount subsequently against vendee—Vendee cannot sue pre-emptor or vendor again.*

K sold some property to *S*. *N* preempted that sale by means of a suit in which *S* alleged that the sale was for Rs. 700 paid by him in cash. *K* alleged that the sale was for Rs. 700 paid to him in cash and Rs. 500 in respect of which a balance had been struck in his favour by *S*. *S* alleged that this balance was fictitious and had been executed by him in favour of *K* after the transaction of sale for Rs. 700 as it was represented to him by *K* that a suit for pre emption was likely to be instituted The trial Court gave a decree for pre emption on payment of Rs. 700. Neither party appealed from the decree. Subsequently *K* sued *S* and got a decree for Rs. 500 under the blance struck. *S* brought a suit against *K* and *N* for the amount decreed.

Held, that *S* was entitled to recover the amount neither from *N* nor from *K*. A fresh suit did not lie for the recovery of money from the successful pre-emptor which *S* was made to pay to the vendor subsequent to the decree for pre-emption. (*Jai Lal, J.*) SUNDER SINGH *v.* NATHU RAM. **I.R. 1933 Lah 481 = 143 I.C. 577 = A I R 1933 Lah 257.**

———*Price- Time for payment—Appeal—Effect of.*

An appeal by the defendant does not operate as an extension of the time fixed by the trial Court for payment of the pre-emption money. (*Mukerji and Bennet, JJ.*) UMRAO SINGH *v.* KANWAL. **I.R. 1933 All. 30 = 141 I.C. 15 = A.I.R. 1933 All. 113.**

Right to.

———*Right to—Decree for specific performance—Sale deed executed under—Claim to pre-empt, whether accrues.*

A sale-deed executed in pursuance of a decree in a suit for specific performance can give rise to a right of pre emption. Such a right accrues from the date of the execution of the sale deed. (*Sulaiman, C. J. and Young, J.*) KALI CHARAN SINGH *v.* JANAK DEO SINGH. **I.R. 1932 All. 583 = 139 I.C. 714 = A.I.R. 1932 All 694.**

———*Right to—Pre emptor bound by sale.*

Where a sale is valid and binding on the pre-emptor, he is not entitled to pre empt, as he cannot challenge validity of sale in suit for pre emption. A.I.R. 1929 All. 658, Rel. on. (*Sulaiman, C.J. and Mukerji, J.*) RAM SINGH *v.* DEO NARAIN. **55 All 972 = 6 I.R. (All.) 119 (1) = 145 I C. 547 = A I R. 1933 All. 758.**

———*Right to—Talukdar—Talukdari dues paid by Government to talukdar—Status of superior proprietor not affected.*

The expression "talukdar" in the Punjab is ordinarily understood as meaning a superior proprietor. The status of a superior proprietor and his right to pre emption are not affected by the fact that the amount paid to him as talukdari is not levied in addition to the amount of land revenue payable by the proprietors to Government but is paid by Government to him out of the revenues assessed at ordinary rates on the proprietors. (*Tek Chand J.*) SARDAR KHAN *v* SADULLA KHAN **I R. 1933 Lah. 12 (2) = 140 I.C. 566 = 33 P. L R. 1054 = A.I.R. 1933 Lah. 57.**

Rival pre-emptors.

See also JOINT VENDEES AND LIS PENDENS, *supra.*

———*Rival pre-emptors—Suit for pre-emption—Vendee selling to a person alleging right of pre-emption but has not—Effect of.*

If the vendee sells the land to a person with a superior or equal right of pre-emption to the plaintiff who has instituted a suit to pre-empt, the plaintiff's suit must be

PRE-EMPTION—Subject-matter.

dismissed, but it has never been laid down that, if a person alleges that he has a right of pre emption and has not and the vendee sells to him, the right of pre-emption is defeated. (*Addison and Din Muhammad, JJ.*) PANNA LAL *v.* SAWAN DAS. **158 I C. 905 = 8 R.L. 323 (1) = 37 P.L.R. 182 = A.I.R. 1935 Lah. 595.**

Subject-matter.

———*Subject-matter—Building sites—Proof of right of pre-emption—Custom regarding house proved—Effect.*

Where a custom of pre-emption with regard to houses is admittedly proved the custom of pre-emption with regard to building sites is quite common and small evidence is sufficient for establishing that the same custom applies to such building sites. (*Sulaiman, A.C.J. and Banerji, J.*) GAURI SHANKAR PRASAD *v.* SITA RAM SAH. **52 All. 76 = I.R. 1932 All. 232 = 136 I.C. 616 = 1931 A.L J. 1149 = A.I.R. 1932 All. 193.**

———*Subject-matter—Mortgage rights—Sale of—Suit for pre emption.*

Mortgage rights in land fall within the definition of immovable property and a suit for pre-emption with respect to sale of such rights may be maintainable. (*Bhide, J.*) RADHA KISHAN *v.* FAKHARUDDIN. **154 I.C. 695 = 7 R.L. 591 (2) = A.I.R. 1934 Lah. 143.**

———*Subject-matter*—Shamilat—*Pre-emptor's right, if extends to* shamilat—*Vendee, a co-sharer in general* Shamilat—*Position of.*

The preferential right of a pre emptor exists not only in the proprietary rights in the lands but also extends to the *shamilat* appertaining to those lands, and the mere fact that the vendee is a co-sharer in the general *shamilat* would not help him to defeat the claim of the pre-emptor so far as the sale of the *shamilat* is concerned (*Agha Haidar, J.*) MAHLA SINGH *v.* HARNAM SINGH. **157 I.C 964 = 37 P L.R. 276.**

Suit for.

See also PRICE, *supra* AND C P. CODE, S. 144.

———Suit for—Amendment of. *See* C. P. CODE, O. 6, R. 17—LIMITATION. **14 Lah. 807 = A.I.R. 1933 Lah. 774 (1).**

———*Suit for—Decree—Tender of pre-emption money made in time—Exoneration of delay in deposit.*

Where a tender of pre-emption money is duly made within time but the money is not actually deposited because the officer of the Court is too busy to take it, the tender must be considered sufficient for the purpose of absolving the party concerned of any further responsibility in the matter. (*Jai Lal and Abdul Qadir, JJ.*) PAT RAM *v.* EDWIN HORWARD. **I.R. 1931 Lah 905 = 134 I.C. 201 = 33 P.L R. 91 = A.I.R. 1931 Lah. 388.**

———*Suit for—Foreclosure decree—Mortgage—Subsequently redeemed by another person interested—Maintainability of suit for pre-emption on basis of foreclosure decree.*

The vendee cannot by a voluntary act or by any act for which he can be held responsible be allowed to defeat or affect adversely a right of pre-emption which has already accrued in favour of the pre emptor. Where a foreclosure decree was passed against the mother who held a life estate but subsequently the daughter who had a vested remainder redeemed the mortgage.

Held, that a suit for pre emption cannot thereafter be sustained on the basis of the foreclosure decree. (*Raza and Bisheshwar Nath, JJ.*) SWAMI DAYAL *v.* RAMADHAR. **6 Luck. 715 = I R. 1931 Oudh 401 = 134 I.C. 865 = 8 O.W.N. 566 = A.I R. 1931 Oudh 358.**

———*Suit for—Plaintiff directed to deposit money in Court—Expiry of time during vacation—Deposit on re opening of Court—Validity.*

PRE EMPTION—Time for pre-emption.

Where in a pre-emption suit the period for depositing the purchase-money in Court expires on a date on which the Court is closed for the vacation, the plaintiff can deposit the money on the day on which the Court re-opens. (*Jai Lal and Abdul Qadir, JJ.*) FATEH KHAN *v.* CHHAJU. **I.R. 1931 Lah. 770 = 133 I.C. 434 = 32 P L.R. 255 = A.I.R. 1931 Lah. 386.**

[F. 33 P.L.R. (91 (92).]

———*Suit for—Plaint not specifying grounds on which claim is based—Particulars supplied in replication—Plea that plaint did not disclose a cause of action—Sustainability.*

Where in the body of the plaint it was stated that the plaintiff had got a right to pre-empt the property in dispute, but the grounds on which the claim was based were not specified, and the matter was put beyond doubt in the replication, when the plaintiff clearly stated that he claimed to pre-empt the property by reason of his being a co sharer in the property sold, and also as the owner of contiguous property, the pleadings taken as a whole made the plaintiff's position quite clear and it cannot be said that they did not disclose the plaintiff's alleged cause of action with sufficient clearness or precision. (*Tek Chand and Currie, JJ.*) SAT NARAIN *v.* PHEROZE BFHRAMJI. **158 I C. 658 = 8 R L. 284 = 38 P.L.R. 755 = A.I R. 1936 Lah. 35.**

———*Suit for—Reference to arbitration—Award—Deposit of money into Court—Validity of tender.*

A pre-emption suit was referred to arbitration and under the award which was passed, the pre emptor was to pay the vendee money within certain period. There was no specific direction as to the manner in which the money was to be paid. Pending proceedings to have the award made a rule of Court, the pre-emptor deposited the amount in Court and notice was issued by the Court to the vendee.

Held, that there was valid tender of the money and that O. 21, R 2 had no application as the deposit was made before a decree was passed in terms of the award. (*Srivastava and Smith, JJ.*) SHEO KUMAR *v.* THAKUR PRASAD. **6 R.O. 456 = 148 I.C. 877 = 11 O.W. N. 459 = A.I R. 1934 Oudh 135.**

———*Suit for—Right to bring pre-emption suit—Law governing.*

The rights of persons to bring pre-emption suits are governed entirely by the Pre emption Act and not by any question of Hindu Law. (*Almond, J. C.*) QADIR BAKHSH *v.* UJAGAR SINGH. **153 I.C. 398 = 7 R. Pesh. 73 = A.I.R. 1934 Pesh. 103.**

———*Suit for—Several plaintiffs—One of them disqualified—Continuation of suit by others.*

In a suit for pre emption the mere fact thut one of the plaintiffs was disqualified from pre empting because he had not made demands would not make the suit by the other plaintiffs defective. (*Sulaiman, A.C. J. and Banerji J.*) SHAMSUDDIN *v.* ALAUDDIN. **I R 1931 All 846 — 134 I.C. 462 = 1931 A.L.J. 1083 = A.I.R. 1932 All 138.**

———*Suit for—Suit for pre-emption and for recovery of possession—Alternative relief—Maintainability.*

The plaintiff can combine a suit for pre emption and a suit for recovery of possession in one and base his claim on alternative grounds. (*Sulaiman and Young, JJ.*) HANKAR KUNWARI *v.* ISHWAR DAYAL SINGH. **I.R. 1932 All 381 = 138 I.C. 251 = 1932 A.L J. 313 = A.I R. 1932 All. 469.**

Time fer pre-emption.

———*Time for pre-emption—Date of sale—Manifestation of intention.*

In considering the question as to when the right of pre-emption can be said to arise, the intention of the

PRE-EMPTION—Time for pre-emption.

parties to the sale must be looked to, in determining what was to be taken to be the date of the sale with reference to which the ceremonies of the demands had been performed. Also the intention of the parties to the sale must be manifested in some unequivocal way to the outside world. One effectual and acceptable mode of manifesting that intention may be delivery of possession; another may be registration. 41 Cal. 943, Rel. on; 7 All. 482; 35 Cal. 575; 16 All. 344 (F.B.); 1 P.L.J. 174 and A. I. R. 1923 P. C. 41, Ref. (*Ross and Scroope, JJ.*) RAMBISHUN SINGH *v.* KULDIP SINGH. **I.R. 1931 Pat. 149=130 I.C. 165=13 Pat L.T. 38=A.I.R. 1931 Pat. 72.**

———*Time for pre emption—Loss of right after sale and before decree—Effect of.*

The right of plaintiff to enforce pre-emption must exist not only at the time of the sale but also at the time of the institution of the suit to enforce that right; if the plaintiff loses that right after the sale, or at any time after the institution of the suit and before the decree for pre emption can be passed in his favour, he is put out of Court and no relief can be granted to him. (*Nanavutty, J.*) SALAMAT ALI *v.* NUR MAHOMED KHAN. **9 Luck. 475=149 I.C. 258=6 R.O. 547=11 O.W.N. 317=A.I.R. 1934 Oudh 303.**

———*Time for pre-emption—Right when to be claimed—Berar—Suit for possession—Defence of pre emptive right—Not sustainable.*

The right of pre-emption in Berar must be claimed at the time the sale takes place or is first mooted, and it cannot be raised as a defence to a suit for possession. The *ratio decidendi* of the rule appears to be that it is only a vested and ascertained right which could be pleaded as an answer to any suit and that the right of pre-emption being inchoate gives no such vested right to co-sharers as to entitle them to resist the claim or possession by pleading it in bar of the suit. 1 Berar. L. J. 8, Foll.; 32 P.R. 1884, Appr.; 7 All. 892; 26 All. 61 and 27 All. 78, Ref.; 24 Mad. 449 and A. I. R. 1924 Mad. 57, Not foll. (*Subhedar A. J. C.*) NARHAR *v.* GULLU. **27 N.L.R. 354=I.R. 1931 Nag. 108=132 I.C. 460=A.I.R. 1931 Nag. 110.**

———*Time for pre-emption—Subsequent events—If can be taken into account by the appellate Court.*

Although it is incumbent on the plaintiff in a pre-emption suit to have a subsisting right on three crucial dates, namely, the date of the sale, the date of the institution of the suit, and the date of the judgment of the first Court, an appellate Court should not take into account anything which may happen subsequent to the date of the judgment which, had it happened earlier might have deprived the plaintiff of his right to pre-empt. (*Sulaiman, C J. and Mukerji, J.*) KHEDAN AHIR *v.* RAM REKHA PANDE. **1934 A L J. 671=154 I.C 241=7 R.A. 721=4 A.W R. 943=A.I.R. 1934 All. 934.**

Transfer, nature of.

———*Transfer, nature of—Exchange—Burden of proof—Indefeasible title.*

Per *Sulaiman, C. J. and Young, J.*, in the order of reference.—The burden of proving that an indefeasible title is acquired under a deed of exchange lies upon the vendee and he must discharge it The deed of exchange cannot be assumed to confer an indefeasible title on the vendee without proof that the transaction was for the benefit of the family, whose property had been taken in exchange. (*Sulaiman, C. J., Mukerji and King, JJ.*) TARA CHAND *v.* RADHA SWAMI SAT SANG SABH... **56 All. 668=6 R.A. 760=148 I.C. 656=1934 A.L.J. 301=3 A.W.R 701=A.I R. 1934 All. 343 (F B.).**

———*Transfer, nature of—Exchange when to be treated as sale.*

PRE-EMPTION—Transfer, nature of.

An exchange would be treated as an exchange except where it is shown by the pre emptor that there are circumstances pointing to its being in fact a sale. The Courts have got the jurisdiction to go into those cricumstances and to treat it as a sale if there be evidence forthcoming to justify the conclusion that the land has been purchased for money. But as long as there is nothing to show that a consideration in cash has passed for the land, which is the *sine qua non* for making a transaction sale, an exchange of plots of land would be deemed an exchange and would not be liable to pre-emption. (*Mir Ahmad, A. J. C.*) BHAI KHAN *v.* FIZULLAH. **160 I.C. 75=8 R. Pesh. 99=A.I R. 1935 Pesh. 191.**

———*Transfer, nature of—Involuntary alienation—Right of pre-emption—Effect of.*

Involuntary sales cannot be made invalid by a right of pre-emption. 41 M. 582 (F.B.), Foll. (*Ramesam, J.*) ALAGARSAMI NAIDU *v.* KATHIA GOUNDAN. **135 I. C. 540=I.R. 1932 Mad. 124=1931 M.W.N. 957=A.I R. 1931 Mad. 799.**

———*Transfer, nature of—Sale—Inference from terms of document—Reference to extrinsic evidence—Permissibility.*

While it is not forbidden to a person to circumvent the law of pre-emption by taking a transfer which fails short of sale there is a marked distinction between a devise and a disguise. Where the parties have really entered into a sale transaction but have disguised it under the cloak or mask of a different transaction the Court must look to the real nature of the transaction for the purpose of determining whether it would be subject to the right of pre-emption or not. Where there is no other evidence of the intention of the parties other than the document itself the question resolves itself into one of construction pure and simple. But if evidence is forthcoming to show the real nature of the transaction it cannot be ignored. Transaction in case held to be one of sale for purposes of pre-emption. (*Kisch, J.*) NAR SINGH NARAIN *v.* SANT RAM. **8 O.W.N. 1113=134 I.C. 1092=A.I R. 1931 Oudh 424**

———*Transfer, nature of—Sale or exchange—Nature of transaction.*

A land transferred to vendee was worth Rs. 300. This sum was paid to the vendor by transferring to him a portion of land worth Rs. 18 by payment of Rs. 142 in cash and by the repayment of a debt of Rs. 140. The plaintiff sued on the allegation that the transaction was in effect a sale and not an exchange as described in the deed and that as he was a collateral of the vendor he was entitled to a decree for possession by pre-emption.

Held, that on the facts the transaction in dispute could be regarded as a sale for a sum of Rs. 142 and not an exchange and that the plaintiff was entitled to pre-emption. (*Abdul Rashid, J.*) ALLAH DITTA *v.* HAJI. **154 I.C. 643=7 R.L. 584=A.I.R. 1934 Lah. 823.**

———Transfer, nature of—Sale or perpetual lease. *See* CIRCUMVENTION OF, *supra*. **A.I.R. 1933 Oudh 329.**

———*Transfer, nature of—Voluntary transfer.*

Neither the pre-emptor nor the Court has any right or power to compel the vendor to sell the property. The pre emptor's right arises only when the vendor sells of his own free-will. Therefore the right of pre emption is exercised in respect of a voluntary sale. It is nothing but a culmination of the voluntary sale. 7 All. 775 and 5 N.L.R. 136, Ref. (*Niyogi, A.J.C.*) ABDUL *v.* KISAN. **27 N.L.R. 392=136 I C. 879=I R. 1932 Nag. 39=14 N.L.J. 48=A.I.R. 1931 Nag. 166.**

PRE EMPTION.

Waiver of right.

———*Waiver of right—Proof of.*

Where the pre-emptor made the statement which showed that he had no inclination to purchase the property and though he lived in the adjoining house evinced no interest in the matter when the house was put to auction and even afterwards made a ridiculous offer.

Held, that a complete waiver had been established. (*Addison and Din Mohammad. JJ.*) SARDAR MOHAMMAD *v.* KHUDA BAKHSH. **160 I.C. 937 = 8 R.L. 635 = A.I.R. 1935 Lah. 884.**

Wajib-ul-arz.

———Wajib ul-arz—Entry in, as to pre-emption according to usage of the country—Applicability of Mahomedan Law. *See* MAHOMEDAN LAW—PRE-EMPTION. **A.I.R. 1935 All. 236.**

Who can pre-empt.

———*Who can pre empt—Birtdar—Bengal Tenancy Act, S.* 3 (2).

A person may be the owner of property so as to be entitled to pre-empt and yet not be a proprietor according to the definition of the term in S. 3 (2), Bengal Tenancy Act. Birt is an absolute gift. The fact that the birtdar is treated as a tenant in the record-of-rights is not incompatible with the conception of his ownership of the land. (*Fazl Ali and Saunders, JJ.*) CHARITER DUSADH *v.* BHAGWATI PANDEY. **152 I.C. 983 = 7 R. P. 279 = 15 Pat.L.T. 796 = A.I.R. 1934 Pat. 596.**

PREFERENCE—Fraudulent.

See (1) PRESIDENCY TOWNS INSOLVENCY ACT (1909), S. 56.
(2) PROVINCIAL INSOLVENCY ACT (1920), S. 54.
(3) T.P. ACT, (1882), S. 53.

PRELIMINARY DECREE.

See (1) C.P. CODE, SS. 2 (2), 97 AND O. 20, RR. 12, 18 AND O. 34, RR. 4 AND 5.
(2) DECREE.

PRELIMINARY ENQUIRY. *See* CR. P. CODE, S. 476.

PRELIMINARY ISSUE. *See* C. P. CODE, O. 14, R. 2.

PRELIMINARY ORDER. *See* CR. P. CODE, S. 145.

PRELIMINARY POINT. *See* C.P. CODE, O. 41, R. 23.

PRE-MEDITATION. *See* PENAL CODE, S. 300.

PREMIUM.

See (1) INSURANCE.
(2) LANDLORD AND TENANT.

PRESCRIPTION.

See (1) ADVERSE POSSESSION.
(2) EASEMENTS ACT, S. 15.
(3) LIMITATION ACT, S. 28, ARTS. 142 AND 144.

PRESENTMENT. *See* NEGOTIABLE INSTRUMENTS ACT, SS. 64 AND 66.

PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882)—*Calcutta Small Cause Courts Rules of Practice, R.* 96—*Effect.*

A claim case is a suit for purposes of S. 37 of the Presidency Small Cause Courts Act because of R. 96 of the Calcutta Small Cause Court Rules. (*Buckland, J.*) BHICUMCHAND CHURURIA *v.* DEEPCHAND DOOGAR. **58 Cal. 1251 = I.R. 1931 Cal. 903 = 134 I.C. 933 = A.I.R. 1932 Cal. 67.**

———*Calcutta Rules of Practice, R.* 102 (*formerly R.* 66)—*Claimant to attached property—Undertaking to pay decretal amount if claim failed—Release from attachment—No subsequent interest in property to decree holder.*

In execution of a small cause decree, the appellant attached the stock-in-trade of the judgment debtor. The respondent then put in a claim to the attached property under R. 102 of the Rules of Practice (Calcutta) which provides that the matter should be treated as a suit. In the claim, he valued the property at Rs. 4,000 and the property was released from attachment on the undertaking of the respondent to pay the decretal sum if his claim failed. And the claim failed, the respondent thereupon brought the present suit in the High Court alleging that the stock-in-trade of the judgment debtor had been hypothecated to him and praying for the enforcement of his charge. In that suit, he impleaded the appellant.

Held, that the appellant had no concern with or interest in the property from the moment when it was released from attachment on the undertaking of the respondent, whether the claim case failed or succeeded and that the liability of the respondent was by his undertaking conditional upon the result of the claim case and nothing else and so the suit was not maintainable as against the appellant. (*Rankin, C.J. and C. C. Ghose, J.*) PADAMCHAND PANNALAL *v.* BHICUMCHAND CHURURIA. **59 Cal. 827 = I.R. 1932 Cal. 608 = 139 I.C. 183 = 56 C.L.J. 349 = 36 C.W.N. 397 = A. I.R. 1932 Cal. 661.**

PRESY. S. C. COURTS ACT (1882), S. 28.

———**S. 18**—*Applicability—Claim case.*

The provisions of S. 18 with reference to the limitation of pecuniary jurisdiction are not applicable to a claim case in the course of execution. (*Rankin, C.J. and C. C. Ghose, J.*) PADAMCHAND PANNALAL *v.* BHICUMCHAND CHURURIA. **59 Cal. 827 = I.R. 1932 Cal. 608 = 139 I.C. 183 = 56 C.L.J. 349 = 36 C.W.N. 397 = A I.R. 1932 Cal. 661.**

———**S. 18**—*Claim case—Value of property and decree exceeding two thousand rupees—Jurisdiction of Small Cause Court.*

Where property exceeding Rs. 2,000 in value is attached and the decretal amount for which the decree amount can be executed also exceeds Rs. 2,000, it would not be open to the Court of small causes to entertain claim suits in such cases.

Quaere: Whether in a case where the value of property is above Rs 2,000 but the decree amount is for a lesser figure, the Small Cause Court has jurisdiction. 38 All. 72 and 35 Cal. 202, Ref. (*Buckland, J.*) BHICUMCHAND CHURURIA *v.* DEEPCHAND DOOGAR. **58 Cal. 1251 = I R 1931 Cal. 903 = 134 I.C. 903 = A.I R. 1932 Cal. 67.**

———**Ss. 18 and 28**—Value of subject-matter—Claim for declaration of title to entire property. *See* PRESIDENCY SMALL CAUSE COURTS ACT, SS. 28 AND 18. **59 Cal. 1092 = A.I.R. 1932 Cal. 629.**

——— **S. 28**—*Applicability.*

The section only applies when the judgment-debtor is a tenant of immovable property at the time of attachment and not when he has ceased to be a tenant at that time. (*Lort Williams, J.*) KUNJA BEHARI BASACK *v.* PULIN KRISHNA ROY. **59 Cal. 1092 = 141 I.C. 303 = I.R. 1933 Cal. 109 (1) = 36 C.W.N. 333 = A.I.R. 1932 Cal. 629.**

———**S. 28 (as amended by Act IV of 1906)**—*Tiled hut in possession of tenant of more value than Rs.* 2,000 —*Jurisdiction of Small Cause Court.*

The amendment of 1906 which gave the court jurisdiction to decide all questions arising in execution of a decree, even though the subject matter was a tiled hut and therefore immovable property, simply removed the

PRESY. S. C. COURTS ACT (1882), S. 28.

bar contained in S. 19 (*g*) and not the bar contained in S. 18. The Small Cause Court has no jurisdiction to entertain a claim for the determination of any right or interest in a tiled hut when its value exceeds Rs. 2,000. (*Lort Williams, J.*) KUNJA BEHARI BASACK *v.* PULIN KRISHNA ROY. **59 Cal. 1092=36 C.W.N. 333=141 I.C. 303=I.R. 1933 Cal. 109 (1)=A.I.R. 1932 Cal. 629.**

———**Ss. 28 and 18**—*Value of subject-matter—Claim for declaration of title to entire property.*

If the plaintiff merely asked for a declaration that the property in suit (a tiled hut) was not liable to attachment and sale in satisfaction of the amount due to the defendant, the value of the subject-matter would be that part of the hut which would have to be sold for the purpose of satisfying the attachment. But if the claim of the plaintiff amounts to a regular suit to establish the claimants' title to the property attached, the value of the tiled hut itself is involved and if that be more than Rs. 2,000 the Court has no jurisdiction. (*Lort Williams, J.*) KUNJA BEHARI BASACK *v.* PULIN KRISHNA ROY. **59 Cal. 1092=36 C.W.N. 333=141 I.C. 303=I.R. 1933 Cal. 109 (1)=A.I.R. 1932 Cal. 629.**

———**S. 35**—*Registrar's powers under—Power to pass order under S. 52 (2), C.P. Code.*

The Registrar, under S. 35 of the Presidency Small Cause Courts Act, has jurisdiction to pass an order under S. 52 (2), C. P. Code. He has exactly the same powers as the Judge and can exercise those powers in execution. (*Beasley, C.J. and King, J.*) SUBRAMANIA AYYAR *v.* THE MADRAS DRUG STORES. **159 I.C. 490 (1)=8 R.M. 511 (1)=41 L.W. 350=1935 M.W.N. 226=A.I.R. 1935 Mad. 298 (1).**

———**S. 37**—*Claim case—Effect as suit.*

A claim case is a suit for purposes of S. 37 because of R. 96 of the Calcutta Small Cause Court Rules (*Buckland, J.*) BHICUMCHAND CHURURIA *v.* DEEPCHAND DOOGAR. **58 Cal. 1251=I.R. 1931 Cal. 903=134 I.C. 903=A.I.R. 1932 Cal. 67.**

———**S. 37**—"*Suit*"—*Claim case.*

The finality conferred by S. 37 to a "suit" cannot be extended to a claim case, even though R. 102 (till recently R. 96) of the Calcutta Rules of Practice says that a claim "shall be treated as a suit." That rule only means that the claim case should be tried like ordinary suits and not in a summary manner. But that does not mean that the claim case is itself a suit, still less a new and independent suit to which the provisions of S. 18 are to be independently applied. (*Rankin, C.J. and C. C. Ghose, J.*) PADAMCHAND PANNALAL *v.* BHICUMCHAND CHURURIA. **59 Cal. 827=I.R. 1932 Cal. 608=139 I.C. 183=56 C.L.J. 349=36 C.W.N. 397=A.I.R. 1932 Cal. 661.**

———**S. 38**—Application under—Order for retrial based on *ex parte* information received in private—Propriety—Revision. *See* C.P. CODE, S. 115. **62 Cal. 289.**

———**S. 38**—*Reference to arbitration—Application for stay—Refusal of trial Judge—Interference by full Court.*

When a Judge of the Presidency Small Cause Court has refused to stay the proceedings under S. 19, Arbitration Act, or under Cl. 18 of Sch. II of the Code of Civil Procedure and exercises the discretion in a particular way and one of the parties who wished the matter to be referred to arbitration acquiesces in the order, leads evidence and takes the chance of success in the first Court, the Full Court cannot interfere with the discretion and stay the suit.

PRESY. S. C. COURTS ACT (1882) S. 61.

Per *Barlee, J.*—The order of the trial Court refusing to refer the dispute to the arbitrators is immediately appealable to the Chief Court. (*Patkar and Barlee, JJ.*) PREMCHAND VADILAL *v.* MITHABHOY & CO. **I.R. 1933 Bom. 312=144 I.C. 643=35 Bom.L.R. 287=A.I.R. 1933 Bom. 202.**

———**S. 41**—*Applicability—Mortgage coupled with lease—Non payment of rent—Suit for ejectment—Maintainability.*

The petitioner executed in favour of the respondent a mortgage deed which was in some respects a combination of simple and usufructuary mortgages. The mortgagee was to have possession of the property subject to certain stipulations regarding interest. On the same day, a deed of rental agreement was entered into between the mortgagor and the mortgagee under which the mortgagor was to remain in possession of the property mortgaged on payment by him of a certain amount as rent per mensem and the lease was to enure for a term of three years subject to certain conditions, one of them being that in case of failure to pay rent as stipulated therein the lessor was entitled to possession of the property without giving notice to quit. The respondent applied for ejectment of the petitioner on the allegation that rent had fallen into arrears.

Held, that the petitioner was a tenant under S. 41 and that the suit was maintainable. 9 M. 57, Appl. (*Anantakrishna Aiyar, J.*) GOPALASWAMI NAIDU *v.* SAKALAGUNA NAIDU. **I.R. 1932 Mad. 587=138 I.C. 509 (2)=1932 M.W.N. 219=35 L.W. 272=A.I.R. 1932 Mad. 318=62 M.L.J. 346.**

———**Ss. 60 and 61**—*Effect of.*

The effect of Ss. 60 and 61 is as follows: The first section provides for summary and immediate relief against distraint. It allows a debtor to come in and obtain time. It allows the owner to procure immediately a release of the property upon terms. S. 61 provides for the adjudication of the claimant's right and title to the property. The disposal of an application under S. 60 does not preclude the claimant from applying under S. 61. (*Ameer Ali, J.*) TOPS *v.* KARNANI INDUSTRIAL BANK, LTD. **59 Cal. 311=I.R. 1932 Cal. 420=138 I.C. 96=36 C.W.N. 530=A.I.R. 1932 Cal. 441.**

———**S. 61**—*Claim to attached movable property under R. 102 of Calcutta Rules of Practice—Property valued at over Rs. 2,000—Adjudication of the claim by executing court—Finality of.*

The Small Cause Court's powers in execution are limited to movables, but subject to this limitation, that Court like any other Court has always power to execute its own decrees and in case of a claim preferred to attached property, the power and duty to deal with the claim or objection though the property may be valued more than Rs. 2,000 by the claimant. The decision of the Small Cause Court on a claim case is, subject to a new trial, final. (*Rankin, C.J. and C. C. Ghose, J.*) PADAMCHAND PANNALAL *v.* BHICUM CHAND CHURURIA. **59 Cal. 827=I.R. 1932 Cal. 608=139 I.C. 183=56 C.L.J. 349=36 C.W.N. 397=A.I.R. 1932 Cal. 661.**

———**S. 61**—*Irregular service of summons—Validity of trial—Revision.*

The mere fact that the summons or notice did not proceed in the peculiar way prescribed in the first portion of S. 61 does not, where a trial takes place, both parties having had notice, having filed pleadings, having appeared, evidence having been taken, deprive the Court of jurisdiction or vitiate the trial under that section. It does not call for interference in revision. (*Ameer Ali, J.*) TOPS *v.* KARNANI INDUSTRIAL

PRESY. S. C. COURTS ACT (1882).

BANK, LTD. **59 Cal. 311=I.R. 1932 Cal. 420=138 I.C. 96=36 C.W.N. 530=A.I.R. 1932 Cal, 441.**

———*Rules (Madras),O.* 41, *R.* 6 (c)—*Powers of Court under.*

The whole clause must mean that the new and important matters which are alleged by the applicant for review were not within his knowledge and therefore could not be produced by him at the time of the decree sought to be reviewed. Hence a Court has no power to pass such an order without calling for strict proof, that the new matter was not within the knowledge of the applicants when the decree was passed. A.I.R.1925 Mad. 578 and A.I.R. 1924 Pat. 809, Ref. (*Walsh, J.*) SUBHAN SINGH *v.* RUKMA BAI. **159 I.C. 737=8 R M. 545=1935 M.W.N. 333=A.I.R. 1935 Mad. 768.**

———*Rules (Madras), O.* 41, *R.* 7—*Application under—Absence of counter-affidavit—If justifies—Grant of application.*

The mere absence of a counter affidavit will not enable the Court to grant an application under O. 41, R. 7, when the party, on whom the onus rests of making out of the facts necessary for such an order has not done so, and when the Court's attention has been clearly directed to evidence conclusively proving the contrary. (*Walsh, J.*) SUBHAN SINGH *v.* RUKMA BAI. **159 I.C. 737=8 R.M. 545=1935 M.W.N. 333=A.I.R. 1935 Mad. 768.**

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909)—*Amendment—Desirability.*

It is desirable to have the Presidency Towns Insolvency Act amended so as to insert a provision corresponding to S. 78 (2) of the Provincial Insolvency Act. (*Beaumont, C.J. and Blackwell, J.*) CURRIMBHAI *v.* AHMEDALI. **58 Bom. 505=I.R. 1933 Bom. 281=143 I.C. 698=35 Bom. L.R. 12=A.I.R. 1933 Bom. 91.**

———*Calcutta High Court Insolvency Rules, Rr.* 79 *to* 83.

It is necessary that the High Court on its Original Side should pay due attention to the procedure prescribed by Rr. 79 to 83 of the Insolvency Rules. (*Rankin, C.J. and Buckland, J.*) KRISHNA DAS RAY *v.* CHARUSILA PAL CHAUDHURY. **137 I.C. 31=I.R. 1932 Cal. 279=35 C.W.N. 567=A.I.R. 1932 Cal. 290.**

———*Interpretation—Decisions of English Courts.*

When provisions and wording of the Presidency Towns Insolvency Act are the same as those of the English Bankruptcy Act, the rulings of the English Courts are to be followed in interpreting the Indian Act. 39 Mad. 250, Foll. (*Haveliwalla, A.J.C.*) FIRM OF GIANCHAND LILARAM, *In the matter of.* **25 S.L.R. 381=I.R. 1931 Sind 65=131 I.C 705=A.I.R. 1931 Sind 70.**

———*Interpretation—English rulings on Bankruptcy Act—Applicability of.*

Where the provisions and the wordings of the Presidency Towns Insolvency Act are almost the same as those of the English Bankruptcy Act, the rulings of the English Courts on the latter Act are to be followed in interpreting the Indian Act. 39 Mad. 250, Foll. (*Haveliwala, A.J.C.*) DHANRAJMAL KISHIN DAS *v.* OFFICIAL ASSIGNEE. **25 S.L.R. 310=131 I.C. 130=A.I.R. 1931 Sind 44.**

———*Object and scope of.*

The Presidency Towns Insolvency Act has for its object, not so much the relief of insolvent debtors, as the prevention of insolvent trading and the protection of the public. A debtor is adjudicated for his own demerits, and the merits of the petitioning creditor are not material. (*Remfry, J.*) L. E. SALCICIONI, *In re.* **164 I. C. 627=9 R.C. 257=39 C.W.N. 324.**

PRESY. TOWNS INS. ACT (1909), S. 7.

———*Rules under—Rangoon High Court R.* 202 (2)—*Rule if* ultra vires.

R. 202 (2) of the Rangoon High Court Rules framed under the Presidency Towns Insolvency Act is not *ultra vires.* (*Maung Ba and Baguley, JJ.*) O. R. M.M. S. P. S. V CHETTYAR FIRM *v.* OFFICIAL ASSIGNEE. **8 Rang. 514=I.R. 1931 Rang. 65=129 I.C. 497=A.I.R. 1931 Rang. 61.**

———*Rules under—Rangoon High Court R.* 202 (2)—*Scope—Right of Official Assignee to commission on sale proceeds.*

The Official Assignee is entitled, under R. 202 (2) of the Rangoon High Court Rules framed under the Presidency Towns Insolvency Act, to his commission over the entire sale proceeds of a property equitably mortgaged and auctioned free from mortgage with the consent of the mortgagee. 5 Rang. 623; 7 Rang. 126; 36 Cal. 990; 54 Cal. 317; 6 Lah. 1 and 7 Bom. 450, Dist.; 50 All. 986 and 51 Bom. 516, Ref. (*Maung Ba and Baguley, JJ.*) O. R. M. M. S. P. S. V. CHETTYAR FIRM *v.* OFFICIAL ASSIGNEE. **8 Rang. 514=I.R. 1931 Rang. 65=129 I.C. 497=A.I.R. 1931 Rang. 61**

———*Third party—Order against for production of account books—Evidence—Official Assignee's report.*

Before a third party can be called upon to produce books of account in his custody the Official Assignee must make out a *prima facie* case that the third party had such books in his custody. The report of the Official Assignee is no legal evidence in support of his application. (*Beasely, C.J. and Cornish, J.*) VALLIAMMAL *v.* OFFICIAL ASSIGNEE, MADRAS. **56 Mad. 273=143 I C. 265=I.R 1933 Mad. 283=1932 M.W.N. 959=36 L.W. 703=A.I.R. 1933 Mad. 74=63 M.L.J. 810.**

———**S. 2 (e)**—*Shares in Co-operative Bank—Shares exempt from attachment, sale or claims of Official Assignee under S.* 26 *of Bombay Act VII of* 1925—*Shares, if "the property" of insolvents.*

Even though the Co-operative Bank has a statutory lien on the shares held by its members and it is provided by statute that the interest of its members shall not be liable to attachment, sale or the claims of the Official Assignee or Receiver, still the shares are "the property" of the insolvents within the meaning of S 2 (*e*) of the Act, since subject to the lien, the insolvents have a disposing power over the shares and its profits. (*Rupchand, A.J.C.*) KALLA GELLA, *In re.* **27 S.L.R. 224=150 I.C. 274=6 R.S. 272=A.I.R. 1933 Sind 355.**

———**S.2 (g)**—"*Secured creditor*" — *Bank claiming lien on shares.*

A Bank claiming a lien on the shares of its insolvent member is a "secured creditor." (*Rupchand, A.J.C.*) KALLA GELLA, *In re.* **27 S.L.R 224=150 I C. 274=6 R.S. 272=A.I.R 1933 Sind 355.**

———**S. 7**—*Applicability— Property outside British India.*

The Indian legislature has always the right to legislate in respect of property, whether within or without British India which can be made available for distribution amongst the creditors in accordance with the principles of International Law provided such property can be made available by enforcing an order *in personam* against the possessor thereof. (*Rupchand, A. J. C.*) OFFICIAL ASSIGNEE *v.* GHANSHAMDAS HOTECHAND. **6 R.S. 208=148 I.C. 941 (2)=A.I.R. 1934 Sind 44.**

———**Ss. 7 and 108**—*Applicability—Proceeding under S.* 108.

S. 7 is applicable only to cases where there has been an adjudication in insolvency. It is not applicable to proceedings to administer a deceased debtor's estate

PRESY. TOWNS INS. ACT (1909), S. 7.

initiated under S. 108. In re *Hewitt*, 15 Q. B. D. 159, Rel. on. (*Beasley, C.J. and Cornish, J.*) VALLIAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS **56 Mad 273 = 143 I.C. 265 = I.R. 1933 Mad. 283 = 1932 M.W.N. 959 = 36 L.W 703 = A.I.R. 1933 Mad. 74 = 63 M.L.J. 810.**

———**S. 7**—*Applicability — Question of Official Assignee's title by reputed ownership.*

The question of the Official Assignee's title by reputted ownership is a question arising in the insolvency proceedings and would fall to be decided under S. 7. (*Melne, A.J.C.*) MOOLJI KHIMJI & CO. *v.* PARDANANI & CO. **143 I.C. 204 = I.R. 1933 Sind 123 = A.I.R. 1932 Sind 207.**

———**S. 7**—*Application under — Application to set aside several transactions by insolvents with different persons—Permissibility.*

There are no specific rules prescribing the form in which an application should be made when it is sought to impugn a transaction by an insolvent on the grounds mentioned in Ss. 55 and 56. But the Court is bound in some measure to observe the ordinary principles as to framing suits laid down by the C. P. Code So an application under S. 7 by which the Court is required to investigate a number of different transactions between the insolvents and different persons is defective; it is like joining different causes of action against different defendants and, on grounds of practical convenience, cannot be permitted. (*Panckridge, J.*) BINRAJ HARNANDRAI, *In re*. **60 Cal. 1367 = 149 I.C. 995 = 6 R.C. 674 = A.I.R. 1934 Cal. 232.**

———**S. 7**—*Dispute between Official Assignee and third parties—Jurisdiction of Court to decide.*

The Insolvency Court has jurisdiction under S. 7 of the Act to decide disputes falling within the purview of the section between the Official Assignee and third parties even though the Official Assignee does not claim a higher and better title. The proviso to the section is not intended to limit the scope of the section to matters in which the Official Assignee claims a higher title than the insolvent would himself have had but is intended only to prevent a stranger to the insolvency from being first examined under S. 36 and then to have his deposition taken under that section used against him on an application made under S. 7. Whether in any particular case an Insolvency Court in India should refuse to exercise its jurisdiction must necessarily depend upon the facts of each case and no hard and fast rule can be laid down in that behalf. Where the property was situate within the jurisdiction of the Court, the parties resided there, a regular suit if filed would be in that very Court and proceedings were already very old, *held*, that it was a fit case in which the Court should not decline to exercise its powers under S. 7. (*Rupchand Bilaram, A.J.C.*) DOULATRAM GURMUKHDAS, *In re*. **27 S.L.R. 275 = 143 I.C. 205 = I.R. 1933 Sind 121 (2) = A.I.R. 1932 Sind 208.**

———**S. 7**—Examination of party under S. 36—Denial of possession of account books—Remedy of Official Assignee. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 36. **63 M.L.J. 810.**

———**Ss. 756 and 36**—Fraudulent preference—Mode of setting aside—Jurisdiction of Insolvency Court, if exclusive. *See* PRESIDENCY TOWNS INSOLVENCY ACT, SS. 56 AND 7. **34 Bom.L.R. 1166 = A.I.R. 1932 Bom. 566.**

———**S. 7**—*Hindu father—Debt incurred by—Binding nature on son — Jurisdiction of Insolvency Court to decide.*

Weid as the provisions of S. 7 are, it does not follow that every dispute between the Official Assignee and the Hindu sons can be dealt with under that section. So long as the son himself chooses to appear before the Insolvency Court and raise question as to the binding nature of the father's debt it may be decided. Where he does not do so, the question of the binding nature of the debt cannot be decided behind the back of the son at the instance of the Official Assignee. And there is no procedure for compelling the son to appear before the Insolvency Court and have the question adjudicated. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHY PILLAI *v.* SUNDARAMURTHY PILLAI. **55 Mad. 558 = I.R. 1932 Mad. 532 = 138 I.C. 225 = 35 L.W. 592 = A.I.R. 1932 Mad. 381 = 63 M L.J. 37.**

———**S 7**—*Joint Hindu family—Division in status —Insolvency of father—Right of Official Assignee to get a declaration regarding binding nature of father's debts.*

Although owing to the division of status brought about by a suit for partition instituted by the sons after their frther's insolvency, the father and the Official Assignee lose the right of private sale of the family property including the shares of the sons, it is open to the Official Assignee to obtain a declaration against the sons and get the family property including their shares therein sold by or through Court. S. 7 gives the widest powers to the Insolvency Court to go into such a question and to declare the liability of the son's shares in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realisations. *Morley* v. *White*, L. R. 8 Ch. 214; 52 M. 717; 23 L.W. 80; 42 M.L.J. 141, Ref. (*Curgenven and Bhashyam Ayyangar, JJ.*) RAMACHANDRA IYER *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad 739 = I.R 1931 Mad. 529 = 1931 M W.N. 1085 = 131 I.C. 481 = 33 L.W. 323 = A I.R. 1931 Mad. 317 = 61 M.L. J. 66.**

[**Comm.** 55 M. 558 (570). **F.** 27 S.L.R. 275 (278). **R.** 25 S.L.R. 521 (523, 525).

———**S. 7**—*Payment of money to creditor after adjudication—Official Assignee—Right to set aside by application —Regular suit—Necessity.*

Where, after the order of adjudication, a creditor receives payment of money in discharge of his debt, the Official Assignee is entitled to have the payment set aside by an application under S. 7 and he need not resort to a regular suit. Whether the creditor can get and retain money which belongs to the estate in payment of his debt in excess of what he would get by way of rateable distribution, is a question which should properly be decided by a Bankruptcy Court and not by a separate suit. (*Rupchand, A J.C.*) OFFICIAL ASSIGNEE *v.* GHANSHAMDAS HOTECHAND. **6 R S. 208 = 148 I.C. 941 (2) = A.I.R. 1934 Sind 44.**

———**S. 7**—*Scope.*

An application by a stranger claiming a lien on certain property of the insolvent on the ground that the applicant was given a lien on the property by the insolvent does not lie under S. 7 (*Milne, A.J.C.*) MOOLJI KHIMJI & CO. *v.* PARDANANI & CO. **143 I.C. 204 = I.R. 1933 Sind 123 = A.I.R. 1932 Sind 207.**

———**S. 7**—*Scope.*

S. 7 is in identical terms with S. 4 of the Provincial Insolvency Act and cases eaplaining the scope of the one may well be relied on to interpret that of the other. (*Madhavan Nair and Jackson, JJ.*) PALANIVELU ODAYAR *v.* OFFICIAL RECEIVER, TANJORE. **135 I.C. 739 = I.R. 1932 Mad. 211 = 1931 M.W.N. 1131 = 31 L.W. 788 = A.I.R. 1932 Mad. 66 = 61 M.L.J. 763.**

———**S. 7**—*Scope — Fraudulent sale by insolvent—Suit to avoid, and for declaration as to disposing power—Maintainability by Official Receiver.*

PRESY. TOWNS INS. ACT (1909), S. 7.

Where the insolvent effects a fraudulent transfer to his wife, the Official Assignee can sue under S. 7 to have it declared void. But he cannot sue under that section for a declaration that he has a disposing power over the remaining property belonging to the sons of the insolvent. (*Milne, J.C.*) OFFICIAL ASSIGNEE *v.* MT. PARMESHWARIBAI. **25 S.L.R. 521=I.R. 1932 Sind 29=135 I.C. 269=A.I.R. 1932 Sind 50.**

———**S. 7, Proviso**—*Application by creditor under Ss.* 55 *and* 56, *if barred.*

The proviso to S. 7 of the Act is no bar to an application by a creditor under Ss. 55 and 56 of the Act to set aside certain transactions by the insolvent as void against the Official Assignee, because it cannot properly be described as "arising under S. 36." (*Panckridge, J.*) BINJRAJ HARNANDRAI, IN RE. **60 Cal. 1367=149 I.C. 995=6 R.C. 674=A.I.R. 1934 Cal. 232.**

———**(as amended by Act XIX of 1927), S. 7, proviso**—*Effect—Denial of joint family—Power of Insolvency Court to decide issue as to status.*

The proviso to S. 7 as amended by Act XIX of 1927, is confined to matters arising under S. 36 and those matters are contained in subsections 4 and 5 of that section namely, whether a person supposed to be indebted to the insolvent is so indebted, and whether a person suspected of having in his possession property belonging to the insolvent has in fact any such property in his possession. If the person supposed to be a debtor to the insolvent or to have insolvent's property in his possession does not admit the fact, then, unless all the parties otherwise agree, the Insolvency Court cannot determine the matter under S. 7. But the questions whether the business carried on by the insolvent is a business of the joint family are not matters falling within sub-S. (4) or (5) of S. 36 and they can be decided by the Insolvency Court under S. 7, the examination of the parties concerned and their denial notwithstanding. 52 Mad. 717 (F.B.), Dist. (*Beasley, C.J. and Cornish, J.*) CHINNAPPA MUDALLY *v.* OFFICIAL ASSIGNEE OF MADRAS. **34 L.W. 849=1931 M.W.N. 1253=55 Mad. 385=135 I.C. 585=I.R. 1932 Mad. 169=A.I.R. 1932 Mad. 167=62 M.L.J. 103.**

———**S. 7, Proviso**—*Jurisdiction of insolvency Court—Mode of exercise.*

Where, in an application under S. 7, the Official Assignee does not claim a higher or a better title than the insolvent, the question whether the Insolvency Court should exercise its jurisdiction under the section or should refuse to do so and refer the Official Assignee to a regular suit must depend upon the facts of each case and no hard and fast rule can be laid down in that behalf. The proceedings started on an application under S. 7 were already three years old and the property in dispute was situate and the parties resided within the jurisdiction of the Court to which the application was made under S. 7. No prejudice was going to be caused to the party against whom the action was taken if he was required to defend his title to the property in such proceedings instead of in a regular suit.

PRESY. TOWNS INS. ACT (1909), S. 9.

Held, that the Insolvency Court should not decline to exercise its jurisdiction under S. 7. 1932 Sind 50, Not appr. (*Rupchand, A.J.C.*) OFFICIAL ASSIGNEE *v.* RAMCHAND. **27 S.L.R. 275=143 I.C. 205=I.R. 1933 Sind 121 (2)=A.I.R. 1932 Sind 208.**

———**S. 8 (1)**—*Review—Powers of Insolvency Court—Order without jurisdiction.*

Large powers are conferred on the Insolvency Court under S. 8 (1) in reviewing, rescinding or varying its orders than in proceedings which fall exclusively under O. 47, R. 1, C. P. Code. That the order was made without jurisdiction is sufficient cause for reviewing the order. (*Mirza, J.*) MORARJI JAIRAM NARAIN, *In re.* **I. R. 1932 Bom. 511=139 I. C. 587=34 Bom.L.R. 1175=A.I.R. 1932 Bom. 569.**

———**S. 9**—*Act of agent—Adjudication of principal—When permissible.*

It is a fundamental principle of insolvency law that a person is not to be adjudicated insolvent except for an act of insolvency which he has personally committed or which has been committed by his agent under such circumstances that it must be taken that the act of insolvency by the agent has been expressly or impliedly authorized by the principal agent whom an order of adjudication is sought. Whether the act of the agent can be so treated depends upon the circumstances of the case. 23 Cal. 26; 16 C. W.N. 733; 24 Bom.L.R. 861 and 49 M. 189, Ref. (*Page, C. J. and Mya Bu, J.*) ABDUL SATTAR *v.* V. E. A. R. M. CHETTYAR FIRM. **10 Rang. 215=I.R. 1932 Rang. 157=138 I. C. 189=A.I.R. 1932 Rang. 101.**

———**S. 9**—*Act of Insolvency—Lapse of more than three months—Legal effect and validity of the act.*

Apart from Ss. 55 and 56 of the Act, an act of insolvency can only be avoided if the adjudication is based on it or it is affected by a relation back of the assignees's title provided in S. 51. An act of bankruptcy is not *ipso facto* void and unless it is a fraudulent transasction, the lapse of the period within which it can be availed of to support an appilcation for adjudication will place it beyond attack. 50 M. 541=52 M.L.J. 352, Ref. to. (*Curgen, J.*) RAMA ROW *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1931 Mad. 449=130 I.C. 753=33 L.W. 468=A.I.R. 1931 Mad. 366=61 M.L.J. 27.**

———**Ss. 9 and 99**—Joint family firm—Adjudication of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 99. **25 S.L.R. 322=A.I.R. 1931 Sind 179.**

———**S. 9**—*Petition of creditor—Act of insolvency—Affidavit.*

The creditor has not only to put forward in his application a specific act of insolvency as contained in S. 9 of the Act, but he has also to prove that an act of insolvency has actually been committed. The creditor's petition also according to S. 13 must be verified by an affidavit or affidavits of some person on his behalf having knowledge of the fact. (*Sen, J.*) *S. A.* R. M. CHETTYAR FIRM, *In the matter of.* **149 I.C. 1036=6 R.R. 348=A.I.R. 1933 Rang. 280.**

———**S. 9**—*Petition of creditor—Acts of insolvency—Statements and proof.*

PRESY. TOWNS INS. ACT (1909), S. 9.

If an act of insolvency as defined in S. 9 is not set out in the petition, the petition is not competent. So also it is no permissable for a creditor to make in his petition allegations which are not acts of insolvency within S. 9 and then try to prove by evidence that as a matter of fact an act of insolvency as defined in S. 9 has been committed. It is not competent for a Court to adjudicate a party insolvent for an act of insolvency not specified in the petition. The petition for ajudication of the debtor by a creditor must be definite and precise as to what available act or acts of insolvency as defined in S. 9 were committed. (*O'Sullivan, A.J.C.*) GOBINDRAM KEDARNATH *v.* PARMANAND DIWANCHAND. **153 I.C. 822=7 R.S. 144=A.I.R. 1934 Sind 177.**

———**Ss. 9 to 45**—*"Proceedings from an act of insolvency to discharge"—Effect of heading.*

The mere fact that Ss. 9 to 45 are headed "proceedings from an act of insolvency to discharge" does not limit their application to the stage after discharge. (*Rankin, C.J. and Pearson, J.*) SHADHAN CHANDRA BHANDARI *v.* SEWNARAIN GOLABRAI. **60 Cal. 936=147 I.C. 191 =6 R.C. 293=37 C.W.N. 718=57 C.L.J. 467=A.I.R. 1933 Cal. 699.**

———**S. 8 (b)**—*Act of insolvency—Sale by debtor and payments made soon after to certain creditors.*

Where the debtor sold his property and soon after it, made payments to some creditors.

Held, that the sale and payments made must be considered together in judging the intention of the insolvent and that these transcations must inevitably defeat or delay those creditors who did not receive any share in the sale price, and as such, it was an act of insolvency. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) JETHANAND MURIJMAL *v.* GHANSHAMDAS. **159 I.C. 745= 29 S.L.R. 265=8 R.S. 95=A.I.R. 1935 Sind 53.**

———**S. 9 (b)**—*Act of insolvency—Strict proof necessary.*

An act of insolvency must be strictly proved. Where a petition for adjudication was based on a transfer by the insolvent, it was found that the past debt was a valid one and it was not alleged that the sale was collusive or that it was not *bona fide.*

Held, that as the sale was not shown to comprise all the available property of the insolvent or to have been made with a fraudulent intent, there was no act of insolvency proved. (*Wadia, J.*) ADAMALI MAHOMEDALI NULVALA, *In re.* **141 I.C. 657=I.R. 1933 Bom. 112=34 Bom. L.R. 1162=A.I.R. 1932 Bom. 580.**

———**S. 9 (b)**—*Transfer of the whole of property—Act of insolvency—English law—Transfer for past debts*—Bona fide *agreement.*

The transfer by a debtor of the whole or substantially the whole of his property in consideration of a past debt is an act of bankruptcy under the English law as well as under S. 9 (*b*) of the Presidency Towns Insolvency Act. But a transfer made in pursuance of an antecedent *bona fide* agreement that security should be given for a loan may not amount to a fraudulent transfer or fraudulent preference, it being incumbent on the person setting up the prior agreement to prove not only that the agreement did exist in fact, but also that it was in all respects a *bona fide* agreement. There must be no secret or expressed bargain or understanding that the giving of the security should be delayed until the debtor had reached a state of insolvency, for that would bring the transfer within this section. (*Braund, J.*) *In the matter of* M. V. R. VELUSWAMY THEVAR. **13 Rang. 192=159 I.C. 217=8 R.R. 259=A.I.R. 1935 Rang. 343.**

———**S. 9 (b)**—*Transfer of whole, and transfer of part of property—Distinction between.*

A sale or mortgage by the debtor of the whole or substantially the whole of his property in consideration of a past debt, that is, a debt already incurred, is an act of insolvency, whatever the motives of the parties may have been. But if he transfers only a part of his property in consideration of a past debt, the transfer does not by itself amount to an act of insolvency, unless it is made with the *intent* to defeat or delay creditors, and that intent must be proved. (*Wadia, J.*) ADAMALI MAHOMEDALI NULVALA, *In re.* **141 I.C. 657=I.R. 1933 Bom. 112= 34 Bom.L.R. 1162=A.I.R. 1932 Bom. 580.**

———**S. 9 (c)**—*Transfer by debtor of whole of his property—Act of insolvency—Whether the transaction amounts to.*

It would not be safe to infer that every transfer of the whole of a debtors properyt is of necessity fraudulent. The sale however will constitute an act of insolvency if the seller intends to defeat or delay his creditors. Whether he does or does not in fact entertain such an intention is a matter of fact which is not the subject of any immutable presumption of law; it must be inferred from the circumstances of each particular case. (*Ferrers, J. C. and O'Sullwan, A.J.C.*) JETHANAND MURJIMAL *v.* GHANSHAMDAS. **159 I.C. 745=29 S.L.R. 265=8 R.S. 95=A.I.R. 1935 Sind 53.**

———**Ss. 9 (c) and 56**—*Act constituting fraudulent preference—If must be voluntary.*

The act which constitutes a fraudulent preference must no doubt be a voluntary act, not an act done under pressure. The word "voluntary" implies an act of free will. An act under pressure is not an act of free will. (*Ferrers, J.C. and O'Sulivan, A.J.C.*) JETHANAND MURIJMAL *v.* GHANSHAMDAS. **159 I.C. 745=29 S.L.R. 265=8 R.S. 95=A.I.R. 1935 Sind 53.**

———**S. 9 (e)**—*Construction—"Not less than 21 days"—Attachment not a continuing act of insolvency.*

The expression "not less than 21 days" in S. 9 (*e*) only means that 21 clear days must have elapsed since the attachment for it to be available as an act of insolvency and it is not a continuing act during the subsequent period of attachment, which may terminate by a sale of the property. Once these days have elapsed, the act of insolvency is complete and no petition can be founded upon it after the expiration of three months from the completion of the period of 21 days. The continuance of the attachment

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is not a continuing act of insolvency. (1899) 1 Q.B.D. 626, Foll. (*Greaves and B. B. Ghose, JJ.*) ANUPAMA DEBI *v.* GURUDAS CHATTERJI. **57 Cal. 1274=I.R. 1931 Cal. 478=131 I.C. 590=A.I.R. 1931 Cal. 246.**

———**S. 9 (e)**—*Unsatisfied execution—Application for adjudication—Discretion of Court—Practice.*

Where a party unsuccessful in a case before the High Court has appealed to the Privy Council and pending the appeal, the successful party attached the debtor's properties and on the expiry of twenty-one days without satisfaction, applied to adjudicate the debtor.

Held, that the Court was not bound to adjudicate the debtor in spite of the default under S. 9 (*e*) but having regard to the fact that the debt was disputed and that there was a *bona fide* appeal pending, the proper procedure was to stay the petition generally with liberty to apply, provided proper security was given by the debtor. (*Marten, C.J. and Murphy, J.*) RUSTOMJI ARDESHIR COOPER *v.* MADHAVJI DAMODAR. **34 Bom.L.R. 1436.**

———**S. 9 (g)**—*Joint family firm—Suit for partition—Managing member appointed receiver—Intimation to creditors regarding inability to pay the debts.*

Where a member of a joint family firm instituted a suit for partition and managing members were themselves appointed receivers and they sent a circular to the creditors that they were not in a position to pay the debts, the whole proceedings from the institution of the partition suit constitute an act of insolvency. The firm should be deemed to carry on business so long as the business debts remain undischarged in spite of the institution of the suit and in sending the intimation to the creditors in pursuance of the wishes of the partners, the receivers were only acting as the agents of the firm. 48 M. 795, Foll. (*Wild, J.C. and Milne, A.J.C.*) CHATURBHUJ *v.* FIRM OF KEWAIRAM. **25 S.L.R. 322=I.R. 1931 Sind 148=134 I.C. 996=A.I.R. 1931 Sind 179.**

———**S. 9 (g)**—*Notice to some creditors—Whether sufficient.*

A notice to some of the creditors is sufficient to all the world if it is a real notice. Any other notice which follows upon such a statutory declaration, is nothing but a mere repetition and has no statutory significance. The notice again need not be in writing. (*Cunliffe, Ag. C. J. and Baguley, J.*) SONIRAM *v.* S. A. R. M. CHETTIYAR FIRM. **12 Rang. 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

———**S. 9 (g)**—*Suspension of payment—Dishonouring of cheque.*

The dishonouring of cheques upon perfectly solvent current accounts is a suspension of payment. A suspension of payment can obviously be either a permanent suspension or a temporary suspension. Whatever reasons may be advanced as to the cause of suspension, even when those reasons may be advanced as to the cause of a suspension, and even when those reasons allege that payment will, in all probability, be renewed at some future date, such action on the part of a bank or a firm taking deposits must amount to a suspension. (*Cunliffe, Ag.C.J. and Baguley, J.*) SOONIRAM *v.* S. A. R. M. CHETTIYAR FIRM. **12 Rang. 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

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———**S. 9 (g)**—*Suspension of payment—Notice by clerk—Validity.*

A person who is acting merely as a clerk has no authority, either express or implied, to act as agent, far less to do acts such as giving notice of suspension of payment on behalf of the principals of the firm. (*Sen, J.*) S. A. R. M. CHETTYAR FIRM, *In the matter of.* **149 I.C. 1036=6 R.R. 348=A.I.R. 1933 Rang. 280.**

———**S. 9 (g)**—*Suspension of payment—Notice of—Statement amounting to—Act of insolvency—Strict proof.*

The proof of the commission of an act of insolvency must be strict and precise, and where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debts, the time, place and particulars of the notice should be accurately specified, and it is incumbent upon the Court to scrutinize with meticulous care the evidence which is led in support of an act of insolvency. In order that a notice of suspension may amount to an act of insolvency, it should have been made within three months before the presentation of petition and it must amount to a deliberate and intentional notice on behalf of the debtor that he has suspended or is about to suspend payment of his debts to his creditors generally. Unless the statement itself is capable *per se* of conveying the intention that the debtor has suspended or intends to suspend or is about to suspend payment of his debts, it is unnecessary to consider the surrounding circumstances. (*Page, C.J. and Mya Bu, J.*) M. S. M. M. CHETTIAR *v.* DORASWAMY MOODALIAR. **11 Rang. 96=I.R. 1933 Rang. 73=143 I.C. 775=A.I.R. 1933 Rang. 41 (2).**

———**S. 9 (g)**—*Suspension of payment—Notice of—Statement amounting to—Act of insolvency—Strict proof.*

The proof of the commission of an act of insolvency must be strict and precise and where it is alleged that a debtor has given notice that he has suspended or is about to suspend payment of his debts, the time, place and particulars of the notice should be accurately specified and the allegation in the petition cannot be supplemented by allegations in the verifying affidavit, Where the petition stated that the debtors had given notice to the petitioners as well as to their other creditors that they have suspended or were about to suspend payment of their debts,

Held, that the act of insolvency was not in the form required by law, and was not couched in terms sufficiently clear and precise to be the basis of an insolvency petition or to justify the Court in passing an order of adjudication. A.I.R. 1933 Rang. 41 and A.I.R. 1934 Rang. 87, Rel. on. (*Page, C. J. and Mya Bu, J.*) C. A. P. C. S. CHETTYAR *v.* V. V. R. CHETTYAR. **13 Rang. 686=159 I.C. 1055=8 R.R. 314=A.I.R. 1935 Rang. 352.**

———**S. 9 (g)**—*Suspension of payment—Notice of—Statement by debtor that he is not in a position to pay in full to his creditors—If amounts to.*

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A statement by a debtor that he is not in a position to pay in full to his creditors may or may not amount to a notice that the debtor has suspended or was about to suspend payment of his debts within S. 9 (*g*). It depends on the circumstances in which the statement is made. Where the debtor made such a statement and his intention was to try to arrange with his more pressing creditors and to put off the evil day,

Held, that he had not suspended nor was he about to suspend payment of his debt. (*Page, C.J. and Mya Bu, J.*) C. A. P. C. S. CHETTYAR *v.* V. V. R. CHETTYAR. **13 Rang. 686 =159 I.C. 1055=8 R.R. 314=A.I.R. 1935 Rang. 352.**

———**S. 9 (g)**—*Suspension of payment—What amounts to.*

When a banking firm closes its doors and gives notice to its creditors that it is not going to make any further payments to its customers, this can be said to amount to an act of insolvency amounting to suspension of payment. But where a banker tells his customers, "I am unable to meet your demands owing to the peculiar circumstances, *viz.*, that you are all demanding instant payment of your dues; but give me time to satisfy you that I am perfectly solvent," that cannot amount to a suspension of payment. (*Sen, J.*) S. A. R. M. CHETTYAR FIRM, *In the matter of.* **149 I.C. 1036=6 R.R. 348=A.I.R. 1933 Rang. 280.**

———**S. 9, Explanation**—*Act of insolvency—Conduct of agent—Adjudication of principal—Procedure.*

The mere fact of a person being an agent of a Chettyar firm cannot in law entitle him to allow a creditor to obtain an order of adjudication, because he, the agent, purports to commit an act of insolvency within the meaning of S. 9. It is incumbent on the Court to require proof from the adjudicating creditor that the agent who is alleged to have committed the act of insolvency was expressly or impliedly authorised to do so or that the ordinary course of the business that he carried on for his principal, or that the nature of such business was sufficient to justify the Court holding that the agent's acts should be considered, in the circumstances, to be the acts of his principal. (*Sen, J.*) S. A. R. M. CHETTYAR FIRM, *In the matter of.* **149 I.C. 1036=6 R.R. 348=A.I.R. 1933 Rang. 280.**

———**S. 9, Explanation**—*Notice—Who can give—Agent.*

The position of an agent or Aiyar of a Chettyar private Bank in Rangoon is very similar to the position of a Bengali gumastha, and he has authority to issue notice of suspension of payment. (*Cunliffe, Ag C. J. and Baguley, J.*) SOONIRAM *v.* S.A.R.M. CHETTYAR FIRM. **12 Rang 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

———**S. 10**—*Acts of insolvency—Need for particulars—Vague allegations—Adjudication refused.*

The petition alleged three acts of insolvency; one was a verbal notice of suspension of payment of debts on a date not given; the second was "keeping house" and concealing himself to avoid meeting his creditors and for that too, no date was given; the last was that he had disposed of a considerable portion of his properties and was trying to dispose of the rest.

Held, that the acts alleged were not sufficient to support an order of adjudication.

Semble: In an adjudication *order*, the exact acts of insolvency together with the dates should be carefully particularized. (*Rankin, C. J. and Buckland, J.*) KRISHNA DAS RAY *v.* CHARUSILA PAL CHAUDHURY. **137 I.C. 31=I.R. 1932 Cal. 279=35 C.W.N. 567=A.I.R. 1932 Cal. 290.**

PRESY. TOWNS INS. ACT (1909), S. 11.

———**S. 11**—*Construction—"Carrying on business".*

The words "carrying on business", in S. 11 mean the same thing as under the Letters Patent of 1865, namely entering into transactions which may result in personal liabilities. (*Remfry, J.*) L. E. SALCICIONI, *In re.* **164 I.C. 627=9 R.C. 257=39 C.W.N. 324.**

———**S. 11**—*Jurisdiction—Petition by creditor—Allegation that debtor is carrying on business within jurisdiction—Non-proof of—Debtor found to personally work for gain within jurisdiction—If sufficient.*

It was alleged in a petition by a creditor that the debtor carried on business within the jurisdiction of Court, but that allegation was not proved. It was, however, admitted and found that the debtor worked for gain at the said place at the material times and also resided within jurisdiction.

Held, that defect in the pleadings and the variation between the allegations in the pleading and proof were not fatal, and that the Court could disregard the erroneous allegation made in the petition and that it was sufficient, for the Court to assume jurisdiction, that the debtor resided and worked for gain within the jurisdiction. (*Remfry, J.*) L. E. SALCICIONI, *In re.* **164 I.C. 627=9 R.C. 257=39 C.W.N. 324.**

———**S. 11 (b)**—*Business by commission agents—Jurisdiction.*

The business contemplated by Cl. (*b*), S. 11, is business carried on within the limits of the Court by a debtor either personally or through an agent properly and strictly so called, and under his effective control, but not by a general agent who carries on business in his own name for diverse constituents on payment to him of a commission. A.I.R. 1929 Sind 24, Rel. on. Where therefore the business carried on at Karachi was a business not of a firm out of British India but of the commission agents who *inter alia* made transactions on behalf of the firm and all the transactions were invariably made by the commission agents in their own respective names and they were personally responsible to the local dealers, the mere fact that the firm out of British India employed the services of these agents to sell goods sent to them from up-country or to enter into forward contracts of sale and purchase on behalf of the firm, would not by itself be sufficient to give jurisdiction to the Karachi Court. (*Rupchand, A. J. C.*) FIRM, NETSIDAS BANSIDAR, *In re.* **27 S.L.R. 298=6 I.R. (Sind) 15=144 I.C. 885=A.I.R. 1933 Sind 202.**

PRESY. TOWNS INSOL. ACT (1909), S. 11.

———**S. 11 (b)**—*"Ordinarily resided"—Meaning of—Confinement in jail—If sufficient.*

A debtor who is confined in the Rangoon Central Jail for upwards of 12 months prior to the date of the petition must be deemed to have "ordinarily resided" in Rangoon within the meaning of S. 11 (*b*) so as to give jurisdiction to the High Court to entertain the petition. (*Braund, J.*) *In the matter of* M. V. R. VELUSWAMY THEVAR. **13 Rang. 192=159 I.C. 217 =8 R.R. 259=A.I.R. 1935 Rang. 343.**

———**S. 11 (c)**—*"Works for gain"—Engine driver occasionally going to Bombay—Jurisdiction of Bombay High Court.*

The question whether the insolvent personally works for gain in a particular place is primarily a question of fact. A person may be working for gain in more than one place. The place where the payment is made to the insolvent is not the test but one of the factors for consideration. The more important thing is where the money is actually received by the debtor and so available for the creditors. There must also be some degree of permanency in the relation between the debtor and the places where he is alleged to work for gain.

An engine driver of the G. I. P. Ry. resided in Bhusawal, received his pay there and took his orders there. He occasionally went to Bombay; the pay-sheets of the railway servants were prepared at the head office of the railway at Bombay. *Held,* that the Court at Bombay had no jurisdiction to adjudicate the debtor as an insolvent. (*Beaumont, C. J. and Mirza, J.*) UDERAJ BODURAM *v.* CLEMENT GRIFFITH HALL. **56 Bom. 530=I.R. 1932 Bom. 513=139 I.C. 591=34 Bom.L.R. 844=A.I.R. 1932 Bom. 432.**

———**S. 11 (d)**—*Applicability—Application against firm of debtors and not an individual person—Test of jurisdiction.*

Cl. (*d*) of S. 11 applies where the application is against a firm of debtors and not against an individual debtor. It is necessary in order to give the Court jurisdiction to pass an order of adjudication, that the firm of debtors carried on business within a year of the date of the application within the Court's jurisdiction. And the *onus* is on the applicant to prove the fact. 1929 Sind 24 and 14 Bom. 541, Ref. The question for determination in such a case however is not whether the debt of the petitioning creditor arose within the jurisdiction of the Court but whether the debtor firm carried on business within a year of the date of application within the jurisdiction of the Court. To give jurisdiction, the business should be carried on either personally or by an agent, properly and strictly so called, but not by a general agent, carrying on business, in his own name, for diverse constituents on commission. The debtor firm had a servant permanently employed within the jurisdiction of the Court who used to watch over the interests of his master, give directions for sale when instructed to do so, bring brokers to the general agent, check weighments, hand over railway receipts and see that the goods were sold at the best available price, make entries in his books and keep his master informed; and a partner of the firm used to come every few months for a few days in connexion with the business of the firm.

Held, that the debtor firm carried on business within the jurisdiction of the Court. (Case-law referred.) (*Aston, A. J. C.*) *In re* GOBINDRAM DHARAMDAS. **150 I.C. 453=7 R.S. 3= A.I.R. 1933 Sind 250.**

PRESY. TOWNS INSOL. ACT (1909), S. 13.

———**S. 12 (1) (c)**—*Petition of creditor—Amendment—Permissibility—Addition of act of insolvency committed more than three months back.*

Where an application for amendment is filed more than three months after the alleged act of insolvency is committed, such an application is not within time under S. 12 (*c*) and so the effect of granting an amendment is to give the petitioning creditors rights which they would not have had, had they sought to file their petition on the date when they applied for the amendment. Hence the amendment should not be permitted in such circumstances. (*O'Sullivan, A. J. C.*) GOBINDRAM KEDARNATH *v.* PARMANAND DIWANCHAND **153 I C 822=7 R.S. 144=A.I.R. 1934 Sind 177.**

———**S. 12 (2)**—*Scope—Petition by creditor—Omission to mention security—If fatal.*

If a petitioning creditor omits inadvertently, and not deliberately, to include or mention a security, it does not necessarily follow that the proceedings should be wholly set aside. (*Costello and Lort Williams, JJ.*) AHAMED MAHAMMAD PARUK *v.* PRAPULLANATH TAGORE. **61 Cal. 924=154 I.C. 524=7 R.C. 493=A.I.R. 1935 Cal. 84.**

———**S. 13**—*'Ability to pay debts'—Meaning—* Onus *of proof.*

The *onus* of proving that the debtor is able to pay the debts so that the creditor's petition may be dismissed is on the debtor himself. What the statute means by ability to pay debts is not merely that the man has assets, which if liquidation proceeds may in the result provide sufficient money to discharge his debts. It means that he is not so embarrassed that he cannot meet his debts in ordinary way by making legal tender and discharging his debts. The circumstance that a man has assets and the assets are not liquid assets and therefore he cannot pay his debts is a circumstance which stand in favour of having a liquidation and not against having a liquidation. (*Rankin, C. J. and C. C. Ghose, J.*) PRATAPMALL RAMESHWAR *v.* CHUNILAL JAHURI. **60 Cal. 345=I.R. 1933 Cal. 507= 144 I.C. 142=A.I.R. 1933 Cal. 417.**

———**S. 13**—*Partners—Separate adjudications on same debt—Validity.*

The petitioning creditor had filed a suit against the son of the applicant individually and obtained a decree; but he afterwards learnt that the applicant was also a partner with his son and proceeded against him under the insolvency law on the same debt. In a notice of motion taken out by the applicant to set aside the adjudication order passed against him it was contended that an account of the decree obtained against his son as a partner there was no debt due and payable by him and that it was not competent to the petitioner to get him adjudicated.

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Held, that though the remedy to sue may be barred by limitation, yet the debt was not extinguished. If therefore it was proved that the debt in dispute was a partnership debt its existence would suffice to support an adjudication order against both father and son. (*Wadia, J.*) VALLIBHAI ADAMJI, *In re.* **6 I.R. (Bom.) 96 =145 I.C. 619=35 Bom.L.R. 881=A.I.R. 1933 Bom. 407.**

———**S. 13 (6)**—*Scope of—Proper order under—Order for security—Condition that order of adjudication would follow on default—Validity.*

S. 13 (6) only contemplates that there should be a stay for such period as may be necessary for the determination of other matter in issue between parties and that ultimately there shall be a trial on the question relating to the debt. The sub-section never contemplates that a conditional order of adjudication should be added, by way of sanction, to an order for furnishing security in connection with the postponement of the determination of the question as to whether or not there was a debt. Such an order cannot be supported and will be set aside. (*Costello and Lort Williams, JJ.*) AHAMED MAHAMMAD PARUK *v.* PRAPULLANATH TAGORE. **61 Cal. 924 =154 I.C. 524=7 R.C. 493=A.I.R. 1935 Cal. 84.**

———**S. 15**—*Interpretation.*

The words "ought to have been presented before some other Court" mean "ought as a matter of convenience to have been presented before some other Court." (*Beaumont, C. J. and Mirza, J.*) UDERAJ BODURAM *v.* CLEMENT GRIFFITH HALL. **56 Bom. 530=I.R. 1932 Bom. 513= 139 I.C. 591=34 Bom.L.R. 844=A.I.R. 1932 Bom. 432.**

———**S. 17**—*Adjudication order—Property beyond British India if vests—Moveable property —Law as to.*

On passing of the adjudication order, the property of the debtor vests in Official Assignee whether it is situate in British India or not and whether the Official Assignee is in a position to get possession of such property as is situate outside British India or not. Moveable properties are *prima facie* governed by the law of the insolvent's domicile. 1926 Bom. 276 and 1926 Cal. 898, Ref. (*Rupchand, A. J. C.*) OFFICIAL ASSIGNEE *v.* GHANSHAMDAS HOTECHAND. **6 R. S. 208=148 I.C. 941 (2)=A.I.R. 1934 Sind 44.**

———**Ss. 17 and 25**—*Adjudication—If* ipso facto *protects insolvent against arrest.*

Upon a proper construction of S. 17 and S. 25 of the Presidency Towns Insolvency Act and the corresponding Ss. 23, 28 and 31 of the Provincial Insolvency Act, upon adjudication an insolvent not only has not *ipso facto* the protection of the law against execution upon his person, but must apply to the Insolvency Court to grant him in its discretion a protection order. Neither in S. 28 of the Provincial Insolvency Act, nor in S. 17 of the Presidency Towns Insolvency Act is any mention made of leave being necessary in respect of remedies against the person of the insolvent, both these sections referring not to the person but to the property of the insolvent. It is intended and enacted by the legislature that an order of adjudication should not operate automatically as a protection against execution upon the person of an insolvent, but that the insolvent should be compelled to apply to the Court to grant him the privilege of protection against arrest, which the Court would do only if the circumstances of the case justified it. (*Page, C. J. and Ba U, J.*) HAMID *v.* MOHAMED SHERIFF. **13 Rang. 623=159 I.C. 936=8 R.R. 290=A.I.R. 1935 Rang. 415.**

PRESY. TOWNS INSOL. ACT (1909), S. 17.

———**Ss. 17 and 51**—*Adjudication in two places on different dates—Vesting of property—Priority of.*

Where a firm is adjudicated by two Courts, the adjudication order which is prior in time vests the property of the insolvent in the Official Assignee of that Court. The priority of vesting does not depend on the date of the commission of the acts of bankruptcy on which the proceedings were started. 42 M. 121, Foll. (*Rankin, C. J. and C. C. Ghose, J.*) MALIK RAMLAL *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **59 Cal. 1161=141 I.C. 863=I.R. 1933 Cal. 204=56 C.L.J. 152=36 C.W.N. 546=A.I.R. 1933 Cal. 115.**

———**S. 17**—*Partner—Adjudication of—Rights of Official Assignee—Assignment of debt due to partnership after adjudication of two of the partners—Validity.*

The Official Assignee, as assignee of the insolvent partners, has a right to come in on a winding up of partnership and claim his share. His rights and liabilities are co-extensive with those of the insolvent partners, had not they become bankrupt; when, therefore, only a partner or some of the partners of the firm become insolvent, the Official Assignee becomes a tenant-in-common with the continuing partners from the date of the petition and the solvent partners have the right to realise the partnership properties. Consequently it must follow that the Official Assignee can claim nothing as to insolvent's shares until all the joint creditors of the partnership are paid. So an assignment of a mortgage debt due to the partnership of the firm is valid even though two of the partners had been adjudicated prior to the assignment. (*Heald and Sen, JJ.*) MA THWE *v.* MUNSHI RAM. **I.R. 1931 Rang. 126=131 I.C. 62=A.I.R. 1931 Rang. 191.**

———**S. 17**—*Plaintiff violating S. 17 in filing suit against defendant—Right to set up that section as a bar to an appeal by defendant.*

It is incorrect on general principles that a person who has broken a particular provision of law should be enabled by the same provisions of law to prevent the Courts of law from interfering in the matter. Where therefore the decree-holder admits having broken the provisions of S. 17 of the Presidency Towns Insolvency Act when he brought his suit against the defendant who had become an insolvent, he cannot be allowed to hold up that section as a bar against an appeal from the decree by the defendant. (*Bennet and Bajpai, JJ.*) AJODHIA PRASAD *v.* SARI RAM. **7 R.A. 188=151 I.C. 579=4 A.W.R. 208 =A.I.R. 1934 All. 1011.**

———**S. 17**—*Property in foreign State—Whether vests in Official Assignee on adjudication.*

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An adjudication order does not operate to vest the insolvent's immoveable property situated in a foreign State in the Official Assignee or when there has been a composition scheme approved of by the Court in the trustees of the composition under the order approving the scheme. 43 C.L. J. 436 at 447, Rel. on. (*Panckridge, J.*) SUMERMULL SURANA, *Re*. **136 I.C. 141=I.R. 1932 Cal. 189=35 C.W.N. 506=A.I.R. 1932 Cal. 124.**

———**S. 17**—*Property of the insolvent—Decree against debtor subsequently adjudicated insolvent—Right to set aside—If "property" of the insolvent.*

Where a decree is passed against a person who is subsequently adjudicated an insolvent, the right to have it set aside for fraud ceases to be exercisable by the insolvent after his insolvency but passes to the Official Assignee. *Boaler* v. *Power*, (1910) 2 K.B. 229, Foll. (*Beaumont, C.J. and Blackwell, J.*) RUSTOMJI ARDESHIR *v.* BYRAMJI BOMANJI. **149 I.C. 910=6 R.B. 404=36 Bom.L.R. 79=A.I.R. 1934 Bom. 84.**

———**S. 17**—Property of the insolvent—Member of Bombay Stock Exchange—Card of Membership. *See* BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION, RR. 18, 56, 57 AND 62. **59 I.A. 318=56 Bom. 374=63 M.L.J. 623 (P.C.).**

———**Ss. 17 and 52**—*Scope—Secured creditor failing to give notice.*

Section 52 is an independent section by itself and is an exception to S. 17, so that if a creditor having a charge over debts due to the insolvent fails to perfect hiis title by giving notice to the debtors to the insolvent, the trustee in insolvency is entitled to those debts as property in the reputed ownership of the insolvent. (*Havelivalla, A.J.C.*) DHANRAJMAL KISHIN DAS *v.* OFFICIAL ASSIGNEE. **25 S.L.R. 310=131 I.C. 130=A.I.R. 1931 Sind 44.**

———**S. 17**—*Secured creditor—Enforcement of security in execution—Omission to implead Official Assignee—Effect.*

Where the secured creditor seeks to enforce his remedy against the security it is necessary that the Official Assignee should be impleaded as party but leave of the Court is not necessary. Where the Official Assignee was not impleaded in certain proceedings in execution taken at the instance of the secured creditor,

Held, that the effect was that the equity of redemption was not represented but the Official Assignee was the only person who could contest the execution. (*Mitter and Henderson, JJ.*) RAJENDRACHANDRA SARKAR *v.* BIPIN CHANDRA SAHA. **60 Cal. 1298=149 I.C. 339=6 R.C. 569=37 C.W.N. 973=A.I.R. 1934 Cal. 64.**

———**S. 17**—*Secured creditor—Rights.*

A secured creditor stands outside the bankruptcy. Rights of secured creditor described. (*Mitter and Henderson, JJ.*) RAJENDRA CHANDRA SARKAR *v.* BIPIN CHANDRA SAHA. **60 Cal. 1298=149 I.C. 339=6 R.C. 569=37 C.W.N. 973=A.I.R. 1934 Cal. 64.**

———**S. 17**—*Suit against insolvent without leave—Maintainability.*

A suit by a creditor against an insolvent is not maintainable without the leave of Court previously obtained. Such a suit should be dismissed and the defect being one which cannot be cured by leave subsequently obtained, the suit should not be merely stayed. 40 B. 235, Foll.; 41 B. 312, Ref.; 31 Bom. L. R. 981, Not foll. (*Blackwell, J.*) MAYA OOKEDA *v.* KUVERJI KURPAL. **I.R. 1932 Bom. 442=138 I.C. 788 =34 Bom.L.R. 649=A.I.R. 1932 Bom. 338.**

Note.—*See*, however, to the contrary, the decision under S. 28 (2) of the Provincial Insolvency Act in *Bhimaji* v. *Chunilal*, 34 Bom. L. R. 683.

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———**S. 17**—*Voluntary transfer—Member of company—Assignment of Provident Fund before accrual—Effect.*

The rules of the Provident Fund of a Company provided that a member was entitled to receive the amount only on his retirement or discharge and that in case he transferred his interest during service he was liable to forfeit his rights for the amount to the Company. A member while in service was adjudged insolvent on his own petition and his rights vested in the Official Assignee.

Held, that the effect of his petition was to transfer or assign immediately his property to the Official Assignee and such transfer which is by operation of law was equivalent to a voluntary transfer by the debtor to the Official Assignee within the meaning of the Provident Fund rule. There would not be such transfer if the debtor were adjudicated otherwise than on his own petition, because transfer in such a case could hardly be deemed to be due to the voluntary act of the debtor, nor if there was collusion between the trustees administering the Fund and the debtor to defeat the claims of creditors. (*Lort Williams, J.*) ERNEST CLARENCE O'BRIEN, *In re*. **60 Cal. 926=147 I.C. 422 =6 R.C. 329=37 C.W.N. 1050=A.I.R. 1933 Cal. 701.**

———**S. 17, proviso**—*Secured creditor—Mortgage suit—Parties—Official Assignee—Proper party to file appeal.*

In the case of a mortgaged property the secured creditor has a right to deal with the mortgaged property without making any application to the Insolvency Court. The matter therefore of mortgage suits is one which lies apart from insolvency proceedings and although it might be possible for an Official Assignee to apply to the Court to be made a party in a mortgage suit it would be seldom that it would be in the interests of the estate for the Official Assignee to take such action. Therefore, on general principles, if action is to be taken at all, it is the insolvent who is the person to take action in regard to mortgage decrees. (*Bennet and Bajpai, JJ.*) AJODHIA PRASAD *v.* SARI RAM. **7 R.A. 188= 151 I.C. 579=4 A.W.R. 208=A.I.R. 1934 All. 1011.**

———**S. 18**—*Hindu joint family—Suit for partition—Jurisdiction of Insolvency Court to stay.*

A partition suit which the sons file to separate the property of the insolvent from the properties of other sharers is not a suit involving a claim against the insolvent except in so far as it may involve a claim to account or a claim for money-decree against the insolvent. The In-

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solvency Court has no jurisdiction to stay such a suit for partition. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHY PILLAI *v.* SUNDARAMURTHY PILLAI. **55 Mad. 558=I.R. 1932 Mad. 532=138 I.C. 225=35 L.W. 592=A.I.R. 1932 Mad. 381=63 M.L.J. 37.**

———**S. 18-A**—*Stay of proceedings in mofussil Court—Grounds.*

Section 18-A affords no indication as to the grounds on which an order staying proceedings or annulling an adjudication should be made. Where a substantial creditor desired that the insolvency proceedings should proceed in the High Court and it appeared that such a procedure would cause no inconvenience to the other creditors or the debtor,

Held, the Court should act under S. 18-A, make an order of adjudication and stay further proceedings in the mofussil Court after annulling the order of adjudication passed by that Court.

Per *Curiam*: An insolvent debtor is not in the same position of a plaintiff as to right of choice of the Court in which his insolvency should be conducted. (*Panckridge, J.*) KRISHNA KISHORE PAUL, *Re*. **135 I.C. 279=I.R. 1932 Cal. 87=35 C.W.N. 566=A.I.R. 1931 Cal. 775.**

———**S. 21**—*Annulment—Effect of.*

Where after the adjudication of two partners as insolvents, the firm assigned a mortgage debt due to it in favour of a third party and the adjudication was subsequently annulled, the result of the annulment is to revest the property in the firm and the assignment is binding on those members whose insolvency was annulled. (*Heald and Sen, JJ.*) MA THWE *v.* MUNSHI RAM. **I.R. 1931 Rang. 126=131 I.C. 62=A.I.R. 1931 Rang. 191.**

———**S. 21**—*Appeal—Interference with discretion.*

Per *Baguley, J.*—Though the discretion exercised by a Judge under S. 21 cannot be interfered with in appeal, when the Judge overlooks the fact that he has a discretion under S. 21 or does not consciously exercise any discretion, his order can be interfered with by the appellate Court which can pass an order after exercise of such discretion. (*Cunliffe, Ag. C.J. and Baguley, J.*) SOONIRAM *v.* S. A. R. M. CHETTYAR FIRM **12 Rang. 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

———**S. 21**—*Enquiry for annulment of adjudication—Scope.*

Per *Baguley, J.*—If, in the opinion of the Court, on the date of the filing of the application for adjudication, there existed other good grounds for the adjudication, any such grounds may be gone into in the inquiry which is to be opened with regard to the annulment of the adjudication, and, if they are proved, at the subsequent inquiry, there is no reason why the Court should not come to the conclusion that on the date of the filing of the application, the debtor ought to have been adjudged insolvent; and, if matters cannot be carried as far as that, the existence of perfectly good grounds for the debtor's adjudication, existing on the date of the filing of the application for adjudication, would be very good grounds for the Court to refuse to exercise its discretion in favour of the debtor.

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Semble.—The word 'may' in the section does not mean 'must'. (*Cunliffe, Ag. C. J. and Baguley, J.*) SOONIRAM *v.* S. A. R. M. CHETTYAR FIRM. **12 Rang. 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

———**S. 21**—*Petition for adjudication based on misconception of law as to statutory notice—Amendment.*

A creditor filed a petition for adjudication alleging that a certain act was the statutory notice of suspension of payment. In so doing he was under a misconception of law, as the real notice was some other act. At the time of inquiry of petition under S. 21, he sought to amend his petition.

Held, the amendment must be allowed. (*Cunliffe, Ag. C.J. and Baguley, J.*) SOONIRAM *v.* S. A. R. M. CHETTYAR FIRM. **12 Rang. 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

———**S. 21**—*Petition for annulment of adjudication—What Judge should consider.*

A Judge, in considering petition for an annulment, is exercising a discretion whether his former order should be maintained. This discretion must, of course, be exercised upon certain materials in the evidence. In considering such a question, he should not conduct a roving inquiry into the financial position of the debtor, but he should scrutinize closely the actual position of the adjudicating firm at the time that the alleged suspension took place and, within limits, should also consider the surrounding circumstances of the suspension and the manner in which the notice of suspension is alleged to have been given. (*Cunliffe, Ag.C.J. and Baguley, J.*) SOONIRAM *v.* S.A.R.M. CHETTYAR FIRM. **12 Rang. 64=149 I.C. 723=6 R.R. 309=A.I.R. 1933 Rang. 363.**

———**S. 21 (1)**—*Appeal by debtor to Privy Council pending—Execution for costs of High Court decree—Adjudication—Proper procedure.*

The insolvent and the petitioning creditor were parties to an appeal which the insolvent lost in the High Court. Pending an appeal by him to the Privy Council, the creditor attached the debtor's properties for costs and on non-satisfaction, had him adjudicated an insolvent.

Held, that the proper order should have been to adjourn the petition or defer the adjudication until the debtor is afforded an opportunity of furnishing proper security for the payment of debt; that the remedy of the insolvent was to apply to the appellate Court for stay of the insolvency proceedings. The order of adjudication was accordingly discharged and insolvency petition directed to stand over generally with liberty to apply. (*Marten, C.J. and Murphy, J.*) RUSTOMJI ARDESHIR COOPER *v.* MADHAVJI DAMODAR. **34 Bom.L.R. 1436.**

———**Ss. 23 and 41**—*Jurisdiction under—Order of annulment—When to be made—Conditional order—Validity of.*

Under S. 41 of the Presidency Towns Insolvency Act, the Court has jurisdiction to make an order of annulment only after the happening of certain events, namely, if, among others, the insolvent shall not apply to the Court for an order of discharge within such time as may

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be prescribed. The Court has, therefore, first to prescribe the time within which the insolvent must apply for an order of discharge, and then to be satisfied that the application for discharge was not made within that time. It is only in that event that the Court has jurisdiction to make an order of annulment; and in exercising that jurisdiction, when it does arise, that Court has to consider, at the time of making an order of annulment, whether it ought to make an order under S. 23 of the Act. As to the vesting of property, unless this procedure is followed, the order of annulment will be an invalid order. When the Judge made an order in August, the jurisdiction to make which only arose in November and he did not consider at the time when the jurisdiction arose what order ought to be made,

Held, that the order of annulment was a wholly invalid order. The Court has no jurisdiction to make a conditional order to take effect in future; that is, it cannot pass an order that if within a particular time no application for discharge is made, the order of adjudication shall stand annulled. (*Beaumont, C. J. and Rangnekar, J.*) SIDICK HAJI HUSEIN *v.* OFFICIAL ASSIGNEE OF BOMBAY. **59 Bom. 600=157 I.C. 930=8 R.B. 90=37 Bom.L.R. 449=A.I.R. 1935 Bom. 310.**

———**Ss. 23, 121-A and 122**—*Scope—Dividends declared but not paid out—Annulment of adjudication—Effect—Insolvent's right to undisbursed sums.*

Moneys representing dividends declared but not paid and credited to the unclaimed dividend account are not the property of the insolvent and do not revert to him under S. 23 of the Presidency Towns Insolvency Act, on the annulment of adjudication. Once a dividend has been declared and moneys allocated to the payment of that dividend, those moneys cease to be in any sense, the property of the debtor. They become the property of the creditors; and if for any reason they cannot be paid, they lapse to Government under S. 121-A of the Act (as amended by Act XX of 1933) and S. 122. (*Beaumont, C. J. and Rangnekar, J.*) SIDICK HAJI HUSEIN *v.* OFFICIAL ASSIGNEE OF BOMBAY. **59 Bom. 600=157 I.C. 930=8 R.B. 90=37 Bom.L.R. 449=A.I.R. 1935 Bom. 310.**

———**S. 23 (1)**—Annulment of adjudication—Effect of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 41. **60 Cal. 259=A.I.R. 1933 Cal. 386.**

———**S. 25**—*Protection order—Discretion of Court.*

A protection order should not be refused, or if once granted cancelled, save on exceptional grounds. The Court ought not to withdraw from the insolvent, protection from arrest unless his conduct has been flagrantly dishonest, or unless it is satisfied that the circumstances are such that it may well be, if the ordinary law is allowed to take its course, that assets will be disclosed by the insolvent which otherwise he would not declare. (*Page, C. J. and Ba U, J.*) HAMID *v.* MOHAMED SHERIFF. **13 Rang. 623**

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=159 I.C. 936=8 R. R. 290=A.I.R. 1935 Rang. 415.

———**S. 27 (1)**—*Public examination of insolvent—Application made at late stage—Rejection.*

An application for public examination made after the insolvent has applied for his discharge cannot be entertained except in very special circumstances. Where the application was made at a very late stage and after a public examination after due notice had once been held,

Held, that the application should be rejected. 26 Bom.L.R. 627, Ref. (*Panckridge, J.*) APURBA KRISHNA ROY, *Re.* **135 I.C. 874=I. R. 1932 Cal. 170=35 C.W.N. 564=A.I.R. 1931 Cal. 801 (2).**

———**Ss. 28 and 27**—*Composition—Public examination of insolvent—Necessity for.*

A composition in the absence of public examination of the insolvent, in a case where the debts are large, is not consistent with an efficient administration of the Act. Unless there is an examination and investigation, no creditor can know whether it is his interest to accept the scheme of composition. (*Rankin, C. J. and Costello, J.*) NARAYAN SINGH SUNDAR SINGH *v.* ATTAR SINGH. **59 Cal. 1436=141 I. C. 860=I.R. 1933 Cal. 206=A.I.R. 1933 Cal. 129.**

———**S. 28**—*Scheme of composition—Details of.*

The debtors should set out in the scheme itself what their assets are and what their scheme of composition is; and if the assets are to be vested in a trustee or trustees, there must be a statement to that effect and if the trustee or trustees are to guarantee so much money to their creditors, there must be a proper statement to that effect also. The details should be clear and specific. (*Rankin, C. J. and Costello, J.*) NARAYAN SINGH SUNDAR SINGH *v.* ATTAR SINGH. **59 Cal. 1436=141 I.C. 860=I.R. 1933 Cal. 206=A.I.R. 1933 Cal. 129.**

———**S. 28**—*Voting letter—Revocation.*

The voting letter does not come into operation immediately it is filed before the Official Assignee but it is only an authority to act at the meeting and may therefore be revoked at or before the meeting but before the proposal or the amended proposal, if any, is considered, and the votes counted, *e.g.,* at an adjourned meeting. (*Rupchand Bilaram, A. J. C.*) BHAGWANDAS LEKHRAJ AHUJA, *In re.* **26 S.L.R. 339=140 I.C. 764=I.R. 1933 Sind 30=A.I.R. 1932 Sind 216.**

———**S. 30**—*Annulment of adjudication—Power of Insolvency Court if at an end—Scheme approved—Power of Court to give effect to.*

The jurisdiction of the Insolvency Court is not exhausted owing to the annulment of the adjudication. Thus the Court has jurisdiction to give effect to the scheme it has approved. (*Panckridge, J.*) SUMERMULL SURANA, *Re.* **136 I.C. 141=I.R. 1932 Cal. 189=35 C.W. N. 506=A.I.R. 1932 Cal. 124.**

———**S. 30**—*Composition arrangement—Unclaimed balance in the hands of the trustee—Debtors if entitled to the same.*

Where under a deed of composition approved by Court, the Official Assignee was placed in possession of funds as trustee for paying credi-

tors who proved their claims, and where after payment to majority of creditors, there was a balance of unclaimed amount in his hands.

Held, the debtors are entitled to the unclaimed balance which is in the hands of the Official Assignee, not as Official Assignee in the insolvency but as trustee of the fund put up in connection with the composition arrangement made with the sanction of the Court. (*Rankin, C. J. and C. C. Ghose, J.*) PARESHRAM *v.* OFFICIAL ASSIGNEE OF CALCUTTA. **60 Cal. 313=I. R. 1933 Cal. 532=144 I.C. 216=A.I.R. 1933 Cal. 387.**

———**S. 36**—*Creditor's right to examine witness under—If absolute.*

A person summoned as a witness under S. 36 of the Presidency Towns Insolvency Act is not in the ordinary position of a witness called by a litigant party in order that he may be examined by the parties; he is so to speak the witness of the Court. The Official Assignee has a discretion in the matter; and a creditor can, if he pleases, place all the materials before the Official Assignee so that the latter may assist the Court. If the Official Assignee decides not to make use of the materials so laid before him by the creditor, the creditor may then apply for leave to appear at the examination and assist the Court with the materials at his disposal. (*Panckridge, J.*) UPENDRA KUMAR MITRA, *In re.* **63 Cal. 88=164 I.C. 415=9 R.C. 204=40 C.W.N. 12.**

———**S. 36**—*Discharge of insolvent—Subsequent examination—Permissibility.*

Under S. 36 the Court has power to direct the examination either of a third party or of the insolvent. There is nothing to prevent the Court from examining the insolvent after his discharge. (*Rankin, C. J. and Pearson, J.*) SHADHAN CHANDRA BHANDARI *v.* SEWNARAIN GOLABRAI. **60 Cal. 936=37 C.W.N. 718=147 I.C. 191=6 R.C. 293=57 C.L.J. 467=A. I.R. 1933 Cal. 699.**

———**S. 36**—*Discretion under—Application by Official Assignee for examination of insolvent—Order by Registrar of High Court—Discretion—Interference by Court in appeal.*

Application by the Official Assignee under S 36 of the Presidency Towns Insolvency Act, for the examination of an insolvent should be readily granted; and where the Registrar or other judicial officer vested with a discretion exercises his discretion after careful consideration both of the facts and of the principles involved and passes an order for such examination, the Court will not lightly interfere in appeal with such discretion, unless it is shown that the discretion has not been used in a proper manner. (*McNair, J.*) SATISH CHANDRA ROY, *In re.* **39 C.W.N. 1227.**

———**S. 36**—*Discretion under—Witness summoned under—Refusal by Registrar to permit creditor to conduct examination—Appeal to Judge—Interference.*

In proceedings under S. 36 of the Presidency Towns Insolvency Act, the Registrar of the High Court has a discretion to refuse to permit the examination of a person summoned under the section to be conducted by the creditors; and in the absence of materials to show that the discretion has been wrongly exercised, the Insolvency Judge will not interfere with the decision of the Registrar in appeal. (*Panckridge, J.*) UPENDRA KUMAR MITRA, *In re.* **63 Cal. 88=164 I.C. 415=9 R.C. 204=40 C.W.N. 12.**

———**S. 36**—*Examination of alienee from insolvent—Subsequent alienee—Admissibility of evidence against.*

The deposition of the immediate alienee from the insolvent when examined under S. 36 of the Act is not evidence admissible against a subsequent alienee who had taken the property from the deponent subsequent to the adjudication. (*Rankin, C. J. and C. C. Ghose, J.*) UMESH CHUNDER SEAL *v.* FALKNER. **I.R. 1932 Cal. 511=138 I.C. 741=36 C.W.N. 337=A.I.R. 1932 Cal. 621.**

———**S. 36**—*Examination of party under—Denial of possession of account books—Remedy of Official Assignee.*

Where certain persons have been examined under S. 36 and have denied the possession of books of account, the remedy of the Official Assignee is to proceed by way of suit and not proceed under S. 7 even assuming that an application under that section is maintainable in law. (*Beasley, C. J. and Cornish, J.*) VALLIAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS. **56 Mad. 273=143 I.C. 265=I.R. 1933 Mad. 283=1932 M.W.N. 959=36 L.W. 703=A.I.R. 1933 Mad. 74=63 M.L.J. 810.**

———**S. 36**—*Hindu joint family—Application by—Proceedings if null and void.*

An order under S. 36 of the Presidency Towns Insolvency Act is a nullity when it is made in proceedings initiated by a Hindu joint family business and is liable to be vacated. (*McNair, J.*) GOBINDLAL MOHATA, *In re.* **164 I.C. 428 (1)=9 R.C. 206=39 C.W.N. 275.**

———**S. 36**—*Hindu joint family—Binding nature of debt—Power of Insolvency Court to summon son.*

The Insolvency Court has no jurisdiction under S. 36 to summon the son at the instance of the Official Assignee who wants to decide the binding nature of the debt between the father and the son. (*Ramesam and Cornish, JJ.*) KRISHNAMURTHY PILLAI *v.* SUNDARAMURTHY PILLAI. **55 Mad. 558=I.R. 1932 Mad. 532=138 I.C. 225=35 L.W. 592=A.I.R. 1932 Mad. 381 =63 M.L.J. 37.**

———**S. 36**—*Scope—Order for examination—When can be made.*

S. 36 confers upon the Court a power which is general in its character. Whenever the circumstances are such as to bring the section into operation, the Court can require the person concerned to be examined and it is no ground for refusing or limiting the order that information to be obtained on the examination may result in litigation against the person examined. One of the objects of the section is to enable the Official Assignee to discover whether he ought to engage in litigation on behalf of the estate or not. The examination may be ordered when the circumstances bring the case within S. 36 (1). The examination may or may not result in some admission of liability on the part of the person examined. *Prima facie* the Court ought not to make an order under S. 36 unless

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there is ground for thinking that the order is likely to be of some use. (*Beaumont, C. J. and Rangnekar, J.*) GOOLBAI PETIT, *In re.* **57 Bom. 665=6 I.R. (Bom.) 98=145 I.C. 648=35 Bom.L.R. 546=A.I.R. 1933 Bom. 309.**

———**S. 36**—*When may be invoked.*

Section 36 of the Presidency Towns Insolvency Act does not contemplate a roving inquiry into the affairs of the insolvent, but where the Official Assignee only desires to inquire into a specific matter, *viz.*, a debt which he is informed is due from the applicant to the insolvent, then S. 36 may be invoked. (*O'Sullivan, A. J. C.*) JAGJIWAN KESHOWJI, *In the matter of.* **29 S. L.R. 49=7 R.S. 97=152 I.C. 878=A.I.R. 1934 Sind 158.**

———**S. 36 (4) and (5)**—*Hindu joint family—Separated status—Decision of question—Power of Insolvency Court.*

The questions whether the insolvent is a member of a joint family or whether the business carried on by the insolvent is a business of a joint Hindu family are not matters falling within sub-S. (4) or (5) of S. 36 and they can be decided by the Insolvency Court under S. 7 of the Act. (*Beasley, C. J. and Cornish, J.*) CHINNAPPA MUDALY *v.* OFFICIAL ASSIGNEE OF MADRAS **55 Mad. 385=135 I.C. 585=I.R. 1932 Mad. 169=34 L.W. 849=1931 M.W.N. 1253=A.I.R. 1932 Mad. 167=62 M.L.J. 103.**

———**S. 39**—*Discharge of the insolvent—Grounds for refusal—Interests of the public at large.*

Where for some time before the order of adjudication was made, the insolvent had acted in a manner which made him a menace to the commercial community and to the public at large, had on the eve of insolvency put the whole of his assets out of the reach of his creditors, deliberately destroyed his account books and was likely, if made once more a free man, to prey upon credulous members of the public and it was further proved that in spite of his insolvency, he has been driving about in a motor car registered under a false name.

Held, the Court should refuse the insolvent his application for discharge, having regard to the interests of the public. In re *Gaskell.* (1904) 2 K.B. 478 at 482, Ref. to. (*Page, C. J. and Maung Ba, J.*) E. A. MAMSA *v.* M. E. MAJID. **9 Rang. 333=I.R. 1931 Rang. 247=133 I. C. 231=A.I.R. 1931 Rang. 275.**

———**S. 39 (1) (c)**—*Order suspending discharge until 12 annas in rupee is paid—Legality.*

Where a Court acts under S. 39, it is incumbent upon it strictly to comply with the provisions of S. 39 in passing an order. Under S. 39 (1) (*c*) the Court is not empowered to suspend the discharge until a dividend of more than four annas in the rupee has been paid. Hence an order suspending the insolvent's discharge 'until twelve annas in the rupee is paid' is not in accordance with law. (*Page, C. J. and Mya Bu, J.*) BOLA RAM *v.* SOHAN SINGH. **13 Rang. 355 =156 I.C. 982=8 R.R. 59=A.I.R. 1935 Rang. 200.**

———**S. 41**—*Annulment of adjudication—Effect.*

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Where adjudication is annulled by reason of the default of the insolvent, the insolvent is to lose the benefit of the insolvency, but he is not to benefit by the annulment. The annulment is not for his advantage. (*Ameer Ali, J.*) KESHABLAL DHAR, *In re.* **60 Cal. 259=I.R. 1933 Cal. 533 (1)=144 I.C. 214=A.I.R. 1933 Cal. 386.**

———**S. 41**—*Annulment of adjudication—Vesting of insolvent's property.*

Normally on an annulment of adjudication by reason of the default of the insolvent, his property should be vested in the Official Assignee or proper officer under the Act in force and is so vested in him for the benefit of the creditors and may be dealt with as if the fund was being dealt with in the insolvency. (*Ameer Ali, J.*) KESHABLAL DHAR, *In re* **60 Cal. 259 =144 I.C. 214=I.R. 1933 Cal. 533 (1)=A. I.R. 1933 Cal. 386.**

———**S. 41**—*Calcutta High Court Insolvency Rules, R. 28—Order of discharge—Duty of Registrar—Order not drawn up for long time—Insolvent, if continues undischarged*

If the order of discharge is not completed by the insolvent within one week, it is the duty of the Registrar to have that order drawn up in order that it might be gazetted and in order that the public and the creditors of every body concerned might know of the order of the Court. If the Registrar did not perform this duty in completing the order made on an application for discharge and the Official Assignee took no steps to have it completed, it does not follow that the insolvent continues to be undischarged for all time and the Official Assignee is not entitled to claim a sum of money coming to the insolvent eight years after the order was made as his after-acquired property. (*Rankin, C. J. and Pearson, J.*) OFFICIAL ASSIGNEE OF CALCUTTA *v.* FREDERICK LIONEL HARCOURT. **59 Cal 775=I.R. 1933 Cal. 52=140 I.C. 812=36 C.W.N. 532=A.I.R. 1932 Cal. 762.**

———**S. 41**—*Calcutta High Court Insolvency Rules, R. 138-A—Applicability.*

The only circumstances under which it ought to be possible for an order to remain without being drawn up for three months are the circumstances in R. 28, namely, where a Judge has made an order that the Registrar need not prepare and complete the order or where the insolvent has not given his consent to the judgment being entered against him. R. 138-A cannot be applied to any other class of cases. (*Rankin, C. J. and Pearson, J.*) OFFICIAL ASSIGNEE OF CALCUTTA *v.* FREDERICK LIONEL HARCOURT. **59 Cal. 775=I.R. 1933 Cal. 52 =140 I.C. 812=36 C.W.N. 532=A.I.R. 1932 Cal. 762.**

———**S. 41**—Jurisdiction under—Order of annulment—Conditions for making—Conditional order to take effect in future—Validity. *See* PRESIDENCY TOWNS INSOLVENCY ACT, SS. 23 AND 41. **37 Bom.L.R. 449=A.I.R. 1935 Bom. 310.**

———**S. 41**—*Scope.*

Where adjudication is annulled by reason of the default of the insolvent, the insolvent is to

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lose the benefit of the insolvency, but he is not to benefit by the annulment. The annulment is not for his advantage. (*Ameer Ali, J.*) KESHARLAL DHAR, *In re*. **60 Cal. 259=I.R. 1933 Cal. 533 (1)=144 I.C. 214=A.I.R. 1933 Cal. 386.**

———**S. 43**—*Applicability—Partners.*

Section 43 applies as much to partners as to other co-contractors. A judgment against one partner is no bar to a subsequent suit on the contract or obligation against the other partners so long as the debt is not extinguished as the liability of partners is a joint and several one. (*Wadia, J.*) VALLIBHAI ADAMJI, *In re*. **6 I.R. (Bom.) 96=145 I.C. 619=35 Bom.L.R. 881 =A.I.R. 1933 Bom. 407.**

———**S. 45 (2)**—*Order of discharge—Mortgagee's application for personal decree—Sustainability.*

Where a mortgagor has been adjudged an insolvent, with reference to certain debts which were provable in insolvency, the order of adjudication and the order of discharge do not and cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were not provable in insolvency. The order of discharge cannot take away the statutory right of the decree-holder to apply for a decree under O. 34, R. 6, C. P. Code, which right accrued subsequently. (*Mears, C.J. and Sen, J.*) NIAZ AHMAD *v.* PHUL KUNWAR. **54 All. 428=I.R. 1932 All. 394=138 I.C. 361=1932 A.L.J. 237=A.I.R. 1932 All. 336.**

———**S. 46**—*Scope—Secured creditor—Remedy—Enforcement of security.*

A secured creditor who comes in under the insolvency has only three courses open to him, namely: (1) that he may realise the security and then prove for the balance, (2) he may surrender the security and prove for the whole debt, and (3) he may state the whole valuation at which he assessed the security and then prove for the balance after deducting the assessed value. The provisions of S. 46 refer to a creditor who has taken any of the three courses and does not refer to one who wants to enforce his security. (*Mitter and Henderson, JJ.*) RAJENDRA CHANDRA SARKAR *v.* BIPIN CHANDRA SAHA. **60 Cal. 1298=149 I.C. 339=6 R.C. 569=37 C.W.N. 973=A.I.R. 1934 Cal. 64.**

———**Ss. 46 (3) and 45 (2)**—*Debt provable in insolvency—Leave to sue the Official Assignee and the insolvent under S. 17—Application for—Costs of—Discharge of the insolvent—Personal liability of insolvent.*

Subsequent to the adjudication of the insolvent the respondent obtained leave to sue the Official Assignee and the mortgagor insolvent under S. 17 of the Presidency Towns Insolvency Act and got an order that the costs of the application be tacked on to the mortgage-debt. He then brought a suit on the mortgage and was awarded a mortgage decree and a personal decree for the balance including the costs of the application for leave to sue. Before execution, the insolvent was discharged and the latter contended that the decree could not be executed after his discharge.

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Held, (1) that the obligation to pay the costs was one which accrued after the date of adjudication and in respect of which there could be no proof in insolvency under S. 46 (3); (2) that the order of discharge did not therefore release the insolvent from the debt. Re *Bluck*: Ex parte *Bluck*, (1887) 57 L.T. 419; *British Gold Fields of West Africa*, (1899) 2 Ch. 7; In re *A Debtor*, (1911) 2 K.B. 652; *Pilling*, In re, (1909) 2 K.B. 788; *Vint* v. *Hudspith*, (1885) 30 Ch. D. 24, Foll. *Buckwell* v. *Norman*, (1898) 1 Q.B. 622, Dist. (*Patkar and Bromfield, JJ.*) GUSTASP BEHRAM *v.* BHAGWANDAS. **55 Bom. 649=33 Bom. L. R. 1101=I.R. 1932 Bom. 41=134 I.C. 1161=A.I.R. 1931 Bom. 554.**

———**S. 46 (3)**—*Father's debt alive—Remedy against sons not barred.*

While a father's debt is alive in insolvency, any remedy against the sons in insolvency is not barred. That the debts as against the father are alive is all that is necessary to enable the Official Assignee to make the son's shares liable for them in insolvency by appropriate proceedings. (*Curgenven and Bhashyam Ayyangar, JJ.*) RAMACHANDRA IYER *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad. 739=I.R. 1931 Mad. 529=1931 M.W.N. 1085=131 I.C. 481=33 L.W. 323=A.I.R. 1931 Mad. 317=61 M. L.J. 66.**

———**S. 46 (3)**—*Proof of debt—Last date for enforcing debt being holiday—Adjudication of debtor on re-opening date—Debt if provable.*

If on the last day when the debt could have been enforced was a public holiday and on the next re-opening day the debtor is adjudicated an insolvent, the debt is provable in insolvency. It is not necessary for the creditor for the purpose of keeping his debt alive, to file a suit on the re-opening day after the intervention of the insolvency. (*Beasley, C.J., Ramesam and Cornish, JJ.*) FATMA BI *v.* NAGOORKHAN. **55 Mad. 630=I.R. 1932 Mad. 321=136 I.C. 822=1932 M.W.N. 216=35 L.W. 260= A.I.R. 1932 Mad. 287=62 M.L.J. 256 (F.B.).**

———**S. 47**—*"Mutual dealings".*

The words 'mutual dealings' referred to in S. 47 refer to mutual dealings at the time of the insolvency and cannot refer to a purchase by one of the debtors of a claim against the insolvent long after the insolvency. *Dickson* v. *Evans*, 6 T.R. 57, Ref. (*Page, C. J. and Das, J.*) MA YAIT *v.* OFFICIAL ASSIGNEE. **9 Rang. 373=I.R. 1931 Rang. 150=131 I.C. 726=A.I.R. 1931 Rang. 193 (1).**

———**S. 48**—Proof by secured creditor. *See* PRESIDENCY TOWNS INSOLVENCY ACT, SCH. II, PARA. 11. **27 S.L.R. 224.**

———**S. 48**—*Rejection of proof—Insolvency of firm—Suit by creditor against partner—Compromise—Acceptance of smaller sum than due—Release of partner.*

A release operates in favour of insolvent firm and the rejection by the Official Assignee of the proof by the creditor for the balance of the debt is correct. (*Beaumont, C. J. and Blackwell, J.*) INDUSTRIAL BANK OF WESTERN INDIA, *In re*. **129 I.C. 890 (2)=32 Bom.L.R. 1656 =A.I.R. 1931 Bom. 123.**

PRESY. TOWNS INSOL. ACT (1909), S. 49.

———**S. 49 (5) and (b)**—*Company in winding up—Surplus assets—Interest at contract rate—Right of creditors.*

Where a company in liquidation turns out to be solvent in the sense that after payment of all its liabilities there are surplus assets left, creditors whose debts carry interest by agreement or otherwise are entitled out of the surplus assets to payment of interest accruing after the commencement of the liquidation until payment is made of the principal debts at the rate at which by agreement or otherwise interest on such debts is payable. (English cases, Ref.) (*Page, C.J. and Maung Ba, J.*) ESMAIL ESOOF MOOLLA *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. **9 Rang. 318=I.R. 1931 Rang. 254=133 I.C. 238=A.I.R. 1931 Rang. 334.**

———**S. 51**—*Adjudication in British India—Property of insolvent in foreign State attached by foreign Court prior to adjudication but subsequent to act of insolvency—Right of Official Assignee to.*

Where the law of insolvency in a foreign State is identical with the law of British India, an adjudication order made in Brtish India would, in ordinary circumstances, vest in the Official Assignee the property of the insolvent in that State. But if a creditor has, before the date of the adjudication, duly obtained an attachment of that property through the foreign Court, it would not vest in the Official Assignee as, at the date of the adjudication, the insolvent could not himself have assigned it because of the attachment. S. 51 of the Presidency Towns Insolvency Act cannot be invoked in favour of the Official Assignee so as to relate back his title to the time of the commission of the act of insolvency which is prior to the attachment. (*Mc Nair, J.*) *In re* BINJRAJ SAGARMAL. **39 C.W.N. 1135=62 Cal. 659.**

———**Ss. 51 and 17**—Adjudication in two places on different dates—Vesting of property—Priority of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, SS. 17 AND 51.

59 Cal. 1161=36 C.W.N. 546.

———**S. 52**—*Property of the insolvent—Member of Stock Exchange—Card of membership.*

A card of membership of the Bombay Stock Exchange cannot be sold for the benefit of the creditors of the member of the Exchange on his becoming bankrupt.

Under the rules of the Bombay Native Share and Stock-brokers' Association, the member has got by right of membership of this Association, the privilage of going to the exchange and keeping his seat there and dealing on the Stock Exchange. But there is no power in the member to sell that right. If he makes default, the directors of the Association can cancel his membership, and they can then sell, what is really the right of nomination to the vacant seat, and they must deal with the proceeds under the rules, but the defaulting member takes no interest in such proceeds. So the insolvent has no right of property therein which can, with propriety, be said to vest, on his insolvency, in the Official Assignee. (*Beaumont, C.J. and Blackwell, J.*) OFFICIAL ASSIGNEE OF BOMBAY *v.* SHROFF. **55 Bom. 623=I.R. 1931 Bom. 405=133 I.C. 821=33 Bom.L.R. 39=A.I.R. 1931 Bom. 225.**

PRESY. TOWNS INSOL. ACT (1909), S. 52.

———**S. 52 (1) (a)**—*After-acquired property—Suit by insolvent in respect of—Maintainability—Intervention by Official Assignee—What amounts to.*

The property of an insolvent divisible amongst the creditors under S. 52 (1) (*a*) of the Presidency Towns Insolvency Act comprises all such property as may be acquired by or devolve on the insolvent before his discharge. The Official Assignee can thus assert a right to such property acquired by the insolvent after his adjudication and before his discharge. But unless the Official Assignee intervenes, so as to assert under S. 52 a right to divide amongst the creditors of the insolvent property which has been so acquired by the insolvent, such after-acquired property may be dealt with by the insolvent himself and third parties may acquire it from the insolvent. What is required for constituting intervention must naturally take its colour from the nature of the property. When the property consists of a right of action and there is already a suit by the insolvent pending, the proper course is for the Official Assignee to apply to be made a plaintiff in the suit and to be given the conduct of the suit. Where the Official Assignee merely appears in Court at the instance of the Judge and asks the defendant's solicitor to consent to the Court Receiver handing over the assets to himself, but on the annulment of adjudication subsequently disclaims any interest in the subject-matter of the suit, there is no intervention by him at all so to prevent the insolvent from maintaining the suit. (*Tyabji, J.*) POONAM CHAND *v.* MOTILAL. **158 I.C. 542=8 R B. 129=37 Bom.L.R. 576=A.I.R. 1935 Bom. 378.**

———**S. 52 (1) (a)**—*Agent for sale—Goods entrusted to—Rights of Official Assignee.*

Goods entrusted to the persons as agents for sale, and stored by them as the goods of their principal, are goods held by them on trust in the fiduciary capacity of agents within S. 52 (1) (*a*), and consequently do not pass on their insolvency to the Official Assignee, unless the principal permits the agents to have a possession not consistent with the ordinary usage of trade thus raising a reputation of ownership in the bankrupt. The burden of proving circumstances of reputed ownership lies on the Official Assignee. 5 Rang. 73; A.I.R. 1927 Rang. 133; 54 M. 5 (F.B.), Rel.; English cases referred to. (*Haveliwalla, A.J.C.*) FIRM OF GIANCHAND LILARAM, *In the matter of.* **25 S.L.R. 381=I.R. 1931 Sind 65=131 I.C. 705=A.I.R. 1931 Sind 70.**

———**S. 52 (1) (a) and (2) (c)**—*Properties held on trust—General rule as to—Exceptions to—Trust not* bona fide*—Sale of goods—Deed of trust executed by buyer to conceal real ownership of property—Effect of.*

The general rule that chattels in possession of a trustee of a *bona fide* trust are in his possession as legal owner and so excluded from the operation of reputed ownership is subject to three exceptions: (*i*) Where the *cestui que trust* consents to the property being dealt with by the

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trustee in a manner inconsistent with the trust; (*ii*) In the case of property held for a specific purpose (*e.g.*, by a factor), unless there is notoriety, unless it is known that the holder is a factor, reputed ownership will apply; (*iii*) If the trust is created with an ulterior object, to conceal the real ownership of the property or to try and maintain in the seller a control which he has already parted with, then again the property will fall within the reputed ownership clause. (*Ameer Ali, J.*) SUMERMULL SURANA, *In re.* **59 Cal. 818=I.R. 1933 Cal. 1=140 I.C. 594=A.I.R. 1932 Cal. 680.**

———S. 52 (1) (a) and (2) (c)—*Sale of goods—Contract by buyer undertaking to hold goods as trustee—Property not passed to buyer—Insolvency of buyer—Reputed ownership.*

Where the buyers had, before their insolvency, executed a contract by the terms of which they undertook "to hold until sale as trustees for and on behalf of the sellers and in the event of sale to receive the proceeds as trustees for sellers and pay the amount forthwith," etc., and after receiving goods, they became insolvent,

Held, that the property (on the sellers' own admission and the terms of the contract) not having passed to the buyer, there could be no legal ownership in the buyer and therefore no trust of which he could be trustee. So the goods vested in the Official Assignee. 56 Cal. 1074, Foll. (*Ameer Ali, J.*) SUMERMULL SURANA, *In re.* **59 Cal. 818=I.R. 1933 Cal. 1=140 I.C. 594=A.I.R. 1932 Cal. 680.**

———S. 52 (1) (a)—*Trust money—Right to follow—Investment in business—Insolvency of trustee.*

Where a certain amount is a trust in the hands of the trustees to be invested in their business and is so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm. Upon the insolvency of the trustees the assets no doubt pass to the Official Assignee but they pass subject to the charge. 13 Ch.D. 696 and 4 De G. M. and G. 372, Rel. on. (*Sir George Lowndes.*) OFFICIAL ASSIGNEE OF MADRAS *v.* KRISHNAJI BHAT. **60 I.A. 203=56 Mad. 570=37 C.W.N. 713=1933 M.W.N. 575=57 C.L.J. 433=35 Bom.L.R. 756=1933 A.L.J. 637=I.R. 1933 P.C. 138=143 I.C. 162=37 L.W. 780=A.I.R. 1933 P.C. 148=65 M.L.J. 1 (P.C.).**

———S. 52 (2) (a)—*After-acquired property of undischarged insolvent—Person dealing* bona fide *with insolvent—Rights.*

Where the undischarged insolvent acquires a property and transfers it to a certain company in the course of transaction by him with the company in which dealings of the company with the insolvent are *bona fide* and for value, such property does not vest in the Official Assignee until he intervenes in the matter. 25 Q.B.D. 262, Ref. (*Page, C.J. and Mosely, J.*) CHOUNG TAIK *v.* MA THEIN NU. **8 Rang. 665=I.R. 1931 Rang. 136=131 I.C. 504=A.I.R. 1931 Rang. 74 (2).**

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———S. 52 (2) (a)—*After-acquired property—Undischarged insolvent—Powers of disposal.*

As regards the after-acquired property, subject to the right and claim of the Official Assignee, the undischarged bankrupt has the power, so long as the Official Assignee does not interfere, to buy and sell and give discharge and do all other acts as he could have done and had done before the intervention of the Official Assignee. (*Guha and Nasim Ali, JJ.*). PREM CHAND MULLICK *v.* NILMONI DAS. **61 C. 281=151 I.C. 137=7 R.C. 73=35 Cr.L.J. 1238=38 C.W.N. 283=1934 Cr.C. 791=A.I.R. 1934 Cal. 529.**

———S. 52 (2) (a)—*Costs awarded to undischarged insolvent in suit for personal wrong—Non-intervention by Official Assignee—Application by money decree-holder for attachment.*

An undischarged insolvent brought a suit for damages for a personal tort and in the course of the proceedings in the appellate Court and before the Privy Council, costs were awarded to him. The appellant who had obtained a money decree against the insolvent prior to his adjudication applied in insolvency that leave should be granted to him to execute the decree by attachment of these costs.

Held, that although damages obtained by an undischarged insolvent in respect of a personal wrong and costs awarded to him in such a suit are property of the insolvent which is capable of passing to his assignee in insolvency under the Presidency Towns Insolvency Act, such property will not pass under that Act to the Official Assignee until he has intervened and claimed it, and that as the Official Assignee had not intervened and claimed those costs, the appellant ought not to be allowed to execute his decree against the insolvent by attachment of the sums representing those costs. (*Page, C. J. and Shaw, J.*) MANI IYER *v.* SYED EBRAHIM. **12 Rang. 428=154 I.C. 79=7 R.R. 261=A.I.R. 1934 Rang. 333.**

———S. 52 (2) (a)—Member of Bombay Stock Exchange—Card of membership—Rights of Official Assignee. *See* BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION, Rr. 18, 56, 57 AND 62. **59 I.A. 318=56 Bom. 374=63 M.L.J. 623 (P.C.).**

———S. 52 (2) (a)—Voluntary transfer by debtor—Member of company—Assignment of Provident Fund before accrual—Effect. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 17. **60 Cal. 926=A.I.R. 1933 Cal. 701.**

———S. 52 (2) (b)—*"Property of the insolvent"—Hindu joint family—Suit for partition—Insolvency of father—Right of father to have his debts paid—Vesting of.*

Notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists and where the father has been adjudicated insolvent such right vests in the Official Assignee as "property of the insolvent divisible among his creditors". 50 Mad. 535; 6 Lah. 1; 49 Mad. 949, Ref. (*Curgenven and Bhashyam Ayyangar, JJ.*) RAMACHANDRA IYER *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad. 739=I.R. 1931 Mad. 529=1931 M.**

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W.N. 1085=131 I.C. 481=33 L.W. 323= A.I.R. 1931 Mad. 317=61 M.L.J. 66.

———**S. 52 (2) (c)**—*Applicability—Constructive possession with pledgee—Goods in the custody of carrier—No notice to carrier of rights of pledgee—If, and when, material.*

Where at the time of adjudication of the insolvent, the Bank was, by virtue of the railway receipts in respect of the goods endorsed and a letter of lien given to them by the insolvent in consideration of advances made to him, in constructive possession of the goods and the goods were actually in the custody of the carrier in the railway waggon or goods shed, over which the insolvent had no control, it cannot be said (in a contest between the Official Assignee and the Bank) that the goods were in either the possession or order or disposition of the insolvent within the meaning of S. 52. The section is inapplicable to such a case, for the further reason that the consent of the Bank could not be assumed necessarily to follow from the fact that the Bank had omitted to give notice till after the adjudication, to the carrier of either the assignment of railway receipts, or of the letter of lien in their favour. Absence of notice is immaterial, where, apart from notice, possession remains—not in the insolvent—but constructively with the pledgee. (*Beasley, C. J. and Stone, J.*) MERCANTILE BANK OF INDIA *v.* OFFICIAL ASSIGNEE OF MADRAS. **56 Mad. 177=I. R. 1933 Mad. 316=143 I.C. 641=37 L.W. 32= A.I.R. 1933 Mad. 207=64 M.L.J. 320.**

———**S. 52 (2) (c)**—*'Consent'—Withdrawal of —Communication of—Necessity for—Effective demand.*

In S. 52 (2) the word is "consent" and unless a withdrawal of consent is communicated to the person from whom consent is withdrawn such withdrawal will not be effective.

The question whether in a particular case a demand is made and so the consent is withdrawn, is a question of fact, depending on the circumstances of each case. The demand must be effective, *bona fide*, and should be pursued with a view to take possession of the mortgaged goods. It should not be merely a casual demand and then let the goods remain in the possession of the apparent owner.

A, the insolvent, prior to his carrying on business separately, was doing business in partnership with *B* and in consideration of his partnership debts and settlement of the accounts executed a mortgage bond in favour of *B*, whereby as security for the payment of the amount he mortgaged with *B* the goods then lying in the shop. In spite of the mortgage *A* carried on his business as usual. Goods under the mortgage were sold and new goods brought for sale, and on the day of *A's* insolvency the goods in the shop were mostly new. On application by *B* for possession of the goods from the Official Assignee.

Held, that the goods in the shop at the commencement of *A's* insolvency were with the consent of the true owner *B*, in the order, possession and the dispossession of the insolvent under such circumstances, that *A* was the apparent owner, and consequently the Official Assignee had a

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right to claim the goods and they could be made available for the general body of the creditors. 1924 Rang. 27 and 1924 Mad. 214, Dist. (*Hawelwala, A. J. C.*) JETHANAND HARUMAL *v.* OFFICIAL ASSIGNEE. **25 S.L.R. 318=I.R. 1931 Sind 68=131 I.C. 708=A.I.R. 1931 Sind 40.**

———**S. 52 (2) (c)**—Pledge of goods by insolvent—Pawnor being in possession—Third party's rights as hypothecatee not disclosed—No trust created—Property in the goods vested in the Official Assignee subject to the rights of defendants. *See* CONTRACT ACT, S. 178. **60 Cal. 262=A.I.R. 1933 Cal. 366.**

———**S. 52 (2) (c)**—*"True owner"—Meaning of.*

"True owner" for the purpose of S. 52 includes a person having a lien or an equitable charge, as well as a person having a legal title. (*Beasley, C. J. and Stone, J.*) MERCANTILE BANK OF INDIA *v.* OFFICIAL ASSIGNEE OF MADRAS. **56 Mad. 177=I.R. 1933 Mad. 316=143 I.C. 641=37 L.W. 32=A.I.R. 1933 Mad. 207= 64 M.L.J. 320.**

———**S. 52 (2) (c)**—*Trustee authorised to invest trust moneys in his own business—Adjudication of trustee—Trust funds—Reputed ownership.*

Where a trustee is authorised by the terms of the trust to invest the trust funds in his own business and pay interest thereon, and he so uses it, the trust funds cannot be traced by the *cestui que trust* as the relationship between them is, by virtue of such liberty, converted into one of debtor and creditor. The funds will be available for the benefit of the general body of creditors as property subject to the reputed ownership of the trustee. (*Curgenven and Bhashyam Aiyangar, JJ.*) NAGAPPA CHETTIAR *v.* OFFICIAL ASSIGNEE OF MADRAS **I.R. 1931 Mad. 817=134 I.C. 161=1930 M.W.N. 1077=A.I.R. 1931 Mad. 251=60 M.L.J. 355.**

———**S. 52 (2) (c) and proviso**—*Debts due to insolvent—Creditor holding charge over—Failure to give notice to the original debtor—Effect of*

Where a secured creditor holds a charge or a lien or a mortgage on debts due to a person in the course of his trade or business, and the charge-holder omits to perfect his title by giving notice to the original debtor and leaves them in the possession, order or disposition of that person under such circumstances so as to allow him to deal with them in any way he likes and that person is afterwards adjudicated insolvent, the Official Assignee has a right to step in and claim the debt for the general body of the creditors in preference to the right of the secured creditors under the doctrine of reputed ownership in S. 52 (2) (*c*) proviso. S. 17 proviso does not help the creditor as S. 52 (*c*) is an exception to S. 17. *Neal*, In re, 1914 K.B. 910 and 25 Bom. 659, Ref.; 6 S.L.R. 97; 7 S.L.R. 61, Expl.; 1929 Sind 114 and 1930 Sind 77. Dist. (*Havelikwalla, A. J. C.*) DHANRAJMAL KISHAN DAS *v.* OFFICIAL ASSIGNEE. **25 S.L.R. 310=131 I.C. 130 =A.I.R. 1931 Sind 44.**

———**S. 53**—*Assets realized—Money received by cheque by executing Court—Payment to decree-holder is not necessary.*

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Section 53 does not say that the assets must be realized by the decree-holder. Money received in the form of a cheque by the executing Court can be treated as "assets realized". (*Wazir Hasan, C. J. and Allsop, J.*) OFFICIAL ASSIGNEE, BOMBAY *v.* DURGA PRASAD. **9 Luck. 278=6 R. O. 217=147 I.C. 68=10 O.W.N. 1282=A.I. R. 1934 Oudh 11.**

———**S. 53**—*Equitable mortgagee—Receiver appointed at the instance of—Income of mortgaged properties with receiver—Subsequent insolvency of mortgagor—Effect.*

Where a receiver is appointed at the instance of an equitable mortgagee, the income realised from the mortgaged properties should in law be considered as earmarked for his use and treated as additional security for the amount due to the mortgagee and the latter is entitled, when he is not able to realise his decree amount by the sale of the mortgaged properties, to proceed against the income in the hands of the receiver in preference to the Official Assignee in whom the properties of the mortgagor might have sbsequently vested. 47 Cal. 418 and 14 C.L.J. 526, Foll. (*Madhavan Nair, J.*) MAHARAJA OF PITTAPURAM *v.* GOKULDOSS GOVERDHANDOSS. **54 Mad. 565=I.R. 1931 Mad. 744=133 I.C. 504= 34 L.W. 165=A.I.R. 1931 Mad. 626= 61 M.L.J. 111.**

———**S. 53**—*Money recovered by Court in pursuance of execution application is recovered in course of execution—Whether process was issued under O.* 21, *R* 46, *instead of precept under S.* 46 *or garnishee order under O.* 21, *R.* 104, *C. P. Code does not make much difference.*

Where steps are taken by the Court for the purpose of obtaining a sum of money into its own possession under a perfectly legal application for execution which the decree-holder is in law entitled to make, the fact that instead of issuing a precept under S. 46 or a garnishee order under R. 104, O. 21, C. P. Code. the Court issues a process under R. 46 of the same order does not make the receipt of the money by the Court otherwise than in the course of the execution. (*Wazir Hasan, C. J. and Allsop, J.*) OFFICIAL ASSIGNEE, BOMBAY *v.* DURGA PRASAD. **9 Luck. 278=6 R.O. 217=147 I.C. 68=10 O.W.N. 1282=A.I.R. 1934 Oudh 11.**

———**Ss. 55 and 56**—Act of insolvency more than three months prior to insolvency—Legal effect and validity of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 9. **A.I.R. 1931 Mad. 366=61 M.L.J. 27.**

———**S. 55**—*Decree-holder insolvent—Execution by private transferee—Objection not raised—Effect.*

Where a judgment-debtor is a party to the execution proceedings and is apprised of the assignment of the decree by the original decree-holder who is adjudged insolvent, in favour of a private person, as well as of the application of the transferee to be substituted in place of the original decree-holder and to carry on the execution and he raises no objection at the time, the Official Assignee not taking any steps to take possession of the decree and execute it himself, he (judgment-debtor) cannot object to the execution and say that the Official Assignee alone is entitled to execute the decree. It is for the Official Assignee or the creditors of the insolvent to object to the money due under the decree being paid to the transferee of the original decree-holder, and therefore, S. 55 does not bar execution of the decree by a private transferee. The judgment-debtor cannot be permitted to frustrate the execution and to claim exemption from his liability to pay the decree upon the ground that the decree-holder has been adjudged insolvent. If the Official Assignee thinks that the transfer is good, there is no reason why the transferee should be debarred from executing the decree. In the absence of any evidence one way or the other, it is not open to the Court to hold that a transfer of a decree made by a person within two years prior to his adjudication was not in good faith and for valuable consideration, in direct conflict with the recitals in the deed of assignment and the circumstances set-forth therein. It is also not sufficient for the judgment-debtor to say that the transaction was colourable and collusive and that the decree had vested in the Official Assignee by operation of law. He has to show not only that the Official Assignee was entitled to intervene but also he had intervened, or that he intended to intervene. (*Jwala Prasad, A. C. J. and James, J.*) MAHESH PRASAD KHATRI *v.* SMITH. **6 I.R. (Pat.) 257=146 I. C. 389=A.I.R. 1933 Pat. 130.**

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———**S. 55**—Onus *of proof*

The burden is on the Official Assignee to prove that the transactions sought to be set aside by him were not made in good faith and for valuable consideration. 9 Rang. 170 (P.C.), Foll. (*Rankin, C J. and C. C. Ghose, J.*) UMESH CHUNDER SEAL *v.* FALKNER. **I.R. 1932 Cal. 511=138 I.C. 741=36 C.W.N. 337=A.I.R. 1932 Cal. 621.**

———**S. 55**—Onus *of proof—Invalidity of transfer.*

Where the Official Assignee challenges the validity of a transfer as not being in good faith and for consideration. the *onus* is on him to establish the same. Where it appeared that the insolvent transferred property to his guarantor in business transaction and the latter took the sale without knowledge that the transferor was insolvent.

Held, that in the absence of proof that the transfer was not made in good faith the transaction should be upheld. (*Sir John Wallis.*) HARRY POPE *v.* OFFICIAL ASSIGNEE OF RANGOON. **60 I.A. 362=6 I.R. (P.C.) 31=1933 M. W.N. 1449=146 I.C. 743=38 C.W.N. 117 =12 Rang. 105=39 L.W. 1=1934 A.L.J. 77 =58 C.L.J. 471=36 Bom.L.R. 137=A.I.R. 1934 P.C. 3=66 M.L.J. 1 (P.C.).**

———**S. 55**—Onus *of proof—Validity of transfer.*

In proceedings under S. 55 the *onus* lies on the person who seeks to impugn the validity of the transfer, that is in most cases on the Official Assignee. (*C. C. Ghose, Ag. C. J. and Costello, J.*) OFFICIAL ASSIGNEE OF CALCUTTA *v.* RAMCHANDRA KASHERA. **60 Cal. 1278=149 I.C. 861 (1)=6 R.C. 642=A.I.R. 1934 Cal. 54.**

———**Ss. 55 and 56**—*Right to apply—Creditor.*

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An application under Ss. 55 and 56 to set aside certain transactions by the insolvents can be made by the creditor, if the Official Assignee declined to move in the matter. (*Panckridge, J.*) BINJRAJ HARNANDRAI, *In re*. **60 Cal. 1367 =149 I.C. 995=6 R.C. 674=A.I.R. 1934 Cal. 232.**

———**S. 55**—*Transaction void under—Validity under S. 53, Provincial Insolvency Act.*

By virtue of the important words being exactly the same in S. 55, Presidency Towns Insolvency Act, as in S. 53, Provincial Insolvency Act, if an hypothecation bond comes within the meaning of S. 55, Presidency Towns Insolvency Act, it would certainly be void under S. 53, Provincial Insolvency Act. (*Das and Baguley, JJ.*) A. S. N. FIRM *v.* N. N. FIRM. **147 I.C. 796 =6 R.R. 178 (2)=A.I.R. 1933 Rang. 424.**

———**S. 55**—*Transfer of whole of assets of debtor in favour of unsecured creditor—Validity.*

If an unsecured creditor elects to take a transfer of the whole of his property from a debtor, knowing that he is in insolvent circumstances, the transfer has the double effect of preferring his claim against the debtor to the claims of other unsecured creditors, and further of removing from the reach of other creditors the whole of the assets out of which the unsecured creditors are entitled to receive a rateable distribution. Such a transfer cannot be deemed to have been made in good faith within S. 55 and is void as against the Official Assignee. (Case-law discussed.) (*Page, C.J. and Mya Bu, J.*) OFFICIAL ASSIGNEE *v.* POPE. **10 Rang. 219= I.R. 1932 Rang. 182=139 I.C. 273=A.I.R. 1932 Rang. 86.**

———**S. 55**—*Trust for the benefit of creditors —Essentials of validity—Onus—Most of the creditors not consulted—Suspicious transfer.*

In order that a deed of trust executed by a debtor for the benefit of creditors within two years prior to his adjudication may be valid, it is necessary that the transfer of property should be in favour of (1) a purchaser (2) in good faith and (3) for valuable consideration. The burden is on the trustees under the deed of trust to make out that the transfer satisfied all the three conditions. 43 M. 739; 39 M.L.J. 345, Ref. A debtor had nearly seventy creditors but only six of them were parties to the deed of trust. The others were not even consulted on the matter. The particular creditor who was alleged to have looked into the accounts of the debt was himself an undischarged insolvent and it was not shown he had anything to lose. One of the trustees appointed under the deed was the debtor himself and the evidence showed that the other creditors were lulled into inaction by a promise to pay in instalments, a promise which was kept up for three months only with a view to gain time and avoid the trust being made the basis of an application for adjudication. Under these circumstances, it was held that the deed of trust was not entered into in good faith for the benefit of creditors and that it should be set aside. (*Curgenven, J.*) RAMA ROW *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1931 Mad. 449=130 I.C. 753=33 L.W. 468=A.I.R. 1931 Mad. 366=61 M.L.J. 27.**

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———**S. 55**—*Voluntary transfer—Remission of debt by insolvent—If void.*

The expression "transfer" in S. 55 of the Presidency Towns Insolvency Act is not limited to any particular form of alienation of his property by the insolvent. The expression is wide enough to cover all sorts of devices that may be practised or suffered by the insolvent to deprive his creditors of the benefit of his property. A remission of a debt by the insolvent without consideration is as much a voluntary transfer under S. 55, in India as in England, and as such against the English Law Section 55 of the Act would override in an insolvency matter the provisions of S. 63 of the Contract Act. (*Mockett, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* KANNIAH NAIDU. **58 Mad. 702=160 I.C. 425 (2)=8 R.M. 649=1935 M.W.N. 297=42 L.W. 514=A.I.R. 1935 Mad. 1009=69 M.L.J. 360.**

———**S. 56**—*Fraudulent preference—Test of—Pressure—Demand is no evidence of pressure when parties aware of impending collapse—No effect on the mind of the debtor.*

The mere making of a preferential payment is not a fraudulent preference. The substantial motive of the debtor in making it must be looked at. If the substantial motive is to prefer the creditor, the payment is a fraudulent preference. If the substantial motive is reparation for past wrong, or to avoid evil consequences to the debtor himself, the payment is not a fraudulent preference. The word "preference" imports the voluntary act of a person who has a choice in the matter. In particular circumstances when a creditor makes a demand for payment, with or without a threat of launching legal proceedings to recover the debt, the effect of the demand upon the mind of the debtor is such that he is no longer to be regarded as making the payment voluntarily or exercising free will in the sense of electing to do something which he need not do. If a demand has that effect upon the mind of the debtor, a transfer executed in favour of a creditor in those circumstances is not a fraudulent preference under S. 56. On the other hand, a demand by the creditor is not always evidence of pressure. If a debtor thinks that if he accedes to the demand and pays his creditor he will be able to continue to carry on his business, and makes the transfer with that object in view, then the debtor's intention in making that transfer is not to prefer the creditor but to benefit himself and prevent his business from being brought to an end. *E contra* where (as in the present case) a demand for payment is made by a creditor to a debtor at a time when both of them have reason to apprehend that the financial position of the debtor is such that in all probability the debtor's business will collapse, the demand would not have any real effect on the mind of the debtor. There is no room in those circumstances for any "pressure" to operate and the transfers in favour of creditors should be treated as fraudulent preferences. *Exp.* Taylor, *In re* Goldsmith, 18 Q.B.D. 295 and Sharp *v.* Jackson, 1899 A.C.

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419, Rel. on. (*Page, C.J. and Mya Bu, J.*) ADAKAMMII ACHI *v.* OFFICIAL ASSIGNEE. **11 Rang. 489=149 I.C. 145=6 R.R. 292=A.I.R. 1934 Rang. 17.**

———**Ss. 56 and 7**—*Fraudulent transfer—Setting aside—Jurisdiction of insolvency Court, if exclusive.*

Where the Official Assignee seeks to set aside a transaction falling under S. 56 and not covered by S. 36 of the Presidency Towns Insolvency Act, it is open to the Court to exercise a discretion whether to try this matter on a notice of motion in the Insolvency Court or to relegate the Official Assignee to a suit in the Civil Courts. It is not correct to say that the Insolvency Court has exclusive jurisdiction in the matter of setting aside a fraudulent transfer. 50 Mad. 776, Diss. from. (*Mirza, J.*) NATHURAM GOPAL MANTRI, *In re.* **141 I.C. 664=I.R. 1933 Bom. 115=34 Bom.L.R 1166=A.I.R. 1932 Bom. 566.**

———**S. 56**—*Onus of proof—Avoidance of transfer—Validity of transaction.*

Under S. 56 the onus is on the Official Assignee to show not merely that there was a preference but that it was made with a view to giving that preference. (*C. C. Ghose, Ag. C.J. and Costello, J.*) OFFICIAL ASSIGNEE OF CALCUTTA *v.* RAMCHANDER KASHERA. **60 Cal. 1278=149 I.C. 861 (1)=6 R.C. 642=A.I.R. 1934 Cal. 54.**

———**S. 57 (c)**—*"Goods and chattels"—Debts due to insolvent.*

A chose in action, if it is a debt due to the insolvent in his trade or business, comes within the words of goods and chattels. 25 Mad. 406, Foll. (*Havelwalla, A.J.C.*) DHANRAJMAL KISHIN DAS *v.* OFFICIAL ASSIGNEE. **25 S.L.R. 310=131 I.C. 130=A.I.R. 1931 Sind 44.**

———**S. 57, proviso**—*Payment to creditor after annulment of adjudication and before appellate order setting aside annulment—Title of Official Assignee.*

A firm was adjudicated insolvent upon a creditor's petition on 1st April, 1933. On 2nd June, 1933, the adjudication was annulled and on 8th July, 1933, an appeal was filed against the order annulling the adjudication. On 21st August, 1933, the appeal was allowed and the order annulling the adjudication was set aside. Meanwhile, on 1st August, 1933, the firm paid certain sums of money to the respondent Banks to whom they were indebted.

Held, that in the events that happened the title of the Official Assignee related back to the first available act of insolvency upon which the insolvency petition was based, that *prima facie* the payments by the firm on 1st August, 1933, to the Banks were void as against the Official Assignee, that the onus lies upon the Banks to satisfy the Court that they are entitled to claim the protection and the benefit of S. 57 of the Presidency Towns Insolvency Act and that the payments in dispute did not fall within the proviso to that section, as the effect of the order passed by the Appellate Court on 21st August, 1933, was that the date of the order of adjudication was the date upon which that order was in fact passed, namely, 1st April, 1933, and as it

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was common ground that before receiving the payments the Banks were fully aware of the insolvency proceedings though they made no enquiries whether any appeal had been lodged against the order annulling the adjudication.

Held also, that the principles underlying the doctrine of *lis pendens* are not dissimilar from the principles which are to be applied in construing S. 57 of the Presidency Towns Insolvency Act. (*Page, C. J. and Mya Bu, J.*) OFFICIAL ASSIGNEE *v.* MERCANTILE BANK OF INDIA, LTD. **12 Rang. 577=154 I.C. 221=7 R.R. 292=A.I.R. 1935 Rang. 61.**

———**S. 58 (2)**—*Property of the insolvent—Title of insolvent in dispute—Powers of Insolvency Court—Direction to Official Assignee to take charge of the property.*

In a case where the title of the insolvent to certain property is disputed, the Insolvency Court can authorise the Official Assignee to take charge of the property pending settlement of the dispute. 37 Cal. 713, Foll. (*Curgenven and Cornish, JJ.*) RAMASWAMI CHETTIAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **54 Mad. 1006=I.R. 1931 Mad. 777=133 I.C. 777=34 L.W. 47=A.I.R. 1931 Mad. 672=61 M.L.J. 812.**

———**S. 58 (2)**—*Scope—Third party—Whether can be directed to produce books of account.*

The Official Assignee cannot apply under S. 58 (*2*) to direct a third person to produce books of account alleged to be in his custody. (*Beasley, C.J. and Cornish, J.*) VALLIAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS. **56 Mad. 273=143 I.C. 265=I.R. 1933 Mad. 283=1932 M.W.N. 959=36 L.W. 703=A.I.R. 1933 Mad. 74=63 M.L.J. 810.**

———**S. 60 (2)**—*Construction—"Income".*

The term "income" in S. 60 (2) must be construed as *ejusdem generis* with "salary" and the Court has jurisdiction under S 60 (*2*) in respect only of the insolvent's salary or income in the nature of a salary. Ex parte *Benwell,* (1885) 14 Q.B.D 301 and In re *Shine,* (1892) 1 Q.B. 522, Ref. (*Page, C.J. and Das, J.*) OFFICIAL ASSIGNEE OF RANGOON *v.* MAUNG NYUN MAUNG. **9 Rang. 138=I.R. 1931 Rang. 114 (1)=131 I.C. 50 (1)=A.I.R. 1931 Rang. 79 (1).**

———**S. 79**—*Duty of Official Assignee—Standard of honesty—After-acquired property of insolvent—Person dealing with insolvent* bona fide—*Rights.*

In deciding what is the duty of the Official Assignee with regard to a contested action in which he is concerned as a trustee, the Court must consider not merely whether he has a cause of action or right or a defence or answer which would prevail at law or in equity as between ordinary litigants, but also what in point of honesty, the trustee ought to do in respect of the facts of the case.

Where a certain company possessed a moral or equitable claim to a certain sum which represented money that had been entrusted by the company to the insolvent to be applied by him for a specific purpose as their agent and the insolvent has no beneficial interest in the sum except to the extent of his commission.

Held, that the Official Assignee is justified in refusing to intervene and claim the amount as

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against the company. (1929) 2 K.B. 735. Ref. (*Page, C. J. and Mosely, J.*) CHOUNG TAIK *v.* MA THEIN NU. **8 Rang. 665=I.R. 1931 Rang. 136 =131 I.C. 504=A.I.R. 1931 Rang. 74 (2).**

———**S. 81**—*Official Assignee—Right to commission—Annulment of adjudication.*

Where an adjudication order obtained on a petition by a creditor is annulled, the Official Assignee is not entitled to a commission. He is certainly entitled to demand from the adjudicating creditor all the out-of-pocket expenses he may have incurred. (*Sen, J.*) S. A. R. M. CHETTYAR FIRM, *In the matter of.* **149 I.C. 1036=6 R. R. 348=A.I.R. 1933 Rang. 280.**

———**S. 90**—*Adjudication in British Court—Injunction restraining proceedings in foreign Court —Whether can be made.*

The language of S. 90 (1) is wide enough to confer on the Court the power of granting an injunction restraining proceedings in a foreign Court by creditors of an insolvent who is so adjudicated in a British Court and the more so when the parties sought to be restrained carry on business within the Court's jurisdiction even if they do not reside there and have assets within its jurisdiction which can be attached in the case of any breach of the injunction. Order for injunction refused on the particular facts. Case-law discussed. (*Panckridge, J.*) SUMERMULL SORANA, *Re.* **136 I.C. 141=I.R. 1932 Cal. 189= 35 C.W.N. 506=A.I.R. 1932 Cal. 124.**

———**S. 90 (1)**—*Injunction restraining proceedings by creditor in a foreign Court—Power of Court to grant*

Section 90 (1) of the Insolvency Act confers on the Court the power of granting an injunction restraining a creditor, who carries on business within its jurisdiction, from proceeding in a foreign Court against the property of the insolvent in the foreign country. (*McNair, J.*) *In re* BINJRAJ SAGARMAL. **39 C.W.N. 1135=62 Cal. 659.**

———**S. 90 (2)**—*"Proceedings in Court"—Enquiry into claims by Official Assignee—Costs of—Power of Insolvency Court to award.*

The Official Assignee cannot be regarded as a "Court" while enquiring into claims made against the estate of an insolvent pending the insolvency and so the insolvency Court has no jurisdiction to award the costs of and incidental to such enquiry. (*Mirza, J.*) MORARJI JAIRAM NARAINJI, *In re.* **I.R. 1932 Bom. 511=139 I.C. 587=34 Bom.L.R. 1175=A.I.R. 1932 Bom. 569.**

———**S. 90 (4)**—*Adjudication made on specific act of insolvency—Evidence of other acts of insolvency—Permissibility.*

After an order of adjudication has been made on specific acts of insolvency contained in affidavits filed in support of the creditor's petition, the Court is not empowered to allow evidence to be given of acts of suspension of payment other than those contained in the petition and the affidavits filed. (*Sen, J.*) S. A. R. M. CHETTYAR FIRM, *In the matter of.* **149 I.C. 1036=6 R.R. 348=A.I.R. 1933 Rang. 280.**

———**S. 90 (4)**—*Amendment — Powers of Court.*

A Court has wide powers to grant amendment under S. 90 (4), Presidency Towns Insolvency

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Act, and there would appear to be no objection to make an amendment where there is no question as to infraction of the law of limitation. (*Ferrers, J.C. and O'Sullivan, A.J.C.*) JETHANAND MURIJMAL *v.* GHANSHAMDAS. **29 S.L.R. 265=8 R.S. 95=159 I.C. 745=A.I.R. 1935 Sind 53.**

———**S. 97**—*Substitution of another creditor—Permissibility—Time limit.*

Where the orginal petitioning creditor is alleged not to act with due diligence, it is open to another creditor to apply to be substituted and the fact that such application is made more than three months after the insolvency is immaterial. (*Aston, A.J.C.*) SALAMATMAL JANIMAL, *In re.* **26 Sind L. R 162=I.R. 1932 Sind 155=139 I.C. 851=A I.R. 1932 Sind 161.**

———**S. 99**—*Applicability — Hindu trading family—Initiation of proceedings by—Maintainability.*

A Hindu trading family or a joint family business is not competent to initiate proceedings under the Act, as it is not a firm or partnership. (*McNair, J.*) GOBIND LAL MOHATA, *In re.* **164 I.C. 428 (1)=9 R.C. 206=39 C.W.N. 275.**

———**S. 99**—*Applicability — Hindu trading family—Joint family firm.*

Section 99 applies as much to a joint family firm as to any other kind of partnership and a joint family firm can be adjudicated insolvent though that will not imply the adjudication of a minor member or even an adult member who has taken no active part in the management and whose liability will extend only to the extent of his interest in the joint family propery. 2 Lah. 40, Ref. (*Wild, J.C. and Milne, A J.C.*) CHATURBHUJ *v.* FIRM OF KEWALRAM. **25 S.L.R. 322= I.R. 1931 Sind 148=134 I.C. 996=A.I.R. 1931 Sind 179.**

———**S. 99**—*Proceedings against joint family firm—Notice on each member, not necessary.*

In proceedings taken for the adjudication of a joint family firm, it is not necessary to serve individual notices upon each member of the family. 25 S.L.R. 54, Ref. (*Wild, J.C. and Milne, A.J.C.*) CHATURBHUJ *v.* FIRM OF KEWALRAM. **25 S.L.R. 322=I.R. 1931 Sind 148=134 I.C. 996=A.I.R. 1931 Sind 179.**

———**S. 102**—*'Obtaining credit'—After-acquired property—Undischarged insolvent—Mortgage by—If an offence.*

An undischarged insolvent is entitled to deal with the property acquired by him after the order of adjudication by way of mortgage. The term "obtaining credit" is not the same thing as a mortgage which is not merely a promise by debtor to pay the loan but a conveyance as well. So the transfer of the property by way of mortgage in raising the loan on hypothecation of immovable property, acquired by the insolvent after the adjudication order does not stand on the same footing as obtaining credit merely, as mentioned in S. 102. The insolvent cannot therefore be convicted under S. 102 for having made such a mortgage without disclosing his insolvency. (*Guha and Nasim Ali, JJ.*) PREM CHAND MULLICK *v.* NILMONI DAS. **61**

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Cal. 281=151 I.C. 137=7 R.C. 73=1934 Cr.C. 791=35 Cr.L.J. 1238=38 C.W.N. 283 =A.I.R. 1934 Cal. 529.

———**S. 102**—*"Obtaining credit"—Meaning of —Obtaining goods on jangad—Offence.*

An undischarged insolvent who obtains goods from another person on *jangad* (sale or return), without disclosing the fact that he is an undischarged insolvent commits the offence of "obtaining credit" within the meaning of S. 102. (*Rangnekar and Kania, JJ.*) EMPEROR *v.* PHIROZSHAH MANEKJI GANDHI. **58 Bom. 646=152 I.C. 706=7 R.B. 164=36 Bom.L.R. 731=36 Cr.L.J. 134=1934 Cr.C. 1132=A.I.R. 1934 Bom. 360.**

———**S. 103**—*Scope.*

Per *Rupchand, J.C.*—Before an insolvent can be put on his trial before a Magistrate, two conditions must be proved to exist, *viz.*, that there are grounds to believe that the debtor has been guilty of an offence under the Act, and secondly, that the circumstances are such as to render a prosecution desirable. (*Rupchand, J.C. and Mehta, A.J.C.*) LALCHAND KHUSHALDAS *v.* OFFICIAL ASSIGNEE, KARACHI. **27 S.L.R. 468=147 I.C. 136=6 R.S. 129=A.I.R. 1933 Sind 381.**

———**Ss. 103 and 104**—*Order under, when to be made.*

Where a *prima facie* case is clearly made out at the preliminary inquiry, an order for proceedings being taken under S. 103 is certainly justified. (*Rupchand, J.C. and Mehta, A.J.C.*) LALCHAND KHUSHALDAS *v.* OFFICIAL ASSIGNEE, KARACHI. **27 S.L.R. 468=147 I.C. 136=6 R.S. 129=A.I.R. 1933 Sind 381.**

———**S. 103 (a) (iii) and (b) (ii)**—Charges under, are distinct—Joinder of three separate acts under both—Illegal. *See* CR. P. CODE, S. 233 AND PRESIDENSY TOWNS INSOLVENCY ACT, S. 103 (*a*) (iii) AND (*b*) (ii). **36 Bom.L.R. 639=A.I.R. 1934 Bom. 303.**

———**S. 103 (b) (ii)**—*Prosecution of insolvent —Sanction of Court.*

Unless the insolvency Judge is satisfied that the money transferred was money belonging to the debtor, he ought not to sanction the prosecution of the insolvent for an offence under S. 103 (*b*) (*ii*). Unless the Judge has clearly in his mind that some definite offence has been committed in the course of "the subsequent dealings of the insolvent" he is not justified in sanctioning the prosecution merely because in the event it might turn out that the Magistrate can elicit from the evidence adduced in the course of the prosecution that an offence under the Insolvency Act has been committed. (*Page, C. J. and Das, J.*) YUSUF ABDUL AZIZ *v.* BLACKWOOD AND BLACKWOOD & CO **149 I.C. 1106 (2)=6 R.R. 369=A.I.R. 1933 Rang. 253.**

———**S. 104**—*Complaint under—Considerations —Notice to insolvent—Desirability.*

In considering whether a complaint should be made under S. 104, the Court has not only to take into account the probability of the criminal proceedings being successful or the reverse, but also must determine upon a consideration of the case as a whole whether it is desirable in the public interest that an example should be made of an insolvent whose conduct has been so bad that criminal proceedings ought to be taken against him as deterrent against the same or similar offences being committed by other insolvents. In any case, the Judge is at liberty to proceed under S. 104 with or without a preliminary enquiry being made. Further, an application under S. 104 is not one in which the insolvent against whom proceedings are proposed is entitled to take part unless invited to do so by the Court, but it cannot be said that where an insolvent is not heard on an application under S. 104 the insolvent is not thereby prejudiced in any way, because in the event of proceedings by way of prosecution being instituted he has, of course, ample opportunity of appearing and defending himself in those proceedings when launched. It depends on the circumstances; and it may often be of great importance to the insolvent that he should have an opportunity of explaining to the Court the reasons why he contends that the Court should not proceed to the extreme limit of making a complaint under S. 104 against him in a Criminal Court. (*Page, C. J. and Mya Bu, J.*) BURMA DAIRY CO., LTD *v.* D. R. DESAI **13 Rang. 525=158 I.C. 644=8 R.R. 199=A.I.R. 1935 Rang. 324.**

PRESY. TOWNS INSOL. ACT (1909), S. 109.

———**S. 104**—*Exercise of powers under—At the hearing of application for discharge—Desirability.*

It is open to the Court at any stage of proceedings after the adjudication order has been passed, and even after discharge, to exercise the discretion with which it is vested under **S. 104. It is** not necessary, and in many cases, it would be undesirable, that the Court should order that a complaint be made under S 104 at the hearing of an application for discharge. Different considerations arise when the Court is called upon to decide whether and if so upon what terms an insolvent should be granted his discharge, and whether the Court should exercise the powers which it possesses under S. 104. (*Page, C J and Mya Bu, J.*) BURMA DAIRY CO, LTD. *v.* D. R. DESAI. **13 Rang. 525=158 I.C. 644=8 R.R. 199=A.I.R. 1935 Rang. 324.**

———**S. 108**—*Proceeding under—Applicability of S. 7 of the Act.*

Section 7 is applicable only to cases where there has been an adjudication in insolvency. It is not applicable to proceedings to administer a deceased debtor's estate initiated under S. 108. *Hewitt*, In re, 15 Q.B.D. 159, Rel. on. (*Beasley, C. J. and Cornish, J.*) VALLIAMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS. **56 Mad. 273=143 I.C. 265=I.R. 1933 Mad. 283=1932 M. W.N. 959=36 L.W. 703=A.I.R. 1933 Mad. 74=63 M.L.J. 810.**

———**S. 109**—*Order—Effect of—Date of drawing up immaterial.*

Under S. 109 of the Act, the property vests in the Official Assignee the moment an administration order under S. 108 is pronounced. The drawing up of the order does not delay the vesting nor a direction by the Judge that the order (pronounced by him) should not be drawn up for some time. So another person subsequently appointed administrator in an administration suit has no power over the estate or to sue for the

PRESY. TOWNS INSOL. ACT (1909), S. 112. recovery of sums of money due to it. (English Cases Ref.) (*Rankin, C. J. and Costello, J.*) HIRALAL MURARKA *v.* MANGTULAL BAGARIA. **59 Cal. 1475=141 I.C. 358=I.R. 1933 Cal. 112 =36 C.W.N. 861=A.I.R. 1933 Cal. 208.**

———**S. 112**—*Rules under, framed by Karachi Court—R.* 154—*Creditor not proving debt before composition—Right to proceed against surety under the composition.*

No creditor can take the benefit of composition unless he has proved his debt before the approval of such composition in view of R. 154 of the Karachi Town Insolvency Rules. Hence where a creditor has not lodged his proof with the Official Assignee and he has not proved his debt under the Insolvency Act, he cannot proceed against the surety under the composition. (*Ferrers, J. C. and Rupchand, A. J. C.*) AHMEDALI MOOSAJI *v.* SONABAI PUNJA. **29 S.L.R. 258=156 I.C. 722 8 R.S. 12=A.I.R. 1935 Sind 137.**

———**Ss. 121-A and 122 (as amended by Bombay Act XX of 1933)**—Unclaimed dividends—Annulment of adjudication—Absence of order for vesting—Effect—If lapse to Government—Right of insolvent to claim. *See* PRESIDENCY TOWNS INSOLVENCY ACT, S. 23. **37 Bom. L.R. 449=A.I.R. 1935 Bom. 310.**

———**S. 126**—*Scope—Rangoon High Court—Power to call upon the Madras High Court to act in aid—*(*English*) *Bankruptcy Act,* 1914, *S.* 122—*Scope.*

Section 122 of the (English) Bankruptcy Act, 1914, which corresponds to S. 118 of the Bankruptcy Act, 1883, applies to all the Courts in the British Empire. It not only authorizes one Court in the United Kingdom to aid and get aid from British Courts outside the United Kingdom but also enables two British Courts outside the United Kingdom to aid each other. So it authorizes one High Court in British India to aid another High Court in British India or a High Court in British India to help a provincial Insolvency Court in British India. S. 126 of the Presidency Towns Insolvency Act which provides that all Courts shall make such orders as may be necessary to give effect to S. 118 of the Bankruptcy Act, 1883, enables the High Court at Rangoon, by means of an order of Court together with a request, to call upon the Madras High Court and its officers to act in aid of it and of the Official Assignee of Rangoon in an insolvency. (*Ramesam, O. C. J. and Cornish, J.*) RAMASWAMY CHETTIAR *v.* OFFICIAL ASSIGNEE OF MADRAS. **135 I.C. 616=I.R. 1932 Mad. 184=1932 M.W.N. 249=34 L.W. 765=A.I.R. 1932 Mad. 264=62 M.L.J. 96.**

———**Sch. II, para. 11**—*Bank holding lien on shares in name of insolvent's wife—Not bound to value or surrender.*

The sharers standing in the name of the wife of the insolvent are *prima facie* her property and a lien over the property of a stranger is in no sense a lien over the property of a debtor so as to attract the applicability of the rules pertaining to proof of claims by secured creditors. (*Rupchand, A. J. C.*) KALLA GELLA, *In re.* **27 S.L.R. 224=150 I.C. 274=6 R.S. 272=A.I. R. 1933 Sind 355.**

———**Sch. II, para. 11**—*Co-operative Bank holding lien on insolvents' shares—Proof of claim without valuing or relinquishing security—Permissibility—Bombay Co-operative Societies Act* (*VII of* 1925), *S.* 26.

Certain shares of a Co-operative Bank were held by the insolvents, a trading firm. The Bank proved their claim without disclosing their lien or giving credit for the shares. On an application by the Official Assignee, it was contended by them that (*i*) under the provision of S. 26 of the Bombay Co-operative Societies Act (VII of 1925) the shares were exempt from attachment of sale or the claims of Official Assignee, that the provisions of the Insolvency law relating to proof by secured creditors applied only to property which vested in the Official Assignee; (*ii*) under bye-law 8 of the Bank, a member may be expelled and his shares forfeited on his insolvency.

Held, that (*i*) the shares which stood in the names of the insolvents were indubitably their property over which the insolvents had a disposing power, subject to the lien; (*ii*) on their insolvency, they had not been in fact expelled and the Bank had not forfeited their shares so far and bye-law 8 was of no avail; that if necessary, the value of the shares may be indirectly made available for the benefit of the creditors by making it a condition to the discharge of the insolvents that they should dispose of them and pay their value to the Official Assignee; therefore the Bank should be directed to value or relinquish their security. (*Rupchand, A. J. C.*) KALLA GELLA, *In re.* **27 S. L.R. 224=150 I.C. 274=6 R.S. 272=A.I. R. 1933 Sind 355.**

———**Sch. II, (Proviso)**—*Official Assignee—Failure to redeem—Equity of redemption lost.*

The failure of the Official Assignee to signify his election to exercise the powers to redeem the property within the time allowed puts an end to his equity of redemption which without more vests in the mortgagee. (*Rupchand Bilaram, A. J. C.*) TAYABALI *v.* PARPATIBAI. **26 S.L.R. 29=I.R. 1932 Sind 106=139 I.C. 95=A.I. R. 1932 Sind 73.**

PRESS ORDINANCE (II OF 1930)—*Interpretation—Reasonable construction of provisions.*

The Press Ordinance enacts provisions of a very comprehensive nature but they should be interpreted in a reasonable manner. The law does not seek to put any narrow construction on the expression used and only interferes, when plainly and deliberately the limits prescribed by it are violated. (*Shadi Lal, C. J., Broadway and Abdul Qadir, JJ.*) PRITHVI DASS SHARMA *v.* EMPEROR. **12 Lah. 345=I.R. 1931 Lah. 713=132 I.C. 889=32 Cr.L.J. 997=32 P.L.R. 676=1931 Cr.C. 539=A.I.R. 1931 Lah. 283 (F.B.).**

PRESS (EMERGENCY POWERS) ACT (XXIII OF 1931)—*Strict construction.*

The provisions of the Press (Emergency Powers) Act are of a penal character and, according to the ordinary rules of interpretation, they should be construed strictly and in such a manner as to protect the liberties of the subject. (*Agha Haidar and Tek Chand, JJ.*) DES RAJ *v.* EMPEROR. **151 I.C. 943=7 R.L. 227=35 Cr. L.J. 1447 (2)=1834 Cr.C. 502 (2)=A.I.R. 1934 Lah. 264.**

———**S. 2 (6)**—*'Document'—Meaning.*

The word 'document' in S. 2 (6) of the Act, bears the same meaning as in S. 29, I. P. Code,

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PRESS (EMERGENCY POWERS) ACT (1931), S. 2.

and S. 3 of the Evidence Act. (*Bajpai, J.*) SATYAWAN ACHARYA *v.* EMPEROR **153 I.C. 411 =7 R.A. 496=36 Cr.L.J. 335=4 A.W.R. 488=1934 Cr.C. 1338=A.I.R. 1934 All. 1031.**

———S. 2 (6)—*"Public news"—Meaning—Information conveyed by photographs.*

Information is "public news" within the meaning of S. 2 (6) if it concerns a matter of public and topical interest as contrasted with purely historical interest. Accused was found in possession of card photographs of person killed in the Chittagong armoury raid case and they were kept for distribution. The legal proceedings were not terminated and the emergency measures rendered necessary in the District of Chittagong were still in operation.

Held, that the information regarding the raid was public news, that the photographs were documents containing public news and therefore news sheets within the meaning of S. 2 (6) and that the accused was guilty. (*Panckridge and Patterson, JJ.*) JITENDRA LAL BENERJEE *v.* EMPEROR. **60 Cal. 1089=37 C.W.N. 990=I.R. 1933 Cal. 457=143 I.C. 612=34 Cr.L.J. 619=1933 Cr. C. 726=A.I.R. 1933 Cal. 458.**

———[As amended by S. 1 (3) of the Emergency Powers Ordinance (II of 1932)], Ss. 3 and 7.

Where the District Magistrate, acting under his own powers under S. 7 or only enforcing the previous order of the Local Government, has directed the publisher of a newspaper to deposit security on the ground that a certain article published therein came within the purview of S. 4 (1) (*d*) and (*e*) of the Act as amended by the Ordinance of 1932, the High Court's power of interference is confined by Ss. 23 and 30 for a limited purpose to decide whether the publication or article does or does not come within the purview of S. 4 (1) of the Act. That power of the High Court should, under S. 30, be invoked, by an application within 2 months from the date of the order. Where no such application was made, the order directing him to furnish security cannot be interfered with. The Distirict Magistrate acting under the Act is not a Court but an executive officer and the High Court has, therefore, no power of superintendence under S. 107 of the Government of India Act. (*Courtney Terrell, C. J., Mahomed Noor and Varma, JJ.*) MURALI MANOHAR PRASAD *v.* EMPEROR. **13 Pat. 547=6 R.P. 669=35 Cr.L.J. 1022=149 I.C. 841= 1934 Cr.C. 720=15 P.L.T. 291=A.I.R. 1934 Pat. 344 (F.B.).**

———S. 3 (3)—*Notice under—Contents.*

The notice under S. 3 (3) and S. 7 (3) need not specify that the offender has contravened any particular sub-section of S. 4 of the Act. (*C. C. Ghose, A. C. J., Mukerji and Panckridge, JJ.*) "ADVANCE" (NEWSPAPER) AND SADHAN PRESS, *In re* **61 Cal. 36=6 I.R. (Cal.) 159=145 I.C. 881=34 Cr.L.J. 1095=38 C.W.N. 56=1933 Cr.C 1256=58 C.L.J. 32=A.I.R. 1933 Cal. 754 (S.B.).**

———S 4—*Offence under—Comment on suspension of civil disobedience movement—Publication as news item.*

It is the effect of the words as published in the news-paper and not merely the meaning of the words taken by themselves that has to be considered in order to see whether a statement is hit at by S. 4. Where a news-paper contained a news item transmitted by an agency to the effect that a certain person said that the suspension of civil disobedience movement amounted to an acknowledgment of defeat and that it was not likely to further the cause of national progress and commended certain other persons who expressed the opinion that the fight should be continued till freedom was attained.

Held that the editor and printer were not liable to be convicted under S. 4. (*C. C. Ghose, A. C. J., Mukerji and Panckridge, JJ.*) "ADVANCE" NEWSPAPER AND SADHAN PRESS, *In re.* **61 Cal. 36=6 I.R. (Cal.) 159=145 I.C. 881=34 Cr. L.J. 1095=38 C.W.N. 56=1933 Cr.C. 1256 =58 C.L.J. 32=A.I.R. 1933 Cal. 754 (S. B.).**

———Ss. 4 and 18—*Poster encouraging violence—Heading "Long long live Revolution".*

When there is nothing in the "announcement" itself which can be said to encourage, directly or indirectly, the commission of any offence, much less murder or other cognizable offence involving violence, or which makes reference, explicit or convert, to any person who has, or is supposed to have committed crimes of this nature, the mere fact that the head-line of the poster, contains the words "Long long live Revolution" cannot lead to the conclusion that it was intended to produce literature advocating violence. (*Agha Haidar and Tek Chand, JJ.*) DES RAJ *v* EMPEROR. **151 I.C. 943—7 R.L. 227=35 Cr.L.J. 1447 (2) =1934 Cr.C. 502 (2)=A.I.R. 1934 Lah. 264.**

———S. 4 (1)—*Construction of offending article.*

Per *C. C. Ghose, J.*—"The article must, as a matter of law, be read as a whole in a fair, free and liberal spirit and should not be viewed with an eye of narrow and fastidious criticism * * * So long as criticism or expression of opinion of any sort is allowed, it is not right that isolated expressions should be subjected to scrutiny under the microscope as it were and a sinister meaning ferretted out and drastic action taken under the Ordinance. * * * What was considered seditions under S. 124-A, Penal Code in 1897 may not necessarily be held to be so in 1932; one cannot shut one's eyes to changes in political conceptions due to the march of events and to the declared objectives of the Government of the day." (*Rankin, C. J., C. C. Ghose and Mallik, JJ.*) AMRITA BAZAR PATRIKA *v* EMPEROR. **I.R. 1932 Cal. 696 =140 I.C. 304=33 Cr.L.J. 949=56 C.L.J. 157=37 C.W.N. 166=1932 Cr.C. 747=A.I. R. 1932 Cal. 738 (S.B.).**

———S. 4 (1), as amended by—Emergency Powers Ordinance (1932), S. 63 (4) (d)—*Government apathy to native industries—Complaint of—Imputation of dishonest motive, to protect foreign industries—Distinction between.*

Where the writers in bewailing the present economic condition of the country and his comments are inspired by a comparison between the zeal and enthusiasm of the authorities in England and the alleged in action of the authorities in India as regards the solution of question relating to unemployment and to obtaining better facilities for

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purposes of trade and commerce and the writer goes on to accuse the authorities in India of suffering from a sort of inertia as regards taking measures which would revive trade and commerce, he is not hit by S. 63 but when he further imputed dishonest motives to Government in protecting foreign industries he brings the Government into hatred or contempt or creates disaffection within S. 63 (*d*). (*C. C. Ghose, Costello and Remfry, JJ.*) ANANDA BAZAR PATRIKA, *In the matter of* **60 Cal. 408=I.R. 1932 Cal. 675=140 I.C. 5 =33 Cr.L.J. 839=37 C.W.N 104=1932 Cr. C. 754=A.I.R. 1932 Cal. 745 (S.B.).**

———S. 4 (1) Ordinance (1932), S. 63 (4) (d)—*"Government established by law".*

No distinction in substance can be drawn between Government established by law in British India and the Executive Government. (*C. C. Ghose, Costello and Remfry, JJ.*) ANANDA BAZAR PATRIKA, *In the matter of.* **60 Cal. 408=I.R. 1932 Cal. 675=140 I.C. 5=33 C.L.J. 839= 37 C.W.N. 104=1932 Cr.C. 754=A. I. R. 1932 Cal. 745 (S.B.).**

———S. 4 (1)—*Construction—"Government established by law in British India".*

The word "Government established by law in British India" only means the existing political system as distinguished from any particular set of administrators. *22 B. 112, Foll. (Rankin, C. J., C. C. Ghose and Mallik, JJ.)* AMRITA BAZAR PATRIKA *v.* EMPEROR. **I.R. 1932 Cal. 696=140 I.C. 304=33 Cr.L.J. 949=56 C.L.J. 157= 37 C.W.N. 166=1932 Cr.C. 747=A.I.R. 1932 Cal. 738 (S.B.).**

———S. 4 (1)—*Newspaper article—Incitement against British rule—Offence.*

The accused was shown to have by means of a newspaper article incited the people to deliver the country from foreign bondage and the oppression and humiliation of the country and the wrongs inflicted by foreign rule were referred to.

Held, that the article constituted an offence under the Press Act read with Ordinance X of 1932. The expressions assumes the presence of an agency which has oppressed and humiliated her. The only agency for which it is possible to behave in that way is the Government established by law. The expressions having been used with reference to it are calculated to excite disaffection towards it. (*Rankin, C. J., Mukerjee and Mitter, JJ.*) DAINIK NAYAK AND SWADESH PRESS, *In the matter of* **I.R. 1933 Cal. 257= 142 I.C. 225=34 Cr. L. J. 316=1933 Cr.C. 359=A.I.R. 1933 Cal. 278 (F.B.).**

———S. 4 (1)—*Newspaper article publishing report of speech—Advocating social boycott as political weapon—Offence.*

An issue of a newspaper published a report of speech which advocated the social boycott of the persons who may participate in the elections to the legislative bodies. The programme of the social boycott was defined and it was proposed that "we should first begin with persuasion, then picketing, and the last and most effective weapon is the strictest social boycott". It also contained a warning that "the candidate, mover, seconder and voter will be boycotted."

Held, that the report came within S. 4 (1) (*d*) as the social boycott of a person, who was a voter or a candidate for an election, would certainly annoy him (if it would not actually put him in fear), and would thereby induce him to refrain from exercising his right to vote or to stand for an election. (*Shadi Lal, C. J., Broadway and Abdul Qadir, JJ.*) PRITHVI DASS SHARMA *v.* EMPEROR. **12 Lah. 345=I.R. 1931 Lah. 713=132 I.C. 889=32 Cr L.J. 997=32 P.L.R. 676= 1931 Cr. C. 539=A I.R. 1931 Lah. 283 (F.B.).**

———S. 4 (1)—*Newspaper article—Offence.*

Even a single sentence, in a newspaper article if abnoxious to S. 4, sub S (1), entails forfeiture of the security, and it is not open to the Court to apportion punishment or to reduce the penalty on any other ground. (*Shadi Lal, C. J., Broadway and Abdul Qadir, JJ.*) PRITHVI DASS SHARMA *v.* EMPEROR. **12 Lah. 345=I R. 1931 Lah. 713 =132 I C. 889=32 Cr.L.J. 997=32 P.L.R. 676=1931 Cr.C. 539=A.I R. 1931 Lah. 283 (F.B.).**

———(As amended in 1932), S. 4 (1)—*Order not stating the clause which the article offended —Validity of.*

An order of Government is not bad merely for the reason that it does not state the particular clause in S. 4 (1) which the article in question was found to have offended. The Act itself has provided what the notice is required to contain and it is not for the Court to impose any further restrictions. (*Rankin, C. J., C. C. Ghose and Mallik, JJ.*) AMRITA BAZAR PATRIKA *v.* EMPEROR. **I.R. 1932 Cal. 696=140 I.C. 304=33 Cr.L.J. 949=56 C.L.J. 157=37 C.W.N. 166 =1932 Cr.C. 747=A.I.R. 1932 Cal. 738 (S.B.).**

———S. 4 (1)—*Order under—When to be taken —Article taken from book describing conditions in Russia during Czarist regime—If offends.*

The intention of the Legislature in passing the Press Act was to prevent the commission of murder or any cognizable offence involving violence in India. A magazine published an article reciting the story of an event in Russia under the conditions prevailing there during the Czarist regime. It was taken almost bodily from a book called "Heroes and Heroines of Russia," in respect of which the Government had taken no action at all. The Government having demanded security in respect of this article.

Held, that the article did not offend against S. 4 (1) of the Act, and did not justify the demand for security. (*Young, C. J., Dalip Singh and Rangi Lal, JJ.*) VIRJA NAND PRINTING PRESS, LAHORE *v.* EMPEROR. **16 Lah. 270=156 I.C. 674=8 R.L. 13=36 Cr.L.J. 971=37 P.L.R. 107=1935 Cr.C. 572=A.I.R. 1935 Lah. 338 (F.B.).**

———S. 4 (1)—*Seditious words—Circumstances attending publication—Relevancy of—Article in insignificant Tamil newspaper.*

In considering whether a certain publication comes within the mischief of S. 4 (1), one has to look to not merely the words used or the intention of writer, but the effect that the words are likely to produce on the minds of the hearers. For this purpose, the circumstances under which

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they were published and the audience to which they were addressed must be considered.

An insignificant Tamil newspaper situated at Rangoon and having small circulation published in its leading article of 23rd October, 1931 militant and seditious words purporting to exhort the readers to support the present political movement in India.

Held, that the words though seditious and intended to inflame the readers did not come within the ambit of S. 4 (1). 38 C. 302, Dist. (*Page C. J., Cunliffe and Baguley, JJ.*) S. N. S. MUDALIAR v. SECRETARY OF STATE FOR INDIA **10 Rang. 165=I.R. 1932 Rang. 139=137 I.C. 655=A.I.R. 1932 Rang. 69 (S.B.)**

———S. 4 (1)—*Tendency to incite commission of offence—Poem eulogising murderer.*

Where a poem expresses approval or admiration of a person who is represented to have committed the offence of murder, for which a death penalty is ordinarily inflicted and the convict to whom the poem relates is termed a hero, and the author desires the drum of his fame to reverberate in the whole universe, it discloses a tendency to incite or encourage the commission of similar offences and the poem comes within S. 4 (1). (*Macnair, J. C., Staples and Subhedar, A. J. Cs.*) BAPUJI KUNBI v. LOCAL GOVERNMENT, CENTRAL PROVINCES. **29 N.L.R. 244=I.R. 1933 Nag. 165=143 I.C. 119=1933 Cr.C. 600 =A.I.R. 1933 Nag. 148 (F.B.).**

———S. 4 (1) (a) [as amended by S. 16 (d) of Act XXIII of 1932]—*Offence under—Disapprobation of certain Government acts—No attribution of base motive—No intention to excite disaffection—Offence.*

An article in a newspaper contained the following passages. ". . . What underlies this arrangement is, in the (language of) modern political dictionary "reprisal". "The jail in India are not indeed heaven. The retaliatory measures of mediaeval sternness which exist are enough for the preservation of order and discipline."

Held, that the article, on a plain reading of it, was intended to support a protest against the measure adopted by the Government, that the word "reprisal" denotes an act of retaliation for some injury or attack, and that it was borrowed from International Law for describing the relations between the Government and the people; and that the use of the word "reprisal," cannot be taken to "tend to bring into hatred or contempt the Government established by law in British India," or "to excite disaffection" towards the Government, and as such do not fall under S. 4 (1) of the Press Act (1931), as amended by S. 16 of Act XXIII of 1932.

Held further, that the use of the word 'retaliatory' in the second passage was only intended to convey that the punishments provided by the jail Code were quite sufficient for subduing recalcitrant prisoners and for maintaining peace or orderliness, and that the writer was not ascribing any base motive to the Government, but only characterising the jail measures as harsh and retaliative. That the article read as a whole was not open to real objection; it only expressed disapprobation of certain measures of the Government with a view to getting them altered by lawful means without exciting or attempting to excite hatred, contempt or disaffection, and that it could not tend directly or indirectly to bring the Government into hatred or contempt. (*Mukerji, Costello and S. K. Ghose, JJ.*) ANANDA BAZAR PATRIKA, LTD, *In the matter of.* **61 Cal. 827=153 I.C. 872=7 R.C. 406=36 Cr.L.J. 432=38 C.W.N. 674=1935 Cr.C. 62=A.I.R. 1935 Cal. 74 (S.B.).**

———(As amended in 1932), S. 4 (1) (b) and Expl. 4—*Article stating that "Chettiyars possess the same essential characteristics as the crow."*

The article in question made reference to the alleged fact that Chettiyars possess the same essential characteristics as the crow, which appeared in the forefront of the article.

Held, that a crow is regarded as a rascal imbued with a low cunning that enables him to pilfer and take advantage of less wary creatures; and deliberately to ascribe in a Burmese newspaper the same attributes to the Chettiyars necessarily tended to engender ill feeling between the Burmans and Chettiyars.

Held also, that the article was outside the pale of Expl. 4 because the object with which it was published plainly was not to remove the sources of any ill feeling that might exist between the Chettiyars and Burmans, but to remove the Chettiyars themselves by making their residence in Burma unprofitable, if not intolerable. (*Page, C.J., Mya Bu and Mackney, JJ.*) "THE NEW LIGHT OF BURMA", *In re.* **157 I.C. 118 (1)= 8 R.R. 79=1935 Cr.C. 852=A.I.R. 1935 Rang. 219 (1) (F.B.).**

———S. 4—*'Class or section'—Attack on Police Officers as such.*

Where there is an attack on the police as a whole it may be said that there are is an attack on a class or section of His Majesty's subjects within the meaning of S. 4 (1 (*c*). (*Addison, Monroe and Agha Haidar, JJ.*) "ZAMINDAR" NEWSPAPER, *In the matter of.* **149 I.C. 370= 6 R.L. 669=35 Cr.L.J. 966=35 P.L.R. 40 =1934 Cr.C. 450=A.I.R. 1934 Lah. 219.**

———S. 4 (1) (c)—*Newspaper article—Entire article to be taken—Reference to arrest of Editor —Offence.*

The Court should in every case consider the book or newspaper article as a whole and in a fair, full and liberal spirit, not dwelling too much upon isolated passages or upon strong word here and there, which may be qualified by the context but endeavouring to gather the general effect which the whole composition would have on the minds of the public. The object of a certain paragraph in respect of which security was demanded under S. 4 was to advertise the newspaper and to secure the patronage of its readers. For that purpose it mentioned the improvements already carried out, held out a promise for future improvements and excused the delay in introducing all the improvements on the plea of the arrest of the Editor whose sufferings in the cause of the nation were claimed as a matter of pride.

Held, that the reference to the arrest of the Editor should not be divorced from the context and the paragraph as a whole was not obnoxious

PRESS (EMERGENCY POWERS) ACT (1931), S. 4.

to S. 4 (1) (*c*). (*Shadi Lal, C.J. and Broadway and Abdul Qadir, JJ.*) PRITHVI DASS SHARMA *v.* EMPEROR. **12 Lah. 345=I.R. 1931 Lah. 713=132 I.C. 889=32 Cr.L.J. 997=32 P.L.R. 676=1931 Cr.C. 539=A.I.R. 1831 Lah. 283 (F.B.).**

———**S. 4 (1) (c)**—*Requisition for security from printer—Same based on writing published before commencement of Ordinance—Legality—Newspaper article*—Bona fide *criticism permitted.*

Security cannot be demanded from a printer or a publisher, who has made his declaration prior to the date of the commencement of the Ordinance, unless the newspaper has been used, subsequent to that date, for the purpose of publishing an objectionable matter. A requisition for security proceeding on a writing published before that date is wholly illegal. The Editor of a newspaper had made a declaration before the date of the commencement of the Ordinance. The Local Government demanded a security from the Editor under S. 4 in respect of an issue published on the 29th April although it contained no offending matter. The order for demand of security proceeded upon what was published before the promulgation of the Ordinance. An article subsequently appeared in the same paper blaming Government for making full use of its extraordinary powers to make free and honest journalism almost impossible and illustrating the danger of the absuse of the powers under the Ordinance by referring to the demand of security from the Hindustan Times.

Held, that the protest was not unwarranted and that the article should not be condemned as a seditious article within S. 4 (1) (*c*). (*Shadi Lal, C.J., Broadway and Abdul Qadir, JJ.*) PRITHVI DAS SHARMA *v.* EMPEROR. **12 Lah. 345=I.R. 1931 Lah. 713=132 I.C. 889=32 Cr.L.J. 997=32 P.L.R. 676=1931 Cr.C. 539=A.I.R. 1931 Lah 283 (F.B.).**

———**S. 4 (1) (d)**—*Article inciting Muslims to get rid of non-Muslim Government.*

There is a good deal of distinction between a comment upon the measures of Government and asking that steps be taken to have them amended or changed and an exhortation to people to turn out the Government which has promulgated these measures. The one is innocent and the other an offence. When an article published by a Muslim went on to say that the Musalmans of India were allowing a non-Muslim Government to dominate them and were submitting to the irreligious laws made by that Government, that not taking steps to remove the domination of that Government is irreligiousness and in the end the article excited the Indian Musalmans to take steps to turn out the non-Muslim Government, *held,* it came within the purview of S. 4 (1) (*d*). (*Courtney Terrel, C.J., Khaja Mahomed Noor and Varma, JJ.*) MAHOMED USMAN GHANI *v.* GOVERNMENT OF BIHAR AND ORISSA. **149 I.C. 838=6 R.P. 668=15 P.L.T. 286 =A.I.R. 1934 Pat. 320.**

———**[as amended by S. 63 of the Emergency Powers Ordinance (1932)], S. 4 (1) (d) and (h)**—*Allegations of lathi charge on and ill treatment of Satyagrahis by police-officers—Police-officers, not a "class of subjects".*

PRESS (EMERGENCY POWERS) ACT (1931), S. 4.

The *Jana Sakti* published an item of news to the effect that as soon as certain Satyagrahis went to a Congress Office, a police inspector and six constables arrested them, took them to a village and used lathis on them as a result of which one was unconscious and in a precarious condition.

Held, (*i*) that in the absence of any suggestion that the misconduct of the officers was approved of by the administration or was part of a deliberate policy of repression, the words were not covered by cl. (*d*); (*ii*) that the police-officers on the one hand and Satyagrahis on the other could not be designated "different classes of His Majesty's subjects" and so the words did not fall under cl. (*h*). 3 Lah. 405 (S.B.), Ref. (*Rankin, C.J., Mitter and Panckridge, JJ.*) JANASAKTI, *In the matter of.* **I.R. 1932 Cal. 537=138 I.C. 849=1932 Cr.C. 606=36 C.W. N. 962=A.I.R. 1932 Cal. 649.**

———**(added by Ordinance II of 1932), S. 4 (1) (d)**—*Tendency to bring the Government into hatred or contempt—Alleged abuse of powers under Ordinance—Alleged consultation and co-operation between the executive and the magistracy—Truth and public good no defence.*

Certain articles published in the *Indian Daily Mail* alleged that the Ordinances were applied ruthlessly and not reasonably, excessive sentences were passed, the way in which particular individuals were picked out for punishment and the unanimity of the Magistrates in inflicting heavy sentences showed that the Magistrates were working in consultation and in co-operation with the Executive, the abuse of powers indicated a policy of vindictiveness, and that the Government should take steps against such abuse.

Held, (*i*) that the general tendency of the articles was not to criticise the policy of the Government of India in promulgating the Ordinances but to assert that the local Government were deliberately abusing and misusing the powers conferred on them by the Ordinances;

(*ii*) that there was no exception in S. 4 of the Press Act making truth and public good an answer to a charge under the section;

(*iii*) that the section made punishable; not merely the creation of hatred or contempt but also the tendency of an article to create such feelings and the article in question had such a tendency;

(*iv*) that, (on the question whether the articles tended to bring into hatred or contempt the administration of justice);

(*a*) the special Courts under the Ordinance were acting in a judicial capacity; (*b*) the method of dealing with persons charged under the Ordinances was part of the administration of justice in force in India; (*b*) the allegation of consultation and co-operation between the magistracy and the judiciary was such as to have a tendency to bring the administration of justice into contempt. (*Beaumont, C.J., Mirza and Murphy, JJ.*) POTHAN JOSEPH, *In re.* **56 Bom. 472= I.R. 1932 Bom. 492=139 I.C. 262=33 Cr. L.J. 749=34 Bom.L.R. 917=1932 Cr.C. 596=A.I.R. 1932 Bom. 468.**

———**[as amended by S. 16 of Act (XXIII of 1932), S. 4 (1) (h), Explanation (4)**—*Leaflet*

PRESS (EMERGENCY POWERS) ACT (1931), S. 12.

promoting feelings of enmity between kisans *and zamindars—Writer having no malicious intent—Conviction under S.* 18 (1)*—Legality.*

Words pointing out matters which are producing or have a tendency to produce feelings of enmity or hatred between different classes of His Majesty's subjects must often, if not invariably, tend either directly or indirectly to promote such feelings, yet if such words are published without malicious intention and with an honest view to the removal of such matters, they are not within the amended S. 4 (1) (*h*) by reason of the provisions of Explanation 4 to that section. Where in the leaflet the subject-matter of the charge, the condition of the *kisans* was described and certain proposals were made for alleviating and improving their position and status and it was contended for the prosecution that it was a document which tended to promote feelings of enmity between *kisans* on the one hand and zamindars or the Government on the other, and consequently its publication was an offence under S. 18 (1), Press Act.

Held, that although the words of the leaflet might tend to promote feelings of enmity or hatred between the *kisans* and the zamindars, the writer did nothing more than point out with a view to their removal the grivances of the *kisans* and had no malicious intent and that the leaflet fell precisely within the words of Explanation (4) and, that being so, it could not be held to be an unauthorised news-sheet within the meaning of S. 18 (1), Press Act, read with the other sections of that Act. (*Kendall, Ag. C.J. and Harries, J.*) MOHAN LAL GAUTAM *v.* EMPEROR. **156 I.C. 908=8 R.A. 49=36 Cr. L.J. 1019=1935 A.W.R. 127=1935 A.L.J. 321=1935 Cr.C. 387=A.I.R. 1935 All. 369**

———S. 7 (3)—Notice under—Contents. *See* PRESS (EMERGENCY POWERS) ACT, S. 3 (3). **A.I.R. 1933 Cal. 754 (S.B.).**

———S. 12 (2)—*Construction—Keeper served with notice—Deposit of security by purchaser—Order of forfeiture for failure of original keeper—Legality.*

Section 12 (2) ought to be read as if after the words "such press shall not be used," the words "by such keeper" are inserted. The Legislature could not have intended that if a keeper on whom a notice has been served completely severs his connection with the press, and sells his interests to a third party, the press ought to be confiscated for failure of the original owner to deposit security, although the third party purchaser has deposited security and has been accepted as keeper (*Young, C.J., Dalip Singh and Rangi Lal, JJ.*) VIRJA NAND PRINTING PRESS, LAHORE *v.* EMPEROR **16 Lah. 270=156 I.C. 674=36 Cr.L.J. 971=8 R.L. 13=37 P.L.R. 107=1935 Cr.C. 572=A.I.R. 1935 Lah. 338 (F.B.).**

———S. 16—*Order of forfeiture made* ex parte *—Validity.*

An order declaring the press to be forfeited to His Majesty passed in the absence of the person who has the custody and the control of the press is invalid. (*C. C. Ghose, A.C.J. and S. K. Ghose, J.*) NRISINGHA CHANDRA GHOSE *v.* EMPEROR. **60 Cal. 1103=146 I.C. 464=35 Cr.L.J. 84=6 I.R. (Cal.) 227=37 C.W.N. 821=1933 Cr. C. 1359=A.I.R. 1933 Cal. 792.**

PRESS (EMERGENCY POWERS) ACT (1931), S. 18.

6 I.R. (Cal.) 227=37 C.W.N. 821=35 Cr. L.J. 84=1933 Cr.C. 1359=A.I.R. 1933 Cal. 792.

———S. 17—*Search and seizure without search warrant—Order of forfeiture—Validity.*

Where the police-officer has not been armed for the purpose of seizing a press under S. 17 with a search warrant the search and the seizure of the press are illegal and the Magistrate cannot make an order of forfeiture under S. 17 (3). (*C. C. Ghose, A.C.J. and S. K. Ghose, J.*) NRISINGHA CHANDRA GHOSE *v.* EMPEROR. **60 Cal. 1103=146 I.C. 464=35 Cr.L.J. 84=6 I.R. (Cal.) 227=37 C.W.N. 821=1933 Cr. C. 1359=A.I.R. 1933 Cal. 792.**

———S. 18—Conviction under—Fine—Imprisonment in default of—Limit of term. *See* PENAL CODE, S. 65—IMPRISONMENT IN DEFAULT OF FINE. **4 A.W.R. 488.**

———S. 18—*Forum.*

There is no restriction in the provisions of the Act as to the Court by which offences under S. 18 are triable. The maximum punishment under that section is six months and therefore any Magistrate may try the offence. (*Burn, J.*) NARAYANA RAZU *v.* EMPEROR. **1933 M.W.N. 911.**

———S. 18 (1) and Cr. Law Amendment Act (XXIII of 1932), Ss. 15 and 16 (h)—*Scope.*

Where a pamphlet published and distributed by the accused, purporting to deal with the grievances of the poor Kisan labourers as against the rich zamindars, bankers and petty shopkeepers, exhorted the labourers to assemble in very large numbers to advocate reduction of rate of interest and of rents of houses and shops, heavy taxation of the rich, enhancement of wages of all labourers and so on, and it appeared that the assembly which was to meet would be so large as could not be controlled by the convener, and the feelings of the assembly would be inflamed by the pamphlet against the rich, and that thereby a breach of the peace was likely,

Held, the pamphlet tended to create feelings of hatred and enmity between different classes of His Majesty's subjects, namely between the rich and the poor, which were sufficiently well-defined and that it fell within the offence contemplated by S. 18 of the Press Act (XXIII of 1931), read with Ss. 15 and 16 (*h*) of the Cr. Law Amendment Act (XXIII of 1932). (*Bennet, J.*) RAM SARAN DAS *v.* EMPEROR. **6 R.A. 960=149 I.C. 710=35 Cr.L.J. 1000=1934 Cr. C. 903=3 A.W.R. 831=A.I.R. 1934 All. 717.**

———S. 18 (1)—*Unauthorised news-sheet—Painting words "boycott British goods" on road—Offence.*

'A view to cause loss' is, under S. 3 (*b*) of Ordinance V of 1932 as amended by Ordinance VII of 1932, the essence of the offence of the offence of molestation but the words "boycott British goods" cannot be supposed to incite the public to entertain the view to cause loss to the dealers in those goods and painting those words on the road does not amount to making an unauthorised news-sheet as defined in S. 2 (*b*), and does not constitute an offence undeh S. 18 (1) of the Press Emergency Powers Act. (*Burn, J.*) PANDURANGA MUDALI, *In re.* **I.R.**

PRESS (EMERGENCY POWERS) ACT (1931), S. 23.

1933 Mad. 35=34 Cr.L.J. 90=1932 M.W.N. 1357=140 I.C. 767=1933 Cr.C. 155=A.I.R. 1933 Mad. 123=63 M.L.J. 906.

———S. 23—*Jurisdiction of High Court—Limits of—Intention of writer—Relevancy of.*

The jurisdiction of the High Court under S. 23, Press (Emergency Powers) Act, is of an extremely limited character and the Courts are not concerned with the question of the intention of the writer of the objectionable passages; all that they are concerned with is to find out whether the words used tended directly or indirectly to bring into hatred or contempt the Government or to excite disaffection towards the Government. If they do, then the petitioners are hit by S. 63, sub-S. (*d*), Emergency Powers Ordinance; if they do not, it is competent to this Court under S. 25 of the said Press Act to set aside the orders of the Local Government. (*C. C. Ghose, Castello and Remfry, JJ.*) ANANDA BAZAR PATRIKA, *In the matter of.* **60 Cal. 408=I.R. 1932 Cal. 675=140 I.C. 5=33 Cr.L.J. 839=37 C.W.N. 104=1932 Cr.C. 754=A.I.R. 1932 Cal. 745 (S.B.).**

———S. 23—*Newspaper article—Oppression and humiliation of rules referred to—Offence if constituted.*

For a subject nation to pray to Sri Krishna on a "Janmashtami" day for attainment of political freedom is not a thing which can be legitimately condemned. But for an innocent sentiment of such character expressions such as "uplifted hand of oppression," "oppressed and humiliated India," "India persecuted and under subjection" and "Piteous wail of a suffering people" will have no place and would be wholly inapposite. These expressions assume the presence of an agency which has oppressed and humiliated her, has uplifted its hand for oppressing her further, and has been persecuting her by keeping her under subjection and being heedless of the piteous wails of her suffering people. The only agency for which it is possible to behave in that way is the Government established by law, and the expressions, having been used with reference to it, obviously tend to bring it into hatred or contempt and are calculated to excite disaffection towards it. (*Rankin, C.J. Mukerji and Mitter, JJ.*) ANUKUL CHANDRA PARIHAL, *In re.* **142 I.C. 225=34 Cr.L.J. 316=I.R. 1933 Cal. 257=1933 Cr.C. 359=A.I.R. 1933 Cal. 278 (S.B.).**

———S. 23—Onus *of proof.*

The *onus* of proof in the proceedings under S. 23 is on the petitioners. (*C. C. Ghose, Costello and Remfry, JJ.*) ANANDA BAZAR PATRIKA, *In the matter of.* **60 Cal. 408=I.R. 1932 Cal. 675=140 I.C. 5=33 Cr.L.J. 839=37 C.W.N. 104=1932 Cr.C. 754=A.I.R. 1932 Cal. 745 (S.B.).**

———S. 23—*Order of Local Government forfeiting security under S.* 4 (1) (*i*)—*Application to set aside—Considerations.*

In an application to the High Court under S. 23 of the Indian Press (Emergency Powers) Act by the keeper of a press to set aside an order of the Local Government forfeiting his security on the ground that a letter set out in the issue of a newspaper printed at that press contained words which "tend directly or indirectly to promote feelings of enmity or hatred between different classes of His Majesty's subjects" within S. 4 (1) (*h*) of the Act, the motive or intention of the applicant would appear to be *nihil ad rem*, except in cases which fall within Explanation 4 of S. 4 of the Act. What has to be considered is the effect likely to be produced upon persons who may be expected to read the passages in question, and for that purpose not only ought the article to be read as a whole, but under S. 26 of the Act it is permissible for the Court to have regard to what is contained in other issues of the same publication with a view to ascertaining what would be the probable effect of the offending passages upon those persons who normally would see the articles that are published in the newspaper. The fact that the offending passages occur in a letter set out in the newspaper would make no difference. (*Page, C.J. Mya Bu and Baguley, JJ.*) SUN PRESS, LTD, *In re.* **13 Rang. 98=156 I.C. 135=7 R.R. 377=36 Cr. L.J. 871=A.I.R. 1935 Rang. 120 (S.B.).**

———S. 23 (1)—*High Court's power—Extent of.*

The High Court is given jurisdiction only to decide whether or not the matter published was of the nature described in S. 4, sub-S. (1). (*Macnair, J.C., Staples and Subhedar, A.J.Cs.*) BAPUJI KUNBI *v.* LOCAL GOVERNMENT, CENTRAL PROVINCES. **29 N.L.R. 244=I.R. 1933 Nag. 165=143 I.C. 199=1933 Cr.C. 600=A.I.R. 1933 Nag 148 (F.B.).**

———AMENDING ORDINANCE (VII OF 1932)—*Validity of*

As the validity of the Ordinance rests neither on proof of an emergency nor upon the recital of an emergency but upon the judgment of the Governor-General that immediate action of that character was necessary, there is no basis for the contention that the Ordinance is not valid and effective merely on the ground that the Ordinance does not begin by saying "whereas an emergency has arisen". (*Rankin, C. J., C. C. Ghose and Mallik, JJ.*) AMRITA BAZAR PATRIKA *v.* EMPEROR **I.R. 1932 Cal. 696=140 I.C. 304=33 Cr.L.J. 949=56 C.L.J. 157=37 C. W.N. 166=1932 Cr.C. 747=A.I.R. 1932 Cal. 738 (S.B.).**

PRESS AND REGISTRATION OF BOOKS ACT (XXV OF 1867)—*Scope—Change in person of keeper of press—Fresh declaration if necessary.*

There is nothing in the Act to suggest that any fresh declaration should be filed in the case of any press which has once been declared and which continues at the same address. The Act does not appear to provide for a change in the person of the keeper of the press, (*Pullan, J.*) RAGHUBAR SINGH *v.* EMPEROR. **6 Luck. 514=130 I.C. 380=32 Cr.L.J. 545=8 O.W.N. 25=14 O.L.J. 89=1931 Cr.C. 209=A.I.R. 1931 Oudh 81.**

PRESS AND REGISTRATION OF BOOKS ACT (1867), S. 3.

———S. 3—*Proceeding under S.* 12—*Place of printing—Proof*—Onus.

Accused, a school boy—*See* PRESS REGISTRATION ACT, S. 12. **A.I.R. 1931 Cal. 641.**

———Ss. 3, 4 and 5—*'Printing'—'Printing Press'—'Newspaper'—Cyclostyling—Roneo duplicator.*

PRESS AND REGISTRATION OF BOOKS ACT (1867), S. 4.

The word 'printing' in the Act must be construed in its strict and narrow sense, namely, typography. It does not include cyclostyling. A Roneo duplicator cannot be considered a 'printing press' within the meaning of S. 4. A newspaper, as defined in the Act, means a printed periodical and not any publication produced by typewriting, duplicating, cyclostyling or such method. (*Staples, A.J.C.*) RAMESHWAR PRASAD *v.* EMPEROR. **27 N.L.R. 270=I.R. 1931 Nag. 182=134 I.C. 854=32 Cr.L.J. 1266=1931 Cr.C. 918=A.I.R. 1931 Nag. 177.**

———**S. 4**—*Construction—"For the printing of books or papers."*

The question whether a printing press is or is not within S. 4 is a question of the use to which the printing press is in fact put or intended to be put by the possessor. The words "for the printing of books of papers" modify the verb "keep" and not the noun "press". They refer to the object of the possessor of the machine. (*Courtney-Terrell, C.J. and Adami, J.*) RAMESHWAR PRASHAD VERMA *v.* EMPEROR. **10 Pat. 492=I.R. 1931 Pat. 394=133 I.C. 682=32 Cr.L.J. 1063 (2)=12 Pat.L.T. 767=1931 Cr.C. 799 (2)=A.I.R. 1931 Pat. 351 (2).**

———**S. 4**—*Construction—"Papers".*

The word "papers" in Ss. 3 and 4 are papers containing news which are intended to be circulated and are practically, if not exactly, synonymous with the word "newspaper" as defined in S. 1 of the Act. (*Courtney-Terrell, C.J. and Adami, J.*) RAMESHWAR PRASHAD VERMA *v.* EMPEROR. **10 Pat. 492=I.R. 1931 Pat. 394=133 I.C. 682=32 Cr.L.J. 1063 (2)=12 Pat.L.T. 767=1931 Cr.C. 799 (2)=A.I.R. 1931 Pat. 351 (2).**

———**S. 4**—*Construction — "Printing"—Cyclostyle machine.*

The word 'printing' includes the multiplication of copies by means of cyclostyle machine. (*Courtney-Terrell, C.J. and Adami, J.*) RAMESHWAR PRASHAD VERMA *v.* EMPEROR. **10 Pat. 492=I.R. 1931 Pat. 394=133 I.C. 682=32 Cr.L.J. 1063 (2)=12 Pat.L.T. 767=1931 Cr.C. 799 (2)=A.I.R. 1931 Pat. 351 (2).**

———**S. 4**—*Object.*

Section 4 appears to have been enacted with a double motive. The first is that the executive authorities shall note where the press is situated and the second is that they shall know who is the person in charge. A removal of the premises clearly deprives the executive authorities of their knowledge as to the location of the press. But the same cannot be said where there is a change in the personnel of the keeper of the press. (*Pullan, J.*) RAGHUBAR SINGH *v.* EMPEROR. **6 Luck. 514=130 I.C. 380=32 Cr.L.J. 545=8 O.W.N. 25=14 O.L.J. 89=1931 Cr.C. 209=A.I.R. 1931 Oudh 81.**

———**S. 7**—*Declaration—Publisher named in—If can be presumed to be publisher at other places not specified*

Where a person is prosecuted for publishing a libel in newspaper, the presumption permitted to be raised by S. 7 of the Act as to his identity with the publisher of the offending article on production of the copy of his declaration given under S. 5 (2) of the same Act, is restricted to the

PRESUMPTION.

prima facie proof that he was the publisher at the place specified in the declaration and does not extend to the proof of the fact that he was also the publisher of the libel at places not specified in the declaration. (*Subhedar, A. J.. C.*) DIWAN SINGH *v.* EMPEROR. **155 I.C. 450=7 R.N. 176=36 Cr.L.J. 744=1935 Cr.C. 418=A.I.R. 1935 Nag. 90.**

———**S. 7**—*Place of publication—Proof.*

The provisions of the Act lay special emphasis on the place of the original publication and do not at all refer to places of subsequent publications. The declarations requires the mention of original place of publications together with the description of premises, therefore the presumptive proof of publication raised by S. 7 must be understood as referring only to the place specified in the declaration and not to places of subsequent publications elsewhere. (*Subhedar, A. J. C.*) DIWAN SINGH *v.* EMPEROR. **155 I.C. 450=7 R.N. 176=36 Cr.L.J. 744=1935 Cr.C. 418=A.I.R. 1935 Nag. 90.**

———**S. 7**—*Presumption about knowledge—Applicability—Seditious pamphlets*

The initial presumption about knowledge under S. 7 in the case of periodicals does not arise in the case of a pamphlet alleged to contain seditious matter. (*Bhide, J.*) CHUNI LAL *v.* EMPEROR. **12 Lah. 483=I.R. 1931 Lah. 401=131 I.C. 273=32 Cr.L.J. 681=32 P.L.R. 740=1931 Cr.C. 302=A.I.R. 1931 Lah. 182.**

———**S. 12**—*Proceeding under—Place of printing—Proof*—Onus.

Where a person is proceeded against under S. 12 of the Press Registration Act there must be evidence to show that the paper had been printed in British India. The burden is on the prosecution to prove the same where the accused is a school boy who may not know where the leaflets had been printed. (*Panckridge, J.*) AMIYA KUMAR BHATTACHARJEE *v.* EMPEROR. **35 C.W.N. 778=134 I.C. 1197=33 Cr.L.J. 91=1931 Cr.C. 841=A.I.R. 1931 Cal. 641.**

———**S. 13**—*Declaration in name of manager—Authorities not being misled—Subsequent declaration to proper form—Offence if constituted.*

Where it appeared that the executive authorities knew that a person was the owner of the Press but the District Magistrate himself allowed him to submit a declaration signed by his manager and when the latter resigned, the owner himself submitted a declaration describing the Press as his, *held*, that the owner of the Press had not committed any offence. (*Pullan, J.*) RAGHUBAR SINGH *v.* EMPEROR. **6 Luck. 514=130 I.C. 380=32 Cr.L.J. 545=8 O.W.N. 25=14 O.L.J. 89=1931 Cr.C. 209=A.I.R. 1931 Oudh 81.**

PRESUMPTION—*See also* (1) BENAMI-PRESUMPTION; (2) B. T. ACT—ADVANCEMENT; (3) EVIDENCE-PRESUMPTION; (4) EVIDENCE ACT, Ss. 21, 112, 114; (4) GRANT-PRESUMPTION; (5) HINDU LAW—JOINT FAMILY—PRESUMPTION—OF INNOCENCE. *See* CRIMINAL TRIAL.

———*Advancement—Purchase by father in name of child.*

There is no presumption in India (as there is in England) that the property acquired by a father in the name of his child is intended for

PREVENTION OF CRUELTY TO ANIMALS ACT (1890), S. 3.

his advancement. 6 M.I.A. 53 (P. C.), Rel. on. (*Bhide and Tapp, JJ.*) MRS. JOHNSTONE *v.* GOPAL SINGH. **12 Lah. 546=I.R. 1931 Lah. 804=133 I.C. 628=32 P.L.R. 840=A.I.R. 1931 Lah. 419.**

PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890), S. 3 (a)—*Construction.*

The adverbs "cruelly and unnecessarily" govern all the verbs 'beats', 'overdrives' and 'overloads', having regard to the intention of the legislature expressed in the preamble and the terms of Ss. 3. 4 and 5 which is to prevent unnecessary cruelty to animals The primary test of an offence under the section is whether the act is cruel. Merely overloading a cart beyond the maximum weight prescribed by the regulations framed by the Commissioner of Revenue is not sufficient for conviction. (*Beaumont, C J. and Broomfield, J*) EMPEROR *v.* MUNSHI. **56 Bom. 264=I R 1932 Bom. 416=138 I.C. 703=33 Cr.L.J. 689=34 Bom.L.R. 595=1932 Cr.C. 569—A.I R. 1932 Bom. 427.**

———**S. 6**—*Construction--"Permits"—Liability of owner.*

The word 'permits' does not involve any conscious act on the part of the person who is held to be liable under the section which aims not only at the liability of a person actually in charge of the animal but also aims at the person who owns it. (*Wort, J.*) BINDESHWAR PRASAD *v.* EMPEROR **10 Pat. 847=I.R. 1932 Pat. 59=136 I C. 59=33 Cr.L.J. 232=13 Pat.L.T. 44—1932 Cr.C. 98=A.I.R. 1932 Pat. 65.**

PREVENTION OF INTIMIDATION ORDINANCE (V OF 1930), S. 3—*Construction—"Molestation"*

B, a shop-keeper, has a legal right to keep his shop open. *A* must intend to interfere with the exercise of such legal right by the shop-keeper; and *A* must obstruct or intimidate or use violence to him or loiter near his place of business. If all these three facts are proved, *A* is guilty of molestation. (*Madgavkar and Barlee, JJ*) EMPEROR *v.* SAKINABAI LUKMANI **55 Bom 220=I. R. 1931 Bom. 154=129 I.C. 346=32 Cr.L. J. 283=32 Bom.L.R. 1506=1931 Cr.C. 78 =A.I.R. 1931 Bom. 70.**

———**S. 3**—*Construction—"Cause".*

From the mere fact that obstructing or using force is specifically referred to in the section, it is clear that violence, obstruction or intimidation is not necessarily included in the word "cause". (*Cuming, J.*) BROJENDRA NATH GUPTA *v.* EMPEROR. **35 C.W.N. 436=33 Cr.L. J. 28=134 I.C. 1129=1931 Cr.C. 833=A I.R. 1931 Cal. 633.**

———**S. 3**—*Construction—Molestation—Loitering at liquor shop*

Loitering at a liquor shop with a view to cause persons to abstain from purchasing liquor comes within the definition of molestation in S. 3 of the Ordinance. (*Addison and Abdul Qadir, JJ*) PINDI DAS *v.* EMPEROR. **I.R. 1931 Lah. 585=132 I.C. 393=32 Cr.L.J. 878=1931 Cr.C. 693=A.I.R. 1931 Lah. 469.**

———**S. 3**—*Construction on—"Person molested".*

PREVENTION OF MOLESTATION AND BOYCOTTING ORDINANCE (1932), S. 3.

The person molested must be the same person as the person to whose legal rights obstruction is to be caused. The accused cannot be held to have loitered with a view to cause loss to the shop-keeper simply from the fact that he accosted the customer and persuaded him about the evils of drink. He cannot be presumed to have in view the idea of causing any loss to the shop-keeper or interfering with the rights of the shop-keeper. On the contrary, in the case of the ordinary temperance worker, it is the welfare of the drinker which occupies the mind of the worker and not the gain or loss to the shop-keeper. (*Madgavkar and Barlee, JJ*) EMPEROR *v.* SAKINABAI LUKMANI **55 Bom 220=129 I.C. 346=I.R. 1931 Bom. 154=32 Cr. L J. 283=32 Bom.L.R. 1506=1931 Cr.C. 78=A I.R. 1931 Bom. 70.**

———**S. 3**—*Construction--Picketing.*

The meaning applied to the picketing of liquor shops is to post men to intercept people going to the shop to buy liquor and prevail upon them to desist from doing so. (*Addison and Abdul Qadir, JJ.*) PINDI DAS *v.* EMPEROR **I.R. 1931 Lah. 585=132 I.C. 393=32 Cr.L.J. 878=1931 Cr.C. 693=A.I.R. 1931 Lah. 469.**

———**S. 3**—*Peaceful picketing—Applicability of the section*

If the object of a peaceful picketeer who loiters about a college is to cause the students not to enter the college, he comes within the mischief of S 3 even though he might cause the students not to enter by mere persuasion or possibly by simply being there. (*Cuming, J.*) BROJENDRA NATH GUPTA *v* EMPEROR. **35 C.W.N. 436=134 I.C. 1129=33 Cr.L.J. 28=1931 Cr.C. 833=A.I.R. 1931 Cal. 633.**

———**S. 11**—*Effect—Criminal Procedure Code (V of 1898), S. 195—Complaint in writing—Necessity for*

The requirements of S. 195 of the Criminal Procedure Code are not abrogated by the Ordinance; a complaint in writing of the public servant concerned is still necessary for a charge under S. 188 of the Penal Code (*Beaumont, C J. and Barlee, J.*) EMPEROR *v.* GANESH VASUDEV **55 Bom. 322=I.R. 1931 Bom. 252=130 I.C. 396=32 Cr.L J. 507=33 Bom.L.R. 59=1931 Cr.C. 183=A.I.R. 1931 Bom. 135.**

PREVENTION OF MOLESTATION AND BOYCOTTING ORDINANCE (V OF 1932), S. 3—*Picketting cloth shop—Offence if committed.*

The accused along with other volunteers went from shop to shop asking the cloth dealers to abstain from dealing in foreign cloth and asked a purchaser to return the cloth he had purchased.

Held, that the accused was guilty of an offence under S. 3. (*James, J.*) BASUDEO NARAIN *v.* EMPEROR. **I.R. 1933 Pat. 730=142 I.C. 180=34 Cr.L.J. 303=13 P.L.T. 753=1933 Cr. C. 158=A.I.R. 1933 Pat. 50.**

———**Ss. 3 (a) and 4**—*Molestation—Gist of offence.*

The gist of the offence of molestation is the doing of certain acts with a view to cause a person to abstain from doing an act which the latter had a right to do. Where, therefore, there is no evidence that the complainant had a right

PREVENTION OF MOLESTATION AND BOYCOTTING ORDINANCE (1932), S. 4.

to tap the trees which did not belong to him, a conviction under S. 4 for preventing him from doing so cannot be sustained. (*Burn, J.*) NARASANNA, *In re.* **I.R. 1933 Mad. 37=140 I.C. 773=34 Cr.L.J. 96 (1)=1933 Cr.C. 257 (1)= A.I.R. 1933 Mad. 147.**

———**S. 4**—Charge of picketing foreign cloth shops—Conviction under Ordinance and under Criminal Law Amendment Act, S. 17 (1)—Two separate sentences not legal. *See* CRIMINAL LAW AMENDMENT ACT (1908), S. 17 (1). **A.I.R. 1933 Mad. 337=64 M.L.J. 351.**

———**S. 4**—*Conviction under—Evidence—Sufficiency of—Accused—Dictator of District Congress Committee.*

The mere fact that the accused is the Dictator of the District Congress Committee or that ordinarily picketing takes place under the directions of the dictator is not sufficient to prove his guilt unless it is proved that he was present when the picketing took place or that it took place under his instructions. (*Jai Lal, J.*) VISHNU DATTA *v.* EMPEROR. **I.R. 1933 Lah. 350 (1)=143 I. C. 356 (1)=34 Cr.L.J. 587=1933 Cr.C. 353 =A.I.R. 1933 Lah. 233.**

———**S. 4**—*Conviction under—Sentence of fine.*

The principle that where a substantial term of imprisonment has been inflicted it is inappropriate to add a fine is inapplicable to a conviction under S. 4, as it is specifically provided that fine should be separately imposed or along with a substantial term of imprisonment. (*Pearson and Patterson, JJ.*) DEVENDRA NATH MAZUMDAR *v.* EMPEROR. **6 I.R. (Cal.) 179=146 I.C. 174=34 Cr.L.J. 1189=1933 Cr.C. 412=A.I.R. 1933 Cal. 333.**

———**S. 4**—*Fine imposed on son aged 18—Recovery from properties of the father—Permissibility.*

A fine imposed on a son aged 18 convicted under S. 4 cannot be realised from the properties of the father even though they were living and working jointly. (*Dalip Singh, J.*) SALIG RAM *v.* EMPEROR. **I.R. 1933 Lah. 286 (1)=142 I.C. 846=34 Cr.L.J. 467=34 P.L.R. 432.**

———**S. 4**—*Picketing—What constitutes.*

A person who loiters around foreign shops and intentionally interferes and obstructs customers in their legitimate rights is guilty under S. 4. (*Pearson and Patterson, JJ.*) DEVENDRA NATH MAZUMDAR *v.* EMPEROR. **6 I.R. (Cal.) 179=146 I.C. 174=34 Cr.L.J. 1189=1933 Cr C. 412=A.I.R. 1933 Cal. 333.**

———**S. 5**—*Offence under S. 4—Procedure.*

Under S. 5, a Magistrate may only take cognizance of an offence punishable under S. 4 on report in writing of the facts which constitute such an offence made by a police officer. But the opinion of the police officer as to whether such facts justify the taking of cognizance under Ordinance V is irrelevant. It must always be for the Magistrate to decide in what particular manner cognizance shall be taken. (*James, J.*) BASUDO NARAIN *v.* EMPEROR. **I.R. 1933 Pat. 130=142 I.C. 180=34 Cr.L.J. 303=13 P.L. T. 753=1933 Cr.C. 158=A.I.R. 1933 Pat. 50.**

PREVIOUS ACQUITTAL—*See* CR. P. CODE. S. 403.

PRINCIPAL AND AGENT—Adathi.

PREVIOUS CONVICTION.

See (1) CR. P. CODE, S. 221, (7).
(2) PENAL CODE, S. 75.

PRIMOGENITURE.

See HINDU LAW—
(1) IMPARTIBLE ESTATE—SUCCESSION.
(2) SUCCESSION.

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See also (1) ACCOUNTS.
(2) C. P. CODE, SCH. II, PARA. 15.
(3) CONTRACT ACT, SS. 182 TO 238.
(4) LIMITATION ACT, ARTS. 62, 85 AND 89.

Accounts. *See also* ACCOUNTS—PRINCIPAL AND AGENT
Adathi.
Authority of agent.
Broker.
Duties and liabilities of agent.
Holding out.
Implied authority.
Pakka arhatia.
Principal's liability for acts of agent.
Proof of agency.
Ratification.
Receiver.
Rights of agent.
Relationship of agency.

Accounts.

———*Accounts—Form of suit.*

The ordinary form of suit is by calling upon the agent to account generally, but if the principal is in the main satisfied with the agent's accounts, and only takes objection to certain items therein which he is prepared to specify then the result of bringing a suit in regard to these particular items only is to relieve the agent of a considerable burden and no objection can be taken to the form of the suit. (*Mya Bu and Dunkley, JJ.*) SUBRHMANIAN CHETTYAR *v.* T. R. M T. S. T. FIRM. **157 I.C. 166=8 R.R. 81=A.I.R. 1935 Rang. 269.**

———*Accounts—Procedure in—Suit for—Allegation that plaintiff is suppressing documents—Passing of preliminary decree.*

If the liability of the defendant to render account arises from the facts admitted in the pleadings, a preliminary decree should be passed directing that an account be taken from him. In rendering account, it is open to the defendant to allege and establish that certain material account books and papers are in possession of the plaintiff who is deliberately withholding them. The fact that the plaintiff is in possession of certain documents and is withholding them cannot have the effect of relieving the defendant of his liability to render account, if he is otherwise liable. 1 A.L.J. 347, Rel. on. (*Niamatullah and Bennet, JJ.*) SHANKAR LAL *v.* TOSHAN PAL SINGH. **150 I.C. 151=6 R.A. 1057=1934 A.L.J. 453 =3 A.W.R. 617=A.I.R. 1934 All. 553.**

Adathi.

———Adathi—*System, explained.*

The course of business known as *adathi* system prevailing among Chettiar money-lenders in Burma is to the following effect. A Chettyar in the mofussil, who wishes to be certain that he will have at his disposal during the course of the year enough capital to meet the requirements of his business, employs a Chettyar in Rangoon as his *adathi*. The *adathi* undertakes to previde within a stated limit the capital necessary to meet the requirements of his mofussil constituent and for his services during the year the *adathi* is paid by his principal in the country a fixed sum by way of remuneration, which varies according to the amount of accommodation that the *adathi* undertakes to provide. For such accom-

PRINCIPAL AND AGENT—Adathi.

modation as may be required by the principal within the limit set out in the *adathi* agreement, the usual current rate among Chettyars is charged; but if the mofussil constituent requires capital in excess of the limit for which the *adathi* undertakes to be responsible, on the additional sums that he provides the *adathi* is at liberty to charge interest in excess of the rates current among the Chettyars. When a mofussil Chettyar requires capital he instructs his *adathi* to procure the required sum for him and the *adathi* either provides the money out of his own resources or obtains it from one or other of the members of the Chettyar community in Rangoon. (*Page, C.J. and Das, J.*) K. S. R. M. CHETTIAR FIRM *v.* A. T. K. P. L. S. P. CHETTIAR FIRM. **12 Rang. 7 = 151 I.C. 804 = 7 R.R. 118 (2) = A.I.R. 1934 Rang. 61.**

———Adathi—*Power to borrow without express instructions.*

Where it was only proved that when on rare occasions an *adathi* had borrowed money for his principal, the principal has ratified the unauthorised act of the *adathi*, it cannot be inferred therefrom that there is an usage among the Chettyar community that the *adathi* has a general authority to bind his principal by contracting loan to an unlimited extent without any instructions in that behalf. (*Page, C. J. and Das, J.*) K. S. R. M. CHETTIAR FIRM *v.* A. T. K. P. L. S. P. CHETTIAR FIRM. **12 Rang. 7 = 151 I.C. 804 = 7 R.R. 118 (2) = A.I.R. 1934 Rang. 61.**

Authority of agent.

———Authority of agent—Construction. *See* AGRA TENANCY ACT (1926)—MUKTARNAMA. **16 R.D. 85.**

———Authority of agent—Construction—Agent authorised to purchase goods—Power to borrow. *See* POWER-OF-ATTORNEY—CONSTRUCTION. **69 M.L.J. 179.**

———*Authority of agent—Construction—Authorisation to vakil to act in trial Court—Power to present appeal.*

A power-of-attorney given by a client to his vakil authorised him to act and appear for the party in the trial Court or in any other Court.

Held, that the vakil had sufficient authority to enable him to present an appeal. (*Jai Lal, J.*) SHUSHIL CHANDAR DAS *v.* RAM SARAN DAS SRI RAM. **I.R. 1932 Lah. 331 = 137 I.C. 279 (1) = 33 P.L.R. 34.**

———*Authority of agent—Construction—Authority to appear for and represent Company—Right of audience.*

Where the power-of-attorney in favour of the director of a Company authorised him to appear for and on behalf of the Company, to conduct and represent the Company in the proceedings in the application in the High Court and to do all acts as he may deem necessary for the proper prosecution of the proceedings.

Held, that the director had no right of audience in Court. The power only authorised him to appear and not to plead. 19 C.W.N. 64, Foll (*Buckland, J.*) EASTERN TAVOY MINERALS CORPORATION, LTD., *In re*. **61 Cal. 324 = 151 I.C. 753 (1) = 7 R C. 175 (1) = A.I.R. 1934 Cal. 563.**

———*Authority of agent—Construction—Authority to conduct litigation.*

Where by a power-of-attorney an agent was authorised 'to conduct litigation' and engage Pleaders or Barristers, *held*, that the agent could appoint a Pleader for instituting an appeal. (*Tek Chand and Johnstone, JJ.*) COURT OF WARDS, SHEIKHUPURA *v.* GOPAL SINGH. **13 Lah. 256 = I.R. 1932 Lah. 511 = 138 I.C. 602 = 33 P.L.R. 535 = A.I.R. 1932 Lah. 430.**

———*Authority of agent—Construction—Authority to mortgage—No authority to bind principal to personal decree.*

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An agent who was given a general power-of-attorney authorizing him to mortgage a certain property on behalf of his principal cannot bind his principal to a personal money decree on the balance after sale of such property. (*Heald and Sen, JJ.*) V. E. R. M. FIRM *v.* U BA CHO. **I.R. 1931 Rang. 280 = 134 I.C. 216 = A.I.R. 1931 Rang. 223.**

———*Authority of agent—Construction—Chettiar firm in Rangoon—Power of agent to execute lease of business premises.*

Under a power of-attorney a Chettiar firm gave authority to its management "to transact, conduct and manage all and every or any of the affairs, concerns, matters and things in which we now are or hereinafter may be in any wise interested or concerned, and for that purpose to use or sign our names to all and every or any document or documents, writing or writings, whatever,"

Held, that taking into consideration the nature and manner in which the Chettyar firms in Rangoon carry on business, the managing agent had authority to execute a lease on behalf of the firm for premises for carrying on business. (*Page, C.J. and Das, J.*) BHAGWAN DAS BAGLA *v.* S. P. K. A. A. M. CHETTYAR FIRM. **150 I.C 697 = 7 R.R. 6 (2) = A I.R. 1933 Rang. 385.**

———*Authority of agent—Construction—Power to compromise, withdraw and file all applications—Power to admit claim included.*

By a *mukhtarnama* executed by the wife in favour of her husband, the signature of the husband himself on any compromise or withdrawal of a suit was to have the effect of making it binding upon the wife as if she herself had signed any such document. The power further empowered the husband to file all applications of every description on behalf of his wife.

Held, that the power-of-attorney empowered the husband to admit a claim without previously obtaining his wife's consent. (*Nanavutty, J.*) KAMAL UDDIN *v.* GULZARI LAL. **148 I.C. 1174 = 6 R.O. 498 = 11 O. W.N. 517 = A.I.R. 1934 Oudh 314.**

———*Authority of agent—Construction—Powers of Court work conferred—Power to lease.*

Where the power-of attorney only conferred extensive powers in connection with Court work and none in connection with estate management, the agent has no power to grant a lease of the lands belonging to the estate. (*Oppenheim, S.M. and Walton, J.M.*) KALI PRASAD MISRA *v.* RAM CHANDRA SINGH. **13 L.R. 387 (Rev.) = 17 R.D. 8.**

———*Authority of agent—Construction—Power to take out execution—Power to apply for determination of mesne profits included.*

Where a power-of-attorney in a suit empowers a person to file appeal, to take out execution and conduct all other necessary proceedings arising out of the litigation, that power is sufficient to enable the person so empowered to file an execution application for determination and realization of mesne profits. (*Bhide, J.*) MT. KARAM BIBI *v.* MEHR ALI KHAN. **I.R. 1933 Lah. 502 = 144 I.C. 553 = A.I.R. 1933 Lah. 876.**

———*Authority of agent—Construction—Principles.*

A power-of-attorney should be construed strictly. (*Bhide, J.*) MT. KARAM BIBI *v.* MEHR ALI KHAN. **I.R. 1933 Lah. 502 = 144 I.C. 553 = A.I.R. 1933 Lah. 876.**

———*Authority of agent—Construction—Principles—Words whether can be imported—Earlier and later clauses.*

There is no rule of construction which permits a document contrary to its actual wording to be read as

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though it followed a proposed precedent unless between the parties it has been rectified or at least is such as would, by the Court be rectified. The question at issue was whether the acting Manager of the defendant Bank had the authority to certify cheques drawn by a constituent, as good for payment on a future day. The plaintiff sought to read the word "accept" into the power of attorney suggesting that it had been omitted owing to the copyist's mistake.

Held, that such a construction was not permissible. The general words in the later clauses of the power of attorney should be read with special powers given in the earlier clauses and cannot be construed so as to enlarge the restricted powers there mentioned.

Held, further, that the power to 'endorse' did not confer the power to 'back' bills on behalf of the Bank and that the power to pay cheques did not include the power to 'promise to pay.' (*Lord Atkin*) VAIKAPPA CHETTIAR *v.* THOMAS COOK & SON. **I.R. 1933 P.C. 114=142 I.C. 660=1933 A.L.J. 277=37 L.W. 319=A.I.R. 1933 P.C. 78=64 M.L.J. 184 (P.C.).**

———*Authority of agent—Death of principal—Effect of.*

Where a decree holder who has given a power of attorney to execute the decree dies, it is not possible to prosecute the execution on behalf of the legal representative of the deceased decree-holder without a fresh power of attorney from the legal representative himself. (*Bhide, J.*) MT. KARAM BIBI *v.* MEHR ALI KHAN. **I.R. 1933 Lah. 502=144 I.C. 553=A.I.R. 1933 Lah. 876.**

———*Authority of agent—Limits—Instituting suit in principal's capacity as guardian of minor.*

A suit was instituted by the general attorney of a minor principal's guardian, without the guardian's knowledge and permission, both on his own behalf and for the minor's guardian, professedly as the guardian's authorized agent.

Held, that the minor not being fully represented, the judgment cannot be conclusive as against him. (*Sulaiman and Kendall, JJ.*) RAM DAS *v.* DWARKA DAS. **I.R. 1931 All. 91=128 I.C. 763=A.I.R 1930 All. 875.**

———*Authority of agent—Power to borrow—Procuring loans to third parties on Principal's security.*

It is the duty of every agent to strictly pursue the terms of his authority and obey the lawful instructions of his principal. No principal is bound by any act of his agent which is not done in the course of his employment on his behalf or by any act which is not within the apparent scope of the agent's authority unless the principal in fact authorised the agent to do that particular act. It is one thing for a gumastha to borrow money from a creditor for his principal. It is quite a different thing for him to cause loans to be given to third parties on the responsibility of the principal. (*Mahadevayya, O.C J. and Ramachandra Rao, J.*) CHANNAVEERAPPA *v.* JEEVAJI BHAGVANJI & CO. **11 Mys.L.J. 357=39 Mys H C R. 166.**

———*Authority of agent—Private instructions to agent—Third party if bound*

Private instructions issued by a principal to an agent are not binding on a third party unless the latter has notice. (*Sulaiman and Young, JJ.*) CHHOTEY LAL PANNA LAL *v.* R. K. RAILWAY. **54 All. 557=I.R. 1932 All 405=138 I C. 439=1932 A.L.J. 526=A.I.R. 1932 All 540**

———Authority of agent—Right to refer pending suit—Principal ignorant—If bound by the award. *See* C.P. CODE, SCH. II, PARA. 15. **1933 M.W.N. 1475.**

PRINCIPAL AND AGENT—Holding out.

Broker.

———*Broker—Right to commission—Test of—Completion of transaction.*

It is necessary in order to entitle a broker to earn his commission to show in the absence of a contract to the contrary, that the transaction is completed, or if the transaction is not completed, to show that the non-completion is due to the default of the principal. But the defendant cannot by employing another broker in the midst of negotiations, however innocently, deprive the broker who brought the parties together of his commission. If, however, the negotiations carried on by the broker have completely ceased and have been abandoned at the time his employment as a broker has ceased, the agency of the broker too ceases and with it his right to claim remuneration. The test is whether the work of the broker who claims brokerage is the effective or efficient cause of the completion of the transaction. He is not entitled to remuneration merely because he first introduced the business. (*Wadia, J.*) LILADHAR *v.* MATHURADAS. **58 Bom. 583=150 I.C. 871=7 R.B. 29=36 Bom L R. 119=A I.R. 1934 Bom 158.**

Duties and liabilities of agent.

———*Duties and liabilities of agent—Entrustment of moneys for investment.*

It is the duty of a solicitor, entrusted with the moneys of his client for investment, before investing the amount upon the mortgage of a farm, to have a proper valuation made. If he chooses to rely mainly on his own general knowledge of farms in the vicinity, he does so at his own risk and if his judgment is shown to have been at fault, he is liable for the loss traceable to his breach of duty to his client. (*Sir George Lowndes.*) WILLIAM ABERCROMBIE SHAW *v.* FREDERICK CHATER JACK. **I.R 1932 P C. 207=137 I C. 531=1932 Cr C. 612=A.I.R. 1932 P.C. 194 (P.C.).**

———*Duties and liabilities of agent—Shipping.*

The liability of the ship's agents for acts of the ship is, and can only be, co-extensive with that of the ship specially when there is no allegation that the ship's agents have done any acts subsequent to the landing of cargo which has caused the loss and for which they are liable irrespective of the liability of their principals. (*Rupchand, A. J. C.*) HAJI SHAKOOR GANY *v.* VOLKART BROTHERS. **25 S L.R. 222=I.R. 1931 Sind 109=133 I.C. 77=A.I.R. 1931 Sind 124.**

Holding out.

———*Holding out—Essentials of.*

It is of the essence of an authority created by "holding out" that the other party to the contract by reason of such "holding out" should have been induced to enter into the contract. (*Page, C.J. and Das, J.*) K. S. R. M. CHETTIAR FIRM *v* A. T. K. P. L. S P CHETTIAR FIAM. **12 Rang. 7=151 I.C. 804=7 R.R. 118 (2)=A.I.R. 1934 Rang 61.**

———*Holding out—Liability—Contract entered into by one but goods supplied to another.*

The goods in suit were ordered by one *R* an independent contractor, but it was the District Engineer who corresponded with the firm with respect to the order. The goods were despatched to the District Engineer and were apparently received by him or some body on his behalf. The goods were utilised for the construction of a building with which the District Board had no connection. It appeared that previously goods had been supplied to the District Board through the District Engineer.

Held, that the District Engineer had not contracted on behalf of the District Board, that there was no holding out by the District Board, and a suit to realise the

PRINCIPAL AND AGENT—Implied authority.

price of goods was not maintainable against the District Board. (*Buckland J.*) JESSOP & CO., LTD. *v.* DISTRICT BOARD OF MONGHYR. **58 Cal. 7=I.R. 1931 Cal. 619=132 I.C. 907=A.I.R. 1931 Cal. 423.**

Implied authority.

———*Implied authority—Wife—Power to acknowledge debts.*

A wife has an implied authority to pledge the credit of her husband for necessaries and the implied authority is not taken away or diminished by reason of her husband's insanity. Such authority is, however, limited to necessaries. She has no power to acknowledge a debt due from her husband (*Beasley, C.J. and Hardswell, J.*) GOMATHI AMMAL *v.* AVU AMMAL. **56 Mad. 964=6 I.R. (Mad.) 208=146 I C. 49=1933 M.W.N. 365=38 L.W. 321=A.I R. 1933 Mad. 686=65 M.L.J. 355.**

Pakka Arhatia.

———Pacca artia—*Position of.*

The position of a *pacca artia* is not that of an ordinary agent who merely brings about a transaction between third parties for he becomes personally responsible since both the buyer and the seller look to him for fulfilment of their contract. If the original seller fails to fulfil the contract the *pacca artia* can claim damages from him. (*Bhide and Currie, JJ.*) JOT RAM SHER SINGH *v.* JIWAN RAM SHEOLI MAL. **I R. 1932 Lah. 594 (2)=139 I.C. 637=33 P.L.R. 985=A.I.R. 1932 Lah. 633.**

———pakka arhatia—*Position of.*

The position of a *Pakka Arhatia* is analogous to that of a *del credere* agent who incurs only a secondary liability towards the principal, and whose legal position is partly that of an insurer and partly that of a surety for the parties with whom he deals, to the extent of any default by reason of any insolvency or something equivalent. A.I.R. 1927 All. 617, Foll. (*Thom and Iqbal Ahmad, JJ.*) MEGHRAJ ROORMAL *v* ANUP SINGH. **159 I.C. 934=8 R A. 529=1936 A.L.J. 475=1935 A. W.R. 1185=A.I R. 1935 All. 1004.**

———Pukka arhti—*Position of.*

A *pukka arhti* undertakes to guarantee the peformance of the contract. (*Shadi Lal, C J and Walker, J.*) PARMESHRI DAS BHAGWAT PARSHAD *v.* RAGHBAR DAS BENI PARSHAD. **I.R 1931 Lah. 937 (1)=134 I.C. 489 (1)=32 P.L R. 380.**

———'pakka arhatia'—*Rights of—Custom entitling commission agent to protection from eventual loss—Validity.*

In the case of transactions entered into on the *Pakka arhat* system a custom or usage that entitles the commission agent to protect himself from loss in the event of the failure of the contracting party to insure him against the loss is not either unreasonable or immoral. There is direct contractual relationship between the *pakka arhatia* and the purchaser and the seller; and he, as principal, is liable to both for the performance of the contract. The failure of a purchaser, who has entered into a forward contract for the purchase of some commodity through a *pakka arhatia* to take delivery on due date does not exonerate the *arhatia* from the liability to take delivery from the seller in pursuance of the forward contract. It follows that a *pakka arhatia* is himself vitally interested in the performance of the contract that has been entered into through him and a custom that provides means to insure the *arhatia* against prospective loss cannot be characterized as unreasonable or immoral. On the contrary such a custom is calculated to check reckless speculation and to promote fair dealing and the transaction of business on honest lines, and, as such, is reasonable and salutary. A.I.R. 1923 All. 242,

PRINCIPAL AND AGENT—Principal's liability for acts of agent.

Dist. (*Thom and Iqbal Ahmad, JJ.*) MEGHRAJ ROORMAL *v.* ANUP SINGH. **159 I.C 984=8 R.A. 529=1936 A L.J. 475=1935 A.W.R. 1185=A.I.R. 1935 All. 1004.**

———Pakka adatia—*Rights of—Margin money.*

A *pakka adatia* is entitled to demand margin money before he enters into any transaction, whether an independent transaction or a transaction by way of a covering transaction. 30 B. 250, Ref. (*Rangnekar, J.*) SAKARBHAI *v.* RAMNIKLAL. **I R 1932 Bom. 358=138 I.C. 244=34 Bom L.R. 709=A.I.R. 1932 Bom. 328.**

———pakka *arhatia—Rights of—Margin money—Mercantile usage in Ghaziabad District.*

According to the mercantile usage prevalent in Ghaziabad a *pakka arhatia* is entitled to call for margin money, if the rise or fall in the market justifies such a demand, and, in the event of the demand not being met, is entitled to close the contract. (*Thom and Iqbal Ahmad, JJ.*) MEGHRAJ ROORMAL *v* ANUP SINGH. **159 I C. 984=8 R.A. 529=1936 A.L J. 475=1935 A.W R 1185=A.I.R. 1935 All. 1004.**

———Pakka adatia—*Rights of tej mandi transactions—Fluctuation—Courses open.*

There are three courses open to a commission agent to secure the payment of the full amount of the premium. He can insist on payment of the whole premium in advance, or he can take security for payment on the due date, or he can demand margin against the fluctuations in the rate of premium. If he has failed to adopt either of the first two courses and finds that the transactions if closed as on a particular date for want of margin, his own liability to his broker would be reduced, he is entitled to call upon the constituent to pay sufficient margin so as to secure the payment of the whole of the moneys which may be due to him on the due date including the premium, and in default of payment to close the outstanding transaction. (*Ragnekar, J.*) SAKARBHAI *v.* RAMNIKLAL. **I.R. 1932 Bom. 358=138 I.C. 244=34 Bom L R. 709=A.I.R. 1932 Bom 328.**

———Pacca arhati—*Validity.*

Held, that the *pacca arat* usage was not unreasonable, and did not involve, a conflict between the *pacca artia's* interest and duty. (*Bhide and Currie, JJ.*) JOT RAM SHER SINGH *v.* JIWAN RAM SHEOLI MAL **I.R. 1932 Lah 594 (2)=139 I.C. 637=33 P.L R. 985=A.I.R. 1932 Lah. 633.**

Principal's liability for acts of agent.

———*Principal's liability for acts of agent—Fraudulent act of agent.*

In order that the act of an agent should be treated as the act of his principal, the agent must have acted within the scope of his authority or the principal must have so conducted himself that he is not at liberty to repudiate the act of the agent. Where by the terms of the agency, the agent of an Insurance Company was only authorised to collect the premiums and all proposals entertained by the agent were subject to the confirmation of the Insurance Company and the agent had no authority whatever to effect a renewal of the policy on behalf of the company, the company is not bound by the act of the agent who not only received the premium and issued provisional receipt for the same but also professed to issue a renewal of the policy. (*Page, C.J. and Das, J.*) UNIVERSAL FIRE AND GENERAL INSURANCE CO., LTD. *v.* SHUP SHIN HTAI. **12 Rang. 312=154 I.C. 53=7 R.R. 252=A.I.R. 1934 Rang. 261.**

———*Principal's liability for acts of agent—Fraud or tortly agent—No benefit to agent.*

PRINCIPAL AND AGENT—Principal's liability for acts of agent.

The principal is liable for the acts done or torts committed by the agent in doing the business within the scope of the agency and the liability is not affected by the question whether the principal derived any benefit by the fraud or tort of his agent or not. *Barwick* v. *E. J.S. Bark*, 2 Ex. 259 and (1912) A.C. 716, Rel. on. (*Reilly and Burn, JJ.*) SETH BANSI RAM JESHAMAL *v.* OFFICIAL ASSIGNEE, MADRAS. **1933 M.W.N. 1246.**

———*Principal's liability for acts of agent—Scope of.*

Where the question is whether the act of an agent is to be deemed the act of his principal, the Court will apply the common law rule, *qui facit per alium facit per se*, unless it is satisfied having regard to the terms of the particular statute or agreement under consideration that it was the intention of the legislature or of the parties, as the case may be, that the act should not be performed by an agent. (*Page, C.J. and Maung Ba, J.*) M. A. KURESHI *v.* ARGUS FOOTWEAR, LTD. **9 Rang. 323=I.R. 1931 Rang. 259=133 I.C. 483=A. I.R. 1931 Rang. 306.**

———*Principal's liability for acts of agent—Suit—Liability.*

Where the suit is against both the principal and agent, in law only one can be held liable. (*Wort and Fazl Ali, JJ.*) PATTINSON *v.* BINDHYA DEBI. **12 Pat. 216=6 I.R. (Pat.) 225=146 I. C. 56=14 Pat. L T. 149=A.I.R. 1933 Pat. 196.**

Proof of agency.

———*Proof of agency—Inference — Contract for supply of goods—Deposit in Bank by way of security—Insolvency of Bank—Right of depositor against principal.*

The plaintiff took a contract from the Military Authorities for the supply of mutton. He deposited according to the rules a certain sum of money in one of the Banks specified in the contract and obtained a receipt. Subsequently the Bank became insolvent and the plaintiff sued the Military Authorities represented by the Secretary of State for recovery of the amount over and above that rateably obtained by the bank.

Held, that the Bank was under those circumstances the agent of the defendants and that the latter was liable for the amount claimed in their capacity as principals. (*Tek Chand and Agha Haidar, JJ.*) HAR SINGH *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **I.R. 1931 Lah. 849=133 I.C. 881=32 P.L.R. 819=A.I.R. 1932 Lah. 34.**

———*Proof of agency—Inference—Implied agency.*

The relation of agency need not depend upon an express appointment and acceptance thereof, and may be implied from the facts and circumstances of the particular case. If from such facts and circumstances, it appears that there was an implied intention to create the relation, it will, by implication, be held to exist. A. I.R. 1928 Cal. 863, Ref. (*Doraiswami Iyer, C.J. and Sreenivasa Iyer, J.*) VENKATANARANAPPA *v.* ABDUL HUKH SAB. **9 Mys.L.J. 364.**

———*Proof of agency—Test—Distinction from the relation between vendor and purchaser.*

The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid, and not as an agent for the proceeds of the re-sale. The transferor is not concerned with any subsequent fluctuations in price and loss or gain to the goods. The essence of agency to sell, is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and therefore entitled to control their sale, as for instance to fix their price, to dictate the terms of re-sale or to re-sell the goods. He cannot demand the price of the goods before re sale, but only such proceeds as accrue to him on such re-sale. By the terms of a contract between the Government of Mysore and a company, the company were appointed the selling agents of oil manufactured by the Government, and were bound to keep regular books of accounts of all oil received or sold, to remit the sale proceeds less commission to the Government Bankers and to be liable for all moneys recoverable on sales effected without raising any question of bad debts and the Government had also the right to fix the minimum prices at which oil should be sold by the agents. It was held that the contract between the parties was one of agency and not of sale. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) SITARAMACHAR *v.* THE GOVERNMENT OF MYSORE. **8 Mys.L.J. 385.**

PRINCIPAL AND AGENT—Rights of agent.

Ratification.

———Ratification—Conditions of—Pro note by agent of minor's guardian—Renewal by minor after majority—Effect of. *See* MINOR—CONTRACT BY GUARDIAN. **155 I.C. 607=A.I.R. 1935 Nag. 127.**

———Ratification—Effect—Agent signing and verifying income-tax return without authority—Principal subsequently producing accounts in pursuance of notice—Effect. *See* POWER OF ATTORNEY—CONSTRUCTION. **155 I.C. 180=1935 O.W.N. 490=A.I.R. 1935 Oudh 305.**

———*Ratification—Meaning of.*

"Ratification" is used to express the conduct of a principal who endorses the action of his agent which had at first taken place without the principal's authority. (*Courtney Terrell, C.J. and Dhavle, J.*) JANKI NATH PAUL *v.* DHOKAR MALL KEDAR BUX. **156 I.C. 200=7 R.P. 698=16 Pat.L.T. 897=A I.R. 1935 Pat. 376.**

Receiver.

———*Receiver—Position of—Liability as principal.*

A receiver appointed by Court is not in the position of an agent in respect of transactions entered into by him. He is really in the position of a principal. (*Buckland, J.*) RAMNARAYAN SATYAPAL *v.* CAREY AND DANIEL. **58 Cal. 174=I.R. 1932 Cal. 50=134 I.C. 1266=A.I.R. 1931 Cal. 491.**

Relationship of agency.

———*Relationship of agency—Sub contract—Suit for rendition of account—Maintainability.*

A sub-contract was entered into by a contractor undertaking some building work of a railway company, with another contractor on certain percentage basis. The sub contractor sued the railway contractor for rendition of accounts.

Held, that under the circumstances a suit for rendition of accounts could not lie, as there was no relationship of principal and agent between the two contractors for realizing money from the railway company, nor was there any privity of contract between the sub contractor and the railway company and that a suit for a specific sum due to him should have been brought. (*Hilton, J.*) MAHOMED SHAFI *v.* FAZAL DIN. **I.R. 1931 Lah. 246=130 I.C. 54=32 P.L.R. 137=A.I.R. 1930 Lah. 1062.**

Rights of agent.

———*Rights of agent—Calling for accounts.*

While the principal is under no statutory obligation to render accounts to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract. The right to claim a state-

PRINCIPAL AND AGENT—Rights of agent.

ment of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his legal rights. 60 P.R. 1899; A.I.R. 1925 Lah. 100 and A.I.R. 1927 Lah. 701, Ref. Where the plaintiffs who were insurance agents were to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through them.

Held, as the plaintiffs cannot certainly know which of these policies have lapsed, matured or been forfeited, they are entitled to call on the defendants for rendition of accounts as this is the only relief which will enable the plaintiffs to satisfactorily assert their rights. (*Tapp, J.*) RAM LAL KAPUR & SONS *v.* ASIAN COMMERCIAL ASSURANCE CO., LTD. **I.R. 1933 Lah. 489 = 144 I.C. 505 = A.I.R. 1933 Lah. 483.**

———*Rights of agents—Calling for accounts—Preliminary decree in favour of principal—Direction for appointment of commissioner.*

The agent is not ordinarily entitled to claim accounts against the principal. Where after the passing of a preliminary decree in a suit by the principal for accounts, the Court gave a direction for the appointment of a commissioner for taking accounts but the plaintiff failed to apply and thereupon the Court on the defendant's application permitted the decree to be amended in order that a commissioner may be appointed at his instance.

Held, that the order granting amendment was invalid. (*Jai Lal, J.*) KESHO RAM *v.* JOTI SARUP GOELA & SONS. **I.R. 1932 Lah. 673 = 140 I.C. 15 = A.I.R. 1932 Lah. 619.**

———*Rights of agent—Calling for accounts—Suit by principal for accounts—Decree in favour of agent—If can be passed.*

An agent is under a statutory obligation to render accounts to his principal. But the principal is under no counter-statutory obligation of the same nature towards the agent. In the absence of a trade usage or definite contract between the parties, the principal cannot be compelled to render accounts to his agent or to keep accounts for him so as to entitle the agent to sue the principal for an adjustment of accounts, even though in point of fact the principal has kept accounts. Where a principal sues his agent for accounts and it is found on taking accounts that something is due to the agent from the principal, a decree cannot be passed in favour ot the agent. (*Addison, J.*) DEVI DAYAL *v.* GOPAL DAS MATHRA DAS. **16 Lah. 7 = 152 I.C. 133 = 7 R.L. 253 = 35 P.L.R. 684 = A.I.R. 1934 Lah. 708.**

———*Rights of agent—Commission agent—Passing of property to principal.*

Where a seller retains the power of disposal stipulating the delivery is only to be made to the buyer when payment is made, the property in the goods does not pass to the buyer until the payment is made, and a suit by the seller for price of the goods is incompetent. The same principal extends to the case where a commission agent purchases and himself pays for goods and does not deliver them to his principal until he makes payment to him. (*Broadway and Currie, JJ.*) BENI PERSHAD SHAMBHU NATH *v.* NARAIN DAS SEVA RAM. **I.R. 1931 Lah. 175 = 129 I.C. 287 = A.I.R. 1930 Lah. 974.**

———*Rights of agent—Personal contract.*

Where an agent by contracting personally, had rendered himself personally liable for the price of goods, bought on behalf of his principal, he has the same rights with regard to the disposal of the goods and with regard to stopping them *in transitu* as he would have had if relation between him and his principal had been that of seller and buyer. (*Tek Chand and Agha Haidar, JJ.*) HARPARSHAD TULSIRAM *v.* JINDAR PARSHAD NAIN KANWAR. **15 Lah. 496 = 150 I.C. 109 = 6 R.L. 823 = 36 P.L.R. 348 = A.I.R. 1934 Lah. 191.**

PRIORITY.

———*Rights of agent—Personal contract—Indemnity—Purchase by agent—Repudiation by principal—Re-sale—Suit for deficiency.*

Where an agent by contracting renders himself liable for the price of goods bought on behalf of his principal, the property in the goods as between the principal and agent vests in the agent and does not pass to the principal untill he pays for the goods and the agent has the same rights with regard to the disposal of the goods and with regard to stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. If therefore the principal refuses to pay, the agent is entitled to re-sell the goods and hold the principal liable for any deficiency arising from the sale. The deficiency would be the measure of the loss sustained by the agent in the transaction, in respect of which he is entitled to be indemnified and reimbursed. (*Rangnekar, J.*) BABASA BAKALE *v.* HOMBANNA. **140 I.C. 624 = I.R. 1933 Bom. 22 = 34 Bom.L.R. 1268 = A.I.R. 1932 Bom. 593.**

———*Rights of agent—Wagering contracts—Re-imbursement.*

An agent can recover monies paid out by him on behalf of his principal even on wagering contracts and a set-off or adjustment in accounts of third parties should be treated on the same footing as cash payments. (*Broadway and Monroe, JJ.*) PIRTHI SINGH JAMIAT RAI *v.* MATU RAM. **13 Lah 766 = I.R. 1932 Lah. 443 = 138 I.C. 241 = 33 P.L.R. 450 = A.I.R. 1932 Lah. 356.**

PRINCIPAL AND AGENT—Suit by agent at his place of business—Proper. *See* JURISDICTION—FORUM. **A.I.R. 1935 Lah. 68.**

———Torts of Agent—Liability of principal for. *See* TORT—VICARIOUS LIABILITY.

PRINCIPAL DEBTOR AND SURETY.

See (1) CONTRACT ACT, SS. 124 TO 145.
(2) LIMITATION ACT, S. 19.
(3) SURETY.

PRINTING PRESS AND REGISTRATION OF BOOKS ACT (1867), S. 12—*Intention if unnecessary—Person carrying on business not personally but through manager.*

Although a person carries on the business of a press through a manager and has nothing to do with the management of the press, still, if he employs a manager to print books and the business of printing is his, he must be held to have printed the books through his manager. The mere fact of printing the book or paper otherwise than in accordance with S. 3 of the Act is an offence, and undoubtedly this offence can be committed by a man when the act itself is done not by him personally but by his servants. No intention is necessary under S. 12. 35 Bom. 55 and 32 Mad. 338, Dist. (*Baguley, J.*) KADAR SULTAN *v.* EMPEROR. **I.R. 1933 Rang. 25 (1) = 141 I.C. 685 = 34 Cr.L.J. 262 = 1933 Cr.C. 74 = A.I.R. 1933 Rang. 4 (1).**

PRIOR DECISION.

See C. P. CODE, S. 11.

PRIOR AND PUISNE MORTGAGE.

See (1) C. P. CODE, O. 34, R. 1.
(2) MORTGAGE—PRIOR AND SUBSEQUENT.
(3) T. P. ACT, SS. 74 AND 75.

PRIORITY.

See (1) DECREE.
(2) MORTGAGE.

PRISONS ACT (1894), S. 3.

(3) REGISTRATION ACT, SS. 47 AND 49.
(4) T. P. ACT, SS. 78 AND 79.

PRISONS ACT (IX OF 1894), Ss. 3 and 4—*"Criminal prisoner"—Approver ordered to be detained by Court—Custody.*

An approver is not a convicted prisoner but when his detention is ordered by a Court of law under S. 337 (3), Cr. P. Code, he comes within the category of "criminal prisoner" as defined in S. 3 (2) of the Prisons Act and S. 4 of that Act imposes upon the Local Government the duty of providing for prisoners' accommodation in prisons as ordained by that Act. (*Shadi Lal, C. J. and Abdul Qadir, J.*) KHAIRATI RAM, *In the matter of.* **12 Lah. 635=I.R. 1931 Lah. 615=132 I C 519=32 Cr.L.J. 913=32 P.L.R. 493=1931 Cr C. 700=A.I.R. 1931 Lah. 476.**

———**S. 40**—*Compliance by Superintendent of jail—Jurisdiction of court to decide.*

Courts under whose warrants under-trial prisoners are detained in jail or the High Court have no jurisdiction to go into the question, whether the Superintendent of the Jail has or has not disregarded or observed the provisions of S. 40. Under the Prisons Act the jurisdiction of the Court extends only to insistence on the due observance of the terms of the writ which it has issued in exercise of its legal powers. The prisoner, if he has any grievance, has to seek redress at the hands of the superior executive authority. (*Harrison and Addison, JJ.*) SUKH DEV RAJ *v.* EMPEROR. **14 Lah. 182=I R. 1932 Lah. 359 (2)=137 I C. 851=33 Cr L J. 531=33 P.L.R. 722=1932 Cr C. 516=A.I R. 1932 Lah. 390.**

———**S. 40**—*"Persons" mean "all persons".*

The word "persons" can only mean "all persons" or "any person" and not 'a certain class of persons." (*Harrison and Addison, JJ.*) SUKH DEV RAJ *v.* EMPEROR. **14 Lah. 182=I R. 1932 Lah 359 (2)=137 I.C 851=33 Cr L J. 531=33 P.L.R. 722=1932 Cr C. 516=A I.R. 1932 Lah. 390.**

PRISONERS ACT (III OF 1900)—*Rules—Under trial prisoner—Detention—Interference by Court when justified.*

Where a person is detained in prison he is of course subject to the provisions of the Prisons Act and the rules thereunder and if it is found that the action taken by the jail authorities is in conformity with the law the Court will have no power to interfere But if it is found that the action is not warranted by the Prisons Act or the rules thereunder the Court has the power to issue directions regarding the detention. The Court however will be slow to interfere in matters of jail administration and will do so only when the action of the jail authorities is found to be clearly illegal or unjustifiable and interference is necessary in the interests of justice. 50 Bom. 741, Ref. (*Bhide and Tapp, JJ.*) SUKH DEV RAJ *v* EMPEROR. **I.R. 1931 Lah. 731=133 I C. 59=32 P.L R. 586=32 Cr L.J. 988=1931 Cr.C. 850=A.I.R. 1931 Lah. 562.**

———**S 39**—Order for examination of witness in Court—Review. *See* CR. P. CODE, S. 561-A—REVIEW. **130 I.C. 538=11 Pat.L.T. 892=A.I.R. 1931 Pat 81.**

PRIVACY.

See (1) EASEMENT.
(2) EASEMENTS ACT (1882), SS. 18 AND 35.
(3) INJUNCTION.

PRIVATE AWARD. *See* C. P. CODE, SCH. II.

PRIVATE DEFENCE. *See* PENAL CODE, SS. 96—106, 300, EXCEPTION AND 302.

PRIVY COUNCIL APPEAL—Concurrent Findings.

PRIVATE LAND.

See (1) B. T. ACT, S. 116.
(2) MADRAS ESTATES LAND ACT, SS. 3 (10) AND 185.

PRIVATE TEMPLE. *See* HINDU LAW — RELIGIOUS ENDOWMENT—TEMPLE.

PRIVATE TRUST.

See (1) C. P. CODE, S 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) RELIGIOUS ENDOWMENT -PRIVATE TRUST.

PRIVIES.

See (1) C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES, S. 47—PARTIES AND REPRESENTATIVES.
(2) EVIDENCE ACT, S. 115—PARTIES AND PRIVIES.

PRIVILEGE.

See (1) EVIDENCE.
(2) EVIDENCE ACT, SS. 123-126.
(3) LEGAL PRACTITIONER.
(4) PENAL CODE, S. 499.
(5) TORT—DEFAMATION PRIVILEGE.

PRIVILEGED COMMUNICATION. *See* EVIDENCE ACT, S. 126.

PRIVILEGED DOCUMENT. *See* EVIDENCE ACT. SS. 123—126.

PRIVY COUNCIL APPEAL.

Concurrent findings.
Costs
Criminal cases.
Death of Party.
Differing of Decisions of.
Duty of High Court and lower Courts
Finding of fact.
Functions.
Judicial Committee Rules.
Jurisdiction.
Leave to appeal.
New Plea.
Practice.
Record.
Special leave to appeal.
Valuation.

Concurrent findings.

———*Concurrent findings—Burden heavy on appellants.*

A litigant who seeks before a second appellate tribunal (in this case the Privy Council) to reverse findings of fact which have been arrived at by the trial Judge and have, after consideration, been confirmed on appeal, comes always with a very heavy burden upon his shoulders. But when he is the principal witness in regard to the crucial facts, and has been crushingly discredited by the trial Judge, the weight of his burden is so great that few, if any could survive under it. (*Lord Russell of Killowen, J.*) MORINE *v.* LONDON LOAN ASSETS, LTD. **150 I.C. 226=40 L.W. 94=36 P L.R. 45=A.I.R. 1934 P.C. 127 (P.C.).**

———*Concurrent findings—Interference.*

Where there are concurrent findings of fact, and in addition, ample evidence to support them, the Privy Coucil as a general rule, will not interfere. (*Lord Atkin.*) OMETA *v.* CHIEF DORE NUMA. **156 I.C. 843 (1) (P.C.).**

———*Concurrent findings—Interference.*

The Board will not interfere with concurrent findings of fact based on ample evidence except on very special grounds. (*Lord Atkin.*) ROCHI RAM *v.* FAIZULLAH KHAN. **I R. 1933 P.C. 100=142 I.C. 549=37 C.W. N. 580=1933 M.W.N. 406=57 C.L.J. 273=1933**

PRIVY COUNCIL APPEAL—Concurrent findings.

A.L.J. 545=35 Bom.L.R. 745=37 L W. 746=A.I. R. 1933 P.C. 120=164 M.L.J. 596 (P.C.).

———*Concurrent findings—Interference.*

It is a general practice of the Judicial Committee not to interfere with the concurrent findings on facts of both the Courts in India. (*Sir Dinshah Mulla.*) U PO LEIN *v.* MA HNIN HLAING. **54 C.L.J. 425=136 I.C. 393= I.R. 1932 P.C. 89=A.I.R. 1931 P.C. 317=61 M.L.J. 898 (P.C.).**

———*Concurrent findings—Interference with.*

Concurrent findings of fact by the Courts in India will not be reviewed by the Privy Council. (*Lord Thankerton.*) HABIBULLAH KHAN *v.* SECRETARY OF STATE. **66 M.L.J. 147 (P.C.).**

———*Concurrent findings—Interference.*

On an issue of fact concurrent findings should be conclusive, unless where the enforcement of the rule would work obvious injustice, or the violation of some principle of law or procedure. The importance of the rule is to discourage bringing before this Board issues of fact in which the appellant has failed in two Courts. (*Lord Wright.*) JEHANGIR SHAPOORJI TARAPORE WALA *v.* SAVARKAR. **I.R 1932 P C. 255=138 I.C. 774= 9 O.W.N. 817=36 L W. 450=34 Bom L.R. 1609= 1933 A.L J. 321=17 R D. 392=A I.R. 1932 P.C. 231=63 M.L.J. 408 (P C.).**

———*Concurrent findings—Interference.*

In accordance with the usual practice in dealings with appeals of the Board, where there are two concurrent findings of fact, the Board will not here an appeal which suggests that those findings are wrong. But where the plaintiff appeared in person, evidently thoroughly believing in her case, the Board, as it thought that it was important, and in the interests of every body that the case should be fully heard, made a special exception in the plaintiff's favour and allowed her to open the case at length. (*Lord Atkin.*) FLORENCE A. DEEKS *v.* H. G WELLS. **I.R 1933 P.C 111=142 I C. 815= 1933 A L J. 393=37 L W. 314=A I.R. 1933 P C. 26=64 M.L.J. 193 (P.C.).**

———*Concurrent findings—Interference—Executor—Personal liability for improper sale by.*

Where both the Courts below, came to the conclusion that at the date of sale of certain properties, the executor had not incurred liabilities on behalf of the estate in respect of which he was entitled to an indemnity out of the assets of the estate, but that the liabilities were incurred in carrying on a business in breach of his duty as executor, and consequently held that he remained personally liable for them, without any right to indemnity, the Board refused in accordance with their practice, to disturb those concurrent findings. (*Lord Thankerton.*) ACHI THAVARAMMAL *v.* BALKIS NACHIAL. **I R 1931 P.C. 173=131 I.C 781=14 O L.J. 357=34 L. W. 740=8 O.W.N. 330=A.I.R. 1931 P.C. 68=61 M.L.J. 456 (P.C.).**

———*Concurrent findings—Interference—Finding of benami.*

The Privy Council is competent to go behind the concurrent findings of fact by the Courts in India that certain property standing in the name of a Hindu widow was held by her *benami* for her husband, when such findings have been arrived at upon a misconstruction of the relevant documents in the case. (*Lord Tomlin.*) SAILENDRA NATH DAS *v.* SAROJ KUMAR DAS. **154 I.C. 1092=1935 O.W.N. 477=1935 A.W.R. 524=39 C.W.N. 598=1935 A.L.J. 609=41 L.W. 669=61 C. L J. 154=1935 M.W.N 427=7 R.P.C. 169=A.I.R. 1935 P.C. 73=68 M.L.J. 559 (P.C.).**

PRIVY COUNCIL APPEAL—Criminal Cases.

———*Concurrent findings—Interference—Rule.*

Concurrent findings of fact will not be disturbed unless it is shown that there has been a miscarriage of justice or the violation of some principle of law or procedure. This does not necessarily imply that their Lordships make their findings their own, for almost *ex hypothesi*, they have not considered them in detail, but only that where matters of fact have been fairly tried by two local Courts, which are often in a better position to conclude upon them than this Board and the same conclusion has been reached by both, it is not in the public interest that the facts should again be examined in the ultimate Court of appeal. 27 I A. 166; 31 I.A. 127 and (1927) A.C. 515, Ref. (*Sir George Lowndes.*) SATGUR PRASAD *v.* HAR NARAIN DAS. **59 I.A. 147 =7 Luck. 64=I.R. 1932 P.C 60=136 I.C. 108=36 C.W.N. 461=1932 A.L.J. 297=9 O.W.N 196=1932 M W.N. 502=55 C L.J. 255=35 L W. 667=34 Bom L.R. 771=A.I.R. 1932 P.C 89=62 M.L.J. 451 (P.C.).**

———*Concurrent findings—What are.*

Where the High Court disregarded altogether evidence of a certain witness but recorded the same finding as the lower Court and there was ample other evidence both oral and documentary which was accepted and acted on by both Courts.

Held, that the finding of both the lower Courts was concurrent. (*Sir John Wallis.*) HOMESHWAR SINGH *v.* KAMESHWAR SINGH BAHADUR. **157 I.C 1=1935 O W.N 851=39 C.W N. 1130=16 Pat L.T. 571= 8 R.P.C. 18=42 L W. 286=37 Bom.L R. 800=1935 M W.N. 1139=A.I.R. 1935 P.C. 146=69 M.L.J. 335 (P.C.).**

Costs.

———*Costs—Interest on.*

The costs of the Privy Council do not carry interest, unless such interest is specially mentioned. (*Courtney Terrell, C.J. and Saunders, J.*) CHANDMAL MARWARI *v.* RAJA SHIBA PRASAD SINGH. **13 Pat. 21= 155 I C. 769=7 R.P. 622=15 P L.T. 513=A I.R. 1934 Pat. 192.**

———*Costs—Interference.*

It is every rarely that the Board interferes with the discretion of the appellate Court in India in the matter, merely of costs. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I A. 1 =I.R. 1932 P C. 81=136 I.C 385=6 Luck. 556= 1932 A.L.J. 663=36 C W N. 137=35 L.W. 118=8 O.W.N. 1378 62=C.L.J. 326=A.I R. 1932 P.C. 13= 62 M.L.J. 320 (P.C.).**

Criminal Cases.

———*Criminal Cases—Interference—Grounds.*

Their Lordships do not sit as a Court of criminal appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice. Grounds for invoking interference such as the meaning and effect of a section of the Evidence Act are merely points for a Court of criminal appeal and not for the Board. *Dillet's case*, (1887) 12 A. C. 459, Ref. (*Viscount Dunedin.*) MOHINDAR SINGH *v.* EMPEROR. **59 I.A. 233=13 Lah. 479=36 L W. 542=9 O.W.N. 914=33 P.L R. 873=140 I.C 290=34 Cr.L.J 18=56 C.L.J. 593= I.R. 1932 P.C. 337 (1)= 1932 Cr. C. 776=A.I.R. 1932 P.C. 234=64 M.L J. 77 (P.C.).**

———Criminal cases—Interference—Order for retrial without jury, of case originally heard by jury. *See* CR. CODE, S. 423 (*b*) (2). **69 M.L.J. 128 (P.C.).**

———*Criminal cases—Jurisdiction—Objection going to root of.*

PRIVY COUNCIL APPEAL—Death of Party.

Where the objection if well-founded, would go to the root of the jurisdiction, the case does not fall within the strict rule that the Board does not and will not act as a tribunal of criminal appeal. (*Viscount Dunedin.*) BHAGAT SINGH *v.* EMPEROR. **58 I. A. 169=12 Lah 280=33 Bom.L.R. 950=35 C.W.N. 646=I. R. 1931 P.C. 143=32 Cr.L.J. 727=34 L.W. 57=14 O.L.J. 540=32 P.L.R. 658=131 I.C. 415=53 C.L.J. 383=8 O.W.N. 846=1931 A.L.J. 448=1931 M.W.N. 601=1931 Cr. C. 521=A.I.R. 1931 P.C. 111=61 M.L.J. 279 (P.C.).**

Death of Party.

———*Death of party of prior to hearing—Validity of decree.*

The fact that one of the parties in the appeal to the Privy Council died before the appeal was heard and his legal representatives had not been brought on the record does not make the decree of the Privy Council a nullity owing to the special provisions of S. 23 of St. III & Will. IV, C. 41. 5 Pat. L. T. 314; 1 P.L.T. 426; 47 Mad. 618 and 103 I. C. 618, Foll (*Wort and Fazl Als, JJ.*) SRI CHANDRA CHUR DEO *v.* MT. SHYAM KUMARI. **11 Pat. 445=I.R. 1932 Pat. 229=139 I. C. 397=13 Pat. L.T. 719=A.I.R. 1932 Pat. 261.**

Differing Decisions of Lower Courts.

———*Differing decisions of lower Courts—Appreciation of evidence—Opinion of appellate Court.*

Where a person's evidence was taken on commission, the first appellate Court is in at least as good a position to appreciate its credibility as the trial Judge, and the Privy Council would naturally attach the greater weight to the former's estimate. (*Sir George Lowndes.*) MAHOMED SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM. **59 I.A 1=I.R. 1932 P.C. 81=6 Luck. 556=1932 A.L.J. 663=36 C.W.N. 137=136 I.C. 385=35 L.W. 118=62 C.L.J. 326=8 O.W.N. 1378=A.I.R. 1932 P.C. 13=62 M.L.J. 320 (P.C.).**

Duty of High Court.

———*Duty of High Court—Recording opinions on all points.*

In an appealable case though the decision on any issue may be sufficient for the disposal of the case it is nevertheless the duty of the Courts in India to pronounce their opinion on all the other important points raised before them to obviate the inconvenience and expense of a remand by the Privy Council. (*Sir George Lowndes.*) JAGANNATH RAO DANI *v.* RAMBHAROSA. **60 I.A. 49=I. R. 1933 P.C. 24=141 I.C. 520 (2)=37 C.W.N. 321=1933 M.W.N. 117=16 N.L.J. 50=35 Bom.L.R. 230=37 L.W. 349=57 C.L.J. 51=1933 A.L.J. 486=29 N.L.R. 94=A.I.R. 1933 P.C. 33=64 M.L.J 142 (P.C.).**

Finding of Fact.

———*Finding of fact.*

Finding of fact which are binding on the High Court in second appeal are equally binding on their Lordships of the Judicial Committee. (*Lord Russell of Killowen.*) SHAM SUNDER KUER *v.* QASIMAN. **8 O.W.N. 920=36 C.W.N. 7 (P.C.).**

———*Finding of fact—Decision of trial Judge based on inadmissible evidence—Value of.*

The importance of the fact that the trial Judge saw the witnesses and heard them give their evidence is greatly diminished if it is found that his decision in material respects is based on inadmissible evidence. (*Sir Lancelot Sanderson.*) BHARAT SPINNING AND WEAVING CO. *v.* MANILAL LALLUBHAI. **157 I.C. 4=7 R.P.C. 14=1935 O.W.N. 863=1935 M.W.N. 1182=37 Bom.L.R. 826=A.I.R. 1935 P.C. 175=69 M.L.J. 433 (P.C).**

PRIVY COUNCIL APPEAL—Judicial Committee Rules.

———*Finding of fact—Judges of High Court acquainted with Hindu mode of life—Findings of—Value of—Contrary medical opinion.*

Where two Judges of the High Court, who from their intimate acquaintance of Hindu modes of life were in a better position than their Lordships of the Privy Council to draw proper inferences as to matters of conduct arising in the case, had given separate, but concurring judgments for holding a fact proved by reliable evidence and inferences arising from conduct, their Lordships of the Privy Council refused, in spite of the expert medical opinion, possibly influenced by all sorts of unproved allegations, to interfere. (*Sir John Wallis.*) RAJKUMAR SEN CHOWDHURY *v.* RAM SUNDAR SAHA. **I.R. 1932 P.C. 54=136 I.C. 102=1932 A.L.J. 198=55 C L.J. 120=35 L.W. 409=1932 M.W.N. 584=34 Bom. L. R. 526=A.I.R. 1932 P.C. 69=62 M.L J. 457 (P.C.).**

———*Finding of fact—Maintainability of appeal.*

Where the result of an appeal to the Privy Council depends upon questions of fact which have been found against the appellant by the High Court and it is not shown that the findings should be displaced, the appellant cannot maintain successfully his appeal. (*Lord Blanesburgh.*) SAMPAT KUMAR SINGH *v.* PETERS. **153 I C. 519=41 L.W. 159=7 R.P.C 117=11 O.W. N. 1367=1935 A.W.R. 86=37 P L.R. 55=61 C.L. J. 53=A.I.R. 1935 P.C 8=68 M.L J. 390 (P.C.).**

———*Finding of fact—Record of evidence meagre.*

Where the oral evidence on the point at issue is very little and the only record of the oral evidence is a copy of the Judge's note showing only the combined result of question and answer containing no indication as to how far the words recorded represent the phraseology of the witness or the phraseology of counsel, their Lordships would be even more disinclined than is usual to review the findings of fact of a Judge who has heard and observed the witnesses, even if they thought that the oral evidence might have justified a different view. (*Lord Russell of Killowen*) MAHOMED NOORDIN *v.* ABDUL KAREEM & CO. **I R. 1931 P.C. 305=134 I.C. 657=A.I.R. 1931 P.C. 272 (P.C).**

Functions.

———*Functions—Drafting of laws.*

The Board certainly has no desire, nor do they conceive it to be part of their function to act a draftsman for Canadian Acts of Parliament. The Canadian Parliamentary draftsmen are far more familiar with Canadian legislation than this Board is, and their Lordships cannot conceive it to be the wish of anybody that Acts of Parliament passed by the Senate and Commons of Canada should be referred wholesale to this Board in order to determine withoht reference to particular facts whether or not it was competent for Parliament to pass upon the hundred and one matters for which they have legislated. (*Lord Chancellor.*) ATTORNEY GENEERAL OF CANADA *v.* ATTORNEY GENERAL OF ONTARIO. **I.R 1932 P.C. 34=135 I.C. 754=A.I.R. 1932 P.C. 36 (P.C.).**

Judicial Committee Rules.

———*Judicial Committee Rules—Judicial Committee Rules, 1920, R. 9—Effect—Extension of time for furnishing security.*

R. 9 of the new Judicial Committee Rules, 1920, has reference only to the procedure in O. 45, R. 7. It does not confer on the High Court an unqualified power to extend the time. (*Beasley, C. J. and Curgenven, J.*) POORNANTHACHI *v.* GOPALASWAMI ODAYAR. **55 Mad. 835 I.R. 1932 Mad. 604=138 I.C. 663 1932 M.W.N 557=35 L.W. 679=A.I.R. 1932 Mad. 484=62 M.L.J. 665.**

PRIVY COUNCIL APPEAL—Jurisdiction.

Jurisdiction.

———*Jurisdiction—Appeals from Ireland.*

The Privy Council has jurisdiction to hear an appeal from a decision by the Supreme Court of Irish Free State. (*Saorstat Eireann*). Case law referred. (*Lord Chancellor.*) PERFORMING RIGHT SOCIETY, LTD *v.* URBAN DISTRICT COUNCIL OF BRAY. **124 I C. 894 =32 P.L R 20=I.R. 1930 P.C. 270=1930 A.C. 377 =99 L.J.P.C. 116=A.I.R 1930 P.C. 314 (P.C.).**

———*Jurisdiction—Interference with—Valuation of loss insured against.*

Where the verdict of the jury as to valuation of quantum of loss insured against under a policy of use and occupation insurance is challenged, the only question that their Lordships of the Privy Council will consider is, not whether they would adopt the view of the jury if the decision rested with them, but whether there was evidence before the jury upon which, not improperly, they could reach the conclusion at which they arrived. (*Lord Blanesburgh.*) MOUNT ROYAL ASSURANCE CO. *v.* CAMERON LUMBER CO., LTD. **7 R.P.C. 77=151 I.C. 600=40 L.W. 180=A.I.R. 1934 P.C. 196 (P.C.).**

Leave to appeal.

———*Leave to appeal—Criminal cases.*

His Majesty in Council under the royal prerogative has the right to entertain appeals from criminal judgments in any part of His Majesty's dominions and it is the right of the subject aggrieved by a conviction and sentence to approach His Majesty in Council with a view to his case being heard. But it is a different question whether the High Court has, in the circumstances of a criminal appellate decision, the right or power to certify the matter as a fit one. The jurisdiction to grant leave is limited by the Letters Patent (*Courtney Terrell, C. J. and Agarwala, J.*) RAHMAN *v.* EMPEROR. **14 Pat. 318=155 I.C. 577=7 R.P. 598=36 Cr.L J. 815=15 P.L.T. 833=A.I.R. 1935 Pat. 66.**

———*Leave to appeal—Criminal cases—Admissibility of evidence.*

Where a question was raised as to the admissibility in evidence of certain statements made by the accused while in police custody but there was other evidence apart of the statements objected to, to support the conviction.

Held, that leave to appeal to the Privy Council should be refused (*Cornish, Burn and Lakshmana Rao, JJ.*) RAMANUJA AIYANGAR *v.* EMPEROR. **159 I C. 240= 1935 M.W.N. 5=42 L.W. 140=8 R.M. 476=37 Cr. L J. 64=1935 Cr C. 1049=A I.R. 1935 Mad. 793= 68 M.L.J. (Supp) 93 (F.B).**

New Plea.

———*New plea.*

An unsuccessful defendant cannot, in appeal to the Privy Council, raise for the first time an entirely new plea that the plaintiff had no cause of action, especially when the point was not taken by him in his written statement, nor urged or considered in the Courts in India. (*Lord Russell of Killowen.*) SECRETARY OF STATE *v.* PARASHRAM MADHAVRAO. **61 I.A. 190= 58 Bom. 306=6 R.P.C. 137=148 I.C. 796=3 A.W. R. 663=1934 A.L J. 438=38 C.W.N. 568=39 L.W. 748=1934 M.W.N. 437=36 Bom.L R. 551=59 C. L.J. 282=A.I.R. 1934 P.C. 108=66 M.L.J. 614 (P.C.).**

———*New plea.*

An appellant cannot be allowed to raise a point without any pleadings and without any evidence before the Board. (*Lord Thankerton.*) VENKATACHANDIKAMBA *v.* VISWANATHAMAYYA. **I.R. 1933 P.C. 126=143 I. C. 32=37 L.W. 622=37 C.W.N. 688=1933 M.W.N. 1384=A.I.R. 1933 P.C. 117=64 M.L.J. 513 (P.C.).**

PRIVY COUNCIL APPEAL—New plea.

———*New plea.*

A point not taken in either of the Courts below, nor forming a ground of appeal before the Privy Council cannot be raised for the first time at the hearing of appeal before the Privy Council, whatever its value might be as a legal proposition. (*Sir Dinshah Mulla.*) KARIM BAKHSH *v.* DARGAH PIR RATTAN NATH. **I. R. 1931 P.C. 264=133 I.C. 728=35 C.W.N. 1221=8 O.W.N. 994=A.I.R. 1931 P.C. 243 (P.C.).**

———*New plea—Claim for proportionate rent—Allowing—Terms.*

A suit by a lessor for rent was dismissed by the High Court on the finding that the lessee had failed to obtain possession of the whole of the leased properties. In appeal before the Board the lessor claimed of rent proportionate to the area of which his lessee obtained possession.

Held, that though this case for an abated rent should have been raised and investigated along with the other questions in the case, it would be an injustice, if the appellant is prepared to submit to the penalties of his failure to raise it earlier, that the respondent should escape from payment of rent in respect of the possession which he could alone attribute to the kabuliyat. (*Lord Thankerton.*) JOGESH CHANDRA ROY *v.* EMDAD MEAH. **59 I.A. 29=I.R. 1932 P.C. 94=59 Cal. 1012 =136 I.C. 398=36 C.W.N. 221=35 L.W. 112=9 O. W.N. 119=16 R.D. 95=55 C.L J. 72=13 L.R. 271 (Rev.)=59 Cal. 1012=1932 M.W.N. 275=34 Bom. L.R. 481=A.I.R. 1932 P.C. 28=62 M.L J. 336 (P.C.).**

———*New plea—Different case—Sustainability*

Where the appellant before the Board set up a plea of sale before the lower Courts and the same having been found against contended before the Board that the transaction was one of gift.

Held, that the plea sought to be raised depended on further facts and could not be permitted to be raised. (*Lord Thankerton.*) SULTAN BEGAM *v.* QAMAR ARA BEGUM. **I.R. 1933 P.C. 150=143 I.C. 209=57 C.L. J. 459=10 O.W.N. 889=38 L.W. 296=A.I.R. 1933 P.C 164=65 M.L.J. 131 (P.C.).**

———*New plea—Issue raised and evidence led—But not pressed in both Courts.*

Where a plea of estoppel by judgment though not raised in the plaint, was raised in the written statement of some of the defendants who were in the same interest as the plaintiffs, a specific issue was raised and evidence led on it but the issue was not pressed in the first Court and was abandoned in the High Court, there is no reason why it should not be allowed to be raised again in further appeal before the Board. (*Sir Dinshah Mulla.*) KISHUN PRASAD PANDEY *v.* DURGA PRASAD THAKUR. **35 C.W.N. 1217=8 O.W.N. 973=I.R. 1931 P.C. 257=133 I.C. 721=34 L.W. 439=A.I.R. 1931 P.C. 231=61 M.L J. 415 (P.C.).**

———*New plea—Late stage—Injury to opponent.*

An objection to the maintainability of an application on the ground that a suit was the proper remedy cannot be allowed for the first time before the Board, when the point had not been raised in India or in the printed case before the Board having regard to the fact that if the objection were to prevail, the other party would be barred by lapse of time from enforcing his proper remedy. (*Lord Tomlin.*) RAGHUNANDAN PRASAD SINGH *v.* KIRTYANAND SINGH BAHADUR. **36 C.W. N 701=55 C.L.J. 413=36 L.W. 111=I.R. 1932 P. C. 133=136 I.C. 629=14 Pat.L.T. 273=A.I.R. 1932 P.C. 131=63 M.L.J. 85 (P.C.).**

———*New plea—Question of fraud—Plea of fraud under S. 18 of the Limitation Act.*

PRIVY COUNCIL APPEAL—New plea.

In view of O. 7, R. 6, C. P. Code, a plaintiff cannot for the first time in appeal before the Privy Council rely on S. 18 of the Limitation Act and contend that by reason of the defendant's fraud, the suit was not time-barred, when no exemption on the ground of fraud was claimed in the plaint, nor was there any proof of the alleged fraud, or of the date when it became known to the plaintiff. (*Sir Shadi Lal.*) KALVAN MAL *v.* AHMAD UDDIN KHAN. **151 I.C. 45=7 R.P.C 54=40 L.W. 415=1934 A.L.J 909=38 C.W.N. 1157=60 C.L.J. 128=36 Bom.L.R. 981=1934 M.W.N. 976=4 A.W.R. 353=11 O.W.N. 1081=A.I.R. 1934 P C. 208=67 M L J 361 (P.C).**

———*New plea—Question of law—Facts disputed.*

A question of law relating to the admissibility of a document by reason of non-registration cannot for the first time be allowed to be raised before the Board when the plea cannot be disposed of without deciding nice questions of fact on which the evidence is not clear and the parties are at variance. (1892) A C. 437, Applied. (*Lord Tomlin.*) OFFICIAL LIQUIDATOR OF MOOLLA SONS, LTD. *v.* PERRIN R. BURJORJEE **59 I.A. 161=10 Rang. 242=34 Bom.L.R 1021=1932 A.L.J. 706=1932 M W.N. 680=36 L.W. 75=9 O.W.N. 930=I.R. 1932 P.C. 151=55 C.L J. 362=36 C.W.N. 677=136 I.C. 737=A.I.R. 1932 P.C. 118=63 M.L. J. 131 (P.C.).**

———*New plea—Question of law—Question as to right of trial Court to review—Point not pressed in Courts in India.*

The question as to the right of the trial Court to review its judgment is a pure question of law. Although the appellants do not seem to have insisted upon this question in the Courts in India though it was included in the memorandum of appeal to the High Court, their Lordships are bound to consider the question, if it has been clearly raised in the appeal to His Majesty in Council and no new evidence is necessary to enable them to dispose of the matter. (*Sir Lancelot Sanderson.*) BISHESHWAR PRATAP SAHI *v.* PARATH NATH. **61 I A. 378=56 All. 634=36 P.L.R. 305=36 Bom. L R. 1179=39 C W.N. 1=60 C.L.J. 267=15 P.L T. 763=7 R P.C. 43=151 I.C. 41=11 O. W. N. 1084=40 L.W. 383=1934 A.L J. 919=1934 M.W.N. 1005 (2)=4 A.W.R. 358=A.I.R. 1934 P.C. 213=67 M. L.J. 608 (P.C.).**

———*New plea—Specific allegations not made out—New plea that negligence is presumed in circumstances of case.*

Where the case was based on specific allegations of negligence which were not made out and then a new plea that negligence is presumed in the circumstances of the case was raised in appeal, which plea was not raised in the pleadings nor at the trial nor was there any trace of it in he judgments of the lower Courts.

Held, that the plea could not be allowed to be raised. (*Lord Atkin.*) 'PHILIP T. DODGE' *v.* DOMINION BRIDGE CO. **159 I.C. 713=8 R.P.C. 117=A.I.R. 1935 P.C. 212 (P.C.).**

Practice.

———*Practice—Abandoned point—Party abandoning or not raising certain defence in High Court—Grant of leave to raise such defence.*

Where a party has not raised certain defence in the High Court or has abandoned it, the Privy Council grants leave to raise such defence before it only in exceptional cases, and there is no distinction in principle between the position of an appellant who abandons in the High Court a ground of appeal of which he had given notice and the position of a respondent in the High Court who does not raise a point in his favour which was open to him without notice. It is quite true that it would be open to the Board on proper terms to refer to the High Court this question for their consideration. But even that the Board would not do except under special circumstances. (*Lord Blanesburgh.*) FANNY SKINNER *v.* BANK OF UPPER INDIA, LTD. **62 I.A. 115=57 All.314=1935 O.W.N. 711=42 L.W. 172=37 Bom L.R 625=61 C.L.J. 477=1935 M.W N. 726=155 I C. 743=7 R.P C. 214=39 C.W.N.834=A. I.R. 1935 P.C. 108=69 M. L.J. 158 (P.C.).**

———*Practice—Amount of alimony.*

Questions relating to the amount of alimony or maintenance, being matters with which the Courts in India are better qualified to deal, will not be interfered with by the Board. (*Lord Russell of Killowen.*) ISWARAYYA *v.* SWARNAM ISWARAYYA. **58 I A. 350=54 Mad. 774=1931 A.L.J. 808=35 C W.N. 1185=8 O W.N. 980=I.R. 1931 P C 252=133 I C. 716=34 L W. 518=33 Bom L.R. 1402=A.I.R. 1931 P.C. 234=61 M. L.J. 367 (P.C.).**

———*Practice—Compromise after leave granted—Power of High Court.*

Where after the grant of leave to appeal to the Privy Council the parties compromised the suit and applied to the High Court to pass a decree in terms of the compromise,

Held, that the High Court had no power to do so, as it would supersede the first decree. (*Murphy and Nanavati, JJ.*) GURURAO *v.* RAMACHANDRA. **57 Bom. 369=6 I.R. (Bom.) 74=145 I.C. 286=35 Bom.L.R. 413=A.I.R. 1933 Bom. 244.**

———*Practice—Consent decree—Appeal incompetent.*

A judgment and decree by consent of parties cannot be challenged by way of appeal to the Privy Council. (*Sir George Lowndes.*) ZAHIRUL SAID ALVI *v.* SETH LACHMI NARAYAN. **27 N.L. J. 136=33 L.W. 723=131 I C. 316=35 C.W.N. 612=I R 1931 P.C. 124=14 N.L.J. 71=33 Bom.L R. 925=1931 M.W.N. 748=A.I.R. 1931 P.C. 107=60 M.L.J. 648 (P.C.).**

———*Practice—Consent decree—Denial of consent by appellant—Interference by Privy Council—Procedure—Remission—Court for enquiry and report.*

It is incumbent on the party alleging that there had in fact been no consent to the judgment and that the statement to that effect was a mistake, to take the necessary steps in India to rectify the mistake. Where the judgment contains a statement to the effect that it was passed by consent of parties, the Privy Council will not, in ordinary circumstances, hesitate to take the statements contained in the judgment as correct and will refuse summarily an application stating that such a statement is a mistake. But the circumstances of the present case were peculiar. It appeared that, the appeal, after a partial hearing, was adjourned "as there is a chance of compromise". The compromise broke down and the formal decree which was subsequently drawn up recited only the previous hearing of the case and not any consent of parties and proceeded to set aside the decree of the lower Court. At the time of hearing, the appellant stated in an affidavit that the statement in the judgment to the effect that it was by consent was not correct. Under these circumstances, their Lordships remitted the case to the lower Court in India for enquiry and report on the factum of consent. (*Sir George Lowndes.*) ZAHIRUL SAID ALVI *v.* SETH LACHMI NARAYAN. **33 L.W. 723=131 I.C. 316=35 C.W.N. 612=27 N.L. R. 139=I R. 1931 P.C. 124=14 N.L J. 71=33 Bom. L.R 925=1931 M.W.N. 748=A.I.R. 1931 P.C. 107=60 M.L. J. 648 (P.C.).**

PRIVY COUNCIL APPEAL—Practice.

———*Practice—Custom—Concurrent findings—Exclusion of women from inheritance—Interference by Privy Council.*

The question whether by custom women are excluded from inheritance is one of fact, and the Privy Council will not interfere with the concurrent findings of the Courts in India negativing such a custom. (*Lord Tomlin.*) MANGAL SINGH *v.* MT. SIDHAN KUNWAR. **154 I.C. 977=1935 A.W.R. 552 (2)=7 R.P.C. 155=37 P.L.R. 264=1935 O.W.N. 431=A.I.R. 1935 P.C. 71 =68 M.L.J. 448 (P.C.)**

———*Practice — Custom— Decisions based on local customs—Interference.*

Decisions based on local law and custom arrived at by local Courts familiar with such laws and customs are of great weight and should not be interfered with. (*Lord Tomlin.*) NANA KWAKU AMOH *v.* NANA SIR OFORI ATTA. **I.R. 1933 P.C 131=143 I.C. 147=37 L W. 401=A.I.R. 1933 P.C. 46 (P.C.).**

———*Practice—Decision under taxation rules—All available evidence to be on record.*

The Privy Council is reluctant to come to any conclusion which would involve the voidance of taxation which has been in operation for many years, without first ensuring that all the available evidence had been placed before the Court as the public interest is concerned in this matter. (*Lord Thankerton.*) RADHA KISHAN JAI KISHAN *v.* MUNICIPAL COMMITTEE, KHANDWA. **61 I.A. 125=39 L W. 739=30 N L R. 121=1931 M.W. N. 546=38 C.W.N. 1073—6 R P C. 90=11 O W N. 291=147 I.C. 894=A I.R. 1934 P.C 62=66 M L.J. 551 (P.C.).**

———*Practice—Duplication of appeals—Two appeals in the same case by the same party from the decisions of different benches—Undesirability.*

It is anomalous that there should be two appeals proceeding at the same time to the Privy Council, one from the lower Court and one from the higher Court which had already varied the order of the lower Court. Such an anomaly should in some manner be avoided. (*Lord Atkin*) JATINDRA NATH CHOWDHURY *v.* UDAY KUMAR DAS **58 I.A 141=58 Cal. 1281=I. R. 1931 P.C. 117=34 L W 356=33 Bom L R. 940= 35 C W.N. 583=1931 M W.N. 620=131 I.C. 309= A.I R 1931 P C. 104=61 M.L J. 47 (P.C.)**

———*Practice—Land acquisition case—Compensation —Interference with.*

The Board will not review the decree of an Indian Appellate Court in land acquisition proceedings merely upon questions of value, unless the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied. 48 M.L.J. 386 (P C.), Foll. (*Lord Russell of Killowen.*) PRAG NARAIN *v.* COLLECTOR OF AGRA. **59 I.A. 155=54 All. 286=34 Bom.L R. 885=35 L.W. 812 =1932 M W.N. 758=1932 A L J. 741=I.R. 1932 P. C. 113=136 I C. 449=9 O.W.N. 423=36 C W N. 579=55 C L.J. 318=A.I.R. 1932 P.C. 102=62 M.L. J. 682 (P.C.).**

———*Practice—Order in Council—Alteration of—Jurisdiction.*

The Board has undoubted jurisdiction to recommend the alteration of a former order in Council on the ground that by inadvertence, it does not give effect to the intention of the Board as expressed in their judgment. (*Lord Atkin.*) JATINDRA NATH CHOWDHURY *v.* UDAY KUMAR DAS. **58 I.A. 141=58 Cal. 1281=35 C W.N 583=131 I.C. 309=1931 M W.N. 620=I.R. 1931 P.C. 117=33 Bom. L.R. 940=34 L.W. 356= A.I.R. 1931 P.C. 104=61 M.L.J. 47 (P.C.).**

PRIVY COUNCIL APPEAL—Record.

———*Practice—Order in Council—Conformity with judgment.*

"It is the duty of their Lordships to see that the order which His Majesty makes in Council faithfully represents the advice which in the judgment they have said they would humbly tender to him". 50 M. L. J. 1181 (P. C.), Foll. (*Lord Thankerton.*) HARADAS ACHARYA *v.* SECRETARY OF STATE FOR INDIA **127 I.C. 533=I.R. 1930 P.C. 341=33 L.W 14=35 C.W. N. 117 (P.C.).**

———*Practice—Pleadings—Construction—Fair notice of case given.*

Their Lordships of the Privy Council will be disinclined to stress the structure of the pleadings in a suit too strickly, if fair notice of the case to be made by the plaintiff has been given, and issue has been joined on an enquiry but faintly adumbrated in the pleadings. *McLean* v. *Mckay.* 5 P. C. 357, Ref. (*Lord Alness.*) SOMESHWAR DUTT *v.* TRIBHAWAN DUTT. **61 I.A. 224=9 Luck. 178=38 C W N. 806=40 L W. 5=Cr. L J 454=36 Bom.L.R. 652=1933 A.L J. 585=6 R P.C 151=149 I.C. 484=3 A.W.R. 865=1934 M. W N. 647=11 O W.N. 784=A.I.R. 1934 P.C. 130= 67 M.L.J. 7 (P.C).**

———*Practice—Restricted leave—Grant of leave on point of area of land for which compensation is due—Question of quantum not open to appeal—Former question depending on latter—Effect on maintainability of appeal.*

In a suit of damages caused to land flooded special leave to appeal was granted by His Majesty in Council on the single point of principle as to what was the area for which compensation should be assessed and the question of quantum was not allowed to be discussed at all at the hearing of the application for leave to appeal. But on dealing with the judgment of the lower Court it was found that the point on which leave was granted could not be determined without determining the question of quantum.

Held, there was nothing further to be discussed at all, as no question arose under the leave to appeal as granted and consequently the appeal should be dismissed. (*Lord Atkin.*) R. TREMBLAY *v.* DUKE PRINCE POWER CO. LTD. **162 I.C. 982=8 R.P C. 300=A.I.R. 1935 P.C. 197 (P C.).**

———*Practice—Solicitors costs—Right to proceed against deposit in High Court—Matter, if need be referred to trial Court.*

In a Privy Council appeal, the solicitors of the respondent in England, can apply to the High Court in India, to be allowed to stand in the shoes of their clients and to have an order for payment to them, of the amount kept in deposit in the High Court. In such a case it is not necessary that the application should be sent down to the trial Court. (*Rankin, C. J. and Graham, J.*) BIKRAM KISHORE MANIKYA *v.* ALI AHMAD. **58 Cal. 1034=134 I.C. 1071 (1)=A.I.R. 1931 Cal. 734 (1).**

Record.

———*Record—Necessary documents—Selection—Duty of solicitors.*

Unnecessary documents should not be included in the books printed for the appeal to the Privy Council. It is the duty of the solicitors to make a selection of the necessary documents. The other papers should be ready at hand in case they should be required. In cases of doubt the solicitor should take the advise of Counsel on this point. (*Sir Shadi Lal.*) EJAZ ALI QUIDWAI *v.* SPECIAL MANAGER, COURT OF WARDS BALRAMPUR ESTATE **1935 A.W.R. 258=154 I.C. 27=7 R.P.C.**

PRIVY COUNCIL APPEAL—Record.

138=41 L.W. 242=61 C.L.J. 102=1935 A.L.J. 744 =1935 O.W.N. 178=A.I.R. 1935 P C. 53=68 M.L.J. 397 (P.C.).

———*Record —Preparation of —Ambiguous vernacular words.*

Where there is a controversy as to the meaning of such words as 'hukmi', 'malguzari', 'jama' and the like which may mean 'rent or revenue' it is desirable that the word used in the vernacular should be inserted in brackets after the English rendering, so as to assist the Court in determining which meaning is applicable in the particular case. (*Sir John Wallis.*) CHARU CHANDRA GHOSE *v.* KUMAR KAMAKHYA NARAIN SINGH. **58 I.A. 17=10 Pat. 284=I.R. 1931 P.C. 76=1931 M.W.N. 65=33 L W. 121=130 I.C. 620=12 Pat L.T. 337=52 C.L.J. 512=35 C.W.N. 201=A I.R. 1931 P C. 5=60 M.L.J. 245 (P.C.).**

———*Record—Rejected evidence—If can be included.*

It is not the practice, and a party cannot be permitted to include in the record of an appeal to the Privy Council documents and statements tendered as evidence which have not been duly proved or admitted and which are clearly inadmissible. (*Page, C. J. and Mya Bu, J.*) KARAPAYA SERVAI *v.* MAYANDI. **147 I.C. 414=6 R.R. 164=A.I.R. 1933 Rang. 212.**

———*Record—Report as to valuation under O.* 45, *R.* 5, *C. P. Code*

When a question as to the value of the subject-matter of the suit is raised in India and when a report with reference to value has been made under O. 45, R. 5, C. P. Code, it is desirable that full information with references to the proceedings be included in the Pirvy Council record. (*Lord Blanesburgh*) ANUP MAHTO *v.* MITA DASADH. **60 I.A. 366=12 Pat. 679=6 I.R. (P.C.) 32 =146 I.C. 815=14 Pat. L.T. 725=A.I.R. 1933 P.C. 232 (P.C.).**

Special leave to appeal.

———*Special leave to appeal—Irregular procedure—No miscarriage of justice.*

The procedure to be followed in proceedings under Art. 8 of the (Allahabad) Letters Patent is left to the discretion of the Court. But if is highly undesirable that when charges of perjury and champerty are made against a pleader, those charges should be tried by the Judges who had previously heard the case out of which the charges arose. But if this procedure does not involve miscarriage of justice, special leave to appeal cannot be granted. (*Lord Macmillan.*) A PLEADER *v.* JUDGES ON THE ALLAHABAD HIGH COURT. **58 I.A. 152=53 All. 183=I.R. 1931 P.C. 192=132 I.C. 608=33 Bom. L.R. 945=34 L.W. 59=35 C.W.N. 640=53 C. L. J. 405=1931 M. W. N. 603=1931 A.L.J. 450=1931 Cr. C. 519=A.I.R. 1931 P.C. 112=61 M. L. J. 130 (P.C.).**

———*Special leave to appeal—Question of law.*

Special leave can be granted where the petitioner has an arguable case on a question of law. (*Lord Atkin.*) MAHARAJ KUMAR SRINIVASA PRASAD SINGH *v.* KESHAVA PARASAD SINGH. **57 Cal. L.J. 335 (P.C).**

———*Special leave to appeal—Refusal.*

The ordinary criterion applicable to all petitions to His Majesty in Council for special leave to appeal is that leave will not be granted where upon the face of the application it is plain that on the merits it is bound to fail. (*Viscount Dunedin.*) BHAGAT SINGH *v.* EMPEROR. **58 I A. 169= 12 Lah. 280=35 C.W.N. 646=I.R. 1931 P.C. 143 =33 Bom L.R. 950=32 Cr. L.J. 727=131 I.C. 415=53 C.L.J. 383=32 P. L. R. 658=8 O.W.N. 846=1931 A.L.J. 448=34 L.W. 57 =14 O.L J. 540=1931 M.W N. 601=1931 Cr.C. 521 =A.I.R. 1931 P.C. 111=61 M.L.J. 279 (P.C.).**

PROBATE AND ADMN. ACT (1881), S. 62.

Valuation.

———*Valuation—Change of—If party can go back on.*

It cannot be disputed that a party who has previously made valuation of a suit or appeal for the purposes of Court-fees is not always precluded from adopting for his proposed appeal a higher valuation as representing the actual or market value of the claim made in the suit. But in a case in which the plaintiff, having a wide discretion in the matter, had to value his claim at its actual or market value and did value it in his plaint in a particular way, he cannot later on be allowed to show that such value did not represent the real value, and to adopt for purposes of an appeal to the Privy Council, a different or higher valuation. (*Mukherji and S.K. Ghose, JJ.*) HAJI HAFEZ MAHOMED HOSSIAN KHAN *v.* MANSUR ALI MIA. **59 C.L.J. 448=153 I.C. 366= 7 R.C. 369=38 C.W.N. 751=A.I.R. 1934 Cal. 809.**

PROBATE—Application by wife after husband's death —Shares in joint names of husband and wife—No Court-fee payable on the value of the shares. *See* HUSBAND AND WIFE. **9 Luck. 370=A.I R 1934 Oudh 72.**

———Application for—Onus. *See* WILL—PROOF OF.

PROBATE AND ADMINISTRATION ACT (V OF 1881), Ss. 4, 12 and 90—*Hindu will in the mofussil—Executor—Vesting of estate—Date of—Probate not obtained—Title of executor derived from will and not from grant of probate.*

The executor of a Hindu will made in the mofussil and not governed by the Hindu Wills Act, 1870, has the estate of the deceased testator vested in him, by virtue of S. 4 of the P. and A. Act, as from the date of the death of the testator and he has all the powers conferred on an executor by the latter Act although he has not taken out probate of the will. Neither the vesting under S. 4 nor the power of disposal under S. 90 of the Act, is dependent upon the grant of probate. In India, as in England, the title of an executor is derived from the will, and not from probate, though it is probate alone which (under S. 12) authenticates his right and dispenses with proof of the execution of the will. (*Sir George Lowndes.*) VENKATASUBBAMMA *v.* RAMAYYA. **59 I.A. 112=55 Mad. 443=I.R. 1932 P.C. 63=136 I C. 111=1932 A. L.J. 293=35 L W. 532=1932 M.W.N. 486=55 C.L. J. 263=34 Bom.L.R. 764=36 C.W.N. 441=9 O.W. N. 201=A.I.R. 1932 P.C. 92=62 M.L.J. 365 (P C.).**

———**S. 12**—*Scope and object of.*

The object of S. 12 is only to get rid of a multiplication of proofs. The provisions of the section do not suggest that before probate the executor had no title. The title of the executor is derived from the will and not from probate, though it is probate alone which authenticates his right and dispenses with proof of the execution of the will. (*Sir George Lowndes.*) VENKATASUBBAMMA *v.* RAMAYYA. **59 I.A. 112=55 Mad. 443=I.R. 1932 P.C. 63=136 I.C. 111=1932 A. L.J. 293=35 L.W. 532=1932 M.W.N. 486=55 C.L. J. 263=34 Bom.L R. 764=36 C.W.N. 441=9 O.W. N. 201=A.I.R. 1932 P.C. 92=62 M.L.J. 365 (P.C.).**

———**Ss. 50, 62 and 64.** *See* SUCCESSION ACT (XXXIX OF 1925), SS. 263 AND 276.

———**S. 62**—*Oral will—Application for probate—Maintainability—Substance of will written at the time —Effect.*

An application for the grant of probate of an oral will can be entertained under the Probate and Administration Act. The fact that the substance of the oral will was taken down at the time the will was made would not make any difference in the eye of law. The

PROBATE AND ADMN. ACT (1881), S. 90.

fact would only be a strong piece of evidence to prove the contents of the oral will. (*Sulaiman, Mukerji and Young, JJ.*) PITAM LAL *v.* KALLA RAM. **53 All. 687 = 136 I.C. 284 = I.R. 1932 All. 172 = 1931 A.L.J. 711 = A.I.R. 1931 All. 489 (F.B).**

——**Ss. 90 and 4**—Hindu will in the mofussil—Executor—Vesting of estate and power of disposal—Date of—Probate not obtained—Effect of. *See* PROBATE AND ADMINISTRATION ACT, SS. 4 AND 90. **62 M.L. J. 365 (P.C.).**

——**S. 90**—*Powers of executor—Compromise of suit disputing will.*

In the absence of any restriction the executor is perfectly competent to compromise the suit disputing the will by agreeing to the creation of a maintenance charge in favour of the contesting widow. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359 = 6 I R (Pat.) 17 = 145 I.C. 1 = 14 Pat.L.T. (Supp.) 1 = A.I.R. 1933 Pat. 306.**

——**S. 211**—*Probate—Grant regarding entire estate is the rule—Departure justified under special circumstances.*

The intention of the legislature was to lay down as a general rule that a grant of probate should be made for the whole estate of a deceased person. It may be that in certain circumstances the Court would be justified in limiting the grant to a specific portion of the estate but in order to justify that, the circumstances must be special ones. It was held that in the particular case special circumstances existed. (*Broadway and Johnstone, JJ.*) SATPAL RAM *v.* COLLECTOR OF MULTAN. **135 I.C. 60 = I.R. 1932 Lah. 44 = 12 Lah. 585 = 32 P L.R. 393 = A.I R. 1931 Lah. 310.**

PROBATE.

See (1) C. P CODE, O. 1, R. 10 AND O. 23, R. 1.
(2) SUCCESSION ACT, SS. 244 AND 276.

PROCEDURE. *See* PRACTICE.

PROCEDURAL LAW. *See* INTERPRETATION OF STATUTES.

PROCESSION.

See (1) CR. P. CODE, S. 144.
(2) HIGHWAY.
(3) RELIGIOUS PROCESSION.

PROCLAMATION. *See* CR.P. CODE, SS. 87 AND 88.

PROCLAMATION OF SALE. *See* C. P. CODE, O. 21, RR. 66 AND 90.

PRODUCTION OF DOCUMENTS. *See* CR. P. CODE, S. 94.

PROFESSIONAL COMMUNICATION. *See* EVIDENCE ACT, S. 126.

PROFESSION ETIQUETTE, ETHICS AND MISCONDUCT.

See (1) BAR COUNCILS ACT (1926).
(2) LEGAL PRACTITIONER.
(3) LEGAL PRACTITIONERS' ACT (1879).

PROFITS.

See (1) CO-SHARER—RIGHT TO PROFITS.
(2) LIMITATION ACT, ART. 120.

PROFITS A PRENDRE.

See (1) EASEMENT.
(2) EASEMENTS ACT (1882), SS. 2 (*b*) AND 4.

PROHIBITION—*Issue of writ—Guiding principles.*

The power of exercising prohibition is discretionary and the Court should not be chary of exercising it, to control persons who are entrusted, with the power of imposing any obligation upon individuals and who attempt to exercise those powers in excess of their jurisdiction. The fact that there is a right of appeal is not necessarily fatal to a claim for the issue of a writ of prohibition. But the guiding principle is that the writ in such a case will not issue unless the want of jurisdiction complained of is based upon a breach of a fundamental principle of justice. (*McNair, J.*) RAMJIDAS MAHALIRAM, *In re.* **62 Cal. 1011.**

——Issue of writ to Income-tax Commissioner—Power of single Judge of High Court. *See* JURISDICTION—WRIT OF PROHIBITION. **62 Cal. 1011.**

PROJECTION.

See (1) EASEMENT—EAVES.
(2) EASEMENTS ACT, SS. 18 AND 23.

PROMISSORY NOTE. *See also* DEBTOR AND CREDITOR ; EVIDENCE ACT, SS 58, 91, 92 AND 115 : NEGOTIABLE INSTRUMENTS ACT, PAPER CURRENCY ACT, S. 25 ; STAMP ACT, SS. 2, 35 AND 37.

Assignment.
Benami.
Cause of action.
Consideration.
Deposit of.
Execution.
Form and contents.
Insufficiency of stamp.
Liability under.
Material alteration.
Original cause of action.
Right to sue.

Assignment.

——*Assignment—Denial of consideration by makers—Permissibility—Right of transferee.*

The makers of a promissory note cannot raise the plea that no consideration passed for the transfer of the note to a third party. Where the transferee sues on the note he is entitled to recover what is payable to the original promisee. (*Mukerji and Bennet, JJ.*) MT. MUNNA KUNWARI *v.* LAKHNATH SAHAI. **I.R. 1932 All. 504 = 138 I.C. 876 = A.I.R. 1932 All. 648.**

——*Assignment—Right of assignee to sue in his own name, without endorsement.*

A promissory note is a written acknowledgment of debt with a promise to re-pay. It is also a memorandum of contract, and evidence of a chose in action. Thus, it may be transferred by assignment and the assignee thereby gets such title as the assignor had in the note and in addition, the right to have the endorsement of the assignor and this includes the right to sue on the assignment in his own name, and recover the amount due under the note from the parties liable. A promissory note is also a negotiable instrument and under the Negotiable Instruments Act, it is transferable merely by endorsement and delivery. As such, it is clothed with certain incidents intended to facilitate the business of merchants. The Negotiable Instruments Act has not affected the transferability of a promissory note by assignment as a chose in action, apart from endorsement. (*Lort Williams and M. C. Ghose, JJ.*) SURATH CHANDRA SAHA *v.* NARAYAN CHANDRA CHAUDHURY. **61 Cal. 425 = 150 I.C. 925 (2) = 7 R.C. 45 = 38 C.W.N. 465 = A.I. R. 1934 Cal. 549.**

——*Assignment—Transfer by deed—Permissibility.*

A promissory note can be transferred like any other chose in action. It can be effected by a deed without endorsement. (*Jackson and Krishnan Pandalai, JJ.*) VENKATARAMA AYYAR *v.* KRISHNASWAMI CHETTIAR. **I.R. 1932 Mad 551 = 138 I.C. 262 = 1932 M. W.N. 653 = 35 L.W. 755 = A.I.R. 1933 Mad. 133 (1).**

——*Assignment—Whether can be made orally in the Punjab.*

As the Transfer of Property Act is not in force in the Punjab, the technical rule requiring assignment to be made in writing which is contained in S. 130 of the Act

PROMISSORY NOTE—Benami.

is not applicable to a case of assignment of a promissory note. An oral assignment of the note is valid. (*Bhide, J.*) LOCHA RAM *v.* HEM RAJ. **I.R. 1931 Lah. 889 = 134 I.C. 121 = 33 P.L.R. 120 = A.I.R. 1932 Lah. 30 (2).**

Benami.

———*Benami—Plea of—If open.*

In a suit on a negotiable instrument (promissory note) by the payee named therein or the indorsee it is not open to the defendants to plead that such endorsee or payee is a mere benamidar. The payment in such a case should be made to the holder of the instrument and nobody else. (*Subhedar, A.J.C.*) NARAYAN *v.* UTIAMRAO. **15 N.L.J. 45.**

———*Benami—Right of real creditor—Mode of adjustment.*

Where a promissory note is executed in favour of one person in lieu of consideration advanced by another the promisor cannot pay money to the latter and be rid of his liability. But in a suit brought by the real creditor to which the debtor and the holder of the promissory note are parties a decree can be passed against the debtor for what is due from him with clear proviso that payment shall be made by the debtor to the holder or to his credit and that it is made by deposit in Court or if money is recovered in execution shall be to the credit of the holder. (*Sen and Niamatullah, JJ.*) SEWA RAM *v.* HOTI LAL. **53 All. 5 = I.R. 1931 All. 314 = 130 I.C. 698 = 1930 A.L.J. 1509 = A.I.R. 1931 All. 108.**

[**D.** 14 L. 19 (21), 61 C. 425 (427). **R.** 36 Bom.L.R. 807 (811).]

Cause of action.

———*Cause of action—Jurisdiction—Loan agreed to be made, and in fact made, in Madras but note executed outside.*

Where in a suit filed in Madras for the recovery of money lent in respect of which a promissory note had been executed by the defendant, it was contended that the Court had no jurisdiction as the note had been executed, and the defendant was resident, outside Madras, it was held that the loan having been agreed to be made, and in fact made, in Madras, part of the cause of action arose in Madras and that the Court had jurisdiction to entertain the suit. (*Stone, J.*) MURUGAPPA CHETTY *v.* NACHIAPPA CHETTY **155 I.C. 164 = 7 R.M. 550 = 40 L.W. 167 = A.I.R. 1934 Mad. 503 = 67 M.L.J. 30.**

———*Cause of action—Pleadings—Suit on pro note as surviving coparcener—Decree as representative—If can be given.*

Where a plaintiff, a Hindu, sues on a promissory note executed to his deceased father claiming as surviving coparcener suing in his own right, resting his title throughout the hearing of the suit on his position as coparcener in law, he cannot at the last stage be allowed to claim a decree merely on obtaining a succession certificate as heir and legal representative. That would alter the cause of action and have the effect of turning a suit by him personally into a suit by him as the representative of his father, especially when the latter position has been abandoned at the commencement of the hearing. (*Wadia, J.*) KAMALAKANT GOPALJI *v.* MADHAVJI VAGHJI. **59 Bom. 573 = 158 I.C. 145 = 8 R.B. 109 = 37 Bom.L.R. 405 = A.I.R. 1935 Bom 343.**

———Cause of action—Suit payable at a specified place—Omission to allege presentment in plaint—Effect of. *See* C.P. CODE, O. 7, R. 1 (*e*). **A.I.R. 1935 Pesh. 132.**

Consideration.

———*Consideration—Burden of proof.*

In a suit on a promissory note, it is open to the defendant to plead that the promissory note executed by him was executed in certain circumstances and was without consideration. The onus, of course, lies on the defendtant to establish that he received no consideration and if he succeeds in displacing the apparent tenor of the promissory note as regards consideration, and the plaintiff cannot fall back upon any other case, the suit must be dismissed. (*Niamatullah, J.*) RAM JASH GOSHAIN *v.* MARKANDE PATHAK. **153 I.C. 611 = 7 R.A. 543 = 4 A.W.R. 964 = A.I.R. 1934 All. 1068.**

PROMISSORY NOTE—Consideration.

———*Consideration—Burden of proof.*

Were defendants plead want of consideration in a suit on a promissory note, in discharging the burden of proof, it is not always necessary for them to prove want of consideration by producing definite evidence on their own behalf. It is open to them to rely upon the facts and circumstances of the case and also to refer to the flaws in the evidence of the plaintiff himself and then to argue that, on the record of the case as it stands, the burden has been discharged by them. Whether a party had discharged the burden of proof laid upon him is a question for the Court to decide and each case depends upon its own peculiar facts and circumstances. (*Addison and Agha Haidar, JJ.*) BISHAMBAR DAS *v.* ISMAIL. **149 I.C. 605 = 6 R.L. 721 = A.I.R. 1933 Lah. 1029.**

———*Consideration—Burden of proof—Presumption under S. 118, Negotiable Instruments Act.*

In a suit on a promissory note the defendants contended that they had affixed their signature to a blank paper, that there was no cash consideration and that they had induced the plaintiff to give evidence in a case by affixing their signature to the note. The Court thereupon cast the burden of proving consideration on the plaintiff.

Held, that the Court erred in not taking into account the presumption under S. 118, Negotiable Instruments Act, and in casting the onus on the plaintiff. (*Kendall, J.*) JAGMOHAN MISIR *v.* MENDHAI DUBE. **54 All. 375 = I.R. 1932 All. 65 = 135 I.C. 241 = A.I.R. 1932 All. 164.**

[**Disc.** 1935 A.L.J. 334.]

———*Consideration—Denial in toto by defendant—Onus.*

Where in a suit on a promissory note, the defendant denies it *in toto*, the burden of proving the loan is on the plaintiff and merely because the defendant goes into the witness box and calls some evidence, the suit cannot be decreed, unless plaintiff proves the facts alleged by him. (*Dunkley, J.*) YANKASAWMY *v.* SITARAM. **156 I.C. 256 = 7 R.R. 388 = A.I.R. 1935 Rang 130.**

———*Consideration—Evidence as to disbelieved—Suit to be dismissed.*

A promissory note executed by the defendants in consideration of the plaintiff withdrawing a complaint of a compoundable offence is no doubt a valid instrument. But where the plaintiff persists in his case that the promissory note was in respect of money advanced in cash and this story is disbelieved, the suit must be dismissed. (*Niamatullah, J.*) RAM JASH GOSHAIN *v.* MARKANDE PATHAK. **153 I.C. 611 = 7 R.A. 543 = 4 A.W.R. 964 = A.I.R. 1934 All. 1068.**

———*Consideration—If to be cash.*

To support the claim under a promissory note it is not necessary that any money should pass at the time of its execution as consideration. The term "consideration" is not restricted to cash money only. (*M. C. Ghose, J.*) KEDAR NATH BASU *v.* RADHANATH NATH. **61 C.L.J. 17.**

———*Consideration—Note payable to bearer—Mistake as to onus—Effect.*

PROMISSORY NOTE—Deposit of.

Where, however, the lower Court has granted a decree to the plaintiff by throwing the burden of proof on the defendant on the ground that S. 118 of the Negotiable Instruments Act raised a presumption in plaintiff's favour, and the promissory note having been made payable to bearer. S. 118 had in fact no application so that the burden of proof should have been placed on the plaintiff, the proper course in such a case is to remand the case for fresh hearing and not pass a decree to the plaintiff on the original consideration. (*Dhavle, J.*) BRIJBHUSHAN PANDE *v.* RAM RAJNAM KUER. **142 I.C. 163 = I.R. 1933 Pat. 127 = 13 Pat.L.T. 506 = A.I.R. 1932 Pat. 324.**

Deposit of.

———Deposit of security for debt—Right of creditor to recover full amount from drawer. *See* NEGOTIABLE INSTRUMENTS ACT, S. 59, PROVISO. **13 Rang. 696.**

Execution.

———*Execution—Admission of—Construction — New plea in appeal.*

In a suit on a promissory note, what the defendant really admitted was the execution of the suit promissory note and the receipt of the consideration therefor, but he never meant to admit that he executed the suit promissory note in favour of the plaintiff, seeing that it was on the face of it executed not in his favour but in favour of another person

Held, on a lenient construction of the pleadings, that the defendant could plead on appeal that plaintiff could not sue on such a promissory note. (*Ba U, J.*) K S. V. CHETTIAR FIRM *v.* MAHOO. **152 I.C. 410 = 7 R.R. 152 = A.I.R. 1934 Rang. 280.**

———*Execution—Admission—Proof of loss.*

Whatever may be the effect of the admission of the execution of the pro-note by the defendant, it has not the effect of an admission that it was lost by the plaintiff. (*Walsh, J.*) SUNDARA RAJALI *v.* GOPALA THEVAN. **150 I.C. 132 = 6 R.M. 697 = 39 L.W. 34 = A.I.R. 1934 Mad. 100.**

———Execution—Defendant admitting execution but pleading discharge—Stamp not cancelled—Objection to admissibility of note—Whether can be allowed at late stage. *See* EVIDENCE ACT, S. 58. **I.R. 1932 Mad. 730 = 139 I.C. 486 = 1932 M.W.N. 793 = 36 L.W. 470 = A.I.R. 1932 Mad. 693 — 63 M.L.J. 303.**

———*Execution—Proof of.*

Where in a suit on a promissory note alleged to be thumb-marked by the deceased executant, the minor sons deny the execution of it by their father, it is necessary that the plaintiff should prove by clear, cogent and reliable evidence that the thumb-impression on the document, is really that of the deceased executant. In such a case a high standard of proof would be exacted from the plaintiff before the execution of the document, can be held to have been duly proved. (*Addison and Agha Haidar, JJ.*) BISHAMBAR DAS *v.* ISMAIL. **149 I.C. 605 = 6 R.L. 721 = A.I.R. 1933 Lah. 1029.**

Form and contents.

———*Form and contents—Construction — Document held to be mere acknowledgment.*

The mere fact that a person chooses to give a certain title to a document by no means makes it that document. A document provided as follows: "On June 25, 1925, Rs. . . . were found due from me to *P* about February 27, 1923, and as the money cannot be given at present hence it has been agreed that I would pay interest at 1 per cent. per annum. Therefore this pro-note payable on demand has been executed so that it may serve as evidence and may be useful in time."

PROMISSORY NOTE—Insufficiency of stamp.

Held, that the document was a mere acknowledgment of debt coupled with an agreement to pay a debt and not a promissory note. Effect of use of "words" on demand discussed. (*Sulaiman and Young, JJ.*) RATAN SINGH *v.* PIRBHU DAYAL. **131 I.C. 135 = 1931 A.L.J. 230 = A.I.R. 1931 All. 302.**

———*Form and contents—Signature.*

The signature may be written in any part of the document. It is not required to be at the foot or in any particular part of the document. The place and manner of signature of a document are immaterial provided that the signature is affixed in such a manner as to authenticate the document. 60 I.C. 747, Ref. (*Srinivasa Iyer, J.*) MUDDAPPA *v.* VEERABHADRIAH. **9 Mys.L.J. 476.**

———*Form and contents—Signature to.*

A man may sign a promissory note by getting some one to write his name for him. 11 U B.R. 1, Foll. (*Otter, J.*) MAUNG SAN SHWE *v.* HAJI KO ISHAQ. **9 Rang. 92 = I.R. 1931 Rang. 195 = 132 I.C 707 = A.I.R. 1931 Rang. 131.**

———*Form and contents—Stamp—Sufficiency—Onus.*

In a suit on a promissory note, if the evidence produced by the plaintiff to show that the promissory note was adequately stamped at the time of execution is insufficient, then the suit should be dismissed. (*Ba U, J.*) U KYAW *v.* HARI DUTT. **153 I.C. 531 = 7 R.R. 222 = A.I.R. 1934 Rang. 364.**

———*Form and contents—Stamp—Use of quarter anna stamps—Validity of.*

A promissory note stamped with quarter anna postage stamps is a document bearing stamps of improper description and can be validated by the Collector under R. 18 of the Government of India Stamp Rules. 19 Bom.L.R. 947, Ref. (*Beasley, C. J., Ramesam and Cornish, JJ.*) MARTIS *v.* CUTHBERT D'SOUZA. **55 Mad. 627 = I.R. 1932 Mad. 354 = 137 I.C. 26 = 1932 M.W.N. 121 = 35 L.W. 518 = A.I.R. 1932 Mad. 390 = 62 M.L.J. 538 (F.B.).**

Insufficiency of stamp.

———*Insufficiency of stamp—Admissibility.*

There is no bar under any law preventing the Court from using a promissory note which is stamped with an one anna stamp instead of a two annas stamp as a piece of evidence supporting the plaintiff's case as to loan. Where such a document has been received in evidence in the trial Court without objection on the part of the defendant, the appellate Court will not interfere. (*C. C. Ghose and Pearson, JJ.*) ABINASH CHANDRA BOSE *v.* NAGENDRA NATH DUTT. **I.R. 1931 Cal. 863 = 134 I.C. 575 = 53 C.L.J. 254 = A.I.R. 1931 Cal. 480.**

———*Insufficiency of stamp—Admissibility as acknowledgment.*

If a promissory note is insufficiently stamped, it is inadmissible in evidence not only as a promissory note but also as an acknowledgment. (*Staples, A. J. C.*) GOVINDA *v.* HARI BHAOO. **147 I.C. 981 = 6 R.N. 150 = 16 N.L.J. 241 = A.I.R. 1933 Nag 391.**

———*Insufficiency of stamp—Admissibility as acknowledgment.*

Where an instrument included a promissory note and in its latter portion an acknowledgment of a prior liability, though as a promissory note insufficiently stamped it may be inadmissible, the latter portion which contains the acknowledgment is admissible to save limitation. A. I. R. 1930 Mad. 485, Foll. (*Krishnan Pandalai, J.*) VENCHESWARA SASTRI *v.* NARAYANA AYYAR. **I.R. 1933 Mad. 85 = 141 I.C. 169 (1) = 36 L.W. 918 = A.I.R. 1933 Mad. 251 (2).**

———*Insufficiency of stamp—Decree for principal sum but not for interest as in the note.*

PROMISSORY NOTE—Insufficiency of stamp.

Where a pro-note is insufficiently stamped the Court may grant a decree for the principal sum but the plaintiff is not entitled to interest at the rate stipulated in the pro note. (*Bisheshwar Nath and Smith, JJ.*) ABDUL RAHMAN *v.* AFZAL HUSAIN. **6 I R. (Oudh) 35=145 I.C. 233=10 O.W.N. 316=A.I.R. 1933 Oudh 259.**

——*Insufficiency of stamp—Proof of debt.*

If the debt is separable from the promissory note the transaction being truly independent of it and not part of the transaction of the promissory note, the debt can be proved, although the promissory note was not admissible in evidence, but if it is part and parcel of the same transaction the debt cannot be separately proved. (*Sulaiman, C .J. and Harries, J.*) GHULAM MURTAZA *v.* FASIH UN-NISA BIBI. **57 All. 434=152 I C 370=7 R.A 330=1934 A.L.J. 1185=4 A.W.R. 754=A.I.R. 1935 All. 129.**

——Insufficiency of stamp—Received in evidence—Appellate Court—Interference. **53 C.L J. 254.**

Liability under.

——*Liability under—Addition of a forged signature—Effect of.*

Where a pro-note purported to have been executed by two persons of whom one is proved to be a real executant while the other signature is a forgery, no claim can be brought on such invalid note even against the executant. (*Mackney, J.*) SATYA NARAYAN TEWARI *v.* SITAL MISSIR. **153 I.C. 631=7 R.R. 228=A.I.R. 1934 Rang. 345.**

——*Liability under—Executant described at the bottom as agent of another—Effect.*

A promissory note ran as follows: "On demand I the undersigned promise to pay *B* or order the sum of Rupees .... with interest." The note was signed by the executant and thereafter he was described as agent and attorney of another.

Held, that the executant was personally liable and the words as agent and attorney were merely descriptive. (*Buckland, J.*) DHIRENDRA NATH MUKHERJEE *v.* NUTBEHARI MUNSHI. **6 I.R. (Cal) 282=146 I.C. 928=37 C.W.N. 296=A.I.R. 1933 Cal. 660.**

——*Liability under—Executant described as proprietor of firm.*

The name of a person or firm to be charged upon a negotiable instrument must be clearly stated on the face or the back of the instrument, so that the responsibility is made plain and can be instantly recognised. The mere fact that the name is disclosed in "some way" is not sufficient. Consequently, the mere fact that a person executes a promissory note describing himself as the proprietor of a firm or writes on a note proper with the name and description of a firm printed on it, cannot be held to be sufficient to hold the firm liable on the promissory note. (*Bhide and Rangi Lal, JJ.*) MAN MOHAN NATH DAR *v.* RADHA KISHAN. **15 Lah 901=153 I.C. 208=7 R.L. 400=35 P.L.R. 590=A.I.R. 1934 Lah. 815.**

——*Liability under—Execution by Chetty agent—Custom.*

There is a custom among South Indian Chettyars by which it is recognized that if in a promissory note executed by the agent of a firm, a combination signature of the firm's initials together with the personal name of the agent, if found, the agent who signs in this fashion is not signing for himself but on behalf of his firm. (*Cunliffe, J.*) S. R. M. C. T. S. S. P C. CHETTYAR FIRM *v.* MANICKAM CHETTYAR. **6 I.R. (Rang.) 50=145 I.C 573=A.I R. 1933 Rang. 265.**

——*Liability under—Execution by manager of joint Hindu family.*

PROMISSORY NOTE—Liability under.

Where a managing member of joint Hindu family borrows money on a promissory note as manager, the other members of the family are liable; and the principle of non-liability of undisclosed principal will not apply. (*Agarwala, J.*) TIKAM CHND CHAUDHURY *v.* SUDARSAN TRIGUNAIT. **I.R. 1933 Pat. 230=144 I.C. 325=14 Pat.L.T. 623=A.I R 1933 Pat. 263.**

——*Liability under—Execution of note by partner in personal capacity.*

The name of the person or firm to be charged on a negotiable document must be clearly stated on the face or on the back of the document. No exception is made with regard to trading firms. A number of a firm executed a promissory note. Nowhere in it was the name of the firm mentioned.

Held, that the firm was not liable. (*Baguley, J.*) KWONG HIP LONE SAW MILL CO. *v.* C. A. M. A. L. FIRM. **6 I.R. (Rang.) 16=144 I.C. 866=A.I.R. 1933 Rang. 131.**

——*Liability under—Finding that signature of one executant forged—Decree against executant admitting execution—If can be passed.*

In a suit on a promissory note said to have been executed by two persons, when one of them admits executions and the other denies it, if the Court finds that the signature of one of them is forged, the suit ought to be dismissed against both. (*Pakenham Walsh, J.*) KUMARASWAMI DESIKAR *v.* DHIRAVIAM PILLAI. **153 I C. 382=7 R.M 351=40 L.W. 802=1934 M. W.N. 1368=A.I.R 1935 Mad. 40=67 M.L J. 841.**

——*Liability under—Hand-note by member of joint family.*

Where the action is based on a hand-note, members of the family other than the member who executed the hand-note cannot be liable in such an action. If however the suit is based on the original loan, then the Court is entitled in law to give judgment against all such members. (*Wort, J.*) BIRKESWAR RAUT *v.* RAM LOCHAN PANDEY. **154 I.C. 95=7 R.P. 417=16 Pat. L.T. 117=A.I.R. 1934 Pat. 629 (1).**

——*Liability under—Hand note signed by authorized agent of mahant.*

For obtaining Court-fee for a memorandum of appeal and for other petty expenses the authorized agent of the mahant of a math borrowed Rs. 400 from the plaintiff for which he gave a hand-note. The money was utilised for the purpose of the appeal and the mahant himself took an active part in the prosecution of that litigation. It was found that the litigation had nothing to do with the math but was instituted purely to satisfy the personal grudge of the mahant.

Held, that the mahant was personally liable for the debts incurred by his authorized agent on his behalf, for the personal purposes of the mahant; the signature on the hand note being that of an agent for a disclosed principal and the agency having been previously authorized and also subsequently ratified, the agent was not liable on the hand-note. (*Dhavle and James JJ.*) NABAKISHORE DUTT *v.* JAGANNATH RAMANUJ DAS. **6 R.P. 670=149 I.C.898=A.I.R. 1934 Pat. 435.**

——*Liability under—Need for clear language.*

In a promissory note the name of a person or firm to be charged should be clearly stated so that the responsibility is made plain and the name can be instantly recognized. 46 C. 663 (P. C.), Rel. on. (*Grille, A. J. C.*) RADHAKISAN *v.* MANCHARDAS. **I.R. 1932 Nag. 78=138 I.C. 168=15 N.L.J. 5.**

——*Liability under—Note executed by "Damodar, Chairman of Weavers Society."*

The promissory note in favour of the plaintiff was executed by "Damodar, Chairman of the Weavers'

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Society," in respect of balance due on accounts which stood in the name of Damodar. It was signed by "Damodar, Chairman, W. Society." It was not stated in the body of the promissory note that he was passing the note on behalf of or on account of the Weaving Society nor did he expressly exclude his personal liability.

Held, that the word "Chairman,' was only a word of description and that Damodar was personally liable on the instrument. *Dutton* v. *Marsh*, (1871) L. R. 6 Q. B. 361; 4 Bom. 275; 52 Bom. 610; 46 I.A. 33; 38 Mad.482, Foll.; *Alexandar* v. *Sizer*, (1869) L. R. 4 Ex. 102 and *Lindus* v. *Melrose*, (1858) 3 M. & N. 177, Dist. *Elliot* v. *Bax Iron Side*, (1925) 2 K. B. 301, Ref. (*Patkar and Nanavati, JJ.*) DAMODAR KESHAV *v.* RAMNATH. **140 I.C. 734=34 Bom.L.R. 1327=A.I.R. 1932 Bom. 607.**

———*Liability under—Note by Hindu coparcener—Death of maker—Effect of.*

If the maker of a promissory note has died before suit the only person who can be sued upon the note is his legal representative. In such a suit if the surviving coparceners are the legal representatives they will be liable on the note; if they are not the legal representatives they will be liable upon the Hindu Law liability if the liability of the legal representative upon the note is established. (*Cornish, J.*) SESHAYYA *v.* SANJIVARAYUDU. **150 I.C. 885=7 R.M. 36=1934 M.W.N. 16=39 L. W. 579=A.I.R. 1934 Mad. 350=67 M L.J. 393.**

———*Liability under—Note signed by member of joint family firm.*

The name of a person or firm to be charged upon a negotiable instrument should be clearly stated on the face or back of the document. It is not sufficient that the principal's name should be "in some way" disclosed, it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the document. 46 Cal. 663 and 54 Cal. 380, Foll. So where a promissory note is executed by *R* described as son of *P* (who with other members of his family constituted a joint family firm) and there was no reference in the document to the firm of *P*, *held* the firm was not liable on the document. (*Page, C. J. and Mya Bu, J.*) P. R. M. P. R. CHETTYAR *v.* MUNIYANDI SERVAI. **10 Rang. 257=I.R. 1932 Rang. 194=139 I.C. 460=A.I.R 1932 Rang. 97.**

[R. 13 R. 87.]

———*Liability under—Oral evidence to prove execution as surety—Admissibility.*

Under S. 92, Evidence Act, it is not open to a person to lead oral evidence to prove that he signed a promissory note merely as a surety when on the face of it, it appears that he executed it as a debtor. 8 C.W.N 101, 5 Rang. 168; A.I.R. 1923 Rang. 15; A.I.R. 1924 Rang. 360; 24 M.L.J. Foll. (*Rangnekar, J.*) KHUMAJI GAJAJI & Co. *v.* DAMAJI. **6 R B. 284=148 I.C. 260 =35 Bom.L.R. 1197=A.I.R. 1934 Bom. 39.**

———*Liability under—Suit by endorsee—Evidence to prove discharge of note—Admissibility.*

Where an endorsee of a promissory note sues on the note and it is found that he is a holder in due course, evidence to prove the defence that the note has been discharged prior to the endorsement is not admissible. But if he is a mere holder he is affected by any prior equities and the defendant must be allowed to adduce proof of satisfaction of the note. (*Mosely, J.*) MANGABAN *v* UPADHYA. **156 I.C. 788=8 R.R. 51=A.I.R. 1935 Rang. 156.**

———*Liability under—Undisclosed principals.*

In an action on a promissoy note against a person whose name properly appears as party to the instrument

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it is not open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. Where plaintiff sues defendants 1 and 4 on a promissory note executed by defendants 2 and 3 who were sons of defendant 1 and it was stated that though Christians the 1st defendant and his sons had been living as members of a joint family.

Held, that defendants 1 and 4 whose names were not disclosed in the promissory note could not be made liable thereunder. (*Sundaram Chetty and Pandurang Row, JJ.*) MUHAMAD ALIYAR ROWTHER *v.* GNANA AMMAL. **150 I.C. 91=6 R.M. 684=39 L.W. 551= A.I.R. 1934 Mad. 327 67 M.L.J. 671.**

Material alteration.

———*Material alteration—Effect of.*

A plaintiff who comes to Court with tampered hand-notes is not entitled to any decree. A. I. R. 1924 Cal. 52 and 33 Cal. 812, Foll. *Mahomed Noor and Dhavle, JJ.*) RAM AUTAR SHUKUL *v.* BALDEO SHUKAL. **11 Pat. 782=I.R. 1933 Pat. 37=140 I.C. 895=A.I. R. 1932 Pat. 352.**

Original cause of action.

———Original cause of action—Benefit of loan taken—Refund of. *See* CONTRACT ACT, S. 70. **A.I.R. 1934 All. 390.**

———*Original cause of action—Hand note—Use of as evidence of loan.*

Where a hand-note is not in favour of any particular individual nor even in favour of bearer it is not admissible in evidence as a hand-note but the suit if so framed, can be tried as one for loan independent of the note and the writing can be used as evidence of the loan irrespective of its being or not being a promissory note as defined in the Negotiable Instruments Act (*Mahomed Noor, J.*) TASADUQ HUSSAIN *v* BASAWAN RAI. **I.R. 1933 Pat. 78=141 I C. 767=A.I.R. 1933 Pat. 159.**

———*Original cause of action—Inadmissible note—Evidence of loan—Admissibility of.*

When money is lent on a promissory note and the promissory note is inadmissible, it is not open to the plaintiff to recover his money by proving orally the terms of the contract. It is only when the debt is separable from the promissory note, that the debt could be proved, although the promissory note was inadmissible in evidence. 53 A. 114 (F.B.), Foll. (*Banerji and King, JJ.*) DHONKAL SINGH *v.* HARBANS LAL. **I R 1933 All. 391=144 I.C. 130=A.I.R. 1933 All. 280.**

———Original cause of action—Insufficiency in stamp —Suit on—Right to decree. *See* PRACTICE—RELIEF. **62 C.L J. 289.**

——— *Original cause of action—Insufficient stamp—Admission in written statement—S.* 58, *Evidence Act—Applicability.*

If a plaintiff as an independent cause of action apart from the promissory note executed in his favour and insufficiently stamped, the admission of the loan in the written statement is under S. 58 of the Indian Evidence Act sufficient to waive the requirements of further proof and to enable the plaintiff to succeed thereon. But if there is no such cause or action, the mere admission of the fact by the defendant could not give him a cause of action and that is not a matter cured by S. 58 or any other section of the Indian Evidence Act. 23 Cal. 851, Appl. (*Krishnan Pandalai, J.*) ACHUTARAMANNA *v.* JAGANNADHAM. **I.R. 1933 Mad. 55=140 I.C. 833 =37 L.W. 157=1933 M.W.N. 663=A.I.R. 1933 Mad. 117=64 M.L J. 79.**

[R. 12 R. 500 (506) (F.B.).]

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———*Original cause of action—Insufficient stamp—Other evidence of loan.*

When a promissory note is executed on account of an antecedent debt, it can seldom be said that the terms of the contract regarding the original loan have been reduced to the form of a document even if the promissory note mentions those terms. In such a case, independent evidence of the liability is admissible even if the promissory note, being insufficiently stamped is not admissible in evidence. On the other hand when the loan and promissory note are part and parcel of the same transaction and the note records the terms of the contract in the form of a document, the terms being mainly that the plaintiff agreed to make a loan and that the defendant agreed to repay that loan. Though S. 91 of the Evidence Act applies so as to preclude evidence of the terms apart from the note and that note being insufficiently stamped, is not admissible in evidence, the factum of loan is not however a term of the contract. That can be proved *aliunde*; when that is proved or admitted, the plaintiff is entitled to claim it back unless the defendant succeeds in showing that the payment was made in discharge of any previous liability or that he is otherwise entitled to retain it. 6 Nag. L. R. 125; A.I.R. 1927 Nag. 241; 27 Nag. L R. 56; 27 Nag. L. R. 327; 24 Bom. 360; 23 Cal. 851; 139 I.C. 298 (F.B.); 29 Mad. 111; 38 Mad. 660, Rel. on; 53 All. 114, Not Foll. (*Macnair, J. C. and Subhedar, A. J. C.*) LAL BAHADUR SINGH *v.* SHEIKH GULAM YASIM. **29 N.L.R. 131=6 I.R. (Nag.) 21=144 I.C. 745=A I R 1933 Nag. 57 (2).**

———*Original cause of action—Note by Hindu father—Suit on—Decree against sons.*

If a person frames his suit alternatively on the promissory note executed by a Hindu father or on the consideration which passed he can obtain a decree against the father and sons but not if the suit is only on the promissory note. In the latter case he can only obtain a personal decree against the father and a decree against the sons to the extent of their interest in the joint family properties. (*Grille, A.J.C.*) RADHAKISAN *v.* MANOHARDAS. **I.R 1932 Nag. 78=138 I.C. 168=15 N.L. J. 5.**

———*Original cause of action—Note inadmissible—Parole evidence of loan.*

When a cause of action for money is once complete and the debtor then gives a hand-note to the creditor for payment of the money at a future time, the creditor, if the note is inadmissible, may always sure for the original consideration and parole evidence can be allowed of the transaction. (*Wort. Ag. C.J., Kulwant Sahay and Fazl Ali, JJ.*) DOMOO KHAN *v.* AGHA ARSHAD KHAN. **12 Pat. 862=6 I.R. (Pat.) 267 (2)=146 I.C. 471=14 Pat.L.T. 651=A.I.R. 1933 Pat. 575 (F B.).**

———*Original cause of action—Note not paid at maturity.*

When a cause of action for money lent is once complete in itself and the debtor then gives a note to the creditor for payment of the money at a future time, and the note is not paid at maturity, the creditor may sue for the original consideration, provided that he has not endorsed or lost or parted with the bill or note under such circumstances as to make the debtor liable upon it to some third person. 7 Cal. 256, Foll. (*Stone, J.*) MURUGAPPA CHETTY *v.* NACHIAPPA CHETTY. **155 I.C. 164=7 R M. 550=40 L.W. 167=A.I.R. 1934 Mad. 503=67 M.L.J. 30.**

———Original cause of action—Note understamped—Amendment basing claim on voucher executed contemporaneously—Permissibility—Claim barred on date of amendment—If a bar to amendment—Power of amendment in appeal. *See* C. P. CODE, O. 6, R. 17. **39 C.W.N. 1235.**

PROMISSORY NOTE—Original Cause of action.

———*Original cause of action—Relief on.*

Plaintiff lent in 1288 Rs 20,000 to *D*, and two others. In 1291 she lent a sum of Rs. 5,000 to *D*, to repay a portion of the original loan and *D*, executed a promissory note for Rs. 5,000. In a suit on the promissory note plaintiff alleged that cash consideration was paid on date of execution of note. The promissory note proved to be inadmissible for non-cancellation of the stamp, and the cash consideration was not only not proved, but plaintiff's agent admitted that nothing was paid on the date of execution of pro-note. Thereupon plaintiff tried to fall back on the original loan.

Held, that the plaintiff could not do that and that suit should be dismissed. (*Das and Brown, JJ.*) MA SHWE HPAW *v.* DWA HPAW. **6 I.R. (Rang.) 42=145 I.C. 378 (2)=A.I.R. 1933 Rang. 161.**

———*Original cause of action—Relief on—Amendment of plaint in suit on note—Permissibility.*

Where the plaintiff brings a suit in a promissory note which, he finds, is improperly stamped and so inadmissible in evidence, he cannot be allowed at the trial of the suit to amend his plaint so as to entitle him to sue on the original cause of action, that being a cause of action wholly distinct from that based upon the promissory note. (*Blackwell, J.*) BURJORJI JIVANJI *v.* HORMUSJI NOWROJI. **I.R. 1932 Bom 417=138 I.C. 783=34 Bom L.R. 643=A.I.R. 1932 Bom. 394.**

[**Diss.** 57 B. 802 (805, 807.). **R.** 35 Bom.L.R. 68 (74); 63 M.L.J. 303 (307).]

———*Original cause of action—Relief on the basis of—When permissible.*

Whether when a bill or note is found to be inadmissible in evidence the payee can sue on the original consideration depends upon whether the cause of action with regard to the original consideration is one which is complete in itself, and the debtor then gives a bill or note to the creditor for payment of the money at a future time. If this is so, then the plaintiff may disregard the promissory note if he chooses and sue upon the original debt. Where, however the original cause of action is a bill or note itself and does not exist independently of it, then the plaintiff cannot disregard the note and sue for the original consideration. 7 Cal. 256, Ref. (*Lort Williams and M. C. Ghose, JJ.*) RANENDRA MOHAN TAGORE *v.* KESHAB CHANDRA CHANDA. **61 Cal. 433=150 I.C. 982=7 R.C. 47=38 C.W.N. 488=A.I.R. 1934 Cal. 554.**

———*Original cause of action—Relief on—Duty of Court.*

When a suit is instituted on a loan it is desirable to keep clearly in mind what are points of law and what are points of fact. When a promissory note or a bill of exchange or anything else is given by the borrower to the lender in respect of the loan, either at the time of the loan or afterwards, the terms upon which it is given and taken would be a question of fact and not of law. (*Page, C.J., Baguley, Sen, Leach and Dunkley, JJ.*) MAUNG CHIT *v.* ROSHAN N. M. A. KAREEM OOMER & CO. **12 Rang. 500=152 I.C. 1038=7 R.R. 184=A.I.R. 1934 Rang. 389 (F.B.).**

———*Original cause of action—Relief on—Note inadmissible.*

Where in a suit on a promissoty note, the note is not admissible in evidence as not being duly stamped, the plaintiff can recover on the original consideration if the plaint disclosed a cause of action on which the plaintiff can succeed independently of the pro note. 10 L.B.R. 54, Ref. (*Carr and Cunliffe, JJ.*) RAM RAGHUBHIR LAL *v.* THE UNITED REFINERIES (BURMA), LTD **9 Rang. 56=I.R. 1931 Rang. 305=134 I.C. 737=A I.R. 1931 Rang. 139.**

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[**Varied.** 11 R. 186; 60 I.A. 183 (P.C.). **R.** 63 M.L. J. 303 (306).]

———*Original cause of action—Relief on—Note inadmissible.*

In spite of the provisions of S. 91 of the Evidence Act it is open to the party who has lent money on terms recorded in a promissory note which turns out to be inadmissible in evidence for want of proper stamp duty to recover his money by proving orally the advance of the loan. Oral evidence to prove the terms of the contract, however, is inadmissible. A.I.R. 1924 Cal. 452 and 46 All. 95 (P.C.), Dist.; 53 All. 844 (F.B.), Diss. (*Wazir Hasan, C.J., Srivastava and Raza, JJ.*) KUNWAR BAHADUR *v.* SURAJ BAKHSH. **7 Luck. 666 = I.R. 1932 Oudh 348 = 139 I.C. 298 = 9 O.W.N. 585 = A.I.R. 1932 Oudh 235 (F.B.).**

———*Original cause of action—Relief on—Note inadmissible.*

Where a plaintiff brought a suit for the recovery of moneys due for the purchase of timber by the defendant and produced along with the plaint an unstamped promissory note for the sum executed by the defendant and the recitals in the document showed that the document was executed after the purchase of the timber and the settlement of accounts.

Held, that there was *prima facie* a completed contract immediately the timber was purchased with an express or implied promise to repay and independently of the note and that the ptaintiff was entitled to a decree on the original cause of action. (*Srinivasa Iyer, J.*) MUDDAPPA *v.* VEERABHADRIAH. **9 Mys.L J. 476.**

———*Original cause of action—Relief on—Note inadmissible.*

Where the suit promissory note which was executed in renewal of an earlier note (a claim in respect of which had become barred), was insufficiently stamped and so inadmissible in evidence, and where it was admitted that no consideration was paid at the time when the suit note was executed, no relief can be given on the basis of the original consideration which supported the earlier promissory note. (*Bisheshwar Nath and Kisch, JJ.*) BHAGWAN BAKHSH *v.* PARAG NARAIN. **141 I C. 296 = 9 O W.N. 961 = I R. 1933 Oudh 54 = A.I.R. 1933 Oudh 18.**

———*Original cause of action—Relief on—Note inadmissible.*

If the original cause of action is the inadmissible instrument itself and does not exist independently of it, or in other words, if the loan transaction and the execution of the pro-note really constitute one single transaction, then the plaintiff cannot submerge his promissory note and base his claim solely upon the consideration of money lent. But when the two transactions do not constitute part of a single transaction, there is no legal objection to the plaintiff basing his claim on the original cause of action which exists independently of the pro-note. 53 A. 111 and 9 Rang. 56, Foll. (*Doraiswami Iyer, C.J. and Ramachandra Rao, J.*) SRINIVASA RAO *v.* VANNAJI JAYARUPJI. **9 Mys L.J. 438.**

———*Original cause of action—Relief on—Note inadmissible being insufficiently stamped.*

Where plaintiff files a suit on a promissory note, it is open to him to put his case in an alternative form and sue for money on basis of original consideration. But if he does not base his case in the plaint on the original consideration, he is out of Court because the promissory note is inadmissible in evidence being insufficiently stamped. (*R.C. Mitter, J.*) TARACHAND PROTAPMAL *v.* TAMIJUDDIN SHEIKH. **159 I.C. 511 = 8 R.C. 320 (2) = 39 C.W.N. 1241 = A.I.R. 1935 Cal. 658.**

———*Original cause of action—Relief on—Note insufficiently stamped.*

PROMISSORY NOTE—Original Cause of action.

Where a promissory note is given which is insufficiently stamped, the plaintiff is entitled to succeed only when his right to obtain relief is independent of the promissory note, that is to say, if the plaintiff's cause of action to recover the money had become complete before the execution of the promissory note, he would be entitled to sue and succeed on the original consideration, if the promissory note is rejected by the Court. 7 Cal. 256; 19 I.C. 840; 128 I.C. 194 and A.I.R. 1931 All. 183 (F.B.), Foll. Where there was no completed and independent cause of action before the promissory note was executed and a part of the money was advanced contemporaneously with the execution of the promissory note.

Held, that the advance by the plaintiff and the execution of the promissory note by the defendant was one transaction and gave rise to only one cause of action, namely, a cause of action, the basis of which was the execution of the promissory note. (*R C. Mitter, J.*) TARACHAND PROTAPMAL *v.* TAMIJUDDIN SHEIKH. **159 I.C. 511 = 8 R.C. 320 (2) = 39 C.W N. 1241 = A.I. R. 1935 Cal. 658.**

———*Original cause of action—Relief on—Note insufficiently stamped.*

The fact that money has been lent, though under a promissory note insufficiently stamped, gives a cause of action to the lender, which is independent of the promissory note. It is not necessary for the lender to succeed to prove an independent express contract prior to the execution of the promissory note. As soon, therefore, as the plaintiff in the suit proves that he paid to the defendant a sum of money by way of loan, he is entitled to get back the money lent with interest, though the promissory note executed to him by the defendant cannot be introduced in evidence on the ground of insufficiency of the stamp. (*Mitter, J.*) MAHATABUDDIN MIA *v.* MAHOMED NAJIR JODDAR. **62 C.L.J. 289 = 40 C. W.N. 473 = A.I.R. 1936 Cal. 170.**

———*Original cause of action—Relief on—Note insufficiently stamped.*

Where the debt and the execution of the promissory note are contemporaneous, the debt can be proved only by the note and where it is insufficiently stamped the plaintiff cannot apply by amendment to convert the suit into one on the original consideration. (*Reilly and Anantakrishna Aiyar, JJ.*) GURA SAHU *v.* KRISHNAMMA. **I.R. 1932 Mad. 658 = 139 I.C. 361 = 36 L.W. 432 = A.I.R. 1932 Mad. 687.**

———*Original cause of action—Relief on—Note not proved.*

In a suit on a promissory note, if the promissory note fails to be proved for some reason or other, the plaintiff is nevertheless entitled to sue on the loan itself. (*Dhavle, J.*) BRIJBHUSAN PANDE *v.* RAMJANAM KUER. **142 I.C. 163 = I.R. 1933 Pat. 127 = 13 Pat. L.T. 506 = A.I R. 1932 Pat. 324.**

——— *Original cause of action—Relief on—Permissibility.*

In a suit on a promissory note, it was contended that the plaintiff not being named in the instrument could not sue on the note. The plaintiff alleged that the consideration really moved from him and claimed to sue on the consideration, apart from the promissory note.

Held, that if for any reason a plaintiff's suit upon a promissory note failed he could fall back upon the original consideration and sue upon that, apart from the note; that an implied contract to repay money arose from the fact that the money was lent, that where all the facts giving rise to the alternative claim were fully stated in the plaint, the fact that the plaintiff has not formally asked for that relief in the plaint was no bar to the granting of that relief. 18 C.W.N. 617 (P.C.); 6 Nag.

PROMISSORY NOTE—Original Cause of action.

L R. 125 and 8 N L.R. 7, Rel.; 23 Cal. 851; 50 All. 839 (F.B.); 51 All. 530; 7 Pat. 845; 24 Bom.L.R. 360; 28 Bom.L.R. 631; 40 M. 585; 45 M. 778 and 35 I C. 219, Foll. (*Bose, A.J.C.*) GULABGIR *v.* NATHMAL. **27 N.L.R. 327=137 I.C. 33=I R. 1932 Nag. 53=A. I.R. 1932 Nag. 23.**

———Original cause of action—Relief on—Suit by real owner. *See* PROMISSORY NOTE—RIGHT TO SUE. **35 C.W.N. 53.**

———*Original cause of action—Renewal of earlier note—Later note insufficiently stamped—Relief on earlier transaction.*

The plaint as originally brought was based on a promissory note of 1925. Subsequently, however, the plaint was amended and the suit was based on an earlier promissory note of 1922. It appeared that the later note was not properly stamped and was therefore inadmissible in evidence. It was further shown that the later note was merely in renewal of liability under the original note and there was an endorsement of discharge to that effect.

Held, that S. 91 of the Evidence Act was not a bar to the suit of the plaintiff based on the earlier transaction which was distinct and separate from the execution of the later note. (*Makerji and Bennet, JJ.*) SALIG RAM *v.* RADHAY SHIAM. **I.R. 1931 All. 830=134 I.C. 254=1931 A.L.J. 522=A I.R. 1931 All. 560.**

———*Original cause of action—Suit on—Maintainability.*

Where a promissory note is invalid and inadmissible because it was not stamped, a suit is nevertheless maintainable on the basis of an independent admission of the loan. (Case-law reviewed.) (*Niyogi, A.J.C.*) MOHAN *v.* RAMJI. **27 N.L.R. 58=I.R. 1931 Nag. 155=134 I.C. 283=A.I.R. 1931 Nag. 113.**

———*Original cause of action—Suit based on—Rate of interest.*

In the absence of a special agreement for interest apart from the promissory note, in a suit based on the contract of loan and not on the note, the plaintiff is entitled only to interest at such rate as the Court deems reasonable, from the date of demand, and not at the rate provided for by the note, from the date of the contract. (*Stone, J.*) MURUGAPPA CHETTY *v.* NACHIAPPA CHETTY. **40 L.W. 167=155 I.C. 164=7 R.M. 550=A.I.R. 1934 Mad. 503=67 M.L.J. 30.**

Right to sue.

———*Right to sue—Assignee—Release of maker by payee.*

Negotiable instruments can be enforced by an assignee only when the assignment has been effected in accordance with the provisions of the Act, and transfer of the rights of a party under a note to order, to some one else, unless effected by operation of law, must be effected by indorsement and delivery and not otherwise. Where therefore a pro-note is assigned by the real owner, and the benamidar executes an acknowledgment admitting that he was merely a benamidar and that the assignor was the real beneficiary, the assignee is not entitled to sue on the pro note, specially when the payee of the note has expressly released the maker. No consideration is required for such a release and the fact that it was collusive is immaterial. (Case-law discussed.) (*Courtney-Terrell, C.J. and Varma, J.*) PEARY PASI *v.* GAURI LAL. **13 Pat. 655=151 I.C. 694=7 R.P. 121=15 Pat.L.T. 576=A.I.R. 1934 Pat. 382.**

———*Right to sue—Beneficial owner.*

A beneficial owner who is not the holder or endorsee cannot sue on the note. (*Curgenven, J.*) SOMU NAIDU *v.* SANYASAYYA. **149 I.C. 1210=6 R.M. 674 (1)=1934 M.W.N. 596=39 L.W. 520=A.I.R. 1934 Mad. 391.**

———*Right to sue—Beneficial owner—Benamidar a party also.*

No one can maintain a suit on a promissory note except the holder thereof. The fact that the holder has been made a party and has admitted that he is only the plaintiff's benamidar makes no difference.

Semble.—It may be that the suit can be proceeded with if it had been based on the consideration and not on the note. (*Suhrawardy and Patterson, JJ.*) HARRISHORE BARNA *v.* GURA MIA CHOUDHURY. **58 Cal. 752=I.R. 1931 Cal. 458=131 I.C. 570=53 C.L.J. 37=35 C.W.N. 53=A.I.R. 1931 Cal. 387.**

———*Right to sue—Beneficial owner—Right not disputed by promisee.*

If the beneficiary is in a position to give a valid discharge the fact that the promissory note does not stand in his name will not disentitle him to a decree in the suit. If the person in whose name the documents stand is a party to the litigation and does not dispute the plaintiff's right to recover the loan and give a valid discharge, there is no reason why the suit should not be maintainable and why a decree should not be made in favour of the beneficiary. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) RAMNAGINA PRASAD *v.* BISHWANATH PRASAD. **6 R.P. 373=147 I.C. 726=15 Pat.L.T. 102=A.I.R. 1934 Pat. 85.**

[**R.** 36 Bom.L.R. 807 (811).]

———*Right to sue—Letter of guarantee by third person*

Where *C* has executed a promissory note to *B* and *A* gives a letter of guarantee to *B* for the payment of the loan to *C* and the note is endorsed to another it is doubtful whether the letter of guarantee is assignable. Where it is not assigned the guarantee being personal to the payee only he can sue upon it and not the endorsee of the note or any other person. (*Cornish, J.*) SESHAYYA *v.* SANJIVARAYUDU. **150 I.C. 885=7 R.M. 36=1934 M.W.N. 16=39 L.W. 579=A.I.R. 1934 Mad. 350=67 M.L.J. 393.**

PROOF. *See* (1) EVIDENCE.
(2) EVIDENCE ACT, SS. 100—114.

PROOF OF DAMAGES. *See* CONTRACT ACT, S. 74.

PROOF OF TENANCY. *See* LANDLORD AND TENANT.

PROPERTY ATTACHABLE. *See* C. P. CODE, S. 60.

PROPERTY NOT ATTACHABLE. *See* C.P. CODE, S 60.

PROPRIETARY RIGHTS.
See (1) CO-SHARER.
(2) LAND TENURE.

PROSECUTION. *See* CRIMINAL TRIAL.

PROSTITUTION. *See* CONTRACT ACT, S. 23.

PROTECTED INTEREST. *See* B. T. ACT, SS. 85 AND 160 (*d*).

PROVIDENT FUND. *See also* C. P. CODE, S. 60.

———*Nominee—Right to attach fund in execution.*

A decree holder as a nominee of the depositor cannot attach the Provident Fund in execution of the decree passed in his favour. The effect of the nomination, if any, is that he becomes the owner of the fund in the eye of the law and by attaching it he is not attaching the property of his judgment-debtor but his own property. (*Jai Lal, J.*) SOHAN SINGH *v.* TARA DEVI. **150 I.C. 213=6 R.L. 834=36 P.L.R. 145=A.I.R. 1934 Lah. 153**

PROVIDENT FUNDS ACT (XIX OF 1925), Ss. 2 and 3—Government servant—Money in Provident Fund—Compulsory deposit—Right of Official Assignee

PROVIDENT FUNDS ACT (1925), S. 2.

PROVIDENT FUNDS ACT (1925), S. 2.

—Money due to a Government servant from the General Provident Fund is a compulsory deposit. *See* PROVINCIAL INSOLVENCY ACT, S. 28—CONSTRUCTION. **11 Rang. 93=A.I.R. 1933 Rang. 148.**

———**Ss. 2 (a) and 4**—*Deposit in Provident Fund—Insolvency of subscriber—Payment to subscriber—If vests in Official Receiver.*

As long as a compulsory deposit is in the hands of the Government or the institution which keeps and manages the fund, it is exempt from attachment under a decree by reason of S. 60 (1) (*k*), C.P. Code, and it does not vest in the Official Receiver on the insolvency of the subscriber. But after the amount standing to his credit is paid to the subscriber, and comes into his hands, it ceases to retain its character of a compulsory deposit and becomes his property. He can then deal with it in any manner he likes, and it is liable to be attached in execution of a decree against him. For the same reason under the provisions of S. 28 (4) of the Provincial Insolvency Act, it vests in the Official Receiver, if he is adjudicated an insolvent either before or after such acquisition by him of the amount. (*Rangnekar and Divatia, JJ.*) WALCHAND *v.* WILLIAMS. **59 Bom. 517=159 I.C. 144=8 R.B. 166=37 Bom.L.R. 494=A.I.R. 1935 Bom. 396.**

———**Ss. 2 (c) and 4 (1) (c) (ii)**—*Married sisters of deceased—Application for payment—Probate or letters of administration necessary.*

The married sisters of the deceased are not "dependents" as defined in S. 2 (*c*) of the Act. Where they are not nominees, they can only get the money by producing probate, letters of administration or a succession certificate, and Court-fee is payable on the deceased's Provident Fund as being his property. (*Wild, J. C.*) COSES FERNANDEZ, *In re.* **26 S.L.R. 429=I.R. 1933 Sind 91 (1)=142 I.C. 359=A.I.R. 1933 Sind 101.**

———**S. 2 (d)**—*Government employees — Officers of the Court of Wards—Bettiah Raj estate—Accumulated balance in the Provident Fund—Exemption from income-tax.*

The officers of the Court of Wards fall within the class of Government employees within the meaning of S. 2 Cl. (d). So the accumulated balance at the credit of the manager of the Court of Wards in the Bettiah Raj estate to the Provident Fund is exempted from taxation under S. 4 (3) (*v*) of the Income-Tax Act. (*Courtney-Terrell, C.J. and Dhavle, J.*) RUTHERFORD *v.* COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA. **10 Pat. 315=I.R. 1931 Pat. 360=133 I.C. 360=12 Pat.L.T. 384=A.I.R. 1931 Pat. 451.**

[**Rel.** 69 M.L.J. 611 (619, 621,630) (F.B.).]

———**Ss. 3 and 5**—*Deceased Mahomedan—Rights of nominee.*

The Provident Funds Act is not intended to affect the rights of the dependants of the subscriber or depositor to share the fund *inter se* in accordance with the personal law of the deceased, except to the extent expressly mentioned in S. 3, Cl. (2) of the Act, that is to say, to protect the fund from assignment by the subscriber and from attachment by creditors who have advanced money to him or to his dependants during his lifetime. Hence where the subscriber is a Mahomedan, a nominee of his, though as such has an absolute right to receive the money does not thereby become the absolute owner thereof. Thus it is rather unfortunate that a Mahomedan should not be able to give directions that the fund should after his death be distributed amongst his dependants in a manner inconsistent with the Mahomedan Law of intestate succession, although a non-Mahomedan may do so by signing a nomination paper

PROVIDENT FUNDS ACT (1925), S. 3.

made out in a form which amounts to a valid will according to the personal law applicable to him. (*Kupchand, A.J.C.*) HAYATUDDIN *v.* MT. RAHIMAN. **159 I.C. 427=8 R.S. 80=A.I.R. 1935 Sind 73.**

———**S. 3 (1)**—*"Compulsory deposit"—Deposit paid over to subscriber—Right of Official Assignee.*

A deposit is a "compulsory deposit" within the meaning of S. 3 (1) of the Provident Funds Act only so long as it remains in the Fund. The moment it is paid to the subscriber, it ceases to retain its character of a compulsory deposit; it is no longer immune from attachment or in case of subsequent insolvency, the claims of the Official Assignee. 44 Bom. 673, Diss. (*Ramesam and Cornish, JJ.*) RANGANAYAKI AMMAL *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1931 Mad. 835=134 I.C. 179=34 L.W. 117=A.I.R. 1931 Mad. 797=61 M.L.J. 354.**

———**S. 3 (1) and (2)**—*Nomination made in consideration of loan—Validity.*

Where a person has made a declaration that certain person will be entitled on his death, to receive payment on his deposit in the institution, the declaration is tantamount to a nomination which is quite a different thing from an assignment or a charge which is void under S. 3 (2), Provident Funds Act. The declaration on the face of it, is to take effect only in the event of the subscriber's death and it is in the nature of a bequest taking effect only in the event of the death of the subscriber before the deposit becomes payable, whereas an assignment takes effect whenever the fund becomes due even if the subscriber be alive. A nomination which purports to confer upon the nominee the right to receive the sums standing to the credit of a subscriber in the fund on the death of the subscriber is not invalid as contravening the prohibition against assignment or charge under S. 3 (1) merely because the nomination has been made in consideration of a loan and not on account of mere love and affection. It is inconceivable that a nomination valid in all other respects is valid only when made without consideration or in consideration of mere love and affection but is invalid when it is made for consideration. (*Mya Bu, J.*) VISHWANADHAM MUDALIAR *v.* MURUGESA MUDALIAR. **160 I.C. 327=8 R.R. 369=A.I.R. 1935 Rang. 440.**

———**S. 3 (2)**—*Right of nominee under—Heirs of deceased under personal law—Right of.*

The amount standing to the credit of a deceased subscriber in a provident fund vests in the dependant and does not form part of the estate of the deceased divisible among his heirs according to his personal law. The dependant-nominee is absolutely entitled to receive the amount free from any debt or other liability of the deceased. (*Rangnekar and Divatia, JJ.*) AHMAD ABDUL RAZAAK *v.* JAMALA BINT MEHDI. **59 Bom. 475=156 I.C. 630=8 R.B. 10=37 Bom L.R. 370=A.I.R. 1935 Bom. 234.**

———**Ss. 3 (2) and 4 (1)**—*Sum paid over to son of deceased judgment-debtor—Liability for decree debt.*

The Provident Fund amount which stood to the credit of the deceased judgment debtor at the time of his decease and which, on his decease, was paid over to his minor son as his dependant cannot be deemed to have devolved on the son by right of inheritance. It vests by statute. It cannot therefore be regarded as the assets of the deceased depositor in the hands of his son and cannot be proceeded against for the realisation of a decree-debt due by the father. 46 Cal. 962, Foll. (*Sundaram Chetty and Pakenham Walsh, JJ.*) THAJ MAHOMED SAIB *v.* BALAJI SINGH. **57 Mad. 440=148 I.C. 491=6 R.M. 493=39 L.W. 186=1933 M.**

PROVIDENT FUNDS ACT (1925), S. 4.

W.N. 1473=A.I.R. 1934 Mad. 173=66 M.L.J. 207.

——**S. 4**—*Effect of.*

The effect of S. 4 of the Provident Funds Act is that in a competition between two persons, it is the nominee who holds a certificate who is entitled to the money. (*Mukerji, A.C.J. and S.K. Ghose, J.*) ATUL-CHANDRA SEN *v.* KANNAMMAL. **62 Cal. 272=155 I.C. 749=7 R.C. 623=39 C.W.N. 47=A.I.R. 1935 Cal. 271 (1).**

——**S. 5**—*Construction—Nominee—Right to receive Provident Funds.*

The provisions of the Act relating to the right of nominees to receive the Provident Fund are not to be read, as though they were controlled by, or subject to any other law for the time being in force, or subject to any disposition whether testamentary or otherwise, by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. The fact that letters of administration or probate is granted to a different person does not prevent the nominee from claiming under the Act the full amount of the sum due on death of a subscriber to the fund. 64 I.C. 62; A.I.R. 1924 Sind 57 and A.I.R. 1928 Lah. 773, Dist. (*Aston, A.J.C.*) MT. HURMAT BIBI *v.* MT. KAZ BANU. **I.R. 1932 Sind 149=139 I.C. 775=A.I.R. 1932 Sind 115.**

——**S. 5 (1)**—"*Notwithstanding anything contained in any law*"—*Interpretation—If includes personal law.*

Per *King, C.J., Srivastava, J.* (*Zia-ul-Hasan, J.* Contra.)—The words "notwithstanding anything contained in any law for the time being in force" in S. 5 (1) have the effect of conferring upon a depositor a right to give his provident fund money as he thinks best, notwithstanding the provision of his personal law. It is therefore open to a Muslim depositor to nominate one of his heirs to receive the Provident Fund on his death, even though his personal law prohibits a will in favour of one of the heirs to the exclusion of the others. The nominee is not only entitled to realise the money from the authority administering the fund, but also to appropriate it to his own use and benefit free from any charge or attachment or liability enforceable by other heirs or by creditors. (*King, C.J., Srivastava and Zia-ul-Hasan, JJ.*) MAHOMED NAIM *v.* MUNIMUNNISSA. **159 I.C. 596=8 R.O. 185=1935 O.W.N. 1296=A.I.R. 1936 Oudh 32 (F.B.).**

——**S. 5 (2)**—*Construction and scope—Second certificate—If barred.*

The effect of S. 5 (2) of the Provident Funds Act is that the nomination will entitle the nominee to a certificate without any proof of his right thereto, such as an applicant for a succession certificate has otherwise to establish. But it does not go further and mean that the other provisions of the Act, which may afford as a bar will also be operative. Therefore, the fact that a certificate has been previously granted to another does not bar the grant of the certificate to the nominee. (*Mukerji, J.C. and S.K. Ghose J.*) ATUL CHANDRA SEN *v.* KANNAMMAL. **62 Cal. 272=7 R.C 623=155 I.C. 749 39 C.W.N 117=A.I.R. 1935 Cal. 271 (1).**

PROVIDENT INSURANCE SOCIETIES ACT (V OF 1912), Ss. 17 (7) and 18—*Scope—Notice—If mandatory*

The giving of the notices under S. 17 (7) of the Provident Insurance Societies Act is mandatory; whereas under S. 18, it is merely permissive. (*Cunliffe, J.*) *In the matter of* THE PIONEER INSURANCE COMPANY, LTD. **164 I.C. 897=39 C.W.N. 274.**

PROVINCIAL INSOLVENCY ACT (III OF 1907), S. 28—*Contingent liability to surety—Debt, if provable.*

A contingent liability to which a debtor may become subject before his discharge is a debt provable under S. 28. A contingent liability of an insolvent debtor to his surety to which he did not become subject before his discharge is not a debt to which the Act would apply. (*Mukerji and Bennet, JJ.*) ANAND SINGH *v.* COLLECTOR OF BIJNOR. **54 All. 1007=143 I.C. 526=I.R. 1933 All. 287=1932 A.L.J. 868=A.I.R. 1932 All. 610.**

——**(V OF 1920).** *See also* INSOLVENCY.

——*English decisions—Relevancy.*

The Provincial Insolvency Act is nothing more than a copy of the Bankruptcy Act of England regarding notice of suspension of payment and that being so, the authorities which have been decided from time to time on this provision in the English Act are necessarily authorities for the Court. (*Wort, A.C.J. and Kulwant Sahay, J.*) LAKHI PRASAD SINGHANIA *v.* UGRAH MISRA. **13 Pat. 78=148 I.C. 39=6 R.P. 434=14 Pat.L.T. 691=A.I.R. 1933 Pat. 461.**

——Ex parte *adjudication—Setting aside—Limitation.*

There is no provision in the Provincial Insolvency Act for the setting aside of an order of adjudication of an insolvent passed *ex parte*. Application for setting aside such an order has to be made under O. 9, R. 13 and is governed by Art. 164 of the Limitation Act. (*Abdul Qadir, J.*) UMAR DIN *v.* RAGHU NATH SAHAI. **I.R. 1932 Lah. 498=138 I.C. 377=33 P.L.R. 698=A.I.R. 1932 Lah. 522.**

——*Inherent powers of Court—Orders for ends of justice.*

An Insolvency Judge possesses the inherent powers of a Civil Court, to make all orders necessary for the ends of justice and prevent abuse of the process of Court. (*Tek Chand and Agha Haidar, JJ.*) ISHAR DAS *v.* MT. FATIMA BIBI. **153 I.C. 993=7 R.L. 489=A.I.R. 1934 Lah. 468.**

——*Inherent powers of Court—Stay of insolvency proceedings.*

Though the Provincial Insolvency Act does not expressly empower the Court to pass an order staying the insolvency proceedings, still the Court is competent to pass such an order in the exercise of its inherent jurisdiction on the analogy of somewhat similar provision contained in S. 94, Presidency Towns Insolvency Act. (*Wild, J. C. and Rupchand, A.J. C.*) DAYARAM MENGHRAJ *v.* SAKHI BAI. **I.R. 1931 Sind 47=130 I.C. 559=A.I.R. 1931 Sind 65.**

——*Objects of.*

The object of the Insolvency Act is to make all the property of the insolvent divisible amongst all his creditors. (*Courtney-Terrell, C. J. and Agarwala, J.*) MAHABIR PRASAD *v.* SHIVANANDAN SAHAY. **152 I.C 277=7 R.P. 162=15 Pat.L.T. 502=A.I.R. 1934 Pat. 514.**

——*Retrospective effect—Adjudication under old Act—Applicability of new Act.*

The provisions of the new Provincial Insolvency Act have no retrospective effect. Consequently where a debtor files his insolvency petition under the old Act (1907) and secures an order of adjudication in his favour, the order confers certain rights upon him which cannot be taken away by the new Act. The old Act applies to such a case and the creditors cannot obtain the annulment of the order of adjudication under the new Act nor can they claim exemption under S. 78 (2). (*Ferrers, J. C. and Rupchand, A.J.C.*) GURMUKH-

PROV. INS. ACT (1920).

DAS RANGALMAL *v.* HASSOMAL. **26 S.L.R. 204=I. R. 1932 Sind 124=139 I.C. 589=A.I.R. 1932 Sind 71.**

———*Scope—Nature of—Provisions being of general character.*

The insolvency law is mainly an administrative or adjective law, a law of machinery to bring about certain results, namely, the satisfaction of the insolvent's debts. The provisions contained in the Act are therefore of a general character. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I.C. 119=I.R. 1932 All. 7=1931 A.L.J. 122=A I.R. 1931 All. 162 (F.B).**

———**S. 2 (1) (c)**—*Secured creditor—Construction of decree.*

The simple mortgagee of certain goods sued for money due. The plaintiff however did not ask for a decree that the mortgaged goods be sold but urged at the hearing that he had a remedy against the goods and in the course of the argument insisted upon his right. The Court passed a decree which was not clearly expressed but the object of which was to give the plaintiff recourse to the goods.

Held, that the position of the plaintiff decree-holder was that of a secured creditor (*Mears, C.J. and Sen, J.*) MUNNA LAL & SONS *v* OFFICIAL RECEIVER, JHANSI. **I.R 1932 All. 320 (1)=137 I.C. 208 (2)= A.I.R. 1932 All. 550 (1).**

———**Ss 2 (1) (d) and 28**—"*Property*"—*Insolvency of Hindu father—Son's share—Right to sell.*

Property in Ss. 2 (1) (*d*) and 28 of the Porvincial Insolvency Act includes a Hindu father's power to sell the son's share; and money derived from the exercise of the father's power to sell his son's share is also property to which the Official Receiver would be entitled. (*Curgenven and Cornish, JJ*) VENKATARAMA SASTRIAR *v.* OFFICIAL RECEIVER, COIMBATORE. **154 I C. 449 =7 R.M. 432=40 L.W. 904=A.I.R. 1935 Mad. 255 =68 M.L.J. 357.**

———**S. 2 (1) (d)**—"*Property*"—*Interest in joint family property.*

The interest of a debtor applicant in the joint family property is his property. (*Rajkhpal Singh and Niamatullah, JJ.*) SIYA RAM *v.* BOHRA KISHORI LAL. **147 I.C. 11=6 R.A. 435=1933 A.L.J. 943=A.I.R. 1933 All. 841.**

———**S. 2 (1) (d)**—"*Property*"—*Power of Hindu father.*

The power of a Hindu father to dispose of the family property to satisfy his legitimate debts is included in the definition of the term "property". (*Madgavkar and Barlee, JJ.*) HARIDAS *v.* LALLUBHAI. **55 Bom. 110=I.R. 1931 Bom. 137=129 I.C. 153=32 Bom.L. R. 1362=A.I.R. 1931 Bom. 50.**

———**S. 2 (1) (d)**—"*Property*"—*Trust property vested in insolvent.*

Trust property in the hands of an insolvent cannot be treated as part of his estate. It is not open to the Court to direct the Receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents. (*Abdul Qadir, J.*) BENARSI DAS *v.* BHAGAT RAM CHAND. **6 R.L. 577=148 I.C. 550=A.I.R. 1934 Lah. 683.**

———**S. 4.**

Appeal.
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PROV. INS. ACT (1920), S. 4—Appeal.

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———**S. 4**—*Appeal—Claim not maintainable under.*

Where a Judge holds that the claim is not maintainable under S. 4, the order can be appealed against under S. 75 read with Sch. I. (*Mitter and Henderson, JJ.*) MONOMOHAN ROY CHOUDHURY *v.* BHUPAL CHANDRA ROY. **149 I.C. 677=6 R.C. 625=58 C.L.J. 118=A.I.R. 1934 Cal. 122 (2).**

———**Ss. 4 and 75**—*Appeal—Competency—Sale of occupancy rights in insolvency—Sale held invalid—Application for refund of purchase-money—Dismissal of—Appeal from.*

A piece of land in which the insolvent had occupancy rights under S. 6 of the Punjab Tenancy Act was sold in insolvency. The sale was subsequently set aside as invalid in a suit by the landlord. Thereupon the vendee applied to the insolvency Court for the refund of the purchase money. The application was dismissed.

Held, that no question of title was involved and that an appeal was not competent from the order dismissing the application. (*Bhide, J.*) FAZAL DIN THAKAR SINGH. **6 I.R. (Lah.) 96=145 I.C. 337=34 P.L.R. 183=A.I.R. 1933 Lah. 628.**

———**Ss 4 and 75**—*Appeal—Decision as to existence of debts of petitioning creditor—Second appeal.*

A question as to the right of the petitioning creditor to file his petition and the existence of his debts is not one falling under S. 4 of the Provincial Insolvency Act, and the decision on such a question is therefore not open to second appeal. (*Divatia, J.*) GOPIKABAI MAHADEV *v.* CHAPSI PURUSHOTTAM. **59 Bom. 161 =154 I.C. 566=7 R.B. 342=36 Bom.L.R. 1236= A I.R. 1935 Bom. 80.**

———**Ss. 4 and 75**—Appeal—*Ex parte* order for delivery of insolvent's property—Application to set aside framed as one for review—Dismissal of—Remedy. *See* PROVINCIAL INSOLVENCY ACT, SS. 75 AND 4. **143 I.C. 613=37 L.W. 720=1933 M.W.N. 75=A.I.R. 1933 Mad. 345.**

———**Ss. 4 and 75**—*Appeal—Order annulling sale*

An order annulling a sale by the insolvent is one provided for by S. 53 to which S. 4 has no application consequently the second proviso to S. 75 of the Act does not apply and no second appeal is competent from the order of annulment. 51 M. 567; 52 M. 337, Rel. on. (*Reilly and Ananthakrishna Iyer, JJ.*) ALAGIRISUBBANAICK *v.* OFFICIAL RECEIVER, TINNEVELLY. **54 Mad. 989 =132 I.C. 641=34 L W. 105=A.I.R 1931 Mad. 745 =61 M.L J. 820.**

[**R.** 13 R. 317 (719).]

———**S. 4**—*Appeal—Order appointing interim receiver under S. 20—Confirmation—Second appeal.*

Where, in a pending insolvency application, the lower Court found that the alleged insolvent had heavy debts to pay, that some of his cheques were returned and his accounts were not forthcoming and after considering the circumstances, appointed an interim receiver in the exercise of the discretion vested in it under S. 20, and this order was confirmed by the District Court,

Held, that there was no question of jurisdiction, and that there was no ground for interference by the High Court in second appeal.

PROVIDENT FUNDS ACT (1925), S. 4.

W N. 1473=A.I.R. 1934 Mad. 173=66 M.L J. 207.

———S. 4—*Effect of.*

The effect of S 4 of the Provident Funds Act is that in a competition between two persons, it is the nominee who holds a certificate who is entitled to the money. (*Mukerji, A.C.J. and S.K. Ghose, J.*) ATUL-CHANDRA SEN *v.* KANNAMMAL. **62 Cal. 272=155 I.C. 749=7 R.C. 623=39 C.W.N. 47=A.I.R. 1935 Cal. 271 (1).**

———S. 5—*Construction—Nominee—Right to receive Provident Funds.*

The provisions of the Act relating to the right of nominees to receive the Provident Fund are not to be read, as though they were controlled by, or subject to any other law for the time being in force, or subject to any disposition whether testamentary or otherwise, by the subscriber or depositor. Unless the nomination is cancelled by the subscriber or varied by a nomination in favour of another person, the nominee, on the death of the subscriber must be regarded as having had conferred on him or her an absolute right to receive the Provident Fund. The fact that letters of administration or probate is granted to a different person does not prevent the nominee from claiming under the Act the full amount of the sum due on death of a subscriber to the fund. 64 I.C. 62; A.I.R. 1924 Sind 57 and A.I.R. 1928 Lah. 773, Dist. (*Aston, A.J.C.*) MT. HURMAT BIBI *v.* MT. KAZ BANU. **I.R. 1932 Sind 149=139 I.C. 775=A I.R. 1932 Sind 115.**

———S. 5 (1)—"*Notwithstanding anything contained in any law*"—*Interpretation—If includes personal law.*

Per *King, C.J., Srivastava, J.* (*Zia-ul-Hasan, J.* Contra.)—The words "notwithstanding anything contained in any law for the time being in force" in S. 5 1) have the effect of conferring upon a depositor a right to give his provident fund money as he thinks best, notwithstanding the provision of his personal law. It is therefore open to a Muslim depositor to nominate one of his heirs to receive the Provident Fund on his death, even though his personal law prohibits a will in favour of one of the heirs to the exclusion of the others. The nominee is not only entitled to realise the money from the authority administering the fund, but also to appropriate it to his own use and benefit free from any charge or attachment or liability enforceable by other heirs or by creditors. (*King, C.J., Srivastava and Zia-ul-Hasan, JJ.*) MAHOMED NAIM *v.* MUNIMUNNISSA. **159 I.C. 596=8 R.O. 185=1935 O.W.N. 1296=A.I.R. 1936 Oudh 32 (F B.).**

———S. 5 (2)—*Construction and scope—Second certificate—If barred.*

The effect of S. 5 (2) of the Provident Funds Act is that the nomination will entitle the nominee to a certificate without any proof of his right thereto, such as an applicant for a succession certificate has otherwise to establish. But it does not go further and mean that the other provisions of the Act, which may afford as a bar will also be operative. Therefore, the fact that a certificate has been previously granted to another does not bar the grant of the certificate to the nominee. (*Mukerji, A.J.C. and S.K. Ghose J.*) ATUL CHANDRA SEN *v.* KANNAMMAL. **62 Cal. 272=7 R.C 623=155 I.C. 749=39 C.W.N 117=A.I.R. 1935 Cal. 271 (1).**

PROVIDENT INSURANCE SOCIETIES ACT (V OF 1912), Ss. 17 (7) and 18—*Scope—Notice—If mandatory*

The giving of the notices under S. 17 (7) of the Provident Insurance Societies Act is mandatory; whereas under S. 18, it is merely permissive. (*Cunliffe, J.*) *In the matter of* THE PIONEER INSURANCE COMPANY, LTD. **164 I C. 897=39 C.W.N. 274.**

PROVINCIAL INSOLVENCY ACT (III OF 1907), S. 28—*Contingent liability to surety—Debt, if provable.*

A contingent liability to which a debtor may become subject before his discharge is a debt provable under S. 28. A contingent liability of an insolvent debtor to his surety to which he did not become subject before his discharge is not a debt to which the Act would apply. (*Mukerji and Bennet, JJ.*) ANAND SINGH *v* COLLECTOR OF BIJNOR. **54 All. 1007=143 I.C. 526=I.R. 1933 All. 287=1932 A.L.J. 868=A.I.R. 1932 All. 610.**

———(V OF 1920). *See also* INSOLVENCY.

———*English decisions—Relevancy.*

The Provincial Insolvency Act is nothing more than a copy of the Bankruptcy Act of England regarding notice of suspension of payment and that being so, the authorities which have been decided from time to time on this provision in the English Act are necessarily authorities for the Court. (*Wort, A.C.J. and Kulwant Sahay, J.*) LAKHI PRASAD SINGHANIA *v.* UGRAH MISRA. **13 Pat. 78=148 I.C. 39=6 R.P. 434=14 Pat.L.T. 691 =A.I.R. 1933 Pat. 461.**

———Ex parte *adjudication—Setting aside—Limitation.*

There is no provision in the Provincial Insolvency Act for the setting aside of an order of adjudication of an insolvent passed *ex parte*. Application for setting aside such an order has to be made under O. 9, R. 13 and is governed by Art. 164 of the Limitation Act. (*Abdul Qadir, J.*) UMAR DIN *v.* RAGHU NATH SAHAI. **I.R. 1932 Lah. 498=138 I.C. 377=33 P.L. R. 698=A.I.R. 1932 Lah. 522.**

———*Inherent powers of Court—Orders for ends of justice.*

An Insolvency Judge possesses the inherent powers of a Civil Court, to make all orders necessary for the ends of justice and prevent abuse of the process of Court. (*Tek Chand and Agha Haidar, JJ.*) ISHAR DAS *v.* MT. FATIMA BIBI. **153 I.C. 993=7 R. L. 489=A.I. R. 1934 Lah. 468.**

———*Inherent powers of Court—Stay of insolvency proceedings.*

Though the Provincial Insolvency Act does not expressly empower the Court to pass an order staying the insolvency proceedings, still the Court is competent to pass such an order in the exercise of its inherent jurisdiction on the analogy of somewhat similar provision contained in S. 94, Presidency Towns Insolvency Act. (*Wild, J. C. and Rupchand, A J. C.*) DAYARAM MENGHRAJ *v* SAKHI BAI. **I.R. 1931 Sind 47=130 I.C. 559=A.I.R. 1931 Sind 65.**

———*Objects of.*

The object of the Insolvency Act is to make all the property of the insolvent divisible amongst all his creditors. (*Courtney Terrell, C. J. and Agarwala, J.*) MAHABIR PRASAD *v.* SHIVANANDAN SAHAY. **152 I.C. 277=7 R.P. 162=15 Pat.L.T. 502=A.I.R. 1934 Pat. 514.**

———*Retrospective effect—Adjudication under old Act—Applicability of new Act.*

The provisions of the new Provincial Insolvency Act have no retrospective effect. Consequently where a debtor files his insolvency petition under the old Act (1907) and secures an order of adjudication in his favour, the order confers certain rights upon him which cannot be taken away by the new Act. The old Act applies to such a case and the creditors cannot obtain the annulment of the order of adjudication under the new Act nor can they claim exemption under S. 78 (2). (*Ferrers, J. C. and Rupchand, A.J.C.*) GURMUKH-

PROV. INS. ACT (1920).

DAS RANGALMAL *v.* HASSOMAL. **26 S.L.R. 204=I. R. 1932 Sind 124=139 I.C. 589=A.I.R. 1932 Sind 71.**

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———**S. 4**—*Appeal—Claim not maintainable under.*

Where a Judge holds that the claim is not maintainable under S. 4, the order can be appealed against under S. 75 read with Sch. I. (*Mitter and Henderson, JJ.*) MONOMOHAN ROY CHOUDHURY *v.* BHUPAL CHANDRA ROY. **149 I.C. 677=6 R.C. 625=58 C.L.J. 118=A.I.R. 1934 Cal. 122 (2).**

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A piece of land in which the insolvent had occupancy rights under S. 6 of the Punjab Tenancy Act was sold in insolvency. The sale was subsequently set aside as invalid in a suit by the landlord. Thereupon the vendee applied to the insolvency Court for the refund of the purchase money. The application was dismissed.

Held, that no question of title was involved and that an appeal was not competent from the order dismissing the application. (*Bhide, J.*) FAZAL DIN THAKAR SINGH. **6 I.R. (Lah.) 96=145 I.C. 337=34 P.L.R. 183=A.I.R. 1933 Lah. 628.**

———**Ss 4 and 75**—*Appeal—Decision as to existence of debts of petitioning creditor—Second appeal.*

A question as to the right of the petitioning creditor to file his petition and the existence of his debts is not one falling under S. 4 of the Provincial Insolvency Act, and the decision on such a question is therefore not open to second appeal. (*Divatia, J.*) GOPIKABAI MAHADEV *v.* CHAPSI PURUSHOTTAM. **59 Bom. 161 =154 I.C. 566=7 R.B. 342=36 Bom.L.R. 1236=A I.R. 1935 Bom. 80.**

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———**Ss. 4 and 75**—*Appeal—Order annulling sale*

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———**S. 4**—*Appeal—Order appointing interim receiver under S. 20—Confirmation—Second appeal.*

Where, in a pending insolvency application, the lower Court found that the alleged insolvent had heavy debts to pay, that some of his cheques were returned and his accounts were not forthcoming and after considering the circumstances, appointed an interim receiver in the exercise of the discretion vested in it under S. 20, and this order was confirmed by the District Court,

Held, that there was no question of jurisdiction, and that there was no ground for interference by the High Court in second appeal.

PROV. INS. ACT (1920), S. 4—Appeal.

Quaere: If a second appeal is at all competent. (*Baker and Shingne, JJ.*) VENILAL *v.* VIRCHAND. **I.R. 1932 Bom. 463=139 I.C. 44=34 Bom.L.R. 382=A.I.R. 1932 Bom. 228.**

———**S. 4**—*Appeal—Order avoiding voluntary transfer—Second appeal—Maintainability.*

An order avoiding a voluntary transfer is authorised by S. 53; it is not necessary to invoke the power under S. 4 and it is not therefore a decision under S. 4. So a second appeal does not lie from such a decision to the High Court. 52 Mad. 337; A.I.R. 1930 Nag. 272, Foll.; 2 Luck. 651 and 45 Mad. 434, Dist.; 51 All. 550 (F.B.), Ref. (*Macnair, J.C., Jackson and Subhedar, A.J Cs.*) RAMACHANDRA *v.* RAMACHANDRA. **27 N.L.R. 179=I.R 1931 Nag. 175=134 I.C. 687=A.I.R. 1931 Nag. 153 (F.B.).**

[R. 144 I.C. 41; 31 N.L.R. 212.]

———**S. 4**—*Appeal—Order of conditional discharge—Omission to implead Official Receiver—Order modified—Second appeal—Maintainability—Interference in revision.*

An insolvent who had been granted a conditional discharge appealed to the District Judge but he impleaded only the creditors and not the Official Receiver. An objection on the ground of non-joinder was taken but the Court while modifying the order held that the non joinder was a mere irregularity. Against the appellate order both the creditor and insolvent preferred appeals.

Held, that the order under appeal was not covered by S. 4 and that no second appeal lay.

Held, further, though the Official Receiver was a necessary party to the appeal the High Court was not bound to interfere in revision when the Official Receiver himself had not moved in the matter. (*Jai Lal, J.*) GOPAL DAS *v.* OFFICIAL RECEIVER. **I. R. 1931 Lah. 622=132 I.C. 526=A.I.R. 1931 Lah. 647.**

———**Ss. 4 and 75**—Appeal—Order of District Judge *See* PROVINCIAL INSOLVENCY ACT, S. 75.

———**Ss. 4 and 75**—*Appeal—Order of District Judge on appeal—Second appeal.*

The right of appeal under the Provincial Insolvency Act is strictly limited by the provisions of S. 75 and there can be no appeal from a decision of a District Judge passed in an appeal from a decision of a Subordinate Court unless the latter is one under S. 4. (*Pandurang Row, J.*) JOHN A. DAVID *v.* ALAGAPPA CHETTIAR. **158 I.C. 59=8 R.M. 219=A.I.R. 1935 Mad. 432.**

———**Ss. 4 and 75**—*Appeal—Order of District Judge under S. 4—Appeal to High Court under S. 75—Appeal to Privy Council—Maintainability.*

When a right of appeal is given to one of the ordinary Courts of the country, the procedure, orders and decrees of that Court will be governed by the ordinary rules of the Civil Procedure Code. An appeal to Privy Council is therefore maintainable from the decision of the High Court under S. 75 from the order of the District Judge, under S. 4 (2). 39 Mad. 617 (P.C.), Ref. (*Lord Thankerton.*) MAUNG BA THAW *v.* MA PIN. **61 I.A. 158=12 Rang. 194=1934 A.L.J. 358=39 L.W. 418=1934 M.W.N. 284=36 Bom.L.R. 427=6 R.P.C. 114=148 I.C. 1=3 A.W.R. 471 (2)=38 C.W.N. 449=11 O.W.N. 418=61 C.L.J. 55=37 P.L.R. 279=A.I.R. 1934 P.C. 81=66 M.L.J. 404 (P.C.).**

[R. 12 R. 355 (359).]

———S. 4—Appeal—Order under S. 54. *See* PROVINCIAL INSOLVENCY ACT, S. 54 APPEAL. **33 P.L.R.971.**

———**S. 4 (1)**—*Appeal—Order of adjudication—Second appeal—Maintainability.*

An order of the District Court dismissing an appeal against an order of the Court of first instance exercising insolvency jurisdiction and adjudging a person as insolvent is final and no second appeal lies. (*Abdul Qadir, J.*) ALLAH DIYA *v.* KUNJ BIHARI. **I.R. 1932 Lah. 645 (1).**

PROV. INS. ACT (1920), S. 4—Application under.

Applicability.

———**S. 4**—*Applicability—Petition under S. 53 or 54—No appeal from appellate order of District Judge.*

To a petition to set aside or declare as void a deed of transfer made by an insolvent under S. 53 or S. 54, Provincial Insolvency Act, S. 4 of the Act has no application and therefore no appeal lies to the High Court from the appellate order of the District Judge. A. I. R. 1931 Mad. 745, Rel, on. (*Pandurang Row, J.*) JOHN A. DAVID *v.* ALAGAPPA CHETTIAR. **158 I.C. 59=8 R.M. 219=A.I.R. 1935 Mad. 432.**

———**S. 4**—*Applicability—Sham transaction—Insolvent only entitled to fraction—Effect.*

S. 4 applies to a disposition which was intended not to transfer any title from the very beginning but was only a nominal and colourable deed. The fact that the insolvent has only a fractional interest in the property conveyed is of no account. (*Niyogi, A J.C.*) BASANTI BAI *v.* RAMRAO. **15 Nag.L.J. 85.**

Application under.

———**S. 4**—*Application under—Form of—No plaint or application necessary.*

It is not necessary that proceedings under S. 4, in order that thay may be valid, should be initiated by a plaint or a regular application. Certain property was claimed by the receiver to have vested in the insolvent; but the insolvent's father objected that the property did not belong to the judgment-debtor. Subsequent to the death of the father, one of the creditors applied to sell the property which had descended to the insolvent from his father and to distribute the proceeds and on the report of the receiver, the property was ordered to be taken possession of by the receiver and sold. Objection was raisd by the sons of the insolvent that their grandfather had bequeathed the property to them by a will. The Judge held that the will had not been proved. The sons then instituted a suit for a declaration that the property was theirs by virtue of a will and could not vest in the receiver. The trial Judge held that the suit did not lie in view of the order of the Insolvency Judge. It was contended on appeal that the proceedings before the Insolvency Judge were not under S. 4 as they were not initiated by an application and that the suit was not barred.

Held, that it was open to the Court to take proceedings *suo motu* under S. 4, that in this case it was moved by one of ths creditors and also by the receiver, that the proceedings of the Insolvency Judge were under S. 4 and binding on parties to litigation and that the present suit did not lie. A. I R. 1928 Lah. 556, Expl. (*Jai Lal and Abdul Rashid, JJ.*) GHULAM DASTGIR *v.* MOHAN LAL. **6 I.R. (Lah.) 285=146 I.C. 912=34 P.L.R. 1063=A.I.R. 1933 Lah. 789.**

———**S. 4**—*Application under—Leave of Court—Application by creditor for declaring transaction benami—Leave not formerly obtained under S. 28 (2)—Effect—Implied leave.*

A creditor's application under S. 4 of the Provincial Insolvency Act, praying for a declaration that a certain transaction is benami, is not barred merely because leave of the Insolvency Court has not been formally obtained under S. 28 (2) of the Act. When the Insolvency Court entertains and hears the application and proceeds to give a decision upon it, it must be deemed that the Court has impliedly granted such leave. (*Beasley, C. J. and King, J.*) NARAYANAMMA *v.* VENKATASOMAYAJULU. **40 L.W. 693=153 I.C.**

PROV. INS. ACT (1920), S. 4—Application under.

624=7 R.M. 364=1934 M.W.N. 1034=A.I.R. 1935 Mad. 46=67 M.L.J. 616.

———**Ss. 4 and 28 (2)**—*Application under—Leave of Court—Application praying for declaration of insolvent's title to property and for direction to Official Receiver to sell—Maintainability—No formal request for leave.*

An application was made to the Insolvency Court under S. 4 of the Provincial Insolvency Act praying for a declaration that certain property belonged to the insolvent and for a direction to the Official Receiver to sell the said property for the benefit of the general body of creditors. The Official Receiver was made a party to the application and it was alleged in the affidavit, filed in support of the application, that a petition was filed before the Receiver asking him to take up the matter and move the Court but that he rejected the petition although all the necessary materials were placed before him.

Held, (*i*) that the application fell within S. 28 (2) of the Provincial Insolvency Act and would not lie without the leave of the Court; (*ii*) that the requirements of S. 28 (2) had been sufficiently complied with, because there really was an application before the Court for leave to proceed with the application. Although it is imperative that consent should be obtained before the institution of the proceedings, a good deal has to be said in favour of the view that by implication the leave of the Court was being asked for and that it was not therefore necessary that a formal request should be made for such leave. (*Beasley, C.J. and Cornish, J.*) VASUDEVA SASTRI *v.* ANNAPURNAMMA GARU. **161 I.C. 732=8 R.M. 864=1935 M.W.N. 549=42 L.W. 402=A.I.R. 1935 Mad. 809=69 M.L.J. 137.**

———**Ss. 4 and 68**—*Application under—Limitation—Sale by Official Receiver—Application to Court to set aside sale.*

An application to the District Judge to set aside a sale of the Official Receiver, even if it be deemed to be one under S. 4 of the Provincial Insolvency Act, must be filed within 21 days from the date of the sale. (*Jai Lal and Skemp, JJ.*) JAI KISHAN DASS *v.* CHIRAGH DIN. **A.I.R. 1935 Lah. 60.**

———**Ss. 4 and 68**—*Application under—Maintainability—Official Receiver passing order without jurisdiction.*

Where the Official Receiver passes an order on a claim petition which he has no jurisdiction to pass, even though no appeal is filed under S. 68, an application under S. 4 is not barred because the remedy under S. 4 is much larger than that could be got under S. 68. In fact the correct procedure is under S. 4 and not by appeal under S. 68. A I.R. 1924 Mad. 529, Rel. on; 47 I.C. 62; A.I.R. 1926 Mad. 363; A.I.R. 1931 Mad. 745 and A.I.R. 1932 Cal. 642, Ref. (*Walsh, J.*) VENKATARAMA CHETTY *v.* ANGATHAYAMMAL. **6 I.R. (Mad.) 220 (2)=146 I.C. 204=38 L.W. 896=A.I.R. 1933 Mad. 471.**

[**D.** 1934 R. 97.]

———**S. 4**—Application under — Maintainability — Seizure of property by Receiver—Remedy. *See* PROVINCIAL INSOLVENCY ACT, SS. 68 AND 4. **149 I.C. 43=6 R.R. 278=A.I.R. 1934 Rang. 97.**

Construction.

———**S. 4**—*Construction—"Subject to the provisions of this Act."*

The expression "subject to the provisions of this Act" in S. 4, restrict the power conferred by the section only to this extent that it may not be exercised in any such manner as would be in conflict with any provision in the Act. (*Mukerji and Guha, JJ.*) RADHA KRISHNA THAKUR *v.* OFFICIAL RECEIVER. **59 Cal. 1135=I.**

PROV. INS. ACT (1920), S. 4—Hindu father's insolvency.

R. 1932 Cal. 611=139 I.C. 323=36 C.W.N. 492=56 C.L.J. 446=A.I.R. 1932 Cal. 642.

———**S. 4**—"*Construction—"Subject to the provisions of this Act"—Meaning of.*

The words "subject to the provisions of this Act" in S. 4 mean "excluding questions otherwise provided for by the provisions of this Act". (*Reilly and Anantakrishna Aiyar, JJ.*) ALAGIRISUBBANAICK *v.* OFFICIAL RECEIVER, TINNEVELLY. **54 Mad. 989=I.R. 1931 Mad. 673=132 I.C. 641=34 L.W. 105=A.I.R. 1931 Mad. 745=61 M.L.J. 820.**

Enquiry under.

———*Enquiry under—Duty of Court.*

It is no doubt true that the Insolvency Court has full power under S. 4 of the Provincial Insolvency Act to decide all questions of title or of any nature whatever or such as it may deem expedient or necessary to decide. But a thorough enquiry is necessary under this section as an order passed under it is final and binding on the parties. A summary order passed without any reference to this section and without the Court applying its mind properly to all the implications of its order, cannot under any circumstances be treated as a proper and valid order under the section. (*Hilton and Din Mahomed, JJ.*) LACHHI *v.* BADRI PARSHAD. **156 I.C. 278=7 R.L. 892=36 P.L.R. 205=A.I.R. 1934 Lah. 1006.**

Finality of decisions.

———**S. 4**—Finality of decision—Dismissal of creditor's application for adjudication of debtor—Court holding that alienations not proved to be fraudulent—*Res judicata. See* C. P. CODE, S. 11. **156 I.C. 537=42 L.W. 7=A.I.R. 1935 Mad. 634.**

———**S. 4**—Finality of decision—Execution sale—Subsequent adjudication of judgment-debtor on petition presented before—Application by Receiver to avoid sale —Dismissal—Fresh application by insolvent and creditor after several years—If barred by prior dismissal. *See* EVIDENCE ACT, S. 41. **155 I.C. 734=A.I.R. 1935 Pat. 273.**

Hindu father's insolvency.

———**S. 4**—*Hindu father's insolvency—Sale of insolvent's property by Official Receiver—Partition suit by sons—Decree—Son's share found liable to father's mortgage debt—Application by Official Receiver for delivery of possession under S. 4.*

In a partition suit by minor sons a decree was passed subject to the mortgage debt of their father. On the insolvency of the father, the Official Receiver sold the insolvent's property but without a previous declaration under S. 4 as to liability of son's share.

Held, that the Official Receiver could not apply under S. 4 for recovery of possession of son's share but must file a separate suit for the same.

Held, further, that the Insolvency Court could not execute the decree of the civil Court and that the civil Court decree can be executed only by the Court which passed it or by some Court to which it had been transferred. A.I.R. 1928 Mad. 735 (F.B.), Rel. on; A.I.R. 1932 Mad. 381 and A.I.R. 1931 Mad. 317, Ref. (*Walsh, J.*) NACHIMUTHU *v.* RAMAKKAL. **147 I.C. 494=6 R.M. 351=A.I.R. 1933 Mad. 475.**

———**S. 4**—*Hindu father's insolvency—Sons not parties—Sale of interest of sons—Procedure.*

Where only the father is adjudicated an insolvent and the sons are never made parties to the proceedings, if the receiver intends to sell the son's interest also, he ought to proceed under S. 4 and seize their share after giving them full notice. (*Niyogi, A.J.C.*) FATEHCHAND DIPCHAND *v.* HIRALAL. **158 I.C. 599=8 R.N. 93=18 N.L.J. 255=A.I.R. 1935 Nag. 193.**

PROV. INS. ACT (1920), S. 4—Hindu father's insolvency.

———**Ss. 4 and 28**—*Hindu father's insolvency—Sons' share sold prior to adjudication—Annulment of sale by receiver—Forum.*

By virtue of the father's power of disposition vesting in the receiver, he is entitled to seize the sons' shares and hence he has also the right to ask for the annulment of the sale of the sons' shares. The remedy of the receiver lies in the Insolvency Court and not in ordinary Civil Court. (*Niyogi, A.C.J.*) HIRALAL CHAMPA LAL MARWADI *v.* FATTEHCHAND PARMANAND. **7 R. N. 109 = 152 I.C. 1026 = A.I.R. 1934 Nag. 271.**

Jurisdiction.

———**S. 4**—*Jurisdiction — Discretion— Complicated questions of law involved.*

The exercise of the jurisdiction which the Insolvency Court derives from S. 4 is purely discretionary and whether in any particular case an Insolvency Court should refuse to exercise its jurisdiction depends upon the facts of such case An application was filed under S. 4 to decide the question of the validity or otherwise of a mortgage. The amount at stake was a very large one. Complicated questions of law were involved in determining the question. There had been two decrees of competent Courts in which the mortgage had been held valid and given effect to. No useful purpose was likely to be served so far as the other creditors besides the applicant were concerned.

Held, that it would be an abuse of the powers given to the insolvency Court under S. 4 to re-adjudicate on the question and it was not expedient to decide the dispute referred in application under S. 4. (*Mehta, A.J.C.*) ICHASHANKER JADURAM *v.* BANAMAL GULZARI MAL. **6 I.R. (Sind) 5 = 144 I.C. 678 = A.I.R. 1933 Sind 185.**

———**S. 4**—*Jurisdiction — Discretion—Dispute of difficult character involving large sum.*

Properties worth over Rs. 12,000 which admittedly belonged to the insolvent at one time were sold by the Official Receiver and purchased by certain persons who in their turn subsequently sold them to the wife of the insolvent. One of the creditors alleged that the wife was only a name lender and that the properties really belonged to the insolvent as they were purchased with his own money which he had secreted with his wife. The Insolvency Court declined jurisdiction under S. 4 and referred the party to a separate suit.

Held, that the case was eminently one in which it was not desirable that the Insolvency Court should have exercised its jurisdiction under S. 4, as the dispute was of a difficult character and involved a very large sum of money and as the result of assuming jurisdiction would have been to deprive the unsuccessful party of a right of first appeal to the High Court and perhaps an appeal to the Privy Council. (*Pandrang Row, J.*) KANAKA SABAPATHI CHETTIAR *v.* GOMATHI MEENAKSHI AMMAL. **8 R.M 38 = 1935 M.W.N. 583 = 156 I.C. 677 = A I R. 1935 Mad. 720.**

Mortgagee's Rights.

———**S. 4**—*Mortgagee's rights—Mortgagee agreeing to sale by Insolvency Court—Purchase by mortgagee himself—Objection to sale.*

Where a mortgagee in possession, instead of keeping out of the insolvency proceedings of his mortgagor and realizing his security by means of a suit or by other means, agreed to have the property sold by the Insolvency Court and purchased the same himself, retaining his lien on the sale proceeds, he must suffer any claimants to raise objections and to have them adjudicated upon under S. 4 before the sale in his favour is confirmed. (*Jai Lal, J.*) DAULAT CHAND *v.* JUGAL KISHORE. **I.R. 1931 Lah. 269 = 130 I.C. 333 = 32 P. L.R. 254 = A.I.R. 1931 Lah. 3.**

PROV. INS. ACT (1920), S. 4—Powers of Court.

Powers of Court.

———**Ss. 4 and 53**—*Powers of Court—Benami transfer—Annulment of.*

S. 4 is controlled by S. 53 only in respect of transfers made by the insolvents. Where, however, a transaction entered into by the insolvents is alleged to be benami, that the title has not passed from the insolvents to third persons and the property is still the property of the insolvents, there is no real transfer at all within the meaning of S. 53 and the Court has the power to annul the transaction. 22 C.W.N. 704; 51 All. 550 (F.B.); 48 All. 414, 92 I.C. 573 and 97 I.C. 174, Foll. (*Kulwant Sahay and James, JJ.*) BISESWAR CHAUDHURI *v.* KANHAI SINGH. **11 Pat. 9 = I.R. 1932 Pat 75 = 136 I C. 299 = 13 Pat.L T. 298 = A.I.R. 1932 Pat. 129.**

[**R.** 1932 M.W.N. 821 (829). **Rel.** 142 I.C. 97 (99). **Foll.** 37 Bom.L.R. 478 (480).]

———**S. 4**—*Powers of Court—Decision after annulment of adjudication.*

S. 4 gives the Insolvency Court no power to decide questions of the nature therin described after the adjudication has been annulled. After that stage has been reached the powers of the Insolvency Court are limited by S. 37 (*Pollock, A.J.C.*) J. N. MUNDARA *v.* NEMSI RAJPAL & CO. **31 N.L.R. (Supp.) 36 = 161 I.C. 981 = 8 R.N. 254 = A.I.R. 1935 Nag. 246.**

———**S. 4**—Powers of Court—Decision as to ownership of property. *See* PROVINCIAL INSOLVENCY ACT, S 53. **1935 A L.J. 1158 = 1935 A.W.R. 118 = A.I.R. 1935 All. 982.**

———**S. 4**—*Powers of Court—Delivery of possession—Application by Receiver for possession of house—Deed of maintenance and residence by insolvent in favour of wife—Wife in possession.*

In 1921, a husband executed a document providing for the maintenance and residence of his wife, in consideration of her having given her consent to his second marriage, necessary under the custom of the caste. The deed provided that she was to be given a particular house for her residence. She was accordingly in possession of that house. In 1927, the husband was adjudicated insolvent and the receiver applied under S. 4 to get possession of the house.

Held, that the agreement was valid and binding, having been entered into for valuable consideration and performed by one party; and though unregistered, the arrangement being one that needed no writing at all, the title of the wife could be proved otherwise and that the receiver was not entitled to get possession. (*Beaumont, C.J. and Murphy, J.*) BAI MANI *v.* MAGANLAL CHIMANLAL. **140 I C. 745 = I.R. 1933 Bom. 28 = 34 Bom.L.R. 1317 = A.I R. 1932 Bom. 602.**

———**Ss. 4 and 56 (3) Proviso**—*Powers of Court—Delivery of possession—Sale of property by receiver—Third person's objection setting up his title, dismissed for default—Application by purchaser for delivery of possession—Objection by third person reiterating his title.*

Where the receiver sold to the respondent a certain house as the property of the insolvent after the Insolvency Court dismissed for non-appearance, the objection by the appellant who put forward his claim to the house and denied the title of the insolvent, and when the respondent applied to the Court for delivery of possession of the house, the appellant again objected reiterating his title to the house.

Held, that before the question of title was decided, either by a decree in a separate suit or by an order under S. 4 of the Insolvency Act, the appellant could

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not be dispossessed from the property. (*Niamatullah, J.*) DWARKA PRASAD *v.* SUNDER. **155 I.C. 1037=7 R.A. 1002=1935 A.L.J. 484=1935 A.W.R. 497=A.I.R. 1935 All 546.**

———**S. 4**—*Powers of Court—Execution—Procedure.*

Though the Insolvency Court may have powers of execution under S. 4, the procedure is only analogous to and not identical with that under O. 21, C. P. Code. A. I. R. 1914 All. 264, Ref. (*Walsh, J.*) NACHIMUTHU CHETTIAR *v.* RAMAKKAL. **147 I.C. 494=6 R.M. 351=A.I.R. 1933 Mad. 475.**

———**S. 4**—*Powers of Court—Existence of debt—Court whether can go into.*

It cannot be said that the Court cannot go into the question of the existence of the debt at the time when the petition for being adjudged insolvent is taken up. The Court in order to decide whether a debtor-petitioner is unable to pay his debts must go into the question of the existence of the alleged debts if disputed. (*Dalip Singh, J.*) HARKE *v.* KALYAN SINGH. **I.R. 1932 Lah. 577=139 I.C. 384=33 P.L.R. 422=A I. R 1932 Lah 620 (1).**

———**S. 4**—*Powers of Court—Fraudulent transfer—Enquiry into before adjudication at the instance of interim receiver.*

Where an application for adjudication is admitted and the opposite party is appointed interim receiver, the Insolvency Court cannot inquire, before the order of adjudication is made, whether a transfer by the applicants to a third person is a genuine one or not. And it is premature for the receiver to start proceedings under S. 4 before the order of adjudication. (*Henderson and R. C. Mitter, JJ.*) BIBHUTI BHUSAN KHAN *v.* BIRENDRA NATH ROY. **158 I C. 704=8 R.C. 210=39 C.W.N. 1167=A.I.R. 1935 Cal. 558.**

———**S. 4**—*Powers of Court—Genuineness of deed.*

The Insolvency Court has full jurisdiction to determine the question of the genuineness or otherwise of the deed of gift executed by the insolvent more than two years prior to his being adjudged insolvent. (*Subhedar, A.J.C.*) RAMRATAN SINGH *v.* HARI. **28 N L.R. 89=I R. 1932 Nag. 91=139 I.C. 288=A.I.R 1932 Nag. 109.**

———**S. 4**—*Powers of Court—Obstruction—Removal of.*

On the adjudication of a Hindu father, some of the family properties were sold by the Official Receiver. There was obstruction in delivery and on the application of the Receiver and the vendees, the Court has the power to order for the removal of the obstruction. (*Pakenham Walsh, J.*) SUBBARAYUDU *v.* SATYANANDAM. **I.R. 1933 Mad. 333=143 I.C. 833=A.I. R. 1933 Mad. 609.**

———**S. 4**—*Powers of Court—Question of title between auction-purchaser and transferee from insolvent.*

Under S. 4 of the Provincial Insolvency Act, an Insolvency Judge can decide the question of title as between the auction purchaser and the alleged transferee of the property in dispute from the insolvent. (*Agha Haidar, J.*) MOTI RAM *v.* OFFICIAL RECEIVER. **153 I.C. 997=7 R.L. 493=37 P.L.R. 487=A.I.R. 1934 Lah. 936 (2).**

———**S. 4**—*Powers of Court—Question of title—Jurisdiction of Insolvency Court.*

S. 4 gives at any rate concurrent jurisdicton to the insolvency Court with ordinary tribunals to try questions of title which might arise between the Official Receiver and the assignee from the insolvent. Whether the Insolvency Court would elect to try the questions of title or relegate the parties to the ordinary tribunals is a matter for that Court to decide according to the circumstances

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of the case. (*Tek Chand and Agha Haidar, JJ.*) RAM DITTA MAL BHALLA *v.* OFFICIAL RECEIVER, LAHORE. **15 Lah. 294=6 R.L. 478=147 I.C. 1026=35 P.L.R. 271=A.I.R. 1934 Lah. 365.**

———**S. 4**—*Powers of Court—Question of title—Order to deposit disputed debt—Power to pass.*

The Court under S. 4 of the Provincial Insolvency Act would only decide questions of title which it may deem expedient and necessary to decide. It would not summarily order a disputed debt to be deposited or enter into an enquiry about the same. But that is not beyond the capacity of the Court to decide. In a case in which the party concerned is himself the creditor and the matter is one which could be expeditiously decided and arises out of former proceedings to which the creditor is a party, it is proper for the Insolvency Court to decide it instead of directing the receiver to a separate suit. (*Gruer, A.J.C.*) DHUDHCHAND *v.* SHRIPAD. **158 I.C. 990=8 R.N. 111=18 N.L.J. 14.**

———**S. 4**—*Powers of Court—Question of title or priority.*

S. 4 gives the Court, subject to the provisions of the Act, full power to decide all questions, whether of title or priority, or of any nature whatsoever, which may arise in a case of insolvency or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property. The Court can decide that a deed of wakf executed by the insolvent was fictitious. (*Bisheshwar Nath and Pullan, JJ.*) ABDUL HASAN KHAN *v.* RAJBIR PRASAD. **6 Luck. 614=I.R. 1931 Oudh 193=131 I.C. 433=8 O W.N. 147=14 O.L.J. 291=A.I.R. 1931 Oudh 124.**

[**R** 15 L. 294 (299); 1934 N. 47 (48).)]

———**S. 4**—*Powers of Court—Question of title—Refusal by Judge to decide—If a bar to decision by his successor.*

Even if a Judge, for some reason or other, declines to decide the question of title under S. 4 of the Provincial Insolvency Act, on general principle, his successor cannot be precluded from going into the question of title and deciding it under that section. (*Agha Haidar, J.*) MOTI RAM *v.* OFFICIAL RECEIVER. **153 I.C 997=7 R.L. 493=37 P.L.R. 487=A.I.R. 1934 Lah. 936 (2).**

———**S. 4**—*Powers of Court—Question of title—Transfer more than two years before adjudication.*

Per *Pullan, J.*—It is, therefore, improper to hold S. 4 supersedes S. 53 and that a Court can set aside a transfer which has been made more than two years before adjudication. This rule must, however, be confined to cases where there has been a transfer and it has no application where the transfer wus intended to be inoperative from the beginning and the insolvent had remained in possession of the property.(*Bisheshwar Nath and Pullan, JJ.*) ABDUL HASAN KHAN *v.* RAJBIR PRASAD. **6 Luck. 614=I.R. 1931 Oudh 193=131 I.C. 433=8 O.W.N. 147=14 O.L.J. 291=A I.R. 1931 Oudh 124.**

———**S. 4**—*Powers of Court—Questions of title—Transfer more than two years before adjudication—Enquiry as to validity—Binding nature of.*

Under S. 4, insolvency Court can deal with and decide questions of title has between an Official Assignee or Official Receiver and a stranger in respect of property which is claimed on the one hand as the insolvent's and on the other hand as the stranger's. Therefore the Insolvency Court is competent to deal with a question arising out of a transfer made more than two years before adjudication and alleged to be made to defraud or defeat the claims of creditors. There may be ques-

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tions of title raised, no matter by whom which the Court may not deem it expedient or necessary to determine and which, on the other hand, the Court may, in its discretion, leave to be determined by an ordinary Civil Court. But if a stranger raises a question of title for its decision, or submits to an investigation by it of a claim of title preferred against him, the decision when made is binding on him. The Court should ordinarily decline to go into questions of title against strangers where the receiver claims no higher right than the insolvent himself; but if the Court, in its discretion, chooses to determine the question, the decision cannot be said to be bad on the ground of want of jurisdiction or to be any the less a decision binding between the parties under sub S. (2) of S. 4, provided that it is not in conflict with any provision of the Act itself. (Case-law discussed.) (*Mukerji and Guha, JJ.*) RADHA KRISHNA THAKUR *v.* OFFICIAL RECEIVER. **59 Cal 1135=I.R. 1932 Cal 611=139 I.C. 323=36 C.W.N. 492=56 C.L.J. 446=A.I.R. 1932 Cal. 642.**

[**F.** 15 L. 294 (300, 301); 37 Bom.L.R. 478 (480). **Cons.** 38 L.W. 896 (899). **Rel.** 142 I.C. 97 (99).]

——**S. 4**—*Powers of Court—Right of Official Receiver to assets realised from insolvent.*

Under S. 4 the Insolvency Court has full power to decide the question whether the Official Receiver is entitled to the assets realised by the decree-holder from the insolvent. A.I.R. 1930 Lah. 39, Overr. (*Harrison and Addison, JJ.*) OFFICIAL RECEIVER, JULLUNDER *v.* LABHU RAM. **14 Lah 724=144 I.C. 580=I.R. 1933 Lah. 507=34 P.L.R. 1076=A.I.R. 1933 Lah. 477.**

——**S. 4**—*Powers of Court—Stranger to insolvency—Order directing payment of mesne profits against.*

S. 4 of the Provincial Insolvency Act which is in terms identical with S. 7 of the Presidency Towns Insolvency Act confers plenary powers on the Insolvency Court to deal with claims affecting third parties to the insolvency. It may decide any question which it may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property, and in doing so, it has ample power to decide questions of title arising between the estate of an insolvent and a third party. This jurisdiction is no doubt of a discretionary character and in cases which involve difficult questions of title, the Insolvency Court will be well advised in asking the receiver to institute proceedings in an ordinary Civil Court. The Court has jurisdiction to pass an order for payment to the receiver of mesne profits against a third party to the insolvency for the period during which he was in possession of property in pursuance of a transfer by the insolvent which had been set aside under S. 53 of the Provincial Insolvency Act. 40 M. 810; 51 M. 540; 52 M. 717; 44 M. 524; 45 M. 434 Foll.; 49 M. 762, Ref; 51 M. 567, Dist. (*Madhavan Nair and Jackson, JJ.*) PALANIVELU ODAYAR *v.* OFFICIAL RECEIVER, TANJORE. **135 I.C. 739=I.R. 1932 Mad. 211=1931 M W.N. 1131=34 L.W. 788=A.I.R. 1932 Mad 66=61 M.L J. 763.**

——**Ss. 4 and 53**—*Powers of Court—Transfer more than two years prior to adjudication.*

Even where the transfer by the insolvent is more than two years prior to the date of adjudication the Insolvency Court has jurisdiction to entertain an application by the Official Receiver to set it aside under S. 4, whether the transfer is void *ab initio* or only voidable. 51 All. 550 (F.B.). Foll. (*Pakenham Walsh, J.*) THE OFFICIAL RECEIVER, WEST GODAVARI, ELLORE *v.* SUBBAYYA. **6 I R. (Mad.) 278=146 I.C. 530 (2)=1933 M.W.N. 206=37 L.W. 508=A.I.R. 1933 Mad, 527=64 M.L.J. 397.**

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——**Ss. 4 and 53**—*Powers of Court—Transfer more than two years before adjudication.*

S. 53 of the Provincial Insolvency Act cannot apply to transfers by the insolvent executed more than two years before the adjudication. But irrespective of S. 53, the Insolvency Court has, under S. 4 of the Act, jurisdiction to annul sham and colourable transfers executed by the insolvent more than two years before the date of the presentation of the application for adjudication. (*Murphy and Barlee, JJ.*) RAOJI BAPUJI PANDARKAR *v.* BAWACHEKAR. **157 I.C. 680=8 R.B. 83=37 Bom. L.R. 478=A.I R. 1935 Bom. 316.**

——**Ss. 4, 53 and 54**—*Powers of Court—Transfer more than two years prior to adjudication—Enquiry into.*

Under S. 4 an Insolvency Court can declare a transfer to be void, even though it was more than two years old on the date of adjudication. (Case-law reviewed.) (*Fraser, J. C and Saadudin, A.J.C.*) JAHANWAR SULTAN *v.* SARDAR ALI KHAN. **I.R. 1933 Pesh. 4=142 I.C. 97=A.I.R. 1933 Pesh. 46.**

——**Ss. 4 and 53**—*Powers of Court — Transfer by transferee of insolvent to third party—Order of annulment obtained by Receiver against first transferee—Effect of, as against second transferee.*

Where property has been transferred by the transferee of an insolvent to a third party and the receiver is aware of the transfer the dispute is reality between the receiver on the one hand and the subsequent transferee on the other and not between the receiver, and the first transferee who has no longer got any interest in the property left. In order to start a proceeding under S. 4 the application should therefore be by the receiver against the person who is now claiming title to the property and an adjudication by the Court on such dispute would be final and would bar a second suit and would be binding on the parties to the proceeding. But if the receiver chooses to proceed under S. 4 against the first transferee who has no interest left in the property and obtains an order against him either *ex parte* or after contest, he cannot use that order as a final adjudication of the matter in dispute as against the real claimant of the title (*Sulaiman, C. J. and Bennet, J.*) AMIR AHMAD *v.* SYED HASAN. **57 All. 900=155 I.C. 684=7 R.A. 976=1935 A.L J. 573=1935 A.W.R. 536=A.I.R. 1935 All. 671.**

——**S. 4**—*Powers of Court—Transfer by transferee from insolvent—Validity.*

The jurisdiction conferred under S. 4 on the Insolvency Court is not limited in any way by S. 53 or S. 54. The Court can declare under S. 4 that certain transfers are invalid and not binding on the Official Receiver. Thus it can declare the later transactions by the transferees from the insolvent as invalid. (*Ramesam and Madhavan Nair, JJ.*) PULLAYYA *v.* OFFICIAL RECEIVER OF KRISHNA. **143 I,C. 372=I. R. 1933 Mad. 289 (2)=1932 M.W.N. 821=A.I.R. 1933 Mad. 271.**

——**S. 4 (3)**—*Powers of Court—Sale before adjudication—Extent of interest that can be sold.*

The insolvency Court has no power under S. 4 (3) of the Provincial Insolvency Act to order the sale of the debtor's property before adjudication. The section only authorizes the Court to decide objections and questions raised by third parties, and gives finality to the decisions of the Insolvency Court on questions of title. S. 4 (3) moreover does not create any extraordinary power of sale; it only permits a sale of the saleable interest of the insolvent when the Court does not think it necessary of expedient to decide questions of title. (*Weston.*) ABDUL LATIF *v.* AHMAD HUSAIN. **1935 A.M.L.J. 77.**

PROV. INS. ACT (1920), S. 4—Remedy under.

Remedy under.

——S. 4—*Remedy under—Application under S. 4 and right of suit—Remedies alternative.*

Any one aggrieved by an order of Insolvency Court may make an objection and invite a decision of that Court under S. 4 or he may file a suit, but he cannot pursue both remedies, and if he obtains a decision of the Insolvency Court under S. 4, a suit by him with regard to the same subject-matter would be barred. Still less can a person aggrieved by an order of the Insolvence Court make an objection to the order in the Insolvency Court and get a decision of that Court under S. 4 of the Act and then file a suit on another ground with regard to the same subject-matter, because S. 11, C. P. Code, with all its explanations applies to a decision of the Insolvency Court under S. 4. (*Staples, A.J.C.*) LALJI *v.* BANSIDHAR. **30 N.L.R. 112=147 I.C. 539=6 R.N. 126=A.I.R. 1933 Nag. 373.**

——S. 4—*Remedy under—Suit by insolvent against Official Receiver—Maintainability.*

A stranger who claims the property taken possession of by the Official Receiver both against him and the insolvent can institute a suit to establish his right independently of S. 4 of the Provincial Insolvency Act. But the insolvent himself is amenable, so far as the question of title to the property or its liability to be sold is concerned, only to the jurisdiction of the Insolvency Court, He cannot invoke the aid of the ordinary Courts to establish his right against the Official Receiver, *e.g.*, for a declaration that he is an 'agriculturist' as defined in the Punjab Alienation of Land Act and that certain lands of his are not saleable. (*Jai Lal, J.*) RAM CHAND *v.* AHMAD YAR. **I.R. 1933 Lah. 34=140 I. C. 808=34 P.L.R. 31=A.I.R. 1933 Lah 65.**

Retrospective effect.

——S. 4—*Retorspective effect.*

The provisions of S. 4 contain mere alterations in procedure and have therefore retrospective effect. The Insolvency Court can decide as to the validity of a gift made before the Act. (*Subhedar, A.J.C.*) RAMRATAN SINGH *v.* HARI **28 N.L.R. 89=I.R. 1932 Nag. 91 =139 I.C. 288=A.I.R. 1932 Nag. 109.**

Scope of.

——S. 4—*Scope of—Attachment order passed by Court—Claim contesting validity—Time limit.*

Where a house was attached under an order of the Court and the objector was not challenging the act of the receiver but the order of attachment passed *ex parte*.

Held, that the attachment was not an act or decision of the receiver within the meaning of S. 68 but was a claim put forward by a stranger to the insolvency proceedings setting his own independent title and it fell within the scope of S. 4. It was therefore open to the Court to enquire into the question of title and adjudicate upon the rights of the objector even though the claim was made 21 days after the attachment. (*Sulaiman and Young, JJ.*) NATHU RAM *v.* MADAN GOPAL. **I.R. 1932 All. 242=136 I C. 791=1932 A. L.J. 391=A.I.R. 1932 All. 408.**

[Expl. 1934 R. 97.]

——S. 4—*Scope of—Consideration passing before Sub-Registrar*—Prima facie *presumption.*

Where consideration has passed before the Sub-Registrar, the presumption is that the transaction was intended to be operative until and unless that presumption is displaced by cogent evidence. The mere fact that the insolvent was a relation of the vendees or that the tansaction took place when the vendor was on the eve of insolvency are not sufficient to rebut this presumption. The transaction in such a case is neither bogus nor sham and cannot be set aside even under S. 4. (*Middleton, J. C. and Saaduddin, A. J. C.*) JADA RAM *v.* FAI ZULLAH KHAN. **150 I.C. 308=6 R. Pesh. 79=A.I. R. 1934 Pesh. 30.**

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——S. 4—*Scope—If controlled by S.* 59.

The powers of the Court under S. 4 of the Provincial Insolvency Act are not controlled by S. 59 or the Act. (*Gruer, A.J.C.*) DHUDHCHAND *v.* SHRIPAD. **158 I. C. 990=8 R.N. 111=18 N.L.J. 14.**

——S. 4—*Scope—Interim receiver—Order authorizing to enter upon third person's property—If falls under.*

An order to an interim receiver to enter upon the property of third person is clearly not one within the scope of S. 4. (*Henderson and K. C. Mitter, JJ.*) BIBHUTI BHUSAN KHAN *v.* BIRENDRA NATH ROY. **158 I.C. 704=8 R.C. 210=39 C.W.N. 1167=A.I.R. 1935 Cal. 558.**

Separate suit.

——Ss. 4 and 68—*Separate suit—Insolvency of Hindu son—Sale of insolvent's in joint family property —Suit by father for mere declaration of title—Maintainability—No decision by Insolvency Court—Effect of.*

On the insolvency of a Hindu son, the Official Receiver sold his interest in certain property of the joint family. The insolvent's father thereupon sued for a declaration that the property belonged to him exclusively and that his son, the insolvent, had no interest in it. He did not however seek to set aside the sale by the Receiver or pray for possession. There was no decision at all by the Insolvency Act either under S. 4 or by way of appeal from the receiver's sale under S. 68 of the Provincial Insolvency Act.

Held, that the suit for a mere declaration was maintainable, and the Official Receiver's sale was only a private sale. (*Pakenham Walsh and Varadachariar, JJ.*) VEERAPPA CHETTIAR *v.* VELLACHAMI CHETTIAR. **159 I C. 512=8 R.M. 511 (2)=41 L.W. 701 =1935 M.W.N. 197=A.I.R. 1935 Mad. 297=68 M. L J. 229.**

——S. 4 (3)—*Separate suit—Limitation—Order for sale of insolvent's interest—Question of title left open—Suit by third party for declaration of his title—Limitation Act, Art.* 13—*Applicability.*

Where subsequent to the order of an Insolvency Court under sub-S. 3 of S. 4 of the Provincial Insolvency Act for sale of the interest of the insolvent in certain properties, leaving question of title to be decided by a competent Civil Court, the plaintiff's suit for a declaration of his title to those properties though brought after one year from the date of that order is not barred by Art. 13 of the Limitation Act. (*Pearson and Mallik, JJ.*) ABDUL MAJID *v.* ABDUL HAQ. **36 C.W.N. 621=143 I.C. 475=I R. 1933 Cal. 434=A.I R. 1933 Cal. 263.**

——S. 5—Amendment of petition—Power of Court. *See* C. P. CODE, O. 6, R. 17—INSOLVENCY PROCEEDINGS. **67 M.L J. 924.**

——S. 5—*Inherent jurisdiction to pass protection order—Application for adjudication pending.*

There is no inherent jurisdiction for the Insolvency Court under S. 5 to pass a protection order or an order protecting the alleged insolvent from arrest and imprisonment in execution of a money decree apart from provisions of Ss. 23 and 31. Pending an application for adjudication, warrant for arrest of the alleged insolvent was issued in execution of a money decree; but actual arrest was not effected. He applied to the Insolvency Court for an order of protection,

Held, that neither S. 23 nor S. 31 applied to the case and that the Court had no inherent jurisdiction to pass the protection order under S. 5. (*Jai Lal, J.*) GHULAM

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SARWAR *v.* GURU PIARA. **6 R.L. 617=148 I.C. 975 =A.I.R 1934 Lah. 113 (2).**

——**S. 5**—*Power to carry out its orders.*

Under S. 5 of the Provincial Insolvency Act, the insolvency Court has the general powers under the C. P. Code, and has power to carry out its own orders. (*Gruer, A. J. C.*) DHUDHCHAND *v.* SHRIPAD. **158 I.C. 990=8 R.N. 111=18 N.L.J. 14.**

——**S. 5**—*Power to order restitution.*

By virtue of S. 5 of the Provincial Insolvency Act, the Insolvency Court has all the powers of a Civil Court. (*Sulaiman, C.J and Iqbal Ahmad, J.*) PANNALAL SHAM LAL *v.* ABDULLAH USMAN. **I. R. 1933 All. 230=143 I.C. 330=1932 A L.J. 1095=A I.R. 1933 All. 117.**

——**S. 5**—*Power to review* ex parte *order.*

In cases relating to insolvency tried by mofussil Courts, they have by virtue of S. 5, the same powers as they have got under the C.P.Code governing their powers and procedure in their original civil jurisdiction. They have therefore, the power of review under O 47, R. 1, C. P. Code, and the right to set aside orders passed *ex parte* under O. 9. 51 M. L. J. 60, Foll. (*Anantakrishna Ayyar, J.*) AYYASWAMI CHETTI *v.* OFFICIAL RECEIVER, COIMBATORE. **135 I C. 750=I.R. 1932 Mad. 222=34 L.W. 735=1931 M.W.N. 924=A.I.R. 1932 Mad. 63=61 M,L.J. 719.**

——**S. 5**—*Power to set aside its* ex parte *order.*

An Insolvency Court can always undo the injustice likely to result from its *ex parte* order when no innocent third person had acquired any rights. (*Tek Chand and Agha Haidar, JJ.*) ISHARDAS *v* MT. FATIMA BIBI. **15 Lah. 698=153 I C 993=7 R.L 489=36 P.L.R. 499=A.I R. 1934 Lah. 468**

——**S. 5**—*Review— Sufficient cause* — Bona fide *mistake of Official Receiver.*

The general body of creditors should not be allowed to suffer by the *bona fide* mistake of the Official Receiver in allowing an order of discharge to be passed *ex parte.* Tha. is a sufficient cause for the Court to review or set aside the order. (*Anantakrishna Ayyar, J.*) AYYASAMI CHETTI *v.* OFFICIAL RECEIVER, COIMBATORE **135 I.C. 750=I.R. 1932 Mad. 222=34 L.W 735=1931 M.W N. 924=A.I.R. 1932 Mad. 63=61 M.L J. 719.**

——**S. 5 (1)**—*Review—Sufficient cause—Refusal to consider application on the merits.*

Where an application for restoration of a case dismissed for default was not considered on the merits because there had been a compromise there was an error patent on the face of the record and the Court can correct it. (*Bose, A. J. C.*) RADHAVALLABH *v.* AWACHIT. **28 N.L.R. 295=141 I.C. 48=I.R. 1933 Nag. 21=A.I.R. 1933 Nag. 39.**

——**S. 6**—*Act of insolvency—Alienations in favour of creditors some of whom are relatives.*

Where all the alienations are the result of pressure on the part of the creditors, they cannot be said to be voluntary and the fact that some of these creditors are relatives does not affect the question. (*Addison and Din Mohammad, JJ.*) RAM CHAND ISHARDAS *v.* CHANCHAL SINGH. **A I.R. 1935 Lah. 278.**

——**S. 6**—*Act of insolvency—Alienation leaving enough assets to pay debts.*

Where even after the alienation of his certain properties the remaining assets of a debtor still exceed the total value of the debts, the debtor cannot be declared an insolvent on the ground that he is unable to pay his debts and the alienations effected by him cannot amount to acts of insolvency. (*Broadway, J.*) MUNI LAL *v.* HIRA LAL. **150 I.C. 651=7 R.L 2 (2)=A.I.R. 1933 Lah. 582**

PROV. INS. ACT (1920), S. 6.

——**S. 6**—*Act of insolvency—Concealment.*

Concealing property to defeat creditors is not an act of insolvency. (*Addison, J.*) HARBANS LAL *v.* BUTE KHAN. **6 I R (Lah.) 251 (2)=146 I.C. 628 (1)=34 P.L.R. 987=A.I.R. 1933 Lah. 725 (1).**

——**Ss. 6 and 54**—Act of insolvency—Fraudulent preference—What is. *See* PROVINCIAL INSOLVENCY ACT, SS. 54 AND 6. **15 Pat.L.T. 461=A.I.R. 1934 Pat 526.**

——**S. 6**—*Act of insolvency—Ineffective alienation.*

If an alienation by a debtor is ineffective by reason of his incompetency to validly deal with the property, the ineffective alienation is not a sufficient ground for adjudicating him an insolvent. (*Abdul Rashid, J.*) KIDAR NATH *v.* MAHOMED IBRAHIM. **6 R.L. 820 (2)=150 I.C. 74=35 P.L.R. 522=A.I.R. 1934 Lah. 394.**

——**Ss. 6 and 7**—*Act of insolvency—Sale in favour of wife for dower debt—Petition by creditor—Adjudication, when justified.*

No order of adjudication could be passed in the absence of a finding that the debtor committed an act of insolvency. Where a creditor presented an application for the adjudication of his debtor on the latter executing a sale deed in favour of his wife in lieu of her dower debt and the lower Court adjudicated the debtor as insolvent remaking that "Transfer of one's tangible property to wife in lieu of dower is always suspect".

Held that the order of adjudication was not justified in the absence of a definite finding that the sale in question amounted to a fraudulent preference. (*Niamatullah, J.*) MAHOMED YAR KHAN *v.* PURAN PRASAD. **157 I.C. 47=8 R.A. 96=1935 A.L.J. 487=1935 A. W.R. 505=A.I.R. 1935 All. 416.**

——**S. 6**—*Act of insolvency—Transfer of protected interest.*

S. 18 of the Punjab Colonization of Government Lands Act protects interests in colony land from attachment and sale by a Civil Court or in insolvency proceedings. As these interests are thus protected from the creditors their transfer by the debtor cannot be said to have been made with the intention of defeating or delaying his creditors, and therefore cannot amount to an act of insolvency. (*Hilton, J.*) MANAK CHAND RALIA RAM *v.* LAKSHMI DAS. **6 R L. 602 (1)=148 I.C. 832=A.I.R. 1934 Lah. 507.**

——**Ss. 6 and 9**—*Act of insolvency- Limitation— Starting point—Arrest in execution of decree.*

The act of insolvency of a person commencing in his being arrested and imprisoned in execution of a decree continues throughout the period during which he remains in prison. (*Bhide, J.*) KARAM *v.* JHANDA MAL. **I.R. 1931 Lah. 384=131 I.C. 112=32 P.L.R. 51=A.I.R. 1931 Lah. 112.**

——**S. 6 (b)**—*Act of insolvency—Partition by father of joint family property—No provision for debts.*

A partition by a father of the joint family property without making adequate provision for the settlement of his debts may amount to a transfer of property with intent to delay and defeat creditors and so constitute an act of insolvency. The fact that the partition is effected by an arbitrator does not justify any conclusion on the point one way or another. (*Coldstream, J.*) WASDEO *v.* HAIDER HASAN. **161 I.C. 978=8 R.L. 837=37 P.L.R. 297=A.I.R. 1936 Lah. 336.**

——**S. 6 (b)**—*Fradulent transaction—Intent to defect or delay creditors—Proof of.*

A mere transfer of property in fovour of a relation would not *per se* amount to an intention to defeat or delay creditors even if it affects a substantial portion of the debtor's estate, in the absence of proof that the

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debtor owes a large sum of money and that he is financially embarrassed and is therefore likely to take the property out of the reach of his creditors. (*Mir Ahmad, A.J.C.*) GANGA DHAR *v.* SHER KHAN. **159 I.C. 529=8 R P. 85=A.I.R. 1935 Pesh. 168.**

———**S. 6 (b)**—*Fraudulent transaction—Intention to defeat creditors as whole, necessary.*

A mere finding that the effect of a transfer would be to defeat one creditor is really quite immaterial. The transfer has got to be made with intent to defeat the creditors as a whole. (*Baguley and Mackney, JJ.*) KO PO YIN *v.* DAW HNIN THET. **153 I.C. 146 (2)=7 R.R. 197 (2)=A I.R. 1934 Rang. 242.**

———**S. 6 (b)**—*Fraudulent transaction—Onus.*

In an insolvency proceedings started by the creditor, the burden of proving that a mortgage effected by the debtor is fraudulent or without consideration undoubtedly lies upon the creditor. (*Baguley and Mackney, JJ.*) KO PO YIN *v.* DAW HNIN THET. **153 I.C. 146 (2)=7 R.R. 197 (2)=A I.R. 1934 Rang. 242.**

———**S. 6 (d)**—*Act of insolvency—Avoidance of single execution.*

Avoidance of service in connection with one particular execution proceeding is not an act of insolvency. (*Mosely and Dunkley, JJ.*) MYUNG NYUN TIN *v.* SAW EN HOKE. **158 I.C. 610=8 R.R. 191=A.I.R. 1935 Rang. 281.**

———**S. 6 (d)**—*Act of insolvency—Intention to defeat creditors as a whole, necessary.*

Under S. 6 (*d*) of the Act, it is an essential feature of an act of insolvency that the act should be done with intent to defeat or delay the creditors generally of the debtor. It is not enough to allege or to prove that the act was done with intent to defeat or delay any particular creditor. An attempt by a debtor to deprive any one creditor of the fruits of a decree against him is not an act of insolvency. (*Mosely and Dunkley, JJ.*) MAUNG MYUN TIN *v.* SAW EU HOKE. **158 I.C. 610=8 R.R. 191=A.I.R 1935 Rang. 281.**

———**S. 6** (*d*)—*Intention to defeat creditors—Inference.*

If the debtors, who have been carring on at one time a fairly extensive business, close their place of business and leave the locality in an unaccountable manner and take residence within the territories of a Native State, there is a clear indication of an intention to defeat or delay creditors within the meaning of S. 6 (*d*) of the Provincial Insolvency Act. (*Agha Haider, J.*) MUNI LAL *v.* THE BARI DOAB BANK, LTD. OF HOSHIARPUR. **161 I.C. 151=8 R.L. 675=37 P.L.R 776=A. I.R. 1936 Lah 176.**

———**S. 6 (d) (iii)**—*Applicability—Warrant issued—Judgment debtor concealing himself.*

Where it was alleged that a warrant for the arrest of the judgment-debtor had been issued and that the debtor was concealing himself in order to avoid arrest.

Held, that the case fell within S. 6 (*d*) (iii). (*Jai Lal, J.*) RAM LABHAYA MAL DEVI DITTA MAL *v.* CHANCHAL SINGH JASWANT SINGH. **I.R. 1931 Lah. 802=133 I.C. 626=A.I.R. 1932 Lah. 28.**

———**S. 6 (e)**—*Act of insolvency—Dismissal of debtor's petition.*

The presentation of the petition of insolvency by the debtor is in itself an act of insolvency. It does not cease to be so even if the petition is dismissed and any creditor may present an insolvency petition against a debtor founded on this act of insolvency. But it must be done within three months of the date on which the debtor presented his petition. (*Mitter and M.C. Ghose, JJ.*) KANAI LAL NANDY *v.* TINKARI DE. **6 I.R. (Cal.)**

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111=145 I.C. 429=37 C.W.N. 535=57 C.L J. 148=A.I.R. 1933 Cal. 564.

———**S. 6 (e)**—*Construction—Decree "for the payment of money"—Mortgage decree for sale.*

The expression "decree of any Court for the payment of money" in Cl. (*e*) of S. 6 of the Provincial Insolvency Act must be construed to have the same meaning as in Cl. (*h*). It means a decree personally against the person concerned. It does not include a decree for sale on a mortgage. (*Thomas, J.*) BAIJ NATH *v.* GAJADHAR PRASAD. **11 Luck. 61=154 I.C. 908=7 R.O. 521=1935 O.W.N. 374=A.I.R. 1935 Oudh 406.**

———**S. 6 (g)**—*Act of insolvency—Mere declaration of inability to pay debts, if enough.*

A mere declaration that a person is unable to pay his debts may not by itself amount to an act of insolvency but coupled with the context and the surrounding circumstances it may amount to such an act. The test is, the effect which the declaration would produce on the minds of the creditors in view of all the circumstances. (*Bhide, J.*) BANARSI DAS KAPUR CHAND *v.* MAMAN CHAND RADHA KISHAN. **I.R. 1933 Lah. 59=141 I. C. 62=34 P.L.R. 43=A.I.R. 1933 Lah. 113.**

———**S. 6 (g)**—Mere suspension of payment—Not an act of insolvency. *See* **A.I.R. 1931 Rang. 317.**

———**S. 6 (g)**—*Mere suspension of payment—Not* per se *an act of insolvency.*

A debtor does not commit an act of insolvency merely by suspending payment of his debts ; under S. 6 (*g*) he commits an act of insolvency only "if he gives notice to any of his creditors that he has suspended payment or that he is about to suspend payment of his debts" due to his creditors generally and the time, place and particulars of the notice should be accurately described. 11 Rang. 95, Ref. (*Page, C.J. and Sen, J.*) MURUGAPPA CHETTYAR *v.* GALLIARA. **12 Rang. 150=151 I.C. 190=7 R.R. 46=A.I.R. 1934 Rang. 87.**

[F. 13 R. 686 (688).]

———**S. 6 (1) (g)**—*Notice under—Writing—Necessity.*

The notice required by S. 6 (1) (*g*) need not be in writing. (*Bhide, J.*) BANARSI DAS KAPUR CHAND *v.* MAMAN CHAND RADHA KISHAN. **I.R. 1933 Lah. 59=141 I.C. 62=34 P.L.R. 43=A.I.R. 1933 Lah. 113.**

———**S. 6 (g)**—*Suspension of payment—Communications if amount to—Construction.*

A declaration of his inability to pay his debts may be made by a debtor to one or more of his creditors in terms and under circumstances which do not suggest that he means to stop payment of his debts as they fall due. Such a declaration may be couched in language which clearly implies that the debtor means to pay nobody in full and to place his assets at the disposal of his creditors. But there should be a definite intimation to the creditors that the debtor intends to suspend the payment of all his debts. Where in response to a letter by one of the creditors, the debtor mentioned his inability to pay and suggested that money might be raised on some shares pledged with the creditor in order to meet the claims of the pressing creditors only and the debtor further expressed his willingness to a scheme of creating a trust for the liquidation of his debts.

Held, that there was no act of insolvency so as to support an insolvency petition. (*Jai Lal and Bhide, JJ.*) HAR KISHANLAL *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD **14 Lah. 117=I.R. 1932 Lah. 701=140 I.C. 275=33 P.L.R. 992=A.I.R. 1932 Lah. 643 (2).**

———**S. 6 (g)**—*Suspension of payment—Facts to be proved.*

In order to bring a case within S. 6 (*g*) of the Provincial Insolvency Act, it is necessary to establish that

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the debtor is not merely refusing to pay particular creditors, but that he has declined to pay any creditor or deal with any individual creditor or with his creditors as a body. (*Wort and Agarwala, JJ.*) HARDAYAN DASS JOHAR MALL *v.* JAGARNATH MARWARI. **152 I.C. 655=7 R.P. 227=15 Pat.L.T. 461=A.I.R. 1934 Pat. 526.**

——**S. 6 (g)**—*Suspension of payment—False denial of debt due to one of creditors—If amounts to.*

Notice of suspension of payment means a declaration by the debtor that he does not intend to pay any of his debts, not that he does not intend to pay the debt of one particular creditor. Furthermore, the indebtedness must be admitted, and the notice must be a specific and deliberate act on the part of the debtor from which his inability or refusal to pay his debts generally can be plainly inferred. A false denial of the debt due to one particular creditor is not, and cannot be construed as a notice of suspension of payment of debts generally. A. I.R. 1933 Rang. 41, Ref. (*Mosely and Dunkley, JJ.*) MA NGWE SINT *v.* KO PO HLA. **159 I.C. 749=8 R. R. 279=A.I.R. 1935 Rang. 340.**

——**S. 6 (g)**—*Suspension of payment—Notice of—Offer to pay fraction of debt only on condition of full discharge.*

The debtors who had become involved in debts sold their property in order to meet their creditors and offered to make a rateable distribution among their unsecured creditors of the balance of the sale proceeds after satisfying a mortgage debt charged on the property. The intimation given to one creditor was to the effect that they would not pay anything to him unless he agreed to accept in full settlement, the small amount which they offered.

Held, that the intimation in question amounted to a notice that the debtors had suspended or were about to suspend payment of their debts and that it amounted to an act of insolvency within the meaning of S. 6 (*g*) of the Provincial Insolvency Act. (*Beasley, C. J. and Cornish, J.*) VEERABRAHMAM *v.* JAGANNADHACHARYULU. **158 I.C. 966=8 R.M. 392=42 L.W. 427=1935 M.W N. 551=A.I.R. 1935 Mad. 589 (2) =69 M.L.J. 184.**

——**S. 6 (g)**—*Suspension of payment—Offer to transfer property.*

Where a debtor had collected his creditors and told them that if they did not want him to sell the property and pay them individually, they could take over the property and realize their debts by selling it themselves.

Held, that this did not amount to a notice to suspend payment within the meaning of Cl. (*g*), S. 6. In re *Walsh*, 52 L.T. 694; A.I.R. 1928 Mad. 393 and A.I.R. 1927 All. 266, Ref. (*Dalip Singh, J.*) LADHA RAM *v.* LURIND CHAND LACHMAN DAS. **I.R. 1933 Lah. 433=144 I.C. 276=34 P.L.R. 682=A.I.R. 1933 Lah. 319.**

——**S. 6 (g)**—*Suspension of payment—Requisites.*

What is required under S. 6 (*g*) is that a communication proceeding from the debtor made seriously, should give the creditors or any of the creditors to understand from the state of circumstances as disclosed at the time that the debtor has suspended or that he is about to suspend payment. *Clough* v. *Samuel*, (1905) A.C. 442, Foll. (*Page, C.J and Sen, J.*) MAUNG SEIN NYUN *v.* DAWSON BANK, LTD. **135 I.C. 656=I.R. 1932 Rang 64=A.I.R. 1931 Rang. 317.**

——**S. 6 (g)**—*Suspension of payment—Temporary stoppage.*

A suspension connotes a temporary stoppage; so it cannot be said that a mere temporary suspension of

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payment till the debtors are able to sell or mortgage their property cannot amount to an act of insolvency. *Crook* v. *Morley*, (1891) A. C. 316, Rel. (*Bhide, J.*) BANARSI DAS KAPUR CHAND *v.* MAMAN CHAND RADHA KISHAN. **I.R. 1933 Lah. 59=141 I.C. 62=34 P.L.R. 43=A.I.R. 1933 Lah. 113.**

——**S. 6 (g)**—*Suspension of payment—What amounts to—Test.*

Principles to be applied in determining whether debtor's statement amounts to suspension of payment are as follows: The first is that a mere statement by a debtor that he is unable to pay his debts however insolvent he may be is not necessarily a notice within the meaning of the Act that he is suspending or about to suspend payment. The second principle is that one has to ascertain what the words used by the debtor would reasonably and ordinarily mean to the mind of a creditor. The third is that in construing the statement of the debtor it has to be seen whether he has clearly indicated that not only is he not going to pay a particular creditor but that he intends to deal with his creditors collectively. It may be added that although no written notice of such suspension is necessary, yet it must be in a sense formal and must not merely be the result of a casual conversation. Appellants offered such cash as was in their possession and security for the remainder of their debt. On this the District Judge concluded that there was an admission of the appellant that they were giving notice of either suspension or intended suspension of payment and that it was sufficient to bring the case within S. 6 (*g*).

Held, applying the above principles, that the statement in question could not be treated as a notice of suspension and that the admission of the debtor by itself was not sufficient to bring it within the meaning of Cl. (*g*) of S. 6. (*Wort, A. C. J. and Kulwant Sahay, J.*) LAKHI PRASAD SINGHANIA *v.* UGRAH MISR. **13 Pat. 78=148 I.C. 39=6 R.P. 434=14 Pat L.T. 691 A.I.R. 1933 Pat. 461.**

[R. 15 P.L.T. 461 (462).]

——**S. 6 (g)**—*Suspension of payment—What constitutes.*

In order to constitute suspension of payment as an act of insolvency the debtor must give notice to a creditor that he has suspended payment of his debts. (*Addison, J.*) HARBANS LAL *v.* BUTE KHAN. **6 I.R. (Lah.) 251 (2)=146 I.C. 628 (1)=34 P.L.R. 987=A.I.R. 1933 Lah. 725 (1).**

——**S. 7**—*Adjudication of firm—Effect of—Discharge—Liability of partners for debts incurred prior to adjudication.*

A partnership has in law no corporate personal existence distinct from that of its individual partners and an order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm. So if a firm is adjudicated, both the joint and separate creditors should prove their claims. If the insolvent firm was subsequently discharged, a partner of that firm is not liable for a separate debt incurred prior to the adjudication of the firm. (*Wild, J. C. and Rup Chand, A. J. C.*) HEERJI JIVRAJ *v* VALABRAM MULJI. **25 S.L.R. 422=I.R. 1932 Sind 65=136 I. C. 815=A.I.R. 1932 Sind 39.**

——**S. 7**—*Debts of deceased—Adjudication of legal representative—Personal decree necessary for.*

Bankruptcy is essentially a proceeding *in personam*, and only the personal debts due by the insolvent can be proved therein. Until there is a personal decree under S. 52, C. P. Code, a decree against a person as the legal representative of another does not make him liable to adjudication under the Provincial Insolvency Act. Hence

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though the legal representative of a deceased person is liable for the debts of the deceased to the extent to which property of the deceased has come into his hands, but before any such liability can be proved in the insolvency of such legal representative, it must first be crystallised into a personal liability in accordance with the proper procedure, which is laid down in S. 52, C. P. Code. A. I. R. 1927 Mad. 922, Rel. on. (*Mya Bu and Dunkley, JJ.*) P. A. A. CHETTYAR FIRM *v.* T. R. M. CHETTYAR FIRM. **12 Rang. 602 = 152 I.C. 558 = 7 R.R. 167 = A.I.R. 1934 Rang. 162.**

——**S. 7**—*Hindu son—Debts of father—Adjudication for—Liability to.*

The son of a Hindu father who died after incurring debts upon promissory notes, apart from some special circumstances which would make him personally liable for the family debt cannot be adjudged insolvent on account of his liability as a member of the family to pay these debts out of the family properties. 50 Mad. 981 = 53 M.L.J. 403, Foll. (*Krishnan Pandalai, J.*) PURNAYYA *v.* BASAVA KOTAYYA. **135 I.C. 31 = I.R. 1932 Mad. 63 = 34 L.W. 761 = A.I.R. 1931 Mad. 788 = 61 M.L.J. 518.**

——**S. 7**—*Joint debtors—Single petition by creditor—Maintainability.*

Where a creditor presented a petition for adjudicating three persons as insolvents and his case was that they had incurred a joint liability and had committed certain acts of insolvency.

Held, that a single petition for the adjudication of the joint debtors was sustainable. (Case-law reviewed.) (*Johnstone, J.*) RAM KRISHAN *v.* ILAM DIN. **I.R. 1931 Lah. 351 (1) = 130 I.C. 783 (1) = A.I.R. 1931 Lah. 384.**

——**Ss. 7 and 9**—*Right to apply under—Mortgagee decree-holder.*

A mortgagee who has obtained a decree on the basis of his mortgage, on the property of the judgment debtor, does not cease to be a secured creditor and is not thereby precluded from making an application under Ss. 7 and 9. (*Mukerji and Bennet, JJ.*) SARBHU LAL *v.* MAHESH DAS. **I.R. 1931 All. 189 = 129 I.C. 557 = 1931 A.L.J. 102 = A.I.R. 1931 All. 224.**

——**S. 7**—*Petition including minors—Procedure—Amendment.*

A petition was presented for the adjudication of two majors, four minors and two widows as insolvents. The same having been dismissed on the ground that it was wrongly framed the petitioner appealed and impleaded the two majors and one widow only. The petitioner alleged that those three persons incurred a joint liability and alleged certain acts of insolvency on their part.

Held, that the proper procedure for the lower Court was to allow the petitioner to amend his petition by striking out the names of unnecessary persons. (*Johnstone, J.*) RAM KRISHAN *v.* ILAM DIN. **I.R. 1931 Lah. 351 (1) = 130 I.C. 783 (1) = A.I.R. 1931 Lah. 384.**

——**S. 9 (1) (c)**—*Creditor's petition—Adjudication on act not alleged in—Legality.*

A person cannot be adjudicated as an insolvent at the instance of his creditor on an act of insolvency not relied on in the petition against him. The fact that a warrant of arrest has been issued against the debtor during the insolvency proceedings does not justify the Court to take note of it and make it the basis for an order of adjudication. (*Mir Ahmad, A. J. C.*) GANGA DHAR *v* SHER KHAN. **159 I.C. 529 = 8 R. Pesh. 85 = A.I.R. 1935 Pesh. 168.**

——**S. 9**—Creditor's petition—Amendment after three months of acts of insolvency—If can be allowed.

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See C. P. CODE, O. 6, R. 17—INSOLVENCY PROCEEDINGS. **67 M.L.J. 924.**

——**S. 9**—*Creditor's petition—Amendment after period of limitation—Permissibility.*

An insolvency petition was grounded on the sale by the debtor in favour of his wife which was alleged to be nominal and collusive. Leave to insert a paragraph in the petition was prayed for, that even if the Court should hold that the debts referred to in the sale deed are true, the transfer was nevertheless a fraudulent preference void as against the receiver.

Held, that the amendment was permissible even though the amendment was asked for after the expiry of the period of limitation prescribed for the main proceeding. (*Lakshmana Rao, J.*) BALAKRISHNALAL JANKIPRASAD *v.* HYATH KHAN SAHEB. **I.R. 1933 Mad. 369 (1) = 144 I.C. 44 = A.I.R. 1933 Mad. 608.**

——**S. 9**—*Creditor's petition—Assets of insolvent—Onus.*

A Court commits an error in placing the onus on the creditors in an insolvency proceeding of proving that certain occupancy holdings are not capable of being sold and that, therefore, they should not be included in the insolvent's assets. (*Broadway, J.*) MUNI LAL *v.* HIRA LAL. **150 I.C 651 = 7 R.L. 2 (2) = A.I.R. 1933 Lah. 582.**

——**S. 9**—*Creditor's petition—Denial of debt—Duty of Court.*

On an application filed by a creditor for adjudging a person as an insolvent, if the latter denies the debt alleged by the creditor to be due to him, the Insolvency Court is bound to make an enquiry into the existence of the debt and come to a finding on the point. (*Tek Chand, J.*) GURDIT SINGH *v.* MOWAZ. **I.R. 1932 Lah. 662 (1).**

——**S. 9**—*Creditor's petition—Excusing delay—Applicability of S. 5, Limitation Act.*

The provisions of S. 5 of the Limitation Act cannot be applied to the case of a creditor's petition under S. 9 of the Provincial Insolvency Act because such a petition is not an application within the meaning of S. 78 of that Act. Distinction between petition and application pointed out. (*Reilly and Anantakrishna Ayyar, JJ.*) GANGJEE PRAMJEE & CO. *v.* O. L. K. K. N. FIRM, COLOMBO. **55 Mad. 766 = I.R. 1932 Mad. 440 = 137 I.C. 740 = 1932 M.W.N. 204 = 35 L.W. 544 = A.I.R. 1932 Mad. 352 = 63 M.L.J. 152.**

[**D.** 1934 N. 171 (172). **R.** 1933 M.W.N. 1049 (1053).]

——**S. 9**—*Creditor's petition—Excusing delay—Applicability of S. 5, Limitation Act.*

The provisions of S. 5 of the Limitation Act cannot be applied to a petition to amend an insolvency petition because it is not an application within the meaning of S. 78 of the Provincial Insolvency Act. (*Cornish, J.*) VAITHIANATHA AIYAR *v.* VAITHIANATHA AIYAR. **34 L.W. 799 = 135 I.C. 613 = I.R. 1932 Mad. 181 = 1932 M.W.N. 164 = A.I.R. 1932 Mad. 112 = 61 M.L.J. 544.**

[**F.** 55 M. 766 (775, 784).]

——**S. 9**—*Creditor's petition—Fraud—Presumption.*

Where a mortgage transaction is effected between the debtor and his own son-in-law at a time when the debtor is involved heavily in debt and within 3 months of the application for his being declared an insolvent, the presumption that the mortgage was to defraud his creditors is very naturally raised against him. (*Abdur Qadir J.*) AMIR CHAND *v.* OFFICIAL RECEIVER, MIANWALL. **134 I.C. 1108 = I.R. 1932 Lah. 4 = 32 P.L.R. 637 (2) = A.I.R. 1931 Lah. 667.**

——**S. 9**—*Creditor's petition—Petition by one of the partners—Amendment.*

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A petition by one of the creditor partners of a firm cannot be permitted to be amended by the addition as party of another creditor partner when the application for that purpose is made after the expiry of three months since the date of insolvency. And the power of the Court to add parties under the incorporated provisions of the Civil Procedure Code cannot be invoked as it is subject to the time-limit prescribed by S. 9 of the Provincial Insolvency Act. (*Cornish, J.*) VAITHI NATHA AIYAR *v.* VAITHINATHA AIYAR. **34 L.W. 799 = 135 I.C. 613 = I.R 1932 Mad. 181 = 1932 M.W. N. 164 = A.I.R. 1932 Mad 112 = 61 M.L J 544.**

——**Ss. 9 and 24**—Creditor's petition—Right to apply —Discr tion of Court to decide. *See* PROVINCIAL INSOLVENCY ACT, SS. 24 AND 9. **59 Bom. 161 = 36 Bom.L.R. 1236 = A.I.R. 1935 Bom. 80.**

——**S. 9 (1)**—Creditor's petition—Substitution of creditor after three months of act of insolvency. *See* PROVINCIAL INSOLVENCY ACT, S. 16. **54 All. 72 = 1931 A.L.J. 1089 = A.I.R. 1932 All. 147.**

——**S. 9**—*Insolvency—Test.*

There can be no doubt that a man can only be declared an insolvent if he is not in a position to pay his debts and if a debtor owed Rs. 50,000 and his property were valued at Rs. 51,000, it cannot be held that he was insolvent. (*Broadway, J.*) MUNI LAL *v.* HIRA LAL. **150 I.C. 651 = 7 R.L. 2 (2) = A.I.R. 1933 Lah 582.**

——**S. 9 (1) (b)**—"*Liquidated sum*"—*What is.*

A sum is "liquidated" if it can be computed with certainty and a debt is "liquidated" if it can be readily ascertained on inquiry. A debt shown in insolvency was the collection of rents of paddy fields and of its mesne profits. It was necessary for the Court to embark on an elaborate enquiry in order to ascertain the net amount due.

Held, that the debt was not liquidated as referred in S. 9 (1) (*b*). (*Mosely and Mackuey, JJ.*) U BA THWIN *v.* U TUN THA. **160 I.C. 367 = 8 R.R. 381 = A. I.R. 1935 Rang. 435.**

——**Ss. 9 and 13**—*Parties—All creditors, if to be included.*

Quaere.—Whether there is no obligation on a petitioning creditor to implead other creditors and whether he has only to comply with the requirements of Ss. 9 and 13 (2) neither of which demands the impleading of other creditors. (*Currie, J.*) LORIND CHAND PARMA NAND *v.* MAHOMED AKRAM KHAN. **6 I R (Lah.) 107 = 145 I.C. 474 = 34 P.L.R. 827 = A.I.R. 1933 Lah. 642 (2).**

——**S 9**—*Right to apply under—Application by one —Partner of a firm—Validity.*

An insolvency petition filed by one of several creditor-partner of a firm, notwithstanding that he is described in the body of the petition as the managing partner of the firm, is not legally sustainable when it is not in the firm name or in the names of all its members, nor signed by the petitioning partner on behalf of the firm or its members. (*Cornish, J.*) VAITHINATHA AIYAR *v* VAITHINATHA AIYAR. **135 I.C. 613 = I.R. 1932 Mad. 181 = 1932 M W N 164 = 34 L W 799 = A.I.R. 1932 Mad. 112 = 61 M.L.J. 544.**

——**Ss 9 and 7**—Right to apply under—Mortgagee decree holder *See* PROVINCIAL INSOLVENCY ACT, SS 7 AND 9. **1931 A L.J. 102 = A.I.R. 1931 All. 224.**

——**S. 9**—*Right to apply under—Relationship of debtor and creditor, absent.*

Where the petitioner alleged that the other party was in his service, realised certain debts from his debtors and embezzled the amount realised, and that he had taken no steps, civil or criminal, to recover the amount.

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Held, that the amount in question was not a 'debt within the meaning of S. 9 and as there was no relation of debtor and creditor between the parties, the petition was not maintainable (*Raza and Bisheshwar Nath, J.*) RAJA RAM *v.* CHANDI PRASAD. **I.R 1932 Oudh 320 (2) = 138 I.C. 627 (1) = 9 O. W. N. 102 = A.I.R. 1932 Oudh 107.**

——**S. 9**—*Starting point—Court auction sale.*

A sale is complete as soon as property is knocked down and purchased by somebody; confirmation comes later.

Held, that the act of insolvency is committed as soon as the property is sold and the period of three months should be calculated from the date of the sale and not from its confirmation. (*Mitter and M. C. Ghose, JJ.*) KANAI LAL NANDY *v.* TINKARI DE. **6 I.R. (Cal.) 111 = 145 I C 429 = 37 C.W N. 535 = 57 C.L.J. 148 = A.I.R. 1933 Cal. 564.**

——**S. 9 (1) (c)**—*Starting point—Date of registered deed.*

When a petition is presented alleging that a debtor has committed an act of insolvency by deed registered, the period of limitation prescribed by sub-S. (1) (*a*), S.9 of the Act runs from the date of its registration and not from the date of its execution. (*Addison, Ag C. J., Monroe and Din Mohammad, JJ.*) LAKHMI CHAND *v.* KESHO RAM **16 Lah. 735 = 158 I.C. 226 (2) = 8 R.L. 202 = A I R 1935 Lah. 565 (F.B.).**

——**S. 9 (1) (c)**—*Starting point—Date of registration.*

The starting point of limitation for the purpose of calculating the three months prescribed by S. 9 (1) (*c*) is the date of the registration of the deed and not its execution. (*Stapleton, A. J. C.*) KANHAYALAL *v.* SADASHIV RAO. **150 I.C. 834 = 7 R.N. 26 = 17 N.L. J. 14 = A.I.R. 1934 Nag. 171.**

——**S. 9 (1) (b) and (c)**—*Starting point—Date of registration.*

The starting point of limitation for the purposes of S. 9 (1) (*b*) and (*c*) of the Insolvency Act is the date of the registration of the deed of transfer and not the date of execution. (*Addison and Din Mohammad, JJ.*) DEVI DAS *v.* MOTI RAM. **16 Lah. 739 = 158 I.C. 413 = 8 R.L. 246 (2).**

——**S. 9 (1) (c)**—*Starting point—Date of registration of mortgage—Petition.*

An insolvency petition filed by a creditor more than three months after the execution by the debtor of a mortgage deed constituting the alleged act of insolvency but within three months of its registration is not barred under S 9 (1) (*c*). Though, on registration, title relates back to the date of execution, no valid transfer can be said to take place until the deed of transfer is registered. The petition filed within three months of the registration is therefore in time. (*Bhide, J.*) KIRPA RAM *v.* SANWALA RAM. **158 I.C. 226 (1) = A.I.R. 1935 Lah. 55.**

——**S. 9 (1) (c)**—*Starting point.*

Period of three months prescribed under S. 9 begins to run from the date of execution and not from date of registration of the deed. (*Dilip Singh, J.*) RATAN CHAND *v.* SMAIL. **149 I.C. 853 = 6 R.L 753 (2) = A. I R 1933 Lah. 821.**

——**S. 9 (1)**—*Three months' period—Can be extended.*

The period of three months in S 9 (1) of the Provincial Insolvency Act is a period of limitation and not a condition precedent and as such is capable of extension. (Case-law considered.) (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH

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MALABAR. 150 I C. 339=6 R M. 710=39 L.W. 449=1933 M.W N. 1049=A.I R. 1934 Mad. 294.

——S. 9 (1) (c)—Three months' period—Computation of—Period expiring during vacation. *See* PROVINCIAL INSOLVENCY ACT, S. 54 1933 M.W.N. 1049.

——S. 9 (1) (c)—*Three months—Computation of—Period expiring during vacation—Presentation of petition on re opening day—If sufficient.*

The period of three months prescribed by S. 9 (1) (*c*) of the Provincial Insolvency Act is a condition precedent and not a period of limitation for the filing of the insolvency petition. The petitioning creditor must, therefore, on the day he presents his petition, have in view some act of insolvency which the debtor has committed within the preceding three months; and he cannot make use of any act of insolvency committed outside that period of three months, because after that period, the transaction ceases to be an act of insolvency. Where, therefore, the period of three months expires during the vacation of the Court, a petition presented on the reopening day is not a valid petition which can be sustained. S. 10 of the General Clauses Act cannot be relied on so as to extend the time until the reopening day. (*Beasley, C. J., Cornish and Pandrang Row, JJ.*) CHENCHU RAMANA REDDI *v.* ARUNACHALAM. 58 Mad. 794 =158 I.C. 1=8 R.M. 226=1935 M.W.N 685=42 L. W. 330=A.I.R. 1935 Mad. 857=69 M.L.J. 283 (F.B.).

——S. 10—*Assets of insolvent—Occupancy rights under Punjab Tenancy Act.*

Where a person applies for adjudication, the fact that his land consists of occupancy rights which cannot be sold without the consent in writing of the landlords as provided for in S. 56 of the Punjab Tenancy Act, is no ground to hold that it is not a realizable asset of the insolvent, unless it is shown that an application had been made to the landlord and the landlord had refused to consent to the transfer of these rights. (*Din Mohammad, J.*) ALLAH DITTA *v.* DEWA SINGH. 37 P L R 82= 7 R.L. 441=153 I.C. 460=A.I.R. 1935 Lah. 183.

——S. 10—*Joint petition—Maintainability.*

The word "debtor" in S. 10 of the Provincial Insolvency Act may be interpreted in the plural under S. 13 of the General Clauses Act. Therefore a joint petition by three brothers for adjudicating them as insolvents is maintainable, if the other conditions mentioned in S. 10 of the Act are satisfied and if it would not be bad for multifariousness. (*Mukerji Ag. C. J. and Guha, J.*) BROJENDRA NANDAN SAHA *v.* NIKUNJA BEHARY DAS. 154 I C. 775=7 R.C. 526=60 C.L.J. 248=39 C.W.N. 104=A.I.R. 1935 Cal. 174.

——S. 10—*Petition under—Duty of Court.*

In an application for adjudication all that a debtor has to do is to afford *prima facie* proof of his inability to pay his debts and it is not for the Court to hold on a nice calculation of the assets that these will satisfy the debts and therefore adjudication should be withheld; when dealing with an application by the debtor the Court is not required to determine whether or not the debts are fictitious. This is a matter which will arise later. Only two questions arise for decision in an application by a debtor: (1) whether his debts amount to Rs. 500 and (2) whether he is unable to pay his debts.

Semble.—Adjudication is now the rule rather than the exception and it cannot be too frequently impressed on Courts dealing with such applications that a meticulous examination of the assets and liabilities and a carefully balanced adjustment of these is not now necessary or required. (*Tapp, J.*) IMAM DIN *v.* RUPA JHANGI ATMA RAM. I.R. 1931 Lah. 523=132 I.C. 11=31 P.L.R. 1016.

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——S. 10—*Petition under—Facts entitling.*

In order to entitle a debtor to apply under S. 10 of the Provincial Insolvency Act, the question for consideration is not whether the debts can be satisfied immediately out of the assets, but whether the assets are so locked up that the debtor will be unable to pay at the times he is called upon to pay. (*Weston.*) MOHAN LAL *v.* RATNA. 1935 A.M.L J. 51.

——S. 10—*Petition under—Inability to pay debts—Burden of proof.*

Inability to pay debts is a condition precedent to the presentation of a debtor's petition. Before a debtor can seek the protection of the Insolvency Court he has to satisfy the Court that he is unable to pay his debts. (*Rachhpal Singh and Niamatullah, JJ.*) SIVA RAM *v.* LOHRA KISHORI LAL. 147 I C. 11=6 R.A. 435= 1933 A.L J. 943=A.I R. 1933 All. 841.

——S. 10—*Petition under—Refusal to adjudicate—Assets not disclosed.*

A debtor has a statutory right to get himself adjudicated an insolvent if he complies with the provisions of S. 10, and the Court cannot refuse to adjudicate him merely because the petition does not disclose possession of assets by him. 44 Cal. 535 (P C.), Rel. on. (*Madhavan Nair and Jackson, JJ.*) DURAISWAMI CHETTIAR *v.* ABDUL SUBAN SAHIB. I.R 1932 Mad. 372=137 I.C. 390=35 L.W. 148=A.I.R. 1932 Mad. 287=62 M.L.J. 234.

——S. 10 (1)—*Inability to pay—Failure to prove—Dismissal—Second application not barred.*

The fact that the insolvent when he filed his previous application was not able to prove that he was unable to pay his debts cannot estop him from proving in the subsequent application that he is unable to pay his debts and so is entitled to be adjudicated as an insolvent. (*Wazir Hasan, C. J and Nanavutty, J.*) RAM ASRAY SAHU *v.* SRI RAM DUBEY. 6 R.O. 392 (1)=148 I.C. 245=11 O W.N. 71=A I.R. 1934 Oudh 94 (1).

——S. 10 (1)—*Unable to pay debts—Occupancy tenant—Landlord willing to buy land.*

Where an occupancy tenant owns houses and one of the landlords is willing to purchase the land, he cannot be said to be unable to pay his debts. (*Bhide, J.*) WADHWA SHAH *v.* AMIR SINGH. 154 I C. 605=7 R L. 583 (2)=A.I.R. 1934 Lah. 985 (1)

——S. 13—*Applicability of Limitation Act* (1908), *S.* 5.

S 5, Limitation Act, does not apply to petitions for insolvency; A. I. R. 1932 Mad. 352, Foll. (*Dalip Singh, J.*) RATAN CHAND *v.* SMAIL. 149 I.C. 853 =6 R.L. 753 (2)=A.I R. 1933 Lah. 821.

——S. 13—*Petition under—Amendment of—Permissibility of—Limits to.*

When the amendment that is sought is one that does not affect the substance of the petition, but will merely have the effect of bringing the petition in conformity with the rules of practice or of remedying a formal defect, the Court in its discretion might properly grant leave for the amendment to be made, even if the amended petition would necessarily be presented more than three months after the alleged act of insolvency, provided that no hardship would thereby be worked to the respondents. But where the amendment is one that goes to the root of the petition and alters the substance of the act of insolvency alleged, the Court ought not to permit the amendment to be made, if the effect of so doing would be that the amended petition would be re-presented more than three months after the date of the act of insolvency alleged. Omission to make the allegation that the act complained of was committed with intent to

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defeat or delay creditors cannot be regarded merely as a formal defect, but must be treated as a failure to allege an essential ingredient of the act of insolvency. An application for leave to make such an amendment more than three months after the date of the alleged act of insolvency ought not to be granted. (Case-law disc.) (*Page, C. J. and Sen, J.*) MURUGAPPA CHETTYAR *v.* GALLIARA. **12 Rang. 150=151 I.C. 190=7 R.R. 46 =A.I.R. 1934 Rang. 87.**

——**S. 13 (1)**—*Inability to pay debts—Onus of proof.*

The onus of proving inability to pay their debts is no doubt initially on the debtors applying for adjudication but it should be borne in mind that if they are fraudulently suppressing any assets they are criminally liable. Where the insolvent goes into the witness box and denies any assets other than those given in the list filed, this should be taken as *prima facie* proof unless there is something on record to be contrary. (*Dalip Singh, J.*) BISHAN SINGH *v.* MAN SINGH. **6 R.L. 429=147 I.C. 679 (1)=35 P.L.R. 184 (1)=A.I.R. 1935 Lah. 213 (1).**

——**S. 13 (1) (e)**—*Inability to pay debts—Interest in the joint family property—Taking into account.*

In order to decide whether the debtor applicant is a person who is unable to pay his debts, the value of his interest in the joint family property which clearly is his "property" should be taken into account. (*Rachhpal Singh and Niamatullah, JJ.*) SIVA RAM *v.* BOHRA KISHORI LAL **147 I.C. 11=6 R.A. 435=1933 A.L. J. 943=A.I.R. 1933 All. 841.**

——**S. 13 (2)**—*Creditor's petition—Full particulars necessary.*

Adjudication of debtor as insolvent at the instance of the creditors involves considerable disgrace and legal disabilities to the debtor and therefore it is all the more necessary that the act of insolvency alleged to have been committed by him should be clearly and precisely described in the insolvency petition to enable the debtor to meet the charges brought against him and unless the facts alleged bring the debtor's conduct well within the ambit of the statute the Court should stay its hands both in the matter of adjudication and the appointment of a receiver. (*Jai Lal and Bhide, JJ.*) HARKISHAN LAL *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **14 Lah. 117=I.R. 1932 Lah. 701=140 I.C. 275=33 P.L.R. 992=A.I.R. 1932 Lah. 643 (2).**

——**S. 15**—*Order of consolidation—When to be made—Enquiry into competency of petitions necessary.*

S. 15 does not empower the Court to pass an order of consolidation of a petition for insolvency before it is admitted and before an opportunity has been afforded to the other parties cancerned of showing that the petition is not compentent. *Prima facie* that section refers to consolidation of insolvency petitions after they are admitted and presupposes that such petitions are otherwise competent. Where the competency of the petitions is being challenged, it must be inquired into before an order of consolidation can be passed. (*Wild, J. C. and Rupchand, A. J. C.*) DAYARAM MEGHRAJ *v.* SAKHIBAI. **I R. 1931 Sind 47=130 I.C. 559=A.I. R. 1931 Sind 65.**

——**S. 16**—*Substitution of creditor—Conditions.*

S. 16 imposes only one condition for the substitution of a creditor, namely, that his debt shall be not less than "the amount required by the Act." The Court cannot superimpose an additional condition to the effect that the creditor who wishes to be substituted should have presented an application within three months of the acts of insolvency. (*Kendall and Bajpai, JJ.*) GANGA NATH *v.* ZALIM SINGH. **54 All. 72=I.**

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R. 1932 All. 74=135 I.C. 250=1931 A.L.J. 1089= A.I.R. 1932 All, 147.

——**S. 16**—*Substitution of creditor—Insolvency petition not pending—Procedure.*

A creditor had filed a petition for adjudication of a debtor. It was however subsequently intimated to the Court that the petitioning creditors and the insolvents had come to an agreement with regard to this matter; on this intimation the petition was dismissed by the Court. No other creditor was given notice of the application based on the settlement which resulted in the dismissal of the petition. Some months later another creditor applied to be substituted for the original petitioning creditors.

Held, that the language of the section contemplates a petition that is alive and not dead, a petition that is proceeding and has not been dismissed, that the subsequent creditor cannot be substituted in place of the original petitioner and that the only course open to him was to launch a fresh petition. (*Cunliffe and Mya Bu, JJ.*) MAUNG GYE *v.* A.L.K.P. CHETTYAR FIRM. **11 Rang. 407=147 I.C. 299=6 R.R. 162=A.I.R. 1933 Rang. 251.**

——**S. 17**—*Death of debtor before adjudication—Court adjudging estate insolvent—Validity of order.*

Where a debtor died before adjudication and the Court passed an order that the estate should thereby be adjudged as insolvent and an Official Receiver was appointed to administer it and in subsequent proceedings the Official Receiver applied under Ss. 53 and 54 to set aside certain alienations and the objection was taken that the estate and not the transferor had been adjudged.

Held, that the Judge had intended to pass the right order and that the application was maintainable even though the order adjudging the estate instead of the person was wrong in form. Provisions of Provincial Insolvency Act compared with Presidency Towns Insolvency Act and English Bankruptcy Act. (*Krishnan Pandalai, J.*) SUBBIAH AIYAR *v* OFFICIAL RECEIVER, TINNEVELLY. **141 I.C. 822=37 L.W. 75= I R. 1933 Mad. 165=1932 M.W.N. 1102=A.I.R. 1933 Mad. 25=63 M.L.J. 727.**

——**S. 17**—*Death of debtor—Subsequent adjudication.*

A person can be declared insolvent in spite of the fact that he died before the creditor's application for his being declared insolvent was decided. (*Abdul Qadir, J.*) GIRDHARI LAL *v.* JUGAL KISHORE. **33 P.L.R. 151=I.R. 1932 Lah. 269=136 I.C. 733=A.I.R. 1932 Lah. 264.**

——**S. 17**—*Death of insolvent—Effect.*

Death of insolvent does not terminate insolvency proceedings. (*Tek Chand and Agha Haidar, JJ.*) ISHAR DAS *v.* MT. FATIMA BIBI. **15 Lah. 698=153 I.C. 993=7 R.L. 489=36 P.L.R. 499=A.I.R. 1934 Lah. 468.**

——**Ss. 17 and 41**—*Death of insolvent—Effect of.*

Ordinarily speaking insolvency proceedings would not terminate until there has been a discharge of the insolvent, but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must automatically be held to have terminated. 9 S.L.R. 34, Diss. From; A.I.R. 1918 Sind 38, Ref. (*Dalip Singh, J.*) ASA NAND *v.* BISHAN SINGH. **147 I.C. 695=6 R.L. 421 =A.I.R. 1933 Lah. 997.**

——**S 17**—*Death of insolvent—Liability of heirs.*

Property of a deceased insolvent vested in the receiver, although presumed to be ancestral, can be made exempt

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from sale after the death of the insolvent only if his heirs succeed in showing that the debts of the deceased were tainted with immorality or were otherwise illegal. A. I. R. 1925 Lah. 366, Foll. (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367 = I.R. 1931 Lah. 291 = 130 I.C. 419 = 31 Punj.L.R. 842 = A.I.R. 1930 Lah. 1034.**

———**S. 17**—*Refusal to adjudicate—Creditor's appeal—Death of debtor—Appeal if cannot be continued against legal representatives.*

Where the Insolvency Court refused to adjudicate a debtor as insolvent and the creditors having appealed the debtor died during its pendency.

Held, that the sons could not be impleaded as legal representatives and the appeal proceeded with. 9 Lah. 306, Ref. (*Harrison, J.*) ATTAR CHAND *v.* MAHOMED MOBIN. **13 Lah. 396 – 135 I.C. 196 = I.R. 1932 Lah. 68 = 32 P.L.R. 809 = A.I.R. 1932 Lah. 121 (1).**

———**S. 17**—*Scope.*

S. 17 does not appear to be limited to cases where the petitioner dies after being adjudicated insolvent. (*Bhide, J.*) AMAR NATH *v.* HARBANS SINGH. **I.R. 1932 Lah. 652 (2).**

———**S. 19**—*Absence of notice—No prejudice—Adjudication order, if affected.*

Where the absence of the requisite notice under S 19 has not led to any prejudice, the order of adjudication cannot be interfered with on that ground. (*Bhide, J.*) JHANDA SINGH *v.* RECEIVER, INSOLVENTS' ESTATE, AMRITSAR. **158 I.C. 94 = A.I.R. 1935 Lah. 412.**

———**Ss. 20 and 56**—*Appointment of interim receiver—His powers to take possession—Insolvent in possession of property as tenant under his mortgagee—Court's power to restore possession to mortgagee.*

Reading Ss. 20 and 56 of the Provincial Insolvency Act, the following principles are deducible from the provisions of law contained therein:—(*a*) An interim receiver may be appointed by any Insolvency Court with directions to take immediate possession of the property of the alleged insolvents; (*b*) the powers to be exercised by an interim receiver shall be determined by the Court with reference to O. 40, C. P. Code; (*c*) to ensure compliance with its order the Insolvency Court can remove a person in whose possession such property is, but it cannot remove any person whom the insolvent has not a present right so to remove. Where the property is under a mortgage and the mortgagee is in possession through his tenant, in ordinary circumstances the Court is not competent to remove the mortgagee from the possession of the property as the insolvent himself cannot do so. Where the person through whom the mortgagee is in possession is the insolvent himself, the receiver takes the property subject to the burden, if any, and is entitled to elect whether to retain it or not, if the burden is too onerous to be borne by him. If the interim receiver elects to remain in possession, he shall have to discharge the obligations attached to the property; but if he does not, the insolvent tenant who has been dispossessed shall have to be let in possession. Under no circumstances, therefore, the property can be restored to the mortgagee. (*Hilton and Din Mahomed, JJ.*) LACHHI *v.* BADRI PARSHAD. **156 I C. 278 = 7 R.L. 892 = 36 P.L.R. 205 = A.I.R. 1934 Lah. 1006.**

———**S. 20**—Order appointing interim receiver—Discretion—Second appeal. *See* PROVINCIAL INSOLVENCY ACT, S. 4—APPEAL. **139 I.C. 44 = 34 Bom. L.R. 382 = A.I.R. 1932 Bom. 228.**

———**S. 21 (2)**—*Scope and object—House claimed by wife—Attachment of—Propriety.*

The summary powers conferred by S. 21 are intended to prevent the debtor from making away with what is

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his property—documents and books of account which might be used against him—property which he might run away with and take away out of the reach of creditors. It is an abuse of the section to order the attachment of a house claimed by the wife of the insolvent as her property and admitted by the insolvent as hers at the instance of a creditor alleging that the wife was only a benamidar for the insolvent. (*Rankin, C.J. and C. C. Ghose, J.*) MRINALINI DASSI *v.* HARIHAR DE. **59 Cal. 1338 = 142 I C 72 = I.R. 1933 Cal. 223 = 56 C.L J. 307 = 36 C.W.N. 741 = A I.R. 1933 Cal. 76.**

———**S. 22**—*Scope and applicability.*

The provision in first part of S. 22 that the debtor shall on the making of an order admitting the petitions produce all account books is not applicable to a case when an order has been made on a creditor's petition. But the second part of the section applies to both classes of cases, *viz.*, debtor's and creditor's petition and to all stages of the proceedings that follow the order admitting the petition, leaving it to the Court or the receiver to make the requisition at the appropriate stage. In re *Mon*, (1882) 21 Ch. D. 61, Ref. (*Mukerji and S. K. Ghose JJ*) AKHOY CHAND BEGWANI *v.* EMPEROR. **61 Cal. 537 = 149 I C. 352 = 6 R.C. 564 = 35 Cr.L.J. 937 = 38 C.W.N. 642 = 1934 Cr.C. 553 = A.I.R. 1934 Cal. 409.**

———**S. 23**—*Application under—When to be made.*

An application under S. 23 can be made by a debtor after his arrest and not before it. (*Addison, J.*) TARA CHAND *v.* JAWAHAR MAL. **I R. 1931 Lah. 448 = 131 I.C. 208 = 32 P L R 311 = A I.R. 1931 Lah. 121.**

———**S. 23**—Protection order—Inherent powers—Pending adjudication application. *See* PROVINCIAL INSOLVENCY ACT, S. 5—INHERENT JURISDICTION. **148 I.C. 975 = A.I.R. 1934 Lah. 113 (2).**

———**S. 23**—*Security for appearance—Insufficiency—Inherent jurisdiction to demand fresh security.*

Where a Court accepts the security furnished by a petitioner in insolvency but on objections by the other side finds that it is not sufficient, it has inherent jurisdiction to demand fresh security if it is satisfied that the security which has already been given is not sufficient. It is fair to presume in such cases that a fraud has been committed on the Court or, in any case, that the Court has acted under a misapprehension in accepting the security. (*Ju Lal, J.*) GULATI *v.* HARDY. **158 I.C. 371 (1) = A.I.R. 1935 Lah. 148.**

———**S. 24**—*Creditor's petition—Dispute as to right to present—Powers of Court—Procedure.*

Ordinarily, when a creditor presents a petition to adjudicate the debtor an insolvent, and the latter challenges the right of the creditor to apply and denies the existence of the debt, the Insolvency Court will, and is entitled to, ask for proof of the creditor's right to present the petition; but the Court is not bound to decide every question connected with it or which may incidentally arise from it. It can refer the parties to a regular suit, if it thinks that a complicated question of law or fact arises in the case. (*Divatia, J.*) GOPIKABAI MAHADEV *v.* CHAPSI PURSHOTTAM. **59 Bom. 161 = 154 I.C. 566 = 7 R.B. 342 = 36 Bom.L.R. 1236 = A.I.R. 1935 Bom. 80.**

———**S. 24**—*Creditor's petition—Insolvent admitting debt—Procedure.*

Where the insolvent having admitted the debt of the petitioner, the Court did not consider it necessary to frame an issue and call for further proof, it is open to the District Judge in appeal to frame an issue on the point and remand the case for evidence thereon, if he thought it fit to do, but he is not justified in dismissing

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the petition without giving the petitioner an opportunity to produce proof of his debt. (*Bhide, J.*) RAM PARSAD *v.* RATTAN CHAND. **6 R.L. 609 (1) = 148 I.C. 910 = A.I.R. 1934 Lah. 128 (1).**

——**S. 24**—*Debtor's application—Points for consideration.*

On a debtor's application to be adjudicated insolvent only two points arise, namely, whether his debts amount to Rs. 500 or over and whether he is unable to pay his debts. (*Tapp, J.*) SOHNA MAL *v.* JEWAN DAS. **I. R. 1935 Lah. 248 = 142 I.C. 690 = 34 P.L.R. 69 = A.I.R. 1933 Lah. 330.**

——**S. 24**—*Debtor's petition—Right of creditor to prove fictitious nature of alleged debts.*

Where a debtor files a petition for adjudication on the ground of inability to pay debts, though it is not necessary to hold an elaborate enquiry as to debtor's inability to pay his debts, the creditor should not be refused to let in evidence to show that several of the debts are fictitious. He is entitled to show that the debtor is in a position to discharge his liabilities and that he has no right to present the petition. (*Bhide, J.*) KANSHI RAM *v.* JUGAL KISHORE. **I.R. 1933 Lah. 417 = 144 I.C. 102 = A.I.R. 1933 Lah. 629.**

——**S. 24**—*Dismissal of—Debtor's application—Grounds—Concealment of accounts.*

The fact that the debtor has concealed his account books is no ground for dismissing the application. (*Tapp, J.*) SOHNA MAL *v.* JEWAN DASS **I R. 1933 Lah. 248 = 142 I.C. 690 = 34 P.L.R. 69 = A.I.R. 1933 Lah. 330.**

——**S. 24 (1)**—*Dismissal of—Debtor's petition—Grounds—Previous colorable transactions.*

If there are *prima facie* grounds for believing that the applicant is unable to pay his debts the Court should not hold an inquiry for the purpose of determining whether some of the debts mentioned are real debts or whether there has been fraudulent concealment of property. When a *prima facie* case is made out the Court should not reject the debtor's application simply because it is shown that he had in the past entered into certain colorable transactions. (*Mitter and M. C. Ghose, JJ.*) SASHI BHUSAN MAITY *v.* FANI BHUSAN BOSE. **148 I.C. 131 = 6 R.C. 429 = 37 C.W.N. 841 = A.I.R. 1934 Cal. 27.**

——**S. 24 (1) (a), Proviso**—*Construction—Power of Court to hear evidence of creditors—Finding of benami character of transfer by debtor—Permissibility.*

The meaning of the proviso to S. 24 (1) (*a*) of the Provincial Insolvency Act is merely that the Court is enabled to deal summarily with the opposition by the creditor, that is to say, the Court must listen to such evidence as the debtor may care to adduce and the debtor may be cross-examined; if the Judge is satisfied after such hearing, he may refuse to hear any further evidence and may grant the adjudication. But this does not mean that the Judge, if he shall be inclined to hear any evidence presented by the creditor, is not entitled to hear such evidence. He may, if he likes, hear such evidence and may hear as much evidence as he may think fit in the circumstances of the case. Where, during the cross-examination of the petitioning debtor, it was elicited by the creditors that he had assigned the greater part of his property to his wife in satisfaction of an alleged dower debt, and the Judge allowed the creditors to offer evidence on which he found that the assignment was a mere *farzi* transaction and that the debtor was still in possession of, and controlling the property, and rejected the petition as he was not satisfied that the debtor was unable to pay his debts.

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Held, that the Judge had exercised the discretion given to him, and that the order was correct and legal. (*Courtney-Terrell, C. J., Dhavle and Agarwala, JJ.*) MAHOMED ALAM *v.* BABULAL MARWARI. **15 Pat. 177 = 160 I.C. 153 = 8 R.P. 338 = 16 Pat.L.T. 833 = A. I.R. 1936 Pat. 18 (F.B.).**

——**S. 24 (1) (a), Proviso**—*Debtor's petition—Inability to pay debts—Duty of Court to investigate.*

Before adjudicating an applicant to be insolvent the Court has to be satisfied that he is not in a position in fact, to pay his debts. The Court is not bound to accept the statement of the petitioner but should investigate the facts for itself. (*Macpherson and Agarwala, JJ.*) JAGARNATH SAHU *v.* BENI PRASAD. **12 Pat. 866 = 147 I.C. 842 (2) = 6 R.P. 383 = 15 Pat.L.T. 271 = A.I. R. 1934 Pat. 97 (1).**

——**S. 24 (1) (a), Proviso**—*Proof of inability to pay debts—Failure to produce books of account—Refusal to adjudicate—Propriety.*

Where it was shown that the debtors had suffered an attachment on a previous occasion, that they had been trying to wind up their business ever since, that their trade had been very much reduced and where the Court had no *prima facie* difficulty in inferring that they were unable to pay their debts, the debtors are entitled to be adjudicated as insolvents and the Court is not justified in refusing to adjudicate them on the ground that they failed to produce their account books for certain years. (*Rankin, C. J. and C. C. Ghose, J.*) RAJENDRA NATH SAHA *v.* RAI KISHORI DASI. **59 Cal. 1279 = 140 I.C. 465 = I.R. 1932 Cal. 720 = 36 C.W.N. 698 = 55 C.L.J. 356 = A.I.R. 1932 Cal. 817.**

——**S. 24 (2)**—*Debtor's petition—Enquiry by Court—Scope of—Finding as to truth of debtor's statements necessary.*

The procedure indicated in sub-S. (2) is to be adopted as a preliminary to the decision as to whether the petition should be granted or not. The hearing of the petition is no mere formal matter. When the petitioning debtor says he has no books of account, it is the duty of the Court to be satisfied *prima facie* and after following the necessary procedure and making the necessary investigation to come to a conclusion that the statements by the debtor are true, before the petition can be granted. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) GANESH LAL SARAWGI *v* SANEHI RAM. **12 Pat. 107 = 141 I.C. 223 = I.R. 1933 Pat. 58 = 13 Pat.L.T. 714 = A.I R. 1933 Pat. 43.**

——**S. 24 (2)**—Failure to examine debtor—Effect of. *See* PROVINCIAL INSOLVENCY ACT, S. 25. **10 Rang. 187.**

——**S. 24 (2)**—*Failure to examine debtor—If vitiates order.*

The provisions of Cl. (2), S. 24 are mandatory and the failure to observe them vitiates the order of the trial Court. The section does not distinguish between debtors' and creditors' petitions. A.I.R. 1930 Lah. 746, Rel. on; A.I R. 1932 Rang. 67, Diss. From. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) POPA RAM *v* BARA KHAN. **158 I.C. 259 = 8 R. Pesh. 49 (2) = A.I.R. 1935 Pesh. 139.**

——**Ss. 25 and 75 (2)**—Application for verification of petition—Petition struck off from register—Order, if appealable. *See* PROVINCIAL INSOLVENCY ACT, S. 75 (2)—APPEAL. **I.R. 1931 Lah. 802 = 133 I.C. 626.**

——**S. 25**—*Creditor's petition—Debtor's ability to pay debt—Duty of Court to come to a finding.*

Under S. 25 the Court should dsimiss the petition, presented by creditor, i f it is satisfied by the debtor

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that he is able to pay his debts. Consequently, it is essential that the Court should come to a finding as to whether the debtor is able to pay his debts or not. (*Dunkley, J.*) MAUNG PO SAI *v.* BANK OF CHETTINAD, LTD. **13 Rang. 717=160 I.C. 109=8 R. R. 340=A.I.R. 1936 Rang. 26.**

———**S. 25**—*Debtor's petition—Inability to pay, not proved—Dismissal.*

If a debtor is unable to prove that he cannot pay his debts the Court has power to dismiss his petition under S. 25 of the Provincial Insolvency Act. (*Rachhpal Singh and Niamatulla, JJ.*) SIVA RAM *v.* BOHRA KISHORI LAL. **147 I.C. 11=6 R.A. 435=1933 A.L. J. 943=A.I.R. 1933 All. 841.**

———**S. 25**—*Dismissal of debtor's petition—Subsequent petition alleging change of circumstances*—Res judicata.

Where a petition for adjudication by a debtor is dismissed and he subsequently files another petition alleging change of circumstances, there can be no bar in the nature of *res judicata*. But the Court should not take the allegation of the petitioner as correct without further proof. (*Middleton, J.C.*) BAZGULKHAN & CO *v.* ABDUL LATIF. **154 I.C. 874=7 R. Pesh. 86=A.I.R. 1935 Pesh. 25.**

———**S. 25**—*Failure to examine debtor—Validity of adjudication.*

Failure to examine the debtor is not one of the facts on the proof of which the Court is bound to dismiss the petition and unless the debtor is thereby prejudiced, failure to examine the debtor as provided in S. 24 (2) does not *ipso facto* vitiate the adjudication. (*Page, C.J. and Mya Bu, J.*) MAUNG CHIT *v.* S. P. Y. S. P. CHETTYAR FIRM. **10 Rang. 187=137 I.C. 671=A.I.R. 1932 Rang. 67.**

———**S 27**—*Creditor's petition—Death of debtor—Subquent adjudication.*

A person can be declared insolvent in spite of the fact that he died before the creditor's application for his being declared insolvent was decided. (*Abdul Qadir, J.*) GIRDHARI LAL *v.* JUGAL KISHORE. **I.R. 1932 Lah. 269=136 I.C. 733=33 P L R. 151=A.I.R. 1932 Lah. 264.**

———**S. 27**—*Hindu joint family—Application by some members—Effect.*

An application for insolvency by some of the members of a joint Hindu family does not *ipso facto* result in the insolvency of all the members of the family. 6 Lah. 1 (P. C.), Rel. on. (*Bhide, J.*) ASA NAND *v.* BISHAN SINGH. **131 I.C. 345=A.I.R. 1931 Lah. 125.**

———**S. 27**—*Powers of Court—Adjudication—Order declaring mortgage void—Validity of.*

The Court should not at the time of adjudication avoid the alienations by the insolvent unless and until it is moved by the Official Receiver under S. 53 or by an aggrieved party. Even if the Court purported to declare the mortgage by the insolvent void, it is not *res judicata* so as to preclude the mortgagee from suing for declaration of its validity. 45 M. 189, Ref. (*Jackson, J.*) CHENCHAYYA *v.* BAPAYYA. **I.R. 1932 Mad. 498=138 I.C. 31=35 L.W. 66=A.I.R. 1932 Mad. 233=62 M.L.J 177.**

———**Ss. 27 and 43**—*Powers of Court—Extension of time—Application for discharge made after expiry of period fixed on date of adjudication.*

Ss. 43 and 27 should be read in a manner so as not to contradict each other and an Insolvency Court can extend the time for applying for discharge even after the expiry of the period fixed on the date of adjudication. A power to grant further time carries with it a power to grant extension even after the expiry, of the term

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originally fixed, since annulment of adjudication is not automatic. 17 C. 512 ; 49 All. 201 ; 51 Cal. 337 ; 7 Pat. 375 ; 53 Mad. 288, Foll. (*Mukerji, A. C. J. and Thom, J.*) MADHO PRASAD VYAS *v.* MADHO PRASAD. **55 All. 241=6 I.R. (All.) 138=145 I.C. 668=1933 A.L.J. 117=A.I.R. 1933 All. 230.**

———**S. 27 (2)**—*Discharge—Extension of time—Grounds.*

An application for extending the time for an application for discharge should be allowed if the result of the annulment of the adjudication would be to prejudice the creditor. It certainly was not the intention of the framers of the Act that the debtor should derive advantage from his failure to apply. (*Macnair, J. C.*) LADURAM *v.* SAKHARAM. **27 N.L R. 374=I.R. 1932 Nag. 33=136 I.C. 873=A.I R. 1932 Nag. 22.**

———**S. 27 (2)**—*Powers of Court—Extension of time for application for discharge.*

S. 27 (2) of the Provincial Insolvency Act authorizes a Court to extend the time for an application for discharging an adjudicated insolvent even if the application for extension of time is made after the period specified for the application for the order of discharge has expired. 7 Pat. 375 (F.B.) and 53 Mad. 288 (F.B.), Foll. (*Macnair, J.C.*) LADURAM *v.* SAKHARAM. **27 N.L.R. 374=I.R. 1932 Nag. 33=136 I.C. 873=A.I.R 1932 Nag. 22.**

———**S. 27 (2)**—*Powers of Court—Extension of time for discharge.*

A Judge was absent on the day fixed for applying for discharge and the insolvent did not apply on that ground. The case was posted to another date when the insolvent applied. The Judge dismissed the application as being belated on the ground that he had no power to extend time.

Held, that the Judge had power to extend time and that he had power to consider the appplication. (*Das and Brown, JJ.*) WALLY MOHAMED CASSIM *v.* HAJI AYOOB HAJI ABBA & COY. **6 I.R. (Rang.) 20=144 I.C. 869=A.I.R. 1933 Rang. 133.**

———**S. 28.**

After-acquired property.
Applicability.
Auction sale.
Construction.
Effect of order.
Foreign adjudication.
Hindu coparcener's insolvency.
Hindu father's insolvency.
Hindu manager's insolvency.
Insolvency of firm.
Leave of Court.
Proceedings against insolvency.
Proceedings by insolvent.
Receiver.
Relation back.
Reputed ownership.
Scope.
Secured creditor.

After-acquired property.

———**S. 28 (4)**—*After-acquired property—Instalment sums falling due after adjudication.*

Sums periodically falling due under a right already acquired, such as an annuity or allowance, or instalments due on an instalment bond or decree can hardly be treated as after-acquired property in respect of instalments falling due after the insolvency. The applicability of the provisions of S. 47 (1) of the English Bankruptcy Act to India considered. (*Waller and Krishnan Pandalai, JJ.*) NILAKANTA SUBUDHI *v.* RAMACHANDRA DEO. **I.R. 1932 Mad. 369=137 I.C. 394=35 L.W. 161=A.I.R. 1932 Mad. 250.**

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———**S. 28 (4)**—*After-acquired property—Property inherited by insolvent as reversioner—Right to deal with.*

S 28 (4) of the Provincial Insolvency Act disables the insolvent from conveying a valid title to property which devolves on him as a reversioner after adjudication and before discharge. (*Pandrang Row, J.*) LINGAYYA *v.* VENKATAPATHY. **157 I.C. 1002=8 R.M. 196=1935 M.W.N. 724=42 L W. 33=A.I.R. 1935 Mad. 694.**

———**S. 28** (4)—*After-acquired property—Property inherited by undischarged insolvent—Mortgage by him —Validity.*

Property devolving by inheritance on an insolvent after his adjudication and before his discharge forthwith vests in the receiver according to S. 28 (4) of the Provincial Insolvency Act and a mortgage of such property by the insolvent is, therefore, invalid. But if the receiver does not claim the property in the insolvency proceedings, it re vests in the mortgagor on his discharge and the mortgagee will be entitled to enforce the mortgage. (*Dalip Singh and Bhide, JJ.*) DIWAN CHAND *v.* MANAK CHAND. **16 Lah. 392=155 I.C 938=7 R.L. 802(2)=36 P.L.R. 185 - A.I R. 1934 Lah. 809.**

———**S. 28 (4)**—*After-acquired property—Zamindary property of insolvent—Sale of, under Co operative Societies Act—Sale price, if devolves on insolvent.*

S. 28 (4) of the Provincial Insolvency Act refers to property which the insolvent acquires by his own efforts such as his wages or salary, or to property which devolves on him by rule of law, such as by inheritance. It is not intended to apply to a case where property which does not come under the section is sold by some one who has a right to sell it. Where the Zamindary property of the insolvent which is exempted under the Bundelkhand Land Alienation Act from liability to attachment and sale in execution of a decree and which is, therefore, by virtue of S. 28 (5), not the property of the insolvent for the purposes of that section, is sold by a Co-operative Bank under the Co-operative Societies Act for a debt owing to them from the insolvent, the sale price of the property will go to the Bank and cannot be considered as being acquired by or devolving on the insolvent under S. 28 (4). (*Bennet, J.*) JALAUN DT. CO OPERATIVE BANK AT ORAI *v* OFFICIAL RECEIVER, JHANSI. **156 I C. 751=8 R.A. 28=1935 A.W.R. 122 =1935 A.L J. 170=A.I.R. 1935 All. 279.**

———**S. 28 (4) and (7)**—*After-acquired property—Payments subsequent to application for adjudication—Official Receiver—If binds.*

Any payment made by debtors of the insolvent to him subsequent to the date on which the insolvency application is presented are void as against the Official Receiver unless the debtors prove that they had made the payments *bona fide* and without knowledge of the insolvency petition having been filed in the Court. Where the debtors fail to appear before the Court and thus do not raise any such contention the Court is not justified in giving credit to the payments made by them to the insolvent and reducing the claim of the Official Receiver only on the statement by the insolvent that when the debtors made the payments they were not aware of the petition for adjudication and that they made the payments *bona fide*. The belief if any entertained by the insolvent cannot be of any avail to the debtors who are *ex parte*. (*Ferrers, J.C. and Rupchand, A.J.C.*) DHARAMDAS THAWARDAS *v.* HUKUMCHAND MIRI MAL. **I.R. 1932 Sind 86=138 I.C. 628=A.I.R. 1932 Sind 62.**

Applicability.

———**S. 28**—*Applicability—Decree declaring insolvent's property not attachable.*

PROV. INSOLV. ACT (1920), S. 28.

Where the appellant prayed that a declaratory decree to the effect that property was not attachable under the decree should be set aside,

Held, that the appeal was not barred by S. 28. (*Mukerji and Bennet, JJ.*) HARNAM CHANDAR *v.* RUP CHAND. **54 All. 532=141 I.C. 146 (1)=I R. 1933 All. 54=1932 A.L.J. 361=A.I.R. 1932 All. 382.**

———**S. 28 (5)**—*Applicability—Interest of ex-proprietary tenant—Receiver's rights.*

As ex proprietary holdings are not saleable because of S. 23 (1) of the Agra Tenancy Act they cannot vest in the Official Receiver under S. 28 (5) of the Provincial Insolvency Act. As the Insolvency Court cannot deal with such holdings the receiver cannot assign the rents in advance which may in future become payable by the sub-tenants to ex proprietary tenant, nor can the Court direct an attachment or seizure of such rents which will fall due in future. The result of the ex-proprietary rights not vesting in the receiver will be that the ex-proprietary tenant will continue to be the tenant and it will not be open to the receiver to substitute any tenant for him.

Quaere.—Whether if the ex proprietary tenant succeeds in obtaining rents from his sub-tenants before they became due the receiver will have any remedy either by seizure of the rents received whether in cash or in kind or by proceeding against him under the penal sections of the Insolvency Act. (*Sulaiman, A.C.J. and Baipai, J.*) BHOLA NATH *v.* CHUNNI LAL. **I.R 1931 All. 687=133 I C 479=15 R D. 531=1931 A.L J. 680= 12 L.R. 200 (Rev.)=A.I R. 1932 All. 41.**

[**R.** 1934 N. 231 (232).]

———**Ss. 28 (4) and 28 (5)**—Applicability—Provident Fund—Deposit in—Insolvency of subscriber—If vests in Official Receiver. *See* PROVIDENT FUNDS ACT, SS. 2 (*a*) AND 4. **37 Bom L.R. 494=A.I.R. 1935 Bom. 396.**

Auction sale.

———**S. 28**—Auction sale—Proceeds of sale vests in receiver—Setting aside sale. *See* PROVINCIAL INSOLVENCY ACT, S. 51. **1934 A.L.J. 857=148 I.C. 891= A.I.R. 1934 All. 252.**

Construction.

———**S. 28**—*Construction—"Property"—Ex proprietary tenancy, if.*

An ex-proprietary tenancy is not property which can be transferred. Nor is it "property" within the meaning of S. 28 of the Provincial Insolvency Act. Consequently, when an ex proprietary tenant is declared an insolvent the Official Receiver has no interest in the tenancy. (*Oppenheim, S.M.*) MATA PRASAD *v.* RAM ADHIN. **18 R D 714 (1)=16 L.R. 98 (Rev.).**

———**S. 28**—Construction—"Property"—Insolvency of Hindu father—Son's share—Right to sell. *See* PROVINCIAL INSOLVENCY ACT, SS. 2 (1) (*d*) AND 28. **40 L.W. 904=A.I.R. 1935 Mad 255=68 M.L.J. 357.**

———**S. 28**—*Construction—Property of insolvent—Provident Fund belonging to Government servant—Right of Official Assignee.*

Money due to a Government servant from the general Provident Fund is a compulsory deposit and on the insolvency of the Government servant the Official Assignee is not entitled to demand from him the money comprised in such deposit.

Semble.—It may be that if the moneys came into the hands of the insolvent and the Official Assignee then took steps before his disposal of the moneys to realise the same the insolvent might be ordered to pay the sums for the general benefit of his creditors. (*Sen, J.*) WALTER EDWARD SHEAD, *In the matter of*. **11 Rang. 93=I.R. 1933 Rang. 76=143 I.C. 771= A.I.R. 1933 Rang. 148.**

PROV. INSOLV. ACT (1920), S. 28.

———**S. 28 (2)**—*Construction—"Other legal proceeding".*

The words "other legal proceeding" in S. 28 (2) of the Provincial Insolvency Act include applications in execution with a prayer for arrest. (*Beasley, C.J. and King, J.*) SWAMI KOTTAYYA *v.* VENKATA RANGARAO. **156 I.C. 428=7 R.M. 692=41 L.W. 167=1935 M.W.N. 37=A.I.R. 1935 Mad. 239=68 M.L.J. 148.**

———**S. 28 (2)**—Construction — "Property"—Insolvency of Hindu father—Son's shares—If vest in receiver—Power to sell. **15 Pat L.T. 502.**

———**S. 28 (2)**—*Construction—Property of insolvent—Money due to creditor kept in Court deposit—Adjudication of debtor.*

Where a certain sum of money payable to the creditor under an award was directed to be brought into Court and was permitted to be in deposit with a third person till the plaintiff's claim was finally decided and the plaintiff having succeeded applied for the same but it appeared that during the interval the debtor had been adjudged insolvent at the instance of another creditor.

Held, that the creditor could recover the amount in spite of the insolvency because the Court had already allotted for his debt. (*Mitter and M.C. Ghose, JJ.*) GOANANGA BEHARI BASAK *v.* MANINDRA NATH DAS. **145 I.C. 826=37 C.W.N. 475=6 R.C. 141=58 C.L.J. 222=A.I.R. 1933 Cal. 625.**

———**S. 28 (2)**—*Construction—Property of insolvent—Non-transferable licences*

The Municipal licences, which are personal and not transferable, cannot form assets in the insolvency of the licensee (*Lord Thankerton*) MUTTU MOHAMMADO *v.* RAMASWAMI CHETTY. **6 R.P.C. 115=148 I.C. 858=39 L.W. 82=A.I.R. 1934 P.C. 1 (P.C.).**

———**S. 28 (2)**—*Construction—"Property"—Provident Fund deposit—Insolvency of employee of company—Provident Fund Rules providing for absolute disposal by employee of amount subscribed by him—Such amount—If vests in receiver.*

The contract between an employer company and its employee (insolvent) as evidenced by the Rules of the Provident Fund contemplated that at all times during all the years of service the amount contributed by the employee should be at his disposal, and whether he resigned or was discharged or whether he purported, either voluntarily or involuntarily to assign his interest his assignee was to receive back that proportion only of the Provident Fund.

Held, that on the insolvency of the employee, the amount subscribed by the employee vested in the receiver as the employee's property under S. 28 (2) of the Provincial Insolvency Act and the company which was in the same position as the insolvent could not resist the claim of the receiver who stood in the shoes of the insolvent, but that before the amount could be handed over to the receiver it would be necessary to give effect to the lien which the company might have under the rules of the Fund; but that the receiver could not claim such part of the amount as was subscribed by the company, which amount would not pass to the subscriber until it should actually be handed to him (*Courtney-Terrell, C. J. and Dhavle, J.*) PALAIYA *v.* T. P. SEN. **156 I.C. 159=7 R.P. 695=16 Pat L.T. 167=A.I.R. 1935 Pat. 211.**

———**S. 28 (2)**—*Construction—Whole property—Meaning.*

The expression "whole property" in S. 28 (2) means in the case of a joint Hindu family the entire joint family property which the father himself can transfer or against which execution may be had to enforce payment of the debt. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I.C. 119=I.R. 1932 All. 7=1931 A.L.J. 122=A.I.R. 1931 All. 162 (F.B.).**

PROV. INSOLV. ACT (1920), S. 28.

———**S. 28 (5)**—*Construction—'Attachment and sale'—Meaning—Land belonging to member of agricultural tribe—Liability to attachment.*

The words "attachment and sale" in S. 28 (5), Provincial Insolvency Act, must be given their plain grammatical meaning and cannot be taken to be equivalent to "attachment or sale".

Land belonging to a member of a notified agricultural tribe is liable to attachment in execution of a money decree passed against him and in the event of his being adjudicated insolvent such land vests in the receiver who has the power to effect a temporary alienation or create a self-redeeming mortgage. (Case-law reviewed.) (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367=I.R. 1931 Lah. 291=130 I.C. 419=31 Punj.L.R. 842=A.I.R. 1930 Lah. 1034.**

———**S. 28 (5)**—Construction—House occupied by agriculturist insolvent—If vests in Official Receiver. *See* C.P. CODE, S. 60 (1) (c)—HOUSE OF AGRICULTURIST INSOLVENT. **A.I.R. 1933 Lah. 1010.**

———**S. 28 (5)**—*Construction—Receiver's powers—Land belonging to member of agricultural tribe.*

A receiver in insolvency, in whom the property of the member of a notified agriculturist tribe has become vested, does not possess power to sell his land to another agriculturist. A.I.R. 1928 Lah. 734 and 119 I.C. 730, Diss. from. (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367=I.R. 1931 Lah. 291=130 I.C. 419=31 Punj.L.R. 842=A.I.R. 1930 Lah. 1034.**

Effect of order.

———**Ss. 28 and 31**—Effect of order—Adjudication—If *ipso facto* protects insolvent against arrest. *See* PRESIDENCY TOWNS INSOLVENCY ACT, SS. 17 AND 25. **13 Rang 623=A.I.R. 1935 Rang. 415.**

———**S. 28 (2)**—*Effect of order—Outstandings—Trust for creditors not effected.*

Where the vendor left certain moneys with the purchaser of goods with a direction to pay his creditors and obtain receipts and subsequently became insolvent,

Held, that the moneys with the purchaser which had not in fact been paid to the creditors vested in the Official Receiver and that there was no trust for creditors. (*Shadi Lal, C.J. and Broadway, J.*) GURDIT SINGH *v.* CHUNI LAL. **I.R. 1931 Lah. 868=134 I.C. 100=32 P.L.R. 876=A.I.R. 1932 Lah. 66.**

———**S. 28**—*Effect of order—Uncertified payments to the insolvent after adjudication—If valid against the receiver.*

Where a person who had obtained a decree against another for a monthly family allowance was adjudicated an insolvent, the decree became vested in the Receiver as from the date of adjudication, and all payments alleged to be made by the judgment-debtor to the insolvent after the said date, which were not certified to the Court under O. 21, R. 2 (3), C. P. Code, could not be recognised as against the receiver by the executing Court. (*Waller and Krishnan Pandalai, JJ.*) NILAKANTA SUBUDHI *v.* RAMACHANDRA DEO. **I.R. 1932 Mad. 369=137 I.C. 394=35 L.W. 161=A.I.R. 1932 Mad. 250.**

Foreign adjudication.

———**S. 28**—Foreign adjudication—Vesting order—Earlier attachment—Effect on. *See* INSOLVENCY—FOREIGN ADJUDICATION. **54 Mad. 727=A.I.R. 1931 Mad. 474=61 M.L.J. 774.**

PROV. INSOLV. ACT (1920), S. 28.

Hindu coparcener's insolvency.

——**S. 28**—*Hindu co parcener's insolvency—Promissory note by manager and other members—Suit against non-adjudicated members—Maintainability.*

The defendants were brothers constituting a joint Hindu family. The managing member and the brothers executed a promissory note but one of the brothers was subsequently adjudicated insolvent. In a suit brought on the promissory note against the managing member and the other executants of the note, the creditor having discharged the insolvent from the suit.

Held, that as the person who became insolvent was not the manager but only a coparcener, his interest alone vested in the receiver and that there was no reason why the creditor, who was entitled to recover his debt from the members of the family other than the insolvent, should be debarred from prosecuting the usual remedy of the suit in the Civil Court. (*Niyogi, A.J.C.*) NATHUSA PASUSA LAD *v.* MAHADEO. **I.R. 1933 Nag. 203=144 I.C. 117=A.I.R 1933 Nag. 324.**

——**S. 28**—*Hindu coparcener's insolvency—Sale of his interest—Remedy of purchaser.*

Where one of the coparceners of a Hindu joint family becomes insolvent, the Official Receiver can sell the right, title and interest of such coparcener in the joint family property and the purchaser's remedy is to compel partition as against the other co sharers. The actual shares of the coparceners of other members in the family need not be determined at the time of sale by the Official Receiver but can be determined at time of partition. 3 Cal. 198, Ref. (*Bhide, J.*) NATHU MAL *v.* DINA NATH. **6 I R (Lah.) 282 (1)=146 I.C. 840 =34 P L R. 1032=A.I.R. 1933 Lah. 651.**

Hindu father's insolvency.

——**S. 28**—*Hindu father's insolvency—Liability of son's shares.*

Where the debts incurred by an insolvent are not alleged to have been tainted with immorality, the shares of sons of the insolvent in the ancestral property are liable to discharge the debts of the father although the property is ancestral. 48 A. 400; 49 M. 849 Rel. on. (*Staples, A.J.C.*) LALJI *v.* BANSIDHAR. **30 N.L.R. 112=147 I.C. 539=6 R.N. 126=A I R. 1933 Nag. 373.**

——**S. 28**—*Hindu father's insolvency—Receiver's rights.*

When the father of a Hindu joint family becomes insolvent the Official Receiver has the right to collect the rent due from the minor's shares in the joint family properties in order to pay off the insolvent's creditors. (*Madhavan Nair, J.*) SHANKARNARAIN *v.* OFFICIAL RECEIVER OF SOUTH KANARA. **I.R. 1932 Mad. 795 =139 I.C. 838=1932 M.W.N. 1189=36 L.W. 581 =A.I.R. 1933 Mad. 73.**

——**Ss. 28 (2), 2 (d) and 59**—*Hindu father's insolvency—Receiver's rights.*

When a joint Hindu father governed by the Mitakshara Law, is adjudicated an insolvent, his joint sons' shares do not vest in the receiver (assuming that the debt payable by the father is one which it is the pious duty of the sons to pay). But it is open to the receiver in insolvency to seize a son's share, and sell it in order to satisfy the debts payable by the father. A.I.R. 1924 P.C. 50; A.I.R. 1925 P.C. 18 and A I.R. 1925 Bom. 416, Rel. on. (*Wazir Hasan, C.J., Srivastava and Allsop, JJ.*) SIDDHESHWAR NATH *v.* DEOKALI DIN. **9 Luck 304=6 R O. 283=147 I.C. 642=10 O.W.N. 1233=A.I R. 1934 Oudh 1 (F B.).**

——**S. 28 (3)**—*Hindu father's insolvency—Receiver's rights—Attachment of family property prior to insolvency.*

PROV. INSOLV. ACT (1920), S. 28.

Where the father of a joint Hindu family is adjudicated an insolvent, only his share of the property vests in the Official Receiver and the shares of the undivided sons do not actually vest in the receiver, but only the father's power to sell such shares. But where such shares of the undivided sons have been attached before the father's share vested in the receiver there can be no vesting of even the father's power to sell the shares in the receiver. Where, in a suit against the father and his sons, after the entire family property was attached the father became insolvent and the receiver sought to take possession of the whole property.

Held, that as on the day of vesting in the receiver the share of the sons also was under a valid attachment, the rights which vested in the receiver did not include the father's power to sell the shares of the sons and that the Official Receiver was therefore not entitled to claim delivery of the entire property. (*Pandrang Row, J.*) SUBBA RAO *v.* OFFICIAL RECEIVER, GUNTUR. **156 I.C. 205=7 R.M. 658=1935 M.W. N. 1028=42 L.W. 295=A.I.R. 1935 Mad. 427.**

——**S. 28 (2)**—*Hindu father's insolvency—Receiver's rights—Dispossession of sons from property.*

Where property in the hands of the sons can be made available for payment of the father's debts the receiver is entitled to have recourse to the usual processes of law, namely, to attach and sell the property. There is nothing in the scheme of the Insolvency Act authorizing the receiver to eject the sons of the insolvent from the property in their possession. The property of the sons is not the property of the insolvent. (*Mears, C.J. and Sen, J.*) SITA RAM *v.* RECEIVER OF THE ESTATE OF RAM PRASAD. **I.R. 1932 All. 353=137 I.C. 785 =1932 A.L J. 285=A.I.R. 1932 All. 353.**

[R. 1932 M.W.N. 1189 (1191).]

——**S. 28**—*Hindu father's insolvency—Receiver's rights—Previous attachment of entire joint family property.*

Where the entire property belonging to the judgment-debtor and his sons had been attached before the judgment debtor was adjudicated as an insolvent and the petition for adjudication was presented after the date of the attachment, it follows that the father's power of disposal of the sons' shares had been destroyed by the existing attachment of those shares; and the Official Receiver has no power either to deal with the sons' shares by reason of the order of adjudication or to appropriate the sale proceeds accruing from the sale of the sons' shares. 51 M. 342, Foll. and 51 M. 417, Ref. (*Madhavan Nair, J.*) OFFICIAL RECEIVER, COIMBATORE *v.* ARUNACHALAM CHETTIAR. **I.R. 1931 Mad. 399=130 I.C. 479=33 L.W. 607=A.I.R. 1931 Mad. 118.**

[**Affirm.** 66 M.L.J. 412.]

——**S. 28**—*Hindu father's insolvency—Receiver's right—Sale of family property without an attachment.*

A Hindu father's right to dispose of the joint family property in order to satisfy his own debts is property within the meaning of S. 28 of the Insolvency Act and vests in the receiver who is entitled to seize the entire family property and transfer it in order to satisfy the debts of the father. It is not incumbent on such a receiver to obtain an order of the Court, execute it and attached the family property. He can straight away seize the property and sell it under a private deed, it not being incumbent upon him to take out an attachment. (*Sulaiman, C. J. and Bennet, J.*) BHAGWAN DAS *v.* LAKSHMI CHAND. **155 I.C. 661=7 R.A. 970=1935 A.L.J. 673=1935 A.W.R. 672=A.I.R. 1935 All. 643.**

PROV. INSOLV. ACT (1920), S. 28.

———**S. 28**—*Hindu father's insolvency—Receiver's right to sell son's share.*

It is open to the receiver in insolvency to seize the son's share and sell it in order to satisfy the debts payable by the father when the debt is one which it is the pious duty of the son to pay. 6 Lah. 1, Rel. on. (Case law discussed. (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=135 I C. 119=I.R. 1932 All. 7=1931 A.L.J. 122=A.I R. 1931 All. 162 (F.B.).**

[F. 53 A. 868 (884) (F.B.); 13 L. 464 (470). R. 1932 A.L.J. 285 (288); 9 Luck. 304 (312, 320), 25 S.L.R. 521 (524); 66 M.L.J. 267 (278). Rel. 1935 A.L.J. 673 (675).]

———**Ss. 28 and 4**—*Hindu father's insolvency—Receiver's rights—Sons' shares sold prior to adjudication.*

By virtue of the father's power of disposition vesting in the receiver, he is entitled to seize the sons' shares and hence he has also the right to ask for annulment of the sale of the sons' shares. The remedy of the receiver lies in the Insolvency Court and not in ordinary Civil Court. (*Niyogi, A.J.C.*) HIRALAL CHAMPA LAL MARWADI *v.* FATTEHCHAND PARMANAND. **152 I.C. 1026=7 R.N. 109=A.I R. 1934 Nag. 271.**

———**S. 28 (2)**—*Hindu father's insolvency—Sale of father's right after a decree for partition—Sons' share not conveyed.*

Where a sale deed executed by the Official Receiver conveyed only the right, title and interest of the insolvent father in a Hindu joint family and the minor sons had obtained in a suit for partition a decree before such sale,

Held, that the share of the sons in the property was not sold. A.I.R. 1916 P.C. 220, Dist. (*Walsh, J.*) NACHIMUTHU CHETTIAR *v.* RAMAKKAL. **147 I.C. 494=6 R.M 351=A.I.R. 1933 Mad. 475.**

———**S. 28**—*Hindu father's insolvency—Undivided son's share—If vests in Official Receiver.*

When a joint Hindu father governed by Mitakshara Law is adjudicated an insolvent, his joint son's share, assuming that the debt payable by the father is one which it is the pious duty of the son to pay, does not vest in the Receiver. 6 Lah. 1, Rel. on. (Case-law discussed) (*Mukerji, Banerji, Kendall, King and Sen, JJ.*) ANAND PRAKASH *v.* NARAIN DAS DORI LAL. **53 All. 239=1931 A.L.J. 122=135 I.C. 119=I.R. 1932 All 7=A.I.R. 1931 All. 162 (F.B.).**

[F. 29 N.L.R. 159 (163). R. 54 A. 954 (965) (F.B.).]

———**S. 28**—*Hindu father's insolvency—Vesting of father's power to sell the son's shares—Death of the insolvent—Effect of.*

On the adjudication of a Hindu father as an insolvent, his power to sell the son's shares in the joint family property for the discharge of such of his debts as are not illegal or immoral vests in the receiver; and such a power does not terminate on the death of the insolvent. Distinction between powers conferred by a deed under the English law and the right of a Hindu father to sell the son's interest in joint family property pointed out. (Case law discussed.) (*Broadway and Bhide, JJ.*) GORI SHANKER *v.* BASHESHAR NAEH GOELA. **13 Lah. 464 =I.R. 1932 Lah. 89=135 I.C. 217=33 P.L.R. 314=A.I.R. 1932 Lah. 151**

[F. 29 N.L.R. 159 (163).]

———**S. 28**—*Hindu father's insolvency—What vests in the Receiver.*

On the insolvency of the father of a joint Hindu family it is only his own share of the family property that vests in the Official Receiver. With respect to those shares what vests in the Official Receiver is only the father's power of disposal. (*Madhavan Nair, J.*) OFFICIAL RECEIVER, COIMBATORE *v.* ARUNACHALAM CHETTIAR. **I.R. 1931 Mad. 399=130 I.C. 479=33 L.W. 607=A.I.R. 1931 Mad. 118.**

PROV. INSOLV. ACT (1920), S. 28.

———**S. 28**—*Hindu father's insolvency—What vests in the receiver—Attachment before judgment and sale of father's property.*

Where a person attaches before judgment the property of the father of the joint Hindu family including the sons' share and the same is sold in execution of the decree against the father alone the sons not taking any objection and the father having been adjudged insolvent before the sale the price of the sons' share would go in satisfaction of the decree and the price of the father's share only vests in the Official Receiver for the benefit of the general creditors. (*Beasley, C. J. and Bardswell, J.*) OFFICIAL RECEIVER, COIMBATORE *v.* ARUNACHALAM CHETTIAR. **6 R.M. 538=148 I.C. 787=1934 M.W.N. 113=39 L.W 338=A.I.R. 1934 Mad. 217=66 M L.J. 412.**

Hindu manager's insolvency.

———**S. 28 (2)**—*Hindu manager's insolvency—Receiver's rights—Attachment of shares of other coparceners.*

The undivided interests of the coparceners in the joint family property do not vest in the receiver upon the adjudication of the manager as an insolvent, though the manager's power to dispose of such shares to satisfy the just and proper debts incurred by him on behalf of the joint family may so vest. But as the manager has no right to exclude them from possession the receiver also cannot attach their property. 19 N. L. R. 128, Overr. (Case-law considered.) (*Macnair, J.C. and Subhedar, A.J.C.*) KANHAIYALAL MARWADI *v.* DABLIA BARI. **29 N.L.R. 159=I R. 1933 Nag. 187=143 I.C. 769=A I.R. 1933 Nag. 150.**

———**S. 28**—*Hindu manager's insolvency—Suit on promissory note executed by manager—Maintainability against other members.*

After the adjudication of the managing member of a joint Hindu family, a creditor filed a suit on a promissory note executed by the managing member. It was dismissed as against the insolvent and the Official Receiver but decreed as against the other members of the joint family. It was contended that the suit was not maintainable against the other members also as, on the insolvency of the managing member, the power to sell the whole of the family property to discharge the debts of the family vested in the Official Receiver as "the property of the insolvent."

Held, that the creditor was not resorting to any property, or trying to interfere with the power, vested in the Official Receiver and the suit, which was only directed against the shares of the other members, was maintainable. (*Krishnan Pandalai, J.*) CHINNA VEERIAH *v.* GURIVI REDDI. **6 R.M. 541=148 I.C. 831=1934 M.W.N. 622=39 L.W. 347=A.I.R 1934 Mad. 223 =66 M.L.J. 277.**

———**S. 28**—*Hindu manager's insolvency—Undivided interests of coparceners—If vest in receiver.*

On the adjudication of the manager of a Hindu joint family, the undivided interests of the coparceners in the joint family property do not vest in the receiver, though the manager's power to dispose of such shares to satisfy the just and proper debts incurred by him on behalf of the joint family may so vest. The power of the coparceners to deal with their shares is not affected by the fact that the receiver instead of the manager has a certain power of disposal over the shares. The manager could not have excluded them from possession and the receiver cannot attach their property. 6 Lah. 1 (P C.), Rel on. (Case law discussed.) (*Macnair, J.C. and Subhedar, A.J.C.*) KANHAIYALAL MARWARI *v.* DABLIA. **29**

PROV. INSOLV. ACT (1920), S. 28.

N.L.R. 159=I.R. 1933 Nag. 187=143 I C. 769=A. I.R. 1933 Nag. 150.

[D. 1934 N. 231 (232).]

Insolvency of firm.

——**S. 28**—*Insolvency of firm—Joint family, a partner—Liability of minor sons—Nature of.*

A minor cannot be adjudicated an insolvent and as a *partner* in a trading firm he is under no personal liability and no property of his which is not the property of the firm, can be touched by the receiver. But where a joint family consisting of fathers and minor sons, is a partner in a trading firm which is adjudicated insolvent, the liability of the minors as *sons* extends to all debts of their fathers as are not shown to be immoral (*Macpherson and Dhavle, JJ.*) BHOLA PRASAD *v* RAMKUMAR MARWARI. **11 Pat. 399=I R. 1932 Pat. 205=139 I.C. 13=14 Pat.L.T. 63=A.I.R. 1932 Pat. 231.**

——**S. 28**—*Insolvency of firm—Only adult partners will be adjudicated.*

When a firm consists of adult and minor partners and an adjudication order is sought against the firm itself, it will not be made against the firm, but the adult partners alone will be adjudicated. (*Mosely and Dunkley, JJ.*) R. K. BANERJEE, OFFICIAL RECEIVER *v.* S. M. N. AHMED. **158 I C. 570=8 R.R. 186=A.I.R. 1935 Rang. 327.**

Leave of Court.

——**S. 28 (2)**—*Leave of Court—Absence—Objection on appeal, for the first time.*

The objection to the suit on the ground of its having been brought without leave of Court required under S. 28 (2) of the Provincial Insolvency Act should be raised in the first Court and where it has not been so raised, it is not open to the Official Receiver on appeal to contend that the suit should have been dismissed by the lower Court for want of leave. (*Bardswell, J.*) SATYAMMA *v.* OFFICIAL RECEIVER, KRISHNA DISTRICT. **6 I.R. (Mad.) 303=146 I.C. 699=38 L.W. 891=A.I.R. 1933 Mad. 917.**

——**S. 28 (2)**—*Leave of Court—Absence—Objection not taken in lower Court—Waiver.*

Where the defence as to want of leave of the Insolvency Court under S. 28 of the Provincial Insolvency Act for the institution of a suit, is not raised in the lower Court, nor mentioned in the grounds of appeal, the objection must be deemed to have been waived. A.I.R. 1929 Mad. 323, Foll. (*Jai Lal and Sale, JJ.*) MALAN DEVI *v.* THE AMRITSAR NATIONAL BANK, LTD. **162 I.C. 39=8 R.L. 838=37 P.L.R. 787=A I R. 1936 Lah. 286.**

——**S. 28 (2)**—*Leave of Court—Conditional grant—Attachment of son's share in execution—Consent to sale of entire property in insolvency—Right of executing creditor to preference.*

Though ordinarily an attachment of the son's shares in execution of a decree would put an end to the right of the Official Receiver to sell the shares of the son of the insolvent, when the attachment is effected by a creditor who was granted leave to institute the suit under S. 28 (2) of the Provincial Insolvency Act on condition of his handing over to the Official Receiver all the moneys realised by him, and when such creditor consents to a sale by the Official Receiver of the entire property of the joint family, the creditor is not, by reason of the attachment, entitled to any preferential right in respect of the proceeds of the sale of the shares of the sons to the exclusion of other creditors. (*Curgenven and Cornish, JJ.*) VENKATARAMA SASTRIAR *v.* OFFICIAL RECEIVER, COIMBATORE. **154 I.C 449=7 R.M. 432=40 L.W. 904=A I.R. 1935 Mad. 255=68 M.L.J. 357.**

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——**S. 28 (2)**—Leave of Court—Formal request for—Necessity—Application for declaration of insolvent's title for direction for sale by Official Receiver—Prayer for leave—Implication of. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 28 (2). **69 M L.J. 137.**

——**S. 28 (2)**—*Leave of Court—If can be implied.*

Even though no formal application is made to the Insolvency Court for leave under S. 28 (2) and even though there is no sanctioning of such leave, when the Insolvency Court entertains an application made by the creditor under S. 4 of the Act hears it and proceeds to be given a decision upon it, the Court must be deemed to have impliedly granted leave. (*Beasley, C.J. and Aiyangar, J.*) NARAYANAMMA *v.* VENKATASOMAVAJULU. **153 I.C. 624=7 R.M. 364=40 L.W. 693=1934 M. W.N. 1034=A.I.R. 1935 Mad. 46=67 M.L J. 616.**

——**S. 28 (2)**—*Leave of Court—If can be implied.*

Where the Insolvency Judge, in his order of adjudication, stated specifically that the creditors might, if so advised, file a separate suit for having the transfer declared void, it was held that it was clear that the permission to sue was granted by him and that it was not necessary for the creditors to make another application at a later stage for the repetition of the previous order. (*Tek Chand and Coldstream, JJ.*) CHATTRU MAL *v.* MT. MAJIDAN. **15 Lah. 849=150 I.C. 888=7 R L. 30=35 P.L.R. 402=A.I.R. 1934 Lah. 460.**

——**S. 28**—Leave of Court—Suit by creditor not bound by composition—No leave of Court is necessary under S. 28 of the Provincial Insolvency Act, for the institution of a suit by a creditor not bound by the composition. *See* PROVINCIAL INSOLVENCY ACT, S. 39. **A.I.R. 1935 Mad. 929.**

Proceedings against insolvency.

——**S. 28 (2)**—*Proceedings against insolvent—Creditor, competency to take.*

When an Official Receiver has been appointed he represents the whole body of creditors and it is he who should move the Court on behalf of a creditor to attach the insolvent's property though it is open to a creditor to bring any matter to the notice of the Official Receiver or of the Court. (*Sulaiman, J.*) JAG MOHAN LAL *v.* MT. GOMTI. **6 I R. (All.) 298=146 I.C. 494=A.I. R. 1933 All. 153.**

——**S. 28 (2)**—*Proceedings against insolvent—Decree against—Right to execute independently of Insolvency Court.*

A person obtaining a decree on the understanding that he is getting a decree against certain insolvents and that his exclusive remedy would be to go to the Insolvency Court and get rateable shares in the assets, has no right to execute that decree independently of the Insolvency Court and attach the property contrary to the provisions of S. 28 (2) of the Insolvency Act. (*Sulaiman, C.J. and Bennet, J.*) BHAGWAN DAS *v.* LAKSHMI CHAND. **155 I C 661=7 R.A. 970=1935 A.L.J. 673=1935 A.W.R. 672=A.I.R. 1935 All. 643.**

——**S. 28 (2)**—*Proceedings against insolvent—Leave of Court—Absence—Duty of Court.*

The wording of S. 28 does not require that a suit by a creditor against an insolvent without leave of Court to be dismissed, but by implication gives power either to stay the suit or allow it to be proceeded with on terms; these powers may be exercised at a stage later than the commencement of the suit, should the suit have already been commenced without leave. 41 B. 312 and 31 Bom. L.R. 981, Rel.; 40 B. 235, Not Foll. (*Tyabji, J.*) BHIMAJI *v.* CHUNILAL. **57 Bom. 623=I R. 1932 Bom. 451=138 I.C. 824=34 Bom.L.R. 683=A.I.R. 1932 Bom. 344.**

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Note.—*See*, however, the ruling under S. 17 of the Presidency Towns Insolvency Act holding that it is the duty of Court to dismiss such a suit. *Maya Ookeda* v. *Kuverji*, 34 Bom.L.R. 649.

———**S. 28**—*Proceedings against insolvent—Leave of Court—Declaratory suit by creditor.*

Whereas a stranger to the proceedings can file a declaratory suit against an insolvent without the leave of the Court, a decree-holder of the insolvent or a creditor who has been a party to the insolvency proceedings, cannot bring such a suit without the leave of the Court under S. 28 (2) of the Act. Failure to obtain leave before the institution of the suit cannot be cured by obtaining leave subsequently. 40 Bom. 235; 51 M. 833; A.I.R. 1922 Nag. 108 and A.I.R. 1919 Sind 42, Rel. on; 54 All. 532; A.I.R. 1930 Lah. 708; 46 All. 16 and 2 Pat. 724. (*Staples, A.J.C.*) DADULAL *v.* NAMDEO. **6 I.R. (Nag.) 54 (2) = 145 I.C. 697 (2) = A.I.R. 1933 Nag. 217.**

———**S. 28 (2)**—*Proceedings against insolvent—Leave of Court—Execution against person—Limitation.*

The concluding portion of S. 28 (2) imposes a disability which debars a creditor from commencing any suit or other legal proceeding, except with the leave of Court and an application for execution is the commencement of a legal proceeding within the meaning of the section. This disability is not affected by the fact that there has been no protection order under S. 31, if the creditor could not have applied at all for leave. Until such leave is obtained, the decree-holder is under disability from taking any step in execution of decree and where the application for execution of a decree passed after an adjudication is made within the period of limitation from the order granting leave, the application is not barred by limitation, even though it may be more than three years from the date of decree. 47 I C. 798, Dist.; 49 A. 201, Diss. (*Kulwant Sahay and Macpherson, JJ.*) HIT NARAYAN SINGH *v.* BRIJ NANDAN SINGH. **10 Pat. 422 = I.R. 1931 Pat. 489 = 134 I.C. 633 = 12 Pat.L.T. 345 = A.I.R. 1931 Pat. 357.**

———**S. 28 (2)**—*Proceedings against insolvent—Leave of Court—Suit and decree against insolvent after petition and before adjudication—Validity as against Official Receiver.*

A petition to adjudicate the 2nd respondent as insolvent was presented in Court on 3-2 1931. On 4-2 1931, appellant to whom the insolvent owed moneys filed a suit against him, without leave of the Court, for the specific performance of an agreement by the insolvent executed on 19-3-1930, undertaking to execute a mortgage in appellant's favour. The insolvent appeared by pleader on 31-7-1931 and filed a written statement on 7-8-1931, but subsequently withdrew his defence on 8-9-1931 on which date a decree was passed against the insolvent. The order of adjudication was passed later on 8 10 1931 vesting the properties in the Official Receiver. The latter filed an application on 13 2-1932 to declare void the decree obtained by the appellant against the insolvent.

Held, that by reason of the doctrine of relation back, the property of the insolvent must be deemed to have vested in the Official Receiver on the date of the presentation of the insolvency petition and that the suit filed subsequent to that and the decree passed therein were void as against the Receiver as being contrary to S. 28 (2) of the Provincial Insolvency Act, no leave of the Court having been obtained.

Held, further, that the decree was not a "transaction" protected by the proviso to S. 55 of the Act. (*Beasley C.J. and Cornish, J.*) ATCHUTA RAMAYYA GARU *v.*

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OFFICIAL RECEIVER, EAST GODAVARI. **58 Mad. 1032 = 158 I.C. 460 = 8 R.M. 268 = 1935 M.W N. 716 = 42 L.W. 220 = A.I.R. 1935 Mad. 817 = 69 M.L.J. 241.**

———**S. 28**—*Proceedings against insolvent—Omission to implead Official Receiver in mortgage suit—Decree and sale—Binding nature.*

A judgment debtor cannot have the sale set aside on the ground that the Official Receiver who was a necessary party was not impleaded in the mortgage suit. Official Receiver may not be bound by the sale but the judgment-debtor is bound. (*Sulaiman and King, JJ.*) INAMULLAH KHAN *v.* SHAMBHU DAYAL. **I.R. 1931 All. 277 = 1931 A.L.J. 62 = 130 I.C. 485 = A.I.R. 1931 All 159.**

———**S. 28 (2)**—*Proceedings against insolvent—Suit against two persons—One adjudicated insolvent—Suit continued without impleading Official Receiver—Decree—Execution—Property sought to be brought to sale—Validity of—Proceedings.*

A widow sued her husband's brother and his son for maintenance. Soon after filing the suit, the former was adjudicated insolvent. The plaintiff took time to consider what was to be done under the circumstances; but choose to continue with the suit as such without impleading the Official Receiver and a decree was obtained making future maintenance a charge on certain property. In execution of the decree she tried to bring the property to sale whereupon the Official Receiver intervened and objected.

Held, that under S. 28 (2), as execution was sought without leave of Court in respect of property which had already vested in the Official Receiver, the proceedings were invalid as against the Official Receiver, in so far he represented the estate of the insolvent, but that otherwise thay were valid. 25 Mad. 406 and *Wood* v. *Surr*, 19 Beav. 551, Ref., 54 C. 595 (P. C.), Dist. (*Pandalai, J.*) PONNUTHAYE AMMAL *v.* OFFICIAL RECEIVER, COIMBATORE. **6 I.R. (Mad.) 262 = 146 I. C. 417 = 38 L.W. 762 = A.I.R. 1933 Mad. 858 = 65 M. L.J. 833.**

Proceedings by insolvent.

———**S. 28**—Proceedings by insolvent—Competency—Proper course. *See* PROVINCIAL INSOLVENCY ACT, S. 59 (*d*). **1935 A.L.J. 709 = A.I.R. 1935 All. 675 (F. B.).**

———**S. 28**—*Proceedings by insolvent—Execution sale without leave of Court—Setting aside*—Locus standi *of insolvent.*

An insolvent who has been adjudicated as such and whose properties have vested in a Receiver appointed by the Insolvency Court, has thereafter no *locus standi* to apply to set aside an execution sale on the ground that the sale was void as having taken place without the leave of the Insolvency Court. (*Guha and Bartley, JJ.*) PHANI BHUSAN BASU *v.* SHASHI BHUSAN MAITY. **156 I.C. 401 = 7 R.C. 710 = 60 C.L.J. 581 = 39 C.W.N. 366 = A.I.R. 1935 Cal. 391.**

———**S. 28**—*Proceedings by insolvent—Right to sue—Claim for damages for defamation—Maintainability by insolvent.*

An insolvent is entitled to sue for defamatory words whether published before or after his adjudication; and such damages as he may recover will not belong to his trustees. Though in such a suit for damages for defamation of the insolvent a part of the claim refers to the injury to the insolvent's estate, the insolvent may still carry on the suit as the right of action for the injury to his character and reputation remains vested in him. (English case relied on.) (*Rup Chand, A.J.C.*) CHAIN-

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RAI VALIRAM *v.* SUNDAY TIMES, LTD. **26 S.L.R. 21 = I R. 1932 Sind 183 = 140 I.C. 233 = A.I.R. 1932 Sind 33.**

———**S. 28 (2)**—*Proceedings by insolvent—Right to sue—Personal claim for damages—Continuance of proceeding after adjudication.*

A claim to damages of ascertained or unascertained amount resulting from a breach of contract on the part of one of the parties to the contract is not a debt, or is it a claim to any beneficial interest in the movable property. The right to claim damages is a mere right to sue and therefore does not vest in the Official Receiver. The insolvent is the person who is entitled to conduct the appeal where the adjudication takes place during the course of the proceeding. (*Niyogi, A J.C.*) LILADHAR *v.* NAGO. **28 Nag.L R. 340 = 141 I.C. 479 = I.R. 1933 Nag. 67 = A.I.R. 1933 Nag. 6.**

———**S. 28**—*Proceedings by insolvent—Sale of land prohibited to be sold—Application to set aside.*

The land of a member of an agricultural tribe was sold in insolvency and the sale proceeds were distributed among the creditors. The insolvent relying on these payments to creditors applied for discharge and was accordingly discharged. He subsequently, long after the expiry of the period of limitation, filed an application to have the sale set aside on the ground that the land cannot be sold under the Punjab Alienation of Land Act.

Held, that though the land cannot be sold in insolvency, under the above circumstances he was not entitled to have the sale set aside. A.I.R. 1930 Lah. 1034, Ref. (*Jai Lal, J.*) JAI KISHAN DASS *v.* CHIRAGH DIN. **I.R. 1933 Lah. 277 (1) = 142 I.C 812 = 34 P.L.R. 486 = A.I.R. 1933 Lah. 250.**

———**S. 28 (2) and (5)**—*Proceedings by insolvent—Suit for money lent after adjudication—Defendant, if can deny that money was plaintiff's.*

Where an insolvent filed a suit for money lent after adjudication the defendant who took the money from the plaintiff should not be allowed to deny that the money belonged to the plaintiff. *Prima facie* there is no presumption that the money does not belong to the plaintiff and if the receiver has not intervened and seized this amount, there is a presumption in favour of the plaintiff that the money is his own and the suit cannot be thrown out on the mere ground that the plaintiff is an insolvent. (*Sulaiman, C.J., Thom and Iqbal Ahmad, JJ.*) ABDUL RAHMAN *v.* NIHAL CHAND. **58 All. 132 = 157 I.C. 41 = 8 R.A. 91 = 1935 A W R. 833 = 1935 A.L.J. 709 = A.I R. 1935 All 675 (F.B.).**

Receiver.

———**S. 28 (2)**—*Receiver—Addition of—Insolvency of mortgagor.*

In a suit to enforce a mortgage, if the mortgagor is adjudicated an insolvent, the Official Receiver is a necessary party and ought to be impleaded. The suit can then be continued against him under O 22. R. 10, and the rule of limitation in Limitation Act, S. 22 (1) does not apply. (*Coldstream, J.*) KARIM BAKHSH *v.* KHERA. **36 P.L R 483 = A.I R. 1935 Lah. 316.**

———**S. 28 (2) and (4)**—*Receiver—Addition—Necessity—Partition.*

A partition of property in which an insolvent has a share is not valid, if the receiver in whom that share is vested is not a party to that partition. But, if the receiver does not claim it in the insolvency proceedings, the partition would be binding upon the parties after the discharge of the insolvent (*Dalip Singh and Bhide, JJ.*) DIWAN CHAND *v.* MANAK CHAND. **16 Lah. 392 = 155 I C 938 = 7 R.L. 802 (2) = 36 P.L.R. 185 = A.I.R. 1934 Lah. 809.**

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———**S. 28**—*Receiver—Rights of—Contract in respect of property.*

The scheme of the Insolvency Act is to vest the property of the insolvent in the receiver. If the insolvent is under a liability whether it arises out of an equity or as a matter of law the receiver cannot have any greater right than the insolvent himself. Where the insolvent had at the time of purchase of certain property agreed with the vendor to remove certain *Chhatta* in a common lane whenever the vendor required and the receiver having sold the property of the insolvent,

Held, that the purchase was bound by the undertaking given by the insolvent. (*Mukerji and Allen, JJ.*) NAND GOPAL DAS *v.* BATUK PRASAD GUPTA. **54 All. 17 = I.R. 1931 All. 701 = 133 I.C. 541 = 1932 A.L.J. 36 = A.I.R. 1932 All. 78.**

———**S. 28 (2)**—*Receiver—Right of suit—Tort resulting in injury to estate.*

A right of suit in respect of a tort resulting in injuries to insolvent's estate vests in the receiver in insolvency, and if the right of action arose prior to the adjudication of the insolvent, on the making of the order of adjudication the only person who can bring a suit in regard thereto is the receiver. (*Ba U and Dunkley, JJ.*) HASHIM KHAN *v.* KOYA MOHIDEEN KAKA. **6 I.R. (Rang.) 62 = 145 I.C. 835 = A.I.R. 1933 Rang. 268.**

———**Ss. 28 (2) and 56 (1)**—*Receiver—Right of suit—Vesting in insolvency—Report under S. 34 (5), U. P. Land Revenue Act—Necessity.*

A vesting under S. 28 (2) or 56 (1) of the Provincial Insolvency Act is a "transfer" under S. 34 (5) of the U. P. Land Revenue Act, and the receiver must make a report as required by that section. In the absence of such a report, he cannot maintain a suit in the Revenue Courts for arrears of rent due to the insolvent. (*Oppenheim, S M. and Drake Brockman, J.M.*) MOTI RAM *v.* NAND LAL. **11 O.W.N. 1037 = 15 L.R. 546 (Rev.) = 18 R.D. 430 (2).**

———**S. 28 (5)**—*Receiver—Rights of—Mere deposit.*

It is not sufficient for the creditor of the insolvent merely to prove a deposit with the insolvent to be entitled to a charge on the assets of the insolvent he must prove a deposit with the insolvent for a definite purpose. (*Bardswell, J.*) SATYAMMA *v.* OFFICIAL RECEIVER, KRISHNA DISTRICT **6 I.R. (Mad.) 303 = 146 I.C. 699 = 38 L W. 891 = A.I.R. 1933 Mad. 917.**

———**S. 28**—*Receiver—Rights of—Occupancy land of insolvent.*

Occupancy land of a tenant does not vest, on his being adjudicated an insolvent, in the Insolvency Court; and the Court cannot therefore in any way deal with such land. (*Staples, A.J.C.*) GHANSYAM KUNBI *v.* YOOWARAJ. **151 I.C 889 = 7 R.N. 71 = 17 N.L.J. 163 = A.I. R. 1934 Nag. 231.**

———**Ss 28 (6) and 56 (3)**—*Receiver—Right to possession—Receiver in possession in mortgagee suit—Subsequent adjudication of mortgagor.*

A receiver appointed in a mortgage suit and in possession of the mortgaged property, is not superseded by the insolvency of the mortgage and the appointment of a receiver-in insolvency. The latter has no preferential right to possession and the receiver appointed in the suit cannot be removed from possession and made to surrender possession to the receiver-in-insolvency. (*Guha and Bartley, JJ.*) NRISHINHA KUMAR SINHA *v.* DEB PROSANNA MUKERJEE. **62 Cal. 483 = 157 I.C. 140 = 8 R.C. 85 = 39 C.W.N. 384 = A.I.R. 1935 Cal. 460.**

Relation back.

———**Ss. 28 (7) and 34**—*Relation back—Debt alive on date of application but barred on date of adjudication—If provable.*

S. 34 is governed by sub-S. (7) of S. 28. Hence if the right to recover a debt has become barred by time on the date when the order of adjudication is made but the right subsists on the date of the presentation of the application or on the date when the application is admitted, the creditor is entitled to prove his debt as the statute of limitation does not affect debts which are within time on the date of the petition. (*Addison and Bhide, JJ.*) NIZAM *v.* BABU RAM. **14 Lah. 730 = I.R. 1933 Lah. 319 = 34 P.L.R. 464 = 143 I.C. 175 = A.I.R. 1933 Lah. 688.**

———**S. 28 (7)**—*Relation back—Sale after admission of petition and before adjudication—Title of purchaser.*

By the operation of S. 28 (7) the title of the auction-purchaser who purchases the property of the debtor after the admission of the insolvency petition but before the order of adjudication is not absolute but contingent on the insolvency application being dismissed. If the insolvency application is dismissed he gets an indefeasible title. But if the order of adjudication is made he cannot claim any title as against the receiver unless he is purchaser in good faith. (*Nasim Ali and Henderson, JJ.*) JOGENDRA NATH KUNDU *v.* JOGNESWAR MANDAL. **63 Cal. 176 = 158 I.C. 574 = 8 R.C. 201 = 39 C.W.N. 1289 = A.I.R. 1935 Cal. 612.**

———**S 28 (7)**—*Relation back—Sale in execution after presentation of insolvency petition but before adjudication—Validity against receiver.*

Where property of the judgment-debtor is sold by the decree holder after the judgment-debtor has applied for insolvency, without notice to the Official Receiver, the sale is a nullity as the adjudication of the insolvent relates back to the date of his petition and the Official Receiver is entitled to all the properties of judgment-debtor from that date. A.I.R. 1914 P.C. 129 and A.I.R. 1917 Mad 924, Foll. (*Pandrang Row, J.*) HENRY MERIEU *v.* OFFICIAL RECEIVER, MADURA. **8 R.M. 477 = 159 I.C. 244 = A.I.R. 1935 Mad. 907.**

———**Ss. 28 (7) and 53**—*Relation back—Transfer declared void—Saleable interest of insolvent's transferee.*

Where subsequent to the transfer made by the insolvent, a petition for adjudication is filed and the transfer is found to be fictitious and fraudulent, and consequently void as against the Official Receiver, the property vests in the Official Receiver under S 28 (7) from date of petition for insolvency and as such the transferee has no saleable interest subsequent to this. Hence a transfer by him is void. (*Addison and Din Mohammad, JJ.*) ATA MOHAMMAD *v.* MEHR CHAND. **16 Lah. 1013 = 156 I.C. 1018 = 8 R.L. 63 = 38 P.L.R. 24 = A.I.R. 1935 Lah. 368.**

Reputed ownership.

———**S. 28 (3)**—*Reputed ownership—Applicability of doctrine—Unregistered mortgage of immovables and movables—Order upholding latter—Insolvent in possession of some other movables—Right of Official Receiver as against mortgagee—Construction of order.*

An insolvent had executed a mortgage of both movable and immovable properties. But the deed was unregistered and was therefore invalid as regards the latter. In an application under S. 54 of the Provincial Insolvency Act the Court held that the document was not invalid as a whole, but was valid as regards the *movables*, *i.e.*, *machineries*, and stated in the concluding part of its order that the mortgage was valid so far as the movables

were concerned and was not void under S. 54. Some movables other than the machineries were in the insolvent's possession and it was contended that the order must be limited to the machineries alone and that the other movables which were in the insolvent's possession vested in the receiver under S. 28 (3) of the Act.

Held, the movables referred to in the concluding part of the order covered all the movables and not merely the machineries, and that the other movables did not vest in the receiver, and they did not suffer from the doctrine of reputed ownership as laid down in S. 28 (3) of the Act; consequently the mortgagee was entitled to their value from the Official Receiver. (*Guha and Bartley, JJ.*) SATYA NIRANJAN BANERJEE *v.* DINESH CHANDRA ROY. **156 I.C. 520 = 7 R.C. 725 (1) = 60 C.L.J. 515 = A.I.R. 1935 Cal. 388.**

Scope.

———**S. 28 (2)**—*Scope.*

The first part of sub-S. (2) deals with remedies against the property of the insolvent and the second part deals with all remedies including the remedy against the person of the insolvent. The Act of 1907 imposed a disability not only as against the property but also against the person of the insolvent and the Act of 1920 has made the alteration that the disability as against the person of the insolvent may be removed by obtaining leave of the Court. (*Kulwant Sahay and Macpherson, JJ.*) HIT NARAYAN SINGH *v.* BRIJ NANDAN SINGH. **10 Pat. 422 = I.R. 1931 Pat. 489 = 134 I.C. 633 = 12 Pat L.T. 345 = A.I.R. 1931 Pat. 357.**

[Not F. 54 A. 416 (419).]

———**S. 28 (2) and (4)**—*Scope.*

The Act makes no difference between property belonging to the insolvent when the order of adjudication is made and the after-acquired property mentioned in Cl. (4). All the property of the insolvent vests in the Court or the Receiver as soon as the order of adjudication is made. The property is taken away from him and vested in the Court so that after such vesting the insolvent ceases to be the owner of the property in law and dealings by him with respect thereto are void. (*Raza and Kisch JJ.*) BUDDHU LAL *v.* RAM SAHAI. **8 Luck. 87 = I.R. 1932 Oudh 332 = 138 I.C. 808 = 9 O.W.N. 523 = A.I.R. 1932 Oudh 244.**

———**S. 28 (2) and (4)**—*Scope—Alienation by undischarged insolvent—Validity of.*

An alienation by an undischarged insolvent of property belonging to him is not void but only voidable at the option of the receiver or the Court and is not wholly void. S. 28 only vests his property in the receiver but does not take away his capacity to contract. 43 All. 555, Ref. (*Iqbal Ahmad and Kisch, JJ.*) RUP NARAIN SINGH *v.* HAR GOPAL TEWARI. **55 All. 508 = I.R. 1933 All. 343 = 143 I.C. 836 = 1933 A.L.J. 475 = A.I.R. 1933 All. 449.**

———**Ss. 28 (2) and 31**—*Scope—Application for arrest of insolvent judgment debtor—Leave of Court—Necessity.*

The broad principle underlying S. 28 (2) is that once a person is adjudicated Insolvent creditors seeking any remedy against him must come to the Insolvency Court to get leave for that purpose and that principle cannot be cut down. In the case of execution petitions pending at the time of the adjudication, there is nothing in the Act to prevent the creditor from proceeding to arrest his debtor unless the latter applies of the Court for protection under S. 31 (if he has not already applied under S. 23). There is, therefore, still scope for the application of S. 31, which cannot be superfluous. (*Beasley, C.J. and King, J.*) SWAMI KOTAYYA *v.* VENKATA RANGARAO. **156 I.C. 428 = 7 R.M. 692 = 41 L.W.**

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167=1935 M.W.N. 37=A.I.R. 1935 Mad. 239=68 M.L.J. 148

———**Ss 28 and 39**—Scope—Composition proceedings—Creditor not party to or aware of such proceedings—Suit by for debt not included in schedule—If barred by S. 28. *See* PROVINCIAL INSOLVENCY ACT, SS. 39 AND 28. **69 M.L.J. 793.**

———**Ss. 28, 39 and 40**—*Scope—Composition scheme and annulment of adjudication—Debt left out by consent of parties—Subsequent suit by creditor—If barred.*

In the case of a scheme, S. 28 has to be read with S. 39 of the Act, and the protection in respect of the debts not included in the scheme is taken away Where, therefore, a debt is left out of the scheme by consent of the parties, a suit instituted by the creditor to recover that debt is not barred. Observation of Thiruvenkatachariar, J., in 56 M.L.J. 489, not Foll. (*Ramesam and Cornish, JJ.*) GOPALU PILLAI *v.* KOTHANDARAMA AYYAR. **57 Mad. 1082=153 I.C. 916=7 R.M. 378=40 L.W. 110=A.I.R. 1934 Mad. 529=67 M.L.J. 843.**

———**S. 28 (2)**—Scope—Decree against insolvent as legal representative of deceased debtor—Absence of personal decree—Attachment after insolvency petition—If can prevail against Official Receiver. *See* PROVINCIAL INSOLVENCY ACT, SS. 34 (2) AND 28 (2). **42 L.W. 707=A.I.R. 1935 Mad. 1058=69 M.L.J. 818.**

———**Ss. 28 (2) and 51 (3)**—*Scope of—Execution sale—Prior to adjudication—Purchaser in good faith—Title of.*

A purchaser of the insolvent's property at a sale in execution of a decree held after the adjudication of the judgment-debtor as an insolvent, who purchases the property in good faith, acquires a good and valid title as against the receiver, though the purchaser is the decree-holder himself. The provision contained in S. 28 (2) of the Provincial Insolvency Act is controlled by S 51 (3) of the Act. And when the decree-holder is wholly unaware of the insolvency proceedings, the sale in execution cannot be held to be a nullity merely because of the non-service of notice on the receiver under O. 21, R. 22, C. P. Code. (*Guha and Bartley, JJ.*) DINESH CHANDRA ROY CHOUDHURY *v.* MUNSI JAHANALI BISWAS. **62 Cal 457. 157 I.C. 862=8 R.C. 130=39 C.W.N. 424=A.I.R. 1935 Cal. 503.**

———**Ss. 28 and 43**—Scope—Expiry of time for applying for discharge—Vesting of property—Powers of Court. *See* PROVINCIAL INSOLVENCY ACT, SS. 43 AND 23. **A.I.R. 1933 Lah. 1008.**

———**S. 28**—*Scope—If operates as protection from arrest.*

Section 28 does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. Effect of deleting 'or persons' in S. 28 considered. 49 All. 201, Foll. (*Bennet, J.*) ALI HUSAIN *v.* LACHHMI NARAIN MAHAJAN. **54 All. 416=I.R. 1932 All. 639=140 I.C. 150 (2)=1932 A.L.J. 168=1932 Cr.C. 204=34 Cr.L.J. 18=13 L.R. 55 (Cr.)=A.I.R. 1932 All. 188.**

———**S. 28 (2)**—*Scope—Jurisdiction of Court—Valid trust created prior to insolvency.*

Where, prior to his insolvency, the insolvent executes a deed of trust vesting his property in trustees for payment of secured and unsecured creditors, and in proceedings under S. 53 of the Provincial Insolvency Act, the deed is upheld as valid and effective, the property comprised therein does not form part of his estate or vest in the Official Receiver. The latter is not, therefore, competent to deal with such property in any way or to administer it either on behalf of the creditors or in accordance with the terms of the deed of trust. The proper course is for the receiver to institute a suit for the administration of the trust. (*Sir Lancelot Sanderson.*) H. HUNTER *v.* RANI KANIZ ABID. **155 I.C. 426=7 R.P.C. 187=42 L.W. 146=1935 M.W.N. 669=37 Bom L.R. 874=40 C.W.N. 33=1935 A.L.J. 785=1935 A.W.R. 944=1935 O.W.N. 610=61 C.L.J. 274=A.I.R. 1935 P.C. 104=68 M.L.J. 744 (P.C.).**

———**S. 28 (2)**—*Scope—Object—Joint Hindu family—Insolvency of some coparceners—Suit against all the members without leave of Court—Decree—If a nullity—Executability as against non-insolvent coparceners—Prior decree-holder—Right to object.*

A decree passed in a suit which offends against the provisions of S. 28 of the Act is not a nullity. The object of S. 28 is to secure to the Official Receiver the unrestricted right to dispose of the insolvents' property, and it is to preserve that right, that suits and other proceedings aimed at the insolvent's property are prohibited. But it is the receiver and receiver alone, and no one else, who has any concern with the insolvency and its administration. Where, therefore, a creditor sues the members of a joint Hindu family, two of whom have been adjudicated insolvents, and obtains a decree against all and executes the decree against the non-insolvents, claiming rateable distribution out of assets realised in execution by a prior decree-holder, it is not for the latter to object to the claim for rateable distribution on the ground that the later suit offended against S. 28, and that the decree is void and inexecutable. It is for the Official Receiver and not for the prior decree-holder to interfere, if the insolvent's estate is in jeopardy as the result of the decree and execution. Nor can there be any prejudice at all or danger to the estate, when the money realised by the sale and claimed by way of rateable distribution is not part of the insolvent's estate, but only of the non insolvents. Once the sale is held, the Official Receiver's power to sell is extinguished, and it does not matter to the receiver who shares or does not share in the money realised, so long as no part of the insolvent's estate is affected. (*King, J.*) VENKATRAMAYYA *v.* VIRAYYA. **160 I.C. 423 (2)=8 R.M. 647=43 L.W. 204=1936 M.W.N. 77=A.I.R. 1936 Mad. 57=69 M.L.J 914.**

Secured creditors.

———**S. 28 (2) and (6)**—*Secured creditor—Rights of—Realisation without leave of Court.*

Upon a proper construction of S. 28 (6) of the Provincial Insolvency Act a secured creditor of the insolvent is entitled notwithstanding S 28 (2) to realize the security by filing a suit or otherwise in accordance with law without obtaining the leave of the Court in that behalf. (*Page, C.J. and Mya Bu, J.*) M. K. M. CHETTYAR FIRM *v.* MAUNG THAUNG. **13 Rang. 37=155 I.C. 227=7 R.R. 343=A.I.R. 1935 Rang. 92.**

———**S. 28 (6)**—*Secured creditor—Rights.*

The right of a secured creditor to realise or otherwise deal with his security is unaffected by an order of adjudication. (*Guha and Bartley, JJ.*) NRISHINGHA KUMAR SINGHA *v.* DEBPRASANNA MUKHERJI. **62 Cal. 483=157 I.C. 140=8 R.C. 85=39 C.W.N. 384 =A.I.R. 1935 Cal. 460.**

———**S. 29**—*Adjudication pending attachment and execution—Execution, if can be continued.*

Where pending an execution petition and an attachment the judgment debtor was adjudicated an insolvent, no question of continuing the execution proceeding with the consent of the Court arises as the adjudication denudes the insolvent of any saleable interest in the pro-

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perty. (*Bose, A.J.C.*) CHUNNILAL *v.* VITHAL. **28 Nag.L.R. 317=140 I.C. 835=I.R. 1933 Nag. 17=A.I.R. 1933 Nag. 28.**

———**S. 31**—*Discretion under—Protection from arrest.*

Under S. 31 a discretion is granted to the Court either to make a protection order or make a limited order or not make an order at all. It is no longer a matter of right for a judgment-debtor to apply in insolvency and be *ipso facto* absolved from liability to arrest. (*Bennet, J.*) ALI HUSAIN *v.* LACHHMI NARAYAN MAHAJAN. **54 All. 416=I.R. 1932 All. 639=140 I.C. 150 (2)=34 Cr.L.J. 18=1932 A.L.J. 168=13 L.R. 55 (Cr.)=1932 Cr.C. 204=A.I.R. 1932 All 188**

———**S. 31**—Protection order—Inherent powers—Pending adjudication application. *See* PROVINCIAL INSOLVENCY ACT, S. 5—INHERENT JURISDICTION. **148 I.C 975=A.I.R. 1934 Lah. 113 (2).**

———**S. 31**—*Interim protection*

The Provincial Insolvency Act makes no provision for an *ad interim* protection pending the hearing of an application for adjudication of a debtor. *A fortiori* the pendency of an appeal from an order dismissing an application for adjudication is no reason to stop the decree-holder from proceeding with execution of his decree by arrest of the judgment debtor. 30 C.W.N 834, Foll. (*Guha and M. C. Ghose, JJ.*) PARAN CHANDRA SEN *v.* BLACKWOOD AND BLACKWOOD & CO. **36 C W N. 345.**

———**S. 31**—*Interim protection before adjudication—Validity.*

There is no provision in the Provincial Insolvency Act under which an order can be issued granting interim protection before adjudication. Only if the debtor is under arrest or imprisonment, the Court may release him but where there is no such arrest or imprisonment, an order granting interim protection is a nullity. (*Bagulay, J.*) MARIAM BIBI *v.* MOTALA **10 Rang. 71=I.R. 1932 Rang. 90=33 Cr.L.J. 435=137 I.C. 36=1932 Cr C. 209=A.I.R. 1932 Rang. 51.**

———**S. 31**—*Refusal of—Protection — Grounds—Indebtedness.*

That the insolvent is heavily indebted is hardly a ground for refusing to pass a protection order. If a debtor has been adjudged insolvent, has placed all his assets at the disposal of the Insolvency Court without concealing any material facts relating to his pecuniary position and has not been guilty of any fraud or dishonesty in relation to his creditors or his estate, an order of protection should ordinarily be granted. Unless some misconduct or want of good faith can be imputed to an insolvent, a protection order should not be refused on vague and general assumptions. (*Niamatullah, J.*) BENI PRASAD *v.* PHULA MAL MADAN MOHAN LAL. **6 I.R. (All.) 352=146 I.C. 819=1933 A.L J 1051=A.I R. 1933 All. 591.**

———**S. 31**—*Refusal of protection—Subsequent order for protection, if barred.*

A previous order refusing protection is no bar to a protection order being made at a subsequent stage. Lapse of time and the fact that no misconduct can be attributed to the insolvent in the meantime are circumstances which may justify a Court in granting an order of protection which has been previously refused. (*Niamatullah, J.*) BENI PRASAD *v.* PHULA MAL MADAN MOHAN LAL. **6 I R. (All) 352=146 I.C. 819=1933 A.L.J. 1051=A.I.R. 1933 All. 591.**

———**S. 31**—Scope—Adjudication — Application by creditor for arrest of insolvent in execution of decree—Leave of Court—Necessity. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (2) AND 31. **68 M.L.J. 148.**

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———**S. 31**—*Scope—Debt after adjudication—Protection order can be obtained.*

The wording of S. 31 is very wide and protection order can be obtained by the debtor even when a debt is incurred after the adjudication. (*Bhide, J.*) SMITH *v.* DUNI CHAND KAPUR. **A.I.R. 1933 Lah. 261.**

———**S. 31 (4)**—*Protection order passed by appellate Court—Who are bound by.*

A protection order of the Insolvency Court of appeal though in general terms must be limited to the debts due to the creditors who had been impleaded as respondents and as against whom the order of the first Court refusing to grant protection was set aside. As between him and the insolvent alone it is operative. But it does not apply to other creditors who were not impleaded as respondents in the Court of appeal and who had no opportunity of contesting the grant of the protection order. As regards them the order of the Court of first instance refusing protection which was made after issue of notice of the application by the insolvent for a protection order to all the creditors becomes final and hence any one of the creditors can in execution of his decree against the insolvent apply for his arrest and imprisonment. (*Pullan and Niamatullah, JJ.*) JITMAL RAM GOPAL *v.* NATHU RAM. **I.R. 1932 All. 389=1932 A.L.J. 407=138 I.C. 267=A.I.R. 1932 All. 385.**

———**S. 33**—*Proof of—Claim of petitioning creditor.*

Where the insolvent is adjudicated at the instance of a creditor, it is incumbent upon him to prove his claim before the Official Receiver and on such proof being lodged it is equally incumbent upon the Official Receiver to examine the proof filed before him and to reject it if he comes to the conclusion that the claim is not proved. *Moor* v. *Anglo Italian Bank*, 10 Ch. D. 681 and 37 I. C. 71, Ref. (*Rupchand, J.C.*) SOBHARAJ DAVARAM *v.* OFFICIAL RECEIVER, SIND **6 I R (Sind) 618=146 I.C. 221 (2)=A.I.R. 1933 Sind 313 (1).**

———**S. 33**—*Provable debt—Declaration as to—Effect on debt merged in that debt.*

A judgment in insolvency, declaring that the creditors' debt (*i.e.*, a judgment debt) is a provable debt does not declare that an alleged debt which merged in that judgment debt is proved. A.I.R. 1927 Pat. 61, Ref. (*Beasley, C. J., Sundaram Chetty and Stone, JJ.*) VENKATARAMANAYYA PANTULU, *In the matter of.* **51 Mad. 601=I R. 1931 Mad. 577=131 I C. 817=34 L W. 282=1931 M W.N. 774=A.I.R. 1931 Mad. 441=61 M.L J. 229 (S.B.).**

———**Ss. 33 and 50 (2)**—*Schedule—Amendment—Disputes between creditors—Necessary parties.*

The receiver is a proper party to any matters arising between the creditors and third parties. In such cases the receiver properly represents the whole body of creditors; but this proposition is clearly inapplicable to a case of a dispute among the creditors themselves, where the interests of some of the creditors are adverse to the interests of others. In such matters the receiver is not a proper party, but the creditors concerned are the proper parties. Hence if any creditor wishes to have any amendment made of the schedule as framed by the Court under S. 33 he must cause notice to issue to all the other creditors who would thereby be affected, and their objections be heard before any alteration or amendment of the schedule can be ordered by the Court and in an application or appeal in connexion with this, the receiver is not a necessary party. 37 All. 252 and 39 M. 479, Rel on. (*Mya Bu and Dunkley, JJ.*) MAUNG PO YEIK *v.* POWER. **150 I. C. 960=7 R.R. 25=A. I. R. 1934 Rang. 112.**

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———**Ss. 33 (3) and 53**—*Provable debt—Fraudulent transfer—Annulment—Decretal debts discharged by alienee's money*—Pro tanto *proof of—If permissible.*

When a transfer by way of sale by the insolvent is annulled as fraudulent under S. 53 but it is found that the alienee paid a sum of money towards the satisfaction of a prior decretal debt, the alienee may be allowed to prove in the insolvency as an unsecured creditor to the extent to the prior debt discharged by him. 51 I. C 720, Rel. (*Tapp, J.*) AMIR CHAND *v.* MANOHAR LAL. **I. R. 1933 Lah. 107 (1)=141 I.C. 336=34 P.L.R. 127=A.I.R. 1933 Lah. 211.**

———**S. 34**—*Provable debt—Claim to maintenance.*

A claim for maintenance or residence is capable of valuation as much as an annuity which is admittedly provable in insolvency. (*Addison and Agha Haidar, JJ.*) MT. CHAMPA *v.* OFFICIAL RECEIVER, KARACHI. **15 Lah. 9=149 I.C. 693=6 R.L. 738=36 P.L.R. 450=A.I.R. 1933 Lah. 901.**

———**S. 34**—Scope. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (7) AND 34—RELATION BACK. **A I. R 1933 Lah. 688.**

———**S. 34 (2)**—*Applicability and scope of—Company assessed to income-tax on estimated income—Subsequent winding up—Liquidator, if can question validity of assessment.*

The provisions of S. 34 (2) of the Provincial Insolvency Act are made applicable by S. 229 of the Companies Act to insolvent companies. S. 34 (2) requires all debts including judgment-debts to be proved. Where, therefore, the assessment of a company has been made by the income-tax department on an estimated income without the accounts being looked into, and the company is subsequently wound up the debt is not binding upon the official liquidator and it is open to him to question the validity of the assessment. (*Srivastava, J.*) INCOME-TAX OFFICER, LUCKNOW *v.* LUCKNOW SUGAR WORKS, LTD. **156 I.C. 708=7 R.O. 673=1935 O.W.N. 791=A.I.R. 1935 Oudh 451.**

———**Ss. 34 (2) and 44**—*Provable debt—Debt contracted between petition and adjudication is provable—Separate suit is barred.*

Having regard to the express language of S. 34 (2) of the Provincial Insolvency Act and the absence in that Act of a clause similar to S. 46 (2) of the Presidency Towns Insolvency Act, a debt contracted after the presentation of the petition in insolvency but before an order of adjudication is provable in insolvency. A suit on the debt after the discharge of the insolvent is barred by S. 44. (*Rangnekar, J.*) JAMSHEDJI FRAMJI *v.* PESTONJI. **141 I.C. 466=I R. 1933 Bom. 95=34 Bom. L. R. 980=A.I.R. 1932 Bom. 511.**

———**Ss. 34 (2) and 28 (2)**—*Provable debt—Decree against assets of deceased in the hands of debtor—Subsequent insolvency of debtor—Decree-holder's rights.*

In the absence of a personal decree under S. 52 (2), C P. Code, against a person as the legal representative of a deceased debtor, such legal representative cannot be adjudicated as an insolvent under the Provincial Insolvency Act in respect of that decree debt. But where he is adjudicated an insolvent, at the instance of a creditor, the debts due under the decree obtained against him as legal representative becomes a debt provable in insolvency under S. 34 (2) of the Act. Consequently an attachment by the decree-holder effected after the filing of the insolvency petition cannot prevail against the Official Receiver by reason of S. 28 (2) of the Act. The decree holder has to be regarded as a creditor in the insolvency and he can come in and prove his debt. (*Beasley, C. J.*) OFFICIAL RECEIVER, TINNEVELLY

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v. KRISHNA PILLAI. **159 I.C. 88=8 R. M. 445=42 L.W. 707=1935 M. W. N. 910=A. I. R. 1935 Mad. 1058=69 M.L.J. 818.**

———**S. 34 (2)**—*Provable debt—Judgment debt—Validity of, if can be gone into.*

To the ordinary rule that a matter decided by a decree cannot be reopened, there is an exception in insolvency. The Insolvency Court has the power to go behind a judgment and inquire into the consideration even for a judgment-debt, and this although the judgment may have gone by default or by consent or been affirmed on appeal. But the Court will not as a matter of course inquire into the validity of a judgment-debt but only when there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice. (Cases referred.) (*Baker and Shingne, JJ.*) ALI MOHOMED *v.* DECCAN MATCH MANUFACTURING CO. **34 Bom. L.R. 411=I.R. 1932 Bom. 374=138 I C. 442=A.I.R. 1932 Bom. 253.**

———**S. 35**—*Action under—Procedure—Notice to insolvent.*

Action under S. 35 can ordinarily be taken on an application made by the Official Receiver or by the creditors and on proof of circumstances specified in that section and the attention of the insolvent must be drawn to the facts alleged against him by notice or otherwise so that he may be able to meet them. (*Jai Lal, J.*) DOLA RAM *v.* PARAMA NAND MUL CHAND. **I.R. 1932 Lah. 659.**

———**S. 35**—*Annulment of adjudication—Enquiry for purpose of—Validity of—Judgment.*

On the application of a creditor who had obtained a decree on a promissory note, the debtor was adjudicated insolvent. The debtor filed an application under S. 35 for annulment of the adjudication order on the ground that there was no consideration for the promissory note and that the judgment was obtained by fraud or collusion.

Held, that the Insolvency Court had power to enquire into the consideration for a judgment-debt. The Insolvency Court would do so when there would be evidence that the judgment had been obtained by fraud or collusion or that there had been some miscarriage of justice. (*Mosely and Dunkley, JJ.*) KOYA MOHIDEEN *v.* HASHIM KHAN. **158 I C. 333=8 R. R. 164=A.I.R. 1935 Rang. 276.**

———**S. 35**—*Annulment of adjudication—Enquiry for purpose of—Validity of judgment.*

The Insolvency Court is entitled to go behind a judgment and will ordinarily exercise its discretion to do so when the judgment had been obtained by fraud or collusion. (*Ba U and Dunkley, JJ.*) HASHIM KHAN *v.* KOYA MOIDEEN KAKA. **6 I.R. (Rang.) 62=145 I.C. 835=A.I.R. 1933 Rang. 268.**

———**S. 35**—*Annulment of adjudication—Grounds.*

The debtor realized certain debts due to him before presenting the insolvency petition and nevertheless showed the debts as still due to him. The Court further found him to be dishonest in his dealings and that he was entering recklessly into transactions and incurring debts which he never hoped to pay. Upon these grounds the Judge annulled the adjudication.

Held, that the facts found might furnish grounds for refusing an absolute order of discharge but they furnished no grounds for dismissing an insolvency petition and that consequently no legal grounds for annulling an adjudication. 44 C. 535, Rel. on. (*Banerji and King, JJ.*) MOHAN LAL *v.* MADHAVA PRASAD. **53 All. 476=I. R. 1931 All. 339=131 I.C. 35=1931 A L.J. 175=A.I.R. 1931 All. 331.**

———**S. 35**—*Annulment of adjudication—No prayer for—Legality—Power to review.*

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The insolvent got himself fraudulently and collusively adjudicated by setting up a bogus creditor. Later on the original creditor who had sued to enforce his claim dropped out and another bogus creditor who stepped in to continue the proceedings, put in proof of his claim before the Official Receiver. The same having been rejected, he appealed to the District Judge who however dismissed his appeal and at the same time annulled the adjudication. Thereupon another creditor applied under O. 47, R. 1 to review the said order but it was also rejected.

Held, that the District Judge acted wrongly in annulling the adjudication in the absence of a prayer to that effect by either party and that the same constituted an error apparent on the face of the record so as to sustain an application for review. (*Beasley, C. J., Ramesam and Cornish, JJ.*) CHINA VENKATAPPAYYA *v.* PUNNAYYA. **1932 M.W.N. 153 = 145 I.C. 346 = 6 I.R. (Mad.) 50 = 38 L.W. 257 = A. I. R. 1933 Mad. 631 = 65 M.L.J. 173 (F. B.).**

——**S. 35**—*Payment of debts—Payment in cash, if necessary.*

Under S. 35 of the Provincial Insolvency Act, the debts of the insolvent must be paid in full before the adjudication can be annulled. It may be that the debts referred to in the section mean debts proved in the insolvency Court; but once a debt is proved, it does not cease to be a proved debt simply because the creditor states that he does not wish to be recorded as a scheduled creditor. The consent of, or even an unconditional discharge by, the creditors will not entitle the Court to annul the adjudication. unless the debts have been paid in full in cash. If the debt is not paid off, it still subsists in spite of the annulment. (*Pollock, A. J. C.*) NAZUKRAO *v.* JAIWANTRAO. **18 N.L.J. 145.**

——**S. 37**—*Applicability—Composition scheme.*

The provisions of S. 37 of the Provincial Insolvency Act are applicable to composition schemes by virtue of S. 39 of the Act. (*Abdul Rashid, J.*) KIDAR NATH *v.* MAHOMED IBRAHIM **6 R.L. 820 (2) = 150 I.C. 74 = 35 P.L.R. 522 = A.I.R. 1934 Lah. 394.**

——**S. 37**—*Construction—'All acts theretofore done'.*

The words "all acts theretofore done" in S. 37 mean all acts done with a view to making sales and dispositions of property, including the setting aside of transfers made by the insolvent with a view ultimately of making sale of the property so recovered for the benefit of the estate in his hands and therefore ultimately for the benefit of the creditors, even though the actual final disposal of the property has not been made on the date of the annulment of the adjudication. (*Baguley and Ba U, JJ.*) R. V. BANERJEE, OFFICIAL RECEIVER *v.* D. SUCCARAM. **158 I.C. 651 = 8 R.R. 208 = A.I.R. 1935 Rang. 328.**

——**S. 37**—*Construction—'Property'—If includes right to sue.*

The word 'property' as used in S. 37, Provincial Insolvency Act, does not include the right to sue for cancellation of a transfer which had accrued to the Official Assignee (*Almond, J. C. and Mir Ahmad, A. J. C.*) SAJJAN MAL *v.* BODH RAJ RAMKISHAN MAL. **152 I C 380 = 7 R. Pesh. 57 = A.I R. 1934 Pesh. 89.**

——**S. 37**—*Construction —"Property"—Right to collect money due to insolvent.*

The word "property" is used in its widest sense, that is to say, it is used in the sense not only of the thing which is the subject-matter of ownership, but includes also the dominion or the right of ownership or of partial ownership. In this sense the right to collect the money

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which is found to be due to the insolvent is property within the meaning of S. 37 and it vests in the appointee. (*Baguley and Ba U, JJ.*) R. V. BANERJEE, OFFICIAL RECEIVER *v.* D. SUCCARAM. **158 I.C. 651 = 8 R.R. 208 = A.I.R. 1935 Rang. 328.**

——**S. 37**—*Effect of annulment.*

On annulment of adjudication, orders passed in proceedings instituted by receiver in insolvency under Ss. 53 and 54 do not become vacated. (Difference between the positions of the debtor and of the appointee made out,) (*Baguley and Ba U, JJ.*) R. V. BANERJEE, OFFICIAL RECEIVER *v.* D. SUCCARAM. **158 I C. 651 = 8 R.R. 208 = A.I.R. 1935 Rang. 328.**

——**S. 37**—*Effect of—Annulment.*

Once an order of annulment of adjudication has been passed, S. 37 applies and there ceases to be any insolvent or any receiver. All acts theretofore done by the Court are valid and subject to that the property of the debtor vests in such person as the Court may appoint and in default of any such appointment in the debtor himself. After the order of annulment, the Court has no jurisdiction to pass any order affecting the property of a person other than the debtor. Where therefore the Court rejects the claims of a creditor as unproved, before the order of annulment its act is an act theretofore done by the Court and is valid; so also the dispositions of property and payments made before the order are duly made. So long as the order of annulment is in force, the Court has no jurisdiction to reopen the distribution of dividends at the instance of a creditor and to demand a refund of money from the other creditors to whom a dividend has been distributed. The remedy of the creditor lies in challenging the order of annulment of adjudication and so long as that order is unchallenged he has no remedy in the Insolvency Court. A.I.R. 1933 Rang. 223, Foll. (*Pollock, A. J. C.*) J. N. MUNDARA *v.* NEMSI RAJPAL & CO. **31 N.L.R. 36 (Supp.) = 161 I.C. 981 = 8 R N. 254 = A.I.R. 1935 Nag. 246.**

——**Ss. 37 and 67**—Effect of annulment—Hindu father's insolvency—Residue in receiver's hands—Right of sons. *See* PROVINCIAL INSOLVENCY ACT, SS. 67 AND 37. **55 Bom. 110 = 32 Bom.L R. 1362 = A.I. R. 1931 Bom. 50.**

——**S. 37**—Effect of annulment—Official Assignee's right to sue—If devolves on trustee appointed by Court. *See* C. P. CODE, O. 22, R. 10—INSOLVENCY. **A.I.R. 1934 Pesh. 89.**

——**S. 37**—*Effect of annulment—Pending application to set aside sale by Official Receiver.*

The unconditional annulment of the adjudication pending a creditor's application to set aside a sale of the insolvent's property by the Official Receiver does not deprive the Insolvency Court of its jurisdiction to hear and determine the application. The effect of S. 37 is that the order of annulment will not invalidate the acts of the Court or of the Official Receiver theretofore done; but they do not acquire a degree of sacrosanctity or immunity from attack by way of appeal which they would not have possessed had there been no order of annulment. (*Pakenham Walsh, J.*) SUBBARAYADU *v.* OFFICIAL RECEIVER, CUDDAPPAH. **156 I.C. 284 (2) = 41 L.W. 461 = 7 R.M. 675 = 1935 M.W.N. 494 = A.I.R. 1935 Mad. 433.**

——**S. 37**—*Effect of annulment—Receiver's position.*

From the moment of the annulment of an order of adjudication and onwards the receiver ceases to be receiver in insolvency, but if he is appointed to receive the property of the insolvent he becomes a mere appointee with reference to such property and thus a mere custodian of the property which comes into his hands. (*Mya*

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Bu and Baguley, JJ.) MAUNG PO GYI *v.* R. K. BANERJEE. **156 I.C. 783=8 R.R. 48=A.I.R. 1935 Rang. 152.**

——**S 37**—*Effect of annulment—Subsequent order vesting property in receiver—Validity of.*

It is not correct to say that after the order of annulment the insolvency proceeding comes to an end *ipso facto*. Though the effect of passing an order of annulment without any condition is to vest the property in the debtor, there is nothing in the Insolvency Act to prevent the Court subsequently from giving suitable directions or vesting the property in the receiver for the protection of the creditors. Such an order is not a review of the order of annulment but is supplementary to it, and can be passed under the inherent powers of the Court under S. 151, C. P. Code, attracted by S. 5 (1) of the Provincial Insolvency Act. No doubt, if subsequent to annulment and before the vesting order, the insolvent has transferred the property to a *bona fide* purchaser, such a purchaser perhaps may not be affected. But the parties to the insolvency proceeding will be bound by the order. (*Courtney-Terrell, C. J. and Mahomed Noor, J.*) CHOUTHMAL BHAGIRATH *v.* JOKHI RAM SURAJ. **12 Pat. 163=141 I.C. 836=I.R. 1933 Pat. 98=13 Pat.L.T. 775=A.I.R. 1933 Pat. 84.**

——**S. 37**—Effect of annulment—Termination of insolvency proceedings. *See* PROVINCIAL INSOLVENCY ACT, S. 43. **I.R. 1932 Mad 745=139 I.C 574 (2)=1932 M.W.N. 1105=36 L.W. 655=A I R. 1932 Mad. 731=63 M.L J. 414.**

——**S. 37**—*Effect of annulment—Vesting property in debtor.*

The words in S. 37 (2) "as the Court may declare" govern only the vesting of the property in the debtor. It means that the vesting of the property in him, in the absence of any other person being appointed by the Court, shall be subject to any condition which the Court may declare. But in the absence of any declaration of condition, it will vest in the debtor unconditionally. (*Courtney Terrell, C. J. and Mahomed Noor, J.*) CHOUTHMAL BHAGIRATH *v.* JOKHI RAM SURAJMAL. **12 Pat 163=141 I.C. 836=I.R. 1933 Pat. 98=13 Pat.L.T. 775=A.I.R. 1933 Pat. 84.**

——**S. 37**—*Powers of appointee.*

A bare appointee, *i.e.*, an appointee under a vesting order which does not impose any condition relating to the property of the debtor) has no authority to deal with the estate of the insolvent as agent or on behalf of the insolvent except as regards realization of the insolvent's claim against others. When the Court vests the property of the insolvent in an appointee the property is put out of the control of the insolvent, but the appointee is no more than the custodian of such property. Hence the creditors are not entitled to any relief against such appointee. All that they are entitled to do as regards him is to execute any decree that they may obtain against the insolvent by getting a garnishee order on account of his custody of the property belonging to the insolvent. A.I.R. 1933 Rang. 223, Appl. (*Mya Bu and Bagulev, JJ.*) MAUNG PO GYI *v.* B K. BANERJEE. **156 I.C. 783=8 R.R. 48=A.I.R. 1935 Rang. 152.**

——**Ss. 37, 53 and 54**—*Powers of appointee.*

Though a person appointed under S 37 of the Act, is competent to continue applications under Ss. 53 and 54, which are pending at the time the order of annulment is made under S. 43, he cannot initiate similar proceedings after the annulment. (*Beasley, C. J., Ramesam and King, JJ.*) VEERAYYA *v.* SRINIVASA RAO. **58 Mad. 908=158 I C. 1060=8 R.M. 420=1935 M.W N. 886=42 L W. 386=A I.R 1935 Mad. 826=69 M.L.J. 364 (F.B.).**

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——**S. 37**—Powers of appointee—Competency to impeach debt shown as due to creditor entered in list of creditors. *See* INSOLVENCY—ANNULMENT OF ADJUDICATION. **69 M.L.J. 839.**

——**Ss 37, 43, 53 and 54**—*Powers of Court on annulment—Directions to appointee.*

Where the Insolvency Court annuls an adjudication under S. 43 of the Provincial Insolvency Act, and passes an order under S. 37 vesting the properties of the quondam insolvent in an appointee (Official Receiver or other person) the administration in insolvency can be continued for the realisation and distribution of the assets of the insolvent notwithstanding the annulment. The Insolvency Court will in such a case have full power to give directions to the appointee as to the realisation and disposal of the debtor's assets. That power, however, should not be used arbitrarily, and should be used not in the interests of this or that creditor, but in the interests of the whole body of creditors; in other words the only proper order for the Court to pass is that the appointee should continue to realise and distribute the debtor's property in accordance with the provisions of the Act. (*Beasley, C. J., Ramesam and King, JJ.*) VEERAYYA *v.* SRINIVASA RAO **58 Mad. 908=158 I.C 1060=8 R.M. 420=1935 M.W.N. 886=42 L.W. 386=A.I.R. 1935 Mad. 826=69 M.L J. 364 (F B.).**

——**S. 37**—*Powers of Court on annulment—Distribution of assets to creditors*

On the annulment of adjudication, the Court has no power to order the distribution of the assets to the creditors by the receiver. All that could be done under S. 37 is either to restore the property to the debtor or to order the property to vest in some specified person. (*Sulaiman, C.J. and Iqbal Ahmad, J.*) PANNA LAL SHAM LAL *v.* ABDULLAH USMAN. **I.R. 1933 All. 230=143 I.C. 330=1932 A.L.J. 1095=A.I.R. 1933 All. 117.**

[**F.** 15 L. 698 (705).]

——**S 37**—*Powers of Court on annulment—Order for distribution of assets among creditors—Legality.*

S. 37 does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency and by annulling the insolvency, the Court comes to the conclusion that it will not proceed with the insolvency. Having come to that conclusion the course open to the Court is either to return the property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law, or pending such security or for some other reason the Court may direct the property of the insolvent in the hands of the receiver to vest in a certain person. But the words "to vest in such person" do not mean distributing the property among the creditors. Such vesting is only for the purpose apparently of making the property available to creditors to proceed through the Civil Court. (*Mukerji and Bennet, JJ.*) PANNA LAL *v.* OFFICIAL RECEIVER. **53 All. 313=I.R. 1931 All. 864=134 I. C. 848=1931 A.L.J. 18=A I.R. 1931 All. 71.**

[**R.** 11 R. 287 (300) (F.B.). **Disappr.** 58 M. 908 (922).]

——**Ss. 37 and 43**—*Powers of Court on annulment—Order under S. 37, if can be passed at a late stage.*

Where an Insolvency Court while passing an order under S. 43 annulling adjudication has omitted to pass an order under S. 37 directing that the property of the insolvent shall vest in the Official Receiver for the benefit of the general body of creditors it has the power to add it at a later stage. (*Tek Chand and Agha Haidar, JJ.*) ISHAR DAS *v.* MT. FATIMA BIBI. **15 Lah. 698**

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=153 I.C. 993=7 R.L. 489=36 P.L.R. 499=A.I.R. 1934 Lah. 468.

———S. 37—*Rights of creditors on annulment.*

The consequences of annulment of adjudication are different to those of a discharge. On the annulment of adjudication, there is nothing to prevent a creditor from pursuing his remedy in a Court of law if his debt has not been scheduled in the insolvency proceedings. So where, after a composition scheme had been sanctioned the adjudication was annulled, a creditor in whose favour a cheque had been given by the insolvent and who could not cash it owing to the adjudication, is entitled to bring a suit against the debtor for recovery of the amount due under the cheque. (*Bhide J.*) DUNI CHAND DAULAT RAM *v.* JITA RAM. **I.R 1933 Lah. 98 (1)=141 I.C. 260=34 P.L.R. 135=A.I.R. 1933 Lah. 187 (1).**

———S. 37—*Scope—Vesting in appointee—Effect of—Debts coming into existence after annulment of adjudication—Liability of appointee to pay—Crown debt—Priority.*

Where the Insolvency Court on the annulment of an adjudication vests the property in the Official Receiver or other person appointed by it, the appointee under S. 37 of the Act does not hold the property for the benefit of the insolvent. He holds the property not for this or that individual creditor, but for the benefit of the whole body of creditors. But it does not mean that the property can be distributed only amongst those creditors who would be entitled to it under the provisions of the Insolvency Act, in other words among those whose debts are provable in insolvency. The scheme of S. 37 is to enable an orderly distribution of the assets of the insolvent which under S. 37 the Court has vested in its appointee, and to place those assets at the disposal of those creditors who would be able to proceed against the debtor if the property had reverted to him by reason of the annulment. A creditor can therefore enforce against the Official Receiver or appointee a debt due to him which was not provable in insolvency and which came into existence after the annulment of the adjudication. A crown debt is entitled to priority quite irrespective of the Insolvency Act. Court-fee due to Government in respect of suits filed by the insolvent *in forma pauperis* after the annulment of his adjudication is a crown debt and must therefore be paid by the appointee under S. 37 out of the assets in his hands. (*Beasley, C.J. and Cornish, J.*) SRINIVASA RAO *v.* SECRETARY OF STATE FOR INDIA. **58 Mad. 1014=157 I.C. 1007=8 R.M. 199=1935 M.W.N. 733=A.I.R. 1935 Mad. 931 =69 M L.J. 856.**

———S. 38—*Composition scheme—Circumstances to be considered—Consent of majority of creditors—Duty of Court.*

Although S. 38 has provided that no scheme shall be approved unless the requisite majority of the creditors' consent, still even if there is that consent of the creditors, the Court must exercise its judicial discretion before approving of the scheme, that is a discretion founded on sufficient reasons after considering all aspects of the case and ascertaining the facts so far as possible. Where the scheme was that the whole of the insolvent's assets should be assigned to one of the creditors on his undertaking to pay the other creditors six annas in the Rupee and where the court approved of the same because the majority had approved it, and where it was represented for those creditors that if the Official Receiver administered the estate of the insolvent it would lead to considerable delay and expense and where the Court had offered the assets of the insolvent to the objecting creditor on the same terms and he was not willing to accept the offer, and where it appeared on the other hand that

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the Court had omitted to consider a number of circumstances, namely, that the Official Receiver had reported against the scheme, that the extent and value of the assets belonging to the insolvent were in doubt, that the insolvent's conduct in failing to appear before the Official Receiver and produce accounts was bad, that the creditor who had taken over the assets of the insolvent under the scheme was a very near relation of his, that the insolvent had himself admitted that his object in consenting to the scheme was to revive his money-lending business and that the scheme was not in fact profitable to the creditors :

Held, that the lower Court had erred in attaching too much weight to the circumstance that the majority of the creditors had approved of the proposed scheme and in failing to take into account the other important aspects of the matter and that in the circumstances the scheme should not have been approved.

Held, however, that in view of the delay and the practical difficulties in restoring the *status quo* the order of the lower Court should not be set aside.

Per *Reilly, J.*—The duty of the Insolvency Court is to see that the assets are administered through the proper and ordinary machinery of the Court and not to require, nor even invite any creditor or other person to take over the estate on certain terms and carry out the functions of the Court for it. (*Reilly and Anantakrishna Aiyar, JJ.*) SEVUGAN CHETTIAR *v.* KASI CHETTIAR. **54 Mad. 823=I.R. 1931 Mad. 630=132 I.C 134= 1931 M.W.N. 378=33 L.W. 620=A.I.R. 1931 Mad. 344=61 M.L J. 173.**

———S. 38—*Composition scheme—When can be filed.*

A composition scheme can be filed in Court only after an order of adjudication is made and not before. (*Guha and Bartley, JJ.*) BROJENDRA NATH GHOSE *v.* SATISH CHANDRA DAS. **6 I.R (Cal) 78 (1)=145 I. C. 185=37 C.W.N. 189=A.I.R. 1933 Cal. 495 (2).**

———S. 39—*Applicability.*

S. 39 of the Provincial Insolvency Act does not strictly apply when the Court does not prepare a schedule as required by the section. (*Ramesam and Cornish, JJ.*) GOPALU PILLAI *v.* KOTHANDARAMA AIYAR. **57 Mad. 1082=40 L.W. 110=153 I.C. 916=7 R.M. 378=A.I.R. 1934 Mad. 529=67 M L.J. 843.**

———S. 39—*Composition scheme—Creditor not party to—Suit by—Leave of Court—Necessity.*

The control that the Insolvency Court retains of the insolvency even after orders under S. 39, Provincial Insolvency Act, are passed, are in order that the composition may in fact be carried out and it has powers under S. 40 to re-adjudge the debtor an insolvent in certain circumstances. Insolvency proceedings continue only for the purpose of giving effect to the composition. But they do not continue for all purposes except in so far as Ss. 37 and 40 require their continuance. An annulment is an annulment and the proceedings are at an end. It can never be said that every section in the Act continues to be applicable. Therefore no leave of the Court is necessary under S. 28 of the Act for the institution of a suit by a creditor not bound by the composition. A.I.R. 1934 Mad. 529, Foll.; A.I.R. 1929 Mad. 157, Expl. (*Curgenven and King, JJ.*) SIDHAYYA *v.* MUDDAPPA. **158 I.C. 592=8 R.M. 283= 1935 M.W.N. 825=A.I.R. 1935 Mad. 929.**

———Ss. 39 and 28—*Composition scheme—Binding nature—Creditor not party to or aware of composition scheme—Rights.*

A composition scheme approved by the Court is not binding on a creditor who is neither a party to, nor aware of the composition proceedings and whose name and

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debt are not entered in the schedule framed under S. 39 of the Act. Such a creditor is not therefore precluded from having recourse to other remedies than those provided by the Insolvency Law in respect of his debt which is not included in the schedule. He can therefore maintain a suit against the debtor as regards that debt and S. 28 of the Act is no bar to such a suit. (*K.S. Menon, J.*) GOVINDASAMI MUDALIAR *v.* SRI THRIPURASUNDARI AMMAN. **159 I.C. 865=8 R.M. 571=43 L.W. 333=1935 M.W.N. 1202=69 M.L.J. 793.**

———**S. 39**—*Rights of creditor.*

The policy of the Insolvency Act is that when a person is indebted, all his debts should be dealt with in the insolvency. It does not seem to be right that a creditor who has got a debt provable in insolvency should stand aside when all the other creditors or most of them have their debts dealt with by the Insolvency Court and refuse to come in or take notice of a composition scheme and then as soon as the adjudication is annulled, proceed once more to harass the insolvent. Of the two Acts, the Presidency Towns Insolvency Act seems to carry out the policy more correctly, because the plain meaning of the word in S. 30 of the Act is that if any composition creditor has a debt which he could prove in insolvency and does not do so, he is nevertheless bound by the composition. But in the Provincial Insolvency Act, S. 39, if strictly followed, means that a creditor whose debt is not entered in the schedule is not bound by the composition and can have a remedy elsewhere against the insolvent. Where the creditors of an insolvent agree to a composition and one of the creditors, who had a decree against the insolvent did not prove his debt in insolvency and was not a party to the composition proceedings and after annulment of the order of adjudication he sought to execute the decree by arresting the judgment-debtor.

Held, that under S. 39, Provincial Insolvency Act, the creditor was entitled to pursue the remedy he liked. But in the circumstances of this case, arrest of the judgment-debtor was refused by the revision Court also. A.I.R. 1934 Mad. 529, Rel. on. Amendment of Provincial Insolvency Act and bringing it in conformity with S. 30, Presidency Towns Insolvency Act, suggested. (*Beasley, C.J.*) THANGESWARA CHETTIAR *v.* RAMAMURTHI CHETTI. **159 I.C. 689=42 L.W. 399=8 R.M. 535 (2)=1935 M.W.N. 380=A.I.R. 1935 Mad. 602.**

———**S. 39**—*Scope—Debt excluded from composition—Suit for—If barred.*

A particular debt was mentioned in the insolvency petition but was not acknowledged to be due and in the composition no provision was made for discharging it. When, after the composition was sanctioned by the Court, the creditor sought to prove the debt in insolvency his claim was disputed by the sureties who had taken over the insolvent's liabilities and the creditor withdrew his application. The creditor subsequently filed a suit against the debtor and the sureties pleaded bar under S. 39, Provincial Insolvency Act.

Held, that the sureties and the creditor had agreed that the debt was to be excluded from the composition and that in those circumstances S. 39, Provincial Insolvency Act, could not be any bar to a suit upon the excluded claim. (*Curgenven and King, JJ.*) SIDAYYA *v.* MUDDAPPA **158 I.C. 592=8 R.M. 283=1935 M. W N 825=A.I.R. 1935 Mad. 929.**

———**Ss 41 and 42**—*Application for discharge—Circumstances to be considered.*

Where a Court finds on an application for absolute discharge that the insolvent is not entitled to the same, it should consider whether he is entitled to a conditional discharge under S. 41. In most cases order of conditional discharge is suitable and cases of refusal of discharge unconditionally for ever are rare. (*Bhide, J.*) FAZAL DIN *v.* NATHU MAL. **6 R.L. 614=148 I.C. 971=A.I.R. 1934 Lah. 109.**

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———**S. 41**—*Application for discharge — Duty of Court.*

An application by an insolvent for an order of discharge should not, ordinarily, be entirely rejected, and if the Court is of the opinion that the insolvent should not be granted an absolute order of discharge, it should consider whether a conditional order of discharge should not be passed, or whether an order of discharge, with a provision that its operation be suspended for a specified time, should not be made. A.I.R. 1929 Lah. 281 and A.I.R. 1930 All. 471, Rel. on. (*Abdul Rashid, J.*) BHAG MAL *v.* PARSHOTAM SINGH. **160 I.C. 529=8 R.L. 545=A.I.R. 1935 Lah. 919.**

———**S. 41**—*Application for discharge—When can be made.*

The wording of S. 41 shows that it is open to the insolvent to apply for his discharge at any time though it is obligatory for him to make an application in the first instance within such time as may have been fixed by the Court at the outset. (*Bhide, J.*) LADHA RAM *v.* PRABH DIAL. **I.R. 1931 Lah. 621 (1)=132 I.C. 525 (1)=32 P L.R. 476=A.I.R. 1931 Lah. 672.**

———**S. 41**—*Conditional order of discharge—Powers—After-acquired property.*

It is open to the Court to grant an insolvent his discharge subject to any condition as regards his after-acquired property. (*Rankin, C.J. and Pearson, J.*) FIRM OF PRAYAG SHAHA SAHEB RAM *v.* DWIJAPADA ROY. **I.R. 1932 Cal. 510=138 I.C. 745=55 C. L.J. 94=A.I.R. 1932 Cal. 623.**

———**Ss. 41 and 17**—*Death of insolvent—Automatic discharge.*

Ordinarily speaking insolvency proceedings would not terminate until there has been a discharge of the insolvent, but the matter is otherwise where the insolvent is dead. In such a case there is an automatic discharge of the insolvent and where the property has been distributed prior to his death, the proceedings must automatically be held terminated. 9 S.L.R. 34, Diss. from; A.I.R. 1918 Sind 38, Ref. (*Dalip Singh, J.*) ASA NAND *v.* BISHAN SINGH. **147 I.C. 695=6 R.L. 421 =A.I.R. 1933 Lah. 997.**

———**S. 41**—*Discharge of firm—Effect of—Separate debt incurred prior to adjudication—Liability of partner for.*

A partnership has in law no corporate personal existence distinct from that of its individual partners and an order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm. So if a firm is adjudicated, both the joint and separate creditors should prove their claims. If the insolvent firm was subsequently discharged, a partner of that firm is not liable for a separate debt incurred prior to the adjudication of the firm. (*Wild, J.C. and Rupchand, A.J.C.*) HEERJI JIVRAJ *v.* VALABRAM MULJI. **25 S.L.R. 422=I.R. 1932 Sind 65=136 I.C. 815=A.I.R. 1932 Sind 39.**

———**Ss. 41 and 42**—*Discharge—Refusal—Grounds.*

Where the insolvent's assets were not found to be equal to eight annas in the rupee and the insolvent had failed to prove that his liabilities arose out of circumstances for which he could not justly be held responsible.

Held, that he could not legally be granted an order of discharge under S. 41. (*Nanavutty, J.*) BRIJ MOHAN *v.* SARJU. **I.R. 1931 Oudh 399 (1)=134 I.C. 607 (1)=8 O.W.N. 843=A.I.R. 1931 Oudh 356 (1).**

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———**S. 41**—*Discharge—Refusal—Grounds—Pendency of suit against receiver.*

Merely that a suit is pending against the receiver should not prevent an Insolvency Court from granting an application for discharge. The discharge does not necessarily end the insolvency proceedings and the insolvency Court has jurisdiction to give directions as to the distribution of assets among the creditors and such power is not taken away on account of the insolvent's discharge. (*Tapp, J.*) RAM CHAND *v.* MOHRA SHAH. **135 I. C. 511 (2) = I.R. 1932 Lah. 111 (2) = 33 P.L.R. 524 = A.I.R. 1934 Lah. 725.**

———**S. 41**—*Discretion under — Revision —Interference.*

Under S. 41 of the Provincial Insolvency Act it is discretionary with the Court to pass one of three orders mentioned therein. The question whether the Courts would have exercised between discretion if they had acted in one manner rather than another is not one which can be properly raised in revision. (*Bhide, J.*) LADHA RAM *v.* PRABH DIAL. **I.R. 1931 Lah. 621 (1) = 132 I.C. 525 (1) = 32 P.L.R. 476 = A.I.R. 1931 Lah. 672.**

———**S. 41**—*Order of discharge—Considerations.*

An order of discharge as contemplated by S. 41 could only be made in the interest of the general body of creditors of the insolvent, and the fact that one of them only raises objection to the discharge is not material for the purpose of the Courts making an order which is to affect the entire body of creditors. (*Guha and Lodge, JJ.*) JATINDRA NATH SAHA *v.* KATIHAR OIL MILLS, LTD. **158 I.C. 398 (2) = 8 R.C. 180 (2) = 39 C.W.N. 1292 = A.I.R. 1935 Cal. 644.**

———**S. 41**—*Power of Court —Limits—Annulment on application for discharge.*

In an application for discharge under S. 41 of the Provincial Insolvency Act, the Court has no power to annul the adjudication in insolvency, though it may be of the opinion that the insolvent is dishonest. (*Beasley, C. J. and Cornish, J.*) PAPANNA *v.* NARASA REDDY. **156 I.C. 453 = 8 R M. 2 = 41 L.W. 809 = A.I.R. 1935 Mad. 646 = 1935 M.W.N. 414 = 68 M.L.J. 699.**

———**S. 41**—*Restoration of application for discharge —Inherent powers of Court.*

The original insolvency petition stood adjourned to 22—1—1926. It was advanced to 22—12—1925 and disposed of by the Court without notice to insolvent. The insolvent applied for discharge within six months from 22-1-1926 but the Court dismissed it erroneously as out of time and annulled the adjudication ; subsequently the application was restored to file.

Held, that the subsequent order of the Court restoring the application was one passed in the exercise of the inherent powers of Court to rectify an error apparent on the face of the record or an error due to a misapprehension of the actual state of facts borne out by the record. (*Sundaram Chetty and Pakenham Walsh, JJ.*) NARASIMHULU SETTY *v.* SESHAYVA. **147 I.C. 442 = 39 L. W. 87 = 6 R.M 378 = 1933 M.W.N. 1309 = A.I.R. 1934 Mad. 31 (1).**

———**S. 41**—*Right to apply for discharge—Debtor declared insolvent after his death—Minor sons added—If can ask for discharge.*

The minor sons of a debtor, who has been declared insolvent after his death and whose minor sons are brought on the record, can ask the Court for a discharge. A.I.R. 1928 Mad. 476; A.I.R. 1928 Mad. 480 and A.I.R. 1930 Cal. 590, Ref. (*Agha Haidar, J.*) NANAK CHAND *v.* OFFICIAL RECEIVER. **8 R.L. 577 = 160 I.C. 708 = A.I.R. 1935 Lah. 935.**

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———**S. 41**—*Scope of—Order directing payment but not granting discharge.*

An order directing the insolvent to pay Rs. 15 a month and to apply for discharge after one year, imposes conditions but does not grant any discharge subject to those conditions, and hence does not come within any of the clauses of S. 41. (*Aston and Rupchand, A. J.Cs.*) KHIALDAS AISHIRAM *v.* NAZIR OF THE SUB-CIVIL COURT, SHIKARPUR. **I.R. 1933 Sind 176 (1) = 144 I.C. 247 = A.I.R. 1933 Sind 151 (1).**

———**S. 41**—*Suspension of absolute discharge for a specific time—Failure to draw up formal order—Effect.*

Where under S. 44 of the former Act III of 1907 and S. 41 of the present Act V of 1920, the Court passes an order of absolute discharge which is suspended for a specific time, that is, until the property of the insolvent has been sold and subsequently the property is sold, the insolvency proceeding is terminated although owing to a clerical error of the office, a formal order of discharge is not drawn up after the sale of the property and the insolvency proceeeding cannot be revived at any later date at the instance of any creditor. (*Bennet, J.*) MOOL CHAND *v.* DIP CHAND. **153 I.C. 869 = 7 R.A. 644 = 1935 A.W.R. 38 = 1935 A L.J. 274 = A.I.R. 1935 All. 272.**

———**S. 41**—*Time fixed for discharge—Omission to file* talbana—*Effect.*

Where an insolvent who has applied for an order of discharge within the time specified by the Court has failed to file *talbana*, his failure to do so cannot be considered as a failure to apply for the discharge. (*Raza and Srivastava, JJ.*) SULTANUDDIN *v.* AMINUDDIN. **I.R. 1931 Oudh 33 = 128 I.C. 273 = 7 O.W.N. 941 = A.I.R. 1930 Oudh 474.**

———**S. 41 (2)**—*Conditional order of discharge—Considerations.*

The intention of the legislature is that the debtor on giving up the whole of his property shall be a free man able to earn his livelihood. But sometimes it is necessary that he should pass through a period of probation. The civil rights of creditor must not be forgotten in such a case and a conditional order of discharge should be, as far as is reasonable, for the benefit of the creditors. What is exactly just to both parties is a matter difficult to determine. Insolvent directed to contribute Rs. 50 out of his monthly salary of Rs. 100 for a period of five years. The rate of Rs. 25 fixed by the Lower Court held to be too low and the period of 25 years fixed, described as amounting to a ' life sentence ' which should not be directed. (*Johnstone, J.*) MAHOMED ALI AKBAR *v* MT. FATIMA BEGAM. **I R. 1931 Lah. 793 = 133 I.C. 553 = 32 P.L R. 298 = A.I R. 1931 Lah. 591.**

———**S. 41 (2) (a)**—*Scope—Permanent order refusing discharge—Legality—Construction.*

S. 41 (2) (*a*) contemplates only an order either granting or refusing an absolute order of discharge as distinguished from an order of discharge subject to a condition. The section does not contemplate that there may be an order absolutely refusing to discharge an insolvent. Where the Judge passed an order in the following terms :—"It seems to me that nothing is to be gained from suspending the discharge or making a conditional order. The man is not fit to be given credit and that will be the result of his remaining an undischarged insolvent. I therefore refuse discharge absolutely."

Held, that the order must be regarded as merely an order refusing to make an absolute order for discharge.

Held, further, that if the order meant to preclude the insolvent from again applying the discharge it was

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erroneous. (*Mukerji and Mitter, JJ.*) KARIM MIA, *In the matter of.* **I R. 1931 Cal. 592=132 I.C. 640=53 C.L.J. 44=A.I.R. 1931 Cal. 392.**

——— **S. 41 (2) (b)**—*Suspension of discharge—Final discharge—Notice to creditors.*

Under S. 41 (2) (*b*) the Court can suspend the operation of the order of discharge for a specified time and on the expiry of the specified time, there is no necessity even to apply for an order of final discharge and if such an application is made by the insolvent, no notice to the creditors is necessary. 44 Bom. 555, Ref. (*Heald and Sen, JJ.*) TAR MAHOMED VALLY MAHOMED *v.* ADAMJEE HOOSEIN. **I.R 1931 Rang. 145 (1)=131 I.C. 721 (1)=A.I.R. 1931 Rang. 188.**

——— **S. 41 (2) (c)**—*Conditional order of discharge—Condition to hand over assets that might be inherited—Propriety.*

Under S. 41 (2) (*c*) of the Provincial Insolvency Act, the Court is competent to grant an order of discharge to an insolvent subject to the condition that he shall hand over to the Official Receiver all the assets which he might inherit from his father. The possibility of the insolvent's father not dying for a long time or not leaving any property for his son, is no ground for making the discharge unconditional. (*Rangi Lal, J.*) ABDUL JABAR *v.* DIN MAHOMED. **35 P.L.R. 786=153 I.C. 144=7 R.L. 686 (1)=A I R. 1934 Lah. 659 (1).**

——— **S. 42**—*Absolute discharge—Grounds for—Insolvent of young age and under his father's control.*

An absolute discharge cannot be granted to an insolvent under S. 42 of the Act solely on the ground that he is a young man of 20 years of age and was carrying on business with his father, the business being under the direction and control of his father, though such circumstances can no doubt be taken into consideration. (*Addison and Din Mohammad, JJ.*) BUDHA MAL *v.* AMAR NATH. **157 I C. 935=8 R.L. 163=A.I.R. 1936 Lah. 381.**

——— **S. 42**—*Assets found insufficient—Duty of Court to refuse discharge—Permission to file second application.*

Under S. 42 the Court is bound to refuse to grant an absolute order of discharge when the assets are found insufficient even to pay eight annas in the rupee, and it is further found that the insolvent had been dishonest and had fabricated accounts. Where however the Court has expressly noted that it would be open to the insolvent to file a fresh application for discharge he may file a second application if circumstances at any subsequent time become favourable to him. (*Bhide, J.*) LADHA RAM *v.* PRABH DIAL. **I R. 1931 Lah. 621 (1)=132 I.C. 525 (1)=32 P.L.R. 476=A.I.R. 1931 Lah. 672.**

——— **S. 42**—*Discharge—Propriety of—Unsuccessful trade.*

The mere fact that the insolvent was unsuccessful in his trade which ended in a loss is not sufficient to hold that it arose from circumstances for which he cannot justly be held responsible. (*Rankin, C.J. and Pearson, J.*) FIRM OF PRAYAG SHAHA SAHEB RAM *v.* DWIJAPADA ROY. **I.R. 1932 Cal. 510=138 I.C. 745=55 C L J. 94=A.I.R. 1932 Cal. 623.**

——— **S. 42**—*Discharge—Refusal—Grounds.*

The insolvents failed to show that their liability had arisen from circumstances for which they could not be held responsible. They were not able to produce account books nor did they explain satisfactorily the alleged loss of the books.

Held, that Court should not grant an absolute order of discharge as the insolvents must have known at the time of contracting debts, that they had no reasonable or probable ground for expecting that they would be able to re-pay them. (*Tek Chand, J.*) TARA SINGH *v.* SARMUKH SINGH. **6 I.R. (Lah.) 239=146 I.C. 532=34 P.L.R. 991=A.I.R. 1933 Lah. 812.**

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——— **S. 42**—*Discretion under—Conduct of insolvent—Appeal—Interference.*

The insolvent's conduct as a trader or in relation to his estate is mainly in the discretion of the Insolvency Court and a Court of appeal should be slow to interfere with that discretion. (*Lord Thankerton.*) MUTTU MAHAMMADO *v.* RAMASWAMY CHETTY. **6 R P C. 115=148 I.C. 858=39 L.W. 82=A.I.R. 1934 P.C. 1 (P.C.).**

——— **S. 42**—*Essentials—Onus on insolvent.*

Where an insolvent applies for an absolute discharge, the onus is on him to show the requirement under S. 42 (*a*), *i.e.*, his inablity to pay 8 annas in a Rupee is from circumstances beyond his control; and it is not necessary that the creditor should show in the first instance that the insolvent is guilty of fraud or dishonesty (*Bhide, J.*) FAZAL DIN *v* NATHU MAL. **6 R L. 614=148 I.C. 971=A.I.R. 1934 Lah. 109.**

——— **S. 42 (1) (a)**—*Discharge—Right to.*

An insolvent should ordinarily be granted his discharge on payment of eight annas in the rupee. (*Weston.*) RASHID AHMAD KHAN *v.* SHOE DAYAL. **1935 A.M.L.J. 86.**

——— **S. 42—(1) (f)**—*Construction—"Rash and hazardous speculations".*

Dealings by the insolvent which might not turn out well are not necessarily rash and hazardous speculations. (*Weston.*) RASHID AHMAD KHAN *v.* SHEO DAYAL. **1935 A.M.L.J. 86.**

——— **S. 42 (2)**—*Report of Official Receiver in favour of discharge—Onus.*

Where an insolvent applies for discharge and the report of the Official Receiver is in favour of granting a discharge to the insolvents, the onus of proving the contrary lies on the opposing creditors. (*Tek Chand, J.*) TARA SINGH *v* SARMUKH SINGH. **6 I R (Lah.) 239=146 I.C. 532=34 P.L R 991=A.I.R. 1933 Lah. 812.**

——— **S. 43**—*Annulment—Grounds—Expiry of period for discharge.*

The Court cannot annul an adjudication merely on the ground that the period for discharge had expired. (*Jai Lal, J.*) DOLA RAM *v.* PARMA NAND MUL CHAND. **I.R 1932 Lah. 659.**

——— **S. 43**—*Annulment—Grounds—Propriety.*

The penalty of annulment under S. 43 of the Act is hardly appropriate in the case of an insolvent who comes before the Court in time and applies for extension of the time fixed for his application for discharge. (*Reilly and Ananthakrishna Aiyar, JJ.*) VELLACHAMI CHETTI *v.* ARUNACHALAM CHETTI. **I R. 1931 Mad. 486=131 I.C. 150=33 L.W. 448=A.I.R. 1931 Mad. 325=60 M.L.J. 339.**

——— **S. 43**—*Annulment—If automatic—Failure to apply for discharge.*

The order of adjudication is not automatically annulled on the failure of the debtor to apply for discharge within the time fixed by the Insolvency Court. (*Tek Chand and Coldstream, JJ.*) ASA NAND *v.* JUGAL KISHORE. **159 I.C. 667 (1)=37 P.L.R. 144=8 R.L. 413=A.I.R. 1935 Lah. 606.**

——— **S. 43**—*Annulment—Setting aside in collateral proceedings.*

An order of annulment of adjudication though ill-considered, but not made without jurisdiction cannot be

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set aside in collateral proceedings. Where the Insolvency Court extends the period for discharge and in absence of an application for discharge during such period annuls the adjudication, it has jurisduction to do so. If a creditor who is affected by the order does not go in appeal or revision against it but only appeals against decision of the Court that he has failed to prove his debts, the order of annulment of adjudication cannot be set aside in such collateral proceedings and holds good. (*Pollock, A. J. C.*) J. N. MUNDRA *v.* NEMSI RAJPAL & CO. **31 N.L.R. (Supp.) 36=161 I.C. 981=8 R.N. 254=A.I.R. 1935 Nag. 246.**

———**S. 43**—*Annulment—Specific order—Necessity.*

Though the provisions of S. 43, Provincial Insolvency Act, are mandatory, still the annulment of adjudication does not occur as a matter of course, but has to be the subject of a specific order of the Court. (*Das and Brown, JJ.*) WALLY MOHAMED CASSIM *v.* HAJI AYOOB HAJI ABBA & COY. **6 I.R. (Rang.) 20=144 I.C. 869=A I.R. 1933 Rang. 133.**

———**S. 43**—*Annulment—Specific order—Necessity.*

If a debtor fails to apply for an order of discharge within the period specified by the Court, or having made such application fails to appear on the date of hearing, the adjudication does not stand cancelled automatically but the Court must make an express order annulling the order of adjudication. (*Tek Chand and Agha Haidar, JJ.*) ISHAR DAS *v.* MT. FATIMA BIBI **15 Lah 698=153 I.C. 993=7 R.L. 489=A.I.R. 1934 Lah. 468.**

———**S. 43**—*Construction—Provisions, if mandatory.*

Quaere.—Whether provisions of S. 43 are mandatory or merely directory. (*Page, C. J., Das and Sen, JJ.*) JAING BIR SINGH *v.* BANERJEE. **11 Rang. 287=6 I.R. (Rang.) 33=145 I.C. 320=A.I.R. 1933 Rang. 223 (F.B.).**

———**S. 43**—*Effect of annulment—Absence of vesting order—Disposal of insolvent's property in the hands of Official Assignee.*

In a case where no vesting order is made at the time of annulment and no directions are given by the Court to the receiver, the estate with its liabilities reverts to the insolvent and therefore the Official Receiver appointed on the adjudication ceases to represent the estate of the insolvent and the receiver no longer represents the creditors. As soon as an order of annulment coupled with vesting order under S. 37 is made, all acts done by the receiver shall be valid and the property of the insolvent shall vest in such person as the Court may appoint. The consequences of the annulment are that the insolvent does not get back any property which has already been distributed amongst his creditors, and as to such property, as till remains in hand, the Court will, to protect the creditors, make an order vesting it in such person as the Court may appoint with a view to distribute the same. That person may proceed to sell and distribute the property among the creditors then existing and not call for any future claims. He should proceed to divide the property in his hand amongst the creditors, whose claims have been admitted and entered in the schedule. 3 Rang. 201; 52 Mad. 648 and 108 I. C. 603, Ref. (*Haveliwala, A. J. C.*) M. F. NAZARETH, *Re.* **25 S L. R. 367=I.R. 1931 Sind 18=129 I.C 898=A.I.R. 1931 Sind 31.**

———**S. 43**—*Effect of Annulment—Pending application under Ss. 53 and 54—If can be continued.*

The conditions that may be imposed by the Court in passing a vesting order under S. 37 relate to the property of the debtor and not to the property of any other person; and whether the Court vests the property in the

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debtor or in some other person unconditionally or imposes condition when making the order, the Court, after the insolvency has been annulled under S. 43, has no jurisdiction thereafter to pass any order affecting the property of any person other than the debtor. Hence when an insolvency has been annulled under the provisions of S. 43 and the receiver has, before the order of annulment, applied to the Court to have a transfer of property set aside under the provisions of S. 53 or S. 54 of the Act, the Court has no jurisdiction after the order of annulment of the insolvency proceedings to continue the proceedings under S. 53 or S. 54 of the Act. (*Page, C.J., Das and Sen, JJ.*) JAING BIR SINGH *v.* BANERJEE. **11 Rang. 287=6 I.R. (Rang.) 33=145 I.C. 320=A.I.R. 1933 Rang. 223 (F. B.).**

———**S 43**—*Effect of annulment—Termination of insolvency proceedings.*

When an adjudication is annulled under S. 43, the insolvency proceedings automatically come to an end except so far as they are kept alive by orders passed under S. 37. Such " acts " in the insolvency as have not been completed at the annulment remain in that state of incompleteness and do not continue and cannot be continued any further unless the Court directs their continuance. (*Wallace, J.*) BHADRAMMA *v.* PARVATHASAM AYYAVARU. **I.R. 1932 Mad. 745=139 I.C. 574 (2)=1932 M.W.N. 1105=36 L.W. 655=A.I.R. 1932 Mad. 731=63 M.L.J. 414.**

———**S. 43**—*Object of annulment—Safeguards—Omission—Subsequent order vesting property in receiver—Inherent powers.*

The order of annulment, on failure of the insolvent to apply for discharge, is intended to punish the insolvent by withdrawing from him the protection which he gets by the order of adjudication. So an order of annulment without making provision for the protection of the creditors would obviously defeat the ends of justice and lead to an abuse of the process of the Court and the Court is therefore entitled to exercise its inherent, powers by subsequently passing an order vesting the property of the insolvent in some other person. (*Courtney Terrell, C. J. and Mahomed Noor, J.*) CHOUTHMAL BHAGIRATH *v.* JOKHI RAM SURAJMAL **12 Pat. 163=141 I.C. 836=I.R. 1933 Pat. 98=13 Pat. L.T. 775=A.I.R. 1933 Pat. 84.**

———**S. 43**—Powers of Court on annulment—Vesting of properties in particular person—Rights and powers of latter—Power to continue administration and to set aside fraudulent transfers. *See* PROVINCIAL INSOLVENCY ACT, SS 37, 43, 53 AND 54. **69 M.L.J. 364.**

———**Ss. 43 and 28**—*Powers of Court—Expiry of time for applying for discharge—Vesting of property.*

Where the time for applying for discharge has expired, the Court is not bound to vest the property in the insolvent; but it may vest in the receiver for the benefit of the creditors; and even if the receiver sells the property or distributes it among creditors, the insolvent has no right to object to it, though the creditors may do so. (*Dalip Singh, J.*) ASA NAND *v.* JUGAL KISHORE. **147 I.C. 778=6 R.L. 451 (1)=A.I.R. 1933 Lah. 1008.**

———**Ss. 43 and 27**—Time for—Application for discharge—Extension—Powers of Court. *See* PROVINCIAL INSOLVENCY ACT, SS. 27 AND 43—POWERS OF COURT—EXTENSION OF TIME. **55 All. 241=6 I.R. (All.) 138=145 I.C. 668=1933 A.L.J. 117=A.I.R. 1933 All. 230.**

———**S. 43**—*Time for—Application for discharge—Extension—Powers of Court.*

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The period of application for discharge can be extended even after the period originally fixed and it is open to the Court to do so *suo motu* or at the instance of the aggrieved party. 10 Lah. 357; 7 Pat. 375 and 58 Mad. 288, Ref. (*Bhide, J.*) GHAUNS *v.* GANGA RAM. **I.R. 1931 Lah. 559=132 I.C. 223.**

———**S. 43 (1)**—*Annulment—Propriety—Application by receiver under S. 53, pending.*

A person was adjudicated on a creditor's petition on 5th January, 1929, and was directed to apply for the discharge within six months from that date. He applied on 4th July, 1929. Before his application the receiver had already applied under S. 53 questioning the validity of the deeds executed by the insolvent. During the pendency of the application the insolvent applied for his discharge and objections having been filed the following order was made. 'Let it be placed with the application for an order of discharge. Put up when any order is passed on the said application after the disposal of the receiver's application.' Meanwhile on an intermediate date the adjudication was annulled as the insolvent was absent. The creditors appealed questioning the correctness of the orders passed.

Held, that as the Court had not really fixed any date for the hearing of the insolvent's application for discharge and as that application was to be heard only after the disposal of the receiver's application under S. 53 the lower Court was wrong in annulling the order of adjudication. (*Raza and Srivastava, JJ.*) SULTANUDDIN *v.* HAKIM AMINUDDIN. **I R. 1931 Oudh 33 =128 I.C. 273=7 O.W.N. 941=A.I.R. 1930 Oudh 474.**

———**S. 44**—*Applicability—Notice to creditor, if a condition.*

The rule of law, *viz.*, an order of discharge, shall release the insolvent from all debts provable under this act, is not qualified by any rule that the creditor should have notice of the proceedings. The rule is based on a policy of law and not any rule of constructive notice. Notice or no notice, S. 44 comes into play and releases the insolvent from the debt which could undoubtedly have been proved under the Act, even if the omission of the name of creditor be deliberate on the part of the insolvent provided no question of fraud is involved. (*Mukerji and Rachhpal Singh, JJ.*) KUNDAN LAL *v.* NATHU. **55 All. 636=6 I.R. (All.) 329=146 I.C. 765=1932 A.L.J. 1340=A.I.R. 1933 All. 600.**

———**S. 44**—*Refusal of discharge—Fresh application—Bar.*

There is nothing in S. 44 which would justify the view that an application for discharge when refused is refused for ever and that no later application can be made. 22 L.W. 202, Foll. (*Abdul Qadir, J.*) NUR DIN *v.* AMAR NATH **I.R. 1932 Lah. 408=138 I.C. 33=33 P.L.R. 620=A.I.R. 1932 Lah. 478.**

———**Ss. 44 and 34 (2)**—*Release of debts—Limits—Discharge—Prior decree—Decree holder unaware of insolvency—Execution after discharge.*

An insolvent was discharged in 1930. A decree-holder who had obtained a decree in 1929 and who was ignorant of the insolvency proceedings put into execution his decree after the insolvent's discharge.

Held, that the debt was one provable under the Act within the meaning of S. 34 (2) that the fact that the creditor was not informed of the insolvency proceedings, did not prove that the debt was incurred by fraud within the meaning of S. 44 (*b*) and that the insolvent was released from the debt by his discharge. (*Kendall, J.*) PIRTHI RAJ *v.* VISHNU DAS. **6 I.R. (All.) 10=144 I.C. 888=A.I.R. 1933 All. 340.**

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———**Ss. 44 and 34 (2)**—Suit after discharge—Debt contracted between petition and adjudication. *See* PROVINCIAL INSOLVENCY ACT, SS. 34 (2) AND 44. **34 Bom.L.R. 980=A.I.R. 1932 Bom. 511.**

———**S. 44 (2)**—*Bar under—Scope of—Alienation by insolvent of property attached prior to insolvency—Rights of attaching creditor after discharge.*

Appellant sued the respondent and obtained an attachment of his property before attachment and in due course got a decree for money. Respondent alienated the property contrary to the attachment. He was afterwards adjudicated insolvent. Though appellant proved his debt in insolvency he got nothing as no assets were realised by the Official Receiver. Respondent got his discharge and appellant sought to execute his decree against the attached property.

Held, S. 44 (2) was not a bar to such execution and that the insolvent's discharge did not relieve the property in the hands of the transferee from subjection to the claim under the attachment by reason of S. 64 of the C. P. Code. (*Cornish, J.*) DORAISAMI PILLAI *v.* ARUMUGA NAICKER. **8 R.M. 597=42 L.W. 834= 1935 M W. N. 1328=159 I.C. 1027=A.I.R. 1936 Mad. 100=69 M.L.J. 799.**

———**S. 44 (2)**—*Release of debt—Limits—Prior to insolvency debt—Promissory note executed subsequent to discharge—Enforceability.*

Where subsequent to his discharge the insolvent executed a promissory note partly in lieu of a debt incurred prior to his insolvency and partly in lieu of a present advance,

Held, that the promisee was entitled to enforce the contract only to the extent of the present advance and that the previous debt which had ceased to exist was not enforceable in spite of the later note. Effect of order of discharge stated. (*Madhavan Nair, J.*) KATHAYYAN CHETTIAR *v.* GOVINDASWAMI CHETTIAR. **I.R. 1932 Mad. 379 (1)=137 I.C. 320=35 L. W. 449=A.I R. 1932 Mad. 416.**

———**S. 44 (3)**—*Release of surety—Effect of discharge of joint decrees.*

The discharge of an insolvent does not release his surety from liability to be proceeded against in execution of a decree passed jointly against him and the insolvent. (*Pollock, A.J.C.*) NAZUKRAO *v.* JAIWANTRAO & CO. **160 I.C. 603=8 R.N. 189=18 N.L.J. 145.**

———**S. 46**—"*Mutual dealings*"—*Set-off—Principles.*

Where there are mutual dealings between the insolvent and a creditor an account has to be taken of what is due from the one to the other in respect of such dealings and the balance of account and no more is to be paid by the one to the other. The provisions are based on manifest justice. The term "mutual dealings" includes not only the case of a person who owes a debt to the insolvent but also the case of a claim for unliquidated damages. (*Mukerji, Ag.C.J. and Mitter, J.*) KRISHNA CHANDRA BHOUMICK *v.* PABNA DHANABHANDAR CO., LTD. **62 Cal. 298=155 I.C. 991=7 R C. 652=60 C.L.J. 281=39 C.W.N 106=A.I.R. 1935 Cal. 225.**

———**S. 47**—Attaching creditor's rights—Attachment before judgment—Decree—Insolvency of judgment-debtor. *See* C. P. CODE, S. 64—INSOLVENCY SUBSEQUENT. **6 I.R. (Nag.) 55=145 I.C. 695=29 N.L.R. 303=A.I.R. 1933 Nag. 229.**

———**S 47**—Effect of non-compliance with provision of. *See* PROVINCIAL INSOLVENCY ACT, S. 62. **A. I.R. 1935 Sind 57.**

———**S. 47**—*Effect of non-compliance with provisions of.*

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Where a mortgagee decree-holder does not comply with the provisions of S. 47 he cannot apply to have his debt included in the schedule. (*Johnstone, J.*) HAVELI SHAH *v.* MT. ZOHRA JAN. **I.R. 1931 Lah. 844 (2) = 133 I.C. 876 (2) = 32 P.L.R. 698 = A.I.R. 1932 Lah. 84.**

——**S. 47**—*Scope.*

S. 47 does not empower the mortgagee to authorize the Official Receiver to sell property not vested in him. (*Dalip Singh, J.*) RAHIMAN *v.* NAGAR MAL. **147 I.C. 640 (1) = 6 R.L. 414 (1) = 35 P.L.R. 143 = A.I.R. 1933 Lah. 1010.**

——**S. 48 (2)**—*Surplus—Right of creditor to contract rate of interest.*

Where after payment in full of all the debts proved in the insolvency with interest at the contract rate up to the date of adjudication and of interest from the date of adjudication at the rate of 6 per cent. per annum on all such debts under S. 61 (6), there is still a surplus of assets left with the Official Receiver, the creditor of the insolvent to whom money is due under a promissory note providing for a higher rate of interest than the statutory 6 per cent. per annum is entitled to be paid interest at the contract rate for the period between the date of abjudication and date of payment unless there is some special reason for reducing that rate. *Bromley* v. *Goodere*, 36 E.R. 49; Exp. *Morris*, 30 E.R. 266; Exp. *Mills*, 30 E.R. 640; *Bower* v. *Morris*, 41 E.R 525; 1 M.H.C. R. 220; 1 M.H.C.R. 217, Ref. to. (*Reilly and Anantakrishna Ayyar, JJ.*) CHINA VENKATARAJU *v.* LAKSHMANASWAMI. **I.R. 1931 Mad. 825 = 134 I. C. 169 = 1931 M.W.N. 937 = 34 L.W. 143 = A.I.R. 1931 Mad. 729.**

——**S. 49**—*Proof of debt—Direction in decree to prove debt in insolvency—If amounts to.*

A decree was passed in favour of the plaintiff after which the judgment-debtor was adjudicated an insolvent on his application filed pending the suit. The decree contained a direction that the plaintiffs should prove their debt in insolvency. The decree was assigned and the assignee applied to the Insolvency Court to be recognized as the insolvent's c editor and referred to the direction as to proving the debt, in the decree.

Held, that in the above circumstances the debt must be held to have been proved, although the formal mode prescribed by S. 49 was not followed. A.I.R. 1930 Mad. 356, Rel. on. (*Venkatasubba Rao and Madhavan Nair, JJ.*) RAMALINGA AYYAR *v.* SUBBA AYYAR. **6 I.R. (Mad.) 134 = 145 I.C. 764 = A.I.R. 1933 Mad. 168.**

——**Ss. 50 (2) and 33**—Disputes between creditors—Amendment of schedule — Necessary parties. *See* PROVINCIAL INSOLVENCY ACT SS. 33 AND 50 (2). **150 I.C. 960 = 7 R.R. 25 = A.I.R. 1934 Rang. 112.**

——**S. 51**—*Assets—Money deposited pending suit—Decree passed subsequently—Effect of insolvency of debtor.*

Where during the pendency of a suit the defendant agreed and paid a certain amount into the hands of the plaintiff's pleader in part satisfaction of the money to which the plaintiff may become entitled and the plaintiff subsequently obtained a decree but meanwhile another creditor applied filed an application in insolvency and the defendant was adjudged insolvent after the decree in the earlier suit had been made,

Held, that the money deposited with the plaintiff's pleader in the earlier suit did not form part of the assets of the insolvent and the original plaintiff was entitled to appropriate the same towards his decree. (*Mitter and M.C. Ghose, JJ.*) GOURANGA BEHARI BASAK *v.* MONINDRA NATH DAS GUPTA. **6 I.R. (Cal.) 141 =**

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58 C.L.J. 222 = 145 I.C. 826 = 37 C.W.N. 475 = A.I. R. 1933 Cal. 625.

——**S. 51**—*Assets realised after petition—Right to—Successive applications for adjudication — Money realised pending first petition.*

Where pending an insolvency petition the Court directed that the money realised in a Court sale should be kept in deposit but the insolvency application was later on dismissed for a technical defect and a fresh application was preferred and the money was sought to be withheld from payment,

Held, that the money kept in deposit did not come under assets realised after the application and the Insolvency Court had no jurisdiction regarding the same. (*Guha and Bartley, JJ.*) D. N CHATTERJEE AND CO. *v.* RAJ KUMAR MANDAL. **6 I.R. (Cal.) 243 = 146 I.C. 597 (2) = 37 C.W.N. 135 = A.I.R. 1933 Cal. 651.**

——**S. 51**—*Attaching creditor's rights—Adjudication by foreign Court—Prior attachment of movables by British Indian Court,*

In execution of a money decree obtained by the appellant against his judgment-debtors he attached in December, 1926, in the Madras High Court, a preliminary decree for partition which had been passed by the High Court in favour of his judgment-debtors. In September, 1928, an order was made by the District Court at Secunderabad adjudicating as insolvents the said judgment debtors. The question having been raised as to what effect was to be given by the Madras Courts to the adjudication order of the Secunderabad Court in competition with the prior attachment of the decree in the Madras Court,

Held, that the British Cantonment in Secunderabad being part of the Hyderabad State and the property of the Nizam, the District Court at Secunderabad was a 'foreign Court' in relation to the Courts of British India.

Held, further, that the appellant's prior attachment was not avoided by the subsequent adjudication of the foreign Court.

Quaere as to the effect a British Indian adjudication order would have had on the appellant's prior attachment and whether under the Code an attachment creates a lien or charge or confers title. (*Lord Thankerton.*) ANANTAPADMANABHASWAMI *v.* OFFICIAL RECEIVER OF SECUNDERABAD **60 I.A. 167 = 56 Mad. 405 = 57 C.L.J. 418 = 35 Bom.L.R. 747 = 1933 A.C. 394 = 1933 A L.J. 692 = I.R. 1933 P C. 95 = 37 C.W.N. 553 = 142 I C. 552 = 37 L W. 576 = 1933 M.W.N. 374 = A.I.R. 1933 P.C. 134 = 64 M.L.J. 562 (P.C.).**

[Appl. 62 C. 659 (664, 665). **Rel.** 57 M. 616 (622).]

——**S. 51**—*Assets — Attaching creditor's rights realised before adjudication.*

The money of the judgment debtor was deposited with the Court having been realized by attachment before judgment. The decree-holders immediately applied for payment. Instead of making an order straightaway, the court thought fit to issue a notice to the other side as to why the money should not be paid to the decree-holders. Soon after that order and before the hearing of the notice, an application was filed to have the judgment-debtors adjudged insolvents, and an *interim* receiver was appointed, who resisted the decree-holder's application.

Held, that the decree-holders having presented their application for payment of the money with all due diligence were entitled to the said moneys in preference to the receiver. (*Milne, J.C. and Haveliwala, A.J. C.*) FIRM OF TEKCHAND *v.* OFFICIAL ASSIGNEE. **I.R. 1932 Sind 10 = 26 S L.R. 41 = 134 I.C. 1178 = A.I R. 1931 Sind 164.**

PROV. INSOLV. ACT (1920), S. 51.

——S. 51—*Attaching creditor's rights—Assets realized prior to insolvency petition.*

Where assets had been realized prior to the insolvency petition, the rights of the Official Receiver do not prevail over those of an attaching creditor. (*Aston, A.J.C.*) SHIVALDAS MOHANDAS *v.* LALCHAND. **6 I R. (Sind) 104 = 146 I.C. 961 = A.I.R. 1933 Sind 305.**

——S. 51—Attaching creditor's—Rights—Attachment—Subsequent insolvency of debtor. *See* C.P. CODE S. 64—INSOLVENCY SUBSEQUENT. **6 I.R. (Nag) 55 = 145 I.C. 685 = 29 N.L.R. 303 = A.I.R. 1933 Nag 229.**

——Ss. 51 and 52—*Attaching creditor's rights—Decree personally against manager of Hindu joint family and against his son and nephew in respect of interests in the family property—Attachment in execution—Subsequent insolvency of father—Sale in execution—Official Receiver, if entitled to entire sale proceeds.*

Where, after the attachment of the family property of a joint Hindu family in execution of a decree obtained against the manager thereof personally and also against his son and nephew in respect of their shares in the joint family property, the father becomes an insolvent, and the attached property is sold in execution of the decree, the Official Receiver is not entitled to the whole of the sale proceeds, but only to such part of the proceeds, as represents the father's share therein. He cannot claim the remaining part which represents the shares of the insolvent's son and nephew; because once the decree against the son and nephew has been followed by attachment of their interests the normal power of the manager to alienate it for payment of debts from the moment of attachment ceases to be his right; nor is such a right transferred to the Official Insolvency by the vesting on the insolvency of the manager. (*Stone and Pandrang Row, JJ.*) OFFICIAL RECEIVER, EAST GODAVARI, RAJAMUNDRY *v.* IMPERIAL BANK OF INDIA. **59 Mad. 296 = 1936 M W N. 510 = 43 L. W. 35 = 161 I C. 726 = 8 R.M 862 = A.I R. 1936 Mad. 193 = 69 M.L.J. 898.**

——S. 51—*Auction sale—Proceeds only vest in receiver—Sale cannot be set aside.*

When an auction sale has taken place, the property itself no longer vests in the Court or the receiver, but under S. 51 the sale proceeds are at the Receiver's disposal. The sale cannot be set aside on an application by the receiver or the insolvent. (*Kendall, J.*) KISHAN SWARUP *v.* MUKANDI LAL. **6 R.A. 788 = 148 I.C. 891 = 1934 A.L.J. 857 = A.I.R. 1934 All. 252.**

——S. 51—*Construction—"Assets realized in the course of the execution."*

The wording of S. 51 "assets realized in the course of the execution by sale or otherwise" do not necessarily mean assets which have been ordered to be paid to the judgment-creditor. It is sufficient if they are available for immediate distribution 42 Cal. 289; 42 Mad. 692; 16 Bom 91; 28 Bom 264, Rel on.; 44 M 100; 46 M. 500 (F.B.) and 11 I.C. 433, Not Foll. (*Milne, J.C. and Haveriwala, A.J.C.*) FIRM OF TEKCHAND *v.* OFFICIAL ASSIGNEE. **26 S L.R. 41 = I.R. 1932 Sind 10 = 134 I.C. 1178 = A I.R. 1931 Sind 164.**

——S. 51—*Creditor's rights—Moneys realised between dates of presentation and admission of petition.*

The date of admission of an insolvency petition does not relate back to the date of its presentation, in the absence of an express provision to that effect. Hence S. 51, Provincial Insolvency Act, does not deprive the creditors of the fruits of their decrees in respect of moneys which are brought into Court between the date of the presentation of petition for insolvency and the date of its admission. S. 51 refers to the date of admission and not to that of the presentation of the petition. A.I.R. 1931 Sind 65, Rel. on. (*Abdul Rashid, J.*) CHARANJIT SINGH *v.* SARDAR MOHAMMAD. **160 I. C 493 = 8 R.L. 538 = A.I.R. 1935 Lah. 690.**

PROV. INSOLV. ACT (1920), S. 51.

——S. 51 — *Creditor's rights — Moneys realised between presentation and admission of the petition.*

S. 51 refers to the date of admission and not that of presentation of petition. Therefore it does not deprive the creditors of the fruits of their decrees in respect of moneys which are brought into Court between the date of the presentation of a petition for insolvency and the date of its admission. (*Wild, J.C. and Rupchand, A.J.C.*) DAYARAM MENGHRAJ *v.* SAKHIBAI. **I.R. 1931 Sind 47 = 130 I C. 559 = A.I.R. 1931 Sind 65.**

——S. 51—*Decree-holder's rights.*

Where the judgment debtor has applied for insolvency, the decree-holder can under S. 51 of the Provincial Insolvency Act only claim such amount as had been realised in execution before the date of the admission of the insolvency petition (*Bhide, J.*) DUNI CHAND DAULAT RAM *v.* JITA RAM. **149 I C. 127 = 6 R.L. 655 = 35 P.L R. 408 = A.I.R. 1934 Lah. 535.**

——Ss. 51 and 52—*Decree holder's rights—Sale in execution after petition and before adjudication—Expenses—Right to a first charge in respect of.*

In execution of a decree, some of the debts due to the debtor were attached by the decree holder, but before the sale, a petition was filed in insolvency against the debtor and an interim receiver appointed. After the sale, the debtor was adjuged insolvent and the question arose whether the decree-holder was entitled against the Official Receiver to a first charge on the sale proceeds for the costs incurred by him in bringing the property to sale

Held, that S. 52 did not apply to the case, as it dealt with property which has not been brought to sale; that under S. 51, however, the words "benefit of the execution" referred to the net realisations after paying costs and charges and that the decree holder was entitled to the charge claimed by him (*Pakenham Walsh, J.*) SWAMINATHA AIYAR *v.* OFFICIAL RECEIVER OF SOUTH MALABAR. **57 Mad. 330 = 6 I R. (Mad.) 130 = 145 I C 999 = 1933 M.W.N. 996 = 38 L.W. 389 = A.I.R. 1933 Mad. 703 = 65 M L.J. 402.**

——S. 51—Manager's insolvency—Suit on promissory note executed by manager—Maintainability against other members. *See* PROVINCIAL INSOLVENCY ACT, S. 28—HINDU MANAGER'S INSOLVENCY. **6 R.M. 541 = 148 I.C. 831 = 39 L. W. 347 = 1934 M. W. N. 622 = A.I.R. 1934 Mad. 223 = 66 M.L.J. 277.**

——S. 51—Realisation of assets—Date of—Decree-holder permitted to bid and set off—Set off, if automatic with sale. *See* C. P. CODE, O. 21, R. 72. **A.I.R. 1935 Lah. 690.**

——S. 51—*Refusal to stay—Appealability at the instance of judgment debtor.*

The *ad interim* receiver appointed after admisson of an insolvency application but before its adjudication applied to a Court executing a decree against the petitioner in the Insolvency Court to stay a sale of immoveable property. The receiver had been ordered to take possession of the petitioner's property. The trial Court refused to stay the sale but on appeal the District Judge did so.

Held, that the appeal to the District Court by the judgment-debtor and not by the receiver is illegal. (*Addison, J.*) AZIZUDDIN *v.* NIAMAT ALI. **I. R. 1931 Lah. 149 = 129 I.C. 213 = 31 P.L.R. 944 = A.I.R. 1930 Lah. 970.**

PROV. INSOLV. ACT (1920), S. 51.

———**Ss. 51 and 52**—*Vested property—Sale without notice—Annulment.*

Property which had already vested in the Official Receiver was put to sale by the decree-holder without notice to the Official Receiver and was purchased by him. The irregularity was brought to the notice of the executing Court by the judgment-debtor, but the sale was confirmed and delivery of possession was also duly carried out. On a report from the receiver, the insolvency Court annulled the sale and delivery of possession.

Held, it had power to do so. (*Courtney-Terrell, C J. and Saunders, J.*) MUKTI RAM *v.* GANGA RAM. **13 Pat. 30=6 I.R. (Pat.) 246 (2)=146 I. C 252=A. I.R. 1933 Pat. 619.**

———**S. 51 (1)**—*Realisation of—Assets after petition and before adjudication—Rights of Official Receiver*

A decree was being executed against a certain person who became an insolvent. Between the date of the admission of the petition of insolvency and the adjudication of the said petition certain property belonging to the insolvent was sold in execution of a decree by one *A*. The sale proceeds were handed over to *A*. The receiver then applied to the Insolvency Court that *A* should be asked to refund the sale proceeds to the receiver.

Held, that the assets were realized after the date of the admission of the petition so that under S. 51 (1), the Official Receiver was entitled to the assets realized by *A*; and that the Insolvency Court had full power to decide the question which had arisen directly out of the insolvency proceeding before it. A. I. R. 1930 Lah. 39, Diss. from. (*Harrison and Addison, JJ.*) SARDAR MAHAMMAD *v.* LABHU RAM. **14 Lah. 724=34 P.L R. 1076=I.R. 1933 Lah. 507=144 I.C. 580=A.I.R. 1933 Lah. 477.**

[Same case also reported as *Official Receiver* v. *Labhu Ram*]

———**S. 51 (3)**—*Purchaser's rights—Adjudication pending execution—Sale in ignorance of*

Where, pending an execution petition, the judgment-debtor was adjudicated an insolvent but the executing Court in ignorance of the same ordered sale of the properties which were purchased by the decree-holder himself, the execution proceedings are a nullity and the question of good faith of the purchaser is not relevant. (*Bose, A J. C.*) CHUNNILAL *v* VITHAL **I R. 1933 Nag. 17=140 I.C. 835=28 Nag L R. 317=A.I R. 1933 Nag 28.**

———**S. 51 (3)**—Scope—If controls S. 28 (2). *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (2) AND 51 (3). **39 C W.N. 424.**

———**S. 52**—*Absence of receiver—Court not bound to stay.*

The executing Court is not bound to stay its hand if no receiver to whom the attached property can be made over is in existence at the time of the sale. (*Nasim Ali and Henderson, JJ.*) JOGENDRA NATH KUNDU *v.* JOGNESWAR MANDAL. **63 Cal 176=158 I C. 574 =8 R.C. 201=39 C.W.N. 1289=A.I.R. 1935 Cal. 612**

———**S. 52**—*Absence of receiver—Executing Court if can act under.*

Under S. 52 the Court executing the decree is to deliver possession to the receiver and no one else; and where there is no receiver in existence till after the sale in execution of a decree, the Court executing the decree cannot act under S. 52. (*Niamatullah and Rachhpal Singh, JJ.*) SAHU DURGA SARAN *v.* BENI PERSHAD. **6 I.R. (All.) 353=146 I.C. 832=1933 A.L.J. 1342=A.I.R. 1933 All, 559.**

———**S. 52**—*Applicability.*

PROV. INSOLV. ACT (1920), S. 52.

S. 52 applies to a state of affairs antecedent to what is contemplated by S. 5 (1). (*Harrison and Addison, JJ.*) OFFICIAL RECEIVER, JULLUNDUR *v.* LABHU RAM. **14 Lah. 724=I. R. 1933 Lah. 507=144 I. C. 580=34 P.L R. 1076=A.I.R. 1933 Lah. 477.**

———**S. 52**—*Applicability—Immovable property.*

The section applies to all kinds of property under attachment by a Court, including immovable property attached by means of a prohibitory order. 57 Cal. 122, Ref. (*Waller and Krishnan Pandalai, JJ.*) SIVASWAMY ODAVAR *v.* SUBRAMANIA IYER. **55 Mad. 316=136 I. C 338 -I R. 1932 Mad. 290=34 L. W. 908=1931 M.W.N. 1251=A I R. 1932 Mad. 95=62 M L J. 68.**

———**S. 52**—*Application under—When to be made.*

S. 52 as it stands, contemplates presentation of an application not after adjudication but at any early stage, that is to say, as soon as the petition is admitted. (*Shadi Lal, C. J. and Broadway, J.*) MADHO RAM BUDH SINGH *v.* RAJ KISHAN **14 Lah. 63=I.R 1932 Lah. 539=138 I.C. 821=33 P. L. R. 790=A.I.R. 1932 Lah. 471.**

———**S. 52** — Attaching creditor's rights —Hindu father's insolvency—Attachment before judgment of family property—Decree against father and subsequent insolvency of father—Right of receiver to claim delivery of sons' shares. *See* PROVINCIAL INSOLVENCY ACT, S. 28 (3). **156 I.C. 205=A.I R. 1935 Mad. 427.**

———**S. 52** — *Construction — 'Property'—Hindu father's insolvency—What vests in receiver.*

The power of a Hindu father to dispose of the family property to satisfy his legitimate debts is included in the term 'property'. On the insolvency of the father, the powers vests in the Official Receiver who can therefore sell the son's shares for the benefit of the father's creditors. 6 Lah. 493 ; 7 Lah. 376 ; 47 A. 263 ; 49 M. 849 (F.B.), Rel. (*Madgavkar and Barlee, JJ.*) HARIDAS *v.* LALLUBHAI. **55 Bom. 110=I R 1931 Bom 137=129 I.C. 153=32 Bom L.R 1362=A.I R. 1931 Bom. 50**

[**D.** 1934 N. 231 (232). **F.** 29 N.L.R. 159 (163).]

———**S. 52**—*Construction—Property in possession of the Court—Immovable property not attached but sought to be sold.*

Immovable property which has not been attached and which is sought to be sold on the ground that the decree created a charge upon it, cannot be said to be property "in the possession of the Court" within the meaning of S. 52, Provincial Insolvency Act, and an interim receiver cannot apply to have the sale stopped. 62 M. L. J. 68, Cons. (*Venkatasubba Rao and Reilly, JJ*) ETHIRAJALU CHETTIAR *v.* THE OFFICIAL RECEIVER, EAST TANJORE, NEGAPATAM. **56 Mad. 453=I R. 1933 Mad. 167=141 I.C 817=1933 M.W. N. 43=37 L.W. 114=A.I R 1933 Mad. 152=64 M. L.J 119.**

———**S. 52**—*Decree-holder's rights—Admission of insolvency petition—Procedure—Duty of executing Court.*

The mere admission of an insolvency petition does not debar a creditor from executing his decree against the debtor. But where execution of a decree has issued against any property of a debtor and before sale thereof notice is given to the executing Court that an insolvency petition has been admitted the executing Court is bound under S. 52, on application, to direct the property attached to be delivered to the receiver. (*Nasim Ali and Henderson, JJ.*) JOGENDRA NATH KUNDU *v.* JOGNESWAR MANDAL. **63 Cal. 176=158 I.C. 574=8 R. C. 201=39 C.W.N. 1289=A.I.R. 1935 Cal 612.**

———**S. 52**—*Decree-holder's rights — Mortgage in favour of decree-holder during pendency of appeal—*

PROV. INSOLV. ACT (1920), S. 52.

Later adjudication of judgment-debtor— Validity of mortgage.

The High Court in appeal ordered that the decree-holder should stay his execution proceedings against the prooperty of the judgment-debtor on condition that the judgment-debtor executed a registered mortgage deed of the land attached in favour of the decree-holder for his benefit The mortgage deed was accordingly executed. The decree-holder succeeded in the appellate proceedings. In the meantime the judgment debtor was adjudicated an insolvent on the application of the other creditors of the judgment-debtor.

Held, that the decree-holder was the person for whose benefit the mortgage security of the judgment-debtor's attached property had been created and hence he had become a secured creditor and was, therefore, entitled to a preferential right to the security over the other creditors as well as the Official Receiver who had subsequently come in. 56 I.C. 257, 41 Mad. 1053 and 92 I. C. 497, Rel. on. (*Addison, J.*) DAULAT RAM CHHAG MAL *v.* SUNDAR MAL RAM CHAND. **I.R. 1931 Lah. 762=133 I.C. 282=32 P.L.R. 180=A.I.R. 1931 Lah. 298.**

———**S. 52**—*Interim receiver—If comes under section.*

The words "has been admitted" in S. 52 clearly shows that the word "receiver" used later on in the section must include an interim receiver. On the admission of a petition there can be no question of a receiver until the debtor has been declared insolvent. (*Young and Rachhpal Singh, JJ.*) GHANSHYAM DAS HANUMAN PRASAD *v.* JAINARAIN VERMAN. **6 R.A. 695 (2)=148 I.C. 417=A.I.R. 1934 All. 444**

———**S. 52**—*Interim receiver—Position of simple money decree-holder's rights.*

According to S. 52 of the Provincial Insolvency Act, as now amended, there is no difference between a receiver appointed after adjudication and an interim receiver so far as the right of a decree-holder in a simple money decree to execute his decree by attachment and sale of the insolvent's property is concerned ; such property vests in the interim receiver in the same manner as in a receiver appointed after adjudication. A.I.R. 1932 Lah. 471, Foll. (*Jai Lal, J.*) BISHAN SINGH *v.* GURMUKH RAM WADHAWA RAM. **I.R. 1933 Lah. 50=141 I.C. 47=34 P.L.R 41=A.I.R. 1933 Lah. 192.**

———**S. 52**—*Interim receiver—Right to apply.*

The receiver referred to in S. 52 is not only the receiver appointed after adjudication ; the term includes interim receivers. The section, as now amended, contemplates the presentation of an application, not, as it used to do, after adjudication, but at an earlier stage, *i.e.*, after an insolvency petition has been admitted. At that stage, the only receiver that can be in existence for the purpose of applying is an interim receiver. 50 M.L.J. 665, Diss. (*Waller and Krishnan Pandalai, JJ.*) SIVASWAMY ODAYAR *v.* SUBRAMANIA IYER. **55 Mad. 316=136 I.C. 338=I R 1932 Mad 290=34 L.W. 908=1931 M.W.N. 1251=A.I.R. 1932 Mad. 95=62 M.L J. 68.**

[F. 14 L. 63. **R.** 65 M.L.J. 402 (404).]

———**S. 52**—*Interim receiver—Right to apply under.*

Receiver referred to in S. 52 is not the receiver appointed after adjudication and an application under S. 52 by an interim receiver is competent. A.I.R. 1932 Mad. 95 and A.I.R. 1928 Bom 177, Foll. (*Shadi Lal, C.J and Broadway, J.*) MADHO RAM BUDH SINGH *v.* RAJ KISHAN. **14 Lah. 63=I.R. 1932 Lah. 539=138 I.C. 821=33 P.L.R. 790=A.I.R. 1932 Lah. 471.**

———**S. 52**—*Power of Court under—Exercise of—Existence of receiver—Necessity.*

PROV. INSOLV. ACT (1920), S. 52.

The only order which the Court can pass under S. 52 is that the property be delivered to the receiver, so that it follows that the order can only be made if the receiver has already been appointed and clothed by the Insolvency Court with power to take possession of the insolvent's property. A.I.R. 1933 Cal. 150 and A.I.R. 1933 Cal, 561, Dist. (*Nasim Ali and Henderson, JJ.*) JOGENDRA NATH KUNDU *v.* JOGNESWAR MANDAL. **63 Cal. 176=158 I.C. 574=8 R.C. 201=39 C.W.N. 1289=A I.R. 1935 Cal. 612.**

———**S. 52**—*Power of executing Court—Absence of application under section.*

It is only when an application is made to the executing Court for the delivery of the property that the Court is required by S. 52 of the Act to direct the property, if in its possession, to be delivered to the receiver. In the absence of such an application the Court is at liberty to sell the property. There is no provision in the Act for the Insolvency Court to allow or direct a sale by the executing Court with or without any conditions. (*Mosely and Dunkley, JJ.*) P.M. CHETTYAR FIRM *v.* A.K.A. C.T.A.L. CHETTYAR FIRM. **13 Rang 534=158 I. C. 859=8 R.R. 222=A.I.R. 1935 Rang. 317.**

———**S. 52**—*Powers of executing Court— Enquiry into title as between judgment-debtors—Competency.*

In an application under S. 52 of the Provincial Insolvency Act, where the conditions laid down by the section are fulfilled, the executing Court has no other duty to perform than to direct the delivery of the property concerned to the Official Receiver. It is not competent for the Court to investigate or decide questions of title as between the insolvent judgment-debtor and any other co-judgment-debtor (though he be his son) or stranger. (*Pandrang Rao, J.*) THE OFFICIAL RECEIVER, KISTNA *v.* KODANDARAMAYYA **58 Mad. 1056=157 I.C. 826=8 R.M. 166=41 L.W. 698=1935 M W.N. 499=A.I.R. 1935 Mad. 651=68 M.L.J. 681.**

———**S. 52**—*Powers of executing Court—Limits of—Jurisdiction of Insolvency Court.*

Where an insolvency petition is admitted against a debtor, after attachment of his properties in execution of a decree against him, an application under S. 52 of the Provincial Insolvency Act has got to be made to the Court which is executing the decree and it is that Court alone which can direct the property to be delivered to the receiver in order that a sale may be held. The Insolvency Court has no jurisdiction to make an order for sale under the section. (*Mukerji, A.C.J. and S.K. Ghose, J.*) MATHURESH CHAKRABARTY *v.* S. R MILLS CO., LTD **155 I.C. 77 (2)=7 R.C. 555=38 C.W.N. 1122=A.I.R 1935 Cal. 150.**

———**S. 52**—*Principle underlying—Sale with notice of insolvency proceeding—Validity.*

The underlying principle of the Provincial Insolvency Act as gathered from the provisions of S. 52 is that when the Court is apprised of the pendency of an application for insolvency in another Court and of the further fact that such application has been admitted it should stay its hands so far as the execution of the decree by the creditors of the insolvent are concerned. Where a sale is held notwithstanding the apprisement of insolvency proceedings the sale is void. (*Mitter and M. C. Ghose, JJ.*) MAHENDRA KUMAR BAISYA SAHA *v.* DINESH CHANDER ROY. **60 Cal. 696=6 I.R. (Cal.) 120=145 I.C. 597=37 C.W.N. 392=57 C.L.J. 381=A.I.R. 1933 Cal. 561.**

———**S. 52**—*Scope.*

The section is peremptory in its terms. Where, prior to the date fixed for sale of immovable property in execution of a decree, the judgment-debtor had applied to

be adjudicated, and the interim receiver applied to the Court to adjourn the sale, the Court is bound to stay the sale and direct delivery of possession to him. (*Waller and Krishnan Panialai, JJ.*) SIVASWAMY ODAYAR *v.* SUBRAMANIA IYER. **55 Mad 316=34 L.W. 908 =136 I C. 338=I.R. 1932 Mad. 290=1931 M.W.N. 1251=A I R 1932 Mad. 95=62 M.L.J. 68.**

[Rel 60 C. 696 (698).]

——S. 53

Amendment.
Appeal.
Applicability.
Bad faith.
Burden of proof.
Creditor's rights.
Enquiry under.
Fraudulent transfer.
Jurisdiction.
Limitation
Power of Court.
Pre-emptor's rights.
Right to apply.
Scope.
Valuable consideration.

Amendment.

——**S. 53 (as amended by Act X of 1930)**—*Amendment—If retrospective.*

The amendment made by Act X of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force. The amendment has not introduced a new period of limitation, but has only classified the meaning of the old section. 54 M. 12 (F.B.), Foll. (*Havan, C. J. and Krish, J.*) ABDUL HAFIZ *v.* MOOL CHAND. **7 Luck 713=I R. 1932 Oudh 331=138 I.C. 711=9 O.W.N. 529=A.I.R. 1932 Oudh 267.**

——**S. 53 (as amended by Act X of 1930)**—*Amendment—If retrospective.*

So far as the N.-W.-F. Province the law prior to the amendment by Act X of 1930 was that the period of limitation was to be considered from the date of adjudication. The amendment can therefore only affect transactions which came into existence after it and the transaction before the date of amendment and over two years old at the adjudication order is not within time. (*Middleton, J. C. and Saaduddin, A J. C.*) JADA RAM *v.* FAIZULLAH KHAN. **150 I.C. 308=6 R. Pesh. 79=A I.R 1934 Pesh. 30.**

——**S. 53 (as amended by Act X of 1930)**—*Amendment—If retrospective.*

The amendment made by Act X of 1930 has retrospective effect and applies to proceedings pending at the time when the Act came into force. *R* made an application for insolvency on 21st November, 1928, and was adjudged an insolvent on 8th March, 1930. *R* had executed a deed of gift in favour of his son on 17th December, 1927. An application for getting the deed of gift annulled under S. 53 was made on 5th September, 1930.

Held, that the decision of the case was governed by S. 53 as amended by Act X of 1930 54 Mad. 12 (F.B.), Foll. (*Srivastava, J.*) ABDUL HAFIZ *v.* MOOL CHAND. **7 Luck 403=I R. 1932 Oudh 31=135 I.C 383=8 O W.N. 1371=A I.R. 1932 Oudh 77 (1).**

Appeal.

——**Ss 53 and 54**—*Appeal—Additional evidence—Receiver confining his case to one of preference—If can adduce—Fresh evidence in appeal as to inadequacy of price.*

Where in challenging a transfer by the debtor the receiver does not press his case under S. 53 and does not allow the transferee to adduce evidence as to the

fairness of the price but confines his case to one of fraudulent preference under S. 54, he should not be allowed in appeal to adduce fresh evidence as to inadequacy of price. (*Nasim Ali and Henderson, JJ.*) RATAN CHAND *v.* PRAMATHA NATH. **158 I.C. 1017 =8 R.C. 234=A.I R. 1935 Cal. 650.**

——**Ss. 53, 54 and 75**—*Appeal—Application under Ss. 53 and 54—Second appeal.*

In respect of an application under Ss. 53 and 54 of the Provincial Insolvency Act to set aside an alienation as fraudulent, no second appeal lies. 61 M.L.J. 820, Foll. (*Burn, J.*) RAMASAMY NAYAKAR *v.* VENKATASAMI NAICKER. **6 I.R. (Mad.) 144=145 I C. 876=38 L. W. 494=A.I.R. 1933 Mad. 653=65 M.L.J. 298.**

——**Ss. 53, 4 and 75**—*Appeal—Dismissal of application under—Second appeal.*

The Official Receiver filed an application for setting aside a mortgage effected by the insolvent on the ground that the transaction was fictitious and intended to defraud creditors. The application was dismissed and appeal therefrom to the District Judge was also dismissed.

Held, that S 53 was clearly applicable to the case and not S. 4 and that no second appeal lay under S. 75. (*Bhide, J.*) CHET RAM RAMRACHH PAL *v.* ATMA RAM. **6 I.R. (Lah.) 231 (2)=146 I.C. 490=34 P.L. R. 960=A.I R. 1933 Lah. 634.**

——**Ss. 53 and 54**—*Appeal—Dismissal of receiver's application—Adjudication annulled immediately after—Competency of appeal by receiver.*

Any order setting aside a transfer under either of S. 53 or 54 presupposes an existing insolvency. Where soon after the dismissal of an application by the receiver to set aside a transfer the adjudication is annulled, there is no existing insolvency upon which an order in favour of the receiver of the scheduled creditors as such can be based. The receiver had ceased to exist, and hence no appeal is competent by the receiver or a creditor from the order of dismissal. A.I.R. 1933 Rang. 223 (F.B.), Appl. (*Baguley and Mackney, JJ.*) BANK OF CHETTINAD *v.* SAW YU BYAN. **160 I.C. 861=8 R.R. 440=A.I R 1935 Rang. 498.**

——**S. 53**—*Appeal — Order avoiding transfer—Second appeal.*

A second appeal does not lie from an order avoiding a voluntary transfer. (*Macnair, J.C. Jackson and Subhedar, A.J.Cs.*) RAMCHANDRA *v.* RAMCHANDRA. **27 N.L R 179=I.R 1931 Nag 175=134 I.C. 687= A.I.R 1931 Nag. 153 (F.B.).**

——**Ss. 53 and 54**—Appeal—Order under second appeal *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 75—APPEAL. **A.I.R. 1935 Mad. 432.**

——**S. 53**—*Appeal—Order under—Second appeal.*

No second appeal lies from a decision under S. 53 of the Provincial Insolvency Act. 51 Mad. 567; 52 Mad. 337, Rel. on. (*Reilly and Anantakrishna Ayyar, JJ.*) ALAGIRISUBBA NAICK *v.* OFFICIAL RECEIVER, TINNEVELLY. **54 Mad 989=I R. 1931 Mad. 673=132 I C 641=34 L.W. 105=A.I.R. 1931 Mad. 745=61 M.L.J. 820.**

Applicability.

——**S. 53**—*Applicability.*

A transfer to a creditor may be dealt with under S. 53 of the Act. (*Shadi Lal, C.J. and Broadway, J.*) BHAGAT RAM BINDRABAN *v.* PURAN CHAND. **I R 1933 Lah. 19=140 I.C. 598=33 P.L R. 1058= A.I.R. 1933 Lah. 43.**

——**S. 53**—*Applicability—Benami transfer—Annulment of—Power of Court.*

S. 53 deals with a real transfer of the property made by the insolvent whereby title has passed from the insolvent to the transferee. Where, however, a transac-

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tion entered into by the insolvents is alleged to be benami, that the title has not passed from the insolvents to third persons and the property is still the property of the insolvents, there is no real transfer at all within the meaning of S. 53 and the Court has the power to annul the transaction. 22 C. W. N. 704 ; 51 A. 550 (F.B.); 48 All. 414 ; 92 I.C. 573 and 97 I.C. 174, Foll. (*Kulwant Sahay and James, JJ.*) BISESWAR CHAUDHURI *v.* KANHAI SINGH. **11 Pat. 9=I.R. 1932 Pat. 75=136 I.C. 299=13 Pat.L.T. 298=A.I.R. 1932 Pat.129.**

[**R.** 1932 M.W.N. 821 (829). **Rel.** 142 I. C. 97 (99). **F.** 37 Bom. L.R. 478 (480).

———**S. 53**—*Applicability—Court-sale.*

A transfer by a Court-sale in execution is within the scope of S. 53. 110 I. C. 742 and 29 I. C. 217, Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) RAMABRAHMAM *v.* ANDALAMMA. **135 I C. 544=I.R. 1932 Mad. 128=34 L.W. 547=1931 M.W.N. 287=A.I.R. 1931 Mad. 597 (1).**

———**S. 53**—*Applicability—Fictitious transfer.*

S. 53 protects only voluntary transfers made before and in consideration of marriage or made in good faith and for valuable consideration and other proper and valid transactions entered into more than two years before the presentation of a petition in bankruptcy. It does not operate as a bar in the case of a fictitious transfer. A.I.R. 1926 All 470, Rel. on. (*Tapp, J.*) MT. SANJIRAT *v.* RAMCHANDAR GUPTA. **I.R. 1933 Lah. 376 (1)=143 I.C. 630=34 P.L.R. 669=A.I.R. 1933 Lah. 197 (1)**

[**R.** 15 **L.** 294 (300).]

———**S. 53**—*Applicability—Fictitious transfer.*

S. 53 applies only to actual transfers. Where the transfer by way of wakf is found to be fictitious the Court can decide the question of title under S. 4. (*Bisheshwar Nath and Pullan, JJ.*) ABUL HASAN KHAN *v.* RAJBIR PRASAD. **6 Luck. 614=I.R 1931 Oudh 193=14 O.L J. 291=131 I C. 433=8 O.W.N. 147=A.I R. 1931 Oudh 124.**

———**S. 53**—*Applicability—No question of transfer—Power of Court to go into question of ownership.*

S. 53 has clearly no application where the allegation is not that the insolvent has transferred property but that he acquired certain property before his insolvency in the name of somebody else. But the Court can go into the facts and ascertain the true ownership of this property under the powers conferred by S. 4 and declare that the property though standing in the name of another is property which has vested in the Official Receiver and which can be distributed among the creditors. (*Harries, J.*) O. M. CHINE *v.* KISHUN PRASAD. **159 I.C. 616=8 R.A. 465=1935 A L.J. 1158=1935 A.W.R. 1118=A I.R. 1935 All. 982.**

———**Ss. 53 and 54**—*Applicability—Relative scope of—Transfer to creditor—"Good faith"—Test.*

If a transfer in favour of a creditor cannot be annulled under S. 54, the prescribed period of three months having elapsed, that provision cannot be circumvented by recourse being had to S. 53, which allows the longer period of two years. But it does not follow from this that the fact that the transfer is in favour of a creditor necessarily takes it out the reach of S. 53. S. 53, in addition to valuable consideration, insists upon good faith ; if the creditor-transferee is shown not to have acted *bona fide*, the transfer can be annulled. But in considering the question of good faith under S. 53, that element which relates to fraudulent preference, must be eliminated, that is to say, the knowledge for instance on the part of the transferee-creditor that the other creditors are being defrauded does not by itself constitute bad faith. But if, for instance, it is found that the property

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transferred is worth more than the debt and that the creditor intends to get a larger benefit than to what he is entitled, or where, though the sale is ostensibly in favour of a creditor there is some benefit reserved to the debtor, or again, where a third party, *i.e.*, a person other than the transferee, is really intended to take the benefit, the sale will be annulled. Such cases of bad faith tainting the transfer, while being unconnected with the fraudulent preference which comes within the mischief of S. 54 are nevertheless within the ambit of S. 53. (*Venkatasubba Rao, J.*) VENKANNA *v.* OFFICIAL RECEIVER, EAST GODAVARI. **157 I.C. 559=41 L.W. 723=1935 M.W.N. 114=A.I.R. 1935 Mad. 250=68 M L J. 57.**

———**S. 53**—*Applicability — Transfer in favour of creditor.*

(*Obiter.*) S. 53 may also be applied to a transfer in favour of a creditor. (*Madhavan Nair, J.*) MUTHIAH CHETTIAR *v.* OFFICIAL RECEIVER OF THE TINNEVELLY DISTRICT. **I.R. 1933 Mad. 70=141 I.C. 101=1933 M.W.N. 312=37 L.W. 130=A.I.R. 1933 Mad. 185=64 M.L J. 382.**

———**S. 53**—Applicability—Transfer by insolvent more than two years before insolvency—Jurisdiction of insolvency Court to annul. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 53—POWERS OF COURT. **37 Bom.L. R. 478=A.I R. 1935 Bom. 316.**

———**Ss. 53 and 54**—*Applicability — Transfer of whole property.*

The presumption under the English law as to the intent when the whole of the property of the insolvent is transferred is not applicable under the Provincial Insolvency Act, which specifically sets forth that certain intent is necessary to bring the act within the meaning of the statute. (*Das and Brown, JJ.*) O. R. M. M. S.S. CHETTYAR FIRM *v.* MA NGWE YON. **147 I.C. 1195=6 R.R. 195=A.I.R. 1933 Rang. 216.**

Bad faith.

———**S 53**—*Bad faith—Inadequate consideration.*

An inadequate consideration will however be evidence of want of good faith which may itself be sufficient for the setting aside of the transfer. (*Sulaiman, A.C.J. and Banerji, J.*) BANERJI *v.* MANGAL PRASAD. **I.R 1932 All. 287=137 I.C. 235=1932 A L J. 53=A.I.R. 1932 All. 243.**

——**S. 53**—*Bad faith—Inference.*

In the vicissitudes of business, firms do sometimes part with their property to get cash or satisfy old creditors and thus keep their credit in the market. But this does not necessarily imply that they are acting *mala fide*, nor does it lead to the conclusion that the transferees had become aware of their difficulties. (*Mir Ahmad, A.J C.*) RAGHUMAL KISHENDAS, AMRITSAR *v.* OFFICIAL RECEIVER, PESHAWAR. **153 I.C. 90=7 R. Pesh. 67=A.I R. 1934 Pesh. 126.**

———**S. 53**—*Bad faith—Transfer of whole property—Inference.*

If a creditor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt and knowing that there are other creditors, he cannot be said to be acting in good faith. (*Shadi Lal, C.J. and Broadway, J.*) BHAGAT RAM BINDRABAN *v.* PURAN CHAND. **I.R. 1933 Lah. 19=140 I.C. 598=33 P.L R. 1058=A.I.R. 1933 Lah. 43.**

———**S. 53**—*Bad faith—What amounts to—Circumstances to be considered collectively.*

In determining the question of good faith, it is necessary that the facts should be considered in relation to each other and weighed as a whole ; it is a mistake to take each fact, which militates against the *bona fides* of the transfer, separated from the rest of the facts and to

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proceed to demonstrate that it was quite consistent with good faith. 36 M.L.J. 483 (P.C.), Ref. One year before the insolvency, finding himself embarrassed, the insolvent transferred his entire immovable property in favour of the father of his son-in law. The property was at a conservative estimate worth about Rs. 18,000 but the sale price was Rs, 8,000 of which one half was adjusted towards a liability of the insolvent to the vendee. The other half, *i.e.*, the amount of Rs. 4,000, was alleged to have been paid in the presence of the Sub-Registrar but no accounts were produced to show wherefrom it came or where it went. The property was not valued by lots; the title deeds were produced by the insolvent himself; the house was never in vendee's possession but was occupied by a relative of the vendor's wife.

Held, that it was a mere device to withdraw the property from the claims of the creditors and that it should be annulled. (*Shadi Lal, C.J. and Broadway, J.*) DINA NATH *v.* GHULAM AKBAR. **I R. 1933 Lah. 330 (2)=143 I C. 286=34 P.L R. 647=A I.R. 1933 Lah. 631.**

———**S. 53**—*Bad faith—What amounts to—Knowledge of debtor's embarrassed circumstances not sufficient* per se.

The fact that that the creditor was not ignorant of the embarrassed circumstances of his debtor and that there may not be enough left after a transfer in his favour to meet the claims of the other creditors in the event of an adjudication is not sufficient to prove *mala fides*. The considerations that apply for determining *mala fides* under S. 54 are different from those that determine the question under S. 53. 50 Mad. 948, Dist. (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH MALABAR. **150 I.C. 339=6 R.M. 710=39 L W. 449=1933 M.W.N. 1049=A.I.R. 1934 Mad. 294.**

———**S. 53**—*Bad faith—What amounts to—Transfer operating as preference of one creditor.*

Security given by a debtor to his creditor upon a portion of, or upon all, his whole property although the effect of it or even the interest of the debtor in making it may be to defeat an expected execution of another creditor is not fraud within the meaning of S. 53 of the T. P. Act. Apart from the law of Insolvency, preference of one creditor to another is not fraudulent. That would be so even if the transferee had notice that the effect of the transfer would be to remove property from other creditors. (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH MALABAR. **150 I.C. 339=6 R.M. 710=39 L.W. 449=1933 M.W.N. 1049=A.I.R. 1934 Mad. 294.**

Burden of proof.

———**S. 53**—*Burden of proof.*

The burden of proof is on the Official Receiver or the creditors who want to question the sale-deed. *Prima facie* when a registered sale deed is produced the presumption is in favour of the transfer of title under it. (*Ramesam and Madhavan Nair, JJ.*) PULLAYYA *v.* OFFICIAL RECEIVER OF KRISHNA. **143 I.C. 372=I.R. 1933 Mad. 289 (2)=1932 M.W.N. 821=A.I.R. 1933 Mad. 271.**

———**S. 53**—*Burden of proof.*

In a proceeding under S. 53 of the Provincial Insolvency Act, the onus lies upon the applicant to prove that the transfer was not made in favour of a purchaser or an incumbrancer in good faith and for valuable consideration. (*Page, C.J. and Baguley, J.*) H. HAGEMEISTER *v.* U, PO CHO. **12 Rang. 625=153 I.C. 395=7 R.R. 211=A.I.R. 1935 Rang. 53.**

———**S. 53**—*Burden of proof.*

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In a proceeding under S. 53, the onus of proving the absence of good faith and payment of consideration lies on the Official Receiver. (*Mir Ahmad, A. J. C.*) RAGHUMAL KISHENDAS, AMRITSAR *v.* OFFICIAL RECEIVER, PESHAWAR. **153 I.C. 90=7 R. Pesh. 67 =A.I.R. 1934 Pesh. 126.**

———**S. 53**—*Burden of proof.*

Where the Receiver seeks to set aside a transfer under S. 53 the onus is upon him to prove that it was not made in good faith and for valuable consideration. (*Mitter and M.C. Ghose, JJ.*) SUSARMOY SEN *v.* BIBHUTI BHUSAN JANA. **147 I.C. 449=6 R.C. 326=37 C.W.N. 675=A.I.R. 1933 Cal. 689.**

———**S. 53**—*Burden of proof.*

The onus of proving bad faith and want of consideration rests on the persons challenging the transfer. 60 M.L.J. 652 (P.C.), Rel. (*Shadi Lal, C.J. and Broadway, J.*) BHAGAT RAM BINDRABAN *v.* PURAN CHAND. **I.R. 1933 Lah. 19=140 I.C. 598=33 P.L. R. 1058=A.I.R. 1933 Lah 43.**

———**S. 53**—*Burden of proof.*

If a creditor comes to Court and merely alleges that a transfer within two years of insolvency has not been made in good faith and for valuable consideration, the burden of proof rests initially on him. But where detailed allegations are made and some of these allegations are admitted, this is not necessarily the case. In such a case what should be decided is whether the admitted circumstances, any inherent improbability of story, and the evidence are sufficient for a conclusion that the deed was not a genuine transaction. (*Macnair, J.C.*) AMOLOK SAO *v.* DHONDBA. **6 I.R. (Nag.) 26=29 N L.R. 164=144 I.C. 844=A.I.R. 1933 Nag. 188.**

———**S. 53**—*Burden of proof.*

Under S. 53 the onus lies on the person challenging the *bona fides* of the transfer and not on the transferee. (*Macpherson and Agarwala, JJ.*) RAMCHANDRA SONRAM *v.* PRITHWIS NARAYAN SARKAR. **6 I.R. (Pat.) 188=145 I.C. 524 (1)=14 Pat.L.T. 739=A. I R. 1933 Pat. 564 (1).**

———**S. 53**—*Burden of proof.*

Where the receiver challenges a transfer by the debtor under S. 53, the onus is upon him to prove the want of good faith. (*Nasim Ali and Henderson, JJ.*) RATAN CHAND *v.* PRAMATHA NATH. **158 I.C. 1017=8 R.C. 234=A.I.R. 1935 Cal. 650.**

———**S. 53**—*Burden of proof.*

In an application under S. 53 of the Provincial Insolvency Act for annulment of certain transfers by the insolvent, the burden of proving that the transfers were not made in good faith and for valuable consideration lies on the applicants. (*Srivastava, J.*) SAT NARIAN *v.* ALIMUDDIN. **150 I.C. 835=7 R.O. 65=11 O.W. N. 601=A.I.R. 1934 Oudh 368.**

———**S. 53**—*Burden of proof.*

In a proceeding under S. 53 to set aside an alienation by the insolvent the onus of proving that the transfer is hit at by the section is on the Official Receiver. It is not for the transferee to prove that the transfer was made in good faith and for valuable consideration, It is however open to the Official Receiver to rely upon any facts that they may be able no elicit from the witnesses examined on the side of the transferee if they go to prove the allegations under S 53 (*Anantakrishna Aiyar, J.*) SUBRAMANIA CHETTIAR *v.* OFFICIAL RECEIVER OF MADURA. **1932 M.W.N. 59.**

———**S. 53**—*Burden of proof.*

In a petition to annul a mortgage deed the onus of proving the fraudulent nature of transaction lies on the petitioner and not on the mortgagee. 60 M.L.J. 210 (P. C.), Ref. (*Lord, Atkin.*) OFFICIAL RECEIVER *v.* P.L.

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K.M.R.M. CHETTYAR FIRM. **58 I.A. 115=9 Rang. 170=53 C L.J 373=1931 A.L J. 444=1931 M W. N. 615=35 C.W.N. 577=I R 1931 P.C. 159=33 Bom.L R. 867=34 L.W. 36=131 I.C. 767=A I.R. 1931 P.C. 75=60 M.L J 652 (P C.).**

[**Appl.** 60 C 1278 (1280). **F** 60 I. A. 362 (364) (P C.); 1932 M. W. N. 59 (60), 36 L. W. 219 (222); 14 P L.T. 739 (740). **R** 1932 A.L J. 53, 37 C. W N. 675 676); 33 P.L R. 1058 (1059 1933 M. W. N. 689 (694); 12 R. 625 (626); 1934 R. 242. **Rel.** 36 C. W. N. 337 (339). **D.** 61 I.A. 115 124 (P C.)]

———**S. 53**—*Burden of proof—Mistake as to—Interference in revision.*

In proceedings under S. 53, Provincial Insolvency Act, the fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. But where the trial Judge has taken an erroneous view as to the law in regard to onus and where his mind is coloured by that view, and he is thereby disabled from weighing evently the evidence and thus the said party is placed at a disadvantage as the direct result of the trial Judge's error, the High Court can interfere in revision to set aside the judgment of the lower Court. (*Pandalai, J.*) CHIDAMBARAM PILLAI *v.* SUBRAMANIA AYYAR. **140 I C 674=I.R. 1933 Mad. 38=36 L.W. 219=A.I.R. 1932 Mad 513.**

———**S. 53**—*Burden of proof—Mistake as to—Interference in revision.*

Error of law as to burden of proof, was held to be good ground for interference in revision. (*Anantakrishna Ayyar, J.*) SUBRAMANIA CHETTIAR *v.* OFFICIAL RECEIVER OF MADURA. **1932 M W.N 59.**

———**S. 53**—*Burden of proof—Transfer of whole property.*

If the transaction is a real and not a fictitious one, it is not brought within the section, unless the receiver proves that the transferee knew that the transferor was insolvent when the transfer was made, even where the transfer is of the whole available assets. 12 Rang 105 (P C.) Foll. (*Mya Bu and Dunkley, JJ.*) K.P.A P. CHETTIAR FIRM *v.* U MAUNG MAUNG. **153 I.C. 19 (2)=7 R.R. 193=A I R 1934 Rang. 208.**

Creditor's rights.

———**Ss. 53 and 33** (3)—Creditor's rights—Fraudulent transfer annulled—Part of consideration found to have discharged earlier debt—*Pro tanto* proof—Permissibility. *See* PROVINCIAL INSOLVENCY ACT, SS 33 (3) AND 53—PROVABLE DEBT. **34 P.L R. 127=A.I. R. 1933 Lah. 211.**

Enquiry under.

———**S. 53**—*Enquiry under—Power of Official Receiver to take evidence.*

The Official Receiver is not even a Court but a mere executive officer. He is not entitled to take evidence in an inquiry under S. 53 though ordered by the District Judge. So limited is his power and so subject to interference that any person can ask the Court to modify or reverse his decision. A.I.R. 1919 Cal. 965; A I.R. 1925 Mad 381; A.I.R. 1920 Lah. 361 and A.I.R. 1932 Lah. 84, Rel. on. (*Walsh, J.*) VENKATARAMA CHETTY *v.* ANGATHAYAMMAL. **6 I R (Mad) 229 (2) =146 I C. 204=38 L.W. 896=A.I R. 1933 Mad 471.**

———**S 53**—*Enquiry under—Report of receiver—Question of annulment.*

The report of the receiver in insolvency recommending annulment should be treated as an application for action under S. 53 and the matter should be investigated on evidence produced in Court. (*C. C. Ghose and Mallik JJ.*) HRIDAY KRISHNA ADYA *v.* OSMANALI MANDAL. 58 Cal. 1352=I.R. 1932 Cal. 191=136 I.C. 143=A.I.R.1932 Cal. 151.

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———**S. 53**—*Enquiry under—Subsequent annulment of adjudication—Effect.*

An enquiry under S. 33 begun prior to the annulment stops short where it is on the date of the annulment but the Court has the power, at the time of annulling the adjudication to give a direction to continue the enquiry.

Per *Obiter*.—A fresh order at the time of annulment vesting the property in the Official Receiver may imply a direction to him to continue an enquiry (under S. 53 or S. 54) on which he had already embarked but it would certainly be more satisfactory from the legal point of view if such a fresh direction is given in express terms. (*Wallace, J.*) BHADRAMMA *v.* PARVATASAM AYYAVARU. **I R. 1932 Mad 745=139 I C 574 (2)= =36 L W 655=1932 M W.N. 1105=A.I.R. 1932 Mad. 731=63 M L.J. 414.**

Fraudulent transfer.

———**S. 53**—*Fraudulent transfer*—Bona fides—*Test*—*Transferee creditor not aware of other creditors—Value of property not greater than amount of debts.*

A debtor being indebted to a creditor in a large sum of money, effected a settlement with the latter under which, the debtor transferred to the creditor some jewellery and also immovable property by way of mortgage. The value of the property transferred was not shown to be greater than the value of the debts released by the creditor. Nor was the creditor aware of any other claims by other creditors against the debtors. Ten months later a petition in insolvency was filed and the debtor was adjudicated an insolvent.

Held, that the transfer was *bona fide* and for valuable consideration and not a mere sham and was not liable to be set aside at the instance of another creditor. (*Page, C J and Baguley, J*) H HAGEMEISTER *v.* U PO CHO **12 Rang 625=153 I.C. 395=7 R.R. 211 =A I R 1935 Rang. 53.**

———**S 53**—*Fraudulent transfer—Bulk of consideration shown to be false.*

Where the bulk of the consideration is shown to be fictitious a mortgage by the insolvent in favour of a person other than the creditor is void. (*Bhide, J.*) RADHA KISHEN TIRATH RAM *v.* FATEH MAHOMED. **I R 1932 Lah 355=137 I.C. 800 (1)=33 P.L.R. 905=A I.R. 1932 Lah. 455**

———**S. 53**—*Fraudulent transfer—Circumstances negativing.*

In a petition to annul a mortgage deed under S. 53 it was found that the man who was in charge of the firm business was only the manager of the business and not the principal, that the unchallenged entries in the books bore out his story, that he had advanced the money and had boorrowed the same obviously for the express purpose of being able to lend it to the debtors, and there was no affirmative evidence to the contrary. No plausible method of carrying out the fraud, no plausible motive for such a fraud, was ever really put before the trial Judge at all, nor was it explained how it could be that these debtors if they were minded to enter into a transaction which was not a *bona fide* one should approach the manager of the branch business and induce him to enter into a series of forged entries in his book, because for every one of them he would eventually have to account to his principal.

Held, that the transaction uuder the circumstances was one of a real mortgage. (*Lord Atkin*) OFFICIAL RECEIVER *v.* P.L.K.M R M CHETTYAR FIRM. **58 I.A. 115=9 Rang. 170=I.R. 1931 P.C 159=38 Bom. L R 867=34 L W 36=131 I.C. 767=53 C L. J. 373=1931 A L J. 444=1931 M.W N. 615=35 C.W N. 577=A.I.R. 1931 P.C. 75=60 M.L.J. 652 (P.C.)**

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———**Ss. 53 and 54**—*Fraudulent transfer—Mortgage to creditor to secure debt already due and also to secure fresh loan advanced.*

Where a mortgage is effected by a debtor not only to secure a debt already due to the mortgagee but also to secure a fresh loan, and the mortgagee is fully aware of the embarrassed condition of the debtor and does not act in good faith, the mortgage can be annulled even in respect of the fresh loan. To such a case though S. 54 may not be applicable, action can be taken under S. 53 (*Sundaram Chetty, J.*) SUBRAMANIAN CHETTIAR *v.* SUBBARAYA GOUNDAN. **155 I.C. 611=7 R.M. 596 =1934 M.W.N. 801=A.I.R.1935 Mad. 246.**

———**Ss. 53 and 54**—*Fraudulent transfer—Mortgage by insolvent as guardian of minor sons.*

Where a mortgage is executed by a father and his two minor sons who are represented by him as their guardian and the mortgage is effected to the extent of the major portion of the consideration for the purpose of discharging the antecedent debts of the father and the cash consideration received is stated to be for discharging some other debts by him, the purpose for which this mortgage is effected being, such as would justify the guardian of the minors to alienate their shares in the family property, the execution of the deed by the father as guardian of the minor sons would not be invalid. Therefore, in so far as it is an alienation by the two sons of the debtor (insolvent) it cannot be viewed as a transfer by the insolvent for the purposes of Ss. 53 and 54. Hence the mortgage cannot be annulled so far as the two-thirds share of the insolvent's sons in the mortgaged property is concerned. (*Sundaram Chetty, J.*) SUBRAMANIAN CHETTIAR *v.* SUBBARAYA GOUNDAN. **155 I.C. 611=7 R.M. 596=1934 M.W.N. 801=A.I.R. 1935 Mad. 246.**

———**S. 53**—*Test—Fraudulent transfer.*

A deed is void against creditors when the debtor is in a state of insolvency or when the effect of the deed is to leave the debtor without the means of praying his present debts. (*Das and Baguley, JJ.*) A. S. N. FIRM *v.* N. N. FIRM. **147 I.C. 796=6 R.R. 178 (2)=A.I.R. 1933 Rang. 424.**

Jurisdiction.

———**S. 53**—*Jurisdiction—Decision of question under—Forum.*

The Insolvency Court, under the terms of the Provincial Insolvency Act, is the only appropriate tribunal which can determine the question raised under S. 53 of the Act. (*C.C. Ghose and Mallik, JJ.*) HRIDAY KRISHNA ADYA *v.* OSMANALI MANDAL. **58 Cal. 1352=I.R. 1932 Cal. 191=136 I.C. 143=A.I.R. 1932 Cal. 151.**

Limitation.

———**S. 53**—*Limitation—Computation—Period expiring on holiday.*

Quaere.—Whether, when the period of two years prescribed in S. 53 of the Act expires on a holiday, the petition can be presented on the next working day of the Court. (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER SOUTH MALABAR. **150 I.C. 339=6 R.M. 710=39 L.W. 449=1933 M.W.N. 1049=A.I.R. 1934 Mad. 294.**

Power of Court.

———**S. 53**—*Power of Court—Avoiding voluntary transfer.*

An order avoiding a voluntary transfer is authorised by S. 53; it is not necessary to invoke the power under S. 4 and it is not therefore a decision under S. 4. 52 M. 337; A. I. R. 1930 Nag. 272, Foll.; 2 Luck. 651 and 45 M. 434, Dist.; 51 A. 550 (F.B.), Ref. (*Macnair, J.*

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C., Jackson and Subhedar A.J.Cs.) RAMCHANDRA *v.* RAMCHANDRA. **27 N.L.R. 179=I.R. 1931 Nag. 175 =134 I.C. 687=A.I.R. 1931 Nag. 153 (F.B.)**

———**S. 53**—*Power of Court—Court, if bound to annul all transfers*

On an application to avoid transfers the Court is not bound to annul all transactions made by the insolvent which come within the purview of S. 53. (*Baguley and Mackney, JJ.*) U IO SHEIN *v.* MAUNG NGWE HLAING **160 I.C. 480=8 R.R. 391=A.I.R. 1935 Rang. 433.**

———**S. 53**—*Power of Court—Series of alienations—Setting aside original transfer—Others also to be annulled.*

If the original alienation is challenged and the subsequent alienees are also made parties, the subsequent transfers also should be set aside if not under S. 53 at least under S 4 when the original transfer falls through. The subsequent transfers cannot have any greater validity than the original transfer. (*Rhide, J.*) DIT RAM MAL *v.* HANSRAJ. **15 Lah. 349=6 R.L. 627=148 I C. 1013=A.I.R. 1934 Lah. 101 (2).**

———**Ss 53, 54 and 4**—Power of court—Transfer more than two years prior to adjudication—Enquiry into validity. *See* PROVINCIAL INSOLVENCY ACT, S. 4—POWER OF COURT. **142 I.C. 97=A.I.R. 1933 Pesh. 46.**

———**S. 53**—Power of court—Transfer by transferee of insolvent—If can be annulled *See* PROVINCIAL INSOLVENCY ACT, S. 4. **1935 A.W.R. 536=A.I.R. 1935 All. 671.**

——— **S. 53**—*Power of Court—Transfer by transferee from insolvent—If can be annulled*

It cannot be said that a transferee from an insolvent can avoid the operation of S. 53 by merely passing on the property to some other person. The original transfer made by the insolvent is voidable under S. 53 and if once it is declared void as against the Official Receiver, the subsequent transfer by the transferee cannot stand and can be annulled under S. 4 of the Act if not technically under S. 53. (*Addison and Din Mohammad, JJ.*) ATA MOHAMMAD *v.* MEHR CHAND. **16 Lah. 1013=156 I.C. 1018=8 R.L. 63-38 P.L.R. 24=A I.R. 1935 Lah. 368.**

———**S. 53**—*Power of court—Transfer by transferee from insolvent—If can be annulled.*

Even if it can be said that the later transactions by the transferees from the insolvent cannot be considered under S. 53, they cannot be considered only on grounds peculiar to and not as consequential on the main transaction.

Per *Madhavan Nair, J.*—The later transfers can be attacked if all of them are linked together as one transaction. 49 Mad. 403, Expl. (*Ramesam and Madhavan Nair, JJ.*) PULLAVYA *v.* OFFICIAL RECEIVER OF KRISHNA. **143 I C. 372=I R 1933 Mad. 289 (2)=1932 M W.N. 821=A.I.R. 1933 Mad 271.**

———**Ss. 53, 54 and 55**—*Power of Court—Validity of transfers by transferees from insolvent, if can be gone into.*

Generally it is incompetent for the Court in proceedings under S. 53 to inquire into the validity of transfers by transferees from insolvents. But in proceedings properly framed under that section it may be convenient and sometimes necessary to have the parties before the Court whose interests will necessarily be affected by the decision It would indeed be extremely inconvenient and expensive if when transfers are sought to be avoided under Ss. 53 to 55, transferees from those transferees even though the sub-transfers were subsequent to the

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petition or to the order of adjudication, could maintain that they should not be impleaded and that receiver should proceed against them by a separate suit. Such a rule would make proceedings in insolvency practically interminable and still more ineffective than they already are. The power of the Court under S. 4 to decide all questions arising in insolvency is undoubted and it is only a matter of discretion whether the procedure under the Act should be adopted or a suit be directed 52 I. C. 761, Ref. (*Pandalai, J.*) CHIDAMBARAM PILLAI *v.* SUBRAMANIA AYYAR. **140 I.C. 674=I.R. 1933 Mad. 38=36 L.W. 219=A.I.R 1932 Mad. 513.**

Pre-emptor's rights.

———**S. 53**—*Pre-emptor's rights—Original transfer set aside.*

A right of pre-emption is merely one of substitution and not of re-purchase and when the original transfer has been found to be fictitious and has been set aside, the title of pre-emptors cannot be sustained. (*Bhide, J.*) DIT RAM MAL *v.* HANS RAJ. **15 Lah. 349=6 R.L. 627=148 I.C. 1013=A.I.R. 1934 Lah. 101 (2).**

Right to apply.

———**Ss. 53 and 54**—Right to apply—Appointee under S. 37—If can start or continue proceedings. *See* PROVINCIAL INSOLVENCY ACT, SS. 37, 43, 53 AND 54. **69 M L J. 364 (F B.).**

———**Ss 53, 54-A and 58**—*Right to apply—Creditor, if can apply when no receiver appointed.*

S. 54 A does not abrogate S. 58 and must be read subject to the provisions of that section. The words "voidable against the receiver" in S. 53 must, therefore, in view of S. 58 be read as "voidable against the receiver or the Court as the case may be" and a creditor is entitled to move the Court, to take action under S. 53 where a receiver has not been appointed. (Case law discussed.) (*Subhedar, A.J.C.*) SITARAM *v.* MT. NATHIBAI. **30 N.L.R 35=147 I.C. 1253=6 R N. 162=A.I.R. 1933 Nag. 365.**

———**S. 53**—*Right to apply — Transfers upheld against some creditors in proceedings under C. P. Code —Other creditors, if can apply under S. 53.*

The language of S. 53 makes it incumbent on the Court to annul every transfer of property by an insolvent if the transferor is adjudged an insolvent within two years after the date of the transfer, provided the Court comes to a finding that such transfer was not made in good faith or for valuable consideration. Where therefore the transfers by the insolvent are upheld as against some creditors in objection under O. 21, R 58 or in a suit under O. 21 R. 63, the other creditors are not deprived of their right to move the Insolvency Court to proceed under S. 53. (*Subhedar, A.J.C.*) SITARAM *v.* MT. NATHIBAI. **30 N.L.R 35=147 I.C. 1253=6 R. N. 162=A.I.R. 1933 Nag. 365.**

Scope.

———**S. 53**—*Scope.*

By virtue of the important words being exactly the same in S. 55, Presidency Towns Insolvency Act, as in S. 53, Provincial Insolvency Act, if an hypothecation bond comes within the meaning of S 55, Presidency Towns Insolvency Act, it would certainly be void under S. 53, Provincial Insolvency Act. (*Das and Baguley, JJ.*) A. S. N. FIRM *v.* N. N. FIRM **147 I.C. 796=6 R R. 178 (2)=A.I R 1933 Rang. 424.**

———**S 53**—*Scope—Question of title—Jurisdiction of Insolvency Court.*

S. 53 does not deal with the jurisdiction of the in solvency Court but only lays down certain rules of law affecting those transactions which fall within its scope; it does not control or restrict the jurisdiction conferred upon the Court by S. 4 to decide all questions of title.

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Held, that the Insolvency Court had jurisdiction to decide a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent. (*Tek Chand and Agha Haidar, JJ.*) RAM DITTA MAL BHALLA *v.* OFFICIAL RECEIVER, LAHORE. **15 Lah. 294=6 R.L. 478=147 I.C. 1026=35 P.L.R. 271=A. I.R. 1934 Lah. 365.**

———**S. 53**—*Scope.*

Ss 53 and 54 only lay down rules of evidence and are not exhaustive. 51 All. 550 (F.B), Foll. (*Pakenham Walsh, J.*) THE OFFICIAL RECEIVER, WEST GODAVARI, ELLORE *v.* SAGIRAJU SUBBAYYA. **6 I.R (Mad.) 278=146 I.C. 530 (2)=1933 M.W.N. 206=37 L.W. 508=A.I R. 1933 Mad. 527=64 M.L.J 397.**

Valuable consideration.

———**S. 53**—*"Valuable consideration"—Meaning.*

The consideration would be valuable within the meaning of S. 53 if it is not so small as to be negligible when the value of the property is to be taken into account. (*Sulaiman, A. C. J and Banerji, J.*) BANERJI *v.* MANGAL PRASAD. **I.R. 1932 All. 287=137 I.C. 235=1932 A.L.J. 53=A.I.R. 1932 All. 243.**

———**S. 54.**

Appeal.
Burden of proof.
Fraudulent preference.
Fraudulent transfer.
Limitation.
Power of Court.
Right to apply.

Appeal.

———**S 54**—*Appeal—Order refusing to annul transfer.*

All orders under S. 54 are not orders under S. 4 of the Act. An order refusing to annul a transfer is covered by S. 75 (3) and is appealable only with the leave of the Court. (*Jai Lal, J.*) TARA CHAND *v.* BALKISHAN. **141 I.C. 36=I.R. 1933 Lah 53=33 P.L.R. 971=A.I R. 1933 Lah. 242.**

Burden of proof.

———**S. 54**—*Burden of proof.*

In an application by the Official Receiver for annulment of payment made by an insolvent as being fraudulent and void under S. 54, the onus of proof is on the Receiver. (*Otter, J.*) L. P. K. CHETTYAR FIRM *v.* R. K. BANNERJI. **9 Rang. 71=I.R. 1931 Rang. 312=134 I C. 744=A.I.R. 1931 Rang. 136.**

———**S. 54**—*Burden of proof.*

The burden of proving that the transaction comes within the scope of S. 54 and is bad as a fraudulent preference lies heavily on the receiver. (*Rangi Lal, J.*) MONOHAR LAL *v.* KHAN ZAMAN. **A.I.R. 1935 Lah. 167.**

———**S. 54**—*Burden of proof.*

In cases falling under S. 54, Provincial Insolvency Act, the onus lies upon the Official Receiver to establish the necessary elements which would make that section applicable and it is not for the mortgagee to prove that the mortgage in his favour executed by the debtor is not fraudulent. A.I.R. 1928 P.C. 77 and A.I.R. 1928 Lah. 744, Ref. (*Tek Chand, J.*) SUNDAR SINGH SACHAR *v.* BAKHSHI SHIV RAM. **6 I.R. (Lah.) 25=144 I.C. 772=34 P.L.R. 436=A.I.R. 1933 Lah. 354.**

———**S. 54**—*Burden of proof — Fraudulent preference.*

If the Official Receiver sues to set aside a transaction by insolvent on the ground of fraudulent preference, the onus of proving that he intended to give preference to

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the particular creditor over the other creditors lies on the Official Receiver. Where the alienee Bank had already obtained a decree against the debtor and was executing that decree, and it had attached his sheep and goats, and it was then that he settled matters completely with the Bank and mortgaged his house to them.

Held, that pressure had been put upon him by the Bank and it was in order to get his sheep and goats released that he entered into the transaction and it cannot be said that he did it with a view to give the Bank preference over the other creditors. (*Addison, J.*) ANJUMAN DEHI KOT *v.* OFFICIAL RECEIVER, GURDASPUR. **154 I.C. 56=7 R.L. 511=37 P.L.R. 155=A.I.R. 1934 Lah. 994.**

Fraudulent preference.

———**S. 54**—*Fraudulent preference — Essentials—Mortgage to get benefit of further loan.*

A debtor on the eve of his insolvency, being already indebted to a creditor to the extent of about Rs. 3,000 executed a mortgage of all his immovable properties, in his favour for Rs. 5,000, getting a further advance of Rs. 1,200. It was found that the creditor was anxious to get security for his debt, which the debtor refused to give unless he was paid a further sum.

Held, that the dominant motive of the debtor was not to give the creditor a preference, but to get a benefit for himself by getting a further advance, and that the transaction was therefore not a fraudulent preference. (*Venkatasubba Rao, J.*) GANGAPPA *v.* OFFICIAL RECEIVER OF BELLARY. **159 I C. 541=8 R.M. 514=41 L.W. 358=1935 M.W.N. 316=A.I.R. 1935 Mad. 300.**

———**S. 54**—*Fraudulent preference—Intention to prefer—Burden of proof—Shifting of onus.*

In applications under S. 54 the onus is in the first instance on the Official Receiver to prove that the dominant or the substantial or effective, though not necessarily the sole, motive which the insolvent had in view was to prefer a particular creditor. But the *onus* is shifted on to the creditor or transferee to prove the contrary where the insolvent has made the payment or transfer of property, as the case may be, in discharge of an old debt and on the eve of bankruptcy. And where the reason of such payment or transfer remains unexplained it is competent for the Court to hold that a *prima facie* case of fraudulent preference has been established to act on it. (*Addison, J.*) DINA NATH *v* LABHU RAM. **I.R. 1932 Lah. 288=137 I.C. 55=33 P.L.R. 255=A.I.R. 1932 Lah. 321.**

———**S. 54 (1)**—*Fraudulent preference—Intention to prefer—Burden of proof.*

The onus of proving that the transfer by the debtor was made with the intention of preferring one creditor to others lies on Official Receiver. 29 I.C. 128 and 43 Cal. 640, Ref. (*Banerji and King, JJ.*) KASHI NATH *v.* OFFICIAL RECEIVER. **135 I.C. 117=I R. 1932 All. 5=1931 A.L.J. 26= A.I.R. 1931 All. 142 (2).**

———**S. 54**—*Fraudulent preference—Liability to refund—Transfer of outstandings—Outstandings not realised.*

A day after the insolvency of a firm certain entries were made in the account books showing satisfaction in cash of certain creditors who alleged that they had merely taken havalas of certain debtors of the firm. When these entries were made there was the concurrence or at least the connivance of the debtors as well as the creditors of the insolvent firm concerned in the transfers. The satisfaction was found to be an undue preference.

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Held, that as the claims of the creditors were fully satisfied according to the new arrangement to which they were parties, and as the transactions were set aside, the payments must be refunded; and it was immaterial if the creditors had been paid in cash or had chosen to accept the havalas of debtors in full satisfaction. (*Ferrers, J.C. and Mehta, A.J.C.*) NANACK CHAND RAMANAND *v.* OFFICIAL RECEIVER. **I.R. 1933 Sind 136=143 I.C. 628=A.I.R. 1933 Sind 85.**

———**S. 54**—*Fraudulent preference—Mortgage for double the real sum due to near relation.*

The execution of a mortgage, for a sum more than double of what is really due, to a near relative, points both to the dishonest intention of the alienor to give undue preference to his creditor and to the *mala fides* of the alienee who obviously reserves the extra consideration for the concealed benefit of the insolvent and the transaction falls within S. 54. (*Dalip Singh, J.*) RADHE KISHAN TIRATH RAM *v.* FATEH MAHOMED. **147 I.C. 262=6 R.L. 378=35 P.L.R. 171=A.I.R. 1933 Lah. 856.**

———**S. 54**—*Fraudulent preference—Mortgage in pursuance of—Prior agreement.*

The principle that when a mortgage is executed in pursuance of a prior agreement, it cannot be avoided as a fraudulent preference, does not apply to a case where the earlier agreement only contains a vague promise by the debtors to execute a mortgage and does not state what the debtors would offer as security, and the simple mortgage executed by them of practically the whole of their properties amounts to an act of bankruptcy. (*Burn, J.*) RAMASAMI NAVAKAR *v.* VENKATASAMI NAICKER. **6 I.R. (Mad.) 144=145 I.C. 876=38 L.W. 494=A.I.R. 1933 Mad. 653=65 M. L.J. 298.**

———**S. 54**—*Fraudulent preference—Mortgage to relieve pressure of creditor.*

A debtor must not of his own mere motion without pressure or application give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference; but if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security. *Smith* v. *Pilgrip*, (1876) 2 Ch. D. 127, Foll.; 54 M.L.J. 337 (P.C.). Where the debtor mortgaged a portion of his assets which was not a substantial portion to one of his creditors and his object was to relieve himself from the pressure of such creditor so as to enable him to continue to carry on his business and it was found that he had not sold the goodwill of the firm or shops or buildings.

Held, that there was no fraudulent preference. (*Nasim Ali and Henderson, JJ.*) RATAN CHAND *v.* PRAMATHA NATH. **158 I.C. 1017=8 R.C. 234=A.I. R. 1935 Cal. 650.**

———**S. 54**—*Fraudulent preference—Payment shortly before insolvency.*

A payment made by the insolvent to one of the creditors, who is not secured creditor, very shortly before he filed the insolvency petition is an undue preference. (*Mukerji, Ag.C.J. and S.K. Ghose, J.*) PANMAL JESRAJ *v.* J. MACLEOD. **60 C.L.J. 253=A. I.R. 1935 Cal. 190.**

———**S. 54**—*Fraudulent preference—Pressure of suit.*

Transfer effected under pressure of a suit does not come under S. 54. (*Rangi Lal, J.*) MANOHAR LAL *v.* KHAN ZAMAN. **A.I.R. 1935 Lah. 167.**

———**S. 54**—*Fraudulent preference—Presumption of —Proof of fraud.*

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Where it is established by the Official Receiver that the object of the insolvent in making the transfer is to give preference to one of the creditors, the fraudulent character thereof is to be presumed, although the mere fact that preference incidentally resulted from the transfer is not enough to attract the application of S. 54. (*Niamatullah and Bennet, JJ.*) BASHIRAN *v.* MOTI RAM. **I.R. 1933 All. 303=143 I.C. 609=1933 A.L. J. 504=A.I R. 1933 All. 431.**

——**S. 54**—*Fraudulent preference—Proof of intention—Circumstantial evidence.*

Fraud being always secret in its working it is seldom possible for a party to adduce direct evidence in proof of it. It is open to the Court to infer fraudulent intention from circumstantial evidence. (*Hasan, C.J. and Bisheshwar Nath, J.*) AJODHIA PRASAD *v.* SITA RAM. **I.R. 1931 Oudh 421=134 I.C. 1013=8 O.W. N. 1126=A.I.R. 1931 Oudh 405.**

——**S. 54**—*Fraudulent preference—Proof of—Intention of debtor—Necessity.*

The predominating motive of the insolvent is the guiding factor in cases under S. 54 in entering into the transaction sought to be impugned. Such intention must be clearly proved. The mere fact that the effect of a transaction is preference of a creditor who gives further accommodation to a debtor does not amount to a proof of intention to give undue preference to such creditor. Plea of fraudulent preference held not to be made out. (*Jai Lal, J.*) BANSI LAL *v.* SRI RAM, OFFICIAL RECEIVER. **12 Lah.L.J. 316.**

——**S 54**—*Fraudulent preference—Question of fact.*

Whether the object of the transfer is to give preference to one of the creditors is a matter of inference from the circumstances of each case and is essentially a question of fact. (*Niamatullah and Bennet, JJ.*) BASHIRAN *v.* MOTI RAM. **I R. 1933 All. 303=143 I.C. 609=1933 A.L.J. 504=A.I.R. 1933 All. 431.**

——**S. 54**—*Fraudulent preference—Question of fact—Test.*

For the purpose of avoiding a transfer of property under S. 54 of the Act as a fraudulent preference, it must be shown that the dominant or substantial motive of the debtor was to give preference to one creditor over the rest. That is a question of fact to be decided according to circumstances of each case. (*Sundaram Chetty, J.*) SUBRAMANIAM CHETTIAR *v.* SUBBARAYA GOUNDAN. **155 I.C. 611=7 R.M. 596=1934 M.W. N. 801=A.I.R. 1935 Mad. 246.**

——**S. 54**—*Fraudulent preference—Security given in pursuance of—Prior agreement.*

If security is given to a creditor by a debtor in insolvent circumstances, not as an act of preference but in pursuance of a previous contract, it is not an act of fraudulent preference. (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH MALABAR. **150 I C. 339=6 R.M. 710=39 L.W. 449=1933 M.W.N. 1049=A.I.R. 1934 Mad. 294.**

——**S. 54**—*Fraudulent preference—Test.*

In proceedings under S. 54 what the Court has to determine is: was the dominant motive actuating the debtor in making the transfer, a desire to prefer the particular creditor or was it of a different character. (*Rangi Lal, J.*) MANOHAR LAL *v.* KHAN ZAMAN. **A.I R 1935 Lah. 167.**

——**S. 54**—*Fraudulent preference—Test of—Intention to avert business crisis.*

The mere fact that the transfers have resulted in an undue preference in favour of one creditor over the other creditors is not necessarily an indication of the intention of the insolvent to give such preference. The

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real test in each case is the dominant motive of the insolvent. The intention of the transferee is immaterial. Where a mortgage was effected not with the intention of giving preference to a creditor but with a view to avoid a crisis in the business, *held*, that the transfer was not hit at by S. 54. (*Jai Lal, J.*) ROORA MAL *v.* OFFICIAL RECEIVER, KARNAL. **I R. 1932 Lah 302=137 I.C. 6=33 P.L.R. 464=A.I.R. 1932 Lah. 381.**

——**S 54**—*Fraudulent preference—Transfer at suggestion of debtor and not by pressure of creditor.*

Where a transfer came into existence not because of pressure by a creditor but at the suggestion of the debtor and the creditor was only too pleased to advance a little more money in order to secure the debts which may or may not be proved to have been incurred.

Held, that the transfer should be annulled A.I R. 1924 Rang. 308, Dist.; A I.R. 1930 Rang 315, Expl. (*Mya Bu and Baguley, JJ.*) MAUNG PO SAN *v.* RECEIVER OF KO KYAN. **158 I.C. 638=8 R R. 197 =A.I.R 1935 Rang. 316.**

——**S. 54**—*Fraudulent preference—Transfer under threat to sue.*

A mere threat to sue, which, if at all, is the only pressure, will not be such as to change the nature of the debtor's act from a voluntary to an involuntary one especially when he was in expectation of such suits being filed by almost all the creditors (*Sundaram Chetty, J.*) SUBRAMANIAN CHETTIAR *v.* SUBBARAYA GOUNDAN. **155 I C. 611=7 R.M. 596=1934 M.W.N. 801=A.I. R. 1935 Mad. 246.**

——**S. 54**—*Fraudulent preference—Transfer to wife.*

Where a husband transferred property to his wife for a grossly inadequate consideration and the circumstances showed that there was an intention to defeat creditors,

Held, that the plea of fraudulent preference must be upheld. (*Dalip Singh, J.*) KRISHEN LAL *v.* MT. MIRZAN BIBI. **150 I.C. 240=35 P.L.R. 74=6 R L. 843=A.I R. 1934 Lah. 271 (1).**

——**S. 54**—*Fraudulent preference—Voluntary payment to near relation without demand.*

A debtor, who was unable to pay his debts, voluntarily gave over to a near relation of his who was one of the creditors, practically the only movable assets he had, *viz.*, a promissory note duly assigned and some piece-goods. There was no allegation or proof that the latter had made any demand on the debtor or that any pressure had been applied by him on the date of the transaction.

Held, that the transaction was not entered into in good faith, that the dominant intention of the debtor was to give to his relation fraudulent preference over other creditors and that the transaction should be annulled under S. 54. (*Tek Chand, J.*) BODHE SHAH *v.* SARMUKH SINGH. **6 I.R. (Lah.) 144=145 I.C. 874 =A.I.R. 1933 Lah. 620.**

——**Ss. 54 and 56**—*Fraudulent preference—What constitutes.*

To constitute preference within the Statute, it must be shown that the act of the debtor was a voluntary one, that is, without any pressure or compulsion exercised over him to do that which he had done. If the debtor was pressed by certain of his creditors and he in the course of business proceeded to borrow money under a mortgage for the payment of the debts due to those creditors, it cannot be said that that is an act of preferring one creditor or some of his creditors, but the whole body of his creditors. The question of preference is always a question of fact; and if there is anything to indicate that the money was borrowed under the mortgage

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for the purpose of paying off some of the creditors under pressure or there is any evidence to show that this was not a purely voluntary Act on the part of the debtor, then clearly there would be no case of preferential payment, which can be regarded as an act of insolvency on which a petition to adjudicate can be founded. (*Wort and Agarwala, JJ.*) HARDAYAN DASS JOHAR MALL *v.* JAGARNATH MARWARI. **152 I.C. 655 = 7 R.P. 227 = 15 Pat.L.T. 461 = A I.R. 1934 Pat. 526.**

———**S. 54**—*Fraudulent preference—What constitutes—Transfer on the eve of insolvency.*

The use of the word "preference" implies an act of free will, and since an act done under pressure cannot be said to be an act of free-will, it is material in determining whether a transaction amounts to a fraudulent transfer or not to see what was the state of mind of the person making the transfer. Consequently to avoid a transaction as a fraudulent transfer, it is not sufficient that the creditor was preferred ; it must further be shown that the transfer was made with the view of giving him preference over the other creditors. It is not necessary that it should have been the sole view ; it is enough if it is the dominant, substantial, or "operative effectual view." If the view to prefer a particular creditor was only a secondary view, the transaction cannot be treated as a fraudulent preference. In each case what the Court has to find is whether the insolvent has preferred the creditor, with the dominant view of giving him preference over the other creditors. If the dominant view in making the transfer was to protect himself from legal proceedings, the transaction would not be a fraudulent preference. A transfer was made on the eve of insolvency, the creditor paying cash in addition to the prior debt which together formed the consideration of the transfer. The insolvent's position on the date of the transfer was far from desperate, although no doubt several suits were filed against him subsequently.

Held, that the transfer did not constitute a fraudulent preference under S. 54. (*Venkatasubba Rao, J.*) RAMASWAMI IYENGAR *v* CHINNATHAMBI KONE. **140 I. C. 463 = I.R. 1933 Mad. 15 = A.I.R. 1932 Mad. 459.**

Fraudulent transfer.

———**S. 54**—*Fraudulent transfer*—Bona fide *transfer under pressure.*

A *bona fide* transfer not with the object of preferring one creditor to another but on account of the pressure exerted by that creditor for the satisfaction of his debt in the absence of any suggestion as to relationship between the parties or collusion is not fraudulent within S. 54. (*Das and Brown, JJ.*) O R. M. M. S. S. CHETTYAR FIRM *v.* MA NGWE YON. **147 I.C. 1195 = 6 R.R. 195 = A..I.R. 1933 Rang 216.**

———**S. 54**—*Fraudulent transfer — Transfer to* bona fide *creditor under pressure - Validity of.*

If a man is insolvent, and disposes of a portion of his property in favour of a *bona fide* creditor, although upon the eve of bankruptcy, and although this fact be known or believed by both parties it may be a perfectly valid and legal transaction. To render it invalid, there must be a disposition on the part of the insolvent to favour that particular creditor, and this is generally shown by the fact that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent-debtor But if the creditor, although he knows that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yields to that pressure and gives the security, although it may be well known to both, at the same time, that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent, the transaction is perfectly good and valid. *Johnson* v. *Fesenmeyer*, 25 Beav. 88 ; *Smith* v. *Pilgrim*, (1876) 2 Ch D. 127, Foll. (*Mya Bu and Dunkley, JJ.*) K. P. A. P. CHETTIAR FIRM *v.* U MAUNG MAUNG. **153 I.C. 19 (2) = 7 R.R. 193 = A.I.R. 1934 Rang. 208.**

———**S. 54**—*Fraudulent transfer—Transfer under pressure—Burden of proof.*

A transfer by the debtor in favour of a creditor under pressure and threat even though when he is in imminent expectation of bankruptcy is not a transfer giving preference to one creditor over others. The word "preference" imports a free choice and it is necessary for the Official Receiver to prove that the debtor's act was voluntary and not due to extraneous influence such as pressure or threat • 43 Cal. 640, Rel. on. (*Tek Chand, J.*) SUNDAR SINGH SACHAR *v.* BAKHSHI SHIV RAM. **6 I.R. (Lah.) 25 = 144 I.C. 772 = 34 P.L.R. 436 = A.I. R. 1933 Lah. 354.**

Limitation.

———**S. 54**—*Limitation—Commencement—Period of three months—Date of execution or date of registration.*

When a sale by an insolvent is taken as an act of insolvency to ground a petition on it, the period of three months, under S. 54 of the Provincial Insolvency Act, should be calculated from the date on which the deed of sale is registered and not from the date of execution. A valid transfer which can be considered an act of insolvency cannot be said to have been made until the document is registered. (*Madhavan Nair and Bardswell, JJ.*) ISWARAYYA *v.* SUBBANNA. **58 Mad 166 = 40 L.W. 413 = 1934 M W N. 784 = 151 I.C 1054 = 7 R. M. 166 = A.I.R. 1934 Mad. 637 (2) = 67 M L J. 380.**

———**S. 54**—*Limitation — Commencement— Decree more than three months prior to but execution within three months of petition.*

Where a consent decree was passed against the insolvent more than three months prior to the date of the petition, an order for rateable distribution passed in execution cannot be annulled under S. 54 as a fraudulent preference, though the execution proceedings might have been taken within three months before petition. (*Wild, J.C. and Rupchand, A J.C.*) CHAINRAI *v.* DOLARAM. **25 S L R. 371 = 136 I.C. 522 = I.R. 1932 Sind 42 = A.I R 1932 Sind 3.**

———**S. 54**—*Limitation—Commencement— Document executed prior to presentation of insolvency petition but registered subsequently.*

Receiver objected to certain mortgages executed by the insolvent on the ground that the mortgages although executed prior to presentation of petition, being registered subsequent to it by the insolvent, were invalid as the transferor had no transferable interest.

Held, that the insolvency of executant who had executed a document requiring registration did not render registration impossible as he was deprived of transferable interest in the property involved subsequent to the execution of the deed but before its registration. (*Mya Bu and Mackney, JJ.*) C.A.C.A.R. CHETTYAR FIRM *v.* U MAUNG MAUNG. **A.I.R. 1935 Rang. 133.**

———**S. 54**—*Limitation—Commencement—Period of three months—Date of execution of mortgage or date of registration.*

The date of the commencement of the period of three months mentioned in S. 54 of the Provincial Insolvency Act is the date on which the transfer sought to be set aside becomes effective in law namely in the case of a transfer such as a mortgage or sale the date of registration of the deed and not the date of its execution, because even though S. 47 of the Registration Act says

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that when registered, the operation of the document is antedated to the date of its execution, the document does not become effective and title cannot pass until it is registered. (*Mya Bu and Dunkley, JJ.*) U BA SEIN *v.* MAUNG SAN. **12 Rang. 263=151 I.C. 670=7 R. R. 108=A.I.R. 1934 Rang. 216.**

———**S. 54**—*Limitation—Commencement—Period of three months—Mortgage executed more than but registered within three months before adjudication.*

There can be no valid mortgage without registration where the value is more than Rs. 100. So the period of three months should be calculated from the date of registration and not from the date of execution of a deed of mortgage. If it was registered within three months prior to the petition for adjudication, it can be attacked under S. 54, even though executed more than three months before the petition. (*Madhavan Nair, J.*) MUTHIAH CHETTIAR *v.* OFFICIAL RECEIVER OF THE TINNEVELLY DISTRICT. **I.R 1933 Mad. 70=141 I.C. 101=1933 M.W.N. 312=37 L.W. 130=A.I.R. 1933 Mad. 185=64 M.L.J. 382.**

———**S. 54**—*Limitation—Computation—Three months period expiring on a holiday—Extension.*

Where the period of three months prescribed by S. 54 of the Provincial Insolvency Act expired during the vacation and the Official Receiver filed an application under S. 54 of the Act for the annulment of a mortgage on the re-opening day.

Held, that the petition was in time and validly presented. S. 10 of the General Clauses Act did not apply but the same effect was achieved by virtue of S. 4 of the Limitation Act which, by S. 29 (2), was made applicable to proceedings under the Provincial Insolvency Act. The period of three months in S. 9 (1) of the Provincial Insolvency Act is a period of limitation and not a condition precedent and as such is capable of extension. The benefit of this rule is also available to a petition under S. 4 of the Act. (Case law considered.) (*Krishnan Pandalai, J.*) NARAYANA AYYAR *v.* OFFICIAL RECEIVER, SOUTH MALABAR. **150 I.C. 339=6 R.M. 710=39 L.W. 449=1933 M.W.N. 1049=A.I.R. 1934 Mad. 294.**

[**Disappr.** 58 Mad. 794=69 M.L.J. 283 (F.B.)]

Power of Court.

———**Ss. 54 and 54 (a)**—*Power of Court—Order directing creditor to deposit in Court—Absence of petition under S 54-A—If fatal.*

When the Court, on the recommendation of the Official Receiver, that a payment made by the insolvent to a creditor was not really due to him, passes an order directing the creditor to furnish security for the amount held by him pending decision as to the exact amount to be refunded by him, and that in default the same will be realised by distress, the fact that the receiver did not file an application under S. 54-A of the Provincial Insolvency Act does not make it an invalid order. When the point has not been taken by the aggrieved party at a prior stage of the proceedings, when he could have done so, and when all the parties have had notice, and evidence has been fully gone into, the absence of a formal application does not make it necessary to quash the proceedings and to start a fresh enquiry by a proper application. (*Mukerji, Ag.C.J. and S. K. Ghose, J.*) PANMAL JESRAJ *v.* J. MACLEOD. **60 C.L.J. 253=A.I.R. 1935 Cal. 190**

Right to apply.

———**S. 54**—*Right to apply*—Locus standi *of creditor.*

A creditor can make an application under S. 54 for annulment when the receiver refuses to act. (*Sundaram Chetty, J.*) SUBRAMANIAN CHETTIAR *v.* SUBBARAYA

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GOUNDAN. **155 I.C. 611=7 R.M. 596=1934 M.W.N. 801=A.I.R. 1935 Mad. 246.**

———**S. 54**—*Right to apply—Validity of mortgage admitted by some creditors—Official Receiver not bound and can apply under the section.*

The Official Receiver is not bound by the admission of the validity of a mortgage executed by the insolvent by some of his creditors; nor is he precluded on that account from applying under S. 54 to have it annulled as a fraudulent preference (*Tek Chand, J.*) SUNDAR SINGH SACHAR *v.* BAKHSHI SHIV RAM. **6 I.R. (Lah.) 25=144 I.C. 762=34 P.L.R. 436=A.I.R. 1933 Lah. 354.**

———**Ss 54 (4) and 75**—*Appeal.*

A creditor has a right of appeal from an order passed on an application by the Official Receiver under S. 54 (4). 47 All. 849, Foll. (*Dalip Singh, J.*) RADHE KISHAN TIRATH RAM *v.* FATEH MAHOMED. **147 I.C. 262=6 R.L. 378=35 P.L.R. 171=A.I.R. 1933 Lah. 856.**

———**S. 54-A**—Scope—Right to apply—Creditor—Sale of insolvent to wife—Prior adverse claim order against creditor in execution proceedings—If a bar. *See* C. P. CODE, O. 21, R. 63—INSOLVENT COURT. **69 M.L.J. 120.**

———**Ss. 54 A and 58**—Scope—Right to apply. *See* PROVINCIAL INSOLVENCY ACT, SS. 53, 54-A AND 58—RIGHT TO APPLY. **A.I.R. 1935 Nag. 365.**

———**S. 55**—*Applicability—Mortgage executed when old Act was in force.*

It is a well settled rule of interpretation of statutes that in the absence of a provision to the contrary, a new law ought not to be construed so as to interfere with vested rights. Hence where the mortgage had been effected six months before the Act V of 1920 came into force and according to the law then in force the mortgage was valid, notwithstanding the fact that it had been made at a time when a petition for the adjudication of the mortgagor was pending, for it was effected for valuable consideration and was protected by the proviso to S. 38, Act III of 1907, the mortgagee therefore had acquired a valuable right and this right could not be lost by the subsequent change in the law made by the enactment of Act V of 1920 and repeal of Act III of 1907. (*Tek Chand and Abdul Rashid, JJ.*) MELA MAL SHIB DYAL *v.* THAKAR DAS SUD. **155 I.C. 1081=7 R.L. 829=A.I.R 1934 Lah. 819.**

———**Ss. 55, 34 and 61 (1) (a)**—*Protection under—Facts to be proved—Mortgage executed as security for payment of rent due to Government—Rent not paid—Adjudication—Sale of properties by Government without notice to receiver—Validity—Proper course for Crown to pursue.*

A person who had executed a mortgage of his immovable property as security for due payment of rent due to Government, committed default in payment thereof. He was adjudged an insolvent and subsequent to adjudication, the Government sold the property without notice to the receiver who applied to have it set aside.

Held, that if the Government wished to rely upon the protection given by S. 55, Provincial Insolvency Act, to *bona fide* transactions prior to the date of the order of adjudication, it was the duty of the Crown to have pleaded the protection of that section, and further the burden was upon the Crown to show that at the time of the transaction in question it had no notice of the presentation of an insolvency petition.

Held further, that the sale should be set aside but that as the debt due to the Crown was contracted before date of adjudication, the debt due to the Crown was

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provable in the insolvency under the provisions of S. 34 (2), and on proof of the debt the Crown should have priority in the distribution of the property of the insolvent under S. 61 (1) (*a*). Consequently, the proper course for the Crown to pursue was to prove in the insolvency the amount due on account of the rent as a debt, and then to claim priority under S. 61 (1) (*a*). (*Mya Bu and Dunkley, JJ.*) SECRETARY OF STATE *v.* S.C. NIVOGI. **158 I C. 361 (2) = 8 R.R. 166 = A. I.R. 1935 Rang. 273.**

———**S 55 (c)**—*Scope—S. 53, T.P. Act not affected.* The true interpretation of S. 55 (*c*) is that insolvency itself will not invalidate a transfer for value except in cases provided for by the Act itself but the avoidance of transfers under the general law or under S. 53, T. P. Act, is not affected by that section. (*Mukerji and Guha, JJ.*) RADHA KRISHNA THAKUR *v.* OFFICIAL RECEIVER. **59 Cal 1135 = I R 1932 Cal. 611 = 139 I C. 323 = 56 C.L J. 446 = 36 C. W.N. 432 = A.I.R. 1932 Cal. 642.**

———**S. 55, Proviso**—*Applicability—Conditions.* Persons claiming the benefit of the proviso must show that they had no notice of the presentation of the insolvency petition (*Ferrers, J.C. and Mehta, A.J.C.*) NANACKCHAND RAMANAND *v.* OFFICIAL RECEIVER. **I.R. 1933 Sind 136 = 143 I.C. 628 = A.I.R. 1933 Sind 85.**

———**S. 55, proviso**—*Applicability—Conditions.* Under the proviso to S. 55 of the Provincial Insolvency Act a transferee under a transaction made before the order of adjudication is protected only if the transfer is for valuable consideration and the transferee had no notice of the presentation of the insolvency petition. In order to bring his case under the proviso to that section, a mortgagee must show that both these conditions co-exist, but where it is found that he had notice of the fact that the petition of insolvency was pending at the time when the mortgage in his favour was executed, he cannot avail himself of the protection given by the proviso to S. 55. (*Tek Chand and Abdul Rashid, JJ.*) MELA MAL SHIB DAYAL *v.* THAKAR DAS SUD. **155 I C. 1084 = 7 R.L. 829 = A I.R. 1934 Lah 819.**

———**S. 55, proviso**—"*Transaction*"—*Meaning of—Suit and decree against insolvent after petition and before adjudication—If protected.* Where a person files a suit against the insolvent pending an insolvency petition against the latter and obtains a decree against him before the adjudication (the insolvent filing a written statement but subsequently withdrawing his defence) the decree is not a "transaction" covered by S. 55 of the Provincial Insolvency Act. The word "transaction" means one in which the insolvent does something and not a proceeding in which he is merely passive. The act of the insolvent in withdrawing his defence and submitting to a decree, being a purely passive act, is not a "transaction" contemplated or protected by S. 55. (*Beasley, C.J. and Cornish, J.*) ATCHUTA RAMAYYAGARU *v.* OFFICIAL RECEIVER, EAST GODAVARI. **58 Mad. 1032 = 158 I.C. 460 = 8 R.M. 268 = 1935 M.W N 716 = 42 L.W. 220 = A.I.R. 1935 Mad. 817 = 69 M.L.J. 241.**

———**Ss. 56 and 20**—Appointment of interim receiver—His powers to take possession—Insolvent in possession of property as tenant under his mortgagee—Court's power to restore possession to mortgagee *See* PROVINCIAL INSOLVENCY ACT, SS. 20 AND 56. **36 P.L.R. 205 = A I.R. 1934 Lah. 1006.**

———**S. 56 (1)**—*Receiver—Whether 'a representative' of judgment-debtor under S. 47, C. P. Code.*

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The question whether the receiver under the Provincial Insolvency Act is or is not a representative of the judgment-debtor for purposes of S. 47, C. P. Code, depends on the purpose and nature of the application made by him. Where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belonged to him the Court could not sell property vested in him for the judgment-debtor's debt, the receiver is not a representative of the judgment-debtor for purposes of the application under O. 21, R. 90, C. P. Code. Consequently no second appeal lies from the order made on the receiver's application. (*Rankin, C.J. and Pearson, J.*) MOHITOSH DUTTA *v.* RAI SATISH CHANDRA CHAUDHURI. **136 I.C. 593 = I R. 1932 Cal. 225 = 35 C.W.N. 971 = A.I.R. 1932 Cal. 203.**

———**Ss. 56 (1) and 28 (2)**—Vesting in insolvency—Proprietary right in Mahal—Procedure. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (2) AND 56—RECEIVER. **11 O W.N. 1037 = 18 R.D. 430 (2) = 15 L.R. 546 (Rev.).**

———**S 56 (2) (b)**—*Receiver's remuneration—Basis of calculation—Sale of insolvent's property free from mortgage.* Where an insolvent's property subject to a mortgage is sold free from the mortgage and the receiver realizes the purchase-money the whole of it is not assets available for distribution but only such part as remains in his hands after paying-off the mortgage and it is only on such part that the receiver is entitled to remuneration. 5 Rang. 623 and 7 Rang. 126, Foll. (*Mya Bu and Dunkley, JJ.*) MAUNG PO YEIK *v.* POWER. **150 I. C. 960 = 7 R R. 25 = A I R. 1934 Rang. 112**

———**S. 56 (3)**—Receiver—Right to possession—Mortgage suit—Appointment of receiver—Subsequent insolvency of mortgagor—Official Receiver—If supersedes receiver in suit. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (6) AND 56 (3)—RECEIVER—RIGHT TO POSSESSION. **39 C W.N. 384.**

———**S. 56 (3), Proviso**—Receiver—Right to possession—Sale of property by Receiver after third person's objection setting up his title, is dimissed for default—Application by purchaser for delivery of possession—Objection by third person reiterating his title—Power of Court. *See* PROVINCIAL INSOLVENCY ACT (V OF 1920), SS 4 AND 56 (3) PROVISO—POWERS OF COURT. **1935 A.W.R. 497 = 1935 A.L.J. 484 = A I.R. 1925 All. 546.**

———**S. 56 (4)**—*Receiver's conduct—Enquiry into—Power of Court.* A receiver in bankruptcy is a trustee for the creditors and consequently, if he has withheld sums which properly belong to the creditors, then his conduct can be and should be inquired into by the Court at any time, and there is no question of limitation. (*Mya Bu and Dunkley, JJ.*) MAUNG PO YEIK *v.* POWER. **150 I. C 960 = 7 R.R. 25 = A.I.R. 1934 Rang. 112.**

———**S. 57**—*Contract of Official Receiver—Secretary of State, if bound.* When the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. An Official Receiver is appointed by the Government to perform certain duties under the Provincial Insolvency Act. The duties are imposed by statute. The Secretary of State has no liability for whatever the Official Receiver has done in the discharge or supposed discharge of his duty or supposed duty. A person in the position of an Official Receiver has no authority to bind the Secretary of State by his contracts. All that he can do by making a contract is in the first

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place to render the property of the insolvent liable for the performance of the contract, if the receiver has obtained the sanction of the Insolvency Court to the making of the contract and if he has not obtained that sanction, then he is personally liable on the contract. Under no circumstances is there any liability imposed on the Secretary of State in Council by an Official Receiver making a contract. 28 Bom. 314 and 1899 A. W.N. 151, Rel. on. (Case-law discussed.) (*Mukerji and Bennet, JJ.*) RAM SHANKAR *v* SECRETARY OF STATE. **54 All 879 = I.R 1932 All. 574 = 139 I.C. 701 = 1932 A L.J. 842 = A.I R. 1932 All. 575.**

———**S. 57 (4)**—*Gross assets—U. P. Government Notification dated May* 20, 1925—*Sale free of encumbrances—Receiver entitled to omission on gross sales*

The receiver is entitled to charge by reason of Government Notification of May 20, 1925, 5 per cent. commission on the gross amount, that is to say, the entire sale proceeds of the property sold free from the prior mortgage and not only on the value of the equity of redemption. 1930 A.L J. 1497, Foll.

Per *Sulaiman, A C.J*—But for the Notification and its interpretation in the earlier case the proper course would be to treat the equity of redemption alone as forming the assets of the insolvent. (*Sulaiman, A C. J and Smith, J.*) DAVID *v.* JUDGE, SMALL CAUSES, CAWNPORE. **I R 1931 All. 719 = 133 I.C. 607 = 1931 A.L J 670 = A.I.R. 1931 All 723.**

———**S. 57 (4)**—*U. P. Government Notification No. 607, VII-247, dated May* 20, 1925—"*Gross assets*"—*Meaning.*

The expression "gross assets" in the Notification of the Government, dated May 20, 1925, means the entire amount realised by the Official Receiver irrespective of whether the whole was distributable or not among the creditors. (*Mukerji and Bennet, JJ.*) OFFICIAL RECEIVER, *In re* **I.R. 1931 All 311 = 130 I C. 695 = 1930 A L J. 1497 = A.I R. 1931 All. 94.**

———**S. 57 (4)**—*U. P. Government Notification* 359, *VII-277, dated March* 11, 1930—"*Gross assets*"—*Basis of remuneration of Official Receiver—Property sold free from encumbrance.*

The words "gross assets" should be construed with reference to the circumstances of the particular case. The definition of "assets" implies that the interest of the mortgagee is not to be taken into account in considering what are the assets of an insolvent debtor. Where the insolvent and the creditors and the mortgagee came to terms with the result that they agreed that the houses should be sold to the mortgagee for Rs. 3,500, that the mortgagee should pay three annas in the rupee to all the unsecured creditors and keep the balance for himself in full satisfaction of the mortgage, and it was ascertained that this arrangement would enable the mortgagee to keep Rs 3,125 for himself and he would be liable to pay Rs. 375 to the unsecured creditors,

Held, that the remuneration of the Official Receiver as fixed by U. P. Government Notification should be calculated on the sum of Rs. 375. 1931 A.L.J. 670, Cons. (*Mukerji and Sen, JJ.*) OFFICIAL RECEIVER, *In re.* **I R 1932 All. 630 = 140 I.C. 111 = 1932 A. L J. 152 = A.I R 1932 All. 260.**

———**S. 59**—*Hindu father's insolvency—Partition without provision for father's debts—Right of receiver to proceed against son's share.*

If the members of a joint Hindu family governed by the Mitakshara Law choose to divide the family property and to separate without making any arrangement for the payment of the family debts, a creditor of the father is entitled to proceed against the separated shares given to the sons and grandsons of the father, to enforce the payment of the debt, the debt being one which it is the pious duty of the sons and grandsons to pay. The receiver in insolvency of the father can proceed in the insolvency proceedings without recourse to a suit against the shares received by the sons and grandsons in the partition. (Case-law considered.) 50 All. 137, Overr. (*Sulaiman, A.J.C. Mukerji, Banerji, Young and Bennet, JJ.*) BANKEY LAL *v.* DURGA PRASAD. **53 All 868 = 135 I C. 139 = I R. 1932 All. 27 = 1931 A.L.J. 917 = A.I.R. 1931 All. 512 (F.B)**

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———**S 59**—*Hindu manager's insolvency—Partition suit subsequent to insolvency petition—Decree passed—Rights of creditor.*

Held by the *Full Bench*—When the managing member of a joint Hindu family is adjudicated an insolvent on debts contracted as managing member, and other members of the joint Hindu family bring a suit for partition, subsequent to the application in insolvency, the decree for partition does not prevent the receiver from selling property allotted to members of the family other than the insolvent.

Per *Mukerji, J.*—Under those circumstances the receiver is not entitled to sell the property allotted to members of the family other than the insolvent. But the receiver may bring a suit in the Court of proper jurisdiction (not being the Insolvency Court) against the divided members of the family and establish their liability and having done so may proceed to execute the same. (*Sulaiman, A.C.J., Mukerji, Banerji, Young and Bennet, JJ.*) BANKEY LAL *v.* DURGA PRASAD. **53 All 868 = 135 I.C 139 = I.R. 1932 All. 27 = 1931 A L J. 917 = A I.R. 1931 All. 512 (F.B.).**

———**S. 59**—*Liability of receiver—Re-opening of account—Liability to refund excess amount.*

It cannot be said that because a particular amount has been passed by the Insolvency Court, the matter cannot be re-opened at a later stage. If on an examination of the accounts by an auditor certain mistakes and overcharges are pointed out, it is open to the Court to re-open the accounts and make the receiver refund what he has taken without justification. (*Sulaiman, A.C.J. and Smith, J.*) DAVID *v.* JUDGE, SMALL CAUSES, CAWNPORE **I.R. 1931 All. 719 = 133 I.C. 607 = 1931 A. L.J. 670 = A.I.R. 1931 All. 723.**

———**S. 59**—*Mortgage by receiver not duly appointed—Ratification by Court—Effect of*

Where a Receiver not duly appointed effects, under a written order of the Insolvency Court, a mortgage of a part of the property belonging to the insolvent, which is subsequently ratified by the Court, the mortgage is analogous to a judicial sale and is valid. As soon as the order of adjudication is passed, the estate of the insolvent vests in Court and the person effecting the mortgage is merely acting as its agent. (*Tek Chand and Abdul Rashid, JJ.*) SHAHBUDDIN *v.* MT. UMRI. **152 I.C. 638 (2) = 7 R.L. 308 = 35 P.L.R. 717 = A.I.R 1934 Lah. 867.**

———**S 59**—*Powers of receiver—Limits—Execution of conveyance.*

The powers conferred upon the receiver by S. 59 of the Provincial Insolvency Act are exercisable only for the purpose of realising the property of the debtor for distribution among the creditors. Money realised by him by sale of the insolvent's property is divisible among the general body of creditors. The receiver has no power to execute a conveyance which would result in a valuable part of the insolvent's estate being lost to the general body of creditors without the purchase money

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being utilised to satisfy the claims. The receiver cannot effect a sale which would result only in the extinction of the debt of one of the creditors. (*Courtney-Terrell, C. J. and Agarwala, J.*) MAHABIR PRASAD *v.* SHIVANANDAN SAHAY. **15 Pat.L.T. 502=152 I.C. 277=7 R.P. 162=A.I.R. 1934 Pat. 514.**

———**S. 59**—*Powers of receiver—Sale and mortgage.*

Under S. 59 of the Provincial Insolvency Act, the receiver is entitled to sell any part of the property of the insolvent and to give receipts for any money received by him without the permission of the Court. If, however, he wishes to mortgage or pledge any part of the property of the insolvent for the purposes of raising money payment of the debts of the insolvent, he must first obtain the leave of the Court. (*Tek Chand and Abdul Rashid, JJ.*) SHAHABUDDIN *v* MT. UMRI. **152 I.C. 638 (2)=7 R.L. 308=35 P.L.R. 717=A.I.R. 1934 Lah. 867.**

———**S. 59**—*Right to complain—Sale of mortgaged property by Official Receiver.*

Where the mortgaged property of the insolvent is sold by the Official Receiver without reference to the rights of the mortgagee, the mortgagee may or may not have a right to protest against the sale; but this does not give the insolvent a right to protest against the sale. (*Dalip Singh, J.*) ASA NAND *v.* JUGAL KISHORE **147 I.C. 778=6 R.L. 451 (1)=A.I.R. 1933 Lah. 1008.**

———**S. 59**—*Rights of receiver—Expenses incurred without Court's sanction—Reimbursement.*

The receiver is not entitled to claim expenses which he has incurred without the previous sanction of the Court. If, however, he satisfied the Court that any part of the expenses was reasonably incurred and in good faith, he will be entitled to claim credit for the same. (*Sulaiman, A. C. J. and Smith, J.*) DAVID *v.* JUDGE, SMALL CAUSES, CAWNPORE. **I.R. 1931 All. 719=133 I C. 607=1931 A.L J. 670=A.I.R. 1931 All. 723.**

———**S. 59**—*Scope—Powers under S. 4, if controlled.*

S. 59 of the Provincial Insolvency Act does not control the powers of the Court under S. 4 of the Act. (*Gruer, A. J C.*) DHUDHCHAND *v.* SHRIPAD. **158 I.C. 990=8 R.N. 111=18 N.L.J. 14.**

———**S. 59 (c)**—*Powers of receiver—Continuing the lease of business premises—Leave of Court.*

Official Receiver continuing to take on lease the premises in which the printing press of the insolvent is worked, acts under S. 59 (*c*) and must enter into the arrangement with the leave of the Court. (*Mukerji and Bennet, JJ*) RAM SHANKAR *v* SECRETARY OF STATE. **54 All. 879=I R. 1932 All 574=139 I C. 701=1932 A.L J. 842=A.I.R. 1932 All. 575.**

———**S. 59 (d)**—*Liability of receiver—Order for costs—Personal liability.*

In a suit brought by the receiver in insolvency the Court passed an order that he should pay the costs of the defendant.

Held, that in the absence of anything to show that the costs should be recovered only from the assets of the insolvent the receiver was personally liable for the costs. It is however open to the receiver or his heirs to apply to the Insolvency Court for an order that he may be reimbursed out of the estate of the insolvent. (*Sulaiman and Young, JJ*) LACHMAN DAS *v.* LAKSHMI NARAIN. **54 All. 444=I.R. 1932 All 277=137 I.C. 70=1932 A L.J. 226=A I R. 1932 All. 288.**

———**S. 59 (d)**—*Suit by insolvent after adjudication—Competency—Proper course.*

S. 28, sub S. (3) prohibits suits being brought by creditors against the property of the insolvent and also prohibits the commencement of any suit or other legal

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proceeding by a creditor. But there is no specific provision in the Act, under which a suit by an insolvent after his adjudication is, in express terms, prohibited. S. 59 (*d*) implies that the receiver is the proper person to institute, defend or continue suits and proceedings relating to the insolvent's property. Where the property in dispute in a suit is admitted to be or is of such a nature that it must vest in the receiver, a receiver alone is the proper person to institute suits and proceedings. The suit brought by an insolvent behind the back of the receiver would be defective. But where a loan is advanced by the insolvent after his adjudication to the defendant, it does not necessarily follow that the sum of money given by the insolvent was property which had vested in the receiver. The insolvent might be a mere benamidar on behalf of an undisclosed principal, in which case he would be entitled to sue even though an insolvent and the suit would, of course, be for the benefit of the real owner. Again under S. 28 (5) properties exempted by the Code of Civil Procedure or other enactments from liability to attachment and sale in execution of a decree do not vest in the receiver. Such moneys as are exempted, remain the property of the insolvent and if he has lent the money out of such accumulated savings, there would be no bar either to his lending the money to the defendant or to his bringing a suit to recover the amount. At the same time as a receiver, is an officer of the Court acting under the control and direction of the Court and in the interest of the insolvent's creditors, it is the duty of the Court to see that no fraud is perpetrated before its eyes, and that the insolvent does not walk away with moneys which ought to go to the officer of the Court. An appropriate course would seem to be, to implead the Official Receiver in the suit or at least give him notice of the action so that when a decree is passed in favour of the plaintiff, the receiver may be at liberty to take the benefit of the decree and recover the amount due under it, if it can be shown that the property was such as had vested in the receiver. Such inquiry can easily be made either in the execution department or by a separate suit between the receiver and the insolvent. (*Sulaiman, C. J., Thom and Iqbal Ahmad, JJ.*) ABDUL RAHMAN *v.* NIHAL CHAND. **58 All. 132=157 I.C. 41=8 R A 91=1935 A.W.R. 833=1935 A.L J. 709=A I.R 1935 All. 675 (F.B.).**

———**S. 60 (2)**—*Land belonging to member of agricultural tribe—Sale by receiver—Effect of Punjab Alienation of Land Act*, 1900, *S.* 16.

S. 16, Punjab Alienation of Land Act, overrides the provisions of the Provincial Insolvency Act in respect of all matters which are done in "enforcement of the order of adjudication." An act done by the receiver in pursuance of the authority which he derives from the order of adjudication is nothing but an enforcement of the order of adjudication and sale of land belonging to member of agricultural tribe is subject to provisions of S. 16, Punjab Alienation of Land Act. A.I.R. 1926 Lah 264 and A. I. R 1926 Mad. 994 (F.B.), Ref. (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367=I R. 1931 Lah. 291=130 I.C. 419=31 P. L R. 842=A I.R 1930 Lah. 1034.**

———**S. 61**—*Admission of appeal against order under—Inference as to leave.*

Where no application for leave to appeal has been made it cannot be inferred that leave was granted because the appeal was admitted. Leave was granted at hearing and time was extended under S. 5, Limitation Act. (*Dalip Singh, J.*) MANGAT RAI *v.* LALA MOHAN LAL. **149 I.C. 935 (1)=6 R.L. 760 (2)=A.I.R. 1934 Lah. 33.**

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——**S. 61**—*From having different branches—Creditors dealing with foreign branch—Realization of property.*

Where the insolvent firm is only one firm with different branches, there is no provision in the Act that creditors who had dealings with the foreign branch must realize their debts as far as possible from the foreign property before being entitled to share rateably with creditors in British India. (*Dalip Singh, J.*) MANGAT RAI *v.* LALA MOHAN LAL. **149 I.C. 935 (1)=6 R. L. 760 (2)=A.I.R. 1934 Lah. 33.**

——**S. 61**—Priority—Case under Companies Act. *See* COMPANIES ACT, S. 230—QUESTION OF PRIORITY. **134 I.C. 200=32 P.L.R. 367=A.I.R. 1931 Lah. 351.**

——**S. 61 (1) (a)**—Crown debts—Mortgage executed as security for payment of rent due to Government—Rent not paid—Adjudication—Sale of properties by Government without notice to receiver—Validity—Proper course for Crown to pursue. *See* PROVINCIAL INSOLVENCY ACT, SS. 55, 34 & 61 (1) (*a*) AND PROTECTION UNDER. **A.I.R. 1935 Rang. 273.**

——**S. 61 (4)**—*Competition between creditor of insolvent firm and personal creditors of partners in respect of their separate assets.*

The petitioning creditor of an insolvent partnership is not entitled to payment out of the separate assets of the partners in competition with their separate creditors. The exception allowed in English law in his favour should not be allowed in applying the provisions of sub S. (4) of S. 61, Provincial Insolvency Act. This is an Act to consolidate and amend the law relating to insolvency in British India and it must be presumed that the Indian Legislature in passing this Act was aware of the exceptions made by the Courts in England to the English Bankruptcy Act on which the Indian enactment is based. If it was its intention to allow exceptions to the rule as laid down in the Act, we should expect to find a provision to this effect in the Act itself. (*Thom and Kisch. JJ.*) NARAIN DAS DORILAL *v.* MIHIN LAL. **56 All. 1041=1934 A L.J. 676=6 R A. 1001=149 I.C. 935 (2)=3 A.W.R. 481=A.I.R. 1934 All. 521.**

——**S. 61 (4)**—"*Partnership debt*"—*Meaning of—Debt for which one partner is personally liable, if on that account a "separate" debt.*

"Partnership" debt means a debt which is due from a partnership. The mere fact that a partner is personal ly liable for the partnership debt as a partner would not deprive it of its character as a "partnership" debt for the purposes of S. 61 (4). To hold that a debt for which a partner is personally liable ceases to be partnership debt would practically obliterate all distinction between the expressions "partnership" debts and "separate" debts as used in that section. A.I.R. 1930 Bom. 380 and A.I.R. 1928 Sind 40, Dist. (*Rhide, J.*) HANS RAJ KHANNA *v.* RAMDITTA MAL. **I.R. 1933 Lah. 388=143 I.C. 755 (2)=A.I.R. 1933 Lah. 639.**

——**S. 62**—*Retention to meet claims to—Secured creditor not complying with S. 47.*

S. 47 must be read as corollary to and subject to S. 62. Before the Official Receiver is required to make any reserve, the claim must be submitted in the required form and further the Official Receiver cannot reasonably be expected to retain any assets when he is not in a position to know the extent of the debt he is to provide for. Hence where there is no compliance by a secured creditor with S. 47, there is no debt provable in respect of which the Official Receiver can retain moneys in his hands. (*O'Sullivan, A.J.C.*) JAMNADAS VISHINDAS, *In re.* **29 S.L.R. 241=156 I.C. 421=8 R.S. 4=A.I.R. 1935 Sind 57.**

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——**S. 63**—*Re-opening distribution—Negligent creditor—Rights.*

A creditor who has been guilty of delay by not proving his claim in time is not entitled to disturb the distribution of any dividend already made—whether or not it be the first and final dividend—though he may be entitled to be paid the dividend or dividends which he has failed to receive out of any money which may be in the hands of the receiver before the declaration of any future dividend. It is the general policy of the Court not to interfere with the distribution already made in the case where a creditor comes in late. (*O'Sullivan, A J.C.*) JAMNADAS VISHINDAS, *In re.* **29 S.L.R. 241=156 I C. 421=8 R.S. 4=A.I.R 1935 Sind 57.**

——**Ss. 63 and 64**—*Re-opening distribution—Creditor proving claim after first dividend—First becoming final dividend—Rights.*

At the time of the declaration of the first dividend, it is not possible for the receiver to be sure whether it will or will not be the final dividend. Unless it is quite clear that it is the final dividend it is not incumbent on him to give individual notices under S. 64. The unexpected event that the first dividend happened to be the final dividend would not entitle the negligent creditors guilty of delay in proving their debts to disturb the distribution of any dividend already declared, though they may be entitled to be paid the dividend or dividends which they have failed to receive out of any money which may be in the hands of the receiver before the declaration of any future dividend. (*Patkar and Baker, JJ.*) VRIJLAL MANSUKHRAM *v.* CHUNILAL FATECHAND. **55 Bom 200=I R. 1931 Bom. 305=131 I C. 881=33 Bom.L R. 148=A.I.R. 1931 Bom. 210.**

——**S. 63**—*Right of creditor failing to submit claim.*

So long as there are assets to distribute, a creditor may come in and prove. But where such creditor has failed to submit his claim before the schedule of the creditors has been framed, he may only do so upon terms and if no injustice would be caused thereby. What terms the Court will impose must depend upon the circumstances of each case. In re *McMurdo*, (1902) 2 Ch. 684 Rel. on (*Rupchand, J C.*) *In re* AMALRAI GODHUMAL. **147 I C. 410=6 R.S. 153=A I.R. 1933 Sind 370.**

——**S. 63**—*Rights* inter se *of—Creditors preferring claims after declaration of dividend.*

All creditors who prefer their claims after the declaration of the dividend and before the claim of any one of them is held proved, should share rateably in what remains of the wreck to the extent of the dividends already declared. 100 I.C 791, Expl. (*Rupchand, J. C.*) *In re* AMALRAI GODHUMAL. **147 I.C. 410=6 R S. 153=A.I.R. 1933 Sind 370**

——**S. 64**—*Scope—First dividend becoming final dividend—No notice to individual creditors—Right to re open distribution.*

S. 64 does not control the proviso to S. 63 of the Act. So where the first dividend happened to be the final dividend the creditor who comes in late is still subject to the proviso of S. 63 and he is not entitled to disturb the dividends already distributed on the ground that no individual notices were sent by the Receiver to the creditors whose claims had been notified but not proved. 47 Mad. 916, Not foll. (1902) 2 Ch 684; 29 Bom.L.R. 1167, Ref. to; 31 Bom.L.R 35, Dist. (*Patkar and Baker, JJ.*) VRIJLAL MANSUKHRAM *v* CHUNILAL FATECHAND. **55 Bom 200=I R. 1931 Bom. 305=131 I.C. 881=33 Bom.L R. 148=A.I.R. 1931 Bom. 210.**

——**S. 66**—*Maintenance allowance—Right of members of insolvent's family*

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S. 66 only gives discretion to the Court to make an allowance to the insolvent for the maintenance of himself and his family, and does not give any independent right to the members of the family of the insolvent to ask for any separate maintenance. (*Bhide, J.*) MURAD *v.* OFFICIAL RECEIVER, SARGODHA. **160 I C. 794 = 8 R L 605 = 37 P.L.R. 517 = A.I R. 1935 Lah. 952.**

———**S. 66 (2)**—*Reasonable allowance—Discretion of Court.*

The Court is not bound to order that one half of the salary of the insolvent be given to the receiver for distribution among the creditors. It has an absolute jurisdiction to make a further reasonable allowance appropriate to the conditions and circumstances of the insolvent out of the remaining one half which is otherwise divisible among the creditors. Where the insolvent who was getting a salary of Rs. 107 had to maintain five school going children besides his wife and widowed sister and his insolvency was due to unforeseen circumstances and the Court ordered Rs. 20 to be paid to receiver for distribution among creditors.

Held, that the lower Court had exercised its discretion properly and no interference was necessary. A.I.R. 1918 All. 248, Not foll.; A.I.R. 1923 All. 466, Rel on. (*Tek Chand, J.*) RAJ SINGH *v.* OFFICIAL RECEIVER, LAHORE. **160 I.C. 173 = 8 L.R. 503 = A.I.R. 1935 Lah. 810.**

———**Ss. 67 and 37**—*Father's insolvency—Sale of sons' shares—Surplus—Right of sons to*

Where in the exercise of the father's power of disposal, the Official Receiver sold the family properties including the shares of the sons to discharge the debts of the father, the surplus, if any, remaining after the satisfaction of the father's creditors should be returned to the sons. (*Madgavkar and Barlee, JJ*) HARIDAS *v.* LALLUBHAI. **55 Bom. 110 = I R. 1931 Bom. 137 = 129 I.C. 153 = 32 Bom.L.R 1362 = A.I.R. 1931 Bom. 50.**

———**S. 67**—"*Payment in full*"—*Meaning of.*

The words "payment in full" in S. 67 refer not merely to the payment of the creditors at the contract rate up to the date of adjudication and of interest at the statutory rate of 6 per cent. from the date of adjudication under S. 61 (6) but also to the payment of the higher rate, if any, stipulated for in the contract with the creditor from the date of adjudication to the date of payment as indicated in S. 48 (2). (*Reilly and Anantakrishna Ayyar, JJ.*) CHINA VENKATARAJU *v.* LAKSHMANASWAMI. **I R 1931 Mad. 825 — 134 I. C. 169 = 1931 M.W.N. 937 = 34 L.W. 143 = A.I.R. 1931 Mad. 729.**

———**S. 68**—"*Act of receiver.*"

The sale of the property of the insolvent by the receiver is an act of receiver within S. 68. (*Page, C.J., Maung Ba and Dass, JJ.*) VENKATACHALAN CHETTYAR *v.* MURUGESAN SERVAI **9 Rang. 231 = I R. 1931 Rang. 156 = 131 I.C. 732 = A.I.R. 1931 Rang. 122 (S.B.).**

[Rel. 16 L. 173 (176) (F.B.).]

———**Ss. 68 and 75**—*Appeal—Rejection by Judge of—Objection by insolvent.*

An insolvent whose estate has vested in the Official Receiver is not entitled to appeal against an order the Judge rejecting his objection to a sale of his estate by the Official Receiver. (*Beasley. C. J. and King, J.*) VENKATARAMANAYYA *v.* BANGARAVYA. **154 I.C. 96 = 8 R.M. 412 (1) = 40 L.W. 864 = A.I.R. 1935 Mad. 107 = 67 M.L.J. 942.**

———**S. 68**—*Limitation—Applicability of Limitation Act, S. 4.*

By reason of the express terms of S. 29 (2) (*a*) of the Limitation Act, S. 4 of that Act applies to an application under S. 68 of the Provincial Insolvency Act: so that if the last day of limitation for that application happens to be a Sunday, it may be presented on the next day. 5 Rang. 384, Diss.; 34 All. 503, Rel. (*Page, C.J. and Das, J.*) MA THAN MAY *v.* BAILIFF OF THE TOWNSHIP COURT OF KYAUNGGON. **9 Rang. 150 = I R. 1931 Rang. 287 = 134 I.C. 223 = A.I R. 1931 Rang. 209.**

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———**S. 68**—Limitation—Application under S. 4—Limitation of 21 days—If applicable—Application under. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 68. **A.I R. 1935 Lah 60.**

———**S. 68**—*Limitation—Claim contesting validity of attachment order by Court.*

Where a house was attached under an order of the Court and the objector was not challenging the act of the receiver but the order of attachment passed *ex parte*,

Held, that the attachment was not an act or decision of the receiver within the meaning of S. 68 but was a claim put forward by a stranger to the insolvency proceedings setting up his own independent title and it fell within the scope of S. 4. It was therefore open to the Court to enquire into the question of title and adjudicate upon the rights of the objector even though the claim was made 21 days after the attachment. (*Sulaiman and Young, JJ.*) NATHU RAM *v.* MADAN GOPAL. **I R. 1932 All. 242 = 136 I.C. 791 = 1932 A L J. 391 = A.I R. 1932 All. 408**

[Expl. 1934 R. 97 (98).]

———**S. 68**—*Limitation—Motion by insolvent.*

S. 68 empowers the insolvent, when aggrieved by any act of the receiver, to move the Court. The insolvent however must take action within the period provided by the proviso to S. 68. (*Broadway, J.*) SHAKAR KHAN *v.* SANMUKH SINGH. **I.R. 1932 Lah. 219 = 136 I.C. 267 = 33 P L.R. 332 = A I.R. 1932 Lah. 320.**

———**S. 68**—*Limitation—Starting point—Order rejecting proof of claim.*

An order rejecting proof of claim is appealable before notice is issued. When an order has been duly issued and a party is apprised of that order, time will run, even though it is directed that a notice of an order shall be sent. (*Jackson and Butler, JJ.*) VEDAVATHI *v.* SADASIVA RAO. **57 Mad. 1030 = 153 I.C. 167 = 7 R M 327 = 1935 M.W.N. 176 = 40 L.W. 145 = A.I.R. 1935 Mad. 149 = 68 M.L J. 65**

———**Ss. 68 and 4**—Order of receiver on claim petition without jurisdiction—No appeal under S. 68—Application under S. 4 maintainable. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 68—APPLICATION UNDER. **146 I.C. 204 = 38 L.W. 896 = A.I.R. 1933 Mad. 471.**

———**S. 68**—*Power of Court—Auction purchaser—Execution of sale-deed to a different person—Cancellation.*

Where the Official Receiver sells a house belonging to the insolvent at a public auction to a certain person who deposits one-fourth of the price but subsequently, under the direction of the Court, executes a sale-deed in favour of another who makes a higher offer, the Insolvency Court cannot summarily cancel the sale-deed. In such a case the Court should leave the controversy to be settled in more appropriate proceedings, granting leave if necessary for a suit against the receiver and the third person claiming rights under the sale-deed. (*Niamatullah, J.*) KESHAB DEO *v.* RAJENDRA KUMAR BHATTACHARJEE. **7 R A 949 = 155 I C. 563 = 1935 A.W R. 506 = A.I.R. 1935 All. 687.**

———**S. 68**—*Power of Court—Confirmation of sale—Refusal.*

Where the land of an agriculturist was sold by the receiver contrary to the provisions of the Punjab Aliena-

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tion of Land Act and the validity of the same was contested by the insolvent by means of an application filed more than 21 days after the sale, but all the time the Official Receiver's report was before the Judge for confirmation,

Held, that the Judge could refuse to confirm the action of the Official Receiver in having sold the property and that the question whether he acted rightly in entertaining the insolvent's application after 21 days did not therefore arise for decision. (*Jai Lal, J.*) MAHOMED *v.* OFFICIAL RECEIVER. **I.R. 1931 Lah. 669 = 132 I.C. 701 = A.I.R 1931 Lah. 133 (1).**

——**S. 68**—*Power of Court—Setting aside sale—Discretion of Court.*

The Court would not readily set aside the sale held by the receiver of the property of the insolvent unless in the circumstances of the case the Court is satisfied that it would not be fair and just that the sale should stand. No doubt if the fraud or collusion is proved in connexion with the sale that would be a ground upon weich the Court would set aside the sale, or again possibly if there is material irregularity in the conduct of the sale. But the Court is not fettered in its discretion to set aside the sale in any case in which it thinks that the sale was neither a fair nor a just one. 5 Rang. 768, Overr.; 39 Mad. 479; 20 I. C. 683; Ex parte *James*, 9 Ch. A. 609 and 36 Cal. 322 (P. C.). Rel. on. Where the two creditors of the insolvent are the only two prospective bidders, it is neither fair nor reasonable that the receiver should hold the sale in the absence of the other creditor at an earlier hour than that at which sales normally are held and long before the other creditor could reasonably be expected to be present and without making enquiries to ascertain whether the other creditor was at that place or giving him any opportunity to be present when the sale took place. (*Page, C.J., Maung Ba and Das, JJ.*) VENKATACHALAN CHETTIAR *v.* MURUGESAN SERVAI. **9 Rang. 231 = I.R. 1931 Rang. 156 = 131 I C. 732 = A.I.R. 1931 Rang 122 (S.B.).**

——**Ss. 68 and 4**—*Remedy under—Scope—Seizure of property by receiver—Remedies of party aggrieved.*

Where the receiver seizes the property, not without power, alleging it to be the property of the insolvent and if the authority of the Insolvency Court is to be invoked to revise that act of the receiver, this can only be done under S. 68. The remedy under S. 68 is not the only remedy open to a person aggrieved by an act of the receiver A stranger to insolvency proceedings may at his option seek his redress in the ordinary civil Court or he may apply under S. 68 Provincial Insolvency Act but if he takes the latter course he must comply with the terms of the section. He cannot be heard to say, in order to avoid the effect of the plain terms of the proviso to S 68, that he makes his application under S. 4 and not under that section. Though the powers of the Court in deciding such an application are defined in S. 4, it does not mean that the application itself is made under S. 4 and clearly at cannot; for S. 4 contains no provision as to how the Court is to be moved to exercise its powers. (*Mya Bu and Dunkley, JJ.*) MA SEIN NU *v.* U MAUNG MAUNG. **149 I.C. 43 = 6 R R. 278 = A.I.R. 1934 Rang. 97.**

——**S 69**—*Appeal—Refusal to convict.*

No appeal lies from an order refusing to convict a debtor for an offence under S. 69. (*Sulaiman, A.C.J. and Bajpai, J.*) JITA MAL *v.* MADAN LAL. **I.R. 1931 All 763 - 133 I.C. 907 = 1931 A.L.J. 999 = A. I R. 1932 All 4.**

——**S. 69**—*Proceeding under—Necessary conditions.*

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The gist of the offence under S. 69 is that a man whose property is required by law to be distributed among his creditors in the statutory manner is doing something to get his property distributed in another manner. All that is meaningless in the absence of an order of adjudication. Consequently proceedings under S. 69 cannot be taken after a petition for adjudication has been dismissed and it is known that the alleged debtor is not going to be made insolvent at all. An order to prosecute passed under those circumstances is entirely *ultra vires*. 37 I. C. 638. Not foll.; 24 C. W N. 425, Ref; (*Rankin, C.J. and Mukerji, J.*) GANGABISHNU SINGHA *v.* KHAN AND KHAN & CO. **58 Cal. 334 = I.R. 1931 Cal. 838 = 134 I.C. 534 = A.I.R. 1931 Cal. 508.**

——**S. 69 (a)**—*"Wilfully."*

To fulfil the requirements of the word "wilfully" in S. 69 (*a*) it will have to be proved that the account books required to be produced were in the possession or power of the debtor. (*Mukerji and S. K. Ghose, JJ.*) AKHOY CHAND BEGWANI *v.* EMPEROR. **61 Cal. 537 = 149 I C. 352 = 6 R.C. 564 = 35 Cr.L.J. 937 = 38 C.W.N. 642 = 1934 Cr.C. 553 = A.I.R. 1934 Cal. 409.**

——**S. 69 (a) and (b)**—*Conviction under clause different from that charged—Legality.*

On a charge framed under S. 69 (*a*) the Court cannot convict an accused under S. 69 (*b*) as the elements of the offences contemplated by the two clauses are not the same. and so there may be prejudice to the accused if such a procedure is adopted. (*Mukerji and S. K. Ghose, JJ.*) AKHOY CHAND BEGWANI *v.* EMPEROR. **61 Cal. 537 = 149 I.C. 352 = 6 R.C. 564 = 35 Cr L.J. 937 = 38 C.W N. 642 = 1934 Cr.C. 553 = A.I.R. 1934 Cal. 409.**

——**S 69 (a) and (c)**—*Conviction on presumption—Propriety—Concealment of property—Receipt of sums of money shortly after insolvency.*

Where the insolvent was proved to have received certain sums of money within seventeen days after his adjudication, the Court may, under S. 114 of the Evidence Act, persume that the source of the trade which brought those sums into the insolvent s hands consisted of undisclosed assets in his possession at the time of the adjudication and a conviction based on such presumption is not bad in law. (*Curgenven, J.*) RAMACHANDRA NAIDU *v.* EMPEROR. **1931 M.W.N. 1312.**

——**S. 69 (c) (1)**—*Scope.*

S. 69 (*c*) (1) refers to debts incurred before the order of adjudication and not to debts incurred after that order, for the simple reason that the insolvent is supposed to be incapable of incurring debts during his insolvency and is expressly forbidden from doing so by S 72 (*Staples A.J.C.*) ZIBAI *v.* LAXMAN. **27 N.L.R. 304 = I R. 1931 Nag. 189 = 134 I.C. 861 = A.I.R. 1932 Nag. 17.**

——**S. 69 (c) (ii)**—*Concealment—Prosecution—Discretion—Duty of Court.*

Before directing the prosecution of an insolvent under S. 69 (*c*) (*ii*) of the Provincial Insolvency Act, for concealing his assets in the exercise of the Judge's judicial discretion, there should be some sort of proportion between the value of the assets alleged to have been concealed and the indebtedness of the insolvent. In exercising the discretion, a proper sense of proportion ought to be exercised by the Judge in directing the prosecution. Where the debts of the insolvent are very large, and the value of the assets concealed is very trifling, it is not a proper exercise of discretion to order a prosecution. (*Courtney Terrell, C.J. and Dhavle, J.*) JANKI DAS

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MARWARI *v.* MANGI LAL BAJRANG LALL. **159 I.C. 171=8 R.P. 248=16 Pat.L.T. 140=A.I.R. 1935 Pat. 126.**

———**S. 69 (c) (ii)**—*Scope—Fraudulent gift.*

A case of gift fraudulently made by an insolvent with intent to diminish the sum to be divided among his creditors is as much liable to punishment under S. 69 (*c*) (*ii*) as a case of charge or mortgage. The words "made away with" are sufficiently wide to cover cases of gift of immovable property. (*Bisheshwar Nath, J.*) HAR PERSHAD *v.* DARGHAI LAL. **135 I.C. 893=I. R. 1932 Oudh 77=8 O.W.N. 1318=A.I.R. 1932 Oudh 61.**

———**S. 70**—*Jurisdiction — Fraudulent mortgage executed at Bombay—Assets held and creditors prejudiced at Yeotmal.*

The debtor carried on trade at Yeotmal and got involved. His assets were in Amraoti and Yeotmal. He executed a mortgage in favour of the petitioner at Bombay with a view to defeat his creditors. The petitioner was tried by the Insolvency Court at Yeotmal for an offence under S. 69 (*c*) (*i*) of the Provincial Insolvency Act. The jurisdiction of the Court being challenged,

Held, (*i*) that the jurisdiction to try the offence should be determined under the Cr. P. Code and was not derived from the Insolvency Act; (*ii*) that as under S. 179 the offence could be tried either at the place where the act was committed or the consequence ensued, and as the offence consisted not merely of the execution of the mortgage but also of the fraudulent intent to defraud the creditors, the offence could be tried at Yeotmal where the consequence ensued, *viz.*, the actual diminution of the sum divisible among creditors at the place where the assets were held. (*Niyogi, A.J.C.*) TRIKAMJI *v.* EMPEROR **6 I.R. (Nag) 51=145 I.C. 550=34 Cr.L.J. 1038=1933 Cr.C. 75=A.I.R. 1933 Nag. 33.**

———**Ss. 71 and 72**—*Applicability—Credit obtained before discharge—If can be proceeded against after discharge.*

S. 71 does not apply to the offence of obtaining credit within the meaning of S. 72. After an insolvent has been discharged, the Insolvency Court cannot proceed against him under S. 72 even though an offence was committed within the meaning of that section before the order of discharge because in such a case the person from whom the insolvent has obtained credit during the insolvency can proceed against the insolvent in the ordinary course of law. (*Staples, A.J.C.*) ZIBAL *v.* LAXMAN. **27 N.L.R. 304=I.R. 1931 Nag. 189=134 I C. 861=A.I.R. 1932 Nag. 17.**

———**Ss. 71 and 72**—*Applicability—Limits.*

S. 71 of the Provincial Insolvency Act provides for the criminal liability of insolvent after his discharge, but only for the offences specified under S. 69 and not for that specified S. 72 (1). (*Lort Williams and Nasim Ali, JJ.*) JORDON *v.* FIRM OF MAHADEO LAL. **61 Cal. 605=151 I.C. 1026=7 R.C. 201 (1)=59 C.L.J. 399=A I R. 1934 Cal. 764 (1).**

———**S. 72**—*Applicability to discharged insolvent.*

S. 72, Provincial Insolvency Act, does not apply to a discharged insolvent who had committed an offence during his insolvency and prior to his discharge. Orders under S. 72 can only be made at some time during the insolvency and prior to the date of discharge. The Court has therefore no jurisdiction to pass an order under the section after the insolvent had been discharged. (*Lort Williams and Nasim Ali, JJ.*) JORDON *v.* FIRM OF MAHADEO LAL. **61 Cal. 605=151 I.C. 1026=7 R. C. 201 (1)=59 C.L.J. 399=A.I.R. 1934 Cal. 764 (1).**

PROV. INSOLV. ACT (1920), S. 75.

———**S. 72**—*Who can appeal.*

The only person who can appeal under S. 72 is the debtor himelf in the case where his prosecution has been ordered. (*Grille, A.J.C.*) PUR SINGH *v.* MUNSHI ALADAD KHAN. **28 N.L.R. 286=141 I.C. 350=I.R. 1933 Nag. 59=A.I.R. 1933 Nag. 9.**

———**S. 73**—Disqualification under—Applicability to candidates for election to municipal council. *See* BOMBAY DISTRICT MUNICIPAL ACT (1901), S. 15. **A.I.R. 1933 Sind 416.**

———**S. 73 (2) (*b*)**—Candidate to Municipal election not applying for certificate under—Obtaining certificate subsequent to election is of no use. *See* BOMBAY DISTRICT MUNICIPAL ACT (1901), S. 15. **A.I.R. 1933 Sind 416.**

———**S. 75.**

Absence of leave.
Appeal.
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Jurisdiction of High Court.
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Person aggrieved.
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Who can Appeal.

Absence of leave.

———**Ss. 75 (3) and 78**—*Absence of leave—Leave obtained after period of limitation—Validity.*

Where an appeal is filed without obtaining leave to appeal, but subsequently leave is obtained after the period of limitation, limitation may be reckoned up to date on which memorandum of appeal is presented or in any case, the delay in filing the appeal can be excused under S. 78. 47 M. 673 and 50 M. 815, Ref. (*Mya Bu and Dunkley, JJ.*) RAMASWAMY *v* POWER. **151 I. C. 625=7 R.R. 103=A.I.R. 1934 Rang. 117.**

Appeal.

———**S. 75 (2)**—*Appeal—Competency—Appointment of receiver and vesting of property.*

Obiter:—An order appointing a receiver and directing the property of the deceased insolvent to vest in the receiver for purposes of realisation and distribution does not fall within purview of Sch. I and as such no appeal is competent under S. 75 (2) (*Abdul Rashid, J.*) GURBAKHSH SINGH *v.* AMAR NATH. **160 I.C. 509=8 R.L. 539=A.I.R. 1935 Lah. 818.**

———**Ss. 75 and 4**—Appeal—Competancy—Dismissal of application by vendee for refund of purchase money. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 & 75—APPEAL—COMPETENCY. **145 I.C. 337=34 P.L.R. 183=A.I.R. 1933 Lah. 628.**

———**Ss. 75 and 4**—*Appeal—Competency*—Ex parte *order for delivery of insolvent's property—Application to set aside framed as one for review.*

On the adjudication of a Hindu father, the receiver obtained an *ex parte* order that his debts were binding on the minor sons. The family property was sold and the purchaser obtained an *ex parte* order for delivery. Then the minors applied to set aside that order but the application was styled as one for review of the previous order. The application was dismissed and an appeal therefrom was also dismissed by the District Judge that it was not competent under O. 47, R. 7.

Held, that the application, though purporting to be under O. 47, R. 1 must be deemed to be under S. 151 of the C P. Code, that the order for delivery passed without notice to the sons was void, the order dismissing the application by the minor sons was the first valid order which was appealable under S. 75 of the

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Provincial Insolvency Act. 61 M.L.J. 894, Ref. (*Curgenven, J.*) RAMARAJA NADAR *v.* CHIDAMBARA NADAR. **I R. 1933 Mad. 314=143 I C. 613=37 L. W. 720=1933 M W.N. 75=A.I.R. 1933 Mad. 345.**

——**S. 75**—*Appeal—Competency of—Order of District Judge refusing to add more persons as debtors in the insolvency—Leave of Court may be implied.*

Where the petition filed by a creditor for adjudicating certain persons as insolvents as members of a joint family with some others already adjudicated was dismissed by the District Judge, and the creditor appealed, on objection to the competency of the appeal.

Held, that the order was appealable under S. 4 read with S. 75 and Sch. I of the Act ; even assuming it was not, in view of S. 75, Cl. (3), the order was appealable with the leave of Court which may be presumed from the fact of the appeal having been admitted and allowed to be proceeded with. 7 Pat. 375, Ref. (*Guha and M. C. Ghose, JJ.*) DINAJPUR TRADING AND BANKING CO., LTD. *v.* PROBHASH CHANDRA SEN. **142 I C. 484=I.R. 1933 Cal. 283=56 C.L.J. 440=A.I.R. 1933 Cal. 151.**

——**S. 75**—*Appeal—Competency — Rejection of—Application by Official Receiver to remove Receiver in mortgage suit and to direct him to surrender possession.*

Where a Court which has appointed a Receiver in a mortgage suit rejects an application made to it by the Official Receiver for removal of the Receiver in suit and for possession of the mortgaged properties, there is no provision either in the C. P. Code or in the Provincial Insolvency Act, which confers a right of appeal against that order. An appeal by the Official Receiver against such rejection is therefore incompetent. (*Guha and Bartley, JJ.*) NRISINHA KUMAR SINHA *v.* DEB PROSANNA MUKERJEE. **62 Cal. 483=157 I.C. 140=8 R.C. 85=39 C.W.N. 384=A I.R. 1935 Cal. 460.**

——**S. 75**—*Appeal—Forum—Appeal against order of Assistant District Court.*

A first appeal from an order of an Assistant District Court passed in its insolvency jurisdiction, lies to the District Court and not to the High Court. (*Myi Bu Dunkley, JJ.*) AH FWAIK *v.* RECEIVER, BAILIFF; DISTRICT COURT, INSEIN. **12 Rang. 352=151 I.C. 790=7 R.R. 118 (1)=A.I.R. 1934 Rang. 155.**

——**S. 75**—*Appeal—Forum—Order of senior sub-Judge in insolvency.*

An appeal from an order passed by the senior sub-Judge in the exercise of insolvency jurisdiction lies to the District Judge. (*Bhide, J.*) CHIRAGH DIN *v.* FATEH MOHAMMAD. **149 I.C. 24 (1)=6 R.L. 661 (1)=34 P.L.R. 176=A I.R. 1933 Lah. 307 (1).**

——**S. 75**—*Appeal—Grounds.*

Guha, J.—An appeal under S. 75, Provincial Insolvency Act, can lie only on grounds similar to those under S. 100 (1), C. P. Code. The decision of the lower Courts based on findings of fact cannot be assailed under S. 75. (*Mukerji and Guha, JJ.*) RADHA KRISHNA THAKUR *v.* OFFICIAL RECEIVER. **59 Cal. 1135=I R. 1932 Cal. 611=139 I.C. 323=36 C.W.N. 492=56 C.L.J. 446=A.I.R. 1932 Cal. 642.**

——**S. 75**—*Appeal—Interference—Finding of fact.*

In absence of any substantial reason, the decision of the District Judge on the question of fact should not be disturbed. (*Wort and Faal Ali, JJ.*) SHEOPARTAP GULZARILAL *v.* MURLIDHAR GANPATRAM. **6 R.P. 480 - 148 I.C 501=A.I.R. 1934 Pat. 144.**

——**S 75**—*Appeal—Necessary parties—Annulment of mortgage on application of petitioning creditors—Appeal by mortgagee.*

Where a person is adjudged insolvent on the application of two creditors, and on failure of the Official Receiver to apply for annulling a mortgage executed by the insolvent, the above creditors apply for the same and get the mortgage annulled, both creditors and the Official Receiver are also necessary parties to the appeal filed by the mortgagee, and if all of them are not impleaded, the appeal is incompetent. (*Addison, J.*) GHULAM SHARAF *v.* LACHHMAN DAS. **6 R.L. 545 (1)=148 I.C. 329 (1)=A I R. 1934 Lah. 36 (1).**

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——**S. 75**—*Appeal—Order that claim not maintainable under S. 4.*

Where a Judge holds that the claim is not maintainable under S. 4, the order can be appealed against under S. 75 read with Schedule I. (*Mitter and Henderson, JJ.*) MONOMOHAN ROY CHOUDHURY *v.* BHUPAL CHANDRA ROY. **149 I.C. 677=6 R.C. 625=58 C.L.J. 118=A.I.R. 1934 Cal. 122 (2).**

——**S. 75 and Sch. I**—Appeal—Order under S. 4. *See* PROVINCIAL INSOLVENCY ACT, S. 4—APPEAL. **58 C.L J. 118.**

——**S. 75 (2)**—*Appeal—Order under S. 25.*

After a notice under S. 19 has been issued to the other parties concerned and they have appeared under S. 24, the only final orders that the Court can pass are either to adjudicate the debtor an insolvent or to dismiss the petition. Where the Court refused permission to verify the petition and ordered the same "to be struck off from the register".

Held, that the order should be deemed to be one of dismissal passed under S. 25 and that the same was appealable. (*Jai Lal, J.*) RAM LABHAYA MAL DEVI DITTA MAL *v.* CHANCHAL SINGH JASWANT SINGH. **I.R. 1931 Lah. 802=133 I.C. 626=A.I.R. 1932 Lah. 28.**

——**S. 75 (3)**—*Appeal—Refusal to annul transfer.*

All orders under S. 54 are not orders under S 4 of the Act. An order refusing to annul a transfer is covered by S. 75 (3) and is appealable only with the leave of the Court. (*Jai Lal, J.*) TARA CHAND *v.* BALKISHAN. **141 I.C. 36=I.R. 1933 Lah. 53=33 P.L R. 971=A.I R. 1933 Lah. 242.**

——**S. 75**—*Appeal—Refusal to frame issue.*

No appeal lies from an order refusing to frame specific issues as required by the insolvent. (*Bhide, J.*) BALMUKAND *v.* KALYAN DAS. **152 I.C. 222=7 R.L. 266=35 P.L R. 155=A.I.R. 1934 Lah 194 (1).**

——**S. 75**—Appeal—Refusal to review. *See* C. P. CODE, O. 47, R. 7. **A.I R. 1935 Pat. 177.**

——**S. 75**—*Appeal—Right of creditor—Order on application under S. 53 by receiver.*

The creditors have *locus standi* to maintain an appeal against an order refusing to annul mortgage by insolvent on an application by the receiver. In such a case the burden lies on the creditors to prove that the transaction in question was not made in good faith or for valuable consideration. (*Bhide, J.*) BARKAT RAI *v.* JEWAN MAL. **154 I.C. 708=7 R.L. 601=A.I.R. 1934 Lah. 968 (1).**

——**S. 75**—*Appeal—Right of creditor—Order on application under Ss. 53 and 54.*

Where the Insolvency Court refuses to set aside a transfer under Ss. 53 and 54, leave to appeal should not be given to a creditor unless either the District Judge or the High Court is satisfied that the Receiver has been requested and has refused to appeal. (*Addison, J.*) PURAN CHAND *v.* RAM CHANDAR GUPTA. **I R. 1931 Lah. 637=132 I.C. 539=33 P.L.R. 65=A.I.R. 1931 Lah. 651.**

——**S. 75**—*Appeal—Right of creditor—Order on application under S. 54 by Official Receiver.*

A creditor has a right of appeal from an order passed on an application by the Official Receiver under S. 54

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(4). 47 All. 849, Foll. (*Dalip Singh, J.*) RADHE KISHAN TIRATH RAM *v.* FATEH MAHOMED. **147 I. C 262=6 R.L. 378=35 P.L.R. 171=A.I.R. 1933 Lah. 856.**

——S. 75—*Appeal—Right of creditor—Refusal to prosecute insolvent.*

A creditor whose application for prosecuting an insolvent for an offence under S. 69 was rejected cannot file an appeal against the order as he is not a person aggrieved by it. (*Grille, A. J. C.*) PUR SINGH *v.* MUNSHI ALADADKHAN. **28 N.L.R. 286=141 I.C. 350=I.R 1933 Nag. 59=A.I.R 1933 Nag. 9.**

Granting of leave.

——S. 75—*Granting of leave—Admission of appeal whether amounts to.*

The mere fact that an appeal has been admitted by a Motion Bench does not necessarily imply that leave for the purpose of the appeal was granted. It is however open to the Court hearing the appeal to grant such leave. 101 I.C. 257 and 7 Pat. 395, Rel. on. (*Bhide, J.*) GHAUNS *v.* GANGA RAM. **I.R. 1931 Lah. 559=132 I.C 223.**

Jurisdiction of High Court.

——S. 75—*Jurisdiction of High Court—Nature of—Interference in second appeal when only revision lies—Irregularity.*

The jurisdiction conferred by S. 75 is one and indivisible. The tribunal in both cases of appeal and revision is the 'High Court". Its powers are different in the two cases (*i.e.*, revisional or appellate) but its jurisdiction is one. The manner in which the jurisdiction is invoked is a matter of procedure, and the fact that the application is labelled an appeal instead of a revision would at the most be an irregularity, which if does not affect the merits, or result in prejudice or injustice, is curable Where, therefore, the High Court entertained a second appeal when only a revision lay and interfered on grounds on which it could interfere in revision, it is a mere irregularity in procedure which is curable. (*Vivian Bose, A.J.C.*) VITHAL BALAJI KASAR *v.* CHUNNILAL. **31 N.L.R. 212=157 I.C. 242=8 R.N. 37=A.I.R. 1935 Nag. 33.**

Leave by implication.

——S. 75 (3)—*Leave by implication—Admission of appeal.*

Where an appeal only lies under the provisions of S. 75 (3) the leave of either the District Judge or the High Court is necessary. But if such appeal has been admitted to hearing by the High Court it should be considered that the necessary leave has been granted. A. I.R. 1928 Pat. 338, Foll. (*Currie, J.*) LORIND CHAND PARMA NAND *v.* MAHOMED AKRAM KHAN. **6 I.R. (Lah.) 107=145 I.C. 474=34 P.L.R. 827=A.I.R. 1933 Lah. 642 (2).**

Person aggrieved.

——S. 75—"*Person aggrieved*"—*Alleged creditor.*

A person who has been allowed to intervene in the insolvency proceedings as a creditor, whose application to include some more persons as debtors in the insolvency had been dismissed, is a "person aggrieved" within the meaning of the Act, though his debt had not been proved at the time he was allowed to intervene. 53 Cal. 866, Ref. (*Guha and M. C. Ghose, JJ.*) DINAJPUR TRADING AND BANKING CO., LTD. *v.* PROBASH CHANDRA SEN. **142 I.C. 484=I.R. 1933 Cal. 283=56 C.L.J. 440=A.I.R. 1933 Cal. 151.**

——S. 75 (1)—"*Person aggrieved*"—*Creditor not a party to the proceedings applying under S. 68.*

Where a creditor of an insolvent filed a petition to set aside the sale of some of the insolvent's properties by the Official Receiver of the insolvent's estate and subsequently, it was found, that he had collusively withdrawn his petition and allowed it to be dismissed by the Court, and another creditor of the same insolvent who applied to have the order of dismissal reviewed and to have himself added as a party in that petition but was not made a party to the proceedings under S. 68 of the Provincial Insolvency Act, appealed *bona fide* against the order of dismissal.

Held, that though the creditor appealing was not a party to the proceedings, still having regard to the fact that he was aggrieved by the orders appealed against, he would come within the terms of S. 75 and would be entitled to prefer the appeal. 56 Cal. 667 (F.B.); 49 Mad. 794; 50 M.L.J. 602, Ref. to. (*Madhavan Nair and Jackson, JJ.*) PULLI GOUNDAN *v.* KUMARASWAMI GOUNDAN. **55 Mad. 313=135 I.C. 742=I.R. 1932 Mad. 214=1932 M.W.N. 552=34 L.W. 684=A.I.R. 1932 Mad. 162=61 M.L.J. 714.**

——S. 75—"*Person aggrieved*"—*Insolvent.*

An insolvent whose estate has vested in the Official Receiver is not entitled to appeal as a person aggrieved against the order of the District Judge passed in insolvency. 41 A. 243 and 49 Mad. 461 (F.B.), Rel. on. (*Beasley, C.J. and King, J.*) VENKATARAMANAYYA *v.* BANGARAYYA. **154 I.C. 96=7 R.M. 412 (1)=40 L.W. 864=A.I.R. 1935 Mad. 107 (1)=67 M.L.J. 942.**

——S. 75—"Person aggrieved"—Insolvent—Sale by receiver—Objection by insolvent—Rejection by Judge—Appeal by insovent—Maintainability. *See* PROVINCIAL INSOLVENCY ACT, SS. 68 AND 75. **67 M.L.J. 942.**

——S. 75—"*Person aggrieved*"—*Meaning — New lease—Prior lessee if can appeal.*

The expression "aggrieved person" means a person who has got a legal grievance, that is, a person who is wrongfully deprived of anything to which he is legally entitled and not merely a person who has suffered some sort of disappointment. Where the Judge of the Insolvency Court granted a lease of a hotel to the highest bidder at an auction and the prior lessee of a hotel appealed against the order granting the lease.

Held, that the appellant was not an 'aggrieved person' within the meaning of S. 75 and that the appeal was incompetent. (*Bhide, J.*) RAM DAS *v.* ROGERS. **I. R. 1931 Lah. 772=133 I.C. 436=32 P.L.R. 438=A. I.R. 1931 Lah. 586 (1)**

——S. 75—"*Person aggrieved*"—*Requisites.*

Under S. 75 of the Provincial Insolvency Act which gives a right of appeal to any person aggrieved by the decision come to by the Insolvency Court, the person aggrieved must have an independent right to the relief sought for. (*Bhide, J.*) MURAD *v.* OFFICIAL RECEIVER, SARGODHA. **160 I.C. 794=8 R.L. 605=37 P.L.R. 517=A.I.R. 1935 Lah. 952.**

——S. 75 (3)—"*Person aggrieved*"—*Sons of insolvent—Vesting of property in receiver.*

The expression "aggrieved person' means a person, who has got a legal grievance, *i e*, a person who is wrongfully deprived of anything to which he is legally entitled and not merely a person who has suffered some sort of disappointment. Where the properties of the deceased insolvent are ordered to vest in a receiver who is appointed for purposes of realization and distribution, the sons or legal representatives of the insolvent cannot be regarded as "persons aggrieved" so far as that order is concerned, and as such no appeal lies under S. 75 (3) without the leave of District Court or of the High Court. The only injury suffered by the sons by the order of the Disdrict Judge is that stigma would attach to them by the property of their father being handed over to a receiver.

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This fact however does not make them an aggrieved party. A.I.R. 1931 Lah. 586, Appl. (*Abdul Rashid, J.*) GURBAKHSH SINGH *v.* AMAR NATH. **160 I.C. 509 = 8 R L. 539 = A.I.R. 1935 Lah. 818.**

Revision.

——**Ss. 75 and 4**—*Revision—Competency—Remedy by way of appeal open—Order for sale of insolvent's interest—Application by purchaser to consider question of title—Issues framed.*

During the course of insolvency proceedings the receiver reported that certain properties had been fictitiously alienated by the insolvent and requested the Court to go into the question under S. 4 and restore possession of the properties to him. The Court did not go into the question, but purporting to act under sub S. (3), S. 4, ordered that the saleable interests of the insolvent in the properties be sold. The properties were accordingly auctioned. Subsequently the auction purchasers applied to the Court for the question of title being inquired into and possession restored to them. A preliminary objection that the Court had already decided and that it would not inquire into the matter under S. 4 was overruled and issues on merits were framed.

Held, that no petition for revision was competent as an appeal by leave of the Court was competent under S. 75. (*Bhide, J.*) MILAWA RAM *v.* KESAR DAS. **6 I.R. (Lah.) 247 (1) = 146 I.C. 545 (1) = A.I.R 1933 Lah. 611 (2).**

——**S. 75**—*Revision—Decision by District Judge on appeal.*

It cannot be held that the High Court has no power to interfere in revision with a decision of the District Judge in appeal. But the High Court should be very reluctant to interfere in revision unless the order is perverse or palpably wrong (*Thomas, J.*) BAIJ NATH *v.* GAJA DHAR PRASAD. **11 Luck. 61 = 154 I.C. 908 = 7 R.O. 521 = 1935 O.W.N. 374 = A.I.R. 1935 Oudh 406.**

——**S. 75, Proviso 1**—*Revision—Decision as to genuineness or* bona fide *of a transaction.*

The question whether a particular transaction is genuine or *bona fide*, or whether it is fictitious or not made in good faith is a mere question of fact and not of law. The decision on such a question is not open to revision. (*Agha Haidar, J.*) JIWAN RAM *v.* THE OFFICIAL RECEIVER, AMBALA. **159 I C. 866 = 8 R. L. 440 = 37 P.L.R. 224 = A.I R 1935 Lah. 708.**

——**S. 75 (1)**—*Revision—Error of law as to burden of proof.*

Where in a proceeding under S. 53 of the Act the lower Court proceeds on a mistaken view of the law as regards the onus of proof the High Court can interfere in revision under S. 75 (1). (*Anantakrishna Aiyar, J.*) SUBRAMANIA CHETTIAR *v.* OFFICIAL RECEIVER OF MADURA. **1932 M.W.N. 59.**

——**S. 75**—*Revision—Interference—Question of law.*

The powers of the High Court under S. 75 are wider than those given under S. 115, C.P. Code, and the High Court can interfere in revision if the order is not according to law (*Bose, A J. C.*) RADHAVALLABH *v.* AWACHIT. **28 Nag.L R. 295 = 141 I.C. 48 = I.R. 1933 Nag. 21 = A.I.R. 1933 Nag. 39.**

Second Appeal.

——**S. 75, Proviso 2**—Second appeal—Annulment of voluntary. *See* PROVINCIAL INSOLVENCY ACT, SS 4 AND 75—APPEAL. **54 Mad 989 = 61 M.L.J. 820.**

——**S. 75 (1), Proviso 2**—Second appeal—Competency—Decision as to existence of debt of petitioning creditor. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 75—APPEAL. **36 Bom L.R. 1236 = A.I.R. 1935 Bom. 80.**

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——**S. 75**—*Second appeal—Competency—Decision of question determinable under S. 28.*

When S 28 authorizes the determination of the question raised the matter cannot fall under S. 4 and so no second appeal can be entertained. (*Vivian Bose, A.J. C.*) VITHAL BALAJI KASAR *v.* CHUNNILAL. **31 N. L.R. 212 = 157 I.C. 242 = 8 R.N. 37 = A.I.R. 1935 Nag 33.**

——**S. 75**—*Second appeal—Competency—Irregularity in addition of parties—Revision.*

An insolvent who had been granted a conditional discharge appealed to the District Judge but the impleaded only the creditors and not the Official Receiver. An objection on the ground of non-joinder was taken but the Court while modifying the order held that the non-joinder was a mere irregularity. Against the appellate order both the creditor and Insolvent preferred appeals.

Held, that the order under appeal was not covered by S. 4 and that no second appeal lay.

Held, further, though the Official Receiver was a necessary party to the appeal, the High Court was not bound to interfere in revision when the Official Receiver himself had not moved in the matter. (*Jai Lal, J*) GOPAL DAS *v.* OFFICIAL RECEIVER **I.R 1931 Lah. 622 = 132 I.C. 526 = A.I.R. 1931 Lah. 647.**

——**S. 75**—*Second appeal — Competency — Lower Court entertaining in competent appeal.*

If a District Judge entertains an appeal which does not lie to his Court, a second appeal lies against his decision. The appealability from such decision does not depend on the view taken by the lower appellate Court with regard to the competency of appeal before it. A. I.R. 1930 Pat. 280 and A.I.R. 1931 Mad. 471, Ref.; 23 Mad. 517, Dist. (*Walsh, J*) NACHIMUTHU CHETTY *v.* RAMAKKAL. **147 I C. 494 = 6 R M. 351 = A.I.R. 1933 Mad. 475.**

——**S 75**—*Second appeal—Competency—Order of adjudication.*

An order of the District Court dismissing an appeal against an order of the Court of first instance exercising insolvency jurisdiction and adjudging a person as insolvent is final and no second appeal lies. (*Abdul Qadir, J*) ALLAH DIYA *v.* KUNJ BIHARI. **I.R. 1932 Lah. 645 (1).**

——**S. 75**—*Second appeal—Competency—Order of adjudication under S. 27 on appeal by District Court.*

No second appeal lies against an order of adjudication passed under S. 27 by the District Court on appeal from an order of the Assistant District Court dismissing the petition under S. 25. It cannot be contended that because the petition of the creditor was based upon an act of insolvency involving a fraudulent preference the order of the Assistant District Court must be held to be an order under S. 4 of the Act, as well as under S. 25. When an order is made under some other section of the Act, and can lawfully be made under that section, then S. 4 will have no application to that particular order. (*Dunkley, J.*) MAUNG PO SAI *v.* BANK OF CHETTINAD, LTD. **13 Rang. 717 = 160 I.C. 109 = 8 R.R. 340 = A.I.R. 1936 Rang. 26.**

——**Ss 75 4 and 53**—*Second appeal—Competency—Order on—Application to set aside fictitious mortgage.*

The Official Receiver filed an application for setting aside a mortgage effected by the insolvent on the ground that the transaction was fictitious and intended to defraud creditors. The application was dismissed and appeal therefrom to the District Judge was also dismissed.

Held, that S. 53 was clearly applicable to the case and not S. 4 and that no second appeal lay under S. 75.

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(*Bhide, J.*) CHET RAM RAMRACHH PAL *v.* ATMA RAM. **6 I.R. (Lah.) 231 (2) = 146 I.C. 490 = 34 P.L.R. 960 = A.I.R. 1933 Lah. 634.**

———**Ss. 75, 53 and 54**—*Second appeal—Competency—Order on application under Ss.* 53, 54.

In respect of an application under Ss. 53 and 54 of the Provincial Insolvency Act to set aside an alienation as fraudulent, no second appeal lies. 61 M. L. J. 820, Foll. (*Burn, J.*) RAMASAMI NAYAKAR *v.* VENKATASAMI NAICKER. **6 I.R. (Mad.) 144 = 145 I.C. 876 = 38 L.W. 494 = A.I.R. 1933 Mad. 653 = 65 M.L.J. 298.**

———**S. 75**—Second appeal —Competency — Order appointing interim receiver—Interference in second appeal. *See* PROVINCIAL INSOLVENCY ACT, S. 4—APPEAL. **34 Bom.L.R. 382 = A.I.R. 1932 Bom 228.**

———**S. 75 (1), proviso 4**—*Second appeal—Competency—Order avoiding voluntary transfer.*

An order avoiding a voluntary transfer is authorised by S. 53. So a second appeal does not lie from such a decision to the High Court. 52 M. 337; A.I.R 1930 Nag. 272, Foll ; 2 Luck. 651 and 45 M. 434, Dist, 51 A. 550 (F.B.), Ref. (*Macnair, J. C., Jackson and Subhedar, A.J.Cs.*) RAMCHANDRA *v.* RAMCHANDRA. **27 N L R. 179 = I R 1931 Nag. 175 = 134 I.C. 687 = A.I R. 1931 Nag. 153 (F.B.).**

———**S 75 (1), Proviso**—*Second appeal—Competency—Refusal by District Court to restore appeal dismissed for default.*

An order by the District Court refusing to restore an appeal to it dismissed for default is covered by the proviso to S. 75 (1), and an appeal lies therefrom to the High Court. (*Dalip Singh, J.*) GANGA RAM *v.* OFFICIAL RECEIVER, DELHI. **I R. 1932 Lah 210 = 136 I.C. 258 = 33 P.L.R. 5 = A.I.R. 1932 Lah. 248.**

———**S. 75**—*Second appeal—Decision not involving question of title*

A second appeal lies to the High Court under S. 75 of the Provincial Insolvency Act, only when the Insolvency Court decides any of the matters referred to in S. 4 of the Act; but in a case in which no question of title or priority arises, there is no second appeal. (*Abdul Rashid, J.*) GHULAM RASUL *v.* KIDAR NATH. **6 R.L. 850 = 150 I.C. 305 = 36 P.L.R. 5 = A.I.R. 1934 Lah. 807 (1).**

———**S. 75, Proviso 2**—*Second appeal—Decision under S.* 53.

The decision made under S. 53 of the Provincial Insolvency Act cannot be treated as one under S. 4; consequently it is not open to second appeal. (*Agha Haidar J.*) JIWAN RAM *v.* THE OFFICIAL RECEIVER, AMBALA **159 I.C. 866 = 8 R L. 440 = 37 P.L R. 224 = A.I.R. 1935 Lah. 708.**

———**S. 75 (1)**—*Second appeal—District Judge purporting to decide under S.* 4.

When the District Judge relies on S. 4 and purports to decide a case under it, a second appeal lies under S. 75 (1). (*Pollock, A. J. C.*) J. N. MUNDARA *v.* NEMSI RAJPAL & CO. **31 N.L.R. 36 (Supp.) = 161 I. C. 981 = 8 R.N. 254 = A.I.R. 1935 Nag. 246.**

———**S. 75**—Second appeal—Order on appeal by District Judge *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 75. **A.I.R. 1935 Mad. 432.**

——— **S. 75 (1)**—*Second appeal—Revision.*

An order passed by a District Court on appeal from a Subordinate Court under S. 75 (1) is not open to appeal but can be the subject of revision. (*Bisheshwar Nath, J.*) HAR PERSHAD *v.* DARGAHI LAL. **135 I. C. 893 = I.R. 1932 Oudh 77 = 8 O.W.N. 1318 = A.I.R. 1932 Oudh 61.**

PROV. INSOLV. ACT (1920), S. 78.

———**S. 75**—*Second appeal—Revision—Affirmance on appeal of order setting aside mortgage.*

Where the Insolvency Court under S. 54 of the Act set aside a mortgage and the order was maintained by the District Judge in appeal,

Held, that a second appeal did not lie and that a revision only lay under the first proviso to S. 75. (*Addison, J.*) DINA NATH *v.* LABHU RAM. **I.R 1932 Lah 288 = 137 I.C. 55 = 33 P.L.R. 255 = A.I.R. 1932 Lah. 321**

———**S. 75**—*Second appeal—Revision—Refusal of absolute discharge.*

An order of the District Judge refusing to grant an absolute discharge to an insolvent cannot form the subject of second appeal. It can however be the subject of revision. (*Bhide, J.*) GOKAL SINGH *v.* LALA KRISHAN LAL **150 I C. 80 = 8 R.L. 820 (1) = 35 P.L.R. 114 = A.I R. 1934 Lah. 198**

Who can appeal.

———**S. 75**—*Who can appeal under.*

S. 75 gives a right of appeal against orders made in the exercise of insolvency jurisdiction by Courts subordinate to a District Court not only to a person aggrieved by the decision but also to any creditor. (*Bisheshwar Nath, J.*) HAR PERSHAD *v.* DARGAHI LAL. **135 I.C. 893 = I R. 1932 Oudh 77 = 8 O.W.N. 1318 = A.I. R. 1932 Oudh 61.**

———**S. 76**—*Scope—If mandatory—Costs—Discretion.*

The provisions of S. 76 are not mandatoty. There is no prohibition to a Court exercising its discretion in the matter of costs and in the exercise of that discretion, applying the provisions of S. 35-A, C. P. Code, to such cases as it deems fit for that application. A. I. R. 1930 Rang 166, Dist. (*Grille, J. C.*)) BAIJNATH *v.* MOTILAL. **31 N.L.R 365 = 8 R.N. 82 = 158 I.C. 394 = A.I.R. 1935 Nag. 207.**

———**S. 78**—Applicability—Creditor's petition—Excusing delay—Applicability of Limitation Act, S. 5. *See* PROVINCIAL INSOLVENCY ACT, S. 9—CREDITOR'S PETITION. **55 Mad. 766 – 63 M.L.J. 152.**

———**S. 78**—*Applicability—Decree-holder insolvent.*

The section has no application to a case in which the decree-holder and not the judgment-debtor is the insolvent. Where all that happended was that a petition was filed by a cerditor and the Official Reciver was appointed as *interim* receiver, but before the stage of adjudication was reached, the insolvency petition was withdrawn, it cannot have any effect in extending the time within which the execution petition should be filed. 1929 M. W. N. 369, Appr. (*Curgenven, J.*) MUTHAYA CHETTIAR *v.* PERIATAMBI TEVAN. **135 I.C. 315 = I. R 1932 Mad. 75 = 1931 M.W.N. 1014 = A.I.R. 1931 Mad. 784.**

———**S. 78**—*Applicability—Petition for adjudication.*

The provisions of S. 5 of the Limitation Act cannot be applied to the amendment of an insolvency petition by the addition of a creditor partner after the expiration of three months from the act of insolvency, because an insolvency petition is not an "application" within the meaning of S. 78 of the Act. (*Cornish, J*) VAITHINATHA AIYAR *v.* VAITHINATHA AIYAR. **135 I.C. 613 = 34 L.W. 799 = I.R. 1932 Mad. 181 = 1932 M.W. N. 164 = A.I.R 1932 Mad. 112 = 61 M.L.J. 544.**

———**S. 78**—*Procedure—Suit to recover debt after limitation and before annulment of adjudication.*

Limitation for proving debts ceases to run during insolvency proceedings. Where therefore a creditor sues after ordinary period of limitation is over but before annulment of adjudication order, the proper course is

PROV. INSOLV. ACT (1920), S. 78.

not to dismiss the suit but to permit him to withdraw suit with liberty to sue again after annulment of adjudication. (*Baguley, J.*) BANDEALLY JAFFER *v.* PEER MAHOMED **6 I.R. (Rang.) 72=146 I.C. 124=A.I.R. 1933 Rang. 75.**

———**S. 78 (2)**—*Applicability—Decree holder's debt not included in the schedule—Deduction—Duration of insolvency.*

Where a creditor had done all that was necessary to prove his debt it must be assumed in the absence of a decision by the Receiver refusing to admit the debt that the debt was proved though the Official Receiver by inadvertence omitted to mention the debt in the schedule. So the decree-holder is for the purposes of execution against the judgment-debtor entitled to deduct the time between the date of the adjudication order passed against the judgment debtor and the annulment thereof. (*Jai Lal, J.*) RALI RAM *v.* SANT RAM GANPAT RAI. **I.R. 1933 Lah. 229=142 I.C. 644=A.I.R. 1933 Lah. 101.**

———**S. 78 (2)**—*Applicability—Essentials.*

In order to claim for purposes of limitation an exemption of the period between the order of adjudication and the order of annulment the creditor must show that the Insolvency Judge either passed a formal order under S. 33 or that there were proceedings which by necessary implication were tantamount to such an order. (*Tek Chand and Agha Haidar, JJ.*) WALAITI RAM *v.* PARTAP SINGH. **I.R. 1932 Lah. 66=135 I.C. 194=32 P.L.R. 905=A.I.R. 1932 Lah. 173.**

———**S. 78 (2)**—*Construction—"Annulled under this Act"—Order of adjudication discharged on appeal—Deduction—Permissibility.*

The defendant was adjudicated insolvent on 17-12 1926. The adjudication was set aside by the High Court on 29-10-1928 and the case remanded to the lower Court and the application for adjudication was eventually dismissed on 30-7-1930. In a suit subsequently brought by the creditor to recover the amounts due to him.

Held, that the words "annulled under this Act" in S. 78 (2) were not limited to annulment under the chapter "Annulment of adjudication" beginning from S. 35; they included the case where the order of adjudication was discharged by the Court of appeal, that the period between the adjudication and the final dismissal of application should be omitted in computing the period of limitation for the suit and tnat the suit was in time. 7 Exch. 263, Rel. on. (*Tek Chand and Monroe, JJ.*) AMAR SINGH *v.* IMPERIAL BANK OF INDIA, JALLUNDAR. **14 Lah. 426=6 I.R. (Lah.) 261=146 I.C. 686=34 P.L.R. 812=A.I.R. 1933 Lah. 953.**

———**S. 78 (2)**—Effect on S. 48, C. P. Code. *See* C. P. CODE, S. 48—SCOPE. **134 I.C. 878=8 O.W.N. 1186.**

———**S. 78 (2)**—*Execution of decree—Subsequent adjudication and annulment—Fresh application to execute—Deduction of period.*

The decree holder applied for execution on 20th February, 1922. The judgment debtor applied for being declared an insolvent on 3rd July, 1922, He was adjudged bankrupt but this order was annulled on 7th December, 1927 The later application for execution was made on 5th April, 1930.

Held, that the decree holder was entitled to the exclusion of the period between 20th February, 1922 and 7th December, 1927 and the application for execution was within time. (*Sen, J.*) KUNDAN LAL *v.* BISHAMBHAR NATH. **I.R. 1931 All. 364=231 I.C. 252.**

PROV. S. C. C. ACT (1887), S. 15.

———**S. 78 (2) Proviso**—*Proof of debt — What amounts to.*

The proof of debts referred to in the proviso to S. 78 refers to proof under S. 33-A mere statement of a debt due on a bond (as distinct from one due on decree obtained after adjudication) under S. 13 (*d*) in an insolvency petition, even though not denied by a creditor, will not amount to proof under the Act. Whether the method of proving a debt allowed by S. 49 is followed or not, there must be some proof of a debt after the order of adjudication, as required by S. 33. (*Staples, A. J. C.*) MANNASAO KALESAR BANI *v.* RAMBHAROSA JUIAR. **31 N.L.R. 101=153 I.C. 533=7 R.N. 142=A.I.R. 1934 Nag. 282.**

———**S. 78 (2), Proviso**—*Proof of debt—What amounts to.*

A person who has lodged a proof and fulfilled all the requirements of S. 49 has "proved" his debt within the meaning of the proviso to S. 78 (2). (*Beasley, C. J.*) LAKSHMI BAI *v.* RUKMAJI RAO. **57 Mad. 767=40 L.W. 199=151 I.C. 284=7 R.M. 120=1934 M.W.N. 934=A.I.R. 1934 Mad. 465=67 M.L.J. 45.**

———**S 79**—*Allahabad High Court Rules, Chapter XIX, R. 27—Adjudication of Hindu joint family firm—Effect of.*

The effect of the adjudication of a firm carried on by a joint Hindu family as an insolvent, is to make all the members of the family insolvents. (*Sulaiman, C. J. and Bennet, J.*) BHAGWAN DAS *v.* LAKSHMI CHAND. **155 I.C. 661=7 R.A. 970=1935 A.L.J. 673=1935 A.W.R. 672=A.I.R. 1935 All. 643.**

———**S. 79**—*Allahabad Rules, R. 34.*

Amendment of R. 34 regarding advertisement suggested. (*Mukerji and Rachhpal Singh, JJ.*) KUNDAN LAL *v.* NATHU. **55 All. 636=6 I.R. (All.) 329=146 I.C. 765=1933 A.L.J. 1340=A.I.R. 1933 All 600.**

PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), S. 8—*Additional Judge—Power to file complaint regarding obstruction to warrant of Court.*

The accused were prosecuted at the instance of an Additional Judge of the Small Cause Court for obstructing a bailiff while executing a warrant of attachment. It appeared that the warrant had been issued by a Judge of the Small Cause Court and that he had sent the proceedings to the Additional Judge after ordering notice.

Held, that the additional Judge had the power to file the complaint. (*Addison and Coldstream, JJ.*) GHULAM MAHOMED *v.* EMPEROR. **13 Lah 16=I.R. 1931 Lah. 682=33 P.L.R. 401=132 I.C. 842=32 Cr.L.J. 964=1931 Cr.C. 770=A.I.R. 1931 Lah. 530.**

———**S. 15**—*Cognizability—Suit for damages for use and occupation.*

A suit for damages for use and occupation of premises is a suit cognizable by a Small Cause Court. (*Addison, J.*) KIDAR NATH *v.* DUNGAR MAL & SONS. **I.R. 1931 Lah. 913=134 I.C. 289=32 P.L.R. 361=A.I.R. 1931 Lah. 501.**

———**S. 15, Sch. II Arts 4 and 8**—*Cognizability—Suit for ground rent in Town.*

A suit for the ground rent of a site, situated in a town, which is neither revenue-paying nor agricultural land, is not excepted from the jurisdiction of the Small Cause Court. Even in the absence of any contract, the Small Cause Court has jurisdiction to award damages for use and occupation of such lands. 15 Cal. 174, Dist.; 22 Mad. 149 and A.I.R. 1925 Lah. 196, Ref. (*Niyogi, A. J.C.*) LAXMINARAYAN *v.* NIYAMAT MASJID. **147 I.C. 839 (1)=6 R.N. 149=A.I.R. 1933 Nag. 382.**

———**S. 15**—*Cognizability—Suit for price of—Share in ornaments.*

PROV. S. C. C. ACT (1887), S. 15.

A suit to recover the price of the plaintiff's share of certain ornaments is triable by the Court of Small Causes. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) JADUNI PANDE *v.* SHEONANDAN PANDE. **11 Pat. 690=141 I.C. 130=I.R. 1933 Pat. 46=14 Pat.L.T. 269=A.I.R. 1933 Pat. 31.**

———**S. 15**—*Jurisdiction—Nature of suit—Test.*

The nature of the suit is to be determined according to the claim made by the plaintiff and not by the contest of the defendant. The latter procedure would give rise to the greatest confusion and eliminate from the jurisdiction of the Court of Small Causes many cases which would fall within that jurisdiction. (*Grille, A.J.C.*) RADHAKISAN BANIA *v.* MOTILAL BANIA. **147 I.C. 1103=6 R N. 158=29 N.L.R. 115=A.I.R. 1933 Nag. 82.**

———**S. 15 (2)**—*Small cause nature—Suit for declaration and refund of profession tax.*

The mere addition of an idle prayer for declaration of the invalidity of the assessment as auxiliary to a suit for refund of profession-tax does not make the suit any the less a suit of a small cause nature, if the claim for money can proceed without the prayer for declaration. 30 M. 101 (F.B.), Foll. (*Rameam, J.*) UNION BOARD DEVAKOTTAH *v.* MANIKKAVACHAGAN CHETTI. **1931 M.W.N. 1107.**

———**S. 15 (2)**—*Small Cause nature—Suit for declaration and refund of profession-tax.*

A party who sues for money has usually to establish, or to clear away something, and his money decree does not become a 'declaratory decree' because the judgment in his favour is prefaced by some sort of declaration. So a suit for the refund of profession-tax amounting to Rs. 125 is of a small cause nature from which no second appeal is competent, even though the plaintiff may have prayed as well for a declaration of the invalidity of the levy. 39 Mad. 219 and 23 M.L.J. 517, Ref. (*Jackson, J.*) RAMAN CHETTY *v.* TALUK BOARD, SIVAGANGA. **I.R. 1932 Mad. 751=139 I.C. 620=1932 M.W.N. 142=35 L.W. 70=A.I.R. 1932 Mad. 226.**

———**S. 16**—*Applicability—Small cause suit transferred to sub-Judge's Court under S. 24, C. P. Code—Existence of a Small Cause Court not shown—Jurisdiction of sub-Judge.*

Where a suit filed in the Small Causes Court at Gorakhpur was transferred by the District Judge to the Court of the Subordinate Judge under S. 24, C. P. Code, it was contended by the applicant in revision that under S. 16 of the Provincial Small Cause Courts Act, the trial by the Subordinate Judge was illegal because there was a Court of Small Causes at Gorakhpur at the time, by which the suit was triable.

Held, that though it was a fact that Gorakhpur was one of the places where a Small Cause Court Judge was usually posted, it did not follow that there was an officer with these powers posted on the date of transfer and it was necessary for the applicant to show this from a reference to not only civil lists but also Gazettes. (*Bennet, J.*) VIDYARTHI *v.* RAM PEARY LAL. **157 I.C. 122=8 R.A. 104=1935 A.W.R. 433=1935 A.L. J. 511=A.I.R. 1935 All. 690.**

———**S. 16**—*Applicability—Suit already filed in another Court having jurisdiction.*

S. 16 of the Provincial Small Cause Courts Act does not apply to a suit already instituted in another Court at a time when the latter Court had jurisdiction to entertain it. A suit though of the kind cognizable by a Court of Small Causes, is not itself so cognizable after another Court had lawfully taken cognizance of it. (*Saunders, J.*) HICHHA MALI *v.* HIRA MALI. **151 I.C. 938=**

PROV. S. C. C. ACT (1887), S. 16.

7 R.P. 143 (2)=15 Pat.L.T. 619=A.I.R. 1934 Pat. 504.

———**S. 16**—*Scope.*

S. 16 does not deprive the regular Courts of their jurisdiction but merely directs them not to try suits of a small cause nature. This bar is removed by S. 24 (4) of the C. P. Code, which empowers the High Court to transfer a suit from a Small Cause Court to a regular Court irrespective of the small cause powers of the Court to which the suit is transferred, provided the value of the suit is within the ordinary pecuniary jurisdiction of Bench Court. (*Baker and Nanavati, JJ.*) PARSHOTAMDAS *v.* BHAGUBHAI. **56 Bom. 387=I.R. 1932 Bom. 479=139 I.C. 194=34 Bom.L.R. 931=A.I.R. 1932 Bom. 486**

———**S. 16**—*Scope.*

S. 16, Small Cause Courts Act, is no bar to the exercise of the powers of the transfer of the District Judge under S. 24, C. P. Code. (*Bennet, J.*) PHUL CHAND SURAJ LAL *v.* CHHADAMI LAL. **151 I.C. 385 (2)=7 R.A. 162=A.I.R. 1934 All. 530.**

———**S. 16**—*Scope.*

S. 16, Small Cause Courts Act is no bar to the exercise of powers of transfer of the District Judge under S. 24, C. P. Code. (*Coldstream, J.*) THAKAR DAS *v.* BALWANT RAI. **154 I.C. 112=7 R.L. 480=37 P.L.R. 177=A.I.R. 1934 Lah. 901.**

———**S. 16**—*Scope—Application under para. 20, Sch. 2, C. P. Code, if a 'suit'.*

The expression 'suit' in S. 16, Provincial Small Cause Courts Act, is wide enough to include within its ambit an application under para. 20, Sch. 2, C. P. Code, which is not a suit but is required to be registered as a suit. So an application to file an award under para. 20, Sch. 2 is a suit within the meaning of S. 16, Provincial Small Cause Courts Act. 10 W.R. 85 and 10 B.H.C. 54, Foll. (*Davis, J. C. and Rupchand Bilaram, A.J.C.*) LOKUMAL *v.* DILSHER. **158 I.C. 1102=8 R.S. 67=A.I.R. 1935 Sind 208.**

———**S. 16**—*Scope—Effect of S. 24, C.P. Code.*

The expression "competent to try" in S. 24 of the Code means of jurisdiction competent to try. S. 16 of the Provincial Small Cause Courts Act is made elastic by S. 24.

Held, that a Small Cause suit pending before a sub Court can be transferred to a District Munsif for purposes of convenience and joint trial even though the value of the suit transferred may be beyond the small cause jurisdiction of the Munsif. (*Jackson and Krishnan Pandalai, JJ.*) CHOCKALINGAM CHETTIAR *v.* PALANIAPPA CHETTIAR. **55 Mad. 960=I.R. 1932 Mad. 726=139 I.C. 477=1932 M.W.N. 763=36 L. W. 479=A.I.R. 1932 Mad. 683=63 M.L.J. 689.**

———**S. 16**—*Scope—If affects—Jurisdiction of Honorary Munsif under—U. P. Honorary Munsifs Act.*

S. 7, Cl. 4, of the Honorary Munsifs Act provides that nothing in S. 16 of Provincial Small Cause Courts Act shall be demed to affect the jurisdiction of Honoray Munsifs or Benches under the Honorary Munsifs Act. Accordingly where a suit of a nature cognizable by a Court of Small Causes is instituted in the Court of the Honorary Munsif, there is nothing to prevent that Court from proceeding to dispose of the suit, even though there is a Court of Small Causes having territorial jurisdiction over that suit. (*Bajpai, J.*) SULAIMAN HUSAIN KHAN *v.* SITA. **155 I.C. 95=7 R.A. 875=1935 A.L.J. 426=1935 A.W.R. 354=A.I.R. 1935 All. 574.**

———**S. 16**—*Trial as regular suit—Effect—Appeal.*

Where a suit cognizable by a Small Cause Court has been tried against the provisions of S. 16 as an ordinary

PROV. S. C. C. ACT (1887), S. 17.

suit by a Judge who is not invested with Small Cause Court powers, the parties to the suit having raised no objection to the trial, it should not be considered as a Small Cause suit, and appeal would lie from the decision. A. I. R. 1924 Nag. 17 Rel. on. (*Staples, A.J.C.*) GANPAT LAXMAN *v.* NATHU. **30 N.L.R. 252=149 I. C. 886—6 R.N. 253=A.I.R. 1934 Nag. 121.**

———**S. 17**—*Applicability—Decree* ex parte *by Union under Bengal Village Self-Government Act.*

S. 17, Provincial Small Cause Courts Acts, contemplates a case where an application is made to set aside a decree passed by Judge of a Court of Small Causes. It has no application to the case of an *ex parte* decree passed by a Union Court under the Bengal Village Self-Government Act. Where, therefore, an application is made to set aside an *exparte* decree passed by the Union Court, and that application is transferred by the District Judge to a Munsif with Small Cause powers for disposal it is not necessary for the applicant to deposit the decree amount or to furnish security therefor as contemplated by the proviso to S. 17. (*R. C. Mitter, J.*) PRAFULLA SUNDARI ROY CHOUDHURANI *v.* AZIZONNESSA. **62 C.L.J. 295=40 C.W.N. 349.**

———**S. 17**—*Application under—Construction.*

When a party applies to set aside an *ex parte* decree under S. 17, Provincial Small Case Courts Act, it may be regarded as consisting of two parts; first a preliminary application to get a direction of the Court with a view to get the *ex parte* decree set aside and secondly after obeying the direction of the Court the actual application to set aside the *ex parte* decree The second part follows only after obeying the directions of the Court. (*Beasley, C.J., Ramesam and King, JJ.*) PITCHAMMA *v.* PEDAMUNEYYA. **58 Mad. 687=7 R.M. 586=155 I C 559 =41 L.W. 482=1935 M.W.N. 57=A.I.R. 1935 Mad. 380=68 M L.J. 466 (F B.).**

———**S. 17**—*Construction—"Amount due under the decree"—Meaning.*

The words "the amount due under the decree" in S. 17 mean "the amount due under the decree at the date it was given" and not "the amount due under the decree at the date when the application for restoration was presented." 47 All. 623, Rel. on. (*Mears, C.J. and Sen. J.*) KALLU MAL *v.* BIKRAMAJIT SINGH. **54 All. 409=I. R. 1932 All. 260=136 I.C. 839 (1)=1932 A.L.J. 260 =A I R. 1933 All. 13.**

———**S. 17**—*Construction—'Security' — Meaning — Unregistered bond.*

Per *Agarwala, J.*—The word 'security' signifies anything that makes the money more assured in its payment or readily recoverable. (*Khaja Mahomed Noor and Agarwala, JJ.*) RAJESHWARI PRASAD SINGH *v.* BRAHMANAND LAL. **12 Pat. 745=6 I.R. (Pat) 157= 145 I.C. 314=14 Pat. L.T. 326=A.I.R. 1933 Pat. 279.**

———**S. 17**—*Deposit—If condition precedent.*

It is not necessary for an applicant who seeks to set aside an *ex parte* decree to deposit the amount due under the decree or give security at the time of presenting his application. It is a sufficient compliance with the terms of the proviso to S. 17 of the Act if an application made in time is followed by a deposit in Court in time. 9 Bom. L. R. 883, Dist., 32 C. 339; 43 M. 579; A I.R. 1930 All. 330, Foll (*Patkar, A. C. J. and Barlee, J*) HAJI AHMED HAJI IBRAHIM *v.* ABDUL HUSSEIN. **I.R. 1932 Bom. 81=135 I.C. 465=55 Bom. 779=33 Bom. L.R. 1433=A.I.R. 1932 Bom. 40.**

———**S. 17**—*Deposit of decree amount or security—Discretion of Court.*

It is within the discretion of the Court whether a person who applies to set aside an *ex parte* decree should deposit the decretal amount in cash or should give security to its satisfaction. (*Jai Lal, J.*) BOSE BROTHERS & CO. *v.* DINA NATH KISHORE CHAND. **I.R 1932 Lah. 311=137 I.C. 230=33 P.L R. 931.**

PROV. S. C. C. ACT (1887), S. 18.

———**S 17**—*Deposit out of time—Mistake by Vakil's clerk—Excusing delay.*

Where on an application to set aside an *ex parte* decree. the decretal amount had been handed over to the Vakil's clerk by the party in time but the deposit could not be made in time owing to the *bona fide* mistake of the clerk in mislaying the chellan, *held*, there was sufficient cause for excusing the delay under Section 5 of the Limitation Act. 21 L.W. 24; 44 M.L.J. 247; 45 M. 628, Rel. (*Anantakrishna Ayyar, J.*) RAMJI DAS MAHANT BAVAJEE *v.* KUMARAKALATHI MUDALI. **135 I C. 737=I R 1932 Mad 209=34 L W. 795= A.I.R. 1932 Mad. 142=61 M.L.J. 710.**

———**S 17**—*Deposit—Secretary of State if exempted from furnishing.*

There is no exception made on behalf of the Secretary of State to the rule laid down by S. 17 as to deposit of decretal amount and furnishing security at the time of application for review. (*Mukerji and Bennet, JJ.*) RAM SANKAR *v.* SECRETARY OF STATE. **54 All. 879 =I.R. 1932 All. 574=139 I.C. 701=1932 A.L.J. 842 =A I.R. 1932 All. 575.**

———**S. 17**—*Non compliance—Effect.*

The provisions of S. 17 are mandatory and a non-compliance with those provisions amounts to an illegality. The furnishing of security for the appearance of the judgment-debtor before the Court cannot be deemed to be a compliance with S. 17 and the fact that cash is subsequently paid into Court is immaterial. (*Bannerji, J.*) SHER AHMED KHAN *v.* ALI BUX. **I.R. 1931 All. 326=130 I.C. 710=1930 A.L.J. 1494=A.I.R. 1931 All 103.**

———**-S. 17**—Order under—If one under C. P. Code *See* COURT FEES ACT SCH. II, ART. 6. **41 L.W. 482 =1935 M.W.N. 57=68 M.L.J. 466 (F.B.).**

———**Ss. 17 and 35**—*Procedure—Abolition of Small Cause Court—Application for setting aside* ex parte *decree made to Munsiff.*

An application for setting aside an *ex parte* decree of a Small Cause Court is undoubtedly a proceeding arising out of a Small Cause Court suit and where such application is made, after the abolition of the Small Cause Court to the Munsif, the procedure in the application is to be regulated by S. 17 of the Small Cause Courts Act and there is nothing in S. 35 of the Act which in terms modifies the provisions of that section. (*Kendall, J.*) BRIJ BIHARI LAL *v.* LALTA PRASAD. **4 A.W R. 382 =1934 A L J 917=17 All 348=153 I.C. 661=7 R. A. 550=A I R, 1934 All. 943.**

———**S. 17**—Procedure—Applicability of—C. P. Code, O. 9, R. 13. *See* C. P. CODE, O. 9, R 13—SMALL CAUSE SUIT. **41 L.W. 482=1935 M.W.N. 57= 68 M.L.J. 466 (F B).**

———**S. 17**—*Scope—Provision as to deposit, if directory—Extension of time.*

The provisions of S. 17 that an applicant for an order to set aside an *ex parte* decree shall *at the time of presenting his application* either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree as the Court may direct are directory and not mandatory and it is open to the Court in appropriate cases to extend the time within which the deposit is to be made or security furnished. (*Tek Chand, Bhide and Agha Haidar, JJ.*) GEDI MAL DHARAM DAS *v.* HUNA MAL SEDHU RAM. **12 Lah. 359=I.R. 1931**

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Lah. 491=32 P.L.R. 504=131 I.C. 635=A.I.R. 1931 Lah. 332 (F.B.).

———**S. 17**—*Security tendered and accepted—Subsequent objection—Rejection of application—Validity.*

An application to set aside an *ex parte* decree was made accompanied by necessary security and the Court was satisfied with the security at the time it was filed. Subsequently the plaintiff objected to the security on the ground that it was difficult to send it to Rai Bareilli for verification and not on the ground that it was insufficient.

Held, that the objection was not good and should not have been allowed and the application should not have been rejected as the provisions of S. 17 had been sufficiently complied with. (*Raza, J.*) HARNAM SINGH *v.* MOOL CHAND. **I.R. 1931 Oudh 254=132 I.C. 238=14 O.L.J 144=8 O.W.N. 225=A.I.R. 1931 Oudh 319.**

———**S. 17**—*Sufficient compliance with—Security bond filed in time but not registered.*

Where a security bond hypothecating immovable property is duly executed by the applicant and filed in Court within the period of limitation but the same is not registered, the Small Cause Court Judge cannot treat the security as sufficient and proceed to hear the application. In such a case the Small Cause Court Judge has no jurisdiction to order a retrial. Case law discussed. (*James J.*) RAMKHELAWAN CHOUDHURI *a.* DUNIALAL CHOUDHRI. **6 R.P. 375=147 I.C. 764=15 Pat.L.T. 13=A.I.R. 1934 Pat. 74.**

———**S. 17**—*Sufficient compliance with Test.*

An unregistered security bond is sufficient compliance with law provided the delay in getting it registered is not due to any fault of the applicant himself. The test is whether the security which the party placed in the hands of the Court and which the Court ultimately accepted was sufficient to enforce the obligation upon him. (*Khaja Mahomed Noor and Agarwala, JJ.*) RAJESHWARI PRASAD SINGH *v.* BRAHMAN AND LAL. **12 P. 745=6 I.R Pat. 157=145 I.C. 314=14 P.L.T. 326=A.I.R. 1933 Pat. 279.**

[**Expl.** 15 P.L.T. 13 (15, 16).]

———**S. 17, Proviso**—*Applicability—Objection by judgment-debtor to execution dismissed for default—Application for restoration.*

An objection taken by a judgment-debtor in certain execution proceedings before the Small Cause Court was struck off for default. The judgment-debtor made an application praying that his objection dismissed for default be restored. The Court dismissed it on the preliminary ground that no security was furnished as required by the proviso to S. 17, Small Cause Courts Act. On revision,

Held, that the order striking off the objection for default cannot be treated as an order under S. 47, C. P. Code, and cannot therefore amount to a decree as no question of the nature specified in that section was determined and that the order can, in no sense, be considered to be an *ex parte* decree so as to attract the applicatton of the proviso to S. 17, Small Cause Courts Act,

Held further, that no question of *res judicata* can arise as the objection had not been dismissed on the merits and it is, therefore, open to the judgment-debtor to take the same objection by another application instead of applying for the order of dismissal being set aside. (*Niamatullah, J.*) ABDUL HAMID *v.* SHYAM LAL CHIMAN LAL. **157 I.C.426=8 R.A.189=1935 A.L.J. 403=1935 A.W.R. 427=A.I.R. 1935 All.502.**

———**S. 17, Proviso**—*Interpretation—Rules applicable.*

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A reasonable and practical interpretation of the section is as follows: (1) The applicant must within 30 days file his application either with cash or with a statement that he is prepared to give security (and in the latter case he may, of course, tender the security he proposes) and ask for the direction of the Court. (2) In the case where he wants to give security, if the Court refuses to direct security, he must deposit cash within the 30 days, or his application will be rejected. (3) If the Court agrees to direct security, then: (*a*) it will consider the security already offered, if it has been so offered; or (*b*) name security to its satisfaction which must be filed within the 30 days. (4) If the applicant does not in fact ask for a direction or if, though the applicant does ask for a direction, the Court does not in fact give any direction, but in fact the Court does issue notice, the Court shall be taken to have approved the deposit of cash or the security offered as the case may be. (5) If filed within the 30 days and accepted by the Court expressly or impliedly by the issue of notice the application is a good application, though it will be open to the decree-holder to challenge the nature and sufficiency of the security and to the Court under O. 9, R. 9 to make such further conditions as it thinks fit. If the Court delayed in giving its direction or approving expressly or implied by the security already tendered, so long that the period of limitation had expired before the applicant had fair opportunity of complying with the direction, then in a suitable case it would be open to the Court itself to consider and exercise the inherent powers reserved to it by S. 151, C. P. Code. (*Sulaiman A. C. J., Mukerji, Boys, and Bajpai, JJ.*) RAM BHAROSE *v.* GANGA SINGH. **54 All.154=136 I.C. 609=I.R. 1932 All. 225=1931 A.L.J. 1049=A.I.R. 1931 All. 727 (F B).**

[**Rel.** 1933 A.L.J. 922 (924).]

———**S. 17, Proviso**—*Non-compliance with—Effect.*

Where the deposit was not made at the the time of the presentation of the application, nor was it made within the period of limitation, nor was the period extended by the Court

Held, that the provisions of S. 17 were not observed and that the application for setting aside the decree passed *ex parte* was therefore not maintainable. (*Middleton, J. C.*) NANAK CHND *v.* PARMA NAND. **8 R.Pesh. 76=158 I C. 1112=A.I R 1935 Pesh. 159.**

———**S. 17, Proviso**—*Review application—Subsequent deposit before the expiry of the period of limitation—Validity of.*

An application for review is valid and can be entertained by the Court even though not then accompanied by the deposit required under S. 17, proviso, provided the deposit is made subsequently before the expiry of period of limitation prescribed for the application. 26 N. L R. 63; 43 M. 579, Ref. (*Macnair, J. C.*) MANIK LAL VERMA *v* KHUSHLAL MALI. **I.R. 1933 Nag 80 (1)=141 I.C. 813 (1)=29 N.L.R. 104=A.I.R. 1933 Nag. 102.**

———**S. 17, Proviso**—*Scope—If mandatory—Power to extend time.*

The proviso to S. 17 is mandatory and the applicant is bound to make the deposit or give security along with his application and not at any subsequent stage of the proceedings and the Court has no power to enlarge the time for making the deposit or furnishing the security. 116 I.C 641 Fol. (*Subhedar, A. J. C.*) PUNDALIK VITHOBA *v.* EMPEROR. **I.R. 1933 Nag. 239=144 I.C. 394=A.I R. 1934 Nag. 43.**

———**S. 17, Proviso**—*Sufficient compliance with—Security bond filed in time but verified later.*

A security bond, which was filed along with the application to set aside an *ex parte* decree, had not however

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been verified by the two sureties. It was in fact verified later; but by that time it was two days beyond the period of limitation prescribed for making the application.

Held, that the bond as filed though not verified in the first instance, was perfectly good and effective and that the application was within time. 29 A.L.J. 1049, Ref. (*Kendall, J.*) AHMADYAR KHAN *v.* KHEYALI. **147 I.C. 853=6 R.A. 580=1933 A.L.J. 992=A.I.R. 1933 All. 933.**

———**S. 17, Proviso**—*Sufficient compliance with—Subsequent deposit—Application if validated.*

Where an application to set an *ex parte* decree aside was not accompanied by a deposit of the amount due under the decree or security to the satisfaction of the Court for the performance of the decree or compliance with the judgment,

Held that the application was not sustainable and that any subsequent deposit could not render the application valid.

Quaere, whether the Court had the power to extend the time for deposit under S.5 of the Limitation Act. (*Dhavle, J.*) MUNSHI SINGH *v.* BANSROPAN CHAMAR **I R. 1933 Pat. 158= =142 I.C. 599=14 Pat.L.T. 20=A.I.R. 1933 Pat. 134.**

———**S. 23**—*Cognizability—Claim for damages based on title to trees.*

Where the relief for damages depended on the proof or disproof of the title of the plaintiff to certain trees,

Held, that the suit was maintainable in the Court of Small Causes. (*Bennet, J.*) KASHI *v.* JAGGO BAI. **6 R.A. 790=148 I.C. 888=15 L.R. 54 (Rev.)=1934 A.L.J. 115=3 A.W.R. 61=18 R.D. 13=A.I.R. 1934 All. 290.**

———**S. 23**—*Discretion under—Revision.*

Under S. 23, Small Cause Court Judge has got a discretion and no revision is competent from his order simply on the ground that a question of title is raised in the suit. (*Hilton, J.*) GANESH DAS *v.* FEROZE DIN. **150 I.C. 980 (1)=7 R.L. 45=A.L.R. 1934 Lah. 249 =A.I.R. 1934 Lah. 355 (1).**

———**Ss. 23 and 25**—*Discretion under—Revision.*

Under S. 23, Small Cause Court is given a considerable discretion. Thus if a *bona fide* question of title arises incidentally in a Small Cause Court suit, the Court may determine it. But where the Court does not consider whether such question was *bona fide* one, or that it was necessary for the purposes of the suit to decide it but decrees the suit, it cannot be said that it acted illegally. Therefore no revision lies on such a decree. (*Kendall, J.*) SHANKAR SAHAI *v.* PRABHU DAYAL. **6 R.A. 1042=150 I.C. 144=4 A.W.R. 496=A.I.R. 1934 All. 695 (2).**

———**Ss. 23 and 25**—*Return of plaint for presentation to proper Court—Appeal—Revision.*

An order by the Small Cause Court returning the plaint for presentation to the proper Court purporting to have been passed under S. 23 is not appealable but it is a 'case decided' within the meaning of S. 115 of the C. P. Code, and if the Court has in doing so acted with material irregularity, the High Court can interfere with the order in revision. 1 I.C 288, Diss. (*Sulaiman, C.J.*) KASTURI *v.* BALMUKAND. **54 All. 1048=I. R. 1933 All. 257=143 I.C. 464=1932 A.L.J. 1068= A.I R. 1933 All. 106.**

———**S. 23**—*Question of title—Jurisdiction of Small Cause Court—Limits.*

A Small Cause Court Judge is competent to decide a question of title but he should finally determine the same and not in a cursory manner. It is not always convenient for him to decide an intricate question of

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title and the object of S. 23 is to meet cases in which the Judge is satisfied that the question of title is so intricate that it should not be decided summarily and then it should return the plaint for presentation to a proper Court. There are no words in the section which would justify the inference that the plaintiff and the defendant should be rival claimants to the immovable property before the question of returning the plaint for presentation to proper Court arises. Where therefore in a suit for arrears of rent in respect of certain shops the defence is that the shops are in the ownership of a third person who had purchased them at an auction sale and the rent had been paid to this third person, and the question of title depends upon a consideration of a number of documents, it is a case in which the question of title ought to be decided by a competent Court other than the Small Cause Court. (*Bajpai, J.*) NOOLA *v.* CHIMAN LAL. **159 I.C. 70 (2)=8 R.A. 391=1935 A. L.J. 301=4 A.W R 1477=A.I.R. 1935 All. 148.**

———**S. 23**—*Transfer under — Effect — Right of appeal.*

The transfer of a Small Cause suit under S. 23, Provincial Small Cause Courts Act makes it a regular suit and first appeal no doubt lies. But the nature of the suit continues to be a Small Cause one and a second appeal is barred under S. 102, C.P. Code The mere fact that a question of title was considered to have been involved in the case or has been incidentally decided would not permit of a second appeal. 87 I.C. 659, Ref. (*Sulaiman, A.C.J. and Bajpai, J.*) ALLAH BUX *v.* NURUL HASAN. **I.R. 1931 All. 827=134 I.C. 251 =1931 A.L J. 967.**

———**S. 25—**

Case decided.
Error of law.
Finding of fact.
New plea.
Powers under.
Question of jurisdiction.
Question of limitation.
Remedy under.
Scope.

Case decided.

———**S. 25**—"*Case decided*"—*Return of plaint for presentation to proper Court.*

When a Court arrives at a finding that the suit is not cognizable by the Small Cause Court and directs the plaint to be returned for presentation to the proper Court, the case must be deemed to have been decided so far as the Court of Small Causes is concerned, even though the Court does not decide it on its merits. Therefore, there is nothing in the provisions of S. 25 of the Provincial Small Cause Courts Act to prevent the High Court from exercising its revisional powers in respect of orders passed by the Judge in the course of proceedings in the Small Cause Court suit before him. (*Srivastava and Thomas, JJ.*) HAR DAYAL *v.* RAGHUBAR DAYAL. **10 Luck. 199=7 R.O. 104=151 I.C. 283=11 O.W.N. 1135=A.I R 1934 Oudh 429 (2).**

Error of Law.

———**S. 25**—*Error of law—Decision correct—Interference.*

Where the former decision was not correct but the later one is correct, the High Court does not in revision interfere on the technical ground that the matter is *res judicata* (*Curgenven, J.*) MODIN KUTTI *v.* MANNAN. **154 I.C. 541=7 R.M. 444=40 L.W. 656= 1934 M.W.N. 1322=A.I.R. 1934 Mad. 563.**

———**S. 25**—*Error of law—Failure to consider presumption of law.*

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In the case of a promissory note, a presumption arises under S. 118 (*a*) of the Negotiable Instruments Act that it was made for consideration. Where the lower Court has not taken this presumption into account because it did not hold the document to be a promissory note, its decision on the question whether there was consideration or not is vitiated by the failure to consider this presumption of law. (*Bennet, J.*) LAKHMI DAS *v.* LAKHO RAM. **154 I.C. 517=7 R A. 771=1935 A. L.J. 651=1935 A.W.R. 366=A.I.R. 1935 All. 410.**

———**S. 25**—*Error of law—Inference from documents.*

The inference drawn from proved documents is a pure question of law. It is open to the Chief Court in revision to consider whether the inference drawn by the lower Court from certain documents has been correctly drawn or not. (*Nanavutty, J.*) IMPERIAL BANK OF INDIA, LUCKNOW *v.* ROBERTS. **7 Luck. 116=I.R. 1931 Oudh 363=134 I.C. 411=14 O.L.J. 483=8 O. W.N. 800=A.I.R. 1932 Oudh 283.**

———**S. 25**—*Error of law—Mistake as to burden of proof.*

Where the judge misdirected himself and wrongly threw the burden of proof on the plaintiff in a promissory note case ignoring the presumption under S. 118, Negotiable Instruments Act, *held*, that the High Court could interfere in revision. (*Kendall, J.*) JAGMOHAN MISIR *v.* MENDHAI DUBE. **54 All. 375=I.R. 1932 All. 65=135 I.C. 241=A.I.R. 1932 All. 164.**

———**S. 25**—*Error of law—What is—Failure to take note of certain circumstances.*

A contracted to sell 1,000 maunds of husks to *B* and delivered some maunds but delayed delivering the remaining portion and finally delivered inferior quality of husks containing sand. *B* refused to accept delivery of the portion subsequently supplied and brought a suit for damages against *A*. *B's* claim was disallowed by the Small Cause Court on the ground that there was nothing to show that *A* had agreed to supply husks of better quality. *A* admitted the presence of sand in the husks but contended its presence was unavoidable and that there was similar proportion of sand in husks previously supplied. The evidence on the point was scanty. *B* showed that the portion subsequently supplied alone contained sand. *B* was willing and anxious to take delivery of the balance of husks but *A* delayed tendering the same. The price of husk had arisen in the intervening period.

Held, that the trial Court had misdirected itself in not taking the circumstances into consideration, especially the conduct of the parties and had erred in law. Decree modified (*Patterson, J.*) ASHUTOSH GARAI *v.* FIRM OF BALMUKUND KISHEN GOPAL. **130 I.C. 575=52 C.L.J. 528=A.I.R. 1931 Cal. 163.**

Finding of fact.

———**S. 25**—*Finding of fact—Interference — Arbitrary reasons.*

Although a Judge in a Small Cause Court case is not bound to deal elaborately with the arguments and details of the case, he is bound to state the reasons for the decision at which he has arrived, and those reasons must be judicial ones and not arbitrary. If the reasons for the decision of a question of fact are arbitrary, then it is a judgment which is contrary to law. (*Wort, J.*) SUKHDEYAL *v.* MUNI LAL. **157 I C. 471 (2)=8 R.P. 157 =A.I.R. 1935 Pat. 452.**

———**S. 25**—*Finding of fact—Interference—Impossible finding.*

In an application under S. 25, the High Court will not generally interfere with findings of facts but where it is shown that the findings are such as could not have been arrived at upon the state of the evidence on the record it is open to the Court to interfere. (*Kulwant Sahay, J.*) DAMRI CHOUDHURY *v.* NATHUNI MIA. **I.R. 1933 Pat. 151 (2)=142 I.C. 463=14 Pat L.T. 61=A I.R. 1933 Pat. 145.**

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———**S. 25**—*Finding of fact—Interference.*

An application for revision under S. 25 has a much larger scope than one under S. 115 of the C. P. Code, but it cannot be said that a clear finding of the Small Cause Court can be reversed or modified by the High Court upon the sole ground that the balance of evidence was in favour of the applicant. It is not within the province of the High Court to make an appraisement of the value or weight of the finding of the Court below. (*Mears, C J. and Sen, J.*) ABDUL QADIR *v* NARENDRA MOHAN GHOSE. **I.R. 1931 All. 257 (1)= 130 I.C. 289 (1)=A.I.R. 1931 All. 210.**

———**S. 25**—*Finding of fact—Interference — Principles.*

The High Court is not justified in interfering with a finding of fact of lower Court in revision unless the judgment is perverse and can be shown to be such on the face of it. (*Rupchand, J.C. and Mehta, A J.C.*) FORD AUTOMOBILE CO. *v.* MENGHRAJMAL MOTIRAM. **147 I.C. 415=6 R.S. 155=A.I.R. 1933 Sind 363.**

———**S. 25**—*Finding of fact—Interference—Principles.*

The High Court will not interfere in revision with the decision of the lower Court on a pure question of fact unless the judgment of the lower Court is perverse. It cannot interfere on the ground that the decision is not in accordance with law. 27 All 531; A.I.R. 1914 All. 153 and 38 All. 690, Ref. (*Kendall, J.*) BHAGWATI PRASAD *v.* ABDUL LATIF. **I.R. 1933 All. 405 =144 I.C. 270=A.I.R. 1933 All. 373.**

———**S. 25**—*Finding of fact—What is—Finding as to "misconduct" under Risk-note H.*

The question whether certain proved facts amount to "misconduct" within the meaning of the Risk-note Form H, is not purely a question of fact, and it is open to the High Court in a revision under the Small Cause Courts Act to hold that the facts found by the trial Court do not in law constitute misconduct. (*Abdul Rashid, J.*) B. B. & C. I. RAILWAY *v.* SHAM LAL GUPTA. **153 I.C. 625=7 R.L. 449=A.I.R. 1935 Lah. 206.**

New plea.

———**S. 25**—*New plea.*

The applicant cannot be allowed to take any plea before the High Court in revision which was not taken in the Court below. (*Raza, J.*) AJUDHIA PRASAD LALJI *v.* DULI CHAND BINAEK RAM. **I.R. 1932 Oudh 290=138 I.C. 160=9 O.W.N. 436=A.I.R. 1932 Oudh 230.**

———**S. 25**—*New plea—New case in revision.*

It is not open to a litigant to make out a new case in revision on a point of fact which has not been urged in the trial Court. (*Rupchand, J.C. and Mehta, A.J.C.*) FORD AUTOMOBILE CO. *v.* MENGHRAJMAL MOTIRAM. **147 I.C. 415=6 R.S. 155=A.I.R. 1933 Sind 363.**

———**S. 25**—*New plea—Want of jurisdiction—If open in revision.*

A plea that the Small Cause Court had no jurisdiction to decide the suit because of Art. 35 (*ii*) of Sch. II, if not taken in the trial Court, cannot be raised for the first time in revision. (*Raza, J.*) MADHO *v.* KASHI RAM. **9 O.W.N. 962.**

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Powers under.

——**S. 25**—*Powers under.*

Where it appears that the Judge really applied his mind to the case and gave a decision on the issue based on the evidence before him it is not a proper case for interference in revision. (*Pullan, J.*) SUKHRAJ *v.* RAM BHAROS. **I.R. 1931 Oudh 256=132 I.C. 240=7 O.W.N. 1202.**

——**S. 25**—*Powers under—Discretionary.*

S. 25 does not give any right of appeal on law or fact and the powers conferred by the section are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Small Cause Court. 15 O.C 319, Ref. (*Raza, J.*) AJUDHIA PRASAD LALJI *v.* DULI CHAND BINAEK RAM. **I.R. 1932 Oudh 290=138 I.C. 160=9 O.W.N. 436=A.I.R. 1932 Oudh 230.**

——**S. 25**—*Powers under—Discretionary*

S. 25, Small Cause Courts Act, does not give right of appeal on law or fact and the powers conferred by the section are purely discretionary and not to be exercised unless it appears that some substantial injustice has resulted from the decree of the Court of Small Causes. (*Raza, J.*) SHEOMANGAL PRASAD *v.* DURGA SAHAI SHUKAL. **6 I.R. (Oudh) 150 (1)=146 I.C. 595 (2)=10 O.W.N. 581=A.I.R. 1933 Oudh 346.**

——**S. 25**—*Powers under—Discretionary.*

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——**S 25**—*Powers under—Discretionary—Conflicting decisions—Interference.*

Where the decision in two rent suits was unimpeachable when taken separately but the two results taken together were anomalous,

Held, that the High Court need not interfere in revision. (*Smith, J.*) BHATTACHARJI *v.* ISHTIAQ HUSAIN KHAN. **I.R. 1933 Oudh 205=143 I.C. 838=10 O.W.N. 48=A.I.R. 1933 Oudh 129.**

——**S. 25**—*Powers under—Discretionary—Exercise of—Principles.*

There is a discretion given to the High Court by S. 25. The High Court has not merely to see whether the Court of Small Causes has made a technical error in its procedure, but it has to consider whether the order finally arrived at is an order which substantially does justice between the parties. (*Mukerji and Bennet, JJ.*) RAM SHANKAR *v.* SECRETARY OF STATE. **54 All. 879=I.R. 1932 All 574=139 I.C. 701=1932 A.L.J. 842=A.I.R. 1932 All. 575.**

——**S. 25**—*Powers under—Exercise of — Another remedy open.*

High Court should not interfere with an order of a Subordinate Court under S. 25, when it is open to the aggrieved party to institute a regular appeal. (*Allsop, J.*) KUNJ BEHARI *v.* THAKUR BAIJNATH. **147 I.C. 184=6 R O 251=A.I.R. 1933 Oudh 454.**

——**S. 25**—*Powers under—Exercise of — Another remedy open.*

The exercise of the right of interference under S. 25 does not depend on the question whether an appeal lies or not An order for payment of compensation to defendant was passed under S. 35-A, C. P. Code.

Held, that even though an appeal lay to the District Judge from the order under S. 24, Small Cause Courts Act, still the High Court could consider the order in revision and interfere if necessary. (*Smith, J.*) KRISHNA DATT *v.* RAM SARAN. **6 I.R. (Oudh) 204=146 I.C. 993 (1)=10 O.W.N. 1085=A.I.R. 1933 Oudh 477.**

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——**S. 25**—*Powers under—Exercise of—Applicant without merits.*

In all revisional applications under S. 25, the High Court must be satisfied, before it interferes, that some substantial injustice has been done. In other words, that there are merits in the application apart from technicality. (*Young, J.*) TURSI RAM *v.* MEGHRAJ BASDEO. **I.R. 1933 All. 396 (2)=144 I.C. 72=A.I.R. 1933 All. 145.**

——**S. 25**—*Powers under—Exercise of—No substantial injustice committed by lower Court.*

Where there has been no substantial injustice committed by the lower Court in the exercise of its jurisdiction no revision lies. (*Blacker, J.*) PREM KISHAN DAS *v.* PEOPLE'S BANK, NORTHERN INDIA, LTD., LAHORE. **158 I.C. 10=A.I.R. 1935 Lah. 190.**

——**S 25**—*Powers under—Exercise of—Order based on conjecture.*

The plaintiff sued for the recovery of a certain sum, said to have been advanced to the defendant on an oral contract, and stated that the defendant had subsequently executed a pro-note as collateral security, but that the note was lost. The trial Court found that the moneys had been lent, but, the promissory note was executed then and there and not as a collateral security. It inferred that as the pro note had not been produced, it must have been executed on an insufficient stamp and dismisssed the suit on this conjecture. On an application for revision under S. 25,

Held, that there was no evidence whatever to support the conjectures made by the Court and that the case set up by the plaintiff was substantially true and that the order of the trial Court should be set aside as there had been a miscarriage of justice. (*Kendall, J.*) ISHWAR SAHAI *v.* MOTILAL **8 R A. 136=1935 A W R. 1093 =157 I.C. 199=1935 A.L.J. 1140.**

——**S. 25**—*Powers under—Exercise of—Principles.*

The revisional powers given by S. 25 are only exercisable where it appears that some substantial injustice to a party to a litigation has directly resulted from a material misapplication or misapprehension of law or from a material error in procedure. Where it appears to the High Court that substantial justice is done to the parties by an order of the Court below setting aside an *ex parte* decree, it will not interfere with such order even though the Court has not complied with the provisions of S. 17 of the Act (*Bennet, J.*) SONKALI *v.* MAHABIR DUBE. **159 I.C. 51=8 R.A. 384=1935 A.W.R. 178=1935 A L J. 414=A.I.R. 1935 All. 379.**

——**S. 25**—*Powers under—Exercise of—Principles.*

The High Court will not ordinarily exercise their powers under S. 25 unless they have reason to suppose that there has been a real mismanagement of the case or actual perversity in decision. When there was no perversity or illegality in the action of the Court which merely granted more indulgence than the circumstances of the case necessitated, *held*, that it was not a proper case for interference in revision. (*Kisch J.*) SITA RAM MANOON LAL *v.* HARAKH CHAND. **8 O.W.N. 1263 =137 I.C. 495=I.R. 1932 Oudh 235=A.I.R. 1932 Oudh 60.**

——**S. 25**—*Powers under—Exercise of—Refusal to grant compensation under S. 95, C. P. Code.*

The grant of compensation under S. 95, C. P. Code, is no doubt a matter of discretion but the discretion has to be exercised in a judicial manner. Where the Court has given no reasons for refusing the application for

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compensation, the order clearly ignores the terms of S. 95 and is not one according to law. (*Srivastava and Thomas, JJ.*) HAR DAYAL *v.* RAGHUBAR DAYAL. **10 Luck. 429=7 R.O. 104=151 I C. 283=11 O.W.N. 1135=A.I.R. 1934 Oudh 429 (2).**

———**S. 25**—Powers under—Execise of—Return of plaint for presentation to proper Court. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SS. 23 AND 25. **54 All. 1048=A.I R. 1933 All. 106.**

———**S. 25**—*Powers under—Exercise of—Substantial injustice.*

S. 25 allows the High Court to interfere where by reason of omission to consider material evidence or where by evident mistake in the appreciation of evidence substantial injustice has been done to the party. (*M.C. Ghose, J.*) GOWRISANKAR RAM KUMAR *v.* SASHI BHUSAN DAS **6 I.R. (Cal.) 14=144 I.C. 740=37 C. W.N. 275=A.I.R. 1933 Cal. 501.**

———**S. 25**—*Powers under—Interference—Clear error of law or perverse decision.*

The High Court will interfere under S. 25 only when there is a substantial injustice, *i.e*, when a clear error of law is shown, or where there is obvious perversity in the decision of a question of fact. When a Small Cause Court says in its judgment that there is no neglect or no misconduct in fact, it is never a question of law. (*Wort, J.*) NAURANG LAL *v.* B.B. & C.I. RY., CO. **160 I.C. 1086=8 R.P. 424=16 Pat.L.T. 887=A.I.R. 1936 Pat. 84.**

———**S. 25**—*Powers under—Interference with discretion—Dismissal of suit under O. 9, R. 2, C. P. Code.*

Where a suit is dismissed under O. 9, R. 2, C. P. Code, it is open to the Chief Court to interfere under S. 25, but it may refuse to interfere on the ground that the representatives of the deceased plaintiff have a remedy to institute a fresh suit. (*Smith, J.*) THAKUR PRASAD *v.* SITA RAM. **138 I.C. 796=I.R. 1932 Oudh 313=8 O.W.N. 1179=A.I.R. 1932 Oudh 106.**

———**S 25**—*Powers under—Interference with—Discretion as to amount of instalment.*

In the case of an instalment decree the amount of the instalments and the period for their payment is a matter of the discretion of the Court; but it is a discretion to be exercised within bounds. Where it is so exercised as to constitute a virtual denial of the plaintiff's rights such as by fixing the amount at an unduly low figure the High Court may interfere in revision and substitute a higher amount as instalment payable. (*Boys, J.*) REOTI PRASAD *v* KUNJI LAL. **54 All. 539=143 I.C. 44=I.R. 1933 All. 163 (1)=A.I.R. 1933 All 90.**

———**Ss 25 and 23**—Powers under—Interference with discretion of lower court. *See* PROVINCIAL INSOLVENCY ACT, SS. 23 AND 25—DISCRETION UNDER. **6 R.A. 1042=150 I C. 144=4 A.W.R. 496=A.I.R. 1934 All. 695 (2).**

———**S. 25**—*Powers under—Interference with discretion of Small Cause Court—Refusal to set aside* ex parte *decree.*

It is a matter of discretion as to whether a Small Cause Court should or should not allow restoration of a suit which was decreed *ex parte*. Where it refuses to allow restoration holding that the grounds alleged were not sufficient, the High Court will not interfere in revision. (*Bennet, J.*) B. B. & C. I. RY. *v* RAGHIB ALI. **154 I.C. 516=7 R A. 769=1935 A.W.R. 273=1935 A.L.J. 708=A.I.R. 1935 All. 437.**

———**S. 25**—*Powers under—Interference with—Irregular procedure—No opportunity to examine witnesses after onus was shifted.*

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If a Judge of a Small Cause Court chooses to depart from the procedure laid down for the conduct of cases in such a Court, he should not fall back on the provisions of that procedure in order to suit his own convenience. In a small cause suit the Judge framed an issue and placed the onus on the plaintiff. When both plaintiff and defendant had closed the case and the judgment was to be delivered, the Judge changed the onus on to the defendant and asked him whether he had any objection to the same. The defendant replied that he had no objection but that he should be allowed to examine his remaining witnesses in case the onus was shifted. The Judge shifted the onus on to the defendant but without allowing him to examine his witnesses decreed the suit.

Held, that the defendant should be allowed to examine his witnesses. (*Broadway, J.*) UDMI RAM *v.* DURGA DAS. **6 I R. (Lah.) 125 (2)=145 I.C. 704=A.I.R. 1933 Lah. 452.**

———**S. 25**—*Powers under—Interference—Judgment indicating that Judge has not applied his mind—Judgment—Contents of—No issues framed—Plaintiff's evidence alone recorded—Judgment contrary to evidence—Validity of.*

A Judge of the Small Cause Court must indicate in his judgment that he has applied a judicial mind to the case, because it is necessary for the High Court to satisfy itself that there has been a decision in accordance with law, and for that purpose it is necessary for the High Court to be satisfied that the Judge has come to his decision judicially and not arbitrarily. Where no issues were framed at all and the decision of the Judge did not follow inevitably from the statement of the plaintiff and that was all the evidence on the file.

Held, that the record did not indicate that the Judge has applied his mind to the case and that the decision was not according to law. (*Kendall, J.*) RAM NATH TULSHI RAM *v.* SALIG RAM. **6 I R. (All.) 125 (2)=145 I.C. 579=1933 A.L.J. 316=A.I.R 1933 All. 339.**

———**S. 25**—*Powers under—Interference with order rejecting amendment.*

An order rejecting amendment is of an interlocutory character and cannot be revised even under S 25. S. 25 is applicable only when a case is decided by the Court and not to an interlocutory order. (*Bhide, J.*) HARI KISHAN *v.* BEWA SINGH. **A.I R. 1934 Lah. 165 (2).**

———**S. 25**—*Powers under — Interference with—Order under O. 5, R. 20.*

It is not within the power of the High Court to examine the facts on which an order under O. 5, R. 20 is made. (*Broadway, J.*) MANGAL SAIN HARBANS LAL *v.* ROSHAN LAL & BROS. **149 I.C. 1112=6 R.L. 802 =A.I.R. 1933 Lah. 288.**

———**S. 25**—*Powers under—Interference—Principles.*

Interference in revision under S. 25 is discretionary and that High Court will not as a rule interfere in revision unless some substantial injustice has resulted from the error or irregularity complained of. 13 A. 277; 52 A. 153; 66 P R. 1904; 23 Bom. 334, Foll. (*Bhide, J.*) B. B. & C. I. RAILWAY CO. *v.* ABDUL RAHMAN MAHOMED ABDULLAH. **I.R. 1931 Lah. 763=133 I.C. 283=32 P.L R. 163=A.I.R. 1931 Lah. 606.**

———**S. 25**—*Powers under—Limits—Question of fact.*

The language in S. 25 states that the High Court may satisfy that the decree or order by the Small Cause Court was according to law. The expression "according to law" is parallel to language in S. 100 (1) (*a*), C. P. Code, and limits the High Court in revision to ground of law that might be raised in a second appeal and it does not cover a revision on questions of fact. (*Bennet, J.*)

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MAHADEO PRASAD *v.* GIRDHARI. **159 I.C. 35=8 R.A. 382=1935 A.W.R. 190=1935 A.L.J. 396=A. I.R. 1935 All. 372.**

———**S. 25**—*Powers under—Refusal to exercise—Substantial justice.*

Where substantial justice has been done the High Court may refuse to interfere in revision. (*Mears, C. J. and Sen, J.*) KALLU MAL *v.* BIKRAMAJIT SINGH. **54 All. 409=I.R. 1932 All. 260=136 I.C. 839 (1)=1932 A.L.J. 260=A.I.R. 1933 All. 13.**

———**S. 25**—*Powers under—Relief against—Restoration of suit dismissed for plaintiff's default.*

Where a small cause suit which was dismissed for plaintiff's default and subsequently restored to file an application, was tried on the same day in the absence of the defendants and decreed *ex parte*, the only remedy of the defendants who seek to set aside the decree on the ground that it is illegal as the Court had no right to dispose of the suit on the same day on which it restored it to file, is by way of revision to the High Court. (*Pakenham Walsh, J.*) CHINNASUBBARAYUDU *v.* VEERASWAMI. **155 I.C. 575=7 R.M. 589=1935 M. W.N. 110=41 L.W. 117=A.I.R. 1935 Mad. 196.**

———**S. 25**—*Powers under—Scope of.*

High Courts should not ordinarily exercise the powers under S 25 unless they have reason to suppose that there had been a real mismanagement of the case or actual perversity in the decision by the trial Court. Where the judgment showed that there had been a real mismanagement of the case before the trial Court and in consequence substantial injustice had been resulted the High Court interfered in revision. (*Nanavutty, J.*) IMPERIAL BANK OF INDIA, LUCKNOW *v.* ROBERTS. **7 Luck. 116=I.R. 1931 Oudh 363=134 I.C. 411=14 O.L.J. 483=8 O.W.N. 800=A.I.R. 1932 Oudh 283.**

Question of jurisdiction.

———**S. 25**—*Question of jurisdiction—Interference.*

Where the decree is passed without jurisdiction by the lower Court, the High Court ought to interfere in revision. (*Curgenven, J.*) MUNUSAMIAH *v.* RAJA OF KALAHASTI. **156 I.C. 600=42 L.W. 203=8 R.M. 26=1935 M.W.N. 519=A.I.R. 1935 Mad. 554**

———**S. 25**—*Question of jurisdiction—Interference—Equity in favour of opposite party.*

Where the question of jurisdiction is involved, and it is by no means a trivial one, the High Court should interfere in revision, even though the equities may be in favour of the opposite party. (*Kendall, J.*) TIRKHA *v.* GHASI RAM. **158 I.C. 516=8 R.A. 310=1935 A. W.R. 972=1935 A.L.J. 981=A.I.R. 1935 All. 842.**

Question of limitation.

———**S. 25**—*Question of limitation—Interference.*

The High Court will not, in the exercise of its discretionary powers of revision under S. 25, interfere with an erroneous decision on a point of limitation, where the judgment of the lower Court does substantial justice between the parties. (*Din Moahmmad, J.*) CHARAN DASS *v.* RAM RATTAN. **A.I.R. 1935 Lah. 137.**

———**S. 25**—*Question of limitation—Interference.*

Under S 25 the High Court can interfere on a point of limitation if the facts are not in dispute. (*Bennet, J.*) GAJADHAR PRASAD *v.* DHARMA NAND. **154 I.C. 713 7 R.A. 797—1935 A.W.R. 365=1935 A.L.J. 379=A.I.R. 1935 All. 716.**

Remedy under.

———**S. 25**—*Remedy under—Availability—Suit of small cause nature—Decision of District Judge on appeal.*

The decision of a District Judge on appeal from a decree of a Munsiff in a suit of a small cause nature of the value of less than Rs. 500 tried by him as a regular suit, is revisable under S. 115, C.P. Code, and not under S. 25 of the Provincial Small Cause Courts Act. (*King, C. J.*) NAND LAL *v.* ALI AKBAR. **165 I.C. 251=1935 O.W.N. 1244=A.I.R. 1936 Oudh 129.**

PROV. S. C. C. ACT (1887), S. 32.

Scope.

———**S. 25**—*Scope.*

Under S. 25 the High Court has only to be satisfied that a decree or order in a case decided by a Court of Small Causes is according to law, and so where the case as presented to the Court was one based on an inadmissible document and so it was dismissed, it is impossible to hold that the case had been decided otherwise than in accordance with law. (*Kendall, J.*) BINDESARI PRASAD *v.* RAM TAPESHA SINGH. **6 I.R. (All) 367=146 I.C. 882=1933 A.L.J. 897=A.I.R. 1933 All. 577.**

———**S. 25**—Scope—Court allowing belated plea of defendant—Decision without giving plaintiff opportunity to meet such plea—Interference. *See* PRACTICE—PLEADINGS. **18 N.L.J. 97.**

———**S. 25**—*Scope—Inherent power of High Court.*

Under S. 25 the High Court may call for a case for the purpose of satisfying itself that a decree or order made in any case has been decided by a Court according to law, and is not in any way bound by questions of waiver as between the parties, regarding the right of revision. (*Kendall, J.*) ABDUL RASHEED KHAN *v.* BALLI RAM. **154 I.C. 15=7 R.A. 700=A.I.R. 1934 All. 107.**

———**S. 25**—*Scope—Power of High Court to act* suo motu.

Under S. 25 the High Court has the power and the duty in proper cases of taking revisional action even though not moved to do so by any party, when the matter come to its notice. Rules as to contents of judgment in small cause suit stated. (*Reilly and Anantakrishna Aiyar, JJ.*) MARIYAYEE AMMAL *v.* PONNUSAMI CHETTIAR. **55 Mad 671=35 L.W 520=I.R. 1932 Mad. 361=137 I.C. 369=A.I.R. 1932 Mad. 336=62 M.L.J 439.**

———**S. 27**—*Scope and effect of*

The fact that no appeal is permitted from a decree made by a Judge, Small Cause Court, is due to the provision of S. 27. That rule does not apply when a case is decided by a successor of a Judge of a Court of Small Causes under S. 35 of the Act. (*Sulaiman, A.C.J., Mukerji and Boys, JJ.*) BHAGWATI PANDE *v.* BADRI PANDE. **54 All 171=136 I.C. 357=I.R. 1932 All. =1931 A.L.J. 953=A.I.R 1931 All. 574 (F.B.).**

———**S. 27**—*Scope and effect of—Small cause suit tried as regular suit.*

When a suit cognizable by a Court of Small Causes is tried by a Munsif invested with small cause powers as an ordinary suit, the judgment is not appealable. (*Guha, J.*) MAHOMED ISMAIL *v.* LAL MIA. **148 I.C. 14=6 R.C. 1158 (1)=37 C.W.N. 917=A.I.R. 1933 Cal. 784.**

———**S. 27**—*Scope and effect of—Small cause suit tried as regular suit.*

The mere fact that a Court having small cause powers by an error tries a small cause suit in a regular way does not give judisdiction to the District Court to hear an appeal against the decree of such Court (*Dunkley, J.*) KO SIT YAR *v.* MA SHWE TAING. **152 I.C. 144=7 R.R. 145=A.I.R. 1934 Rang. 312.**

———**Ss. 32 and 35**—*Applicability and construction—Suit instituted as small cause suit—Judge succeeded by one having no small cause powers—Suit sent to Civil Court—Subsequent investment of Judge with requisite powers—Effect—Trial of suit by—Appeal.*

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Sub-S. (2) of S. 32 is in the nature of a proviso to sub-S. (1) of that section and its operation must therefore be limited to cases mentioned therein. If a suit is instituted in the ordinary Civil Court or proceedings are commenced in such a Court, the subsequent investment of such a Court with small cause powers would not make S. 32 (1) applicable. Sub-S. (2) would apply, if at the time of the institution of the suit there is no Court of Small Causes in the locality and the suit is filed in a Civil Court, even if the presiding Judge of the Civil Court be later on invested with Small Cause Court powers. If, therefore, a suit is instituted in a Court of Small Causes and that Court is abolished, the case will have to be sent to the ordinary Civil Court under S. 35 of the Act If the Court to which the case is so sent under S. 35 acquires before the date of trial the powers of a Small Cause Court, S. 32 (1) would become applicable. In such a case the decision would be that of a Small Cause Court, and no appeal would lie. (*Mitter, J.*) MOHESH CHANDRA MALI *v.* SM. GANGAMAYEE MAZUMDAR. **157 I.C. 1026 = 8 R.C. 148 = 61 C.L.J. 137 = A.I.R. 1935 Cal. 556**

——**S. 33.**—Jurisdiction to attach immovable property in execution. *See* C.P.Code, S. 7—SMALL CAUSE COURT. **132 I.C. 208.**

——**S. 35**—Right of appeal. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 27. SCOPE AND EFFECT OF. **1931 A.L.J. 953 = A.I.R 1931 All. 574 (F.B.).**

——**S. 35**—*Scope and construction—Small cause suit disposed of as original suit—Effect.*

S. 35 does not in any way operate to change a small cause suit into an original suit. What it does is to invest a Court which otherwise would be incompetent to hear any, or certain, small cause suits with power to hear certain of such suits, namely, those pending in that Court at the time its jurisdiction is changed. The section does not purport to turn a small cause suit into an original suit with all kinds of changes in procedure in the rights of appeal. (*Stone, J.*) RAMASWAMI MUTHIRIAN *v.* ARUNACHALAM CHETTIAR, **42 L W 619 = 159 I.C. 958 = 8 R.M. 585 = 1935 M.W.N. 837 = A.I.R. 1935 Mad. 919 = 69 M.L.J. 443.**

——**S. 35**—*Scope—Transfer of Munsif—Subordinate Judge having small cause jurisdiction—Power of succeeding Munsif not having small cause jurisdiction—Transfer.*

Where a Munsif has been transferred and there is in the district a Subordinate Judge invested with the powers of a Small Cause Court for the area within the jurisdiction of the Munsif, under S. 35, it would be such a Subordinate Judge who would have authority to entertain the proceeding. A new Munsif who comes to take the place of the Munsif transferred but who does not possess the Small Cause Court powers would have not jurisdiction himself to transfer the case from the Small Cause Court side of his predecessor to his own regular side The case would go automatically to the Subordinate Judge who is invested with Small Cause Court powers. If there is such a Subordinate Judge, it would be open to the District Judge to transfer the case from the Court of the Subordinate Judge with Small Cause Court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with Small Cause Court powers the Munsif will under S. 35, have to try it on the original side, and the District Judge would have no power at all to act under S. 24 so as to transfer the case to the new Munsif and make him a Court of Small Causes. He can, of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be Small Cause Court suit. An

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appeal in such cases would lie to the District Judge. (*Sulaiman, A.C J., Mukerji and Boys, JJ.*) BHAGWATI PANDE *v.* BADRI PANDE. **54 All. 171 = 136 I.C. 357 = I.R. 1932 All. 181 = 1931 A.L.J. 953 = A I.R. 1931 All. 574 (F.B.).**

——**Sch. II, Art. 1**—*Scope and applicability—Suit against District Board for refund of tax.*

Sch. II, Art 1 applies more to suits for damages or compensation in connexion with official acts; and hence a suit against the District Board for refund of tax is outside the scope of this article and is cognizable by a Small Cause Court (*Tapp, J.*) DT. BOARD, JHANG *v.* GANPAT RAM. **I R 1933 Lah 112 = 141 I.C. 378 = 34 P.L.R. 219 = A I.R. 1933 Lah 124.**

——**Sch. II, Art. 2** — *Applicability—Suit for damages.*

Where the suit was for damages for money paid by the plaintiffs for which the defendant was liable,

Held, that Art. 2 had no application. (*Bisheshwar Nath, J.*) RAM ANAND SINGH *v.* KHEDOO SINGH. **I.R. 1933 Oudh 214 = 143 I.C. 843 = 10 O.W.N. 52 = A.I R. 1933 Oudh 146.**

——**Sch. II, Art. 4 (c) as amended by Bombay Act (VI of 1930), S. 3**—*Cognizability—Tenant-at-will—Suit to eject—Tenant denying landlord's title.*

A suit to eject a tenant at-will, after determination of the tenancy by a notice to determine, duly given by the landlord, is not barred from the cognizance of the Small Cause Court. Such a suit falls under Cl. (*c*) of Act. 4 of Sch. II of the Act, as amended by S. 3, of the Bombay Amendment Act (VI of 1930). But when the termination of the lease is not the only issue to determine as for example, when the defendant disputes the plaintiff's title, Cl. (*c*) cannot apply and the suit cannot be tried by the Court of Small Causes. (*Beaumont, C.J.*) BAI JIVKORE *v.* HIMATLAL GIRDHARLAL. **161 I C. 210 (1) = 8 R B. 342 (1) = 37 Bom.L R. 965 = A.I.R. 1936 Bom. 98.**

—— **Sch. II, Art. 6**—*Cognizability—Suit on personal covenant in rehun bond executed for arrears of rent.*

Where the tenants in consideration of arrears of rent and some cash consideration execute a rehun bond, the relationship of landlord and tenant gives place to that of creditor and debtor and the creditor's suit on the personal covenant contained in the bond is of a small cause nature. The insolvency of one of the joint promisors does not bar the suit as against the other joint promisors (*Macpherson, J.*) GOKHUL BIHARI PANDE *v.* KHIJHU RAI. **6 R.P. 350 (2) = 147 I.C. 341 = A.I.R. 1934 Pat. 43.**

——**Sch. II, Art. 8**—*Applicability—Motor garage.*

There is no reason for making a distinction between a garage and a shop. A shop is normally used for keeping goods, a garage is normally used for keeping a motor car, but both of them are suitable for residential purposes and are within the purview of Art. 8. (*Almond, A.J.C.*) PARKASH MEHARA & CO. *v.* SANT RAM **160 I.C. 175 (1) = 8 R. Pesh. 104 (1) = A.I.R. 1935 Pesh. 192.**

——**Sch. II, Art. 8**—*Applicability—Open site for stacking fuel.*

An open site on which fuel is stacked containing a chappar used for shelter and carrying on business can hardly be regarded as a house or a shop and hence a suit for rent is not cognizable by a Court of Small Causes. (*Tapp, J.*) JIVAN KHAN *v.* MAHOMED FAZAL AZIM. **149 I.C 293 (1) = 6 R.L. 664 = 34 P.L.R. 100 = A.I. R. 1933 Lah. 306.**

——**Sch. II, Art. 8**—*Cognizability—Suit by assignee—Arrears of rent.*

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The assignment of arrears of rent by the landlord to a third party has not the effect of altering its character. So far as the tenant is concerned, his liability still continues to be one for the payment of rent, on account of land held by him, due to the landlord. The fact that the landlord has assigned his rights, and his representative, whether a vendee or an heir, is suing, would not alter the character of that liability. The suit is not thereby altered into one for a mere debt, but is still a suit for recovery of rent, other than house rent, and the Small Cause Court has no jurisdiction to entertain it, as laid down in Art. 8, Sch. II of the Provincial Small Cause Courts Act. (*Sulaiman, C.J. and King, J.*) NATHU LAL *v.* KEWAL RAM. **57 A 230=7 R.A. 34=150 I.C 767=1934 A.L.J. 848=4 All. W.R. 88 =15 L.R. 493 (Rev.)=18 R.D. 389=A.I.R. 1934 All. 893.**

——**Sch. II, Art. 8**—*Cognizability—Suit by assignee of right to recover rent.*

A suit by an assignee to whom the right to recover rent is transferred does not cease to be a suit for rent and is therefore not a suit of a "small cause" nature, being exempted from the cognizance of a Small Cause Court by Art. 8. (*Bhide, J.*) SUNDAR SINGH *v.* KARAM CHAND. **A.I.R. 1935 Lah. 976.**

——**Sch. II, Arts. 8 and 13**—*Cognizability—Suit by farmer of municipal market dues against person holding site under him.*

A person who occupies a site in a municipal market has no right or interest in land so as to give rise to an action for rent in respect of the site occupied by him. He is only liable for market toll and the money payable by him is not rent so as to come within Art. 8 of the Provincial Small Cause Courts Act. Nor would the dues come under "other dues" under Art. 13, because they are not payable by reason of any interest in immovable property. Plaintiff a farmer of a market sued the defendant who held a site under him in the market for dues in respect of that site.

Held, that the suit was not barred either by Art. 8 or 31 of the Provincial Small Cause Courts Act. (*Wort, J.*) ALIAR KUNJRA *v.* HAZARI MULL. **154 I.C. 877=7 R.P. 500=16 Pat.L.T. 175=A.I.R. 1935 Pat. 184.**

——**Sch. II, Art. 8**—*Cognizability—Suit for rent for use and occupation against trespasser.*

A suit claiming rent for use and occupation against an alleged trespasser is not a suit for recovery of rent within Sch. II, Art. 8 and as such is cognizable by the Small Cause Court. (*Hilton, J.*) GANESH DAS *v.* FEROZE DIN. **150 I.C. 980 (1)=7 R.L. 45=A I.R. 1934 Lah. 355 (1).**

——**Sch. II, Art. 8**—*Cognizability—Suit for rent in respect of Khattis used for storing grain.*

Khattis, whether situate within the limits of a residential house or otherwise, are meant for storage of grain, and when let apart from the houses in which they are situate they cannot be considered to be places meant for human habitation. Hence a suit for rent in respect of such khattis used for storing grain is not one for recovery of rent of house and is not cognizable by a Court of Small Causes. (*Niamatullah and Rachhpal Singh, JJ.*) KAMALA PRASAD *v.* RAM PRASAD. **56 A. 261=6 I.R. (All.) 316 (1)=146 I.C. 594=1934 A.L J. 73=3 A. W.R 128=A.I.R. 1933 All. 918.**

——Sch. II, **Art. 13**—*Applicability—Claim for share of income of an inam land.*

Right to claim a share of the income of inam land by inamdar is a right to payment by reason of some interest in immovable property to which Art. 13 applies. (*Ramesam, J.*) VENKATA RAO *v.* GURUSWAMI

PROV. S. C. C. ACT (1887), Sch. II, Art. 15.

CHETTI. **154 I.C. 619=7 R.M 461=1934 M.W.N. 1119=41 L.W. 641=A.I.R. 1935 Mad. 41=68 M. L.J. 172.**

——**Sch. II, Art. 13**—*Applicability—Claim for share of income of religious shrine.*

A claim for a certain amount though less than Rs. 500 on account of share as khadims out of income of a religious shrine falls under Art. 13, Sch. I, and is excluded from the cognizance of a Court of Small Causes. 3 Lah. 369; A.I.R. 1926 Lah. 276, Dist.; 41 M. 528 and 41 P.R. 1872, Rel.on. (*Bhide, J.*) MAHOMED UMAR DARAZ ALI KHAN *v.* PIRJI ABDUL RASHID **6 I.R. (Lah.) 7=144 I.C. 669=A.I.R. 1933 Lah. 606.**

——**Sch. II, Art. 13**—*Applicability—Suit by zamindar for* poruppu *and cesses.*

A suit for *poruppu* and cesses by a zaminder against a tenant does not come within Art. 13 and is cognizable by a Small Cause Court. (*Curgenven, J.*) RAMASWAMI CHETTIAR *v.* ZAMINDAR OF SIVACANGA. **I.R. 1932 Mad. 411=137 I.C. 564 (1)=1932 M.W.N. 55=35 L.W. 144=A.I.R. 1932 Mad. 224.**

——**Sch. II. Art. 13**—Applicability—Suit for market dues by farmer against person holding site. *See* PROVINCIAL SMALL CAUSE COURTS ACT, ARTS. 8 AND 13. **154 I.C. 877=16 Pat. L.T. 175=A.I.R. 1935 Pat. 184.**

——**Sch. II, Art. 13**—*Applicability—Suit for recovery of arrears of municipal taxes.*

A suit for recovery of arrears of municipal taxes does not fall within Art. 13 or any other article of Sch. II. It is cognizable by a Small Cause Court. (*Fazal Ali, J.*) MUNICIPAL COMMISSIONERS OF RANCHI CORPORATION *v.* MT. MUNGIA. **I.R. 1932 Pat. 210=139 I.C. 104=13 Pat. L.T. 277=A.I.R. 1932 Pat 220.**

——**Sch. II, Art. 13**—*Applicability—Suit to recover jodi or meras.*

A suit to recover jodi or meras which are in the nature of customary dues and are not rent paid to the Rajas by agraharamdars is excepted from the cognizance of the Small Cause Court. (Case law referred.) (*Curgenven, J.*) MUNUSAMIAH *v* RAJA OF KALAHASTI. **156 I.C. 600=8 R.M. 26=42 L.W. 203= 1935 M.W.N. 519=A.I.R. 1935 Mad. 554.**

——**Sch. II, Art. 15**—*Cognizability—Suit by lessor for unpaid premium.*

A sum agreed to be advanced in future, but not advanced is not a debt due to the mortgagor from the mortgagee as in the case of the unpaid part of premium which is consideration of a lease already given effect to. So a suit by the landlord for the unpaid premium is not one for specific performance to lend money and is cognizable by a Court of Small Causes. (*Niamatullah J.*) BHAGAUTI SHUKUL *v.* CHANDRIKA PRASAD KUERI. **150 I.C. 289=6 R.A. 1063=A.I.R. 1933 All 147.**

——**Sch. II,, Art. 15**—*Cognizability — Suit for recovery of account papers of darpatni mahal—Second appeal.*

When the *patnidar* sued the *darpatnidar* for recovery of *thoka, seha, jamawasil* and *hastabud* papers of the *darpatni mahal* on the basis of a registered contract and claimed in the alternative Rs. 100 as damages.

Held, that the suit was—not one for recovery of movables under S. 10, Sp. R. Act—but one for specific performance of an executory contract, not cognizable by Small Cause Court and that a second appeal was competent. (*S. K. Ghose, J.*) NAJIBULLA SARDAR *v.* HARIMOHAN MITRA. **59 Cal. 352=I.R. 1932 Cal. 472=138 I.C. 640=A.I.R. 1932 Cal. 481.**

PROV. S.C C. ACT (1887), Sch. II, Art. 18.

———Sch. II, Art. 18—*Cognizability—Suit to recover amount deposited with arbitrator to be forfeited in the event of refusal to abide by award.*

The parties in a quarrel had appointed two persons as their arbitrators to settle the dispute, and each side had deposited certain amount with one of them, on the agreement that if either of the parties to the dispute refused to abide by the award, he should forfeit the amount that he had deposited. One of the parties brought a suit to recover the amount from arbitrator, on the ground that he was not justified under the agreement in handing over the deposit to the other party, because there had been no joint and common award by the arbitrators and that consequently the plaintiff had not become liable to forfeit his deposit.

Held, that the suit was cognizable by Small Cause Court. 33 Mad. 494; 27 All 200 and 24 All. 208, Ref.; A. I. R. 1929 Sind 49, Not foll. (*Kendall, J.*) GORAKH PRASAD *v.* BALDEO PRASAD. **6 I R. (All.) 214=145 I.C. 970 (2)=A I.R 1933 All. 902.**

———Sch. II, Art 19—Small cause nature—Suit for money with a prayer for declaration. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 15 (2)—SMALL CAUSE NATURE. **139 I.C. 620=1932 M.W.N. 142=35 L.W. 70=A I.R. 1922 Mad. 226.**

———Sch. II, Art. 28—*Cognizibility—Suit for share of intestate's property.*

A suit for a share in a property of a Mahomedan, who died intestate is not cognizable by the Small Cause Court. (*Niamatullah, J.*) MT. AMINA KHATOON *v.* MAHOMED HASAN. **149 I.C 323=6 R.A. 892=18 R.D 351=A.I.R. 1934 All. 453.**

———Sch. II, Art. 28—*Cognizability—Suit to recover property as heir.*

A suit by a father for recovery of property as heir of his deceased daughter is not cognizable by a Small Cause Court. 49 M.L.J. 554, foll.; 27 All 622 and 27 I.C. 773, Not foll. (*Pakenham Walsh, J.*) RETHINASWAMY THEVAR *v.* NATARAJA THEVAR. **I.R. 1933 Mad. 232 (1)=142 I.C 613 (1)=1933 M.W.N. 208=A.I.R. 1933 Mad. 346.**

———Sch. II, Art. 29—*Scope and applicability—Balance struck and agreement to pay sum found due.*

Where not only the balance is struck but there is a definite agreement by the defendant to pay the sum found due, the agreement affords a fresh cause of action to the plaintiff and a suit based for recovery of money agreed to be paid is not a suit within the meaning of Cls. (*a*), (*b*), or (*c*) of Art. 29. (*Rupchand, J.C. and Mehta, A J C.*) MADHOWDAS RAM DAS *v.* SANTRAMDAS. **27 S.L R. 308=147 I.C. 432=6 R.S. 166=A.I R 1933 Sind 324.**

———Sch. II, Arts. 29 and 30—*Suit for accounts explained.*

A suit for accounts is a suit for an indeterminate amount which could only be arrived at by taking the regular accounts between the parties. Where therefore the plaintiff sues for a definite sum and shows clearly how that sum is to be ascertained the suit is not one for accounts. (*Grille, A.J.C.*) RADHAKISAN BANIA *v.* MOTILAL BANIA. **147 I.C. 1103=6 N.R. 158=29 N. L R. 115=A.I.R 1933 Nag. 82.**

———Sch II, Art. 29 (c)—*Scope.*

The proviso to Art. 29 (*c*) contemplates that where a balance has been struck by the parties or their agents a suit can lie on such balance in the Court of Small Causes. (*Rupchand, J.C. and Mehta, A J.C.*) MADHOWDAS RAM DAS *v* SANTRAMDAS. **27 S L R. 308=147 I.C. 432=6 R.S. 166=A.I.R 1933 Sind 324.**

———Sch. II, Art. 31—*Applicability—Co sharers—Receipt of profits by one, if wrongful.*

PROV. S.C.C. ACT (1887), Sch. II, Art. 31.

Where one of several co-sharers in an occupancy holding is in actual cultivating possession thereof his possession cannot be considered to be wrongful nor can he be said to be in wrongful receipt of the profits accruing from the holding belonging to them in common. Possession of one of the co-sharers on receipt of income derived by him from the joint holding is on behalf of all the co-sharers and there is no wrongful receiving of the profits. (*Niamtullah, J.*) AMJADALI *v.* AZIZ-UD-DIN. **132 I C. 201 (1)=A.I.R. 1931 All. 551.**

———Sch. II, Art. 31—*Applicability—Suit against tenant 'by sufferance' for damages for use and occupation.*

A tenant continuing in possession after the expiry of his lease without the landlord's consent is a tenant "by sufferance," being no better than a mere trespasser and liable to be turned out at any moment without any notice to quit. The liability of such a tenant is *ex delicto* as for a tort. A suit by the landlord against such a tenant for damages for use and occupation, the measure of such damages being the amount of the mesne profits, is not a suit for "the profits of immovable property" within the meaning of Art. 31 of the Provincial Small Cause Courts Act and is not excepted from the cognisance of a Court of Small Causes (*Venkatasubba Rao, J.*) GURAVYA *v.* SATHIRAJU. **157 I.C 246=8 R M. 122=41 L.W. 426=1935 M.W N. 195=A.I.R. 1935 Mad. 307=68 M L.J. 196.**

———Sch. II, Art. 31—Applicability—Suit for mesne profits—If small cause. *See* C. P. CODE, S. 102. **18 N. L J. 76.**

———Sch. II, Art. 31—*Cognizability—Suit against agent for value of goods.*

A suit against an agent for the value of goods received and not accounted for by him is not for accounts and is cognizable by a Small Cause Court. 24 I.C. 764, Foll. (*Addison, J.*) AMBA PARSHAD JOSHI *v.* NORATTAN CHAND PERMESHRI PERSHAD. **135 I.C. 64=I.R. 1932 Lah. 48=32 P.L.R. 103=A.I.R. 1931 Lah. 271 (1).**

———Sch. II, Art. 31—*Cognizability—Suit by joint owner to recover rent collected by another.*

A suit by one joint owner to recover his proportionate share of the rent from another who had collected the entire rent, to which the tenants are also made parties, is not barred under Art. 31, Provincial Small Cause Courts Act, from the cognizance of a Small Cause Court. (*Beckett, J.*) ISHAR DAS *v.* RAMAN MAL. **152 I.C. 570=7 R.L. 289=A I.R. 1935 Lah. 50 (1).**

———Sch. II, Art. 31—*Cognizability—Suit for mesne profits actually received.*

A suit for mesne profits is not cognizable by a Court of Small Causes if the plaintiff by alleging that the defendant has actually received profits asks for an account of the profits received. But a suit for mesne profits in which there is no allegation that the defendant received any profits may be triable by a Small Cause Court as Art. 31 does not state that they should be considered suits for an account. (*Macnair, J.C. and Pollock, A.J C.*) DUKREEYA MEHRA *v.* MUKTEE MAHRIN. **29 N.L R 61=I.R 1933 Nag. 82=141 I. C. 825 (2)=A.I.R. 1933 Nag. 87.**

[Foll. 31 N.L.R. 180.]

———Sch. II, Art 31—*Cognizability—Suit for mesne profits actually received.*

A suit for mesne profits in which the plaintiff alleges that the defendant has actually received some profits is one calling for an account and falls under Art. 31 of the Provincial Small Cause Courts Act, and is not therefore cognizable by a Small Cause Court, (*Gruer, A.J.C.*) BHARAT *v.* FIRANTA. **31 N.L.R. 180=156 I.C. 68=7 R.N. 210=A.I.R. 1936 Nag. 42.**

PROV. S.C C. ACT (1887), Sch. II, Art. 31.

———Sch. II, Art. 31—*Cognizability—Suit for mesne profits—Transfer under S. 24, C. P. Code—Appeal and revision.*

A suit for Rs. 187 being the profits of immovable property wrongfully received by the defendants is excluded from the cognizance of a Court of Small Causes by Art. 31. The mere fact that the suit was originally instituted in the Court of Small Causes and was transferred therefrom under S. 24 of the Code cannot alter its nature and justify an application for revision to the High Court when in fact an appeal to the District Court is competent. (*Addison and Bhide, JJ.*) UBED-UL-RAHMAN *v.* DARBARI LAL. **6 I.R. (Lah.) 276=146 I.C. 845=34 P.L.R. 262=A.I.R. 1933 Lah. 509.**

———Sch. II, Art 31—*Cognizability—Suit for paddy wrongfully seized or their value.*

Suits for the recovery of specific quantities of paddy or their value from the defendant on the ground that this amount of paddy belonging to the plaintiff firm had been wrongfully seized by the defendant are suits in tort for conversion and are cognizable by a Court of Small Causes and as such no second appeal lies. And such suits were held not similar to a suit for account. A.I.R. 1928 Rang. 102 (F.B.), Expl. (*Dunkley, J.*) U BA CHIT *v.* K. M. T. T. CHETTYAR FIRM. **151 I.C. 405=7 R.R. 69=A.I.R. 1934 Rang. 218.**

———Sch. II, Art. 31—*Cognizability—Suit to recover excess collection by one co-sharer.*

A suit by one of the joint landlords for recovery of sums which may have been collected by his co-sharers from the tenants in excess of their legitimate share is not cognizable by the Court of Small Causes. Such a suit is essentially a suit for accounts. (*Agarwala, J.*) JAGARNATH SARAN SINGH *v.* BISWA MOHAN KUMAR. **6 I.R. (Pat.) 287=146 I.C. 793=A.I.R. 1934 Pat. 2.**

———Sch. II, Art. 31—*Cognizability—Suit for share of profits of occupancy holding.*

On declaration of joint tenancy by the Revenue Court a suit for a share of the profits of an occupancy holding would lie in a Small Cause Court. (*Kendall, J.*) RAM KALI *v.* KAMTA PRASAD. **6 R.A. 754=148 I.C. 640=3 A.W.R. 350=15 L.R. 129 (Rev.)=18 R.D. 102=A.I.R. 1934 All. 404.**

———Sch. II, Art 31—*Small Cause nature—Suit to recover—Usufruct of growing trees.*

The trees standing on land being immovable property, the usufruct of growing trees is profit on immovable property and a suit to recover the mesne profits from such usufruct is not a suit of small cause nature. (Case-law discussed.) (*Wallace, J.*) VALLAVVA *v.* BOMMADEVARA SATYANARAYANA VARAPRASADA RAO. **I.R. 1932 Mad. 818=140 I.C. 92=A.I.R. 1932 Mad. 554.**

———Sch. II, Art. 31—*Suit for account—What is.*

A suit in which accounts have to be taken incidentally to arrive at the finding whether the amount claimed by the plaintiff is really due to him is not a suit for accounts. Suit between principal and agent. (*Sen and Niamatullah, JJ.*) BARATI *v.* ABDUL HAKIM. **I. R. 1931 All. 462=132 I.C. 30=1931 A.L.J. 5.**

———Sch. II, Art. 31—*Suit for account—What is—Suit for fixed sum based on a prior settlement of accounts.*

Where the plaintiff alleged that there was a settlement between the parties in 1924 under which the defendant acknowledged a certain amount in paddy, cash and hay but subsequently the dealings continued between the parties, and the plaintiff claimed only a fixed sum, different from that shown in the settlement and did not call on the defendant to render an account, the suit cannot be deemed to be one for an account as contemplated by Art. 31 of the Act. 28 Mad. 394; 24 M. L. J. 693 and 33 I. C. 16, Ref. (*Curgenven, J.*) MARIAPPA VAIKARAN *v.* SRINIVASA MUDALIAR. **135 I.C. 343=I.R. 1932 Mad. 87=1931 M.W.N. 975=A.I.R. 1931 Mad. 789.**

PROV. S.C.C. ACT (1887), Sch. II, Art. 35.

———Sch. II, Art. 35—*Cognizability—Test.*

In determining whether a suit is cognizable by a Court of Small Causes, the Court is only concerned with the allegations in the plaint. And if the plaint does not contain any clear allegation of criminal misappropriation or breach of trust, Art. 35, Sch. II will not bar a suit for recovery of the amount. (*Kendall, J.*) GORAKH PRASAD *v.* BALDEO PRASAD. **6 I.R. (All.) 214=145 I.C. 970 (2)=A.I.R. 1933 All. 902.**

———Sch. II, Art. 35 (b)—*Cognizability—Suit for damages for wrongful arrest.*

A suit for damages for wrongful arrest is not cognizable by the Court of Small Causes. (*Tek Chand, J.*) MAST RAM *v.* HARNAM DAS. **I.R. 1932 Lah. 637.**

———Sch. II, Art. 35 (ii)—*Applicability—Cutting of trees under mistake of fact.*

Quaere.—Whether the cutting of trees under a mistake of fact does or does not fall under Art. 35 (*ii*), Provincial Small Cause Courts Act (Case-law referred.) (*Walsh, J.*) MOIDIN KUNHAMMAD *v.* AHMAD KUTTI ABDULLA. **6 I.R. (Mad.) 147=145 I.C. 888=A.I.R. 1933 Mad. 636.**

———Sch. II, Art. 35 (ii)—Applicability—Suit for compensation for negligence. *See* C. P. CODE, S. 102. **143 I.C. 494=34 P.L.R. 583=A.I.R. 1933 Lah. 363 (1).**

———Sch. II, Art. 35, Cl. (ii)—*Applicability—Suit for damages*—Bona fide *claim to land and cutting down tree thereon.*

Where the applicant made a *bona fide* claim to land and therefore to a tree which stood thereon and which he had cut down and the respondent brought a suit for damages for trespass and mischief,

Held, that Cl. (2), Art. 35, Provincial Small Cause Court Act, had no application whatever and that the suit was of a small cause nature and consequently to appeal lay. (*Dunkley, J.*) MAUNG MOE *v.* MAUNG TUN GYAW. **6 I.R. (Rang.) 92=146 I.C. 333 (2)=A.I.R. 1933 Rang. 261.**

———Sch. II, Art. 35 (ii)—*Cognizability—Plaint alleging criminal misappropriation by defendants—Allegation insufficient to support conviction.*

If the plaintiff's allegation contained in his plaint amounts to an averment that the defendants were guilty of criminal misappropriation, the suit is one which should be instituted in a regular Civil Court. But if there is no doubt that no Criminal Court would convict the defendants if the evidence carries the case no further than what is alleged in the plaint, Art. 35 (*ii*), Sch. II will not bar the jurisdiction of the Small Cause Court. (*Niamatullah, J.*) BHAGWAN PRASAD *v.* PELU KEWAT. **154 I. C. 1013=7 R.A. 855=4 A.W.R. 958=A.I.R. 1935 All. 33.**

———Sch. II, Art. 35 (ii)—*Cognizability—Plaint allegation amounting to 'theft.'*

Where the plaint sets out that the defendant "without right and without consent by deceit unlawfully reaped the crop" of the plaintiff, the allegation amounts to an offence of theft which comes under Chapter 17 of the Penal Code and therefore the suit is excluded from Small Cause Court jurisdiction by Art. 35 (*ii*) of the Small Cause Courts Act. (*Bennet, J.*) NARAIN DAS *v.* KASHI PRASAD. **153 I.C. 763=7 R.A. 598=1935 A.W.R. 36=1935 A.L.J. 248=A.I.R. 1935 All. 264.**

PROV. S C.C. ACT (1887), Sch. II, Art. 35.

——**Sch. II, Art. 35 (ii)**—*Cognizability—Suit for damages for offence under Chap. XIV, I. P. Code.*

Where it is suggested that the suit is one for damages or loss due to an offence punishable under Chapter XVII, I. P. Code, the decision must very according to the particular circumstances set out and the various allegations in the plaint. It may be that one single fact among the varying circumstances of particular cases may alter the whole effect of the allegations made in the plaint. Suit in the particular case held to be of a small cause nature. (*Boys and Niamatullah, JJ.*) HUKUM KANDOO *v.* JAINTRI GOVIND RAI. **I.R. 1931 All. 532 (1)=132 I.C. 564 (1)=A.I.R. 1931 All. 595.**

——**Sch. II, Art. 35 (ii)**—*Cognizability—Suit for damages for removing fruits and cutting trees—Criminal intention not alleged.*

The plaintiff sued for damages for cutting Dak jungle and removing fruits of the trees by the defendants and the amount claimed was Rs. 50 on each count the total being Rs. 100. There was nothing in the plaint to allege that the defendants acted with any criminal intention.

Held, that the suit was congnizable by the Small Cause Court and that no second appeal lay. (*Mukerji and Bennet, JJ.*) BANDHU PANDEY *v.* GAURI DATT PANDEY. **I.R. 1931 All. 273=130 I.C. 481=1930 A.L.J. 1247.**

——**Sch. II, Art. 35 (ii)**—*Cognizability—Suit for damages for wanton trespass.*

An action for damages for wanton trespass on land is exempted from the cognisance of a Small Cause Court under Cl. (*ii*) of Sch. II of the Provincial Small Cause Courts Act. (*Venkatasubba Rao, J.*) RAMA SWAMI CHETTIAR *v.* SUPPIAH CHETTIAR. **158 I.C. 37=8 R.M. 215=1935 M.W.N. 868=42 L.W. 404=A.I.R. 1935 Mad. 699=69 M.L.J. 98.**

——**Sch. II, Art. 35 (ii)**—*Cognizability—Test—Suit for damages for wrongful cutting of tree.*

The question whether a case is determinable by a Small Cause Court Judge must rest upon an examination of the plaint and a decision by the Judge as to whether or no the language of the plaint on a reasonable construction inports the commission of an offence under Chap. XVII, I. P. Code. The plaintiff sued to recover a sum of money on the ground that the defendant had cut a *nim* tree belonging to the plaintiff which was growing upon the plaintiff's ground and had done so with the knowledge of the plaintiff and without any right and had taken it away.

Held, that the plaint did not disclose a criminal offence and that the suit was cognizable by the Court of Small Causes. (*Mears, C. J. and Sen J.*) BHAN DATT *v.* MOTI LAL. **I.R. 1932 All. 648=140 I.C 506=1932 A.L.J. 306=A.I.R. 1932 All. 472.**

——**Sch. II, Art. 35** (ii)—Cognizability—Suit for recover of timber or their value removed under directions of Court—Second appeal. *See* C. P. CODE, S. 102. **145 I.C. 888=A.I.R. 1933 Mad. 636.**

——**Sch. II. Art. 35 (ii)**—*Cognizability—Suit to recover gold and silver delivered to defendant for making ornaments.*

A suit to recover gold and silver handed by the plaintiff to the defendant, a Sonar, for making ornaments, it being alleged in the plaint that the defendant in bad faith did not return the same, does not fall under Art 35 (*ii*) of the Provincial Small Cause Courts Act and is not barred from the jurisdiction of the Small Cause Court. (*Bennet, J.*) GANGA PRASAD *v.* PRABHU DAYAL. **4 A.W.R. 1267=A.I.R. 1935 All. 141 (2).**

PROV. S.C.C. ACT (1887), Sch. II, Art. 41.

——**Sch. II, Art. 35 (ii) and S 15**—*Cognizability—Suit regarding right to enter on another's land and to cut grass.*

A suit regarding a right to enter on another's land and to cut grass is one falling under Art. 35 (*ii*), Sch. II and is excluded from the cognizance of Small Cause Court. (*Tapp, J.*) ATTAR SINGH *v.* NURU **6 I.R. (Lah.) 63=145 I.C. 155=A.I.R. 1933 Lah. 172**

——**Sch. II, Art. 35 (ii)**—*Second appeal—Forcible cutting and removal of trees—Suit tried on regular side.*

Where the plaint alleged that the defendants had forcibly and criminally cut certain branches of a tree but it appeared that the said allegations were designedly made with a view to show that by reason of Art. 35 (*ii*) the suit was not cognizable by the Small Cause Court and it further appeared that no objection was raised to the trial of the suit by the Munsif on the Regular Side.

Held, that S. 102, C. P. Code, did not under the circumstances apply to the case and that a second appeal was not barred. (*Hasan, C.J. and Bisheshwar Nath, J.*) MARJAD SINGH *v.* BHAGWATI PRASAD. **135 I.C. 889=I.R. 1932 Oudh 73=8 O.W.N. 1019=A.I.R. 1931 Oudh 411.**

——**Sch. II, Art. 35 (j)**—*Applicability—Suit for refund of profession-tax—Second appeal.*

A suit for the refund of profession-tax amounting to Rs. 64 is not governed by Art. 35 (*j*) and is cognizable by the Small Cause Court. The notice of demand is not a "legal process" and the claim for interest is not damages for the illegal recovery but damages for detention of money. So no second appeal is competent. 27 Bom. L. R. 447, Not foll.; 31 Bom. L. R. 1307; 3 I.C. 422, Foll. (*Ramesam J.*) UNION BOARD, DEVAKOTTAH *v.* MANIKKAVACHAGAN CHETTI. **1931 M.W.N. 1107.**

——**Sch. II, Art. 38**—*Applicability—Suit for maintenance based on agreement.*

Art. 38 applies "to all suits relating to maintenance whether based on contract, bond, award, decree or personal law." Where therefore the wife sues for arrears of maintenance alleged to be due under the agreement entered in the course of proceedings by her under S. 488, Cr. P. Code, the suit is one "relating to maintenance" and is excluded from the jurisdiction of the Court of Small Causes by Art. 38. (*Tek Chand, J.*) MT. PARBATI *v.* TEK SINGH. **155 I.C. 965=7 R.L. 810=A.I.R. 1935 Lah. 101.**

——**Sch. II, Art. 38**—*Cognizability—Suit for arrears of maintenance—Second appeal.*

A suit for arrears of maintenance due under a bond or agreement is not cognizable by a Court of Small Causes under Art. 38 and consequently even though the claim be below Rs. 500 a second appeal is competent. 16 Bom. 267; 20 Mad. 29; 40 A. 52, Foll. (*Madgavkar, J.*) KISANJI *v.* LAKSHMI. **135 I.C. 477=I.R. 1932 Bom. 93=33 Bom.L.R. 510=A.I.R. 1931 Bom. 286.**

——**Sch. II, Art. 41**—*Applicability—Suit by ex-co-sharer.*

Art. 41, Provincial Small Cause Courts Act, applies only to a suit by a person who at the time of bringing the suit is a co-sharer in a joint property. A suit by a person who was once a sharer in such property does not fall under the article. (*King, J.*) CHOROTTI *v.* KARUNAKARAN NAIR. **154 I.C. 447=7 R.M. 431=40 L.W. 856=1934 M.W.N. 1352=A.I.R. 1935 Mad. 83=68 M.L.J. 24.**

——**Sch. II, Art. 41**—*Applicability—Test—Suit for contribution by decree-holder.*

The question whether a suit falls under Art. 41 or not should be determined according to the averments in the

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plaint. Where a decree-holder sued another person interested in the decree for expenses incurred in execution and claim proceedings and the declaratory suit under O. 21, R. 63 C. P. Code, and for costs paid to the other party in respect of the same.

Held, that the suit was not governed by Art. 41. (*Tek Chand, J.*) LABH SINGH *v.* QAIM DIN. **32 P.L.R 710=A.I R. 1931 Lah. 748.**

——**Sch. II, Art. 41**—*Cognizability—Dissolved partnership—Suit for contribution against legal representative.*

Where the partnership is not subsisting, a suit by one of the partners against the legal representatives of another partner for contribution in respect of the amount paid by him in respect of a joint decree against both the partners is maintainable on the small cause side. However, it will be open to the defendants to prove that on a settlement of accounts the amount payable by them is wiped out or reduced. (*Pandrang Row, J.*) GURUSWAMI NAICK *v.* VENKIDAMMAL. **153 I.C. 451=7 R.M. 355 (1)=41 L W. 580 1935 M W.N. 597= A.I R. 1934 Mad. 699 (2)=68 M.L J. 405.**

——**Sch. II, Art. 41**—*Cognizability—Payment by one liable to pay—Suit for reimbursement.*

Certain putnidars filed a rent suit and got a decree against the plaintiff and his brothers and others. The plaintiff said he had no possession of or interest in any of the lands of the *jote* in question, having long before separated from his brothers, and as the putnidars had, however, executed the rent decree against the plaintiff, he had been obliged to satisfy that decree and so brought the present suit for reimbursement.

Held, that the suit was not one for contribution but one for reimbursement, since his contention was that the defendants were wholly liable and that he was not liable at all and so was cognizable by the Court of Small Causes. 18 C.W.N. 1308, Foll. (*Lort Williams and Nasim Ali, JJ.*) RADHASYAM DUTTA *v.* ANANGA MUNJARI DASI. **151 I C 626=7 R.C. 145 (1)=38 C.W.N. 532—A.I.R. 1934 Cal. 626.**

——**Sch. II, Art. 42**—*Cognizability—Suit for arrears of allotment and call-money.*

A suit by a company for recovery of arrears of allotment money and call-money due on shares allotted is cognizable by a Court of Small Causes. (*Bhide, J.*) PEOPLE'S BANK OF NORTHERN INDIA, LTD. *v.* CHANAN RAM. **I R. 1933 Lah 381=143 I.C. 723 (1)=34 P L R. 592=A I.R 1933 Lah. 657.**

PUBLIC DOCUMENT. *See* EVIDENCE ACT, SS. 65 AND 64.

PUBLIC GAMBLING ACT (III OF 1867)—*Trial by Magistrate who issued search warrant—Legality.*

It is not desirable that a Magistrate who issued a warrant for the search of premises where gambling was reputed to take place should himself try the case subsequently and a conviction by such Magistrate cannot stand. (*Bajpai, J.*) SHYAM BEHARI *v.* EMPEROR. **153 I.C. 146 (1)=36 Cr.L J. 293=7 R. A. 450 (1)= 1934 Cr. C. 1305=4 A.W.R 345=A.I.R. 1934 All. 987 (2).**

——**S. 1**—*Instrument of gaming defined.*

Anything which assists gaming or which is used for furtherance of gaming would be instrument of gaming. It is not possible to give an exhaustive list of such articles. It will be necessary to consider the article in question with reference to the game that is played. Slips of papers found in the house held to be instruments of gaming. 65 I C 852; 46 A. 447 and 49 All. 562, Rel. on. (*Bennet and Bajpai, JJ.*) LACHHI RAM *v.* EMPEROR. **6 I.R (All.) 286=146 I.C. 293=34 Cr.L.J. 1244=**

PUBLIC GAMBLING ACT (1867), S. 5.

14 L.R 361 (Cr.)=1933 A.L.J. 1254=1933 Cr.C. 876=A I.R. 1933 All. 554.

——**Ss. 3 and 4**—*Accused admitting gambling in a house—No proof that profit was made by house owner—Legality of conviction.*

The admission of the accused that they were gambling at the time of the raid by the police in the house of one *X*, in the absence of proof of the fact that *nal* was being taken by *X* or profit was made by him, would not warrant the conviction of the accused under the Act. (*Iqbal Ahmad, J.*) THAKUR DAS *v.* EMPEROR. **160 I.C. 998=8 R A 687=35 Cr.L J. 354=1936 A.L.J. 419=1935 A W.R. 1314=1935 A Cr.C. 287=1936 Cr C. 96=A.I.R. 1936 All. 109.**

——**Ss. 3 and 4**—*"Common gaming house"—"Ring-game" kept as one of items in variety entertainment.*

In an enclosure erected for a variety entertainment one of the items was the ring-game. This was a game where the public may, if they so desire, try to throw brass rings, which they buy from the management at four to the anna, over small coin placed on a table. The coins were ranged from one anna to a rupee.

Held, that this enclosure could not be properly described as a 'common gaming house", not could the table on which the coins were spread be described as an instrument of gaming and that even if technically it could be so described, this was clearly a case of *de minimis non curat lex*, a principle of law well recognized by Courts and enunciated by S. 95, I. P. Code,

Held further, that this type of game when played for such small prizes was not the mischief aimed at by the Public Gambling Act (*Young, C J. and Din Mohammad, J.*) ABDUL QADAR JAN *v.* EMPEROR. **158 I C. 65=36 Cr.L.J. 1258=1935 Cr.C. 355=A.I R. 1935 Lah. 225.**

——**Ss. 3 and 4**—*Prosecution under—Previous unsuccessful attempts by Police to implicate accused—Duty of Court.*

Where the police had on previous occasions made unsuccessful attempts to falsely implicate the accused under the Gambling Act, the Court must before recording an order of conviction under Ss. 3 and 4, be satisfied that there is evidence of unimpeachable character to support the conviction. (*Iqbal Ahmad, J.*) THAKUR DAS *v.* EMPEROR. **160 I C 998=8 R A. 687=35 Cr.L J 354=1936 A L J 419=1935 A W.R 1314= 1935 A.Cr.C. 287=1936 Cr.C. 96=A.I.R. 1936 All. 109.**

——**Ss 3 and 4**—*Prosecution under—Residents of locality addicted to gambling—No presumption against accused.*

In a prosecution under Ss. 3 and 4 of the Act, no presumption against the accused can be made by the mere fact that residents of a particular locality are addicted to gambling. (*Iqbal Ahmad, J.*) THAKUR DAS *v.* EMPEROR. **160 I C. 998=8 R A. 687=35 Cr.L.J. 354=1936 A.L J. 419=1935 A.W.R. 1314=1935 A. Cr.C. 287=1936 Cr.C 96=A.I.R 1936 All. 109.**

——**S. 5**—*Search under—S. 103, Cr. P. Code, not applicable—Entry by police-officer scaling walls at midnight—Validity of search*

The provisions of S. 103 of the Cr. P. Code do not apply to a search conducted after the issue of a warrant under S. 5. A search conducted under that Act is not illegal either for the reason that the search witnesses were persons residing about half a mile away from the applicant's house or that it was made by means of an entry into the applicant's house by the police officer scaling the walls of a neighbouring house at midnight. Such a power is expressly conferred by S. 5 of the Act.

PUBLIC GAMBLING ACT (1867), S. 5.

68 I. C. 845 and 1 Luck. 301, Foll. (*Nanavutty, J.*) MAHADEO PRASAD VISHNU *v.* EMPEROR. **9 Luck. 355 = 6 R.O. 257 = 11 O.W.N. 62 = 147 I C. 317 = 36 Cr.L.J. 397 = 1934 Cr.C. 260 = A.I.R. 1934 Oudh 90.**

——**Ss. 5 and 10**—*Issue of warrant on information that gaming was likely to take place in a house—Legality—Examination of person found in the house under S. 10—Presumption that persons present were there for gaming—If arises.*

A warrant issued not upon information that the house was being used as a common gaming house but upon information that gaming was likely to take place therein, is not in strict accordance with the provisions of S. 5 of the Act S. 10 must be read strictly and if the warrant is not issued strictly in accordance with the provisions of the Act, then a person found in the house when it is searched may not be examined under that section. No presumption arises against persons who were found in the premises that they were there for the purpose of gaming, when the house was searched on the illegal warrant. (*Thom, J.*) BHIRUG *v.* EMPEROR. **6 R.A. 825 = 148 I.C. 1128 = 35 Cr.L J. 878 = 3 A.W.R. 541 = 1934 Cr C. 617 (1) = 1934 A.L.J. 680 = A.I R 1934 All. 524 (2).**

——**Ss. 5 and 6**—*Search by police-officer—Presumption under S. 6, if arises.*

In the absence of strict compliance with the provisions of S. 5 the presumption under S. 6 cannot be raised. Where a Magistrate who did not authorise any police officer to take action under S. 5, but himself professed to take action did not enter the room himself to conduct the search but sent the Police Inspector to do it.

Held the provisions of S. 5 were not complied with and the presumption under S. 6 cannot be raised from the instrument of gaming seized by the Inspector. (*Jai Lal, J.*) HARI RAM *v.* EMPEROR. **141 I C. 659 = I. R. 1933 Lah. 164 (2) = 34 Cr L.J. 252 = 34 P.L R. 518 = 1933 Cr.C. 354 = A.I.R. 1933 Lah. 234.**

——**S. 6**—*Presumption under—Prosecution, when can invoke.*

Where the prosecution invokes to its aid the presumption under S. 6 of the Act, it must prove affirmatively that the search was in accordance with the provisions of S. 5. Unless there is something on the record to show that the officer who conducted the search, or issued the warrant for search, did so in pursuance of the belief that the house was used as a "common gaming house" no presumption can, on the recovery of instruments of gaming from the house, be made, against the accused. Where there is no such evidence, the conviction of the accused cannot be sustained merely on the strength of the presumption referred to in S. 6. (*Iqbal Ahmad, J.*) THAKUR DAS *v.* EMPEROR. **160 I C. 998 = 8 R.A. 687 = 35 Cr L J. 354 = 1936 A.L.J 419 = 1935 A W. R. 1314 = 1935 A.Cr.C. 287 = 1936 Cr.C. 96 = A.I.R. 1936 All. 109.**

——**S. 6**—*Scope.*

S. 6 lays down that the Court must draw a presumption from the finding of cards, etc., that the house was used as a common gaming house, and that that presumption will stand until it is rebutted. (*Thom and Bennet, JJ*) EMPEROR *v.* BASANT RAI. **6 I R. (All.) 279 = 146 I.C. 244 = 34 Cr.L J 1232 = 14 L.R. 212 (Cr.) = 1933 Cr.C. 913 = A.I.R. 1933 All. 574.**

——**S. 7**—*Common gaming house—Private room containing all paraphernalia of club.*

A private room containing all the paraphernalia of a club and rented by members of only one caste is not *prima facie* a common gaming house within the meaning of the Act, even if the members indulge in a game of cards and even if there is a certain amount of money at stake upon the issue of the game (*Ferrers, J C. and Haveliwalla, A. J. C.*) ADAM ALI *v.* EMPEROR. **155 I.C. 971 = 7 R S. 219 = 36 Cr L.J. 865 = 1935 Cr. C. 247 = A I.R. 1935 Sind 52.**

PUBLIC GAMBLING ACT (1867), S. 13.

——**Ss 10 and 11**—*Tender of pardon to co-accused—Powers of Magistrate.*

The procedure relating to the grant of pardon to a co-accused under the Act is a special one and overrides the general law on the subject as laid down in the Cr. P. Code. The trying Magistrate is therefore justified under Ss. 10 and 11 in granting a pardon to one of the accused and using his evidence against the co-accused. (*Nanavutty, J.*) MAHADEO PRASAD VISHNU *v.* EMPEROR. **9 Luck. 355 = 6 R.O. 257 = 147 I C. 317 = 35 Cr.L.J. 397 = 11 O.W.N. 62 = 1934 Cr.C. 260 = A I.R. 1934 Oudh 90.**

——**S. 12**—*Game of skill—Dart game.*

In the dart game there was a target divided into different coloured half inch squares each numbered from 1 to 10. The squares in the horizontal rows were numbered 1 to 10 in sequence, but the vertical rows did not contain the numbers arranged in their sequence. The numbers were scattered about the board haphazard. The player was given 5 darts, and if he put one of these darts into one of the squares bearing the number on which he had staked he got twice his stake back. The darts, which were of varying weight and length, were thrown from a distance of about 12 feet in a bad light, and the numbers were not distinguishable except by persons with keen eye-sight.

Held, that the dart game was a game of chance and was not intended to be anything else. (*Pollock, A. J. C.*) SIKANDAR KHAN *v.* EMPEROR. **31 N L R. 24 = 36 Cr L.J. 60 = 152 I.C. 209 = 7 R.N. 91 = 1934 Cr.C. 1087 = AI.R. 1934 Nag. 225.**

——**S. 12**—*Game of skill—Roll-up or table game or table game held to be only game of chance.*

In the roll up of table game the player rolled 2 resident rubber balls up to the far end of the table where there are 13 shallow cups numbered 1 to 13. The sum of the numbers of the 2 cups in which the balls eventually settled was the player's score and it was open to him to bet that he would score 6 or under or 7 or 8 and over. If he successfully staked on 6 and under or on 8 and over, he presumably got twice his stake back, and if he successfully staked on 7 he got a higher reward.

Held, that the roll up or table game was a game of chance, and not a game of skill. (*Pollock, A. J. C.*) SIKANDARKHAN *v.* EMPEROR **31 N.L R. 24 = 36 Cr.L.J. 60 = 152 I C 209 = 7 R.N. 91 = 1934 Cr.C. 1087 = A.I.R. 1934 Nag. 225.**

——**S. 13**—*Articles ranging in value from two pice to about one rupee—Number of tickets equal to number of articles—Each ticket available for one anna—Lottery and not gambling.*

The applicants had for sale a variety of articles of trifling value. These articles were said to have ranged in value from two pice up to about a rupee. They adopted the method of writing out as many tickets as there were articles with the name of one of the articles on each ticket. They invited purchasers to buy any ticket for one anna. The purchaser then received the article the description of which was written on the ticket.

Held, that what had been described above did not constitute gambling within the meaning of the Public Gambling Act, and that it was more of the nature of a lottery and a harmless one. (*Kisch, J.*) SHIVA CHARAN *v.* EMPEROR. **6 I.R. (All.) 230 = 146 I.C. 76 =**

PUBLIC GAMBLING ACT (1867), S. 13.

34 Cr.L.J. 1128 (2)=14 L.R. 218 (Cr.)=1933 A.L.J. 925=1933 Cr.C. 827 (1)=A.I.R. 1933 All. 482 (1).

———**S. 13**—*Gambling place—Mere publicity or its visibility from public place—Not sufficient.*

In order to be a public place or a public thoroughfare within the meaning of S. 13, the place or the thoroughfare must either be open to the public or actually used by the public, and the mere publicity of the gambling place or its visibility from a public place or a public thoroughfare is not sufficient. (*Iqbal Ahmad, J.*) EMPEROR *v.* SRIPAL. **6 R.A. 606=147 I.C. 1028 (2)=35 Cr.L.J. 564=1934 A.L.J. 360=1934 Cr.C. 45=A.I.R. 1934 All. 17.**

———**S. 13**—"*Public place*"—*Meaning of.*

Where the place selected by the gamblers (accused) charged under S. 13 is such that the intention of the accused is not to obtrude themselves upon members of the public, but on the contrary to conceal themselves and carry on the play secretly, they cannot be convicted under S. 13 of the Act of gambling in public place. A low lying *nala* selected as the place for gambling, which is quite away from a road running parallel to it is not a "public place". (*Subhedar, A.J.C.*) GOVINDA *v.* EMPEROR. **162 I.C. 886=37 Cr. L.J. 712=8 R.N. 291=18 N.L.J. 336.**

———**S. 13**—*Side-betting in dart game—If amounts to gambling.*

Although the dart game itself cannot be said to be a gambling game, side-betting upon the result of throwing the darts may amount to gambling within the meaning of S. 13 of Act. (*Lort Williams and Jack, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* L. E. RENNY. **62 Cal. 865=162 I.C. 129=37 Cr. L.J. 530 (2)=8 R.C. 572=A.I.R. 1936 Cal. 184.**

PUBLIC HIGHWAY.

See (1) HIGHWAY.
(2) EASEMENTS ACT, S. 28 (*a*).

PUBLIC NUISANCE.

See (1) C.P. CODE, S. 91.
(2) CR. P. CODE, SS. 133-143.
(3) PENAL CODE, S. 268

PUBLIC OFFICE. *See* CONTRACT ACT, S. 23—PUBLIC POLICY.

PUBLIC OFFICER. *See* C.P. CODE, S. 2 (17).

PUBLIC PATH. *See* EASEMENTS ACT (1882), S. 18.

PUBLIC PLACE. *See* CR. P. CODE, S. 133.

PUBLIC POLICY. *See* CONTRACT ACT, S. 23.

PUBLIC PROSECUTOR— Duty of. *See* CR. P. CODE, S. 162. **13 Rang. 570=A.I.R. 1935 Rang. 370 (F.B.).**

PUBLIC PURPOSE. *See* LAND ACQUISITION ACT (1894), S. 3 (*f*).

PUBLIC PURPOSES LAND ACQUISITION ACT (VI OF 1857)—*Scope and object of—Acquisition under—Declaration of "public purpose"—If conclusive—Works of Public Utility Companies Act (XXII of 1863).*

Act VI of 1857 was for the acquisition of land for public purpose, whereas Act XXII, 1863, is for works of public utility to be constructed by private persons or companies in contra-distinction to the purpose of the Act of 1857 The two Acts give powers of acquisition for different purposes. The declaration under the one Act that the acquisition was for a public purpose is conclusive as is the declaration under the other that "the land may be taken under the Act". The declarations having been made, it is not open to any Court to hold that it was not for a 'public purpose'. (*Wort and Agarwala, JJ.*) JAINTY CENTRAL COLLIERY, LTD. *v.* JAGDISH PRASAD SINGH. **155 I.C. 98=7 R.P. 547=15 Pat.L.T. 681=A.I.R. 1935 Pat. 134.**

PUBLIC RIGHT. *See* CR. P. CODE, SS. 137 AND 139-A.

PUBLIC ROAD.

See (1) C.P. CODE, S. 91.
(2) HIGHWAY.

PUBLIC SERVANT.

See (1) CR. P. CODE, SS. 195-197.
(2) PENAL CODE, SS. 21, 161, ETC.

———Obstruction of. *See* PENAL CODE, SS. 186, 189 AND 341.

PUBLIC SERVANTS ACT (XXXVIII OF 1850), S. 8—*Commissioners—Whether 'a court'—Complaint under S. 195, Cr. P. Code, 1898.*

The Commissioners appointed under the Public Servants Act, 1850, are a Court though their conclusions take the form of advice to superior authority. Consequently a complaint by them is necessary under S. 195, Cr. P. Code. (*Harrison, J.*) M. M. KHAN *v.* EMPEROR. **12 Lah. 391=I.R. 1931 Lah. 1010=134 I.C. 818=32 Cr.L.J. 1252=32 P.L.R. 939=1931 Cr.C. 924=A.I.R. 1931 Lah. 662.**

PUBLIC SERVANTS INQUIRIES ACT (XXXII OF 1850), S. 25—*Officer dismissed without enquiry—Right of suit—Government of India Act, S. 96-B (1) and R. 14.*

A Reader in the Government Press was dismissed from service without any enquiry. He sued the Secretary of State for damages for wrongful dismissal.

Held, he had no right of action, as R. 14 framed under the Government of India Act, imposing formalities like enquiry before dismissal of a civil servant was specifically without prejudice to the provision of the Public Servants Inquiries Act, S. 25, which says : "Nothing in this Act shall be construed to affect the authority of the Government for suspending or removing any public servant without an enquiry under this Act". When that was the case it was not possible to say that the Government or the authority to whom it delegated its powers in the matter could not, with reference to R.14, dismissal its civil servant without an enquiry. That one was doing work, as a reader in a press, which could have been done by a private person did not make him any the less a public servant or limit the right of Government to dismiss him at his pleasure. The statutory rules gave him no right of suit, and the general rule was that no remedy could be taken but the particular remedy prescribed by the statute. ((*Beasley, C. J. and Bardswell, J.*) RANGACHARI *v.* SECRETARY OF STATE FOR INDIA. **57 Mad. 857=40 L.W. 146=154 I.C. 884=7 R.M. 505=A.I.R. 1934 Mad. 516=67 M.L.J. 123.**

PUBLIC STREET— Conversion of private land—Proof. *See* CALCUTTA MUNICIPAL ACT, S. 3 (57). **58 Cal. 1124=A.I.R. 1931 Cal. 433.**

PUBLIC SUITS VALIDATION ACT (IX OF 1932)—*Scope.*

One of the avowed objects of the Act is to validate suits pending at the time of its enactment which would otherwise be invalid by reason of the previous sanction of the Local Government in respect thereof not having been obtained as required by S. 93 of the C.P. Code. It is not necessary for the plaintiffs to obtain any sanction of the Local Government during the pendency of the suit (*Bisheshwar Nath and Smith, JJ.*) PREMO *v.* SHEO

PUBLIC TEMPLE.

NATH. **8 Luck. 266=140 I.C. 896=I.R. 1933 Oudh 22=9 O.W.N. 966=A.I.R. 1933 Oudh 22.**

PUBLIC TEMPLE.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT—TEMPLE.
(2) RELIGIOUS ENDOWMENT.

PUBLIC TRUST.

See (1) C.P. CODE, S. 92.
(2) HINDU LAW—RELIGIOUS ENDOWMENT.
(3) MAHOMEDAN LAW—WAKF.
(4) RELIGIOUS ENDOWMENT.
(5) TRUST.
(6) TRUSTS ACT.

PUISNE MORTGAGE.

See (1) MORTGAGE—PRIOR AND SUBSEQUENT.
(2) T.P. ACT, S. 75.

PUNCTUATION. *See* INTERPRETATION OF STATUTES.

PUNISHMENT. *See* PENAL CODE, SS. 53-75.

PUNJAB ALIENATION OF LAND ACT (XIII OF 1900)—*Applicability—Additional charge on mortgages created before Act.*

A deed creating an additional charge on mortgages of 1895 and 1896 does not attract the provisions of the Alienation of Land Act 13 Lah. 660, Foll. (*Bhide and Rangi Lal, JJ.*) MULK RAJ *v.* RASAL SINGH. **35 P.L.R. 606.**

——(as amended by 1931)—*Applicability—Mortgage sanctioned before Act.*

A compulsory mortgage sanctioned before 1st July, 1931, on which date the amended Punjab Alienation of Land Act came into force is not affected by the Act. (*Tapp, J.*) MAHOMED SHAH *v.* KHEM CHAND. **I. R. 1933 Lah. 393 (1)=143 I.C. 879=34 P.L.R. 591 =A.I.R. 1933 Lah. 136.**

——*Construction.*

The act is on extremely beneficent measure, intended primarily to protect land belonging to members of the agricultural tribes who form the backbone of the population. It is the duty of the Courts to administer it in a generous and liberal spirit and to see its useful and beneficial provisions are not whittled down by any legal quibbles. (*Addison and Agha Haidar, JJ.*) THAKAR DAS *v.* ROSHAN DIN. **I.R. 1933 Lah. 161 =141 I.C. 634=34 P.L.R. 523=A.I.R. 1933 Lah. 397.**

——*House.*

A house in a village "abadi" does not fall within the definition of land. (*Bhide, J.*) DEPUTY COMMISSIONER, KANGRA DT. *v.* SHIV RAM. **I.R. 1933 Lah. 235=142 I.C. 652=34 P.L.R. 399=A.I.R. 1933 Lah. 125.**

——*Retrospective effect.*

The Alienation of Land Act has no retrospective effect. (*Tek Chand and Tapp, JJ.*) MT. UMRAO BIBI *v.* RAM KISHEN. **13 Lah. 70=I R. 1932 Lah. 379=137 I.C. 820=33 P.L.R. 1003=A.I.R. 1932 Lah. 281.**

——*Sale ordered by decree—Objection to sale—Whether can be raised before executing Court.*

Where the sale is ordered by the decree an objection cannot be taken before the executing Court that the property is not alienable under the Punjab Alienation of Land Act. (*Addison, J.*) SURJAN *v.* TEGH BAHADUR SINGH. **I.R. 1931 Lah. 389=131 I.C. 229=A.I.R. 1931 Lah. 545.**

——S. 2 (3)—*Applicability of Act—Land within Small Town Committee.*

Where the Act is otherwise applicable the fact that the land is included in the limits of the Small Town Committee does not matter. (*Irving, F.C.*) TARA SINGH *v.* MT. FAZLAN. **35 P.L.R. 234=13 Lah.L.T. 29.**

PUNJ. ALIENATION OF LAND ACT (1900), S. 3.

——Ss. 2 (3) and 16—*Date trees—Liability to attachment and sale.*

Fruit trees (date trees) giving annual produce and standing on agricultural land though not expressly mentioned or included in the definition of land given in S. 2 (3) are not liable to attachment and sale in execution of decree against the owner who is a member of an agricultural tribe. A decree-holder can therefore attach each year the fruit of the date trees as part of the produce of the land just as he can attach wheat but he cannot attach the trees and sell them in perpetuity with a view to the fruit, *i.e.*, produce, being gathered by him in perpetuity. Such a sale, is prohibited not only by S. 15 but by S. 3, and comes within S. 16 of the Act. (*Addison, J.*) DEPUTY COMMISSIONER, JHANG *v.* GANGA RAM. **6 I.R. (Lah.) 12=34 P.L.R. 786=144 I.C. 691 (1)=A.I.R. 1933 Lah. 880.**

——S. 2 (3)—*'Land'—If includes trees.*

Trees, whether fruit trees or otherwise, cannot be considered to be 'land' within the meaning of S. 2 (3). Reading Ss. 2 (3) and 15 together the term 'land' in S. 2 (3) must be confined to the ordinary meaning of 'land' especially as there is a distinction drawn in the Act itself between land and the products of the earth of land. A.I.R. 1933 Lah. 880; 108 P.R. 1919, Overr.; 5 Lah. 385 and 15 P.R. 1892, Rel. on. (*Young, C.J., Bhide and Din Mohammad, JJ.*) BHAGWANA *v.* GOPI. **155 I.C. 659=7 R.L. 761=37 P.L.R. 821=A.I.R. 1935 Lah. 202 (F.B.).**

——S. 2 (3) (a)—*'Sites of building'.*

The sites of the building and other structures referred to in S. 2 (3) (*a*) are those that exists on a portion of land which is actually under cultivation or is let or occupied for agricultural purposes or for purposes subservient to agriculture (*Rangi Lal, J.*) DEPUTY COMMISSIONER OF ATTOCK *v.* ATTAR CHAND. **160 I.C. 540=8 R.L. 546=A.I.R. 1935 Lah. 901.**

——S. 3—*Dayas are not Jats.*

Dayas held not a sub-division of Jats and so a Daya who makes an alienation cannot be treated as a member of an agricultural tribe. (*Tapp, J.*) DEPUTY COMMISSIONER, JHANG *v.* DEVI DITTA. **6 I.R. (Lah. 87=145 I.C. 245=A.I.R. 1933 Lah. 58.**

——S. 3—*Effect.*

Sanction of Deputy Commissioner is required for auction sale of agriculturist's land. (*Middleton, J.C. and Saaduddin, A J.C.*) HASHAM KHAN *v.* MAHOMMED YUSAF KHAN. **150 I.C. 641=7 R Pesh. 3=36 P.L.R. 220=A.I.R. 1934 Pesh. 34.**

——S. 3—*Mortgage of holding—Validity as between agriculturists.*

There is nothing illegal or opposed to public policy in one agriculturist taking the land of another agriculturist on mortgage, undertaking in exchange to pay off the debts due by the mortgagor to a non-agriculturist. (*Tek Chand, J.*) WASINDA RAM *v.* BAHADUR KHAN. **152 I.C. 224=7 R.L. 268=36 Cr.L.J. 20=35 P.L.R. 361 =1934 Cr.C. 697=A.I.R. 1934 Lah. 434.**

——S. 3—*Sale to non-agriculturist — Sanction—Considerations.*

A sale that infringes the directions given in the Land Administration Manual should not be sanctioned by the Deputy Commissioner under S. 3 of the Punjab Land Alienation Act, merely because the non-agriculturist vendee who happens to be a creditor of the vendor offers a better price than an agriculturist could afford to offer. Such a result does not justify the grant of

PUNJ. ALIENATION OF LAND ACT (1900), S. 3.

sanction. (*Latifi, F.C.*) EMPEROR *v.* FATEH MOHAMMAD. **13 Lah.L.T. 57.**

——**S. 3**—*Scope*—"*Land*"—*Execution sale of trees—Validity of*—*If passes land also.*

A sale in execution of trees apart from the land on which they stand is not in contravention of the provisions of the Act. They are not "land" as defined in S. 3 of the Act. A sale of the trees does not necessarily involve a sale of the land underneath as a legal incident. The question is one of intention. Where the Court orders the sale of the trees only, because the land cannot be sold, it is obvious that there is no intention to sell the land. (*Coldstream and Bhide, JJ.*) DEPUTY COMMISSIONER, JHANG *v.* AYA SINGH. **156 I.C. 793 = 8 R L. 28 = A.I.R. 1935 Lah. 324.**

——**S. 3 (2)**—*Applicability—Mortgage not covered by S. 6—Sanction.*

S. of 3 the Act applies only to permanent alienations of land A mortgage which is not covered by S. 6 (1) (*a*), (*b*) or (*c*) of the Act cannot be given effect to. Sanction should not therefore be accorded to it. The proper remedy in such a case is to apply to the Government for special sanction under S. 6 (1) (*d*), through the usual channel (*Latifi, F.C.*) BASANT SINGH *v.* HIRA. **14 Lah L.T. 12.**

——**S. 3 (2)**—*Conditional sanction—Legality.*

Sanction to alienate should be given or refused unconditionally. The Court cannot grant sanction subject to the condition of prior payment of debts. (*Irving, F. C.*) JASSU RAM *v.* SULTAN KHAN. **11 Lah.L.T. 52.**

——**S. 3 (2)**—*Decree contravening section—Validity*

A decree passed in violation of the terms of S. 3 (2) of the Punjab Alienation of Land Act is not a nullity. The decree is open to appeal or revision and unless set aside, is binding. It is not a decree passed without jurisdiction. (*Tek Chand and Din Mahomed, JJ.*) SARBULAND *v.* PREM DAS. **16 Lah. 56—155 I C. 615 = 7 R.L. 744 = 35 P.L.R. 709 = A.I R. 1934 Lah. 947.**

——**S 3 (2)**—*Marriage with Awan male—Status of wife not affected.*

A woman, not originally an Awan, does not, by marrying an Awan male, become an Awan herself and thus escape the restrictions imposed by the Act. (*Fraser, J C. and Saaduddin, A.J C.*) SAHIB JAN *v.* MAHOMED. **141 I.C. 268 = A.I.R. 1933 Pesh. 1.**

——**Ss. 3 (2) and 14**—*Permanent alienation—Validity of.*

A permanent alienation is not invalid. All that S. 3 (2) says is it shall not be effective, unless and until sanctioned by the Deputy Commissioner. So where a gift is made to one who is not a member of an agricultural tribe, the gift is valid, but a copy of the decree should be sent under S. 21 (*a*) to the Deputy Commissioner for suitable action. (*Fraser, J C. and Saaduddin, A J C.*) SAHIB JAN *v.* MAHOMED. **141 I.C. 268 = A I R. 1933 Pesh. 1.**

——**S. 3 (2)**—*Sale to non agriculturist—Sanction of Deputy Commissioner—Circumstances to be considered.*

When the fact of a sale is proved and the vendor desires to resile from it under cover of the Act, the Deputy Commissioner is competent to give sanction under S. 3 (2), proviso (1), even against the will of the vendor if the equities of the case appear to require it and the sale is not opposed to the principles of the Land Alienation Act. There is no compulsion on the Deputy Commissioner arising out of the fact that the sale has taken place. On the contrary he has to be strictly on his guard against an attempt to evade the Land Alienation Act by presenting him with a *fait accompli*. All he has to see is whether if the application had been made before the sale, it would have appeared as one which should have been granted on the facts then existing. (*Irving, F.C.*) TARA SINGH *v.* MT. FAZLAM. **35 P.L.R. 234 = 13 Lah.L.T. 29.**

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——**S. 3 (2)**—*Sanction under—Grant of—Discretion—Exercise of.*

S. 3 gives a discretion to the Deputy Commissioner; but that discretion is a sound discretion guided by law. Sanction under S. 3 (2) should not be given merely to enable the payment of unsecured debts. It is not desirable that the Deputy Commissioner should use his powers under the Act with the object of assisting the collection of the Land Revenue. (*Latifi, F.C.*) EMPEROR *v.* N. B **14 Lah.L T. 11.**

——**S. 3 (2), Proviso (1)** — *Vendor resiling from sale—Sanction of Commissioner — Factum of sale—Decision as to—Value of.*

Though no person can have sanction forced on him to make a sale which he does not want to make, where, however, the fact of sale is proved and the vendor desires to resile from it under cover of the Act, the Deputy Commissioner is competent to give sanction under S. 3 (2), proviso (*1*) even against the will of the vendor if equity requires it. This of course implies that the Deputy Commissioner should come to a decision on the factum of sale but that opinion is no adjudication and is not binding on the Tahsildar or Collector. (*Irving, F.C.*) MAHMUD *v.* GOPAL SINGH. **11 Lah. L.T. 133.**

——**S. 4**—*Agriculturist*—Sayed alavi *whether comes under.*

Quaere: Whether a *sayed alavi* belongs to the general category of sayeds and is therefore entitled to the advantages conferred upon the tribe in the District of Gurgaon under the Alienation of Land Act. (*Broadway and Agha Haidar, JJ.*) MAHOMED AHTRAM ULLAH KHAN *v.* DELHI MOTOR AND FURNITURE WORKS. **I.R. 1932 Lah. 616 = 139 I.C. 712 = 33 P.L.R. 906 = A.I.R. 1933 Lah. 243.**

——**S. 4**—*Trust for benefit of statutory agriculturists—If a member of an agricultural tribe.*

A trust is not a member of an agricultural tribe unless it is notified, but merely because the trust is principally for the benefit of Rajputs who are statutory agriculturists, it cannot be said that the trust is a member of an agricultural tribe as notified within the district. (*Addison, J.*) DEPUTY COMMISSIONER, KANGRA *v.* SANATAN DHARAM RAJPUT HIGH SCHOOL. **A.I R. 1935 Lah. 274.**

——**S. 6**—*Alienation by agriculturist in favour of non-agriculturist—Whether void.*

Where a member of an agricultural tribe makes an alienation, whether permanent or temporary, in favour of a non-agriculturist in contravention of the provisions of the Act, the contract is not void *ab initio*, and the possession of the alienee is not necessarily unlawful in every case 120 P.R. 1906; 79 P.R. 1913 and 27 P.L. R. 1906, Ref. (*Broadway, Tek Chand, Coldstream, Dalip Singh and Abdul Qadir, JJ.*) QADIR BUKHSH *v.* HAKAM. **13 Lah. 713 = I.R 1932 Lah. 547 = 139 I.C. 17 = 33 P L.R. 851 = A.I.R. 1932 Lah. 503 (F.B.).**

——**S. 6**—*Applicability—Mohyal Brahmins—Conversion to Muhammadanism—Subsequent notification declaring all persons of this tribe to be members of agricultural tribe—Such converts come within notification.*

A family of Mohyal Brahmins were converted to Muhammadanism. Subsequent to this a notification was

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issued by which all persons belonging to the Mohyal Brahmin tribe were declared to be members of an agricultural tribe.

Held, that the above family, though they were converts to Muhammadanism, were still Mohyal Brahmins and that they came within the notification, and that S. 6 applied to them. (*Addison and Agha Haidar, JJ.*) GHULAM AHMAD *v.* GHULAM FARID. **6 I.R. (Lah.) 131=145 I.C. 733=A.I.R. 1933 Lah. 844.**

——**Ss. 6 and 17**—*Further advance on security of mortgaged land on same conditions—Whether amounts to new mortgage.*

The essence of a mortgage is a "transfer of an interest," in immovable property. A document which gives immovable property as security for the satisfaction of a debt, without transferring any interest in the property merely constitutes a charge on the property and is not a mortgage Where a mortgagor, having already mortgaged his lands with possession to the mortgagee in 1874, takes a further advance from him in 1925 on the security of the land already mortgaged, on the same conditions as the original mortgage, such a transaction does not amount to a fresh alienation of an interest in the land, and consequently the provisions of the Alienation of Land Act are not attracted. But if the new transaction purports to cancel the earlier one, or contains conditions substantially different from those contained in the original mortgage, or an additional area of land is included in the security, the old mortgage is at an end, and a new and wholly different relationship between the parties is created, to which "*ex necessitate rei*" the provisions of the Alienation of Land Act will be attracted. Similarly if the new transaction raises the aggregate mortgage-money to a figure in excess of the value of the land, it will really be a sale though ostensibly given the form of a mere advance on the old security. In each case therefore the Court has to determine the true nature of the transaction. (*Broadway, A.C.J., Tek Chand and Abdul Qnadir, JJ.*) SHER SINGH *v.* DAYA RAM. **13 Lah. 660=I R. 1932 Lah. 514=139 I.C. 49=33 P.L R 847 =A.I.R. 1932 Lah. 465 (F B.).**

[**Appl.** 142 I.C. 641 (642). **Rel.** 35 P.L.R. 606 (608).]

——**Ss. 6 and 8**—*Mortgage contrary to Act—Validity.*

A mortgage in violation of the provisions of the Act is not void *in toto*. It is enforceable on the points not expressly covered by the Act. (*Coldstream and Bhide, JJ.*) SOCHET SINGH *v.* HADAYAT ULLAH. **13 Lah 508=I.R. 1933 Lah. 44=140 I C. 863=33 P.L.R. 815=A I R. 1932 Lah. 630.**

——**Ss. 6 and 9**—*Mortgage in contravention of—Validity of—Revision by Deputy Commissioner.*

If a member of an agricultural tribe makes a mortgage on his land in any manner or form not permitted by or under the Act, the mortgage is not absolutely illegal and the Deputy Commissioner has authority to revise and alter the terms of the mortgage, so as to bring it in accordance with such form of mortgage permitted by or under the Act as the mortgagee appears to him to be equitably entitled to claim. (*Addison and Agha Haidar, JJ.*) GHULAM AHMAD *v.* GHULAM FARID. **6 I.R. (Lah.) 131 =145 I.C. 733=A.I.R. 1933 Lah. 844.**

——**S. 6**—*Sale in contravention of Act—Effect of—Suit to recover price paid—Contract Act, S.* 65.

A contract of sale in contravention of the provisions of the Punjab Alienation of Land Act is not void *ab initio*, because there is a provision in the Act enabling the vendee to have the defect in his title removed by securing the sanction of the Deputy Commissioner. If he fails to apply for such sanction, or if such sanction is applied for and is refused, the so called permanent alienation takes effect as a usufructuary mortgage in form (*a*) permitted by S. 6 for such term as the Deputy Commissioner considers to be reasonable. Where a vendee alleged himself to be a member of an agricultural tribe but was found by the Courts to be a non-agriculturist, the case is covered by S. 65 of the Contract Act, and the vindee can recover the price paid by him to the vendor. (*Rangi Lal, J.*) BAHADUR *v.* MAHOMED DIN. **7 R L. 94=151 I.C. 172=A.I.R. 1934 Lah. 979.**

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——**S. 6 (1) (a), (b) and (c)**—Mortgage not falling under—Sanction for—Procedure for obtaining. *See* PUNJAB ALIENATION OF LAND ACT, S. 3 (2). **14 Lah.L.T. 12.**

——**S. 9**—*Mortgage deed invalidated — Claim for personal decree—Maintainability.*

Where the plaintiff gave up the mortgage security since he could not avail himself of the provisions in the deed because of S 9 of the Act and claimed a money decree,

Held, that the suit was maintainable and should be determined on the terms of the deed excluding the terms relating to the security of land. (*Coldstream and Bhide, JJ.*) SOCHET SINGH *v* HADAYAT ULLAH. **13 Lah. 508=I R. 1933 Lah. 44=140 I.C. 863=33 P.L R. 815=A.I.R. 1932 Lah. 630.**

——**S. 9 (1)**—*Application by mortgagee—Denial of validity by mortgagor—Permissibility.*

The mortgagor cannot defeat the mortgagee who applies under S. 9 (1) by denying the legitimacy of the mortgage, as the mortgagee would then have no other remedy whatever. The Deputy Commissioner has authority to revise the terms of the mortgage in spite of the mortgagor's objection. (*Irving, F.C.*) ALI AKBAR *v.* AMAR SINGH. **11 Lah.L.T. 145.**

——**Ss 14 and 21-A (2)**—*Decree contravening Act —Remedy of Deputy Commissioner.*

There can be no doubt that the course laid down in sub section (2) of S. 21 A of the Act is the only one, that is open to the Deputy Commissioner whose attention has been drawn to a decree passed by a Civil Court, which appears to give effect to a permanent alienation of land which had been effected in contravention of the provisions of the Act, and if he fails to take action in the manner prescribed therein the decree stands. Obviously S. 14 has no application to such a case. It deals with those cases only in which the dispute as to the validity of the alienation has not been taken to a Civil Court and that Court has not passed a decree in connection therewith. Where a decree is passed by a Civil Court giving effect to a sale which contravenes the provisions of the Act and the Deputy Commissioner converts the sale into a mortgage under S. 14, his action is clearly *ultra vires* and cannot in any way affect the Civil Court decree. (*Tek Chand and Din Mahomed, JJ.*) SARBULAND *v.* PREM DAS **16 Lah. 56=155 I.C. 615 =7 R.L. 744=35 P.L.R. 709 A.I.R. 1934 Lah. 947.**

——**Ss. 14 and 6**—*Sale to non-agriculturist—Position of alienee till sanction*

Until the sanction of the Deputy Commissioner is given to a permanent alienation, like a sale to a non-agriculturist, the alienation takes effect automatically as a usufructuary mortgage in form A permitted by S. 6 for such term not exceeding twenty years and on such conditions as the Deputy Commissioner considers reasonable. (*Addison, J.*) MT. NANDI *v.* PALA SINGH **I.R. 1933 Lah. 414=144 I.C. 13=A.I R. 1933 Lah. 650.**

——**S. 16**—*Applicability—Date trees.*

Fruit trees (date trees) giving annual produce and standing on agricultural land though not expressly

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mentioned or included in the definition of land given in S. 2 (3) are not liable to attachment and sale in execution of decree against the owner who is a member of an agricultural tribe. A decree-holder can therefore attach each year the fruit of the date trees as part of the produce of the land just as he can attach wheat but he cannot attach the trees and sell them in perpetuity with a view to the fruit, *i.e.*, produce, being gathered by him in perpetuity. Such a sale is prohibited not only by S. 15, but by S. 3 and comes within S. 16 of the Act. (*Addison, J.*) DEPUTY COMMISSIONER, JHANG *v.* GANGA RAM. **6 I.R. (Lah.) 12=34 P.L.R. 786=144 I.C. 691 (1)=A I.R. 1933 Lah. 880.**

——**S. 16**—*Applicability—Date trees attached in execution.*

Trees are not land within the meaning of S. 2 (3) and hence the statutory prohibition in S. 16 (1) of the Act does not apply in the case of the date trees attached in execution of a decree. A.I.R. 1925 Lah. 29, Rel. on. (*Tapp, J.*) DEPUTY COMMISSIONER, JHANG *v.* SHANKAR DAS LACHHMAN DAS. **6 I.R. (Lah.) 11 (1)=144 I.C. 690=34 P.L.R. 780=A.I.R. 1933 Lah. 589.**

——**S. 16**—*Decree against member of agricultural tribe—Sale of property in execution—Permissibility.*

Land belonging to a member of the agricultural tribe cannot be sold in execution even though a decree has been obtained by the mortgagee against such member. The executing Court cannot ignore the provisions of law and sell the property which the Legislature has made non transferable. (*Addison and Agha Haidar, JJ.*) THAKAR DAS *v.* ROSHAN DIN. **I.R. 1933 Lah. 161 =141 I.C. 634=34 P.L.R. 523=A.I.R. 1933 Lah. 397.**

——**S. 16**—Decree in contravention of executing Court cannot sell land—Section mandatory. *See* C. P. CODE, S. 47—EXECUTING COURT. **A.I.R. 1934 Lah. 609 (1).**

——**Ss. 16 and 21 A**—*Decree in contravention of S. 16—Procedure—Objection in execution—Maintainability.*

If a decree contravenes S. 16 of the Act, the proper course is to attack the decree itself and not to attack a subsidiary order passed in execution of that decree. Where a decree orders the sale of certain property for the realisation of the decree debt, an objection that the judgment-debtor is an agriculturist, and that the property cannot in consequence be sold in execution, cannot be raised for the first time in execution proceedings. (*Skemp, J.*) BUDHU RAM *v.* ALI SHAH. **A I.R. 1935 Lah. 443.**

——**S. 16**—*Decree ordering sale—Plea as agriculturist—Whether can be raised in execution.*

Where a decree orders the sale of a certain property for the realisation of a debt the objection that the judgment-debtor is an agriculturist and that the property cannot be sold in execution proceedings by virtue of the provisions of the Alienation of Land Act cannot be raised for the first time in execution proceedings and the executing Court cannot go behind the decree. (*Tek Chand, J.*) GANESH DAS *v* GANGA SINGH. **I R. 1932 Lah. 393=138 I.C. 60=33 P.L.R. 632=A.I.R. 1932 Lah. 529.**

——**S. 16**—*Land of member of agricultural tribe—Sale by Official Receiver to another agriculturist.*

A Receiver in insolvency, in whom the property of the member of a notified agriculturist tribe has become vested, does not possess power to sell his land to another agriculturist. 1928 Lah. 734 and 119 I.C. 730, Diss. From. (*Broadway and Tek Chand, JJ.*) MIRZA *v*

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JHANDA RAM. **12 Lah. 367=I.R. 1931 Lah. 291=130 I.C. 419=31 P.L.R. 842=A.I.R. 1930 Lah. 1034.**

[R. 32 P.L.R. 486 (487).]

——**S. 16**—*Land belonging to member of agricultural tribe—Collector ordering execution of lease for satisfaction of decree—Subsequent objections by judgment debtor under S. 47, C. P. Code—Jurisdiction.*

On an application to attach certain land which belonged to a member of an agricultural tribe, the Collector suggested that portion of the land be leased for two years, and the Court without issuing notice to judgment-debtor passed order that the land be leased for two years and the records were sent to the Collector for necessary action. The judgment-debtor filed objections by an application under S. 47, C. P. Code, but it was dismissed on the ground that the Court had become *functus officio* after the order passed on receipt of Collector's proposal.

Held, that the Collector was acting only as a ministerial officer, that as mutation was not affected by the Collector, the decree could not be said to have been satisfied and that it was open to the judgment-debtor to raise the objections. 1928 Lah. 475, Rel. on.; 1931 Lah. 141 and 1929 Lah. 121, Dist. (*Bhide, J.*) SHER MOHAMMAD *v.* BHAGWAN DAS. **I.R. 1933 Lah. 488 =144 I.C. 509=A.I.R. 1933 Lah. 441.**

——**S. 16**—*Members of agricultural tribe—Sale of land in insolvency—Application to set aside—Delay*

The land of a member of an agricultural tribe was sold in insolvency and the sale proceeds were distributed among the creditors. The insolvent relying on these payments to creditors applied for discharge and was accordingly discharged. He subsequently, long after the expiry of the period of limitation, filed an application to have the sale set aside on the ground that the land cannot be sold under the Act.

Held, that though the land cannot be sold in insolvency, under the above circumstances he was not entitled to have the sale set aside 1930 Lah. 1034, Ref. (*Jai Lal, J.*) JAI KISHAN DASS *v.* CHIRAGH DIN. **I.R. 1933 Lah. 277 (1)=142 I.C. 812=34 P.L.R. 486=A. I.R. 1933 Lah. 250.**

——**S. 16**—*Opinion of Collector—Power of Court not to follow*

Where some land belonging to the judgment-debtors is attached and thereafter the Collector is consulted as to what farm of the land should be arranged the Court is not bound to follow the Collector's report. Where the decree-holder prefers objections to such a report the Court should go into the question and dispose of the case on the merits. 1 Lah. 192 (P.C.), Rel. on (*Addison, J.*) THE UNION BANK, LTD. *v.* MOHAMMAD SAID KHAN. **I.R. 1931 Lah. 364=131 I.C. 92.**

——**S. 16**—*Scope—Provisions of Provincial Insolvency Act modified.*

S. 16 of the Punjab Alienation of Land Act overrides the provisions of the Provincial Insolvency Act in respect of all matters which are done in "enforcement at the order of adjudication." (*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367=I.R. 1931 Lah. 291=130 I C. 419=31 P.L.R. 842=A.I.R. 1930 Lah. 1034.**

——**S. 16 (1)**—*Scope—Agricultural land—Attachment in execution.*

S. 16 (1) does not prohibit the attachment of the land belonging to an agriculturist in execution of a decree against him and a decree-holder is entitled to claim a declaration that the land of his agriculturist debtor is liable to attachment and to be thereafter dealt with as provided in S. 72, C. P. Code. 1 Lah. 192, Rel. on.

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(*Broadway and Tek Chand, JJ.*) MIRZA *v.* JHANDA RAM. **12 Lah. 367=I.R. 1931 Lah. 291=130 I.C. 419 =31 P.L.R. 842=A.I.R. 1930 Lah. 1034.**

———**S. 16 (2)**—*Construction and scope—Lease for sixteen years in execution—Second decree in favour of same creditor—Second lease for 20 years to take effect after expiration of prior lease—Legality.*

A decree against a judgment-debtor (agriculturist) was satisfied in 1926 by a lease of two wells of the judgment-debtor for a term of 16 years. Subsequently in execution of another decree in favour of the same judgment-debtor the Court ordered that there should be another lease for 20 years of the same two wells, to take effect after expiry of the prior lease.

Held, that the second lease contravened S. 16 (2) of the Act and the Court was at liberty to make a farm or mortgage only for a total period of twenty years.

Held, further, that the Court cannot convey anything more than the right, title or interest of the judgment-debtor, or anything more than what the latter himself can convey; if the latter's capacity for alienation is limited by law, S. 16 of the Act does not confer any such extraordinary power on the Court. (*Skemp, J.*) DEPUTY COMMISSIONER, MUZAFFARGARH *v.* SETH SUKHDIAL. **157 I.C. 1028=A.I.R. 1935 Lah. 56.**

———**S. 16 (2)**—*Lease of entire land of judgment-debtor—Powers of executing Court.*

Ordinarily, the executing Court must proceed at the instance of the decree-holder until the decree is fully satisfied ; and it is only when a statutory bar exists that execution to the full extent can be refused. There does not appear to be any statutory provision that a judgment-debtor holding land not liable to sale is entitled to have a sufficient area for his maintenance exempted from the farm or lease which an executing Court is empowered to arrange. The power of the executing Court to lease out the whole of the judgment-debtor's land cannot be affected by any standing order of the Financial Commissioner. (*Beckett, J.*) NARINJAN DASS *v.* FAZAL HUSSAIN SHAH. **158 I.C. 842=8 R. L. 316=37 P.L.R. 629=A.I.R. 1936 Lah. 30.**

———**(as amended by Act I of 1931), S. 16 (2)**—*Mortgage ordered to be effected by Court without advice of Collector—Validity of.*

Where a mortgage ordered to be effected by the Court in respect of rhe property of the judgment-debtor is without the advice of the Collector and no suitable provision is made for the maintenance of the judgment-debtor and his family, the mortgage is not valid. (*Dalip Singh, J.*) BHAGWAN DAS *v.* NIKKA. **6 I.R. (Lah) 253=146 I.C. 630 (2)=34 P.L.R. 986= A.I.R. 1933 Lah. 813.**

———**(as amended by Act I of 1931), S. 16 (2)**—*No retrospective operation.*

S. 116 (2) inserted by Act I of 1931 is intended to operate in future. It has no retrospective operation, and does not affect mortgages affected before the passing of the Act. (*Tek Chand and Monroe, JJ.*) MT. SURJI *v.* SHEO RAM. **14 Lah. 389=6 I.R. (Lah.) 34=144 I.C. 965=34 P.L.R. 277=A.I.R. 1933 Lah. 492.**

———**S. 21-A**—Application under — Omission to implead legal representatives of deceased party—Abatement—Setting aside—Extension of time—Power of Court. *See* C. P. CODE, O. 22, RR. 4 (3) AND 9 (3). **A.I.R. 1935 Lah. 443.**

———**Ss. 21-A (2) and 14**—*Decree contravening Act —Remedy of Deputy Commissioner.*

There can be no doubt that the course laid down in sub-section (2) of S. 21-A of the Act is the only one, that is open to the Deputy Commissioner whose attention has been drawn to a decree passed by a Civil Court which appears to give effect to a permanent alienation of land which had been effected in contravention of the provisions of the Act and if he fails to take action in the manner prescribed therein the decree stands. Obviously S. 14 has no application to such a case. It deals with those cases only in which the dispute as to the validity of the alienation has not been taken to a Civil Court and that Court has not passed a decree in connection therewith. Where a decree is passed by a Civil Court giving effect to a sale which contravenes the provisions of the Act and the Deputy Commissioner converts the sale into a mortgage under S. 14, his action is clearly *ultra vires* and cannot in any way affect the Civil Court decree. (*Tek Chand and Din Mahomed, JJ.*) SARBULAND *v.* PREM DAS. **16 Lah. 56=155 I.C. 615=7 R.L. 744=35 P.L.R. 709=A.I.R. 1934 Lah. 947.**

PUNJ. COLONIZATION OF GOVT. LANDS ACT (1912), S. 10.

———**S. 21 A**—*Scope—Object.*

Section 21-A was enacted merely to enable the Court to correct a decree which infringed the law on the face of the record. Where the mortgaged property was a house and not agricultural land and the Court came to the conclusion that it was not land at the time of mortgage.

Held, that there were no grounds for revision. A.I.R. 1927 Lah. 897, Rel. on. (*Rangi Lal, J.*) DEPUTY COMMISSIONER OF ATTOCK *v.* ATTAR CHAND. **160 I.C. 540=8 R.L. 546=A.I.R. 1935 Lah 901.**

———**S. 21-A (2)**—"*Informed of such decree*"—*Meaning of.*

It is the duty of the Court, under S. 21-A, sub-S. (1) to send to the Deputy Commissioner as such a copy of his decree or order. Where a warrant for possession of the property in execution of the decree was sent to the Collector in the usual course and a subordinate in his office endorsed it to the tahsil,

Held, this was not information which came to the knowledge of the Deputy Commissioner. (*Addison, J.*) DEPUTY COMMISSIONER, KANGRA *v.* SANATAN DHARAM RAJPUT HIGH SCHOOL. **A.I.R. 1935 Lah. 274.**

PUNJAB CANAL AND DRAINAGE ACT (VIII OF 1873), S. 33—*Cut made from* rajbah—*Whether punishable.*

A *rajbah* maintained by the Government is a very different thing from a water course. A cut made from a *rajbah* is not punishable under S. 33.

Semble.—There is an obvious *lacuna* in the Act on this point. (*Townsend, F.C.*) LAL SINGH *v.* EMPEROR. **10 Lah.L.T. 6 (1).**

PUNJAB COLONIZATION OF GOVERNMENT LANDS ACT (V OF 1912)—*Horse breeding grant in Sargodha colony—Tenancy-at-will—Subsequent acquisition of occupancy—Death of tenant—Absence of legal heirs—Procedure—Escheat.*

Where, on the death of a tenant, who acquires occupancy rights in respect of a horse-breeding grant (in Sargodha colony), the original grant being a tenancy-at-will—there is no heir competent to succeed under the rules and conditions applicable to the tenancy, the tenancy should escheat to the Government, as there is no legal heir. Land to which there is no heir at law invariably reverts to Government to be held and re-allotted by the Government at their discretion. The Collector has no jurisdiction to grant mutation in such a case at the instance of rival claimants. (*Dobson and Latifi, F. Cs.*) RUKAYYA BEGAM *v.* FAQIR ULLAH SHAH. **14 Lah.L.T. 33.**

———**S. 10**—*Government land—Powers of Government to assign—Right of previous allottee to question—Interference by Civil Court.*

PUNJ. COLONIZATION OF GOVT. LANDS ACT (1912), S. 15.

Certain land was shown as a way in the plan when certain Ahatas were allotted to the plaintiffs. Subsequently however the same land was allotted by Government to the defendants. The plaintiffs sued for a declaration that the land was a pathway and for a mandatory injunction.

Held, that the property being that of the Government they were free to allot it in any manner they liked.

Held, further, that even if the Government had not exercised its powers properly the Civil Court cannot interfere. (*Addison and Bhide, JJ.*) SEWA SINGH *v.* SECRETARY OF STATE. **12 Lah. 5 = I R. 1931 Lah. 915 - 134 I.C. 291 = 32 P.L R. 206 = A I R. 1931 Lah. 270.**

——**S. 15**—*Death of grantee—Widows paying instalments—Lands whether form accretion to husband's estate.*

A certain person obtained grant of land as a *cufard posh* as a tenant. His son completed the five years' term of tenancy required to get the right to purchase the land and he actually paid the first instalment. He however died subsequently and mutation was made in favour of his three widows in August 1908. The latter paid the other instalments.

Held, that the property proved an accretion to the estate of the deceased and that the widows had only a life estate in the same. (*Coldstream and Dalip Singh, JJ.*) JIWAN SINGH *v.* AJMER KAUR. **134 I C. 1117 = I.R. 1932 Lah. 13 = A I R. 1932 Lah. 144.**

——**S. 15**—*Prior agreement for transfer—Entry of transferee's name in records.*

Although a subsequent transfer by the tenant is void, a prior agreement for transfer can be given effect to, but the name of the transferee cannot be entered in the records in the absence of the Government. (*Harrison and Addison, JJ.*) KANDHARA SINGH *v.* LADHA SINGH. **I.R. 1932 Lah. 453 = 138 I.C. 268.**

——**Ss. 17, 24, 25, 26 and 36**—*Scope of S. 36—Jurisdiction of Civil Court—Exclusion of—Extent of.*

A widow, *M* of the original grantee of land was in possession in accordance with S. 20 (*b*). The Commissioner granted *M* permission to surrender her rights to her daughter *B* and mutation of names in the land revenue records was effected accordingly. A suit was brought by a reversioner praying for a declaration that the gift and the orders of the Commissioner would not affect his rights after the death of *M*. The lower Court held that jurisdiction of the Civil Court was barred in virtue of S. 36.

Held, that what was excluded from the jurisdiction of the Court was any matter of which the Collector was empowered by the Act to dispose (*e.g.*, such a matter would be action taken under S. 17 or Ss. 24 and 25 or S. 26) and that the jurisdiction of the Civil Court was not barred

Held, further, that one of the matters to be ascertained for the proper disposal of the case would be what was the effect of the mutation effected in *B's* favour, *viz.*, whether the legal effect of the mutation was to create new tenancy in *B's* favour or whether only *M's* interest in property was relinquished. 1932 Lah. 412, Ref. (*Coldstream and Currie, JJ.*) GURDIT SINGH *v.* MT. MAN KAUR. **150 I.C. 634 = 6 R L. 861 = A.I. R 1933 Lah. 293.**

——**S. 19**—*Applicability—Agreement to sell land* in futuro.

S. 19 forbids the transfer of tenancy rights by a Government in favour of a third party without the sanction of the Commissioner or other officer appointed by him. Where the transfer is not of tenancy rights but the agreement is to sell the land after proprietary rights have been conferred by the Government, to such an agreement S. 19 has no application. Such an agreement, does not purport to be a sale *in praesenti* of the tenancy rights, but is a mere agreement to sell *in futuro* the proprietary rights in the land, if and when they are conferred on the promisor. S. 19 is, therefore, no bar to a suit for specific performance of the agreement. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM MOHAMMAD *v.* LAKHA SINGH. **153 I.C. 437 = 7 R.L. 433 = 37 P.L R. 58 = A.I.R. 1935 Lah. 181 (2).**

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——**S. 19**—*Personal grant—Agreement to share grant with stranger—Legality.*

Where the grant is purely personal and has been made for rendering military service to the Crown, the grantee cannot introduce strangers with himself to share the grant and any agreement admitting rights of others to share the grant is illegal (*Addison and Din Mohammad, JJ.*) MT. HARNAM KAUR *v.* NARAIN SINGH. **17 Lah. 38 = 161 I.C. 201 - 8 R L. 682 = A. I.R. 1935 Lah. 739.**

——**S 19**—*Purchase of tenancy from Collector—Secret agreement by purchaser with another that each to advance half purchase-money and to take possession of half of land and half profits—Subsequent agreement to repay purchase money in case of breach—Enforceability.*

G bought with the sanction of the Collector a tenancy which was held on horse breeding terms. Prior to the purchase *G* had made an oral agreement with *T* that *T* would advance half the purchase-money of Rs. 10,000, pay half the outgoings and have possession of one half of the land and receive one half of the profits. Though the agreement was a void agreement under S. 19, the parties to it observed it loyally for several years and subsequently *G* executed a formal written document in which after reciting the earlier transaction he expressly made an agreement to the effect that the enjoyment of the lands should continue as before, but in case of a breach of the agreement it was provided that he, and after his death his children, should pay the full purchase money of the land to the other parties to the agreement. On death of *G*, his son succeeded and ejected *T's* sons. In a suit by *T's* son for the amount fixed in the agreement.

Held, that the subsequent agreement was entirely distinct from the prior one, that it was not illegal as it only provided that a certain state of affairs should continue and that even though the prior dealing was in operative, plaintiff was entitled to half the purchase-money which his father had paid. (*Tek Chand and Monroe, JJ.*) QURBAN HUSSAIN SHAH *v.* FAZAL SHAH. **6 I.R. (Lah.) 69 = 145 I.C. 163 = A.I.R. 1933 Lah. 291.**

——**S. 19**—*Sale under—Contract between parties not to compete in auction—Validity.*

An agreement between several persons not to bid against each other and to buy the property in partnership is not opposed to public policy, and the party who had advanced money to the bidder under the agreement can recover the same on his refusal to perform his part of the contract. (*Jai Lal, J.*) NAND *v.* BHAGAT SINGH. **I.R. 1931 Lah 869 = 134 I.C. 101 = 32 P. L.R. 879 = A.I.R. 1932 Lah. 32.**

——**Ss. 19 and 21 (a)**—*Scope—Occupancy tenant—Widow succeeding to son with permission of Government—Subsequent gift to daughter with sanction of Commissioner—Locus standi of husband's reversioners to contest.*

One *N* who was granted occupancy rights by Government in a plot of land died in 1897. His son who

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succeeded him died in 1898. The Government then allowed his mother, *N's* widow, to succeed to the occupancy rights. Later she made a gift of her rights to her daughter, the gift being sanctioned by the Commissioner under S. 19 of the Act. The nephews of *N* brought a suit to declare that the gift shall not be operative after the death of *N's* widow.

Held, as *N's* widow was not an heir to her son under S. 59 of the Punjab Tenancy Act which regulated the succession to occupancy rights prior to Act V of 1912, the act of the Government in allowing her to succeed amounted to allotting the occupancy tenancy rights to her, and that succession would be governed by S 21 (*a*) of the Act that the gift having been sanctioned by the Commissioner under S. 19 of the Act, which section alone restricted her rights of alienation, the reversioners of her husband had no *locus standi* to contest the gift. (*Addison and Abdul Rashid, JJ.*) GHULAM RASUL *v.* MST. MOHAMMAD BIBI. **16 Lah 252=161 I C 974 (1)=8 R.L 832 (1)=37 P.L R. 797=A.IR. 1936 Lah. 349.**

——**S. 19**—*Tenant agreeing to give possession of land for debt due or in alternative to pay a certain sum a year—Agreement not void.*

Where a tenant agreed with the plaintiff to wipe off his indebtedness by giving possession of a part of the land, the tenancy of which had been granted to him by the Government or in the alternative to pay a certain sum a year, in a suit by the plaintiff for recovery of three annual instalments,

Held, the agreement could not be deemed to be void under S. 19 of the Act as according to the recitals, the relationship between the parties was of a creditor and a debtor and not of a landlord and a tenant. (*Jai Lal, J.*) MAHOMED ZAMAN *v.* MAHOMED HAYAT. **153 I.C. 388=7 R.L. 430=35 P.L.R. 575=A.I.R. 1934 Lah. 857**

——**S. 19**—"*Transfer*"—*Family arrangement on death of tenant.*

Where a *bona fide* dispute as to the question of succession had arisen between the parties on the death of occupancy tenant and a family arrangement was arrived at whereby the entire lands were taken by brother of deceased and the widow was given maintenance allowance.

Held, there was really no transfer in this case within the meaning of S. 19. (*Tek Chand and Abdul Rashid, JJ.*) JAGPAL KAUR *v.* SURAT SINGH. **160 I.C. 21 =8 R.L. 483=A.I.R 1935 Lah. 638.**

——**S. 20**—*Death of grantee—Mutation in names of sons and widowed daughter in law—Daughter-in law not described as holder of life estate—Absolute estate conferred—Validity to be questioned in Revenue Court.*

Where on the death of a grantee the mutation was effected in the names of his sons and the widow of his predeceased son and it was not stated in the mutation order and entry that the widow merely acquired the proprietary rights as life tenant,

Held, (1) that the widow should be taken to be an absolute owner and that her alienation of the estate by will was valid; (2) that the question as to whether she had or had not paid her share of the *Nazarana* was immaterial; and (3) that if the grant to the widow was against the rules the proper procedure was to impugn the same before the higher revenue or executive authorities and not before the Civil Court. (*Harrison and Tek Chand, JJ.*) MT. BUDHAN *v.* KARMAN. **131 I C. 214=A.I.R. 1931 Lah. 417 (2).**

——**S. 20**—*Scope.*

S. 20 of the Act provides a self contained law of succession to tenancies of original grantees. It is complete in itself. It overrides the customary law of the home districts. If the provisions of Cls (*a*) to (*d*) do not provide a successor, it is mandatory on the Collector to make a nomination, for the tenancy *shall* devolve upon the successor or successors nominated by the Collector. In such a case any person or persons who were included within those who could be so nominated but were not nominated are not aggrieved parties and have no right of appeal against the order of the Collector. (*Calvert, F. C.*) MT. HARNAMO *v.* SOHAN SINGH. **12 Lah.L.T. 49.**

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——**Ss. 20 and 21**—*Widow of original grantee in possession—Succession to—Nomination of successor—Validity of.*

Where widow of original grantee of land is in possession in accordance with S. 20 (*b*), *prima facie* the succession would be governed by the provisions of S. 21 and S. 21 does not give widow power to nominate a successor. (*Coldstream and Currie, JJ.*) GURDIT SINGH *v.* MT MAN KAUR. **150 I.C. 634=6 R.L. 861 =A.I.R. 1933 Lah. 293.**

——**S. 21**—*Construction—Predecessor in the tenancy to occupancy tenant—Non-occupancy maturing into occupancy—If same tenancy.*

For the purposes of S. 21 a tenancy which matures from a tenancy-at will into an occupancy tenancy, until it is fully extinguished by the acquisition of proprietary rights, is one and the same tenancy throughout, regardless of the fact that the rules of primogeniture which originally governed it have charged on the acquisition of occupancy rights. The original grantee of the tenancy whose successor acquires occupancy rights is therefore the predecessor in the tenancy to the occupancy tenant. (*Dobson and Latifi, F Cs.*) RUKAYYA BEGAM *v.* FAQIR ULLAH KHAN. **14 Lah.L.T. 33.**

——**S. 21**—*Scope.*

The Act does not confer on collaterals greater rights to the succession of occupancy tenancies in colonies than exist in the home districts. (*Calvert, F. C.*) HARNAMO *v.* DEVA SINGH. **12 Lah.L T. 45.**

——**S. 21**—*Succession to tenants—Nomination by Collector.*

Where the Collector has made a fresh grant for life or till marriage, it is for the Collector to name a successor after her marriage under S. 21. (*Shadi Lal, C.J. and Rangi Lal, J.*) MT. FATIMA *v.* KAVA ALI. **150 I. C 927 (1)=7 R.L. 35=36 P.L.R. 213=A.I.R. 1934 Lah. 321 (1).**

——**S. 21 (a) and (b)**—*Applicability—Effect of words "first allotted".*

Section 21 governs the succession to the tenancy of both tenants at-will and occupancy tenants. The words "first allotted" describe its creation and S 21 (*b*) governs the succession where the widow has succeeded the original tenant and grantee. The succession in such case goes to the person or persons who succeed if the tenancy were agricultural land acquired by the original tenant, the definition of such original tenant being in S. 3 of the Act and being confined strictly to male grantees. In contradistinction to this, S. 21 (*a*) only applies where the first tenant of the land, that is to say, the grantee, was a woman, to whom the grant was made on account of her husband's father, son or brother's services, he having presumably died in the performance of his duty. A.I.R. 1930 Lah. 474, Rel. on; A.I.R. 1931 Lah. 271, Diss. from. (*Harrison and Addison, JJ.*) DEWA SINGH *v.* GIAN SINGH. **14 Lah. 168=I.R. 1932 Lah. 457=138 I.C. 306=33 P.L.R. 595=A.I. R. 1932 Lah. 412.**

——**S. 21 (a)**—*Case falling under—Power to nominate successor—Exclusive jurisdiction of Collector.*

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Where a case falls under S. 21 (*a*) it is the Collector who has the power to nominate the successor. It is not for the Civil Court to usurp his functions even though the field from which the choice has to be made is ever so narrow. (*Tek Chand and Agha Haidar, JJ.*) MT. JOWALI *v.* MANGAL SINGH. **12 Lah. 529=I.R. 1931 Lah. 894=134 I.C. 126=32 P.L.R. 249=A.I.R. 1931 Lah. 271 (2).**

———**S. 21 (a)**—*Grant of* Abadkari *rights—Death of male tenant—Occupancy rights conferred on widow—Effect.*

Where an *Abadkari* grant has been made under Act II of 1893 to a male tenant who died before acquiring "occupancy right" and after his death "occupancy rights" were conferred on his widow and the question arises in connection with those rights, such widow should be considered as the person "to whom the tenancy has first been allotted" within the meaning of S. 21 (*a*) (*Tek Chand and Agha Haidar, JJ.*) MT. JOWALI *v.* MANGAL SINGH. **12 Lah. 529=I.R. 1931 Lah. 894=134 I.C. 126=32 P.L.R. 249=A.I.R. 1931 Lah. 271 (2).**

[**Not F.** 14 L. 168 (171); 33 P.L.R. 922 (925).]

———**S. 21 (a) and (b)**—*Gogera Branch peasant grant—Death of grantee before five years—Succession by widow—Right to nominate successor.*

Tenants holding under Gogera Branch peasant grants are not tenants-at-will. A first allotment can be made to a female only on account of services of some male. Where the widow has succeeded the original tenant and grantee the succession is governed by Cl. (*b*) and not Cl. (*a*) of S. 21. Where succession is governed by Cl. (*a*) the nomination of an heir would rest with the Collector. (*Coldstream and Currie, JJ.*) TABA *v.* AMIN CHAND **I.R. 1932 Lah. 618=139 I.C. 705=33 P.L.R. 922=A.I.R. 1932 Lah. 627.**

———**S. 21 (a)**—*Tenancy—Meaning.*

The word "tenancy" in S. 21 (*a*) means the tenancy to which the dispute relates, and may refer to occupancy tenancy. (*Tek Chand and Agha Haidar, JJ.*) MT. JOWALI *v.* MANGAL SINGH. **12 Lah. 529=I.R. 1931 Lah. 894=134 I.C. 126=32 P.L.R. 249=A.I.R. 1931 Lah. 271 (2).**

———**S. 21 (b)**—*Policy of Act—Widow of original grantee—Rights of succession.*

The whole policy in colony matters is to exhaust the heirs of the original grantee before going back to the home village for reversioners who had never been selected as colonists. The rights of a widow to succeed to occupancy rights may be terminated by the birth of a posthumous son to her late husband, by her death or by her re marriage or by abandonment or by ejectment; otherwise they continue and when those with prior claims die, the rights of widow may be admitted.

Held, that the widow of the original grantee succeeds before distant reversioners under S. 21 (*b*). (*Calvert, F. C.*) MT. LADO *v.* SUNDI. **11 Lah.L.T. 85.**

———**S. 21 (b)**—*Succession—Female tenant succeeding to son of original grantee—Death of—Original grantee's daughter and nephew—Preference.*

On the death of an original allottee of the tenancy, who was a Jat Kahlon of Sialkot District, his son succeeded to the tenancy. On the latter's death, his mother, widow of the original tenant succeeded. She too died. The land was claimed by a married daughter of the original tenant and his nephew.

Held, that the former was entitled to succeed in preference to the latter; and simply because she happened to be the sister of the last male-holder, she did not lose her rights of succession. (*Dobson, F.C.*) MT. SARDAR BIBI *v.* MAHOMED ALI. **14 Lah.L.T. 21.**

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———**S. 24**—*Notice under—Necessity under.*

The issue of notice under S. 24 is a statutory obligation and no order can be passed until it is issued. (*Calvert, F. C.*) SHADI *v.* EMPEROR. **11 Lah.L.T. 164.**

———**S. 24**—*Resumption of grant—Rules governing.*

Resumption is a severe penalty and the utmost care should be taken to follow the prescribed procedure in cases where resumption may be necessary. Where no written notice was issued to the tenant requiring him to rectify the breach within a reasonable time and no notice was sent to some of the co sharer,

Held, that the order of resumption made under those circumstances was invalid. (*Boyd, F. C.*) SOBHA SINGH *v.* EMPEROR. **35 P.L.R. 233.**

———**S. 36**—*Collector's order granting proprietary rights—Jurisdiction of Civil Court—If excluded.*

The Collector has no arbitrary powers to grant proprietary rights over an occupancy tenancy to a third person who is not the occupancy tenant. Where the Collector's order sanctioning mutation in favour of certain persons is not in accordance with the law of succession of the parties, the Collector is not empowered to sell the proprietary rights to them under the Punjab Colonization of Government Lands Act. In such circumstances, a suit by the rightful heirs for possession is maintainable and the jurisdiction of the Civil Court is not excluded by S. 36 of the Act. (*Tek Chand and Skemp, JJ.*) IBRAHIM *v.* ZAINAB. **156 I.C. 29=7 R.L. 839=37 P.L.R. 163=A.I.R. 1935 Lah. 613.**

———**S. 36**—*Exercise of powers under S. 10 of the Act—Interference by Civil Court.*

Certain land was shown as a way in the plan when certain *Ahatas* were allotted to the plaintiffs. Subsequently however the same land was allotted by Government to the defendants. The plaintiffs sued for a declaration that the land was a pathway and for a mandatory injunction,

Held, that the property being that of the Government they were free to allot it in any manner they liked.

Held, further, that even if the Government had not exercised its powers properly the Civil Court cannot interfere. (*Addison and Bhide, JJ.*) SEWA SINGH *v.* SECRETARY OF STATE. **12 Lah. 5=I.R. 1931 Lah. 915=134 I.C. 291=32 P.L.R. 206=A.I.R. 1931 Lah. 270.**

PUNJAB COURTS ACT (VI OF 1918 as amended)—*Appeal—Jurisdiction—Suit for redemption of mortgage—Value for purposes of appeal—Subsequent ascertainment of mesne profits—Forum, if altered.*

In a redemption suit the value of the suit for purposes of jurisdiction of the trial Court had been fixed at Rs. 99. The suit was dismissed but, on appeal, the appellate Court remanded the case to the trial Court for a finding regading the value of improvements made by the mortgagee. On remand, the lower Court found the value of improvements to be Rs. 5,000. An objection was then taken that the value of the improvements being Rs. 5,000 the appeal lay to the High Court and not to the District Judge.

Held, that for purposes of jurisdiction in the trial Court the value of the suit was Rs. 99 and on the dismissal of the suit it remained the same for purposes of the appeal to the District Judge. Hence the appeal had been properly valued and was cognizable by him. The fact that the value of the improvements was Rs. 5,000, did not oust the jurisdiction of the District Judge to entertain the appeal and to decree the amount in favour of the mortgagee as a condition precedent to the redemption of the mortgage, if he ultimately found

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that the mortgagor was bound to pay for the improvements. (*Jai Lal, J.*) MAST RAM *v.* MAHOMED KHALIL. **135 I.C. 49 = I.R. 1932 Lah. 33 = 32 P.L.R. 102 = A.I.R. 1931 Lah. 584.**

———**S. 3 (2)**—*Land suit—Suit relating to land in village abadi which is site of building.*

A suit which relates to a piece of land in the village abadi which is the site of a building and is not being occupied for any agricultural purposes is not a land suit within the meaning of the Act (*Din Mahomed, J.*) RAM SARAN *v.* KARAM CHAND. **A.I.R. 1935 Lah. 105.**

———**S. 18**—*Powers of review—Order of Additional Judge—Review by District Judge if valid.*

O. 47, R. 5, C. P. Code, would apply only to the case of a Court consisting of more than one Judge. According to S. 18 of the Punjab Courts Act, where the Court of the Additional Judge is distinct from that of the District Judge, an order passed by the Additional Judge can be reviewed by the District Judge, though the former is still attached to the Court. (*Bhide, J.*) NAND SINGH *v.* SHER SINGH. **I.R 1933 Lah. 117 = 141 I.C. 392 (1) = 34 P.L.R. 229 = A.I.R. 1933 Lah 130.**

———**S. 34**—*Remand by additional District Judge to Sub-judge—Transfer to another Sub Judge—Power of District Judge.*

Where an additional District Judge remands a case under O. 41, R. 25 to a Subordinate Judge, the District Judge is competent to transfer the case to the file of another Subordinate Judge of equal status. (*Tek Chand, J.*) JAS KAUR *v.* BHAG DEVI. **13 Lah. 806 = 140 I. C. 238 = I.R. 1932 Lah. 638 = 33 P.L.R. 1015 = A.I.R. 1933 Lah. 29.**

———**S. 39**—*Forum of appeal—Suit for accounts.*

Where the suit, on the face of it, is a suit for accounts such suit being an unclassed suit, the appeal lies to the District Judge and not to the Subordinate Judge (*Jai Lal, J.*) ARJAN SINGH *v.* BACHAN SINGH. **150 I.C. 735 = 7 R L. 19 = 36 P.L.R. 55 = A.I R. 1934 Lah. 416.**

———**S. 39**—*Redemption suit valued at Rs.* 1,000. *Preliminary decree for possession on payment of Rs.* 9,050 *passed by Sub-Judge—Appeal by mortgagee for enhancement of the amount—Forum.*

A brought a suit against *B* for redemption of a house on the payment of Rs. 1,000. *B* pleaded *inter alia* that *A* had admitted *B* as owner of the house and that as such he had rebuilt the house incurring a cost of Rs. 15,000, which *A* must pay in addition to mortgage money. The Subordinate Judge passed a preliminary decree for possession by redemption of the mortgage on payment of Rs. 9,050. *B* filed an appeal for enhancement of the amount.

Held, that the appeal lay to the Hight Court and not to the District Court as the value of the subject-matter in a redemption suit was the amount adjudicated by the trial Court, Rs. 9,050 and not the valuation given by the plaintiff, Rs. 1,000. 1926 Lah. 376 (F.B.), Foll.; 106 P. R. 1895 (F.B.), held overruled. (*Tek Chand and Monroe, JJ.*) ABDUL AZIZ *v.* RAHMAT ULLAH. **148 I.C. 234 = 6 R.L. 522 (2) = A.I.R. 1933 Lah. 155.**

———**S. 39**—*Suit for account—Forum.*

In an account suit it is the value of the amount decreed that determines the Court of appeal. Where therefore the amount decreed is over Rs. 10,000 the appeal lies to the High Court. (*Harrison and Addison, JJ.*) UTTAM CHAND *v.* VISHAN DAS. **I.R. 1933 Lah. 586 = 144 I.C. 627 = A.I.R. 1933 Lah. 568.**

———**S. 39**—*Suit for pre-emption—Decree for possession subject to encumbrance — Value of encumbrance exceeding pecuniary jurisdiction of the Court—Validity of decree.*

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The value of the suit for purposes of jurisdiction in suits for pre-emption of sales of agricultural land is thirty times the land-revenue assessed on land and the valuation of the original suit determines the forum of appeal; and merely that the Court passes a decree for possession subject to an encumbrance which exceeds the pecuniary jurisdiction will not make the decree so passed *ultra vires* of the Court. (*Tek Chand and Monroe, JJ.*) CHANDGI RAM *v.* RAM SUKH. **147 I.C. 29 = 6 R.L. 354 = 35 P.L.R. 26 = A.I.R. 1933 Lah. 767.**

———**S. 39**—*Suit for rendition of account—Forum of appeal—Limits of appellate jurisdiction.*

In a suit for dissolution of partnership and rendition of accounts, the plaintiff tentatively valued the relief sought at Rs. 2,000. The value of the suit for purposes of jurisdiction automatically became Rs. 2000. The defendant in his written statement pleaded that nothing was due to the plaintiff and alleged that the plaintiff owed him a very large sum. The Senior Subordinate Judge passed a preliminary decree dissolving the partnership and ordering that accounts be taken. After a protracted inquiry a final decree of Rs. 3,286 was passed in favour of the plaintiff against the defendant. Both parties being dissatisfied with the decision filed appeals in the District Court. In his memorandum of appeal, the plaintiff stated that "the value of the suit was Rs. 2,000 but he valued the appeal for purposes of jurisdiction and Court-fee at Rs. 5,000, or more on accounts," and paid *ad valorem* fee Rs. 5,000, stating that he was prepared to make good the deficiency in Court-fee in the event of the Court finding that on the evidence he was entitled to a larger sum. The defendant valued his appeal for jurisdiction and Court-fee at Rs. 8,286 and stamped it accordingly. The District Judge dismissed the defendant's appeal and accepted that of the plaintiff and, in the modification of the decree of the trial Court, passed a decree in favour of the plaintiff for Rs. 32,933 2-3 with costs and interest at six per cent. per annum.

Held, that for the purposes of determining the forum of appeal the "value of the original suit" was Rs. 3,286 and the appeals lay to the District Court, and the limits of jurisdiction fixed in Ss. 25, 26 and 39 and other sections of the Punjab Courts Act relate not only to jurisdiction to entertain, but also to jurisdiction to decide the suit or appeal as the case may be, and as such the District Judge had no jurisdiction to pass a decree for more than Rs. 5,000 and that the proper course for him was to return the memorandum of appeal for presentation in the High Court.

Held, further, that the High Court had jurisdiction to pass a decree even if it finds that the plaintiff is entitled only to a sum below Rs. 5,000 and need not send back the case to the District Court for re-hearing and re-decision. (*Tek Chand, Jai Lal and Monroe, JJ.*) GANGA RAM *v.* HAKIM RAI **15 Lah. 512 = 151 I.C. 703 = 7 R.L. 192 = 36 P.L.R. 361 = A.I R. 1934 Lah. 545 (2) (F.B.).**

———**S. 39**—*"Value of subject-matter of suit"—Suit for rendition of account—Valuation in plaint not decree amount as determining forum of appeal.*

The plaintiff sued for dissolution of partnership and rendition of accounts and valued the suit for purposes of jurisdiction and Court-fee tentatively at Rs. 8,000 and paid Court-fee on that amount stating that if a higher sum was found due on taking the account he would pay additional Court-fee thereon. The trial Court passed a decree dissolving the partnership and fixing the shares of the partners. A Commissioner having been appointed

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he examined the accounts and reported that Rs. 9,824 was due by the defendant. The defendant filed objections and the Court eventually passed a decree for Rs 3,375 only. The defendant appealed urging that nothing was due by him while the plaintiff appealed to have the decree amount enhanced to Rs. 9,284.

Held, that "the value of the subject-matter of the original suit" was Rs. 8,000 as stated in the plaint and not the decree amount and appeals against that decree whether instituted by the plaintiff for enhancement or by the defendant for the total dismissal of the suit properly lay to the High Court. (*Shadi Lal, C J., Broadway, Tek Chand, Coldstream an Agha Haidar, JJ.*) KALU RAM *v.* HANWANT RAM. **15 Lah. 151=151 I.C. 641 =7 R L. 160=36 P.L R. 391 =A.I.R. 1934 Lah 488 (F.B)**

[F. 15 L. 512 (522, 526) (F.B)]

———**S. 41**—*Application for certificate presented after limitation—No evidence showing sufficient cause for extension of time—Issue of certificate—Effect of.*

Under S. 41, an application for grant of a certificate regarding custom must be presented within 30 days from the date on which the decree of the lower appellate Court was passed, and it is the duty of the applicant to explain the delay for every day that expired beyond that period. The lower appellate Court has no power to grant a certificate on an application made after the expiry of the prescribed period if there is no legal evidence on which it could satisfy itself that there was sufficient cause for extension of time A certificate so granted is not a valid one and the question of custom cannot be agitated in second appeal. (*Abdul Rashid, J.*) RAN SINGH *v.* MILKIAT SINGH. **6 R L 639= 148 I.C 1126=37 P.L.R. 342=A.I.R 1934 Lah. 617.**

———**S. 41**—*Certificate of custom—Time for making application.*

Where a certificate of custom is granted after 30 days from the date of judgment and District Judge gives no reasons for condoning the delay, the certificate may be rejected. (*Abdul Rashid, J.*) HIRDE RAM *v.* JHANDU. **149 I C. 434=6 R L 680=35 P.L R. 338=A.I.R. 1935 Lah. 213 (2).**

———**S. 41**—*Certificate—Necessity—Question of law—Custom as established by* riwaj-i-am.

Where the question related to the existence of a custom as understood with reference to a clause in the *riwaj-i-am*, *held*, that the question was one of law and that a second appeal was maintainable without a certificate under S 41. (*Jai Lal, J.*) GHAFUR *v.* SAHABUDDIN. **I.R. 1932 Lah. 523=138 I C. 680=33 P.L. R. 416 (2)=A.I.R. 1932 Lah. 397.**

———**S. 41**—*District Judge refusing certificate—Power of High Court to direct him to do so.*

Where it was most necessary as in fact it was the duty of the District Judge to grant the required certificate but he refused to grant it,

Held, the High Court could direct the District Judge to give the necessary certificate under S. 107, Government of India Act. (*Addison, J.*) CHHANGAN *v.* BRIJ LAL **160 I.C. 105 (1)=8 R.L 491=A I.R. 1935 Lah. 592.**

———**S. 41**—*Finding of fact—Wrong assumptions made—Interference with finding.*

Where material evidence has been overlooked and the decision is based on wrong assumptions of fact, the finding though one of fact, can be set aside in second appeal. (*Bhide, J.*) ROSHAN DIN *v.* SHERA. **I.R. 1933 Lah. 263=142 I.C 673 (1)=33 P L R. 1013.**

———**S. 41**—*Plea of custom decided as point of law—Second appeal—Certificate if necessary.*

PUNJAB COURTS ACT (1918), S. 41 (3).

Where neither party has led in evidence as to the existence or non-existence of a custom and the decision is given purely on a point of law a certificate is not necessary for purposes of second appeal. (*Abdul Qadir, J.*) WARAS KHAN *v.* MT. MEHRAN. **13 Lah. 826= I R 1932 Lah. 569=139 I.C. 110=33 P.L.R. 564= A.I.R. 1932 Lah. 473.**

———**S. 41**—*Question of custom—Appeal only questioning jurisdiction of lower Court—No certificate necessary.*

Where the lower Court gives a decision on question of custom and an appeal is filed in which the jurisdiction of the lower Court to consider the question itself and not the finding regarding custom is challenged, no certificate under S. 41 is necessary for the appeal. A.I.R. 1931 Lah. 495, Ref. (*Bhide, J.*) MAHOMED UMAR DARAZ ALI KHAN *v.* PIRJI ABDUL RASHID. **6 I.R. (Lah.) 7=144 I C. 669=A.I R. 1933 Lah. 606.**

———**S. 41**—*Question of custom—Certificate—Necessity for.*

A question of custom in absence of a certificate under S. 41 cannot be agitated in the High Court. (*Bhide, J.*) ALA DAD *v.* SARDAR. **I R. 1933 Lah. 351=143 I C. 418=34 P.L R 910=A.I.R. 1933 Lah. 115.**

———**S. 41**—*Question of custom—Right of sons of adopted person to share in property of natural grandfather—Certificate, if necessary.*

The right of the sons of an adopted person to share in the succession to property which has descended from their natural grandfather is a question of custom which renders grant of a certificate necessary to entitle them to agitate the question in second appeal. (*Beckett, J.*) ISMAIL *v.* MOHAMMAD DIN. **A.I.R. 1935 Lah. 944.**

———**S. 41 (3)**—*Applicability — Appeals against orders.*

The operation of S 41 (3) is restricted to second appeals against appellate decrees. It has no application to appeals against orders, where the District Judge has passed an order remanding the case under O. 41, R. 23. S. 41 (3), Punjab Courts Act, is applicable and a certificate is not necessary. (*Tek Chand and Coldstream, JJ.*) MAULU *v.* GHANAVA. **15 Lah. 807=151 I.C. 225=7 R L. 111=35 P.L.R. 420=A I.R. 1934 Lah. 366.**

———**S. 41 (3)**—*Applicability—Personal law applied—Finding as to custom not recorded—Certificate if necessary.*

The District Judge did not decide that the parties were governed by the personal law He simply pointed out that admittedly customary law was applicable, and while interpreting the answer to a question relating to the custom in the *riwaj-i-am* came to the conclusion that there existed a *lacuna* in it. He then held that where there exists such a *lacuna*, the personal law of the parties can be resorted to.

Held, that the finding of the District Judge was not one as to the existence of the custom and therefore a certificate was not necessary. (*Shadi Lal, C.J. and Broadway, J.*) SOHNU *v.* BAHGA **135 I.C. 54= I.R. 1932 Lah. 38=A I R. 1931 Lah. 433.**

———**S. 41 (3)**—*Application under—Considerations.*

The test is not whether the question involved is difficult but whether it is of sufficient importance and the evidence for and against it is conflicting or uncertain. The word "evidence" in S. 41 (3) does not merely mean the instances actually proved in a particular case, but also includes the entries in the published *riwaj-i ams* and previous judicial decisions in which the question of custom had been raised and decided. (*Tek Chand, J.*) MT. ACHHRO *v.* GANDA SINGH. **158 I.C. 119= A.I.R. 1935 Lah. 554.**

PUNJAB COURTS ACT (1918), S. 41.

———**S. 41 (3)**—*Discussion of evidence—Absence of—Second appeal certificate.*

Where there is no discussion of the new evidence by the lower appellate Court a certificate is necessary to sustain a second appeal. (*Jai Lal, J.*) MT. ALAM BIBI *v.* JAWAYA. **150 I.C. 356=6 R.L. 854=35 P.L.R. 110=A.I.R. 1934 Lah. 300.**

———**S. 41 (3)**—*Custom—Decision resting on interpretation of* wajib-ul arz*—Certificate, if necessary.*

Where the decision of the District Judge rests not upon a consideration of evidence but on an entry in the *wajib ul arz*, a second appeal to the High Court is competent without a certificate, even if the parties were at issue as to its interpretation. (*Tek Chand and Abdul Rashid, JJ.*) INDAR SINGH *v.* JAI SINGH. **157 I.C. 341=37 P.L.R. 390.**

———**S. 41 (3)**—*District Judge refusing certificate—High Court, if can send case back for reconsideration.*

Where the District Judge has considered the application which was before him and found that the certificate should not be granted, a second appeal is incompetent without a certificate, and there is no power in the High Court to send the case back to him for re-consideration or with an order to him to grant the required certificate. (*Addison and Abdul Rashid, JJ.*) MT. JANAT BIBI *v.* GHULAM HUSSAIN. **16 Lah. 307=155 I.C. 212=7 R.L. 659=36 P.L.R. 256=A.I.R. 1934 Lah. 861.**

———**S. 41 (3)**—*Order refusing certificate—Question covered by precedent—Revision.*

Where the District Judge refused to grant a certificate under S. 41 (3), basing his decision on a ruling of a Division Bench of the High Court which was exactly in point and not contradicted by any other authority, it cannot be said he has erred materially in the exercise of his jurisdiction. (*Bhide, J.*) MT. AS KAUR *v.* JAGAT SINGH. **I.R. 1933 Lah. 81 (1)=141 I.C. 462=34 P.L.R. 189=A.I.R. 1933 Lah. 269.**

———**S. 41 (3)**—*Point of law—Question as to custom—Decision with reference to case relating to another district—Interference.*

Where the lower Court decided a question of custom not on the evidence but on the authority of a decision relating to another district and tribe.

Held, that the decision as to custom could be agitated in second appeal. (*Coldstream and Dalip Singh, JJ.*) MAHOMED *v.* GAUHRA. **I.R. 1931 Lah. 1018=134 I.C. 826=32 P.L.R. 617=A.I.R. 1932 Lah. 61.**

———**S. 42 (2)**—*Second appeal—Original suit of small cause nature.*

Where the original suit was not tried by a Court of Small Causes but it was a suit of the nature cognizable by a Court of Small Causes and the claim was less than Rs. 500, a second appeal is barred by S. 42 (2) of the Punjab Courts Act. (*Hilton, J.*) HARGOPAL *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **153 I.C. 119 (2)=7 R.L. 387 (1)=35 P.L.R. 521=A.I.R. 1934 Lah. 515 (1).**

———**S. 44**—*Appeal not raising question of custom—Certificate, if required.*

Where in an appeal the plantiffs are not raising any question as to the validity or existence of custom, but are merely contending that the District Judge as misunderstood their claim and para. 64 of Rattigan's Digest on which they relied and that he was wrong in holding that the plaint did not disclose cause of action, on certificate of custom is required in support of the appeal. (*Coldstream and Bhide, JJ.*) IMAM DIN *v.* MT. ROSHAN BIBI. **149 I.C. 1049=6 R.L. 787=A.I.R. 1934 Lah. 229.**

———**S. 44**—*Case decided—Arbitration—Order of supersession—Revision.*

PUNJAB COURT OF WARDS ACT (1903), S. 16.

A case in which after reference to arbitration an application for supersession is made, the order superseding and terminating the reference amounts to an order deciding a case and is open to revision. (*Abdul Qadir, J.*) MAHOMED NAZIR *v.* ABDUL RASHID. **I.R. 1931 Lah. 847=133 I.C. 879=32 P.L.R. 391=A.I.R. 1931 Lah. 318.**

———**S. 44**—*Decision within jurisdiction—Revision.*

Where the lower Court decides a question which it has jurisdiction to determine, no revision lies from such decision irrespective of the fact whether the decision is right or wrong. 11 Cal. 6 (P.C.), Ref. (*Currie, J.*) MENGHA RAM *v.* DHOMA RAM RAM CHAND. **6 I.R. (Lah.) 243 (2)=149 I.C. 505=34 P.L.R. 966=A.I.R. 1933 Lah. 783.**

———**S. 44**—*Error of law—Revision.*

A mere error of law which does not raise any question affecting jurisdiction is no good ground for interference in revision. (*Bhide, J.*) KRISHNA CHAMBER OF COMMERCE, LTD. *v.* PREM SINGH KISHAN CHAND. **155 I.C. 533=7 R L. 732 (1)=36 P.L.R. 283=A.I.R 1934 Lah. 1019 (1).**

PUNJAB COURT-FEES AMENDMENT ACT (VII OF 1922), Sch. II, Art. 22—*Mortgage of ancestral property—Further sum secured on some property—Suit to set aside mortgage—Court-fee payable.*

The father had executed a mortgage with possession for Rs. 3,500 and subsequently charged the same land with a further sum of Rs. 232. It was stipulated that this sum was to be added to the original amount and that the land should be redeemed on payment of both amounts. In a suit for a declaration by the sons that the alienations were not for necessity and did not affect their reversionary interest.

Held, that the second deed did not constitute a second alienation, there was only one alienation and a stamp of Rs. 20 was sufficient. (*Currie, J.*) SUBA SINGH *v.* BELA SINGH. **I.R. 1933 Lah. 230=142 I.C. 641=A.I.R. 1933 Lah. 382.**

PUNJAB COURT OF WARDS ACT (II OF 1903), S. 5 (2) (d)—*Estate taken over—Omission to modify under S. 9—Effect.*

Where the Court of Wards assumes management of an estate but the same is not followed up by a notification as required by S. 9 there is no effective taking over of the estate. (*Coldstream and Johnstone, JJ.*) MAHOMED SHEER *v.* COURT OF WARDS. **I.R. 1931 Lah. 1015=134 I.C. 823=32 P.L.R. 672=A.I.R. 1932 Lah. 62.**

———**S. 5 (2) (d)**—*Order under—Whether can be questioned in Court.*

It is not open to the Court to question the propriety of an order under S. 5 (2) (*d*). (*Coldstream and Johnstone, JJ.*) MAHOMED SHER *v.* COURT OF WARDS. **I.R. 1931 Lah. 1015=134 I.C. 823=32 P.L.R. 672=A.I.R. 1932 Lah. 62.**

———**S. 9**—*Absence of notification under—Effect.*

Where the Court of Wards assumes management of an estate but the same is not followed up by a notification as required by S. 9 there is no effective taking over of the estate. (*Coldstream and Johnstone, JJ.*) MAHOMED SHER *v.* COURT OF WARDS. **I.R. 1931 Lah. 1015=134 I.C. 823=32 P L.R. 672=A.I R. 1932 Lah. 62.**

———**S. 16**—*Strict construction.*

The provisions of S. 16 are novel and of an exceptional kind it is necessary to apply them strictly inasmuch as they limit the ordinary right of an owner of property to dispose of it as he chooses. The words "order made under S. 5 (2)" where intended to mean an

PUNJAB COURT OF WARDS ACT (1903), S. 16.

order duly given effect and completed by an official notification under S. 9, Where there is no such notification there is no effective order and S. 16 does not apply so as to invalidate an alienation made by the proprietor after the estate was released from the management of the Court of Wards. (*Coldstream and Johnstone, JJ.*) MAHOMED SHER *v.* COURT OF WARDS. **I.R. 1931 Lah. 1015=134 I.C. 823=32 P.L.R. 672 =A.I.R. 1932 Lah. 62.**

———**S. 16 (2)**—"*Any debt contracted*"—*Meaning—Fresh contract by ward after attaining majority—Third party's liability taken over—Enforceability.*

The words "any debt contracted" in S. 16 (2) do not include debts contracted by third parties. Under the section the debt which the erstwhile infant or ward promises to pay or the promise or contract which he ratifies must be one contracted or entered into by him. Where however the minor enters into a fresh contract after attaining majority to pay a third party's debt he is liable for the same. (*Shadi Lal, C. J. and Tapp, J.*) COURT OF WARDS *v.* MOKAND LAL. **I.R. 1931 Lah. 1011=134 I.C. 819=32 P.L.R. 667=A.I.R. 1931 Lah. 756.**

———**S. 16 (2)**—*Prohibition under—If extends to contracts for necessaries—Contract Act, S. 68.*

The prohibition contained in S 16 (2) of the Act extends to all suits brought on promises made after the promisor has ceased to be a ward to pay any debt contracted by him during the period when he was a ward and includes also all subsequent ratifications of earlier contracts even on receipt of fresh consideration and contracts contemplated by S. 68 of the Contract Act are not outside the pale of his prohibition. (*Addison and Din Mohammad, JJ.*) GIRDHARI LAL & BROS. *v.* BALDEO SINGH. **16 Lah. 932=8 R L. 18=156 I.C. 710=37 P.L R. 862=A I.R. 1935 Lah. 764.**

———**S. 19**—*Notice—Object and sufficiency of.*

The object of a notice to Court of Wards is to give the public officer concerned an opportunity to reconsider his legal position and to settle the claim if so advised, without litigation and if the notice substantially fulfils this object it must be held to be sufficient. Hence where in a notice the intention to lodge a suit is made clear, minor defects in the form will not invalidate the notice. 24 Mad. 279 and 27 Bom. 189, Ref. (*Bhide, J.*) COURT OF WARDS. BHABAUR ESTATE *v.* BAKHTAWAR KHAN. **6 I R. (Lah.) 45 (2)=144 I.C. 976= A.I R. 1933 Lah 370.**

———**S. 31 (2), (3)**—*Relative scope.*

Sub-S. (3) must be taken to be independent of Sub-S. (2) of S. 31 and should not be taken to relate only to execution proceedings pending at the time when the property came under the superintendence of Court of wards. S. 31 (3) applies to all fresh proceedings in execution for the only exception created in the sub-section is in respect of decrees which relate to a transaction subsequent to the date of the notification under S. 9. (*Bhide, J.*) GODHA RAM-JIWAN DAS *v.* MUHAMMAD KHAN. **161 I C. 242=8 R L. 700=A.I.R. 1935 Lah. 876.**

———**S. 31 (3)**—*Applicability—Decree against Court of Wards.*

Decrees passed not only against the ward but also against the Court of Wards are covered by sub-S. (3) of S. 31 of the Punjab Court of Wards Act. (*Bhide, J.*) GODHA RAM JIWAN DAS *v.* MUHAMMAD KHAN. **161 I C. 242=8 R L. 700=A I.R. 1935 Lah. 876.**

———S. 31 (3)—*If imperative*

The provisions of sub S (3) of S. 31 appear to be imperative and the execution Court has no jurisdiction to proceed with the execution or to issue any attachment

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or other process in execution until and unless the certificate referred to in that sub-section is produced. (*Bhide, J.*) GODHA RAM JIWAN DAS *v.* MUHAMMAD KHAN. **161 I.C. 242=8 R.L. 700=A.I.R. 1935 Lah. 876.**

———**S. 46**—*Disability removed except joint property of his and another ward—Effect on status.*

Where the legal incapacity of a ward of Court is removed except in respect of any property which he owned jointly with another who continued to be under superintendence, the former is not then a ward of Court and is capable of entering into a fresh contract after such removal but he is not in a position to ratify any debt incurred during his minority. (*Addison and Beckett, JJ.*) PRABH DIYAL *v.* MAHOMED NAWAZ SHAH. **16 Lah. 404=155 I.C. 1009=7 R.L. 818=37 P.L.R. 770=A.I.R 1934 Lah. 866.**

PUNJAB CRIMINAL PROCEDURE AMEND MENT ACT (IV OF 1930)—*Special tribunal—Jurisdiction, not exclusive.*

There is nothing in the Act which confers exclusive jurisdiction on the tribunal. All that the Act declares is that, if so advised, the Local Government may constitute a special Court with special procedure to try certain offences. That really means nothing more than that the ordinary Courts and the special tribunal have concurrent jurisdiction over certain offences. (*Dalip Singh, J.*) DHANWANTRI *v.* EMPEROR. **14 Lah. 820=6 I.R. (Lah.) 278=35 Cr.L.J. 171=146 I.C. 843=34 P.L. R. 672=1933 Cr.C. 1108=A.I.R. 1933 Lah. 852.**

PUNJAB CUSTOM (POWER TO CONTEST) ACT (II OF 1920), Ss 2 and 7—"*Alienation*"—*Bequest.*

According to Ss. 2 and 7 of Punjab Act II of 1920 no person shall contest any alienation of immovable non-ancestral property on the ground that such alienation is contrary to custom. The term "alienation" includes a testamentary disposition of property. (*Harrison and Addison, JJ.*) MOHAMDA *v.* MT. KHETAN. **6 I R. (Lah.) 101 (1)=145 I.C. 415=34 P.L R. 849=A.I. R. 1933 Lah. 680.**

———**S. 6**—*Scope.*

S. 6 clearly means that no person can contest an alienation of ancestral property unless he is within five degrees of the alienor. If the plaintiff is more remote, he has no right to sue in his capacity of a member of the village proprietary body ; the right of the body as such to contest an alienation is based on S. 5 of the Punjab Laws Act, 1872, which is expressly excluded by Act II of 1920 (*Addison and Coldstream JJ.*) SAHIB SINGH *v.* DATA RAM. **14 Lah. 203=I.R. 1931 Lah 996= 134 I.C. 788=32 P.L.R. 598=34 P.L R. 550=A.I.R. 1931 Lah. 706.**

———**S. 7**—*Alienation of non-ancestral property—If can be contested by way of defence.*

S. 7 is intended to, and does, debar the descendants, collaterals, or other relations of a proprietor, from controlling his allenations of self-acquired or non-ancestral property, and thus deprive them of the right which, according to the custom prevailing in some tribes, they might have possessed before its enactment. It is quite immaterial, whether the contest to the alienation is raised by the descendants, collaterals or relations of the alienor in a suit instituted by them, or by way of defence to a claim brought by the alienee. (*Tek Chand and Abdul Rashid, JJ.*) MAHOMED ASGHAR *v.* MT GHULAM FATIMA. **16 Lah. 604=158 I.C. 604=37 P.L. R. 711=A.I.R. 1935 Lah. 154 (2).**

———**S. 7**—*Non-ancestral property—Alienation of—Right to contest.*

Among the Kambhos of Dipalpur Tahsil, Montgomery District, a proprietor is entitled to alienate his self

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acquired property and the collaterals cannot impeach the alienation. Further by S. 7, Punjab Custom Act, 1920, an alienation of non-ancestral immovable property cannot be contested on the ground that it is contrary to custom. 107 P.R. 1887, Ref. (*Shadi Lal, C.J. and Abdul Qadir, J.*) MT. MELO *v.* JAIMAL. **6 I.R. (Lah.) 271 (2) = 146 I.C. 816 = 34 P.L.R. 1029 = A.I.R. 1933 Lah. 697 (1).**

———**S. 7**—*Scope—No appointment of heirs.*

S. 7 lays down that no person shall contest the appointment of an heir to non-ancestral immovable property on the ground that such an appointment is contrary to custom ; but when as a matter of fact there was no appointment of an heir at all, the section is no bar and the plaintiffs can maintain their suit for possession by successfully denying that no adoption whatsoever took place. (*Agha Haidar, J.*) SAMMAN *v.* DALJIT SINGH. **154 I.C. 665 = 7 R.L. 589 = A.I.R. 1934 Lah. 1002.**

PUNJAB DISTRICT BOARDS ACT (XX OF 1882), S. 30—*Haisiat tax—Decree declaring tax* ultra vires *and restraining District Board from realising it—Tax validated by Punjab District Board's Tax Validating Act (III of 1927)—Executability of decree.*

The plaintiff obtained a decree declaring the Haisiat-tax as imposed by S. 30 of the Act to be *ultra vires* and restraining the Board from realising it. Subsequently the Punjab District Board's Tax Validating Act (III of 1927) was passed validating the imposition of the tax and when the District Board proceeded to realise the tax from the assessees, the plaintiff applied for execution of his decree.

Held, that the decree had become inoperative and that the District Board could not be restrained from realising the tax. (*Bhide, J.*) BUKKAN SINGH *v.* DISTICT BOARD, LUDHIANA. **14 Lah 230 = I.R. 1933 Lah. 6 = 140 I.C. 533 = 34 P.L.R. 546 = A.I.R. 1933 Lah 41.**

———**Ss 30 and 31**—*Profession tax—Levy on trade or calling—Exemption of persons of small income—Tax whether one on income.*

Where the tax was made payable according to the trade, profession or calling of particular individuals and the amount payable depends not upon the income of the person but upon the trade, etc.,

Held, that the tax was a profession tax and not one on income even though the notification imposing it has made a proviso that it shall not be leviable from any person whose annual income is less than a certain amount. The proviso in such a case merely introduces an exemption. 9 Lah. 340 Dist. (*Jai Lal, J.*) ANOKH SINGH *v.* DISTRICT BOARD, FEROZEPUR. **I. R. 1931 Lah. 489 = 131 I.C. 633 = 32 P.L.R. 403 = A. I.R. 1931 Lah 508.**

———**Ss 56 and 57**—*Fine for future continuing breach—Legality.*

An order on conviction under Reg. 13 containing a direction for paying an additional fine for future continuing breach is *ultra vires*. The Board must bring a fresh complaint on which a fine can be imposed for a continuing breach. (*Dalip Singh, J.*) FAZLA, *In re*. **152 I.C. 166 = 7 R.L 260 = 36 Cr L J. 105 = 1934 Cr.C. 647 = A I R 1934 Lah 428 (1).**

———**Ss 70, 76 and 72**—*Suit for refund of Haisiat-tax—Jurisdiction of Civil Court.*

A Civil Court has jurisdiction to entertain a suit against the District Board for refund of Haisiat-tax. (*Tapp, J.*) DT. BOARD, JHANG *v.* GANPAT RAM. **I.R. 1933 Lah 112 = 141 I.C. 378 = 34 P.L.R. 219 = A.I.R. 1933 Lah. 124.**

PUNJ. GENERAL CLAUSES ACT (1898), S. 11.

———**S. 74**—*Suit for refund of tax paid—Onus.*

In a suit against a District Board for refund of tax paid it is for the plaintiff to show that he is not liable to pay the tax and that it has been illegally exacted from him and not for the District Board to prove that the plaintiff has been properly assessed and is not entitled to a refund. (*Tapp, J.*) DT. BOARD JHANG *v.* GANPAT RAM. **I.R. 1933 Lah. 112 = 141 I.C. 378 = 34 P.L.R. 219 = A.I.R. 1933 Lah. 124.**

———**S. 76**—*"Others"—If "Sahukar" included.*

A sahukar does not fall within the category of "others" in the section, on the application of the doctrine of *eusdem generis*. (*Tapp, J.*) DT. BOARD, JHANG *v.* GANPAT RAM. **I.R. 1933 Lah. 112 = 141 I.C. 378 = 34 P.L.R. 219 = A I R. 1933 Lah 124.**

PUNJAB DISTRICT BOARDS (TAX VALIDATING) ACT, 1927—*Act in* ultra vires.

The previous sanction of the Governor-General having been obtained the Punjab District Boards (Tax Validating) Act is not *ultra vires*. (*Jai Lal and Agha Haidar, JJ.*) GANPAT RAI *v.* DISTRICT BOARD, SARGODHA. **I.R. 1931 Lah. 878 = 134 I.C. 110 = 33 P.L.R. 135 = A.I.R. 1932 Lah. 87.**

PUNJAB EXCISE ACT (I OF 1914), S. 51—*Sentence—Deterrent sentence necessary.*

The Courts should bear in mind that the illicit distillation implies a good deal of preparation and results not only in the loss of excise revenue but also in drunkenness. The sentence should therefore be deterrent and the good family of the accused is no mitigating circumstance. (*Broadway, A.C.J.*) EMPEROR *v.* DHARAM SINGH. **I.R. 1933 Lah. 154 = 141 I.C. 592 = 34 Cr. L.J. 180 = 34 P L.R. 552.**

———**S. 61 (1) (a)** — *Quantity of cocaine—Prosecution failing to show—Presumption in favour of accused.*

Where the prosecution has not shown how much cocaine was in the packets found with the accused any presumption made must be in favour of the accused on the footing that there were only such quantities intended for personal use (*Harrison, J.*) MEHTAB DIN *v.* EMPEROR. **135 I.C. 40 = I.R. 1932 Lah. 24 = 33 Cr. L J. 114 = 32 P.L R. 778 = 1932 Cr.C. 20 = A.I.R. 1932 Lah. 10.**

———**S. 75**—*Discharge of accused for want of certificate under S. 188, Cr. P. Code—Certificate subsequently obtained—Second trial more than one year from date of offence—Legality of.*

The petitioner was arrested for illicit distillation on 17th June, 1930. He was, however, discharged on 25th July, 1930, for want of a certificate as required by S. 188 of the Cr. P. Code. That certificate was subsequently obtained on 16th April, 1931, but an order directing further trial was only passed on 30th July, 1931.

Held, that the later trial could not be deemed to be the continuation or revival of the original proceedings by virtue of the subsequent production of the certificat and that the subsequent trial having been commenced more than one year from the date of offence, it was without jurisdiction and that the conviction should be set aside. (*Jai Lal, J.*) BHAN SINGH *v.* EMPEROR. **I.R. 1933 Lah. 343 = 143 I.C. 341 = 34 Cr.L.J. 578 = A I R. 1933 Lah. 659 (2).**

PUNJAB GENERAL CLAUSES ACT (I OF 1898), S. 11 (2)—*Effect—Punjab Municipal Act, 1911, S. 13 (3).*

Though it is not so expressly provided under S. 13 (3) of the Punjab Municipal Act more than one outgoing member may at one time continue in office after the expiry of three years from the date of the election. Effect of S. 11 (2), Punjab General Clauses Act, consi-

PUNJ GOVT. SERVICE RULES.

dered. (*Addison and Coldstream, JJ.*) BISAHMBAR NATH JAITBE *v.* MUNICIPAL COMMITTEE, DELHI. **I.R. 1931 Oudh 881=134 I.C. 113=33 P.L.R. 83= A.I.R. 1932 Lah. 26.**

PUNJAB GOVERNMENT SERVICE RULES—*Withholding promotion—Appeal.*

To be passed over for a superior grade, even though promotion to that grade was by selection, is tantamount to withholding promotion and an appeal to the Commissioner is competent in such a case (*Dobson, F. C.*) PRITAM SINGH *v.* AZIZ AHMAD. **11 Lah. L. T. 9.**

PUNJAB GOVERNMENT TENANCY. *See* LANDLORD AND TENANT—EXPROPRIETARY HOLDING—GOVERNMENT TENANCY (PUNJAB).

PUNJAB HIGH COURT—Criminal case—Right of Counsel to take copies from records—Need for amendment of rules. *See* PRACTICE—RULES. **A.I.R. 1930 Lah. 1024.**

PUNJAB LAND REVENUE ACT (XVII OF 1887)—*Appeal—Order appointing appellant as lambardar—If appealable—Remedy.*

An order of the Commissioner on appeal, appointing the appellant as lambardar subject to his satisfying the Collector as to his property, is not a final order and is not appealable. But if the Collector passes order appointing him lambardar, the opposite party can then appeal on the whole case to the Commissioner. (*Irving F.C.*) HARI SINGH *v.* CHATAR SINGH. **13 Lah.L.T. 39.**

———*Applicability of C. P. Code—Appeal—Summary dismissal.*

The C. P. Code does not apply to procedure under the Land Revenue Act and there is no rule passed under that Act which prevents an appellate Court throwing out an appeal *in limine.* (*Irving, F. C.*) KHAN MAHOMED *v.* GURDIT SINGH. **11 Lah L.T. 108.**

———*Instruction in Excise Manual—Value.*

Instructions laid down in the Excise Manual issued under the authority of the ministry of agriculture cannot be quoted as an authority under the Land Revenue Act except in so far as it summarises the rulings of the Financial Commissioner under the Land Revenue Act. (*Irving, F. C*) LACHHMAN SINGH *v.* MOHAN SINGH. **11 Lah L T. 122.**

———*Order of Deputy Commissioner— Modification by Collector—Review—Sustainability.*

There is a distinction between the functions of the Collector under the Land Revenue Act and the Deputy Commissioner under the Land Alienation Act, if Collector sitting as such cannot by review modify the order of the Deputy Commissioner. (*Irving, F. C.*) MANDIR SHERI BABA NANGA ARJAN *v.* LOHKU. **11 Lah.L T. 97.**

———*Patwari candidate—Proceeding for cancellation of name—Contents of judgment.*

In proceedings for the cancellation of the name of a patwari candidate the Collector should write a self-contained judgment (*Irving, F. C.*) KARNAIL SINGH *v.* EMPEROR. **11 Lah L T 25.**

———*Rules under—R.* 7 (1) (ii)—*Lambardar—Appointment of hereditary claim—No preference to.*

The Collector is no way bound to respect hereditary claims appointing a lambardar. Where he has properly exercised his discretion and preferred the younger to the elder brother, the selection should not be interfered with on appeal. (*Calvert, F. C.*) RAJA *v.* SARANG. **11 Lah L T. 153**

———S 11—*Scope—Control of Local Government on judicial functions of Financial Commissioner.*

S. 11 of the Act deals with the administrative control over the Financial Commissioner by the Local Government. This control does not extend to the judicial functions of the Financial Commissioner and the Local Government cannot interfere in the exercise by the Financial Commissioner of his powers in appeal, review or revision. (*Irving, F. C.*) CHARAN *v.* SINGH FAZIL. **12 Lah.L.T. 63.**

PUNJ. LAND REV. ACT (1887), S. 16.

———S. 13—*Appeal—Notice.*

It is not necessary that notice to the appellant should be given by the Commissioner before an appeal under the Act is dismissed by him. (*Irving, F. C.*) HAKIM *v.* MT. FATIMA BIBI. **35 P L.R. 231.**

———S. 15—*Application for review preferred beyond time—Sufficient cause for delay.*

Where, on an application for review preferred beyond the period of 90 days prescribed by S. 15 the Revenue Commissioner reviewed and set aside an order passed by his predecessor in office, *held*, that it must be assumed that the Revenue Commissioner, before entertaining the application, was satisfied that there was sufficient cause for the delay. (*Lord Thankerton,*) MAHOMED AKBAR KHAN *v.* COURT OF WARDS. **61 I A. 138=15 Lah. 216=59 C.L J. 348=36 P.L R. 433=39 L W. 697= 6 R P.C. 95=147 I C. 906=A.I.R. 1934 P.C. 93=66 M.L.J. 328 (P.C.).**

———S. 15—*Review—Order granting sanction—Nature of.*

An order granting sanction to review a mutation order should be so worded that it may not be taken as prejudging the case. (*Boyd, F. C.*) INDAR NARAIN *v.* BAHADUR. **34 P.L.R. 631.**

———S. 16—*Appeal out of time—Objection—Decicion based on wrong rule.*

An objection that the appeal was lodged out of time need not be considered as, where a wrong rule was applied, the Commissioner can revise at any time. (*Calvert, F. C.*) RAJA *v.* SARANG. **11 Lah.L.T. 153.**

———S. 16—*Application for revision—Limitation.*

Though there is no rule of limitation for applications for revision to the Court of the Financial Commissioner parties are expected to exercise due diligence in the prosecution of their claim. The right principle to adopt in such cases is to refuse to interfere on a petition for revision if made after the period assigned for an appeal, unless for reasons which would justify, extending the period of limitation. (*Irving, F.C.*) CHANDAR PARKASH *v.* LAKSHMI NARAIN. **11 Lah.L T. 15.**

———S. 16—*Application for revision—Limitation.*

No period of limitation is fixed for the exercise by the Financial Commissioner of his power of revision, but it is to be expected that the applicant will exercise due diligence and unless special cause is shown, the Commissioner will not admit an application for revision after a period of 90 days fixed for an appeal. (*Irving, F. C.*) JAGIR CHAND *v.* GULAB. **11 Lah L.T. 16.**

———S. 16—*Mutation orders not appealed against—Interference in revision.*

It is true that in the peculiar circumstances of mutation orders the general principle that ignorance does not save limitation may operate with hardship, requiring interference in revision. But every case in which the Financial Commissioner's powers of revision are invoked when the period of limitation for an appeal has expired should be most rigorously scrutinized Where the ground for the failure of the applicant to appeal in time was stated to be that he was awaiting the result of a similar appeal then pending,

Held, that it was no ground for interfering in revision. (*Irving, F. C.*) SUBHAN ALI *v.* JAHAN KHAN. **12 Lah L.T. 59.**

———S. 16—*Mutation—Revision—Other remedy open.*

PUNJ. LAND REV. ACT (1887), S. 16.

It is the duty of the Financial Commissioner to interfere in revision in order to put right an obvious disregard of rules relating to mutation proceedings. The fact that another remedy is open in a Civil Court is no bar to revision. (*Latifi, F.C.*) BOSTAN KHAN *v.* KARAM KHAN. **13 Lah. L.T. 37.**

——**S. 16**—*Non-compliance with S. 117—Interference in revision.*

Where the Officer conducting the partition does not decide the question of title in the manner required by S. 117 the case is a fit one for interference in revision. (*Irving, F. C.*) KIRPA RAM *v.* MT. KIRPO. **11 Lah. L.T. 43.**

——**S. 16**—*Other remedy—No revision.*

Where the aggrieved parties have their remedy in the civil or revenue Courts, the special powers of revision cannot be invoked. (*King, F. C.*) MST. SORASTI DEVI *v.* MST. LAKHMI. **11 Lah.L.T. 152.**

——**S. 16**—*Report of Commissioner in partition proceedings—Objections to—No opportunity for—Material irregularity.*

It is a material irregularity, in cases where a commission has been ordered and the Commissioner has submitted a report, not to give the parties a reasonable opportunity of bringing forward objections thereto. (*Irving, F.C.*) MOTI RAM *v.* JAISHI RAM. **12 Lah.L T. 13.**

——**S. 16**—*Revenue Officer's cases—Interference in revision.*

In Revenue Officer's cases of a judicial nature the Financial Commissioner's powers of revision are unrestricted but he will not normally exercise it unless circumstances are such as would justify revision in Revenue Court's cases. (*Irving, F.C.*) HUKAM CHAND *v.* MALAK RAM. **11 Lah.L T. 42.**

——**S. 16**—*Revision—Interference in mutation case.*

The Financial Commissioner ought to interfere in revision to put right an obvious disregard of rules relating to mutation procedure. (*Irving, F. C.*) KHUSHAL DAS *v.* KESAR SINGH. **11 Lah.L T. 18.**

——**S. 16**—*Revisional jurisdiction—Mode of exercise.*

Though his powers of revision are unlimited, the Financial Commissioner may refuse to use them in cases of a judicial nature between parties except in cases covered by S. 115, C. P. Code. (*Irving, F.C.*) CHANDRA PARKASH *v.* LAKSHMI NARAIN. **11 Lah. L T. 15.**

——**S. 16**—*Revisional jurisdiction—Nature—Cases of dismissed village officers and Government servants.*

No general rules governing the use of revisional powers can be laid down which are applicable to all cases. As regards the dismissal of village officers the Financial Commissioner would properly interfere if there has been such a denial of national justice as would be involved in dismissing a man without hearing him or if the offence for which he had been dismissed was not one of those which under the Land Revenue Rules justify dismissal. But where there is no such material irregularity or manifest illegality the Commissioner should be very reluctant to upset a concurrent finding of fact and where the facts are proved or admitted and the only question is one of the severity of the sentence, it would normally be difficult to override a concurrent opinion that the man's delinquence make him unfit to remain a village officer. This view however should be confined to the case of village officers and should not be extended to that of Government servants. (*Irving, F. C.*) KIRZA KHAN *v.* EMPEROR. **11 Lah L T. 19.**

——**S. 16**—*Scope—Appealable order not appealed against—Powers of revision.*

It is not an inflexible rule that a revision should not be entertained by the Financial Commissioner where another remedy is open. The powers of revision can be exercised to rectify a miscarriage of justice even in an appealable case, though no appeal has been preferred against the order. (*Latifi, F.C.*) AZAD KHAN *v.* MOHAMMAD KHAN. **14 Lah.L.T. 9.**

PUNJ. LAND REV. ACT (1887), S. 34.

——**S. 16**—*Substantial application—Dismissal for default.*

Where the applicant in revision died leaving a minor for whom however no person was willing to be appointed guardian and it appeared that the applicant had a real grievance,

Held, that the petition should not be dismissed for default but should be proceeded with. (*Irving, F.C.*) KIRPA RAM *v.* MT. KIRPO. **11 Lah.L.T. 43.**

——**S. 16 (4)**—*Scope—Direction to review mutation in a particular way—Legality.*

An order of the Financial Commissioner directing Revenue officers to review a mutation in a particular direction without hearing the parties concerned is opposed to S. 16 (4) of the Act. (*Irving, F. C.*) MOHAMMAD WARIS *v.* EMPEROR. **13 Lah. L.T. 53.**

——**S. 20**—*Service by post—Presumption as to proper service.*

The course prescribed in S. 20 for service by registered post stands precisely on the same posting as any other form of service and a revenue officer may presume that the summons was served if it is proved that the letter was properly addressed and duly posted and registered. It is not laid down that it is necessary to prove that the letter was actually placed in the hands of the person served. The presumption that may be made is that a registered letter properly addressed and duly posted will get into the hands of the addressee. Whether in any case the presumption should be drawn depends on the circumstances of the case. (*Miles Irving, F. C.*) LOKNATH *v.* KYLYAN DASS. **13 Lah.L.T. 9.**

——**Ss. 34 and 35**—Jamabandi—*Mutation—Rules governing.*

The *jamabandi* does not provide for any one being in possession except as owner or as cultivator unless the owner is explicity declared to be *ghair qabiz*. If a person other than one of the owners shown in column 4 who is not the actual cultivator of the land claims to appear in column 5 the putwari should enquire by what right he claims. If he says he is an intermediary tenant the mutation may be entered up in column 5 but if he claims adverse possession his claim should be treated in column 4. This however does not prevent one of the owners being shown in column 5 as the person to whom rent is paid because the possession of one is that of all. Nor does it prevent a tenant who arranges for the cultivation through sub-tenants being shown in the column. But it does prevent what are really mutations of *ghair qabiz* appearing in the guise of mutations of cultivating possession. (*Irving, F. C.*) UDHA MAL *v.* MT. MEWA BIBI. **11 Lah.L.T. 47.**

——**S. 34**—*Omission of mortgagee to report mortgage—Innocent purchaser—Equities.*

If a person with a defective title purports or intends to mortgage the property any interest subsequently acquired is available in equity to make the mortgage effectual. But that equity refers to the mortgagor and mortgagee. It does not affect the innocent purchaser who purchased the property in ignorance of the mortgage. When the mortgagee has neglected to report the mortgage as required by S. 34 of the Act, as between him and a *bona fide* purchaser, equity lies heavily on the side of the latter. (*Irving, F. C.*) ALI AKBAR *v.* AMAR SINGH. **11 Lah.L.T. 145.**

PUNJ. LAND REV. ACT (1887), S. 34.

———**S. 34**—*Scope.*

Before a mutation should be entered there should be an acquisition of a right and not merely a claim especially when it is disputed. (*Calvert, F.C.*) HARNAMO *v.* DEVA SINGH. **12 Lah. L.T. 45.**

———**S. 37**—*Delay—Refusal of mutation.*

No period of limitation is laid down under S. 37 of the Act. Where there is a transfer of the equity of redemption but not of possession delay can be condoned. (*Irving, F.C.*) NAWAB *v.* GANDA MAL. **11 Lah.L. T. 35.**

———**S. 37** — Jamabandi — *Alteration of disputed entries—Grounds of.*

No disputed entry in a *jamabandi* should be altered whether on the ground of mistake or fraud, except on the basis of an obvious clerical error or patent fact; and a fact that needs an elaborate enquiry to establish is not a patent fact. (*Latif, F.C.*) BOSTAN KHAN *v.* KARAM KHAN. **13 Lah.L.T. 37.**

———**S. 37**—*Mutation—Decree of Civil Court—Evidentiary value.*

The business of a Revenue Officer under S. 37 is to make entries in accordance with facts proved to have occurred or such as are supported by a decree or order. A simple declaratory decree that a person is owner or occupancy tenant of land falls under the latter category and may very properly be given effect to in mutation proceedings by inserting the name of the person declared to be owner or tenant but when a declaratory decree is conditional on payment of a sum of money the only entry which the revenue authorities can make on the basis of it is a note to the effect that the declaratory decree has been passed. It is not the business of the Revenue Officer to receive the money and pass it on to the other party nor has he any authority to compel to other party to receive it. If the parties come to him and say that the money has been paid and received he may enter up the consequent mutation of ownership; otherwise the remedy on the basis of the declaratory decree is a civil suit for possession on payment. (*Irving, F.C.*) SHIB SARAN DAS *v.* CHUHRA. **11 Lah.L.T. 112.**

———**S. 37**—*Variation regarding entry as to rent—Absence of mutation order—Effect.*

Variations from entry regarding rent which has been existing for 17 years and more should not be made without mutation. S. 37 of the Act does not require that the procedure of testing a mutation should be followed in altering the entry in the record of rights. The Standing Orders of the Financial Commissioner no doubt lay down a procedure which Revenue Officers ought to follow and neglect to follow that procedure no doubt throws grave doubt on any alteration made without it. But these orders are only executive instructions and have not the force of law. A change which has got into the jamabandi in a way contrary to these instructions is not necessarily void. All that can be said is that it is open to grave suspicion (*Irving, F.C.*) BAHADUR CHAND *v.* JHANDA. **11 Lah.L.T. 79.**

———**S. 37**—Wajib ul-arz — *New document — Omission of entry—Inference.*

The argument from the omission of an entry from a new *wajib-ul-arz* is a very strong one. It is a natural presumption from the omission of an entry that it has been done deliberately and with due cause. When a new *wajib ul-arz* is prepared it supersedes the old and the new one cannot be altered without due cause. (*Irving, F.C.*) DILBAGH RAI *v.* MEHR SHAH. **11 Lah.L.T. 101.**

———**S. 37 (a)** — *Mutation entry — Correction of—Applications for—Error not patent—Applications to be discouraged.*

PUNJ. LAND REV. ACT (1887), S. 44.

An application for correction which is contested and which on the face of it is not based on an obvious clerical error or patent defect should be rejected summarily and the parties referred to a civil suit. The fact of a man having been dead at a time when he was thought to be alive and similar errors may be good grounds for correction but such cases are so rare and when they do occur, they are seldom contested. The intention of the law is that a mutation order after the period of appeal has expired is final and can only be altered in a regular way by review or by application to a Civil Court. (*Irving, F.C.*) THAKAR SINGH *v.* ABDUL HAMID. **11 Lah.L T. 128.**

———**S. 44**—*Burden of proving that the entries in record of rights are wrong, is on the party who alleges it—Later record should be given preference to the previous record.*

An entry made in record of-rights in accordance with the law for the time being in force must be presumed to be correct until the contrary is proved or a new entry is lawfully substituted therefor. The burden of proving the contrary rest heavily on the party who alleges it. The presumption of correctness that attaches to revenue records must attach to the later record in preference to the earlier one, unless it could be shown to be wrong. A.I.R. 1927 Lah. 607, Relied on; A.I.R. 1924 Lah. 444, Dist. (*Abdul Rashid, J.*) SUNDAR SINGH *v* CHHAJJU KHAN. **151 I C. 407=7 R.L. 129=A.I. R. 1934 Lah. 309.**

———**S. 44**—*Conflict between revenue records—Which to prevail.*

Where the revenue records commencing with 1904-1905 and continuing for a period over 20 years till the date of suit do not agree with those of the year 1890 the presumption of correctness attaches to the more recent records. (*Broadway and Addison, JJ.*) DOST MAHOMED *v.* BAHADUR. **I R. 1932 Lah 503 (2)= 138 I C. 502=33 P.L.R. 220=A I.R 1932 Lah. 278.**

———**S. 44**—*Conflicting entries—Effect of.*

Where the revenue records contain conflicting entries, the presumption of truth attaching to them is rebutted. (*Irving, F.C.*) RANBHIR SINGH *v.* LEHNA SINGH. **11 Lah.L.T. 141.**

———**S. 44**—*Entries in jamabandi—Rebuttal—Muafi register.*

The primary authority on title consists of the jamabandi and their value is very much greater than that of an entry in any maufi register. Hence entries consistently made from 1851 in all the jamabandis showing the mahant for the time being of a Gurdwara as the owner of the land in suit cannot be rebutted by an entry in the maufi register made in 1856 and by an order passed at the time of the last settlement to the effect that land was attached to the Gurdwara. (*Harrison and Addison, JJ.*) ABDUL HAQ *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE **14 Lah. 156= I.R 1932 Lah. 474=138 I.C. 387=33 P.L.R. 730= A.I.R. 1932 Lah 513.**

[**D.** 1934 L 68 (70).]

———**S. 44**—*Finding of lower appellate Court based on the wrong presumption contrary to S. 44 can be upset in second appeal.*

Finding of fact could be upset in second appeal, where it is vitiated by the fact that the presumption attaching to the current settlement record under S. 44 was not taken into account and such finding was given under the misapprehension that a settlement had been carried out in the year 1884. (*Abdul Rashid, J.*) SUNDAR SINGH *v.* CHHAJJU KHAN. **151 I.C. 407=7 R.L. 129=A. I.R. 1934 Lah. 309.**

PUNJ. LAND REV. ACT (1887), S. 44.

———**S. 44**—*Mutation entry—Presumption as to truth.*

The presumption as to correctness attaches to a mutation entry only after it is incorporated in a jamabandi. (*Irving, F.C.*) HARNAM SINGH *v.* ISHAR SINGH. **13 Lah.L.T. 2.**

———**S. 44**—*Mutation proceeding—Decision on basis of record-of rights—Presumption.*

Where a person sues another entered as purchaser for establishing that the sale was not in fact effected and that plaintiff continued to have title and the defendant set up entries in the record-of-rights and mutation in his favour,

Held, that there was a presumption under S. 44 in favour of the defendant and that the plaintiff must show that the mutation was a false document.

Held, further, that the fact that the patwari had committed certain irregularities in the mutation proceedings would not displace the presumption. (*Sir John Wallis*) NIZAM DIN *v.* GODAR. **6 I.R. (P C.) 21=146 I C. 506 (2)=38 C.W N. 173=58 C.L.J. 492=36 Bom.L.R. 132=A.I.R. 1934 P.C. 40=65 M.L.J. 866 (P C.).**

———**S. 44**—*Mutation—Entry as to change of caste—Effect*

Where a record in mutation proceeding of caste designation whether rightly or wrongly made has formed part of the record-of-rights for fifteen years a presumption of truth attaches to it. (*Irving, F.C.*) GHULAM FARID *v.* FIROZ KHAN. **11 Lah.L.T. 8.**

———**S. 44**—*Pedigree tables—Conflict between—Presumption.*

The pedigree table prepared in the course of each settlement is a part of the record-of rights and as such there is a statutory presumption of correctness attaching to it. It is however impossible to lay down a rule that the presumption is stronger in favour of one rather than the other. It is for the Court to decide in each case which pedigree table is to be preferred. (*Tek Chand and Abdul Rashid, JJ.*) DATA RAM *v.* KHAZANA RAM. **A.I.R. 1935 Lah. 108.**

———**S. 44**—*Presumption under—Applicability of—Assignment of proprietary rights in land for maintenance and service of Gurdwara—Punjab Sikh Gurdwaras Act* (1925), *S.* 18 (1) (b)—*Presumption under.*

A gift land by way of dharmarth for meeting expenses for Gurdwara to which langer was attached is an assignment of the proprietary rights in the land for the service and maintenance of Gurdwara and the provisions of S. 18 (1) (*b*) are applicable; and the presumption therein contained displaces the presumption which otherwise would arise under S. 44, but where the assignment is without any direct reference to any religious purpose, the presumption does not apply. (*Broadway, C. J. and Abdul Qadir, J.*) RAN SINGH *v.* SHIROMANI GURDWARA PARBHANDAK COMMITTEE. **I.R. 1933 Lah. 210=142 I.C. 530=A I.R. 1933 Lah. 137.**

———**S. 44**—*Revenue records—Presumption of correctness—Rebuttal.*

Under S. 44, a presumption of correctness attaches to the revenue records, and the burden of proving that the entries in the revenue records are incorrect rests on the person who challenges the correctness thereof. The mere fact that the Patwari has committed some irregularity in submitting the report on which the order of mutation is based, is insufficient to displace the statutory presumption and in the absence of definite proof that the order of mutation itself is false or that a fraud has been practised on the revenue authorities, the burden cannot be held to have been discharged. (*Abdul Rashid, J.*) LALA *v.* SARDARA. **151 I.C. 884=7 R.L. 215=35 P.L.R. 491=A.I.R. 1934 Lah. 472.**

PUNJ. LAND REV. ACT (1887), S. 117.

———**S. 44**—*Tribal designation—Entry in record—Interference by Collector.*

There is nothing to prevent the Collector referring to superior authority a proposal to alter the designation. But where the entry in the record has persisted through four jamabandis it is not proper to come to a decision which may have the effect of invalidating a large number of transfers which have been acted upon. If the vendor desires to resile from his bargain on the ground that the vendee is not a member of an agricultural tribe he should be left to take his remedy in the civil Court. (*Irving, F.C.*) FEROZE KHAN *v.* GHULAM FARID. **11 Lah.L T. 110.**

———**S. 45**—*Mutation—Suit for declaration of title.*

Plaintiff was in possession of the land which was the subject of alienation by will in favour of the defendant, mutation was effected in favour of defendant whereupon plaintiff sued for declaration of his title.

Held, that it was unnecessary for him to bring any suit to set aside the alienation by will as he was in possession of the property and that his suit fell under S. 45, and was governed by Art. 120, Lim. Act, and not by Sch. I Art. 1, Punjab Lim. Act. (*Bhide, J.*) DALIP SINGH *v.* MT. TABI. **15 Lah. 469=152 I.C. 100=7 R.L. 244 (2)=36 P.L R. 357=A.I R 1934 Lah. 134.**

———**S. 84**—*Material irregularity—Failure to consider plea.*

The failure to consider a plea involving a question of title is a material irregularity and is a good ground for interference in revision (*Irving, F. C.*) MAHOMED HASSAN *v.* KARIM BAKHSH. **11 Lah.L.T. 61 (1).**

———**S. 111**—*Filing of award.*

Where an award does not partition any properties in the shape of agricultural land, the Court has jurisdiction to order filing of it. 1930 Lah. 418, Dist. (*Dalip Singh, J.*) GIRDHARI LAL *v.* BANWARI LAL. **147 I.C. 768=6 R.L. 448=A.I R. 1933 Lah. 1034.**

———**S. 116**—*Question of title—Questions, if property is joint or sole property of one of the parties.*

Where the dispute between the parties to a suit is whether a garden and the kothas therein are joint property or the sole property of one of them, the question is one of title. (*Jai Lal and Skemp, JJ.*) MUZAFFAR ALI *v.* GHAZANFAR ALI. **155 I.C. 282=7 R.L. 676=36 P.L.R. 497=A.I.R. 1935 Lah. 175.**

———**S. 117**—*Applicability—Private partition raising question of title.*

A plea of private partition raising a question of title. is governed by the procedure laid down in S. **117.** (*Irving, F. C.*) MAHOMED HASSAN *v.* KARIM BAKHSH. **11 Lah.L T. 61 (1).**

———**S. 117**—*Effect of.*

The section merely enables the Revenue Court to make a declaration of title; it does not, however, oust the jurisdiction of the ordinary Courts. (*Tek Chand and Monroe, JJ.*) SUKHDEV SINGH *v.* MATHRA SINGH. **I R 1933 Lah. 215=142 I.C. 606=34 P.L.R. 115=A.I.R. 1933 Lah. 412.**

———**S. 117**—*Non-compliance—Interference in revision.*

Where the officer conducting the partition does not decide the question of title in the manner required by S. 117, the case is a fit one for interference in revision. (*Irving, F.C.*) KIRPA RAM *v.* MT KIRPO. **11 Lah. L.T. 43.**

———**S. 117**—*Partition proceedings—Party referred to civil suit—Declaration refused by Civil Court—Subsequent application to Revenue Court—Duty of latter—Suit for declaration—Limitation.*

In the course of partition proceedings the revenue authorities acting under S. 117, and *prima facie* holding

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the plaintiff's claim to be valid referred the defendant to a civil suit to obtain a declaration. The declaration, however, was refused ultimately by the High Court, on the ground that no final partition had taken place between the parties. The plaintiff again approached the Revenue authorities to revive the partition proceedings, but they refused.

Held, (1) there was no justification for the refusal to correct the entries in accordance with the judgment of the High Court; (2) that limitation for a suit for a declaration by the plaintiff would commence only from the date of the subsequent denial of title by the defendant, if the latter still persisted in denying plaintiff's title. (*Young, C.J. and Din Mahomed, J.*) BAKHSH SHAH *v.* GHULAM ALI SHAH. **7 R.L. 333 = 152 I.C. 821 = A.I.R. 1935 Lah. 63.**

——**S. 117**—*Suit for partition before Revenue Court—Question of title raised but not decided—Validity of procedure—Civil suit raising title—Maintainability.*

The widow of the last holder applied for partition before the revenue authorities but the same was resisted by her late husband's brothers and his nephew on the question of title. They were directed by the Revenue Officer to file a suit in his Court and on his failing to do so the partition was carried out.

Held, that the action of the Revenue Officer in proceedings with the partition without any decision of the question of title was opposed to law

Held further, that a suit in the Civil Court challenging the plaintiff's right to partition in the previous suit was not barred under S. 158. (*Bhide and Tapp, JJ.*) TIRATH RAM *v.* MT. NIHAL DEVI. **12 Lah. 688 = I.R. 1931 Lah. 923 = 134 I.C. 299 = 32 P.L.R. 434 = A.I.R. 1931 Lah. 664.**

——**S 117 (1)**—*Revenue Officer—When can exercise jurisdiction of Civil Court.*

Before a Revenue Officer can exercise the jurisdiction of a Civil Court, there must be an application for the partition of the property pending in his Court with regard to the title of which he can undertake to adjudicate as a Civil Court and if there is no such application pending, he has no jurisdiction to usurp the function of a Civil Court and to adjudicate on the question of title relating to any property whatsoever. (*Young, C.J. and Din Mohammad, J.*) SULTAN *v.* BAHADUR. **16 Lah. 502 = 158 I.C. 1113 (2) = 37 P.L.R. 752 = A.I.R. 1935 Lah. 269.**

——**S. 141**—*Alienation—Objections of Collector—Disposal.*

When the Collector is acting as a ministerial officer of the executing Court, under S. 141, the objections to the manner in which an alienation is made should be heard and decided by the Court although the arrangements about alienation would be the duty of the Collector. (*Hilton, J.*) DUR MAHOMED *v.* SAIN DITTA MAL DIYA MAL. **150 I.C. 652 = 7 R.L. 2 (1) = A.I.R. 1934 Lah. 407.**

—— **S. 158**—*Applicability—Question of title raised but not decided by Revenue Officer—Civil suit challenging partition—Maintainability.*

The widow, the last holder applied for partition before the Revenue authorities but the same was resisted by her late husband's brothers and his nephew on the question of title. They were directed by the Revenue Officer to file a suit in his Court and on his failing to do so the partition was carried out.

Held, that the action of the Revenue Officer in proceeding with the partition without any decision of the question of title was opposed to law.

Held, further, that a suit in the Civil Court challenging the plaintiff's right to partition in the previous suit

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was not barred under S. 158. (*Bhide and Tapp, JJ.*) TIRATH RAM *v.* MT. NIHAL DEVI. **12 Lah. 688 = I.R. 1931 Lah. 923 = 134 I.C. 299 = 32 P.L.R. 434 = A.I.R. 1931 Lah. 664.**

——**S. 158**—*Suit for declaration that certain land is not partible—Jurisdiction of Civil Court.*

A suit for a declaration to the effect that certain land was excluded from the *ordinary shamilat* and could not be partitioned involves a question of title and the Civil Court has jurisdiction to entertain the same. (*Harrison and Dalip Singh, JJ.*) MOHAMMADA *v.* JHANDA. **I.R. 1931 Lah. 861 = 133 I.C. 893 = 32 P.L.R. 545 = A.I.R. 1931 Lah. 654.**

——**S. 158 (1) and (2)**—*Partition before Revenue Officer—Suit by ex minors to contest—Jurisdiction of Civil Court—Bar.*

The plaintiffs sued for a declaration that certain land was the joint property of the parties, that there had been no legal partition of it and that they were consequently entitled to have their half share partitioned. The plaintiffs further complained that being minors their interests were not properly safeguarded by those who represented them at a partition before the Revenue Officer.

Held, that the jurisdiction of the Civil Court to entertain the suit was barred both under S. 158 (2) (xvii) and (xviii) and under S. 158 (1) of the Act. (*Addison and Hilton, JJ.*) AMAR SINGH *v.* RAM SINGH. **13 Lah. 471 = I.R. 1932 Lah. 599 = 139 I.C. 635 = 33 P.L.R. 103 = A.I.R. 1932 Lah. 236.**

——**S. 158 (2) (xiv)**—*Money paid by lambardar as land revenue for defaulting proprietor—Suit to recover—Jurisdiction of Civil Court.*

A suit by a village lambardar for recovery of a certain sum which had been paid by him to Government as land-revenue, on behalf of a defaulting proprietor is excluded from the jurisdiction of a civil Court by S. 158, Cl. (14). But as the parties had not been prejudiced, owing to the trial of the suit by the civil Court, the decree passed by the Court was ordered to be registered as a decree of an Assistant Collector of the second grade. (*Bhide, J.*) SHAFI MAHOMED *v.* JAHANGIR. **149 I.C. 1061 (2) = 6 R.L. 796 = A.I.R. 1934 Lah. 157 (2).**

——**S. 158 (2) (xvii)**—*Partition of agricultural land—Award relating to—Application to file in Court—Jurisdiction of Court.*

A private award partitioning the joint property by metes and bounds including agricultural land cannot be filed in Court as part of the award relates to the partition of agricultural land, over which the Civil Courts have no juridiction under S. 158 (2) (*xvii*). 22 I.C. 381, Foll. (*Shadi Lal, C.J. and Broadway, J.*) LACHMAN DAS *v.* JAIMNI DAS. **I.R. 1933 Lah. 318 = 143 I.C. 143 (1) = 34 P.L.R. 454 = A.I.R. 1933 Lah. 732 (2).**

PUNJAB LAND REVENUE RULES, R. 7—"Candidate".

For the purpose of Rule 7 the word "candidate" means a person who has offered himself for the appointment and is before the Collector at the time of passing his order. The rule means that if of the adult candidates before the Collector none is suitable the Collector may appoint a minor candidate before him. It does not mean that if of the adult candidates before the Collector none is suitable the Collector shall, before appointing a minor, search for a suitable adult who will put himself forward. (*Irving, F.C.*) MALKIAT SINGH *v.* WARYAM SINGH. **12 Lah. L.T. 61.**

——**R. 7**—*Power of Commissioner to withdraw approval.*

PUNJAB LAND REV. RULES, R. 14.

Though the Collector should not pass over a candidate who has been approved by the Commissioner as a suitable candidate, there is nothing to prevent the Commissioner f om withdrawing an approval when he finds it was based on an incomplete knowledge of the facts. (*Irving, F.C.*) MALKIAT SINGH *v.* WARYAM SINGH. **12 Lah. L.T. 61.**

———**R. 14 (2)**—*Scope.*

R. 14 (2) provides that in proprietary estates the lambardar shall be appointed from among the land owners. There is no escape from this. If none of the land owners is resident in the village the correct procedure will be to appoint one of them lambardar and appoint some occupancy tenant as his agent. (*Boyd, F. C.*) HARCHARAN SINGH *v.* ALLAH DITTA, **12 Lah L. T. 43 (1).**

———**Rr. 16 (1) (c) and 17 (ii) (c)**—*Scope and contruction*—Lambardar—*Appointment and dismissal*——"*Ceased to hold*"—*Construction.*

The qualification as to holding of land in the patti or taraf for which a *lambardar* is appointed is absolute. If a *lambardar* is liable to be dismissed for not having it, he cannot also be appointed without it. The words "ceased to hold" cannot be interpreted so as to admit of a man being appointed initially without this qualification. The rule obviously intends that a *lambardar* must have land in the sub-division of the estate in which he holds office. (*Irving, F.C.*) JAGAN NATH *v.* DEWA SINGH. **13 Lah. L.T. 47.**

———**R. 16 (ii) (a)**—*Lambardar—Dismissal—Committing grievous hurt in affray.*

The offence of committing grievous hurt in an affray is one which justifies dismissal of a lambardar under R. 16 (*ii*) (*a*). (*Irving, F.C.*) DEWAN SINGH *v.* UJAGAR SINGH. **11 Lah.L T. 27.**

———**R. 17 (2)**—*Effect—Rule of primogeniture.*

R. 17 (2) does not give sanction to the view that the rule of primogeniture outside the prescribed degrees gives a *prima facie* claim which has to be rebutted. The clause merely contains a negative prohibition, the effect of which is positively that outside the prescribed degrees primogeniture is a factor which should be taken into consideration with all other factors in the case. The amount of weight to be given depends on the merits of each case. (*Irving, F.C.*) JAGAT SINGH *v.* BHAGAT SINGH. **11 Lah. L.T. 1.**

———**R. 17 (2)**— *Lambardar — Disqualification—Participation in crime.*

If a person is really a member of a notorious criminal family, there need be no hesitation to pass him over. (*Irving, F.C.*) RAJA *v.* SARDARA. **11 Lah L.T. 21.**

———**R. 17 (2)**—*Prior incumbent superseded, not dismissed—Heir if disqualified*

Where the previous incumbent was not dismissed, a disqualification justifying passing him over on the merits cannot attach in the second degree to any one who may come under their influence. (*Irving, F.C.*) RAJA *v.* SARDARA. **11 Lah. L.T. 21.**

———**R. 21 (iv)**—*Effect—Division of village into* pattis—*Order of Collector—Interference.*

It is not the intention of R. 21 (*iv*) of the Rules, that the Commisssioner should interfere as regards the division of a village into *pattis* so as to impose on the collector a revision of the arrangement of the estate contrary to his opinion. (*Irving, F. C.*) BHAI KHAN *v.* HASTA. **11 Lah. L.T. 94.**

———**R. 27**—*Dismissal of sufed posh and appointment of substitute—Discretion of Collector.*

No hereditary claim can be considered in making the appointment of a zaildar or sufed posh and the decision whether to appoint a substitute or to dismiss a zaildar

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or sufed posh for incapacity due to old age is one which should normally be left to the Collector. (*Irving, F. C.*) JAWALA SINGH *v.* EMPEROR. **12 Lah. L.T. 16.**

———**R. 30 (c)**—*Inam (A) in Talagang Tahsil of Attock District—Succession—Rules of.*

Inams of class (A) in the Talagang Tahsil of Attock District are governed as to matters of succession by the Jhelum Inam Rules, notified as R. 30 (*c*) of the Punjab Land Revenue Rules. (*Latifi, F.C.*) ALLAH DAD KHAN *v* AMIR KHAN. **13 Lah. L.T. 46.**

PUNJAB LAWS ACT (IV OF 1872), S. 5—*Effect—Custom—Onus of proof—Personal law taking effect in the absence of custom.*

S. 5 does not raise any presumption that parties are governed by custom rather than by their personal law. The onus lies on the party who pleads the applicability of custom to prove the same. Where he does not discharge that burden the personal law will be given effect to. 45 Cal. 450 (P. C.) and 10 Lah. 86, Rel. on. (*Harrison and Tek Chand, JJ.*) MUSSAMMAT BAHSIRAN *v.* MOHAMMAD ZAHUR. **13 Lah. 119 = I.R. 1931 Lah. 390 = 131 I C. 230 = 32 P.L.R. 146 = A.I.R. 1931 Lah. 446.**

———**S. 5**—*Effect—Personal law—Existence of custom—Proof.*

No presumption arises in favour of the existence of a custom to the exclusion of personal law. The person asserting a custom has to prove its existence. (*Shadi Lal, C.J. and Rangi Lal, J.*) IQBAL SINGH *v.* JASMER SINGH. **15 Lah. 715 = 153 I.C. 862 = 7 R.L. 464 = 35 P.L.R. 215 = A.I.R. 1934 Lah. 296 (2).**

———**S. 5**—*Qureshis of Bhera migrated to Lahore—Law governing—Burden of proof.*

Where the parties were Qureshis of Bhera town and the deceased lived originally in Bhera but subsequently migrated to Lahore and worked as an Imam of a mosque and also carried on Piri muridi,

Held, that under S. 5, Punjab Laws Act, the onus of proving that in matter of succession the parties are not governed by their personal law but by custom was on the person who so asserted.

Held, further, that as no custom was established by the evidence on the record, the parties were governed by their personal law. (*Jai Lal and Abdul Rashid, JJ.*) MT. GHULAM BIBI *v.* MT. SARWAR BIBI. **14 Lah. 794 = 35 P.L.R. 121 = 148 I.C. 1143 = 6 R.L. 643 = A I.R. 1933 Lah. 784 (2).**

———**S. 5 (b)**—*Application—Failure to prove custom.*

Custom cannot be extended by analogy but must be founded on evidence. When either party to a suit sets up a custom as a rule of decision it lies on him to prove the custom which it was sought to apply. If he fails to do so Cl. (5) of the Punjab Laws Act will apply. (*Addison, J.*) SANTU *v.* ABHE SINGH. **I R. 1931 Lah. 875 = 134 I.C. 107 = 32 P.L.R. 557 = A.I.R. 1931 Lah. 708.**

PUNJAB LIMITATION (CUSTOM) ACT (I OF 1920)—"*Alienation*"—*Transfer by widow, not merely of her life estate, but the full estate in the property with concurrence of next heir.*

Even assuming that under the Customary Law of the Punjab, the transfer by a vidow of her life estate in ancestral property does not amount to an "alienation" within the meaning of Arts. 1 and 2 of the Punjab Limitation (Custom) Act (I of 1920); where, however, she purports to transfer not merely her life-interest, but the absolute estate in the property itself, with the concurrence of the next reversioner, such transfer is an "alienation" within the purview of the Act, and a suit to set it aside must be brought within the special period of

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limitation thereby prescribed. (*Sir George Lowndes.*) MT. SAT BHARAI *v.* BARKHURDAR SHAH. **6 R.P.C. 123—148 I C. 551=59 C L J 1=1934 M.W.N. 1=38 C W N 235=A.I.R. 1934 P C. 43=66 M.L.J. 61 (P.C).**

——*Alienation by widow—Suit by reversioners challenging—Limitation.*

Although for the purpose of determining whether a widow possessed unrestricted power of alienation in the property which had descended to her from her husband, it is immaterial whether the property was ancestral or self-acquired in his hands, but the question is of great importance for ascertaining the period of limitation governing a declaratory suit by a reversioner to challenge the widow's alienation. If the property was ancestral of the husband and the contesting reversioner, there can be no doubt that (Punjab)* Act I of 1920 is applicable and the period of limitation is six years. If however the property was non ancestral, *qua* the plaintiff, the suit would be governed by Art 125 Limitation Act. (*Tek Chand, J.*) SANT SINGH *v.* HARDIT SINGH **6 I R (Lah) 211=146 I C. 350=34 P.L R. 929=A. I.R 1933 Lah. 915.**

——*Applicability—Alienation of ancestral property by female—Suit by reversioner to avoid.*

Where a female effects an alienation of ancestral land a suit by the reversioner questioning the same is governed by the Punjab Limitation Act, 1920 (*Shadi Lal, C. J. and Tapp, J.*) MAHOMED MUSTAFA *v.* ANWAR ELAHI. **135 I C. 505=I R. 1932 Lah. 105=32 P.L.R. 621.**

——*Applicability—Alienation by Government.*

The Act applies only to alienations of ancestral immovable property and appointment of heirs by persons who followed custom in the Punjab. It has no application to an alienation made by the Government. (*Bhide, J.*) MEHAR KHAN *v.* SAKHI MAHOMED **I.R 1931 Lah 865=134 I.C 97=33 P L.R 237=A I R. 1932 Lah. 45.**

——*Suit attacking wills—Limitation.*

Where the suit in substance is a suit attacking the will, it is not open to the plaintiffs by cleverly wording their plaint to avoid the proper limitation for the suit. (*Addison and Abdul Rashid, JJ.*) MOHAMMAD ALI KHAN *v.* ANWAR HUSSAIN. **155 I.C. 1104=7 R L. 836=A.I.R. 1934 Lah. 913.**

——**S. 2 (b)**—*Applicability—Invalid sale—Title of vendee—Proof of adverse possession.*

Where a sale was effected in favour of certain persons in 1903 and the collaterals of the vendor sued and obtained a decree in 1907 that the sale was not binding and the vendor having died in 1919 the actual heirs including some of the vendees sued in 1923 for declaration of their rights,

Held, that the persons who were not vendees had to prove adverse possession as against the collaterals and that the provisions of S. 2 (*b*) of the Punjab Limitation Act read with S. 28 of the Limitation Act could not be availed of by them. (*Tek Chand and Agha Haider, JJ.*) SALHUN *v.* MALKU **I R. 1931 Lah. 377=131 I.C. 105=A I R. 1931 Lah. 439.**

——**S. 6**—*Reversioner setting aside alienation—Commencement of limitation.*

Where a reversioner seeks to impugn an alienation limitation commenced from the date of the alienation and an after-born reversioner cannot invoke the aid of S. 6, to extend time. (*Coldstream and Bhide, JJ.*) ARJA SINGH *v.* WARYAM SINGH, **154 I.C. 592=7 R L 581=A.I R. 1934 Lah. 290.**

——**S. 7**—*Alienation by widow—Reversioner's right to possession—Declaration that alienation is void—If condition precedent.*

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Reversioners cannot take possession of the land on the death of the widow without paying off the mortgage charge unless they succeed in getting a declaration that the mortgage is null and void and is not binding on the reversioners. (*Coldstream and Bhide, JJ.*) IMAM DIN *v.* MT. ROSHAN BIBI. **149 I.C. 1049=6 R.L. 787=A I.R. 1934 Lah. 229.**

——**S 7**—*Applicability—Suit based on inheritance—Defendant setting up alienation.*

A suit which is based purely on the right of inheritance, and in which an alienation is set up and relied on by the defendant, cannot be considered to be a suit on the ground that the alienation is not binding on the plaintiff so as to bring it within the provisons of S. 7. (*Dalip Singh and Bhide, JJ.*) GOPAL SINGH *v.* THAKAR SINGH. **A.I.R. 1935 Lah. 313.**

——**Ss. 7 and 8 and Art. 2 (b)**—*Applicability—Suit by daughter for possession of estate alienated by father—Limitation—If can take advantage of declaratory decree obtained by reversioners—Limitation Act, Art.* 144.

The land in suit belonged to one *S.S.*, who died in 1915. His daughter filed a suit in 1926 for possession of his estate which had been alienated by him Certain collaterals of *S.S.* had in the meanwhile obtained a decree declaring that the alienations effected by *S. S.* shall not affect their reversionary rights.

Held, (1) that under S. 8 of the Act, the daughter could not take advantage of the declaratory decree obtained by the collaterals, as she had no *locus standi* to impeach the alienations in question, and consequently her suit was incompetent; (2) that even if she could take advantage of the declaratory decree obtained by the collaterals, her suit was barred by limitation under Art. 2 (*b*) of the Schedule to the Punjab Limitation Act, as in view of S. 7 of the Act, the suit should have been instituted within one year after the Act came into force; and (3) that the suit was governed by Art. 2 (*b*) of the Punjab Limitation Act and not by Art. 144 of the Indian Limitation Act. (*Bhide and Din Mahammad, JJ.*) MUSSAMMAT SANTI *v.* RAM KISHEN. **16 Lah. 237=37 P.L.R. 461 & 353=7 R.L. 622=A I.R. 1934 Lah. 725.**

——**S. 7**—*Effect—Suit by reversioner—Invalidity of alienation and appointment of heir—Both if need be impugned.*

Section 7 only bars a remedy unless a particular course has been previously taken or there is still time for that to be done. It cannot be interpreted as destroying a right already obtained by pursuing a prescribed remedy available at the time merely on the ground that another prescribed remedy which subsequently became open to the plaintiffs was not availed of. The section does not make it inumbent on a reversioner to obtain a declaration both as regards the invalidity of the alienation and the appointment of an heir, where both these are present before he can sue for possession. (*Shadi Lal, C.J. and Tapp, J.*) BAKHSHISH SINGH *v.* PHUNAM SINGH. **I.R. 1931 Lah. 836=133 I.C. 868=32 P.L.R. 689=A.I.R. 1932 Lah. 17 (2).**

——**S. 7**—*Failure to sue for declaration—Effect on right of inheritance.*

It is a discretionary matter to institute a declaraory suit and the failure to do so cannot pre-

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vent the heirs from claiming when succession opens out, for S. 7 does not create any statutory provision so as to confer any prescriptive title. (*Dalip Singh and Bhide, JJ.*) GOPAL SINGH *v.* THAKAR SINGH. **A.I.R. 1935 Lah. 313.**

———**S. 7 and Art. 2 (b)**—*Suit for declaration by collaterals that certain adoption and gift by childless proprietor are invalid—Declaration granted by lower Courts—Second appeal in High Court—Gift declared invalid and adoption question not considered on ground of want of certificate—Death of proprietor and suit for possession by reversioners is governed by Art. 2 (b) and not S. 7.*

A childless proprietor made an adoption and subsequently effected a gift in favour of the adopted boy. In a suit by the collaterals, both the adoption and the gift were declared invalid by the lower Courts but the High Court on second appeal confirmed the invalidity of the gift and declined to go into the question of adoption as there was not the requisite certificate under S. 41 (3), Punjab Courts Act. On the death of the proprietor, the reversioners sued for possession of the properties. It was contended that they had to file a suit for declaration under S. 7, Limitation Act, and then only they could sue for possession.

Held, that the decision of the lower appellate Court regarding adoption had become final, that the reversioners had already the declaration both as regards adoption and gift and that their suit was governed by Art. 2 (*b*) and not by S. 7.

Held further, that the principle that if there are several points before a Court of appeal and that Court chooses to decide the appeal on a certain point, leaving the other points undecided, then the question involved in those other points remains open and would not be subject to the rule of *res judicata* and it would be open to the parties to re-agitate such questions as have been left undecided, did not apply to the present case. (*Addison and Agha Haidar, JJ.*) RALLA *v.* ATTRA. **147 I.C. 270=6 R.L. 372=A.I.R. 1933 Lah. 824.**

———**S. 7 (b)**—*Application for mutation by alleged adopted son dismissed—No suit by him for possession—Mutation subsequently effected in his favour—Suit by collateral for declaration after six years.*

A widow was in possession of her husband's property after her husband's death. Application for mutation in his favour filed by a person who alleged to be the appointed heir of the deceased was dismissed, but he did not file any suit for possession of the properties as the alleged appointed heir. Subsequently the widow remarried and there was a forfeiture of her life estate whereupon a collateral got mutation effected in his favour. But on objection of the appointed heir mutation was effected in his favour and he got possession of the property. Thereupon the collateral filed a suit for declaring the mutation order ineffectual, but beyond six years after the appointed heir had set up right as alleged appointed heir.

Held, that the suit could not be regarded as one to set aside the alleged appointment of heir. As the alleged appointed heir failed to sue for possession within six years when his right as alleged adopted son was interfered with, his right became extinct and that thereafter he was merely a trespasser and as such collateral's suit was not barred. (*Tek Chand and Skemp, JJ.*) KARTAR SINGH *v.* KHARKHA SINGH **8 R.L. 651=160 I.C. 1000=A.I.R. 1935 Lah. 787.**

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———**S. 8**—*Declaratory decree obtained by reversioner—Daughter, if can take advantage of.*

Under S. 8 of the Punjab Limitation (Custom) Act, a declaratory decree obtained by a reversioner enures for the benefit of all persons entitled to *impeach* the alienation. A daughter, not being an agnate, has no *locus standi* to contest the alienation of her father and, therefore, cannot take advantage of such a declaratory decree. (*Bhide and Din Mahomed JJ.*) MUKHA SINGH *v.* RAM KISHAN. **154 I.C. 988=7 R.L. 622 =37 P.L.R. 353=A.I.R. 1934 Lah. 725.**

———**S. 8**—*"Entitled to impeach alienation"—Meaning of.*

From the words "entitled to impeach the alienation" used in S. 8, it appears that the legislature intended to include those persons only who possessed *in praesenti* any right to challenge the alienation and to exclude those who either possessed no such title or, having possessed it, had lost it by their own act or by operation of law. A right once lost cannot be regained and any decree obtained by those whose right subsists cannot entitle those who have lost their right to obtain possession on the basis of that decree. By no stretch of language therefore can the word "entitled" be taken to include those whose title is not alive. Hence where, at the time of the previous suit, the plaintiffs in the subsequent suit had lost their rights, the plaintiffs in the former suit could not be considered to have claimed the right in common for themselves and for the other reversioners and as such the previous suit is not a representative suit within the meaning of S. 11, Expl. 6 and therefore the finding arrived at therein cannot be *res judicata* in the subsequent suit as the plaintiffs in this suit cannot be said to have been claiming under plaintiffs in previous suit. (*Addison and Din Mohammad, JJ.*) INDER SINGH *v.* MIAN SINGH. **17 Lah. 20= 161 I.C. 369=38 P.L.R. 252=8 R.L. 732= A.I.R. 1935 Lah. 391.**

———**Sch. I, Art. 1**—*Applicability—Mutation order—Suit for declaration of title.*

Plaintiff was in possession of the land which was the subject of alienation by will in favour of the defendant; mutation was effected in favour of defendant whereupon plaintiff sued for declaration of his title.

Held, that it was unnecessary for him to bring any suit to set aside the alienation by will as he was in possession of the property and that his suit fell under S. 45, Land Revenue Act, and was governed by Art. 120, Limitation Act, and not by Sch. I, Art. 1, Punjab Limitation Act. (*Bhide, J.*) DALIP SINGH *v.* MT. TABI. **15 Lah. 469=152 I.C. 100=7 R.L. 244 (2)= 36 P.L.R. 357=A.I.R. 1934 Lah. 134.**

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———**Sch. I, Art. 1**—*Applicability—Property should be ancestral qua plaintiff.*

In order to make Art. 1, Punjab Limitation Act applicable, it must be shown that the property in suit was ancestral *qua* the plaintiffs, and until that has been shown the ordinary rules of limitation as laid down in the Limitation Act are not departed from. (*Shadi Lal, C. J. and Broadway, J.*) HAZURA SINGH *v.* KISHEN SINGH. **I.R. 1933 Lah. 353=143 I.C. 422=A.I.R. 1933 Lah. 369.**

———**Sch. I, Art. 1**—*Scope—Plaintiff in possession—Mutation in favour of vendees—Suit by plaintiff to establish his rights.*

The suit contemplated under Sch. I, Art. 1 is one instituted during the lifetime of the alienor. If no such suit is instituted during the lifetime of the alienor the only result is that a suit for possession will not be maintainable according to S. 7, cl. (*b*) of the Act. Where the plaintiffs were in possession of the property and the vendees were never in possession of the same and an order of the mutation in favour of the vendees was passed and plaintiff filed a suit for declaration that they were owners,

Held, that Art. 1 did not bar his suit. (*Coldstream and Bhide JJ.*) KARMUN *v.* HARKISHAN. **A.I.R. 1935 Lah. 87.**

———**Sch. I, Art. 1**—*Suit for declaring will invalid instituted after testator's death—Limitation for.*

A suit for a declaration that the bequest of certain landed property by a testator did not affect the reversionary rights of the plaintiffs after the death of the testator is governed by Art. 1 and should be instituted within six years of the date of registration when it is made by a registered deed and it makes no difference that the suit itself was instituted after the death of the testator. 13 Lah. 22, Foll. (*Bhide, J.*) AHMAD *v.* ALLAH BIBI. **6 I.R. (Lah.) 322=146 I.C. 1069=34 P.L.R. 261=A.I.R. 1933 Lah. 686.**

———**Sch. I, Art. 1**—*Will by childless person—Suit to contest—Limitation*

When a childless testator dies leaving a widow she unusually succeeds and the legatee only begins to enjoy the legacy after the death. The words "after the death of the alienor" in Art. 1 of Act I of 1920, define the nature of the suit and not the time at which it is brought. Such a suit may be brought before or after the testator's death provided the statutory period has not expired. (*Harrison and Dalip Singh, JJ.*) HARNAMAN *v.* MT. TABI. **13 Lah. 22=I.R. 1931 Lah. 1040=134 I.C. 1040=32 P.L.R. 556=A.I.R. 1931 Lah. 702.**

———**Sch. I, Art. 1 (c)**—*Testamentary disposition—No mutation—Running of time.*

Under the Punjab Limitation (Customs) Act, 'Alienation' includes any testamentary disposition of property. When the alienation is not made by means of a registered deed, and no mutation on the basis of the wills is entered in the register of mutations, the time begins to run from the date on which the alienation comes to the knowledge of the plaintiffs. (*Addison and Abdul Rashid, JJ.*) MOHAMMAD ALI KHAN *v.* ANWAR HUSSAIN. **155 I.C. 1104=7 R.L. 836 =A.I.R. 1934 Lah. 913.**

PUNJAB LIM. (CUSTOM) ACT (1920), Sch. I, Art. 4.

———**Sch. I, Art. 2**—*Applicability—Suit for possession in pursuance of declaratory decree—Starting point of limitation.*

R sold a plot of land in 1895. His collateral thereupon brought an action impeaching the alienation and he obtained a declaratory decree on 28th June, 1901, to the effect that the alienation should not affect the reversion any rights of the vendor's collaterals and that the latter would be entitled on the death of the alienor to recover possession of the property on payment of a certain amount found binding. *R* died in March, 1920, and a suit to recover possession was filed by the collaterals in January, 1925.

Held, that the suit was governed by Art. 2, that the period of limitation began to run from the death of the alienor and not from the date on which death was known to the plaintiffs and that the suit was consequently barred by limitation. (*Shadi Lal, C.J. and Abdul Qadir, J.*) TULSI RAM *v.* BADHAWA. **12 Lah. 13=I.R. 1931 Lah. 426=131 I.C. 298=32 P.L.R. 219 =A.I.R. 1931 Lah. 238.**

———**Sch. I, Art. 2**—*Applicability—Sale of reversionary rights.*

P sold one half of his expected reversionary interest in the share of *S* a childless collateral of his, in the village *shamilat*. *P* died before 1897 and *S* survived him and did not die till September, 1908. In 1910 the vendee got the share mutated in his name on the strength of the sale and got possession of the land. Thereupon the sons of *P* sued for possession of the share of *S*.

Held, that the suit was not governed by Art. 2 of the Second Schedule of the Punjab Limitation (Customs) Act because the reversionary rights sold were not immoveable property. (*Jai Lal and Abdul Qadir, JJ.*) SUNDAR SINGH *v.* MEHR DIN. **I.R. 1931 Lah. 363=131 I.C. 91=32 P.L.R. 301=A.I.R. 1931 Lah. 375.**

———**Sch. I, Art. 3**—*Applicability—What plaintiff must prove*

Where in a suit for a declaration to the effect that an alleged adoption was invalid and that it never took place it appeared that there was some evidence to support the adoption and there was a gift in favour of the adopted son and the adoption and the gift were openly declared at the time of the mutation of the year 1908, and the adoption was held invalid only owing to absence of certain ceremonies required under the special custom of the district.

Held, that the suit was governed by Art. 3 of the Schedule to the Punjab Limitation (Custom) Act, 1920. For the purpose of the article it is necessary to determine the date on which the alleged adoption became known to the plaintiff. (*Bhide, J.*) PHOOL SINGH *v.* TOTA. **I.R. 1931 Lah. 487=131 I.C. 631=A.I.R. 1931 Lah. 456.**

———**Sch. I, Art. 4**—*Mutation in favour of adopted son—Suit by collateral challenging adoption—Time limit.*

A person died in 1919 and in 1922 certain lands standing in his name were mutated in favour of a person alleged to be his adopted son. A collateral sued in 1928 for possession of the land.

PUNJAB LIM. (CUSTOM) ACT (1920), Sch. I, Art. 4.

Held, that the suit was governed by Art. 4 of the Schedule to the Punjab Limitation of Custom Act and time began to run from the date when the land was mutated in favour of the adopted son. (*Jai Lal, J.*) HAKU *v.* SUNDAR. **I.R. 1932 Lah. 366=137 I.C. 844=33 P.L.R. 949=A.I.R. 1932 Lah. 457.**

———**Sch. I, Art. 4 (b)**—*Declaratory decree confirmed in appeal—Subsequent suit for possession—Limitation—Commencement of.*

The period of limitation would commence not from the date when the declaratory decree is obtained from the Court of first instance but from the date when the decree is finally confirmed by the last appellate Court. When a competent appeal is pending the matter is still subjudice and therefore time does not begin to run until the appeal is disposed of. (*Addison and Din Mohammad, JJ.*) NARSING BAKSH *v.* BIHARI LAL. **159 I.C. 1030=A.I.R. 1935 Lah. 662.**

———**Sch. I, Art. 4 (b)**—*Inapplicability—Property not proved to be ancestral.*

Where it is not established that the property is ancestral, Art. 4 (*b*) does not apply as it deals exclusively with suits for possession of ancestral immoveable property. (*Addison and Din Mohammad, JJ.*) NARSING BAKSH *v* BIHARI LAL. **159 I C. 1030=A.I.R. 1935 Lah. 662.**

PUNJAB REPEALING LOANS LIMITATION ACT (III OF 1923), S. 5—*Case falling under—Applicability of S.* 14, *Limitation Act.*

The proviso of S. 14 of the Limitation Act can be availed of in the case of suits governed by the special rule of limitation enacted by S. 5 of the Repealing (Punjab Loans Limitation) Act III of 1923. (*Shadi Lal, C. J. and Monroe, J.*) THAKUR DAS *v.* DHANNA RAM. **I.R. 1932 Lah. 630.**

PUNJAB MUNICIPAL ACT (III OF 1911)—*Notifications of Local Government—Levy of octroi duty on 'carriages'—Motor cars whether liable to duty.*

A notification under the Punjab Municipal Act provided that octroi duty was payable on all conveyances including carriages and on all articles made wholly or partly of metal.

Held, that motor cars were included in the term 'carriage' and were liable to duty. (*Addison, J.*) HIRA CHAND *v.* EMPEROR **13 Lah. 53 =I.R. 1931 Lah. 662=32 Cr.L.J. 946=32 P. L.R. 639=132 I.C. 694=1931 Cr.C. 860= A.I.R. 1931 Lah. 572.**

———**Ss. 3 (5) and 219**—"*Erection*" or "*re-erection*"—*Repairing old wall—If permission necessary.*

Effecting some crude repairs to the existing walls does not amount to erection or re-erection. It does not, therefore, require the sanction of the Municipal Committee and a conviction under S. 219 for not having obtained the sanction is bad and illegal. (*Broadway, C. J.*) AILAH DAD *v.* EMPEROR. **I.R. 1933 Lah. 286 (2)=142 I.C. 869=34 Cr.L.J. 452=33 P.L.R. 1041=1933 Cr.C. 161=A.I.R. 1933 Lah. 85.**

———**S. 3 (5) (a)**—"*Material alteration*"—*Wooden partitions subdividing building.*

Where the wooden partitions are substantial affairs completely subdividing the building and leaving no means of communication between different portions and they reach the ceiling and are in fact walls though constructed of wood, they are not merely temporary erections but clearly fall within the scope of S. 3 (5) (*a*) of the Punjab Municipal Act as being a material alteration to the building. (*Currie, J.*) SHIB RAM *v.* EMPEROR. **159 I.C. 369=37 P.L.R. 173=1935 Cr.C. 649=A.I.R. 1935 Lah. 445.**

PUNJAB MUNICIPAL ACT (1911), S. 33.

———**S. 3 (13) (b)**—*Street paved out of municipal funds—Right of use by public.*

Where the pavement of the street was carried out with the express consent of the proprietors out of municipal funds and there was no agreement that the street should not thereby become a public street, it comes within the purview of the definition of a public street in S. 3 (13) (*b*) of the Punjab Municipal Act. It would be a contradiction in terms that a street should be a public street and still it should not be open to a member of the public. The ownership of the soil may remain in the proprietors but they have no right to prevent the public from using the street as such. (*Rangi Lal, J.*) MT. RESHAM *v.* MATU RAM. **7 R.L. 95=151 I.C. 169=A. I.R. 1934 Lah. 936 (1).**

———**S. 13 (3)**—*Scope—Application of provisions to more than one outgoing member.*

There is nothing in the subject or context of the Municipal Act repugnant to the application of the provision in S. 13 (3) to more than one outgoing member, where after the expiry of three years from a general election all the members continued to hold office and on a later date the Commissioner notified under S. 14 (*c*), the names of the persons appointed for the vacant seats.

Held, that the procedure was legal. (*Addison and Coldstream, JJ.*) BISHAMBAR NATH JAITBE *v.* MUNICIPAL COMMITTEE, DELHI. **33 P.L.R. 83=I.R. 1931 Lah. 881=134 I.C. 113=A. I.R. 1932 Lah. 26.**

———**S. 14 (c)**—*Expiry of three years' period—Members continuing in office—Subsequent notification—Validity.*

There is nothing in the subject or context of the Municipal Act repugnant to the application of the provision in S. 13 (3) to more than one outgoing member, where after the expiry of three years from a general election all the members continued to hold office and on a later date the Commissioner notified under S. 14 (*c*), the names of the persons appointed for the vacant seats.

Held, that the procedure was legal. (*Addison and Coldstream, JJ.*) BISHAMBAR NATH JAITBE *v.* MUNICIPAL COMMITTEE, DELHI. **33 P.L.R. 83 =I.R. 1931 Lah. 881=134 I.C. 113=A.I. R. 1932 Lah. 26.**

———**S. 33**—*Notified Area Committee delegating its power to Secretary by general resolution to institute suit—Legality—Ratification, effect of.*

The Notified Area Committee cannot delegate its powers to its Secretary by a general resolution without reference to any particular case to institute civil suit on its behalf. The action of the committee in so doing is *ultra vires* and cannot be validated by ratification as an illegal act

PUNJAB MUNICIPAL ACT (1911), S. 47.

cannot be legalised. (*Addison and Din Mohammad, JJ.*) NOTIFIED AREA COMMITTEE, OKARA *v.* KIDAR NATH. **17 Lah. 35=38 P.L.R. 394=158 I.C. 346=8 R.L. 237=A.I.R. 1935 Lah. 345.**

———**S. 47**—*Applicability—Lease under S. 83.*

The conditions laid down in S. 83 do not result in the avoidance of those laid down in S. 47. S. 83 presumes the existence of a lease which is a contract, and before such lease or contract can be binding, it must be drawn up in the manner given in S. 47. (*Middleton, J. C. and Mir Ahmad, A. J. C.*) ABDUL HAMID *v.* MUNICIPAL COMMITTEE, PESHAWAR **157 I.C. 879=8 R. Pesh. 40=A.I.R. 1935 Pesh. 124.**

———**S. 47**—*Contract not in accordance with law—Suit to recover interest on value of goods supplied.*

Where a Municipal contract was not executed in accordance with S. 47 but the parties had acted on the same

Held, that the person who supplied goods was entitled to recover interest on the amount due to him of which he had been wrongfully kept out (*Jailal and Abdul Qadir, JJ.*) BHANDARI BROS *v.* MUNICIPAL COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 1028—134 I.C. 1028=32 P.L.R. 546=A.I.R. 1931 Lah. 457.**

———**S. 47**—*Contract not in writing—Goods delivered—Claim for price by seller—Contract Act, S. 70.*

A contract for delivery of goods was made with the plaintiff by or on behalf of the Municipal Committee which not being in writing under seal was not binding on the Municipal Committee under S. 47, Punjab Municipal Act. Plaintiff who delivered the goods to the Committee claimed the price thereof and the Committee resisted the claim on the ground that the plaintiff was entitled to the return of the goods only and not its price. The Municipal Committee also resisted the plaintiff's claim for amendment of the plaint by inserting a relief for the return of goods under S. 70, Contract Act.

Held, that as the Committee resisted the plaintiff's claim to amend the plaint by inserting a relief for the return of the goods, it was not open to the Committee to say that the plaintiff was entitled to a return of the goods only and not for recovery of its price. (*Coldstream and Bhide, JJ.*) RAM CHAND LOTIA & SONS *v.* MUNICIPAL COMMITTEE, LAHORE. **6 I.R. (Lah.) 118=145 I.C. 687=A.I.R. 1933 Lah. 14.**

———**S. 47**—*Failure to observe formalities—Validity of contract.*

Where a corporation or committee makes a contract, the formalities for which are prescribed by statute, and when there is a failure to observe those formalities, the contract is invalid and cannot form the subject of an action, even though there is executed consideration. 1933 Pesh. 16, Appr. (*Middleton, J. C. and Mir Ahmad, A. J. C.*) ABDUL HAMID *v.* MUNICIPAL COMMITTEE, PESHAWAR. **157 I.C. 879=8 R. Pesh. 40=A.I R 1935 Pesh. 124.**

———**S. 47**—*Lease of municipal land—Absence of registered document—Claim for compensation*

A lease of municipal land requires a document in writing, S. 47 being mandatory. Where however the contract of lease is unenforceable for want of a written document the lessees can recover compensation for the period during which the lessees were in possession. (*Tek Chand and Coldstream, JJ.*) MUNICIPAL COMMITTEE, LAHORE *v.* MIRAN BAKSH. **13 Lah. 561=143 I.C. 621=33 P.L.R. 1051=I.R. 1933 Lah. 22=A.I.R. 1933 Lah. 15.**

PUNJAB MUNICIPAL ACT (1911), S. 61.

———**S. 47**—*Non-compliance with—Contract with Corporation—Binding nature of—Liability of Corporation on* quantum meruit.

Where a Corporation enters into a contract under a statute and the terms of the statute relating to the formalities of the contract are not observed, the contract cannot be enforced against or by the Corporation. The contract is invalid and cannot form the subject of an action, even though there is executed consideration. But a decree can, nevertheless, be passed against the Corporation on the basis of *quantum meruit*. (Case law discussed.) (*Fraser, J. C. and Saaduddin, A J C.*) MUNICIPAL COMMITTEE, PESHAWAR *v.* MASITI. **141 I.C. 23=A.I.R. 1933 Pesh. 16.**

———**S. 47**—*Sale by Committee—Point that it is not supported by writing—Committee, if can raise at the time of argument.*

The question whether a sale by the Municipal Committee was effected in the manner prescribed by S. 47 cannot be considered to be entirely a question of law, as it involves the question whether the sale was in fact supported by any writing as required by that section. The Committee has no right to raise the point at all at the stage of arguments. (*Dalip Singh and Bhide, JJ.*) MUNICIPAL COMMITTEE, SONEPAT *v.* DHARAM CHAND **37 P.L.R. 289=162 I.C. 59=8 R. L. 842=A.I.R. 1935 Lah. 632.**

———**S. 47**—*Sale by Committee subject to conditions—Committee admitting factum of sale—Right to repudiate conditions on ground that sale is not supported by writing.*

Where the factum of the sale is admitted by the Municipal Committee, the conditions subject to which the sale was made must also be held to have been admitted. If the sale is not supported by a formal writing, it is open to the Committee to supply this omission at any time. When, therefore, it admits the sale, it cannot avail itself of the provisions of S. 47 to repudiate the conditions subject to which the sale was made. (*Dalip Singh and Bhide, JJ.*) MUNICIPAL COMMITTEE, SONEPAT *v.* DHARAM CHAND **37 P.L.R. 289=162 I.C. 59=8 R.L. 842=A.I.R. 1935 Lah. 632.**

———**S. 49**—*Suit against Municipal Committee for mandatory injunction—Need for notice.*

The plaintiff sued a Municipal Committee for a mandatory injunction to rebuild a *khal* at their expense and for a perpetual injunction to restrain the defendant from building a drain on the site.

Held, that the suit could not proceed in respect of the mandatory injunction in the absence of a notice under S. 49. (*Addison, J.*) MUNICIPAL COMMITTEE OF HANSI *v.* MEHTAB SINGH. **131 I.C. 348 (1)=12 Lah.L.J. 323=31 P. L.R. 991=A.I.R. 1931 Lah. 124.**

———**S. 61**—*Object and effect—House-tax not part of "annual value" of building.*

PUNJAB MUNICIPAL ACT (1911), S. 62.

Per *Tek Chand, J.*—The tax payable under S. 61 is not in the nature of a fixed levy on the ownership of property but is in reality and substance a tax on 'rental' connected with and dependent upon occupation of the premises, whether by the owner himself or by a tenant under him. The provision was apparently with a view to provide a convenient mode for realization of the house-tax by the Municipal Committee. The amount of tax in such cases does not form part of the annual value of the property. (*Addison, Tek Chand, Jai Lal, Dalip Singh and Agha Haidar, JJ.*) CHHUNNA MAL SALIG RAM *v.* COMMISSIONER OF INCOME-TAX, PUNJAB. **I.R. 1931 Lah. 433=131 I.C. 193=32 P.L.R. 517=A.I.R. 1931 Lah. 320 (2) (F.B.).**

———**S. 62 (10)**—*Notification in imposing tax not specifying date on which it is to come in force—Date to be taken by implication less than three months from date of notification—Tax, if lawfully imposed.*

Where the notification issued by the Local Government to notify the imposition of a tax does not specify any date on which the tax is to come in force and the date which may by implication be taken to be the date specified is a date less than three months from the date of the notification, the tax imposed by the notification cannot be said to be imposed in accordance with the provisions of the Municipal Act. (*Monroe, J.*) ABDUL HAMID *v.* MUNICIPAL COMMITTEE, DELHI. **160 I.C. 524=8 R.L. 554 (1)=A.I.R. 1935 Lah. 980.**

———**S. 78**—*Offence under—Essentials.*

To constitute an offence under S. 78 there should be an attempt to introduce dutiable articles into *octroi* limits with intent to defraud the Municipal Committee. The fact that a person refused to pay *octroi* on the ground that the articles were not dutiable does not render him guilty of an offence under the section. (*Shadi Lal, C. J.*) RAHMAT ELAHI *v.* EMPEROR. **I.R. 1931 Lah. 834=133 I.C. 866=32 P.L.R. 688=32 Cr.L.J. 1081=1931 Cr.C. 1053 (2)=A.I.R. 1931 Lah. 752 (1).**

———**S. 81**—*Action taken by Committee under—Suit questioning validity of procedure—Applicability of procedure under Act*—Onus *of proof.*

Where a suit is filed questioning the procedure adopted by the Municipal Committee in recovering certain amounts due by way of rent by recourse to the procedure prescribed by S. 81 of the Act, it is for the Municipal Committee to show that the amount for which they applied to the Magistrate is money legally recoverable under the Act. (*Jai Lal, J.*) ABDULLAH *v* THE MUNICIPAL COMMITTEE, DELHI. **I.R. 1931 Lah. 758=138 I.C. 278=32 P.L.R. 172=A.I.R. 1931 Lah. 315 (2).**

———**S. 81**—*Applicability*—Chabutras *constructed by Municipality—Claim for rent—Procedure.*

Where a Municipal Committee sought to recover the amounts payable by the occupants of certain *Chabutras* constructed by the Committee and it appeared that the case was really one of ordinary relationship of landlord and tenant between the parties,

PUNJAB MUNICIPAL ACT (1911), S. 81.

Held, that the money claimed could not be recovered under S. 81 and that the proper course was for the Committee to institute suits in the Civil Court. (*Jai Lal, J.*) ABDULLAH *v.* THE MUNICIPAL COMMITTEE, DELHI. **I.R. 1931 Lah. 758=133 I.C. 278=32 P.L.R. 172=A.I.R. 1931 Lah. 315 (2).**

———**S. 81**—*Applicability—Claim under Municipal contract.*

Section 81 cannot be invoked for the purpose of realising money due to a Municipal Corporation on a contract. (*Shadi Lal, C.J.*) PUNJAB SINGH *v.* EMPEROR. **131 I.C. 337 (2)=32 Cr. L.J. 693 (1).**

———**S. 81**—*Applicability—Recovery of rent for platform—No written permission under S. 170.*

For the application of S. 170 of the Punjab Municipal Act, written permission by the Municipal Committee is necessary. And if S. 170 is inapplicable, the Committee is not justified in invoking the penal provisions of S. 81. Hence where there has been payment of rent to the Committee, without any written permission by the Committee, the penal provisions of S. 81 cannot be invoked. The enjoyment of rent shows only relationship of landlord and tenant and a dispute regarding arrears of rent must be determined and adjudicated by a Civil Court. (*Tek Chand and Abdul Rashid, JJ.*) MUNICIPAL COMMITTEE, DELHI *v.* HAFIZ ABDULLAH. **15 Lah. 884=7 R.L. 344=152 I.C. 919=36 P. L.R. 298=A.I.R. 1934 Lah. 699.**

———**S. 81**—*Applicability—Rent due for balcony.*

Rent due in respect of a balcony does not fall under S. 170 which relates only to ground-floors nor is it a sum claimable under the Act. So the penal provisions of S. 81 are not applicable thereto. 7 L. 568; 99 I.C. 1030; 133 I.C. 278, Ref. (*Coldstream, J.*) JAMNA DAS *v.* NOTIFIED AREA COMMITTEE OF SHAHDARA. **I.R. 1933 Lah. 223 (2)=142 I.C. 516=34 Cr.L.J. 369 (1)=34 P.L.R. 429=1933 Cr.C. 638=A.I.R. 1933 Lah. 394.**

———**S. 81**—*Lease of Municipal land—Default in payment of rent—Application to Magistrate for recovery—Substainability.*

A Municipal Committee leased out a portion of municipal land on rent to a person and a deed was executed. The lessee did not pay rent for one year and the Committee ordered that the sum should be recovered by application to a Magistrate under S. 81 of the Municipal Act. The same having been objected to on the ground that S. 170 did not apply.

Held, that the sum sought to be realised was a fee claimable under S. 170 and the same could be realised as an arrear under S. 81 of the Act. (*Addison, J.*) BHIKHARI LAL *v.* MUNICIPAL COMMITTEE, JAGADHRI. **I.R. 1931 Lah. 790=133 I.C. 550=32 P.L.R. 707=32 Cr.L.J. 1041 (1)=1931 Cr.C. 1024=A.I.R. 1931 Lah. 753 (1).**

———**S. 81**—Municipal Committee—Unauthorised levy of money—Suit to recover—Limitation. *See* LIMITATION ACT, ART. 2—APPLICABILITY. **152 I.C. 680=A.I.R. 1935 Lah. 47 (1).**

PUNJAB MUNICIPAL ACT (1911), S. 81.

———S. 81—Teh-Zamini—*Recovery by summary process—Permissibility.*

The petitioner built some shops with the permission of the Municipal Committee on land which formed part of the public street and with like permission, some projections over a Municipal drain. At the time when the permission was granted, no condition as to payment of fees or rent was imposed but subsequently the Municipal Committee decided to levy *teh Zamini* from the petitioner.

Held, that the levy was neither a tax nor a fee which the Municipal Committee was authorised to levy under the Municipal Act and that the amount could not be recovered by the summary process provided by S. 81 of the Act. (*Jai Lal, J.*) DURGA PARSHAD *v* EMPEROR. **1934 Cr.C. 167=147 I.C. 604=6 R.L. 406=35 Cr. L.J. 439=14 Lah. 664=34 P.L.R. 944=A. I.R. 1934 Lah. 84 (2).**

———S. 83—*Applicability—Lease of the right to use the "serai".*

Section 83 does not apply to a case where the Municipal Committee gave a three-year lease of the "serai" (ground used for cattle fair) to the defendant. The subject-matter of the lease in such a case is not an octroi on animals brought within the octroi limits as defined in S. 61 (*f*) but the right to use the *serai.* (*Fraser, J.C. and Saaduddin, A.J.C.*) MUNICIPAL COMMITTEE, PESHAWAR *v.* MASITI. **141 I.C. 23=A.I.R. 1933 Pesh. 16.**

———S. 84—*Applicability—Suit for injunction against Municipality restraining it from imposing tax.*

Section 14 does not include a suit claiming a perpetual injunction restraining the Municipal Committee from imposing a tax, on the ground that the tax has not been lawfully imposed. (*Monroe, J.*) ABDUL HAMID *v.* MUNICIPAL COMMITTEE, DELHI. **160 I.C. 524=8 R.L. 554 (1)=A.I.R. 1935 Lah. 980.**

———Ss. 84 and 86—*Assessment of tax—Jurisdiction of Civil Court.*

A tax assessed by the Municipal Committee cannot be disputed in any other way than that laid down in Ss. 84 and 86 of the Municipal Act. It does not matter whether the assessment is illegal or *ultra vires* or not. Even if the assessment is illegal or *ultra vires,* it is an assessment and the jurisdiction of the Civil Court is definitely barred. (*Young, C.J. and Din Mohammad, J.*) NAUBAHAR HUSSAIN SHAH *vs.* MUNICIPAL COMMITTEE, BATALA. **16 Lah. 529=36 P.L.R. 301=8 R.L. 462=159 I.C. 1059=A.I.R. 1935 Lah. 970.**

———Ss. 84 and 86—*Tin spangles—Assessment.*

The assesment of Rs. 10 per maund of tin spangles instead of 8 annas per maund is not *ultra vires.* Against such assessment an appeal lies under S. 84 to the Commissioner and S. 86 therefore bars a suit. (*Hilton, J.*) MUNICIPAL COMMITTEE OF AMRITSAR *v.* HUKAM CHAND KANSHI RAM. **15 Lah. 663=149 I.C. 775=6 R.L. 751=35 P.L.R. 165=A.I.R. 1934 Lah. 200.**

PUNJAB MUNICIPAL ACT (1911), 132.

———S. 86—*Applicability—Question if Committee is competent to impose tax in certain area in view of the terms of contract.*

Section 86 has no applicability to a case where the plaintiff is not questioning the powers of the Municipal Committee under the Punjab Municipal Act but is urging that in view of the terms of the sales of the sites in a certain area, the Committee cannot impose a certain tax within that area. In other words, the decision of the question turns purely on the terms of a contract between the parties and the question of the validity and effect of the contract is obviously a matter for the decision of the Civil Courts and not of the executive authorities referred to in Ss. 84-86 of the Punjab Municipal Act. (*Dalip Singh and Bhide, JJ.*) MUNICIPAL COMMITTEE, SONEPAT *v.* DHARAM CHAND. **37 P.L.R. 289 =162 I.C. 59=8 R.L. 842=A.I.R. 1935 Lah. 632.**

———S. 121—*License to firewood dealer—Condition restricting amount he can deposit—Validity.*

Obiter.—The Municipal Committee are legally entitled to attach a condition to the license given to a dealer of firewood restricting the amount that he can deposit. (*Skemp, J.*) MUL CHAND *v.* EMPEROR. **158 I.C. 944=8 R.L. 327=36 Cr. L.J. 1478=37 P.L.R. 783=1935 Cr.C. 1038 =A.I.R. 1935 Lah. 676.**

———Ss. 121 and 81—*Licence fees—No licence issued—Realisation of fees by distress and sale—Validity of.*

The licence fees under S. 121 of the Act are only payable when licences are granted. Where no licence has ever been granted nor have they been applied for, the attempt to levy those fees by the distress and sale of the moveable property of the people, carrying on the various trades under S. 81 of the Act is illegal; the proper remedy is provided in sub-S. (5) of S. 121. (*Addison, J.*) UMARDIN *v.* EMPEROR. **6 I.R. (Lah.) 27=144 I.C. 830=34 Cr.L.J. 867= 1933 Cr.C. 1024=A.I.R. 1933 Lah. 814.**

———S. 132—*Damage by accumulation of water—Injunction against Municipality.*

The Municipal Committee are not entitled under any law to keep open as a channel or as pit passing through another person's land something which is not used by way of drainage or sewerage. These are the only relevant purposes which are mentioned in S. 132 and in the absence of these, a person whose property is damaged by accumulation of water, is entitled to an injunction against the Municipal Committee ordering them to close the opening passing under his house. (*Dalip Singh, J.*) DIWAN CHAND *v.* MUNICIPAL COMMITTEE, AMRITSAR. **147 I.C. 801 =6 R.L. 452=A.I.R. 1933 Lah. 1003.**

———S. 132—*No proof as to when grant was made—Presumption.*

In a suit for a perpetual injunction to abate the nuisance caused by water running in a Municipal channel being blocked, in the absence of any proof as to when, if ever, any licence or grant was made by the plaintiff, it is sufficient to assume that the Municipality acted without protest on the part of the plaintiff under the provisions of S. 132. (*Dalip Singh J.*) DIWAN

PUNJAB MUNICIPAL ACT (1911), S. 152.

CHAND *v.* MUNICIPAL COMMITTEE, AMRITSAR. **147 I.C. 801=6 R.L. 452=A.I.R. 1933 Lah. 1003.**

———**S. 152**—*Prosecution under—Public notice issued prior to amendment of section—If can be relied on.*

In view of the provisions of S. 2 of the Municipal Act and S. 6 of the Punjab General Clauses Act I of 1898, it is not necessary for the Municipality to issue a fresh public notice under the amended cl. (1) of S. 152, where such notice had been issued under the Act before the amendment of 1933. It is, therefore, open to the Municipal Committee to rely on such notice, in a prosecution under S. 152 (*a*) and (*b*) for practising prostitution and keeping a brothel in a prohibited area. (*Tek Chand, J.*) EMPEROR *v.* MT. NAWAB BEGUM. **158 I.C. 527=8 R.L. 273=36 Cr.L.J. 1396.**

———**S. 153**—*Failure to comply with notice by committee—No offence.*

The failure to comply with a notice issued by the committee does not constitute an offence under S. 153 of the Punjab Municipal Act. It is only the failure to comply with the Magistrate's order which is punishable under that section. (*Shadi Lal, C.J.*) BABU RAM *v.* EMPEROR. **152 I.C. 1036=1934 Cr.C. 944 (2)=37 P.L.R. 61=36 Cr.L.J. 219 (1)=7 R.L. 357 (1)=A.I.R. 1934 Lah. 619.**

———**S. 153**—*Owner of house doing his best to get rid of disorderly tenant—Liability to punishment.*

It is doubtful whether the owner of a house, who is doing his best to get rid of a disorderly tenant, can properly be fined under S. 153 of the Punjab Municipal Act. (*Shadi Lal, C.J.*) BABU RAM *v.* EMPEROR. **152 I.C. 1036=1934 Cr.C. 944 (2)=37 P.L.R. 61=36 Cr.L.J. 219 (1)=7 R.L. 357 (1)=A.I.R. 1934 Lah. 619.**

———**S. 169**—*Scope—Power of Municipal Committee under in respect of highways.*

A Municipal Committee in which a public highway is vested has no power to treat it as personal property. Under S. 169, Punjab Municipal Act, it may close a street temporarily for a public purpose or permanently, but in the latter case, it is bound to provide the public with another road. The power of closure under S. 169 is limited and does not imply the power to obstruct. (*Young, C.J. and Din Mahomed, J.*) MUNICIPAL COMMITTEE, DELHI *v.* MAHOMED IBRAHIM. **16 Lah. 517=37 P.L.R. 753=7 R.L. 335=152 I.C. 850=A.I.R. 1935 Lah. 196.**

———**S. 169 (g)**—*Public street—Power of committee to lease.*

The Municipal Committee is authorised under S. 169 (*g*) to lease out any land used by it for a public street and no longer required therefor. (*Addison and Din Mohammad, JJ.*) JAI NARAIN *v.* MUNICIPAL COMMITTEE, DELHI. **157 I.C. 966=8 R.L. 164=37 P.L.R. 160.**

———**(as amended in 1933), S. 169 (g)**—*Suit to restrain Municipal Committee from leasing public street—Power to lease conferred by subsequent amendment—Right to injunction.*

PUNJAB MUNICIPAL ACT (1911), S. 170.

Certain shopkeepers sued to restrain the Municipal Committee from leasing portions of the public street in front of their shops to hawkers for selling their goods. Subsequent to the institution of the suit, the Municipal Committee was empowered by amendment in the Act to lease portions of the public street. The plaintiffs contended that as the Municipal Committee had no such power on the date of the institution of the suit, it could not do so.

Held, that no injunction could be granted as the injunction was to operate in the future and the Municipal Committee had been empowered to lease portions of public street.

Held also, that the view from the plaintiff's shops had been obstructed did not constitute nuisance which could be made the basis of claiming relief. (*Bhide, J.*) CHANDER BHAN *v.* MUNICIPAL COMMITTEE, REWARI. **153 I.C. 777 (1)=7 R.L. 456=A.I.R. 1934 Lah. 986 (1).**

———**S. 170**—*Applicability—Rent due for balcony—Recovery of—S. 81 not applicable.*

Rent due in respect of a balcony does not fall under S. 170 which relates only to ground-floors nor is it a sum claimable under the Act. So the penal provisions of S. 81 are not applicable thereto. 7 Lah. 568; 99 I.C. 1030; 133 I.C. 278, Ref. (*Coldstream, J.*) JAMNA DAS *v.* NOTIFIED AREA COMMITTEE OF SHAHDARA. **I.R. 1933 Lah. 223 (2)=142 I.C. 516=34 Cr.L.J. 369 (1)=34 P.L.R. 429=1933 Cr. C. 638=A.I.R. 1933 Lah. 394.**

———**S. 170**—*Essentials for applicability.*

In order that S. 170 may apply, the Municipal Committee must prove the following matters: (1) That a permission in writing was granted; (2) that it was for the temporary occupation of any street or land vested in it; and (3) that the purpose for which it was granted was one of the three specified purposes mentioned in the section, that is to say, deposit of any building materials, making of any temporary excavation or making an erection thereon, that is to say, the erection by the person to whom the permission is granted. Where there was no permission in writing by the Municipal Committee and the permission was merely for the occupation of a structure constructed by the Committee and the purpose was to give more business area to the occupants of certain shops.

Held, that S. 170 did not apply. (*Jai Lal, J.*) ABDULLAH *v.* THE MUNICIPAL COMMITTEE, DELHI. **I.R. 1931 Lah. 758=133 I.C. 278=32 P.L.R. 172=A.I.R. 1931 Lah. 315 (2).**

———**S. 170**—*Lease of Municipal land—Default in payment of rent—Application to Magistrate for recovery—Sustainability.*

A Municipal Committee leased out a portion of municipal land on rent to a person and a deed was executed. The lessee did not pay rent for one year and the Committee ordered that the sum should be recovered by application to a Magistrate under S. 81 of the Act. The same having been objected to on the ground that S. 170 did not apply, *held*, that the sum sought to be realised was a fee claimable under S. 170 and that the same could be realised as an arrear under S. 81 of the Act. (*Addison, J.*) BHIKHARI LAL *v.* MUNI-

PUNJAB MUNICIPAL ACT (1911), S. 170.

CIPAL COMMITTEE, JAGADHRI. **I.R. 1931 Lah. 790=133 I.C. 550=32 P.L.R. 707=32 Cr. L. J. 1041 (1)=1931 Cr. C. 1024=A.I.R. 1931 Lah. 753 (1).**

———**S. 170**—*No written permission under—Recovery of rent—S. 81 not applicable.*

For the application of S. 170 written permission by the Municipal Committee is necessary. And if S. 170 is inapplicable the Committee is not justified in invoking the penal provisions of S. 81. Hence where there has been payment of rent to the Committee without any written permission by the Committee, the penal provisions of S. 81 cannot be invoked. The payment of rent shows only relationship of landlord and tenant and a dispute regarding arrears of rent must be determined and adjudicated by a Civil Court. (*Tek Chand and Abdul Rashid, JJ.*) MUNICIPAL COMMITTEE, DELHI *v.* HAFIZ ABDULLAH. **152 I.C. 919=15 Lah. 884=7 R.L. 344 =36 P.L.R. 298=A.I.R. 1934 Lah. 699.**

———**S. 172**—*Action under—Permission granted in disregard of bye-law—Power of Municipal Committee to revoke permission—Estoppel.*

Where a Municipal Committee granted permission in writing to the plaintiff for a structure erected by him and also accepted a penalty from him, it cannot proceed against him under S. 172 of the Punjab Municipal Act and require demolition of the structure even though it finds that its permission was granted in contravention of its own bye-law, for that section authorises the Committee to prosecute an offender or demolish a structure only when it is erected without its permission in writing. Although the Committee had no power to grant the permission, it would be estopped from withdrawing it and requiring the plaintiff to demolish the structure. Further there is no provision in the Act enabling the Committee to revoke a permission once given. (*Bhide, J.*) FAQIR CHAND *v.* MUNICIPAL COMMITTEE, LUDHIANA. **155 I.C. 491=7 R.L. 722= 36 P.L.R. 124=A.I.R. 1934 Lah. 1021.**

———**S. 172**—*Conditional permission—Payment of rent for encroachment—Enforceability of contract.*

Where a person applied to the Municipal Committee for sanction to build so as to encroach upon a street and the Municipality having sanctioned the same on condition of his paying certain rent he agreed to the same.

Held, that the contract was not illegal and that the Municipality was entitled to recover the rent reserved. (*Jai Lal, J.*) KESHO DATT *v.* MUNICIPAL COMMITTEE, DELHI. **I.R. 1931 Lah. 664= 32 P.L.R. 607=132 I.C. 696=A.I.R. 1931 Lah. 634.**

———**S. 172**—*Encroachment on street—Prosecution—Notice—Irregularity.*

Where the building of thara (platform) is sanctioned by the Municipal Committee on the site belonging to the owner but it is built on the street, it must be deemed to have been built on the street without the written permission of the Committee within the meaning of S. 172 (1). S. 172 (2) of the Act authorises the Committee to issue a notice requiring the owner to remove the encroachment and the failure to comply with such a notice renders the owner liable to prosecution under S. 219. (*Shadi Lal, C. J.*) CHIRAGH DIN *v.* EMPEROR. **35 P.L.R. 355=7 R. L. 397=153 I.C. 198 (2)=36 Cr.L.J. 298= 1934 Cr.C. 700=A.I.R. 1934 Lah. 447.**

PUNJAB MUNICIPAL ACT (1911), S. 172.

———**S. 172**—*Immoveable encroachment—Conditional sanction by Municipal Committee—When permissible.*

Where a Municipal Committee has not framed any bye-laws regulating their power to impose conditions as to payment of rent, etc., on sanctioning an encroachment under S. 172, it is not open to the Committee to grant permission to make an immoveable encroachment on a public street subject to the condition of payment of ground rent. 11 Lah. 276, Rel. on. (*Jai Lal, J.*) SAMUNDAR DAS *v.* MUNICIPAL COMMITTEE OF SONEPET. **I R. 1931 Lah. 748=133 I.C. 124 =32 P.L.R. 211.**

———**S. 172**—*Notice by Municipality partly beyond its powers—Disobedience to—Effect of.*

Where the notice issued by the Municipality is in part within the powers conferred on the Municipality and in part beyond its powers, it must be treated as bad in its entirety. To hold otherwise would impose upon the other party the obligation of picking out from the notice the requirement which it was within the power of the Municipality to call upon him to carry out. 1 Weir 749, Foll. (*Tek Chand, J.*) GULZARI LAL *v.* MUNICIPAL COMMITTEE, LUDHIANA. **6 I. R. (Lah.) 196=146 I.C. 241=34 P.L.R. 636=A.I.R. 1933 Lah. 935.**

———**S. 172**—*Scope.*

Section 172 only applies to cases where an encroachment has recently been made by a person on a public street, etc., without the written permission of the Municipal Committee. Where it is found that no encroachment was made recently the notice under S. 172 is illegal and the question of the ownership of the land on which the said encroachment is alleged to have been made is immaterial. (*Jai Lal, J.*) MUNICIPAL COMMITTEE, JAGADHRI *v.* PARAS RAM. **131 I. C. 221=31 P.L.R. 951=A.I.R. 1931 Lah. 79 (1).**

———**S. 172 (1)**—*Complaint for offence under—Conviction under S. 219—Legality.*

Where the complaint was for an offence under S. 172 (1) of the Municipal Act it is not open to a Magistrate to convict the accused under S. 219 of that Act. (*Tek Chand, J.*) GOBIND RAM *v.* EMPEROR. **31 P.L.R. 967=1931 Cr. C. 162 (1)=A.I.R. 1931 Lah. 98 (1).**

———**S. 172 (1)**—*Sanction—Form of—Power to add conditions to sanction or to cancel it.*

The plaintiffs applied to the Municipal Committee to built two *tharras* in front of their shops and the following resolution was passed by them "sanctioned as recommended by the Building Sub-Committee. The necessary agreement deed be obtained before issuing the permit." No permit was issued to the plaintiffs, but they were given by the office a copy of the plan which they had filed bearing the seal of the Municipal Committee with the word "granted". A resolution was subsequently passed by the Municipal Com-

PUNJAB MUNICIPAL ACT (1911), S. 173.

mittee cancelling the former resolution but in the meantime the plaintiffs had built the *tharras*. Thereupon the Committee issued a notice to the plaintiffs under S. 172 (2) requiring their removal. The plaintiffs brought a suit for an injunction against the Municipal Committee.

Held, that no particular form is prescribed in which the permission is to be granted and that the plan with the word "granted" written on it together with the seal of the Municipal Committee must be considered as permission in writing.

Held also, that the Municipal Committee having sanctioned the building of the *tharra* had no power to add any conditions to the sanction and that a sanction once granted could not be revoked. (*Agha Haidar, J.*) KANSHI RAM *v.* MUNICIPAL COMMITTEE, MOGA. **36 P.L.R. 277 =155 I.C. 893=7 R.L. 797=A.I.R. 1934 Lah. 1011.**

———**S. 173** — *Applicability — Encroachment continued after expiry of permission.*

S. 173 applies only to cases of recent encroachments made without sanction of the Municipal Committee. Where an encroachment was made some years ago and with the permission of the Municipal Committee, it cannot be said with any justification that, because either the sanction has expired, or rather the tenancy or license has expired, or because having made the encroachment a person has failed to comply with the conditions which had to be performed on his part, he placed the encroachment without the sanction of the Committee; and S. 173 cannot be applied to such a case. (*Jai Lal, J.*) UTTAM SINGH *v.* MUNICIPAL COMMITTEE, RAWALPINDI. **35 P.L.R. 601= 155 I.C. 384=7 R.L. 703=36 Cr.L.J. 710= 1934 Cr.C. 1034=A.I.R. 1934 Lah. 733 (2).**

———**S. 173**—*Powers of Municipal Committee —Lease of public street—Portion of public street for private purposes.*

The Municipal Committee cannot use a public street otherwise than as a public street and it has no right to interfere with the enjoyment of the right of way by the public by letting out a portion of it to a particular individual for a private purpose. (*Rangi Lal, J.*) MUNICIPAL COMMITTEE, MULTAN *v.* ABDUL GHAFUR. **155 I. C. 951=7 R.L. 801=A.I.R. 1934 Lah. 900.**

———**S. 188**—*Bye-laws under—Failure to frame—Construction of* tonga *stand—If* ultra vires*—Jurisdiction of Civil Court.*

In matters which require a bye-law to be framed under the Punjab Municipal Act, the Municipal Committee cannot act with so framing the necessary bye-laws. Before constructing a *tonga* stand, the Committee must frame bye-laws under S. 188 (*p*) of the Act; and if they are not framed the construction of the stand is *ultra vires*. A suit in a Civil Court in respect of such an act is therefore competent. (*Young, C. J. and Din Mahomed, J.*) MUNICIPAL COMMITTEE, DELHI *v.* MAHOMED IBRAHIM. **16 Lah. 517= =37 P.L.R. 753=7 R.L. 335=152 I.C. 850 =A.I.R. 1935 Lah. 196.**

———**S. 188 (g)**—*Exclusion of area from* octroi *limits—Powers of Municipal Committee.*

PUNJAB MUNICIPAL ACT (1911), S. 193.

The fixing of municipal limits for the collection of an *octroi* tax is entirely a matter of discretion with the Municipal Committee. It is therefore competent for the Committee to agree to exclude a certain area from the *octroi* limits on sale of sites in that area. (*Dalip Singh and Bhide, JJ.*) MUNICIPAL COMMITTEE, SONEPAT *v.* DHARAM CHAND. **37 P.L.R. 289=162 I.C. 59 =8 R.L. 842=A.I.R. 1935 Lah. 632.**

———**S. 188 (q)**—*Bye-law* (4) *providing no penalty for its breach—Conviction for its breach —Legality.*

As bye-law (4) framed under S. 188 (*q*) prohibiting the keeping of sulphur matches for purposes of trade in excess of 40 doz. boxes, provides no penalty for its breach, a person committing breach of the bye-law cannot be convicted and fined; Ss. 121 and 219 do not apply to such a case. (*Addison, J.*) JODHA MAL *v.* MUNICIPAL COMMITTEE, PIND DADAN KHAN. **1935 Cr. C. 1304=A.I.R. 1935 Lah. 943.**

———**S. 193**—*Refusal of sanction to build—Reasons—Power of Court to interfere.*

A Court is not ordinarily entitled to decide the question of sufficiency or otherwise of the reasons given by the Committee to refuse sanction to build but it is entitled to see whether the reasons for which sanction has been refused are not *ultra vires* or are not arbitrary or capricious. If a Committee acts *ultra vires* or arbitrarily or capriciously in refusing sanction a Civil Court is competent to give relief to the persons aggrieved against its action.

Semble: Though the Committee is not bound to record any reasons in the resolution refusing sanction it would be well-advised to communicate the reasons to the applicants. (*Jai Lal, J.*) MUNICIPAL COMMITTEE, DELHI *v.* TIRKHA RAM. **I.R. 1931 Lah. 789=133 I.C. 549=A.I.R. 1932 Lah. 59.**

———**S. 193**—*Sanction under—Committee, if debarred from asserting its private rights.*

Appellant applied to the Committee for sanction to open a number of doors in the wall bounding this property. The Municipal Committee omitted to pass any orders with the result that after the lapse of two months, sanction was deemed to have been given under S. 193. Accordingly after two months appellant opened certain doors. The Committee then issued notice to him under S. 195 to demolish them but he appealed to the Deputy Commissioner who accepted his appeal on the ground that under S. 193 the Committee was deemed to have sanctioned the doors. A short time afterwards the Committee erected a wall close to and in front of the doors which effectually masked them.

Held, that the sanction of the Committee under S. 193 was only necessary on sanitary and general public grounds and a sanction so given did not prevent the Municipal Committee from taking any steps which it thought fit, in order to assert its rights to its own private property and that as the wall in which the doors were built and the land on which the doors were open were both the property of the Committee, the Committee was not prevented from so doing by the implied sanction. (*Skemp and Jai Lal, JJ.*)

PUNJAB MUNICIPAL ACT (1911), S. 193.

BEHARI LAL *v.* MUNICIPAL COMMITTEE, MOGA. **A.I.R. 1935 Lah. 131.**

———S. 193—*Word 'absolutely'—Effect.*

The word 'absolutely' in S. 193 is used as alternative to 'subject to such modification'. It does not imply that the Municipal Committee has the unrestricted power to refuse to sanction a building or that it is not bound to disclose its reasons for such refusal. The word does not qualify 'refuses to sanction' but governs the power of the Committee to sanction the building. (*Jai Lal, J.*) MUNICIPAL COMMITTEE DELHI *v.* TIRKA RAM. **I.R. 1931 Lah. 789=133 I.C. 549=A.I.R. 1932 Lah. 59.**

———S. 195—*Validity of notice—Re-erection of wall on old foundations.*

The Civil Court has jurisdiction to decide whether the notice issued under S. 195 is valid. Where there is a mere re-erection of a building on the foundations of an old wall a notice under S. 195 is not competent. (*Tek Chand, J.*) JIWAN DAS *v.* MUNICIPAL COMMITTEE, PINDI GHEB. **I.R. 1932 Lah. 535=138 I.C. 743=33 P.L.R. 782=A.I.R. 1932 Lah. 597.**

———S. 219—*Complaint for offence under S. 172 (1)—Conviction under S. 219—Legality.*

Where the complaint was for an offence under S. 172 (1) of the Municipal Act it is not open to a Magistrate to convict the accused under S. 219 of that Act. (*Tek Chand, J.*) GOBIND RAM *v.* EMPEROR. **31 P.L.R. 967=1931 Cr.C. 162 (1)=A.I.R. 1931 Lah. 98 (1).**

———S. 219—*Offence under—Sentence—Daily fine—Legality.*

An order imposing a daily fine from the date of conviction is illegal. The proper course is to institute further prosecution and allow the accused an opportunity of defending himself before the further fine is imposed. But while the infliction of fine after the date of the conviction cannot be allowed, the words "continuing breach" in S. 219 empower the Magistrate to impose a daily fine to the date of the compliance or to the date of conviction whichever may first occur. (*Shadi Lal, C. J.*) CHIRAGH DIN *v.* EMPEROR. **35 P.L.R. 355=153 I.C. 198 (2)=7 R.L. 397=36 Cr.L.J. 298=1934 Cr.C. 700=A.I.R. 1934 Lah. 447.**

———S. 219—*Thara sanctioned on owner's land—Thara built on street—Issue of notice—Irregularity.*

Where the building of thara (platform) is sanctioned by the Municipal Committee on the site belonging to the owner but it built on the street, it must be deemed to have been built on the street without the written permission of the Committee within the meaning of S. 172 (1). S. 172 (2) of the Act authorises the Committee to issue a notice requiring the owner to remove the encroachment and the failure to comply with such a notice renders the owner liable to prosecution under S. 219. (*Shadi Lal, C. J.*) CHIRAGH DIN *v.* EMPEROR. **35 P.L.R. 355=153 I.C. 198 (2)=7 R.L. 397=36 Cr.L.J. 298=1934 Cr.C. 700=A.I.R. 1934 Lah. 447.**

———S. 221—Bona fide *dispute of ownership—Obstruction offered to contractor—No offence.*

Where there was a *bona fide* dispute between the Municipal Committee and the accused as regards the ownership of a certain site and it was doubtful whether the Municipal Committee could direct its contractor to pave the disputed land and thus constitute him a person legally authorized under S. 221, and on the contractor proceeding to pave the site the accused told him that it was their property and should not be paved:

Held, that the accused were not guilty of offence under S. 221. (*Mir Ahmad, A.J.C.*) WAJID ALI SHAH *v.* EMPEROR. **1935 Cr.C. 158 =A.I.R. 1935 Pesh. 16.**

PUNJAB MUNICIPAL ACT (1911), S. 228.

———Ss. 221 and 228—*Complaint by Sanitary Inspector—Authority.*

In the case of a Sanitary Inspector the authority to file a complaint should be in writing and by name and not office. Where this procedure is not followed there is no proper complaint and the conviction and sentence based on an invalid complaint cannot be maintained. 8 P.R. 1916 Cr. and A.I.R. 1924 Lah. 80, Rel. on. (*Jai Lal, J.*) SHARFU PHULLA *v.* EMPEROR. **6 I.R. (Lah.) 139 (1)=145 I.C. 741=34 Cr.L.J. 128 (1)=1933 Cr.C. 878=A.I.R. 1933 Lah. 597 (1).**

———S. 225—*Notice under S. 195—Validity questioned—Jurisdiction of Civil Court.*

Section 225 does not bar the jurisdiction of the Civil Courts to question a notice issued under S. 195. (*Tek Chand, J.*) JIWAN DAS *v.* MUNICIPAL COMMITTEE, PINDI GHEB. **I.R. 1932 Lah. 535=138 I.C. 743=33 P.L.R. 782=A.I.R. 1932 Lah. 597.**

———S. 228—*Conviction under—Continuing fine—Legality.*

A continuing fine on a conviction under S. 228 of the Punjab Municipal Act is illegal. (*Dalip Singh, J.*) SHIV DAS MAL GURANDITTA MAL *v.* EMPEROR. **7 R.L. 13=150 I.C. 693=36 P.L.R. 180=1934 Cr.C. 1356=A.I.R. 1934 Lah. 972.**

———S. 228—*Suit by Secretary of Municipal Committee—Absence of reference to corporation—Maintainability of suit.*

There is nothing in the Punjab Municipal Act which empowers a Municipal Committee to delegate the right to decide whether a suit shall or shall not be brought by a particular person. A suit for rent brought by the Secretary of the Notified Area Committee against persons using *tharas* on land belonging to the Committee cannot be maintained without reference to the corporation. The fact that the action of the Secretary has been ratified by resolutions of the Committee does not matter. (*Dalip Singh, J.*) SECRETARY, NOTIFIED AREA COMMITTEE, OKARA *v.* KIDAR NATH. **I.R. 1932 Lah. 325=137 I.C. 253=33 P.L.R. 956 =A.I.R. 1932 Lah. 388.**

———S. 228—*Mandatory character—Complaint by unauthorised person—Conviction—Legality.*

Under S. 228 of the Punjab Municipal Act, a complaint by an unauthorised person is not valid, and a conviction obtained on such a complaint is not sustainable, as it is opposed to the mandatory provisions of the Act. Nor can the defect be cured by S. 537 of the Cr. P. Code. (*Dalip Singh, J.*) SHIV DAS MAL GURANDITTA MAL *v.* EMPEROR. **7 R.L. 13=150 I.C. 693=36 P.L.R. 180=1934 Cr.C. 1356=A.I.R. 1934 Lah. 972.**

PUNJAB MUNICIPAL ACT (1911), S. 242.

———**Ss. 242 (1), 61 (1) (b)**—*Teacher in school under District Board—Power of Small Town Committee to impose house-tax.*

A teacher in a school under the District Board holds an office under a "local authority". The Small Town Committee is therefore justified in imposing the "house-tax" upon him. His case comes under sub-cl. (1), S. 61 and the taxes imposed under this sub-section require only the sanction of the Local Government. Sub-S. (3), S. 61, which refers to the Governor-General-in-Council refers to a tax which is not covered by sub-S. (1) or sub-S. (2). The demand made by the Small Town Committee from such teachers is justified under the provisions of S. 242 (1) read with S. 61 (1) (*b*) with the "explanation" and the Government Notification No. 397, dated 27th June, 1916. (*Agha Haidar, J.*) SMALL TOWN COMMITTEE, PADHANA *v.* GIAN CHAND. **153 I.C. 750=7 R.L. 453=A.I.R. 1934 Lah. 980.**

———**Sch. I, Arts. 71 and 75**—*Tin spangles—Assessment.*

The spangles which are imported should not be excluded from Art. 75 and included in Art. 71 merely on the ground that they are made of tin. (*Hilton, J.*) MUNICIPAL COMMITTEE OF AMRITSAR *v.* HUKAM CHAND KANSHI RAM. **15 Lah. 663=149 I.C. 775=6 R.L. 751=35 P. L.R. 165=A.I.R. 1934 Lah. 200.**

PUNJAB ORDINANCE (III OF 1930) (LAHORE CONSPIRACY CASE)—*Special tribunal—Conviction—Sentence of death—Execution—Stay by Local Government—Effect.*

The tribunal appointed under the ordinance, sentenced to death certain persons and issued a warrant authorizing the Superintendent of Jail to execute the sentence by a certain date. But in the meanwhile the Local Government suspended the execution of the sentence pending application to Privy Council for leave to appeal. An application was made for the issue of the writ of *habeas corpus,* the contention of the petitioners being that the custody of the persons was illegal as the date for execution of sentence had expired, and as the tribunal had ceased to exist, there was no authority which could issue a fresh warrant for the execution of the death sentences.

Held, that even if the Local Government found that there was any legal difficulty in carrying out the sentence, it would be still open to it under S. 402, Cr. P. Code, to commute the sentence into one of transportation or imprisonment and consequently the custody in which the persons were kept could not be considered to be illegal or improper. (*Bhide, J.*) CHINT RAM THAPUR *v.* EMPEROR. **1931 Cr.C. 631=135 I.C. 189=I.R. 1932 Lah. 61=33 Cr.L.J. 126=33 P.L.R. 1024=A.I.R. 1931 Lah. 359.**

PUNJAB PRE-EMPTION ACT (I OF 1913)—*Scope of—Vendee having equal right of pre-emption—Association of a stranger with him in the purchase—Effect of.*

The policy of the Pre-emption Act is to keep out strangers and thus maintain the exclusiveness of the estate. If a vendee therefore having an equal right of pre-emption associates with himself in a joint purchase a stranger or a person having no right to first refusal under the Act, he loses his right of resistance and cannot be allowed to retain even his own share of the purchase. A.I.R. 1934 Lah. 878, Rel. on. (*Addison and Din Mahomed, JJ.*) HAYAT BAKHSH *v.* MANSABDAR KHAN. **16 Lah. 921=160 I.C. 826=8 R.L. 616=37 P.L.R. 873=A.I.R. 1935 Lah. 529.**

PUNJAB PRE-EMPTION ACT (1913), S. 5.

———**Ss. 2 and 22**—*Money deposited by pre-emptor—Attachability.*

The amount deposited under S. 22 of the Pre-emption Act by a pre-emptor cannot be attached in execution of a decree against him after the pre-emption suit has been dismissed. (*Rangi Lal, J.*) SOLAKHAN SINGH *v.* SUNDAR SINGH. **36 P.L.R. 250=153 I.C. 126 (1)=7 R.L. 380=16 Lah. 390=A.I.R. 1934 Lah. 850.**

———**S. 3 (5)**—*Sale by Official Receiver—Right to pre-emption.*

The sale of the property of an insolvent by the Official Receiver is not a sale in execution of an order of the Court within the meaning of S. 3 (5) of the Act and is, therefore, subject to the right of pre-emption. 16 Lah. 173 (F.B.), Foll. (*Tek Chand and Currie, JJ.*) SAT NARAIN *v.* PHEROZE BEHRAMJI. **158 I.C. 658=8 R.L. 284=38 P.L.R. 755=A.I.R. 1936 Lah. 35.**

———**S. 3 (5) (a)**—*"Sale in execution of order of Court"—Sale of insolvent's property by Receiver.*

The sale of the property of an insolvent by the Receiver is not a sale in execution of an order of the Court within the meanng of S. 3, sub-S. (5) (*a*), and is therefore subject to the right of pre-emption. (*Young, C.J., Bhide and Din Mohammad, JJ.*) GURBAKHSH SINGH *v.* SARDAR SINGH. **16 Lah. 173=7 R.L. 766=37 P.L.R. 402=155 I.C. 693=A.I.R. 1935 Lah. 268 (F.B.).**

———**S. 4**—*Collusive sale—Pre-emptor's right if prejudiced.*

No doubt a vendee may defeat pre-emtor's right by any legitimate means; but where the vendor and the vendee collude to disguise a transaction in order to deceive the pre-emptor in that the vendor first sells his kotha only and a week later his whole house to the vendee, the apparent two transactions amounting merely to give the vendee a superior right of pre-emption as against the pre-emptor, the two transactions are to be treated as part of one and the same transaction and as such subject to pre-emptor's right of pre-emption as though the property was sold by one sale-deed. 100 P.R. 1895 (F.B.), Ref. (*Bhide and Tapp, JJ.*) LABH SINGH *v.* TAJ DIN. **12 Lah. 578 =135 I.C. 36=I.R. 1932 Lah. 20=32 P.L. R. 801=A.I.R. 1931 Lah. 436.**

———**S. 4**—*Right to pre-emption.*

By S. 4, the right of pre-emption has been defined to mean the right of a person to acquire agricultural land in preference to other persons and this would naturally imply that this right should be in existence when the actual acquisition is to be made. (*Addison and Din Mohammad, JJ.*) HAYAT BAKHSH *v.* MANSABDAR KHAN. **16 Lah. 921=160 I.C. 826=8 R.L. 616=37 P.L.R. 873=A.I.R. 1935 Lah. 529.**

———**S. 5**—*"Shop"—What is.*

PUNJAB PRE-EMPTION ACT (1913), S. 11.

The question whether a particular building is to be considered as a house or as a shop for the purposes of pre-emption, is a question of fact to be decided upon the peculiar circumstances of every case as it arises. Where the building in dispute is situated in a lane which opens into a bazaar but no such business is being carried on in these premises as could convert it into a shop, and its upper storey is admittedly used for residential purposes and it has always been described as a dwelling-house, the building is not a shop but a house subject to the right of pre-emption. (*Addison and Din Mohammad, JJ.*) JAS RAJ JUNIWAL *v.* GOKAL CHAND JAINI. **160 I.C. 349=8 R.L. 530=37 P.L.R. 630=A.I.R. 1935 Lah. 808.**

———**S. 11**—*Attachment of deposit.*

According to S. 11, money deposited by the pre-emptor is not liable to be attached at all. (*Bhide, J.*) NATHA SINGH *v.* FATEH KHAN. **6 I.R. (Lah.) 1=144 I.C. 695=A.I.R. 1933 Lah. 791.**

———**S. 15**—*Priority—Purchase by person with superior right along with stranger—Suit by person with inferior right—Purchaser by the former of stranger's rights before suit—Effect of.*

A person with a superior right cannot resist the claim of a person with an inferior right to pre-empt if he associates a stranger in the purchase by him, and even if prior to the suit by the person with the inferior right he purchased the rights of the stranger. (*Jai Lal, J.*) MANGA *v.* IMAM DIN. **I.R. 1933 Lah. 71 (2)=141 I.C. 187=34 P.L.R. 125=A.I.R. 1933 Lah. 117.**

———**S. 15**—*Town or village—Test.*

A very important test as to whether a place is a town or a village is the presence or absence of a substantial bazaar and the avocations of the majority of the inhabitants. Though there are many features which may be relied upon as distinguishing a town from a village, there can be little doubt that a group of residences of a compact agricultural community form a village, whilst a large group of houses inhabited largely by a heterogeneous population dependent upon trade, rather than agriculture, and in which relationships are contractual rather than customary, will, if of sufficient size, form a town.

Held, on evidence that Thal was a town. Hence there can be no right of pre-emption in respect of sale of land situated within that town. (*Middleton, J.C.*) WALI SHAH *v.* GULAB KHAN. **157 I.C. 769=8 R.Pesh. 38=A.I.R. 1935 Pesh. 114.**

———**S. 15 (a)**—*Reasonable chance of succession—Heir to vendor—Necessary.*

The Pre-emption Act contemplates a reasonable chance of succession as an heir, and not one based on traditional membership of the same tribe. Where the plaintiff may be one of the proprietary body of the village and may perhaps under some customary rule succeed the vendor in the case of failure of all his heirs, he cannot be considered to be an heir. (*Fraser, J.C. and Saad-ud-Din Khan, A.J.C.*) MIAN ASTAB GUL *v.* FAIZULLAH KHAN. **A.I.R. 1935 Pesh. 80 (1).**

PUNJAB PRE-EMPTION ACT (1913), S. 16.

———**S. 15 (b) thirdly**—*Sister's son of last male holder—Right of.*

Where immoveable property is acquired by a female through her husband, son, brother or father, the right of pre-emption of sister's son of last male-holder has to be determined by the fact of his being heir of last male-holder and not to the female vendor for he, as a distant kindred, is a recognized heir according to Mahomedan law and his chances of succession are within a measureable distance. Therefore, the sister's son cannot claim only a partial pre-emption basing his claim on his right of ownership of estate. (*Almond, J.C. and Saaduddin, A.J.C.*) MALIK PASANDO *v.* MT. ZOHRA. **151 I.C. 581=7 R.Pesh. 26=A.I.R. 1934 Pesh. 72.**

———**S. 15 (c)**—*"Owner of the estate"—Meaning of—Owner of agricultural land—Land subsequently built upon but owner still liable to land revenue—Right of pre-emption.*

If a person owns property which is assessed to land revenue and for which as an owner he is responsible to pay the amount assessed, he must be held to be "the owner of the estate". The defendant was the owner of a *serai* in the village, the land under the *serai* being formerly agricultural and assessed to land revenue. The plots were subsequently built upon and though a separate record was kept for the plots, the owners of the buildings were still liable to pay land revenue.

Held, that the defendant was still "the owner of an estate" within the meaning of the third clause to S. 15. (*Fraser, J.C. and Saaduddin, A.J.C.*) FAQIR MAHOMED *v.* KALA KHAN. **141 I.C. 643=A.I.R. 1933 Pesh. 33.**

———**S. 15 (c)**—*"Owner of an estate"—Who is—Extent and situation of area owned, if material.*

In deciding whether a person is an owner of an estate within the meaning of S. 15 (*c*) *'thirdly'*, the determinating factor is whether the area in question is or is not assessed to land-revenue. Its extent, situation and the purpose for which it was bought or to which it may be devoted are absolutely immaterial. 1920 Lah. 94 and 109 P.L.R. 1908, Dist.; 45 I.C. 887, Rel. on. (*Tapp, J.*) CHANAN DIN *v.* CHANAN DIN. **I.R. 1933 Lah. 109=141 I.C. 363=34 P.L.R. 227=A.I.R. 1933 Lah. 213.**

———**S. 15, Expl.**—*Construction.*

The explanation to S. 15 according to its grammatical sense definitely provides for both cases, *viz.*, where a female has succeeded to property as a life tenant and where she has acquired property in full proprietary rights. (*Almond, J. C. and Saaduddin, A. J. C.*) MALIK PASANDO *v.* MT. ZOHRA. **151 I.C. 581=7 R. Pesh. 26=A.I.R. 1934 Pesh. 72.**

———**S. 15, Expl.**—*Female holding as full owner—Alienation by—Right of husband's collaterals to pre-empt.*

If a female holding as full owner sells property the collaterals of her husband cannot claim pre-emption. (*Jai Lal, J.*) GHAFUR *v.* SHAHABUDDIN. **I.R. 1932 Lah. 523=138 I.C. 680=33 P.L.R. 416 (2)=A.I.R. 1932 Lah. 397.**

———**S. 16**—*Co-sharer—Right to pre-empt—Right lost before decree—Effect.*

PUNJAB PRE-EMPTION ACT (1913), S. 16.

The law of pre-emption is highly technical and a plaintiff co-sharer, before he can succeed, must show that his right existed not merely at the date of sale, before he went to Court, but also while the case was being actively prosecuted before the Court and in fact right up to the time when the Court passes the decree. Where, therefore, the plaintiff ceased to be a co-sharer in the land in respect of which he had brought pre-emption suits by reason of a parallel litigation, his suits must fail. 45 All. 709, Foll. (*Addison and Agha Haidar, JJ.*) HET RAM *v.* DAL CHAND. **14 Lah. 421=I.R. 1933 Lah. 139 (2)=141 I.C. 535=34 P.L.R. 101=A.I.R. 1933 Lah. 481 (2).**

———**S. 16 (5)**—*Collusive sale—Pre-emptor's right if prejudiced.*

No doubt a vendee may defeat pre-emptor's right by any legitimate means; but where the vendor and the vendee collude to disguise a transaction in order to deceive the pre-emptor in that the vendor first sells his kotha only and a week later his whole house to the vendee, the apparent two transactions amounting merely to give the vendee a superior right of pre-emption as against the pre-emptor, the two transactions are to be treated as part of one and the same transaction and as such subject to pre-emptor's right of pre-emption as though the property was sold by one sale-deed. 100 P.R. 1895 (F.B.), Ref. (*Bhide and Tapp, JJ.*) LABH SINGH *v.* TAJ DIN. **12 Lah. 578=135 I.C. 36=I.R. 1932 Lah. 20=32 P.L.R. 801=A.I.R. 1931 Lah. 436.**

———**S. 22**—Suit for pre-emption—Dismissal—Order for additional Court-fee—Failure to pay—Order directing deduction from amount deposited—Legality. *See* COURT-FEES ACT, S. 10. **152 I.C. 799=A.I.R. 1935 Lah. 75.**

———**S. 22 (5) (a)**—*Pre-emptor withdrawing his deposit after dismissal of his suit—Right to prosecute appeal.*

There is no legal objection to a plaintiff withdrawing his deposit even without the leave of the appellate Court and yet prosecuting his appeal. It would not be fair that he should be so debarred, for in some provinces several years may elapse before an appeal is decided and the unsuccessful pre-emptor therefore loses interest on his money for all the years during which the money is held in Court. Nor, if he succeeds on appeal, has he any legal claim to recover damages from any of the parties. On the other hand, it is open to the appellate Court, if objection to the withdrawal is taken by the vendee to refuse to continue the hearing of the appeal until the pre-emption money has been re-deposited. (*Fraser, J. C. and Saaduddin, A. J. C.*) MT. BIBI AISHA *v.* SHADI KHAN. **A.I.R. 1935 Pesh. 143.**

———**S. 25, Proviso**—*Applicability—Market value—Mode of determination.*

One of the points to be considered in determining the market value is the price actually paid. Where the price mentioned in the sale-deed is shown to be fully paid and fixed in good faith it is unnecessary to decide the market value. But where the payment is by redemption of debts as opposed to cash the proviso to S. 25 will govern the case. (*Harrison and Tek Chand, JJ.*) HARI CHAND *v.* ATTAR SINGH. **I.R. 1931 Lah. 511=131 I.C. 751=A.I.R. 1931 Lah. 490.**

PUNJAB REDEMPTION OF MORTGAGES ACT (1913), S. 12.

———**S. 27**—*Mention of price in sale-deed not with good faith—Mode of assessing value.*

Where the trial Court finds that the price mentioned in the sale-deed was neither fixed in good faith nor paid, the pre-emptor is entitled to pre-empt on payment of the market price of the property at the date of the sale. (*Bhide and Tapp, JJ.*) LABH SINGH *v.* TAJ DIN. **12 Lah. 578=32 P.L.R. 801=135 I.C. 36=I.R. 1932 Lah. 20=A.I.R. 1931 Lah. 436.**

PUNJAB PURE FOOD ACT (VIII OF 1929), S. 19—*Complaint not authorised by Director of Public Health—Conviction—Legality.*

It is necessary that the Inspector should be authorized by the Director of Public Health for laying complaints under Pure Food Act and a conviction on a complaint without such authorisation cannot stand. (*Mir Ahmad, A. J. C.*) DHANA RAM GANGA RAM *v.* MUNICIPAL COMMITTEE, D. I. KHAN. **154 I.C. 873 (1)=7 R. Pesh. 83=36 Cr.L.J. 624 (1)=1935 Cr. C. 172=A.I.R. 1935 Pesh. 24.**

PUNJAB REDEMPTION OF MORTGAGES ACT (XI OF 1913), S. 12—*Applicability—Right to mortgage—Order of Collector—Suit to avoid.*

A suit under S. 12, Redemption of Mortgages Act, XI of 1913, instituted by a person aggrieved by an order passed by the Collector under Ss. 6 to 10 or 11 of the Act to establish his right in respect of the mortgage is governed by Art. 14, Limitation Act; it makes no difference that the suit is one for a mere declaration and no relief to set aside the order of the Collector has been expressly asked in the plaint. 4 Lah. 346, Overr. and 1925 Lah. 385, Appr. (*Tek Chand, Jai Lal and Monroe, JJ.*) GANGU *v.* MAHANRAJ CHAND. **15 Lah. 389=149 I.C. 661=6 R.L. 723=36 P.L.R. 337=A.I.R. 1934 Lah. 384 (F.B.).**

———**S. 12**—*Co-mortgagor redeeming mortgage—If a mortgagee.*

It is doubtful whether a co-mortgagor who redeems the whole of the mortgaged land can under any circumstances be deemed to be a mortgagee of the land so as to attract the operation of the Redemption of Mortgages Act, his legal position being merely that of a charge-holder. (*Addison and Din Mohammad, JJ.*) MAHOMED ALI *v.* GHULAM NABI. **37 P.L.R. 103=159 I. C. 633=A.I.R. 1936 Lah. 290.**

———**S. 12**—*Death of one of the defendants—L. Rs. not brought on record—Rights of plaintiffs not capable of being declared in their absence—Abatement.*

The rule of total abatement is a highly technical rule and should not be applied unless strictly necessary. On the death of *B* who had mortgaged a certain land to the plaintiffs, the land descended in three shares, one of which was mutated in favour of each branch of defendants. There was no partition among the defendants and they obtained on an application for redemption to the Assistant Collector an *ex parte* decree for possession on payment of Rs. 695. The plaintiffs brought a suit for declaration that the land could be redeemed only on payment of

PUNJAB REDEMPTION OF MORTGAGES ACT (1913), S. 12.

Rs. 1,895. One of the defendants died after the institution of the above suit and his representatives were not brought on record within time and there was no application for extension of time.

Held, that as no declaration can be made defining the rights of the plaintiffs against the surviving defendants without reference to the share of the deceased defendant, the Court had to reluctantly apply the rule of total abatement and the suit had abated in toto.

Held also, that as a result of one of the defendant's death the Collector's order had become final in respect of the share which belonged to him. (*Broadway, C. J. and Monroe, J.*) PALA MAL NARAIN DAS *v.* MAHOMED ALI. **I.R. 1933 Lah. 344=143 I.C. 364=34 P.L.R. 1046= A.I.R. 1933 Lah. 129.**

———**S. 12**—*Suit under—Defendants claiming derivative title from mortgagor—Proof of their title—Right of mortgagee to insist upon.*

In litigation arising out of proceedings under Punjab Act, II of 1913—as in a suit for redemption—a mortgagee can put the party, who seeks to redeem the mortgage, to proof of his title, unless of course such person is the original mortgagor whose title the mortgagee cannot deny on the principle that a grantee cannot deny the grantor's title. So where the defendants are not the original mortgagors but only claim a derivative title from the mortgagor, they must be put to proof of their title before being allowed to redeem the mortgage. (*Tek Chand, J.*) FAKIR KHAN *v.* ISMAIL KHAN. **14 Lah. 218=I.R. 1933 Lah. 101=141 I.C. 264=34 P.L.R. 149=A.I.R. 1933 Lah. 179.**

———**S. 12**—*Suit under—Nature and scope of—Applicability of O. 34, C. P. Code—Co-mortgagees with divisible interest—Death of one—Suit does not abate* in toto.

A suit under S. 12 is really one to get rid of the order passed by the Collector allowing, or refusing to allow redemption. It is a suit to establish the erroneous nature of the order. It is not in form or in substance a suit for redemption. The provisions of O. 34, C. P. Code, relating to the impleading of parties to a suit for redemption do not apply to it. Where, therefore, the revenue entries show that the five plaintiffs are co-mortgagees, each holding a well-defined and divisible share, each of them is "aggrieved" by the order of the Collector and under S. 12 possesses an individual right to establish the erroneous nature of the order. So on the death of one of the plaintiffs and the failure to bring on record his legal representatives in time, the suit does not abate *in toto* but only *qua* the share of the deceased plaintiff. (*Tek Chand, J.*) FAKIR KHAN *v.* ISMAIL KHAN. **14 Lah. 218= I.R. 1933 Lah. 101=141 I.C. 264=34 P.L. R. 149=A.I.R. 1933 Lah. 179.**

PUNJAB REVENUE SERVICE RULES—*District offices—Seniority—If governs appointment—Selection grade—Rs. 75—5—125 grade, if.*

The grade of Rs. 75—5—125, in district offices is not selection grade filled without reference to the duties of the incumbents, but is a selection by appointment definitely appropriated to certain posts in all districts except Simla. A government servant can only receive the pay of this grade by virtue of his filling a definite post, and hence seniority has little or no significance. (*Irving, F. C.*) SRI KRISHNA *v.* KHALIL-UR-RAHMAN. **13 Lah.L.T. 55.**

PUNJAB SERVICE FUNDAMENTAL RULES—*Senior clerk—Appointment—Interference by superior officer.*

No one may be appointed to the post of senior clerk unless there is good reason to hold that he will ultimately be fit for a post in a higher grade. Where however the selection is made from persons not eligible he has a right of appeal. And when rules are so violated the superior officer has the power to set matters right. (*Irving, F. C.*) BHANJAN RAM *v.* EMPEROR. **13 Lah. L.T. 5.**

———**R. 54**—*Charge of corruption—Acquittal—Right to pay.*

R. 54 (*a*) is meant to cover the case of a Government servant who is suspended prior to enquiry and is honourably acquitted and such suspension should be taken to be a provisional penalty based on a *prima facie* ground for believing in the accused person's guilty. The extent to which the penalty of suspension remains unaltered must be the subject of appeal.

Held, that an order granting half pay to a person, who was charged of corruption but eventually acquitted, is open to appeal. (*Irving, F. C.*) ASA SINGH *v.* EMPEROR. **13 Lah.L.T. 7.**

PUNJAB SERVICES PUNISHMENT AND APPEAL RULES, R. 3—*Reduction—Reversion of officiating member to substantive post—Appeal.*

A Government servant officiating in an appointment is on probation in that appointment and his reversion to his substantive post does not amount to reduction for the purpose of that rule. So no appeal lies from an order reverting an officiating member of the subordinate services to his substantive post. Also no appeal lies from an order removing the name of a candidate from a list of candidates. (*Irving, F. C.*) MUSHTAQ RAI *v.* EMPEROR. **11 Lah.L.T. 140.**

PUNJAB SETTLEMENT RULES—*Lower Chenab Colony—Acquisition of proprietary rights—Exclusion of widows.*

The policy of the Government withholding proprietary rights from a widows with a life-interest only is still effective in the Lower Chenab colony. (*Dobson, F. C.*) AMAR SINGH *v.* KARAM SINGH. **14 Lah.L.T. 19.**

PUNJAB SIKH GURDWARAS ACT (VIII OF 1925)—*Applicability to Udasis.*

Udasis are not Sikhs for the purposes of the Act and the dera of Bhai Prithi Sahib at Manak is not a Sikh Gurdwara within the meaning of the Act. (*Broadway and Johnstone, JJ.*) RAM PARSHAD *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **32 P.L.R. 910=135 I. C. 657=I.R. 1932 Lah. 113=12 Lah. 497= A.I.R. 1931 Lah. 161.**

———*Notification of Gurdwara—Another institution at same place—Original grant of land for its upkeep—Ownership of property.*

A Sikh Gurdwara was notified at a place where there was another institution founded by the petitioner's great grandfather. It was claimed on

the petitioner's behalf that the room in which the Granth Sahib was kept alone formed the Gurdwara and that the rest of the buildings and the property belonged to the institution, or were the property of his predecessors-in-office and himself.

Held, that there was nothing in the evidence to show that there had at any time been both a Gurdwara and another institution within the same boundary walls, all the buildings having been used together and treated throughout the existence of the institution as a single entity, and that it was absurd to suggest that the noified Sikh Gurdwara consisted of one room where the Granth Sahib was kept, and that the remaining buildings were the private property of the line of mahants or belonged to a separate institution.

Held also, that the documents on the record showed that the original grant of land was made for the upkeep of the institution and the produce had been applied for that purpose, and therefore the institution was the owner of this property and that the office-holders never before claimed it as their property and they administered in their capacity as office holders (*Addison and Monroe, JJ.*) PREM DAS *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE **6 R.L. 662=149 I.C. 267=A.I.R. 1934 Lah. 602.**

———*Sikhs*—Udasis—*If Sikhs—Status and tenets of—Reading of* Granth Sahib *by.*

Udasis are a sect of schismatics district from the orthodox Sikhs. They are a monastic order in origin and are followers of *Baba* Siri Chand, son of the first *Guru,* and unlike the orthodox Sikhs they still worship idols and the *smadhs* of their *Gurus* as well as certain other objects such as the ball of ashes, etc. They are really Hindus and can be called Hindus only in the wider sense of the term. They, however, do reverence to the *Granth Sahib* and read it without renouncing Hinduism; and simply because an *udasi sadh* reads *Granth Sahib* in an institution in the presence of Sikhs or other persons present there, it does not follow that the place is a Sikh Gurdwara. (*Monroe and Rangi Lal, JJ.*) HAKAM SINGH *v.* ISHAR DAS. **156 I.C. 1017=8 R.L. 60=A.I.R. 1935 Lah. 859.**

———**S. 2 (4)**—*Office-holder—Muafidar reciting Granth.*

Muafidars who had abandoned secular pursuits and where consistently performing service at the institution were found to take out the Granth Sahib and recite it.

Held, that they fell within the definition of office-holders as given in S. 2 (4), as they participated in the management of the public worship and that the presumption arose in favour of the Gurudwara under S. 18 (*g*). (*Addison and Currie, JJ.*) KAHAN DASS *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. **154 I.C. 357 =7 R.L. 548=A.I.R. 1934 Lah. 68.**

———**S. 2 (9)**—*Sikhs—Udasis.*

Udasis are not Sikhs within the meaning of that term as defined in the Sikh Gurdwaras Act. 1931 Lah. 161, Foll. (*Broadway and Johnstone, JJ.*) SHIROMANI GURDWARA PRABANDHAK COMMITTEE *v.* MT. NAND KAUR. **136 I.C. 31=I.R. 1932 Lah. 207=33 P.L.R. 498=A.I.R. 1931 Lah. 254.**

———**S. 3**—*Powers of High Court.*

It is not open to the High Court to consider whether the Government's declaration is justified by the circumstances. (*Broadway, C.J. and Monroe, J.*) HAR PARSHAD *v.* COMMITTEE OF MANAGEMENT, GURDWARA HERAN. **6 I. R. (Lah.) 195 (1)=146 I.C. 236=34 P.L.R. 921=A.I.R. 1933 Lah. 334.**

———**S. 3**—*Service of notice on person in possession—Validity of.*

Service of notice on the person who is in full physical and lawful possession is proper service within the meaning of S. 3 even though the real owners are some other persons. (*Addison and Agha Haidar, JJ.*) GOBIND SINGH *v.* MANAGING COMMITTEE OF GURDWARAS. **147 I.C. 54=15 Lah. 55=36 P.L.R. 438=A.I.R. 1933 Lah. 828.**

———**Ss. 3 and 5 (1)**—*Tribunal deciding that certain land did not belong to Gurdwara—Properties claimed as such in "consolidated list"—Dismissal does not amount to declaration that property belonged to Gurdwara.*

In its judgment the Tribunal decided in the clearest possible terms that certain properties do not belong to the Gurdwara Guru Sar Sutlani or any other Gurdwara to which the Act is applicable. It was contended however that these properties having been claimed by certain Sikhs as the property of Gurdwara Guru Sar Sutlani in the "consolidated list" which was submitted by them to the Local Government under S. 3 of the Act and that Mahant's petition of claim in respect of these properties made under S. 5 having been dismissed by the Tribunal, the order of dismissal was tantamount to a declaration that they belonged to the Gurdwara.

Held, that the contention was without force and must be rejected. (*Tek Chand, J.*) SAHIB SINGH *v.* BHAGAT SINGH. **148 I.C. 335=6 R.L. 560=A.I.R. 1933 Lah. 798.**

———**S. 3 (2)**—*Consolidated list—Defective proceeding—Decision against village proprietary body—Procedure.*

The proceedings taken in connection with the consolidated list were most misleading and defective. The village shamilat was included therein and the village proprietary body was in possession of it. Notice was sent to two persons who were alleged to be in possession. They did not claim the shamilat and a suit by the Gurudwara Committee under S. 28 was decreed under S. 30 (*ii*).

Held, that there was nothing to put the villagers on their guard that the whole shamilat was being claimed and consequently the Court should not decide the claim merely because they did not make a claim in a petition under S. 5 of the Act.

Held further, that under S. 32 the Court should frame an issue in respect of the claim and forward the record to the tribunal and that the Court should dispose of the suit on receipt of the decision of the tribunal. (*Addison and Currie, JJ.*) BISHNA *v.* COMMITTEE OF GUR-

PUNJAB SIKH GURDWARAS ACT (1925), S. 3.

DWARA, SUDHAL. **15 Lah. 66=151 I.C. 890= 7 R.L. 211=36 P.L.R. 426=A.I.R. 1934 Lah. 390.**

———**S. 3 (2)**—*Provisions complied with—Disposal of case by tribunal.*

Where the provisions of S. 3 (2) have been complied with and therefore the claim advanced in a suit is one that is capable of being made under S. 5 (1), S. 32 is clearly attracted and the Civil Court should settle the issue referred to in S. 32 and remit that issue for disposal by the tribunal. 1927 Lah. 394, Dist. (*Broadway, Johnstone and Abdul Qadir, JJ.*) COMMITTEE OF MANAGEMENT FOR GURDWARA PANIA SAHIB *v.* FAZAL KHAN. **12 Lah. 204=I.R. 1931 Lah. 361=131 I.C. 89=A.I.R. 1931 Lah. 85 (F.B.).**

———**S. 5**—*Grant made to Udasi Sadh for founding village in desolate place and establishing langar for feeding Sadhs—Land is not grant to Gurdwara.*

Where a grant was made to an Udasi Sadh so that he might found a village in a desolate place and establish a langar for feeding Sadhs, *held,* that the land or muafi was not granted to a Gurdwara. (*Addison and Currie, JJ.*) SHIROMANI GURDWARA PARBANDHAK COMMITTEE *v.* HARCHARAN SINGH. **154 I.C. 375=7 R.L. 555=A.I.R. 1934 Lah. 1.**

———**S. 5**—*Gurdwara property—Mahant shown as owner of land.*

A land was shown in 1911-12 as being in the cultivating possession of one *D* as a tenant without occupancy rights, the owner being shown as *K D,* Mahant of the Gurdwara Bhai Pheru. In 1921-22 after the death of *D,* the tenant-at-will or without occupancy rights was shown as *P R* who claimed to be the owner of the land. *Held,* that the onus lay very heavily on *P R* to show that he was the owner of the land in question and that on the evidence on record land must be deemed to be Gurdwara property. (*Broadway and Monroe, JJ.*) PALA RAM *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. **6 I.R. (Lah.) 82=145 I.C. 227=A.I.R. 1933 Lah. 142.**

———**S. 5**—*Gurdwara property—Member of fraternity entered as Malik in revenue records.*

The petitioners and their predecessors were described as Maliks of certain lands in the revenue records. The evidence showed that they were members of a fraternity which served a gurdwara and though there existed blood relationship between certain members of the fraternity, it was not by virtue of blood relationship, but because of their religious vocation that they came into possession of and held the lands. Besides other facts, it was in evidence that the only alienation of any part of the lands by the petitioners or their predecessors had been by transfer in favour of the institution. *Held,* that the lands were the property of the institution and had been held as such by the petitioners by virtue of their connection with it. (*Addison and Monroe, JJ.*) FAUJA SINGH *v.* SIKH GURDWARA PARBANDHAK COMMITTEE. **36 P.L.R. 323.**

———**S. 5**—*Interest—Right to join in management.*

PUNJAB SIKH GURDWARAS ACT (1925), S. 5.

One *A* made a will and thereby bequeathed half the income of his property for setting up a langar (free kitchen). The other half was to be given to his son *S* for maintenance of his family including *A's* widow. *S* was to realize the rents, etc., and keep half the income to himself and hand over half to *H, A's* widowed daughter *N's* son, as manager of the langar. *H* and *N* were merely to receive their food from the langar. After the death of *S* and *H,* whoever was fit out of *A's* family was to be appointed manager of the langar. After the death of *S,* his son *K* and *H* handed over the property to the Golden Temple before the Gurdwaras Act. The property was included in consolidated list under S. 3 of the Act. *Held,* that *N* had no interest in the charity within the meaning of S. 5. *N* was not also entitled to any management as after her marriage she ceased to be a member of *A's* family. (*Addison and Currie, JJ.*) COMMITTEE OF MANAGEMENT OF GURDWARAS, AMRITSAR *v.* MT. NIHAL DEVI. **154 I.C. 418=7 R.L. 572=A.I.R. 1934 Lah. 65.**

———**S. 5**—*Transfer of control—Application by sharers in profits for compensation—Sustainability.*

Where the Shromani Gurdwara Prabandhak Committee assumes management in pursuance of a resolution of the Sacred Shrines Committee there is no unlawful usurpation of the management and persons who have shares in the income should apply if at all under S. 5 and not under S. 6. (*Broadway and Johnstone, JJ.*) SADHU SINGH *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 1035 =134 I.C. 1035=A.I.R. 1932 Lah. 41.**

———**S. 5 (1)**—*Claim under—Jurisdiction of tribunal.*

Where the provisions of S. 3 (2) have been complied with and therefore the claim advanced in a suit is one that is capable of being made under S. 5 (1), S. 32 is clearly attracted and the Civil Court should settle the issue referred to in S. 32 and remit the issue for disposal by the tribunal. 1927 Lah. 394, Dist. (*Broadway, Johnstone and Abdul Qadir, JJ.*) COMMITTEE OF MANAGEMENT FOR GURDWARA PANIA SAHIB *v.* FAZAL KHAN. **12 Lah. 204=I.R. 1931 Lah. 361=131 I.C. 89=A.I.R. 1931 Lah. 85 (F.B.).**

———**S. 5 (1)**—*Publication of consolidated list—Person coming forward under S.* 5 (1)—*Burden of proof.*

When a consolidated list is published, a person who comes forward under S. 5 (1) must prove that he has a right, title or interest in the property included in the list. If no such claim is made, the Shiromani Gurdwara Parbandhak Committee has right under S. 28 to bring suit for possession which must be automatically decreed. (*Addison and Currie, JJ.*) COMMITTEE OF MANAGEMENT OF GURDWARAS, AMRITSAR *v.* INDAR SINGH. **147 I.C. 1142=6 R.L. 485=35 P.L. R. 286=15 Lah. 117=A.I.R. 1933 Lah. 1041.**

———**S. 5 (1)**—*Question whether limited owner can alienate by gift—Jurisdiction of tribunal.*

PUNJAB SIKH GURDWARAS ACT (1925), S. 5.

The question whether a person having a limited interest in a property was competent to alienate it by gift can be decided by the Gurdwara tribunal. 1927 Lah. 394, *held obiter*. (*Broadway, Johnstone and Abdul Qadir, JJ.*) COMMITTEE OF MANAGEMENT FOR GURDWARA PANIA SAHIB *v.* FAZAL KHAN. **12 Lah. 204=I.R. 1931 Lah. 361=131 I.C. 89=A.I.R. 1931 Lah. 85 (F.B.).**

———**S. 5 (3)**—*Notification under—Effect.*

A notification under S. 5 (3) itself is conclusive proof of the fact that no claim under S. 5 (1) is made and a suit under S. 28 brought by the Committee of Gurudwaras for possession of the property should be decreed. (*Addison and Currie, JJ.*) KAHAN DAS *v.* MANAGING COMMITTEE OF THE GURDWARA OF BACHA NAU. **149 I.C. 955=6 R.L. 764=A.I.R. 1934 Lah. 54.**

———**Ss. 5 (3) and 28**—*Publication of notification under S.* 5 (3).

The publication of notification under S. 5 (3) is conclusive proof of the fact that no claim was made. (*Addison and Agha Haidar, JJ.*) GOBIND SINGH *v.* MANAGING COMMITTEE OF GURDWARAS. **15 Lah. 55=147 I.C. 54=36 P.L.R. 438=A.I.R. 1933 Lah. 828.**

———**S. 6**—*Applicability—Claim for share in offerings—Right as office-holder if involved.*

Section 6 deals entirely with compensation which is payable for the unlawful removal of an office-holder. A person who is not an office-holder within the meaning of the Act who is not forcibly or unlawfully removed from any office which he may have held, cannot apply under S. 6 to receive a share of the offerings at the shrines to which he may be entitled. All claims for participation in such income should be made, if it all, under S. 5 of the Act. Where it is in evidence that on the Hola festival most, if not all, of the members of the Sodhi family made a point of being present but it is also clear that their presence was in order to see that they got the proper share of the offerings that were made on those occasions and had nothing whatever to do with the worship or performance of any of the rituals or ceremonies that might have been carried on in those institutions, the Sodhis as a family cannot be regarded as office-holders within the meaning of S. 6. (*Broadway and Johnstone, JJ.*) SODHI SADHU *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **I.R. 1931 Lah. 1035=134 I.C. 1035=A.I.R. 1932 Lah. 41.**

———**S. 6**—*Compensation to—Mahant—Measure.*

Where the ex-Mahant of a Gurdwara bore an excellent character and during his period of Mahantship built with commendable zeal and initiative a number of pakka rooms and other apartments and brought the institution to a position of prosperity and importance and the total income of the Gurdwara was about Rs. 4,000 a year.

Held, that the Tribunal was justified in fixing Rs. 2.400 a year as compensatory allowance to the ex-Mahant for the loss of all rights or privileges enjoyed by him while a Mahant. He however would not be entitled to any monthly allowance for renting a house for his residence or to a lump sum for purchasing one. (*Broadway and Agha Haidar, JJ.*) NARAIN SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **I.R. 1932 Lah. 707=140 I.C. 395=34 P.L.R. 580=A.I.R. 1932 Lah. 599.**

PUNJAB SIKH GURDWARAS ACT (1925), S. 7.

———**S. 6**—*Office-holders—Meaning.*

Persons who claim to be owners of institutions but who have not acted as pujaris or granthis are not 'office-holders' and therefore cannot apply. (*Broadway and Johnstone, JJ.*) SADHU SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE, AMRITSAR. **I.R. 1931 Lah. 1035=134 I.C. 1035=A.I.R. 1932 Lah. 41.**

———**Ss. 7 and 8**—*"Dharmashala"—Meaning of.*

The word "dharmashala" is and can be used for a very common type of institution in which there is an alms-house as well as a place of public worship by Sikhs. But it can be only an alms-house without being a place of public worship. Even if "Granth" was being read since 1880, it does not mean that the institution was originally intended to be a place of public worship by Sikhs. The inference that it was a place of public worship might be easier to draw, if the institution set up is in a Sikh village abadi. (*Addison and Monroe, JJ.*) PURAN SINGH *v.* MELA SINGH. **150 I.C. 259=6 R.L. 849=A.I.R. 1934 Lah. 277.**

———**Ss. 7 and 16 (2) (iii)**—*Gurdwara—Existence of Smadhs in institution is worshipped by Udasi Sadhs.*

In an institution, there were old Smadhs and none except Udasi Sadhs and persons in sympathy with them used to worship there. Further Granth Sahib was not read.

Held, that the institution was not a Sikh Gurudwara. (*Addison and Currie, JJ.*) NAGINDAR SINGH *v.* PAL DAS. **154 I.C. 371=7 R.L. 563=A.I.R. 1934 Lah. 60.**

———**S. 7**—*Holding of dewans and reading of Guru Granth Sahib in Gurdwara—Such Gurdwara is established for use of Sikhs even though there is no property attached to Gurdwara.*

In a Gurdwara, it was found that dewans were held and that the Guru Granth Sahib was read from time to time.

Held, that the Gurdwara was one established for use by Sikhs for the purpose of public worship, even though there was no property attached to the Gurdwara. (*Addison and Currie, JJ.*) RAM SINGH *v.* CHATAR SINGH. **147 I.C. 626 (1)=6 R.L. 411 (1)=A.I.R. 1933 Lah. 1040.**

———**S. 7**—*Merely because resident Udasi reads Granth Sahib, institution does not become Sikh Gurdwara.*

It does not follow that an institution is a Sikh Gurdwara merely because the Udasi Sadh, resident there, reads the Granth Sahib in the presence of Sikhs or other persons present. (*Addison and Currie, JJ.*) ARJAN SINGH *v.* INDAR DAS. **15 Lah. 247=151 I.C. 1005=7 R.L. 237=A.I.R. 1934 Lah. 13.**

———**Ss. 7, 12 (10) and 25 (a)**—*Petition under—Possession of institution declared to be Sikh Gurudwara—If can be obtained.*

Possession of an institution declared to be a Sikh Gurudwara can only be obtained by a suit brought under S. 25 (*a*), Sikh Gurdwaras Act,

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and no hereditary office holder can be deprived of his right to occupy the Gurudwara in his official capacity except in accordance with the provisions of part 3, Sikh Gurudwaras Act (*See* Ch. 11). Hence the Court cannot give possession on a petition filed under Ss. 7 and 12 (10). *Coldstream, J.*) RAM KISHEN *v.* BUDH SINGH. **A. I.R. 1935 Lah. 121.**

———**Ss. 7 and 15**—*Right to apply for review—Person not party to prior proceedings and whose right is barred by time.*

Where the tribunal passes an order, it cannot review it on the application of a person who was not party to the proceedings in which such order was passed and whose right to object has been barred by limitation under S. 8; and the case having ended, the provisions of S. 15 cannot be utilised. (*Addison and Currie, JJ.*) LAL SINGH *v.* MANGAL SINGH. **147 I.C. 714=6 R.L. 431 (1)=A.I.R. 1933 Lah. 1038 (1).**

———**S. 7**—*Sikh Gurdwara—Institution not founded for public worship—Declaration suit—Maintainability.*

Where it is not proved that an institution was established by Sikhs for the purpose of public worship it cannot be declared a Sikh Gurudwara on a petition under S. 7. (*Broadway and Johnstone, JJ.*) SHIROMANI GURUDWARA PRABANDHAK COMMITTEE *v.* MT. NAND KAUR. **136 I.C. 31=I.R. 1932 Lah. 207=33 P.L.R. 498=A.I.R. 1931 Lah. 254.**

———**Ss. 7 and 16 (2) (iii)**—*Sikh Gurdwara—Essentials—Grant to holy Udasi Sadh for supplying his personal needs or of other ascetics is not Sikh Gurdwara.*

In order that a Gurdwara may be a Sikh Gurdwara, it must be proved that the Gurdwara was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. A grant to a holy Udasi Sadh for the purpose of supplying his personal needs and those of other ascetics and needy travellers does not make the institution a Sikh Gurdwara. (*Addison and Currie, JJ.*) ARJAN SINGH *v.* INDAR DAS. **15 Lah. 247=151 I.C. 1005=7 R.L. 237=A.I.R. 1934 Lah. 13.**

———**Ss. 7 and 16 (2) (iii)**—*Use of word "Bhai" for Rupa and "Dharmasala" for building—Inference.*

The mere fact that the Rupa in whose memory the institution is founded is designated "Bhai" or that the building is described as "Dharmasala" in revenue papers does not establish that the institution is a Sikh Gurudwara. (*Addison and Currie, JJ.*) NAGINDAR SINGH *v.* PAL DAS. **154 I.C. 371=7 R.L. 563=A.I.R. 1934 Lah. 60.**

———**Ss. 7 (3), 10 and 31 (2)**—*Suit for possession—Notification under S. 7 (3)—Procedure.*

Where during the pendency of a suit for possession of property claimed as a Dera of Udasis a notification is published under S. 7 (3), it is necessary for the plaintiff to present a petition under S. 10 of that Act if he wants to claim possession thereof. The proceedings in the suit should be stayed in view of the provisions of S. 31 (2). (*Bhide, J.*) HARNAM DAS *v.* MANGAL SINGH. **6 I.R. (Lah.) 124=145 I.C. 701 (1)=34 P.L.R. 857=A.I.R. 1933 Lah. 268.**

PUNJAB SIKH GURDWARAS ACT (1925), S. 8.

———**S. 8**—*Decision under—Appeal pending—Petition under S. 10, if to be stayed.*

The Sikh Gurudwaras Act does not contemplate that a petition under S. 10 of the Act pending before the tribunal should be stayed while an appeal is being heard against the decision under S. 8 of the Act. (*Hilton, J.*) JAIMAL SINGH *v.* PREM SINGH. **7 R.L. 5=150 I.C. 671 (1)=A.I.R. 1934 Lah. 832.**

———**S. 8**—*Gurudwara—Dharmasala established by Sikhs for public worship.*

Where the dharmasala is established for use by Sikhs for the purpose of public worship and is used for such worship by Sikhs and the land attached to it has been given by the ancestors of the present villagers, it is a Sikh Gurudwara. (*Addison and Monroe, JJ.*) PREM DAS *v.* LABH SINGH. **149 I.C. 1087=6 R.L. 798=A.I.R. 1934 Lah. 130.**

———**S. 8**—*Hereditary office-holder—Former Office-bearers Udasis—Sikh, not chela of deceased office-bearer.*

Where the former office-holders were Udasis and petitioner is a Sikh and was never the chela of the deceased office-holder, he cannot be an hereditary office-holder. (*Addison and Monroe, JJ.*) PREM DAS *v.* LABH SINGH. **149 I.C. 1087=6 R.L. 798=A.I.R. 1934 Lah. 130.**

———**S. 8**—*Mahant who is hereditary office-holder has* locus standi *to come in under S. 8.*

A Mahant and his predecessors were admitted to be office-holders in the Gurdwara. The Mahant deposited that he was the owner of the building. It was contended on the basis of the above statement that he had no *locus standi* to come in under S. 8.

Held, that the assertion that he was the owner should not be read alone, that the Mahant's mistaken idea about his being the owner did not affect the question of his *locus standi* to come in under S. 8 and that he had such right. (*Addison and Currie, JJ.*) ARJAN SINGH *v.* INDAR DAS. **15 Lah. 247=151 I.C. 1005=7 R.L. 237=A.I.R. 1934 Lah. 13.**

———**S. 8**—*Office-holders who are not hereditary*—Locus standi *to maintain petition.*

Where the appointment of office-holders has been made by the Panchayat and there is no rule of succession for the institution, the alleged office-holder has no *locus standi* to maintain his petition. (*Addison and Monroe, JJ.*) JOWAND SINGH *v.* SURAT SINGH. **154 I.C. 356=7 R.L. 545=A.I.R. 1934 Lah. 344.**

———**S. 8**—*Petition under—Existence of Gurdwara cannot be disputed.*

It is not open to a petitioner or petitioners under S. 8 of the Sikh Gurdwaras Act to dispute the existence of a Gurdwara which may be interpreted as a place of worship. It can only be claimed that it is not a Sikh Gurdwara, *i.e.,* Sikh place of worship. It is only under S. 10 that a petitioner can claim a right, title or interest in property notified under S. 7 (3) by the Local Government. (*Addison and Agha Haidar, JJ.*) SUNDAR SINGH *v.* NARAIN DAS. **35 P.L.R. 619=155 I.C. 396=7 R.L. 706=A.I.R. 1934 Lah. 920.**

———**S. 8**—*Petition under—What must be proved.*

PUNJAB SIKH GURDWARAS ACT (1925), S. 8.

A person has to establish that he is a hereditary office-holder before he can put in a petition under S. 8. If he is not a hereditary office-holder his petition is not competent nor his appeal against the decision of the tribunal. (*Addison and Monroe, JJ.*) TEHL SINGH *v.* HARNAM SINGH. **6 R.L. 626=148 I.C. 1007=A.I.R. 1934 Lah. 98.**

———**S. 8**—*"Sikh Gurudwara"—Meaning of—Proof requisite—Grant to holy* udasi sadh *or institution maintained by him for meeting his own personal needs and also that of ascetics and needy travellers—Dharmasala Dharmo Chak, Amritsar—If Gurudwara.*

Merely because an *udasi sadh* reads *Granth Sahib* in the presence of the Sikhs or other persons present, it does not follow that the institution in question is a Sikh Gurudwara. An institution can be held to be a Sikh Gurudwara only if it is proved that it was established for use by Sikhs for the purpose of public worship and was in fact used for such worship by Sikhs. A grant to a holy *udasi sadh* or to an institution maintained by him for the purpose of supplying his personal needs and of those of other ascetics and needy travellers does not make the institution a Sikh Gurudwara. Dharmasala Dharmo Chak in the Amritsar District is not a Sikh Gurudwara. (*Monroe and Rangi Lal, JJ.*) HAKAM SINGH *v.* ISHAR DAS. **156 I.C. 1017=8 R.L. 60=A.I.R. 1935 Lah. 859.**

———**Ss. 8 and 9**—*Petition not prosecuted or held incompetent—Notification by Local Government.*

It would appear that, where a petition under S. 8 of the Sikh Gurdwaras Act is dismissed by reason of its being incompetent, it must be taken not to have been presented in accordance with the provisions of that section and that the Local Government could notify the institution under S. 9 as Sikh Gurdwara. But where it is withdrawn or not prosecuted, there is room for some difference of opinion. (*Addison and Agha Haidar, JJ.*) SUNDAR SINGH *v.* NARAIN DAS. **154 I.C. 475=7 R.L. 576=35 P.L.R. 619=A.I.R. 1934 Lah. 920.**

———**S. 10**—*Petition under—Duty of tribunal.*

The tribunal can proceed to deal with the petitions under S. 10 only on the assumption that the institution is a Sikh Gurdwara even though it has not been notified as such before the tribunal delivered its judgment. (*Monroe and Rangi Lal, JJ.*) HAZARA SINGH *v.* CHET RAM. **160 I.C. 533=8 R.L. 550=A.I.R. 1935 Lah. 813.**

———**S. 10**—*Petitions under—Grant of declaration disallowing objector's claim—Legality.*

Petition under S. 10 can either be wholly accepted, partially accepted or wholly dismissed. There is no provision in the Sikh Gurudwaras Act, for the grant of a declaration disallowing the claim of the objectors. (*Monroe and Rangi Lal, JJ.*) HAZARA SINGH *v.* CHET RAM. **160 I.C. 533=8 R.L. 550=A.I.R. 1935 Lah. 813.**

———**S. 10**—*Petition under, pending appeal against declaration as gurdwara—Absence of notification—Tribunal, if can dispose of petition.*

PUNJAB SIKH GURDWARAS ACT (1925), S. 12.

The (Sikh) Tribunal held the institution of the Gurudwara Nawin Badshahi as Sikh Gurudwara. The office-holder of that Gurudwara claimed the endowed property as personal and petitioned to the tribunal under S. 10. When petition was heard by the tribunal, an appeal against its decree (declaration as Gurudwara) was pending in the High Court and the Gurudwara had therefore not been notified as a Sikh Gurudwara.

Held, that the fact that the necessary notification was not issued was immaterial since the High Court confirmed the decree and therefore tribunal could dispose of the petition.

Held, also that the entry of the property in the Wajib-ul-arz and in the settlement record as muafi, the repeated admissions by the holders of it that the income of the land was spent on the Gurudwara and the fact that the original dedication of the land was for the Gurudwara proved that the property was endowed property belonging to Gurudwara and not personal property of the office-bearers. (*Monroe and Rangi Lal, JJ.*) HAZARA SINGH *v.* GURDIT SINGH. **160 I.C. 533=8 R.L. 550=A.I.R. 1935 Lah. 807.**

———**S. 10**—Petition under—Stay of—Pendency of appeal against decision under S. 8—If a ground. *See* SIKH GURUDWARAS ACT, S. 8. **150 I.C. 671 (1).**

———**S. 12**—*Decree passed by Gurudwaras Tribunal—Application to Civil Court for execution—Sustainability.*

Where the Sikh Gurudwaras Tribunal passed a decree and a person in the position of an assignee of such decree applied to the Civil Court under O. 21, R. 16, C. P. Code, for execution of the decree, *held*, that the application should be first made to the Gurudwaras Tribunal and not to the Court. The fact that the Tribunal cannot itself execute the decree and will have to send it to another is not material. (*Bhide, J.*) INTZAMIA COMMITTEE GURUDWARA RORI SAHIB *v.* SARAN DAS. **I.R. 1931 Lah. 535=132 I.C. 183=A.I.R. 1931 Lah. 499.**

———**S. 12**—*Effect.*

In order that a tribunal should be properly constituted the president and members must be duly appointed as required by S. 12. Such a tribunal can function so long as two of its members are in session. The section provides for cases of difference of opinion. The final sentence of sub-cl. (2) lays down that the opinion arrived at under the circumstances shall be deemed to be the opinion of the Tribunal. (*Broadway, Tek Chand and Johnstone, JJ.*) HIRA DAS *v.* SHIROMANI GURUDWARA PARBANDHAK COMMITTEE. **12 Lah. 467=I.R. 1931 Lah. 497=131 I.C. 737=32 P.L.R. 589=A.I.R. 1931 Lah. 385 (F.B.).**

———**S. 12 (9) and (11) and S. 15**—*Death of petitioner—Bringing of legal representatives on record—Procedure.*

A petition under S. 8 of the Sikh Gurudwaras Act can, on the death of the petitioner, be continued by his legal representative. It is clear from S. 12 (9) and (11) of the Act, that the tribunal is bound to follow in this respect the

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provisions of the C. P. Code, S. 15 cannot be invoked for the purpose of substituting the legal representative for the original petitioner as there is nothing in that section which can be read as permitting the tribunal arbitrarily to add or substitute one petitioner for another. (*Addison and Agha Haidar, JJ.*) SUNDAR SINGH *v.* NARAIN DAS. **155 I.C. 396=7 R.L. 706=35 P.L.R. 619=A.I.R. 1934 Lah. 920.**

———**Ss. 12 (10) and 25**—*Decree for compensation obtained from Tribunal—Mode of execution.*

Where a decree by the Tribunal orders money by way of compensation to be paid to the Mahant, the Mahant should apply to the Collector under S. 25 and should not ask the District Court to execute the decree under S. 12 (10), as the District Judge has no jurisdiction to proceed with the execution. (*Addison, J.*) GURDWARA TEJA KALAN *v.* DHIAN DAS. **14 Lah. 672=I.R. 1933 Lah. 424 (2)=144 I.C. 192=34 P.L.R. 633=A.I.R. 1933 Lah. 630.**

———**S. 13**—*Two members—Absence of third member—Case whether can be decided.*

Under S. 13 it is legal for two of its members in the absence of the third finally to decide the case before them. (*Broadway, Tek Chand and Johnstone, JJ.*) HIRA DAS *v.* SHIROMANI GURDWARA PARBANDHAK COMMITIEE. **12 Lah. 467 I.R. 1931 Lah. 497=131 I.C. 737=32 P.L.R. 589=A.I.R. 1931 Lah. 385 (F.B.).**

———**S. 14 (1)**—*Disposal of petition under S. 10—Powers of tribunal.*

When a petition under S. 10 is forwarded to the tribunal its sole duty is to dispose of the petition in accordance with the provisions of the Act. The inclusion of property in a list prepared under S. 7 (2) implies a claim that that property is the property of the Gurdwara mentioned in the petition to which the list accompanies, but neither this petition nor the implied claim is before the tribunal for adjudication, the only claim before it is the claim of the petitioner who under S. 10 claims that certain property belongs to him: and, the only way in which the tribunal can dispose of the petition is by decreeing the claim in whole or in part or by dismissing the petition, leaving the effect of the order to be determined afterwards, according to law, either the general law or the specific provisions of the Act, and the tribunal cannot on dismissal of such petition declare that the property belongs to the Gurdwara. (*Monroe and Currie, JJ.*) SHIROMANI GURDWARA PARBANDHAK COMMITTEE, AMRITSAR *v.* JAGAT RAM. **16 Lah. 968=156 I.C. 1042=8 R.L. 71=38 P. L.R. 44=A.I.R. 1935 Lah. 279 (2).**

———**S. 14 (2)**—*Petitioners under S. 8*—Locus standi *when can be challenged.*

A petition under S. 8 of the Sikh Gurdwaras Act is only competent, if made by (1) any hereditary office-holder or (2) twenty or more worshippers of the Gurdwara, under S. 14 (2) the forwarding of the petition to the Tribunal for disposal is conclusive proof that the petition was received by the Government in time and in the case of a petition forwarded by worshippers of a Gurdwara under S. 8 that the provisions of

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that section with respect to such worshippers were duly complied with. Nothing is however said about a petition forwarded by a hereditary office-holder except that it must be held to have been presented in time. It follows, therefore, that the status of petitioners who claim to be worshippers cannot be contested whereas the *locus standi* of a petitioner who claims as an hereditary office-holder can be challenged and would have to be decided before the trial can proceed. This position is not affected by S. 16 (1) of the Act, which can only apply to a petition properly before the Tribunal. (*Addison and Agha Haidar, JJ.*) SUNDER SINGH *v.* NARAIN DAS. **35 P.L.R. 619=154 I.C. 396=7 R.L. 706=A.I.R. 1934 Lah. 920.**

———**S. 15**—*Object of—Addition and substitution of parties—Powers of Tribunal.*

There are no respondents in a petition presented under S. 8 of the Sikh Gurdwaras Act and for this reason, S. 15 has been enacted empowering the Tribunal by advertisement or otherwise, to enquire if any person desires to be made a party and to join any person whom it considers should be made a party. The intention of S. 15 is to allow the Tribunal to consolidate rival or conflicting claims, if convenient, and to furnish a means of getting respondents or objectors to contest petition and thus to permit of petitions being tried as suits because the petitions themselves name no objectors. There is nothing in this section which can be read as permitting the Tribunal arbitrarily to add or substitute one petitioner for another, while such a course is clearly against the scheme of the Act. (*Addison and Agha Haidar, JJ.*) SUNDER SINGH *v.* NARAIN DAS. **155 I.C. 396=7 R.L. 706=35 P.L.R. 619=A.I.R. 1934 Lah. 920.**

———**S. 16**—*Duty of Court.*

Courts are allowed no discretion in the application of S. 16 of the Act; their sole duty is to apply the criteria there laid down and state the result. The legislature has determined what test is to be applied in the decision of these cases. Court can apply that test and no other. (*Monroe and Rangi Lal, JJ.*) LAL SINGH *v.* SITAL DAS. **A.I.R. 1935 Lah. 521.**

———**S. 16**—*Evidence.*

Where the foundation of an institution is for Sikh worship and all the office-holders during the whole period of the existence of the institution have been Sikhs, the Gurdwara is established for the worship of Sikhs. (*Addison and Monroe, JJ.*) JOWAND SINGH *v.* SURAT SINGH. **154 I. C. 356=7 R.L. 545=A.I.R. 1934 Lah. 344.**

———**S. 16**—*Institution built for reading of Granth Sahib—Granth Sahib publicly worshipped and Sradh of Guru Nanak celebrated—Office-holders engaged in worship smadhs.*

An institution was built as a Gurudwara for the reading of the Granth Sahib and feeding way-farers and Sadhs. The original grant of land to it was made by the villagers. From the very beginning it had been considered a village Gurudwara where the villagers publicly worshipped the Granth Sahib and where the Shradh of Guru Nanak was celebrated. *Held*, that

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merely because Udasis had been office-holders or that they worshipped the smadhs existing near the institution, the institution did not become an Udasi institution nor did it cease to be a Sikh Gurudwara. (*Addison and Monroe, JJ.*) RAM KISHAN *v.* BUR SINGH. **15 Lah. 270=151 I.C. 738=7 R. L. 185=36 P.L.R. 442=A.I.R. 1934 Lah. 39.**

———**S. 16**—*Meaning of.*

Where an institution is founded by inhabitants of a Sikh village for their own benefit for religious and charitable purposes, the religion being the worship of the Granth Sahib as a Sikh Gurdwara, the fact that the incumbents had always been Udasis is immaterial, as in a large percentage of cases Udasis are found to be incumbents of Sikh Gurdwaras. (*Addison and Monroe, JJ.*) PURAN DAS CHELA *v.* KARTAR SINGH. **151 I.C. 32=7 R.L. 104=36 P.L.R. 280=A.I.R. 1934 Lah. 398.**

———**S. 16**—*Proof of gurdwara—Revenue records.*

Where the question to be decided was as to whether there was a gurdwara in a particular village and the revenue records showed that a gurdwara existed from earliest times, that the gurdwara was a place of worship for the Sikhs and that there was a langar and muafi attached to it and the oral evidence against this was discrepant and contradictory, *held,* the revenue records should be relied on as against the oral evidence. (*Dalip Singh and Agha Haidar, JJ.*) KARTAR SINGH *v.* GURDWARA PRABANDHAK COMMITTEE. **6 I R. (Lah.) 134=145 I.C. 727=A.I.R. 1933 Lah. 475.**

———**S. 16**—*Reports of Tahsildar and Extra Assistant Commissioner—Relevancy.*

In a dispute as to whether certain institution is a Sikh Gurudwara or not, reports of Tahsildar and Extra Assistant Commissioners prepared in inquiry into muafi of the land at a time when there was no such dispute or relevant and entitled to considerable weight. (*Addison and Monroe, JJ.*) RAM KISHAN *v.* BUR SINGH. **15 Lah. 270=151 I.C. 738=7 R.L. 185=36 P. L.R. 442=A.I.R. 1934 Lah. 39.**

———**S. 16**—*Sikh Gurdwara—Proof—Granth Sahib worshipped on occasions.*

Where there is no evidence of daily worship of the Granth Sahib in an institution, the mere fact that the person in charge opened the Granth Sahib on the occasion of the Bishakhi fair for the worship of the pilgrims and incidentally collected some money is not sufficient to make the institution a Sikh Gurdwara. (*Monroe and Rangi Lal, JJ.*) HARNAM DAS *v.* KHAZAN SINGH. **157 I.C. 844=8 R.L. 143=37 P.L. R. 348.**

———**S. 16**—*Use of word "damdama" in title place of institution—Evidentiary value of.*

The word "Damdama" is not used exclusively by the Sikhs. Hence the mere use of this word in the title place of an institution is not strong evidence that the institution is a Sikh institution. (*Monroe and Rangi Lal, JJ.*) LAL SINGH *v.* SITAL DAS. **A.I.R. 1935 Lah. 521.**

———**S. 16 (1)**—*Gurudwara—Old institution founded in* 1850—*Grant of lands for upkeep by*

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Sikhs—Absence of evidence of nature of worship—Udasi *mahant—If* udasi dera.

The Mahants of an old institution founded in 1850 had always been *udasis,* and Sikh worship had been practised there, but there was no evidence of what happened before 1904. Lands were granted by the Sikh villagers for its upkeep, but there was no evidence as to the nature of worship originally practised for the purposes of the foundation. *Held,* that there was nothing to show that it was not at its origin an *udasi dera.* (*Addison and Monroe, JJ.*) SANTOKH SINGH *v.* DEVI DAS. **7 R.L. 33=150 I.C. 925 (1) =A.I.R. 1934 Lah. 969.**

———**S. 16 (?)**—Dharmasala—*Essentials for being described as Gurdwara*—Dharmasala *of Lal Mal* Saraf.

A *dharmasala* means primarily a place of rest and has subsidiary meanings which connote both a Hindu place of worship and a Sikh place of worship. In order to establish that an institution is a Sikh Dharmasala it should be proved that it was established for use by Sikh for the purpose of public worship and that it had been so used by Sikhs. *Held,* on the evidence that the *dharmasala* of Lal Mal *Saraf* was not a Sikh Gurdwara within the meaning of the Sikh Gurdwaras Act. (*Broadway and Johnstone, JJ.*) GOBINDA MAL *v.* LABH SINGH. **32 P.L.R. 395 =13 Lah. 6=142 I.C. 600=I.R. 1933 Lah. 220=A.I.R. 1932 Lah. 268.**

———**S. 16 (2)**—*Petition under S.* 8—*Character of institution—Burden of proof.*

Where in a petition under S. 8 the petitioner asserts that he is the mahant of a Dharmasala and claims that the Dharmasala is not a Sikh Gurudwara even if it appears from its foundation that the mahants have been udasis and there are samadhis of the petitioner's ancestors at the Dharamasala the *onus* is on the objectors to establish the character of the institution. When it is proved by documentary evidence that the Dharmasala has been a place of public worship since 1853 and that such worship has been connected with the Granth Sahib and it also appears that the village is a Sikh village and the evidence of the objectors goes to show that the existence of a samadh dates only from recent times, more than probably after the Sikh Gurudwara controversy had become acute and the importance of the samadh had been realised by the udasi mahants it should be held that the institution falls under S. 16 (2) (*iii*). (*Addison and Monroe, JJ.*) SOHAN DAS *v.* BELA SINGH. **6 R.L. 414 (2)=147 I.C. 632=A.I. R. 1934 Lah. 180.**

———**S. 16 (2)**—*Smadh of Guria as object of worship—Adi Grantha also kept—Character of institution.*

Where the principal object of worship in the institution is the Samadh of Guria, the mere fact that Adi Grantha is also kept in the institution and on occasions opened with due ceremony and passages from it read, cannot be held as proof of purely Sikh nature of worship, carried on at the Gurudwara or Dera. (*Broadway and Johnstone, JJ.*) SHIROMANI GURUDWARA PRABANDHAK COMMITTEE *v.* MAHANT GULAB DAS. **136 I.C. 257 =I.R. 1932 Lah. 209=33 P.L.R. 336=A.I. R. 1931 Lah. 296.**

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———**S. 16 (2) (1)**—*Applicability—Tank existing between two buildings erected to memory of first and second Gurus.*

Where tank forms a very important adjunct to the two buildings erected to the memory of the first and the second Gurus, the institution (Gurudwara) must be regarded as consisting of the two buildings together with the tank which exists between them and therefore the tank falls within the purview of sub-S. 2 (1), S. 16. (*Broadway and Coldstream, JJ.*) GURMUKH SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **142 I.C. 698=I.R. 1933 Lah. 244=33 P.L.R. 806= A.I.R. 1932 Lah. 451.**

———**S. 16 (2) (iii)**—*Any Sikh entitled to worship in institution and anybody allowed to have recitation of Granth Sahib—Institution is Sikh Gurdwara.*

Where in an institution it was found that any Sikh could worship and he could not be stopped from doing so and that if any one wanted to distribute Karah parshad and have recitation of Guru Granth Sahib, he could do so.

Held, that the institution was a Sikh Gurdwara. (*Addison and Agha Haidar, JJ.*) KATHA SINGH *v.* JASWANT SINGH. **6 R.L. 505=148 I.C. 162 =35 P.L.R. 346=A.I.R. 1934 Lah. 28.**

———**S. 16 (2) (iii)**—*Dharmasala founded by villagers and used for worship of Granth Sahib —Held institution was Sikh Gurdwara.*

The institution in dispute was a dharmasala founded by the villagers and used for the worship of the Granth Sahib; way-farers were also entertained there, as it was situated on an important road. There was no evidence to show that it was an Udasi Monastery.

Held, that it was a Sikh Gurdwara within the meaning of S. 16 (2) (*iii*) of the Act. (*Addison and Currie, JJ.*) UTTAM DAS *v.* BALWANT SINGH. **6 R.L. 511=148 I.C. 185=35 P.L.R. 343= A.I.R. 1934 Lah. 25.**

———**S. 16 (2) (iii)**—*Dharmasala erected in Sikh village—Granth Sahib read—Mahanta Udasi*

The village where the Dharmasala in question was situated was a Sikh village, and the Dharmasala was the only place of worship in the village. The Granth Sahib was read there, but the Mahant was an Udasi.

Held, the fact that the Mahant was an Udasi was common to many Sikh Gurudwaras and that the Dharmasala in question was a Sikh Gurudwara. (*Addison and Monroe, JJ.*) BISHAN DAS *v.* GURBAKHSH SINGH. **6 R.L. 526=148 I. C. 45=A.I.R. 1934 Lah. 63 (2).**

———**S. 16 (2) (iii)**—*Dharmasala for public worship—Inference from user.*

Where it was proved that a dharmasala was founded by Sikhs for use for the purpose of public worship and the evidence showed that it was used for that purpose and the office-holders being non-residents had employed others to read the Granth Sahib.

Held, that the institution was a Sikh Gurudwara. (*Addison and Monroe, JJ.*) SAJJAN SINGH *v.* ISHAR SINGH. **6 R.L. 391=147 I.C. 309=35 P.L.R. 168=A.I.R. 1934 Lah. 215.**

———**S. 16 (2) (iii)**—*Gurdwara—Village dharmasala—Granth Sahib read and travellers fed.*

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Where ever since the time of the British occupation the dharmasala had been a typical village Gurdwara dharmasala in which Granth Sahib had been publicly worshipped and travellers fed and prior to British rule the grants of land and revenue free assignments were made by Sikhs.

Held, that the dharmasala was for public worship. (*Addison and Monroe, JJ.*) GURMUKH DAS *v.* PARTAP SINGH. **6 R.L. 456=147 I.C. 834=A.I.R. 1934 Lah. 319.**

———**S. 16 (2) (iii)**—*Institution established by Sikhs for public worship—Granth Sahib read —Office-holders being Sikhs—Grants by Sikhs —Participation of Hindus in worship—Institution as Sikh Gurdwara.*

A dharmasala was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. Certain Hindus, who were in sympathy with the tenets of the Sikh religion, also used to go there to hear the Granth Sahib read. The office-holders had all been Sikhs and the grants in favour of the institution were made by Sikhs. It was the Granth Sahib which was worshipped there.

Held, that it was sufficient for the purpose of S. 16 (2) (*iii*) of the Act that the institution was established for use by Sikhs for the purpose of public worship and was used for such worship by Sikhs. Merely because persons who stated that they were Hindus also went there to worship the Granth Sahib, the institution should not therefore be held to be a Hindu institution. (*Addison and Monroe, JJ.*) MUL SINGH *v.* HARNAM SINGH. **A.I.R. 1934 Lah. 173.**

———**S. 16 (2) (3)**—*Institution founded in times of Moghuls by one Guria—Mahants being Udasis—Character of institution.*

The institution was founded a very long time ago (in the time of Moghuls) by one Guria and ever since its foundation all the Mahants have been Udasis, succession going from Guru to Chela subject to confirmation by Udasi Bhats, and the principal object of worship was the Smadh of a Guria, which existed on the date of dispute.

Held, (1) that the institution must be regarded as having been founded by Udasis and must be treated as an Udasi Gurdwara; and (2) that the *onus* of proving, that Guria was a Sikh and that the institution had been established for use by Sikhs for the purpose of public worship and that it had been used for such worship by Sikhs, was on those claiming it to be a Sikh Gurdwara or Dera and well within S. 16 (2) (3). (*Broadway and Johnstone, JJ.*) SHIROMANI GURDWARA PRABANDHAK COMMITTEE *v.* MAHANT GULAB DAS. **136 I.C. 257=I.R. 1932 Lah. 209=33 P. L.R. 336=A.I.R. 1931 Lah. 296.**

———**S. 16 (2) (iii)**—*Mere proof of use of institution for worship, by Sikhs—If sufficient.*

Proof of two separate matters is necessary in order that S. 16 (2) (*iii*) should be applied, the first being that the institution was established for use by Sikhs for purpose of public worship, and this is not a necessary inference, when the second proposition concerning user of the institution only has been established. (*Monroe and Rangilal, JJ.*) LACHHMAN DAS *v.* ATMA SINGH. **158**

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I.C. 903 (2)=8 R.L. 323 (2)=A.I.R. 1935 Lah. 666.

———**S. 16 (2) (iii)**—*Proof of Sikh Gurudwara.*

The institution called "Dharmasala Peshawaris" founded by Peshawaris, was being used for marriage parties and funerals with the permission of the Peshawari community. Travellers had frequently stayed there. Smoking had often taken place. Anti-Sikh ceremonies like tonsure, conversion to Hinduism and Hawan have been performed there. The samadh which existed there till recent times had been worshipped and other religious books besides the Granth Sahib had been frequently read.

Held, that these uses were inconsistent with the character of a religious institution founded and maintained for the purpose of public worship by Sikhs and as such it was not a Sikh Gurudwara.

Held further, that the mere fact that the Mahants had been Nirmals did not make it a Sikh Gurudwara *(Monroe, Rangi, Lal, JJ.)* COMMITTEE OF MANAGEMENT OF GURUDWARAS, AMRITSAR *v.* COMMITTEE OF MANAGEMENT OF DHARMASALA PESHAWARIS **160 I.C. 538=8 R.L. 542=A.I.R. 1935 Lah. 663.**

———**S. 16 (2) (iii)**—*Proof of Sikh Gurudwara.*

In order to establish that an institution is a Sikh Gurudwara, it is not sufficient to produce satisfactory evidence that it was used for the purpose of public worship by Sikhs and ask the Court to infer that the institution was established for such a purpose. *(Monroe and Rangi Lal, JJ.)* HARNAM DAS *v.* RUR SINGH. **157 I.C 142=8 R.L. 95.**

———**S. 16 (2) (iii)**—"*Sikh Gurdwara*"

The fact that Sikhs have for a considerable time worshipped at a place of worship, does not necessarily mean that it is a "Sikh Gurdwara" within the meaning of S. 16 (2) (*iii*) of the Sikh Gurdwaras Act. *(Addison and Agha Haidar, JJ.)* SUNDER SINGH *v.* NARAIN DAS. **155 I.C. 396=7 R.L. 706=35 P L.R. 619=A. I.R. 1934 Lah. 920.**

———**S. 16 (2) (iii)**—*User for long period of Sikh mode of worship—No presumption that same mode prevailed at the origin of shrine.*

Section 16 (2) (*iii*) requires the fulfilment of two distinct conditions, the first relating to user, the second to the purpose of the establishment. If satisfaction of one condition were to be accepted as a ground for proving the fulfilment of the second, it would have been unnecessary for the legislature to specify as necessary fulfilment of the second condition. Hence the existence for a long period of a Sikh mode of worship does not raise the presumption that the same mode of worship prevailed at the origin of the shrine. *(Monroe and Rangi Lal, JJ.)* ATMA DASS *v.* TAKHAT SINGH **160 I.C. 145=8 R. L. 498=A.I.R. 1935 Lah. 809.**

———**S. 16 (3)**—*Hereditary office-holders—Members of committee managing gurudwara who are either nominated or co-opted by committee.*

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The members of a committee managing a gurudwara (other than a Sikh Gurudwara), who are either nominated by the founder or have been co-opted by the committee can be regarded as hereditary office-holder so as to be entitled to be restored to office under S. 16 (3). *(Addison and Beckett, JJ.)* GURU NANAK SAT *v.* THAKAR DAS. **A.I.R. 1935 Lah. 277.**

———**S. 18**—*Income from land used for expenses of langar of gurdwara—Presumption.*

Where the income from a land has been used for a long time for the expenses of the langar of a gurdwara, the presumption is that the land is muafi belonging to the gurdwara. *(Dalip Singh and Agha Haidar, JJ.)* KARTAR SINGH *v.* GURDWARA PRABANDHAK COMMITTEE. **6 I.R. (Lah.) 134=145 I.C. 727=A.I.R. 1933 Lah. 475.**

———**S. 18**—*Mahants of gurdwara erecting buildings on land of gurdwara—Presumption.*

Where the mahants of a gurdwara who are in possession of the lands of gurdwara as custodians for the benefit of the gurdwara erect buildings on such land, the presumption is that the buildings pertain and attach to the gurdwara. *(Dalip Singh and Agha Haidar, JJ.)* KARTAR SINGH *v.* GURDWARA PRABANDHAK COMMITTEE. **6 I.R. (Lah.) 134=145 I.C. 727=A.I.R. 1933 Lah. 475.**

———**Ss. 18 and 2 (4) (i)**—*Muafi grant to ragis singing in Gurdwara—Devolution of succession from one office-holder to another—Right to land with Gurdwara and not with ragis.*

A land was granted by the original proprietor to a Gurdwara and a certain person who was to play on musical instrument during the time of religious services was to enjoy the benefits of the land. He had three others who were his chelas who helped him in his work, and on his death, his widow and chelas continued to work, and enjoy the land and subsequently the land was enjoyed by persons who were holding office as ragis in the Gurdwara. Further the names of petitioners who claimed the land as their personal property were shown in the Record of Rights in which the remark was that muafi was made in the names of ragis singing in the Gurdwara.

Held, that the presumption under S. 18 (1) (*g*), Gurdwaras Act, that the right, title or interest claimed by the persons whose names are entered in the Record of Rights appertained to the Gurdwara applied that the petitioners were office-holders as defined in S. 2 (4) (*i*), that the devolution of succession was from one office-holder to another and that petitioners could not claim it either as full proprietors or as permanent occupancy tenants. *(Dalip Singh and Agha Haidar, JJ.)* SHIROMANI GURDWARA PRABANDHAK COMMITTEE *v.* UTTAM SINGH. **6 I.R. (Lah.) 14=144 I.C. 712=A.I.R. 1933 Lah. 894.**

———**S. 18**—Proof that land is endowed property. *See* PUNJAB SIKH GURDWARAS ACT, S. 10. **A.I.R. 1935 Lah. 807.**

———**S. 18 (1) (b)**—*Presumption under—Applicability of—Assignments of proprietary*

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rights in land for maintenance and service of Gurdwara.

A gift of land by way of dharmarth for meeting expenses for Gurdwara to which langer was attached is an assignment of the proprietary rights in the land for the service and maintenance of Gurdwara and the provisions of S. 18 (1) (*b*) are applicable; and the presumption therein contained displaces the presumption which otherwise would arise under S. 44, Punjab Land Revenue Act; but where the assignment is without any direct reference to any religious purpose, the presumption does not apply. (*Broadway, C. J. and Abdul Qadir, J.*) RAN SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **I.R. 1933 Lah. 210=142 I.C. 530=A.I.R. 1933 Lah. 137.**

———**S. 18 (1) (b)**—*What remained after land revenue assigned in name of Gurdwara—Presumption is that muafi and not land pertained to Gurdwara.*

The land revenue was assigned to members of a certain family and what remained was assigned in the name of the Gurdwara.

Held, that the presumption would be that only the muafi pertained to the Gurdwara and not the land and that muafi could be quite distinct from the land. (*Addison and Currie, JJ.*) SHIROMANI GURDWARA PRABANDHAK COMMITTEE *v.* HARCHARAN SINGH. **154 I.C. 375=7 R. L. 555=A.I.R. 1934 Lah. 1.**

———**S. 18 (1) (d)**—*Income of land not proved to have been applied to service and maintenance of Gurdwara—Presumption under S.* 18 (1) (d) *does not arise.*

Where the income of the land has not been established to have been applied to the service and maintenance of the Gurdwara, the presumption under S. 18 (1) (*d*) does not arise. (*Addison and Currie, JJ.*) SHIROMANI GURDWARA PRABANDHAK COMMITTEE *v.* HARCHARAN SINGH. **154 I.C. 375=7 R.L. 555=A.I.R. 1934 Lah. 1.**

———**S. 18 (1) (e)**—*Presumption under—Applicability.*

In order to bring a case within the presumption under S. 18 (1) (*e*) it has to be proved that the acquisition of the right, title or interest in question was made with funds proved to have belonged to the Gurdwara. (*Addison and Monroe, JJ.*) PURAN DAS *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **15 Lah. 732 =35 P.L.R. 423=A.I.R. 1934 Lah. 421.**

———**S. 18 (g)**—*Presumption under—When arises*

Where an assignment of land is made in the name of the office-holder of a dharmasala and the succession has been from guru to chela on two successive occasions, the presumption under S. 18 (*g*) arises. (*Monroe and Rangi Lal, JJ.*) HAZARA SINGH *v.* CHET RAM. **160 I.C. 533=8 R.L. 550=A.I.R. 1935 Lah. 813.**

———**S. 18 (1) and (g)**—*Presumption.*

Where it is found and admitted that the property descended from a mahant, an office-holder, to his chela, the successor-in-office, a rebuttable presumption is created under S. 18 (1) (*g*).

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(*Broadway, C.J. and Monroe, J.*) HAR PARSHAD *v.* COMMITTEE OF MANAGEMENT, GURDWARA HERAN. **6 I.R. (Lah.) 195 (1)=146 I.C. 236=34 P.L.R. 921=A.I.R. 1933 Lah. 334.**

———**S. 18 (1) (g)**—*Presumption under—Applicability—Muafidar reciting Granth.*

Muafidars who had abandoned secular pursuits and were consistently performing service at the institution were found to take out the Granth Sahib and recite it.

Held, that they fell within the definition of office-bearers as given in S. 2 (4), as they participated in the management of the public worship and that the presumption arose in favour of the Gurudwara under S. 18 (*g*). (*Addison and Currie, JJ.*) KAHAN DASS *v.* SHIROMANI GURUDWARA PARBANDHAK COMMITTEE. **154 I.C. 357 =7 R.L. 548=A.I.R. 1934 Lah. 68.**

———**S. 18 (1) (g)**—*Property of office-holder —Person laying claim to onus of proving nature of property.*

If the deceased is shown to be an office-holder the burden of proof lies on the party claiming his property to show that it was his personal property and did not belong to the Gurdwara. (*Broadway, O.C.J. and Bhide, J.*) MT. SHIV DEVI *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **136 I.C. 718=I.R. 1932 Lah. 254=32 P.L.R. 858=A.I.R. 1932 Lah. 150.**

———**S. 18 (2)**—*Applicability—Claim to land through common ancestor.*

Where certain land was claimed on behalf of the Gurudwara but the claimant did not derive title from a past or present office-holder but claimed through a common ancestor,

Held, that the provision of S. 18 (2) of the Sikh Gurudwaras Act will not apply. (*Addison and Bhide, JJ.*) DALIP SINGH *v.* SIKH GURUDWARA PARBANDHAK COMMITTEF, AMRITSAR. **I.R. 1931 Lah. 645=132 I.C. 661=32 P.L. R. 479=A.I.R. 1931 Lah. 668.**

———**S. 22 (4)**—*Outgoing Mahant—Right to allowance.*

An outgoing Mahant is not entitled to a mere subsistence allowance which would enable him to supply himself with bare necessaries of life and residence but to an allowance which would enable him to maintain himself in a position of comparative ease, comfort and dignity. Measure of compensation prescribed. (*Broadway and Agha Haidar, JJ.*) NARAIN SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **I.R. 1932 Lah. 707=140 I.C. 395=34 P.L.R. 580 =A.I.R. 1932 Lah. 599.**

———**S. 27**—*Applicability—Trust deed by previous Mahant in favour of Chela.*

A sapurdnama executed by a Mahant distinctly stated that nine shops duly specified belonged to the Gurdwara on the date on which the document was executed. It proceeded to point out that the income had not been sufficient and that certain gentlemen (named in the deed) had, with great difficulty, managed to raise subscriptions which had enabled him to put the institution on a proper footing and that the income of this property was used by him for his own use and for the purposes of the Gurdwara. It then recited the fact that he had taken *R* aged 12 as his

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Chela and that he and *R* would be entitled to deal with the property under the terms of the deed and after his death *R* would carry on the work under the control of the gentlemen (or their nominees) who had raised the subscriptions subject to his good conduct.

Held, that there was no allotment of any property, or the income of any property to any person other than the Gurdwara and that S. 27 did not apply in this case. (*Broadway and Johnstone, JJ.*) RATTAN SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **32 P.L. R. 768=135 I.C. 503=I.R. 1932 Lah. 103= A.I.R. 1931 Lah. 256.**

———**S. 27**—*Gurdwara property—Mahant claiming it as his own—Onus of proving title.*

Certain property was notified as Gurdwara property but the Mahant of that property basing his claim on a trust deed executed by his predecessor-in-office set up title in himself. It was perfectly clear from the trust deed that the Mahant was not in possession as owner.

Held, that the onus of proving title was on the Mahant and his possession did not shift the burden on the opposite party. (*Broadway and Johnstone, JJ.*) RATTAN SINGH *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE. **32 P.L. R. 768=135 I.C. 503=I.R. 1932 Lah. 103 =A.I.R. 1931 Lah. 256.**

———**Ss. 28 and 30 (2), Proviso**—*Court finding that proviso to S. 30 (2) applies—Procedure.*

Where in a suit under S. 28, even if the Court considers that the first proviso to sub-S. (2) of S. 30 applies, that is no reason for dismissing the suit. On that finding it should frame an issue under S. 32 of the Act and forward that issue to be tried by the Sikh Gurudwaras Tribunal. The suit should then be later decided by the Court in accordance with the decision of the tribunal. 1934 Lah. 390, Appr. (*Addison and Din Mohamad, JJ.*) MANAGING COMMITTEE, GURUDWARA HARJAN BELAN *v.* PARTAP SINGH. **160 I.C. 133=8 R.L. 497=A.I.R. 1935 Lah. 843.**

———**S. 28**—*Notification under S. 5 (3)—Effect.*

A notification under S. 5 (3) itself is conclusive proof of the fact that no claim under S. 5 (1) is made and a suit under S. 28 brought by the Committee of Gurdwaras for possession of the property should be decreed. (*Addison and Currie, JJ.*) KAHAN DASS *v.* MANAGING COMMITTEE OF THE GURDWARA OF BACHA NAU. **149 I.C. 955=6 R.L. 764=A.I.R. 1934 Lah. 54.**

———**Ss. 28, 30 and 32**—*Suit under S. 28—Application by person entitled to benefit of S. 30—Suit should not be dismissed but procedure under S. 32 should be followed*—Obiter.

Obiter.—Where a suit under S. 28 is filed but the Court finds that a person is entitled to the benefit of S. 30, the suit filed under S. 28 should not be dismissed but the Court should under S. 32 frame one issue and refer it for decision to the Gurdwara Tribunal. (*Addison and Currie, JJ.*) MANAGING COMMITTEE OF GURDWARAS *v.* JAI NATH. **15 Lah. 113=6 R.L. 533=148 I.C. 250=A.I.R. 1934 Lah. 30.**

PUNJAB SIKH GURDWARAS ACT (1925), S. 30.

———**S. 30, Proviso**—*Person having clear knowledge about notification and notice to him—If can claim exemption.*

Where a person has a fairly clear knowledge of the Government Notification and notice sent to him and the working of the Gurudwaras Act, it does not matter whether he has received notice in original or not. ((*Addison and Beckett, JJ.*) AMIN CHAND *v.* HAZARI RAM. **A.I.R. 1935 Lah. 165.**

———**S. 30 (1), Proviso**—*Applicability—List under S. 3 (1)—Property referred to as* malika *—Property claimed by Mahant as tenancy—Right of Gurdwara whether lost.*

After an institution was declared a Sikh Gurdwara, certain Sikhs filed a list under S. 3 (1). One of the items therein mentioned was the suit property described as *'malkiyat'*. A notification under S. 5 was issued and later the Managing Committee took action under S. 28. The contesting defendant, the Mahant, pleaded that the suit item was a tenancy belonging to him in his personal capacity.

Held, that S. 30 (1) applied and there never having been any claim to the occupancy tenancy, possession of that tenancy could not be granted to the plaintiffs. *Held,* further, that the proviso to S. 30 (1) could not apply to the case as it was clear that with a little diligence the whole position would have been made clear. A.I.R. 1930 Lah. 607, Ref. (*Broadway and Johnstone, JJ.*) SUNDAR DAS *v.* MANAGING COMMITTEE, GURDWARA BAWLI SAHIB. **13 Lah. 36=I.R. 1932 Lah. 388=137 I.C. 877=A.I.R. 1932 Lah. 303.**

———**S. 30 (ii)**—*Consolidated list—Defective procedure—Decision against village proprietary body—Validity.*

The proceedings taken in connection with the consolidated list were not misleading and defective. The village shamilat was included therein and the village proprietary body was in possession of it. Notice was sent to two persons who were alleged to be in possession. They did not claim the shamilat and a suit by the Gurdwara Committee under S. 28 was decreed under S. 2 (*ii*).

Held, that there was nothing to put the villagers on their guard that the whole shamilat was being claimed and consequently the Court should not decide the claim merely because they did not make a claim in a petition under S. 5 of the Act.

Held further, that under S. 32 the Court should frame an issue in respect of the claim and forward the record to the tribunal and that the Court should dispose of the suit on receipt of the decision of the tribunal. (*Addison and Currie, JJ.*) BISHNA *v.* COMMITTEE OF GURDWARA, SUDHAL. **15 Lah. 66=151 I.C. 890= 7 R.L. 211=36 P.L.R. 426=A.I.R. 1934 Lah. 390.**

———**S. 30 (ii), Proviso 1**—*Applicability.*

If claimant could have found out that certain property is entered in list by exercise of diligence, S. 30 (*ii*), Prov. 1 has no application. (*Addison and Agha Haidar, JJ.*) GOBIND SINGH *v.* MANAGING COMMITTEE OF GURDWARAS. **147**

PUNJAB SIKH GURDWARAS ACT (1925), S. 30.

I.C. 54=15 Lah. 55=36 P.L.R. 438=A.I.R. 1933 Lah. 828.

———S. 30 (2), proviso—*Applicability.*

The proviso to cl. (2) of S. 30 does not cover cases where errors are made in the preparation of claims. (*Addison and Currie, JJ.*) MANAGING COMMITTEE OF GURDWARAS *v.* JAI NATH. **15 Lah. 113=6 R.L. 533=148 I.C. 250=A.I.R. 1934 Lah. 30.**

———S. 30 (2), Proviso—*Applicability—Conditions—Onus.*

Unless the first proviso to sub-S. (2) of S. 30 of the Act applies, the suit under S. 28 must be automatically decreed. In order to come within this proviso the claimants against Gurudwara have to prove want of knowledge of the fact that their right, title or interest had been included in the list published under the provisions of sub-S. (2) of S. 30; that their failure to make the claim under S. 5 was due to want of this knowledge and that they could not by the exercise of reasonable diligence have come to know of the fact that their right, title or interest was so included. The burden of proving all these matters is on them and the benefit of the proviso can only be extended to such of the claimants as are able to establish these matters. (*Addison and Din Mohammad, JJ.*) MANAGING COMMITTEE, GURUDWARA HARIAN BELAN *v.* PARTAP SINGH. **160 I.C. 133=8 R.L. 497=A.I.R. 1935 Lah 843.**

———S. 30 (2), Proviso—*Scope—Errors made in preparation of claims.*

The proviso to cl. (2) of S. 30 of the Sikh Gurudwaras Act provides only for two classes of cases—(1) those in which the claimant had no knowledge of the existence of his own rights; (2) those in which he had no knowledge of the fact that the right, title and interest had been included in the list published under sub-S. (2) of S. 3, in either case subject to the further proviso that he could not have obtained this knowledge by the exercise of reasonable diligence. It is not wide enough to cover cases where errors are made in the preparation of claims. (*Addison and Currie, JJ.*) GURUDWARA COMMITTEE OF JHULNA MAHAL *v.* MT GUR DEVI. **15 Lah. 113=148 I.C. 250=6 R.L. 533=36 P.L.R. 425=A.I.R. 1934 Lah. 30.**

———Ss. 30, proviso (ii), 32 and 34—*Dispute as to title—Procedure.*

Where it is shown that the person in possession had no knowledge that the property sued for was included in the list published under S. 3 (2) and could not by the exercise of due diligence have known it proviso (*ii*) to S. 30 applies and the Court should not decide the claim on the mere ground that the property had been included in the notification. In such a case the question of title has to be decided between the parties and the proper procedure is for the Court to frame an issue and forward the same to the Sikh Gurudwara's tribunal. The decision of the tribunal could later on be dealt with by the Court under S. 34. (*Addison and Monroe, JJ.*) MAHOMID AMIN *v.* MANAGING COMMITTEE OF THE GURDWARAS. **6 R.L. 387 (2)=147 I.C. 378=A.I.R. 1934 Lah. 203.**

PUNJAB SIKH GURDWARAS ACT (1925), S. 133.

———S. 32—Claim under S. 5 (1)—Mode of disposal. *See* PUNJAB GURUDWARA'S ACT, S. 5 (1). **12 Lah. 204=I.R. 1931 Lah. 361=131 I.C. 89=A.I.R. 1931 Lah. 85 (F.B.).**

———S. 32—*Consolidated list—Defective proceeding—Reference to tribunal.*

The proceedings taken in conection with the consolidated list were not misleading and defective. The village shamilat was included therein and the village proprietary body was in possession of it. Notice was sent to two persons who were alleged to be in possession. They did not claim the shamilat and a suit by the Gurdwara Committee under S. 28 was decreed under S. 30 (*ii*).

Held, that there was nothing to put the villagers on their guard that the whole shamilat was being claimed and consequently the Court should not decide the claim merely because they did not make a claim in a petition under S. 5 of the Act.

Held further, that under S. 32 the Court should frame an issue in respect of the claim and forward the record to the tribunal and that the Court should dispose of the suit on receipt of the decision of the tribunal. (*Addison and Currie, JJ.*) BISHNA *v.* COMMITTEE OF GURDWARA, SIDHAL. **15 Lah. 66=151 I.C. 890=7 R.L. 211=36 P.L.R. 426=A.I.R. 1934 Lah. 390.**

———S. 37—*Compromise sanctioned by Tribunal—Binding nature on third party decree-holder.*

In 1924 the judgment-debtor raised a loan from a Bank on the security of certain property in Amritsar. In 1926 the Bank obtained a decree. In 1928 the Committee of the Durbar Sahib, Amritsar, applied for stay under S. 37, but it was rejected. The Local Government had however showed the property as belonging to the Gurdwara. The Committee filed a declaratory suit and impleaded the Bank but the Committee's claim was dismissed. The judgment-debtor filed a petition before the Gurdwaras Tribunal and the same was compromised and the property was declared to belong to the Durbar.

Held, that the Durbar could on the basis of the compromise apply for stay of execution of the decree obtained by the Bank and that the Bank was bound by the adjudication by the Tribunal. (*Tapp, J.*) CENTRAL BANK OF INDIA, LTD. *v.* CHARAYA & CO. **I.R. 1831 Lah. 929=134 I.C. 481=A.I.R. 1932 Lah. 125.**

———Ss. 37 and 5 (1)—*Dismissal of Mahant's claim petition—No declaration that property belongs to Gurdwara—Jurisdiction of executing Court to order restitution.*

It is not the mere fact of dismissal of the Mahant's petition of claim under S. 5 (1) which entitles the Gurdwara Committee to retain possession of certain lands, but a declaration by the Tribunal that they belonged to the Gurdwara. Where no such declaration has been made by the Tribunal its decision does not debar the executing Court from carrying out the provisions of the ordinary law in making restitution of properties which had been improperly seized by it in execution of its decree, which has since been reversed. (*Tek Chand, J.*) SAHIB SINGH *v.* BHAGAT

PUNJAB SIKH GURDWARAS ACT (1925), S. 133.

SINGH. **148 I.C. 335=6 R.L. 560=A.I.R. 1933 Lah. 798.**

———**S. 133**—*Powers of Committee.*

The Gurudwara Committee has no statutory power to hold possession of properties which do not belong to the particular Gurdwara under its management but which have been found to belong to a local Nirmala Dharamsala with which the Gurdwara has no concern whatever. (*Tek Chand, J.*) SAHIB SINGH *v.* BHAGAT SINGH. **148 I.C. 335=6 R.L. 560=A.I.R. 1933 Lah. 798.**

———**S. 145**—*Applicability—Meeting to be actually held*

Section 145 is only applicable when a meeting has actually taken place and does not apply where no meeting is ever held. (*Broadway and Johnstone, JJ.*) INIIZAMIA COMMITTEE GURDWARA *v.* PREM DASS. **12 Lah. 314=I.R. 1931 Lah. 415=131 I.C. 287=32 P.L.R. 48=A.I.R. 1931 Lah. 226.**

PUNJAB SMALL TOWNS ACT (1921), S. 4-A—*Failure to take oath—Effect of.*

Failure of a person who has been elected or nominated to the committee to take the oath of allegiance does not affect the existence of the committee. Such person is a member of the committee even though he has not been taking part actually in the meetings. A.I.R. 1923 Mad. 360; 39 Cal. 304 and 39 Mad. 700, Ref. (*Tek Chand and Monroe, JJ.*) EMPEROR *v.* SIDHU MAL. **14 Lah. 461=I. R. 1933 Lah. 473=144 I.C. 475=34 P.L.R. 758=34 Cr. L. J. 776=1933 Cr. L. J. 676=A.I.R. 1933 Lah. 435.**

———**S. 16**—*Cost of maintenance of lunatic detained in Mental Hospital.*

The detention of lunatics in a Mental Hospital and the cost of their maintenance is covered by the objects mentioned in S. 16. The Small Town Committee is entitled to spend the funds on the cost of maintenance of lunatics, but it is not bound to do so. Hence the committee is not liable to pay the costs of maintenance of lunatics already incurred. (*Jai Lal, J.*) REHMAT ALI *v.* SMALL TOWN COMMITTEE, DHARIWAL. **15 Lah. 480=151 I.C. 403=7 R.L. 127=36 P. L.R. 350=A.I.R. 1934 Lah. 148.**

———**S. 21 (a) (ii)**—*"Circumstances".*

The tax-paying capacity of an assessee must depend upon his means or material welfare, that is, upon the money that comes into his hands from various sources. That is certainly the principal, possibly the only assessable component of an assessee's circumstances. (*Addison and Din Mohammad, JJ.*) SARUP SINGH *v.* SMALL TOWN COMMITTEE, FATEGARH. **16 Lah. 1073=159 I.C. 1064=38 P.L.R. 118=A.I.R. 1935 Lah. 636.**

———**S 25**—*Propriety of assessment as to amount—If can be challenged in Court*

Whether the tax has been properly assessed as to amount, cannot come before the Court. It is for the assessee to object under S. 25 to the amount of the assessment unit at which he is assessed. If he is dissatisfied with the order passed on his objection, he can appeal to the Deputy Commissioner setting forth any circumstance in his favour and ask for the unit to be reduced. The order passed by the Deputy Commissioner is final and cannot be challenged in the Court. (*Addison and Din Mohammad, JJ.*) SARUP SINGH *v.* SMALL TOWN COMMITTEE, FATEGARH. **16 Lah. 1073=159 I.C. 1064 38 P.L.R. 118=A.I.R. 1935 Lah. 636.**

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———**S. 35**—*Effect—S 16 if modified.*

S. 35 merely regulates the powers of the committee for issuing orders for sanitary or other purposes and does not any way affect the scope of the power of the committee under S. 16. (*Jai Lal, J.*) REHMAT ALI *v.* SMALL TOWN COMMITTEE, DHARIWAL. **15 Lah. 480=151 I.C 403=7 R.L. 127=36 P L R. 350=A.I. R. 1934 Lah. 148.**

———**Ss. 35 and 36**—*Date when rules come in force—If can affect right of committee to collect fees under them.*

Where the rules framed and published under Ss. 35 and 36 provide that no person shall deposit any goods for sale on a platform constructed in front of his house and on the public street without the written permission of the committee, the date when the rules come in force cannot affect the present or future right of the committee to collect the fees under the rules. The date of the notification in which the rules are published only affects the power of the committee to require permission for the erection of a platform. (*Beckett, J.*) BALMOKAND *v.* SMALL TOWNS COMMITTEE, TALAGANG. **A.I.R 1935 Lah. 960.**

———**S. 35**—Small Towns Committee—Power to lease portion of public street. *See* PUNJAB SMALL TOWNS ACT, S. 41 (1) (*e*). **16 Lah. 608.**

———**S. 41 (1) (e)**—*Small Towns Committee—Power to lease portion of public street*

A Small Town Committee is not empowered under S. 41 (1) (*e*) of the Small Towns Act to grant a lease of any portion of a public street. The mere vesting of a public street in a corporate body would not necessarily give the corporate body either ownership of the soil under the public street or necessarily give it a power to grant leases thereof. (*Dalip Singh and Agha Haidar, JJ.*) RALLA RAM-DINA NATH *v.* SMALL TOWN COMMITTEE, CHUHARKANA. **16 Lah. 608=37 P.L.R. 719=159 I.C. 983=8 R.L. 447=A.I.R. 1935 Lah. 958.**

PUNJAB SUBORDINATE SERVICES PUNISHMENT AND APPEAL RULES—*Discharge and dismissal—Distinction—Appealability of order of dismissal.*

So long as a man has not a substantive appointment he is on probation. It is the discharge of a person appointed on probation which is barred from the operation of the rules. Nothing is said about his dismissal. Dismissal is a very different thing from discharge. While no appeal lies from the discharge of a person who has not a substantive appointment an appeal does lie from an order of dismissal. (*Irving, F.C.*) MELA RAM *v.* EMPEROR. **11 Lah.L T. 72.**

———*Sentence of dismissal or removal—Procedure.*

A sentence of dismissal or removal should not be passed under the Punjab Subordinate Service Rules unless: (1) the grounds on which it is proposed to take action are reduced to the form of a definite charge or charges in writing; (2) the charge or charges is communicated in writing to the person charged; (3) the charge is communicated in writing a statement of the

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allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration; (4) he is required to put in a written statement and may if he desires be heard in person; (5) if he desires and the authority so directs an oral enquiry is made; (6) the proceedings contain a sufficient record of the evidence and a statement of the findings and ground thereof. The said rules are mandatory and where they are not properly kept in view the Financial Commissioner may interfere. (*Miles Irving, F.C.*) PIARE LAL *v.* EMPEROR. **13 Lah.L T. 11.**

——**Rr. 3 and 14 (1) (a)**—*Discharge of person appointed on probation—Appeal.*

The discharge of a person appointed on probation does not amount to removal or dismissal. Nor does it amount to withholding of promotion. If the candidate holds another post in Government service, reversion to it is not reduction for the purpose of R. 3 (*c*). In such a case, Rr. 5 and 6 do not apply and an appeal by the candidate is incompetent. (*Irving, F.C.*) FEROZE-UD-DIN *v.* EMPEROR. **12 Lah L.T. 10.**

——**Rr. 6 and 9**—*Applicability—Stoppage of increment.*

The procedure prescribed by R. 6 of the Punjab Subordinate Services Punishment and or Appeal Rules applies only to cases of dismissal, removal or reduction and not to cases of stoppage of increment. In the latter case all that the appellate Court has to consider is whether the facts alleged are established and justify the penalty inflicted. (*Dobson, F.C.*) MEHR SINGH BAB *v.* EMPEROR. **14 Lah.L T. 22.**

——**R. 6 (1)**—*Non-compliance—Effect.*

R. 6 (1) is absolutely Mandatory and the failure to observe it invalidates the proceedings. (*Irving, F.C.*) MELA RAM *v.* EMPEROR. **12 Lah.L.T. 72.**

PUNJAB TENANCY ACT (XVI OF 1887)—*Procedure—Applicability of O 32, R 2, C. P. Code.*

O. 32, R. 2, C. P. Code, applies to cases under the Punjab Tenancy Act. (*Miles Irving, F.C.*) FATEH SINGH *v.* KHUSHI MOHAMAD. **35 P.L.R. 428.**

——*Application—Duty of Revenue Officers.*

Revenue Officers are supposed to work the Tenancy Act sympathetically. (*Dobson, F.C.*) HABIB *v.* RAJA JOTI PRASAD. **11 Lah L.T. 10.**

——*Provisions of Limitation Act—Applicability.*

The provisions of the Limitation Act applies to proceedings under the Tenancy Act only by analogy. (*Irving, F C*) BISHAMBAR LAL BASHESHAR LAL *v.* RAM CHANDAR. **11 Lah L.T. 89.**

——*Standing Orders, O. 23, R. 11—Mutation—Refusal—Grounds—Landlord's refusal.*

If a transfer has taken place mutation must not be refused simply because the landlord refuses his consent or because the provisions of Ss. 53 and 56 of the Tenancy Act have not been complied with. (*Irving F. C.*) KHUSHAL DAS *v.* KESAR SINGH **11 Lah.L.T 18.**

——**S. 4**—*Land held for agricultural purpose—Occupation of houses whether comes under—Suit for ejectment—Forum.*

The plaintiff instituted a suit in the Court of the Assistant Collector for ejectment of the defendants alleging that they had settled the defendants in houses constructed by them, that the latter in lieu of rent agreed to supply them Kallar which they intended to utilize as manure for their agricultural lands and that they had not performed the conditions on which the houses were given. The houses in dispute were situated in abadichak and the land on which they stood was classified as gairmumkin abadi. The defendants had no other land in their possession for cultivation along with the houses.

Held, that defendants did not hold land under the plaintiff for agricultural purposes and that the suit was maintainable in the Civil Court.

Semble.—As regards agricultural purpose mentioned in S. 4 (1), it is the purpose of the occupier and not the object of the owner which supplies the test. (*Ju Lal, J.*) MAMMON *v.* ALLAH BAKSH. **I.R. 1931 Lah. 687 = 132 I.C. 847 = A.I.R. 1931 Lah. 726.**

——**3. 4 (1)**—*"Land"—Land given to tenant with option to build thereon.*

A mere option given to the tenant to build on the land in dispute, is not sufficient to take the land out of the definition of that term, when as a matter of fact no building has yet been erected thereon (*Bhide, J.*) FAZAL AHMED *v.* TOLA RAM SINGH. **161 I C 349 = 8 R L. 726 = 37 PL R 735 = A I.R. 1936 Lah. 244.**

——**3 4 (1)**—*"Land"—Site of water-mill—Suit for declaration of occupancy rights—Jurisdiction of Civil Court.*

Where the plaintiffs sued for a declaration that they were occupancy tenants of a water-mill.

Held, that the site of the mill was not "land" within the meaning of S. 4 (1) and that the suit was maintainable in the Civil Court. (*Bhide, J.*) GOBIND *v.* NAINUN. **I R 1932 Lah. 644 (1).**

——**S. 4 (5)**—*'Mukarariadar'—If a tenant.*

'Mukararidars' have not been excluded from the definition of a tenant under Cl. (5) of S. 4. The question, whether a Mukarraridar comes within that definition, will have to be decided on the conditions on which the land is held by him. Where it appears from the lease that the land was taken by the Mukarraridar on payment of Rs. 3 per kanal as rent, this would be sufficient to bring him within the definition of the term. (*Bhide, J.*) FAZAL AHMED *v.* TOLA RAM SINGH. **161 I C 349 = 8 R.L. 726 = 37 P.L.R. 735 = A.I.R 1936 Lah. 244.**

——**S. 4 (6)**—*"Landlord"—Transferee of right to recover rent.*

The transfer of a mere right to recover rent could not make the transferees "landlords" within the definition of the term as given in the Punjab Tenancy Act. 61 P.L. R. 1912, Foll. (*Bhide, J.*) SUNDAR SINGH *v.* KARAM CHAND. **A I.R. 1935. Lah 976.**

——**S. 4 (6) (7)**—*"Landlord".*

Every successor in interest of a landlord and every person who is entitled to receive rent from the tenant is a landlord for the purposes of the Act. (*Mir Ahmad, A.J.C.*) AKBAR KHAN *v.* KALA KHAN. **154 I.C. 896 = 7 R Pesh 89 = A.I.R. 1935 Pesh. 20.**

——**S. 4 (12)**—Haq ihtrafi—*Suit for recovery of—Forum.*

Haq ihtrafi is a village cess within the meaning of S. 4 (12) of the Act and a suit for the recovery thereof is properly triable by a revenue Court. (*King, F.C.*) SHER SINGH *v.* FAQIRIA. **11 Lah.L.T. 163.**

——**Ss. 5 and 8**—*"Settling along with the founders"—Meaning.*

The meaning of "settling along with the founders" is settling contemporaneously but settlement by the founder may take place at some stage after the original foundation. (*Irving, F.C.*) PARAS RAM *v.* MAKHAN LAL **11 Lah L.T 81.**

——**S. 5 (1) (a)**—*Occupancy rights—Inference as to—Rent not exceeding revenue.*

Where possession is traced to the year 1863 and the rent has never exceeded the amount of land revenue and cesses the presumption is in favour of the acquisition of

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occupancy rights by the tenant and when there is no rebutting evidence the tenants should be treated as occupancy tenants. (*Dobson, F.C.*) SUGGHAN *v.* RAM SARAN. **11 Lah.L.T. 12.**

———**Ss. 6 and 8**—*Transfer of mortgage rights—Right of landlord to object—Decree for possession.*

When an occupancy right has been mortgaged the landlord can object to a transfer of the mortgage rights from the original mortgagee to another. Where the Court decrees possession in such a case at the instance of the landlord the decree should be passed against the transferee and not against the tenant. (*Irving, F.C.*) FAUJA *v.* TAJ BEG. **11 Lah.L.T. 64.**

———**Ss. 6 and 8**—*Transfer of occupancy right—Acquiescence by landlord—Inference.*

When a tenant under S. 6 or S. 8 has transferred this right of occupancy without having obtained the consent in writing of the landlord, unless the landlord sues within a reasonable time his acquiescence may be inferred and if inferred will disentitle him to the relief claimed. (*Irving, F.C.*) KANDU *v.* MAULA BAKHSH **11 Lah. L.T. 77.**

———**S. 8**—*Acquisition of occupancy rights—Proof—Mode of.*

Occupancy rights can be established under S. 8 by proof of a promise never to eject, either express or implied. (*Irving, F.C.*) BABU *v.* SHIB NATH. **13 Lah L T. 25.**

———**Ss. 8 and 10**—*Scope.*

S. 10 does not preclude a man from acquiring rights of occupancy under S. 8. (*King, F.C.*) UMAR HAYAT *v.* FAZIL. **11 Lah.L T. 156.**

———**S. 9**—*Occupancy rights—Rejection of claim—Acquisition of right by adverse possession.*

Where the claim of occupancy right has been negatived in mutation proceeding the tenant cannot acquire the same right by the mere fact that he has been in long possession and has not been evicted. (*Miles Irving, F.C.*) SAIDU *v.* SULTAN AHMAD. **13 Lah.L.T. 12.**

———**S. 14**—*Scope—Suit for rent on basis of lease—Absence of proof—Relief by way of damages—Power to grant.*

Under S. 14, it is consistent to grant relief on a claim for rent and to grant rent as from a tenant at will, or damages as from a trespasser for use and occupation, when the lease sued on is not properly proved, although the reverse would not be true. (*Irving, F.C.*) C. N. CHANDRA *v.* AHMED YAR. **13 Lah L T. 34.**

———**S. 15**—*Landlord—Who is*—Hissedari kasht—*Practice of—Payment of rent to another co sharer—Validity of.*

The landlord means the person under whom a tenant holds land and to whom the tenant is liable to pay rent. Under the practice known as "*hissedari kasht*" one of the several co-owners of land is by agreement the sole landlord in respect of a certain parcel of a joint estate. Where there is such a practice, the landlord is the particular shareholder to whom the land in question has fallen and the tenant cannot plead the protection of S. 15 so as to enable him to pay his rent to any other of the co sharers. (*Irving and Boyd, F.Cs.*) RAM CHAND *v.* JAIMAL RAI. **11 Lah.L.T. 165.**

———**S. 22**—*Occupancy tenants under S. 5 (1) (a) erroneously declared as tenants under S. 8*—Malikana *payable by.*

Where the defendants who would be occupancy tenants under S. 5 (1) (*a*) have been erroneously declared as occupancy tenants under S. 8 in a previous litigation.

Held, though that decision had become final, it would not be equitable to enhance the *malikana* beyond the maximum rate for occupancy tenants under S. 5 (1) (*a*). (*Fagan, F.C.*) JAWAHAR SINGH *v.* LABHU SINGH. **11 Lah.L.T. 161.**

PUNJAB TENANCY ACT (1887), S. 45.

———**S 24 (3) (a)**—*Premature suit for enhancement—Revision.*

Where the lower Court failed to note that the suit for enhancement had been instituted within the ten years' period allowed under S. 24 (3) (*a*) of the Act and so was premature, the decree of the lower Court should be set aside in revision. (*King F.C.*) ALLAH DIYA *v.* KARIM BAKHSH. **11 Lah.L.T. 158.**

———**S. 36**—*Adverse possession—Tenant holding over—Assertion of hostile title—Commencement of adverse possession.*

The Punjab Tenancy Act and not the Transfer of Property Act governs the case of a tenant holding over without the landlord's consent. In such a case the mere assertion of an adverse title by the tenant cannot make the statute of limitation run against the landlord. Even if there is an assertion of an adverse title it can take effect only after the close of the agricultural year. (*Bhide and Currie, JJ.*) SOHAWA SINGH *v.* KESAR SINGH. **13 Lah. 432=I.R. 1932 Lah. 715=140 I. C. 474=33 P.L.R. 771=A I.R. 1932 Lah. 586.**

[**R.** 34 P.L R. 319 (321).]

———**Ss. 36 and 41**—*Tenant for fixed period of one year and tenancy at will—Distinction between.*

Unless there is a definite contract or decree to the effect that the tenancy is for a fixed period of one year, the tenant is only a tenant at will, even though he is a tenant from year to year and falls under the description of S. 41 and bound by S. 36. (*Irving, F.C.*) FATEH SINGH *v.* RAM CHAND. **11 Lah.L T. 148.**

———**S. 38**—*Abandonment—Section if exhaustive.*

Abandonment under the Tenancy Act is not limited to the provisions of S. 38. (*Dalip Singh, J.*) HANS GIR *v.* RAGHBIR SINGH. **6 R L. 311=146 I.C. 1022 =34 P.L R 1065=A.I.R. 1934 Lah. 163 (2).**

———**Ss. 39 and 44**—*Ejectment proceedings—Minor not properly represented—Effect.*

The fact that a minor is not properly represented in ejectment proceedings is no ground to grant him immunity from ejectment but it can form a ground for remand in an appropriate case. (*Dobson, F.C.*) HABIB *v.* RAJA JOTI PRASAD. **11 Lah.L.T. 10.**

———**S 39**—*Repudiation of landlord's title—Effect of—Forfeiture of right of occupancy.*

An occupancy tenant can only be ejected from his tenancy on the grounds enumerated in S. 39 of the Tenancy Act and so a suit for ejectment of the occupancy tenant does not lie on the ground that he had forfeited his right of occupancy by repudiation of landlord's title. (*Currie, J.*) BISHUN DAS *v.* THAKAR SINGH. **I.R. 1933 Lah. 186=142 I.C. 232=34 P.L.R. 319=A.I. R. 1933 Lah. 488.**

———**Ss. 42 and 45**—*Notice of ejectment—Omission of name of landlord—Effect.*

No suit to contest a notice of ejectment under Ss. 42 and 45 can be held to be time-barred by reason of an omission of the name of a landlord whose name does not appear on the notice served on him. (*Irving, F.C.*) BISHAMBAR LAL BASHESHAR LAL *v.* RAM CHANDAR. **11 Lah.L.T. 89.**

———**Ss. 45 and 84**—Ejectment notice—Suit to contest—Claim of occupancy right—Failure to decide issue as to—Revision. *See* REVISION—FAILURE OF JURISDICTION. **13 Lah.L.T. 43.**

———**S. 45**—*Notice against person who is not a tenant.*

The relationship of landlord and tenant must exist at the time the notice is issued. So a notice issued against

PUNJAB TENANCY ACT (1887), S. 45.

a person who held a mortgage and whose mortgage was declared invalid by the Civil Court and who, in consequence, became a trespasser, is not valid. (*Irving, F. C.*) RANBHIR SINGH *v.* LEHNA SINGH. **11 Lah.L. T. 141.**

——**S. 45**—*Notice under—Requisite for—Relationship of landlord and tenant.*

A notice under S. 45 cannot issue when the relationship of landlord and tenant does not exist between the parties. (*Irving, F.C.*) GOBIND SINGH *v.* GANDA SINGH. **12 Lah.L.T. 11.**

——**S. 45 (5)**—*Scope.*

S. 45 (5) is mandatory provided the Revenue Officer is satisfied that the notice was duly served. (*Irving, F. C.*) FAZAL DIN *v.* DALIP SINGH. **35 P.L.R. 367.**

——**S 48**—*Scope—Error as to construction of agreement and subject-matter of suit—Interference.*

S. 48 is conditional and permissive. A Court which applies its mind to the question of relief under S. 48 does not commit a material irregularity if it decides the question in one particular way.

Held, that an error as to construction of an agreement is no ground for revision but that error as to the property comprised in the suit resulting in substantial injury to party is a good ground for interference. (*Irving, F C.*) RAM DAS *v.* SHAHBAZ KHAN. **11 Lah.L.T. 83.**

——**S. 49**—*Mortgagor holding as tenant for fixed term—Liability to ejectment.*

A tenant not having a right of occupancy but holding for a fixed term can under S. 49 of the Tenancy Act be ejected from his tenancy at the expiration of the term even if there is no arrear of rent at all. Where the mortgagee has put in the mortgagor as his tenant, the latter is subject to all the ordinary liabilities of a tenant, whether as a tenant-at-will or a tenant holding for a fixed term and subject to the liability for ejectment under S. 49. (*Irving, F.C.*) PREM SINGH *v.* KISHEN SINGH. **11 Lah.L.T. 159.**

——**S. 50**—*Death of occupancy holder—Suit by collateral claiming to succeed—Jurisdiction of Civil Court.*

The land in suit was the occupancy holding of one *F*. Certain persons claiming to be collaterals of *F*, instituted a suit after the death of the latter for a declaration that they were entitled to succeed to the occupancy rights. The defendants denied that the plaintiffs were the reversioners of *F* and pleaded that by virtue of an agreement made by the plaintiffs during the lifetime of *F* they had relinquished their right to succeed to the occupancy rights in dispute.

Held, that the dispute was not between a landlord and tenant but it was between a person who claimed to succeed to the occupancy rights of the deceased *F* and the owners of land and the suit was cognizable by Civil Court. (*Jai Lal, J.*) HUSSAIN *v.* GHULAM MAHOMED. **149 I.C. 1107=6 R.L. 804=13 Lah.L.T. 51=A.I.R. 1934 Lah. 271 (2).**

——**S. 50 A**—*Intention and scope of.*

The whole intention of S. 50-A of the Tenancy Act is to render final the decision of the Revenue Courts in cases under S. 45 by expressly barring recourse to Civil Courts for the purpose of attacking the decision of the Revenue Court in such cases. Therefore, the section bars a suit which, though on the face of it, is merely one for a declaration that the plaintiffs are owners by virtue of adverse possession, is in substance, one to contest their liability to ejectment which has already been decided by the Revenue Court. (*Currie, J.*) MEHAR KHAN *v.* ATTA MUHAMMAD SHAH. **16 Lah. 1086=**

PUNJAB TENANCY ACT (1887), S. 59.

156 I.C. 592=8 R.L. 11=37 P.L.R. 507=A.I.R. 1935 Lah. 719.

——**Ss. 53 and 54**—*Mortgage without possession of occupancy rights—Subsequent sale — Sale set aside by landlord—Mortgage enforceable as against landlord.*

Where a landlord has succeeded in recovering possession from the transferee of occupancy rights, the occupancy tenant can claim re entry not on the ground that he has got any option to continue his tenancy but because the tenancy exists and as he is the tenant and his transfer has been declared void, he is entitled to the possession of his rights So where the landlord got decree in his favour setting aside a sale of the occupancy rights by the tenant and got possession, a mortgagee (without possession) of the occupancy rights can enforce his mortgage against the landlord, as the occupancy rights still subsist. (*Fraser, J. C. and Saaduddin, A. J. C.*) MUQARRAB KHAN *v.* NANDRAM. **I.R. 1933 Pesh. 12=142 I.C. 518=A.I.R 1933 Pesh. 49.**

——**Ss. 53 and 56**—*Non-compliance — Refusal of mutation.*

If a transfer has taken place mutation must not be refused simply because the landlord refuses his consent or because the provisions of Ss. 53 and 56 have not been complied with. (*Irving, F. C.*) KHUSHAL DAS *v.* KESAR SINGH. **11 Lah.L T. 18**

——**Ss. 53, 59 and 60**—*Occupancy tenant—Right to dispose of tenancy by will.*

There is no power in the occupancy tenant to dispose of the occupancy tenancy by will. (*Irving, F. C.*) SAPARAS *v.* MT. AMIRAN. **13 Lah.L.T. 40.**

——**S. 56**—Occupancy rights — If realisable assets of insolvent. *See* PROVINCIAL INSOLVENCY ACT, S. 10. **153 I.C. 460=A.I.R 1935 Lah 183.**

——**S. 56**—*Consent not in writing—Acquiescence of landlord—Effect of.*

Where the consent of the landlord is not in writing as required by S. 56, acquiescence cannot be pleaded as a bar to a suit to declare a sale invalid. 12 Lah. L. T. 1, Foll. (*Irving, F. C.*) KHUDA BAKHSH *v.* MEHR SINGH. **12 Lah.L.T. 4.**

——**S. 56**—*Transfer of mortgage rights—Right of landlord to object—Decree for possession.*

Whene an occupancy right has been mortgaged the landlord can object to a transfer of the mortgage rights from the original mortgagee to another. Where the Court decrees possession in such a case at the instance of the landlord the decree should be passed against the transferee and not against the tenant. (*Irving, F. C.*) FAUJA *v.* TAJ BEG. **11 Lah L.T. 64.**

——**Ss. 56 and 60**—*Transfer by occupancy tenants—No consent in writing by landlord—Acquiescence of landlord—Effect of—Suit by landlord to set aside transfer—Maintainability.*

In the face of the mandatory provisions of law which require the consent of the landlord to be expressed in writing, acquiescence of landlord evinced by silence and even accompanied by receipt of rent but not expressed in writing is not a bar to a suit under S. 60 of the Act to set aside the sale of land by occupancy tenants holding under S. 6. (*Irving and Boyd, F.Cs.*) ATA ULLAH *v.* GHULAM HAIDAR KHAN. **12 Lah L.T. 1.**

——**S. 57**—*Hypothecation of occupancy rights—Validity of.*

The Tenancy Act does not forbid a hypothecation of occupancy rights. (*Fraser, J. C. and Saaduddin, A J. C.*) MUQARRAB KHAN *v.* NAND RAM. **I.R. 1933 Pesh. 12=142 I.C. 518=A.I.R. 1933 Pesh. 49.**

——**S. 59**—*Agreement in* wajib-ul-arz *relating to succession—Interpretation.*

PUNJAB TENANCY ACT (1887), S. 59.

An agreement in *wazib ul-arz* providing for the succession of *sharik nazdiki* is an occupancy tenant must be interpreted in the light of the provisions of S. 59 of the Punjab Tenancy Act. It is reasonable to suppose that the landlords agreed to the succession of such collaterals as would be entitled to succeed under the tenancy law and custom. Where a person rests his case upon an agreement oversiding the statutory rules of succession contained in S. 59, he must show that the language of the agreement is clear and that the intention is unmistakable. (*Rangi Lal, J.*) COURT OF WARDS, ANAND PUR ESTATE *v.* JIWAN SINGH. **7 R.L. 110 = 151 I.C 233 = 36 P.L.R. 31 = A.I.R. 1935 Lah. 20.**

———**S. 59**—*Alienation in contravention of section—Reversioner—Right to challenge.*

Alienation of occupancy rights in contravention of S. 59 cannot be challenged by the reversioner where the parties are not governed by custom. 98 P.R 1907, Foll. (*Bhide, J.*) FEROZE DIN *v.* KHAIR DIN. **6 I.R. (Lah.) 76 = 145 I.C. 204 = 34 P.L.R. 1049 = A.I.R 1933 Lah. 184**

———**S. 59**—*Alienation of occupancy rights by widow—Person entitled to succeed after her, if affected.*

If a statute confers upon a person a limited interest only, the position is much the same as when a limited interest is created by a will, and the person entitled to succeed on the termination of that interest cannot be affected by any act of the holder of the limited interest, unless he has himself acquiesced therein. Accordingly an alienation by a widow on whom a right of occupancy has devolved does not affect a person entitled to succeed after her. (*Beckett, J.*) SULTAN BAKSH *v.* BUTA. **A.I.R. 1935 Lah. 99.**

———**S. 59**—*Death of occupancy tenant—Mutation in equal shares in names of widow of deceased tenant and his mother—Subsequent remarriage by widow—Effect of—Right of reversioners.*

On the death of an occupancy tenant the tenancy was mutated in the names of his widow and his mother in equal shares by mutual consent. The widow remarried and in a suit by the reversioners of the deceased tenant.

Held, that the mother did not become a co tenant merely by the mutation as the plaintiff or landlords had not consented to the arrangement as between the widow and the mother, and that the reversioners were entitled to succeed to the tenancy (*Bhide, J.*) MT. PUNJAB KAUR *v.* MANA SINGH. **149 I.C 511 = 6 R.L. 693 = A.I.R. 1933 Lah 396.**

———**S. 59**—*Death of occupancy tenant without heirs—Landlord takes free from encumbrances.*

On the death of an occupancy tenant without heirs the landlord does not take by devolution. He takes possession because the tenancy has become extinguished. Consequently a mortgagee from the tenant has no rights against the landlord and the latter takes the land free from encumbrances whether he had notice or not of the same. (*Broadway and Currie, JJ.*) NIZAM DIN *v.* MT WAZIR BEGAM. **11 Lah 716 = 131 I.C. 342 = 32 P.L.R. 183 = A.I.R. 1931 Lah. 211.**

———**S. 59**—*Entry in* wajib ul arz *regarding succession according to law—Qarabatis from common ancestor occupying land held entitled to succeed.*

A person who rests his case upon an agreement over riding the statutory rules of succession contained in S. 59 must show that the language of the agreement is clear and that the intention is unmistakable. But where a *wajib ul-arz* of 1852 qualified the right of qarabatis by the words "jo mustahiq hai" which can reasonably be interpreted to confine the right to those entitled under the law then under S. 59 those qarabatis can succeed whose common ancestor occupied the land. 19 P.R. 1917, Foll. (*Jai Lal and Abdul Qadir, JJ.*) LABHU *v.* UTTAM. **12 Lah. 652 = I.R. 1932 Lah. 30 = 135 I.C. 46 = 32 P.L.R. 958 = A.I.R. 1931 Lah. 371.**

PUNJAB TENANCY ACT (1887), S. 59.

———**S. 59**—*Joint tenancy– Succession.*

A joint tenant has a right to succeed to a joint tenancy in the absence of any nearer reversioner, even though the shares have been specified. (*Beckett, J.*) SULTAN BAKSH *v.* BUTA. **A.I.R. 1935 Lah. 99.**

———**S. 59**—*Occupancy tenant—Powers of bequest.*

S. 59 enacts the mode of devolution of property held by occupancy tenants; there is no power in the occupancy tenant to dispose of the occupancy tenancy by a will taking effect after his death. (*Addison and Agha Haidar, JJ.*) SAWAN SINGH *v.* KARTAR SINGH. **149 I.C. 520 (2) = 6 R.L. 700 = A.I.R. 1933 Lah. 400.**

———**S. 59**– Occupancy tenant—Widow succeeding to son under permission of Government—Effect of—Gift by widow to daughter with sanction of Commissioner—Validity as against husband's reversioners. *See* PUNJAB COLONISATION OF GOVERNMENT LAND ACT, SS. 19 AND 21 (*a*). **16 Lah. 252.**

———**S. 59**—*Rights of tenant's widow—Effect of re-marriage.*

The interest of a widow of a deceased tenant on whom the right of occupancy has devolved terminates on her re-marriage irrespective of the existence or non-existence of male collateral relatives (*Tapp, J.*) MT. PARMESHRI *v.* RALLA, **I.R. 1933 Lah. 232 = 142 I.C. 645 = 34 P.L.R. 403 = A.I.R. 1933 Lah. 140.**

———**Ss. 59 and 60** — *Sale of occupancy rights by widow—Reversioner—Competency to question.*

Independently of the provisions of Ss. 59 and 60 there are privileges conferred on reversioners and co tenants. The reversioners are competent, under custom, to question the sale of occupancy rights by a widow, but it has to be shown that the common ancestor of the plaintiffs and her husband had held the land. (*Mir Ahmad, A. J. C.*) NADIR *v.* MT. KARAM NISHAN. **153 I C. 941 = 7 R. Pesh 77 = A I.R. 1935 Pesh 3.**

———**Ss. 59 and 60**—*Scope — Occupancy right—Transfer by widow to landlord—If void—Right of transferee from co-tenant to impeach after death of widow.*

A transfer of occupancy rights by a widow in contravention of S. 59, is only voidable and that too at the instance of the landlord only under S. 60 It is not void. When the transfer is a surrender in favour of the landlord, it is perfectly valid. An assignee of a co-tenant of the widow has no *locus standi* to impeach the surrender On the widow's death after the surrender, there is nothing left who can survive to the assignee of the co-tenant, and a suit by him after the death of the widow for possession of the widow's share is not maintainable. (*Addison and Din Mohammad, JJ.*) HARGOBIND *v.* GURDASMAL. **155 I.C. 836 = 7 R.L. 776 = 37 P.L.R. 403 = A.I.R. 1936 Lah. 70.**

———**S. 59**—*Succession—Joint tenants.*

By a legal fiction joint tenants have always been treated as one tenant and on the death of a joint tenant, the occupancy tenancy does not extinguish but survives to his co-tenant. (*Mir Ahmad, A.J. C.*) NADIR *v.* MT. KARAM NISHAN. **153 I C. 941 = 7 R. Pesh 77 = A I R. 1935 Pesh. 3.**

———**S. 59**—*Will by occupancy tenant with consent of wife—Next reversioner—Right to sue for declaration.*

Where an occupancy tenant made a will in respect of the tenancy with the consent of his wife and a nephew challenged the will,

PUNJAB TENANCY ACT (1887), S. 59.

Held, that though the parties were Mahomedans the wife being only a life tenant under the statute her consent was not sufficient and that the nephew as the next reversioner was entitled to a declaration under S. 42, Specific Relief Act. (*Bhide, J.*) FEROZE DIN *v.* KHAIR DIN. **6 I.R. (Lah) 76=145 I C. 204=34 P.L.R. 1049=A.I.R. 1933 Lah. 184.**

——S 59, Proviso—*Occupation of land by ancestor—Proof—Entry in settlement.*

Where the sons of *A* are entered in the settlement of 1854 in joint possession of the tenancy along with their uncle *J* while the *tanqih unquq muzarian* of 1865 made it clear that the tenancy was an old established one.

Held, that the presumption was irresistible that *A* occupied the land. (*Addison, J.*) SOHAN SINGH *v.* RAHMAT ULLAH. **I R. 1931 Lah 999=134 I.C. 791=32 P.L.R. 601.**

——S. 59 (1)—*Scope—Tenant holding for brief period—Whether can be said to have occupied the land.*

The occupancy tenancy devolves upon the male collateral relatives of a deceased occupancy tenant after the widow's death in the absence of the male issue provided that the common ancestor had occupied the land. It is impossible to construe the proviso to S. 59 (1) as meaning that a tenant holding an occupancy tenancy for a brief period under the existing occupancy tenant or a trespasser holding the land, say, for two days, is a person who occupied the land. (*Addison, J.*) MULA SINGH *v.* MAHOMED SHER. **I.R. 1931 Lah. 583 (1) =132 I.C. 391 (1)=32 P.L R. 399=A I.R. 1931 Lah. 507 (1).**

——S 60—Suit under—Limitation. *See* LIMITATION ACT, ART. 120. **13 Lah.L T. 40.**

——S 69—*Scope—Tenant's right to compensation.*

What S. 69 means is that a tenant who has broken up land thereby gains a peculiarly privileged status which entitles him to compensation for disturbance; that means for being disturbed and for nothing else. This is in addition to any compensation due for improvements, including the very improvement of breaking up the land. (*Irving, F.C.*) HOSHNAK RAI *v.* GHULAM MUSTAFA. **11 Lah L T. 116.**

——S. 70—*Ejectment suit—Tenant's claim for compensation—Duty of Court to direct.*

It is mandatory under S. 70 that in a suit to contest ejectment the Court should direct the tenant to file a statement of his claim to compensation. The Financial Commissioner can interfere of his own mere motion to enforce S. 70 where the lower Courts have overlooked the provision. (*Miles Irving, F.C.*) FATEH SINGH *v.* KHUSHI MOHAMAD. **35 P.L.R. 428.**

——S. 70—*Scope.*

S. 70 is mandatory and the Court is bound to determine the question of compensation before the ejectment decree is allowed to be put in execution. (*Miles Irving, F.C.*) KHUDU *v.* SHER KHAN. **13 Lah.L T. 14.**

——S. 70 (2)—*Mandatory provisions—Non compliance—Interference.*

Under S. 70 (2) if a Court decrees ejectment of a tenant the Court is bound to determine the amount of compensation due to the tenant; where the Court ignores the provisions of that section the order can be set aside on ground of material irregularity. (*Irving, F C.*) BISHAMBAR LAL BASHESHAR LAL *v.* RAM CHANDAR. **11 Lah L.T 89.**

——S. 74—*Scope.*

S. 74 is intended to provide for the cases in which in spite of the provisions of the law a tenant has been actually ejected and it does not absolve any Court from preventing ejectment taking place before compensation has been paid. (*Miles Irving, F.C.*) KHUDU *v.* SHER KHAN. **13 Lah.L T. 14.**

PUNJAB TENANCY ACT (1887), S. 77.

——S. 77—*Amount of rent—Determination—Jurisdiction of Civil Court.*

A Civil Court is precluded from determining the amount of rent due from a lessee to a lessor by S. 77. And the mere fact that the lessee was proceeded against *ex parte* and that as a witness he admitted a certain sum to be on this head, cannot possibly confer jurisdiction upon the Court which it would not otherwise possess. (*Middleton, J.C and Mir Ahmad, A.J.C.*) MAZULLAH KHAN HAYAT KHAN *v.* MAHOMED YAKUB KHAN. **157 I.C. 240=8 R. Pesh. 21=A.I.R. 1935 Pesh. 107.**

——Ss. 77 and 88—*Attachment of land in execution of rent decree—Release of, on objection—Suit by decreeholder—Jurisdiction of Revenue Court.*

Where in execution of a rent decree a certain land was attached but on intervention of an objector, the land was held not liable to attachment, a suit by the decreeholder to determine the rights between the objector and himself is not one which the Revenue Court, the jurisdiction of which is strictly limited, is competent to entertain under S. 77 of the Punjab Tenancy Act. Having regard to S. 88 of the same Act and the rules made thereunder, O. 21, Rr. 58 to 63, C. P. Code, apply to the case and the matter could only be determined by a suit under O. 21, R. 63 brought in a Civil Court. (*Lord Tomlin.*) MAHOMED AKBAR KHAN *v.* MJAN MUSHARAF SHAH. **61 I A. 371=15 Lah 836=60 C L.J. 261=39 C.W. N. 89=151 I.C. 221=7 R.P.C. 51=40 L.W. 396=11 O W N. 1158=18 R D. 475=36 P.L R. 285=4 A.W.R. 398=A.I.R. 1934 P.C. 217=67 M.L.J. 641 (P C.).**

——S. 77—*Dues not falling under Act—Suit to recover—Maintainability.*

Where certain Brahmins who were in the position of jagirdars sued certain Rajputs who were in proprietary possession of lands to recover certain revenue which had been reserved to them and it appeared that no portion of the produce represented any priestly dues,

Held, that the dues were not covered by the provisions of the Punjab Tenancy Act and that the suit was consequently not cognizable by the Civil Court. (*Shadi Lal, C.J and Broadway, J.*) VIDYA DHAR *v.* DILA RAM. **I.R. 1931 Lah 873=134 I.C. 105=32 P L.R. 477=A.I.R. 1931 Lah. 652.**

——S. 77—*Jurisdiction of Revenue Court—Suit by landlord for declaration of title and possession—Resistance by third party.*

In a suit by a landlord for declaration of title and for possession of the land on the death of the occupancy tenant, if the mortgagees in possession are also impleaded, the suit as against them is not cognizible by the Civil Court but only by a Revenue Court. (*Bhide, J.*) BELI *v* BELI RAM. **154 I C. 52=7 R.L. 512=37 P. L.R 153=A.I.R. 1934 Lah. 445.**

——S. 77—*Occupancy tenancy—Powers of Revenue Court.*

The question whether a person is an occupancy tenant or not should be decided by a Revenue Court, and not by a Civil Court. (*Dalip Singh, J.*) GANGARAM *v.* RELU. **147 I.C. 505=6 R L. 398 (2)=A.I.R. 1933 Lah. 999.**

——S. 77—*Occupancy tenant—Suit for profits—Jurisdiction of Civil Court.*

An occupancy tenant is not a co-sharer and S. 77 does not apply to a suit between occupancy tenants for realisation of profits. Such a suit is triable by a Civil Court

PUNJAB TENANCY ACT (1887), S. 77.

and the mere fact that another claim properly falling within the jurisdiction of the Revenue Court is superadded will not confer jurisdiction of the Revenue Court. (*Bhide, J.*) RUKNUDDAULAH *v.* MAHOMED UMAR DARAZ ALI KHAN. **I R 1932 Lah. 533=138 I.C. 755=33 P.L.R 766=A.I.R 1932 Lah. 595.**

——**S. 77**—*Purchaser of share of landlord's rent—Suit against tenant for rent—Forum.*

Where a purchaser of a share of the rent to which certain landlords were entitled sued the tenants for rent, the suit is cognizable by a Civil Court. 61 P.L.R. 1912, Foll. (*Addison, J.*) ISHAR *v.* DITTU. **12 Lah. 433=134 I.C. 1119=32 P.L.R. 924=A.I.R. 1931 Lah. 623.**

——**S 77**—*Suit for ejectment of tenants of Government land—Forum.*

Where the Secretary of State sued certain tenants in ejectment on the ground that they had committed a breach of the conditions of the lease and it further appeared that the lease was not for the purpose of sub letting the holding,

Held, that the suit against the tenants could be maintained only in the Revenue Court and not in the Civil Court. (*Bhide, J.*) SECRETARY OF STATE FOR INDIA *v.* BAHADUR CHAND. **I R 1931 Lah. 863=133 I.C. 895=A.I.R. 1932 Lah. 67.**

——**S. 77**—*Suit by purchaser for removal of structures erected by lessee—Jurisdiction.*

A suit by purchaser of lessor's proprietary interest for removal of structures erected on the land by the lessee is triable by a Revenue Court. (*Mir Ahmad, A J.C.*) AKBAR KHAN *v* KALA KHAN. **154 I.C. 896=7 R. Pesh. 89=A I.R. 1935 Pesh 20.**

——**S. 77 (3)**—*Applicability—Question if occupancy rights fall under S. 5 or 6 or 8.*

A dispute between parties whether certain occupancy rights fall under S. 5 of the Punjab Tenancy Act and are therefore liable to be sold in execution of a decree or whether they must be held to fall under S. 6 or 8, is not one which is covered by the provisions of S. 77 (3). (*Abdul Rashid, J.*) PRABHU *v* BANWARI. **155 I.C. 320=7 R.L. 693=35 P.L.R 781=A.I.R. 1934 Lah. 733 (1).**

——**S. 77 (3)**—*Applicability—Tenant suing for refund of advance rent—Jurisdiction of Civil Court.*

Where the landlord fails to place the tenant in possession and the latter institutes a suit for refund of the rent paid in advance the suit is cognizable by the Civil Court. 172 P R. 1888, Foll (*Agha Haidar J.*) BHAGWAN SINGH *v.* GANDA SINGH. **I.R. 1931 Lah. 743=133 I.C. 119=32 P.L.R. 203=A.I.R 1931 Lah. 269.**

——**S. 77 (3)**—*Suit to recover rent from surety—Forum.*

A Revenue Court cannot take cognizance of a case in which a man is sued on account of rent of land for which he is alleged to have given security. (*Townsend, F.C.*) BAHAL SINGH *v.* JAGAT SINGH. **10 Lah. L.T. 26.**

——**S. 77 (3)**—*Suit for rent by assignee of mortgagee—Jurisdiction of Civil Court—Erroneous exercise—Correction.*

The points which arose for determination in a suit by an assignee from the mortgagee for rent were: (1) Whether the defendant is the mortgagee and if he had assigned his rights; (2) whether the mortgagee made over the lands to others for cultivation on payment of *batai*; (3) whether the cultivators were owners or were liable to render any produce to others.

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Held, that the points were more appropriately determinable by a Civil Court and that if they would be wrongly decided, action could be taken under S. 100 and the decrees registered as those of a Revenue Court. (*Tapp, J.*) POHU LAL *v.* KAPURA. **I R. 1931 Lah. 647=132 I C. 663=A I R. 1931 Lah. 707.**

——**S. 77 (3) (1)**—*Suit against landlord by ejected tenant for compensation—Jurisdiction of Civil Court.*

A Civil Court has no power to take cognizance of a suit brought by a tenant, who had been ejected by his landlord, for compensation for breach of contract of lease and for illegal and unjustified termination of lease. Such a suit is cognizable only by the Revenue Court. (*Jai Lal and Skemp, JJ.*) RUPLAL & SONS *v.* SECRETARY OF STATE. **16 Lah. 687=157 I.C. 684=37 P.L R. 836=8 R.L. 131=A.I.R. 1935 Lah. 903.**

——**S 77 (3) (1)**—*Suit by occupancy tenant for declaration of his right to share of produce—Jurisdiction of Civil Courts.*

A suit instituted by an occupancy tenant against his landlord for a declaration that the plaintiff is entitled to a share of the total produce of the land which was the subject of tenancy is cognizable by the Revenue Courts exclusively and not by the Civil Courts. Where, however, the case was tried by the Civil Court in good faith and the objection as to jurisdiction has not prejudiced either of the parties, the decree of the Civil Court may be registered as that of the Revenue Court. (*Jai Lal, J.*) ABDUL RAHIM *v.* DITTA. **6 I.R. (Lah.) 158=146 I.C. 30=34 P.L.R. 970.**

——**S. 77 (3) (4)**—*Purchaser of landlord's right—Suit to recover arrears of rent—Jurisdiction of Civil Court.*

A suit to recover arrears of rent in respect of agricultural land by a person who has purchased the landlord's right to recover the arrears is cognizable by a Civil Court as such purchaser cannot be regarded as a landlord within the meaning of Cl. (*n*), S. 77 (3). 13 I. C. 511 and A. I. R. 1931 Lah. 623, Rel on. (*Shadi Lal, C J. and Broadway, J.*) FATEH CHAND *v.* ARJAN. **I.R. 1933 Lah 330 (1)=143 I.C. 297=34 P.L.R. 496=A.I.R. 1933 Lah. 415.**

——**(as amended by Act III of 1912), S. 77 (3), Proviso**—*Effect of proviso—Case not falling under clause (3)—Applicability of proviso.*

The practical effect of the proviso is that whereas before its enactment Civil Courts were prohibited from trying those suits only in which the question raised in the plaint *ex facie* fell within one or other of the clauses of S. 77 (3) their jurisdiction is now barred in those cases also in which on the averments in the plaint the suit is properly triable by a Civil Court but the defendant's pleas raise a question which under the sub section is to be determined by the Revenue Courts only where neither the plaint nor the pleas raised a question within cl. (*d*) or any other clause of S. 77 (3) the proviso does not come into operation. (*Tek Chand and Currie, JJ.*) SHAM SINGH *v.* AMARJIT SINGH. **12 Lah. 111=I R. 1931 Lah. 527=132 I.C. 15=32 P.L.R. 329=A.I R 1931 Lah. 362**

——**S. 77 (3), Proviso (1)**—*Suit in Civil Court on ground that defendant was trespasser—Court finding him as tenant—Procedure.*

Where in a suit for possession on the allegation that the defendant is a trespasser, the Civil Court finds that the defendant is a tenant at will of the plaintiff, it must follow the procedure laid down in proviso (1) to S. 77 (3) of the Act and return the plaint for presentation to the Collector. (*Abdul Rashid, J.*) MAHOMED *v.* ALLAH DITTA. **155 I.C. 242=7 R.L. 668=35 P.L.R. 411=A.I.R. 1934 Lah. 353.**

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———**S. 77 (3) Proviso**—*Suit involving issues relating to conditions of tenancy—Jurisdiction of Revenue Court.*

A suit by a mukararidar against the landlord in which certain issues relating to the conditions of the tenancy arise between the parties, is cognizable by a Revenue Court in view of the proviso to Sub-S. 3 of S 77. (*Bhide, J.*) FAZAL AHMED *v.* TOLA RAM SINGH. **161 I.C. 349 = 8 R L. 726 = 37 P L.R. 735 = A.I.R 1936 Lah. 244.**

———**S. 77 (3), Provisos (1) and (2)**—*Applicability—Suit for possession by occupancy tenant—Landlord pleading extinction of occupancy rights—Jurisdiction of Civil and Revenue Courts—Test.*

The plaintiff's father sold an occupancy holding to certain persons. The landlords sued in the Revenue Courts for ejectment of the vendees on the ground that the sale was voidable at their instance. They obtained a decree from the Revenue Court and in execution of that decree the vendor as well as the vendees were evicted from the tenancy. The plaintiffs sued in the Civil Courts for possession of his occupancy holding on the ground that he was entitled to be restored to possession after the sale had been set aside. The landlords pleaded that the occupancy rights had become extinct and that issue was triable by the Revenue Courts.

Held, that if it was necessary to decide the issue raised by the landlords, S. 77 (3), proviso (1) applied and the plaint should be returned for presentation to the Collector and the Revenue Court would have to decide the suit. If, however, the suit can be disposed without going into the question exclusively triable by the Revenue Court, the Civil Court may decide the suit. (*Addison and Bhide, JJ.*) LABHU *v.* BALWANT SINGH. **12 Lah. 646 = I.R. 1931 Lah. 907 (2) = 134 I.C. 203 (2) = 32 P.L R. 362 = A.I.R 1931 Lah 294.**

———**S. 77 (3) (d)**—*Applicability—Nature of tenancy not in dispute—Right of claimant to succeed as the issue—Jurisdiction of Civil Court.*

S. 77 (3) (*d*) is applicable to those cases only in which the relationship of landlord and tenant is admitted and the object of the suit is to determine the nature of the tenancy, *i e.*, whether the statuts of the tenant falls under S. 5, 6, 7 or 8. Where the point for decisions is not the nature of the tenancy but whether the defendant is related to the deceased and if so whether their common ancestor had occupied the land so that if those facts were proved the claimant should *ipso facto* be entitled to succeed to the occupancy tenancy, the suit is cognizable by a Civil Court and the prohibition under S. 77 (3) (*d*) has no application. (*Tek Chand and Currie, JJ.*) SHAM SINGH *v* AMARJIT SINGH. **12 Lah. 111 = I.R. 1931 Lah. 527 = 132 I.C. 15 = 32 P.L.R. 329 = A.I.R. 1931 Lah. 362**

———**S. 77 (3) (d)**—*Scope — Question if deceased tenant had abandoned his rights — Jurisdiction of Civil Court.*

The question whether a deceased tenant had or had not abandoned his rights does not come within the terms of S. 77 (3) (*d*) of the Punjab Tenancy Act and the jurisdiction of the Civil Court is not, therefore, ousted when the landlord takes the plea that the tenancy right of the predecessor of the plaintiff had been abandoned and his occupancy rights thereby extinguished. (*Dalip Singh, J.*) MANSAB ALI KHAN *v.* RAM KARAN. 159 I.C 419 = 8 R L 397 = 37 P.L.R. 378 = A.I.R. 1935 Lah 686.

———**S. 77 (d)**—*Suit by tenants to establish their right to occupancy by inheritance—Jurisdiction.*

Where the plaintiffs, who were admittedly tenants, sought to establish their right to hold the property as occupancy tenants on the ground of inheritance, *held*, that the suit came within the ambit of S. 77 (*d*) of the Act and was consequently cognizable by a Revenue Court. (*Shadi Lal, C.J. and Broadway, J.*) MAHLI *v.* NARINDAR SINGH. **I.R. 1933 Lah. 289 (1) = 142 I.C. 857 (1) = 34 P.L R. 435 = A.I.R. 1933 Lah. 610.**

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———**S. 77 (3) (e)**—*Persons occupying houses in abadi—Suit for ejectment—Jurisdiction of Civil Court.*

The plaintiff instituted a suit in the Court of the Assistant Collector for ejectment of the defendants alleging that they had settled the defendants in houses constructed by them, that the latter in lieu of rent agreed to supply them Kallar which they intended to utilize as manure for their agricultural lands and that they had not performed the conditions on which the houses were given. The houses in dispute were situated in *abadi chak* and the land on which they stood was classified as *gairmumkin abadi*. The defendants had no other land in their possession for cultivation along with the houses.

Held, that defendants did not hold land under the plaintiff for agricultural purposes and that the suit was maintainable in the Civil Courts.

Semble.—As regards agricultural purpose mentioned in S. 4 (1) it is the purpose of the occupier and not the object of the owner which supplies the test. (*Jai Lal, J.*) MAMMON *v* ALLAH BAKHSH. **I R. 1931 Lah. 687 = 132 I.C. 847 - A.I.R. 1931 Lah 726.**

———**S 77 (3) (g)**—*Applicability—Suit on footing of mortgagor and mortgagee - Defendant alleging tenancy.*

S. 77 (3) (*g*) applies only where the relationship of landlord and tenant between the parties is admitted. Where it was alleged that the plaintiff was the mortgagee and that he had been unlawfully dispossessed by the defendant, but the defendant denied the mortgage and pleaded that the plaintiff was a tenant at will

Held, that S. 77 (3) (*g*) was not applicable (*Tek Chand, J.*) SHER SINGH *v.* HARNAM SINGH. **I.R. 1932 Lah. 156 = 135 I.C. 684 = 33 P.L.R. 342 = A.I. R. 1932 Lah. 201.**

———**S. 77 (3) (h)**—*Suit by landlord for possession on ground that tenancy had become extinct—Holding mortgaged by last holder in favour of one of defendants—Jurisdiction of Civil Court.*

A suit by the landlord for possession of an occupancy holding on the ground that the defendants were not entitled to succeed and that the tenancy had become extinguished in default of heirs falls under cl. (*h*) of S. 77 (3), where such holding had been mortgaged by the last holder in favour of one of the defendants. The fact that the issue affected only one of the defendants is immaterial, for according to the proviso to S. 77 of the Act, as soon as the Civil Court finds it necessary to decide *any* matter which is cognizable exclusively by a Revenue Court under S. 77 (3), its jurisdiction is ousted and the whole suit becomes triable by a Revenue Court. (*Coldstream and Bhide, JJ.*) RICHHPAL *v.* SUJAN SINGH. **16 Lah. 695 = 160 I C. 281 = 8 R.L. 516 = 37 P L.R. 842 = A.I.R. 1936 Lah 46.**

———**S. 77 (3) (1)**—*Landlord wrongfully seizing produce—Suit by tenant for damages—Jurisdiction of Civil Court.*

A suit by tenants for the wrongful seizure of produce by the landlord is not one to recover a sum of money wrongfully taken or paid as rent nor does it arise out of the conditions of the tenancy. It is a suit for damages for an act alleged to have been done by defendant under no law or contract at all. (*Tek Chand and Monroe, JJ.*) MANGTU *v.* KAHAN SINGH **13 Lah. 786 = I.R 1932 Lah 357 = 137 I.C. 788 (1) = 33 P.L.R. 571 = A.I.R 1932 Lah. 494.**

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——**S. 77 (3) (j)**—*Suit for declaration that plaintiff is not liable to pay* haq buha.

A suit for a declaration that plaintiff is not liable to pay to the defendant anything on account of *haq buha*, alleging (*inter alia*) that as the gaddi nashin of a religious institution, he occupies a peculiar position in the village and does not belong to the class of persons by whom *haq buha* is payable to the defendant is cogniz able by the Civil Court. (*Tek Chand and Monroe, JJ.*) BHAGTA NAND *v.* SARDAR MOHAMMAD NAWAZ KHAN. **16 Lah. 204=156 I.C 450=7 R.L. 905=37 P.L.R. 441=A.I.R. 1935 Lah. 150.**

——**S. 77 (3) (j)**—*Suit to recover* haq buha.

A suit for a declaration regarding liability to pay *haq buha* is maintainable only in the Revenue Court and cannot be instituted in a Civil Court. (*Johnstone, J.*) BHAGTA NAND *v.* MAHOMED NAWAZ KHAN. **131 I. C. 338=31 P.L R. 954=A.I.R. 1931 Lah. 175.**

——**S. 77 (k)**—"*Land owner*"—*Holder of decree for possession but without possession.*

A mortgagee in possession is a land owner within the Act but a person who has only obtained a decree for possession as the mortgagee of a share of the holding is not a land owner until he has obtained possession and so long as he has not obtained possession he is not a co sharer and cannot sue under S. 77 (*k*) of the Tenancy Act. (*Calvert, F.C.*) LUQMAN *v.* BAGGA. **12 Lah. L.T 47.**

——**S. 77 (3) (k)**—*Scope of—Defendants not co-sharers—Suit for value of plaintiff's share*

Where the plaintiff sues to recover the sum realized by defendants on account of his share in certain trees and the defendants are not co sharers in the land on which the trees stand, the case does not fall under S. 77 (*k*). (*Bhide, J.*) TEJA RAM *v.* BHIKAM SAIN. **149 I.C. 937=6 R L 760 (1)=A I R. 1934 Lah. 196 (1).**

——**S. 77 (3) (k)**—*Shamilat land—Dispute regarding trees—Jurisdiction of Civil Court.*

Where the land on which the trees stood was admitted by both parties to be *shamilat* land jointly owned by them but the dispute related not to the land or its profits but to the trees which either party claimed to be its own exclusive property,

Held, that the suit was maintainable in the Civil Court. 10 P.R. 1911, Ref. (*Tek Chand, J.*) SAUNKU *v.* SOHNU. **I.R. 1932 Lah 282=137 I C. 72=33 P. L.R. 466=A.I.R. 1932 Lah. 399.**

——**S. 77 (3) (k)**—*Suit for accounts between sons of co lessees—Civil Court has jurisdiction.*

A suit for accounts by the son of one co lessee against the other, is not a suit by a "co sharer in an estate or holding for settlement of accounts" and the suit is therefore not excluded from the cognizance of Civil Court by any provision contained in S. 77. (*Tek Chand, J.*) RACHHPAL SINGH *v.* LAL SINGH. **I.R. 1933 Lah. 378=143 I.C 719=A.I R. 1933 Lah. 730.**

——**S. 77 (3) (k)**—*Suit for co sharer for settlement of accounts—Plea of payment to creditors of plaintiff during latter's minority—Maintainability—Set off.*

In a suit by a co sharer under S. 77 (*k*), Punjab Tenancy Act, for settlement of accounts against the defendants who managed the state during the plaintiff's minority, the defendants pleaded that during the minority they have paid more than the amount due as share of produce to pay off the debts of the plaintiff's deceased father.

Held, the plea was valid, and that it might be regarded either as an equitable set off arising out of the relations of the parties or as a claim in payment made on behalf of the plaintiff. (*Irving, F C.*) KESAR SINGH *v.* TIRATH SINGH. **13 Lah L.T. 45.**

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——**S. 77 (3) (n)**—*Suit by transferee of mere right to recover rent in future—Jurisdiction of Civil Court.*

Suit by a transferee of a mere right to recover rent is future for a particular period for realisation of rent is cogniable by Civil Court as the plaintiff has not the status of a landlord. (*Bhide, J.*) SUNDAR SINGH *v.* KARAM CHAND. **A.I.R. 1935 Lah. 976.**

——**S. 77 (3) (o)**—*Applicability—Suit between co-owners.*

S. 77 (3) (*o*) of the Act does not apply to a suit between two sets of co-owners of the same land, one of whom resists the rights of the other to use the joint land in a particular manner without payment of certain dues to him. Such a suit is cognizable by the Civil Court. (*Tekchand and Monroe, JJ.*) NATHU *v.* UTTAM SINGH. **14 Lah. 11=I.R. 1933 Lah. 33=140 I.C. 771 (1)=34 P.L.R. 142=A.I.R. 1933 Lah. 94.**

——**S. 80**—*Collector affirming finding—Remedy—Subsequent modification of order if material.*

Where the Collector confirms the finding of the lower Court the remedy is by way of revision even though the Collector might subsequently modify his previous order. (*Dobson, F.C.*) WAZIR ALI KHAN *v.* HARI RAM. **11 Lah L T. 6.**

——**S. 80**—*Order setting aside* ex parte *decree—Appealability.*

An order setting aside an *ex parte* decree is not appealable. (*Irving, F.C.*) SANTA SINGH *v.* LABHU RAM. **11 Lah. L T. 120.**

——**S. 80**—*Right of appeal—Scope of—Order impleading* pro forma *defendant—Appeal.*

The right of appeal given by S. 80 of the Act is subject to the provisions of S. 104 and O. 43, R. 1 of the C.P. Code. An order of the trial Court impleading a *pro forma* defendant is not appealable. If the appellate Court sets it aside, it acts without jurisdiction. (*Irving and Calvert, F.Cs.*) GHEBA *v.* HARI SINGH. **11 Lah. L T. 151.**

——**S. 80**—*Sanction to review an order—Appeal.*

Grant of sanction to review an order is not in itself an order and is not subject to appeal. (*King, F.C.*) ZAHUR-UD-DIN *v.* SARDAR HUSSAIN. **11 Lah. L T. 155 (1).**

——**S. 84**—*Appeal—Duty of Assistant Commissioner—Irregular disposal - Interference in revision.*

Where the Collector's order in a partition proceedings is exiguous to a decree and it appeared doubtful whether he has applied his mind to the case to the requisite extent the appellate Court should go into the case and dispose of each of the grounds of appeal. Where it does not do so the Commissioner can interfere in revision and order a *de novo* trial. (*Townsend, F.C.*) MT. DILLO *v.* KAPURA. **10 Lah T T 7**

——**S. 84**—*Concurrent findings—Interference.*

The concurrent findings of two Courts on a plea of acquiescence cannot be interfered with unless there has been a flagrant miscarriage of justice. (*Irving, F.C.*) PALA SINGH *v.* HIRA LAL. **11 Lah. L.T. 55.**

——**S. 84**—*Erroneous decision of law or fact—Interference in revision.*

Where the lower Court has applied its mind to the case, an erroneous decision in law or fact is no ground for interference in revision. (*Irving, F.C.*) RAMZAN *v.* HIRA. **11 Lah. T.T. 61 (2).**

——**S. 84**—*Erroneous decision as to* res judicata—*Interference.*

Where there is no flagrant injustice the Court will not interfere on revision with an erroneous decision on

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the question of *res judicata*. (*Irving, F.C.*) GANGA RAM *v.* RAM SINGH. **11 Lah L.T. 98.**

——S. 84—*Erroneous decision in law—Revision.*

A wrong decision on a question of *res judicata* is no ground for revision. (*Irving, F.C.*) KANDU *v.* MAULA BAKHSH. **11 Lah. L.T. 77.**

——S. 84—*Erroneous decision on point of limitation—Interference.*

A wrong decision on a point of limitation is not normally a subject for interference in revision but where the decision is based on a law which is not applicable *proprio vigore* and such application has resulted in injustice the Commissioner can interfere in revision. (*Irving, F.C.*) BISHAMBAR LAL BASHESHAR LAL *v.* RAM CHANDAR. **11 Lah. L.T. 89.**

——S. 84—*Error of jurisdiction—Notice under S. 45 issued when no relationship of landlord and tenant.*

Issuing a notice under S. 45 when there is no relationship of landlord and tenant is an error of jurisdiction. It is also a material irregularity not to bring into issue the plea to the effect that such relationship does not exist. (*Irving, F.C.*) GOBIND SINGH *v.* GANDA SINGH. **12 Lah. L.T. 11.**

——S. 84—*Error of law—If a ground for revision.*

The application of a law which is not applicable may in some circumstances be subject of revision; but an error of law is no ground for revision. (*Irving, F.C.*) BABU *v.* SHIB NATH. **13 Lah. L.T. 25.**

——S. 84—*Failure to consider objections to award—Interference.*

Where the Court has not adequately considered the objections to an award by an arbitrator the Financial Commissioner can interfere in revision. (*Irving, F.C.*) GHULAM FATIMA *v.* FATEH DARYA. **11 Lah. L.T. 59.**

——S. 84—*Failure to exercise jurisdiction—Revenue Court basing decision on* obiter dicta *of Civil Court—Interference.*

A Revenue Court which bases its decision on an *obiter dicta* of the Civil Court on the point of limitation and dismisses a suit on the ground of limitation, fails to exercise its jurisdiction, and its decision is therefore liable to be set aside in revision. (*Irving, F.C.*) SAPARAS *v.* MT. AMIRAN. **13 Lah. L.T. 40.**

——S. 84—*Failure to grant relief under S. 14—Suit for rent under lease—Lease not proved—Court not passing decree on ground of use and occupation—Interference in revision.*

In a suit for rent on the basis of a lease, if the lease not properly proved, it is still open to the Court to pass a decree against the defendant as a tenant-at-will or by way of damages for use and occupation as prescribed by S. 14 of the Punjab Tenancy Act; for the minor relief is inherent in the claim for the higher and it is incumbent on the Court to grant the same, though the plaintiff does not specifically claim it in the plaint. And when the lower Courts fail to grant such relief and dismiss the suit, the Court of Revision will interfere and grant the relief. (*Irving, F.C.*) C. N. CHANDRA *v.* AHMAD YAR. **13 Lah. L.T. 34.**

——S. 84—Failure of jurisdiction—Adverse possession—Question—Revenue Court neglecting to refer to Civil Court—Revision. *See* JURISDICTION—CIVIL AND REVENUE COURTS. **13 Lah. L.T. 43.**

——S. 84—*Failure to try material issue—Interference.*

An error of law is no ground for revision but the failure to try a material issue amounts to a failure of jurisdiction and is a good ground for revision. (*Irving, F.C.*) SADHU RAM *v.* MEHR SHAH. **11 Lah. L.T. 76.**

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——S. 84—*Finding as to proof occupancy rights—Revision—Interference.*

A finding as to proof of a promise, express or implied, on the part of a landlord not to eject a tenant, is not open to revision. (*Irving, F.C.*) BABU *v.* SHIB NATH. **13 Lah. L.T. 25.**

——S. 84—*Flagrant error of law—Mortgagor holding as tenant for term—Refusal to eject on the ground of no arrears of rent—Interference in revision.*

Though a mistake of law is not a ground for revision in a flagrant case, the order can be revised. The order of the lower Court refusing to eject the mortgagor holding as a tenant after the expiry of the term of the tenancy is an instance of such an erroneous order. (*Irving, F.C.*) PREM SINGH *v* KISHEN SINGH. **11 Lah. L.T 159.**

——S. 84—*Ground for interference—Miscarriage of justice.*

Where the result of accepting the appeal on account of a clerical error is to leave the applicant without any redress against the attachment and sale of his house from which he claims as an agriculturist to be exempt,

Held, that the order of the Commissioner was a miscarriage of justice and should be set aside in revision. (*Dobson, F.C.*) MOHNA *v.* PARAS RAM BANU MAL. **11 Lah L.T. 162.**

——S. 84—*Illegal assumption of jurisdiction—Interference—Fact of appeal being time barred if material.*

The fact that the appeal is time-barred does not prevent the Financial Commissioner as a Court of revision from pursuing an illegitimate assumption of jurisdiction to its source. The consideration will however be taken into account whether due diligence had been exercised by the applicant. (*Irving, F.C.*) SANTA SINGH *v.* LABHU RAM. **11 Lah. L.T. 120.**

——S. 84—*Irregularity—Interference in revision—Failure of justice, necessary*

The Financial Commissioner will not interfere in the exercise of his revisional authority under S. 84 in cases where the lower Court has acted illegally or with material irregularity except where the illegality or irregularity had occasioned or might occasion a substantial failure of justice. An interlocutory order, even if it contravened the provisions of O 33, Rr 2, 3 and 5, or an order refusing to reject a plaint under O. 7, R. 11, cannot be interfered with in revision since it can legitimately be made in due course a ground of appeal. (*Latif, F.C.*) KARAM ILAHI *v.* SUNDAR DAS. **12 Lah L.T. 57.**

——S. 84—*Irregular order—Interference.*

Where an order is irregular the Financial Commissioner will interfere in revision, though a possible appeal might then have become time barred (*Irving, F.C.*) LACHHMI NARAIN *v.* DHANNA RAM. **11 Lah L.T. 45.**

——S. 84—*Material irregularity—Collector not dealing with grounds of appeal — Interference in revision.*

Where the Collector has not dealt with the grounds of appeal or has not written an independent judgment the Commissioner can interfere in revision. (*Irving, F.C.*) DREHAN KHAN *v.* DOST MAHOMED KHAN. **11 Lah. L.T. 70.**

——S. 84—*Material irregularity—Decision of Revenue Court—Interference.*

The decision of a Revenue Court as to acquiescence of landlord in an alienation of tenancy cannot be interfered with by the Civil Court so long as it has applied its mind to the case. (*Irving, F.C.*) PALA SINGH *v.* HIRA LAL. **11 Lah. L.T. 55.**

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——S. 84—*Material irregularity—Direction as to compensation for tenant—Failure to give*

The failure to direct a tenant defending an ejectment suit to file a statement of his claim to compensation is a material irregularity which justifies interference in revision. (*Miles Irving, F.C.*) FATEH SINGH *v.* KHUSHI MOHAMAD. **35 P.L.R. 428.**

——S. 84—*Material illegality—Disregard of S.* 56.

It is a material illegality to disregard the mandatory provisions of the law which require the consent of the landlord to a transfer by the occupancy tenant to be expressed in writing. (*Irving, F. C.*) KHUDA BAKHSH *v.* MEHR SINGH. **12 Lah.L.T. 4.**

——S. 84—*Material irregularity—Failure to frame important issue.*

The failure to frame and determine the crucial issue in the case is a material irregularity. (*Irving, F C.*) FATEH SINGH *v.* RAM CHAND. **11 Lah.L.T. 148.**

——S. 84—*Material irregularity—Meaning.*

It is not a material irregularity to be influenced by analogy from another law, provided the finding arrived at is brought within the four corners of the law that really applies. (*Irving, F.C.*) BABU *v.* SHIB NATH. **13 Lah L T. 25.**

——S. 84—*Material irregularity—Neglect to deal with material issue.*

Neglect to deal with a material issue which has been raised in the ground of appeal is a material irregularity and would justify interference on revision. (*Irving, F. C.*) PARAS RAM *v.* MAKHAN LAL. **11 Lah L.T. 81.**

——S. 84—*Material irregularity—Notice against a person not a tenant.*

The fact that a notice of ejectment has been issued against a person who is not a tenant is a material irregularity or defective jurisdiction. A suit to contest liability for ejectment can be instituted by a person who is not a tenant and the Assistant Collector has jurisdiction to entertain the suit. But if the result of dismissing the suit is that a notice of ejectment against a person who is not a tenant remains operative, which notice no revenue authority has jurisdiction to execute, the Commissioner can pursue the defect in jurisdiction to the notice which is really the subject matter in the suit. (*Irving, F.C.*) RANBIR SINGH *v.* LEHNA SINGH. **11 Lah.L.T. 141.**

——S. 84—*Material irregularity—Question of* res judicata.

It is not a material irregularity for a Court to come to a wrong decision on a matter of *res judicata* but is a material irregularity if the Court decides the question of *res judicata* without having before it the necessary materials in coming to that decision. (*Irving, F.C.*) RANJODH SINGH *v.* NATHU. **11 Lah L.T. 54.**

——S. 84—*Material irregularity—Suit in ejectment—Plea of adverse possession found against—Plea in second appeal of occupancy rights—Refusal by Court to go into.*

Where in a suit for ejectment the defendant claimed proprietary rights in themselves by adverse possession and that was found against by two Courts.

Held, the Commissioner committed no irregularity in failing or refusing to discuss an implied claim to occupancy rights set up for the first time before him (*Boyd, F.C.*) JAWAHARI *v.* HAKU. **12 Lah L T. 40.**

——S. 84—*Material irregularity—Suit in ejectment—Failure to determine compensation.*

The failure to determine the question of compensation in an ejectment suit is a material irregularity justifying interference in revision. (*Miles Irving, F.C.*) KUHDU *v.* SHER KHAN. **13 Lah L.T. 14.**

PUNJAB TENANCY ACT (1887), S. 84.

——S. 84—*Material irregularity—Trial Court—If ground for revising order of appellate Court.*

In a revision application against the order of the appellate Court the material irregularity committed by the trial Court does not afford on ground for interference with the order of the appellate Court. The Court of Revision is concerned only with the appellate order. (*Irving, F.C.*) BABU *v.* SHIB NATH. **13 Lah.L.T. 25.**

——S. 84—*Order under S.* 45 (5)—*Interference.*

An order under S. 45 (5) is not open to appeal except on the question of service. The Financial Commissioner may however pursue a material irregularity to its source and if no suit to contest is brought an ejectment order in respect of tenancy to which the law does not apply cannot be allowed to stand. (*Irving, F.C.*) FAZAL DIN *v.* DALIP SINGH. **35 P.L.R. 367.**

——S. 84—*Premature suit for enhancement.*

Where the lower Court failed to note that the suit for enhancement had been instituted within the ten years' period allowed under S. 24 (3) (*a*) of the Act and so was premature, the decree of the lower Court should be set aside in revision. (*King, F.C.*) ALLAH DIYA *v.* KARIM BAKSH. **11 Lah L.T. 158.**

——S. 84—*Refusal to submit records—Revision.*

Neither the Commissioner nor the Collector has any jurisdiction in revision, and their refusal to take action under S. 84 (2) and (3) of the Tenancy Act does not in itself provide any ground for revision. The Financial Commissioner has jurisdiction, with or without such action on the part of the Commissioner or the Collector, to call for the records of a case. (*Irving, F.C.*) JIWAN DAS *v.* KANSHI RAM. **13 Lah.L T. 20.**

——S. 84—*Revenue Court—Refusal to give effect to decision of Civil Court—Interference.*

Where the Revenue Court fails to give effect to a decision of a Civil Court it amounts to an improper exercise of jurisdiction and the Financial Commissioner can interfere in such cases. (*Irving, F.C.*) MAHAIN *v.* SHAFI MAHOMED. **11 Lah L.T. 95.**

——S. 84—*Revisional jurisdiction.*

An erroneous finding of fact or law cannot be upset in revision. (*Miles Irving, F.C.*) SAIDU *v.* SULTAN AHMAD. **13 Lah.L T. 12.**

——S. 84—*Revisional jurisdiction of Commissioner—Appeal dismissed on erroneous views as to court fee—Interference*

Where the Collector dismissed an appeal on the ground that it is insufficiently stamped, it is open to the Financial Commissioner to revise the erroneous order. 7 Lah. L. T. 19, relied on. (*Townsend, F.C.*) KALE KHAN *v.* KAIR DIN. **10 Lah.L.T 24.**

——S 84—*Revisional jurisdiction—Exercise.*

The Financial Commissioner is not bound to interfere in revision even in a case in which a defective jurisdiction is established unless he is satisfied that his declining to interfere would lead to justice or failure of justice. (*Irving, F.C.*) KHERA *v* DHANNA **11 Lah L T. 17.**

——S. 84—*Revisional jurisdiction—Mistake of law.*

A mistake in law is not of itself a ground for revision. (*Irving. F C.*) BEANT RAM *v.* DALIP SINGH. **11 Lah L T 4.**

——S. 84—*Revision—Right of parties to be heard—Waiver.*

It is unnecessary to summon parties under S. 84 (5) proviso. The persons affected have a right to be heard when a day is fixed ; but this right can be waived. When in a lower Court parties have been asked if they wish to appear before the Commissioner on revision and have declined they should be taken to have declined the

PUNJAB TENANCY ACT (1887), S 84.

right given by S. 84. (*Irving, F.C.*) FAQIR MAHOMED *v.* MAHOMED SARWAR. **11 Lah.L.T. 32.**

———**S. 84**—Scope—Deficiency in Court-fee—If can be allowed to be made up in revision. *See* C. P. CODE, S. 149. **13 Lah.L.T. 31.**

———**S. 84**—*Scope of revisional jurisdiction—Erroneous decision—Interference.*

The revisional jurisdiction can be invoked only when there is failure of jurisdiction or material irregularity. A decision which is not vitiated on the above grounds cannot be interfered with even if it is erroneous. (*Irving, F.C.*) GURDITTA *v.* MAHANT OF TEMPLE THAKAR BANKHANDI RAI. **11 Lah.L T 36.**

———**S. 84**—*Superior Court relying on new evidence—Interference.*

It is not an irregularity for superior revenue Courts to decide cases upon pieces of evidence they themselves discover in the land records. In many cases applicants are entirely ignorant of where to look for material evidence. But it cannot be said that when it is done it becomes open to superior Courts on revision to exercise their powers in a very much wider manner than if the usual practice of Civil Courts had been adopted and no evidence considered that had not been brought forward at first instance. (*Irving, F.C.*) QAMAR DIN *v.* SULTAN. **11 Lah.L.T. 51.**

———**S. 84**—*Wrong decision as to* res judicata—*Interference in revision.*

A wrong decision on matter of *res judicata* is no ground to exercise the powers of revision; but a decision of a Civil Court bars the jurisdiction of a Revenue Court even apart from the question of *res judicata*. (*Irving, F.C.*) BANU MAL *v.* GANGA SINGH. **11 Lah L T. 57.**

——— **S. 87**—*Decree being in wrong form—Interference in revision.*

Where the decree is in the wrong form the Financial Commissioner can interfere in revision. (*Irving, F.C.*) FAUJA *v.* TAJ BEG. **11 Lah L.T. 64.**

———**S. 88 (2)**—*Proceedings under Tenancy Act—Limitation applicable.*

The C. P. Code has been applied to proceedings under the Tenancy Act by S. 88 (2) Where in proceedings under the Tenancy Act any section, rule or order of the C. P. Code has the force of a rule under the Tenancy Act, it is reasonable to hold that the period of limitation laid down in Sch. I of the Limitation Act as applicable to that section, rule or order applies. An application under the Tenancy Act to set aside a sale on the ground of irregularity is governed by Art. 166 and not by Art. 181. (*Irving, F.C.*) BEHARI LAL *v.* MUNSHI LAL. **11 Lah L.T. 138.**

———**Ss. 90 and 91**—*Service of copy of notice—Sufficiency.*

The mode of service of summons laid down in S. 90 must in accordance with S. 88 (2) be read with the provisions of the Code of Civil Procedure and the effect of O. 5, R. 10 is as if after the words "be served" in S. 91 was inserted "by delivering or tendering a copy." (*Irving, F.C.*) BISHAMBAR LAL BASHESHAR LAL *v.* RAM CHANDAR. **11 Lah.L.T. 89.**

———**S. 98**— Non-compliance with — Revision. *See* JURISDICTION—CIVIL AND REVENUE COURTS. **13 Lah L T. 43.**

———S. **98**—*Suit to contest ejectment—Question of adverse possession—Mode of disposal.*

Only a Civil Court can decide finally whether adverse possession exists. Where in a suit to contest the notice of ejectment it becomes necessary to decide the question of adverse possession, the proper course is that prescribed by S. 98. (*Irving, F.C.*) SADHU RAM *v.* MEHR SHAH. **11 Lah.L.T. 76.**

PUNJAB TENANCY ACT (1887), S. 100.

———**S. 99**—*Jurisdiction—Basis of—Simple mortgage accompanied by collateral security—Suit by mortgagee for possession or for return of money—Jurisdiction of Civil Court.*

Jurisdiction should be determined by the allegations in the plaint as interpreted by reference to the document put in therewith by the plaintiff. In a suit by the mortgagee for possession of the mortgaged land or for return of money, it was found from the allegations in the plaint, that the intention of the parties was, that there should be a simple mortgage accompanied by collateral security, and that the mortgagor was to remain in possession of the property, and the mortgagee was to receive rent in kind as consideration for his advance.

Held, that the suit was triable by the Civil Court. (*Middleton, J. C. and Saaduddin, A. J. C.*) DAULAT KHAN *v.* KALA MAL. **6 I.R. (Pesh.) 19=146 I.C. 766=A.I R. 1933 Pesh. 73.**

———**S. 100**—*Applicability—Objection to jurisdiction by virtue of the defence.*

S. 100 applies to all cases in which a Court, whether civil or revenue, has determined a suit which it had no jurisdiction to entertain. It is immaterial whether the objection to the jurisdiction of the Court could be raised initially on the institution of the suit or whether it came into existence on the pleadings of the defendant. In either case from the stage that the objection to jurisdiction comes into existence the Court ceases to have jurisdiction to entertain the suit and if it continues with its determination than S. 100 would empower the High Court to take action provided the other conditions laid down in S. 100 are satisfied. (*Jai Lal, J.*) MAHOMED HUSSAIN KHAN *v.* KIRPA. **I R. 1933 Lah. 72=141 I.C. 179(2)=34 P.L.R. 82=A.I.R. 1933 Lah. 119.**

———**S. 100**—*Decree of Civil Court in suit cognizable only by Revenue Court—Registration as decree of Revenue Court.*

A decree of a Civil Court in a suit cognizable by only the Revenue Court cannot be registered as a decree of the Revenue Court if such registration will result in prejudice. In such a case the parties must be left to fight their case *de novo* in the Revenue Court (*Mir Ahmad, A J C.*) AKBAR KHAN *v.* KALA KHAN. **154 I C 896=6 R. Pesh. 89=A.I.R. 1935 Pesh. 20.**

———**S. 400**—*Jurisdiction of Civil Court—Erroneous exercise—Correction.*

The points which arose for determination in a suit by an assignee from the mortgagee for rent were: (1) Whether the defendant is the mortgagee and if he had assigned his rights; (2) whether the mortgagee made over the lands to others for cultivation on payment of 'batai'; (3) whether the cultivators were owners or were liable to render any produce to others.

Held, that the points were more appropriately determinable by a Civil Court and that if they would be wrongly decided, action could be taken under S. 100 and the decrees registered as those of a Revenue Court. (*Tapp, J.*) POHU LAL *v.* KAPURA. **I.R. 1931 Lah. 647=132 I.C. 663=A I.R. 1931 Lah. 707**

———**S. 100**—*Registration of Civil Court decree as decree of Revenue Court—Decree erecting tenant without observing procedure under Ss.* 41, 42 *and* 43.

A definite procedure is prescribed for the ejectment of tenants under Ss. 41, 42 and 43 of the Punjab Tenancy Act. If a decree is passed in favour of a plaintiff without observing the provisions regarding the ejectment of a tenant, it must be held that the tenant was prejudiced by the mistake as to jurisdiction and it would be inequitable in these circumstances to register the decree of the Civil Court as a decree of the Revenue Court. The

PUNJAB TENANCY ACT (1887), S. 100.

provisions of S. 100 of the Punjab Tenancy Act are not applicable to such a case. (*Abdul Rashid, J.*) MAHOMED *v.* ALLAH DITTA. **155 I.C. 242=7 R.L. 668=35 P.L.R. 411=A.I.R. 1934 Lah. 353**

———**S. 100**—*Suit triable by Civil Courts—Trial by Revenue Court—Appeal—Procedure.*

If the Collector holds on appeal that the suit should have been tried by a civil Court, the proper procedure is to make a reference to the Commissioner under S. 100 of the Act and not dismiss the appeal. (*King, F. C.*) SHER SINGH *v.* FAQIRIA. **11 Lah.L.T. 163.**

———**S. 100**—*Trial Revenue Court's order unprejudicial—Defect of jurisdiction discovered in second appeal—Trial and not first appellate Court's order to be registered as that of trial Civil Court.*

Where a suit has been tried very fully by the Assistant Collector and neither party is prejudiced by the trial in his Court owing to defect of jurisdiction but the case went up in appeal and the trial Court's order is modified in appeal and the defect in jurisdiction is found in second appeal, it is better to register the decree of the trial Court as one of Second Class Sub-Judge rather than as one of the District Judge. (*Tek Chand, J.*) RACHHPAL SINGH *v.* LAL SINGH. **I.R. 1933 Lah. 378=143 I.C. 719=A.I.R. 1933 Lah. 730.**

———**S. 111**—*Agreement under—Entry in* wajib ul arz *—Same limited to particular settlement—Effect.*

Where the terms of an entry in a *wajib ul arz* of 1854 expressly limit it to a particular settlement, the *wajib-ul-arz* cannot be treated as an agreement between landlord and tenant within the meaning of S. 111. This position is not improved even if the same entry is made in successive settlement records without any investigation as to rights of occupancy tenants. 185 P.W.R. 1913 and 16 P.R. 1915, Foll.; 2 P.R. 1919, Rev., Diss. from. (*Jai Lal and Abdul Qadir, JJ.*) LABHU *v.* UTTAM. **12 Lah. 652=135 I.C 46=I.R. 1932 Lah. 30=32 P.L.R. 958=A.I.R. 1931 Lah. 371.**

———**Ss. 111 and 112**—*Enhancement of rent—Canal irrigation as ground.*

An agreement in respect of rent does not persist beyond the terms of the settlement. Where enhancement is claimed on ground of canal irrigation it is no defence to say that nobody else pays a higher rate. (*Irving, F C.*) TEJA SINGH *v.* MAKHAN SINGH. **11 Lah. L.T. 44.**

PUNJAB VILLAGE PANCHAYATS ACT (III OF 1922), S. 26—*Suit against minor—Power of Panchayat to entertain—Revision.*

The Village Panchayat has no jurisdiction to entertain a suit against a minor. Where the Panchayat entertains a suit in contravention of the statute the High Court can interfere in revision. (*Agha Haidar, J.*) KUNDAN LAL *v.* RAM CHAND. **15 Lah. 80=6 R L. 317=146 I C. 1050=35 P.L.R. 140=A I.R. 1934 Lah. 156.**

PURCHASER.

See (1) C. P. CODE, O. 21, RR. 93 AND 94.
(2) CONTRACT—SALE.
(3) SALE.
(4) SALE OF GOODS ACT (1930).
(5) T. P. ACT (1882), SS. 54 AND 55.

QABIZ. Recorded sub-tenant entered as—Effect. *See* AGRA TENANCY ACT (1926), S. 86. **15 R.D. 143.**

QABZADARI LAND.

See (1) LANDLORD AND TENANT— QABZADARI TENANT.
(2) OUDH LAWS ACT (1876), S. 7 (*a*).

RAILWAY COMPANY.

QUANTUM MERUIT.

See (1) CONTRACT—QUANTUM MERUIT.
(2) CONTRACT ACT, SS. 65, 70 AND 73.

QUANTUM VALEBAT—Doctrine of—Applicability—Contract for supply of goods found to be void. *See* CONTRACT ACT, S. 65. **A.I.R. 1933 Mad. 332.**

QUARRIES. *See* MINERALS.

QUASHING PROCEEDINGS. *See* CR. P. CODE, S. 439.

QUESTION OF FACT.

See (1) C. P. CODE, S. 100—QUESTION OF FINDING OF FACT.
(2) S. 115—FINDING OF FACT.

QUESTION OF LAW.

See C. P. CODE, (1) S. 11—ISSUE OF LAW.
(2) S. 100—QUESTION OF LAW.
(3) S 115—ERROR OF LAW.

QUIA TIMET ACTION— Infringement of trade mark—Absence of evidence of confusion. *See* TRADE MARK—INFRINGEMENT OF. **A.I.R. 1934 P.C. 167=66 M.L J. 588 (P.C.).**

———Quia timet action— Suit regarding right of support. *See* EASEMENTS ACT (1882), SS. 15 AND 34. **11 Rang. 47=A.I.R. 1933 Rang. 18.**

RAILWAY COMPANY—*Contract of consignment—Amount of freight—Mistake of clerk—Company bound.*

A consignment of planks was despatched from station *S* on the *R* line at owner's risk and the risk-note Form B was given to the consignor. The weight charged was equal to the carrying capacity of the whole wagon. The consignment was not weighed at *S* but was weighed at *R* where the Railway authorities demanded freight at a higher rate on the ground that there was an under-discharge. The consignor having paid the money under the protest sued the Railway Company for refund and the Railway Company pleaded mistake of its clerk at *S*.

Held, that such mistake could not alter the basis of the original contract, that the company was bound by their agent's contract and the plaintiff was consequently entitled to recover the excess paid. (*Sulaiman and Young, JJ.*) CHHOTEY LAL AND PANNA LAL *v.* R. K. RAILWAY. **54 All. 557=I.R 1932 All. 405=1932 A.L J. 526=138 I.C. 439=A.I R. 1932 All. 540.**

———Contract of consignment—Rate of freight—Freight charged at maund rates—Wagon rates not claimable at the place of destination *See* RAILWAYS ACT, S. 53. **1933 A.L.J. 1180.**

———*Contract of consignment— Rate of freight—Wrong entry of station master—Company if bound.*

Even if the station master of the despatching station enters in the carriage forward receipt the rate as chargeable from that station to the station of destination, though it is really a rate chargeable up to the junction station, the railway company is not bound by the entry made by the station master. 35 I.C. 208, Ref.; A.I.R. 1926 All. 146, Dist. (*Grille, A J. C.*) SECRETARY OF STATE *v.* NAND KISHORE. **141 I.C. 236=I R. 1933 Nag. 45=A.I R. 1932 Nag. 180.**

———*Duty of consignor—Overcharge claimed.*

It is the duty of the consignors to take delivery and to pay the excess charges and then to sue for recovery of the excess if so advised. They have no right to refuse delivery and, if they do so and leave the goods on the railway premises they are liable to pay demurrage. (*Staples, A. J. C.*) CHHOGALAL *v.* SECRETARY OF STATE. **29 N L R. 333=147 I.C. 959=6 R.N. 145=A.I.R. 1933 Nag. 261.**

RAILWAY COMPANY.

———Liability of—Consignee crossing railway line—Damage caused to car due to the negligence of servants of the Railway Company—Company liable. *See* TORT—NEGLIGENCE. **A I.R.1932 Sind 80.**

———*Liability of—Delivery of goods to person without production of railway receipt—Liability to holder of receipt—Railway receipt—If document of title.*

Railway receipts pass from hand to hand and are generally regarded as equivalent to documents of title; and an endorsee of a railway receipt from the consignor in whose name it is made out is entitled to the delivery of the articles covered by the receipt The Railway Company is not justified in delivering the goods to any one else without production of the receipt, even though the consignor sends a telegram (which is not confirmed) directing delivery to such other person. To so deliver the goods without the production of the receipt on the mere basis of an unconfirmed telegram and without any explanation for the non-production of the receipt is a clear breach of duty on the part of the Railway Company; and in the absence of sufficient proof of justifying circumstances absolving them from liability, the company is liable to the endorsee or holder of the railway receipt for the value of the goods covered by it. (*King, J.*) MADAN GOPAL *v.* KAMESWARA RAO. **159 I C. 872=8 R.M. 572=42 L.W 795=1935 M.W.N. 1279 =A.I.R. 1936 Mad. 25=69 M.L.J. 716.**

———Liability of—Trespasser crossing Railway line to get to station master's office—Train knocking him down—Whistle by Railway—Company not liable. *See* TORT—NEGLIGENCE. **34 Bom L. R. 826=A. I. R. 1932 Bom. 452.**

———Loss of goods in transit—Time of loss—Burden of proof. *See* CONTRACT ACT, S. 164. **1932 A.L.J. 788=A.I R. 1932 All. 584.**

———*Rates for carriage—Transport* via *foreign line —Quoted rate, effect of.*

The words "for traffic to" constitute a phrase which is current in railway parlance to indicate that the rates are for carriage to a junction whence the goods will be transferred to a foreign line. Where a railway company quotes rates for carriage of goods from a certain station on the line of that company to another junction station on that line for traffic to a station on the foreign line, the rate so quoted is for carriage of goods from the station of despatch to the junction station and does not include the rate chargeable from the junction station to the station of destination on the foreign line. (*Grille, A.J.C.*) SECRETARY OF STATE *v.* NAND KISHORE. **141 I.C. 236=I R 1933 Nag. 45=A.I.R. 1932 Nag. 180.**

———*"Water tight" wagon.*

The term "water-tight" is used as descriptive of a type of wagon and is not to be understood as a guarantee that it is actually water-tight, although it is supposed to be so. (*Grille, A.J.C.*) SECRETARY OF STATE *v.* LAXMINARAYAN. **I.R. 1933 Nag. 207 (2)=144 I.C. 204=A I.R. 1933 Nag 1.**

RAILWAYS ACT (IX OF 1890), S. 3 (6)—*"Railway Administration"—Railway administered by Government—Suit against—Government a necessary party —Civil Procedure Code (V of* 1908), *S.* 79.

"Railway administration" in the case of a railway Administered by the Government means the Manager of the railway and includes the Government. The Government owning the railway is, therefore, a necessary party in a suit against the railway and under S. 79, C.P. Code, a suit against the Government has to be instituted against "the Secretary of State for India in Council."

RAILWAYS ACT (1890), S. 47.

So a suit which purports to be against the "Railway Administration through their agent resident at Calcutta," after the East India Railway, *i.e.*, the defendant had been taken over by the Government is not a proper suit against the Secretary of State for India in Council. (*Jwala Prasad and James, JJ.*) SHAIKH ELAHI BAKSH *v.* E.I. RAILWAY ADMINISTRATION **10 Pat. 466=I R. 1931 Pat. 371=133 I.C. 451=13 Pat.L.T. 86=A.I. R. 1931 Pat. 326.**

———**S. 3 (6)**—State Railway—Suit against—Form of. *See* C. P. CODE, S. 79 AND RAILWAYS ACT, S. 3 (6). **12 Pat.L.T. 681=A.I. R. 1931 Pat. 393.**

———**S. 3 (6)**—State Railway—Suit against—Notice to manager of Railway—Sufficiency of. *See* C. P. CODE, S. 80—STATE RAILWAY. **12 Pat.L.T. 681=A.I.R. 1931 Pat. 393.**

———**S. 3 (14)**—*'Terminals'—Whether includes transhipment charges—Suit to recover same—Jurisdiction of Civil Court.*

Transhipment charges are terminals within the meaning of S. 3 (14) and not tolls for using a ferry under S. 51 (*f*) and therefore the Civil Court has no jurisdiction to entertain a claim relating to such charges. 15 B. 537 and 15 Q B. D. 505, Ref. (*Staples, A. J. C.*) PANNALAL *v.* B. N. RY. CO **28 N.L R. 27=I.R. 1932 Nag 61=137 I C. 159=A.I.R 1932 Nag. 53.**

———**S. 47**—*Rules under—Rule limiting company's liability as a bailee—Validity.*

Railway companies, like all statutory bodies, have certain rights, privileges and liabilities A railway company is not entitled by the mere issue of rules and regulations to escape a statutory liability unless the legislature has sanctioned such a procedure. Unless the Railways Act, in respect of all goods delivered to it for purposes of transportation the railway company's liability is that of a bailee. A rule by which it attempts to escape that liability is a rule which is inconsistent with the Railways Act itself, and therefore *ultra vires.* (*Thom and Smith, JJ.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SHEO BHAGWAN CHIRANJI LAL. **160 I C 703=8 R A. 641=1936 A.L.J. 387= 1935 A.W.R. 1389=A.I R. 1936 All. 69.**

———**S. 47**—*Rules under—Rr.* 23 *and* 24—*Reweighment or remeasurement—Agreement to charge by weight —Charge by measurement at destination—Validity of.*

Where at the place of despatch the railway has agreed to charge by weight, it cannot at the place of destination claim to charge by measurement That is not a claim to re weigh or to re-measure. It is a claim to measure for the first time and to calculate in accordance with such measurement. 43 All. 623 and A.I R 1928 Nag. 52, Ref. (*Pollock, A.J.C.*) SECRETARY OF STATE *v.* AGASHE. **29 N L R. 306=I.R. 1933 Nag. 241=144 I.C. 386=A.I.R. 1933 Nag. 135.**

———**S. 47**—*Rules under General Rules* 27-*AA* (5) *and* (6)—*Validity of.*

R. 27-AA of the general rules that the railway will not be responsible until a railway receipt is given is *ultra vires* and inconsistent with the Act. (*Staples, A.J C.*) CHHOGALAL *v.* SECRETARY OF STATE. **29 N. L R 333=6 R N. 145=147 I.C. 959=A.I.R. 1933 Nag. 261.**

———**S. 47**—*Rules under—Gratuity Rules, R.* 8—*Effect—Right to demand gratuity.*

Gratuity is something of the nature of a gift and therefore R. 8 of the Gratuity Rules does not impose any legal liability on the Railway Administration to pay any gratuity to the employee nor does it confer on him any right which he can lawfully demand. The Court is not entitled to interfere and compel payment even if it

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is found that the discretion vested in the Railway Administration was not exercised *bona fide* but arbitrarily or has been influenced by extraneous and irrelevant consideration. (*Mallik and Jack, JJ.*) SECRETARY OF STATE *v.* BHOLA NATH MITRA. **60 Cal. 909 = I.R. 1933 Cal. 458 = 143 I.C. 637 = 37 C.W N. 663 = A.I R. 1933 Cal. 409.**

———**S. 47 (1) (g) and (2)**—*Rules under—Rules for the hawking and exposure for sale of goods made for guidance of public—If* ultra vires.

Per *Ferrers, J. C.*—A railway station is private property and it is intended for certain purposes. The rule forbidding the hawking and exposure for sale of goods on any station or platform comes within S. 47 (1) (*g*), and anybody not being a Railway servant infringing the rules made thereunder is liable to be punished, for the words "any person" used in Cl. (2) cannot be taken to be used for the restricted class of railway servants but is applicable to the public in general also.

Per *Rupchand, A.J C.*—S. 47 authorizes the framing of rules in respect of different objects and these are enumerated in Cls. (*a*) to (*g*). A bare reading of the clauses makes it abundantly clear that except Cl. (*e*), the other clauses contemplate rules being made not only for the guidance of railway employees but also for the guidance of the public. And such rules are not *ultra vires* the section. The expression used in Cl. (2) "any person" means any person whether he be employed in the railway or not. (*Ferrers, J. C. and Rupchand, A. J.C.*) SOBHRAJ *v.* EMPEROR. **29 S L.R. 27 = 158 I.C. 212 = 8 R.S 42 = 36 Cr.L J. 1345 = 1935 Cr.C. 377 = A I.R. 1935 Sind 91.**

———**Ss. 47 (2) and 134**—*Rules under—R.* 17—*Breach by member of public—Offence.*

Per *Ferrers, J. C.*—It appears from S. 134 that any person committing any offence against the Act or any rule thereunder shall be liable for such offence in any place in which he may be. It is clear therefore that any person not being a railway servant can be tried and punished for a breach of R. 17, made under S. 47.

Per *Rupchand, A. J. C.*—There is no magic in the use of the expression "offence". It means any act or omission made punishable by the law for the time being in force. Cl. (2) of S. 47 empowers the railway to provide punishment for breach of the rules and thereby impliedly makes a breach of such rules an offence (*Ferrers, J.C. and Rupchand, A.J.C.*) SOBHRAJ *v.* EMPEROR. **29 S.L.R. 27 = 158 I C. 212 = 8 R S. 42 = 36 Cr.L.J. 1345 = 1935 Cr.C. 377 = A.I.R. 1935 Sind 91.**

———**S. 51 (f)**—Tolls—Transhipment charges—Suit to recover—Jurisdiction of Civil Court. *See* RAILWAYS ACT, S. 3 (14). **28 N.L.R. 27 = A.I.R. 1932 Nag. 53.**

———**S. 53**—*Contract of consignment—Consignment of firewood—Freight charged in railway receipt at maund rates—Wagon rates not claimable at the place of destination.*

Where in respect of consignment of firewood, the railway receipt was given charging the goods at the despatching station at maund rates, the railway is not entitled to charge subsequently at wagon rates, even though larger wagons may have been used for the purpose. 29 All. 228; 1926 All. 296; 62 I.C. 602, Ref. (*Niamatullah and Rachhpal Singh, JJ.*) DALIP SINGH KUNDAN LAL *v.* SECRETARY OF STATE. **148 I.C. 610 = 6 R.A. 743 = 1933 A.L.J. 1180 = A.I.R. 1934 All. 19.**

———**S 55**—*Contract of consignment—Agreement for lower rate—Loading on consignor's responsibility—Subsequent unloading because of over-loading—Right to demand higher rates on re loading.*

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A Railway Company contracted to carry sleepers at a lower rate and the sleepers were loaded in a wagon on the consignor's responsibility and forwarded at owner's risk. At an intermediate station, the wagon was found to be over-loaded and therefore some sleepers were unloaded and kept there for some time. Later, the consignor having complained about this, the sleepers were loaded and sent at owner's risk, but at the destination delivery was refused to the consignor unless he paid higher rates.

Held, that the Railway had no power to charge higher rates and that the consignor was entitled to delivery on payment of the lower rates contracted for. (*Kendall, J.*) SECRETARY OF STATE FOR INDIA *v.* JANKI DAS GOVIND RAM. **154 I.C. 227 = 7 R A. 718 = 4 A.W.R. 588 = A.I.R. 1934 All. 952.**

———**S. 55**—*Refusal to deliver—If refusal to allow re-weighment amounts to.*

A refusal to allow re-weighment is not a refusal to give delivery. If under the contract of carriage, the Railway Company were entitled to have the goods re-weighed and the finding is that they did re weigh and demand—(as they were entitled to do under S. 55)—the freight due on the weight so calculated by them (which was in excess of that noted at the place of booking), the mere fact that the Railway Company refused to comply with the request of the plaintiffs to have the goods re weighed in their presence does not amount to a refusal to deliver and does not render the Railway Company liable in damages for non-delivery. 16 C.W.N. 356; 22 C.W.N. 310; *Ibid.* 902 Foll. (*Pearson and Mallik, JJ.*) BENGAL NAGPUR RY. CO., LTD. *v* RAVAN DESAI & CO. **I.R. 1932 Cal 653 = 139 I.C. 802 = 55 C.L.J. 603 = A.I.R. 1932 Cal. 877.**

———**S. 55**—*Sale by Railway company—Formality in conducting sale not observed—Railway Company, if liable in tort*

Unless the sale is conducted with the formality provided by S. 55 of the Railways Act, the Railway Company is not protected from what is, but for the section, a tortious act notwithstanding that they have a right to detain goods, and a person whose goods are lawfully detained can justly claim damages if the goods are wrongfully sold. (*Courtney-Terrell, C.J. and Agarwala, J.*) SUNDARJI SHIVJI *v.* SECRETARY OF STATE. **13 Pat. 752 = 151 I.C. 995 = 7 R.P. 148 = 16 Pat.L.T. 61 = A.I.R. 1934 Pat. 507.**

———**S. 55 (2)**—*Construction—"Local newspaper".*

By "Local newspaper" in S. 55 (2) is meant a newspaper which is issued from the locality and not a newspaper which may be read at the place. (*Sen, J.*) SECRETARY OF STATE FOR INDIA *v.* HARNARAIN CHAND. **53 All. 595 = I.R. 1931 All. 427 (2) = 131 I.C. 683 (2) = 1931 A.L.J. 335 = A.I.R. 1931 All. 337.**

———**S. 55 (2)**—*Construction—"Local" newspapers—Meaning of.*

The word "local" in S. 55 (2) means papers of place where the sale is to be held, and the provision is intended to give notice of the sale to persons of the locality who are likely to attend the purchase. (*Sulaiman, C J. and Bennet, J.*) SECRETARY OF STATE *v.* SIMLA FOOTWEAR COMPANY. **57 All. 843 = 157 I.C. 1080 = 8 R A 254 = 1935 A.L.J. 793 = 1935 A.W.R. 918 = A.I.R. 1935 All. 601.**

———**S. 55 (2)**—*Notice of auction in local newspaper.—Contents.*

The object of a public notice of auction under S. 55 and the provision that the notice is to be inserted in local newspapers is an indication that it was the intention of the legislature that the local public shall be in-

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formed of a particular auction in order that persons may be attracted to bid at the auction. In order to attract bidders to the auction, the notice should contain adequate materials so that possible bidders may be informed of the class of the goods and the time and place where the sale is to be held. A notice that does not state when the sales would take place or the nature of the goods or the places at which they would be sold or the condition of the goods or indeed any particulars which would be calculated to attract purchasers to the sale is not "notice of the intended sale" as prescribed by S. 55. (*Courtney-Terrell, C.J. and Agarwala, J.*) SUNDARJI SHIVJI *v.* SECRETARY OF STATE. **13 Pat. 752=151 I.C. 995=7 R.P. 148=16 Pat L.T. 61=A.I.R. 1934 Pat. 507.**

———**S. 55** (5)—*Under charge—Mistake in calculation—Consignors misled—Recovery from consignors.*

The Railway Company received several consignments and delivered the same to the consignee at certain rates. It appeared, however, that, owing to a mistake in calculation, a lower rate of freight had been levied and on discovery of the same by the Railway Auditor, the under charge was sought to be recovered from the consignor and consignee, the suit was held to be time-barred as against the consignee.

Held, that the consignors were justified in believing that the rate charged was correct and in acting on such a belief, and that under the particular circumstances the Railway Company had by their conduct deprived themselves of any right to obtain redress as against the consignors. (*Shadi Lal, C.J. and Walker, J.*) SHAHDARA SAHARANPUR LIGHT RY., LTD. *v.* PARTAP SINGH KESHO LAL. **I.R 1931 Lah. 509=131 I.C. 749=32 P.L.R. 397=A I.R 1931 Lah. 511.**

———**S. 56**—*Sale under*—14 *days' notice—Sufficiency*

The words 'as nearly as may be' in S. 56 imply that the terms of S. 55 are not to be rigidly applied in a sale under S. 56.

Held, that the notice of fourteen days was a sufficient notice for a sale under S. 56. (*Sulaiman, C. J. and Bennet, J.*) SECRETARY OF STATE *v* SIMLA FOOTWEAR COMPANY. **57 All. 843=157 I.C. 1080=8 R.A. 254=1935 A L J. 793=1935 A.W.R. 918=A.I.R. 1935 All. 601.**

———**S. 72.**

Construction
Damage to goods.
Delay.
Deterioration of goods.
Deviation from route.
Estoppel.
Liability of Company.
Loss of goods.
Misconduct.
Negligence.
Rate of freight.
Re-weighment.
Right to damages.
Risk-note.
Rules under.
Short delivery.

Construction.

———**S. 72**—*Construction—"Wilful neglect"—Meaning.*

The expression "wilful neglect" in this connection includes reckless carelessness and knowing omission to take reasonable care of goods accepted for carriage. "Wilful" in the expressions of "wilful neglect" does carry with it some element of intention or at least of a conscious disregard of duty. (*Reilly and Anantakrishna Aiyar, JJ.*) SOUTH INDIAN RAILWAY CO. LTD. *v.* V. M. S. P. BROTHERS. **I.R. 1932 Mad. 466 (2)=137 I.C. 884=1932 M.W.N 506=35 L.W. 687=A.I R. 1932 Mad. 545=62 M.L.J. 573.**

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———**S. 72 (2)**—*Construction—"That responsibility"—Meaning of.*

The words "that responsibility" in S 72 (2) can mean grammatically "the responsibility of a railway administration for the loss, destruction or deterioration of animals or goods delivered to the administration to be carried by railway" as set forth in S. 72 (1). The word "that" was used in order not to repeat the same words over again which had already been used in S. 72 (1). (*Addison and Monroe, JJ.*) B. B. & C. I. RY. CO. *v.* MT. ABDUL RAQIB. **15 Lah. 596=36 P.L R. 536=7 R.L. 15=150 I C. 709=A.I.R 1934 Lah. 186.**

Damage to goods.

———**S. 72**—Damage to goods—Failure to provide against rain water. *See* MISCONDUCT, *infra*. **A.I R. 1933 Pat. 630.**

———**S. 72**—*Damage to goods—Loading against sides and flap doors—Proof as to.*

When the only evidence is that when the wagons were opened, some bags which were huge and comparatively light fell out, it is not enough to prove that the goods had been loaded against the sides or flap-doors. The finding that there is no negligence necessarily excludes the case of misconduct (*Mitter, J.*) MANILAL ANANDJI *v.* BENGAL NAGPUR RAILWAY, LTD. **155 I.C. 1052=7 R.C. 668=39 C.W.N. 114=60 C.L.J. 590=A I R. 1935 Cal. 271 (2).**

———**S. 72**—*Damage to goods—"Misconduct"—Consignment of goods in water-tight wagon—Rainwater blowing through crevices of the door—Liability for damages.*

A consignment of rice bags was despatched in a water-tight wagon, but some bags became wet and damaged on account of the rain blowing into the wagon through the crevices of the door. There was no evidence of negligence on the part of the Railway Company. The consignment was sent under a risk-note in Form H, which made the Company liable only in case of damage on account of 'misconduct'.

Held, that the Railway Company having done all they could by providing a water-tight wagon, they were not liable for the damage caused, because there was no "misconduct", and that damage was clearly the result of an accident. (*Madhavan Nair, J.*) SOUTH INDIAN RAILWAY CO., LTD. *v.* DANDAYUTHAM CHETTIAR. **154 I.C. 453=7 R.M. 434=40 L.W. 702=1934 M. W.N. 1385=A.I.R. 1934 Mad. 715=67 M.L.J. 704.**

———**S. 72**—*Damage to goods—Misconduct—Filling in wagon contrary to rules—Damage to goods by rain water—Leakage in wagon—Inference.*

Where contrary to the standing order which the B. N. Railway Gazette issued, certain quantities of biri leaves and biris were loaded in wagons right up to the flap-door with the result that they were damaged by rain water through leaks in the wagons which were discovered at the arriving station,

Held, that the Railway Company was guilty of misconduct.

Quaere:—Whether it is an inflexible rule of law that wherever leaks are found in the wagon at the arriving station, it should be inferred that the leaks existed at the starting station? 58 Cal. 586, Cons. (*Mitter, J.*) BENGAL NAGPUR RAILWAY CO., LTD. *v.* MOOLJI SICKA & CO. **54 C.L J. 314=I R. 1932 Cal. 52=134 I.C 1268=A I.R. 1932 Cal. 70.**

———**S. 72**—*Damage to goods—Misconduct—Goods loaded in "water-tight" wagon—Burden of proof.*

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Where goods are loaded in a water tight wagon, it is for the consignor to prove that the wagon was not, as a matter of fact, water-tight to the knowledge of the company's servants, before the goods were despatched. If he proves this, misconduct can reasonably be inferred. In the case of water tight wagons no obligation is laid on the company's servants to provide any water-proof sheets at all. (*Grille, J.*) SECRETARY OF STATE *v.* LAXMINARAYAN. **I.R. 1933 Nag. 207 (2) = 144 I.C. 204 = A.I.R. 1933 Nag. 1.**

———**S. 72**—*Damage to goods—Risk-note Form A—Defective packing—Goods damaged by wet—Right to damages.*

Certain goods which were packed defectively were sent under risk-note A. Some of the goods were damaged by wet and it was not proved that the goods got wet owing to the misconduct of the Railway,

Held, that having regard to the implications of risk note A, the consignor was not entitled to any damage. (*M. C. Ghose, J.*) M. & S. M. RY. *v.* HAJI LATIF ABDULLAH. **159 I.C. 886 = 8 R.C. 362 = A.I.R 1935 Cal. 809.**

———**S. 72**—*Damage to goods—Risk note Form "H"—"Misconduct"—Meaning of—Consignment getting wet—Damages—Liability of Railway Company—Non observance of rules—Effect of.*

In a suit for damages against a Railway Company, in respect of consignments of goods carried by the railway, which got wet by rain water entering into the wagons which were either leaky or were not securely closed and made water-tight owing to the negligence of the Railway Company and its servants, when it is found that the company's servants have acted in violation of the rules in connection with the consignments the Railway Company is guilty of misconduct and cannot be absolved from liability for the damage, though the consignments are covered by risk-notes in Form "H". "Misconduct" is not term of art. In ordinary parlance it means management or mismanagement, and it is often used quasi-specifically in the sense of malfeasance of culpable neglect of an official in regard to his office. It is sometimes used to connote moral obliquity; but there is little reference to ethics when misconduct in railway risk notes is taken to mean the doing of a wrong thing; such misconduct may or may not be wilful. An unexplained and habitual failure to act in a accordance with the rules or standing orders obviously designed to prevent damage by wet to goods in transit certainly amounts to misconduct, and the company must be held liable in such case. (*Dhavle, J.*) BENGAL NAGPUR RAILWAY CO. *v.* JANKI DAS MARWARI. **159 I.C. 580 = 16 Pat.L.T. 837 = 8 R.P. 293 = A.I.R. 1936 Pat. 70.**

———**S. 72**—*Damages to goods—Suit to recover loss—Sender's statement as to condition of packing—Binding nature.*

If the sender agrees that the condition of the package is not satisfactory he cannot afterwards turn round and say that the packages were in good condition. (*C. C. Ghose and Pearson, JJ.*) MAFAT LAL GOGAL BHAI *v.* B. B. AND C. I. RY. **131 I.C. 31 = A.I.R. 1931 Cal. 489.**

———**S. 72**—*Damage to goods in transit—Risk-note Form A—No wilful neglect on part of Railway Company—Liability for loss or damage.*

Where under the risk-note Form A one of the conditions of the contract between the parties was that the Railway Administration would not be held responsible for the condition of the goods until the same were delivered at destination or for any loss arising from the same, and it appeared that the outer covering of the packages was not made secure against damp and rain with the result that some of the goods were damaged in transit.

Held, that there being no wilful negligence on the part of the Railway Company, the consignee was not entitled to recover damages from the Company for the loss or damage. (*C. C. Ghose and Pearson, JJ.*) MAFAT LAL GOGAL BHAI *v.* THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY, LTD. **131 I.C. 31 = A.I.R. 1931 Cal. 489.**

Delay.

———*See also* SHORT DELIVERY. *infra.*

———**S. 72**—*Delay—Address of consignee not written legibly—Consequent delay—Liability of Railway Company for.*

It is the duty of the consignor to furnish the address of the consignee and write the same plainly and legibly. If the consignor does not perform his duty and the goods are thereby lost or delayed, the company cannot be held responsible for the same. (*Lort Williams and M. C. Ghose, JJ.*) SECRETARY OF STATE *v.* FAKIR MOHAMED WAZIR MOHAMED. **61 Cal. 293 = 149 I.C. 1229 = 6 R.C. 747 = 38 C.W.N. 359 = A.I.R. 1934 Cal. 508.**

———**S 72**—*Delay—Detention of goods by Company to prevent possible theft—Liability for.*

The detention of the goods by the company was in order to prevent any possible theft and it was done by railway servants in the discharge of their duty to prevent theft. It was found that a wire had been cut and they suspected that a theft had taken place or that theft might take place unless proper steps were taken, and they removed the wagons to the proper shed and properly sealed the wagons again.

Held, that the Railway Company was not responsible for the delay caused by such detention. (*M. C. Ghose, J.*) M. & S. M. RY. *v.* HAJI LATIF ABDULLAH. **159 I.C. 886 = 8 R.C. 362 = A.I.R. 1935 Cal. 809.**

———**S. 72**—Delay—Diversion of goods from route—Company liable. *See* SHORT DELIVERY, *infra.* **A.I.R. 1932 All. 584.**

———**S. 72**—*Delay—Risk-note Form A—"Misconduct"—Delay in transit.*

Where the consignor has executed risk note A, the liability of the Railway Company is limited by the terms of the contract which provide that the Railway Administration shall not be liable for any loss except upon proof that the loss arose from misconduct on the part of the Railway Administration servants. The burden of proving such misconduct is admittedly upon the plaintiff. Delay on part of Railway to carry consignment which is not unreasonable is no indication of misconduct. (*Lordge, J.*) M. & S. M. RAILWAY CO. *v.* RAVI SHING DEEPSING & CO. **159 I.C. 907 = 8 R.C. 364 = A.I.R. 1935 Cal. 811.**

———**S. 72**—*Delay—Risk-note Form B—Consignment of mangoes—Breach in the line—No notice sent to sending station—Delay and resale—No notice of resale—Liability of Railway Company.*

58 bundles of mangoes were consigned by the plaintiff just before, and 37 bundles just after the 29th July, for delivery at Howrah. On that date there was a breach in the line of which no notice was given to the sending and delivering stations till after the 4th August. The Railway Company sold the mangoes at the place of breach and realised a small amount. In a suit by the plaintiff for the full value of the mangoes,

Held, that the Railway Company were at fault in not sending intimation of the breach in time and so were liable for the full value of the 37 bundles sent subsequent to the breach, and with reference to the 58 bundles

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they should have given notice of sale to the consignee before selling them and that they were liable for the consequential loss. (*Costello and Jack, JJ.*) WAZIR MOHAMED *v.* BENGAL NAGPUR RAILWAY CO., LTD. **I.R. 1932 Cal. 469=138 I.C. 487=55 C.L.J. 104=A.I.R. 1932 Cal. 492.**

———**S. 72**—*Delay in transit—Refusal by consignee to take delivery—Claim for compensation.*

Where the extraordinary delay in the transit of the railway parcel had rendered the consignment of the parcels valueless for the plaintiff and he refused to take delivery and sued the company for compensation,

Held, that the Court would be entitled to award by way of damages the price of the consignment which was actually paid by the plaintiff. (*Nanavutty, J.*) SECRETARY OF STATE FOR INDIA *v.* SCHOOL BOOK AND APPARATUS DEPOT. **I.R. 1933 Oudh 171=143 I. C. 219=10 O.W.N. 1319=A.I.R. 1933 Oudh 339.**

Deterioration of goods.

———**S. 72**—*Deterioration of goods—Claim by consignee—Duty to take delivery*

The consignee of goods claiming damages for deterioration is not entitled to refuse to take delivery but should take delivery and sue for the loss and where owing to his failure to take delivery, no evidence exists regarding the amount and extent of damage, he cannot recover any compensation. It is only by showing special circumcumstances that he can be given an award of interest on damages (*Addition and Hilton, JJ.*) SECRETARY OF STATE FOR INDIA *v.* DEVI DITTA MAL. **6 R.L. 572=148 I C. 489.**

———**S. 72**—*Deterioration of goods during transit—Consignee refusing to take delivery—Right to damages.*

When goods consigned by Railways are only deteriorated and not absolutely lost, the consignee is bound to take delivery of the goods and then claim damages for the deterioration ; when the consignee not only refuses to take delivery but also prevents the Railway Company from selling the goods. he is not entitled to claim damages on the basis of actual loss. (*M. C. Ghose, J.*) LADURAM HIRALAL *v.* SECRETARY OF STATE. **153 I.C. 867=7 R.C. 404=59 C.L.J. 467=A.I.R. 1934 Cal. 834.**

———**S. 72**—*"Deterioration" of goods—Meaning of Risk-note Form H—Railway company sending goods by passenger instead of mail train—Fall in price due to delay in delivery caused thereby—Liability.*

The plaintiff firm depatched certain consignments of apples to Bombay from their place of business at Rawalpindi and booked them under Risk note H. They sued the Railway company for damages on the ground that the Railway Administration at Rawalpindi did not despatch the consignments by the Frontier Mail as was always done, and that in despatching them by the passenger trains they caused an unreasonable delay in the delivery of goods at Bombay and that as the price of apples had fallen down, the consignments did not fetch the price they would have otherwise done.

Held per *Din Mohammad, J.*—That the word "deterioration" as used in the Risk-note included depreciation in value on account of detention or delay in delivery but that the Railway Administration was under no obligation to the plaintiff firm to carry its goods by the Frontier Mail in view of Rule 19 of the coaching tariff, and as no misconduct had been established against the Railway Administration's servants, the company was protected by the Risk-note H.

Held, per *Bhide, J.*—That the word "deterioration" could not be held to cover depreciation of value due to all in the market price and therefore the company could

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not claim any exemption from liability on the basis of the Risk note but that in the absence of any specific contract to convey the goods by a particular train or within a particular period, all that the plaintiff could insist on under the general law was that the goods should have been delivered within reasonable time and that as it was not alleged that there was any risk of deterioration within 4 or 5 days within which time the goods had arrived in Bombay, or that the fruit was in fact damaged in any way, there was no reason for holding that there was any unreasonable delay and that therefore the plantiff had failed to make out any case for damages. (*Bhide and Din Mahomed, JJ.*) SECRETARY OF STAIE *v.* KHAN CHAND RAM LAL. **16 Lah. 280=159 I.C. 72=8 R.L. 341=37 P.L.R. 579=A.I R. 1935 Lah. 492.**

———**S. 72**—*Deterioration of goods—Risk-note Form B—Delay in carriage—Perishables—Sale by Railway Company—Liability of company—Misconduct.*

Where certain potatoes consigned by a Railway arrived at the destination after a delay of eleven days and on account of their perishable nature, were sold by auction by the Railway authorities.

Held, it was a case of deterioration or damage and not a case of non-delivery and so the condition of the Risk-note imposing an obligation on the Railway Company to give evidence as to their dealing with the goods did not arise, that though the goods were perishable, they were not perishable in the sense that under no circumstance can they stand a railway journey, that they would not have perished if they were in good condition when they were first consigned and therefore there was no misconduct of the Railway company. (*Wort, J.*) GATI SHAH MAHADEO RAM *v.* SECRETARY OF STATE. **130 I.C. 837=A.I R. 1931 Pat 201.**

Deviation from route.

———**S. 72**—Deviation from route—Delay and shortage in weight—Liability of Railway company. *See* SHORT DELIVERY, *infra*. **A.I.R. 1932 All. 584.**

Estoppel.

———**S. 72**—*Estoppel—Consignor sending goods under contract—If can claim against it.*

The Railway Company does not owe a consignor any duty, which the contract under S. 72 (2) is expressed on the face of it to exclude, and if he has approbated that contract by sending his goods under it, he cannot afterwards reprobate by claiming a right inconsistent with it. (*Addison and Monroe, JJ.*) B. B. & C.I. RY. CO. *v.* MT. ABDUL RAQIB. **15 Lah. 596=150 I.C. 709=7 R.L. 15=36 P.L.R. 536=A.I R. 1934 Lah. 186.**

Liability of Company.

See also UNDER THE OTHER HEADINGS.

———**S. 72**—*Liability of company—Consignor asking goods to be rebooked but refusing to execute risk-note.*

The railway company cannot be compelled to carry goods on terms imposed by a proposer which are contrary to the rules of the Railway Company. Plaintiff despatched a consignment of goods from *A* to *K* at railway risk. The consignment arrived at *K* but plaintiff could not arrange for its delivery and at this request it was detained for a considerable time. The plaintiff then asked the Railway Company at *K* to have the goods rebooked from *K* to *A*. In accordance with Rules and Regulations, the Railway Company stated that the plaintiff should execute risk note A if the goods were to be rebooked. The plaintiff refused to execute risk note A and brought a suit for compensation against the railway company.

Held, that he had no cause of action either under the Railways Act or under the Carriers Act When the

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Railway Company carried the goods to *K*, they fulfilled their part of the contract and that contract came to an end. (*Bennet, J.*) BADRUDDIN *v.* SECRETARY OF STATE. **158 I.C. 526 = 8 R.A. 312 = 1935 A.L.J. 991 = 1935 A.W.R. 969 = A.I.R. 1935 All. 844.**

———**S. 72**—*Liability of company—Goods placed with consent of company's servant in goods shed near running line—Destruction by fire caused by sparks from passing engine.*

Where goods, which are admittedly combustible, are tendered by the plaintiff to the Company's servant and with his consent placed tn the Railway Company's goods. shed near the running line, the goods are delivered to the Company within the meaning of S. 148 of the Contract Act. It follows that in respect of these goods the Company's liability is that of a bailee, and if the goods are destroyed by fire caused by sparks from a passing engine owing to the neglience of the company in falling to make adequate and reasonable provision for the protection of the goods, the company is liable for the loss sustained by the plaintiff. (*Thom and Smith, JJ.*) SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* SHEO BHAGWAN CHIRANJI LAL. **160 I.C. 703 = 8 R A. 641 = 1936 A.L.J. 387 = 1935 A.W. R. 1389 = A.I.R. 1936 All. 69.**

Loss of goods

———**S. 72**—*Loss of goods—Liability of company—Proof of misconduct—Risk-note Form A.*

A suit was brought for damages for loss caused to a consignment of goods. There were five bales of cloth consigned and all the five bales were delivered. The shortage was due to some goods slipping out of some of the bales. The consignment wae delivered to the Company under Risk-note form A which is to be be used when the consignments are already in bad condition or so defectively packed as to be liable to damage, leakage or wastage in transit,

Held, that the company under the protection granted to it under Risk-note A would not be responsible except upon proof that the loss was due to misconduct on the part of the Railway administration or servants. A.I R. 1929 All. 124 Rel. on ; A.I.R. 1923 All. 605 and A.I.R. 1924 All. 7, Expl. and Dist (*Dalal, J.*) SECRETARY OF STATE FOR INDIA *v.* RUP RAM AUDH BEHARI LAL. **A.I.R. 1931 All. 135.**

———**S. 72**—*Loss of goods—Loss admitted by railway company—Mode of transport—Onus of proof.*

Where the loss is admitted by the company, the onus of showing how the consignment was dealt with and its condition throughout the transit, lies upon the railway company and their failure or inability to enlighten the Court on the point cannot prejudice the plaintiff's claim for damages. (*Jwala Prasad J.*) JAMUNADAS RAMJAS *v.* EAST INDIA RAILWAY CO., LTD. **148 I.C. 396 = 6 R.P. 454 = A.I R. 1933 Pat 630.**

———**S. 72**—*Loss of goods—Risk-note Form A—Negligence of consignor—Goods not packed properly—Liability for loss.*

A Railway Company does not insure against the negligence of the consignor. It is the latter's duty to have the goods properly packed, such as would be damaged unless properly packed; and when that is not done. he cannot recover any damages for loss occasioned thereby. (*Mitter, J.*) MANILAL ANANDJI *v.* BENGAL NAGPUR RAILWAY, LTD. **155 I.C. 1052 = 7 R.C. 668 = 39 C.W.N. 114 = 60 C. L. J. 590 = A.I.R. 1935 Cal. 271 (2).**

———**S. 72**—*Loss of goods—Risk-note Form H—Misconduct—Burden of proof—Through consignment of goods—Theft at intermediate station—Liability of Railway Company—Evidence as to condition of wagon at intermediate station—Duty of company to adduce.*

Certain tins of ghee were consigned to a Railway Company for carriage over it under a risk-note in Form H, which exonerated the company from all liability for loss or damage except on proof of misconduct of the servants of the company. In case of non-delivery or short delivery, not being due to accident or fire, the company was bound to disclose to the consignor how the consignment was dealt with while in the possession or control of the company. The tins were placed in a wagon which was sealed and rivetted as part of a through consignment. The wagon was intact at one of the intermediate stations, but at a station further off, the off-side of the wagon was open, the seal removed and some of the contents missing. In a suit by the consignor for damages for short delivery against the company,

Held, that the company had done all that they were bound to do to ensure the safety of the consignment, that no misconduct on the part of the company's servants could fairly be inferred from the facts proved, and that they were not liable to the plaintiff for damages.

Held, further, that disclosure on the part of the company as required is the risk note did not mean that the company should, in the case of a through consignment, be prepared to give evidence as to the condition of the wagon at any intermediate stage of the journey, and the burden of proving misconduct lay on the plaintiff. (*Guha and Bartley, JJ.*) BANWARILAL JAGANNATH *v.* B B. AND C. I. RAILWAY CO. **160 I.C. 728 = 8 R. C. 448 = 61 C.L.J. 526 = A.I.R. 1936 Cal. 24.**

———**S. 72**—*Loss of goods—Risk-note Form H.—Misconduct—Meaning—Theft at station yard—Evidence pointing to wilful neglect of railway servants—Liability of Railway Company.*

Misconduct need not be wilful. It may be interpreted as being equal to wilful neglect or failure of duty towards the consignor. The plaintiff consigned a bale of dates weighing 9½ maunds for being sent to a certain destination. The bale never reached its destination and was found missing when the train arrived. It was proved in an action on risk note Form H that the wagon in which the goods had been placed was secured on one side by an "Ellis patent lock" and on the other by an ordinary lock. The station was on the latter side and it was shown that one of the rings to which the lock was attached was broken and that the bale was missing,

Held, that the bale was removed owing either to deliberate misconduct of the railway servants in the shape of standing by or helping in the theft or at any rate in so neglecting the wagon to make the theft possible and that the Railway Company was liable in damages for the misconduct on the part of some servant of the railway administration. (*Mukerji and Niamatullah, JJ.*) EAST INDIAN RAILWAY *v.* NARAIN DAS GANGA SARAN. **54 All. 368 = I.R. 1932 All. 602 = 140 I.C. 103 = 1932 A.L.J. 217 = A.I.R. 1932 All. 321.**

[**R.** 1933 A.L.J. 995 (997).]

———**S. 72**—*Loss of goods—Risk-note Form H.—Misconduct—Theft in running train—Inference of connivance by railway servants.*

A theft had been committed in a running train consisting of 65 wagons. The consignee's bale was approximately in the centre. The train stood from time to time at deserted and ill-lighted railway stations.

Held, that in such circumstances it was not a fair inference that the railway servants know of or connived at the entry into the wagon of trespasser. (*Fraser, J.C.*

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and Saaduddin, A.J.C.) DIDA RAM WISANDA RAM *v.* SECRETARY OF STATE. **A I.R. 1934 Pesh. 119.**

———**S. 72**—*Loss of goods—Risk-note Form H—Misconduct—Wagon rivetted and sealed and not locked.*

Where goods booked under risk note Form 'H' are lost by theft during transit, the loss cannot be said to be due to the misconduct of the Railway Administration simply because the doors of the wagon were rivetted and sealed and were not locked. The rivetting of the wagon is at least as effective a safeguard against theft as the locking of it. *(Abdul Rashid, J.)* B.B. & C.I. RAILWAY *v.* SHAM LAL GUPTA. **153 I.C. 625=7 R.L. 449=A.I.R. 1935 Lah. 206.**

———**S. 72**—*Loss of goods—Risk note Form H—Wilful neglect—Burden of proof.*

Where goods consigned at the owner's risk under risk-note Form H are shown to have been properly directed but not delivered to the consignee, the onus of proof lies on the person who sues the Railway Company for compensation for the loss, to show wilful neglect on the part of the Railway Administration or its servants. 50 All. 246, Disappr *(Reilly and Anantakrishna Aiyar, JJ.)* SOUTH INDIAN RAILWAY CO., LTD. *v.* V.M.S. P. BROTHERS. **I.R. 1932 Mad. 466 (2)=137 I C 884 =1932 M.W.N. 506=35 L W. 687=A.I.R. 1932 Mad. 545=62 M.L J. 573.**

———**S. 72**—*Loss of goods—Risk-note Form H—"Wilful neglect"—Loss of heavy bale at station yard—Inference as to theft by or wilful neglect on part of railway servants.*

A consignment consisting of a heavy bale of cloth was sent under risk note Form H from station *A* to station *I*. It was proved that it was properly directed and that it safely reached an intermediate station *E*. It further appeared that the bale was in the goods wagon at station *E* half an hour before the train left that station By the time the train left station *E* and arrived at the next stopping station about half an hour thereafter, it was discovered that the bale was missing. The consignees having sued the Railway Company to recover compensation for the loss.

Held, that the proper inference to be drawn from the facts was that either the bale was stolen at station *E* by the Railway servants or that it was stolen by some body else in circumstances made possible by the wilful neglect of the railway servants and the plaintiffs were therefore entitled to recover compensation for the loss of the consignment. *(Reilly and Anantakrishna Aiyar, JJ.)* SOUTH INDIAN RAILWAY CO., LTD. *v.* V.M.S. P. BROTHERS. **I.R. 1932 Mad. 466 (2)=137 I C 884=1932 M.W.N. 506=35 L.W. 687=A.I.R. 1932 Mad. 545=62 M.L.J. 573.**

———**S. 72**—*Loss of goods—Suit to recover damages—Excepted articles under S. 75—Onus of proof—Section subject to S. 15.*

One of the provisions to which S. 72 is subject, is contained in S. 75 of the Act. Where a person sues to recover damages for loss of goods he must show that they are not excepted articles under S 75. *(Suhrawardy and Jack, JJ.)* SECRETARY OF STATE FOR INDIA *v.* GOPALMAL PURUSOTHAM DAS. **58 Cal. 989=I.R 1931 Cal. 886=134 I.C. 886=35 C.W.N. 452 A.I.R 1932 Cal. 3**

———**S. 72**—*Loss of goods—Theft—Liability of company.*

Two silver bars were loaded in a treasure van properly locked at station *H*. At station *C* one was found stolen from a hole cut in a wooden floor, locks remaining intact. It was found that the train had stopped outside the station *C*, but there was no evidence as to the place of theft and as to the guard's negligence at station *C*.

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Held, that since the care taken by the Railway Company as bailee of the consignment was what could be expected of an ordinary prudent person and there was no negligence on the part of its servants the company could not be held responsible for the loss. *(Agarwala and Saunders, JJ.)* TOLARAM GIRDHARI LAL *v.* SECRETARY OF STATE. **152 I.C. 562=7 R.P 207= 15 Pat L.T. 818=A.I R. 1934 Pat. 583.**

Misconduct.

See also DAMAGE TO GOODS—DELAY AND LOSS OF GOODS, *supra.*

———**S. 72**—*Misconduct—Burden of proof—Risk-note Form H.*

In the case of risk note H, the railway has first to disclose how it has dealt with the consignment, if necessary, by giving evidence. If upon a fair construction of that evidence an inference of misconduct of railway servants arises, then liability for the loss falls upon the railway. If no inference of such misconduct arises, then the burden of proving the misconduct is thrown upon the consignor. *(Fraser, J. C. and Saaduddin, A.J.C.)* DIDA RAM WISANDA RAM *v.* SECRETARY OF STATE. **A I.R. 1934 Pesh. 119.**

———**S. 72**—*"Misconduct"—Meaning of—Failure to provide against rain water—Risk-notes Forms A and H.*

The liability of the railway administration under risk-note forms A and H arises when loss, deterioration or damage arises from "misconduct" of the railway administration servants. "Misconduct" would ordinarily mean failure to do what is required of a person to be done. Failure to provide against such ordinary contingency, such as rain water forcing itself into the waggon and causing damage to grain etc., in it, is misconduct. *(Jwala Prasad, J.)* JAMUNADAS RAMJAS *v.* EAST INDIA RAILWAY CO., LTD. **148 I C. 396=6 R.P. 454=A.I.R. 1933 Pat. 630.**

———**S 72**—*Misconduct — Meaning of—Risk-note Form H.*

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence and is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be. *(Guha and Bartley, JJ.)* BANWARILAL JAGANNATH *v.* BOMBAY BARODA AND CENTRAL INDIA RAILWAY CO. **160 I.C. 728=8 R C. 448=61 C L.J. 526=A.I. R. 1936 Cal. 24.**

———**S. 72**—*'Misconduct'—Meaning of—Risk note Form H.*

Misconduct is not mismanagement but is behaviour which involves an imputation of some degree of moral obloquy. The misconduct must however be of the company's servants and must not refer to any deficiencies in the rules made by the Railway Administration, by which those servants are to govern themselves. Therefore, the contention that the wagon ought to have been closed by some more secure means than that of sealing and riveting is an argument that attacks the general administration of the line and is not a question of misconduct of the Railway servants. *(Fraser, J. C. and Saaduddin, A. J. C.)* DIDA RAM WISANDA RAM *v.* SECRETARY OF STATE. **A.I.R. 1934 Pesh. 119.**

———**S. 72**—*Misconduct—Misconduct of servants—Burden of proof—Damages assessed by Inspector—Whether misconduct is proved.*

Negligence is not the same thing as wilful neglect and wilful negligence is not the same thing as misconduct which it is essential for the consignor to prove. The fact that the District Commercial Inspector investigated the case and assessed the damages has no bearing

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whatever on the essential question of misconduct on the part of the company's servants. (*Grille, A. J. C.*) SECRETARY OF STATE *v.* LAXMINARAYAN. **I.R. 1933 Nag. 207 (2)=144 I.C. 204=A.I.R. 1933 Nag. 1.**

———**S. 72**—*Misconduct—Misconduct of servants—Liability of railway administration for—Risk note Form B.*

Risk-note B protects the railway administration against claim for damages arising out of "loss or destruction or deterioration or by damage to the goods" and cannot be applicable to a case where the claimant is damnified, not by loss, destruction or deterioration of the goods themselves, but by some act of the railway administration or its employees not affecting the condition of the consignment or the goods consigned. Obviously the note is intended to protect railway administration where goods in whole or in part are lost or destroyed or spoiled otherwise than through misconduct of the railway administration or its employees. (*Niamatullah, J.*) SECRETARY OF STATE *v.* MADURI DAS NARAIN DAS. **55 All. 625=I.R. 1933 All 381=144 I.C. 113=1933 A.L.J 966=A.I.R. 1933 All. 477.**

———**S. 72**—"*Misconduct*"—*Negligence if amounts to.*

"Misconduct" implies something more than negligence, and a finding that there was no negligence on the part of the Railway necessarily excludes misconduct. (*Mitter, J.*) MANILAL ANANDJI *v.* BENGAL NAGPUR RAILWAY, LTD **155 I.C. 1052=7 R.C 668=39 C.W.N. 114=60 C.L.J. 590=A.I.R. 1935 Cal. 271 (2).**

———**S. 72**—"*Misconduct*" *Negligence—If amounts to—Risk note Form A.*

Misconduct is not necessarily established by proving even culpable negligence. It is something opposed to accident or negligence and is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. A. I.R. 1933 Cal. 742, Foll. (*Lodge, J.*) M. & S. M. RAILWAY CO *v.* RAVI SHING DEEPSING & CO. **159 I.C. 907=8 R.C. 364=A.I.R. 1935 Cal. 811.**

———**S 72**—"*Misconduct*"—*Omission to provide water-tight doors to wagon.*

If rain water enters a wagon, which is in good condition, by the great force of winds, the omission of the Railway Company to provide absolutely water-tight doors will not amount to misconduct. (*Mitter, J.*) MANILAL ANANDJI *v.* BENGAL NAGPUR RAILWAY, LTD. **155 I.C. 1052=7 R.C. 668=39 C.W.N. 114=60 C.L.J. 590=A.I.R. 1935 Cal 271 (2).**

———**S. 72**—*Misconduct—Onus of proof—What amounts to misconduct.*

Under S. 72 the onus of proving misconduct is on the party alleging it. When misconduct on the part of servants is alleged, it must be shown that the servants were actually responsible for the guilty or wrongful act, knowledge on the part of the railway administration or their servants that an act was likely to cause injury is not sufficient. Misconduct is not necessarily established by proving even culpable negligence. It is the intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be. The limitation of the Railway Company's liability by a special contract in the risk-note is valid in law. (*Guha, J.*) MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LTD. *v* SUNDARJEE KALIDAS. **60 Cal. 996=147 I.C. 752=6 R.C. 356=57 C.L.J. 281=A.I.R. 1933 Cal. 742.**

———**S. 72**—*Misconduct—Perishables in damaged condition unfit for further journey—Disposal by Railway after consultation with consignor—Failure to consult consignee, not misconduct.*

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It cannot be laid as a proposition of law that the consignor loses his title in the goods as soon as he makes them over to the Railway Company for delivery to the consignee at another station. It depends on the circumstances of each case. Where, therefore, a consignment of perishables, damaged by fire, were in such a condition that they could not stand further journey and the Railway Company after consultation with the consignor sold them at once.

Held, that the Railway was not guilty of any misconduct either for not having consulted the consignee or for having disposed of the consigement, when further delay would have meant the total destruction of the consignment. (*Lort Williams and M C Ghose, JJ.*) SECRETARY OF STATE *v.* FAKIR MAHOMED WAHIR MAHOMED. **61 Cal. 293=149 I.C. 1229=6 R.C. 747=38 C.W.N. 352=A.I.R. 1934 Cal. 508.**

———**S. 72**—*Misconduct—Refusal to work even by general strike.*

The refusal to work of a single employee or of railway employees on account of strike must be considered misconduct. It is not material whether or not the Railway Company did all in their power to minimise the effect of the misconduct of some of their servants. (*Macnair, J. C.*) TIKARAM *v.* BENGAL NAGPUR RAILWAY. **29 N.L.R 66=I.R. 1933 Nag. 168=143 I.C. 389=A.I.R. 1933 Nag. 42 (1).**

———**S 72**—*Misconduct—Risk note Form B.*

The word "misconduct" occurring in risk-note B is of wider import than the popular sense in which that word is used. Want of proper care and caution may amount to misconduct within the meaning of risk-note B. A mistake in the preparation of the railway receipt which throws doubt on the identity of the consignment to which it relates is a misconduct in the above sense. (*Niamatullah, J.*) SECRETARY OF STATE *v.* MADHURI DAS NARAIN DAS. **55 All. 625=I.R. 1933 All. 381=144 I.C. 113=1933 A.L.J. 966=A.I.R. 1933 All. 477.**

———**S. 72**—*Misconduct—Risk-note form B—New form—Liability of Railway Company—Misconduct—Omission to padlock wagons and gross delay in transit.*

The new Risk-note Form B imposes a larger measure of responsibility on the Railway administration than the old risk-note form. The word "misconduct" includes wrongful commission or omission, intentional or unintentional.

Held, that the deliberate omission of the Company to padlock the wagons and the gross delay in transit constituted misconduct and that the Company was liable for the loss of entire packages during such transit. (*Mitter and Patterson, JJ.*) SECRETARY OF STATE FOR INDIA *v.* DHOKALMAL MOHADEB LAL. **I.R. 1931 Cal. 940=134 I.C. 940=35 C.W.N. 1250=54 C.L.J 154=A.I.R. 1931 Cal. 734 (2).**

———**S. 72**—*Misconduct—Wilful misconduct—Significance of—Negligence—If sufficient—Wagons only sealed but not locked—Effect of.*

In a suit for damages against a Railway Company for loss of goods consigned, what has to be shown is the misconduct of the Railway servants. There is no difference between misconduct and "wilful" misconduct. The word "wilful" is redundant. Negligence is different from misconduct. Merely because the Railway Company seals the waggons and do not lock them as required by the rules, it cannot be said that there is misconduct giving rise to liability. (*Wort, J.*) NAURANG LAL *v.* B. B. & C. I. RY. CO **160 I.C. 1086=8 R.P. 424=16 Pat.L.T. 887=A.I.R. 1936 Pat. 84.**

Negligence.

See also MISCONDUCT, *supra.*

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———**S. 72**—*Negligence—Burden of proof.*

The burden is always on the consignor to prove that the damage was caused by negligence of the bailee or his servants. In doing so, it is open to the consignor to ask the Court to draw a presumption against the bailee for failure to call material witnessess who had to deal with the goods while in his custody. But when such evidence is led, it is for the Court to decide whether an inference can be drawn in favour of the consignor or not; of course in fit cases it is open to the Court to draw a presumption of negligence from the fact of loss or damage to tha goods, if there is no evidence to explain the circumstances under which the loss or damage was caused But that is something different from saying that the burden is on the bailee to prove want of negligence. Whether in any particular case the Court will infer negligence must therefore necessarily depend upon the facts of such case. A. I. R. 1917 P. C. 173, Rel. on. (*Rupchand, A. J.C.*) KISHINCHAND PURSANOMAL *v* SECRETARY OF STATE. **26 S L R. 327 = I.R. 1932 Sind 130 = 139 I.C. 605 = A I.R. 1932 Sind 123.**

———**S. 72**—*Negligence—Compensation claimed due to leakage—Burden of proof—Leaks not discernible on inspection—No negligence.*

Where compensation is claimed on account of damage by rain water leaking through holes in a wagon, the plaintiff must establish the positive evidence that it was owing to the defective state of the wagon in which the goods were loaded that the injury was caused. By merely proving that when the wagon reached its destination, it was found in a defective state, he does not discharge the onus which lies heavily upon him to prove misconduct by the servants of the railway company. When there are leaks in the roof of a wagon which is not discernible on inspection at the time the goods are loaded and these givinig way during the course of the journey, the goods in the wagon are damaged by rain-water, no negligence of railway servants is established. (Case-law referred) (*Kisch, J.*) SECRETARY OF STATE *v.* JHADDU LAL HAZARI LAL. **I.R. 1933 All 411 = 144 I C. 304 = 1933 A.L J. 295 = A I.R 1933 All. 460.**

———**S. 72**—*Negligence—Delivery of goods to Company—Question of fact—Goods destroyed by fire—No negligence—Non-liability of Company.*

The responsibility of Railway Company under S. 72 is that of a bailee. The question whether the goods were actually delivered or not is a question of fact. Where the bags of biri leaves stocked in an open space were destroyed by fire during night, apparently by some passer by throwing a cigar on them,

Held, that the Company was not negligent and were not liable in damages. (*Jack, J.*) MOOLJI SICKA & CO. *v*, BENGAL NAGPUR RAILWAY CO., LTD. **137 I. C. 445 = I.R 1932 Cal. 305 = 35 C.W.N. 1242 = A.I. R. 1932 Cal. 257.**

———**S. 72**—*Negligence—Risk-note Form B—Wilful neglect—Wagon sealed but not locked—Inference.*

The question of wiful neglect is one to be determined in the light of the cirumstances of each case. It cannot be laid down as a hard and fast rule that the mere fact that the wagon was sealed and not locked constitutes wilful neglect within the meaning of Risk-note B.

Per *Shadi Lal, C. J.*—It cannot be affirmed that the locking of a wagon is always an adequate safeguard against theft; especially when it is remembered that the Railway administration owns thousands of wagons and it is impracticable to have a different lock for each wagon. If a standard lock is used it would not be difficult for thieves to make keys fitting it (*Shadi Lal, C. J. and Broadway, J.*) BADRI DAS KUNJ LAL, *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1931 Lah. 648 = 132 I.C. 664 = A.I.R. 1931 Lah. 627 (2).**

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———**Ss. 72 and 76**—*Negligence—Standard of care—Negligence of Company servants—Loss of goods in fire accident—Liability of railway company.*

The standard of care required of a bailee cannot be formulated as an inflexible practical rule applicable to all cases. The general principle is that the bailee should take such care as a man of ordinary prudence would take of his own goods. The bailee is liable for the servant's acts done during the course of employment. The conduct of the Railway administration with reference to such consignments in general and the suit consignment in particular should be considered. The Court has to see whether the company took the necessary steps to obviate the risk of loss and whether they took adequate measures for protecting the goods when such risk had already happened.

Held, on the facts that the loss of jute consignment by fire in a railway shed was due to the negligence of the servants of the company and the latter was liable for the loss. (*Mukerji and Nag JJ.*) SECRETARY OF STATE *v.* RAMDHAN DAS DWARKA DAS. **150 I C.189 = 6 R.C. 781 = 58 C L.J. 98 = 37 C.W.N. 1109 = A.I.R. 1934 Cal. 151.**

———**S. 72**—*Negligence—Wagon not locked—If evidence of negligence.*

Held, it has not been proved that the Railway Company has been negligent by reason of the fact that there was not an ordinary lock on the wagon. The question whether it amounts to negligence not to put locks on all wagons is one of fact. A. I. R. 1931 Lah. 627 (2), Rel. on. (*Addison and Monroe, JJ.*) B. B. & C. I. RY. CO. *v.* MT. ABDUL RAQIB. **15 Lah. 596 = 150 I.C. 709 = 7 R.L. 15 = 36 P.L R. 536 = A.I R. 1934 Lah. 186.**

Rate of freight.

———**S. 72**—*Rate of freight—Contract of carriage—When complete—Grant of railway receipts if essential—Loading when old rates were in force—Railway receipts issued when new rates were in force—Rate chargeable.*

A contract for despatch of goods by rail is complete as soon as the goods are delivered to the Railway company and are accepted by the Railway company and taken charge of. The grant of a railway receipt is not essential for the acceptance of the goods by the Railway Company. So where the goods were delivered and loaded in wagons on and before 31st January but the railway receipts were not given until 1st February on which date increased rates of carrige came into force, the railway is not entitled to charge increased rates. (*Staples, A.J.C.*) CHHOGALAL *v.* SECRETARY OF STATE. **29 N L R. 333 = 6 R N. 145 = 147 I.C. 959 = A.I.R. 1933 Nag. 261.**

Re weighment.

———**S. 72**—*Re-weighment—Risk-note Form B—Goods sent under—Leakage detected—Refusal of consignee to take delivery unless reweighed—Expenses incurred for reweighment—Consignee not liable for—Negligence of Railway company.*

The plaintiff despatched mustard oil in a tank to *N* on the E.B. Ry. under Risk note Form B. When it reached station *C*, an hour before it reached *N*, leakage was discovered. At the destination, the plaintiff refused to take delivery till it was re-weighed. There was no weighing apparatus at *N*; the oil had to be taken to *C* for weighing, where it was found to be short.

Held, that in view of the finding of the Lower Court that after the arrival of the oil tank at *C*, the tank was

not placed under watch and ward, the lower Court was justified in holding that negligence and misconduct on the part of the railway administration was proved and that the railway was liable for the loss; (2) in view of the leakage, the plaintiff was justified in refusing to take delivery unless it was re-weighed and the amount of the loss to the consignment was ascertained; it was not his fault that there was no re-weighing apparatus at *N* and so not only the railway administration was liable for additional loss which may have occurred during the return journey but that the plaintiff could not be charged with the freight therefor from *N* to *C*. (*King and Iqbal Ahamd, JJ.*) SECRETARY OF STATE FOR INDIA *v.* GHANSHIAM DAS BAIJNATH. **149 I.C. 659=6 R. A. 947=1933 A.L.J. 1316=A.I.R. 1934 All. 393.**

———**S. 72**—Re weighment—Suit for damages for non-delivery—Refusal by railway to re-weigh—Not a refusal to deliver—Railway Company not liable in damages. *See* RAILWAYS ACT, S. 55. **55 C.L.J 603= A.I R. 1932 Cal. 877.**

Right to damages.

See also DETERIORATION OF GOODS, *supra.*

———**S. 72**—*Right to damages—Delivery of goods under wrong number—Plaintiff claiming open inspection — Open inspection allowed — Fall in prices— Damages—Right of plaintiff.*

The plaintiff was entitled under a railway receipt to take delivery of the goods on 19th August, 1931, when he presented the railway receipt. He was also entitled to take delivery of the consignment according to the description thereof given in the railway receipt. The railway officials, however, offered to deliver goods bearing a different number. The plaintiff's suspicions were roused and he claimed open inspection of the consignment which was allowed on 1st September. In the meanwhile prices of goods contained in the consignment went down. The plaintiff sued the railway administration for damages.

Held, that the plaintiff was entitled to damages and that the plaintiff was justified in not accepting the goods, except after an examination in order to satisfy himself whether they contained the goods he had ordered. (*Niamatullah, J.*) SECRETARY OF STATE *v.* MADHURI DAS NARAIN DAS. **55 All. 625=I.R. 1933 All 381= 144 I.C. 113=1933 A.L.J. 966=A.I.R. 1933 All. 477.**

Risk-note.

———**S. 72**—*Risk note—Binding nature of.*

Where a person sues a Railway Company to recover damages for non-delivery of goods basing his claim upon a railway receipt which specifically mentions the existence of a risk-note, he is not entitled to allege that the risk-note was not executed or was executed without authority. A. I. R. 1925 Cal. 915 and A. I. R. 1926 Pat. 148, Rel. on. (*Addison and Monroe, JJ.*) B. B. & C. I. RY. CO. *v.* MT. ABDUL RAQIB. **15 Lah. 596=150 I.C. 709= 7 R.L. 15=36 P.L.R. 536=A.I.R. 1934 Lah. 186.**

———**S. 72**—*Risk note—Non-production of—Right of parties.*

Where the risk-note is not forthcoming the question of the plaintiff's liability to establish the defendant's wilful neglect does not arise and the plaintiff's case must succeed under the ordinary law. (*Jai Lal and Agha Haidar, JJ.*) RAM NARAIN BUDH SINGH *v.* GWALIOR LIGHT RAILWAY. **I.R. 1931 Lah. 924= 134 I.C. 300=33 P.L.R 100=A.I.R. 1932 Lah. 136.**

———**S 72**—*Risk notes From A and B—Due execution—Absence of—Onus of proof.*

Where a consignor sues for damages on the basis of the railway receipt and the receipt specifically mentions

the existence of risk-notes A and B, the onus is on the consignor to show that the risk notes had not been properly executed. (*Addison and Hilton, JJ.*) SECRETARY OF STATE FOR INDIA *v.* DEVI DITTA MAL. **6 R.L. 572=148 I.C. 489.**

———**S. 72**—*Risk-note Form B—New form—Effect of proviso—Misconduct of Railway servants—Proof— Statement of Company as to mode of dealing with goods.*

Where a case is covered by the proviso in the new risk-note Form B it is obligatory on the Railway Company to disclose in detail how the consignment was dealt with throughout the transit and if the circumstances so disclosed raised an inference of misconduct on the part of either the Railway administration or its servants, the burden of proving misconduct on the part of the Railway Company's servants must be taken to have been discharged by the consignor. 54 Bom. 105, Not Foll.; A.I.R. 1930 Pat. 559, Ref. (*Mitter and Patterson, JJ.*) SECRETARY OF STATE FOR INDIA *v.* DHOKALMAL MOHADEB LAL **I R. 1931 Cal. 940=134 I.C. 940= 35 C.W.N. 1250=54 C.L J. 154=A.I.R. 1931 Cal. 734 (2).**

[R. 1933 A L.J. 995 (997).]

———**S. 72**—*Risk-note Form B—"Rate"—Meaning— Goods carried at less than the rate for owner's risk— Clause exempting railway from liability—Binding nature of.*

The word "rate" mentioned in the risk-note Form B means the charge per maund for the minimum quantity. Where the amount charged by the company was less than what would have been payable if the goods were taken at owner's risk and was much less than what would have been payable if the goods had been taken at railway risk, the consignor and consignee are bound by the clause exempting the company from all liability. (*Sulaiman C. J.*) JAIN GLASS WORK *v.* SECRETARY OF STATE. **148 I C. 419=6 R.A. 695 (1)=1933 A. L.J. 901=A.I.R 1933 All. 854 (1).**

———**S. 72**—*Risk-note Form H—Liability under— Misconduct—Onus of proof.*

Under risk-note Form H, a plaintiff can succeed only on proof of misconduct of the Railway Administration's servants. This provision is not consistent with the substantive clause laying down the conditions of liability; the provision is also likely to mislead persons seeking their remedy under that form. The Railway Company should not obtain an advantage from the unsatisfactory wording in the risk-note. (*Weston, J.C.*) GANESHI LAL MANNA LAL *v.* B. B. & C.I. RAILWAY CO. **1935 A.M.L.J. 38.**

Rules under.

———**S. 72**—*Rules under*—Ultra vires—*Rule opposed to Act.*

The rule of a Railway Company that the administration is not accountable for any articles unless they are booked and a receipt is given to the consignor is inconsistent with the Railways Act and is therefore *ultra vires*. (*Jack, J.*) MOOLJI SICKA & CO. *v.* BENGAL NAGPUR RAILWAY CO., LTD. **137 I.C. 445=I.R. 1932 Cal. 305=35 C.W.N. 1242=A.I.R. 1932 Cal. 257.**

Short delivery.

———**S. 72**—*Short delivery—Refusal by consignee to take delivery of even the goods available—Right to damages.*

Where out of a consignment of 200 boundles, nine were missing, and the Railway Company offered to deliver the remaining 191 bundles and intimated that a claim may be sent in regarding the missing bales, the plaintiffs are not entitled to refuse that offer and claim

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damages in respect of the whole consignment. Their claim for damages is limited to the nine missing bundles. (*Thom and Bennet, JJ.*) SECRETARY OF STATE *v.* RAGHUBAR DAYAL BABURAM. **148 I C. 226 (2)=6 R.A. 662=1933 A.L.J. 1360=A.I.R. 1933 All. 595.**

———S. 72—*Short delivery—Risk note Forms A and B—Diversion of goods from route—Delay and shortage in weight—Liability of Railway Company.*

The extemption from liability afforded to the Railway Administration by the risk-note forms A and B is operative and available to the Railway Administration only during the transit on the ordinary route and once the goods are diverted from that route the protection afforded by the risk notes ends. Where the goods were diverted owing to a mistake of the Railway Company with the result that there was a delay in delivery and shortage of weight.

Held, that the consignor could recover damages and that the Railway Company could not seek protection under risk notes Forms A and B. 1930 A. L. J, 297, Rel. on. (*Iqbal Ahmad, J.*) SECRETARY OF STATE FOR INDIA *v* KESHO PRASAD SHEO PRASAD. **I R. 1932 All. 561=139 I.C. 381=1932 A.L J. 788=A I. R. 1932 All. 584.**

———**Ss. 75 and 72 (2)** - *Goods falling under S. 75—Risk note Form X if* ultra vires.

When articles declared to fall under S. 75 exceeding Rs. 100 in value are sent without the extra percentage, the railway can protect itself by an agreement under S. 72 (2) provided the conditions falling within that sub section are satisfied and risk note form X is not *ultra vires*. (*Addison and Monroe, JJ.*) B. B. & C. I. RY. CO. *v.* MT. ABDUL RAQIB. **15 Lah. 596=150 I.C. 709=7 R.L. 15=36 P.L.R. 536=A I.R. 1934 Lah. 186.**

———S 75—"*Loss*"—*Meaning of.*

Loss by theft or by means of fraud, is clearly a "loss" within the meaning of S. 75 of the Railways Act. The loss of goods by the railway need not occur through inadvertence or involuntarily and the section should be read so as to include cases of loss by wilful neglect or connivance of Railway Officers. (*M. C. Ghose and Bartley, JJ.*) SECRETARY OF STATE *v.* SURJYAMALL HARIBAKSH **61 Cal 599=152 I C. 37=7 R.C. 222 =A.I.R. 1934 Cal. 783.**

———S. 75—*Loss of goods—Omission to make declaration of value—Right of action.*

In the case of valuable goods, declaration of value is a matter of importance to the railway administration, as it would put the responsible officers of the railway on their guard and they would take special care to guard the parcel. Where the plaintiff has omitted to make the requisite declaration, his suit for loss of parcel must fail as he is hit by S. 75 of the Railways Act, and he cannot escape the effect of the section on the ground that the loss happened by the negligence or connivance of railway servants. (*M. C. Ghose and Bartley, JJ.*) SECRETARY OF STATE *v.* SURJYAMALL HARIBAKSH. **61 Cal. 599=152 I.C. 37=7 R C. 222=A.I.R. 1934 Cal. 783.**

———S. 75—*Loss of goods—Suit for damages—What claimant must prove—Excepted articles — Onus of proof.*

Where a person seeks to recover damages as price of goods sent at the ordinary Railway parcel rate and lost while in custody of the Railway administration, he must prove first that he entrusted the parcel to the Railway administration and that it did not contain any of the excepted articles mentioned in the second schedule, exceeding Rs. 100 in value. It is not for the Railway

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administration to prove the contrary. 42 All. 76, Dist. (*Suhrawardy and Jack, JJ.*) SECRETARY OF STATE FOR INDIA *v.* GOPALMAL PURUSOTHAM DAS. **58 Cal. 989=I.R. 1931 Cal. 886=134 I.C. 886=35 C.W.N. 452=A.I.R. 1932 Cal. 3.**

———S. 76 — *Negligence of Railway Company — Burden of proof.*

In suits for damages for non-delivery of goods entrusted to a Railway Company, the primary question is whether the Company has taken as much care of the goods as a man of ordinary prudence would under similar circumstances take of his own goods of the same description. As regards burden of proof, S. 76 does no more than take away from the plainiff a burden which in any case lies upon the defendant under S. 106, Evidence Act, *viz.*, to prove facts which are within his special knowledge. It is for the defendant to place all the materials before the Court and if there is a failure on the defendant's part in this respect the plaintiff may ask the Court to presume that if produced such materials would have gone against the defendant. Upon materials produced by the defendant the plaintiff must show that there was want of due diligence or that there was negligence on the part of the latter or his servants or agents (*Mukerji and Nag, JJ.*) SECRETARY OF STATE *v.* RAMDHAN DAS DWARKA DAS. **150 I.C. 189=6 R C. 781=58 C L.J. 98=37 C W.N. 1109=A.I.R. 1934 Cal. 151.**

———S. 76—*Plaintiff contracting to hold Company free from responsibility except on proof of misconduct of railway servants—Damage to goods—Liability of Company.*

Where from the terms of the contract it appears that the plaintiff knew of the fact that the goods tendered to the railway were either in bad condition or defectively packed and undertook to hold the railway "harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination and for any loss arising from the same except upon proof that such loss arose from misconduct on the part of the Railway administration's servants", he is not relieved of the necessity of proving that the loss or damage had arisen from misconduct on the part of the railway servants, by S. 76 of the Railways Act. This, however, only shows that if it is clear that the damage has been caused by the misconduct of the railway servants, it is not necessary for the plaintiff to prove how their misconduct has caused the loss. (*Kendall, J.*) SECRETARY OF STATE FOR INDIA *v.* NARAIN DAS SHYAM LAL. **155 I.C. 97=7 R.A. 893=1935 A.L.J. 640=1935 A.W.R 604=A I R. 1935 All. 525.**

———S. 77—*Applicability—Action based on tort.*

Section 77 of the Railways Act refers only to a claim to a refund of an overcharge or compensation for loss, destruction or deterioration of goods delivered to be so carried, that is to say, it refers to a suit against the carrier, in his capacity as a carrier for the loss, destruction or deterioration of the goods. The section therefore refers to the special liability of the carrier as such; it has no application to the broad liability of the Railway Company as tort-feasors quite apart from their position of railway carriers. And therefore no notice is necessary before bringing such a suit. (*Courtney Terrell, C.J. and Agharwala, J.*) SUNDARJI SHIVJI *v.* SECRETARY OF STATE. **13 Pat. 752=151 I.C. 995=7 R.P. 148=16 Pat.L.T. 61=A.I.R. 1934 Pat. 507.**

———S. 77—*Applicability—Goods not lost but in possession of company—Sale by public auction—Suit for damages.*

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Where goods had reached their destination and had never been lost from the possession of the railway company but were in the lost property office and were sold by public auction against the express direction of plaintiff, *held*, that in a suit for damages against the Railway Company, S. 77 did not apply and that no notice under it was necessary. (*Sulaiman, C. J. and Bennet, J.*) SECRETARY OF STATE *v.* SIMLA FOOTWEAR COMPANY. **57 All. 843=157 I.C. 1080=8 R.A. 254 =1935 A.L.J. 793=1935 A.W.R 918=A.I.R. 1935 All. 601.**

———**S. 77**—*Loss of goods—Effect of non-delivery—Notice.*

Non-delivery of goods amounts to loss within the meaning of S. 77 and a notice under S. 77 is necessary in such a case. (*Suhrawardy and Jack, JJ.*) DUNI CHAND RAM SARAN DAS CHOPRA *v.* E. I. RAILWAY. **I.R. 1931 Cal. 797=134 I.C. 93=35 C.W.N. 338= A.I.R. 1931 Cal. 585.**

———**Ss. 77 and 140**—Notice to District Traffic Superintendent—Sufficiency of. *See* RAILWAYS ACT, SS. 140 AND 77. **13 Pat.L.T. 695.**

———**Ss. 77 and 140**—*Notice—Rule as to—Substantial compliance.*

There is nothing in S. 77 or S. 140 which makes it imperative on plaintiff to mention in the plaint that refund had been demanded from the Railway Administration in the manner required by law. If the fact is denied by the defendant but appears from the evidence, the plaintiff's suit is not liable to be dismissed. Where in a suit for refund of overcharge realised by the Railway Company, the plaint recited that a notice under S. 80, C. P Code, had been given to the Manager of the Railway within six months of the delivery of the goods and more than two months before the institution of the suit,

Held, that there was substantial compliance with the requirements of Ss. 77 and 140 and that the suit could not be dismissed on that ground. (*Niamatullah, J.*) MELA RAM GORWARA *v.* SECRETARY OF STATE FOR INDIA. **I.R. 1932 All. 306=1932 A.L.J. 405=137 I.C. 205=A.I.R. 1932 All. 381.**

———**S. 77**—*Notice—Secretary of State as defendant —Need for notice under S. 80, C. P. Code*

A notice under S. 77 would not dispense with a notice under S. 80 of the Code when the Secretary of State is the defendant. (*Sen, J.*) SECRETARY OF STATE FOR INDIA *v.* FAZALUDDIN BADRUDDIN. **143 I.C. 298=I.R 1933 All. 218=1932 A.L.J. 1033=A.I.R. 1933 All. 53.**

———**S. 77**—*Notice—Service on one branch of administration—Effect against different branch.*

According to S. 77 the notice must be addressed to the Railway Administration from which compensation is demanded. Notice under S. 77 to one Railway Administration cannot avail a party for a claim against another Railway Administration. (*Suhrawardy and Jack, JJ.*) DUNI CHAND RAM SARAN DAS CHOPRA *v.* E. I. RAILWAY. **I.R 1931 Cal. 797=134 I.C. 93=35 C.W.N. 338=A.I.R. 1931 Cal. 585.**

———**S. 77**—*Notice—Service—Proof.*

Because a certain postal receipt of acknowledgment has been filed by the plaintiff which purports to be with reference to some document transmitted to a railway authority it cannot be predicated with certainty that the document was a notice which fulfilled the requirements of S. 77. (*Sen, J.*) SECRETARY OF STATE FOR INDIA *v.* FAZALUDDIN BADRUDDIN. **143 I.C. 298=I.R. 1933 All. 218=1932 A.L.J. 1033=A.I.R. 1933 All. 53.**

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———**S. 77**—*Notice—Service on Traffic Manager of Company—Whether sufficient.*

Notice required by Ss. 77 and 140 must be served on the Agent of the Company and not on the Traffic Manager of the Company. The mere fact that in practice claims such as the one put forward by a party are dealt with by Traffic Manager will not by itself be sufficient to make a notice to the Traffic Manager valid in law. Such notice is invalid unless it is shown that the Agent had authorised the Traffic Manager to receive such notice on his behalf. 4 Lah. 46, Ref. to; 7 Lah. 238, Dist. (*Bhide, J.*) B. B. & C. I. RAILWAY CO. *v* ABDUL RAHMAN MAHOMED ABDULLAH. **I.R. 1931 Lah. 763=133 I.C. 283=32 P.L.R. 163=A.I. R. 1931 Lah. 606.**

———**S. 77**—*Railway Administration—State Railway —Suit against—Notice to District Collector alone—Sufficiency—Separate notice to Railway Administration —Necessity—C. P. Code, S. 80.*

The Collector of a District does not represent the Government of India in Railway matters, and in the absence of a statutory provision to that effect, a notice served on him would not be a notice served on the Government of India for purposes of S 77 of the Railways Act, in the case of a State Railway although for the purpose of S. 80, C. P. Code, a notice to the Collector is sufficient, because S. 80, C. P. Code, contains a specific provision to that effect In the case of a suit against a State Railway, therefore, there must be two separate notices, one to the Railway Administration under S. 77 of the Railways Act and another to the Collector under S. 80, C.P. Code (*Sulaiman, C.J. and Bennet, J.*) BALAK RAM-ATMA RAM *v.* SECRETARY OF STATE FOR INDIA **156 I.C. 541=8 R.A 1= 1935 A.L.J. 908=1935 A.W.R 1010=A.I.R. 1935 All. 900.**

———**S. 77**—*Risk-note B—Exception—Misconduct of officials—Delivery contrary to instructions.*

Where the railway officials delivered the goods in contravention of the express and definite instructions of sender, *held*, that the case fell within the exception of the risk-note B, as the misdelivery was due to misconduct of the officials and that the railway was liable for damages. (*Tek Chand and Coldstream, JJ.*) SECRETARY OF STATE *v.* MEGH RAJ. **I.R. 1933 Lah 469= 144 I.C 404=34 P.L.R. 749=A.I.R. 1933 Lah. 425.**

———**S. 78**—*Risk note—Complete contract—Excess freight collected from consignee—Legality—Refund.*

The risk note embodies a complete contract between the parties. Where the Railway Company agreed to convey certain goods at a specified rate but charged excess at the destination.

Held, that the Railway Company was not entitled to go behind the original contract and that the excess amount paid by the consignee could be recovered by him from the company. (*Sen, J.*) JAMNAGAR DWARKA RAILWAY *v.* NARAIN PRASAD SURAJ BHAN. **I.R. 1931 All 496=132 I.C. 336=1931 A.L.J. 367.**

———**S. 80**—*Discovery of damage to goods at destination—No evidence as to place of damage—Suit against Railway which carried last—Maintainability.*

Where goods consigned for carriage pass through several railways and are found damaged when unpacked at destination, and there is no evidence at all as to where they were damaged or upon which company's Railway system they were damaged, the suit for damages ought to be filed against the Railway Company to which the goods were first delivered for carriage. The Company which carried the goods last and delivered them to the consignee cannot be held liable; and a suit against the

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latter is therefore not maintainable. (*Beasley, C.J.*) SOUTH INDIAN RAILWAY CO., LTD. *v.* NARAYANASWAMY PILLAI. **151 I.C. 774=7 R.M. 136=40 L.W. 625=1934 M.W.N. 1127=A.I.R. 1934 Mad 652.**

——**S 80**—*Principle of section—Option to sue.*

The principle underlying S. 80 is that the railway which takes delivery of goods with an undertaking to carry it safe, is an agent for the railways over which the goods have to pass in order to reach its destination and *vice versa*. The consignor is a third person. He contracts with the particular railway to deliver to him, at a particular station, the goods consigned and the arrangement of carrying the goods is between the railways over which the goods have to pass and has nothing to do with the consignor. He may sue the Company to which the goods are delivered or the Company on whose railway, the loss, injury destruction or deterioration occurred or both. (*Jwala Prasad, J.*) JAMUNADAS RAMJAS *v.* EAST INDIA RAILWAY CO., LTD. **148 I.C. 396=6 R.P. 454=A.I.R. 1933 Pat. 630.**

——**S. 101**—*Charge of one offence—Conviction for another—Legality.*

A person charged under S 101, for disobeying railway rules requiring him to stop engine near signal, cannot be convicted for disobeying rules regarding maintaining vacuum. (*Rupchand and Mehta, A.J.Cs.*) PARSRAM KUNDRAJ *v.* EMPEROR. **148 I.C. 66=6 R.S. 179=35 Cr.L.J 582—1933 Cr.C. 795=A.I.R. 1933 Sind 225.**

——**S. 101 and R. 187 (8) (3)**—*Disobedience of R. 187 (8) (3)—What amounts to.*

The words "when it is required to change the position of a permanently locked point" in R. 187, Cl. 8, sub Cl. (3) would indicate that the rule assumes that the man on duty is aware that a permanently locked point has been unlocked. It is only in that case that he is bound to re-lock it before any train is allowed to enter the station yard. Where, therefore, a Station Master who unlocks a permanent point fails to reset it before he is relieved by the assistant Station Master and omits to inform the latter or to note that he has allowed the point to remain unlocked in the Journal or Diary kept in the Station, in which these matters are noted, the assistant Station Master cannot be said to have had notice that any permanent point has remained unlocked even though he would have discovered it if he had gone on a visit of inspection before taking over the charge and it is very doubtful whether according to the rule as it stands, he can be said to be guilty of having disobeyed it. (*Rachhpal Singh, J.*) GAURI DAYAL DUBE *v.* EMPEROR. **154 I C 1059=7 R A. 869=36 Cr.L J. 630=4 A.W. R. 1413=1935 Cr.C. 109=A.I R. 1935 All. 121.**

——**S. 101 (a)**—*Rules under R. 101—Non-compliance—Prosecution of driver—Evidence of fire-man.*

Where an engine driver is being prosecuted for breach of R. 101 for disobeying the order of the guard, the evidence of the fire man cannot be summarily neglected on the mere ground that he is subordinate to the driver. On the other hand he is the most important witness. (*James, J.*) D'CRUZ *v.* EMPEROR. **I.R 1933 Pat. 192=143 I C 220=34 Cr.L.J. 576=1933 Cr.C. 213=A.I R. 1933 Pat. 94.**

——**S. 101 (a)**—*Rules under—R. 131—Duty of driver—Minor bridges.*

The drivers have regarded R. 131 as applying to what are known as important bridges; it is not fair when an accident does happen, to charge a driver with breach of the rules because in the accounts and engineering departments comparatively small bridges are called major bridges. (*James, J.*) D'CRUZ *v.* EMPEROR. **I.R. 1933 Pat. 192=143 I.C. 220=34 Cr.L.J. 576=1933 Cr.C. 213=A.I.R. 1933 Pat. 94.**

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——**S. 101 (c)**—*Duty of driver.*

It is not duty of the driver to stop the train merely because way-farers shout to him. (*James, J.*) D'CRUZ *v.* EMPEROR. **I.R. 1933 Pat 192=34 Cr.L J. 576=143 I C. 220=1933 Cr.C. 213=A I.R. 1933 Pat. 94.**

——**Ss. 112 and 114**—*Season ticket—Use by another—Offence.*

A season ticket issued in the name of one person was found to be used by his brother. It was not contended by the former that the latter had taken the ticket without his consent or knowledge.

Held, that it must be presumed that the former had given the ticket to the latter for use and that his conduct amounted to an offence under S. 112 committed by the latter. (*Murphy and Wadia, JJ.*) EMPEROR *v.* AKBARALLI HAJI. **6 I.R. (Bom) 136=146 I.C. 162=34 Cr L J 1257=35 Bom.L.R. 875=1933 Cr.C. 1176=A.I.R. 1933 Bom. 412.**

——**S 113**—*Object of—Intention to defraud, not necessary—Travelling in a higher class, on account of no accommodation in the lower class—If justification.*

The intention to defraud is not necessary for the offence under S. 113. The Section only provides a summary remedy to recover the change incurred by a passenger together with a penalty provided in the section. S. 113, Cl. (2) is clear and explicit and admits of no implications or exceptions. A passenger travelling in a lower class has no right to travel in a higher class without the previous permission of a railway servant and without a proper ticket for that class and the fact that he was obliged so to do as there was no accommodation in the class for which he had purchased a ticket is no justification and does not afford a defence in proceedings against him under S. 113 (*Patkar and Barlee, JJ.*) B. G. HORNIMAN, *In re.* **141 I.C. 794=34 Bom.L R. 1666=34 Cr.L J. 239=I.R. 1933 Bom 159=1933 Cr.C 123=A.I R. 1933 Bom. 59.**

——**S. 113 (4)**—*Proceedings under—Nature of—Revision by High Court.*

The act referred to in S. 113 is not an offence; the proceeding under that section is not a prosecution for an offence but nevertheless it is a judicial proceeding and an order passed by a Magistrate under S. 113 (4) of that Act is subject to revision by High Court. (*Patkar and Barlee, JJ.*) B G. HORNIMAN, *In re.* **141 I C. 794=34 Cr.L J 239=I.R. 1933 Bom. 159=34 Bom. L R 1666=1933 Cr.C. 123=A I.R 1933 Bom. 59.**

——**S. 114**—*Applicability.*

S. 114 applies to purchasers and transferees of tickets and not to transferors alone 23 S.L.R. 39, Overr. (*Ferrers, J. C., Rupchand and Dadiba C. Mehta, A.J. Cs.*) EMEPROR *v.* KODUMAL. **155 I.C. 697=7 R.S. 198=36 Cr L J. 827=1935 Cr.C. 376=A.I.R. 1935 Sind 90 (F.B.).**

——**S. 114**—*Offence under—If can be dealt with under S. 562, Cr P. Code.*

Per *Full Bench* (*Dadiba C. Mehta, A. J. C., dissenting.*)—Offences punishable under S. 114, Railways Act, are easy to commit but not easy to detect. When detection has been successfully effected, an offender should not go scot-free even if he has not been convicted before.

Per *Dadiba C. Mehta, A.J.C.*—When a particular penal section of a statute is interpeted in a particular way in favour of a subject by a Divisional Bench, the subject has a right to say that he has not committed any offence, that he had no guilty intention whatsoever in doing an act in the belief that the interpretation was

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correct. If subsequently that interpretation is found fault with by a Full Bench, so that the very act which at one time was not looked upon as an offence, is now regarded as an offence, the altered interpretation should not have a retrospective effect as if the subject should have anticipated the second decision of the High Court. Even if a technical conviction is recorded the accused should have the benefit of S. 562 1)(A). (*Ferrers, J. C., Rupchand and Dadiba C. Mehta, A.J Cs.*) EMPEROR *v.* KODUMAL. **155 I.C. 697=7 R.S. 198=36 Cr.L.J. 827=1935 Cr.C. 376=A.I.R. 1935 Sind 90 (F.B.)**

———**S. 120**—"*Person*"—*Whether includes Railway servants.*

S. 120 applies to Railway servants and the word 'person' in the section includes an employee of the Railway. (*Saunders, J.*) APPAL SWAMY *v.* EMPEROR. **6 I.R. (Pat.) 310=14 Pat. L.T. 652=146 I.C. 937 (1)=35 Cr.L.J. 205 (1)=1934 Cr C. 70 (1)=A.I.R. 1934 Pat. 52 (1).**

———**S. 121**—*Obstructing Railway servant—Refusal to pay excess fare, does not amount to.*

Refusal to pay excess fare cannot possibly amount to obstructing or impeding a railway servant in the discharge of his duty within the meaning of S. 121 of the Railways Act. (*Lakshmana Rao, J.*) POLARAO *v.* EMPEROR. **1933 M.W.N 874.**

———**S. 122**—*Railway platform—Access to the public without having to show tickets—Entry into, not unlawful.*

A railway platform, to which the general public have free access, without having to show tickets, or without having to obtain special permission of any sort, is a part of the railway premises which may be entered by the members of the general public under the implied permission of the railway authority. Hence a person who enters such premises cannot be treated to be trespasser merely because he enters the platform without express permission and his entry is not unlawful within the meaning of S. 122. (*Sulaiman, C.J and King, J.*) CHANDAI *v.* EMPEROR. **56 All. 254=6 I R. (All) 318=146 I.C. 684=1933 A L.J. 1432=35 Cr.L J. 165=15 L.R. 4 (Cr.)=1933 Cr.C. 1521=A.I.R. 1933 All. 891.**

———**S. 122**—*Unlawful entry—Actionable trespass—What is.*

Then word "unlawful" has practically the same meaning as "illegal" which can be interpreted as including actionable. Hence an entry upon railway premises may be held to be unlawful, if it constitutes an actionable trespass. Any entry by a member of the public upon railway premises would constitute an actionable trespass, unless such entry is permitted by the Railway authority, expressly or by implication. (*Sulaiman, C.J. and King J.*) CHANDAI *v.* EMPEROR. **56 All. 254=6 I.R. (All) 318=146 I C. 684=35 Cr. L.J. 165=15 L.R. 4 (Cr.)=1933 A.L.J. 1432=1933 Cr.C. 1521=A.I.R. 1933 All. 891.**

———**S. 122**—*Unlawful entry—Test of—Intention immaterial.*

In determining the question whether a person's entry into the railway is unlawful, the intention of the person must be left out of account. Hence a person who enters lawfully, *i.e.*, with the permission of the railway authorities does not commit offence under S. 122, merely because he enters with the intention of committing some offence. (*Sulaiman, C.J. and King, J.*) CHANDAI *v.* EMPEROR. **56 All. 254= 35 Cr.L J. 165=15 L.R. 4 (Cr)=6 I.R. (All.) 318=146 I C. 684=1933 A.L.J. 1432=1933 Cr.C. 1521=A.I R. 1933 All. 891.**

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———**S. 122 (1)**—*Offence—Crossing railway line to enter platform.*

Where the accused was shown to have crossed a railway line instead of entering it by the ordinary route and there was evidence that there was a notice board put at the station prohibiting such trespass,

Held, that the accused was liable to be convicted under S. 122(1) (*Curgenven, J.*) LAKSHMI NARASIMHAM, *In re*. **I.R. 1933 Mad. 212 (2)=142 I.C. 202(2)=34 Cr.L J. 291 (1)=1933 Cr.C. 555 (1)=A. I.R. 1933 Mad. 372 (1)**

———**S. 122 (1)**—*Offence—Trespass on railway line—Passenger with ticket.*

A passenger with a ticket, though his entry into the platform is lawful, has no right to enter on any part of the railway premises or to trespass on the railway line, because lawful entry into one part of the railway does not make entry into every part of a railway lawful. (*Walsh, J.*) RANGAYYA, *In re*. **152 I C. 615 (1)=36 Cr.L.J. 128 (1)=7 R.M. 262 (1)=1934 M.W.N. 1320 =40 L.W. 664=1935 Cr.C. 22 (1)=A.I.R. 1935 Mad. 3 (1).**

———**Ss. 126 and 128**—*Lying on railway lines.*

The offence of lying on the railway lines in front of trains that were practically stationary cannot be said to endanger the safety of persons travelling or being on the railway and comes under S 128 and not under S. 126. Where several persons are charged with having conspired to do or cause to be done certain acts which are offences under SS. 126 and 128 the proper conviction will be under S. 129 (*b*) of the Penal Code for conspiring to commit an offence under S. 128 of the Railways Act. (*Wallace and Jackson, JJ.*) MUKUNDALAL SIRCAR *v.* EMPEROR. **1930 M.W N. 1264.**

———**S. 128**—*Offence under—Pulling communication chord and sitting in front of engine—Sentence*—Bona fide *conduct as mitigating circumstance.*

A passenger pulled the communication chord of a railway train and stopped the train several times on the ground that his compartment was overcrowded. On the vacuum break being disconnected he sat down after warning the authorities, in front of the engine and commenced playing a musical instrument thus delaying the train for about eighty minutes.

Held, that an offence under S. 128 had been committed.

Held, however, that in passing sentence the fact that the accused had in the interest of the public protested against the maladministration of the Railway Company should be taken into consideration. Sentence of one day imprisonment passed. (*Raza and Pullan, JJ.*) EMPEROR *v* RAM CHARAN MUTSADDI. **6 Luck. 485 =14 O.L.J. 126=130 I.C. 384=32 Cr.L J. 547=8 O.W.N. 99=1931 Cr.C 213=A.I.R 1931 Oudh 85.**

———**S. 135**—Applicability—Notifications under—Effect of—Land vested in G. I. P. Railway Administration—If subject to charge for municipal taxes—Bombay City Municipal Act, S. 212 *See* BOMBAY CITY MUNICIPAL ACT, S. 212. **37 Bom.L.R. 513=A.I.R. 1935 Bom. 352.**

———**Ss. 140 and 70**—*Notice—Mode of service.*

Where a copy of notice under S. 77, which was addressed to the Traffic Manager, N. W. Ry. was sent to the Agent of E. I. Ry. for information, and it was urged that the plaintiff intended to make a claim against the E.I. Ry. administration,

Held, there was no notice under S. 77, and mere sending of the copy was no service under S. 140. (*Suhrawardy and Jack, JJ.*) DUNI CHAND RAM CHARAN DAS CHOPRA *v.* E. I. RAILWAY. **I R. 1931 Cal. 797= 134 I.C. 93=35 C.W.N. 338=A.I.R. 1931 Cal. 585.**

RAILWAYS ACT (1890), S. 140.

——**Ss. 140 and 77**—Rule regarding notice—Substantial compliance. *See* RAILWAYS ACT, SS. 77 AND 140. **1932 A.L.J. 405=A.I.R. 1932 All. 381.**

——**Ss 140 and 77**—*Scope—Notice to District Traffic Superintendent—Sufficiency of.*

S. 140 merely provides a safe and unanswerable method for serving a claim upon the railway administration and enacts in effect that service upon the Agent is service upon the Company. But S. 77 enacts that the service must be upon the administration. If the Company by its course of business holds up any particular official as competent to deal with claims, then service of notice upon such an official must be taken as against the company to be service upon the Company. So where the Company has all along persisted in a course of business by which they allowed the District Traffic Superintendent to deal with claims for compensation and never in the course of their correspondence till the filing of the written statemant did the Company suggest that the notice to him was ineffective,

Held, that the plea was not open to the company that there had been no sufficint notice under S. 140. 35 Cal. 194, Diss.; 45 Mad. 135 at 154, 155, Foll. (*Courtney, Terrell, C. J. and Fazl Ali, J.*) BENGAL AND NORTH-WESTERN RAILWAY CO., LTD. *v.* KAMESHWAR SINGH BAHADUR. **12 Pat. 67=141 I C. 813 (2)=I R. 1933 Pat. 94=13 Pat.L.T. 695=A.I R. 1933 Pat. 45.**

——**Sch. II**—"*Silk.*"

Artificial silk is not silk. (*Addison and Monroe, JJ.*) B. B. & C. I. RY. CO. *v.* MT. ABDUL RAQIB. **15 Lah. 596=150 I.C. 709=7 R.L. 15=36 P L R. 536=A. I.R. 1934 Lah 186.**

RAILWAY RECEIPT *See also* CONTRACT ACT (1872), S. 178.

——If document of title—Delivery of goods to person without production of—Liability of Railway Company. *See* RAILWAY COMPANY. **69 M.L.J. 716.**

RAIYAT.

See (1) B T. ACT, SS. 5 (2), 23, 40, ETC.
(2) LANDLORD AND TENANT—OCCUPANCY RIGHTS AND OCCUPANCY TENANT.
(3) MADRAS ESTATES LAND ACT (1908), SS. 5, 112 AND 135, etc.

RAIYTAI HOLDING.

See (1) B. T. ACT. Ss. 5, 49 and 50.
(2) MADRAS ESTATES LAND ACT (1908), SS. 3 (1) 20.

RANBIR PENAL CODE, Ss 150 and 153—*Person desiring to get together unlawful assembly—Offence.*

A person desiring to get together an unlawful assembly to take forcible possession of a certain area of land is punishable as a member of such unlawful assembly under S. 150 and not under S 153 of the Ranbir Penal Code. (*Dalal, C. J.*) MOHAMMAD SADIQ *v.* STATE. **37 P.L.R J. & K. 7**

——**S. 376**—*Rape of young girl of* 11—*Sentence of whipping—Desirability.*

In a case of rape of a young girl of 11 it is desirable to inflict a punishment of whipping. (*Dalal, C. J.*) SYED UMAR SHAH *v.* STATE. **37 P.L.R.J. & K. 19** (1).

RANGOON CITY MUNICIPAL ACT (VI OF 1922), S. 15—*Petition under—Powers of Chief Judge—Power to set aside election, and order re election—Declaring the petitioner elected—If valid.*

On a petition under S. 15 of the City of Rangoon Municipal Act, the Chief Judge of Rangoon Small Cause Court has full power to order a re count of the votes, and if as a result of such re-counting it is found that the petitioner has secured more valid votes than the respondent and he has the necessary qualifications for election, the Chief Judge has power to set aside the election of the respondent and declare the petitioner elected in his place. The power of ordering a fresh election rests not with the Court but with the local Government and the power may only be exercised if there is no peron who may be deemed to be elected under sub S. (2). (*Leach, J.*) L. H. WELLINGTON *v.* THE CHIEF JUDGE, RANGOON SMALL CAUSE COURT. **13 Rang. 310=8 R.R. 256=159 I.C. 196=A.I.R. 1935 Rang. 349.**

RANGOON CITY MUNICIPAL ACT (1922), S. 80 (2).

——**S. 80 (2)**—*Assessment of rice mills based on contractor's test—Legality.*

In assessing rice mills in the Rangoon District the contractor's test ought not to be applied, and assessments based upon that principle would be *ultra vires*. (*Page, C. J. and Ba U, J.*) V. E. R. M. CHETTYAR FIRM *v.* MUNICIPAL CORPORATION RANGOON. **13 Rang. 709=159 I.C. 996=8 R.R. 304=A.I.R 1935 Rang. 413.**

——**S. 80 (2)**—*Burma Railways—Annual value—Assessment of—"Profit basis" system.*

The correct method of ascertaining the annual value of the Burma Railways under S. 80 (2) is to find out the annual assessable value of the Burma Railways undertaking as a whole and after deducting the annual assessable value of the indirectly productive portion of the whole undertaking to multiply the resultant figure representing the annual assessable value of the directly productive portion, that is, the running lines, by the gross receipts earned in the municipal area of the City of Rangoon and to divide the said sum by the gross receipts earned by the Burma Railways undertaking as a whole. By adopting this system, a simple, fair and reasonable assessment of the annual value of the hereditament within the taxable area of the City of Rangoon will be obtained and such a system will conform to the two fundamental principles of law of rating *viz.* (1) that the aggregate of the rates payable by the railway in the various municipal area through which it runs must not exceed the rates payable by the undertaking as a whole, and (2) that the assessment of the hereditament in each area must be based upon the profits earned in the locality in which the hereditment is situate. (Case-law referred.) (*Page, C. J. and Mya Bu, J*) SECRETARY OF STATE *v.* RANGOON CORPORATION. **10 Rang. 539=140 I. C. 821=I.R. 1933 Rang. 11=A.I.R. 1932 Rang 169.** [R 13 R. 709 (712, 713).]

——**S. 80 (2)**—'*Gross annual rent*'—*Meaning of—Mode of assessment.*

The term 'gross value' means the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes and tithe, the commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent. This definition may be taken as denoting the meaning of gross annual rent in S. 80 (2). A.I.R. 1932 Rang. 169 and *Great Western and Metropolitan Railway Co.* v. *Kensington Assessment Committee* (1916) 1 A.C. 22, Ref. In every case the assessment must depend upon what the Commissioner determines as the rent which a hypothetical tenant might reasonably be expected to give for the property if he paid the usual tenant's rates and taxes and the landlord paid the expenses necessary to enable the mill to earn the rent. It may or may not be that the gross annual rent would

RANGOON CITY MUNICIPAL ACT (1922), S. 92.

be equivalent to the actual agreed rent *plus* the sum reasonably expended in order that the rent might be obtained, but it does not necessarily follow that these two sums would be the same. (*Page, C.J. and Ba U, J.*) V. E. R. M. CHETTYAR FIRM *v.* MUNICIPAL CORPORATION, RANGOON. **13 Rang. 709=159 I.C. 996=8 R.R. 304=A.I.R. 1935 Rang. 413.**

———**S. 92 (1)**—*Applicability—Buildings of Burma Railways undertaking.*

Notwithstanding the enactment of S. 92 and the transfer of the Burma Railways undertaking to Government, the assessment of the Burma Railways continues to be regulated by S. 135, Railways Act, and S. 92 (1) does not apply to the buildings of the Burma Railways undertaking. (*Page, C.J. and Mya Bu, J.*) SECRETARY OF STATE *v.* RANGOON CORPORATION. **10 Rang. 539=140 I.C. 821=I.R. 1933 Rang. 11=A.I.R. 1932 Rang. 169.**

———**S. 164**—*Powers of Local Government.*

The Local Government's power under S. 164 is to 'prescribe the officer' to perform certain duties, not to appoint him. There is a great difference between 'prescribing what certain persons are to do and appointing certain persons to do those things. In the choice of Revenue Officer the Local Government is by S. 164 therefore confined to some one who is an 'Officer of the Corporation'. (*Braund, J.*) BALTHAZAR & SON, LTD. *v.* MUNICIPAL CORPORATION, RANGOON. **160 I.C. 90=8 R.R. 334=A.I.R. 1935 Rang. 439.**

———**S. 178 (3)**—*"At such date"—Total sum payable by various markets fixed and rateably charged on assessable value as licence fees—Validity of.*

The Corporation in levying license fees under S. 178 (3) arrived at the total amount of the cost which was to be covered by the sums payable by all the private markets. This total sum they divided among all the private markets in proportion to their respective assessable values. The sums so arrived at were in the case of each private market, a percentage, and in each case the same percentage of its assessable value. A sum which represented that percentage was then charged to each private market as its licence fee for the right to keep it open for a year.

Held, that the licence fees which were charged were fees charged at a rate fixed by the Corporation within the meaning of S. 178 (3) and validly charged under the powers conferred upon the Corporation by that section. (*Lord Russell of Killowen.*) PAZUNDAUNG BAZAAR CO., LTD. *v.* MUNICIPAL CORPORATION OF THE CITY OF RANGOON. **58 I A. 313=9 Rang. 440=I.R 1931 P.C. 260=133 I C 724=54 C.L J. 285=34 L W. 936 =1931 M.W.N 824=35 C.W.N. 1005=A I.R. 1931 P.C. 217=61 M.L.J. 740 (P.C).**

———**S. 178 (3)**—*License fee—Amount of.*

The fee which the Corporation is entitled to charge under S. 178 (3) in respect of licenses to private markets need not be confined to the cost of the issue and inspection of licenses and the office expenses of the controlling authority. The fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed by the Corporation in respect of the supervision and regulation of private markets. If the Corporation have in good faith charged the fees and fixed the amount thereof on that basis, it is within the powers of the Corporation to exact payment of those fees. (*Lord Russell of Killowen*) PAZUNDAUNG BAZAAR CO., LTD. *v.* MUNICIPAL CORPORATION OF THE CITY OF RANGOON. **58 I A. 313=9 Rang. 440 =I.R. 1931 P.C. 260=133 I.C. 724=54 C.L.J. 285=**

RANGOON POLICE ACT (1899), S. 30.

34 L.W. 936=1931 M.W.N. 824=35 C.W.N. 1005 =A.I.R. 1931 P.C. 217=61 M.L.J. 740 (P.C.).

RANGOON DEVELOPMENT TRUSTS ACT (IV OF 1920), S. 69 (2)—*Agent not liable to tax—Rr. 1 and 3 under S. 95 providing for agent's liability—Validity of.*

Whereas both the owners and the agents of vessels are specifically made liable for the due return of passengers under S. 69 (3), it is the owners alone who are made responsible for the collection and payment of the tax under S. 69 (2). Hence it is the owners alone who are liable for the collection and payment of the tax. Rr. 1 and 3 framed under S. 95 (except in so far as it refers to the owners) are inconsistent with S. 6 (2) and therefore *ultra vires*. (*Page, C J., Das and Ba U, JJ.*) RANGOON DEVELOPMENT TRUST *v.* G. S. BEHARA & SONS. **10 Rang. 412=I.R. 1932 Rang. 195=139 I.C. 566=A.I.R. 1932 Rang. 123 (F.B.)**

———**S. 95**—Rules framed under—Rr. 1 and 3—Validity of—Inconsistent with S. 69 (2) *See* S. 69 (2) *supra*. **10 Rang. 412=A.I.R. 1932 Rang. 123 (F.B.).**

RANGOON HACKNEY CARRIAGE ACT (1917), S. 23—Refusal to grant licence—Remedy to sue for damages and not writ of mandamus. *See* SPECIFIC RELIEF ACT, S. 45. **A.I.R 1933 Rang. 39.**

———**S. 23**—*Rickshaw licence — Commissioner not exercising discretion vested in him—Writ of mandamus.*

The Commissioner of Police must issue licence to a rickshaw, whether it is old or new, if it complies with the conditions as laid down under S. 23 and is found fit for public use, and if the Commissioner has not issued the licence up to the maximum number as fixed by him. And therefore where he does not exercise the discretion as vested in him, a writ of mandamus can be issued directing him to issue such a licence. (*Ba U, J.*) DEVAREDDY PEDDAYAH *v.* COMMISSIONER OF POLICE, RANGOON. **I.R. 1933 Rang. 47=142 I.C 832=A.I.R. 1933 Rang. 37.**

RANGOON HIGH COURT RULES (APPELLATE SIDE), R. 56—Application for leave to appeal to His Majesty in Council—Time requisite for obtaining copy of judgment—If can be excluded. *See* LIMITATION ACT, S. 12 (3). **13 Rang. 762.**

RANGOON POLICE ACT (1899), Ss. 7, 10, 11 and 19—Complaint against Police Sub Inspector—Offence committed in discharge of duty—Need for sanction of Local Government. *See* CR. P CODE, S. 197—SANCTION NECESSARY. **A.I R. 1935 Rang. 165.**

———**S. 30**—*Offence under—Proof.*

It is no offence to be found on a road unless the accused is found under the circumstances detailed in sub-Ss. (*a*), (*b*), (*c*) and (*e*), S. 30, armed with a dangerous or offensive weapon, or lying or loitering, or with the face covered or disguised, or in possession without lawful excuse of house-breaking implements. (*Baguley, J.*) EBRAHIM *v.* EMPEROR. **6 I R. (Rang.) 84=146 I. C. 233=34 Cr.L.J. 1253 (1)=1933 Cr.C. 509=A.I.R. 1933 Rang. 74.**

———**S. 30 (d)**—*Scope.*

Sub S. (*d*), S. 30. applies to people found "within the precincts of any dwelling-house or other building or in the back drainage space". Being by the side of a building is not necessarily "being within its precincts" unless there is a suggestion on the record that the accused was in a back drainage space. (*Baguley, J.*) EBRAHIM *v.* EMPEROR. **6 I.R. (Rang.) 84=146 I.C. 233=34 Cr.L.J. 1253 (1)=1933 Cr.C. 509=A.I.R. 1933 Rang. 74.**

RANGOON POLICE ACT (1899), S. 41.

———**S 41 (16)**—*Charge under—Acquittal—Effect of.*

The acquittal of the accused on the charge under S. 41 (16) is equivalent to an acquittal on a charge of rioting (*Dunkley, J.*) NGA MYAT THAUNG *v.* EMPEROR. **159 I.C. 967=37 Cr.L.J. 189=8 R.R. 300=1935 Cr.C. 1217=A.I.R. 1935 Rang 436.**

RANGOON PORT ACT (IV OF 1905), S 87—*Power of sale permissive—Exercise of—Private rights.*

The power of sale under S. 87 of the Act is permissible and so should be exercised in strict conformity with private rights. *Metropolitan Asylum Dt.* v. *Hill*, (1881) 6 A.C. 193, Ref. to. (*Dunkley, J.*) MOOLA & SONS *v.* COMMISSIONER FOR THE PORT OF RANGOON. **I R. 1931 Rang. 177 (2)=132 I.C. 545 (2)=A.I R. 1931 Rang. 95.**

———**S. 87**—*Sale of goods by Commissioner though charges have been paid—Liability of Commissioner.*

The Rangoon Port Act does not impose on the owner a duty to remove his goods prior to the date fixed for the auction; it imposes upon him solely a duty to pay the charges to the Commissioner. When the charges have been paid, the right of sale under S. 87 ceases to exist. Further it is open to the owner to pay the Commissioner's dues at any time up to the last moment before the sale and when the dues have been paid, it is the Commissioner's duty and not the duty of the owner to see that the goods are withdrawn from sale. The fact that the owner gratuitously takes upon himself to remove the goods prior to the date fixed for the sale does not impose upon him a legal duty to do so. When the goods are sold, even though the charges due to the Commissioner have been paid before the date of sale, the sale takes place by the default of the Commissioners and consequently under S. 161, Contract Act, the Commissioner is responsible to the owner for the value of the goods. (*Dunkley, J.*) MOOLA & SONS *v.* COMMISSIONER FOR THE PORT OF RANGOON. **I.R. 1931 Rang. 177 (2)=132 I.C. 545 (2)=A.I R. 1931 Rang. 95.**

———**S. 102**—Liability of Commissioner of Rangoon Port. *See* CONTRACT ACT, S. 161. **A.I.R. 1931 Rang. 95.**

RAPE. *See* PENAL CODE, S. 376.

RASH DRIVING.

See (1) HIGHWAY
(2) PENAL CODE, SS. 279 AND 304-A.

RATEABLE DISTRIBUTION. *See* C. P. CODE, SS. 47, 73.

REASONABLE CARE—Meaning of. *See* T. P. ACT, S. 41. **A I R. 1935 Rang. 423.**

REASONABLE AND PROBABLE CAUSE. *See* MALICIOUS PROSECUTION.

RECEIPT.

See (1) EVIDENCE ACT, S. 92.
(2) REGISTRATION ACT, S. 17 (1) (*b*) AND (*c*).
(3) STAMP ACT, SS. 2 (23), 35 (*b*), SCH. I, ART. 23.

RECEIPT OF ASSETS. *See* C. P. CODE, S. 73.

RECEIVER. *See also* (1) C. P. CODE, S. 80 AND O. 40, R. 1.
(2) CR. P. CODE, S. 145.
(3) MORTGAGE—RECEIVER.
(4) PROV. INSOLVENCY ACT, SS. 53, 56, 59, *etc.*

———Appointment of—Right to apply—Equitable mortgagee. *See* MORTGAGE—RECEIVER. **54 Mad. 565=61 M.L.J. 111.**

———*Commission—Order of Court providing for percentage on "gross sales" of business—Commission on "trade discount", packing charges and freight.*

The order of Court appointing two persons as joint receivers of a going business provided that they so retain five per cent. on the "gross sales" in their hands as and for their remuneration. According to the practice of that business, the price was quoted at a certain figure, subject to a reduction of a certain percentage as "trade discount" and the net price was arrived at after deducting this discount. The basis of the receivers' remuneration was in question.

Held, the receivers were entitled to commission only on the *actual* sale proceeds, which might include freight and packing charges but not "trade discount." The receivers' commission is in truth the price of the work done by them. It must have some relation to the labour involved and the time taken. (*Venkatasubba Rao, J.*) KABALAMURTHI PILLAI *v.* SUBRAMANIA PILLAI. **I. R. 1931 Mad. 559=131 I.C. 655=A.I R. 1931 Mad. 500=60 M.L.J. 332.**

———*Foreign Court—Receiver appointed by Baroda Court can be recognised in British Court.*

A Receiver appointed by the Baroda Courts can, subject to objection of the opposite party, be recognised by the British Courts, and such a receiver can bring a suit in British Courts. (*Madgavkar and Barlee, JJ.*) CHANDULAL *v.* MANEKLAL. **55 Bom. 309=I R. 1931 Bom. 352=132 I.C. 512=33 Bom L.R. 258=A.I R. 1931 Bom. 251.**

———*Loss caused by—Remedy—Suit for compensation.*

When a person claims compensation for the loss sustained by him owing to the act of a receiver, the proper procedure is to file a suit and not to apply under O. 40, R. 4, C. P. Code. (*Mahadevyya and Ramachandra Rao, JJ.*) RAJA HUSSAIN *v.* BANK OF MYSORE, LTD. **11 Mys L.J. 257.**

———Mortgage decree—Execution sale—Purchase by receiver—Legality — Principles. *See* C. P. CODE, O. 21, RR. 72 AND 73. **68 M.L.J. 597.**

———Negligence—Decree in favour of estate—Failure to apply for execution by attachment—Onus. *See* C. P. CODE, O. 40, R. 4—NEGLIGENCE. **55 Mad. 120=62 M L.J. 199.**

———*Personal liability of—Pre-existing contracts of firm.*

A & Co. brought a suit for arrears of commission due to them on the price of the coal supplied by the defendant firm to the E. I Railway. The first defendant was the firm of the owners of the Colliery. *D* the second defendant was the receiver and manager of the Colliery appointed by Court and subsequently discharged. Prior to the appointment of *D*, the first defendant firm had appointed the plaintiff their agent for the sale of coal and agreed to pay him commission therefor. In pursuance of the contract, coal was supplied but the course of business actually adopted was that the Colliery supplied the coal to the E. I. Railway and the latter paid the Colliery directly without any reference to the plaintiff. The lower Court passed a decree for the amount claimed against the second defendant personally.

Held, the receiver was not personlly liable. The contracts had been entered into by the firm before the receiver manager was appointed, and not on the faith of the credit of the second defendant and so the remedy of the plaintiff was against the Colliery alone. *Parsons* v. *Sovereign Bank of Canada*, (1913) App. Cases 160, Ref. *Moss Steamship Co., Ltd.* v. *Whinney*, (1912) App. Cases 254; In re *London United Breweries Ltd.*, (1907) 2 Ch. D. 511; In re *Br. Power T. and L. Co., Ltd.*, (1910) 2 Ch. D. 470, Foll. (*Ross and Dhavle, JJ.*) DINSHAW *v.* AMRIT LAL & CO. **10 Pat. 379=I R. 1931 Pat. 379=133 I.C. 459=13 Pat.L.T. 142=A.I. R. 1931 Pat. 298.**

RECEIVER.

———Property in the possession of—Attachment of—Permission of Court necessary. *See* C. P. CODE, O. 40, R. 1—LEAVE OF COURT. **A.I.R. 1931 Pat. 204 (1).**

———*Rights of—Interim receiver in mortgage suit—Properties sold in execution—Sale made absolute—Right to sue for possession.*

Where in a mortgage suit an interim receiver was appointed and the properties were sold in execution, the sale made absolute and a certificate granted to the purchaser, it is the purchaser and not the receiver who is entitled subsequently to sue for possession of the property. (*Page, C. J. and Sen, J.*) ABDULLA ABDUL GANY *v.* B. K. CHATTERJEE. **9 Rang 565=135 I C. 863=I R. 1932 Rang. 79=A.I.R. 1932 Rang. 11.**

———*Rights of—Right to indemnity—Nature of—Suit by to recover amount spent—Limitation.*

The right to indemnity which receiver has got is not created by the contract. Hence to a suit by the receiver to recover amount spent by him, Art. 83 of Limitation Act has no application. (*Madhavan Nair, J.*) CHEFFRATH VEETIL KARNAVAN *v.* NARAVANA AYYAR **157 I.C. 746=8 R.M. 160=1935 M.W N. 598=42 L.W 680=A.I.R. 1935 Mad. 594=69 M.L.J. 539.**

———Status and powers of receiver in execution—Directions as to disbursement of moneys—Power of Court to give. *See* C. P. CODE, O. 40 R. 1—EXECUTION. **69 M.L J. 534.**

———Suit against—Costs—Liability for. *See* C. P. CODE, O. 40, R. 1—SUIT AGAINST RECEIVER. **A. I R. 1931 Nag. 143.**

RECIPROCAL DEMAND. *See* LIMITATION ACT, ART. 85. **58 Cal. 649=A.I.R. 1931 Cal. 359.**

RECITALS.

See (1) DEED—CONSTRUCTION.
(2) EVIDENCE—RECITALS.
(3) EVIDENCE ACT, SS. 9, 13, 32 AND 90—ANCIENT DOCUMENTS.
(4) HINDU LAW—JOINT FAMILY—ALIENATION—NECESSITY.

———How far conclusive. *See* TRANSFER OF PROPERTY ACT (1882), S. 105. **1933 A.L.J. 749=A.I. R. 1933 All. 735 (F.B.).**

RECORD OF RIGHTS.

See also (1) AGRA TENANCY ACT (1926), S. 86.
(2) BENGAL TENANCY ACT (1885), SS. 5, 50, 66, 103, 105, ETC.
(3) C. P. LAND REVENUE ACT (1881), S. 80.
(4) CHOTA NAGPUR TENANCY ACT (1906), S. 84.
(5) CUSTOM (PUNJAB)—RIWAJ-I-AM.
(6) EVIDENCE ACT, S. 35—LIMITATION ACT ART. 120.
(7) MADRAS ESTATES LAND ACT, S. 172
(8) PUNJAB LAND REVENUE ACT (1887), SS. 37 AND 44.
(9) REVENUE RECORDS.
(10) U. P. LAND REVENUE ACT (1901), SS. 44 AND 57.
(11) WAJIB-UL-ARZ.

———*Conflict between old record and recent record—Presumption of correctness—Burden of proof.*

When there is a conflict between old record-of rights and a recent record-of-rights, the latter is to be presumed to be correct, unless it is proved by evidence to be incorrect. The burden of proving that the recent record is not correct is on the party who impeaches it. (*M. C. Ghose, J.*) BHUPENDRA KRISHNA GHOSE *v.* ABDUR RAHMAN. **61 C.L.J. 18=A.I.R. 1935 Cal. 710.**

RECORD OF RIGHTS.

———*Conflict between records of different dates—Rule applicable.*

Where there are two Records-of-rights prepared at different times, entries in both of them will be presumed to be correct entries of the state of things existing at the time, when the entries were made, and there is nothing in the law which would entitle a party to say that the entry in the subsequent record is rebutted by the entry in the previous record. On the other hand, both records are presumed to be correct at the time they were made and as the later record records the then existing state of things, preference must in the absence of evidence be given to it. 5 Pat. L.T. 140, Not foll.; 10 Pat, L. T. 569 (F.B.), Foll. (*Ross. J.*) MATUKDEO NARAIN *v.* SADHUSARAN OJHA **I.R. 1931 Pat. 509=134 I.C. 957=12 Pat.L.T 304.**

———*Entries in—As basis of a cause of action.*

Where the plaintiff, who was admittedly in possession of a plot of land without any disturbance or interference from defendant, based his suit for a declaration of his title on an entry in the record-of-rights, which he alleged to be incorrect, to the effect that it belonged to the touzis of the plaintiff and defendant jointly.

Held, the entry in the record-of-rights gave him no cause of action. (*Pearson and Mallik, JJ.*) NAGENDRA KISHORE KOY CHOWDHURY *v.* BROJENDRA KISHORE ROY. **I.R 1932 Cal 650=139 I.C. 759=56 C.L.J 316=36 C W N. 783=A I R. 1932 Cal. 842.**

———*Entries in—Admissibility of—Entries as to valuation not required by law*

As the law does not require valuation to be given in the register of Record of rights, the entries in the Record-of-rights as to valuation are irrelevant and therefore inadmissible under S 35 of the Evidence Act. 47 I.C. 1 (P.C.), Rel. on. (*Sushedar, A. J. C.*) NAMDEO SHANKAR *v* RAMRAO MAKOTI **6 I R. (Nag.) 77=146 I C 152=A I R 1933 Nag. 310.**

———*Entries in—Burden of proving incorrectness.*

The burden of proving that the entry in the record-of-rights is wrong is on the person challenging the same. (*R. C. Mitter J.*) SURENDRA NATH MAJUMDAR *v.* HARIPADA SARDAR. **163 I C 410=9 R C 23=61 C. L J. 80=39 C.W N. 722.**

———*Entries in—Correction of—Suit for—Limitation.*

Limitation for a suit for the correction of an entry in record of rights is six years from the date of final publication of the record-of-rights. 1 P L.J. 73, Ref. (*Agarwala, J.*) ABAY CHARAN SEKHAR *v.* IBRAHIM MIAN. **148 I.C 193=6 R P. 427=A.I.R. 1933 Pat. 698 (2).**

———Entries in—Correction of—Suit for—Nature—Limitation. *See* B. T. ACT, S 111-A. **57 C.L J. 385=A.I R. 1933 Cal. 789.**

———*Entries in—Entry recording whole plot as road—Whether conclusive.*

Per *Obiter*.—An entry in the record of rights recording a whole plot as a road does not by itself negative a claim of full proprietary rights therein at least in respect of the portions not used as a road. (*Panckridge and Patterson, JJ.*) UMA KANTA CHATTERJEE *v.* KALIPADA CHOUDHURY **6 I R. Cal 232 (2)=146 I C. 558=37 C.W.N. 823=35 Cr.L J. 89=1933 Cr.C. 1357=A.I.R. 1933 Cal. 790.**

———*Entries in—Evidentiary value of.*

The person in possession with his name recorded in the village papers is a representative of the deceased only for the purposes of realization of land revenue and for no other purpose. So any decree obtained against a person who is not the rightful heir, but whose name is

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recorded will not be binding on a person who claims adversely to the person whose name is recorded in the khewat. (*Sulaiman, C. J. and Mukerji, J.*) AMAR CHAND *v.* PARMANAND. **150 I.C. 323=18 R.D. 356 =6 R A. 1070=15 L R. 476 (Rev.)=A.I.R. 1934 All. 474.**

———*Entries in—Evidentiary value of.*

Where tenancy is not merely used as one for residential purposes but also for horticultural purposes, the record of rights describing the land as Sali land will have the same value as it would have in any other case; and if it is shown to be incorrect or opposed to the real state of facts the entry cannot be relied on. (*Mukerji and S. K. Ghose, JJ.*) LUXMAN CHANDRA MISTRY *v.* CHARU CHANDRA MITTRA. **159 I C. 613=8 R.C. 331=62 C.L.J. 111=A I.R. 1935 Cal. 783.**

———*Entries in—Evidentiary value of—Entries in Revenue Surveyor's Register.*

The entries of the Revenue Surveyor's Register are of no evidentiary value in themselves They merely become of value as corroborating the evidence of the Revenue Surveyor himself. (*Mya Bu and Dunkley, JJ.*) U PO SHIN *v.* EDWARD. **150 I.C. 898=7 R.R. 20=A.I.R 1934 Rang. 139.**

———Entries in—Evidentiary value of—Question of title. *See* EVIDENCE—RECORD OF RIGHTS. **62 C.L. J. 10.**

———*Entries in—Evidentiary value of—Question of title.*

No entry in the village record of rights can supply the place of a title deed and a transferee who acts on such an entry as evidence of the title of his transferor cannot be held to have acted in good faith. A.I R. 1927 Nag. 41, Rel on. (*Nanavutty, J.*) HARGOVIND PRASAD *v.* AMBIKA DUTT RAM. **9 Luck. 571=6 R O 393=148 I C 422=11 O.W.N. 421=A I.R 1934 Oudh 165.**

———*Entries in—If conclusive on question of boundary.*

Where a narrow strip of land, adjoining and contiguous to two plots of land, is claimed by parties as being included in th ir respective Settlement Dags, the decision cannot be based on the entry in the record of rights alone. In deciding the question of boundary, the other evidence in the case has to be taken into consideration, (*Guha, J.*) NALAKSMI *v.* ABHOYCHARAN SIL. **149 I C. 1109 (2)=6 R C. 713=58 C.L.J. 478=A.I.R. 1934 Cal. 294.**

———Entries in—Land entered as "Karsa Chakran"—Con lusion that land is service tenure. *See* B. T. ACT, S. 181. **39 C W.N. 581=61 C. L.J. 143.**

———*Entries in—Land recorded as* Sir—*No suit brought within one year—Entry is conclusive.*

The power to record land as *sir* rests solely with the revenue authorities, and the only remedy, which a person aggrieved by an entry of land as *sir* at a settlement has, is to institute a suit within one year of the date on which assessment is offered to the proprietor under S. 68 (5). Where no such suit is brought, the entry of the land *sir* is conclusive, and final. (*Staples, A. J. C.*) BHOLU KHEMA GUJAR *v.* CHHAJJULASA. **30 N L R 109=147 I.C 561=6 R.N. 128=A I R. 1933 Nag. 378.**

———*Entries in—Meaning of "Talukdari villages."*

As regards the question whether the expression "taluqdari villages" comprises villages subsequently awarded by the settlement decree, the best evidence is to be found in the settlement record of rights. (*Hassan, C J. and Pullan J.*) ABADI BEGAM *v* MAHOMED KHALIL KHAN. **6 Luck 282=I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

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——— Entries in—Presumption arising from—Rebuttal of—Onus. *See* LANDLORD AND TENANT—RENT—SUSPENSION. **61 C.L.J. 134=A.I.R. 1935 Cal. 554.**

———*Entries in—Presumption as to correctness.*

The presumption arising from the entry in a record of rights should be given effect to unless the correctness of it is disproved by evidence. (*Agarwala, J.*) GUHI RAM SINGH CHAUDHURI *v.* ADALAT MAHATO. **6 I. R. (Pat.) 262=146 I.C. 448.**

———*Entries in—Presumption of correctness.*

An entry in a record of rights is presumed to be correct till the contrary is shown. If therefore the entries show that the holding is subject to enhancement of rent, the subsequent possession of the tenants is *prima facie* a possession consistent with the entries. 22 C.W.N. 449, Foll. (*Mitter, J.*) JAGATDWIPTENDRA-NARAYAN BHUP *v.* BAILASH RAY AGARWALLA. **59 Cal. 454=I.R. 1932 Cal. 375=137 I.C. 860=A.I.R. 1932 Cal. 427.**

———Entries in—Presumption of correctness—Conflict with the incidents of *ghatwali* tenure—Entries prevail. *See* LAND TENURE—GHATWALI TENURE—RECORD OF RIGHTS. **11 Pat. 464=A.I R. 1933 Pat. 57.**

———*Entries in—Presumption of correctness—Evidentiary value as regards title.*

The record-of rights is no evidence on the question of title, as the records are mainly based on possession. But an entry in the record raises a presumption that the statements made therein are true and correct. (*Mitter and Patterson, JJ.*) RAJ KRISHNA PRASAD LAL SINGH DEO *v.* BARBANI COAL CONCERN, LTD. **62 Cal. 346=159 I.C. 98=8 R.C. 257=60 C.L.J. 477=A I R. 1935 Cal. 368.**

———*Entries in—Presumption as to correctness—Onus.*

The entries in the record of rights being made after enquiry by experienced revenue officials are statutory evidence of great weight and the onus is on the party impugning their correctness to establish by cogent evidence that such entries are incorrect. (*Wort and Fazl Ali, JJ.*) KAMAKHYA NARAIN SINGH *v.* KIRAN CHANDRA MUKERJI **I.R. 1932 Pat. 211=139 I.C. 143=13 Pat.L.T. 264=A.I.R. 1932 Pat. 195.**

———*Entries in—Presumption of correctness—Person disputing the correctness—Onus.*

There is a presumption of correctness attaching to the revenue records, as the entries are made by a public servant in the ordinary course of his duties and it is upon the person who disputes their correctness to show that the entries are not correct. ((*Bhide, J.*) RUP CHAND *v.* HAR NAND. **6 I R (Lah.) 233=146 I.C. 519 (2) =34 P.L.R. 999=A.I.R. 1933 Lah. 795.**

———*Entries in—Presumption as to correctness—Rebuttal—Onus.*

Where the record of rights contains an entry that the defendants have a right of occupancy, the *onus* is on the plaintiff to show that the entry is incorrect, 31 C.W. N. 192, Ref. (*S K. Ghose, J.*) MANMATHA NATH BISWAS *v.* BIJOY KUMAR DOBEY. **I.R 1931 Cal. 668 =133 I.C 220=53 C.L J. 616=A.I.R. 1932 Cal. 351.**

———*Entries in—Value of—Conflict with Butwara record.*

The Butwara record is not conclusive evidence but merely evidence under S. 35 of the Evidence Act as an official record. It is very weak evidence when it conflicts with the Record of Rights. (*Mallik and Jack, JJ.*) BENODA CHARAN CHAKRAVERTY *v.* RAMANI KISHORE CHAKRAVERTY. **61 Cal. 302=151 I.C. 749 (2)=7 R.C. 162=38 C.W.N. 268=A.I.R. 1934 Cal. 488.**

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———*Inam proceedings.*

The inam proceedings constitute a "great act of state" and great weight ought ordinarily to be attached to the enquiries and reports of the Inam Commissioner. (*Ananthakrishna Aiyar and Cornish, JJ.*) NARAYANASWAMI BAHADUR *v.* BODA THAMMAYYA. **1930 M. W.N. 945.**

———*Interpretation—' Sarsikan jama".*

The contents of the Sarsikan papers in each district are not standardised. Hence the interpretation of the term "Sarsikan jama" in such papers depends on the facts and the circumstances of a particular case. (*Macpherson and Dhavle, JJ.*) RAJENDRA NARAYANA SINGH DEO *v* BIHARI LAL CHAKRAVARTY. **11 Pat. 569 = I R 1932 Pat. 185 = 138 I.C. 419 = A.I.R. 1932 Pat. 157.**

———*Jamabandi—Remarks in para.* 12, *Appendix* 7, *Douie's Settlement Manual, apply to settlement operation.*

Directions given in para. 12, Appendix 7. Douie's Settlement Manual, merely refer to settlement operations and are not applicable to the preparation of jamabandi papers. (*Abdul Rashid, J.*) SUNDAR SINGH *v.* CHHAJJU KHAN **151 I.C. 407 = 7 R.L. 129 = A.I.R. 1934 Lah. 309.**

———*Trees—Entry as to—Conflict with general law.*

The presumption raised under the general law that a tree belongs to the owner of the land can override the entry in the record of rights only if it can be assumed that in no case whatsoever can a person other than the owner of the land acquire right in the trees standing on it. Else the record-of rights are presumed to be correct. 24 All. 294 (P. C.); 19 Cal. 660 (P.C.), Dist. ; 1 Pat. 368 and 10 Pat. 622, Rel. on. (*Fazl Ali and James, JJ.*) JAGDEO SINGH *v.* MAHENDRA SINGH. **149 I.C. 149 = 6 R.P. 592 = A.I.R. 1934 Pat. 287.**

RECTIFICATION.

See (1) C. P. CODE, S. 151—AMENDMENT AND S. 152.
(2) SPECIFIC RELIEF ACT, S. 31.

RECURRING RIGHT. *See* LIMITATION ACT, S. 23 AND ART. 131.

REDEMPTION.

See (1) C. P. CODE, O. 34, RR. 5 & 7.
(2) MORTGAGE—REDEMPTION.
(3) T. P. ACT, SS. 60, 85 AND 91.

RE-ENTRY. *See* LANDLORD AND TENANT.

REFERENCE.

See (1) ARBITRATION.
(2) C. P. CODE, SCH. II, PARAS. 1 AND 15.
(3) STAMP ACT, SS. 57 AND 60

———Reference to Division Bench—Power of single Judge — Scope of. *See* CR. P. CODE, S. 439 — PRACTICE. **11 Pat. 143 = A.I.R. 1931 Pat. 379 (F.B.)**

REFERENCE TO HIGH COURT.

See (1) C. P. CODE, O 46.
(2) CR. P. CODE, SS. 374, 435.

REFORMATORY SCHOOLS ACT (VIII OF 1897), S 8 (1)—*Conviction and sentence of accused.*

No action under S. 8 (1) can be taken against the accused without recording the conviction and the sentence to enable him an opportunity of appealing. (*Saad-ud-din, A. J. C.*) DHERU GUL *v.* EMPEROR. **149 I.C. 1128 = 6 R. Pesh. 74 = 36 P.L.R. 79 = 1934 Cr.C. 648 (2) = A.I.R. 1934 Pesh. 29 (2).**

———**S. 16**—*Order of detention in substitution of a sentence of imprisonment—Power of Appellate Court to interfere.*

REGISTRATION ACT (1908), S. 2.

S. 16 does not prevent the Sessions Judge from interfering with an order of detention in a Reformatory School passed under S. 10 by the District Magistrate in substitution of a sentence of imprisonment. 28 Cal. 423 and 13 I.C. 284, Rel. on. (*Macnair, J.C.*) AZIMUDDIN *v.* EMPEROR. **27 N L.R 242 = I.R. 1931 Nag 192 = 134 I.C. 864 = 32 Cr.L.J. 1268 = 1931 Cr.C. 920 = A. I.R. 1931 Nag. 179.**

REFUND. *See* C. P. CODE, SS. 73 AND 151.

REFUND OF COURT-FEE. *See* COURT-FEE AND COURT-FEES ACT, SS. 6, 12 (1) AND 13.

REGISTERED DOCUMENT. *See* EVIDENCE ACT, S. 68.

REGISTRATION ACT (XVI OF 1908)—*Party circumventing Act—Person effecting several mortgages of less than Rs.* 100—*Avoidance of registration as object —Legality.*

There is nothing in the Registration Act which forbids the splitting up of a transaction. Thus a person may execute several mortgages of the value of less than Rs. 100 so as to avoid registration. (*Keane, S. M. and Oppenheim, J. M.*) SITA SINGH *v.* KATWARU LAL. **15 R.D. 380 = 12 L.R. 167 (Rev.).**

———*Construction—Strict construction.*

The Registration Act has to be strictly construed; but there is a point at which it is unnecessary to multiply technicalities. Non compliance with R. 30 of the Act held to be an irregularity. (*Rankin, C. J. and C. C. Ghose, J.*) NILABJABARANI DASI *v.* NANDARANI DASI. **58 Cal. 133 = I R. 1931 Cal. 638 = 133 I.C. 110 = A I.R. 1931 Cal. 478.**

———**S. 2 (6)**—*Immovable property—Debt secured on immovable property—Nature of.*

A debt, though secured on immovable property, is still only movable property. (*Lord Atkin.*) THE IMPERIAL BANK OF INDIA *v.* THE BENGAL NATIONAL BANK, LTD. **58 I.A. 323 = 59 Cal. 377 = 33 Bom.L. R. 1338 = 34 L.W. 569 = I.R 1931 P.C. 299 = 134 I.C. 651 = 1931 A L.J. 804 = 35 C.W.N 1034 = 54 C.L.J. 117 = 1931 M W.N. 910 = A.I.R. 1931 P.C. 245 = 61 M.L.J. 589 (P.C.).**

———**S. 2 (6)**— "Yajman vrithi"—*Agreement for delegation of duties—Whether requires registration.*

"Yajman vrithi" is immovable property within the meaning of S. 2 (6) But where the agreement regarding the same merely amounts to a delegation of duties connected with it, the transfer does not amount to a lease so as to require registration. (*Rupchand and Milne, A.J.Cs.*) KODULAL *v.* BEHARILAL. **25 S.L.R. 451 = I R. 1932 Sind 71 = 137 I.C. 136 = A.I.R. 1932 Sind 60.**

———**S. 2 (7)**—*Agreement to lease—Need for present demise.*

An 'agreement to lease' must be an actual demise and should operate as a lease. Where the document recited that on the happening of a certain event within six months and upon a certain indeterminate act, a lease would be granted to the plaintiff,

Held, that the document did not amount to an 'agreement to lease' within the meaning of the Registration Act. 47 Cal. 485, Rel. on. (*Banerji and King, JJ.*) LACHHMAN SINGH *v.* TODAR MAL. **I.R. 1931 All. 230 = 130 I.C. 6 = A.I.R. 1931 All. 252.**

———**S. 2 (7)**—"*Lease*"—*Agreement to occupy and pay rent—Necessity for registration.*

In a kabuliyat, the defendants acknowledged that they occupied sites in the abadi without the permission of the lambardar and they undertook to pay rent for the sites at Rs. 10 per year for five years and to give up posses sion at the end of that period.

REGISTRATION ACT (1908), S. 11.

Held, that the document was clearly a lease within the meaning of S. 2 (7) of the Registration Act which includes as undertaking to occupy and as the lease was unregistered, it was not admissible in evidence. (*Jackson, A.J.C.*) SADARAM *v.* SUNDAR SINGH. **I.R 1931 Nag 135 = 134 I.C. 263 = A.I.R. 1931 Nag. 128.**

——**Ss. 11 and 87**—*Appointment of an official by Registrar to do registration—Presumption—Defect in appointment—Effect of.*

Where there is nothing on the record to show that an official has not been duly appointed, the presumption would be that he has been duly appointed by the Registrar. Even if all the necessary qualifications to give power to the Registrar were not fulfilled still S. 87 would cover any defect in such appointment. (*Dalip Singh and Bhide, JJ.*) MST ZOHRA JAN *v.* HAVELI SHAH. **A.I.R. 1935 Lah. 301.**

——**Ss. 17 and 49**—Mortgage of four properties—Subsequent unregistered agreement to exclude one property and reduce amount—Admissibility *See* REGISTRATION ACT SS. 49 AND 17. **56 Bom 101 = A.I.R. 1932 Bom. 168.**

——**S. 17 (1) (b).**

Acknowledgment.
Adoption deed.
Agreement.
Assignment. *See* TRANSFER, *infra.*
Award.
Charge.
Compromise.
Construction
Equitable mortgage. *See* MORTGAGE.
Family arrangement.
Lease.
Mortgage.
Movables and immovables.
Mutation proceedings.
Partition
Receipt.
Registration necessary.
Registration not necessary.
Release
Relinquishment.
Sale-deed.
Security bond.
Solenama.
Surety bond.
Transfer.
Value.

Acknowledgment.

——**S. 17 (1) (b)**—*Acknowledgment—"Declare"—Meaning—Document purporting to be mortgage-deed—Evidence as to acknowledgment.*

The word "declare" is used in Cl. (*b*), S. 17 in the same sense as the words "create", "assign," "limit" or "extinguish", namely, as implying a definite change of legal relationship in the property by an expression of the will of the executant embodied in the document. It implies a declaration of will and not a mere statement of fact. Where before the expiry of the period of limitation for a suit to recover a mortgage debt, the mortgagors executed a document described as a mortgage deed in favour of the mortgagee in which they acknowledged an earlier mortgage in respect of the property and the document was signed by the mortgagors but not registered;

Held, that the document was admissible in evidence for the purpose of proving an acknowledgment by the mortgagors of the pre-existing mortgage. The reference to the earlier mortgage was a mere recital of a pre-existing fact and therefore it was exempt from registration. A.I.R. 1932 Lah. 154 Foll; 5 Bom. 232 and A.I.R. 1932 P.C. 55, Rel. on; 102 P. R. 1900, Dist. (*Tek Chand, J.*) KARAM SINGH *v.* MT. MAYA WANTI. **I.R 1932 Lah. 710 = 140 I.C. 387 = A.I.R. 1932 Lah. 592.**

REGISTRATION ACT (1908), S. 17.

——**S. 17 (1) (b)**—Acknowledgment— Document containing acknowledgment of previous transaction—No registration. *See* CONSTRUCTION, *infra.* **A.I.R. 1935 Lah. 821.**

——**S. 17 (1) (b)**—*Acknowledgment—Mortgage by conditional sale—Failure of mortgagee to take possession after expiry of period—Unregistered acknowledgment due—Effect of.*

According to the terms of a deed of mortgage executed on 10th July, 1911, money was payable within five years and, if it was not so paid, the mortgagee was entitled to take possession as owner of the house. The mortgagee however did not take possession of the house and on the 9th March, 1927, the mortgagor made an acknowledgment in plaintiff's bahi to the effect that interest on the mortgage debt had been paid up to date and that a sum of Rs. 950 was due under the registered mortgage deed.

Held, that the mortgagee was not entitled to recover the mortgage debt by sale of the property on the strength of the acknowledgment, that the acknowledgment did not amount to a novation of contract and that being unregistered, could not by itself create a fresh charge on the property. (*Bhide, J.*) BADRI DAS *v.* BESU. **6 I R (Lah) 62 = 145 I.C. 156 = 34 P.L.R. 1055 = A.I R. 1933 Lah. 174.**

Adoption deed.

——**S. 17 (1) (b)**—*Adoption deed—Construction—'Declare.'*

The words 'declare an interest' imply definite change of legal relation to the property by an expression of will. So a deed of adoption which is only a recital of an act of adoption which has already taken place is not the expression or declaration of will by which the right is constituted and so is not compulsorily registrable. Further it is not the adoption deed which confers the status of an adopted son or any interest in the property of the adoptive father but the adoption itself. Any wording in the adoption deed cannot either create or limit any rights which the adopted son gets by his adoption. 5 Bom 232, Ref. (*Beaumont, C.J. and Baker, J.*) VISVANATH *v.* RAHIBAI. **55 Bom. 103 = I.R. 1931 Bom 117 = 128 I.C. 901 = 32 Bom.L.R. 1385 = A.I.R. 1931 Bom 105.**

Agreement.

——**S. 17 (1) (b)**—*Agreement to abide by decree relating to immovable property—Registration, if necessary.*

An agreement to abide by the decree passed by a Court of competent jurisdiction, even though the decree relates to immovable property does not by itself create, declare or extinguish any right or interest in immovable property under S. 17 because the right has already been declared or adjudicated by the decree and hence such agreement is not compulsorily registrable. (*Fazl Ali and James, JJ.*) BHIKGUNATH PRASAD SINGH *v.* MT. ANNAPURNA DAI. **153 I.C. 1098 = 7 R.P. 404 = A.I.R. 1934 Pat 644.**

——**S 17 (1) (b)**—*Agreement to give up ex-proprietary rights—Need for registration.*

It is doubtful whether it is not compulsory to embody in writing an agreement to give up ex proprietary rights. The document will in such a case require registration. (*Oakden, S.M. and Oppenheim, J.M.*) RAM NATH.

REGISTRATION ACT (1908), S. 17.

BUX SINGH *v.* SPECIAL MANAGER, COURT OF WARDS, KATESAR ESTATE. **15 R.D. 91=12 L.R. 1 (Rev.).**

———**S. 17 (1) (b)**—*Agreement—Lease for term registered—Contemporaneous agreement limiting right created by lease—Admissibility without registration.*

Where a registered lease of immovable property of the value of more than Rs. 100 for a term of fifteen years and an unregistered agreement imposing a limitation on the right created by the lease are executed between the parties simultaneously as part of the same transaction, the agreement, in order to make the limitation effective, must be registered under S. 7 (1) (*b*) of the Registration Act; and being unregistered, it is inadmissible in evidence by reason of S. 49 of the Act. (*Srivastava, Ag. C.J.*) ANANT SINGH *v.* GANGA BAKHSA SINGH. **151 I.C. 1010=7 R O. 156=18 R D. 487=11 O.W.N. 1184=A.I.R. 1934 Oudh 447.**

———**S.** 17 (1) (b)—Agreement for partition—No registration necessary. *See* PARTITION, *infra.* **33 Bom. L.R. 802=A.I R. 1931 Bom 419 (1).**

———**S.** 17 (1) (b)—Agreement to re-convey. *See* SALE DEED, *infra.*

———**S. 17 (1) (b)**—*Agreement to sell—Attaching creditor—Consent to sale of property.*

An attachment before judgment does not create any title or interest but merely prevents any alienation to the prejudice of the attaching creditor. Hence an agreement by the attaching creditor consenting to sale of the property does not require registration as he has no right or interest in such property by virtue of his attachment before judgment. (Case-law referred.) (*Macpherson and Dhavle, JJ.*) GAURI DUTT MARWARI *v.* DOWRING. **13 Pat. 735=151 I C. 683=7 R.P. 111=A.I.R. 1934 Pat. 413.**

———**S. 17 (1) (b) and (d)**—*Agreement to sell earth and sand—Need for registration.*

An agreement by which on payment of a certain amount as compensation, the defendants were given the liberty to remove earth and sand from certain land belonging to the plaintiff and the defendants also undertook to level the land after removal is not a lease or an agreement for the sale of earth and sand as chattels. It is an agreement for the sale of an interest in immovable property. Where such an agreement is not registered it cannot be received as evidence of any transaction affecting the property but is admissible to prove the terms of the covenant to level up the land after removing earth and sand. (*Beasley, C.J. and Cornish, J.*) KANJI & MOOLJI BROS. *v.* SHANMUGAM PILLAI. **56 Mad. 169=I.R. 1932 Mad. 805=139 I.C. 870=36 L.W. 626=1932 M.W.N. 897=A.I.R. 1932 Mad. 734=63 M L.J. 587.**

———**(as amended by Act II of 1927), S. 17 (1) (b)**—*Agreement to sell immovable property—Registration.*

In a suit for specific performance of a contract, the agreement ran as follows: "I have executed this contract in respect of Jiroyati land.....I shall execute a sale deed (in one month) and get the same registered".

Held, the document was only a contract to sell and not a sale and that by virtue of the retrospective provisions of Act II of 1927 which nullified the effect of 53 I.A. 214 (P.C.) it did not require to be registered. (*Ramesam, J.*) KRISHNAMURTHY *v.* SUNDARAMMA. **1931 M. W.N. 297.**

———**S. 17 (1) (b)**—*"Agreement to sell"—Petition reporting arrangement between debtor and creditors—Whether compulsorily registrable.*

REGISTRATION ACT (1908), S. 17.

A petition to the Court reporting an arrangement which had been arrived at between the signatories out of Court by which certain properties belonging to the debtor had to be conveyed to the creditors in full satisfaction of the debts due by him to them is not "agreement to sell" and therefore does not require registration. (*Tek Chand and Tapp, JJ.*) MT. UMRAO BIBI *v.* RAM KISHEN. **13 Lah 70=I R. 1932 Lah. 379=137 I.C. 820=33 P.L.R. 1003=A.I.R. 1932 Lah. 281.**

Award.

See also REGISTRATION ACT, S. (17) (1) (*e*) AND (2) (*vii*).

———**S. 17 (1) (b)**—*Award—Award that on default of payment of amount, other party will have right to realize same by sale of mortgaged property—Registration, if necessary.*

A person dealing with property which is duly mortgaged is presumed to know that the property is liable to be sold in discharge of the debt, and it is immaterial whether the property is sold in execution of a mortgage decree or in execution proceedings taken to enforce an award passed in respect of the mortgage deed as a decree. The non-registration of an award of this kind does not therefore in any way prejudice a person who deals with the property with knowledge of the registered deed of mortgage. Hence where an award declared that in the event of the non payment of the amount awarded, the other party will have a right to realize the same in execution proceedings by the sale of the mortgaged properties and the mortgage was created by a prior registered document.

Held, that the award was outside the letter of S. 17 (1) (*b*). (*Rupchand, A.J C.*) CHOTIRMAL *v.* LALOOMAL. **29 S.L R 344=157 I.C. 28=8 R.S. 26=A.I. R. 1935 Sind 136.**

———**S. 17 (1) (b)** —*Award—Document reciting that executants accept award—Need for registration.*

Where a document merely recites that the executants accept the award of the panchayat and does not by itself create any such right, title or interest as is contemplated by S. 17 of the Registration Act, it does not require registration. (*Addison and Din Mohammad, JJ.*) NAGAR SINGH *v.* BELA SINGH. **160 I C. 895 =8 R.L. 627=37 P L R. 459=A.I.R. 1935 Lah. 955.**

———**S. 17 (1) (b)**—*Award—Private award—Registration—Necessity.*

An award made by arbitrators under orders of the Court has no force until a decree is passed on it. A private award, if it is valid, is operative even though neither party has sought to enforce it by a regular suit. A private award therefore falls within the class of documents specified in S. 17 (1) (*b*), Registration Act, whereas an award of the other class does not. By the amendment of S. 17, Registration Act, by S. 10 of T. P. Supplementary Act, 1929, the exception contained in S. 17 (2), (6) having been removed, a private award, if it satisfies the requirement as to value, is compulsorily registrable. (*Mukerji, Ag. C.J. and S. K. Ghose, J.*) JITENDRA NATH DE *v.* NAGENDRA NATH DE. **62 Cal. 201=153 I C. 776=7 R C. 402=60 C.L.J. 259 =39 C.W N. 54=A.I.R. 1934 Cal. 815.**

Charge.

See also TRANSFER, *infra.*

———**S. 17 (1) (b)**—*Charge amounting to mortgage—Need for registration.*

Where the charge created by compromise amounts to a mortgage and is not registered, it is of no effect. (*Young and Rachhpal Singh, JJ.*) GHANSHYAM DAS HANUMAN PRASAD *v.* JAINARAIN VERMAN. **6 R.A. 695 (2)=148 I.C. 417=A.I.R. 1934 All. 444.**

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———S. 17 (1) (b)—Charge—Debentures of company —Registration necessary. *See* CONSTRUCTION, *infra*. **58 Cal. 136 = A.I.R. 1931 Cal. 223.**

———S. 17 (1) (b)—*Charge—Deed purporting to be mortgage with possession—Properties in possession of the then mortgagees—New mortgagee to open account to be operated upon by debtor for their redemption—Deed, if a mere agreement to give mortgage.*

Where a document purports to be a deed of mortgage with possession but at the time some of the properties at any rate were in the possession of the then mortgagees and the new mortgagees are to open an account of a certain amount in favour of the debtor and interest is to run on that amount from the date of the account being opened and the debtor undertakes to operate on the account to redeem the properties and as each property is redeemed the new mortgagees become mortgagees with possession of it in respect of the whole advance and interest and in the meantime they have a mortgage over the whole properties (*i.e.*, until redemption of each, a second mortgage) for the whole sum and the interest.

Held, that the document is not a mere agreement to give a mortgage but creates a charge over the properties and therefore comes directly within the terms of S. 17 (*b*). (*Lord Atkin.*) PRATAPSINGH MOHOLALBHAI *v.* KESHAVLAL HARILAL SETALWAD. **62 I.A. 23 = 59 Bom 180 = 39 C.W.N. 440 = 61 C.L.J 42 = 37 Bom. L.R. 315 = 1935 O.W.N. 118 = 1935 A.L.J. 242 = 153 I.C. 700 = 1935 A.W.R. 180 = 41 L.W. 210 = 7 R.P.C. 123 = 1935 M.W.N. 97 = A.I.R. 1935 P.C. 21 = 68 M. L.J. 339 (P.C.).**

———S. 17 (1) (b)—*Charge—Document creating.*

A charge though it may not amount to a transfer creates some interest in immovable property and such a document must be registered. (*Ramesam and Stone, JJ.*) MALLIAH *v.* VENKATESWARLU. **152 I C. 772 = 7 R. M. 286 (2) = 40 L.W. 677 = A.I.R. 1934 Mad. 713.**

———S. 17 (b)—*Charge on immovable property—Debenture creating charge on assets of Bank—Registration—Necessity for.*

Quaere.—If a debenture executed by a Bank creating a floating charge over its assets and registered under S. 109, Companies Act, is inoperative to affect its immovable property in the absence of registration under the Registration Act ? (*Lord Atkin.*) THE IMPERIAL BANK OF INDIA *v.* THE BENGAL NATIONAL BANK, LTD. **58 I.A. 323 = 59 Cal. 377 = 33 Bom.L.R. 1338 = 34 L.W. 569 = 134 I C. 651 = I.R. 1931 P C. 299 = 1931 M.W N. 910 = 1931 A.L J. 804 = 35 C.W.N. 1034 = 54 C.L.J. 117 = A.I.R. 1931 P.C. 245 = 61 M.L.J. 589 (P. C.).**

———S. 17 (1) (b) and 49 — *Charge—Unregistered bond creating charges over immovable property for over Rs. 100—Validity.*

A bond, which purports to create a charge over a house and site for a sum of Rs. 176-8-0 if not registered is invalid under the provisions of S. 17 (1) (*b*) and S. 49 (*a*), Registration Act. (*Dunkley, J.*) MAUNG PO KYI *v.* NOOR MAHOMED. **147 I.C. 562 = 6 R.R. 165 = A.I. R. 1933 Rang 259.**

Compromise.

See also MUTATION PROCEEDINGS AND SOLENAMA *infra* AND REGISTRATION ACT, S. 17 (2) (vi).

———S. 17—*Compromise—Decree embodying—No need for registration.*

A compromise regarding a dispute as to immovable property is not compulsorily registrable, if it is embodied in a decree. (*Addison and Bhide, JJ.*) SHAH DIN *v.* ABDUL MAJID. **I.R. 1931 Lah. 519 (1) = 132 I.C. 7 (1) = 31 P.L.R. 959.**

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———S. 17—*Compromise—Decree—Solenama creating or declaring howla right in land—Registration.*

A compromise decree based on a solenama which declared howla rights in lands in suit, but did not create any permanent or present demise, does not require registration to be valid and operative in law. (*Guha and Bartley, JJ.*) JOGESH CHANDRA MUKERJEE *v.* RAI BEHARI LAL MITRA. **153 I.C. 313 = 7 R.C. 371 = 59 C.L J. 328 = A.I.R. 1934 Cal. 799.**

———S. 17 (1) (b) — *Compromise — Petition of—Whether compulsorily registrable.*

The petition of compromise which does not create a right in favour of a party but merely enables the parties to go to Courts and have a right created or extinguished is not compulsorily registrable.

Semble.—There is a distinction between a petition of compromise being used in the Court to which it is presented and its being subsequently used in another Court for the purpose of proving the right if any under that petition. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359 = 6 I. R. (Pat.) 17 = 145 I. C. 1 = 14 Pat. L. T. (Sup.) 1 = A.I R. 1933 Pat. 306.**

———S. 17 (1), (b) and (c) — *Compromise—Compromise defining or varying terms of existing tenancy—Whether compulsorily registrable.*

A compromise which merely defines or varies some of the terms of an already existing tenancy does not require registration and is admissible even though unregistered (*Dhavle, J.*) SHAILA BALA DEVI *v.* GANGANARAYAN BHAKAT. **148 I.C. 353 = 6 R.P. 448 = A.I.R. 1933 Pat. 457.**

Construction.

See also ACKNOWLEDGMENT, *supra*.

———S. 17 (1) (b)—*Construction—"Any right, title or interest"—Charge—Debentures of Company—Need for document being registered.*

The words "any right, title or interest" in S. 17 (1) (*b*) are intended to be very wide and include a mere charge on immovable property as it is a right in immovable property—a right to have it brought to sale to realise a sum of money to be paid to the chargee.

Held, that the debentures created by a company granting a floating charge on the company's assets require registration. (*Rankin, C.J. and C.C. Ghose, J.*) IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, LTD. **58 Cal. 136 = 131 I.C. 689 = 34 C.W.N. 605 = 53 C.L J. 269 = A.I.R. 1931 Cal. 223.**

[**Reversed** on other grounds 58 I.A. 323 ; 59 C. 377 (P.C.).]

———S. 17 (1) (b)—*Construction—"Declare".*

The word "declare" in S. 17 is *ejusdem generis* with the other words create, assign or limit with which it is in contiguity. (*Page, C. J. and Mya Bu, J.*) S. P. K. R R M. CHETTIAR FIRM *v.* ADMINISTRATOR-GENERAL OF BENGAL. **11 Rang. 481 = 149 I. C. 457 (2) = 6 R. R. 302 = A.I.R. 1933 Rang. 307.**

———S. 17 (1) (b)—*Construction—'Declare'—Document admitting prior mortgage—Effect.*

The word 'declare' in S. 17 (1) (*b*) must be read to indicate something more than a mere statement of an existing fact and to imply a declaration of will to cause a change of legal relationship in respect of the property concerned. *Held*, that a document which merely admitted the existence of a prior mortgage created no definite change of legal relation to the property and was not compulsorily registrable. (*Coldstream and Johnstone, JJ.*) RADHA KISHAN SINGH *v.* HUKAM CHAND. **I. R. 1932 Lah. 190 = 136 I.C. 14 = 32 P.L.R. 881 = A. I.R. 1932 Lah. 154.**

———S. 17 (1) (b)—*Construction—'Declare'—Document containing acknowledgment of previous transaction.*

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The word "declare" as used in S. 17 must be construed in the same sense as the preceding words "create", "assign" etc. and the declaration does not mean "merely a statement of fact," but it must by itself bring about some definite change of relation to the property, by an expression of will embodied in it. Hence documents which merely contain an acknowledgment of a past transaction will not require registration (*Monroe and Bhide, JJ.*) PUNJAB AND SIND BANK, LTD. *v.* RUSTOMJI. **160 I.C. 773=8 R.L. 592=A.I.R. 1935 Lah. 821.**

———**S. 17 (1) (b)**—*Construction—'Declare'—Document reciting right in another—Necessity for registration.*

The word 'declare' implies a declaration of will, not a mere statement of fact. The distinction is between a mere recital of a fact and something which in itself creates a title. Where the statement in a petition merely acknowledged as a fact that another person had a right and itself did not create any right, it does not require registration (*Viscount Dunedin.*) BAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI. **59 I.A. 130=11 Pat. 272=136 I. C. 798=I.R. 1932 P.C. 142=36 C.W.N 250=35 L.W. 217=34 Bom L.R. 463=1932 A.L.J. 186=55 C.L.J. 136=1932 M.W N. 660=13 Pat L.T. 279=9 O.W.N. 43=A.I.R. 1932 P. C. 55=62 M.L J. 296 (P.C.)**

———**S. 17 (1) (b)**—*Construction—'Operate'*

The word 'operate' in S. 17 (*b*) refers to the immediate intention of the instrument and not to the ultimate consequences or collateral effects. (*Rankin, C.J and C. C. Ghose, J.*) IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, LTD. **58 Cal. 136=131 I C. 689 34 C. W. N 605=53 C.L.J. 269=A I. R. 1931 Cal. 223.**

Family arrangement.

———**S. 17 (1) (b)**—*Family arrangement constituting partition—Need for registration.*

If a family arrangement giving several properties to different persons is reduced to writing, it will undoubtedly have to be registered under the provisions of S. 17. (*Dunkley. J.*) MA KYAW *v.* DAW KYE U. **159 I.C 798 =8 R.R. 284=A I.R. 1935 Rang. 355.**

———**S. 17 (1) (b)**—*Family arrangement—Record of—Registration—'Declare'—Meaning.*

"Declare" in S. 17 (1) (*b*) of the Registration Act is to be taken in the same sense as the words "create", "assign", etc., as implying a definite change of legal relation to the property by an expression or declaration of will and not merely a statement of a fact. A record of family arrangement which is based on a recognition of a pre-existing right cannot be regarded as creating or declaring a new title and is not therefore liable to compulsory registration. (*Srivastava, C J. and Thomas, J.*) BHAGET *v.* MADHO PRASAD. **151 I.C. 452=7 R.O. 127=11 O.W.N. 1071=A.I.R. 1934 Oudh 462.**

———**S. 17 (1) (b)**—*Family arrangement—Registration—Necessity for—Unregistered arrangement acted upon for long time—Binding nature of.*

A family arrangement, if it is in fact reduced to the form of a document, requires registration if it affects property of the value of over Rs. 100; but where it has been fully given effect to and acted upon for a long time as a final partition of the property, the parties thereto are bound by it even though it was not registered. 42 C. 801 (P.C.) and 46 M. 919, Rel. on. (*Addison and Bhide, JJ.*) RAM LAL *v.* MT. SITA BAI. **14 Lah. 635=I.R. 1933 Lah. 462=144 I.C. 396=34 P.L.R. 741=A.I.R. 1933 Lah. 648 (2).**

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Lease.

See also AGREEMENT, *supra* AND REGISTRATION ACT, S. 17 (1) (*d*).

———**S. 17 (1) (b)**—*Lease—Document of lease—Compulsory registration.*

Where a document purported to be an agreement by which the defendants agreed to vocate the houses in which they were then living and to construct their buildings on another part of the land and as regards the site they agreed to vacate the half of it and on account of this relinquishment they agreed to pay rent at Rs. 2 instead of at Rs. 4 and they further stipulated that in the event of their not making the above changes by a certain date the plaintiff should have the right to eject them,

Held, that the document was compulsorily registrable.

Held, further, that the relationship between the parties could not be proved by oral evidence apart from the deed. (*Hilton, J.*) MAHOMED DIN *v.* SARDARA. **6 R L 576=148 I.C. 558 (1)=A.I.R. 1934 Lah. 743 (1).**

———**S. 17 (1) (b)**—*Lease—Further advance—Mortgage effected—Need for registration.*

The appellant an occupancy tenant borrowed Rs. 100 for his marriage from respondent in 1915. He took Rs. 60 on a *Zarpeshgi* lease for five years and next day Rs. 40 on an agreement that if Rs. 40 was not repaid within five years respondent would remain in possession until it was repaid.

Held, that the two transactions were part of the same transaction, that the effect of the second was to convert the first from a lease into a mortgage and that the same was inadmissible in evidence for want of registration. (*Oakden, S.M. and Smith, J.M.*) PANCHA *v.* MOTI RAM. **15 R.D. 144.**

Mortgage.

See also ACKNOWLEDGMENT, *supra* AND RELEASE, *infra.*

———**S 17 (1) (b)**—*Mortgage—Equitable mortgage—Agreement constituting mortgage—Need for registration.*

A memorandum embodying the terms of a mortgage provided as follows: "Having placed in your hands the services as per list mentioned in the reverse as security for such sum or sums of money as may hereinafter be advanced, I hereby agreed that in default of payment on demand of all or any such sum or sums of money, you shall be at liberty to sell all or such securities as shall be sufficient to reimburse you. I further agree to execute at any time any deed, transfer or assignment in respect of the securities."

Held, that the deed was the agreement between the parties and not a mere list and being unregistered was inadmissible in evidence. (*Harrison and Addison, JJ.*) BANK OF NORTHERN INDIA, LTD. *v.* NARAIN SINGH. **I.R. 1932 Lah. 442=138 I.C. 247.**

———**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Confirmatory letter—Whether amounts to conveyance.*

A letter regarding a mortgage by deposit of title-deeds was as follows: "With reference to our conversation regarding loan, we confirm the said terms in pursuance of which we have duly executed a demand pro-note for the above amount in your favour and have already deposited with you title-deeds of the following properties as per schedule herein below by way of equitable mortgage as security for repayment of the amount due to you with interest on the pro note."

Held, that the letter was merely confirmatory and that it did not amount to a conveyance so as to require stamp or registration as it did not purport to transfer

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any property to the mortgagee. (*Rupchand Bilaram, A.J.C.*) TAYABALI *v.* PARPATIBAI. **26 S.L.R. 29 = I.R. 1932 Sind 106 = 139 I.C. 95 = A.I.R. 1932 Sind 73.**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Deposit of title-deeds—Memorandum evidencing—Registration—Oral evidence—Admissibility*

A memorandum forming part of a transaction evidencing an equitable mortgage by deposit of title-deeds, which is only the record of a completed transaction and does not constitute the bargain as to the deposit of the title-deeds does not require registration, and oral evidence is therefore anmissible as to the deposit of the title-deeds. (*Guha and Bartley, JJ.*) RAKHAL DAS CHATTOPADHAYA *v.* INDUBALA BASU. **161 I.C. 512 = 8 R.C. 529 = 61 C.L.J. 473 = A.I.R. 1936 Cal. 125.**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Deposit of title-deeds pursuant to verbal agreement—Letter re-stating terms—Necessity for registration.*

Where the charge had been created by deposit of title-deeds and the execution of a hand-note, in pursuance of a previous verbal agreement to create such a security by deposit of title-deeds, a letter which merely recites the fact of the creation of an equitable mortgage and re-states all the terms of the loan, does not constitute the bargain between the parties, and, therefore, does not require registration. (*D. N. Mitter and Patterson, JJ.*) KALIDAS CHANDRA *v.* JUGALKISHORE DATTA. **62 Cal. 998 = 9 R.C. 161 = 164 I.C. 197.**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Document by which title-deeds are handed—Registration—Necessity for.*

Where in the correspondence between the mortgagor and a mortgagee Bank in respect of an equitable mortgage, a document addressed to the Manager of the Bank contains a statement to the effect that the title-deeds are "hereby handed" to the Bank, in consideration of which the borrowers ask that the Bank should oblige them by advancing the loan sanctioned by the Directors on a pro-note, on the security of the deposit of the title-deeds a list of which is alleged to be attached and there is also a declaration in the document that the properties of which the title-deeds are handed over are free from encumbrances, the document constitutes the bargain between the parties and is not admissible in evidence to prove the mortgage unless it is registered. 50 I.A. 77 = 1 R. 66 (P.C.), Foll.; 58 I.A. 68 = 54 M. 257 (P.C.), Dist. (*Addison, Ag.C.J and Din Mohammad, J.*) MT. JIWAN *v.* PUNJAB NATIONAL BANK, LTD., LAHORE. **160 I.C. 897 = 8 R.L. 630 = A.I.R. 1935 Lah. 889.**

——**S. 17 (1) (b)**—Mortgage—Equitable mortgage—Letter contemporaneous with deposit—Registration—Necessity for. *See* T. P. ACT, S. 59—EQUITABLE MORTGAGE. **A.I.R. 1933 Pesh. 35.**

——**S. 17 (1) (b)**—Mortgage—Equitable mortgage—Letter intimating deposit—Registration—Letter falls not within S. 17 (1) (*b*) but in exception contained in S. 17 (2) (*vi*). **55 Bom 677 = A.I.R. 1931 Bom. 337.**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Letter referring to memorandum of agreement—Necessity for registration.*

A letter written by the mortgagor the next day after an agreement to deposit the title-deeds had been concluded ran as follows: I am sending you the title-deeds with the intention of depositing the same with you as per the memorandum of yesterday executed by me" and then referred to the schedules annexed to the letter.

Held, the two documents must be read together and so read, they embodied the terms of the transaction, and not having been registered, the morgage was not valid. 43 C. 895 (P.C.); 50 C. 338 (P.C.); L.R. 5 H.L. 321. Rel. (*Curgenven and Bhashyam Ayyangar, JJ.*) JAGANNADHAM PILLAI *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1931 Mad. 334 = 129 I.C. 814 = 32 L.W. 666 = 1930 M.W.N. 865 = A.I.R. 1931 Mad. 124 = 60 M.L.J. 309**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Memorandum containing list of documents deposited—Registration—Necessity for.*

At the time of making a deposit of title-deeds as security for money lent, the mortgagor gave a memorandum which contained a list of the title-deeds with the introductory words : "As agreed upon in person, I have delivered to you the undermentioned documents as security."

Held, that the memorandum was not other than a written record of the particulars of deeds, the subject of an agreement constituted in fact by the act of deposit and the payment of the money. It did not create or declare any interest in the property included in the deeds. Even if it was a condition of the advance that the memorandum was to be given, the fact that the memorandum was prepared, signed and handed over to the mortgagee before the advance of the balance of the money to be secured by the deposit could not alter the nature and meaning of the document. It was and remained a list of the documents deposited and nothing more. It did not embody the terms of the agreement between the parties and therefore did not require registration. A.I.R. 1923 P.C. 50, Dist ; 11 Beng.L.R. 405, Ref. (*Lord Tomlin.*) SUNDARACHARIAR *v.* NARAYANA AYYAR. **58 I.A. 68 = 54 Mad. 257 = 1931 A.L.J. 245 = 35 C.W.N. 494 = 1931 M.W.N. 349 = 33 Bom.L.R 878 = 33 L.W. 501 = 8 O.W.N 666 = 131 I.C. 328 = I.R. 1931 P.C. 104 = 53 C.L.J. 396 = A.I.R. 1931 P.C. 36 = 60 M.L.J. 506 (P.C.).**

[**F.** 62 C. 998 (1002). **Appl.** 11 R. 481 (485); 34 Bom.L.R 748 (753). **R.** 59 C. 586 (609); 59 C. 781 (786-7). **Rel.** 26 S.L.R. 29 (35).]

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Memorandum effecting—Need for registration.*

Where the letter or memorandum accompanying the deposit of title-deeds constitutes the bargain between the parties, it requires registration in order to create the charge that it purports to create the transaction itself it requires registration. (*Mukerji and Guha, JJ.*) SAILENDRA NATH PALIT *v.* SYED HADE KAZA MANE. **59 Cal 586 = I.R 1932 Cal. 326 = 137 I.C. 500 = 36 C.W.N. 193 = 54 C.L.J. 328 = A.I.R. 1932 Cal. 356.**

——**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Memorandum relating to deposit of title-deeds—When requires registration.*

It cannot be said that no memorandum relating to a deposit of title-deeds can be within S. 17 unless it embodies all the particulars of the transactions of which the deposit forms part ; but no such memorandum can be within the section unless, on its facts, it embodies such terms and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties, Hence where in the application to renew a promissory note, the applicant states the loan required, the security he is prepared to offer and expresses his willingness to accept the conditions printed on the form and the actual loan is made several days after, the letter cannot be taken to create any charge on the property and as such does not require registration. 58 I.A. 68 = 54 M. 257 (P.C.), Appl. (*Monroe and Bhide, JJ.*) PUNJAB AND SIND

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———**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Record of completed transaction.*

The memorandum relating to the deposit of title-deeds ran as follows: "I *have borrowed* * * * * and I *have kept* the undermentioned documents as security for the said loan * * * * the properties of which the title-deeds are kept herewith are free incumbrances." The evidence showed that the talk of security had taken place 10 days before, and an agreement reached two days before the date of the transaction.

Held that the memorandum was only the record of an entirely completed transaction and so required no registration. 43 I.A. 122; 5 H.L. 321; 58 I.A. 68. Ref. (*Mukerji and Guha, JJ.*) SURENDRA MOHAN RAI CHOUDHURY *v* MOHENDRA NATH BANERJEE. **59 Cal. 781=140 I C 662=I.R. 1933 Cal. 14=36 C. W.N. 420=A.I.R. 1932 Cal. 589.**

———**S. 17 (1) (b)**—*Mortgage—Equitable mortgage—Record of completed transaction.*

Where a document was merely a record of the transaction that had already taken place, and was not intended by the parties to be the repository in which the bargain between them was contained,

Held, that it was a memorandum of mortgage by deposit of title deeds that had already been created, and that it did not purport to be an instrument by which any right or interest in the property was created or effected. Consequently the deed did not require registration (*Page, C.J. and Mya Bu, J.*) S. P. K. R. R. M. CHETTYAR FIRM *v.* ADMINISTRATOR-GENERAL OF BENGAL. **11 Rang. 481=149 I.C. 457 (2)=6 R.R. 302=A.I.R 1933 Rang 307.**

———**S. 17 (1) (b)**—*Mortgage—Hyphothecation bond—Subsequent varthaman by mortgagee—Recital that no money is due under bond—Varthaman written in token of cancelling bond—Registration.*

The mortgagee under a hypothecation bond wrote to the mortgagor a varthamanam, whick after referring to the bond recited. "Inasmuch as no amount is due to me thereunder and it is benami, I have executed this varthamanam in token of my cancelling the said deed and the deed previous thereto when required by you and of my having no right to take any action thereunder." It was not registered.

Held, that it did not create, declare or extinguish any right, but that it only contained a statement of fact that there was no money due under the bond, and promised that another document would be executed if so required by the mortgagor; and that consequently it did not require registration. (*Madhavan Nair, J.*) SARASWATHI AMMAL *v.* SRINIVASA NANDIAN **153 I C. 694=7 R M. 371=40 L.W. 727=1934 M.W.N. 1392 =A.I R 1934 Mad. 735 (2)=67 M.L.J. 690.**

———**S. 17 (1) (b)**—*Mortgage—Letter purporting to extinguish security—Necessity for registration.*

A letter written by the mortgagee by which he expressly relinquished the principal amount due under the mortgage is one that requires registration because the legal effect of such relinquishment is the extinction of his interest in the mortgage security. The letter cannot in any sense be treated as a receipt within the meaning of Exception 11 of Cl. (*b*). (*Sundaram Chetty, J.*) SOMASUNDARAM CHETTIAR *v.* MUTHIRULAPPA PILLAI. **147 I.C 464=6 R M. 345=1933 M.W.N. 141 (2)=37 L.W. 677=A.I R. 1933 Mad. 432.**

———**S. 17 (1) (b)**—*Mortgage—Provision for collection of profits by mortgagee—List showing names of tenants—Necessity or registration.*

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A mortgage deed stated that the interest on the debt would be equal to the mortgagee's share of the profits in the Khewat, but it was not mentioned as to how such profit were to be collected. Attached to the deed, however, was a list headed 'A list of tenants from whom the mortgagee is to collect." On a question arising as to whether the list should be registered.

Held, that the list itself amounted nothing more than an agreement as to the method by which the mortgagee was to collect the interest secured by the mortgage deed and hence need not be registered. Such interest as was conveyed to the mortgagee was conveyed by the mortgage deed which was in order. (*Walton, J.M.*) BIDYA RAM *v.* KUNJ BEHARI CHAUBEY. **14 L.R 658 (Rev.).**

———**S. 17 (1) (b)**—*Mortgage—Value above Rs. 100—Need for registration.*

Where a mortgage is of the value of above Rs. 100 it requires registration and if unregistered it is inadmissible in evidence. (*Keane, S.M and Oppenheim, J.M.*) BRIJ MOHAN BARAI *v.* HEMRAJ SAITHWAR. **15 R. D. 281=12 L.R. 90 (Rev.).**

Movables and immovables.

———**Ss. 17 (1)(b) and 49**—*Movables and immovables—Deed transferring immovable and movable property—Non-registration—Effect of.*

Where movable as well as immovable property is transferred by a document for a single consideration, which document, though compulsorily registrable in order to affect the immovable property, is not registered it is equally ineffectual to affect movable property, the reason being that the document embodies one transaction for one consideration and there is no separate transaction concerning the movable property. The document is therefore inadmissible in evidence even as regards a claim in respect of movable property. (*Dunkley, J.*) BHABI DUTT *v.* RAMALALBYAMAL. **152 I.C. 431= 7 R.R. 156=A.I R. 1934 Rang. 303.**

Mutation proceedings.

———**S. 17 (1)**—*Mutation proceedings—Proceedings in mutation cases and orders passed therein—Whether require registration.*

Proceedings in mutation cases and the orders passed therein do not require registration because they are not instruments which alone are compulsorily registrable under S. 17. (*Hasan, C.J. and Kisch, J.*) TRILOKI NATH *v.* RAM MANORATH. **7 Luck. 32=I.R. 1931 Oudh 297=132 I C. 537=8 O W.N. 764=15 R D. 375=14 O.L J. 494=A.I R. 1931 Oudh 296.**

———**S. 17 (1) (b)**—*Mutation proceedings—Orders thereon—If instruments—Compromise—Whether requires registration proceedings of mutations—If they are instruments.*

A compromise which does not create or declare any new right but only recognizes a pre existing right does not require registration. (Case-law referred.) When such a compromise has been accepted by the Revenue Court and embodied in its order, no question of registration arises as proceedings of mutation and orders thereon are not "instruments" within the meaning of S. 17. (*Srivastava and Nanavutty, JJ.*) SITALA BAKHSH SINGH *v.* JANG BAHADUR SINGH. **8 Luck. 694=6 I.R. (Oudh) 66=145 I. C. 805=10 O. W. N. 624=17 R.D. 681=14 L.R. 561 (Rev.)=A.I.R. 1933 Oudh 347.**

Partition.

———**S. 17 (1) (b)**—*Partition—Agreement for—Formal document contemplated.*

A father and a son with a view to partition exchanged to documents, one by which the son agreed in consideration of certain property to give up his claim to the

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rest and the other by which the father agreed to transfer the property to the son's name and to execute in writing any legal document that may be necessary. Possession was not given.

Held, the documents did not require registration. 50 I. A. 134; 50 Bom. 334 (P.C.), Foll. 56 I. A. 363, Dist. (*Madgavkar and Baker, JJ.*) BHAGVANDAS *v.* MANSUKLAL. **I.R. 1931 Bom. 445 (1)=133 I. C. 861 (1) =33 Bom. L. R. 802=A.I.R. 1931 Bom. 419 (1).**

———**S. 17 (1) (b)** —*Partition— Deed of.*

The terms of a document which was unregistered were to the effect that the three brothers agreed that they have partitioned their land. Details of the land allotted to each brother were given and the provisions were made whereby the brothers were to compensate each other in various ways on account of inequalities in the quality of the land. These terms of compensation were all put in the future tense. In a suit by one of them for a declaration that he was the owner of certain land he sought to prove the partition by the above document.

Held, that the deed was a partition deed and required registration and that it was not merely an agreement to partition in future and that the deed being unregistered could not be used in evidence and that no other evidence was admissible to prove the partition. (*Almond, J. C. and Mir Ahmad, A. J. C.*) AZIMULLAH KHAN *v.* AZIZULLAH. **151 I C. 787=7 R. Pesh. 34=A.I.R. 1934 Pesh. 100.**

———**S. 17 (1) (b) and S. 49**—*Partition—List of bonds.*

A mere memorandum containing a list of bonds allotted to the plaintiff's share on a partition does not require registration. (*Guha and M. C. Ghose, JJ.*) KSHETRA MOHAN PAL CHOUDHURY *v.* TUFANI TALUKDAR. **144 I. C 868=6 R. C. 55=37 C. W. N. 112=A.I.R. 1933 Cal 474.**

———**S. 17 (1) (b)**—*Partition lists signed by the parties — Registration—Necessity— Test—Deed—Construction.*

The question whether a particular document falls within the scope of S. 17 (1) (*b*) of the Registration Act has to be decided on a perusal of that document and rulings upon other documents not shown to be of an exactly similar character are no guide to a proper decision of the question. Where certain partition lists endorsed upon and signed by the parties indicate that they were intended by the parties to be the only evidence of an arrangement of partition as between them, it must be held that such lists declare the rights of the parties within the meaning of S. 17 (1) (*b*); and if unregistered, they cannot be admitted in evidence to prove the terms of the partition. (*Coldstream and Jai Lal, JJ.*) GANESH DAS *v.* KANTHU. **159 I.C. 274=8 R L. 373 =A.I.R. 1935 Lah. 448.**

Receipt.

See also REGISTRATION ACT, 17 (1) (*e*) AND 2 (XI).

———**S. 17 (1) (b)**—*Receipt—Mere acknowledgment of receipt of money—Whether compulsorily registrable.*

Where the receipt does not purport expressly to extinguish the mortgage and merely acknowledges receipt of the money due thereon it is not rendered inadmissible for want of registration. 10 Lah. 709, relied on. (*Harrison and Tek Chand, JJ.*) BAL MOKAND *v.* RAM LAL. **I.R. 1931 Lah. 835=133 I. C. 867=32 P.L.R. 407.**

———**S. 17 (1) (b)**—*Receipt for mortgage money.*

S. 17 (1) (*b*) does not apply to a receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. (*Raza and Kisch, JJ.*) AFSAR JEHAN BEGAM *v.* BECHE LAL. **7 Luck. 16=I. R. 1931 Oudh 226=132 I. C. 66=14 O.L.J. 156=8 O.W.N. 279=A.I.R. 1931 Oudh 288.**

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———**S. 17 (1) (b)**—*Receipt—Remittal of a portion of mortgage dues by mortgagee—Admissibility without registration.*

A receipt alleged to be executed by the mortgagee purporting to remit a portion of the mortgage dues is, without registration, inadmissible in evidence. (*Madhavan Nair, J.*) KRISHNASWAMI PATHAR *v.* RAMACHANDRA AYYAR. **135 I. C 572=I. R. 1932 Mad. 156=1931 M.W.N. 261=A.I.R. 1931 Mad. 601.**

Registration necessary.

———**S. 17**—*Registration necessary—Deed reciting that transfer has already taken place—Registration, if unnecessary.*

The documents which are drafted for effecting sales and mortgages of immovable preperty are always worded in such manner as to show that the transfer had already taken place. Hence merely on this account it cannot be argued that these documents do not require proper stamp and registration. (*Agha Haidar, J.*) MT. MIRAJ BEGAM *v.* SETH RAM PARSHAD & SONS. **A.I. R. 1935 Lah. 122.**

———**S. 17 (1), (b) and (2) (i) and (vi)**—*Registration necessary—"Composition deed"—"Decree or order" —Agreemene between debtor and creditor creating charge over immoveable properties—If exempt from registration.*

Pending insolvency petitions in the High Court by two creditors against a firm, an agreement was executed by the partners of the firm and some of their creditors including the two petitioners under which, it was provided that the debtors should immediately pay a certain sum borrowed from a relation of theirs to the creditors and should then be allowed time for one year to pay off the balance of their debts. In default, certain immovable properties of the debtors were to be sold and the creditors were to be paid the balance due to them as also the relation who was to lend the amount to them. A charge was also created over the properties in favour of the creditors. Finally, it was stipulated that in case the creditors were not paid in full, they were free to recover the balance from the debtors personally or by recourse to any other properties which the debtors might possess. This agreement was filed in Court and the petitioning creditors applied to withdraw the petitions. The Official Assignee not objecting, they were allowed to be withdrawn.

Held, (1) that the agreement was not a composition deed so as to be exempt from registration under S. 17 (2) (i), as it made every possible kind of arrangement, including a final residuary right of suit to ensure that the creditors should be paid in full, (2) that it was also not a decree or order of Court under S. 17 (2) (*vi*), as it did not in any sense form part of the Court's order, and as the parties did not apply to the Court to record the terms of the agreement, although the Court no doubt considered it when examining the reasons why leave to withdraw was asked for, (3) that it fell under S. 17 (1) (*b*) as creating an interest in immovable property requiring registration and being unregistered was inadmissible in evidence. (*Beasley, C J and King, J.*) OFFICIAL ASSIGNEE OF MADRAS *v* SUBBA RAO. **153 I C. 541 =7 R. M 362=40 L. W. 615=A. I R. 1934 Mad. 697=67 M.L.J. 836.**

———**S. 17 (1) (b)**—*Registration necessary—Sale deed and contemporaneous agreement to reconvey—Registration.*

A sale deed and a contemporaneous agreement to reconvey constitute a single transaction which amounts to a mortgage and such documents are registrable. (*Hilton, J.*) AMIR *v.* INDAR SINGH. **6 R. L. 510 (1)=147 I.C. 1191=35 P L.R. 337=A.I.R. 1934 Lah. 453.**

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Registration not necessary.

——**S. 17 (1) (b) and (2) (v)**—*Registration not necessary—Deed of maintenance and residence—Arrangement in favour of the first wife—No registration necessary.*

In 1921, the husband executed a deed, addressed to the head of community, providing for the maintenance and residence in a particular house of his wife in consideration of her giving her consent to his second marriage, such consent being necessary under the custom of the caste. The agreement was not registered but the wife was in possession of that house since the date. On an application made by the Receiver in the insolvency of the husband six years later,

Held, (per *Beaumont, C. J.*). that the document should have been registered under S. 17 (1) (*b*)

(Per *Murphy, J.*): that the document fell under S. 17 (2) (*v*) and did not require registration,

(Per *Curiam*): that the arrangement was, however, one which need not be made in writing and can be proved otherwise is being perfectly and valid agreement and the wife was entitled to retain possession. 45 Mad. 612 (F.B.), Rel. (*Beaumont, C. J. and Murphy, J.*) BAI MANI *v.* MAGANLAL CHIMANLAL **140 I.C 745 = I.R. 1933 Bom. 28 = 34 Bom.L.R. 1317 = A.I.R. 1932 Bom. 602.**

——**S. 17 (1) (b)**—Registration not necessary—Document admitting prior mortgage *See* CONSTRUCTION, *supra*. **A.I.R. 1932 Lah 154.**

——**S. 17 (1) (b)**—*Registration not necessary—Gift—Deed of revocation—Value—Less than Rs.* 100

Where the property gifted is presumably of the total value of less than Rs. 100, a deed revoking the gift does not require registration. (*Keane, S.M. and Oppenheim, J.M.*) MAHOMED HASAN KHAN *v.* JANG BAHADUR SINGH. **15 R.D. 295 = 12 L R. 105 (Rev.).**

——**S. 17 (1) (b)**—*Registration not necessary*—Kistbandi *receipt—Payment of mortgage debt regulated.*

A *kistbandi* receipt executed subsequent to a mortgage deed and regulating the mode of payment of the debt does not require registration. (*Suhrawardy and Graham, JJ.*). SASI BUSHAN DAS *v* RAM CHANDRA DAS. **135 I C 871 = I R. 1932 Cal. 167 = 35 C.W.N. 861 = A I.R. 1932 Cal. 136.**

——**S. 17 (1) (b)**—*Registration not necessary*—"Yajman vrithi"—*Agreement for delegation of duties - Whether requires registration.*

"*Yajman vrithi*" is immovable property within the meaning of S. 2 (6). But where the agreement regarding the same merely amounts to a memorandam of the delegation of the obligations by the plaintiff to the defendant for a period of two years, which carried with it the necessary result of perquisities being received and does not amount to a lease, it is not inadmissible for want of registration. (*Rupchand and Milne, A. J. Cs*) KODULAL *v.* BEHARILAL **25 S L.L 451 = I.R. 1932 Sind 71 = 137 I.C. 136 = A.I.R. 1932 Sind 60.**

Release.

——**S. 17 (1) (b)**—*Release—Deed releasing charge on immovable property—Need for registration.*

A document releasing a charge created on immovable property comes directly within the terms of S. 17 (1) (*b*) and requires registration. (*Lord Atkin*) PRATAPSINGH MOHOLALBHAI *v* KESHAVLAL HARILAL SETALWAD. **62 I.A. 23 = 59 Bom. 180 = 39 C W.N 440 = 61 C L.J. 42 = 37 Bom. L R. 315 = 1935 A.L.J. 242 = 155 I C 700 = 1935 A W.R. 180 = 41 L W. 210 = 7 R.P.C 123 = 1935 M W N. 97 = 1935 O.W.N. 118 = A.I.R. 1935 P.C. 21 = 68 M.L.J. 339 (P.C.).**

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——**S. 17 (1) (b)**—*Release—Mortgage bond—Release of rights under—Compulsory registration—Admissibility of unregistered document to prove transfer of debt.*

A document by which the defendant relinquished his interest in a mortgage bond in favour of his brother, the plaintiff, and authorised the latter to collect the full amount of the debts is inadmissible in evidence in so far as it operates to extinguish his right in the mortgage security; but there is no bar to its being admitted for showing the transfer of the debt itself, apart from the security. (*Sundaram Chetty and Pakenham Walsh, JJ.*) LAKSHMANA NAICKER *v.* JAVARAM NAICKER. **150 I C. 18 = 6 R M. 708 = 39 L. W. 153 = A.I.R. 1934 Mad. 178 = 66 M.L.J. 380.**

——**S. 17 (1) (b)**— Release — Release by mortgagee of one item—Agreement between mortgagee and stranger purchaser prior to purchase—If requires writing and registration. *See* EVIDENCE ACT, S. 92 (4). **68 M L J. 91.**

Relinquishment.

——**S. 17 (1) (b)**—*Relinquishment Agreement between mortgogor and mortgagee—Relinquishment of debt exceeding Rs* 100*—Need for registration.*

A document evidencing an agreement between the mortgagor and the mortgagee to vary the terms of the registered mortgage deed relating to the rate of interest payable under that deed which is in effect an agreement to relinquish a portion of the mortgage debt exceeding Rs. 100, falls under S. 17 (1) (*b*) and cannot be received in evidence when not registered as evidence of any transaction affecting the mortgaged property. (*Raza and Kisch, JJ.*) AFSAR JEHAN BEGAM *v.* BECHE LAL. **7 Luck. 16 = I R 1931 Oudh 226 = 132 I C 66 · 8 O.W.N 279 = 14 O.L.J. 156 = A.I R. 1931 Oudh 288.**

——**S 17 (1) (b) and 49**—*Relinquishment—Document relinquishing right and recording payment—Registration*

A document purporting to declare that the executants held no title in a house and had relinquished their connection with it and also purporting to record a payment of money described as having been spent by them in rebuilding the house, requires to be registered, and is inadmissible without registration. (*Shadi Lal, C.J. and Il ton, J.*) ABDUL RAHMAN *v* GURDIT SINGH. **6 R L. 657 = 149 I.C. 154 = 35 P.L R. 570 = A.I.R. 1934 Lah. 604 (2).**

——**S 17 (1) (b)**—*Relinquishment of rights—By a joint decree-holder—No writing necessary.*

In the absence of anything definite to show the contrary, the purchase made by a joint decree-holder, though in his own name, would undoubtedly enure for the benefit of all the persons interested in the joint fund which has been utilised in the acquisition of the property. Other persons would be beneficially interested in the purchase, and would be 'entitled to recover a share of the properties purchased at auction", conditional on the payment of a proportionate share of the costs incurred in the litigation. And this right can be relinquished without a written instrument, as such right is short of ownership A I R. 1933 All. 631 and A.I.R. 1915 P. C. 81, Ref. (*Sulaiman C J. and King J.*) LAL SINGH *v.* CHOTEY BETI. **148 I C. 502 = 6 R.A. 696 = 3 A.W.R. 422 = 1934 A.L.J. 107 = A.I.R. 1933 All. 854 (2).**

——**Ss. 17 (1) (b) and 49**—*Relinquishment of rights—Deed of—Necessity for registration.*

A deed by which certain rights are relinquished in respect of property over Rs 100 requires registration and is inadmissible as evidence without registration. (*Broad-*

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way, J.) SAHIB SINGH *v.* DALIP SINGH. **6 I.R. (Lah.) 119=145 I.C. 691=A I R. 1933 Lah. 422.**

Sale-deed.

——**S. 17**—*Sale-deed—Agreement to recovery—Registration.*

Where the vendor executes a registered sale-deed to the vendee who in turn executes to the vendor a separate agreement to reconvey the properties to the vendor, both documents being of the same date, the agreement can be specifically enforced, though unregistered, because such an agreement does not create an interest in the property so as to bring it within S. 17. *(Varadachariar, J.)* CHINNAKKAL *v.* CHINNATHAMBI GOUNDAN. **152 I C. 634=40 L W. 646=1934 M W.N. 1122=7 R.M 267=A.I R. 1934 Mad 703=67 M L J. 635.**

——**S. 17 (1) (b)**—*Sale deed—Registration in district where no property exists—Validity*

Although a document registered as a *kobala* may be invalid by reason of its being registered in a district, because the only property covered by it as lying within that district had no existence and was merely fictitiously introduced, if the document satisfies the requirements of S. 17 (1) (*b*) of the Registration Act, as being a non-testamentary instrument purporting to create or declare, though in future, a right vested or contingent, in favour of the claimants, the document would be registrable, and as such would not be invalid. *(Mukerji, A. C. J. and S. K. Ghose J.)* NURANESSA KHATOON *v.* SHAIKH OSMAN GANI **155 I C 926—7 R C. 644=39 C.W.N. 120=60 C.L.J. 243=A I R 1935 Cal. 203.**

——**S. 17**—*Sale-deed—Unregistered contract for sale of immovable property—Vendor, if can be treated as trustee.*

A vendor under an unregistered contract for the sale of immovable property cannot be treated as holding the property as a trustee for the purchaser by reason of what he had said or done *(Page, C J. and Mya Bu, J.)* OFFICIAL ASSIGNEE *v.* MOOLLA SONS, LTD. **12=Rang. 589=154 I C. 9=7 R R. 274=A.I R. 1935 Rang. 84**

Security bond.

——**S. 17 (1) (b)**—*Security bond to Court—Assignment to minors on attaining majority—Mode.*

Where a Court obtained a security bond which hypothecated immovable property to secure a proper disposal of money due to minors, deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety need not be made by way of a regularly stamped and registered deed of sale but may be made by an order passed by the Court and the assignee can sue on his own behalf A I.R. 1931 All. 389 (F.B.), Foll.; A.I.R. 1933 Rang. 337, Diss. from *(Tek Chand and Skemp, JJ.)* BHAGWAN DAS *v.* GHULAM MOHAMMAD. **159 I. C 1019=8 R. L. 453=A.I.R 1935 Lah. 863.**

——**S. 17 (1) (b)**—*Security bond of Court—Assignment to minors on attaining majority—Mode.*

Where a Court obtains a security bond hypothecating immovable property to secure a proper disposal of the money due to minors deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety can be made by an order of the Court without any registered deed of transfer. *(Sulaiman, A. C. J., Mukerji and Boys, JJ.)* RAM SARAN DAS *v.* YUDHITRA PRASAD **53 All. 786=I R. 1931 All. 760=133 I C. 904=1931 L.J 503=1931 All. 389 (F B.).**

——**S. 17**—*Security bond to Court hypothecating immovable property.*

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A security bond executed in accordance with an order passed under O. 41, Rr. 5 and 6, staying execution of a decree pending decision of the appeal, whereby the surety hypothecates his immovable property for satisfaction of such decree as might be passed by the appellate Court, and which is duly accepted by the Court and execution stayed accordingly, does not require registration as it is a step in judicial proceeding, and the decree-holders can move the Court to realize the decretal amount from the immovable property of the surety mentioned in the bond, even though it had not been registered. *(Tek Chand, Jai Lal and Monroe, JJ.)* KASTURI LAL *v.* GOVERDHAN DASS. **15 Lah 282=149 I.C. 300=6 R.L. 665=36 P.L.R. 386=A I.R. 1934 Lah. 138 (F.B.).**

[**Diss** 13 R. 359 (364)]

——**S. 17 (1) (b)**—*Security bond to Court—Need for registration.*

A security bond executed in pursuance of an order of Court whereby the judgment debtor hypothecates his immovable property for satisfaction of the decree passed against him, falls within S. 17 (1) (*b*) of the Registration Act and cannot affect the immovable property comprised therein unless it is registered. The Courts' acceptance of such a bond merely indicates that the Court considers the security sufficient and does not give validity to the bond. In other words, the Court approves the substance not the form of the security, the execution of the bond being the mode and the bond the form in which the security is subsequently furnished. In such circumstances, it cannot be said that the execution of the bond is an act of the Court or " a step of judicial procedure," or that the Court merely by approving the substance of the sucurity tendered can, or purports to, convert the security bond—which by law is incapable of affecting the title to immovable property—into an operative, valid and admissible document of title. 31 Mad. 330, Foll.; 52 Bom. 72 and 15 Lah. 282 Not foll. *(Page, C.J. and Mya Bu, J.)* A. S. P. S. SUBRAMANIAN CHETTYAR *v.* LLOYDS BANK, LTD. **13 Rang. 359=156 I.C. 534=8 R.R. 10=A.I.R. 1935 Rang. 168.**

Solenama.

——**S 17 (1) (b)**—*Solenama—Evidence of discharge of mortgage debt—Whether requires registration.*

There is nothing in law to exclude oral evidence of the discharge or release of a mortgage deed when the plea is that the payment was made partly by payment of money and partly by release of the debt. Where a solenama was not entered into for the purpose of varying the terms of a mortgage security but was a mere contract for the discharge of the amount due under the mortgage or satisfaction of the mortgage.

Held that the deed did not require registration for the purpose of being used in evidence.

Held further that assuming the solenama required registration it had been acted upon by the parties and the defect as to want of registration was thereby cured, *(Guha and M. C. Ghose, JJ.)* RAMCHANDRA SAU *v.* KAILASHCHANDRA PATRA. **58 Cal 532=I.R. 1931 Cal. 749=133 I.C. 701=A.I.R. 1931 Cal. 667.**

Surety bond.

——**S. 17 (1) (b)**—*Surety bond—Non-registration—Effect.*

Where the surety bond is not registered, the creditor cannot claim the amount secured as a charge on the property in the hands of the surety. *(Raza and Bisheshwar Nath, JJ.)* JAINARAIN SINGH *v.* PARMESHAR MURAO. **I.R. 1931 Oudh 350=132 I.C. 798 (1)=14 O.L.J. 376=8 O.W.N. 544=A.I.R. 1931 Oudh 310.**

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Transfer.

———**S. 17 (1) (b)**—*Transfer—Assignment of future rents—Need for registration.*

An assignment of future rents requires registration. (*Mukerji and Guha, JJ.*) SAILENDRA NATH PALIT *v.* SYED HADE KAZA MANE. **59 Cal. 586 = I.R. 1932 Cal. 326 = 137 I.C. 500 = 36 C.W.N. 193 = 54 C.L.J. 328 = A.I.R. 1932 Cal. 356.**

———**S. 17 (1) (b)**—*Transfer—Charge—Vendor's lien—Assignment of—Necessity for registration.*

The unpaid vendor's lien under S. 55 (4), T. P. Act, is an interest in immovable property and therefore an instrument assigning such a right, when the property with respect to which the right exists is worth more than Rs. 100 in value, is compulsorily registrable under S. 17, Registration Act, despite the provisions of S. 8, T. P. Act. (Cases disc.) (*Madhavan Nair, J.*) RANGANATHA AYYANGAR *v.* RAJAGOPALA AYYANGAR. **I.R. 1933 Mad. 251 = 142 I.C. 730 = A.I.R. 1933 Mad. 181.**

———**S 17 (1) (b)**—*Transfer—Deed transferring mortgage decree—Registration.*

Registration of a deed transferring a mortgage decree is unnecessary especially where the transfer deed does not disclose on its face what kind of decree is transferred. 9 All. 108, Rel. on. (*Reilly and Anantakrishna Ayyar, JJ.*) BANGARAYYA *v.* NALLAPPARAJU VENKATASUBBARAJU. **I R. 1931 Mad. 487 (2) = 131 I.C. 151 (2) = A.I.R. 1931 Mad. 302.**

———**S. 17 (1) (b)**—*Transfer—Mortgage to Bank—Bank going into liquidation—Arrangement between Bank and its creditors by which whole assets of Bank transferred to purchasing company—Agreement not registered—Suit on mortgage by Bank, if maintainable.*

The defendant executed a mortgage to a Bank. The Bank went into liquidation and an arrangement was come to between the Bank and its creditors by which the whole assets of the Bank were transferred to a purchasing company. But the agreement was not registered. Subsequently the Bank filed a suit on the mortgage.

Held, that the transfer of this mortgage debt was effective as between the transferor and the transferees. But any proceedings to recover the debt brought against the mortgagor must be, not in the name of the transferee, but in that of the transferor and as such a suit by the Bank in its own name to recover the mortgage debt was maintainable. (*Lord Blanesburgh.*) FANNY SKINNER *v.* BANK OF UPPER INDIA, LTD. **62 I.A. 115 = 57 All. 314 = 1935 O.W.N. 711 = 42 L.W. 172 = 37 Bom. L.R. 625 = 61 C.L.J. 477 = 155 I C. 743 = 1935 M W N. 726 = 7 R P.C. 214 = 39 C.W.N. 834 = A.I.R. 1935 P C. 108 = 69 M.L J. 158 (P C).**

———**S. 17 (1) (b)**—*Transfer—Partnership—Dissolution of—Assignment of interests by partner—Partnership assets including immovable property—Necessity for registration.*

An agreement by which a partner assigns his interests in a firm owning immovable property in favour of another partner requires to be registered. On the dissolution of their partnership, the plaintiff and the defendant executed an agreement by which each of them assigned his interests in the partnership property mutually in favour of the other so that each of them acquired exclusive interests in the immovable property of the firms originally held by them jointly. By the same agreement, the defendant also undertook to pay the plaintiff a debt due from one of the firms to the other. The agreement was not registered and in a suit by the plaintiff to realise the debt,

Held, (1) on a construction of the agreement and the circumstances in which it was brought about, the agreement embodied the contract between the parties. It was not merely a document creating a right to obtain another not was it merely a memorandum of an agreement previously made. 50 I. A. 77 and 56 I.A. 363, Ref. to. (2) A partner, it is ture, has no right to any specific items of partnership property ; but a partner in a firm, the assets of which include immovable property, unlike a shareholder in a joint stock company, holds an interest in that property and a dissolution of partnership operates as a transfer of that interest. The agreement in suit, in so far as it affected immovable property of more than Rs. 100 in value, is therefore inadmissible in evidence. 49 M. 738; 51 M.L.J. 410; Diss. 17 B. 235 and 15 Ch. D. 363, Ref. (*Curgenven and Cornish, JJ.*) SAMUVIER *v.* RAMASUBBIER. **55 Mad. 72 = I.R. 1931 Mad. 657 = 132 I.C. 305 = 33 L.W. 576 = A.I.R. 1931 Mad. 580 = 60 M.L.J. 527.**

———**S. 17 (1) (a) and (b)**—*Transfer—Transfer by Mahomedan husband to wife in lieu of dower—Nature of transaction—Deed—If registrable—Test—Value of property or consideration for transfer.*

A deed of transfer executed by a Mahomedan husband to his wife in lieu of dower is a deed of sale. The test to determine whether it requires registration under S. 17 of the Registration Act is the value of the property transferred and not the amount or value of the consideration for the transfer, *i.e.*, the amount of dower. Where the amount of consideration is not mentioned in the deed, the enquiry must be as to what is the value of the property and not what is the amount of the dower. (*Monroe, J.*) GOPAL DAS *v.* SAKINA BIBI. **16 Lah. 177 = 156 I.C. 70 = 7 R.L. 849 = 37 P.L.R. 424 = A.I. R. 1936 Lah. 307.**

———**S. 17 (1) (b)**—*Transfer—Vendor's lien—Registration.*

A document creating a charge or vendor's lien which is given to the seller in S. 55 (4), T. P. Act, requires registration; and it follows from this that any document which purports to transfer what the vendor has under such document, also requires registration under S. 17 (1) (*b*) of the Registration Act. (*Beasley, C.J. and Bardswell, J.*) RAJAGOPALA IYENGAR *v.* RANGANATHA IYENGAR. **152 I.C 375 = 7 R M. 219 = 1934 M.W.N. 1194 = 40 L.W. 481 = A.I.R. 1934 Mad. 615.**

Value.

———**S. 17 (1) (b)**—*Value—Declaration of trust—Value not stated—Power of revocation reserved with donor.*

Though a declaration of trust executed by the donees of certain properties specifying the objects for which they would hold them and reserving a power of revocation of the trust in the donor, does declare or extinguish a right or title to an immovable property, where there is no evidence of the real value of the properties which, in all probability, might be less than Rs. 100 in value in view of the fact that the donor could at any moment have brought the whole trust to an end and required the property to be handed back, the document is admissible in evidence even though not registered. (*Beaumont. C. J.*) RAMACHANDRA SHANKAR *v.* ANANDIBAI. **I.R. 1932 Bom. 304 = 137 I.C. 580 = 34 Bom.L R. 218 = A.I.R. 1932 Bom. 188.**

———**S. 17 (1) (b)**—*Value—Interest conveyed and not consideration.*

The value of Rs. 100 refers to the value of the right, title or interest conferred thereby and not necessarily the consideration. Where the defendant executed a deed out of affection towards his wife granting her the life interest in property producing Rs. 90 a year.

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Held, the value of the interest conveyed was more than Rs. 100 and that the document required registration. 2 B. 97 and *ibid.* 353, Expl. (*Beaumont, C.J. and Nanavati, J.*) BAI PARSAN *v.* LALLUBHAI. **I.R. 1932 Bom. 370=138 I.C. 274=34 Bom.L.R. 459=A.I.R. 1932 Bom. 217.**

———**Ss. 17 (1) (c) and 49**—*Sale of mortgagee rights —Receipt executed two months after—Liability to registration—Oral evidence to prove payment.*

Where a sale of mortgagee rights took place two months before the execution of the receipt for the consideration received, the receipt cannot be regarded as a contract of sale. It merely evidences the payment of consideration for a contract that has been completed two months previously, and is therefore admissible in evidence without registration. Even if it is compulsorily registrable under S. 17 (1) (*c*) of the Registration Act, the payment can be proved by means of oral evidence. (*Abdul Rashid, J.*) LALA *v.* SARDARA. **151 I.C. 884 =7 R.L. 215=35 P.L.R. 491=A.I.R. 1934 Lah. 472.**

———**S. 17 (1) (c)**—*Scope—Document recording receipt of consideration for certain oral mortgages.*

S. 17 (1) (*c*) is perfectly clear and the simple meaning of it is that any document which records the receipt of money due on a mortgage, or on any other instrument indicated in S. 17 (1) (*b*) comes within it. Therefore, a document which is a receipt and which recites certain oral mortgages which were said to have been executed previously and records the receipt of the consideration for all those mortgages on the date of the execution of the receipt, requires to be registered under S. 17 (1) (*c*), and if not registered, is inadmissible in evidence. (*Young, C.J. and Rangi Lal, J.*) GHULAM MAHOMED *v.* SARKHRU. **16 Lah. 485=156 I.C 376=7 R L. 896=36 P.L R. 211=A.I.R. 1934 Lah. 970.**

———**S. 17 (1) (d)**—*Admission to tenancy—Necessity for registration.*

A document admitting a lessee to statutory tenancy does not require registration, (*Oppenheim, S. M.*) JAWAHAR SINGH *v.* FATEH. **14 L.R. 381 (Rev.)=17 R.D. 503.**

———**S. 17 (1) (d)**—*Agreement to lease—Letter not creating present demise—Whether registrable.*

The defendant wrote a letter to the plaintiff as follows: "As per our conversation I agree to take your home on Rs. 325 per month for five years certain and ten years option.... I also agree to the other conditions in your type-written agreement. Please consider this as an agreement." Subsequently a formal lease was prepared and lodged for registration but it was not registered owing to defendant's non-appearance. The defendant occupied the premises for some time but then vacated The plaintiff having sued to recover damages for breach of the agreement.

Held, the letter cannot be construed as a present demise of the flat and therefore does not require registration and so is admissible without registration.

Held, also that the lease though unregistered was admissible in evidence to prove part-performance and also to claim damages under S. 53-A, T. P. Act. (*Wadia, J.*) SULEMAN HAJI AHMED UMAR *v.* PATELL. **6 I.R (Bom) 81=145 I C. 557=35 Bom. L R. 722=A.I.R. 1933 Bom. 381.**

———**S. 17 (1) (d)**—*Agricultural lease—Period not fixed—Reservation of yearly rent—Registration—Oudh Rent Act, S. 156.*

A lease of land for agricultural purposes, reserving an annual rent, though no period is fixed in it, is to be taken as a lease from year to year and is compulsorily registrable under S. 17 (1) (*d*) of the Registration Act. But S. 156 of the Oudh Rent Act which modifies the general law of registration, applies to a *patta* granted by a landlord to a tenant in which no period is fixed; and therefore such a lease, though unregistered, is good and valid. (*King, C.J. and Thomas, J.*) NARAIN SINGH *v.* JAGAT JIT SINGH. **10 Luck. 490=153 I.C. 609=7 R.O 365=1935 R.D. 41=11 O.W.N. 1565=A.I.R. 1935 Oudh 90.**

———**S. 17 (1) (d)**—*Amalnama—Terms of lease incorporated—Need for registration.*

An amalnama contained all the terms of the tenancy, placed the tenant in possession and disclosed an intention to create a present demise. It described the land settled and only reserved the measurement of it for determining its area for the future and stated that on ascertainment of the area on measurement the rent would be calculated. It nevertheless specified the *nirikh* or rate of rent at Rs. 80 per *bigha*. It recited that Rs. 20 had been paid and that the executant settled the land by it in *sarasari* rights. It further provided that the lessee "may erect pucca structures on the lands if he so desired."

Held, that the deed was nothing but a lease and is compulsorily registrable under S 17 (*d*).

Held further that, not being admissible as a lease, it could not be relied on to prove one of the terms of the lease, namely the permission to erect structures. (*Mukerji and Guha, JJ.*) HARAN CHANDRA CHAKRAVARTI *v.* KALIPRASANNA SARKAR. **59 Cal. 396=135 I.C. 725=I.R 1932 Cal. 133=54 C.L J 220=A.I.R. 1932 Cal. 83 (2).**

———**S. 17 (1) (d)**—*Auction of leasehold property—Acceptance of highest bid—Necessity for registration.*

The only agreements to lease which require registration are those which create a present demise The acceptance of the highest bid in an auction for farming out the rents of some villages does not by itself give the purchaser any right in the property which he could obtain only by the execution of a muchalika. In the absence of a muchalika, there is no agreement which requires registration. (*Krishnan Pandalai, J.*) DOMBRU PANDA *v.* SRI RAMACHANDRA DEO. **1933 M W.N. 818**

———**S. 17 (1) (d)**—*Award—Land acquisition—Dispute about value referred to arbitration—Award—If amounts to a lease.*

The dispute between the parties relating to a plot of land belonging to the plaintiff and proposed to be acquired by the Government for the benefit of the defendant was referred to arbitration and an award was passed, by which, *inter alia*, the defendant was to pay Rs. 55 per guntha per year to the plaintiff.

Held, that under S. 16 of the Land Acquisition Act from the date of acquisition the Government or the Railway Company became the absolute owner of the land in question, the plaintiff had thereafter no interest which he could transfer to the defendants by way of lease, the award could not amount to a lease within S. 17 (1) (*d*) of the Registration Act and did not require registration. (*Baker and Wadia, JJ.*) GOVINDLAL MANEKLAL *v.* MANEK CHOWK SPINNING AND WEAVING MILLS CO. **151 I C. 156=7 R B. 44=36 Bom L R. 174=A.I.R. 1934 Bom. 140.**

———**S 17 (1) (d)**—*Deed containing double contract —Agreement to lease—Lease binding for six months—Registration if necessary.*

Prior to the amending Act XX of 1929 which expressly enacts that a lease should be executed both by the lessor and the lessee, documents drawn up in the form of an indenture and purporting to leases were

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executed by the lessees only. But such a document can only be treated as a mere record of an agreement on which the lessor has agreed to lease the property to the lessee, not a lease properly so called. An indenture of lease signed by the lessee contained the following clause "that this lease will run for at least six months from date, and hence if the lessees happen to vacate the premises earlier, they will still be liable to pay rent for the full period of six months. After the expiration of six months the lessees may continue to occupy the premises at the aforesaid rent and on the terms noted in this indenture, as long as they may desire, provided they continue to pay their monthly rent strictly in advance . . . . . In case of the lessor happening to sell the building to anyone at any time after expiry of six months from this day, the lessees will be bound to vacate the premises on receipt of a month's clear notice for the same from the lessor."

Held, that the document provided for two agreements one of them being a lease for a period of six months binding on both parties, and the other an agreement permitting the tenant to continue in occupation so long as he wished but subject to his tenancy being terminated at the wish of the lessor in the event of the lessor selling the property; that it was not a lease for an indefinite period and did not require registration. It was a lease for a period of six months and as such was admissible in evidence though not registered.

Held further, that a lease for a period not exceeding one year need not be in writing, and if in writing, according to the law prevailing in the Bombay Presidency and in Sind, such writing need not be registered. (*Fereers, J.C. and Rupchand, A J.C.*) DEVIDAS ZOWKIRAM *v.* ALU WALLA BROS **26 S.L.R. 377=I.R. 1933 Sind 10=140 I.C. 681=A.I.R. 1932 Sind 217.**

———**S. 17 (1) (d)**—*Lease—Document varying terms of tenancy permanently—Necessity for registration.*

An agreement permanently varying the terms of a tenancy to the benefit of the tenant is really a new lease on more favourable terms, and if under the Registration Act, a lease for more than five years or for more than Rs. 50 requires registration, a document giving a new lease permanently at a more favourable rate certainly requires registration. The mere fact that it is a fresh lease does not make it the less a lease. If a lease itself requires registration, a document varying its terms for all time also requires registration. (Case-law discussed.) (*Ramesam, J.*) NOTOBORO CHOWDARI MAHAPATRO *v.* DASARI KHAMBAYYA DORA. **135 I.C. 345=I.R. 1932 Mad. 89=A.I.R. 1931 Mad. 751.**

———**S. 17 (1) (d)**—Lease from month to month—Non-registration—Admissibility. *See* REGISTRATION ACT, S. 49—LEASE. **32 P.L.R. 361=A.I.R. 1931 Lah. 501.**

———**S 17 (1) (d)**—*Lease for one year under Agra Tenancy Act—Necessity for registration.*

A lease for one year only does not require registration, even though under the Agra Tenancy Act the lease would confer statutory rights on the tenant. 14 R. D. 170, Not foll. (*Oppenheim, S M. and Walton, J. M.*) KALI PRASAD MISRA *v.* RAM CHANDRA SINGH. **13 L.R. 387 (Rev.)=17 R.D. 8.**

———**S. 17 (1) (d)**—*Lease for one year—Whether compulsorily registrable.*

A lease for one year only does not require registration. (*Collister, J.*) NATTHU LAL *v.* DAL CHAND **152 I.C. 757=7 R.A. 387=15 L.R. 374 (Rev.)=18 R.D. 313=A.I.R. 1934 All. 902.**

———**S. 17 (1) (d)**—*Lease for one year under—Agra Tenancy Act—Need for registration.*

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A lease for one year granted after the coming into force of Act III of 1926 would require registration under S. 17 (*d*) as such a lease confers statutory rights on the tenant. 14 R. D. 170, Foll. (*Keane, S. M. and Oppenheim, J.M.*) SRI DURGA DEBIJI *v.* BADRI PRASAD. **15 R.D. 399.**

———**S. 17 (1) (d)**—*Lease for twelve years—Need for registration.*

Where an unregistered lease for 12 years was executed by the landholder just before his property was put in the management of the Court of Wards and it appeared that it is a mere dodge to lower the status of the actual cultivators who were tenants in chief in respect of a portion of the holding.

Held, that the lease being unregistered was inadmissible in evidence and the status of the tenants was not modified thereby. (*Oakden, S. M and Oppenheim, J.M.*) SHER SINGH *v.* BANWARI SINGH. **15 R.D. 106=12 L.R. 14 (Rev.).**

———**S. 17 (1) (d)**—"*Lease*"—*Solenama prior to T. P. Act—Registration.*

Before the T. P. Act, if an owner of land consented by deed that another person shall occupy the land for a certain time, that amounted to a lease. A solenama, prior to the T. P. Act, which created a "lease" in the above sense and which operated as a present demise, would not be admissible in evidence unless registered as required by S. 17 (1) (*d*) of the Registration Act. (*Mitter and Nasim Ali, JJ.*) NAGENDRA CHANDRA NAG *v.* PURNA CHANDRA GUPTA. **39 C.W.N. 98=60 C.L J. 384=A I.R 1935 Cal. 261.**

———**S. 17 (1) (d)**—Sir *land—Lease deed—Agreement not to eject tenants at any time—Need for registration.*

The landlord induced certain persons to settle in his village and gave them a lease of certain *sir* land under which he promised that he would never eject them or their heirs. The undertaking was embodied in a written document which was not registered.

Held, that the document was compulsorily registrable and being unregistered was inadmissible in evidence. (*Keane, S.M. and Oppenheim, J.M.*) RAM PRASAD PURI *v.* CHAWTHI LONIA. **15 R.D. 278=12 L.R. 93 (Rev.).**

———**S 17 (1) (d)**—Sir *land—Permission to grant grove—Necessity for registration.*

Permission to plant a grove in *sir* land need not be in writing or registered (*Oppenheim, S.M and Walton, J M.*) PUTTU *v.* RAMCHANDRA. **14 L.R. 284 (Rev.)=17 R.D. 399.**

———**S. 17 (1) (d)**—*Tenancy at will—Necessity for registration.*

A lease deed creating a tenancy at will does not require registration. 31 Bom.L.R. 335, Ref. (*Baker, J.*) NARAYAN BALKRISHNA *v.* SIVSHANKARDAS. **I.R. 1932 Bom. 495=139 I.C. 258=34 Bom.L.R. 959=A.I.R 1932 Bom. 493.**

———**Ss. 17 (1) (d) and 49**—*Unregistered lease—Clause creating charge of rent—Admissibility of.*

Where a lease created by a compromise and embodied in a decree of Court is inadmissible for want of registration, a clause in the deed creating a first charge on the demised land as security for rent due is also not admissible, though standing by itself it may not amount to a lease. (*Macpherson and Fazl Ali, JJ.*) SACHINDRA MOHAN GOSH *v* RAMJASH AGARWALLA. **11 Pat. 98=I.R 1932 Pat. 54=136 I.C. 54=12 Pat. L T. 871=A.I.R. 1932 Pat. 97.**

———**S. 17 (1) (d)**—*Unregistered lease—Whether confers title.*

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Under the T.P. Act a permanent lease can be created only by a regsitered instrument. Where the document is not registered, no title passes. It cannot be construed as an agreement to lease but even if it could be so construed it would require registration before it can be put forward as an agreement on the basis of which a claim for specific performance could be made. (*Mukerji, J.*) BADAL CHANDRA SADHUKHAN *v.* DEBENDRA NATH DEY. **6 I R. (Cal.) 162=145 I.C. 892=58 C. L.J. 325=37 C.W N. 473=A.I.R. 1933 Cal. 612.**

———**S. 17 (1) (d)**—*Unregistered mokarrari lease—Payment of nazarana—Proof of agreement of lease.*

Plaintiff paid defendant the entire nazarana amount and obtained a mokarrari lease-deed executed in his favour by the defendant. The registering of the document was put off on one pretext or another by the defendant. In a suit for specific performance of the agreement in the lease deed.

Held, that the unregistered deed was inoperative and inadmissible, but that the agreement could be proved by other evidence (*Rowland, J.*) DHARICHHAN SINGH *v.* MAHABIR SINGH. **147 I.C. 1057=8 R P. 391=14 Pat. L.T. 628=A.I.R. 1933 Pat. 544.**

———**Ss. 17 (1) (d) and 49**—*Unregistered rent note—Suit in ejectment—Plea of permanent tenancy—Admissibility of rent note.*

The predecessor in title of the plaintiff leased certain lands to the predecessor in title of the defendant under a rent-note in the first instance for nine years. The rent-note was not registered. The defendant was put in possession and paid rent at a uniform rate to the plaintiff. In the record-of-rights from 1903 to 1920, the defendant's name was entered as a permanent tenant. In 1925 the plaintiff sued for ejectment It was contended for the defendant that he had acquired rights of permanent tenancy by virtue of the rent-note prescribing for a uniform rent and by adverse possession.

Held, that (*i*) as the rent-note required registration and was not registered, it could not affect any immovable property comprised therein; (*ii*) as the document was not admissible either to prove the terms of the contract or to show that it contained all the terms of the contract, the bar to the reception of other evidence under S. 91 of the Evidence Act did not arise; (*iii*) though, under S 135 J of the Bombay Land Revenue Code, an entry in the record of-rights must be presumed to be true till the contrary is proved, the presumption had been rebutted in this case by the plaintiff proving that the document relied on by the revenue officers in making that entry was inadmissible in evidence; (*iv*) the mere fact that the tenant had been paying rent at a uniform rate was no evidence of adverse possession; (*v*) nor was the plaintiff estopped because there was no representation that the acceptance of the rent would plea of permanent tenancy. In the result the defendant's confer occupancy tenancy failed. (*Beaumont, C.J. and Barlee, J.*) DATTO SHIVRAM GOSAVI *v.* BABASAHEB MALHAR. **58 Bom. 419=150 I.C. 555=7 R.B. 1=36 Bom L R. 359=A I.R. 1934 Bom. 194.**

———**S. 17 (1) (d), Proviso**—*Applicability—Lease for three years—Rent note payable for two years—Rent of Rs. 400 for third year—If compulsorily registrable—Interest on rent—Power of Court to award.*

A lease for a period of three years, which provides for no rent for the first two years, but fixing a rent of Rs. 400 for the third year, cannot be regarded as a lease reserving an annual rent of one-third of Rs. 400 so as to fall under S. 17 (1) (*d*) of the Registration Act. Such a lease has to be construed either as fixing a rent for the third year alone or a consolidated rate for all the three years, and is therefore exempt from registration under the notification of the Local Government issued under the proviso to S 17 (1). It is wrong to award interest on the rent. (*Venkatasubba Rao, J.*) GOPALASWAMI NAIDU *v.* LAKSHMI AMMAL. **156 I.C. 825=8 R.M. 57=1935 M.W.N. 605 (1)=41 L.W. 351=A. I.R. 1935 Mad. 305 (1).**

———**S. 17 (1) (e)**—*Award—Statement in award—'Declare'—Meaning of.*

A mere statement of fact by a party to an instrument would obviously have no effect upon legal relations, but a similar statement in an award by arbitrators regarding a point in dispute between the parties does affect the legal relationship; in the first case it is a mere admission of an undisputed fact, in the second case, it is a decision and finding upon a fact which is disputed. The statement in the award is a declaration within the meaning of S. 17 (1) (*e*), Registration Act, and the award is compulsorily registrable. (*Middleton, J. C. and Mir Ahmad, A J C.*) ABDUI LAH KHAN *v* BAHRAM KHAN. **159 I C. 1022=7 R. Pesh. 109=A.I.R. 1935 Pesh. 69**

———**S. 17 (2) (i)**—Composition deed—Agreement between debtor and creditor creating charge over immovable properties—Registration. *See* REGISTRATION ACT, S. 17 (1) (*v*) AND (2) (i) AND (*vi*)—REGISTRATION NECESSARY. **A.I.R. 1934 Mad. 697=67 M. L.J. 836.**

———**S. 17 (2) (i)**—*Composition deed—Property assigned to trustees—Need for registration—Trusts Act, S. 5*

A composition deed by which a debtor assigns his immovable property to trustees for the benefit of his creditors requires to be registered under S. 5 of the Trusts Act. The exemption from registration under S. 17 (2) (*i*) of the Registration Act is available to a composition deed only to the extent that it purports to create or assign a right in immovable property, and not when it amounts to a trust which obviously contemplates something more than mere creation or assgning of a right in immovable property. Accordingly, a composition deed, so far as it is a trust deed, is not valid if it is not registered (*Allsop and Bajpai, JJ.*) GOVIND RAM *v.* KASHI NATH. **58 All 505=1935 A.W R. 1432=161 I C 903=8 R A. 802=1936 A.L J. 350=A.I.R 1936 All. 239.**

———**Ss. 17 (2) (v) and 49**—*Agreement of sale unregistered—Admissibility in suit for specific performance.*

An agreement for sale of immovable property which recites the receipt of part of consideration and which contains also a covenant encumbering or selling the property to another, does not itself effect or create any interest in the property sold, and falls under Cl. (2) (*v*) of S.17, Registration Act, and does not require registration. It is therefore admissible as evidence of a contract in a suit for specific performance. (*Wort and Dhavle, JJ.*) ABDUL LATIF MIAN *v.* DEBI MAHTON. **13 Pat 620=155 I.C. 47=7 R.P. 534=15 Pat.L.T. 443 =A.I.R. 1934 Pat. 195.**

———**S. 17 (2) (v)**—*Contract for sale of immovable property—Registration—T.P. Act, S. 54.*

A mere contract for the sale of an immovable property which does not create an interest in such immovable property does not require registration. 51 A. 771 (P.C.), Expl. (*Sulaiman, C.J. and Collister, J.*) SOHAN LAL *v.* ATAL NATH. **56 All. 142=6 R A. 656=148 I.C. 229=1933 A.L.J. 1584=A.I.R. 1933 All. 846.**

———**S. 17 (2) (v) and (1) (b)**—*Equitable mortgage—Letter intimating deposit—Inchoate right to lease—Lease executed subsequent to letter—Registration—Necessity for.*

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The plaintiffs carried on banking business in Calcutta, S and Sons who were carrying on business in Calcutta owed money to the plaintiffs and as sureties for S and Sons, the defendants created an equitable mortgage on their own immovable property in favour of the plaintiffs by means of a letter, dated May, 1922 addressed to them stating that they had instructed their Solicitors to hand over the title-deeds "to be held by you as a security against advances you may make to S and Sons, Calcutta." At the date of this letter, the only interest the defendants had in the property was a right to get a lease of that property executed in their favour; and that lease was in fact executed in February, 1923. The question was if the letter of May, 1922, needed registration.

Held by Beaumont, C. J. (*Mirza, J.*, contra). The immovable property in question was the lease which at the date of the letter did not exist and so the letter could not have possibly created or declared any interest in property. The letter falls not within the operative words of S. 17 (1) (*b*) but within the exception contained in sub S. (2) of sub-para. (*v*). (*Beaumont, C. J. and Mirza, J.*) JAGJIVANDAS *v.* KING, HAMILTON AND CO. **55 Bom 677=I R. 1931 Bom. 481=134 I.C. 545=33 Bom. L.R. 709=A.I.R. 1931 Bom. 337.**

———**S. 17 (2) (vi)**—*Award by arbitrators appointed by Court—Need for registration.*

An award made by arbitrators appointed by the Court with a view to having its terms incorporated in a decree of the Court is not an award which is compulsorily registrable. (*Mya Bu and Baguley, JJ.*) KYA HLA PRU *v.* MA PAN MRA PRU **154 I.C. 557=7 R. R. 313=A.I R. 1935 Rang. 16.**

———**S. 17 (2) (vi)**—*Award arrived on settlement by parties and signed by them—It ceases to be award—Registration.*

A document signed by the arbitrators as their award does not cease to be an award merely because over and above the signatures of the *panchas*, the parties themselves signed it in token of their acceptance of the partition as made by the arbitrators and treating it as an award, it does not require registration. 51 All. 659 and A.I.R. 1927 Bom. 956, Rel. on. (*Courtney-Terrell, C. J. and Kulwant Sahay, J.*) MT. JASODA KUER *v.* PUNIT SINGH. **6 R.P. 300=146 I C. 937 (2)=A.I.R. 1934 Pat. 48.**

———**S. 17 (2) (vi) (as amended by Transfer of Poperty Supplementary Act of 1929)**—*Award dividing immovable properties—Necessity for registration.*

The words "and any award" in S. 7 (2) (*vi*) of the Registration Act have been omitted by the Amending Act XXI of 1929. The result is that an award is no longer excepted and if it creates or assigns any right in immovable property of more than Rs. 100 in value as in the case of an award amounting to a deed of partition, it is compulsorily registrable. (*Sulaiman, C. J. and Kisch, J.*) BACHCHAN LAL *v.* NAROTTAM DATT. **I R. 1933 All. 253=143 I.C. 423=1932 A.L.J. 1090=A I.R. 1933 All. 59.**

———**S. 17 (2) (vi)**—*Award incorporated in decree.*

An award incorporated in a decree does not require registration. (*Middleton, J.C. and Saaduddin, A.J.C.*) HUKUM CHAND TILAK CHAND *v.* LORINDA RAM. **6 I.R. (Pesh.) 24=146 I.C. 1094=A.I.R. 1933 Pesh. 83.**

———**Ss. 17 (2) (vi) and 49**—Compromise of criminal case—Admissibility without ragistration. *See* REGISTRATION ACT, S. 49—COMPROMISE. **11 O.W.N. 450 =A.I.R. 1934 Oudh 116.**

REGISTRATION ACT (1908), S. 17.

———**S. 17 (2) (vi)**—*Compromise decree—Registration.*

If by a decree of Court made on a compromise a transaction is had which has the effect of extinguishing the right of a party and declaring or creating a right in favour of another party in any property which is the subject-matter of the suit or proceeding, S. 17 (1) of the Registration Act would not hit that decree In a suit for a declaration of title and for possession on eviction of the defendants, the claim being based on a purchase from a *pro forma* defendant, the parties effected a compromise which provided *inter alia* : "plaintiff gets from defendant (10) (*pro forma*) a sum of Rs. 460 in all and in consideration thereof relinquishes in his favour all his claim arising under the *kobala* executed by defendant (10). The title of defendant (10) to the lands in dispute.....remains unimpaired and the plaintiff's claim thereto will be rejected." The suit was dismissed as a result of the compromise.

Held, that the compromise fell under S. 17 (2) (*vi*) and was not compulsorily registrable. (*Mukerji and M.C Ghose, JJ.*) NATHURAM AGARWALLA *v.* ABDUL LATIF. **157 I C. 971=8 R.C. 141=39 C.W.N. 485=A.I.R. 1935 Cal 478.**

———**S. 17 (2) (vi)**—*Compromise—Dismissal of suit in accordance with—Deed of compromise not actually incorporated in decree—If compulsorily registrable.*

Where a pending suit is compromised and the Court dismisses the suit in accordance with the deed of compromise entered into by the parties and filed in Court which consigns the record to the record room, the compromise does not require registration, but is exempt from registration under S. 17 (2) (*vi*) of the Registration Act. It is only necessary that the decree must be substantially based on the compromise so that the terms of the same must be deemed to have been read into the body of the decree. The deed of compromise may be copied out verbatim in the body of decree, or it may be attached to the decree by means of a schedule. If there is a clear reference to the compromise which was before the Court and which must be taken to have been an integral part of the decree in view of the language used, S. 17 (2) (*vi*) would apply and the document was not compulsorily registrable and was admissible in evidence though not registered. (*Agha Haidar, J.*) KALU *v.* RAM SINGH. **8 R.L. 162=157 I.C. 959=37 P.L.R, 238.**

———**S. 17 (2) (vi)**—*Compromise—Order of Court—Petition of compromise incorporated—Non registration—Effect.*

Where a petition of compromise relating to a mutation case was incorporated in the order of the Court, *held*, that the order was sufficient proof of the terms of the settlement and that they did not require registration for their admissibility in evidence. (*Hasan, C. J. and Kisch, J.*) TRILOKI NATH *v.* RAM MANORATH. **7 Luck. 32=I.R. 1931 Oudh 297=132 I C. 537=14 O.L J. 494=8 O.W.N. 764=15 R.D. 375=A.I.R. 1931 Oudh 296.**

[**Rel.** 8 Luck. 694 (698)].

———**S 17 (2) (vi)**—*Compromise—Terms not incorporated in decree—Order recording compromise not registered—Admissibility in later proceeding.*

Where the terms of a compromise were not incorporated in the decree as they did not relate to the subject-matter of the suit but they were embodied in the order recording the compromise by means of a reference to them as "*hasub tasfiya bahami*",

Held, that the order recording the compromise, though unregistered, was admissible in a later proceeding to prove the terms of the compromise. 4 Lah. 263 and A.

REGISTRATION ACT (1908), S. 17.

I.R. 1930 Lah. 855, Ref. (*Bhide, J.*) MAHBUB *v.* MUNSHI. **135 I.C. 203 = I.R. 1932 Lah. 75 = 32 P.L.R. 761 = A.I.R. 1932 Lah. 24.**

——**S. 17 (2) (vi)**—*Consent decree operating to create a lease—Registration.*

Only such decrees and orders which partake of the character of the documents mentioned in clauses (*b*) and (*c*) of sub-section (1) are excluded from compulsory registration. If, however, a consent decree operated to create a lease, it requires to be compulsorily registered. 47 C. 485 (P.C.); 31 C.W.N. 1099; 27 C.W.N. 897, 56 C. 427; 57 Cal. 775; 126 I.C. 719 and 10 Lah. 685, Foll. (*Macpherson and Fazl Ali, JJ.*) SACHINDRA MOHAN GHOSH *v.* RAMJASH AGARWALA. **11 Pat. 98 = I.R. 1932 Pat. 54 = 136 I.C. 54 = 12 P.L.T. 871 = A.I.R. 1932 Pat. 97.**

——**S. 17 (2) (vi)**—*Construction—"Any decree".*

Clause (*vi*), S. 17 of the Registration Act exempts from registration "*any* decree or order, of a Court" and not "any *final* decree or order, etc." Thus the exemption is not restricted to decrees, which have become final and conclusive but includes within its purview, decrees which have been set aside wholly or in part on appeal or review or have otherwise become inoperative. The circumstance that the decree is subsequently varied or reversed, might affect is enforceability but not its value as a "method" or proof of the terms of the transaction, which were embodied in it. Therefore it is open to a party in a later suit to have the terms of the compromise proved by reference to the decree (*Tek Chand and Abdul Rashid, JJ.*) WALAITI RAM *v.* SHADI RAM. **16 Lah. 27 = 154 I.C. 1049 = 7 R.L. 630 = 37 P.L.R. 798 = A.I.R. 1934 Lah. 721.**

——**S. 17 (2) (vi)**—*Construction—'Court'—Officer disposing of mutation cases.*

The provisions of the U. P. Land Revenue Act, 1901, relating to cases of mutation of names distinctly show that the officer seized of mutation cases is enjoined by law to decide disputes regarding entries of names by means of an inquiry into the question of possession and when he is unable to satisfy himself as to which party is in possession he shall ascertain by a summary inquiry who is the person best entitled to the property and shall put such person in possession. It is difficult to hold such an officer is not a "Court" (*Hasan, C. J. and Kisch, J.*) TRILOKI NATH *v.* RAM MANORATH. **7 Luck. 32 = I.R. 1931 Oudh 297 = 132 I.C. 537 = 14 O.L.J. 494 = 8 O.W.N. 764 = 15 R.D. 375 = A.I.R. 1931 Oudh 296.**

——**S. 17 (2) (vi)**—*Construction—Decree.*

The term 'decree' as used in cl. (*vi*) ought to receive liberal construction and even if the compromise goes beyond the property in suit, it will not, if embodied in the decree, require registration. 22 Mad. 598 (P.C.) and 47 Cal. 485 (P.C.), Foll. (*Macpherson and Fazl Ali, JJ.*) SACHINDRA MOHAN GOSH *v.* RAMJASH AGARWALA. **11 Pat. 98 = I.R. 1932 Pat. 54 = 136 I.C. 54 = 12 Pat.L.T. 871 = A.I.R. 1932 Pat. 97.**

——**S. 17 (2) (vi)**—*Construction—"Proceeding"—Application for attachment.*

An application for attachment is a "proceeding" within the meaning of S. 17 (2) (*vi*), Registration Act. (*Venkatasubba Rao, J.*) GOVINDASWAMI MUDALIAR *v.* RASU MUDALIAR. **58 Mad. 781 = 156 I.C. 791 = 8 R.M. 49 = 41 L.W. 301 = 1935 M.W.N. 501 = A.I.R. 1935 Mad. 232 = 68 M.L.J. 41.**

——**S. 17 (2) (vi)**—*Construction—"Subject-matter of the suit or proceeding"—Meaning—Compromise of suit and application for attachment before judgment—Creation of charge and dismissal of application for attachment—Compromise, if requires registration.*

REGISTRATION ACT (1908), S. 17.

The respondent filed in 1931 a suit against a person for the recovery of a sum of money. On his application certain properties were attached before judgment. Both the application and the suit came on for hearing on the same day. On that day the parties entered into a compromise and a decree was made embodying its terms, by which a charge was created in favour of the respondent for the sum decreed, over the properties sought to be attached. As regards the application, an order was made 'petition is dismissed'. After two years the present petitioner obtained a money decree in Small Cause Court against the same judgment-debtor and attached in execution the properties already mentioned. The respondent preferred a claim under O. 21 R. 58, C. P. Code, claiming valid charge over the properties. This contention having been upheld in the lower Court, questions arose whether it could be held that the properties in question were the subject-matters of the earlier suit of 1931 under S. 17 (2) (*vi*) of the Registration Act.

Held, that the consent decree should be deemed to have been as much a decree in the suit as an order in the petition; the use of the word 'dismissed' conveyed no more than that the petition had been disposed of by the decree made in the suit, and that, consequently, the property in question was the 'subject-matter' of a 'proceeding' within S. 17 (2) (*vi*) and that the consent order was exempt from registration. (*Venkatasubba Rao, J.*) GOVINDASWAMY MUDALIAR *v.* RASU MUDALIAR. **58 Mad. 781 = 156 I.C. 791 = 8 R.M. 49 = 41 L.W. 301 = 1935 M.W.N. 501 = A.I.R. 1935 Mad. 232 = 68 M.L.J. 41.**

——**S. 17 (c) (vi)**—"Deed or order"—Agreement between debtor and creditor creating charge over immovable properties—Registration. *See* REGISTRATION ACT, S. 17 (1) (*b*) AND (2) (1) AND (*vv*)—REGISTRATION NECESSARY. **A.I.R. 1934 Mad. 697 = 67 M.L.J. 836.**

——**(as amended), S. 17 (2) (vi)**—*Order of Court—Agreement affecting immovable property, not the subject-matter of the suit—If it can be incorporated.*

Under S. 17 (2) (*vi*) any agreement affecting immovable property which is not the subject-matter of the suit cannot be incorporated in an order of the Court because it would require registration. (*Sulaiman, A.C.J. and King, J.*) BISHUNATH RAI *v.* SARJU RAI. **53 All. 1000 = I.R. 1931 All. 643 = 133 I.C. 403 = 1931 A.L.J. 835 = A.I.R. 1931 All. 745.**

——**(as amended in 1929), S. 17 (2) (vi)**—*Security bond affecting immovables executed by judgment-debtor pursuant to decree—Court approving of it—Registration.*

A security bond affecting immovable property executed by judgment-debtor pursuant to the decree is not exempt from registration and the Court by merely approving the substance of it, cannot purport to convert it into operative, valid and admissible documents of title. (*Page, C.J. and Mya Bu, J.*) A.S.P.S. SUBRAMANIAN CHETTIAR *v.* LLOYDS BANK. **13 Rang. 359 = 156 I.C. 534 = 8 R.R. 10 = A.I.R. 1935 Rang. 168.**

——**Ss. 17 (2) (vi) (prior to amendment of 1929) and 50**—*Unregistered award—Charge created by—Priority.*

A charge created by an award prior to the Amending Act of 1929, which is not registered, retains seniority over a subsequent mortgage deed which is registered. (*Aston, Rupchand and Mehta, A.J.Cs.*) BAHLUMAL SANTDAS *v.* NARAINDAS DIPCHAND. **I.R. 1933 Sind 157 = 27 S.L.R. 121 = 143 I.C. 863 = A.I.R. 1933 Sind 151 (2) (F.B.).**

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———**S. 17 (2) (xi)**—*Mortgage bond—Endorsement on—Partial release—Mortgage not wiped out—Endorsement, if compulsorily registrable.*

Where an endorsement by the mortgagee on the mortgage bond purported to release some of the mortgaged properties and the mortgage itself was not extinguished,

Held, that the endorsement is not compulsorily registrable. (*Mukerji, J.*) PRANBALLAV SAHA *v.* BHAGABAN CHANDRA SEAL. **6 I.R. (Cal.) 127=145 I.C. 657=37 C W.N 424=A I.R 1933 Cal. 588.**

———**S. 17 (2) (xi)**—*Mortgage bond—Endorsement of payment—Registration—Necessity for.*

An endorsement of payment on a mortgage deed which does not on its face purport to extinguish the mortgage comes within S. 17 (2) (*xi*) and does not require registration, 37 Cal. 589 and 8 M.L.J. 269, Ref (*Reilly and Anantakrishna Ayyar, JJ.*) SUPPAN CHETTY *v.* YAGNANARAYANA AYYAR. **I.R. 1932 Mad 285=136 I.C. 317=34 L.W. 921=A.I.R. 1932 Mad. 141.**

———**S. 17 (2) (xi)**—*Mortgage bond — Endorsement releasing some of the mortgaged properties—Registration.*

An endorsement on the back of the mortgage deed releasing some of the mortgaged properties does not extinguish the mortgage, but falls within sub S. (2), Cl. (*xi*) of S. 17 of the Registration Act, and does not require registration. (*Mukerji J.*) PRANBALLAV SAHA *v.* BHAGABAN CHANDRA SEAL. **145 I C. 657 =6 R.C. 127=37 C.W.N. 424=A.I R. 1934 Cal .588.**

[Reversed on other grounds 61 C. 894].

———**S. 17 (2) (xi)**—*Receipt—Money due under mortgage—Receipt for payment—Registration*

A receipt for payment of money due under a mortgage does not require registration, unless it purports to extinguish the mortgage. A receipt acknowledging payment of a smaller sum of money in full satisfaction of a larger amount due under the mortgage is not admissible without registration as it purports to exonerate the mortgagor from any liability under the mortgage. (*Mitter and S. K. Ghose, JJ.*) ASANUDDIN MONDAL *v.* ASMATULLA. **142 I.C. 517=I.R. 1933 Cal. 304= 36 C.W.N. 738=55 C.L.J. 571=A I.R. 1933 Cal. 198.**

———**S. 17 (2) (xii)**—*Scope—Sale of by receiver in insolvency—If exempt from registration.*

A deed of transfer executed by an Official Receiver in insolvency, in pursuance of a public auction held by him, conveying to the highest bidder certain promissory notes, mortgage debts, etc., belonging to the insolvent, the sale being afterwards confirmed by the Court, is not exempt from registration under S. 17 (2) (*xii*) as it was not granted in pursuance of any sale by public auction by a Civil Officer. (*Beasley, C.J. and King, J.*) NARASAPPA *v.* HUSSAIN SAB. **152 I.C. 988=40 L.W. 747 =1934 M.W.N. 1399=A I.R. 1935 Mad. 55=67 M. L.J. 746.**

———**(as amended), S. 17, Expl.**—*Agreement to sell—Whether requires registration.*

A document which is a mere agreement to sell does not require registration. (*Tek Chand and Agha Haidar, JJ.*) CHHANGA SINGH *v.* GAJJAN SINGH. **135 I.C. 669=I R. 1932 Lah. 125=32 P.L.R. 807=A.I.R. 1932 Lah. 95.**

———**S. 17, Expl.**—*Scope—If retrospective—Contracts creating lien—If affected.*

S. 2 of the Registration Amendment Act (II of 1927), which added the Explanation to S. 17 of the Act is clearly retrospective. It does not, however, deal with those contracts in which a lien has been specifically created, as a specific charge would certainly "affect" immovable property within the meaning of S. 49 of the Act. (*Wort and Dhavle, JJ.*) ABDUL LATIF MIAN *v.* DEBI MAHTON. **13 Pat 620=155 I.C 47=7 R.P. 534=15 Pat.L T. 443=A.I.R. 1934 Pat. 495.**

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———**S. 18 (e)**—*Will—Disposition of immovable property—Registration.*

A will which deals with immovable property is not compulsorily registrable. (*Irving, F.C.*) HAKIM *v.* MT. FATIMA BIBI. **35 P.L.R. 231.**

———**S. 21**—*Scope—Inadequate description—Effect of.*

S. 21 of the Registration Act only lays down certain particulars to be complied with before registration of a document. If the properties are sufficiently identifiable, there is no reason why the document, if registered, would not be operative in respect of such properties as would be found to answer the description contained in the document. (*Mukerji, A. C. J. and S. K. Ghose, J.*) NURANNESSA KHATOON *v.* SHAIKH OSMAN GANI. **155 I.C. 926=7 R.C 644=60 C L.J. 243=39 C.W. N. 120=A.I.R 1935 Cal 203.**

———**S. 23**—*Document presented four months after execution and registered—Presumption against person presenting document.*

Where the presentation for registration is made after the expiry of the four months allowed by S. 23 but the document is still registered, the person presenting the document must prove that the days prior to the presentation of the document were holidays or that the office of the Sub-Registrar was closed and the presumption is against the person who presented the deed for registration. Where no such proof is forthcoming, the registration is invalid. (*Brown, J.*) MAUNG AUNG DIN *v.* MAUNG AUNG MYINT. **11 Rang. 15=I R. 1933 Rang. 25 (2)=141 I.C. 705=A I.R. 1933 Rang. 5.**

———**S. 23 A**—*Construction—"Person claiming under the document"—Will conferring authority to adopt—Subsequently adopted son—Right to re-present document for registration.*

If the will confers an authority to the widow to adopt a son, the son subsequently adopted by the widow is a "person claiming under the document," even though the adopted son is not named in the document and the document by itself does not confer all the rights of an adopted son. The phrase "claiming under such document" in Ss. 71, 73, 77 and 23-A is intended to cover all the persons specifically enumerated in Ss. 32 and 40 and perhaps to include other persons not falling under the list of persons enumerated but certainly not to cut down the list. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M. W.N. 1148.**

———**S 23 A**—*Construction—"Person not duly empowered"—Meaning of—Includes persons not empowered at all.*

The section applies to all cases where the person presenting the document was not entitled to present it. Whenever the presentation by a person who (not entitled in his own right to present) has not got a proper authority of another to present the document is accepted, it is the case of a person not duly empowered to present. It may be that the section often comes to play when the presentation is by a person who purports to act as agent but without a power of-attorney but that does not mean the section is confined only to such cases. The section is on the face of it intended to cure a technical defect in the registration which though technical is also a vital defect. It applies to all cases where the person presenting the document for registration is one other than a person properly empowered, whether he

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was one acting under a defective or imperfective power but not entitled at all to present it. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

———**S. 23-A**—*Re registration—Objection to, on the ground of its being out of time—Presumption.*

The presumption of law is that all official acts are properly performed. It is for the Registrar before whom the re-presentation was made under S. 23 A of the Registration Act to satisfy himself that the representation was made within the proper time and if he proceeded to register the document the presumption is that he was so satisfied. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

———**S. 23 A**—*Scope—Document registered as will—Will found invalid, but document good as power to adopt—Re-registration as power—Permissibility.*

All that the section requires before it can be applied is that the document which was erroneously registered when it was accepted for registration by the registration officer should be one requiring registration. There is no further condition in the section that the former presentation must have been made on the footing of the correct description of the document and the section is inapplicable if the former presentation was made on the basis of an incorrect description of it. The section does not say "a document requiring registration and presented for registration under its correct description." So where a document was originally registered a will, but as a will it was found to be invalid and valid only as a power to adopt, re-registration of the document as a power can be sought under S. 23 A notwithstanding the fact that it was originally presented for registration only as a will. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M.W.N. 1148.**

———**S. 23 A**—*Scope—Validity of registration disputed in suit—Appellate Court holding registration invalid—Period of four months—Starting point.*

The object of S. 23 A of the Registration Act is to enable parties to get technical defects cured and removed, and when a document is re-registered under the section, it takes effect from the date of the prior registration; and evidence of such re-registration can be produced in appeal or second appeal. When the validity of the registration is disputed in a suit, but the registration is held to be invalid only on appeal, the period of four months starts only from the date of the appellate decree, and if it is re registered within four months from that date, it is valid. (*Bhide, J.*) SAWAN SINGH *v.* HAWLI SHAH SARDARI LAL. **152 I.C. 611=7 R.L. 299—A.I.R. 1935 Lah. 32.**

———**S. 28**—*Fictitious property included in deed to give jurisdiction—Validity of registration.*

The inclusion of fictitious property in the deed for the purpose of giving jurisdiction to the Sub Registrar is a fraud on the registry and the effect is that there is no proper registration. There is no material difference on principle between the inclusion of a property not intended to pass by a deed and a property to which the vendor has no title. (*Wort and Fazl Ali, JJ.*) JAGDEO SAHU *v.* MAHABIR PRASAD. **153 I.C. 602=13 Pat. 111=15 Pat.L.T. 73=A.I.R. 1934 Pat. 127.**

———**S. 28**—*Fraud on Registration law.*

The word "fictitious" used in 41 Cal. 972 (P.C.) is not confined to non-existing properties. It is satisfied if the deed does not "relate" to a specified property for any effective purpose of enjoyment or use. An insignificant item of property included in the sale-deed was of no value, both in respect of the interest taken in it and in respect of its complete inaccessibility; it was incapable either of being utilized or enjoyed by the purchaser; the vendor refused to include in the sale any property to which these disadvantages did not attach in the place where registration was effected.

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Held, that one of two inferences alone was possible, either that it was never intended by either party that the item should, for any purpose other then that of registration, be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchaser. The so-called sale was a mere device to evade the Registration Act. 52 All. 793, Reversed. (*Lord Blanesburgh.*) COLLECTOR OF GORAKHPUR *v.* RAM SUNDAR MAL. **61 I.A. 286=56 All. 468=40 L.W. 217=38 C.W.N. 1101=15 P.L.T. 531=60 C.L.J. 67=36 Bom L.R. 867=1934 M.W.N. 751=7 R.P.C. 1=150 I.C. 545=11 O.W.N. 889=4 A.W.R. 46=1934 A.L.J. 779=A.I.R. 1934 P.C. 157=67 M.L.J. 274 (P.C.).**

———**S. 28**—*Fraud on Registration law—Burden of proof—Test.*

As in the case of every other kind of fraud, a party who sets up in defence the plea of fraud on the Registration Law is bound to make it out by clear and cogent evidence. There should be the strongest evidence of collusion between the transferor and the transferee, before the latter can be deprived of the benefit of the transfer by reason of its registration being invalid, because a small item of property not belonging to the transferor is included in it. A mere failure to make out a good title to the property dealt with will not amount to fraud so as to invalidate the instrument. The real question is whether it was intended or not that the document should take effect as regards the particular item. The fact that it is a fictitious item may be evidence of fraud. But when the item does exist, the transaction cannot be invalidated merely because the party has not adduced satisfactory evidence of his title. (*Venkatasubba Rao, J.*) VENKATASASTRULU *v.* VEERABHADRUDU. **154 I.C. 572=7 R.M. 446=1934 M.W.N. 1082=40 L.W. 749=A.I.R. 1935 Mad. 26.**

———**S. 28**—*Fraud on Registration law—Inclusion of item not intended to be conveyed—Right of executant to avoid deed.*

As a general rule plaintiff cannot plead his own fraud or illegal act as basis of his claim or as a necessary step towards the success of his claim. His position in the matter is not made better the showing that the defendant has joined him in the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit even the hearing of an appeal. The parties include a particular item of property in a sale not belonging to the vendor and not intended by any of the parties to the deed to pass to the vendee simply with a view to get the deed registered in the particular Office of a Sub-Registrar. Both the vendor and the vendee joined in the fraud. It was who found that the fraud was effected and the vendor got his money and the vendee put him in possession. A suit was brought for recovery of certain items covered by the sale-deed on the ground that the document was not validly registered and could be ignored.

Held, that the plaintiff being himself a party to the fraud on the Registration Department could not be allowed to plead or take advantage of any illegality in the registration of the deed. (*Reilly and Anantakrishna Ayyar, JJ.*) VENKATASWAMI *v.* VENKATASUBBAYYA. **55 Mad 507=I.R. 1932 Mad. 689=139 I.C. 404=1932 M.W.N. 226=35 L.W. 294=A.I.R. 1932 Mad. 311=63 M.L.J. 77.**

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———**S. 28**—*Fraud on Registration law—Inclution of item when fraudulent—Intention—Evidence as to—Admissibility.*

The inclusion of an item of property of small value in a mortgage deed mainly with the object of getting it registered in the place where that property is situated, the bulk of the property being situate elsewhere, is not sufficient to invalidate the registration as being a fraud on the Registration law. The question really depends on the intention of the properties to transfer or not to transfer that particular item. The question of intention is one of fact, and in the absence of any pleading on the point, evidence of intention cannot be gone into by the Court, because no amount of evidence can be looked into upon a plea which was not put forward. (*Subhedar and Pollock, A.J.Cs.*) GOPAL PRASAD TIWARI *v.* THAKUR DEEN DAYAL SINGH. **163 I.C. 961=9 R.N. 18 =18 N.L.J. 291.**

———**S. 28**—*Fraud on Registration law—Inclusion of property to which mortgagor had no title—Collusion of mortgagee necessary—Onus.*

The fact that an item of property not belonging to the mortgagor has been included in the mortgage will not render the registration invalid unless such inclusion was made with a view to commit a fraud on the registration laws and the mortgagees were parties to the fraud. If the properties were non existent, its inclusion would invalidate the mortgage, but where it is existent, should be strong evidence of the mortgagee's collusion. The onus of proving such collusion is on those who attack the validity of the registration. (*Beasley, C.J. and Curgenven, J.*) RAMANATHAN CHETTI *v.* DELHI BATCHA TEVAR. **I.R. 1931 Mad. 600=131 I C 840 =33 L.W. 727=A.I.R. 1931 Mad. 335=60 M.L.J. 302.**

———**S. 28**—*Fraud on Registration law*—Onus.

The burden of proving that there has been a fraud on the law of registration is on the party setting it up. (*Wallace and Bardswell, JJ.*) SRI RAJA SOBHANADRI APPARAO BAHADUR GARU *v.* VENKOBA RAMA RAO. **54 Mad. 352=I.R. 1931 Mad. 245=129 I.C. 245= 32 L.W. 680=1930 M.W.N. 1067=A.I.R. 1931 Mad. 45=60 M.L.J. 701**

———**S. 28**—*Fraud on the Registration law—What constitutes—Inclusion of a small item of property to enable registration at a particular place.*

In order to establish fraud, there must be a collusion between parties to practice a fraud upon the register ing officer. As a test of such an intention, it has to be considered whether there was a property that could be conveyed by the executant or as to which a genuine belief existed that he could convey it. Another point that may be considered is whether there was any intention on the part of the parties that it should be conveyed to the executee. The facts that the property is small or that the primary intention was that registration should be in a particular office will not in themselves constitute acts of fraud. When the contention is raised that the inclusion in a registrable document of a particular piece of property was merely for the purpose of giving jurisdiction to the Registrar, the true test whether S. 28 has not been complied with, will be, in cases where the parties intend the document to be a deed of real transfer, did they collude in intending that that piece of property should not pass. 43 M. 436; 1920 M.W.N. 487; 11 A. 36; 48 C. 509 (P.C.); 43 M. 405; 41 C. 972 (P.C.); 46 M. 435; 4 Pat. 394; 46 A. 754, Ref. (*Wallace and Bardswell, JJ.*) SRI RAJA SOBHANADRI APPARAO BAHADUR GARU *v.* VENKOBA RAMA RAO. **54 Mad. 352=I.R. 1931 Mad. 245=129 I.C. 245=32 L.W. 680=1930 M.W. N. 1067=A.I.R. 1931 Mad. 45=60 M.L.J. 701.**

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———**S. 28**—*Scope—Fraud on registration—What is —Unwarranted inclusion of property—When invalidates registration—Onus.*

Where property which does not in fact exist at all is included in a deed to enable registration being effected in a particular place, it is a fictitious inclusion and the registration is invalid, so also where property which exists but to which the grantor has no title is included in the deed, but neither party to the deed intends to include it as a fact as a subject-matter of the deed, the registration is invalid, as the inclusion is made only with a view to effect registration in the particular place fraudulently. But where existing property which is not proved to belong to the grantor is included, and the grantee *bona fide* believes that it belongs to the grantor, the registration is not invalid, and the burden is on the party challenging the validity to prove that the inclusion of the property was intended to be fictitious by both the parties. In the absence of proof that the grantee was aware of the want of title of the grantor or that the grantee colluded with the grantor in committing a fraud on the registration office, registration would not be fraudulent or invalid. (*Murphy Divatia, JJ.*) CHHOTABHAI *v.* DADABHAI. **152 I.C. 715=7 R.B. 166=36 Bom L.R 738=A.I.R. 1935 Bom. 54.**

———**S. 30**—*Sub-Registrar acting under—Failure to state the same—Irregularity.*

A conveyance dealt with several plots of land some of which were described to be within the local limits of the jurisdiction of Sub-Registrar and the others within the local limits of the Sadar Sub-Registrar both of whom were subordinate to same Registrar. The office of the Sub-Registrar was amalgamated with that of the Registrar and the conveyance was registered with the Registrar, and the Registrar did not state that he was acting as Registrar pursuant to discretion under S. 30. It was found subsequently that the plots of land described to be within the local limits of the jurisdiction of the Sub Registrar had no existence.

Held, that having regard to S. 87 the fact that the Registrar did not state that he was acting as Registrar pursuant to discrecton under S. 30 did not make the registration invalid and ineffective. 18 Cal. 556, Foll., 3 C.L.J. 165, Ref. (*Rankin, C.J. and C. C. Ghose, J.*) NILABJABARANI DAS *v.* NANDARANI DASI. **58 Cal. 133=I R. 1931 Cal. 638=133 I.C. 110=A.I.R. 1931 Cal. 478.**

———**S. 32**—*Death of executant—Presentation by some of his representatives—Registration, if valid.*

The registration of a document presented by some of the representatives of an executant, who is dead at the time of the presentation of the document is good registration. Even assuming the procedure adopted is defective such a defect is curable by S. 87. (*C. C. Ghose and Pearson, JJ.*) GAYESHALI SARKAR *v.* CHINTAHARAN CHANDA. **58 Cal. 876=I R. 1931 Cal. 655=133 I.C. 191=A.I.R. 1932 Cal. 110.**

———**S. 32**—*Endorsement showing invalid presentation—Proof of real facts.*

Even if the endorsement by a Sub-Registrar on a mortgage-deed as regards presentation purports to show an invalid presentation there is nothing in the Act to prevent a person from showing that the endorsement made by the Sub-Registrar was inaccurate and proving the real facts. (*Lord Atkin.*) OFFICIAL RECEIVER *v.* P.L.K.M.R.M. CHETTYAR FIRM **58 I.A. 115=9 Rang. 170=53 C.L.J. 373=1931 A.L J. 444=I R. 1931 P.C. 159=131 I.C. 767=33 Bom.L.R. 867=**

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34 L.W. 36=1931 M W N. 615=35 C.W.N. 577=A.I.R. 1931 P.C. 75=60 M L.J. 652 (P.C.).

———**S. 32**—*Invalid power to present—Estoppel.*

When a deed is not properly registered having been presented for registration by an agent not duly authorised, the executants cannot be estopped from urging its invalidity because there can be no estoppel against the statute. (*Sir Lancelot Sanderson*) DOTTIE KARAN *v.* LACHMI PRASAD SINHA. **10 Pat. 481=58 I A. 58=I.R 1931 P.C. 97=131 I.C. 321=8 O W.N. 548=33 L.W. 596=14 O.L J 403=12 Pat. L.T. 543=1931=A L J. 489=33 Bom.L R. 434=35 C.W.N. 354=1931 M.W N. 241=53 C L J. 198=A I.R. 1931 P.C. 52=60 M.L J. 441 (P.C.)**

———**S. 32**—Minor claiming under document—Presentation for registration, valid. *See* REGISTRATION ACT, SS. 73 (1) AND 32. **A.I.R. 1933 Mad. 407=64 M.L.J. 449.**

———**Ss. 32 and 33**—*Mortgage deed presented by agent not duly authorised—Validity of.*

Ss. 32 and 33, Registration Act, relating to the presentation of documents for registration are imperative, and their provisions must be strictly followed; and where the agent who presented a mortgage deed for registration has not been authorized in the manner prescribed by the Act, the deed is invalid and cannot affect the immovable property to which it relates A I. R. 1914 P.C. 16, Rel. on. (*Niamatullah and Bennet, JJ.*) RAM MOHAN LAL *v.* TASADDUQ HUSAIN. **6 I. R. (All.) 121=145 I C. 572=1933 A.L.J. 159=A.I. R. 1933 All. 233.**

———**S. 32**—*Presentation for registration — Real owner alleging sale to be benami—Suit under S. 77.*

Where a suit was instituted by a person under S. 77 of the Registration Act on the footing that the defendant was a benamidar for him in respect of a sale-deed,

Held, that the plaintiff claiming to be the ostensible owner was not a representative of the alleged benamidar, that he would not present the sale-deed for registration and that a suit under S. 77 could not be maintained by him. (*Guha and Ghose, JJ.*) SELAMATULLA CHAUDHURI *v.* AKTAR-ER NESSA. **58 Cal 681=I.R. 1931 Cal. 719=133 I.C. 591=A I.R. 1931 Cal. 664.**

———**S. 32**—*Registration by officer—Presumption of validity.*

The fact that the Sub-Registrar accepted a document from the executant and duly registered it, is *prima facie* proof that the executant was not in an intoxicated condition when he presented it for registration. 33 Cal. 537 (P.C), Rel. on. (*Rupchand and Milne, A.J Cs*) KOTUMAL MOHANDAS *v.* DUR MAHOMED. **I.R 1932 Sind 45=136 I.C. 525=A.I.R. 1931 Sind 78.**

———**S. 32**—*Security bond filed in Court—By whom to be presented.*

Where, in a security bond filed in Court, no person is named as the obligee, the bond is given to the Judge of the Court and therefore if not presented by the obligors, ought to be presented by the Judge or by a person holding a duly authenticated power-of-attorney from him. (*Mackney, J.*) DAW MIN BAW *v.* A.V.P.L.N CHETTYAR FIRM. **155 I.C. 511=7 R.R. 347=A.I.R 1935 Rang 39.**

———**S. 32**—*Special power to present documents for registration—Power containing material alterations—Validity of presentation.*

A mortgage-deed, dated 4-10-1910, was presented for registration and registered by a person who produced a power-of attorney, dated 9-2-1910 for purposes of presentation which stated that the executants authorised him to present the deed which they had already executed

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on 8 2-1910 which was subsequently changed to 4-10-1910.

Held, that the date of deed in the power-of-attorney was obviously altered and that the registration of the mortgage of the 4th October, 1910, was not effected in accordance with the provisions of the Registration Act. (*Sir Lancelot Sanderson.*) DOTTIE KARAN *v.* LACHMI PRASAD SINHA. **58 I.A. 58=10 Pat. 481=I.R. 1931 P.C. 97=131 I C 321=8 O.W N. 548=1931 A.L J. 489=33 L.W. 596=14 O L J. 403=12 Pat.L.T 543=33 Bom L R. 434=35 C.W.N. 354=1931 M.W.N. 241=53 C L.J. 198=A.I.R. 1931 P C. 52=60 M.L.J. 441 (P.C.).**

———**S. 32**—*Strict compliance necessary.*

The provisions of S. 32 regarding presentation of the documents for registration by the party himself or his representatives or assign must be strictly followed. 37 All. 49 (P.C.), Relied on. (*Shadi Lal, C. J. and Hilton, J.*) DIWAN SINGH *v.* GURBACHAN SINGH. **I R. 1932 Lah. 289=137 I.C. 41=33 P.L.R. 227=A I.R. 1932 Lah. 276.**

———**S 32 (a)**—*Presentation by executant—Physical act if necessary.*

After a deed was executed, the Sub Registrar went to the place, where the parties lived to register it, but the document required certain amendments and so he gave instructions and returned. Subsequently the Counsel for the parties presented the document to the Sub Registrar at his headquarters He endorsed it as having been presented by the Counsel for being registered on the spot and returned the deed to the Counsel who handed it back to one of the parties. A few days later the Sub-Registrar went to the place where the parties were and the deed was again presented by one of the executants and he thereupon had the document registered.

Held, that the document must be held to have been presented on the later date at the spot where the parties lived, that the validity of the presentation could not be questioned.

Semble. Even if the lady did not personally hand the paper to the Sub-Registrar, the presentation was by her. It is immaterial by whom the principal act was performed (*Shadi Lal, C. J. and Coldstream, J.*) BARKURDAR SHAH *v.* MT. SAT BHARAI. **I.R 1931 Lah. 705 (2)=132 I.C 881(2)=A.I R. 1931 Lah. 677.**

———**S. 32 (b)**—*'Representative.*

The word 'representative' includes the case of one of several representatives. Where a document is presented for registration by one of such representatives, it is a valid presentation within the meaning of S. 32 (*b*). (*Mitter, J.*) ABDUL GAFUR BHUIYA *v.* BADIAL HAQUE. **I.R. 1932 Cal. 585=139 I.C. 234=55 C.L J. 107=A.I.R. 1932 Cal. 588.**

———**S 33**—*Court—Sadar Registrar.*

The Sadar Registrar of Rumpur state is not a Court or Judge within the meaning of S. 33. 15 All. 141 and A.I.R. 1924 All. 265, Rel. on. (*Niamattullah and Bennet, JJ.*) RAM MOHAN LAL *v* TASADDUQ HUSAIN **6 I.R (All) 121=145 I.C. 572=1932 A.L.J. 159=A. I.R. 1933 All 233.**

———**S. 33**—Death of executant—Presentation by some of his representatives—Registration valid—Defect curable by S. 87. *See* REGISTRATION ACT, S. 87. **58 Cal. 876.**

———**S. 33 (1)**—*Document registered under proof by private copy.*

Where a power of attorney was executed before and authenticated by the Sub-Registrar under S. 33 (1) of the Registration Act and he did not keep a copy of the original.

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Held, that it was open to a party to prove the document by a private copy and that S. 74 (2) of the Evidence Act was not applicable to such a case. (*Sulaiman, A.C. J. and Bajpai, J.*) BISHEN SARUP *v.* ABDUL SAMAD. **136 I.C. 273 = I.R 1932 A. 161 = 1931 A.L.J. 666 = A.I.R. 1931 All. 649.**

———**S. 33 (1) (c)**—*Powers of attorney outside British India—Authentication of.*

The proviso to S. 33 and the sub-Ss. (2) and (3) apply only to cases mentioned in cls. (*a*) and (*b*) of that section which deal with power of attorney to be executed and authenticated in British India, and do not apply to Cl.(*c*) which provides for the manner in which powers of attorney are to be authenticated in a place outside British India. In such cases, the power of attorney must be executed before and authenticated by the officers named in S. 33 (*c*) personally and execution and authentication before a commissioner is not a sufficient compliance with that section. (*Niamatullah and Bennet, JJ.*) RAM MOHAM LAL *v.* TASADDUQ HUSAIN. **6 I.R. (All.) 121 = 145 I.C. 572 = 1933 A.L.J. 159 = A.I.R. 1933 All. 233.**

———**S. 34**—Construction—No allegation of necessity or accident—No question of discretion of Registrar—Section subject to S. 77. *See* REGISTRATION ACT, S. 77. **1933 M.W.N. 1373.**

———**S. 34**—Document presented by one of mortgagees—Registrar registering it in absence of executant—Validity of registration. *See* REGISTRATION ACT, S. 87. **A.I.R 1935 Lah 416.**

———**S 34**—*Duty of Registrar and of identifying witnesses under—Signatures of—If constitute attestation of execution.*

It is true that the registering officer has imposed on him by S. 34 of the Act, the duty of satisfying himself whether execution was admitted by the person purporting to execute the document, but it is no part of his duty to attest the signature of the executant; the enquiry held by him relates to the execution and to the identity of the executant and not to attestation. So also the only duty imposed on the identifying witnesses is to identify the person who executes the document. No duty is imposed on them to attest the signature of that person as executing the document, and they are not called before the Registrar for that purpose. (*Blackwell, J.*) HARKISANDAS *v.* DWARKADAS. **161 I.C. 374 = 8 R. B. 342 = 37 Bom. L.R. 913 = A.I.R. 1936 Bom. 94.**

———**S. 34**—*Enquiry by Registrar—Scope of—Execution admitted but alleged to have been made under misapprehension—No power to Registrar to refuse registration.*

The scheme of the Act is that the Registrar should not go into questions as to whether the parties understood the nature of the document or meant it to be something else than what it is. The only question which he has to decide under S. 34 is whether it bears the genuine signature of the alleged executant. If the executant admits his signature but says that he put his signature under a misapprehension as to the contents of the document, the Registrar is not entitled to refuse execution. Execution, if admitted as a matter of fact, is good for registration, though it may be invalid for enforcing the document. (*Sundaram Chetty and Pakenham Walsh, JJ.*) RAMASWAMI CHETTIAR *v.* SRINIVASA PILLAI. **148 I.C. 94 = 6 R.M. 440 = 38 L.W. 1000 = 1933 M.W.N. 1373 = A I.R. 1934 Mad. 113 = 66 M. L.J. 424.**

———**Ss. 34 and 35**—*One of executants of sale deed not present at registration—Effect of—Doctrine of part-performance.*

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A sale deed was presented for registration by one of the vendees. On that date all the vendors except *K* were present. The Sub-Registrar registered the document, noting in the endorsement that *K* was absent and that the deed was being registered on behalf of the other executants. Presence of *K* was not secured; possession of the land was taken by the vendees;

Held, that the appearance of *K* before the Sub Registrar should have been secured and the deed registered after hearing him. As this was not done, the registration was not valid *quod* his share.

Held, further, that as the sale deed was actually given effect to by all the vendors including *K*, the doctrine of "part performance" clearly applied to the case and the plaintiff was entitled to retain possession of the whole land. (*Tek Chand and Aga Haidar, JJ.*) KAURA Ram *v.* CHAMAN LAL. **154 I.C. 1088 - 7 R. L. 637 - A.I.R 1934 Lah. 751.**

———**S. 35**—*Admission of execution—What amounts to.*

For purposes of the Registration Act, execution means signing or affixing a mark. Where the executants admitted to the Registrar that they had marked the document but added that their marks had been obtained by fraud, it is nevertheless a sufficient admission of execution on the basis of which the Registering Officer is competent to register the document. (*Macnair, O J C.*) RINDU *v.* VITHOBA. **27 N.L.R. 116 = I R. 1931 Nag. 158 = 134 I C. 286 = A.I.R. 1931 Nag. 159**

——— **S. 35**—Death of executant—Presentation by some of his representatives—Registration valid—Defect Curable by S. 87. *See* REGISTRATION ACT, S. 87. **58 Cal. 876.**

———**S. 35 (1) (a)**—*Death of executant—Transfer of mortgage—Death of transferor—Presentation by transferee—Document, if registrable.*

Where a person is accepted by the Registration Officer as the representative of a deceased person though in fact he may not be legally entitled to represent the deceased and the document is registered, this constitutes merely an error in procedure on the part of the Registering Officer and does not invalidate the registration. (*Butler, J.*) ARUNACHALA MUDALI *v.* VENKATACHALA PILLAI. **149 I C 1174 = 6 R.M. 670 = 1934 M W N. 624 = 39 L.W. 715 = A.I R. 1934 Mad. 425 - 66 M.L.J. 677.**

———**S. 35 (1) (c)**—*Death of executant—Admission of all legal representatives necessary for registration.*

The effect of Ss. 35 and 58 to.61 is that if the person executing the document is dead, the Sub-Registrar should have before him the admission of all the legal representatives of the deceased person as regards execution before he can proceed to register it. And his registering the document on the admission of only some of them is not proper registration. (*Niamatullah and Bennet, JJ.*) ABDUL AZIZ KHAN *v.* KANIZ FATIMA. **6 I R. (All.) 165 = 145 I.C. 754 = 1933 A.L J. 318 = A.I.R. 1933 All. 302.**

———**S. 40 (2)**—"*Adoptive son*"—*Person intended to be adopted.*

Per *Ramesam, J.*—"I doubt if a person intended to be adopted but not actually adopted will come under the phrase" 'adoptive son'. (*Ramesam and Cornish, JJ.*) SUDARSANA RAO *v.* SEETHARAMAMMA. **1933 M. W.N. 1148.**

———**S 47**—*Attachment between execution and registration of mortgage—Effect of.*

Registration is a necessary solemnity for the enforcement of a mortgage of immovable property but it does not suspend the mortgage until registration actually takes place. So where subsequent to the execution of a mortgage and prior to its registration, the property is

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attached, the attachment does not affect the mortgage lien. 54 I.A. 89, Rel. (Case-law ref.) (*Mukerji and Guha, JJ.*) NABADWIP CHANDRA DAS *v.* LOKE NATH ROY. **142 I.C. 452=I.R 1933 Cal. 293=59 Cal. 1176=36 C.W.N. 733=A.I.R. 1933 Cal. 212.**

——**S. 47**—*Operation of—Transferor losing interest in property after execution and before registration.*

It is nowhere laid down that a person who has executed a document requiring registration renders registration of the document impossible by his being deprived of transferable interest in the property involved subsequent to the execution of the deed and before its registration. Registration, in such circumstances, does take effect so as to bring S. 47, Registration Act, into operation. (*Mya Bu and Mackney, JJ.*) C.A.C.A.R. CHETTYAR FIRM *v.* U MAUNG MAUNG. **A.I.R. 1935 Rang. 133.**

——**Ss. 47 and 49**—*Priority—Sale-deed executed before, but registered after, another.*

A sale deed dated 29 12-1920 was executed in favour of *A* but it was registered only on 13-5-1921. On 6 1-1921, the vendor executed and registered a sale-deed of the same properties in favour of *B*.

Held, that once the sale-deed in favour of *A* was registered on 13-5 1921, S. 49 had no application and by virtue of S. 47 the deed began to operate from 29-11-1920 and was therefore entitled to priority. (*Niamatullah and Bennet, JJ.*) RAM NARAIN CHAUBE *v.* BASDEO MISRA. **6 I.R. (All.) 268 (1)=146 I.C. 159=1933 A.L.J. 1200=A.I.R. 1934 All. 70.**

——**S. 47**—*Sale-deed—Effect of registration—If title passes.*

The question as to when title passes on a sale to the vendee depends on the intention of the parties. If it is intended between the parties that the title should not pass until payment of the consideration money, registration alone is insufficient to pass the title without such payment. (*Agarwala, J.*) ABDULLAH KHALIFA *v.* BHICHUK GOSAIN. **6 R.P. 374=147 I.C. 767=A.I.R. 1934 Pat. 68.**

——**S. 47 and T. P. Act, S 54**—Sale-deed—Validity before registration. *See* T. P. ACT, S. 54 AND REGISTRATION ACT, S 47. **7 R.M. 166=A.I.R. 1934 Mad 637(2)=67 M.L.J. 380.**

——**S. 47**—*Scope and effect—If can cure defect in attestation.*

S. 47 obviously contemplates that any document presented for registration shall be complete and valid in law before presentation for registration. It has nothing to do with the attestation of the document and a document not validly attested cannot be validated by reason of its registration by the Registering Officer. (*Blackwell, J.*) HARKISANDAS *v.* DWARKADAS. **161 I.C. 374=8 R.B. 342=37 Bom.L.R. 913=A I.R. 1936 Bom. 94.**

——**S. 48**—*Priority—Earlier oral charge—Subsequent registered mortgage.*

A subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgage has no notice. (*Tyabji and Wadia, JJ.*) CHHAGANLAL SAKHARAM *v.* CHUNILAL. **152 I.C. 267=7 R B. 133=36 Bom. L.R. 277=A.I.R 1934 Bom. 189.**

——**S. 48**—*Priority—Oral sale to mortgagee in possession—Subsequent registered sale—Transfer.*

An oral sale to a mortgagee who is already in possession of the land prevails over a subsequent registered sale, especially where the vendee under the latter sale has notice of the former sale. (*Bhide, J.*) IMAM SHAH *v.* HAYAT MOHAMMAD. **A.I.R. 1935 Lah. 164 (2).**

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——**S. 49**—

Acknowledgment.
Agreement to sell.
Applicability.
Assignment.
Award.
Charge.
Collateral purpose.
Compromise.
Gift.
Law applicable.
Lease.
Mortgage.
Movables and immovables.
Partition.
Plea of non-registration.
Receipt.
Relinquishment.
Sale.
Scope.
Surety bond.
Unregistered document.

Acknowledgment.

——**S. 49**—*Acknowledgment contained in letter to third party—Admissibility without registration.*

An acknowledgment contained in a communication addressed to a third party does not require registration. (*Viscount Dunedin.*) BAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI. **59 I A. 130=11 Pat. 272=136 I.C. 798=I.R. 1932 P C 142=36 C.W.N. 250=35 L W 217=34 Bom.L R. 463=1932 A.L J. 186=1932 M W.N. 660=55 C.L J 136=13 Pat.L.T. 279=9 O.W.N. 43=A I R. 1932 P.C 55=62 M.L.J. 296 (P.C.).**

[F. 12 P. 147 (152).]

——**S 49**—*Acknowledgment—Deed inadmissible—Suit on acknowledgment contained therein—Maintainability.*

A suit lies on an unconditional acknowledgment as it implies a promise to pay. Where the deed cannot be registered owing to some legal objection, the document can be used as the basis of a claim for return of the money acknowledged to be due therein and it is not necessary to base the claims on the original dealings which may however afford very good evidence in the case if the claim is contested on the merits. (*Addison, J.*) BARU MAL *v.* DAULAT RAM. **I.R. 1932 Lah. 299 (1)=137 I.C. 155=33 P.L.R. 517 (2)=A.I.R. 1932 Lah 400.**

——**S. 49**—*Acknowledgment—Execution of fresh mortgage—Recital as to prior mortgage—Second deed not registered—Reference to prove acknowledgment.*

Where before the expiry of the period of limitation the mortgagors executed a document described as a mortgage deed in favour of the mortgagee in which they acknowledged an earlier mortgage in respect of the property and the document was signed by the mortgagors but not registered.

Held, that the document was admissible in evidence for proving an acknowledgment of the pre-existing debt. (*Tek Chand, J.*) KARAM SINGH *v.* MT. MAYA WANTI. **I R. 1932 Lah. 710=140 I. C. 387=A.I.R. 1932 Lah. 592.**

Agreement to sell.

——**Ss. 49 and S. 17 (2) (v)**—Agreement to sell—Admissibility without registration—Suit for specific performance. *See* REGISTRATION ACT, SS. 17 (2) (*v*) AND 49. **13 Pat. 620=A.I.R. 1934 Pat. 495.**

——**S. 49**—Agreement to sell earth and sand—Unregistered—Reference to prove terms of covenant. *See* REGISTRATION ACT, S. 17 (1) (*b*) AND (*d*)—

REGISTRATION ACT (1908), S. 49.

AGREEMENT. **A.I.R. 1932 Mad. 734=63 M.L.J. 587.**

———**S. 49**—*Agreement to sell—Unregistered—Personal claim for damages—Admissibility for the purpose of.*

There is nothing in S. 49 when properly construed to compel the Court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immovable property comprised in such document. An agreement for sale of immovable property recited the payment of earnest money and provided that the balance of the purchase-money should be secured by an equitable mortgage of the said property, *i.e.*, by the purchaser depositing the title deeds with the vendor. The purchaser having refused to complete the sale, the property was sold, and the vendor sought to prove in the winding up of the purchaser company for damages for breach of contract.

Held, that the non-registration of the agreement did not preclude the vendor, under S. 49 of the Registration Act, from putting forward a personal claim for damages under the agreement. (*Lord Tomlin.*) OFFICIAL LIQUIDATOR OF MOOLLA SONS, LTD. *v.* PERRIN R. BURJORJEE. **59 I.A. 161=10 Rang 242=34 Bom. L.R. 1021=1932 A.L.J. 706=1932 M.W.N. 680=36 L.W. 75=9 O.W.N. 930=I R 1932 P C. 151=55 C.L.J. 362=36 C.W.N. 677=136 I.C. 737=A.I.R. 1932 P.C. 118=63 M.L J. 131 (P.C).**

———**S. 49**—*Agreement to sell—Unregistered—Receipt clause—Admissibility.*

An agreement for sale is a contract for sale merely and not a conveyance; and it does not come within the mischief of S 49 by reason of the fact that there is a receipt clause contained in the document. (*Wort, J.*) BRAHAMDEO SAO *v.* HARO SINGH. **157 I.C. 327=8 R.P. 117=A.I R. 1935 Pat. 237.**

Applicability.

———**S. 49**—*Applicability—Contest between executants of unregistered deed and third party.*

There is no warrant whatever for the proposition that the provisions of Ss. 17 and 49 of the Registration Act are inapplicable where the contest is not between the executants of an unregistered deed *inter se* but is between them and a third party (*Tek Chand and Agha Haidar, JJ.*) KORA MAL GUR DIAL *v.* FAZAL ALI. **153 I.C. 813=7 R.L 462=36 P.L.R. 25=A.I.R. 1934 Lah. 759.**

———**S. 49**—*Applicability—Delay in presentation—Jurisdiction to register.*

Where a document is presented for registration after four months from date of execution, and the delay is not accounted for, the Registrar has no jurisdiction to register it. Presentation by the wrong person and presentation at the wrong time stand in the same footing. In either event, the Registrar has no jurisdiction to register the document and the fact that he has registered the document will not take that document out of the ambit of S. 49. (*Page, C. J. and Mya Bu, J.*) U. AUNG DIN *v.* MAUNG AUNG MYINT. **11 Rang. 207=147 I C. 287=6 R.R. 157=A.I.R. 1933 Rang. 194.**

———**S. 49 (a) and (c)**—*Applicability—Writing not necessary—Proof of transaction apart from unregistered document.*

Cls. (*a*) and (*c*) of S. 49 have reference to the fact that certain kinds of transfer of immovable property can only be effected by written instruments (*e.g.*, sale, mortgage other than mortgage by deposit, lease, gift); whereas in other cases (*e.g.*, partition, surrender, release), the transaction is not required to be in writing, but if it is in writing, the instrument is required to be registered. Cl. (*a*), deals with the former case, cl. (*c*) with the latter. In either case, the circumstance which subjects the instrument to the requirement of registration is that it purports or operates to create, declare, assign, limit or extinguish a right, title or interest to or in the immovable property. It is this which makes the registration necessary and if not be registered it is in this that the instrument is to fail of its effect. The right, title or interest is, as a consequence not created, declared, assigned, limited or extinguished, even although no written instrument was necessary. Unless there has been a transaction independent of the written instrument and capable of proof without the evidence thereof, the right, title and interest in question has not been declared, created, assigned, limited or extinguished. The Registration Act cannot be defeated by a contention to the effect that as no written instrument was necessary, the transaction itself is independent of the written instrument which can be regarded simply as evidence thereof. Cl. (*c*) makes the instrument inadmissible as evidence of the transaction. (*Rankin, C.J. and C.C. Ghose, J.*) IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK LTD. **58 Cal. 136=34 C.W. N. 605=131 I.C. 689=53 C.L J. 269=A.I R. 1931 Cal. 223.**

Assignment.

———**S. 49**—*Assignment—Partnership—Dissolution of—Unregistered assignment of interest by partner—Indivisibility of agreement—Clause relating to payment of debt—Enforcement of—Admissibility of agreement for purpose of.*

On the dissolution of the partnership, the plaintiff and the defendant executed an agreement by which each of them assigned his interest in the partnership property mutually in favour of the other. By the same agreement, the defendant also undertook to pay a debt due from one of the firms to the other. The agreement was not registered and in a suit by the plaintiff to realise the debt, it was held that the agreement, in so far as it affected immovable property of more than Rs. 100 in value, was without registration inadmissible in evidence. If there are two distinct provisions in a contract, the one relating to rights in immoveable property and the other to the payment of money, proof of the latter provision can be given though the document is not registered. But in this case, the various terms were so inextricably mixed up that it can only be regarded as a single and indivisible transaction. No part of the agreement is admissible in evidence for the enforcement of any of its terms. (Case law referred to.) (*Curgenven and Cornish, JJ.*) SAMUVIER *v.* RAMASUBBIER. **55 Mad. 72=I R. 1931 Mad. 657=132 I.C 305=33 L.W. 576=A.I R. 1931 Mad. 580=60 M.L.J. 527.**

———**S. 49**—*Assignment—Unregistered assignment deed—Admissibility.*

An unregistered deed of assignment of the assignor's share in certain estates is not admissible in evidence and cannot be referred to for any purpose. (*Murphy and Sen, JJ.*) NEMTULLA *v.* SAFIABU. **156 I C. 779=8 R B. 30=37 Bom. L.R. 82=A.I.R. 1935 Bom. 208.**

Award.

———**S. 49**—*Award—Splitting of—Award inadmissible as regards immovable properties — Admissibility as regards moveables.*

Where part of an award is invalid as being in excess of the arbitrator's powers and is separable from the rest, the rest of the award can be maintained. But where the award partitioning the properties is, for want of registration, inadmissible in evidence as regards the immovable properties dealt with by it and it is obvious

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that the arbitrators had the relative values of the movables and immovables in making the partition and allowing for the differences, the award is indivisible and it cannot be admitted in evidence even so far as it relates to the movables only. (*Sulaiman, C. J. and Kisch, J.*) BACHCHAN LAL *v.* NAROTTAM DATT. **I. R. 1933 All. 253=143 I.C. 423=1932 A.L.J. 1090=A.I.R. 1933 All. 59.**

Charge.

——**S. 49**—*Charge—Bond creating charge—Distinct personal covenant—Enforceability.*

Where a bond purporting to create charge over immovable property is ineffective for want of registration still if there is a distinct personal covenant to pay in the bond, it can be enforced. (*Carr, J.*) MAUNG SAN BWIN *v.* MAUNG SHWE KIN. **I.R. 1931 Rang. 132=131 I.C. 500=A.I R. 1931 Rang. 65 (1).**

Collateral purpose.

——**S. 49**—*Collateral purpose—Agreement relating to immovable property—Non-registration—Admissibility on question of damages.*

A suit to recover damages for breach of an agreement relating to immovable property, which agreement is compulsorily registrable under S. 17, is a suit which affects immovable property and is not covered by the exception regarding its admissibility for a collateral purpose. A 'collateral purpose' means a purpose which excludes all reference to the contract relating to immovable property. (*Jai Lal, J.*) BAHAWAL *v.* AMRIK SINGH **142 I.C. 424—I R. 1933 Lah. 207—34 P.L. R. 354=A.I.R. 1932 Lah. 655**

——**S. 49**—*Collateral purpose—Document being inadmissible—Possession under document relied on.*

Where a Hindu widow executed a sub lease and the tenant continued in possession thereunder for more than 12 years and acquired a right of occupancy.

Held, that though the sub lease may be inadmissible in evidence because of the provisions of S. 85 (2) of the Bengal Tenancy Act which prohibit the registration of a sub-lease purporting to create a term exceeding 9 years, the tenant can rely on his possession thereunder in order to resist a suit for ejectment. (*Mukerji, J.*) ARJUN CHANDRA MANDAL *v.* TRAILAKYA MANI DASSI. **6 I.R. (Cal) 192=146 I.C. 246=37 C.W.N. 333=A.I.R. 1933 Cal. 610.**

——**Ss. 49 and 17**—*Collateral purpose—Mortgage of four properties—Subsequent agreement to exclude one property and reduce amount—Necessity for registration—Admissibility.*

The defendant executed a mortgage bond in 1921 by which the plaintiffs were to hand Rs. 1,25,000 to the defendant who offered to give as security a first mortgage on his four properties specified in the document. By a subsequent document, dated May, 1922, it was agreed that instead of four properties, three only of the properties were to be given as security and that the sum to be advanced by the plaintiff should be reduced to Rs. 1,00,000.

Held, that the subsequent agreement was admissible in evidence without registration not for the purpose of affecting any immovable property—but for a collateral purpose, *viz.*, to show that some substituted contract had been arrived at between the parties in May, 1922. 46 M. 349; 46 I.A. 285; 47 I.A. 188 and 31 B. 303, Foll. (*Baker and Nanavati, JJ.*) KESHAVLAL HARILAL *v.* PRATAPSING. **56 Bom. 101=I.R 1932 Bom. 293=137 I.C. 564 (2)=34 Bom.L.R. 167=A.I.R. 1932 Bom. 168.**

[Point considered irrelevant—Evidence rejected—Affirmed on other grounds. 62 I.A. 23=59 Bom. 180 (P.C.).

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——**S. 49**—*Collateral purpose—Sale of equity of redemption—Sale deed not registered—Undertaking by purchaser to pay the mortgage amount—Proof of—Permissibility.*

Where a sale-deed by which the purchaser purchased the mortgaged property from the widow of the mortgagor may be inadmissible in evidence as not having been registered, it can nevertheless be used for collateral purposes, *i.e.*, to show that he undertook thereby to retain a certain sum, part of the consideration for the sale and pay off the subsisting mortgage, in order to be entitled to be paid that amount before the reversioner is allowed to take possession of the property mortgaged. (*Wort and Fazl Ali, JJ.*) JAGDEO SAHU *v.* MAHABIR PRASAD. **13 Pat. 111=153 I C 602=7 R P. 357=15 Pat.L.T. 73=A.I R. 1934 Pat. 127.**

——**S. 49**—*Collateral purpose—Unregistered document—Admissibility for collateral purpose.*

Where a party is in possession of land, a document which is unregistered but which requires registration can be used for the collateral purpose of showing the nature of his possession. (*Addison and Din Mohammad, JJ.*) NAGAR SINGH *v.* BELA SINGH **160 I C. 895=8 R. L. 627=37 P.L R. 459=A.I.R. 1935 Lah. 955.**

——**S. 49**—*Collateral purpose—Unregistered document—Admissibility in evidence for collateral purpose—Nature of possession.*

A document which is inadmissible for the purpose of proving the transaction between the parties may yet be admissible for a collateral purpose such as for the purpose of explaining the nature of possession of the claim to the land. Where an unregistered *hukumnama* or *sanad* alleged to be granted in favour of the plaintiff's father was relied on for showing that the possession of the plaintiffs was on their own account and not jointly for themselves and the defendant,

Held, that the document was admissible in evidence for that purpose (*Agarwala, J.*) BHUSAN SUTRADHAR *v.* GUHIRAM SUTRADHAR. **6 I.R. (Pat.) 235 (2)=146 I C. 4.**

——**S. 49**—*Collateral purpose—Unregistered document—Admissibility to prove nature of possession.*

Unregistered documents can be used for determining the nature of the claimant's possession. (*Bhide and Din Mohammad, JJ.*) KARTAR SINGH *v.* MT. MEHR NISHAN. **16 Lah 313=155 I.C. 1064=7 R.L. 826=A.I.R. 1934 Lah. 885.**

——**S. 49** — *Collateral purpose — Unregistered kabuliyat.*

Though the unregistered kabuliyat may not be admissible to prove the tenancy itself, the recitals contained therein might nevertheless be referred to as explaining the nature and character of the possession of the property in question, by the tenants. 46 I.A. 285, Foll. (*Mukerji and Guha, JJ.*) J. C. GALSTAUN *v.* PROFULLA KUMAR DE. **141 I.C. 320=I R. 1933 Cal. 101=36 C.W.N. 583=A.I.R. 1932 Cal. 634.**

Compromise.

——**S. 49**—*Compromise of criminal case—Admissibility without registration.*

Proceedings under S. 145, Cr. P. Code, in respect of site valued less then Rs. 100 was compromised by which defendant was allowed to erect a building and plaintiff also was allowed to build a new room on the site and Rs. 50 were paid to the plaintiff. The compromise was acted on by the parties but subsequently the plaintiff sued for the removal of the defendant's building.

Held, that the compromise, though not registered, was admissible and that as the parties had enjoyed benefit under it, plaintiff could not be allowed to resile

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from it. A.I.R. 1921 All. 248. Ref.; 35 Cal. 1010, Dist. (*Smith, J.*) JAWAHIR *v.* MATA DIN. **6 R.O. 453 = 148 I.C. 867 = 11 O.W.N. 450 = A.I.R. 1934 Oudh 116.**

———**S. 49**—*Compromise—Unregistered deed of compromise—Reference to immovable property relating to pre-existing state of things—Admissibility of deed.*

Where one of the terms of a compromise refers to immovable properties of one of the parties, but no new rights are either created or declared by the compromise but the reference merely relates to the pre existing state of things with regard to which there is no dispute, even though the deed may be unregistered, still it is admissible. (*Tek Chand and Skemp, JJ.*) AIJAZ HUSSAIN *v.* MAQBUL HUSSAIN. **156 I.C. 836 = 8 R.L. 38 = A.I.R. 1935 Lah. 307.**

Gift.

———**S. 49**—*Gift—Deed of gift conferring right of residence—Necessity for registration—Admissibility of secondary evidence.*

If the title on which plaintiff wishes to rely constitute a gift, it requires compulsory registration and if unregistered, it is inadmissible in evidence. So where in the course of execution of a mortgage decree, the wife of the judgment-debtor set up a right of residence alleged to have been granted to her by a document which required registration but was not registered, she cannot be allowed to establish her claim by secondary evidence. (*Fraser, J.C.*) TOTARAM *v.* MT ISRI BAI. **6 I.R. (Pesh.) 17 = 146 I.C. 363 = A.I.R. 1933 Pesh. 67.**

Law applicable

———**S. 49**—*Law applicable—Admissibility of document.*

The law laid down in S. 49 is really one of procedure, and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought. (*Dalip Singh, J.*) GANDA MAL *v.* UTTAM CHAND. **147 I.C. 673 (2) = 6 R.L. 429 = 35 P.L.R. 167 = A.I.R. 1933 Lah. 1038 (2).**

———**(as amended by Act XXI of 1929), S. 49, Proviso**—*Law applicable.*

The proviso to S. 49 enacted by S. 10 (3) (*b*), Act XXI of 1929, does not apply to suits commenced before it came into force. (*Rowland, J.*) DHARICHHAN SINGH *v.* MAHABIR SINGH. **153 I.C. 246 = 7 R.P. 327 = 14 Pat L.T. 628 = A.I.R. 1933 Pat. 544**

———**(as amended in 1929), S. 49, Proviso**—*Law applicable—Provision, if retrospective.*

S. 49, as well as the proviso added thereto by Act XXI of 1929, enacts a rule which is really one of procedure, and the admissibility of a document in a suit is governed by the law as it exists when the suit is brought. (*Rangi Lal, J.*) BANARSI DAS *v.* ALI MUHAMMAD **157 I.C. 839 = 8 R.L. 145 = 37 P.L.R. 658 = A.I.R. 1936 Lah. 5.**

Lease.

———**S. 49**—*Lease—Creation by a compromise—Decree embodying—No registration—Clause creating charge for rent—Admissibility of.*

Where a lease created by a compromise and embodied in a decree of Court is inadmissible for want of registration, a clause in the deed creating a first charge on the demised land as security for rent due is also not admissible, though standing by itself it may not amount to a lease. (*Macpherson and Fazl Ali, JJ.*) SACHINDRA MOHAN GOSH *v.* RAMJASH AGARWALLA. **11 Pat. 98 = I.R. 1932 Pat. 54 = 136 I.C. 54 = 12 Pat.L.T. 871 = A.I.R. 1932 Pat. 97.**

———**S. 49**—Lease deed—Unregistered—Suit in ejectment—Plea of permanent tenancy—Admissibility. *See* REGISTRATION ACT, SS. 17 (1) (*d*) AND 49. **58 Bom. 419 = A.I.R. 1934 Bom. 194.**

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———**S. 49**—*Lease—Memorandum of—Formal document contemplated in future—Memorandum whether requires registration.*

Where a memorandum was executed in the form of a letter and it was shown that it did not contain all the terms of the lease and that a lease containing the terms was contemplated in future,

Held, that the letter did not attract the provisions of S. 92 of the Evidence Act or S. 49 of the Registration Act. (*Broadway and Bhide, JJ.*) SUNDAR SINGH *v.* RAM SARAN DAS. **14 Lah. 137 = 142 I.C. 754 = I.R. 1933 Lah. 269 = 33 P.L.R. 323 = A.I.R. 1933 Lah. 61.**

———**S. 49**—*Lease from month to month—Non-registration—Admissibility.*

A lease from month to month which requires registration under S. 107, T. P. Act, but not under S. 17 of the Registration Act is admissible in evidence to prove the nature of possession under the instrument. S. 49 of the Registration Act applies only to instruments which are required to be registered by S. 17 of the Act. (*Addison, J.*) KIDAR NATH *v.* DUNGAR MAL AND SONS. **I.R. 1931 Lah. 913 = 134 I.C. 289 = 32 P.L.R. 361 = A.I.R. 1931 Lah. 501.**

———**S. 49**—Lease—Non registration of deed of lease—Terms of lease—Permission to erect structures—Not admissible to prove. *See* REGISTRATION ACT, S. 17 (1) (*d*). **54 C.L.J. 220.**

———**S. 49**—Lease for term registered—Unregistered contemporaneous agreement limiting right under lease—Admissibility. *See* REGISTRATION ACT, S. 17 (1) (v). **11 O.W.N. 1184.**

———**S. 49**—*Lease—Unregistered agreement of lease from 1st December, 1924 to 1st January, 1925—Admissibility.*

An agreement of lease "from the 1st December, 1924, to 1st January, 1925" is not governed by S. 17 and so the Registration Act does not stand in the way of its being received in evidence. 44 Mad. 55, Ref. to. (*Venkatasubba Rao, J.*) GNANAPRAKASAM PILLAI *v.* F.S. VAZ. **I.R. 1931 Mad 573 (2) = 131 I.C. 621 (2) = 33 L.W. 763 = A.I.R. 1931 Mad. 352 = 60 M.L.J. 293.**

———**S. 49**—*Lease—Unregistered deed—Admissibility to show nature of possession.*

In a suit for ejectment the Court may look into an unregistered rent deed to see to the nature of possession. (*Addison, J.*) KISHORI LAL *v.* BANUMAL. **32 P.L.R. 637 (1) = 134 I.C. 1106 (1) = I.R. 1932 Lah. 2 (1).**

———**S. 49**—Lease—Unregistered lease—Admissibility to prove part performance—Claim for damages. *See* REGISTRATION ACT, S. 17 (1) (*d*). **35 Bom.L.R. 722 = A.I.R. 1933 Bom. 381.**

———**S. 49**—*Lease—Unregistered lease deed—Admissibility.*

The landlord induced certain persons to settle in his village and gave them a lease of certain *sir* land under which he promised that he would never eject them or their heirs. The undertaking was embodied in a written document which was not registered.

Held, that the document was compulsorily registrable and being unregistered was inadmissible in evidence. (*Keane, S.M. and Oppenheim, J.M.*) RAM PRASAD PURI *v.* CHAUTHI LONIA. **15 R.D. 278 = 12 L.R. 93 (Rev.).**

———**S. 49**—*Lease—Unregistered lease—Amount of rent—Reference for determining damages—Permissibility.*

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Where rent is mentioned in a lease which is inadmissible in evidence on account of its being unregistered, though the figure as to the rent mentioned in the lease cannot be looked at in order to establish the rent fixed, it might be looked at to establish what damages the landlord suing for arrears of rent was entitled to by way of rent. (*Addison, J.*) KIDAR NATH *v.* DUNGAR MAL AND SONS. **I.R. 1931 Lah. 913=134 I.C 289 =32 P.L.R 361=A.I R 1931 Lah. 501.**

———**(as amended in 1929), S. 49**—Lease—Unregistered lease—Claim for rent under—Maintainability. *See* T. P. ACT, S. 53 A. **62 Cal. 294**

———**S. 49**—*Lease—Unregistered lease—Reference for collateral purpose.*

Where the terms of a lease are incorporated in a letter by reference to the earlier lease deed and if the new lease is a fresh lease altogether, the old one, even though unregistered can be referred to for a collateral purpose, for example, to show that the new arrangement was subject to the same period of notice as the old. (*Rankin, C J. and Mukerji, J.*) ASSAM BENGAL RY. CO., LTD *v.* HARI MOHUN PAL. **6 I R. (Cal.) 278 (2)=146 I C. 884=A I R 1933 Cal. 440.**

———**S. 49**—*Lease—Unregistered lease—Suit to recover damages for use and occupation.*

S. 49 is not a bar to the owner of immovable property demised by him under an unregistered lease from recovering damages for use and occupation of the demised premises. (*Rupchand and Milne, A.J Cs.*) KODULAL *v.* BEHARILAL. **25 S.L.R. 451=I.R. 1932 Sind 71=137 I C. 136- A I R. 1932 Sind 60**

———**S 49**—Lease—Unregistered mokarrari lease—Payment of nazarana—Proof of agreement in lease, allowable. *See* REGISTRATION ACT. S. 17 (1) (*d*) **14 Pat L T. 628=A.I.R. 1933 Pat. 544.**

Mortgage.

See also ACKNOWLEDGMENT, *supra* AND RELINQUISHMENT, *infra*.

———**S. 49**—Mortgage—Equitable mortgage—Deed constituting agreement and not mere list—Need for registration. *See* REGISTRATION ACT, S. 17 (1) (*b*) —MORTGAGE. **138 I.C. 247.**

———**S. 49**—Mortgage — Equitable mortgage—No written agreement showing intention to create—Evidence of intention to create security—Admissibility. *See* T. P. ACT, S. 59. **58 I.A. 68=54 Mad 257=60 M.L. J. 506 (P C).**

———**S. 49**—*Mortgage — Mortgagors basing their claim for possession on redemption by them of sub mortgage—Mortgages unregistered—Suit, if maintainable.*

When the mortgagors-plaintiffs do not suggest that the mortgagees are in possession of the property by their leave and licence, but they base their claim on the fact that they have redeemed the mortgages in favour of the sub mortgagees and assert that because they have redeemed these mortgages from sub-mortgagee they are entitled to possession of these lands, their suit is a suit for possession of lands which have been redeemed and of which the person in possession has failed to deliver possession after the redemption, and therefore it depends entirely upon proof of the mortgages If the mortgages are incapable of proof for want of registration, the suit of the mortgagors must of necessity fail (*Dunkley, J.*) MA PO *v.* MA BWIN. **155 I.C. 204=7 R.R. 339= A.I.R. 1935 Rang. 15.**

———**S 49**—*Mortgage—Proof of—Mortgage deed not registered—Other evidence of title—Admissibility of.*

The mortgagor of occupancy holding sued for possession of the property mortgaged and offered to pay the smount due under the mortgage. The mortgage deed haowever was not registered.

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Held, that although the unregistered deed was not receivable in evidence, and although other evidence also was not admissible to prove the nature of the transaction, nevertheless the mortgagor was not debarred from proving his title to the holding independently of the document A.I R. 1928 All. 641; 47 I C 852 and A.I.R 1927 All. 311, Ref. (*Sulaiman, Ag.C J, and Bajpai, J.*) HALKA *v.* NANNHON. **I.R. 1932 All. 628=140 I.C 42=1932 A.L.J. 101=A.I R. 1932 All. 259.**

———**S. 49**—Mortgage—Receipt purporting to extinguish—Admissibility without registration. *See* RECEIPT *infra*. **36 C.W.N. 738.**

———**S 49**—*Mortgage—Unregistered deed of mortgage—Admissibility to prove possession*

An unregistered deed of mortgage can be admitted in evidence to prove the nature of possession. (*Mukerji, J.*) JU SINGH *v.* SHAH MUNIR **18 R D 90.**

———**S. 49**—*Mortgage Unregistered mortgage bond—Reference in suit to recover money.*

Where the mortgage bond could not be sued on as it was unregistered and the suit was filed as one for recovery of the money and the unregistered bond was sought to be referred to

Held, that the bond was admissible in evidence as it was not relied on as evidence affecting the property. (*Pearson, J.*) KHANTAMONI DASI *v.* BISHWA NATH PAL **6 I.R. (Cal.) 228 =146 I C 476=58 C L J. 403=37 C.W.N. 915=A.I R. 1933 Cal. 786**

———**S. 49**—*Mortgage—Unregistered mortgage deed—Admissibility to prove character of possession*

A mortgagor may refer to an unregistered deed of mortgage for Rs 100 or more in order to show the character of the possession of the mortgagee and can give evidence as to the circumstances under which the defendant obtained possession. Case-law reviewed. (*Otter and Brown, JJ.*) MAUNG SIN *v.* MAUNG SO MIN **8 Rang. 556=I R 1931 Rang 79=129 I C 511=A.I R. 1931 Rang 40**

———**S. 49**—*Mortgage—Unregistered mortgage deed—Proof of loan—Admissibility for.*

A mortgage deed on account of lack of registration is madmissible to prove the alleged mortgage of certain land, but as proof of the loan it is relevant and extremely cogent evidence (*Dunkley, J.*) MOTIRAM *v.* DAW HNIN E. **153 I.C 56=7 R R. 192=A.I.R. 1934 Rang. 196.**

———**S. 49, proviso**—*Mortgage—Unregistered mortgage—Money advanced and possession given —Suit for ejectment of mortgagee before payment—Part-performance.*

Where the defendant had advanced money to the plaintiff and he was given possession of certain land on the understanding that he should not be ejected until the amount was repaid, the defendant is entitled to the benefit of the doctrine of part-performance embodied in S. 53-A of the T. P. Act and the proviso to S. 49 of the Registration Act and a suit by the plaintiff for the ejectment of the defendant as *shikmi* tenant is not maintainable, though the mortgage had not been registered. (*Oppenheim, S. M.*) DHANAI CHAMAR *v.* CHUNNI. **14 L.R. 157 (Rev.)=17 R.D. 201.**

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Moveables and immoveables.

——S 49—*Moveables and immoveables—Instrument containing separable contracts—Moveables and immoveables dealt with—Registration if necessary.*

If an instrument embodies an entire and indivisible contract relating to immoveable and moveable properties and it cannot be looked *qua* the immoveables for want of registration, the whole must be excluded but where it contains two or more distinct and separable contracts one dealing with immoveables and the other with moveables there is no bar to the Court admitting it in evidence for the purpose of settling the rights of the parties *qua* the moveables. (*Tek Chand and Monroe, JJ.*) KARAM CHAND v. UMA DATT HANS RAJ **I.R. 1932 Lah 495=138 I.C. 369=33 P L.R. 715=A.I.R 1932 Lah. 545.**

——S. 49—Moveables and immoveables—Unregistered deed transferring immoveable and moveable property—Inadmissible even as regards moveables *See* REGISTRATION ACT, S 17 (1) (*b*)—MOVEABLES AND IMMOVEABLES **A I R 1934 Rang 303.**

Partition.

——S. 49—*Partition—List of bonds*

A mere memorandum containing a list of bonds allotted to the plaintiff's share on a partition does not require registration. (*Guha and M C Ghose, JJ*) KSHITIRA MOHAN PAL CHOUDHURY v. TUFANI TALUKDAR **144 I C. 868 =6 R C 55=37 C.W N 112=A I R 1933 Cal 474**

——S. 49—Partition—Partition lists—Admissibility without registration. *See* REGISTRATION ACT, S 17 (1) (B). **A I R 1935 Lah. 448.**

——S. 49—*Partition—Unregistered deed—Admissibility to prove nature of possession*

An unregistered deed of partition though inadmissible to prove the partition, is admissible for collateral purposes of proving the nature of possession. (*Broadway, J*) SAHIB SINGH v. DALIP SINGH **6 I.R. (Lah.) 119=145 I.C. 691 =A.I R 1933 Lah. 422**

——S. 49—*Partition—Unregistered deed—Admissibility to prove debts were not joint*

An unregistered deed relating to partition is inadmissible to prove that property had been partitioned and that in consequence thereof, certain debts of the family realised by the defendants were not joint as the factum of partition of the debts which the defendants seek to prove is clearly a "transaction" affecting the property. (*Bhide, J.*) KISHAN CHAND v. DINA NATH **I.R. 1933 Lah. 132=141 I.C. 487=34 P.L.R. 194= A.I.R. 1933 Lah. 574.**

——S. 49—Partition—Unregistered deed—Not admissible. *See* REGISTRATION ACT, S. 17 (1) (*b*)—PARTITION. **A.I.R. 1934 Pesh. 100.**

Plea of non-registration.

——S. 49—*Plea of non-registration of document—If open for the first time before Privy Council*

A question of law relating to the admissibility of a document by reason of non-registration cannot for the first time be allowed to be raised before the Board when the plea cannot be disposed

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of without deciding nice questions of fact on which the evidence is not clear and the parties are at variance. (1892) A.C. 473, Applied. (*Lord Tomlin*) OFFICIAL LIQUIDATOR OF MOOTY SONS, LTD v. PERRIN R. BURJORJEE. **59 I.A. 161=10 Rang. 242=I.R. 1932 P.C. 151=55 C L J. 362=36 C W.N. 677=136 I.C. 737 =34 Bom.L.R. 1021=1932 A L.J. 706=1932 M.W.N. 680=36 L W. 75=9 O.W.N. 930 =A.I.R 1932 P.C. 118=63 M L.J. 131= (P C).**

Receipt.

——S 49—Receipt—Mortgage bond—Unregistered—Relinquishment deed—Admissible to prove transfer of debt *See* RELEASE *infra* **A. I R. 1934 Mad. 176=66 M.L.J. 380.**

——S. 49—*Receipt—Mortgage—Money due under—Receipt for payment—Admissibility without registration*

A receipt for payment of money due under a mortgage, if it purports to extinguish the mortgage, is not, if unregistered, admissible either as extinguishing the liability or for the purpose of showing the admission of the mortgagee that he would return the mortgage bond after endorsement of payment (which comes nearly to the same thing.) (*Mitter and S K Ghose, JJ*) ASANUDDIN MONDAL v. ASMATULLA. **142 I.C. 517=I. R. 1933 Cal. 304=36 C.W.N 738=55 C.L. J. 571=A.I.R. 1933 Cal. 198.**

——S 49—Receipt—Sale of mortgagee rights—Receipt executed two months after—Receipt unregistered—Oral evidence to prove payment. *See* REGISTRATION ACT, SS 17 (1) (*c*) AND 49 **A. I R. 1934 Lah 472.**

Relinquishment.

——S 49—Relinquishment—Agreement between mortgagor and mortgagee—Relinquishment of debt exceeding Rs. 100—Need for registration—Not admissible as evidence of any transaction. *See* REGISTRATION ACT, S. 17 (1) (*b*)—RELINQUISHMENT **A I.R 1931 Oudh 288**

——S. 49—*Relinquishment—Deed of—Necessity for registration*

A deed by which certain rights are relinquished in respect of property over Rs. 100 requires registration and is inadmissible as evidence without registration. (*Broadway, J*) SAHIB SINGH *v.* DALIP SINGH. **6 I.R. (Lah.) 119=145 I.C. 691=A.I.R. 1933 Lah. 422.**

——S. 49—*Relinquishment—Document relinquishing rights and recording payment—Admissibility without registration.*

A document purporting to declare that the executants held no title in a house and had relinquished their connection with it and also purporting to record a payment of money described as having been sent by them in rebuilding the house, requires to be registered, and is inadmissible without registration. (*Shadi Lal, C J. and Hilton, J.*) ABDUL RAHMAN v. GURDIT SINGH. **6 R.L. 657=149 I.C. 154=35 P.L.R. 570= A.I.R. 1934 Lah. 604 (2).**

——S. 49—*Relinquishment — Unregistered deed—Admissibility—Proof of transfer of debt.*

A document by which the defendant relinquished his interest in a mortgage bond in favour of his brother under a document which pur-

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ported to be a receipt, the plaintiff, and authorised the latter to collect the full amount of the debts is inadmissible in evidence in so far as it operates to extinguish his right in the mortgage security; but there is no bar to its being admitted for showing the transfer of the debt itself, apart from the security. (*Sundaram Chetty and Pakenham Walsh, JJ.*) LAKSHMANA NAICKER *v* JAYARAM NAICKER **150 I.C. 18=6 R. M. 708=39 L.W. 153=A.I.R. 1934 Mad. 178=66 M.L.J. 380.**

Sale.

———**S. 49**—*Sale of immoveable property worth less than Rs* 100—*Unregistered kobala—Admissibility to prove nature of possession.*

An unregistered kobala effecting a sale of immoveable property of a value less than Rs. 100 cannot confer title and is inadmissible as a title-deed; but it can be admitted in evidence for the collateral purpose of showing the nature of possession. (*McNair, J.*) ABDUL ALIM *v* ABDUL SATTAR **161 I.C. 734=8 R C. 540=61 C L. J. 590=A.I.R. 1936 Cal. 130**

Scope.

———**S. 49**—*Scope—Part performance—Doctrine of—Applicability of*

Per *Cornish, J.*—The provisions of S. 49 are mandatory and the doctrine of part performance cannot be invoked in a case governed by the section. 1928 A.C. 173, Ref. (*Curgenven and Cornish, JJ.*) SAMUVIER *v* RAMASUBBIER. **55 Mad. 72=I.R. 1931 Mad. 657=132 I.C. 305 =33 L.W. 576=A.I.R. 1931 Mad. 580=60 M.L.J. 527.**

Surety bond.

———**S 49**—*Surety bond—Effect of non-registration.*

Where the surety bond is not registered the creditor cannot claim the amount secured as a charge of the property in the hands of the surety. (*Raza and Bisheshwar Nath, JJ.*) JAINARAIN SINGH *v.* PARMESHAR MURAO. **I.R. 1931 Oudh 350=132 I.C. 798 (1)=14 O L.J. 376=8 O.W.N. 544=A.I.R. 1931 Oudh 310.**

Unregistered document.

———**S. 49**—*Unregistered document—Admissibility to prove nature of possession.*

Though the terms of a deed, which is inadmissible for want of registration, cannot be proved, nor can the deed be used to prove possession, when possession has been proved by other evidence, the deed can be admitted in evidence to prove that the possession was adverse or to prove separation between the members of a joint family. 43 Mad. 244 (P.C.), Rel. on. (*Staples, A. J. C*) MUNNALAL *v* NARAYAN. **I.R. 1933 Nag. 228=144 I.C. 312=A.I.R. 1933 Nag. 270.**

———**S. 49**—*Unregistered document—Recital that bride is given in marriage in lieu of dower of certain amount and some items of immoveable property—Contract of guarantee by bridegroom's father—Admissibility of document*

Where an unregistered document incorporating a contract of marriage recited that the *nika* between the parties had been performed and that the bride was being given in marriage in lieu of a prompt dower of a certain amount and certain items of immoveable property described

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therein, and it also contained a personal covenant by the father of the bridegroom to indemnify the bride in case the dower was not paid by the husband.

Held, that the only effect of non-registration would be that the document would not affect any immoveable property covered by it or be received as evidence of any transaction affecting such property and that it could be used for the purpose of proving the amount of dower and the contract of guarantee entered into by the bridegroom's father relating thereto. (*Addison and Din Mohamed, JJ.*) MAHOMED QASIM *v.* RUQIA BEGUM. **16 Lah. 1105=157 I.C. 69=8 R.L. 78=37 P.L.R. 210=A.I.R. 1935 Lah. 375.**

———**S. 50**—*Applicability—Both documents registered.*

Where both the documents are registered, S. 50 has no application. (*Agarwala, J.*) ABDULLAH KHALIFA *v.* BHICHUK GOSAIN. **6 R.P. 374 =147 I.C. 767=A.I.R 1934 Pat. 68.**

———**S. 50**—*Mortgagee under prior unregistered deed—Notice to later mortgagee at time of registration of his prior deed.*

A mortgagee under a registered mortgage-deed cannot claim priority if the mortgagee under a prior unregistered mortgage-deed appears before the Sub-Registrar and gives notice of his prior unregistered document at the time when the later mortgage-deed is presented for registration. And if the later mortgage-deed is executed simply consolidating previous deeds with much interest added and no actual money passes, such a notice given by the prior mortgagee is equally valid, and the rule, that notice acquired after payment of money is immaterial, is not vitiated. 30 All. 238 and 1929 Lah. 500, Rel. on. (*Addison, J.*) RODHAL MAL *v* RAMJIDAS. **6 I.R. (Lah.) 165=146 I.C. 40 (1)=A.I.R. 1933 Lah. 609.**

———**Ss. 50 and 17 (2) (before Amending Act of 1929)**—*Unregistered award—Charge created by—Priority*

A charge created by an award prior to the Amending Act of 1929, which is not registered retains seniority over a subsequent mortgage-deed which is registered (*Aston, Rupchand and Mehta, A. J. Cs*) PAHLUMAL SANTDAS *v* NARAINDAS DIPCHAND **27 S.L.R. 121=I.R. 1933 Sind 157=143 I C. 863=A.I.R. 1933 Sind 151 (2) (F.B.).**

———**S. 51**—*Document entered in wrong book —Validity of registration.*

Where a document which should have been entered in Book 1 was entered in Book 4 and the mistake was made by the registering officer in good faith and did not injure any innocent person.

Held, that this error did not make the registration invalid. 34 Bom. 202 and 52 M.L.J. 482, Approved. (*Sir Shadi Lal.*) SATINDRA NATH *v* JATINDRA NATH. **62 I.A. 265=63 Cal. 1=42 L.W. 474=1935 A.W.R. 1177=8 R. P.C. 27=37 Bom.L.R. 833=16 Pat.L.T. 739=1935 M.W.N. 1145=1935 O.W.N. 952 =39 C.W.N. 1191=157 I.C. 419=1935 A. L.J. 1005=A.I.R. 1935 P.C. 165=69 M. L.J. 503 (P.C.).**

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———**S. 51**—*Transaction affecting immoveable property—Entry in Book IV—Validity of document.*

Where the language of the document clearly expresses the nature of the transaction as one affecting immoveable property, and where it contains a description of such property sufficient to identify the same within the meaning of S. 21, Registration Act, the mere fact that the document has been entered in Book IV should not be regarded as invalidating the document. (*Mua Bu and Baguley, JJ.*) LUCY MOSS *v.* MAH NYEIN MAY. **149 I.C. 1113=6 R.R. 356=A.I.R. 1933 Rang. 418 (2).**

———**S. 52**—*Omission to give particulars—Irregularity.*

Where the Sub-Registrar who registered a document at the place where the parties lived failed to mention the day, hour and place but otherwise, the execution was clearly proved

Held, that the omission on the part of the Sub-Registrar was a mere irregularity cured by S. 87 (*Shadi Lal, C.J. and Coldstream, J.*) BARKHURDAR SHAH *v.* MT SAT BHARAI. **I.R. 1931 Lah. 705 (2)=132 I.C. 881 (2)=36 P.L.R 371=A.I.R. 1931 Lah 677.**

———**S. 52 (1) (a)**—*Compliance with—Person presenting a document—Who is.*

To constitute a presentation under S. 52 (1) (*a*) it is not necessary that the executant should himself or herself personally hand the document to the registering officer; it is immaterial by whom the physical act is performed. Where the document is handed at first by an unauthorized person to the Registrar, who, however, registers it only after the executant admits execution of the deed, there is no invalidity and the requirements of S. 52 (1) (*a*) are sufficiently complied with. (*Shadi Lal, C.J. and Coldstream, J.*) BARKHURDAR SHAH *v.* SAT BEHARI. **I R. 1931 Lah 705 (2)=132 I.C. 881 (2)=36 P L R. 371=A I R. 1931 Lah 677.**

———**Ss. 58, 59 and 60**—*Effect of registration.*

The facts mentioned in the endorsement of the registering officer may be proved by those endorsements provided the provisions of S. 60 have been complied with. 9 Bom L.R. 401, Foll. (*Beaumont, C.J. and Baker, J.*) VISVANATH *v.* RAHIBAI. **55 Bom. 103=I.R. 1931 Bom 117=128 I.C. 901=32 Bom.L.R. 1385=A.I.R. 1931 Bom. 105.**

———**Ss. 58 and 59**—*Endorsement under—Signature of Registrar—If attestation of execution of document under T. P. Act.*

If the condition for a valid attestation under the Transfer of Property Act are fulfilled, there is nothing in law to prevent a Sub-Registrar from being treated as an attesting witness even though the signature of the Sub Registrar might have been made *alio intuitu* to satisfy the requirements of the Registration Act. When the Registrar made his endorsement on the back of the document, he was simply carrying out his statutory duties under the Registration Act and was not purporting to attest the document. He made his signature *alio intuitu* and it would be wrong to disregard the real purpose for which his signature appears on the document It may be true that the endorsement made by the Registrar in the course of his duties shows that the Registrar received from the executant a personal acknowledgment of his signature. But the Registration Act did not require him to affix his signature in the presence of the executant and the Registrar could and might have affixed his signature to the endorsement at any time in the course of the same day. So no presumption could possibly be made in favour of the plaintiff that the signature of the Registrar was affixed in the presence of the executant and that the document was duly attested. (*Roy, J.*) NIBNIA BARU *v.* JOHARLAL SARKAR. **61 Cal. 525=38 C W.N. 753=151 I.C. 1063=7 R.C. 216=A.I R. 1934 Cal. 772.**

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———**Ss. 58 and 59**—*Endorsements under—Signature of registrar—If attestation of execution of document.*

The endorsements required by S. 58, to be made upon the document registered are in reference to admission of execution and the identity of the person, admitting execution and not attestation. And though the registering officer is bound by S. 59 of the Act, to affix the date and his signature to all endorsements made in his presence, he is not bound to do so at the time they were made, and will comply with the section if he does so on the same day at a time when the persons who made the endorsements may not be present. Clearly, therefore, the section does not contemplate that the signature of the registering officer to any endorsement is to be treated as that of an attesting witness in connection with an admission of execution. (*Blackwell, J.*) HARKISANDAS *v.* DWARKADAS. **161 I C. 374=8 R.B. 342=37 Bom. L R. 913= AI.R. 1936 Bom. 94.**

———**S. 60**—*Endorsement — Presumption—Document not signed by one executant—Absence of note by Registrar—Effect.*

The endorsement of registration no doubt raises a presumption that the executants or their duly accredited agents had appeared before the Registrar. But if a document is executed by several persons and the same is presented for registration by one who had a registered power of-attorney but the Registrar's endorsement does not state on whose behalf this power-of-attorney was, nor is there a note by the Registrar of the absence of the signature of one of the executants, the omissions are sufficient to rebut the presumption. (*Dalip Singh and Abdul Qadir, JJ.*) MT. WALAYAT JAN *v.* JAMAL DIN. **151 I C. 462=7 R L. 138=35 P.L.R. 316=A.I.R. 1934 Lah. 262.**

———**S. 60**—*Endorsement of registering officer—If evidence of execution.*

Under S. 60, the certificate signed by the registering officer is evidence of the fact that the payment of money referred to in the endorsement was made as therein mentioned. But the mention in the endorsement of a certain person as mortgagor does not prove the execution of the deed as a mortgage deed. (*Srivastava, J.*) PARMANAND MISIR *v.* GUR PRASAD. **11 Luck. 393=157 I C 567=8 R.O. 25=1935 O.W.N. 892=A.I. R. 1935 Oudh 500.**

———**Ss 60 and 61**—*Omission of deed from index does not invalidate registration.*

Compliance with the provisions of Ss. 60 and 61 is quite enough for the completion of registration of a deed Therefore an omission of the particulars pertaining to such deed from the index kept in the registration department does not invalidate the registration as such, but is only a matter of importance for the purposes of notice. (*Rachhpal Singh and Smith, JJ.*) SITA RAM *v.* RAJ NARAIN. **150 I C. 145=6 R.O. 623=11 O.W.N. 770=A I R. 1934 Oudh 283.**

———**S. 60**—*Sale deed—Endorsement of payment of consideration by Registrar—Evidentiary value of.*

An endorsement by the registering officer on a sale-deed registered by him, of payment of cash thereunder in his presence by the vendee to the vendor, is not only admissible in evidence under S. 60 of the Registration Act, but constitutes evidence of the fact of payment of the amount noted as consideration for the deed. The

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onus of proving the contrary is thereby shifted on to the party who denies payment of consideration to prove the contrary which he alleges. (*Nanavutty and Zia ul-Hasan, JJ.*) RAM SHANKAR *v.* RAM MANORATH. **7 R.O. 339=153 I.C. 373=1935 O.W.N. 11=A.I.R. 1935 Oudh 86.**

——**S. 60 (1)**—*Certificate of registration—Effect.*

A certificate of registration though *prima facie* evidence that the document has been duly registered according to law is not conclusive evidence of valid registration. (*Page, C.J. and Mya Bu, J.*) U AUNG DIN *v.* MAUNG AUNG MYINT. **11 Rang. 207=147 I.C. 287=6 R.R. 157=A.I.R. 1933 Rang. 194.**

——**S. 68 (2)**—*Order for production of document—Power of Sub-Registrar.*

The Registration Act does not give any power to the Sub-Registrar or Registrar to order the production of a document after it has been registered and delivered to the party concerned with a view to examining the stamp duty thereon and making a reference to the Collector if necessary under S. 33. The subsequent production though made in compliance with an illegal demand is not sufficient to bring the case within S. 33. (*Tek Chand, Abdul Qadir and Bhide, JJ.*) THAKAR DAS *v.* EMPEROR. **13 Lah. 745=I.R. 1932 Lah. 530=138 I.C. 758=33 P.L.R. 762=A.I.R. 1932 Lah. 495 (F.B.).**

——**S. 68 (2)**—*Scope—Powers of Registrar.*

S. 68 (2) does not confer upon the Registrar the power of cancelling the registration of a document, the execution of which is not denied and which has been already registered by a Sub Registrar. A.I.R. 1932 Lah. 495 (F.B.), Dist. (*Shadi Lal, C.J. and Abdul Qadir, J.*) HUSSAIN ALI SHAH *v.* SARDAR ALI SHAH. **149 I.C. 509=6 R.L. 694=A.I.R. 1933 Lah. 786.**

——**S. 72**—*Appeal under—Pre-requisite for applicability of S. 77.*

An appeal under S. 72 is a pre-requisite of a suit under S. 77 of the Act. (*Guha and Ghose, JJ.*) SELAMATULLA CHAUDHURI *v.* AKTARUNNESSA. **58 Cal. 681=I.R. 1931 Cal. 719=133 I.C. 591=A.I.R. 1931 Cal. 664.**

——**Ss. 72, 73, 74 and 75**—*Execution of document—Meaning of—If denotes mere signing.*

Execution of a document means not the mere mechanical act of signing the document or getting it signed, but an intelligent appreciation of the contents of the document and signing it in token of the acceptance of those contents. (*Fazal Ali, J.*) KESHWAR MEHRA *v.* RAJESWARI PERSHAD SINGH. **158 I.C. 395=8 R.P. 194=16 Pat. L.T. 706=A.I.R. 1935 Pat. 497.**

——**Ss. 73 (1) and 32**—*Minor claiming under document—Presentation for registration—Validity—Husband of minor married woman acting under power of attorney—Appeal by—Competency of.*

Where a minor married woman presented before a Sub-Registrar a relinquishment deed executed in her favour for registration and the Sub-Registrar having refused to register it she executed a power-of-attorney in favour of her husband who preferred an appeal to the Registrar and got the document registered.

Held, that the presentation by the minor claiming under the document sought to be registered was perfectly valid, that the power-of-attorney in favour of the husband was valid in law by virtue of S. 5 of the Powers of Attorney Act (1882) even though his wife was a minor, and that he was competent to present the appeal to the Registrar under S. 73 (1). (*Krishnan Pandalai, J.*) CHINNAMMI *v.* VENKAYAMMA. **I.R. 1933 Mad. 232 (2)=142 I.C. 646=1933 M.W.N. 636=37 L.W. 471=A.I.R. 1933 Mad. 407=64 M.L.J. 449.**

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——**S. 75 (1)**—*Admission of execution by implication.*

If in proceedings under S. 73 of the Act, the Counsel for the executant states that his client has no objection to registration but only he does not concede the validity of the document, it is an implied admission of execution and the District Registrar has jurisdiction to order registration. (*Wazir Hasan, C. J. and Bisheshwar Nath, J.*) RAM SARUP SINGH *v.* GAYA PRASAD. **I. R. 1932 Oudh 334=139 I.C. 61=9 O.W.N. 280=A. I.R. 1932 Oudh 178.**

——**S. 77**—Applicability—Appeal under S. 72 as essential pre-requisite. *See* REGISTRATION ACT, S. 72. **58 Cal 681=A.I.R. 1931 Cal. 664.**

——**S. 77**—*Circumstances for consideration—Document executed by pardanashin lady.*

In a suit under S. 77, all that is required to be shown by the plaintiff is as to whether the document was executed by the alleged executant, and whether the requirements of law as to presentation for registration in due time to the proper office and in the manner generally prescribed by the Act had been complied with by the person presenting the document for registration. Where a document is alleged to have been executed by a pardanashin lady, the question whether the document was executed under circumstances which would make it operative as against a pardanashin lady is alien to the enquiry under S. 77. (*Mitter, J.*) ABDUL GAFUR BHUIYA *v.* BADIAL HAQUE. **I.R. 1932 Cal 585=139 I.C. 234=55 C.L.J. 107=A.I.R. 1932 Cal. 588.**

——**S. 77**—"*Decree*"—*Meaning of—Decree affirmed on appeal—Limitation for presentation for registration of document—Starting point—Original decree or appellate decree.*

The suit contemplated by S. 77 is one for a decree directing the document to be registered .... if it be duly presented for registration within 30 days after the passing of such decree. A registering officer has no jurisdiction, therefore, to register a document which is not presented within 30 days of the date of the decree of the Civil Court. But the word "decree" in S. 77 means a final decree and if an appeal is filed from a decree, the document may be presented for registration within 30 days of the decree of the appellate Court. If the decree of the lower appellate Court is affirmed by the High Court in second appeal, that decree will merge in the decree of the High Court, and it will be open to the High Court to pass the very order which the lower appellate Court was competent to pass and to direct the document to be registered within 30 days of the decree passed by the High Court. (*Fazl Ali, J.*) KESHWAR MEHRA *v.* RAJESWARI PERSHAD SINGH. **158 I.C. 395=8 R.P. 194=16 Pat. L.T. 706=A.I.R. 1935 Pat. 497.**

——**S 77**—*No allegation of necessity or accident—Refusal of Registrar to register—Suit for compulsory registration—No question of interference with Registrar's discretion.*

S. 34 is subject to S. 77 wherein there is no provision as to the time within which the parties are to appear to admit execution. It is only when urgent necessity or unavoidable accident is alleged and made out that the Registrar can exercise his discretion. When, therefore, neither of those conditions was alleged but the Registrar refused execution on some other erroneous ground, there can be no question of interfering with his discretion in a suit brought under S. 77. (*Sundaram Chetty and Pakenham Walsh, JJ.*) RAMASWAMY CHETTIAR

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v. SRINIVASA PILLAI. **148 I.C. 94 = 6 R.R. 440 = 38 L W. 1000 = 1933 M.W.N. 1373 = A.I.R. 1934 Mad. 113 = 66 M L.J. 424**

——S. 77—*Omission to file suit under—Suit for specific performance—If barred.*

Where the plaintiff and defendants had entered into and reduced into writing a contract of exchange, but it was not registered and the cause for not having got it registered was entirely due to the laches of the defendant and the plaintiff did his very best to get it registered but failed because the defendant failed to attend before Sub Registrar and Registrar and subsequently removed himself from the jurisdiction of the Indian Registration Authorities and the plaintiff did not follow the procedure prescribed in S. 77 after the Registrar's refusal.

Held, that the Registrar's order of refusal was correct in the circumstances and even, if challenged by a suit under S 77 could not have been set aside, because the Courts could not compel the Registrar to register a document, the registration of which was contrary to the provisions of the statute and consequently all the laches were on the defendant's side and the equities were very strongly in plaintiff's favour and that a suit for specific performance of the exchange to direct the defendant to execute and register a fresh document on the lines of the original deed did lie and could be decreed.

Held, further, that plaintiff could also be decreed possession of the land which he was to be given under the exchange after the execution of the necessary deed. (*Fraser, J.C.*) BASHESHAR NATH *v.* MIAN FEROZ SHAH. **A.I.R. 1935 Pesh 12.**

——S. 77—Order of refusal not made—Suit held to be premature—Fresh suit after order of refusal not barred. *See* C. P. CODE, O 23, R. 1—BAR TO FRESH SUIT. **A I R 1932 Lah 138.**

——S 77—*Representative—Real owner alleging sale to be benami—Suit by alleged real owner—Maintainability.*

Where a suit was instituted by a person under S. 77 on the footing that the defendant was a benamidar for him in respect of a sale-deed and that he acted in collusion with the executant of the deed in not prosecuting the appeal against the order of the Sub-Registrar refusing registration of the document,

Held, that the plaintiff claiming to be the real owner was not a representative of the alleged benamidar, that he could not be said to be a person having a direct relation to the document, that he could not present the sale deed for registration under S, 32 and there could be no appeal by him to the Registrar under S. 72 and the defendant having given up the appeal presented by him under S. 72, could not bring a suit under S 77 and the plaintiff had no *locus standi* to bring the suit under S 77 on the footing that the defendant was benamidar, as he is bound by the act of the alleged benamidar under S. 32 (*Guha and Ghose, JJ.*) SELAMATULLA CHAUDHURI *v.* AKTARERNESSA. **58 Cal 681 = I.R. 1931 Cal. 719 = 133 I C 591 = A.I R. 1931 Cal 664.**

—— S 77—*Suit under—Conditions for filing.*

No suit can be brought under S 77 until the remedies open to the plaintiff under that Act have been exhausted, that is, until the Registrar clearly rejected the appeal against the order of the Sub-Registrar refusing to register the document. (*Tapp, J.*) CENTRAL BANK OF INDIA LTD. *v.* S. S CHARAVA & CO. **I.R. 1931 Lah 929 = 134 I C 481 = A I R. 1932 Lah 125.**

——S. 77—*Suit under*— Ex parte *decree—Decree set aside—Effect—Validity of deed*

Where registration of a document was effected pursuant to an *ex parte* decree in a suit under S. 77 but the *ex parte* decree was later on set aside, the registration effected under the decree had disappeared or stood automatically cancelled even without an application by the contesting party to have the original registration cancelled. Finally a decree on the merits was passed directing that the document should be presented for registration but the document was not presented and registered within 30 days of the fresh decree.

Held, the plaintiff lost all benefits under the decree and the document is inadmissible and no suit can be founded on it. (*Fraser, J C. and Suadud tin, A.J.C.*) QAMAR GUL KHAN *v* MUHAMMAD AKRAM KHAN. **141 I.C. 384 = A I.R. 1933 Pesh. 24.**

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——S. 77—*Suit under—Infructuous termination—Suit for specific performance—Maintainability.*

S. 77 does not provide the exclusive relief to a plaintiff who has paid consideration and earnest money to the defendant who has promised the transfer to him of the immovable property. The mere failure of a suit under that section or its infructuous termination cannot operate as *res judicata* in a suit brought for the specific performance of the original contract and for recovery of possession of the immovable property (*Sulaiman, A. C J. and Young J.*) BAL KISHEN DAS *v.* BECHAN PANDEY. **54 All. 68 = I R 1932 All 209 = 136 I.C. 561 = 1931 A.L J. 1092 = A I R. 1932 All. 96.**

——S. 77—*Suit under—Limitation—Computation—Date of institution of suit.*

Registration of a document was refused on 3 11 1928; the suit under S. 77 was filed on 1 12 1928. The defendant who was a lunatic on the date of suit died on 15 12-1928 and his heirs were substituted on 18 1 1929.

Held, the suit was not barred by limitation; it cannot be said that there was no legally instituted suit on 1-12-1928, simply because no guardian *ad litem* was appointed; nor can it be said that the suit was instituted only on the date of substitution of the heirs of the original defendant. (*Henderson, J*) PRASANNA RAM GHOSH *v.* ANFAR ALI. **153 I.C 621 = 7 R C. 388 = 38 C W N. 900 = A I.R 1934 Cal. 833.**

——S. 77—*Suit under—Other claims—Joinder of.*

No other claim can be coupled with the prayer to enforce registration of a document in a suit under S. 77. 39 C.L J 40, Foll. (*Patterson, J*) PROBADHA GOALINI *v.* BANKA BEHARI MONDAL. **142 I C. 520 = I.R. 1933 Cal. 302 = 56 C L J. 413 = A I.R. 1933 Cal. 196.**

——S. 77—*Suit under—Tampered document.*

No suit for compulsory registration under S. 77 can be based on a tampered document. (*Patterson, J.*) PROBADHA GOALINI *v.* BANKHA BEHARI MONDAL. **142 I.C 520 = I R 1933 Cal 302 = 56 C L.J. 413 = A I R 1933 Cal. 196.**

——Ss. 82 and 83—*Sanction for prosecution—If condition precedent.*

Permission of the authorities mentioned in S. 83 of the Registration Act is necessary before an accused can be prosecuted under S 82 of the Act. A prosecution without sanction is illegal and not merely an irregularity which can be cured. A sanction obtained after committal to Sessions and before the hearing commences in the Sessions Court is of no avail and does not validate the trial. Nor is the defect one curable by S 537 of the Cr. P. Code. (*Sulaiman C J., Kendall and Bajpai JJ.*) EMPEROR *v.* MOHAMMAD MEHDI. **152 I.C. 667 = 7 R A. 365 = 36 Cr L J. 137 = 1934 A L.J. 965 = 4 A.W R. 524 = 1934 Cr.C. 1291 = A.I.R. 1934 All. 963 (F B).**

——S. 82 (c)—*Applicability—Assuming name of non-existent person—If offence*

The wording of S 82 (c) is "whoever falsely personates another" which is quite different from "whoever

REGISTRATION ACT (1908), S. 82.

falsely assumes a fictitious name." To constitute an offence under S. 82 (*c*), the accused should have personated another person. Merely assuming the name of a person not in existence is not an offence under the section. Cr. Appeal No. 1930 of 1922 and 4 M. H C. R. 18, Foll (*Burn, J.*) EMPEROR *v.* RANGAMMAL. **159 I.C. 155 (1) = 1935 M.W N. 1162 = 8 R M. 455 (1) = 42 L W. 662 = 1935 Cr.C. 1254 (1) = A.I.R. 1935 Mad. 913.**

———**S. 82 (c)**—Offence under, ingredients of. *See* PENAL CODE, S. 205 AND REGISTRATION ACT, S. 82 (*c*). **42 L.W 662 = 1935 M.W.N. 1162 = A.I.R. 1935 Mad. 913.**

———**S. 82 (d)**—*Abetting wrongful personation—Nature of offence.*

Where a person assists another in wrongful personation before the registration officer, he is guilty of an offence under S. 82 (*d*). (*Panckridge and Patterson, JJ.*) MONTAJADDI *v.* EMPEROR. **I.R. 1933 Cal. 342 = 143 I.C. 15 = 34 Cr.L.J. 526 (2) = 1933 Cr.C. 794 = A I R. 1933 Cal. 481.**

———**S. 87**—*Applicability—Defect in procedure—Mistaken view of law.*

Where a registering officer acts with due care but takes a mistaken view of the law, the mistake must be treated as a defect in his procedure, to which the provisions of S. 87 apply. 27 All. 57, Dist. (*Macnair, O. J C.*) RINDU *v.* VITHOBA. **27 N.L R. 116 = I R. 1931 Nag. 158 = 134 I C. 286 = A.I.R. 1931 Nag. 159.**

———**S. 87**—*Applicability—Delay in presentation—Jurisdiction of Registrar.*

Presentation at the wrong time stands on the same footing as a presentation by the wrong person, and in either event, the defect is not a mere defect in procedure on the part of the Registrar so as to bring into play the provision of S. 87. In either case the Registrar has no jurisdiction to register. (*Page, C. J. and Mya Bu, J.*) U AUNG DIN *v.* MAUNG AUNG MYINT. **11 Rang 207 = 147 I.C. 287 = 6 R.R 157 = A.I.R. 1933 Rang. 194.**

———**S. 87**—Applicability—Sub Registrar acting under S. 30—Omission to state the same—Irregularity—Registration not invalid or ineffective. *See* REGISTRATION ACT, S. 30. **58 Cal 133 = A.I R. 1931 Cal 478.**

———**S. 87**—*Applicability—Want of jurisdiction.*

Where the facts of a case do not show a defect of procedere but on the contrary they disclose a want of jurisdiction in the Registering Officer, S. 87 does not apply. (*Sir Lancelot Sanderson.*) DOTTIE KARAN *v.* LACHMI PRASAD SINHA. **58 I.A 58 = 10 Pat. 481 = I.R. 1931 P C. 97 = 131 I.C 321 = 8 O W N 518 = 33 L.W. 596 = 1931 A.L J 489 = 33 Bom.L.R. 434 = 14 O.L J. 403 = 12 Pat L.T 543 = 35 C.W N. 354 = 1931 M.W.N. 241 = 53 C L J. 198 = A.I.R. 1931 P.C. 52 = 60 M.L J. 441 (P.C.).**

———**S. 87**—Appointment of an official by Registrar to do registration—Defect in appointment—Effect of. *See* REGISTRATION ACT, S 11 **A I R. 1935 Lah. 301.**

———**S. 87**—*Defect in procedure—Document presented by one of mortgagees—Registrar registering it in absence of executant.*

In seeking to apply S. 87, it is important to distinguish between defects in the procedure of the Registrar and lack of jurisdiction. "Where the Registrar has no jurisdiction to register as where a person not entitled to do so presents for registration, or where there is lack of territorial jurisdiction or where the presentation is out of time, the section is inoperative," 7 R 624, applied. Where a document is presented by one of the mortgagees and the Registrar registers it in the absence of the executant, though there is a contravention of S. 34, the defect is only one in procedure and the registration is not illegal so as to make the document inadmissible. (*Coldstream and Jai Lal, JJ*) MUNI LAL *v* HAJI GHULAM HUSSAIN NUR AHMAD. **16 Lah. 1019 = 157 I.C. 78 (2) = 8 R.L. 81 = 38 P.L.R. 35 = A.I.R. 1935 Lah 416.**

———**S 87**—*Illegality—Document registered though presented four months after execution.*

Where a document is presented to the Sub Registrar for registration after the expiry of four months from the date of the execution under S. 23, the Sub-Registrar has no jurisdiction to entertain the application or to register the document, and the defect cannot be cured by S. 87. A. I. R. 1929 P. C. 279; 23 All. 233, Rel. on. (*Brown, J*) MAUNG AUNG DIN *v.* MAUNG AUNG MYINT. **11 Rang 15 = I R. 1933 Rang. 25 (2) = 141 I.C. 705 = A.I.R. 1933 Rang. 5.**

———**S 87**—*Irregularity—Death of executant—Presentation by some of his representatives—Validity of registration.*

The registration of a document presented by some of the representatives of an executant who is dead at the time of the presentation of the document is good registration. Even assuming the procedure adopted is defective, such a defect is curable by S. 87. (*C. C Ghose and Pearson, JJ.*) GAYESHALI SARKAR *v.* CHINTAHARAN CHANDA. **58 Cal 876 = I R. 1931 Cal. 655 = 133 I.C 191 = A I.R 1932 Cal 110.**

———**S. 87**—Omission to give particulars under S. 52—Irregularity—Omission cured. *See* REGISTRATION ACT, S 52. **A I.R 1931 Lah. 677.**

RE-HEARING. *See* C. P. CODE, S. 151, O. 9 AND O. 47.

RE IMBURSEMENT.

See (1) CONTRACT ACT, SS. 69 AND 70.
(2) MORTGAGE—REIMBURSEMENT.

RELATIONSHIP.

See (1) EVIDENCE ACT, S. 32
(2) LANDLORD AND TENANT.

RELEASE.

See also (1) EVIDENCE ACT, S 92.
(2) REGISTRATION ACT, S. 17 (1) (*b*).

———*Distinction from partition.*

A deed by which co owners divide property in severalty is a deed of partition and merely because mutual release is an incident of the division, the partition deed of release does not become a release. Moreover a deed of release is a one-sided document and binds the executant alone while a partition is an agreement between two or more persons who are all bound by it, (*Irving F.C.*) RAM LAL *v.* EMPEROR. **11 Lah. L.T. 157.**

RELEVANCY.

See (1) EVIDENCE.
(2) EVIDENCE ACT, S. 8.

RELEVANCY OF TITLE. *See* CR. P. CODE, S. 145.

RELIEF

See (1) C. P. CODE, S. 151 AND O. 7, R. 7.
(2) PRACTICE—RELIEF.

RELIGIOUS BEQUEST.

See WILL—CONSTRUCTION.

RELIGIOUS ENDOWMENT.

See also (1) ADVERSE POSSESSION.
(2) DEED—CONSTRUCTION.
(3) HINDU LAW—RELIGIOUS ENDOWMENT.
(4) LIMITATION ACT, ARTS. 120, 142 AND 144.
(5) MAHOMEDAN LAW—RELIGIOUS ENDOWMENT.

RELIGIOUS ENDOWMENT—Alienation.

Alienation.
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Alienation.

———*Alienation—Shebait*—De facto—*Powers to set aside alienation by the previous shebait.*

A *de facto* shebait is as much entitled as a *de jure* one to maintain a suit to declare the alienations by the previous shebait invalid. 24 C. 77 and 9 C.L.J. 597, Rel. (*Suhrawardy and Graham, JJ.*) SIRIS CHANDRA SAW *v.* UPENDRA NATH GIRI DAS. **I.R. 1932 Cal. 81=135 I.C. 273=35 C W.N. 768=54 C.L.J. 544=A.I.R. 1931 Cal. 776.**

———*Alienation—Mahant—Power to compromise and to create an interest beyond his lifetime.*

It is within the power of a mahant to make a compromise creating an interest in the property beyond his own lifetime, where such compromise is for the benefit of the estate. In determining whether a compromise is for the benefit of the estate, the test is whether the compromise was in fact concluded with the object of saving the estate from unnecessary loss. (*Dalip Singh and Beckett, JJ.*) UTTAM DAS *v.* COMMITTEE OF MANAGEMENT OF GURDWARA BHAI PHERU. **153 I.C. 430=7 R.L 431 =A.I.R. 1934 Lah. 964.**

———Alienation—Possession of alienee adverse—Properties of idol may be lost by adverse possession. *See* ADVERSE POSSESSION—RELIGIOUS ENDOWMENT. **11 Pat. 701.**

———*Alienation—Suit by one of several succeeding shebaits—Maintainability.*

Quære.—Whether when some of the successors of the grantors shebaits do not question an alienation by a former shebait, a suit can lie for impeaching the alienation at the instance of one of the shebaits who succeeds to one of the grantors of permanent mokrari lease. (*Mitter and B. N Rau, JJ.*) RONALD DUNCAN CROMARTIC *v.* SRI SRI ISWAR RADHA DAMODAR JEW. **62 C.L.J. 10.**

———*Alienation—Suit to set aside—Competency to maintain—Future shebait*

In the case of public and charitable endowment any person who is in any way interested in the trust is entitled to maintain a suit for a declaration that the alienations made by the trustee are not binding on the trust. In the case of private trust, a person interested in it as a member of the family for whose spiritual benefit the worship of the idol was established and who has further the prospect of holding the office of shebait is entitled to maintain a suit to set aside an improper alienation by the shebait in office. **52 C. 809 (P.C.); 55 C. 919 (P.C.);**

RELIGIOUS ENDOWMENT—Dedication.

6 C. 764 (P.C.), Ref. (*Suhrawardy and Graham, JJ.*) SIRIS CHANDRA SAW *v.* UPENDRA NATH GIRI DAS. I.R. 1932 Cal. 81=135 I.C. 273=35 C.W.N. 768=54 C.L.J. 544=A.I.R. 1931 Cal 776.

Archaka.

———*Archaka—Archaka mirasi right—Removal of idol from principal shrine to new shrine—Right of old archakas to mirasi rights in new shrine.*

The *utsava* of a particular deity was kept and worshipped in the shrine of another deity Subsequently it was removed and installed as an object of independent worship in a new shrine. Prior to such removal, that idol was worshipped by the archakas of the principal shrine, but not as an object of independent worship or as a separate source of income. After its removal to the new shrine, the worship was performed by the archakas as paid servants of the Devasthanam and not as in the case of the old shrine, without any fixed pay and by taking the offerings, etc. The offerings, and all other sources of revenue went to the Devasthanam.

Held, that when a principal deity is worshipped in a shrine, other idols placed there and receiving the benefit of that worship are not usually regarded as objects of independent mirasi rights of worship; that the fact that the old archakas performed worship of the deity in the old temple, could at least only give rise to a presumption in their favour of archaka mirasi right in the new shrine, which, however, had been rebutted by evidence as to subsequent conduct, namely, receipt of a fixed salary instead of the offerings and other collections. (*Varadachariar and Burn, JJ.*) SRI MAHANT PRAYAG DOSS JEE VARU *v.* GOVINDACHARLU. **157 I.C. 547=41 L W 63=1935 M.W.N. 59=A.I.R. 1935 Mad. 220=68 M L.J 295.**

Cypres doctrine.

———Cypres *doctrine—Applicability.*

Where directions of Court are applied for by the executors of a will on the ground that the funds in their hands are not sufficient for the purpose of carrying out the wishes of the testator who directed in his will that a temple should be built out of a portion of the residue after the debts have been paid the Court may vary the directions of the testator by the application of the *cypres* doctrine. That doctrine is only applied where, from lapse of time and change of circumstances it is no longer beneficial to apply the property left by the founder or donor in the exact way in which he has directed it to be applied, but it can only be applied beneficially to similar purposes by different means. In re *Campden's Charities*, 18 Ch. D. 310 Ref. (*Tyabji, J.*) BALKRISHNA *v* VINAYAK. **I.R. 1932 Bom 518=139 I.C. 594=34 Bom.L.R. 113=A I.R. 1932 Bom. 191.**

Dedication.

———*Dedication.*

The inscription 'Om' on the *kotha* of a non-Mahomedan *takia* does not prove dedication nor the fact that the *kotha* was built by public subscription (*Dalip Singh, J.*) WADHAWA *v.* ALLAH DITTA. **I.R 1932 Lah. 153=135 I.C. 681=33 P.L.R. 180=A.I.R. 1932 Lah. 220.**

——— *Dedication—Charitable intention unaccompanied by present gift.*

A compromise decree containing a clause as follows: "and it is further ordered and decreed that the rents of bazaars and with the income of Rs. 5,000 to be contributed equally by the plaintiff and the 1st defendant to be devoted to such charities as they shall agree upon."

Held, that the provision was not sufficient to create a charitable gift because though there was a charitable intention it was unaccompanied by a present gift.

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(*Beasley, C.J. and Cornish, J.*) RAJAGOPALA CHETTY *v.* OFFICIAL ASSIGNEE OF MADRAS. **1932 M.W.N. 289.**

———*Dedication—Debutter nature—Proof of—Deed of endowment—If essential—Conduct of parties—Admissibility as evidence of dedication—Rent-free grant—If debutter.*

In order to establish the debutter nature of a property it is not necessary that in every case a deed of endowment should be forthcoming. The course of dealings by the parties may furnish evidence of dedication in the absence of any deed. But at the same time, very strong evidence must be forthcoming to prove debutter in the absence of a deed. A rent-free grant is not necessarily debutter. An assertion in a mortgage executed by the predecessor of a party that a certain property is partible secular property with which he had power to deal is of evidentiary value as against those claiming (in the character of shebaits) under him of the fact that the property was dealt with as secular property, although the evidentiary value may be very slight. (*Mitter and B.N. Rau, JJ.*) RONALD DUNCAN CROMARTIC *v.* SRI SRI ISHWAR DADHA DAMODAR JEW. **62 C.L.J. 10.**

———Dedication—Nature and incidents. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **10 Pat. 388=A.I.R. 1931 Pat. 275.**

———Dedication—Proof of. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **34 Bom.L.R. 415=A.I.R. 1932 Bom. 305.**

———*Dedication—Proof of—Mode of enjoyment—Relevancy of.*

In dealing with the question whether an endowment is real or nominal only, the manner in which the dedicated property is held or enjoyed is the most important point for consideration. Though a mere abuse of trust by the trustee for the time being cannot affect the validity of an endowment where there is no question about its being a real and valid endowment originally yet when the question is whether the endowment is real or fictitious, the mode of dealing with it by its donors and successors is an important matter for consideration. 27 C. 242, Foll. (*Mahomed Noor and Dhavle, JJ.*) CHATURBHUJ SINGH *v.* SARADA CHARAN GUHA. **11 Pat. 701=141 I C 157=I R. 1933 Pat. 47=14 P.L.T. 509=A I.R. 1933 Pat. 6.**

———Dedication—Proof of—Use of family property for temple for a number of years. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **34 Bom. L.R. 733=A.I.R. 1932 Bom. 439.**

———Dedication—Property subject to a charge and not a trust in favour of charities. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **A.I.R. 1933 Mad 204.**

———Dedication—Real or illusory—Tests. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **10 Pat. 388=A I.R 1931 Pat. 275.**

———*Dedication—Temple—Dedication to the public—Proof.*

Some of the tests for considering the question whether there should be a presumption of dedication are user by the public, worship by the public and offerings by the public. 15 Bom. 612; 23 Bom. 659; 50 C. 292, Ref. (*Beaumont, C J. and Blackwell, J.*) NARSIDAS *v.* RAVISHANKAR. **I. R. 1931 Bom 107=128 I.C. 891=32 Bom L.R. 1435=A I.R. 1931 Bom. 33.**

———Dedication—Test of—Complete or partial dedication—Subsequent conduct of parties. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **55 C. L.J. 26=A.I.R. 1932 Cal. 419.**

RELIGIOUS ENDOWMENT—Math.

Dharmasala.

———Dharmasala—Meaning. *See* SIKH GURDWARAS ACT (1925), S. 16 (2). **13 Lah. 6=A.I.R. 1932 Lah. 268.**

Founder's rights.

———*Founder's rights—Revocation.*

The rule that a founder or his descendants cannot revoke an endowment applies only to endowments which have been validly created; to be valid and irrevocable, the endowment must be created in perpetuity for religious or charitable purposes and not be merely a temporary arrangement without a complete and absolute transfer. (*Mahomed Noor and Dhavle, JJ.*) CHATURBHUJ SINGH *v.* SARADA CHARAN GUHA. **11 Pat. 701=141 I C. 157=I R. 1933 Pat. 47=14 Pat.L.T. 509=A.I.R. 1933 Pat. 6.**

Idol.

———Idol—Properties vested in—Alienation for unauthorized purpose—Possession of alienee adverse. *See* ADVERSE POSSESSION—RELIGIOUS ENDOWMENT. **11 Pat 701.**

———Idol—Right of suit of. *See* RIGHT TO SUE. *infra.* **62 C.L J 153**

———Idol—Trust in favour of—Defendants in possession denying trust and setting up adverse title—Suit by plaintiff on behalf of the institution—No liability to be non suited on the ground of want of power to represent the idol. *See* HINDU LAW—RELIGIOUS ENDOWMENT—IDOL. **34 Bom.L.R 415=A I R. 1932 Bom 305.**

Mahant.

See MATH AND SIKH GURDWARA, *infra.*

Manager.

———Manager—Position of—Express trustee for the purpose of S. 10, Limitation Act. *See* LIMITATION ACT, S. 10—EXPRESS TRUSTEE. **A.I.R. 1935 Mad. 483.**

Math.

———*Math — Asthal — Principal and subordinate Asthals—Superior rights of Mahant of principal Asthal*

Subordinate Asthals may have and often do have each a Mahant of its own at their head. An original foundation with a Gaddinashin Mahunt exercising jurisdiction over a subordinate Asthal or Math with a Mahunt of its own is not unoften found with relations existing between them in respect of proprietary rights to their respective possession depending upon their respective constitutions. (*Mukerji and S. K. Ghose JJ.*) GOBINDA RAMANUJA DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal 326=164 I C 33=9 R.C. 115=62 C L J 153.**

———*Math — Mahant — Election of—Validity of—Omission to invite general body.*

Installation is a ceremony for giving publicity to the fact of the elevation of a candidate to the giddi as Mahant, and the mere omission to invite the general body of gaddinashins would not by itself vitiate an election otherwise valid. (*Addison and Agha Haidar, JJ.*) SHAM DAS *v.* MAHALIK DAS. **149 I C. 1187=6 R. L. 811=36 P.L.R 129=A I R 1933 Lah. 916.**

——— *Math—Mahant—Head of several Maths—Power to divide Asthals as between his successors and to saddle property of one with reservation in favour of another—Custom.*

In the case of a Mahant who has a number of separate asthals which by usage have all been held by one man, the Mahant ordinarily has no power to provide for the division of the asthals as between his successors or to saddle the property of one or more of the component asthals with a reservation in favour of the others. The essence of the law governing Math is in the following of

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custom or usage ; and such a separation would *prima facie* be improper unless there were special circumstances justifying it, and cannot be supported in the absence of proof of custom justifying such a course. (*Mukerji and S. K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I.C. 33=9 R.C. 115=62 C.L J. 153.**

———*Math—Mahant—Nature and rights of office of—Right to deal with properties—Trust in favour of institution—Number of Mahants—If can be more than one.*

The properties endowed to a Math or Asthal is as a rule held by the Mahant as its owner and the succession to him in such property follows with the succession to the office ; the nature of the ownership is an ownership in trust for the Math or institution itself ; but at the same time it must be borne in mind that though large administrative powers are vested in the reigning Mahant, this trust does exist and must be respected. The supreme head of a Math is a single person though there may in some cases be a chief or presiding Mahant and also other Mahants of lesser grade. (*Mukerji and S.K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I.C. 33=9 R.C. 115=62 C.L.J. 153.**

———*Math—Mahant—Power to transfer properties of one Math to another—Transaction in the nature of permanent lease—Validity.*

Transference of properties held in trust for the Math or institution in a way which deprives some beneficiary intended by the trust and benefits some other beneficiary which the trust never contemplated is clearly outside the powers of the Mahant. Such a diversion is indefensible in principle and cannot be justified. When a Mahant transfers properties dedicated to the worship of deities in one Asthal to another Asthal in deprivation of the former and to be applied to the worship of the deities in the latter, with a reservation that the latter Asthal should pay a fixed annual sum of money to the former, the arrangement being not for a time only, but to operate for all times, the arrangement amounts to a permanent alienation for a fixed amount payable yearly, and it is very much like the granting of a permanent *mokurrari* lease of *debutter* property which is outside the powers of the Mahant. (*Mukerji and S.K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I.C. 33=9 R.C. 115=62 C.L. J. 153.**

———*Math—Mahant—Power to transfer right of management.*

The Mahant of a Math in the absence of a custom to the contrary, has ordinarily no right or power to transfer the right of management vested in him, even though such transfer is coupled with an obligation to manage in conformity with the trust annexed thereto. (*Mukerji and S K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I. C. 33=9 R.C. 115=62 C.L J. 153.**

———*Math—Mahant—Properties held by—If presumed* debutter—*Burden of proof.*

There is no presumption in law that if a Mahant holds any property, it is *prima facie debutter* property. A person claiming the properties as belonging to the office of Mahant has the burden on him of establishing the same. (*Mukerji and S.K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I.C. 33=9 R.C. 115=62 C.L.J. 153.**

———*Math—Mahant—Right to nominate chela—If lost by conviction in a criminal case.*

The right of a Mahant of a Mutt to nominate his chela as successor to himself is a right appurtenant to the office and subsists as long as the office continues. The conviction of a Mahant in a criminal case on a charge of rape does not incapacitate him from making an appointment of his successor. (*Mukerji and S.K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I.C. 33=9 R.C. 115=62 C. L J. 153.**

RELIGIOUS ENDOWMENT—Private Trust.

———*Math—Mahant—Succession—Chela—Qualifications—Kanka ceremony—When to be performed.*

The ceremony of Kanka which is necessary before a candidate can succeed to the Mahantship of a Math need not be performed during the lifetime of the Mahant on whose death the succession has opened. A chela is not made in a day ; and there must be some means for appointing successors to Mahants who die before a fully qualified successor is available. (*Roughton, R. M.*) GURULINGA v BABUAYA. **18 N L J 120.**

———*Math—Mahant—Succession—Institution requiring celebate as Mahant—Married person renouncing marriage tie—Right to succeed.*

In the case of a Math belonging to a class known as *Muurashi*, the office of Chief Mahant being hereditary and devolving on the chief disciple of the existing Mahant, who must be a celebate, it is not necessary that the person succeeding should be a Gouriya Brahmin ; if a man renounces his family ties after his marriage and embraces Brahmacharya, he may be fit to be appointed to that office. (*Mukerji and S.K. Ghose, JJ.*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326=164 I.C. 33=9 R C. 115=62 C L.J. 153.**

Private trust.

———*Private trust—Dedication to family idol and for feeding.*

Where by a deed of endowment the executant dedicated certain properties to the sheba of certain family idols and for feeding the poor and carrying out certain charitable objects such as feeding students, etc.,

Held, that the deed created a private and not a public trust. (*C.C. Ghose, Ag C J. and Mitter, J.*) PRASAD DAS PAL *v.* JAGANNATH PAL. **60 Cal. 538=6 I.R. (Cal.) 58=144 I.C. 894=37 C.W.N. 181=A.I.R. 1933 Cal. 519.**

———*Privte trust—If can be converted into secular property.*

A private religious endowment by a family can only be converted into secular property, if at all, by the consensus of the whole family; this can only be done with the consent of all the male and female relations of the founder interested in the endowment. (*Curgenven and Cornish, JJ.*) MANICKAMMAL *v.* MURUGAPPA GRAMANI. **157 I.C. 181 (2)=8 R.M. 115=A.I.R. 1935 Mad. 483.**

———*Private trust—Private Hindu debutter—Suit to frame scheme—Maintainability in Civil Court—Parties not joining suit—Inference.*

Where some of the heirs of the founder of a private debutter trust sued for the framing of a scheme and the other heirs did not join them though they had been served with notices,

Held, (1) that the Civil Court had jurisdiction to entertain the suit; (2) that the heirs who did not join the plaintiffs in the institution of the suit could be presumed not to have an objection to the prayer of the plaintiffs being granted. (*Mallik and Guha, JJ.*) RABINDRA NATH MANDAL *v.* CHANDI CHARAN MANDAL. **I.R. 1931 Cal. 864=134 I.C. 576=53 C.L.J. 621=A.I.R. 1932 Cal. 117.**

———*Private trust—Several trustees—Right of majority to act.*

In the case of a private trust where there are more trustees than one all must join in the execution of the

RELIGIOUS ENDOWMENT—Public or Private.

trust. Where the assistant shebaits are entitled to select and nominate a person as shebait, a majority of them cannot elect a shebait. All of them must join in electing a shebait. (*C C. Ghose, Ag.C.J and Mitter, J.*) PRASAD DAS PAL *v.* JAGANNATH PAL. **60 Cal. 538 = 6 I.R. (Cal.) 58 = 144 I.C. 894 = 37 C.W.N. 181 = A. I.R. 1933 Cal. 519.**

Public or private.

——— *Public or private—Test.*

One of the tests to determine whether an endowment is a private family endowment or a public endowment is to consider whether the founder or all the members of the family could divert the income of the endowed property to their own private use or to any purpose other than that expressed in the deed of endowment. (*Kulwant Sahay and James, JJ.*) RAM PRASAD GUPTA *v.* RAM KISHUN PRASAD. **11 Pat. 594 = I R. 1932 Pat. 178 = 138 I.C. 331 = 13 Pat.L.T. 256 = A I.R. 1932 Pat. 177.**

——— *Public or private—Test—Usage.*

Usage can be taken into consideration in deciding whether there is a trust of a public nature. 53 Mad. 608; 40 Cal. 297; 11 I.C. 166 and 34 All. 468, Ref. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288 = I R. 1932 Pat. 81 = 136 I.C. 417 = 12 Pat.L.T. 817 = A.I.R. 1932 Pat. 33.**

Right to sue.

See also TRUSTEE, *infra.*

——— *Right to sue—Idol.*

The right of suit vests not in the idol of the endowment but in the *shebait* ; and it makes no difference whether the idol sues as represented by the *shebait* or the *shebait* sues as *shebait* of the idol, the thing to be regarded is the substance of the claim. (*Mukerji and S.K. Ghose, JJ*) GOBINDA RAMANUJ DAS *v.* RAMCHARAN RAMANUJ DAS. **63 Cal. 326 = 164 I.C. 33 = 9 R.C. 115 = 62 C.L J. 153.**

——— *Right to sue—Person without legal right but in actual possession—Right to maintain suit on behalf of.*

Obiter.—A person without legal right but in actual possession of a mutt or any other endowment is entitled to maintain a suit for recovery of possession appertaining to it, not for his own benefit, but for the benefit of the mutt or endowment. 19 Cal. 776 and 1927 Cal, 130, Not Foll.; 60 I.A. 124 = 12 P. 251 and 1935 P.C. 44, Rel. on. (*Mitter, J.*) MOHAMMAD SOLEMAN *v.* TASADDUQ HOSSAIN. **158 I.C 544 = 8 R.C. 192 = A. I.R. 1935 Cal. 623.**

——— *Right to sue—Property attached to office—Right to possession of properties goes with right to possession of office.*

Where properties are attached to an office whether by way of endowment or by way of emoluments, the right to possession of the properties goes with the right to possession of the office and if the right to sue for recovery of possession of the office is barred, the possession of the properties cannot be dissociated therefrom and independantly dealt with; 6 M.H.C.R 301; 26 Mad. 113; 35 Mad. 92 and 1926 Mad. 1012, Ref. (*Walsh and Varadachariar, JJ.*) RAJAGOPALA NAIDU *v.* RAMASUBRAMANIA. AYYAR **1935 M.W.N. 503 = A.I.R. 1935 Mad. 449.**

Scheme.

——— Scheme—Construction — Temple— Devasthanam — Power of trustee "to fine, suspend, reduce or remove servant"—If confers power of summary dismissal. *See* MASTER AND SERVANT—EMPLOYEE OF DEVASTHANAM. **69 M.L.J. 206.**

RELIGIOUS ENDOWMENT—Temple.

——— *Scheme—High Court framing—Trivial deviation from rules—No injury—Interference.*

A trivial deviation from the formal compliance with the rules under the scheme will not do any real injury to any party and no injury is done if the rules have been substantially complied with. To hold otherwise would be to constitute the Civil Court the actual manager of the temple, a practice which has often been condemned. (*Wallace, J*) SHANMUGA MUDALI *v.* ARUNAGIRI MUDALI. **1932 M W N. 1311 = I R. 1932 Mad 910 = 140 I.C. 443 = 36 L.W. 669 = A.I.R. 1932 Mad. 658.**

Shebait.

See also ALIENATION. *supra.*

——— *Shebait—Resignation by—Validity.*

A shebait is a mere manager without any vested interest in the property. He is competent to resign his office or abdicate in favour of his co-shebait or successor in office.

Quaere: Can he transfer his office to a stranger? (*Suhrawardy and Graham, JJ.*) SIRIS CHANDRA SAW *v.* UPENDRA NATH GIRI DAS. **135 I C. 273 = 35 C.W.N. 768 = I.R. 1932 Cal 81 = 54 C L.J. 544 = A. I.R. 1931 Cal. 776.**

Sikh Gurdwara.

———Sikh Gurdwara—Essentials for being described as Sikh Gurdwara. *See* PINJAB SIKH GURDWARAS ACT (1925), S. 16 (2). **13 Lah. 6 = A.I.R. 1932 Lah. 268.**

———Sikh Gurdwara—Mahant—Appointment, mode of—Statement of prior Mahant if binding on successor. *See* EVIDENCE ACT. S. 18 — STATEMENT BY PREVIOUS MAHANT. **12 Lah. 497 = A.I.R. 1931 Lah. 161.**

——— *Sikh Gurdwara—Surplus income—Right of Mahant.*

Where there is no deed of endowment or where it is ambiguous, usage is relevant evidence to determine whether the lands and income were after their acquisition endowed for the gurdwara or were only burdened with the actual expenses thereof, the surplus being held by the Mahant for his own benefit. 53 Mad. 608, Relon. (*Addison and Monroe, JJ.*) PURAN DAS *v.* SHIROMANI GURDWARA PARBHANDHAK COMMITTEE. **15 Lah. 732 = 155 I C. 324 = 7 R.L 699 = 35 P.L.R. 423 = A.I.R. 1934 Lah. 421.**

Takias.

——— *Takias among non-Mahomedans—Nature of.*

All *takias* are not religious institutions. Even if that is so in the case of *takias* under the Mahomedan Law, it is not so in the case of *takias* in the ordinary sense as understood by non-Mahomedans. (*Dalip Singh, J.*) WADHAWA *v.* ALLAH DITTA. **I R. 1932 Lah. 153 = 135 I.C. 681 = 33 P.L.R. 180 = A.I.R. 1932 Lah 220.**

Temple.

See also ARCHAKA AND DEDICATION, *supra.*

——— *Temple—Entry into—Exclusion of members of founder's caste from—Validity.*

A religious institution, such as a temple, may be endowed by a person of any caste, and yet there can be a custom existing in that institution in favour of the opponents of the founder of the temple and against the members of the community or family of the founder, and restricting the entry by the members of his caste into the sanctum of the temple. Such customs do exist and have been judicially recognised. There is nothing unreasonable or obnoxious in such customs. (*Rangnekar and Divatia, JJ.*) S K. WODEYAR *v.* GANAPATI **158 I.C. 796 = 8 R.B. 142 = 37 Bom.L.R. 584 = A.I.R. 1935 Bom. 371.**

RELIGIOUS ENDOWMENT—Temple.

———Temple—Gross negligence of trustee—*Ex parte* decree against temple—Suit by succeeding trustee—Maintainability. *See* C.P. CODE, S. 11—*Ex parte* DECREE. **A I R. 1931 Mad. 641=60 M.L.J. 590.**

———*Temple—Sri Pandaram.*

The office of Sri Pandaram in a temple is the office of a trustee, though the duties of the holder may be mostly secular. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAVA PILLAI. **I.R. 1931 Mad. 705=133 I C. 193=1931 M.W N. 8=A.I R. 1931 Mad. 505.**

Trust.

———*Trust.*

Reigious endowments created for public purposes of a charitable or religous nature either by Hindus or by Mahomedans are not trusts in the strict sense of the term as understood in English Law. (*Kulwant Sahay and Macpherson, JJ.*) SYED ALI HUSSAIN *v.* BIBI AKHTARI BEGUM. **10 Pat. 506=I R. 1931 Pat 449 =134 I.C. 417=12 Pat L.T. 793=A I.R. 1931 Pat. 354.**

Trustee.

See also TEMPLE, *supra.*

———*Trustee—Delegation of management to committee—Validity—Suit by Committee—Maintainability.*

A trustee cannot delegate his trusteeship to a stranger. But that principle does not apply to case where all the trustees of a religious endowment, fifty in number, in order to facilitate management, authorise a Committee of five of the trustees to look after the management of the temple. Such a delegation of the power of management is not invalid; and a suit by such a Committee on behalf of the endowment in maintainable, even if the other trustees are not impleaded, especially when the plaintiffs have obtained permission to sue on behalf of all the trustees. (*Madhavan Nair, J.*) RAMAN NAMBUDRI *v* URALARS AND COMMITTEE MEMBERS. **40 L.W. 540=1934 M W N. 949=152 I.C. 632=7 R.M. 264 (2)=A I.R. 1934 Mad. 672.**

———*Trustee—Office of—Sale of.*

A conveyance or sale of the office of a trustee for consideration is invalid. Though the duties of Sri Pandaram are mostly secular, it involves duties to be performed in a temple and the office-holder who has to perform the duties attached to the office and who has the right of enjoining the properties after meeting the expenses is clearly a trustee and a sale of his office is not valid in law, if made in favour of any person other than the sole immediate heir. 1 M. 235 (P. C.), Foll.; 15 M. 183; 36 M.L.J. 355, Ref. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAVA PILLAI **I.R. 1931 Mad 705=133 I C. 193=1931 M.W.N. 8 =A.I R. 1931 Mad. 505.**

———*Taustee—Power of delegation—Lease by agent of trustee—Specific performance.*

A trustee or a person in a representative capacity cannot delegate his authority except where the employment of an agent is according to the usual course of business. It is open to a trustee or a shebait to appoint a sub-agent, but such appointment must only be as a means of carrying out his own duties himself and not for the purpose of delegating those duties by means of such appointment. So where the sanction of the trustee is necessary for a lease of debutter properties, a contract to lease entered into by the agent of the trustee without reference to the trustee till after the contract was entered into is not binding and not specifically enforceable. (*Mukerji and Bartley, JJ.*) SRI SRI GOPAL SRIDHAR MAHADEB *v.* SASHI BHUSAN SARKAR. **60 Cal. 111**

RELIGIOUS ENDOWMENT—Worship.

=142 I C 465=I R. 1933 Cal. 278=36 C.W.N. 1108 A.I R 1933 Cal. 109.

——— *Trustee—Powers of—Service—Inam-holder alienating property—No provision for performance of service made—Suit for declaration that alienation is void—Trustee, if can maintain.*

Where a service inam holder alienated the service inam without making due provision for the performance of the service either by himself or by the alienee, and in fact the services had not been duly performed either by one or the other of them.

Held, that the trustee, though he had no right to possession, could maintain proceedings for a declaration that the alienation was void as against the temple so as to make the property available for those who perform the service and avert the possibility of its resumption by the State. 23 Mad. 439, Rel. on. (*Varadachariar, J.*) VENKATACHARYULU *v.* HARIHARA PRASAD. **158 I C. 883=8 R M 376=42 L.W. 757=1935 M.W.N. 903=A I R. 1935 Mad 964.**

——— *Trustee — Trustee of kattalai— Removal—Procedure.*

A trustee of a kattalai or a minor endowment can be removed only by the Court and in a properly instituted suit. (*Venkatasubba Rao, J.*) SAMI AYYANGAR *v.* VENKATARAMANA AYYANGAR. **150 I C. 156=6 R. M. 702=39 L.W. 513=A I R. 1934 Mad. 381.**

Wakf

———*Wakf—Appointment of trustee—Wishes of founder—Court, if bound to accept.*

The Court is not bound to accept the wishes of the founder of the wakf in the choice of the trustee. Its primary duty is to consider the general interests of the general body of the public for whose benefit the trust is created. (*Sulaiman Ag C.J and Baipai, J.*) MAHOMED AHSAN ALI KHAN *v.* IBRAR HUSAIN. **I.R. 1931 All 641=133 I.C. 401=1931 A L J. 1071=A.I.R. 1931 All 765**

——— *Wakf—Meaning.*

The word 'wakf' is borrowed from Mahomedan Law and implies permanent dedication of property for religious or charitable purposes. When property is declared wakf, the original owner is divested of it and it vests in Almighty God. (*Addison and Bhide JJ.*) RIKHI KESH *v.* MELA RAM. **I R. 1931 Lah 411= 131 I.C. 283=32 P.L R. 304=A I R 1931 Lah. 170.**

———*Wakf—Sajjadanashin—Accounts not produced—Removal.*

Where the Sajjadanashin chooses not to produce his full accounts, unless the failure is explained away, he would be removed from his office. (*Dhavle and Saunders, JJ.*) NAJIHUDDIN AHMAD *v.* AMIR HASAN KHAN. **153 I.C 557=7 R P. 361=A.I.R 1934 Pat. 443.**

Worship.

———*Worship—Parasnath Hill—Ownership of—Erection of dwelling-houses on hill—Interference with worship.*

Held, on the evidence, that the Parasnath Hill is not the debutter property of the Jain deities thereon but the property of the Raja of Palgunj and now that of the Swetambaries.

Held, further, that the Digambaries could not complain of erection of dwelling houses and rest-houses on the hill on the ground that it was a sacrilegious pollution or interfered with their right of worship. (*Sir John Wallis.*) HAKUM CHAND *v.* MAHARAJ BAHADUR SINGH. **60 I.A 313=12 Pat 681=I R 1933 P C. 187=144 I.C. 346=35 Bom.L.R. 990=58 C L J. 56=14 Pat.L.T.**

RELIGIOUS ENDOWMENTS ACT (1863), S 5.

559=38 L W 306=1933 M W.N. 882=1933 A.L J. 1325=37 C W N 1021—A.I R. 1933 P C 193=65 M L J. 163 (P.C).

RELIGIOUS ENDOWMENTS ACT (XX OF 1863), S. 5—*Applicability.*

S. 5 of Act X of 1863 only applies where there is a vacancy existing at the time the application is made. (*Bennet and Bajpai, JJ.*) SHERA SHAH *v* BHURE SHAH 157 I.C 202 8 R A 142=1935 A. W.R 118=1935 A L.J 311 =A I R 1935 All. 273

——S. 7—*Committee appointed under—Death of one member pending suit by—Suit may be continued by others.*

A Committee appointed by the Government under S. 7 is not *ipso facto* dissolved on the death of one of its members pending the suit by the member of the Committee and the suit and other proceedings can be continued by the surviving members of the Committee and the suit or appeal does not become infructuous on the death of one of the members of the Committee (*Guha and Bartley, JJ.*) GHOLAM HOSSAIN SHAH *v.* SYED ALTAF HOSSAIN 61 Cal 80=38 C W N 214=149 I.C. 1215=6 R C. 735=58 C L J 333=A.I.R. 1934 Cal. 328

——S 7 —*Committee appointed under—Powers of—Original scheme of endowment superseded by Committee and Mutwalli appointed by them—Position of Mutwalli—Appointment of Mutwalli for three years and subject to good behaviour—Validity of agreement.*

Under the Act of 1863, the Committee appointed under S. 7 was to have the same powers that the Board of Revenue had under Regulation XIX of 1810, the powers being of supervision and control The power to suspend or remove a Mutwalli for just cause, which was properly incident to the principal duties and responsibilities of the Board of Revenue under Regulation XIX of 1810 was impliedly given to the Committee The trustee, Manager or Superintendent of the religious establishment appointed by the Committee has no possession strictly so called. The property is vested in the Committee and the manager in only an agent or servant of the Committee. The Committee can always under the law take over such custody or management from the manager, provided they act in the interest of the institution. Hajee Mohamed Moshin executed a deed of endowment in 1806. Certain properties were conveyed to two Mutwallis and the income therefrom set apart for pious purposes. The Mutwallis appointed by the founder were given the power to appoint their successors. In 1818, the Board of Revenue by virtue by their powers under Regulation XIX of 1810 dismissed the then Mutwallis for corruption and appointed another as sole Mutwalli From that date, the history of the institution consisted of fresh appointments of Mutwallis by the Government, suits by the dismissed Mutwallis for a declaration of their right to the office for life and to nominate their successor and the Committee being obliged to face protracted litigation on that account. In 1916, therefore, the Committee decided to appoint Mutwallis for a term (of three years) with the conditions of service set out in a registered agreement which *inter alia* provided for the Mutwalli being sent out on three months' notice. The defendant in the present suit was appointed in that manner in 1923 He executed a fresh agreement on the same terms in 1926 and was reappointed but when, a few months later, he was asked to clear out, he refused to do so and so the suit. The defendant contended that he was a Mutwalli under the Mahomedan Law and could not be removed by the Committee and that the agreement executed by him relating to the appointment of a Mutwalli for a limited period was illegal and invalid and not binding on him.

Held, that the powers of the Committee appointed under Act XX of 1863 were not the powers exercisable under the general Mahomedan Law in the matter of appointment of Mutwallis and not the powers exercised by the creator of the endowment itself, but the power vested in the Ruling power, the power exercised by the Board of Revenue under Regulation XIX of 1810 and the powers conferred upon the Committee under the Act of 1863. The Mutwallis appointed under the Regulation had no power to appoint their successors and that was the scheme followed by the Board of Revenue in supersession of the general rule of Mahomedan Law and of the scheme outlined in the original deed of endowment. The Committee had the power vested in them under the law to decide the duration of tenure of a Mutwalli and the conditions of service, and regard being had to the past history of the institution, their decision to appoint a Mutwalli for a term and subject to good behaviour was *bona fide* and in the interests of the institution. (2 The position of a Mutwalli appointed by the Committee is that of a servant of the Committee; he had no free hold in his office. He was not a Mutwalli under the endowment or under the general Mahomedan Law. (3) The onus was on the defendant to show that his dismissal was actuated by improper motives and that onus he had not discharged (4) The appointment by the Committee of the defendant as Mutwalli for a term and subject to certain conditions was within their competence under Act XX of 1863 and so the agreement executed by the Mutwalli with the Committee at the time of his appointment was not *ultra vires* or opposed to public policy. The defendant was therefore validly removed from office and he had no right to it. (*Guha and Bartley, JJ.*) GHOLAM HOSSAIN SHAH *v.* SYED ALTAF HOSSAIN. 61 Cal. 80=149 I C 1215 =6 R C 735=38 C W N. 214=58 C.L.J 333=A.I. R. 1934 Cal 328

——S. 14—Applicability. *See* RELIGIOUS ENDOWMENTS ACT, S. 18, *infra.* 11 Pat. 594=A.I.R. 1932 Pat. 177.

——S. 14—*Applicability.*

The provisions of S. 14 are not applicable to temples for the maintenance of which no endowment has been made. (*Wazir Hasan, C. J., Raza and Bisheshwar Nath, JJ.*) KEDAR NATH *v.* PEAREY LAL GUPTA. 7 Luck. 648=I. R. 1932 Oudh 202=137 I.C. 42=9 O.W.N. 229 =A.I.R. 1932 Oudh 152 (F.B.).

——Ss. 14 and 18—*Applicability—Endowments created after* 1863—*"Any mosque, temple or religious endowment"—Meaning.*

The words "any mosque, trustee or religious endowment" in S. 14 mean a mosque, temple or religious endowment to which the provisions of Regulation XIX of 1810 would have applied if they were in force now, and therefore include religious endowments of a public character, which came into existence not only before 1863 but also afterwards. Leave can therefore be granted under S. 18 of the Act to sue the Muttawali of a wakf which is created after 1863. (*Nasim Ali and Khundkar, JJ.*) BADAR RAHIM *v.* BADSHA MIA. 62 Cal. 125=153 I.C. 291= 7 R.C. 364=60 C.L.J. 298=38 C.W.N. 1056=A.I.R. 1934 Cal. 741.

——S. 14—*Construction—"Appointed under this Act".*

RELIGIOUS ENDOWMENTS ACT (1863), S. 14.

The words "appointed under this Act" in S. 14 apply not only to "the members of the committee" but also to the words "trustee, manager or superintendent". (*Bennet and Bajpai, JJ.*) SHERA SHAH *v.* BHURE SHAH. **157 I.C. 202=8 R.A. 142=1935 A.W.R. 118=1935 A.L.J. 311=A.I.R. 1935 All. 273.**

———**S. 14**—*Construction—"Appointed under this Act"—Meaning of.*

The words "appointed under this Act" in S. 14 of the Act, only refer to the committee and not to the trustee, manager or superintendent. (*Nasim Ali and Khundkar, JJ.*) BADAR RAHIM *v.* BADSHA MIA. **60 Cal. 125=153 I.C. 291=7 R.C. 364=60 C.L.J. 298=38 C. W. N. 1056=A.I.R. 1934 Cal. 741.**

———**S. 14**—*Misfeasance and breach of trust—Error of judgment, not sufficient—Alleged diversion of funds of endowment—Proof of detriment to the interests of endowment necessary.*

If in the course of the management of a religious endowment by the Committee appointed under the Act, there has been any error of judgment or any act done which bears the interpretation that there was mismanagement, but the *bona fides* of which could not be questioned and it could not be established by clear and cogent evidence that acts detrimental to the interests of the endowment were done by the Committee, no relief can be granted as contemplated by S. 14 of the Act. In a suit under S. 14 for removal of the defendants from membership of the Religious Endowments Committee for alleged acts of misfeasance, breach of trust and neglect of duty.

Held, (*i*) Three-ninths share of the properties were, according to the original deed of endowment or Towliatnama, to be devoted to religious purposes. Certain properties, known as the Kharij Towliat properties, which escheated to the Government after the death of the founder were, by virtue of an arrangement made by the Government, treated as appanage to the three-ninths share, but the income therefrom was not a portion of the funds specifically dedicated to religious purposes by the founder. Payments out of this Kharij Towliat fund made by the Committee on account of a settlement of dispute with a person who was asserting his right to be a Mutwalli of the Imambarah with the power to nominate his successor, and made by virtue of a previously existing arrangement and sanctioned by the District Judge, cannot be said to be an act of diversion of funds by the Committee. (*ii*) Similarly the payment of a sum of Rs. 500 to compromise a dispute with a Mutwalli who refused to vacate the office and asserted a right to the office for life instead of facing a protracted litigation is not merely *bona fide* but in the best interests of the institution. (*iii*) The three-ninths share of the endowed properties was, it is true, earmarked for pious purposes but there is nothing in Indian statutes or in Mahomedan Law which draws a clear cut distinction between religious or pious purposes on the one hand and charitable purposes on the other. In the absence of proof that payments made by way of charity to poor persons or by way of gratuities

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to servants who had put in years of service, that such payments made out of that three-ninths share had the effect of curtailing the expenditure for the pious purposes specifically mentioned in the deed of endowment, they cannot be called an improper diversion of the funds. (*iv*) The failure on the part of the Committee to perform the ceremonies in connection with the Mohurrum on account of serious obstacle placed in their way by a servant dismissed by them, who was bent upon disregarding the directions of the Committee and preventing the new manager appointed by the Committee from discharging his functions, cannot by any means be called a neglect of duty on the part of the Committee. (*v*) Rule 17 of the Rules relating to the management of the Hooghly Imambarah related to the power of the Mutwalli to dismiss or suspend servants of the Imambarah. This rule was amended by the Committee limiting the Mutwalli's power of dismissal to servants drawing less than Rs. 8 a month. Such an amendment made in the presence of the then Mutwalli by the Committee in the exercise of the statutory authority vested in them cannot be called an unjustified interference with the internal management by the Mutwalli. (*vi*) The Mutwalli was only a servant with duties delegated by the Committee. If the Committee appointed a Mutwalli for a limited term of three years with conditions attached to the appointment and if under those conditions there has been a discharge of the Mutwalli, the Committee is within its rights. Even if some of the acts aforesaid amounted to an error of judgment, it was not sufficient for relief under S. 14 of the Act. (*Guha and Bartley, JJ.*) GHOLAM HUSSAIN SHAH *v.* SYED MUSLIM HOSSAIN. **58 C.L.J. 356=150 I.C. 124=6 R.C. 759=A.I.R. 1934 Cal. 348.**

———**S. 18**—*Applicability.*

All that is necessary in order to attract the provisions of S. 14 and S. 18 of the Act of 1863 is to show that the endowment is of a nature that the superintendence of it could vest in the Board of Revenue under Regulation XIX of 1810 if it were in force. As the preamble of that Regulation stated that when endowments had been granted in land by an individual for the support of a Hindu temple, such endowments were to be considered as for public purposes to which the Regulation would be applicable, the Act of 1863 would equally be applicable to them. (*Kulwant Sahay and James, JJ.*) RAM PRASAD GUPTA *v.* RAM KISHUN PRASAD. **11 Pat. 594=I.R. 1932 Pat. 178=138 I.C. 331=13 Pat.L.T. 256=A.I.R. 1932 Pat. 177.**

———**S. 18**—Applicability—Wakf created after 1863—Leave to sue muttawali of—If can be granted. *See* RELIGIOUS ENDOWMENTS ACT, Ss. 14 AND 18. **38 C.W.N. 1056.**

———**S. 18**—*Public endowment—Endowment for the support of a temple.*

Where the founder has divested himself completely of his interest in the property and transferred it in favour of the temple and for the maintenance of the images therein, the protection of the endowment according to the Hindu Law ultimately vests in the Crown and as such it must

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be treated to be a public nature. (*Kulwant Sahay and James, JJ.*) RAM PRASAD GUPTA *v.* RAM KISHUN PRASAD. **11 Pat. 594=I.R. 1932 Pat. 178=138 I.C. 331=13 Pat.L.T. 256=A.I.R. 1932 Pat. 177.**

———**S. 18 and C. P. Code, S. 92**—*Remedies under—Alternative character of.*

The plaintiffs can proceed either under **S. 18,** Religious Endowments Act or under S. 92, C. P. Code. (*Dhavle and Saunders, JJ.*) NAJIHUDDIN AHMED *v.* AMIR HASAN KHAN. **153 I. C. 557=7 R.P. 361=A.I.R. 1934 Pat. 443.**

RELIGIOUS OFFICE.

See also (1) HINDU LAW—RELIGIOUS OFFICE.
(2) MAHOMEDAN LAW—WAKF—RELIGIOUS OFFICE.

———*Alienation—Archaka miras right in temple—Mortgage of—Validity.*

A mortgage by the holder of an archaka miras right in a temple is a transfer of the office for the pecuniary advantage of the holder; and when it is made in favour of one who is not in the line of heirs of the alienor, it is invalid, although the mortgagee may himself be an archaka qualified to hold the office. (*Burn and K. S. Menon, JJ.*) RANGASWAMI BATTAR *v.* ALASINGHA BATTAR. **160 I.C. 416=8 R.M. 632=1936 M.W. N. 116=43 L.W. 331=A.I.R. 1936 Mad. 103=69 M.L.J. 888.**

———*Alienation—Archaka right—Custom permitting—Proof of.*

A hereditary religious office such as that of an archaka in a Hindu temple is inalienable, and no custom qualifying this principle can be proved or upheld, if the alienation amounts to a sale for pecuniary advantage of the holder of the office. Such an alienation being opposed to public policy, the alienor or his representative is not estopped from contesting the validity of the same. (*Venkatasubba Rao, J.*) NALLASAMI GURUKKAL *v.* SADASIVA GURUKKAL. **153 I C. 464=7 R.M. 360=40 L.W. 799=1934 M.W. N. 1062=A.I.R. 1935 Mad. 5 (2)=67 M.L. J. 759.**

———*Alienation—Archakaship in temple—Devise by will to heir—Validity*

An alienation of a religious office, such as that of an archakaship of a temple, is not invalid when it is made in favour of one in the line of the alienor's heirs, and when it is neither for consideration nor in any way opposed to or inconsistent with the interests of the institution. The right of delegation has been expressly recognised in the case of archakas by permitting the system of proxies. Consequently, a devise by will of the archakaship to the testator's sister's son, who is not in any way personally unfit or disqualified from performing the duties of the office, is valid. (*Varadachariar and Burn, JJ.*) SRI MAHANT PRAYAG DOSS JEE VARU *v.* GOVINDACHARLU. **157 I.C. 547=41 L.W. 63=1935 M.W.N. 59= A.I.R. 1935 Mad. 220=68 M.L.J. 295.**

———*Joshi—Right to officiate at ceremony—Hindus forming Satya Shodak Samaj—Exclusion of service of priest—Validity.*

Where certain members of the Satya Shodak Samaj did not call in a Brahmin priest to perform their ceremonies, and this course they adopted according to the tenets of their sect.

Held, that the village Joshi was not entitled to claim that he should be invited to perform such ceremonies and the members of the samaj should not be forced to employ a priest of their former religion or to give him compensation for not employing him. (*Pollock, A. J. C.*) NARAYAN *v.* BALA. **152 I.C. 379=7 R.N. 98=17 N.L.J. 104=A.I.R. 1934 Nag. 240.**

———Mutawalliship of Mosque—Succession to—Right of females or persons claiming through females. *See* MAHOMEDAN LAW—WAKF. **68 M. L.J. 684.**

———Yajmanvrithi—Farming out—Rights of widow of priest—No contract with the defendant—Defendant entitled to retain for his own benefit the sums paid to him. *See* BOMBAY INVALIDATION OF HINDU CEREMONIAL EMOLUMENTS ACT (1926), S. 4. **35 Bom.L.R. 606=A.I.R. 1933 Bom. 347.**

RELIGIOUS PROCESSIONS—*Right of Hindus to conduct processions before mosques—Limitations to exercise of right.*

The plaintiffs, Hindus of a locality, sued for a declaration of their right to conduct processions, both social and religious on all streets and thoroughfares playing music with customary religious ceremonies past the sites occupied by mosques. The Court having found the right in the plaintiffs' favour passed the following decree: "That the plaintiffs both in their individual capacity and as members of the Hindu community have a right to take out religious and social processions accompanied by music along public roads even while passing mosques, subject to any orders or directions issued by the Magistrate or the Police for preventing breaches of the public peace or obstruction of the thoroughfares or for other matters mentioned in S. 144, Cr. P. Code, or under statutory provisions or for regulation of traffic, provided that the exercise of such a right does not amount to a nuisance recognised by law". (*Sulaiman and Young, JJ.*) MAHOMED JALIL KHAN *v.* RAMNATH KATUA. **53 All. 484= 1931 A.L.J. 354=I.R. 1931 All. 344=131 I.C. 40=A.I.R. 1931 All. 341.**

———*Rights of Hindus to play music near mosque—Proper decree to be passed—Considerations to be taken into account.*

Where a newly installed Hindu temple was situated within a dozen yards of a Mahomedan mosque and certain Hindus sued for a declaration that they were competent to perform the worship by ringing ghanths, ghariyals, by blowing sankh, etc., and taking processions without restriction of time and for an injunction restraining the Mahomedan defendants from interfering with their worship.

Held, that the plaintiffs both in their individual capacities and as members of the Hindu community had (*a*) the right to take out religious and social processions accompanied by music along public roads even while passing mosques, and (*b*) a right to perform worship in the thakurdwara accompanied by music subject in both to any orders or directions by the Magistrate or the Police for preventing breaches of the peace or obstruction of the thoroughfare or for other

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matters mentioned in S. 144, Cr. P. Code, or under other statutory provisions or for regulation of traffic provided that the exercise of such rights (*a*) and (*b*) do not amount to a nuisance recognised by law. (Case-law discussed.)

Per *Bennet, J.*—The fact that one party has newly come to the locality and is starting religious worship in close proximity to an existing religious institution, so close as to disturb, is a matter to be taken into consideration along with other matters.

Per *Mukerji, J.*—In considering the rights of the parties it is immaterial whether the persons whose actions are objected to have come recently to the neighbourhood or have been occupying the place for a long time. The basis of the decision in such cases must be the civil right alone and no account can be taken of mere sentiments of certain people. Meaning of the word "annoyance" pointed out. (*Mukerji and Bennet, JJ.*) JANKI PRASAD *v.* KARAMAT HUSAIN **53 All. 836=137 I.C. 587=I.R. 1932 All. 333 =1931 A.L.J. 624=A.I.R. 1931 All. 674.**

———*Rules applicable—Exercise of right on highways—Nuisance, what constitutes—Right of Police and Magistrate to regulate traffic.*

The principles governing the rights of parties regarding religious processions on public highways may be summarised as follows: (1) There is a right in every community to take out a religious procession with its appropriate observances along a highway. This is an inherent right and does not depend upon proof of custom or long established practice. Even if such a procession is an innovation, it would be in the exercise of legal rights. The right is not lost by mere abstention or non-exercise of it for a long time. (2) A public highway is primarily for purposes of traffic and every individual is entitled to use it in a reasonable way. But he cannot claim it exclusively for purposes of worship. No right can be claimed to block a public thoroughfare completely and the Police and Magistrates are entitled to issue orders for regulation of traffic or to prevent obstruction of thoroughfares and such orders are not actionable in Civil Courts. (3) Worshippers in a mosque or temple which abuts a highway have no right to compel the processionists to stop their music completely while passing a mosque or temple on the ground that there was continuous worship inside it. (4) If the parties are bound by a contract *inter se* a declaration in breach of such a contract will not be granted by a Civil Court. (5) There is no right to commit a public nuisance on a highway nor is there any absolute right to commit a private nuisance regarding a particular defendant. But all music however bad cannot amount to a nuisance even though it may annoy occupiers of a house on the road. But a noise may become a nuisance. The standard of judging it is according to that of men of ordinary habits and not men of fastidious tastes or of over-sensitive nature whether due to religious sentiment or not. (Case-law discussed.) (*Sulaiman and Young, JJ.*) MAHOMED JALIL KHAN *v.* RAMNATH KATUA. **53 All. 484=1931 A.L.J. 354=I.R. 1931 All. 344=131 I.C. 40=A.I.R. 1931 All. 341.**

RENUNCIATION.

———*Suit for declaration to take out—Maintainability in Civil Court—Compromise between communities—When binding.*

When objection is taken to the taking out of a procession or of playing music in the vicinity of a mosque or temple, a civil suit lies for a declaration of the right to do so. Such a suit can be brought either by individual plaintiffs against individual defendants who object or it may be of a representative character, the result of which will bind both the communities which are represented. If it is established that there is any binding contract between the parties to the suit, the plaintiff would not be entitled to a declaration of right which would amount to its breach. Without proof of valid authority express or implied it would not be possible to bind the other members of the communities who were no parties to the written compromise or could not validly give consent. (*Sulaiman and Young, JJ.*) MAHOMED JALIL KHAN *v.* RAMNATH KATUA. **53 All. 484=I.R. 1931 All. 344=1931 A.L. J. 354=131 I.C. 40=A.I.R. 1931 All. 341.**

RELIGIOUS PURPOSE. *See* CONTRACT ACT, S. 23.

RELIGIOUS TRUSTS. *See* RELIGIOUS ENDOWMENT.

RELINQUISHMENT.
See (1) C. P. CODE, O. 22, R. 10.
(2) LANDLORD AND TENANT.
(3) REGISTRATION ACT, SS. 17 (1) (*b*) AND 49.

REMAINDER.
See (1) T. P. ACT, SS. 13-19.
(2) WILL—CONSTRUCTION.

REMAND.
See (1) APPEAL—PRACTICE.
(2) C. P. CODE, S. 151 AND O. 41, RR. 23-27.
(3) PRACTICE—REMAND.

RE-MARRIAGE.
See (1) HINDU LAW—RE-MARRIAGE.
(2) HINDU WIDOWS' RE-MARRIAGE ACT (1856).

REMEDY.
See (1) C. P. CODE, S. 115—OTHER REMEDY OPEN.
(2) DEBTOR AND CREDITOR.
(3) INTERPRETATION OF STATUTES.

RENNEL'S MAP. *See* EVIDENCE ACT, SS. 36 AND 83. **56 C.L.J. 369.**

RENT.
See (1) LANDLORD AND TENANT.
(2) LOCAL TENANCY ACTS.

RENT-FREE TENURE.
See (1) GRANT—CONSTRUCTION.
(2) LAND TENURE—RENT-FREE TENURE.
(3) LANDLORD AND TENANT—RENT-FREE GRANT.

RENT SUIT.
See (1) C. P. CODE, S. 11—RENT SUIT AND O. 2, R. 2.
(2) LOCAL TENANCY ACTS.

RENUNCIATION. *See* HINDU LAW—CIVIL DEATH.

REPEALING ACT. *See* INTERPRETATION OF STATUTES.

REPORTS—*Law Reports—Reversing decision——Failure to report—Second appeal—Reporting of.*

It is reprehensible of compilers of law reports to omit to report the judgment of the Appellate Court reversing the decision in a case which they have reported. A decision in second appeal should rarely be reported until any appeal preferred against it under the Letters Patent has been determined. (*Macpherson, J.*) MALIK MOKHTAR AHMAD *v.* AKLOO MAHTOO. **10 Pat. 622=I.R. 1931 Pat. 506=134 I.C. 954=12 Pat.L.T. 308=A.I.R. 1932 Pat. 5.**

REPRESENTATION.
See (1) EVIDENCE ACT, S. 115.
(2) T. P. ACT, S. 41.

REPRESENTATIVE, LEGAL.
See (1) C. P. CODE, S. 2 (11) AND O. 22.
(2) EVIDENCE ACT, S. 115.

REPRESENTATIVE SUIT. *See* C. P. CODE, O. 1, R. 10; O. 22, RR. 3 AND 4 AND O. 23, R. 1.

REPUDIATION.
See (1) CONTRACT—REPUDIATION.
(2) CONTRACT ACT, SS. 73, 119, ETC.
(3) LANDLORD AND TENANT—REPUDIATION OF TENANCY.

REPUTATION.
See (1) EVIDENCE.
(2) TORT—DEFAMATION.

REPUTE. *See* CR. P. CODE, S. 110.

REPUTED OWNERSHIP.
See (1) EVIDENCE ACT, S. 110.
(2) PRESIDENCY TOWNS INSOLVENCY ACT, S. 52 (2) (*e*).

RE-SALE. *See* CONTRACT ACT, S. 107.

RESCISION—Right of. *See* SPECIFIC RELIEF ACT, S. 35 (*c*).

RESIDENCE. *See* C. P. CODE, S. 20.

RESIDUARY BEQUEST.
See (1) SUCCESSION ACT (1926), SS. 102 AND 103.
(2) WILL - CONSTRUCTION.

RESIDUARY CLAUSE. *See* SUCCESSION ACT, S. 103.

RES JUDICATA. *See also* C. P. CODE, S. 11.

———Execution proceedings—Constructive *res judicata*—Suit for possession by purchaser—Plea that decree was satisfied and sale irregular—If maintainable. *See* MYSORE C. P. CODE REGULATION, S. 47 AND O. 21, R. 90. **13 Mys.L.J. 75=39 Mys.H.C.R. 1096.**

———Heard and finally decided—Application for final decree in mortgage suit—Dismissal for default of prosecution—Fresh application—If barred. *See* MYSORE C. P. CODE REGULATION, O. 34, R. 5. **40 Mys. H.C.R. 9.**

RESTITUTION. *See* C. P. CODE, SS. 144 AND 151.

RESTITUTION OF CONJUGAL RIGHTS.
See (1) HINDU LAW—MARRIAGE.
(2) HUSBAND AND WIFE.
(3) MAHOMEDAN LAW—MARRIAGE.

REVENUE RECORDS.

———*Discretion of Court—Marriage, in contravention of Child Marriage Restraint Act—Decree conditional.*

No Court of law should deliver a child of tender years to the mercies of her adult husband, particularly when the marriage has been performed in contravention of the provisions of the Child Marriage Restraint Act, 1929, but the decree in a suit for restitution of conjugal rights should be made subject to conditions. (*Dunkley, J.*) RAM TAPSI *v.* SUNDARI **160 I.C. 755=8 R.R. 428=A.I.R. 1935 Rang. 507.**

RESTORATION OF PROPERTY. *See* CR. P. CODE, S. 517.

RESTORATION OF SUIT OF APPEAL. *See* C. P. CODE, S. 151 AND O. 9, RR. 4 AND 9.

RESTRAINT ON ALIENATION. *See* SUCCESSION ACT, S. 138.

RESTRAINT OF TRADE. *See* CONTRACT ACT, S. 27.

RESTRICTION ON ALIENATION.
See (1) DEED—CONSTRUCTION—GIFT.
(2) HINDU LAW—WILL.
(3) SUCCESSION ACT, SS. 138 AND 172.
(4) T. P. ACT, S. 10.
(5) WILL—CONSTRUCTION.

RESULTING TRUST.
See (1) SUCCESSION ACT, S. 108.
(2) TRUSTS ACT, SS. 88 91

RESUMPTION. *See* GRANT—RESUMPTION.

RETRACTED CONFESSION. *See* EVIDENCE ACT, SS. 24, 114, ILL. (*b*) AND 133.

RE-TRIAL.
See (1) C. P. CODE, O. 41, RR. 23 AND 25.
(2) CR P. CODE, S. 439—RE-TRIAL.

RETROSPECTIVE EFFECT. *See* INTERPRETATION OF STATUTES

RETURN OF PLAINT. *See* C. P. CODE, O. 7, R. 10.

RE-UNION. *See* HINDU PARTITION—RE-UNION.

REVENUE—*Berar non-agricultural land—Assessment made in* 1871.

The assessment of land revenue on non-agricultural land in Berar levied in 1871 must be held to have been fixed in perpetuity. (*Nelson, R. M.*) SHRIDHAR VISHNU BAPAT, *In re.* **16 N. L.J. 71.**

REVENUE COURT.
See (1) C. P. CODE, S. 11—COMPETENT COURT.
(2) JURISDICTION—REVENUE COURT.

REVENUE OFFICER—Patwari—Statement regarding landlord's admission of tenant— Evidentiary value. *See* EVIDENCE—PROOF—TENANCY. **15 R.D. 110=12 L.R. 12 (Rev.).**

REVENUE PAPERS.
See (1) ADVERSE POSSESSION.
(2) REVENUE RECORDS.

REVENUE RECORDS.
See also (1) ADVERSE POSSESSION—REVENUE PAPERS
(2) EVIDENCE—REVENUE DOCUMENTS.
(3) EVIDENCE ACT, S. 35—REVENUE RECORDS.

REVENUE RECORDS.

———*Batwara papers—Entries in—Binding nature of.*

The entries in the batwara papers only bind the co-sharer Zemindars who were parties to the proceedings and do not create any estoppel against any tenant unless he was a co-sharer Zemindar himself and in that capacity was a party to the proceedings. (*Mahomed Noor and Dhavle, JJ.*) CHATURBHUJ SINGH *v.* SARADA CHARAN GUHA. **11 Pat. 701=141 I.C. 157=I.R. 1933 Pat. 47=14 Pat.L.T. 509=A.I.R. 1933 Pat. 6.**

———*Clerical error—No effect on title.*

A mere clerical error in the Collector's register does not throw any cloud on a person's title. It is only when he attempts to have the error corrected and the Deputy Collector refuses to do so, that it becomes necessary for him to institute a suit. (*Henderson, J.*) RAMGOPAL DAS NASKER *v.* PURNACHANDRA ROY. **154 I.C. 444=7 R.C. 492=A.I.R. 1934 Cal. 619.**

———*Construction*—"Hasab rasad khewat"—*Meaning of—Partition of* shamilat.

The words "*Hasab rasad khewat,*" when used in a revenue record in relation to a partition of the *shamilat* area, means "according to the revenue assessed on the holding", which is the ordinary sense of the words. But in the case of villages of a particular type, the words are capable of being interpreted as "according to the area". But it is only in exceptional circumstances that the latter interpretation holds good. (*Addison and Din Mahomed, JJ.*) SUNDER *v.* INDER SINGH. **159 I.C. 366=8 R.L. 378 (2)=A.I.R. 1935 Lah. 446.**

———*Entries in—Correctness of—Trustee entered in the column of owners.*

Much significance cannot be attached to the mere fact that in the revenue records the names of the Gaddinashins (trustees of a Mahomedan shrine) have been shown in the column of owners. The fact that the incumbent is only a "trustee" and not an owner in the true sense of the term is not ordinarily of importance for the purposes of the revenue records and it is not unusual to find such entries in the case of persons who are mere custodians or trustees. (*Addison and Bhide, JJ.*) MIRAN BAKHSH *v.* GHULAM NABI. **14 Lah. 624=148 I.C. 1133=6 R.L. 645=34 P.L.R. 482=A.I.R. 1933 Lah. 725 (2).**

———*Entries in—Discrepancy between original and fair order.*

Where there is a discrepancy between the original order and the fair order, due to the mistake of the Amin in copying the fair order, the original order is the effective one. A mistake in a copy would not alter the order. (*Oppenheim, S. M. and Walton, J. M.*) MADHUBAN SAHU *v.* ABHIRAJ SINGH. **17 R.D. 356=14 L.R. 249 (Rev.).**

———*Entries in—Evidentiary value.*

The entries in the revenue records cannot be regarded as anything more than '*prima facie*' proof of the matters to which they relate, and their correctness is subject to rebuttal. (*Smith, J.*). ABDUL RAHMAN KHAN *v.* LACHHMI NARAIN. **158 I.C. 802=8 R.O. 124=1935 R.D. 520=1935 O.W.N. 1183=A.I.R. 1936 Oudh 65.**

REVENUE RECORDS.

———*Entries in—Evidentiary value.*

Entries in revenue documents are not conclusive but their importance in a case for possession cannot be denied. (*Otter and Brown, JJ.*) MAUNG SIN *v.* MAUNG SO MIN. **8 Rang. 556=I.R. 1931 Rang. 79=129 I.C. 511=A.I.R. 1931 Rang. 40.**

———*Entries in—Evidentiary value—Tenancy—Entries regarding*

The revenue entries should be read as a whole. It must also be borne in mind that the usual practice of the revenue authorities is to enter in the tenancy column, all persons who are in actual possession of the land whether they are in fact tenants under the so called landlords or not, until the entry is reversed by fresh mutation. Consequently the mere circumstance that certain names appear in the tenancy column is no proof of their being tenants. (*Tek Chand, J.*) MANGAL SINGH *v.* AMIR SINGH. **I.R. 1932 Lah. 626.**

———Entries in—Presumption relating to. *See* U. P. LAND REVENUE ACT, 1901, S. 44. **18 R. D. 502.**

———*Entries in—Property belonging to thakurdwara—Entry in name of mahant—Effect.*

The mere entry of the name of the mahant of a thakurdwara in column of owner does not prove that the property was his private and exclusive property. (*Addison and Agha Haidar, JJ.*) RAGHUNATH DAS *v.* GAJPAT RAI. **155 I. C. 554=7 R.L. 733=35 P.L.R. 443=A.I. R. 1934 Lah. 449.**

———*Entries in—Tenancy—Khudkasht and sub-tenancy.*

An entry of Khudkasht and sub-tenancy cannot stand together. So where the land is recorded as Khudkasht of one person, another person's name cannot be entered as the sub-tenant of the land. (*Drake Brockman, S. M.*) MUTRA *v.* RADHA PATTI SINGH. **14 L.R. 672 (Rev.).**

———*Fards Bachh*—Evidentiary value. *See* EVIDENCE ACT, S. 35—REVENUE RECORDS. **32 P. L.R. 508=A.I.R. 1931 Lah. 605.**

———*Jamabandi*—Entries on—Presumption. *See* EVIDENCE ACT, S. 114, ILL. (*e*)—OFFICIAL ACTS. **29 N.L.R. 272=A.I.R. 1933 Nag. 130.**

———*Jamabandi*—Entries in—Proof of adverse possession. *See* EVIDENCE ACT, S. 114, ILL. (*e*)—OFFICIAL ACTS. **13 Lah. 432=A.I.R. 1932 Lah. 586.**

———Jama-wasil-bakis—*Reference to English and Bengali dates—Suit for arrears of rent—Determination of liability.*

Where the question arose whether the revenue of a holding in Dihi Panchannagram within the District of 24 Parganas was in arrears and in the *jama-wasil-bakis* of the Collectorate, the year of arrear was entered in Bengali, while the English date was given whenever the revenue was recoverable by the Collector.

Held, that the accounts should be read in the light of the *jama-wasil-bakis* and the liability for arrears determined on that basis. (*Rankin, C. J. and Mitter, J.*) JOGENDRANATH DAS *v.* DAMODARDAS KHANNA. **60 Cal. 302=I.R. 1933 Cal. 503=144 I.C. 125=A.I.R. 1933 Cal. 373.**

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———Khatanni—*Person holding without landlord's consent—Entry of name.*

The name of a person holding land without the consent of the landlord should be entered in Col. 10 and not Col. 8 of the *Khatanni* records. (*Oppenheim, J. M.*) SRIPAT SINGH *v.* BALDEO. **15 R.D. 671.**

———*Mutation—Decree of Civil Court—Old entries—Modification.*

The Financial Commissioner will interfere in revision in order that mutation may be effected in accordance with the decree of the Civil Court. It would be a most dangerous doctrine to admit that several years after a mutation order has been made, it is open to a Revenue Officer to substitute for it another and a completely different order merely on the ground that the original order was mistaken. (*Irving, F C.*) HARI SINGH *v.* ATTAR SINGH. **11 Lah.L.T. 121.**

———*Mutation*—Ex parte *entries—Evidentiary value.*

Where an entry is made in the revenue records on a claim made by a party in whose favour it is made, but without the concurrence of the party adversely affected, its evidence has little pre-emptive value. (*Coldstream and Johnstone, JJ.*) PARAS RAM *v.* CHETAN DAS. **135 I.C. 501=I.R. 1932 Lah. 101=32 P.L.R. 731=A.I.R. 1932 Lah. 81.**

———*Mutation—Procedure—Possession of party when material.*

The business of a Revenue Officer in mutation is to decide whether a fact has been proved to exist or not; he has no jurisdiction to decide whether it ought to exist. It is the settled practice in mutation procedure that the fact that a transaction is voidable does not prevent mutation where possession has passed. Where the question of possession does not arise, the Collector cannot go out of his way beyond the registered deed of mortgage. (*Irving, F C.*) NATHURAM *v.* UDE RAM. **11 Lah.L.T. 109.**

———*Mutation—Relinquishment of claim in mutation proceedings.*

The statement in mutation proceedings made by the revenue agent representing all the four daughters of the deceased that his clients were the lawful heirs of *I* and were willing that mutation of names in respect of entire property be made by right of inheritance in favour of *A*, one of the four sons of the deceased, does not prove that there was a relinquishment by the daughters of their interest in the property. It merely evidences their consent to mutation being effected in favour of one of the heirs alone. (*Hasan, C. J. and Bisheshwar Nath, J.*) AMIR JAHAN BEGAM *v.* KHADIM HUSAIN KHAN. **I.R. 1931 Oudh 235=132 I.C. 75=14 O.L.J. 314=8 O.W.N. 237=A.I.R. 1931 Oudh 253.**

———*Mutation—Transferee under registered deed—Recital as to delivery of possessions.*

Prima facie effect would be given in mutation proceedings to a registered deed especially as between the parties to the deed. The recital as to delivery of possession should be taken into account and the validity of the transfer is of no account. (*Irving, F. C.*) RAM KHETRI *v.* KULDIP CHAND. **11 Lah.L.T. 114.**

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———*Patwari's papers—Erroneous entry in.*

A Court trying an ejectment case can decide whether an entry in the putwari's papers is right or wrong; if it is wrong, a taluqdar upon proof of the same, is entitled to proceed against the real tenant. (*Oppenheim, S. M. and Walton, J. M.*) UMA NATH BAKSH SINGH *v.* DHUN SINGH. **14 L.R. 316 (Rev.)=17 R.D. 478.**

———*Patwari's papers—Erroneous entry—Effect of.*

A wrong entry by a patwari showing *Sir* land as ordinary land cannot change the character of the land. (*Oppenheim, S. M. and Walton, J. M.*) KULDIP SINGH *v.* GANGA BARAI. **14 L.R. 325 (Rev.)=17 R.D. 444.**

———*Revenue Manual, Para.* 1011—*Appeal to Commissioner—Order in—Civil suit to impugn its correctness.*

The order of the Commissioner reversing the Collector's order, on appeal under paragraph 1011 of the Revenue Manual is final and cannot be impugned in a civil suit. (*Niamatullah and Bennet, JJ.*) BHARAT SINGH *v.* RAM PRASAD. **6 R.A. 843=149 I.C. 59=3 A.W.R. 487=15 L.R. 226 (Rev.)=18 R.D. 169=A.I.R. 1934 All. 816.**

———*Revenue papers—Entries in—Presumption—Rent.*

In the absence of other evidence, it must be assumed that the rent entered in the revenue papers is correct. (*Knox, J M.*) RAM LAL *v.* RAJA ANAND RAM. **13 L.R. 88 (Rev.)=16 R.D. 181.**

———*Revenue register—Entries in—Evidentiary value.*

The entries in the revenue registers cannot be given the effect of determining the legal status of the person whose name is entered in those registers. If those entries do not describe the true legal position, they are of no consequence on the question of title according to law. (*Wazir Hasan, C. J. and Raza, J.*) GANESH BAKSH SINGH *v.* AJUDHIYA BAKHSH SINGH. **7 Luck. 564=I.R. 1932 Oudh 230=137 I.C. 349=9 O.W.N. 304=A.I.R. 1932 Oudh 172.**

———*Robakari—Proof of revenue-free title.*

Where according to the Robakari, the lands were exempted from assessment not because they had been already assessed but because a lakhiraj title was claimed and found in favour of the plaintiff's predecessor on behalf of a deity.

Held, that the Robakari may be taken to rebut the presumption under the record-of-rights that the land is rent-free and may be taken to establish a revenue-free title in favour of the plaintiff. (*Mukerji and S. K. Ghose, JJ.*) KUMAR BIRENDRA NATH RAY HAHADUR *v.* SURENDRA NATH TAGORE. **150 I.C. 617=7 R.C. 32=58 C.L.J. 120=A.I.R. 1934 Cal. 192.**

———*Settlement records—Agreements contained in—Effect.*

Agreements in a Settlement Record are not intended to take effect after the expiry of the settlement. (*Irving, F. C.*) KANDU *v.* MAULA BAKHSH. **11 Lah.L.T. 77.**

———*Settlement records—Entries in.*

Where there is no sufficient evidence to rebut the entries made at the previous settlements, the

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mere production of a judgment not including the land is of no avail. (*Oppenheim, S. M.*) BALDEO PAL SINGH *v.* TRILOCHAN PRASAD SINGH. **16 R. D. 202=13 L.R. 93 (Rev.).**

———*Settlement records—Entries in—Correctness—Presumption.*

Where there are conflicting entries, one made prior to the settlement and the other at the settlement and the natural inference to be drawn is that the settlement entry corrected the wrong entry made previously. (*Keane, S. M. and Oppenheim, J. M.*) GAYAN CHAND LAL *v.* RAM CHANDRA LAL. **12 L.R. 470 (Rev.)=16 R.D. 4.**

———*Settlement records—Entries in—Description as graveyard—Survey proceeding—Description of part of land as* qabrustan*—Character of other parcels of same land.*

Where the entire plot was shown in settlement records as graveyard but for the purposes of survey it was measured as a plot consisting of several parcels and the first of such parcels was again described as *qabrustan, held* that the entire plot must be deemed to bear the same character. (*Hasan, C. J. and Kisch, J.*) NOOR MAHOMED *v.* BALLABH DAS. **7 Luck. 198=I.R. 1931 Oudh 406=134 I.C. 870=14 O.L.J. 390=8 O.W.N. 579=A.I.R. 1931 Oudh 293.**

———*Settlement records—Entries in—Evidentiary value.*

Settlement entries are not conclusive evidence of fact and their accuracy is always open to disproof at any time. (*Knox, S.M. and Grant, J.M.*) RAM SEWAK *v.* TEKAI. **1935 O.W. N. 1146=1935 R.D. 467.**

———*Settlement records—Misdescription of land—Effect.*

The effect of a misdescription of the land at the settlement or at the partition made on the basis of settlement will not alter the character of the land or deprive party of his rights. (*Keane, S.M. and Oppenheim, J.M.*) TIRBENI NAIK *v.* DHAJJU. **15 R.D. 406.**

———*Settlement record—Entries in—Presumption of correctness—Land recorded as occupancy—Claim as 'sir' land—Sustainability.*

Though it is permissible to produce evidence to prove that the settlement entries are incorrect, it must be presumed to be correct until it is clearly proved otherwise. Ordinarily a proprietor who cultivates land would be considered to cultivate it as his Khudkasht land; so where the proprietor is shown as "shikmi" tenant and the land as occupancy, it cannot be treated as the 'sir' land of the proprietor unless he proves clearly twelve years' cultivation as a proprietor. (*Oppenheim, S.M. and Walton, J.M.*) ABHILAKH *v.* SRI BHAGWAT NAIK. **14 L.R. 37 (Rev.)=17 R.D. 25.**

———*Settlement records—Entries—Presumption—Rebuttal.*

Summary settlements have not the same value as regular settlement. A presumption arising from entries in a regular settlement cannot, therefore, be rebutted by entries in an earlier summary settlement. A.I.R. 1923 Lah. 12, Rel. on. (*Johnstone, J.*) SADDU *v.* MANI RAM.

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I.R. 1931 Lah. 589=132 I.C. 397=31 P.L. R. 1024=A.I.R. 1931 Lah. 139.

———*Settlement records—Entry in recent settlement—Presumption as to correctness—Burden of proof.*

Where the question is whether certain land is muafi or statutory land and it is shown as statutory land in the later settlement it is for the landlord to show that the entry was incorrect. (*Oppenheim, J. M.*) NAWAB SHAHENSHAH BEGAM *v.* NANHOO. **12 L.R. 387 (Rev.)=16 R.D. 36.**

———*Settlement records—Entries in—Use of word* "stitiban"*—Presumption—Rebuttal.*

Where the plots of land had nothing whatever to do with the matter of cultivation, *held,* that the presumption which might have arisen from the use of the word *"stitiban"* in the settlement *khatian* had been amply rebutted by the evidence. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) BAMA CHARAN GORAIN *v.* GOBINDRAM MARWARI. **A.I.R. 1935 Pat. 105 (1).**

———*Settlement records—Entries in—Value. See* EVIDENCE ACT, S. 35. **A.I.R. 1931 Lah. 139.**

———*Settlement record—Entries in—Value.*

Where the entries in the prior settlement record are ambiguous and the entry in a later settlement record is conclusive, the Court should act upon the latter. (*Pullan, J.*) BHAGWATI PRASAD *v.* MARJAD SINGH. **I.R. 1931 Oudh 107=129 I.C. 331=7 O.W.N. 1079=14 R.D. 664= A.I.R. 1931 Oudh 136.**

———Survey papers not finally published—Admissibility. *See* EVIDENCE ACT, S. 114, Ill. (*e*)—OFFICIAL ACTS. **A.I.R. 1933 Pat. 468.**

———*Survey record—Entry as to tenancy—Value.*

An entry in the survey record under Rr. 128 and 278 of the Technical Rules of the Settlement Department, Vol. I, in respect of land which does not form part of an agricultural holding is not meant to be a decision as to the rights of the landlord and the occupant. (*Macpherson and Agarwala, JJ.*) RAMKISHUN PANDEY *v.* BIBI SOHAILA. **6 I.R. (Pat.) 192=145 I.C. 567=14 Pat.L.T. 685=A.I.R. 1933 Pat. 561.**

———*Village papers—Entries in—Village papers—Same contrary to compromise between parties—Value.*

Where the entries in the village papers in favour of one party are made in the teeth of the terms of a compromise entered into between the parties or their representatives, the entries are of no value whatever and their evidential value by reason of the presumption of their correctness is swept away by the compromise. (*Hasan, C.J. and Kisch, J.*) BISHESHWAR PANDE *v.* BHAWANI DIN SINGH. **I.R. 1932 Oudh 191=136 I.C. 703=13 L.R. 103 (Rev.)=16 R.D. 1= 8 O.W.N. 1397=A.I.R. 1932 Oudh 121.**

REVENUE SALE—*Payment of purchase-money—Failure on part of purchaser—Procedure.*

Where there is omission to pay the balance of the purchase-money before the confirmation of the sale and it was brought to the notice of the Deputy Commissioner, it is the duty of the officer to order a re-sale. (*Raghavendra Rao, H.M.*) GIRDHARILAL *v.* ANANTRAM. **17 N.L.J. 41.**

REVENUE SALE.

———*Property held by limited owner—What passes under sale.*

Where property held by a limited owner is sold at a revenue sale, what passes under the sale is the entire property and not merely the interest of the limited owner. (*Kulwant Sahay and Macpherson, JJ.*) LALITA PRASAD CHAUDHURY *v.* SARNAM SINGH. **149 I.C. 491=6 R.P. 602=14 Pat.L.T. 27=A.I.R. 1933 Pat. 165.**

———*Surplus paid to wrong person—Claim for damages by rightful owner—Liability of Secretary of State for acts of subordinate officers.*

The Secretary of State for India in Council is not liable for the act of the Deputy Collector in the performance of his statutory duties. Where the Deputy Collector paid the surplus sale proceeds to a wrong person,

Held, that the rightful owner was not entitled to recover damages from the Secretary of State. Nature of Sovereign acts discussed. (*Costello and M. C. Ghose, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAMNATH BHAITA. **150 I.C. 440=6 R.C. 857=37 C.W.N. 957=A.I.R. 1934 Cal. 128.**

REVENUE SETTLEMENT—Distinction between summary and regular settlements. *See* EVIDENCE ACT, S. 35—REVENUE RECORDS. **31 P.L.R. 1024=A.I.R. 1931 Lah. 139.**

REVENUE SURVEY MAP.

See also EVIDENCE ACT, SS. 83 AND 87.

———If conclusive against Government.

See BENGAL ALLUVION AND DILUVION ACT, SS. 3 AND 6. **39 C.W.N. 1000.**

REVERSIONER.

See (1) EVIDENCE ACT, S. 115.
(2) HINDU LAW—REVERSIONER AND WIDOW.

REVERTER.

See T. P. ACT, S. 91.

REVIEW.

See C. P. CODE, S. 114 AND O. 47.

REVISION.

See (1) AGRA TENANCY ACT (III OF 1926), SS. 243, 248, 252, ETC.
(2) C. P. CODE, S. 115.
(3) CR. P. CODE, SS. 435-439.
(4) PRACTICE—REVISION.
(5) PROV. SMALL CAUSE COURTS ACT (1887), S. 25.
(6) PUNJAB COURTS ACT (1918), S. 44.
(7) PUNJAB LAND REVENUE ACT (1877), S. 16.
(8) PUNJAB TENANCY ACT (1887), S. 84.

———*Decision on limitation—If open to.*

A revision does not properly lie on a decision on the question of limitation. (*Irving, F.C.*) KESAR SINGH *v.* TIRATH SINGH. **13 Lah.L.T. 45.**

———*Failure of jurisdiction—Failure to try material issue—Interference.*

Where a Court in a suit to contest an ejectment notice neglects to try the issue implicit in the claim of occupancy tenancy made by the plaintiff, there is a failure of jurisdiction justifying intereference in revision. (*Irving, F.C.*) SADHU RAM *v.* MEHR SHAH. **13 Lah.L.T. 43.**

RIGHT OF WAY.

———*Grounds—Order correct when passed—Interference.*

Where the lower Court's order was correct on the date on which it passed the order, it is not open to revision. (*Bennet, J.*) GHULAM MUSTAFA *v.* SYED KHURSHED ALI. **4 A.W.R. 1259.**

———Mutation procedings—Failure to recognise Civil Court decree—If a ground. *See* MUTATION —DUTY OF REVENUE OFFICER. **13 Lah.L.T. 53.**

———*New plea—Jurisdiction—Maintainability.*

A new plea as to jurisdiction which has not been put forward before the lower Court cannot be raised or considered in revision. (*Beasley, C.J. and King, J.*) THIRUGNANA SAMBANDA PANDARA SANNADHIGAL *v.* KANNUCHAMI PILLAI. **152 I.C. 1052=7 R.M. 309=40 L.W. 920=A.I.R. 1935 Mad. 56 (1)=68 M.L.J. 55.**

———*Small Cause Court—Decision not based on entire evidence—Error of law—Interference.*

A decision of a Small Cause Court which is not based on the entire evidence in the case and which is vitiated by the Court's failure to draw proper inferences from proved facts is erroneous in law and is open to revision and liable to be set aside. (*Mahadevayya, Offg. C. J.*) KRISHNA RAO *v.* SRINIVASA SETTY. **39 Mys. H.C.R. 553.**

REVOCATION.

———of leave to sue. *See* LETTERS PATENT (CALCUTTA), CL. 12.

———of probate. *See* SUCCESSION ACT, SS. 263, 321.

———of will. *See* WILL.

RIGHT OF BURIAL.

See (1) EASEMENT.
(2) EASEMENTS ACT, S. 18.

RIGHT OF DRAINAGE.

See EASEMENTS ACT, S. 13 (*f*).

RIGHT OF FERRY.

See EASEMENTS ACT, S. 15.

RIGHT OF FISHERY.

See (1) EASEMENTS ACT, S. 2 (*b*).
(2) FISHERY.

RIGHT OF OCCUPANCY.

See OCCUPANCY RIGHT.

RIGHT OF PRIVACY.

See (1) EASEMENT.
(2) EASEMENTS ACT, SS. 7, 18 AND 35.

RIGHT AND REMEDY.

See INTERPRETATION OF STATUTES.

RIGHT OF REPLY.

See CR. P. CODE, S. 292.

RIGHT OF SUIT.

See C. P. CODE, SS. 9, 47 AND 92, O. 2, R. 2.

RIGHT TO SUPPORT.

See (1) EASEMENT.
(2) EASEMENTS ACT, SS. 7 ILL. (*e*), 15 AND 34.

RIGHT OF WAY.

See (1) CUSTOM—RIGHT OF WAY.
(2) EASEMENT—RIGHT OF WAY.
(3) EASEMENTS ACT (1882), SS. 2 (*b*), 13, 15, 20, 22, 28 (*a*) ETC.
(4) HIGHWAY.

RIPARIAN RIGHTS.

See also (1) EASEMENT—WATER RIGHTS.
(2) EASEMENTS ACT, S. 7, ILL. (*h*) AND (*j*).

———*Artificial water-course—Basis of rights in.*

Any right to the flow of water from an artificial water-course must be based on some grant, whether in the nature of an easement or otherwise. The basis of every such right must be an agreement expressed or presumed from the user, with the owners of the land through which the stream runs. An artificial water-course might be constructed on the terms that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream should have and no more. *Bailey & Co. v. Clark, Son and Morland,* (1902) 1 Ch. D. 649, Foll. (*Adami and Wort, JJ.*) RAJNITI PRASAD SINGH *v.* TOKH NARAIN PURI. **I.R. 1931 Pat. 318=133 I.C. 46=12 Pat. L. T. 473=A.I.R. 1931 Pat. 332.**

———*Artificial water-course—Channel—Basis of rights in.*

It cannot be laid down as an absolute proposition of law that a riparian owner can claim the right to use the water in an artificial channel just in the same way as the riparian owner can claim to use it with respect to a natural stream. The right can be claimed only under certain circumstances. It is not an absolute right as in the case of the riparian owner having lands abutting a natural stream. Any right of the owner to the flow of the water must rest on prescription or grant from or contract with the owner of the land from which the water is artificially brought. 1925 P.C. 236; 1917 Pat. 65 and 1933 Mad. 10, Ref. (*Madhavan Nair, J.*) GHULAM MOHIDEEN KHAN SAHIB *v.* SECRETARY OF STATE. **157 I.C. 734=8 R.M. 159=1935 M.W.N. 665=41 L.W. 756=A.I.R. 1935 Mad. 700.**

———*Artificial water course—Stream—Riparian rights—If exist.*

There are no riparian rights as such in the case of artificial streams; whatever rights may be claimed by persons through whose lands the stream passes must rest on some arrangement either proved or presumed. (*Varadachariar, J.*) RAMAN NAIR *v.* PARAMESWARAN NAMBUDRI. **153 I.C. 14=7 R.M. 319=40 L.W. 629=1934 M. W.N. 1063=A.I.R. 1934 Mad. 683=67 M. L.J. 558.**

———*Artificial water course—What constitutes—Acquisition of right by adjacent owner—Proof.*

An artificial stream is a stream which flows at its source by operation of men or if it flows at its source by the operation of nature flows in a channel made by men. Water made to flow in an artificial channel from a natural stream is an artificial stream. In the case of an artificial watercourse, any right to the flow of water must rest on some grant or arrangement either proved or presumed, from or with the owner of the lands from which water is artificially brought or on some other legal origin. Thus the artificial course might have been made under such circumstances that the riparian owner had the same rights as in a natural stream. Riparian rights negatived on facts. (*Sundaram Chetty, J.*) NARASIMHULU *v.* BHADRAYYA. **I.R. 1932 Mad. 845=36 L.W. 688=140 I.C. 311=A. I.R. 1933 Mad. 10.**

RIPARIAN RIGHTS.

———*Extent of rights—Natural use.*

A riparian owner is a person who owns land abutting on a stream, and who as such has a certain right to take water from the stream. A riparian owner has the same rights in a tidal and navigable river as he has in a river which is not tidal and navigable. His right to the use of the stream does not depend upon the ownership of the soil of the stream and he can take water, first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one. The right is a natural right and not in the strict sense of the term an easement, though in many cases it has been called an easement. In particular it is not capable of being lost *non utends* and the maxim *tantum prescript possessum* has no application. (English cases discussed.) (*Lord Dunedin.*) SECRETARY OF STATE *v.* SUBBARAYUDU. **59 I.A. 56=55 Mad. 268=136 I.C. 413=I. R. 1932 P.C. 109=35 L.W. 238=36 C.W. N. 359=34 Bom.L.R. 500=55 C.L.J. 461= 1932 M.W.N. 480=1932 A.L.J. 348=A.I. R. 1932 P.C. 46=62 M.L.J. 213 (P.C.).**

———*Government stream—Right of riparian owner—Liability to cess.*

A riparian owner is not liable to pay water cess to Government for using water of a stream belonging to the Government land on one side of which belongs to him and he takes it in respect of a natural, or of an easement, right. (*Lord Dunedin*) SECRETARY OF STATE *v.* SUBBARAYUDU. **59 I.A. 56=55 Mad. 268=136 I.C. 413=I. R. 1932 P.C. 109=35 L.W. 238=36 C.W. N. 359=34 Bom.L.R. 500=55 C.L.J. 461= 1932 M.W.N. 480=1932 A.L.J. 348=A.I. R. 1932 P.C. 46=62 M.L.J. 213 (P.C.).**

———*Natural water-course—Extent of right.*

A riparian owner has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and for his cattle and this without regard to the effect which such use may have, in case of deficiency, upon proprietors lower down the stream and further he has a right to the use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream or divert the water for the purpose of irrigation. 4 C. 633, Foll. (*Adami and Wort, JJ.*) RAJNITI PRASAD SINGH *v.* TOKH NARAIN PURI. **I. R. 1931 Pat. 318=133 I.C. 46=12 P.L.T. 473 =A.I.R. 1931 Pat. 332.**

———*Public navigable river—Test.*

A river is not navigable unless it is navigable throughout the year for ordinary boats used for commercial purposes. In deciding the question of navigability, an investigation into the past history of the channel is not without importance. For if it be found that at one time the channel was connected with two navigable streams at its two ends, it would not be an unreasonable inference to draw to hold that it at that time formed a

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part of an entire navigable system. Where a river was navigable at a certain portion and the construction of a bridge higher up was likely to interfere with the navigabiltiy of the river, but it appeared that the river was impassable for ordinary boats during the dry season.

Held, that the river was not a public navigable river. (*Mukerji, J.*) LALIT MOHAN RAY *v.* KALI MOHAN SAHA. **6 I.R. (Cal.) 221=146 I.C. 409=37 C.W.N. 442=A.I.R. 1933 Cal. 615.**

———*Right of 'lagan' in ghat—Nature and incidents.*

Nature and incidents of a right of lagan in a river ghat explained. (*Dalal, J.*) BRIJ MOHAN DAS *v.* BHIKHUJI. **I.R. 1931 All. 205=129 I. C. 717=1931 A.L.J. 267=A.I.R. 1931 All. 207.**

———*Tidal navigable river—Public right of access to the adjacent banks—Nature and extent of.*

The public right to use the waterway would not imply the right to land upon, or to take merchandise on to or over immediately adjacent land in private ownership. Such a right may no doubt be established by custom or prescription but the banks above the "ordinary" high water mark remain private property unaffected by the waterway. The rights of riparian owners on the banks of tidal navigable waters exist *jure naturae,* because the land has by nature the advantage of being washed by the stream but it is essential to the existence of this right that the land should be in contact with the flow of the stream at least at the times of "ordinary" high tides. *Lyon* v. *Fishmonger Co.,* (18/6) 1 A.C. 662, Ref. to. (*Sir George Lowndes.*) DAWOOD HASHIM ESOOF *v.* TUCK SHEIN. **58 I.A. 80=9 Rang. 122=33 L.W. 543=131 I.C. 777=I.R. 1931 P.C. 167=33 Bom.L.R. 897=53 C.L.J. 472 =1931 M.W.N. 521=35 C.W.N. 472=A.I. R. 1931 P.C. 72=60 M.L.J. 593 (P.C.).**

———*Tidal navigable river—Public right of navigation—Extent of.*

Per *Sir George Lowndes.*—"Under the English Law the bed of a tidal creek which is vested in the Crown and over which all subjects of the Crown have a right of navigation is confined to the space covered by ordinary high tides, that is the mean between the spring and neap tides—or in other words, to that part of the shore which for four days in every week or for the most part of the year is reached and covered by the tides. In India it has been long recognised that the beds or channels of tidal navigable waters are the property of the Government in right of the Crown. . . . This (English) principle is equally applicable to Indian waters . . . The public right of navigation or waterway can only be co-extensive with the right of the Crown or the Government in the bed." (*Sir George Lowndes.*) DAWOOD HASHIM ESOOF *v.* TUCK SHEIN. **58 I.A. 80=9 Rang. 122=33 L.W. 543=131 I.C. 777=I.R. 1931 P.C. 167=33 Bom.L. R. 897=53 C.L.J. 472=1931 M.W.N. 521 =35 C.W.N. 472=A.I.R. 1931 P.C. 72= 60 M.L.J. 593 (P.C.).**

———*Tidal stream navigable for a few days in a month—If and when a public waterway.*

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In order to make good a complaint of obstruction to free access from a tidal channel to his land (in the absence of an easement), the complainant must prove not merely that there is a public waterway over some part of the upper creek but that the waterway comes right up to his land. Where the tidal stream was for most of the time dry except for a trickle of water and only for a few hours on five to ten days in each month, there was enough water to float small logs of wood, it cannot be called a public waterway. (1923) A.C. 429, Ref. to. (*Sir George Lowndes.*) DAWOOD HASHIM ESOOF *v.* TUCK SHEIN. **58 I.A. 80=9 Rang. 122=33 L.W. 543=131 I.C. 777=I.R. 1931 P.C. 167=33 Bom.L.R. 897=53 C.L.J. 472=1931 M.W. N. 521=35 C.W.N. 472=A.I.R. 1931 P. C. 72=60 M.L.J. 593 (P.C.).**

———*Use of water of stream—Right of riparian proprietor.*

Every riparian proprietor has a natural right to use the water of stream which flows past his land equally with other proprietors; to have the water come to him undiminished in flow, quantity and quality, and unaffected in temperature; and to go from him without obstruction. Where the plaintiff's natural right has been interfered with by the acts done by the defendants in raising their dam and sluices and damage had been caused to the working of the plaintiff's machines and the defendants have raised their dam and sluices only recently and have not acquired any prescriptive right to continue to do so, the plaintiff's suit for damages and injunction should be allowed. (*Ganga Nath, J.*) HANUMAN PRASAD *v.* MENDWA. **158 I.C. 519=8 R.A. 309=1935 A.W.R. 1012=1935 A.L.J. 1061=A.I.R. 1935 All. 836.**

RISK-NOTE.

See RAILWAYS ACT (1890), Ss. *72, 77, 78.*

RIVERS ANR RIVER BEDS.

See (1) RIPARIAN RIGHTS.
(2) WATERS AND WATER COURSES.

RIWAJ-I-AM.

See (1) CUSTOM (PUNJAB)—RIWAJ-I-AM.
(2) EVIDENCE—RIWAJ-I-AM.

———*Entries in—Correctness*—Onus.

An entry in a Riwaj-i-am even when unsupported by instances shifts the *onus* on to the person who contends that that entry is incorrect. (*Coldstream and Dalip Singh, JJ.*) FAZAL DAD *v.* MD. GHULAM SUGHRA. **13 Lah. 219=I. R. 1931 Lah. 825=133 I.C. 649=32 P.L.R. 782=A.I.R. 1931 Lah. 453.**

———Entries in as to custom against females—Rebuttal—*Onus* of proof. *See* CUSTOM (PUNJAB)—SUCCESSION. **A.L.R. 1935 Lah. 72=37 P.L.R. 203=A.I.R. 1935 Lah. 617.**

———*Entries in as to custom—Presumption—Entry adversely affecting women—Rebuttal.*

An entry in the Riwaj-i-am recording a special custom is *prima facie* proof of that custom and may be rebutted by the party disputing the correctness of the entry. Where the special custom recorded in the Riwaj-i-am adversely affects the rights of women who had no opportunity of appearing before the Revenue authorities the pre-

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sumption in favour of the Riwaj-i-am can be rebutted by a few well-ascertained instances to the contrary. (*Tek Chand and Gordon Walker. JJ.*) GHULAM MAHOMED *v.* MT. KALLI. **12 Lah. 412=I.R. 1931 Lah. 1003=134 I.C. 795=32 P.L.R. 929=A.I.R. 1931 Lah. 641.**

———*Entries in—Series of—Value.*

The last Riwaj-i-am must prevail unless it is shown conclusively that the entry in it is wrong. (*Coldstream and Dalip Singh, JJ.*) FAZAL DAD *v.* MT. GHULAM SUGHRA. **13 Lah. 219=I. R. 1931 Lah. 825=133 I.C. 649=32 P.L.R. 782 =A.I.R. 1931 Lah. 453.**

———*Entries—Value.*

The statements contained in the *Riwaj-i-am* form strong piece of evidence in support of a custom as to the inheritance rights of daughters. (*Hasan, C. J. and Bisheshwar Nath, J.*) TIRATHPATTI *v.* RANJIT SINGH. **6 Luck. 407=I.R. 1931 Oudh 140=130 I.C. 124=7 O.W.N. 1120=14 R.D. 672=A.I.R. 1931 Oudh 40.**

ROAD.

See HIGHWAY.

ROBAKARI.

See REVENUE RECORDS.

ROBBERY.

See PENAL CODE, SS. 390 AND 398.

ROYALTY.

See LANDLORD AND TENANT—ROYALTY.

RYOT.

See MADRAS ESTATES LAND ACT, SS. 3 (11) (*a*), 26 (3), 77, 112, etc.

RYOTI LAND.

See MADRAS ESTATES LAND ACT, SS. 3, 6, 20, etc.

RULES.

See also (1) DEED—CONSTRUCTION.
(2) INTERPRETATION OF STATUTES.

———*Rules of Association—Forfeiture clause—Construction.*

One of the rules of a Benevolent Association was: "The monthly deposit shall be paid in advance by every member on or before the 15th day of the month. In default he shall be liable to pay a fine of 10 cents for each such failure, which shall be debited to his account, and if his monthly deposit shall be two months in arrear he shall be notified, and failing payment of same in full after the expiration of 21 days, he shall *ipso facto* cease to be a member and forfeit all privileges as a member." A member paid his monthly deposit for June in due course on or before the 15th June. In July he did not make any payment. In August he paid no deposit, and on the 16th August, in assumed accordance with rule, he was notified that his deposits were in default. On the 8th September he thereupon, according to the Association, automatically ceased to be a member, he died on the 24th September, 1932.

Held, that the rule being of the nature of a forfeiture, it has got to be reasonably clear that the forfeiture operates. On the true construction of the rule it means that in order to work a forfeiture a monthly deposit has to be in arrear for the period of two months; in other words, that the period of two months applied to the period of default for each deposit and not to the number of subscriptions that have to be in arrear. (*Lord Atkin.*) CHEE WOR LOK *v.* YEOH SAW GEOK. **154 I.C. 261=7 R.P.C. 127=A.I.R. 1935 P.C. 7 (P.C.).**

RULES OF ASSOCIATION—Forfeiture clause—Construction. *See* INTERPRETATION OF STATUTES. **154 I.C. 261=A.I.R. 1935 P.C. 7 (P.C.).**

RULE AGAINST PERPETUITY.

See T. P. ACT, SS. 13, 14.

———Scope of—Tying up of property indefinitely and restraining alienation—Hindu joint family—Arrangement to keep properties joint and not to partition—Validity. *See* T. P. ACT, S. 14. **62 C.L.J. 71.**

RULE NISI—What is—Effect of. *See* PRACTICE—RULE NISI. **28 S.L.R. 161.**

RULES OF PRACTICE.

See PRACTICE—HIGH COURT.

RUNNING ACCOUNT.

See (1) CONTRACT ACT, S. 60.
(2) LIMITATION ACT, ARTS. 64 AND 85.

RYOTWARI TENURE.

See LAND TENURE—RYOTWARI TENURE.

———Holder of—Right to water from a particular channel—No existence of. *See* EASEMENTS ACT, S. 7. **54 Mad. 793=61 M.L.J. 563.**

ST. JOHN'S MUNICIPAL ACTS (1921 AND 1926), S. 94—*'Assign'.*

The assign entitled under S. 94 to compensation must at the least be the legal assign of the term at the expiration of the lease. (*Lord Blanesburgh.*) AVELINE SCOTT DITCHAM *v.* JAMES J. MILLER. **I.R. 1931 P.C. 276=134 I. C. 324=A.I.R. 1931 P.C. 203 (P.C.).**

SALE.

See CONTRACT—SALE.

———Contract of sale—Consideration—Failure to pay within time fixed—Relief to the purchaser—Transfer of property—Super-added condition—Power of Court to relieve purchaser. *See* T. P. ACT, S. 31. **63 I.A. 26=70 M.L.J. 82=15 Pat. 127 (P.C.).**

SALE OF GOODS—*Advance by purchaser—Right to refund—Both parties at fault.*

Where both parties to a contract of sale are at fault, they should be restored to the position which they occupied in relation to each other prior to the suit contract and consequently the seller is bound to refund the sum of money he received as advance from the purchaser, when the consideration has failed. (*Doraisami Iyer, C. J. and Rama Rao, J.*) BRAHMA SURIAH *v.* SINGIRI NANJAPPA. **9 Mys.L.J. 35.**

———*Breach of contract—Readiness of buyer—Proof—Actual tender if necessary.*

In order to prove that a buyer is ready and willing to perform his part of the agreement it is not necessary for him to show that he actually made a tender of the price. Where the seller does not possess the goods it is an act of supererogation on the part of the buyer to take the money to the seller and make an actual tender thereof. 8 Lah. 198, applied. (*Addison and*

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Hilton, JJ.) GANESH DATT & Co. *v.* GOPAL SINGH MANGAL SINGH. **135 I.C. 606=I.R. 1932 Lah. 142=32 P.L.R. 828.**

———*Breach of contract—Right to avoid—Waiver—Inference from conduct.*

Where in a suit to recover the deposit paid under a contract which was not performed the plaintiff set up a plea of impossibility and pleaded that he had an option to avoid the contract but it appeared that he did not at any time declare the contract to be void but continued making supplies.

Held, that the plaintiff had by his conduct waived the option he might have had of declaring the contract to have come to an end. (*Broadway and Johnstone, JJ.*) GURDIT SINGH *v.* SECRETARY OF STATE. **I.R. 1931 Lah. 340=130 I.C. 772=A.I.R. 1931 Lah. 347.**

———*Contract—Essentials—Stipulation as to price.*

In a contract for the sale of goods the most essential condition is the price. Where there is no evidence as to price there is no binding contract. (*Young, J.*) TREVELLION *v.* MINCK. **6 R.A. 597=147 I.C. 982=3 A.W.R. 161=1934 A.L.J. 43=A.I.R. 1934 All. 203.**

———Delivery—Delivery ex-hopper. *See* CONTRACT—CONSTRUCTION—MILLING CONTRACT (RANGOON). **11 Rang. 506.**

———*Indivisible contract—Breach—Accrual of cause of action.*

The question whether a contract is an entire or divisible one has to be decided on a consideration of all the circumstances of the case. Where no definite instalments were fixed by the contract nor was any period specified for the delivery of any instalment and in point of fact goods of more than one shipment were at times delivered together, and it further appeared that the quantities of the different shipments were also not equal and were arbitrarily fixed.

Held, that the contract was an entire one and that the cause of action for breach of the contract could not arise till the expiry of the period for the delivery of the goods of the last shipment. (*Addison and Bhide, JJ.*) BASHESHAR LAL BANSI DHAR *v.* BHIK RAJ. **12 Lah. 254=I.R. 1931 Lah. 760=133 I.C. 280=32 P.L.R. 965=A.I.R. 1931 Lah. 616 (2).**

———Passing of property—Condition regarding payment of price—Applicability of rule to principal and agent. *See* PRINCIPAL AND AGENT—RIGHTS OF AGENT. **I.R. 1931 Lah. 175=129 I.C. 287.**

———*Price—Liability for—Implied agreement to pay.*

Where a certain article was delivered to the purchaser under a contract for the sale of certain goods and subsequently the parties broke the contract but the purchaser failed to pay the purchase-money and retained the article sold.

Held, that the purchaser was liable to be sued for the balance of the price because by his conduct he must be taken to have consented to pay the value of the article retained. (*Shadi Lal, C. J. and Walker, J.*) BHIMA MAL & SONS *v.* RAHMAT ULLAH. **130 I.C. 574=A.I.R. 1931 Lah. 309.**

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———*Repudiation—Acceptance of—Damages—Right to, and measure of.*

The plaintiffs alleged that they were instructed to purchase linseed as defendants' brokers, that the defendants repudiated the contract, that the plaintiffs accepted the repudiation and that they were entitled to damages at the market rate prevailing on the date of repudiation. It was contended by the defendants that in order that the plaintiffs may be entitled to damages, it was necessary to show that at the due date they had as brokers dealt with third parties in the market and suffered loss on that basis.

Held, the plaintiffs were entitled to accept the repudiation and claim damages on the then prevailing rate without showing that they continued to act as agents even after the repudiation. (*Beaumont, C. J. and Mirza, J.*) RATANLAL *v.* BRIJ MOHAN. **I.R. 1931 Bom. 445 (2)=133 I.C. 861 (2)=33 Bom.L.R. 703=A.I.R. 1931 Bom. 386.**

———*Repudiation by buyer—Justification of refusal on different ground after expiry of the time for delivery—Permissibility.*

Where the buyer refused to take delivery of goods on the ground that, contrary to the custom of trade, delivery was not made as and when the bales were ready at the Mills, he is not entitled, after the time for delivery has expired, to justify his refusal on another ground, *viz*, that some of the goods tendered were not of the kind or quality contracted for. 49 Mad. 791 and 49 M.L.J. 1, Foll. (*Jackson and Mockett, JJ.*) RAMIER *v.* RAMUDU IYER. **56 Mad. 304=I.R. 1933 Mad. 151=141 I.C. 632=1933 M.W.N. 39=37 L.W. 210=A.I.R. 1933 Mad. 176=64 M.L.J. 199.**

———*Repudiation — Damages — Interest before judgment.*

In a suit for damages for repudiation of the contract in pursuance of which the plaintiffs purchased linseed as defendants' brokers, no interest can be awarded before judgment. (*Beaumont, C. J. and Mirza, J.*) RATANLAL *v.* BRIJ MOHAN. **I.R. 1931 Bom. 445 (2)=133 I.C. 861 (2)=33 Bom.L.R. 703=A.I.R. 1931 Bom. 386.**

———Repudiation — Damages — Measure of—Rate on date of delivery or repudiation. *See* SALE OF GOODS ACT, S. 60—ANTICIPATORY BREACH. **150 I.C. 760.**

———Repudiation by vendor—Justification—Onerous liability subsequently cast by statute. *See* CONTRACT ACT, S. 20—SCOPE. **11 Rang. 201=6 I.R. (Rang.) 101=146 I.C. 440=A.I.R. 1933 Rang. 79.**

———*Re-sale—Right to—Construction of covenant in contract.*

An indent authorised the sellers to sell the goods by public auction or private sale when and where they liked after 10 days' notice of their intention to do so should the buyers fail to accept the draft on presentation or fail to pay on maturity. It further provided that in case of need the seller's invoice might be taken in lieu of draft.

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Held, that the contract permitted the substitution of the seller's invoice for the draft and by forwarding the invoice the plaintiff substantially complied with the terms of the contract and that the failure of the defendant to make payment and take up the goods conferred a right of re-sale on the plaintiff. (*Bhide and Tapp, JJ.*) NATHU MAL RAM DAS *v.* RAM SARUP & Co. **12 Lah. 692=135 I.C. 778=I.R. 1932 Lah. 170=32 P.L.R. 609=A.I.R. 1932 Lah. 169.**

———*Re-sale—Unreasonable delay—Measure of damages.*

It is a well-settled rule that if the vendor chooses to enforce his right to re-sell he must do so within a reasonable time from the date of the breach and that he should not allow the value of the goods to depreciate by making undue delay in re-selling them. If the goods are re-sold within a reasonable time after the breach of the contract by the purchaser the measure of damages is the difference between the contract price and the price realised on the re-sale with the costs and expenses of the re-sale. But if the re-sale has been unreasonably delayed until the market has fallen, the price realised on re-sale will not afford a true criterion of the damages. The measure of damages in such a case will be the difference between the contract price and the market price on the date of the breach of the contract. (*Shadi Lal, C. J. and Agha Haidar, J.*) NIKKU MAL SARDARI MAL *v.* GUR PRASHAD. **12 Lah. 452=I.R. 1931 Lah. 985 (2)=134 I. C. 777 (2)=32 P.L.R. 747=A.I.R. 1931 Lah. 714.**

———*Right of resale—Mode of exercise.*

As in the case of statutory right of re-sale so in the case of a re-sale under a contract the seller must give notice to the buyer of his intention to do so and re-sell them after the lapse of a reasonable time. (*Bhide and Tapp, JJ.*) NATHU MAL RAM DAS *v.* RAM SARUP & Co. **12 Lah. 692=135 I.C. 778=I.R. 1932 Lah. 170= 32 P.L.R. 609=A.I.R. 1932 Lah. 169.**

———*Shopkeeper—If bound to serve member of public.*

Apart from special legislation it is open to a shop-keeper any time to refuse to deal with any member of the public and it is not necessary for the shopkeeper to assign any reason for his refusal. (*Young, J.*) TREVELLION *v.* MINCK. **6 R.A. 597=147 I.C. 982=3 A.W.R. 161= 1934 A.L.J. 43=A.I.R. 1934 All. 203.**

SALE OF GOODS ACT (III OF 1930), S. 2— Mercantile agent—Broker—Pledge by—Validity. *See* CONTRACT ACT, S. 178. **151 I.C. 413=7 R.R. 72=35 Cr.L.J. 1375=1934 Cr.C. 889=A.I. R. 1934 Rang. 198.**

———**S. 2 (7)—***Applicability—Suit regarding "immoveable property" within the meaning of S.* 3 (25), *General Clauses Act—Effect of special Act.*

By an agreement in writing between plaintiff and the Secretary of State, the plaintiff purchased certain buildings and materials situated at *S* and undertook to remove them within a given period. Subsequently the defendants became the owners by purchase of the land at *S*. Plaintiff brought an action on the original side of the High Court claiming an injunction and damages for the wrongful and tortious act of the defendants in the fact that they prevented him from carrying out his contract to remove the buildings and materials as per his original agreement. The defence was that the buildings and materials in dispute or some of them were the property of the defendants and were not covered by the plaintiff's contract and he was not entitled to take them away.

Held, that the provisions of the Sale of Goods Act could not apply to the case because the suit related to immoveable property. The provisions of a special Act such as the Sale of Goods Act cannot except in the branch of the law to which it specially applies overrule a Statute of the nature of the General Clauses Act. (*Cunliffe, J.*) A. SWAMI IYAH NADAR *v.* THE COMMISSIONERS FOR THE PORT OF RANGOON. **9 Rang. 13=I.R. 1931 Rang. 303=134 I.C. 511=A.I.R. 1931 Rang. 109.**

———**S. 9—***Contract to sell goods—Increase of customs duty before delivery—Right of seller to claim excess.*

In a contract for sale of goods, if before goods are tendered customs duty is increased, the seller is entitled to claim the excess duty imposed from the buyer, provided he proves that such excess duty on the goods tendered has been already paid. It is immaterial whether such duty has been paid by the seller himself or that some one else has paid it. 21 Bom. 628 and A.I.R. 1933 Mad. 21, Expl. (*Ferrers, J.C. and Rupchand, A.J.C.*) JHAMANDAS JODHRAM *v.* TIRATHDAS DEOMAL. **28 S.L.R. 98=149 I.C. 614=6 R.S. 233=A.I.R. 1933 Sind 404.**

———**Ss. 13 (2) and 37 (3)—***Indivisible contract—Rejection of part—Right of buyer.*

In a contract by instalments or a contract which according to its terms is treated as an instalment contract, the buyer can reject the quantity under any instalment. But under an indivisible contract, the buyer loses his right to reject if he accepts part. *Rotax Horn,* (1910) 2 K.B. 937, Foll.; *Barker* v. *Agius,* (1927) 33 C.C. 120, Not foll. (*Ameer Ali, J.*) ANDREW YULE & Co., *In re.* **59 Cal. 928=140 I.C. 877=I.R. 1933 Cal. 67=A.I.R. 1932 Cal. 879.**

———**S. 15—***Sale by description—Question by Court.*

There has been a growing strictness in the matter of regarding the particulars in the contract as part of the description of the goods. If a stipulation is a part of the description, the only question that remains is, if the goods supplied conformed to it, and it is irrelevant to enquire whether it was considered in the trade a matter of importance or whether it affected the market-value of the goods. (*Moore v. Landauer,* (1921) 2 K.B. 519, Ref. (*Ameer Ali, J.*) ANDREW YULE & Co., *In re.* **59 Cal. 928=140 I.C. 877 =I.R. 1933 Cal. 67=A.I.R. 1932 Cal. 879.**

———**S. 16—***Condition of fitness—Sale of tyres.*

In the case of sale of tyres by a person who is the distributor of Continental Solid tyres, and

SALE OF GOODS ACT (1930), S. 16.

those tyres only, there is no implied condition as to the fitness of the tyres for any particular purpose, though the goods sold must be of merchantable quality. (*Mosely, J.*) GLOBE AUTOMOBILE CO. *v.* K. A. K. MASTER. **157 I.C. 12=8 R.R. 81.**

———**S. 16 (1)**—*Condition of fitness—Rules formulated.*

(*i*) If the buyers expressly communicated to the sellers the purpose for which the goods are wanted (and the other conditions are present) then there is an implied condition of fitness. (*ii*) Apart from express communication, that knowledge may be imputed to the sellers by reason of the circumstances of the case. (*iii*) Where the goods may be utilised for a variety of purposes known to the supplier, then, unless he is notified of the particular purpose for which these goods are wanted, there is no condition of fitness that they shall be fit for that particular purpose. *Priest* v. *Last*, (1903) 2 K.B. 148, Rel. (*Ameer Ali, J.*) ANDREW YULE & Co., *In re*. **59 Cal. 928=I.R. 1933 Cal. 67=140 I.C. 877=A.I.R. 1932 Cal. 879.**

———**S. 19**—*Passing of property in goods—Test—Dominion held by seller—Effect.*

Although the incidence of risk, is a good test in determining in which of the two parties the property in the goods vests, it is not a conclusive test and the question always is as to intention of the parties, as other circumstances may show that the property in the goods was retained by one party in spite of the fact that they were shipped or booked and thereafter remained at the risk of the other party. Where therefore the dominion over the goods, *i.e.*, the right to dispose of them is retained by the sellers and they do not intend that the goods should be delivered to the purchasers till they pay for the same, the property in goods does not pass to the purchasers and a suit by the sellers for recovery of the price of the goods does not lie.

Per *Jai Lal, J.*—If the contracts had been in the C.I.F. form then ordinarily the property in the goods would have passed to the purchasers on shipment thereof, though in that case also circumstances might have rebutted this presumption. (*Jai Lal and Abdul Qadir, JJ.*) KAHN AND KAHN *v.* PREMSUKH DAS RUP NARAIN. **134 I.C. 1110=I.R. 1932 Lah. 6=A.I.R. 1931 Lah. 260.**

———**S. 22**—*Passing of property—Intention of parties.*

Where a contract for sale of specific goods which were in a deliverable state, did not contain any express intention of the parties as to when the property was to pass to the buyer but the price of goods was expressed at certain rate and the quantity sold was mentioned in the notes exchanged between the parties, and it required only a simple calculation to determine the total price to be paid.

Held, that the parties to the contract intended that the buyer should become the owner of the property on payment of the total price, and that the passing of the property did not depend upon the measurement to be done by the seller. The measurement, if any, was to be made by the buyer in order to satisfy himself that he had got the quantity he had borgained for, and that the price paid by him was really due. Such measurement did not affect the transfer of the property in the goods. (*Sir Shadi Lal.*) HOE KIM SEING *v.* MAUNG BA CHIT. **62 I.A. 242=14 Rang. 1=42 L.W. 469=1935 O.W.N. 980 =157 I.C. 891=37 P.L.R. 659=37 Bom.L. R. 866=1935 A.L.J. 1119=1935 A.W.R. 1299=1935 M.W.N. 1125=8 R.P.C. 67=39 C.W.N. 1217=A.I.R. 1935 P.C. 182=69 M.L.J. 467 (P.C.).**

SALE OF GOODS ACT (1930), S. 37.

———**S. 24**—*Applicability*—Jangad *transaction.*

A *jangad* transaction is a "sale or return" and involves a representation that the purchaser will (*a*) signify his approval or acceptance of the goods and pay for it; and (*b*) if not, return the same within the period fixed, or where no time is fixed on the expiration of a reasonable period. But until one or the other condition is fulfilled, no property passes to the buyer. In such a transaction the owner of the goods gives credit to the deliveree, though it is subject to certain conditions. (*Rangnekar and Kania, JJ.*) EMPEROR *v.* PHIROZSHAH MANEKJI GANDHI. **58 Bom. 646=152 I.C. 706=7 R.B. 164=36 Bom.L. R. 731=1934 Cr.C. 1132=A.I.R. 1934 Bom. 360.**

———**S. 27**—*Construction—Conduct precluding denial of seller's authority—What amounts to.*

An owner of a bus engaged *A* as his agent to ply the bus for hire and left a letter addressed to the District Magistrate and signed by himself requesting the Magistrate to grant "G" permit to *A*. The registration Certificate of the bus was also left with *A* who fraudulently altered the letter into one addressed to the D.S.P. requesting him to transfer the registration in his name, which having been done, he sold the bus to a stranger who was ignorant about *A's* real title. The owner thereupon challenged the buyer's title in legal proceedings.

Held, that the owner could not have contemplated the possibility of fraud on part of *A*, and that on the true construction of S. 27, he was not precluded from challenging the title acquired by the buyer. *Farquharson Bros. & Co.* v. *C. King & Co.*, (1902) A.C. 325, Foll.; *Henderson & Co.* v. *Williams*, (1895) 1 Q.B. 521 and *Commonwealth Trust, Ltd.* v. *Akotey*, (1926) A.C. 72, Dist. (*Curgenven and King, JJ.*) MOHAMBARAM *v.* RAM NARAYAN. **42 L.W. 431=8 R.M. 279=1935 M.W.N. 932=158 I.C. 535=A.I.R. 1935 Mad. 850=69 M.L. J. 691.**

———**S. 35**—Scope—"Express promise"—Meaning of. *See* CONTRACT ACT, S. 93—APPLICABILITY. **154 I.C. 1097=1935 O.W.N. 496=A.I.R. 1935 P.C. 67=68 M.L.J. 635 (P.C.).**

———**Ss. 37 (3) and 13 (2)**—Indivisible contract—Acceptance of part—Effect of. *See* SALE OF GOODS ACT, SS. 13 (2) AND 37 (3). **59 Cal. 928=A.I.R. 1932 Cal. 879.**

———**S. 37 (3)**—Repudiation by buyer—Justification of refusal on different ground after expiry of the time for delivery. *See* SALE OF GOODS —REPUDIATION BY BUYER. **56 Mad. 304=A.I. R. 1933 Mad. 176=64 M.L.J. 199.**

SALE OF GOODS ACT (1930), S. 41.

———S. 41—*Place of inspection.*

The normal place of inspection is the place of delivery. If *A* agrees to deliver goods to *B* at Calcutta, the place of inspection is Calcutta, even though *A* knows *B* intends to ship them to New York, unless *Calcutta* is not suitable for inspection, having regard to the nature of the goods and the way in which they are packed. *Parkins* v. *Bell,* (1893) 1 Q.B. 193 and *Saunt* v. *Belscher,* (1920) 90 L.J. 2 K.B. 541, Ref. (*Ameer Ali, J.*) ANDREW YULE & Co., *In re.* **59 Cal. 928=I.R. 1933 Cal. 67=140 I.C. 877= A.I.R. 1932 Cal. 879.**

———S. 42—*Acceptance—Right of rejection, when lost.*

The buyer's right of rejection may be lost by (*i*) acts of ownership such as sub-sale, shipment, sending forward, etc., (*ii*) delay in giving notice of rejection, (*iii*) part retention of the goods. (*Ameer Ali, J.*) ANDREW YULE & Co., *In re.* **59 Cal. 928=I.R. 1933 Cal. 67=140 I.C. 877 =A.I.R. 1932 Cal. 879.**

———S. 42—*Claim for damages after re-sale —Sustainability.*

Where the buyer, who was responsible for not discovering an alleged breach of warranty earlier, sued to recover damages after having effected a re-sale,

Held, that the claim was unsustainable. (*Coldstream and Johnstone, JJ.*) MITHAN LAL INDER NARAIN *v.* SURAJ PARSHAD MADAN GOPAL. **135 I.C. 498=I.R. 1932 Lah. 98=32 P.L.R. 734 =A.I.R. 1932 Lah. 52.**

———S. 42—*Reasonable time.*

A reasonable time for examining goods is a question of fact depending on the circumstances of each case. Where the goods reached the plaintiffs-buyers on the 21st October and was re-sold on 22nd and the buyer for re-sale sent the intimation of damaged condition of goods on 30th October but the plaintiffs delayed for another fortnight.

Held, that the plaintiffs were not entitled to recover damages in view of their prolonged failure to give notice. (*Coldstream and Johnstone, JJ.*) MITHAN LAL INDER NARAIN *v.* SURAJ PARSHAD MADAN GOPAL. **135 I.C. 498 =I.R. 1932 Lah. 98=32 P.L.R. 734=A.I. R. 1932 Lah. 52.**

———S. 54 (4)—*Re-sale by unpaid vendors— Damages—Amount of—Commission on re-sale.*

If in exercise of their right of re-sale, the unpaid vendors of certain piece-goods sold some of the unpaid for goods, they are entitled to the loss thereby sustained by them inclusive of all out-of-pocket expenses in effecting the re-sale but not to a re-sale commission in respect of goods sold by him as his own so as to inflate his claim for damages. The result is the same even where the property has passed but goods have not been parted with by the vendor. 95 S.L.R. 21, Appl.; *Maclean* v *Dunn,* (1828) 29 R.R. 714; *Lamond* v. *Davall,* (1847) 9 Q.B. 1030=72 R.R. 502, Rel. on. (*Rup Chand, A.J.C.*) GILLANDERS ARBUTHNOT & Co. *v.* OFFICIAL ASSIGNEE. **25 S.L.R. 271=I.R. 1931 Sind 32=129 I.C. 912= A.I.R. 1931 Sind 26.**

———S. 60—*Anticipatory breach—Courses open to parties and their rights.*

SALT ACT (1882), S. 9.

Where there is a repudiation by the promisor by the anticipatory refusal to perform the contract before the time for performance has arrived, two courses are open to the promisee, namely, either to treat the contracts as subsisting or to treat them as rescinded, and if he elects to treat the repudiation as inoperative and treat the contracts as still in force, in such a case the promisee keeps the contract alive for the benefit of the other party as well as his own; in other words, he keeps the contract alive for all purposes. But if the promisee fails to fulfil a condition precedent which is binding on him, the promisor will be discharged. 1933 P.C. 233, Rel. on. (*Venkatasubba Rao, J.*) NAGISETTY *v.* VENKATASUBBAYYA. **157 I.C. 640=1935 M.W.N. 230=41 L.W. 440=A.I.R. 1935 Mad. 345.**

———S. 60—*Anticipatory breach—Measure of damages.*

Where a contract is for delivery of goods on a certain day and the defendant repudiates the contract before that date, damages must be assessed on the basis of the market rate prevailing on the due date of delivery and not on the basis of the rate prevailing on the date of the repudiation. (*Brown, J.*) MAUNG PO KYAW *v.* SAW TAGO. **150 I.C. 760=I.R. 1933 Rang. 42=A.I.R. 1933 Rang. 25.**

SALT ACT (XIX OF 1882)—*Offence under— Whether punishable under Penal Code,* 1860.

Doing anything in contravention of the Salt Act or of any rule made thereunder is not a separate offence under Penal Code; similarly the abetment of an act in contravention of the Salt Act or of any rule made thereunder is not a separate offence under the Penal Code. 6 O.C. 153, Ref.; 6 Mad. 249, Dist. (*Wazir Hasan, C.J. and Pullan, J.*) MOHANLAL SAKSENA *v.* EMPEROR. **128 I.C. 221=7 O.W.N. 895=32 Cr.L.J. 104=1930 Cr.C. 1161=A.I.R. 1930 Oudh 497.**

———S. 9—Abetment of offence under Salt Act —Punishment under Penal Code, S. 117—Legality. *See* PENAL CODE, S. 117. **1930 Cr.C. 1161=A.I.R. 1930 Oudh 497.**

———S. 9—*Notification No.* 41, *R.* 8—*Offence under—Essentials.*

Where the accused is charged under S. 9 of the Salt Act for contravening R. 8 under Notification No. 41, the prosecution must prove not only that the accused imported salt into British India from a State but that the salt was produced or manufactured in such State. The mere fact of importation into British India from a State does not give rise to a presumption that the salt was produced or manufactured in the State and the onus of showing that it was not so manufactured is not thrown upon the accused. (*Young, C.J. and Rangi Lal, J.*) EMPEROR *v.* AMIR HUSSAIN. **153 I.C. 951=7 R.L. 481=36 Cr.L.J. 463 =36 P.L.R. 248=1934 Cr.C. 1355=A.I.R. 1934 Lah. 967.**

———S. 9—*Notification No.* 41, *R.* 9—*Essence of offence under.*

The essence of the offence under R. 9 of Notification No. 41 issued under S. 9 of the Salt Act is that duty has not been paid in the State where the salt is obtained. If there is no evidence in

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the case that duty has not been paid in the State upon the salt, it cannot be presumed that duty was not in fact so paid. (*Young, C. J. and Rangi Lal, J.*) EMPEROR *v.* AMIR HUSSAIN. **153 I.C. 951=7 R.L. 481=36 Cr.L.J. 463=36 P.L.R. 248=1934 Cr.C. 1355=A.I.R. 1934 Lah. 967.**

———**S. 9 (a)**—*Offence under—Abetment—Conviction under S. 117, I. P. Code—Propriety.*

A person guilty of abetment of an offence under S. 9 (*a*) of the Indian Salt Act may be convicted and sentenced under S. 117, I. P. Code, where it is proved that the act amounted to an abetment of the commission of an offence by the public generally or by any number or class of persons exceeding ten. (*Mears, C.J. and Sen, J.*) JOTI PRASAD GUPTA *v.* EMPEROR **53 A. 642=136 I.C. 91=33 Cr.L.J. 236=I.R. 1932 A. 139=1931 A.L.J. 986=1932 Cr.C. 27=A.I.R. 1932 A. 18.**

———**S. 9 (c)**—*Scope.*

Clause (*c*), S. 9 embraces all abetments whether aggravated or mitigated in their nature. The section does not provide for any execution in respect of such abetment as provided for by Penal Code, S. 117, and the punishment prescribed by the said section is for all abetments of acts which are declared to be offences by the provisions of Salt Act. (*Wazir Hasan, C.J. and Pullan, J.*) MOHANLAL SAKSENA *v.* EMPEROR. **128 I.C. 221=7 O.W.N. 895=32 Cr. L.J. 104=1930 Cr.C. 1161=A.I.R. 1930 Oudh 497.**

SANCTION—Legislature enacting provision—Duties imposed on individuals—Presumption that performance shall be enforced. *See* INTERPRETATION OF STATUTE—PRESUMPTION. **A.I.R. 1932 Oudh 210 (F.B.).**

SANTAL PARGANAS JUSTICE REGULATION (1893), S. 10—*"Only for trial of suits"—Meaning of.*

The expression "only for trial of suits" includes not only the actual hearing of the suit but also institution of the suit. Hence Civil Procedure Code applies to the institution of suits also. (*Wort and Mahomed Noor, JJ.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **13 Pat. 486=152 I.C. 301=7 R.P. 185=15 P. L.T. 237=A.I.R. 1934 Pat. 292.**

SANTHAL PARGANAS SETTLEMENT REGULATION (III OF 1872)—*Record of rights under—Weight of—Entry of* "Brahmottar raiyat"—*Effect of.*

The Record-of-rights in the Santhal Parganas has a status very different from that under the Bengal Tenancy Act. Where a tenant is described as a *"Brahmottar raiyat"*, the words are not used as part of the description of the landlord but as a description of the tenant. It means merely that he is a tenant of a particular kind. The entry is absolutely conclusive. Even if the entry were other than what it is, the entry of the word "raiyat" or "raiyati", will have the same effect., (*Courtney Terrell, C.J., Wort and Agarwala, JJ.*) UCHIT LAL MISSER *v.* RAGHUNANDAN TEWARI. **14 Pat. 52=153 I.C. 183=7 R.P. 306=15 P.L.T. 661=A.I.R. 1934 Pat. 656 (F.B.).**

———**S. 5**—*Jurisdiction of Civil Court during settlement.*

SANTHAL PARGANAS SETTLEMENT REGULATION (1872), S. 6.

Section 5 of Regulation III of 1872 only bars during the pendency of settlement operations the institution of suits before the Civil Courts and trial of suits already instituted before them. There is no bar to the Civil Court trying a suit which has been properly instituted before the officer referred to in the section, namely, the Settlement Officer, provided that the Settlement Officer transfers the case to the Civil Court. (*Khaja Mohammad Noor and Varma, JJ.*) THAKURAIN KUSUM KUMARI *v.* BISESWAR LAL MARWARI. **14 Pat. 356=157 I.C. 316=8 R.P. 109=16 Pat.L.T. 536=A.I.R. 1935 Pat. 439.**

———**Ss. 5 and 5 (a)**—*Lands situated in Santal Parganas and outside—Courts in Santal Parganas and Gaya District—Concurrent jurisdiction of—Suit filed in Court of Settlement Officer in Santal Parganas—Jurisdiction to transfer suit to Gaya Court.*

Wort, J.—Where lands are situate both within the Santal Parganas and outside, and the Court in Santal Parganas and Gaya Court have concurrent jurisdiction to try the suit subject to the restriction in the Regulation, the Settlement Officer has jurisdiction to transfer a suit filed in his Court to the Gaya Court and the Gaya Court can take cognizance of the suit by reason of such transfer. Per *Mahomed Noor, J.*—The Settlement Officer has jurisdiction to transfer a case only to a Court established under the Bengal, Agra and Assam Civil Courts Act of 1887; he has no jurisdiction to send the suit to Gaya. But as there was no inherent want of jurisdiction, in the Gaya Court, the Gaya Court could take cognizance of the suit. (*Wort and Mahomed Noor, JJ.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **13 Pat. 486=152 I.C. 301=7 R.P. 185=15 P.L.T. 237=A.I.R. 1935 Pat. 292.**

———**S. 5-A**—*Submission to jurisdiction—Transfer of suit by Settlement Officer to District Judge of Sonthal Parganas—Latter transferring it to District Judge of Bhagalpur who transferred it to Subordinate Judge—Defendant not objecting to irregularity of transfer—Effect of.*

A suit which was properly instituted under S. 5 of Regulation III of 1872 before the Settlement Officer of the Sonthal Parganas was transferred by him under S. 5 A to the District Judge of that district. The latter without any authority transferred the suit to the District Judge of Bhagalpur, who in his turn transferred the suit to the Subordinate Judge of that district, in whose jurisdiction a portion of the property was situated. The defendant did not raise any objection to the irregularity of this transfer for a period of about three years and in the meantime took various steps in the suit and thereby submitted herself to the jurisdiction of the Bhagalpur Court where the suit was irregularly pending.

Held, that although the transfer of the suit by the District Judge of Sonthal Parganas to Bhagalpur was irregular, there being no inherent want of jurisdiction in the Subordinate Judge of Bhagalpur and the defendant having submitted herself to the jurisdiction of the Court, she could not be allowed to raise the question of jurisdiction three years after the suit was registered in that Court, (*Khaja Mohammad Noor and Varma JJ.*) THAKURAIN KUSUM KUMARI *v.* BISESWAR LAL MARWARI. **14 Pat. 356=157 I.C. 316=8 R.P 109=16 Pat.L.T. 536=A.I.R. 1935 Pat 439.**

———**S. 6**—*Compromise decree allowing interest in contravention of section—Power of Court to pass.*

The mandatory provisions of S. 6 of the Regulation cannot be evaded and the Courts are not empowered to

SANTHAL PARGANAS SETTLEMENT REGULATION (1872), S. 6.

pass a decree even on compromise which allows interest in its contravention. The section has been enacted on the grounds of public policy to protect the people of the Sonthal Parganas from their own improvident acts. The very object will be defeated if money-lenders can persuade the debtors by agreeing to a decree and thereby get more interest than they would have got on contest. (*Khaja Mohammad Noor and Varma, JJ.*) THAKURAIN KUSUM KUMARI *v.* BISESWAR LAL MARWARI. **14 Pat 356 = 157 I C. 316 = 8 R.P. 109 = 16 Pat L.T. 536 = A.I R 1935 Pat 439.**

——**S. 6**—"*Intermediate adjustment.*"

The expression "intermediate adjustment" includes the renewal of the loan by the execution of a bond. (*Wort and Varma, JJ.*) SURAJMAL MARWARI *v.* HURO RAI **14 Pat 400 = 156 I.C 290 = 7 R P. 709 = 16 Pat L T. 579 = A.I R. 1935 Pat. 98.**

——**S. 6**—*Power of Court to reduce bond rate of interest.*

There is nothing in S. 6 which would entitle the Court to reduce the interest from the bond rate to a lesser sum. What comes within the mischief of the section is, first of all, compound interest ; and, secondly, the total amount of interest going in excess of the sum of the loan itself, that is to say, the principal sum Hence the mortgagee is entitled to bond rate up to days of grace granted by the decree. Interest after the decree or after the days of grace would not be governed by the Regulation, but S 34; C. P. Code, applies and interest at six per cent. can be allowed. (*Wort and Varma. JJ.*) SURAJMAL MARWARI *v.* HURO RAI **14 Pat. 400 = 156 I.C. 290 = 7 R P. 709 = 16 Pat L.T. 579 = A.I.R. 1935 Pat. 98.**

——**S. 25-A**—*Applicability — Dispute between rival claimants to proprietary rights in same property.*

There is no reason why S. 25-A of Regulation III of 1872 should not be held to apply to cases where the dispute is between two rival claimants, each claiming to be the proprietor of the same property. The section obviously will have no application to disputes between a landlord and a tenant or to cases where one of the parties neither is nor asserts himself to be. a Zemindar even though the other party may be a Zemindar and where there is no dispute as to any proprietary right between them. It will be unduly restricting the scope of the section and defeating the purpose for which it has been enacted to hold that it will not apply unless each party admits the other party to be a Zemindar or proprietor. A suit is clearly maintainable in a Civil Court where both the plaintiffs and the defendant claim to be the proprietors of the same properties. (*Fazal Ali and Sanders, JJ.*) RANI SONABATI KUMARI *v.* RAJA KIRTYANAND SINGH **14 Pat. 70 = 157 I.C. 433 = 8 R.P. 121 = A.I.R. 1935 Pat 306.**

——**S. 27 (2)**—*Scope—Mortgage suit—Decree directing sale of raiyati holding—Power of executing Court to refuse to execute.*

The words S 27 (2) of Sonthal Parganas Settlement Regulation are absolutely prohibitive; and the executing Court has no power to execute a decree directing sale of a raiyati holding. The fact that the judgment-debtor did not raise the objection in the mortgage suit itself does not operate as an estoppel, because there can be no estoppel against the statute. The law prohibits the sale of a raiyati holding, whether the judgmen-debtor objects or not ; it is therefore open to the executing Court to examine the nature of the property directed to be sold under the decree and also to refuse to sell the property which is prohibited by law to be sold. (*Courtney Terrell, C.J., Wort and Agarwala, JJ.*) UCHIT LAL MISSER *v.* RAGHUNANDAN TEWARI. **14 Pat. 52 = 153 I.C. 183 = 7 R.P. 306 = 15 P.L.T. 661 = A.I.R. 1934 Pat. 666 (F B).**

SANYASI. *See* HINDU LAW—ASCETIC.

SARBARAKARIS. *See* LAND TENURE.

SCHEDULED DISTRICTS ACT (1874), S. 6 (b)—*Rules framed under—Revisional jurisdiction of Board—Case governed by.*

The Board has no revisional jurisdiction in cases governed by rules framed under S. 6 (*b*) of the Scheduled Districts Act, 1874, to regulate the procedure of the revenue officers appointed in Kumaun. (*Oppenheim. J. M.*) HIRA SINGH *v.* NATHUA. **15 R D. 656.**

SCHOOL REGISTER AND CERTIFICATE. *See* EVIDENCE ACT, S. 35.

SEA CUSTOMS ACT (VIII OF 1878)—*Object and scope of.*

The object of the legislature was to authorize the customs authorities to release the ship provided there was some person within the jurisdiction who would be answerable for such claims as either the ship or the carrier would have been answerable for, if she or he had remained within the jurisdiction. (*Rup Chand, A. J. C.*) HAJI SHAKOOR GANY *v.* VOLKART BROTHERS. **25 S L.R 222 = I.R. 1931 Sind 109 = 133 I.C 77 = A I.R. 1931 Sind 124.**

——**Ss. 29 and 30**—*Construction—"Wholesale cash price" - Meaning of—Alternative basis of assessment—When to be adopted—Lubricating oil—No similar oil in the market.*

Ss. 29 and 30 are sections of a taxing Act not to be pressed against the tax payer beyond their plain intendment and taken as a whole, they seem to disclose on the part of the legislature when describing the price which is to represent the "real value" of the goods to be taxed, a definite purpose to define a price conservative in its very aspect and free in particular from any loading for any post importation charges incurred in relation to the goods. The price is to be a price for goods as they are both at the "time" and "place" of importation. The words "wholesale cash price less trade discount" indicate that only sales to the trade are those in contemplation. An American Company were the manufacturers of a grade of lubricating oil which they imported into India and sold to consumers direct without the intervention of a dealer. The oil was consigned from America upon invoices charging the importing branch with the cost price of the oil f. o. b. New York, plus a small manufacturing profit. The selling price to the consumers was about 70 per cent. above entry price, the selling price being swollen by the retailing profit and charges in respect of matters subsequent to importation. There was no other oil on the market "of the like kind and quality". Except for a small discount to those purchasing their requirements exclusively from the company and a special discount for cash, there was no regular trade discount.

Held, that having regard to their course of business the import duty on the Oils should be determined on the alternative basis of assessment indicated in sub-S. (*b*) of S. 30, as the selling price to consumers could in no sense be called a "wholesale cash price, less trade discount". (*Lord Blanesburgh*) VACUUM OIL COMPANY *v.* SECRETARY OF STATE. **59 I A. 258 = 56 Bom. 313 = 34 Bom L R. 1057 = 36 C W.N. 854 = 55 C.L.J 520 = 36 L.W. 156 = I R 1932 P C. 203 = 1933 M.W N. 81 = 137 I.C. 535 = A.I R. 1932 P.C. 168 = 63 M L.J. 437 (P C.).**

——**Ss. 64 and 85**—*Object and effect of—Clause in bill of lading providing for suits for loss or damage to*

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be brought within one year—Suit brought out of time—Enforceability of claim as a statutory obligation.

The object of Ss 64 and 85 was to authorize the Customs Authorities to release the ship, provided that there was some person within the jurisdiction who would be answerable for such claims as either the ship or the carrier would have been answerable for, if she or he had remained within the jurisdiction. No greater rights were intended to be conferred against the ship's agent signing the declaration. The words of the sections do not dispense with the necessity of proof by plaintiff of an *enforceable* claim existing at the date of the suit. They are of no assistance to a plaintiff who brings a suit for short delivery after one year from date of delivery—the time fixed by his bill of lading. In such a case, there is no enforceable claim at all. (*Blackwell, J.*) HAJI SHAKOOR GANY *v.* H. E. HINDF & CO., LTD. **I.R. 1932 Bom. 431=138 I C. 793=34 Bom.L.R. 634 =A I.R. 1932 Bom 330.**

SECOND APPEAL. *See* C. P. CODE, S. 100.

SECRETARY OF STATE. *See* TORTS.

———Act of Government authorized by law—No right to compensation provided—No right exists. *See* BENGAL FERRIES ACT (I OF 1885), SS 6 AND 17. **A.I.R. 1936 Pat. 87.**

———Liability of, for acts of Deputy Collector—Error in revenue sale. *See* TORTS—ACT OF STATE. **37 C. W.N 957.**

———Liability of illegal settlement by Government with the defendant under Assam Land and Revenue Regulation (I of 1886)—If liable for damage. *See* ASSAM LAND AND REVENUE REGULATION (I OF 1886), S. 32. **62 Cal. 1053.**

———*Liability of—Negligence of Manager of Court of Wards—Loss due to—Suit for damages and accounts—Maintainability.*

The suit does not lie against the Secretary of State for India in Council in respect of an act of a subordinate in connection with the exercise of Sovereign or governmental power. Though the Secretary of State may be charged with the liability in respect of the mercantile dealings of the Government or on the basis of a contract entered into with another, the management of the Court of Wards does not fall within any of such categories and a suit is not maintainable against the Secretary of State for India at the instance of a disqualified proprietor to whom the estate had been subsequently restored, claiming accounts and damages for loss caused by the negligence and mismanagement of the Manager of the Court of Wards during the management of the plaintiff's estate. (Case law exhaustively discussed.) (*Rankin, C.J. and C.C. Ghose, J.*) SECRETARY OF STATE FOR INDIA *v* SRIGOBINDA CHAUDHURI **59 Cal. 1289=140 I.C 856=I.R. 1933 Cal. 58=55 C. L.J. 542=36 C W N 606=A.I R. 1932 Cal. 834.**

Wrongful acts or officers—Liability for—Wrongful detention of Police Officer. *See* CROWN—TORT. **9 Rang. 375.**

SECURITIES ACT (X OF 1920), S 18—*Effect of—Suit barred under Limitation Act—Extension of time limit.*

The effect of S. 18 of the Indian Securities Act is that even if the true owner of a promissory note has an enforceable claim against the Government according to the general law of limitation, he cannot enforce such payment after the lapse of six years from the date on which the payment is due under the promissory note. It does not extend the period of limitation up to the period of six years if the person is otherwise disabled from suing because of the ordinary law of limitation. (*Curgenen and Sundaram Chetty, JJ.*) THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KUNHI KRISHNA VARMA VALIA RAJA. **I R 1933 Mad. 213 =142 I C 286=37 L.W. 302=A.I.R. 1933 Mad. 376 =64 M.L J. 172.**

SERVANT—Fraud of — Liability of master. *See* PRINCIPAL AND AGENT—PRINCIPAL'S LIABILITY FOR AGENTS ACTS.

SERVICE INAM.

See (1) GRANT—SERVICE GRANT.
(2) LAND TENURE—INAM.

SETTLEMENT RECORDS. *See* REVENUE PAPERS.

SHAHJOG HUNDI. *See* NEGOTIABLE INSTRUMENTS ACT, S. 5.

SHAMILAT RIGHTS. *See* CUSTOM (PUNJAB)—ALIENATION.

SHET ASNADI LANDS. *See* LAND TENURE—INAM

SHIKMI TENURE. *See* LAND TENURE—SHIKMI.

SHIPPING—Bill of lading—Clause in—Suit for loss or damage to be brought in one year—Effect of. *See* BILL OF LADING—CLAUSE IN. **I R. 1932 Bom. 431=138 I C. 793=34 Bom L.R. 634=A.I.R. 1932 Bom. 330.**

———*Bill of lading—Issue of—Loose practice—Party permitting same whether can resile.*

A person who has himself directed the ship to hold the goods for shipment on behalf of *A* cannot be allowed subsequently to treat as wrongful the carrying out of his own instructions in the absence of anything done by him to countermand the same in good time. (*Rankin, C.J., C. C. Ghose and Lort Williams, JJ.*) NIPPON YUSEN KAISHA *v.* MAHALIRAM RAMJIDAS. **I R. 1931 Cal 786=134 I.C. 82=52 C.L.J. 365=A.I.R. 1931 Cal 269 (S B.).**

———Bill of lading—Issue by Shipping Company to shipper named in mate's receipts—Same contrary to course of business — Liability of shipping company in damages. *See* CONTRACT ACT, S. 178—SHIPPING. **I R 1931 Cal 865 (2)=134 I C. 73 (2)=53 C.L.J. 111=A.I R. 1931 Cal 373 (S.B.).**

———*Collision.*

In order that the position of a vessel may be ascertained by another vessel within the meaning of the Regulation, she must be known by that other vessel to be in such a position that both vessels can safely proceed without risk of collision. The data on which an inference is founded may be so conclusive as to raise the inference to the level of a certainty. But in such cases the vessel which so infers takes the chance of her inference being right. (*Lord Macmillan*) NIPPON YUSEN KAISHA *v.* CHINA NAVIGATION CO., LTD. **155 I C. 61=7 R P.C. 157=A.I.R 1935 P.C. 25 (P.C.).**

———*Collision—Contributory negligence.*

Where two vessels held on too long on their unwarranted course, and one of them was navigating in breach of Regn 25, while the initial position of the other was more faulty than that of the former, with the result that both vessels continued their erroneous action until neither could avoid collision, *held*, that both were rightly to blame. (*Lord Merrivale.*) S S. LEOPOLD *v.* HOCHELAGA STEAMSHIP CO., LTD. **I.R. 1932 P.C. 191=137 I C. 466=A.I R. 1932 P C. 65 (P.C.).**

———*Collision—Signals other than those specified—Use of—Risk.*

Signals other than those specified and prescribed are given at the risk of the vessel which gives them. The

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Regulations prescribe signals for specific occasions. Use of them on any other occasion leaves those responsible open to the liability. As to "warning blasts" and exchange of whistle notes, other than the authorized signals, Regn. 29 may not be wholly irrelevant, but the manifest danger against which the seaman has to guard is that if that be done which is not prescribed, it may be misunderstood or misrepresented. *The Gulf of Suez*, (1921) P. 318; *The Buccari*, 35 Lloyds List, Rep. 29 and *The Tovarisch*, (1931) A. C. 121, Ref. (*Lord Merrivale.*) S S. LEOPOLD *v.* HOCHELAGA STEAMSHIP CO., LTD. **I.R. 1932 P.C. 191=137 I.C. 466=A.I.R. 1932 P.C. 65 (P.C.).**

———*Conflict of laws—Law of ship's flag.*

Where any question arises involving a conflict of laws, the law of the ship's flag prevails unless it is clear from the express language of the bill-of lading or otherwise that the parties intended some other law to prevail. *Moore* v. *Harris*, (1876) A.C. 318, followed. (*Rupchand, A.J.C.*) HAJI SHAKOOR GANY *v.* VOLKART BROTHERS. **25 S L.R. 222=I.R. 1931 Sind 109=133 I.C. 77=A.I.R. 1931 Sind 124.**

———*Landing charges—Collection of—Karachi mercantile usage.*

It is ordinarily the duty of the local agent of a ship owner or of a charterer to collect all landing charges due to a landing contracter from the consignees and then make over the collection to the landing contractor, after deducting from them the rebate as per contract, either on his own behalf or on behalf of the charterer or the shipowner. (*Mehta, A J.C.*) PESTONJI BHICAJI *v.* RAVJI JAVERCHAND. **150 I.C. 483=7 R S. 15=A.I.R. 1933 Sind 235.**

———Liability of Ship's agent. *See* PRINCIPAL AND AGENT. **25 S.L R. 222=A.I.R. 1931 Sind 124.**

———*Mate's receipt—Issue of bill of lading.*

The production of the mate's receipt is a very necessary condition if the shipowner is to be asked to issue bills of lading to a person other than the person named in the mate's receipt. It is also a useful protection to him in case the shipper named in the receipt is acting for a principal. But there can be cases where the issuing of a receipt without the bill of lading being produced may not be a wrongful act amounting to conversion of the part on the part of the carrier.

Per *Lort Williams, J.*—The shipowner cannot deliver the bill of lading without production of the mate's receipt. (*Rankin C.J., C. C. Ghose and Lort Williams, JJ.*) NIPPON YUSEN KAISHA *v* MAHALIRAM KAMJI DAS. **I.R. 1931 Cal. 786=134 I.C. 82=52 C.L.J. 365=A.I.R. 1931 Cal. 269 (S B).**

———*Right of carrier to possession.*

If goods in the possession of a carrier on behalf of another are wrongfully put on board a vessel and the vessel innocently accepts them in the ordinary course of business the carrier would be entitled to demand the goods. (*Rankin, C.J., C. C. Ghose and Lort Williams, JJ.*) NIPPON YUSEN KAISHA *v.* MAHALIRAM RAMJIDAS. **I R. 1931 Cal. 786=134 I.C. 82=52 C. L J. 365=A I.R. 1931 Cal. 269 (S.B.).**

SHOLAPUR MARTIAL LAW ORDINANCE ACT (IV OF 1930), S. 11—*Effect of.*

The effect of S. 11 is to validate all sentences properly or improperly passed by the Military and the High Court is thereby precluded from entering into the question whether Martial Law was properly declared at Sholapur in May, 1930. The sentences passed by the military are not subject to the usual rules as to appeal and revision. (*Beaumont, C.J., Madgavkar and Blackwell, JJ.*) EMPEROR *v.* CHANNAPPA SHANTIRAPPA. **55 Bom 263=I.R. 1931 Bom. 196=32 Cr.L.J. 403=129 I.C. 596=32 Bom.L.R. 1613=1931 Cr.C. 65=A.I.R. 1931 Bom 57 (F B).**

SIKH GURDWARAS ACT (VIII OF 1925). *See* PUNJAB SIKH GURDWARAS ACT (VIII OF 1925).

SIKHISM—*Conversion to—Requisites for.*

Sikhism is a proselytizing religion. A mussalman woman can become a Sikhni by a mere declaration of faith. No other ceremony is necessary 18 I C. 930, Foll (*Addison and Agha Haidar, JJ.*) KHAZAN SINGH *v.* MT. LACHHMI. **I R. 1933 Lah. 169=34 P. L R 356=142 I C. 13=A.I.R. 1933 Lah. 347.**

SIKHS. *See* HINDU LAW—APPLICABILITY.

SINDH COURTS ACT (BOMBAY ACT XII OF 1866), S. 1.

Quaere.—Whether the Court of the Judicial Commissioner of Sind exercising criminal jurisdiction as a Court of Session, or one of the Additional Judicial Commissioners exercising such jurisdiction, is a Court subordinate to the Court of the Judicial Commissioner exercising criminal appellate jurisdiction. (*Lord Atkin.*) HARI *v.* EMPEROR. **62 I A 174=59 Bom. 496=62 C L.J. 1=1935 M W.N. 689=1935 A.L J 1154=156 I.C. 3=7 R. P.C 223=1935 O W.N 744=39 C. W.N 929=16 Pat L T 513-42 L W 162=1935 A. Cr C. 185=37 Bom L.R. 634=1935 A.W.R 808=37 P L.R. 542=36 Cr L.J. 978=1935 Cr.C 871 (2)=A I.R. 1935 P C. 122-69 M.L J 128 (P.C).**

———**S 16**—*Disciplinary jurisdiction — Pleader charged with attending and participating in political meetings and processions organized by unlawful bodies—Disclaimer by him of any intention to associate with such bodies—Warning considered enough.*

Report was made for action under the disciplinary jurisdiction against a pleader for attending political meetings and taking part in political processions organized under the auspices of Congress, declared unlawful under the ordinance. The same pleader had on a previous occasion been warned for congratulating All India leaders sentenced under the Salt Act, or Penal Code, and let off with a warning. The pleader concerned declared that he was not, and that he had never any intention of associating himself with the Congress or its activities or participating in any disloyal movement or in any association declared by the Government to be unlawful.

Held, in view of this disclaimer, the pleader on this occasion also be let off with a warning but he should be saddled with costs of the Crown. (*Ferrers, J.C. and Mehta, A.J.C.*) HARBUXRAI H. SHAHANI, *In the matter of*. **27 S L R. 177=6 I. R. (Sind) 79=146 I.C. 754=A.I.R. 1933 Sind 310.**

———**S. 16**—*'Misbehaviour"—Meaning.*

The word is not limited to conduct in the course of a pleader's professional duties but extends to general behaviour. Misbehaviour means improper conduct. 44 I.C. 338, Ref. (*Haveliwala and Milne, A.J Cs.*) HURBUX RAI, *In re* **25 S L.R. 131=I.R. 1931 Sind 59=131 I.C. 187=1931 Cr.C. 193=A.I.R. 1931 Sind 33.**

———**S 16**—"*Misbehaviour*" — *Passing resolution sympathising with Satyagraha movement and breach of Salt Laws.*

Two members of the Bar actually participated in passing the resolution that the Bar Association sympathized with the spirit underlying Satyagraha movement started by Mahatma Gandhi and heartily congratulated leaders sentenced under Salt Act or Penal Code.

Held, that movement which intended to arouse spirit of lawlessness was illegal, and to sympathize with the spirit of the movement inspiring and actuating law-

SIND COURTS ACT (1866), S. 16.

breaking, and heartily congratulating persons, was to sympathize with defiance of law. To take part in passing the resolution was not a mere expression of opinion but amounted to an encouragement to the public to join the movement and defy the laws. Such conduct amounts to misbehaviour within the meaning of S. 16. (*Havelt wala and Milne, A.J.Cs*) HURBUX RAI, *In re.* **25 S. L.R. 131 = I.R. 1931 Sind 59 = 131 I.C. 187 = 1931 Cr.C. 193 = A.I.R. 1931 Sind 33.**

——— **S. 16**—*Misbehaviour—Unauthorised retention of client's money by pleader—Payment by cheque on bank having no funds.*

Where a legal practitioner retained a considerable amount belonging to his client on an excuse which was merely a pretence for retaining the money and it also appeared from the evidence that when pressed by the client he gave a cheque on a bank in which he had no sufficient funds.

Held, that the practitioner was guilty of a serious misbehaviour for which the only adequate punishment was the cancellation of his sanad. (*Ferrers, J.C. and Aston, A.J.C.*) B. A. BARRISTER, *In re.* **I R. 1933 Sind 113 (2) = 142 I.C. 593 = A I.R. 1933 Sind 45.**

——— **S. 16**—*Misbehaviour—Use of client's money and inability to repay.*

A pleader drew out moneys belonging to his client and paid the cheque to his own credit in his own bank; he did not enter those moneys in his client's account and he was not able to refund those moneys when called upon:

Held, that the pleader had been guilty of such misbehaviour as would justify the Court in taking action under S. 16. (*Ferrers, J.C. and Aston, A.J.C.*) G. A. PLEADER, *In re.* **I.R. 1933 Sind 141 = 143 I.C. 631 = 1933 Cr.C. 207 = A.I R. 1933 Sind 65.**

——— **S. 16**—*Proceedings under—Nature of.*

The inquiry under S. 16 is of a quasi criminal character and there must be a strong proof before the pleader is dealt with. But it is also to be borne in mind that the proposition to be proved is not that the inculpated pleader has brought himself within one of the sections of the Indian Penal Code. Disciplinary action against a pleader is not by way of punishment. It rests upon the principle that the Court deems him unworthy of its confidence and unfit for his place The proposition to be proved is that he has been guilty of some such mis behaviour as would justify the Court in removing or suspending him from practice. (*Ferrers, J. C. and Aston, A.J.C.*) G. A. PLEADER, *In re.* **I.R. 1933 Sind 141 = 143 I.C. 631 = 1933 Cr.C. 207 = A.I R. 1933 Sind 65.**

SIND COURTS CRIMINAL CIRCULARS, Ch. I R. 4—Irregularity of police officer—Observation in judgment—Propriety. *See* Cr. P CODE, S. 561-A—EXPUNGING REMARKS. **150 I C. 610 = 35 Cr L.J. 1138 = 7 R.S. 20 = 1934 Cr C. 637 = A.I.R. 1934 Sind 68.**

SIND ENCUMBERED ESTATES ACT (XX OF 1896)—*Defendant placed under protection pending suit for partition—Joinder of Manager—Notice under S. 80, C. P. Code, not necessary.*

Where after the institution of a suit for partition, the defendant is placed under the protection of the Manager of the Encumbered Estates in Sind, no notice is necessary under S. 80, C. P. Code for impleading the manager. 96 I.C. 351, Foll. Also a claim for partition, at lease where it is not disputed by the Manager, is not in respect of any Act purporting to be done by him and on that ground also no notice is necessary. (*Wild, J. C. and Rupchand Bilaram, A J C.*) HARCHUMAL *v.* MAZAR KHAN. **25 S L.R. 200 = I R. 1931 Sind 106 = 133 I.C. 74 = A.I.R. 1931 Sind 158.**

SIND JUDICIAL COMMISSIONER'S COURT RULES, R. 2.

——— **S. 29**—*Powers of restored Zemindar—Partition.*

The word 'alienation' is distinct and from 'partition' and there is nothing in S 29 or any other section of the Act to suggest that it was intended to prevent a restored Zamindar from making a partition of property either privately or through the Court so as to bind his heirs. (*Rupchand Bilaram and Milne, A.J.Cs.*) KHIMANMAL *v.* SHER MAHOMED KHAN. **25 S L R 430 = I.R. 1931 Sind 87 = 132 I.C. 471 = A I R 1931 Sind 118.**

——— **S. 29**—*Sanction for sale—Validity of gift.*

The sanction given by the Commissioner in Sind under S 29 for sale of property cannot be utilised in making a gift of that property and a gift made without such sanction does not enure beyond the lifetime of the donor. (*Wild, J. C. and Rupchand, A. J. C.*) MT. HAKIM BIBI *v.* MIR AHMED. **25 S L.R. 72 = I R. 1931 Sind 20 = 129 I.C. 900 = A.I R 1931 Sind 17.**

SIND FRONTIER REGULATION (III OF 1892), S. 5—*Reference to Jirgah—Portion of subject-matter out of the area to which Regulation applied.*

If there is a dispute which is likely to cause a breach of the peace within the area to which the Regulation applies, the District Magistrate has authority to refer the dispute to the Jirgah for settlement and it is immaterial that portion of the subject-matter of the dispute is not within the particular area to which Regulation has been applied (*Wild, J C. and Milne A J C.*) MT. JAMAL KHATUN *v.* TAJOO KHAN. **25 S.L.R 245 = I R 1931 Sind 125 = 134 I C. 381 = A I R. 1931 Sind 137.**

——— **S. 5**—*Reference to Jirgah—Procedure to be observed by Jirgah.*

There are no rules laid down for the procedure of the jirgah but there must be a substantial compliance with the ordinary provision of law relating to civil procedure. The parties must have notice of the proceedings, they must have opportunity, if they so desire, to place their evidence before it. But if these conditions are substantially complied with, the particular form is perhaps not of any moment. (*Wild, J. C. and Milne, A. J. C.*) MT. JAMAL KHATUN *v.* TAJOO KHAN. **25 S.L.R. 245 = I.R. 1931 Sind 125 = 134 I C 381 = A I R. 1931 Sind 137.**

——— **S. 5**—*Reference to Jirgah—Omission to state reasons—Effect of.*

The District Magistrate must be satisfied that there is a dispute contemplated by the section and he must make an order in writing stating the grounds of his being so satisfied. An omission to do so would not, however, deprive him of jurisdiction to refer the matter to a Jirgah if the report of the District Superintendent of Police on which he acted contained the grounds for such a decision. 33 Cal. 352, Foll. (*Wild, J. C. and Milne, A J C.*) MT JAMAL KHATUN *v.* T JOO KHAN **25 S.L.R. 245 = I.R. 1931 Sind 125 = 135 I.C. 381 = A.I R. 1931 Sind 137.**

SIND JUDICIAL COMMISSIONER'S COURT RULES—*Re-interrogatories—Filing of.*

Re-interrogatories can be filed for examination of witnesses outside the jurisdiction of the Court. High Court Rules, which are defective on this point are recommended to be brought in line with the rules of the Bombay High Court. (*Rupchand, A.J.C.*) RUCHALDAS GIDUMAL *v.* TIKAMDAS LILARAM. **I R. 1931 Sind 86 = 132 I.C. 470 = A.I R. 1931 Sind 105.**

——— **R. 2 (4)**—*Single Judge can quash commitment.*

Rule, 2, Cl. 4 of the rules of the Court is clear and vests in a single Judge of the Judicial Commissioner's Court the power dealing with every application for quashing a commitment under S. 215, Cr. P Code. (*Rupchand, A.J.C.*) MANIRAM MANGHANMAL *v.* EM-

SIND JUDICIAL COMMISSIONER'S COURT RULES, R. 19.

PEROR. **26 S.L.R. 407=I.R. 1932 Sind 189=34 Cr.L.J. 14=140 I.C. 485=1932 Cr.C. 693=A.I.R. 1932 Sind 157.**

——**Rr. 19 and 20**—*Execution—Plea of Judgment-debtor that he is an agriculturist—Procedure.*

It is open to the judgment debtor, to plead that he is an agriculturist within the Dekkan Agriculturists' Relief Act in execution proceedings and that execution proceedings in respect of agricultural lands should be transferred to Collector under Sch. 3, C. P. Code, read with Rr. 19 and 20 of Sind Judicial Commissioner's Court Rules (*Wild, J. C., Aston and Rupchand, A.J.Cs.*) DEUMAL RACHANDMAL *v.* FIRM OF LAL CHAND. **25 S.L.R. 475=I.R. 1931 Sind 97=133 I.C. 65=A.I.R. 1931 Sind 97 (F.B.).**

SIR.

See (*i*) AGRA TENANCY ACT (III OF 1926), S. 4 (*d*).

(*ii*) LANDLORD AND TENANT—SIR.

SOCIETIES REGISTRATION ACT (XXI OF 1860)—*Institution not registered under—Promissory note in favour of—Suit on—Maintainability.*

Where the object of an institution is to help the cause of education from the income and interest arising out of trust fund, the institution has to be registered under the Registration of Societies Act in order to enable it to acquire a juridical status. In the absence of registration under the aforesaid Act all the trustees in charge of the fund have alone a legal status. Therefore a promissory note if executed in favour of the institution which has no juridical status is void and no suit can be instituted to enforce it on behalf of the institution. (*Subhedar, A. J. C.*) JAMBOODAS DEVIDAS CHAWRE *v.* CHAWRE DIGAMBAR JAIN BOARDING. **31 N.L.R. 15=151 I.C. 893=7 R.N. 69=A.I.R. 1934 Nag 207 (2).**

SOLICITOR. *See also* LEGAL PRACTITIONER—ATTORNEY.

——Bill of costs—Taxation—Right of solicitor to amend or substitute fresh bill—Discretion of Court—Disallowance of costs on ground of undignified tone of correspondence—Propriety. *See* BOMBAY HIGH COURT RULES (O.S.), R. 559. **37 Bom.L.R. 39=A.I.R. 1935 Bom. 150.**

——Lien. *See* LEGAL PRACTITIONER—LIEN.

——*Lien for costs—Law relating—English Law—C. P. Code—If exhaustive.*

The question of solicitor's lien in the High Courts in India is governed by the relevant principles of English law. The C. P. Code, has not abrogated the pre-existing law; not is the Code exhaustive on the point (*Costello and Lort Williams, JJ.*) PREMSUKHDAS SINGHANIA *v.* BURAL AND PYNE. **61 Cal. 1005=154 I.C. 781=7 R.C. 527=38 C.W.N. 1031=A.I.R. 1935 Cal 168.**

——Lien on documents for costs—If can be pleaded in answer, to order for production of documents under S. 94, Cr. P. Code. *See* CR. P. CODE, S. 94. **62 Cal. 1037=39 C.W.N. 917.**

SOLICITOR AND CLIENT—*Breach of duty—Non-disclosure of material facts—Liability for damages.*

A party holding a fiduciary relationship, and committing a breach of duty by non disclosure of material facts which his constituent is entitled to know in connection with the transaction, is liable in damages to his constituent; he cannot be heard to say that disclosure would not have altered the decision to proceed with the transaction. Once it is established that the non disclosed facts were material, speculation as to what course the constitutent, on disclosure, would have taken is irrelevant.

SPECIAL MARRIAGE ACT (1872), S. 21.

One *B*, who had obtained loans from a loan company as well as from a solicitor on mortgages, applied for further loans from the Company. The solicitor who acted as such for the company and the debtor disclosed to the company only one of the three mortgages in his favour, and the advances were made by the company.

Held, that the solicitor's non-disclosure of the two mortgages in his favour was a breach of his duty as solicitor to the loan company, and that the latter were entitled to damages against the solicitor. (*Lord Thankerton.*) BRICKENDEN *v.* LONDON LOAN AND SAVINGS COMPANY OF CANADA. **1934 A.L.J. 613=40 L.W. 206=4 A.W.R. 638=151 I.C. 972=7 R.P.C. 84=A.I.R. 1934 P.C. 176 (P.C.).**

——*Compromise between parties—Intention to deprive solicitor's costs—Power of Court to refuse recognition.*

A solicitor's lien for his costs on the fruits of his labour may in some circumstances be defeated by a compromise between the parties. As a general rule the Court will not interfere in a compromise in order to preserve the solicitor's lien, when the compromise is a *bona fide* one. But if the compromise is not *bona fide* but collusive, entered into between the parties specifically for the purpose of depriving the solicitor of his lien, then the Court will usually interfere and protect the solicitor, and in such an event the solicitor may apply for payment of costs by either of the parties to the scheme. The Court will hold there is collusion if the agreement between the parties is made with the knowledge that the result will inevitably be to deprive the solicitor of his costs which he has earned, or if the parties enter into the agreement knowing and intending that the outcome will be to deprive the solicitor of his lien (*Costello and Lord Williams, JJ.*) PREMSUKHDAS SINGHANIA *v.* BURAL AND PYNE. **61 Cal. 1005=154 I.C. 781=7 R.C. 527=38 C.W.N. 1031=A.I.R. 1935 Cal. 168.**

——Lien—Nature of. *See* LEGAL PRACTITIONER—LIEN.

SOLITARY CONFINEMENT. *See* CRIMINAL TRIAL—SENTENCE

SPECIAL MARRIAGE ACT (III OF 1872), S. 21—*Declaration—Falsity of—Burden of proof.*

The burden of proving that the declaration made by the deponent under the Act was false lies heavily upon the prosecution. (*Nanavutty, J.*) WALTER *v.* EMPEROR. **9 Luck. 561=6 R.O. 425=148 I.C. 689=35 Cr.L.J. 744=11 O.W.N. 404=1934 Cr.C. 499=A.I.R. 1934 Oudh 155.**

——**S. 21**—*Offence under—Formal renunciation of any religion not necessary.*

The offence contemplated in S. 21 only deals with the declaration of a profession of want of belief in the Christian, Jewish, Hindu, Mohammadan, Parsi, Buddhist, Sikh or Jain religion at the time when the declaration is made. A person may be born to parents professing one of these religions and may even have been practising the tenets of one of them up to the time of his marriage, but if at the time when he contracts a marriage under the Act, he makes a declaration that he does not profess any of these religions, then it cannot be said against him that, because he was born in the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jain religion, and had not formally renounced any of these religions before he made his declaration he is guilty of an offence under S. 21 of the Special Marriage Act, read with S. 199, Penal Code. The declaration does not amount to an abjuration for all purposes of the personal law of the declarant, but merely as a statement for purposes of the Act itself. 49 Cal. 1069; 31

SPECIAL MARRIAGE ACT (1872), S. 22.

Cal. 11; A.I.R. 1928 B. 74 and 16 All 212, Ref. (*Nanavutty, J.*) WALTER *v.* EMPEROR. **9 Luck. 561 = 6 R.O. 425 = 148 I.C. 689 = 11 O.W.N 404 = 35 Cr L.J. 744 = 1934 Cr C. 499 = A.I.R. 1934 Oudh 155.**

——(AS AMENDED BY ACT XXX OF 1923), Ss. 22-26—*If retrospective.*

Ss 22 to 26 added by the Amending Act (XXX of 1923), to the Special Marriage Act (1872), are not retrospective and do not affect the rights of offspring of marriages contracted under the old law of 1872, the Act is a substanti es law affecting the status and rights of property. (*Courtney-Terrell, C. J. and Varma, J.*) PUNYABRATA DAS *v.* MONMOHAN RAY. **153 I.C. 520 = 7 R.P. 349 = 15 Pat.L.T. 380 = A.I.R. 1934 Pat. 427.**

——(AS AMENDED BY ACT XXX OF 1923), S. 24—*If retrospective—"Who marries"—Effe t of.*

S. 24 added to the Special Marriage Act of 1872, by the amending Act of 1923, only applies to persons who marry under the Act subsequent to the amending Act. The words "who marries" in S. 24 clearly shows that the marriage contemplated is one after the date of the coming into force of the newly added S. 24. In other words, S. 24 cannot have any retrospective effect and will not apply to persons who solemnised their marriage under the Special Marriage Act before its amendment in 1923. (*Madhavan Nair and Lakshmana Rao, JJ.*) THUKRU BAI *v.* ATTANAR. **58 Mad 1004 = 158 I.C. 77 = 8 R M. 220 = 1935 M W.N. 579 = 42 L.W. 228 = A.I.R 1935 Mad 653 = 69 M.L.J. 81.**

——S. 24—*"Who marries"—Meaning — Hindu marrying under old Act—Personal law—If abjured.*

The words "who marries" in S. 24 of the Amended Special Marriage Act (1923) mean "who shall marry hereafter," namely from the date of the enactment which brought that section into existence, and cannot mean "who has married under the Act hereby amended." Therefore a person who has married under the old Act does not cease to be governed by his personal law; and his offspring are governed not by the date of the death of the father which might occur after the new Act but by the date of the marriage which took place under the old Act. (*Courtney Terrell, C. J. and Varma, J.*) PUNYABRATA DAS *v.* MONMOHAN RAY. **153 I.C. 520 = 7 R.P. 349 = 15 P.L.T. 380 = A.I.R. 1934 Pat. 427.**

SPECIAL POWERS ORDINANCE (X OF 1932)— High Court's Original Criminal Jurisdiction—Modification by Oridinance—Power of Governor General. *See* GOVERNMENT OF INDIA ACT, S. 106 **60 Cal. 814 = I.R. 1933 Cal 259 = 142 I C. 310 = 34 Cr.L J 320 = 1933 Cr.C 500 = 37 C.W.N. 481 = A.I.R. 1933 Cal. 364.**

——S. 17—*Proceeding pending on date of expiry of ordinance—Subsequent conviction, if legal—General Clauses Act, S. 6, if applies.*

S. 6 of the General Clauses Act is not applicable to a temporary statute, which expires automatically on a given date, but applies only to statutes which are "repealed" by another enactment, and therefore proceedings which are pending under an ordinance on the date of its expiry cannot be continued, in the absence of a clear statutory provision to this effect. Therefore a magistrate has no power to continue proceedings in a prosecution under S. 17 of the Special Powers Ordinance which has been started before but not completed on the date of its expiry and a conviction by him is illegal. (*Tek Chand, J.*) KALYAN DAS *v.* EMPEROR. **15 Lah 782 = 155 I.C. 447 = 7 R.L 716 = 36 Cr.L.J. 735 = 37 P.L. R. 19 = 1935 Cr.C. 272 = A.I.R. 1935 Lah. 188.**

SPECIAL POWERS ORDINANCE (1932), S. 77.

——S. 21—*Charge under—Expiry of ordinance pending trial—Effect of.*

The accused was charged under S. 17 of Ordinance (X of 1932) read with S. 21 of Ordinance (II of 1932) and S. 80 (2) of Ordinance (X of 1932), for having sent a letter encouraging disobedience of lawful authority. Pending trial, Ordinance (II of 1932), which was a temporary Act, expired.

Held, that in the absence of any notification empowering the continuance of pending proceedings, and S. 21 of Ordinance (II of 1932) not being one of those mentioned in S. 20 of the Criminal Law Amendment Act (XXIII of 1932) the charge under the ordinances could not be proceeded with on the expiry of the ordinances. (*Sulaiman, C. J., Mukerji and King, JJ.*) BANS GOPAL *v.* EMPEROR **55 All 961 = 34 Cr.L.J 1030 = 6 I.R (All.) 141 = 145 I C. 680 = 1933 A.L J. 875 = 1933 Cr C. 1181 = A.I.R. 1933 All. 669 (F B).**

——Ss 36 and 37—*Special Notification under old Ordinance—Continuance.*

Ss. 36 and 37 of Ordinance X of 1932 are repetitions of Ss. 35 and 36 of Ordinance II of 1932. Where it was shown that under S. 35 of Ordinance II there was a notification investing the Chief Presidency Magistrate with the powers of a Special Magistrate,

Held, that it was not necessary for the Government to issue another notification under the later Ordinance and that by the new Ordinance the powers vested under the older Ordinance were given to the officer in question. (*Rankin, C J. and Ameer Ali, J*) ANANTA KUMAR MUKHERJI *v.* EMPEROR. **147 I.C. 827 = 6 R.C. 368 = 35 Cr.L.J 480 = 37 C.W.N. 509 = 1933 Cr.C. 1161 = A I R. 1933 Cal. 679.**

——S. 48—*Plea under, raised by defence—Duty of Judge.*

Where the Local Government is of opinion that the offence was committed in furtherance of a movement prejudicial to the public safety or peace and the accused raises the plea that the offence, if committed at all, was not committed in furtherance of the alleged movement it is the duty of the Judge to make a reference. (*Rankin, C. J. and Ameer Ali, J.*) AMAR CHANDRA *v.* EMPEROR. **60 Cal 814 = I.R. 1933 Cal. 259 = 142 I.C. 310 = 34 Cr.L.J. 320 = 37 C.W.N. 481 = 1933 Cr. C. 500 = A.I.R. 1933 Cal. 364.**

——S. 48 (2)—*Power of High Court—Limits.*

It is not competent for the High Court to decide upon the fact whether the offence was committed in furtherance of a movement prejudicial to the public safety or peace because the Statute intends that matter to be left solely with the Local Government. (*Rankin, C. J. and Ameer Ali, J*) AMAR CHANDRA *v.* EMPEROR. **60 Cal. 814 = I.R. 1933 Cal. 259 = 142 I.C. 310 = 34 Cr. L J 320 = 37 C.W.N. 481 = 1933 Cr.C. 500 = A.I.R. 1933 Cal. 364.**

——S. 77—*If* ultra vires*—Repetition of—Ordinance—Power of Government.*

The same conditions, which may at one time create an emergency, may, whether they continue or disappear, be regarded as again creating an emergency. There is nothing in S. 72 which may be construed as indicating that an Ordinance, which, under it is to remain in force for six months cannot be repeated. And hence S. 77, Special Powers Ordinance, X of 1932, is not *ltra vires.* (*Rankin, C. J., Mukerji and Mitter, JJ*) ANUKUL CHANDRA PARIHAL, *In re.* **142 I.C. 225 = 34 Cr.L. J. 316 = I.R. 1933 Cal. 85 = 1933 Cr.C. 359 = A.I.R. 1933 Cal 278 (S B.).**

——S. 77—Newspaper article—Incitement against British rule—Offence. *See* PRESS (EMERGENCY POW-

ERS) ACT (XXIII OF 1931), S. 4 (1). **I.R. 1933 Cal. 257=142 IC. 225=34 Cr.L.J. 316 (F.B.).**

———**S. 80**—Notification under Ordinance II of 1932—Continuance under later Ordinance *See* SPECIAL POWERS ORDINANCE ACT, SS. 36 AND 37. **37 C.W.N. 509=1933 Cr.C. 1161=A.I.R. 1933 Cal. 679.**

———**S. 80**—*Sentence under Ordinance II of* 1932—*Continuance.*

The expression "anything done in pursuance of any provision" of such and such Ordinances covers the case of penalties inflicted under Ordinance II and the other expiring Ordinances referred to in Ordinance X, the sentences imposed under the expiring Ordinance continue to have effect even after the date of the expiry. (*Panckridge and Patterson, JJ.*) JOGENDRA CHANDRA ROY *v.* SUPERINTENDENT OF THE DUM DUM SPECIAL JAIL. **60 Cal. 742=I.R. 1933 Cal. 241 (2) =142 I.C. 204=34 Cr.L.J 291 (2)=37 C.W.N. 363 =1933 Cr.C. 361=A.I.R. 1933 Cal. 280.**

SPECIAL TRIBUNAL.

See (1) C. P. CODE, S. 9.
(2) INTERPRETATION OF STATUTES.

SPECIFIC PERFORMANCE—*Agreement to grant Kanom—Enforceability.*

In proper cases a decree for specific performance of an agreement to grant a kanom can be passed. The principle that no decree could be made for specific performance of a contract to advance or take a loan will not apply to such a case. (1929) M.W.N. 686, Foll. (*Reilly and Anantakrishna Ayyar, JJ.*) KALYANI *v.* KRISHNAN NAMBIAR. **55 Mad. 519=I.R. 1932 Mad. 489=138 I C. 78=1932 M.W.N. 193=35 L. W. 307=A I.R. 1932 Mad. 305=62 M.L.J. 525.**

———*Agreement to re convey property.*

An agreement to re convey the property cannot be ignored as *nudam pactum* and as such void of any legal effect. The reciprocity between the parties is evidence of consideration. An agreement of this description is not without consideration and is capable of being specifically enforced. (*Sen and Niamatullah, JJ.*) RAM DAS RAE *v.* BRINDABAN RAM. **I.R. 1931 All. 207=129 I.C. 719=1931 A L J. 571=A I.R. 1931 All. 113.**

———*Compromise decree—Mode of enforcement.*

On passing an order recording a compromise under O. 23, R. 3, C. P. Code, the Court is to pass a decree not for the specific performance of the original contract but for the specific performance of the new contract to have the suit disposed of in a particular manner. But the analogy should not be carried far. There is one difference: While the Specific Relief Act gives the Court discretion to refuse specific performance of a contract, no such exception has been made in O. 23, R. 3. The specific performance of an agreement to end the suit by a compromise decree is different from specific performance of agreed acts to be performed after such decree, which the Court may or may not be in a position to supervise or enforce. If after a compromise decree is passed the consenting party disobeys the decree the decree holder has his remedy under O. 21, R. 32 and where the contract is not specifically enforceable the party may claim damages. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R. (Pat) 17=145 I C. 1 =14 Pat L.T. (Sup.) 1=A I.R. 1933 Pat 306.**

———*Contract giving option—Mutuality.*

There can be no mutuality in respect of what are known as "option contracts," until at any rate, the party to whom the option is given has exercised the option. Where the plaintiff executed a sale deed to the defendant (which was registered) for herself and on

behalf of her minor son, and took on the same date from the defendant an agreement to re-convey the properties, and when she sued for specific performance of the agreement the defendant pleaded want of mutuality.

Held, the privilege under the agreement was conferred either on the plaintiff or on her minor son, and whatever force there may be in the objection as regards the minor, no such objection could arise as regards the plaintiff. (*Varadachariar, J.*) CHINNAKKAL *v.* CHINNATHAMBI GOUNDER. **152 I.C. 634=1934 M. W.N. 1122=7 R.M. 267=40 L.W. 646=A.I.R. 1934 Mad. 703=67 M.L J. 635.**

———*Contract to mortgage—Letter by debtor to creditor that if amount not repaid within certain time, he will execute mortgage—Title deed also handed over—Enforceability.*

Where the defendant, on pressure put by the plaintiff to repay the amount due to him under promissory notes or to furnish security by way of mortgage, handed over the title-deeds of certain properties and also wrote that if the amount is not paid without much delay, he will execute a mortgage deed on stamp paper.

Held, that on the failure of the defendant to repay the amount, the plaintiff was entitled to a decree for specific performance of the contract to grant the mortgage of the properties. 41 Mad. 959, 7 R. 234 (P.C.) and 43 I.A. 104, Ref. (*Stone and Walsh, JJ.*) APPU *v.* SIVARAMAKRISHNA AYYAR. **158 I.C. 297=8 R.M. 251 =1935 M.W.N. 834=42 L.W. 500=A.I.R. 1935 Mad. 560.**

———*Contract to sell—Vendee not in possession of sale deed—Enforceability.*

The vendee can enforce specific performance of a contract to sell even though he is not in possession of the sale-deed, provided he is able to prove the terms of his agreement. (*Shadi Lal, C.J. and Hilton, J.*) DIWAN SINGH *v.* GURBACHAN SINGH. **I.R. 1932 Lah. 289 =137 I.C. 41=33 P.L R. 227=A.I.R. 1932 Lah. 276.**

———Debutter property—Contract to lease by agent of trustee—No sanction or knowledge of trustee—Enforceability. *See* RELIGIOUS ENDOWMENT—TRUSTEE. **36 C.W.N. 1108.**

———*Debutter properties—Contract to lease—Enforceability.*

The analogy of minority of deities is a pure fiction for which no authority is to be found in Hindu law itself and there is no principle on which on such analogy a contract, otherwise good and valid, can be taken out of the class of contracts of which specific performance may be granted under the law. (*Mukerji and Bartley, JJ.*) SRI SRI GOPAL SRIDHAR MAHADEB *v.* SASHI BHUSAN SARKAR. **60 Cal. 111=142 I.C. 465=I.R. 1933 Cal. 278=36 C.W.N. 1108=A I R. 1933 Cal. 109.**

———*Decree for—Defendant's right to execute.*

A decree for specific performance operates in favour of both parties, and the defendant is, as much as the plaintiff, entitled to execute the decree. (*Rankin, C.J. and Pearson, J*) HERAMBA CHANDRA MAITRA *v.* JYOTISH CHANDRA SINHA. **59 Cal. 501=I R. 1932 Cal. 579=139 I.C. 230=36 C.W.N. 172=A.I.R. 1932 Cal. 579.**

———*Decree for—Directions—Date of showing good title—Enquiry into—Necessity for.*

A decree for specific performance of a contract for sale of land should not only direct the main inquiry as to whether a good title can be *made* (*i.e.*, proved) but as a rule should also direct a secondary inquiry as to *when* a good title was *shown* (*i.e.*, all matters essential to the

SPECIFIC PERFORMANCE.

title are stated in the abstract). The time when a good title is shown is material in connection with the payment of interest by the purchaser and liability for costs of the reference. The ordinary rule is that the purchaser pays interest from the point at which good title is shown and that costs are given against a vendor up to that time. (*Ameer Ali, J.*) HARISHANKAR PAL *v.* SARADA-PRASAD DAS. **59 Cal. 536=I.R. 1932 Cal. 492=138 I.C. 657=A.I.R. 1932 Cal. 516.**

———*Decree for—Direction for execution of* kobala *on payment of money—Period specified—Extension of time.*

Where in a suit for specific performance the Court grants a decree and directs the execution of a *kobala* on payment of a certain amount within a specified time, the Court has jurisdiction to grant time for the deposit of the balance of the consideration money in the event of its being satisfied after due enquiry that there had been some adequate reason for the party's failure to deposit the money within the time fixed. (*Patterson, J.*) ABDUR RAHIM MOLLA *v.* TAMIJADDIN MOLLA. **6 I.R. (Cal) 105=145 I.C. 381=37 C.W.N. 397=A.I.R. 1933 Cal. 580.**

———*Decree for—Effect of—Right of defendant to enforce.*

A decree for specific performance enures not only for the benefit of the plaintiff but also of the defendant. The passing of the decree does not terminate a suit for specific performance and all the reliefs open to the plaintiff after judgment are equally available to the defendant. The defendant, whether he be purchaser or vendor, is therefore entitled, after judgment, to require specific performance from the unwilling plaintiff in the same action. 12 Bom. 174; 46 Bom. 990 and 59 Cal. 501, Foll. Where, however, the first defendant had, in violation of his contract with the plaintiff, alienated parts of the property to the other defendants, he cannot in equity invoke the aid of the Court to compel the plaintiff to take a conveyance of his (the first defendant's) share alone or compel the other defendants against their consent to join in the conveyance to the plaintiff. (*Venaktasubba Rao and Curgenven, JJ.*) AKSHAYALINGAM PILLAI *v.* AVVAMBAL AMMAL. **56 Mad. 796=I.R. 1933 Mad. 459=144 I.C. 621=1933 M.W.N. 265=37 L.W. 417=A.I.R. 1933 Mad. 386 =64 M.L.J. 536.**

———Decree for—Power of Court to grant possession. *See* C. P. CODE, O. 21, R. 32 AND S. 47. **12 Pat. L.T 636=A.I.R. 1931 Pat. 179.**

———*Executed contract—Delay in seeking remedy, effect of.*

Where it cannot be said that the plaintiff has slept over her rights, for she obtained possession of the land at the time when the contract of sale was entered into, and since that time has been in possession and enjoyed the usufruct thereof and where real right of action had only accrued a short time before the proceedings were instituted, nine years' lapse of time would not be fatal to any action for specific performance of an executed contract. (*Dunkley, J.*) MAUNG YAN *v.* MA MAI WI. **154 I.C. 80=7 R.R. 258=A.I.R. 1934 Rang. 310 (2).**

———*Minor—Contract by guardian to re-purchase property—Want of mutuality—Enforceability.*

During the minority of the plaintiff certain property belonging to his adoptive father was sold by his natural father as his guardian to the defendant. The sale-deed provided that if the defendant or his heirs were to sell the property they should sell it to the plaintiff for the amount for which it was originally sold and also for such

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price as may be determined by arbitrators in respect of any building that may thereafter be constructed. The defendant in violation of the contract sold the land to another. In a suit by the guardian to enforce his right to re-purchase under the contract,

Held, that the contract in question was void for want of mutuality and was therefore not enforceable at the instance of either party. 39 Cal. 232, Foll. (*Jackson, Sundaram Chetty and Mockett, JJ.*) VENKATA-CHALAM PILLAI *v.* SETHURAM RAO. **56 Mad. 433=I.R. 1933 Mad. 219=142 I.C. 315=1933 M.W.N. 315=37 L.W. 340=A.I.R. 1933 Mad. 322=64 M.L.J. 354 (F.B.).**

———*Refusal—Misdescription of land.*

Where the plaintiff agreed to sell to the defendant land which was described as Government leasehold tenure in perpetuity renewable at the expiration of every fifty years, the same having been renewed about a year ago but it was on investigation found to be newly assessed land,

Held, the defendant was entitled to rescind the contract. *Ayles* v. *Cox*, 15 Beav. 23 and *Flight* v. *Booth* 1 Bing. N.D. 370; *In re* contract between *Fawcett and Holmes*, 42 Ch D. 150 and *Puckett and Smith's Contract*, (1902) 2 Ch. 258, Ref. (*Dadia, J.*) KRISHNAJI GOPINATH *v.* RAMCHANDRA. **135 I.C. 417=I.R. 1932 Bom. 65=33 Bom L.R. 1377=A.I.R. 1932 Bom. 51.**

———*Refusal—Person claiming not performing his part.*

The vendors of certain leasehold property had to obtain the consent of their lessors to a sale but they failed to do so. It appeared however that the purchasers had agreed to obtain the necessary consent but owing to certain dealings between the vendors and the lessors the consent was not forthcoming and meanwhile the purchasers gave notice repudiating the contract. The purchasers having sued for the recovery of the price the defendants claimed specific performance.

Held, that the vendor's failure to obtain sanction deprived them of their right to claim specific performance and that the purchasers were entitled to recover the purchase money paid by them. (*Beaumont, C.J. and Blackwell, J.*) TEJU KAYA & CO. *v.* GANGJI NENSEY & CO. **57 Bom. 292=I.R. 1933 Bom. 230 =142 I.C. 381=34 Bom. L.R. 1629=A.I.R. 1933 Bom. 71.**

———*Reliefs—Execution of sale-deed and recovery of possession.*

In a suit for specific peformance of an agreement which contained a covenant to pass a sale deed and also to deliver possession of the property, the plaintiff can also ask for possession of the property. 27 Bom. L.R. 42, Ref. (*Patkar and Barlee, JJ.*) BHAGWANDAS *v.* NARAN KANJI. **140 I.C. 730=34 Bom L.R. 1322=A.I.R 1932 Bom 595.**

———*Remedy—Courts in Sonthal Parganas if can grant.*

The remedy by way of specific performance is an ancient one and was administered as part of the law of justice, equity and good conscience The mere fact that the restrictions imposed by the Specific Relief Act do not apply in the Sonthal Parganas, does not affect the law, that the remedy is applicable as part of the law of justice, equity and good conscience. The Courts of the Sonthal Parganas have therefore jurisdiction to grant the remedy by way of specific performance. (*Courtney-Terrell, C. J. and Agarwala, J.*) GULAB ROY GHUTHUTIA *v.* MAHENDRA NATH. **14 Pat. 249=156 I.C. 618=8 R.P. 20=16 Pat L.T. 83=A.I.R. 1935 Pat. 1.**

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———*Right to—Recovery of—Money left with mortgagee to pay off creditors of mortgagor but not so paid.*

The principle that no suit to specifically enforce a contract to lend money is maintainable does not apply to the case of an usufructuary mortgage in which a portion of the consideration is left with the mortgagee to pay off the creditors of the mortgagor and on failure of the mortgagee so to do, the mortgagor sues to recover the amount held in trust for him. Nor is the failure of the mortgagee to obtain possession through no fault of the mortgagor any defence to the action. (*Jai Lal, J.*) THAKAR SINGH *v.* JAGAT SINGH. **I.R. 1933 Lah. 3 = 140 I.C. 495 = 33 P.L.R. 1085 = A.I.R. 1933 Lah. 1.**

———*Right to—Suit for—What plaintiff must show,*

It is the duty of the plaintiff, before he can obtain relief by way of specific performance, to allege and prove that he was ready and willing to perform his part of the contract as it really was and not as he thought it to be. 9 All. 705 (P.C.) and 52 Bom. 597, Rel. on. (*Shadi Lal, C.J. and Hilton, J.*) NARINJAN *v* MAHOMED YUNUS. **I R. 1932 Lah. 237 - 136 I.C. 557 = 33 P.L.R. 188 = A.I.R. 1932 Lah. 265.**

——— *Title—"To the satisfaction of the purchaser's attorney"—Meaning and effect of.*

The effect of a stipulation by a vendor to make out a marketable title "to the satisfaction of the purchaser's attorneys" is that it is incumbent on him to establish either that the solicitors approved of the title or that there was such a title tendered as made it unreasonable not to approve of it. The term does not give the solicitor arbitrary and absolute power to reject a title however good it may be. He is the sole Judge, provided he acts "reasonably and *bona fide*". For determining if he has acted reasonably, the Court has to examine the title tendered to the solicitor to consider, whether it was such as would induce the Court to hold that its rejection was reasonable or unreasonable On the one hand, the Court cannot lightly disregard the judgment of a solicitor on the question, but on the other hand, the purchaser is not entitled to maintain that his solicitor's judgment is the last word on the subject *Pyrke* v. *Waddingham*, 10 Here 1 and 35 Bom. 110, Ref. (*Wadia J.*) KRISHNAJI GOPINATHA *v.* RAMCHANDRA. **135 I C. 417 = I R. 1932 Bom, 65 = 33 Bom.L R. 1377 = A.I R. 1932 Bom. 51.**

SPECIFIC RELIEF ACT (I OF 1877)—*Scope.*

The Act is not exhaustive.

Per *Beaumont, C. J.*—"I should be sorry to hold that the power of this Court, which is derived from the old Court of Chancery, to grant injunctions wherever just and convenient, as those words have been construed in England, has been taken away by an Act of Parliament" (Legislature). (*Beaumont, C.J. and Blackwell, J.*) RAMDAS KHATU & CO. *v.* THE ATLAS MILLS CO., LTD. **55 Bom. 659 = I.R. 1931 Bom 263 = 130 I.C 583 = 33 Bom.L.R. 19 = A.I R 1931 Bom. 151.**

——— **S. 9**—*Applicability—Court auction and delivery—Suit by dispossessed person.*

Where a purchaser in execution of a decree obtains possession and persons dispossessed file objections under O. 21, R. 100, C. P. Code, which are dismissed, the suit to establish the right to possession contemplated, by O. 21, R. 103, is not one under S. 9 of the Specific Relief Act. (*Sulaiman, C.J. and Mukerji, JJ.*) MURLIDHAR *v.* JAINTI PRASAD. **1932 A.L J. 812 = I.R. 1932 All. 560 = 139 I.C. 366 = A.I.R. 1932 All. 703.**

———**S 9**—*Applicability — Dispossession — What amounts to.*

The act of a person claiming a right of way over certain land, in passing over that land in exercise of that right, does not amount to dispossession within the meaning of S. 9 of the Specific Relief Act so as to give the owner of the land a right of suit under the section. (*R. C. Mitter, J.*) JOGENDRA CHANDRA DAS *v.* BIRENDRA LAL DAS. **156 I.C. 924 = 8 R C. 43 = 61 C.L.J. 307 = 39 C.W.N. 394 = 1935 Cr.C. 789 = A.I.R. 1935 Cal. 454.**

——— **S. 9**—Applicability—Prayer for standing crops. *See* GENERAL CLAUSES ACT, S. 3 (25)—APPLICABILITY. **153 I C. 332 = 7 R.M. 349 = 40 L.W. 922 = A.I.R. 1935 Mad. 134.**

———**S. 9**—*Construction — "Otherwise than in due course of law"—If mean illegally.*

The words "otherwise than in due course of law" in S. 9, Specific Relief Act, are not synonymous with the word "illegally". The phrase means "in the regular, normal process and effect of the law, operating on a matter which has been laid before a Court, Civil or Criminal, for adjudication". It would ordinarily exclude self-help. (*R.C. Mitter, J.*) JOGENDRA CHANDRA DAS *v* BIRENDRA LAL DAS. **156 I.C. 924 = 8 R.C. 43 = 61 C L J. 307 = 39 C.W.N. 394 = 1935 Cr C 789 = A.I.R. 1935 Cal. 454.**

———**S. 9**—*Construction—Otherwise than in due course of law—Suit by one dispossessed of property by the Insolvency Court.*

On the adjudiction of a Hindu father, some of the family properties was sold by the Official Receiver. There was obstruction in delivery and on the application of the Receiver and the sons, the Court ordered for the removal of the obstruction. Thereupon a son of the father filed a suit under S. 9, Specific Relief Act, for possession of a part of the house of which he complained he had been forcibly dipossessed by the Receiver.

Held, that the son had not been dispossessed otherwise than in due course of law, that even otherwise as the petitioner had other remedies open to him by way of appeal under Ss. 68 and 75 of the Provincial Insolvency Act or an application under O. 21, Rr. 97 to 101 of the C. P. Code, it was not a fit case for interference in revision. 45 Mad. 434, Foll.; 51 M. 567, Dist. (*Pakenham Walsh, J.*) SUBBARAYUDU *v.* SATYANANDAM. **I.R. 1933 Mad. 333 = 143 I C. 833 = A.I. R 1933 Mad. 609.**

———**S. 9**—*Construction—"Suit"—If includes execution proceedings.*

An application in execution proceedings is included in the term 'suit' in S. 9 and therefore an appeal is not maintainable in respect of an order of the executing Court. (*Abdul Qadir, J.*) TOTA RAM *v* SHIBBAN LAL. **13 Lah. 798 = I.R. 1932 Lah. 681 (1) = 140 I.C. 48 = 33 P.L.R. 463 = A.I.R. 1932 Lah. 416.**

———**S. 9**—*Decision in proceeding under—Effect.*

The decision in proceedings under S. 9 will operate as *res judicata* so as to bar a later suit for possession between the same parties. The judgment in the suit under S. 9 will be admissible in evidence in the subsequent suit. (*Jack and Nag, JJ.*) HRIDAYA NATH ROY *v.* PROBODH CHANDRA KHAN. **60 Cal 1171 = 147 I.C. 747 = 6 R.C. 353 = 37 C.W.N. 1148 = 57 C.L J. 549 = A.I.R. 1933 Cal. 923.**

———**S. 9**—*Revision—Decree or orders under—Finality.*

Decrees and orders under S. 9, Specific Relief Act, were intended by the framers of the Act to be so far as possible final. Applications in revision are not in definite terms barred by the Section, but it is clear that they are not to be lightly entertained. (*Smith, J.*) SURAJ BALI TEWARI *v.* KANDHAIYA BUKSH SINGH. **135 I.C 890 = I.R. 1932 Oudh 74 = 8 O.W N. 1341 = A.I.R. 1932 Oudh 39.**

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———S 9—*Suit not coming under—Relief on basis of possessory title.*

In a suit for possession, if the plaintiff proves that he was in peaceful possession at the time of dispossession by the defendant, the defendant can only resist the claim for possession on proving title in himself. If he fails to do so, the plaintiff is entitled to a decree on the basis of his possessory title notwithstanding the fact that the plaintiff did not frame his suit as a suit under S. 9 of the Specific Relief Act but based it on title and did not sue the defendant within a period of six months from the date of his dispossession. (*Zia-ul-Hasan, J.*) PHAKKAR *v.* PRAGI. **10 Luck. 659=154 I.C. 570=7 R.O. 479=1935 R.D. 108=1935 O W.N. 230=A. I.R. 1935 Oudh 268.**

———S 9—*Suit under—Cause of action—Removal of fencing and exercising right of way after orders of Criminal Court.*

Defendants started proceedings under S. 147, Cr. P. Code, claiming a right of way over certain land belonging to the plaintiff. During the pendency of the proceedings plaintiff fenced the land. The proceedings terminated subsequently in favour of the defendant, the Court passing an order in terms of S. 147 (2), prohibiting the plaintiff from interfering with the exercise of his right of way by the defendant over the land. But no mandatory order for removal of the fence was passed. The defendant however, removed the fencing and began to exercise his right of way, whereupon plaintiff instituted a suit under S. 9 of the Specific Relief Act.

Held, that assuming that the act of passing over the land is "dispossession", the acts of the defendant in pulling down the fence and exercising his right of way were acts done "in due course of law" and did not afford the plaintiff a cause of action to file a suit under S. 9, and that the suit was consequently not entertainable.

Held, further, that the proper remedy of the plaintiff was to institute a regular suit. (*R. C. Mitter, J.*) JOGENDRA CHANDRA DAS *v.* BIRENDRA LAL DAS. **156 I.C. 921=8 R C. 43=61 C.L J. 307=39 C.W. N. 394=1935 Cr.C. 789=A.I.R. 1935 Cal. 454.**

———S 9—*Suit under—Decree—Remedy.*

When a suit under S. 9, Specific Relief Act, is decreed the remedy of the defendant lies not in revision but in the institution of a suit for a declaration of the defendant's title and for possession. (*Kendall, J.*) BADRI DAS *v* MT. DHANNI. **156 I.C 738=7 R.A. 25=A I.R. 1934 All. 541.**

———S. 9—*Suit under—Maintainability in Court other than Civil Court.*

It cannot be said that it is only a civil Court which can entertain a suit under S. 9. (*Sulaiman, J.*) KHUSHNUND HASAIN *v.* JANKI PRASAD. **53 All. 532=I.R. 1931 All. 545=132 I.C. 801=A.I.R. 1931 All 663.**

———S. 9—*Suit under—Maintainability—Ejectment in due course of law.*

Where the plaintiff who had been ejected by the defendant on the strength of one decree passed by the Revenue Court declaring the plaintiff to be a sub-tenant and therefore liable to ejectment sued in the Civil Court under S 9 of the Specific Relief Act,

Held, that the suit was not maintainable because the plaintiff had been ejected in due course of law. 29 Bom. 213 and 18 I.C. 727, Ref. (*Dalal, J.*) MT RAJWANTA KUER *v.* MAHABIR RAI. **53 All. 414=I.R. 1931 All 191=129 I C. 559=12 L.R. 47 (Rev.)=15 R.D 185=A.I R. 1931 All. 205.**

———S. 9—*Suit under—Maintainability—Plaintiff suing defendant as trespasser—Finding of co-tenancy.*

In a suit under S. 9 of the Specific Relief Act the plaintiff's case was that he was the fixed rate tenant of a certain plot and that within six months of the institution of the suit the defendant had dispossessed him without any right. The defendant's case was that he was the tenant of the plot in question and that the plaintiff was never in possession of it. The parties agreed to abide by the sworn statement of a referee who stated on oath that the plaintiff had been in possesion of the plot in suit within six months of the institution of the suit and added that the parties were co-tenants of the holding of which the plot in suit formed a part. The trial Court held that the suit being a suit between co-tenants for possession the jurisdiction of the Civil Court was barred by S. 230 of the Agra Tenancy Act and accordingly dismissed the suit. In revision,

Held, that the suit as brought was cognizable by the Civil Court as the plaintiff did not admit that the defendant was a co-tenant but brought the suit against him as a pure trespasser and that when he had proved that he had been in possession within six months and had been dispossessed by the defendant he was entitled to a decree and the Court was not called upon to go into the question of title. (*Kisch, J.*) BRIJ NARAIN LAL *v.* GOKUL PRASAD. **1935 A.W.R. 926=1935 R.D. 384=1935 A.L.J. 813.**

SPECIFIC RELIEF ACT (1877), S. 12.

———S. 9—*Suit under—Maintainability—Suit barred under Tenancy Act.*

If a suit were barred under the Tenancy Act it would be immaterial whether a Civil Court suit is brought under S. 9 of the Specific Relief Act or S. 9, C. P. Code. (*Sulaiman, J.*) KHUSHNUND HASAIN *v.* JANKI PRASAD. **53 All. 532=I.R. 1931 All. 545=132 I.C. 801=A I.R. 1931 All. 663.**

———S. 9—*Suit under—Maintainability—Tenants in possession not parties.*

Where in a suit by the landholder under S. 9 the tenants on the land did not join as plaintiffs,

Held, that the suit was not maintainable. (*Pakenham Walsh, J.*) RAMANEMMA *v.* BASAVAYYA. **151 I.C. 990=7 R.M. 162 (2)=1934 M.W.N. 443=40 L.W. 277=A.I R. 1934 Mad. 558.**

———S. 9—*Suit under—Scope of enquiry—Question of title.*

In suits under S. 9 questions of title are irrelevant, for, like the old assize of noval disseizin in Plantagenet times, the section was enacted to afford a summary remedy against persons who had taken the law into their own hands and had ejected those in possession of land otherwise than through process of law. (*Page, J.*) SATISH CHANDRA DE *v.* MADAN MOHAN JATI. **58 Cal. 29=I.R. 1931 Cal. 618=132 I.C. 906=A.I.R. 1931 Cal. 483 (2).**

———S. 9—*Suit under—Scope of enquiry—Question of title.*

In a suit under S. 9 of the Specific Relief Act, the Court cannot go into the question of title, especially in a case which is not even a case of landlord against tenant but one of competing tenants. The sole question before the Court is one of possession. (*Pakenham Walsh, J.*) APPANNA *v.* KRISHNAMMA **153 I.C. 332=7 R.M. 349=1934 M.W.N. 1375=40 L.W. 922=A.I.R. 1935 Mad. 134.**

———S, 10—Applicability—Suit for recovery of moveables, account papers for *darpatni mahal*. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 15. **59 Cal. 352=A.I.R. 1932 Cal. 481.**

———S. 12—*Discretion under—Exercise of.*

The discretion that vests in the Court to avoid relief of specific performance is discretionary but the discretion

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that vests in the Court is not arbitrary. Where the plaintiff sought to enforce a contract intended for the more beneficial enjoyment of his property against the transferee of the other contracting party,

Held, that a decree for specific performance should be made. (*Mukerji and Allen, JJ.*) NAND GOPAL DAS *v.* BATUK PRASAD GUPTA **54 All. 17=1932 A.L.J. 36=I.R. 1931 All. 701=133 I.C. 541=A.I.R 1932 All. 78.**

——**Ss. 12 and 22**—*Refusal of relief—Ground.*

Indefiniteness of time to exercise option regarding relief may be a ground for refusing specific performance. (*Sulaiman, C. J. and Collister, J.*) SOHAN LAL *v.* ATAL NATH. **56 All. 142=148 I.C. 229=6 R. A. 656=1933 A.L.J.1584=A I.R. 1933 All. 846.**

——**S. 12**—*Right to relief—If affected by infructuous termination of proceedings under S. 77, Registration Act.*

The mere failure of a suit under S. 77 of the Registration Act or its infructuous termination cannot operate as *res judicata* in a suit brought for the specific performance of the original contrac and for recovery of possession of the immovable property. (*Sulaiman, Ag. C.J. and Young, J.*) BALKISHEN DAS *v.* BECHAN PANDEY. **54 All. 68=I.R. 1932 All. 209=136 I C. 561=1931 A. L.J. 1092=A.I.R. 1932 All. 96.**

——**S. 12**—*Right to relief—Other remedy barred by time.*

If the contract for the transfer of immovable property is not such as can be specifically granted, the plaintiff will not be entitled to get that relief, merely because he has allowed his alternative relief to be barred by time. At the same time, if the contract for specific performance is of a nature as to admit of being specifically performed, then the mere fact that the other remedy has become barred by time, should not deprive the plaintiff from getting the relief to which he is entitled. (*Sulaiman, C. J. and Collister, J.*) SOHAN LAL *v.* ATAL NATH. **56 All 142=6 R.A 656=148 I.C. 229=1933 A.L.J. 1584=A.I R. 1933 All. 846.**

——**S. 12**—Right to relief—Procedure prescribed under S. 77, Registration Act, not followed. *See* REGISTRATION ACT, S. 77. **A.I.R. 1935 Pesh. 12.**

——**S. 12**—*Suit for specific performance—Proof required*

In an action for specific performance the plaintiff has necessarily to prove the existence of a concluded contract between himself and the defendant and also that he was ready and willing at all material dates to perform his part of the contract. (*Wort and Dhavle, JJ.*) SAUKHI SAH *v.* MAHAMAYA PRASAD SINGH BAHADUR. **156 I C. 658=8 R.P. 13=15 Pat.L.T. 469=A.I.R. 1934 Pat. 518.**

——**S. 14**—*Applicability—Sale by coparcener of joint Hindu family.*

Where the property is sold by a coparcener in a joint Hindu family the vendee can obtain specific performance only in respect of the share of the alienating coparcener only and such a case does not fall under S. 14. (*Suhrawardy and Costello, JJ.*) PANCHANANDA KUNDU *v.* RAJANI KANTA PAL. **I.R. 1931 Cal. 497=131 I.C. 849=35 C.W.N. 40=A.I.R. 1931 Cal. 463.**

——**Ss. 14, 16 and 17**—*Lease by one co-sharer under misapprehension—Refusal of others—Suit for specific performance not maintainable.*

Where a co sharer professes to grant a lease of the entire estate in a property of which he held a share only, in the belief that the other party had already obtained the consent of the other co-sharer it cannot be deemed

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that there was a concluded contract, whereby the co-sharer undertook a binding obligation on behalf of himself and the other co-sharer to obtain the lease of the property, and even though such co-sharer may have received the salami fixed, no suit for specific performance to execute a kabuliyat and give possession can lie against the entire body of the proprietors. (*Lord Salvesen.*) PROMATHA NATH MITRA *v* GOSTHA BEHARI SEN. **59 I A. 47=59 Cal. 1025=136 I.C. 405=I R. 1932 P C. 101=55 C.L.J. 46=35 L.W. 825=36 C.W.N. 231=A I.R. 1932 P.C. 43=62 M. L.J. 243 (P.C.)**

——**Ss. 14, 15 and 19**—*Relative applicability and scope of—Defendant contracting to sell entire house to plaintiff—Defendant owning only half share—Specific performance in respect of that half share—Right of plaintiff to compensation for deficiency.*

Where the defendant entered into a contract with the plaintiff for the sale of an entire house in respect of which he had only a half share, the case is governed by S. 15 of the Specific Relief Act and the plaintiff is entitled to a decree for specific performance in respect of the half share of the defendant only on his relinquishing all claim to compensation for the default on the part of the defendant. As the portion of the contract which must be left unperformed is equal to the other portion in respect of which the decree for specific performance can be given, it is impossible to say that the part unperformed is small and S. 14 cannot in the circumstances apply to the case S. 19 is to be read subject to the provisions of Ss. 14 and 15 when the case is one of specific performance of part of the contract and the plaintiff is, therefore, not entitled to any compensation in respect of the portion of the contract left unperformed. (*Srivastava, J.*) ANANT RAM *v.* SARJU PRASAD. **11 Luck 390=157 I.C. 570=8 R.O. 26=1935 O.W. N. 890=A.I.R. 1935 Oudh 453.**

——**S. 15**—*Agreement by agent on behalf of co-sharers—Ratification by some—Refusal by others—Right to specific performance against those who ratified the contract.*

Where a person is jointly interested in an estate with another person, and purports to deal with the entity, specific performance will not be granted against him as to his share. But that is only if the contract is indivisible and the question whether the contract was divisible or not is essentially one of fact. Where an agent without authority contracted to sell to the plaintiff the shares of five co-sharers, three of whom ratified the contract and the others refused and it was clear that each party treated his share as separate and distinct, there is no impediment in law to a decree being granted to the plaintiff in respect of the shares of such of the co-sharers who ratified the agent's contract. (*Guha and M. C. Ghose, JJ.*) HARENDRA CHANDRA DAS *v.* NANDA LAL ROY. **141 I.C. 708=57 C.L.J. 1=I R. 1933 Cal. 180=36 C.W.N. 1002=A.I.R. 1933 Cal. 98.**

——**S. 15**—*Hindu joint family—Sale by one of several co-parceners—Right to claim specific performance.*

Where one member of a joint Hindu family purports to sell not only his but his coparcener's shares and the vender is not able to give a good title to anything more than his own individual share in the property, if the purchaser desires to have a remedy by way of specific performance he cannot claim more than the share of the actual contracting member of the joint family and he can only obtain even that share by being prepared to pay not merely a proportionate part of the purchase-money but the whole of the sum originally agreed upon

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as consideration for the sale of the entire property. 46 M. 605 (F. B.), Foll. (*Suhrawardy and Costello, JJ.*) PANCHANANDA KUNDU *v.* RAJANI KANTA PAL. **I.R. 1931 Cal 497=131 I.C. 849=35 C.W.N. 40=A.I.R. 1931 Cal. 463.**

———S. 16—*Applicability—Sale by member of joint Hindu family.*

The shares of the coparceners are not separate and therefore S. 16 cannot apply to a case where specific performance is claimed in respect of a contract of sale entered into by one of the coparceners. (*Suhrawardy and Costello, JJ.*) PANCHANANDA KUNDU *v.* RAJANI KANTA PAL. **I.R. 1931 Cal. 497=131 I C. 849=35 C.W.N. 40=A.I.R. 1931 Cal. 463.**

———S. 18—*Agreement for lease—Defective title of lessor—Burden of proof.*

An agreement for the lease to the appellant of underground coal rights in two mouzas comprised in the respondent's zemindari provided that "if the appellant neglects or fails to take such lease except for the reason of the want of the lessor's title to the said mouzas" the *salami* or premium deposited by him would be forfeited to the respondent, the zemindar. In a suit by the appellant to recover the *salami*, on the ground that the respondent had no title to the underground mining rights, the mouzas being held under *debuttar and brahmottar* grants made by the respondent's ancestors, *held*, the onus was on the appellant to show that the respondent's title to grant a lease of the mineral rights in the two mouzas was not free from reasonable doubt, that in the absence of any evidence to show the terms of the grants made by the respondent's predecessors, or that they expressly included the underground rights, the onus had not been discharged, and that consequently the appellant had forfeited the *salami*. (*Lord Macmillan.*) H. V. LOW & CO. *v.* RAJA BAHADUR JYOTI PRASAD SINGH DEO. **58 I.A. 392=59 Cal. 699=135 I.C 632=I. R. 1932 P.C. 24=35 C.W.N. 1246=34 L.W. 853=33 Bom L R. 1544=54 C.L J. 366=1931 A.L.J. 1112=A.I.R 1931 P.C. 299=61 M L J. 699 (P.C.).**

———S. 19—*Damages in lieu of specific performance—Power to award even though not claimed in plaint.*

In a suit for specific performance of an agreement, it is always possible for the Court, if it does not think fit to enforce the agreement specifically to award damages in lieu of enforcement, even if not directly claimed in the plaint. (*Baguley and Ba U, JJ.*) U AUNG DIN *v.* B. K. HALDAR. **157 I.C 26=8 R.R. 68 (2).**

———S 19—Decree for specific performance—No award of compensation or mesne profits—Fresh suit—Maintainability. *See* C.P. CODE, O. 2, R. 2—SPECIFIC PERFORMANCE. **18 N.L J. 76.**

———S 19—Scope—Specific performance of part of contract. *See* SPECIFIC RELIEF ACT, SS. 14 AND 15. **1935 O.W.N. 890=A.I R. 1935 Oudh 453.**

———S. 19—*Suit by vendor for specific performance—Damages claimed in addition to price—No bar to specific performance.*

The agreement between the parties stated that the defendant had paid Rs. 50 as earnest, that for the balance of Rs. 800 he would execute a pronote, and that as soon as amount was paid, a conveyance would be executed in his favour. In a suit for specific performance of the agreement, the lower Court held that the defendant had done all he had to do, the payment of the amount under the pronote was a different cause of action and so dismissed the suit. On appeal,

Held, that the agreement was specifically enforceable as much at the instance of the seller as at the instance of the purchaser and that the fact that the seller claimed

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in the plaint damages corresponding to interest on the prinicipal amount due did not make it any the less specifically enforceable. (*Shaw, J.*) MOIDEEN BABA *v.* R.M.P. CHETTYAR FIRM. **152 I.C. 552=7 R.R. 168=A.I.R. 1934 Rang. 160.**

———S. 19 (3)—*Decree for specific performance—Compensation for breach of contracts—Powers of Court.*

Where in a suit for specific performance of an agreement to re-convey the lands to the plaintiff, the purchased money had been deposited in Court but the defendant refused to receive the money and convey the lands.

Held, that in granting a decree for specific performance; the Court may award the plaintiff mesne profits by way of compensation for breach of contract under the third paragraph of S. 19 and that, on the other hand, the defendant having improperly refused to receive the money, was not entitled to any interest thereon. (*Bardswell, J.*) SUBRAMANIA MUDALI *v.* SEMALAI GOUNDAN. **147 I C. 1062=6 R.M. 410=1933 M.W. N. 869=A I.R. 1934 Mad. 97.**

———S. 20—*Agreement providing for damages—Specific performance, whether can be enforced.*

It cannot be said that a party to an agreement of sale cannot enforce specific performance of the contract merely because there is provision for payment of damages under the agreement. (*Tek Chand and Agha Haidar, JJ.*) KANHAYA LAL *v.* DEVI DAS JAGANNATH. **12 Lah. 328=I.R 1931 Lah. 417=131 I.C. 289=32 P. L R. 40=A.I R. 1931 Lah. 227.**

———S 21—*Agreement to pay money—Enforcement.*

A contract under which a sum of money had been agreed to be paid but was not paid cannot be specifically enforced. It is open to the promisee to sue the promisor for the recovery of damages on account of the failure of the promisor to perform his part of the contract. (*Kisch and Rachhpal Singh, JJ.*) KHUNNI LAL *v.* BANKEY LAL. **154 I.C. 542=7 R.A. 774=1934 A.L. J. 713=4 A.W.R. 478=A.I.R. 1934 All. 449.**

———S 21—*Agreement to pay money—Enforcement.*

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———S. 21—*Applicability—Reference to arbitration—Award made—Suit for its cancellation maintainable.*

Where an agreement of reference has been acted upon and terminated in an award, a suit for cancellation is not against the tenor of S, 21. That section has no application except where a person, having made a contract to refer a controversy to arbitration, has refused to perform it and institutes a suit in respect of the subject-matter in defiance of the contract. (*Sen and Niamatullah JJ.*) DWARKA *v.* RAM JATAN **53 All 16=I R. 1931 All. 83=128 I.C. 755=1930 A.L.J. 1537=A I R. 1930 All. 877.**

———S 21—*Refusal of specific performance—Delay in filing suit—Other remedy open.*

Plaintiff had advanced money to a husband and wife who had promised to execute a mortgage. The husband died and two years after his death, plaintiff brought a suit against the wife and other legal representatives for specific performance of the contract to execute a mortgage.

Held, that specific performance can be refused on the ground of delay.

Held, further, that specific performance can be allowed only when there is no other sort of relief which will

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meet the circumstances of the case and that in this case a suit for recovery of money coupled with the attachment before judgment would have served the necessary purposes. (*Baguley, J.*) ABDUL RAHIM *v.* MA BUDIMA. **150 I.C. 245 = 6 R R. 380 = A.I.R. 1933 Rang. 149.**

———**S. 21 (a)**—Agreement to advance money in future—Right to enforce. *See* CONTRACT—RIGHT TO ENFORCE. **1935 A.L.J. 429 = 1935 A.W.R. 417 = A. I.R. 1935 All. 688.**

———**S. 21 (a)**—*Discretion under—Wrongful dismissal —Remedy.*

Although the Secretary of the District Board may establish that he has been wrongfully dismissed, still, assuming that he has established that point, he is not entitled to the remedy of injunction or of specific performance. He cannot get the temporary injunction for restraining the Board from enforcing its resolution. (*Bennet, J.*) MAHOMED MUSTAFA ALI KHAN *v.* DISTRICT BOARD, BAREILLY. **56 All. 573 = 6 R.A. 804 = 4 A.W.R. 543 = 148 I.C. 945 = 1934 A.L.J. 368 = A.I.R. 1934 All. 101.**

———**S. 21 (a)**—*Mortgagee undertaking to discharge prior debt—Default—Remedy of mortgagor.*

Where the mortgagee fails to perform his undertaking to discharge a debt due from the mortgagor, the remedy of the latter is to institute a suit for compensation against the defaulting mortgagee and not by specific performance of the agreement. Specific performance cannot be compelled where the compensation is the adequate remedy. (*Sen and Niamatullah, JJ.*) NARAIN PERSHAD *v.* NARAIN SINGH. **52 All. 1037 = I.R. 1931 All. 407 = 131 I.C. 599 = 1930 A.L.J. 1577 = A I.R. 1931 All. 40.**

———**S. 21 (a), Ill. 3**—Suit by mortgagor to recover unpaid portion of loan—Maintainability—Proper remedy. *See* MORTGAGE—RIGHTS OF MORTGAGOR. **A.I.R. 1935 Mad. 1045 = 69 M.L.J. 760.**

———**S. 21 (b)**—*Contract of personal service—Specific performance.*

It is well settled that the Court will not make an order the effect of which is to enforce specifically any contract of personal service. (*Beaumont, C.J. and Rangnekar, J.*) RAMKUMAR POTDAR *v.* SHOLAPUR SPINNING AND WEAVING CO., LTD. **59 Bom. 218 = 156 I.C. 80 = 7 R B. 486 = 36 Bom.L.R. 907 = A.I.R. 1934 Bom. 427.**

———**S. 21 (b)**—*Contract for preparation of account papers—Specific performance.*

A contract for the preparation of a set of account papers relating to the *darpatni mahal* is one of which the Court cannot, from its very nature, enforce specific performance. (*S.K. Ghose, J.*) NAJIBULLA SARDAR *v,* HARIMOHAN MITRA. **59 Cal. 352 = I R. 1932 Cal. 472 = 138 I.C. 640 = A I.R. 1932 Cal. 481.**

———**Ss. 21 (b) and 56 (f)**—*Injunction to prevent breach of contract to employ people.*

By S. 21 (*b*) and 56 (*f*), Specific Relief Act, an injunction cannot be granted to prevent the breach of a contract to employ certain people. *Kirchner & Co.* v. *Gruban,* (1909) 1 Ch. 413, Ref. (*Aldison, J.*) N.W. RY. ADMINISTRATION *v.* N.W.RY. UNION, LAHORE. **14 Lah. 330 = 148 I.C. 49 = 6 R.L. 493 = 34 P.L.R. 975 = A.I.R. 1933 Lah. 203.**

———**S. 21 (c)**—*Essential terms settled—Minor details still not settled—Specific performance*

If the essential terms of a contract are settled, the contract may well be regarded as complete and concluded and may be enforced or specifically performed, either as consisting of those terms only or together with such other terms and conditions as may be regarded as being usual in contracts of that description. (*Mukerji and Bartley, JJ.*) SRI SRI GOPAL SRIDHAR MAHADEB *v.* SASHI BHUSAN SARKAR. **60 Cal. 111 = 142 I.C. 465 = I.R. 1933 Cal. 278 = 36 C.W.N. 1108 = A.I.R. 1933 Cal. 109.**

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———**S. 21 (e)**—Contract of lease of trust properties—Enforceability. *See* RELIGIOUS ENDOWMENT—TRUSTEE. **36 C.W.N.1108.**

———**S 21 (e)**—Lease of debutter properties. *See* SPECIFIC PERFORMANCE — DEBUTTER PROPERTY. **36 C.W.N. 1108.**

———**S. 22**—*Delay and laches—How far a bar to specific relief.*

Per *Suhrawardy, J.*—"The English doctrine of delay and laches showing negligence in seeking relief in a Court of Equity cannot be imported into the Indian Law in view of Art 113 of the Limitation Act which fixes a period of three years within which a suit for specific performance should be brought. Except in mercantile and business contracts, time is not of the essence of the contract, but it may be material for the purpose of consideration whether in the circumstances of a particular case, specific performance should be granted. Though time may not be essential, delay even within the time prescribed by law will affect the remedy. Absence of proof of plaintiff's readiness will entitle the court to refuse relief to the plaintiff under S. 22 of the Specific Relief Act. Mere delay is not a ground for refusing relief to the plaintiff if there has been no charge in the *status quo* since the contract; but where the conduct of the plaintiff is such that though it does not amount to abandonment but shows waiver or acquiescence especially when inaction on his part induces the defendant to change his position, the plaintiff ought not to be allowed any relief." 30 Cal. 265; 33 Cal. 633 and *Lindsay Petroleum Co.* v. *Hurd,* 5 P.C. 221, Ref. (*Suhrawardy and Graham, JJ.*) JADU NATH GUPTA *v.* CHANDRA BHUSHAN SUR. **I.R. 1932 Cal 461 = 138 I.C. 498 = 36 C.W.N. 285 = A.I.R. 1932 Cal. 493.**

———**S. 22**—*Discretion of Court—Laches—Repeated defaults on the part of plaintiff.*

In May, 1924, a contract was entered into between the plaintiff and the defendant whereby in consideration of a *salami* of Rs. 400 he was to give to the plaintiff *lakheraj* right in a tank which the plaintiff had been holding under him at an annual *jama* of Rs. 52. The whole of the amount was to be paid the next day but the plaintiff paid only Rs. 200 the next day and promised to pay the balance in a week. The plaintiff did not pay anything within the time and subsequently offered a smaller sum which was refused; in December, the defendant had settled the tank with another on more profitable terms. In a suit by the plaintiff for specific performance of the agreement,

Held, that the granting of the relief under S. 22 was discretionary. That discretion cannot be invoked by a party guilty of laches or where grant of the relief would involve hardships and inequity to the other parties concerned. The plaintiff was therefore not entitled to relief. (*Suhrawardy and Graham, JJ.*) JADU NATH GUPTA *v.* CHANDRA BHUSHAN SUR. **I.R. 1932 Cal. 461 = 138 I.C. 498 = 36 C.W.N. 285 = A.I.R. 1932 Cal. 493.**

———**S. 22**—*Discretion under—Contract of sale of house—Mistake as to area, not affecting price—Absence of misrepresentation—Right to specific relief.*

The plaintiff sued for specific performance of an agreement entered into with the defendant for the purchase of a house belonging to the latter. The price of

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the house which was alleged to measure 66 x 22 feet was fixed at the rate of Rs. 6-10 per foot. On actual measurement, the house was found to have only an area of 876 sq. ft. and the price at the agreed rate would only be Rs. 5,803 8 0 instead of the original price of Rs. 9,619-8 0. It was found that there was no misrepresentation by the plaintiff and that if there was any mistake it was due to defendant's own negligence. It was held that it was not therefore a case in which a Court, in its discretion, refuse to decree specific performance. 17 I.C. 732; 72 I C. 586, Dist.; 38 Cal. 805; 7 Bom.L.R. 319; 41 Cal. 852, Rel. on. (*Wallace and Bardswell, JJ.*) SESHA SUBRAMANIA AYYAR *v.* APPU. **1931 M.W.N. 234.**

———**S. 22 (1) and (2)**—*Discretion under—Hardship—Diminution of purchase price—If amounts to.*

The scond defendant was the mortgagee of the suit properties with a power of sale. In a public auction held by him, the third defendant bid for Rs. 12,550 and the sale was knocked down to him. Under the terms of the sale, the balance of the purchase money, after deducting the deposit, was payable within 15 days after sale; in default, the deposit was to be forfeited and the sale cancelled. The balance was not paid by the third defendant and the second defendant effected a private sale in favour of the plaintiff for Rs. 9,000 and the sale was approved by the Official Assignee in whom the properties had vested on the insolvency of the owner. Subsequently, however, the second defendant executed a sale-deed in favour of the third defendant for Rs. 12,550 and refused to complete the contract in favour of the plaintiff. In a suit by the plaintiff for specific performance of the contract in his favour,

Held, that time was the essence of the contract in favour of the third defendant and on his default the auction sale was cancelled, that the sale in favour of the plaintiff was a *bona fide* transaction, that the diminution in price was no evidence of unfair advantage gained by the plaintiff and that there was no reason for refusing specific performance to the plaintiff. The term "hardship on the defendant" in S. 22 (2) of the Specific Relief Act is used in the sense of some collateral hardship and not merely the diminution of the purchase-money. (*Ramesam and Cornish, JJ.*) PICHAI MOIDEEN ROWTHER *v.* CHATURBUJA DAS KUSHAL DAS AND SONS. **6 I.R. (Mad.) 196=145 I.C. 1023=38 L W. 507=1933 M.W.N 1033=A.I.R. 1933 Mad. 736=65 M.L.J. 491.**

———**S. 23 (b)**—*Agreement to reconvey to vendor or his heirs—Eforceability by assignee outside family.*

Where a person sells his land or house to another person and the latter enters into a contract to convey the property back to the vendor or his heirs, the right to obtain a reconveyance from the vendee or his heirs is ordinarily assignable even to a stranger who can enforce it by a suit. But where the intention of the parties is that the vendor or his heirs alone should be given the right of repurchasing the property, the assignee outside the family cannot enforce the contract specifically. 55 I.A. 243, Appl.; 10 Cal. 30 (P.C.); 42 B. 344 and 35 Bom. 258, Ref. (*Shingne, J.*) HARIKISANDAS *v.* BAI DHANOO. **151 I.C. 536=7 R.B. 68=36 Bom.L. R. 290=A.I.R. 1934 Bom. 171.**

———**S. 23 (b)**—Decree for—Defendant's right to execute. *See* SPECIFIC PERFORMANCE—DECREE FOR. **59 Cal 501=36 C.W.N. 172=A.I.R. 1932 Cal. 579.**

———S. 23 (b)—*Right of representatives—Limits.*

S. 23, Cl. (*b*) of the Specific Relief Act permits the representative in interest of a party to an agreement to sue for its specific performance. Where *X* enters into an agreement with *Y* to sell a certain land, and *Y* enters into a further agreement with the plaintiff to sell that land to him, the plaintiff is the representative in interest of *Y*, and has, therefore, a *locus standi* to maintain a suit for specific performance of the agreement against *X*, unless the case falls within any of the provisos to Cl. (*b*) of S. 23. (*Tek Chand and Abdul Rashid, JJ.*) GHULAM MOHAMMAD *v.* LAKHA SINGH. **153 I.C. 437=7 R.L. 433=37 P.L.R. 58=A.I.R. 1935 Lah. 181 (2).**

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———**S. 25**—Agreement for lease—Defective title of lessor—Return of premium. *See* SPECIFIC RELIEF ACT, S. 18—AGREEMENT FOR LEASE. **33 Bom L R. 1544=34 L W. 853=35 C W.N 1246=1931 A.L.J. 1112=54 C.L.J. 366=A.I.R. 1931 P.C. 299=61 M. L J. 699 (P.C).**

———**S. 25**—*Contract of sale—Defects in property or title—Effect on right to enforce.*

A buyer of immovable property is not bound to complete the sale if there are defects in the property or in the title to the property which are material and also latent, that is to say, not discoverable by the exercise of ordinary care or if the title is not free from doubt. A vendor who had himself purchased the property from a Hindu widow in possession under her husband's will which was unsigned and unattested and the construction of which was open to reasonable doubt as to whether it created an absolute estate or only a limited estate, cannot be said to have made out his title beyond reasonable doubt; the vendee is therefore entitled to repudiate the agreement, which consequently cannot be specifically enforced (*Broomfield and Wadia, JJ.*) LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND. **59 Bom. 83=155 I C. 564=7 R B. 439=36 Bom.L R. 1041=A.I.R. 1935 Bom. 15.**

———**S. 25**—*Construction—Title free from reasonable doubt.*

If a title depends upon evidence of matters of fact, it is a title which is capable of being disputed and the purchaser would be buying a law-suit and a Court of Equity will not enforce the contract if there is a reasonable probability that enforcing a title upon an unwilling purchaser will involve him in litigation. *Nottingham Patent Brick and Tile Company* v. *Butler*, 16 Q.B.D. 778, 47 Bom. 369, 11 Bom.L.R. 545, Ref. (*Wadia, J.*) KRISHNAJI GOPINATH *v.* RAMACHANDRA. **135 I.C. 417=I R. 1932 Bom. 65=33 Bom L R. 1377=A.I.R. 1932 Bom. 51.**

———**S. 25 (b)**—*Construction—"Title free from reasonable doubt"—Meaning of.*

A "title free from reasonable doubt" means a markertable title which can at all times be enforced upon an unwilling purchaser. But specific performance should not be decreed if, in the opinion of the Court, the title may fairly and reasonably be questioned by other competent persons, though the Court itself takes a favourable view of it. (*Broomfield and Wadia, JJ*) LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND. **59 Bom. 83=155 I.C. 564=7 R.B. 439=36 Bom.L R. 1041=A I.R. 1935 Bom. 16.**

———**S. 25 (b)**—Title—"To the satisfaction of the purchaser's attoneys"—Meaning and effect of. *See* SPECIFIC PERFORMANCE—TITLE. **33 Bom.L.R. 1377.**

———**S. 27**—*Absence of notice—Onus of proof.*

When once the plaintiff has proved an agreement to sell arrived at between him and the vendor, it is for the vendee, in order to defeat the plaintiff's claim, to prove that he paid the money to the defendant-vendor under the sale-deed in his favour in good faith and without

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notice of the prior contract. And it is one of the recognised canons of jurisprudence that a person, who seeks to take advantage of an exception has to prove affirmatively that his case falls within the scope of that exception. (*Tek Chand and Agha Haidar, JJ*) KANHAYA LAL *v.* DEVI DAS JAGANNATH. **12 Lah. 328 = I R. 1931 Lah 417 = 131 I.C. 289 = 32 P.L.R. 40 = A I.R. 1931 Lah. 227.**

——S 27—*Absence of notice—Onus of proof.*

In order to take advantage of the exception in S. 27, the transferee must prove that he had no notice of the original contract. (*Ma kney, J.*) KO MAR *v.* MA MAY **154 I C. 474 = 7 R.R. 309 = A.I.R. 1935 Rang. 12.**

——S. 27—*Attaching creditor of tenant's property if "transferee".*

Judgment-creditors of the tenant who have attached the properties in execution are not transferees of that property for value, within the meaning of S. 27 of the Act. (*Mosely, J.*) S.T.N.R.M. CHETTIYAR *v.* U PO HLA. **159 I.C. 65 = 8 R R 244 = A I.R. 1935 Rang. 126.**

——S 27—*Minor—Contract for sale by guardian for necessity—Enforceability.*

A contract for sale of immovable property entered into by the guardian or manager on behalf of a minor and the legal necessity of which has been proved, can be specifically enforced. (*Wort, J.*) BRAHAMDEO SAO *v.* HARO SINGH. **157 I C. 327 = 8 R.P. 117 = A.I.R. 1935 Pat. 237.**

——S 27 (b)—*Absence of notice—Onus of proof.*

When the plaintiff in a suit for specific performance of a contract of sale establishes the prior contract the onus of proof that a third party has subsequently purchased the property *bona fide* and without notice, is on the party who claims to be such purchaser. (*Wort and Dhavle, JJ*) SAUKHI SAH *v.* MAHAMAYA PRASAD SINGH BAHADUR. **156 I.C 558 = 8 R.P. 13 = 15 Pat.L.T. 469 = A.I.R. 1934 Pat. 518.**

——S. 27 (b)—*Applicability—Agreement for transfer—Third party taking without notice—Protection.*

In 1874 two sets of persons agreed that in case of a contemplated transfer the property dealt with in the agreement was to be tranferred to the other party for a proper price. In 1928 a deed of exchange was executed between the representatives of one of the parties and a third person. Thereupon the representatives of the other party sued to enforce the previous agreement.

Held, that S. 27 applied to the case and that the transferee without notice was protected. (*Sulaiman, C.J. and Banerji, J.*) SHAHZAD SINGH *v.* JIACHHA KUNWAR. **54 All 966 = 143 I.C 388 = I R. 1933 All. 244 = 1932 A.L J. 853 = A.I.R. 1933 All. 452.**

——S. 27 (b)—*Applicability—Conditions.*

Performance of a contract can be specifically enforced as against the subsequent purchaser who has notice of the previous contract provided the contract is valid and the fact of notice has been proved. (*Wort, J.*) BRAHAMDEO SAO *v.* HARO SINGH. **157 I.C. 327 = 8 R.P. 117 = A.I.R 1935 Pat. 237.**

——S. 27 (b)—*Decree—Directions in—Sale with notice of prior contract—Suit by first promisee.*

When a person with knowledge of the previous contract of sale purchases the property the purchase is voidable at the option of the prior promisee and the contract with him can be enforced specifically against the subsequent purchaser; in such a suit the Court should declare the second purchase as null and void and cancel it and order the original promissor to carry out his contract by executing a sale deed in favour of the plaintiff.

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(*Sulaiman, C. J. and Young, J.*) KALI CHARAN SINGH *v.* JANEK DEO SINGH. **I.R. 1932 All. 583 = 139 I.C. 714 = A.I.R. 1932 All. 694.**

——S. 27 (b)—*Option Contract—Subsequent purchaser for value without notice of—Specific performance.*

Where a document gave the plaintiff an option to claim possession of a certain field in case the amount fixed for maintenance was not paid in any year but did not contain any condition that after delivery of possession the executant's liability for maintenance was discharged, it follows that the right in the field was not transferred to the plaintiff. In respect of the field it was only an executory agreement to be enforced specifically in case the plaintiff exercised her option to take possession of the land. Such an agreement cannot be specifically enforced as against a *bona fide* purchaser of the field for value and without notice of the plaintiff's claim (*Niyogi, A. J. C.*) MT. BANA BAI *v.* MT. CHANDRA BHAGA. **27 N L.R. 24 = I R. 1931 Nag. 98 = 132 I.C. 450 = A.I.R. 1931 Nag. 60.**

——S 27 (b)—*Receiver in insolvency—If person claiming under insolvent.*

The receiver in insolvency is a person claiming under the insolvent and a contract entered into by the latter at the time of purchasing certain property is enforceable against the receiver of a transferee from him with notice. (*Mukerji and Allen, JJ.*) NAND GOPAL DAS *v.* BATUK PRASAD GUPTA. **54 All 17 = I.R. 1931 All. 701 = 133 I.C. 541 = 1932 A.L.J. 36 = A.I.R. 1932 All. 78.**

——S 27 (b)—*Specific performance of agreement to sell immovable property—Onus.*

By an agreement dated 26th November, 1926, the defendant No. 1 agreed to sell certain immovable property to the plaintiff. On the 22nd December, 1926, the defendant No. 1 sold the property to the respondent by a registered sale deed.

Held, in a suit by the plaintiff for specific performance of the agreement of 26th November, 1926, (1) that although under S. 54 of the Transfer of Property Act the plaintiff's agreement for sale did not of itself create any interest in or charge on the property, he was entitled under S. 27 (*b*) of the Specific Relief Act, to enforce the agreement against the respondent, the subsequent transferee of the property; (2) that under S. 27 (*b*) of the Specific Relief Act (as read with Ss. 103 and 106 of the Indian Evidence Act) the burden of proof primarily lay on the respondent, the later transferee, to bring himself within the exception in S. 27 (*b*) and to establish (*a*) payment of his money, (*b*) his good faith, and (*c*) absence of notice to him of the original contract; (3) that there being no sufficient evidence either on the question of payment or on the question of the notice, the onus had not been discharged by the respondent; (4) that, consequently, the plaintiff was entitled to enforce specific performance of his agreement against the subsequent transferee. (*Lord Thankerton.*) BHUP NARAIN SINGH *v.* GOKUL CHAND MAHTON. **61 I.A. 115 = 13 Pat. 242 = 1934 A L.J. 291 = 59 C.L J. 139 = 1934 M.W N. 206 = 36 Bom.L.R. 421 = 6 R.P.C. 108 = 147 I.C. 1134 = 38 C.W N. 393 = 3 A.W.R. 410 = 39 L.W. 363 = 11 O.W N. 330 = 15 Pat.L.T. 67 = A.I.R. 1934 P.C. 68 = 66 M.L.J. 255 (P.C.).**

——S. 27 (b)—*Subsequent transferee—Facts to be proved.*

In a suit for specific performance of a contract for sale of land as against the defendant who claimed title thereto by virtue of a subsequent contract, the burden is on the defendant of proving (*i*) that he paid valuable considerations, (*ii*) that he acted *bona fide*, and (*iii*) that

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he had no notice of the original contract. 26 M.L J. 218 and 36 Bom. 446, Foll. (*Curgenven and Cornish, JJ.*) SITAYYA *v.* KOTAYYA. **134 I C 1211 = I R. 1932 Mad. 27 = 34 L.W. 669 = A.I.R. 1932 Mad. 71.**

———**S. 27 (b)**—*Subsequent transferee—Constructive notice of prior agreement.*

Where a transferee has knowledge of such facts which would put him on inquiry which if prosecuted would have disclosed a previous agreement, such transferee is not a transferee without notice of the original contract within the meaning of the exception in S. 27 (*b*). (*Sir Lancelot Sanderson.*) MAHOMED ASLAM KHAN *v.* FEROZE SHAH. **59 I.A. 386 = 13 Lah. 687 = 36 L.W. 441 = 37 C W N. 71 = 56 C.L J. 330 - 9 O W.N. 882 = I.R. 1932 P C 258 = 34 P.L R 55 = 1933 A.L.J. 491 = 138 I.C. 770 = A.I.R. 1932 P.C. 223 = 63 M.L.J. 694 (P C).**

———**S 27 (b)** — *Subsequent transferee — Main portion of consideration paid after notice of prior contract —Right to protection.*

Where a subsequent vendee has paid only a small part of the sale consideration before he had notice of previous contract and pays the bulk of the consideration after notice, it is impossible to hold that he is acting in good faith or is a person who has paid his money without notice of the original contract so as to be entitled to the protection given by S. 27 (*b*) of the Specific Relief Act. (*Sulaiman, C.J. and Allsop, J.*) GAURI SHANKER *v.* RAM SEWAK. **4 A.W R. 375 = 152 I.C 39 = 7 R.A. 244 = 1934 A.L.J. 871 = A I.R. 1934 All 1045.**

———**S. 27 (b)**—*Transferee without notice—Burden of proof.*

When a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character. 40 Cal. 565, Ref. (*Guha and M. C. Ghose, JJ.*) HARENDRA CHANDRA DAS *v.* NANDA LAL ROY. **141 I.C 708 = 57 C.L.J. 1 = I.R. 1933 Cal. 180 = 36 C.W N. 1002 = A.I.R. 1933 Cal 98.**

———**S. 28**—Price of house fixed with reference to area—Actual area much less than contemplated—No misrepresentation—Specific performance. *See* SPECIFIC RELIEF ACT, S. 22—DISCRETION UNDER. **1931 M. W.N. 234.**

———**S. 31**—*Burden of proof—Defence—Laches.*

The burden of proor is heavily on the person seeking rectification. The proof of error should be clear and conclusive. Rectification being an equitable remedy is subject to the equitable defence of laches on the part of the plaintiff in seeking rectification. (*Wallace and Stone, JJ.*) SAYAMMA *v.* VENKATA REDDI. **54 Mad. 973 = 134 I.C. 1208 = 1931 M.W.N. 906 = 34 L.W. 266 = A.I.R. 1931 Mad. 785 = 61 M.L J. 437.**

———**S. 31**—*Rectification of instruments—Limits of.*

There are two limits to the rectification of an instrument: (1) when third parties have acquired rights in good faith and for value; (2) when a decree has been obtained upon an unrectified instrument and that decree has been executed and the money or property concerned has been recovered. (*Reilly and Anantakrishna Ayyar, JJ.*) LATCHAYYA *v.* SEETHAMMA. **35 L.W. 322 = 136 I.C. 850 = I.R. 1932 Mad. 325 = 1931 M.W.N. 1329 = A.I R. 1932 Mad. 275 = 62 M.L.J 350.**

———**S. 31**—*Right to apply under—Party for whose ultimate benefit, bond was executed in favour of Court.*

A bond was executed to the District Judge for payment of certain amount either to the Judge or his successor in office or to his assign. The bond though

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intended for the ultimate benefit of the plaintiff was not assigned to him. An application to have the bond amended was dismissed. Thereupon the plaintiff sued for rectification of the bond.

Held, that the plaintiff was a stranger to the bond and had no *locus standi* to file the suit. (*Mya Bu and Baguley, JJ.*) OPPENHEIMER *v.* MANECKJEE. **147 I.C. 297 = 6 R.R. 163 = A.I.R. 1933 Rang 337.**

———**S. 31**—*Scope—Enabling section—Fraud alleged in respect of certain clauses in the deed—No suit for rectification is necessary.*

S. 31 is only an enabling section. It does not preclude a pardanashin lady from bringing a suit for redemption, pleading also that certain clauses in the deed of mortgage were not explained to her and are not binding upon her. It is not necessary in such a case for her to sue first for rectification of the deed. (*Raza and Smith, JJ.*) LAKSHMI NARAIN *v.* MOHAMADI BEGAM. **7 Luck. 454 = I.R 1932 Oudh 205 = 137 I.C. 102 = 9 O.W.N. 60 = A.I.R. 1932 Oudh 123.**

———**S. 31**—*Suit under—Scope of enquiry—Relief—Difference in respect of area.*

In a suit for rectification of a kobala on the ground that it differed from the *batnanama* on which it was based both in respect of the total area of land conveyed and in respect of the northern boundary of the land, when it is found that there is no mistake or fraud in the matter of the conveyance, and that the alteration in the northern boundary had been made with the knowledge of both of the parties, the plaintiff is not entitled to any relief.

The question for decision in such a suit is whether the kobala was a correct expression of the intention of the parties and of the agreement entered into between them; and the question whether the plaintiff had actually got possession of the whole area in pursuance of the agreement is entirely outside the scope of the suit. (*Patterson, J.*) MAHOMED EUSUFF *v.* UMEDALI MIAN. **151 I.C. 1090 = 7 R.C. 219 = 59 C.L J. 360 = A I R 1934 Cal. 750.**

———**S. 35**—*Contract avoided —Mesne profits—Liability for—Period.*

Where the defendant by taking advantage of the fiduciary position he occupied towards the plaintiff, got a contract in his favour and possession of the property in pursuance thereof, he is bound when the contract is set aside at the instance of the plaintiff, to account for mesne profits not merely from the date when the contract was avoided but from the date he got possession. (*Sir George Lowndes.*) SATGUR PRASAD *v.* HARNARAIN DAS. **59 I.A. 147 = 36 C.W N 461 = 7 Luck. 64 = 1932 A L.J. 297 = 1932 M W.N 502 = 55 C.L.J. 255 = 35 L.W. 667 = 34 Bom.L.R 771 = I.R. 1932 P. C 60 = 136 I C. 108 = 9 O.W N. 196 = A.I.R. 1932 P. C. 89 = 62 M.L.J. 451 (P.C.).**

———**S. 35 (c)**—*Right under, if confined to vendor.*

The right of rescission recogniesd in S. 35 (*c*) of the Specific Relief Act is not confined to a vendor, whether plaintiff or defendant, but is equally open to a purchaser whether he appears in the action as plaintiff or defendant. (*Venkatasubba Rao and Curgenven, JJ.*) AKSHAYALINGAM PILLAI *v.* AYYAMBAL AMMAL. **56 Mad. 796 = I R. 1933 Mad. 459 = 144 I.C. 621 = 1933 M.W. N. 265 = 37 L.W. 417 = A.I.R. 1933 Mad. 386 = 64 M.L J. 536.**

———**S. 39**—Applicability—Suit to declare that deed not executed by plaintiff and for cancellation. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*)—APPLICATION. **39 C.W.N. 250.**

———**S. 41**—*Alienation by*—De facto *guardian of Mahomedan minor—Setting aside—Equities.*

SPECIFIC RELIEF ACT (1877), S. 41.

Where a sale by the *de facto* guardian of a Mahomedan minor is set aside, the purchaser is entitled to compensation to the extent to which the consideration for the sale has been used for the benefit of the minor or his estate. 7 Lah. 35, Foll. (*Doraiswami Iyer, C.J., Rama Rao and Srenivasa Iyer, JJ.*) KYTHAYAN BAVEE *v.* HANUFA BEE. **9 Mys.L.J. 196 (F B).**

———**S. 41**—Right to relief—Minor—Bond by—Absence of fraudulent misrepresentation as to age. *See* CONTRACT ACT, S. 65. **61 Cal. 1075.**

———**S. 41**—*Sale by Mahomedan mother—Setting aside of—Decree, conditional on refunding consideration—Powers of Court.*

Though a transaction is declared to be void, the Court may in adjudging the cancellation of the instrument under this section, require the party to whom such relief is granted to make compensation to the other as the justice of the case may require. Thus, where an alienation by a Mahomedan mother is set aside, the Court may, having regard to the fact that the price was devoted to pay off debts binding on the shares of the minor sons impeaching the sale, grant a decree to the sons conditionally on their refunding the consideration. 30 Cal. 539 (P. C.) Rel on; 7 Lah 35; 28 Bom. 181; 49 Bom. 376, Foll.; 1918 M. W. N. 909; 10 L. W. 225 =32 I. C. 804; A I.R. 1929 Lah. 331; 44 Mad. 605, Dist. (*Madhavan Nair, J.*) ABDUL MAJID SAHIB *v.* EAMIZA BIVI SAHIBA. **I R 1931 Mad 489=131 I.C. 153=1931 M W.N 150=33 L.W. 312=A.I.R. 1931 Mad 468.**

———**S. 41**—*Sale by minor—Misrepresentation as to age—cancellation—Power of Court to direct the refund of consideration.*

Where a minor brings a suit to set aside a sale brought about by him by misrepresenting his age to the vendee, it is open to the Court under S. 41 of the Specific Relief Act, at the time of setting aside the sale, to direct the minor to refund the consideration to the vendee. (*Mukerji, Ag. C. J. and Bennet, J.*) MT. HAMIDAN BIBI *v.* NANHE MAL. **I.R 1933 All 49=141 I C. 152=A I.R. 1933 All. 372.**

———**S. 41**—*Sale by minor—Misrepresentation as to age—Cancellation—Refund of consideration.*

Where persons, who are, in fact, under age, by false and fraudulent misrepresentation as to their age, induce others to purchase property from them, they are liable in equity to make restitution to the purchasers of the benefit they had obtained before they could recover possession of the property sold. (Case-law reviewed). (*Sen, J.*) MT. HAMIDAN BIBI *v.* NANHE MAL. **A.I. R. 1933 All. 371.**

———**S. 42**—.

Applicability.
Construction.
Declaratory suit.
Decree under.
Election
Relief under.
Scope.

Applicability.

———S. **42**—*Applicability—Election—Rejection of nomination of candidate—Declaration as to invalidity of.*

Where a candidate's nomination was rejected on the ground that his name was not found on the electoral roll he can institute a suit under S. 42 for a declaration to the effect that the order of the Returning Officer was invalid. The Civil Court can entertain such a suit unless it has been excluded by express provision. Where the Returing Officer summarily rejected the nomination on the ground firstly that the name of the candidate was not borne on an electoral role other than that on which he claimed to be borne; and secondly on the ground that he had produced no certified copy of the electoral role on which he claimed to be borne,

Held, that the candidate could maintain a suit in the Civil Court under S. 42, Specific Relief Act, and that the same was not barred by Rr. 29 (2) and 68 of the Rules under Bihar Local Self Government Act. (*Fazal Ali and James, JJ.*) KALI PROSAD SINGH *v.* MAKUTDHARI PROSAD SINHA. **12 Pat. 209=6 I.R. (Pat.) 243=146 I.C. 225=14 Pat.L.T. 73=A I.R. 1933 Pat. 155.**

———**S. 42**—*Applicability—Election—Suit for declaration of validity of an election.*

Where the election of a candidate who had secured the largest number of votes had been wrongfully set aside by the District Magistrate at the instance of a defeated candidate, a suit by the former is maintainable for a declaration of the validity of his election. (*Guha and Bartley, JJ.*) MAHOMED MAIJADDIN *v.* JANAKIBALLAV DUTT. **145 I.C. 248=6 I.R. (Cal.) 84 (2) =37 C.W.N. 122=A.I.R. 1933 Cal. 492.**

———**S. 42**—Applicability—Legal character or right—Right to temple honours not connected with office—Suit for declaration—Maintainability. *See* C. P. CODE, S. 9—DIGNITIES AND HONOURS. **41 L.W. 384=A.I.R. 1935 Mad. 621=69 M.L.J. 14.**

———**S. 42**—*Applicability—Plaintiff not having right to possession.*

In a declaratory suit the main point was whether defendant 1 was holding under plaintiff or under defendant 2. Plaintiff was not in any case entitled to possession,

Held, that the suit was not bad for want of prayer for possession and that S. 42 had no application. (*Agarwala, J.*) JAGANNATH MAHADANI *v.* UDHAB CHANDRA SINHA. **6 I R. (Pat.) 5=144 I.C. 753=A.I.R. 1933 Pat. 259.**

———Specific Relief Act, S. 42—Construction—Legal character—Hereditary Karnam. *See* SPECIFIC RELIEF ACT, S. 42—DECLARATORY SUIT. **56 Mad. 749.**

———**S. 42**—*Construction—Legal character—Person in possession.*

A person in possession is considered in law to have that legal character or right which is contemplated by S. 42 of the Act and can protect his possession through Court against a mere trespasser. (*Din Mahomed and Addison, JJ.*) MT. MALAN *v.* MOHAN SINGH. **158 I.C. 261=8 R. L. 217=A.I.R. 1935 Lah 547.**

———**S. 42**—*Construction—'Right in the property'—Prospective shebait, if can sue on behalf of idol.*

The words 'as to right in the property' have been interpreted in a wide sense and cover the case of a person interested in a private trust as a member of the family and with the prospect of holding the office of shebait. He is entitled to maintain a suit to set aside an improper alienation by the shebait in office. (*Suhrawardy and Graham, JJ.*) SIRIS CHANDRA SAW *v.* UPENDRA NATH GIRI DAS. **54 C L.J. 544=35 C. W N. 768=135 I C. 273=A.I.R. 1931 Cal. 776.**

———**S. 42**—*Declaratory suit—When maintainable.*

Where the plaintiffs' title to a part of the lands has been disputed and they are in possession of all the lands under a common title, a suit by them for declaration of their title to the entirety of the lands in maintainable. (*Tek Chand and Monroe, JJ.*) SUKDEV SINGH *v.* MATHRA SINGH. **I.R. 1933 Lah. 215=142 I.C. 606 =34 P L.R. 115=A.I.R. 1933 Lah. 412.**

SPECIFIC RELIEF ACT (1877), S. 42.

——**S. 42**—*Declaratory suit—When maintainbale—Cancellation of succession certificate, not a necessary relief.*

The decision of the Court under Succession Act is a summary one and does not stand in the way of the trial of the same question in any regular suit. The existence of the succession certificate is not such a fact as to make its cancellation a necessary relief which the plaintiff must consequently seek in a suit under S. 42 of the Specific Relief Act. (*Almond, J.C and Mir Ahmad A.J.C*) MT. JIWANDI BAI *v.* CHUHA RAM. **7 R. Pesh. 31 = 151 = I.C. 689 A.I.R. 1934 Pesh. 83.**

——**S. 42**—*Declaratory suit—When maintainable—Hindu widow's alienation—Reversioner's suit to declare void.*

A suit by the nearest reversioner for a declaration that an alienation by a widow succeeding to widow's estate, by means of deed of gift was void after the lifetime of the widow is maintainable. (*Iqbal Ahmad and Kisch, JJ.*) RAM TAWAKAL TEWARI *v.* MT. DULARI. **154 I.C. 412 = 7 R.A. 756 = A.I.R. 1934 All. 469.**

——**S. 42**—Declaratory suit—When maintainable—Insolvency of Hindu son—Sale by Official Receiver of interest in family property—Suit by father for bare declaration of title. *See* PROVINCIAL INSOLVENCY ACT, SS. 4 AND 28. **68 M.L.J 229**

——**S. 42**—*Declaratory suit—When maintainable—Right to future maintenance.*

If a person chooses to seek a declaration only for future maintenance for which the cause of action has not accrued, S. 42 of the Specific Relief Act cannot stand in his way. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAYI. **12 Pat 359 = 6 I.R. (Pat) 17 = 145 I.C. 1 = 14 Pat L.T. (Sup.) 1—A.I.R. 1933 Pat. 306.**

——**S. 42**—Declaration suit—When maintainable—Suit by donor for mere declaration. *See* MAHOMEDAN LAW—GIFT. **16 Lah. 629 = A.I.R. 1935 Lah. 795**

——**S. 42**—*Declaratory suit—When maintainable—Suit for declaration that plaintiff is adoptive father of defendant.*

A suit for a declaration that the plaintiff is and continues to be the adoptive father of defendant is virtually a suit to declare that defendant is the adopted son of the plaintiff and is maintainable 29 Mad. 48 and 34 Bom. 676, Rel. on ; 13 N.L.R 187; A.I.R. 1928 All. 309 and 42 M. 219, Dist. (*Subhedar, A J.C.*) BANSILAL SHANKARLAL *v.* SHANKARLAL RAMLAL. **150 I.C. 650 = 7 R N. 18 = A.I.R. 1933 Nag 292.**

——**S. 42**—*Declaratory suit—When maintainable—Suit mere declaration that cancellation of the appointment of Karnam, is* ultra vires.

A suit by the plaintiff for a declaration that the Revenue Officer's order cancelling his appointment to the post of a Karnam and made by the propretor, is *ultra vires* is not barred by S. 42 of the Act, because the suit is one to have the true construction of the statue declared and to have the act done in contravention of the Statue (Act III of 1895) pronounced void and of no effect. 22 Mad. 270 (P.C.), Rel. on. (*Madhavan Nair, J.*) VENKATARAGAVIAH *v.* CHENCHU SUBBIAH. **136 I.C. 38 = I.R. 1932 Mad. 246 = 33 L.W. 294 = A.I.R. 1931 Mad. 502.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for mere declaration that decree is void.*

A suit for a declaration that a decree is illegal and void and not binding upon the plaintiff, without seeking further relief is not barred by S. 42, even though the plaintiff is out of possession, where it is impossible for him to sue for possession without having the decree set aside. (*King, C. J. and Zia ul-Hasan, J.*) M. FARIDUDDIN AHMAD *v.* MURTAZA ALI KHAN. **158 I.C. 338 = 8 R.O. 88 = 1935 O.W.N. 1071 = A.I.R. 1936 Oudh 67.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for mere declaration that decree is void.*

Where a prior decree is sought to be set aside on the ground of fraud, a mere declaratory suit will lie at the instance of a third party but a party to a suit who desires to get rid of the decree passed against him in that suit on any of the grounds open to him in law must seek for consequential relief such as the cancellation or the setting aside of the decree. (*Doraiswami Iyer, C. J. and Mahadevayya, J*) HANUMAPPA NAIK *v.* SIVALINGA SETTY. **10 Mys.L J. 288.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for mere declaration as to invalidity of Board's order dismissing a Karnam.*

Where the Board of Revenue, purporting to act in revision, converted the order of the Collector suspending a Karnam for one year into one of dismissal, and the Karnam brought a suit for a declaration that the order of the Board of Revenue was without jurisdiction and *ultra vires* without any consequential relief.

Held, that the question was in substance one relating to the correct interpretation of the Reg. I of 1803 and Act III of 1895 and the suit was to have an act done in contravention of the statue pronounced void; he was the hereditary Karnam and as such was entitled to a legal character, which had been taken from him by the order which he seeks to have declared invalid and the suit was maintainable. (*Beasley, C. J. and Bardswell, J.*) SECRETARY OF STATE FOR INDIA *v.* SUBBA RAO. **56 Mad. 749 = I.R. 1933 Mad. 389 = 144 I C. 400 = 1933 M W.N. 611 = 38 L.W. 155 = A.I R. 1933 Mad. 618 = 65 M.L J 186.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for mere declaration that municipal assesment illegal.*

A suit for a declaration that an assessment of the plaintiff's holding by the Municipality is illegal and *ultra vires* being based on an erroneous valuation is not bad for the reason that the plaintiff has not asked for any consequential relief in the shape of an injunction restraining the defendant Municipality from realising the tax, when the Municipality has done nothing towards such realisation. 26 I.A. 16, Ref. (*Mallik and Jack, JJ.*) SURENDRA NATH SEN *v.* CHAIRMAN OF THE MUNICIPAL COMMISSIONER OF MYMENSINGH **61 Cal. 276 = 152 I C. 694 = 7 R.C. 311 = 38 C.W.N. 245 = A I.R. 1934 Cal. 673.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for mere declaration of right to mutawallishp.*

Where a person sued in his personal capacity for declaration of his right to mutawalliship and he did not pray for possession since it appeared that he could take over the property if the declaration was granted,

Held, that the suit was not barred under S. 42 owing to the absence of a prayer for possession (*Bisheshwar Nath and Allsop, JJ.*) MUHAMMAD JAFAR HUSAIN KHAN *v.* MUHAMMAD TAQI KHAN. **9 Luck. 170 = 6 I.R (Oudh) 76. 145 I.C. 1003 = 10 O.W N. 1163 = A.I.R. 1933 Oudh 517.**

——**S. 42**—*Declaratory suit—When maintainable—Suit for mere declaration of title to religious office.*

Where the plaintiff alleges he is entitled to a religious office and that he is prevented from discharging his duties by the trustees and their nominees, it is not necessary that actual possession should be asked for; a suit for

declaration of his right and injunction will give the plaintiff all that can also be obtained by a prayer for possession. 28 Bom. 567, Foll; 15 Mad. 307; 25 Mad. 736; (1911) 2 M.W.N. 384, Ref. (*Madhavan Nair, J.*) MUTHUKUMARASWAMI PILLAI *v.* SUBBARAYA PILLAI. **I.R. 1931 Mad. 705 = 133 I.C. 193 = 1931 M.W.N. 8 = A.I.R. 1931 Mad. 505.**

——**S. 42**—*Declaratory Suit—When maintainable—Suit to declare entry in revenue records, wrong.*

Where the entry in the revenue records describing the mortgagors as agriculturists affects the existing rights of the mortgagees, the non-agriculturists, a mortgagee, can ask for a declaration that the mortgagor is not entitled to the legal character or right which he claims. S 42, Specific Relief Act, applies and a suit for a declaration that their mortgages are valid in spite of the change in revenue records is maintainable. (*Coldstream and Jai Lal, JJ.*) MANZUR UL-HAQ *v.* AMIN CHAND. **160 I.C. 450 (2) = 8 R.L. 559 = A.I.R. 1935 Lah. 838.**

——**S. 42**—Declaratory suit—When maintainable—Suit to declare that it has been paid back—Money left with vendee to pay creditor. *See* CONTRACT—SALE OF HOUSE. **6 R.A. 849 = 149 I.C. 93 = A.I.R. 1934 All. 770.**

——**S. 42**—*Declaratory suit—When maintainable—Suit to declare title to decree.*

Where a person conducts a litigation as an agent of the plaintiff and the suit is compromised and in accordance with the compromise, the agent obtains a promissory note in his name and subsequently sues on the note and gets a decree, a suit for a declaration that the plaintiff is the actual decree-holder and that the person was merely acting as his agent in the case, is competent Such a suit is not barred by S. 9 or S. 47, C. P. Code. (*Brown and Baguley, JJ.*) ABDUL GAFOOR *v.* MA SULTANO. **I.R. 1931 Rang. 110 = 130 I.C. 366 = A.I.R. 1931 Rang. 24.**

——**S. 42**—*Declaratory suit—When maintainable—Suit to declare title to property attached under S. 146, Cr. P. Code.*

Where property had been attached by a Magistrate and a Receiver appointed under S. 146, sub S. (2) of the Cr. P. Code, the property must be taken to be in *custodia legis* and not in the possession of a defendant. So a suit for declaration of title to the property is maintainable without a prayer for possession. (*Addison and Agha Haidar, JJ.*) MAHOMED HABIT KHAN *v.* BADI-UL ZAMAN. **14 Lah. 414 = I.R. 1933 Lah. 91 = 141 I.C. 443 = 34 P.L.R. 242 = A.I.R. 1933 Lah. 195.**

——**S. 42**—*Declaratory suit—When maintainable—Suit by presumptive reversioner for declaration of right.*

One *S* a Hindu, died leaving two widows *D* and *M*. The latter executed a deed of gift in favour of a daughter of *S* and *D* and another in favour of *W*, an agnate of *S*. A son of the daughter filed a suit, after the death of the widows, impleading his mother and others in possession of the property under the gift deeds, for a declaration that the suit property formed part of the estate of his grandfather *S*, and that after the death of the widows *D* and *M*, the defendants had no right to remain in possession and that he ought to be given possession of the properties, as his mother had failed to recover possession from the other defendants. The plaint did not show that the defendants had denied the plaintiff's title, but it was apparent that the defendants were interested in denying his title.

Held, the suit was maintainable under S. 42, Specific Relief Act, there was no doubt that the plaintiff was entitled to succeed on his mother's death and the passing

of the bulk of the estate into the hands of persons who had no right to it did involve a danger to the estate. Nor could it be said that the declaration sought was either futile or premature. (*Fazl Ali and Rowland, JJ.*) SITAL RAUT *v.* ADALA RAUT. **155 I.C. 244 = 7 R.P. 570 = 16 Pat.L.T. 236 = A.I.R. 1935 Pat. 256.**

——**S. 42, proviso**—*Declaratory suit—When maintainable—Right to consequential relief arising during pendency of suit.*

If at the time when a suit is instituted the plaintiff is not able to seek any further relief than a mere declaration of title, he need not in his suit ask for any further relief and his suit will be competent under the substantive portion of S. 42, Specific Relief Act. If, on the other hand, he is at that time able to seek further relief than a mere declaration of title and omits to do so, his suit will be barred under the proviso. The ability of the plaintiff to seek further relief dates to the time when the suit is brought and cannot be utilised against him if that ability comes into existence only after the institution of the suit and during the pendency of the suit. Accordingly, the plaintiff's right to maintain a suit for a mere declaration is not affected by the fact that during its pendency the right to possession also accrues to him. (*Addison and Din Mohammad, JJ.*) HURMAT ALI SHAH *v.* TUFAIL MOHAMMAD. **16 Lah. 729 = 156 I.C. 830 = 8 R.L. 32 = 37 P.L.R. 99 = A.I.R. 1935 Lah. 332.**

——**S. 42**—*Declaratory suit—When not maintainable—Decree on award—Suit to declare absence of authority—Cancellation, necessary relief.*

Where in prior proceedings the father referred the matter to arbitration a decree was passed on the basis of the award and the son subsequently sued for a mere declaration that the father had no authority to refer,

Held, that the suit was not maintainable without a further prayer for cancellation of the decree. (*Tek Chand and Agha Haidar, JJ.*) SRI RAM *v.* KHAWAJI. **155 I.C. 209 = 7 R.L. 655 = 35 P.L.R. 136 = A.I.R. 1934 Lah. 235.**

——**S. 42**—*Declaratory suit—When not maintainable—Hindu father's alienation—Suit for mere declaration as to invalidity.*

Where a son impugns an alienation effected by the father the suit is not only for declaration but also for possession and therefore a mere declaratory suit cannot be maintained. (*Coldstream and Bhide JJ.*) RAJ KISHORE *v.* MADAN GOPAL. **13 Lah. 491 = 143 I.C. 249 = I.R. 1933 Lah. 322 = 33 P.L.R. 829 = A.I.R. 1932 Lah. 636.**

——**S. 42**—*Declaratory suit—When not maintainable—Mere apprehension of hardship not enough—Suit by one decree holder for declaration that a rival decree-holder's decree is void.*

Unless it is ascertained, or definitely alleged on substantial grounds, that the assets realized or to be realized in execution of decrees of rival decree-holders would be insufficient to discharge in full the claims of all the decree-holders under S. 73, C. P. Code, no decree-holder has a right to maintain a suit to have the decree of his rival declared void on the ground that it was fraudulently obtained and to ask the Court to grant an injunction restraining the defendant from executing his decree against the common judgment-debtor or his property. 43 Mad. 381, Dist. (*Subhedar, A.J.C.*) PANDHARINATH KRISHNA *v.* MAROTI GANESH. **6 I.R. (Nag.) 40 = 145 I.C. 206 = A.I.R. 1933 Nag. 214.**

——**S. 42**—*Declaratory suit—When not maintainable Plaintiff not in possession of property.*

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Where the plaintiffs are out of possession at the date of the suit, they have no right to ask for a pure declaratory decree. (*Mukerji, Ag. C. J. and Rachhpal Singh, J.*) DWARKA PRASAD *v.* MT. JASODA KUNWAR. **147 I.C. 999 (1) = 6 R.A 601 = A.I.R. 1933 All. 958.**

———**S. 42**—*Declaratory suit—When not maintainable—Property in possession of defendant.*

A suit for mere declaration that the plaintiffs are owners of a portion of house in the possession of the defendant, without any further relief, does not lie. (*Addison, Ag. J. C. and Din Mohammad, J.*) DHANI RAM *v.* RURA MAL. **160 I.C. 830 = 8 R.L. 619 = A.I.R. 1935 Lah. 881.**

———**Ss. 42 and 56 (1)**—*Declaratory suit—When not maintainable—Rival trustees—Plaintiffs out of possession—Suit for injunction to restrain interference with management—No prayer for possession.*

Where the plaintiffs claimed to be the duly appointed trustees of the trust and therefore entitled to possession of the trust property and to its management, but the defendants were actually in possession of the property and managing it, the plaintiffs can only enforce their rights by obtaining possession. A prayer for possession is an equally, if not the more, efficacious relief than a mere injunction and the plaintiffs are not therefore entitled to sue for a declaration of their right to the office of trustee and a mere injunction restraining the defendance from interfering with their management (which they had not) without a further prayer for possession. 33 M. 452, Foll, 58 Cal. 474, Ref.; 28 Bom. 567; 36 Mad. 364 and 80 I. C. 1053, Diss. (*Carr, J.*) KHALIFA M.S.A. GANNY *v.* MAHOMED. **9 Rang. 459 = 135 I.C. 332 = I.R. 1932 Rang. 44 = A.I.R. 1931 Rang. 322.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit based on footing of title—Title not proved—Right to declaration on strength of prior possession.*

An alienee from a Hindu widow sued for a declaration of his title to certain lands attached under S. 146, Cr. P. Code. The suit was brought on the definite footing of "an absolute title" alleging necessity, and payment of consideration. The lower appellate Court dismissed the suit as the plaintiff failed to prove either the passing of consideration or the existence of legal necessity.

Held, although questions as those of legal necessity and the adequacy and the passing of the consideration cannot be raised by the defendants who were strangers to the reversion, the plaintiff was not entitled to succeed in his suit, brought as it was on the definite footing of "an absolute title" which he had failed to establish nor could he be allowed to change his ground to a title based on prior possession.

Per *Macpherson, J.*—The plaintiff would have failed even if he had come on previous possession (or practically, on appeal against the order under S. 146, Cr. P. Code), for he would have had to show that he was entitled to possession against the whole world at least at the date when the suit was brought. (*Macpherson and Dhavle, JJ.*) BIPAT MAHTON *v.* KULPAT MAHTON. **13 Pat 182 = 153 I.C 439 = 7 R.P. 345 = A.I.R. 1934 Pat. 498.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit for mere declaration that certain issue of shares are void.*

Where a shareholder brought a suit for a declaration that certain shares issued and allotted to the defendants were void and that the defendants were not competent to act as shareholders,

Held, that the suit was not maintainable under S. 42 of the Specific Relief Act as no legal character or right of the plaintiff was denied by the defendants and that in the absence of any consequential relief by way of rectification of register, removal of names, etc., the suit was also within the mischief of the proviso to S 42. (*Pearson and Mallik, JJ.*) JOGESH CHANDRA MAJUMDAR *v.* DURGA MOHAN CHAKRABARTY **I.R. 1932 Cal. 684 = 140 I.C. 76 = 36 C.W.N. 638 = A.I.R. 1932 Cal. 714.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit for mere declaration by dispossessed tenant.*

It is not permissible for a tenant who has been dispossessed and whose rights are still extant to bring a suit for only a declaration instead of a suit for recovery of possession. (*Oppenheim, S. M. and Drake Brockman, J.M.*) RAM KISHUN *v.* MT. RAGHBIRO. **14 L.R. 549 (Rev.) = 17 R.D. 715.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit for mere declaration that a mortgage was not binding on plaintiffs' share.*

Plaintiffs alleged that they and all the defendants, except defendant 1, were the heirs of one *M* who died leaving a certain house and possibly other property also. This house was said to have been mortgaged by one of the other heirs to respondent 1, and the respondent 1 brought a suit on his mortgage. The plaintiffs in consequence sued for a declaration that the mortgage on which the mortgage suit was based was not binding on the plaintiffs' two thirds share in the property. They asked for no other relief nor did they establish their position as heirs.

Held, that the suit as framed was not maintainable. (*Baguley, J.*) MA ON KYINE *v.* M. T. T. K. R. A. R. K. R. FIRM. **6 I.R. (Rang.) 45 = 145 I.C. 370 (2) = A.I.R. 1933 Rang. 157.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit for mere declaration that plaintiff is validly appointed mutawalli.*

A suit for a declaration that plainliff has been appointed to the office of mutawalli by the bhek or order, and for an injunction restraining the defendants from preventing him carrying out his duties, is competent and no suit for possession is necessary. 28 Bom. 567, Rel. on. (*Addison and Din Mohammad, JJ.*) ALI SHAH *v.* FATEH MOHAMMAD. **159 I.C. 237 = 8 R.L. 365 = A.I.R. 1935 Lah. 657.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit for mere declaration of title to the office of matathipathi.*

A suit by a person, claiming to be the *matathipathi* of a Muth, for a bare declaration that he is the only person entitled to succeed to the *peetha* and to all the property, rights and privileges of the Muth and for an injunction to restrain the defendants from doing any act inconsistent with the plaintiff's rights of succession is not maintainable without a prayer for possession of the properties of the Muth. The defect in such a suit is not a mere technical defect, but one which, if overlooked, would have serious practical consequences and would directly offend against S 42 of the Specific Relief Act. (*Reilly, C. J and Srinivasa Rao, J.*) BALAKRISHNA *v* GOVERNMENT OF MYSORE. **13 Mys.L J. 228 = 40 Mys H.C.R. 277.**

———**S. 42**—*Declaratory suit—When not maintainable—Suit by member of joint Hindu family not in possession, for mere declaration of title.*

A suit by the plaintiffs for a declaration to the effect that they were entitled, along with the defendants, their brothers, to the entire property left by their father as members of a joint Hindu family and further asking for a perpetual injunction against the defendants to the

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effect that they should allow the plaintiffs to retain joint possession in equal shares of the entire property of which a list was appended to the plaint is not competent where the plaintiffs are clearly not in possession and the defendants are keeping them out of possession. The plaintiffs ought to sue for recovery of possession of the land either by a suit for joint possession or for possession of their share by partition. (*Broadway and Monroe, JJ.*) ATMA RAM *v.* GODHU RAM. **14 Lah. 306 = I.R. 1933 Lah. 124 = 34 P.L.R. 5 and 235 = 141 I. C. 409 = A.I.R. 1933 Lah. 712.**

——**S. 42**—*Declaratory suit—When not maintainable —Suit for mere declaration that money in the hands of receiver is self-acquired property.*

The case of money collected by a Court executing a decree is entirely different from the case of property in the possession of a receiver and the custody of the Court is entirely on behalf of the decree-holder and the Court cannot deal with the money in any other way except as the property of the decree-holder. A suit therefore by the daughter-in law of the decree holder for a mere declaration that the money really was the self acquired property of her husband and not joint family property, with decree holder as manager without asking for consequential relief of the recovery of the money from the decree-holder is not maintainable. (*Walsh, J.*) NATESA AYYAR *v.* MANGALATHAMMAL. **I R. 1933 Mad. 455 = 144 I.C. 602 = 1933 M W.N. 1106 = 38 L. W. 194 = A.I.R. 1933 Mad. 503 (2).**

——**S. 42**—*Declaratory suit—When not maintainable—Wakf—Wrongful alienation of property—Suit to declare it not binding.*

One *H*, who was the absolute owner of certain zamindari and house property, executed a registered will, and made a wakf of part of the property in favour of one Kanya Pathshala and bequeathed the remaining to one Mt. *B* widow of his nephew. With regard to the interest bequeathed to Mt. *B*, the will set out the line of succession and constituted the widow the malik of the property with the only restriction that she had no power to transfer her share in zamindari estate; her successors however were to hold the share absolutely and only on extinction of the line of succession the property bequeathed to her was to revert to the wakf. *B* mortgaged part of the property bequeathed including zamindari share, by simple mortgage. The administrator filed a suit for declaration that the mortgage deed did not affect the property comprised therein so as to prejudice the rights of reversion of the wakf.

Held, (1) that the administrator or the pathshala had no right to challenge the mortgage in question, (2) that in the absence of anything to show that the mortgage had in any way interfered with the administration of the estate the declaration could not be granted and (3) at any rate the mortgage was valid and subsisting during the lifetime of Mt. *B*. (*Wazir Hasan, C. J. and Raza, J.*) DAYA SHANKAR *v.* MAHOMED IBRAHIM KHAN. **147 I.C. 957 = 6 R.O. 319 = 10 O.W N. 1181 = A.I.R. 1933 Oudh 555.**

——**Ss. 42 and 43**—Decree under—Effect of—Declaration that plaintiff was no longer defendant's wife—If judgment *in rem*. *See* EVIDENCE ACT, S. 41. **36 Bom.L.R. 1021.**

——**S. 42**—*Relief under—Discretion of Court.*

It is not a matter of absolute right to obtain a declaratory decree and it is discretionary with the Court to grant it or not. Decree refused on facts. (*Raza and Smith, JJ.*) JAI NARAIN *v.* RAM DEO. **8 Luck. 477 = 6 I.R. (Oudh) 29 = 144 I.C. 978 = 10 O.W.N. 179 = A.I.R. 1933 Oudh 207.**

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——**S. 42**—*Relief under—Discretion of Court—Declaration with conditions.*

The granting of a relief by declaration is discretionary and it is open to Court in a suit for declaration that certain property is wakf and hence not liable to attachment to grant the declaration asked for subject to conditions consistent with the terms of the deed of wakf. (*Thom and Kachhwal Singh, JJ.*) KHALIL UDDIN *v.* SRI RAM. **56 All. 293 = 3 A.W.R 190 = 6 R.A. 674 = 148 I.C. 294 = A.I.R 1934 All. 176.**

——**S. 42**—*Relief under—Discretion—Interference by appellate Court.*

Where a reversioner files a suit for declaration that the will executed by a widow should not affect his reversionary interest, and the first Court decrees it, the appellate Court ought not to set it aside. (*Fazl Ali and James, JJ.*) MT BHAGO KUAR *v.* DULHIN RAJBANSI KUER. **154 I.C. 175 = 7 R.P. 433 = A.I.R. 1934 Pat. 660.**

——**S. 42**—*Relief under—Discretion of Court—Rules as to exercise of.*

Though the grant of a declaratory relief is entirely in the discretion of the Court, the discretion has to be exercised on certain well-recognized principles and with reference to the varying circumstances of each case. No hard and fast rule can be laid down as to the circumstances in which the discretion to grant a declaratory relief should or should not be exercised. (*Iqbal Ahmad and Kisch, JJ.*) RAM TAWAKAL TEWARI *v.* MT. DULARI. **154 I.C. 412 = 7 R A. 756 = A.I.R 1934 All 469.**

——**S. 42**—*Relief under—Discretion of Court—Suit for declaration that action of Collector is wrongful—Government not impleaded—Refusal of relief.*

In a suit for a declaration that plaintiff had been validly appointed karnam and that the collector's action in appointing the defendant was wrongful, the Government not being impleaded as a party.

Held, that the passing of a declaratory decree under S. 42 of the Specific Relief Act, was discretionary with the Courts; that the Court will refuse to pass a decree which the Government may in its discretion either accept or disregard; that the Government, a proper party, not having been impleaded, the Court will exercise a sound discretion by refusing to pass a decree (*Venkatasubba Rao, J.*) SWARNAPATHI *v.* SURYAPRAKSA RAO. **6 R.M. 537 = 148 I.C. 765 = 39 L.W. 510 = A.I.R. 1934 Mad 293.**

——**S. 42**—*Relief under—Interference by appellate court.*

Where a declaratory relief has been given by the Courts below, the appellate Court cannot refuse that relief unless it comes to the conclusion that the Courts below in the exercise of their discretion have acted in an arbitrary or perverse manner. (*Baipai, J.*) SHIAM LAL *v.* MOHAMAD ALI ASHGAR HUSAIN. **7 R A.442 = 153 I C. 73 = 1935 A.W.R. 607 = A.I.R. 1935 All. 174.**

——**S. 42**—*Relief under—Discretion of Court—Interference by appellate Court.*

The matter of granting a declaration under S. 42 Specific Relief Act, is one within the discretion of the Court. Where, therefore, the trial Court has in the exercise of its discretion, granted a declaration under the section, the appellate Court should not as a rule reverse the decree, unless it finds that the discretion has been improperly exercised. (*Fazl Ali and Rowland, JJ.*) SITAL RAUT *v.* ADALAT RAUT. **155 I C. 244 = 7 R. P. 570 = 16 Pat. L.T. 236 = A.I R. 1935 Pat. 256.**

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———**Ss. 42 and 53**—*Relief under—Exclusive right to lead prayers in Mosque not made out.*

Plaintiffs sued for a declaration that the plaintiffs were the Mutawallis and Imams of a certain mosque for more than 25 years with an exclusive right of leading prayers and for a perpetual injunction restraining the defendants, non-Ahmadis, from interrupting them in the offering of prayers and in the performance of other religious functions while the plaintiffs were saying namaz in the mosque. The plaintiffs failed to prove that they were the mutawallis or that one of them had an exclusive right to lead the prayer or that they had a right to prevent defendant from offering prayers behind any one who was not member of the plaintiff's sect.

Held, under the above circumstances, the plaintiffs could be given only a decree declaring plaintiffs' right to enter the mosque and offer up prayers with the regular congregation behind the imam chosen by the members of the congregation but not to pray in a separate congregation behind an imam of their own. 2 P. L. J. 108, Foll. (*Mukerji, Ag. C J. and King, J.*) SIFAT ALI KHAN *v.* ALI MIAN. **I.R. 1933 All. 407=144 I C. 298=1933 A.L.J. 513=A.I.R. 1933 All. 284.**

———**S. 42**—*Relief under—Refusal—Anticipated breach of peace, no ground to deny one a legal right.*

If a person has an undoubted legal right to say his prayers in a mosque the Courts cannot refuse to recognize that legal right by refusing a declaration prayed for merely because an anticipated breach of the peace is to be committed by the other side. (*Jai Lal and Abdul Rashid, JJ.*) JIWAN KHAN *v.* HABIB. **14 Lah. 518 =6 I.R. (Lah.) 2=144 I.C. 658=34 P.L R. 1096= A.I.R. 1933 Lah. 759.**

———**S. 42**—*Relief under—Refusal—Anticipation of a contingency.*

The declaratory relief being in the discretion of the Court, it should not be granted in anticipation of a contingency which may not arise. Therefore, a mortgagee, who has not obtained a simple money decree under O. 34, R 6, C. P. Code, is not entitled to a declaratory relief that a deed of transfer executed by the mortgagor in respect of certain property not mortgaged by him is void being in fraud of creditors including himself. (*Niamatullah and Collister, JJ.*) FARYAD FATIMA BIBI *v* MUJAHID ABBAS. **152 I.C. 360=7 R.A. 325 =4 A.W.R. 818=A.I.R. 1934 All. 1064.**

———**S. 42**—*Relief under—Refusal—Empty declaration.*

A declaration in respect ot the correctness or otherwise of an electoral roll when the election is already over which would be mere empty and useless one and which will not affect the legal position of the parties to the election, cannot be granted. (*Wazir Hasan, C. J. and Allsop, J.*) ABDUL AHAD *v.* ASHFAQ ALI. **147 I. C. 792=6 R.O. 308=A.I.R. 1933 Oudh 423 (2).**

———**S. 42**—*Relief under—Refusal—Exclusive right to trade-mark not made out.*

Every one has the right to use any kind of trade-mark he likes so long as he does not infringe the right of others already acquired. Hence where a plaintiff does not make out a case that the right to the use of a certain trade-mark is the "exclusive right of property" which he has acquired to the exclusion of every one else, a relief to declare that the plaintiff has got the right to use that trade-mark cannot be granted. 6 Rang 291, Rel. (*Niamatullah and Rachhpal Singh, JJ.*) GANESHI LAL *v.* ANWAR KHAN MAHBOOB & CO. **55 All. 702=1933 A L J. 1541=I.R. 1933 All. 346=143 I.C. 840=A I.R. 1933 All. 495.**

———**S. 42**—*Relief under—Refusal—Mere apprehension of plaintiff.*

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A mere apprehension existing in the mind of the plaintiff does not give him any right to sue under S. 42 of the Act. The fact that the defendants in their written pleas did not concede the plaintiff's alleged legal character also does not have retrospective effect so as to create a cause of action for the suit. (*Middleton, J. C. and Mir Ahmad A.J.C.*) JAGTU MAL *v* LAKSHMAN DAS. **157 I.C. 523=8 R. Pesh. 28=A.I.R. 1935 Pesh. 110 (2).**

———**S. 42**—*Relief under—Refusal—Stage.*

Where a declaration is to be refused, it should be refused at a preliminary stage of litigation and not by a Court of appeal after the issues on fact and law have been decided. 10 C. 324 (P.C.), Foll. (*Mukerji and Allen, JJ.*) RAGHUNATH BARAIE *v.* JAINARAIN BARAIE. **I.R. 1932 All 284=137 I.C. 145=1932 A.L.J 99=A.I.R 1932 All. 661.**

———**S. 42**—*Relief under—Right to—Contingent reversioners.*

Every declaratory decree must be ancillary to some consequential relief obtainable thereby and no such relief is possible in the case of distant and contingent and not presumptive, reversioners. (*Wasir Hasan, C.J. and Razi, J.*) DAVA SHANKAR *v.* MAHOMED IBRAHIM KHAN. **147 I C. 957=6 R.O. 319=10 O W.N. 1181=A.I R. 1933 Oudh 555.**

———**S. 42**—*Relief under—Right to—Denial of right necessary.*

In order to obtain relief by way of declaration and injunction there should be an infringement or denial of the right or threat of injury. The infringement or denial is a question of fact but it need not necessarily be evidenced by actual resistance followed by open rupture and quarrel. In cases of this sort, the attitude of the defendants even after the commencement of the litigation is not without force and significance. 27 All. 688; 16 I.C. 714; 27 Bom. L R. 198;46 I.C. 553: A I R. 1924 Oudh 69, Ref. to. (*Doraiswami Iyer, C.J. and Rama Rao, J.*) DODDA BACHIAH *v.* PAPIAH. **9 Mys.L.J. 49.**

———**S. 42**—*Relief under—Right to—Test*

Where the effect of negativing a right claimed by the defendant is to directly or indirectly affirm a right claimed by the plaintiff in common with others, a suit for declaration that the defendant does not possess such right is maintainable. However the relief may be worded, the test is always the same, namely whether the right claimed by the defendant implies a denial of the plaintiff's "right as to any property" or to some legal character. (*Niamatullah and Rachhpal Singh, JJ.*) GANESHI LAL *v.* ANWAR KHAN MAHAOOB & Co. **55 All. 702=1933 A L.J. 1541=I.R. 1933 A. 346= 143 I.C. 130=A.I R. 1933 All. 495.**

———**S. 42**—Relief under—Suit for injunction—Power to grant declaratory decree. *See* PRACTICE—RELIEF. **4 A W.R. 1392=A I R. 1935 All. 106**

———**S 42**—*Scope—If exhaustive.*

British Indian Courts have no general powers to make a declaratory decree outside the limits formulated by S. 42 and the said section cannot be utilized with the object of enunciating a truism. (*Sen and Niamatullah, JJ.*) BHOLA NATH SHANKAR DAS *v.* LACHMI NARAIN. **53 All. 316=136 I.C. 84=I R. 1932 A. 132 =1931 A.L J. 84=A I R. 1931 All. 83.**

———**S. 42**—*Scope—Not exhaustive.*

S. 42 is not exhaustive of the categories of declaratory suit maintainable under the law. (*Varadachariar, J.*) VENKATACHARYULU *v.* HARIHARA PRASAD. **158 I.C. 883=8 R.M. 376=42 L.W. 757=1935 M.W.N. 903=A.I.R. 1935 Mad. 964.**

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———**S. 42**—*Scope—Not exhaustive.*

S. 42 of the Specific Relief Act is not exhaustive 22. M. 270 (P.C.). Rel. (*Beasley, C.J. and Bardswell, J.*) SECRETARY OF STATE FOR INDIA *v.* SUBBA RAO. **56 M. 749 = I.R. 1933 Mad. 389 = 144 I.C. 400 = 1933 M.W.N. 611 = 38 L.W. 155 = A.I.R. 1933 Mad. 618 = 65 M.L.J. 186.**

———**S. 42**—*Scope—Not exhaustive.*

S. 42 is not exhaustive so as to exclude all other forms of declaratory suits. 22 Mad. 270 (P.C.) and 35 All. 487 (P.C.), Rel. on. (*Sulaiman, C.J. Mukerji, and King, JJ.*) SRI KRISHNA CHANDRA *v.* MAHABIR PRASAD **55 A. 791 = 149 I.C. 198 = 6 R.A. 866 = 1933 A.L.J. 673 = A.I.R. 1933 All. 488 (F B.).**

———**S. 42, proviso**—Scope—Court sale—Application under 21, R. 97 dismissed—Suit for declaration under O 21, R. 103—Prayer for possession if essential. *See* C.P. Code, O. 21. R. 103—COURT SALE. **151 I. C. 59 = 17 N.L.J. 24 = A.I.R 1934 Nag. 169 (1).**

———**S. 42. Proviso**—*Scope—Suit for declaration by creditor that transfer by debtor is fraudulent—If barred*

A suit by a creditor for a declaration that his debtor has transferred his immoveable property with a view to defeat or delay his rights and that the transfer is therefore ineffectual against his rights, is not barred by the proviso to S. 42, Specific Relief Act. (*Tek Chand and Coldstream, JJ.*) CHATTRU MAL *v* MT. MAJIDAN. **15 Lah. 849 = 150 I.C. 888 = 7 R L. 30 = 35 P.L.R. 402 = A I.R. 1934 Lah. 460**

———**S. 45**—Certiorari or Mandamus—Election—Order of Election Officer—Prayer for inclusion in list of valid nominations—Procedure. *See* SP. REL. ACT. S. 50 **I R. 1933 Mad. 206 (1) = 142 I.C. 187 = A.I R. 1933 Mad. 319.**

———**S. 45**—*Jurisdiction of High Court—Issue of writ of certiorari on the Controller of Patents.*

The High Court has jurisdiction to issue a writ of *certiorari* or prohibition or mandatory order under S. 45 of the Specific Relief Act against the Controller of Patents and Designs, in proceedings on an application under the Patents and Designs Act. The High Court has a right to exercise a controlling jurisdiction similar to that which is exercised by the King's Bench Division in England, over matters arising within the jurisdiction of the High Court and over persons or bodies exercising duties within its jurisdiction. Before, however, these extraordinary remedies are used, the Court must be sure that they will be effective. The mere existence of a right of appeal is not conclusive, because it may not be adequate and in some circumstances the remedy given by the issue of such writs may be more speedy and more convenient and less costly. (*Lort Williams and Jack, JJ.*) DORMAN LONG & CO., LTD. *v.* JAGADISH CHANDRA MAHENDRA. **62 Cal 596 = 163 I C. 997 = 9 R.C. 109—39 C.W.N. 573.**

———**S. 45**—*Jurisdiction of High Court - Scope.*

The jurisdiction of the High Court under S. 45 is confined to acts done or to be done within the limits of the ordinary Original Civil Jurisdiction of the Court. (*Reilly and Burn, JJ.*) INSPECTOR OF MUNICIPAL COUNCILS AND LOCAL BOARDS, MADRAS *v.* VENKATANARASIMHAM. **6 R.M. 404 = 147 I.C. 1052 = 1934 M.W.N. 662 = 39 L.W. 45 = A I R. 1934 Mad. 140 = 66 M.L.J. 233.**

———**S. 45**—*Mandamus— Discretion—Scope— Order prayed for—Precision necessary.*

In respect of a sale fixed for a Saturday, 11th August, by a notice of 3rd July, the applicant for mandamus, by a notice of motion dated on Thurday, moved the Court on Friday for a mandamus to the Commissioner. The necessary evidence of a demand and refusal was extraordinarily weak. The Court postponed the sale by an order made *ex parte* a proceding which nothing but extreme urgency would justify.

Held, that the writ of mandamus being a high prerogative writ was of the greatest value in maintaining the law, but it was discretionary. The precise order asked for and made should in such cases be carefully defined. The form of procedure adopted in the present case should not become a precedent in any future attempt to decide similar questions. (*Lord Atkin*) COMMISSIONER FOR LOCAL GOVERNMENT LANDS AND SETTLEMENT *v.* ABDUL HUSEIN KADERBHAI. **I.R. 1931 P. C. 217 = 132 I.C. 729 = 1931 A.C. 652 = A.I.R. 1931 P.C 132 = 61 M.L.J. 299 (P.C.).**

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———**S. 45**—Mandamus—Grounds—Grievance of ratepayer—No opportunity of being heard afforded. *See* CALCUTTA MUNICIPAL ACT (1923). S. 141. **58 Cal. 1267.**

———**S. 45**—*Power of High Court—Discretion—Mandamus to commissioner of Income tax to state case to Bombay High Court—Case, if stated, triable by Court in Sind.*

Where a case, if stated by the Commissioner of Income tax, would have to be referred to the Court of the Judicial Commissioner in Sind for decision, it would not be right for the Bombay High Court in the exercise of its discretion, to make an order under this section requiring the Commissioner to state a case to it even if the Bombay Court has jurisdiction to do so by reason of that the Commissioner resides in Bombay. (*Beaumont, C.J. and Blackwell, J.*) INDIAN LIFE ASSURANCE COMPANY *v* COMMISSIONER OF INCOME-TAX, BOMBAY **I.R. 1931 Bom. 273 = 130 I.C. 593 = 33 Bom. L R. 36 = A.I.R. 1931 Bom. 150.**

———**S. 45**—*Mandamus on Income tax Commissioner —Other remedy open.*

The assessee has no right to apply to the Court for an order in the nature of a mandamus under Specific Relief Act requiring the Commissioner to state a case and refer a question of law because a "specific and adequate legal remedy" in that behalf is available to the assessee under S. 66 (2) and (3), Income-tax. Act (*Page, C.J., Das and Sen, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v* C.P.L E. CHETTYAR CONCERN. **12 Rang. 322 = 6 R.R. 391 = 150 I.C. 408 = A I.R. 1934 Rang. 132 (S.B.).**

———**S. 45**—*Non compliance with law—Refusal to issue license—Writ of mandamus.*

The Commissioner of Police must issue licence to a rickshaw whether it is old or new if it complies with the conditions as laid down under S. 23 of the Rangoon Hackney Carriage Act and is found fit for public use and if the Commissioner has not issued the licence up to the maximum number as fixed by him. And therefore where he does not exercise the discretion as vested in him, a writ of mandamus can be issued directing him to issue such a licence. (*Ba U, J.*) DEVAREDDY PEDDAYAH *v.* COMMISSIONER OF POLICE, RANGOON. **I.R. 1933 Rang. 47 = 142 I C. 832 = A.I.R. 1933 Rang. 37.**

———**S. 45**—*Order under when to be made.*

An order under S. 45 is only to be made *inter alia* if the plaintiff has no other specific and adequate legal remedy. 47 B. 742 (P.C.), Ref. (*Page, C. J. Dass and Ba U, JJ.*) RANGOON DEVELOPMENT TRUST. *v.* G.S. BEHARA & SONS. **10 Rang 412 = I R. 1932 Rang. 195 = 139 I.C. 566 = A.I.R. 1932 Rang. 123 (F.B.).**

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———**S. 45**—*Power of High Court—Discretion of the —Income tax Commissioner to state a case on order passed under S.* 33, *Income tax Act—Mandamus not open.*

The Commissioner of Income-tax has a discretion in the matter of stating a case on an order arising under S. 33 and the High Court has no power to order him to do so under S. 45, Specific Relief Act. (*Beaumont, C J and Blackwell, J.*) TATA HYDRO ELECTRIC AGENCY, LTD. *v.* COMMISSIONER OF INCOME-TAX, BOMBAY. **58 Bom. 361 = 150 I.C. 52 = 6 R.B. 420 = 36 Bom L.R. 23 = A.I.R. 1934 Bom. 62.**

———**S. 45**—*Powers of High Court—Mandamus.*

The High Court has no doubt power to issue a mandamus to prevent a Court from doing something which clearly it has no power to do. But where that Court comes to the conclusion after full consideration of arguments that it has jurisdiction to do what it proposes to, and there is ground for the decision, an application for a mandamus will be refused. (*Leach, J.*) L. H WILLINGTON *v* THE CHIEF JUDGE, RANGOON SMALL CAUSE COURT. **13 Rang 310 = 8 R.R. 256 = 159 I.C. 196 = A.I.R. 1935 Rang. 349.**

———**S. 45**—*Power of the High Court—Mandamus—Municipal Election—Objection on the ground of disqualification—Enquiry under R.* 53 *made under Burma Municipal Act.*

R. 27 of the Rules framed by the Local Government under S. 8 of the Burma Municipal Act, 1898, contemplates disqualification for nomination as well as election and consequently if an objection as to the validity of nomination upon the ground of disqualification is not brought under R. 27, it is not open to the objector to bring it under R. 53 and if such objection is brought under R. 53, High Court can in a suitable case issue a mandamus on the officer holding inquiry under R. 53 to forbear from doing so. (*Otter, J.*) MAILA SINGH *v.* BOURNE **135 I.C. 859 = I.R 1932 Rang. 75 = A.I.R. 1931 Rang. 326.**

———S. 45—Power of High Court under—Objections to validity of rules framed under City of Bombay Municipal Act—Refusal by Commissioner to decide—Power of High Court to direct him to decide. *See* BOMBAY CITY MUNICIPAL ACT, SS. 28 (*k*) AND 29. **37 Bom L.R. 970.**

———**S. 45**—*Relief under - Other remedy open.*

If the remedy is there, an application under S. 45 of the Act is barred. The petitioner's estimate of his chances of getting what he wants by that remedy is wholly irrelevent. (*Reilly and Burn, JJ.*) INSPECTOR OF MUNICIPAL COUNCILS AND LOCAL BOARDS, MADRAS *v.* VENKATANARASIMHAM. **6 R.M. 404 = 147 I C. 1052 = 1934 M.W N. 662 = 39 L.W. 45 = A.I. R. 1934 Mad. 140 = 66 M.L.J. 233.**

———**S. 45**—*Relief under—Refusal—Third party's application to restrain the granting of sanction for building.*

No order can be made at the instance of a third party restraining the Municipal Commissioner from granting sanction for a proposed building, when the sanction has already been granted qualified by a condition that the building should not contravene any of the provisions of the Act. (*Beaumont, C.J. and Blackwell, J.*) BAI BASANTI BAI *v* MUNICIPAL COMMISSIONER OF BOMBAY. **I R. 1931 Bom 261 = 130 I.C. 581 = 33 Bom L.R. 31 = A.I.R. 1931 Bom. 173.**

———**S. 45**—Remedy under—Availability—Assessee failing to appeal under S. 50-A of the Income tax Act. *See* INCOME-TAX ACT, S. 50-A. **68 M L J. 227.**

———**S. 45**—*Remedy under—Availability—Relief not available under S.* 66 (3), *Income-tax Act.*

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An assessee in Sind, unlike an assessee within the jurisdiction of High Courts, has no remedy under S. 45, Specific Relief Act, even if he cannot obtain relief under S. 66 (3) of the Income-tax Act. It is, however, for the legislature to remedy this anomaly by extending the provisions of S. 45, Specific Relief Act, or by amending S. 66 (3) of the Income-tax Act so as to give him a right of reference where Commissioner refuses to state a case on fanciful and unfounded grounds. (*Milne, J.C. and Rupchand, A.J.C.*) FIRM OF KHEMCHAND RAMDAS *v* COMMISSIONER OF INCOME-TAX **26 S.L.R. 235 = I.R. 1932 Sind 58 = 136 I.C. 762 = A.I.R. 1932 Sind 1.**

———**S. 45**—*Remedy under—Availability—Remedy by way of damages open.*

The licence in respect of plaintiffs rickshaw was suspended on the ground that it was not fit for public use and he was asked to rectify the defects Instead of complying with the order the applicant came to Court and asked for an order under S. 45, Specific Relief Act, directing the Superintendant of Police to get his rickshaw repaired and to issue a licence alleging that his rickshaw was wilfully damaged by a constable of the Hackney Carriage Department under the directions of the Superintendent of Police who suspended the licence.

Held, that the application must be dismissed and that even if the allegations were true the applicant's remedy was to sue for damages. (*Ba U, J*) SUBBIAH *v.* COMMISSIONER OF POLICE, RANGOON. **I.R. 1933 Rang. 56 = 142 I.C. 841 (1) = A I R. 1933 Rang. 39.**

———**S. 45 and Land Acquisition Act, S. 18**—*Revision—Relief under S* 45, *Specific Relief Act.*

An order of the Collector refusing to make a reference under S 18, Land Acquisition Act, is a judicial act, though he is not technically a Court. But no relief under S. 45, Specific Relief Act, can be obtained outside the Chartered High Courts. Therefore the order refusing to make a reference can be revised by the High Court, (*Jack and Khundkar, JJ.*) LEAH ELIAS JOSEPH SOLOMON *v.* H. C. STORK. **61 Cal 1041 = 153 I.C. 938 = 7 R C 411 = 60 C L.J 184 = 38 C.W.N. 844 = A. I.R 1934 Cal. 758.**

———**S. 50**—*Election—Order of Election Officer—Government's order impeached—Procedure.*

Where the petitioner prayed that the High Court should be pleased to issue a writ of *certiorari* to the Election Officer and to direct the said Officer to include his name in the list of nominated candidates and then proceed to hold the election and though relief sought was nominally against the Election Officer it was in reality against the Government who had cancelled the order of the Election Officer accepting the nomination papers and further directed the exclusion of the petitioner's name from the list of valid nominations,

Held, that the prayer asked for would be suitable in a writ of mandamus but not in a writ of *certiorari*.

Held, further, that the Court could not issue a writ of mandamus against the Governor acting with ministers. Need for Government being joined as a party in such applications pointed out. (*Burn, J.*) KESAVA REDDIAR *v.* TAHSILDAR OF POLUR **I R. 1933 Mad. 206 (1) = 142 I.C. 187 = A.I.R. 1933 Mad 319.**

———**S. 53**—*Injunction sought against Railway Administration—Correctness of.*

Equity acts *in personam* and an injunction must be addressed to the defendant personally. The Secretary of State as a Corporation sole would be an individual, but neither is the N. W. Ry. Administration, Lahore, an individual, nor is the Agent of the railway an individual. That would amount only to a suit against the office of agent and not against the person or official himself.

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(*Addison, J.*) N. W. RY. ADMINISTRATION *v.* N. W. RY. UNION, LAHORE. **14 Lah 330=148 I.C 49=6 R L 493=34 P L.R. 975=A I.R. 1933 Lah. 203.**

——**S. 53**—*Insolvency of party—Suit by unsecured creditor in foreign state—Injunction restraining progress of suit—Jurisdiction.*

The insolvent was adjudicated in Calcutta but subsequently the adjudication was annulled and a scheme of composition approved. It appeared that the insolvent had certain poperties in Bikanir, which, however, was charged to the full in favour of creditors. The latter properties were not included in the composition. An unsecured creditor having sued to recover the debt contracted by the insolvent at Calcutta the insolvent applied for an injunction restraining the creditor from proceeding with the suit.

Held, that though the Court under the cirumstances of the case can make an injunction order effective, it was not necessary to pass such an order (*Rankin, C.J. and Pearson, J.*) SUMERMULL SURENA *v.* BANSILAL ABIR CHAND. **137 I.C 299=I R 1932 Cal. 298=35 C.W N. 997=A.I R. 1932 Cal. 310.**

——**S. 53**—Suit for injunction—Power to grant declaratory decree. *See* PRACTICE—RELIEF. **4 A.W. R. 1392=A.I.R. 1935 All. 106.**

——**S. 54**—*Alien — Injunction against—When granted.*

In granting an injunction against an alien, the Court acts *in personam* and it will so act only when the person against whom the relief is sought is within its reach and amenable to its jurisdiction. Where the defendant is in no way amenable to the jurisdiction of the Court or of any British Court to which the decree, if any, passed in the suit might be transferred for execution, that by itself is sufficient reason to decline jurisdiction. (*Rupchand, A J C.*) HASHIM OSMAN *v* MT. JHAPUBAI. **25 S L R. 269=I R 1931 Sind 144=134 I.C. 400=A I.R. 1931 Sind 136.**

——**S. 54**—*Arbitration proceedings—Injunction to restrain—Jurisdiction.*

Though the obaining of an entirely wrong award from an arbitrator does not inflict a legal wrong upon the person against whom the award is made and would not entitle such person to recover damages and though the general principle is clear that a plaintiff is entitled to ask for an injunction only against a legal wrong, yet where in an action the validity or existence of the contract is challenged on any ground, the Court has jurisdiction to restrain arbitration proceedings under the agreement until that question has been determined. (1895) 1 Q.B 253; 23C.W.N. 811, Ref. (*Beaumont, C.J. and Blackwell, J.*) RAMDAS KHATAU & CO *v* THE ATLAS MILLS CO., LTD. **55 Bom. 659=I R 1931 Bom 263=130 I.C. 583=33 Bom L R. 19=A.I.R. 1931 Bom. 151.**

——**S. 54**—*Form of injunction—Clear terms.*

Where, in a suit for injunction restraining the defendant from working the brick kiln on the ground that the smoke and soot emitted by the chimney of the kiln caused damage to the plaintiff's trees, the lower Court issued a perpetual injunction restraining defendant from "so working the brick kiln as to cause any nuisance to the plaintiff."

Held, that though that was the usual form in which injunctions were issued in England and in India, there is no rule of law to prevent the Court from issuing it in clearer and more definite terms where it was so possible; that as it was not disputed that there would be no damage if the height of the chimney was sufficiently raised the injunction should be issued in clearer terms by fixing the minimum height of the chimney. (*Fazl*

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Ali, J.) ELAHI BUKSH *v.* MAHASAHAY TARAK NATH GHOSH. **6 R.P. 500=148 I.C. 671=A.I.R. 1934 Pat. 306.**

——**Ss. 54 and 55**—*Injunction—Suit for—Defences to—Delay—Warning to defendant before construction—Suit after completion of building—Delay immaterial.*

It is true that where the plaintiff has not brought his suit or applied for an injunction at the earliest opportunity but has waited till the building complained of by him has been completed, a mandatory injunction will not generally be granted. Where, however, the plaintiff has given notice before the defendant's building has been completed that the defendant thereby will obstruct his easement of light or air and that he is running a risk in completing the building, the plaintiff is not disentitled from claiming an injunction in a suit brought after the completion of the building merely because he had not filed a suit or sought an interim injunction at an earlier stage. 16 Cal. 252. Expl. (English Cases Ref.) (*Page, C.J. and Das, J.*) POOZUNDAUNG BAZAAR CO., LTD. *v.* ELLEKMAN'S ARRACAN RICE AND TRADING CO., LTD. **12 Rang 200=151 I C. 193=7 R R. 51=A.I.R 1934 Rang. 144.**

——**Ss. 54 and 55** — *Mandatory injunction—Discretion—Infringement of easement right—Remedy by way of damages.*

Where a plaintiff asks for a mandatory injunction restraining the defendant from building in such a way as not to infringe his easements of light and air, the Court has a discretion and where the loss thus to be suffered by the plaintiff can be reasonably compensated by awarding damages, having regard to the circumstances Court will not grant an injunction. (*Page, C.J. and Das, J.*) LEE PAIK LEONG *v.* TAN KIN ENG. **149 I.C. 754=6 R R. 321=A.I.R. 1933 Rang. 344**

——**S. 54**—*Minor—Injunction against—Obstruction to construction of building—Minor and major defendants—Injunction against minor defendant also—Propriety.*

In an action to restrain several defendants from causing obstruction to the proposed construction of a building by the plaintiff defendant No. 1 acted as guardian of the minor. The acts and misdeeds complained against were alleged to have been done by defendant No 1 and by original defendant No. 2, the father of the minor and there was no evidence that the minor did any act or that the acts committed by original defendants Nos. 1 and 2 were done at the instance of the minor or on his behalf. The defendant No. 1 filed a written statement on behalf of the minor son of defendant No. 2 raising the same contentions as he himself raised but he subsequently gave up his defence. The lower Court thereon granted an injunction against all the defendants including the minor.

Held, an injunction was a a remedy against an individual and should be issued only in respect of acts done by him against whom it is sought to be enforced. So no injunction can be granted against the minor merely because his guardion gave up his defence. (*Patkar and Broomfield, JJ.*) RAMACHANDRA BALWANT TILAK *v.* NARASINHA CHINTAMAN. **I.R. 1931 Bom. 423=133 I C. 839=33 Bom.L.R. 590=A I.R. 1931 Bom. 466.**

——**S. 54**—*Minor — Injunction against — When granted.*

Minority *per se* is not a ground for refusing an injunction, but before an injunction can be granted against a minor, it must be shown that the acts were done by him personally or by some one on his behalf or at his instance. (1879) 12 Ch. D. 675; (1899) 1 Ch. 343; 35 Beav. 127; 31 C. 839, Ref. (*Patkar and Broomfield, JJ.*) RAMACHANDRA BALWANT TILAK *v.* NARA-

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SINHA CHINTAMAN, **I.R. 1931 Bom. 423=133 I.C. 839=33 Bom.L.R. 590=A.I.R. 1931 Bom. 466.**

———**S. 54**—*Nature of injunction—Does not run with the land—Exceptions to the rule.*

The rule that a decree for injunction does not run with the land has been deviated from in the case of legal representatives on the death of the judgment-debtor on the ground of the express provisions made by S. 50 of the C.P. Code, and in the case of transferees in virtue of S. 52, T. P. Act. (*Patkar and Baker, JJ.*) AMRITLAL VADILAL *v.* KANTI LAL **I.R. 1931 Bom. 356=133 I.C. 214=33 Bom.L.R. 266=A.I.R. 1931 Bom. 280.**

———**S. 54**—*Perpetual injunction— Granting of—Principles—Lawful act interfering with rights of others or with bad motive—Injunction restraining—Legality.*

The grant of an absolute injunction resulting in an invasion of the defendant's legitimate rights to use his own property and restrains him from enjoying his own land is wholly illegal. An act which is not unlawful in itself does not become unlawful merely because it interferes with other people's business or because the motive of the act is bad. The holding of a *mela* by the defendant on his land as a rival attraction to that held by the plaintiff on his own on identical days cannot be held to be unlawful because it may interfere with the plaintiff's *mela* or because it was held with a bad motive. It would be actionable if the defendant in so doing employed illegal means or used force, violence, intimidation or threat. He cannot, however, be restrained by an injunction from holding a *mela* in his own land in a peaceable manner. (*Mallik and M.C. Ghose, JJ.*) MAHOMED ZAHADUR RAHIM *v.* SATYENDRA NARAYAN MUKHOPADHYA. **61 Cal 543=152 I.C. 66=7 R.C. 229=59 C.L.J. 383=A.I.R. 1934 Cal 752.**

———**S. 54**—*Public thoroughfare — Permanent injunction to restrict—Permissibility.*

The public generally has the right to use a public thoroughfare and a Court is not justified in restricting that general right by the issue of any permanent injunction to any particular individual. And where religious processions are taken out under licence from the authorities it is for the authorities to impose such conditions as may be deemed necessary for the safeguarding of the public peace and the freedom of every individual to use the public thoroughfares without any improper obstruction. A.I.R. 1931 All. 341, Ref. (*Broadway, J.*) CHANDAN *v.* GHULAM RASUL SHAH. **I.R. 1933 Lah 395=144 I.C. 39=A.I.R. 1933 Lah. 344.**

———**Ss. 54 and 55**—*Relief under—Facts to be proved—Encroachment made by one of proprietors—Suit for mandatory injunction by another.*

Where an encroachment has been made by one of the proprietors into the common land and another proprietor files a suit for mandatory injunction the plaintiff should prove special damages and should take action within reasonable time; further he should show that the defendant had appropriated more area that would be allotted to him in case of partition. (*Agha Haidar, J.*) ABDUL RAHMAN KHAN *v.* DAULAT KHAN. **A.I.R. 1935 Lah 250.**

———**Ss. 54 and 55**—*Relief under—Erection of* chabutra *by one co-owner on joint land.*

Where one of the co-owners of a *kucha* sought to put up a *chabutra* which would have the effect of excluding the others from using it and the latter having sued for an injuction the other party denied there title.

Held, that it was a proper case in which an injunction should be granted restraining the erection of the *chabutra*. (*Abdul Qadir, J.*) ALI JAN *v.* MAHOMED ISMAIL. **I.R. 1931 Lah. 840=133 I.C. 872=32 P.L.R. 694=A.I.R. 1932 Lah. 89.**

———**S. 54**—*Relief under—Right to—Invasion of right or threat of invasion if necessary.*

In order to obtain relief by way of declaration and injunction there should be an infringement or denial of the right or threat of injury. The infringement or denial is a question of fact but it need not necessarily be evidenced by actual resistance followed by open rupture and quarrel. In cases of this sort, the attitude of the defendants even after the commencement of the litigation is not without force and significance. 27 All. 688; 10 I.C. 714; 27 Bom. L. R. 198; 46 I. C. 553; A.I.R. 1924 Oudh 69, Ref. to. (*Doraswami Iyer, C.J. and Rama Rao, J.*) DODDA BACHIAH *v.* PAPIAH. **9 Mys. L.J. 49.**

———**S. 54**—*Right to sue for injunction—Holding of election.*

Where in a suit for a permanent injunction restraining a corporation from proceeding with an election, the plaintiff claims to be an elected member of the corporation, but does not obtain leave to bring a representative suit, he must prove that he himself has a right enforceable by law requiring the corporation not to proceed with the election. Such a right must be personal to the plaintiff. (*Ferrers, J.C.*) ROCHIRAM A. AMESUR *v.* MUNICIPAL CORPORATION, KARACHI. **7 R.S. 67=151 I.C. 862=A.I.R. 1934 Sind 136.**

———**S. 54**—*Right to sue for—Injunction—Suit by person not owner—Proof requisite.*

Before a person who is not the owner of land can prevent another person from using the land to the same extent as himself, he must establish a right by acts of exclusive possession of a very definite nature. A miscellaneous user such as making only a temporary use of the land for occasional necessities of a house holder cannot create any title by adverse possession; a miscellaneous user of this sort is not possession at all. (*Young, J.*) MAHABIR SINGH *v.* SHEO SHANKAR SINGH. **153 I.C. 672=7 R A. 560=A.I.R. 1934 All. 883.**

———**S 54**—*Right to sue—Permanent injunction—Removal of construction on Shamilat—Special damage, if necessary.*

In a suit by the plaintiffs against the defendant for a permanent injunction to have certain constructions removed on the ground that they had been built by the defendant upon two pathways being part of the Village Shamilat of which the plaintiffs as well as the defendant are some of the owners proof of special damage is unnecessary. (*Tek Chand and Coldstream, JJ.*) QARUM *v.* DEWA SINGH. **156 I.C. 358=7 R. L. 900=35 P.L.R. 472=A.I.R 1934 Lah 701.**

———**S. 54**—*Right to sue—Threat of invasion of right—Party wall—Suit for declaration and injunction to restrain plaintiff building—Previous attempt by plaintiff to get the consent of defendant—Defendant's silence—Inference.*

The plaintiff, desirous of reconstructing a wall which belonged to him and to the defendant in common, approached the defendant for his consent both informally and also by sending him registered notice. The defendant showed hostility and did not reply to the notice. In a suit brought by the plaintiff for a declaration of his right and an injunction to restrain the defendant from obstructing the plaintiff building the wall, on objection taken as to the maintainability of the suit, it was held that the only inference from the

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attitude of the defendant was that he was unwilling to give his consent, that no more evidence of any open rupture or quarrel was necessary to entitle the plaintiff to maintain the suit and that an injunction ought to be granted to avoid future litigation. 19 C.W.N. 887, Ref. to. (*Doraswami Iyer, C.J. and Rama Rao, J.*) DODDA BACHIAH *v.* BAPIAH. **9 Mys. L.J. 49.**

———**S. 54**—*Right to sue—Village graveyard reserved for use of community—One member of community whether can sue.*

A village graveyard reserved for the use of the inhabitants of a particular community in that village cannot be said to be a trust in favour of anybody. The members of that community are only co-owners in that land and hence one of them can sue other co owners who pervert the use of the common property. A.I.R. 1925 P. C. 298, Dist. Other cases referred. (*Dalip Singh, J.*) SHAMASUDDIN KHAN *v.* ABDUL AZIZ. **I. R. 1932 Lah. 525 = 138 I C 691 = 33 P.L.R. 768 = A. I.R. 1932 Lah. 423.**

———**S. 54**—*Scope—If exhaustive—Suit for injunction by creditor against debtor—Maintainability.*

No suit for injunction can lie except under S. 54 of tae Specific Relief Act. There is no obligation on a debtor either to sell his property to pay off his debts or not to sell his property voluntarily so as to make it available for attachment and sale in execution in the event of a decree being passed against him. The obligation contemplated by S. 54 may arise from contract or independently of it. But a debtor's obligation to pay his debts is only personal and cannot give rise to an action under the section. His obligation not to sell his property arises only after attachment and not before. (*Niyogi, A.J.C.*) BALARAM *v.* KESHEO. **160 I.C 732 = 8 R.N. 197 = 18 N.L.J. 123.**

———**S. 54**—*Suit under—Competency—Defendant building on plaintiff's land.*

A suit for perpeual injunction under S. 54 of the Specific Relief Act restraining the defendant from building on the plaintiff's land and from interfering with his possession, is competent though the defendant had built two *Kothas* on the land before the institution of the suit, where the *Kothas* in question were erected very quickly and the plaintiff came into Court without any delay. A suit for possession would have been the proper remedy only if the building had been constructed and occupied by the defendant long before the suit. (*Rangi Lal, J.*) TARA CHAND *v.* MAHAIN. **153 I.C. 211 (1) = 7 R.L. 402 = 35 P.L.R. 729 = A.I.R. 1934 Lah. 851.**

———**S. 54**—*Waste of money—If an irreparable injury.*

Waste of money is not an irreparable injury and under S. 54, Specific Relief Act, an injunction is not to be given when the injury, if any, can be compensated by damages. (*Ferrers, J.C.*) ROCHIRAM A. AMESUR *v.* MUNICIPAL CORPORATION, KARACHI. **7 R.S. 67 = 151 I.C. 862 = A I.R. 1934 Sind 136.**

———**S 54 (c)**—*Injunction or damages—Discretion—Principles regulating exercise of—Difference between English and Indian law—Circumstances material for consideraion.*

In a case where the plaintiff's right of light or air has been proved or admitted to have been infringed, the English Courts have proceeded on the principle that the normal and natural relief that ought to be granted is by way of an injunction and not by awarding damages. The burden lies upon the defendant to satisfy the Court as a matter of equity that in the circumstances of any particular case the Court ought not to issue an injunction

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and on the principle that "he who seeks equity must do equity," the defendant who has acted with a reckless disregard of the plaintiff's rights has been held to be disentitled from invoking the aid of Court to award damages in lieu of injunction. The law in India is, however, different. In England, the plaintiff whose legal right has been invaded is *prima facie* entitled to an injunction. In India the Court has jurisdiction to grant an injunction in its discretion only in cases in which (*inter alia*) "the invasion is such that pecuniary compensation would not afford adequate relief." In considering the question whether an injunction ought to issue, the Courts in India are not concerned with the question if the defendant has acted in a high-handed manner or an unneighbourly spirit but only with the question whether an award of damages would or would not afford adequate relief to the plaintiff for the invasion of his rights. In connection therewith, all the circumstances of the case must be taken into consideration, not only the injury to the plaintiff, but also the amount which has been laid out by the defendant, and the Court ought to be chary of granting an injunction in cases where an injunction would be oppressive and inflict hardship upon the defendant out of all proportion to the injury to the plaintiff. (Case law discussed.) The defendants erected a five storeyed building, in spite of warning, and had admittedly infringed the prescriptive right to light and air entering through the windows in the northern wall of the plaintiffs' three storeyed building.

Held, that award of damages and not injunction was an appropriate remedy, having regard to the facts (*i*) that notwithstanding the erection, the plaintiffs' building remained substantially useful as business premises ; (*ii*) that, though the comfort and convenience in using the rooms facing north have been deleteriously affected, their business had not been in the least affected ; (*iii*) the defendants' building was a magnificent structure erected on steel framework and any re-construction will inflict upon the defendants immense expenditure out of all proportion to the extent of the injury suffered by the plaintiffs by reason of the violation of their rights. (*Page, C.J. and Das, J.*) POOZUNDAUNG BAZAAR CO., LTD. *v.* ELLERMAN'S ARRACAN RICE AND TRADING CO., LTD. **12 Rang 200 = 151 I.C. 193 = 7 R.R. 51 = A.I R. 1934 Rang 144.**

———**S. 54, Ill. (r)**—*Support—Interference with—Suit to restrain—Actual damage not necessary.*

Every landowner has a right to the support of his land in its natural state. It is not an easement ; it is a right of property. In a suit for injunction restraining the defendant from interfering with plaintiff's right of support, it is not necessary to show that the plaintiff has sustained actual damage. It is sufficient to show that the injury is imminent and certain to result from the defendant's acts. (*Mitter, J.*) TAMLUK TRADING AND MANUFACTURING CO., LTD. *v.* NABADWIP-CHANDRA NANDI. **59 Cal. 363 = I.R. 1932 Cal. 488 = 138 I.C. 667 = A.I R. 1932 Cal. 542.**

———**S. 55**—*Frame of suit—Defendants who are proprietor's building* Kothas *on cremation ground.*

Where the plaintiffs as the representatives of the Hindu inhabitants of the village sued the defendants, who were two of the proprietors, for their ejectment from the land in suit on the graund that it was part of the area reserved as a cremation ground and that the defendants had no right to build *Kothas* on the area in suit thereby infringing tne plaintiffs' rights.

Held that technically speaking, the plaintiffs' suit for ejectment of the defendants who were the village proprietors, was not properly framed and that the suit

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ought to have been for a mandatory injunction asking the Court to demolish the recently erected *Kothas* and that that object could easily be attained either by amending the plaint or giving the proper relief to the plaintiffs although it was not specially asked for. (*Agha Haidar, J.*) NAND RAM *v.* JAI CHAND. **153 I C. 968=7 R.L. 483=36 P.L.R. 253=A I.R. 1934 Lah. 1009.**

——**S 55**—*Relief under—Apprehension of damage—Trees overhanging crops*

When there is a reasonable apprehension of damage to crops by the overhanging of trees on neighbouring land, the owner of the crops is entitled to an injunction to compel the owner of the trees to cut the overhanging branches. (*Butler, J.*) PUTRAYA *v* KISHNA GOTA. **40 L.W. 639=152 I C. 579=1934 M W.N 1188=7 R.M 255=A.I.R. 1935 Mad. 31=67 M L.J. 442.**

——**S. 55**—*Right to relief under—Delay in suing, if can bar.*

Where the defendant builds on the wall which is the exclusive property of the plaintiff and which is known to the defendant to be the plaintiff's exclusive property, the defendant by his action commits trespass on the wall of the plaintiff and the trespass continues and will continue to be committed as long as the wall of the defendant is not removed. Therefore the plaintiff is entitled to the issue of a mandatory injunction ordering the defendant to demolish the portion built on the wall and it cannot be held that the plaintiff has lost his right to get the wall of the defendant, which has been built on the top of his own wall demolished, simply by delaying the institution of the suit for a few months. (*Abdul Rashid, J.*) MT. BHAGWANTI *v.* MOHAN SINGH. **A. I.R. 1934 Lah. 847.**

——**S. 55**—*Right to relief under—Delay in suing, if can bar.*

The grant of a mandatory injunction is an equitable relief which it is discretionary with the Court to grant or to refuse. Ordinarily a great deal of delay in the institution of the suit would disentitle the plaintiff to the grant of a mandatory injunction. However the question as to whether there has been unreasonable delay in the institution of the suit depends on the circumstances of each particular case. (*Abdul Rashid, J.*) MT. BHAGWANTI *v.* MOHAN SINGH. **A.I.R. 1934 Lah. 847.**

——**S. 55**—*Right to sue—Representative suit—Special damages, if necessary.*

Where land had been reserved many years ago for a specified purpose, namely, for burning the dead, it is not open to the defendants who are proprietors to divert it to any other use by building *Kothas* and thus reducing its area. The plaintiff as representatives of the Hindu inhabitants of the village can sue for a mandatory injunction asking the Court to demolish the *Kothas*. No question of special damage arises in a case of this description and it is no defence that the plaintiffs would not be prejudiced in any way while burning their dead because the land on which the *Kothas* stand is only a small portion out of the whole plot. (*Agha Haidar, J.*) NAND RAM *v.* JAI CHAND. **153 I.C. 968=7 R.L. 483=36 P.L.R 253=A.I.R. 1934 Lah. 1009.**

——**S. 56**—*Damages or injunction—Right to.*

Damages and injunction are two remedies alternative in character given in respect of the same wrong, *viz.*, an infraction of the legal right by way of easement; and such an infraction takes place only when the deprivation is such as to amount to a nuisance. (*Pandrang Row, J.*) BHUSHANAM *v.* UMAPATHI MUDALIAR. **159 I. C. 888=8 R M 575=A.I R 1935 Mad. 870.**

——**S. 56**—*Monetary relief adequate—Refusal.*

SPECIFIC RELIEF ACT (1877), S. 56.

Where equally efficacious relief can be obtained by monetary compensation, injunction should not be granted. (*Ferrers, J.C. and Rupchand, A J C.*) MORUMAL *v.* GOBINDRAM. **I R. 1933 Sind 191=144 I.C. 452=27 S L R 41=A.I.R. 1933 Sind 176.**

——**S 56**—*Relief under—Discretion of Court.*

Under the Law in India declarations and injunctions are discretionary forms of specific relief and under S 56, Specific Relief Act, the Court may refuse to grant an injunction if the plaintiff has by acquiescence or other conduct disentitled himself to such relief. (*Sir John Wallis.*) HUKUM CHAND *v.* MAHARAJ BAHADUR SINGH. **60 I.A 313=12 Pat 681=35 Bom L R 990=58 C.L J. 56=14 Pat.L T 559=38 L W 306=1933 M W N 882=1933 A L J. 1325=I R. 1933 P. C. 187=144 I C. 346=37 C.W N 1021=A.I.R. 1933 P.C. 193=65 M L.J. 163 (P C.).**

——**S 56**—*Right to relief under—Want of diligence—If fatal.*

Want of diligence or lack of prompt action on the part of the plaintiff is fatal to the relief of injunction claimed by him against an alleged encroachment. (*Addison and Din Mohammad, JJ.*) JAI NARAIN *v.* MUNICIPAL COMMITTEE, DELHI. **157 I.C. 966=8 R.L. 164=37 P.L.R. 160.**

——**S. 56**—*Scope.*

S. 56 refers only to permanent injunction, temporary being governed by O 39, C. P. Code. (*Lort Williams, J.*) A. MILTON & CO *v* OJHA AUTOMOBILE ENGINEERING COMPANY. **57 Cal. 1280=I R. 1931 Cal. 380=130 I C 252=A.I.R. 1931 Cal. 279**

——**S. 56**—*Scope and applicability—Temporary injunction.*

S. 56, Specific Relief Act, relates to permanent injunction and cannot be made directly to apply to a temporary injunction which is governed by the provisions of O. 39, C P. CODE (*Kendall, J*) RAGHUBAR DAYAL MISRA *v.* SHANKAR LAL. **152 I.C 98=7 R A. 257=A.I.R. 1934 All. 876.**

——**56 (a)**—*Bar under section—Scope.*

The plaintiff obtained possession of property under a decree and defendant filed an application under O. 21, R. 100, C. P. Code. The plaintiff filed a declaratory suit with the prayer for perpetual injunction of proceedings under under O. 21, R. 100.

Held, that S. 56 (*a*) was not a bar as there was a multiplicity of proceedings. (*Kulwant Sahay and Khaja Mohammad Noor, JJ*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727=149 I.C 809=6 R.P. 652=14 Pat.L.T. 258=A. I.R. 1933 Pat 250.**

——**S. 56 (a) and (i)**—*Injunction to restrain execution sale—If can be granted.*

Where the plaintiff's property, to which his rights have been established, is attempted to be wrongfully sold in execution, he has a right to restrain it by an injunction, since the result of allowing the sale to go on would be a multiplicity of proceedings in future between him and the would-be purchaser. The principle enunciated in Cl. (*i*) of S. 56 of the Specific Relief Act cannot be applied to such a case, because there is no principle or precedent which compels a person whose interests are not at all affected by a decree and against whom that decree is not binding to satisfy that decree. He cannot be made to stop the sale by depositing the decree amount. (*Nasim Ali, J*) KUMAR PRATIVA NATH ROY *v.* BENODE BEHARI GHOSE **162 I.C. 296=8 R.C. 588=61 C.L J 75=A.I R. 1936 Cal. 181.**

——**S 56 (b)**—*Applicability—Proceedings pending before same Court.*

SPECIFIC RELIEF ACT (1877), S. 56.

Where two proceedings are pending in the same Court between the same parties Cl. (*b*) of S. 56 has no application and the Court can always regulate its own proceedings as the prohibition under Cl. (*b*) operates only in respect of Courts which are not subordinate in the sense that they are co-ordinate or superior and not in respect of the Court itself which must always be taken to be competent to regulate its own proceedings. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat 727=149 I.C. 809=6 R P. 652=14 Pat.L.T. 258=A.I.R. 1933 Pat. 250.**

———**S. 56 (b)**—*Applicability—Proceedings pending in Court of higher grade.*

S. 56 (*b*) of the Specific Relief Act bars a suit for an injunction seeking to stay proceedings in a Court not subordinate to that from which the injunction is sought. (*Zia-ul-Hasan, J.*) EHSAN BEG *v.* RAHMAT ALI. **152 I.C 798=7 R O 247=11 O.W.N 1376=A.I.R. 1935 Oudh 47.**

———**S. 56 (b)**—*Scope.*

S. 56 (*b*) contemplates injunctions directed to the Court itself and does not prevent any Court from making an order *in personam* forbidding an individual from prosecuting proceedings in another Court. (*Lort Williams, J.*) A. MILTON & CO. *v.* OJHA AUTO MOBILE ENGINEERING COMPANY. **57 Cal. 1280=I. R. 1931 Cal. 380=130 I.C. 252=A.I.R. 1931 Cal. 279.**

———**S. 56 (b)**—*Suit for declaration and injunction—Declaration only, if can be granted.*

Where a person files a declaratory suit with a prayer for perpetual injunction he can be granted a declaration if his case is true even though he is not entitled to an injunction (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RADHA MADHAB JIU THAKUR *v.* RAJENDRA PRASAD BOSE. **12 Pat. 727=149 I.C 809=6 R.P 652=14 Pat.L.T. 258=A.I.R. 1933 Pat. 250.**

———**S. 56 (f)**—*Applicability—Temporary injunction in case under Copyright Act.*

In a case of infringement of copyright the application for temporary injunction is governed by S. 6 of the Copyright Act and not by S. 56 (*f*) of the Specific Relief Act. (*Tapp, J.*) KARTAR SINGH *v.* LADHA SINGH. **I.R. 1931 Lah. 634=132 I.C. 586=A.I.R. 1931 Lah. 624.**

———**Ss. 56 (f) and 21 (b)**—Contract to employ people—Breach of—Injunction to prevent. *See* SPECIFIC RELIEF ACT, SS. 21 (*b*) AND 56-F. **14 Lah. 330=34 P.L.R. 975=A.I.R. 1933 Lah. 203.**

———**S. 56 (g) and (i)**—*Applicability—Light and air—Interference—Right to injunction.*

Where it had been established on facts that the construction of a wall adjoining *P's* house by the adjoining owner would not amount to a nuisance and the reduction in the quantity of light and air that would be available to *P* could be compensated by way of damages.

Held, that S. 56 (*i*) and (*g*), Specific Relief Act, applied and that *P* was not entitled to the injunction prayed for. A.I.R. 1934 Rang. 144, Foll. (*Pandurang Row, J.*) BHUSHANAM *v.* UMAPATHI MUDALIAR. **159 I.C. 888—8 R.M. 575=A I.R. 1935 Mad. 870.**

———**S. 56 (i)**—*Encroachment of* shamilat *land—Suit for mandatory injunction when maintainable.*

A suit was instituted by some of the proprietors of a village for a mandatory injunction on the allegation that the defendants had constructed *khurlis* and other buildings on *shamilat* land used as a passage for all the village proprietors. The trial Court found that encroachment had been made recently but it was not clear from the judgment whether they were on the land the whole of which was used as a passage,

Held, that the suit in that form could be maintained only if the encroachment was entirely on the passage, and that otherwise the plaintiff must sue for possession (*Jai Lal, J.*) SANTU *v.* NARAIN SINGH. **132 I.C. 199=A.I.R. 1931 Lah. 494.**

———**S. 56 (k)**—*Scope.*

An injunction cannot be granted where the applicant has no personal interest in the matter. (*Addison, J.*) N. W. RY. ADMINISTRATION *v.* N. W. RY. UNION, LAHORE. **14 Lah. 330=148 I.C. 49=6 R.L. 493=34 P L.R. 975=A.I R. 1933 Lah. 203.**

SPES SUCCESSIONIS—MEANING OF. *See* HINDU LAW—WILL. **59 Cal. 859=A I R. 1932 Cal. 600.**

STAMP—Affidavit filed in criminal case—Stamps upon it should be Court fee stamps, not non-judicial stamps. *See* EVIDENCE—ADMISSIBILITY. **58 Cal. 1211.**

———Document admitted as acknowledgment—Appeal—Question whether document is promissory note *See* STAMP ACT, S. 35. **57 Mad. 783=A.I.R. 1934 Mad. 500=66 M.L.J. 703.**

———**STAMP ACT (II OF 1899)**—*Kabin-nama—Stamp, if necessary.*

A Kabin-nama, pure and simple, does not require any stamp (*Agha Haidar, J.*) MT. MIRAJ BEGAM *v.* SETH RAM PARSHAD & SONS. **A.I.R 1935 Lah. 122.**

———*Stamp duty—Determination of—Evidence dehors instrument—Court, if can consider.*

The stamp duty payable upon an instrument must be determined by referring to the terms of the document and the Court is not entitled to take into consideration evidence dehors the instrument itself. (*Page, C.J., Mya Bu and Mosely, JJ.*) C. R. M. M. L. A CHETTYAR FIRM, *In re.* **13 Rang. 613=157 I.C. 538=8 R R. 99=A.I.R. 1935 Rang. 243 (S B.).**

———*Strict construction.*

The Stamp Act being a fiscal enactment, its provisions should as far as possible be construed in favour of the subject. Art. 57, Stamp Act, construed. (*Hasan, C.J., Raza* and *Bisheshwar Nath, JJ.*) BOARD OF REVENUE *v.* LALTA BAKHSH SINGH. **6 Luck 601=I R 1931 Oudh 241=132 I C. 225=14 O.L.J. 224=8 O.W.N. 116=A.I.R 1931 Oudh 99.**

———**S. 2 (5)**—"*Bond*"—*Date of payment need not be stated.*

It is no part of the definition of "bond" that the date of payment should be stated (*Gruer, A. J. C.*) CHHAGANLAL *v.* EMPEROR. **31 N.L.R. 108=153 I. C. 952=7 R.N. 150=36 Cr.L.J. 493=1934 Cr.C. 1298=A I R 1934 Nag. 261.**

———**S. 2 (5)**—*Bond—Definition not exhaustive.*

Per *Sulaiman, A.J.*C.—The definition of 'bond' in S. 2 (5) is not exhaustive. (*Sulaiman, A C.J., Mukerji and Boys, JJ.*) RAJ BALAMGIR, *In the matter of.* **I. R. 1931 All 605=133 I C. 157=1931 A.L.J. 608=A I R 1931 All. 392 (F B.).**

———**S. 2 (5)**—*Bond and acknowledgment—Distinction between—Acknowledgment — Promise to pay if included.*

There is a clear distinction between an "acknowledgment" and a "bond" as defined in the Stamp Act, and if a 'promise to pay" is imported into an "acknowledgment" the distinction between the two will practically disappear when the ackowledgment is attested. A promise to pay cannot be deemd to be included in an acknowledgment for the purpose of the Stamp Act.

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A.I.R. 1919 Nag. 141 and 22 Cal. 757, Ref. (*Bhide, J.*) JAGANNATH *v.* MT. CHAULI. **I.R. 1933 Lah. 208 = 142 I.C. 535 = 34 P L.R. 417 = A.I.R. 1933 Lah. 271.**

———**S. 2 (5) (b)**—*Account books—Balance in account books signed and attested—Obligation to pay expressed—If constitutes bond.*

Mere signing of a balance in account books, even if it is attested does not necessarily make such instrument a bond. Even if the obligation to pay is implied, it does not do so. But where words are added showing an obligation to pay, the matter becomes different. Where a 'ruju' and a 'chitti' were executed on the same day and the ruju was an acknowledgment of debt by signing a balance in creditor's account books and it expressed an obligation to pay principal and interest and was not payable to order or bearer and the chitti was attested,

Held, that the 'ruju' and 'chitti' formed one instrument of bond within S. 2 (5) (*b*) and was chargeable as such. (*Gruer, A J C.*) CHHAGANLAL *v.* EMPEROR. **31 N.L R. 108 = 153 I C. 952 = 7 R N. 150 = 36 Cr.L. J. 493 = 1934 Cr.C. 1298 = A I.R. 1934 Nag. 261.**

———**S. 2 (5) (b)**—Applicability—Hundi not payable to bearer or order—Stamp payable on bond. *See* DEED—CONSTRUCTION—BOND OR HUNDI. **32 P.L R. 753.**

———**S. 2 (10)**—Agreement in writing allotting shares in consideration of transfer of business—Agreement even if in writing is not a conveyance. *See* COMPANIES ACT, S. 104. **15 Lah. 509 = A.I.R. 1934 Lah. 533 (S.B.).**

———**S. 2 (10)**—*Agreement to sell—Parties avoiding execution of conveyance—Duty payable—Agreement, not amounting to conveyance.*

If, after entering into a contract to sell, the parties in spite of the risk that either party may resile from the contract, refrain from getting an actual deed of conveyance prepared they can successfully evade the payment of higher duty. If the parties choose to be satisfied with a mere contract for sale, without an actual deed of sale, stamp deed payable on a conveyance cannot be demanded. The vendor company entered into an agreement on 26th January, 1921, to sell all their business undertakings and assets including goodwill, freehold hereditaments, etc., with effect from 1st January, 1920 The agreement recited that the purchase shall be completed on such date as shall be mutually arranged. After execution of this document a sale deed was executed by the vendors in respect of the immovable property but no deed of transfer was executed as regards the goodwill, and movable property. The agreement deed was stamped as agreement deed and bore 8 annas stamp only.

Held, that the agreement deed did not amount to a conveyance but was merely a contract to sell although the parties intended that when completed it should take effect from 1st January, 1920. It was therefore properly stamped. *Commissioners of Inland Revenue* v. *Angus & Co.*, (1889) Q.B.D. 579, Rel. on; 20 Bom. 432, Dist. (*Sulaiman, Banerji and King, JJ.*) SWADESHI COTTON MILLS COMPANY, LTD., *In re.* **I.R. 1932 All. 322 (2) = 137 I.C. 337 = 1932 A.L.J. 394 = A.I R. 1932 All. 291 (S.B).**

———**S. 2 (10)**—*'Conveyance"—Contract constituting allottee's title consisting of agreement to transfer property in future—Companies Act, S.* 104.

An actual transfer of property is an essential feature of a "conveyance." A contract "constituting the title of the allottee" consisting merely of an agreement to transfer property in the future cannot be treated as a "conveyance." (*Addison, Jai Lal and Bhide, JJ.*) BHOLA RAM AND SONS *v.* EMPEROR. **15 Lah. 501 = 150 I C. 781 (2) = 7 R.L. 24 = 36 P.L.R. 9 = 1934 Cr.C. 835 = A I R. 1934 Lah. 530 (S B.).**

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———**S 2 (10)**—*Mortgage by deposit of title-deeds—Confirmatory letter—Whether requires stamp.*

A confirmatory letter with reference to a mortgage by deposit of title deeds does not amount to a conveyance so as to require stamp or registration. (*Rupchand Bilaram, A J.C.*) TAVABALI *v.* PARPATIBAI. **26 S. L.R. 29 = I.R. 1932 Sind 106 = 139 I.C. 95 = A.I.R. 1932 Sind 73.**

———**S. 2 (11)**—Pro note duly stamped—Loss or removal of stamp—Document admissible. *See* STAMP ACT, S. 35—CONSTRUCTION. **1934 A.L.J. 1202 = A. I.R. 1934 All. 388.**

———**Ss. 2 (11) and 12**—*Stamp not cancelled—Admissibility of document.*

Where in a promissory note out of four stamps only, three were cancelled and one was not cancelled.

Held, the document was inadmissible. A.I.R. 1929 Rang. 270, Rel. on. (*Harrison and Addison, JJ.*) KHAZAN SHAH *v.* ATTA ULLAH. **6 I.R. (Lah.) 61 = 145 I C 154 = 34 P L R. 1052 = A.I.R. 1933 Lah. 148 (2).**

———**S. 2 (15)**—*Decree for partition—Failure to fix judicial stamp—Power of executing Court to refuse execution.*

Where a partition decree is not drawn up on judicial stamp paper, there is no decree at all and the executing Court can refuse execution. The fact that in such a case the party has mistakenly furnished Court fee stamp and the Court mistakenly permitted the decree to be drawn up is immaterial. (*Dalip Singh, J.*) DILBAGH RAI *v.* MT. TEKA DEVI. **I.R. 1932 Lah 157 = 135 I.C. 685 = 33 P L.R. 343 = A.I.R. 1932 Lah. 249.**

———**S. 2 (15) and Sch. I, Art. 45**—*Decree for partition—Preliminary decree defining share—Not final order and not chargeable.*

In a suit for partition and making over of certain fraction of the estate to the plaintiff, the decree stating that plaintiff is entitled to a certain fraction does not divide the property in severalty and therefore is not required to be stamped under S. 2 (15) read with Sch. I. Art. 45. To make the order chargeable with stamp duty, it must effect an actual division by metes and bounds of the property. The decree which states that the plaintiff is entitled to a fraction is only a preliminary decree, and the suit remains pending until actual division has been effected. Proceedings instituted for dividing the property by metes and bounds cannot therefore be deemed to be execution proceedings. 29 Bom. 366; 32 Cal. 483 and 35 Mad. 26, Foll. (*Baguley, J.*) MAUNG CHIT SAI *v.* MAUNG THEIN. **I.R 1932 Rang. 200 = 139 I.C. 673 = A.I R. 1932 Rang. 120.**

———**S. 2 (15) and Sch. I A (as amended in Madras)**—*Instrument of partition—Agreement to effect future partition.*

A partition list which does not itself effect any division but is merely an agreement for effecting a future partition on terms agreed is not an instrument of partition within the meaning of S. 2 (15) and is liable to stamp duty as an agreement under Sch. I-A, Art. 4. (*Pandalai, J.*) GANGAIYA *v.* CHINA LINGAIYA. **6 I.R. (Mad.) 88 (1) = 145 I.C. 529 (2) = A.I R. 1933 Mad. 162.**

———**S. 2 (15) and Art. 45**—*"Instrument of partition"—Compromise decree in partition suit.*

A decree reciting "a razinama" made by consent of parties in a partition suit and allotting specific properties to the several parties and further directing other parties to deliver possession falls within S. 2 (15) and is charge-

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able with stamp duty under Art. 45 of Sch. I as a final order affecting partition. (*Raza, Bisheshwar Nath and Smith JJ.*) MUZAFFAR HUSSAIN *v.* SHARAFAT HUSAIN. **9 Luck. 270 = 6 I.R. (Oudh) 144 = 146 I. C. 506 (1) = 10 O.W.N. 1222 = A.I.R. 1933 Oudh 562 (F.B.).**

———**S. 2 (15)**—*Instrument of partition—Construction—Description as co owners, if necessary.*

Under S. 2 (15) the parties need not be really co-owners in eye of law. Still if they purport to be co-owners and if the document is executed in that capacity, it would come within the definition of partition. The very fact of the reference to properties as those in which the parties have certain shares indicates that they purport at least to deal with them as co-owners. Even if the description as co-owners is not actually found in a document it is still open to the Court to find on proper construction of the terms thereof whether the parties purport to be co owners of the property or not. (*Sundaram Chetty and Pakenham Walsh, JJ.*) VENKATAPPA NAIDU *v.* MUSAL NAIDU. **150 I.C 119 = 6 R M 700 = 39 L.W. 157 = A.I.R. 1934 Mad. 204.**

———**S. 2 (16) (b)** —*Lease – Agreement to occupy portion of railway land for construction of petroleum installation signed by both parties—Restrictions on mode of enjoyment and against sub letting—Agreement terminable by short notice—License or Lease—Stamp duty.*

An agreement was executed on a blank paper and signed by the Railway Company and the Burmah Shell Oil Company who was called the licensee. The licensee was to have the temporary use or occupation of a plot of land for constructing and maintaining a petroleum installation; the specifications for the construction were subject, however, to the approval of the Railway. The Oil Company should allow free access at all times to the authorized officers of the Railway and was bound to obey any directions for repair or reconstruction. The rent was payable in advance; local cesses and taxes were to be paid by the Oil Company. The licensee had no power to transfer or sub-let. The agreement could be put an end to by 3 months' notice or in the event of breach of any stipulation, by a week's notice. The agreement further provided that nothing therein contained should be construed to create a tenancy in favour of the Oil Company, that the Railway would have full power to direct from time to time the mode in which the liberties and licenses should be exercised by the Oil Company and that the Oil Company should indemnify the Railway against all claims demands and damages. The question was if the agreement should be stamped as a "lease" or if it was only a license.

Held, that the nomenclature used by the parties was by no means conclusive of the question, that so long as the transaction remained in force and was not terminated, the Oil Company had for the time being exclusive possession and enjoyment of the land, and as such was not a mere license within the scope of S. 52 of the Easements Act, that S. 2 (16) (*b*) of the Stamp Act contemplated as much a composite agreement signed by both the lessor and lessee as an unilateral agreement signed by the lessee only, and that the document was a lease within the definition of that term under S. 2 (16) (*b*) and so chargeable as such under Sch. I, Art. 35 (*a*) (*iv*) of the Stamp Act. 48 Mad. 368, Dist. (*Sulaiman, C J., Mukerji and King, JJ.*) BURMAH SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD., *In the matter of*. **55 All 874 = 6 I.R. (All.) 145 = 145 I.C. 674 = 1933 A.L.J. 749 = A.I.R. 1933 All 735 (F.B.).**

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———**S. 2 (17) and Art. 40**—*Applicability—Consent decree creating charge—Property not subject of suit—Liability to stamp duty.*

A consent decree creating a charge on immovable property which is not the subject matter of the suit does not require to be stamped under the Stamp Act. (*Beaumont, C.J., Broomfield and Wadia, JJ.*) SHARAN BASAPPA *v.* SANGANBASAPPA. **59 Bom. 469 = 156 I.C 960 = 8 R.B. 40 = 37 Bom.L.R. 346 = A.I.R. 1935 Bom. 256.**

———**S. 2 (17)**—*Applicability—Deed stating result of partnership account—Party under obligation to pay agreeing to hold property on behalf of other person—Effect—Document as one of mortgage.*

A document in Gujrati executed in favour of one *V* by his partner *G*, after stating that the accounts between the parties had been examined by an arbitrator, went on to state that a sum of Rs. 1,12,500 had been found to be due to *V*. This amount the executant *G* promised to pay as soon as his movable and immovable properties situated in Calcutta and its suburbs could be sold. In the paragraph which followed, the executant said: "I have lands and estates in Kankurgachi, Belur, Maniktola, Manharpuker and Puri, etc Suits are pending in respect of some of them, as there are disputes in connexion with documents relating thereto. Some of the disputes are settled and the rest will be settled in a short time. And for selling these lands and estates, I have in my possession their title-deeds. When they are sold, I will pay in full anyhow your dues within four years. Till then as a security I pledge to you all these properties and the properties of my share in the company. The documents thereof which I hold are to be deemed to be held on your behalf. After paying your debts I can make any other disposal. I pass the writing to that effect".

Held, whether the word "pledge" was a correct translation of the vernacular word or not, the document had got to be taken as a whole and taking the document as a whole, there could be no doubt that the document did amount to a transfer by way of assurance or mortgage.

Held further, that the mortgage attached to the property which was specified, that is to say which was ascertained or ascertainable on reference to the title-deeds mention of which is to be found in the document; in other words, the mortgage attached to the property which could be ascertained with reasonable certainty and the deed was therefore liable to duty under S. 2 (17). (*C. C. Ghose, A C.J., Pearson and Mukerji, JJ.*) VERAJ. LAL MULJEE *v.* SECRETARY OF STATE. **134 I.C. 1269 = I.R. 1932 Cal. 53 = A.I.R. 1931 Cal. 732 (S.B.)**

———**S. 2 (21) and Sch. I, Art. 48 (b)**—*Power of attorney—Vakalat to Advocate in Presidency Small Cause Court—Stamp duty.*

A vakalatnama executed by a client to his Advocate to be used in the Bombay Presidency Small Cause Court is a power-of-attorney as defined in S. 2 (21) of the Stamp Act and is chargeable with a stamp duty of Rupee one under Art. 48 (*b*) of Sch. I of the Act, as applied to Bombay. (*Murphy and Divatia, JJ.*) HORMUSJI *v.* NANA. **58 Bom. 597 = 151 I.C. 709 = 7 R.B. 74 = 36 Bom.L.R. 658 = A.I.R. 1934 Bom. 299.**

———**S. 2 (22)**—Promissory note or acknowledgment —Document held to be mere acknowledgment. *See* DEED—CONSTRUCTION —ACKNOWLEDGMENT OR PROMISSORY NOTE. **1931 A.L.J. 230 = A.I.R. 1931 All. 302.**

———**S. 2 (22)**—"*Promissory note*"—*What constitutes —Agreement to repay money withdrawn from Court—Test for determining nature of document.*

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S. 2 (22) extends the definition of "promissory note" as given in the Negotiable Instruments Act in certain ways but it does not do away with one essential characteristic of a promissory note that it must contain a promise to pay to some person or persons or to their order or to the bearer of the note. A document was in the following terms: "A sum of Rs. 17,000 has been in Civil Court deposited to your credit to the account of the suit. To day I have withdrawn that amount on furnishing security. We shall repay to you the said sum together with interest thereon at the rate of 6 per cent. per annum from this day as soon as you settle the High Court affairs. If it shall be ordered by the Court that the aforesaid amount should be deposited in Court, we shall deposit only the said amount in Court and pay to you the amount of interest accruing thereon till the date"

Held, that the document was not a promissry note within the meaning of S. 2 (22) of the Stamp Act

Per *Cornish, J.*—In deciding whether a document is a promissory note, the question is what is the dominant or the substantial effect of the instrument. And in the determination of the question two tests are applicable, namely, whether it was the intention of the parties, that the instrument should be a promissory note, and whether the document was a promissory note in the common acceptation of the term by businessmen. (*Reilly and Cornish, JJ.*) VENKATARATNAM *v.* BUTCHAYYA. **I R 1933 Mad. 197=142 I.C. 121=1933 M W N. 210=37 L.W. 260=A.I.R. 1933 Mad. 306=64 M L J. 204.**

———**Ss. 2 (23), 3 and Sch. I, Art. 53**—*Cash memo. containing warranty—If a receipt.*

The terms of the document in question were as follows: "No. 3478, Cash memo. the Indo-Burma Watch Co., 497, Dalhousie Street, Rangoon, 8th June, 1933. One Sil E and C 834, Water proof pad Rs. 34. No. 3,24,161. Total Rs 34.

Watch Warranty.—The above article is guaranteed to keep good time for a period of two years unless over wound, broken or given to other repairers.

(Sign) R.R.D."

Held that initials at the foot of the document related solely to the alleged warranty and that the document *qua* receipt had not been executed and was not liable to duty.

Held, further, that even assuming that the document had been duly executed within S. 3, it was not a receipt within S. 2 (23) of the Act. (Case law referred.) (*Page, C.J., Das and Sen, JJ.*) FINANCIAL COMMISSIONER, BURMA *v.* INDO-BURMA WATCH CO., RANGOON. **12 Rang. 174=6 R.R. 260=148 I C. 886=A.I.R. 1934 Rang. 49 (2) (S.B.).**

———**Ss. 2 (23) and 62**—"*Receipt*"—*Acknowledgment of batta by witness.*

The definition of "receipt" in S. 2 (23) is applicable only to instruments executed by the payee in favour of the payer and not to acknowledgments of payment made to a third person. A memorandum which signed by the witness to intimate to the Court that he has received the diet money to which he was entitled under the rules and which filed in Court, is not a "receipt" or an acknowledgment made to the payee and does not require stamp. (*Bisheshwar Nath and Kisch, JJ.*) EMPEROR *v.* MAHIPAL SINGH. **8 Luck. 164=I R 1932 Oudh 398=140 I.C. 192=33 Cr.L J. 925=9 O.W.N. 852=1933 Cr C. 91=A.I.R. 1933 Oudh 51.**

———**S. 2 (24)**—*Wakf* "alalaulad wal khandan"—*Nature.*

Held, that a document which purported to be wakf *alalaulad wal khandan* was a deed of settlement within the meaning of S. 2 (24). (*Smith, J.*) EMPEROR *v.* AHMAD ZAMAN KHAN. **6 I R. (Oudh) 143=146 I C 559=10 O.W N 997=35 Cr L.J. 83=1933 Cr. C. 1392 (2)=A I R. 1933 Oudh 461.**

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———**S. 3 and Sch. I, Art. 12**—*Decree in terms of award—Stamp duty payable.*

A decree of Court in the terms of an award is not an instrument chargeable with stamp duty. (*Irving, F.C.*) REFERENCE UNDER S. 56 (2) OF THE STAMP ACT. **11 Lah L.T 147.**

———**S 5 and Sch. I Art. 62 (c)**—*Sale of* 29 *bonds for a lump sum by one instrument—Stamp duty payable.*

The plaintiff purchased 29 bonds from the second defendant for a lump sum of Rs. 2,425. The sum of the amounts due on the several bonds was Rs. 6,040. The sale-deed in favour of the plaintiff bore a stamp duty of Rs. 5. On a reference relating to the sufficiency of the stamp.

Held, (by the Full Bench, *Niamatullah and Bennet, JJ*, dissenting) that (*i*) S. 5 was inapplicable. The expression "distinct matters" is equivalent to "distinct transactions" and not a transaction comprising several items. No distinction can be made from the point of view of interpreting S. 5 between actional claims and other classes of property. A sale deed comprising several items of property cannot be held to comprise several "distinct matters" within the meaning of S. 5; (*ii*) under Art. 62 read with S. 13 of the General Clauses Act, the stamp duty chargeable on the deed was only Rs. 5 (*Mukerji, Ag C.J., King, Niamatullah, Bennet and Iqbal Ahmad, JJ.*) RAM SARUP *v.* JOTI. **55 All. 468=I.R. 1933 All. 273=143 I.C 486=1933 A.L.J. 427=A.I.R 1933 All. 321 (F.B.).**

———**S. 6**—*Deed both lease and mortgage—Stamp to be used.*

Where a deed is to be taken both as a lease and as a mortgage, it must bear a stamp leviable in the case of a mortgage, which requires a highter stamp duty. (*Sundaram Chetty and Pandrang Row, JJ.*) GNANADESIKAM PILLAI *v* ANTONY. **58 Mad. 75=155 I.C. 838=7 R M. 618=40 L.W. 246=A.I.R. 1934 Mad. 458=67 M.L.J 455.**

———**S. 6**—Effect—Right of election under S. 17, Negotiable Instruments Act—No modification by S. 6, Stamp Act. *See* NEGOTIABLE INSTRUMENTS ACT, S. 6. **A I.R. 1932 Mad. 765=63 M.L.J. 548.**

———**S. 9**—*Notification of Exemption, Cl. 85—Scope—Land acquired by State Railway from Trustees of the Port of Bombay in exchange for Government lands—Exemption from stamp duty.*

The Secretary of State on behalf of the G. I. P. Railway conveyed lands worth about Rs. 89 lakhs to the Trustees of the Port of Bombay who in turn transferred lands worth about 86 lakhs and paid Rs. 3 lakhs in cash. The lands conveyed by the Trustees of the Port of Bombay were required for purposes of the Railway; the question being raised whether the instrument of exchange required to be stamped,

Held, that (1) the exemption contained in Cl. 85 of the Notification of Exemption was intended to bring in all exchanges between any person and Government where the land was being acquired by Government for public purposes; (2) the land acquired for purposes of user in connection with the railway owned by the Government which can be used for strategic as well as for commercial purposes was acquired for public purposes; (3) the expression "private person" was used in contradistinction to an "official person" or to a Government Servant and included the Trustees of the Port of Bombay; (4) though the small amount, *viz.*, Rs. 3 lakhs, was paid in cash for equality of exchange

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having regard to the relative value of the land, the anSaction was clearly an exchange and not a sale which fell within the Notification of Exemption. (*Beaumont, C. J. and Divatia, J.*) STAMP ACT (1899), *In the matter of.* **58 Bom. 437=151 I.C. 911=7 R B 94= 36 Bom L R. 467=A I R. 1934 Bom. 231.**

———**Ss 12 and 2 (11)**—*Admissibility of document—Stamp not cancelled.*

Where in a promissory note out of four stamps only three were cancelled and one was not cancelled,

Held, the document was inadmissible. A. I. R, 1929 Rang 270, Rel. on. (*Harrison and Addison JJ.*) KHAZAN SHAH *v.* ATTA ULLAH. **6 I.R. (Lah.) 61= 145 I C. 154=34 P.L R 1052=A.I.R. 1933 Lah. 148 (2).**

———**S. 12**—*Cancellation—What amounts to.*

Crossing a stamp by drawing a line and signing on the second adjacent stamp is not cancellation of the first stamp within the meaning of S. 12 of the Stamp Act. (*Ba U, J.*) U KYAW *v.* HARI DUTT. **153 I.C. 531 =7 R R. 222=A I.R. 1934 Rang. 364**

———**S. 12**—*Object—One of several stamps not cancelled—Effect.*

The principle underlying S. 12 is that the possibility of a stamp affixed to an instrument being used again should be precluded. Where a promissory note had four one anna adhesive stamps affixed to it and one of them was not in any way cancelled.

Held, that the note was insufficiently stamped. (*Shadi Lal, C. J. and Rangi Lal, J.*) SOHAM LAL NIHAL CHAND *v.* RACHUNATH SINGH. **153 I C. 1076=7 R.L 507=37 P.L R 494=A.I R. 1934 Lah. 606.**

———**S. 12 (3)**—*Effective cancellation—Test.*

Where it is possible to use stamp a second time, in spite of the one line that is drawn across it, the stamp is not cancelled in the effectual manner required by S. 12 (3). A.I.R. 1920 Lah. 374, Rel. on. (*Addison and Sale, JJ.*) ALLAH BAKHSH *v.* DOST MOHAMMAD. **161 I.C. 487=8 R.L 760=A.I R. 1935 Lah 716.**

———**S. 13**—*Decree not drawn on non-judicial stamp —Subsequent annexing of such stamp—Defacement and entry of cause title and names of parties—If validates decree.*

A decree which is not drawn up on a non-judicial stamped paper is invaild and incapable of execution; but when by order of Court which passed the decree, a non-judicial stamped paper is supplied by the decree holder and annexed to the original decree and defaced, the names of the parties, and the cause title being put down on it, the decree is validated with retrospective effect from the date when it was originally drawn up. (*Mukerji and S. K. Ghose, JJ.*) JOGESH CHANDRA BANDOPADHYA *v.* MOHINI MOHAN GHOSE. **154 I.C 458= 7 R C. 452=38 C.W.N. 1118=A.I.R. 1935 Cal. 125.**

———**S. 19**—*Applicability—Suit on foreign promissory note—Admissibility without stamp.*

S. 19 of the Stamp Act only requires a foreign promissory note to be stamped before it is presented for acceptance for payment, etc. It does not apply when the instrument is not so presented or endorsed or transferred or otherwise negotiated. The section does not make the instrument inadmissible in a suit filed on it by the promisee against the maker. (*Rupchand, A. J. C.*) GANGA RAM SHEWARAM *v* MALLIK NUR AHMED. **28 S.L.R. 266=153 I.C. 635=7 R.S. 140=A.I.R. 1935 Sind 48.**

———**S. 24 and Art. 23**—*Conveyance in consideration of specified portion of debt and waiver of remainder—Assessment of stamp duty.*

The charging words in Art. 23 "where the amount or value of the consideration for such conveyance as set forth therein" do not mean that Revenue Authorities

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must have regard only to what the parties to the instrument have elected to state the consideration to be, but that the duty must be assessed upon the amount oy value of the consideration for the transfer as disclosed upon an examination of the terms of the instrument as a whole. Where a deed of conveyance relates that a certain property is transferred in consideration of part of a debt owed by the debtor-transferor and the balance of the debt is expressly mentioned to be waived, stamp duty is payable under S. 24 of the Stamp Act on the whole of the debt including the waived portion, as it is manifest that the agreement to release the balance of the debt forms part of the consideration passing to the transferor for executing the conveyance. (*Page, C. J. Mya Bu and Mosely, JJ.*) THE FINANCIAL COMMISSIONER BURMA *v.* C. R. M. M. L A. CHETTIAR FIRM. **13 Rang. 613=157 I.C. 538=8 R.R. 99=A.I. R. 1935 Rang. 243 (S B.).**

———**S 25**—*Applicability—Assignment by lessee for fixed sum of money—Transfer of liability for annuity to landlord—Stamp on annuity.*

Where lessee sold all his rights and liabilities under a permanent lease to another for a fixed sum of money and the liabilities so transferred to the assignee included the payment of an annuity to the landlord, the rent or annuity to which the corpus of sale is subject cannot be regarded as the consideration for the transfer by way of assignment and S. 25 has no application thereto. 24 B. 257, Foll. (*Beaumont, C J., Madgavkar and Baker, JJ.*) PUNAMCHAND LALLUBHAI DOSHI, *In re.* **I.R. 1931 Bom. 114=128 I C. 898=32 Bom.L.R. 1447= A.I R. 1931 Bom. 1.**

———**S. 28 (3)**—Scope—Sale by Official Assignee in insolvency—Purchaser at—Sale by latter to another—Right to demand conveyance direct in favour of sub purchaser. *See* T. P. ACT, S. 55 (1) (*d*). **37 Bom.L. R. 440=A I.R. 1935 Bom. 340.**

———**S 30**—*Applicability—Lease executed to satisfy a debt—Receipt, if necessary.*

S. 30 has no application where immovable property exceeding Rs. 20 in value is made over by a debtor to a creditor in satisfaction of a pre existing liability. Where the liability under the promissory notes is extinguished by the execution by the debtor of a registered lease of his immovable property in favour of the creditor, the latter is not bound under S. 30 to pass any receipt for the satisfaction of the debts due on the promissory notes. (*Subhedar, A. J. C.*) EMPEROR *v.* SUKHDEO. **28 N.L R. 216=I.R. 1932 Nag. 145=34 Cr. L J 31=140 I C. 397=1932 Cr.C. 907=A.I.R. 1932 Nag. 172.**

———**S. 32**—*Certificate of Collector under—Finality of.*

Where the Collector, under S. 32 of the Stamp Act, treats a document as being of a particular character, and levies duty on it as such, his decision is final and cannot be challenged in a Court of law, except under S. 57 of the Stamp Act on reference by the Chief Controlling Revenue Authority. (*Rupchand, A J.C.*) GANGA RAM SHEWARAM *v.* MALLIK NUR AHMED. **153 I. C. 635=7 R S. 140=28 S.L R. 266=A.I.R. 1935 Sind 48.**

———**S. 33**—*Application of—Copy of document insufficiently stamped attached to plaint.*

Where a copy of an entry not properly stamped was attached to a plaint and the suit was compromised at the first hearing and there was nothing to show that the original entry was ever produced or came before the Court, S. 33 of the Stamp Act had no application. (*Coldstream, Dalip Singh and Currie, JJ.*) MUNSHI RAM *v.* HARNAM SINGH. **151 I.C. 708=7 R.L. 196 =36 P.L.R. 1=A.I.R. 1934 Lah. 637 (1) (F.B.).**

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——**S 33**—*Production of document—Illegal demand—Action under S 33—Legality.*

It is not sufficient for the purposes of S. 33 that the document should somehow be produced or come before a public officer. It is essential that it should be produced or come before him "in the performance of his functions" and a mere production in compliance with an illegal demand will not confer authority on him to take action under S. 33 (*Tek Chand, Abdul Qadir and Bhide, JJ.*) THAKAR DAS *v.* EMPEROR. **13 Lah 745=I R 1932 Lah. 530=138 I.C. 758=33 P.L.R. 762=A I.R 1932 Lah. 495 (F.B.).**

——**S. 35**—*Acknowledgment unstamped—Admissibility of.*

The defendant borrowed a certain sum from the plaintiff and signed a memorandum in these terms: "Signed by R. S. Rs. 250 cash have been taken Besides this nothing else is due from me." This document did not bear any stamp.

Held, that the inference that there was an implied acknowledgment on the part of the defendant that the sum then taken, *viz.*, Rs. 250, did remain due from the defendant, was perfectly justifiable, that the document was intended to supply evidence on the debt, and that it being unstampted was inadmissible. 15 All. 56; 27 All. 84; 28 All. 436 and A I.R. 1923 All. 297, Dist. and Expl. (*Kendall, J.*) BINDESARI PRASAD *v.* RAM TAPESHA SINGH. **6 I.R. (All.) 367=146 I C. 882=1933 A L J. 897=A.I.R. 1933 All. 577.**

——**S. 35 and Sch. I, Art. 1**—Acknowledgment unstamped—Admissibility. *See* STAMP ACT, SCH. I, ART. 1 AND S. 35. **A.I.R. 1934 Nag. 273.**

——**S. 35**—*Admission of document—Duty of Court to levy full penalty.*

When a Civil Court admits a document in evidence under S. 35, Stamp Act, on payment of deficiency in stamp duty and penalty, it must first exact the full amount of the penalty. (*Irving, F.C.*) FAQIR AHMAD *v.* EMPEROR. **13 Lah L T. 32.**

——**Ss 35 and 36**—*Admission by lower Court—Document insufficiently stamped—Interference by appellate Court.*

Under S. 35, Stamp Act, an instrument not duly stamped cannot be admitted in any evidence for any purpose whatever, but when once it is admitted by a Court, though wrongly, the appellate Court is debarred under S 36 of the Act from interfering in the matter. (*Tapp, J.*) RUP CHAND *v.* BALI RAM. **I.R 1933 Lah. 146=141 I.C. 569=34 P.L.R. 501=A.I.R 1933 Lah. 240 (1).**

——**Ss. 35 and 36**—*Admission by lower Court—Document not admissible even on payment of penalty—If can be questioned at a later stage in revision.*

Where a document like a promissory note, which is insufficiently stamped and which cannot be admitted in evidence under S. 35 of the Stamp Act even on payment of duty and penalty, is admitted in evidence by the lower Court, it cannot be called in question in revision on the ground that it is not duly stamped. S. 61 gives the Court to which appeals lie a jurisdiction to deal with the case of instruments which should not have been admitted in evidence without the payment of duty and penalty under S. 35 or without the payment of a higher duty than those paid. It does not give such Court any jurisdiction to deal with the case of an instrument which should not have been admitted at all. (*Bennet, J.*) LAKHMI DAS *v.* LAKHO RAM. **154 I.C. 517=7 R.A. 771=1935 A.L.J. 651=1935 A.W.R. 366=A.I.R 1935 All 410.**

——**Ss. 35 and 36**—*Admission by lower Court—Interference in appeal.*

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Once a document has been admitted in evidence by the lower Court under S. 35, such admission cannot be questioned at any later stage of the same suit or proceeding on the ground that the instrument has not been duly stamped and the natural consequences of that admission which have become final must also follow. The Appellate Court cannot say that though it has been marked as an exhibit in the case, it would not look into it or pass a decree on that basis. (*Sundaram Chetty, J.*) ALAGAPPA CHETTY *v.* NARAYANAN CHETTIAR. **I R 1932 Mad 843=140 I.C 315=1932 M.W.N. 1171=36 L.W. 599=A.I R. 1932 Mad. 765=63 M.L.J. 548.**

——**S 35**—*Application of—Document insufficiently stamped attached to plaint—Decree on terms of compromise.*

Where a copy of an entry not properly stamped was attached to a plaint and the suit was compromised at the first hearing and a decree was passed on terms of the compromise without the copy or the original entry having been put in evidence, the document could not be held to have been acted upon and the provisions of S. 35 of the Stamp Act had no application. (*Coldstream, Dalip Singh and Currie, JJ.*) MUNSHI RAM *v.* HARNAM SINGH. **151 I.C 708=7 R.L 196=36 P. L.R. 1=A.I.R. 1934 Lah 637 (1) (F.B.).**

——**S 35**—*Construction—Admitted in "evidence"—Handing document for refreshing witness's memory.*

Merely handing a document to a witness for the purpose of refreshing his memory does not make the document a piece of evidence in the case. (*Varma and Saunders, JJ.*) TRIBHUAN OJHA *v.* RAMCHANDRA DUBE. **14 Pat 233=158 I.C 962=8 R.P. 228=16 Pat L.T. 475=A.I.R. 1935 Pat. 375.**

——**S. 35**—*Construction and scope—Improperly stamped promissory note—Admissibility for collateral purposes.*

Although a document is inadmissible for the purpose of proving a claim, it may be admissible for a collateral purpose, that is, a purpose foreign and not subordinate to that for which the document was executed. A promissory note which is not properly stamped is not only inadmissible for the purpose of proving the debt covered by it, but cannot also be used to support the statement of the plaintiff's witnesses who come to prove the debt. (*Varma and Saunders, JJ.*) TRIBHUAN OJHA *v.* RAMCHANDRA DUBE **14 Pat. 233=158 I C. 962=8 R P. 228=16 Pat L T. 475=A.I R. 1935 Pat. 375.**

——**S 35**—*Construction 'Is'—Pro-note duly executed—Subsequent removal of stamp—Procedure.*

It is necessary to interpret the word "is" in S. 35 so as to include "has been" Consequently where a promissory note is duly stamped at the time of the execution, the document is admissible in evidence if at the time it is tendered in evidence it is no longer "duly stamped" by reason of the loss or removal of the stamp (*Kendall, J.*) MT. MEWA KUNWARI *v.* BOUREV. **56 All. 781=149 I.C. 90=6 R.A. 851=1934 A.L.J. 1202=A.I.R. 1934 All. 388.**

——**S. 35**—*Foreign promissory note not stamped as much—Admissibility.*

A foreign promissory note which is not stamped as such is not excluded by S 35 of the Stamp Act from being admitted in evidence in a suit filed by the promisee against the maker of the note for recovery of the amount due on the instrument. (*Rupchand, A.J.C.*) GANGA RAM SHEWARAM *v.* MALLIK NUR AHMED. **153 I.C. 635=7 R.S. 140=28 S.L.R. 266=A.I.R. 1935 Sind 48.**

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———**S. 35**—*Instrument not duly stamped—Suit on—Suit, if can be decreed if defendant admits contents.*

S. 35, Stamp Act, does not merely say that an instrument which is not duly stamped shall not be admitted in evidence, but it also says that the instrument shall not be acted upon for any purpose, and the passing of a decree upon such an instrument is "acting" upon it. Consequently when a suit is brought upon an instrument which is not duly stamped, the admission of the contents of the instrument made by the defendant does not avail the plaintiff and a decree cannot be based on such an instrument. (*Mosely and Dunkley, JJ.*) MAUNG PO CHEIN *v.* C. R. V. V. V. CHETTYAR FIRM. **158 I.C. 533 = 8 R. R. 177 = A.I.R. 1935 Rang. 282.**

———**S. 35**—*Penalty—Procedure by Court—Opportunity to pay penalty in second appeal.*

Where a document is held to be an insufficiently stamped agreement the trial Court should record at the earlier stages a finding on that issue and give an opportunity to the party to pay the penalty. Where such opportunity was denied, *held*, that the penalty could be allowed to be paid in second appeal. (*Tek Chand and Agha Haidar, JJ.*) NARAIN DATT *v.* KIRPAKISHEN. **13 Lah. 516 = I.R. 1933 Lah. 48 = 140 I.C. 869 = 33 P.L.R. 809 = A I.R. 1932 Lah. 616.**

———**S. 35**—*Penalty — Unstamped document—Payment of stamp duty and penalty—Duty of Court to afford opportunity.*

When the Court overrules the contention of a party that a document does not require any stamp duty, it should afford him an opportunity to pay the stamp duty and penalty before refusing to admit it in evidence. There is no authority for the proposition that the requisite stamp duty and penalty should be tendered at the time of the production of the document (*Jai Lal and Rangi Lal, JJ.*) THAKAR DAS RUPCHAND *v.* SHER AHMAD IQBAL AHMAD. **153 I.C. 233 = 7 R.L. 409 — 35 P.L.R. 687 = A.I.R. 1934 Lah. 730.**

———**S. 35**—*Promissory note insufficiently stamped—Admissibility in evidence as acknowledgment.*

If a promissory note is insufficiently stamped, it is inadmissible in evidence not only as a promissory note but also as an acknowledgment. (*Staples, A.J.C.*) GOVINDA *v.* HARI BHAOO. **147 I.C. 981 = 6 R. N. 150 = 16 N L J. 241 = A.I R. 1933 Nag. 391.**

———**Ss. 35 and 36**—Promissory note insufficiently stamped—Admissibility of evidence—Waiver of objection in trial Court—No interference by appellate Court. *See* PROMISSORY NOTE—INSUFFICIENCY OF STAMPS. **53 C L.J. 254 = A.I.R. 1931 Cal. 480.**

———**S. 35**—*Promissory note insufficiently stamped—Inadmissibility in evidence—Decree on basis of note—Whether can be passed.*

Where a promissory note is inadmissible in evidence as being insufficiently stamped, a decree cannot be passed on the note even if the defendant admits liability thereunder. (*Shadi Lal, C. J. and Rangi Lal, J.*) SOHAN LAL NIHAL CHAND *v* RAGHU NATH SINGH. **153 I.C. 1076 = 7 R.L. 507 = 37 P.L.R. 494 = A.I.R. 1934 Lah. 606.**

———**S. 35**—Promissory note insufficiently stamped—Instrument including a promissory note and acknowledgment of prior liability—Promissory note inadmissible—Instrument admissible to prove acknowledgment. *See* PROMISSORY NOTE—INSUFFICIENCY OF STAMP. **36 L.W. 918 = A.I.R. 1933 Mad. 251 (2).**

———**S. 35**—Promissory note insufficiently stamped—Other evidence of loan—Admissibility. *See* PROMISSORY NOTE—ORIGINAL CAUSE OF ACTION. **29 Nag. L.R. 131 = A.I.R. 1933 Nag. 57 (2).**

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———**S. 35, Proviso (a) and Sch. I, Art. 5**—*Acknowledgment amounting to fresh agreement—Admissibility on payment of penalty.*

When the previous loans were not time-barred, a sarkhat was executed by the debtor for the money lent before; but it was stated at money lent had been paid in cash, and the debtor agreed to pay interest. It was not stamped.

Held, that though it might have been an acknowledgment, it was the intention of the parties that the sarkhat should be a fresh transaction; that the document could be treated as an agreement which was admissible in evidence on payment of the stamp duty and penalty. (*Mukerji and Bennet, JJ.*) RAM PRASAD *v.* SHEO BAKHSH. **54 All. 761 = I.R. 1933 All. 136 = 142 I.C. 688 = A.I.R. 1933 All. 179.**

[D. 31 N.L.R. 105 (107).]

———**S. 85, Proviso (a)**—*Bond—Admissibility on payment of penalty—"Just exceptions"—Meaning of.*

S. 35, Proviso (*a*) is mandatory and a document (*e.g.*, a bond) which is not one of the documents excepted in that proviso must be admitted in evidence on payment of duty and penalty. The omission to get a document, which is executed out of British India and stamped with a foreign stamp, stamped in British India is not any "just exception" contemplated by the proviso. The phrase is somewhat vague, and means "some valid objection to the document being stamped other than a mere objection under the Stamp Act, *e.g.*, some fraud or intention on the part of the holder of the document to evade the duty or again the document itself might be a suspicious one, or a forged one in the opinion of the Court". (*Staples, A.J.C.*) KEDARMAL RAGHUNATH *v.* RATIRAM. **31 N.L.R. 162 = 156 I.C. 213 = 7 R.N. 228 = A.I R. 1935 Nag. 54.**

———**S. 35, Proviso (a)**—*Document not admissible under—Inadmissibility in evidence.*

If a document could not be admitted under proviso (*a*) to S. 35, then it would be totally inadmissible in evidence. Where a document is inadmissible in evidence, a plaintiff can sue upon the original claim if in time, but the document cannot be admitted in evidence in support of the claim. (*Staples, A.J.C.*) KEDARMAL RAGHUNATH *v.* RATIRAM. **31 N.L.R. 162 = 156 I.C. 213 = 7 R.N. 228 = A.I.R. 1935 Nag. 54.**

———**S. 35, Proviso (a)**—*Promissory note in form but attested by two witnesses—Not a bond.*

A document which purports to be a promissory note in form and to be payable to order, is a promissory note even though it is attested by two witnesses and not a bond and cannot be validated according to S.35, Proviso (*a*). (*Staples, A J.C.*) GOVINDA *v.* HARI BHAOO. **16 N.L.J. 241 = 147 I.C. 981 = 6 R.N. 150 = A.I.R. 1933 Nag. 391.**

———**S. 35 Proviso (b)**—*Receipt evidencing cash advance—Omission to cancel—Admission in evidence on payment of penalty.*

Where the document in question was not an "acknowledgment of a debt" within the meaning of Art. 1 of Sch. I but was an entry purporting to be a 'receipt' of a cash advance made by the plaintiff and an one anna stamp was affixed to the same but the defendant failed to cancel the same,

Held, that the receipt would be considered to have been unstamped and could be admitted in evidence only on payment of a penalty of one rupee. (*Tek Chand, J.*) RATAN LAL *v.* DULA. **I.R. 1932 Lah. 624.**

———**S. 36**—*Admissibility by lower Court—Interference in appeal.*

Where a document is decided by the trial Court to be admissible in evidence, such admission cannot be questioned in appeal on the ground that the document has

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not complied with R. 7 of the rules made by the Government of India under S. 75, Stamp Act. (*Tek Chand and Monroe, JJ.*) HAR NARAIN SAHIB RAM *v.* BIHARI LAL CHARANJI LAL **13 Lah 800=142 I.C 729=I.R 1933 Lah. 251=34 P.L.R. 92=A.I.R. 1932 Lah. 582.**

———**Ss. 36 and 35**—Admission by lower Court—Interference in appeal. *See* STAMP ACT, SS. 35 AND 36.

———**S. 36**—*Applicability—Promissory note insufficiently stamped—Suit on—Admission of note to prove acknowledgment—Decree on basis of note—Validity.*

The words of S. 36 of the Stamp Act are perfectly general and are not restricted in their application *to such documents only* as can be received in evidence on payment of the stamp duty and penalty. It applies also to instruments which form the very basis of the claim made, and since the section lays down that the admission of the instrument cannot be called in question, it necessarily implies that the instrument must also be acted upon. In a suit on an insufficiently stamped pro note the note was allowed to be filed in evidence, the Court being of opinion that it could be relied on as an acknowledgment of liability, and on the strength of it a decree was passed. The decree having been set aside on appeal,

Held in second appeal, that the pro note once having been admitted in evidence, the original defect ceased to be a hindrance by reason of S. 36, Stamp Act, and that the decree passed on the strength of it was perfectly valid. (*Venkatasubba Rao, J.*) LAKSHMAPPA *v.* MASUD SAHIB. **152 I.C. 683=7 R.M. 270=40 L.W. 636=1934 M W.N. 974=A I R 1934 Mad. 700=67 M L J. 539.**

———**S. 36**—*Construction—"Admitted in evidence".*

"Admitted in evidence" means the act of letting the document in as part of the evidence; but it must be let in as a result of the judicial determination of the question whether it can be admitted in evidence or not for want of stamp. 6 I C. 903, Foll. An unstamped hundi exhibited before a Commissioner appointed by the Court was given only an identifying mark and no more. The Commissioner had not considered, when it was exhibited, as to its admissibility in evidence, much less was there any objection raised as to its admissibility An issue as to its admissibility was pending before the Court.

Held, that it could not be inferred in law that there was an admission of the hundi in evidence by the Commissioner within the meaning of S. 36, Stamp Act. (*Pandurang Row, J.*) ABDUL WAHAB SAHEB *v.* ANJANEYALU. **159 I C. 23=8 R M. 468=1935 M. W.N. 1041=42 L W. 574=A.I R 1935 Mad 888.**

———**S. 36**—*Construction—"Admitted in evidence"—Attention of Court not drawn to insufficient stamp till after case was closed—Document not to be deemed as admitted.*

A document cannot be deemed to have been admitted in evidence until the Judge has applied his mind to a consideration of its admissibility. Where the attention of the Judge was not drawn till after the case was closed to the fact that the suit promissory note was insufficiently stamped and the note had only been endorsed by the clerk but not signed or initialled, it cannot be deemed to have been admitted and the Court is not precluded from dismissing the suit. 53 Mad. 137, Ref. (*Curgenven, J.*) SADASIVIER *v.* MEENAKSHI IYER. **147 I C 369=6 R.M 335 (1)=A.I.R. 1933 Mad. 781=38 L.W. 582=65 M.L.J. 673.**

———**S. 36**—*Construction—Admitted in evidence—Document put on record but not admitted as result of judicial determination—Stamp insufficient—Power of Court to reject.*

An insufficiently stamped document was filed and some evidence was taken on it and it was marked as an exhibit for reference, but the endorsement required by O. 13, R. 4 was not made. The next day the opposite party objected to the admissibility of the document and the objection was upheld.

Held, that there was no judicial determination of the question of the admissibility of the document till the objection was raised and the words "admitted in evidence" in S. 36, Stamp Act, must be taken to mean letting in as a part of the evidence as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. Hence the Court could reject the document under O. 13, R. 3. 6 I.C. 903, Expl; 16 I.C. 834; A.I.R 1919 Nag. 141 and A.I R 1929 Mad. 522, Rel. on. (*Bhide, J.*) JAGAN NATH *v.* MT. CHAULI **I R. 1933 Lah. 208=142 I.C. 535=34 P.L.R. 417=A I R 1933 Lah. 271.**

———**S. 36**—*Document admitted in evidence—Not to be subsequently challenged.*

When once a document is admitted in evidence under O. 13, R. 4, its admission cannot be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. And the trial Court has no more authority to review its own order admitting the document in evidence than an appellate Court would have to reverse that order on appeal. A.I R. 1929 Mad 622; A.I.R. 1933 Pat. 404 and A I.R. 1930 Cal. 577, Ref. (*Kendall, J.*) NOOR AHMAD *v.* IRSHAD GHANS. **56 All 131=147 I C. 205=6 R. A. 425=A.I R. 1933 All 821**

———**S. 36**—*Documents admitted by lower Courts—Admissibility, if can be questioned in second appeal*

Where documents have been admitted in evidence in the lower Courts, their admissibility cannot be questioned on second appeal on the ground that they are not duly stamped (*Dunkley, J.*) VELLAYAPPA CHETTYAR *v.* SOMASUNDARAM CHETTYAR **13 Rang 322=156 I.C. 589=8 R.R. 28=A I.R. 1935 Rang 160.**

———**S. 36**—*Document admitted by lower Court—Effect.*

Where a document has in fact been admitted by the lower Court, S 36 applies and the admission cannot be questioned on ground of want of stamp except as is mentioned in S. 61 of the Act. (*Sulaiman and Young, JJ.*) RATAN SINGH *v.* PIRBHU DAYAL. **131 I.C. 135=1931 A.L.J. 230=A I.R. 1931 All. 302.**

———**S. 36**—*Partition decree—Omission to affix judicial stamp—Effect.*

Where a partition decree is not drawn up on judicial stamp paper there is no decree at all and the executing Court can refuse execution. The fact that in such a case the party has mistakenly furnished Court fee stamp and the Court mistakenly permitted the decree to be drawn up is immaterial. (*Dalip Singh, J.*) DILBAGH RAI *v.* MT. TEKA DEVI. **I.R 1932 Lah. 157=135 I.C. 685=33 P.L.R. 343=A.I.R. 1932 Lah. 249.**

———**S 36**—Promissory note insufficiently stamped—Suit on—Defendant admitting execution and pleading discharge—Procedure—Discovery of the insufficiency of stamp—Admissibility of document cannot be re opened. *See* EVIDENCE ACT, S. 58—PROMISSORY NOTE. **A. I.R. 1932 Mad. 693=63 M L J. 303.**

———**S. 36**—*Promissory note insufficiently stamped—Trial Court receiving document as acknowledgment—Appeal—Re-opening stamp question.*

When a document has once been admitted in evidence overruling the plea raised on the ground of insufficiency

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of stamp, the question regarding stamp cannot once again be raised in the appellate Court. Where a document understamped for a promissory note was admitted by the District Munsif as an acknowledgment and the suit was decreed on the basis of a prior agreement of loan, but the Dittrict Judge disbelieved the story of the prior agreement and dismissed the suit on the ground that it was an ordinary promissory note transaction.

Held, that though the lower Court was justified in dismissing the suit on the ground that the prior contract was not proved, it could not reopen the question if the document was properly stamped. The document having once been admitted in evidence it was not open to the appellate Court to say that it would like to interpret the document as a promissory note, but is precluded from doing so because it is not properly stamped. A party cannot plead an antecedent debt and acknowledgment and then complain of gross irregularity because he is not given a decree on the promissory note (*Jackson, J.*) VENKATAKRISHNA REDDI *v.* BATCHA REDDI. **57 Mad 783=151 I.C. 241=7 R M 117=1934 M.W N 474=39 L.W. 582=A.I.R. 1934 Mad. 500=66 M.L J. 703.**

———**S. 36**—*Scope—Document admitted by trial Court as bond—Interference in appeal.*

S. 36 is not confined to instruments admitted in the course of evidence in support of subsidiary points arising in the case but applies also to documents forming the foundation for the suit Where the lower Court has definitely found that the suit note is a bond and has admitted it in evidence levying penalty on it, the question whether the suit note is a promissory note or bond does not necessarily arise for decision in appeal. Even assuming that the suit document is a promissory note, it having been admitted in evidence by the payment of a penalty, its admission cannot thereafter be called in question. (*Madhavan Nair and Jackson, JJ.*) VENKATA REDDI *v.* HUSSAIN SETTI. **57 Mad. 779 =150 I.C 51=6 R.M. 676=39 L W 632=1934 M. W N. 637=A.I.R 1934 Mad. 383=66 M L J. 709.**

[F. 57 M. 783 (790).]

———**S. 36**—*Scope—It covers admission otherwise than by Court.*

The words of S. 36 Stamp Act, do not contemplate admission in evidence except by the Court itself. (*Pandurang Rao, J.*) ABDUL WAHAB SAHEB *v.* ANJANEVALU. **159 I.C. 23=8 R.M. 468=1935 M.W.N. 1041=42 L W. 574=A I.R. 1935 Mad. 888.**

———**Ss. 36 and 12**—Suit on promissory note—Admission of execution—Objection as to stamp—Re-opening. *See* EVIDENCE ACT, S. 58. **63 M L J 303.**

———**S. 37**—*Government of India Stamp Rules, R. 18—Promissory note stamped with quarter anna postage stamps—Validation by Collector.*

A promissory note stamped with quarter anna postage stamps is a document bearing stamps of improper description and can be validated by the Collector under R. 18 of the Government of India Stamp Rules. 19 Bom. L. R. 947, Ref. (*Beasley, C J., Ramesam and Cornish, JJ.*) MARTIS *v.* CUTHBERT D'SOUZA. **55 Mad 627 =I R. 1932 Mad. 354=137 I.C. 26=1932 M W.N. 121=35 L W. 518=A.I.R. 1932 Mad. 390=62 M.L.J 538 (F.B.).**

———**S. 38**—*Bond executed outside British India—Presentation in British Indian Court after 10 months—Power of Court to impound.*

Where a bond executed outside British India is presented in a British Indian Court nearly 10 months after its execution, it cannot be stamped in British India under the provisions of S. 18, nor can it be endorsed by the Collector under S. 32. But the Court must impound

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the document under proviso (*a*) to S. 35 and send it to the Collector under S. 38 of the Stamp Act. (*Staples, A.J.C.*) KEDARMAL RAGHUNATH *v.* RATIRAM. **31 N L.R. 162=156 I.C. 213=7 R N. 228=A I.R. 1935 Nag. 54.**

———**Ss. 38 (1) and 61**—*Scope—Final authority as to stamp duty and penalty—Civil or Revenue Court.*

Both under Ss. 38 (1) and 61, Stamp Act, the Civil Court is the final authority as to the amount of the stamp duty, while the Revenue authorities have the final decision on the amount of penalty to be levied. (*Irving, F.C.*) FAQIR AHMED *v.* EMPEROR. **13 Lah.L.T 32.**

———**Ss 40 and 56**—*Powers of Collector.*

Where a Court is unable to determine whether the amount of duty to be paid is sufficient or not, or what duty should be paid, the Court should state the same when sending the case to the Collector. The certificate of Collector under S. 40 (1) (*a*) is final and probably an order under S. 40 (1) (*b*) is also final. It is discretionary with the Collector whether the matter should be referred to the Chief Controlling Revenue Authority. (*Staples, A.J.C.*) KEDARMAL RAGHUNATH *v.* RATIRAM **31 N.L.R. 162=156 I C. 213=7 R.N. 228=A.I.R. 1935 Nag. 54.**

———**S. 40 (1) (b)**—*Order of Collector under—Revision.*

The Chief Controlling Authority is competent to revise the order of the Collector passed under S. 40 (1) (*b*). (*Boyd, F.C.*) TARLOK NATH *v.* EMPEROR. **34 P.L R. 630.**

———**S 42 (2)**—*Applicability—Duty or penalty not levied.*

S. 42 (2) has no application to a case where no duty and penalty have been levied in respect of a document by the lower Court. (*Sundaram Chetty, J.*) ALAGAPPA CHEITY *v.* NARAYANAN CHETTIAR. **I R 1932 Mad. 843=140 I.C 315=1932 M W N. 1171=36 L.W. 599=A.I R. 1932 Mad. 765=63 M.L J 548**

———**S. 56 (2)**—*Scope—Exercise of power before stamp is paid.*

S 56 (2) confers very wide controlling powers on the Chief Controlling Revenue Authority and the power can be exercised even before the stamp duty is paid. (*Tek Chand, Abdul Qadir and Bhide, JJ.*) THAKAR DAS *v.* EMPEROR. **13 Lah 745=I R. 1932 Lah 580=138 I C 758=33 P.L.R 762=A.I.R. 1932 Lah. 495 (F B.).**

———**Ss. 57 and 61**—*Decision under S. 61 at the instance of Collector—Reference to High Court under S. 57—Competency.*

Where an order is obtained under S. 61 of Stamp Act at the instance of the Collector and no steps are taken to have it set aside, no decision given by the High Court in a reference under S. 37 can have any effect in law as the decision at the instance of the Collector is final. There is no case within the meaning of S. 57 (1) for the term 'case' in S 57 (1) refers only to a case as yet undecided by a competent authority, and the decision to be given by the High Court under sub-S. (2) must clearly be a decision on which action can be taken if thought fit. (*Monroe, Bhide and Din Mahomed, JJ.*) MUBARIK AHAD *v.* FAQIR AHMAD. **15 Lah. 762=151 I C. 458 (1)=7 R L. 134=36 P.L.R. 260=A.I.R. 1934 Lah. 666 (S B.).**

———**S. 57 (1)**—*Reference — Competency of—Case 'otherwise coming to its notice.'*

Before the Revenue authority can refer to the High Court a case 'otherwise coming to its notice,' the Revenue authority should be faced with the duty of disposing of the case, as indicated by the concluding words of S. 59. A document was brought to the Collector for his

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opinion under S. 31 of the Act. He made an order that it was chargeable under Art. 40, cl. (*b*). The parties applied to the Board of Revenue to override or interfere with that ruling and the Board made a reference to the High Court.

Held, that the reference was incompetent. The Collector did not state a case to the Board and so S. 56 (2) did not operate to impose any duty on the Board of Revenue with reference to the instrument, and as the Collector did not exercise his powers under S. 33 to impound the instrument, the Board of Revenue had no controlling power over the Collector at that stage. So the Board was not competent to make the reference. 25 M. 751, Ref. (*Rankin, C. J., C. C. Ghose and Buckland, JJ.*) W. G. DEEKS, *In re*. **59 Cal. 1171 = I.R. 1932 Cal. 671 = 140 I.C. 57 = 36 C.W.N. 502 = A.I.R. 1932 Cal. 736.**

[R. 61 C. 556 (561).]

———Ss. 60 and 61 (2)—*Applicability—Reference by appellate Court—Competency.*

An appellate Court has no power to make a reference under S. 60 of the Stamp Act. S. 60 applies only to trial Courts which may feel a doubt at the stage of admission of a document as to whether it is or it is not properly stamped, and such Court can refer the matter to the High Court. After the document has been admitted by the trial Court, if the appellate Court has any doubts about the matter and desires to take any action, the proper course is to proceed under S. 61 (2) of the Act. (*Beasley C. J., Ramesam and King, JJ.*) SOMAYYA *v.* ANJANEYULU. **156 I.C. 61 (1) = 7 R.M. 633 = 41 L.W. 278 = 1935 M.W.N. 185 = A.I.R. 1935 Mad. 382 = 68 M.L.J. 267.**

———S. 60—*Reference—Grounds.*

It is only where and when the Judge making the reference has any doubt that the matter can be referred. 11 M. 38 (F.B.), Foll. (*Harrison, Jai Lal and Bhide, JJ.*) AMAR SINGH *v.* ASA. **I.R 1932 Lah. 72 (1) = 135 I.C. 200 (1) = 33 P.L.R. 58 = A.I.R. 1932 Lah 172 (F.B.).**

———S. 61—*Applicability—Trial Court making no order with regard to stamp.*

Before the order of the trial Court regarding the sufficiency or insufficiency of the stamp can be made the subject matter of consideration by the appellate Court for the purpose of making a declaration, such an order must have real existence. An order by implication, cannot be taken into consideration by an appellate Court and cannot validly form the subject-matter of considera tion for the purpose of issuing a declaration. S. 61 has no applicability in a case where the Court of the first instance makes no order with regard to the stamp. 118 P R. 1908, Rel. on; A. I. R. 1921 Cal 613 and A. I. R. 1926 Cal. 877, Dist. (*Abdul Rashid, J.*) MIRZA FARI DUN BEG *v.* EMPEROR. **161 I.C. 484 = 8 R.L. 762 = A.I.R. 1935 Lah. 909.**

———Ss 61 and 57—Decision under S. 61 at the instance of Collector—Reference to High Court under S. 57—Competency. *See* STAMP ACT, SS. 57 AND 61. **15 Lah. 762 = 36 P.L.R. 260 = A.I.R. 1934 Lah. 666 (S.B.).**

———S. 61—*Declaration by District Judge under, when appeal lay to High Court—Liability to be set aside.*

Where on an application under para. 20, Sch. II, C.P. Code, a decree is passed by the Subordinate Judge on the basis of the award, and the District Judge makes a declaration under S. 61. Stamp Act, that the award should not have been received in evidence without levying the deficient stamp duty and penalty, it is unnecessary to set aside that declaration, on the ground the High Court alone had jurisdiction to make it as the

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appeal from the decree passed on the basis of the award lay to it. The declaration made by the District Judge can be treated as declaration made by High Court, since High Court could do it of its own motion and also because Collector would refer the matter to the High Court. (*Abdul Rashid, J.*) MIRZA FARIDUN BEG *v.* EMPEROR. **161 I.C. 484 = 8 R.L. 762 = A.I.R. 1935 Lah. 909.**

———S. 61—Document not admissible even on payment of penalty—Admission of such document—If can be questioned at a later stage. *See* STAMP ACT, SS. 35 AND 36. **1935 A.L.J. 651 = 1935 A.W.R. 366 = A. I.R. 1935 All. 410.**

———S. 61—*Order admitting a document—Duty and penalty sufficient—No de laration under S. 61.*

Where the amount of the duty and penalty paid is sufficient and the document has been properly admitted in evidence under S. 35 of the Act, no declaration in respect of that document can be made under S. 61. (*Raza and Allsop, JJ.*) JANG BAHADUR *v.* BHAGGOO. **151 I.C. 532 (1) = 7 R.O. 130 (1) = 11 O.W.N. 258 (1) = A.I.R. 1934 Oudh 344 (1).**

———S. 61—*Reference under—Procedure—Duty of Collector.*

When a case is reported under S. 61, Stamp Act, the Collector must first insist on the payment of the deficiency reported by the Civil Court, and unless he decides to move the High Court to revise the declaration made by the reporting Court, he must proceed to decide on the penalty. He may also very properly give notice that unless the deficiency is paid in a reasonable time to be fixed by him, the maximum penalty will be assessed. (*Irving, F.C.*) FAQIR AHMAD *v.* EMPEROR. **13 Lah.L.T. 32.**

———S. 61 (2)—Admission of document by trial Court —Appellate Court having doubt as to proper stamp duty —Reference under S. 60—Competency. *See* STAMP ACT, SS. 60 AND 61 (2). **68 M.L.J. 267.**

———S 62—*Instrument not duly stamped—Liability of creditor.*

A creditor has been making a regular practice of securing his loans by ruju cum chitti system, *i.e.*, by making his debtor sign a balance in his account books and chittis attested on the same day. The creditor supplied the printed form of chittis to his debtors, suffering himself to pay duty and penalty for them on prior occasions.

Held, that the creditor was well aware that execution of the documents involved loss of revenue to Government and hence it could be presumed that it was the creditor and not the debtors who prescribed this system to evade the law by taking separate 'chittis' to supplement the 'rujus' of the debtors in his account books, though generally the obligation was on the debtor to supply stamp. (*Gruer, A. J. C.*) CHHAGANLAL *v.* EMPEROR. **31 N.L.R. 108 = 153 I.C. 952 = 7 R.N. 150 = 36 Cr.L.J. 493 = 1934 Cr.C. 1298 = A.I.R. 1934 Nag. 261.**

———S. 62—*Scope—Intention — Proof—Necessity—Expediency of prosecution under.*

No fraudulent intent need be proved for a conviction under S. 62 of the Stamp Act. But the section must be read with S. 43, and no prosecution should be started when the duty and penalty have been paid, except in case of fraud. But though the duty and penalty have not been paid, if the document cannot be impounded, a prosecution under S. 62 should be compounded for payment of duty *plus* a sum which may reasonably be imposed as penalty when there is no reason to believe a fraudulent mind. (*Irving, F.C.*) NIHAL CHAND *v.* EMPEROR. **13 Lah.L.T. 18.**

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——**S. 62 (1) (b)**—*Applicability — Criminal intention, if necessary.*

S. 62 (*b*) does not require any criminal intention or intention of defrauding Government and the ignorance of law on the part of the accused does not render him immune from conviction under S. 62 (*b*) although it can be taken into account in passing sentence. (*Sulaiman, C.J. and King, J.*) RAGHUBAR DAYAL *v.* EMPEROR. **56 All. 680 = 4 A.W.R. 1573 = 1934 A.L.J. 582 = 150 I.C. 672 = 7 R.A. 15 = 35 Cr L.J. 1132 = 1934 Cr.C. 274 = A.I.R. 1934 All. 201.**

——**Ss. 62 (1) (b) and 64 (a)**—*Complaint brought under S.* 64 (a)—*Conviction under S.* 62 (1) (b)—*Duty of Court.*

Where a complaint is brought under S. 64 (*a*), before accused can be convicted under S. 62 (1) (*b*), the Magistrate must direct the attention of the accused to the fact that though the complaint was brought under S. 64 (*a*), they also stood in jeopardy under S. 62 (1) (*b*). (*Monroe, J.*) MAYA SHAH *v.* EMPEROR. **6 I.R. (Lah.) 316 = 146 I.C. 1055 = 1933 Cr C 1414 = 35 Cr.L.J. 291 = 34 P.L.R. 1072 = A.I.R. 1933 Lah 959.**

——**Ss 62 (1) (b) and 64 (a)**—*Offences distinct.*

The offences under S. 62 (1) (*b*) and S. 64 (*a*) are not respectively minor and major offences and it cannot be presumed that a sanction to prosecution under S 64 (*a*) is a sanction by implication to a prosecution under S. 62 (1) (*b*). The Collector is required by S. 43 of the Act, when instituting a prosecution under S. 62 (1) (*b*) to consider whether there has been fraud An express sanction would, no doubt, be evidence that he had considered the question. (*Monroe, J.*) MAYA SHAH *v.* EMPEROR. **6 I.R. (Lah.) 316 = 146 I.C. 1055 = 35 Cr.L J. 291 = 34 P.L.R. 1072 = 1933 Cr.C. 1414 = A. I.R. 1933 Lah. 959.**

——**Ss 62 (1) (b) and 65** — *Passing unstamped receipt—Failure to give proper receipt on demand—Nature of offence.*

The offence under S. 65 consists in not giving a properly stamped receipt when demanded. The offence under S. 62 (1) (*b*) consists in passing a receipt unstamped whether one is demanded by the payer or not. Hence where a person gives an unstamped receipt and refuses to give a stamped one even after demanding for same he commits two offences under Ss. 62 and 65 in respect of the same transaction. (*Baker, A.C.J. and Divatia, J.*) EMPEROR *v.* GIRDHARDAS. **6 I.R. (Bom.) 172 = 146 I.C. 807 = 35 Bom L.R. 981 = 35 Cr. L.J. 234 = 1933 Cr C. 1421 = A.I.R. 1933 Bom. 462.**

——**S. 62 (1) (b)**—*Reducing fine—Genuine doubt regarding stamp duty payable.*

Accused was convicted under S. 62 (1) (*b*) for not paying proper stamp duty and was fined Rs. 40. The proper duty payable in respect of the document was a matter about which genuine doubts could be entertained.

Held, that the fine should be reduced to Rs. 10. (*Smith, J.*) EMPEROR *v.* AHMAD ZAMAN KHAN. **6 I.R. (Oudh) 143 = 146 I.C. 559 = 35 Cr.L J. 83 = 10 O.W.N. 997 = 1933 Cr.C. 1392 (2) = A.I.R. 1933 Oudh 461.**

——**S. 64**—*Intention—Proof—Necessity—Presumption.*

Fraudulent intention has necessarily to be established for a conviction under S. 64. There is a strong presumption that a person will not expose himself to the penalty for fraud in a case in which he is not interested. It has also to be presumed that what is done openly is not done fraudulently. (*Irving, F.C.*) **NIHAL CHAND *v.* EMPEROR. 13 Lah.L.T. 18.**

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——**S. 64 (a)**—*Proof of intent.*

For a conviction under S. 64 (*a*) proof of intent to defraud is necessary. (*Monroe, J.*) MAYA SHAH *v.* EMPEROR. **6 I.R (Lah.) 316 = 146 I C. 1055 = 35 Cr. L.J. 291 = 34 P L.R. 1072 = 1933 Cr.C. 1414 = A.I.R. 1933 Lah. 959.**

——**S 64 (c)**—*Creditor obtaining instrument not duly stamped.*

Merely receiving an unstamped document may not amount to an offence, but when a creditor himself intentionally procures the signing of an improper entry in his own account book, he commits a substantive offence under S 62, and is punishable under S. 64 (*c*) which is not *ejusdem generis* with the other sub sections. (*Gruer, A J.C.*) CHHAGANLAL *v.* EMPEROR. **31 N L.R 108 = 153 I C. 952 = 7 R.N. 150 = 36 Cr.L.J. 493 = 1934 Cr.C. 1298 = A.I R. 1934 Nag. 261.**

——**Ss. 65 and 62 (1) (b)**—Passing unstamped receipt—Failure to give proper receipt on demand—Nature of offence. *See* STAMP ACT, SS. 62 (1) (*b*) AND 65 **35 Bom L.R. 981 = A I R. 1933 Bom. 462.**

——**Sch I. Art 1**—*Acknowledgment, if governed by article or proviso—Test*—Bahi *entry recording purchase of goods on credit—Stamp duty.*

The question, whether a particular acknowledgment falls within Art. 1, Stamp Act, or is excepted from its operation by the proviso, will depend on the wording of the document. In considering whether a document is governed by the article or the proviso it is the document as it stands and not the bargain to which it refers, which has been made chargeable to stamp duty. The duty is on the instrument and not on the transaction. If therefore a document is so worded that it expressly, or by necessary implication comes within a particular provision of the Act, it must be stamped accordingly. But the implication must arise from the phraseology used in the document, and not be a matter of legal inference or presumption. An implication of law does not involve liability to duty though it may give rise to certain legal obligations. It does not therefore follow that simply because a particular document is a good "acknowledgment" for the purpose of extending time under S. 19, Limitation Act, or that it may be basis of a suit, that it must necessarily be chargeable to duty as an agreement under the Stamp Act.

Held, an entry in a *bahi* of the seller which was merely a memorandum of a transaction of purchase of goods on credit was neither an acknowledgment of a debt within the meaning of Art. 1 nor an agreement or memorandum of an agreement within the meaning of Art. 5 (*c*) and as such did not require to be stamped. It is a voucher which a purchaser who buys on credit leaves at the shop of the seller. The fact that the entry was made in *bahi* and not on a separate piece of paper made no difference. (*Tek Chand, Talip Singh and Rangi Lal, JJ.*) NANAK CHAND *v.* FATTU. **17 Lah. 1 = 158 I C 234 = 8 R L. 196 = 38 P.L.R. 390 = A.I.R. 1935 Lah. 567 (S B).**

——**Sch I, Art. 1 and S. 35**—*Acknowledgment.*

The wording of the Stamp Act must be strictly construed and, unless the document that purports to be an acknowledgment is saved by the proviso to Art. 1, it cannot be admitted in evidence under the proviso to S. 35. For a document to be covered by the proviso to Art. 1, there must either be an express promise to pay as distinguished from the implied promise to pay, which is contained in any unconditional acknowledgment, or there must be a stipulation to pay interest or to deliver goods or other property. In the absence of any such express promise to pay or agreement to pay interest, the acknowledgment is as bare acknowledgment and, al-

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though under the general provisions of law it does imply a promise to pay, it is still an acknowledgment which should be stamped with a one anna stamp under Art. 1 and therefore, if unstamped, is inadmissible in evidence under S. 35. (*Staples, A. J. C.*). RAM CHANDRA BACHHARAJ *v.* MUKA GUJAN MAHAR. **31 N. L. R. 105=153 I.C. 255=7 R. N. 127=A.I.R. 1934 Nag. 273.**

——**Sch. I, Art. 1**—*Acknowledgment containing promise to pay.*

An acknowledgment of debt in order to incur the duty under Art. 1 must be not only an acknowledgment made to supply evidence of such debt, but must also contain no promise to pay the debt or no stipulation to pay interest or to deliver goods or other property. Where therefore a judgment-debtor in his letter asks the creditors to have full faith in him as he intends to reap his crops shortly and faithfully promises to pay the sum within three weeks, the letter is not liable to the stamp duty of one anna. (*Courtney Terrell, C. J and Luby, J.*) HABIBUL RAHMAN KHAN *v.* ANWAR KHAN. **152 I.C. 879=7 R. P. 265=A.I R. 1934 Pat. 629 (2).**

——**Sch. I, Art. 1**—*Acknowledgment—Letter not amounting to.*

A document purported to be a 'letter written by the defendant to the plaintiff firm and contained references to the dealings in question as well as to certain other transactions. The final words in the document' that the letter had been written so that it may remain as a sanad and might be of use in time of need, referred to the other transactions, and did not have any connection with the dealings in dispute.

Held, that it was not an acknowledgment within the meaning of Sch. I, Art. 1 and was admissible in evidence even though unstampted; 46 M. 948, App. (*Tek Chand, J.*) RAMJI MAL-GORDHAN DAS *v.* BELA RAM. **6 I.R. (Lah.) 306=146 I.C. 1009 (2)=35 P. L.R. 4=A.I.R. 1933 Lah. 962.**

——**Sch. I, Art. 1**—Acknowledgment and bond—Distinction between. *See* STAMP ACT, S. 2 (5). **34 P L.R. 417=A.I R. 1933 Lah 271.**

——**Sch. I, Art. 1**—Acknowledgment not stamped—Document intended to supply evidence of debt—Not admissible. *See* STAMP ACT, S. 35. **1933 A. L. J. 897=A.I.R. 1933 All. 577.**

——**Sch. I, Art. 1**—*Applicability—Acknowledgment of indebtedness after examination of accounts.*

As a result of the examination of accounts, the defendant formally acknowledged his liability in the following terms: "A sum of Rs. 250, half of which is Rs. 125, has been found due by me to *S*....on a settlement of accounts..in respect of dealings between me and him up to date. These presents are, therefore, executed to be of service in case of need." In a suit by the plaintiff on the basis of such acknowledgment,

Held, it was clearly an acknowledgment within the meaning of Art. 1, Sch. I of the Stamp Act and could be the foundation of a suit. (*Sulaiman, Ag C. J. and Niamatullah, J.*) ABDUL RAFIQ *v.* BHAJAN, **53 All. 963=I. R. 1932 All 296=137 I.C. 243=1932 A.L.J. 77=A.I.R. 1932 All 199.**

[**Cons.** 1934 A.L.J. 1185 (1187). (Case arising under Limitation Act, S. 19.) **Not. F.** 56 A. 281 (284).]

——**Sch. I, Art. 1**—Entry by debtor in creditor's accounts that amount would be paid—No acknowledgment. *See* STAMP ACT, SCH. I, ART. 5. **38 L. W. 846=146 I. C. 943.**

——**Sch. I, Art. 1**—Entry in bahi—Acknowledgment coupled with promise to pay—Stamp payable as an agreement. *See* STAMP ACT, SCH I, ART. 5. **A.I.R. 1931 Lah. 631 (1).**

STAMP ACT (1899), Sch. I, Art. 5.

——**Sch. I, Art. 1**—Entry in Bahi—Agreement stamped with one anna stamp—Admissibility on recovery of penalty. *See* STAMP ACT, SCH. I, ART. 5. **I. R. 1931 Lah. 684 (1)=132 I. C. 844 (1)=32 P. L.R. 767.**

——**Sch. I, Art. 1**—*Extract from account book containing acknowledgment of debt—Entry in book to pay interest above such acknowledgment—Stamp duty payable.*

In a suit for money, an extract from plaintiff's account book was put in as evidence. In it the defendant had written and signed in his own hand a statement that he had received a certain sum of money. Above this signed statement, there was an entry in the book to the effect that the money was to carry interest at a certain rate.

Held, that the whole of the extract from the account book cannot be considered as a single document for which the defendant was responsible, that the entry as to the interest did not profess to be a document executed by the defendant and that it was only a mere acknowledgment of debt and stamp duty was to be paid only as such. 41 All. 169 Dist. (*Mukerji, A. C. J., King and Niamatullah, JJ.*) RAM PRASAD RAM KUMAR *v.* PARSHTOAM HALWAI. **147 I.C. 212 (1)=6 R. A. 426 =1933 A.L.J. 198=A.I.R. 1933 All. 256 (F B.).**

[**D.** 1934 A.L.J 1155 (1156)]

——**Sch. I, Arts. 1 and 5**—Document styled as receipt—Declaration that money is borrowed at certain interest—Agreement and not acknowledgment. *See* STAMP ACT, SCH. I, ART. 5. **A. I. R. 1934 All. 1052.**

——**Sch. I, Art. 3**—*Document 'recording' adoption.*

The document which began by reciting the factum of adoption went on to say that no document was executed at the time or subsequently and therefore that the said document was being executed later to affirm the adoption. Then followed a recital of the consequences of the adoption and the document wound up by saying "hence this deed of adoption was executed". It also contained directions regarding the performance of the executant's obsequies, etc.

Held, that the document was one 'recording' an adoption and not a will and that it fell under Art. 3. Meaning of the word 'recording' considered. (*Harrison, Jai Lal and Bhide, JJ.*) LABH SINGH *v.* MEHR SINGH. **13 Lah. 270=I R. 1932 Lah. 65=135 I.C. 193=33 P.L.R. 585=A.I.R. 1932 Lah. 118 (F.B.).**

——**Sch. I, Art. 4**—*Document reciting change of name—Stamp duty.*

A document merely reciting that the executant has changed his name does not fall within the definition of an affidavit when it is not made formally before an attesting officer. A mere declaration, as it is, is not chargeable with stamp duty. (*Irving, F.C.*) REFERENCE UNDER STAMP ACT, S 56 (2). **12 Lah L.T. 18.**

——**Sch. I, Art. 5 and S. 35, proviso (a)**—Acknowledgment amounting to agreement—Admissibility on payment of penalty. *See* STAMP ACT, S. 35, PROVISO (*a*) AND SCH. I, ART. 5. **54 All. 761=A.I.R. 1933 All. 179.**

——**Sch. I, Arts. 5 and 23**—*'Agreement' or sale deed.*

Where a document recited that in consideration of certain debts the paddy land was delivered to the creditor, and apart from the use of the word 'agreement', in two places, it showed that the transaction had not passed the stage of a contract of sale and also contained a promise to perfect the title by executing a registered deed of conveyance.

Held, the document was an agreement falling under Art. 5 and not a deed of sale within the meaning of Art. 23. (*Maung Ba, J.*) MA THIN ZA *v.* VEERA

STAMP ACT (1899), Sch. I, Art. 5.

KALAI. **I.R. 1931 Rang. 135=131 I.C. 503=A.I.R. 1931 Rang 193 (2).**

———Sch. I Art. 5—Applicability—Agreement evidencing transaction of sale—Transaction of sale of goods—Exemption under Art. 5. *See* DEED—CONSTRUCTION—AGREEMENT. **1931 A.L.J. 608=A.I.R. 1931 All. 392 (F.B.).**

———Sch. I, Art. 5—*Document styled as receipt—Declaration that money is borrowed at certain interest.*

A document styled as a receipt but declaring that the executant has borrowed a certain sum of money at a certain rate of interest does not amount to a mere acknowledgment but is a memorandum of an agreement. (*Ntamatullah and Collister, JJ.*) *In re* SUKHDEO PRASAD. **152 I C. 41=7 R.A. 248=1934 A L J. 1155=4 A.W.R. 765=A.I.R. 1934 All. 1052.**

———Sch. I, Art. 5—*Entry in bahi—Acknowledgment coupled with agreement to pay—Stamp duty payable.*

Where an entry in a bahi purported to be an unconditional acknowledgment but also contained a promise to pay the sum mentioned.

Held, that the entry should be stamped as an agreement and where it is not so stamped, it is admissible in evidence on payment of the duty on an agreement. (*Harrison and Tek Chand, JJ.*) PAHLAD *v.* SHIB LAL. **I.R 1931 Lah. 705 (1)=132 I.C. 881 (1)=A I.R. 1931 Lah. 631 (1).**

———Sch. I, Art 5—*Entry in bahi—Agreement to pay not bare acknowledgment—Stamp payable.*

Where an entry in a bahi made after the previous accounts were gone into and the balance struck was stamped with an one anna stamp but the wording of the entry showed that it was an acknowledgment which imported a promise to pay.

Held, that the document should have borne a stamp of eight annas and was admissible on payment of the penalty prescribed by the Act. (*Harrison and Tek Chand, JJ.*) RELU MAL *v.* SHORAN. **I.R. 1931 Lah. 684 (1)=132 I C 844 (1)=32 P.L.R. 767.**

———Sch. I, Arts. 5, 1, 14 and 49—*Entry by debtor in creditor's accounts that amount would be paid—Stamp.*

An entry in the creditor's account book made by the debtor that "the sum will be paid by me immediately" is not an acknowledgment within Art. 1, since the payee is not named, it is not a promissory note and where it is not attested, it cannot be a bond. It can, however, be regarded as an agreement or a memorandum of agreement and the party may be allowed an opportunity of stamping the document correctly. 3 Bom.L.R. 699; (1903) A.W.N. 174; 8 Bom.L.R. 644 and 49 Cal. 729, Ref. (*Pakenham Walsh, J.*) KADIR MOITHIN PULAVAR *v.* PANDURANGA NAIDU. **146 I.C. 943=6 R.M. 305=38 L.W. 846=1933 M.W N 1243=A.I.R. 1934 Mad 25.**

———Sch. I, Arts 5 (c), 6 and 40—*Applicability—Form E/Revised 1926 of the Imperial Bank of India—Agreement to pawn movables.*

Form E/Revised 1926 of the Imperial Bank of India is liable to stamp duty under Art. 5 (*c*), Sch. I, and not under Art. 6 or 40, Stamp Act, as it is neither an instrument evidence an agreement relating to deposit of an instrument constituting or being evidence of the title to any property within Art. 6 (1), nor an instrument evidencing an agreement relating to the pawn or pledge of movable property within Art. 6 (2), nor can it be regarded as mortgage deed within Art. 40. Ex parte *Hubbard*, (1887) 17 Q.B D 690, Ref. (*Page, C J., Das and Mya Bu, JJ*) IMPERIAL BANK OF INDIA *In re.* **11 Rang. 145=I.R 1933 Rang. 54=142 I.C. 761=A.I. R, 1933 Rang 31 (F.B.).**

STAMP ACT (1899), Sch. I, Art. 14.

———Sch. I Art. 5 (c)—Bahi entry recording purchase of goods on credit—Stamp duty. *See* STAMP ACT, SCH. I, ART. 1. **A.I.R. 1935 Lah. 567.**

———(as amended by Burma Act II of 1932), Sch. I, Art. 5 (c)—*Instrument relating to promissory note—Stamp duty payable.*

Where the instrument referred to the delivery to the Bank of a promissory note on the terms that it shall be available as security for cash credit which the Bank had agreed to give to a borrower and the guarantor also executed an agreement as to the enforcement of the note, and the question was raised as to the stamp necessary for the instrument relating to the security of the overdraft.

Held, that the instrument fell within Art. 5 (*c*) and not Art. 6 or Art. 40 of Sch. I of the Stamp Act and was liable to stamp duty under that Article as amended by S. 7 of the Burma Act, II of 1932 (*Page, C. J., Das and Mya Bu, JJ.*) IMPERIAL BANK OF INDIA. *In re.* **11 Rang. 145=I R. 1933 Rang. 54=142 I.C. 761=A I R. 1933 Rang. 31 (F.B).**

——— Sch. I, Art. 5, Exemption (a)—*Applicability—Sale of ornaments—Entry in books of account with price.*

When the accused made a purchase of gold ornaments from a client, he got the client to make an entry in the account book giving the client's name and a description of the goods purchased and of the price paid, and got this signed by the client,

Held, that the documents were merely memoranda of the sale of goods and were exempt from stamp duty under Art. 5, Exemption (*a*), and not conveyance within Art. 23, but as the documents contained a clear acknowledgment that the price had been received by the seller they were receipts as well as memoranda of the sale of goods and should have been stamped as receipts with stamp duty of one anna each. (*Sulaiman, C J. and King, J.*) RAGHUBAR DAYAL *v.* EMPEROR. **56 All. 680=4 A.W.R. 1573=150 I.C. 672=7 R.A. 15=35 Cr.L.J. 1132=1934 A.L.J. 582=1934 Cr C. 274=A. I.R. 1934 All. 201.**

———Sch I, Art. 12—*Application to file award—Award relating to Buddhist monastery—Stamp duty*

What has to be considered is, not the value which the appellants may place on the property at the time of filing their application for the purpose of invoking the jurisdiction of the Court, but the value of the property at the time of the making of the award. When the value of the property with which the instrument in question is concerned is not stated in the instrument, its value for purpose of stamp duty must be taken to be the price which could be obtained for it on a sale in open market. Where the property concerned is a Buddhist monastery which has no value, the stamp duty payable is the minimum amount payable under Art. 12, read with Art. 15, Stamp Act, as amended by Burma Act (II of 1932), that is, two annas. (*Mya Bu and Dunkley, JJ.*) MAUNG PO TUN *v.* U. SANDIWARA. **157 I.C. 44=8 R.R. 71=A I R. 1935 Rang. 204.**

——— Sch. I, Art. 12—*Decree in terms of award—Stamp duty payable.*

A decree of Court in the terms of an award is not an instrument chargeable with stamp duty. (*Irving, F.C.*) REFERENCE UNDER S. 56 (2) OF THE STAMP ACT. **11 Lah L.T. 147.**

———Sch. I Art. 14—Entry by debtor in creditor's accounts that amount would be paid—No bond. *See* STAMP ACT, SCH. I, ART. 5. **38 L.W. 846=146 I. C. 943.**

STAMP ACT (1899), Sch. I, Art. 15.

———**Sch. I, Art. 15**—Applicability—*Ex parte* decree bySmall Cause Court—Application to set aside—Security bond—Stamp duty—Court-fee stamp of 8 annas—Sufficiency. *See* COURT FEES ACT, SCH. II, ART. 6. **68 M L.J. 466 (F.B.).**

———**Sch I, Art. 15**—Security bond under S. 55 (4), C. P. Code—Duty not chargeable under Stamp Act. *See* COURT FEES ACT, SCH. II, ART. 6. **34 P.L.R. 480.**

———**Sch. I, Art. 23**—Applicability—Ornaments sold—Entry in purchaser's account book by seller giving description of goods and price paid—Documents were memoranda of sale as well as receipts—Exempted under Art. 5, Exemption (*a*). *See* STAMP ACT, SCH. I, ART. 5 EXEMPTION (*a*). **1934 A.L.J. 582=A.I.R. 1934 All. 201.**

———**Sch. I, Art. 23**—*Conveyance in consideration of discharge of debt—Mention of less than actual amount due—Balance stated as waived—Stamp duty*

The charging words in Art. 23 "where the amount or value of the consideration for such conveyance as set forth therein" do not mean that Revenue Authorities must have regard only to what the parties to the instrument have elected to state the consideration to be, but that the duty must be assessed upon the amount or value of the consideration for the transfer as disclosed upon an examination of the terms of the instrument as a whole. Where in a conveyance of immovable property, the consideration passing to the transferor for executing the conveyance was therein stated to be a total sum of Rs. 300, made up of Rs. 250 being the total of two items of principal sum and Rs. 50 being the balance of interest arrived at by waiving Rs. 145 14 0, out of Rs. 195-14 0, the total of two items of interest,

Held, that the benefit which would accrue to the transferor as the result of duly executing the conveyance was that he would obtain in substance and effect the cancellation of the whole debt of Rs. 445-14-0 which was due from him to the transferee, and that stamp duty must be paid on that amount, as the agreement to release the balance of the debt formed part of the consideration passing to the transferor for executing the conveyance. (*Page, C.J., Mya Bu and Mosely, JJ.*) C. R. M. M. L. A. CHETTYAR FIRM, *In re*. **13 Rang 613=157 I.C. 538=8 R.R. 99=A.I.R. 1935 Rang. 243 (S.B.).**

———**Sch, I, Art. 23**—Conveyance in consideration of specified portion of debt and waiver of remainder—Assessment of stamp duty. *See* STAMP ACT, S. 24. **13 Rang. 613.**

———**Sch. I, Art. 23**—"*Conveyance*"—*Meaning of—Receipt mentioning fact of sale—Stamp duty.*

The test to determine whether a document is a conveyance is to find out whether the intention of the parties was that the document should be the sole repository and appropriate evidence of the transaction of sale. If it is so, the Court must hold it to be a conveyance. But if it merely recites a past accomplished fact, it is not a conveyance liable to be stamped or registered as such. A deed which merely acknowledges as a fact that a right is vested in a particular person is not a conveyance; it has to be shown that the right was created by the particular deed in question. A document purporting to be receipt recited that the executant had sold land to *M H*, son of *A D* and *M D*, son of *S* for Rs. 1,038 15 3 for building purposes and that out of the purchase money, Rs. 700 had been received in cash and for the balance another receipt would be passed at the time of payment. It further recited that possession had been given to the purchaser, etc.

Held, the document was only a receipt and not a conveyance under Art. 23. (*Tek Chand, Abdul Qadir and Bhide, JJ.*) MAHOMED HASHAM *v.* EMPEROR. **13 Lah. L.T 48.**

STAMP ACT (1899), Sch. I, Art. 40.

———**Sch. I, Art. 28**—*Receipt or conveyance—Document stating receipt of consideration in part and referring to sale as complete.*

Where there is nothing in a document to show that title in the property was being conveyed by the vendor to the vendee by it, on the other hand, the document refers to a sale as a completed transaction under which possession had been delivered to the vendee, and the primary object of the execution of the document appears to be to record the fact that out of the total purchase price, a portion had been received by the vendor from the vendee and to safeguard the latter against a fresh demand for that sum, rather than to create title in the vendee as owner of the land, which had been done already by an independent transaction altogether.

Held, that the document is a receipt and not a conveyance. 6 I.C. 346 and A.I.R. 1932 P. C. 55, Relied on. (*Tek Chand, Abdul Qadir and Bhide, JJ.*) MAHOMED HASHAM *v.* EMPEROR. **14 Lah. 102=I.R. 1932 Lah 572=33 P.L.R. 821=139 I.C 154=A.I.R. 1932 Lah 535 (S.B.).**

———**Sch. I, Art 35 (a) (iv)**—Lease—Agreement, if a lease or licence. *See* STAMP ACT, S 2 (16) (*b*). **55 All 874=A.I.R 1933 All. 735 (F.B.).**

———**Sch. I, Arts. 35 (a) (vi), 35 (c) and 5 (c)**—*Lease of land, buildings and appurtenances for 34 years—Covenant by lessee to pay off lessor's debt and annual rent—Property to pass to lessee at the end of period—Stamp payable.*

The U. P. Electric Supply Company entered into a Bulk Supply agreement with the Municipal Board of Lucknow by an indenture dated 5-3-1931. The Board agreed to grant a lease to the company of certain land and of an Electric Generating Station for a term of 34 years and 170 days in consideration of an annual rent of Rs. 3,000 and of the repayment by the Company of the loan borrowed by the Board from the Government in thirty five half-yearly instalments of Rs 47,500. After the whole amount was paid up, the generating station with the buildings and appurtenances would become the absolute property of the Company. There was, however, no proviso for re entry in the event of the Company failing to fulfil its obligations.

Held, that having regard to the fact that the payment of a sum of Rs. 16,62,500 was not in the nature of a price or premium for the granting of a lease but was a price to be paid for the acquisition by the company of the generating station, the document should be stamped under Art. 35 (*a*) (*vi*) and also as an agreement falling within Art. 5 (*c*) and not also on Art. 35 (*c*) as a lease. (*Buckland, A. C. J., Costello and Panckridge, JJ.*) UNITED PROVINCES ELECTRIC SUPPLY CO., LTD., *In re*. **61 Cal. 556=152 I.C 601=7 R.C. 297=38 C.W.N. 627=A.I.R. 1934 Cal 803.**

———**Sch I, Art. 35, Exemption**—*Applicability—Agricultural lease—Agreement to pay weighment dues forming part of consideration.*

An agricultural lease for a period of one year reserving an annual rent not exceeding Rs. 100 is covered by the exemption contained in Art. 35 of the Stamp Act even though an agreement for payment of weighment dues, which do not constitute rent, forms part of the consideration of the lease. (*Srivastava, J.*) BASHIR AHMAD *v.* LAL NAR SINGH PARTAB BAHADUR SINGH. **159 I.C 126=1935 R.D 544=8 R.O. 16=1935 O.W.N 1223=A.I.R. 1936 Oudh 74.**

———**Sch. I, Art 40**—Applicability—Form E/Revised Imperial Bank of India—Agreement to pawn movables—Stamp duty under Art. 5 (*c*). *See* STAMP

STAMP ACT (1899), Sch. I, Art. 40.

ACT, ARTS. 5 (*c*), 6 AND 40. **11 Rang. 145 = A.I.R. 1933 Rang. 31 (F.B.).**

———**Sch. I, Art 40**—Applicability—Mortgage bond by Receiver and sureties for due execution of office of former—Stamp duty. *See* STAMP ACT, ART. 57. **39 C.W.N. 1046 = A.I.R. 1935 Cal. 610.**

———**Sch. I, Art. 40**—Applicability—Security bond executed to Court—Stamp duty payable under Art. 57. *See* STAMP ACT, ART. 57. **8 O.W.N. 116 = A.I.R. 1931 Oudh 99.**

———**Sch. I, Art. 40**—*Surety bond under O. 41, R. 5, C. P. Code—Duty chargeable.*

A surety bond executed under O. 41, R. 5, C.P. Code, by a surety for the judgment-debtor hypothecating his property in favour of the Court executing the decree for the benefit of the decree-holder as security for the loss that the latter might sustain up to a certain amount owing to any default or misconduct on the part of the judgment-debtor, is chargeable with duty under Art. 40 and not Art. 57, it being not executed to secure the due performance of a contract. Oudh Stamp Reference No. 2 of 1927, Diss. From. (*Kendall, Young and King, JJ.*) JANGE LAL, *In re.* **52 All. 844 = I R 1931 All 419 – 131 I.C. 675 = 1931 A L J. 41 = A I. R. 1931 All. 189 (F.B).**

———**Sch. I, Art. 45**—Compromise decree in partition suit directing the other party to deliver possession—Stamp payable under Art. 45. *See* STAMP ACT. S. 2 (15) AND ART. 45. **A.I. R. 1933 Oudh 562 (F.B).**

———**Sch.I, Art. 45**—*Decree passed on award directing partition—Stamp duty—Part of decree separable from portions of decree effecting partition—Liability to stamp duty.*

It is not permissible to add to or substract from the definition as given in S. 2 (15). Similarly it would be illegal to engraft any exceptions or impose and limitations on Art. 45 beyond those that are clearly set forth in the provisos. Every final order effecting a partition passed by any Civil Court is an instrument of partition and so is every award by an arbitrator directing a partition. Standing by itself therefore either of the two is chargeable with duty of the amount indicated in Art. 45 as the proper duty therefor. If therefore the award had been stamped with proper duty, 12 annas only would have sufficed for the decree, but if it is not so stamped there is no provision of law which can save the decree from stamp duty as prescribed in Art. 45, Sch I. But where a part of the decree is separable from the other portion of decree effecting partition and all the reliefs have been joined together for convenience in one document, such part is not liable to stamp duty and can be proved. (*Addison and Din Mohamed, JJ.*) ABDUL HASAIN KHAN *v.* MT. MAHMUDI BEGAM **16 Lah. 667 = 158 I.C. 502 = 37 P.L.R. 676 = A.I.R. 1935 Lah. 364.**

———**Sch. I, Art. 45**—*Deed of partial partition—Stamp payable.*

Where a deed of partition purports to divide only some of the shares, the duty should be levied on the amount of the value of the separated share or shares. (*Boyd, F. C.*) TARLOK NATH *v.* EMPEROR. **34 P. L.R. 630.**

———**Sch. I, Art. 45**—*Partition suit involving several reliefs—Compromise and decree not stamped—Execution of part of decree on payment of stamp duty.*

Where in a partition suit involving several reliefs, a decree is passed in accordance with a compromise, and neither the compromise nor the decree is stamped, the partition decree can be regarded as consisting of a various number of decrees and a part of the decree which a party seeks to execute can be executed on payment of stamp duty as required by Art. 45. (*Skemp, J.*) HARI RAM *v* SIRI RAM. **158 I.C. 877 = 8 R.L. 321 (2) = A.I R. 1935 Lah. 342**

STAMP ACT (1899), Sch. I, Art. 45.

———**Sch I, Art. 45**—Partition—Suit for—Preliminary decree defining share—Not Chargeable under S. 2 (15) read with Art. 45. *See* STAMP ACT, S. 2 (15) AND SCH. I, ART 45. **A I.R. 1932 Rang. 120.**

———**Sch I, Arts. 45 and 55**—*Partition deed and release—Distinction between.*

A deed by which co-owners divide property in severalty is a deed of partition and merely because mutual release is an incident of the division, the partition deed does not become a release. Moreover a deed of release is a one-sided document and binds the executant alone while a partition is an agreement between two or more persons who are all bound by it (*Irving, F. C.*) RAM LAL *v* EMPEROR. **11 Lah L T. 157.**

———**Sch I, Art. 45**—*Stamp duty—Separation of smaller from larger share.*

Under Art 45 the duty payable on the instrument of partition is for the amount of the value of the separated share or shares of the property. The smaller shares which have been separated off from the largest share should be a criterion for fixing the stamp duty payable on the instrument. (*Sundaram Chetty and Pakenham Walsh, JJ.*) VENKAIAPPA NAIDU *v.* MUSAL NAIDU. **150 I C. 119 = 6 R.M. 700 = 39 L.W. 157 = A.I R. 1934 Mad. 204.**

———**Sch. I, Art. 46-B**—*Three firms forming a partnership—Agreement putting an end to their relationship qua partnership—If a deed of dissolution of partnership.*

The Stamp Act contains no definition of either "dissolution" or of "partnership", and both these terms have been used in the sense in which they are used in the Indian Contract Act. If three firms agree to combine their property, labour or skill in some business, they cannot be considered to be partners, the essential requirement of S 239 of the Contract Act being that the contracting parties should be 'persons", *i.e.*, individuals. It follows, therefore, that an agreement which puts an end to their relationship *qua* the partnership is not a deed of dissolution of partnership within the meaning of Art 46 B. (*Niamatullah and Bajpai, JJ.*) REFERENCE UNDER S. 61, STAMP ACT. **158 I C 43 = 8 R A. 275 = 1935 A.L J. 938 = 1935 A.W. R. 863 = A.I.R. 1935 All. 767.**

———**Sch I, Art. 48 (b) and S. 2 (21)**—Vakalat in Presidency Small Cause Court—Stamp duty—Power-of-attorney—Stamps as required by Art. 48 (*b*). *See* STAMP ACT, S 2 (21) AND SCH. I, Art. 48 (*b*). **58 Bom. 597 = A.I R 1934 Bom. 299.**

———**Sch. I, Art 49**—*Bill of exchange—Document containing promise to pay on fixed date—Stamp duty payable as on promissory note.*

Where a document contained a promise to pay otherwise than on demand and was payable five years after execution and it contained no order to pay.

Held, that it was not a bill of exchange or a *hundi* and that it was leviable to stamp duty as a promissory note. (*Middleton, J. C. and Saaduddin, A. J. C.*) MAHOMED HAFIZ UMARDARAZ KHAN *v.* MAHOMED AKBAR KHAN. **6 I.R. (Pesh.) 6 = 145 I.C. 662 = A.I. R. 1934 Pesh. 1.**

———**Sch. I, Art. 49**—Entry by debtor in creditor's accounts that amount would be paid—Not a pro note. *See* STAMP ACT, SCH. I, ART. 5. **38 L.W. 846 = 146 I C. 943.**

———**Sch. I, Art. 53**—Applicability—Sale of ornaments—Entry in books of account giving description of goods and price paid—Documents are memoranda of sale as well as receipts. *See* STAMP ACT, SCH. I, ART

STAMP ACT (1899), Sch. I, Art. 53.

5, EXEMPTION (*a*). **1934 A.L.J. 582 = A.I.R. 1934 All. 201.**

——**Sch. I, Art. 53**—Cash memo. containing warranty—If a receipt. *See* STAMP ACT, SS. 2 (23), 3 AND SCH. I, ART. 53. **12 Rang. 174 = A.I.R. 1934 Rang. 49 (2) (S B.).**

——**Sch. I, Art. 53**—Receipt—Recital of sale of land—If amounts to "conveyance". *See* STAMP ACT, ART. 23. **13 Lah L.T. 48.**

——**Sch. I, Art. 57**—*Applicability—Security bond executed in favour of Court—Immovable properties rendered security for performance—Stamp duty payable*

Where during the pendency of an appeal the executing Court directed execution to proceed on condition the decree-holder offered security for the restitution of any property taken and thereupon a third person executed a bond to the Court, undertaking to give compensation if the decree-holder failed in appeal and he also made certain immovable properties security for the due performance of the covenant.

Held, that the document was a security bond and as such liable to stamp duty under Art. 57 and not Art. 40 of the Stamp Act. (*Hasan, C. J., Raza and Bisheshwar, Nath, JJ.*) BOARD OF REVENUE *v* LALTA BAKHSH SINGH. **I.R. 1931 Oudh 241 = 132 I.C. 225 = 14 O.L. J. 224 = 8 O.W.N. 116 = A I.R. 1931 Oudh 99.**

——**Sch. I, Art. 57**—*Applicability—Security bond by way of mortgage by receiver to Court for performance of office—Stamp duty.*

A mortgage bond executed by a receiver appointed by the Court to the Court appointing him for the due execution of his office of receiver is governed by Art. 57 for purposes of stamp duty. The fact that sureties also join in the bond does not take it out of Art 57 or make Art. 40 applicable. (*D. N. Mitter and Rau, JJ.*) DHIRENDRA NATH PODDAR *v.* HEMANGINI DASI. **63 Cal. 173 = 158 I C. 406 = 8 R.C. 183 = 39 C.W.N. 1046 = A.I.R. 1935 Cal. 610.**

——**Sch. I, Art. 57**—Applicability—Security bond executed under S. 55 (4) of the C. P. Code—Personal obligation only imposed—Art. 57 no application. *See* COURT FEES ACT (1870), SCH. II, ART. 6. **14 Lah. 284 = A.I R. 1933 Lah. 89 (S.B.).**

——**Sch. I, Art. 57**—Applicability—Surety bond under O. 41, R. 5, C. P. Code—Duty chargeable under Art. 408, not under Art 57. *See* STAMP ACT, ART 40. **1931 A.L J. 41 = A.I.R. 1931 All 189 (F.B.).**

——**Sch. I, Art. 57**—*Contract—Meaning—Surety bond under, O. 41, R. 5, C. P. Code.*

The Word "contract", in Art. 57 is used in the sense of contract as defined in S. 2 (*b*) of Contract Act. A surety bond executed for a judgment-debtor under O. 41, R. 5, C.P Code is not such a contract. (*Kendall, Young and King, JJ.*) JANGE LAL, *In re* **52 All. 844 = I.R. 1931 All 419 = 131 I.C. 675 = 1931 A.L.J. 41 = A.I R. 1931 All. 189 (F B).**

——**Sch I, Art. 57**—*Security bond—Execution in pursuance of order of Court under C.P. Code—Liability to stamp duty.*

A security bond executed in pursuance of an order of Court under the Code of Civil Procedure and imposing only a personal obligation on the surety is not leviable to stamp duty under the Stamp Act. (*Addison and Bhide, JJ.*) IOWALA MAL *v.* KHARAITI RAM. **14 Lah 708 = 143 I.C. 12 = I.R. 1933 Lah. 313 (2) = 34 PL R 480 = A.I.R. 1934 Lah. 228.**

——**Sch I. Art. 57**—*Security bond—Stamp.*

On an application made by the judgment-debtor under O. 41, R. 5, C. P. Code, for stay of execution of the decree pending the decision of appeal, the Court while declining to stay the execution directed the decree-holders to furnish security of urban immovable property for the refund of the money, which might be realized by them, with interest thereon, in the event of the success of the appeal. Thereupon the decree-holders filed a security bond, bearing a stamp of Rs. 7 8-0, and the judgment-debtors objected that the bond was insufficiently stamped,

Held, that the bond in question was properly stamped under Art. 57, (*Tek Chand and Jai Lal, JJ.*) TULLAH SHAH RAM SARAN SHAH *v.* GHULAM HUSSAIN. **15 Lah. 78 = 147 I.C. 671 = 6 R.L. 441 = 36 P.L.R. 441 = A.I.R. 1933 Lah. 1004.**

——**Sch I, Art. 57**—*Supurdnama—Stamp duty.*

Where the terms of a document executed by a supurddar were that the supurddar acknowledged having received the attached property from the amin and agreed to produce the same whenever demanded by the Court of the amin and further agreed that in case of failure, the Court would be at liberty to realise the price thereof from his person and property,

Held, that the document was a security bond as defined in Sch. I, Art. 57 and that it was not liable to duty being covered by Exemption (*e*) to that Article. (*Sulaiman, C.J and Bennet, J.*) STAMP ACT, *In re.* **57 All. 888 = 155 I.C. 1034 = 7 R A. 1005 = 1935 A. W.R. 486 = 1935 A L.J. 489 = A I.R 1935 All. 558.**

——**Sch. I, Art. 62 (c) and S 5**—Sale of 29 bonds for a lump sum by one instrument—Stamp duty payable—S. 5 inapplicable—Stamp duty under Art. 61 read with S. 13 of the General Clauses Act, Rs. 5. *See* STAMP ACT, S. 5 AND SCH. I, ART. 62 (*c*). **55 All. 468 = A.I R. 1933 All. 321 (F B.).**

——**Sch. I, Art. 63**—*Assignment of lease—Lessee liable to pay annuity to landlord—Transfer of rights and liability for lump sum—Stamp.*

A document which after reciting a previous permanent rease executed by the Thakors in favour of the lessee in consideration of an annual sum of Rs. 292, proceeded to state that the rights of the lessee under the lease were assigned to the executant for a lump sum of Rs. 4,229 and the executant was to abide by the terms of the permanent lease, and bound by virtue of one of such terms, to pay the annual sum of Rs. 292 direct to the Thakors. Apart from the sum of Rs. 4,229 the lessee assignor derived no benefit whatever from the annual payment. The stamp duty payable on the deed of sale was held to be an *ad valorem* duty on Rs. 4,229 and no stamp was necessary on the annuity. 24 B. 257, Foll. (*Beaumont, C J., Madgavkar and Baker, JJ.*) PUNAMCHAND LALLUBHAI DOSHI, *In re.* **I.R. 1931 Bom 114 = 128 I.C 898 = 32 Bom.L.R. 1447 = A.I.R. 1931 Bom. 1.**

——**Sch. I-A, Art 4 and S. 2 (15)**—*Partition list—Stamp duty payable.*

A partition list which does not itself effect any division but is merely an agreement for effecting a future partition on terms agreed, is not an instrument of partition within the meaning of S. 2 (15) and is liable to stamp duty as an agreement under Art. 4, Sch. I-A (*Pandalai, J*) GANGAIYA *v.* CHINA LINGAIYA. **6 I.R (Mad.) 88 (1) = 145 I.C. 529 (2) = A.I.R. 1933 Mad 162**

STATUTE—Fraud upon. *See* **36 C.W.N. 1088 = A.I. R. 1932 Cal. 753 = 61 Cal. 197 = A.I.R. 1934 Cal. 259.**

——Interpretation of. *See* INTERPRETATION OF STATUTES.

STATUTORY BODY—Exercise of powers under statute—Limits. *See* BOMBAY DIST. MUNICIPAL ACT, S. 96. **56 Bom. 135 = A.I.R. 1932 Bom. 259.**

STAY—Appeal from preliminary decree pending —Proceedings for partition by metes and bounds to be stayed—Practice of Lahore High. *See* C. P. CODE, O. 20, R. 18. **34 P.L.R. 579=A.I.R. 1933 Lah. 790.**

STRAITS SETTLEMENTS ORDINANCE No. 56 (LIMITATIONS), S. 9—*Verbal assignment by attorney to himself of property known to be his principal's —Vesting of property in trust—Purpose, if specific.*

Where what took place was a verbal assignment by the appellant, as attorney of the administrator, to himself, of property known to be his principal's,

Held, he was in a fiduciary capacity and the only result of the proceeding was that the property became vested in him in trust for the administrator.

Held, further, the appellant dealt with the property in a fiduciary capacity antecedent to such dealing and the purpose for which it became vested in him must be found in the purpose for which that capacity was conferred upon him,

Held further, that the purpose for which the property became vested in the appellant was specific if he is regarded in the light of a trustee for the administrator or even if it was to administer the estate and account for the residue to the next of kin. (*Sir Sidney Rowlatt.*) KASIVISVANATHAN CHETTIAR *v.* CHOKKALINGAM CHETTIAR. **155 I.C. 855=7 R.P.C. 209=37 Bom. L.R. 837=A.I.R. 1935 P.C. 28 (P.C.).**

STRIKE. *See* MASTER AND SERVANT—STRIKE.

SUBROGATION. *See* (1) DEBTOR AND CREDITOR.
(2) MORTGAGE— SUBROGATION.
(3) TRANSFER OF PROPERTY ACT (IV OF 1882), S. 92.

SUB-SOIL RIGHTS. *See* MINERALS.

SUCCESSION ACT (X OF 1865)—Applicability—Native Christians of Mysore State—Hindu Law of Adoption—If applies. *See* HINDU LAW—APPLICABILITY—CONVERTS. **13 Mys.L.J. 302=40 Mys.H.C.R. 267.**

———**Ss. 98 and 106**—Life interest with absolute gift of remainder—Vested interest but possession postponed. *See* SUCCESSION ACT (1865), SS. 106 AND 98. **38 L.W. 860.**

———**S. 100 (S. 113 OF ACT XXXIX OF 1925)**—*Scope—Bequest of life estate to son — Remainder to daughter-in-law for life—Remaindar to others—Daughter-in law not in exi tence at death of testator—Bequest void—If cured by Act VIII of* 1921.

A testator (plaintiff's father-in-law) under his will gave a life-estate to his son (plaintiff's husband), in the properties, then a life-estate to the plaintiff by way of remainder, after her husband's death with a further gift by way of remainder afer her death, to certain other persons. Plaintiff was not in existence on the date of the testator's death. Plaintiff having sued for a declaration that a certain alienation made by her deceased husband was inoperative beyond her husband's life.

Held, that the disposition in favour of the plaintiff was void under S. 100 of the Succession Act, 1865 (S. 113 of Act of 1925) and that the invalidity was not cured by or prevented by Act VIII of 1921, and consequently plaintiff could not maintain the suit (*Beasley, C. J. and Varadachariar, J.*) KUPPUSWAMI PILLAI *v.* JAYALAKSHMI AMMAL. **58 Mad 15=154 I.C. 537=7 R.M. 439=40 L.W. 570=1934 M.W.N. 488 =A.I.R. 1934 Mad. 705=67 M.L.J. 525.**

———**Ss. 106 and 98**—*Life interest with absolute gift of remainder—Vested interest but possession postponed—Right to mortgage,*

Under the will, the testator appointed three persons as executors. His son was disinherited but his grandson, then a child of 4 months, was to be under the protection of his mother and grandmother, appointed guardians of his person. For a period of three years after testator's death, the executors should manage the properties; then they should deliver all the properties to the two guardians who should manage the properties till the end of their lifetime without any power of alienation. After them, the testator's son's descendants should take the properties absolutely and enjoy them from generation to generation. The survivor of the two ladies died in 1926 and the question was if a mortgage executed by the grandson in 1924 was valid.

Held, that the effect of the will was this a life-estate was bequeathed to the widows with an absolute gift over of the remainder to the deslendants of the testators son. The absolute gift of the remainder was to a specified class of persons of whom the grandson was one. Under S. 106 of the Succession Act, the interest of the grandson was a vested interest from the date of the testator's death, even though possession thereof might have been postponed. And the case was not governed by the exception to S. 98. The grandson was therefore competent to execute the mortgage. 57 I.C. 547; 4 C. 304; 28 C. 621 (P.C.); 38 C. 468 (P.C.), Rel on. (*Sundaram Chetty and Pakenham Walsh, JJ.*)SREE CHAND SOWCAR *v.* KASI CHETTY. **38 L.W. 860=147 I.C. 383=6 R.M. 335 (2)=1933 M.W.N. 1222=A.I.R. 1933 Mad. 885=66 M.L.J. 170**

———**(XXXIX OF 1925)**—*Applicability — Crown taking property by escheat.*

The Indian Succession Act is not applicable to the Crown when it takes the property upon escheat. (*Sen, J.*) SECRETARY OF STATE FOR INDIA *v.* GIRDHARI LAL SHAMBHUNATH. **54 All 226=I.R. 1932 All. 213=136 I.C. 565=1932 A.L.J. 150=A.I.R. 1932 All. 220.**

———*Applicability—Foreigners.*

There are no words in the Succession Act as it now stands limiting the Act to British subjects as opposed to foreigners. (*Dalip Singh, J.*) AMAR SINGH *v.* SHAM SINGH. **37 P.L.R. 502=160 I.C. 531=8 R.L. 547=A.I.R. 1935 Lah. 646.**

———*Applicability—Hindu convert to Christianity.*

A Hindu convert to Christianity, who dies a Christian is governed by the Indian Succession Act in matters of succession and cannot elect to be governed by the Hindu Law of Inheritance. (*Raza and Smith, JJ.*) DWARKA NATH SINGH *v.* RAJ RANI. **I.R. 1931 Oudh 408=134 I.C. 872=8 O.W.N. 1198=A.I.R. 1932 Oudh 85.**

———*Scope—If restrospective—Will executed in* 1890 *—Bequest to unborn person—Validity.*

The Succession Act, 1925, has no retrospective effect and does not apply to a will executed in 1890. Therefore a bequest under the will to unborn persons, who were not in existence at the time of the testator's death, is void. (*Niyogi and Staples, A.J.Cs.*) BHIMRAO *v.* PUNJAB RAO. **158 I.C. 1042=8 R.N. 105=18 N.L.J. 1.**

———**S. 2 (bb)**—'*District Judge*'—*High Court—Jurisdiction to issue succession certificates.*

By defining District Judge as the 'Judge of the principal Court of civil jurisdiction' the High Court is now enabled to issue succession certificates. (*Cunliffe, J.*) AROONACHALAM CHETTIAR. *In the matter of.* **9 Rang. 205=135 I.C. 80=I.R. 1932 Rang. 32=A.I.R. 1931 Rang. 281 (1).**

[Rel. 1934 A.L.J. 800.**]**

———**S. 2 (bb)**—'District Judge'—High Court—No jurisdiction to grant succession certificate. *See* SUCCESSION ACT, S. 371. **1934 A.L.J. 800=A.I.R. 1934 All. 958.**

———**S. 2 (bb)**—"*District Judge*"—*If includes Judge of High Court.*

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S. 2 of the present Succession Act empowers a High Court to grant succession certificate. The term "District Judge" in the sections relating to succession certificates includes a Judge of the High Court. (*Remfry, J.*) BHOLANATH PAL, *In the goods of.* **58 Cal. 801 = 134 I C. 1279 = 35 C.W.N. 122 = I.R. 1932 Cal. 63 = A. I.R. 1931 Cal 580.**

[**Diss.** 1934 A.L J. 800. **R.** 29 N.L R. 278 (284)]

———**S. 2 (d)**—*Christian—Who is—Test.*

In considering whether the rules of succession laid down in the Succession Act are to be applied in administering the estate of an alleged Christian, the Court must have regard to the outward and formal recognition of his religious belief, and not to what may be the real though undisclosed, convictions of the deceased' 21 Cal. 666 (P.C.), Ref. (*Page, C J. and Sen, J*) MA KHIN THAN *v.* MA AHMA. **12 Rang. 184 = 149 I C. 1148 = 6 R.R. 373 = A.I R. 1934 Rang. 72.**

———**S. 2 (h)**—*Will containing provisions following rules applicable on intestacy—Validity.*

The fundamental idea of a will is that the testator should thereby dispose of his property, or such part thereof at his personal law permits him to bequeath by will, in such manner as seems to him best; and there is no reason why the provisions of a will should not follow the rules applicable on intestacy (*Das and Dunkly, JJ.*) MA KHATUN *v.* MA BI BI. **149 I.C. 654 = 6 R.R. 304 = A.I.R. 1933 Rang 393.**

———**Ss. 4 and 5**—*Adoption by Buddhist woman—Subsequent conversion to Christianity—Right of adopted child to inherit.*

According to the rules of succession laid down under the Succession Act, an adopted child is not an heir entitled upon an intestacy to inherit the estate of his deceased adoptive parent. A Buddhist woman adopted a girl as a daughter in Keittima form with a view to inherit; but she subsequently became a Christian and died as a Christian intestate.

Held, that the adopted girl could not inherit. 43 All. 525, 9 M.I.A. 195; 14 W.R. 33 (P.C.) and 57 I.A. 313 (P.C.), Ref. (*Page, C. J. and Sen, J.*) MA KHIN THAN *v.* MA AHMA. **12 Rang 184 = 149 I.C 1148 = 6 R.R. 373 = A.I.R. 1934 Rang. 72.**

———**S. 9**—*Domicile of origin—Abandonment and acquisition of new domicile—Burden of proof.*

The question of domicile should not be confused with nationality. The question whether a person abandons his domicile of origin and acquires a new domicile largely depends on residence coupled with an intention on his part to choose the new country where he resides as his permanent home in preference to the country of his birth The onus of proving an abandonment of the domicile of origin and acquisition of a new one is on the person who sets up such a change of domicile. (*M Nair, J.*) THOMAS EDMUND TEIGNMOUTH SHORE *v.* HUGH CAREY MORGAN **62 Cal. 869.**

———**S 10**—*Change of domicile—Conditions—Englishman going to India and residing there for greater part of life intending to devote life to missionary service—Intention—Indian domicile by choice—If acquired.*

To effect a change of domicile there must be an intention to settle in a new country as a permanent home, and if this intention exists and is sufficiently carried into effect certain legal consequences follow from it, whether such consequences were intended or not, and perhaps even though the person in question may have intended the exact country. The real essence of an assumption of a domicile of choice is intention. Where an Englishman comes out to India with the object of doing missionary work in India for the period of his life, and founds a mission whose members devote themselves to work in India throughout their lives, which is undoubtedly his own intention, and further spends the greater part of his life in India, it must be held that he has chosen an Indian domicile and that he is governed by the provisions of the Indian Succession Act. (*McNair, J*) THOMAS EDMUND TEIGNMOUTH SHORE *v.* HUGH CAREY MORGAN. **62 Cal 869.**

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———**Ss 29 and 33**—*Applicability—Jews in Calcutta—Charter of 1726—Effect.*

In order to show that the English Law on its introduction by the Charter of 1726 was inapplicable to a particular community it is not enough to prove that the community had prior to that date been governed by a law differing from English Law. What must be shown is that the English law is based on or presupposes social or political conditions peculiar to the country of its origin

Held, that part V, Ss. 29 and 30 of the Succession Act applies to the members of the Jewish community in Calcutta (*Panckridge, J*) SARAH EZRA, *In the goods of*, **58 Cal. 761 = I R. 1931 Cal. 827 = 134 I.C. 443 = A I R 1931 Cal. 560.**

———**S. 37**—*'Child'—If includes illegitimate child.*

The word 'child' in S 37 cannot possibly include an illegitimate child (*Panckridge, J.*) SARAH EZRA, *In the Goods of.* **58 Cal 761 = I R. 1931 Cal. 827 = 134 I.C. 443 = A.I R. 1931 Cal. 560.**

———**Ss 37 and 48**—Adopted child—Right to inherit. *See* SUCCESSION ACT, SS. 4 AND 5. **12 Rang. 184 = 149 I C 1148 = A L R. 1934 Rang. 103 = 6 R.R. 373 = A I R 1934 Rang 72.**

———**S 63 (a)**—*Execution of will by markswoman—Scratch mark put by writer—Validity.*

A will executed by a markswoman was attested by four witnesses one of whom was dead and the others were examined. After the attesation there was the customary memorandum by the writer that the will was in the handwriting of one of them. It appeared that the scratch mark was put by the writer and not by the executant.

Held, (on a difference of opinion) that the will was properly executed in accordance with S. 63 (*a*) of the Succession Act. (*Krishna Pandalai, J. on a difference of opinion between Sundaram Chetty and Pakenham Walsh, JJ.*) DASU REDDI *v.* VENKATASUBBAMMAL. **57 Mad. 979 = 152 I C. 75 = 7 R.M 173 = 1934 M W. N 135 = 39 L.W. 588 = A.I.R. 1934 Mad. 436 = 67 M.L.J. 721.**

———**S. 63 (c)**—Unattested will by Talukdar—Validity—Oudh Estates Act (1862) S. 19 *See* OUDH ESTATES ACT, S. 19. **8 O.W.N. 258 = A.I.R. 1931 P.C. 24 (P.C.).**

———**S. 73**—*Confirming will by subsequent codicil—Effect of.*

The effect of confirming a will by codicil is to bring the will down to the date of codicil and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same dispositions as in the original will but with the alterations introduced by the codicil. (1893) 1 Ch. 101, referred to. (*Lord Russel.*) GOONEWARDENE *v.* GOONEWARDENE. **134 I.C. 1074 = 34 L W. 964 = 1931 A.C. 647 = A.I.R. 1931 P.C. 307 = 61 M L J 340 (P C.).**

———**Ss 74 77 and 84**—Will—Construction Statement that there was no need for will as regards movables—Intention of testator—Duty of Court. *See* HINDU LAW—WILL—CONSTRUCTION. **39 C.W.N. 237.**

———**Ss. 82 to 87**—*Applicability—Will by talukdar.*

The rules of construction contained in Ss. 82 to 87 of the Indian Succession Act, 1925, are applicable to bequests made by talukdars and in interpreting wills made

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by talukdars, the Court must be guided by those rules. (*King, C J. and Zia-ul-Hasan, J.*) RAMANUJ BHAN BAKHSH SINGH *v.* MANRAJ KUER. **153 I C. 878 = 7 R.O. 409 = 1935 O.W.N. 68 = 10 Luck. 606 = A.I. R. 1935 Oudh 198.**

——**S. 87**—*Will—Construction — Intention of testator.*

In construing a will, effect must be given, as far as is legally possible, to the wishes and intention of the testa tor. (*Costello and Lort Williams, JJ.*) LAL BEHARY DHUR *v.* THE ADMINISTRATOR-GENERAL OF BEN-GAL. **155 I.C. 1071 = 7 R.C. 670 = 39 C.W.N. 46 = A.I.R. 1935 Cal. 284.**

—— **S. 88**—*Repugnant clauses—Rule of construction.*

Where the language used in the earlier part of a will by the testator has the effect of constituting his widow absolute owner after his death of the entire estate belong-ing to him, but a subsequent clause in the same will gives a part of that estate to another legatee, the latter clause must be given effect to on the principle of con struction embodied in S. 88. (*Jackson, A.J.C.*) VIT-HAL *v.* NARAYAN. **I.R. 1931 Nag. 131 = 134 I.C. 259 = A.I.R. 1931 Nag. 69.**

——**S. 89**—*Bequest for the purpose of a building for Hindus exclusively for general purposes—Validity.*

A bequest of a sum of money for the purpose of a "building for Hindus exclusively for general purposes to be erected on land which is bought" is void for un-certainty. (*Mirza, J.*) CHINUBHAI *v.* BAI MANEKBAI. **I.R. 1932 Bom 368 = 138 I C. 326 = 34 Bom.L.R. 609 = A I.R. 1932 Bom. 451.**

——**S 90**—*Will—Construction—Disposition of after-acquired property.*

Unless there are expressions in the will to indicate a contrary intention it must be presumed that the testator intended to dispose of all his property at his death. A description of the property as that which the testator 'now' owns or occupies according to circumstances does not exclude after-acquired property. (*Niyogi, A.J.C.*) MT. RANGOO *v.* HARISA. **141 I C. 150 = 28 N L.R 255 = I R. 1933 Nag 36 = A I R. 1932 Nag. 163.**

——**Ss. 102 and 103**—*Residuary bequest of personal estate—Prior bequest void—Rights of residuary legatee.*

A general residuary gift of personalty in a will sweeps up, and is intended to sweep up, all personal property of which the testator may die possessed which from any cause may happen not to be otherwise effectually dis-posed of; and all such property falls into the general residue unless an intention is apparent in the will that it is not under any circumstances to do so. Where a testatrix after devising certain immovable property and certain personal property to a Bishop bequeathed to her niece certain plots of land and added: "I also give to my niece all my personal property and effects" and the be-quest to the Bishop was void under S. 118 of the Indian Succession Act.

Held, that the words in the will were wide enough to constitute a residuary gift of the personalty in favour of the niece and that the personalty which formed the subject matter of the legacy to the Bishop fell into the residue. (*Page, C.J. and Mya Bu J.*) ELIZABETH O'DONOGHUE *v.* SUTHERLAND. **12 Rang. 705 = 155 I.C. 310 = 7 R R. 345 = A.I.R. 1935 Rang. 71.**

——**Ss. 102 and 103**—*"Residuary legatee"—Who is.*

A residuary lagatee is the person designated by the testator as one who will take the surplus or residue of the property, and residuary bequest implies that the legatee is entitled to all property belonging to the testator at the time of his death of which he has not made any other testamentary disposition which is capable of taking effect. So whatever is not effectually disposed of goes

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to the residuary legatee. No particular mode of expres-sion is necessary to constitute a residuary legatee. It is sufficient if the intention of the testator be sufficiently expressed in the will that the surplus of his estate after payment of debts and legacies shall be taken by a person there designated. The residuary legatee becomes vested with the surplus or residue of the property left by the testator at his death. A person devised and bequeathed his property by a will in favour of his wife with direc-tions to her to pay certain amount to certain persons and to spend some amount in charities every year and after her death the property was to devolve on his two daughters, and on their death on their existing and future offspring. The testator's daughters and daughters' sons claiming to be residuary legatees applied for grant of letters of administration.

Held, that the position of the daughters and daughters' sons was not that of residuary legatees, but was that of a remainderman or reversioners and they were not entitled to the letters of administration. (*Niyogi, A J.C.*) MT. CHHABI BAI *v.* MT. CHUNNIA BAI. **31 N L.R 30 (Supp) = 160 I.C. 160 = 8 R.N. 155 = A.I.R. 1935 Nag. 239**

——**S. 103**—*Residuary bequest—Scope of—Property unknown to testator.*

Under the Indian Law, a residuary clause does not apply to property unknown to the testator The law in this respect differs from the English Law. 38 Mad. 1096, Foll. (*Mitter and Henderson, JJ.*) SUBODH CHANDRA NIYOGI *v.* BHUBALIKA DASEE **60 Cal. 1406 = 149 I.C. 410 = 6 R.C. 580 = A.I R. 1934 Cal. 356.**

——**S. 104**—*Applicability—Administration of estate—Pendency—Right inherited by party—Enforcement.*

Where the Administrator-General was appointed exe-cutor under a will and the widow of the testator filed a caveat but the same was withdrawn subsequently in pursuance of an agreement for apportionment of the estate and the widow subsequently inherited an unascer-tained share of the residuary estate from her son, and applied to the Court for directions being issued to the Administrator-General for handing over the property.

Held, that the applicant could invoke in her aid S. 104. (*C. C. Ghose, A.C.J. and Mitter, J.*) SECRE-TARY OF STATE FOR INDIA *v.* PARIJAT DEBI **60 Cal. 1135 = 150 I C 158 = 6 R.C. 767 = 37 C.W.N. 769 = A I.R. 1933 Cal. 841.**

——**S. 108**—*Scope—Bequest void for uncertainty—Effect.*

S 108 of the Succession Act embodies the English rule in testamentary matters, known as the rule in *Skrymsher* v. *Northcote*, and if a bequest fails, there is an intestacy as to the lapsed share of the residue. (*Ameer Ali, J.*) VEDABALA DEVI *v.* THE OFFICIAL TRUS-TEE OF BENGAL. **62 Cal. 1062 = 39 C.W.N. 1154.**

——**S. 109**—*Construction and scope—Death of lega-tee—Right of heirs other than lineal descendants.*

S. 109 of the Succession Act only provides that in case of the legatee's death before the testator the bequest shall take effect as if the legatee's death had happened after the death of the testator. To prevent a lapse it has to be assumed that the legatee survived the testator. But the section does not provide that on such assumption being made only the lineal descendants are to have the benefit of the bequest and not other heirs. The bequest will take effect in favour of all the heirs of the legatee. (*Srivastava and Zia-ul-Hasan, JJ*) MOHAMMAD YAKUB KHAN *v* AZIZ UN NISA. **155 I.C. 1076 = 11 Luck. 376 = 7 R O. 631 = 1935 O.W.N. 881 = A.I.R. 1935 Oudh 437.**

——**S. 111**—*Applicability—Hindu wills.*

SUCCESSION ACT (1925), S. 112.

The rule of law embodied in S. 111 of the Succession Act is not directly applicable to the case of a Hindu will. But the principle of law recognised in the section is entitled to acceptance as a rule of general application, where there is no special rule to the contrary. (*Pandrang Row, J.*) VISVANADHAN *v.* ANJANEYALU. **158 I.C. 1083=8 R.M. 432=1935 M W.N. 1119=42 L.W. 746=A.I.R. 1935 Mad. 865.**

———**S. 112**—*Scope.*

S. 112 is subject to the restriction (1) in Sch. III of the Act. (*Fazl Ali and Scroope, JJ.*) NAKSHETRAMALI DEI *v.* BRAJASUNDER DAS. **6 I.R. (Pat.) 290 (2)=146 I.C. 865=12 Pat. 708=A.I.R. 1933 Pat. 647.**

———**S. 112 Excep.**—*Applicability—Bequest to living person—Whether enures for benefit of subsequently born children—Suspension of bequest.*

After making certain bequests a Hindu testator provided as follows: "*L's* first male child by the present wife to be heir, in default of any male child being born to him or dying in childhood either a son of *K* or *G* to be heir. The boy should live with the daughter-in law as adopted son. . . . . The residue to be administered by the executors for the benefit of the heir to pass to him absolutely on his attaining 21 years." *L* had no child at the date of the testator's death.

Held; (1) that the bequest under the first part of the will did not take effect as there was no son of *L* at the time of the testator's death; (2) that the testator had not intended that the operation of the bequest should be suspended indefinitely until a son was born to *L* and that the exception to S. 112 of the Succession Act did not apply so as to enable the son of *L* subsequently born to take the bequest; (3) that the second part of the will was void for uncertainty as it did not appear which son of *K* or *G* the testator intended to benefit; and (4) that the gift of the house to *L* was subject to the condition as to residence with the daughter-in-law and that it did not take effect if the condition was not satisfied. (*Fazl Ali and Scroope, JJ.*) NAKSHETRAMAL DEI *v.* BRAJASUNDER DAS. **6 I.R. (Pat) 290 (2)=146 I.C. 865=12 Pat. 708=A.I.R. 1933 Pat. 647.**

———**S. 118**—*Applicability—Two successive wills—Bequest to charity modified but not put an end to by later will.*

Where the testator executed two successive wills and it appeared that the legacies for charity contained in the first will were modified but not put an end to by the later will.

Held, (per *obiter*) that the later will did not offend against S. 118 (*Rankin, C.J. and C. C. Ghose, J.*) ELIZABETH ANNA *v.* OFFICIAL TRUSTEE OF BENGAL. **130 I.C. 217=52 C.L.J. 475=A.I.R. 1931 Cal. 138.**

———**S. 119**—*Vested interest—Construction—Enjoyment postponed till the termination of life-estates.*

A testator provided in his will with reference to certain Government Promissory Notes as follows: "My wife and on her death my daughter and on her death my daughter's sons shall, on my death, be entitled to get the G. P. notes exclusively belonging to me and in respect of them, neither my brother nor my nephews nor my brother's grandsons shall be competent to make any claim."

Held, that the expression 'on her death' was meant to indicate merely the time when the gift over was to be reduced to possession and not the time when the right to such possession vested, that the intention of the testator was to make gifts *in presenti* in their favour only postponing the enjoyment thereof—in the case of the daughter till on the death of the widow and in the case of the grandsons till the lives of the widow and the daughter were over and that substitutional estates were not intended to be conferred. (*Mukerji and Guha, JJ.*) SWARNAMOYEE DASI *v* PROBODH CHANDRA SARKAR **143 I.C. 402=I.R 1933 Cal 425=36 C.W.N. 758=55 C.L.J. 420=A.I.R. 1933 Cal. 253.**

SUCCESSION ACT (1925), S. 124.

———**S. 124**—*Absolute estate—Proviso—Gift over—Construction.*

Where a testator left a will by which he devised an absolute estate to a female with a proviso that in the event of the death of the female, his nephew was to be the heir but the female survived the testator.

Held, that the gift over to the nephew did not take effect and that the female took an absolute estate. (*Wort and Dhavle, JJ.*) KAMLA PRASAD *v.* MURLI MANOHAR. **13 Pat. 550=7 R.P 190=152 I.C. 446=15 P.L T. 715=A.I R. 1934 Pat. 398.**

———**S. 124**—*Applicability.*

S. 124, Indian Succession Act, 1925, does not apply if a period is specified in the will within which the contingent event is to happen. In other words, the section only applies, if on a reasonable interpretation of the language used by the testator the occurrence of the uncertain event prior to "the period when the fund bequeathed is payable or distributable" is alone within his contemplation. If the terms of the will make that construction of his words impossible, the section then does not apply. (*Lord Blanesburgh, J.*) INDIRA RANI *v.* AKHOV KUMAR. **59 I.A 419=9 O W.N. 1113=56 C.L.J. 423=140 I.C. 433=1932 M.W.N. 1301=I.R. 1932 P.C. 327=37 C.W.N. 153=60 Cal. 554=37 L.W. 1=14 P.L T. 101=1933 A.L.J. 382=37 Bom. L.R 211=A.I.R. 1932 P.C. 269=64 M L J. 48 (P.C).**

———**S. 124**—Applicability—Estate conferred on sons—Contingency regarding their dying isssueless—Construction of will. *See* SUCCESSION ACT, S. 131. **A I.R. 1931 Cal. 499.**

———**Ss. 124 and 131**—Construction of will—Gift over "in the event of any sons dying without leaving male issue him surviving"—Death issueless, at any time and not merely in testator's lifetime. *See* SUCCESSION ACT, SS. 131 AND 124. **59 I.A. 419 (P.C.).**

———**S. 124**—"*Period*"—*Meaning—Uncertain event happening after succession—Effect.*

The 'period' referred to S 124 does not mean an indefinite period after the testator's death during which the contingency of the death issueless may occur but the lawful period for distribution by the executors and 'before the period' means 'before the commencement of such period.' Where the testator conveyed the residue of his estate to his son and in the event of the latter's death without issue to certain deities and the son died issueless after the testator's death.

Held, that the uncertain event happened after the succession opened and therefore the son should be deemed to have taken an absolute and indefeasible estate. (*Courtney Terrell, C. J. and Fazl, Ali J.*) BASHIST NARAIN SAHI *v.* SRI RAMCHANDRA SAHI. **12 Pat. 18=I.R 1933 Pat. 219=144 I C. 179 (2)=14 Pat. L.T 567=A.I R. 1933 Pat. 126.**

———**S 124**—*Principle underlying—Applicability to wills not governed by the Act.*

The principle underlying S 124 was based on *Edwards v. Edwards*, 15 Beav. 357, which has been in part overruled by *O'Mahoney v Burdett*, 7 H L 388. So the rule cannot be applied as a rule of justice, equity and good conscience to a will not governed by the Act. (*Patkar and Nanavati, JJ.*) AMBALAL HARGOVIND *v.* AMBALAL SHIVLAL. **141 I.C. 327=I.R. 1933 Bom. 66=34 Bom.L.R. 1506=A.I.R. 1933 Bom. 64.**

SUCCESSION ACT (1925), S. 127.

———**S. 127**—*Restriction regarding marriage—Condition if unreasonable.*

The testator gave a life interest in certain immovable property to his son and after his death bequeathed the property in equal shares to the life tenant's three sons and the life-tenant's daughter the plaintiff. The testator thereafter provided that if the plaintiff should be married before the death of the tenant for life, in such a case she should not take any interest under the will and also provided that if she should lead an immoral or unchaste life she should not receive any benefit under the will and the estate should go to her three brothers absolutely and in equal shares.

Held, that the plaintiff took a vested interest as to one-fourth of the immovable property referred to in the will liable to be divested on her marriage during the lifetime of the tenant for life.

Held further that the provision as to marriage was not an unreasonable condition in restraint of marriage so as to be hit at by section 127 of the Succesession. Act. (*Rankin, C. J. and Buckland, J.*) FLOSSIE O. COHEN *v.* OBEDIAH AARON COHEN. **59 Cal. 102 = I.R.1932 Cal. 338 = 137 I.C. 482 = 54 C.L.J. 324 = A.I.R 1932 Cal. 350.**

———**Ss. 129 and 130**—*Applicability—Will—Bequest to minor son and to sister in case of son's death after death of testator—Son dying before testator—Sister, if takes.*

One *S* executed a will on 26-11 1913 whereby it was provided that his minor son *P* should succeed to and enjoy his properties (described in the will as his own after his lifetime, and that if the son should die after *S*, the testator's sister should enjoy the properties with all rights. *P*, the minor son, died in 1914, after which *S* gifted some of the properties comprised in the will to a relation and sold some others to his sister. The suit property which was undisposed of was sold by the sister to plaintiff, who brought a suit to recover possession from defendants who claimed to be in possession under an oral will by *S*.

Held, that S. 130 rather than S. 129 of the Succession Act, applied to the case and that the sister took no interest at all, because the minor son died before and not after the testator, and that consequently, plaintiff got no title under the sale by the sister. (*Madhavan Nair, J.*) SUBRAMANIA PADAYACHI *v.* PAKKIRI PADAYACHI. **154 I.C. 85 = 7 R.M. 410 = 40 L.W. 869 = A.I.R. 1935 Mad. 119.**

———**S. 131**—*Applicability—Estate conferred on sons—Contingency regarding their dying issueless—Effect.*

R died leaving him surviving his widow *S* and two sons *A* and *B*. He left a will executed by him in October, 1903 by which after giving certain pecuniary legacies and annuities he devised and bequeathed the whole of his estate to his infant sons. The probate of the will was taken out in August, 1904, and the elder son *A* obtained the letters of administration after attaining majority. *A* died in February, 1930, leaving his widow *I* and a daughter. The younger son *B* who had attained majority obtained representation to the estate of *R* on 30th May, 1930. *I* instituted a suit on 3rd July, 1930, claiming the share which her husband *A* had in the estate contending that in the events that had happened and on a true construction of the will of *R*, she was entitled to the share as heiress of *A*. *I* relied upon the following clause in the will. "Subject to the payments of the legacies and annuities aforesaid (the latter unless otherwise expressly provided being payable during the terms of the natural lives of the annuitants) as well as to the provisions hereinbefore mentioned, I devise and bequeath the whole my estate real or personal of any kind or description

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whatsoever and wheresoever situate to my said executors and trustees in trust for such of sons as shall then be dead (such son or sons taking the share which their or his father would have taken hereunder had they or he been then alive) provided the said son or sons' sons shall be orthodox Hindus of good repute equally as tenants-in-common and the said sons or sons of my sons taking equally per stirpes as tenants-in-common, but nevertheless in the event of my sons or sons' sons dying without leaving lineal male issue surviving him, the other of my son or sons or sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu law, but should I die without lineal male descendants, the son or sons to be adopted by my wife shall inherit the whole of my residuary estate but he shall not be put in possession until he attains the age of twenty-one years and should any of my heirs or residuary legatees cease to be orthodox Hindus of good repute he shall forfeit a moiety of his share which shall go to my other qualified heirs according to their respective shares."

Held, that the testator intended that on his death his two sons should as between themselves divide his estate half and half and that if subsequently any of the sons died sonless the surviving son was to get the share of the son dying sonless.

Held also, that the specified uncertain event contemplated in the will, namely, one son dying sonless was necessarily to happen after the death of the testator. *A* and *B* therefore took a vested interest in their share in *R's* estate at his death but such interest was liable to be divested in case either of them died subsequently without leaving the male issue.

Held further, that S. 124 did not apply to the case but S. 131 applied and the clause of defeasance was valid and the gift over in favour of *B* had taken place. It was not a contingent bequest but a bequest of vested interest. *I* therefore did not inherit the share which was in *A*. 23. Cal. 563, Dist (*C. C. Ghose and Pearson, JJ.*) AKHOY KUMAR GHOSE *v.* INDIRA RANI GHOSE. **135 I.C. 868 = I.R. 1932 Cal. 164 = 56 C.L.J. 617 = A.I.R. 1931 Cal. 499.**

———**Ss. 131 and 124**—*Construction of will—Gift over "in the event of any sons dying without leaving male issue him surviving"—Death issueless, at any time and not merely in testator's lifetime.*

The testator, a Hindu governed by the Dayabhaga Law, executed a will, bequeathing the whole of his residuary estate to his sons in the manner following:—"I devise and bequeath the whole of my estate—in trust for such of my sons as shall be living at my death—and also for the son or sons of such of my sons as shall then be dead (such son or sons taking the share their or his father would have taken hereunder had they or he been then alive) equally as tenants-in-common and the said sons or sons of my sons taking equally *per stirpes* as tenants-in-common, but nevertheless in the event of any sons or sons' sons dying without leaving lineal male issue him surviving the other of my son or sons or son's sons living at the time shall be equally entitled to his or their share of the property as he or they would inherit under the Hindu Law". The testator died in 1904, leaving his widow and two sons, *S* and *A* him surviving. The elder son *S* died in 1930 intestate without any male issue, but leaving him surviving his widow (the plaintiff) as his sole heiress under the Dayabhaga Law and an infant daughter. The plaintiff thereupon brought the present suit against the surviving son *A*, claiming that on a true construction of the will her husband *S* had become absolutely entitled to his equal half share of the

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residuary estate, and that on his death intestate his half share devolved upon herself as sole heiress.

Held (negativing the plaintiff's contention) that, on a true construction of the will as a whole, S. 131 and not S. 124 of the Indian Succession Act, 1925, was applicable and that the half share of *S*, on his death without male issue, passed under the gift over to the younger son *A* (the defendant). The words "dying without leaving lineal male issue him surviving" are *prima facie* to be construed in their literal significance as referring to death at any time, and not merely in the lifetime of the testator. The question is one entirely of intention and though this rule of interpretation will yield to any sufficient intention to a contrary effect to be found in the language of the will taken as a whole, there was in the will in dispute no indication of a contrary intention sufficient to displace the *prima facie* meaning of the words used in that clause. (*Lord Blanesburgh.*) INDIRA RANI *v.* AKHOY KUMAR. **59 I A 419 = 60 Cal. 554 = 140 I.C. 433 = 9 O.W.N. 1113 = 56 C.L.J. 423 = 1932 M.W.N. 1301 = I.R. 1932 P.C. 327 = 37 C.W.N. 153 = 37 L.W. 1 = 14 Pat.L.T. 101 = 1933 A.L.J. 382 = 37 Bom.L.R. 211 = A.I.R. 1932 P.C. 269 = 64 M.L.J. 48 (P.C.).**

———**S. 131**—"Thing bequeathed"—Meaning of—If same as "interest." *See* T. P. ACT, S. 28. **156 I.C. 33 = 16 Pat.L.T. 245 = A.I.R. 1935 Pat. 401.**

———**S. 138**—*Absolute estate conferred on Hindu widows—Subsequent gift over—Effect and validity of.*

If an estate is given in terms which confer an absolute estate on the donee and then further interests are given merely after, or on the termination of, that donee's interest, his absolute interest is not cut down and the further interests fail. Where from the fact that the testator constituted the legatees (who were Hindu widows) "maliks" of his property after him with full powers of alienation, his intention was clearly to confer an absolute estate on them, a subsequent clause providing for a gift over is inoperative and ineffective to cut down the absolute estate. (*Tek Chand and Monroe, JJ.*) PARTAP CHAND *v.* MT. MAKHNI. **14 Lah. 485 = I.R. 1933 Lah. 521 = 144 I.C. 651 = 34 P.L.R. 73 = A.I.R. 1933 Lah. 365.**

———**S. 138**—*Bequest of absolute estate—Subsequent clause imposing restriction on alienation—Validity of.*

Where in a deed of gift or will an absolute estate of inheritance is created in favour of person, any subsequent clause which purports to restrict that interest is invalid, and the donee or legatee takes an absolute estate as if the deed contained no such restrictive condition. The rule is the same even if the restriction is for a limited period only. A Hindu testator declared in a will that his three sons were his heirs and were absolute owners, in equal shares, of his movable and immovable properties. But in a subsequent clause of the will he tried to restrict their power of alienation and partition in respect of immovable properties until the youngest of them had attained majority.

Held, that this restriction is clearly repugnant to the absolute estate created in the earlier part of the will and is therefore invalid. (*Tek Chand and Monroe, JJ.*) UMRAO SINGH *v.* BALDEV SINGH. **14 Lah. 353 = I.R. 1933 Lah. 371 = 143 I.C. 615 = 34 P.L.R. 665 = A.I.R. 1933 Lah. 201.**

———**Ss. 142 and 150**—Specific or demonstrative legacy—Legacy payable out of proceeds of sale. *See* SUCCESSION ACT, SS. 150 AND 142. **I.R. 1932 Bom. 561 = 140 I.C. 206 = 34 Bom.L.R. 1124 = A.I.R. 1932 Bom. 506.**

———**Ss. 150 and 142**—*Specific or demonstrative legacy—Legacy payable out of proceeds of sale.*

SUCCESSION ACT (1925), S. 192.

The testator directed by his will that "after the amount due in respect of lands sold under oral agreements has been received," a sum of Rs. 10,000 to his wife and a sum of Rs. 4,000 to his daughter should be paid.

Held, that the legacies were demonstrative and not specific. (*Patkar and Murphy, JJ.*) RAJANIKANT *v.* KIKO KATILAL. **I.R. 1932 Bom. 561 = 140 I.C. 206 = 34 Bom.L.R. 1124 = A.I.R. 1932 Bom. 506.**

———**S. 172**—*Bequest with condition as to good character—Absolute property conveyed—Restriction as to power of alienation—Effect.*

By her will a Hindu lady provided as follows: "Of all my properties *X* shall be the executor. The said executor will not have any right to sell the property. Whatever may be the income of the property the executor will have the right to spend the same for his own maintenance and that of his family but will have no further right." If *X* turned out to be of bad character certain persons were directed to take off the property from *X's* hands and build a temple out of the sale proceeds. It was not shown that *X* had turned out a bad character.

Held, that under the circumstances as the lady did not limit the duration during which the appropriation of the income of her property by *X* was to take place it followed that the corpus of the estate should be taken as having been bequeathed to *X* as he never turned out to be of bad character and he could therefore alienate the property notwithstanding the prohibition contained in the will (*Mukerji and Niamatullah, JJ.*) MANNU LAL *v.* LACHMAN DAS. **1932 A.L.J. 564 = 141 I.C. 650 = I.R. 1933 All 80 = A.I.R. 1932 All 476.**

———**S. 172**—Gift of income of property—Absence of provision as to income—Intention—No indication that enjoyment to be of limited duration—Legatee's right to corpus. *See* T. P. ACT, S. 10. **A.I.R. 1935 Sind 235.**

———**S. 180**—*Doctrine of election—Limits of.*

Any one taking possession under a will cannot set up an adverse title. But this doctrine is subject to the qualification that the election must be made with full knowledge of the circumstances. The doctrine is again inapplicable to a person who was in possession from before the execution of the will. *Board* v. *Board*, 9 Q.B. 48, *Dalton* v. *Fitzgerald*, (1897) 2 Ch. 86 and 20 M.L.J. 687, Dist. (*Mitter and Henderson, JJ.*) SUBODH CHANDRA NIYOGI *v.* BHUBALIKA DASSEE. **60 Cal. 1406 = 149 I.C. 410 = 6 R.C. 580 = A.I.R. 1934 Cal 356.**

———**S. 180**—Property purchased in name of woman with her stridhanam—Her husband executing will with reference to such property and appointing wife as executrix—Wife approbating will and accepting office of executrix—Her heirs, if can seek to claim that property as her stridhan. *See* EVIDENCE ACT, S. 115. **A.I.R. 1935 Mad. 1066.**

———**S. 192**—*Enquiry under—Scope of.*

It is only necessary under S. 192 to consider whether the objector to the grant of the application had any title and whether the claimant was really entitled to the property. The only question for the Court relates to the right of possession, as to who among the rival claimants had a preferential claim. There can be, of course no final decision so far as the question of title is concerned in a summary proceeding by the Judge, in which the scope of enquiry is restricted to the right of possession, subject to a regular suit in which the question of title as between rival claimants is to be finally decided. (*Guha and M. C. Ghose, JJ.*) BHABATARINI DEBI *v.* PRAFULLA KUMAR MUKHERJEE. **I.R. 1932 Cal. 711 = 140 I.C. 376 = 36 C.W.N. 871 = A.I.R. 1933 Cal. 17.**

SUCCESSION ACT (1925), S. 192.

———**S. 192**—*"Succession"—If applies to testamentary succession also.*

The provisions of the Succession Act are not confined to intestate succession only, but are also applicable to cases of testamentary succession. Hence the word "succession" used in S. 192 refers to testamentary succession as well as to intestate succession. (*Abdul Rashid, J.*) CHAMPI DEVI *v.* PURAN BAL. **154 I.C. 686=7 R.L. 594=A.I.R. 1934 Lah. 930.**

———**S. 194**—*Order under—When can be passed.*

An order under S. 194 of the Succession Act can be passed only after the conditions embodied in S. 193 have been fulfilled. (*Abdul Rashid, J.*) CHAMPI DEVI *v.* PURAN BAL. **154 I.C. 686=7 R.L 594=A.I.R. 1934 Lah. 930.**

———**S. 194**—*Scope—Delivery of property without security—Legality.*

The substantive provisions of the law as contained in S. 194 of the Succession Act are not in any way controlled by O. 32, R. 6, C. P. Code, relating to the receipt of property by a guardian. An order for delivery of possession of movables to a person under S. 194 of the Succession Act without demanding security from him is not illegal. (*Guha and M. C. Ghose, JJ.*) BHABATARINI DEBI *v.* PRAFULLA KUMAR MUKHERJEE. **I. R. 1932 Cal. 711=140 I.C. 376=36 C.W.N. 871=A. I.R. 1933 Cal. 17.**

———**S. 195**—*Curator—Termination of summary proceedings—Appointment, if ceases.*

The appointment of a curator does not come to an end when he had not handed over possession of the property, although the summary proceedings have terminated. (*Mukerji and Bennet, JJ.*) LAKHMI CHAND *v.* RAM LAL KAPOOR. **I R. 1931 All. 654=133 I.C. 414 =A.I.R. 1931 All. 423.**

———**S. 195**—*Order of appointment—Omission to state reasons—Legality.*

Ordinarily it is expected that the District Judge would clearly state that he is satisfied as regards the requisites for appointing a curator but an omission to do so would not make the order of appointment illegal. (*Sulaiman, A.C.J., Mukerji and Boys, JJ.*) LILA *v* MAHANGE. **54 All. 183=137 I C 634=I.R 1932 All. 347=1931 A.L.J. 974=A.I.R. 1931 All. 632 (F.B.).**

———**S. 200**—*Scope.*

S. 200 does not state that a curator must be specifically authorized by the District Judge to institute or defend suits. What S. 200 states is that the curator shall be subject to all the orders of District Judge, regarding the institution or defence of suits. (*Mukerji and Bennet, JJ.*) LAKHMI CHAND *v.* RAM LAL KAPOOR. **I.R. 1931 All 654=133 I.C. 414=A.I R. 1931 All. 423.**

———**S. 200 Proviso**—*Scope.*

Proviso to S. 200 does not relate to the institution or defence of suits, but merely relates to what it specifically states, that is, collection of debts or rents. (*Mukerji and Bonnet, JJ.*) LAKHMI CHAND *v.* RAM LAL KAPOOR. **I.R 1931 All. 654=133 I.C. 414=A.I.R. 1931 All 423.**

———**S. 211**—*Executor—Decree against—Subsequent revocation of probate—Effect of.*

The validity of a decree against an executor is not affected by the subsequent revocation of the probate. It is binding on the estate and on all subsequent representatives of the State. 35 C. 955; *Hewson* v. *Shelly*, (1914) 2 Ch.D. 13 and *Allen* v. *Dundas*, 3 T.R. 125, Ref. (*Page, C.J. and Mya Bu, J.*) MA THEIN *v.* NEPEAN. **9 Rang 330=I.R. 1931 Rang. 270 (2)=133 I.C. 494 (2)=A.I.R. 1931 Rang. 283.**

SUCCESSION ACT (1925), S. 212.

———**S. 211**—Hindu widow—Alienation in excess of powers—Avoidance. *See* SPECIFIC RELIEF ACT, S. 42. **A.I.R. 1933 Oudh 555.**

———**Ss. 211, 250, 255, 256 and 257**—*Applicability—Property passing by survivorship—Letters of administration in respect of—Application for—Maintainability.*

The case of a person who obtains property by survivorship is not expressly provided under the Succession Act (1925), and by reason of the express words of S. 211, as the title in executor or administrator ordinarily appointed under the Succession Act would not cover the property which has passed to a third person by survivorship, it is open to the person to whom such property has so passed to come to Court and to apply for letters of administration with execution as mentioned in Ss. 255 to 257 of the Act; and just as a beneficiary is entitled to apply for a limited grant under S. 250, whether there is a will or not, a person to whom coparcenary property has passed by survivorship has the right to apply for representation under S. 255 or 256, as the case may be. (*Kania, J.*) BAI UJAMBAI *v.* HARAKCHAND. **59 Bom. 644=8 R.B 6=156 I.C. 621=37 Bom.L.R. 300=A I.R 1935 Bom. 242**

———**Ss 211 and 307**—*Bequest of whole of self-acquired property to widow—Widow also constituted residuary legatee—Right to recover debts due to deceased.*

A person bequeathed the whole of his self-acquired property to his wife subject to certain bequests in favour of his children. The widow was granted probate. She was the residuary legatee under the will and as the executrix sued to recover debts due to her deceased husband.

Held, that she as executrix was his legal representative for all purposes, that all the property vested in her and that in the absence of any restriction imposed upon her by the will she was entitled to recover the debts due to her deceased husband. It is not necessary that the will should expressly empower the wife to collect the debts. (*Jai Lal and Abdul Rashid, JJ.*) MT. ISHAR KAUR *v.* AMAR NATH. **6 I.R. (Lah.) 236=146 I.C. 515=A.I R. 1933 Lah. 740.**

———**S. 211 (2)**—*Deceased co-parcener of joint Mitakshara Hindu family—Letters of administration granted to manager—Legality—Mortgage by manager without sanction of Probate Court—Validity.*

By reason of S. 211 (2), no letters of administration can be granted in respect of the estate of a deceased person who was a member of a joint Mitakshara Hindu family along with other coparceners. It is therefore not necessary to obtain the sanction of the District Judge in order to render a mortgage executed by the manager of such a family valid and binding on the joint family estate of a minor, even though the manager may have obtained letters of administration, because such a grant is without jurisdiction and may be ignored. (*D. N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING. **62 Cal. 733=61 C.L J 593=161 I.C. 595=8 R.C. 533=A I.R. 1933 Cal. 116.**

———**S. 212**—*Applicability—Application to set aside execution sale—Death of judgment debtor—Continuation of proceeding by legal representatives.*

Where the judgment debtor applied to have a sale of his property in execution set aside and on his death his son and wife wanted to continue the proceeding, it cannot be said that they wanted to establish their right to any part of the property of the deceased and S. 212 has no application. (*Macpherson and Khaja Mahomed Noor, JJ.*) SMITH *v.* GOKUL CHANDRA CHAKRAVARTI. **11 Pat. 424=I.R. 1932 Pat. 203=139 I. C. 74=13 Pat L.T. 457=A.I.R. 1932 Pat. 234.**

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———**Ss. 212, 213 and 214**—*Applicability—Mortgage suit—Proof of representation—Jews.*

A mortgage was executed in favour of three jews. One of them died and a suit was brought on the mortgage by the two remaining mortgagees and the heirs of the deceased mortgagee. The first Court held that the suit in so far as it related to a decree for the deficiency after the sale of the mortgaged property was not maintainable under S. 214 of the Succession Act.

Held, that if the representatives of the deceased mortgagee were necessary parties at all, then the case was governed by S. 212 or 213 and not by S. 214 and the suit was not maintainable by the heirs unless they produced probate or letters of administration. (*Beaumont, C J. and Murphy, J.*) MENAHIM YOUSEF *v.* ISLAM AMAN SALAH. **134 I.C. 1167 = 33 Bom.L R. 1222 = I.R. 1932 Bom. 47 = A.I.R. 1931 Bom. 547.**

———**S 213**—*Applicability—Wills made by Hindus of the Punjab.*

S. 213 does not apply to wills made by Hindus of the Punjab and relating to immovable property situate in the Punjab. (*Jai Lal, J.*) SOHAN SINGH *v.* BHAG SINGH. **15 Lah. 898 = 7 R.L 686 = 155 I.C. 309 = 35 P.L R. 441 = A I.R. 1934 Lah. 599.**

———**S. 213**—*Cla m based on will—Probate is a condition precedent to claim being allowed.*

Where the claimants base their title on a will alleged to have been executed by the deceased, succession to whose estate is governed by Indian Succession Act, they cannot establish their claim before obtaining probate of the alleged will under S. 213. (*Raza and Smith, JJ.*) DWARKA NATH SINGH *v.* RAJ RANI. **8 O.W N. 1198 = I R. 1931 Oudh 408 = 134 I.C. 872 = A.I.R. 1932 Oudh 85.**

———**Ss. 213 and 214**—*Executor—Power to act—Grant of probate*

The probate of a will is operative only as the authenticated evidence of the executor's title and not as the foundation thereof for he derives his title from the will itself and the property of the deceased vests in him from the moment the testator dies. The executor before he proves the will can do all acts which are incidental to his office except those relating to suits in connection with the estate. (*Wadia, J.*) PANDURANG SHAMRAO *v.* DWARKADAS KALLIANDAS. **6 I R (Bom.) 161 = 146 I.C. 621 = 35 Bom L.R 700 = A.I.R. 1933 Bom 342**

———**S. 213**—*Scope—Suit by executor—Probate, if a condition precedent.*

The grant of a probate is not a condition precedent to the institution of a suit by an executor. He has the right to sue as executor even before he obtains probate, and he will be entitled to get a decree if he produces the probate before the passing of the decree. (*Nasim Ali and Khundkar, JJ.*) PRABHATNATH DAS *v.* RAMENDRAKUMAR SHAHA. **61 Cal. 1081 = 155 I.C. 64 = 7 R.C. 554 = A.I R. 1935 Cal. 158.**

———**S. 213**—*Suit for benefit of the estate—Heir in possession—Right to maintain.*

The legal heir of a testator in possession of his general estate can maintain a suit for the benefit of the estate so long as any other claimant does not establish his right to the same under the will. 18 C. W. N. 1136, Foll. (*Mukerji and Guha, JJ.*) GOPAL LAL CHANDRA *v* AMULYA KUMAR SUR. **59 Cal. 911 = 142 I.C. 747 = I R 1933 Cal. 313 = A.I.R 1933 Cal 234.**

———**S 213**—*Suit by executor or legatee—Probate not a condition precedent—Bombay High Court—Practice—Decree not to be sealed till grant of probate—Propriety of.*

The grant of probate of a will is not a condition pre cedent to the institution of the suit and the executor or legatee may institute a suit without obtaining probate but he will not be entitled to a decree unless the probate is granted to him before the passing of the decree It is immaterial if the grant of the probate follows the institution of the suit, so long as it is granted before the date of the decree. 38 I.A. 7 and 37 B 158, Foll. But the practice in Bombay of passing a decree in a suit by an executor or legatee with a direction that the decree is not to be sealed until probate is granted or representation taken out is not strictly correct. 43 I.A. 113 and 50 Cal. 49, Ref. (*Wadia, J.*) RAICHAND DANJI *v.* JIVRAJ BHAVANJI. **56 Bom. 65 = 135 I.C 421 = I.R. 1932 Bom. 69 = 33 Bom.L.R. 1372 = A I R. 1932 Bom 13.**

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———**S. 213**—*Suit by executor—Probate subsequently obtained.*

If an executor institutes a suit in anticipation of probate and subsequently obtains probate, the requirements of S. 187 (now S. 213) are satisfied for the purposes of a decree to be obtained. 38 C. 327, Foll. (*Mukerji and Guha, JJ.*) GOPAL LAL CHANDRA *v.* AMULYA KUMAR SUR **142 I C. 747 = I R. 1933 Cal. 313 = 59 Cal 911 = A.I.R. 1933 Cal 234.**

———**Ss. 213 and 227**—Vesting of estate—Date of—Relation back. *See* EXECUTOR, VESTING OF ESTATE. **59 Cal 911.**

———**S 214**—*Applicability—Crown taking property by escheat.*

The provisions of Ss. 214 and 381 are not applicable when the property vests in the Crown by reason of escheat. (*Sen, J.*) SECRETARY OF STATE FOR INDIA *v* GIRDHARI LAL SHAMBHUNATH. **54 All. 226 = I.R. 1932 All 213 = 136 I.C. 565 = 1932 A.L.J. 150 = A.I.R. 1932 All. 220.**

———**S. 214**—*Applicability—Mortgage suits.*

S. 214 of the Succession Act, has reference only to suits to enforce payment of simple debts. Suits to bring mortgaged property to sale are not within its purview because a mortgage suit is really a suit to realize an interest in immovable property. Therefore the heirs of a deceased Chinese Buddhist, who dies intestate, cannot be compelled to obtain a grant of letters of administration or a succession certificate before asking the Court to grant them a mortgage decree (*Leach, J.*) SAW CHONG GRE *v.* HAFIZ BIBI. **153 I C 375 = 7 R R 205 = 12 Rang. 690 = A.I.R. 1934 Rang. 369**

———**S. 214**—*Certificate—Production in appeal.*

The suit was decreed by the Court of first instance. There was no plea in the Court of first instance that a succession certificate was not produced. The objection was taken for the first time in appeal the appeallate Court accepted the certificate and remanded the case.

Held, that the appellate Court was right in accepting the certificate. (*Mukerji, J.*) BHUDAT SINGH *v.* MANGAT RAI. **6 R A. 617 = 147 I C 1168 = 1934 A.L. J. 579 = 3 A.W.R. 574 = A.I.R. 1934 All. 296.**

———**S. 214**—*'Debt'—Legatee of share of residue—Application to recover—Succession certificate if necessary.*

The legatee of a share in the residuary estate has no interest in any of the property of the testator until the residue has been ascertained and in seeking to recover the same a succession certificate is not necessary. (*C. C. Ghose, A. C. J. and Mitter, J.*) SECRETARY OF STATE FOR INDIA *v.* PARIJAT DEBI. **60 Cal 1135 = 150 I C 158 = 6 R.C. 767 = 37 C. W.N. 769 = A.I R. 1933 Cal. 841.**

———**S. 214**—*Executor appointed by will—Probate of will unnecesary—Succession certificate for realising debt—Necessity.*

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An executor appointed by a will, for which probate need not be and has not been obtained, is not exempted from the requirement of S. 214 to produce a succession certificate before he can get a decree for a debt due to the testator's estate. 37 M. 175, Ref. (*Reilly, J.*) RAMUTTI *v.* PADMANABHAN CHETTI. **I.R. 1932 Mad. 582 (2) = 133 I C. 494 = 1932 M.W.N. 872 = 35 L.W. 264 = A.I.R. 1932 Mad. 301.**

———**S. 214**—*Insurance—Person named in policy not obtaining administration or succession certificate—Money in hands of Insurance Company—If attachable for his debt.*

Where the deceased had mentioned in his life policy that it was for the benefit of his wife and after his death the judgment-creditor sought in execution of a decree against the person named in the policy to attach it and obtain prohibitory order against the company directing it not to pay the amount to the person named.

Held, that Letters of Administration or a succession certificate was necessary to entitle the person named in policy to claim payment of the amount due under the policy and that merely because he is in one of the two persons mentioned in the policy as the persons to whom payment of the amount due under the policy is to be made in the event of the death of the insured, letters of administration or a succession certificate do not become unnecessary. Such person obtains no rights under the policy of insurance, on the death of an assured, by reason of the fact that his name is mentioned in the policy as the person to whom it should be paid and as such the amount in the hands of the Insurance Company cannot be attached. (*Mya Bu and Dunkley, JJ.*) DAW YU *v* SUN LIFE ASSURANCE CO. **157 I C 810 = A.I.R. 1935 Rang. 211.**

———**S. 214**—*Insurance policy—Subsequent adoption and will—Death of insured—Minor's estate vesting in Court of Wards—Company calling for succession certificate or probate—Propriety*

There is nothing in law to prevent a company from entering into a contract with a proposer for life insurance that the company would pay the money only to him or his assign or to his executor or his administrator. Where a Hindu took a whole life policy and before his death he adopted a boy and also executed a will in his favour and after his death the minor's estate was taken over by the Court of Wards.

Held that the Insurance Company was justified in calling for probate or letters of administration or a succession certificate before payment of the amount. (*Mukerji and Bennet, JJ.*) GRESHAM LIFE INSURANCE-SOCIETY, LTD. *v.* COLLECTOR OF ETAWAH. **54 All. 1026 = 143 I.C. 343 = I R 1933 All. 233 = 1932 A L J. 1015 = A I R. 1933 All. 1.**

———**S. 214**—*Legatee entitled to share in residue—His legal representative, if bound to produce succession certificate.*

The legatee of a share in a residue has no interest in any of the properties of the testator until the residue is determined. His right is to have the estate properly administered and applied for his benefit when the administration is complete. Until the claims against the testator's estate for debts, legacies and testamentary expenses, etc., have been satisfied, the residue does not come into actual existence. No specific share of the residue thereof vests in the legatee till the residue is determined and his sole right is to call upon the executor to administer the estate in due course. The relationship of creditor and debtor does not therefore exist between the executor and the legatee until the residue is determined as to attract the application of S. 214, Succession Act, and in case of his death before the determination

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residue it is not necessary for a person claiming on succession to be entitled to the share of the legatee in the residue to obtain a succession certificate. The terms of S. 214 do not apply to such a case as a decree is not asked for against the executor as a debtor of the legatee. (*Sir Lancelot Sanderson*) SECRETARY OF STATE *v.* PARIJAT DEBI **63 I.A. 61 = 63 Cal 677 = 1936 A L. J. 12 = 43 I. W. 16 = 1936 M W.N. 10 = 38 Bom. L R. 125 = 159 I.C. 329 = 40 C.W.N. 185 = 1935 A. W.R. 1416 = 1935 O.W.N. 1274 = A I.R. 1935 P.C. 203 (P.C.).**

———**S. 214**—*Procedure—Production of probate—Time for.*

A suit should not be dismissed for non-production of probate or succession certificate, as the case may be, but the Court should grant reasonable time to enable the party to produce it. 49 A. 1; 19 C. W. N. 794; 17 Mad. 14; 24 A. 138; 42 A. 549; 57 I.C. 650. Foll. (*Niyogi, A. J. C.*) KALYANSA *v.* TULSABAI **27 N.L. R. 162 = I.R. 1931 Nag. 177 (1) = 134 I. C. 849 (1) = A.I.R. 1931 Nag. 181.**

———**S. 214**—*Scope—Decree without succession certificate—If void—Execution—Objection, if open.*

The effect of the Succession Act is to make it obligatory on the Court to receive certain evidence in the form of a succession certificate before a decree has been granted; but failure to produce the necessary evidence does not make the decree void. And the execution Court has no right to reopen the decree and see if it had been passed after taking the necessary evidence, though the decree may have been passed *ex parte*, and though a succession certificate should have been produced but not in fact so produced. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) RAM KINKAR SINHA *v.* MUHAMMAD ISMAIL CHOUDHURY. **157 I C. 81 = 8 R. P. 89 (2) = 16 Pat. L T. 99 = A.I.R. 1935 Pat. 143.**

———**S. 214 (1) (b)**—*Applicability—Application for execution of mortgage decree by sale of mortgaged property.*

S. 214 (1) (*b*) of the Succession Act applies only if the application for execution against the debtor of the deceased is for obtaining an order for the payment of his debt. If the personal remedy under the mortgage-deed has become barred by time and the mortgagee is simply entitled to a decree for sale of the mortgaged property, it is difficult to hold that the application for the execution of the mortgage decree for realisation of the amount by sale of the mortgaged property is an application to obtain an order for the "payment" of his debt. No succession certificate is, therefore, necessary in such a case. (*Sulaiman, C. J. and Bennet, J.*) MOHAMMAD IBRAHIM *v.* BHAGWAN DAS **158 I.C. 885 = 8 R.A. 341 = 1935 A.W.R. 860 = A.I R. 1935 All. 897.**

———**S. 214 (1) (b)**—*Decree obtained by sole partner—Execution by son—Certificate necessary.*

A decree obtained by a firm consisting of one partner only cannot be executed by the son of the decree-holder without the production of a succession certificate under S. 214 (*b*) of the Succession Act. (*Patkar and Murphy, JJ.*) BHAGVAN MANAJI *v.* HIRAJI PREMAJI. **I.R. 1932 Bom. 599 = 140 I.C. 519 = 34 Bom. L.R. 1112 = A.I.R. 1932 Bom. 516.**

——— —**Ss. 216 and 332**—*Suit brought by legatee with permission of executor—Maintainability.*

According to a will made by *A*, the father of the plaintiff the plaintiff was entitled to all the movables as well as debts due to her father at the time of his death. She instituted the present suit against *B* and his three brothers on the basis of a pro-note. But *R* was appointed

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the executor under the will and he had taken out probate thereof. The lower Court otherwise decreed the suit but dismissed it on the ground that only the executor could sue. Against that decision the plaintiff appealed.

Held, that as the executor had given evidence to the effect that the suit was instituted with his permission and as according to the will she was entitled to this pro-note, the plaintiff could sue on the basis of that pro note but she would certainly not be entitled to realize the money until she obtained the usual succession certificate. (*Addison and Bhide, JJ.*) PANNA DEVI *v.* SHAM LAL. **6 I.R. (Lah.) 252 (2)=146 I.C. 633=A.I.R. 1933 Lah. 805.**

———S 218—*Letters of Administration—Application for—Who can oppose grant.*

An application made by the deceased's wife's brother's daughter for Letters of Administration to the estate of the deceased was opposed by a person who was neither a sapinda nor a sakulya, nor a semanodaka of the deceased; but who was related to the deceased through a common ancestor or rather a common link to the deceased.

Held, that though both the parties were not heirs at all still it could not be said that the person had no interest of any description, which would entitle him to appear and watch and if necessary to oppose the application and can therefore be allowed to appear and oppose the application. A.I.R 1914 P. C. 1 and 56 I. C. 122, Ref. (*C. C. Ghose and Mallik, JJ.*) GOWRISHANKAR CHATTORAJ *v.* SATYABATI DEBI. **I.R. 1931 Cal. 660=133 I.C. 212=A.I.R. 1931 Cal 470.**

———S. 218—*Letters of Administration—Persons entitled to—Question of adoption—Court, if can to go into.*

If on the status of the respondents in proceedings for letters of administration being proved they would be the only persons entitled to inherit the estate of the deceased, the Court is perfectly justified in going into the question of adoption of the respondents. 5 Rang. 159 and 9 L. B R. 163, Rel. on. (*Ba U and Shaw, JJ.*) MAUNG KYAW *v.* MA DAUNG. **153 I C. 138=7 R R. 197 (1)=A.I.R 1934 Rang. 205.**

———S 218—*Letters of Administration—Rights of step-children and adopted daughter.*

Letters of administration were granted to step children. But an appeal was filed by the objector on the ground that she was the adopted daughtor of the deceased.

Held, that has the step children where entitled to a small share they were entitled to apply.

Held also, that if the objector wanted to get letters, she must apply for same and prove that she is the adopted daughter. Then she has preferential right to letters. But if she fails to do so, letters should be given to the step children. A.I R. 1928 Rang. 225, Ref. (*Mosely and Dunkley, JJ.*) MAUNG TALOKE *v.* KO AUNG MYINT. **158 I C. 397=8 R R 167=A.I.R. 1935 Rang. 280.**

———S. 218 (1) and (2)—*Enquiry under—Scope—Rival claimants—Husband of deceased—Right of.*

Where there are a number of rival claimants for the grant of letters of administration, and the claim of one of the rivals is admitted by the other claimants, and the applicant whose claim is admitted is a fit and proper person to be granted letters, letters of administration, would in the normal course, be granted to him, and it is then unnecessary to consider the status of the other rival claimants. But where, as between the rival claimants *inter se*, the claim of none of them is admitted by the others, it is incumbent on the Court to determine the status of the applicant before letters are issued to him. The husband of the deceased is *prima facie* entitled to the grant of letters of administration to the estate of his wife. But when his status as husband and his fitness to administer the estate are disputed, the Court is bound to determine both his status and his fitness. (*Page, C.J. and Baguley, J.*) MAUNG BA HAN *v.* MAUNG TUN YIN. **153 I.C. 397=7 R.R. 215=12 Rang. 629=A.I.R. 1935 Rang. 54.**

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———S. 219 (f)—*Application by creditor—Facts to be alleged and proved.*

Under S. 219 (*f*) of the Succession Act, it is not enough for a creditor-applicant for letters of administration to merely allege that the deceased left no relatives or persons connected with him by marriage or consanguinity who were entitled to letters of administration and willing to act, but it is also necessary as in the case of a civil suit, to adduce evidence in support of the allegation in the application. Evidence merely to the effect that the deceased had no wife or children and was not married would not be enough. The applicant must produce evidence that enquiries have been made in the place where the deceased's parents originally lived which would show whether the deceased had any relative still living. (*Mukerji and Bennet, JJ.*) RAM DASS *v.* DISTRICT JUDGE OF JHANSI. **7 R.A. 18 (2)=150 I.C. 748 (1)=A.I.R. 1934 All. 885.**

———S. 222—*Appointment of Executor by implication.*

Where a testator provided for certain specific legacies and further directed "my nephew is to discharge the debts due by me to the world," *held*, that the nephew was appointed an Executor by implication. (*Beasley, C.J. and Walsh, J.*) VIRAMMA *v.* SESHAMMA. **54 Mad. 266=I.R. 1931 Mad. 623=132 I.C. 127=1931 M.W.N. 213=33 L.W. 159=A.I.R. 1931 Mad. 343=60 M.L.J. 264.**

———Ss. 222 and 224—*Appointment of executor by implication—Executor appointed by person nominated to so appoint in will.*

Where a certain person has been appointed by the will of the testator to nominate an executor and he has done so, it must be taken that the person so appointed executor has been appointed under the will by necessary implication. 5 Bom. L.R. 639, Foll. (*Sulaiman, C.J. and King, J.*) DURGA DAS POOSARY, *In re*. **150 I.C. 1018=7 R.A. 61=1934 A.L.J. 596=4 A.W.R. 250=A.I.R. 1934 All. 804.**

———S. 222—*Grant of probate—Person not named in will.*

Under S. 222 of the Indian Succession Act no person who has not been named in the will either expressly or by necessary implication can be granted probate of the will. (*Sulaiman, C.J. and Rachhpal Singh, J.*) EDWARD WATSON COLESTON *v.* THERESA CHITTY. **152 I.C. 124=7 R.A. 260=1934 A.L.J. 1089=4 A.W.R. 768=A.I.R. 1934 All. 1053.**

———S. 223—*Probate, if can be granted to.*

A probate cannot be granted to a minor according to S. 223. (*Jai Lal, J.*) BHAG MAL *v.*

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MALIK SINGH. **131 I.C. 339=A.I.R. 1931 Lah. 229.**

———**Ss. 227 and 213**—Vesting of estate—Date of—Relation back. *See* EXECUTOR—VESTING OF ESTATE. **59 Cal. 911.**

———**Ss. 229 and 230**—*Renunciation—Mode.*

A renunciation made by an executor by a writing in the absence of the Judge need not be addressed to the Court. All that is required by S. 230 is that the writing containing the renunciation must bear the signature of the renunciant executor. A statement expressly declaring refusal to accept the responsibility of executor, which is recorded by the Court and signed by the executor is valid to effect a renunciation. (*Shadi Lal, C.J. and Broadway, J.*) GADODIA *v.* RAGHUBAR DAYAL. **I.R. 1931 Lah. 766=133 I.C. 286=A.I.R. 1931 Lah. 746.**

———**S. 230**—*Renunciation—Effect.*

Under S. 230 once the renunciation is validly made it cannot be retracted and the renouncing executor is thereby prevented from applying for probate of the will appointing him executor. 51 Cal. 745, Foll. (*Shadi Lal, C.J. and Broadway, J.*) GADODIA *v.* RAGHUBAR DAYAL. **I.R. 1931 Lah. 766=133 I.C. 286=A.I.R. 1931 Lah. 746.**

———**Ss. 232 and 233**—*Application by residuary legatee—Probate Court—Jurisdiction to construe will.*

The Probate Court is competent to construe the will and to consider on the construction whether an applicant for letters of administration is entitled to the letters as the residuary legatee or universal legatee. (*D. N. Mitter and Patterson, JJ.*) BHUPATI CHARAN BASU *v.* CHANDI CHARAN BASU MALI. **156 I.C. 241=7 R.C. 696=39 C.W.N. 390=A.I.R. 1935 Cal. 154.**

———**S. 232**—*Locus standi*—Will of absolute estate to wife—Gift over to sister's son—Application by latter for letters of administration after death of widow—Maintainability. *See* WILL—CONSTRUCTION. **39 C.W.N. 390=A.I.R. 1935 Cal. 154.**

———**S. 232**—'Residuary legatee'—Who is. *See* SUCCESSION ACT, SS. 102 AND 103. **A.I.R. 1935 Nag. 239.**

———**S. 232**—*Will in favour of religious institution—Mahant in charge—Death of—Successor, if entitled to letters of administration.*

Where a will is in favour of a religious institution and the property is to be managed by the Mahant in charge, on the death of such Mahant his successor is entitled to claim letters of administration with respect to the will. (*Bhide, J.*) LACHHMAN DAS *v.* RAM CHANDER. **6 I.R. (Lah.) 246=146 I.C. 547=A.I.R. 1933 Lah. 265.**

———**Ss. 233 and 234**—*'Representative'—Meaning of.*

The word "representative" appearing in Ss. 233 and 234 should not at least in the case of a Hindu be restricted to a 'legal representative'. The only heir of a residuary legatee, who died after obtaining probate but without having fully administered the estate of the testator, is entitled to obtain a grant of administration with a copy of the will annexed (without obtaining representation according to law to the residuary legatee). 45 C. 862, Foll. (*Mirza, J.*) MANJI JETHA LAKHANI, *In re*. **I.R. 1932 Bom. 422=138 I.C. 712=34 Bom.L.R. 606=A.I.R. 1932 Bom. 270.**

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———**S. 234**—*Scope—Applicability to case of appointment of minor by will.*

Section 234 only deals with cases where no executor has been appointed or if an executor has been appointed he declines to act. The section is not applicable when the executor appointed by the will is a minor. The appropriate procedure in such a case is that prescribed by S. 244. (*Beasley, C. J. and Walsh, J.*) VIRAMMA *v.* SESHAMMA. **54 Mad. 266=I.R. 1931 Mad. 623=132 I.C. 127=A.I.R. 1931 Mad. 343 1931 M.W.N. 213=33 L.W. 159=60 M.L.J. 264.**

———**S. 244**—*Minor executor—Procedure for obtaining Letters of Administration.*

Minor executors are expressly and solely provided for by S. 244 of the Succession Act. When a minor executor is appointed, then it is open to his legal guardian or such other person as may seem to the Court fit, apply to have the Letters of Administration issued to him. And before Letters of Administration can be granted to a legal guardian of a minor, the legal guardian must apply to be appointed the minor's guardian for the purpose of enabling him or her to obtain those Letters of Administration for the use and benefit of the minor. 34 Cal. 706, Rel. on. (*Beasley, C.J. and Walsh, J.*) VIRAMMA *v.* SESHAMMA. **54 Mad. 266=I.R. 1931 Mad. 623=132 I.C. 127=A.I.R. 1931 Mad. 343= 1931 M.W.N. 213=33 L.W. 159=60 M.L.J. 264.**

———**S. 244**—*Minor sole executor—Application for probate—Sustainability—Procedure.*

Where a minor is the sole person who can claim to be an executor to a will and his legal guardian applies for grant of probate, letters of adminstration with the will annexed can be granted to him. The application for probate by the minor which is unsustainable in law can be allowed to be amended into one for letters of administration even on appeal. A.I.R. 1927 Lah. 770, Rel. on; 41 I.C. 279, Dist. (*Jai Lal, J.*) BHAG MAL *v.* MALIK SINGH. **131 I.C. 339=A.I.R. 1931 Lah. 229.**

———**S. 246**—*Procedure under—Defective application—Effect.*

The correct procedure under S. 246 is that there should be two applications: (*i*) to be appointed as the proper person to represent the lunatic; and (*ii*) for the grant of letters. But where a person applies only for grant of letters, the defect is only one of procedure and does not affect the merit. (*Das and Brown, JJ.*) MA CHIT SU *v.* KYAW MAUNG. **6 I.R. (Rang.) 10=144 I.C. 821=A.I.R. 1933 Rang. 128.**

———**S. 246**—*Right to administer—Natural mother of adopted son.*

A natural mother is the proper person to administer estate on behalf of her son who has been adopted and is lunatic in the absence of any one else better qualified to do this. (*Das and Brown, JJ.*) MA CHIT SU *v.* KYAW MAUNG.

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6 I.R. (Rang.) 10=144 I.C. 821=A.I.R. 1933 Rang. 128.

———**S. 247**—*Administrator* pendente lite—*Position of—Appointment—Grounds—Power of Court.*

The position of an administrator *pendente lite* is similar to that of a receiver with this distinction that the administrator *pendente lite* represents the estate of the deceased for all purposes except distribution. Before granting administration *pendente lite* the Court has to be satisfied in the first place that there is a *bona fide* suit pending touching the validity of the will of the deceased. Apart from the Act the Court has a general power to appoint a receiver in any case in which it may appear just and convenient to do so but such an appointment cannot be claimed as of right. (*Wadia, J.*) PANDURANG SHAMRAO *v.* DWARKADAS KALLIANDAS. **6 I.R. (Bom.) 161=146 I.C. 621=35 Bom.L.R. 700=A.I.R. 1933 Bom. 342.**

———**S. 250**—*"No beneficial interest on his own account"—Meaning of.*

The section is not concerned with the subsequent or ultimate devolution of property of which the deceased was a trustee. After the death of the trustee, his heirs may derive benefit from the property of which he was a trustee but that is no bar to the applicability of the section because so long as the trustee is there, he has no beneficial interest on his own account. (*Rangnekar, J.*) ADARJI MANCHERJI DALAL, *In re.* **55 Bom. 795=I.R. 1931 Bom. 429=133 I.C. 845=33 Bom.L.R. 576=A.I.R. 1931 Bom. 428.**

———**S. 250**—*'Trustee'—Policies on the lives of partners taken out by the partnership—Right of the remaining partners to apply for limited grant.*

Where certain policies effected on the lives of individual partners out of the partnership funds and for the benefit of the partnership have been found to be partnership property and one partner died leaving no general representative of his estate, the remaining partner can apply for a grant limited to the policies of the deceased, because a partner is a trustee of the partnership property standing in his name and no partner can be said to have any beneficial interest in any particular estate or property until the partnership is dissolved. 21 Bom. 673; (1897) A.C. 11, Ref. to. (*Rangnekar, J.*) ADARJI MANCHERJI DALAL, *In re.* **55 Bom. 795=I.R. 1931 Bom. 429=133 I.C. 845=33 Bom.L.R. 576 =A.I.R. 1931 Bom. 428.**

———**S. 263**—*Application for revocation—Long delay.*

Though there is no fixed time during which an application for revocation of a probate might be made, even if there may be no acquiescence, a person may be debarred by long delay in making such application. 23 C.L.J. 100, *Ref.* (*Mukerji and Mitter, JJ.*) HAIMABATI MITRA *v.* KUNJA MOHAN DAS. **135 I.C. 282=I.R. 1932 Cal. 90=35 C.W.N. 387=A.I.R. 1931 Cal. 713.**

———**S. 263**—*Application for revocation of probate—Value of—Appeal—Bombay Civil Courts Act (XIV of 1869), S. 28 (a).*

The value for purposes of jurisdiction of an application to revoke the probate under S. 263 of the Succession Act extends to the whole property covered by the probate and is not limited to the interest of the applicant therein. So an appeal from the order of a Sub-Judge on such an application where the property covered by the will is worth more than Rs. 5,000 lies direct to the High Court even though the applicant's share is worth only Rs. 1,600 and not to the District Court. (*Patkar and Murphy, JJ.*) RAMGOPAL *v.* JAITUNBAI. **57 Bom. 143=141 I.C. 575 (2)=I.R. 1933 Bom. 110=34 Bom.L.R. 1677 =A.I.R. 1933 Bom. 71.**

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———**S. 263**—*Probate granted by High Court—Revocation—Procedure.*

Where a probate granted by the High Court is sought to be revoked, the proper procedure is to file a petition under the testamentary and intestate jurisdiction of the High Court and not a suit on the ordinary original side. (*Wadia, J.*) NARBHERAM JIVRAM *v.* JEVALLABH. **147 I.C. 362 =6 R.B. 193=35 Bom.L.R. 998=A.I.R. 1933 Bom. 469.**

———**S. 263**—*Proceeding for revocation—Alienees since probate—Whether necessary parties.*

Aliences since the probate are not necessary parties to proceedings for revocation of the grant of probate on the ground of proceedings being defective in substance. But after revocation the aliences may, if they choose, be allowed to intervene and opportunities given to them of being heard when the propounder is called upon to prove the will in solemn form. (*Mukerji and Mitter, JJ.*) HAIMABATI MITRA *v.* KUNJA MOHAN DAS. **135 I.C. 282=I.R. 1932 Cal. 90=35 C.W.N. 387=A.I.R. 1931 Cal. 713.**

———**Ss. 263 and 276**—*Proper parties not cited —Validity of grant.*

Though S. 276 (unlike S. 278) does not mention that "the family or other relatives of the deceased" should be stated in a petition for probate, S. 263, Ill. (*ii*) shows that a grant made without citing parties who ought to have been cited, *e.g.*, the daughters of the testator, is liable to be revoked. (*Mukerji and Bartley, JJ.*) CHARUBALA DE *v.* MENAKA SUNDARI DE. **142 I.C. 69=I.R. 1933 Cal. 225=58 C.L.J. 318 =36 C.W.N. 1010=A.I.R. 1933 Cal. 74.**

———**S. 263**—Revocation—Effect—If revocation for all purposes—Prior unsuccessful applicant—If can oppose fresh grant—*Res judicata. See* C. P. CODE, S. 11—MISCELLANEOUS PROCEEDINGS. **39 C.W.N. 1071.**

———**S. 263**—*Revocation—Effect on previous decree against executor.*

The validity of a decree against an executor is not affected by the subsequent revocation of the probate. It is binding on the estate and on all subsequent representatives of the State. 35 C. 955; *Hewson v. Shelly*, (1914) 2 Ch.D. 13 and *Allen* v. *Dundas*, 3 T.R. 125, Ref. (*Page, C.J. and Mya Bu, J.*) MA THEIN *v.* NEPEAN. **9 Rang. 360=I.R. 1931 Rang. 270 (2)=133 I.C. 494 (2)=A.I.R. 1931 Rang. 283.**

———**S. 263**—*Revocation—Grounds—Minor not represented.*

Notice of citation was issued and served on the widow of the testator for herself and as guardian

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of her infant daughter. The notice however was held to be of no effect since the widow was living with and under protection of the propounder and there was no opportunity for her to oppose the grant of probate or require proof of will in her presence. No guardian *ad litem* of the minor was appointed. 32 years after the grant of probate and on death of the mother and the devolution of property on her the daughter applied for revocation. The will on the face of it was officious practically disinheriting the widow and the daughter.

Held that the fact that no guardian *ad litem* was appointed was enough to revoke the grant of probate. (*Mukerji and Mitter, JJ.*) HAIMABATI MITRA *v.* KUNJA MOHAN DAS. **135 I.C. 282=I.R. 1932 Cal. 90=35 C.W.N. 387=A.I.R. 1931 Cal. 713.**

———**S. 263**—*Revocation—"Just cause"—Discretionary.*

Under S. 263 the power to revoke a grant is discretionary and "just cause" as defined in the section is discretionary. (*Wadia, J.*) GEORGE ANTHONY HARRIS *v.* MILLICENT SPENCER. **149 I.C. 251=6 R.B. 346 (2)=35 Bom.L.R. 708=A.I.R. 1933 Bom. 370.**

———**S. 263**—*Revocation—Long delay not amounting to waiver—Procedure.*

Mere delay in applying for revocation of probate is immaterial if it does not lead to an inference of waiver. Where the will was proved in common form and an application for revocation was made twenty years after on the ground that special citations had not been issued on two persons who were minors at the time probate was granted,

Held, that the application could be entertained. *Held*, however, that the proper procedure under the circumstances was to call on the executor to prove the will in the revocation proceeding. (*Mukerji and Guha, JJ.*) ASWINI KUMAR CHAKRAVARTHI *v.* SUKHAHARAN CHAKRAVARTHI. **135 I.C. 286=I.R. 1932 Cal. 94=35 C.W.N. 568=A.I.R. 1931 Cal. 717.**

———**S. 263**—*Revocation—Procedure.*

The grant of probate or letters of administration is a decree of a Court and where it has been wrongly granted an application can be made to the same Court which granted it to set aside and a regular suit is not always necessary unless the grant is sought to be revoked ground of the invalidity of the will or on the ground of any dispute as to its genuineness. There may therefore be either an application to revoke the grant or a substantive suit but when the grant is revoked fresh proceedings have to be instituted in order to obtain proper representation to the estate of the deceased and that must be done by a petition under the Act. The party propounding the alleged will may as plaintiff seek to obtain revocation of the grant to the defendant. The defendant may be called upon to prove his title to the letters of administration and then the plaintiff may contest the grant and lead his own evidence in support of the will. The absence of citations to persons interested will not always invalidate the grant. (*Wadia, J.*) GEORGE ANTHONY HARRIS *v.* MILLICENT SPENCER. **149 I.C. 251=6 R.B. 346 (2)=35 Bom.L.R. 708=A.I.R. 1933 Bom. 370.**

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———**S. 263**—*Right to apply—Person claiming adversely to testator.*

An application for revocation of probate of a will made by a mahant of a mutt is not maintainable at the instance of persons claiming to be his spiritual descendants and alleging that the properties disposed of by the deceased mahant belonged to him in his official and not personal capacity and as such could not be disposed of by him. (Case-law referred.) (*Macpherson and Fazl Ali, JJ.*) MAHANTH RAM DAS *v.* PREM DAS. **10 Pat. 817=I. R. 1932 Pat. 72=136 I.C. 296=13 Pat.L.T. 594=A.I.R. 1932 Pat. 95.**

———**S. 263 (d)**—*Revocation—Executors unwilling to administer estate.*

A grant of probate becomes useless and inoperative if the persons appointed as executors are unwilling to administer the estate, and it is, therefore, open to the Court to revoke the grant. (*Abdul Rashid, J.*) RAM PARSHAD *v.* SARDHA RAM. **158 I.C. 374=8 R.L. 245=A.I.R. 1935 Lah. 963.**

———**S. 263, Illus. (1)**—*Objection to jurisdiction—If can be taken collaterally—Separate proceeding to revoke grant—Necessity.*

The objection to the grant can be taken in a collateral proceeding and no separate proceeding is necessary to revoke the grant. It is a well-known principle that if proceedings are taken by a Court without jurisdiction, no further proceedings are necessary to set the same aside or to nullify the effect of such proceedings. (*D. N. Mitter and Patterson, JJ.*) DURGA PRASAD BARHAI *v.* JEWDHARI SING. **62 Cal. 733=161 I.C. 595=8 R.C. 533=61 C.L.J. 593=A.I.R. 1936 Cal. 116.**

———**Ss. 265 and 286**—*Contentious proceedings—Subordinate Judge as District Delegate—Jurisdiction—Oudh Civil Rules, R. 239.*

Under R. 239 of the Oudh Civil Rules Subordinate Judges in Oudh have been appointed District Delegates to grant probates and letters of administration in non-contentious case only. When the respondents appear and file objections against the application, the proceedings cease to be non-contentious. Therefore a Subordinate Judge who proceeds with the case after it becomes contentious, he exceeds his jurisdiction. (*Srivastava, Ag. C. J. and Thomas, J.*) RAM KISHORE *v.* NAND KUMAR. **151 I.C. 843=7 R. O. 146 (1)=11 O.W.N. 1301=A.I.R. 1934 Oudh 442 (1).**

———**Ss. 265, 272 and 286**—*Scope—Subordinate Judge—District Delegate—Transfer of contentious proceedings to—Legality—Oudh Courts Act, S. 31 (2).*

A transfer of proceedings under S. 31 of the Oudh Courts Act by a District Judge to a Subordinate Judge is made to the Subordinate Judge as such and not to the District Delegate. There is nothing in the Succession Act which renders a Subordinate Judge as such, incompetent to dispose of contentious proceedings. The fact that the Subordinate Judge also happens to be a District Delegate will not deprive him of jurisdic-

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tion, if the proceeding is transferred to him by order of the District Judge, although as a District Delegate he cannot dispose of a contentious proceeding. (*King, C. J. and Srivastava, J.*) KALOO *v.* NOOR JAHAN. **10 Luck. 316=152 I. C. 876=7 R.O. 248=11 O.W.N. 1481=A. I.R. 1935 Oudh 38.**

———**S. 265**—*Transfer by District Judge to Subordinate Judge—Proceedings becoming contentious after transfer—Jurisdiction of Subordinate Judge.*

Where the District Judge transferred an application for grant of probate to the Subordinate Judge for disposal and in the Court of the Subordinate Judge a caveat was lodged whereupon the applicant raised the objection that the proceedings having become contentious, the Subordinate Judge had ceased to have jurisdiction to proceed with the case.

Held, that the test in each case must be whether the Subordinate Judge is acting in his capacity as a district delegate or in the capacity of a Subordinate Judge to whom a case has been transferred by an order of the District Judge, that if he is seized of the case in the capacity of a district delegate, his jurisdiction ceases, as soon as the proceedings become contentious but that if he is trying the case as a Subordinate Judge, to whom the case has been transferred by the District Judge, there is no provision either in the Indian Succession Act or in the Oudh Civil Rules confining his jurisdiction to non-contentious cases and that it makes no difference in principle, whether the proceedings at the time of the transfer had already become contentious or whether they become contentious afterwards, and that in the absence of any provision taking away the case from the jurisdiction of the Subordinate Judge, when the proceedings before him become contentious, it must be held that the Subordinate Judge is entitled to deal with the case, whether contentious or non-contentious. (*Srivastava and Nanavutty, JJ.*) ANANDPAL SINGH *v.* RAM CHARAN. **11 Luck. 196=155 I.C. 501=7 R.O. 594= 1935 O.W.N. 555=A.I.R. 1935 Oudh 415.**

———**S. 267**—*Application for letters—Will—Mode of production.*

There is no law, which provides that the petitioner for letters of administration with the will annexed must produce it from his own custody and with the petition. It is quite sufficient if he has an interest in the administration of the estate and can establish the existence of the will and if necessary can secure the production thereof by the person in whose possession it is. (*Jai Lal, J.*) BUA DITTA MAL *v.* DEVI DITTA MAL. **I.R. 1931 Lah. 623=132 I.C. 527=A.I.R. 1931 Lah. 130.**

———**S. 269**—*Jurisdiction of District Judge under—Nature of—Property situate outside his province—Power to interfere for the protection of.*

The section creates a special jurisdiction in the District Judge authorising him to interfere for the protection of the deceased's property for which ultimately an administrator may be constituted. It is not confined to property situate within his territorial jurisdiction; the power can

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be exercised in respect of the entire property of the deceased wherever situate. (*Niyogi, A.J.C.*) MRS. M. REGO *v.* P. F. REGO. **I.R. 1933 Nag. 230=144 I.C. 322=29 N.L.R. 238=16 N. L.J. 86=A.I.R. 1933 Nag. 173.**

———**S. 269**—*Powers under—It can be exercised after application for letters of administration dismissed.*

S. 269 is independent of any application made for the grant of probate or letters of administration and the power to interfere for the protection of the property given by S. 269 can be exercised even though the application for letters of administration has been dismissed. (*Niyogi, A. J. C.*) MRS. M. REGO *v.* P. S. REGO. **I.R. 1933 Nag. 230=144 I.C. 322=29 N.L.R. 238=16 N.L.J. 86=A.I.R. 1933 Nag. 173.**

———**S. 269**—*Powers under—Injunction against person not a party.*

Though an order of injunction must be addressed to the party to the proceeding, yet S. 269 gives very wide powers of exceptional nature to the District Judge who in the exercise of such powers is competent to pass an order directing the Chief Accounts Officer of the Railway not to pay the parties pending further orders, though the latter was no party to the proceedings. (*Niyogi, A. J. C.*) MRS. M. REGO *v.* P. F. REGO. **I.R. 1933 Nag. 230=144 I.C. 322=29 N.L.R. 238=16 N.L.J. 86=A.I.R. 1933 Nag. 173.**

———**Ss. 272, 286 and 265**—Scope—District Delegate—Subordinate Judge—Transfer of contentious proceedings by District Judge—Jurisdiction. *See* SUCCESSION ACT, Ss. 265, 272 AND 286. **11 O.W.N. 1481=A.I.R. 1935 Oudh 38.**

———**S. 273**—*Administrator—Power to terminate leave and license given by deceased.*

A person who has got letters of administration to the estate of the deceased must be regarded as taking the place of that deceased. Therefore any person who on his own admission has entered upon the premises originally with leave and licence of the deceased must vacate the premises if the administrator so desires. For this purpose it is enough that the administrator has given some kind of notice. (*Baguley, J.*) MA GYI *v.* MAUNG TET. **151 I.C. 971=7 R.R. 130 (2) =A.I.R. 1934 Rang. 291.**

———**S. 273**—*Banker and customer—Payment of money for purposes inconsistent with trust—Liability—No right to indemnity.*

A banker who receives into his possession money of which his customer has, to his knowledge, become the owner in a fiduciary character, contracts the duty not to part with them, even at the mandate of his customer, for purposes which he knows are inconsistent with the customer's fiduciary character and duty. If indeed, the banker has knowledge of the misapplication of trust money received by his customer and paid to him, he is just as much liable for the amount as if he had himself been nominated a trustee of the money and it had come into his hands as such and he is not entitled to the indemnity given in S. 273 of the Succession Act. (*Beasley, C. J. and Bardswell, J.*) IMPERIAL BANK OF INDIA, MADRAS *v.* KRISHNAMURTHI. **I.R. 1933 Mad. 411=38 L.W. 119=144 I.C. 479=A.I.R. 1933 Mad. 628=65 M.L J. 471.**

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———**S. 276**—*Applicability—Pending proceedings.*

S. 276 of the Succession Act lays down a rule of procedure and not substantive law and therefore applies to an application pending at the time the new Act took effect. (*Sulaiman, Mukerji and Young, JJ.*) PITAM LAL *v.* KALLA RAM. **53 All. 687=136 I.C. 284=I.R. 1932 All. 172 =1931 A.L.J. 711=A.I.R. 1931 All. 489 (F.B.).**

———**S. 276**—*Disposing mind—Burden of proof.*

The burden of proving the existence of disposing mind is on the applicant who applies for a probate of the will. (*Jai Lal, J.*) NIKA RAM *v.* MANGU RAM. **154 I.C. 1014=7 R.L. 628 (1)=A.I.R. 1934 Lah. 682 (2).**

———**S. 276**—*Oral will—Application for probate—Maintainability.*

An application for the grant of probate of an oral will can be entertained under S. 276. The oral will was taken down at the time the will was made would not make any difference in the eye of the law. The fact would only be a strong piece of evidence to prove the contents of the oral will. (*Sulaiman, Mukerji and Young JJ.*) PITAM LAL *v.* KALLA RAM. **53 All. 687 =136 I.C. 284=I. R. 1932 A. 172=1931 A. L.J. 711=A.I.R. 1931 All. 489 (F.B.).**

———**S. 276**—*Probate—Will in respect of property without title—Effect.*

Where it appeared that the testatrix had lost her right to the property a will in respect of that property is a nullity. And when there is no will in the eye of the law there can be no probate in respect of it.

Semble: The case would be different if some of the property bequeathed had belonged to the testatrix and some had not. (*Wazir Hasan, C. J. and Raza, J.*) SHRI MAHARAJ NANDESHWAR MAHADEOJI *v.* MUNNI. **142 I.C. 293 (1)=I.R. 1933 Oudh 100 (1)=9 O.W.N. 1078=A.I. R. 1933 Oudh 84.**

———**Ss. 276 and 263**—Proper parties not cited—Validity of grant. *See* SUCCESSION ACT, Ss. 263 AND 270. **36 C.W.N. 1010.**

———**S. 278**—*Application for letters—Validity of will—Power of Court to decide.*

Where a will is propounded by the applicant and the application is for grant of the letters of administration with the will annexed, it is not the function of the Court to go into the question of the validity of the will with reference to the nature of the property disposed of by it. That matter must be left to the parties to be contested in separate proceedings. In such cases the only function of the Court is to determine whether the will was executed by the deceased while he was in possession of his senses, *i.e.*, while he had a disposing mind. 56 P.R. 1919, Dist. (*Jai Lal, J.*) BUA DITTA MAL *v.* DEVI DITTA MAL. **I.R. 1931 Lah. 623=132 I.C. 527=A.I.R. 1931 Lah. 130.**

———**S. 283**—*Citation—Issue of—Discretion.*

Different considerations arise when the testator is a Hindu and when he is Christian. And hence the law allows a discretion under S. 283 and that which the law expressly allows the

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Courts ought not by implication to take away. Therefore even where the will alters a devolution of property it is not in every case that a special citation need be issued. 8 Cal. 570, Expl. (*Ferrers, J.C.*) SILVIAN REGINALD WATER SMITH *v.* FIVAN HAROLD DONALD SMITH. **147 I.C. 404= 6 R.S. 146=A.I.R. 1933 Sind 262.**

———**S. 283**—*Citation—Minor—Appointment of guardian* ad litem.

It is only where the applicant for the probate is himself a guardian of a minor on whom citation should issue or where the natural guardian of such minor lives under the influence, care and protection of the propounder of the will, that a guardian *ad litem* should be appointed for the purpose of receiving the citation and on such guardian service of citation should be effected. The fact that the citation was issued on the guardian *ad litem* and he did not appear and contest the proceedings does necessitate the appointment of a guardian *ad litem*. 40 C.L.J. 297; 2 C.W.N. 100; 12 C.W.N. 6; 19 C.W.N. 747, Ref.; (1891) P.D. 291, Dist. (*Mukerji and Mitter, JJ.*) HAIMABATI MITRA *v.* KUNJA MOHAN DAS. **135 I.C. 282=I.R. 1932 Cal. 90=35 C.W.N. 387=A.I.R. 1931 Cal. 713.**

———**S. 283**—*Notice of citation—Minor—Formal service—Effect.*

Where the notice of probate proceedings was served on the mother of the presumptive heirs of the testator both in her personal capacity as the wife of the testator and natural guardian of his infant daughters by throwing the process in the verandah when the woman was in the *barā-ghar* at distance of 4 or 5 cubits behind a jhap and the woman was living under the protection of the propounder of the will and under circumstances that she could have had no opportunity either to oppose the grant of probate or require the will to be proved in her presence.

Held, that the service amounted to formal service but it was of no greater effect in law than the personal service on an infant of tender years and therefore was of no effect as service. 55 I. A. 16 at 27, Rel. on. (*Mukerji and Mitter, JJ.*) HAIMABATI MITRA *v* KUNJA MOHAN DAS. **135 I.C. 282=I.R. 1932 Cal. 90=35 C.W.N. 387=A.I.R. 1931 Cal. 713.**

———**S. 283**—*Right to object—Objector claiming to be joint with testator.*

A person who alleges that he and the testator were living joint and that the property which the testator purported to dispose of was joint family property has no *locus standi* to object to the grant of letters of administration even though citations had been served on him and he appeared before the Court. 1 Pat.L.W. 308, 14 C.W. N. 119 and 17 Cal. 48, Foll. (*Wort and Fazl Ali, JJ.*) RAMYAD MAHTON *v.* RAM BHAJU MAHTON. **10 Pat. 812=135 I.C. 103=I.R. 1932 Pat. 23=13 Pat.L.T. 521=A.I.R. 1932 Pat. 89.**

———**S. 283**—*Right to object—Purchaser after death of testator.*

Any interest, however slight, and even the possibility of an interest, is sufficient to entitle a party to oppose the grant of probate. That im-

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plies a real interest which is or is likely to be prejudicially or adversely affected by the will. The purchaser of one of the properties comprised in the estate in execution of a decree against one of the heirs after the death of the testator has a *locus standi* to oppose the grant of probate and it is not necessary for the objector to show that he had an interest in the estate at the time of the testator's death. 4 Cal. 360; 20 Cal. 37; 28 Cal. 587; 8 C.W.N. 748 and 19 C.W.N. 1108, Rel. (*Mukerji and Cuha, JJ.*) NABIN CHANDRA GUHA *v.* NIBARAN CHANDRA BISWAS. **59 Cal. 1308=I.R. 1932 Cal. 686=140 I.C. 54=36 C.W.N. 635=A.I.R. 1932 Cal. 734.**

———**S. 283 (1) (c)**—*Citation—Persons entitled to.*

Citation is to be issued to all persons claiming to have any interest in the estate of the deceased and a person disclaiming interest of the deceased in the property disposed of by him is not entitled to citation and has no *locus standi* in the Probate Court. (*Macpherson and Fazl Ali, JJ.*) MAHANTH RAM DAS *v.* PREM DAS. **10 Pat. 817=I.R. 1932 Pat. 72=136 I.C. 296 =13 Pat.L.T. 594=A.I.R. 1932 Pat. 95.**

———**S. 283 (1) (c)**—*Right to object—Person claiming title paramount to that of testator.*

Persons claiming a paramount title and challenging the title of the testatrix to execute the will have no *locus standi* to object to the grant of letters of administration. So a person who claims as the nearest agnate of the husband of the testatrix, alleging that the testatrix had no right to will away the properties, has no right to object to the grant. (*Kulwant Sahay, J.*) JANKI SARAN SAHI *v.* RAMBAHADUR SAHI. **140 I.C. 722 =I.R. 1933 Pat. 18 (2)=13 Pat.L.T. 597= A.I.R. 1932 Pat. 343.**

———**Ss. 286 and 295**—*Scope—Pendency of suit relating to will before Subordinate Judge—Power of District Judge to grant probate.*

S. 286 debars a *District Delegate* from granting probate or Letters of Administration in any case in which there is contention. It does not apply to a District Judge. Thus the fact that a suit as to the validity of a will has been instituted in the Court of the senior Subordinate Judge is no bar to the District Judge granting a probate if he is satisfied as to the genuineness of a will. The section applicable to proceedings before the District Judge under those circumstances is S. 295. (*Jai Lal, J.*) MT. PERMESHRI *v.* TILAK RAM. **I.R. 1931 Lah. 864=133 I. C. 896=A.I.R. 1932 Lah. 48 (2).**

———**Ss. 286, 265 and 272**—Scope—District Delegate—Subordinate Judge—Transfer of contentious proceedings by District Judge—Jurisdiction. *See* SUCCESSION ACT, Ss. 265, 272 AND 286. **11 O.W.N. 1481=A.I.R. 1935 Oudh 38.**

———**S. 289**—*Probate proceeding—Consent of parties—Withdrawal of objection—Procedure.*

A probate proceeding will result in a judgment *in rem* and therefore the Court cannot act merely on the consent of the parties before it so as to shut out an enquiry into the genuineness and due execution of the will itself. But if the defendant at any stage withdraws his objection whether

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under a compromise or otherwise the proceeding may become a non-contentious one in which case the probate will be granted in common form. The agreement however cannot be incorporated in the probate. (*Sulaiman, A. C. J. and King, J.*) BISHUNATH RAI *v.* SARJU RAI. **53 A. 1000 =I.R. 1931 All. 643=133 I.C. 403=1931 A. L.J. 835=A.I.R. 1931 All. 745.**

———**S. 291**—Surety to administration bond—Discharge—Power of Court. *See* CONTRACT ACT, Ss. 129 AND 130. **54 All. 293.**

———**S. 292**—*Application under—Nature of—Dismissal for default—Fresh application.*

An application under S. 292 is really made in proceedings in the nature of execution and is no bar to a fresh application being entertained in the exercise of inherent jurisdiction when the first application had been dismissed in default and not on merits. (*Bhide, J.*) HARIBUX *v.* SHAMSUNDAR. **158 I.C. 384 (1)=A.I.R. 1935 Lah. 145 (1).**

———**S. 295**—Applicability—Suit before Subordinate Judge as to validity of will—Power of District Judge to grant probate. *See* SUCCESSION ACT, Ss. 286 AND 295. **I.R. 1931 Lah. 864=133 I.C. 896.**

———**S. 296**—*Enquiry into applicant's title by District Judge—Scope of.*

Though the finding of the District Judge regarding the title of the applicant to the property of the deceased will not be conclusively binding on the party affected, yet it is necessary, for deciding the question whether the claimant is entitled to the protection of such interest or not, to find out whether the claim is *prima facie* well founded. (*Niyogi, A. J. C.*) MRS. M. REGO. *v.* P. F. REGO. **I.R. 1933 Nag. 230=16 N. L.J. 86=144 I.C. 322=29 N.L.R. 238=A. I.R. 1933 Nag. 173.**

———**S. 299**—Appeal—Forum. *See* BENGAL N.-W.P. AND ASSAM CIVIL COURTS ACT, S. 23. **6 I.R. (Pat.) 170=145 I.C. 375=14 Pat. L.T. 285=A.I.R. 1933 Pat. 276 (2).**

———**S. 299**—*Appeal—Refusal to permit contest of grant.*

An order refusing to allow a caveator to oppose a grant is not appealable. But an appeal lies from an order granting probate and refusing to allow a defendant in the petition to contest the grant, holding that he had no *locus standi* to do so. 21 C. 539 and 24 C.W.N. 316, Ref. (*Mukerji and Guha, JJ.*) NABIN CHANDRA GUHA *v.* NIBARAN CHANDRA BISWAS. **59 Cal. 1308= I.R. 1932 Cal. 686=140 I.C. 54=36 C.W. N. 635=A.I.R. 1932 Cal. 734.**

———**S. 299**—*Appealability—Test—Application under S. 271—District Judge deciding to go on with proceeding—Appeal.*

In order to have a right of appeal there must be an order made by the District Judge by virtue of any of the powers conferred by Part 9 of the Act. "Order" generally implies an adjudication of the rights of the parties and a direction to be carried out by them. Where the party moved the District Judge under S. 271 which did not in terms require any application by the objector and the Judge decided to go on with the proceeding.

Held, that it was not a case falling within the scope of S. 299 so as to give the appellant a right

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of appeal. (*Sulaiman and Young, JJ.*) LAL BHUPENDRA NARAIN SINGH *v.* ASHTABHUJA RATAN KUER. **I.R. 1932 All. 534=139 I.C. 156 =1932 A.L.J. 418=A.I.R. 1932 All. 379.**

———**S. 301**—*Removal of executor—Powers—Procedure.*

The power to remove an executor and to provide for a successor to his office is one conferred upon the High Court alone by S. 301, Indian Succession Act, and such relief cannot be sought by regular suit. (*Coldstream and Bhide, JJ.*) KARAM DEVI *v.* RADHA KISHAN. **16 Lah. 975=157 I.C. 87=8 R.L. 86=37 P.L.R. 77 =A.I.R. 1935 Lah. 406.**

———**S. 302**—*Application by executor for grant of probate—Caveat entered—Parties other than executor entering into agreement and caveat withdrawn—Application by heir of deceased legatee to enforce terms of agreement—Jurisdiction of High Court to entertain.*

A testator by his will, after making specific bequests and provisions for certain annuities, provided that the residue should be divided among certain persons in a particular proportion and appointed the Administrator-General as the executor. An application by the Administrator-General for grant of a probate of the will a caveat was entered by a party whereupon the matter was entered as a contentious suit. The parties concerned other than the Administrator-General came to an arrangement which was embodied in the form of an agreement under which the shares given by the will were to be allotted in a particular manner and the caveat was withdrawn, a decree being passed in the probate proceedings. Subsequently, on the death of a legatee, the person entitled to succeed to him made an application for a direction that the Administrator-General, as the executor of the will should pay to the applicant the share of the legatee in the residue in accordance with the terms of the agreement.

Held, that the High Court had jurisdiction to entertain the application, under S. 302 and to direct the Administrator-General to make over the share of the legatee to the applicant and there was no necessity to relegate the applicant to a separate suit on the original side.

Held also, that before the Court directed the Administrator-General to pay to the applicant any portion of the residuary estate, it should have decided the question whether it was necessary for the applicant to produce a succession certificate in order to claim the share of the deceased legatee. (*Sir Lancelot Sanderson*). SECRETARY OF STATE *v.* PARIJAT DEBI. **63 I.A. 61=63 Cal. 677=159 I.C. 329=1935 A.W. R. 1416=1935 O.W.N. 1274=8 R.P.C. 77 =1936 A.L.J. 12=43 L.W. 16=1936 M.W. N. 10=38 Bom.L.R. 125=40 C.W.N. 185 =A.I.R. 1935 P.C. 203 (P.C.).**

[On appeal from 60 Cal. 1135.]

———**S. 302**—*Heir of legatee—Application for direction to executor—Maintainability.*

Where the administration of the estate is alive it is open to the heir of a legatee to apply for directions to the executor being issued by the Court in the matter of the legacy being ascertained. The applicant need not be driven to a

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fresh suit for that purpose. (*C. C. Ghose, A. C. J. and Mitter, J.*) SECRETARY OF STATE FOR INDIA *v.* PARIJAT DEBI. **60 Cal. 1135=150 I. C. 158=6 R.C. 767=37 C.W.N. 769=A. I.R. 1933 Cal. 841.**

———**S. 302**—*Petition for directions to executor—Discretion—Proper remedy.*

The power of giving directions for the summary disposal of certain disputes, which could be the subject of a suit is vested in the High Court, but the exercise of that power is discretionary. Where the matter is complicated and many questions of law and fact will arise in giving any directions to the executor as to the legacy in favour of a legatee, the proper remedy is to bring a suit and not the petition under S. 302. (*Abdul Quadir, J.*) ARYA PRATI NIDHI SABHA *v.* OM PARKASH. **6 R.L. 625=148 I.C. 1010=35 P.L.R. 307=A.I.R. 1934 Lah. 120.**

———**S. 303**—*Executor* de son tort—*Who is—Administration—Proceedings for account—Originating summons—Leave of Court—Necessity—Limitation.*

One E died intestate leaving some next of kin. Letters of administration were obtained to her estate by her daughter. That daughter died and her son, the defendant, obtained probate to her will. His mother had put aside a sum of money said to be some Rs. 17,413-8-0 as the share of one of the brothers of *E*, whose whereabouts were unknown. The defendant deposited this money in a Bank on interest. The present plaintiff obtained letters of administration *de bonis non* to the estate of *E*. The defendant paid over to her the Rs. 17,413-8-0 as the share of brother of *E*. The plaintiff applied on an originating summons in which she sought to make the defendant account for all interest obtained or which may be deemed to have been earned by this sum of Rs. 17,000 and for an inquiry as to what money came into his hands.

Held, that the present question was one which arose in the administration of the estate, and there being no disputed question of fact, an originating summons lay and that the defendant was not an executor *de son tort* and that what he did was not wrong. In re *Powers,* 30 Ch.D. 291, Rel. on.

Held also, that even if this proceeding is not a suit, without leave under cl. 12, it was not a proceeding warranted under the Charter and that by adjourning the matter into Court and at the same time giving leave under cl. 12 of the Charter, the Court could not give itself jurisdiction. 58 C. 768 and 56 C. 940, Ref.

Held further, that the claim was governed by Art. 120, Limitation Act. The defendant was not holding under an express trust but the claim against him was an equitable claim and by taking charge of a fund as executor to his mother, in respect of which the mother was clearly a trustee, although not holding on an express trust the defendant although he was not a derivative executor, rendered himself liable in equity to account for the fund and that limitation ran only from the date when there was a denial of or an infringement of the right claimed. 11 L. 657=57 I.A. 325 and 58 I.A. 1=9 R. 645 (P.C.), Ref. (*Remfry, J.*) ELIZA MARTIN, *In the goods of.*

SUCCESSION ACT (1925), S. 306.

62 Cal. 120=157 I.C. 936=A.I.R. 1935 Cal. 511.

——**S. 306**—*Action for damages for death caused by negligence of defendant—Defendant dying pending suit—Whether suit can be continued against his legal representatives.*

Where at the time of the death of the defendant there is an action pending against him for damages for his negligence which resulted in the death of the husband of the plaintiff and it is an action allowed by the Fatal Accidents Act (XIII of 1855), according to the words of S. 306 of the Indian Succession Act, the action survives against his executors and administrators and hence the action can be continued against the legal representatives of the defendant. (*Beasley, C.J. and Madhavan Nair, J.*) BALASUBRAMANIAM MUDALIAR *v.* MARIAN RODRIQUES. **57 Mad. 951=153 I.C. 535=7 R.M. 361=40 L.W. 108=1934 M.W.N. 708=A.I.R. 1934 Mad. 507=67 M.L.J. 146.**

——**S. 306**—*"Executors and administrators"—Heirs, if included in.*

The heirs of a deceased party are not included in the expression "executors and administrators" as used in S. 306. Therefore under that section a cause of action does not survive to or against his heirs as such. (*Page, C.J. and Ba U, J.*) CASSIM & SONS *v.* SARA BIBI. **13 Rang. 385=160 I.C. 715=8 R.R. 413=A.I.R. 1936 Rang. 17.**

——**S. 306**—*"Personal injury" means bodily injury.*

The expression "personal injury" in S. 306 does not include injuries of all descriptions caused by tortuous acts; but it is used in the sense of bodily injury. (*Coldstream and Jai Lal, JJ.*) PEOPLES BANK OF NORTHERN INDIA *v.* DES RAJ. **160 I.C. 759=8 R.L. 588=A.I.R. 1935 Lah. 705.**

——**S. 306**—*"Personal injuries"—Interpretation of.*

The words "personal injuries" in S. 306 of the Succession Act mean bodily or physical injuries as opposed to injuries to property or reputation, and are plainly *ejusdem generis* with an "assault" and not with "defamation". Accordingly a cause of action which is in respect of injury to the credit and reputation of the plaintiffs caused by the wrongful acts of the deceased defendant does not fall within the exceptions set out in S. 306, but under that section survives against the executors and administrators of his estate. (*Page, C.J. and Ba U. J.*) CASSIM & SONS *v.* SARA BIBI. **13 Rang. 385=160 I.C. 715=8 R.R. 413=A.I.R. 1936 Rang. 17.**

——**S. 306**—*"Personal injury"—Pecuniary loss through deception—If amounts to.*

"Personal injury" in S. 306 is intended to mean injury to the person as distinguished from injury to property. Defamation, malicious prosecution, assault and bodily hurt may all indirectly cause financial loss or financial expenditure, but they are in the main injuries which are personal in that they directly give rise to mental or physical suffering or inconvenience. Hence pecuniary loss caused through deception is not injury of that nature and hence liability for such loss survives after the death of the person liable. (*Niamatullah and Allsop, JJ.*) DEHRA DUN TRAMWAY CO. *v.* HANSRAJ. **58 A. 342=159 I.C. 977=8 R.A. 537=1935 A.W.R. 1189=A.I.R. 1935 All. 995.**

SUCCESSION ACT (1925), S. 307.

——**S. 306**—*"Personal injury"—Suit in tort for—Survival of.*

A suit in tort for personal injury does not survive after the death of the person injured. According to S. 306, an action for personal injury not causing the death of the party does not survive. The word "personal" in S. 306 means all personal injuries in the commonly accepted use of the word "personal", and cannot be restricted merely to physical injuries to the person, and on this view the fact that the plaintiff had incurred some pecuniary loss will not cause the right to sue to survive. 44 Mad. 828; 48 All. 630; 4 Pat.L.J. 676 and 47 Bom. 716, Foll.; 53 Cal. 987 and 31 Cal. 993, Diss. from; 49 Mad. 208 and 31 Cal. 406, Ref. (*Staples, A.J.C.*) RATAN CHAND *v.* MUNICIPAL COMMITTEE, HINGANGHAT. **27 N.L.R. 237=I.R. 1931 Nag. 22=130 I.C. 86=A.I.R. 1931 Nag. 9.**

——**S. 306**—*Suit for malicious prosecution—Decree—Death of plaintiff pending appeal—Effect.*

In a suit for malicious prosecution the plaintiff's right which is a mere right to sue for damages for a personal injury changes its character once it is merged in a decree. It then becomes a matter of record which is a right of higher nature. The rights and liabilities arising under a decree awarding damages for malicious prosecution therefore continue when the plaintiff dies during the pendency of an appeal against the decree, so far as the appeal is concerned, but as regards the cross-objections they abate. (*Staples and Vivian Bose, A.J.Cs.*) GULABRAO RAMCHANDRA *v.* DEORAO KRISHNA RAO. **30 N.L.R. 186=149 I.C. 1079=6 R.N. 260=A.I.R. 1934 Nag. 119.**

——**S. 307**—*Application for permission for sale not headed as one under—Duty of Court.*

Where a person who had obtained probate of a will applied for permission for sale of certain immoveable property covered by the will and his application was not specifically headed as one under S. 307 of the Succession Act, the Court should not confine its attention to a consideration of the applicability of that section alone but it should find out whether it had jurisdiction under any other provision of law to grant the permission sought for. (*Bennet and Bajpai, JJ.*) MADKO RAM *v.* JAI CHAND RAI. **155 I.C. 933=7 R.A. 999=4 A.W.R. 111=A.I.R. 1935 A. 360.**

——**S. 307**—*Executor—Duty of.*

Executors are bound to carry out the direction of the will. It is unseemly on their part to obtain probate of a will and then, instead of acting as ministers of the will of the testator, turn against his wishes and try to act in contravention of the directions of the testator. (*Tyabji, J.*) BALKRISHNA *v.* VINAYAK. **I.R. 1932 Bom. 518=139 I.C. 594=34 Bom.L.R. 113=A.I.R. 1932 Bom. 191.**

SUCCESSION ACT (1925), S. 307.

———**S. 307**—*Executor—Powers of—Lease for ninety-nine years with option of purchase to lessee.*

An executor stands in the position of a trustee for the parties beneficially entitled to the estate. His primary duty is to realise the assets and to administer the estate in the best way possible. The validity of a transaction entered into by the executor depends on the answer to the question whether it was reasonably necessary for the due administration of the estate of the deceased. Having regard to the provisions of S. 36 of the Trusts Act and S. 307 of the Succession Act, the executor has no power to grant a lease for ninety-nine years with an option to the lessee to purchase the reversion in the demised premises or any part thereof at any time during the said period. *Oceanic Steam Navigation Co. v. Sutherberry,* (1880) 16 Ch.D. 236 and 22 Bom. 1, Ref. (*Wadia, J.*) MAHOMED HUSSAIN *v.* BAI AISHABAI. **141 I.C. 734=I.R. 1933 Bom. 142 =34 Bom.L.R. 1365=A.I.R. 1932 Bom. 604.**

———**Ss. 307 and 211**—*Mahomedan will—Powers of executor—Sale or mortgage by—Validity of.*

Though according to the Mahomedan Law, a Mahomedan cannot dispose of by will more than one-thrid of the property after payment of his debts and funeral expenses and the remaining two-thirds must go to his heirs, unless the heirs consent to the provisions of the will, the matter is now governed by S. 211 of the Succession Act under which the property of the testator vests in the executor and can be sold and conveyed by him under S. 307 of the Act if there is no restriction by the will on his power of alienation. (*Patkar and Broomfield, JJ.*) AHRONEE SHEMAIL *v.* SHEIKH AHMED OMER. **33 Bom.L.R. 1056=135 I.C. 817=I.R. 1932 Bom. 129= A.I.R. 1931 Bom. 533.**

———**S. 307**—*Scope—Transferee when protected.*

Section 307 gives the executor powers at least as extensive as those of an executor in England before 1926. But the transferee who deals with a transferor, who happens to be an executor, not as executor but as owner is not entitled to the protection which the law affords to the transferees from executors acting *qua* executor. (*Ameer Ali, J.*) GEETARANEE DE *v.* NARENDRA KRISHNA DE. **60 Cal. 394=I.R. 1933 Cal. 510=144 I.C. 137=A.I.R. 1933 Cal. 429.**

———**S. 307 (2)**—*Executor—Powers of—Alienation of property—Implied restriction—Direction not to divide the property till minor sons attained age.*

The mere fact that the testator intended that the property should not be divided till the minor sons of the testator attained the age of twenty-one years does not give rise to the inference that the testator intended to impose any restriction on the power of alienation of the executor. (*Patkar and Broomfield, JJ.*) AHRONEE SHEMAIL *v.* SHEIKH AHMED OMER. **135 I.C. 817=I.R. 1932 Bom. 129=33 Bom.L.R. 1056=A.I.R. 1931 Bom. 533.**

———**S. 307 (2) (i)**—*Estate fully administered —Order for sale by probate Court—Validity of.*

Even after the estate has been completely administered, the probate Court has jurisdiction to grant permission to the administratrix to sell the property. The order may be improper but it is not a nullity and the purchaser at the sale in pursuance of that order is not defeated unless fraud is proved. (*Pearson and Mallik, JJ.*) KHETRA MOHAN MITRA *v.* NALINI BALA DASI. **141 I.C. 214=I.R. 1933 Cal. 92=36 C.W. N. 744=55 C.L.J. 535=A.I.R. 1932 Cal. 828.**

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———**S. 307 (2) (i)**—*Powers of investment—Directions in will.*

Where there is a specific direction as regards the investment of the money in the testator's will the administrators are not entitled to invest the money otherwise than as directed by the testator without the sanction of the Court. (*Beasley, C.J. and Bardswell, J.*) IMPERIAL BANK OF INDIA, MADRAS *v.* KRISHNAMURTHI. **I.R. 1933 Mad. 411=38 L.W. 119=144 I.C. 479=A.I. R. 1933 Mad. 628=65 M.L.J. 471.**

———**S. 307 (2) (ii)**—*Object—Property bequeathed to society—Mode of administration—Procedure.*

The object of S. 307 (2) (*ii*) of the Succession Act is to enable the District Judge as the Court of testamentary jurisdiction to see that the permission applied for is necessary in the interest of the administration of the estate. Where a person bequeathes certain property to a society and the estate is without any encumbrance and no other legatee is to be paid, there is nothing to administer and the property in the hand of the administrator should be handed over to the legatee and the administration should end. If the society thinks that it is in the interests of the society that the property should be converted into money and invested in the Government promissory notes, it may institute a suit under S. 92 (C. P. Code) or take such other steps as they might be advised. But an application to the District Judge in his testamentary jurisdiction for permission to sell the property bequeathed is entirely a wrong method, as the Judge has no jurisdiction to pass orders for sale. 3 C.W.N. 635, Rel. on. (*Mukerji and Bennet, JJ.*) INDRANI, *In the matter of.* **53 All. 422=130 I.C. 498=1931 A.L.J. 36=A.I.R. 1931 All. 212.**

———**S. 307 (2) (iii)**—*Mortgage by administrator without leave of Court—Validity of—Setting aside of—Conditions for.*

A mortgage executed by the administrator without leave of Court is not void but only voidable at the instance of any person interested in the property. The holder of two money decrees against the estate in the hands of the administrator is not entitled, however, to set aside the mortgage, except by making restitution to the mortgagees to the extent to which the mortgagees had *bona fide* advanced money to the mortgagor. If the party is unable to make such restitution the only other course for the Court is to allow the mortgagee to enforce his mortgage against the estate. *Butler* v. *Rice,* (1910) 2 Ch. D. 277, Dist. 3 C.L.J. 260, Ref. (*Page, C. J. and Mosely, J.*) ZOLLIKOFER & CO. *v.* O. A. O. K. K. M. CHETTYAR FIRM. **9 Rang. 34=I. R. 1931 Rang. 154=131 I.C. 730=A.I.R. 1931 Rang. 277.**

SUCCESSION ACT (1925), S. 308.

———S. 308—*Borrowing for benefit of estate —Right of creditor against estate.*

Where an executrix executed promissory notes as such executrix and it appeared that the loans were taken for the benefit of the estate and the creditor impleaded all the parties and applied for a decree binding the estate.

Held, that the only right which the creditor could claim was the right to be subrogated to the right of the executrix to be indemnified out of the estate to the necessary extent. It is consequently necessary that the right of the executrix to the indemnity is established before the creditor can be subrogated to such a right. Case-law elaborately discussed. (*Mukerji and Guha, JJ.*) MAHARAJA SIR MANINDRA CHANDRA NANDI *v.* SUDHIR KRISHNA BANERJEE. **136 I.C. 893=I. R. 1932 Cal. 245=35 C.W.N. 850=53 C.L. J. 589=A.I.R. 1932 Cal. 182.**

———S. 311—*Will directing trustees or executors to act by majority—Right of minority to file suits, against wishes of majority.*

The will of deceased declared that the trustees were to act by majority and also laid down that trustees were to act by resolution passed at the meeting of the Board or by circulation of resolutions signed by them. The majority of trustees were in favour of compromising a claim and opposed to the filing of a suit, and no fraud or collusion on the part of the majority was established.

Held, that the minority of trustees or Executors had no right against the wish of the majority to file a suit and involve the estate in a risk of heavy loss for costs. *Luke* v. *Smith Kesinton Hotel & Co.* (1879) 11 Ch.D. 121; 34 Mad. 406; 29 Mad. 302; 5 C.L.J. 527; 24 All. 226 and 26 Cal. 409, Dist. (*Aston, A. J. C.*) GORDHANDAS MADANLAL *v.* BHAGWANDAS RAMPERSHAD. **150 I.C. 476=7 R.S. 9=A.I.R. 1933 Sind 232.**

———S. 321—*Proceedings to re-call probate and have the will proved in solemn form—Costs of—Charge for.*

The costs incurred by a party who, though a necessary party, was not cited in prior probate proceedings, in connection with his application to re-call the probate and have the will proved in solemn form can be treated as "expenses of obtaining probate" within the meaning of S. 321 of the Succession Act and may be made a first charge on the estate. (*Rankin, C. J. and Mitter, J.*) SARAT CHANDRA DE *v.* PRAMATHA NATH BANERJI. **145 I.C. 295=6 I.R. (Cal.) 89= 37 C.W.N. 113=A.I.R. 1933 Cal. 482.**

———S. 323—*Scope—Duty of executor—Preference of one creditor—Mortgage by executor to him—Validity as against other creditors.*

Under S. 323 of the Succession Act, the executor is bound, when the assets are insufficient to pay the debts of the deceased in full, to pay all the creditors equally and rateably and to pay neither more nor less. He has no power to prefer one creditor to another or to mortgage the estate or any part of the assets for making any payment in excess of the rateable and equal payment due to the creditor. A mortgage executed by the executor to one creditor in preference to the rest, will not bind the latter. (*Tyabji, J.*) MATHURADAS *v.* RAIMAL. **159 I.C. 533=8 R.B. 215=37 Bom.L.R. 642=A.I.R. 1935 Bom. 385.**

SUCCESSION ACT (1925), S. 333.

———S. 325—*Scope—Payment of legacies before debts—Rule governing.*

S. 325 which lays down a rule of priority, does not, however, stand in the way, in an admittedly solvent estate, of the executor paying a legatee before he has discharged the debts of the deceased. The question has to be considered from the standpoint of the solvency or the insolvency of the estate. As a matter of general principle it is the duty, no doubt, of an executor first to ascertain the position of the estate and unless it is clear to him the estate is solvent and there is no risk of creditors being prejudiced, not to pay the legacies before the debts have been discharged. The same principle applies where there has been an administration decree. This rule should not be departed from even if the legatees were to furnish security before drawing the amount. (*Buckland and Costello, JJ.*) LALA GOBERDHONEDAS *v.* HARISH CHANDRA. **152 I.C. 198=7 R.C. 248=38 C.W.N. 457=A.I.R. 1934 Cal. 609.**

———S. 332—*Legatee's title to property—Consent of executor—Arbitrary withholding of—Remedy of legatee.*

Although the assent of the executor is necessary to complete a legatee's title to his legacy, the executor is not entitled to withhold his consent arbitrarily, and if he does so the legatee is competent to bring a suit to recover the property bequeathed to him by joining the executor with the transferees to whom the property may have been transferred by the executor. (*Jackson, A. J. C.*) VITHAL *v.* NARAYAN. **I.R. 1931 Nag. 131=134 I.C. 259=A.I.R. 1931 Nag. 69.**

———Ss. 332 and 216—Suit brought by legatee with permission of executor on pronote to which according to will she was entitled is maintainable. *See* SUCCESSION ACT, Ss. 216 AND 332. **A.I. R. 1933 Lah. 805.**

———S. 333—*Executor and specific legatee—Assent to legacy—Mortgage by his heirs—Subsequent decree for costs against the estate represented by heirs—Purchaser in execution—Rights of.*

The executor and specific legatee died after fully administering the estate. His assent to his legacy being presumed, his heirs mortgaged the legacy to the plaintiff. Subsequently in proceedings for revocation, a decree for costs was passed against the estate and in execution of that decree, the right, title and interest of the heirs of the specific legatee was purchased by the defendant.

Held, that the title of the specific legatee became complete as soon as his assent could be implied; the defendant only purchased the equity of redemption; and that the plaintiff was entitled to a decree on his mortgagee, subject to his discharging the decree for costs in favour of the defendants. 32 I.A. 1, Dist. (*Rankin, C. J. and Mitter, J.*) SARAT CHANDRA DE *v.* PRAMATHA NATH BANERJEE. **145 I.C. 295=6 I.R. (Cal.) 89=37 C.W.N. 113=A.I.R. 1933 Cal. 482.**

SUCCESSION ACT (1925), S. 333.

———**S. 333 (2)**—*Specific legatee—Implied—Assent.*

Where the executor was also a specific legatee and after having fully administered the estate, he died, he may be presumed to have assented to his legacy. (*Rankin, C. J. and Mitter, J.*) SARAT CHANDRA DE *v.* PRAMATHA NATH BANERJI. **145 I.C. 295=6 I.R. (Cal.) 89=37 C. W.N. 113=A.I.R. 1933 Cal. 482.**

———**S. 351**—*Demonstrative legacies—Interest on—When begins to run.*

Interest is payable on a demonstrative legacy from the expiry of one year from the testator's death. Where the testator directed that a sum of Rs. 10,000 to his wife and a sum of Rs. 4,000 to his daughter should be paid as soon as the proceeds of sale were realised.

Held, that the legacies were all demonstrative; that no date having been fixed in the will for the distribution of the legacy, the wife was entitled to interest from the expiration of one year from the testator's death and that the legacy in favour of the daughter being governed by the express terms of S. 351 (2), she was entitled to interest from the date of the death of the testator. (*Patkar and Murphy, JJ.*) RAJANIKANT *v.* KIKO RATILAL. **I.R. 1932 Bom. 561 =140 I.C. 206=34 Bom.L.R. 1124=A.I.R. 1932 Bom. 506.**

———**S. 360, Proviso**—*Construction—"Distribution"—Executor—Mortgage by one creditor in preference to others—Decree on—Suit by other creditors for rateable distribution—Maintainability—Parties—Creditors to follow assets.*

Where an executor, executes a mortgage in favour of creditor in preference to other creditors. It is open to the other creditors in such a case, even after the mortgagee creditor has obtained a decree on the mortgage to sue for a declaration that the mortgage and the decree passed thereon are not binding on them and would give the mortgagee no priority over their claims against the estate, and to claim rateable distribution of the proceeds of the estate along with the creditor who has obtained the decree on his mortgage. The executor is not a necessary party to such an action. "Distribution" in S. 360 of the Succession Act is not restricted to payment of legacies only; it covers also payments in discharge of the claims of creditors also. The proviso to S. 360 only restricts the effect of the notices to the liability of the executor alone; it leaves the other rights untouched. The right of a creditor or claimant to follow the assets is not prejudiced. (*Tyabji, J.*) MATHURADAS *v.* RAIMAL. **159 I.C. 533=8 R.B. 215=37 Bom.L. R. 642=A.I.R. 1935 Bom. 385.**

———**S. 368**—*Breach of trust by executor—Power of Court to prevent.*

Where pending actual proceedings in the suit for administration the executors who were also residuary legatees were shown to have helped themselves to the money of the estate and they did not cease doing so even after becoming aware of the risky condition of the estate.

Held, that the executors were guilty of a breach of trust and that the Court could in interlocutory proceedings order him to bring back into Court the money in their hands or order them to furnish security for that amount. (*Rankin, C. J. and Mitter, J.*) GOBARDHANDAS *v.* GOPAL DAS MODI. **60 Cal. 30=149 I.C. 743=6 R.C. 626 =A.I.R. 1933 Cal. 268.**

SUCCESSION ACT (1925), S. 371.

———**S. 369**—*Duty of executor—Investment of funds.*

No one is bound to become an executor, but if he does accept the position he must act with the ordinary care and the prudence of a diligent business man. He must make the fund productive and in order to do this he must invest the money in some form of security. If he fails to do so he will be liable for the consequent loss. (*Mears, C. J. and Sen, J.*) R. *v.* A. STOCK, *In the Goods of.* **54 All. 605=I.R. 1932 All. 321=137 I.C. 201=1932 A.L.J. 363=A.I. R. 1932 All. 384.**

———**Ss. 370 to 390**—*Scope—Application for certificate—Inquiry into titles of deceased persons—Propriety.*

An application for the grant of a succession certificate was made by *K* claiming to be entitled to a certain deposit through her deceased daughter. *B* and *D* filed objections to the grant of a certificate to *K* and claimed the deposit for themselves, *B* through another person deceased and *D* through the deceased husband of *K's* daughter.

Held, that it was never contemplated by Part 10 that there could be an inquiry in one proceeding as to which of the three deceased persons was entitled to the deposit. (*Mahomed Noor and Saunders, JJ.*) MT KABO *v.* DAMRI LAL. **159 I.C. 1119=8 R.P. 321=A.I.R. 1935 Pat. 478.**

———**S. 371**—*Grant of succession certificate—Jurisdiction of Allahabad High Court.*

Although "District Judge" is defined as meaning the Judge of the principal Civil Court of Original Jurisdiction, an application for grant of a succession certificate cannot in all cases be made to a High Court. A High Court Judge cannot grant a succession certificate unless he is the Judge of a principal Civil Court of Original Jurisdiction. A Judge of the Allahabad High Court is not such a Judge, but a District Judge is. An application for grant of the succession certificate cannot therefore be made to that High Court. (*Sulaiman, C. J. and Mukerji, J.*) RAJENDRA CHANDRA SEN GUPTA, *In the goods of.* **152 I.C. 825=7 R.A. 398 (2)= 1934 A.L.J. 800=4 A.W.R. 321=A.I.R. 1934 All. 958.**

———**S. 371**—*"Has no fixed place of residence"—Interpretation.*

The words "has no fixed place of residence" in S. 371 mean "has no fixed place of residence in British India". Accordingly if the deceased had no fixed place of residence in British India but had some property in British India then an application for succession certificate should be made to the District Judge where the property is situated. (*Dalip Singh, J.*) AMAR SINGH *v.* SHAM SINGH. **160 I.C. 531=8 R.L. 547=37 P.L.R. 502=A.I.R. 1935 Lah. 646.**

———**S. 371 (as amended by Act XVIII of 1929)**—Succession certificate—High Court—Jurisdiction to issue. *See* SUCCESSION ACT, S.

SUCCESSION ACT (1925), S. 372.

2 (*bb*). **9 Rang. 205=A.I.R. 1931 Rang. 281 (1).**

———**S. 372**—*Guardian of minor—Grant of succession certificate—Conditions—Form.*

A certificate under S. 372 should be granted only when the guardian has been appointed guardian of the property under the Guardian and Wards Act. The form of certificate should not be in favour of the minor. The proper form is for the certificate to be granted to the guardian who should be empowered to recover, transfer or negotiate or otherwise deal with the securities in question for the use and benefit of the minor and to pass valid receipts on his behalf. (*Beaumont, C. J. and Rangnekar, J.*) NARAYAN KHANDERAO, *In re.* **6 I.R. (Bom.) 86 (1)=145 I.C. 588 (1) =35 Bom.L.R. 950=A.I.R. 1933 Bom. 436.**

———**Ss. 373 and 375**—Hindu widow—Application by, for certificate—Right to unconditional grant. *See* HINDU LAW—WIDOW—SUCCESSION CERTIFICATE. **152 I.C. 803=A.I.R. 1935 Pat. 10.**

———**Ss. 373 and 375**—*Rival claimants to certificate—Procedure.*

Where there are rival claimants to a certificate, the Judge should select or appoint the fittest person to whom a single certificate could be granted to collect the whole of the debt on behalf of all the persons entitled to receive it and should take security from such person that he would give their dues to all other persons entitled to share in the distribution of the money. (*Fazl Ali and Rowland, JJ.*) NEAZMUL HAQUE *v.* MT. MOULUDUNNISSA. **149 I.C. 1011=6 R. P. 681=15 P.L.T. 226=A.I.R. 1934 Pat. 304.**

———**S. 375**—*Discretion of Court—Security to protect contingent rights of reversioners.*

Where the case does not fall under sub-Ss. (3) and (4), S. 373, it is discretionary with the Court to ask for security. It need not be asked to protect the contingent rights of the reversioners. A.I.R. 1923 All. 579, Rel. on. (*Mir Ahmad, A.J.C.*) MOHR SINGH *v.* MT. GUJRI. **158 I.C. 175=8 R.Pesh. 50=A.I.R. 1935 Pesh. 140.**

———**S. 375 (2)**—*Application for assignment—Rejection of, without perusing bond—Revision.*

Where a Court rejects an application for assignment of a security bond given by a person to whom succession certificate has been granted, without perusing the security bond, it commits a material irregularity in the exercise of its jurisdiction and its order is liable to be set aside in revision by the High Court. (*Thom and Iqbal Ahmad, JJ.*) SURENDRA NARAIN SINGH *v.* LAL BAHADUR. **154 I.C. 816=7 R.A. 824=1935 A.W.R. 361=A.I.R. 1935 All. 705.**

———**S. 381**—Applicability—Crown taking property by escheat. *See* SUCCESSION ACT, S. 214—APPLICABILITY. **54 All. 226=1932 A.L.J. 150 =A.I.R. 1932 All. 220.**

———**S. 381**—*Suit by holder of Succession Certificate—Defence of oral will, not made out—Effect.*

Where the plaintiff brought a suit for the recovery of a sum of money deposited by the deceased with the defendant, alleging a will on the strength of which he had obtained a succession certificate and the defendant set up an oral will in his favour, but it was found that both the wills were not proved,

Held, as the defendant had failed to establish the oral will set up by him, he was bound to pay the amount to the holder of the succession certificate, whatever rights the heirs of the deceased might have against the plaintiff. All that the defendant was entitled to retain was the amount properly expended by him on the funeral expenses of the deceased. (*Rupchand Bilaram and Milne, A.J.Cs.*) ISARMAL *v.* NICHOMAL. **I. R. 1931 Sind 64=131 I.C. 192=A.I.R. 1931 Sind 81.**

———**S. 381**—*Suit on succession certificate—Question of title—If can be gone into.*

A succession certificate which is valid so long as it is not revoked is a conclusive proof of the right of the holder thereof to recover the amount in respect of which the same has been granted. Hence on a suit brought on the succession certificate, the question of the rights of other parties to recover the amount from the debtor, in other words the question of title to the amount concerned, cannot be raised. That matter must be left to be determined in proper proceedings by those who claim a title to the amount in dispute. (*Jai Lal, J.*) CHARAN DAS *v.* NATHU MAL DOONGER MAL. **6 R.L. 531=148 I.C. 240= A.I.R. 1934 Lah. 79 (1).**

SUCCESSION ACT (1925), Sch. VI.

———**S. 384**—*Order requiring security—Appeal.*

An order granting or refusing succession certificate is appealable at the instance of a party aggrieved thereby but an order requiring security to be furnished as a condition to the granting of the certificate is not appealable. Case-law referred. (*Dhavle and Macpherson, JJ.*) CHITRAREKHA DAI *v.* BABU BANSMAN RAI. **10 Pat. 835=I.R. 1932 Pat. 44=135 I.C. 524=A.I. R. 1932 Pat. 117.**

———**S. 384**—*Refusal to cancel succession certificate—Appeal.*

While the order is one refusing to cancel a succession certificate, an appeal does not lie under S. 384. (*Mears, C. J. and Sen, J.*) KRISHNA KUMARI *v.* NAUBAHAR SINGH. **I.R. 1931 A. 227=130 I.C. 3=1931 A.L.J. 200=A.I.R. 1931 All. 242 (2).**

———**Ss. 384 and 388**—*Refusal to revoke certificate—Appeal.*

Only an order granting or refusing a certificate or revoking a certificate is made appealable by S. 384 or S. 388 and an order refusing to revoke a certificate has not been made appealable, specially when the application for revocation does not contain a prayer for a succession certificate. 42 A. 347, Dist. (*Jai Lal, J.*) RURA MAL *v.* MT. PARMESHARI. **I.R. 1933 Lah. 360 =143 I.C. 485=34 P.L.R. 535=A.I.R. 1933 Lah. 56.**

———**Sch. III**—Restriction under—Applicability to case under S. 112. *See* SUCCESSION ACT, S. 112—SCOPE. **12 Pat. 708.**

———**Sch. VI**—*Scope.*

The form of probate prescribed by Sch. VI does not admit of the incorporation of private terms. (terms agreed to between parties) like the

SUCCESSION CERTIFICATE ACT (1889).

division of the estate of the testator and the putting of each party into separate possession of it. (*Sulaiman, A. C. J. and King, J.*) BISHUNATH RAI *v.* SARJU RAI. **53 A. 1000=I.R. 1931 A. 643=133 I.C. 403=1931 A.L.J. 835=A.I.R. 1931 All. 745.**

SUCCESSION CERTIFICATE ACT (VII OF 1889)—*Construction.*

The Succession Certificate Act is partially a fiscal enactment, and it is to be administered as far as possible leniently and must be construed in favour of the subject. (*Mukerji, J.*) BHUDAT SINGH *v.* MANGAT RAI. **6 R.A. 617=147 I.C. 1168=1934 A.L.J. 579=3 A.W.R. 574 =A.I.R. 1934 All. 296.**

SUFEDPOSH—*Appointment of—Discretion of Collector.*

No hereditary claim can be considered in making the appointment of a Zaildar or sufedposh and the decision whether to appoint a substitute or to dismiss a Zaildar or sufedposh for incapacity due to old age is one which should normally be left to the Collector. (*Irving, F. C.*) JAWALA SINGH *v.* EMPEROR. **11 Lah.L.T. 105=12 Lah. L.T. 16.**

———*Appointment of—Interference in revision.*

An appointment to the post of Zaildar of sufedposh by Collectors should, as far as possible, be upheld on appeal; where the appointment by the Collector has been confirmed by the Commissioner on appeal, the selection cannot be interfered with in revision. (*Irving, F. C.*) NARAIN SINGH *v.* ABDUL MAJID. **12 Lah.L.T. 19.**

———*Appointment of non-resident.*

A sufedposh is generally filled by a resident of the zail in which the vacancy occurs. This however is not an inflexible rule. (*Townsend, F. C.*) GAJJAN SINGH *v.* EMPEROR. **10 Lah.L.T. 6 (2).**

———*Dismissal—Procedure.*

Before a *Sufedposh* is dismissed a separate enquiry should be instituted and evidence taken after affording full opportunity to the accused to clear his character. The Collector is not comptent to dispense with the procedure prescribed because he thinks that *prima facie* the case against the accused is a strong one. (*Irving, F. C.*) JAWAHAR SINGH *v.* EMPEROR. **11 Lah.L. T. 100.**

———*Qualification of.*

A person whose financial position is not satisfactory is not fit to be appointed a sufedposh. (*Maynard, F. C.*) ABADAN KHAN *v.* KHALA SINGH. **11 Lah.L.T. 160.**

———*Sufficient cause.*

See C. P. CODE, O. 22, R. 9.

SUITS VALUATION ACT (VII OF 1887)—*Applicability—Sonthal Parganas.*

It is doubtful if the Act applies to the Sonthal Parganas but the spirit of the Act should nevertheless be applied and the jurisdiction should follow the valuation on which the Court-fees are paid. (*Courtney Terrell, C. J., Kulwant Sahay and James, JJ.*) NARAYAN JHA NARONE *v.* JOGNI PRASAD JHA. **13 Pat. 329=6 R.P. 410=147 I.C. 1222=15 P.L.T. 139=A.I.R. 1934 Pat. 184 (S.B.).**

SUITS VALUATION ACT (1887).

———*Jurisdictional value—Erroneous payment of Court-fee—Effect.*

An erroneous payment of Court-fee cannot affect jurisdiction. 1915 M.W.N. 239, Foll. (*Jackson, J.*) GOPALA MENON *v.* RAMAN MENON. **I.R. 1932 Mad. 517=138 I.C. 136=1932 M. W.N. 53=35 L.W. 64=A.I.R. 1932 Mad. 217.**

———*Jurisdictional value—Principles applicable.*

(1) Where the valuation of a suit for purpose of jurisdiction is contested the value must be determined by the Court; and

(2) where the valuation can be ascertained correctly the plaintiff cannot be allowed to put an arbitrary value upon his claim nor can he be allowed to overvalue or undervalue his claim with a view to choose his forum. (*Mears, C. J. and Sen, J.*) INAYAT HUSAIN *v.* BASHIR AHMAD. **141 I.C. 141=I.R. 1933 A. 66=1932 A.L. J. 416=A.I.R. 1932 All. 413.**

———*Partnership—Suit for dissolution and accounts—Jurisdiction—Valuation for.*

A suit for dissolution of partnership and accounts has to be valued under the Suits Valuation Act for purposes of jurisdiction on the same basis as for purposes of Court-fee. (*Jai Lal, J.*) MOHAN LAL *v.* NIHAL CHAND. **152 I.C. 608=7 R.L. 294=A.I.R. 1935 Lah. 40.**

———*Scope—Jurisdictional value—Determination.*

The Court Fees Act is purely fiscal enactment and it has no bearing on the question as to which is the proper Court for the institution of the suit having regard to the value of the property. (*Mears, C. J. and Sen, J.*) INAYAT HUSAIN *v.* BASHIR AHMAD. **141 I.C. 141=I.R. 1933 A. 66=1932 A.L.J. 416=A.I.R. 1932 All. 413.**

———*Suit for partnership accounts—Test of jurisdiction.*

The pecuniary jurisdiction of the Civil Court is ordinarily speaking governed by the value stated by the plaintiff in his plaint and if a suit for partnership accounts having regard to the valuation in the plaint if within the jurisdiction, such jurisdiction is not ousted by the Court ultimately finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff. (*Courtney Terrell, C. J., Kulwant Sahay and James, JJ.*) MT. UREHAN KUER *v.* MT. KABUTRI. **13 Pat. 344=6 R.P. 495 =148 I.C. 579=15 P.L.T. 131=A.I.R. 1934 Pat. 204 (S.B.).**

———*Suit to redeem mortgage—Jurisdictional value.*

In a suit for redemption of a mortgage and for recovery of surplus profits from the mortgagee the valuation for purposes of jurisdiction is determined by the principal amount of mortgage. 5 Mad. 284 and 39 Mad. 447, Foll. (*Sundaram Chetty, J.*) POTHANNA *v.* SATYANANDACHARYULU. **I.R. 1931 Mad. 669=132 I.C. 317= 33 L.W. 785=A.I.R. 1931 Mad. 479=60 M.L.J. 698.**

———Suit to reduce rate of maintenance awarded by decree—Valuation. *See* COURT-FEES ACT, S. 7 (*ii*), (*iv-a*) AND SCH. II, ART. 17-B. **42 L.W. 42=69 M.L.J. 202.**

———**Ss. 3 and 4**—*Title to immoveable property —Suit for declaration—Basis of jurisdiction.*

SUITS VALUATION ACT (1887), S. 4.

Subject to the maximum value which should be calculated having regard to Ss. 3 and 4, the market value should determine the jurisdiction in a suit for determination of title, and it is not open to the plaintiff to value his relief as he likes. 43 Bom. 507; 1932 A.L.J. 416 and 56 I.C. 762 Rel. on. (*Sulaiman, C. J. and Mukerji, J.*) JAGDISH SARAN *v.* JAIDAIKUNWAR. **56 A. 198=6 I.R. (All.) 206=145 I.C. 942=A.I.R. 1933 All. 903.**

———S. 4—*Alienation by Hindu widow—Suit to declare invalid and for injunction restraining alienees from cutting down trees—Valuation—Basis.*

In a suit by a Hindu reversioner for a declaration that the alienations made by the widow of the last male holder are not binding on the reversionary right and for a permanent injunction restraining the alienees from cutting down certain fruit trees on the properties, the plaintiff need not value the suit according to the market value of the properties, for purposes of jurisdiction. (*Beasley, C. J.*) KANAKARAJU *v.* VENKATARAJU. **159 I.C. 367=8 R.M. 491=1935 M.W.N. 660=41 L.W. 627=A.I.R. 1935 Mad. 262 (2)=68 M.L.J. 248.**

———S. 4—*Applicability—Suit to declare adoption invalid—Jurisdictional value—Basis.*

In a suit for a declaration that an adoption is invalid, where the properties comprised in the suit are of the market-value of more than Rs. 10,000, the jurisdictional value has to be determined with reference to the market-value of the properties and not their value as under S. 7 (*v*) of the Court-Fees Act. (*Varadachariar and Burn, JJ.*) NAGAMMA *v.* NARASIMHAM. **159 I.C. 424 (1) =8 R.M. 497=41 L.W. 469=1935 M.W.N. 320=A.I.R. 1935 Mad. 279 (1)=68 M.L.J. 329.**

———S. 4—*Declaratory suit by defeated claimant—Prayer for declaration of title also—Jurisdictional value.*

Where an unsuccessful claimant desires not only that the attachment should be removed, but also that his title should be declared as against the judgment-debtors, in cases in which the value of the property attached is more than the value of the decree, the value of the suit which governs the jurisdiction of the Court to deal with it is the value of the property itself and not merely the value of the decree. 39 M. 602 and 17 A. 69, Foll. (*Baguley, J.*) DAW DUT *v.* DAW KWI. **I.R. 1932 Rang. 88=137 I.C. 54=A.I.R. 1932 Rang. 20.**

———S. 4—*Declaratory suit by unsuccessful claimant—Valuation of.*

Where a claimant whose objection to an attachment in executing a decree against a judgment-debtor is dismissed, files a declaratory suit that the property attached in his own and could not be attached, the valuation of the suit in cases where the value of the property is greater than the amount of the decree is the amount of the decree. 38 All. 72, Appr. 17 All. 69, Overr. (*Mukerji, A.C.J., King and Niamatullah, JJ.*) MOOL CHAND MOTILAL *v.* RAM KISHEN. **55 All. 315=I.R. 1933 All. 215=143 I.C. 275=1933 A.L.J. 222=A.I.R. 1933 All. 249 (F.B.).**

———S. 4—*Redemption of kanom—Additional claim for damages—Jurisdictional value.*

SUITS VALUATION ACT (1887), S. 8.

Plaintiff sued in redemption of a kanom with the added prayer for Rs. 1100 by way of damages.

Held, that the value of the suit for purpose of jurisdiction is the kanom amount alone and not that amount *plus* the damages claimed. (*Jackson, J.*) GOPALA MENON *v.* RAMAN MENON. **I. R. 1932 Mad. 517=138 I.C. 136=1932 M. W.N. 53=35 L.W. 64=A.I.R. 1932 Mad. 217.**

———S. 8—*Administration suit—Valuation for Court-fees and jurisdiction.*

In an administration suit the value of the suit for the purpose of both Court-fee and jurisdiction must be the same and is the amount at which the plaintiff values his share, the suit falling within the provisions of S. 8 of the Suits valuation Act. (*Mya Bu and Dunkley, JJ.*) MA THIN ON *v.* MA NGWE HMON. **12 Rang. 512= 153 I.C. 858=7 R.R. 233=A.I.R. 1935 Rang. 13.**

———S. 8—Appeal—Forum—Valuation in plaint if conclusive. *See* JURISDICTION—APPEAL. **A.I.R. 1931 Oudh 58.**

———S. 8—*Declaration regarding alienation by Hindu widow—Jurisdictional value.*

Where the daughter by a predeceased wife sued the widow of the last male holder for certain declarations in respect of alienations made by her, *Held*, that the suit should be valued for purposes of jurisdiction according to the market value of the properties and that any rational value set by the plaintiff on her interest could not be taken into account.

Semble: There is some force in the argument that in cases where the plaintiff claims a vested right in certain properties the value of the vested right must be taken to determine the jurisdiction. (*Anantakrishna Ayyar, J.*) DHANABAGGIAMMAL *v.* MARI AMMAL. **I.R. 1932 Mad. 722=139 I.C. 471=1932 M.W.N. 780=36 L.W. 483=A.I.R. 1932 Mad. 671.**

———S. 8—*Meaning of.*

Section 8 of the Suits Valuation Act does not mean that if the suit is valued for the purpose of jurisdiction, the suit must be valued at the same amount for Court-fees but that the value for Court-fees determines the value for jurisdiction. (*Leach, J.*) MAUNG NYI MAUNG *v.* MANDALAY MUNICIPAL COMMITTEE. **12 Rang. 335=153 I.C 1037=7 R.R. 245=A.I.R. 1934 Rang. 268.**

———S. 8—*Meaning.*

The meaning of S. 8 of the Suits Valuation Act is that the value for purposes of jurisdiction shall follow the value for purposes of Court-fee and not *vice versa*. (*Addison, J.*) GURDWARA MAHANT JAWAL SINGH *v.* KALA SINGH. **I.R. 1931 Lah. 744 (2)=133 I.C. 120 (2)=32 P. L.R. 193=A.I.R. 1931 Lah. 307.**

———S. 8—Mere declaratory suit—Valuation for purpose of jurisdiction—Real value of property determining factor. *See* BOMBAY CIVIL COURTS ACT (1869), S. 25. **33 Bom.L.R. 1437.**

———S. 8—*Money claim—Reduction by decree—Effect on forum of appeal.*

Where a suit is for the recovery of a specific sum of money the reduction of the amount as a

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result of the adjudication by the Court or by a compromise between the parties does not alter the original valuation for purposes of appeal. (*Jai Lal, J.*) MATHRA DAS PURI *v.* JALAL DIN. **I.R. 1932 Lah. 633=140 I.C. 223=A.I.R. 1933 Lah. 8.**

———**S. 8**—*Mortgage—Suit for redemption and surplus profits—Valuation.*

In a suit for redemption of a usufructuary mortgage and for recovery of a certain sum of money as the surplus profits of the mortgaged property, the valuation of the suit for the purposes of jurisdiction is the same as the valuation for the purposes of Court-fees, and depends on the principal amount of the mortgage. (*Agarwala, J.*) MAHATHA LONG SINGH *v.* BISHUN LAL SINGH. **149 I.C. 560=6 R.P. 620 (1) =A.I.R. 1933 Pat. 625 (1).**

———**S. 8**—*Mortgage—Suit for amount due and interest—Jurisdictional value is that given in plaint.*

Where the suit is to recover certain mortgage amount together with interest, *held*, that the valuation both for purposes of Court-fee and for the purpose of jurisdiction was the valuation given in the plaint. (*Mukerji and Mitter, JJ.*) SAILENDRA KUMAR PALIT *v.* HARI CHARAN SADHU KHAN. **58 Cal. 829=I.R. 1931 Cal. 396= 130 I.C. 876=52 C.L.J. 589=A.I.R. 1931 Cal. 159.**

———**S. 8**—*Partition suit—Mode of valuation.*

In a suit for partition valuation for the purposes of jurisdiction is to be determined according to the value of the plaintiff's share. (*Srivastava, J.*) HARBHAN DAT *v.* LADLI SARAN. **6 I.R. (Oudh) 147=146 I.C. 582=9 Luck. 219=17 R.D. 1043=10 O.W.N. 1196=A.I. R. 1933 Oudh 547.**

———**S. 8**—*Plea of undervaluation overruled—Appeal by defendant—Valuation for purposes of forum of appeal.*

The general rule is that the value fixed by the plaintiff in his plaint must, *prima facie*, be the basis for determination of the forum of the suit or appeal arising out of it, though the position is different if it is found that the plaintiff has deliberately under-valued or over-valued his claim with the object of having the suit tried or the appeal heard by a Court which would not have jurisdiction to try the suit or hear the appeal in case the claim is properly valued. Where the trial Court rejected the plea of the defendant that the plaintiff had under-valued his suit and decreed the plaintiff's claim, and the defendant filed an appeal valuing it at the plaintiff's valuation of the suit, it could hardly lie in the mouth of the plaintiff-respondent to say that he deliberately under-valued his claim in the plaint, even though the defendant repeated in his memorandum of appeal that the suit had been under-valued in the plaint. (*Srivastava and Thomas, JJ.*) GAYA DEI *v.* TULSHA DEI. **10 Luck. 587=154 I.C. 125=7 R.O. 440=1935 O.W.N. 168=A.I.R. 1935 Oudh 296.**

———**S. 8**—*Suit falling under S. 7 (v) of Court-fees Act—Jurisdictional value.*

In a suit falling under S. 7 (*v*) of the Court-Fees Act, the valuation for the purpose of jurisdiction under S. 8 of the Suits Valuation Act must be according to the value of the property. (*Srivastava, J.*) MOIZUDDIN *v.* BENI MADHO. **158 I.C. 296=8 R.O. 84 (1)=1935 O.W.N. 1068.**

———**S. 8**—*Suit for accounts—Sum exceeding pecuniary jurisdiction found due—Jurisdiction if ousted.*

In a suit for accounts the value for the purposes of Court-fees and the value for the purposes of jurisdiction are the same. Though a Court cannot entertain jurisdiction where the amount or value of the subject-matter exceeds the pecuniary jurisdiction which has been prescribed by the Bombay Civil Courts Act, it does not interfere with the power of the Court to pass any decree in a suit ibr accounts although it might exceed its pecuniary jurisdiction. If the plaintiff valued his suit at Rs. 130 it is within the competence of the Second Class Subordinate Judge to entertain the suit. His jurisdiction is not ousted after he has made a preliminary decree for accounts by the fact that on taking accounts a sum more than his pecuniary jurisdiction has been found to be due. 15 Bom. L.R. 1021 and 13 C.W.N. 493, Dis. (*Patkar and Tyabji, JJ.*) ISHWARAPPA *v.* DHANJI. **56 Bom. 23=I.R. 1932 Bom. 314=137 I.C. 702 =34 Bom.L.R. 44=A.I.R. 1932 Bom. 111.**

———**S. 8**—*Suit for cancelling deeds—Undervaluation.*

Although the value put by the plaintiff on his suit *prima facie* determines the jurisdiction on the plaint the plaintiff is not at liberty to place an arbitrary value to the suit. Where the plaintiff filed a suit for cancellation of two documents a deed of sale in which the consideration was stated to be Rs. 700 and a promissory note for Rs. 500 and valued the suit for purposes of jurisdiction and Court-fee at Rs. 100:

Held, that the suit was undervalued and there was no reasonable cause for putting such a low valuation upon the relief sought by the plaintiff. (*Mya Bu, J.*) MAUNG NOE *v.* MAUNG KHA PU. **I.R. 1933 Rang. 44=142 I.C. 705=A.I.R. 1933 Rang. 40.**

———**S. 8**—*Suit for declaration and consequential relief—Valuation—Plaintiff's right—Limits.*

In a suit for a declaratory decree where consequential relief is prayed the plaintiff is entitled to put his own valuation on the suit subject to Ss. 4 and 9 of the Suits Valuation Act and he must do so by putting down one single and entire sum as representing the value of the total reliefs sought by him. He cannot put one valuation for purposes of Court-fee and another for purposes of jurisdiction. (*Mitter and M. C. Ghose, JJ.*) BASANTA KUMARI DEBYA *v.* NALINI NATH BHATTACHARJEE. **150 I.C. 732=7 R.C. 40=57 C.L.J. 465.**

———**S. 8**—*Suit for declaration and injunction—Appeal against decree—Forum—Jurisdictional value—Madras Civil Courts Act (III of 1873), S. 14—Effect.*

In the case of an appeal arising out of a suit for a declaration and injunction, the value for purposes of jurisdiction is the same as that for purposes of Court-fee, S. 8 of the Suits Valuation Act taking effect as against S. 14 of the

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Madras Civil Courts Act. So where a suit for declaration and injunction in respect of land worth Rs. 8,000 but for purposes of relief valued at Rs. 4,000 was dismissed by the Sub-Court, the forum for appeal is determined by the value for the purposes of Court-fee and an appeal lies only to the District Court and not to the High Court. (*Ramesam and Cornish, JJ.*) OFFICIAL RECEIVER OF RAMNAD *v.* ARUNACHALAM CHETTIAR. **57 Mad. 186=147 I.C. 707=6 R.M. 384=1933 M.W.N. 998=38 L.W. 447=A.I.R. 1933 Mad. 721=65 M.L.J. 420.**

———**S. 8**—*Suit for declaration and injunction —Plaint valuation, to be taken.*

As a general rule the amount at which the plaintiff values the relief sought by him for purposes of court-fee is to be taken despite anything contrary in the plaint as the value for purposes of jurisdiction. The plaintiff sued for a declaration to the effect that they were the lessees for a term of five years of certain land and for an injunction restraining defendants from interfering with plaintiff's possession as lessees.

Held, that the plaintiff's value should be taken for determining the court-fee and jurisdiction. (*Tek Chand, J.*) GHULAM HAIDAR *v.* BISHAMBER DAS. **I.R. 1932 Lah. 681 (2)=140 I.C. 73=33 P.L.R. 458.**

———**S. 8**—*Suit for declaration and injunction —Valuation—Mode of avoiding payment of higher court-fee—Fresh suit.*

Where the plaintiff valued the suit for a declaration and injunction at Rs. 2,100, so as to give jurisdiction to a Court of a higher grade,

Held, that the value for purposes of jurisdiction and court-fee was the same, namely, Rs. 2,100. The only way of avoiding payment of the higher court-fee is for the plaintiff to bring a fresh suit with a lesser valuation for purposes of jurisdiction and court-fee. (*Addison, J.*) GURDWARA MAHANT JAWAL SINGH *v.* KALA SINGH. **I.R. 1931 Lah. 744 (2)=133 I.C. 120 (2)=32 P.L.R. 193=A.I.R. 1931 Lah. 307.**

———**S. 8**—*Suit for declaration that decree is not binding and for injunction—Jurisdictional value.*

The jurisdictional value of a suit for a declaration that a decree is not binding on the plaintiff and for an injunction is the same as that fixed for purposes of Court-fee, namely, the amount at which the plaintiff values the relief. (*Tek Chand, J.*) JHANDA SINGH *v.* GULAB MAL BHAGWAN DASS. **13 Lah. 788=I.R. 1932 Lah. 320=137 I.C. 240=33 P.L.R. 488=A.I.R. 1933 Lah. 246.**

———**S. 8**—*Suit for declaration that property is not liable to attachment and sale in execution of decree—Jurisdictional value.*

In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the determination of the value of the suit for purposes of jurisdiction must rest upon the construction to be placed on the nature of the suit and the character of the relief claimed, if the suit could not be treated as one under O. 21, R. 63, C. P. Code, no objection having been filed by the plaintiff under O. 21, R. 58 before he instituted the suit. Where it is clear from the allegations made in the plaint and the relief sought therein that the sole object of the suit is to get a declaration that the property is not liable to attachment and sale in execution of the defendant's decree, and the judgment-debtor is made a *pro forma* defendant and no relief is claimed against him, the case is, in substance, in no way different from a suit brought under O. 21, R. 63 and the value of the suit for purposes of jurisdiction is not the value of the property but the decretal amount. (*Srivastava and Nanavutty, JJ.*) NARAIN DAS *v.* THAKUR PRASAD. **154 I.C. 818=11 Luck. 1=7 R.O. 506=1935 O.W.N. 305=A.I.R. 1935 Oudh 271.**

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———**S. 8**—*Suit by mortgagee to set aside adverse claim order—Prayer for declaration that mortgage is genuine—Jurisdictional value.*

A suit by a mortgagee of the judgment-debtor praying that an adverse claim order may be set aside and also for a declaration that the mortgage relied on by him was genuine and for proper consideration, the mortgagor also being impleaded as a party to the suit, is a suit which discloses not only a cause of action in respect of the setting aside of the claim order but also a cause of action regarding the validity of the mortgage against all the defendants. The plaintiff in such a suit is entitled to value his suit for purposes of jurisdiction at the amount due under the mortgage. (*Pandrang Row, J.*) MAHOMED HUSSAIN AMBALAM *v.* RAMANATHA IYER. **158 I.C. 1015=8 R.M. 399=1935 M.W.N. 912=42 L.W. 649=A.I.R. 1935 Mad. 1002.**

———**S. 8**—Suit to set aside claim order—Valuation—If same as value for Court-fees. *See* COURT-FEES ACT, SCH. II, ART. 17 (1). **68 M. L.J. 231.**

———**S. 8**—*Suit under Ss.* 44 *and* 84, *Agra Tenancy Act,* 1926—*Jurisdictional value.*

The value for the purposes of Court-fee and the value for the purposes of jurisdiction should be identical with the amount of the rent in the next preceding year when a suit is brought either under S. 44 or S. 84 of the Agra Tenancy Act. (*Sulaiman, C.J. and Mukerji, J.*) RAGHUNATH RAM *v.* SITAJ LAL. **152 I.C. 115=7 R.A. 265=1934 A.L.J. 708=18 R.D. 222=15 L.R. 246 (Rev.)=3 A.W.R. 674=A.I.R. 1934 All. 825.**

———**S. 8**—*Valuation in plaint—If precludes different valuation for appeal.*

A party who has previously made a valuation of his suit or appeal for the purpose of Court-fee is not always precluded from adopting for his proposed appeal a higher valuation as representing the actual or market-value of the claim made in the suit. But where a plaintiff having discretion to value his claim in alternative ways chooses to value his claim in the plaint in a particular way, he is not entitled to set up subsequently that his valuation given in the plaint is not real. (*Mukerji and S. K. Ghose, JJ.*) HAJI HAFEZ MAHOMED HOSSAIN KHAN *v.* MANSUR ALI. **153 I.C. 366=7 R.C. 369=38 C.W.N. 751=59 C.L.J. 448=A.I.R. 1934 Cal. 809.**

SUITS VALUATION ACT (1887), S. 8.

———S. 8—*Value of appeal—Value of subject-matter of suit.*

The general rule in appeal is, that when the appeal is against the whole decree, and if the suit has been decreed in full, the value of the appeal is the same as the value of the original plaint. Plaintiff valued her suit for purposes of Court-fee and jurisdiction at certain amount to which the defendant did not object. In appealing against the decision, the defendant valued the appeal for purposes of jurisdiction at the same value as in the plaint, but for purposes of Court-fee he valued the subject-matter at a considerably low amount.

Held, that the defendant had to put a stamp on the value put for jurisdiction. (*Baguley and Ba U, JJ.*) MAUNG PO NYUN *v.* DAW NGWE BWINT. **147 I.C. 791=6 R.R. 179=A.I.R. 1933 Rang. 410 (1).**

———S. 8—*Value of suit—What is—Valuation for appeal—Damages after date of suit—If can be taken into account.*

The value of a suit is its value at the date of its institution and not what the value will become on some subsequent date. Nor does the value of a suit depend upon the competency of a Court to pass a decree for a particular claim. The claim may be absolutely untenable, but if a plaintiff claims relief he has to value it and that value will determine the forum for the institution of the suit or appeal. Plaintiff filed a suit in a Subordinate Court for removal of a dam and for damages caused to him by the dam. He valued the suit at Rs. 300 in respect of the dam and at Rs. 2,300 being the damages or mesne profits for one year, thus making a total of Rs. 2,600, and paid Court-fee on Rs. 2,600. Plaintiff also claimed future damages till removal of dam which he estimated roughly at Rs. 3,000 and stated that the total valuation of the suit was Rs. 5,600. The suit having been dismissed, plaintiff appealed to the High Court. Objection was taken after the hearing of the appeal had proceeded for some time that the appeal lay to the District Court and not to the High Court as the valuation for purposes of jurisdiction and Court-fee was the same, *i.e.*, Rs. 2,600.

Held, that the future damages claimed by the plaintiff could not be added for the purpose of valuation either for Court-fee or for jurisdiction, that the suit was not one of those excepted under S. 8 of the Suits Valuation Act, and consequently the valuation of the suit being only Rs. 2,600 and not Rs. 5,600, no appeal lay to the High Court. (*Khaja Mahomed Noor and Agarwala, J.*) GIRJA KUR *v.* SHIVA PRASAD SINGH. **14 Pat. 414=156 I.C. 769=8 R.P. 17=16 Pat.L.T. 103=A.I.R. 1935 Pat. 160.**

———S. 9—*Lahore High Court Rules, R.* 4—*Suit to get wall demolished—Valuation—Forum of appeal.*

A suit for the issue of a perpetual injunction to the effect that the defendant be ordered to demolish the wall built by him near plaintiff's ventilator and that he be restrained from building a second storey on his shop within five feet of the window of the plaintiff's, virtually falls under R. 4 framed by the Lahore High Court under S. 9, Suits Valuation Act, and therefore must be valued at a sum exceeding Rs. 100 and not exceeding Rs. 500. A first appeal over such a suit lies only to the District Judge. (*Abdul Rashid, J.*) MUNSHI RAM *v.* MAM SARAN. **155 I.C. 153=7 R.L. 642=A.I.R. 1934 Lah. 796.**

SUITS VALUATION ACT (1887), S. 11.

———S. 11—*Failure to object to under-valuation in trial Court—Objection in execution—Permissibility of.*

A suit for a declaration of right of maintenance and for arrears was filed *in forma pauperis* and due to oversight no valuation was put. The suit was beyond the pecuniary jurisdiction of the Munsif but no objection was taken by the defendant, and when the decree was sought to be executed, objection was raised that the Munsif had no jurisdiction to pass the decree.

Held, that it was a case of under-valuation; and so no objection was taken in the trial Court the objection which was taken at the time of execution should fail. (*Wort and Mahomed Noor, JJ.*) MT. JAGTARAM KUER *v.* MT. MUNDER KUER. **13 Pat. 290=6 R.P. 733=150 I.C. 378=A.I.R. 1934 Pat. 240.**

———S. 11—*Objection as to jurisdiction—Waiver.*

A suit for maintenance was valued at Rs. 3,000 for purposes of jurisdiction. The suit having been disposed of one on the merits, there was an appeal, but then the correct valuation was discovered to be Rs. 18,000 and the Court set aside the decree and remanded the case.

Held, that the objection as to jurisdiction was cured by waiver and that the appellate Court ought not to have entertained the same. (*Abdul Qadir, J.*) HAMIR KAUR *v.* COURT OF WARDS. **I.R. 1932 Lah. 391=138 I.C. 62 (2)=33 P.L.R. 634=A.I.R. 1932 Lah. 538.**

———S. 11—*Objection to jurisdiction taken after settlement of issues—Permissibility.*

Where the defendant did not raise his objection to the pecuniary jurisdiction of the Court either in his written statement or at the time of the settlement of issues and the trial Court was allowed to enter into matters of fact without any such question being raised, the Court is justified in refusing to entertain such a plea subsequently. (*Courtney Terrell, C. J., Kulwant Sahay and James, JJ.*) NARAYAN JHA NARONE *v.* JOGNI PRASAD JHA. **13 Pat. 329=6 R. P. 410=147 I.C. 1222=15 P.L.T. 139=A.I.R. 1934 Pat. 184 (S.B.).**

———S. 11—*Scope.*

The language of S. 11 is comprehensive enough to include all cases of erroneous valuation and does not suggest any distinction between cases in which the valuation depends upon rules having the force of law and those in which the valuation is determined otherwise. (*Wort and Mahomed Noor, JJ.*) MT. JAGTARAM KUER *v.* MT. MUNDER KUER. **13 Pat. 290=6 R.P. 733 =150 I.C. 378=A.I.R. 1934 Pat. 240.**

———S. 11—*Scope—Applicability.*

Section 11 is intended to cure a defect as regards valuation in respect of a suit or an appeal when it has been tried or heard by a Court which did not have jurisdiction with regard to it. Section 11 has no application where a preli-

SUITS VALUATION ACT (1887), S. 11.

minary objection is raised before the appeal has been heard. (*Bisheshwar Nath and Pullan, JJ.*) PITMAN SINGH *v.* BISHUN NARAIN. **6 Luck. 426 =130 I.C. 339=7 O.W.N. 1188=I.R. 1931 Oudh 147=A.I.R. 1931 Oudh 58.**

———S. 11—*Undervaluation or overvaluation —Validity of decree.*

The mere fact that a suit has been overvalued or undervalued cannot be allowed to affect the decree unless the disposal of the suit on the merits has been prejudicially affected owing to the overvaluation or undervaluation. 46 M. 631 and 36 A. 58, Ref. (*Mukerji, A. C. J., King and Niamatullah, JJ.*) MOOL CHAND MOTILAL *v.* RAM KISHEN. **55 All. 315=I.R. 1933 All. 215=143 I.C. 275=1933 A.L.J. 222=A.I.R. 1933 All. 249 (F.B.).**

———S. 11—*Valuation—Objection for the first time in execution—If open.*

It is not open to the parties, during the course of the execution proceedings, to raise an objection for the first time regarding the undervaluation or overvaluation of a suit. (*Abdul Rashid, J.*) GIAN CHAND *v.* CHARANJI LAL. **155 I.C. 229=7 R.L. 661=36 P.L.R. 238=A.I.R. 1934 Lah. 804.**

———S. 11—*Valuation of relief not made—Suit tried by District Judge—Cure of defect.*

In the case of suit for an injunction the trial Court should insist on the valuation of the relief sought and that valuation will then determine the jurisdiction of the Court. Where however the Assistant District Judge did not return the plaint to the plaintiff to value the relief sought for purpose of Court-fees and as a result the plaintiff obtained an adjudication from the Court which, on the valuation subsequently declared, had no jurisdiction to try it.

Held, that the defect in jurisdiction was however cured by S. 11 of the Suits Valuation Act. (*Leach, J.*) MAUNG NYI MAUNG *v.* MANDALAY MUNICIPAL COMMITTEE. **12 Rang. 335=153 I.C. 1037=7 R.R. 245=A.I.R. 1934 Rang. 268.**

———S. 11—*Want of pecuniary jurisdiction —Objection raised in revision—Entertainability.*

Where in a partition suit an objection on the ground of pecuniary jurisdiction was raised for the first time before the High Court in revision and it appeared that the undervaluation had not prejudicially affected the disposal of the suit on its merits.

Held, that the objection could not be entertained. (*Mallik and Jack, JJ.*) NARAN CHANDRA GHOSE *v.* RANGALAL GHOSE **150 I.C. 744=7 R.C. 43=37 C.W.N. 764.**

———S. 11 (1) (b)—*Objection to jurisdiction —Proper time to raise.*

Any objection which is to be raised on the ground of pecuniary jurisdiction must be taken in the trial Court at the earliest possible opportunity and where the objection is not taken it is not to be entertainable thereafter unless the appellate Court is satisfied that there has been some miscarriage of justice on the merits. 46 A. 250, Ref. (*Courtney Terrell, C. J., Kulwant Sahay and James, JJ.*) MT. UREHAN KUER *v.* MT. KABUTRI. **13 Pat. 344=15 P.L.T. 131 =6 R.P. 495=148 I.C. 579=A.I.R. 1934 Pat. 204 (S.B.).**

SUPREME COURT CHARTER (1774), Cls. 4 and 21—*Writ of prohibition—High Court's power to issue.*

The High Court has power under Cl. (4) of the Supreme Court Charter (1774) to issue writs of prohibition. The clause conferred on the Supreme Court all the powers, including that of issuing writs of prohibition, which were possessed by the Court of the King's Bench in England, and all those powers have been inherited by the High Court, except such as have been specifically taken away by the statute. Cl. (21) of the Charter cannot be construed as controlling the language of Cl. (4) so as to cut down and curtail the powers conferred by Cl. (4). (*Panckridge, J.*) NATIONAL CARBON CO. AND BRIGHT STAR BATTERY CO., *In re.* **61 Cal. 450=152 I.C. 914 =7 R.C. 329=38 C.W.N. 729=A.I.R. 1934 Cal. 725.**

SUPPORT

See (1) TORT—NUISANCE—SUPPORT.
(2) INJUNCTION—SUPPORT.

SUPURDAR.

See C. P. CODE, S. 145.

SURETY.

See also (*i*) C. P. CODE, SS. 55 (4), 145 AND O. 38, R. 2.
(*ii*) CONTRACT ACT, S. 128, *et seq.*
(*iii*) CR. P. CODE, S. 513.
(*iv*) COURT-FEES ACT, SCH. II, ART. 6.
(*v*) HINDU LAW—DEBTS—SURETY-DEBTS.

———Bond to Criminal Court—Undertaking to produce crops of lands attached in proceedings under S. 145, Cr. P. Code—Enforcement—Procedure—Power of Criminal Court to take execution proceedings. *See* MYSORE CR. P. CODE REGULATION, S. 145. **39 Mys.H.C.R. 1042.**

———*Contract, if can be inferred—Father's willingness to help his son and payment of his debt on one occasion.*

It cannot be inferred from the fact that the father was willing to help his son, that he therefore was prepared to be a guarantee for him, and nothing of the kind can be inferred from the circumstance that the father actually paid on one occasion. (*Buckland, J.*) JAGGANATH ADDY *v.* KHETRA PAL BHATTACHARJEE. **152 I.C. 560 =7 R.C. 284=59 C.L.J. 511=A.I.R. 1934 Cal. 711.**

———*Discharge of liability—Surety for appearance of judgment-debtor.*

Where a judgment-debtor under arrest was released on his furnishing security for his appearance if his objection under S. 47 of the Code was dismissed and later on after the dismissal of the said petition the judgment-debtor appeared in Court and paid the decretal dues in instalments and the decree-holder proceeded against the surety for the balance,

Held, that S. 136, Contract Act, applied and that the liability of the surety ceased after the judgment-debtor surrendered to the Court on the dismissal of his application. (*Guha and M. C. Ghose, JJ.*) BHAGWANDAS *v.* NABIN

SURETY.

CHANDRA. **I.R. 1933 Cal. 405=143 I.C. 322 =56 C.L.J. 586=A.I.R. 1933 Cal. 337.**

———*Discharge of liability—Variation of contract between debtor and creditor—Prejudice to surety—Enquiry into—Relevancy of.*

If there is a substantial alteration of the original contract between debtor and creditor without the assent of the surety, even if there be no actual prejudice to the surety which can be shown to exist, the surety will be discharged because the Court or Jury will not go into the question whether there has been any actual prejudice or not. The surety is to be the judge as to whether he will continue to remain liable on the new contract or not. (English cases referred to.) (*Baker and Nanavati, JJ.*) KESHAVLAL HARILAL *v.* PRATAPSING. **56 Bom. 101=I.R. 1932 Bom. 293=137 I.C. 564 (2)=34 Bom. L.R. 167=A.I.R. 1932 Bom. 168.**

———Liability of—Attachment before judgment —Security bond undertaking to pay decree amount if suit decreed—Dismissal of suit for default—Subsequent restoration—Effect. *See* C. P. CODE, O. 38, R. 6 (2). **68 M.L.J. 444.**

———*Payment by principal—Limitation if extended against surety.*

Payment by a principal debtor do not extend the period of limitation against a surety. (*Raza and Bisheshwar Nath, JJ.*) JAI NARAIN SINGH *v.* PARMESHA MURAO. **I.R. 1931 Oudh 350=132 I.C. 798 (1)=14 O.L.J. 376=8 O.W.N. 544=A.I.R. 1931 Oudh 310.**

SURETY—Rights of. *See* C. P. CODE, S. 145.

———Security bond—Construction—"If judgment-debtor failed to pay" means failure to pay voluntarily. *See* C. P. CODE, S. 145—CONSTRUCTION. **A.I.R. 1933 Nag. 287.**

———Security bond — Construction — Order directing security—Reference to—Permissibility. *See* EVIDENCE ACT, S. 95—SECURITY BOND. **61 Cal. 890.**

———*Security bond Construction—Security "pending disposal of suit."*

Where the terms of the security bond are that the sureties gave security pending the disposal of the suit, the obvious meaning of the bond and the intention of its executants is that they are to remain sureties until the disposal of the suit by final orders in it by the Appellate Court. (*Mosely, J.*) LEKHURAM *v.* SAIN DASS. **157 I. C. 28=8 R.R. 92.**

———Security bond to Court—Assignment to minors on attaining majority—Mode. *See* REGISTRATION ACT, S. 17. **A.I.R. 1935 Lah. 863.**

———*Security bond to Court—Enforcement in execution.*

A security bond executed in favour of the Court is enforceable in execution. There need be no assignment to the person for whose benefit the bond is intended. (*Mitter and Henderson, JJ.*) RAJENDRA CHANDRA SARKAR *v.* BIPIN CHANDRA SAHA. **60 Cal. 1298=149 I.C. 339=6 R.C. 569=37 C.W.N. 973=A.I.R. 1934 Cal. 64.**

———*Subsequent agreement to pay unconditionally—Nature of relationship—Liability.*

SURETY.

Where originally the relationship between the plaintiff and the defendant was that of a creditor and surety, but that relationship was superseded by a subsequent agreement by which the defendant unconditionally undertook to pay the amount owing to the failure on the part of the principal debtor to pay, the defendant became the debtor and when sued in that capacity, it is not open to him to plead that his liability is at an end by reason of the plaintiff allowing his remedy against the principal debtor to become barred. (*Niamatullah, J.*) JUGAL KISHORE *v.* P. K. OFFICIAL RECEIVER. **156 I.C. 964=8 R.A. 69 (1)=1935 A.W.R. 492.**

———*Surety for appearance—Forfeiture of bond —Right to recover money lost.*

It is essential when a man stands surety for the appearance of another that he should take every precaution to insure the carrying out of his undertaking. The surety cannot, when the bond is forfeited, be permitted to claim the money forfeited from the person for whom he stood surety or from any person who induced him to stand. To allow such a suit to be maintained would be opposed to public policy because such a course would tend to render the surety callous and the whole object of demanding the bond would be defeated. (*Broadway, J.*) BHANA MAL *v.* BHARTU MAL BANSI DHAR. **135 I.C. 224=I. R. 1932 Lah. 96=32 P.L.R. 739=A.I.R. 1932 Lah. 23.**

———Surety bond—Construction—Liability of surety for a stated sum—Liability, if absolute or only for deficiency up to limit—Enforcement of —Limitation Act (IX of 1908), Art. 182. *See* C. P. CODE, S. 145—LIMITATION. **63 M.L.J. 85 (P.C.).**

———*Surety bond—Construction—Liability for decretal amount until judgment-debtor discharged in insolvency—Application for discharge dismissed—Liability of surety.*

The surety executed a bond whereby he undertook to produce the judgment-debtor until he presented the insolvency petition and was adjudicated and discharged. After adjudication the application of the judgment-debtor for discharge was dismissed owing to the report of the Official Receiver that the outstandings shown were unrealisable and that a large credit was given to a woman without any security.

Held, that the words of the surety bond in the case were clear that the liability enured not only till an application for discharge was filed, but that the judgment-debtor was discharged in fact, therefore, the surety's obligation could not be deemed to have ceased the moment the application for discharge was filed by the insolvent. (*Anantakrishna Ayyar, J.*) KANDASWAMI CHETTIAR *v.* ANNAMALAI CHETTIAR. **6 I.R. (Mad.) 86=145 I.C. 531=A.I.R. 1933 Mad. 360.**

———*Surety bond—Construction—Rules of.*

The principles of construction, so far as surety bond are concerned, are somewhat different from the principles which should be adopted for construing any other documents. The operative part of a guarantee is liable to be controlled by the recitals, at least where the latter are plainly

inconsistent therewith, but not otherwise, though a covenant of indemnity, unlike a release or guarantee, is not to be restricted by its recitals. Where the recitals plainly indicated that the sureties had come to execute the bonds on the requisition which the principal had made, calling upon the agent to furnish the sureties who would remain liable to the extent of Rs. 1,00 and no other amount being mentioned in the bonds but only a general statement about liability for the entire amount for which defendant would be found liable.

Held, that the intention of the parties was that the executants would remain liable up to the extent of Rs. 1,000 and no more. (*Mukerji and S. K. Ghose, JJ.*) BIKRAM KISHORE MANIKYA BAHADUR *v.* JADAB CHANDRA CHOUDHURY. **160 I.C. 388=8 R.C. 433=A.I.R. 1935 Cal. 817.**

———Surety bond—Construction—Undertaking for mesne profits in suit—Suit dismissed but decreed on appeal—Liability of surety. *See* C. P. CODE, S. 145—DISCHARGE OF SURETY. **6 I.R. (Mad.) 35=145 I.C. 285=38 L.W. 254.**

———*Surety bond—Discharge of liability—Negligence of obligee.*

The mere laches of the obligee or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond, is not sufficient of itself to relieve the sureties. Where a Co-operative Society sued their accountant as principal for the recovery of certain sums of money embezzled by him and also sought to make liable his sureties and the sureties accused the Society of negligence in superintending the work of the accountant and added that as it allowed the accountant to abscond by delaying its report to the Police for about ten days after it became fully aware of the embezzlement, their security bond had been discharged.

Held, that none of these things were sufficient to discharge the sureties. (*Addison and Dalip Singh, JJ.*) SONEPAT CO-OPERATIVE SOCIETY, LTD. *v.* KAPURI LAL. **157 I.C. 124=37 P.L.R. 43 =8 R.L. 91=16 Lah. 583=A.I.R. 1936 Lah. 305.**

———Surety bond—Liability for decree—Compromise—Discharge of surety. *See* C. P. CODE, S. 145—DISCHARGE OF SURETY. **11 Pat. 590 =A.I.R. 1932 Pat. 313.**

———Surety bond—Moveables attached in execution—Liability of surety for—Scope of—Mode of enforcing bond—Limitation—Limitation Act (IX of 1908), Arts. 181 and 182—Application for arrest of second surety—Prior application for recognition of assignment of decree and for arrest of first surety, if available to save limitation against surety. *See* LIMITATION ACT, ARTS. 181 AND 182—SURETY. **A.I.R. 1933 Mad. 722 =65 M.L.J. 507.**

———*Unregistered bond—Liability of surety.*

Where the surety bond is not registered the creditor cannot claim the amount secured as a charge on the property in the hands of the surety. (*Raza and Bisheshwar Nath, JJ.*) JAINARAIN SINGH *v.* PARMESHAR MURAO. **I.R. 1931 Oudh 350=132 I.C. 798 (1)=14 O.L.J. 376=8 O.W.N. 544=A.I.R. 1931 Oudh 310.**

TARIFF ACT (1894), S. 10.

SURRENDER (BY TENANT)—

See (*i*) AGRA TENANCY ACT (1926), S. 32.
(ii) C. P. TENANCY ACT (1920), S. 95.
(*iii*) LANDLORD AND TENANT SURRENDER.

SURRENDER (BY WIDOW.) *See* HINDU LAW—WIDOW—SURRENDER.

SURVEY MAP. *See* EVIDENCE ACT, S. 83.

SURVEY OFFICER'S DECISION. *See* UNDER ADVERSE POSSESSION—INTERRUPTION OF.

TACKING. *See* (*i*) ADVERSE POSSESSION—TACKING.
(*ii*) LIMITATION ACT (1908), ART. 144.

TAKIA. *See* MAHOMEDAN LAW—WAKF—TAKIA.

TALABI BRAHMATTER TENURE. *See* LAND TENURE—CHOTA NAGPUR—TALABI BRAHMATTER. **11 Pat. 569.**

TANK-BED. *See* MADRAS ESTATES LAND ACT, S. 3 (16) (*a*).

TARIFF ACT (VIII OF 1894), S. 10—*Contract to sell goods—Increase of customs duty before delivery—Seller entitled to claim excess.*

In a contract for sale of goods, if before goods are tendered customs duty is increased, the seller is entitled to claim the excess duty imposed from the buyer, provided he proves that such excess duty on the goods tendered has been already paid. It is immaterial whether such duty has been paid by the seller himself or that some one else has paid it. 21 Bom. 628 and A.I.R. 1933 Mad. 24, Expl. (*Ferrers, J. C. and Rupchand, A.J.C.*) JHAMANDAS JODHARAM *v.* TIRATHDAS DEOMAL. **28 S.L.R. 98=149 I.C. 614=6 R.S. 233=A.I.R. 1933 Sind 404.**

———**S. 10**—*Increase of duty between date of contract and date of delivery—Liability to pay increased duty—Right of seller to refuse delivery.*

S. 10 refers to the sale of an article duty free. It is intended to make it plain, in the absence of an agreement upon whom rests the liability to pay duty on articles agreed to be sold, where the duty has increased between the date of contract and the date of delivery. In such a case the seller is entitled to refuse to give delivery until the agreed purchase price *plus* the increased duty is tendered even though he has not already paid the increased duty himself. (*Beasley, C. J. and Burn, J.*) ADAM HAJEE PEER MAHOMED ESSACK *v.* HAJEE SUKUR GANNY. **56 Mad. 334=I.R. 1932 Mad. 799=139 I.C. 847=36 L.W. 583 =1932 M.W.N. 946=A.I.R. 1933 Mad. 24 =63 M.L.J. 565.**

———**S. 10**—*Increase of duty—Liability of purchaser—Burden of proof.*

In order that the increase of duty shall be passed on the purchasers, it must be shown that the goods delivered have paid duty. It is for the vendor, who relies on the terms of Indian Tariff Act, to show that the case comes within the ambit of the section on which he relies, It is not the purchaser's duty to plead that a particular exception to the law of contract did not operate. It is vendor's duty to plead the exception and to substantiate the plea. Whether the vendor purchased silver at an increased price or no in order to enable delivery to the purchaser is immaterial. (*Grille, J. C.*), MOTI-

TARIFF ACT (1894), S. 10.

CHAND *v.* VISHRAM. **31 N.L.R. 12=151 I.C. 324=7 R.N. 58=A.I.R. 1934 Nag. 177.**

———**S. 10**—*Scope—Increase of duty.*

The increase of duty referred to in S. 10 is on any article and not necessarily on any class of article. The amount which the seller is entitled to recover in addition to the contract price is the amount of duty paid by him, which must obviously mean actually paid to Government when the goods are imported. The section cannot be applicable to cases where goods were already in existence in India prior to the increase of duty and on which no enhanced duty whatsoever had been paid to Government. The question whether the vendor is entitled to claim from the purchaser the enhanced duty on the goods is one of interpretation of the written contract. If the contract is clear and has made the purchaser liable to pay in addition to the contractual price the enhanced duty as well, there would be no question as to their liability. But where the contract is silent and merely contains a promise on the part of the vendor to sell goods at a certain rate, its obvious meaning is that he is to supply the goods at that rate irrespective of any duty that might have been paid upon it, or that may have to be paid on other goods. If the circumstances of the transaction show that the intention of the parties was that the goods contracted to be sold were to be imported from abroad, then it would be a necessary inference that the parties intended that the enhanced duty that might come in afterwards would be payable by the purchasers. But, in the absence of any such indication, it cannot be held that every contract of sale in India has to be varied in accordance with enhanced duty when such duty is imposed afresh or is increased on articles of that class. (*Sulaiman, C. J. and Mukerji, J.*) GAJADHAR PRASAD RAMNATH *v.* LALO RAM GAJANAND. **56 A. 1022=150 I.C. 438=6 R.A. 1102=1934 A.L.J. 1244=A.I.R. 1934 All. 587.**

TAXATION OF COSTS.

See (1) BOMBAY HIGH COURT RULES (O. S.).
(2) CALCUTTA HIGH COURT RULES (O.S.).
(3) COSTS.
(4) PRACTICE—COSTS.

TEA CONTROL ACT (XXIV OF 1933), Ss. 12, 14 and 15—*Construction—Mortgage of right, title and interest of tea company—If transfers right to obtain licenses.*

Export licenses under the Tea Control Act are licenses to export tea in general and not to export the tea which is the produce of particular estates; and the right to obtain licenses to export tea in general, being freely transferable to persons who have no interest in any particular tea estate cannot be said to be comprised in the right, title and interest of the owner of a tea estate. Consequently a mortgage by a tea company of its right, title and interest in certain tea gardens cannot have the effect of transferring or affecting the right which the company obtains under the Act to obtain licenses to export tea upto the amount of their export quota. (*Panckridge, J.*) GHOSE & SONS *v.* CHANDRAPUR TEA CO., LTD. **39 C.W.N. 1261.**

TEA DISTRICTS EMIGRANT LABOUR ACT (XXII OF 1932), S. 18 (1)—*Scope of—*

TELEGRAPH ACT (1885), S. 10.

Recruiter's duty to make enquiry—If dispensed with.

The provisions of S. 18 (1) relate only to taking the recruit to the depot. It has no bearing on any enquiry which may be necessary before the recruiter makes the arrangement with the recruit, which of course he makes subject to any provisions to which he may be liable. (*Macpherson, J.*) BIRSA SARDAR *v.* EMPEROR. **158 I.C. 1124=8 R.P. 240=16 Pat.L.T. 423=A.I.R. 1935 Pat. 411.**

———**S. 21**—*Rules framed by Bihar and Orissa Government under—R. 30—If* ultra vires.

The rules under the Tea Districts Emigrant Labour Act are made by the Local Government in exercise of the powers conferred by S. 21 (1) of the Act; sub-Cl. (*g*) of S. 21 empowers the Local Government to make rules providing for any matter which, in their opinion, may be required to give effect to the provisions of Ch. III. The rule-making power is expressed very widely; and a rule requiring a recruiter to give a true account of his adult female recruit would be one required to give effect to the provisions of Ch. III of the Act. R. 30 appears therefore to be validly made, certainly so far as a woman unaccompanied by her husband is concerned. It makes no difference that the local forwarding agent also incurs liabilities under Rr. 19 and 20 read with R. 30 in respect of "woman unaccompanied by their husbands". (*Macpherson, J.*) BIRSA SARDAR *v.* EMPEROR. **158 I.C. 1124=8 R.P. 240=16 Pat.L.T. 423=A.I.R. 1935 Pat. 411.**

———**S. 21 (g)**—*Giving effect to the provisions of Ch. III—Criterion for determining.*

Under S. 21 (*g*) of the Act, it is the opinion of the Local Government of what is a matter required to give effect to the provisions of Ch. III, that is to be criterion. Such opinion will naturally be based on local conditions. The criterion is not that the rule should give such effect. (*Macpherson, J.*) BIRSA SARDAR *v.* EMPEROR. **158 I.C. 1124=8 R.P. 240=16 Pat.L.T. 423=A.I.R. 1935 Pat. 411.**

TEJMANDI TRANSACTIONS.

See (1) CONTRACT.
(2) PRINCIPAL AND AGENT—PAKKA ADAT.

TELEGRAPH ACT (XIII OF 1885), S. 10 (d)—*Damage—Meaning of—Depreciation to property due to aerial line span.*

Where the question was whether the depreciation in the value of property owing to the presence of an aerial line span was not damage to property,

Held, that the damage was not confined to actual damage to property by demolition of a building or damage to crops. The rendering of a site useless for building purposes might or might not be damage to the owner. This would depend on the circumstances existing at the time when the line was laid and could best be determined by considering whether there would have been any loss on the sale of the land from this cause if the land had been sold at that time. (*Beckett, J.*) HUSSAIN BAKHSH *v.* SECRETARY OF STATE. **17 Lah. 391=160 I.C., 636 (2)=8 R.L. 573 =38 P.L.R. 883=A.I.R. 1935 Lah. 982.**

TELEGRAPH ACT (1885), S. 16.

———S. 16 (3)—*Proceedings under—Limitation.*

The proceedings under Telegraphs Act, S. 16 (3) are governed by Art. 181, Limitation Act, and the period would be three years from the date on which the right to apply to the District Judge accrued, that is, from the date when the dispute arose. (*Beckett, J.*) HUSSAIN BAKHSH *v.* SECRETARY OF STATE. **17 Lah. 391=160 I.C. 636 (2)=8 R.L. 573=38 P.L.R. 883=A.I.R. 1935 Lah. 982.**

TELEGRAPHIC MESSAGE.

See EVIDENCE ACT, S. 88.

TEMPLE.

See (*i*) HINDU LAW—RELIGIOUS ENDOWMENT—TEMPLE.
(*ii*) RELIGIOUS ENDOWMENTS.

TEMPORARY ACT.

See INTERPRETATION OF STATUTES.

TENANCY.

See (1) LANDLORD AND TENANT.
(2) LEASE.
(3) TENANCY ACTS.
(4) T. P. ACT, SS. 105-117.

TENANCY IN COMMON.

See CO-SHARER.

TENDER.

See also (1) CONTRACT ACT, S. 38.
(2) T. P. ACT, SS. 83 AND 84.

———*Filing of—When amounts to payment into Court.*

Where it is not suggested that the judgment-debtor had no ready money and the filing of tender was merely a pretence of payment, filing a tender in Court amounts to payment into Court if money is deposited within the usual time. (*Niamatullah and Allsop, JJ.*) BAIJNATH BALMAKUND *v.* CHEDI LAL. **156 I.C. 59=7 R.A. 1039=1935 A.L.J. 315=1935 A.W.R. 250=A.I.R. 1935 All. 748.**

TENURE.

See LAND TENURE.

THAK MAPS.

See EVIDENCE ACT, (1) S. 35—SURVEY RECORDS.
(2) S. 36.

THEFT. *See* PENAL CODE, SS. 378-382.

THEKA. *See* AGRA TENANCY ACT (1926), SS. 14 AND 17.

THEKADAR. *See* AGRA TENANCY ACT (1926), SS. 3 (6), 19, 23, 24; 44; 73; ETC.

THICA MOKRA. *See* B. T. ACT, S. 7.

THIKKADAR.

See (1) B. T. ACT, SS. 22 (3) AND 120.
(2) CHOTA NAGPUR TENANCY ACT (1908), S. 16.

THIRD PARTY. *See* CONTRACT—THIRD PARTY.

THUNDUWARAM. *See* LAND TENURE—MIRASI—TENURE.

TIDAL NAVIGABLE RIVER.

See (1) FISHERY.
(2) RIPARIAN RIGHTS.

TIME—Essence of Contract. *See* CONTRACT ACT, S. 55.

TORT—Conspiracy.

———Extension of—Powers of Court.

See (1) C. P. CODE, S 148.
(2) C. P. CODE, O. 34, R. 7.

TITLE-DEEDS.—Mortgage by—Deposit of.

See (1) REGISTRATION ACT, S. 17 (1) (*b*)—MORTGAGE—EQUITABLE MORTGAGE.
(2) T. P. ACT, S. 59.

TOMB. *See* MAHOMEDAN LAW—WAKF—TOMB.

TORT.

Assault.
Conspiracy.
Contribution. *See* TORT-FEASORS.
Conversion.
Corporation.
Damages.
Defamation.
Fatal accident.
Fraud.
Joint tort-feasors.
Malicious arrest.
Malicious proceedings.
Malicious prosecution.
Master and servant.
Negligence.
Nuisance.
Remedy.
Secretary of State.
Seduction.
Trespass.
Vicarious liability.
Wrongful arrest.
Wrongful attachment.
Wrongful ex-communication.
Wrongful inducement.

Assault.

See also DAMAGES, *infra.*

———*Assault—Damages—Cost incurred in criminal prosecution, if recoverable.*

Costs incurred in the criminal prosecution cannot be recovered as part of damages or compensation for an assault. (*Jai Lal, J.*) LAHORI *v.* RAM CHAND. **I. R. 1931 Lah 911=134 I.C. 207=32 P.L.R. 421=A.I.R. 1931 Lah 648 (1).**

———*Assault—Suit for damages—Proof of assault—Previous conviction or acquittal by Criminal Court—Relevancy.*

In a civil action in tort for assault, the fact that the defendant was convicted or acquitted previously by the Criminal Court for the offence of assault would be relevant only as to the fact of conviction or acquittal and is totally irrelevant as to whether such conviction or acquittal was right, *i.e.*, whether the assault was in fact committed or not. It is the duty of the Civil Court to inquire into that question without being in any way influenced by the conclusions of the Criminal Court. (*Mockett, J.*) JAGGA RAO, *In re.* **156 I.C. 896=8 R.M. 76 (2)=41 L.W 786=1935 M.W.N. 452=A.I.R. 1935 Mad. 563=68 M.L.J. 660.**

Conspiracy.

———*Conspiracy—Cause of action.*

Where the plaint clearly alleged that there was collusion between a dismissed agent and another, and the Court finds that there was such collusion to defraud the plaintiff, plaintiff has a cause of action against both the conspirators. (*Pollock, A. J. C.*) MADHORAO *v.* RAGHUNATH. **152 I C. 638 (1)=7 R.N. 108=17 N. L.J. 186=A.I.R. 1934 Nag. 259.**

———*Conspiracy—Interference with business.*

An unlawful interference with the business of another person with intent to hurt that person is actionable

TORT—Conspiracy.

provided that damage results from interference. A lawful interference by unlawful methods with the same object and producing similar results is equally actionable. Even though the dominating motive in a certain course of action may be the furtherance of one's business or of one's interest, one is not entitled to interfere with another man's method of earning his living by illegal means. Illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy, where they would not have been illegal, if done by a single individual. App. Cas. 1901, p. 510 and App. Cas. 1915, p. 814 H.L., Ref. (*Sen and Niamatullah, JJ.*) BHOLA NATH SHANKAR DAS *v.* LACHMI NARAIN. **53 All. 316=136 I.C. 84=I.R. 1932 All. 132=1931 A.L.J. 84=A.I.R. 1931 All. 83.**

———*Conspiracy—Malice—Meaning.*

Malice in the sense of spite or ill-feeling is not the gist of the action. An act that is legal in itself does not become illegal because it is prompted by an indirect or sinister motive. (*Sen and Niamatullah, JJ.*) BHOLA NATH SHANKAR DAS *v.* LACHMI NARAIN. **53 All. 316=136 I.C. 84=I R. 1932 All. 132=1931 A.L.J. 84=A.I R. 1931 All. 83.**

———*Conspiracy—Meaning—Combination of persons—Procuring breach of contract.*

What is wrong in the case of an individual continues to be a wrong if committed by an association of individuals by pre concert or conspiracy. A conspiracy consists in the agreement of two or more persons to do an unlawful act by unlawful means. If a person or a combination of persons unlawfully procure a breach of contract, the matter is actionable provided that damage accrues therefrom. 2 E.L and B.L. 216, Ref.; App. Cas. 1905 p. 239, H.L. Ref. (*Sen and Niamatullah, JJ.*) BHOLA NATH SHANKAR DAS *v.* LACHMI NARAIN. **53 All. 316=136 I.C. 84=I.R 1932 All. 132=1931 A. L.J. 84=A.I.R. 1931 All. 83.**

Conversion.

———*Conversion—Action for—Value recoverable.*

The value recoverable in an action for conversion is in general the value of the property at the date of the conversion and not its value at any earlier or later date. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Conversion—Bonds—Assessment of damages.*

As a mere piece of movable property, and irrespective of its character, as representing an actionable claim the value of a bond is only nominal, but the measure of the damages for its non-delivery would be upon the basis of its character as representing an actionable claim. But if the bond is void at the time of conversion and not by any act of the defendant, only nominal damages can be recovered. (*Mukerji and S. K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Conversion— Carrier or bailee— Intention to appropriate.*

Where a carrier or bailee deals with goods entrusted to him, his intention is material to the question whether he converts them, because a dealing with them in the course of business manifests of itself no intention to deny the owner's title or to intermeddle or interfere with the title of any one, but if *A* is the real owner of the goods he may claim them from the carrier and if the carrier does not interplead but sets up the title of his bailor he must prove such title or be liable to the real owner for the value of the goods. (*Rankin, C.J., C.C.*

TORT—Damages.

Ghose and Lort Williams, JJ.) NIPPON YUSEN KAISHA *v.* MAHALIRAM RAMJIDAS. **I R. 1931 Cal. 736=134 I.C. 82=52 C.L.J. 365=A.I.R. 1931 Cal. 269.**

———*Conversion—Co pawnees—One of them making improper use of goods pawned—Remedy of the other.*

In order to enable one tenant in-common to maintain an action against another, there must not merely be a carrying away of the property but such a carrying away of it as will disable the party complaining from having the lawful use of benefit of the property or there must be the destruction of it. Where all that was alleged was that one of two co pawnees had refused to hand over the goods pawned to the pawner when the latter had served a notice for the same and that he had leased the goods without the consent of the other co-pawnee,

Held, that the latter could not maintain a suit in tort for conversion, the proper remedy being an action for accounts. (*Tek Chand and Aghi Haidar, JJ.*) HARSUKH RAI *v.* DARSHAN SINGH. **13 Lah. 555=I.R 1932 Lah. 154=135 I.C. 682=33 P.L.R. 93=A.I.R 1932 Lah. 185.**

———Conversion —Damages —Burden of proof—Intermixing by defendant. *See* EVIDENCE ACT, S. 106. **13 Pat. 762.**

———*Conversion—Damages—Measure of.*

The measure of damages in an action for trover is the value of the goods. According to the circumstances the general damages may be a substantial sum or may be a nominal sum, but there may be additional special damages given besides the actual value of the goods if the damages sustained are held not to be too remote. (*Wort, J.*) SITARAM SHAM NARAYAN *v.* ISWARI CHARAN SARANGI. **154 I.C. 198=7 R.P. 442=A.I. R. 1934 Pat. 57.**

———*Conversion—Onus.*

Obiter —In a suit for damages for conversion, the onus is not on the wrongdoer defendant to prove to what extent the property of the plaintiff has been converted. *Duke of Leeds* v. *Earl of Amherst*, 20 Beav. 239, Ref. (*Wort, J.*) SITARAM SHAM NARAYAN *v.* ISWARI CHARAN SARANG. **154 I.C. 198=7 R.P. 442 =A.I.R. 1934 Pat. 57.**

Corporation.

———Corporation—Liability of or damage owing to under-ground water. *See* NEGLIGENCE, *infra*. **26 S. L.R. 136.**

———*Corporation—Vicarious liability—Corporation not liable for act of officer over whom it has no control.*

The Corporation has no liability for the act of an officer over whom, in the exercise of those duties, it has no measure of control whatever and who is, in no sense in his capacity of Revenue Officer, its servant or agent. A.I.R. 1933 Cal. 243 and *Ching* v. *Surrey Council*, (1910) 1 K.B. 736, Dist. (*Braund, J.*) BALTHAZAR & SON *v.* MUNICIPAL CORPORATION, RANGOON. **160 I.C. 90=8 R R. 334=A.I.R. 1935 Rang. 439.**

Damages.

See also ASSAULT, *supra* AND FATAL ACCIDENT, *infra.*

———*Damages—Exemplary damages when disallowed—Defendant's conduct provoked by plaintiff's conduct.*

A plaintiff who has provoked the defendant's conduct by his own, is not entitled to exemplary damages. Hals. Vol. 10, p. 301, Rel. on. (*Bose, A.J.C.*) DAMODHAR *v.* VISHWANATH. **28 N.L.R. 320=141 I.C. 58=I. R. 1933 Nag. 19=A.I.R. 1933 Nag. 29.**

———*Damages—Substantial damages—Deliberate and wanton assault and consequent loss of eye-sight—Principles in estimating damages.*

TORT—Damages.

Where owing to a deliberate and wanton assault by the defendant the plaintiff loses his eye-sight and has suffered considerable pain and loss of earning and he files a suit for damages, substantial and exemplary damages should be awarded. The principles which guide the Courts in estimating damages in a case of this kind are as follows. The injured person is entitled to damages for personal suffering and for loss of enjoyment of life and also to actual pecuniary loss resulting to and the expenses reasonably incurred by him. If he is engaged in a profession, trade or other occupation, he must be compensated for the probable future loss by reason of incapacity or diminished capacity to work. 38 B. 552, Ref. (*Jai Lal and Abdul Rashid, JJ.*) GURDIT SINGH *v.* FAKIR CHAND. **6 I.R. (Lah.) 20=144 I.C. 729=34 P.L.R. 783=A.I.R. 1933 Lah. 761.**

——*Damages—Trespass and assault — Malicious motive and insulting conduct—Relevancy of.*

Though the mere use of abusive language is not actionable unless special damage is proved, yet where the cause of action is based on trespass and assault, the amount of damages may be indefinitely enhanced by evidence of malicious motive or violent and insulting conduct on the part of the defendant. In that connection, the use of abusive language may properly be taken into account to enhance the damages. 26 Cal. 653, dist. (*Rowland, J.*) SHEO NARAYAN PATHAK *v.* LAI MAN PATHAK. **I.R. 1931 Pat. 484=134 I.C. 628=12 Pat.L.T. 698=A.I.R. 1931 Pat. 404.**

Defamation.

——*Defamation—Defamatory meaning — Test of reasonable man—Two different conclusions possible—Procedure.*

In considering the question whether the words complained of are defamatory or in other words, whether they are capable of a defamatory meaning, the test is whether under the circumstances in which the writing is published, reasonable men, to whom the publication is made, would be likely to understand it in a libellous sense. What the Court has to consider is what might be conveyed by the words complained of to a reasonable fair-minded man and not what might be inferred from it by a man of a morbid or suspicious mind. It is unreasonable that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document. (1882) 7 App. Cas. 741; (1910) 2 Ir. R. 166, Foll. (*Sulaiman and Young, JJ.*) LACHHMI NARAIN *v.* SHAMBHU NATH. **I.R. 1931 All 183=129 I.C. 551=1931 A.L.J. 16=A.I.R. 1931 All. 126.**

——*Defamation—Damages—Assessment—Newspaper libel of the worst type—Proof of pecuniary loss—Necessity—Right to general and substantial damages.*

Where the words used in defamatory article in a newspaper must clearly injure the plaintiff's reputation, they are actionable *per se*, and the plaintiff is entitled to substantial damages without proof of actual pecuniary loss. A plaintiff who has been painted in the most abominable terms and openly accused of crime, immorality and vice and dishonourable conduct in the discharge of his official duty, is clearly entitled to general damages for which no proof of pecuniary loss is legally necessary. The method of publication of the libel has also to be considered in assessing damages. A newspaper may fall into any hands, and printed matter being generally of a permanent character which people are disposed to believe implicitly. Substantial damages may be awarded in the case of a newspaper libel. (*Addison, Ag.C.J. and Din Mohammad, J.*) MUNSHI RAM *v.* MELA RAM WAFA. **17 Lah. 332=157 I.C. 854=8 R.L. 147=37 P.L.R. 670=A.I.R. 1936 Lah. 23.**

TORT—Defamation.

——*Defamation—Joint tort-feasors—Publication to third party—Defamatory meaning of words—Benefit of doubt.*

Where there are a large number of interpretations to be put upon words, it would be unreasonable to select that which would give a defamatory sense. Where two or more persons agree to defame another and one of them utters the words in the presence of another member, all of them may be sued as joint tort-feasors, provided there has been publication to some third party. (*Young, J.*) TREVELLION *v.* MINCK. **6 R.A 597=147 I.C. 982=1934 A.L.J. 43=3 A.W.R. 161=A.I.R. 1934 All. 203.**

——*Defamation—Justification.*

Where justification is pleaded and proved in an action for damages for libel, it would not matter if the words complained of do in fact bear a libellous meaning. (*Sulaiman and Young, JJ.*) LACHHMI NARAIN *v.* SHAMBHU NATH. **I.R. 1931 All. 183=129 I.C. 551=1931 A.L.J. 16=A.I.R. 1931 All. 126.**

——*Defamation—Justification—Specific plea necessary.*

Where a defendant in a libel suit wishes to plead justification on account of the truth of the matters alleged in the libel, he must do so specifically and distinctly. (*Harrison and Dalip Singh, JJ.*) AJIT SINGH *v.* RADHA KISHEN. **I.R. 1931 Lah. 947=134 I.C. 515=32 P.L.R. 772=A.I.R. 1931 Lah. 246.**

——*Defamation—Law applicable.*

In default of special legislation, the Indian Courts are to apply the rules of equity and good conscience which include the Common Law. So the English Common Law should be applied to Indian cases of defamation. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) RAM KIRAT KAMKAR *v.* BISESWAR NATH. **11 Pat. 693=141 I.C. 133=I.R. 1933 Pat. 43=14 Pat.L.T. 279=A.I.R. 1933 Pat. 35.**

——*Defamation — Libel — Fictitious story—When libel—Intention—Absence of malice or deliberateness—If protects writer from liability.*

A narrative apparently fictitious may be in fact a libel on living persons. If a writer intends to portray a real person under an imaginary name and chooses for that purpose what he supposes to be a fictitious name, he is nevertheless liable if he happens to choose the name of a real person, though he had no intention whatever of doing so. If the defendant's words have in fact injured the plaintiff's reputation, it is no defence to an action by the plaintiff that the defendant intended to refer to some one else. Want of deliberateness and malice will not protect the defendant; for a man may be liable though he has not a particle of malice against the person defamed. (*Addison, Ag C.J. and Din Mohammad, J.*) MUNSHI RAM *v.* MELA RAM WAFA. **17 Lah. 332=157 I.C. 854=8 R.L. 147=37 P.L.R. 670=A.I.R. 1936 Lah. 23.**

——*Defamation—Newspaper libel—Allegorical story—Proof identification of person defamed—Extraneous evidence—Admissibility.*

Even an allegory may be a libel; but there must be a definite imputation upon a definite person who must be the plaintiff. If even a cursory perusal of a story in a newspaper at once leads an ordinary reasonable reader to connect it with the plaintiff, the identity is fully established, and it is futile for the writer of the article to argue that he did not intend to defame the *real person* (plaintiff) and that he only used a name at random as a mere representative of a class dealt with in the article. The plaintiff in such cases of libel can aver extraneous facts to show that he is the person expressly referred to. The plaintiff need not produce persons enquiring of him

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after the publication of the article. Nor is it necessary that all the world should understand the libel. It is enough if those who know the plaintiff can make out that he is the person meant. (*Addison, Ag.C.J. and Din Mohammad, J.*) MUNSHI RAM *v.* MELA RAM WAFA. **17 Lah. 332=157 I.C. 854=8 R.L. 147=37 P.L.R. 670=A.I.R. 1936 Lah. 23.**

———*Defamation—Newspaper libel*—Innuendo—*Defendant's evidence, if relevant.*

In a suit for damages against the editor of a newspaper in respect of an article damaging the plaintiff's honour and reputation, the evidence of the defendant is irrelevant on the question of the *innuendo*, which depends on the meaning which the words would be understood by ordinary persons to bear, and not whether the defendant intended them to bear that meaning. (*Lord Thankerton.*) GERALD LORD STRICKLAND *v.* CARMELO MIFSUD BONNICI. **7 R.P.C. 103=1935 A.W.R. 440=1935 O.W.N 327=37 P.L.R. 118=41 L.W. 665=153 I.C. 1=A.I.R. 1935 P.C. 34 (P.C.).**

———*Defamation—Newspaper libel—Plea of fair comment—Sustainability.*

Comment in order to be justifiable as fair comment must appear as comment and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is comment. The general plea of absence of guilt includes a plea of fair comment and if the newspaper article contains comment which is separate from the report of the proceedings, the latter part may be defended under the statutory plea of publication in good faith for the information of the public, while the part forming comment may be defended under the general plea of fair comment. In order to give room for the plea of fair comment the facts must be truly stated. (*Lord Thankerton.*) TRUTH & SPORTSMAN, LTD. *v.* GEORGE STANLEY THOMPSON. **I.R. 1933 P.C. 20=1933 A.L.J. 625=141 I.C. 518=37 L.W. 566=A.I.R. 1933 P.C. 36 (P.C.).**

———*Defamation—Newspaper libel—Proof of malice—If necessary—Reference by* innuendo—*Libel of a class—Suit by one only of the class—Maintainability.*

As far as defamation cases in general are concerned, consideration of malice in law is only necessary when the plea of privilege is raised. Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable of being, by *innuendo*, shown to be directly applicable to any one individual of that class an action for damages may be maintained by that individual in respect of the publication of that matter. (*Cunliffe, J.*) GURDIT SINGH *v.* "THE STATESMAN", LTD. **62 Cal. 838=39 C.W.N. 845.**

———*Defamation — Newspaper libel—Proprietor—Publication without knowledge of—Liability.*

The proprietor of a newspaper in which a libel is published is liable to the person defamed though he has no knowledge of the publication. (*Addison, Ag. C.J. and Din Mohammad, J.*) MUNSHI RAM *v.* MALA RAM WAFA. **17 Lah. 332=157 I C. 854=8 R.L. 147=37 P.L.R. 670=A.I.R. 1936 Lah. 23.**

———*Defamation—Newspaper libel — Publication—Separate suits against editor, printer and publisher—If maintainable.*

The editor, printer and publisher of a defamatory article in a newspaper are each individually liable and they need not all be joined in the suit unless the plea of non-joinder is raised, but there can be no several suits on one cause of action. So far as the publication in a newspaper is concerned, the cause of action is one complete and indivisible act in itself. Although several people have contributed to it, the act is not divisible

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and it is that act which constitutes the cause of action. Consequently an extinguishment of that cause of action against one means a full and complete extinguishment. (*Vivian Bose, A.J.C.*) MAKHANLAL *v.* PANCHAMLAL. **152 I.C. 398=7 R.N. 101=18 N.L.J. 27=A.I.R. 1934 Nag. 226.**

———*Defamation—Newspaper libel—Wrong publication of interview—Editor defending press reporter—Proof of malice—Privilege.*

The plaintiff sued to recover damages from a newspaper company for libel. It was his case that an interview had been inaccurately published and that he had not been given an opportunity to contradict the same and that ultimately after the lawyer's notice was served the newspaper published his letter with a note defending his reporter.

Held, (1) that the publication of the interview did not constitute a libel on the plaintiff; (2) there was no question of excessive publication by means of the later letter and foot-note; (3) the Editor was entitled to defend the reporter without importing that the plaintiff was a liar and that is all that he did; (4) that the Editor having acted under the orders of the Directors was not guilty of malice and that the suit should consequently be dismissed. (*Rankin, C.J. and C. C. Ghose, J.*) THE ENGLISHMAN, LTD. *v.* HON'BLE ANTONIO ANIVABENE. **I.R. 1931 Cal. 303=129 I C. 863=35 C.W.N. 271=52 C.L.J. 345=A.I.R. 1931 Cal. 81.**

———*Defamation—Privilege—Absolute—Privilege to Judge—If extends to administrative tribunals.*

The absolute privilege which is given to words spoken by a Judge was originally intended for the protection of Judges sitting in recognized Courts of Justice established as such. The doctrine has been extended to tribunals exercising functions equivalent to those of an established Court of Justice. But it has no application to Commissioners exercising merely administrative functions and other administrative officers exercising similar duties. Such persons will be protected if they establish that they spoke the words complained of on a privileged occasion, and the plaintiff fails to prove express malice. (*Lord Atkin.*) WILLIAM FRANCIS O'CONNOR *v.* GORDON WALDRON. **153 I.C 908=7 R.P.C. 115=41 L.W. 86=1935 M.W.N. 40=1935 A.L J. 37=1935 A.W R. 102=A.I.R. 1935 P C. 3 (P.C.).**

———*Defamation — Privilege — Absolute—Scope of doctrine—Quasi-judicial body—Statements made before*

The doctrine of absolute privilege is not confined to statements made before judicial tribunals strictly so called but applies to statements made before "a tribunal (which word covers a commission or inquiry) recognized by law, which though not a Court in the ordinary sense of the word, exercises judicial functions, that is to say, acts in a manner similar to that in which a Court of justice acts in respect of an inquiry before it." Hence as the proceedings before an officer under S. 75, Madras Estates Land Act, are quasi-judicial proceedings, the statements made before such officer are privileged. (*Venkatasubba Rao, J.*) DURAISWAMI THEVAN *v.* LAKSHMANAN CHETTIAR. **I.R. 1933 Mad. 381 (2) =38 L.W. 240=144 I.C. 115=A.I.R. 1933 Mad. 537.**

———*Defamation—Privilege—Absolute — Statements made to Magistrates.*

Statements made to a Magistrate for the purpose of getting him to act within the scope of his authority are matters of absolute privilege 40 A. 341 and 48 C. 388, Ref. (*Courtney-Terrell, C.J and Kulwant Sahay, J.*) KAM KIRAT KAMKAR *v.* BISESWAR NATH. **11 Pat. 693=141 I.C. 133=I R. 1933 Pat. 43=14 Pat. L.T. 297=A.I.R. 1933 Pat. 35.**

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———*Defamation—Privilege — Absolute—Statements in written statement and deposition.*

Statements made in the written statement and in the evidence are absolutely privileged. (*Mya Bu and Baguley, JJ.*) MA HLA KHIN *v.* U KHIN MAUNG U. **154 I.C. 535=7 R.R. 310=A.I.R. 1935 Rang. 30.**

———*Defamation—Privilege—Absolute— Words used by a Judge while trying cause in Court.*

An action for damages for defamation cannot be maintained against a judicial officer for words used by him to a person while he was being examined as a witness, as a judicial officer enjoys an absolute privilege. (*Kendall, J.*) JAGANNATH PRASAD *v.* RAFAT ALI KHAN. **153 I.C. 1075=7 R A. 677=3 A.W.R. 683=1934 A.L.J. 1173=A.I R. 1934 All. 827.**

———*Defamation—Privilege— Judicial proceeding—Counsel and party—Law governing—Scope of protection—Defamatory statement concerning witness.*

A civil suit for damages for a defamatory statement made on oath or otherwise by Counsel, party or witness in a judicial proceeding is governed not by S. 499 of the Penal Code but by the principles of justice, equity and good conscience which are identical with the corresponding rules of English Common Law. The protection under the Law extends to all statements made by a party, pleader or witness in the suit, no matter whom it may relate to, whether it is the opposite party or his witness, so long as it is not irrelevant to the matter in hand. 40 A. 341 and 48 C. 388, Ref. (*Grille, A.J.C.*) MAN MOHANSING *v.* BISHALSING. **29 N.L.R. 24=I.R. 1933 Nag. 58=141 I.C. 362=15 N L.J. 149=1933 Cr.C. 191=A.I.R. 1933 Nag. 47.**

———*Defamation—Privilege—Judicial proceeding—Privileged statement—Test of relevancy.*

The statement, on which the privilege is conferred, need not be necessarily relevant in the narrow sense of the word; the statement should be made with reference to the subject of the enquiry or should be relative to the matter in hand. Where the defendant in answer to an application under S. 74 of the Madras Estates Land Act stated that no melwaram was due but the application was made needlessly and out of spite after plaintiff had murdered the defendant's predecessor in title (*i.e.*) his father-in-law.

Held, such statement was absolutely privileged. (*Venkatasubba Rao, J.*) DURAISWAMI THEVAN *v.* LAKSHMANAN CHETTIAR. **I.R. 1933 Mad. 381 (2)=38 L.W. 240=144 I.C. 115=A.I.R. 1933 Mad. 537.**

———Defamation — Privilege — Legal practitioner —Presumption of good faith—Duty to withdraw statement, when shown to be untrue—Duty to bring the case within the terms of Excep. 9. *See* LEGAL PRACTITIONER—PRIVILEGE. **34 Bom. L R. 910=A.I.R. 1932 Bom. 490.**

———*Defamation—Privilege—Publication — Pleader handing over written statement to others interested.*

Where the Counsel hands over the envelope containing the written statement to another, who is a munshi of another Counsel on his side in the case or to one who is a helper and a friend of his client, he does nothing more than what would be done by any lawyer in the course of his business and this fact cannot be held to constitute publication, and even if it did, it must be held to be privileged, (*Harrison and Dalip Singh, JJ.*) AJIT SINGH *v.* RADHA KISHEN. **I.R. 1931 Lah. 947=134 I.C. 515=32 P.L.R. 772=A.I.R. 1931 Lah. 246.**

———*Defamation—Privilege— Publication —Pleader placing written statement in bar room.*

Where a Vakil, after having put in a written statement, handed over the envelope containing its copy to the Pleaders in the Bar room, who wanted to read it out of interest in the law on the point or out of curiosity.

Held, that as the proceedings formed part of the judicial record, he was privileged in handing over the same to the Pleaders inside the Bar room. (*Harrison and Dalip Singh, JJ.*) AJIT SINGH *v.* RADHA KISHEN. **I. R. 1931 Lah. 947=134 I. C. 515=32 P.L.R. 772=A.I.R. 1931 Lah. 246.**

———*Defamation—Privilege—Public money believed to be defalcated—Informing authorities—Malice must be proved—Information false to informant's knowledge —Malice imputed.*

Any person, who has reason to believe that there have been defalcations of public money, has a duty to inform the authorities concerned and that information so given is privileged The informants cannot be liable for tort unless actual or express malice can be proved against them. The motive of the informant is not very material. But the law imputes malice if the defamatory statement is false to the knowledge of the person making it at the time when he makes it. A.I.R. 1929 Lah. 561; A.I.R. 1930 Rang. 177 and *Royal Aquarium* v. *Parkinson*, (1892) 1 Q.B. 431, Ref. (*Allsop, J.*) GHULAM RASOOL *v.* IBRAHIM BEG. **6 R.O. 399 (2)=148 I. C. 427=11 O.W.N. 122=A.I.R. 1934 Oudh 8.**

———*Defamation—Proof.*

In cases of defamation, the injury on the face of it must flow from the wrongful action; if it does not, it has to be explained how the matter complained of has caused the injury. (*Bose, A.J.C.*) DAMODHAR *v.* VISHWANATH. **28 N L.R. 320=I.R. 1933 Nag. 19=141 I.C. 58=A.I.R. 1933 Nag. 29.**

———*Defamation—Publication—Auctioneers' notice—Rental as to default of purchaser—Libel not constituted.*

The defendants, who were importers of piece goods, sold by auction the goods which were the subject matter of the contract between the plaintiffs and the defendants because the plaintiffs failed to take delivery. The plaintiffs complained of the terms of the notice published by the auctioneers which runs as follows: "The following goods of plaintiffs will be sold by public auction because of their refusal to pay and take delivery of the goods they had purchased."

Held, that the notice did not constitute a libel so as to be actionable for damages. (*Sulaiman and Young, JJ.*) LACHHMI NARAIN *v.* SHAMBHU NATH. **I. R. 1931 All. 183=129 I. C. 551=1931 A. L. J. 16=A. I. R. 1931 All. 126.**

[Appl. 1934 A.L.J. 43 (45)].

———*Defamation—Publication—Petition to President of Union Board alleging disqualification—Malicious statement.*

A petition to the President of a Union Board stating that a person was suffering from leprosy and therefore was not qualified for election as a memder of a Local Board under S. 55 of the Madras Local Boards Act, 1920, does not amount to defamation, however malicious the statement might be. (*Jackson, J.*) DORAISAMI NAIDU *v.* KANNIAPPA CHETTI. **I R. 1931 Mad. 558=131 I.C. 654=32 Cr.L.J. 767=1931 M.W.N. 366=1931 Cr.C. 551=A.I.R. 1931 Mad. 487.**

———*Defamation —Publication —Pleader handing over written statement to his munshi.*

No publication can be held to have taken place where a Counsel gives the contents of the written statements to his own clients or to his own munshi, in the ordinary discharge of his duties as lawyer. (*Harrison and Dalip Singh, JJ.*) AJIT SINGH *v.* RADHA KISHEN. **I.R. 1931 Lah. 947=134 I.C. 515=32 P.L.R. 772=A.I R. 1931 Lah. 246.**

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———*Defamation—Slander—Imputation of unchastity—Suit for damages—Maintainability—Difference between English and Indian Law.*

The rule of English Common Law that spoken words imputing unchastity to a woman are not actionable without proof of special damage owes its origin to conditions peculiar to England and rests on the most artificial distinctions. It is not applicable to India and a claim for damages by a Hindu woman in respect of an allegation of unchastity is sustainable on the Original Side of the High Court without proof of special damage. 8 Mad. 175 and 51 Bom. 167, Foll.; 28 Cal. 452, Not foll. (*Beasley, C.J. and Cornish, J.*) NARAYANA SAH *v.* KANNAMMA BAI. **55 Mad. 727=I.R. 1932 Mad. 901=140 I.C. 422=1932 M.W.N. 563=35 L.W. 647=A.I.R. 1932 Mad. 445=62 M.L.J. 608.**

———*Defamation—Slander—Verbal abuse—Calling person outcaste.*

G called *P* an outcaste. The persons gathered there were people belonging to the locality who knew that *P* had not been outcasted.

Held, that the language used amounted to mere verbal abuse and was not actionable without proof of special damage. 26 Cal. 653 (F.B) and A.I.R. 1925 All. 371, Rel. on. (*Addison, J.*) GIRDHARI LAL *v.* PANJAB SINGH. **6 I.R. (Lah.) 318=146 I.C. 1078=34 P.L.R. 1071=A.I.R 1933 Lah 727.**

———*Defamation—Suit for—Costs—Unsustained plea of justification by successful defendant.*

In a defamation suit it is legitimate to consider the conduct of the defendant right up to the time of the verdict, and an unsustained plea of justification is a good ground for depriving a party of his costs though he succeeds on other pleas. (*Vivian Bose, A.J.C.*) MAKHANLAL *v.* PANCHAMLAL. **152 I.C. 398=7 R. N. 101=18 N.L.J. 27=A.I.R. 1934 Nag. 226.**

Fatal accident.

———*Fatal accident—Measure of damages—Sentimental damages.*

Where a suit for damages is brought by one for causing fatal accident to another, only such damages can be awarded as can be shown to have been actually suffered financially by those who bring the suit; sentimental damages, cannot be awarded, nor can damages be awarded merely for the loss of a son, daughter, a wife or a husband, unless actual financial damages have been suffered or where there was at the time of the accident a prospective pecuniary advantage to those who afterwards bring the suit which prospective pecuniary advantage is lost by reason of the fatal injury caused to the person in respect of whose death the suit is filed. In most cases damages which are recoverable are the amount of money which has been expended for the medical and funerel expenses and where plaintiffs are able to show that they were wholly or partially dependent upon the earnings of the deceased person, damages on that basis. Where the deceased was a boy aged 12 years earning Rs. 6 per month and a suit was brought by his aged mother and the father was alive,

Held, that Rs. 600 awarded as damages was not excessive. *Taff Vale Railway* v. *Jenkins*, (1913) A. C. 1, Ref. (*Beasley, C.J. and Madhavan Nair, J.*) DEVI SINGH *v.* MANGATHAYAMMAL. **155 I.C. 307=7 R. M. 565=1934 M.W.N. 794=A.I.R. 1935 Mad 322.**

Fraud.

———Fraud—Suit to recover damages—Action of pure tort and one based on contract—Distinction between—Joint vendees—Subsequent partition—Suit one by one vendee for damages against vendor—Fraud in overstating income. *See* CONTRACT ACT, S. 45. **A. I. R. 1932 Mad. 583=62 M.L.J. 154.**

TORT—Joint tort-feasors.

Joint tort-feasors.

See also DEFAMATION, *supra.*

———*Joint tort feasors—Accord and satisfaction.*

An accord and satisfaction in favour of one joint tort-feasor operates in favour of them all. (*Vivian Bose, A.J.C.*) MAKHANLAL *v.* PANCHAMLAL. **152 I.C. 398=7 R.N. 101=18 N.L.J. 27=A.I.R. 1934 Nag. 226.**

———*Joint tort feasors—Contribution between*—Merryweather *v.* Nixon—*Rule in—Applicability to India—Express promise to indemnity—Validity of.*

The rule in *Merryweather* v. *Nixon*, 8 T. R. 195 as confined to cases of wilful and conscious wrongdoing is applicable to India. In other words, if an act is unlawful or the doer of it knows it to be unlawful as constituting either a civil wrong or criminal offence he cannot maintain an action for contribution or for indemnity against the liability which results to him therefrom. Secondly an express promise of indemnity to him for the commission of such an act is void. The plaintiff, who was aware of the fact that the first defendant had entered into a contract with his brother for the sale of certain lands to him, 'tempted' him to break the contract by offering a higher price and undertook all the risks of the litigation that may ensure as a result of the breach of contract. It was found that the plaintiff had conspired with the 1st defendant to defraud the 1st defendant's brother. The latter brought a suit for specific performance against the plaintiff and the first defendant and it was decreed. The plaintiff claimed in the present suit contribution from first defendant for his costs incurred in the suit by the brother.

Held, that the plaintiff and the first defendant were joint tort feasors, that the plaintiff was not entitled to contribution, that an express promise to indemnify by the first defendant contained in the contract with the plaintiff was void and could not be given effect to. English cases discussed. (24 C. 330; 4 P L.J. 486, Foll.; 1927 M.W.N. 888, Ref. (*Madhavan Nair, J.*) YEGNANARAYANA *v.* YAGANNATHA RAO **135 I.C. 710=I. R. 1932 Mad. 198=34 L W. 618=1931 M.W.N. 667=A.I.R. 1932 Mad. 1 (2).**

———*Joint tort-feasors—Contribution between—Mode of establishing joint liability if material—Distinction between conscious and unconscious wrongdoers.*

There can be no right of contribution among conscious tort-feasors The mere fact that three persons agreed to commit an act of tort cannot be regarded as a valid agreement, much less as a valid contract on which a suit can be based by a joint tort feasor against his co tort feasor. No distinction can be drawn in principle between a case where a joint liability has been liquidated without a suit and where a joint liability has been established by a suit and the judgment has been liquidated by one of the parties. Applicability of Rule in *Merryweather* v. *Nixon*, 8 T. R. 195, Cons. Distinction between conscious and unconscious wrongdoers pointed out. (*Mukerji and Bennet, JJ.*) PARBHOO DAYAL *v.* DWARKA PRASAD. **54 All. 371=I.R. 1932 All. 101=135 I C. 837=1932 A.L.J. 215=A.I.R. 1932 All. 334.**

———*Joint tort-feasors—Liability of—Injuries caused by a number of men—Defendant proved to be one of them.*

Where during a Hindu procession bricks were thrown at Hindus by Muslims from their mosque and certain Hindus who took part in the procession sued the Mahomedans for damages,

Held, that it was sufficient in such a case to prove hat the injuries were caused as the result of throwing

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missiles and that the person against whom damage was claimed was one of those who threw the missiles, where it is shown that the defendants as a body were acting in pursuance of the common object. (*Pullan and Niamatullah, JJ.*) BASHARAT BEG *v.* HIRA LAL. **I.R. 1932 All. 358=1932 A.L.J. 497=138 I.C. 77=A.I.R. 1932 All. 401.**

———*Joint tort-feasors—Liability for mesne profits.*

The general law about the liability of joint tort-feasors if mesne profits are taken to be damages, has been modified by S. 2 (12) of the Civil Procedure Code. (*Suhrawardy and Jack, JJ.*) BHUPENDRA NARAIN SINHA BAHADUR *v.* RAJESWAR PRASAD BHAKAT. **135 I.C. 876=I.R. 1932 Cal. 172=35 C.W.N. 367=A.I.R. 1931 Cal. 802.**

———*Joint tort-feasors—Liability for mesne profits—Kanungo trespassing on land and taking possession in combination with others—Government not repudiating Kanungo's action—Liability for mesne profits.*

Where a number of persons actuated by design or as a result of conspiracy combine together and dispossess *P*, *P* is entitled to look to all of them jointly for recovery of mesne profits. The Kanungo at first committed stray acts of trespass on *P's* land and thereafter entering into combination with others went upon the land, gave settlement of the land to these others and got *P* dispossessed. The action of the Kanungo was never repudiated by the Government at any stage. *P* subsequently instituted a suit for possession and mesne profits.

Held, Government was liable jointly with the others to *P* for mesne profits. (*Mukerji and S. K. Ghose, JJ.*) SECRETARY OF STATE *v.* HIRU MONDAL. **159 I.C. 8=8 R.C. 290=A.I.R. 1935 Cal. 752.**

———Joint tort-feasors—Liability of—Suit for damages against some only—Maintainability— Joint decree against—Right to. *See* PRACTICE—PARTIES. **42 L.W. 17=A.I.R. 1935 Mad. 750.**

———*Joint tort feasors—Raiyats and under tenants—No evidence of combination or collusion—No joint and several liability.*

The defendant's first party were raiyats and the defendant's fourth party were their under tenants; there was no evidence, however, of a combination or collusion between them to deprive the plaintiffs of possession.

Held, that neither the mere fact that there was the relationship of landlord and tenant or lessor and between the defendants nor even the fact that they in any sense encouraged the sub-tenants was sufficient to support a finding that they were joint tort-feasors and that the strict rule of joint and several liability cannot be enforced. (*Wort and Varma, JJ.*) RAM PRAGASH DAS *v.* BANKEY BEHARI LAL. **6 R.P. 586=149 I.C. 117=A.I.R. 1934 Pat. 394.**

———*Joint tort-feasors—Release of one—Effect against another—Agreement not to sue—Effect.*

The release of one joint wrongdoer no doubt releases all the others. But a covenant not to sue one joint tort feasor does not operate as a release of the other. A transaction which is in form an actual release will be construed as being merely an agreement not to sue if it contains an express reservation of the right to proceed against the other wrongdoers, because the reservation would be otherwise wholly ineffective. (*Venkatasubba Rao, J.*) POLLACHI TOWN BANK, LTD. *v.* SUBRAMANIA AYYAR. **6 R.M. 423=147 I.C. 1192=1934 M.W.N. 621=39 L.W. 114=A.I.R. 1934 Mad. 180.**

———*Joint tort-feasors—Release of one—Effect—Others if discharged from liability.*

A release granted to one joint tort-feasor operates as a discharge of the other tort-feasors where the cause of

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action, which is one and indivisible has itself been released. But the acceptance of a sum of money from one of the joint tort-feasors in full discharge of his own personal liability does not operate as a release so far as the other joint tort feasors are concerned. Where a suit has been filed on a joint cause of action for damages on account of injuries caused by the joint tort feasors and one of the defendants has been exempted from the decree, the other defendants are not released as the exemption of one of the joint tort-feasors does not bring to an end the joint cause of action against the tort-feasors. (*Pullan and Niamatullah, JJ.*) BASHARAT BEG *v.* HIRA LAL. **I.R. 1932 All. 358=138 I.C. 77=1932 A.L.J 497=A.I.R. 1932 All. 401.**

———*Joint tort-feasors—Suit for damages against some only—Maintainability—Right to joint decree—Onus of proof.*

The mere coincidence of a number of persons doing a series of acts whereby another may be injured will not amount to their acting in combination or conspiracy so as to make them liable as joint tort-feasors. It must be shown that they acted concurrently The mere omission to sue some of several wrongdoers will not disable the plaintiff from claiming full relief against the other joint wrongdoers who have been sued. Nor can it be held from the omission to impleaded all of them that the plaintiff has split up his claim against the various wrongdoers so to entitle him to relief only against individual wrongdoers in respect of damages which each of them might be found to have caused. The rule is one of joint and several liability. (*Pakenham Walsh and Varadachariar, JJ.*) SUBBAYYA *v.* VERAYYA. **160 I.C 822=8 R M. 725=42 L.W. 17=1935 M.W.N. 1043=A.I.R. 1935 Mad. 750.**

Malicious arrest.

———*Malicious arrest—Civil process—Action for damages.*

Although most of the cases of malicious arrest arise out of civil process, in a proper case an arrest by the police for a crime procured by the defendant maliciously would afford a cause of action for a suit for damages. (*Ameer Ali, J.*) GRAHAM *v.* HENRY GINDEY. **60 Cal. 955=148 I C. 262=6 R.C. 450=A.I.R. 1933 Cal. 708.**

———*Malicious arrest—Defence of judicial order—Validity.*

Where in an action for damages for malicious arrest, it was proved that the defendant had secured the *ex parte* order for arrest of the plaintiff on the strength of a false allegation that the plaintiff was about to leave the jurisdiction and that allegation was made maliciously without reasonable and probable cause.

Held, that in substance it was an action for damages for abuse of process analogous to an action for malicious prosecution and the plea that the defendant had only required a judicial officer to exercise his discretion was of no avail (*Panckridge, J.*) SUDHANGSHU SEKHAR DEY *v.* HARI CHARAN GHOSE. **I.R. 1932 Cal. 618=139 I C. 438=56 C.L.J. 29=36 C.W.N. 809=A.I R. 1932 Cal. 847.**

———*Malicious arrest—Defences—Proof of offence.*

Where the offence being compoundable the prosecution does not proceed and the arrested persons turns round and sues the individual who is responsible for his arrest in trespass, it would be open to the defendant to establish that the offence for which the plaintiff was arrested had in fact not been committed. (*Ameer Ali, J.*) GRAHAM *v.* HENRY GIDNEY. **60 Cal. 955=148 I C. 262=6 R.C. 450=A.I.R. 1933 Cal. 708.**

———Malicious arrest—*Ex parte* order for arrest obtained maliciously—Action for damages—Points to be

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proved. *See* C. P. CODE, O. 21, R. 30. **36 C.W.N. 809 = A.I.R. 1932 Cal. 847.**

———*Malicious arrest—Information given by private individual—Liability for damages.*

In a suit for damages for false imprisonment where the person sued is not the person who actually arrests and imprisons the plaintiff, the question in each case is whether the defendant so acted as to render the plaintiff's arrest the act of the defendant. Generally the Court holds a private individual responsible for an arrest by the police if the individual has either "given the plaintiff into custody", "directed the constable to arrest" or "signed the charge-sheet" with the knowledge that the plaintiff would not otherwise be detained. A private individual should not be held responsible for the supervening arrest on the ground that arrest was likely to follow from information given by him unless, although he has not expressly directed the arrest he has in fact made it impossible for the constable to act otherwise.

Semble.—It is doubtful whether S. 59, Cr. P. Code, is the only defence to a private person who has been responsible for the arrest of another by the police. (*Ameer Ali, J.*) GRAHAM *v.* HENRY GIDNEY. **60 Cal. 955 = 148 I.C. 262 = 6 R.C. 450 = A.I.R. 1933 Cal. 708.**

Malicious proceedings.

———*Malicious proceedings—Cause of action—Jurisdiction of Court.*

The dismissal of insolvency petition is part of cause of action in a suit filed to recover damages for injury which a party has suffered in his credit and reputation as the result of the malicious filing of a petition in insolvency. Injury to credit and reputation is also part of cause of action. Therefore, the Court within whose jurisdiction the dismissal of the insolvency petition takes place or damage is suffered has jurisdiction to try a suit for damages for the malicious filing of a petition in insolvency. (*Leach, J.*) A.M.M. MURUGAPPA CHETTIAR *v.* GALLIARA. **159 I.C. 142 = 8 R.R. 251 = A.I.R. 1935 Rang. 367.**

———*Malicious proceedings—Malicious suit for damages—Maintainability.*

Ordinarily a civil action, though false and malicious in its institution, will not give rise to an action for damages. The test to be applied is whether the civil action complained of necessarily or naturally involved damage which could not be recompensed by an order for costs. If the action necessarily or naturally involved such damage and was instituted falsely and maliciously, a suit for damages is maintainable. (Case-law referred.) (*Leach, J.*) AH FONG *v.* NAMKEE. **12 Rang. 289 = 6 R.R. 261 = 148 I.C. 895 = A.I.R. 1934 Rang. 75.**

Malicious prosecution.

See also MALICIOUS PROSECUTION.

———*Malicious prosecution — Witnesses—Suit for damages for evidence given—Sustainability.*

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. 11 Beng.L.R. 321 (P.C.), Foll. (*Aston, A.J.C.*) FAKIR MAHOMED *v.* FAKIR MAHOMED NANJI. **I.R. 1932 Sind 53 = 136 I.C. 757 = A.I.R. 1932 Sind 23.**

Master and servant.

See also VICARIOUS LIABILITY, *Infra.*

———*Master and servant—Negligence of fellow workman—Common employment.*

Where injury is caused owing to the negligence of a fellow workman, the master is not liable in tort for the damage. Doctrine of common employment applied. (*Rupchand Bilaram, A.J.C.*) ABDUL AZIZ *v.* SECRETARY OF STATE. **26 S.L.R. 282 = 142 I.C. 334 = I.R. 1933 Sind 124 = A.I.R. 1933 Sind 129.**

TORT—Negligence.

Negligence.

———*Negligence—Burden of proof—Sparks from Railway engine damaging plaintiff's property—Contributory negligence of plaintiff—If proved.*

Where the plaintiff brought a suit for damages against a Railway Company on the allegation that certain sparks from an engine of the company fell on the grass growing on the railway banks and spreading on to the jungle of the plaintiff's adjoining land damaged some patel grass and trees.

Held, that the burden of proof as to whether proper precautions had been taken to avoid emission of such sparks lay on the Railway Company and that the latter would be liable if it failed to take all reasonable precautions.

Held, further, that the plaintiff could not be held guilty of contributory negligence if it was not possible for his servants to have averted the damage by adopting such steps as were humanly possible. (*Bajpai, J.*) B. B. AND C. I. RAILWAY CO. *v.* DWARKA NATH. **155 I.C. 631 = 1935 A.W.R. 414 = 7 R.A. 963 = A.I.R. 1935 All. 669.**

———*Negligence — Contributory negligence — Lost opportunity to avoid injury.*

In a suit for damages for injury caused by the negligent act of the defendant, the negligence which is to preclude a plaintiff from recovering must be such as that he could, by ordinary care have avoided the consequences of the defendant's negligence. Consequently where in a suit brought for damages for injuries caused to the dog of the plaintiff it is found that the dog was standing on the road easing at the time, the lorry approached it and that the defendant did not consider it worth his while to stop the lorry which collided with the bitch of the plaintiff and caused injury, the mere fact that the servant of the plaintiff who had taken the dog out was not at the spot is not sufficient negligence to prevent the plaintiff recovering damages. *Davies* v. *Mann*, (1842) 10 M. & W. 546, Appl.; A.I.R. 1930 Cal. 97; A.I.R. 1925 Cal. 893 and *Radley* v. *London N. W. Ry. & Co.* (1876) 1 A. C. 754, Rel. on. (*Bennet, J.*) KRISHNA MURARI LAL *v.* DIXIT CHATURBHUJ. **6 I.R. (All.) 28 = 144 I.C. 1014 = A.I.R. 1933 All. 214.**

———*Negligence—Contributory negligence—Railway—Level-crossing gates.*

A person who finds the gates of a railway level-crossing open and is thereby misled into thinking the line safe for crossing, is not bound to minute circumspection, and if he is run over by a train, the Company may be liable to him although he did not use his faculties so clearly as he might have done under other circumstances. Where the plaintiff is guilty of contributory negligence he is not entitled to throw the whole of the blame on the negligence of the defendant and recover damages. But where the defendant's negligence is such as invites, as it were, the plaintiff to be less circumspect, the defendant cannot put the blame on the plaintiff if he happened to be less circumspect than he would otherwise have been. (*Mukerji and Bajpai, JJ.*) DAYA SHANKAR *v.* B. B. AND C. I. RY. CO. **53 All. 913 = 136 I.C. 380 = I.R. 1932 All. 204 = 1931 A.L.J. 847 = A.I.R. 1931 All. 740.**

———Negligence—Contributory negligence—Shipping—Collision—Regulations for preventing collisions at sea—(Canada) Regn. 25. *See* SHIPPING—COLLISION. **A.I.R. 1932 P.C. 65.**

———Negligence—Contributory negligence—Sparks from Railway Company damaging plaintiffs property—Impossibility to avert damage. *See* TORTS—NEGLIGENCE—BURDEN OF PROOF. **155 I.C. 631 = 1935 A.W.R. 414 = A.I.R. 1935 All. 669.**

TORT—Negligence.

———*Negligence—Crossing railway lines—Damage caused—Liability of Railway Company.*

A consignee coming to take the delivery of a consignment from the goods shed is not a mere licensee but a person who is obliged by the requirements of the railway company and by the nature of their goods yard to cross railway lines several times; each time he takes delivery of goods, a heavy obligation lies on the railway company to take all reasonable precautions to ensure the safety of the consignee or his agents crossing the lines at the places, which the railway sets apart for that purpose. Where it was necessary for a consignee, in order to take delivery of the consignment to cross the railway lines several times and while crossing the lines, some waggons standing stationary at once began to move and struck the car of the consignee although he tried to swerve and dashing it on the waggon on the next line, reduced it to a total wreck and there was no sign board erected to warn the public nor was any man posted to warn the public and no whistle was blown or warning given.

Held, that the damage to the car was caused by the negligence of the servants of the railway company in failing to take reasonable precautions and the railway company was liable for the same. 26 Bom. 609, Rel. on; A.I.R. 1925 Mad. 304, Dist. (*Aston, A. J. C.*) HORMUSJEE COWASJEE BYRAMJI *v.* SECRETARY OF STATE. **I.R. 1932 Sind 159=139 I.C. 864=A I.R. 1932 Sind 80.**

———*Negligence—Damage owing to under ground water—Liability of corporation with statutory powers.*

A corporation in the exercise of the powers derived from statute is not liable in damages unless those powers are negligently exercised. Where the owner of a building sued a municipality for damages on account of water escaping through pipes, but there was no definite evidence as to the cause of the leakage.

Held, that in the absence of proof of negligence, the defendants were not liable. Rule in *Rylands* v. *Fretcher*, L. R. 3 H. L. 330, discussed. (*Milne, J. C. and Rupchand, A. J. C.*) BHAI PARTAB *v.* MUNICIPALITY OF HYDERABAD. **26 S.L.R. 136=I.R. 1933 Sind 25=140 I.C. 717=A.I.R. 1932 Sind 131.**

———*Negligence—Defence of statutory authority—Scope of.*

The principle that a person cannot be held to answer for damages caused by carrying out an operation authorised under statutory powers if the statutory conditions are fulfilled, only applies if the authorised operation is conducted without negligence. The respondent Company ran an electric train service along a highway over which they had a preferential right of way. The appellant was driving on the highway at about 7 P.M. in a sleigh drawn by a pair of horses which took fright, got out of control and ran to and along the rail track. The appellant and his carriage were run from behind by the electric car. The headlight of the car was not functioning properly at the time and so could not distinguish the carriage in time. The jury returned a verdict of negligence in not having a man at the previous station to repair the headlight.

Held, that the verdict of the jury may be construed to mean that the respondents were negligent in allowing the car to proceed with a headlight so dim, that the verdict could not be said to be perverse and that where negligence was found, the defence of statutory authority was of no avail. *Canadian Pacific Ry. Co.* v. *Roy*, (1902) A. C. 220; *Rex* v. *Broad*, (1915) A. C. 1110, Foll. (*Lord Wright.*) PAUL PRONEK *v.* WINNIPEG RY. CO. **I.R. 1932 P.C. 333=140 I.C. 447=37 L.W. 13=A. I.R. 1932 P.C. 275=64 M.L.J. 27 (P.C.).**

TORT—Negligence.

———*Negligence—Digging trench and not covering it—Water accumulating and causing damages to neighbour.*

Where any alteration is made from the normal in land, the owner of that land is liable for any damage which may accrue to his neighbour if there has been want of care by the land owner in making the alteration. Where therefore a land owner digs a trench and by failing properly to cover it permits water to accumulate in the trench in such quantities that it naturally percolates through the soil into his neighbour's ground and damage is caused thereby, he is responsible for all the damage so caused. (*Young, J.*) SARJU PRASAD *v.* MAHADEO PRASAD. **I R. 1932 A. 82=141 I. C. 645=1932 A. L J. 758=A.I.R. 1932 All. 573.**

———*Negligence—Duty of care—Licensee and tres passer—Difference between.*

In the case of a trespasser, the occupier of land owes him no duty. In the case of a licensee, the occupier does owe a duty not to set anything in the nature of a trap on the land and to warn the licensee against any concealed danger. (*Beaumont, C. J. and Mirza, J.*) ISMAIL HAJI NANA *v.* B. B. & C. I. RAILWAY. **I.R. 1932 Bom. 590=140 I.C. 249=34 Bom.L.R. 826=A.I.R. 1932 Bom. 452.**

———*Negligence—Electricity used for domestic purposes—Liability of consumer—Rule in* Rylands *v.* Fletcher*—Applicability.*

It is well settled that electricity is an element to which the rule in *Rylands* v. *Fletcher* applies. But the liability that *prima facie* arises upon failure to exercise the care prescribed in the rule, however, is not inevitable, and in certain circumstances can be avoided. It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinarily use of the land or such a use as is proper for the general benefit of the community. The use of electric energy for lighting or other domestic purposes is so reasonable and prevalent that to bring electricity upon land or premises for such purposes is to use the land or premises in a natural and not an unnatural way. Although a consumer of electricity for domestic purposes is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons. The rule laid down in *Rylands* v. *Fletcher* is not applicable in such circumstances. (*Page, C. J. and Mya Bu, J.*) DHANAL SOORMA *v.* RANGOON INDIAN TELEGRAPH ASSOCIATION, LTD. **13 Rang. 369=160 I.C. 245=8 R.R. 357=A.I.R. 1935 Rang. 401.**

———*Negligence—Failure to take best step in emergency.*

Good sense and policy of the law impose some limit upon the amount of care, skill and nerve which are required of a person in a position of duty, who has to encounter a sudden emergency. In a moment of extreme peril and difficulty you are not to expect perfect presence of mind, accurate judgment, and promptitude. If man is suddenly put in an extremely difficult position and a wrong order is given by him, it ought not in the circumstances to be attributed to him as a thing done with such want of nerve and skill as to amount to negligence. If in a sudden emergency a man does something which he might, as he knew the circumstances, reasonably think proper, he is not to be held guilty of negligence, because, upon review of the facts, it can be seen that the course he had adopted was not in fact the best. Steps taken

TORT—Negligence.

for extinguishment of fire in railway yard commented on.)*Rupchand, A. J. C.*) KISHINCHAND PURSANOMAL *v.* SECRETARY OF STATE. **26 S.L.R. 327=139 I.C. 605=I.R. 1932 Sind 130=A.I.R. 1932 Sind 123.**

———*Negligence — Hidden and latent defects in garments—Injury to consumer—Liability of manufacturer.*

A manufacturer of garments is liable in tort for injury caused to the consumer by reason of a hidden and latent defect in the garments due to negligence in manufacture. A manufacturer of garments, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in their manufacture will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care. A consumer who contracts a disease owing to the presence of a deleterious chemical in the pants, due to negligence in manufacture is, therefore, entitled to damages from the manufacturer. It is immaterial that he purchased the pants from certain retailers against whom he has a claim in contract. Equally irrelevant is any question of liability between the retailers and the manufacturer on the contract of sale between them. The tort liability is independent of any question of contract. *Donoghue* v. *Stevenson*, (1932) A. C. 562 applied (*Lord Wright.*) RICHARD THORALD GRANT *v.* AUSTRALIAN KNITTING MILLS, LTD. **43 L.W. 132=1935 O.W.N. 1327=159 I.C. 667 (2)=8 R. P.C. 97=1936 A.L.J. 120=A.I.R. 1936 P.C. 34=70 M.L.J. 513 (P.C.).**

———*Negligency—Injury by faulty structure of building—Liability of occupier and owner.*

The general rule in cases of injury due to the faulty structure of a building is that the person responsible to the general public for the safe up keep of the building is the occupier rather than the owner. when the owner himself is not in possession. It is for the plaintiffs to show that there are some special circumstances which render the owner liable rather than the lessees. To make the owner liable he must have been aware at the time of leasing out the property that the property was in a condition imminently dangerous to the occupiers of the adjoining property. (*Dalip Singh and Beckett, JJ.*) H. D. HIRAMANACK *v.* BALKISHEN. **155 I.C. 1035=7 R.L. 819=A.I.R. 1934 Lah. 931.**

———*Negligence—Injury to property — Claim for damages—What plaintiff has to prove.*

In an action for negligence the plaintiff must establish (*a*) that the defendant was under a duty to take care towards the complaining party to avoid the damage complained of, (*b*) that there was a breach of that duty on the part of the defendant, and (*c*) that the breach was the direct and proximate cause of the damage complained of. The onus of proving negligence is on the plaintiff and the mere proof of the happening of an accident is not as a general rule sufficient evidence to support the action. An exception to the general rule, however, occurs whenever the facts established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defendant's negligence. Whenever there is a duty cast upon the defendant to exercise care and the circumstances under which the injury happened are such that with the exercise of the requisite case no risk would have ensued in the ordinary course of events, the burden is shifted to the defendant to disprove his liability. Every accident does not warrant an inference of negligence but there may be accidents of such a nature that negligence is presumed from the mere fact of their having happened.

TORT—Negligence.

Where a motor car standing on a road near the defendant's building was smashed on account of an ornamental structure in the defendant's building falling down and it appeared that it fell down accidentally owing to rain water soaking down.

Held, that the break down was due to an internal flaw and the defendant was not liable in damages for negligence. (*Wadia, J.*) PAULINE D'SOUZA *v.* CASSAMALLI JAIRAJBHOY. **58 Bom. 189=147 I.C. 354=6 R.B. 189=35 Bom.L.R. 1007=A.I.R. 1933 Bom. 465.**

———*Negligence — Medical man — Liability —Law governing.*

To render a medical man liable, even civilly, for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical men might have shown or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a decree as to have led to a bad result. Where the Surgeon is registered and injury results from his treatment, the presumption is that he is competent and the treatment correct till the contrary is shown. A medical man does not undertake that his treatment shall be infallible; and therefore he is only held to undertake to perform what can be ordinarily done in similar circumstances. If the medical man has employed the ordinary degree of skill current in his profession, he is entitled to his remuneration, though his treatment has failed of its effect. A mistake in an opinion given when asked for, and after examination, does not render him liable provided the opinion is not negligently given. If there is no evidence to connect negligence with the accident, he is not liable. (*Addison and Din Mohammad, JJ.*) V. N. WHITAMORE *v.* R. N. RAO. **156 I.C. 875=8 R.L. 42=A.I.R. 1935 Lah. 247.**

———*Negligence—Motor accident—Personal injuries —Action for damages—Averment of one set of facts—Different story proved—Relief.*

If in an action for damages for personal injuries sustained in a motor accident, the Counsel for the plaintiff candidly admits that he could not rely on his client's account of the matter, this circumstance of itself would in the ordinary case be enough to justify the dismissal of the suit, for, the burden of proof being upon the plaintiff, if he is unsuccessful in proving the case which both in averment and in evidence he sets out to make, he must inevitably fail. Moreover the plaintiff is not entitled to throw over the case of negligence which he has alleged and spoken to in evidence and then ask the appellate Court to find negligence established on a quite different *species facti*. To permit this might work grave injustice to a defendant who had properly directed his evidence to the case which he had been told he had to meet. (*Lord Macmillan*) RAYMOND LINCOLN *v.* ALICE POUPINEL DE VALENCE. **I.R. 1932 P.C 115=136 I.C. 451=36 L.W. 434=A.I.R. 1932 P.C. 95=63 M.L.J. 275 (P.C.).**

———*Negligence—Motor car collision—Liability to pay damages—Contributory negligence of driver of plaintiff's car—Effect of.*

In a suit for damages for personal injuries arising out of collision between two cars, if it is found as a fact that the negligence of the defendant wholly or in part caused the injury to the plaintiff, then it would be no answer to the plaintiff's claim for damages that the driver of the car in which the plaintiff was being driven by his negligence contributed to the accident. If therefore it is found as a fact that the collision between two cars was

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caused partly by the negligence of the driver of the car which did not belong to the plaintiff but in which the plaintiff was riding and partly by the negligence of the defendant, plaintiff would be entitled to recover damages from the defendant notwithstanding the contributory negligence of the driver of the car in which he was being driven. *Mills* v. *Armstrong*, (1888) 13 A. C. 1, Foll. (*Page, C.J. and Das, J.*) PAPA CHRISTOPOULOS *v.* CORRIE. **147 I.C. 293=6 R.R. 160=A.I.R. 1933 Rang 235.**

———*Negligence—Person keeping dangerous articles—Duty to store in proper place.*

A person who keeps dangerous articles, such as tartary, a particularly dangerous thing apparently liable to explode on impact only, unlike other fireworks, without fire being first applied, does so at his peril and is under a duty to others to see that they are stored in a place where they are not likely to be set off by impact or any other means. If he fails to so store them he is guilty of negligence, if an accident happens in consequence. (*Beasley, C.J. and Cornish, J.*) SALIAH MAHOMED HAJI IBRAHIM *v.* ABDUL SAMATH SAHIB. **157 I.C. 991=8 R.M. 185=1935 M.W.N. 865=42 L.W. 210 =A.I.R. 1935 Mad. 606=69 M L J. 218.**

———*Negligence—Primary and secondary liability—Minor's property—Neglect of guardian in management.*

Where the defendant's negligence is the primary and substantial cause of the damage sustained by the plaintiff, he will be responsible for the whole damage though it might have been increased by the wrongful conduct of a third person, which jointly with defendant's negligence so caused the damage. The same rule applies where the negligence is that of a person for whom the defendant is liable. Where the omission of the guardian to invest the minor's property in trust securities as directed by S. 20 of the Trusts Act and to file proper accounts was the main cause of the loss caused to the minors though the action of others also partly caused the loss.

Held, that the guardian and his surety were liable for the whole loss sustained by the minors. (*Aston, A.J.C.*) RADHAKISHEN *v.* SECRETARY OF STATE. **27 S.L.R. 142=I R. 1932 Sind 37=136 I.C. 517=A.I R. 1932 Sind 181.**

———*Negligence—Proof—Omnibus driven at fast rate —Driver not sounding horn.*

An omnibus was travelling at a fast rate and the driver did not sound the horn, as obviously he ought to have done travelling at that speed. The omnibus also swerved to its wrong side. The motor bus driver was not called to explain how it was that he failed to blow the horn or state that he did do so or deny that he went on to his wrong side and why it was that he did not see the little boy in front of the car in sufficient time to pull up and avert the accident.

Held, negligence was clearly proved. (*Beasley, C. J. and Madhavan Nair, J.*) DEVI SINGH *v.* MANGATHAYAMMAL. **155 I.C. 307=7 R M. 565=A.I.R. 1935 Mad. 322.**

———*Negligence—Proof of*—Res ipsa loquitur—*Conditions precedent for the application of the maxim.*

The plaintiff in a running down case is not entitled to succeed unless he gives affirmative proof of negligence. It is true that when a car goes about and a lamp post comes down, the principle of *res ipsa loquitur* applies and negligence is *prima facie* established. But before the maxim can be invoked, it must be first of all established that the vehicle was at the time of accident as a matter of fact under the management of the defendant or his servant (*Costello, J.*) BAIJNATH SHAW *v.* CORPORATION OF CALCUTTA. **141 I.C 248=I R. 1933 Cal. 96=36 C.W.N. 2147=A.I.R. 1933 Cal. 178.**

TORT—Nuisance.

———*Negligence—Rash driving—Driving on wrong side.*

On a straight and open road a speed of thirty miles cannot necessarily and of itself be described as an excessive and rash speed. (*Smith and Allsop, JJ.*) RAM SEWAK *v.* EMPEROR. **6 I.R. (Oudh) 79=146 I.C. 38 =34 Cr.L.J. 1154=10 O.W.N. 823=1933 Cr.C. 1275 =A.I.R 1933 Oudh 391.**

———*Negligence—Rash driving—Driving on wrong side.*

It is not always necessarily rash and negligent to drive on the wrong side of the road. Much would depend upon other conditions. (*Smith and Allsop, JJ.*) RAM SEWAK *v.* EMPEROR. **6 I R. (Oudh) 79=146 I.C. 28 =34 Cr.L J. 1154=10 O.W.N. 823=1933 Cr.C. 1275 =A.I.R 1933 Oudh 391.**

———*Negligence—Rule in* Rylands *v.* Fletcher—*Nature of obligation.*

The duty which the law imposes under the principles laid down in *Rylands* v. *Fletcher* is not an obligation independent of negligence and differing from it in kind, but a duty to take the degree of care in the circumstances which the law prescribes, and failure to perform that duty amounts to negligence on the part of the person by whom the duty is to be performed. Further, if by reason of such negligence injury is sustained by a person to whom the duty is owed, a cause of action for negligence arises. (*Page, C. J. and Mya Bu, J.*) DHANAL SOORMA *v.* RANGOON INDIAN TELEGRAPH ASSOCIATION, LTD. **13 Rang. 369=160 I.C. 245=8 R.R. 357=A.I.R. 1935 Rang. 401.**

———Negligence—Running down case. *See* MOTOR VEHICLES ACT (MANITOBA), S. 62. **1932 A.C. 690= A.I.R. 1932 P.C. 246**

———Negligence – Shipping — Use of unauthorised signals—Regulations for preventing collisions at sea—(Canada) Regns. 25 and 29. *See* SHIPPING—COLLISION. **A.I R. 1932 P C. 65 (P.C.).**

———*Negligence—Trespasser — Liability of railway company for error of judgment.*

A railway company is not liable to a trespasser for a mere error of judgment, even amounting to negligence, on the part of its servant which causes damage to the trespasser. *G. T. Ry of Canada* v. *Barnett*, (1911) A. C. 361, Appl. The plaintiff who had been to the goods-yard of the railway, attempted to cross the railway line to get to the Station Master's office, when he was knocked down in broad day light by a construction engine moving very slowly, at three miles an hour. There was no evidence of a permission or license from the company to cross the lines except at the level crossing. The driver sounded the whistle which, however, had no effect on the plaintiff who was then "thinking about his own affairs." The driver then applied the brakes, but a second too late.

Held, that the railway company was not liable for the injury caused to the plaintiff. (*Beaumont, C.J. and Mirza, J.*) ISMAIL HAJI NANA *v.* B. B & C. I. RAILWAY. **I.R. 1932 Bom. 590=140 I.C. 249=34 Bom. L.R. 826=A I R 1932 Bom. 452.**

Nuisance.

———*Nuisance—Abatement—Right to cut over-hanging branches of trees.*

If a neighbour's trees overhang one's lands, he is entitled to abate the nuisance himself and cut the branches to the line of the boundary, and he can do so without notice if he can do that without entering upon the neighbour's land (*Butler, J.*) PUTRAYA *v* KISHNA GOTA. **40 L W 639=152 I C. 579=1934 M.W.N. 1188=7 R.M. 255=A.I.R. 1935 Mad. 31=67 M L.J. 442.**

TORT—Nuisance.

———*Nuisance—Digging trench and failing to cover it—Water stagnating and injuring neighbour's wall—Action for damages—Sustainability.*

Where a landowner digs a trench on his land adjoining the plaintiff's house and by failing properly to cover it permits water to accumulate in the trench in such quantities that it naturally percolates through the soil and causes damage to the neighbour's wall, the latter is entitled to recover damages from the defendant for the damage so caused, sue to recover the damage so caused. 3 H. L. 330, 2 Ch. D. 692 and 13 Q.B.D. 131, Rel on. 28 Bom. 472, Disappr. (*Sulaiman, C.J. and Mukerji, J.*) MAHADEO PRASAD *v.* SARJU PRASAD. **141 I C. 645 = I.R. 1933 All 82 = 1932 A L. J. 758 = A. I. R. 1932 All. 573.**

———*Nuisance—Injury to property — Vibration—Coming to the nuisance—Plea of—Remedy.*

A man is liable if he causes vibrations by an engine or otherwise and thereby injures the property of another. Though the nuisance was in existence previously and the man comes to the nuisance, still he is entitled both to the remedy by way of damages and the remedy by injunction. Whether an injunction should be granted or only damages depends upon circumstances of each case. Where the vibrations caused to the building are such that if the nuisance continues, there is danger of the whole building collapsing, it is clearly a case for injunction and not for damages.

Per *Barlee, A.J.C.*—The land in cities has a special situation value, and there is no reason for allowing people to have the advantage of the proximity of their fellows and to expect the freedom from interference of the country. There is also no logical distinction so far as the plea of coming to the nuisance is concerned, between a nuisance which diminishes personal convenience and one which affects property. Both ordinarily affect the value of the property, for the proximity of an oil engine may not only cause material damage, but may depreciate the letting value of the house. But where the vibrations are caused to the building which is not abnormally ramshackle, the owner is entitled to protection. *Rylands* v. *Fletcher*, 3 H. L. 330, Not Appl.; *St. Helen's Smelting Co.* v. *Tipping*, (1865) 11 H. L. C. 642 and *Hoare & Co* v. *McAlpine Sons & Co*, (1923) 1 Ch. 167, Cons. (*Percival, J.C. and Barlee, A.J.C.*) EBRAHIM PIR MAHOMED *v* GANGARAM. **24 S.L.R. 401 = 128 I.C. 289 = A.I R. 1930 Sind 310.**

———*Nuisance—Personal injury—Action by non-occupying owner—Noise and vibration caused by electric dynamos.*

A suit for injunction or damages is not maintainable by non-occupying owner in respect of a nuisance alleged to be personally injurious only to the occupier. He can however sue if the nuisance is likely to injure the reversion provided the act complained of is permanently injurious and affects the property. The defendants were authorized by a licence from the Madras Government to supply electric light for the City of Madras. The plaintiff who was the owner of certain premises adjoining those of the defendants sued for an injunction and for damages on the ground that owing to noise and vibration caused by the rotaries and electric dynamos worked by the defendants, his property was injuriously affected.

Held, that no such nuisance as would entitle the owner or occupier for injunction and damages had been made out. (*Ramesam and Cornish, JJ.*) ALWAR CHETTY *v.* MADRAS ELECTRIC SUPPLY CORPORATION, LTD. **56 Mad. 289 = 141 I C. 241 = I.R. 1933 Mad. 91 = 36 L W. 833 = 1932 M.W.N. 1017 = A.I.R. 1932 Mad. 779 = 63 M.L.J. 868.**

TORT—Nuisance.

———*Nuisance—Private nuisance—Cause of action—Right to mandatory injunction.*

Where a person comes to Court complaining of a private nuisance injuriously affecting him by physically injuring his property and interfering materially with his health, there is a real cause of action and such a cause of action is well recognized in law and is based on the maxim "*sic uteri tuo ut alienum non laedas*" The occupier of a house is liable for allowing the continuance on his premises of any artificial work which causes nuisance to a neighbour. Where the pit or well and boring pipe in the court yard of the respondent's house were an artificial work maintained by him in his premises and water collecting in the unfilled pit had percolated through the soil and caused damage to the appellant's wall.

Held, the respondent was responsible for this damage, and the only remedy which the appellant could effectively have against this damage is a mandatory injunction. (*O'Sullivan and Lobo, A J Cs.*) MANUMAL JAROMAL *v* SHAMDAS SAHSANOMAL. **29 S L R. 172 = 158 I.C. 1103 = 8 R.S. 65 = A.I R. 1935 Sind 46.**

———*Nuisance — Public highway—Obstruction to—Immediate access to private property—Right of—Infringement of.*

The rule requiring special damage in cases of obstruction to a public highway is qualified in cases where the plaintiff complains of an interference with his beneficial enjoyment of property thereby. A right of immediate access from private property to public highway or *vice versa* is a private right distinct from the rights of the owner of the property to use the highway itself as one of the public, the violation or infringement of which would furnish a cause of action in respect of an obstruction on the public way, without any further proof of special damage. (*Niyogi, A.J.C.*) SHRONARAYAN *v.* DINDAYAL. **27 N L R 213 = I.R. 1931 Nag. 161 = 134 I.C. 673 = A.I R 1931 Nag 189.**

———*Nuisance—Public highway — Obstruction to—Right of action—Special damage.*

The rule of English Common Law has been applied in India as a rule of equity, justice and good conscience, that no action can be maintained by one member of the public for the obstruction of a highway without proof of special damage. 9 Mad 463; 3 Cal 20 (F.B.); 2 Bom. 457; 2 Bom. 469; 23 C.W.N 91; 26 C.W.N. 587, Foll (*Wort, J.*) MAHOMED DIN MIAN *v.* MT. ATIRAJO KUER. **10 Pat 568 = I R. 1931 Pat. 383 = 133 I.C. 463 = 12 Pat.L.T. 885 = A.I.R. 1931 Pat. 418**

[D. 14 P.L.T. 361 (363). Not F. 60 C. 1003 (1005).]

———*Nuisance — Public highway — Obstruction to right of way—Continuing wrong*

A wrongful interference with a public right of way constitutes a nuisance and is a continuing wrong within the meaning of S. 23 of the Limitation Act. (*Kulwant Sahay, J.*) BHAGWANDUTT *v.* ASARFI LAL MAHTA. **6 I R. (Pat.) 260 = 146 I.C. 408 = A.I R. 1934 Pat. 34**

———*Nuisance — Public highway—Obstruction to—Suit for removal of encroachment—Plaintiff, if need prove special damage.*

In the case of an obstruction to a public highway, a member of the public can maintain a suit for removal of the encroachment without proving special damage. Difference between Indian and English Law pointed out. (*Mallick and Jack, JJ.*) MANDA KINEE DEBEE *v.* BASANTAKUMAREE DEBEE **60 Cal. 1003 = 147 I.C. 811 = 6 R C. 364 = A I.R. 1933 Cal. 884.**

———Nuisance—Public highway — Obstruction to—Owners of houses abutting on—Right of action—

TORT—Nuisance.

Special damage—If to be proved. *See* HIGHWAY—OBSTRUCTION. **152 I C. 850 = A.I.R. 1935 Lah. 196.**

———*Nuisance—Public highway—Public nuisance—Claim for injunction—Encroachment on public road—Plaintiff's house not affected.*

A suit for an injunction on the ground that an encroachment is a public nuisance is not maintainable when the nature and extent of the encroachment made on the public road is not of such a description as would lead to an inference that the plaintiff's house has materially suffered thereby. (*Jai Lal, J.*) KASHMIRA SINGH *v.* MATHRA SINGH. **I.R. 1932 Lah. 622.**

———*Nuisance—Public nuisance—Abatement—No right in a private person.*

There is no statutory provision in India justifying a private person or a member of the public in demolishing a building and causing loss to another person by way of abating a nuisance. The provisions of Ss. 133 to 140 of the Cr. P Code, the Madras Local Boards Act and the Land Encroachment Act indicate that in the case of such a public nuisance, anybody aggrieved should not take the law into his own hands. A question of this kind has to be determined according to the statute law of India and the English Common law principle cannot be applied. (*Sundaram Chetty and Pakenham Walsh, JJ.*) NARASIMHULU *v.* NAGUR SAHIB. **57 Mad. 351 = 147 I.C 553 = 6 R M. 376 = 35 Cr.L J. 437 = 1933 M.W.N. 905 = 1934 Cr.C. 434 = A.I.R. 1934 Mad. 95 = 66 M.L J. 31.**

———*Nuisance—Public nuisance—Bridge obstructing navigation—Statutory authority and conditions—Compliance with—Necessity for—Special damage.*

Statutory conditions must be strictly fulfilled if interference with public rights is to be justified. Where it was found that owing to the construction of the bridge navigation is now confined to the periods of slack water amounting in all to only about two hours of the 24 it must be held that the bridge in its present form substantially interferes with navigation. Unless therefore the Bridge Company can establish statutory authority for erecting such a bridge, they have caused a public nuisance by obstructing the navigable highway, and the shipowners who have suffered special damage in the damage caused to their ship by the nuisance will have a cause of action against them for damages. And if the special Act, which constitutes the Bridge Company and confers upon them the power to construct and maintain the bridge, limits the power by the express condition that the bridge is not to interfere with navigation, this stipulation which is absolute in favour of public rights controls the whole activities of the company. It cannot be held that the Bridge Company has any statutory authority to interfere with navigation. *Canadian Pacific Ry.* v. *City of Toronto*, (1911) A. C. 461, Ref (*Lord Atkin.*) S. S. EURANA *v.* BURRAD INLET TUNNEL AND BRIDGE CO. **I.R. 1931 P.C. 90 = 130 I.C. 682 = 33 L.W. 506 = A.I.R. 1931 P.C. 59 (P C.).**

———*Nuisance—Public nuisance—Special damage—Requirement of—Suit for declaration that village site is part of communal land.*

The rule regarding the requirement of special damage in cases of obstruction to a public right or a pathway does not apply to a suit by certain villagers not as members of the public but as persons who have the right of using the suit land as a threshing floor, for a declaration that a portion of the village is kalam poromboke. This portion of the case is reported only in 130 I C. 761; A.I.R. 1931 Mad. 452, 1931 M.W.N. 353 and 34 L.W. 214. (*Ramesam, J.*) VENKATAKRISHNA REDDI *v.* SRINIVASACHARIAR. **54 Mad. 527 = I.R. 1931 Mad. 457 = 130 I.C. 761 = 1931 M.W.N. 353 = 34 L.W. 214 = A.I.R 1931 Mad. 452 = 61 M.L J. 135.**

———*Nuisance—Public nuisance—Suit for removal—Procession—Right to take along a particular route—Obstruction to—Maintainability—Special damage—If necessary.*

If a plaintiff comes to Court merely on the allegation that the public in general has suffered some damage or is likely to suffer some damage on account of a public nuisance, a suit may not be maintainable, if the plaintiff does not also allege that he himself, as a member of the public, has suffered or is likely to suffer some damage. But where the plaintiff has been himself obstructed and prevented from exercising his right which he has in common with others, there is no authority which has laid down that his suit is not maintainable. Where the suit is not brought on behalf of the entire public of a place but is brought by certain members of one community only to vindicate their right to take out processions along a particular route, the plaintiffs, strictly speaking, put forward not a claim for the removal of what can be called a public nuisance but bring a suit for remedying the infringement of a special right exercisable by their community only and in that view of the matter, the suit would be maintainable. Further, if there is a right to take out a procession along a particular route and the defendant's action causes an obstruction with the result that the processionists are compelled to change the route or are prevented from following the usual route that would amount to special damage. (*Sadasivan, C. J.*) MAHOMED HASAN *v.* AMBAR PRASAD. **7 R A. 123 = 151 I C 263 = A I.R 1934 All. 941.**

———*Nuisance—Right to worship—Obstruction to—Special damage.*

In a suit for declaration of a right of easement to pass over a plot of land in order to come to a place of worship, special damage need not be proved by plaintiff. (*Kulwant Sahay, J.*) RAMJANAM SINGH *v.* RAM BARAN SINGH **6 I R (Pat.) 174 = 145 I C. 387 = 14 Pat L T. 361 = A I.R. 1933 Pat. 302.**

———*Nuisance—Storage of water in irrigation tanks—Doctrine of* Rylands v. Fletcher*—Applicability to India.*

The doctrine of *Rylands* v. *Fletcher* is not applicable to India. The storage of water in irrigation tanks is a duty imposed on the Zamindars, partly as an incident of their tenure and in some cases by Statute. *e. g.*, the Madras Estates Land Act. It is therefore not a "Non-natural use" of the land and in India, a person does not store water at his peril. I I. A. 364, Rel on. (*Kumaraswami Sastri and Reilly, JJ.*) GAJAPATHI KRISHNA CHANDRA DEO *v.* RAJA OF VIZIANAGARAM. **1931 M.W.N. 23 = 33 L.W. 771 = A.I R. 1931 Mad. 561 (2) = 60 M L.J. 662.**

———Nuisance—Support—Right of—Interference with—Suit to restrain—Actual damage not necessary. *See* EASEMENTS ACT, S. 7, ILL. (*e*) **59 Cal. 363 = A.I.R. 1932 Cal. 542.**

Remedy.

———*Remedy—Suit for damages—Claim for entire amount necessary.*

In a suit for damages based on an act of tort, the entire amount of damages will be recovered in one suit and several suits are to be discouraged. (*Mukerji and Bennet, JJ.*) MUNICIPAL BOARD, ETAWAH *v.* MT. RAM SRI. **I.R. 1931 All. 570 = 133 I.C 26 = A I.R. 1931 All. 670.**

———*Remedy—Suit for personal injury—Survival of.*

A suit in tort for personal injury does not survive after the death of the person injured. (*Staples, A. J.*

TORT—Secretary of State.

C.) RATAN CHAND *v.* MUNICIPAL COMMITTEE, HINGANGHAT. **27 N L R 237=I.R. 1931 Nag. 22 =130 I.C 86=A.I R. 1931 Nag. 9.**

[F. 30 N.L.R. 84 (87); 30 N.L.R. 186 (188).]

Secretary of State.

———*Secretary of State—Error in revenue sale—Liability of Secretary of State for act of Deputy Collector.*

The Secretary of State for India in Council is not liable for the act of the Deputy Collector in the performance of his statutory duties, where the Deputy Collector paid the surplus sale proceeds to a wrong person.

Held, that the rightful owner was not entitled to recover damages from the Secretary of State. Nature of sovereign acts discussed. (*Costello and M C. Ghose, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RAM NATH BHATTA. **150 I C 440 6 R C. 857=37 C. W.N. 957=A.I R. 1934 Cal. 128.**

———*Secretary of State—Liability of—Loss of surety bond in court Custody—Suit for damages—Maintainability.*

As regards torts committed by servants of the Secretary of State in the conduct of undertakings which might be carried on by private persons are concerned exemption from liability cannot be pleaded by the Secretary of State. The Secretary of State will not, however, be liable for torts committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign. Where the Secretary of State was sued for the loss of a surety bond filed in Court.

Held, that the plaintiffs had no cause of action and that the fact alleged only constituted *damnum sine injuria*. (*Aston, A. J C.*) RADHAKISHAN *v.* SECRETARY OF STATE **27 S.L R 142=I.R. 1932 Sind 37—136 I.C. 517=A.I R. 1932 Sind 181.**

———*Secretary of State—Negligence — Government—Liability for servant's negligence*

"Government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents engaged in the public service." Owing to the negligence of a bailiff in accepting certain security as sufficient, appellant suffered loss for which he filed a suit against the Secretary of State for damages.

Held, that the tort was negligence and that the act complained of was neither directly authorized nor ratified by the Secretary of State or Local Government. The negligence of the bailiff was not at the instance of the Government. The plaintiff is not entitled to any remedy against the Secretary of State. (*Baguley, J.*) RAMASAMI *v.* SECRETARY OF STATE FOR INDIA. **6 I R (Rang.) 31=145 I.C. 226=A.I R. 1933 Rang. 113.**

———Secretary of State—Wrongful acts of officers—Liability for—Wrongful detention by Police Officers. *See* CROWN—TORT. **9 Rang. 375=A. I R. 1931 Rang. 294.**

Seduction.

———*Seduction—Action for damages—Enticement of plaintiff's wife—Cause of action.*

To support an action for seduction both *injuria* and *damnum* are necessary The plaintiff must, therefore, prove (1) that the female seduced was in his service, actual or constructive, at the time of seduction, otherwise there is no *injuria*; (2) that by reason of the act complained of or otherwise. he was deprived of her services, otherwise, there is no *damnum*. In an action for enticement of wife, the plaintiff is not entitled to damages for mere mental pain or anxiety. (*Ganga Nath, J.*) TIKA RAM *v.* SOBHA RAM. **8 R.A. 4=1935 A.W.R. 956= 1935 A.L.J. 1003=156 I.C. 556=A I.R. 1935 All. 855.**

TORT—Trespass.

Trespass.

See also—DAMAGES, *supra.*

———*Trespass — Damages — Exemplary damages—Award of.*

In an action for trespass on land, substantial damages may be recovered; and in the case of wanton trespass persisted in with violent and intemperate behaviour—the conduct of the defendant being high-handed and malicious—exemplary damages can be awarded to the plaintiff. The principle of *restitutio in integram* does not apply to such a case, for the damages awarded are intended to express indignation at the defendant's wrong rather than to recompense the plaintiff for his loss. (*Venkatsubba Rao, J.*) RAMASWAMI CHETTIAR *v.* SUPPIAH CHETTIAR. **158 I C. 37=8 R.M 215= 1935 M W N. 868=42 L.W. 404=A I R. 1935 Mad. 699=69 M.L.J. 98.**

———*Trespass—Damages—Measure of—Suit by owner not entitled to possession.*

In a suit for damages for trespass by owner not entitled to possession of the goods, the principles applicable in the case of trespass to or detention of the goods of a person entitled to possession would be utterly wrong. The plaintiff has to show circumstances pointing to an actual loss of business of some kind. Where he has not proved it, he is only entitled to nominal damages (*Ameer Ali, J.*) UDAY CHAND PANNALAL *v.* THANSING KARAM CHAND **62 Cal. 586=157 I C. 937—8 R C. 138=39 C.W.N. 357=A I.R. 1935 Cal. 537**

———*Trespass—Entry into plaintiff's house to arrest plaintiff's brother.*

Defendant had a decree against plaintiff's brother and the latter though residing outside, usually came and lived with his brother. In execution of the decree, the defendant entered the baithak of the plaintiff's house with the bailiff and naib sheriff believing that the judgment debtor was there as usual, with the object of effecting his arrest. The judgment-debtor was not there and on the plaintiff's remonstrating, the defendant apologised. Subsequently the plaintiff sued for damages.

Held, that the bailiff and naib sheriff acted lawfully in entering the house *bona fide* for arresting the judgment debtor, that the defendant accompanied them to point out the person to be arrested, that no trespass was committed and that the plaintiff was not entitled to any damages. 42 Mad. 446, Ref. (*Tek Chand, J.*) DEVI DAYAL *v.* GHULAM MAHOMED. **6 I R (Lah.) 237= 146 I C 543=A I R 1933 Lah. 723.**

———*Trespass—Graveyard reserved for common use of community—One member leasing it out for drying chillies, etc.—Trespass to person and land.*

Where a graveyard is reserved for the use of a community, and one member of it prevents common use of it by leasing it out for drying chillies, etc., he is guilty of trespass on person as much as on land. It is a trespass on the person in the sense that feelings and sentiments of persons are outraged by seeing the graves of their ancestors desecrated 7 Bom. 323 and A I.R. 1925 P.C. 298, Ref. (*Dalip Singh, J.*) SHAMSUDDIN KHAN v. ABDUL AZIZ. **I.R. 1932 Lah. 525=138 I C. 691 =33 P L R. 768=A I.R. 1932 Lah. 423.**

———*Trespass—Owner not entitled to possession—Right to sue—Cause of action.*

An owner not entitled to possession of goods has a right of action to sue for damages if there has been some permanent injury to the goods in respect of which trespass has been committed. Even in cases where the

TORT—Trespass.

injury is not to the goods but to a right in respect of the goods, a cause of action may arise. (*Ameer Ali, J.*) UDAI CHAND PANNALAL *v.* THANSING KARAM CHAND **62 Cal. 586 = 157 I C 937 = 8 R.C. 138 = 39 C.W.N. 357 = A.I.R. 1935 Cal. 537.**

———*Trespass—Persons executing legal processes—When protected.*

Persons who execute legal processes, like a warrant of arrest, attachment or search are protected by the warrant, from liability in respect of the act authorized by it But they can claim this immunity only if the warrant or order is not illegal or irregular on the face of it, and if they conform to its terms and the mode or procedure prescribed by law in that behalf. Where certain Sub Inspectors of Police, who made a search of a house relied on S. 165, Cr. P. Code, but it was found that they had not complied with the procedure laid down in S. 165

Held, that S. 165 did not justify their action and they were liable to pay damages for trespass. 39 Cal. 953, Foll. (*Pollock, A. J. C.*) HIRALAL *v.* RAMDULARE. **31 N L.R (Supp.) 66 = 160 I.C. 306 = 8 R. N. 183 = A I.R. 1935 Nag. 237.**

———*Trespass—Right of action—Person not entitled to possesson.*

Qua action for trespass simply, an owner would not be entitled to sue unless entitled to possession. (*Ameer Ali, J.*) UDAY CHAND PANNALAL *v.* THANSING KARAM CHAND. **62 Cal 586 = 157 I.C 937 = 8 R.C. 138 = 39 C W N. 357 = A.I R. 1935 Cal. 537.**

———*Trespass—Search of another's house—Proof of actual damage, if necessary.*

A search of another's house is *prima facie* trespass, and the fact that the search was made in good faith does not justify the trespass, nor is it necessary for the plaintiff to prove that damage was actually committed. The plaintiff has only to prove trespass and it is for the defendant to prove a good cause or excuse. (*Pollock, A.J.C.*) HIRALAL *v.* RAMDULARE. **31 N. L. R (Supp.) 66 = 160 I.C 306 = 8 R.N. 183 = A..I.R. 1935 Nag. 237.**

———*Trespass — Trover — Removal of coal before plaintiff got his title.*

The plaintiff is not entitled to maintian an action for damages in respect of coal removed from the plaintiff's mine before he got his title to it. (*Wort and Fazl Ali, JJ*) BAIJNATH JUGAL KISHORE *v.* MANINDRA CHANDRA NANDI. **I.R 1931 Pat. 373 = 133 I.C. 453 = 13 Pat.L.T 73 = A.I.R 1931 Pat. 436.**

Vicarious liability.

———*Vicarious liability — Liability of principal — Test of—Scope of employment.*

The liability of the master for an act of his servant always depends on the question whether the act complained of falls within the scope of the employment of the servant or not. If it does, he is liable whether such act is wilful, reckless or improper. It is immaterial whether such act amounts to a trespass or nuisance or some other tort. The same principles apply to the case of a principal and agent. Every act of a servant or agent which is reasonably necessary for the due discharge of his duties or the preservation of the interests of his master or principal or otherwise incidental to the purpose of his employment, falls within the scope of his employment. The question wether any particular act falls within the scope of his employment or not must necessarily depend on the facts of each case. (*English Cases discussed.*) (*Ferrers, J C. and Rupchand, A.J.C.*) MORUMAL *v.* GOBINDRAM BIKHCHAND. **I R. 1933 Sind 191 = 144 I.C. 452 = 27 S.L.R. 41 = A.I.R. 1933 Sind 176.**

TORT—Wrongful attachment.

———*Vicarious liability—Mukhtyar—Course of employment—Malicious prosecution instituted by agent—Liability of master for.*

It is not in the ordinary course of the mukhtyar's or agent's employment to institute criminal prosecutions; and in a case for damages for malicious prosecution, which is a special class of cases and in which malice and want of reasonable or probable cause have to be proved, this principle of the prosecution being not in the usual course of the servant's employment should be strictly applied and, if the servant maliciously institutes a prosecution without his master's authority or, when his master has instituted a prosecution, withholds information from his master that he should have given, the master cannot be liable. 48 All. 560, *Lloyd* v. *Grace Smith & Co.*, (1912) A. C. 716 and *Bank of New South Wales* v. *Owsten*, (1878-79.) 4 A. C. 270, Rel. on (*Staples, A. J C.*) RAGHUNATH RAO *v.* MOTIRAM. **30 N. L. R. 101 = 147 I.C. 1084 = 6 R.N. 153 = A I.R. 1933 Nag. 299.**

———*Vicarious liability—Serang of ship—Servant of hirer or ship-owner—Effective control—Liability for his negligence.*

The serang of the ship was not bound to receive and obey the order of the hirer. The hirer had nothing to do with either the selection or the appointment of the serang of the ship or of the crew that manned the launch. The masters were the persons who had selected and appointed the serang as their servant, and whose order the serang was bound to receive and obey. In spite of the hire of the launch, they had never parted with the control over the serang and although the serang was under the direction and control of the hirer as far as the performance of the journeys was concerned, he was not under the latter's direction or control with reference to the mode and manner of navigating the vessel, which he did as a servant of the masters.

Held, that in the absence of anything to show that the masters had parted with the power of controlling the serang with regard to the work on which he was engaged, or that serang was under the direction and control of the hirer as regards the mode and manner of navigating the vessel, the masters were liable for the negligence of the serang. English cases considered (*Mya Bu and Dunkley, JJ.*) INDO-BURMA RIVER STEAM NAVIGATION CO., LTD. *v.* BRITISH INDIA STEAM NAVIGATION CO. LTD. **A I R.1934 Rang. 185.**

———Vicarious liability—Suit against master for malicious prosecution—Master proved to have no malice —Liability for special knowledge of servant. *See* MALICIOUS PROSECUTION—SUIT FOR. **30 N.L.R. 101 = A.I R. 1933 Nag 299.**

Wrongful arrest.

———*Wrongful arrest—Warrant of arrest wrongfully served on witnesses—Damages.*

Damages cannot be awarded to witnesses against whom warrants of arrest are wrongfully served. (*Jai Lal, J.*) RAM KISHAN *v.* BASDEV LAL. **A.I.R. 1934 Lah. 170.**

Wrongful attachment.

———*Wrongful attachment — Defendant obtaining writ of attachment without proper order of Court—Liability to pay damages.*

Where the defendant, in collusion with the office, obtained a writ of attachment without any proper order of Court and attached the property of the plaintiff, he is liable to pay damages. (*Sulaiman, C.J. and Bennet, J.*) PADMANABH VYASARAYA ACHARYA *v.* JAGANNATH. **1935 A.W.R. 1386.**

TORT—Wrongful attachment.

———*Wrongful attachment—Malicious proceeding—Wrongful seizure—No action when seizure is lawful—Seizure of goods without authority—Proof of malice not necessary.*

A distinction must be drawn between acts done without judicial sanction and acts done under judicial sanction improperly obtained. If goods are seized under a writ or warrant which authorized the seizure, the seizure is lawful, and no action will lie in respect of the seizure, unless the person complaining can establish a remedy by some such action as for malicious prosecution. If however the writ or warrant did not authorize the seizure of the goods seized, an action would lie for damages occasioned by the wrongful seizure without proof of malice. (*Lord Russell of Killowen.*) RAMANATHAN CHETTY *v* MIRA SAIBO MARIKAR. **I.R. 1931 P C 54=130 I.C 310=1931 A.L.J 541=1931 A.C 77=14 O L J 334=8 O.W. N 325=33 L W. 513=A.I R. 1931 P C. 28=61 M. L.J. 330(P C).**

Wrongful ex-communication.

———Wrongful ex communication from caste jamat—Damages—Malice—Proof of—Necessity for. *See* C. P. CODE, S. 9. **37 Bom.L.R. 603=A.I.R 1935 Bom. 367.**

———*Wrongful ex-communication—Suit for damages—Maintainability.*

A suit claiming damages for wrongful ex-communication apart from the slander containing an imputation as to the chastity of a woman is maintainable. (*Beasley, C. J. and Cornish, J.*) NARAYANA SAH *v.* KANNAMMA BAI. **55 Mad 727=I R 1932 Mad. 901=140 I.C. 422=1932 M.W.N 563=35 L.W. 647=A.I. R. 1932 Mad. 445=62 M L J. 608.**

Wrongful inducement.

———*Wrongful inducement—Breach of contract—Inducement of.*

An action lies for procuring a person under contract with the plaintiff to break his contract. (*Madhavan Nair, J.*) YEGNANARAYANA *v.* YAGANNADHA RAO **135 I.C 710=I.R, 1932 Mad. 198=34 L W. 618=1931 M.W.N. 667=A I.R. 1932 Mad. 1 (2).**

———*Wrongful inducement—Inciting another to do a wrongful act—Liability for consequences—Motive or intention, if relevant—'Illegal means.'*

Where the plaintiff filed a suit for the purpose of obtaining damages from the defendant for wrongfully procuring the Local Government to issue an order restraining the Municipality from issuing a licence to him (plaintiff) and it was found that the Local Government was legally entitled to pass the stay order, that damage thereby resulted to the plaintiff and the defendant had a legal right to apply for the stay order.

Held, the motive or intention of the defendant in procuring the stay order in the circumstances is *nihil ad rem*. The plaintiff failed to prove that the defendant procured the stay order by illegal means and so the suit must fail. The expression "illegal means" means acts which are illegal not because they are morally wrongful but because they are legally wrongful. (*Allen* v. *Flood*, (1898) A.C. 1, applied. (*Page, C.J. and Mya Bu, J.*) NAN KEE *v.* AH. FONG **13 Rang. 175 =155 I.C. 890=7 R R. 358=A.I.R. 1935 Rang. 73 (2).**

TRACING.

See (1) TRUST—TRACING.
(2) TRUSTS ACT, SS. 63 AND 66.

TRADE DISPUTES ACT (VI OF 1929), Ss. 16 and 17—*Scope—Instigation and declaration of prolonged strike in textile industry throughout the whole of India—If offence punishable under S.* 17.

The instigation and declaration of a strike in the textile industry throughout the whole of India does not fall under S. 16 (1) (*b*) and is not therefore punishable under S. 17 of the Act, when there is really no evidence which would justify the Court in holding that a strike in that textile trade, however prolonged, would necessarily or probably cause severe, general and prolonged hardship to the community as opposed to those engaged in the textile trade. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* ALWE. **60 Bom 108=160 I.C. 189=8 R B. 250=37 Cr L J. 252=37 Bom.L.R. 892=1936 Cr.C. 16=A.I.R. 1936 Bom. 5.**

———**S. 16 (1) (a) and (b)**—*Illegal strike—What amounts to.*

The class of strike which is rendered illegal under S. 16 (1) is one which has objects beyond the furtherance of a particular trade dispute, and which is designed or calculated to coerce Government by inflicting severe, general and prolonged hardship upon the community. If a strike has objects beyond the furtherance of a trade dispute, it falls under S. 16 (1) (*a*), although it may have objects in furtherance of a trade dispute within the particular trade as well; and if, having regard to the nature of the strike and the circumstances prevailing at the date of the instigation or other acts specified in S. 17 of the Act, the Court holds that the natural and probable consequences of the strike will be to inflict such severe, general and prolonged hardship upon the community, that either the Government of India or the Local Government may reasonably be affected in consequence thereof to be compelled to take or abstain from taking a particular course of action, the strike also falls under S. 16 (1) (*b*), although those responsible for the strike may not have designed or planned such result. The sub-S. (*a*) and (*b*) of S 16 (1) are connected by the copulative "and", so that a strike rendered illegal is one which falls within the terms of both sub-sections. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* ALWE. **60 Bom 108=160 I C. 189=8 R.B. 250=37 Cr.L J. 252=37 Bom L.R 892=1936 Cr.C. 16=A.I R. 1936 Bom. 5.**

———**S 16 (1) (b)**—*Construction—"Community."*

The meaning of the expression "community" in S. 16 (1) (*b*) depends on what Government is referred to. If it is the Government of India, the "community" must mean the general public of British India; and if it is the Local Government, then the "community" would mean the general public in the territory over which the Local Government exercises sway. The word "community", in either case must at any rate, mean the general public as distinct from any section, and particularly as distinct from the persons engaged in the particular trade to which the strike relates. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* ALWE. **60 Bom. 108=160 I.C. 189=8 R B 250=37 Cr L J. 252=37 Bom L.R. 892 =1936 Cr.C. 16=A.I.R. 1936 Bom. 5.**

———**S. 16 (1) (b)**—*Construction—"Designed or calculated.*

The words "designed or calculated" are clearly intended to bear distinct meanings; and under the sub-section, it is enough to prove either design or calculation. The word "designed" is equivalent to planned. The section does not say by whom the design is to be formed; but it must be by the persons responsible for the strike. The Court, has, therefore, to determine under S. 16 (1) (*b*) whether the persons responsible for the strike designed or planned to inflict severe, general and prolonged hardship upon the community and thereby to

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compel the Government to take or abstain from taking any particular course of action. Difficulties may, however, arise for all the persons responsible for the strike may not have the same design or plan But it is the duty of the Court to determine, whatever the difficulties may be what the design of those responsible for the strike was at the time when they instigated it or did the other acts specified in S. 17. The word "calculated" on the other hand seems to be directed to probable consequences which may be expected to follow from the strike apart from what was in the minds of those responsible. (*Beaumont, C. J. and Wadia, J.*) EMPEROR *v.* ALWE. **60 Bom 108 = 160 I C. 189 = 8 R B 250 = 37 Cr.L.J. 252 = 37 Bom L R. 892 = 1936 Cr.C. 16 = A I.R. 1936 Bom 5.**

———**S 16 (1) (b)**—*Construction—Government.*

The word "Government" in S. 16 of the Trade Disputes Act may be either the Government of India or the Local Government, having regard to the General Clauses Act. (*Beaumont, C.J. and Wadia, J.*) EMPEROR *v.* ALWE. **60 Bom. 108 = 160 I C 189 = 8 R B. 250 = 37 Cr L J. 252 = 37 Bom.L.R. 892 = 1936 Cr.C. 16 = A.I.R. 1936 Bom. 5.**

TRADE-MARK—*Assignment — Mode of—Writing —Necessity.*

A trade-mark is generally transmitted along with the goodwill of a business, and can only be assigned in writing. (*Wadia, J.*) ANGLO INDIAN DRUG AND CHEMICAL CO., *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom 373 – 7 R.B 444 = 155 I C. 641 = 36 Bom.L. R. 1165 = A I.R. 1935 Bom 101.**

———*Distinction between registered and unregistered trade-mark—Property acquired by user.*

The only difference between a suit for infringement of a trade mark registered under the Act and that of a trade-mark not registered appears to be that a trade-mark, registered under the Act of 1875 in England, gives an immediate property in the registered trade mark, whether that property has got to be acquired by user in a country where there is no registration. (*Sundaram Chetty and Walsh, JJ.*) JAMAL NOOR MAHOMED SAIT CO. *v.* ABDUL KAREEM & CO. **57 Mad. 600 = 7 R M. 139 = 151 I C 869 = 39 L.W. 319 = A.I.R. 1934 Mad. 211 = 66 M L.J. 440.**

———*English law—How far applicable.*

Per *Niamatullah, J.*—There is no statutory law in India on the subject of trade-marks. Cases of alleged infringement of trade marks have to be decided according to rules of justice equity and good conscience. English law on the subject may be applied not because it is applicable as such in India, but because it embodies rules of justice, equity and good conscience. Conditions peculiar to this country may, however, necessitate acceptance of the English law with certain modifications. In England there is now the Trade Marks Act of 1905, under which trade-marks are registered for specified classes of goods. Though the provisions of that enactment are based on decisions given before the Act was passed, the decisions under the Act should be applied with caution, as they are not infrequently based on the terms of the statute rather than on the broad principles of justice, equity and good conscience, which influenced the decisions before the Act. (*Niamatullah, J., on difference between King and Iqbal Ahmad JJ.*) THOMAS BEAR & SONS *v.* PRAYAG NARAIN. **57 All. 510 = 154 I.C. 788 (2) = 7 R A. 804 = 1935 A.L.J. 80 = 4 A. W.R. 1028 = A I R. 1935 All. 7.**

———*Essentials of.*

A registrable trade-mark must contain or consist of at least one of the following essential particulars : (1) The

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name of a company, individual or firm represented in a special or particular manner; (2) the signature of the applicant for registration or some predecessor in his business ; (3) an invented word or invented words; (4) a word or words having no direct reference to the character or quality of the goods and not being according to its ordinary signification, a geographical name or a surname ; (5) any other distinctive mark, but a name signature of word or words, other than such as fall within the description in the above paras. (1), (2), (3) and (4) shall not, except by order of the Board of Trade of the Court, be deemed a distinctive mark. When none of these particulars appear there is no trade-mark. (*Staples, A J C.*) HAFIZULLAH HAMIDULLAH *v.* S. K PAPA. **30 N L R. 45 = 35 Cr L J. 373 - 6 I.R (Nag.) 112 = 146 I.C. 1084 = 1933 Cr C. 1423 = A.I R. 1933 Nag. 344.**

———*Infringement—Agent's label—Imitation—False representation as to agency—Injunction.*

Attempts to deceive unwary purchasers by false representations by the use of devices may be made in different forms and it is a question of fact in each case whether there is a false representation or not. A dealer may not represent contrary to fact that he is an agent for a manufacturer and use the real agent's label or design. Injunction issued. (*Rupchand Bilaram, A J. C.*) DWARKADAS FATEH CHAND *v.* LAL CHAND HIRANAND. **26 S L.R. 287 = I R. 1932 Sind 140 = 139 I C. 780 = A.I.R. 1932 Sind 222.**

———*Infringement—Burden of proof.*

When the plaintiffs prove that the mark is a colourable imitation, the burden of showing how the defendants came to adopt it is on the defendants. (*Sundaram Chetty and Walsh, JJ.*) NOOR MAHOMED SAIT CO. *v.* ABDUL KAREEM & CO. **57 Mad. 600 = 151 I. C. 869 – 7 R.M 139 = 39 L.W. 319 = A.I R. 1934 Mad. 211 = 66 M.L.J. 440.**

———*Infringement—Damages not proved—Right to nominal damages.*

Per *King, J.*—Where the plaintiff has proved that his right of trade mark has been infringed but no damages have been proved, then nominal damages can be allowed, even though they are not proved. (*Niamatullah, J, on difference between King and Iqbal Ahmad, JJ.*) THOMAS BEAR & SONS *v.* PRAYAG NARAIN. **57 All 510 = 154 I C 788 (2) = 7 R A. 804 = 1935 A. L.J. 80 = 4 A.W.R. 1028 = A I R 1935 All. 7.**

———Infringement—Damages—Quantum of—Mode of computation—Loss to plaintiffs—Profits to defendants. *See* DAMAGES—MEASURE OF—TRADE MARK. **10 Rang. 85 = A.I R. 1932 Rang. 56.**

———*Infringement—Evidence of actual deception, if necessary.*

In order to get an injunction it is not necessary to prove that any one had in fact been deceived but that it is enough if the defendant's trade-mark bears such a resemblance to that of the plaintiffs as to be calculated to mislead incautious purchasers. (*Sundaram Chetty and Walsh, JJ.*) NOOR MAHOMED SAIT CO. *v.* ABDUL KAREEM & CO. **57 Mad. 600 = 39 L.W. 319 = 7 R. M. 139 = 151 I.C. 869 = A I R. 1934 Mad. 211 = 66 M.L J. 440.**

———*Infringement—Evidence—Comparison of exhibits.*

The Court is justified in acting on its own comparison of exhibits before it. (*Sundaram Chetty and Walsh, JJ.*) NOOR MAHOMED SAIB CO. *v.* ABDUL KAREEM & CO. **57 Mad. 600 = 151 I C. 869 = 7 R.M. 139 = 39 L.W. 319 = A.I R 1934 Mad. 211 = 66 M.L.J. 440.**

———Infringement—Injunction. *See also* C. P. CODE, O. 39, Rr. 1 AND 2.

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———*Infringement—Injunction— Actual deception—If to be proved.*

To establish a claim to an injunction in an action for infringement of a trade-mark, the plaintiff must show that the particular mark used on his goods is symbolical only of his manufacture and that they have acquired a wide reputation in the market. It is not necessary to show that the defendant had the intention to deceive or to prove actual instances of deception. (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO *v.* SWASTIK OIL MILLS CO., LTD **59 Bom. 373=7 R B 444 =155 I.C. 641=36 Bom.L.R. 1165=A I R. 1935 Bom. 101.**

———*Infringement—Injunction — Fraudulent misrepresentation, if necessary.*

The parties who were dealing in condensed milk used labels having device of a cow. The plaintiff's label had 'Dancow' imprinted on it while the defendant used a similar label with the word 'cow'. They were alike in several respects, though there were minor points of difference also. The plaintiff having sued for an injunction in respect of the trade mark, *held*, that an injunction should be issued. A fraudulent misrepresentation is not an essential ingredient for the issue of an injunction. Whether the plaintiff's goods are identified with the device used depends on the evidence. (*Rupchand Bilaram, A. J. C.*) DANISH DAIRIES MILK EXPORT *v.* FIRM OF MURLIDHAR & CO. **26 S.L R 51=I R. 1932 Sind 176=140 I.C. 160=A I. R. 1932 Sind 84.**

———*Infringement—Injunction—Interim injunction—Application for—Probability of deception—Test of—Unwary purchaser—Balance of convenience.*

In an application for interim injunction pending a suit to restrain the defendant from passing-off goods bearing mark and figure similar to those used by the plaintiffs, the Court is not justified in refusing the injunction merely because, on a close and critical comparison of one with the other, the Court is of opinion that there is no likelihood of deception. An ignorant purchaser probably trusts to his recollection, he has no opportunity for comparison, and if he is likely to take the one for the other, there is a *prima facie* case for an injunction. Where the Court finds that the defendant's article is comparatively new, it would be a greater inconvenience to allow him to flood the market with his goods and possibly infringe the plaintiffs' rights than to restrain the defendant for a short time and compensate him, if so entitled, for the loss sustained by him in consequence. (*Coutts-Trotter and Ramesam, JJ.*) EBRAHIM CURRIM & SONS *v.* ABDULLA SAHIB **148 I C. 110=6 R.M 442 =38 L.W. 771=A.I.R. 1934 Mad. 226=65 M.L.J. 617.**

———Infringement—Injunction—Interlocutory injunction—Refusal on account of delay. *See* C. P. CODE, O. 39, R. 1—TRADE MARK. **26 S.L.R. 335.**

———*Infringement—Injunction—Principles governing—Delay.*

There is in principle no distinction between a case in which the name, of the use of which the complaint is made, is the name of the person carrying on the business and a case in which it is not. In both cases, the law is clear that nobody has any right to represent his goods as the goods of somebody else. *Valentine Meat Juice Co.'s case*, (1910) 83 L.T. 259; *Reddaway* v. *Benham*, (1896) A.C. 199, Ref. Where, however, it was shown that the defendant commenced to use the name complained of in connection with his goods as early as 1917 but the plaintiff in all subsequent notices and proceedings, complained only of the get-up of the defendant's goods and not of the use of the name, and only filed a suit to restrain the use of the name eight years later, it was held the conduct of the plaintiff disentitled him from an injunction to restrain use of his trade name. (*Curgenven and Bhashyam Ayyangar, JJ.*) ABDUL KAREEM SAHIB *v.* ABDUL KARFEM SAHIB. **I R. 1931 Mad. 682=132 I.C. 650=1931 M.W.N. 311= A.I.R 1931 Mad. 461.**

———*Infringement—Injunction—Suit for—Burden of proof.*

Where the action for the infringement of trade-mark is in substance a *quia timet* action, in the absence of evidence of actual confusion, a strong case must be made to justify a conclsion that confusion will result from the appearance of the defendant's goods in the market. (*Lord Tomlin.*) MALAYAN TOBACCO DISTRIBUTORS, LTD, *v.* THE UNITED KINGDOM TOBACCO CO., LTD. **150 I C 229=7 R.P.C. 11=39 L.W. 755=A.I.R. 1934 I.C. 167=66 M.L.J. 588 (P.C.).**

———*Infringement—Injunction—Suit for—Principles applicable—Plaintiffs selling for many years cigarettes and smoking tobacco—Defendants recently starting sale of chewing tobacco—Figure of elephant a common feature on packets and tins of both.*

Per *Niamatullah, J.* (*concurring with Iqbal Ahamd, J. and King, J., contra*).—The plaintiff company are the manufacturers and sellers of cigarettes and tobacco known as "Virginia Bird's Eye" smoked in pipes of the European style. The packets and tins containing respectively the cigarettes and the tobacco have the picture of an elephant on them. It is not disputed that the plaintiff company have acquired a right in the trade mark of elephant for their cigarettes and tobacco, having used the same for a considerably long time. The defendant has recently started the manufacture and sale of chewing tobacco The packets and tins in which the defendant sells his tobacoo are quite unlike those in which the plaintiffs sell their articles The only common feature is that the defendant's packets and tins also have the figure of an elephant on the label, though its colour and posture are different in the two. In a suit for injunction,

Held, that the general rule is that the plaintiffs, whose goods have acquired a reputation in the market through a trade-mark or name with which their goods have become associated, have a right to restrain the defendant from using a trade mark or name which is identical with or similar to that of the plaintiffs, and such right extends not only to the particular goods sold by the plaintiffs but also to cognate classes of goods, provided the cumulative effect of the similarity of the mark, the commercial connection between the plaintiff's goods and those of the defendant and surrounding circumstances are such as to lead the unwary customers to mistake the defendant's goods for those of the plaintiffs, but that in the circumstances of the case, while it is not impossible for some ignorant and particularly indiscriminating persons to mistake the defendant's goods for those of the plaintiffs, persons exercising ordinary caution are not likely to assume that the tobacco sold by the defendant was manufactured by the plaintiffs and therefore the trade-mark used by the defendant is not a colourable imitation of the plaintiffs' mark and that the plaintiffs' right in respect of their elephant trade mark applies only to cigarettes and smoking tobaoo and does not extend to chewing tobacco. (*Niamatullah, J.*) THOMAS BEAR & SONS, LTD. *v.* PRAYAG NARAIN. **4 A.W.R. 1028 =57 All. 510=154 I.C. 788 (2)=7 R.A. 804=1935 A.L J.80=A.I.R. 1935 A. 7.**

———*Infringement—Injunction—Temporary injunction—Application for—Balance of convenience.*

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Where in a suit for injunction and other reliefs for infringement of trade mark by the defendants the plaintiff prays for an injunction, the Court has to see on which side the balance of convenience lies assuming that the infringement exists. Where the loss to the defendants by the grant of injunction cannot be remedied if plaintiff fails, but the plaintiff's interests can be otherwise safeguarded, the injunction should be refused. (*Jai Lal and Agha Haidar, JJ.*) HARI CHAND ANAND & CO *v.* SINGER MANUFACTURING CO. **149 I.C. 1064 = 6 R.L. 794 (2) = A.I.R. 1933 Lah. 1046.**

——Infringement Offence. *See* PENAL CODE (1860), S. 476. **26 S.L.R. 241.**

——*Infringment*—Quia timet *action—Absence of evidence of confusion.*

Where the action for the infringement of trade mark is in substance a *quia timet* action, in the absence of evidence of actual confusion, a strong case must be made to justify a conclusion that confusion will result from the appearance of the defendant's goods in the market. (*Lord Tomlin.*) MALAYAN TOBACCO DISTRIBUTORS, LTD. *v.* THE UNITED KINGDOM TOBACCO CO., LTD. **150 I.C. 229 = 7 R.P.C. 11 = 39 L.W. 755 = A.I.R. 1934 P.C. 167 = 66 M.L.J. 588 (P.C.).**

——*Infringement—Suit for—Cause of action—Proof of.*

In an action for passing off an infringement of trade-mark, it is essential for the success of the plaintiffs that they should establish by evidence that their goods are known by some name or description of such a nature that the use of the defendant's label will cause people to think that goods bearing that label are the goods of the plaintiffs (*Lord Russell of Killowen.*) MAHOMED NOORDIN *v.* ABDUL KAREEM & CO. **I.R. 1931 P.C. 305 = 134 I.C. 657 = A.I.R. 1931 P.C. 272 (P.C.).**

——*Infringement—Suit for—Defence to—Efforts to guard against deception.*

If the use of a particular name has become associated with the goods of the plaintiff and the same name used by the defendants is calculated to deceive, the plaintiffs are entitled to protection and it is no answer for the defendants to say that special efforts are made to guard against deception in actual fact. (*Panckridge, J.*) LOTUS LTD. *v.* MT. NASIUNESSA BEGAM. **151 I.C. 5 = 7 R.C. 87 = 38 C.W.N. 265 = A.I.R. 1934 Cal. 600.**

——*Mark when* publici juris—*Test.*

The real test to find whether a mark has become *publici juris* is whether the use of it by other persons is still calculated to deceive the public, not the long duration of fraudulent user. If their user may still have the effect of inducing the public to buy goods not made by the original owner of the original trade mark as if they were his goods, then the principle of *publici juris* has no application. (*Narayana Ayyar, C. J., Sahasranama Ayyar and Ouseph, JJ.*) MANAGING PRPRIETOR OF THE MALABAR TILE WOTKS *v.* ARUNACHALAM CHETTIAR. **142 I.C. 555.**

——*Meaning of—Combination of numerals.*

A combination of numerals, if distinctive, can form a trade-mark. (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO. *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom. 373 = 7 R.B. 444 = 155 I.C. 641 = 36 Bom.L.R. 1165 = A.I.R. 1935 Bom. 101.**

——*Passing off—Acquiescence—Effect of.*

Where the owner of a trade-mark stands by and allows a number of different people to copy his mark he loses his right in it by reason of the fact that the mark has become common to the trade, but the owner of a trade mark cannot be said to have thrown his mark open to the trade generally by acquiescing in one other person

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or firm using it. (*Leach, J.*) GASPER & CO. *v.* LEON CHEY & CO. **12 Rang. 534 = 152 I.C. 855 = 7 R.R. 176 = A.I.R. 1934 Rang. 297.**

——*"Passing off"—Action for—Basis of.*

In England, the registration of trade-mark constitutes proof of title, and an action for infringement is only associated with an infringement of a registered trade-mark. A condition precedent to an action for infringement is registration. In this country we have no such system of registration and the remedy of the aggrieved trade lies in a "passing off" action. The basis of a "passing off" action is a false representation. The plaintiff has to show that the act of the defendant complained of is calculated to lead to the passing off of the defendants' goods for those of the plaintiff, and it does not depend on whether the latter has acquired any right of property in the device under which he sells his goods. (*Leach. J.*) GASPER & CO. *v.* LEONG CHEV & CO. **12 Rang. 534 = 152 I.C. 855 = 7 R.R. 176 = A.I.R. 1934 Rang. 297**

——*Passing off—Action for—Burden of proof.*

In actions for passing off in connection with trade marks, the plaintiff has to prove that his goods were known to the public by some distinct name, mark, badge, get up or appearance, and that the defendant's use or imitation of the same is likely to mislead the public into believing that the defendant's goods are those of the plaintiff. Though the actual length of time during which a trade-mark is used or employed is not an important element to be considered, the user or employment must have been long enough to render it probable that a reputation in the market has been acquired. (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO. *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom 373 = 7 R.B. 444 = 155 I.C. 641 = 36 Bom.LR 1165 = A.I.R. 1935 Bom 101.**

——*Passing off—Action for—Defence—Acquiescence—Scope of doctrine—Defendant aware of the legal position.*

It is of the essence of acquiescence, as a defence to an action for passing off, that the party acquiescing should have been aware of the violation of his legal rights and the defendant should either have been ignorant of the plaintiff's rights or deluded by the plaintiff's representation into thinking that his wrongful act was assented to by the plaintiff. Where the defendant was aware of the real legal position and yet deliberately put on the market the spurious goods, there is no room for the doctrine of acquiescence to operate in his favour. (*Page, C.J. and Cunliffe, JJ.*) MOHIDEEN BAWA *v.* RIGAND PERFUME MANUFACTURERS. **10 Rang 133 = I.R. 1932 Rang. 103 = 137 I.C. 391 = A.I.R. 1932 Rang. 114.**

[R. 12 R. 200 (224).]

——*Passing off—Action for—Defences to 'Crown' mark—No actual deception or fraudulent intention proved—Right to injunction and nominal damages.*

The plaintiff started a tile factory at Feroke and chose as his trade-mark the figure of a crown impressed on one side of the title and other minor particulars. The defendant started another factory at Cochin and in 1923 began to use a crown mark which closely resembled that of the plaintiff and exported his tiles to the eastern districts where the plaintiff's tiles were well known.

Held, overruling the contentions of the defendant, (*i*) that the crown, though well-known, had with reference to the plaintiff's tiles, become distinctive; (*ii*) that the public having come to associate the crown mark with the goods of the plaintiff, the defendant acted in violation of the law that no one had any right to pass off his

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goods as those of another ; (*iii*) that so long as there was the possibility of deception of the public, the fact that retail dealers would not be deceived or that a fraudulent intention has not been made out did not disentitle the plaintiff getting relief by way of perpetual injunction and recovering nominal damages even though no special damage was proved ; and (*iv*) that the Court at Cochin had jurisdiction to award relief even though the plaintiff's business was outside Cochin. (*Narayana Ayyar, C.J., Sahasranama Ayyar and Ouseph, JJ.*) MANAGING PROPRIETOR OF THE MALABAR TILE WORKS *v.* ARUNACHALAM CHETTIAR. **142 I.C. 555.**

———*Passing off—Action for — Defence —Delay—Effect.*

Delay is not by itself fatal to an action for passing-off. It can only serve as a basis for an inference of acquiescence which, however, is a question of fact. But where an infringement takes place in Burma of the rights of a firm with its head office at Paris, it is but reasonable that some time should elapse before the local representative can advise the head office about the facts and the latter can instruct him to file a suit. (*Page, C. J. and Cunliffe, J.*) MOHIDEEN BAWA *v.* RIGAND PERFUME MANUFACTURERS. **10 Rang 133 = I.R. 1932 Rang. 103 = 137 I.C. 391 = A.I.R. 1932 Rang. 114.**

———*Passing off—Action for—Descriptive name acquiring secondary meaning—Proof—"Madras Curry Powder"—Injunction.*

Whether a name originally descriptive has acquired a secondary meaning as denoting exclusively the plaintiff's goods depends on the facts of each particular case. The plaintiffs sued for an injunction on the ground that they had acquired an exclusive right to the use of the name "Madras Curry Powder." It appeared however that in the place where the article was sold, it was not generally understood that "Madras Curry Powder" was powder exclusively manufactured by the plaintiffs.

Held, that under those circumstances, an injunction could not be issued against persons selling similar goods under similar names. (*Beasley, C. J and Cornish, J.*) VENKATACHALAM *v.* RAJAGOPAL NAIDU. **55 Mad. 966 = 141 I.C. 660 = I.R. 1933 Mad. 153 = 1932 M.W.N. 835 = 36 L.W. 498 = A I.R. 1932 Mad. 705 = 63 M.L.J. 568.**

———*Passing-off—Action for—Essentials of.*

The gist of a passing-off action is deceit; for "passing-off" is one of the ways by which goods of one trader are sold by another in a manner calculated to deceive the purchaser into thinking that they are the goods of the former. There must be a reasonable probability of deception. There can be no such probability when the goods manufactured by the defendant have neither been manufactured nor sold by the plaintiff before. There is no infringement in such a case. (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO. *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom. 373 = 7 R B 444 = 155 I.C. 641 = 36 Bom.L.R. 1165 = A.I.R. 1935 Bom. 101.**

———*Passing off—Action for—Essentials of—Imitation, a question of fact—Injunction.*

In an action to restrain the defendant from using wrappers resembling those of the plaintiff, there must be evidence of repute. The plaintiff must prove that the imitation is of some marks or other appearances associated in the minds of the customers with the plaintiff's goods. It is not necessary to prove that any one has, in fact, been deceived. It is enough if the defendant's trade mark bears such a close resemblance to that of the plaintiff as to be calculated to mislead incautious purchasers. That is a question of fact. Where the defendant has gone so far as to copy not only the position, size and colour of the plaintiff's hemispheres but to a large extent the distribution of colour and design within them in the wrappers on his beedies (cheap variety of cigarettes), it is an appropriate case for the issue of an injunction. 15 M.L.J. 45 ; *Somerville* v. *Schembri*, (1887) 12 A. C. 453 ; *Leather Cloth Company's case*, (1886) 11 H.L.C. 523, Ref. (*Curgenven and Bhashyam Ayyangar, JJ.*) ABDUL KAREEM SAHIB *v.* ABDUL KAREEM SAHIB. **I.R. 1931 Mad. 682 = 132 I.C. 650 = 1931 M W.N. 311 = A.I R. 1931 Mad. 461.**

———*Passing-off—Action for—Injunction—Actual deception—If necessary—Probability of deception—Considerations.*

In a passing off action, where the plaintiff is shown to have acquired a reputation or goodwill in respect of certain goods in descriptive names derived from the use over a substantial period of a particular mark, the question to be considered is whether an alleged use by the defendants of their mark reasonably calculated to result in the deception of purchasers into the belief that, if they see or are offered the defendant's mark-cloth, they are seeing or getting the plaintiff's mark cloth; and in considering that question, the Court is entitled to inquire not only whether deception is likely to arise from the initiative of the purchasers themselves, but also whether a temptation is likely to be offered to unscrupulous traders to make use of any available similarity of name. There is no difference, in essence, between a case in which deception has, and one in which it has not yet, occurred. And it is not to the astute and experienced dealers alone that the Court has to look. The Court must consider the ordinary characteristics and the normal sense of discrimination, or the lack of it, not only of those experienced dealers who purchase the goods from one another but also of those small retailers in district towns and villages who purchase from the larger dealers and the "man in the street" who is the ultimate purchaser. The Court can also take into account, in assessing the liability to deceive of a particular mark, the ordinary commercial opportunities for intentional deception by dishonest persons. A trader may deliberately set out to filch his rival's trade by a calculated copy of his trade mark or get-up, or he may, while astute enough to avoid what he conceives to be a cynically deliberate copy, endeavour or even be content, to get as near thereto as is possible consistently with his remaining outside the reach of the Court's jurisdiction; or he may assume an offensive mark or get up by carelessness or even inadvertence. But if it results in a reasonable probability of deception, the Court will protect the owner of the infringed mark in all cases, and grant an injunction. (*Braund, J.*) ABDULLA ALLY MOHAMMAD *v.* MOHAMMAD EBRAHIM & CO. **157 I.C. 902 = 8 R.R. 121.**

———*Passing off—Action for—Injunction—Delay—Effect of.*

Mere delay, apart from acquiescence will not disentitle the plaintiff to the grant of an injunction to restrain the defendant from passing off his goods as those of the plaintiff. 13 Rep. Pat. Cas. 457; (1878) 9 Ch. D. 176, Ref. (*Curgenven and Bhashyam Ayyangar, JJ.*) ABDUL KAREEM SAHIB *v.* ABDUL KAREEM SAHIB. **I R. 1931 Mad. 682 = 132 I.C. 650 = 1931 M W N. 311 = A I R. 1931 Mad. 461.**

———*Passing off—Action for—Injunction—Suit for—Plaintiff taking up name associated with defendant and building reputation—Right to restrain defendant from using that name.*

A person, who takes up a name associated with the goods of another, cannot by applying it to his own goods and building up a reputation in his own way, seek to restrain the person, with whose goods the name was pre-

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viously associated and who has not abandoned it from continuing to use the same.

Thus where it was shown that the name 'sait beedies' was used by the defendant for his beedies long before the plaintiff came into the market, subsequently the plaintiff borrowed that name and built up a huge trade and reputation but nevertheless at no time had the defendant discontinued his business or the name he had been using, it was held that, under the circumstances, the defendant cannot be said to "pass off" his goods as those of the plaintiff. 11 H L.C. 530, Ref. (*Curgwen and Bhashyam Ayyangar, JJ.*) HUSSAIN MEAH SAHIB *v.* ABDUL RAHIM SAHIB **I.R. 1931 Mad. 589 = 131 I C 829 = 1931 M W N. 254 = 33 L.W. 554 = A I.R. 1931 Mad 326.**

———*Passing off—Action for—Nature and scope of—Onus of proof.*

A passing-off action is, in essence, a suit in defence of the plaintiff's right of property in the particular name, make or get-up, he claims and in the goodwill attributed thereto. The plaintiff in every case has to establish that he has indeed acquired for himself or his goods a sufficient reputation, under the mark, or under the name by which, in consequence of the use of that mark, his goods have come to be known, to entitle him to treat it as his own, and to be protected (*Braund, J.*) ABDULLA ALLY MOHAMMAD *v* MOHAMED EBRAHIM & CO. **157 I.C. 902 = 8 R.R 121.**

———*Passing off—Action for—Points for proof by plaintiff.*

In an action for passing off, the plaintiff should in the first instance prove that the goods sold under their label and get-up were goods which had a reputation in the market as being goods manufactured or sold by them, of which the label and get up was distinctive and well-known in the particular market and that the goods sold by the defendants were a colourable imitation of the label and get up of the plaintiff's goods. (*Page, C. J. and Cunliffe, J.*) MOHIDEEN BAWA *v.* RIGAND PERFUME MANUFACTURERS **10 Rang 133 = I R. 1932 Rang. 103 = 137 I C. 391 = A.I R. 1932 Rang. 114.**

———*Passing off—Action for—Probability of deception—Intention—Relevancy—Duty of traders to avoid marks tending to confuse one with another.*

In a passing off action it is necessary to find an intentional copying by the defendant of the plaintiff's mark. The relevance of intention is merely that when dishonest intention is present, the Court's task in detecting a probability of deception becomes less burdensome. There is an onus both of commercial honesty and of legal obligation upon traders who adopt marks to avoid with scrupulous care anything tending to confusion with the mark of another. If they do not take pains when making a new trade-mark to make it quite unlike an existing one, they do so at the peril of making evidence against themselves. No man may sell his goods as the goods of another. (*Braund, J.*) ABDULLA ALLY MOHAMMAD *v.* MOHAMED EBRAHIM & CO. **157 I C. 902 = 8 R R. 121.**

———*Passing off—Action for—Right of importer to maintain action.*

Where in the local market a particular brand of goods is associated with the importers and not with their suppliers, the importer is entitled to institute an action for "passing off". A I.R. 1924 P C. 187, Rel. on. (*Leach, J.*) GASPER & CO. *v* LEONG CHEV & CO. **12 Rang. 534—152 I C. 855 = 7 R.R. 176 = A I R. 1934 Rang. 297.**

———*Passing-off—Cause of action—Test of unwary purchaser—Absolute identity of articles not necessary—Damages—Awarding of—Essentials.*

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It is by no means necessary that there should be absolute identity between the articles of the plaintiff and those of the defendant, nor the fact that the two articles when placed side by side appear dissimilar to the European eye is of much consequence. The main test is that notwithstanding the dissimilarities between the two articles, there is contained in the defendant's article such characteristic features as might reasonably lead an unwary purchaser buying the article to believe that he was buying the plaintiff's article. For awarding damages to the plaintiff, the extent of the sale of the defendant's articles is very material. *The Singer Manufacturing Co.* v *Loog* 18 Ch. D 395; *Scixo* v. *Provenzendo*, 1 Ch A. 192, Rel on. (*Page, C. J. and Das, J.*) EASTERN ASIATIC MATCH CO. *v.* KEMMENDINE MATCH CO., LTD **I R. 1931 Rang. 281 = 134 I.C. 217 = A I R. 1931 Rang. 213.**

———*Property in—Acquisition of*

Property in a word, name or any other trade-mark cannot be acquired until the vendible article is put on the market, for no property can be acquired except through the process of sale, or offering for sale, in the market. Nor can there be property in a trade-mark apart from the goods of which it has become the symbol. (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO. *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom 373 = 7 R B 444 = 155 I.C. 641 = 36 Bom.L. R. 1165 — A I R. 1935 Bom 101.**

———*Right to—If confined to article bearing particular mark—English law.*

Unlike as in England where a trade-mark is registered not only for a particular article but for a class of goods under which the article falls, in India, the right to use a particular trade-mark is confined to the article to which it is affixed; but a plaintiff may prove, by proper and sufficient evidence, that the trade-mark in question has become so identified and associated with his products that his name would suggest itself to a purchaser on seeing it on any other product like the one which is alleged by the plaintiff to be an "allied" product. But the acquisition of an exclusive right to a trade mark in respect of a particular commercial article cannot confer on the owner thereof a right to prohibit the use by others of such mark in relation to goods of a totally different character. (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom. 373 = 7 R B 444 = 155 I C. 641 = 36 Bom.L R. 1165 = A I.R. 1935 Bom 101.**

———*Right to—Protection—Conditions for grant of.*

Protection cannot be granted in respect of a trade-mark unless the plaintiff establishes that the particular mark indicates not merely a certain quality of goods but also that they are the goods of the plaintiff's manufacture. But no claim can be made to a trade-mark in respect of a commodity which is neither manufactured nor sold by the plaintiff at the date of the suit (*Wadia, J.*) ANGLO-INDIAN DRUG AND CHEMICAL CO. *v.* SWASTIK OIL MILLS CO., LTD. **59 Bom. 373 = 7 R. B. 444 = 155 I.C. 641 = 36 Bom L.R. 1165 = A.I R. 1935 Bom. 101**

———*Right to—Suit for declaration—Exclusive right to mark to be made out.*

Every one has the right to use any kind of trade-mark he likes so long as he does not infringe the right of others already acquired. Hence where a plaintiff does not make out a case that the right to the use of a certain trade-mark is the "exclusive right of property" which he has acquired to the exclusion of every one else, a relief to declare that the plaintiff has got the right to use that trade-mark cannot be granted. 6 Rang. 291, Rel. (*Niamatullah and Rachhpal Singh, JJ.*) GANESHI

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LAL *v* ANWER KHAN MAHBOOB & CO. **55 All. 702 =1933 A L J. 1541=I.R 1933 All. 346=143 I.C. 840=A I R. 1933 All. 495.**

———*Title to—Mode of acquisition.*

There is no protection in this country to a registered trade-mark as such and the owner has to prove by evidence that he has acquired a right thereto in the sense that the trade-mark or the trade-name is associated in the minds of the public with the goods manufactured by him. (*Pinckridge, J.*) LOTUS, LTD *v.* MT. NASIUNESSA BEGAM. **151 I C. 5=7 R.C. 87=38 C.W.N. 265=A I R. 1934 Cal. 600.**

———*Trade-name—Cases relating to business name and trade mark—Principles applicable—Distinction.*

One of the few distinctions between the principles applicable to cases relating to business names and those relating to trade-marks is that the rule as to anything being common to the trade does not apply to the former class, except when it is claimed that the business name or part of it connotes the plaintiff's goods or work. At the same time, any word descriptive or otherwise, which is common to the trade is not sufficiently distinctive to found a title to an exclusive right thereto, although the man, who is the first who uses a business name entirely consisting of words common to the trade, is entitled to restrain the use of a new name which is likely to deceive the public into a belief that a rival business is his. (*Remfry, J.*) HORMUS ARDESHAR KANDAWALA *v.* ARDESHAR COWASHJI DUSTOOR. **61 Cal 571=154 I.C. 829=7 R C 535=A I R 1935 Cal 109.**

———*Trade name—Fraudulent use of—Suit to restrain—Facts to be proved by plaintiff*

In order to justify the Court at a plaintiff's instance prohibiting the defendant firm from using its own name in all or any of its business transactions, it is essential for that plaintiff to establish by proper evidence two facts. He must prove that the words in the names of the firms are so alike that the latter will be taken as the same as or equivalent to the former. He must further prove that his firm name has acquired a secondary meaning, *i.e.*, that the word, when applied to goods, means that the goods are the goods of the plaintiff, and of no one else. (*Lord Russell of Killowen*) WILLIAM DIMECH *v.* GOFFREDO ALESSANDRO CHRETIEN. **I.R. 1931 P.C. 56=130 I C 312=34 L W. 977=A.I.R. 1931 P C. 15=61 M L.J. 334 (P.C.).**

———*Trade name—Fraudulent use of—What is.*

If the use by the defendants of their firm name does in fact necessarily result in their goods being taken for the goods of plaintiffs, the continued use by the defendants of that firm name would become fraudulent (*Lord Russel of Killowen*) WILLIAM DIMECH *v.* GOFFREDO ALESSANDRO CHRETIEN. **I R. 1931 P C 56 =130 I.C 312=34 L.W. 977=A I.R. 1931 P C. 15=61 M L.J. 334 (P.C.).**

———*Trade name—Goodwill of hotel business—Whether passes by sale of premises.*

Ordinarily a hotel connotes the business carried on by a person, though sometimes the term is also used with regard to premises but it is only owing to their association with the original business carried on by them. Where a person purchased the materials and gardens in which a hotel had been run,

Held, that the vendee did not purchase the goodwill of the business or the right to use the name in which the hotel business had been carried on and that the vendee could continue the business under the original name at some other place. (*Jai Lal, J.*) NIZAM DIN *v.* SHER BAHADUR. **I.R 1931 Lah 859=133 I.C. 891=32 P.L.R. 542=A.I.R. 1931 Lah. 650.**

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———*Trade name—Name widely and substantially established—If entitled to protection.*

A name which is substantially and widely established is not on the account any the less entitled to protection. It is difficult to perceive why, on the ground of public policy or otherwise, a reputation, once *de facto* found to be established, in a word of even universal currency in relation to restricted class of goods should be disentitled to the protection of the Courts. (*Braund, J.*) ABDULLA ALLY MOHAMMAD *v.* MOHAMED EBRAHIM & CO. **157 I.C. 902=8 R R. 121.**

———*Trade name—Passing off—Action for—Damages—Method of assessment.*

In a suit for damages against the defendant for setting up a similar business in a similar name which was likely to lead the public to mistake the defendant's business for the plaintiff's the method of assessment is to allow the plaintiff's usual percentage of profit on the difference between the plaintiff's, usual gross trade earning before the unfair competition began and his actual earnings thereafter, with a lump sum for expected increase of business. Where, however, the plaintiff's business was affected by trade depression, and the plaintiff cut down his advertising and shifted to cheaper premises, any increase of business is eliminated and something must be deducted for trade depression, change of address and curtailed advertising. (*Remfry, J.*) HORMUS ARDESHAR KANDAWALA *v.* ARDESHAR COWASHJI DUSTOOR. **61 Cal. 571=154 I.C. 829=7 R C. 535 =A.I.R. 1935 Cal 109.**

———*Trade name—Passing-off—Action for—Injunction, right to—Form of injunction.*

The plaintiff who was carrying on business for 25 years as "Bombay Dyeing and Cleaning Company" sought to restrain the defendant from carrying on business as "Bombay Art Dyers and Cleaners." The undisputed facts were that the defendant secured the premises, which he knew had been formerly, and then, but recently, occupied by the plaintiff and that he put up signboards like the plaintiff's old signboards in size and shape and that on those signboards—or some of them—the prominent word was 'Bombay".

Held, that apart from the motive of the defendant in selecting the name, the name itself, and the distribution and contents of the notice-boards, made it likely that old customers of the plaintiffs would take the defendant's shop to be the plaintiff's and selecting the premises formerly occupied by the plaintiff certainly made it all the more incumbent on the defendant to distinguish his business from that of the plaintiff and that the plaintiff was entitled to an injunction

Held also, overruling the contention, that the injunction should restrain the use of the word "Bombay" in connection with any business of art dyeing and cleaning, that the injunction should be in the usual form restraining the defendant, his servants and agents from using the name "Bombay Art Dyers and Cleaners", or any other name calculated to induce the belief that the defendant's business was the business of or an agency, branch or department of the plaintiff's business. (*Remfry, J.*) HORMUS ARDESHAR KANDAWALA *v.* ARDESHAR COWASHJI DUSTOOR **61 Cal. 571=154 I.C. 829=7 R.C. 535=A.I R. 1935 Cal. 109.**

———*Trade name—Rights in respect of name of business.*

There are two distinct classes of rights in respect of the name of a business: One only arises when that name or some part of it, whether it be what is known as a fancy word, an ordinary word or a geographical name, has come to mean the goods of, or to connote the skill, probity or excellence of the particular business. The

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other class of right is to a distinct name, that is the right to prevent others from adopting a name which is likely to lead the public to mistake another new business for the plaintiff's business. This right arises immediately on the user of the name by the first person who uses it, provided that the name used does not infringe the rights of another person. (*Kemfry, J.*) HORMUS ARDESHAR KANDAWALA *v.* ARDESHAR COWASHJI DUSTOOR. **61 Cal. 571=154 I.C. 829=7 R.C. 535 =A.I.R. 1935 Cal. 109.**

TRADE UNIONS ACT (1926), S. 13—*Suit by Railway Union—Proper plaintiffs.*

Where in the heading the plaintiff purported to be the N.-W.Ry. Union, Lahore, through two Vice Presidents who were named and the plaint stated that the plaintiffs were the Vice Presidents of the North-Western Railway Union, Lahore.

Held, that *prima facie* the proper plaintiff was not before the Court and that the Union was not properly represented. (*Addison, J.*) N.-W.RY ADMINISTRATION *v.* N. W. RY. UNION, LAHORE. **14 Lah. 330= 148 I.C. 49=6 R.L. 493=34 P.L.R. 975=A.I.R. 1933 Lah 203.**

TRAMWAYS ACT (XI OF 1886), S. 6 (3)—*Tramway Order*, 1921, *Cl.* 13—*Part of undertaking—Land used for purposes of Company—Mode of acquisition, if material.*

Where land is acquired for the purpose of the Tramway, the method of its acquisition is immaterial for the purpose of deciding whether it is part of the Company's undertaking. It is part of the undertaking when it is shown that it belongs to the Company and is suitable for and used by the Company for the purposes of the Tramway such as for stacking sleepers. (*Banerji and King, JJ.*) DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO, LTD. *v.* JAGMANDAR DAS. **53 All. 1009=I.R. 1931 All. 820=134 I.C. 244=1931 A.L.J. 1038=A.I.R. 1932 All. 141.**

———**S. 6 (3)**—*Tramway Order*, 1921, *Cl.* 37—*Effect—Transfer of undertaking—Sanction—Demi-official letter.*

Cl. 37 of the Tramway Order merely lays down that the undertaking can only be transferred with the assent of Government previously obtained but does not specify any form in which such assent should be expressed. A demi official letter by a Secretary to Government in the P.W.D intimating that Government will have no objection to the transfer is sufficient to convey the previous assent of Government. Promoter's transfer upheld. (*Banerji and King, JJ.*) DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO, LTD. *v.* JAGMANDAR DAS. **53 All 1009=I.R 1931 All 820= 134 I.C. 244=1931 A.L.J. 1038=A.I.R. 1932 All 141.**

[**Rel.** 56 A. 330 (347) (Demi-official letter conveying previous sanction of Government—Effect).]

———**S. 6 (3)**—*Tramway Order*, 1921, *cl. 37—Mortgage of undertaking—Sanction not obtained—Effect.*

The rules laid down in the Tramway order have the force of law and a transfer of part of an undertaking such as by mortgage without the previous sanction of the Government is absolutely void and cannot be ratified. (*Banerji and King, JJ.*) DEHRA DUN MUSSOORIE ELECTRIC TRAMWAY CO., LTD *v.* JAGMANDAR DAS. **53 All. 1009=I.R. 1931 All. 820=134 I.C. 244=1931 A.L.J. 1038=A.I.R. 1932 All. 141.**

———**S. 7 (2) (1)**—"*Other works*," *workshops not included.*

The words "other works" used in Cl (1), S. 7 (2), cannot be construed as including workshops. *Farnworth v. Manchester Corporation*, (1928) 1 K.B. 533, Ref. Workshops are not provided for in the Tramways Act. They are provided for in the City Municipal Act. There is nothing in the least inconsistent between the provisions of the Tramways Act and the provisions of the City Municipal Act whereby the Commissioner is empowered to require any one to take out a license before he casts metal, or hammers or breaks iron, or heats metal. The Tramways Company are not entitled to cast metal or to break or hammer iron or beat metal in their workshops without obtaining license from the Commissioner of the Corporation. (*Reilly and Anantakrishna Ayyar, JJ.*) CORPORATION OF MADRAS *v.* MADRAS ELECTRIC TRAMWAYS, LTD. **54 Mad 364 =I.R. 1931 Mad 417=130 I.C. 721=1931 M.W.N. 73=33 L.W. 224=A.I.R. 1931 Mad. 152=60 M.L.J. 551.**

TRANSFER—(*i*) Criminal case. *See* CRIMINAL PROCEDURE CODE (1898), SS. 526 AND 528.

(*ii*) Decree. *See* C. P. CODE, SS. 39 AND 41.

(*iii*) Suit *See* C. P CODE, SS. 22-24.

TRANSFER OF PROPERTY ACT (IV OF 1882)—*Amending Act XXI of 1929—Retrospective effect.*

The T P. Amendment Act XXI of 1929 cannot be held to have retrospective effect. (*Addison, J.*) KIDAR NATH *v.* DUNGAR MAL & SONS. **I.R. 1931 Lah. 913 =134 I.C. 289=32 P.L.R. 361=A.I.R. 1931 Lah. 501.**

———**(and Bengal Tenancy Act)**—Applicability and relative scope—Distinction between cases falling under the two. *See* B. T. ACT AND T. P. ACT. **16 Pat.L.T. 633=A.I.R. 1935 Pat 508.**

———Applicability—Lease prior to Act—Solenama—Registration—Necessity. *See* REGISTRATION ACT, S. 17 (1) (*d*). **39 C.W.N. 98=A.I.R. 1935 Cal. 261.**

———*Applicability—N W F P.*

The Transfer of Property Act does not apply to North-West Frontier Provinces but its principles do govern cases arising amongst its residents. (*Mir Ahmad, A.J.C.*) GANDHA SINGH MEHR SINGH *v.* SECRETARY OF STATE. **152 I.C. 231=7 R.Pesh. 47=A.I.R. 1934 Pesh. 101.**

———*Applicability—Punjab.*

The Transfer of Property Act does not apply to the Punjab. (*Dalip Singh, J.*) RATAN CHAND *v.* SMAIL. **149 I.C. 853=6 R.L. 753 (2)=A.I.R. 1933 Lah. 821.**

———**(as amended in 1929)**—*Applicability—Punjab.*

Though the Act as amended in 1929 is not in force in the Punjab, the general principles of the Act are nevertheless applicable. (*Addison and Agha Haidar, JJ.*) MOHAMMAD ABDULLAH *v.* MOHAMMAD YASIN. **I.R. 1933 Lah 113=141 I.C 377=34 P.L.R. 245=A.I.R. 1933 Lah. 151.**

———*Lease of bank—Agricultural and non-agricultural—Law governing.*

In a document of lease no reference was made to cultivation. Neither was there any stipulation as to payment of cesses and the true purpose of the lease was preservation and rearing of fishes, grazing of cattle on the bank being only a subsidiary one.

Held, that the lease was for non-agricultural purposes governed by the provisions of Transfer of Property Act and not by those of Bengal Tenancy Act. 20 W.R. 341 and 34 C.W.N. 1063, Foll. (*Mitter, J.*) BIR BIKRAM KISHORE MANIKYA BAHADUR *v.* AMANADDIN. **159 I.C 235=8 R.C. 297=40 C.W.N. 156=A.I.R. 1935 Cal 638.**

———*Mortgagee—If includes mortgagee decree-holder.*

T. P. ACT (1882).

A mortgagee had obtained a preliminary decree on his mortgage. Government sold the property for arrears of land revenue and there was a surplus remaining after the satisfaction of the land revenue. Mortgagee decree-holder attached the surplus under S. 73. It was contended that after mortgagee had obtained his preliminary decree the mortgage no longer existed; he was no longer a mortgagee, but a decree-holder, and what rights he had were under the mortgage decree, that is to say, under C. P. Code, and not under the T. P. Act.

Held that the mortgage must in some sense be held still to subsist, because the persons having the right of redemption could exercise that right up to the time of the confirmation of the sale of the property in execution of the mortgage decree. A mortgagee decree holder may be described as a mortgagee in a apotheosis, but he still can be thought of as a mortgagee. The word 'mortgagee' in S. 73, T. P. Act should not be interpreted so rigorously as to exclude mortgagee decree holders. (*Baguley and Mackey, JJ.*) U THET *v.* TOWNSHIP OFFICER, KAWA. **160 I.C. 130=8 R.B. 342=A.I.R 1935 Rang 409.**

———*Scope—If exhaustive—English law—Applicability of—Suit for sale by statutory charge-holder.*

The Transfer of Property Act was not intended to be exhaustive, and does not profess to be a complete Code In any case not covered by the Act, the Court is entitled to apply rules of English law which are not inconsistent with the Act; and the holder of a statutory charge is entitled to a decree for sale. (*Lort Williams and Costello, JJ.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUN CHANDRA SINGHA. **61 Cal. 1047= 60 C.L.J 312=153 I C 972=7 R.C 414=38 C.W.N. 917=A.I R. 1934 Cal. 862.**

———*Scope—Transfer of interest in immovable property—Registered instrument not necessary.*

There is nothing in the Transfer of Property Act to suggest that no transfer of interest in immovable property can be effected without a writing duly registered A.I R. 1927 Sind 200, Rel. on. (*Rupchand, A J C.*) KALUMAL TOLARAM *v* AHMED NUR MAHOMED. **25 S L R. 405=I R 1931 Sind 117=134 I C. 373= A.I.R. 1931 Sind 107.**

———**S. 2**—Transfer of actionable claim or novation. *See* TRANSFER OF PROPERTY ACT, S. 130. **56 Bom. 462=A I.R 1932 Bom 446.**

———**Ss. 2 (c) and 111 (g)**—*Tenure created prior to Act—Acquisition by holder of superior tenure after Act—If causes merger.*

In view of S. 2 (*c*) of the T. P. Act, there is no scope for the application of S. 111 (*d*) of the Act to tenures which were created before the Act came into force. Therefore, where an inferior tenure, constituted before the Act, is acquired by the holder of the superior tenure after the Act came into force, there is no merger of the one in the other by operatian of law, when it is found that the holder has an intention to keep the two separate. (*R.C. Mitter, J.*) RAJA BEJOY SINGH DUDHORIA *v.* TARINI CHARAN SAHA. **39 C.W.N. 694.**

———**Ss. 2 (d) and 53**—*Applicability to Punjab—Right of creditor to sue for declaration that transfer by debtor is with view to defeat his rights.*

The Transfer of Property Act has not been extended to the Punjab and the Courts in the Punjab are not bound by its technicalities, though sometimes reference is made to such of its provisions as embody the principles of the common law, based on equity, justice and good conscience. In the Punjab, creditors have been allowed on general principles of equity, justice and good conscience, to sue for a declaration that their debtor had transferred his immovable property with a view to defeat or delay their rights. S. 2 (*d*) of the Transfer of Property Act contains a highly technical provision which is not binding on the Courts in the Punjab and cannot be invoked to defeat such a suit. (*Tek Chand and Coldstream, JJ.*) CHATTRU MAL *v.* MT. MAJIDAN. **15 Lah. 849=150 I C. 888=7 R.L. 30=35 P.L.R 402=A I R 1934 Lah 460.**

T. P. ACT (1882), S. 3.

———**Ss. (2) (d) and 54**—Applicability—Sale by receiver in insolvency—Not exempt from registration. *See* T. P. ACT, S. 54—APPLICABILITY. **40 L.W. 747 =67 M L.J. 746.**

———**S. 2 (d)**—*Security bond—Assignment to minors on attaining majority—Mode.*

Where a Court obtains a security bond which hypothecated immovable property to secure a proper disposal of the money due to minors, deposited with it, an assignment of the security bond in favour of the minors on their attaining majority in order to enable them to realise the money from the surety can be made by an order of the Court, without any registered deed of transfer. (*Sulaiman, A C.J., Mukerji and Boys, JJ.*) RAM SARAN DAS *v.* YUDHISHATAR PRASAD. **53 All. 786=I R. 1931 All. 760=133 I C. 904=1931 A.L. J 503=A.I R. 1931 All. 389 F.B.).**

———**Ss. 2 (d) and 51**—*Transfer in execution of decree—Applicability of S. 51 of the Act.*

S. 51, T. P. Act, does not apply to a transfer in execution of a decree. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I C. 401=1931 A.L.J. 273= A.I.R. 1931 All 277 (F.B.).**

———**S. 3**—*Actionable claim—Assignee of co-sharer's right to recover profits*

A right to recover profits from the co-sharer which is enforceable in the Revenue Court is not an actionable claim (*Sulaiman, C.J., Mukerji and King, JJ.*) LALLU SINGH *v.* CHANDER SEN. **56 All. 624=6 R. A 586=147 I.C. 937=15 L R. 29 (Rev)=3 A.W.R. 39=18 R D. 32=1934 A.L.J. 1=A.I.R. 1934 All. 155 (F.B.).**

———**Ss. 3 and 6 (e)**—*Actionable claim—Claim for unliquidated damages for breach of contract—Assignability of.*

A claim to recover an ascertained amount is an actionable claim and can be validly transferred; but a claim for unliquidated damages for breach of contract, after the breach, is not on "actionable claim" within the meaning of S. 3 and cannot be transferred because of the provisions of Cl. (*e*) of S. 6, T. P. Act. (Case-law discussed.) (*Niamatullah and Rachhpal Singh, JJ.*) MOTI LAL *v.* RADHEY LAL. **55 All. 814=147 I.C. 529 (2)=6 R.A. 484=1933 A.L.J. 1009=A.I.R. 1933 All. 642.**

[R. 10 Luck. 26 (29).]

———**S. 3**—*"Actionable claim"—Provident fund—Right of subscriber.*

The right of the subscriber or depositor to the Provident Fund money is a right to get a definite sum out of the Provident Fund arising out of an obligation created by the rules of the Provident Fund and is hence an actionable claim as defined in S 3, T. P. Act. 36 Cal. 936 (F B.) and A.I.R. 1935 Cal 271, Rel on. (*Nasim Ali and Henderson, JJ.*) BHUPATI MOHANDAS *v.* PANINDRA CHANDRA CHAKRAVARTY. **63 Cal 578= 62 C.L J 359=160 I.C. 219=8 R.C. 412=40 C.W.N. 102=A I.R. 1935 Cal. 756**

———**S. 3**—*Actionable claim—Right to recover arrears of annuity charged upon immovable property.*

A right to recover arreas of annuity is a debt and though charged upon immovable property, the claim under it amounts to an actionable claim. (*Sir Shadi*

T. P. ACT (1882), S. 3.

Lal.) SATINDRA NATH *v.* JATINDRA. NATH. **62 I. A 265=63 Cal. 1=42 L W 474=1935 A W.R 1177=8 R P C 27=37 Bom. L.R. 833=16 Pat L T 739=1935 M W N. 1145—1935 O.W.N. 952=157 I C. 419=39 C W.N 1191=1935 A L.J 1005=A.I. R 1935 P C. 165=69 M L J. 503 (P C)**

———**S 3**—*Actionable claim—Secured debt—Transferability of debt apart from security.*

A debt is distinct from the security. A debt secured upon immovable property does not become identified with it, it exists as movable property. The debt can be transferred without the security. The effect of the definition of "actionable claim" introduced by the Amending Act of 1900 is only to restrict the statutory rights on transfer such as the right to sue in the transferees' name, etc., to such transfers as are transfers of actionable claims as defined. But it does not mean that the debt without the security cannot be made the subject of transfer at all. (*Lord Atkin.*) THE IMPERIAL BANK OF INDIA *v.* THE BENGAL NATIONAL BANK, LTD **58 I A. 323=59 Cal. 377=I.R. 1931 P.C 299=134 I C 651—33 Bom. L R 1338—34 L W. 569=35 C W N. 1034=1931 M.W N. 910—1931 A L J. 804=54 C. L J 117=A I R. 1931 P.C. 245=61 M L.J. 589 (P C).**

[Appl 66 M.L.J. 380 (382). **Expl & Appl** 62 I.A. 115 (123) **]**

———**(as amended), S.** 3—"*Actionable claim*"—*Unpaid dower debt*

A claim to unpaid dower debt is an actionable claim as now defined in S. 3. (*Pullan and Niamatullah, JJ.*) AMIR HASAN KHAN *v.* MAHOMED NAZIR HASAN **54 All 499—I R. 1932 All 254—136 I.C. 833—1932 A L J 275—A I R 1932 All 345.**

———**S. 3**—*Attestation by acknowledgment of mark.*

The word 'attested' in S. 3 as amended covers the personal acknowledgment from the executant of a signature or mark. Where one of the attesting witnesses gave evidence that the attesting witnesses were present when *L* executed the document and the executant made his signature in his presence and the attesting witnesses were present when *L* executed the document and made their marks.

Held, that the deed was validly attested. (*Mukerji, J.*) RAM CHARAN *v.* BHAIRON **53 All 1=I.R. 1931 All. 353=131 I.C. 241—1930 A L J. 1561=A I R. 1931 All 101.**

[Diss 6 Luck. 619 (634). **Overr.** 54 A. 1051 (1058) (F.B.).**]**

———**S. 3**—*Attestation—Amending Act XXVII of 1926—Retrospective effect.*

The word 'attested' as defined by the Amending Act XXVII of 1926 takes retrospective effect because of Act XII of 1927. Where a mortgage suit was filed in 1925 and at the trial the defendants admitted execution but contested the attestation and one of the two attesting witnesses when examined stated that he did not see the defendants sign their names but that they admitted execution before him and the other witness and thereupon they signed their names as witnesses

Held, that the mortgage bond was proved to have been duly attested. (*S. K. Ghose J.*) PROVAKAR MUKERJEE *v.* INDRA NARAYAN GHOSH. **I.R. 1931 Cal 835 =134 I C 531=53 C.L J 326.**

———**S. 3**—*Attestation*—Animo attestandi.

Attestation means a certain act with reference to execution of the instrument. The act must be with the intention of attesting the executant's signature, *i.e.*, it must be done with *animo attestandi*. (*Hasan, C. J. and Bisheshwar Nath, J.*) CHANDRANI KUER *v.* SHEO NATH. **6 Luck 619=I.R. 1931 Oudh 273=132 I C 337=14 O.L.J. 36=8 O.W N. 194=A.I.R. 1931 Oudh 146.**

T. P. ACT (1882), S 3.

———**S 3 (as amended by Act XXVII of 1926)**—*Attestation—Effect of amendment—Mortgage held invalid prior to amendment.*

Although the amendment of the law made by Act XXVII of 1926 was intended by the legislature to have retrospective effect and to validate mortgages executed before the amending Act was passed, still the legislature did not intend to validate the mortgages held by a competent Court to be invalid for want of proper attestation according to the law then in force. *Eyre* v. *Wynn-Mackenzie*, (1896) 1 Ch. 135 and *Day* v. *Kelland*, (1900) 2 Ch 745, Rel (*Rupchand and Wild. JJ.*) HARBHAGWANDAS *v.* GHULAM SHAH. **25 S L R. 59=I R 1931 Sind 79=131 I.C. 719=A I R 1931 Sind 64.**

———**S 3 (as amended by Act XXVII of 1926)**—*Attestation—Insufficient attestation—Deed executed by pardanashin lady.*

If the attestors to a deed of mortgage executed by a gosha lady did not see her sign it, the lady did not acknowledge her signature to it, and the attestators themselves did not sign the instrument in the presence of the lady, the instrument is not properly attested within the meaning of the term 'attested' as defined by the Amending Act of 1926. (*Beasley, C.J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=33 L.W. 95=136 I C. 38—I R. 1932 Mad. 246=A.I.R. 1931 Mad. 140=60 M.L J. 56.**

———**S. 3**—*Attestation—Insufficient attestation—Deed by pardanashin lady—Admission by her as to thumb impression on deed.*

A pardanashin lady placed her thumb impression on a document and there was a thick curtain separating her from the other people It was found that she could not see the attesting witnesses from inside nor was her attention called to the fact that they were signing the deed as attesting witnesses.

Held, that the admission by the lady as to the existence of her thumb impression on the deed did not do away with the necessity of proof of proper attestation and that the attesting witnesses in the case could not be said to have signed in her presence and that there was no proper attestation. (*Wazir Hasan, C J. and Smith, J.*) MUSHARRAFI BEGAM *v.* KUNDAN LAL. **9 Luck. 12=6 I R (Oudh 12=144 I C. 860=10 O.W. N 724=A I R 1933 Oudh 365**

[Reversed 63 I.A. 326 (P.C) **]**

——— **S. 3**—*Attestation—Knowledge of contents.*

Mere attestation cannot necessarily import knowledge of the contents of the document, much less can it amount to a sanction of the alienation. Rule applied to attestation by kazi of transfer deed executed by mutawalli. (*Patkar and Murphy, JJ.*) HAMIDMIYA SARFUDDIN *v.* NAGINDAS JIVANJI **57 Bom 709=148 I.C. 385=6 R B. 294=35 Bom.L R. 252=A.I.R. 1933 Bom. 217.**

———**S 3 (as amended by Act XXVII of 1926)**—Attestation by marksman—Validity — "Signed the instrument"—Meaning of *See* GENERAL CLAUSES ACT, S 3 (52). **58 Mad 220=68 M L J 191.**

———**S. 3**—Attestation — Mortgage— Essentials of valid attestation—No evidence that the witnesses signed in the presence of the executant—No sufficient attestation. *See* EVIDENCE ACT, S. 71—ATTESTING WITNESS. **1931 A L J. 342=A I.R. 1931 All 411.**

———**Ss. 3 and 59**—*Attestation—Signature affixed in presence of one witness only—Mortgage deed—Receipt clause signed by mortgagor and attested by two witnesses—Signature of Registering Officer and of identifying witnesses—Sufficiency of attestation—Evidence Act, S. 90.*

T. P. ACT (1882), S. 3.

At the foot of the witness clause in a deed of mortgage, the mortgage was signed by one attesting witness only ; below that signature and attestation, there was a receipt clause by the mortgagor admitting receipt of consideration and signed by him, which signature was witnessed by two persons, one of whom had attested his signature to the execution of the document. On the same day, *i.e.*, on the day of execution during the registration of the document, the mortgagor admitted execution, signed the endorsement, he was identified by a witness who too signed below, and finally the Sub-Registrar signed the endorsement ; the Sub Registrar also wrote another endorsement stating that it was registered which too was signed by him.

Held, (1) that the mortgage deed was not validly attested as contemplated by Ss. 3 and 59, T. P. Act, and that the signatures of the witnesses to the receipt clause amounted only to an acknowledgment by them that the mortgagor admitted receipt of the consideration and had signed the deed in that place for that purpose and was not a valid attestation ; (2) that neither the signatures of the Sub-Registrar not that of the identifying witnesses at the registration constituted an attestation within the meaning of S. 59 ; (3) that what took place before the Registering Officer had nothing to do with and could not be looked at for the purpose of proving, attestation of a document requiring registration and that the Registration Act assumed that the document sought to be registered was a document complete in all essentials before it was presented for registration ; and (4) that in such a case, even if the document be over thirty years old, the Court was not entitled to presume that the executant and the attesting witnesses were all present and made their signatures at one and the same time in each other's presence. (*Blackwell, J.*) HARKISANDAS *v* DWARKADAS. **161 I C. 374 = 8 R.B. 342 = 37 Bom.L.R. 913 = A.I R. 1936 Bom 94.**

——**S. 3 (as amended by Act XXVII of 1926)**—"*Attestation*"—*Signature of Registering Officer.*

The signature of the Registrar or Sub Registrar on the back of the document registered by him may be treated as a valid attestation, but before that can be done, evidence is necessary to establish that the Registering Officer signed the document in the presence of the executant. (*Beasley, C.J. and King, J.*) NAGAMMA *v.* VENKATRAMAYYA. **58 Mad. 220 = 154 I C 777 – 7 R M. 497 = 40 L.W. 937 = A.I R. 1935 Mad. 178 (2) – 68 M.L. J. 191.**

——**Ss. 3, 59 and 123**—*Attestation—Signature of Registrar—Gift deed Attestation by one witness only—Validity—Registrar, if an attesting witness.*

There is nothing in law to prevent a Registrar from being treated as an attesting witness to a deed of gift registered by him, even though the signature of the Registrar might have been made *alio intuitu*, to satisfy the requirements of the Registration Act provided the conditions for a valid attestation under the Transfer of Property Act are fulfilled. But a deed of gift which on the face of it is attested only by one witness, whose name alone appears as such, cannot be held to be a validly attested document, when there is no evidence to show that the Registering Officer had signed in the presence of the executant, although the endorsement of the Registrar shows that the executant had admitted execution of the document before the Registrar. (*Roy, J.*) NILIMA BASU *v.* JOHARLAL SARKAR. **61 Cal. 525 = 151 I.C. 1063 = 7 R.C. 216 = 38 C.W.N. 753 = A.I R. 1934 Cal. 772.**

——**S. 3**—*Attestation—Signature of Sub-Registrar—Sufficiency of.*

T. P. ACT (1882), S. 3.

In the absence of evidence that the Sub Registrar affixed his signature or put his seal on the mortgage bond in the presence of the lady executant, it cannot be said that the bond was properly attested 48 C.L.J 281, Foll. (*Mitter, J.*) HEM CHANDRA BAG *v.* GUIRAM DAS. **150 I C. 762 – 7 R C. 44 – 58 C.L J 545.**

——**S. 3**—*Attestation—When operates as estoppel.*

Where an attesting witness is present at the transaction and attests the deed having heard its contents, he is estopped from challenging the right of the transferee. 20 Cal. 296 (P. C.), Rel on (*Mahomed Noor, J.*) BHAGWAT RAI *v.* GORAKH RAI **150 I.C. 765 = 7 R. P. 19 = A I.R 1934 Pat. 93.**

——**S. 3**—"*Attested*"—*Acknowledgment of execution to witness—Statement by attesting witness—Sufficiency of.*

Where one of the witnesses who identified the executant before the Sub-Registrar deposed that before he signed the document as an identifying witness he received personal acknowledgment from the executant of his signature.

Held, that the witness must be deemed to be one of the attesting witnesses within the meaning of S. 68 of the Evidence Act and that the deed was duly proved. (*Subhedar and Pollock, J. J. C.*) MT. CHUNNIBAI *v.* GIRDHARILAL. **16 N L J. 319.**

——**S. 3 (as amended by Act X of 1927)**—"*Attested*"—*Amendment has retrospective operation.*

When the intention of the legislature is clear, effect must be given to it. The amendment made by Act X of 1927 was intended to give the definition of "attested" retrospective effect and the meaning of that amendment cannot be controlled by the general saving clause enacted in that and subsequent Acts. A I.R. 1928 Mad 773, Diss. from. (*Jackson, A. J. C.*) PRABHULAL *v.* JHADURAMSAO. **I R. 1931 Nag 97 – 132 I C. 449 = A.I.R. 1931 Nag. 95.**

——**S 3 (as amended by Act XXVII of 1926, S 2)**—"*Attested*"—*Person signing on behalf of the executant—Capacity to attest.*

A person who signs on behalf of the illiterate executant of a document cannot also sign as an attestor of it. 40 C. 438 and 40 M 550, Foll (*Curgenven, J.*) VENKATARAMAYYA *v.* NAGAMMA. **136 I.C. 343 = I.R. 1932 Mad. 295 – 35 L.W. 233 – 1931 M.W.N. 1242 = A.I R 1932 Mad 272.**

——**Ss 3 (as amended by Act XXVII of 1926, S 2) and 123**—"Attested"—Signature by attestor—Necessity for—Marking—Invalidity of—Amending Act retrospective. *See* T. P. ACT, SS. 123 AND 3. **1931 M.W.N 1242.**

——**S. 3**—"*Attested*"—*Signature and endorsement of Sub Registrar—Sufficiency of.*

Before the endorsement by the Sub-Registrar can be treated as valid attestation, it must be proved that he signed in the presence of the executant. 60 M L.J. 302, Foll. (*Curgenven, J.*) VENKATARAMAYYA *v* NAGAMMA. **136 I.C. 343 = I R. 1932 Mad. 295 = 35 L. W. 233 = 1931 M.W.N. 1242 = A.I.R. 1932 Mad. 272.**

——**S. 3**—"*Immovable property*"—*Debt secured on immovable property—Nature of*

Per *Lord Atkin.*—"The debts may be secured either on immovable property or on merchandise, they must be wholly secured or partly secured. the security may have been given when the debt was created or later, but in any case the debts exist as *movable* property and do not, if secured, become identified with the security or transformed into land in the one case or merchandise in the other. The separation between debt and security is well established." (*Lord Atkin.*) THE IMPERIAL BANK OF

T. P. ACT (1882), S. 3.

INDIA *v.* THE BENGAL NATIONAL BANK, LTD. **58 I.A. 323 = 59 Cal. 377 = I.R. 1931 P.C. 299 = 134 I.C. 651 = 34 L.W. 569 = 33 Bom L.R. 1338 = 35 C.W.N. 1034 = 1931 M.W.N. 910 = 1931 A.L.J. 804 = 54 C.L.J. 117 = A.I.R. 1931 P.C. 245 = 61 M.L.J. 589 (P.C.).**

——**S. 3**—*Immovable property—Mortgage of fruit-bearing trees—Formalities if need be complied with.*

Whether or not a mortgage of fruit-bearing trees is a mortgage of immovable property is a question dependent in each case upon the intention of the contracting parties and cannot be settled by an inflexible rule. Where there is a mortgage with possession of fruit-bearing trees with the intention that the mortgagee is to remain in possession during the years of the mortgage and enjoy the fruits and should not cut down the trees so as to convert them to either timber or firewood, it must be held that the trees so mortgaged were either immovable property or at least an interest in immovable property and the mortgage should be effected with the formalities prescribed by S. 59, T. P. Act. (*Sen, J.*) SHIV DAYAL *v.* PUTTU LAL. **54 All. 437 = I.R. 1932 All. 641 = 140 I.C. 491 = A.I.R. 1933 All. 50.**

——**S. 3**—*Immovable property—Mortgagee's rights.*

Mortgagee rights are indisputably immovable property. Even a mortgage debt is immovable property, as it is not an actionable claim. (*Tapp, J.*) BANARSI DAS *v.* RAM CHANDAR. **I.R. 1933 Lah. 116 = 141 I.C. 421 = 34 P.L.R. 233 = A.I.R. 1933 Lah. 210.**

——**S. 3**—*Notice—Constructive notice—Applicability—Kanom—Renewal—Omission of melcharathdar to enquire.*

In the case of holdings under a Kanom Kuzhikanom and other similar demises, the tenants do as a matter of fact expect renewals. A melkanomdar therefore who does not make enquiries whether the tenant has a renewal in his favour should be deemed to have constructive notice of the renewal and the melcharth cannot be enforced as against the kanomdar. Doctrine of constructive notice discussed. (*Reilly and Anantakrishna Ayyar, JJ.*) KALYANI *v.* KRISHNAN NAMBIAR. **55 Mad. 519 = I.R. 1932 Mad. 489 = 138 I.C. 78 = 35 L.W. 307 = 1932 M.W.N. 193 = A.I.R. 1932 Mad. 305 = 62 M.L.J. 525.**

——**S. 3**—Notice—Constructive notice—Banker and customer—Rate of interest charged on overdraft—Knowledge and ratification of. *See* BANKER AND CUSTOMER. **59 Cal. 662 = A.I.R. 1932 Cal. 521.**

——**S. 3**—*'Notice'—Constructive notice—Plea of bona fide purchaser—Attestation by purchaser of deed creating charge—Close relation with the family and circumstances.*

In accordance with the terms of a deed of partition between the plaintiff and his brothers, defendants 1 to 3, the plaintiff claimed a charge over the properties of the first defendant in respect of certain debts which he had been obliged to pay on his behalf. The fifth defendant resisted the claim by pleading that he was a *bona fide* purchaser of those properties from the first defendant. That plea was negatived by the Court on the following grounds: (*i*) The fifth defendant was a close relation of the plaintiff's family. (*ii*) He was closely connected with the negotiations and discussion preliminary to the execution of the partition deed (*iii*) He was the first attestor to the partition deed. (*iv*) In pursuance of that partition deed, the fifth defendant's wife had filed a suit for partition against the plaintiff's family in respect of her mother's property. (*v*) In the sale deeds of the various items of the properties in favour of the fifth defendant, specific mention was made of the partition deed to account for the vendor's title.

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Held, that, under the circumstances, the fifth defendant had notice of the clause in the covenant creating the charge; even if not, his omission to ascertain the contents of the partition deed should be construed as wilful abstention from an enquiry which he ought to have made. The charge in favour of the plaintiff was therefore binding on the fifth defendant 16 M. 301, Ref. (*Curgenven and Sundaram Chetty, JJ.*) ABDUL RAZAK ROWTHER *v.* ABDUL RAHIMAN SAHIB. **1933 M.W.N. 1013 = 38 L.W. 463 = 149 I.C. 287 = 6 R.M. 629 = A.I.R. 1933 Mad. 715 = 65 M.L.J. 390**

——**S. 3**—*Notice—Constructive notice—Property known to be in possession of tenant.*

If a person, who purchased land belonging to his vendor, knew that the plaintiff was in possession thereof all along only in the capacity of a tenant, *prima facie* there would be no need for him to institute further enquiry unless it is shown that he had reasons to suspect that the possession of tenancy had suddenly changed into one of ownership. (*Rama Rao and Sreenivasa Iyer, JJ.*) THIMMIAH *v.* VENKAPPA. **10 Mys L.J. 67.**

——**S. 3**—*Notice—Constructive notice—Property in possession of tenant—Lessor's title—Notice of.*

The authorities do not go so far as to lay down that where there is a tenant in possession of the property it is incumbent upon an intending purchaser not only to ascertain what the tenant's rights are but also who is his lessor and what is that lessor's title. The mere circumstance therefore that the property was in possession of a tenant who, if questioned, would have named the lessor is not by itself sufficient to fix the purchaser with constructive notice of the nature and extent of the lessor's title. 16 Cal. 414 and 27 Bom. 408, Ref. (*Curgenven and Cornish, JJ.*) SITTAYYA *v.* KOTAYYA. **I.R. 1932 Mad. 27 = 134 I.C. 1211 = 34 L.W. 669 = A.I.R. 1932 Mad. 71.**

——**S. 3**—*Notice—Constructive notice—Registration.*

Ordinarily speaking, a purchaser must be held to have notice of a prior registered mortgage unless special circumstances are shown which will excuse him from not making a search in the registration office. (*Baguley, J.*) MAUNG HLAW *v.* M.N.S. CHETTYAR FIRM. **6 I.R. (Rang.) 27 = 145 I.C. 118 = A.I.R. 1933 Rang. 153.**

——**S. 3**—*Notice—Constructive notice—Registration.*

The registration of a prior transaction is notice to a party entering into a transaction with respect to the same property on a subsequent date. 48 C. 1, Cons. (*Mukerji and Bennet, JJ.*) RAM LAL *v.* SHIAMA LAL. **I.R. 1931 All. 342 = 131 I.C. 38 = 1931 A.L.J. 73 = A.I.R. 1931 All. 275.**

——**S. 3**—*Notice—Constructive notice—Registration.*

The mere registration of a mortgage is not *per se* constructive notice of the mortgage. No legal obligation is cast upon an auction-purchaser to search the registry before he bids at the action. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All 334 = I.R. 1932 All. 497 = 132 I.C. 401 = 1931 A.L.J. 273 = A.I.R. 1931 All. 277 (F.B.).**

——**S. 3**—*"Notice"—Constructive notice—Registration of sub-mortgage—Omission to search the register—Gross negligence.*

Neither under the old law nor since the amendment is it the law, that registration of a sub mortgage itself is notice to the original mortgagor. But as the plaintiff in a mortgage suit is under a duty to Court to implead all parties interested in the property, his omission to search the register amounts to gross negligence, sufficient to fix him with constructive notice. 48 Cal. 1 (P.C.), Ref. (*Reilly and Anantakrishna Ayyar, JJ.*) VISWANATHA

T.P. ACT (1882), S. 3.

AYYAR *v.* CHIMMIKUTTI AMMA. **55 Mad. 320=135 I.C. 535=I.R. 1932 Mad. 119=1931 M.W.N. 1141 =34 L.W. 635=A.I.R. 1932 Mad. 115=62 M.L.J. 272.**

———**S. 3**—*Notice—Constructive notice—Registration —Punjab.*

As the T.P. Act is not in force in the Punjab, the question whether registration is or is not notice in that province would depend on the facts of each case. (*Bhide, J.*) D. A. V. COLLEGE REGISTERED SOCIETY, LAHORE *v.* UMRAO SINGH. **157 I.C. 92=8 R.L. 84 =A.L.R. 1935 Lah. 129 (2)=37 P.L.R. 168=A.I.R. 1935 Lah. 410.**

———**S. 3**—*Notice—Omission to make enquiry—Gross negligence—Effect of.*

A purchaser of an item of property comprised in a mortgage, who makes no enquiry whatever as to the existence of encumbrances on the property must be held to have had notice of the existence of such encumbrances within the meaning of the T. P. Act prior to its amendment in 1929. Though mere registration might not be notice, when there is evidence that he made no enquiry, notices of the mortgage can be inferred from the evidence which amounts to gross negligence in not making any enquiry. (*Mitter and Patterson, JJ.*) BENGAL COAL CO, LTD. *v.* SITARAM CHATTERJI. **159 I.C. 159=61 C.L.J. 560=A.I.R. 1935 Cal. 667.**

———**S. 3**—*Notice—Partners—Notice to one partner —Effect as against other partner.*

A notice sent to the firm of *K* and *P* and received by *P*, a member of the firm, is just as good a notice as if it were directly delivered to *K* himself. (Case law reviewed. (*Tek Chand and Agha Haidar, JJ.*) KANHAYA LAL *v.* DEVI DAS JAGANNATH. **12 Lah. 328=I.R. 1931 Lah. 417=131 I.C. 289=32 P.L.R. 40=A.I.R. 1931 Lah 227.**

———**S. 3**—"*Notice*"—*Proof of—Attestation.*

Attestation does not involve the witness in any knowledge of the contents of the deed nor fix him with notice of its provisions. 44 C. 186 (P.C.) and 49 C. 334 (P. C.), Rel. (*Tek Chand and Monroe, JJ.*) FAZAL HUSSAIN *v.* JIWAN SHAW. **14 Lah. 369=I.R. 1933 Lah 86=141 I.C. 454=34 P.L.R. 196=A.I.R. 1933 Lah. 551.**

———**S. 3**—*Notice—Proof of—Attesting witness— Knowledge of contents.*

It is true that merely by signing a document as an attesting witness a person cannot be said to have knowledge of its contents but there may be circumstances when he would be deemed to have notice of the contents of the documents. (*Tek Chand and Agha Haidar, JJ.*) TARABAZ KHAN *v.* NANAK CHAND. **I.R. 1932 Lah. 447=138 I.C. 263=33 P.L.R. 685=A.I.R. 1932 Lah. 566.**

———**S. 3**—'*Notice*'—*Purchaser of portion of bhag in possession—Subsequent purchaser of entire bhag— Failure to inquire.*

R was the prior purchaser of an unrecognized portion of a bhag from the bhagdar. *A* who was the subsequent purchaser of the entire bhag sued for possession from *R*. *A* had inquired of the vendor and the talati and was assured and correctly that *R* was entered in the record-of-rights as a tenant. *A* however failed to inquire of *R*.

Held, that in absence of a finding by the lower Courts that *A* deliberately refrained from going to *R* because *A* doubted the information of the vendor and the talati as to the record-of-rights, the abstention from inquiry from *R* did not amount to wilful or gross negligence amounting to constructive notice. (*Madgavkar, J.*) ZAVERCHAND *v.* JESANG. **33 Bom L.R 499=135 I.C. 431 =I.R. 1932 Bom. 79=A.I.R. 1931 Bom. 430.**

T.P. ACT (1882), S. 6.

———**S. 3**—*Notice—Will registered.*

Though a will is registered, except the executant or his agent no one else is competent to take inspection or copies and it will be scarcely justifiable to take registration as sufficient notice for the purposes of limitation. (*Dalip Singh and Bhide, JJ.*) GOPAL SINGH *v.* THAKAR SINGH. **A.I.R. 1935 Lah. 313.**

———**S. 3, Expls. I and II**—Applicability—Co-sharers—Sale by one of joint property by registered deed —If notice to others—Possession of vendee—If adverse. *See* CO-SHARERS—ADVERSE POSSESSION. **1935 R.D. 267.**

———**Ss. 4 and 59**—*Scope.*

S. 4 properly read means, so far as it is applicable to the case of mortgages that if and when a document of mortgage is executed it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of S. 59 which expressly provided that in certain areas a mortgage can be only by means of an instrument in writing. (*Jai Lal and Abdul Rashid, JJ.*) GURDAS MAL *v.* PUNJAB SINDH BANK LTD, RAWALPINDI. **6 R.L. 465=147 I.C. 942=35 P.L.R. 249=A.I.R. 1933 Lah. 972.**

———**S. 5**—*Future property—Hypothecation of movables—Validity.*

A hypothecation not merely of movables existing on the promises at the time but also in respect of movables which might be subsequently acquired and brought there is valid, though it is not governed by the Transfer of Property Act or by the Contract Act (Case-law Ref.) (*Mukerji and Guha, JJ.*) H. V. LOW & CO., LTD. *v.* PULINBIHARILAL SINGHA. **59 Cal. 1372=143 I.C. 193=I.R. 1933 Cal. 372=A.I.R. 1933 Cal. 154.**

———**Ss. 5 and 53**—"*Transfer of property*" — *Partition in Hindu joint family—If transfer—Effect of fraud.*

A partition in a Hindu joint family by which the joint family property has been divided by metes and bounds is a "transfer of property" as defined by S. 5, T. P. Act, and when such partition is effected with a fraudulent intent, S 53, T. P. Act, would apply to it. (*Barlee and Sen, JJ.*) WAMAN RAMKRISHNA *v.* GANPAT MAHADEO. **60 Bom. 34=160 I.C. 242=8 R.B. 255=37 Bom.L.R 925=A.I.R. 1936 Bom. 10.**

———**S. 6**—*Non existent property—Assignment of— Effect.*

Where the estate of interest which a deed of assignment purports to assign has at the date of deed no existence, it is well settled that neither at law nor in equity can the assignment of such an interest operate according to its tenor. In equity such a transfer may in certain circumstances create equitable rights but at law it is useless. *Sweet* v. *Shaw* 3 Jur. 317; *Collyer* v. *Isaacs*, 19 Ch. D 342; *Performing Right Society* v. *London Theatre of Varieties*, (1922) 2 K. B. 433 and (1924) A.C. 1, Ref. (*Lord Blanesburgh.*) AVELINE SCOTT DITCHAM *v.* JAMES J MILLER. **I.R. 1931 P.C. 276=134 I.C. 324=A.I.R. 1931 P.C 203 (P.C.)**

———**S. 6**—"*Property of any kind*"—*Provident Fund —Transferability.*

The amount due to a subscriber out of a Provident Fund is a debt or actionable claim and is therefore "property" within the meaning of the Transfer of Property Act and can therefore be validly assigned by the subscriber. (*Nasim Ali and Henderson, JJ.*) BHUPATI MOHAN DAS *v.* PHANINDRA CHANDRA CHAKRAVARTY. **63 Cal. 578=62 C.L.J. 359=160 I.C. 219= 8 R.C. 412=40 C.W.N. 102=A.I.R. 1935 Cal. 756.**

———**S. 6**—*Property—Transferability—Presumption —Non-transferable property—Onus to prove.*

T.P. ACT (1882), S. 6.

The general rule is that all property is transferable, and the onus of proving that a certain property is not transferable lies upon the person who so asserts. The onus is heavier where such person has borrowed money on the strength of a mortgage-deed in which he professes to have the power of transfer. (*King, C.J. and Zia ul- Hasan, J.*) SHAMS ARA BEGAM *v.* FAKHR JEHAN BEGAM. **159 I.C. 311=1935 O.W.N. 1232=A.I.R. 1936 Oudh 121.**

———**S. 6**—*Religious office—Office of mutawalli—Transferability.*

It is an elementary principle of Mahomedan Law that the office of a sajjadanashin or a mutawalli of a religious endowment cannot form the subject of transfer by sale or mortgage. (*Tek Chand and Agha Haidar, JJ.*) HAJI ALI MAHOMED *v.* ANJUMAN I-ISLAMIA, PUNJAB **12 Lah. 590=32 P.L.R. 867=135 I.C. 56=I.R. 1932 Lah. 40=A.I.R. 1931 Lah. 379.**

———**S. 6**—*Agreement to divide after succession opened—Validity.*

Where an agreement entered into between expectant heirs in 1868 provided for the division of the property after the succession opened,

Held, that the agreement was not hit at by S. 6, T. P. Act or S. 23, Contract Act, and was enforceable. (*Kulwant Sahay and Macpherson, JJ.*) LALITA PRASAD CHAUDHURY *v*, SARNAM SINGH. **14 Pat.L.T. 27=149 I.C. 491=6 R.P. 602=A.I.R. 1933 Pat. 165.**

———**Ss. 6 (a) and 43**—*Applicability.*

There is a distinction between a transfer which is professedly one of mere right, *e.g.*, a right of reversion or expectancy and a transfer of specific property which the transferor erroneously represents he is authorized to transfer though he may have, for the time being, merely a reversionary right therein. Transfers of the former class would obviously fall within the purview of S. 6 (*a*) and would be void *ab initio* while those of the latter class would be governed by S 43. A. I. R. 1928 Nag. 262 and A. I. R. 1929 Oudh 185, Diss. from; 3 C. P. L. R. 72 and 29 I. C. 439, Foll. (*Subhedar, A.J.C.*) SYED BISMILLA *v.* MANULAL CHABILDAS. **27 N L R. 199=I.R. 1931 Nag. 70=130 I.C. 822=A.I.R. 1931 Nag. 51**

———**S. 6 (a)**—*Applicability—Punjab.*

The Transfer of Property Act not being in force in the Punjab, alienation of reversionary rights is not void. A. I. R. 1930 Lah. 928 and A. I. R. 1926 Lah. 39, Relied on. (*Currie, J.*) GOBINDA *v* CHANAN SINGH. **147 I.C 847=6 R.L 453=A.I.R. 1933 Lah. 378.**

———**S. 6 (a)**—*Possibility—Restoration of acquired property to one co-owner to be conveyed to the others—Transfer by another co-owner of his share—Vested interest.*

A piece of land which belonged to several owners was acquired in 1865 by the Government. In 1912 they restored the whole land to *A*, the owner of one half of it, who undertook to convey the pieces of land to the several owners. In 1913, *N* who was entitled to a quarter share therein, sold it to plaintiff who sued for specific performance impleading both *A* and *N*.

Held, that the transfer to the plaintiff was not of a mere possibility, but that as soon as the Government resolution was promulgated announcing its decision to restore the property, a vested interest was created in the heirs, one of whom was *N* and that the transfer by him was valid. (*Tyabji, J.*) LAKSHMAN SUBRAO *v.* BABANI SOIRU. **I.R. 1932 Bom. 528=139 I.C. 642=34 Bom L R. 366=A.I.R. 1932 Bom. 244.**

———**S. 6 (a)**—*Reversioner—Expectancy of—Agreement to sell—Validity.*

T.P. ACT (1882), S. 6.

A contract by a Hindu to sell immovable property to which he is the nearest reversionary heir, expectant upon the death of the widow in possession, and to transfer it upon possession accruing to him is void. 50 C. 239 (P.C.), Ref. (*Mukerji and Guha, JJ.*) BASANTA KUMAK BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C. 802=55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

———**S. 6 (a)**—*Reversioners—Sale by.*

A transfer of the reversionary interest by the reversioners of a Hindu widow is a transfer in expectancy and invalid under S 6 (*a*), 31 M. 554; 50 Cal. 929 (P.C.); 6 C.L.J. 28; 48 A. 150, Ref. (*Madhavan Nair, J.*) SREERAMULU *v* SOMARAJU. **1930 M.W.N. 1054.**

———**Ss. 6 (a) and 43**—*Reversioner—Transfer of interest by presumptive reversioner—Validity of.*

The right of a presumptive reversioner to succeed to the property on the death of the limited owner, in possession is only a *spes successionis* and its transfer is invalid, though in form it purports to be a conveyance of a present interest in the property. The transfer, being expressly forbidden by S. 6 (*a*) of the Transfer of Property Act, does not become valid by the application of S. 43 of that Act on the vendor subsequently succeeding to the property. 29 M. L. J. 733; 53 M. L. J 218 and 122 I. C. 177, Not Foll. 39 M. 554; 41 M. 418; 50 C. 929, Foll. (*Beasley, C. J. and Bardswell, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SAMPATH NAIDU. **6 I.R. (Mad) 170=145 I C 965=1933 M W N. 1377=38 L.W. 610=A.I.R. 1933 Mad. 795=65 M.L J 588.**

———**S. 6 (a)**—Spes successionis—*Death of occupancy tenant leaving wife and daughter—Suit by daughter for declaration of her right of succession—Maintainability.*

On the death of an occupancy tenant leaving a widow and daughter, the property was mutated in favour of the widow for her life or till re-marriage. After about 20 years the widow applied to have the occupancy rights transferred in the name of her daughter, but the daughter was directed to file a suit to have her right declared. Accordingly the daughter filed a declaratory suit that she was the legal heir and entitled to the property. The collaterals contended that the suit amounted only to an assertion of a *spes successionis* and as such was not maintainable.

Held, the suit was maintainable. 9 Lah. 467, Not Foll.; 10 Lah. 58 and 10 Lah. 489, Foll. (*Jai Lal and Agha Haidar, JJ.*) KARIM BAKHSH *v.* MT. RAHMAN. **I.R. 1933 Lah 467=144 I.C. 408=34 P.L.R. 743=A.I.R. 1933 Lah. 555.**

———**S. 6 (a)**—Spes successionis—*Transfer by Hindu reversioner void.*

An agreement by a Hindu to sell immovable property to which he is a reversionary heir, even if the nearest, expectant upon the death of widow in possession and to transfer it upon possession accruing to him is void and it is not a performable contract until the realization of the expectation occurs. Such a transfer is void. 50 Cal. 929 (P.C.). Appl. (*Sulaiman and Kendall, JJ.*) MAHADEO PRASAD SINGH *v.* MATHRA CHAUDHURY. **I.R. 1931 All. 481=132 I.C. 321=1931 A L.J. 295=A I.R 1931 All 589 (2).**

———**S. 6 (a)**—Spes successionis *or vested interest—Properties to be taken by adopted son after widow—Limited power of alienation to widow—Interest of adopted son—Transferability.*

A will provided as follows: After my death, my widow being in possession as owner of all properties shall administer and enjoy the same and having re-paid all my debts for which she can sell a portion of the proper-

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ties she will be competent to adopt. On the death of my widow, my adopted son, if adopted, will get all the properties. During the lifetime of my widow, the adopted son will get an allowance of Rs. 20 a month from my widow.

Held, that though the estate remained vested in the widow till her death and the adoption of a son did not divest her of the estate, the interest of the adopted son was nevertheless a vested interest in the remainder capable of being transferred under the law—and not a mere *spes successionis*. So if the adopted son had, for valuable consideration, agreed to forego is right to some of those properties and convey an absolute title therein to the widow of the testator, the deed would be operative both as a relinquishment and as creating an estoppel. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I. R. 1932 Cal. 540=138 I.C. 882=55 C.L.J. 205=A. I.R. 1932 Cal. 600.**

———**Ss. 6 (a) and 43-A**—Transfer of immovable property by heir apparent—Erroneous representation by transferor that he is full owner—Transferee acting on such representation—Rights of—Transferor acquiring interest subsequently—Previous transfer can operate on such interest. *See* T. P. ACT, SS. 43 AND 6 (*a*). **4 A.W.R. 1121.**

———**S. 6 (d)**—*Applicability—Person having power of enjoyment—Transfer of rights—Right of transferee to claim partition.*

An award making a partition provided that certain property was to belong to *M* who was to be the absolute owner thereof. He was to appropriate and maintain himself with the income and rent of such property but was to have no power to make any transfer such as sale, mortgage, lease, hypothecation, as security and theka for a term or in perpetuity in respect of the property. If he did make transfer, the same was to be considered invalid. Besides *M* any one among his descendants was to have power to make mortgages, etc. *M* by a deed of sale transferred all his rights in the property to *P* who instituted a suit for partition of his share.

Held, that *M* could validly assign his right of enjoyment to *P*, that S. 6 (*d*) did not apply and disentitle *M's* brother to question the right of *P* to partition. *P* could also under the circumstances resist the ejectment by virtue of the possessory right of *M*. (*Pullan and Niamatullah, JJ.*) RAM NATH *v.* NANAK CHAND. **143 I.C 61=I R. 1933 All. 166=1932 A.L.J. 821=A.I.R. 1932 All. 686.**

———**S. 6 (d)**—*Heritable rights—Presumption as to transferability.*

Prima facie properietary rights are transferable and it is for the contesting party to show that such transfer is not permissible.

Held, that certain muafi granted by the ruler for the support of Brahmin, was transferable. (*King, J.*) HARI KISHAN SASTRI *v.* RATAN SINGH. **151 I.C. 562=7 R.A 187=15 L.R. 413 (Rev.)=18 R.D. 328 =A.I.R. 1934 All. 973.**

———**S. 6 (d)**—*Hindu widow—Property allotted in lieu of maintenance—Transferability.*

The widow's right to maintenance is a personal right and as such inalienable. But where property has been given to a widow of a Hindu joint family in lieu of maintenance, the transfer of such property by her is valid and effective during her lifetime. (*Sen and Niamatullah, JJ.*) DHUP NATH *v.* RAM CHARITRA. **54 All. 366=143 I.C. 65 (1)=I.R. 1933 All. 176=A. I.R. 1932 All. 662.**

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———**S. 6 (d)**—Hindu widow—Right of residence of —If saleable. *See* C. P. CODE, S. 60. **69 M.L J. 317.**

———**S. 6 (dd)**—*'Right to future maintenance'—If covers heritable but non-transferable interest in land.*

The right to future maintenance as contemplated by the legislature means a personal right for the maintenance or personal enjoyment of the grantee. It does not cover heritable but non-transferable interest in land. (*King, C. J. and Smith, J.*) MT. BHAGWATI *v.* RAGHUBAR DAYAL. **158 I.C. 710=3 R.O. 118=1935 O.W.N. 1134=A.I.R 1936 Oudh 76.**

———**S. 6 (e)**—*Assignment of ascertained debt—Validity of.*

Where the assignment relates to a debt, the amount of which is ascertained, then the transfer of such a right is valid and is not in contravention of the provisions of S. 6 (*e*). (*Rachhpal Singh and Smith, JJ.*) BAIJNATH *v.* PARMESHWARI DAYAL. **10 Luck. 26= 6 R.O. 582 =149 I.C. 529=11 O.W.N. 691=A.I R. 1934 Oudh 240.**

———**S. 6 (e)**—*Assignment—Claim to interest prior to, is mere right to sue.*

The assignee of a debt so far as the claim to interest due before the date of assignment is concerned purchases a mere right to sue which is not transferable in view of the provisions of S. 6 (*e*). (*Rachhpal Singh and Smith, JJ.*) BAIJNATH *v.* PARMESHWARI DAYAL. **10 Luck. 26=6 R.O. 582=149 I.C 529=11 O.W. N. 691=A.I.R. 1934 Oudh 240.**

———**S. 6 (e)**—*Assignment of right to receive* theka *money—Validity.*

A sale deed executed by a Zemindar assigning his right to receive the *theka* money due for a certain number of years is not invalid under S. 6 (*e*) as the transfer is not merely of the right to sue but of the right to receive the *theka* rent. (*Bennet, J.*) RAM CHARAN DAS *v* NAZEERAN. **158 I.C 4=8 R.A. 287=1935 A.W.R 202=1935 R.D. 92=1935 A.L.J. 348=A.I.R 1935 All 342.**

———**S. 6 (e)**—Breach of contract—Claim for unliquidated damages for—Assignability invalid. *See* T. P. ACT, SS 3 AND 6 (*e*). **1933 A.L.J. 1009=A.I. R. 1933 All. 642.**

———**S. 6 (e)**—*Breach of contract—Right to damages —Assignability.*

The right to recover damages arising from breach of contract which is not in the nature of a debt, not being a liquidated sum, or beneficial interest in any movable property, is a mere right to sue and is incapable of assignment. A I.R. 1924 Nag. 140, Appr. (Case-law discussed.) (*Niyogi, A J.C.*) MT. POWEI *v.* SHIWA PAIKU MAHAR. **31 N.L.R 142=156 I.C. 487=7 R.N. 232=A.I R 1935 Nag. 2.**

[Rel. 31 N L.R. 235 (238).]

———**S. 6 (e)**—*Breach of contract—Right to sue for damages for—Assignability.*

A mere right to sue for damages for breach of a contract is not a property which is capable of assignment. 36 Cal. 345; A.I.R. 1923 Bom. 403 and A I.R. 1935 Nag. 2, Rel. on. (*Niyogi, A.J.C.*) MOHANLAL LAD *v.* MOTILAL MARWADI. **31 N.L. R. 235=157 I.C. 587=8 R.N. 62=A.I.R. 1935 Nag. 135.**

———**S. 6 (e)**—*Instalment buyer of motor car—Sale of car—Remedy of purchaser.*

Where a person who has purchased a car on instalments sells it to another on payment of full price but dispossesses his vendee, the latter has only a personal right against the former. Such a right is a mere right to sue within S. 6 (*e*) and hence cannot be transferred. (*Staples, A.J.C.*) NAVNITDAS *v.* MANCHARSA. **30**

T.P. ACT (1882), S. 6.

N.L.R. 213=6 R.N. 210=148 I.C. 822=A.I.R. 1934 Nag. 78.

———**3. 6 (e)**—Lease by mortgagor—Covenant by lessee to pay Government dues—Default—Assignment of mortgagor's rights to mortgagee—Suit by mortgagee—S. 6 (*e*) not applicable—Claim amounting to actionable claim. *See* T. P. ACT, S. 130. **59 I.A. 41=11 Pat. 266=A.I.R. 1932 P.C. 32=62 M.L.J. 287 (P.C.).**

———**3. 6 (e)**—"*Mere right to sue*"—*Alienation by manager—Right of minor brother to sue—Transferability.*

Where a manager alienates the joint family property for himself and his minor brother the latter has an interest in the property which he is capable of transferring and the alienee from him is entitled to sue. It is not a transfer of a mere right to sue! (*Broomfield and Wadia, JJ.*) HANMANTAPPA *v.* DUNDAPPA. **151 I.C. 1043=7 R.B. 100=36 Bom.L.R. 474=A.I.R. 1934 Bom. 234.**

———**3. 6 (e)**—"*Mere right to sue*"—*Contract for sale of immovable property.*

A mere claim for damages in respect of a breach of contract is a mere right to sue which cannot be transferred. An executory contract for the future sale of immovable property is however not a mere right to sue, although a right to sue is involved in it on breach of its conditions. Where however at the time of the execution of the deed of assignment, by which an agreement for sale was assigned, the assignor is aware that the contract was incapable of execution, what he assigns is not an executory contract but a claim in respect of compensation for a breach thereof and hence mere right to sue. (*Grille, J.C.*) PUNJARAM MALI *v.* HARISAO RANGARI. **7 R.N. 134=31 N.L.R. 203=A.I.R. 1934 Nag. 268.**

———**3. 6 (e)**—"*Mere right to sue*"—*Right of agent to indemnity from principal before rendering of accounts—Assignability.*

An agent has a right to claim an indemnity from his principal after rendering an account and not before. Consequently a right to indemnity before rendering an account is a mere right to sue and cannot be assigned under S. 6 (*e*), T. P. Act. (*Lort Williams and Jack, JJ.*) GHISULAL GONESHILAL *v.* GUMBHIRMALL PANDHYA. **62 Cal. 510=164 I.C. 111 (2)=9 R.C. 137=39 C.W.N. 606.**

———**3. 6 (e)**—"*Mere right to sue*"—*Right of co-sharer to profits—If assignable.*

The right of a co-sharer to the profits against another co-sharer in possession is not in law a right to mesne profits but is a right to obtain and call for an account and such a right can be transferred. 24 M.L.J. 313 and 8 Rang. 645, Foll. (*Venkatasubba Rao, J.*) SUSAI LAZAR VILLAVARAYA *v.* RAMASWAMI NAIDU. **6 I. R. (Mad.) 34=145 I C 228=38 L.W. 408=1933 M.W.N. 743=A.I.R. 1933 Mad. 710 (1).**

———**S. 6 (e)**—"*Mere Right to sue*"—*Right to recover unpaid purchase-money.*

Where *A*, after mortgaging his property to *B*, subsequently sells it to *C*, who retains part of the purchase money for payment of *B*'s mortgage, but does not pay it, *A* has a charge on the property until the amount is paid, and his right to recover the unpaid purchase-money from *C* is assignable in law and cannot be styled as a mere right to sue 36 Cal. 345; 47 B. 719; 47 M. 698, Dist.; 33 Mad. 446, Not Foll.; 39 Mad. 997 and 42 Cal. 849, Ref. (*Niyogi, A.J.C.*) NATHU MALI *v.* BANSAJI. **27 N.L.R. 288=I.R. 1931 Nag. 103=132 I.C. 455=A I.R. 1931 Nag. 89.**

[D. 31 N.L.R. 235 (238).]

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———**S. 6 (e)**—"*Mere right to sue*"—*Sale by guardian—Transfer by minor of same properties on attaining majority—Validity of.*

Per *Murphy, J.* (*obiter*). A sale by guardian is not void but voidable at the instance of the minor. If the minor, on attaining majority, assigned the same property to another person, the assignment consists of nothing more than the minor's right to sue to have the alienation set aside. Such a transfer is forbidden by S. 6 (*e*) of the T. P. Act. (*Patkar and Murphy, JJ.*) JHAVERBAI HATHIBAI *v.* KABHAI BECHER. **141 I.C. 806=34 Bom.L.R. 1512=I.R. 1933 Bom. 165=A I.R. 1933 Bom. 42.**

———**S. 6 (e)**—"*Mere right to sue*"—*Sale of land and right to recover past profits.*

If along with the land the right to recover the profits of the land which have already accrued due is sold, it is not a "mere right to sue" but property with an incidental right *attached* to the property itself, to which the section has no application (Eng. cases and 33 C.W.N. 614; A.I.R. (1929) All. 63; A.I.R. 1929 Pat. 245 and 44 M. 539, Ref.) (*Rangnekar, J.*) SHANKARAPPA *v.* KHATUMBI. **56 Bom. 403=34 Bom.L.R. 991=141 I.C. 488=I.R. 1933 Bom. 99=A I.R. 1932 Bom. 478.**

[Rel. 31 N.L.R. 142 (146).]

———**S. 6 (e)**—Mortgage of property to be purchased—Enforceability—'Feeding by estoppel.' *See* T. P. ACT, S 43. **1931 A.L J. 73=A.I.R. 1931 All. 275.**

———**S. 6 (e)**—*Property which is subject matter of litigation—Transfer—Validity.*

Where a transfer is made of the property which is the subject-matter of the litigation and if the transfer is for good consideration it cannot be said that a mere right to sue is transferred. An *ex parte* rent decree was passed and a sale in execution of it was held. After the confirmation of this sale, some of the defendants transferred the property to the present plaintiff who applied to have the decree and sale set aside.

Held, that the transfer was not of a mere right to sue, but of the property which was the subject-matter of litigation, that the transfer necessarily carried with it the right to sue and that plaintiff was entitled to sue. (*Mitter and M.C. Ghose, JJ.*) KHUDIRAM *v.* SHOMNATH BANERJEE. **I.R 1933 Cal. 444=143 I.C. 575=37 C.W.N. 706=A.I.R. 1933 Cal. 454.**

———**S. 6 (e)**—*Right to sue for accounts—Assignment—Validity.*

Where at the time of the assignment a liquidated amount had become due to the assignors of the plaintiff, the assignment of a right to recover this debt is more than a mere right to sue for accounts and it does not therefore offend the provisions of S. 6 (*e*), T. P. Act. The mere fact that a calculation will have to be made before determining the exact amount does not make that amount any the less a debt due to the assignors validly assignable in law. (*Madhavan Nair and Jackson, JJ.*) MATHU *v.* ACHU. **57 Mad 1074=151 I.C. 353=40 L.W. 524=7 R.M. 123=A.I.R. 1934 Mad. 461=67 M L.J. 158.**

———**S. 6 (e)**—Right to sue for money in the hands of agent—Validity of transfer—Not a mere right to sue. *See* ACCOUNTS—PRINCIPAL AND AGENT. **57 C L.J. 46=A I R. 1933 Cal. 461.**

———**S. 6 (f)**—*Payment charged on land in consideration of, but not not subject to performance of worship.*

The right to recover a sum of money agreed to be paid to the plaintiff and charged upon particular land with the object that certain religious ceremonies should be performed by him is transferable, where it is found that the performance of the worship is not a condition

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precedent to his claim. 29 Bom.L.R. 102 and 50 A. 394, Foll. (*Baker and Nanavati, JJ.*) SAVITRI RAMAVYA *v.* HOLEBASAPPA. **I.R. 1932 Bom. 309 = 137 I.C. 600 = 34 Bom.L.R. 198 = A.I.R. 1932 Bom. 257.**

——**S. 6 (g)**—'*Pension.*'

The word 'pension' in the Pensions Act, 1871 and in the C. P. Code, S. 60 and in the Transfer of Property Act, S. 6 implies periodical payments of money by Government to the pensioner. 26 A. 617, Appr. (*Lord Macmillan.*) WASIF ALI MIRZA NAWAB BAHADUR *v.* KARNANI INDUSTRIAL BANK, LTD. **58 I.A. 215 = 59 Cal. 1 = 35 L.W. 384 = I.R. 1931 P.C. 215 = 132 I.C. 727 = 53 C.L.J. 493 = 35 C.W.N. 791 = 1931 A.L.J. 495 = A.I.R. 1931 P.C. 160 = 61 M.L.J. 208 (P.C.).**

——**S. 6 (h)**—*Object of transfer being immoral—Validity of transfer.*

If the consideration or object of passing a sale-deed be immoral, *i.e.*, past or future cohabitation, the transfer would be void under S. 6 (*h*), T. P. Act, read with S. 23 of the Contract Act (*Patkar and Barlee, JJ.*) SABA VAYELLAPPA *v.* YAMANAPPA SABU. **149 I.C. 464 = 6 R.B. 380 = 35 Bom.L.R. 345 = A.I.R. 1933 Bom. 209.**

——**S. 6 (i)**—*Tenant—Relinquishment of agricultural holding—Validity.*

The relinquishment by a tenant of his agricultural holding is a transfer which is prohibited by S. 6 (*i*). (*Hasan, C.J. and Kisch, J.*) AMAR NATH SINGH *v.* HAR PRASAD SINGH. **7 Luck. 425 = I.R. 1932 Oudh 125 = 136 I.C. 333 = 13 L.R. 20 (Rev.) = 8 O.W.N. 1359 = 15 R.D. 785 = A.I.R. 1932 Oudh 79.**

——**S. 7**—*Lease by minor—Validity.*

A lease by a minor is void; it is incapable of the ratification express or implied by the acceptance of rent by the lessor on attaining majority. (*Patkar and Barlee, JJ.*) INDIAN COTTON COMPANY, LTD. *v.* RAGHUNATH. **I.R. 1931 Bom. 278 = 130 I.C. 598 = 33 Bom.L.R. 111 = A.I.R. 1931 Bom. 178.**

——**S. 8**—Applicability—Dedication of property to wakf—Title to part of property subsequently found against—Effect. *See* MAHOMEDAN LAW—WAKF—VALIDITY OF. **60 I.A. 116 = 55 All. 83 = 64 M.L.J. 514 (P.C.).**

——**S. 8**—*Equitable mortgage—Transfer of mortgage debt by endorsement of promissory notes secured by deposit of title-deeds—Security also passes.*

Where the law admits of the separate transfer of mortgage debt by the endorsement of promissory notes secured by a deposit of title-deeds, S. 8, T. P. Act, operates to carry the security with it. 44 Mad. 196 = 44 M.L.J. 25, Foll.; 44 Mad. 965, Diss. From. (*Mosely, J.*) U THIT *v.* U PAW I. **160 I.C. 727 = 8 R.R. 421 = A.I.R. 1935 Rang. 483.**

——**S. 8**—*Purchaser in Court-sale—Title from date of sale.*

Under S. 65, C. P. Code and S. 8, T. P. Act, a purchaser in Court-sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof. 40 Cal. 89 (P.C.), Ref. (*Walsh, J.*) HARIHARAN PATTAR *v.* NARAVANA MENON. **6 I.R. (Mad.) 31 = 145 I.C. 174 = A.I.R. 1933 Mad. 482.**

——**S. 8**—*Sale of land—Right to growing crops, when accrues.*

The right to the growing crops passes by the sale of the land in the absence of an express provision to the contrary, and in the case of a Court-sale, the right to the possession of the crops accrues from the date of the delivery of possession of the land. 13 Mad. 15 and

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A.I.R. 1919 Cal. 588, Rel. on. (*Patterson and Guha, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BAGIRATH MAHTO. **61 Cal. 991 = 151 I.C. 662 = 7 R.C. 147 = 35 Cr.L.J. 1367 = 38 C.W.N. 854 = 59 C.L.J. 482 = 1934 Cr.C. 808 = A.I.R. 1934 Cal. 610.**

——**Ss. 8 and 43**—*Scope and operation—Transferee, if can proceed against transferor's interest in any property other than that transferred.*

A person having one-half interest in houses *P*, *Q*, *R* and *S* erroneously represented that he was authorised to transfer the whole of the houses *P* and *Q* and mortgaged them. At a subsequent partition, the houses *R* and *S* were allotted to the mortgagor and *P* and *Q* to another. The lower appellate Court held that as what was mortgaged, was only half the houses *P* and *Q*, the substituted security only passed to half the houses *R* and *S* and gave a decree accordingly. The High Court in dismissing the second appeal held that under S. 8 of the Transfer of Property Act, the interest which passed to the mortgagee was half the interest which the transferor was then capable of passing in the houses *P* and *Q* and that if the mortgagor had subsequently acquired the whole of those houses it would have been at the option of the mortgagee to proceed against the whole of the houses *P* and *Q* owing to the operation of S. 43 of the Transfer of Property Act but that there was no authority for the proposition that the security could be transferred to any other property or to the transferor's interest in any other property. 1932 A.L.J. 909 (P.C.) and 24 A. 479, Dist. (*Kendall, J.*) BABU LAL *v.* NOOR MAHOMED. **6 R.A. 882 = 149 I.C. 313 = 3 A.W.R. 608 = A.I.R. 1934 All. 731.**

——**S. 8**—*Transfer of land—Bamboo clusters standing on land—Property in.*

On a transfer of land, the property in the bamboo clusters standing on the land also passes to the transferee. (*Rowland, J.*) JAGMOHAN SINGH *v.* EMPEROR. **142 I.C. 504 = I.R. 1933 Pat 151 (1) = 34 Cr.L.J. 355 = 13 Pat L.T. 519 = A.I.R. 1932 Pat. 344.**

——**S. 9**—*Admission as to ownership—Whether operates as conveyance.*

Title to land cannot pass by mere admission where the statute requires a deed. Hence the mere execution of a bazidawa by a benamidar which contains an undertaking not to interfere with the plaintiff's possession cannot itself give or transfer title to the property from the benamidar to the real owner. (*Khaja Mohammad Noor and Scroope, JJ.*) KESHRI MULL *v.* SUKAN RAM. **12 Pat. 616 = 14 Pat.L.T. 208 = 149 I.C. 393 = 6 R.P. 598 = A.I.R. 1933 Pat. 264.**

——**S. 9**—*Family arrangement—Whether can be made orally.*

There is nothing in the T. P. Act which prohibits a family arrangement from being made by oral agreement; this is clear from the provisions of S. 9. (*Dunkley, J.*) MA KYAW *v.* DAW KYE U. **159 I.C. 798 = A.I.R. 1935 Rang. 355.**

——**S. 9**—*Release by parole—Validity.*

The appropriate form of conveyance whereby one joint tenant relinquishes his interest in favour of another joint tenant is a release, and not a sale or a gift; it operates rather as an extinguishment of a right than as a conveyance. Under the Transfer of Property Act, a release by parole is a perfectly valid transaction. 22 C.W.N. 441; 28 C.L.J. 220; A.I.R. 1931 Cal. 223 and A.I.R. 1935 Mad. 113, Foll. (*Dunkley, J.*) SAYA HMAN *v.* SAYA HLA. **160 I.C. 325 = 8 R.R. 366 = A.I.R. 1935 Rang. 448.**

——**S. 10**—Absolute restraint on alienation—Effect. *See* WILL—CONSTRUCTION. **A.I.R. 1935 Sind 182**

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———S. 10—*Absolute restraint on alienation—Sale-deed—Clause prohibiting transfer to any one except vendor and his heirs—Validity.*

A clause in a sale-deed, providing that the vendee would not transfer the property by mortgage, gift or sale to any one excepting the vendor and his heirs and that if the property were sold by auction sale the sale would be invalid and that if the property were transferred in contravention of the said terms, then the vendor or his heir would have a right to get it back by paying a certain amount, is contrary to S. 10 of the T. P. Act as it amounts to an absolute restraint on alienation and is, therefore, void. (*Sulaiman, C.J. and Bennet, J.*) GAYASI RAM *v.* SHAHABUDDIN. **57 All. 861=157 I.C. 897=8 R.A. 228=1935 A.L.J. 410=1935 A.W.R. 411=A.I.R. 1935 All. 493.**

———S. 10—*Award giving residue of trust property but restricting alienation—Effect of.*

Where a clause in award gives the residue of a certain property declared to be trust property, to certain person and his family and absolutely restricts him from parting or disposing of the interest in the property the restriction is void under S. 10. The disposition being good and the restriction void, the residue goes to the settlor's family as a resulting trust under S. 83, Trusts Act. (*Haveliwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C. 694=8 R.S. 127=AI R. 1935 Sind 235.**

———S. 10—*Family arrangement—Property given to son—Condition that he should not alienate it during father's lifetime—Validity.*

The word "absolutely" in S. 10 of the T. P. Act should be construed in a reasonable manner. Where under a family arrangement, a Hindu father in the Punjab governed by the Mitakshara law gave some property to his son stipulating that in respect of a portion of it, the son should not make any transfer during his father's lifetime.

Held, that the condition which was sought to be imposed was not absolute as it extended only to the lifetime of the father after which the son would be free to dispose of the property in any manner he liked and that, therefore, it was binding on the son. (*Agha Haidar, J.*) TOOK CHAND *v.* RADHA KISHAN. **155 I.C. 699=7 R.L. 763=37 P.L.R. 249=A.I.R. 1935 Lah. 503.**

———S. 10—*Gift of income—No provision for remainder—If gift of corpus.*

Where there is gift of the enjoyment of income in the form of rents of certain property with no provision for the remainder, it can be construed as gift of the corpus, and under S. 172, Succession Act, the corpus as well as the income belong to legatee when there is no indication of intention that the enjoyment of the bequest should be of limited duration. 12 Bom. 137 and 40 Cal. 192, Rel. on. (*Haveliwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C. 694=8 R.S. 127=A.I.R. 1935 Sind 235.**

——— S. 10—Gift to wife—Apparently absolute gift—Restriction of alienation to stranger—Clause not void. *See* MAHOMEDAN LAW—FAMILY ARRANGEMENT. **7 Luck 257=59 I.A. 236=A.I.R. 1932 P.C. 158=63 M L.J. 180 (P C.).**

———S 10—*Partition—Restraint on alienation by co-sharer—Validity.*

A provision in partition deed, by which properties are allotted absolutely to the respective sharers, prohibiting alienation, including mortgage, of the properties allotted in absolute interest to each sharer, except with the consent of the other sharers, is repugnant to S 10, T. P. Act, and is therefore invalid. (*Krishnan Pandalai, J.*) MUDARA *v.* MUTHU HENGSU. **154 I.C 587=7 R.M. 449=40 L.W. 908=A.I.R. 1935 Mad. 33.**

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———S. 10—*Sale and agreement to re convey—Restriction against alienation contained in the agreement—Validity of.*

Where a deed of sale absolutely transferred property to another but by an agreement to re-convey forming part of the same transaction, the purchaser was restrained from alienating the same, the restriction on alienation is void, under the principle of S. 10 of the T. P. Act, although the Act itself was not in force at the time of the contract. A.I R. 1929 All. 381, Foll. (*Baker, J.*) ALLIBHAI MAHOMED AKUJI *v.* DADA ALLI. **136 I.C. 509=I R. 1932 Bom. 205=33 Bom.L.R. 1296=A.I.R. 1931 Bom. 578.**

———Ss. 10 and 11—*Scope—Award—Clause declaring certain properties to be trust properties and forbidding alienation by sale or mortgage or otherwise—If void.*

Where a clause in an award provides "that as all the aforesaid immovable properties are hereby made and declared trust properties, neither the parties to the reference or any one of them, or his, or their heirs, legal representatives, nor the trustees, shall have any power or right to alienate them in any way by sale or mortgage or otherwise" it is against the provisions of Ss. 10 and 11 and is as such void. (*Haveliwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C. 694=8 R.S. 127=A.I.R. 1935 Sind 235.**

———S. 11—Absolute interest conferred—Partial restraint on alienation—Validity of. *See* HINDU LAW—GIFT. **58 I.A. 270=35 C.W.N 903=A.I.R. 1931 P.C. 179=61 M.L.J. 501 (P C.).**

———S. 11—*Applicability—Vendor and purchaser—Contract for removal of chhatta—Enforceability.*

Where a contract between a vendor and purchaser for the removal of a Chhatta in a common lane at any time the vendor required was intended for the more beneficial enjoyment of the property by the vendor.

Held, that the contract was enforceable by the vendor and S 11 was not a bar to the maintenance of a suit for that purpose. (*Mukerji and Allen, JJ.*) NAND GOPAL DAS *v.* BATUK PRASAD GUPTA. **54 All. 17=1932 A.L J. 36=I.R. 1931 All. 701=133 I.C. 541=A.I.R. 1932 All. 78.**

———S. 11—*Condition excluding daughter's issue from succession—Validity of.*

Where a grant which conferred an absolute estate on the grantee contained a condition that the property should not in any case pass to the heirs of the daughters of the grantee, *held*, it was an attempt to alter the legal course of succession to an absolute estate and was therefore void. Tagore Case. I.A. Supp. 47, Ref. to. (*Sir Dinshaw Mulla.*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I A 270=59 Cal 142=I. R. 1931 P C. 296=134 I C. 648=54 C.L J. 393=34 L.W. 51=8 O.W N. 944=33 Bom L.R. 1257=1931 M.W.N. 989=1931 A.L J. 555=35 C.W.N. 903=A.I.R 1931 P.C. 179=61 M L.J. 501 (P.C.).**

———S. 11—*Condition as to residence of grantee—Validity of.*

Where an absolute estate is conferred on the grantee, a condition requiring the grantee to reside at a particular place is of no binding effect. (*Sir Dinshaw Mulla.*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270=59 Cal. 142=I.R. 1931 P.C. 296=134 I C. 648=54 C.L J. 393=34 L.W. 51=8 O.W.N. 944=33 Bom L.R 1257=1931 M W.N. 989=1931 A.L J. 555=35 C.W.N. 903=A.I.R. 1931 P C. 179=61 M L J. 501 (P C.).**

———S. 12—*Applicability—Company—Provident Fund rules—Transfer of fund during service—Forfeiture clause.*

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Where one of the rules of a Provident Fund of a company was that in case a member transferred his interest in the Provident Fund during service he was liable to forfeit the amount to the company,

Held, that the rule offended against S. 12, T. P. Act and was void. (*Lort Williams, J.*) ERNEST CLARENCE O'BRIEN, *In re*. **60 Cal. 926=37 C.W.N. 1050=147 I.C. 422=6 R.C. 329=A.I.R. 1933 Cal. 701.**

———**S. 12**—*Bombay Native Share and Stock Brokers Association—Rules of—Validity of.*

There is nothing contrary to the provisions of S. 12 of the Transfer of Property Act in the rules of the Bombay N.S. and S.B. Association providing that upon the declaration of default, the defaulting member's right and interest in the Association (whether in respect of his card of membership or otherwise) shall be extinguished and come to an end. (*Lord Blanesburgh.*) OFFICIAL ASSIGNEE OF BOMBAY *v.* K. R. P. SHROFF. **59 I A. 318=56 Bom. 374=34 Bom.L.R. 1178=36 C W.N. 909=36 L W. 906=I R. 1932 P C. 215 (2)=137 I C. 776=1933 M.W.N. 227=55 C L.J. 592=A.I.R. 1932 P.C. 186=63 M.L.J. 623 (P.C.).**

———**Ss. 13, 14 and 100**—*Applicability of doctrine of perpetuity—Agreement to pay maintenance allowance from generation to generation making it a charge on certain property.*

When the intention of the parties is to create a liability in perpetuity not capable of being redeemed absolutely at any time, the transaction cannot possibly be a mortgage. An agreement to pay maintenance allowance to a person and to continue to pay to his descendants from generation to generation making it a charge over property, creates a charge and not a mortgage. The rule against perpetuity would not apply to a charge of this kind which does not amount to a transfer of interest within the meaning of Ss. 13 and 14. 19 I.C. 661 and 42 Mad. 581 (P.C.), Rel. on. (*Sulaiman, C.J. and King, J.*) MATLUB HASAN *v.* MT KALAWATI. **147 I.C. 302=6 R A. 472=A.I.R. 1933 All. 934.**

———**Ss. 13 and 16**—*Gift to* R *for life—Then to* R's *sons and grandsons if any absolutely—Provision for reverter to* R's *father if* R *had no issue—Validity of gift to* D.

Per *Full Bench*.—One *S* gave away property to *R* for life, and after her death if there be any male descendants, whether born of son or daughter to them absolutely. If *R* would have only daughters they were to have no power of transfer. In the absence of any issue whether male or female, living at the time of her death, the gifted property was not in any way to devolve upon her husband or his family, but it was to go to *D*, father of *R*.

Held, that the gift in favour of *D* was dependent upon the failure of the prior interest in favour of the daughters and the result was that the gift in favour of *D* also failed. 16 Bom. 492, Dist. (*Srivastava, Nanavutty and Smith, JJ.*) GIRJISH DATT *v.* DATA DIN. **9 Luck. 329=6 R.O 337=147 I.C. 991=11 O.W.N. 1=A.I.R. 1934 Oudh 35 (F.B.).**

———**S. 14**—*Applicability—Postponement of vesting in interest—Effect.*

With regard to S. 19 of the T. P. Act the burden of proving the contrary intention is on those who assert it and the weight of the burden is aggravated by the elimination in the explanation of circumstances which might apart, from the explanation, be thought sufficient to discharge it. Where the settlor directed that after the death of the tenant for life and after making provision out of the trust fund for the payment of a monthly allowance to the widow for life, the trustee was to hold the rest of the trust estate for the use and benefit of his son or sons to be made over to him or them on the attainment of 21 years,

Held, that the language of the deed points to an immediate vesting of the interest disposed of.

Held, further, that if the disposition was not covered by S. 19 it was contingent and the vesting in interest being postponed to a period longer than that permitted under S. 14 it was invalid. Effect of the words "to be made over" and "to hold for the use and benefit of" in deed of trust considered. (*Panckridge, J.*) SEWDAYAL RAMJEEDAS *v.* OFFICIAL TRUSTEE OF BENGAL. **58 Cal. 768=I.R. 1931 Cal. 820=134 I.C. 436=A.I.R. 1931 Cal. 651.**

———**S. 14**—*Applicability—Sale and agreement to re-convey—If bad under the rule against perpetuities.*

The objection founded on the rule against perpetuities does not apply to a mere covenant to convey or re-convey, property sold under a deed of sale, because the agreement does not by itself create an interest in lands; and when the privilege under the agreement is conferred on the parties to the contract, no objection based on perpetuity will arise. (*Varadachariar, J.*) CHINNAKKAL *v.* CHINNATHAMBI GOUNDAN. **152 I.C. 634=7 R.M. 267=1934 M.W N. 1122=40 L.W. 646=A.I.R. 1934 Mad. 703=67 M.L.J. 635.**

———**S. 14**—Award in partition suit between co sharers—Clause prohibiting purchase by one of interest in property allotted to another and providing for pre-emption, in case of such acquisition—If void. *See* CONTRACT ACT, SS. 23 AND 25. **39 C.W.N. 716.**

———**S. 14**—*Hindu joint family—Award—Clause providing that certain property should remain trust property from generation to generation and its income only should be enjoyed—Validity.*

Hindu Law does not allow the property to be tried up in perpetuity except in the case of religious or charitable endowments. Where a clause in an award provides 'that all the aforesaid immovable property should remain as trust property from generation to generation, the income whereof only should be enjoyed by the parties and their heirs and legal representatives as declared hereunder' the underlying idea being to tie down the properties from generation to generation, leaving only income of the properties to the families, the clause is not operative in view of S. 14, T. P. Act. (*Haveliwala, A.J.C.*) VISHRAM *v.* GANGARAM. **160 I.C. 694=8 R.S. 127=A.I.R. 1935 Sind 235.**

———**S. 14**—*Hindu joint family—Rule against perpetuity—Scope of—Restraint on alienation—Creation of future interests—Limits to—Hindu joint family—Arrangement to keep properties joint and not to partition—Validity as against persons not parties to it—Tying properties by means of trust—Validity.*

It is well known that perpetuity may arise in two ways: (1) by taking away from the owner the power to alienate property; (2) the creation of future remote interests. The former gives rise to the rule forbidding restraints on alienation, which strictly speaking is the rule against perpetuities. The latter gives rise to the rule against remoteness, which is also miscalled rule against perpetuities. Every member of a joint Hindu family and therefore all may, for sufficient consideration, bind themselves to forego their rights for specified period and for a definite purpose by a contract which can be enforced against them personally. But it is not competent for owners of property by any arrangement made in their discretion to alter the ordinary incidents of pro-

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perty and to say that the joint property shall remain the joint property of the family in perpetuity without the incident which the law attaches to it, namely, that every independent coparcener is entitled at any time to have his share divided off from the rest. Although there is nothing inherently wrong or objectionable in a contract between persons tying up properties for a limited time for a limited purpose or for the sake of convenience, it is against public policy that property should be settled on special trust for an indefinite period, so as to prevent it being freely dealt with. What cannot be done directly cannot be also done indirectly by the intervention of a trust. A deed by which an arrangement not to divide the properties is entered into will be operative only so long as the executants of the deed choose to remain bound by its terms. But it is certainly inoperative as against persons not parties thereto; and consequently a member of the family who is not a party to it can challenge its validity and ask for partition of the shares which he has in the properties covered by the deed, the properties regaining their original character when the contract ceases to be in force. (*Mukerji and Ghose, JJ.*) AJIT KUMAR MITRA *v.* SRIMATI TARUBALA DASI. **63 Cal. 209 = 162 I.C. 965 = 8 R.C. 677 = 62 C.L.J. 71.**

———**S. 14**—*Hindu joint family—Trust—Creation of family fund for benefit of members born and to be born—Validity—Properties to be kept joint and income to be utilised for maintenance of members—Settlement of property on special trust—Manager to meet expenses and utilise surplus for purchase of property to be thrown into fund—Validity as against persons not parties.*

A deed executed by four brothers who were members of a joint Hindu family, after reciting that the object of the deed was to establish Family Fund for the maintenance of all the members of the family of the executants thereof and that one of them was making over his self-acquired properties and all of them their ancestral properties for the maintenance of all the members of the family of all of them and that other properties which belonged to them or would belong to them in future as their separate properties could not be claimed by any of them or their heirs on the ground of being joint in mess, provided as follows: "We expect that any other person or we brothers or any one of our family shall not at any time do anything contrary to the terms of the deed." Provision was made for residence in some of the properties, and for maintenance of the family out of the income of the other properties. The deed also prohibited transfer by way of gift or sale, and comtemplated the appointment of a manager, laying down detailed instructions for his guidance and also his powers, duties and liabilites. Finally there was a provision as follows: "If any surplus remains after defraying the said expenses, the same will be kept in deposit in the Family Fund in the hands of the manager and with that money, the manager will be competent to purchase any immovable property or Government Promissory Note or any profitable permanent property and the same shall be purchased in the name of the then manager of the Family Fund mentioning him as such and the property thus purchased shall be included in the Family Fund."

Held, on a construction of the deed, (1) that no trust was intended in the sense, that the brothers divested themselves of their ownership in the properties and created a legal title in the manager or any one else, constituting him a trustee either expressly or by implication; (2) though undoubtedly a trust was created in the sense that the properties constituting the Family Fund were declared to be available for the use of persons other than the owners thereof and in a prescribed manner, yet such trust, not being a public charitable trust, but

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only a private trust was amenable to the rule against perpetuities, it being well settled that what could not be done directly could not also be done indirectly by the intervention of a trust; (3) that the disposition of the corpus of the properties made under the deed offended against the rule against perpetuities by taking away the owner's power of alienation; (4) that the creation of an interest in the surplus in the members of the family amounted to the creation of a future remote interest, and the direction to purchase properties to be thrown into the Family Fund and to partake of the character of the properties originally constituting it also offended against the said rule in two ways, namely, by restraining alienation and by creating future remote interests; and (5) that the object being to settle the properties in trust for the maintenance of the members of the family born and to be born and to create a perpetuity as regards the properties and to limit for an indefinite period the enjoyments of the profits thereof, the rule againt perpetuities came into operation and the deed ceased to be operative and binding on those who were not parties thereto.

Held further, that the arrangement comtemplated could not be done by gift, and what could not be done by gift could not also be done by the intervention of a trust; that the manager who was to keep the corpus intact and spend the income in a particular way could not be regarded as holding the properties adversely in any way to the individual co-sharers, so as to bar by limitation a suit by a coparcener after 12 years. (*Mukerji and M. C. Ghose, JJ.*) AJIT KUMAR MITRA *v.* SRIMATI TARUBALA DASI. **63 Cal. 209 = 162 I.C. 965 = 8 R.C. 677 = 62 C L.J. 71.**

———**S. 14**—*Indefinite failure of male issue—Clause providing for reversion—Validity of.*

A grant executed by a Raja in favour of his daughter conferred an absolute estate on her and contained a defeasance clause which provided that if the heirs of the grantee, that is, her sons, their male descendants and her daughters ceased to exist, the property should revert to the Raja and his heirs,

Held, the event referred to was an indefinite failure of the male issue of the grantee and the attempted gift over, was therefore void. (*Sir Dinshaw Mulla.*) SARAJU BALA DEVI *v.* JYOTIRMOYEE DEBI. **58 I. A. 270 = 1931 A L J. 555 = 59 Cal. 142 = I R. 1931 P. C. 296 = 134 I C. 648 = 54 C.L J. 393 = 34 L.W 51 = 8 O.W.N. 944 = 33 Bom L.R 1257 = 1931 M.W.N. 989 = 35 C.W.N. 903 = A.I.R 1931 P.C. 179 = 61 M. L.J. 501 (P.C.).**

[**Disc.** 16 P.L.T. 245 (251, 252).]

———**S. 14**—*Perpetuity—Interest in favour of person for generation after generation.*

An interest created by a document in favour of a person for generation after generation is clearly a perpetuity and as such offends against S. 14 of the T. P. Act. (*Bennet, J.*) SYED WAHAJUDDIN *v.* SYED ALI AHAMD. **153 I C 595 = 7 R.A. 534 = 4 A.W.R. 218 = A.I.R. 1934 All. 983.**

———**S. 14**—*Perpetuity—Partition deed—Condition prohibiting purchase by one, of share of another—If against perpetuities.*

There was a clause in a partition deed to the effect that one party shall not purchase for himself or benami, a ryoti or under-royti holding allotted to the share of another party. In case of a breach of this condition, the party was entitled to disregard to purchase and get khas possession of the holding. It was contended that this clause was against the rule against perpetuities.

Held, that the clause did not create any right in property in favour of the co sharers of any of them.

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The ryots and under-ryots holding under them could transfer their interest to any body; only rights were reserved to quondam co-sharers to disregard purchase of such rights by his other co-sharers who got allotments elsewhere. A.I.R. 1927 Cal. 41, Foll.; A.I.R. 1929 Cal. 263, Dist. (*R. C. Mitter, J.*) JADU NATH GUHA ROY *v* KASISWAR GUHA ROY. **160 I.C. 250=8 R. C. 419=A.I.R. 1935 Cal. 779.**

——**S. 15**—*Applicability.*

Where the settlor directed that after the death of the tenant for life and after making provision out of the trust fund for the payment of a monthly allowance to the widow for life, the trustee was to hold the rest of the trust estate for the use and benefit of his son or sons to be made over to him or them on the attainment of 21 years.

Held, that the interest of the sons immediately vested, and that even if it did not and there was a possible, failure in the case of any son, S. 15 applied and the gift failed as regards the whole class. (*Panckridge, J.*) SEWDAYAL KAMJEEDAS *v* OFFICIAL TRUSTEE OF BENGAL. **58 Cal. 768=I.R. 1931 Cal. 820=134 I.C. 436=A.I.R 1931 Cal. 651.**

——**S. 19**—*Absolute rights conferred on* R *in the event of his surviving* L—*No vested interest.*

A compromise effected between *K* and *L* was as follows:—In the event of *K* surviving *L*, *K* will be the permanent owner with powers of transfer and of transmitting inheritance of the whole of his property . . . . . In the event of *K* not so surviving, his male descendants according to the rule of lineal primogeniture will be entitled to the said property with powers of transfer and heritability.

Held, that the words "*K* will be the permanent owner with powers of transfer and of transmitting inheritance" did not convey a vested interest which was liable to be defeated in case *K* did not survive *L*. (Case-law discussed. (*Wazir Hasan, C.J. and Nanavutty, J.*) SURENDRA NARAIN SINGH *v.* RAJA LAL BAHADUR SINGH. **9 Luck. 378=147 I C 1088=11 O.W.N. 109=18 R D. 70=A.I.R. 1934 Oudh 59.**

——**S 19**—Applicability—Vesting in interest if postponed—Postponement resulting violation of S. 14 *See* T. P. ACT, S. 14. **58 Cal. 768=A.I.R. 1931 Cal. 651.**

——**S 19**—*Compromise between brothers—Property given to one absolutely on death of other—Nature of interest taken.*

Where by a compromise between two brothers the elder was given a life estate and the younger was given the remainder if he survived the former, the estate taken by the latter is a vested and not a contingent interest. Such an interest can be proceeded against in execution. (*Hasan and Misra, JJ.*) LAL BAHADUR SINGH *v.* RAJENDRA NARAIN SINGH. **9 Luck 173=11 O.W. N. 114=18 R.D. 68 (2)=A.I.R. 1934 Oudh 454.**

[**Rel.** 9 Luck. 378 (381)].

——**S. 27**—*Succession to managership of endowed property—Person dying before expiry of tenure—Acceleration of succession.*

An award provided that the managership of certain endowed property should devolve on the next successor after it had been held by the previous one for twenty-one years. The manager who had been appointed for twenty-one years died before the expiry of the full period.

Held, that the effect of the failure of the prior interest was to accelerate the subsequent interest even though the failure may not have taken place in the precise manner laid down in the award. (*Hasan, C.J. and Bisheshwar Nath, J.*) DEBI SHANKAR *v.* NAND KISHORE. **135 I.C 395=I.R. 1932 Oudh 43=8 O.W.N. 1138=A.I.R. 1932 Oudh 161.**

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——**S. 28**—*Applicability—Gift of absolute estate by Hindu widow to daughters—Malik—Later provision that on death of any daughter issueless others should take—Effect of—Construction of gift deed.*

A Hindu widow who was absolute owner of certain property executed a deed of gift in favour of her three daughters, making them absolute: "absolute proprietresses" (*malik mustaqil*) of the said property and putting them in possession as rightful owners and declaring that they have acquired a "full and absolute title with rights of possession, transfer, etc." A subsequent clause of the deed provided that "if any daughter out of the three dies issueless, the surviving daughters shall in equal shares be made absolute proprietress of the property." One of the daughters subsequently died without issue.

Held, S. 28, T. P. Act, applied to the case; that the deed of gift must be construed as a whole; though the first part of the disposition taken by itself undoubtedly conferred full and absolute title to ⅓ share in favour of each of the three, the later clause must be treated as a defeasance clause and that on the death of any daughter without issue, the surviving daughters took the property in equal shares. The gift over was not repugnant to Hindu Law; and therefore the absolute estate originally conferred by the first part in the deed was cut down to a life estate by the defeasance by way of gift over. (*Courtney-Terrell, C. J. and Dhavle, J.*) RAMESHWAR KUER *v.* SHEO LAL UPADHEVA. **14 Pat. 640=156 I.C. 33=7 R P. 677=16 Pat.L.T. 245=A I R. 1935 Pat. 401.**

——**S. 28**—*Construction—"Interest"—Meaning of.*

The word "interest" in S. 28, T. P. Act, has the same meaning as the "thing bequeathed" in S. 131 of the Succession Act. (*Courtney Terrell, C. J. and Dhavle, J.*) RAMESHWAR KUER *v.* SHEO LAL UPADHEVA. **14 Pat. 640=156 I.C. 33=7 R P. 677=16 Pat.L T. 245=A I.R. 1935 Pat 401.**

——**Ss. 28 and 31**—*Relative scope and effect of.*

S. 28, T. P. Act, deals with a case in which on the happening of a specified uncertain event the property transferred is to pass to a second donee, whereas S. 31 refers to a mere cesser of the first donee's interest on the happening of a specified uncertain event, in which case the property will in ordinary cases revert to the donor. (*Courtney Terrell, C.J. and Dhavle, J.*) RAMESHWAR KUER *v.* SHEO LAL UPADHEVA. **14 Pat 640=156 I.C. 33=7 R P. 677=16 Pat.L.T. 245=A I R. 1935 Pat 401.**

——**S. 31**—*Condition subsequent by way of defeasance—Validity.*

A condition subsequent by way of defeasance that any interest created shall cease to exist in case a specified uncertain event shall happen or in case a specified uncertain event shall not happen, can be valid. It does not follow that because the law allows such a condition being imposed, the Court is bound to enforce it in every case. (*Srivastava and Smith, JJ.*) MUNSHI LAL *v.* AHMAD MIRZA BEG. **8 Luck 707=6 I R. (Oudh) 2=144 I.C. 756=10 O.W.N. 759=A I.R. 1933 Oudh 291.**

——**S. 31**—*Contract of sale—Failure of purchaser to pay price by due date—Power of Court to relieve purchaser.*

There is nothing in S. 31, which merely declares that a limitation upon a condition subsequent is a lawful method of grant, to exclude the right of the Court to give relief to the purchaser who fails to make payment of the price, or part thereof, by the date agreed upon in the contract of sale. (*Lord Thankerton.*) DEVENDRA PRASAD SUKUL *v* SURENDRA PRASAD SUKUL. **63 I.A. 26=15 Pat. 127=159 I.C. 559=1935 A.W.R.**

T. P. ACT (1882), S. 31.

1510=40 C.W.N. 238=43 L.W. 128=62 C.L.J. 436 =1935 O.W.N. 1368=A.I.R. 1936 P. C 24=70 M.L.J. 82 (P C.).

———**Ss. 31 and 28**—Relative scope and effect of. *See* T. P. ACT, SS. 28 AND 31. **14 Pat. 640=A I.R. 1935 Pat. 401.**

———**S. 35**—*Sale of property subject to mortgage—No provision for payment of debt — Vendee of part from original vendee selling to creditor reciting original sale —Creditor, if precluded from proceeding against rest of the property.*

S sold to his wife the whole of his immovable properties subject to a mortgage the consideration for the sale being the mahur debt due to her. He had then made no provision for the amount admittedly due by him to *A*. The wife conveyed a portion of the properties to the mortgagee in discharge of the mortgage debt and he in turn conveyed them to *A* and in the sale deed to *A* the conveyance by *S* to his wife was recited as the basis of the title. *A* subsequently attached the remaining properties in the hands of the wife in execution of the decree obtained by him for the amount due to him from *S* on the ground that the sale in favour of the wife was executed in fraud of the debt due to *A* and therefore not valid. It was contended on behalf of the wife that *A* having purchased a portion of the properties from the mortgagee must therefore be held by his conduct to have ratified the sale in favour of the wife.

Held, that the mere mention of the purchase from the wife as the root of the vendor's title in the sale deed in favour of *A* could not be construed as a definite assertion of the wife's title by *A* and that *A* was not barred by any rule of election from urging the fraudulent character of the original sale deed in favour of the wife. A.I.R. 1928 All. 234, Dist. (*King, J.*) VEERAYYA *v.* KATIGA BIBI. **158 I.C. 497=8 R.M. 272=1935 M W.N. 880=A I.R. 1935 Mad. 684.**

———**S. 36**—*Applicability—Suit by plaintiffs as heirs against executor* de son tort.

In a suit by the plaintiffs as heirs of a deceased holder of an impartible estate against an executor *de son tort*, the plaintiffs are entitled to such rents and royalties due up to the date of the death of the deceased holder. S, 36 of the T. P. Act embodies a rule of equity and that principle should be applied to a case of this nature even though the section in its terms be not applicable having regard to S. 2, sub-S. (*d*). (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal 711=154 I.C. 479=7 R.C. 459=A.I R. 1935 Cal. 39.**

———**S. 36**—*Applicability—Suits for profits by one co-sharer against lambardar.*

S. 36, Transfer of Property Act, does not in terms apply to the case of a suit for profits brought by one co-sharer, against the lambardar but still the principle underlying that section is applicable; and therefore though the date for the payment of the share or income may not have arrived, the income does accrue from day to day and became vested in the co sharers, even though the actual apportionment is postponed for the sake of convenience. (*Sulaiman, A.C.J. and Young, J.*) MAHOMED ABDUL JALIL KHAN *v.* MD. ABDUL SALAM KHAN. **I R. 1932 All. 278=137 I.C. 166= 1932 A.L.J. 93=13 L.R. 29 (Rev.)=16 R.D. 110= A.I.R. 1932 All. 178.**

[**Rel.** 1934 A. 453 (454)].

———**S. 39**—Bona fide *transferee—Contract creating right to receive maintenance from the profits of village —Enforceability against the transferee.*

Where the plaintiff was only entitled to a right to receive part of his maintenance from the profits of a village by a contract with the owner which, being unregistered, created no charge for the same, the right cannot be enforced against a subsequent transferee for value without notice. (*Bisheshwar Nath and Kisch, JJ.*) KESHO PRASAD *v* UPPER INDIA BANK, LTD. **141 I.C 474=I.R. 1933 Oudh 55=9 O.W.N. 1037= A.I.R. 1933 Oudh 76.**

T. P. ACT (1882), S. 40.

———**S. 39**—Bona fide *transferee with notice—When affected.*

In order to affect a *bona fide* purchaser for value with notice, he must have notice not merely of the existence of the right of maintenance, that is, of the existence of persons who did or might require to be maintained but also of the existence of a charge actually created and binding on the estate. (*Rupchand and Mehta, A.J.Cs.*) TULSIDAS KESHAVDAS *v.* HANIFABAI **26 S.L R. 269 =I.R 1932 Sind 83=138 I.C. 655=A.I.R. 1932 Sind 162.**

———**S. 39 (prior to amendment of 1929)**—*Bona fide* transferee—Hindu widow's claim for maintenance—Enforceability against the transferee. *See* HINDU LAW —MAINTENANCE—WIDOW. **40 L.W. 678.**

———**S. 39**—*Husband and wife—Gift to wife for maintenance—Binding nature on creditors of husband.*

The right of maintenance of the wife is not a charge on the husband's estate. Where property is transferred with the intention of defeating her right, her rights against the property in the hands of the transferee is governed by S. 39, T. P. Act. Where a Hindu husband who was on cordial terms with his wife made a gift of his property to his wife in order to provide for her maintenance, *held*, that the wife was not a creditor and that the transfer in her favour could not take effect as against the claims of the husband's creditors. (*Hasan, C. J. and Bisheshwar Nath, J.*) BRIJ RAJ KUER *v.* RAM DAYAL. **7 Luck 411=135 I.C. 369=I.R. 1932 Oudh 17=8 O.W.N. 1291=A.I.R. 1932 Oudh 40.**

———**S. 39**—*Transferee of part of property with notice of charge—Extent of liability.*

The holder of a decree for arrears of maintenance charged upon certain properties is entitled to enforce the same against the transferee of the properties for value with notice of the charge, even though the transferee purchased only a part of the estate. If he is obliged to satisfy the full amount of the charge, his only remedy is a suit for contribution against the owners of the remaining portion of the estate. (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **8 Luck. 168= 9 O.W.N. 900=143 I C. 692=I.R. 1933 Oudh 194= A.I.R. 1932 Oudh 336.**

———**S. 40**—*Agreement in favour of wife—Bogus transactions—Transferee in good faith and for value not bound.*

An agreement was executed between a husband and a wife, that the wife would get a certain monthly allowance on failure of which she could recover the amount by suit. The property was also hypothecated for further assurance but the same was transferred by the husband. The wife having sued the transferee on the ground that her husband's agreement had created a charge on the property, the husband was joined as a party defendant but in appeal he ranked as appellant along with the wife.

Held, that the agreement was a bogus one not intended to be acted upon and, therefore, had not created any interest in the property in favour of the wife. The transferee being without notice of agreement and being purchaser for value was not liable for payment of the amount mentioned in the agreement out of the property. 13 All. 28 and 33 Cal. 985 at 993, Ref ; 47 All. 90 and

T. P. ACT (1882), S. 40.

28 All 655, Dist. (*Dalal, J.*) ASHRAF ZADI BEGAM *v.* LALTA PRASAD. **I.R. 1931 All. 267 (2)=130 I.C. 299 (2)=A.I.R. 1931 All. 338.**

———**S. 40**—"*Annexed to ownership of immovable property*"—*Obligation to pay* zar-i-chakaram.

An obligation to pay *zar-i-chakaram* cannot be said to be annexed to the ownership of immovable property within the meaning of S. 40. A contract giving rise to a right of pre-emption or a contract of sale both would create an obligation annexed to the ownership of property and it is to such obligations that S. 40 is meant to apply. Restrictive covenants are covenants restraining the use to be made of the land. A contract to pay a certain sum of money on the happening of a certain event cannot be held to be a restrictive covenant. (*Young and Pullan, JJ.*) ABDAS SHAKUR *v.* KUNWAR MUNSHI NAND LAL. **I.R. 1931 All 703=133 I.C. 543=15 R.D. 447=12 L R. 226 (Rev.)=1931 A. L.J. 429=A.I.R. 1931 All. 552**

———**S. 40**—*Applicability—Artificial channel of one person running through land of another—Use of water by latter under contract with owner of channel—Liability to pay water rate—If one running with the land—Enforceability against transferee.*

Where an artificial stream or channel is constructed by one person as part of an irrigation system, and an arrangement is made by which the owners of lands through which the channel passes take water and pay water-rate to the owner of the channel for so taking water, the obligation of the owner of land to pay such water-rate is an obligation "annexed to the ownership of immoveable property" or a covenant running with the land within the meaning of S. 40, and may be enforced against a transferee from the original land-owner by a transferee from the owner of the channel. The obligation in fact devolves on the person who happens to be the owner of the land and is inseparably connected with it. (*Curgenven and K. S. Menon, JJ.*) RAMAN NAYAR *v.* PARAMESWARAN NAMBUDRI. **158 I C. 887=8 R.M. 375=1935 M.W.N. 990=42 L.W. 642=A.I.R. 1935 Mad. 975.**

———**S. 40**—*Applicability*—'Lagan' *right in* ghat—*Easement right—Enforceability against purchaser.*

Where a person sued to enforce his '*lagan*' right in a *ghat* against a purchaser of the back portion of the *ghat*, *Held*, that the right was an easement, that it was enforceable irrespective of the question of notice and that S. 40, T. P. Act, had no application (*Dalal, J.*) BRIJ MOHAN DAS *v.* BHIKHUJI. **I R 1931 All. 205=129 I.C. 717=1931 A.L.J. 267=A.I.R. 1931 All. 207.**

———**S. 40**—Lease—Covenant as to rent—If runs with the land. *See* LEASE—RENT—COVENANT TO PAY WHETHER TITLE OR NO TITLE. **62 Cal. 346=60 C.L. J. 477=A.I.R. 1935 Cal. 368.**

———**S. 40**—*Notice—Question of fact.*

The question of notice is a question of fact. A I.R. 1921 P. C. 112, Ref. (*Dalal, J.*) ASHRAF ZADI BEGAM *v.* LALTA PRASAD. **I.R. 1931 All. 267 (2)=130 I.C. 299 (2)=A.I.R. 1931 All. 338.**

———**S. 40**—*Partition—Allotment of assets and liability—Clause providing for charge in favour of one paying the debts of another—Purchaser with notice of—Charge binding on.*

A partition deed between four brothers provided that if any of them was obliged to pay off the debts of the family allotted to another, the person so paying would be entitled to a charge on the properties of the other to the extent of the amount paid.

Held, that the clause was a restrictive covenant in the nature of an obligation annexed to the ownership of immovable property within the meaning of S. 40 of the Transfer of Property Act, which was binding on a purchaser of the properties from one of the brothers with notice of the covenant. (*Curgenven and Sundaram Chetty, JJ.*) ABDUL RAZAK ROWTHER *v.* ABDUL RAHIMAN SAHIB. **149 I.C. 287=6 R M. 629=1933 M W N. 1013=38 L.W. 463=A.I.R. 1933 Mad. 715 =65 M.L.J. 390.**

T. P. ACT (1882), S. 41.

———**S. 40**—*Scope—Applicability— Personal obligation to pay money under contract.*

By enacting the second part of S. 40, the legislature merely meant to adapt to the law in India, the English rule of conferring an equitable title in land on the holder of a contract relating to the transfer of land. The section cannot be applied to a merely personal obligation to pay a sum of money to a third party arising out of a contract. (*Young and Pullan, JJ.*) ABDUS SHAKUR *v.* KUNWAR MUNSHI NANDA LAL. **53 All 742=I.R. 1931 All. 703=133 I.C. 543=12 L.R 226 (Rev.)=15 R.D. 447=1931 A.L.J. 429=A. I.R. 1931 All 552.**

———**S. 40 (2)**—*Claim for maintenance—Properties liable for*—Bona fide *transferee—Liability for claim.*

Where an *ekrarnama* provided that in the event of the executant not paying the allowance fixed for maintenance, the obligee was to have liberty to proceed against the properties relinquished by her in favour of the obligor and in case she was unable to realise the arrears from those properties, she might have recourse to the other properties of the obligor, no particular or specific property having been mentioned as liable for the claim, the deed cannot be construed as creating a charge but only an obligation arising out of a contract annexed to the ownership of immovable property which, however, cannot be enforced against a *bona fide* purchaser without notice. (*Suhrawardy and Graham, JJ.*) MOHINI DEBI *v.* PURNA SASHI GUPTA. **I.R. 1932 Cal. 411= 138 I C. 24=36 C.W.N. 153=55 C.L.J. 198=A.I.R. 1932 Cal. 451.**

———**S. 40, Ill.**—Construction—Purchaser after attachment but in pursuance of agreement made before—Priority. *See* C. P. CODE, O. 21, RR. 59 AND 60. **68 M.L.J. 67.**

———**S. 41**—*Applicability—Tenancy.*

S. 41 of the T. P. Act does not apply to tenancies. (*Oppenheim, S. M. and Drake Brockman, J. M.*) BACHCHA SHUKLA *v.* GAJADHAR SINGH. **1935 R.D. 62.**

———**S. 41**—*Benami sale—Fraud—Suit by subsequent purchaser—Plea of fraud by the original owner in possession.*

It is necessary under S. 41 to prove not merely consideration but also good faith and due enquiry. Where the second defendant, the owner of certain property, executed a benami sale-deed of land to the first defendant who, in turn, conveyed it to the plaintiff, in a suit brought by the plaintiff for possession of the property from second defendant who continued in possession in spite of the two conveyances, it was held that it was open to the second defendant who claimed relief to plead real facts, *e.g.*, fraud of the other party or of his predecessor in title. The Court in such cases does not assist either party but acts on the principle "*in pari delicto potior est conditio possidentis*". 21 Bom. 405, Not Foll.; A.I.R. 1923 Cal. 90 and 45 A. 396, Rel. on. (Case law discussed.) (*Madgavkar and Barlee, JJ.*) LAKSHMAN BALVANT KHISTI *v.* VASUDEV MOHONIRAJ PANDE. **I R. 1931 Bom. 377=133 I.C. 265=33 Bom.L R. 356=A.I.R. 1931 Bom. 227.**

———**S. 41**—*Burden of proof.*

T. P. ACT (1882), S. 41.

In order that a purchaser may be entitled to the benefit of S. 41, he must show that he has taken reasonable care and has acted in good faith. Existence of circumstances calling for such inquiry is not necessary. Where he fails to look into papers to see whether vendor has power to sell property, he is not entitled to benefit of S. 41 and the mere fact that the vendor's name appears in register *D* is not sufficient. (*Wort, J.*) RAM CHARITRA THAKUR *v.* SHIVANANDAN THAKUR. **150 I.C. 922=7 R.P. 42=A.I.R 1934 Pat. 67.**

———**S. 41**—*Burden of proof—Onus on transferee.*

The burden of proof is always on the transferee to show that he acted in good faith and that his transferor was the ostensible owner with the express or implied consent of the real owner. (*Nanavutty, J.*) HARGOVIND PRASAD *v.* AMBIKA DUTT RAM. **9 Luck. 571=6 R O 393=148 I.C. 422=11 O.W.N. 421=A I.R. 1934 Oudh 165**

———**S. 41**— *Construction —"Person interested"—Trustee.*

All that S. 41 requires is that the alienors should act as "ostensible owners" with the consent express or implied of the "persons interested". There can be no doubt that the trustees of a property come under the latter category. (*Bhide, J.*) D. A. V. COLLEGE REGISTERED SOCIETY, LAHORE *v.* UMRAO SINGH. **157 I.C. 92=8 R L. 84=37 P.L.R. 168=A I.R. 1935 Lah. 410.**

———**S. 41**—*Co sharer—Some of co sharers shown as owners in revenue records—Transfer by such co sharers—Sale cannot be challenged by other co-sharers.*

Where some of the co-sharers are shown in the Revenue Records for a number of years as owners and they were mortgaging the land, a sale, by such co-sharers cannot be challenged by the other co sharers and the vendee stands in the position of the vendors and any defence available to them is open to him as regards the title to the property. 46 All 377 and 31 C.W.N. 205, Ref (*Bhide, J.*) UDHO DAS *v.* MEHR BAKHSH. **I R. 1933 Lah. 457=144 I.C. 340 (2)=34 P.L R. 714=A.I.R. 1933 Lah. 262.**

———**S. 41**—*Enquiry by transferee—Absence of.*

Where there was nothing to show that the transferee made any enquiries about the title of the transferor.

Held, that he was not entitled to the protection under S. 41. (*Bishesbwar Nath and Nanavutty, JJ.*) SADDHA SINGH *v.* MANGAL SINGH. **I.R. 1933 Oudh 139=142 I.C. 860=10 O.W.N. 58=A.I.R. 1933 Oudh 166.**

———**S. 41**—*Enquiry by transferee—Absence of.*

Where the vendees were shown not to have made any enquiry whatsoever at the time when they purchased the property.

Held, that vendees could not claim the protection under S. 41. (*Grille, A. J. C.*) KANCHEDILAL *v.* KANHAI. **I.R 1932 Nag. 147=140 I.C. 390=28 N. L.R. 227=A.I.R. 1932 Nag. 165**

———**S 41**—*Enquiry by transferee—Absence of alienation by heir—No enquiry whether there are other co-heirs—Applicability of section.*

In order that S. 41 may apply it is not necessary that the real owner should have consented. It is sufficient if the transferor is the ostensible owner to the knowledge of the real owner. The test is that the transferee should show that he acted like a reasonable man of business and with ordinary prudence. Where a transferee takes a transfer from an heir to a deceased who is in possession of the property without making inquiries as to whether there are other co heirs, he is not entitled to the protection under S. 41. (*Niamatullah and Rachhpal Singh, JJ.*) FAZAL HUSAIN *v.* MAHOMED KAZIM. **56 All. 582=1934 A L J. 544=150 I C. 81=18 R.D. 374=6 R A. 1027=15 L R. 465 (Rev.)=4 A W.R. 1427=A I.R. 1934 All. 193.**

———**S. 41**—*Enquiry by transferee— Absence of—Mortgage of trust property - Duty of mortgagee to enquire.*

Where the mortgagors who were trustees of a religious institution mortgaged the trust properties and the mortgagee took the mortgage knowing of their character as trustees and without making sufficient inquiry.

Held, that the mortgagee could not rely on S. 41, T. P. Act. (*Baker, A.C.J. and Divatia, J.*) JAMSHEDJI PESTONJI *v.* DORABJI KUVERJI **149 I.C. 317=6 R. B. 368=35 Bom L.R. 1091=A.I R. 1934 Bom. 1.**

———**S. 41**—*Enquiry by transferee—Absence of—Vendee being co-sharer—Effect—Applicability of section.*

All that S. 41 requires is that the transferee should take "reasonable care to ascertain that the transferor had power to make the transfer". What is "reasonable care" is a question of fact and must naturally depend upon the circumstances of the case. Reasonable care would ordinarily include inquiry but in exceptional circumstances it may not be considered essential. Where the vendee is himself a co-sharer in the property and believes himself to be fully aware of the circumstances relating to the title of the vendors, and the vendors have been acting as ostensible owners for years and nothing has happened to put him on any further inquiry as to title, S. 41 is applicable to the circumstances of the case although the vendee does not make any inquiry as to title. (*Bhide, J.*) D. A. V. COLLEGE REGISTERED SOCIETY, LAHORE *v.* UMRAO SINGH. **157 I. C. 92=8 R L. 84=37 P.L.R. 168=A.I.R. 1935 Lah. 410.**

———**S. 41 and Evidence Act, S. 115**—Enquiry by transferee—Duty to make—Right to benefit of estoppel —Duty to make enquiries. *See* EVIDENCE ACT. S. 115. **11 O.W.N. 1097.**

———**S. 41**—*Enquiry by transferee—Nature of—Consideration not proved.*

Where the payment of the consideration for the transfer has not been proved, the contention based on the provisions of S. 41 must fail. The same would be the case if the transferee's inquiry has been of the most superficial character. (*Mya Bu and Dunkley, JJ.*) U PO SHIN *v.* EDWARD. **150 I.C. 898=7 R.R. 20=A. I.R 1934 Rang. 139.**

———**S. 41**—*Enquiry by transferee—Proof of.*

It is not enough for the purchaser to say that an enquiry as regards the possession of the property had been made through a servant. The transferee should place before the Court the evidence showing what enquiries had been made by the servant, so that the Court might be in a position to judge for itself whether these enquiries which the servant made could be considered to be reasonable or not. (*Smith and Rachhpal Singh, JJ.*) SHAHAR BANO BEGAM *v.* RAJ BAHADUR SINGH. **6 R O. 555=149 I.C. 357=11 O.W.N. 702=A.I.R. 1934 Oudh 223.**

———**S. 41**—*Essentials.*

Not only is it necessary that the transferee should have acted in good faith but also that the transfer should have been made by the ostensible owner with the consent express or implied of the person interested. If these requirements are not satisfied the principle of the section cannot be applied. 26 All 490; A.I.R. 1924 All 381 and A.I.R. 1926 Cal. 916, Dist. (*Bhide, J.*) NANDLAL *v.* KARAM BIBI. **6 I.R. (Lah.) 185=146 I.C. 210=A.I.R. 1933 Lah. 258.**

T. P. ACT (1882), S. 41.

———**S. 41**—*Good faith—Need for proof—Absence of negligence not sufficient.*

The onus lies on the vendee to establish his honesty and good faith in order to bring his action within S. 41 and it is not sufficient to establish merely that he made an enquiry. The vendee may have made a reasonably careful enquiry and may have ascertained the true fact but chosen to ignore them. A finding of the absence of negligence is not therefore the same thing as a finding of good faith. A person may act without negligence but at the same time without honesty. (*Hilton, J.*) MT. HAKIMAN *v.* MT. BADRUNNISSA. **6 R.L. 586 = 148 I.C. 742 = A.I.R. 1934 Lah. 658.**

———**S. 41**—*Good faith—Presumption from circumstances—Sale by mother of son's share to her sister.*

Where a mother sold the share of her son in the estate of his father to her sister and it was not disputed that the transferor and the transferee lived in the same house together and that the transferee used to write the accounts in connection with the estate for the transferor the only reasonable presumption that could be drawn from the circumstances is that the transferee purchased the share of the son in his father's estate knowing that his share had not been paid to him. (*Ba U J.*) GALLOPE *v.* MA IN. **7 R.R. 61 = 151 I.C. 314 (2).**

———**S. 41**—*Good faith—Proof—Even if made fruitless.*

When the transferee however minute his inquiries might have been, would not have found any reason to believe that the transferor was not fully empowered to make the mortgage and in fact, no clue existed to suggest that a third person laid any claim to the property which the transferor was mortgaging, it cannot be said that the mortgagee was not acting in good faith. (*Ba U and Mackney, JJ.*) MAUNG PO LU *v.* BANK OF CHETTINAUD. **154 I.C. 249 = 7 R.R. 295 = A.I.R. 1934 Rang. 313.**

———**S. 41**—*Hindu joint family—Applicability—Mortgage in favour of karta of Dayabhaga Hindu family—Subsequent division between mortgagee and his co sharers—Assignment by mortgagee of entire mortgage right—Suit by assignee—Co-sharers of mortgagee—If can dispute title of assignee.*

One *P*, who was the karta of a joint Hindu Dayabhaga family consisting of himself, his brother and his nephews took a mortgage bond in his name from one *R S.* in 1915. In 1919 there was an agreement between *P* and his five co sharers reciting that they had separated in June, 1919, that the properties acquired and the monies lent were *ejmali* properties, and that their future acquisitions would be their respective self acquisitions. In 1925, *P* assigned his rights as mortgagee to plaintiff who brought a suit for sale on the mortgage impleading thereto as defendants, the representatives of the mortgagor, the original mortgagee *P* and his co-sharers and also purchasers of the equity of redemption. The co-sharers of *P* did not put forward any claim to any interest in the mortgage money.

Held, that so far as the co-sharers of *P* were concerned, they would be estopped by reason of the principles embodied in S. 41, Transfer of Property Act, from contending that *P* had only one sixth share in the mortgage money, because by their conduct they had represented to the outside world that *P* was entitled to deal with the entire rights of the mortgagee and they were fully bound by this representation to the outside world. Plaintiff could therefore avail himself of the principle of estoppel against the co-sharers and could get a decree for the entire mortgage money even as against a purchaser of the equity of the redemption, who could not at all be prejudiced, because the co-sharers of *P* were parties to the suit. (*D. N. Mitter and Patterson, JJ.*) BENGAL COAL CO., LD. *v.* SITARAM CHATTERJI. **159 I.C. 159 = 61 C.L.J. 560 = A.I.R. 1935 Cal. 667.**

T. P. ACT (1882), S. 41.

———**S. 41**—*Hindu limited owner—Alienation by—Suit by reversioners to set aside—Absence of protest by father of reversioners—If raises estoppel against sons.*

K, a Hindu, died leaving certain properties which were enjoyed by his widow *C*. She gave away the properties to her son in-law from whom the defendants purchased them. After the death of *C*, the plaintiffs claiming to be the nearest reversioners of *K*, sued to recover the properties from the defendants. The latter pleaded that the father of the plaintiffs who was the village patel at the time not only did not protest against the transfer, but also actually got the patta of the lands transferred in the name of the defendant's vendor, receiving from him kandaya both before and after the death of *C*, and that consequently the plaintiffs were estopped from questioning the purchase by the defendants from *C's* son-in law.

Held, that S. 41, T. P. Act, did not apply to the case, and that no adverse inference could be drawn from the transfer of patta as it was the duty of the Patel to receive kandaya from the khatedar for the time being. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KEMPIAH *v.* RANGA. **13 Mys.L.J. 61 = 39 Mys.H.C.R. 1119.**

———**S. 41**—Hindu limited owner—Purchaser from limited owner—When protected—Estoppel. *See* EVIDENCE ACT, S. 115. **13 Mys.L.J. 61 = 39 Mys.H.C.R. 1119.**

———**S. 41**—*Hindu limited owner—Transfer by.*

When a Hindu lady cannot without legal necessity transfer a part of the estate in her possession so as to bind the reversioners, much less can she by orally transferring possession and putting such person in possession destroy the rights of the reversioners in case such person transfers the property. In such a case the transferee from such a person cannot plead estoppel under S. 41 for that section refers to personal estoppels arising out of the conduct of the plaintiffs or persons through whom they are claiming and the mere fact that the Hindu widow's estates is vested in the limited owner for the time being cannot create an estoppel against the reversioners by virtue of the consent obtained from the limited owner. (*Sulaiman, C. J. and Thom, J.*) SHAMBHU PRASAD *v.* MAHADEO PRASAD. **55 All. 554 = I.R. 1933 All. 409 = 144 I.C. 293 = 1933 A.L.J. 1185 = A.I.R. 1933 All. 493.**

———**S. 41**—*Husband and wife—Representation as to title of wife—Husband bound.*

A Burmese husband allowed his wife and children to hold themselves out as the sole owners of the properties and to deal with them as if they were such owners The wife and children mortgaged the properties and the mortgagee acted in good faith and without notice of the title of the husband,

Held, the husband could not impugn the mortgage. (*Ba U and Dunkley, JJ.*) MAUNG PO SEIN *v.* MA MYIT. **6 I R. (Rang.) 138 = 146 I.C. 1073 = A.I.R. 1933 Rang. 361.**

———**S. 41**—*Involuntary transfer—Applicability—Auction purchaser—Right to protection under—"Transfer"—Meaning.*

S. 41, T. P. Act, does not apply to auction-purchasers. The "transfer" spoken of in the section must be a voluntary transfer effected by an act of the ostensible owner. Consequently, auction-purchasers are not entitled to the protection afforded by S. 41 or by any

T. P. ACT (1882), S. 41.

principle on which that section is based. (*Sulaiman, C. J. and King, J.*) PURAN MAL *v.* SHIVA LAL. **1934 A.L.J. 1260=155 I.C. 86=7 R.A. 905=4 A.W.R. 492=A.I.R. 1935 All. 234.**

——**S. 41**—*Involuntary transfer—Transfer by operation of law.*

The protection conferred by S 41 cannot be claimed by an auction-purchaser. A person claiming the benefit of S. 41 has first to prove that a person was an ostensible owner of a property with the consent, express or implied, of another, and that he made a transfer of it. It cannot be said that a person making a purchase at an auction sale is a transferee from a transferor who was in possession of the property with the consent of another. In an auction sale, the judgment debtor, whose interests are being sold, is no consenting party. 34 I.C. 494, Dist. (*Smith and Rachhpal Singh, JJ.*) SHAHAR BANO BEGAM *v.* RAJ BAHADUR SINGH. **6 R O. 555=149 I.C. 357=11 O.W.N. 702=A.I.R. 1934 Oudh 233.**

——**S. 41**—*Minor—Interest in property held by—Transfer by adult brother—Transferee, if protected as against minor.*

A minor who has an interest in property cannot by reason of the disability of infancy give his consent, and therefore, a transferee of such property from an adult brother of the minor cannot claim the protection of S. 41 of the T. P. Act as against the minor as such brother cannot be said to be an ostensible owner of the property with the consent of the minor. (*Addison and Din Mohammad, JJ.*) KALSUM BEGAM *v.* MOHAM MAD ISMAIL. **161 I.C. 390=8 R.L. 741=37 P.L.R. 112=A.I.R. 1936 Lah. 161.**

——**S. 41**—*Minors—Member of Hindu joint family—Ostensible owner—Alienee from manager of joint family—Persons interested—Consent of.*

A manager of a joint Hindu family consisting of some minors alienated the ancestral house without any necessity. The alienee transferred it to third persons who in a suit by minors for setting aside the alienation pleaded S. 41 of the T. P. Act.

Held, that the original alienee was not the ostensible owner of the said ancestral family house with the consent express or implied of the persons interested in the said ancestral house, inasmuch as the minors who had an interest in the said house did not and could not by reason of the disability of infancy give their consent. Therefore the minors were not prevented by the terms of S. 41 from alleging that the deed of alienation by the manager was merely a sham transaction and that the alienee had no authority to transfer the said house. (*Sir Lancelot Sanderson.*) SHANKAR *v.* DAOOJI MISIR. **58 I A. 206=53 All. 290=1931 A.L.J. 373=35 C.W.N. 693=I.R. 1931 P.C 186=132 I.C. 602=33 Bom.L.R. 1000=1931 M.W N. 679=34 L.W. 119=54 C.L.J. 24=A.I.R. 1931 P.C. 118=61 M.L. J. 212 (P.C.).**

——**S. 41**—*Minor—Real owner, a minor.*

In order to bring S. 41 into effect, the ostensible owner must be in possession of the property with the consent, express or implied, of some other person interested in the immovable property. S. 41 is inapplicable, therefore, to a case where the plaintiff was at all material times a minor and incapable of consenting to his father holding himself out as the owner of the property. 36 B. 446; 34 All 22 and 26 Bom. 433, Ref. (*Cunliffe, O. C. J. and Baguley, J.*) MAUNG SEIN BA *v.* MAUNG KYWE. **12 Rang. 55=150 I.C. 667=7 R R. 2=A.I R 1934 Rang. 90.**

——**S. 41**—*Mortgage—Purchaser of the equity of redemption—No obligation on mortgagee to give notice.*

T. P. ACT (1882), S. 41.

S. 41 cannot be invoked by the purchaser of the equity of redemption on the ground that he purchased from the mortgagor as ostensible owner without notice of the mortgage. There is no obligation on the mortgagee to give notice of his mortgage to the world. 27 Bom. L. R. 434, Foll.; 32 Cal. 357, Ref. (*Niyogi, A.J. C.*) NARAYAN *v.* PURSHOTAM. **27 N.L R. 144=I.R. 1931 Nag. 164=134 I.C. 676=A.I.R. 1931 Nag. 144.**

——**S. 41**—*Municipal and police records—Transferee consulting khasra paimash of the municipality or Police records of levy of punitive tax—Discharge of obligation.*

The khasra paimash is not a record of title but a mere record of survey and carries with it no presumption of correctness so far as the question of ownership is concerned. A municipality is generally interested more in the assessment of tax than in the determination of ownership and for its purposes an occupier is as good as an owner Moreover, in the preparation of documents like khasra paimash, a municipality is concerned more with the measurements of the buildings with a view to safeguard its own interests against any encroachment on the public streets than in the ascertainment of the title of persons owning such buildings. In the same way, the police department when taking a census of the houses for the purposes of levying the punitive tax is merely interested in recording the names of the occupants from whom they could levy the contribution. The transferees cannot be said to have discharged their obligations under S. 41 of the T. P. Act by merely taking out the old records of the municipality or of the Police Department. (*Bhide and Din Mahammad, JJ.*) KARTAR SINGH *v.* MT. MEHR NISHAN. **16 Lah. 313=155 I.C. 1064=7 R.L 826=A.I.R 1934 Lah. 885.**

——**S. 41**—*Ostensible owner—Invalid bequest by widow—Consent of reversioners—Legatee's name included in the record-of rights—Loan by stranger—Estoppel of reversioners.*

Though a bequest by the widow of property inherited from her husband is invalid, yet where the next reversioners consented not only to the will but to the getting of the legatee's name entered in the record-of-rights and a third person has on the faith thereof advanced a loan to the ostensible owner, *i.e.*, the legatee, the reversioners are estopped from asserting their own title to the prejudice of the stranger. (*Niyogi, A.J.C.*) TEJMAL *v.* SAVAJI. **135 I C. 407=I.R. 1932 Nag. 7=27 N. L.R. 283=A I.R. 1931 Nag. 194.**

——**S. 41**—*Ostensible owner—Mutation in mortgagor's name—Effect.*

The mere fact of mutation having been made in the name of the mortgagor is not sufficient to make him the ostensible owner of the property mortgaged especially when the mutation proceedings, in respect of which the mortgagee must be fixed with notice when he relies on an entry in the mutation register in support of his mortgagor's ostensible ownership, disclose the fact that other persons claimed ownership in the mortgaged property. (*Hasan, C.J. and Bisheshwar Nath, J.*) AMIR JAHAN BEGAM *v.* KHADIM HUSAIN KHAN. **I.R 1931 Oudh 235=132 I.C. 75=14 O.L.J. 314=8 O.W.N. 237=A I.R. 1931 Oudh 253.**

——**S. 41**—*Ostensible owner—Proof—Entry in revenue papers—Value.*

A person cannot be said to be an ostensible owner with the consent of the true owner on the basis of an entry in the Revenue papers when the ostensible owner's name was entered in the Revenue papers in the face of the opposition of true owner and was only entered as he was in possession at the time. **20 C.W.N. 265 (P.C.),**

T. P. ACT (1882), S. 41.

Rel. on (*Grille, A. J. C.*) KANCHEDILAL *v.* KANHAI. **28 N.L.R. 227 = I.R. 1932 Nag. 147 = 140 I.C. 390 = A.I.R. 1932 Nag. 165.**

———**S. 41**—*Partner—One partner permitting another to deal with partnership property as ostensible owner—Estoppel.*

When one of partners has permitted another partner to deal with partnership property as an ostensible owner and such property is mortgaged by the latter to a bank, knowledge on the part of one of the members of the investigation committee of the bank in his personal capacity that property belongs to partnership is not itself sufficient to justify an inference as to knowledge on the part of the bank. The partner who has so permitted is estopped from pleading the partnership and his own interest in the mortgaged property (*Monroe and Bhide, JJ.*) PUNJAB AND SIND BANK, LTD. *v* RUSTOMJI. **160 I C. 773 = 8 R.L. 592 = A.I.R. 1935 Lah. 821.**

———**S. 41**—*Principle.*

It is a principle of natural equity that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice, or something which amounts to constructive notice, of real title, or that there existed certain circumstances which ought to have put him upon an inquiry, that if prosecuted would have led to a discovery of it. I.A. Supp. Vol. 40; A.I.R. 1930 All. 374, Foll. (*Raza and Smith, JJ.*) PARBHOO DAYAL *v.* AJUDHIYA SINGH. **135 I C. 397 = I R. 1932 Oudh 45 = 8 O.W.N. 1148 = A.I.R. 1931 Oudh 419.**

———**S. 41**—*Reasonable care—Casual enquiries from strangers.*

Where the purchaser made casual inquiries of persons who were not conversant with the vendor's affairs, *held* that the purchaser had not taken reasonable care. (*Mukerji and S N. Guha, JJ.*) AMIRTA LAL BAISYA *v.* PRATAP CHANDRA CHAKRAVARTY. **I. R. 1931 Cal. 417 = 130 I.C. 897 = 52 C L.J. 492 = A.I.R. 1931 Cal. 144**

———**S. 41**—"*Reasonable care*"—*Interpretation.*

The expression "reasonable care" in S. 41 has been interpreted as meaning such care as an ordinary man of business or a person of ordinary prudence would take, and it is not enough to assert generally that enquiries should be made, or that a prudent man should have made further enquiries, but some specific circumstances should be pointed out as the starting point of an enquiry which might be expected to lead to some result. The party charged must have notice not of a fact or instrument which in truth related to the subject in dispute without his knowing that such is the case, but that he had actual notice that it did so relate. There must be actual notice that the property is in some way affected, and no fraudulent turning away from the knowledge of facts which *res gestae* would suggest to a prudent mind. If mere want of caution, as distinguished from wilful blindness, is all that can be imputed to the purchaser, then the doctrine of constructive notice will not apply. (*Mosely and Dunkley, JJ.*) M. S. CHETTYAR FIRM *v.* KALIAMMA. **161 I.C. 221 = 8 R.R. 456 = A.I.R. 1935 Rang. 423.**

———**S. 41**—*Reasonable care—Proof—Mortgagee as ostensible owner.*

Where there is no evidence to prove that the mortgagee took the mortgage from the ostensible owner after taking reasonable care to ascertain that the transferor had power to make the transfer and that he (mortgagee) had acted in good faith, he cannot claim protection of S. 41. (*Hasan, C.J. and Bisheshwar Nath, J.*) AMIR JAHAN BEGAM *v.* KHADIM HUSAIN KHAN. **I.R. 1931 Oudh 235 = 132 I.C. 75 = 14 O.L.J. 314 = 8 O. W.N. 237 = A.I R. 1931 Oudh 253.**

———**S. 41**—*Reasonable care and good faith—Onus of proof—Purchaser not seeing any papers—Inference.*

The purchaser himself must in every case show that he had taken reasonable care to ascertain that the tranferor had power to transfer, and that he has acted in good faith. When the purchaser admits that he saw no papers, it can be safely inferred that he did not take reasonable care. The fact that the transferor's name appears in the D. Register is not sufficient. (*Wort, J.*) RAM CHARTER THAKUR *v.* SHIVANANDAN THAKUR. **7 R.P. 42 = 150 I.C. 922 = A.I.R. 1934 Pat. 67.**

———**S. 41**—*Revenue papers—Inspection of—Sufficiency of.*

Where, had the transferee made inquiries in village before purchasing the property he would at once have come to know that the property had long ago been sold by the transferor and that he had no interest left in the property at all which he could transfer, transferee gets no title to the land. Mere inspection of the revenue papers by the transferee is not enough. (*Nanavutty, J.*) HARGOVIND PRASAD *v.* AMBIKA DUTT RAM. **9 Luck. 571 = 6 R.O. 393 = 148 I.C. 422 = 11 O.W.N. 421 = A.I.R. 1934 Oudh 165.**

———**S. 41**—*Revenue papers—Vendor erroneously mentioned as owner of larger share in revenue papers—No enquiries by purchaser—Reliance on revenue papers—No proof of reasonable care.*

Property comprising 10 biswas was sold in 1909 in execution of a mortgage decree. But the sale certificate mentioned only 1 biswas as having been sold. The mistake was repeated in the revenue papers which erroneously stated that the mortgagor was in possession of the 9 remaining biswas. The mortgagor sold this property to the defendants who were sought to be ejected by the purchaser of 10 biswas in the Court sale of 1909. The defendants were unware of the sale certificate but they claimed the protection of S. 41 of the T. P. Act on the ground that they had relied on the revenue papers.

Held, that S. 41 made it incumbent on the transferee to take care to ascertain that the transferor had power to make the transfer and to act in good faith and the first step which he is expected to take is to search the registration office to ascertain what transfers, if any, had been made by the transferor; his failure to do so and to acquaint himself with the prior mortgage disentitled him to the protection of. S. 41. (*Niamatullah and Rachhpal Singh, JJ.*) KHATUN FATIMA *v.* SHIB SINGH. **1933 A L J. 1036 = 147 I.C. 840 = 6 R.A. 576 = A I.R. 1933 All. 917.**

———**Ss. 41 and 48**—*Rival transferees—Negligence—Absence of—Priority between—S. 41 not applicable.*

The question of priority between a mortgagee and a subsequent purchaser of the same immovable property is governed by S. 48. The purchaser is not protected by the provisions of S. 41, when there is no proof of negligence on the part of mortgagee. But even if the mortgagee be regarded as a person interested in the property, it cannot be said that with his consent, express or implied, the owner was the ostensible owner of the property.

Quaere: S. 41 makes no express reference to negligence. Therefore it is doubtful whether negligence can be a plea under S. 41. A.I.R. 1929 Rang. 117,

T. P. ACT (1882), S. 43.

Doubted. (*Rachhpal Singh and Smith, JJ.*) SITA RAM *v.* RAJ NARAIN. **150 I.C. 145=6 R.O. 623=11 O.W.N. 770=A.I.R. 1934 Oudh 283.**

———**Ss. 43 and 6 (a)**—Applicability. *See* T.P. ACT, SS. 6 (*a*) AND 43. **27 N.L.R. 199=A.I.R. 1931 Nag. 51.**

———**S. 43**—*Applicability—Knowledge of purchaser about want of authority to transfer.*

Where a mortgagee is fully aware that his mortgagor's claim for the entire share is contested by a collateral in the Court of Revenue and he takes the mortgages in question with that knowledge and with the knowledge that the transferor was not authorised to transfer to him more than her own share in the inheritance of her deceased husband, it is impossible to hold, that, whatever representations the mortgagor made at the time of executing the deed of mortgage they were erroneous in the matter of her authority to transfer more than her legal share in the inheritance of her husband. There can be no estoppel in favour of one against the other if both parties knew the true state of facts. A.I.R. 1921 P.C. 112, Rel. on. (*Wazir Hasan, C.J. and Smith, J.*) BHAGWAN DIN *v.* MAHOMED YUNUS KHAN. **9 Luck. 359=6 R.O. 407=148 I.C. 367=11 O.W.N. 145=A.I.R. 1934 Oudh 112.**

———**S. 43**—*Applicability—Transferees—If includes auction purchasers.*

It it doubtful if the word "transferees" in S. 43, T. P. Act, would expressly cover an auction purchaser. (*Sulaiman, C.J. and King, J.*) PURAN MAL *v.* SHIVA LAL. **1934 A.L.J. 1260=155 I.C. 86=7 R.A. 905=4 A.W.R. 492=A.I.R. 1935 All. 234.**

———**S. 43**—*Applicability—Third party's right not intervening.*

Two groves with some other property of the mortgagor were mortgaged for the purpose of purchasing the very two groves from its owner. The mortgagee having sought to enforce his mortgage against those groves an objection was taken that it could not be so done, as the mortgagors had no interest in the property sold at the date of the mortgage.

Held, that the mortgage was enforceable on the principle of feeding the grant by estoppel there being no third party's interest intervened between the execution of the security and the execution of the sale deed. (*Mukerji and Bennet, JJ.*) RAM LAL *v.* SHIAMA LAL. **I.R. 1931 All. 342=131 I.C. 38=1931 A.L.J. 73=A.I.R. 1931 All. 275.**

———**S. 43**—*Applicability—Transfer prohibited by law.*

The equitable doctrine contained in the section cannot be invoked in support of a transfer prohibited by law, for example, a sale or other transfer by the reversioners of a Hindu widow. 48 C. 1 (P.C.) and 41 M. 418 (F. B.), Ref. (*Madhavan Nair, J.*) SREERAMALU *v.* SOMARAJU. **1930 M.W.N. 1054.**

———**S. 43**—*Hindu limited owner—Applicability—Hindu transferee from Hindu widow—Right to benefit of section.*

A Hindu who lends money on a mortgage by a Hindu widow must be deemed to be aware of the elementary principles of Hindu Law that a widow inheriting the property of her deceased husband holds it only for her life with the limited interest of a Hindu widow, and such a transferee cannot claim the benefit of S. 43, T P. Act, because he is not a person who has acted on the erroneous representation of a party who subsequently acquires an interest in the property. (*Bennet, J.*) JAGERNATH PRASAD *v.* MT. DHANPATI. **151 I.C. 561=7 R.A. 184=A.I.R. 1934 All. 969.**

T. P. ACT (1882), S. 43.

———**S. 43**—*Insolvent—Transfer by undischarged insolvent—Revesting of property in the insolvent after discharge—Right of mortgagee.*

On the date of the mortgage in favour of the plaintiff, the defendant was an undischarged insolvent. At the time of the suit by the mortgagee, the insolvent had been discharged and the mortgaged property revested in the defendant.

Held, that an alienation by an undischarged insolvent of property belonging to him was not void, but only voidable at the option of the Court or the receiver and that the mortgagee was, under the circumstances, entitled, under S. 43 of the T. P. Act, to enforce the mortgage by sale of the mortgaged property. (*Iqbal Ahmad and Kisch, JJ.*) RUP NARAIN SINGH *v.* HAR GOPAL TEWARI. **55 All. 503=I.R. 1933 All. 343=143 I.C. 836=1933 A.L.J. 475=A.I.R. 1933 All. 449.**

[F. 16 L. 392 (400).]

———**S. 43**—*Mortgage — Mortgagor subsequently acquiring interest in mortgaged property—Estoppel.*

A mortgagor when he executed the mortgage believed that he was fully competent to execute it. Years after, a claim was brought for 5 annas 4 pies share in the property and a decree was passed under which it was ordered that the claimants would get possession of 5 annas 4 pies share if they paid a certain amount within a certain period The claimants were unable to pay that amount and a compromise was entered into under which the claimants got much less than 5 annas 4 pies share and the mortgagor got more than 10 annas 8 pies share. When the mortgagee obtained a decree and applied for its execution, the mortgagor contended that the mortgagee could proceed only against the share, which, according to the finding of the Court, was owned by him and as the additional share which he possessed had become his in pursuance of the agreement which he had arrived at after the decree, the mortgagee could not proceed against that share.

Held, repelling the contention of the mortgagor, that the mortgagor was estopped from pleading that he was not entitled to mortgage the property which he mortgaged and that he was also estopped from defeating the claim of the mortgagee if any property which he had mortgaged and which he did not actually own at the time of the mortgage had subsequently come into his possession (*Harries and Rachhpal Singh, JJ.*) ABDUL AHAD *v.* BRIJ NARAIN RAI. **153 I.C. 984=7 R.A. 653=1935 A.L.J. 214=1935 A.W.R. 87=A.I.R. 1935 All. 269.**

———**S. 43**—*Non transferable occupancy holding—Abandonment - Prior settlement in favour of another—Enforceability.*

Where a non-transferable occupancy holding was mortgaged by the raiyat and on the death of the latter the landlord settled the lands with another on footing that the widow had abandoned the holding and obtained rent but he also brought the property to sale in execution of his mortgage decree and purchased the same and the person who was subsequently inducted into the land sued for recovery of possession,

Held, that the settlement in favour of the subseqnent lessee was valid and could be enforced by reason of the principles contained in S. 43, T.P. Act. (*Guha and Bartley, JJ.*) DEB NATH MORAL *v.* SASI BHUSAN MORAL. **149 I.C. 1099=6 R.C. 708=58 C.L.J. 145=37 Cal. W.N. 1144=A.I.R. 1934 Cal. 82.**

———**S. 43**—*Reversioners—Sale by—No misrepresentation.*

Where certain alienations were made by the window and in order to set aside those alienations the reversioners executed a document in favour of a third person by

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which they consented to sell the properties to him in consideration of his advancing the cash necessary for the purpose of the suit and in that document it was distinctly recited that the property conveyed was one in which they had only a reversion, there is no question of any misrepresentation and the transferee from the reversioners is not entitled to invoke the aid of S. 43 in support of the transaction. (*Madhavan Nair, J.*) SREERAMULU *v.* SOMARAJU. **1930 M.W.N. 1054.**

———**S. 43**—*Reversioner—Suit by presumptive reversioner to set aside alienation by female heirs—Decree in their favour—Subsequent settlement by which reversioners surrender their share and sell half of the property to alienee—Opening of succession—Reversioner question ing right to alienate—Transferor prevented from questioning sale.*

Where two reversioners, the last male holder's paternal uncle and his son, the plaintiff herein, brought suits to set aside certain alienation by female heirs but, after a decree in their favour, matters were settled and the net result of the settlement was that one-half of the property sold was to be restored to the reversioners, and the other half to be retained by the alienee and when, on the opening of the succession in favour of the plaintiff by the death of the last female heir, the plaintiff filed the present suit for recovering the property,

Held, (1) that under S. 43 of the Transfer of Property Act, the plaintiff's father having sold this property as if it belonged to him and to the plaintiff at a time whem they had admittedly no title thereto, the plaintiff could not now be heard to set up that fact after acquiring the title as reversioner subsequently, and (2) treating the old alienation as still the subject for consideration, the act of the plaintiff's father acting on his own behalf and on behalf of the plaintiff in surrendering whatever rights they had by the decree and in purporting to sell the property to the alienee was as emphatic an affirmation of the transaction as it was possible to imagine. The fact that at that time they were not the actual reversioners but only the presumptive reversioners was not sufficient to deprive that act of its due force and effect. It is possible for presumptive reversioners even before the succession opens by a sufficient act of affirmation to do something which disables them from questioning the alienation after they are *in titulo*. (*Krishnan Pandalai, J.*) VELLAYAMMAL *v.* PALANIANDI AMBALAM. **38 L.W. 955 = 1933 M.W.N. 341 = 147 I.C. 381 = 6 R.M. 333 = A.I.R. 1933 Mad. 856 = 65 M.L.J. 772.**

———**Ss. 43 and 6 (a)**—*Reversioner—Transfer of interest by presumptive reversioner—Validity of—Illustration to S. 43 not good law.*

The illustration to S. 43 of the T. P. Act is repugnant to S. 6 (*a*) of the Act and is not good law. The right of a presumptive reversioner to succeed to the property on the death of the limited owner in possession is only a *spes successionis* and its transfer is invalid, though in form it purports to be a conveyance of a present interest in the property. The transfer, being expressly forbidden by S. 6 (*a*) of the T. P. Act, does not become valid by the application of S. 43 of that Act on the vendor subsequently succeeding to the property. (*Beasley, C.J. and Bardswell, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* SAMPATH NAIDU. **6 I.R. (Mad.) 170 = 145 I.C. 965 = 1933 M.W.N. 1377 = 38 L.W. 610 = A.I.R. 1933 Mad. 795 = 65 M.L.J. 588.**

———**S. 43**—*Reversionary rights—Mortgage of—Validity of, in Punjab.*

A contract mortgaging a *spes successionis* in the Punjab where the Transfer of Property Act, is not in force, can be enforced as an agreement to convey the estate when it falls into possession. Where a person mortgages a certain land as his own property without purporting to mortgage his reversionary rights therein, the mortgage is not void *ab initio* and in any case the case is fully covered by the principles underlying S. 43 of the T. P. Act. (*Abdul Rashid, J.*) AUTAR SINGH *v.* LAL SINGH. **35 P.L.R. 732 = 155 I.C. 880 = 7 R.L. 799 = A.I.R. 1934 Lah. 996.**

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———**S. 43**—*Scope.*

S. 43 really lays down or enunciates what is known as "feeding the estoppel"; that is to say where a grantor has purported to grant an interest in land, which he did not at the time possess but subsequently acquires, the benefit of the subsequent acquisition goes automatically to the earlier grantee, or, as is usually expressed, "feeds the estoppel." (Case law disc.) (*Sen, J.*) VILLA *v.* PETLEY. **6 R.R. 245 = 148 I.C. 721 = A.I.R. 1934 Rang. 51.**

———**Ss. 43 and 8**—Scope and operation—Transferor if can proceed against transferee's interest in any property other than that transferred. *See* T. P. ACT, SS. 8 AND 43. **A.I.R. 1934 All. 731.**

———**Ss. 43 and 6 (a)**—*Transfer of immovable property by heir apparent—Erroneous representation by transferor that he is full owner—Transferee acting on such representation—Rights of.*

Every attempt should be made to reconcile the provisions of S. 43 of the T. P. Act together with the illustration with the provisions of S. 6. S. 6 (*a*) applies to cases where professedly there is a transfer of a mere *spes successionis*, the parties knowing that the transferor has no more right than that of a mere expectant heir. But where an erroneous representation is made by the transferor to the transferee that he is the full owner of the property transferred and is authorised to transfer it and the property transferred is not a mere chance of succession but immovable property itself, and the transferee acts upon such erroneous representation, then if the transferor happens later, before the contract of transfer comes to an end, to acquire an interest in that property no matter whether by private purchase, gift, legacy or by inheritance or otherwise, the previous transfer can at the option of the transferee operate on the interest which has been subsequently acquired, although it did not exist at the time of the transfer. The illustration to S. 43 is directly applicable to such a case. (*Sulaiman, C.J. and Rachhpal Singh, J.*) SHYAM NARAIN MISIR *v.* MANGAL PRASAD. **57 All. 474 = 153 I.C. 163 = 1935 A.L.J. 13 = 7 R.A 455 = 4 A.W.R. 1121 = A.I.R. 1935 All. 244.**

———**S. 44**—*Applicability—Conditions—Purchaser of share—Right to mesne profits.*

S. 44, T. P. Act, does not speak of a family dwelling-house nor does it say that the dwelling-house must be occupied either permanently or even occasionally by the undivided family. The word 'dwelling house' does not necessarily cannote a dwelling-house occupied by an undivided family which also owns it. So also the words "belonging to an undivided family" are quite unqualified and do not *per se* all import that the house must be occupied permanently or even temporarily by the undivided family. The only two requisites laid down in the proviso to S. 44 are (1) that the house must be a dwelling house, and (2) that it must belong to an undivided family. It does not matter if the house is occupied by tenants. Hence S. 44, T. P. Act, would apply to the case of the purchaser of a share of one out of a number of dwelling-houses owned by an undivided family, which they have rented out. Where an undivided

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family owned dwelling-houses, which they rented out and the purchaser of a share in it claimed mesne profits from the date of purchase to the date of possession.

Held, that the proviso to S. 44, T. P. Act, applied, even though the members of the family did not reside therein, and that the purchaser was not entitled to mesne profits. 18 Cal. 10 and 45 M. 648=42 M.L.J. 507 (F.B.), Dist. (*Walsh, J.*) SUBRAMANYA SASTRY *v.* SHEIK GHANNU. **A.I.R. 1935 Mad. 628.**

——**S. 44 (2)**—*Undivided family—Essentials.*

To constitute an undivided family for the purpose of S. 44, T. P. Act, it is unnecessary that the members of the family should have constantly resided in the dwelling-house nor is it necessary that they should be joint in mess. A.I.R. 1929 Cal. 231, Ref. (*Walsh, J.*) SUBRAMANYA SASTRY *v.* SHEIK GHANNU. **A.I.R. 1935 Mad. 628.**

——**S. 48**—*Earlier oral charge—Subsequent registered mortgage—Priority.*

S. 48 of the T. P. Act must be read subject to S. 48 of the Registration Act and so a subsequent registered mortgage is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee had no notice. (*Tyabji and Wadia, JJ.*) CHHAGANLAL SAKHARAM *v.* CHUNILAL. **152 I.C. 267=7 R.B. 133=36 Bom.L.R. 277=A.I.R. 1934 Bom. 189.**

——**S. 48**—*Salvage payment—Mortgagee decree-holder—Further charge—Right to—Subsequent mortgagee—Priority.*

In respect of payments made to avert a sale for arrears of revenue, even though it may be subsequent to the final decree on his mortgage the decree-holder is entitled to a first charge on the sale proceeds in the mortgage suit in priority to the subsequent mortgagee. 11 M.I.A. 241, Ref. (*Sir John Wallis.*) MANOHAR DAS *v.* HAZARIMULL. **58 I.A. 341=59 Cal. 463=I.R. 1931 P.C. 293=134 I.C. 645=1931 M.W.N. 1163=34 L.W. 472=33 Bom.L.R. 1345=8 O.W.N. 893=35 C.W.N. 1040=1931 A.L.J. 800=54 C.L.J. 125=A.I.R. 1931 P.C. 226=61 M.L.J. 343 (P.C.).**

[D. 55 M. 408 (478).]

——**S. 50**—*Applicability—Lease by mortgagor—Rent paid in advance—Right of tenant.*

The mortgagor cannot create a lease so as to bind the mortgagee, much less the purchaser in auction of the mortgaged property and the tenant cannot take advantage of S. 50 of the Act with regard to rent paid in advance in a suit brought by the purchaser not for rent but for compensation. 30 Bom. 250 and 28 Bom.L.R. 1162, Foll. (*Baker, J.*) GIRDHARLAL *v.* LILADHAR. **134 I.C. 1223=33 Bom. L.R. 1123=I.R. 1932 Bom. 7=A.I.R. 1931 Bom. 539.**

——**S. 50**—*Rent paid in advance.*

In order to get the benefit of the protection of S. 50, the tenant should pay rent as rent. Rent paid in advance is a mere loan and is not a payment in fulfilment of an obligation to pay rent. Such a payment cannot be pleaded by a tenant in a suit for rent or compensation for use and occupation by the assignee of the property. (*Heald, J.*) PALE ZABAING RURAL CO-OPERATIVE CREDIT SOCIETY *v.* MAUNG THU DAW. **9 Rang. 470=135 I.C. 646=I.R. 1932 Rang. 54=A.I.R. 1931 Rang. 292.**

——**S. 51**—*Applicability.*

A claim for improvements can only be made by a transferee who makes them believing in good faith that he was absolutely entitled to the property—and not by a person who never had any title and was in possession by the leave of the real owner. (*Shingne, J.*) MURLIDHAR NARAYANDAS *v.* PARMANAND LUCHMANDAS.

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I.R. 1932 Bom. 301=137 I.C. 560=34 Bom.L.R. 164=A.I.R. 1932 Bom. 190.

——**S. 51**—*Applicability — Exchange — Mutation refused by Revenue Officer owing to absence of party—Such party believing in good faith to be owner, erecting building—Subsequent sale—Pre-emption.*

Two persons exchanged lands and on application for mutation, owing to the absence of one of the parties, mutation was refused to be effected in his name. Such person believed in good faith to be the owner of the land and erected a building thereon. When mutation was refused, the opposite party who had given the land in exchange executed a sale-deed in favour of the person who had built on it. Thereupon a collateral of the vendor applied for pre-emption.

Held, that he was entitled to do so only on the payment of the full sale value of the land and the costs of the building erected thereon and that S. 51 applied to the case. (*Addison and Bhide, JJ.*) QAIM *v.* GHULAM DIN. **6 I.R. (Lah.) 167=146 I.C. 36=A.I.R. 1933 Lah 540.**

——**S 51**—*Applicability to lessees.*

Though the case of a lessee holding under a lease for over 99 years may be outside the contemplation of S. 51, the principle contained therein may be applied to lessees who are sought to be ejected. 1925 All. 261, Rel. on. (*Mukerji and S. K. Ghose, JJ.*) MOHAMMAD ALI KHAN *v.* KANAILAL. **159 I.C. 767=8 R.C. 350=A.I.R. 1935 Cal. 625.**

——**S. 51**—Applicability—Lessee for life building permanent structures—Holding over after lessee's death by transferee—Ejectment by lessor—Right to claim compensation. *See* T.P. ACT, S. 108 (*h*), (*p*) AND (*q*). **40 C.W.N. 52.**

——**S. 51**—*Applicability—Transferees having no bona fide belief in title.*

S. 51 does not apply to a case where the transferee of immoveable property has not proved that he believed in good faith that he was absolutely entitled to the property in question. (*Sen and Baipai, JJ.*) MOTI CHAND *v.* BRITISH INDIA CORPORATION, LTD. **I.R. 1932 All. 126 (2)=136 I.C. 78 (2)=1932 A.L.J. 54=A.I.R. 1932 All. 210.**

——**S. 51**—*Applicability—Transfer in execution of decree.*

S. 51, T. P. Act, does not apply to a transfer in execution of a decree. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* KAM CHANDER. **53 All 334=I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

——**S. 51**—*"Believing in good faith that he is absolutely entitled"—Meaning.*

Per *King, J.*—It is doubtful whether the expression "believing in good faith that he is absoultely entitled thereto" means anything more than believing that he is what is usually termed in India a "full proprietor" with a heritable and transferable estate, as opposed for example, to a person holding a life estate or rent free grantee whose grant is liable to resumption. The phrase does not mean that the person must believe that the property is free from all encumbrances. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

——**S. 51**—*Good faith—Negligence—Effect of.*

It is true that absence of proper inquiry condemns a bargain as one not made in good faith. But any and every negligence does not show want of good faith. Good faith within S. 51 is not necessarily precluded by facts showing negligence in investigating the title. **57 I.**

T. P. ACT (1882), S. 51.

A. 305=53 M. 692, Rel. on. (*Mukerji and S. K. Ghose, JJ.*) MOHAMMAD ALI KHAN *v.* KHANAILAL. **8 R.C. 350=159 I.C. 767=A.I.R. 1935 Cal. 625.**

——**S. 51**—*Right to compensation for improvements—Requisite for—Purchaser from limited owner.*

The principles of equity embodied in S. 51 of the T. P. Act can only be invoked on proof of good faith in effecting the improvements. Such good faith must lie in the belief of his absolute title which in turn amounts to belief in the title of his vendor. The mere fact of payment of consideration to the vendor cannot be the criterion. Where the purchaser resided in the same village in which the original owner of the properties lived and the properties were situated, and he was aware that the person from whom he purchased derived title from a widow with limited interest with no power of disposition, gift or release except, under special circumstances, he should have made enquiries and satisfied himself about the nature of the title of his vendor. Without such enquiry, he is not justified in making improvements or entitled to claim compensation for them. (*Rama Rao and Srinivasa Iyer, JJ.*) BASANNA *v.* PARVATHAMMA. **10 Mys.L.J. 65.**

——**S. 51**—*Scope—Improvements by vendee—Right of purchaser at Court-sale to compensation.*

A person who has been evicted can claim compensation under S. 51 provided he is (1) a transferee, (2) he has made the improvement, (3) he has made such improvement believing in good faith that he was absolutely entitled, and (4) he was evicted. The section does not provide for these various capacities or qualifications being filled or fulfilled by different persons. It is intended to provide for a right to compensation to an individual who fulfils all the conditions laid down. The relief given by the section is not any species of property and such a right is neither heritable nor transferable. There is no general equitable principle entitling the person dispossessed to compensation apart from what has been laid down in S. 51. Hence a purchaser of a property at a Court sale who has been dispossessed cannot claim compensation for improvements effected by the vendor. The evictee himself must be the improver. (Case-law referred.) (*Ameer Ali, J.*) NAGENDRABALA DASEE *v.* PANCHANAN MOURIE. **60 Cal. 1388=150 I.C. 42=6 R.C. 804=A.I.R. 1934 Cal. 290.**

——**S. 51**—*Scope—Person having a better title—Whether can be compelled to sell to the transferee.*

Under S. 51, it is the person who has a better title within the meaning of the section, who has the right to decide whether to pay for the improvements made by the transferee or to sell his own interest to the transferee; and the transferee cannot compel the person having a better title to sell his interest to him. (*Sen and Baipai, JJ.*) MOTI CHAND *v.* BRITISH INDIA CORPORATION, LTD. **I.R. 1932 All. 126 (2)=136 I.C. 78 (2) =1932 A.L.J. 54=A.I.R. 1932 All. 210.**

——**Ss. 51 and 70**—*Scope—Ss. 51 and 70 compared.*

Per *Sulaimain, J.*—The provisions of S. 70 are in no way in conflict with the principle underlying S. 51. Under S. 70 the accession becomes a part of the security and therefore cannot be appropriated by the mortgagor or his representatives. It can be sold along with the mortgaged property and will pass to the purchaser. S. 51 does not entitle a person who has made improvements on another's land in good faith to retain the improvements or accessions or to remove the building materials. Such constructions are deemed to vest in the owner of the land, but he is given a right to claim their value. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I.C 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

T. P. ACT (1882), S. 52.

——**S. 51**—*Transfer by executor vitiated by want of good faith—Compensation for improvements by transferee.*

A transferee from the executant of a will, is not entitled to claim compensation, for improvements made by him in the property transferred, from the legatee to whom the said property was bequeathed. Where it is found there was no good faith on the part of the donee-transferee. (*Jackson, A. J. C.*) VITHAL *v.* NARAYAN. **I R. 1931 Nag. 131=134 I.C. 259=A.I.R. 1931 Nag. 69.**

——**S. 52.**

Applicability.
Compromise.
Construction.
Dower.
Duration of lis.
Effect of lis pendens.
Execution proceedings.
Execution sale.
Foreclosure suit.
Lease.
Maintenance suit.
Mortgage suit.
Partition suit.
Pre-emption.
Scope.

Applicability.

——**S. 52**—Applicability conflict between the rule of *res judicata* and the doctrine of *lis pendens*—The latter does not prevail over the former, if the former is applicable. *See* C. P. CODE, S. 11—APPLICABILITY. **61 Cal. 494.**

——**S. 52**—*Applicability.*

The doctrine of *lis pendens* does not apply to the enforcement of a right which existed prior to the institution of a *lis*. (*Shadi Lal, C.J. and Broadway, J.*) BHAG *v.* UJAGAR SINGH. **135 I.C. 48 (2)=I.R. 1932 Lah. 32 (2)=32 P.L.R. 283=A.I.R. 1931 Lah. 435.**

——**Ss. 52 and 53**—*Applicability—Act of management—Admission to tenancy.*

Where before the Court sale the previous owner admitted certain trespassers to the land on the basis of economic rent and it appeared that it was beneficial to the estate.

Held, that the arrangement was not hit at by the doctrine of *lis pendens*. (*Oppenheim, S.M. and Drake Brockman, J.M.*) CHHAB NATH *v.* BALDEO. **18 R.D. 282=15 L.R. 343 (Rev.).**

——**S. 52**—*Applicability—Buildings erected on land with respect to which one of parties claims right of passage.*

A defendant will not be at liberty to erect buildings on a piece of land which forms the subject matter of the litigation and thus compel the plaintiff to file another suit for the removal of the obstructions which came into existence after the suit had been filed. To such a case S. 52 applies. (*Abdul Rashid, J.*) NARAIN SINGH *v.* IMAM DIN. **154 I.C. 724=7 R L. 606 (2)=A.I.R. 1934 Lah. 978.**

——**S. 52**—*Applicability—Dealing with property—Avoidance.*

Where there was not a transfer but a dealing with property, and the object was prohibited by S. 52.

Held, that the transaction could be avoided. (*Oppenheim, S.M. and Drake Brockman, J.M.*) HARKARAN SINGH *v.* GOYA PRASAD. **11 O.W.N. 390=18 R.D. 175=15 L.R. 218 (Rev.).**

T. P. ACT (1882), S. 52.

Compromise.

———S. 52—Compromise —Transfer of right—Not affected by *lis pendens*. *See* T. P. ACT, S. 32—PARTITION SUIT. **36 Bom.L.R. 738.**

———S. 52—*Compromise — Consent decree* — Lis pendens—*Applicability of.*

Lis pendens applies even if the pending suit ends in a consent decree on compromise but the compromise must be honest and not collusive. (*Mahomed Noor, J.*) JUTHAN TEWARI *v.* PARASNATH SINGH. **151 I.C. 70=7 R.P. 60=A.I.R. 1934 Pat. 270.**

Construction.

———S. 52—*Construction—"Court"—Registrar of Co-operative Societies.*

The Registrar of Co-operative Societies acting under R. 14 (5 *b*) of the rules framed under the Co operative Societies Act is a "Court" and a purchase of properties from the owner pending an application by a Co-operative Society to obtain an award from the Assistant Registrar on default of the mortgagor is one made *pendente lite*. In any case when once the award has been put before a competent Civil Court in execution and the Court directs the sale of the mortgaged property, any purchase made during such proceedings is made *pendente lite* and affected by the doctrine of *lis pendens*. (*Pakenham Walsh, J.*) VELAYUDA MUDALI *v.* CO-OPERATIVE RURAL CREDIT SOCIETY, ULAKOTTAI. **57 Mad. 426=148 I.C. 1098=6 R.M. 567=1933 M.W.N. 1398 =38 L.W. 880=A.I.R. 1934 Mad. 40=66 M.L.J. 90.**

Dower.

———S. 52—*Dower—Suit by Mahomedan widow—Transfer made by husband—Legality.*

A Mahomedan woman claiming dower debt can also claim a charge against specific portion of her husband's property. But where it is a mere money claim, it cannot be charged on any specific item and consequently a transfer of an item pending the suit is not hit at by S. 52 especially when the remaining property is not found to be insufficient to satisfy the dower claim. (*Bisheshwar Nath and Pullan, JJ.*) ABDUL RAHMAN KHAN *v.* INAYAT BIBI. **I.R. 1931 Oudh 129=130 I.C. 113= 7 O.W.N. 1181=A.I.R. 1931 Oudh 63.**

Duration of lis.

———S. 52—*Duration of* lis.

The doctrine of *lis pendens* does not apply when the decree has already been passed. There are, however, two exceptions. Where there is a mortgage suit, the proceedings in giving effect to the mortgage decree may be taken as a continuation of the proceedings. Secondly, execution proceedings have also been considered to be a continuation of the proceedings during which the doctrine prevails. But if the decree-holder took no active steps to execute his decree for specific performance of an agreement to execute a mortgage for nearly two years, the doctrine of *lis pendens* cannot be brought into operation. 15 Bom.L.R. 809, Ref. (*Tyabji, J.*) LAKSHMAN MAHADEV *v.* RAMCHANDRA. **I.R. 1932 Bom. 524=139 I.C. 610=34 Bom.L.R. 117=A.I.R. 1932 Bom. 301.**

———S. 52—*Duration of* lis—*Decree directing specific performance—Inordinate delay in execution.*

No doubt in a suit for specific performance of an agreement where the Court by its decree directs execution of the deed, the *lis* should be deemed to continue until the decree-holder has had a reasonable time within which to ascertain that the judgment-debtor neglects or refuses to obey the decree and in the event of neglect or refusal, to prepare and deliver to the Court a draft of the necessary document. But where there is an inordinate delay of over two years in execution of the decree which is not satisfactorily explained by the decree-holder there is no active prosecution of the suit or proceeding on the part of the decree holder. 12 B. 217, Ref. (*Subhedar, A.J.C.*) HARLAL *v.* LALA PRASAD. **14 N.L.J. 77=I.R. 1931 Nag. 123=133 I.C. 395=A.I.R. 1931 Nag. 138.**

———(as amended), S. 52—*Duration of* lis—*Effect of the amendment of* 1929 *—Continuance of* lis *in mortgage suits.*

The 'active prosecution' mentioned in S. 52 must be deemed to continue so long as the suit is pending in appeal, since the proceedings in the appellate Court are merely continuation of those in the suit; and in a mortgage suit, the *lis* does not terminate with the preliminary decree but must be deemed to continue at least till the passing of the final decree so that the sale by the mortgagor to a third person pending the proceedings could not in any way affect the rights which the mortgagee obtained under his decree. The amending Act of 1929 has not introduced a new rule of law in the explanation appended to the section but has put the impress of legislature upon certain judicial pronouncements in which it was held that in a mortgage suit the *lis* continued even after the final decree and subsisted during the pendency of execution proceedings. (*Sen and Bajpai, JJ.*) MOTI CHAND *v.* BRITISH INDIA CORPORATION, LTD., CAWNPORE. **I.R. 1932 All. 126 (2)=136 I.C. 78 (2) =1932 A.L.J. 54=A.I.R. 1932 All. 210.**

———S. 52—Duration of *lis*—Decree creating charge—Mortgage of charged properties—Subsequent mortgagee paying off charge—Subrogation—*Lis* continuing till complete satisfaction of decree. *See* MORTGAGE—SUBROGATION. **A.I.R. 1934 Mad. 358=66 M.L.J. 566.**

Effect of Lis pendens.

———S. 52—*Effect of* lis pendens.

The effect of the rule of *lis pendens* is simply that a sale *pendente lite* cannot affect the rights of any party to the suit under any decree or order which may be made therein. (*Bisheshwar Nath and Pullan, JJ.*) MATHURA PRASAD *v.* GHANSHIAM DAS. **I.R. 1931 Oudh 319 =132 I.C. 767=14 O.L.J. 233=8 O.W.N. 179=A.I.R. 1931 Oudh 157.**

Execution proceedings.

———S. 52—*Execution proceedings.*

S. 52 contains a general rule of *lis pendens* to avoid multiplicity of suits and the principle applies to execution proceedings, whether S. 52 is in terms applicable or not. (*Pakenham Walsh, J.*) VELAYUDA MUDALI *v.* CO-OPERATIVE RURAL CREDIT SOCIETY, ULAKOTTAI. **57 Mad. 426=148 I.C. 1098=6 R.M. 567=1933 M W.N. 1398=38 L.W. 880=A.I.R. 1934 Mad. 40=66 M.L.J. 90.**

Execution sale.

———S. 52—*Execution sale.*

The doctrine of *lis pendens* applies to a sale in execution pending a suit by a third party for a declaration of his lien on the property which had been hypothecated to him by the judgment-debtor. 23 W.R. 329; 15 C. 94; 28 C. 23, Rel. (*Bhide, J.*) MULKH RAJ *v.* NANAK. **I.R. 1933 Lah. 5=140 I.C. 534 (2)=34 P.L.R. 468 =A.I.R. 1933 Lah. 10.**

———S. 52—*Execution sale.*

An execution sale pending a suit by the sons of the judgment-debtor for a declaration that the property was not liable to be attached is affected by the doctrine of *lis pendens*. (*Tapp, J.*) GHULAM MOHAMMAD *v.* SANSAR CHAND. **I.R. 1933 Lah. 85=141 I.C. 448 =34 P.L.R. 531=A.I.R. 1933 Lah. 171.**

T. P. ACT (1882), S. 52.

Foreclosure suit.

——**S. 52**—*Foreclosure suit—Pendency of—Usufructuary mortgage executed by mortgagor.*

A foreclosure suit is a contentious one where the mortgaged property was directly and specifically in question and a usufructuary mortgage executed by the mortgagor in favour of a third person pending the passing of the final decree without the permission of the Court comes within the section. (*Niamatullah and Kisch, JJ.*) RAM CHARAN *v.* PARAMESHWARI DIN. **55 All. 235 = I.R. 1933 All. 364 = 144 I.C. 70 = 1933 A.L.J. 113 = A.I.R. 1933 All. 201.**

Lease.

——**S. 52**—Lease—Granted by Government in *khas mahal*—Transfer by *pendent lite*—Validity—S. 52 applicable. *See* CROWN GRANTS ACT, S. 2. **63 Cal. 523 = A.I.R. 1935 Cal. 746.**

——**S. 52**—*Lease—Mortgage suit—Grant of lease by mortgagor* pendente lite—*Validity.*

While a mortgage suit is pending, the mortgagor cannot effect transfers by way of leases to enure beyond the time when the property passes by sale to his mortgagee. (*Narayana Ayyar, C.J. and Ouseph, J.*) JACOB MAMMED KASSIM SAIT *v.* KUNHI THOMA. **142 I.C. 188.**

——**S. 52** — *Lease — Pendency of suit regarding validity of first lease—Grant of second lease—Validity.*

Where a lease granted by the manager was contested by a minor member and during the pendency of the suit all the members joined in granting a lease to another.

Held, that the later lease was hit at by the doctrine of *lis pendens*. (*Oppenheim, J.M.*) ASHGAR ALI *v* MAHOMED YUSUF. **15 R.D. 589 = 12 L.B. 323 (Rev.)**

——**S. 52**—*Lease—Pendency of proceedings under O. 21, R. 100, C.P. Code.*

The doctrine of *lis pendens* is applicable to a lease of property executed during the pendency of proceedings in the Revenue Court under O. 21, R. 100, C. P. Code, for restoration of possession of that property. (*King, C. J. and Nanavutty, J.*) THAKUR BAKHSH SINGH *v.* ABHAIDAT SINGH. **11 Luck. 283 = 155 I.C. 1082 = 7 R.O. 639 = 1935 R.D. 346 = 1935 O.W.N. 698 = A.I.R. 1935 Oudh 462.**

——**S. 52**—Lease—Pendency of—Mortgage suit—Lease granted by purchaser in execution of in money decree at low rent—Subsequent purchaser in mortgage suit—Binding nature of lease—Voidable. *See* AGRA TENANCY ACT (1926), S. 19. **A.I.R. 1932 All. 480.**

——**S. 52**—*Lease—Transfer by way of agreement to lease*—Lis pendens.

The doctrine of *lis pendens* will apply to an agreement to execute a transfer by way of lease, if other conditions are fulfilled. (*Kendall, J.*) PANCHAM PALODHAR *v.* KANDHAI PALODAR. **6 R.A. 733 = 148 I.C. 653 (2) = A.I.R. 1934 All 713.**

Maintenance suit.

——**(as amended by Act XX of 1929), S. 52**—*Maintenance suit—Charge for maintenance*—Lis—*Duration and effect.*

Where the properties where made subject to a charge for maintenance by a decree, the *lis* continues until the sale is actually effected and is not terminated by the decree. It is immaterial in such a case that the purchaser of the properties had no notice of the charge or the consequent sale proceedings. (*Madhavan Nair, J.*) ABDUL MUHAMAD ROWTHER *v.* SEETHALAKSHMI AMMAL. **I.R. 1931 Mad. 410 = 130 I.C. 666 = 1930 M.W.N. 1059 = 33 L.W. 109 = A.I.R. 1931 Mad. 120.**

T. P. ACT (1882), S. 52.

——**S. 52 (as amended in 1929)** — *Maintenance suit—Decree charging properties—Mortgage after and before sale—If affected—"Directly and specifically in question"—Meaning.*

The doctrine of *lis pendens* applies to maintenance actions, and under the explanation to S. 52, T. P. Act as amended in 1929, the *lis* continues after the decree and up to the sale in execution of the properties charged by the decree. A mortgage executed by the judgment-debtor after the decree and before the sale is therefore affected by *lis pendens*. The fact that in a suit for maintenance by a Hindu widow, a charge is claimed over all the family properties which are specified in the plaint would not make any difference in the application of the doctrine, if the properties are sufficiently designated so as to make them directly and substantially the subject-matter of the litigation. (*Ramesam and Venkatasubba Rao, JJ.*) RAMASWAMI PILLAI *v.* TRICHINOPOLY CO-OPERATIVE CREDIT BANK, LTD. **59 Mad. 101 = 1935 M.W.N. 983 = 8 R.M. 344 = 158 I.C. 778 = 42 L.W. 550 = A.I.R. 1935 Mad. 867 = 69 M.L.J. 447**

Mortgage suit.

——*See also* LEASE SUPRA.

——**S. 52**—*Mortgage suit.*

In mortgage suits the rule of *lis pendens* only applies to transfers by plaintiff or defendant of their respective interest after the suit including transfers by court-sale in money decrees against either party. It does not apply to previously existing transfers including mortgages or legal proceedings to enforce such transfers by those entitled. The sale in pursuance of a mortgage decree, the mortgage having been executed before the institution of the suit, is not affected by the doctrine of *lis pendens*. (*Waller and Krishnan Pandalai, JJ.*) CHINNASWAMY PADAYACHI *v.* DARMALINGA PADAYACHI. **56 Mad. 115 = I. R. 1932 Mad. 650 = 139 I.C. 307 = 36 L.W. 253 = 1932 M.W.N. 742 = A.I.R. 1932 Mad. 566 = 63 M.L.J. 394.**

[F. 30 N.L.R. 284 (289).]

——**S. 52**—*Mortgage suit—Assignment by subsequent mortgagee of his interest in the property—Subsequent joinder of subsequent mortgagee in the suit—Validity of assignment.*

The words "by any party" are not merely descriptive; they refer to the time, at which the transaction, which it is sought to assail, actually took place. Where pending a suit brought by the first mortgagee, the subsequent mortgagee who was not till then impleaded in the suit assigned his interest to a third party and long after the assignment, the subsequent mortgagee was added as a party to the mortgage suit and a decree obtained against him.

Held, that the assignment was not affected by *lis pendens* and that the decree obtained against the subsequent mortgagee did not affect the rights of the assignee. (*Wort and James, JJ.*) MT. SHEORATAN KOER *v.* KAMTA PRASAD. **11 Pat. 485 = I.R. 1932 Pat. 198 = 139 I.C. 78 = 13 Pat.L.T. 582 = A.I.R. 1932 Pat. 270.**

——**S. 52**—*Mortgage suit—Decree for sale passed by Original Side, High Court—Property partly lying in mofussil—Effect of decree.*

When a decree for sale in a mortgage suit is passed on the Original Side of the High Court in respect of property which lies outside its local jurisdiction, such a decree attracts the operation of *lis pendens*. When once the High Court acquires jurisdiction to determine the suit, the decree that it passes, is in no way different from a decree passed by mofussil Court. The fact that the decree is passed by consent of parties is immaterial. 14 M.I.A. 101 and 15 C. 94, Ref. (*Mukerji and Mitter, JJ.*) C.L. KIERNANDER *v.* BENIMADHAB KHETTRI.

T. P. ACT (1882), S. 52.

58 Cal. 598=I.R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal 763.

———**S. 52**—Mortgage suit—Duration of lis. *See* S. 52—DURATION OF LIS. **A.I.R 1932 All. 210.**

———**S. 52**—*Mortgage suit—Duration of* lis—*Amendment Act XX of* 1929, *Explanation.*

In the case of a mortgage suit, the *lis* continues after the decree *nisi* and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale. The explanation added by the Amendment Act XX of 1929 does not alter the law but only emphasises that the correct view of it is that taken by the Calcutta High Court in 2 C.L.J. 288. (*Kulwant Sahay and Rowland, JJ.*) GHANSHYAM DAS *v.* RAGHO SINGH. **10 Pat. 234=I.R. 1931 Pat. 161=130 I C. 257=11 Pat.L.T. 898=A.I.R. 1931 Pat. 64.**

———**S. 52**—*Mortgage suit—Pendency of suit on prior mortgage—Sale in execution of decree on puisne mortgage—Effect.*

Held, by the majority of the Full Bench, that where sale in execution of a decree obtained on foot of a puisne mortgage takes place during the pendency of the suit or the prior mortgage, the sale in the subsequent mortgagee's suit is affected by the rule of *lis pendens* so as to make the purchaser's right subject to the result of the prior mortgagee's suit.

Per *Mukerji, J. (dissenting).*—Where a transfer takes place as the result of an auction sale held during the pendency of a prior mortgagee's suit in execution of a subsequent mortgagee's decree, the principle of *lis pendens* will not apply. If, however, both the subsequent mortgagee and the mortgagor be parties to the prior mortgagee's suit, the auction purchaser in the subsequent mortgagee's suit will be bound by the result of the prior mortgagee's suit but not on the principle of *lis pendens* but because the subsequent mortgagee and all who are parties to his suit claim under titles inferior to that of the prior mortgagee. (*Sulaiman, A. C. J. Mukerji, Banerji, Young and Pullan, JJ.*) RAM SANEHI LAL *v.* JANKI PRASAD. **53 All. 1023=I.R. 1931 All. 769=134 I.C. 1=1931 A.L.J. 729=A.I.R. 1931 All. 466 (F.B.).**

[F. 56 M. 115 (127).]

———**S. 52**—*Mortgage suit—Plaintiff purchasing property in execution of his mortgage decree—Defendant purchasing decree on another mortgage—Auction sale in defendant's favour after decree and before purchase by plaintiff—Suit for possession.*

The plaintiff purchased property in execution of his mortgage decree. The defendant purchased a decree on a mortgage of another property of the mortgagor in favour of a Bank. Before bringing the property mortgaged to sale, the defendant obtained an order amending the decrees passed in the Bank's suit, the result of which was that the property mortgaged to the plaintiff was added to that mortgaged to the Bank. The defendant purchased the property in auction sale after the plaintiff obtained his decree and before the sale in his favour. Plaintiff sued the defendant for possession.

Held, that S. 52 of the T. P. Act stood in the way of the defendant and that assuming that his purchase was like a purchase at a private sale, the purchase was subject to the decree obtained by the plaintiff and was also subject to the result of the execution of that decree and that if the defendant wanted to take advantage of a private sale made by a mortgagor after the decree, it was his duty to intervene in the execution proceedings and to pay the mortgage money and to stop the sale, and that after the sale had taken place, it was not open to the purchaser from the mortgagor, against whom a decree for sale had been passed, to say that he could nullify the purchase under the mortgage decree.

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Held further, that the property purchased by the plaintiff being not included in the mortgage in favour of the Bank, the plaintiff would never know that the property had been sold in execution of the Bank's decree and it would certainly not be his duty to make the defendant a party to the execution proceedings. (*Mukerji, J.*) SITAL PRASAD *v.* MAHOMED MURAUWAT YAR KHAN. **6 R.A. 860=149 I.C. 187=A.I.R. 1934 All. 972.**

———**S. 52**—*Mortgage suit—Preliminary decree for sale on prior mortgage—Subsequent mortgage after—If affected by* lis pendens.

Where after a preliminary decree for sale on a prior mortgage, a subsequent mortgage is executed in respect of the same property to another person, the latter mortgage is affected by the rule of *lis pendens* in S. 52 of the T. P. Act. The subsequent mortgage does not therefore in any way bind the prior mortgagee decree-holder or affect his rights in the property mortgaged. (*Srivastava, Ag. C.J. and Thomas, J.*) RADHEY LAL *v.* RAM LAL. **152 I.C. 1018=11 O.W.N. 1258=7 R.O. 269=A.I.R. 1935 Oudh 49.**

———**S. 52**—*Mortgage suit—Prior suit by another mortgagee—Priority.*

A mortgage suit brought by a mortgagee cannot be affected by *lis pendens* because some one else who does not claim from him, *i.e.*, another mortgagee, has already sued to enforce his own rights. Both have rights against the same owner and the title of each relates back to the date of his mortgage and is not created by the decree. (*Pollock, A.J.C.*) GANPAT RAO *v.* VITHABAI. **30 N.L.R. 284=6 R.N. 165=148 I.C. 62=A.I.R. 1934 Nag. 36.**

———**S. 52**—*Mortgage suit—Purchaser of property pending suit impleaded—His right to prefer appeal against the decree in suit.*

Where pending a suit on a mortgage, the property is sold and the vendee is made a party to the suit with the leave of the Court, the vendee can file an appeal from the decree passed in order to protect his interests, even though the original debtors have not appealed. (*Young, C.J. and Abdul Rashid, J.*) JIT SINGH *v.* PUNJAB AND SIND BANK, LTD. **159 I.C. 1087=A.I.R. 1935 Lah. 640.**

———**S. 52**—Mortgage suit—Successive mortgages—Rival purchasers in execution of mortgage decrees—Priority. *See* MORTGAGE—PRIOR AND SUBSEQUENT. **A.I.R. 1934 Mad. 585=67 M.L.J. 312.**

———**S. 52**—*Mortgage suit—Suit by second mortgagee—Decree—Lease by mortgagor pending execution—Rights of auction purchaser.*

A mortgagor in possession of his property as tenant under his first mortgagee executed a second mortgage. The second murtgagee brought a suit on his mortgage and obtained a decree but pending the execution proceedings, the mortgagor leased the property for a term of three years and received the rent in advance. The property was subsequently sold in execution and in a suit by the auction purchaser for compensation for loss of rent.

Held, that the grant of lease by the mortgagor to the defendant after the institution of the suit by the second mortgagee, was under S.52 by affected the doctrine of *lis pendens* and could not affect the rights of the plaintiffs who stood in the shoes of the second mortgagee. 28 Bom.L.R. 1162, Foll. (*Baker, J.*) GIRDHARLAL *v.* LILADHAR. **134 I.C. 1223=33 Bom.L.R. 1123=I.R. 1932 Bom. 7=A.I.R. 1931 Bom. 539.**

Partition suit.

———**S. 52**—*Partition suit by minor son against Hindu father—Compromise and transfer of rights by one party to another—If affected by* lis pendens.

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During the pendency of a partition suit by a Hindu minor against his father, a compromise was effected under which the father defendant executed a trust deed transferring all his rights in the family properties to trustees for the benefit of the minor plaintiff;

Held, that the arrangement did not come within the prohibition of S. 52 and was not bad on the ground of *lis pendens*. (*Murphy and Divatia, JJ.*) CHHOTABHAI *v.* DADABHAI. **152 I.C. 715=7 R.B. 166=36 Bom.L.R. 738=A.I.R. 1935 Bom. 54.**

———**S. 52**—*Partition suit—Purchase of property* pendente lite.

The doctrine of *lis pendens* applies to the purchase of property during the pendency of a suit for partition relating to such property, where the suit is not proved to be collusive. (*Coldstream and Bhide, JJ.*) KHEM CHAND *v.* MUL CHAND. **6 R.L. 582=148 I.C. 731=A.I.R. 1934 Lah. 457.**

Pre-emption.

———**S. 52**—*Pre-emption—Applicability of* lis pendens.

It is debateable question whether a pre-emption decree should be treated as a transfer for the purpose of the doctrine of *lis pendens*, but there can be no doubt that the question of how far a transfer is prohibited by that doctrine is one which cannot be answered without reference to the nature of the suit and the extent of the right therein involved and sought to be protected by the doctrine. Where, during the pendency of a pre-emption suit, the vendor's son brought an action for a declaration that the sale should not affect his right to succeed on the father's death and both the suits were decreed and after the father's death the son sued the vendee to recover the property, *held*, that the title of the pre-emptor was not vitiated by the doctrine of *lis pendens*. (*Shadi Lal, C.J. and Broadway, J.*) BHAG *v* UJAGAR SINGH. **135 I.C. 48 (2)=I.R. 1932 Lah. 32 (2)=32 P.L.R. 283=A I.R. 1931 Lah. 435.**

[Rel. 15 L. 349 (351),]

———**S. 52**—*Pre-emption—Suit for.*

The doctrine of *lis pendens* applies to a suit for pre-emption. (*Nanavutty, J.*) SALAMAT ALI *v.* NUR MAHOMED KHAN. **9 Luck. 475=149 I.C 258=6 R.O. 547=11 O.W.N. 317=A.I.R. 1934 Oudh 303.**

Scope.

———**(as amended by Act XX of 1929), S. 52**—*Scope.*

The amended section has no retrospective effect in its operation. (*Subhedar, A.J.C.*) HARLAL *v.* LALA PRASAD. **14 N.L.J. 77=I.R 1931 Nag. 123=133 I.C. 395=A.I.R. 1931 Nag. 138.**

———**S. 52**—*Scope—Notice.*

The doctrine of *lis pendens* is independent of notice. 51 B. 37 and 52 Bom. 208, Foll. (*Baker, J.*) GIRDHARLAL *v.* LILADHAR. **I.R. 1932 Bom. 7=134 I.C. 1223=33 Bom.L.R. 1123=A.I.R. 1931 Bom. 539.**

———**S. 53—**

Applicability.
Benami transfer.
Burden of proof.
Dower.
Frame of suit.
Fraudulent transfer.
Fraud unaccomplished.
Future creditors.
Gift.
Good faith of transferee.
Intent to defraud.
Mortgagor and mortgagee.
Nature of right under.
preference of one creditor.
Scope.

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Transfer partly good.
Wakf.

Applicability.

———**S. 53**—*Applicability—Attachment of property in execution—Mortgage after attachment ceased and before fresh attachment—Validity.*

A certain property wes attached in execution of a money decree. No sale was effected for want of bidders and the case was closed. Subsequent to this but before a fresh attachment by decree holder, the property was mortgaged.

Held, that the previous attachment had ceased to exist, that the mortgage was valid and that mere knowledge of the mortgagee about the long pending execution against mortgagor did not make the transfer made *bona fide* for value invalid. (Case law reviewed.) (*Baguley, J.*) V. P. L. FIRM *v.* E. K. S. M. CHETTIYAR FIRM. **6 I.R. (Rang) 130=146 I.C. 954=A.I.R. 1933 Rang. 169.**

———**S. 53**—*Applicability—Movable property.*

The principle underlying 13 Eliz. Ch. 5 and S. 53, T. P. Act, ought to be applied in India to transactions relating to the transfer of movable property upon the ground that these principles are in accordance with justice, equity and good conscience. 10 Cal. 616, Ref. (*Page, C.J. and Sen, J.*) AH FOON *v.* HOE LAI PAT. **9 Rang. 614=I.R. 1932 Rang. 49=135 I.C. 641=A.I.R. 1932 Rang. 13.**

———**S. 53**—Applicability—"Transfer"—Partition in joint Hindu family. *See* TRANSFER OF PROPERTY ACT, S. 5. **37 Bom.L.R. 925=A.I.R. 1936 Bom. 10.**

———**Ss. 53 and 2 (d)**—Applicability to Punjab—Right of creditor to sue for declaration that transfer by debtor is with a view to defeat his right. *See* T. P. ACT, SS. 2 (*d*) AND 53. **35 P.L.R. 402=A.I.R. 1934 Lah. 460.**

Benami transfer.

———**(as amended), S. 53**—*Benami transfer—Suit to enforce debtor's claim—Creditor can prove the nature of transfer.*

When a purchaser, who is not a *bona fide* purchaser and who has simply lent his name to a debtor to be used as a cloak for the property, brings a suit to enforce the debtor's claim, it is open to the individual who happens to be a creditor of the debtor to prove the true nature of the transfer in favour of the plaintiff. (*Sulaiman, C. J., Mukerji and King, JJ.*) LALLU SINGH *v.* CHANDER SEN. **56 All. 624=6 R.A. 586=147 I.C. 937=15 L.R. 29 (Rev.)=3 A.W.R. 39=18 R.D. 32=1934 A.L.J. 1=A.I.R. 1934 All. 155 (F.B.).**

Burden of proof

———**S. 53**—*Burden of proof—Annulment of transfer—Application by Official Receiver.*

The burden of proving that the transactions questioned by the Official Receiver are liable to annulment on the grounds mentioned in S. 53 would be upon him. (*Tek Chand and Agha Haidar, JJ.*) RAM DITTA MAL BHALLA *v.* OFFICIAL RECEIVER, LAHORE. **15 Lah. 294=6 R.L. 478=147 I.C. 1026=35 P.L.R. 271=A.I.R. 1934 Lah. 365.**

Dower.

———**S. 53**—*Dower—Gift by husband in favour of wife in lieu of—Fraudulent transaction—Evidence.*

The husband executed a *hiba bil ewaz* in favour of his wife in lieu of dower. The deed conveyed all properties moveable and immovable including the household effects. It went the length of saying that if any property possessed by him might possibly have been left out it should also be deemed to be included in it. The

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couple had been married for over 15 years and no explanation was forthcoming as to why the donor thought of making the gift just at the time when a suit had been instituted against him by one of the creditors. It was also found that no physical possession of the property had been transferred to the donee.

Held, that the deed was not a genuine transaction, that it was made with the object of defrauding creditors and was invalid under S. 53, T. P. Act. (*Bisheshwar Nath and Kisch, JJ.*) AMINA BEGAM *v* SHEO PRASAD. **I.R. 1931 Oudh 367=134 I.C. 415=8 O. W.N. 794=A.I.R. 1931 Oudh 344.**

———**S. 53**—*Dower—Transfer in lieu of dower debt*

A transfer of property by a Mahomedan husband to his wife in lieu of a dower debt cannot be impeached under S. 53 of the Transfer of Property Act, if the transfer is a genuine one. A. I. R. 1933 Pat 281, Foll. (*Abdul Rashid, J.*) MT. AMINA *v.* LAKHMI CHAND. **154 I.C. 979=7 R.L. 624=A.I.R. 1934 Lah. 705.**

———**S. 53**—*Dower—Transfer in lieu of dower debt —Validity.*

A transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the power of the creditors for the benefit of the debtor. As soon as it is found that the transfer was made for adequate consideration in satisfaction of a genuine debt and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies. Where a Mahomedan busband transferred property in lieu of an actual dower debt,

Held, that the transfer could not be impeached under S. 53. (*Wort and James, JJ.*) MAHADEO LAL JWALA PRASAD *v.* MT. BIBI MANIRAN. **12 Pat. 297 =6 I.R. (Pat.) 142=145 I.C. 213=14 Pat. L.T. 611 =A.I.R. 1933 Pat. 281.**

Frame of Suit.

———**S. 53**—*Frame of suit—Attachment raised—Suit by creditor under O. 21, R. 63—Maintainability—Suit need not be representative.*

A creditor whose attachment has been raised and who avails himself of the right given by O. 21, R. 63 can sue on his own behalf alone for having the alienation declared void, without mention of any other creditors or their debts. A.I.R. 1928 Rang. 1. Foll. (*Mya Bu and Dunkley, JJ.*) U MAUNG NGE *v.* P. L. S. P. CHETTIAR FIRM. **152 I.C. 506=7 R.R. 161=A.I.R. 1934 Rang. 200.**

———**S. 53**—*Frame of suit—Objection in appeal—Suit not brought on behalf of all creditors.*

Where the defendant elects to go to trial upon the footing that the plaintiff is entitled to bring a suit and is content that the suit should be heard on merits, he cannot claim in appeal for the first time that the suit as framed is not maintainable by reason of S. 53, T. P. Act, in that it was not brought on behalf of or for the benefit of all creditors. (*Baguley, J.*) V. E.A. CHETTYAR FIRM *v.* MA THAN SHIN. **153 I.C. 191=7 R. R. 200=A.I.R. 1934 Rang. 308.**

———**S. 53**—*Frame of suit—Objection in appeal—Suit not brought on behalf of all creditors.*

Where plaintiff filed a suit under S. 53, T. P. Act, but failed to sue on behalf of or for the benefit of the creditors of judgment-debtor but no objection was taken in the trial Court and the suit was decreed.

Held, that as the defendant elected to go to trial upon the footing that the plaintiff was entitled to bring the suit and had been content that the suit should be heard on the merits on that basis, he was not entitled in the appellate Court to claim that the suit as framed was not

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maintainable by reason of S. 53, T. P. Act. (*Mosely, J.*) RAM NARAYAN PANDAY *v.* RAM PARAMARATH. **158 I.C. 248=8 R.R. 163=A.I.R. 1935 Rang. 275.**

———**S. 53**—*Frame of suit—Relief—Plaintiff treating transfer as valid—Issued under S. 53—If it can be raised.*

A plaintiff desiring to bring a case under S. 53, T. P. Act should ask for the relief of a declaration that the transfer in question is one which is void as regards him because he is defrauded, defeated or delayed. Where he does not sue for any such remedy but on the contrary treats the transfer as a valid transfer, it would be improper to frame an issue under S. 53 as no such issue arises on the pleadings and it is not necessary for the Court to give a decision on the point. (*Bennet, J.*) SARJU SINGH *v.* SHYAM SUNDER SINGH. **153 I.C. 674=7 R.A. 561=4 A.W.R. 127=A.I.R. 1934 All. 948.**

———**S. 53**—*Frame of suit—Representative suit—Test of.*

In any suit to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors, it is necessary to find whether the suit was of a representative character or otherwise and this depends upon the nature of the averments made in the plaint, the pleading and the decree that is ultimately passed. Though the pleadings raised the larger issue between the transferor and the body of the creditors, it was not, however, for the benefit of the creditors as a whole. The plaintiff was the sole creditor and he was content with merely a decree in his own favour and did not claim a decree in terms of Form No. 13, Appendix D to Sch. I, C. P. Code.

Held, that he did not sue in a representative character. 34 Cal. 999; 16 Bom. 1; 27 Bom. 322 and A.I.R. 1919 Mad. 257, Ref. (*Niyogi, A.J.C.*) RAHIMTULLAH *v.* RASULKHAN. **6 I.R. (Nag.) 45=145 I.C. 357 =29 N.N.R. 246=A.I.R. 1933 Nag. 169.**

———**S. 53**—*Frame of suit—Suit to set aside fraudulent transfer.*

Per *Mirza, J.*—A suit to set aside a transfer of property under S. 53 will fail if it is not brought by the plaintiffs in a representative capacity on behalf of themselves and other creditors of the defendants. 16 B. 1; 27 B. 146; 34 C. 999, Foll. (*Beaumont, C.J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595=I. R. 1932 Bom. 545=139 I.C. 820=34 Bom.L.R. 862 =A.I.R. 1932 Bom. 498.**

———**S. 53**—Frame of suit—Suit under O. 21, R. 63, C. P. Code, involving avoidance of transfer—Valuation for jurisdiction—Representative suit. *See* C. P. CODE, O. 21, R. 63—SUIT UNDER. **12 Rang. 666=A.I.R. 1934 Rang. 302.**

———**S. 53 (as amended)**—*Frame of suit—Suit by creditor not in representative capacity—Debtor not raising objection in written statement—Right to plead subsequently that suit is not maintainable—Acquiescence.*

Where a Court has inherent jurisdiction to try a particular suit, but its jurisdiction is irregularly invoked, a litigant by his conduct may be precluded from maintaining in the circumstances of the case that the suit was not maintainable as framed *a fortiori* in a case where the irregular institution of the suit was due to a failure on the part of the plaintiff to conform to an enactment passed for the benefit of a particular class of persons. Where the appellant elected to go to trial without alleging in her written statement, or raising by way of an issue that the suit as framed was not maintainable by reason of S. 53, T. P. Act.

Held, that having elected to go to trial upon the footing that the plaintiff was entitled to bring the suit

against her, and having been content that the suit should be heard on the merits upon that basis, she was not entitled to claim that the suit as framed was not maintainable by reason of S. 53 of the Act. S. A. No. 244 of 1932 and A.I.R. 1933 Rang. 52, Rel. on. (*Mosely, J.*) SARAL BIBI *v.* N. S. A. R. CHETTYAR FIRM. **161 I.C. 205=8 R.R. 454=A.I.R. 1935 Rang. 489.**

Fraud accomplished.

——**S. 53**—*Fraud accomplished—Right of transferor to avoid.*

A transfer which is merely colourable and made with the intention of defrauding creditors can be set aside by the transferor at any time before the fraud has actually taken place. But where the fraudulent purpose of preventing the decree-holders from attaching his property and realising their debts has been carried out, it is not open to a plaintiff who made the fraudulent transfer to recover in view of his own fraud. (*Rennet, J.*) MANGAL SEN *v.* BAKHTAWAR SINGH. **I.R. 1932 All. 68=135 I.C. 244.**

Fraudulent transfer.

——**S. 53**—*Fraudulent transfer—Absence of cash or any proved prior consideration and absence of pressure from transferee.*

Where without any special pressure being brought to bear upon judgment-debtor by the alleged creditor, he transferred the whole of his property to that creditor without receiving one pie of cash consideration, and where all the consideration alleged was said to be old debts and money paid or promised to be paid to other creditors, some of which remained unpaid until date of inquiry.

Held, that the transfer must be regarded *prima facie* as voidable. (*Baguley, J.*) N. S. P.R. M. S. P. FIRM *v.* ATTAUDIN. **148 I.C. 539=6 R.R. 233=A.I.R. 1933 Rang. 191.**

——**S. 53**—*Fraudulent transfer—Evidence of intention—Transferees obtaining mutation—Effect.*

The defendant who had all along been indebted to the plaintiff executed two *stpurdanamas* in favour of other persons fraudulently, collusively and dishonestly in order to defeat the plaintiff's claim. The evidence showed that the transactions were not *bona fide*, that they were made gratuitously and presumably to defraud the plaintiff.

Held, that the plaintiff could impeach the transfers as being fraudulent ones and that the mere fact that mutation had been effected in favour of the so called transferees was immaterial. (*Raza and Kisch, JJ.*) PARKASH NARAIN *v.* BIRENDRA BIKRAM SINGH. **7 Luck. 131=I.R. 1931 Oudh 211=132 I.C. 51=8 O.W.N. 593=A.I.R. 1931 Oudh 333.**

——**S. 53**— Fraudulent transfer. *See* BENAMI—FRAUDULENT TRANSFER.

——**S. 53**—*Fraudulent transfer—Portion of consideration paid—Effect.*

Where a transfer has been found by the Court to have been made with a view to defeat or delay creditors, the mere fact that a portion of the consideration has been proved to have been paid is no ground for supporting the transaction as valid to the extent of the consideration actually paid, unless there is a previous charge or mortgage which has been paid off. 13 M. 6; 37 M. 227; 24 M.L.J. 266; 1927 M.W.N. 1, Foll. (*Kumaraswami Sastri and Reilly, JJ.*) PONNUSAMI PILLAI *v.* QUADIR MOHIDEEN ROWTHER. **1930 M.W.N. 1145.**

——**S. 53**—*Fraudulent transfer—Portion of consideration genuine—Rights of purchaser.*

Where a person who is not a creditor purchases the whole of the judgment-debtor's immovable property and

no provision is made for payment of the decree-debt and the Court finds that only a portion of the consideration is genuine, the alienation being to defeat or delay creditors is wholly invalid even though consideration may have been given for some part and it must be set aside in its entirety. The purchase can however be given a charge on the property to the extent of encumbrance which he has discharged. (*Walsh, J.*) SUPPAN ASARI *v.* ALIMA BIBI. **40 L.W. 685=155 I.C. 17=7 R.M. 539=1934 M.W.N. 845=A.I.R. 1934 Mad. 587=67 M.L.J. 585.**

——**S. 53**—*Fraudulent transfer—Setting aside of—Rights of transferee—Credit for the mortgage debt discharged.*

When a transfer of immovable property is set aside on the ground that it was intended to defeat and delay the creditors, the transferee is entitled to get credit only for the mortgage debt binding on the property that he may have discharged as part of the consideration for the document and not for the money debts of the transferor discharged by him. 99 I.C. 709 and 43 I.C. 956, Foll. (*Madhavan Nair, J.*) GANGAMA NAICK *v.* VEERAPPA CHETTI. **I.R. 1931 Mad. 593=131 I.C. 833=A.I.R. 1931 Mad. 513.**

Fraud unaccomplished.

——**S. 53**—*Fraud unaccomplished—Right to recover property.*

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected. Then and then alone does the fraudulent grantor or giver loses the right to claim the aid of the law to recover the property he has parted with. (*Wazir Hasan, C.J. and Bisheshwar Nath, J.*) LALJI *v.* BACHOO LAL. **I.R. 1932 Oudh 336=139 I.C. 52=9 O.W.N. 275=A.I.R. 1933 Oudh 6.**

Future creditors.

——**S. 53**—*Future creditors—Fraudulent transfer—Right to impeach.*

A fraudulent tranfer can equally be impeached by subsequent creditors as well as by those existing at the time it was made. (*Raza and Kisch, JJ.*) PARKASH NARAIN *v.* BIRENDRA BIKRAM SINGH. **7 Luck. 131=I.R. 1931 Oudh 211=132 I.C. 51=8 O.W.N. 593=A.I.R. 1931 Oudh 333.**

——**S. 53**—*Future creditors—Intent to defraud.*

Semble.—S. 53 can cover the case, not only of existing creditors but of possible future creditors also the reference to arbitrators is not in the nature of a transfer of property and cannot invalidate a transfer on the ground that the transferor proposed to embark on speculative transactions and with a view to put the property out of the reach of his possible creditors, made the transfer, when there was no ground to justify the inference that the intention of the transferor in referring the disputes to arbitration was to defeat the plaintiffs (*Beaumont, C.J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. **56 Bom. 595=I.R. 1932 Bom. 545=139 I.C. 820=34 Bom. L.R. 862=A.I.R. 1932 Bom. 498.**

Gift.

See also DOWER, *supra.*

——**S. 53**—*Gift in fraud of creditors—If void.*

A deed of gift executed in order to defeat the donor's creditors is not necessarily void under S. 53, T. P. Act. A deed of transfer, unless it is meant by the executant to be fictitious is only voidable at the option of the creditors; and if the latter do not choose to avoid it, it is a perfectly valid instrument as between the parties to it. (*Niamatullah, J.*) QUTUBUDDIN *v.* MANGLA DUBEY.

T. P. ACT (1882), S. 53.

155 I.C. 829=7 R.A. 993=1935 A.W.R. 717=1935 R.D. 259=A.I.R. 1935 All. 771.

———S. 53—*Gift—Intent to defeat creditors—Effect of—Transferee in good faith from donee—If protected.*

Where the intention of both parties to a gift is to defeat and delay the donor's creditor, the gift is not void *ab initio*, but is merely voibable at the instance of the creditor under S. 53 of the T. P. Act. A transferee from the donee in good faith for consideration is protected under that section. (*Jai Lal and Sale, JJ.*) MALAN DEVI *v.* THE AMRITSAR NATIONAL BANK, LTD. 37 P.L.R. 787=162 I.C. 39=8 R.L. 838=A.I.R. 1936 Lah. 286.

———(as amended in 1929), S. 53—*Gift—Presumption—Existence of creditors—No presumption after the amendment.*

The presumption under the Act before the amendment of 1919 does not find a place under the amended S. 53. It is only when there are creditors in existence at the time of the gratuitous transfer or when a transfer is made just before a man embarks on some very hazardous speculation that it can be presumed that the gift is made with intent to put his property out of the reach of his creditors. (*Baguley, J.*) MAUNG THAN SEIN *v.* U PO NYUN. 149 I.C. 1091=6 R.R. 363=A.I.R. 1933 Rang. 252.

———S. 53—Gift to wife—Wife's right of maintenance—Binding nature on creditors. *See* T. P. ACT, S. 39. 8 O.W.N. 1291.

Good faith of transferee.

———S. 53—*Good faith of transferee—Attitude of Court.*

Where it is proved that the transferee paid what was the fair value of the property transferred to him, the Court will lean towards holding that the transferee acted *bona fide* in the transaction. 5 Bom. L.R. 142, Ref. (*Page, C.J. and Sen, J.*) AH FOON *v.* HOE LAI PAT. 9 Rang. 614=I.R. 1932 Rang. 49=135 I.C. 641=A.I.R. 1932 Rang. 13.

———S. 53—*Good faith of transferee—Knowledge of impending attachment against vendor.*

Mere knowledge on the part of the vendee who has paid a fair price for the property of an impending attachment of the properties of the vendor, is not by itself sufficient to disprove the *bona fides* of the vendee, in the absence of proof to show he was aware as well of an intention on the part of the vendor to defeat and delay his creditors (Case law referred.) (*Page, C.J. and Sen, J.*) AH FOON *v.* HOE LAI PAT. 9 Rang. 614=I.R. 1932 Rang. 49=135 I.C. 641=A.I.R. 1932 Rang. 13.

[R. 146 I.C. 954 (956).]

———S. 53—*Good faith of transferee—Transferee being party to fraud—No good faith though full consideration has passed.*

In cases of conveyances from debtor to creditor the validity of such conveyance depends upon the existence of both consideration and good faith. If intention to defraud creditors is shared by a transferee, there is no good faith and the transfer will not stand though full consideration had passed. (*Tek Chand and Currie, JJ.*) MADANGOPAL *v.* LAHRI MAL JANKI DAS. 12 Lah. 194=I.R. 1931 Lah. 254=130 I.C. 62=31 Punj. L.R. 775=A.I.R. 1930 Lah. 1027.

[F. 16 L. 680 (684).]

———S. 53—*Good faith of transferee—Valid transfer—Determining factor—Intention of transferee—Good faith of transferee and consideration proved.*

Where a transfer is attacked as having been made to defeat or delay creditors, it is the knowledge and intention of the transferee which is the determining factor as to the validity of the transfer. If the transferee acts in good faith and proves consideration for the transaction, it cannot be set aside by reason of the transferor having transferred the property for the purpose of defeating or delaying his creditors. (*Shadi Lal, C.J. and Rangi Lal, J.*) DAYA RAM PHERU RAM *v.* NADIR CHAND. 154 I.C. 679=A.I.R. 1934 Lah. 318 (2).

Intent to defraud.

———S. 53—*Intent to defraud—Need for legal proof.*

The intention involved in the transfers made to defeat or delay creditors has got to be proved by the creditor. It is essential that decision of the Court rests not upon suspicion, but upon legal grounds established by legal testimony. (*Baguley, J.*) V.E.A. CHETTYAR FIRM *v.* MATHAN SHIN. 153 I.C. 191=7 R.R. 200=A.I.R. 1934 Rang. 308.

———S. 53 (2)—*Intent to defraud—Proof of—Partition of joint family property—Bulk of property conveyed to the only son.*

On a reference to arbitration, a partition of joint family properties was made by which the bulk of the properties was given to the only son and a monthly allowance to the father. The partition was attacked as a fraudulent transfer, and the plaintiff relied, in proof of fraud, on the presumption under S. 53 (2).

Held, that, assuming that the partition was a transfer, the consideration was natural love and affection which could not be said to be grossly inadequate, that the award could not be said to be altogether one-sided since the father got residence, maintenance and an allowance under the award, and that therefore no presumption of fraud could be made therefrom. (*Beaumont, C.J. and Mirza, J.*) SHANTILAL *v.* MUNSHILAL. 56 Bom. 595=I.R. 1932 Bom. 545=139 I.C. 820=34 Bom. L.R. 862=A.I.R. 1932 Bom. 498.

———S. 53—*Intent to defraud—Proof.*

It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and tangible proofs. It is by its very nature secret in its movements. It is therefore sufficient if the evidence given is such as may lead to the inference that fraud must have been committed. In the generality of cases, circumstantial evidence is the only resource in dealing with questions of fraud. If this is not done the ends of justice would be constantly if not invariably defeated. (*Raza and Kisch, JJ.*) PARKASH NARAIN *v.* BIRENDRA BIKRAM SINGH. 7 Luck. 131=I.R. 1931 Oudh 211=132 I.C. 51=8 O.W.N. 593=A.I.R. 1931 Oudh 333.

———S. 53—*Intent to defraud—Proof—Untransferred assets sufficient to meet all claims—Transfer, if can be questioned.*

The intent in order to render a transfer voidable must be an intent so to impair the estate as to render it incapable for remaining assets to satisfy its general liabilities. If the untransferred assets suffice to meet all claims, a single creditor cannot prevent the transferor from dealing as he pleases with the surplus. (*Baguley, J.*) V. E. A. CHETTYAR FIRM *v.* MA THAN SHIN. 153 I.C. 191=7 R.R. 200=A.I.R. 1934 Rang. 308.

Mortgagor and mortgagee.

———S. 53—*Mortgagor and mortgagee—Subsequent lease depriving mortgagee of his security—Avoidance.*

The owner of 58 bighas of lands hypothecated the holding. It appeared that 47 bighas were culturable and 11 bighas unculturable waste land. The mortgagor subsequently gave a lease of the culturable lands to another at a certain rate. The effect of the lease was that during the period of the lease, the property was not only absolutely valueless to the owner but also involved

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a net liability of a few rupees, the amount by which the land revenue exceeded the rent payable.

Held, that the lease was a fraudulent transfer as it deprived the mortgagee of his security and the Court could order the ejectment of the lessee as a trespasser. (*Oppenheim, S.M. and Drake Brockman, J. M.*) RAMCHOR SINGH *v.* BENI MADHO. **18 R.D. 367=15 L.R. 445 (Rev.).**

———**S. 53**—*Mortgagor and mortgagee—Fraudulent lease—Avoidance by purchaser in Court sale.*

Where a mortgagor effects a fraudulent lease of the mortgaged property, the creditor who subsequently becomes purchaser of the property in execution of the mortgage decree can treat the lease as void under Ss. 52 and 53, T. P. Act, and eject the lessee as a trespasser. (*Oppenheim, S. M. and Drake Brockman, J. M.*) GITA RAM *v.* BANWARI LAL. **18 R.D. 368=15 L.R. 447 (Rev.).**

Nature of right under.

———**S. 53**—*Nature of right under—Inaction of one creditor, if material.*

The inaction of one creditor cannot bar the general body of creditors as the right under S.53 is an undivided right, though when it is exercised, it enures for the benefit of the general body of creditors. 1926 Mad. 66, Foll. (*Addison and Bhide, JJ.*) LAL SINGH *v.* JAI CHAND. **12 Lah. 262=I.R. 1931 Lah. 346=130 I.C. 778=31 P.L.R. 1014=A.I.R. 1931 Lah. 70 (2).**

Preference of one creditor.

———**S. 53**—*Preference of one creditor—Good faith of transferee and full consideration—Transfer valid.*

A transfer made entirely in good faith and for full and valuable consideration is valid even though the transferee may by such transfer get a preference over other creditors or possible creditors. 30 Mad. 6 and 34 Cal. 999, Ref. (*Baguley, J.*) TAN SAN MAR *v.* U KYA ZIN. **6 I.R. (Rang.) 38=145 I. C. 330=A.I.R. 1933 Rang. 162.**

———**S. 53**—*Preference of one creditor—Relationship with transferee—Inference.*

If the transferor is in fact indebted to the plaintiff, the mere fact of his relationship with the former or the circumstance that the transfer had the effect of giving one creditor preference over the others, will not render the transaction fraudulent. 44 C. 662 (P.C.), Rel. on. (*Tek Chand and Currie, JJ.*) MADANGOPAL *v.* LAHRI MAL JANKI DAS. **12 Lah. 194=I.R. 1931 Lah. 254 =130 I.C. 62=31 P.L.R. 775=A.I.R. 1930 Lah. 1027.**

———**S. 53**—*Preference of one creditor—Sale to creditor for more than debt due—Validity of sale—Vendee paying off mortgage debt—Effect of setting aside.*

Though a sale in favour of a creditor by which he was preferred and another creditor lost his money is not invalid under S. 53, yet where only a part of the consideration was the debt due to the creditor and the rest of it is fictitious, the whole transaction is void. 30 Mad. 6 and 37 Mad. 227, Ref.

But if the vendee-creditor has paid off four mortgages, two in his own favour and two in favour of another, the effect of setting aside the sale is that he holds the position of a mortgagee under those four deeds of mortgage. The properties will be sold subject to the rights of the purchaser on those four mortgages. (*Ramesam, O. C. J. and Cornish, J.*) APPALARAJU *v.* KRISHNAMURTY. **I.R. 1932 Mad. 166=135 I.C. 582=34 L.W. 949= A.I.R. 1932 Mad. 182.**

———**S. 53**—*Preference of one creditor—Transfer for consideration—If fraudulent transfer.*

T. P. ACT (1882), S. 53.

Mere preference of one creditor by a debtor is no ground for impeaching a transaction. A transfer made for adequate consideration, though in favour of one creditor, is not a transfer that comes within the purview of S. 53. The cumulative effect of all the circumstances connected with the transaction must be considered together in deciding whether it is a fraudulent transfer. (*Staples, A.J.C.*) RAMCHANDRA *v.* SHAM RAO **162 I.C. 749=8 R.N. 284=18 N.L.J. 329.**

———**S. 53**—*Preference of one creditor—Transfer for pre-existing debt—Validity.*

Where the transfer is in favour of a creditor for a pre-existing debt, the knowledge of the creditor that the transfer is likely to defeat or delay the other creditors does not make the transfer in his favour voidable under S. 53 (*Jai Lal, J.*) GOBIND RAM *v.* CHHOG MAL. **152 I.C. 472=7 R.L. 279=35 P.L.R. 163=A.I.R. 1934 Lah. 161.**

———**S. 53**—*Preference of one creditor Valid transfer.*

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. Where there is no question of bankruptcy, the validity of a transfer is not affected by the circumstance that one creditor was preferred to the detriment of another. If a transaction was made for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor, it cannot be impeached under S. 53, T. P. Act. 43 Cal. 521 (P. C.), Foll. (*Subhedar, A. J. C.*) UTTAMRAO *v.* GANGARAM. **27 N L.R. 382=I.R. 1932 Nag. 29= 136 I.C. 237=A.I.R. 1932 Nag. 33.**

———**S. 53**—*Preference of one creditor—When protected.*

A debt advanced to the mortgagor at the time of the execution of the deed cannot be considered as a part of his pre-existing liability to the mortgagee and unless this is so, no preference could be claimed for them over the debts of the other creditors. What is protected is the preference of one creditor over the others for his pre-existing liabilities and not for those that are being freshly incurred. (*Addison and Din Mohammad, JJ.*) WARYAM SINGH *v.* THAKAR DAS DHAMALI RAM. **16 Lah. 680=158 I.C. 254=8 R.L. 212=37 P.L.R. 813 =A.I.R. 1935 Lah. 404.**

Scope.

———**S. 53**—*Scope.*

What S. 53 invalidates is a transfer which removes the whole or part of the debtor's property from the creditor as a body to the benefit of the debtor. The principle is well settled that transactions with the object of giving preference to one creditor over another are not void under S. 53. (*Hasan, C.J. and Bisheshwar Nath, J.*) BRIJ RAJ KUER *v.* RAM DAYAL. **7 Luck. 411= 135 I.C. 369=I.R. 1932 Oudh 17=8 O.W.N. 1291= A.I.R 1932 Oudh 40.**

Transfer partly good.

See also FRAUDULENT TRANSFER, *supra.*

———**S. 53**—*Transfer partly good—Effect.*

Where a transfer, though in part for valuable consideration is as regards the other part only an arrangement to defeat creditors, it is wholly void against the creditors and cannot be upheld to the extent to which it is supported by consideration. (*Tek Chand and Currie, JJ.*) MADANGOPAL *v.* LAHRI MAL JANKI DAS. **12 Lah. 194=I.R. 1931 Lah. 254=130 I.C. 62=31 P.L.R. 775=A.I.R. 1930 Lah. 1027.**

[F. 16 L. 680 (684).]

———**S. 53**—*Transfer partly good—Right of transferee for the amount paid by him.*

T. P. ACT (1882), S. 53.

Where a transferee paid off revenue and prior charge on the property, on setting aside the transfer, he should be given the first claim on any sale proceeds realised by selling the property in execution. (*Baguley, J.*) N. S. P. R. M. S. P. FIRM *v.* ATTAUDIN. **148 I.C. 539=6 R.R. 233=A.I.R. 1933 Rang. 191.**

———**S. 53**—*Transfer partly good—Transfer in part for valuable consideration but vitiated by fraud—Validity.*

If intent to defraud creditors is shared by a transferee, there is no good faith and the transfer will not stand though full consideration has passed. And if a transfer, though in part for valuable consideration, is as regards the other part only an arrangement to defeat creditors, it is wholly void against the creditors, and cannot be upheld to the extent to which it is supported by consideration. It is fraud that vitiates the transaction and if fraud be established on the record, the transaction should not be held partially valid, merely on the ground that part of the consideration was found to be genuine. The only exception that the law contemplates is in favour of a transferee in good faith and for consideration and if there are circumstances which clearly negative the presumption of good faith, the protection afforded by the exception cannot be availed of. (*Addison and Din Mohammad, JJ.*) WARYAN SINGH *v.* THAKAR DAS DHAMALI RAM. **16 Lah. 680=158 I.C. 254=8 R. L. 212=37 P.L.R. 813=A.I.R. 1935 Lah. 404.**

Wakf.

———**S. 53**—*Wakf executed for benefit of minor sons—Provision made for existing debts—Validity of transfer.*

S. 53 which is based on English Acts is intended to protect the existing as well as subsequent creditors against fraudulent conveyances. If a person makes a transfer with a view to defeat creditors, to whom he might be indebted at a future time, the transfer is liable to be impeached by them just as much as a transfer made with intent to defraud existing creditors. Where a wakf was executed for the preservation of the property for the benefit of the minor sons and it appeared that provision was made for the payment of all the debts then existing and the deed was executed in good faith.

Held, that the transfer was not hit at by S. 53. (*Hasan, C.J. and Biseshwar Nath, J.*) ZAHIR AHMAD KHAN *v.* DEBI DAYAL. **6 Luck. 397=I.R. 1931 Oudh 109=129 I.C. 333=7 O.W.N. 1115=A.I.R. 1931 Oudh 134.**

———**S. 53-A**—*Act in furtherance of contract.*

Where the purchaser was already in possession of the property as mortgagee and then continued in possession after the agreement to sell had been concluded and a portion of price was paid in addition to the amount already due on the mortgage, in respect of which the purchaser was already in possession.

Held, that such payment was an unequivocal act which could not be referred to any other matter than the agreement for sale, and as such it was sufficient to satisfy the requirement of S. 53-A of the T.P. Act, *viz.*, that some act must be done in furtherance of the contract. (*Dunkley, J.*) MA THET *v.* MA SE MAI. **13 Rang. 17=154 I.C. 13=7 R.R. 277=A.I.R. 1934 Rang. 304.**

———**S. 53-A**—Applicability—Agreement of lease between Co-operative Society and shareholders—No promise of outright sale. *See* BOMBAY CO-OPERATIVE SOCIETIES ACT, SS. 54, 56, 64 AND 64-A. **36 Bom. L.R. 1245=A.I.R. 1935 Bom. 91.**

———**S. 53-A**—*Applicability—Absence of contract in writing.*

T. P. ACT (1882), S. 53-A.

Section 53-A cannot be applied to any case in which there is no contract in writing. (*Baguley, J.*) U LU PE *v.* CO KIM SENG. **6 I.R. (Rang.) 8=144 I.C. 825=A.I.R. 1933 Rang. 136.**

———**S. 53-A**—*Applicability—Delivery of possession by third party—Plea of limitation—Whether can be got round.*

At the time *P* was granted sanad of certain land by Collector, *P* was requested to execute a private agreement with *K* to sell him half of the land under certain circumstances, but the obligation to convey the land to *K* under those circumstances was not a condition of the grant. *P* executed such an agreement in favour of *K* and on the happening of those circumstances, *K* requested *P* to convey the land in terms of the agreement and on his failure, instead of suing for specific performance of the agreement, approached the Collector who cancelled the grant in favour of *P* and re-granted the land to *K*. In a suit brought by *P* against *K* for possession, *K* pleaded that *P* had agreed to convey the land to him and as possession was with him, he could not be legally ejected. Further *P* without raising the plea that it was open to him to sue for specific performance of the agreement at the date of suit contended after the period of limitation for claiming specific performance had expired that it was open to him to resist ejectment by proving that he had a subsisting right to enforce the specific performance of the agreement at date of suit.

Held, that *K* did not take possession of the property in part-performance of the agreement to sell the land executed in his favour, but obtained it from the Collector under a grant made by him after he had wrongfully terminated the grant in favour of *K* nor was there any consent or acquiescence on the part of *P* to possession being taken or retained by *K* and consequently the doctrine of part performance did not apply to the case.

Held, further, that even if it was open to *K* to counter-claim for specific performance of agreement, he could have done so, if at the date when he counter-claimed, his suit for such relief was in time and that it was hardly arguable that a person seeking specific performance of an agreement could get round the plea of limitation by obtaining wrongful possession of the land and then pleading the agreement as a defence when his suit is barred by limitation. (Case-law referred.) (*Rupchand and Milne, A. J. Cs.*) SARDAR MAHOMED TAHIR *v.* MIAN PIRBUX. **25 S.L.R. 433=I.R. 1932 Sind 113=139 I.C. 388=A.I.R. 1932 Sind 42.**

———**S. 53-A**—*Applicability—Lease unregistered—Unregistered lease—Suit for rent on basis of—Maintainability.*

Neither under S. 53-A of the T. P. Act, nor under S. 49 of the Registration Act as amended in 1929, can a landlord recover rent under an unregistered lease, if the lease is one requiring registration. (*Remfry, J.*) JAMBAD COAL SYNDICATE, LIMITED, *In re*. **163 I.C. 845=9 R.C. 90=62 C. 394=A.I.R. 1936 Cal. 628.**

———**S. 53-A**—*Applicability—Movable property.*

The doctrine of part performance as laid down in S. 53-A, T. P. Act, can have no relation under any circumstances to movable property. (*Dunkley, J.*) BHABI DUTT *v.* RAMALALBVAMAL. **152 I.C. 431=7 R.R. 156=A.I.R. 1934 Rang. 303.**

———**S. 53-A**—Applicability and scope—Agreement for sale in 1919—Replacement by unregistered deed of sale in 1923—Repudiation by vendor—Vendee—If can invoke part performance. *See* PART PERFORMANCE—DOCTRINE OF APPLICABILITY. **37 Bom. L.R. 82=A.I.R. 1935 Bom. 208.**

T. P. ACT (1882), S. 53-A.

——**S. 53-A**—*Applicability—Transfer by Mahomedan to wife in lieu of dower—Deed unregistered—Possession not transferred—Doctrine of part performance—If can be invoked—Continuing in possession—Meaning of.*

A Mahomedan wife leased her claim on a deed of 1886 under which her husband transferred to her a house in satisfaction of her dower debts, and claimed that as she was in continuous possession of the house in pursuance of the deed since 1886 and was therefore entitled to use it as against a subsequent mortgagee by virtue of S. 53-A.

Held, that as no possession was given to the wife at the time of the execution of the deed or intended to be given to her, no reference to the question of continuing in possession or retaining possession under S. 53-A could arise ; and that it could not prevail as against the rights of a subsequent mortgagee. (*Grille, J. C.*) ZENABBI *v.* GAJANANRAO. **162 I.C. 881=8 R.N. 290=18 N. L.J. 311.**

——**S. 53-A**—*Applicability—Transfer by writing necessary.*

To obtain the benefit of the provisions of S. 53-A, the first thing required is a contract to transfer for consideration immovable property by writing from which the terms necessary to constitute a transfer can be ascertained with reasonable certainty. In the absence of such instrument a person cannot claim any benefit on the ground of part performance under S. 53 A. (*Shaw, J.*) MA MYA *v.* ANNAMALAI CHETTYAR. **151 I.C. 227= 7 R.R. 59=A.I.R. 1934 Rang. 127.**

——**S. 53-A**—*Applicability—Void contract.*

Where the agreement of transfer is void, the doctrine of part performance is inapplicable. (*Kulwant Sahay and Macpherson, JJ.*) LALITA PRASAD CHAUDHURY *v.* SARNAM SINGH. **14 Pat. L.T. 27=149 I.C. 491= 6 R.P. 602=A.I.R. 1933 Pat. 165.**

——**S. 53-A**—*Award relating to immovable property.*

Where a party secures an advantage for himself in pursuance of an award relating to immovable property, he cannot be allowed to repudiate the award. The principles embodied in S. 53-A of T. P. Act are applicable to such cases and even if the document requires registration, the defect is cured as soon as it is acted upon by the parties. (*Addison and Din Mohammad, JJ.*) NAGAR SINGH *v.* BELA SINGH. **160 I C. 895 =8 R.L. 627=37 P.L.R. 459=A.I.R. 1935 Lah. 955.**

——**S. 53-A**—*Contest between person claiming under transferor and person claiming under transferee.*

V conveyed his property to *L* by an unregistered document and *L* was put in possession of it. *L* executed a registered mortgage of this property to *A*. The mortgage was a usufructuary motgage, but *A* was unable to obtain possession of the property thereunder. *A* brought this suit for possession against defendants and *L*. The case of the defendants was that they were owners of this property, and that they had purchased it by an oral agreement from this same *V* some years prior to the present suit :

Held, that *L* entered into possession in part performance of the contract of sale between her and *V* and that the contesting defendants as claiming under the transferor *V* were debarred from enforcing against *A* who was claiming under the transferee, any right in respect of this property.

Held also, that *A* was entitled not to a declaration of his title to the property, but only to a declaration of his right to the possession thereof as against the defendants. (*Dunkley, J.*) MASTRAM *v.* MA OHN. **154 I.C. 769 =7 R.R. 316=A.I.R. 1934 Rang. 284.**

T. P. ACT (1882), S. 53-A.

——**S. 53-A**—*Doctrine of part performance—Applicability.*

The doctrine of part performance has been recognised in S. 53-A subject to certain limitations, one of them being that there must be some writing from which the form of the contract can be ascertained with reasonable certainty. The earlier decisions which allowed the doctrine of part performance to prevail even in cases where there was no writing are no longer good law. (*Mahomed Noor, J.*) AZIZ AHMAD *v.* ALAUDDIN AHMAD. **6 I.R. (Pat.) 9=144 I.C. 788=A.I.R. 1933 Pat. 485.**

——**S. 53-A**—*Doctrine of part performance—Scope.*

The doctrine of part performance has no applicability in India, except as enacted in the provisions of S. 53 A, T. P. Act. A.I.R. 1935 Rang. 230, Foll. (*Dunkley, J.*) SAYA HMAN *v.* SAYA HLA. **160 I C. 325=8 R.R. 366=A.I.R. 1935 Rang. 448.**

——**S. 53 A**—*Landlord and tenant—Suit in ejectment—Compromise—Tenant paying nazarana and landlord promising never to eject tenant—Omission to register or record compromise—Effect—Part performance.*

Pending a suit by a landlord to eject a tenant from *sir* land, a compromise was entered into between the parties, under which the landlord received payment of *nazarana* from the tenant and in consideration therefore agreed that he and his heirs would never eject him from the land in question. The compromise was, however, neither registered nor embodied in a decree, the suit being withdrawn and dismissed as compromised.

Held, S. 53-A, T.P. Act, applied to the cases and the tenant could invoke the doctrine of part-performance, and that the landlord could not be allowed to plead invalidity on the ground that the agreement was unregistered and therefore inadmissible. (*Oppenheim, S. M. and Drake Brockman, J. M.*) PHULESHARA *v.* SHEO BARAN. **18 R.D. 654=16 L.R. 93 (Rev.).**

——**S. 53-A**—*Leases.*

The doctrine of part performance, as enacted in S. 53-A, T. P. Act, applies to leases also. (*Rangi Lal, J.*) BANARSI DAS *v.* ALI MUHAMMAD. **157 I.C. 839 =8 R.L. 145=37 P.L.R. 658.**

——**S. 53-A**—Lease—Absence of registered deed—Applicability of doctrine of part performance. *See* T. P. ACT, S. 107. **58 I.A. 91=58 Cal. 1235 (P.C.)**

——**S. 53-A**—*Lease—Lessee under prior unregistered lease—Possession and continuous payment of rent to landlord—Part performance—If can be invoked against subsequent lessee.*

S. 53-A, T. P. Act, was intended to have retrospective effect. It merely gives statutory recognition to the equitable doctrine of part performance which the Courts in India have applied to numerous cases. A previous lessee who has taken possession of the land leased under an unregistered lease and who has been continuously paying the fixed rent to his landlord is entitled to rely on the doctrine of part performance in defence to a suit by a subsequent lessee from the landlord to dispossess him. (*Rangi Lal, J.*) BANARSI DAS *v.* ALI MUHAMMAD. **157 I.C. 839=8 R.L. 145=37 P.L.R. 658= A.I.R. 1936 Lah. 5.**

——**S. 53-A**—Lease—Unregistered lease—Absence of express covenant against enhancement of rent—Enhancement not claimed for several years—Doctrine of part-performance — Applicability of. *See* OUDH RENT ACT, S. 33 (1). **18 R.D. 572.**

——**S. 53-A**—*Mortgage unregistered — Creditor obtaining possession after payment—Suit for ejectment before payment—Maintainability.*

T. P. ACT (1882), S. 53-A.

Where the defendant had advanced money to the plaintiff and he was given possession of certain land on the understanding that he should not be ejected until the amount was repaid, the defendant is entitled to the benefit of the doctrine of part performance embodied in S. 53-A of the T. P. Act and the proviso to S. 49 of the Registration Act and a suit by the plaintiff for the ejectment of the defendant as *shikmi* tenant is not maintainable, though the mortgage had not been registered. (*Oppenheim, S.M.*) DHANAI CHAMAR *v.* CHUNNI. **14 L.R. 157 (Rev.) = 17 R.D. 201.**

——**Ss. 53-A, 58 (d) and 59**—*Mortgage—Oral usufructuary mortgage—Suit for redemption—Maintainability—Proper remedy of mortgagor.*

Both in India and in Burma, cultivators, in the teeth of the express terms of S. 59 of T. P. Act, are still wont to obtain loans by delivering their lands to the lenders upon the terms that the lenders may remain in possession until the loan is repaid, and appropriate the fruits of the land towards the repayment of the principal and or of the interest due under the loan. Such transactions are usufructuary mortgages within S. 58 (*d*) and unless the instrument of mortgage in such a case is in writing, and the transaction also falls within S. 53-A, the terms of the mortgage cannot be relied on as a ground of attack or of defence by either the plaintiff or the defendant in a mortgage suit, except in cases in which they are embodied in a duly registered written instrument. Accordingly a suit framed as a suit for redemption of lands which are the subject of an oral usufructuary mortgagee cannot be sustained inasmuch as the plaintiff pleads and relies on the oral mortgage which is required by law to be effected by a registered instrument. The proper course of the mortgagor to take in such a case would be to sue for possession relying on his title. In such a suit, it is not permissible for the defendant to rest his claim to remain in possession on the oral mortgage which could not be proved. (*Page, C.J., Mosely and Ba U, JJ.*) MA KYI *v.* MA THON. **13 Rang. 274 = 157 I C. 565 = 8 R.R. 100 = A.I.R. 1935 Rang. 230 (F.B.).**

——**S. 53-A**—*Registered kabuliyat to pay rent at certain rate—Agreement to reduce rent and realization of reduced rent.*

A certain rent was fixed by registered *kabuliyat* in the year 1882. Subsequently in 1906, there was an agreement to reduce the rent and the rent according to the reduced rates was taken till the agreement was ratified by an oral contract in 1920. The tenant did not get registered pattas from the landlord. In a suit by the landlord claiming rent according to the *kabuliyat* of 1882.

Held, that the doctrine of part performance applied as the tenants were entitled to get a registered patta from the landlord and as they had a subsisting contract in their favour which could be specifically enforced and that the landlord was not entitled to realize rent at the rate mentioned in the *kabuliyat* of 1882. (*Guha, J.*) SATYANIRANJAN CHAKRAVARTY *v.* HABIBAR SOBHAN. **6 I.R. (Cal.) 4 = 144 I.C. 598 = A.I.R. 1933 Cal. 393.**

——**S. 53-A**—*Retrospective effect.*

S. 53-A does have application to a case where the suit has been brought after the Amending Act came into force, but where the transfer in question took place before the Amending Act came into force. (*Bennet, J.*) GAJADHAR MISIR *v.* BECHAN CHAMAR. **153 I.C. 717 = 7 R.A. 558 = 4 A.W.R. 436 = A.I.R. 1934 All. 768.**

——**S. 53-A**—*Retrospective effect.*

It is very doubtful whether S. 53-A of the T. P. Act can be applied retrospectively to pending cases. (*Mahomed Noor and Luby, JJ.*) MUKTESWAR TRIGUNAIT *v.* BARAKAR COAL CO., LTD. **152 I.C. 499 = 7 R.P. 205 = A.I.R. 1934 Pat. 546.**

T. P. ACT (1882), S. 53-A.

——**S. 53-A**—*Retrospective effect.*

S. 53-A, Transfer of Property Act, has no retrospective operation and does not apply to agreements made before 1st April, 1930, when it came into effect. (*Murphy and Sen, JJ.*) COOVERJEE H. PLUMBER *v.* VASANT THEOSOPHICAL CO-OPERATIVE HOUSING SOCIETY, LTD. **154 I C. 583 = 7 R.B. 347 = 36 Bom. L.R. 1245 = A.I.R. 1935 Bom 91.**

——**S. 53-A**—*Retrospective effect.*

S. 53-A has no retrospective effect, and does not apppy to leases executed before the 1st of April, 1930. (*King, C J. and Zia-ul-Hasan, J.*) JANKI *v.* KANHAIYA LAL. **159 I.C. 316 = 1935 O.W.N. 1238 = A.I.R. 1936 Oudh 102.**

——**S. 53-A**—*Retrospective effect.*

S. 53-A does not affect any proceeding commenced before the amending Act of 1929. It is not retrospective. (*Wort, James and Mahomed Noor, JJ.*) RAMKRISHNA JHA *v.* JAINANDAN JHA. **14 Pat. 672 = 157 I.C. 98 = 8 R P. 90 = 16 Pat.L.T. 451 = A.I.R. 1935 Pat. 291 (F.B.).**

——**S. 53 A**—*Retrospective effect.*

S. 53-A has no retrospective effect. A.I.R. 1932 Mad. 734, Foll. (*Mukerji, J.*) GAWRI SHANKER *v.* GOPAL DAS. **151 I.C. 388 = 7 R.A. 161 = 3 A.W.R. 763 = A.I.R. 1934 All. 701.**

——**S 53-A**—*Retrospective effect.*

S. 53-A has retrospective effect. The section however can apply only if the agreement is in writing and the terms have not been set out with reasonable certainty. (*Wadia, J.*) SULEMAN HAJI AHMED UMAR *v.* PATELL. **6 I. R. (Bom) 81 = 35 Bom.L.R. 722 = 145 I C. 557 = A.I.R. 1933 Bom. 381.**

——**S. 53-A**—*Retrospective effect—If given.*

S. 53-A has no application to an agreement to transfer immovable property which was made prior to 1st April, 1930. (*Beasley, C.J. and Cornish, J.*) KANJI AND MOOLJI BROS. *v.* SHANMUGAM PILLAI. **56 Mad. 169 = I.R. 1932 Mad. 805 = 139 I.C. 870 = 36 L.W. 626 = 1932 M.W.N. 897 = A.I.R. 1932 Mad. 734 = 63 M L J. 587.**

[F. 30 N.L.R. 1 (8).]

——**S. 53-A**—*Retrospective effect—Pending proceedings—Plea in defence—Maintainability.*

Under the T. P. Act, as it stood before the amendment, the doctrine of part performance had no place whatever; and even if at the date of the suit by the legal owner the defendant had an enforceable contract of sale in his favour, he cannot rely on that fact as a defence to the claim in ejectment. At best, he could only apply for stay of the ejectment until he obtained specific performance of his contract by suitable proceedings. S. 53-A of the amended Act is not retrospective and does not apply to pending proceedings. S. 16 of the Amending Act of 1929 clearly excluded such operation in respect of suits pending on the date of the coming into force of the Act, *i.e.*, 1st April, 1930. (*Varadachariar and Burn, JJ.*) MUTHUSWAMI AYYAR *v.* LOGANATHA MUDALI. **164 I.C. 353 = 9 R.M. 104 = 1935 M.W.N. 267 = 41 L.W. 364 = A.I.R. 1935 Mad. 404.**

——**S. 53-A (as amended in 1929)**—*Retrospective effect—Pending actions.*

S. 53-A, T. P. Act, is not retrospective and its provisions cannot be applied to pending actions, even if it be assumed that the section is to be applied to transactions completed before 1st April, 1930, but not put into litigation on that date. (*Nasim Ali, J.*) DURGAPADA

T. P. ACT (1882), S. 53-A.

KARMAKAR *v.* NRISINGHA CHANDRA NANDY CHAUDHURY. **62 Cal. 492=159 I.C. 20=39 C.W.N. 416 =A.I.R. 1935 Cal. 541.**

———**S. 53 A**—Sale-deed—One of executants of deed not present at registration—Registration not valid—Sale given effect to by all the vendors—Doctrine of part performance applied. *See* REGISTRATION ACT, SS. 34 AND 35. **A.I.R. 1934 Lah. 751.**

———**S. 53 A, Proviso**—*Notice of contract—Burden of proof.*

It is for the person claiming the benefit of the doctrine of part performance to show that the transferee, who otherwise has a legal title, had notice of the contract or of the part performance thereof. (*Mackney, J.*) KOMAR *v.* MA MAY. **154 I.C. 474=7 R.R. 309=A.I.R. 1935 Rang. 12.**

———**S. 54.**

Absence of registered instrument.
Agreement.
Applicability.
Construction.
Contract of sale
Delivery.
Earnest money.
Oral transaction.
Registration.
Sale or hire purchase.
Sale when complete.

———**S. 54**—*Absence of registered instrument—Suit for declaration—Maintainability.*

A person who claims to be the purchaser of certain lands for a value of Rs. 1,000 cannot sue for a declaration of title to the property except by way of adverse possession for 12 years without a registered instrument. A claim tantamount to a suit for a declaration of title as such must fail. (Case law considered.) (*Shaw, J.*) MA MYA *v.* ANNAMALAI CHETTYAR. **151 I.C. 227= 7 R.R. 59=A.I.R. 1934 Rang. 127.**

———**S. 54**—*Absence of registered instrument—Suit for declaration of title—Maintainability.*

A purchaser of immovable property of the value of Rs. 100 and upwards cannot in the absence of registered deed sue for a declaration of title except when he has acquired title by adverse possession. 58 Cal. 1235 (P.C.), Rel. on. (*Page, C.J.*) KO YAN *v.* MA MAI WI. **I.R. 1933 Rang. 2 (1)=140 I.C. 777=10 Rang. 529=140 I C. 777=A.I.R. 1933 Rang. 4 (2).**

[**Rel.** 1934 R. 127 (128).]

———**S. 54**—*Agreement — Description as sale-deed —Effect.*

Where a document, though described as a sale deed, is merely an agreement to divide the fruits, if any, of a contemplated litigation between the two parties of the agreement, the description of the document cannot make the transaction a sale, if it is not so on its merits and the so called vendee is not entitled to maintain a suit for ejectment before the successful termination of the contemplated litigation. 40 I.A. 86, Ref. (*Hasan, C.J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I.R. 1931 Oudh 305 =7 O.W.N. 1010=132 I C. 753=A.I.R. 1930 Oudh 481.**

———**S. 54**—Agreement—Giving up of ex-proprietary rights—Need for registration. *See* REGISTRATION ACT, S. 17 (1) (*b*)—AGREEMENT. **15 R.D. 91=12 L.R. 1 (Rev.).**

———**S. 54**—Applicability — Crown grants. *See* CROWN GRANTS ACT, SS. 2 AND 3. **10 Pat. 203= A.I.R. 1931 Pat. 268.**

———**S. 54**—Applicability—Hiba-bil-ewaz—Writing and registration not always necessary. *See* MAHOMEDAN LAW—GIFT. **A I.R. 1934 Oudh 163.**

T. P. ACT (1882), S. 54.

———**S. 54**—*Applicability—Sale by receiver in insolvency—If exempt from registration.*

A sale by an Official Receiver in insolvency is not a transfer which falls within S. 2 (*d*) of the Transfer of Property Act. S. 54 applies to such a sale, and it therefore requires registration for its validity. (*Beasley, C.J. and King, J.*) NARASAPPA *v.* HUSSAIN SAB. **152 I.C. 988=1934 M.W.N. 1399=7 R.M. 303=40 L.W. 747=A.I.R 1935 Mad. 55=67 M.L J. 746.**

———**S. 54**—Applicability—Sale subject to result of suit is a sale under the T.P. Act. *See* AGRA PRE EMPTION ACT, S 11. **A.I.R. 1932 All. 685.**

———**S. 54**—Applicability—Transfer under compromise decree not registered—Not a sale. **A.I.R. 1931 All. 741.**

———**S. 54**—*Applicability—Settlement of immovable property—Transfer of interest under.*

The interest under a settlement of immovable property falls within the ambit of S. 54 of the T.P. Act and no sale or transfer of that interest can be made or effected otherwise than by a registered instrument. The fact that the transferor has received the agreed consideration for the transfer does not make the equitable doctrine of part performance applicable in aid of the claim of the transferee. (*Page, C.J. and Mya Bu, J.*) OFFICIAL ASSIGNEE *v.* MOOLLA SONS, LTD. **154 I.C. 9= 7 R.R. 274=12 Rang. 589=A.I.R. 1935 Rang. 84.** [**Affirm.** 63 I.A. 340 (P.C.)]

———**S. 54**—*Applicability—Transfer in lieu of dower —If 'a sale'.*

A transfer of immovable property by a Mahomedan husband to his wife in exchange for dower is not a gift, but a sale, having all the incidents of a contract of sale and is nothing but a sale; and when the property so transferred is of the value of Rupees one hundred and upwards, it must be effected by a registered instrument as required by S. 54, T.P. Act, which relates to sales. (*Mitter and McNair, JJ.*) SABURANNESSA *v.* SABDU SHEIKH. **152 I.C. 422=7 R.C. 274=38 C.W.N. 747=A.I.R. 1934 Cal. 693.**

———**S. 54**—*Applicability—Transfer in lieu of dower.*

A deed of gift or transfer by a Mahomedan husband to his wife in satisfaction of her dower is amenable to the provisions of the T.P. Act, and if the property transferred is immovable property of a value exceeding Rs. 100, it cannot operate to pass title unless it is registered. (*Grille, J.C.*) ZENABBI *v.* GAJANANRAO. **162 I.C. 881=8 R.N. 290=18 N L J. 311.**

———**S. 54**—Applicability—Transfer in lieu of existing dower debt is a sale. **1931 A.L.J. 951.**

———**S. 54**—*Construction — "Intangible thing"— Decree for money—Assignment of registration— Necessity.*

An instrument of assignment of a decree for money is not a sale of "intangible thing" within the meaning of S. 54 of the T.P. Act, and does not therefore require registration. The expression "intangible thing" in S. 54 applies to such incorporeal rights as easement, right to receive rent and profits, etc., and does not cover a simple decree for money. Even if it be held to be wide enough to cover rights created under a decree, the expression must be construed to mean something *ejusdem generis* with the other objects mentioned in the section. (*Faul Ali, J.*) SHRI THAKURJI *v.* DWARIKA RAM. **158 I.C. 276=8 R.P. 183=A.I.R. 1935 Pat. 492.**

———**S. 54**—Construction—"Interest"—Meaning of—Agreement of sale—Subsequent attachment—Rights of vendee—If affected by the attachment. *See* C.P. CODE, O. 21, RR. 59 AND 60. **68 M.L.J. 67.**

T. P. ACT (1882), S. 54.

———**S. 54**—*Construction—'Price'—Forbearance to sue if can constitute.*

A sale is an exchange of property for a *price*. So a transfer of property in consideration partly of a sum of money and partly of forbearance by the transferee to take certain legal proceedings is not a sale. 45 Mad. 612 (F.B.), Foll.; 9 Mad. 141; 25 Bom. 696 (F.B.), Ref. (*Beasley, C.J. and Curgenven, J.*) VENKATA JAGANNATHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=33 L.W. 95=135 I.C. 17=I.R. 1932 Mad. 49=A.I.R. 1931 Mad. 140=60 M.L.J. 56.**

———**S. 54**—Contract of sale—Agreement to sell immovable property—Vendee's right to specific performance as against subsequent transferee under registered deed. *See* SPECIFIC RELIEF ACT, S. 27. **61 I.A. 115=A.I.R. 1934 P.C. 68=66 M.L.J. 255 (P.C.).**

———**S. 54**—*Contract of sale—Time fixed in disregard of—Effect.*

A contract for sale of immovable property does not become unenforceable merely because of failure to keep the dates assigned by the contract either for completion or for the step towards completion. Equity does not regard the terms or the letter of the contract, but rather its substance. The disregard of the terms of the contract so far as time is concerned may depend upon the express stipulations of the parties, the nature of the property or the surrounding circumstances. (*Wort and Dhavle, JJ.*) SAUKHI SAH *v.* MAHAMAYA PRASAD SINGH BAHADUR. **15 Pat.L.T. 469=156 I.C. 558=8 R.P. 13=A.I.R. 1934 Pat. 518.**

———**S. 54**—*Contract of sale—Law applicable prior to T. P. Act.*

A contract of sale which was entered into before the coming into force of the Transfer of Property Act is governed by the English Law. Such a contract creates an equitable interest in land and if unlimited in point of time, is not specifically enforceable as it offends the law of perpetuities. 28 Bom.L.R. 954 and 47 Bom. 191, Foll.; 48 I.A. 376, Ref. (*Baker, J.*) ALLIBHAI MAHOMED AKUJI *v.* DADA ALLI. **136 I.C. 509=I.R. 1932 Bom. 205=33 Bom.L.R. 1296=A.I.R. 1931 Bom. 578.**

———**S. 54**—*Contract of sale—Liability for interest—Vendee let into possession before payment of purchase-money.*

Under a compromise the defendants were to execute a sale-deed in May, 1917, and the plaintiff to pay the consideration before the Registrar. If the plaintiff was then unable to pay, he was to pay interest at 9 per cent. But the defendants quarrelled among themselves and though the plaintiff was let into possession in May, 1917, the sale-deed could not be executed earlier than January, 1924.

Held, that the contract not having provided for such a contingency, the principle of equity became applicable that where the vendee is in possession, he should pay interest on the purchase-money from the date he got possession till the date of payment. (*Pakenham Walsh, J.*) SURYAPRAKASA RAO *v.* VENKATA DIKSHITULU. **6 I.R. (Mad.) 250=146 I.C. 317=1933 M.W.N. 127=A.I.R. 1933 Mad. 844.**

———**S. 54**—Contract of sale—Registration not necessary. *See* REGISTRATION ACT, S. 17 (2) (*v*). **A.I.R. 1933 All. 846.**

———**S. 54**—*Contract of sale—Registration not necessary.*

In a suit for specific performance of a contract, the agreement ran as follows: "I have executed this contract in respect of Jiroyati land * * * I shall execute a sale deed (in one month) and get the same registered".

Held, the document was only a contract to sell and not a sale and that by virtue of the retrospective provisions of Act II of 1927 which nullified the effect of 53 I.A. 214 (P.C.), it did not require to be registered. (*Ramesam, J.*) KRISHNAMURTHY *v.* SUNDARAMMA. **1931 M.W.N. 297.**

———**S. 54**—*Contract of sale—Rights under—If a good defence in suit for ejectment.*

S. 54, T. P. Act, expressly enacts that a contract for the sale of immovable property does not of itself create any interest in or charge on such property. There is therefore no room for the application of the English equitable doctrine that a contract for sale of real property makes the purchaser the owner in equity of the estate. Thus under the law applicable before the insertion of S. 53 A, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, was not relevans defence to an action of ejectment. If the contract it still enforceable the defendant may found upon it to have the action stayed, and by suing for specific permance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part-performance will not avail him to any effect. (*Lord Macmillan.*) PIR BUX *v.* MAHOMED TAHAR. **61 I.A. 388=58 Bom. 650=39 C.W.N. 34=1934 M.W.N. 1037=60 C.L.J. 370=16 Pat.L.T. 1=29 S.L.R. 74=36 Bom.L.R. 1195=7 R.P.C. 60=1934 A.L.J. 912=4 A.W.R. 417=11 O. W.N. 1145=40 L.W. 492=18 R.D. 469=151 I.C. 326=A.I.R. 1934 P.C. 235=67 M.L.J. 865 (P.C.).**

———**S. 54**—*Delivery—Undivided share of less than Rs. 100 in value—Constructive delivery, not sufficient.*

An undivided share in joint family property is tangible immovable property and even though it be of less than Rs. 100, the transfer may be made by delivery of possession. But for the purpose of S. 54 of the Transfer of Property Act, there must be a real delivery of property where the deed of transfer is not registered and mere constructive possession is not sufficient. A recital in the deed that possession has been delivered is insufficient and ineffective. And as in the case of an undivided share, actual delivery of possession may be impossible, to be effective as a conveyance of title, the sale-deed must be registered. (*Grille, A. J. C.*) NATHU *v.* GULAB CHAND. **6 I.R. (Nag.) 31=144 I.C. 919=A.I.R. 1931 Nag. 31.**

———**S. 54**—*Delivery—Vendee already in possession—Mutation sufficient.*

Where the vendee of the property sold is already in possession of the property sold, mutation of the vendee's name in the records is sufficient to constitute delivery of possession so as to satisfy S 54. 34 I.C. 692, Rel. on. (*James, J.*) SANTOKHI MISSER *v.* SIRO JHA. **151 I.C. 55=7 R.P. 59=A.I.R. 1934 Pat. 301.**

———**S. 54**—*Delivery—Vendee already in permissive possession—Change in character of possession is enough.*

The essence of delivery of possession for a sale is no doubt that possession should change but where the vendee is already in permissive possession of the property on the date of sale, it is enough for such delivery of possession to be sufficient within S. 54 if the character of his possession changes; and this can be effected if the vendor converts by appropriate declarations or acts the previous permissive possession of the vendee into possession as that of a vendee. (*Mukerji, J.*) KULACHANDRA GHOSH *v.* JOGENDRACHANDRA GHOSH. **60 Cal. 384=I.R. 1933 Cal. 515=144 I.C. 155=A.I.R. 1933 Cal. 411.**

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———**S. 54**—*Earnest money—Forfeiture of—Default of purchaser—Seller subsequently parting with property.*

The earnest money is generally paid as a guarantee for the payer's performance of the contract and is subject to forfeiture if he makes default. "It is part of the purchase price when the transaction goes forward ; it is forfeited when the transaction falls through by reason of the fault of the vendee." 50 M.L.J. 629 (P.C.), Ref. Where, after the purchaser failed to complete the contract for sale within a reasonable time, the seller parted with his property and put it out of his power to perform his part, that does not make the seller equally in default with the purchaser, and does not disentitle the seller from retaining the earnest money. (*Cornish, J.*) VENKATACHALAM *v.* AKKAYYA. **1933 M.W.N. 836.**

———**S. 54**—Oral transaction—Exchange — Validity —Transaction acted on. *See* T. P. ACT, S. 118—ORAL EXCHANGE. **8 O.W.N. 1275.**

———**S. 54**—*Oral transaction—Oral sale is valid in Punjab.*

Transfer of Property Act not being in force in the Punjab an oral sale is valid. (*Bhide, J.*) UDHO DAS *v.* MEHR BAKHSH. **I R. 1933 Lah. 457=144 I.C. 340 (2)=34 P.L.R. 714=A.I.R. 1933 Lah. 262.**

———**S. 54**—*Registration—Necessity—Transfer for less than Rs* 100*—Delivery of possession not possible.*

Even in the case of a sale for less than Rs. 100 where delivery of possession is not possible the deed in order to be valid must be registered. (*S. K. Ghose, J.*) KALIRAM MAJUMDAR *v.* DULAL RAM CHAUDHURY. **I.R. 1933 Cal. 309=142 I.C. 582=A.I.R. 1933 Cal. 544.**

———**S. 54**—*Registration — Necessity—Transfer of property of more than Rs.* 100.

In order to create title in immovable property of the value of more than Rs. 100—it is necessary that a registered deed should be executed. (*Kulwant Sahay and Khaja Mohammad Noor, JJ.*) RAMJI SAHAY *v.* GOPALJI. **6 I R. (Pat.) 205=145 I.C. 790=14 Pat. L.T. 224=A.I.R. 1933 Pat. 428.**

———**S. 54**—*Registration—Practice in India.*

Where a cash payment is to be made at the time of registration of a sale deed, the commoner practice in India is for the vendee, on payment, to present the deed for registration and get the registration receipt. (*Lord Thankerton.*) BHUP NARAIN SINGH *v.* GOKHUL CHAND MAHTON. **61 I.A. 115=13 Pat. 242=1934 A.L.J. 291=59 C L J. 139=1934 M.W.N. 206=36 Bom L.R. 421=147 I C. 1134=38 C.W.N. 393=6 R.P.C. 108=3 A.W.R. 410=39 L.W. 363=11 O.W.N. 330=15 Pat L.T. 67=A.I.R. 1934 P.C. 68=66 M.L.J. 255 (P.C.).**

———**S. 54**—Sale or hire-purchase—Test. *See* CONTRACT—HIRE PURCHASE—TEST. **A.I.R. 1932 All. 607.**

———**S. 54**—*Sale, when complete.*

The title passes on the execution and registration of the deed though the purchase money may remain wholly or partly unpaid except where there is an agreement to the contrary. (*Fazl Ali and Chatterji, JJ.*) RAM DHARI RAI *v.* GORAKH RAI. **10 Pat. 264=I.R. 1931 Pat. 306=133 I.C. 34=12 Pat.L.T. 570=A I.R.1931 Pat. 236.**

———**S. 54**—*Sale, when complete.*

Under S. 54 of the T. P. Act, the payment of the price is not necessarily a *sine qua non* to the completion of the sale, unless there is anything in the agreement of sale definitely laying down that sale shall not be taken to have been completed until the entire purchase-money is paid. If the price is not paid, the seller cannot on that account repudiate the sale and his only remedy is to sue for the price or the balance of the price not paid. The mere fact that the entire purchase price is payable before possession is delivered to the vendee does not make the sale incomplete until the entire purchase-money has been paid. (*Tek Chand and Abdul Rashid, JJ.*) PREM SINGH *v.* DISTRICT BOARD, RAWALPINDI. **7 R.L. 96=151 I.C. 163=A.I.R. 1934 Lah. 917.**

———**S. 54**—Sale when complete—Transfer valid only on registration. *See* REGISTRATION ACT, S. 47 AND T. P. ACT, S. 54. **A.I.R. 1934 Mad 637 (2)=67 M. L.J. 380.**

———**S. 54**—*Sale, when complete—Passing of title—Consideration not paid—Effect of.*

There is a distinction between a sale where the consideration is intended to be paid and is not paid and where the consideration is not intended by both parties to be paid at all. In the former case, the title would pass to the purchaser and in the latter case though the vendor was trickad into going through the form of execution and registration of the document, the sale-deed would be void as a colourable transaction. (*Patkar and Barlee, JJ.*) BASALINGANA *v.* CHINNAVA. **56 Bom. 556=I.R. 1932 Bom. 405=138 I.C. 534=34 Bom. L.R. 427=A.I.R. 1932 Bom. 247.**

———**S. 54**—*Sale, when complete—Effect of registration.*

The question as to when title passes on a sale to the vendee depends on the intention of the parties. If it is intended between the parttes that the title should not pass until payment of the consideration money, registration alone is insufficient to pass the title without such payment. (*Agarwala, J.*) ABDULLAH KHALIFA *v.* BHICHUK GOSAIN. **6 R.P. 374=147 I C. 767=A.I. R. 1934 Pat. 68.**

———**S. 54**—*Sale, when complete—Passing of title—Non-receipt of consideration.*

In cases of sales, it is very seldom the intention of parties to allow title to pass without receiving the consideration. To gather the intention of the parties one has only to refer to the *kobala* itself where the terms and conditions are mentioned. It cannot be said that merely by registration, title passes. (*Varma, J.*) SHIBA PRASAD GOSWAMI *v.* UPENDRA SAMANTA SINGHAR. **154 I.C. 612=7 R P. 479=A.I.R. 1935 Pat. 45.**

———**S. 54**—*Sale, when complete—Registration—If condition precedent to taking effect.*

The executant of a sale deed which is compulsorily registrable has no *locus penitentiae* to resile from the transaction merely because the title under the deed is incomplete for want of registration, because such incompleteness is not a thing of which he can take advantage. If the instrument is otherwise complete, the executant is to be regarded as having done everything that was in his power to complete the sale and to make it effective. But as regards third parties the point of time at which the transfer is to be effective is when the deed can be said to be a registered deed. (*Mukerji and Mitter, JJ.*) NARESH CHANDRA DUTT *v.* GIRISH CHANDRA DAS. **62 Cal 979=160 I C. 730=8 R.C. 451=61 C.L J. 360=A.I.R. 1936 Cal. 17.**

———**S. 55—**

Applicability.
Construction.
Covenant for title.
Disclosure.
Duty of vendor.
Liability of vendee.
Rights of vendee.

T. P. ACT (1882), S. 55.

Rights of vendor.
Scope.
Vendor's lien.

——— **S. 55 and Registration Act, S. 17**—*Applicability—Agreement for sale.*

S. 55 of the Transfer of Property Act only applies to those cases in which the ownership of property has passed under an agreement of sale; and if an agreement falls under S. 17 (2) (*v*) of the Registration Act, it is one under which the ownership has not passed to the purchaser and therefore could not come under S. 55, T. P. Act. (*Wort and Dhavle, JJ.*) ABDUL LATIF MIAN *v.* DEBI MAHTON. **13 Pat. 620=15 Pat.L.T. 443=155 I.C. 47=7 R.P. 534=A.I.R. 1934 Pat. 495.**

———**S. 55**—*Applicability—Contract for sale—Revision by buyer—Grounds.*

If S. 55 be taken as a whole there is no warrant for taking buyer and seller to mean those who have actually completed a sale; those in the course of transacting a sale are also contemplated. A buyer who has taken an agreement can put an end to his contract if he finds before the completion of the sale that the seller is disabled from performing his promise in its entirety, such as regarding the covenant to deliver vacant possession of the property sold. (*Madhavan Nair and Jackson, JJ.*) PANCHAPAGESA AYYAR *v.* ARUNACHALA MUDALIAR. **1932 M.W N. 122.**

———**S. 55**—*Applicability—Contract to the contrary—Liability of vendee to tender draft conveyance.*

S. 55 of the Transfer of Property Act applies only when there is no contract to the contrary. Therefore where the vendors specifically agree to convey the property sold to the vendee or his nominee, the vendee is under no duty to tendor to the vendors a proper draft conveyance. (*Costello and Lort Williams, JJ.*) PROBODH KUMAR DAS *v.* GILLANDERS ARBUTHNOT & CO. **152 I.C. 571=7 R.C. 289=59 C.L.J 503=A. I.R. 1934 Cal. 699.**

———**S. 55 (2)**—*Applicability—Vendee dispossessed by pre emptor.*

Sub-S. (2) of S. 55 of the T. P. Act does not apply where the vendee is dispossessed as a result of a pre-emption suit, inasmuch as it cannot be said that the interest which the vendor purported to sell to the vendor did not subsist at the time of the sale or that the vendee had no power to transfer his interest. (*Srivastava and Zia-ul-Hasan, JJ.*) ASHIQ ALI *v.* HINDPAL SINGH. **10 Luck. 601=7 R.O. 374=153 I.C. 715=1935 O. W.N. 99=A.I.R. 1935 Oudh 75.**

———**S. 55 (2)**—*Construction—"Contract to contrary"—Scope—Indemnity against claim by co sharer—Vendee dispossessed by reversioners—Right of vendee to be indemnified.*

"The contract to the contrary" in S. 55 need not be express and may be implied from the terms of the sale-deed, but it is well settled that, in order to exclude the operation of the statutory liability of the vendor a contract, covenant or agreement must so clearly be inconsistent, with the statutory rules as to lead to the inference that it had been made to qualify the generality of the law. In a sale-deed it was provided as follows: "If any partner or co-sharer of ours should arise and make a claim and the whole or a part of the property sold goes out of the possession of the vendee, the vendee would be entitled to recover that amount together with costs and damages from our persons and property of every kind". The vendor had purchased the property from a widow and daughter of the last male-holder. On the death of the widow and the daughter, the reversioners of the last male-holder brought a suit for possession of the property and it was decreed. The vendee thereupon filed a suit against his vendor for the sale-consideration and costs incurred in the litigation with the reversioners.

Held, that the clause in the sale deed was not exhaustive of all the contingencies in which the plaintiff could be entitled to recover the sale price from the vendors, that it was not inconsistent with the statutory rule which provides for the liability of vendors even in other cases and that the plaintiff was entitled for the sale consideration and also the costs incurred in defending the title of his vendors. 50 All. 371 (P.C.), Foll. (*Iqbal Ahmad and Kisch, JJ.*) NAND RAM *v.* PURSHOTAM DAS. **6 I.R. (All). 131=145 I.C. 615=1933 A.L.J. 201=A.I.R. 1933 All. 203.**

———**S. 55**—*Covenant for title—If applies to pre-emption—Sales.*

The Act does not apply to pre-emption sales, so far as the formalities are concerned. But the pre emptor is entitled to enforce the covenants running with the land. The implied covenant for title is one which runs with the land and therefore is enforceable by the pre-emptor in whom vests the property. Hence the pre-emptor can claim compensation for the breach of the warranty of title as any vendee under a private sale can. (*Niyogi, A.J.C.*) ABDUL *v.* KISAN. **136 I.C. 879=I.R. 1932 Nag. 39=27 N.L.R. 392=14 N.L.J. 48=A.I.R. 1931 Nag. 166.**

———**S. 55**—*Covenant for title—Breach of—Damages—Value of improvements.*

Where the terms of a conveyance are very wide and there is nothing in those terms which could be interpreted as restricting the full liability for damages in case of breach of covenant, damages for breach of covenant of title should be assessed with reference to the value of the property at the date of eviction and not with reference to its value at the date of sale and such damages include the value of improvements which the vendee may have made. Where a site with a house standing thereon is sold, the vendor would be presumed to have forseen either the improvements of the house sold or the dismantling of it in order to build a new one as a natural and proper use of the site. Consequently, even if the loss is caused to the vendee by reason of interference with the quite enjoyment of the house that loss would be deemed to have naturally arisen in the usual course of things from the breach. Knowledge of the purchaser of the defect of title in his vendor does not affect his right to recover damages. 40 Mad. 338, Foll.; 21 Bom. 175; 20 N.L.R. 55; *Bunny Hopkinston*, 27 Beav. 565; *Rolph* v. *Grough*, L.R. 3 Exch. 44; *Luck* v. *Furze*, L.R. 1 C.P. 441 and 1 Lah. 380, Ref. (*Niyogi, A.J.C.*) KISANLAL RAMRATAN *v.* RADHABAI. **27 N.L.R. 207=I.R. 1931 Nag. 24=130 I.C. 88=A.I.R. 1931 Nag. 14.**

———**S. 55**—*Covenant for title—Breach of—Remedy of purchaser after sale.*

When a sale is complete and a conveyance is executed, vendee cannot avoid the sale on subsequent discovery of defect in vendor's title unless there has been fraud. His remedy lies merely to sue for damages. 52 Cal. 914, Rel. on. (*Bhide, J.*) UDHO DAS *v.* MEHR BAKHSH. **I.R. 1933 Lah. 457=144 I.C. 340 (2)=34 P.L.R. 714=A.I.R. 1933 Lah. 262.**

———**S. 55**—Covenant for title—Breach—Suit for damages—Starting point—Date of dispossession. *See* LIMITATION ACT, ART. 116—VENDOR AND PURCHASER. **14 N.L.J. 125 (F.B.).**

———**S. 55**—*Covenant for title—Nature of—Breach—Suit for damages—Starting point—Onus.*

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A covenant for title must be distinguished from a covenant for quiet enjoyment; the former, if broken, is necessarily broken immediately upon the execution of the assurance which contains it; and the purchaser may bring an action immediately and is not bound to wait till he is evicted. But a covenant for quiet enjoyment affords no right of action until a disturbance. The onus is on the plaintiff to allege and prove a breach of the covenant. (*Venkatasubba Rao, J.*) MEERKANNI ROWTHER *v.* PERIYAKARUPPAN. **57 Mad. 1016=7 R M. 155=151 I.C. 920=1934 M.W.N. 1207=40 L.W. 775=A.I.R. 1934 Mad. 687=67 M.L.J. 647.**

——**S. 55**—*Covenant for title — Sale by trustees of charitable endowment.*

Though, apart from authority conferred by deed scheme or sanction of Court, the trustees have the power to sell property for 'provident administration' of the charity, the purchaser takes the property subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances. No conscientious solicitor would advise his client to purchase property with such an obligation. (*C. C. Ghose, A.C.J. and Costello, J.*) MISRILAL RAIDANI *v.* NETAI CHAND NANDI. **150 I.C. 389=6 R.C. 839=58 C.L. J. 513=A.I.R. 1934 Cal. 372.**

——**S. 55 (1) (a)**—*Covenant for title—Breach of—Suit for refund of purchase money—Defence.*

The defendant sold to the plaintiff a piece of land with a warranty that if there was a defect in the vendor's title, he would be liable for the purchase money. The real owner brought a suit against both vendor and vendee; the vendor therein admitted he had no title to the property and the suit was thereupon compromised by the vendee giving up a portion of the property to the real owner. In a suit by the plaintiff for recovery of the purchase-money,

Held, that as the sale by the defendant had failed for want of consideration, he was bound to refund the purchase-money and he was not entitled to say that the vendee had made an advantageous bargain with the real owner and had practically lost little thereby. (*Courtney Terrell, C.J. and Kulwant Sahay, J.*) ZAINAB *v.* AZIZUNISSA. **6 R.P. 401=147 I.C. 1170=A.I.R. 1934 Pat. 280.**

——**S. 55 (1) (g)** — *Covenant for title—Breach—Right to damages—Discharge of encumbrances by purchaser not necessary.*

A vendee who has purchased property subject to incumbrance is not bound to discharge it as a condition precedent to the claim for damages for breach of covenant of title. 50 All. 371 (P.C.); 20 A.L.J. 301 and 55 I.C. 152, Ref. (*Niyogi, A.J.C.*) SHEIKH ABDUL *v.* KISAN. **14 N.L.J. 48=136 I C. 879=I R 1932 Nag. 39=27 N.L.R. 392=A.I.R. 1931 Nag. 166.**

——**S. 55 (2)**—*Covenant for title—Attached properties sold by defendant to third party and mortgaged by latter to another—Improper execution by decree-holder—Suit for damages by mortgagee—Liability of decree-holder and judgment-debtor.*

Defendants 7 and 8 sold certain properties to defendant 2 on 17-12-1924, and at the time of the sale they were under attachment under decree obtained by the 1st defendant against defendants 7 and 8. The sale deed referred to the attachment and contained a covenant that if the vendors did not arrange to pay off the decree debt and to have the attachment raised, they would be liable for any loss caused thereby. Defendant 2 mortgaged those properties to plaintiff in February 1927. Defendants 7 and 8 sold other properties to defendant 9 on 16-1-1925 in order to pay off the decree,

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and a sum of Rs. 4,500 was reserved with defendant 9 for payment to decree-holder. It was recited in that sale-deed and proved that 1st defendant agreed to accept Rs. 4,500 in full satisfaction of his claim under the decree. Though that amount was paid by defendant 9 to defendant 1, the latter executed his decree for the balance due under the decree, in spite of the agreement to the contrary, got the attached properties to sale and purchased them through his clerk in September 1927. Plaintiff fearing that his security would be impaired deposited the necessary amount into Court under O. 21, R. 89, C. P. Code, and got the sale set aside and brought a suit claiming to recover that amount from 1st defendant or 7th and 8th defendants or 9th defendant.

Held, that defendants 7 and 8, having failed to apply to the Court to enter up satisfaction of the decree under O. 21, R. 2, C. P. Code, which it was open to them to do, must be held liable to plaintiff for damages by force of S. 55 (2) of the T. P. Act. (*Varadachariar, J.*) PAPPU REDDIAR *v.* PICHU AYYAR. **42 L.W. 435=161 I.C. 963=8 R M. 901=1935 M.W N. 898=A.I. R. 1935 Mad. 961.**

——**S. 55 (2)**—*Covenant for title—Breach—Damages—Measure of.*

In a suit for compensation by the vendee against the vendor for breach of covenant for title, the value of the property at the date of the breach and not at the date of the sale is the proper criterion. (*Venkatasubba Rao, J.*) ALAGARAPPA REDDIAR *v.* ALAGIRISAMI NAICK. **156 I.C. 843 (2)=8 R.M. 65=41 L.W. 728=1935 M.W. N. 375=A.I.R. 1935 Mad. 636=68 M.L.J. 588.**

——**S. 55 (2)**—Covenant for title—Breach—Suit by vendee for compensation—Starting point—Date of dispossession. *See* LIMITATION ACT, ART. 116—BREACH OF COVENANT OF TITLE. **68 M.L.J. 588.**

——**S. 55 (2)**—*Covenant for title—Exclusion of—Express covenant necessary.*

Unless the vendor's liability as imposed by S. 55 (2), T. P. Act, is excluded by express covenant, his liability would be deemed to subsist notwithstanding the fact that the vendee "may have some idea" as to the defect in the title of the vendor. A.I.R. 1932 All. 546 and 6 I.C. 890, Rel. on ; A.I.R. 1923 All. 169; A.I.R. 1925 Mad. 968 and 61 I.C 604, Ref. (*Kendall. J.*) KALKA SINGH *v.* NAMDAR KHAN. **I.R. 1933 All. 430=144 I.C. 406=1933 A.L.J. 938=A.I.R. 1933 All. 389.**

——**S. 55 (2)**—*Covenant for title—Exclusion—Express covenant necessary.*

Unless the vendor's liability as imposed by S. 55 (2) is excluded by express covenant his liability is deemed to subsist notwithstanding the fact that the vendee may have some idea as to the defect in the title of the vendor. (*Mukerji and Bennet, JJ.*) NEWALKISHORE *v* SARJU RAM SAHU. **54 All. 774=I.R. 1932 All. 528 =139 I.C. 99=1932 A.L.J. 611=A.I.R. 1932 All. 546.**

[**F.** 1933 A.L.J. 938 (940).]

——**S. 55 (2)**—*Covenant for title—Express covenant in sale deed—Suit to recover damages on basis of implied covenant—Maintainability.*

The sale deed recited that the vendor had placed the vendee in possession of the entire property and that part of the property was the subject-matter of a gift in favour of another but that the same had been cancelled. One of the clauses in the sale deed provided as follows: "If God forbid, the whole of the property transferred, or any portion goes out of the possession of the vendee on account of any transfer or encumbrance....the vendee shall have a right to recover his consideration money ...." The vendee was resisted in taking possession of the property to which the deed of gift related. The

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suit instituted to recover the property proved unsuccessful and thereupon the vendee sued the vendor for damages.

Held, that the covenant for reimbursement was an enabling clause, that there was nothing in the sale deed excluding the implied warranty of title and that the plaintiff was entitled to recover a proportionate part of the purchase money by way of damages. (*Mukerji and Niamatullah, JJ.*) NANHI *v.* KETKI. **I.R. 1932 All. 121 = 136 I.C. 73 = 1932 A.L.J. 69 = A.I.R. 1932 All. 224.**

———**S. 55 (2)**—*Covenant for title—Express warranty.*

Where there was a distinct representation by the defendant that in the 8 acres that he purported to sell on behalf of himself and his younger brother, the third brother, *A* had no interest whatsoever.

Held, that there was over and above the implied warranty under S. 55 (2) of the Transfer of Property Act an express warranty of title and the defendant was responsible in law to make good the loss which admittedly accrued to the plaintiffs when they lost half the land as a result of the litigation of *A* against them. (*Subhedar, A J.C.*) KASHIRAO *v.* ZABU. **147 I.C. 852 (1) = 6 R.N. 148 = 16 Nag.L J. 201 = A I.R. 1933 Nag. 364.**

———**S. 55 (2)**—*Covenant for title—Implied warranty—Breach—Right to damages.*

C sold certain property to *T* and *B*, the sale deed containing the usual indemnity clause. *B* sold his share to *G*, brother of *T*. *C* had purchased the property from *H* and at the date of sale the property was mortgaged to *L*. *H* left a portion of the purchase money with *C* for payment to *L*. *C* did not pay and *H* brought a suit against *C*, *T* and *G* for the recovery of the unpaid purchase money. The contention of *G* and *T* that they were *bona fide* purchasers for value and had no notice that the property was mortgaged was over-ruled and a decree was passed against *C* personally and against the property in the hands of *T* and *G*. In execution of the decree the property was sold and *G* and *T* were dispossessed. *G* and *D*, son of *T*, consequently sued *C* for damages consequent on the loss of the property purchased by them.

Held, that the plaintiffs were entitled to an implied warranty of title under S. 55, T. P. Act and in the case of breach they were entitled to repudiate the sale altogether or to claim compensation for the breach. (*Mears, C.J. and Sen, J.*) GOBARDHAN DAS *v.* AFZAL HUSAIN. **I R 1932 All. 438 = 138 I.C. 495 = 1932 A L J. 598 = A.I.R. 1932 All. 553.**

———**S. 55 (4)**—*Covenant for title—Construction of—Expenses incurred by vendees in pre emption suit—If recoverable.*

The covenant in a sale deed only provided that if the vendees were dispossessed, the vendor would be liable to refund the whole of the purchase-money. Soon after the sale, the vendees were dispossessed in pursuance of a decree in a pre-emption suit in respect of their sale. In a suit by the vendor against vendees for the balance of purchase-money the vendees sought to set off the expenses incurred by them in contesting the pre emption suit on the strength of the covenant.

Held, that the covenant did not obviously contemplate a pre-emption suit, that it was merely intended to cover defect of title and that it did not cover any loss resulting from the pre-emption suit. 111 P.R. 1908 and A I.R. 1926 Lah. 182, Dist. (*Bhide, J*) MT. ISHRO *v.* NAUBAT RAI. **6 I.R. (Lah.) 169 = 146 I.C. 120 = A.I R. 933 Lah. 522.**

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———**S 55 (1) (a)**—*Disclosure—Conditions restricting use of property—Non-disclosure—Effect.*

The seller is bound to disclose to the buyer restrictive conditions as to the use of the property imposed by a decree, as they are material defects ; and non-disclosure of the same entitles the buyer to rescind the contract. (*Broomfield and Wadia, JJ.*) LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND. **59 Bom. 83 = 155 I. C. 564 = 7 R.B. 439 = 36 Bom. L.R. 1041 = A.I.R. 1935 Bom. 16.**

———**S. 55 (1) (a)**—*Disclosure—Material defect—Test—Liability of property to compulsory acquisition.*

A defect to be material must be of such a nature that it might be reasonably supposed, that if the buyer had been aware of it, he might not have entered into the contract at all, because he would be getting something different from what he contracted to buy. A defect in title, as distinct from a defect in the property itself, is a latent defect, because *prima facie* the seller knows his title and the buyer does not. Liability of the property sold to be acquired compulsorily under the Land Acquisition Act amounts to a material defect as well as a latent defect. (*Broomfield and Wadia, JJ.*) LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND. **59 Bom 83 = 155 I.C. 564 = 7 R.B. 439 = 36 Bom.L.R. 1041 = A I.R. 1935 Bom. 16.**

———**S. 55 (1) (c)**—*Disclosure—Duty—Information about income.*

Any information regarding the income or the rental of the property to be sold is a relevant question within S. 55 (1) (*c*) and it is the duty of the seller to answer such a question to the best of his information. If he gives an answer which he knows to be false he is guilty of a breach of duty and misrepresentation. Further if he volunteers any information about the income he is certainly bound to give true information. (*Staples, A. J.C.*) PREMCHAND *v.* RAM SAHAI. **28 N.L.R. 184 = I R. 1932 Nag. 138 = 140 I.C. 209 = A.I.R. 1932 Nag. 148.**

———**S. 55 (1) (f)**—Duty of vendor—Property sold not transferred—Vendee securing equivalent to that property. *See* CONTRACT ACT, S. 39—SALE. **A.I. R. 1934 All. 617.**

———**S. 55 (1) (f)**—*Duty of vendor—Duty to put buyer in possession—"Contract to the contrary"—Clause in sale deed exonerating seller in case of defect in title—Effect.*

The seller is ordinarily bound to put the buyer in possession of the property sold by him and if he claims to be exonerated from such obligation on the strength of a provision in the sale deed, such stipulation must be sufficiently explicit and free from ambiguity. Where the vendor is not in a position to put the vendee in possession of certain items of the property sold by him by reason of the fact that he has himself lost for all time the right to obtain possession of those items by the operation of limitation, a clause in the sale deed to the effect "*if any defect in title be found with respect to any property, then the vendor will not be liable therefor*," will not be sufficient to exonerate the vendor from his statutory liability under S. 55 (1)(*f*) of the T.P. Act. The vendee is therefore entitled to compensation from the vendor in respect of those items. (*Derbyshire, C. J. and Costello, J.*) BARISAL LOAN OFFICE. LTD. *v.* SATIS CHANDRA DAS. **40 C.W.N. 19 = 160 I.C. 407 = 8 R.C. 440 = A.I.R. 1936 Cal. 12.**

———**S. 55 (1) (g)**—*Duty of vendor—Sale deed silent as to existence of any incumbrance—Vendor's liability.*

S. 55 (1) (*g*) of the T. P. Act imposes on the seller a statutory liability to discharge all the incumbrances

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existing on the property at the time of the sale, unless the property is sold subject to incumbrances. Where there is not a word in the terms of the sale deed to indicate that the property has been sold subject to any incumbrance, and in the absence of any provision therein making the vendee liable for any incumbrance, the vendor is clearly bound under S. 55 (1) (*g*) to meet all the incumbrances. "Incumbrance" under the section is wide enough to include a recurring liability like a claim for maintenance charged on the property by a decree of Court. (*Srivastava and Thomas, JJ.*) HARCHARAN LAL *v.* NURUL HASAN KHAN. **10 Luck. 274 = 152 I.C. 221 = 7 R.O. 196 = 11 O.W.N. 1348 = A.I.R. 1934 Oudh 492.**

——**S. 55**—*Growing crops—Right to.*

The right to growing crops passes by the sale of the land, in the absence of an express provision to the contrary, and in the case of a Court sale, the right to possession of the crops accrues from the date of delivery of possession of the land. (*Patterson and Guha, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* BHAGIRATH MAHTO. **61 Cal 991 = 59 C.L.J. 482 = 151 I.C 662 = 7 R.C. 147 = 35 Cr L.J. 1367 = 38 C.W.N. 854 = 1934 Cr.C. 908 = A.I.R. 1934 Cal. 610**

——**S. 55**—*Liability of vendee—Purchase-money.*

Where the transaction of sale is completed there is a personal remedy against the vendee and in favour of the vendor apart from the statutory vendor's lien. (*Mukerji and Bennet, JJ.*) RAGHUKUL TILAK *v.* PITAM SINGH. **52 All. 901 = I.R. 1931 All. 246 = 130 I.C. 198 = 1930 A.L.J. 1524 = A.I.R. 1931 All. 99.**

——**S. 55 (1) (a)**—*Liability of vendee—Duty—Ordinary care.*

The words "ordinary care" are somewhat indefinite. A purchaser of property is under no legal obligation. But in dealing with real property regard must be had to the usual course of business. A purchaser who wilfully departs from it to avoid knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects, which would have come to his knowledge if he had transacted the business in the ordinary way. (*Broomfield and Wadia, JJ.*) LALLUBHAI RUPCHAND *v.* MOHANLAL SAKARCHAND. **59 Bom. 83 = 155 I C. 564 = 7 R B. 439 = 36 Bom.L R. 1041 = A.I.R. 1935 Bom. 16.**

——**S. 55 (1)**—*Liability of vendee—Personal obligation of vendor.*

The transferee is not bound to pay the personal obligation of his predecessor in title such as payment of *sar-i-chakaram*. (*Young and Pullan, JJ.*) ABDUS SHAKUR *v.* KUNWAR MUNSHI NAND LAL. **53 All. 742 = I.R. 1931 All. 703 = 133 I.C. 543 = 12 L.R. 226 (Rev.) = 15 R.D. 447 = 1931 A.L.J. 429 = A.I.R. 1931 All. 552.**

——**S. 55 (5) (b)**—Liability of vendee—Direction for payment of unpaid purchase money to mortgagee—Failure—Effect. *See* LIMITATION ACT, ART. 120. **1932 A.L.J. 556 = A.I.R. 1932 All. 454.**

——**S. 55 (5) (b)**—*Liability of vendee—Direction to pay creditor—Default—Suit by vendor to recover unpaid price—Maintainability.*

Where the vendee failed to pay the balance of the consideration left with him to the creditors of the vendor within a reasonable time and thereupon the vendor sued for recovery of the unpaid purchase money.

Held, that the plaintiff was damnified because interest was mounting upon his debts and that he had a valid cause of action to sue for recovery of the money. (*Sen and Bennet, JJ.*) MAKUND LAL *v.* BHOLA RAI.

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I.R. 1931 All. 430 (2) = 131 I.C. 686 (2) = 1931 A.L.J. 985 = A.I.R. 1931 All. 419.

——**S. 55**—*Rights of vendee—Executed contract—Shortage of land sold—Compensation for.*

In the case of an executed contract, where a property has been conveyed and the purchase money paid, the purchaser has only a limited right to claim compensation from his vendor. He may sue when there is a breach of a conveant of title or warranty on its discovery or when the deed contains an express condition for compensation for any defects. But where his claim is based on misrepresentation pure and simple, such misrepresentation must be fraudulent. *Jolliffe* v. *Baker*, (1883) 11 Q. B. 255, Ref. Where there is no such express condition for compensation for shortage of area and no fraud is proved the purchaser who should have taken the land on measuring it has no cause of action for the shortage. 29 I.C. 394, Ref. (*Ferrers, J. C. and Rupchand, A.J.C.*) PARMANAND BHOJRAJ *v.* MOTUMAL PHATUMAL. **I. R. 1933 Sind 182 = 144 I.C. 371 = A.I.R. 1933 Sind 144.**

——**S. 55**—*Rights of vendee—Purchase money not fully paid—Suit for recovery of possession—Conditional decree—Validity of—Practice.*

Under S. 55 of the Transfer of Property Act, the vendee is, after the conveyance, entitled to possession and the vendor has a statutory charge on the property for the unpaid purchase money: it is not competent to the Courts in a suit for possession by the vendee to pass a decree for possession conditionally on the vendee paying the balance of the purchase money. But in order to do justice between the parties, it is competent and proper for the Court to incorporate the statutory charge in the decree in the suit brought by the purchaser for recovery of possession. (Case-law discussed.) 34 Mad. 543 and 43 Mad. 712, Foll. (*Patkar and Barlee, JJ.*) BASALINGANA *v.* CHINNAVA. **56 Bom. 556 = I.R. 1932 Bom. 405 = 138 I.C. 534 = 34 Bom.L.R. 427 = A. I.R. 1932 Bom. 247.**

——**S. 55**—*Rights of vendee—Vendee has two distinct causes of action—Lapse of remedy by one does not destroy remedy by other.*

The vendor's covenant is twofold, for a right to convey and for quiet enjoyment, and so the vendee has two distinct causes of action in the event or a breach of the covenant. The causes of action from the breach of one part of the covenant will lapse if the remedy is not sought within the statutory period, but that will not destroy any remedy to which the vendee may be entitled by reason or the breach of the other part of the covenant. A.I.R. 1932 Nag. 5 (F.B.), Rel on. (*Pollock, A.J.C.*) AMBADAS *v.* WAMAN RAO. **30 N.L R. 138 = 6 R.N. 184 = 148 I.C. 480 = A.I.R. 1934 Nag. 16.**

——**S. 55 (1)**—Rights of vendee—Defect in title of vendor. *See* SPECIFIC RELIEF ACT, S. 25. **36 Bom. L.R. 1041.**

——**S. 55 (1) (d)**—*Rights of vendee—Sale by Official Assignee in insolvency—Purchaser, right to demand conveyance in favour of sub-purchaser.*

When a person purchases the right, title and interest of an insolvent at a sale by the Official Assignee, he is entitled to demand from the Official Assignee a conveyance either in favour of himself or in favour of another to whom he has in the meanwhile sold his rights in the property. The words "proper conveyance" in S. 55 (1) (*d*), T. P. Act, must be read in which they would be understood in English law, as meaning a conveyance either in favour of the puchaser or as he shall direct. The purchaser at the insolvency sale cannot be deprived of the benefit of S. 28 (3) of the Stamp Act. (*Beaumont,*

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C.J. and Rangnekar, J.) RAHIMTULLAH *v.* OFFICIAL ASSIGNEE, BOMBAY. **59 Bom. 582=157 I.C. 1462=8 R.B. 104=37 Bom.L.R. 440=A.I.R. 1935 Bom. 340.**

——**S. 55 (1) (g)**—*Rights of vendee—Vendee made to pay-off mortgage—Right to reimbursement and damages.*

Where, under the terms of a sale deed, the property was sold free from incumbrance, but the vendee fails to obtain possession, and has to pay off an encumbrance existing on the property before he could get possession, he is entitled to recover the money so paid by him and also to damages for the period he was kept out of possession of the property purchased by him. (*Srivastava, Ag. C.J. and Smith, J.*) GAURI SHANKAR *v.* MUNNU. **153 I.C. 811=7 R.O. 399=11 O.W.N. 1563=A.I.R. 1935 Oudh 142.**

——**S. 55 (2)**—*Rights of vendee—Indemnity clause—Construction—If covers dispossession by pre-emptor.*

A vendee against whom a pre emption decree was passed sued the vendor claiming the difference between the price that he paid and that which he got from the pre-emptors. On a construction of the indemnity clause in the sale deed,

Held, that although the indemnity clause is wide enough to cover the case of the property going out of the possession of the vendee by a suit for pre emption, it was never the intention of the parties that it should apply to a case of pre-emption and that the very fact that it is stipulated that in the contingencies mentioned the vendor would be liable to return the whole or part of the consideration money in proportion to the extent of the property going out of the hands of the vendee shows clearly that the clause was not actually intended to cover the eventuality of the property being lost to the vendee by a pre-emption suit and that, therefore, the vendee's suit should be dismissed. (*Srivastava and Zia-ul-Hasan, JJ.*) ASHIQ ALI *v.* HINDPAL SINGH. **7 R.O. 374=1935 O.W.N. 99=153 I.C. 715=A.I.R. 1935 Oudh 75.**

——**S. 55 (2)**—*Rights of vendee—Provision for—Liquidated damages—Right to further damages.*

Where there is a definite stipulation in the sale-deed as to the payment of damages on given contingency it is not open to the vendee to receive further damages by way of compensation for the costs of litigation he has incurred in seeking to protect his title against a third person. (*Mukerji and Bennet, JJ.*) BALBHADDAR SINGH *v.* ASAD ALI KHAN. **I.R. 1931 All. 546=132 I.C. 802=1931 A.L.J. 97.**

——**S. 55 (4) (b)**—*Scope—Amendment of 1929—Effect of.*

The section as it stood prior to the amendment of 1929 did not in terms give the vendor a charge on the property in the hands of any one but the buyer. But still the vendor can always follow the property in the hands of a transferee who had notice of the non-payment of the purchase-money. The amendment of 1929 merely gave effect to this principle and did not make any actual change in the law. (*Carr and Cunliffe, JJ.*) RAM RAGUBHIR LAL *v.* THE UNITED REFINERIES, BURMA, LTD. **9 Rang. 56=I.R. 1931 Rang. 305=134 I.C. 737=A.I.R. 1931 Rang. 139.**

——**S. 55 (6) (b)**—*Rights of vendee—Charge on property—Part-payment of price.*

The question whether a purchaser by part-payment can obtain a charge on the property depends on whether the default in completing the contract was committed by him or the vendor and that is a question of fact in each case. 52 M.L.J. 33; 51 M.L.J. 788 (P.C.), Ref. (*Beasley, C.J. and Walsh, J.*) ADARI SANYASI *v.* NOOKALAMMA. **51 Mad. 708=I.R. 1931 Mad. 535=131 I.C. 487=34 L.W. 556=A.I.R. 1931 Mad. 592.**

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——**S. 55 (6) (b) (old Act)**—*Rights of vendee—Enforceability against Court auction purchaser.*

It is a well-established principle of equity that a purchaser of immovable property has a lien on the property purchased. This principle is recognised in S. 55 (6) (*b*). The lien will, however, be ineffectual as against a transferee for value and without notice; but it will take effect as against a purchaser at a Court auction sale. (*Hasan, C.J. and Bishsheshwar Nath, J.*) SHEO DULARE *v.* JAGANNATH. **7 Luck. 405=136 I.C. 222=I.R. 1932 Oudh 94=8 O.W.N. 1313=A.I.R. 1932 Oudh 88.**

——**S. 55**—*Rights of vendor—Purchase money left with vendee with direction to discharge encumbrances—Default of vendee—Remedy of vendor.*

Where property is sold free from encumbrances and yet there are encumbrances outstanding on the property the buyer may retain in his hand sufficient amount to pay off the encumbrances but it is his duty to pay the amount so retained to the prior encumbrancer. The vendee cannot be allowed to retain the amount and neither pay it to the seller nor to the encumbrancer. Where property has been transferred by a vendor to a vendee with a direction to the vendee to pay off a third person and the money left in the hands of the vendee is in substance a part of the purchase money itself, there is a statutory charge created by S. 55, T. P. Act, which is enforceable as such. The money is already due to the vendor and if not paid as directed can be recovered by enforcement of the charge without the vendor being called upon to show that as a consequence of a breach of any covenant he has suffered some other actual damage. If there is a clear undertaking and the vendee has agreed to release the vendor either from his personal liability to another person or release his property from any previous encumbrance, he is bound to fulfil his undertaking. Where a date has been fixed for payment and that date has expired the suit to enforce the covenant they perhaps not strictly be called a suit for specific performance of contract, but it is certainly a suit on the covenant to compel the vendee to release the vendor from his liability which he had undertaken to free him of. The vendor is entitled to enforce the covenant and when there is an immediate apprehension of his suffering irreparable loss he is entitled to call upon the vendee to make good the payment which he had promised to make. The fixing of the date being for the benefit of the seller there is no reason why he should not insist on the covenant even after the expiry of the date; however a suit for damages can lie only when damages has been suffered.

Held, on the facts that the vendor was entitled to a decree for refund of the whole of the amount left in the hands of the vendee together with interest at the rate running on the mortgage debts. He was however not entitled to any decree for damages without proving the extent of the damages actually incurred. The vendor could compel the vendee to pay the amount in order to release the vendor's other properties from liability even though he might not yet have suffered actual loss. (*Sulaiman, C.J. Young and King, JJ.*) MT. NAIMA KHATUN *v.* BASANT SINGH. **6 R.A. 962=149 I.C. 781=1934 A.L.J. 318=A.I.R. 1934 All 406 (F.B.).**

——**S. 55 (4)**—Vendor's lien—Assignment—Registration is necessary. *See* REGISTRATION ACT, S. 17 (1) (B)—TRANSFER. **A.I.R. 1933 Mad. 181.**

——**S. 55 (4)**—*Vendor's lien—Plea as defence to later purchaser's suit for possession—Separate suit unnecessary.*

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A mortgagee purchased the property from the mortgagor, knowing that the mortgagor had not paid his vendor the purchase price in full. The property was in possession of the vendor. In a suit for possession by mortgagee purchaser,

Held, that he was entitled to possession only on payment of the balance of the purchase price due by his mortgagor to the vendor, that only a conditional decree should be passed, and that the mortgagor's vendor should not be asked to file a separate suit for a declaration of the vendor's lien under S. 55 (4), T. P. Act. (*Das, J.*) U TI *v.* M. P. M. S. CHETTIAR FIRM. **147 I.C. 742=6 R.R. 177=A.I.R. 1933 Rang. 401.**

———**S. 55 (4)**—Vendor's lien—Transfer—Registration is necessary. *See* REGISTRATION ACT, S. 17 (1) (B)—TRANSFER. **A.I.R 1934 Mad. 615.**

———**S. 55 (iv) (b)**—Vendor's lien—Applicability of principle—Purchase by Burman Buddhist—Part consideration paid from joint fund of husband and wife—Mortgage of land purchased for balance by husband alone—Suit on mortgage against husband alone—Wife not made party—Decree, not binding on wife. *See* BUDDHIST LAW (BURMESE)—SALE. **A.I.R. 1934 Rang. 190 (2).**

———**S. 55 (4) (b)**—*Vendor's lien—Covenant by vendee to pay off creditors of vendor—Lien of vendor, not lost.*

The covenant contained in a sale deed by which the vendee, with whom a portion of the consideration was left, undertook to pay off the creditors of the vendors is not a 'contract to the contrary" within S. 55 (4) (*b*) of the Act. It is not inconsistent with the continuance of the vendor's lien; on failure by the vendee to pay off the creditors, the vendor is entitled to recover the unpaid portion of the purchase-money by sale of the property. (*Hasan, C.J. and Bisheshwar Nath, J.*) DAULAT RAM *v.* INDRAJIT. **8 Luck. 185=141 I.C. 468=I.R. 1933 Oudh 58=9 O.W.N. 1032=A.I.R. 1933 Oudh 33.**

———**S. 55 (4) (b)**—*Vendor's lien—Sale in favour of three persons in certain shares.*

Where the sale of land is to three persons in certain shares, the vendor has a lien on the land for the unpaid purchase-money against all and is not concerned with the proportion paid by the various co-sharers. (*Addison and Agha Haidar, JJ.*) BHAG MAL *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE. **150 I.C. 725=7 R.L. 21 (1)=35 P.L.R. 410=A.I.R. 1934 Lah. 348.**

———**Ss. 56, 81 and 82**—*Scope and applicability.*

The right to contribution is controlled by the right of marshalling as shown by Ss. 56 and 81, T. P. Act. (*Ramesam and Venkatasubba Rao, JJ.*) MUTHIAH BHAGAVATHAR *v.* VENKATARAMA AYYAR. **59 Mad. 121=163 I.C. 977=9 R.M. 84=42 L.W. 482=1935 M.W.N. 1242=A.I.R. 1936 Mad. 106=69 M.L.J. 303.**

———**S. 56 (as amended in 1929)**—*Scope and applicability—Mortgage prior to amendment—Several properties subject to common charge—Purchaser of one—Right to claim marshalling.*

S. 56 of the T. P. Act as it stood before the amendment would not be applicable to a case where more than two properties were subject to a common charge. The scope of the section has been widened by the amendment of 1929, which provides for cases where more than two properties are subject to common charge. In the case of a mortgage executed prior to the amendment in which there are more than two properties, S. 56 of the T. P. Act will not therefore apply. In such a case

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which is outside the scope of the section, the principles of the English Courts of Chancery will apply, and in order to claim the benefit of the doctrine of marshalling, it must be shown that the purchaser of one of the several properties comprised in the mortgage must be a *bona fide* purchaser for value without notice. The equities which apply to puisne encumbrancer in the marshalling of securities apply also to a *bona fide* purchaser for value without notice, of a portion of property the whole of which was subject to a prior encumbrance. A purchaser who makes no enquiry whatever as to the existence of encumbrances on the property must be deemed to have notice under the Act as it stood before the amendment, although the deed of sale in his favour might contain a recital or representation that there are no other encumbrances on the property. Such a purchaser is not a *bona fide* purchaser without notice and he cannot claim the benefit of the doctrine of marshalling as understood by the Equity Courts of England. (*Mitter and Patterson, JJ.*) BENGAL COAL COMPANY, LTD. *v.* SITARAM CHATTERJI. **8 R.C. 283=159 I. C. 159=61 C.L.J. 560=A.I.R. 1935 Cal. 667.**

———**S. 56**—*Scope and applicability.*

S. 56 will not apply as between the subsequent purchasers, but only between a purchaser and his vendor. 31 Cal. 95 and 42 All. 336, Ref. (*Staples, A. J. C.*) SITARAM *v.* RAMRAO. **I.R. 1931 Nag. 65=130 I.C. 817=13 N.L.J. 213=A.I.R. 1931 Nag. 91.**

———**S. 57**—*Powers under—Combined consent decree adjusting rights of several mortgagees—Validity.*

In a mortgage suit the Court can pass by consent a combination of several decrees in favour of different mortgagees, determining the order in which they were to be paid and incorporating orders which the Court would be amply justified in marking under S. 57, T. P. Act. (*Mukerji and Mitter, JJ.*) C. L. KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal. 598=I.R. 1931 Cal 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

———**Ss. 58 and 100**—*Deed—Construction—Mortgage or charge.*

Where a document simply creates a lien on property for the realisation of a monthly allowance and does not contain words showing either expressly or impliedly that there is a transfer of any interest in the property, and there is no question of redemption, the document does not constitute a mortgage but merely creates a charge. (*Srivastava and Nanavutty, JJ.*) SIKANDAR ARA AMINA BEGAM *v.* HASAN ARA BEGAM. **165 I.C. 70 =1935 O.W.N. 871=A.I.R. 1936 Oudh 196.**

———**Ss. 58 and 100**—*Deed—Construction—Mortgage or charge.*

Where a deed which was described as a deed of further charge provided that the executant had borrowed Rs. 40 at an interest of 2 per cent. per mensem which she promised to repay in three years and that in case of default in payment the amount of the deed would be borne by the property mortgaged under the previous deeds and that the amount of the deed would be payable at the time of the redemption of the said mortgages.

Held, the deed constituted a charge and not a mortgage and as the amount of the debt was less than Rs. 100, the registration of it was not compulsory. (*Srivastava, J.*) RAM PARTAB *v.* ANRUDH SINGH. **8 R.O. 197 =159 I.C. 612=1935 O.W.N. 1199.**

———**S. 58**—*Deed—Construction—Mortgage or lease—Test.*

In construing a document as to whether it is a lease or a mortgage the following test may be applied. If it is not a security for the payment of any money or for the performance of any engagement, if no accounts are to be

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rendered or required, and if there is no provision for redemption, express or implied, it is simply a lease even though it may be described as a mortgage. 25 All. 109 (P.C.), Foll.; A.I.R. 1928 Mad. 35, Ref. (*Shadi Lal, C. J. and Abdul Qadir, J.*) HUSSAIN ALI SHAH *v.* SARDAR ALI SHAH. **A.I.R. 1933 Lah. 786.**

——**S. 58**—*Deed—Construction—Mortgage or sale—Mortgagee authorized to construct house according to his liking at his own cost—Mortgagor liable for whole amount.*

Where the mortgagees are authorized to re construct the transferred house "according to their liking at their own cost" and there is a stipulation in the deed that at the time of redemption, if it is found that the amount due to the mortgagees cannot be recovered in full from the mortgaged property, the mortgagors would be liable to make good the deficiency from their own pockets as well as from their other property," the transaction is a mortgage and not an out and out sale. (*Tek Chand and Monroe, JJ.*) ABDUL AZIZ *v.* RAHMAT ULLAH. **A.I.R. 1933 Lah. 155.**

——**S. 58**—Deed—Construction—Mortgage or charge—Further advance on same terms—Charge, not mortgage—Aggregate mortgage money in excess of the value of land—It will be a sale. *See* PUNJAB ALIENATION OF LAND ACT (1900), SS. 6 AND 17. **13 Lah. 660 = A.I.R. 1932 Lah. 465 (F.B.).**

——**S. 58**—*Deed—Construction—Mortgage or sale—Tests for finding out.*

The question if a transaction is a sale with a condition of re purchase or only a mortgage has to be determined on the construction of the document with the help of the surrounding circumstances. *N* sold his property to *V* in 1910. In the sale-deed, there was a clause enabling the vendor and his heirs to have the lands reconveyed within twenty years on payment of the consideration. On the same day *V* leased the lands to *N* by mulgeni lease and in 1913 *V* sold the property to *M* under whom the defendants claimed. The heirs of *N* brought the present suit under S. 15 *D* of the Dekhan Agriculturists' Relief Act to take accounts of the mortgage on the allegation that the transaction was in reality a mortgage by conditional sale.

Held, on a construction of the document and surrounding circumstances, the deed of 1910 evidenced an outright sale with a condition of repurchase and not a mortgage by conditional sale. Some of the tests for finding out if a transaction is a sale or a mortgage are; if there is any relation of creditor and debtor between the parties, if there is any stipulation or provision in the deed for payment of interest, if the price paid is adequate, if the rent reserved by the lease is fair. with whom the possession continues, etc. "The transfer of possession is more consistent with a sale whereas retention of possession by the transferor is an indication of a mortgage." (Case-law discussed.) (*Patkar and Broomfield, JJ.*) KUPPA KRISHNA HEGDE *v.* MHASTI GOLI NAIK. **I.R. 1931 Bom. 449 = 134 I.C. 337 = 33 Bom. L.R. 633 = A.I.R. 1931 Bom. 371.**

——**Ss. 58 and 100**—Mortgage and charge—Distinction between. *See* T. P. ACT, SS. 100 AND 58. **A.I.R. 1933 All. 934.**

——**S. 58**—*Mortgage—Payment of prior mortgage debt—Agreement to execute fresh mortgage—Right of subrogation—Agreement does not constitute mortgage or charge.*

A claim to subrogation can be sustained only when there is an agreement with the debtor that the lender shall be subrogated to the rights of the mortgagee and though such an agreement can be presumed when the money is expressly advanced for the purpose of paying off an incumbrance, the mere fact that the money borrowed by the debtor is used to pay off a prior mortgage does not entitle the lender to the benefit of the discharged security. A mere oral agreement by which a person undertakes to execute a mortgage of the property in favour of the person advancing money for the payment of prior mortgage debt cannot constitute a charge or mortgage within the meaning of Ss. 100 and 58. By making payment, the other person does not acquire an interest or charge on the property or upon the right to redeem the property. The agreement merely created a right in him to obtain a regular deed of mortgage of the property to be executed by the debtor. The person making payment is not entitled to the benefit of the discharged security or to the right of subrogation. (*Rara and Smith, JJ.*) RAM HAIT *v.* POHKAR. **7 Luck. 237 = I.R. 1932 Oudh 5 = 134 I.C. 1093 = 8 O.W.N. 1105 = A.I.R. 1932 Oudh 54.**

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——**S. 58**—*Mortgage—Sale deed and contemporaneous agreement to reconvey—Effect.*

A sale deed and a contemporaneous agreement to reconvey constitute a single transaction which amounts to a mortgage and such documents are registrable. (*Hilton, J.*) AMIR *v.* INDAR SINGH. **6 R.L 510 (1) = 147 I.C. 1191 = 35 P.L.R. 337 = A.I.R. 1934 Lah. 453.**

——**S. 58**—Movables—Hypothecation of—Validity of. *See* MORTGAGE—MOVABLES. **10 Mys.L.J. 16.**

——**Ss. 58 and 68**—*Zarpeshgi—Transferee of simple mortgaged property takes it subject to mortgage but is not personally liable to pay mortgage money—In case of transferee of usufructuary mortgaged land it is even so—But if usufructuary mortgagee is dispossessed by such transferee, then transferee is liable to repay the mortgage debt.*

A transferee of a mortgaged property takes it subject to the mortgage, but does not undertake the personal obligation of the transferor to repay the mortgage debt. In effect the result of purchasing a property subject to a simple mortgage is that the purchaser is liable for the value of the mortgaged property and no further. Therefore although the mortgage charge is enforceable against the property in the hands of the transferee, the latter is under no liability for anything in excess of that value. The case of a usufructuary mortgage, however, differs from the case of a simple mortgage in that there is no personal covenant by the mortgagor to repay the mortgage debt, the object of such a transaction being that the mortgagee shall repay himself out of the profits of the mortgaged property of which he is in possession. There being no personal covenant in such a case there can be no question of a transferee of the mortgaged property being charged with any personal liability. Where therefore the case of a zarpeshgidar was that the defendants having been allotted the mortgaged property by the collectorate partition, it must be presumed, that, in the partition, allowance was made for his existing mortgage, and that as the defendants had dispossessed him, they were bound in equity to repay the mortgage debt.

Held, that the zarpeshgidar not being a simple mortgagee could not and did not seek a personal decree in the sense in which that term was used with reference to a simple mortgage and that the defendants are bound in equity to repay the mortgage debt. A.I.R. 1932 Pat. 273, Rel. on; A. I. R. 1923 P.C. 54 and 34 All. 64 (P. C.), Dist. (*Agarwala, J.*) MT. JALESHWAR KUER *v.* SHEONARAYAN SAH. **6 R.P. 437 = 148 I.C. 23 = A.I.R. 1934 Pat. 1.**

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———S. 58—Zaripeshgi lease—Construction—Land given by security for payment—Effect of. *See* LEASE—ZARIPESHGI. **14 L.R. 226 (Rev.) = 17 R.D. 270.**

———**(as amended by Act XX of 1929), S. 58 (a) (c) and proviso**—*Scope—Existence of debt essential.*

Cl. (*a*) of the section governs Cl. (*c*) and in spite of the new proviso added by the amending Act of 1929, unless there is a debt and a relationship of the creditor and debtor between the parties, there can be no mortgage even if the condition of repurchase is embodied in one document which effects or purports to effect the sale. (*Patkar and Broomfield, JJ.*) KUPPA KRISHNA HEGDE *v.* MHASTI GOLI NAIK. **I.R. 1931 Bom. 449 = 134 I.C. 337 = 33 Bom.L.R. 633 = A.I.R. 1931 Bom 371.**

[R. 1934 N. 18 (20).]

———**S. 58 (a) and (d)**—*Simple and usufructuary mortgages—Combination—Right of mortgagee to eject lessee.*

Certain lands in the possession of the defendants-lessees were mortgaged by their owner to plaintiffs. The deeds were styled deeds of mortgage with possession and contained an express covenant to pay the entire balance within three years coupled with a further provision that in case of default on such payment the mortgagees might recover the money due by means of the mortgaged property and also from the mortgagor personally. The plaintiffs having sued to eject the defendants after the expiry of the lease,

Held, that the deed evidenced a combination of simple and usufructuary mortgages and that in the latter capacity the plaintiffs were entitled to maintain the suit in ejectment (*Curgenven and Sundaram Chetty, JJ.*) VENKATARATNAM *v.* VARAHALIAH. **I.R. 1932 Mad. 706 = 139 I.C 449 = 37 L.W. 214 = 1932 M.W.N. 1053 = A.I.R. 1932 Mad. 768 = 63 M.L.J 310.**

———**Ss. 58 (a) and 67 (a)**—Simple mortgagee—Suit by—Appointment of receiver—Right to apply for. *See* C. P. CODE, O. 40, R. 1—MORTGAGE SUIT. **56 Mad. 915 = A.I.R 1933 Mad. 570 = 65 M.L.J. 222 (F.B.).**

———**Ss. 58 (b) and 98**—*Mortgage—Construction—Mortgage with personal covenant—Mortgagee authorized on default to enter into possession.*

It is not necessary for a simple mortgage that there should be an express provision giving the mortgagee a power of sale. Where a mortgage deed contains a personal covenant under which the mortgagor undertakes to pay the mortgage-money on the due date, the personal covenant carries with it by necessary implication, a power of sale. The fact that the deed authorizes the mortgagee in case of default to enter into possession of the mortgaged property, cannot take away the power of sale implicit in the personal covenant, more particularly, when the mortgagor has failed to put the mortgagee in possession. Such a mortgage is not an anomalous mortgage within the meaning of S. 98 of the Transfer of Property Act. (*Srivastava and Nanavutty, JJ.*) RAM LOCHAN PRASAD *v.* BACHCHU CHAUBE. **10 Luck. 10 = 6 R.O. 504 = 148 I.C. 1197 = 11 O.W. N. 760 = A.I.R. 1934 Oudh 255.**

———**S. 58 (b) and (d)**—Mortgage—Simple or usufructuary—Mortgagor described as dastaway arki. *See* MORTGAGE—CONSTRUCTION. **12 L.R. 364 (Rev.) = 16 R.D. 16.**

———**S. 58 (b)**—*Simple mortgage—Personal covenant to pay interest—Conditional clause regarding possession—Effect of.*

The mere fact that the mortgagee is entitled to take possession in default of payment of the principal does not convert an otherwise simple into an usufructuary mortgage. Where a mortgage is simple, it must be held

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to carry with it a personal covenant to pay the principal and interest. (*Coldstream and Bhide, JJ.*) SOCHET SINGH *v.* HADAVAT ULLAH. **13 Lah. 508 = I.R. 1933 Lah. 44 = 140 I.C. 863 = 33 P.L.R. 815 = A.I.R. 1932 Lah. 630.**

———**S. 58 (b)**—*Simple mortgagee—Rights of—Right to apply for appointment of receiver.*

A simple mortgagee has merely the right to sue upon the personal covenant or to bring the property to sale; he cannot satisfy his claim out of the rents and profits of the mortgaged property nor can be acquire the absolute ownership of the estate by foreclosure. In this respect he is in a position different from that of an English legal mortgagee who has a contractual right to the possession of the mortgaged property and from an equitable mortgagee who is entitled by contract to be put into the position of a legal mortgagee with the privileges appertaining to that position. By reason of his right to possession, direct or indirect, the Courts, on the application of a legal or equitable mortgagee, may appoint a receiver but a simple mortgagee has no right to possession and no right to apply for the appointment of a receiver. 54 M. 565, Diss. (*Courtney-Terrell, C.J. and Fazl Ali, J.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **142 I.C. 300 = I.R. 1933 Pat. 135 = 13 Pat.L.T. 525 = A.I.R. 1932 Pat. 360.**

[**Disappr.** 56 M. 915 (926, 946). **R.** 1934 A.L.J. 561 (563, 564).]

———**Ss. 58 (b) and 67**—*Simple mortgage—Right to apply for receiver.*

The Court has the power to appoint a receiver even in a suit by a simple mortgagee if it finds that the property is insufficient to meet the decretal amount. (*Dalip Singh, J.*) ASA RAM *v.* CHARANJI LAL. **149 I.C. 95 (2) = 6 R.L. 652 (1) = 34 P.L.R. 950 (1) = A.I.R. 1934 Lah. 38 (1).**

———**S. 58 (c)**—*Mortgage by conditional sale—Failure of mortgagee to take possession after expiry of period—Unregistered acknowledgment of amount due—Effect of.*

According to the terms of a deed of mortgage executed on 10th July, 1911, money was payable within five years and if it was not so paid, the mortgagee was entitled to take possession as owner of the house. The mortgagee however did not take possession of the house and on the 9th March, 1927, the mortgagor made an acknowledgment in plaintiff's bahi to the effect that interest on the mortgage debt had been paid up to date and that a sum of Rs. 950 was due under the registered mortgage-deed.

Held, that the mortgagee was not entitled to recover the mortgage debt by sale of the property on the strength of the acknowledgment, that the acknowledgment did not amount to a novation of contract and that being unregistered, could not by itself create a fresh charge on the property.

Held further, that the remedy of the mortgagee to sue for money, even if he had, was barred by time. (*Bhide, J.*) BADRI DAS *v.* BESU. **6 I.R. (Lah.) 62 = 145 I.C. 159 = 34 P.L.R. 1055 = A.I.R. 1933 Lah. 174.**

———**S. 58 (c)**—*Case governed by Bengal Regulation* (XXII of 1806)—*Suit for possession—Maintainability.*

Where the mortgagee in a mortgage by conditional sale, has not taken foreclosure proceedings under the Bengal Regulation XVII of 1806, no suit for possession can lie. In a province in which the Bengal Regulation (XVII of 1806) is in force, a suit for possession cannot be maintained by a mortgagee in a mortgage by conditional sale if he has not taken proceedings under the Regulation. (*Bhide, J.*) BADRI DAS *v.* BESU. **6 I.R.**

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———S. 58 (c)—*Construction—Mortgagor.*

The word "mortgagor" occurring in S. 58 (*c*) must be understood in the light of the definition of the "mortgage "given in S. 58 (*a*). S 51 (*c*) presupposes the existence of a mortgage given in S. 58 (*a*), *i.e.*, the parties must stand to each other in relation of creditor and debtor. The test to determine whether the relation between the parties is that of creditor and debtor is to see whether what was described as purchase-money was intended to be treated as a loan, whether the purchase-money recited in the sale deed represents the market value of the property and whether the possession was intended to be transferred and was transferred in accordance with the sale: Effect of covenant of repurchase and agreement of sale embodied in same document pointed out. (*Niyogi, A. J. C.*) RAMNARAYAN *v.* RAMRATAN. **149 I C. 354=6 R N. 222 (2)=A.I.R. 1934 Nag. 18.**

———S. 58 (c) (as amended in 1929)—*Sale—Agreement to repurchase in subsequent document—Transaction, if one of sale.*

Where the document of sale is one of outright sale with no agreement of repurchase, and the agreement to repurchase is contained in a subsequent document, the transaction shall not be deemed to be one of mortgage, *i.e.*, it shall be deemed to be one of sale. (*Mosely, J.*) MA SEIN NYO *v.* MAUNG SAN PE. **157 I.C. 179=8 R.R. 86=A.I.R. 1935 Rang. 212.**

———S 58 (c)—*Mortgage by conditional sale—Requisites—Sale or mortgage—Test.*

In order to bring a case within the definition of conditional mortgage there ought to be a stipulation that on default of the payment of the mortgage money on a certain date the sale shall become absolute. If the condition be there, it necessarily follows that primarily the consideration for the document is "mortgage money," an expression which connotes the existence of a debt as also of a security. It is not the form of the document but the intention of the parties which is the deciding factor, and it rather lies on the party who contends that a document *prima facie* connoting an absolute sale is really a mortgage to prove his contention. Where there is a controversy as to whether the transaction is a sale or a mortgage by conditional sale, the matter has primarily to be determined upon a construction of the document or documents concerned. An absolute sale-deed does not cease to be so merely because the vendor stipulates that he shall have a right to repurchase. If a deed of sale and a contract of repurchase be two separate and independent transactions and not two connected and interdependent parts of one and the same transaction they do not amount to a mortgage by conditional sale and do not satisfy the conditions of S. 58 (*c*). (Case law discussed). (*Sen and Niamatullah, JJ.*) RAM DAS RAE *v.* BRINDABAN RAM. **I R. 1931 All. 207=129 I.C. 719=1931 A.L J. 571=A.I.R. 1931 All. 113.**

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———Ss. 58 (c) and 68—*Mortgage by conditional sale—Suit for mortgage amount—Maintainability—Mortgagee cannot give up condition as to sale and sue for amount.*

The essential characteristic of a mortgage by way of conditional sale is that on breach of the condition of re-payment within the stipulated period the contract exhausts itself and the transaction is closed and becomes one of absolute sale to be enforced by foreclosure; and hence it is not open to the mortgagee to give up the condition as to sale and treat the mortgage as an ordinary mortgage. 48 All. 302, Rel. on. (*Bhide, J.*) BADRI DAS *v.* BESU. **6 I.R. (Lah) 62=34 P.L.R. 1055=145 I.C. 159=A.I.R. 1933 Lah 174.**

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———S. 58 (c)—*Sale with condition for release of the property.*

Where a person executed a document whereby he purported to sell the property in consideration of the loan due by the executant but it was agreed that if the executant paid the money within three years, the property would be released. (*Wa guazasht kara lengen.*)

Held, that the transaction fell within the language of S. 58 (*c*). It was a case of mortgage and not of an out and out sale. (*Mukerji and Bennet, JJ.*) MUMTAZ BEGAM *v.* LACHHMI. **I.R. 1931 All. 239=130 I.C. 15=1930 A.L.J. 1435=A.I.R. 1931 All. 196.**

———S. 58 (c)—*Sale with a condition for re-purchase or mortgage by conditional sale.*

Where a document which was in the margin described as a kat-kabala, but in the body of it purported to be a deed of sale with the following condition that "if the said principal amount and an equal amount of profit be paid to you within the period of eight years, then you shall return back the said lands with this kabala."

Held, in a suit for redemption of the land that the deed was an out-and-out sale and not a mortgage by conditional sale. (*Costello, J.*) ALTAPALI KHAN *v.* UZIRALI KHAN. **60 Cal. 167=I.R. 1933 Cal. 528=144 I.C. 220=A.I.R. 1933 Cal. 381.**

———S. 58 (c)—*Sale and simultaneous agreement by vendee to repurchase property at any time after 25 years on payment of sale price—Nature of transaction.*

Simultaneously with a sale-deed, the vendee executed an agreement by which the vendor was given a right of repurchase of the property for the sale-price at any time after 25 years from date of sale.

Held, that taking the two documents together, time was not the essence of the contract, that the transaction was not an out-and-out sale but only a mortgage by conditional sale and that the vendor was entitled to redeem within 60 years after the expiry of the 25 years period fixed in the agreement A. I. R. 1924 P. C. 226 and A. I. R. 1927 All. 321, Foll. (*Iqbal Ahmad and Kisch, JJ.*) MT. GOMTI *v.* MEGHRAJ SINGH. **6 I.R. (All) 34=145 I.C. 147=1933 A.L J. 907=A.I.R. 1933 All. 443.**

———S. 58 (d)—*Applicability—Mortgagor not delivering possession to mortgagee—Provision for management of part of property by mortgagee or his substitute and for collection of rent, etc., as agent of mortgagor—Collections to be set off against interest and principal—Nature of mortgage.*

S. 58 (*d*) contemplates that in any event that the whole of the mortgaged property should be delivered by the mortgagee and retained by him until the mortgage debt is paid off. Where the mortgagee under an English mortgage is given power to manage a part of the property either himself or to appoint a substitute, and to collect the rents, etc., so as to ensure payment of interest on the mortgage amount, the mortgage does not become a usufructuary mortgage. (*Wort and Dhavle, JJ.*) RAJA JANKI NATH RAY *v.* SYED ASAD REZA. **14 Pat. 860=158 I.C. 738=8 R P. 211=16 Pat.L.T. 757=A.I.R. 1936 Pat. 211.**

———S. 58 (d) (before Amending Act of 1929)—*Delivery of possession—Need not be contemporaneous with execution of mortgage.*

The delivery of possession need not be contemporaneous with the execution of the mortgage. The requirements of law will be satisfied if the mortgagor delivers such possession to the mortgagee as the mortgaged property is capable of on the date of the mortgage. If

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a prior mortgagee is then in possession and the whole object of the subsequent usufructuary mortgage is the redemption of the prior mortgage, a declaration on the part of the mortgagor contained in the deed of mortgage that he has delivered possession to the mortgagee of the interest mortgaged is quite sufficient. (*Hasan, C.J. and Bisheshwar Nath, J.*) RAM KHILAWAN *v.* GHULAM HASAN. **8 Luck. 1190=141 I.C. 464=I.R. 1933 Oudh 60=9 O.W.N. 1027=A.I.R. 1933 Oudh 35.**

———**S. 58 (d)**—*Money borrowed on promissory note —Debtor executing lease of land—Covenant to set off rent towards interest—Transaction, if usufructuary mortgage.*

Where a person borrows money by executing a promissory note and contemporaneously with it executes a lease of certain plots of land in favour of his creditor and covenants with him that he should remain in possession of the land and set off the rent towards interest payable under the note, the two transactions do not amount to a usufructuary mortgagee, as the lease is not for the purpose of securing the payment of the principal money advanced but is only an arrangement for the payment of interest and there is nothing to prevent the creditor from bringing a suit for recovery of the money on foot of the promissory note. (*Baipai, J.*) MAHADEO *v.* RAMESHWAR DAYAL. **157 I.C. 364=8 R.A. 181 =1935 A.L.J 275=1935 R.D. 63=1935 A.W.R. 75 =A.I.R. 1935 All. 150.**

———**S 58 (d)**—*Money left with mortgagee to pay off creditors of mortgagor—Default—Suit by mortgagor to recover amount—Maintainability—Failure of mortgagee to obtain possession, no defence.*

The principle that no suit to specially enforce a contract to lend money is maintainable does not apply to the case of an usufructuary mortgage in which a portion of the consideration is left with the mortgagee to pay off the creditors of the mortgagor and on failure of the mortgagee so to do, the mortgagor sues to recover the amount held in trust for him. Nor is the failure of the mortgagee to obtain possession through no default of the mortgagor any defence to the action. (*Jai Lal, J.*) THAKAR SINGH *v.* JAGAT SINGH **I.R. 1933 Lah. 3= 140 I.C. 495=33 P.L.R. 1085=A.I.R. 1933 Lah. 1.**

———**S. 58 (d) (as amended by Act XX of 1929)**—*Mortgage of* 1918—*Applicability of amendment.*

The amendment of 1929 does not govern transactions entered into and rights and liabilities created before the passing of the Amending Act. In the case of mortgage executed in 1918, the relief which the plaintiff prays for cannot be restricted to a decree for possession only and his right must be determined with reference to the law as it stood prior to the Amending Act. (*Hasan, C. J. and Bisheshwar, Nath, J.*) RAM KHILAWAN *v.* GHULAM HASAN. **8 Luck. 1190=141 I.C. 464=I.R. 1933 Oudh 60=9 O.W.N. 1027=A.I.R. 1933 Oudh 35.**

———**S. 58 (d)**—*Usufructuary mortgage — Accounts rendered by mortgagee—Rent when equivalent to interest.*

In a mortgage with possession, where the mortgagee is bound to render accounts of rent and profits, the rent can be taken to be equivalent to the interest only in the absence of a definite finding as regards rent. (*Bhide, J.*) HARDIT SINGH *v.* MT. DAMODARI. **6 I.R. (Lah.) 58 =145 I.C. 122=A.I.R. 1933 Lah. 141.**

———**S. 58 (d)**—*Usufructuary mortgage—Actual delivery, if necessary.*

A mortgage executed by *A* in favour of *B* was for a term of 10 years, and was in form a mortgage with possession. Possession was not in fact taken by the mortgagees, but by a second document of even date, the mortgaged land was leased to *A* for the same term at a rent which may be taken to represent the yearly interest on the mortgage debt. Mutation was duly recorded in the Government records on the basis of the mortgage in the names of the mortgagees. There had been previous transaction between the parties of a similar character. *B* sued *A* for possession after ten years in his capacity as mortgagee.

Held, that there was no reason to construe the mortgage as other than a possessory mortgage, as it clearly purported to be, and that the term of the lease having expired, the mortgagee was entitled to possession. Evidence to show that the mortgage was in reality a simple mortgage according to the intention of the parties was inadmissible under S. 92, Evidence Act, and no presumption could be drawn from the previous transactions. (*Sir George Lowndes.*) FEROZ SHAH *v.* SOHBAT KHAN. **60 I.A. 273=143 I.C. 659=I.R. 1933 P.C. 183=14 Lah. 466=38 L.W. 68=1933 M.W.N. 755=37 C.W.N 993=35 Bom.L.R. 877=58 C.L.J. 52=1933 A.L.J. 1193=10 O.W.N 797=35 P.L.R. 1 =A.I.R. 1933 P.C. 178=65 M.L.J. 150 (P.C.).**

———**S. 58 (d)**—*Usufructuary mortgage—Period of possession can be fixed in advance.*

In a usufructuary mortgage there is nothing to prevent parties estimating in advance what period it would take to pay off the mortgage debt and thus fixing the minimum period in which the mortgagee should have possession. 26 Bom. 252 and 32 Bom. 569, Ref. (*Wort and Mohamad Noor, JJ.*) RAMESHWAR NARAIN SINGH *v.* PANI RAM MODI. **A.I.R. 1934 Pat. 217.**

———**Ss. 58 (d) and 105**—Usufructuary mortgage or lease—Possession for fixed period as security for debt — Power of sale—Mortgage and not lease. *See* DEED —CONSTRUCTION—MORTGAGE OR LASE. **A.I.R. 1934 Pat. 217.**

———**S. 58 (d)**—*Suit for possession by mortgagee — Amount of consideration paid—Enquiry into.*

Where a mortgagee files a suit for possession simpliciter on the mortgage deed the Court need not consider as to whether the full consideration has passed. If it finds that much of the consideration is paid the mortgagee is entitled to possession. The exact sum to be paid need not be determined till the time of redemption. (*Addison and Agha Haidar, JJ.*) FAZAL DIN *v.* MILKHA SINGH. **6 I.R. (Lah.) 68=145 I.C. 182=34 P.L.R. 1037=A.I.R. 1933 Lah. 193.**

———**(as amended by Act XX of 1929), Ss. 58 (d) and 67**—*Usufructuary mortgage containing personal covenant to pay—Right of mortgagee to sue for sale.*

A suit for sale on what is purely a usufructuary mortgage is incompetent even though a personal covenant to pay is embodied in the deed. (*Addison and Agha Haidar, JJ.*) MOHAMMAD ABDULLAH *v.* MOHAMMAD YASIN. **I.R. 1933 Lah. 113=141 I.C. 377=34 P.L.R. 245=A.I.R. 1933 Lah. 151.**

———**S. 58 (d)**—*Usufructuary mortgage—Rights of mortgagee—Interest in lieu of mesne profits—Limitation.*

In case of a breach of a covenant to deliver possession contained in a deed of usufructuary mortgage, a claim for damages is not barred so long as the claim for the principal is not barred. 19 A. 39 (P.C.); 20 M. 37, Foll. (*Ramesam, J.*) SUBRAMANIA AIYAR *v.* PANCHANADA ODAYAR. **136 I.C. 785=I.R. 1932 Mad. 323=1931 M.W.N. 751=A.I.R. 1933 Mad. 175.**

———**S. 58 (d)**—*Usufructuary mortgage—Rights of mortgagee—Interest in lieu of mesne profits.*

Where though the mortgage purported to be a mortgage with possession, as a matter of fact possession was not delivered to the plaintiff-mortgagee, and the plaintiff claimed damages in the shape of mesne profits for three years,

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Held, that the damages to which the plaintiff was entitled for non-delivery of possession was a right to interest on the mortgage amount and that this right was not lost by the mere fact that after refusal of the mortgagor to deliver, the mortgagee did not take any steps to enforce possession. 17 Mad. 469; 46 C. 448, Foll.; 17 Bom. 425; 45 Bom. 325, Diss. From (*Ramesam, J.*) SUBRAMANIA AIYAR *v.* PANCHANDA ODAYAR. **136 I.C. 785 = I.R. 1932 Mad. 323 = 1931 M.W.N. 751 = A.I.R. 1932 Mad. 175.**

——**Ss. 58 (d) and 67**—*Usufructuary mortgage—Right to sue for sale—Covenant to pay should be clear and unconditional.*

An usufructuary mortgagee as such can only continue to enjoy the mortgaged properties till redemption. He has no right to institute a suit for sale of the properties, unless the mortgage deed contains, apart from the words merely indicating the time and the mode of redemption, an express personal covenant to pay the money. But any such covenant should be clear and unconditional in the undertaking to pay. A mortgage deed stated that the possession of the properties was handed over to the mortgagee on *sap ildarwar* (usufructuary mortgage pure and simple). The amount borrowed was Rs. 10,625. A period of 30 years was fixed for redemption. At the end of that period, only a sum of Rs. 4,000 was to remain due and payable. The deed then provided for a lease of the property to the members of the mortgagor's family and that "the mortgagee shall receive (the aforesaid Rs. 4,000 and arrears of rent) and make over the property. If we fail so to pay, you shall not only enjoy the properties but shall also be entitled to appropriate the (entire) income towards the interest due on the principal amount."

Held, that the deed contained no personal covenant to pay, so as to entitle the plaintiff to sue for sale of the mortgaged property. (Case-law discussed.) (*Curgenven and Sundaram Chetty, JJ.*) DAMODARA SHANBHOGUE *v.* CHANDAPPU PUJARY. **56 Mad. 892 = 1933 M.W.N. 1251 = 38 L.W. 161 = 148 I.C. 1029 = 6 R.M. 558 = A.I.R. 1933 Mad. 613 = 65 M.L.J. 194.**

——**Ss. 58 (d) and 59**—Usufructuary mortgage—Oral—Suit for redemption—Maintainability—Proper remedy of mortgagor. *See* T. P. ACT, S. 53-A. **13 Rang. 274 (F.B.).**

——**S. 58 (e)**—*English mortgage—Assignment of lease by way of—Liability of assignee for rent.*

The definition of English mortgage as given in S. 58 (*e*) must be read subject to the definition of a mortgage as given in Cl. (*a*) of that section and consequently an English mortgage in India can hardly be regarded as the transfer of the entire estate of the mortgagor to the mortgagee. Some estate (it cannot be correctly called an equitable estate) is left in the mortgagor and only an interest therein is transferred to the mortgagee. So when a party takes an assignment of lease by way of mortgage as security for money lent, he does not, by reason only of his being an English mortgagee, become liable on the covenants for payment of rent to the lessor, apart from any contract by which he might have taken upon himself any such obligation. 54 C. 813, Ref. (*Mukerji and Guha, JJ.*) FAIA KRISTA PAL *v.* JAGANNATH MARWARI. **59 Cal. 1314 = 140 I.C. 788 = 36 C.W.N. 709 = 56 C.L.J. 187 = I.R. 1933 Cal. 36 = A.I.R. 1932 Cal. 775.**

——**S. 58 (e)**—*Applicability—English mortgage—Deed transferring mortgaged property absolutely to mortgagee and containing express covenant to pay on particular date and providing for redemption and reconveyance on payment of mortgage money—Nature of mortgage—Provision for management by mortgagee or appointee of portion of properties and concessions as regards repayment—If alters character.*

A mortgagor by a deed of mortgage granted, conveyed and transferred to the mortgagee all the mortgaged properties to hold them for ever subject to redemption, and undertook to pay all costs and charges and expenses which might be incurred by the mortgagee in getting and recovering payment of monies and premises secured. The deed contained a personal covenant to repay the mortgage money on a particular date as also a covenant as to title. Another clause allowed the mortgagor to redeem within the period of one year from the date of the deed on payment of principal and interest and also allowed him to make part payments of the principal money after the period of one year. It was lastly provided that if the mortgagee fulfilled certain conditions he would be allowed a further period of three years over and above the period of five years fixed by the deed. The usual redemption clause provided that the mortgagee would reconvey the properties on repayment by the mortgagor of the mortgage money as well as advances and sums spent by the mortgage for the preservation of the mortgaged properties, Government revenue, rents and all other costs. There was an agreement in the deed by the mortgagor to execute a power-of-attorney to the mortgagee, in pursuance of which he executed a power of-attorney on the date of the mortgage, which authorised the mortgagee to realise in the name and on behalf of the mortgagor all the rents, cesses and interest and other dues due to the mortgagor from a portion of the mortgaged properties, and the sums so collected were to be set-off as against interest any balance going towards the principal, after deducting all the costs, charges and expenses. The mortgagee was not to be held accountable as mortgagee in possession, but only for monies actually received by him. The power-of-attorney further authorised the mortgagee to appoint one or more substitutes to do, execute and perform all or any such matters and things. For a time the mortgagee himself collected the rents and profits under the mortgage bond and power-of-attorney and later on appointed a substitute or agent for the purpose.

Held, (1) that the mortgage was an English mortgage under S. 58 (*c*), T. P. Act and there was nothing inconsistent with that kind of mortgage in the mortgagee taking a power of-attorney for the purpose of ensuring the management of the property and payment of interest or in the fact that the management and collection by the mortgagee should be as agent of the mortgagor and not as mortgagee; (2) that the clause giving the mortgagor certain options as regards part payment and extension of time for payment did not make the mortgage any the less an English mortgage; (3) that the substitute appointed by the mortgagee to collect the rents, etc., was the agent not of the mortgagee but was the agent of the mortgagor himself under S. 194, Contract Act; (4) that the mortgagee having been enabled and authorised to collect the rents, etc., of only a portion of the mortgaged properties, there was no such possession as would make the mortgage a usufructuary mortgage as contemplated by S. 58 (*d*), T.P. Act. So there is no question as to their contracting out of the statutory liability to account as mortgagees in possession, and (5) that the mortgagee was therefore liable to account only for the actual collections made by him and not on the footing of wilful default. (*Wort and Dhavle, JJ.*) RAJA JANKI NATH RAY *v.* SYED ASAD REZA. **14 Pat. 560 = 158 I.C. 738 = 8 R.P. 211 = 16 Pat. L.T. 757 = A.I.R. 1936 Pat. 211.**

——**S. 58 (e)**—*Applicability—English mortgage—Leasehold property—Covenant for payment of rent and*

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royalty by mortgagor—Mortgagee not to ask for money within certain period if mortgagor pays interest regularly—Mortgagor entitled to remain in possession and to carry on colliery business therein—Nature of mortgagee

In a mortgage of a leasehold property it was provided that the rent and royalty were payable by the mortgagor. The mortgagee was not to ask for the money within certain period if mortgagor paid the interest stipulated regularly and the mortgagor was entitled to remain in possession of the mortgaged premises and to carry on colliery business therein.

Held, that the mortgage was not an English mortgage within the meaning of S. 58 (*e*), T.P. Act, and that the whole of the right, title and interest of the mortgagor did not pass to the mortgagee. (*Guha and Lodge, JJ.*) SATYA CHARAN SRI MANI *v.* RAMKINKAR BANERJEE. **159 I.C. 1001=8 R.C. 369=62 C.L.J. 28=A.I.R. 1935 Cal. 659.**

———**S. 58 (e)**—*English mortgage—Transfer by way of—What passes—Mortgagor's power to deal with rents and profits—Agreement between mortgagor and mortgagee in respect—If inconsistent with English mortgage.*

Per *Dhavle, J.*—It cannot be held that in an English mortgage as the entire legal estate passes, thereafter there is nothing on which a power-of-attorney given by the mortgagor to the mortgagee to realize rents on his behalf can operate, and that if the mortgagee chooses to take possession, he must do so on his own account as it is not open to him, by any agreement with the mortgagor to get rid of the liability to account as mortgagee in possession. The English mortgagee, while he has undoubtedly the right to go into possession, is indisputably at liberty to leave the mortgagor in possession so as to avoid the liability of a mortgagee in possession. In spite of the absolute transfer required by S. 58 (*e*), T. P. Act, in an English mortgage, the mortgagor still has an interest in the property which is not limited to the right to redeem but extends to the receipt of the rents and profits of the mortgaged property even as against the mortgagee who does not choose to go into possession; and the regulation of such rights by an agreement between the parties cannot in any way be regarded as inconsistent with the definition of an English mortgage. (*Wort and Dhavle, JJ.*) RAJA JANKI NATH RAY *v.* SYED ASAD REZA **14 Pat. 560 =158 I C. 738=8 R.P. 211=16 Pat. L.T. 757=A.I. R. 1936 Pat. 211.**

———**S. 58 (f)**—*Documents of title—Tax receipt and map.*

A tax receipt and a copy of a map are not documents of title within the meaning of the section. (*Cunliffe, J.*) MAJOO TEAN *v.* MA THEIN NYUN. **10 Rang. 403= I.R. 1932 Rang. 236 =140 I.C. 487=A.I.R. 1932 Rang. 185.**

———**S. 58 (f)**—*Equitable mortgage—Copies of title-deeds—Deposit—Validity.*

Where the documents that were deposited are not original documents, but copies only, they are not such substantial documents as may be regarded as documents of title to the property for the purpose of effecting a mortgage by deposit of title-deeds. (*Mukerji and Guha, JJ.*) SAILENDRA NATH PALIT *v.* SYED HADE KAZA MANE. **59 Cal 586=36 C W.N. 193=I.R. 1932 Cal. 326=137 I.C. 500=54 C.L.J. 328=A I.R. 1932 Cal 356.**

———**S. 58 (f)**—*Equitable mortgage—Copies of title-deed, attested—Deposit of—Validity.*

For the purpose of deposit, an attested copy would not be enough unless, perhaps, there is proof of the original not being available. (*Mukerji and Guha, JJ.*) SURENDRA MOHAN RAI CHOUDHURY *v.* MOHENDRA NATH BANERJEE. **59 Cal. 781=140 I.C. 662=36 C. W.N. 420=I.R. 1933 Cal. 14=A.I.R. 1932 Cal. 589.** [R. 35 P.L.R. 249 (257).]

———**S. 58 (f)**—*Equitable mortgage—Documents of title—Some only deposited—Effect.*

An equitable mortgage by deposit may be valid if only some of the material documents of title to the property have been deposited, although a complete title be not thereby shown to the depositor's interest in the estate. It is sufficient if the deeds deposited *bona fide* relate to the property, are material evidence of title and are shown to have been deposited with the intention of creating a charge. (*Mukerji and Guha, JJ.*) SURENDRA MOHAN RAI CHOUDHURY *v.* MOHENDRA NATH BANERJEE. **59 Cal. 781=140 I.C. 662=I.R. 1933 Cal. 14=36 C.W.N. 420=A.I.R. 1932 Cal 589.**

———**S 58 (f)**—*Equitable mortgage—Documents of title—Sufficiency of.*

The documents must necessarily be documents showing the mortgagor's title, but that does not mean that they should never be held to be sufficient unless they actually connect the mortgagor with some predecessor of his whose title the documents show. On the other hand if they purport to show the mortgagor's title in the property, it is not necessary that they should connect the mortgagor with some predecessor of his who had acquired the title originally. (*Mukerji and Guha, JJ.*) SURENDRA MOHAN RAI CHOUDHURY *v.* MOHENDRA NATH BANERJEE. **59 Cal. 781=140 I.C. 662=I.R. 1933 Cal. 14=36 C.W N. 420=A.I.R. 1932 Cal. 589.**

———**S. 58 (f)**—*Equitable mortgage—How created.*

For the purposes of an equitable mortgage all that is necessary is a loan coupled with a deposit of title deeds relating to the property to be mortgaged with the intention of creating a charge on the property. No writing is needed for the creation of such a mortgage ; but if the parties choose to put their agreement with respect to the transaction in writing, that document will exclude all other evidence of the transaction. Further, if the document falls within the purview of S. 17, Registration Act, and is not registered, it will not be admissible in evidence by virtue of S. 49 of the same Act. The result in such circumstances will be that there will be no legal evidence of the transaction available. 50 I.A. 77=50 Cal. 338 (P. C.) and 54 Mad. 257=58 I. A. 68 (P. C.), Rel. on. (*Monroe and Bhide, JJ.*) PUNJAB AND SIND BANK, LTD. *v.* RUSTOMJI. **160 I.C. 773=8 R.L. 592=A.I. R. 1935 Lah. 821.**

———**S. 58 (f)**—*Equitable mortgage—Lease.*

The lessee executed a mortgage by deposit of title deeds of the lease. Though the lease had expired on the date of the mortgage, the lessee was continuing in possession and the lessor had accepted rent. Further the lease was renewed by the lessor.

Held, that the lease deed was sufficient document to found a mortgage by deposit of title deeds. (*Sen, J.*) VILLA *v.* PETLEY. **6 R.R. 245=148 I.C. 721=A.I. R. 1934 Rang. 51.**

———**S. 58 (f)**—*Equitable mortgage—Letter referring to memorandum of agreement—Registration—Necessity for.*

A letter written by the mortgagor the next day after an agreement to deposit the title-deeds had been concluded ran as follows : "I am sending you the title-deeds with the intention of depositing the same with you as per the memorandum of yesterday executed by me" and then referred to the schedules annexed to the latter.

Held, the two documents must be read together and, so read, they embodied the terms of the transaction, and

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not having been registered, the mortgage was not valid. 43 C. 895 (P.C.); 50 C. 338 (P.C.); L.R. 5 H.L. 321, Rel. (*Curgenven and Bhashyam Ayyangar, JJ.*) JAGANNADHAM PILLAI *v.* THE OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1931 Mad. 334=129 I.C. 814=32 L.W. 666=A.I.R. 1931 Mad. 124=60 M.L.J. 309.**

——**S. 58 (f)**—Equitable mortgage in Punjab—Creation of, by deposit of copy of original deed. *See* MORTGAGE—EQUITABLE MORTGAGE. **A.I.R. 1935 Lah. 10.**

——**S. 58 (f)**—Equitable mortgagee—Receiver—Appointment of—Right to apply for. *See* MORTGAGE—RECEIVER. **54 Mad. 565=133 I.C. 504=61 M.L.J. 111.**

——**S. 58 (f)**—*Equitable mortgagee—Receiver appointed at the instance of—Income of mortgaged properties with receiver—Subsequent insolvency of mortgagor—Effect.*

Where a receiver is appointed at the instance of an equitable mortgagee, the income realised from the mortgaged properties should in law be considered as earmarked for his use and treated as additional security for the amount due to the mortgagee and the latter is entitled, when he is not able to realise his decree amount by the sale of the mortgaged properties, to proceed against the income in the hands of the receiver in preference to the Official Assignee in whom the properties of the mortgagor might have subsequently vested. 47 C. 418 and 14 C.L.J. 526, Foll. (*Madhavan Nair, J.*) MAHARAJA OF PITTAPURAM *v.* GOKULDASS GOVERDHANDOSS. **54 Mad 565=I.R. 1931 Mad. 744=133 I.C. 504=34 L.W. 165=A.I.R. 1931 Mad. 626=61 M. L.J. 111.**

——**S. 58 (f)**—*Equitable mortgage—Rules governing—Deposit of tax receipt and map with creditor—Effect.*

Where a debt and the deposit of documents of title with the creditor have been proved, unless the form of the documents which have been deposited is such that the Court can infer from the deposit that it was the intention of the depositor thereby to create a security on the property, the transaction does not amount to a mortgage by deposit of title deeds.

Held, that a transaction whereby a tax receipt and a certified copy of a survey map relating to land in Rangoon were delivered to a creditor did not give rise to a mortgage by deposit of title-deeds History of mortgage by deposit of title-deeds traced. (*Page, C. J. and Das, J.*) V. E. R. M. A. R. CHETTYAR FIRM *v.* MA JOO TEEN. **11 Rang. 239=147 I. C. 1105=6 R R. 180=A.I.R. 1933 Rang. 299.**

[R. 11 R. 481 (486).]

——**S. 58 (f)**—*Equitable mortgage—Suit on—Promissory note executed—Mortgage held invalid—Decree on personal covenant.*

Where a promissory note was executed by a person and he executed on the following day an agreement to deposit title deeds and on the next day sent a letter which made reference to the memorandam of agreement of the previous day, the two documents constitute a mortgage and the mortgage becomes invalid for want of registration. On finding a mortgage to be invalid, the Court may give a decree on the personal covenant which it contains, provided of course it is not barred. As the debt is embodied in a promissory note which forms the basis of the invalid mortgage, the Courts is not disqualified from giving a decree upon that note. (*Curgenven and Bhashyam Ayyangar, JJ.*) JAGANNADHAM PILLAI *v.* OFFICIAL ASSIGNEE OF MADRAS. **I.R. 1931 Mad. 334=129 I.C. 814=32 L.W. 666=A.I.R. 1931 Mad. 124=60 M.L.J. 309.**

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——**S. 58 (f)**—Registration—Memorandum of agreement and not a mere list—Necessity for registration *See* REGISTRATION ACT, S. 17 (1) (b)—MORTGAGE—EQUITABLE MORTGAGE. **138 I.C. 247.**

——**S. 58 (f)**—Registration—Equitable mortgage—Memorandum of completed transaction. *See* REGISTRATION ACT, S. 17 (1)—MORTGAGE—EQUITABLE MORTGAGE. **59 Cal. 781=A.I.R. 1932 Cal 589.**

——**S. 58 (f)**—*Sub-mortgage—If can be created by deposit of title-deeds.*

A sub-mortgage is a mortgage of the mortgagee's interest in the immovable property in question, and a transfer of sub-mortgage debt is a transfer of immovable property An equitable sub mortgage can be created by deposit of title-deeds in the same way as a mortgage. (*Mosely, J.*) U THIT *v.* U PAW I. **160 I.C. 727 =8 R.R. 421=A.I.R. 1935 Rang. 483.**

——**S. 58 (g)**—*Anomalous mortgage.*

A transaction which at the commencement is a deed of mortgage with possession and which is to ripen into a sale on the happening of a certain contingency cannot be said to be a mortgage whereby the mortgagor ostensibly sells the mortgaged property with a covenant for redemption or re-conveyance if the mortgage-money is paid. It is an anomalous mortgage. 39 M. 1010 and 38 M. 667, Ref. (*Raghavendra Rao, H. M.*) PANDARINATH TUKARAM *v.* ZASBA. **14 Nag. L.J. 31 (Rev.)**

——**(Before amendment of 1929), Ss. 58 (g) and 98**—Deed—Construction—Anomalous mortgage, not usufructuary. *See* T. P. ACT, S. 98. **1931 M.W.N. 595.**

——**S. 59**—Attestation—Conditions of validity—Deed attested by one witness only—Attestation of signature of receipt clause in deed by two witnesses—Sufficiency—Signatures of Registering Officer and of identifying witness—If constitute valid and sufficient attestation. *See* T. P. ACT, SS. 3 AND 59. **37 Bom. L.R. 913.**

——**(As AMENDED BY ACTS XXVII OF 1926, X OF 1927 AND XII OF 1927), S. 59**—*Attestation—Endorsement by Sub-Registrar—Signature by witnesses—Admitting executants absent—Sufficiency of attestation.*

The mere endorsement by the Sub-Registrar of admission of execution and the signature of the witnesses present at that time are not sufficient to satisfy the requirements of S. 59, where there is no evidence to the effect that the signatures of the witnesses to the admission were affixed to the document in the presence of the admitting executants, nor any endorsement to that effect. 52 M. 123=55 M.L.J. 794 (F.B.), Disc. (*Beasley, C.J. and Curgenven, J.*) RAMANATHA CHETTY *v.* DELHI BATCHA TEVAR. **I.R. 1931 Mad. 600=131 I.C. 840=33 L.W. 727=A.I.R. 1931 Mad. 335=60 M.L.J. 302.**

——**S. 59**—*Attestation—Invalid attestation—Personal covenant—Enforceability.*

Where a mortgage executed by the guardian of a minor was found invalid for want of proper attestation, the document is nevertheless admissible for the purpose of proving the personal covenant contained therein. 32 Mad. 410 (F.B.), Foll. (*Beasley, C.J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163=33 L.W. 95=135 I.C. 17=I.R. 1932 Mad. 49=A.I.R. 1931 Mad. 140=60 M.L.J. 56.**

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———**S. 59**—*Attestation—Proof.*

The proviso to S. 68 only removes the necessity of calling an attesting witness to prove the execution of the documents therein referred to and does not purport to relieve the party of the necessity of proving a mortgage in the form prescribed under S. 59, T. P. Act. A.I.R. 1929 Pat. 422, Diss. from. (*Page, C.J. and Mya Bu, J.*) R. M. A. R. M. CHETTIAR FIRM *v.* U HTAW. **11 Rang. 26=I.R. 1933 Rang. 22=141 I.C. 700=A.I.R. 1933 Rang. 6.**

———**S. 59**—*Attestation—Rules as to—Identification of witness by Sub-Registrar—Effect.*

Attestation means a certain act with reference to execution of the instrument. The act must be with the intention of attesting the executant's signature, *i.e.*, it must be done with *animo attestandi*. The witnesses are to attest the fact of execution. A person who does not attest the execution at all but has put his signature with a different object and for a different purpose altogether cannot be called an attesting witness. The determination as to whether the signature put by a person on an instrument is to be regarded as an attestation or not depends upon the character and circumstances in which the signature is made. The person concerned should have received an acknowledgment from the executant for the purpose of attesting the execution. A mortgage deed was presented for registration eight days after its execution by a pardanashin lady. The endorsement of the Sub-Registrar showed that the completion of the deed and the receipt of the consideration as given in the mortgage were admitted by the lady from behind the door. The lady was identified by two persons. Below the signatures was a note by the Sub-Registrar to the effect that the thumb-impressions had been duly taken. One of the identifying witnesses stated that the lady did not make any acknowledgment of execution to him.

Held, that the signatures of the Sub-Registrar and of the identifying witnesses on the registration endorsement could not constitute them as attesting witnesses so as to satisfy the requirements of S. 59. They were never asked by the lady to attest the instrument and neither the lady nor they had any intention that they should sign the endorsement as attesting witnesses. Case-law discussed. (*Hasan, C.J. and Bisheshwar Nath, J.*) **6 Luck. 619=I.R. 1931 Oudh 273 =132 I.C. 337=14 O.L.J. 34=8 O.W.N. 194=A.I.R. 1931 Oudh 146.**

[R. 9 Luck. 12 (17).]

———**S. 59**—*Attestation—Signature of Sub-Registrar—Sufficiency of.*

In the absence of evidence that the Registrar affixed his signature or put his seal on the mortgage bond in the presence of the lady executant, it cannot be said that the bond was properly attested. 48 C.L.J. 281, Foll. (*Mitter, J.*) HEM CHANDRA BAG *v.* GUIRAM DAS. **150 I.C. 762=7 R.C. 44=58 C.L.J. 545.**

———**S. 59**—*Attestation—Suit to enforce mortgage—Attestation by two witnesses—Rules governing.*

Where a mortgagor sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much, that the mortgagor signed the document in the presence of an attesting witness and one man attested the document, provided the document on the face of it bears the attestation of more than one person. But if the validity of the mortgage be specifically denied in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage-deed was attested by at least two witnesses. (*Mukerji, Banerji and King, JJ.*) LACHMAN SINGH *v.* SURENDRA BAHADUR SINGH. **54 All. 1051=I.R. 1932 All. 505=139 I.C. 1=1932 A.L.J. 653=A.I.R. 1932 All. 527 (F.B.).**

———**S. 59**—*Attestation of mortgage bond—Witness signing after receiving acknowledgment of executant's signature—Validity—Retrospective effect of Act XXVII of 1926.*

The word 'attested' as defined by the Amending Act XXVII of 1926 takes retrospective effect because of Act XII of 1927. Where a mortgage suit was filed in 1925 and at the trial, the defendants admitted execution but contested the attestation and one of the two attesting witnesses when examined stated that he did not see the defendants sign their name but that they admitted execution before him and the other witness and thereupon they signed their names as witnesses,

Held, that the mortgage bond was proved to have been duly attested. (*S. K. Ghose, J.*) PROVAKAR MUKERJEE *v.* INDRA NARAYAN GHOSH. **I.R. 1931 Cal. 835=134 I.C. 531=53 C.L.J. 326.**

———**S. 59**—*Attesting witness—Executant not signing in presence of—No acknowledgment—Validity of attestation.*

Section 59 requires that a mortgage deed must be attested by at least two witnesses. Where a mortgage deed alleged to be executed by a pardanashin lady before the signature of two persons as attesting witnesses but from their evidence it was clear that the lady did not sign the deed in their presence nor make any acknowledgment to them of having signed it,

Held, that the persons signing could not be regarded as attesting witnesses and their signatures did not comply with the provisions of S. 59. L.R. 19 I.A. 218, Rel. on. (*Hasan, C.J. and Bisheshwar Nath, J.*) CHANDRANI KUER *v.* SHEO NATH. **6 Luck. 619=I.R. 1931 Oudh 273= 132 I.C. 337=14 O.L.J. 34=8 O.W.N. 194 =A.I.R. 1931 Oudh 146.**

———**S. 59**—*Attesting witnesses—Sub-Registrar and witnesses signing at the time of registration.*

The signatures of the Sub-Registrar and of the witnesses identifying the executant at registration are not sufficient attestation of the deed for the purposes of the T. P. Act, even assuming that the Sub-Registrar and attesting witnesses did receive from the executant a personal acknowledgment of his signature or mark, and that they did sign in the executant's presence. (*Mukerji, Banerji and King, JJ.*) LACHMAN SINGH *v.* SURENDRA BAHADUR SINGH. **54 All. 1051=I.R. 1932 All. 505=139 I.C. 1=1932 A.L.J. 653=A.I.R. 1932 All. 527 (F.B.).**

[Not F. 61 C. 525 (527). R. 9 Luck. 12 (17).]

———**S. 59**—*Attestor—Person interested in transaction—Benami mortgage—Person really advancing money whether can attest.*

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When a mortgage is executed benami, the person who actually advances the money is of course interested in the transaction and may be taken to be a party to the transaction but he is actually not a party to the mortgage deed as it stands. If he attests the deed, his attestation is sufficient for purposes of S. 59.

Per curiam.—The old English law in this respect has been modified even in England and is wholly inapplicable to conditions in India. (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) DURGA DIN *v.* SURAJ BAKSH. **7 Luck. 41=I.R. 1931 Oudh 354=134 I.C. 402=14 O.L.J. 413=8 O.W.N. 660=A.I.R. 1931 Oudh 285 (F.B.).**

———**S. 59 (before amdt.)**—*Equitable mortgage—Award, a document of title.*

The arbitrators gave their award in a partition suit referred to them, by virtue of which the property in dispute was awarded to *R*. The award was filed in Court in pursuance of an application made to file the same and a decree was given in accordance therewith. *R* obtained a copy of the award and deposited it with a Bank as evidence of his title to the property mortgaged by him.

Held, that as the original was filed in Court, the award was evidence of *R's* title to the property in dispute and deposit of the same created a valid mortgage on the property in dispute. (*Jai Lal and Abdul Rashid, JJ.*) GURDAS MAL *v.* PUNJAB-SINDH BANK LTD., RAWALPINDI. **6 R.L. 465=147 I.C. 942=35 P.L.R. 249=A.I.R. 1933 Lah. 972.**

———**S. 59 (before amdt.)**—*Equitable mortgage—Award creating title—Mortgage by deposit of copy of award—Validity.*

Where an award has been filed in Court and a decree has been passed and the debtor failing to get the original award deposits a certified copy of the award as evidence of his title to the property mortgaged by him, the deposit creates a valid equitable mortgage. 1933 Lah. 972, Foll. (*Young, C.J. and Abdul Rashid, J.*) JIT SINGH *v.* PUNJAB AND SIND BANK, LTD. **159 I.C. 1087=A.I.R. 1935 Lah. 640.**

———**S. 59 (before amdt.)**—*Equitable mortgage—Cantonment area—Validity of.*

A mortgage by deposit of title-deeds is invalid, if effected within a Cantonment area where such transactions are prohibited, even though the property is situated in a place where such mortgages are valid. The determining factor in the matter of the validity of the mortgage in such cases is not the place where the property alleged to have been mortgaged is situated, but the formalities required by the law for the creation of a valid mortgage at the place where the title-deeds are alleged to have been delivered to the creditor. A.I.R. 1932 Cal. 823, Foll. (Case-law discussed.) (*Jai Lal and Abdul Rashid, JJ.*) GURDAS MAL *v.* PUNJAB-SINDH BANK LTD., RAWALPINDI. **6 R.L. 465=147 I.C. 942=35 P.L.R. 249=A.I.R. 1933 Lah. 972.**

———**S. 59 (before amdt.)**—*Equitable mortgage—Cantonment area—Validity.*

A mortgage by deposit of title-deeds cannot be effected within the limits of a Cantonment to which S. 59 has been extended. A.I.R. 1933 Lah. 972, Ref. (*Jai Lal and Abdul Rashid, JJ.*) PUNJAB AND SIND BANK, LTD. *v.* ISHAR SINGH ASA SINGH. **149 I.C. 1060=6 R.L. 797 (1)=A.I.R. 1933 Lah. 1001.**

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———**S. 59**—*Equitable mortgage—Classification of equitable mortgages.*

Mortgages by deposit of title-deeds come under one of the following three possibilities:—(*i*) The title-deeds may be passed "without more" or "with nothing said" except that they were to be security. (*ii*) The delivery may be accompanied with a bargain, which either is not written, or if written, does not constitute the contract. (*iii*) There may be a written bargain—a memorandum which is tacitly considered by the parties themselves as the only repository and appropriate evidence of the agreement. Only the third class requires registration. (*Tyabji, J.*) NATIONAL BANK OF INDIA, LTD. *v.* NAZIR & Co. **I.R. 1932 Bom. 532=139 I.C. 745=34 Bom.L.R. 748=A.I.R. 1932 Bom. 401 (2).**

———**S. 59 (before amdt.)**—*Equitable mortgage—Creation of—Letter contemporaneous with deposit—Necessity for registration.*

An equitable mortgage can be created by the deposit of title-deeds alone but where the title-deeds are handed over accompanied by a bargain, the terms of the bargain must prevail; and where it is reduced to writing, it and it alone must determine the scope and extent of the security. 50 Cal. 338 (P.C.), Ref. The real test is not the exact moment at which the documents are handed over, and if they are handed over merely for purposes of inspection and not for the completion of the contract, then the terms of any subsequent document recording the terms of the contract must be regarded as the contract itself. The debtor wanted a loan from the Bank by depositing a mortgage-deed as security. The Bank replied in the affirmative and thereupon the debtor wrote a letter and a pro-note, on receipt of which the Bank paid the loan. The letter described itself as one of hypothecation and contained the important terms of the transaction.

Held, that the letter should have been registered. (*Fraser, J.C. and Saaduddin, Ag. J.C.*) JAIMAL SINGH *v.* PEOPLE'S BANK OF NORTHERN INDIA LTD. **141 I.C. 541=A.I.R. 1933 Pesh. 35.**

———**S. 59 (before amdt.)**—*Equitable mortgage—Delivery of title-deeds—Evidence of—Delivery to common solicitor.*

A promissory note and a memorandum of deposit of title-deeds were handed outside the limits of the Presidency-town to the agent of a solicitor who was acting both for the debtor and creditor with instructions to the solicitor to deliver the title-deeds to the creditor. No such delivery was, however, proved.

Held, that the requirements of a valid equitable mortgage were not satisfied as the delivery took place outside the Presidency-town and further delivery to the common solicitor was not sufficient as delivery was not made to him as agent of the creditor. (*Mukerji and Bartley, JJ.*) SURAJMULL SHROFF *v.* GOPEERAM BHOTICA. **141 I.C. 257=I.R. 1933 Cal. 98=36 C.W.N. 1028=A.I.R. 1932 Cal. 823.**

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———S. 59—*Equitable mortgage—Mortgage by deposit of promissory note and title-deeds—Right to enforce—Endorsee of promissory note.*

An endorsee of a negotiable instrument, the payment of which is secured by a mortgage by deposit of title-deeds, can claim to enforce the mortgage, even though there is no registered instrument conveying the mortgage rights to him. 52 I.C. 871 and 44 M. 196, Rel. on. 44 M. 965, Diss. from. (*Sen, J.*) VILLA *v.* PETLEY. **6 R.R. 245=148 I.C. 721=A.I.R. 1934 Rang. 51.**

———S. 59—*Equitable mortgage—Exemption from registration—Scope of.*

The exception in S. 59 of the T. P. Act (that there need not be a registered instrument to evidence an equitable mortgage) remains subject to an exception that has a two-fold effect. First, that if the terms of the contract relating to the equitable mortgage have been reduced to the form of a document—if the intended equitable mortgage is created by a contract which is reduced to the form of a document—no evidence shall be given in proof of the terms of such contract except the document itself (or secondary evidence of its contents); Indian Evidence Act, S. 91. Secondly, since the object of such a document is to create a security, *i.e.*, it purports or operates to create an interest in immoveable property, the document itself shall not affect the property nor be received as evidence unless it has been registered; Registration Act, Ss. 17 and 49. (*Tyabji, J.*) NATIONAL BANK OF INDIA, LTD. *v.* NAZIR & CO. **I.R. 1932 Bom. 532=139 I.C. 745=34 Bom.L.R. 748=A.I.R. 1932 Bom. 401 (2).**

———S. 59—Equitable mortgage—Memorandum of mortgage—Prior transaction—Registration. *See* REGISTRATION ACT, S. 17 (1) (*b*)—MORTGAGE—EQUITABLE MORTGAGE. **11 Rang. 491=A.I.R. 1933 Rang. 307.**

———S. 59—Equitable mortgage—Memorandum—Registration—Necessity. *See* REGISTRATION ACT, S. 17 (1) (*d*) **61 C.L.J. 473.**

———S. 59—*Equitable mortgage—Memorandum of deposit of title-deed—Necessity for registration.*

What the Court has to determine, where there is a writing or memorandum, is whether the document constitutes the bargain between the parties or is merely the record of an already completed transaction. The decision of this question must depend on what was the intention of the parties when the memorandum was written, and that intention is a question of fact. If it was the intention of the parties that the memorandum should constitute the contract between them, then the memorandum must be registered, but if it was merely the record of an already completed transaction, the contract of mortgage can be established independently of the memorandum and it is not rendered invalid by the non-registration of the memorandum. (*Mosley and Dunkley, JJ.*) MA ON *v.* RAMANATHAN CHETTIYAR. **158 I.C. 845=8 R.R. 220=A.I.R. 1935 Rang. 333.**

———S. 59—Equitable mortgage—Registration—Memorandum containing list of documents deposited. *See* REGISTRATION ACT, S. 17 (1) (*b*)—MORTGAGE—EQUITABLE MORTGAGE.

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———S. 59—*Equitable mortgage—Validity of—Burden of proof.*

The Act, far from containing any general prohibition of mortgages by deposit of title-deeds, expressly exempts them when made in the specified places from the formalities prescribed for other mortgages. The onus is strongly on him who seeks to impugn the validity of such a mortgage. (*Sir John Wallis.*) PAPIAH NAIDU *v.* NAGANATHA SETHUPATHI. **59 Cal. 439=58 I.A. 333=I.R. 1931 P.C. 280=134 I.C. 328=35 C.W.N. 1061=33 Bom.L.R. 1351=54 C.L.J. 194=A.I.R. 1931 P.C. 239=61 M.L.J. 408 (P.C.).**

———S. 59—*Mortgage of fruit bearing trees—Compliance with formalities if necessary.*

Whether or not a mortgage of fruit bearing trees is a mortgage of immovable property is a question dependent in each case upon the intention of the contracting parties and cannot be settled by an inflexible rule. Where there is a mortgage with possession of fruit bearing trees with the intention that the mortgagee is to remain in possession during the years of the mortgage and enjoy the fruits and should not cut down the trees so as to convert them to either timber or firewood, it must be held that the trees so mortgaged were either immovable property or at least an interest in immovable property and should be effected with the formalities prescribed by S. 59, T. P Act. (*Sen, J.*) SHIV DAYAL *v.* PUITU LAL. **54 All. 437=I.R. 1932 All. 641=140 I.C. 491=A.I.R. 1933 All. 50**

———S. 59—Mortgage debt—Assignment—Registration—Necessity—Mortgage to Bank—Agreement between Bank and Trust as to transfer of assets—Agreement neither completed nor registered—Right of suit on mortgage. *See* REGISTRATION ACT, S. 17 (1) (*b*)—TRANSFER. **62 I.A. 115=69 M.L.J. 158 (P.C.).**

———S. 59—Mortgage-deed—Provision for collection of rents—List showing names of tenants—No registration necessary. *See* REGISTRATION ACT, S. 17 (1) (*b*)—MORTGAGE. **14 L.R. 658 (Rev.).**

———S. 59—*Registration—Mortgagee acting as agent of mortgagor in arranging loan—Letter by former containing particulars of security does not require registration.*

A mortgagee with deposit of title-deeds was acting as an agent of his mortgagor in arranging a loan for the mortgagor. At the same time he was also acting as agent of the mortgagee; but as agent of the mortgagor he sent a letter to the mortgagor containing the scope of the security and the terms.

Held, that the document was not the bargain between the parties to the mortgage subsequently effected but only one sent by agent of the mortgagor; that it did not require registration and that extraneous evidence was admissible to prove the scope of the security. (*Sen, J.*) VILLA *v.* PETLEY. **6 R.R. 245=148 I.C. 721=A.I.R. 1934 Rang. 51.**

———Ss. 59 and 82—Registered mortgage deed—Alleged modification by subsequent verbal

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arrangement—Proof of—Permissibility. *See* T. P. ACT, Ss. 82 AND 59—CONTRIBUTION. **A.I.R. 1934 P.C. 98=66 M.L.J. 662 (P.C.).**

———**Ss. 59 and 4**—*Scope.*

Section 4 properly read means, so far as it is applicable to the case of mortgages, that if and when a document of mortgage is executed, it must be registered as provided in the Registration Act, but this section does not in any way do away with the effect of S. 59 which expressly provides that in certain areas a mortgage can be the only means of an instrument in writing. (*Jai Lal and Abdul Rashid, JJ.*) GURDAS MAL *v.* PUNJAB-SINDH BANK, LTD., RAWALPINDI. **6 R.L. 465=147 I.C. 942=35 P.L.R. 249=A.I.R. 1933 Lah. 972.**

———**S. 59**—*Unregistered mortgage—Notice given to subsequent mortgagee at time of registration—Priority.*

A mortgagee under a registered mortgage deed cannot claim priority if the mortgagee under a prior unregistered mortgage deed appears before the Sub-Registrar and gives notice of his prior unregistered document at the time when the later mortgage deed is presented for registration. And if the later mortgage deed is executed simply consolidating previous deeds with much interest added and no actual money passes, such a notice given by the prior mortgagee is equally valid and the rule, that notice acquired after payment is money is immaterial, is not vitiated. 30 All. 238 and A.I.R. 1929 Lah. 500, Rel. (*Addison, J.*) RODHAL MAL *v.* RAMJIDAS. **6 I.R. (Lah.) 165=146 I.C. 40 (1)=A.I.R. 1933 Lah. 609.**

———**S. 59**—*Usufructuary mortgage for Rs.* 100 *unregistered—Suit for possession by mortgagor—Mortgagee in possession for over* 12 *years—Rights of parties.*

An unregistered deed of usufructuary mortgage for Rs. 100 is invalid and no suit for redemption could lie. Yet there is nothing against the mortgagor claiming a decree for possession, if he could prove his title independently of the mortgage. The mortgage being invalid, the mortgagor is entitled to possession of the property on proof of title, but if the usufructuary mortgagee has been in possession for more than 12 years as such, he must be deemed to have acquired mortgagee's rights and thus there comes into existence a legal operative mortgage which the mortgagor must redeem as a condition precedent to a decree for possession. (*Ganga Nath, J.*) SHAMRATI KUER *v.* KALIKA SINGH. **156 I.C. 813=8 R.A. 40=1935 A.L.J. 826=1935 A.W.R. 705.**

———**S. 59**—*Written bargain constituting the contract—Registration—If necessary.*

The defendant addressed a letter dated the 30th May, 1919 to the plaintiff-bank in the following terms: "I beg to state that the title-deeds of my immoveable property situated at * * * * were lodged by me with your bank on May 30, 1919, as guarantor for any possible indebtedness of * * * *". There was no evidence that any oral agreement had already been entered into between the parties and that the letter was drafted subsequently. On the other hand, the evidence was to the effect that the bank had formulated its proposal in what was intended to be a

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letter written by the debtor and the terms of the proposal were exactly reproduced in the letter in question.

Held, that in the absence of registration, the letter was not admissible in evidence. (*Tyabji, J.*) NATIONAL BANK OF INDIA, LTD. *v.* NAZIR & CO. **I.R. 1932 Bom. 532=139 I.C. 745=34 Bom.L.R. 748=A.I.R. 1932 Bom. 401 (2).**

———**S. 59 (before amdt.)**—*Equitable mortgage—Deposit of title-deeds outside towns mentioned—Creation of charge.*

A mere deposit of title-deeds outside the towns mentioned in S. 59 of the Act will not amount to creation of a charge on the properties to which the deeds relate. (*Mukerji and Bennet, JJ.*) BASANT LAL TAKHAT SINGH *v.* COMMISSIONER OF INCOME-TAX, U. P. **I.R. 1933 All. 130=142 I.C. 864=A.I.R. 1932 All. 451.**

———**S. 59 (before amdt.)**—*Equitable mortgage—No written agreement showing intention to create equitable mortgage—Evidence of agreement.*

Though an agreement embodied in a written document requiring registration under S. 17, Registration Act, and not so registered cannot be proved by the written document or by oral evidence, yet where there is no written agreement there is no reason why the intent to create a security by deposit of title-deeds under the exception provided for in S. 59, T. P. Act, should not be evidenced by written as well as by oral evidence. (*Lord Tomlin.*) SUNDARACHARIAR *v.* NARAYANA AYYAR. **58 I.A. 68=54 Mad. 257=I.R. 1931 P.C. 104=1931 A.L.J. 245=35 C.W.N. 494=1931 M.W.N. 349=33 L.W. 501=8 O.W.N. 666=131 I.C. 328=53 C.L.J. 396=33 Bom L.R. 878=A.I.R. 1931 P.C. 36=60 M.L.J. 506 (P.C.).**

———**S. 59 (before amdt.)**—*Equitable mortgage—Property situate outside British India.*

The provisions of S. 59 are applicable whether the property, which is the subject-matter of equitable mortgage, is inside or outside British India, or whether the property is situate in the province to which the Act applies or not. The High Court of Bombay can enforce an equitable mortgage entered into in Bombay of properties situated in Baroda by means of a personal decree and a decree for sale in the event of default. (*Kania, J.*) CENTRAL BANK OF INDIA, LTD. *v.* NUSSERWANJI. **57 Bom. 234=142 I.C. 130=I.R. 1933 Bom. 174=34 Bom.L.R. 1384=A.I.R. 1932 Bom. 642.**

———**S. 59 (before amdt.)**—*Equitable mortgage—The Punjab.*

The Transfer of Property Act is not in force in the Punjab. The result is that S. 59 does not prohibit the creation of a mortgage by deposit of title-deeds in the Punjab. Hence such mortgages are valid. 9 M.I.A. 307 (P.C.) and 31 P.R. 1916, Ref. (*Jai Lal and Abdul Rashid, JJ.*) GURDAS MAL *v.* PUNJAB-SINDH BANK, LTD., RAWALPINDI. **6 R.L. 465=147 I.C. 942=35 P.L.R. 249=A.I.R. 1933 Lah. 972.**

———**S. 59, proviso**—(*Before amendment*)—*Equitable mortgage—Applicability—Bangalore.*

The saving clause in S. 59 of the Transfer of Property Act, as much as the rest of the Act is applicable to the Civil and Military Station of Bangalore, bu virtue of the Government of India

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Notification dated 16th January 1917 passed under the Indian (Foreign Jurisdiction) Order in Council dated 11th June, 1902. So a mortgage of immoveable properties in Bangalore effected by deposit of title deeds in Madras is valid and operative. (*Sir John Wallis.*) PAPIAH NAIDU *v.* NAGANATHA SETHUPATHI. **I.R. 1931 P.C. 280 =134 I.C. 328=33 Bom.L.R. 1351=35 C. W.N. 1061=54 C.L.J. 194=59 Cal. 439= 58 I.A. 333=A.I.R. 1931 P.C. 239=61 M. L.J. 408 (P.C.).**

[Disc. 34 Bom.L.R. 1384 (1387-8) R. 35 P. L.R. 249 (254).]

———**Ss. 59-A and 61**—*Mortgage by Hindu father—Later mortgage by sons—Covenant against redemption without payment of both amounts—Mortgagee's right to consolidate—Redemption of one mortgage alone—Right to.*

Where the father of a Hindu joint family executes a mortgage of family property by way of conditional sale and after his death, his sons, one of them being the manager, execute another mortgage expressly stipulating that they will have no power to redeem the property without payment of the previous mortgage money and the amount of the later in a lump sum, the mortgagee has a right to consolidate the two mortgages and insist on payment of both before redemption. It is immaterial which of the two mortgages is sought to be redeemed. The later deed is a deed of further charge and the stipulation contained in it for simultaneous redemption amounts to a contract for consolidation. The fact that a suit on one of the mortgages could be barred by limitation on the date does not defeat the mortgagee's claim to consolidation, because there is no limitation to a claim pleaded in defence, and because the mortgagee's claim cannot be extinguished so long as his lien by possession exists. The English doctrine that a right of consolidation can only arise when all the mortgages are made by the same mortgagor cannot be applied to India. (*Nanavutty and Zia-ul-Hasan, JJ.* SADA NAND *v.* DAYA SHANKAR SINGH. **10 Luck. 481=153 I.C. 307=7 R.O. 319=11 O. W.N. 1601=A.I.R. 1935 Oudh 213.**

———**Ss. 59-A and 61**—Mortgage by the manager—Subsequent mortgage executed by her son—Agreement to consolidate—Expression—'Mortgagor' in S. 61 includes his heirs and survivors. *See* T. P. ACT, Ss. 61 AND 59-A. **9 Luck. 657 =1934 Oudh 246.**

———**S. 60.**

Abatement of mortgage-debt.
Accounts.
Clog on redemption.
Default clause.
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Indivisibility of mortgage.
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Partial Redemption.
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Abatement of mortgage-debt.

———**S. 60**—Abatement of mortgage-debt. *See* S. 60—INDIVISIBILITY OF MORTGAGE. **59 Cal. 1372.**

———**(As amended, 1929), S. 60**—*Abatement of mortgage-debt—Right to when arises.*

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Under the amendment to S. 60, T. P. Act, in 1929, the insertion of the word "only" after the word "except", in the last paragraph of the section, makes it clear that there can be a proportionate abatement of the mortgage-debt only where the mortgagee has acquired an interest in the equity of redemption. (*Mitter and McNair, JJ.*) RAMBALLAV SAHA *v.* BHAGABAN CHANDRA SEAL. **61 Cal. 894=59 C.L.J. 473=152 I.C. 429=7 R.C. 272=38 C.W.N. 833=A. I.R. 1934 Cal. 775.**

Accounts.

———**S. 60**—*Accounts—Sums received by mortgagee—Credit in favour of mortgagor.*

An account being taken between the mortgagor and the mortgagees, sums due from one to the other during the continuance of the mortgage should be included. The principle in such cases is that as money becomes due to the mortgagor at any given time, it should be deemed to have been recovered by the mortgagor by a corresponding decrease in the amount payable to the mortgagee. 4 A.L.J. 176, Ref. (*Pullan and Niamatullah, JJ.*) BANWARI SINGH *v.* SAKHRAJ SINGH. **135 I.C. 248=I.R. 1932 All. 72= 1931 A.L.J. 421=A.I.R. 1931 All. 585.**

Clog on redemption.

———**S. 60**—*Clog on redemption—Clause providing for mortgagee's perpetual possession of raiyati lands.*

A stipulation in the mortgage-deed that the *raiyati* lands which formed part of the mortgaged property would remain in the possession of the mortgagee and would not be restored to the mortgagor on the redemption of the mortgage is a clog on the equity of redemption. (*Fazl Ali, J.*) SAPNESWAR PATI *v.* BRUNDABAN PANDA. **6 R.P. 474=148 I.C. 429=A.I.R. 1934 Pat. 397.**

———**S. 60**—*Clog on redemption—Permanent lease subsequent to mortgage.*

Quaere: Whether a permanent lease subsequent to a mortgage would amount to a clog on the equity of redemption. (*Patkar and Broomfield, JJ.*) PARASHRAM *v.* LAKSHMIBAI. **I.R. 1931 Bom. 509=134 I.C. 701=33 Bom.L.R. 755 =A.I.R. 1931 Bom. 399.**

———**Ss. 60 and 72**—*Clog on redemption—Provision for payment of* gilandazi *expenses at time of redemption—Liability of mortgagor to pay.*

A "clog" is an impediment and refers to a condition which is manifestly to the advantage of the mortgagee and which unduly fetters the mortgagor's right to redeem the property on payment of what is legitimately due from him. If the parties agree, as part of the contract of mortgage, to certain terms which are fair and advantageous to both parties and are not inconsistent with or repugnant to the contract itself, such a condition cannot necessarily be construed as a clog on the equity of redemption. But if the condition is penal, oppressive or unconscionable, or if the mortgage, taking advantage of his position in relation to the mortgagor, has, by inserting it, unduly fettered the mortgagor's right to get back the property, it would obviously be a clog. The parties to a mortgage-deed, in order to avoid future disputes, dealt with certain items

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of expenses including *gilandazi*, to be incurred in future in respect of the mortgaged property and mutually agreed that half the expenses would be borne by the mortgagees and the other half by the mortgagor. It was also definitely provided that if the mortgage was redeemed on the due date, the share of *gilandazi* expenses borne by the mortgagee was to be paid along with the mortgage money.

Held, (1) that the contract was obviously to the advantage of both parties and that the stipulation could not be regarded as a clog on the equity of redemption; (2) that the contract did not necessarily deprive the mortgagees of the rights they had under S. 72 of the T. P. Act, independently of the provision in question. (*Fazl Ali, J.*) BISHESWAR DAYAL *v.* CHEDI SINGH. **156 I.C. 926=8 R.P. 41=16 Pat.L.T. 91=A.I.R. 1935 Pat. 157.**

———**S. 60**—*Clog on redemption—Provision regarding rebuilding of property—Stipulation as to payment of sum spent with interest at 2 per cent.—Validity.*

A mortgage-deed contained a clause to the effect that a mortgagee would be free to build or rebuild the house and that in the case of redemption, the mortgagor would pay the amount of the money spent over the building or rebuilding with interest at 2 per cent. per annum.

Held, that the stipulation did not amount to a clog on the equity of redemption and was enforceable. (*Mukerji and Bennet, JJ.*) SABRATAN *v.* DHANPAT GADARIYA. **54 All. 1041=143 I.C. 409=I.R. 1933 All. 245=1932 A.L.J. 1021=A.I.R. 1933 All. 70.**

———**S. 60**—*Clog on redemption—Stipulation in mortgage—Failure to pay—Effect of—Equity of redemption when lost.*

A stipulation in the mortgage-deed that the mortgage will be foreclosed if the mortgage money is not paid does not extinguish the mortgage, on failure to pay the mortgage money and the right of redemption is not lost. The equity of redemption can only be lost either by a fresh agreement between the parties or by foreclosure proceedings. In the absence of either, the entry recording mutation in the name of the mortgagee as owner is of very little help in the determination of the point. (*Sri Vastava and Rachpal Singh, JJ.*) HARIHAR BAKHSH SINGH *v.* LACHHMAN SINGH. **9 Luck. 657=149 I.C. 543=6 R.O. 567=11 O.W.N. 559=A.I.R. 1934 Oudh 246.**

———**S. 60**—*Clog on redemption—Test of.*

The postponement of redemption for a long period in a mortgage is not necessarily or *per se* a clog on redemption. What has to be seen is whether the effect of such a covenant is to postpone redemption for an unduly long period without any corresponding advantage to the mortgagor, or whether circumstances are such as to indicate that the stipulation postponing redemption is unreasonable and oppressive and intended to fetter the right to redeem.

Held, that in the circumstances of the case, a stipulation postponing redemption for 50 years was not a clog. (*Tapp, J.*) BANSI LAL *v.* SAWANU. **6 I.R. (Lah.) 151=145 I.C. 1016=34 P.L.R. 902=A.I.R. 1933 Lah. 373.**

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———**S. 60**—*Clog on redemption—Test—Postponement of redemption for 55 years on onerous terms to mortgagor.*

The true test to see whether claims in a mortgage-deed amount to a clog on the equity of redemption is not to look to the events as they have happened but to see whether such events might have happened. Where a mortgage-deed postponed redemption for 55 years and fixed the value at the time of redemption at a figure far in excess of the then probable value of the property and the deed was full of onerous covenants for the mortgagor.

Held, that there was a clog on the redemption and the mortgagor was entitled to redeem before that expiry of the period fixed. (*Wazir Hasan, C. J. and Smith, J.*) HAR DAYAL SINGH *v.* RAM SINGH. **9 Luck. 151=6 I.R. (Oudh) 65=145 I.C. 669=10 O.W.N. 973=A.I.R. 1933 Oudh 460.**

Default clause.

———**S. 60**—Default clause—Construction Provision for. RECOVERY OF MONEY BEFORE EXPIRY OF PERIOD LIMITATION—*See* LIMITATION ACT, ART. 132. **A.I.R. 1931 All. 537.**

Further charge.

———**S. 60**—*Further charge—Clog on equity of redemption—Usufructuary mortgagee advancing further money to mortgagor—Stipulation for redemption only on payment of both amounts—Validity of.*

It is perfectly legitimate for a usufructuary mortgagee who advances money subsequently to his mortgagor to have a stipulation in the subsequent document that the land would not be redeemed unless the amount due to him under both the prior and the subsequent documents is paid up and hence the mortgagor cannot redeem the original mortgage alone unless the subsequent mortgages are also paid up. Case-law Ref. (*Jailal and Agha Haidar, JJ.*) MAHOMED KHAN *v.* CHANDI SHAH. **147 I C. 193=6 R.L. 358=35 P.L.R. 236=A.I.R. 1933 Lah. 864.**

Indivisibility of mortgage.

———**S. 60**—*Indivisibility of mortgage—Exceptions to—Assignment of part of equity of redemption to stranger—Release of part of estate by mortgagee—Right of mortgagee to enforce arrears on whole estate—Prejudice to stranger.*

A mortgage for an entire sum is from its very purpose indivisible. It is not competent to a mortgagee to release the share of an individual mortgagor by receiving from him what he may conceive to be his rateable share, and any payment made by an individual mortgagor can only be properly treated as made for the whole body of mortgagors and should be credited in reduction of their joint-debt. This rule has its inception in cases where there has been a severance of interest of the mortgagees or of the mortgagors. Sections 60 and 67 (*d*) of the Transfer of Property Act indicate two such instances. Other exceptions to the rule as to indivisibility of mortgages are cases where the mortgagee recognises a partition of the mortgaged property among the co-mortgagors or where there has been a severance of the interest of the mortgagors with the consent of the mortgagee, as for example, where a part has been previously redeemed.

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Where the splitting up of the security has been permitted and recognised by the mortgagee subsequent to the creation of a charge in favour of a third party, the general rule will apply, namely, that the rights of persons who have acquired an interest in the mortgaged estate, since the making of the mortgage, of which the mortgagee has notice, cannot be defeated or impaired by any subsequent arrangement to which they are not parties. If the mortgagee, with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt against such purchaser. 30 C. 755; 15 C.W.N. 800; 1 C.L.J. 337; 2 C.L.J. 202; 33 Cal. 613; 6 C.L.J. 46 and 28 M. 555, Ref. (*Mukerji and Cuha, JJ.*) H. V. Low & Co., Ltd. *v.* Pulinbeharilal Singha. **143 I.C. 193=59 Cal. 1372=I.R. 1933 Cal. 372=A.I.R. 1933 Cal. 154.**

Kat kobala.

———**S. 60**—*Kat kobala*—Redemption—Payment of principal and interest—Account of rents and profits—Liability of mortgagee. *See* T.P. Act, Ss. 76 and 77. **53 C.L.J. 380.**

Partial redemption.

———**S. 60**—Partial redemption—Transferee of part—Equitable considerations—Conduct of mortgagee. *See* Mortgage—Redemption—Partial Redemption. **37 C.W.N. 424=A.I.R. 1933 Cal. 588.**

[Reversed on L. P. Appeal. **61 Cal. 849.**]

———**S. 60**—Partial redemption—Mortgagee giving up claim against purchaser of part of property in Court—Right of purchasers of other portions to piece meal redemption. *See* Mortgage—Redemption, partial. **61 C.L.J. 560=A.I.R. 1935 Cal. 667.**

———**S. 60**—*Partial redemption—Right of transferee of part of mortgaged property—Release by mortgagee of part of property—Effect.*

If a mortgagee, with notice that the equity of redemption in a part of the mortgaged property has been conveyed, releases any part of the mortgaged estate, he must abate a proportionate part of the mortgage debt as against such purchaser: and that latter is, under S. 60, T. P. Act, as it stood before the amendment of 1929, entitled to claim partial redemption, *i.e.*, of his property only. But notice or knowledge to the mortgagee of the transfer of equity of redemption is necessary; in the absence of such notice or knowledge, a release by the mortgagee will not give rise to any equities on which the transferee can claim partial redemption. (*Mitter and McNair, JJ.*) Ramballav Saha *v.* Bhagaban Chandra Seal. **38 C.W.N. 833=61 Cal. 894=59 C.L.J. 473=152 I.C. 429=7 R.C. 272=A.I.R. 1934 Cal. 775.**

———**S. 60**—*Partial redemption—Co-mortgagors—Sale of share of equity of redemption by one—Acquisition of mortgagee rights by vendee—Right of other co-mortgagor to redeem part.*

To bring a case within the rule, in S. 60 of the Transfer of Propeerty Act, allowing piecemeal redemption, it is not necessary that the share in the equity of redemption acquired by the mortgagee should be specified. One of two co-

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mortgagors sold his equity of redemption to five others, one of whom subsequently obtained an assignment of the entire mortgage rights from the mortgagee. The other mortgagor having sued to redeem his half share, alleging that the integrity of the mortgage had been broken up; *held*, that S. 60, T. P. Act applied to the case, and that the plaintiff could be given a decree for redemption of his share in the mortgaged property. (*Srivastava and Nanavutty, JJ.*) Sarfaraz *v.* Mohammad Salim. **6 R.O. 614=150 I.C. 140=11 O.W.N. 933=A.I.R. 1934 Oudh 348.**

Period for redemption.

———**S. 60**—*Period for redemption—If can be reduced by the Court.*

Periods such as forty years for redeeming a mortgage cannot be reduced by the Court where otherwise there is nothing unconscionable in the agreement. 36 All. 195 (P.C.) and A.I.R. 1929 Lah. 523, Rel. on. (*Johnstone, J.*) Lal Singh *v.* Kartar Singh. **I.R. 1931 Lah. 249=130 I.C. 57=A.I.R. 1930 Lah. 1060.**

Redemption suit.

———**Ss. 60 and 92**—*Redemption suit—Decree in redemption suit simply providing for dismissal of suit in default of payment—Right to redeem, if extinguished—Second suit for redemption—Maintainability.*

The right to redeem is a right conferred upon the mortgagor by enactment, of which he can only be deprived by means and in manner enacted for that purpose, and strictly complied with. If the decree in a redemption suit departs from the form required by S. 92, T. P. Act, and simply provides that in case of default by the plaintiff in payment, "his case will stand dismissed" and no payment of the mortgage-money is made, the decree cannot be construed to be an order of a Court extinguishing the right to redeem within the meaning of the proviso to S. 60, and a second suit for redemption is properly maintainable. (*Lord Russell of Killowen.*) Raghunath Singh *v.* Hansraj Kunwarl **61 I.A. 362=56 All. 561=60 C.L.J. 337=39 C.W.N. 9=1934 M.W.N. 1065=15 Pat.L.T. 697=36 Bom.L.R. 1189=151 I.C. 37=A.L.R. 1934 P.C. 197=7 R.P.C. 47=40 L.W. 390=1934 A.L.J. 900=11 O.W.N. 1092=4 A.W.R. 368=A.I.R. 1934 P.C. 205=67 M.L.J. 813 (P.C.).**

———**S. 60**—*Redemption suit—Possessory mortgage—Tacking bond by mortgagor—Suit for redemption—Right of mortgagee to claim bond amount—Question of limitation.*

In a suit by a mortgagor for redemption of his possessory mortgage, the mortgagee is entitled to insist on the payment of the sum due under the tacking bond, if he is otherwise entitled to it, regardless of the question whether his suit on foot of that bond, if brought at the time of the redemption suit, would be barred by limitation. Redemption cannot be allowed unless the plaintiff pays the principal and interest due under the tacking bond. (*Pullan and Niamatullah, JJ.*) Paras Ram Chaubey *v.* Sheo Dha Pandey. **I.R. 1932 All. 440=138 I.C. 492=1932 A.L.J. 595=A.I.R. 1932 All. 558.**

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———S. 60—*Redemption suit—Successive suit —Maintainability.*

A prior decree for redemption which simply specified the amount due under the mortgage and contained no default clause by which on default of payment on any particular date the mortgagor would be barred from his right to redeem does not put an end to the relationship of mortgagor and mortgagee and so does not bar a second suit for redemption within the period of limitation. 43 B. 334; 32 Bom.L.R. 933, Foll.; 43 B. 703, Dist. (*Patkar and Broomfield, JJ.*) GOVIND GANGADHAR *v.* NARAYAN DAMODAR. **I.R. 31 Bom. 507=134 I.C. 699 (2)=33 Bom.L.R. 844=A.I.R. 1931 Bom. 480.**

Right to redeem.

———S. 60—*Right to redeem—Assignee of mortgagee.*

A zamindar made a usufructuary mortgage of his zamindari without *sir* in 1867. Subsequently in 1895 he executed a usufructuary mortgage of his *sir*. Plaintiff took an assignment of his first mortgage in 1900 and the defendant of the second mortgage in 1910. In 1913 plaintiff purchased the equity of redemption in the property covered by both the mortgages and instituted a suit against the defendant for redemption of the mortgage of 1895 relating to *sir*.

Held, that the plaintiff was entitled to redeem. (*Mears, C.J. and Sen, J.*) RAM DAS *v.* PARMANAND GIR. **I.R. 1931 All. 349=131 I.C. 45 =12 L.R. 148 (Rev.)=15 R.D. 341=1931 A.L.J. 162=A.I.R. 1931 All. 238.**

———S. 60—*Right to redeem—Benamidar mortgagor—Transferee from.*

A transferee from the heirs of a benamidar mortgagor can maintain a suit for redemption. 29 C.L.J. 434 and 45 Cal. 909 (P.C.), Rel. on. (*Sundaram Chetty, J.*) MAHOMED SHERIFF SAHIB *v.* SYYED KASIM SAHEB. **6 I.R. (Mad.) 33=145 I.C. 230=38 L.W. 266=1933 M.W. N. 642=A.I.R. 1933 Mad. 635.**

———S. 60—*Right to redeem—Default of mortgagee—Sale for arrears of rent—Purchase by mortgagee—No bar to redemption.*

A raiyati holding was mortgaged and the mortgagee undertook to redeem a prior mortgage and pay the rent of the holding but he neither redeemed the mortgage nor paid the rent and when the holding was sold for arrears of rent, including the rent for two years prior to the mortgage, he bought it in the name of another person. In a suit for the redemption of the mortgage,

Held, the fact that another person, who was not the mortgagor, shared responsibility with the mortgagee for a wrongful omission would not in the circumstances of the case give him a right to derive benefit from the omission at the expense of the mortgagor and the sale was no bar to the redemption. (*Saunders, J.*) RAM KISHORE PANDE *v.* JEGARNATH RAI. **151 I.C. 255=7 R.P. 77 (1)=A.I.R. 1934 Pat. 307.**

———S. 60—*Right to redeem—Mortgage by conditional sale—No foreclosure taken—Redemption.*

Where mortgage was by conditional sale and no proceedings were taken to foreclose it, mortgage could be redeemed. (*Bhide, J.*) PAL SINGH *v.* BHOLA SINGH. **149 I.C. 969=6 R.L. 771 (2)=A.I.R. 1934 Lah. 242.**

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———S. 60—*Right to redeem—"Person interested in a share only"—Right to redeem the whole property.*

It is not correct to hold that in all circumstances and irrespective of any considerations, the right as well as the liability of the owner of a part of the equity of redemption is to redeem the whole. The question whether the Court will allow the redemption on the whole of the mortgage at the instance of a person entitled to a part only of the equity of redemption, must depend on the circumstances of each case and the rights acquired by the mortgagee or by third parties subsequent to the mortgage. 38 M. 310, Ref. (*Mukerji and Guha, JJ.*) H. V. Low & Co., LTD. *v.* PULINBIHARILAL SINGHA. **59 Cal. 1372=143 I.C. 193=I.R. 1933 Cal. 372= A.I.R. 1933 Cal. 154.**

———S. 60—*Right to redeem—Purchaser of portion of right of redemption.*

A mortgage is in law indivisible, and a purchaser of a portion of the right of redemption has a right to redeem the whole mortgage if he desires to do so. (*Baguley and Ba U, JJ.*) BANK OF CHETTINAD, LTD. *v.* C. T. A. C. T. FIRM. **7 R.R. 8=150 I.C. 692=A.I.R. 1933 Rang. 392.**

———S. 60—*Right to redeem—Terms of document.*

The mortgage deed provided for a term of ten years but there was also a clause to the effect that the mortgagor would be entitled to redeem the property if he paid within ten years.

Held, that the term as to duration having been distinctly mentioned, the mortgagor could not sue for redemption before the expiry of ten years.

Quaere: Whether if the mortgagor could sue for redemption before that period, if the mortgagee commits a breach of contract. (*Mukerji and Allen, JJ.*) AKBAR HUSAIN *v.* SHAH AHSANUL HAQ. **I.R. 1931 All. 843=134 I.C. 459 =A.I.R. 1932 All. 155.**

———S. 60—*Right to redeem—Preliminary decree for foreclosure—Effect of.*

A preliminary decree for foreclosure does not extinguish the right of the mortgagor to redeem the mortgage. 7 I.C. 50, Foll. (*Mukerji and Bennet, JJ.*) MOHAN LAL *v.* RAM CHARAN. **I.R. 1931 All. 244=130 I.C. 196=1931 A. L.J. 265=A.I.R. 1931 All. 223.**

———S. 60—*Right to redeem—Prior and subsequent mortgagees—Failure to implead in respective suits—Right to redeem from transferee.*

A who was the owner of certain fields mortgaged the same in 1900 to *B* and in 1909 to *C*. *B* brought a suit in 1912 and obtained a final decree for sale in 1914. In those proceedings however *C* was not impleaded. A few days after the decree *A* sold his rights to *D*. In 1916 in execution of the sale-decree the mortgaged property was brought to sale and purchased by *E* who obtained possession in 1918. In 1921 *C* sued upon his mortgage and he impleaded *E* who did not wish to redeem but pleaded paramount title. *D* paid the amount due on the mortgage to *C*.

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D sued *B* to redeem the mortgage effected in favour of *E*.

Held, that *D* was entitled to redeem *E*. (*Macnair, J.C.*) LAKHMI CHAND *v.* JANARDHAN. **141 I.C. 144=I.R. 1933 Nag. 39=28 N.L.R. 247=A.I.R. 1932 Nag. 154.**

———**S. 60**—*Right to redeem—Property subject to two mortgages leased to Hindu father and stranger—Father paying mortgage decree on one mortgage—Stranger not contributing—In suit on other mortgage son entitled to redeem whole.*

The son is as a member of the joint family entitled to redeem as much property as his father could have redeemed. The property, which was subject to two mortgages, was taken on lease by a Hindu father and a stranger. After a decree was passed on one of the mortgages, the father redeemed the mortgage by joint family funds the stranger contributing nothing. In suit on the other mortgage the son is entitled to redeem whole and not only, one-fourth, although father declined to redeem. Section 60 is no bar to the owner of the equity for redeeming the whole mortgage amount. A.I.R. 1925 Pat. 57 and A.I.R. 1921 P.C. 125, Rel. on. (*Grille, A.J.C.*) ANANDA PANDURANG *v.* UTTAMRAO. **6 I.R. (Nag.) 12=29 N.L.R. 77=144 I.C. 521=A.I.R. 1933 Nag. 44 (2).**

Splitting integrity.

See also PARTIAL REDEMPTION—REDEMPTION, *supra*.

———**S. 60**—Splitting integrity—Indivisibility of mortgage, *supra*. **59 Cal. 1372.**

———**S. 60**—*Splitting integrity—Mortgage-debt—Apportionment of—Permissibility.*

An apportionment of a mortgage debt cannot be made without the consent of all the parties interested. (*Broadway, C.J. and Monroe, J.*) PALA MAL NARAIN DAS *v.* MAHOMED ALI. **I.R. 1933 Lah. 344=34 P.L.R. 1046=143 I.C. 364=A.I.R. 1933 Lah. 129.**

———**S. 60**—*Splitting integrity—Mortgagee purchasing share of mortgaged property—Purchaser from some mortgagors—No right to redeem entire mortgage.*

Where the mortgagees purchase a share out of the property mortgaged to them the integrity of the mortgage is broken and therefore, it is not open to the purchaser from some of the mortgagors to redeem more than the share purchased by him. (*Mukerji, Ag. C.J., King and Niamatulla, JJ.*) JAGANNATH KUNWAR *v.* JAIPAL. **55 All. 359=I.R. 1933 All. 108=142 I.C. 410 =1933 A.L.J. 151=A.I.R. 1933 All. 257 (F.B.).**

———**S. 60**—*Splitting integrity—Partial redemption—Splitting mortgage—Mortgagees acquiring part of mortgaged property—Right to proceed against other poperrty.*

Where a mortgage has been split by reason of the mortgagee having become the owner of two of the mortgaged properties, he is entitled to claim only a proportionate amount of the mortgage money from the other remaining party. 31 M. 419 and 34 L.W. 125, Foll.; 40 M. 968 (F.B.), Dist. (*Madhavan Nair, J.*) SOMANATH SWAYI *v.* KARJI ANANTA PATNAIK. **1931 M.W.N. 891=135 I.C. 911=I.R. 1932 Mad. 239=A.I.R. 1932 Mad. 18.**

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———**S. 60**—*Splitting integrity—Partial redemption—First mortgagee purchasing mortgaged properties in execution—Second mortgagee of one of the properties—Rights to redeem first mortgage.*

Where the first mortgagee obtained a decree on his mortgage without impleading the second mortgagee and purchased properties in execution including the one mortgaged to the latter and on failure to get possession, brought a suit against the second mortgagee, who claimed to redeem all the properties,

Held, that the integrity of the mortgage security having been broken up by the purchase of the mortgaged properties by the plaintiff, he could not be compulsorily redeemd *in toto* and that the second mortgagee could only redeem the property mortgaged to him. 48 C. 22 (P.C.), Ref.; 8 P.L.T. 81; 11 P.L.T. 595;52 I.C. 512, Foll. (*Wort, J.*) AMIR CHAND *v.* MOTI PANDE. **I.R. 1931 Pat. 511=134 I.C. 959=12 Pat. L.T. 769=A.I.R. 1931 Pat. 434.**

———**S. 60**—*Splitting integrity—Partial redemption—Several mortgagors—Right to redeem portions on proportionate payment—Purchase by mortgagee of part—Effect.*

Where the unity of the mortgage is broken up by the mortgagee purchasing a portion of the mortgaged property, the other owners of the equity of redemption are entitled to redeem their shares on payment of that proportion of the mortgage debt, which is the same as the proportion which the value of their share bears to the whole mortgaged property including the portion bought by the mortgagee. (*Baguley and Mackney, JJ.*) U SAN BA *v.* SAN SHWE ZIN. **151 I.C. 627=7 R.R. 95 (2)=A.I.R. 1934 Rang. 372.**

———**S. 60, proviso**—*Clog on redemption—Permanent lease by mortgagor to mortgagee—Validity.*

Certain lands were given in usufructuary mortgage for three years to secure an advance of Rs. 800 by the mother of the owner who was a minor in 1886. In 1889, he, being a major, gave a Zarpeshgi of the same lands and other lands to the mortgagee for five years for a consideration of Rs. 466-3-0. Being unable to put the mortgagee in possession of the additional lands, the mortgagor granted in 1890 a permanent lease of the mortgaged lands and some other lands to the sons of the mortgagee for a salami of Rs. 300. Subsequently he executed a Zarpeshgi of all the lands to the mortgagee. The mortgagor died in 1909, and in 1917 the manager of his estate, appointed under the Chota Nagpur Encumbered Estates Act, repaid all the sums due to the mortgagee under the three mortgages of 1886, 1889 and 1890 and thereafter recovered rent from the sons of the mortgagee. In 1927, the mortgagor's son sued for redemption and for an account challenging the lease of 1890 as being a clog on the equity of redemption and therefore void.

Held, that a permanent lease by a mortgagor to a mortgagee was not necessarily or always void as being a clog on the equity of redemption, but that on the contrary, the proviso to S. 60, T. P. Act, contemplated that the equity of redemption might be extinguished without limiting

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the method of extinguishing it by sale of the equity of redemption to the mortgagee; that the mortgage and the lease, viewing the transaction as a whole, could be held to form one transaction, and that the lease could not be challenged on the ground of unfairness or otherwise. (*Agarwala and Rowland, JJ.*) RAMDHANI SAHU *v.* PITAMBAR SINGH. **155 I.C. 972=7 R.P. 649=16 Pat.L.T. 119=A.I.R. 1935 Pat. 353.**

———**Ss. 61 and 59-A**—*Consolidation—Mortgage by manager—Another mortgage by subsequent manager agreeing to pay it along with first —Agreement amounts to contract to consolidate.*

Where a father in a joint family executes a mortgage and after his death his son, the then manager, executes another mortgage agreeing to repay the second loan along with the first then the agreement amounts to a contract to consolidate, for the expression "mortgagor" includes also his heirs and survivors. 18 Bom. 591, Dist. (*Sri Vastava and Rachhpal Singh, JJ.*) HARIHAR BAKHSH SINGH *v.* LACHHMA SINGH. **11 O.W. N. 559=9 Luck. 657=149 I.C. 543=6 R.O. 567=A.I.R. 1934 Oudh 246.**

———**S. 61**—Contract to the contrary—Provision in later deed of mortgage for simultaneous redemption of first and second mortgages—Right to redeem one only. *See* T. P. ACT, Ss. 59-A AND 61. **153 I.C. 307=7 R.O. 319=11 O.W. N. 1601=A.I.R. 1935 Oudh 213.**

———**S. 61**—*Mortgagors by their subsequent documents stipulating not to sell or mortgage till previous mortgage was paid—Subsequent documents created further charge.*

A stipulation on the part of the various mortgagors that they would not mortgage or sell the property previously mortgaged till the money due on the subsequently executed document by them had been paid makes the previously mortgaged property, security for the payment of the money subsequently borrowed by them by various mortgages and such documents create further charges on the property previously mortgaged. The agreement that the mortgagor shall pay the amount due on the subsequently executed bond by one he redeems the prior mortgage is an agreement to create a charge on the property previously mortgaged. (*Mukerji, Ag. C. J. King and Niamat-ullah, JJ.*) JAGANNATH KUNWAR *v.* JAIPAL. **55 All. 359=I.R. 1933 All. 108=142 I.C. 410=1933 A.L.J. 151=A.I.R. 1933 All. 257 (F.B.).**

[D. 36 P.L.R. 195 (197).]

———**S. 62 (b)**—*Construction—'Term'—Redemption of usufructuary mortgage—One day in sixtieth year fixed—Clog on redemption—Suit filed earlier if premature.*

Where a mortgage deed of 1898 provided that the mortgagor could redeem only on one day during the sixtieth year and if they failed to do so their right should be extinguished and the assignee from the mortgagor sued for redemption of the mortgage:

Held, that the condition amounted to a clog on the equity of redemption and that the suit for redemption was not premature.

Per *Young, J.*—The word 'term' in S. 62 (*b*) must be read to mean a reasonable term or a

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term which does not amount to a denial of the right to redeem.

Per *Sulaiman, J.*—No hard and fast rule can be laid down as to when a covenant amounts to a clog on the equity of redemption. The Court has to take into account all the circumstances as they then existed and all the terms of the mortgage deed and then consider whether the covenant in dispute is so hard and unconscionable as to nullify for all practical purposes the right of redemption or the exercise of the right is restricted in such an unreasonable manner as practically to deny it. (*Sulaiman and Young, JJ.*) BHULLAN *v.* BACHCHA KUNBI. **53 All. 580=I.R. 1931 All. 376=131 I.C. 520=1931 A.L.J. 324=A.I.R. 1931 All. 380.**

———**S. 63**—*Accession—Meaning.*

Per *Sulaiman, J.*—Where only a temporary structure is put up without any intention that it should be a permanent fixture to the land, it would be difficult to call it an accession to the mortgaged property within the meaning of S. 63 or S. 70. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

———**S. 63**—*Accession—Mortgagee acquiring occupancy rights.*

The acquisition of the occupancy rights of the raiyats by the mortgagees should be treated as an accession to the mortgaged property. A mortgage by a zarpeshgi lease was taken by two families and a non-transferable occupancy holding was purchased by the lessees,

Held, that both families were mortgagees and the two families by acquiring occupancy lands separately could have no better right in them than what they had if they had acquired them jointly and as such the occupancy rights acquired formed an accession to the mortgaged property. 1929 Pat. 730, Rel. on; 59 I.A. 366=63 M.L.J. 116, Dist. (*Mohammad Noor and Dhavle, JJ.*) PARMESHWAR RAI *v.* RAMRUDRA PRASAD SINHA. **158 I.C. 162=8 R.P. 178=A.I.R. 1935 Pat. 360.**

———**S. 63**—*Accession to mortgaged property* —Khoti *land—Purchase of occupancy rights by mortgagee.*

During the currency of a mortgage of *Khoti* lands, the mortgagee purchased *Khoti nisbat* lands in the village from the occupancy tenants without the permission of the mortgagor. The mortgagors sold the equity of redemption to the mortgagee and two years later sold a share in the *Khoti nisbat* lands, purchased by the mortgagee, to the plaintiff.

Held, that, whether the lands are regarded as *Khoti Khasgi* land or as *khoti nisbat,* they should be treated as an accretion to the mortgaged property which vested in the mortgagors on redemption and were included in the sale of all the "privileges and rights" of the mortgagor to the mortgagee and that the plaintiff acquired no right to the same by his subsequent purchase. 20 Bom. L. R. 681, Foll. (*Beaumont, C.J. and Broomfield, J.*) KONDU RAMJI *v.* MAHADEV GOPAL. **I.R. 1932 Bom. 553=139 I.C. 812=34 Bom. L. R. 855=A.I.R. 1932 Bom. 526.**

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———**S. 63**—*Accession—Right of mortgagor to claim—Erection of stable—Removal of materials.*

It is only in case separate enjoyment or possession is not possible that the accession should be delivered, with the property to the mortgagor by the possessory mortgagee. Where a stable was built on the mortgaged property by the possessory mortgagee,

Held, that the mortgagee could remove the materials of the stable without injuriously affecting the other property. (*Mukerji and Bennet, JJ.*) DURGA SHANKER *v.* GANGA SAHAI. **I.R. 1933 All. 145=142 I.C. 889=1932 A.L.J. 493=A.I.R. 1931 All. 500.**

———**S. 63**—*Applicability—Suit on first mortgage—Decree and Court sale—Subsequent suit by second mortgagee—Temporary structures erected by purchaser—Whether liable to be sold in latter suit.*

Where in execution of a decree on a first mortgage, a person purchased the property and erected a structure of a temporary nature on the land and subsequently the second mortgagee sued and obtained a decree,

Held, that the property including the structure could be put up for sale and that the purchaser was not entitled to remove the materials. Conditions for applicability of S. 63 stated. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497 =132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

———**S. 63**—*Accretions to mortgaged property —Subordinate tenures acquired by mortgagee for his own benefit—Right of mortgagor to—S. 90, Trust Act.*

Section 63 of Transfer of Property Act cannot be read as entitling the mortgagor to recover on redemption acquisitions made by the mortgagee for his own benefit in circumstances which do not bring him within S. 90 of the Indian Trusts Act. The mortgagor is not entitled on redemption to treat subordinate tenures acquired by the mortgagee for his own benefit as accessions to the mortgaged property without regard to the question whether the mortgagee had any special advantage by reason of his position as mortgagee in acquiring them. 6 I.A. 145; 5 Cal. 198 (P.C.), Ref. to. 17 C.W.N. 586, Disapproved. (*Sir John Wallis.*) SORABJEE *v.* DWARKADAS RANCHHODDAS. **59 I.A. 366=I.R. 1932 P.C. 245=138 I.C. 557=36 C.W.N. 947=9 O.W. N. 728=56 C.L.J. 65=1932 M.W.N. 864= 34 Bom.L.R. 1310=15 N.L.J. 63=36 L.W. 381=193 A.L.J. 889=A.I.R. 1932 P.C. 199 =63 M.L.J. 116 (P.C.).**

———**S. 63-A**—*Improvements—"Kacha" kotha —Mortgage—Right of.*

Mortgagee is not entitled to compensation for the "kacha" kotha built by him on the mortgaged property. He can only remove the material. (*Bhide, J.*) PAL SINGH *v.* BHOLA SINGH. **149 I.C. 969=6 R.L. 771 (2)=A.I.R. 1934 Lah. 242.**

———**S. 65**—*Duty of mortgagor—Previous encumbrances—No duty to disclose.*

Section 65 enumerates implied contracts by mortgagor and does not cast any duty upon him

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to make any disclosure of previous encumbrances. (*Subhedar, A.J.C.*) RAMKRISHNA NANDRAM *v.* GANESH NARAIN. **30 N.L.R. 303=150 I.C. 20=6 R.N. 279=35 Cr.L.J. 1063=1934 Cr.C. 658=A.I.R. 1934 Nag. 149.**

———**S. 65 (a)**—*Purchaser of mortgaged property—Right to deny validity of mortgage.*

A purchaser of mortgaged property at a sale in execution of a decree is a representative of the mortgagor and is estopped from denying the validity of the mortgage if the mortgagor himself could not be permitted to deny its validity. 36 All. 141, Foll. (*Mukerji and Bennet, JJ.*) SARJU PRASAD *v.* KARUM ULLAH. **I.R. 1932 All. 572=139 I.C. 695.**

———**S. 65-A**—*Lease by mortgagor of house plot—Validity.*

The lease of a house-site by the mortgagor is invalid when the same is not by a registered document and is not one in the ordinary course of the management of property. (*Bagulcy and Mackney, JJ.*) V. E. A. CHETTYAR FIRM *v.* SEIN HTAUNG. **159 I.C. 1038=A.I.R. 1935 Rang. 420.**

———**S. 65-A**—*Mortgage with possession—Covenant by mortgagor not to grant lease—Permanent lease in contravention—Validity—Right of lessee to restrain waste by mortgagee—Suit for injunction—Maintainability.*

If a mortgagor grants a permanent lease after a mortgage with possession, or a lease, not in the usual course of management, the same is not binding on the mortgagee who can take steps to oust the lessee. When there is a covenant by the mortgagor in the mortgage-deed not to grant a lease during the subsistence of the mortgage and if a lease is granted by the mortgagor in violation of the covenant, the mortgagee can ignore the lease by putting an end to the lessee's possession. But as between the mortgagor and the lessee, it is a valid lease and the lessee has an undoubted right to redeem; and having the right to redeem, he has the right to see that his equity of redemption is not rendered less valuable by acts on the part of the mortgagee. He is therefore entitled to restrain waste on the part of mortgagee and to sue him for an injunction to restrain such waste on the part of the mortgagee in possession. (*R. C. Mitter, J.*) BASANTA KUMAR DAS *v.* ADARMANI GUPTA. **164 I.C. 241=9 R.C. 179=40 C.W.N. 57.**

———**S. 65-A**—*Mortgagor in possession—Lease by—Auction purchaser, not bound.*

A lease by a mortgagor in possession subsequent to a decree on the mortgage and pending execution cannot bind the mortgagee or the auction-purchaser who stands in the shoes of the mortgagee. The lease is affected by *lis pendens* and the tenant cannot invoke S. 50 of the T. P. Act with regard to the rent paid in advance. (*Baker, J.*) GIRDHARLAL *v.* LILADHAR **I.R. 1932 Bom. 7=134 I.C. 1223=33 Bom.L.R. 1123=A.I.R. 1931 Bom. 539.**

———**S. 65-A**—*Non-retrospective effect.*

The new provision contained in S. 65-A has no retrospective operation. (*Jwala Prasad and James, JJ.*) DASAIN SAHU *v.* MT. RAMDULARI KUAR. **10 Pat. 332=I.R. 1931 Pat. 329=**

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133 I.C. 169=12 Pat.L.T. 206=A.I.R. 1931 Pat. 210.

———S. 65-A—*Simple mortgagor in possession —Permanent lease by—If binding on purchaser in execution of mortgage-decree.*

A simple mortgagor in possession of mortgaged property is entitled in the ordinary course of management of the property, to lease it out permanently, irrespective of its effect on the mortgagee, provided it is not collusive fraudulent, or destructive or permanently injurious to the property so as to render the mortgagee's security insufficient and the purchaser of the property in execution of the mortgage-decree is not entitled to turn the lessee out. (*Ganga Nath, J.*) NIADER SINGH *v.* RAM CHANDER. **154 I.C. 1009=7 R. A. 844=1925 A.W.R. 421=1935 A.L.J. 360 =A.I.R. 1935 All. 511.**

———S. 66—*Commutation of rent by mortgagor —Validity of—Right of mortgagee to question.*

In India the legal title continues in the mortgagor who is entitled to manage the property without any restriction or limitation, so long as the value of the security is not impaired. Where a mortgagor in possession commuted the produce rents due from his tenants into cash rents, the mortgagee cannot impeach the cummutation or set it aside at least so long as it was an honest conversion at a fair and reasonable rate. (*Ross and Chatterji, JJ.*) BENI PRASAD *v.* PARMESHWAR SINGH. **I.R. 1931 Pat. 281=132 I.C. 361=12 Pat.L.T. 121=A.I.R. 1931 Pat. 193.**

———S. 66—*Lease for three years—Validity.*

The mortgagor in possession may make a lease conformable to usage in the ordinary course of management, for instance, he may create a tenancy from year to year in the case of agricultural lands or from month to month in the case of houses. But it is not competent to the mortgagor to grant a lease on unusual terms or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode which he himself had used it before he granted the mortgage. This view is now embodied in the new S. 65-A of the Act. So a lease by mortgagor for three years is not binding on the mortgagee. (*Page, C. J. and Mya Bu, J.*) M. P. M. S. FIRM *v.* KO PYU. **10 Rang. 210=I.R. 1932 Rang. 171=138 I.C. 213=A.I.R. 1932 Rang. 113.**

[R. 65 M.L.J. 826 (830).]

———S. 66—*Permanent lease—Power to grant.*

Prior to the introduction of S. 65-A in 1929 the mortgagor in possession of the property in the case of a simple mortgage was entitled to transfer or deal with the property in any way he liked provided the mortgagees security was not rendered insufficient. He could grant permanent leases subject to the same condition and so the mortgagee who purchases the property in execution of his own decree is not entitled to eject the mokarrari lessee without showing that his security was prejudicially affected. (*Jwala Prasad and James, JJ.*) DASAIN SAHU *v.* MT. RAMUDULARI KUAR. **10 Pat. 332=I.R. 1931 Pat. 329=133 I.C. 169=12 Pat.L.T. 206=A.I.R. 1931 Pat. 210.**

[R. 65 M.L.J. 826 (831).]

———S. 66—*Mortgagor's power to lease—Scope of—Mortgage by jenmi of equity of redemption —Subsequent renewal of kanom demise by jenmi —Not binding on mortgagee.*

The power of the mortgagor to lease (before S. 65-A was introduced) was limited by the rule that the mortgagor must not by his act render the security insufficient or do anything that is not necessary for the prudent management and enjoyment of the income while he is entitled to it; and the burden of proving that the security is unimpaired by the lease is on the lessee. The two conditions for the exercise of the right to lease by the mortgagor are that: (1) the mortgagor must be in possession to exercise the right in question; and (2) the lease must be the usual mode of management of the property. The appellants were tenants on kanom demise from a jenmi who mortgaged the equity of redemption to the respondents by simple mortgage. Subsequent to the mortgage, the appellants paid further sums and obtained renewals. The respondents brought a suit on their mortgage, purchased the property in execution and then sued to redeeem the original kanoms. The appellants contended to the renewals were binding on the respondents as kanom was the usual and accustomed mode of enjoyment of the property and that the property and that the mortgagor was competent to grant a lease.

Held, (*i*) that the renewals materially diminished the value of the property; (*ii*) that the subsequent advances were in the nature of subsequent mortgages; (*iii*) that kanom, though common, was not the prudent way of enjoying the property. From every point of view, the mortgagor was not competent to grant the renewals which were, therefore, not binding on the respondents. (*Krishnan Pandalai, J.*) MOIDUNNI HAJI *v.* MADHAVAN NAIR. **1933 M.W.N. 347= 38 L.W. 921=148 I.C. 1115=6 R.M. 575= A.I.R. 1933 Mad. 876=65 M.L.J. 826.**

———S. 66—*Permanent lease by mortgagor— Validity.*

A mortgagor cannot grant a perpetual lease in so far as it impairs the security of the mortgagee and affects prejudicially his rights as such. 15 O.C. 239; 2 O.L.J. 276 and 9 O.L.J. 317, Foll. (*Raza and Bisheshwar Nath, JJ.*) MANTHURA *v.* JAGMOHAN SINGH. **I.R. 1931 Oudh 292= 132 I.C. 532=6 Luck. 546=14 O.L.J. 280 =8 O.W.N. 131=15 R.D. 80=12 L.R. 67 (Rev.)=A.I.R. 1931 Oudh 256.**

———S. 67—*Anomalous mortgage—Right of sale—Absence of express provision in deed— Effect of.*

Per *Dhavle, J.*—The rights and liabilities of the mortgagor and mortgagee in an anomalous mortgage are no doubt determined by their contract as evidenced in the mortgage-deed (provided no question of local usage arises); but the terms of the deed may easily import a sale. The fact that there is no express provision in the deed giving the mortgagee a right of sale will not

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disentitle him to such relief, if a power of sale can be implied from the terms of the deed. (*Wort and Dhavle, JJ.*) RAJA JANKI NATH RAY *v.* SYED ASAD REZA. **14 Pat. 560=158 I. C. 738=8 R.P. 211=16 Pat.L.T. 757=A. I.R. 1936 Pat. 211.**

———S. 67—*Applicability—Statutory charge* under S. 205, Calcutta Municipal Act. *See* CALCUTTA MUNICIPAL ACT. S. 205. **A.I.R. 1934 Cal. 862.**

———S. 67—*Applicability—Combination of simple and usufructuary mortgage—Possession not obtained—Right of mortgagee to sue for mortgage money.*

A mortgage, though in form usufructuary, contained a clause by which the profits were to be applied primarily towards the interest and the balance, if any, towards the principal and if the interest and principal were not paid within five years, the land was to be sold to the mortgagee. The mortgagor on the same day passed a rent note for the property, undertaking to pay rent therefor. Possession continued with the mortgagor who did not, however, pay any rent. In a suit for the mortgage amount after the expiry of five years from the date of mortgage.

Held, that the two rights of the mortgagee, the right to possession and the right to be paid, were independent and that the mortgagee was entitled to sue for the mortgage money under S. 67 even though he may have given up possession. 1 Pat. 350 and 34 Bom.L.R. 462, Ref. (*Baker, J.*) PINTO *v.* NARAYAN. **141 I.C. 471 =I.R. 1933 Bom. 94=34 Bom.L.R. 984=A. I.R. 1932 Bom. 558.**

———S. 67—*Applicability—Mortgage for term—Provision that in default of regular payment of interest—Mortgagee to have right to recover whole amount—Default—Mortgage money, if becomes 'due'.*

A mortgage-deed for a term of six years provided that if the mortgagor failed to pay the interest or compound interest for any two periods of six months in full, the mortgagee should have the right to recover the whole amount due without waiting for the full term. The mortgagor failed to pay in full two instalments of interest and the mortgagee sent him a notice demanding payment of the mortgage-money within a month, and filed a suit on the expiry of the one month.

Held, that the suit was not premature as the mortgagee was not bound to wait for the whole term, default having been made in the payment of interest; and that the option given to the mortgagee did not contravene the provisions of S. 67 of the T. P. Act. (*Nanavutty and Thomas, JJ.*) RAJENDRA BAHADUR SINGH *v.* RAGHUBIR SINGH. **151 I.C. 856=7 R.O. 149= 11 O.W.N. 1141=A.I.R. 1934 Oudh 473.**

———S. 67—*Contract to the contrary—Right to foreclose or redeem postponed for five years—Suit for foreclosure—Limitation.*

The enforcement of the right to foreclose is controlled by any contract to the contrary. If the effect of the clause in the mortgage-deed be that neither the mortgagor had the right to repay the mortgage-money and to redeem the mortgaged

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property nor the mortgagees had the right to re-call the mortgage-money and to sue for foreclosure before the expiry of five years, limitation for a suit for foreclosure is calculated from the first date after the expiry of the five years. In such a case, limitation does not start earlier even if the mortgagees had bargained for possession and never got it. (*Wazir Hasan, C. J. and Bisheshwar Nath, J.*) RAM SARUP SINGH *v.* GAYA PRASAD. **I.R.1932 Oudh 334=139 I.C. 61=9 O.W.N. 280=A.I.R. 1932 Oudh 178.**

———S. 67—*Applicability —Mortgage for term —Default clause—Acceleration of period for payment—Exercise of option.*

Neither S. 67 nor any other section of the T. P. Act lays down any provision in regard to the time when the mortgage-money is to become due. It is to be determined in each case upon the terms of the contract between the parties. Ordinarily when a mortgage-deed fixes a period for payment the mortgage-money becomes due at the expiration of the stipulated period. But if the mortgage-deed also gives the mortgagee an option to recover his money before the stipulated period there is no reason why the mortgage-money should not be held to have become due as soon as the mortgagee has exercised the option given to him. Where the mortgage-deed provided that if the interest for two instalments be not paid in full the mortgagees will have the option before the expiration of the period fixed to recover the whole of the amount due through Court.

Held, that the mortgagee could exercise the option when the mortgagor committed default. (*Bisheshwar Nath, J.*) RAGHBIR SINGH *v.* KUNWAR RAJENDRA BAHADUR SINGH. **8 Luck. 488 =I.R. 1933 Oudh 233=144 I.C. 279=10 O. W.N. 329=A.I.R. 1933 Oudh 237.**

[D. 56 A. 496 (501).]

———Ss. 67 and 68—*Rights under—Mortgage with possession of* Sir *land—Failure to deliver possession.*

If a person mortgages with possession his *sir* land and fails to deliver possession of the mortgaged property to the mortgagee, the mortgage-money becomes payable under S. 68 of the T. P. Act and the mortgagee is entitled to a money decree for the same. But if the time stipulated for redemption expires, the mortgage-money becomes due to the mortgagee under S. 67 and a decree for sale can be made under that section. (*Srivastava, J.*) ABDUL RAUF KHAN *v.* SANT RAM. **157 I.C. 657=8 R.O. 40=1935 O.W. N. 924.**

———S. 67—*Right to sue for sale—Puisne mortgagee.*

A mortgagee can sell the property as it stands at the date of his mortgage. When a decree is based on a puisne mortgage *ex facie* the rights under the decree are subject to prior incumbrances existing at the date of the second mortgage. (*Bisheshwar Nath and Pullan, JJ.*) MATHURA PRASAD *v.* GANSHIAM DAS. **I.R. 1931 Oudh 319=132 I.C. 767=14 O.L.J. 233= 8 O.W.N. 179=A.I.R. 1931 Oudh 157.**

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———S. 67—Security bond to Court—Enforcement in execution. *See* EXECUTION—SECURITY BOND. **60 Cal. 1298=37 C.W.N. 973.**

———Ss. 67 and 58 (b)—Receiver—Can be appointed in—Suit by simple mortgagee. *See* C. P. CODE, O. 40, R. 1—MORTGAGE-SUIT. **34 P.L. R. 950 (1).**

———S. 67—*Right to sue for sale—Usufructuary—Mortgagee empowered to sue for mortgage-money if possession interfered with—Initial failure of mortgagor to deliver possession.*

Where the deed of usufructuary mortgage provided that "if the possession of the mortgagees be interfered with in any way, the mortgagees shall have power to sue for delivery of possession or realise the entire amount from person or property," and the mortgagors failed to deliver possession of part of the mortgaged property.

Held, that the clause contemplated a case where the mortgagee was at first put in possession and then dispossessed and did not apply to the initial failure of the mortgagors to give possession of the whole property, and that the mortgagee was only entitled to sue for recovery of possession *plus* mesne profits for three years and not for sale. (*Mukerji and Bennett, JJ.*) GAURI SINGH *v.* BECHU SINGH. **I.R. 1933 All. 150=142 I. C. 779=1932 A.L.J. 1092=A.I.R. 1933 All. 97.**

———S. 67—*Right to sue for sale—Usufructuary mortgage containing personal covenant to pay.*

A suit for sale on what is purely a usufructuary mortgage is incompetent even though a personal covenant to pay is embodied in the deed. (*Addison and Agha Haidar, JJ.*) MOHAMMAD ABDULLAH *v.* MOHAMMAD YASIN. **I.R. 1933 Lah. 113 =141 I.C. 377=34 P.L.R. 245=A.I.R. 1933 Lah. 151.**

———Ss. 67 and 58 (d)—*Right to sue for sale—Usufructuary mortgage—Covenant to pay should be clear and unconditional.*

An usufructuary mortgagee as such can only continue to enjoy the mortgaged properties till redemption. He has no right to institute a suit for sale of the properties, unless the mortgage-deed contains, apart from the words merely indicating the time and the mode of redemption, an express personal covenant to pay the money. But any such covenant should be clear and unconditional in the undertaking to pay. On a construction of the deed in question.

Held, that the deed contained no personal covenant to pay, so as to entitle the plaintiff to sue for sale of the mortgaged property. (Case-law discussed.) (*Curgenven and Sundaram Chetty, JJ.*) DAMODARA SHANBHOGUE *v* CHANDAPPU PUJARY. **56 Mad. 892=1933 M.W.N. 1251=38 L.W. 161=148 I.C. 1028=6 R.M. 558=A.I.R. 1933 Mad. 613=65 M.L.J. 194.**

———S. 67 (a)—Power to appoint—Receiver—Simple mortgagee—Personal remedy given up. *See* C. P. CODE, O. 40, R. 1—MORTGAGE SUIT. **A.I.R. 1933 Mad. 447.**

———Ss. 67 (a) and 68 (c)—*Right to sue for sale—Usufructuary mortgage with right to realise mortgage-money from property.*

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Though a usufructuary mortgagee as such has no authority to sue for sale, where the personal covenant and the terms in which it is couched in the deed of mortgage disclose an intention that the mortgagee should be able to realise his mortgage-money from the property mortgaged in the event of the mortgagor failing to secure the mortgagee in the possession of the security, the mortgagee is entitled to sue for sale. (*Hasan, C. J. and Bisheshwar Nath, J.*) RAM KHILAWAN *v.* GHULAM HASAN. **8 Luck. 1190=141 I. C. 464=I.R. 1933 Oudh 60=9 O.W.N. 1027= A.I.R. 1933 Oudh 35.**

———S. 67 (d)—*Indivisibility of mortgage—Mahomedan mortgagor—Release of portion of property by mortgagee—Validity.*

It is no doubt the right equally of the mortgagor as well as of the mortgagee to keep a mortgage indivisible but this is by no means an invariable rule of law. It is primarily the interest of the mortgagee to insist that the integrity of the mortgage should not be broken up but it is always open to him to release a portion of the mortgaged property from the mortgage lien and the mortgagors cannot dispute his right so to do provided that no additional burden is cast on any porion of the mortgaged premises. Where the parties are Mahomedans the share of each of the heirs of the original mortgagor is defined by law and the mortgagee can, in such a case give up his morgage lien on the share of any one of the mortgagors by making a proportionate reduction of the mortgage-money and enforce his mortgage for the balance as against the shares of the other heirs who are on the record. 4 P.L.T. 698; 29 C.W.N. 51; 25 C.W.N. 594; 30 Cal. 755, Ref. to. (*Kulwant Sahay and Khaja Mahomed Noor, JJ.*) WALFIYATUNNISSA BEGAM *v.* CHALAKHI. **10 Pat. 341=I.R. 1931 Pat. 260=132 I.C. 100=12 Pat.L.T. 28=A.I.R. 1931 Pat. 164.**

———S. 67 (d)—*Indivisibility of mortgage—Several mortgagees—Mortgage-deed specifying amounts borrowed from each—Suit by one for his share of mortgage-money—Maintainability.*

It cannot be disputed that ordinarily a mortgage is indivisible both as regards the mortgagees and the mortgaged security. Where, however, there is severance of interests as between the mortgagees with the consent of the mortgagor, the position is different so far as the frame of the suit is concerned. Accordingly, where the mortgagor states in the deed that he has borrowed specified amounts from each set of the mortgagees and that he has created a common charge in favour of all of them on the property therein specified, it is open to each set of mortgagees to sue for their share of the mortgage-money by sale of the entire mortgaged property, impleading their co-mortgagees as defendants if the latter refuse to join as plaintiffs. (*Niamatullah and Allsop, JJ.*) LACHHMI NARAIN *v.* BABU RAM. **154 I.C. 437=7 R.A. 761=1935 A.W.R. 169=1935 A.L.J. 749=A.I.R. 1935 All. 391.**

———S. 67 (d)—*Indivisibility of mortgage—Several mortgagees—Suit by one for his share of debt abandoning the security—Maintainability—Proper course.*

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A suit brought by one of several mortgagees to recover his share of the mortgage-debt is not maintainable. The only proper course is for the co-mortgagee to implead the other mortgagees as defendants and sue for a decree for the entire amount or the sale of the entire mortgaged property. He cannot get a decree for his share of the mortgage-debt or a sale of a part of the mortgaged property. The same principle applies even where one of the mortgagees chooses to abandon the security. (*Sulaiman, C. J. and Ganga Nath, J.*) RAM SARUP *v.* KUNJI LAL. **159 I.C. 48=8 R.R. 383=1935 A.L.J. 188 =1935 A.W.R. 116=A.I.R. 1935 All. 263.**

———**S. 67 (d)**—*Indivisibility of mortgage—Suit for share of mortgage-money—Decree in plaintiff's favour.*

Where the plaintiffs sue for their proportion of the mortgage-money, the other persons who could have any possible interest in the mortgage security being added as party defendants, there is nothing in S. 67 (*d*), T. P. Act which prevents the passing of a decree in favour of the plaintiffs. (*Guha, J.*) HAIDAR ALI KHONDKAR *v.* MAHOMED SAFIUDDIN KAZI. **I.R. 1932 Cal. 28 =134 I.C. 1068=54 C.L.J. 113=A.I.R. 1932 Cal. 34.**

———**S. 67-A**—*If retrospective.*

S. 67-A does not apply to mortgages executed before 1st April, 1930. A person in whose favour a mortgage was executed before 1st April, 1930, A person in whose favour a mortgage was executed before 1st April, 1930, acquired the right or title of a mortgagee before that date and therefore any remedy or any proceeding in respect of such right or title in a suit on that mortgage would be in no way affected by S. 32 of Act 20 of 1929 and could be enforced or instituted as if Act 20 of 1929 had never been passed. 30 N.L.R. 265=144 I.C. 326=A.I.R. 1933 Nag. 171, Overruled. (*Grille, J. C., Subhedar and Pollock, A. J. Cs.*) LAXMIBAI *v.* KONDBA. **31 N. L.R. Supp. 1=8 R.N. 139=159 I.C. 758= A.I.R. 1935 Nag. 226 (F.B.).**

———**S. 67-A**—*If retrospective.*

The provisions of S. 67-A can have no application to a mortgage made or effected before 1st April, 1930. (*Ba L and Dunkley, JJ.*) V. R. S. CHETTIAR FIRM *v.* YA YA. **150 I.C. 678 =7 R.R. 6 (1)=A.I.R. 1933 Rang. 377.**

———**S. 67-A**—Applicability—Statutory charges under S. 205, Calcutta Municipal Act. *See* CALCUTTA MUNICIPAL ACT. S. 205. **A.I.R. 1934 Cal. 862.**

———**S. 67-A**—*Applicability—Parties not the same.*

The rule enunciated in S. 67-A is not applicable when the parties to the two mortgages are not the same. In a case in which there were two mortgages on the same property, there were in the first deed three mortgagors, one of whom was not a party to the second deed. There were also three mortgagees, of whom only one was a party to the second deed and the second plaintiff who was a mortgagee under the second deed was not a party to the first one.

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Held, it was at least doubtful if the plaintiffs could sue on both deeds. (*Carr, J.*) KO AUNG BYE *v.* KO PO KYAING. **I.R. 1931 Rang. 149 =131 I.C. 725=A.I.R. 1931 Rang. 208.**

———**S. 67-A**—*Construction—Principle.*

Section 67-A of the Transfer of Property Act is one which restricts the rights of mortgagees and therefore must be construed strictly. (*Lort Williams and Costello, JJ.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUN CHANDRA SINGHA. **61 Cal. 1047=60 C.L.J. 312=153 I.C. 972= 7 R.C. 414=38 C.W.N. 917=A.I.R. 1934 Cal. 862.**

———**S. 67-A**—Applicability—Suit on two security bonds executed by same debtor in favour of same creditor. *See* COURT-FEES ACT, S. 17 —APPLICABILITY. **68 M.L.J. 316.**

———**(as amended), S. 67-A**—*Object—Applicability of section to charge-holder.*

The intention of S. 67-A, T. P. Act is to compel a mortgagee who is entitled to the same kind of decree in respect of several mortgages over the property of the same mortgagor to consolidate the mortgages and enforce them in a single suit provided he was not contracted out of his obligation. The same obligation is placed upon a charge-holder under S. 100; and the words "so far as may be" are inserted there because the legislature realised that some of the provisions dealing with mortgages may be inapplicable to charges. The proviso that there may be a contract to the contrary is applicable to a charge by act of parties though it is inapplicable to a charge by operation of law. (*McNair, J.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUN CHANDRA SINGHA. **60 Cal. 1470=149 I.C. 24 (2)=6 R.C. 547=38 C.W.N. 153=A.I.R. 1934 Cal. 325.**

———**S. 67-A**—*If retrospective.*

Section 67-A is not retrospective. It does not apply to a mortgage executed before the 1st April, 1930. (*Carr, J.*) KO AUNG BYE *v.* KO PO KYAING. **I.R. 1931 Rang. 149=131 I.C. 725=A.I.R. 1931 Rang. 208.**

———**S. 67-A**—*If retrospective.*

Quaere.—Whether S. 67-A is retrospective. (*Mahomed Noor, J.*) DEONANDAN PRASAD SINGH *v.* PEARAY SINGH. **156 I.C. 479=8 R.P. 8= A.I.R. 1935 Pat. 365.**

———**S. 67-A**—*Object of.*

The policy of the legislature in enacting S. 66-A of the T. P. Act is that the question between the mortgagor and mortgagee about all the mortgages held by the latter be tried once for all in the same suit.

Quaere: Whether S. 67-A is retrospective? (*Mahomed Noor, J.*) DEONANDAN PRASAD SINGH *v.* PEARAY SINGH. **156 I.C. 479=8 R.P. 8 =A.I.R. 1935 Pat. 365.**

———**S. 67-A**—*Applicability—Two mortgages of different dates.*

A person who holds two mortgages of different dates must file a consolidated suit on both the mortgages and his omission to sue precludes him from filing a second suit. (Case-law discussed.) (*Niyogi and Grille, A.J.Cs.*) GADIRAM *v.* PUNAMCHAND. **30 N.L.R. 265=I.R. 1933**

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Nag. 232=144 I.C. 326=A.I.R. 1933 Nag. 171.

———S. 68—*Applicability—Anomalous mortgage.*

The rights and liabilities of the parties to an anomalous mortgage, *viz.*, a combination of three mortgages, usufructuary, simple and mortgage by conditional sale are, according to S. 98, determined by their contract as evidenced in the mortgage deed. The provisions of S. 68 have no application thereto. (*Wazir Hasan C.J. and Bisheshwar Nath, J.*) RAM SARUP SINGH *v.* GAYA PRASAD. **I.R. 1932 Oudh 334=139 I.C. 61=9 O.W.N. 280=A.I.R. 1932 Oudh 178.**

———S. 68—*Applicability—Priority lost by mortgagee's mistake of law.*

A subsequent mortgagee took a mortgage in his favour knowing of a previous but unregistered mortgage in favour of another mortgagee. This transaction was done under the impression that even if the prior mortgagee was able to obtain registration of his deed, yet the deed in favour of the subsequent mortgagee would take precedence as it was first registered.

Held, that S. 68, Transfer of Property Act had no application as that section was applicable only to cases where the security was lost to the mortgagee otherwise than by his own fault. 7 I.C. 251, Dist. (*Addison and Agha Haidar, JJ.*) JOWAND SINGH *v.* SAWAN SINGH. **149 I.C. 1030=6 R.L. 782=A.I.R. 1933 Lah. 836.**

———S. 68—Suit under—Limitation—Starting point—Cause of action. *See* LIMITATION ACT, ARTS. 116 AND 120. **151 I.C. 448.**

———S. 68—*Scope.*

Section 68 only entitles a mortgagee to sue for the mortgage money when he is entitled to possession of the mortgaged property if the disturbance of such possession takes place at the instance of the mortgagor or if some person who derives title through the mortgagor. The mortgagor cannot be held liable for the tortuous acts of strangers who are not under his control. (*Jai Lal, J.*) **134 I.C. 1116=I.R. 1932 Lah. 12 =32 P.L.R. 561=A.I.R. 1931 Lah. 694.**

———S. 68—Usufructuary mortgage—Application for personal decree—Sustainability. *See* C. P. CODE, O. 34, R. 6—USUFRUCTUARY MORTGAGE. **13 Lah. 259.**

———S. 68 (i) (a)—*Anomalous mortgage—Right to money decree.*

Where the mortgage was partly usufructuary and there was an express promise to pay the sum on a particular date and to redeem the land on that date,

Held, that the mortgage was an anomalous one and that as the land could not be sold under S. 15, Land Alienation Act, in execution of any decree the mortgagee was entitled to give up the security and to obtain a simple money decree for the sum sued for. (*Addison and Din Mahomed, JJ.*) QADIR PARAST KHAN *v.* MEHR NUR MAHOMED. **16 Lah. 612=158 I.C. 206=37 P.L.R. 709=A.I.R. 1935 Lah. 103.**

———S. 68 (1) (a)—*Action for mortgage-money—Implied covenant.*

T. P. ACT, S. 68.

Any action claiming the mortgage-moneys simpliciter must be made under S. 68 (*a*) of the T. P. Act, if at all and there is no implied covenant creating personal liability. (*Wort, J.*) KIRTI NARAYAN SINGH *v.* SURENDRA MOHAN SINGH. **7 R.P. 269=152 I.C. 897=A.I.R. 1934 Pat. 624.**

———S. 68 (1) (a)—*Simple mortgage—Conditional clause regarding possession—Personal covenant to pay interest, if negatived.*

The mere fact that the mortgagee is entitled to take possession in default of payment of the principal does not convert an otherwise simple into an usufructuary mortgage. Where a mortgage is simple it must be held to carry with it a personal covenant to pay the principal and interest. (*Coldstream and Bhide, JJ.*) SOCHET SINGH *v.* HADAYAT ULLAH. **13 Lah. 508=I.R. 1933 Lah. 44=140 I.C. 363=33 P.L.R. 815 =A.I.R. 193 Lah. 630.**

———S. 68 (1) (b)—*Applicability—Conditions—Conduct of mortgagor regarding transaction independent of mortgage, if a default or wrong.*

If S. 68 (*b*) is to be applied there must be proof that the reduction in the security was caused by the wrongful act or default of the mortgagor. Where the mortgage deed provided that the mortgagee was to obtain possession but by a separate contract the parties agreed that the mortgagor should continue in possession on payment of a certain rate, but the mortgagor subsequently moved the Revenue Court and got the rate of rent reduced and thereupon the mortgagee sued under S. 68 (1) (*b*).

Held, that the transactions of mortgage and lease were quite independent, that the mortgagor's conduct in having the rent reduced was not a default or a wrong and that the mortgagee was not entitled to succeed. (*Pullan and Niamatullah, JJ.*) BOOCHI *v.* NATHI RAM. **I.R. 1931 All. 642=133 I.C. 402=A.I.R. 1932 All. 51.**

———S. 68 (1) (b)—*Suit under—Limitation—Starting point—Mortgage providing for three months' notice for re-payment—Power of sale on default—Sale of property by prior mortgagee—Deficiency.*

Certain mortgaged properties were brought to sale by a prior mortgagee, but the price fetched was not sufficient to pay the whole of the debt. Plaintiff who was a second mortgagee then filed a suit claiming that the mortgagor had failed to pay the amount and that he (plaintiff) had lost his security in consequence of the wrongful act or default of the mortgagor in not paying up the interest or redeeming the prior mortgage. The second mortgage bond (*i.e., plaintiff's*) was an ordinary on-demand bond, which provided *inter alia,* that on three months' notice the mortgagor would pay the amount due and that in default the mortgagee or his nominees would be entitled to sell the property under the T. P. Act.

Held, that though under S. 68 (1) (*b*) ,T. P. Act, the mortgagee may require the mortgagor to give sufficient security for his debt, and on default of the mortgagor to sue for the mortgage-money, yet there was a condition precedent to such a suit, namely, a notice to the mortgagor

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requiring him to furnish another sufficient security for the debt; and in the absence of proof of such a notice it cannot be held that limitation did not arise until the property was sold in exercise of the power of sale conferred on the mortgagee, the bond being only an on-demand bond. (*Beasley, C.J. and Butler, J.*) KAMALAMBAL *v.* PURUSHOTHAM NAIDU. **152 I.C. 437=40 L.W. 659=7 R.M. 228=A.I.R. 1934 Mad. 644=67 M.L.J. 499.**

———**S. 68 (1) (b)**—*Right to sue for mortgage-money on dispossession barred—Further cause of action.*

Where a usufructuary mortgagee is dispossessed soon after entering into possession of the property but his right to sue for the mortgage-money on such dispossession is allowed to be barred by time, he has no further cause of action to sue for the mortgage-money on expiry of the term. (*Wort, J.*) KIRTI NARAYAN SINGH *v.* SURENDRA MOHAN SINGH. **152 I .C. 897=7 R.P. 269=A.I.R. 1934 Pat. 624.**

———**S. 68**—*Construction—"Mortgagor" includes also heirs or assignees.*

It would be placing much too narrow a construction on S. 68 to limit the word "mortgagor" to the actual mortgagor himself. That section applies equally to the heir or assignee of the equity of redemption according to the ordinary rules of construction of Statutes.

On a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of a purchaser to indemnify the vendor against personal liability on foot of the mortgage. (*Ross and Chatterji, JJ.*) ..JANKI SARAN SINGH *v.* SYED MAHOMED ISMAIL. **I.R. 1932 Pat. 241 =139 I.C. 525=13 Pat.L.T. 373=A.I.R. 1932 Pat. 273.**

———**S. 68 (1) (c)**—*Suit under—Limitation—Starting point—Mortgagor's inability to pay land revenue.*

Where the mortgagee is deprived of his security in consequence of the default of the mortgagor in paying the land revenue due on the land, time would not begin to run against the mortgagee until the default in payment of land revenue, which resulted in the sale of the land, took place. Inability of the mortgagor is a default within S. 68 (1) (*c*). (*Dunkley, J.*) ATAGAN *v.* MAUNG PO PEIK. **151 I.C. 426=7 R.R. 77=A.I.R. 1934 Rang. 227.**

———**S. 68 (1) (d)**—*Applicability—Mortgage by conditnonal sale.*

In a mortgage by conditional sale, in the absence of a specific agreement to that effect, it is not the duty of the mortgagor to put the mortgagee in possession of the property after the expiry of the stipulated period and the mortgagee is not entitled to sue for the mortgage-money for the failure of the mortgagor to do so. (*Bhide, J.*) BADRI DAS *v.* BESU. **6 I.R .(Lah.) 62=34 P.L.R. 1055=145 I.C. 159=A.I.R. 1933 Lah. 174.**

———**S. 68 (1) (d)**—*Right to sue—Mortgage set aside in suit under S. 60, Punjab Tenancy Act.*

T. P. ACT, S. 70.

Where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord in a suit brought under S. 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage-money. (*Tek Chand, Abdul Rashid and Rangi Lal, JJ.*) LABH SINGH *v.* JAMNUN. **15 Lah. 751=7 R.L. 100=151 I.C. 1=36 P.L.R. 233=A.I.R. 1934 Lah. 853 (2) (F.B.).**

[*F.* 36 P.L.R. 478 (479).]

———**S. 69**—*Invalid mortgage—Power of sale.*

Section 69, T. P. Act, contemplates a sale in professed exercise of a power under a mortgage, which is a valid mortgage; and if the mortgage is not a valid one owing to invalid attestation, there cannot be a professed exercise of sale under the mortgage. (*Blackwell, J.*) HARKISANDAS *v.* DWARKADAS. **37 Bom.L.R. 913=161 I.C. 374=8 R.B. 342=A.I.R. 1936 Bom. 94.**

———**S. 70**—*Accession—Electric installation on mortgaged property.*

Improvements, *e.g.*, electric installation effected on the mortgaged property which are in the nature of fixtures and immoveable are accession to the mortgaged property and are liable for the mortgage charge. (*Coldstream and Bhide, JJ.*) PUNJAB AND SIND BANK, LTD. *v.* KISHEN SINGH GHULAB SINGH. **16 Lah. 881=156 I.C. 795 (2)=37 P.L.R. 883=8 R.L. 20=A.I.R. 1935 Lah. 350.**

———**S. 70**—Accession—Meaning. *See* S. 63 —ACCESSION. **53 All. 334.**

———**S. 70**—*Accession—Meaning of—Mortgage of service inam free of assessment—Subsequent enfranchisement.*

By the terms of a deed of mortgage executed by the appellant in favour of the respondent, the mortgagee was to remain in possession of the property, for twelve years, and out of Rs. 30 the estimated profits of the property was to appropriate Rs. 18 towards interest and pay Rs. 12 to the mortgagor. Before the expiration of the twelve years the service inam, which was the subject-matter of the mortgage and was free of assessment, was enfranchised and converted into ryotwari tenure and the ordinary assessment imposed on it.

Held, (i) the enlargement of the inamdar's interest in the property consequent on the enfranchisement was an "accession" to the property. The term "accession" is not to be confined to physical acquisitions or additions to the mortgaged property. It may also be used to denote the acquisition by the person in possession of outstanding interests in the property. 5 C. 198 (P.C.); 33 C. 1212; 25 A. 46; 4 I.C. 357, Ref. to.

(ii) Such accession formed an addition to the mortgagee's security which could only be held on payment of the Government revenue. (*Krishna Pandalai, J.*) RAMAMURTHI *v.* ADENNA. **1931 M.W.N. 595.**

———**S. 70**—*Accession—Mortgage of land and house—Subsequent planting of machinery for permanent use.*

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Where the land containing a building is mortgaged and machinery is subsequently planted in the building for permanent use, such machinery is an accession to the mortgaged property within the meaning of S. 70, T. P. Act. (*Das and Brown, JJ.*) R. M. P. C. CHETTYAR FIRM *v.* SIEMDNS, LTD. **11 Rang. 322=147 I.C. 283=6 R.R. 158=A.I.R. 1933 Rang. 195.**

———S. 70—*Accession.*

A semi pucca house built on mortgaged land is an accession to the land. (*Baguley and Mackney, JJ.*) V. E. A. CHETTYAR FIRM *v.* SEIN HTAUNG. **159 I.C. 1038=A.I.R. 1935 Rang. 420.**

———S. 70—*Accession—Clearing of new land.*

When the accretion to the original holding by clearing new land is considerable, the new clearing is not an accretion within the meaning of S. 70. (*Baguley, J.*) TAY GYI *v.* MAUNG YAN. **6 I.R. (Rang.) 117=146 I.C. 674=A.I.R. 1933 Rang. 81.**

———S. 70—*Applicability—Representatives of mortgagor and mortgagee.*

Although S. 70 is applicable as between the mortgagor and the mortgagee only and not as against third party, there is no reason for restricting the scope of the section to accessions made by the mortgagor personally. The representatives of the mortgagee and the mortgagor would be governed equally by the rule, it being immaterial whether they are merely heirs or subsequent transferees. A.I.R. 1931 All. 277, Appl. (*Baguley and Mackney, JJ.*) V. E. A. CHETTYAR FIRM *v.* SEIN HTAUNG. **159 I.C. 1038=A.I.R. 1935 Rang. 420.**

———S. 70—*Applicability—Representatives in interest of mortgagor and mortgagee—Strangers.*

Section 70 regulates not only the rights and liabilities of mortgagors and mortgagees personally but also the rights and liabilities of the representatives or successors-in-interest of the mortgagors and mortgagees respectively. The section, however, does not apply to the case of strangers. (*Sulaiman, King and Sen, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 27 (F.B.).**

———S. 70—*Accession—Accrual of sir rights in khudkasht land.*

A mortgagee can only obtain proprietary rights over the land, which was khudkasht at the time of his mortgage, but subsequently has been declared *sir* at the settlement and the cultivating rights in such land will remain with the mortgagors who will become occupancy tenants under S. 49 (1), Tenancy Act, although in the absence of the special enactment to the contrary the accrual of *sir* rights in khudkasht land would ordinarily be an accretion to the mortgaged property within the meaning of S. 70 T. P. Act. (Case-law discussed.) (*Staples, A.J.C.*) RAJESHWAR *v.* MT. RUKHMA. **I.R. 1933 Nag. 127=142 I.C. 603=29 N.L.R. 142=A.I.R. 1933 Nag. 104.**

———S. 70—Applicability—Auction purchaser on earlier mortgage erecting buildings—Suit on later mortgage—Right to building. *See* MORTGAGE—IMPROVEMENTS. **53 All. 334 (F.B.).**

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———S. 70—*Want of notice—If material.*

Per *Sulaiman and King, JJ.*—The question of want of notice is of no significance so far as S. 70 is concerned. (*Sulaiman and King, JJ.*) NANNU MAL *v.* RAM CHANDER. **53 All. 334=I.R. 1931 All. 497=132 I.C. 401=1931 A.L.J. 273=A.I.R. 1931 All. 277 (F.B.).**

———S. 70—Scope—Comparison. *See* T. P. ACT, SS. 51 AND 70—SCOPE. **53 All. 334.**

———S. 70—*Accession—Mortgage of undivided share—Partition amongst co-sharers—Different share allotted to mortgagor—Improvements on substituted share.*

The improvements effected and new buildings constructed on properties allotted to the mortgagor at a partition amongst co-sharers must be treated as accessions to mortgaged properties and as such available for the satisfaction of the mortgagee's mortgage debt under S. 70, Ill. (*b*). 1 I.A. 106; 101 P.R. 1894; 20 Cal. 533; 26 Cal. 434; 24 All. 483; 35 Cal. 388; 6 C.L.J. 46 and 98 I.C. 1039, Fol. (*Tek Chand and Monroe, JJ.*) AMAR SINGH *v.* BHAGWAN DAS. **14 Lah. 749=35 P.L.R. 550=149 I.C. 104=6 R.L. 652 (2)=A.I.R. 1933 Lah. 771.**

———S. 72—*Money expended in supporting title of mortgagor—Addition to the mortgage money.*

A mortgagee in possession is entitled, by virtue of S. 72, to add to the principal money of his mortgage any money properly expended by him in supporting the title of his mortgagor. An express agreement is not necessary for this purpose. (*Sir George Lowndes.*) PARSOTIM THAKUR *v.* LAL MOHAR THAKUR. **58 I.A. 254=10 Pat. 654=54 C.L.J. 1=132 I.C. 721=35 C.W.N. 786=1931 A.L.J. 513=33 Bom.L.R. 1015=10 Pat. 654=I.R. 1931 P.C. 209=1931 M.W.N. 929=12 Pat.L.T. 683=34 L.W. 76=A.I.R. 1931 P.C. 143=61 M.L.J. 489 (P.C.).**

———S. 72—Gilandazi expenses—Agreement between mortgagor and mortgagee to share equally—Stipulation that mortgagor to pay share of expenses borne by mortgagee along with mortgage money—Effect on rights of mortgage. *See* T. P. ACT, SS. 60 AND 72—CLOG ON REDEMPTION. **16 Pat.L.T. 91=A.I.R. 1935 Pat. 157.**

———S. 72—*Payment of revenue—Right to add money paid, to principal is optional.*

Under S. 72, the mortgagee may, when he has paid land revenue for the preservation of the mortgaged property, add the money so paid to the principal money due on the mortgage and charge the mortgage rate of interest thereon, but this right is a permissive right which can be exercised by him at his option. It is not imperative on the mortgagee to add this amount to the amount due under his mortgage; he can treat it independently as a simple money debt due under S. 69, Contract Act, if he desires to do so. (*Dunkley, J.*) VEERAYYA KONAR *v.* M. V. E. V. E. CHETTYAR FIRM. **160 I.C. 469=8 R.R. 389=A.I.R. 1935 Rang. 438.**

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———**S. 72**—*Payment of revenue—Mortgage decree-holder—First charge—Right to.*

The interest of the decree-holder in the security directed to be sold is pending sale, at least as great as that of a mortgagee before decree. The fact of his having obtained a mortgage decree before his claim to a lien arose is no sufficient reason for depriving him of such lien in respect of what are really salvage payments, payments made to prevent a sale for arrears of revenue. For such payments, he is entitled to a first charge on the sale proceeds in his mortgage suit. (*Sir John Wallis.*) MONOHAR DAS *v.* HAZARIMULL...**58 I.A. 341=59 Cal. 463=I.R. 1931 P.C. 293=134 I.C. 645=1931 M.W.N. 1163=34 L.W. 472=33 Bom.L.R. 1345=1931 A.L.J. 800=35 C.W.N. 1040=54 C.L.J. 125=8 O.W.N. 893=A.I.R. 1931 P.C. 226=61 M.L.J. 343 (P.C.).**

———**S. 72**—*Payment of revenue—Right to add same to principal.*

A service inam which was mortgaged was enfranchised. The mortgagor got the patta but did not pay the assessment and the mortgagee in possession was obliged to pay the same.

Held, that the payment of the revenue was necessary to prevent "destruction of sale of the security" and the mortgagee was entitled to add it to the principal money due under the mortgage. (*Krishnan Pandalai, J.*) RAMAMURTHI *v.* ADENNA. **1931 M.W.N. 595.**

———**S. 72**—Permanent lease—Right of mortgagee to enforce. *See* MORTGAGE—LEASE. **A.I.R. 1931 Bom. 399.**

———**S. 72**—*Payment of rent by mortgagee claiming to be owner—Right to add to principal amount.*

The mortgagee has a right to add to the principal money payments made by him towards rent which the mortgagor was bound to pay. This statutory right is not affected by the fact that he professed to make those payments not as mortgagee but as owner under a purchase found by the Court to be invalid. As soon as the conveyance failed, the only capacity he could have occupied was that of a mortgagee. (1879) 4 A.C. 391; *Lord St. Leonards, etc., Society v. Richards,* (1841) 1 Ir. and War. 334. (*Ross and Scroope, JJ.*) FOODENI SAH *v.* AZHAR HUSSAIN KHAN. **10 Pat. 210=I.R. 1931 Pat. 254=131 I.C. 814=A.I.R. 1931 Pat. 325.**

———**S. 72**—*Right to grant permanent lease.*

A mortgagee cannot give a permanent lease. (*Oakden, S.M. and Smith, J.M.*) MAHOMED MIAN KHAN *v.* MAHOMED ISMAIL KHAN. **14 R.D. 585.**

———**S. 72**—*Usufructuary mortgagee—Dispossession from property—Right to interest.*

Where a usufructuary mortgagee of certain properties was dispossessed from some of the items but he did not take steps to obtain additional security for the debt.

Held, that the mortgagee was not entitled to claim interest on the mortgage money on account of such dispossession. 29 I.A. 148, Rel. on. (*Guha and Bartley, JJ.*) PRASANNA KUMAR HALDAR *v.* GIRISH CHANDRA GHOSH. **149 I.C. 667=6 R.C. 613=37 C.W.N. 1162=58 C.L.J. 80=A.I.R. 1934 Cal. 149.**

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———**S. 72, proviso**—*Scope and effect of—Payment of taxes—Demand or refusal, necessary.*

Where mortgagee pays taxes on the mortgaged property and claims the amount along with the security advanced, it is necessary for him to show not only that he has expended sum which he claims but also that that expenditure was necessary in the sense that he had called upon the mortgagor to pay and he failed to take proper and timely steps to do so. Proviso to S. 72, T. P. Act, means that whenever a payment is made which it is intended to add to the security there must be given an oportunipty to the mortgagor to pay and a failure by him to do so. (*Braund, J.*) U SIN *v.* U TIN SI. **160 I.C. 314=8 R.R. 372=A.I.R. 1935 Rang. 473.**

———**S. 73 (as amended by Act XX of 1929)**—*Doctrine of substitution—Sale of part of mortgaged property for arrears of revenue—Right of mortgagee to proceed against mortgaged property as well—Bengal Revenue Sale Act* (1859), *S.* 54.

Under the law as it stood before the amendment of 1929, the mortgagee had the right to the surplus sale proceeds only in a case where the whole of the estate has been sold for arrears of revenue. Under S. 73 of the T. P. Act, as amended in 1929, the right of substitution has been conferred on him even where a portion only of the property has been so sold. But there is nothing in the section precluding the right of mortgagee to proceed against the mortgaged property also where by reason of S. 54 of the Bengal Revenue Sale Act, the sale of a portion of the estate was subject to encumbrance and the mortgage rights still subsisted. (*Courtney Terrell, C. J. and Kulwant Sahay, J.*) KAPURI SAHU *v.* MATHURA DAS. **6 R.P. 524=148 I.C. 972=15 Pat.L.T. 95=A.I.R. 1934 Pat. 209.**

———**S. 73**—*Surplus sale proceeds—Mortgagor's dues to Crown—If entitled to priority.*

A property which was under a mortgage was sold by the Government for arrears of land revenue. Subsequent to the mortgage, the property was pledged to the Government to secure an agricultural loan advanced to the mortgagor, by the Government. After the revenue sale of the property, there was a surplus amount remaining which the Government wanted to attach to satisfy the loan it had advanced.

Held, that so much of the surplus sale proceeds as amounted to the sum due to the mortgagees, were in effect, his property. The dues of the Crown were not payable out of the property of a prior mortgagee of the party who was indebted to the Crown. A.I.R. 1934 Rang. 8; A.I.R. 1934 Rang. 321; 29 All. 537 and 34 All. 223, Ref. (*Baguley and Mackney, JJ.*) U THET *v.* TOWNSHIP OFFICER, KAWA. **160 I.C. 130=8 R.R. 342=A.I.R. 1935 Rang. 409.**

———**S. 73 (3)**—*Prior encumbrance—Landlord and tenant—Charge for rent—Enforceability against subsequent mortgagee.*

Landlord had a first charge for rent. The leasehold was mortgaged by the lessee. The landlord enforced his charge for rent, got a decree and the leasehold property sold in execution

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of decree was purchased by the mortgagee. The landlord claimed out of the surplus sale proceeds rent up to date of sale.

Held, that the relationship of landlord and tenant continued up to the date of sale and not merely till the date of suit and he was entitled to rent up to the date of sale for which he was prior encumbrancer within the meaning of S. 73 (3). (*James, J.*) CENTRAL BANK OF INDIA, LTD. *v.* SACHINDRA MOHAN GHOSH. **6 I.R. (Pat.) 6=144 I.C. 706=A.I.R. 1933 Pat. 257.**

———**S. 74 (old Act)**—*Applicability.*

The section does not apply to a case where a purchaser from the widow having no interest in the equity of redemption pays off a mortgage on the property which has been subsequently sold to a third person by the mortgagor. The section deals only with the right of subrogation, declared in favour of a subsequent mortgagee by his discharging a prior mortgage. (*Sundaram Chetty, J.*) PICHAIYAPPA CHETTY *v.* GOVINDARAJULU MUDALY. **130 I.C. 506=33 L.W. 78=1930 M.W.N. 1190=A.I.R. 1931 Mad. 110.**

———**S. 74 (old Act)**—*Applicability—Sale in execution of mortgage decree—Rights of second mortgagee purchaser.*

Where the second mortgagee purchases at a sale held in pursuance of a decree passed in a mortgage suit properly constituted, there is no reason to suppose that his rights are to be regulated by S. 74 or are confined to that section only. (*Mukerji and Guha, JJ.*) KALIPADA MUKERJEE *v.* BASANTA KUMAR DUTTA. **59 Cal. 117=35 C.W.N. 877=138 I.C. 177=I.R. 1932 Cal. 427=A.I.R. 1932 Cal. 126.**

———**S 74 (old Act)**—*Right of subrogation—Principles applicable.*

The defendant executed a simple mortgage of his properties to one *S* in 1904. In 1912 he executed another simple mortgage deed in favour of *P* and directed the latter to discharge the prior debt. On the same date he executed a usufructuary mortgage over the same property in favour of the plaintiff. *P* had failed to pay *S* with the result that the latter sued on the mortgaged property and realised the debt in Court sale. Plaintiff deposited the decree amount under O. 21, R. 89, C. P. Code, and sued the defendant mortgagor for recovering the amount. It appeared that *P* who had been directed to discharge the prior mortgage was a benamidar of the plaintiff. *Held*, that the plaintiff was subrogated to the rights of the prior mortgagee by reason of his payment and that he was entitled to recover the amont paid from the defendant. *Held*, further, that the defendant's right against *P* was to institute a suit to recover compensation for breach of contract. Principles of subrogation discussed. (*Sen and Niamatullah, JJ.*) NARAIN PERSHAD *v.* NARAIN SINGH. **52 All. 1037=I.R. 1931 All. 407=131 I.C. 599=1930 A.L.J. 1577 =A.I.R. 1931 All. 40.**

———**S. 74 (old Act)**—*Mortgage sale—Payment by second mortgagee—Rights of second mortgage auction-purchaser.*

Where a puisne mortgagee pays off a prior

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mortgagee, he would be subrogated to the position of the prior mortgagee, but that does not mean that the right of redemption on the part of the mortgagor judgment-debtor still remained in him or that even after the sale which has been confirmed he would be competent to enforce it as against the purchaser or purchasers at the sale. Even assuming that he still possesses that right, he could not prevent the purchasers from getting delivery of possession. (*Mukerji and Guha, JJ.*) KALIPADA MUKERJI *v.* BASANTA KUMAR DUTTA. **35 C.W.N. 877=59 Cal. 117=138 I.C. 177 =I.R. 1932 Cal. 427=A.I.R. 1932 Cal. 126.**

———**S. 74 (old Act)**—*Applicability—Payment of prior mortgagee by vendee, out of purchase-money reserved.*

If a person purchases property subject to two prior mortgages and the bulk of the price is retained by him for their discharge, his payment of the first mortgage would not entitle him to set up that mortgage as a shield against the claim of the second mortgagee, inasmuch as payment by him is really a payment of the mortgagor. Moreover the doctrine of subrogation rests on the presumed intention to keep alive the first mortgage as a shield against the puisne incumbrancer, but that presumption must be deemed to be rebutted when the purchase in question contemplates the discharge of the puisne incumbrancer by payment out of the purchase-money. (*Shadi Lal, C.J. and Abdul Qadir, J.*) TULSI RAM *v.* RADHA KISHEN. **6 I.R. (Lah.) 264=146 I.C. 679 =A.I.R. 1933 Lah. 810.**

———**S. 74 (old Act)**—*Subrogation—Discharge of prior mortgage-decree.*

Where the major portion of the consideration of the mortgage has gone towards the full satisfaction of the decree on the previous mortgage, the subsequent mortgagees under S. 74 by subrogation acquire the rights of the prior mortgagee to the extent of the amount so expended. (*Subhedar, A.J.C.*) HARLAL *v.* LALA PRASAD. **14 N.L.J. 77=I.R. 1931 Nag. 123=133 I.C. 395=A.I.R. 1931 Nag. 138.**

———**S. 74 (Old Act)**—*Distinction between rights of puisne mortgagee and co-mortgagor.*

Distinction between the right of subrogation conferred on the puisne mortgagee and co-mortgagor pointed out. (*Rankin, C. J., C. C. Ghose, Mukerji, Mallik and Guha, JJ.*) UMAR ALI *v.* ASMAT ALI. **58 Cal. 1167=I.R. 1931 Cal. 409 =130 I.C. 889=53 C.L.J. 154=35 C.W.N. 409=A.I.R. 1931 Cal. 251 (F.B.).**

———**S. 74 (Old Act)**—*Subrogation—A principle of equity.*

The doctrine of subrogation proceeds upon principles of equity and cannot be availed of by a person who has not performed his own obligation. (*Shadi Lal, C. J. and Abdul Qadir, J.*) TULSI RAM *v.* RADHA KISHEN. **6 I.R. (Lah.) 264=146 I.C. 679=A.I.R. 1933 Lah. 810.**

———**S. 74 (Old Act)**—*Applicability—Payment by stranger.*

A stranger who has no previous interest in the property cannot, by paying off the mortgage on the property without the consent and much less

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against the wishes of the mortgagor, claim to be subrogated to the rights of the mortgagee. 47 M.L.J. 316; 89 I.C. 116, Not foll.; 40 M.L.J. 114; 111 I.C. 690, Foll.; 36 M. 426, Ref. (*Beasley, C. J. and Walsh, J.*) ADARI SANYASI *v.* NOOKALAMMA. **54 Mad. 708=I.R. 1931 Mad. 535=131 I.C. 487=34 L.W. 556=A.I.R. 1931 Mad. 592.**

———**S. 74 (Old Act)**—*Subsequent mortgagee—Money retained for paying off prior mortgage—Excess, if any, to be paid by mortgagor—Excess paid by mortgagee—Priority in respect of.*

Where the mortgage-deed in suit was executed expressly with the object of discharging the prior usufructuary mortgage and money was left with the mortgagee for the purpose and the parties, contemplating the possibility of the money left with the mortgagee proving insufficient for the purpose, covenanted that if such a contingency arose, the mortgagors would be personally liable for it, the intention of the parties should be held to be that the prior mortgage should be extinguished. There is no question of subrogation and the mortgagee, by paying the excess amount, is not entitled to claim the amount as a prior charge. (*Wazir Hasan, C. J. and Bisheshwar* Nath, *J.*) SAID AHMAD *v.* RAJA BARKHANDI MAHESH PRATAB NARAIN SINGH. **8 Luck. 40=I.R. 1932 Oudh 339=I.C. 64=9 O.W.N. 253=A.I.R. 1932 Oudh 255.**

———**S. 75 (Before amendment)**—*Puisne mortgagee not party to suit by earlier simple mortgagee—Purchase by simple mortgagee—Puisne mortgage barred—Suit by puisne mortgagee to redeem prior mortgage—Right to possession.*

Defendants 1 and 2 were the first and simple mortgagees and the plaintiffs subsequent mortgagees. Defendants 1 and 2, in a suit to enforce their mortgage, purchased the property. The plaintiffs were not impleaded in that suit but their right to enforce their mortgage was barred by time under Art. 132 of the Limitation Act but they brought a suit to redeem the property from the defendants as prior mortgagees in possession.

Held, that the effect of the sale was, not to convert the defendants into mortgagees in possession, because as simple mortgagees they were not entitled to possession, but to make them the holders of equity of redemption. So even if the plaintiffs were allowed to redeem the defendants, they could only be entitled to take a transfer of the security but without any right to possession. That would not, however, help the plaintiffs any way as in enforcing their second mortgages, the bar of limitation would as before apply. (*Beaumont, C. J. and Nanavati, J.*) NATHMAL *v.* NILKANTH. **141 I.C. 811=I.R. 1933 Bom. 163=34 Bom.L.R. 1519=A.I.R. 1933 Bom. 25.**

———**S. 75 (Before amendment)**—*Puisne mortgagee—Right to enforce mortgage barred—Right to redeem prior mortgage.*

Obiter: A puisne mortgagee whose right to enforce his mortgage is barred under Art. 132 may nevertheless be entitled to redeem a prior mortgage under the power conferred upon him by S. 75 of the Transfer of Property Act. (*Beaumont, C. J. and Nanavati, J.*) NATHMAL *v.* NILKANTH. **141 I.C. 811=I.R. 1933 Bom. 163=34 Bom.L.R. 1519=A.I.R. 1933 Bom. 25.**

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———**S. 76**—Applicability—Usufructuary mortgage. *See* T. P. ACT, S. 76 (*g*). **7 Luck. 454=A.I.R. 1932 Oudh 123.**

———**Ss. 76 and 77**—*Applicability*—Kat kobala—*Construction—Redemption on payment of principal and interest—Mortgagee's liability to account for profits.*

A *kat kobala* provided that the lands were to be kept in *kat* for a period of 9 years and that during that time, the mortgagees will be entitled on paying the rent to the landlord to appropriate the profits in lieu of the annual rent payable. It further provided that on the expiry of 9 years, the mortgagors shall redeem the *kat kobala* after paying the entire amount due for principal and interest. It said: "If we cannot pay the entire amount according to the stipulation, then after the term this *kat kobala* itself will be regarded as an out and out sale and we shall cease to have any right." A suit having been filed for redemption.

Held, (1) that the plaintiff could not redeem without paying the amount due for principal and interest apart altogether from the amounts of rents and profits received by the mortgagees from the land; (2) that there was no case for rectification or cancellation on the ground of mistake; and (3) that the mortgagors could not ask for an account under Ss. 76 and 77 of the T. P. Act. (*Rankin, C. J. and C. C. Ghose, J.*) OSMEN ALI *v.* FAIJIAN BEWA. **I.R. 1931 Cal. 799=134 I.C. 95=53 C.L.J. 380.**

———**S. 76**—*Construction—"During the continuance of the mortgage".*

The expression "during the continuance of the mortgage" means "after the contract establishing the relationship of mortgagor and mortgagee between the parties has been entered into and established and till the time the mortgage comes to an end or is extinguished." (*Raza and Smith, JJ.*) LAKSHMI NARAIN *v.* BOHAMADI BEGAM. **7 Luck. 454=I.R. 1932 Oudh 205=137=I.C. 102=9 O.W.N. 60=A.I.R. 1932 Oudh 123.**

———**S. 76 (a)**—Transaction governed by Dekhan Agriculturists' Relief Act—Mortgage with possession—Agreement to appropriate profits in lieu of interest—Accounts—Basis. *See* DEKHAN AGRICULTURISTS' RELIEF ACT, (1879), Ss. 13 AND 13-A—T. P. ACT, S. 76. **58 Bom. 472=A.I.R. 1934 Bom. 321.**

———**S. 76 (c)**—*Government revenue—Liability of mortgagee.*

In the absence of a contract to the contrary, it is the mortgagee who is liable to pay any enhanced assessment of the Government revenue. Though in a case where the liability of the mortgagee was fixed at a specified sum, the excess, if any, will have to be borne by the mortgagor, yet if the bond specified that "the mortgagee would pay at the rate of Rs. 6 being the proportionate Government revenue", the figure only represents the then revenue and the mortgagee is liable for any subsequent enhancement as well.

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46 A. 269 (P.C.) and A.I.R. 1926 M. 405, Ref. *(Curgenven, J.)* CHATHU NAMBIAR *v.* KUNHIRAMAN NAMBIAR. **I.R. 1932 Mad. 289=136 I.C. 337 (2)=34 L.W. 804=A.I.R. 1932 Mad. 154.**

———**S. 76 (g)**—*Applicability—Usufructuary mortgage.*

S. 76 is applicable to a usufructuary mortgage. Every mortgagee in possession, whether usufructuary or otherwise, is bound to account to the mortgagor under S. 76 (*g*) as to the profits of the mortgaged property unless he establishes a contract in the terms of S. 77. *(Raza and Smith, JJ.)* LAKSHMI NARAIN *v.* MOHAMADI BEGAM. **7 Luck. 454=I.R. 1932 Oudh 205=137 I.C. 102=9 O.W.N. 60=A.I.R. 1932 Oudh 123.**

———**S. 76 (g)**—*Duty of mortgagee in possession—Not maintaining accounts—Award of interest.*

Where a usufructuary mortgagee failed to keep such accounts as are required of a mortgagee in possession, the Court is justified in view of the provisions of S. 76 (*g*) in disallowing in *toto* his claim both for past and future interest. *(Sir Dinshah Mulla.)* RAI SHADI LAL *v.* LAL BAHADUR. **I. R. 1933 P. C. 104=142 I.C. 739=35 Bom.L.R. 308=1933 A.L.J. 339=37 L.W. 480=57 C.L.J. 152=1933 M.W.N. 174=37 C.W.N. 420=A.I.R. 1933 P.C. 85=64 M.L.J. 298 (P.C.).**

———**S. 76 (g)**—*Duty of mortgagee—Cooked up accounts—Presumption—Unlawful realization.*

The mortgagee in possession is under a statutory liability to keep clear, full and accurate accounts. If the accounts kept by him are suspicious and unreliable, it is not improper for the Court to proceed on the hypothesis that all the tenants had paid their rents. This presumption ought not, however, to be extended to unlawful realizations from the tenants, such as *nazrana, bhusa* or *paira. (Wazir Hasan, C. J. and Bisheshwar Nath, J.)* SAID AHMAD *v.* RAJA BARKHANDI MAHESH PRATAB NARAIN SINGH. **8 Luck. 40=I.R. 1932 Oudh 339=139 I.C. 64=9 O.W.N. 253=A.I.R. 1932 Oudh 255.**

———**S. 76 (g) and (h)**—*Liability of mortgagee to account—Law prior to T. P. Act.*

The liability of the mortgagee to render accounts is well recognized even before the coming into force of the Transfer of Property Act. *(Agarwala and Rowland, JJ.)* KAMLA PARSHAD *v.* BAMDEO MISSIR. **155 I.C. 22=7 R. P. 530=A.I.R. 1935 Pat. 148.**

———**Ss. 76 (g) and (h) and 77**—*Mortgagee in possession—Duty to account.*

Cls. (*g*) and (*h*), S. 76, are not qualified by any such proviso as 'in the absence of a contract to the contrary'; therefore they apply in all cases, contract or no contract to the contrary, excepting those in which S. 77 makes them inapplicable. Hence every mortgagee in possession is bound to account under S. 76 (*h*) of the Act unless he establishes a contract in terms of S. 77. *(Agarwala and Rowland, JJ.)* KAMLA PARSHAD *v.* BAMDEO MISSIR. **155 I.C. 22=7 R.P. 530=A.I.R. 1935 Pat. 148.**

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———**S. 76 (g)**—*Failure of mortgagee to maintain accounts—Presumption against mortgagee—Limits of.*

Where a mortgagee with possession fails to maintain full and accurate accounts, presumption can be made against him. But it cannot be laid down as a hard and fast rule that whenever a mortgagee has failed in the obligation imposed on him by S. 76, Cl. (*g*) he must necessarily be made liable on the basis of the gross rental. It is conceivable that there may be cases in which the raising of a presumption that all the tenants have paid their rents may not be justified. The presumption should not be carried beyond reasonable limits. When the mortgagee is made liable for the rental, he should be allowed the costs of the collection. A.I.R. 1932 Oudh 123 and 255, Ref. *(Srivastava and Nanavutty, JJ.)* KAZIM HUSAIN *v.* DEBI DAYAL. **9 Luck. 456=6 R.O. 454=148 I.C. 880=18 R.D. 172=11 O.W.N. 387=A.I.R. 1934 104.**

———**S. 76 (g)**—*Mortgagee not maintaining regular account—Adverse presumption.*

Where a mortgagee has failed in his duty to maintain regular accounts of the income and expenditure, every presumption is to be taken against him. *(Tek Chand and Currie, JJ.)* CHANDRA *v.* DWARKA DAS. **161 I.C. 984=8 R.L. 835=37 P.L.R. 567=A.I.R. 1936 Lah. 42.**

———**S. 76 (h)**—*Mortgagee in possession—Appropriation of income—Liability to account.*

A mortgagee in possession who has agreed to accept the whole of the usufruct of the mortgaged property in lieu of a portion of the interest due to him is liable under S. 76 (*h*) to render account and give credit for the surplus income if any, and S. 77 has no application to the case. 7 I.C. 293, impliedly overruled. *(Sulaiman, A. C. J., Mukerji and Boys, JJ.)* MAHOMED ISHAQ KHAN *v.* RUP NARAIN SINGH. **1931 A.L.J. 977=54 All. 205=136 I.C. 363=I.R. 1932 All. 187=A.I.R. 1931 All. 562 (F.B.).**

———**Ss. 76 (h) and 77**—*Mortgagee in possession—Liability under S. 76* (h)—*Rights to contract out.*

The liability of mortgagee in possession under S. 76 (*h*) to give credit for the receipts after deducting the expenses and interest, in the account is absolute unless the case comes within the purview of S. 77 and the parties would not be at liberty to contract themselves out of the statutory liability. 7 I.C. 293, impliedly overruled. *(Sulaiman, A. C. J., Mukerji and Boys, JJ.)* MAHOMED ISHAQ KHAN *v.* RUP NARAIN SINGH. **136 I.C. 363=I.R. 1932 All. 187=54 All. 205 (F.B.)=1931 A.L.J. 977=A.I.R. 1931 All. 562 (F.B.).**

———**S. 77**—*Applicability—Part of interest to be paid out of usufruct.*

S. 77 only comes in where the mortgagor is from the outset safe from being confronted at the time of redemption with a demand for anything more than the principal sum advanced. It does not cover the case in which only a part of the interest is to be paid out of the usufruct. *(Agarwala and Rowland, JJ.)* KAMLA PARSHAD

T. P. ACT, S. 77.

v. BAMDEO MISSIR. **155 I.C. 22=7 R.P. 530= A.I.R. 1935 Pat. 148.**

———**S. 77**—*Contract to the contrary.*

In a mortgage-deed it was provided that "the mortgagee shall appropriate the surplus profits towards interest, we the mortgagors having no claim, for profits and the mortgagee having no claim,' for interests."

Held, that the mortgage-deed was a contract within the meaning of S. 77 and that the mortgagee was not bound to account for rent and profits of the mortgaged premises. (*Sir Lancelot Sanderson*). BACHCHU LAL *v.* SYED MAHOMED MAH. **37 C.W.N. 457=10 O.W.N. 299= 1933 M.W.N. 278=37 C.W.N. 457=37 L. W. 537=1933 A.L.J. 350=144 I.C. 1025=6 I.R.P.C. 7=A.I.R. 1933 P.C. 136 (P.C.).**

———**S. 77**—*Contract to the contrary—Evidence of—Balance of profits after payment of Government Revenue to be appropriated towards interest.*

Under S. 77, the parties can enter into a contract that there is to be no accounting between them. Generally if the parties agree that there is to be no accounting, it is wholly unnecessary to mention the rate of interest. It would be sufficient to say that the profits will go in discharge of interest but it does not necessarily follow that simply because the rate of interest is mentioned, the parties must have intended that there was to be accounting. Where the sub-mortgagor recited that he would repay the amount borrowed with interest at a certain rate, that he was put in possession, that after payment of Rs. 95 for Government Revenue yearly out of the profits, he would appropriate the balance in payment of interest, *held,* that the sub-mortgagor was not entitled to ask for an account. (*Srivastava and Rachhpal Singh, JJ.*) MAHOMED ALI KHAN *v.* ALI MIRZA KHAN. **10 Luck. 70=6 R. O. 460=148 I.C. 903=11 O.W.N. 524=A. I.R. 1934 Oudh 220.**

———**S. 77**—*Undertaking by mortgagor—Covenant to pay amount of decrease in profits—Stipulation regarding land acquisition amount—Whether can be taken into account.*

A mortgage-deed provided as follows: "If any land appertaining to the mortgaged share is duly acquired for Government purposes and any decrease in the profits payable to the mortgagee accrued for that reason or if the mortgagee has to pay any other kind of new Government cess with regard to the mortgaged property and the same cannot be realised from the tenants in spite of all legal efforts, then we shall continue to pay this deficit in the annual profits out of our own pocket in cash or from our other moveable or immoveable property, we shall be entitled to get the compensation for the land paid by the Government in cash."

Held, that the undertaking amounts to a personal covenant but the arrangement as regards the event of the acquisition by the Government was one of the terms on which the mortgage was granted and the fact that the mortgagors entered into a personal covenant to pay the amount did not prevent the said amount being taken into consideration in determining the total amount payable by the mortgagors. (*Sir Lancelot Sanderson.*) BACHCHU LAL *v.* SYED MAHOMED MAH. **6 I.R. (P.C.) 7=144 I.C. 1025 =37 C.W.N. 457=1933 M.W.N. 278=10 O.W.N. 299=1933 A.L.J. 350=37 L.W. 537=A.I.R. 1933 P.C. 136 (P.C.).**

T. P. ACT, S. 78.

———**S. 78**—*Applicability.*

Section 78 applies in cases of prior and subsequent mortgagees, and not to the case of a prior mortgagee and subsequent purchaser. (*Rachhpal Singh and Smith, JJ.*) SITA RAM *v.* RAJ NARAAN. **150 I.C. 145=6 R.O. 623=11 O.W. N. 770=A.I.R. 1934 Oudh 283.**

———**S. 78**—*Applicability—Prior mortgage not guilty of negligence—If loses priority.*

S. 78 is not applicable in the absence of proof of fraud, misrepresentation or negligence, gross or otherwise, as a result of which the second mortgagee is misled into entering into the mortgage relied on by him. (*Tek Chand and Abdul Rashid, JJ.*) RAM DASS *v.* RALIA RAM JOWANDA MAL. **A.I.R. 1935 Lah. 887.**

———**S. 78**—*"Fraud, misrepresentation, gross leglect".*

The words "fraud," "misrepresentation" and "gross negligence" occurring in S. 78 are three different kinds of conduct and are disjunctive. There can therefore be a gross neglect without there being any element of fraud or misrepresentation. Negligence may be evidence of fraud if it is so gross as to be incompatible with the idea of honesty. In proof of gross negligence, all that is necessary to show is not direct and positive fraud, but lack of good faith in the sense of due care and attention. Gross negligence may be defined as the absence of that degree of care and prudence which it is reasonably necessary to avoid injury to others. (*Niyogi, A.J.C.*) RANGAPPA GANGAPPA *v.* SYED IMAMUCDIN. **7 R.N. 170=154 I.C. 904=30 N.L.R. 196= A.I.R. 1934 Nag. 29.**

———**S. 78**—*'Gross neglect'—Prior mortgagee registering his mortgage after the date of subsequent mortgage but within the period allowed by law.*

Where a prior mortgagee has nothing towards inducing a subsequent mortgagee to advance money, but has simply availed himself of the time given to him by the law for registering his mortgage, he cannot be said to be guilty of "gross neglect", within the meaning of S. 78.

Where a mortgage is prior in date and has been validly registered within the time allowed by the law, it cannot be postponed to a subsequent mortgage merely because the prior mortgagee had omitted to get his mortgage registered until after the execution of a subsequent mortgage. (*Roy, J.*) SURENDRANATH GHOSH *v.* HARIDAS BISWAS. **60 Cal. 225=I.R. 1933 Cal. 521=14 I.C. 196 =A.I.R. 1933 Cal. 398.**

———**S. 78**—*'Gross neglect'—Mortgagee, if bound to secure title-deeds of property mortgaged.*

It is not ordinarily obligatory for a person who takes a registered mortgage to secure the title-deeds of the properties mortgaged and ordinarily his registered mortgage is sufficient protection to him. (*Mosley and Macknew, JJ.*) WAN TAIK YA *v.* M. S. S. CHETTYAR FIRM. **155 I.C. 954 =7 R.R. 367=A.I.R. 1935 Rang. 26.**

T. P. ACT, S. 78.

———**S. 78**—*Gross neglect—Omission to enquire about the original redemption certificate.*

Though a more careful lender would perhaps have taken an affidavit from the borrower as to the loss of the original redemption certificate, the omission to do so on the part of the prior mortgagee in reliance of the owner's statement that the original had been lost and that an attested copy was alone available cannot be deemed negligence, much less gross negligence, within the meaning of S. 78, so as to postpone his priority. (*Mukerji and Guha JJ.*) SURENDRA MOHAN ROY CHOUDHURY *v.* MOHENDRA NATH BANERJEE. **59 Cal. 781=140 I.C. 662=36 C.W.N. 420= I.R. 1933 Cal. 14=A.I.R. 1932 Cal. 589.**

———**S. 78**—*Gross neglect—Proximate cause for the advance by subsequent mortgagee—Incorrect description of properties—Failure to inspect title-deed—No postponement of security.*

In order to invite the application of the section, it is necesary to prove that the fraud, misrepresentation or gross neglect of the prior mortgagee was the proximate cause for the advance of money by the subsequent mortgagee. If the fraud or gross neglect is not the proximate and primary cause but only one of various contributory factors that led the subsequent mortgagee to advance money, S. 78 can have no application. Certain property which was gifted to the mortgagor was incorrectly described in the deed of gift. The incorrect description was repeated in a mortgage of 1922 and a later mortgage in favour of plaintiffs, who paid off the previous mortgage. Subsequently, the property was again mortgaged in favour of defendants but correctly described. It was found that while the plaintiffs were guilty of gross negligence in not ascertaining the correct description by reference to the entries in the Khewat, the defendants were guilty of gross negligence in omitting to inspect the original title-deed, *i.e.*, the deed of gift.

Held, that the plaintiff's security was not liable to be postponed to that of the defendants, since, if the latter had inspected the gift deed, they would have been in a position to acquaint themselves with the incumbrance. (*Iqbab Ahmed and Bajpai, JJ.*) RATANLAL *v.* MUKADI LAL. **6 I.R. (All.) 296=146 I.C. 488=1933 A.L.J. 16= 17 R.D. 109=14 L.R. 122 (Rev.)=A.I.R. 1933 All. 299.**

———**S. 78**—*Negligence or laches—Mortgagee—Knowledge of assignment of equity of redemption, too late—No negligence.*

It is no part of the duty of a mortgagee to keep an account of what the mortgagor himself was doing with his equity of redemption. It is fundamentally erroneous to talk of a mortgagee who is out of time in discovering that the equity of redemption has been assigned as a person who had been guilty of negligence or laches. If he does not come to know of the assignment till it is too late to sue the assignee, that is not a question of negligence or laches. (*Rankin, C.J. and Mitter, J.*) RAJANI KANTA GHOSH *v.* SOURENDRA NATH MITRA. **151 I.C. 454=7 R.C. 124=38 C.W.N. 124=A.I.R. 1934 Cal. 421.**

———**S. 80 (before amendment)**—*Tacking—*

T. P. ACT, S. 81.

Simple mortgage tacked on to usufructuary mortgage.

Where the words used in a second mortgage deed were that "the amount due on it would be paid along with the sum of the first mortgage" and the document also provided that the second mortgage was to be tacked on to the first.

Held, that the first mortgage could not be redeemed without redeeming the second mortgage. It is possible to tack a simple mortgage upon a usufructuary mortgage. 1926 All. 171 and 13 A.L.J. 889, Dist. (*Young, J.*) KANHAYA LAL *v.* TULSI PERSHAD. **I.R. 1931 All. 182=129 I.C. 550=A.I.R. 1931 All. 197.**

———**S. 81, (as amended in 1930)**—*Prior mortgagee deliberately releasing part of his security—Subsequent mortgagee's right to claim marshalling as against prior mortgagee.*

There is nothing in the plain meaning of S. 81 as now enacted, to suggest that the right of the subsequent mortgagee to claim marshalling is a right which can be exercised only against the mortgagor and not against the prior mortgagee. It cannot, of course, be exercised against the prior mortgagee so as to prejudice his right, but it cannot be said that his rights are prejudiced when he has deliberately released a part of his security which might have been made readily available to him. Hence under S. 81 a subsequent mortgagee has the right to claim marshalling against the prior mortgagee. (*Dunkley, J.*) RAM SABAD *v.* SUBBIAH NAIDU. **156 I.C. 318=7 R.R. 391=A.I.R. 1935 Rang. 139.**

———**S. 81**—*Rateable apportionment—Doctrine of—Applicability to India—Nature of right.*

The equitable doctrine of rateable apportionment is in accordance with the principles of justice and fair dealing and though not the subject of any special statutory provision, is not excluded by any statutory provision and is accordingly applicable in India. It confers a right on the puisne mortgagees against the mortgagor and volunteers claiming under the mortgagor to have the equity of redemption of two or more properties jointly mortgaged to a prior mortgagee rateably apportioned as between the puisne mortgagees. The rule, however, can be invoked only when it does not conflict with the earlier mortgagee's right to elect out of which fund to realise his debt and accordingly cannot be invoked where such election has in fact been exercised in a case where the second mortgagee as to one property is the same person as the first mortgagee of that and another property. *Barnes v. Racster,* 62 E.R. 944; *Flint* v. *Howard,* (1893) 2 Ch. 54 and 51 M. 648; 55 M.L.J 358, Ref. (*Stone, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* BYRAMSHAW. **34 L.W. 772=135 I.C. 316=I.R. 1932 Mad. 76=A.I.R. 1932 Mad. 196=61 M.L.J. 512.**

———**S. 81**—*Scope.*

The material time for the exercise of the right of marshalling is the time when the prior mortgagee seeks to realise his mortgage amount. If at that time there is already a person who has acquired for valuable consideration an interest in the property not mortgaged to the second mortgagee then the right of marshalling does not exist. Primarily the right of marshalling is a

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right given against a mortgagor. The right is not enforced against a mortgagee or purchaser of the other estate and the right of such a mortgagee or purchaser not to be marshalled does not depend upon whether he had notice of the second mortgage. (*Ramesam and Jackson, JJ.*) UNNAMALAI AMMAL *v.* GOPALSWAMI CHETTI. **54 Mad. 59=I.R. 1931 Mad. 319=129 I.C. 655=32 L.W. 943=1931 M.W.N. 1121=A.I.R. 1931 Mad. 199=60 M.L.J. 69.**

———**S. 81**—*Scope.*

Section 56 will not apply as between the subsequent purchasers, but only between a purchaser and his vendor, whilst S. 81 only applies to subsequent mortgagee, and not to subsequent purchasers. 31 Cal. 95 and 42 All. 336, Ref. (*Staples, A.J.C.*) SITARAM *v.* RAM RAO. **I.R. 1931 Nag. 65=130 I.C. 817=13 N.L.J. 213=A.I.R. 1931 Nag. 91.**

———**Ss. 81, 82 and 56**—Scope—Marshalling—Effect on contribution. *See* T. P. ACT, SS. 56, 81 AND 82. **69 M.L.J. 303.**

———**S. 82**—*Applicability—Punjab.*

The general principles underlying S. 82 are applicable to the Punjab. (*Addison and Agha Haidar, JJ.*) GIAN SINGH *v.* ATMA RAM. **I.R. 1933 Lah. 152=141 I.C. 596=34 P.L.R. 532 =A.I.R. 1933 Lah. 374.**

———**S. 82**—*"Contract to the contrary"—If can be implied—Contribution—When arises—Principles.*

There can be no contribution if the encumbrance is discharged by the very person who is liable for the debt; in such a case he merely pays his own debt as he is bound to do. The right to resist the claim to contribution in such a case is expressly saved by the words "in the absence of a contract to the contrary" in S. 82, T. P. Act. The section deals with the rights of owners *inter se* and therefore the contract to the contrary is a contract between them, that is, those liable to contribute. Where one of two persons owning mortgaged properties receives the whole amount to the exclusion of the other, there arises a contract which need not be express, that the other shall not be liable to contribute. Similarly when each of them receives an equal moiety, a contract must be implied that they shall bear the burden equally. When there is a contract to the contrary, one of the parties cannot deprive the other of the benefit under it; otherwise either party could frustrate the contract by merely assigning his property. Section 82 has solely to do with the distribution of burden on the properties in a case where no other question as to who had the benefit of the money in the beginning or similar complication arises. The question how much money one man owes to another must be first determined with reference to the transaction between them, and after that question is determined, one has next to see on which item it can be made a charge with reference to S. 82. (*Ramesam and Venkatasubba Rao, JJ.*) MUTHIAH BHAGAVATHAR *v.* VENKATARAMA AYYAR. **59 Mad. 121 =163 I.C. 977=9 R.M. 84=42 L.W. 482= 1835 M.W.N. 1242=A.I.R. 1936 Mad. 106 =69 M.L.J. 303.**

———**S. 82**—*"Contract to the contrary".*

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The expression "contract to the contrary" means contract between mortgagor and mortgagee, and not between the mortgagors themselves. Again, the contract referred to in the section is not a subsequent contract between the mortgagors. (*Jackson, J.*) MUTHU KUMARASWAMI MUDALIAR *v.* GOVINDA PADAYACHI. **I.R. 1932 Mad. 359 =137 I.C. 285=1932 M.W.N. 168=35 L.W. 145=A.I.R. 1932 Mad. 218.**

———**S. 82**—*"Contract to the contrary"—Contract between mortgagor and assignee of the equity of redemption.*

An agreement binding only as between the mortgagors or as between the mortgagor and the assignee of the equity of redemption is not a "contract to the contrary" within the meaning of S. 82. So where the purchaser of a part of the mortgaged property contracted to pay off the mortgage debt and committed default but subsequently paid off the whole decree obtained by the mortgagee, his right to obtain contribution is not affected by his previous contract with the mortgagor with which the mortgagee had nothing to do. 24 M. 85 and 34 C.W.N. 661 (P.C.), Foll. (*Niyogi, A.J.C.*) SONAJI *v.* KRISHNA RAO. **27 N.L.R. 258=I.R. 1931 Nag. 184= 134 I.C. 856=A.I.R. 1931 Nag. 172.**

———**S. 82**—*Contract to contrary—Right to contribution—Condition for.*

The right to obtain contribution presupposes the existence of a joint liability. Where the liability rests on one person only, contribution is wholly out of question. Two properties *A* and *B* were mortgaged to a person, and subsequently *A* was again mortgaged to another and *B* to a third. In a suit, by the subsequent mortgagee of property *A*, decree was obtained and he purchased it for a value much below its market-value and paid off the prior mortgage debt over both the properties *A* and *B* and sued for contribution from the subsequent mortgagee of property *B*.

Held, that the right to contribution depended on the question whether the purchase of property *A* was subject to the entire encumbrance or only subject to a proportionate charge, and that the circumstances, that the purchase value was small, had by itself no effect on the right to contribution but was of evidential value in deciding the question, but in the present case, there was a contract to the contrary which negatived the right of contribution. (*Niamat-ullah and Collister, JJ.*) GULZARI LAL *v.* ALI AHSAN. **1933 A.L.J. 1639=147 I.C. 521 (2)=6 R.A. 489=A.I.R. 1933 All. 929.**

———**S. 82**—*"Contract to contrary"—Sale in execution.*

All the elements of contract are as much present when a sale takes place in execution of a decree as in an ordinary sale by two contracting parties. Hence there can be a contract to the contrary even in a sale held in execution of a decree. 27 Bom. 334, Ref. (*Niamatullah and Colister, JJ.*) GULZARI LAL *v.* ALI AHSAN. **1933 A.L.J. 1639=147 I.C. 521 (2)=6 R.A. 489=A.I.R. 1933 All. 929.**

———**S. 82**—*"Contract to the contrary"—Specific pleading and proof.*

A contract to the contrary within the meaning of S. 82 should be specifically alleged and proved and the contract would have had to be a contract

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to which the mortgagee would have assented. *(Bennet, J.)* JAI NARAIN *v.* RASHAK BEHARI LAL. I.R. 1931 All. 385=131 I.C. 545=A.I.R. 1931 All. 546.

———S. 82—*"Contract to the contrary"—Whether includes agreement between co-mortgagors.*

From the terms in which S. 82 of the T. P. Act is expressed, there is no justification for concluding that "a contract to the contrary" mentioned therein, is a contract between the mortgagor and the mortgagee. The term is very general and may refer to any contract, including one between the mortgagors. Where the mortgagors agree that one of them would take the whole of the money lent by the mortgagee and would be liable in the first instance to repay it, while the other would stand merely in the position of a surety, and the entire debt is satisfied by sale of the principal debtor's property the latter will have no claim for contribution against the property hypothecated by the surety as such, and the surety is not debarred by S. 92 of the Evidence Act from proving the existence of the agreement in a suit against him for contribution by the principal debtor. *(Niamatullah and Allsop, JJ.)* KHUDAWAND KARIM KHALESAN *v.* NARENDRA NATH. 1935 A.W.R. 1343=1935 A.L.J. 1273=162 I.C. 117=8 R.A. 842=A.I.R. 1936 All. 258.

———Ss. 82 and 59—*Contribution—Right to—Registered mortgage deed—Alleged modification by subsequent verbal arrangement—Inadmissible—Contribution claimed by purchaser of part of the properties comprised in the mortgage.*

A deed of usufructuary mortgage, dated 6th December, 1905, was duly registered, expressed to be for an advance of Rs. 35,000 and in respect of 175 acres of a *raiyati* holding but full effect was never given to it and as the result of a verbal agreement entered into between the parties at about the time of the registration of the deed the mortgagee advanced Rs. 14,000 only and was put into usufructuary possession of 70 acres only out of the 175 acres mentioned in the deed. Subsequently, the appellants, as purchasers of part of the lands comprised in the mortgage, having bought subject to the mortgage and having paid off the mortgage debt of Rs. 14,000, brought a suit claiming contribution from the respondents, who were the owners of the other parts of the land subject to such mortgage'.

Held, that it was essential for the appellants to allege and prove a common mortgage, *i.e.*, a mortgage affecting both their lands and also the lands of the respondents. The appellants relied, for this purpose, on a mortgage alleged to have been to secure Rs. 14,000 (*i.e.*, the aforesaid registered mortgage deed of 6th December, 1905, as modified by a verbal agreement subsequently made).

Held, that in view of the provisions of S. 59, Transfer of Property Act (enacting that when the principal sum secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument), the mortgage so relied on could not be proved, and accordingly the appellant's claim for contribution failed. *(Lord Tomlin.)* KAMTA SINGH *v.* CHATURBHUJ SINGH. 61 I.A. 185=13 Pat. 310=1934 M.W.N. 377=36 Bom. L.R. 547=6 R.P.C. 119=148 I.C. 486=39 L.W. 482=3 A.W.R. 595=11 O.W.N. 481=15 Pat.L.T. 169=A.I.R, 1934 P.C. 98=38 C.W.N. 575=1934 A.L.J. 462=59 C.L.J. 277=66 M.L.J. 662 (P.C.).

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———S. 82—*Contribution—Payment of prior mortgage-debt by purchaser of part of mortgaged property—Right to contribution from another part owner.*

Where a purchaser of part of the mortgaged properties pays off a mortgage-debt to which all the properties are subject, the owner of another part of the mortgaged properties who seeks to redeem his share of the properties is liable to contribute the proportionate share of the debt which the value of his share of the properties bears to that of the rest of the properties. But a claim to such contribution which is barred by limitation cannot be pleaded in bar of redemption. *(Krishnan Pandalai, J.)* DRAVIAM CHETTIAR *v.* RAMAIYA CHETTIAR. 159 I.C. 857=8 R. M. 567=41 L.W. 730=A.I.R. 1935 Mad. 390=68 M.L.J. 362.

———S. 82—*Contribution—Right to—Claim by mortgagee—Order settling the order in which properties are to be sold—If bars claim to contribution.*

A mortgagee is entitled to claim and avail himself of the right of contribution conferred by S. 82. Such right is not confined to a full owner of the mortgaged properties. Nor is a claim to such right, as between persons interested in the order of Court directing the mortgaged properties to be sold in a particular order under the mortgaged properties barred by reason of a prior mortgage-decree. *(Madhavan Nair, J.)* RAGHAVACHARI *v.* VENKATANARAYANA REDDI. 156 I. C. 715=8 R.M. 42=1935 M.W.N. 217=41 L.W. 416=A.I.R. 1935 Mad. 456.

———S. 82—Contribution—Right to—If subject to right of marshalling. *See* T. P. ACT, Ss. 56, 81 AND 82. 69 M.L.J. 303.

———Ss. 82, 92 and 92—Contribution—Right to—Purchaser of part of mortgaged properties—Right barred by limitation—No right to refuse to give up possession. *See* T. P. ACT. Ss. 92, 93 and 82. A.I.R. 1935 Mad. 390=68 M.L.J. 362.

———S. 82—Contribution—Right to—Condition for. *See* S. 82, CONTRACT TO CONTRARY, *supra.* A.I.R. 1933 All. 929.

———S. 82—*Co-sharer—Rent due by one ryot—Payment by another co-sharer—Contribution—Charge—No priority over earlier encumbrances.*

A co-sharer who, to prevent arrest for a decree against himself and another co-sharer for arrears of rent due by both under the Estates Land Act, pays the whole rent and brings a suit for contribution is entitled to contribution from the other and to a charge for his excess payment on the co-sharer's share of the property. But it can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith and without any suspicion that such a charge may come into future existence advanced money on the property. The plaintiff is not entitled in respect of his charge, to priority over encumbrances existing on the

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date of payment. (61 M.L.J. 343 (P.C.); 41 Cal. 926 (P.C.); and 11 M.I.A. 241, Dist.; 26 Mad. 686 (F.B.),.Ref. (*Waller and Krishnan Pandalai, JJ.*) VYRAPERUMAL MUDALIAR *v.* ALAGAPPA MANIAGARAR. **135 I.C. 609=I.R. 1932 Mad. 177=55 Mad. 468=34 L.W. 889=1931 M.W.N. 1197=A.I.R. 1932 Mad. 189=62 M.L.J. 31.**

———**S. 82**—*Intention.*

The intention of S. 82 is not that the lien of the mortgagee should be divided but simply to determine the liability of the purchasers of the property *inter se.* (*Mosley and Mackney, JJ.*) WAN TAIK YA *v.* M. S. S. CHETTYAR FIRM. **155 I.C. 954=7 R.R. 367=A.I.R. 1935 Rang. 26.**

———**S. 82**—*Mortgagee's right to proceed against any property—Principle of contribution not affected by.*

Except in certain cases, a mortgagee is entitled to proceed against any portion of the mortgaged property for the whole of the mortgage-debt. That does not, however, affect the principle of contribution recognised in S. 82 that each property must contribute rateably to the debt secured by the mortgage in his favour. 40 M. 968 (F.B.), Ref. (*Venkatasubba Rao and Curgenven, JJ.*) NAGENAHALLI CO-OPERATIVE SOCIETY *v.* NANJAPPA. **1932 M.W.N. 1343.**

———**S. 83**—*Mortgagee allowing property to stand benami—Deposit to credit of benamidars and the mortgagee—Validity.*

Ordinarily, it is duty of the mortgagor to find out the real mortgagee and to deposit the money to his credit. But where the defendants 1 and 2 had allowed the property to stand benami in the names of defendants 3 to 7 (the heirs of the persons in whose favour the usufructuary mortgage was executed) and allowed them to be recorded in the record of rights and the mortgagor made the deposit to the credit of not only defendants 1 and 2 but also defendants 3 to 7, the deposit was valid and he is entitled to mesne profits from the date of the deposit. (*Fazl Ali and James, JJ.*) NARAYANA SAHU *v.* KISHUN SAHU. **153 I.C. 1035=7 R.P. 397=15 Pat. L.T. 689=A.I.R. 1934 Pat. 622.**

———**S. 82**—*Mortgagee purchasing equity of redemption in part of mortgaged property—Effect.*

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole property comprised in the mortgage. 22 All. 284, Ref.

Held, as there was in the present case no valid sale in favour of the mortgagee, the principle did not apply. (*Madhavan Nair, J.*) BRAHMAYYA *v* SUBBARAYUDU. **I.R. 1931 Mad. 488=131 I.C. 152=34 L.W. 125=A.I.R. 1931 Mad. 552.**

———**S. 82**—*Mortgagee purchasing one of the properties mortgaged—Effect of—Liability of other property—Extent of.*

Where the mortgagee decree-holder has purchased at the auction sale in execution of his decree in respect of his second mortgagee, one of the two properties mortgaged to him, the equity of redemption in that property becomes vested in him and such purchase has the effect of discharging and existinguishing a portion of the mortgage debt which is chargeable to the property purchased by him, *i.e.*, a portion of the debt, which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the properties comprised in the mortgage. 22 A. 284, Foll. (*Mallik and Guha, JJ.*) KRISHNA CHANDRA BHOUMIK *v.* PABNA MODEL CO., LTD. **59 Cal. 76=I R. 1932 Cal. 280=137 I.C. 260=A.I.R. 1932 Cal. 319.**

———**S. 82**—*Suit for contribution—Individual rights against defendants not pleaded—Right of plaintiff to joint decree.*

Where in a suit for contribution on account of the excess share of the mortgage discharged by them the plaintiffs did not ask for a definement of the respective liabilities of the several defendants,

Held, that the plaintiffs were not entitled to a decree for a consolidated amount against the defendants jointly. (*Sen and Niamatullah, JJ.*) MURLI PRASAD AWASTHI *v.* SHEO DAT PRASAD. **1931 A.L.J. 349=A.I.R. 1931 All. 625.**

———**S. 82**—*Mortgagee purchasing equity of redemption in part of the mortgaged property by the mortgagee—Effect of—Right of mortgagee to realise the whole of the mortgage amount from the remaining portion.*

When a mortgagee buys at auction or privately the equity of redemption in a part of the mortgaged property, such purchase has the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, the portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. He cannot recover the whole amount from the remaining property. 22 A. 284, Foll. (*Addison and Agha Haidar, JJ.*) GIAN SINGH *v.* ATMA RAM. **I. R. 1933 Lah. 152=141 I.C. 596=34 P.L.R. 532=A.I R. 1933 Lah. 374.**

———**Ss. 82 and 100**—*Mortgage of several properties—Proportionate liability—Charge against portions of property as have not discharged their liability.*

The first paragraph of S. 82 of the T. P. Act enunciates the general rule as regards the apportionment of liability between the several properties whether belonging to one or several owners when they are mortgaged to secure one debt. The provision that the properties are liable to contribute rateably to the debt secured by the mortgage clearly implies that this liability constitutes a charge upon the properties. Further the provisions of S. 82 read with S. 100 clearly give rise to a charge against such portions of the mortgaged property as have not discharged their proportionate share of the liability. (*Srivastava and Zia ul-Hasan, JJ.*) NISAR AHMAD KHAN *v.* MANZUR AHMAD KHAN. **10 Luck. 690=154 I C. 267=7 R.O. 464=1935 O.W.N. 278=A.I. R. 1935 Oudh 245.**

———**S. 82**—*Mortgage of several properties—Subsequent purchaser of one item—Discharge of mortgage decree—Claim for contribution—Poundage and compensation, if recoverable.*

A person owning properties *A*, *B* and *C* mortgaged them to another and subsequently sold property *B* to a third person from whom the plaintiff ultimately purchased it. Later on the mortgagor was adjudged insolvent and the Official Receiver sold property *A* to the 1st defendant. After the sale the mortgagee sued and got a

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decree. The properties having been sold in execution the plaintiff paid off the entire mortgage amount and sued the other sharers for contribution:

Held, that the suit was competent and that plaintiff was entitled to recover poundage and interest on the debt but not the 5 per cent. compensation paid to the disappointed buyer. (*Walsh, J.*) KRISHNASWAMI PILLAI *v.* JANAKALAXMI AMMAL. **6 R.M. 452=148 I.C. 217=1934 M.W.N. 629=39 L W. 428=A.I.R. 1934 Mad. 189=66 M.L.J. 308.**

———**S. 82**—*Mortgage of several properties—Mortgagee recovering debt from one item—Alienee whether entitled to recover contribution from holders of other items.*

Where the mortgagee proceeds only against one of the items of property and having obtained a decree recovers the entire debt out of that item, an alienee from the mortgagor of that item can recover contribution from the persons who hold the other itemes included in the mortgage. (*Boys and Smith, JJ.*) BAL KISHAN *v.* BUNDA. **I.R. 1932 All. 215=136 I.C. 567=1931 A.L.J. 1073=A.I.R. 1932 All. 246.**

———**S. 82**—*Principle underlying section.*

There is no authority for the position that mortgagors are only liable *inter se* for contribution to the extent of the benefit they have received from the mortgage money. On the other hand S. 82 lays down that *inter se* mortgagors are liable for contribution in proportion to the value of their property which has been included in the joint mortgage. (*Bennet, J.*) JAI NARAIN *v.* RASHAK BEHARI LAL. **I.R. 1931 All. 385=131 I.C. 545=A.I.R. 1931 All. 546.**

———**S. 82**—*Scope—Mortgage by several—Enforcement.*

S. 82 cannot be construed as meaning that any mortgage by seven persons of their shares in different properties is to be treated as seven entirely separate mortgages. It is open to the mortgagee to recover his debts from any one or more of the shares. The mortgagee does not owe a duty to each mortgagor to sue all other mortgagors or their assignees. (*Rankin, C.J. and Mitter, J.*) RAJANI KANTA GHOSH *v.* SOURENDRA NATH MITTRA. **151 I.C. 454=7 R.C. 124=38 C.W. N. 124=A.I.R. 1934 Cal. 421.**

———**S. 82**—*Suit for contribution—Several properties—Some alone sought to be made liable—Extent of liability.*

S executed a simple mortgage in favour of *T* in respect of ten items of property. Later on *S* executed another simple mortgage in respect of two of those items in favour of *R*. The latter sued on his mortgage and purchased the items in execution of his decree. *T's* heirs sued subsequently on the prior mortgage and sold in execution the two items which had been previously sold. The transferees from *R* thereupon deposited the decree amount in court and instituted a suit for contribution claiming relief against some of the other properties mortgaged.

Held, that the defendants could be rendered liable only in proportion to the properties held by them unless it was shown that the other properties had been completely absorbed in satisfaction of prior charges. The onus of proving that the properties had been so absorbed was on the plaintiffs. (*Sen and Niamaullah, JJ.*) MURLI PRASAD AWASTHI *v.* SHEO DAT PRASAD. **1931 A.L.J. 349=A.I.R. 1931 All. 625.**

———**S. 82**—*Value for purposes of contribution—Mode of ascertainment.*

To arrive at the value, for contribution purposes of each of several properties on which a particular mortgage is secured, the amount of all prior incumbrance upon such properties must be ascertained and deducted. Where properties *A*, *B* and *C* are all made security for one mortgage, if property *A* is subject to a prior incumbrance jointly with properties, *X*, *Y* and *Z*, the rateable share to be attributed to *A* under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. It is incorrect to say that it is only necessary in such a case to see what was the total amount of the prior incumbrance to which *A* was liable irrespective of the question whether that liability was to be shared by *X*, *Y* and *Z*. (*Sir George Lowndes*) FAQIR CHAND *v.* AZIZ AHMAD KHAN. **59 I.A. 106=54 All. 199=136 I.C. 751=I.R. 1932 P.C. 149=1932 A.L.J. 195=36 C.W.N. 437=35 L.W. 421=1932 M.W.N. 445=13 Pat. L.T. 261=55 C.L.J. 271=34 Bom. L.R. 760=9 O.W.N. 91=A.I.R. 1932 P.C. 74=62 M.L.J. 492 (P.C.).**

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———**S. 83**—*Amount uncertain—Penal clause in the mortgage clause—Deposit of amount not covering penalty—Sufficiency.*

S. 83 does not require deposit of an amount calculated in accordance with the penal provisions of a bond. Such an amount is not due on the bond. Where the mortgagor deposits an amount which is adequate except to recover the penalty, the tender is not bad. (*Macnair, J.C. and Staples, A.J.C.*) RAM RAO *v.* GOPALA. **28 N.L.R. 149=I.R. 1932 Nag. 153=140 I.C. 406=A. I.R. 1932 Nag. 169.**

———**Ss. 83 and 84**—*Amount uncertain—Penal clause as to interest on default—Deposit by mortgagor of principal and reasonable compensation for interest after default—Validity—Interest, if ceases.*

A mortgage deed provided for enhanced interest on default. But the mortgagor, though he committed default, deposited only a sum which though less than the amount payable on the footing of the penal clause; still represented the amount properly payable to the mortgagee including reasonable compensation under S. 74 of the Contract Act.

Held, that the deposit was a valid deposit under S. 83 of the T. P. Act and that under S. 84, the mortgagee was not entitled to claim interest after the date of deposit. The fact that for one reason or another there might be uncertainty or difference between the parties as to what the amount due is does not preclude the operation of Ss. 83 and 84. (*Varadachariar and Stodart, JJ.*) MUTHIA CHETTIAR *v.* RAMAMOORTHI. **159 I.C. 867=8 R.M. 574=42 L. W. 802=A.I.R. 1935 Mad. 1072=69 M.L.J. 841.**

———**S. 83**—*Applicability—Charge—Suit to enforce.*

S. 83, T. P. Act, applies not only to a suit on a mortgage, but also to a suit to enforce a charge, such as for arrears of maintenance charged on property. (*King, C.J. and Zia-ul-Hasan, J.*) BRIJ GOPAL *v.* MASUDA BEGAM. **10 Luck. 350=153 I.C. 263=7 R.O. 313=11 O.W.N. 1550=A.I.R. 1935 Oudh 93.**

———**S. 83**—*Applicability—Deposit after suit.*

S. 83, T. P. Act, is intended to apply to a deposit made by a mortgagor before the institution of a suit on the mortgage. It does not apply to deposit made after a suit has been filed and a preliminary decree has been passed. (*King, C. J. and Zia-ul-Hasan, J.*) BRIJ GOPAL *v.* MASUDA BEGAM. **10 Luck. 350=153 I.C. 263=7 R.O. 313=11 O.W.N. 1550=A.I.R. 1935 Oudh 93.**

———**S. 84**—*Deposit of part of decretal amount—Interest does not stop.*

A mortgagee decree-holder is not bound to accept a part payment of the amount under the decree and hence

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interest does not cease to run by reason of deposit of such amount in Court. (*Shadi Lal, C.J. and Broadway, J.*) MEWA SINGH *v.* TARA SINGH. **6 I.R. (Lah.) 100=145 I.C. 416 (1)=34 P.L.R. 853=A.I.R. 1933 Lah. 685.**

———**S. 84**—*Effect of tender—Simple money claims and claims based on mortgages—Distinction between.*

In the case of ordinary money claims not based on mortgage, a tender before suit of the amount due must be followed by payment into Court in order to stop the running of interest. (38 M. 959 ; 16 Bom. 141 ; 34 Cal. 305, Rel.) In the case of mortgages the rule is different and a tender alone as the effect, under S. 84, T. P. Act, of stopping interest from the date of tender. (*Waller and Krishnan Pandalai, JJ.*) ARUNACHALA PILLAI *v.* GOVINDASWAMI NAICKER. **55 Mad. 458=135 I.C. 907=I.R. 1932 Mad. 235=1931 M.W.N. 1226=34 L.W. 843=A.I.R. 1932 Mad. 109=62 M.L.J. 266**

———**S. 83**—*Joint mortgagors—Deposit by—Presumption as to amount paid by each.*

Where two mortgagors are both jointly and severally liable to pay the mortgage debt and a deposit is made by them under S. 83 to save their property, there is no presumption either that both the mortgagors paid equally or that one paid the whole amount or a portion of it; and it is for the claimant to prove what share of money he is entitled to receive. (*M. C. Ghose, J.*) LAL BEHARY SAHA *v.* BIMALAPADA MAJUMDAR. **8 R.C. 310=159 I.C. 420=A.I.R. 1935 Cal. 728.**

———**(as amended in 1929), Ss. 83 and 92**—*Sale of equity of redemption invalid—Deposit of mortgage amount by purchaser in Court—Rights of purchaser.*

S. 83 deals with the right to deposit the mortgage money in Court and not with the right to redeem by payment direct to the mortgagee or the right to bring an action for redemption. A purchaser of the mortgaged property from the widow of the mortgagor, whose sale is not effective on account of invalid registration, although he is precluded from proving his purchase, he may establish his undertaking to pay off the subsisting mortgage by the deed. If he has deposited the mortgage amount under the agreement in his sale deed, he is entitled to the equitable relief of claiming that amount before the reversioner is allowed to take possession of the property mortgaged. Because although the sale deed is inadmissible for proving his title to the property, it can be used for collateral purposes, *i.e.*, to show that he should retain part of the consideration for the sale and pay that sum in discharge of the mortgage. (Case-law disc.) (*Wort and Fazl Ali, JJ.*) JAGDEO SAHU *v.* MAHABIR PRASAD. **13 Pat. 111=153 I.C. 602=7 R.P. 357=15 Pat.L.T. 73=A.I.R. 1934 Pat. 127.**

———**S. 83**—Scope—Suit for maintenance charged on property—Preliminary decree—Subsequent deposit of amount—Effect on running of interest. *See* C.P. CODE, O. 24, R. 3. **11 O.W.N. 1550=A.I.R. 1935 Oudh 93.**

———**S. 84**—*Conditional tender—Validity of.*

A subsequent purchaser of the property, after the sale in his favour, wanted the mortgagees to accept the sum of Rs. 1,000 either in full satisfaction of the amount due on the mortgage or to release the property sold to him out of the mortgaged property. The mortgagees refused to accept the amount.

Held, that the mortgagees were justified in refusing as the transferee had no right to demand either condition and such a conditional tender would not amount to a valid tender. The mortgagees were justified in refusing it. (*Staples, A. J. C.*) SITARAM *v.* RAM RAO. **13 N.L.J. 213=I.R. 1931 Nag. 65=130 I.C. 817=A.I.R. 1931 Nag. 91.**

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———**S. 84**—*Valid tender—Condition—Payment into Court—Suit on for the recovery of interest only—Principle applicable.*

No doubt, in a suit upon the mortgage, if the mortgagor desires to plead that interest had ceased to run because of a previous valid tender of the amount due, that plea must be accompanied by payment into Court, otherwise the tender would be ineffectual. But in a suit for the recovery of interest only, the payment of interest into Court would not raise the inference of readiness to pay the whole amount due on the mortgage, nor would the failure to pay this amount into Court raise the contrary inference that the mortgagor was not prepared to pay. (*Dunkley, J.*) MAUNG BA KYAW *v.* NANIGRAM JAGANATH. **13 Rang. 22=154 I.C. 189=7 R.R. 272=A.I.R. 1934 Rang. 316.**

———**S. 84**—*Valid tender—Condition.*

In order that a tender shoule operate to stop the running of interest there must, no doubt, be a continued readiness to pay the amount due on the mortgage. But it is unnecessary to keep the money immediately at the disposal of the mortgagee provided that it can be found whenever the mortgagee sees fit to demand it; if a mortgagee unequivocally refuses a proposed payment of the amount due, the mortgagor is not bound to make a formal tender of it, and the mortgagee cannot recover interest accruing subsequently. (*Dunkley, J.*) MAUNG BA KYAW *v.* NANIGRAM JAGANATH. **13 Rang 22=154 I.C. 189=7 R.R. 272=A.I.R. 1934 Rang. 316.**

———**S. 91**—*Purchaser of mortgagor's right—Mortgaged property purchased by two purchasers—Title to equity of redemption is to be determined by priority of sale.*

As between two purchasers of mortgaged property the title to the out standing equity of redemption is determined by the priority not of the respective mortgages but of the respective sales and the person who first buys the equity of redemption whether he be the mortgagee himself or a stranger would be entitled to redeem all the subsisting mortgages on the property and thus acquire an absolute title. A.I.R. 1922 All. 135 and A.I.R. 1925 All. 804, Foll.; A.I.R. 1932 Cal. 126, Ref. (*S. K. Ghose, J.*) RAM KINKAR HAZRA *v.* HARERAM HAZRA. **6 I.R. (Cal.) 116=145 I.C. 575=A.I.R. 1933 Cal. 181.**

———**S. 91**—*Right to redeem—Mortgage of ex-proprietary rights—Ejectment decree against mortgagors only—Zamindar's right to redeem.*

After the execution of a mortgage of ex-proprietary rights a suit for ejectment of the mortgagors and mortgagees was brought by the Zamindar. The suit was decreed against the mortgagors only.

Held, that the Zamindar's successors-in-interest could redeem the mortgage. (*Pullan and Niamatullah, JJ.*) BASDEO RAI *v.* JAIMANGAL RAI. **136 I.C. 69=I.R. 1932 All. 117=1931 A.L.J. 914=A.I.R. 1932 All. 53.**

———**S. 91 (a)**—*Construction—"Interest or charge"—Puisne mortgagee whose right of sale is barred—Right to sue for redemption of prior mortgagee.*

The words "interest in or charge upon", in Cl. (*a*) of S. 91, T. P. Act, must obviously mean a *subsisting* interest or charge. Consequently a puisne mortgagee, who has been unsuccessful in a suit for mortgagee-possession and who fails to enforce his mortgage by foreclosure or sale within the prescribed period, is not a person who has any subsisting interest in or charge upon the mortgaged property and is not entitled to sue for redemption under S. 91, although his right as a mortgagee cannot be said to have been extinguished. (*Sri-*

T.P. ACT (1882), S. 91.

vastava and Nanavutty, JJ.) RAM ADHAR *v.* SHANKAR BAKHSH SINGH. **10 Luck. 531=153 I.C. 808=7 R.O. 400=1935 O.W.N. 40=A.I.R. 1935 Oudh 139.**

——**S. 91 (a)**—*Construction—'Interest'—Mode of devolution.*

An occupancy tenure is the creation of statute, and where a special rule of succession has been laid down in the statute, it is the statute which regulates the devolution of inheritance and not the personal law of the tenant. The interest referred to in S. 91 can accrue either by succession, conveyance or contract. The interest referred to in S. 91 is interest in the property sought to be redeemed 30 All. 128, Ref. (*Mears, C.J and Sen, J*) RAM SINGH *v* BALDEO PRASAD. **I R. 1932 All. 444=138 I C. 552=13 L.R. 225 (Rev.)=16 R.D. 450=1932 A.L J. 605=A.I.R. 1932 All. 643.**

——**S. 91 (a)**—*Landlord—Right to redeem—Death of tenant without heir—Reverter to landlord.*

On the death of a tenant or sub tenant without heirs his right reverts to the landlord and does not escheat to the Crown. It is open to the landlord in such a case to redeem a mortgage made by the sub-tenant. (*Mukerji and Kennet, JJ*) ARJUN SINGH *v.* MAHESHA NAND. **I.R. 1932 All. 391=138 I C. 366=1932 A.L.J. 474 =16 R.D. 463=13 L.R. 337 (Rev.)=A.I.R. 1932 All. 437.**

——**S. 91 (a)**—Lessee—Mortgage with possession—Subsequent permanent lease by mortgagor in breach of covenant—Right of lessee to redeem. *See* T. P. ACT, S. 65-A. **40 C.W.N. 57.**

——**S. 91 (a)**—*Landlord—Person interested—Permanent lease—Right to redeem.*

Where the superior holder of an urban site granted a permanent lease but continued to have an interest in it since he was liable to pay any assessment or other tax leviable on it in case the permanent tenant did not do so and he had also rights of resumption in certain contingencies and the superior holder had a further right reserved in respect of the building put upon the site.

Held, that the landlord could redeem a mortgage effected by his permanent tenant who died without leaving any heirs (*Patkar and Murphy, JJ.*) VENKATESH KRISHNA *v.* BHUJABALLI **57 Bom 194=I R. 1393 Bom. 242=142 I.C.481=35 Bom.L.R. 60=A.I. R. 1933 Bom. 97.**

——**S. 91 (a)**—*Lessee—Right to redeem—Lessee for 15 years.*

A lessee who takes the property for a lease of 15 years on pre payment of a lump sum has an interest in the property and is among the persons who may sue for redemption. (*Grille, A J C.*) ANANDA PANDURANG *v.* UTTAMRAO **6 I R (Nag.) 12=144 I.C. 521=29 N.L.R. 77=A.I.R. 1933 Nag 44 (2).**

——**(Before amendment of 1929), S. 91 (f)**—*Applicability—Charge.*

The provision in S. 91 (*f*) is in the nature of an exception specially applied by the legislature to the case of mortgages. And this exception should not be extended to a charge in perpetuity.' (*Sulaiman, C.J. and King J.*) MATLUB HASAN *v.* MT. KALAWATI. **147 I.C. 302=6 R A. 472=A.I.R. 1933 All 934.**

——**(Before amendment of 1929), S. 91 (f)**—*Attaching creditor—Court auction-purchaser—Right to redeem.*

A an attaching creditor does not by reason of the attachment obtain any lien or charge on the attached property and therefore *a fortiori* he cannot hand on any such charge to the purchaser at the auction, nor can he retain in himself the right to redeem by purchasing the property himself at such auction. 17 C.W.N. 873 and 44 Mad. 232, Rel. on. (*Mukerji and Mitter, JJ.*) C.L. KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal. 598=I R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

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——**(Before amedment of 1929), S. 91 (f)**—Attaching creditor—Right to redeem—Simple money decreeholder—Purchase in execution sale—Subsequent purchase by mortgage in execution of mortgage decree—Right to possession—Attaching creditor's right to redeem not lost. *See* MORTAGE—MORTGAGE SUIT—RIGHT TO POSSESSION. **1932 A. L. J. 289=A. I. R. 1932 All. 356.**

——**(Before amendment of 1929), S. 91 (f)**—*Mortgage suit—Person obtaining order of attachment—Whether necessary party.*

A person who obtains an order of attachment in his favour has no interest either in the mortgage security or in the right of redemption and is not a necessary party to a mortgage suit. (*Mukerji and Mitter, JJ.*) C.L. KIERNANDER *v.* BENIMADHAB KHETTRI. **58 Cal. 598=I R. 1931 Cal. 849=134 I.C. 561=A.I.R. 1931 Cal. 763.**

——**S. 92**—Applicability—Mortgagee paying up his own earlier mortgage—Right to subrogation. *See* MORTGAGE—SUBROGATION—RATIONALE OF DOCTRINE. **7 Luck. 655=A.I.R. 1933 Oudh 9.**

——**S. 92**—*Auction purchaser paying prior encumbrance—Claim to interest—Liability to account for profits.*

A purchaser of mortgaged property who pays the prior encumbrances and subsequently claims interest no such payments should also account for corresponding proportion of the profits derived from the property. If the interest he claims is less than the profits he has to account, he need not account for the surplus. But if the interest exceeds the profits, he will have to credit the profits towards the interest and claim only the balance of interest. (*Ramesam and Stone, JJ.*) RAMCHANDRA NAIDU *v.* PAVALAYAMMAL. **8 R M. 502 (2)= 159 I C. 478=1935 M W N. 662=42 L.W. 12=A.I. R. 1935 Mad. 360=68 M L.J. 717.**

——**S. 92**—*Co-mortgagors—Dispute among—Award—Discharge of mortgage by one.*

Where a dispute relating to a mortgage executed by five brothers was referred to arbitration and an award was passed, if the award be treated as tantamount to a decree of Court superseding the mortgage, the mortgagors becomes co-judgment debtors and if one of them has paid off the mortgage debt, he would acquire a right similar to that of a co mortgagor paying-off the mortgage debt. 26 Mad. 686; 36 Mad. 493; 14 C.W.N. 361, Ref. (*Niyogi, A.J.C.*) JAIRAM *v.* BHILAJI. **27 N. L R. 152=I.R. 1930 Nag. 361=127 I.C. 889=A.I.R. 1930 Nag. 300.**

——**Ss. 92 and 95**—*Co-mortgagor redeeming entire mortgage—Right to subrogation.*

The combined effect of the amended Ss. 92 and 95 is that while a mortgagor who pays his own debt cannot claim any subrogation against a puisne mortgagee, yet one of several mortgagors who pays not only for himself but also for the other mortgagors is entitled to subrogation against the co-mortgagors. (*Srivastava and Ziaul-Hasan, JJ.*) NISAR AHMAD KHAN *v.* MANZUR AHMAD KHAN. **159 I.C. 54=8 R.O. 151=1935 O. W.N. 1203=A.I.R. 1936 Oudh 47.**

——**Ss. 92 and 95**—Co-mortgagor redeeming mortgage—Right to charge—Suit for contribution—Cause of action. *See* LIMITATION ACT, ART. 132. **1935 O W.N. 278=A.I.R. 1935 Oudh 245.**

T.P. ACT (1882), S. 92.

———**S. 92**—*Maintenance charge—Person paying charge decree—Subrogation.*

Under S. 92 a person who has paid off the amount of a maintenance charge decree becomes subrogated to the decree-holder's rights and therefore has a charge against the property. (*Niyogi and Staples, A.J Cs.*) MT. SAVITRIBAI *v.* NANHELAL. **30 N.L.R. 148=6 R.N. 207=148 I.C. 815=A I.R. 1934 Nag. 84.**

———**(as amended), Ss. 92 and 94**—*Prior mortgagee taking another mortgage—Intention to keep alive—Proof—Extinction of prior debt.*

Certain property was mortgaged to *A* and later on to *B* and subsequent to *B's* mortgage, the same property was again mortgaged to *A* and a part of the consideration of the mortgage had been kept with *A* so that a sum was to be paid *B* for satisfaction of his mortgage-money and the rest was to be kept by *A* to himself in discharge of his first mortgage. *A* paid nothing to *B* and held up his first mortgage as a shield and pleaded in a suit by *B* for sale of the mortgaged property that the property could only be sold subject to his prior charge under his first mortgage.

Held, that the question whether the prior mortgage was kept alive or not was one of intention which does not depend on the mortgagee's subsequent declaration but must be gathered from the facts of each case at the time the subsequent mortgage wos executed.

Held further, that under the circumstances of the case the prior mortgagee had intended to extinguish his debt and that it was not given to him to hold the prior mortgage as a shield against the subsequent mortgagee's claim. (*Dalal, J.*) BALBADDAR UPADHYA *v.* SHEOMANGAL. **I.R. 1931 All. 269=130 I.C. 301=A I.R. 1931 All. 347.**

———**S. 92**—*Puisne mortgagee having prior mortgage—Keeping alive—Intention—Presumption—Burden of proof.*

There is a presumption that the holder of a subsequent mortgage who has prior mortgages on the same property would keep alive the prior mortgages if they are for his benefit. But the presumption can be rebutted if the facts and circumstances attending the particular transaction are such that he could not have intended to hold the prior mortgages alive. The question whether such keeping alive would be for his benefit has to be decided in the light of circumstances existing at the time of the transaction, the onus being on him to prove circumstances leading to the inference that it was in his interest at the time of the transaction to keep the charges alive and therefore that may be taken to be his intention. (*Agha Haidar, J*) DHANPAL SINGH *v.* MT. FAHIMAN. **7 R.L. 477=153 I.C. 870=A.I.R. 1935 Lah. 203.**

———**S. 92**—*Puisne mortgagee's right—Discharge of mortgage by puisne mortgagee—Subrogated right—Question of legal necessity for mortgage under Hindu Law, if material.*

S, the managing member of a joint Hindu family of which the plaintiffs were the coparceners mortgaged certain family property under a possessory mortgage in favour of *M* in 1905 and the defendant, who was a subsequent mortgagee from *S* got possession of the property by redeeming the mortgage of *M*. Plaintiff brought a suit to eject defendant in 1936.

Held, that the defendant was entitled to claim the rights of a prior mortgagee in respect of the said property, though legal necessity in his favour had not been established and the plaintiffs could not claim to eject him from the said property when they were out of possession of it since 1905 and had never cared to question the validity of the mortgages executed by *S*.

T.P. ACT (1882), S. 92.

16 O.W.N. 119, Appl. (*Raza and Nanavutty, JJ.*) RAM KISHAN LAL *v.* MAHOMED BAQUAR KHAN. **I R 1931 Oudh 271=132 I.C. 271=8 O.W.N. 222=A.I.R. 1931 Oudh 144 (2).**

———**S. 92**—*Puisne mortgagee's right—Mortgage decree—Discharge by subsequent mortgagee—Subrogated right.*

Where the prior mortgagee obtained a decree and the mortgaged property wos brought to sale in pursuance of that decree and the mortgagor effected a fresh mortgage of the same property and the discharge of the decree was recited as consideration therein.

Held, that the prior mortgage was not extinguished and that the later mortgagee on discharge of the decree could hold the earlier mortgage as a shield. (*Hasan, C. J. and Kisch, J.*) RAM BILAS *v.* LACHMI NARAIN. **I.R. 1931 Oudh 302=132 I.C. 512=14 O.L.J. 380=8 O.W.N. 541=A.I.R. 1931 Oudh 295.**

———**S. 92**—*Puisne mortgagee's right—Property subject to mortgage—Subsequent mortgage by mortgagor after selling the property to third party—Subsequent mortgagee discharging prior incumbrance—Rights of.*

Where property which is subject to a mortgage is sold by the mortgagor to a third party and subsequent to such sale, the mortgagor executes the mortgage in suit to the plaintiff, the mortgage transfers no interest in the property to the plaintiff, as the property does not belong to the mortgagor at the time of its execution. The mere fact that the plaintiff has discharged the prior incumbrance does not confer on him any interest in the property. (*King, C. J. and Thomas, J*) SUKHRAM DASS *v.* MAHBUB KHAN. **11 Luck. 224=155 I.C. 905=7 R.O. 628=1935 O.W.N. 622=A.I.R. 1935 Oudh 399.**

———**S. 92**—*Puisne mortgagee's right—Mortgagee paying prior mortgage decree—Right to subrogation.*

Per *Sulaiman, C. J. and Bennet, J* (*Ganga Nath, J.* contra.)—Where a property has been the subject of two simple mortgages and a suit has been brought for sale on the first mortgage and decreed against the second mortgagee also; and subsequently a third mortgage is taken and this mortgagee, has paid the decretal amount but has not obtained possession of the property; when the second mortgagee brings a suit for sale and makes the third mortgagee a party, the third mortgagee is entitled to claim a right to subrogation for the amount which he paid in discharge of the decree in the earlier mortgage suit, even though a fresh suit on the first mortgage would be barred by limitation. (*Sulaiman, C. J., Bennet and Ganga Nath, JJ.*) ALAM ALI *v.* BENI CHARAN. **58 All 602=1935 A L.J 1294=160 I.C. 541=8 R A. 618=1935 A.W.R. 1456=A.I.R. 1936 All 33 (F.B).**

———**S 92**—*Puisne mortgagee's right—Suit by first mortgagee—Preliminary decree—Payment by subsequent mortgagee—Right to subrogation.*

Where a subsequent mortgagee, after a preliminary decree in the suit by the first mortgagee, pays off the decretal amount, he is entitled to be substituted for the first mortgagee as a plaintiff. As the Court has to pass a final decree, it is clear that the Court is not *functus officio* when the payment is made and accepted. 27 All. 325 (P.C.), Expl and Dist.; A I R. 1928 Nag. 145 and 12 N.L R. 50, Rel. on.; A.I R. 1926 Nag. 84, Expl. (*Macnair, J. C.*) YAMUNABAI *v.* MAROTI. **6 I R. (Nag) 90=146 I.C. 514=29 N.L R. 183=A.I.R. 1933 Nag 163**

———**S 92**—*Puisne mortgagee's right—Third mortgagee paying first in pursuance of agreement in his mortgage—He can use first mortgagee as shield against second mortgagee.*

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Even where a third mortgagee agrees by a mortgage deed to discharge the first mortgage, he can equitably use the first mortgage as a shield against the second mortgage because the intention of the third mortgagee in paying off the first charge is to keep alive the first mortgage for his own benefit and not for the benefit of intermediate encumbrancer or any other party. (Case-law discussed.) (*Niyogi, A. J. C.*) MOHANLAL *v.* MOHOMAD SUJAT. **30 N.L.R. 164=6 I.R. (Nag.) 36 =144 I.C. 969=A.I.R. 1933 Nag. 155.**

———**S. 92 (as amended by Act XX of 1929)**—*Puisne mortgagee's right—Third mortgagee paying consideration of his mortgage to first mortgagee—Law prior and subsequent to amendment.*

Where out of the consideration money for the third mortgage over the same property, a sum is left with the third mortgagee for paying off the first mortgage and the third mortgagee pays off the first mortgage, he is subrogated to the position of the first mortgagee and can claim priority as against the intermediate mortgagee. This is the correct view if the law is governed by the new S. 92, as introduced by the Amending Act of 1929. Even if S. 92 has no retrospective effect, the rule laid down in that section would be a safe guide to follow as laying down correctly the rule of justice, equity and good conscience for cases arising before the passing of the Amending Act of 1929. As a matter of justice and equity, there is no reason why the intermediate mortgagee should get the benefit of the redemption of the prior mortgage when he has paid nothing towards such redemption. (*King, C. J. and Thomas, J.*) SUKHRAM DASS *v.* MAHBUB KHAN. **11 Luck. 224=155 I.C. 905=7 R.O. 628=1935 O.W.N. 622=A.I.R. 1935 Oudh 399.**

———**S. 92**—*Purchaser in Court auction—Execution of mortgage decree—Right to subrogation—Purchase money deposited in Court to avert sale—Right of purchaser.*

A transferee of properties sold in execution of a mortgage decree whose money was deposited into Court by the mortgagors themselves to avert the Court sale is entitled to subrogation in respect of such payment. 1 Pat. 332, Foll. (*Curgenven and Sundaram Chetty, JJ.*) ABDUL RAZAK ROWTHER *v.* ABDUL RAHIMAN SAHIB. **1933 M.W.N. 1013=38 L.W. 463=149 I.C. 287=6 R.M. 629=A.I.R. 1933 Mad. 715=65 M.L.J. 390.**

———**S. 92**—*Purchaser from widow—Discharge of mortgage debt—Reversioner entitled to possession—If bound to pay mortgage debt paid.*

Where a purchaser of a property from the widow holding a life estate discharges a mortgage debt out of the consideration for the purchase and on the death of the widow, the reversioner sues for possession of the property, credit should be given to the mortgage amount paid by the purchaser. In such a case, if the plaintiff reversioner does not impute bad faith on the part of the purchaser, the latter is not bound to allege or prove good faith. (*Agarwala and Saunders, JJ.*) BABAN MISRA *v.* BISHWANATH PANDE. **155 I.C. 870=7 R.P. 631 =A.I.R. 1934 Pat. 681.**

———**S. 92**—*Purchaser of equity of redemption—Purchaser paying prior mortgage out of money left in his hands—Right to subrogation.*

A purchaser of the equity of redemption from the original mortgagor is entitled to the benefit of subrogation under S. 92 of the T. P. Act if he redeems a prior mortgage, and no restrictions are placed on the applicability of that section to cases where the money is paid out of the sum left in the hands of the transferee or

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cases where he has undertaken liability to discharge the previous debt. (*Sulaiman, C. J. and King, J.*) UMED SINGH *v.* BABU RAM. **7 R.A. 47=150 I.C. 937= 1934 A.L.J. 887=4 A.W.R. 221=A.I.R. 1934 All. 1035.**

———**(as amended), S. 92**—*Purchaser of equity of redemption — Subrogation—Payment of mortgage amount by stranger—Rights of stranger.*

A payment made by a stranger to the mortgage of the amount due to the mortgagee would *prima facie* amount to a transfer of the mortgage right. Being a stranger, he is presumed to intend to keep it alive for his own benefit and would be entitled to be subrogated to the rights of the mortgagee. Items 1 and 2 of the suit properties belonging to *D* had been mortgaged to *S*. *A* obtained a decree against *D*, attached the property and purchased it himself. During the continuance of the attachment, item 1 was sold by *D* to *P* who paid off the entire mortgage amount due to *S*. Shortly after, he got a mortgage of the other item also and claimed a charge on both the properties for the amount paid by him by being subrogated to the rights of *S*. It was contended that at the time he paid off *S*, he had no interest in item 2 and to that extent, he was a mere volunteer.

Held, the decree which *A* obtained was subject to the mortgage rights of *S*. In spite of the sale in execution, *D*, who had the equity of redemption, had an interest in paying off the mortgage to *S* and keeping it alive in his favour; *P* having, at the instance of *D*, paid off that amount could claim the same right to stand in the shoes of *S* and was entitled to a charge on both the properties even though he might have had no title to them at the time of payment. 40 B. 646 and 53 B. 353, Foll. (*Madhavan Nair, J.*) GOVINDA KANGANI *v.* MURUGESA MUDALI. **135 I.C. 529=I.R. 1932 Mad. 113=A.I.R. 1931 Mad. 720.**

———**S. 92**—*Purchaser of part of equity of redemption—Right of subrogation.*

The purchaser of a part of the equity of redemption comes within the description of persons referred to in S. 91. On redeeming the property subject to the charge, he is given by S. 92 the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee. (*Rowland and Agarwala JJ.*) JHUM LAL *v.* SHAM NARAYAN SINGH. **I.R. 1933 Pat. 31=140 I.C. 845=13 Pat. L.T. 686=A.I.R. 1933 Pat. 33.**

———**S. 92**—*Purchaser of part of equity of redemption—Purchaser paying first mortgagee — Right to subrogation.*

A purchaser of a portion of the mortgaged property by paying the amount to the first mortgagee acquires the rights of the first mortgagee, and he is entitled to use the first mortgage which he has satisfied as a shield against the second mortgage. (*Niyogi and Grille, A. J. Cs.*) GADIRAM *v.* PUNAMCHAND. **I.R. 1933 Nag. 232=144 I.C. 326=30 N.L.R. 265=A.I.R. 1933 Nag. 171.**

———**S. 92**—*Purchaser of portion of equity of redemption—Purchaser paying prior mortgage under covenant with mortgagor—Right to subrogation.*

Where a purchaser of a portion of the equity of redemption retains at the time of his purchase a part of the price and expressly agrees by a covenant in the deed of his purchase to discharge the prior mortgage debts out of the same, he is not entitled to subrogation by paying off those debts. By paying off the prior mortgages, he simply discharges an obligation which is upon him under an express contract. (*Nasim Ali, J.*

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MUKARAM MARWARI *v.* MAHAMMAD HOSAIN. **62 Cal. 677=161 I C. 48=8 R.C. 470=A.I.R. 1936 Cal. 42.**

———**S. 92**—Purchaser's right—Real purchaser at court auction sale—Payment of mortgage debt *bona fide* after decree in redemption suit—Benefit of redemption going to benamidar purchaser—Right to recover amount from certified purchaser. *See* C. P. CODE, S. 66—REAL PURCHASER. **1931 A.L J. 601.**

———**S. 92**—*Purchaser's rights—Right to suborgation—Purchaser redeeming portion of mortgaged properties.*

A purchaser redeeming only a half share in the mortgage is not entitled to suborgation. 36 C. 193 and 38 A. 502, Ref. (*Bisheshwar Nath and Nanavutty, JJ.*) KANHAIYA LAL *v* IKRAM FATIMA. **8 Luck. 103=I.R. 1932 Oudh 360=139 I C. 358=9 O.W.N. 557=A.I.R. 1932 Oudh 268.**

———**S. 92**—*Purchaser under a sale deed—Discharge of vendee's liabilities—Sale void for want of title in vendor viz., a maintenance decree and hypothecation bonds—Vendee's right to subrogation.*

Where a vendee under a deed of sale discharges the liabilities of the vendors at the latter's request, the liabilities being a maintenance decree against him, and debts under hypothecation bonds executed by him, and the sale turns out to be void for want of title in the vendor, the vendee becomes subrogated to the rights possessed under the maintenance decree and the hypothecation bonds ; and he is entitled to recover the sums paid by him from the properties which were liable to the maintenance decree and to the debts under the hypothecation bonds. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) KRISHNAMACHAR *v.* KESAVACHAR. **12 Mys.L.J. 288=39 Mys. H.C.R. 374.**

———**S. 92**—*Purchaser under first mortgage decree—Right to set up first mortgage as shield in suit by subsequent mortgagee.*

A person who is in the rights of a first mortgagee and of the original mortgagor as acquired at a sale under the first mortgage, is entitled at the suit of a subsequent mortgagee who is not bound by the sale and the decree on which it proceeded, to set up the first mortgage as a shield. (Case-law discussed.) (*Wort, J.*) RAMANANDAN PRASAD SINGH *v.* RAM DAS. **155 I.C. 663=7 R.P. 608=A.I.R. 1934 Pat. 70.**

———**S. 92**—Purchaser undertaking to pay off mortgage sale by widow of equity of redemption invalid—Deposit of mortgage amount by purchaser in Court under the agreement in sale deed—Equitable relief of claiming the amount from the reversioner before the reversioner is allowed to take possession. *See* T. P. ACT, SS. 83 AND 92. **13 Pat. 111=A.I.R. 1934 Pat. 127.**

———**S. 92**—Purchaser undertaking to pay prior mortgage—Delay in payment—Vendee remaining in possession of property after paying the prior mortgage and appropriating profits—Suit for sale by the subsequent mortgagee—Vendee not entitled to claim further interest. *See* MORTGAGE—PRIOR AND SUBSEQUENT. **1934 A. L.J. 887=A.I.R. 1934 All. 1035.**

———**S. 92**—*Purchaser undertaking to pay two encumbrances — Payment of one only—Right to set the encumbrance paid off as a shield against the other encumbrancer.*

A later purchaser or mortgagee who undertakes to pay two prior encumbrances but who pays only one and not the other cannot resist the claim of the encumbrancer not so paid by setting up the discharge of the other encumbrance as a shield and claiming priority for the amount paid in discharge of it. A purchaser from such a purchaser with notice of the covenant cannot also claim any right of subrogation. 6 C. L. J. 134; 53 M. 188; 41 All. 417, Ref. (*Curgenven and Sundaram Chetty, JJ.*) ABDUL RAZAK ROWTHER *v.* ABDUL RAHIMAN SAHIB. **149 I.C. 287=6 R. M. 629=1933 M.W.N. 1013=38 L.W. 463=A. I.R. 1933 Mad. 715=65 M.L.J. 390.**

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———**S. 92**—*Registration—Amendment of* 1929—*Effect of—Subrogation—Registered agreement necessary.*

Before the new S. 92 came into force an intention to keep alive a prior incumbrance was presumed. But by the enactment of S. 92 of the Amended T. P. Act, the law to the effect that the intention to keep alive the prior discharged incumbrance could be presumed, has been changed and now there can be no presumption, and the person who has advanced money to a mortgagor, money with which the mortgage has been redeemed, has to prove the existence of a registered agreement of subrogation before he can claim that relief. (Case-law discussed.) (*Nanavutty and Rachhpal Singh, JJ.*) MAHOMED RAZA *v.* BILQIS JEHAN BEGAM. **9 Luck. 717=6 R.O. 508=149 I.C. 84=11 O.W.N. 619=A. I.R. 1934 Oudh 213.**

———**(as amended), S. 92**—*Retrospective effect—Amending provision.*

Act XX of 1929 did not clothe persons who under the previous law obtained only a charge with the rights of a mortgagee. (*McNair, J. C. and Pollock, A. J. C.*) RAMKARAN HIRALAL *v.* JAGESHWAR BHUT. **30 N. L.R. 1=157 I C. 466=A.I R. 1934 Nag. 97.**

———**(as amended in 1929), S. 92**—*Retrospective effect.*

S. 92 came into force in April 1930 and therefore does not govern the case of a transfer prior to that date. (*Wort and Fazl Ali, JJ.*) JAGDEO SAHU *v.* MAHABIR PRASAD. **13 Pat. 111=15 Pat.L.T. 73=153 I.C. 602=7 R.P. 357=A.I R. 1934 Pat. 127.**

———**(as amended), S. 92**—*Retrospective effect.*

Ss. 92 and 101 of the T. P. Act have retrospective effect. Even otherwise, the rule of subrogation laid down therein can be applied as rule of justice and equity. (*Mukerji, Banerji and Bennet, JJ.*) TOTA RAM *v.* RAM LAL. **54 All. 897=I. R. 1932 All. 524=139 I.C. 107=1932 A.L.J. 627=A I.R. 1932 All. 489 (F.B.).**

———**(as amended), S. 92**—*Retrospective effect.*

S. 92 as amended does not take retrospective effect. (*Sundaram Chetty, J.*) PICHAIVAPPA CHETTY *v.* GOVINDARAJULU MUDALY. **130 I C. 506=1930 M.W.N. 1190=33 L W. 78=A.I.R. 1931 Mad. 110.**

———**S. 92**—*Subrogation—Charge created by decree for rent—Right to be subrogated to.*

Where a person advances the money to a mortgagor to pay off a mortgage debt and gets a mortgage in security of that advance, then he is entitled to be subrogated to the rights of the original mortgagee. But the charge which is created by the decree for rent obtained by the landlord is a right to which the landlord alone is entitled and there is no right of subrogation in the person advancing money to the mortgagor to pay off the rents. (*Wort, J.*) RAMNANDAN PRASAD SINGH *v.* RAM DAS. **155 I.C. 663=7 R.P. 608=A.I.R. 1934 Pat. 70.**

———**Ss. 92, 93 and 82**—*Subrogation—Doctrine of shield—Scope and extent of—Right barred by limitation—If available in defence to suit for redemption.*

A purchaser of part of the mortgaged properties who has a right to contribution in respect of mortgage debt paid of by him cannot use such right as a shield or refuse to give up possession of the part belonging to another owner until payment of the amount of contri-

T.P. ACT (1882), S. 92.

bution, if such right is barred by limitation. Nor could such right be used as a sword against the owner's independent equily of redemption or as a shield to protect the possession obtained by reason of paying off the mortgage debt, when the right its barred by limitation. (*Krishnan Pandalai, J.*) DRAVIAM CHETTIAR *v.* RAMAIYA CHETTIAR. **41 L.W. 730=159 I.C. 857=8 R.M. 567=A.I.R. 1935 Mad. 390=68 M.L.J. 362.**

——(**as amended by Act XX of 1929**), **S. 92**—*Registration—Subrogation—Essentials.*

In order to support a claim of subrogation under S. 92 there should be a registered instrument to that effect. (*Raza and Smith, JJ.*) RAM HAIT *v.* POHKAR. **7 Luck 237=I. R. 1932 Oudh 5=134 I. C. 1093=8 O. W.N. 1105=A.I.R. 1932 Oudh 54.**

——**S. 92**—*Subrogation—Legal and conventional—Difference between.*

Subrogation is of two kinds legal and conventional. Where a third mortgagee redeems the first mortgage then he will be subrogated to the position of the first mortgagee as against the second mortgagee. This is what is known as legal subrogation. Conventional subrogation is somewhat different and it takes place where the person who pays off the debt has no interest to protect but advances money under an agreement express or implied that he would be subrogated to the rights and remedies of the first incumbrancer. Conventional subrogation can only arise by an agreement either express or implied. The case in which a legal subrogation, as distinct from conventional subrogation is claimed, stands on a different footing. In the case of legal subrogation, the third incumbrancer redeems the first mortgage in order to protect his own interest. Similarly a man who purchases the equity of redemption of the mortgagor and who redeems the first mortgage does so in order to protect his own interest. The case in which a conventional subrogation is sought however is defferent. There a person claiming a right of subrogation has to prove that there was an agreement (*Nanavutty and Rachhpal Singh, JJ.*) MAHOMED RAZA *v* BILQIS JEHAN BEGAM. **9 Luck. 717=6 R O 508=149 I.C. 84=11 O.W.N. 619=A.I.R. 1934 Oudh 213.**

——**S. 92**—Subrogation—Right to debt due to bank —Third party paying debt and taking back title deeds —He is entitled to be subrogated to the rights of the bank. *See* DEBTOR AND CREDITOR—SUBROGATION. **34 P.L.R. 477=A.I.R. 1933 Lah. 416.**

——**S. 92**—Subrogation—Right to—Payment of prior mortgage debt—Agreement to execute a fresh mortgage —No right of subrogation. *See* T. P. ACT, S. 58—MORTGAGE. **8 O W.N. 1105.**

——**S. 92**—*Subrogation—Right to—Person performing his own obligation.*

The rule against the subrogation of a mortgagor is extended to any purchaser of the equity of redemption or encumbrancer who discharges the prior encumbrance which he is by contract, express or implied, bound to discharge. A person cannot claim subrogation when he simply performs his own obligation or covenant. 36 C. W. N. 4 (P. C.), Rel. on. (*Nanavutty, J.*) JAIDEVI KUWAR *v.* SRIPAL SINGH **6 R O 281=147 I.C. 628 =11 O W.N 139=A.I.R. 1934 Oudh 129.**

——**S 92**—*Subrogation—Right to—Redemption of mortgage without paying entire amount due.*

All that is necessary to confer the right of subrogation is that the mortgage in respect of which the right is claimed should have been redeemed in full. It is not necessary that the entire amount due on the basis of the mortgage should be paid if the mortgagee agrees to let the mortgage be redeemed on payment of a smaller amount. (*Iqbal Ahamed, J.*) SHIB CHARAN DAS *v.* MUQADDAM. **158 I.C. 643=1935 A.W.R. 1121=8 R.A. 330=1935 A.L.J. 1129=A.I.R. 1936 All. 62.**

T.P. ACT (1882), S. 95.

——**S. 92**—*Scope.*

The Legislature has by the amendment not created a right which did not exist before but has simply clarified the position of the co-mortgagor holding a charge within the meaning of S. 95 read with S. 100.) *Niyogi, A. C. J.*) JAIRAM *v.* BHILAJI. **27 N L. R. 152=I. R. 1930 Nag. 361=127 I.C. 889=A.I.R. 1930 Nag. 300.**

——(**as amended**), **S. 92**—*Scope and effect.*

S. 92 does not state that the mortgagor on redeeming the property subject to a mortgage can in no circumstances, obtain the right of redemption which that mortgagee might have. Ordinarily a mortgagor has a right to redeem a mortgage effected by him. The principle to which the section is intended to give effect is that he who removes another's burden steps into the shoes of the person whose rights constitute the burden. (*Macnair, J. C.*) LAKHMICHAND *v.* JANARDHAN. **141 I C 144 =I R. 1933 Nag. 39=28 N.L.R. 247=A.I.R. 1932 Nag. 154.**

——**S. 94**—*Purchase by mortgagor of his own property in execution—Right of subsequent mortgagee.*

If in execution of a decree for sale of the mortgaged property the mortgagor purchases the property for himself, it passes into his hads subject to the right of the subsequent mortgagee, it being his duty as owner of the estate to discharge the debt of the subsequent mortgagee for which he had pledged the estate. The same principle would apply even if there had been intermediate purchasers of the property before it came into the hands the mortgagor. *Otter v. Lord Vaux*, 6 D. M. and G. 638 and 29 M. 113, Ref. to. (*Venkatasubba Rao and Madahvan Nair, JJ.*) RAMANATHAN CHETTIAR *v.* AUDINATHA AYYANGAR. **I.R. 1931 Mad. 642=132 I C 290=1931 M.W N. 760=A.I.R. 1931 Mad. 642.**

——**S. 95**—*Co mortgagors—Equity of redemption vesting in several persons—Relationship* inter se.

If the equity of redemption vests in several persons, all of them must be treated as co-mortgagors within the meaning of S. 95 of the T.P. Act. The terms of S. 59-A do not support the argument that if a mortgagor dies leaving several heirs, or if he transfers the equity of redemption in favour of several persons, then the several persons so deriving title from him cannot be regarded as co-mortgagors. No doubt the word 'mortgagor' would include such legal representatives but it does not mean that the relationship between them *inter se* would not be that of co-mortgagors. (*Srivastava and Zia ul-Hasan, JJ.*) NISAR AHMAD KHAN *v.* MANZUR AHMAD KHAN. **159 I C. 54=8 R.O. 151=1935 O. W.N. 1203=A.I.R. 1936 Oudh 47.**

——**S. 95**—*Co-mortgagor—Payment of prior mortgage debt—Subrogated right.*

Where there are several mortgages on a property, the owner of part of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor. Where it is manifestly for his benefit it may be presumed that it was his intention to keep the prior mortgage alive. And S. 95 does not necessitate the extinguishment of the mortgage and the creation of a charge S. 95 does not apply where the co mortgagor pays off an earlier charge and treats himself as buying it in such a case he cannot be considered to redeem the mortgaged property within the meaning of the section. (*Macnair, J. C. and Pollock, A. J. C.*) RAMKARAN HIRALAL *v.* JAGESHWAR BHUT. **30 N L.R. 1=157 I.C. 466=A.I.R. 1934 Nag. 97.**

T. P. ACT (1882), S. 95.

———**S. 95**—*Co-mortgagor—Redemption by—Rights acquird by—Enforcement of—Limitation for—Stating part.*

On redemption of the mortgage property by one of the several mortgagors, even in a case where the mortgage was not a possessory one, a charge accrues in favour of the mortgagor who dicharged the mortgage and the redeeming mortgagor is entitled to enforce the charge against his co-mortgagors. The right to enforce it accrues on the date of payment and is governed by Art. 132 of the Limitation Act. 28 A. 482 (P. C.), Foll. (*Sulaiman, A. C. J. and Sen, J.*) COLLECTOR OF FARRUKHABAD *v.* KISHORE MOHAN **I.R. 1932 All. 274=137 I.C. 86 (2)=1932 A.L.J. 19=A.I.R. 1932 All. 250.**

———**S. 95**—*Effect of amendment.*

S. 95 of the T. P. Act has by Act XX of 1929 been amended in such a way that Ss. 92 and 95, as they now stand, make it clear that the right of the co-mortgagor redeeming is the "same right as the mortgagee whose mortgage he redeems may have against the mortgagor". In effect the decision in *Srimati Rajakumari's* case, 25 C.W.N. 283, is now statute law. The amendment may well be brought to make more clear the priority of the co-mortgagor and to clear away all risk of postponement to a purchaser for value without notice but as a co-mortgagor can when redeeming take formal assignment (or its equivalent in the case of a decree) the chief merit of the amendment is that it provides to the co-mortgagor by the general law, the same security, that proper conveyancing would always have provided and not a form of charge which is different in some of its incidents. (*Rankin C.J., C. C. Ghose, Mukerji, Mallik and Guha, JJ.*) UMAR ALI *v* ASMAT ALI. **58 Cal. 1167=I.R. 1931 Cal. 409=130 I C 889=35 C.W.N. 409=53 C.L.J. 154=A.I.R. 1931 Cal. 251 (F.B.).**

———**S. 95**—*Co-mortgagor—Redemption by—Charge—Waiver of—Mutation of names in favour of other co-mortgagor.*

Mere mutation of names does not confer any title; so the fact that the co-mortgagor, who after redeeming the entire mortgage, gratuitously allowed mutation to be made in favour of the other co mortgagor who has not paid his share of the mortgage money, does not amount to either estoppel or waiver of his right to enforce the charge which he obtained under S. 95. (*Raza and Bisheshwar Nath, JJ.*) MADHO SINGH *v.* KALLOO SINGH **140 I C. 580=I.R. 1933 Oudh 3 (2)=13 L.R. 374 (Rev.)=9 O.W.N. 923=16 R.D. 547=A.I.R. 1933 Oudh 28.**

———**(Before amendment of 1929), S. 95**—*Co-mortgagor—Redemption by—Right to subrogation—Nature and extent of—Interest—Rate of.*

Certain property was mortgaged by the owner. Subsequently he dedicated part of that property for some endowments and settled part of it on his wife for life, the estate settled on the wife being subject to certain charges. The wife (tenant for life) redeemed the whole property.

Held, that under S. 95, T. P. Act (before its amendment) a charge was created in favour of the life-tenant on the mortgaged property in possession of the trustees of the endowments for their proportionate share of the mortgage-debt. The right of subrogation thus created by the section being a limited right, does not entitle the redeeming co-mortgagor to enforce the terms of the mortgage against the other mortgagors in the same way as the mortgagee could or to claim as a matter of right, interest at the bond rate. The question as to the rate of interest, the amount of which and the date from which it is to be calculated is at the discretion of the Court. (*James and Agarwala, JJ.*) BIRENDRA KESHRI PRASAD NARAIN SAHEE *v.* BAHURIA SARASWATI KUER. **13 Pat 356=16 Pat. L.T. 147=155 I.C. 756=7 R.P. 619=A.I.R. 1934 Pat. 612.**

T. P. ACT (1882), S. 95.

———**S. 95**—*Co-mortgagor—Redemption of entire property by—Mortgagee giving consent—Other co-mortgagors suing to recover possession of share—Payment of mortgage amount.*

Held, (*on a difference between the Sulaiman, C.J. and Mukerji, J.*), there is nothing in S. 95 to indicate that its application is restricted to cases where the co-mortgagor cannot redeem his own share only and is compelled to redeem the whole property. The same principle will apply where a co-mortgagor redeems the whole property with the mortgagee's consent, although he might have compelled the mortgagee to permit the redemption of his own share only and the other co-mortgagors cannot recover possession of their share without payment of their proportionate amount. (*Sulaiman, C.J and Mukerji, J.*) JAUHARI *v.* TUNDAY. **54 All 975=141 I.C. 91 (2)=I R. 1933 All 35=1932 A.L.J. 986=A.I.R. 1933 All 21.**

———**S. 95**—*'Expenses incurred in redeeming'—Whether includes mortgage debt.*

The expression "the expenses properly incurred in so redeeming" in S. 95 includes the mortgage debt. *Prima facie* it is the duty of the Court to interpret and apply the section as a complete and independent statement of the law. (*Rankin, C. J., C. C. Ghose, Mukerji, Mallik and Guha, JJ.*) UMAR ALI *v.* ASMAT ALI. **58 Cal. 1167=I.R. 1931 Cal. 409=130 I C 889=35 C.W.N. 409=53 C.L.J 154=A I.R. 1931 Cal. 251 (F.B.).**

———**S. 95**—*Part—Redemption by owner—Charge—Enforcement—Limitation—Starting point.*

The right to enforce the charge created under S. 95, T. P. Act, by the redemption of a mortgage by the holder of a part of the mortgaged property accrues only when the whole mortgage debt has been paid off; and the period of limitation for a suit to enforce such a charge is 12 years from the date when the whole debt is paid off. (*James and Agarwala, JJ.*) BIRENDRA KESHRI PRASAD NARAIN SAHEE *v* BAHURIA SARASWATI KUER. **13 Pat. 356=16 Pat L.T 147=155 I.C. 756=7 R.P. 619=A.I R. 1934 Pat. 612.**

———**S. 95**—Purchaser of equity of redemption—Redemption of mortgage—Suit by owner to recover possession—Limitation—Decree for redemption created a charge. *See* LIMITATION ACT, ART. 144—MORTGAGE. **57 Bom. 134=35 Bom.L.R. 48=A.I.R. 1933 Bom. 114.**

———**S. 95**—*Scope—Nature of co-mortgagor's right.*

S. 95 is intended to declare the right against the mortgaged property which a co-mortgagor acquires by redemption. There is a marked contrast between the language of S 95 which deals with a co-mortgagor and the language of S. 74 (before amendment of 1929) which deals with puisne mortgagee. What S. 95 confers is a charge. The security of the mortgagor for reimbursement of the excess paid beyond his share is not something which is given to reinforce a personal liability resting upon the other mortgagors to contribute, nor is it something which has to be engineered by putting him in the shoes of the mortgagee,

Rankin, C.J. (per obiter).—I should hesitate before assuming that the charge given by S. 95 cannot amount to an interest in specific immovable property. (*Rankin, C.J., C. C. Ghose, Mukerji, Mallik and Guha, JJ.*) UMAR ALI *v.* ASMAT ALI. **58 Cal. 1167=I R. 1931 Cal. 409=130 I C 889=35 C.W.N. 409=53 C.L.J. 154=A.I.R. 1931 Cal. 251 (F.B.).**

T. P. ACT (1882), S. 98.

———(Before amendment of 1929), S. 98—*Anomalous mortgage—Contract to the contrary—Service inam free of assessment—Mortgage of—Enfranchisement and assessment—Liability to pay.*

By the terms of a deed of mortgage of service inam held free of assessment, the respondent was to remain in possession for twelve years, to appropriate half of the profits towards the mortgage and to pay the balance to the mortgagor (the appellant). During the currency of the mortgage, the inam was enfranchised and converted into ryotwari tenure, patta granted to the appellant and assessment imposed on it.

Held (the case being one prior to the amendment of 1929), as the whole rents and profits were not to be appropriated to the mortgage money but part of it was payable to the mortgagor, it was not an usufructuary mortgage but anomalous. The rents and profits having been previously ascertained and their appropriation definitely arranged, any other payment out of them which would vary that method of appropriation was not contemplated by the parties. In other words, there was as regards such other payments, *e.g.*, increase in land revenue a contrary to the contrary. So the assessment of land revenue should properly be paid by the mortgagor who held the patta for the lands and if on his default the mortgagee was obliged to pay instead, he was entitled to recover it from the mortgagor. 25 I.C. 641; 9 M.L.T. 206; 17 M.L.J. 517, Ref. (*Krishnan Pandalai, J.*) RAMAMURTHI *v.* ADENNA. **1931 M. W.N. 595.**

———S. 98—*Anomalous mortgage—Mortgage to be simple one in first instance and to be usufructuary one on non-payment of principal sum on fixed date—Separate covenant to pay interest yearly—Suit for interest alone—Maintainability.*

The rights and liabilities of the parties to an anomalous mortgage must be determined by the terms of the contract as evidenced in the mortgage deed. The parties intended that the mortgage should, in the first instance be a simple mortgage and that in the event of non-payment of the principal sum on the date fixed, the mortgage should be converted into a usufractuary mortgage. Further, they intended that while the mortgage was subsisting as a simple mortgage, the mortgagee should have all the powers of a simple mortgage and there was a separate covenant to pay interest yearly.

Held, that the expression "amount secured" though normally means both principal and interest, in this case it meant only principal, and that a suit for interest alone was maintainable. A.I.R. 1922 U.B. 1 and A.I.R. 1922 P.C. 412, Ref. (*Ba U, J.*) CHAN YIN SEIN *v.* MG. AUNG THEIN. **152 I.C. 494=7 R.R. 157=A.I.R. 1934 Rang. 159.**

——— Ss. 98 and 58 (b)—Mortgage—Construction—Mortgage with personal covenant—Mortgagee authorised on default to enter into possession—Power of sale not taken away—Not an anomalous mortgage. *See* T. P. ACT, SS. 58 (*b*) AND 98. **11 O.W.N. 760=A.I.R. 1934 Oudh 255.**

———S .98—*Mortgage stating that mortgagee has been put in possession—Provision for interest on mortgagees failure to get possession—Mortgagee not put in possession—Right to decree for sale.*

Where the defendant executed a mortgage deed in favour of the plaintiff's predecessors-in-title and the mortgage-deed stated that the mortgagee had been put in possession of the mortgaged property and further provided that in case of the mortgagee's failure to get possession, he would be entitled to interest on the principal amount at a certain rate and the lower Court finding that the mortgagee had not been put in possession of the property held that the plaintiff was entitled to a decree for sale in respect of the mortgage-money.

Held, that the decree of the lower Court was in consonance with the terms of the contract between the parties as contained in the mortgage deed and did not offend the provisions of S 98 of the T. P. Act. (*Srivastava and Nanavutty, JJ.*) MAHABIR SINGH *v.* KISHORI. **154 I.C. 674=7 R.O. 497=1935 O.W.N. 221=A.I.R. 1935 Oudh 254.**

———S. 99 (O. 34, R. 14, C. P. Code)—*Applicability—Sale held prior to the coming into force of the act.*

S. 99, T. P. Act, does not apply to a sale held in 1877 long prior to the enactment of the Act in 1882. (*Srivasatau, Ag. C. J. and Zia-Ul-Hasan, J.*) SHEO DARSHAN SINGH *v.* MAHESHUR DAYAL. **10 Luck. 293=152 I C. 839=7 R.O. 241=11 O.W.N. 1403=A.I.R. 1935 Oudh 183.**

———S. 99 (C. P. Code, O. 34, R. 14)—*Maintenance decree creating charge—Attachment and sale in execution.*

A maintenance decree first declares the liability of the judgment-debtors to pay as maintenance a certain amount and directs them to pay it and as security for this payment creates a charge on some property. It cannot therefore be brought within the ambit of R. 14, O. 34. A decree-holder(in execution of a decree obtained by him against the holder the maintenance decree) attaching such decree is entitled to bring to sale the property which in charged in the decree as security for the arrears of maintenance in execution. The decree-holder need not be driven to a separate suit under S. 67, T. P. Act. (*Niyogi, A. J. C.*) VENKAT RAO *v.* ZUNKARI MARWADI. **6 R N. 175=148 I.C. 196=A.I.R. 1934 Nag. 83.**

———S. 99 (C. P. Code, O. 34, R. 14)—*Scope—Sale in contravention of—Void or voidable.*

A sale held in contravention of S. 99, T. P. Act (O. 34, R. 14, C. P. Code), is not void, but only voidable, and if not set aside within the period of limitation cannot be impeached afterwards. (*Srivastava, Ag. C.J. and Zia-ul Hasan, J.*) SHEO DARSHAN SINGH *v.* MAHESHUR DAYAL. **10 Luck. 293=152 I.C. 839=7 R.O. 241=11 O.W.N. 1403=A.I.R. 1935 Oudh 183.**

———S. 100—*Applicability and scope — Statutory charges.*

S. 100, T. P. Act, purports primarily to deal with the incidence of security, and not with the method of enforcing it; the words "all the provisions hereinbefore contained," do not however mean that all those provisions refer to charges, and the section itself is not intended to apply to certain stautory charges. (*Lort Williams and Costello, JJ.*) CORPORATION OF CALCUTTA *v.* KUMAR ARUN CHANDRA SINGHA. **61 Cal. 1047=60 C.L.J. 312=153 I C. 972=7 R.C. 414=38 C.W.N. 917=A. I.R. 1934 Cal. 862.**

———S. 100—*Charge—Applicability of S.* 91 (f).

The provisipns in S. 91 (*f*) is in the nature of an exception specifically applied by the legistature to the case of mortgages. And this exception should not be extended to a charge in perpetuity. (*Sulaiman, C.J. and King, J.*) MATLUB HASAN *v.* MT. KALAWATI. **147 I.C. 302=6 R.A. 472=A.I.R. 1933 All. 934.**

———(as amended by Act XX of 1929), S. 100 *Charge—Binding nature of—Notice to transferee—Registration of charge, if amounts to.*

A charge is not required by law to be registered; so that the fact that it was registered cannot by itself amount to notice to a transferee for value. (*Grille, A.J. C.*) PANNALAL JADAM *v.* NARAYAN RAO. **I.R. 1933 Nag. 112=142 I.C. 376=15 Nag.L.J. 141.**

T. P. ACT (1882), S. 100.

——**S. 100**—Charge—Binding nature of—Plea of *bona fide* purchaser—Circumstances amounting to constructive notice—Covenant creating charge—Wilful omission to ascertain the contents of the partition deed. *See* T. P. ACT, S. 3—NOTICE. **A. I. R. 1933 Mad. 715=65 M.L.J. 390.**

——**(As amended in 1929) S. 100**—*Charge, Binding nature of—Charge created by decree—Subsequent purchaser without notice—If bound.*

Where a charge is created by a decree, no question of notice arises ; and such a charge is binding on a subsequent transferee whether he had notice of the charge or not. (*D. N. Mitter and Patterson, JJ.*) HEMLATA DEBI *v.* BHOWANI CHARAN ROY. **164 I.C. 921=9 R. J. 313=39 C.W.N. 725.**

——**S 100**—*Charge—Creation of—Letter by customer to Bank undertaking not to alienate.*

A letter was addressed to the Bank by a customer undertaking not to alienate certain properties and some time after the letter moneys were lent by the Bank to the customer. Such a letter does not amount to a charge. (*Ramesam and Stone, JJ.*) MALLIAH *v.* VENKATESWARLU. **40 L W 677=152 I.C. 772=7 R.M. 286 (2)=A.I.R. 1934 Mad 713**

——**S 100 and Bihar and Orissa Public Demands Recovery Act, Ss. 7 and 8**- Charge—Creation of—Service of notice—Effect of—Right of Secretary of State and purchaser at certificate sale. *See* BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (1914), SS. 7 AND 8 AND T.P. ACT, S. 100. **13 Pat. 364=A.I.R. 1934 Pat 648.**

——**S. 100**- *Charge—Creation of.*

Where a decree mentioned that the arrears of maintenance have been made a charge on the property described in the plaint and with reference to future maintenance it stated that the plaintiff was recover the value there at a particular rate by executing the decree and selling the plaint-mentioned property.

Held, the words were sufficient to create a charge in respect of future maintenance as well. (*Madhavan Nair, J.*) ABDUL MUHAMAD ROWTHER *v.* SEETHA LAKSHMI AMMAL. **I.R 1931 Mad 410=130 I.C. 566=33 L.W. 109=1930 M.W.N. 1059=A.I.R. 1931 Mad. 120.**

——**S. 100**—*Charge—Creation of—Property to be specific*

In order to make the property security for payment of money, there should be some expression to signify that the property is liable for such payment and for that purpose the property must be specified with particularity. Where an *ekrarnama* provided that in the event of the executant not paying the allowance fixed for maintenance, the obligee was at liberty to proceed against the properties relinquished by her and in case she was unable to realise the arrears from those properties, she might have recourse to the other properties of the obligor, no particular or specific property having been mentioned as liable for the claim the deed cannot be construed as creating a charge. (*Suhrawardy and Graham, JJ.*) MOHINI DEBI *v.* PURNA SASHI GUPTA **I.R 1932 Cal 411=138 I.C. 24=36 C.W.N. 153=55 C.L.J. 198=A I.R 1932 Cal. 451.**

——**S. 100**—*Charge—Creation of—Annuities payable out of particular estates.*

The fact that the incidents of various allowances payable by way of maintenance have been thrown on particular estates means that these allowances are to be paid out of the profits of the specified estates and constitute a charge on those estates. (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **8 Luck 168=9 O.W N. 900=143 I C. 692=I.R. 1933 Oudh 194=A I.R. 1932 Oudh 336.**

T. P. ACT (1882), 100.

——**S. 100**—*Charge—Creation of—Intention.*

When parties refer in a document to particular properties as the source from which a debt is to be paid or by the sale of which a debt is to be realised, that can ordinarily be taken as an indication to make the property more directly liable than on a mere enforcement of personal liability. But where the facts recited in the document clearly show why the properties are referred to in the document and in what manner the properties are to be made available for the obligations arising under the document. It will not be right to ignore these circumstances and imply a general intention to create a security. (*Varadachariar, J.*) AYYAPPA NAICKER *v.* THAYAMMAL. **40 L W. 883=154 I. C. 736=7 R. M. 483 =A.I.R. 1935 Mad. 17=67 M.L.J. 801.**

——**S. 100**—*Charge—Creation of—Oral transaction —Sufficiency.*

A charge may lawfully be created orally, although, if it is created by an instrument in writing, it must be registered unless made by a will or the amount secured is less than one hundred rupees. (*Guha and Bartley, JJ.*) BIBHUTI BHUSAN GHOSE *v.* BAIKUNTHA NATH MANDAL. **164 I.C. 477=9 R.C. 216=62 C.L J. 55.**

——**S. 100**—*Charge—Creation of—Sale-deed in favour of plaintiff—Failure of plaintiff to execute agreement of reconveyance according to contract—Plaintiff not entitled to charge*

P advanced a sum of money to *U* who agreed to pass a document in the form of a sale-deed and *P* agreed to pass an agreement to re convey. *U* executed his deed, but *P* failed to execute the agreement to re-convey. In a suit by *P* to enforce the sale deed it was found that the transaction amounted neither to a sale nor to a mortgage. In a suit by *P* claiming to have the amount made a charge on the property.

Held, that whatever the intention of the parties might have been, the failure to carry it out was due to *P's* own default and no charge could therefore be created under S. 100. (*Baker and Divatia, JJ.*) PHATTECHAND *v.* UMA. **149 I.C. 241=6 R.B. 353=35 Bom. L R. 1138=A I R. 1934 Bom. 24.**

——**S. 100**—*Charge or mortgage.*

The essence of a mortgage is a 'transfer of an interest' in immovable property. A document which gives immoveable property as security for the satisfaction of a debt, without transferring any interest in the property, merely constitutes a charge on the property and is not a mortgage. (*Broadway, A. C. J., Tek Chand and Abdul Qadir, JJ.*) SHER SINGH *v.* DAYA RAM. **13 Lah. 660=139 I.C. 49=I.R 1932 Lah. 545=33 P.L. R. 847=A I R. 1932 Lah. 465 (F.B.).**

——**S. 100**—Charge or mortgage of—Contract of sale—Covenant against alienation—Effect of—No charge or mortgage. *See* DEED—CONSTRUCTION—MORTGAGE. **13 Pat. 620=15 Pat.L.T. 443=A.I.R. 1934 Pat. 495.**

——**S. 100**—*Charge and mortgage—Distinction between*

A charge is a liability to pay money laid upon a person or estate. Such a liability is created by every mortgage : so that every mortgage includes a charge, but the reverse is not always true. There is no personal covenant to pay in a mere charge and no transfer of any interest in the property but merely an obligation imposed on the property with reference to the payment. It is difficult to conceive of a charge with a personal covenant to pay, which does not amount to a mortgage. If it is a mortgage, it must comply with the formal requirements required by statute you cannot call it a charge to dispense with writing

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Where the law requires a specific transaction to be in accordance with specified formalities in order that particular legal results may follow, no Court will favour an endeavour to give to an identical transaction another name with the object of bringing about the particular legal results in question without observing the formalities specified by the law. (*Tyabji and Wadia, JJ.*) CHHAGANLAL SAKHARAM *v.* CHUNILAL. **152 I.C. 267=7 R.B. 133=36 Bom.L.R. 277=A.I.R. 1934 Bom. 189.**

———**S. 100**—*Charge and mortgage—Distinction between.*

A charge is merely a security for payment of money to be enforced against the property charged. There is no transfer of any interest in the property in favour of the charge-holder as in the case of a mortgage. So from the very nature of it, it cannot, as a general rule, be enforced against a transferee for consideration without notice. But in the case of a mortgage there is a transfer of interest and a transferee of the mortgaged property can only acquire the remaining interest of the mortgagor and is therefore bound by the mortgage. (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **8 Luck. 168=I.R. 1933 Oudh 194=143 I.C. 692=9 O.W.N. 900=A.I.R. 1932 Oudh 336.**

———**S. 100**—*Charge—Creation of—Partition of assets and liabilities—Indemnity clause—Construction of—Creation of charge.*

On a partition between four brothers, the debts due by the family were also allotted amongst them. The deed provided as follows: "Each of us shall discharge the debts falling to his share from the property which has fallen to his share. If otherwise the properties falling to the share of one person are made liable for the debts due by other sharers, the other sharers and the properties allotted to their shares shall be liable for any loss caused thereby."

Held, that the clause created a charge in favour of the person for any excess sum paid by him over and above his share of the debt, on the properties of other sharers in proportion to the sums which they should have paid, but defaulted to pay. (*Curgenven and Sundaram Chetty, JJ.*) ABDUL RAZAK ROWTHER *v* ABDUL RAHIMAN SAHIB **1933 M.W.N. 1013=38 L.W. 463=149 I.R. 287=6 R.M. 629=A.I.R. 1933 Mad. 715=65 M.L.J. 390.**

———**Ss. 100 and 58**—*Charge and mortgage—Distinction between.*

A charge is not exactly identical with a mortgage, and although a similar remedy is available, a suit for the enforcement of a charge is not necessarily the same as a suit for sale on the basis of a mortgage-deed. One obvious distinction is that a mortgage is for a fixed term whereas a charge may be in perpetuity. In the case of a mortgage it can be ultimately redeemed, whereas a charge in perpetuity cannot be redeemed at all. There is therefore no question of redeeming a charge but only paying up the arrears of the amount charged due and preventing the sale of the property in execution of decree (*Sulaiman, C.J. and King, J.*) MATLUB HASAN *v.* MT. KALAWATI. **147 I.C. 302=6 R.A. 472=A.I.R. 1933 All. 934.**

———**S. 100**—Charge or mortgage. *See* T. P. ACT, S 100 MAINTENANCE CHARGE. **A.I.R. 1933 All. 934.**

———**S. 100**—Charge or mortgage. *See* T. P. ACT, SS. 58 AND 100—DEED—CONSTRUCTION—MORTGAGE OR CHARGE. **1935 O.W.N. 871.**

———**Ss. 100 and 58**—Charge or mortgage. *See* T. P. ACT, SS. 58 AND 100—DEED—CONSTRUCTION—MORTGAGE OR CHARGE. **1935 O.W.N. 1199.**

T. P. ACT (1882), 100.

———**S. 100**—Charge by operation of law—Applicability of S. 67-A. *See* T. P. ACT, S. 67-A—OBJECT. **60 Cal. 1470=A.I.R. 1934 Cal. 325.**

———**S. 100**—*Charge—Validity of—Charge created by Court on property out of its jurisdiction.*

Whether charge created by a Court of foreign jurisdiction over the property outside its jurisdiction is on the face of it invalid and does not affect the mortgage security of subsequent mortgagee. (*Subhedar, A.C.J.*) RAMKRISHNA NANDRAM *v.* GANESH NARAIN. **30 N.L.R. 303=150 I.C. 20=6 R.N. 279=35 Cr.L.J. 1063=1934 Cr.C. 658=A.I.R. 1934 Nag. 149.**

———**S. 100**—*Contingent liability—Charge for—Validity.*

For the creation of a valid charge it is not a necessary condition that there should be any pre-existing liability; a charge may undoubtedly be created for the discharge of a contingent liability. (*Tek Chand and Din Mahomed, JJ.*) KESARI MAL UMRAO SINGH *v.* TANSUKH RAI KIDAR NATH. **16 Lah. 137=153 I.C. 1064=7 R.L. 503=37 P.L.R. 482 and 537=A.I.R. 1934 Lah. 765.**

———**S. 100**—*Contingent liability—Charge for—Validity.*

A charge cannot be created on a future contingency. An *ekrarnama* which does not say that the properties mentioned therein remain liable for the allowance from the date of the execution of the document but only says that if the allowance remains in arrear in future, the properties may be sold for realisation of the same, cannot be said to create a charge. 14 Cal 687, Ref. (*Suhrawardy and Graham, JJ.*) MOHINI DEBI *v.* PURNA SASHI GUPTA. **I.R. 1932 Cal 411=138 I.C. 24=36 C.W.N. 153=55 C.L.J. 198=A.I.R. 1932 Cal. 451.**

———**S. 100**—Decree creating charge. *See* T.P. ACT, S. 100—ENFORCEABILITY. **A.I.R. 1932 Oudh 336.**

———**S. 100**—Discharge of encumbrance—Payment of prior mortgage debt—Agreement to execute fresh mortgage—Charge not created. *See* T. P. ACT, S. 58—MORTGAGE. **8 O.W.N. 1105.**

———**S. 100**—*Enforceability.*

A charge is not enforceable against a purchaser for value without notice, because it does not create any interest such as a mortgage does. 33 C. 985 and 42 C. 625, Ref. (*Suhrawardy and Graham, JJ.*) MOHINI DEBI *v.* PURNA SASHI GUPTA. **I.R. 1932 Cal. 411=138 I.C. 24=36 C.W.N. 153=55 C.L.J. 198=A.I.R. 1932 Cal. 451.**

———**S. 100**—*Enforceability—Transferee without notice—Charge created by decree and charge created by award—Enforceability of—Effect of amendment by Act XX of* 1929.

Under the law as it stood before 1929, where a right is charged on specific immovable property either by decree or by contract, it can be enforced even against a subsequent transferee for value and without notice. But an award passed in an arbitration is not equivalent to a decree and a charge created by it cannot be enforced against a transferee without notice 6 O.W.N. 493, Ref. On the other hand, where there is a decree passed before 1929 creating a charge, a right has accrued to the decree-holder to enforce the charge against transferees of the property irrespective of notice. This right is not taken away or affected by the amendment to S. 100 by the Amending Act, XX of 1929, owing to the provisions of S. 63 (*d*) of the Amending Act (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **8 Luck. 168=143 I.C. 692=I.R. 1933 Oudh 194=9 O.W.N. 900=A.I.R. 1932 Oudh 336.**

T. P. ACT (1882), S. 100.

———S. 100—Equitable charge—Partition suit—Compromise decree—Provision regarding payment of debts—Effect—No trust or charge created in favour of creditors. *See* CONTRACT—THIRD PARTY. **55 Mad. 436 = A.I.R. 1932 Mad. 457 = 62 M.L.J. 533.**

———S. 100 — *Floating or fixed charge—Charge on machineries, etc., for royalty—No power of disposal to lessee and no extraneous event necessary to make the charge "settle".*

Where a coal mining lease provided for the periodical payment of the royalty and that "the machineries, the engine and the boilers, etc. (in the leasehold property) will all along remain under first charge for the said royalty,"

Held, that it created a fixed and not a floating charge. Mere variability of the amount or the subject of the charge was not by itself sufficient to make it a floating charge. The movables could not be disposed of by the lessee with ordinary course of business and so the outstanding feature of a floating charge is absent. Secondly, as soon as royalty became due it automatically formed a charge on the assets specified without any other extraneous event. The charge thereby created retained its priority over any charge, however specific, subsequently created. (*Mukerji and Guha, JJ.*) H. V. LOW & CO., LTD. *v.* PULINBIHARILAL SINGHA. **59 Cal. 1372 = 143 I.C. 193 = I.R. 1933 Cal 372 = A.I.R. 1933 Cal. 154.**

———S 100—*Floating charge — Distinction from specific charge.*

A specific charge is one which the moment it is created, fastens on ascertained and definite property or property capable of being ascertained. But a floating charge "is ambulatory and shifting in its nature, hovering over, and so to speak, floating with the property which it is intended to affect, until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." (1904) A C. 355, Ref. (*Doraiswami Iyer, C.J.*) BANK OF MYSORE, LTD. *v.* MYSORE INDUSTRIAL BANK, LTD. **10 Mys. L.J. 16.**

———S. 100—*Floating charge—Meaning.*

A floating charge is a present charge though it does not finally attach or crystallize upon any specific property until the happening of some event which puts an end to the right of the company to deal with the property in the course of the business. (*Ranken, C.J. and C.C. Ghose, J.*) IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK, LTD. **58 Cal. 136 = 53 C.L.J. 269 = 131 I.C. 689 = 34 C.W.N. 605 = I.R. 1931 Cal. 481 = A.I.R. 1931 Cal. 223.**

———S. 100—*Floating charge—Requisites of.*

If it is a charge on a class of assets of company present and future, if that class is one which in the ordinary course of the business of the company would be changing from time to time and it is contemplated that until some future step is taken by or on behalf of those interested in the charge the company may carry on its business in the ordinary way, then it is a floating charge A floating security is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it. On the otherhand it is not a specific security; the holder cannot affirm that the asset are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. (*Mukerji and Guha, JJ.*) H. V. LOW & CO., LTD. *v.* PULINBIHARILAL SINGHA. **59 Cal. 1372 = 143 I.C. 193 = I.R. 1933 Cal. 372 = A.I.R. 1933 Cal. 154.**

——— S. 100—*Further advance—Running account—Debtor's shop made collateral security to maximum of Rs. 4,000—Charge—If limited to first advance.*

T. P. ACT (1882), S. 100.

Where the debtor has a running account with the creditor on the usual cash credit system and for the repayment of all advances in this account the shop of the debtor is made collateral security, subject to the maximum principal sum borrowed not exceeding Rs. 4,000, the charge on the shop is not intended to be limited to the first advance of Rs. 4,000, but it is to include all advances in the account. (*Tek Chand and Din Mahomed, JJ.*) KESARI MAL UMRAO SINGH *v* TANSUKH RAI KIDAR NATH. **16 Lah. 137 = 153 I.C. 1064 = 7 R.L. 503 = 37 P.L.R. 482 and 537 = A.I.R. 1934 Lah. 765.**

———S 100—Further advance on same terms—New mortgage, if created. *See* PUNJAB ALIENATION OF LAND ACT (1900), Ss. 6 AND 7. **13 Lah. 660 = A.I.R. 1933 Lah. 465 (F.B.).**

———S. 100—*Future property—Hypothecation of—Validity.*

A hypothecation not merely of movables existing on the premises at the time but also in respect of movables which might be subsequently acquired and brought there is valid, though it is not governed by the Transfer of Property Act or by the Contract Act. (Case law referred.) (*Mukerji and Guha, JJ.*) H. V. LOW & CO., LTD *v* PULINBIHARILAL SINGHA. **59 Cal. 1372 = 143 I.C. 193 = I.R. 1933 Cal. 372 = A.I.R. 1933 Cal 154**

———S. 100—*Landlord and tenant—Madras Estates Land Act—Suit to recover rent—Whether one to enforce charge.*

The landholder's claim to recover rent under the Madras Estates Land Act cannot be said to be one to enforce a charge within S. 100, T. P. Act, whatever might be the result of the sale of the holding by the Revenue Court in execution of a decree for arrears of rent passed by it. (*Anantakrishna Ayyar, J.*) RAMA KOTI SURYANARAYANA *v.* RAMACHENDRUDU. **I.R. 1932 Mad. 709 = 139 I.C. 452 = 37 L.W. 655 = 1932 M.W.N. 1287 = A.I.R. 1932 Mad. 716.**

———S. 100—*Maintenance charge—Agreement to pay maintenance—Charge on property—Rule against perpetuity not applicable.*

When the intention of the parties is to create a liability in perpetuity not capable of being redeemed absolutely at any time, the transaction cannot possibly be a mortgage. An agreement to pay maintenance allowance to a person and to continue to pay to his descendants from generation to generation making it a charge over property, creates a charge and not a mortgage. The rule against perpetuity would not apply to a charge of this kind which does not amount to a transfer of interest within the meaning of Ss. 13 and 14. 19 I.C. 661 and 42 Mad. 581 (P.C.), Rel on. (*Sulaiman, C.J. and King, J.*) MATLUB HASAN *v.* MT. KALAWATI. **147 I.C. 302 = 6 R.A. 472 = A.I.R. 1933 All. 934.**

———S. 100—*Maintenance charge—Creation of—Hindu widow—Claim for maintenance—Agreement—Nature of.*

The maintenance of a Hindu widow is not a charge on her husband's estate unless it is fixed and charged on such estate by decree or agreement. In order to create a charge, the agreement must be such as to make a property security for the payment of the maintenance, thereby creating an interest in the property. (*Suhrawardy and Graham, JJ.*) MOHINI DEBI *v.* PURNA SASHI GUPTA. **I.R. 1932 Cal. 411 = 138 I.C. 24 = 36 C.W.N. 153 = 55 C.L.J. 198 = A.I.R. 1932 Cal. 451.**

———S. 100—*Maintenance charge—Charge by decree—Mode of realisation.*

Where a decree creates a charge on specified properties, a decree-holder is entitled to realise the mainten-

T. P. ACT (1882), S. 100.

ance by executing the decree without having recourse to any suit. 10 M. 283; 24 M. 683; 1917 M.W.N. 782 and 31 M L.J. 839, Ref. (*Madhavan Nair, J.*) ABDUL MUHAMAD ROWTHER *v.* SEETHALAKSHMI AMMAL. **I.R. 1931 Mad. 410=130 I. C. 666=1930 M. W. N. 1059=33 L.W. 109=A.I.R. 1931 Mad. 120.**

——**S. 100**—*Maintenance charge — Transferee of part of property with notice of charge—Extent of liability.*

The holder of a decree for arrears of maintenance charged upon certain properties is entitled to enforce the same against the transferee of the properties for value with notice of the charge even though the transferee purchased only a part of the estate. If he is obliged to satisfy the full amount of the charge, his only remedy is a suit for contribution against the owners of the remaining portion of the estate. (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **8 Luck. 168=I.R. 1933 Oudh 194=143 I.C. 692=9 O.W.N. 900=A.I.R. 1932 Oudh 336.**

——**S. 100**—Movables—Hypothecation of—Validity of. *See* MORTGAGE—MOVABLES.

——**S. 100**—Decree creating charge—Payment by subsequent encumbrancer—Subrogation. *See* MORTGAGE—SUBROGATION. **A I.R. 1934 Mad. 353=66 M.L.J. 566.**

——**S. 100**—*Personal liability—Creation of by charge.*

The definition of charge in S. 100 does not create a personal liability. But where a charge is the result of a contract there may also be a personal remedy to be found. Every case must depend on its own facts. (*Mukerji and Bennet, JJ.*) RAGHUKUL TILAK *v.* PITAM SINGH. **52 All. 901=I.R. 1931 All. 246=130 I.C. 198=1930 A.L.J. 1524=A.I.R. 1931 All. 99.**

——**S. 100**—*Personal liability—Property subject to a charge—Person in enjoyment of its income—Personal liability.*

A person in enjoyment of the income of a property which is subject to a charge for the expenses of a temple, is personally liable to make them good out of the profits enjoyed by him. (*King, C. J. and Zia-ul-Hasan, J.*) PARSHADI LAL *v.* BRIJ MOHAN LAL. **159 I.C. 117=8 R.O. 159=1935 O.W.N. 1217=A I.R. 1936 Oudh 52.**

——**S. 100**—*Person entitled to charge—Charge over property—Payment of Government revenue by Sardar-lambardar.*

A sardar lambardar who pays Government Revenue has a first charge over the estate for such payment since he is bound to pay such revenue and since S. 122 of C. P. Land Revenue Act states that land revenue is a first charge on the estate. (*Macnair, J.C.*) MANOHARLAL *v.* KANHAIYALAL. **28 N.L.R. 214=I.R. 1933 Nag. 2=140 I.C. 532=A.I.R. 1932 Nag. 171.**

——**S. 100**—*Priority—Earlier oral charge—Subsequent registered mortgage.*

A subsequent registered mortgagee is entitled to priority over an earlier oral charge, not accompanied by delivery of possession, of which the mortgagee had no notice. (*Tyabji and Wadia, JJ.*) CHHAGANLAL SAKHARAM *v.* CHUNILAL. **152 I.C. 267=36 Bom. L.R. 277=7 R.B. 133=A.I.R. 1934 Bom. 189.**

——**S. 100**—Priority—Rent due by one ryot—Payment by another—Contribution—Charge—No priority over earlier encumbrances—Charge only on the properties existing at the date of payment. *See* T. P. ACT, S. 82. **34 L W. 889=1931 M.W.N. 1197.**

——**S. 100**—*Property subject to charge transferred o several persons—Joint liability of all.*

T.P. ACT (1882), 101.

A charge is in the nature of a mortgage and the charge holder is entitled to recover the amount due to him from whichever portion of the property that he chooses. If the property is transferred to several persons all of them are jointly liable for the claim of the charge holder. The question how far each of them is liable is a question of contribution among the transferees themselves and does not concern the charge-holder (*King C.J. and Zia ul Hasan, J.*) PARSHADI LAL *v.* BRIJ MOHAN LAL. **159 I.C. 117=8 R.O. 159=1935 O.W.N 1217=A.I.R. 1936 Oudh 52.**

——**S. 100**—*Retrospective effect—Amendment of* 1929.

The amendment of S. 100 by Act XX of 1929 is not retrospective.

Quaere.—If the law was not the same even before the amendment. (*Tyabji and Wadia, JJ.*) CHHAGANLAL SAKHARAM *v.* CHUNILAL. **152 I.C. 267=7 R.B. 133=36 Bom.L R. 277=A.I.R. 1934 Bom. 189.**

——**S. 100**—*Specific property—Charge created in decree over—Right to proceed against other property—Execution against charged properties—If condition precedent.*

Where a charge is created in the decree over certain specified properties for the payment of the decretal amount, the decree-holder should first exhaust his remedy against charged property before proceeding against other property. In the event of the charge proving insufficient there is nothing to prevent the decree holder from proceeding against other property. At the same time, by specially indicating this property the parties evidently intended it to be primary remedy and the judgment-debtor was entitled to act on this belief with regard to the rest of his property. It therefore might be prejudicial to him if the decree-holder were allowed to desert his charge completely and suddenly pounce upon the other property. (*Niyogi and Grier, A.J.Cs.*) FATEHCHAND MANGILAL MARWADI *v.* INDIAN COTTON CO., LTD. **157 I C. 292=8 R.N. 39=A.I.R. 1935 Nag 129.**

——**S. 101**—*Merger—Presumption—No evidence of intention.*

Where a man who pays off a mortgage has a right to extinguish it and a right to keep it alive, in the absence of express evidence of intention, he should be assumed to have acted according to his interest. If a mortgagee of two properties purchased one of them in discharge of his mortgage, unaware of a subsequent mortgage of both the properties in favour of the plaintiff, he must be deemed to have kept his own mortgage alive and is entitled to use it as a shield against the subsequent mortgagee. 10 C. 1035 (P C.); 39 Cal. 527 (P.C.); 47 M. 190 (P.C.); 49 M L.J. 361, Rel.; 30 M. 67, Not foll. (*Madhavan Nair, J.*) ABDUL MAJID SAHIB *v.* ARUNACHALA MUDALIAR. **136 I C. 305=34 L.W. 715=I.R 1932 Mad. 273=A.I.R. 1931 Mad. 84=61 M.L.J. 857.**

——**S. 101**—*Benefit of keeping alive—Use of former mortgage as shield—Mode of—Right of mortgagee to sue on as plaintiff.*

There is no warrant or authority for holding that under S. 101, T. P. Act, a mortgagee can use his former mortgage as a shield against some claimant only as a defendant but not sue on it himself as a plaintiff. (*Ramesam and Stone, JJ.*) POLAVYA DORA *v.* ANANTHA PATRO. **59 Mad. 44=42 L W. 669=1935 M.W N. 1142=160 I.C. 757=8 R.M. 721=A.I.R. 1936 Mad 61=69 M.L.J. 903.**

——**S. 101**—*Mortgagee paying up his own earlier mortgage in consideration of a fresh mortgage—Priority—Right to.*

T. P. ACT (1882), S. 101.

Where a person who holds a first mortgage pays it up himself in consideration of a fresh mortgage executed in his favour, S. 101 is not applicable but he is entitled to priority in respect of that portion in the subsequent mortgage which corresponds to the prior one because he should be presumed to have intended what was to his benefit and to keep alive the earlier mortgage to be used as a shield against the intermediate mortgages. 20 M. 274; 16 C. 523 and 15 O.C. 211, Ref. (*Raza and Bisheshwar Nath, JJ.*) KANHAIYA LAL *v.* GULAB SINGH. **7 Luck. 655=I R. 1932 Oudh 304=138 I.C. 206=9 O.W.N. 387=A.I.R. 1933 Oudh 9.**

———**S. 101**—*Mortgagee purchasing portions of mortgaged property—Mortgage by several co-sharers—Agreement of sale by some co-sharers to third party—Subsequent sale by all to mortgagee—Decree for specific performance in favour of third party—Right of mortgagee to fall back on mortgage as regards shares sold to third party.*

Five branches of a family executed a deed of mortgage to plaintiff in respect of their shares in the family property. All the five branches leased the properties to the 1st defendant under muchilikas and later on, three of the branches, *i.e.*, 1st, 4th and 5th branches executed in the 1st defendant's favour an agreement agreeing to sell their shares to him. Subsequent to that all the 5 branches sold their shares to the plaintiff (mortgagee), but continued in physical possession of the properties as plaintiff's tenants under muchilika. 1st defendant thereafter sued for specific performance of the agreement in his favour, making the plaintiff also a party to that suit and obtained a decree in his favour, but a formal decree for possession was not passed in his favour, as he was in possession as a tenant. The sale-deed in favour of the plaintiff thereby became inoperative so far as the shares of branches of 1, 4 and 5 were concerned. In a suit by plaintiff for possession by partition of the shares of branches of 2 and 3 and for relief against the other shares on the basis of his mortgage,

Held, though the plaintiff could not fall back on his mortgage in respect of the shares of the 2nd and 3rd branches, by reason of the sale in his favour, he was entitled to fall back on his mortgage so far as the shares of the 1st, 4th and 5th branches were concerned and was entitled to a usual mortgage decree for three-fifths of the mortgage amount as against those shares. Where the second transaction replacing a former mortgage is frustrated wholly or in part, the mortgagee can fall back on the earlier mortgage under S. 101, T. P. Act. (*Ramesam and Stone, JJ.*) POLAVYA DORA *v.* ANANTHA PATRO. **59 Mad. 44=160 I.C. 757=8 R. M. 721=42 L.W. 669=1935 M.W.N. 1142=A.I.R. 1936 Mad. 61=69 M.L J. 903.**

———**S 101**—*Presumption—Sale in favour of mortgagee—No puisne encumbrance.*

While under the old section, merger was the rule, the section as amended makes it the exception. If there is any puisne encumbrance, it would no doubt be to the benefit of the purchaser to keep the prior encumbrance alive for being used as a shield against the claim of the puisne encumbrancers. But in the absence of any puisne encumbrance, there is no room for any presumption in favour of an intention to keep the prior encumbrance alive. (*Bisheshwar Nath and Nanavutty, JJ.*) KANHAIYA LAL *v.* IKRAM FATIMA. **8 Luck. 103=I.R. 1932 Oudh 360=139 I.C. 358=9 O.W.N. 557=A.I.R. 1932 Oudh 268.**

———**S. 101**—*Purchaser undertaking to discharge two mortgages—Earlier mortgage alone discharged—Suit by the second mortgage—Right of purchaser to subrogation.*

T. P. ACT (1882) S. 101.

Where the purchaser of mortgaged property undertook to discharge two mortgages on the property but in fact discharged only the prior mortgage and not the later mortgage in favour of the plaintiff,

Held, that it was to the benefit of the purchaser to keep alive the first mortgage which he discharged out of the purchase-money and that he was therefore entitled to be subrogated to the position of the prior mortgagee. (*Curgenven and Sundaram Chetty, JJ.*) BAPU *v.* VENKATACHALAPATHI IYER. **148 I.C. 311=6 R.M. 466=1933 M.W.N. 331=37 L.W. 751=A.I.R. 1934 Mad. 227=64 M.L.J. 606.**

———**S. 101**—Puisne mortgagee discharging prior mortgage—First mortgage discharged by the third mortgage in pursuance of agreement—Right to keep it alive. *See* T. P. ACT, S. 92 –PUISNE MORTGAGEE'S RIGHT. **A.I.R. 1933 Nag. 155.**

———**S. 101**—*Construction—Prior mortgagee in possession by right of foreclosure—Suit by subsequent mortgagee for foreclosure—If bound to redeem first mortgagee in possession—"Otherwise than subject thereto"—Meaning.*

A subsequent mortgagee seeking forclosure under his mortgage is bound to redeem a prior mortgage who has already foreclosed and is in possession of the property, before he can take possession. There is no difference in principle between a mortgage who has obtained possession under a sale in execution of the mortgage decree and one who has obtained possession by foreclosure of his mortgage. S. 101, T. P. Act, allows a subsequent mortgagee two alternatives, either to redeem the prior mortgage or to take the property subject to that mortgage; and the words, "otherwise than subject thereto," in the concluding part of the section, refer to the 2nd eventuality contemplated by the section, namely, that of the puisne mortgagee trying to sell the property and not of his seeking foreclosure. A subsequent mortgagee who has obtained a decree for sale can avail himself of either of two alternatives. But a subsequent mortgagee seeking foreclosure cannot foreclose and get possession subject to the charge of the prior mortgagee already in possession. In such a case the subsequent mortgagee has no option but to redeem the prior mortgage. (*Srivastava and Zia-ul-Hasan, JJ.*) SALIK RAM *v.* JANGJIT BAHADUR SINGH. **11 Luck. 270=155 I.C. 498=7 R.O. 595=1935 O.W.N. 684=A.I.R. 1935 Oudh 411.**

———**S. 101**—*Puisne mortgagee discharging prior mortgage decree—Earlier mortgage can be held as shield.*

Where the prior mortgagee obtained a decree and the mortgaged property was brought to sale in pursuance of that decree and that mortgagor effected a fresh mortgage of the same property and the discharge of the decree was recited as consideration therein,

Held, that the prior mortgage was not extinguished and that the later mortgagee on discharge of the decree could hold the earlier mortgage as a shield. (*Hasan, C.J. and Kisch, J.*) RAM BILAS *v.* LACHMI NARAIN. **I.R. 1931 Oudh 302=132 I.C. 542=14 O.L.J. 380=8 O.W.N. 541=A.I.R. 1931 Oudh 295.**

———**S. 101**—*Puisne mortgagee discharging prior encumbrance—Mortgage of property belonging to two brothers by one of them—Other not ratifying former's action—Mortgagee paying of pre-existing encumbrances which are valid charge on share of brother not joining in mortgage and his debts—Liability of his share to prior encumbrances.*

One of the two brothers executed a mortgage in respect of the shares of both of them in certain agricultural land.

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The mortgagee paid off prior encumbrance on the share of the brother, who had neither joined in the execution of the mortgage nor ratified the action of his brother, and also some of his debts. In a suit for declaration that the mortgage was not binding on him,

Held, that the mortgage was invalid, but that the mortgagee should be presumed to have intended to keep alive for his own benefit the prior mortgages and debts which were redeemed by the invalid mortgage, and that the plaintiff's share was liable to the extent of the prior incumbrances on his share and his debts which had been paid off. 10 Cal. 1035 (P C.); 38 P.R. 1894 and A.I.R. 1922 Lah. 275, Ref. (*Tek Chand, J.*) PAL SINGH *v.* SUNDER SINGH. **6 I R. (Lah) 129=145 I.C. 719=34 P.L.R. 864=A.I R. 1933 Lah. 1000.**

——**S. 101**—*Applicability — Principle applied to cases in Punjab.*

The principle contained in S. 101 of the T.P. Act can be applied to the Punjab as a rule of justice and equity. (*Addison and Bhide, JJ.*) GOPAL SINGH *v.* LADHA MAL. **I.R. 1931 Lah. 241=130 I C. 49=A. I.R. 1930 Lah. 1063.**

——**S. 101**—*Puisne mortgagee discharging prior mortgage decree—Purchaser from mortgagor—Suit for possession by—Right to use mortgage as shield, though barred.*

When a mortgagee has obtained a decree on his mort gage, no second claim would lie on the mortgage against the mortgagor or his successors in interest; to that extent the rights under the mortgage are extinguished by the merger. But that does not mean that the rights under the mortgage are necessarily extinguished. When a lower security merges in a higher the rights under the former may sometimes revive for certain limited purposes if the later becomes ineffectual. Where therefore a mortgagee finds property over which he has charge and against which he has obtained a preliminary decree being sold as if it belonged to another man and purchases the property at the sale and also proceeds against his mortgagor to the stage of a final decree and obtains possession and in effect satisfied the mortgage decree, the mortgage security is not wholly extinguished. After the mortgagee's right to execute his decree is barred, he can use it as a shield in a suit for possession by the purchaser from the mortgagor. (Case-law discussed.) (*Bose, A.J.C.*) RAM SHANKAR *v.* GULAB SHANKAR. **30 N.L.R. 142=6 I.R. (Nag.) 17=144 I C. 736=A.I. R. 1933 Nag. 241.**

——**S. 101**—*Mortgagee purchasing undivided share in mortgaged property—Effect of.*

Under S. 101 (prior to its recent amendment) the purchase by the mortgagee of an undivided share in the mortgaged properties does not extinguish the mortgage. Nor are the rights of the mortgagee restricted to the use of the mortgage only as a shield for his protection. He can enforce his mortgage, at any rate where a portion of the equity of redemption had been acquired by a third party. (*Pearson and Mallik, JJ.*) UPENDRA NATH SAMANTA *v.* SARODA PROSAD GHOSE. **I.R. 1933 Cal. 4=140 I C. 589=36 C.W.N. 696=A I.R. 1932 Cal. 772.**

——**S. 101**—*Landlord having charge for rent—Mortgagee purchasing with notice—Enforceability of charge.*

A landlord who had a first charge for rent enforced his charge and a got a decree. A mortgagee of the leasehold property was impleaded as a party, but in execu tion of the decree the leasehold property was not sold subject to the mortgage. The mortgagee purchased the property with permission of Court. Another creditor who had purchased the interest of the lessee in execution

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of money decree objected to the mortgagee purchaser claiming a share in the surplus of sale proceeds.

Held, that the right of the mortgagee to redeem was allowed to be extinguished and that he was entitled to his mortgage money out of the surplus sale proceeds after the satisfaction of the claims of the prior incumbrancer. (*James, J.*) CENTRAL BANK OF INDIA, LTD. *v.* SACHINDRA MOHAN GHOSH. **6 I.R. (Pat.) 6=144 I C. 760=A.I.R. 1933 Pat. 257.**

——**S. 101**—*Landlord having charge on holding in respect of decree—Purchase of holding in execution of money decree—Charge, if merged—Subsequent mortgagee, if gets priority.*

A landlord who purchases his tenant's holding at a sale in execution of a money decree against the latter does not thereby lose his first charge on the holding in respect of decrees for rental arrears, so as to give priority to a subsequent mortgagee. In other words the purchase does not cause a merger of the first charge in respect of the rent decree so far as a subsequent mortgagee from the tenant in concerned. This is so under S. 101, T.P. Act, both before its amendments in 1929 and after the amendment. (*Niyogi, A.J.C.*) GULLON *v.* SETH DHANRAJ. **163 I C. 602=9 R.N 9=18 N L.J. 274**

——**S. 101**—*Mortgagee purchasing at Court sale —Intention to keep charge alive.*

In the course of execution proceedings under a money-decree, the mortgagee made a statement that the equity of redemption may be sold subject to the mortgage charge but the mortgage charge was not mentioned in the proclamation of sale and the sale certificate and the mortgagee purchased the property himself.

Held, that the purchaser could be taken to have intended to keep the mortgage charge alive even though it was not mentioned in the sale proclamation and sale certificate. 43 All. 703, Ref. (*Bhide, J.*) GURDIT SINGH *v* HAKUMAT RAI. **135 I C. 201=I R. 1932 Lah. 73=32 P.L.R. 759=A.I R. 1932 Lah. 56 (2).**

——**S. 101**—Mortgage of two properties—Purchase of one by mortgagee—Effect of—Liability of other property—Proportionate reduction of. *See* T.P. ACT, S. 82. **59 Cal. 76=A.I.R. 1932 Cal. 319.**

——**S. 101**—*Merger—Doctrine prior to the Act.*

The law relating to merger in India prior to the enactment of the Transfer of Property Act was that where the absolute owner of an estate becomes also the owner of a charge thereon (or *vice versa*), in the absence of any intention either express or presumed on his part, merger or extinguishment of title will take place. 22 I.C. 966 and 48 I.A. 485, Foll.; *Ingle* v. *Jenkins*, (1900) 2 Ch. 368 and *Tyrwhitt* v. *Tyrwhitt*, 32 Beav. 244, Ref. (*Koss and Fazl Ali, JJ.*) SOMESHWARI PRASAD NARAIN DEO *v.* MAHESHWARI PRASAD NARAIN DEO. **10 Pat. 630=135 I C 85=I.R. 1932 Pat. 5 =13 Pat.L.T. 347 and 405=A.I.R. 1931 Pat. 426.**

——**(as amended), S. 101**—*Purchaser undertaking to discharge two encumbrances—Failure to discharge one—Paid-up mortgage whether can be used as shield.*

Where a transferee of immoveable property, having a prior lien upon the property, purchases the property with a distinct stipulation with his vendor to discharge with the purchase-money left in deposit with him his own lien and that of another mortgagee and the transferee satisfies his own encumbrance but fails to discharge the other incumbrance, he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the latter. 33 A. 101 and 74 I.C. 640, Rel. on. (*Mears, C.J. and Sen, J.*) BALBHADDAR UPADHYA *v.* SHEO MANGAL. **I.R. 1932 All. 251=136 I.C. 824 =1932 A.L.J. 413.**

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———(prior to amendment of 1929), S. 101—*Merger—Intention—Presumption of.*

Where the prior mortgagee, at the time of purchasing the equity of redemption, was aware of the subsequent usufructuary mortgage, he must be deemed, unless the contrary is shown, to intend to keep his mortgage alive. (*Dhavle and Saunders, JJ.*) MT CHANDA BIBI *v.* MOHANRAM SAHU. **13 Pat. 200=15 Pat.L. T. 42=153 I C. 412=7 R P. 332=A.I.R. 1934 Pat. 134.**

———S. 101—*Merger—Test of—Presumption.*

Where the mortgagee's estate and that of the mortgagor vest in one person, the question of merger depends upon the intention; and when no intention is expressed the Court considers what is most advantageous for him and decides for or against merger. 10 Cal. 1035 (P.C.); 29 Cal. 154 (P.C.) and 39 Cal. 527 (P.C.). Rel. on. (*Bose, A.J.C.*) RAMSHANKAR *v.* GULAB SHANKAR. **30 N.L.R. 142=6 I.R. (Nag.) 17=144 I.C. 736=A.I.R. 1933 Nag. 241.**

———S. 101—*Merger—Scope of doctrine.*

The doctrine of merger is a wide one and applies whenever it is equitable that a person who obtains possession of property over which he has a charge should have the charge satisfied before he is made to part with possession. 2 I.A 7 (P.C.) and 18 Bom. 86, Rel. on. (*Bose, A.J.C.*) RAMSHANKAR *v.* GULAB SHANKAR. **30 N.L.R. 142=6 I.R. (Nag.) 17=144 I C. 736=A. A.I.R. 1933 Nag. 241.**

———S. 101—Prior mortgagee—Suit on first mortgage —Joinder of puisne encumbrancer — Consent decree between plaintiff and mortgagor—Prior mortgagee (plaintiff) entitled to keep his mortgage as a shield—Priority of it not lost. *See* C. P. CODE, O. 34, R. 1—PRIOR MORTGAGEE. **9 Rang. 1=A.I R. 1931 Rang. 105.**

———(as amended), S. 101—*Puisne mortgagee discharging prior mortgage—Several mortgagees—Payment of prior mortgage—Subrogated right as against intermediate mortgagee.*

Where a third mortgagee professes to keep in his hand a part of the mortgage money in order to pay off the first and second mortgages and pays off only the first mortgage, in a suit by the second mortgagee to enforce his mortgage, it is open to the third mortgagee to insist on his being treated as a first mortgagee whose mortgage must be paid off before the puisne mortgagee brings the mortgaged property to sale. (*Mukerji, Banerji and Bennet, JJ.*) TOTA RAM *v.* RAM LAL. **54 All 897=I.R. 1932 All. 524=139 I.C. 107=1932 A.L.J. 627=A.I.R. 1932 All. 489 (F.B.).**

———S. 101—Discharge of encumbrance—Consideration used for discharge of four mortgages—Void sale in favour of creditor—Setting aside of—Purchaser occupies the position of mortgagee under the four deeds of mortgage. *See* T. P. ACT, S. 53—PREFERENCE OF ONE CREDITOR. **34 L.W. 949=A.I.R. 1932 Mad. 182.**

———S 101—*Prior mortgagee purchasing mortgaged property—Doctrine of* Toulmin *v.* Steere—*Applicability to India.*

The doctrine laid down in *Toulmin* v. *Steere*, (3 Mer. 210), that the purchaser of an equity of redemption cannot set up a prior mortgage of his own, or which he has got in, against subsequent incumbrances of which he had notice, is not to be regarded as a rule of justice, equity and good conscience and cannot therefore be applied in India. Whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties, to be gathered from the terms of the document and the circumstances of the case. 11 I.A. 126, Foll. (*Beaumont, C. J. and Baker, J.*) ALLISAHEB *v.* SHESHO GOVIND **33 Bom.L.R. 1238=135 I.C. 489 =I.R. 1932 Bom. 105=A.I.R. 1931 Bom. 545.**

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———S. 101—*Puisne mortgagee discharging prior mortgage—Same whether kept alive.*

Where a subsequent mortgagee discharges a prior encumbrance, he may be assumed to have acted in the manner most beneficial to himself and to have kept the mortgage alive, to be used as a shield against an intermediate incumbrancer. In other words payments made to the prior mortgagee are to be regarded as purchasers *pro tanto* of the prior mortgage. (*Raza and Bisheshwar Nath, JJ.*) RAM SAHAI *v.* KUNWAR SAH. **7 Luck. 26=139 I.C. 626=I R 1932 Oudh 373=14 O L.J. 370=8 O.W N. 522=A.I.R 1932 Oudh 314.**

———S. 101—*Prior mortgagee's right — Extent of land erroneously stated in first mortgage—Fresh deed correcting the error executed after second mortgage—Right of prior mortgagee not extinguished.*

Defendants 1 and 2 mortgaged the property in dispute to defendant 3 for Rs. 5,500. The same property with other property was subsequently mortgaged to the plaintiff for Rs. 3,000. After the mortgage to the plaintiff was executed, it was discovered that in the first mortgage the acreage of the plot in dispute was stated to be 19·04 acres instead of 10·04 acres. Hence a second deed was executed for Rs. 5,000. Defendant 3 retained possession of the first deed.

Held, that the case clearly disclosed an intention on the part of defendant 3 to retain all the rights that he possessed under the first mortgage so that he might be in a position to give effect to those rights as a shield against any subsequent mortgagee. 43 All 469 (P.C.) and 39 Cal. 527, Rel. on. (*Page C J.*) PALANIAPPA CHETTIAR *v.* DAW HNIN THET. **154 I.C. 343=7 R. R. 301=A.I.R 1934 Rang. 7.**

———(as amended in 1929), S. 101—*Retrospective effect—No such operation.*

The amendment of S. 101 by Act XX of 1929 is not retrospective in its operation, though S. 101 is not one of the sections which S. 63 of the Amending Act declares, shall not be retrospective. (*Baguley, J.*) KO PO KUN *v.* C. A. M.A.L. FIRM. **10 Rang. 465=I.R. 1932 Rang. 219=140 I.C. 156=A.I.R. 1932 Rang. 197.**

——— S. 101—*Prior mortgagee purchasing mortgaged property—Intention to keep mortgage alive—Presumption.*

Where a prior mortgagee purchases the mortgaged property in the absence of an indication to the contrary, it is to be presumed that the owner intended to keep alive the previous mortgage if it would be for his benefit. (*Shadi Lal. C.J. and Monroe, J.*) MAKHAN MAL *v.* GOKAL CHAND. **I.R. 1932 Lah 538 (2)=138 I.C. 699=33 P.L.R. 183=A.I.R. 1932 Lah. 237.**

———S. 101—*Effect of.*

Under S. 101, even prior to the amendment in 1929, if the continuance of the encumbrance is for the benefit of the purchaser, he is presumed to keep it alive, and no formal expression of an intention to keep it alive is necessary. 47 M. 190; 57 C 82 and 6 R. 488, Foll. (*Baguley, J.*) KO PO KUN *v.* C.A.M.A.L. FIRM. **10 Rang. 465=I.R. 1932 Rang. 219=140 I.C 156=A. I.R. 1932 Rang. 197.**

———S. 101— Puisne mortgagee, (third mortgagee) purchasing one item of mortgaged property by third mortgagee—Assignment of decree obtained by first mortgagee in favour of third mortgagee—Execution by third mortgagee against other item—Permissibility. *See*

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MORTGAGE—SUCCESSIVE MORTGAGES. **A.I.R. 1934 Mad. 250.**

———**S. 101**—*Mortgagee purchasing mortgaged properties—Presumption—Discharge of mortgage—Intention to the contrary—No pleading or proof of*

In execution of a money decree, defendants 5 and 6 brought the property of the judgment-debtors to sale in 1919. A mortgage of the property in favour of the plaintiff dated 1913, was mentioned in the execution petition. The plaintiff put in a claim petition in which he stated that the mortgage had been discharged by a sale-deed executed in his favour in 1919 by which he became the absolute owner of the property. The claim was dismissed as too late and the property was purchased by the decree holder. The plaintiff did not bring a suit under O. 21, R. 63 within one year to establish his right and so the order on the claim petition became final. In a suit brought by the decree-holder purchaser for mesne profits, the plaintiff resisted the claim on the strength of the sale-deed and again failed. The plaintiff thereupon brought the present suit to recover the money due under the mortgage bond of 1913. It was argued on his behalf that (*i*) as the property was purchased by the decree-holder subject to the mortgage, he was estopped from questioning the plaintiff's right as mortgagee; and (*ii*) the sale deed having become ineffectual and inoperative as a result of the order dismissing his claim, his original mortgage revived.

Held, that the plaintiff was not entitled to succeed: (*i*) The Court did not sell the property subject to the encumbrance, but only notice of encumbrance was given in the proclamation and so the purchaser was not precluded from questioning the validity of the mortgage. (*ii*) The effect of the execution of a sale deed of the mortgaged properties in favour of the mortgagee must be taken to be the extinguishment of the earlier mortgage in his favour unless there was an express or implied intention to keep the encumbrance alive. No such intention had been pleaded in the case; on the other hand the plaintiff had preferred to rely on his sale-deed both in the claim and in the suit for mesne profits. The Courts in equity have no doubt allowed a party, when one remedy has failed, to take whatever other remedy lies ready to hand, but a party cannot be allowed to revive a dead remedy merely because that best suits his convenience. (*Madhavan Nair and Jackson, JJ.*) DASOPOLAI *v.* NARAYANA PATRAO. **57 Mad. 195=148 I C 1121=6 R. M. 572=1933 M.W.N. 1357=38 L.W. 813=A.I.R 1933 Mad. 879=65 M.L.J. 819.**

———**S. 101**—*Mortgagee subsequently acquiring interest of one of the mortgagors—Integrity of mortgage not broken.*

Where a mortgage deed was executed by four persons whose properties were jointly and severally liable, the fact that subsequently the mortgagee acquired the interest of one of the mortgagors by purchase, does not break the integrity of the mortgage. (*Sulaiman and Young, JJ.*) NIAZ AHMAD KHAN *v.* PARSOTTAM CHANDRA. **53 All. 374=I R 1931 All. 177=129 I. C. 545=1931 A.L.J. 153=A.I.R. 1931 All. 154.**

———**(as amended), S. 101**—*Retrospective effect.*

Ss. 92 and 101 of the T. P. Act have retrospective effect. Even otherwise the rule of subrogation laid down therein can be applied as a rule of justice and equity. (*Mukerji, Banerji and Bennet, J.*) TOTA RAM *v.* RAM LAL. **54 All. 897=I.R 1932 All 524=139 I.C. 107=1932 A.L.J. 627=A I.R. 1932 All. 489 (F.B.).**

———**S. 101**—*Hindu joint family—Mortgage in favour of father—Sale of equity of redemption in favour of sons—Father and sons constituting members of joint family—Merger.*

Where a mortgage in favour of the father was followed by a sale of the equity of redemption in favour of his sons, it cannot be presumed from the fact that the father and the sons are members of a joint Hindu family that either the mortgage or the sale was in favour of all the members of the joint family. There is nothing in Hindu Law to prevent a member of a joint family acquiring separate property, but even if it be assumed that the mortgage and sale in question were in favour of the entire joint family, there can be no merger of the mortgage in favour of the father in the sale in favour of the sons. (*King, C.J. and Zia-ul-Hasan, J.*) RANDHIR SINGH *v.* RAMESHAR. **11 Luck. 302=156 I.C. 705=7 R O. 677=1935 O.W.N. 774=A.I.R. 1935 Oudh 445.**

———**S. 101**—Property mortgaged twice—Prior mortgagee purchasing mortgaged property in execution of money decree—Court ordering it to be sold subject to both incumbrances—Sale certificate mentioning only subsequent incumbrance—This omission cannot raise presumption that prior mortgagee gave up his charge on suit property. *See* C. P. CODE, O. 21, R. 94. **32 P.L.R. 759=A.I.R. 1932 Lah. 56 (2).**

———**S. 105**—*Applicability—Mining lease.*

The essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not, in the nature of things and by reason of the user, disappear. Though a coal mining settlement does not partake of this character, still as some portion, however small, of the surface has to be used for carrying on the mining operations and taking the coal out, to that extent it may be regarded as satisfying the requirements of the section and treated as a lease. (*Mukerji and Guha, JJ.*) FALA KRISTA PAL *v.* JAGANNATH MARWARI **59 Cal. 1314=140 I C. 788=I.R. 1933 Cal. 36=36 C.W.N. 709=56 C.L.J. 187=A.I.R. 1932 Cal. 775.**

———**Ss. 105 and 107**—*Applicability—Oral agreement for a lease for three years—Transfer of possession and payment of rent—Registration—Necessity.*

Under an oral agreement for a lease of three years, the lessee was already given possession and rent was taken from him. Only the formal execution of the deed was to be done later.

Held, that the oral agreement amounted to a lease and not merely an agreement to lease and necessitated a registered document. (*Beasley, C.J. and Bardswell, J.*) MOPURAPPA *v.* RAMASWAMI GRAMANI. **57 Mad. 760=40 L W. 52=1934 M.W.N. 946=152 I C. 538=7 R.M. 247=A.I R. 1934 Mad. 418=67 M.L J. 54.**

———**S. 105**—*"Certain time"—Lease for indefinite period—Validity of.*

The word used in the rent-note to denote the duration of the lease was *aniyamit* (अनियमित) which means indefinite or unrestricted or unlimited. But reading the rent-note as a whole it appeared that the period of the lease was to extend so long as the *Kesars* and *Maratha* institutions were in existence.

Held, it was not a permanent lease and the lease was valid in law, assuming those institutions were legal entities there being no evidence to the contrary. 29 Bom. 580 Dist.; *Great Northern Railway Co.* v. *Arnold*, (1916) 33 T.L.R. 114; 7 Bom.L.R. 772; 4 Bom. 424; 33 Bom.I. R. 111, Foll. (*Patkar and Broomfield, JJ.*) RAMCHANDRA BALWANT TILAK *v.* NARASINHA CHINTAMAN. **I.R 1931 Bom. 423=133 I.C. 839=33 Bom.L.R. 590=A.I.R. 1931 Bom. 466.**

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——**S. 105**—*Lease or license—Recitals—Value of.*

In deciding whether a document amounts to a lease or is only a license, the recitals therein can never be conclusive; the Court has to look to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties. (*Sulaiman, C.J., Mukerji and King, JJ.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD., *In the matter of.* **55 All. 874=6 I.R. (All.) 145=145 I.C. 674=1933 A.L.J. 749=A.I.R. 1933 All. 735 (F.B.).**

——**S. 105**—*Lease by minor—Validity.*

A lease by a minor is void; it is incapable of ratification express or implied by the acceptance of rent by the lessor on attaining majority. (*Patkar and Barlee, JJ.*) INDIAN COTTON COMPANY, LTD. *v.* RAGHUNATH. **I.R. 1931 Bom. 278=130 I.C. 598=33 Bom.L.R. 111=A.I.R. 1931 Bom. 178.**

——**Ss. 105 and 58**—Lease or mortgage—Possession for fixed period as security for debt—Power of sale—Mortgage and not lease. *See* DEED—CONSTRUCTION—MORTGAGE OR LEASE. **A.I.R. 1934 Pat. 217.**

——**S. 105**—Lease or mortgage—Test. *See* T. P. ACT, S. 58—MORTGAGE OR LEASE. **A.I.R. 1933 Lah. 786.**

——**S. 105**—*Lease—Writing not signed by owner.*

A mere writing to the effect that a person has taken a certain bungalow at a certain rent for one year and not signed by the owner is not a lease. (*Middleton, J. C.*) HARI CHAND *v.* HAMMOND. **6 R. Pesh. 50=148 I.C. 548 (1)=A.I.R. 1934 Pesh. 81 (1).**

——**Ss. 105 and 111**—*Lease for life—Duration of—Holding over by representatives—Ejectment.*

A lease for life is a lease for a certain period, for it terminates with the death of the lessee. If, after the determination of the lease by the death of the lessee, the premises are held over without the consent of the lessor, the latter is entitled to eject the person holding over without any notice to quit. (*Nisim Ali, J.*) CHANDI CHARAN MITRA *v* ASHUTOSH LAHIRI. **164 I.C. 837=9 R.C. 290=40 C.W.N. 52.**

——**Ss 105 and 106**—*Lessee, who is—Notice to quit—Who are entitled.*

The only leases recognized by S. 105 of the Transfer of Property Act are leases for a certain time periodical leases, and leases in perpetuity. Where therefore the status of a person does not fall under any of these heads he cannot be a lessee; and hence he cannot insist upon a notice to quit as contemplated by S 106. (*Baguley, J.*) MA GYI *v.* MAUNG TET. **151 I C. 971=7 R.R. 130 (2)=A.I.R. 1934 Rang 291.**

——**S. 105**—*Possession as lessee—Liability to ejectment.*

Where the evidence showed that the defendant was the tenant of the predecessor of the plaintiff and that he had been paying rent for the possession,

Held, that the plaintiff could not sue to eject the defendant as a trespasser and that he could eject him only under the terms of the lease. (*Mukerji and Bennet, JJ.*) QADIR KHAN *v.* KESHO DAS. **I.R 1931 All. 238=130 I C. 14=1930 A.L.J. 1409.**

——**S. 105**—*Transaction not coming under—If lease for other purposes.*

Even if a transaction does not amount to a lease under S. 105 of the Transfer of Property Act, it may nevertheless be a lease for the purposes of the Stamp Act (*Sulaiman, C. J., Mukerji and King, JJ.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD., *In the matter of.* **55 All. 874=6 I.R (All.) 145=145 I.C. 674=1933 A.L.J. 749=A.I.R. 1933 All. 735 (F.B.).**

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——**S. 105**—'Yajman vrithi'—*Transfer of duties and obligations—Whether amounts to lease.*

A '*yajman vrithi*' primarily denotes an obligation imposed upon the *purohit* or family priest to perform certain religious rites, the performance of which no doubt carries with it certain emoluments. It is not immoveable property in the proper sense of the word although it is treated as such but the transfer of the duties and obligations attached to the status of a *purohit* cannot possibly be said to be a transfer of rights to enjoy immoveable property so as to amount to a lease within the meaning of the T. P. Act. (*Rupchand and Milne, A J.Cs.*) KODULAL *v.* BEHARILAL. **25 S.L.R. 451=I R. 1932 Sind 71=137 I C. 136=A.I.R. 1932 Sind 60.**

——**S. 106**—*Applicability.*

S. 106 does not apply to the case of a lessee for a fixed term when the term has expired. (*Sulaiman, A. C. J. and Baipai, J.*) BISHEN SARUP *v.* ABDUL SAMAD. **136 I.C. 273=I.R. 1932 All. 161=1931 A.L J. 666=A.I.R. 1931 All. 649.**

——**S. 106**—*Applicability—Tenancy originating before Act.*

S. 106 does not apply to a tenancy proved to have originated before the T. P. Act. (*Rankin, C. J. and Pearson, J.*) DEBENDRA NATH DHANG *v.* PASHUPATI NATH DEB. **136 I.C. 889=I.R 1932 Cal. 241=35 C.W.N. 1047=A.I.R. 1932 Cal 198.**

——**S. 106**—*Applicability*—Utbandi *tenant.*

In the case of *utbandi* holdings unless there is a special custom to that effect the right to occupy the land does not enure beyond a particular season or a particular year and the tenancy not being a lease from year to year S. 106 does not apply. (*Mukerji, J.*) SURENDRA NATH SARKAR *v.* BAIDYA NATH MUKERJI. **60 Cal. 681=6 I R. (Cal.) 177=146 I.C. 55=37 C.W.N. 335=A.I.R. 1933 Cal. 609.**

——**Ss 106 and 116**—*Lease for term—Premises in Calcutta—Holding over—Nature of tenancy.*

When a tenant under a lease of premises in Calcutta, for a term of three years holds over after expiry of the term, he does so as a monthly tenant, and each month of the tenancy expires at midnight on the 1st day of the succeeding month. (*Buckland, J.*) SUSIL CHANDER NEOGY *v.* BIRENDRAJIT SHAW. **38 C.W.N. 782=153 I.C. 673=7 R.C. 398 (1)=A.I.R. 1934 Cal. 837.**

——**Ss. 106, 110, 111 (h) and 116**—*Notice—Computation of time—Tenant holding over.*

The defendant was a tenant for a term of four years commencing from the 1st June, 1921. After the expiry of his lease, he continued to hold over till 1928. On 1st February, 1928, he gave notice of his intention to quit on the 1st March.

Held, that the notice was valid and effective. The lease of 1921 expired at midnight on the 1st June, 1925, and the notice expired with the end of a month of the tenancy, *viz.*, the midnight of the 1st March, 1928, (*Lord Tomlin.*) BENOY KRISHNA DAS *v.* SALSICCIONI. **59 I.A 414=60 Cal. 389=35 Bom. L R. 6=141 I.C. 514=I R 1933 P.C. 22=1933 A.L.J. 423=37 C.W.N. 1=16 R D 539=1932 M W.N. 1237=36 L. W. 747=56 C.L J. 319=9 O W.N. 892=A.I.R. 1932 P.C 279=63 M.L.J. 685 (P.C.).**

——**S. 106**—*Notice—Duration—Leases of premises in Calcutta—Custom requiring 30 days' notice—If exists.*

A lease of Premises in Calcutta held on a monthly tenancy is teminable by 15 days' notice, as required by S. 106, T.P. Act. There is no prevailing custom in Calcutta which requires the giving of 30 days' notice

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to a monthly tenant. (*McNair, J.*) PROFULLA CHANDRA MULLICK *v.* NANDA LAL JHAMOR. **39 C. W.N. 1069.**

——**S. 106**—*Notice—Accidental error in—Effect.*

A notice was given on 9th November, 1927, to the lessee stating that he should vacate the land on 13th May, 1927. It appeared that 1927 in the notice was a mistake for 1928 and the parties were not misled on that account.

Held, that the notice was valid. (*Sulaiman, C.J. and Mukherji, J.*) TIKA RAM *v.* SRI THAKUR DAOJI MAHARAJ. **152 I C. 189=7 R A. 286=4 A.W.R. 1105=1934 A.L.J. 674=18 R.D. 240=15 L.R. 260 (Rev.)=A.I R. 1934 All. 787.**

——**S. 106**—*Notice—Claim for enhancement—Refusal—Remedy.*

Where enhanced rate of rent is proposed by a landlord and the tenant continues to occupy the property without any protest as to enhancement of rent, the latter should be deemed to have accepted the proposal. But when the tenant protests against the enhancement the remedy of the landlord is ejectment and where he did not pursue that remedy he cannot subsequently claim the enhanced rent. (*Wazir Hasan, C. J. and Raza, J.*) MAHOMED NOOR *v.* ASHIQ BEG. **9 Luck. 112=6 I. R. (Oudh) 56=145 I.C. 647=10 O.W N. 1000=A. I.R. 1933 Oudh 465.**

——**S. 106**—*Notice—Duration — Tenants holding over on the expiry of yearly lease.*

The defendants were holding for a long time under yearly leases and on the expiry of the term under the last lease were holding over on payment of rent to the lessor. There was no provision in the contracts between the parties, what if any, should be the notice in case the defendants held over.

Held, that the tenancy should be deemed to be renewed from month to month (though rent was paid per year) and that fifteen days' notice ending with a month of the tenancy was sufficient. (*Mukerji and Bartley, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MADHU SUDAN MUKHERJEE. **141 I.C 833=I R 1933 Cal. 187=36 C.W.N. 918=A.I.R. 1933 Cal. 260.**

——**S. 106**—*Notice—Necessity—Lease for fixed period.*

Where the lease is for a fixed period and is governed by the Act, it is determined under S. 111 (*a*) by the efflux of time limited by the lease, and notice must be presumed by implication as given when it was executed and therefore no notice under S. 106 is required for the termination of such a lease. (*Sulaiman, Ag. C. J. and Sen, J.*) MD. FAZIHZZAMAN *v.* ANWAR HUSAIN. **I R. 1932 All. 595=139 I.C. 828=1932 A.L.J. 126=A.I. R. 1932 All. 314.**

——**Ss. 106 and 111**—*Notice—Necessity—Tenancy for fixed period.*

S. 106 does not apply to cases in which the parties under their agreement, fix a period for the lease. After the expiry of the period, the tenant is only a tenant at sufferance and is not entitled to any notice to quit. (*Niamatullah and Rachhpal Singh, JJ.*) KUNDAN LAL *v.* DEEPCHAND. **6 I.R. (All.) 331=146 I. C. 762=1933 A.L.J. 682=A.I.R. 1933 All. 756 (2).**

——**S. 106**—*Notice—Right to—Lessee under unregistered lease, which is compulsorily registrable.*

The position of a lessee under an unregistered lease which is compulsorily registerable is that of a mere tenant-at will. A mere demand for possession would be sufficient and there is no necessity for a notice under S. 106. Where, therefore, the notice sent to him before a suit for ejectment does not fulfil the requirements of a

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valid notice under S. 106, but it amounts to a demand for possession, a decree for ejectment is legally justified. (*King, C.J. and Zia-ul Hasan, J.*) JANKI *v.* KANHAIYA LAL. **159 I C. 316=1935 O.W N. 1238=8 R.O. 173=A.I.R. 1936 Oudh 102.**

——**S 106**—*Notice invalid—Decree for ejectment—When justified.*

A decree for ejectment may be justified on the ground that the lessee had been denying the lessor's title to the property and setting up ownership in himself, although the notice to quit which was sent to the lessee is invalid for non compliance with the requirements of S. 106. (*King, C. J. and Zia-ul Hasan, J.*) JANKI *v.* KANHAIYA LAL. **159 I.C. 316=1935 O.W.N. 1238 =8 R.O. 173=A.I.R. 1936 Oudh 102.**

——**S. 106**—*Notice—Necessity—Holding over.*

The words "in the absence of an agreement to the contrary" in S. 116 refer to an agreement as to the terms of the holding over. Where there was a term in lease that the lessee would give up possession without notice and on the expiry of the lease the lessee held over on payment of rent,

Held, that the term as to notice was not carried over to the new lease and that notice was necessary to terminate the later lease. (*Mitter and M. C Ghose, JJ.*) DASARATHI KUMAR *v.* SARAT CHANDRA GHOSE. **149 I.C. 722=6 R.C. 630=37 C.W.N. 971=A.I.R. 1934 Cal. 135.**

——**S. 106**—*Notice—Validity of—Tenant addressed as trespasser—More time allowed to tenant than he was entitled to.*

A notice to quit should not be construed with a desire to find faults in it, but with a view to its validity. The giver of a notice is not bound to admit the person to whom it is given as a tenant; a notice is good notwithstanding that the addressee is described therein as a trespasser. Nor does the fact that two months' time is given where only 15 days' time is necessary invalidate the notice. (*Mukerji and Bartley, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MADHU SUDAN MUKHERJEE. **141 I.C. 833=I R 1933 Cal. 187=36 C.W.N. 918=A.I.R 1933 Cal. 260.**

——**S. 107**—*Applicability—Agricultural leases.*

S. 107, T. P. Act, does not apply to agricultural leases. (*King, C.J. and Thomas, J.*) NARAIN SINGH *v.* JAGAT JIT SINGH. **10 Luck. 490=153 I.C. 609=7 R O. 365=1935 R.D. 41=11 O.W.N. 1565=A.I.R. 1935 Oudh 90.**

——**S. 107** —Applicability—Cantonments. *See* CANTONMENTS ACT, S. 284 (287). **A.I.R. 1931 Lah. 501.**

——**S. 107**—*Lease or agreement to let—Test—Oral agreement for renewal each year—Validity.*

Whether an oral agreement between the parties must be construed as a lease, or amounts merely to an agreement to let is a question of the intention of the parties. If the intention of the parties was not to create immediately the relation of landlord and tenant between them, or that something more had to be done before the relation commenced, it is to be presumed that their agreement was intended to operate only as an agreement to let and not as a lease. Where therefore parties enter into a verbal agreement that on the expiry of the present lease the same be renewed for a further period of three years, the lease to be renewed each year as formerly in accordance with the Waste Land Grant Rules, the only construction which the agreement will bear is that the relationship of landlord and tenant should come into existence under it only on the signing of a new lease at the expiry of the existing lease, and further that the relationship should come to an end at

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the end of each successive year and should be renewed annually on the signing of a fresh yearly lease. Such an agreement is valid, although not reduced to writing, and can be enforced. (*Cunliffe and Dunkley, JJ.*) SYRIAM LAND CO., LTD. *v* RODRIGUEZ. **148 I.C. 301=6 R.R. 215=A.I.R. 1933 Rang. 220.**

———**S. 107**—*Lease—Essentials—Registered* kabuliat *—Lessor accepting and executing unregistered* amal namah—*Sufficiency.*

Where the lessee executes a registered *kabuliat* in favour of the lessors and the lessors accept it by means of an unregistered *amalnamah*, no valid lease is constituted as the *kabuliat* executed by the tenant is not a lease nor can the acceptance of the lessor be proved either by the *amalnamah* or by oral evidence. (Case law discussed.) (*Wort, James and Mahomed Noor, JJ.*) RAMKRISHNA JHA *v.* JAINANDAN DAS. **14 Pat. 672 =157 I.C. 98=8 R.P. 90=16 Pat.L T. 451=A.I.R. 1935 Pat. 291 (F.B.).**

———**S. 107**—Lease from month to month—Non-registration—Admissibility. *See* REGISTRATION ACT S 49 LEASE. **A I.R. 1931 Lah. 501.**

———**S. 107**—*Oral lease — Delivery of possession—Proof.*

Under S. 107 a lease made by oral agreement should be accompanied by delivery of possession. Delivery of the key of a vacated bungalow is a sufficient delivery of possession. (*Middleton, J C.*) HARI CHAND *v.* HAMMOND. **6 R Pesh. 50=148 I.C. 518 (1)=A.I.R. 1934 Pesh. 81 (1).**

———**S 107**—*Oral lease for one year—Validity.*

An oral lease of property for a period of one year is valid. (*Dunkley. J.*) ALAKAN *v.* ARUMUGAM CHETTYAR. **6 I.R (Rang.) 110=146 I.C. 640=A.I.R. 1933 Rang. 262.**

———**S. 107**—*Permanent lease—Verbal agreement—Need for registration—Part performance.*

In June 1913 the defendant entered into possession of a plot of land under a verbal agreement by the plaintiff for the grant to him of a permanent lease, and thereafter he erected certain structures on the land at a cost of nearly Rs. 12,000. The plaintiff was aware of the construction and as the Courts in India found he must have realised that the defendant would not have constructed the buiding unless he was assured of the possession of a permanent right in it. The defendant in December 1918 had notice that performance of the verbal agreement of 1913 was definitely refused by the plaintiff. In April, 1923, the plaintiff after duly serving a notice to quit sued to eject the defendant upon the allegation that he was merely a monthly tenant.

Held, that in view of the povisions of S. 107 of the T.P. Act, in the absence of a registered instrument, the verbal agreement alone could not create a permanent lease in favour of the defendant and that the English equitable doctrine of part performance could not be applied so as to modify or override the mandatory provisions of the Act, so as to nullify the statutory requirement of a registered instrument. 42 C. 801 (P.C.) and 39 M. 509, Expl. (*Lord Russell of Killowen.*) ARIFF *v.* JADUNATH MAJUMDAR. **58 I A. 91=58 Cal.1235 =I R. 1931 P.C. 154=131 I.C 762=33 Bom L R. 913=1931 M.W.N. 480=33 L.W. 586=35 C.W.N. 550=53 C L J. 359=8 O.W.N. 739=15 R.D. 354= A.I.R. 1931 P.C 79=60 M.L J. 538 (P C.)**

———**S. 107**—*Proof of lease—Lease deed being inadmissible in evidence—Oral evidence—Admissibility.*

When the origin of a tenancy is know and the document by which it purports to have been created and which is the primary evidence of the transaction is ruled out, oral evidence as to the terms of the tenancy is not

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admissible nor can attendant circumstances be looked in to find out what its nature or incidents were. S. 107 would be defeated if such a course was permissible. (*Mukerji, J.*) BADAL CHANDRA SADHUKHAN *v.* DEBENDRA NATH DEY. **6 I.R. (Cal.) 162=145 I.C. 892=58 C L.J. 325=37 C.W.N. 473=A.I.R. 1933 Cal. 612.**

———**S. 107**—*Scope—Effect of—Holding over—Applicability of doctrine.*

S. 107 only prescribes the mode of creation of a lease. The effect of its non-compliance will be that the lease will be of no effect for the period. The statute does not say about the rights of the parties under the invalid lease and does not prevent the doctrine of holding over being applied as that has been recognised by the statute itself. (*Mahomed Noor, J.*) AZIZ AHMAD *v.* ALAUDDIN AHMAD **6 I.R. (Pat.) 9=144 I.C. 788=A.I.R. 1933 Pat. 485.**

———**S. 107**—*Unregistered lease—Suit for arrears of rent—Reference to rent in deed for ascertaining damages—Permissibility.*

Where rent is mentioned in a lease which is inadmissible in evidence on account of its being unregistered though the figure as to the rent mentioned in the lease cannot be looked at in order to establish the rent fixed, it might be looked at to establish what damages the landlord suing for arrears of rent was entitled to by way of rent. (*Addison, J.*) KIDAR NATH *v.* DUNGAR MAL & SONS. **I.R. 1931 Lah 913=134 I.C. 289=32 P.L.R. 361=A I.R. 1931 Lah. 501.**

———**S. 108**—*Applicability—Tenancy at will.*

S. 108 has no application to a tenancy at will. (*Macpherson and Agarwala, JJ.*) RAMAKISHUN PANDEY *v.* BIBI SOHAILA. **6 I R (Pat.) 192=145 I. C. 567=14 Pat. L.T. 685=A I.R. 1933 Pat. 561.**

———**S. 108**—*Applicability—Execution of security bond to receiver to raise second crop—Executant's liability—Same as that of a lessee.*

In connexion with proceedings for the determination of mesne profits, a receiver was appointed to auction the land and the respondent executed a security bond to raise the second crop and give a certain amount of paddy.

Held, that though the Transfer of Property Act did not apply, the principles of S. 108 applied and that the respondent's liabilities were those of a lessee subject to the same legal incidents. (*Curgenven J.*) AYYANNA *v.* GANGAYYA. **I.R 1933 Mad. 367=144 I.C. 16 =38 L.W. 263=A.I.R. 1933 Mad. 465.**

———**S. 108**—Delivery of possession—Possession denied by defendant—Onus. *See* BURDEN OF PROOF —LANLORD AND TENANT. **59 I.A 29=59 Cal 1012 =62 M.L.J. 336 (P.C.).**

———**S. 108**—*Rights of lessee—Ejectment of former lessee in possession.*

The lessee is entitled to enforce his right to obtain possession of the land leased to him so that he may enjoy its usufruct by ejecting another in possession of the property leased out to him, and there is no reason why he should not be allowed to enforce his right against another person who is holding under his lessor, who is bound to put him in possession. 14 Mad. 269, Ref.; 53 I.C. 140, Dist. The mere fact that the lessor in the course of the suit entered into a compromise with the former lessee, whose lease had expired, does not disentitle the later lessee from obtaining his decree against the former lessee. (*Sulaiman, Ag. C. J. and Sen, J.*) MD. FAZIHZZAMAN *v.* ANWAR HUSAIN. **I.R. 1932 All. 595=139 I.C. 828=1932 A.L.J. 126=A.I.R. 1932 All. 314.**

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——**S. 108 (b)**—*Delivery of possession—Onus.*

Under S. 108 (*b*) of the T. P. Act, a lessor must deliver possession of a property leased to a lessee, who can raise the defence that possession being not given he is not liable to pay rent. Onus of delivery of possession lies on lessor before claiming rent for lease. (*Mir Ahmad, A J.C.*) GANDA SINGH MEHR SINGH *v* SECRETARY OF STATE. **152 I.C 231=7 R. Pesh. 47 =A.I.R. 1934 Pesh. 101.**

——**S. 108 (b)**—*Right of lessee to recover possession —Enforceability against former lessee.*

Under S. 108 there is a liability on the lessor to put the lessee in possession even though the actual transfer of interest in the immoveable property may not have taken place. Where the lessor chooses to allow another person such as a prior lessee whose term has expired to remain in possession the lessee can sue the lessor and the prior lessee for possession. (*Sulaiman, A.C.J. and Bajpai, J.*) BISHEN SARUP *v.* ABDUL SAMAD. **136 I.C. 273=I.R 1932 All. 161=1931 A.L.J. 666=A. I.R. 1931 All. 649.**

——**S. 108 (c)**—*Covenant for quiet enjoyment—Scope of—Disturbance by trespasser.*

The covenant for quiet enjoyment, is only a covenant against disturbance by somebody claiming under law ful title. It does not extend to disturbance by a tres passer. A.I.R. 1922 Cal. 87; 15 Mad. 111 and A.I. R. 1915 Mad. 717, Rel on (*Curgenven, J.*) AYYANNA *v.* GANGAYYA. **I R. 1933 Mad 367=144 I C. 16= 38 L.W. 263=A.I R. 1933 Mad. 465.**

——**S. 108 (c)**—*Covenant for quiet enjoyment—Scope —Lease by Hindu for term—Death before expiry of term—Dispossession by reversioners—Lessee's rights.*

The covenant contained in S. 108 (*c*), T. P. Act, corresponds to what is known as the *absolute* covenant in the English law and not to the qualified covenant which will be available only in the event of dispossession by the grantor or these claiming under him ; the former is available even in respect of dispossession by a person claiming by title paramount. The statutory covenant under S. 108 (*c*) is an express covenant for quiet enjoyment available for the whole term of the lease independent of the termination of the interests of the lessor, and not merely an implied covenant limited to the duration of the lessor's own interest though the term may not come to an end within that time. In the case of a lease for 15 years granted by a Hindu widow in respect of properties inherited by her as heir to her deceased son for a stated consideration, the lease will be binding only so long as the widow herself is alive. On her death, it ceases to be binding and the reversioners are entitled to possession of the properties, although the term of the lease has not expired. The lessee under the lessor will, however, be entitled under S. 108 (*c*), T. P Act, to recover compensation in respect of the unexpired portion of the consideration paid by him from out of the private assets of the lessor-widow in the hands of her legal representative, when he is dispossessed before the expiry of the term of the lease. (*Varadachariar, J.*) NANDI REDDI RAMA GOVINDA REDDI *v.* LAKSHMI REDDI. **158 I C. 851=8 R M. 358=1935 M W.N. 924 (2)=42 L.W. 358=A I.R. 1935 Mad. 973=69 M.L.J. 461.**

——**S. 108 (c)**—*Covenant for quiet enjoyment—Scope.*

The obligation of a lessor is the same as that of a vendor so far as regards the duty to give a good title though the obligation to give disclosure or to furnish proof thereof may be different. 57 Cal. 1189, Ref. (*Mallik and Jack, JJ.*), HIRALAL ROY CHOUDHURY *v.* KUMAR SATYAPRIYA GHOSAL. **149 I.C. 1027=6 R C. 687=38 C.W.N. 244=59 C.L.J. 21=A.I.R. 1934 Cal. 437.**

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——**S. 108 (e)**—*Destruction of demised premises— Avoidance of lease.*

Where the shed in which the plaintiff carried on business and which he had obtained under a lease for a period of three years was blown off, it is optional to him to avoid the lease, unless the contract had provided otherwise. (*Jai Lal, J.*) BANARSI DAS *v.* CANTONMENT AUTHORITY, AMBALA CANTONMENT. **150 I.C. 682=7 R.L. 11=A.I.R. 1933 Lah. 517.**

——**S. 108 (g)**—*Mortgage on leased property—Lessee paying mortgage amount to avoid eviction—Right to recover same from lessor.*

Where the lessee is threatened with disturbance or eviction by the act of the prior mortgagee, for payment of which debt the lessor has made himself liable by covenanting with some third party such as the mortgagee or his own vendor of the leased premises, that threat amounts to a breach of covenant, for his enjoyment. If so, such a sum paid by the lessee to avoid eviction and distrubance must in reason be one which the lessor is bound to make good and hence the lessee is entitled to recover the same from the lessor. (*Pandalai, J*) ISWARA SHETTY *v.* RAMAPPA SHETTY. **152 I.C. 201=7 R.M. 193=40 L.W. 545=A.I.R. 1934 Mad. 658.**

——**S. 108 (h), (p) and (q)**—*Lease for life—Permanent structures built—Ejectment—Compensation—Right to.*

A person who holds under a lease which is of a non-permanent character cannot compel the lessor to take the structures built thereon by him on eviction and pay the price thereof under S. 51 of the T. P. Act, when the structures have not been built under a mistaken belief and good faith and when the lessee knew full well that he had a lease only for life and yet built the structures. In the absence of a contract or local usage to the contrary, the lessee's transferee or representative must remove the structures, and surrender vacant possession to the lessor; he cannot claim compensation for the structures. (*Nasim Ali, J.*) CHANDI CHARAN MITRA *v.* ASHUTOSH LAHIRI. **164 I.C. 837=9 R.C. 290=40 C.W.N. 52.**

——**S. 108 (j)**—*Lessee's powers of transfer—Land covered by kothi.*

Where the land in dispute or part of it is covered by a kothi the presumption is that it was let for building purposes and the lessee of the land let for building purposes has a right of transfer. Where no part of the land in dispute forms site of the kothi and is merely appurtenant to it as part of its compound and was let as such the lessee should be deemed to possess a right of transfer of the nature described in S 108 (*j*). (*Pullan and Niamatullah JJ*) JOTI PRASAD *v* HAR PRASAD. **I R 1932 All 558=139 I C 346=13 L.R. 266 (Rev.)=1932 A L J. 567=16 R D. 429=A.I.R. 1932 All. 473.**

——**S. 108 (h)**—*Object and scope of.*

The intention of Cl. (*h*) of S. 108 was to declare the law and to substitute a general principle inconsistent with the principle of *quae quid plantatur* but it limited the tenant's right to remove as a right to be exercised during the term of the lease.

Semble—The amendment of Cl. (*h*) in 1929 has introduced no new principle. (*Rankin, C J. and Costello, J.*) GOVINDA PROSAD SHAH *v.* CHARUSILA DASSI. **60 Cal 1042=37 C W N 791=147 I.C. 1238 =6 R.C. 416=58 C L J. 161=A I R. 1933 Cal. 875.**

——**S. 108 (J)**—Mortgage by lessee—Liability of mortgagee for rent—Privity of estate—English

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doctrine of—Applicability to India. *See* LANDLORD AND TENANT—RENT. **58 Bom. 327=A.I.R. 1934 Bom. 134 (F B.).**

———**S. 108 (p)** — *Applicability—Plot originally agricultural, becoming holding for building purposes.*

S. 108 (*p*) is inapplicable to a plot which has lost its agricultural character and has become a holding for building purposes, and the lessee is, therefore, entitled to build on the plot. (*Sulaiman, C.J. and Bennet, J.*) AHMAD NAZAR BEG *v.* BRIJ NANDAN PRASAD. **159 I.C. 680=1935 A.W.R. 1221=1935 R.D. 480=A.I.R. 1935 All. 1040.**

———**S. 109**—*Liability of transferee of lessor—Limits.*

If lessee so elects, the transferee shall be subject to all liabilities of the lessor as to the property, which expression is taken to mean, the burden of all covenants running with the land such as covenant for quiet enjoyment. Where there is a breach of the covenant for enjoyment of a lessee and the lessee treats the transferee of the lessor as liable, he cannot turn round and charge the original lessor in respect of the covenant as, he having once made his election, it is final. (*Pandalai, J.*) ISWARA SHETTY *v.* RAMAPPA SHETTY. **152 I.C. 201 =7 R.M. 193=40 L.W. 545=A.I.R. 1934 Mad. 658.**

———**S. 110** — *Applicability — "Agreement to the contrary"—Inference*

To exclude the operation of the second clause of S. 110, there must be an *express* agreement to the contrary. From the fact that the rent is payable before the seventh of the next month while the term of the tenancy is to expire on the first, no agreement to exclude the operation of the section can be inferred. (*Lord Tomlin.*) BENOY KRISHNA DAS *v.* SAI SICCIONI. **59 I.A. 414 =60 Cal. 389=35 Bom L R. 6=141 I C. 514=I.R. 1933 P.C. 22=1933 A.L.J. 423=16 R D. 539=37 C. W.N. 1=1932 M.W N. 1237=36 L.W. 747=56 C.L. J. 319=A.I.R. 1932 P.C. 279=9 O.W.N. 892=63 M. L.J. 685 (P.C.)**

———**S. 110**—Lease for term—When expires—Holding over—Effect. *See* T. P. ACT, SS. 106 AND 116. **38 C.W.N. 782.**

———**Ss. 110, 116 and 106**—'Month of tenancy'—Computation of—Tenant holding over. *See* TRANSFER OF PROPERTY ACT (1882), S. 106, 110, 111 (*h*) AND 116. **63 M.L.J. 685 (P.C.).**

———**S. 111 (a)**—*Lessee holding over—Status of.*

The position of a lessee for a fixed term holding over after the expiry of the term cannot be considered to be that of a tenant. The fact that the question whether the lease had or had not terminated was in dispute does not improve his position, the question must be decided in the light of the final decision of the point (*Addison and Bhide, JJ.*) UBED UL-RAHMAN *v.* DARBARI LAL. **6 I.R. (Lah.) 276=146 I.C. 845=34 P.L.R. 262=A. I.R. 1933 Lah. 509.**

———**S. 111 (a)**—*Lessee holding over—Compensation for use and occupation—Basis of assessment.*

Where the tenancy has terminated and the defendants have been found to be in unlawful possession, they cannot rely on the terms of the tenancy. The compensation for "use and occupation" in such a case must be assessed on the basis of the normal rent realisable during the period in question. (*Addison and Bhide, JJ.*) UBED-UL RAHMAN *v.* DARBARI LAL. **6 I.R. (Lah.) 276= 146 I.C. 845=34 P.L.R. 262=A.I.R. 1933 Lah. 509.**

———**S. 111 (d)**—*Applicability—Mortgagee interest remaining in mortgagee—There can be no merger of interests of lessee and lessor.*

A mortgage involves a transfer of interest in the mortgaged land; and as long as part of the interest of a

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lessee remains with the mortgagees, there can be no complete merger of the interests of the lessee and the lessor in the same person so as to attract the operation of S. 111 (*d*), T. P. Act. Where the owners had notice of the mortgage effected by the occupancy tenants, the mortgagees being in possession,

Held, that they could not extinguish the mortgage by the payment of a small sum for the equity of redemption. (*Beckett, J.*) PARAS RAM *v.* DHARAM CHAND. **157 I.C. 997=8 R.L. 167=A.I.R. 1935 Lah. 522.**

———**S.111 (d)**—Merger—Plaintiff and defendant joint proprietors—Plaintiff also lessee of part of property from before acquisition of proprietary interest by both—No merger of rights or lessee. *See* CO SHARER—SUIT FOR ACCOUNTS. **58 I.A. 75=6 Luck 197=61 M.L. J. 261 (P.C.).**

———**S. 111 (e)**—*Surrender of undefined portion of holding by some of the tenants—Validity of.*

The surrender of an unascertained undefined portion of a holding by some of the tenants in favour of the landlord is valid and binding on the parties to it 22 N.L.R. 17, Foll. (*Macnair, O.J.C.*) RINDU 2. VITHOBA. **27 N.L.R. 116=I.R 1931 Nag 158=134 I.C. 286= A.I.R. 1931 Nag. 159.**

———**S. 111 (g)**—Applicability—Lease created prior to act—Permanent lease of entire village on fixed rent—Rent payable in instalments—Condition that if rent is not paid regularly lessor can cancel lease—Act, if governs lease. *See* B. T ACT, SS. 10 AND 155. **16 Pat L T. 633=A.I.R. 1935 Pat. 508.**

———**S. 111 (g)**—*Applicability—Service tenure granted prior to Act—Default in rendering service and repudiation of grantor's title—If entails automatic forfeiture.*

The rule contained in S 111 (*g*), T. P. Act, as it stood before the amendment in 1923, applies also to tenancies created prior to the passing of the T. P Act as a rule of justice, equity and good conscience; in the case, therefore, of a service tenure existing long prior to the Act, the principle embodied in S. 111 (*g*) can be invoked. Consequently the breach of a condition by the holder of such a tenure by defaulting to render the stipulated services or a repudiation of the grantor's title cannot automatically work a forfeiture. The forfeiture does not become complete without an act on the part of the grantor showing an intention to determine the lease or grant. (*Venkatasubba Rao, J.*) LAKSHMU NAIDU *v.* VENKAYYA. **158 I.C 1093=1935 M.W.N. 901=42 L.W. 362=A.I.R. 1935 Mad. 943.**

———**S. 111 (g) (1)**—*Covenant against tranfer or encumbrance by tenant—Usufructuary mortgage of part of the holding—Right of re-entry*

Where a condition in a lease provided that the tenant "shall not be able to transfer the said *Karsha* right in any way by gift or sale, or to grant any *Karsha* settlement in respect thereof or to encumber the same in anyway" and that the tenant was, in the event of breach of that condition, liable to be ejected,

Held, that forfeiture was to be incurred by the lessees and the right to re-entry was to accrue to the lessor only in the event of the lessee transferring or encumbering the entire lease-hold, and that the condition was not broken by an usufructuary mortgage by the tenant of a two-third share of the holding. *Church* v. *Holding*, 15 Ves. 258, Foll. (*Guha and M C. Ghose, JJ*) SWARNAMOYEE DEBYA *v.* AOYAJADDI. **60 Cal. 47=I.R. 1932 Cal. 577=139 I.C. 239=36 C.W.N. 819=A.I. R. 1932 Cal. 787.**

———**S. 111 (g) (2)**—*Denial of title—Disclaimer, if should be brought home to the knowledge of landlord.*

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The defendants, who were permanent lessees of certain lands from 1885, partitioned the property describing themselves as the owners of the land and also passed several mortgages and sale deeds in favour of strangers, in which they described themselves as owners. No rent had been paid since 1907 when there was an order of the Collector changing the khata of the lands in the names of the defendants. They had, however, never communicated to the landlord their desire to renounce the relationship of landlord and tenant. It was also found that the heirs of the landlord were unaware of the dealings by the tenants.

Held, that a denial by the tenant of his landlord's title must, in order to work a forfeiture of the tenancy, be brought home to the knowledge of the landlord and as the landlord had no knowledge in this case, the conduct of the tenants did not bring about a forfeiture of the tenancy. 35 A. 145; 41 M. 629; 42 M. 589; 43 M. 480, Ref. (*Patkar and Murphy, JJ.*) NARAYAN VITHAL *v.* MANGESH VITHAL. **I.R. 1933 Bom. 8=140 I.C. 567=34 Bom.L.R. 1287=A.I.R. 1932 Bom. 599.**

———**S. 111 (g) (2)**—*Denial of title—Effect of—Applicability to permanent tenancy.*

A disclaimer of the landlord's title made before the suit for ejectment occasions a forfeiture of the tenancy. This rule applies to all tenancies permanent or otherwise. (*Shadi Lal, C.J. and Broadway, J.*) MELA RAM *v.* SANDHI KHAN. **13 Lah. 796=I.R. 1933 Lah. 168=141 I.C. 825 (1)=34 P.L.R. 87=A.I.R. 1933 Lah. 221.**

———**S. 111 (g)**—Denial of title—Meaning of—English Law of forfeiture—Applicability of *See* LANDLORD AND TENANT—FORFEITURE. **59 Bom. 194.**

———**S. 111 (g) (2)**—*Denial of title—Notice to quit not necessary.*

Where a tenant who is entitled to notice denies the title of the landlord, no notice is necessary to eject him. (*Bhide, J.*) KARAM CHAND *v.* AMAR NATH MOHSAN. **6 I.R. (Lah.) 150 (2)=145 I.C. 992=34 P.L.R. 884=A.I.R. 1933 Lah. 377.**

———**S. 111 (g) (2)**—*Denial of title—What amounts to.*

In a rent suit by the landlord the tenant contended that the plaintiff was not his landlord and that he was nobody's tenant.

Held, that this amounted to a disclaimer of landlord's title and that the landlord was entitled to eject him.

Semble.—The doctrine of forfeiture must be applied with the utmost possible precaution. (*Rachhpal Singh, J.*) MADHO LAL *v.* LAL BAHADUR SINGH. **149 I.C. 517=6 R.A. 914=A.I.R. 1934 All. 103.**

———**S. 111 (g) (2)**—*Denial of title—What amounts to.*

The mortgaging of premises by a tenant does not amount to an unequivocal and unambiguous denial of the landlord's title. A denial by the tenant must not only be direct and unequivocal but must be made to the knowledge of the landlord. 35 All 145 and A.I.R. 1919 Mad. 1106, Ref. (*Hulton, J.*) MAHOMED MAHMUD KHAN *v.* LAJA MAL. **15 Lah. 683=151 I.C. 209=34 P.L.R. 495=7 R.L. 108=A.I.R. 1934 Lah 289.**

———**(Before amendment). S. 111(g)**—*Forfeiture—Oral information of to lessee, sufficient.*

Under S. 111 of the old T. P. Act, oral information by the lessor to the lessees that owing to their default the lease was forfeited is sufficient to constitute forfeiture. Such information need not be in writing. (*Jackson and Walsh, JJ.*) SATYANARAYANA SARMA *v.* VENKATARAMAMURTHY. **157 I.C. 804=A.I.R. 1935 Mad. 454.**

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———**S. 111 (g)**—*Forfeiture—Requisites.*

In cases to which S. 111 of the T. P. Act applies, forfeiture is incurred only by breach of an express condition entitling the lessor to re-enter or for denial of the lessor's title and in case the lessor should give notice of his intention to terminate the lease. 26 M. 157 and 42 M. 589 (P.C.), Ref. (*Waller and Krishnan Pandalai, JJ.*) PERIYANAN CHETTY *v.* GOVINDA RAO. **I.R. 1932 Mad. 402=137 I.C. 487=1931 M.W.N. 1287=35 L.W. 191=A.I.R. 1932 Mad. 328=62 M.L.J. 496.**

———**S. 111 (g)**—*Object and scope of amendment.*

The amendment of Cl. (*g*) by the Act of 1929 was no doubt made in order to remove the ambiguity of the words in the orginal sub-clause and to make clear a point which had given rise to a difference of judicial opinion. By reason of the alteration in a case where a lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or where a lessee renounces this character as such by setting up a claim in a third person or by claiming title in himself it will be necessary for the lessor to indicate definitely his intention to take advantage of the forfeiture which has been incurred by giving notice to that effect to the lessee and under the section as it now stands it is necessary that such step shall be taken before the right to institute a suit can arise. (*Costello and Jack, JJ.*) PROKASH CHANDRA DAS *v.* RAJENDRA NATH DAM. **58 Cal. 1359=I.R. 1932 Cal. 104=135 I.C. 296=35 C.W.N. 823=A.I.R. 1932 Cal. 221**

———**S. 111 (g)**—*Scope.*

The only requirement of S. 111, Cl. (*g*) is that the lessor does some act showing his intention to determine the lease. There is no reason why the lessor's election must be made at some time prior to the institution of the suit. 42 Bom. 195, Foll (*Costello and Jack, JJ.*) PROKASH CHANDRA DAS *v.* RAJENDRA NATH DAM. **58 Cal. 1359=I.R. 1932 Cal. 104=135 I.C. 296=35 C.W.N. 823=A.I.R. 1932 Cal. 221.**

———**S. 111 (h)**—Co sharer landlords—Joint letting—Notice to quit by one alone—Not valid. *See* CO-SHARER—LEASE. **39 C.W.N. 246.**

———**S. 111 (h)**—*Notice to quit—Duration—Lease for term—Commencement from 1st of month—Holding over—Notice to quit by last day of month—Validity.*

Premises in Calcutta were let to a tenant for a term of three years from 1st day of April, 1918. The tenant held over after expiry of the term. On the 24th September, 1932 the landlord caused a notice to be sent to the tenant requiring him to quit the premises by the last day of October, 1932.

Held, that the lease for term originally fixed expired at midnight on the 1st April, 1921, that thereafter the tenant held over as a monthly tenant, each month of the renewed tenancy expiring at midnight on the 1st day of the succeeding month; and consequently the notice to quit expiring with the last day of a month was a bad notice and insufficient to determine the tenancy.

Obiter: that the notice to quit in form was not bad as vague. (*Buckland, J.*) SUSIL CHANDER NEOGY *v.* BIRENDRAJIT SHAW. **153 I.C. 673=7 R.C. 398 (1)=38 C.W.N. 782=A.I.R. 1934 Cal. 837.**

———**S. 111 (h)**—*Notice to quit—Validity of.*

According to terms of a deed of lease the defendant took a dwelling house "from the 1st January, 1924 to the 1st January 1925." The tenancy was to be determined by either party giving to the other of them subsequent to the 1st of January, 1925, fifeen days' notice in writing expiring in the calendar month On the 15th September, 1930, the notice to quit was issued to the defendant asking him to take notice that he was thereby called

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upon to vacate and deliver possession "on the forenoon of the 1st October 1930."

Held, though the notice ought to have terminated the tenancy on the 30th September, it was not, however, bad by reason of its being too long by a few hours. "The validity of a notice to quit ought not to turn on the splitting of a straw." (1895) 1 Q.B. 378 Foll.; (1892) 30 L.R. (Ir.) 412; 46 Cal. 458 (P.C.), Ref to. (*Venkatasubba Rao, J.*) GNANAPRAKASAM PILLAI *v.* F.S. VAZ. **I.R. 1931 Mad. 573 (2) = 131 I.C. 621 (2) = 33 L.W. 763 = A.I.R. 1931 Mad. 352 = 60 M.L.J. 293.**

———**S. 112**—*Acceptance of rent by one of several trustees—Effect of.*

Acceptance of rent after default, by a trustee who had been held out by his co-trustees as having authority to receive payments amounts to an acceptance binding on the trustees. (*Jackson and Walsh, JJ.*) SATYANARAYANA SARMA *v.* VENKATARAMAMURTHY. **157 I.C. 804 = A.I.R. 1935 Mad. 454.**

———**S. 112**—*Conditional acceptance of rent—Effect.*

A conditional acceptance of tent by the lessor after default involving a forfeiture, is none the less a waiver. (*Jackson and Walsh, JJ.*) SATYANARAYANA SARMA *v.* VENKATARAMAMURTHY. **157 I.C. 804 = A I R. 1935 Mad. 454.**

———**S. 112**—*Subsequent suit for rent—Effect of.*

Forfeiture may be waived by the landlord but instead of waiving the forfeiture, the landlord definitely determines the lease, a subsequent suit for rent does not operate as a waiver of forfeiture and the tenant is not liable for the period subsequent to the notice to quit. (*Ross and Fazl Ali, JJ.*) UPENDRA NATH MUKHERJI *v.* DHUBESWAR LAL SINGH. **I.R. 1931 Pat. 299 = 132 I C. 875 = 12 Pat.L.T. 225 = A.I.R. 1931 Pat. 240.**

———**S. 112**—*Waiver—Onus.*

The onus is on the lessee to adduce some evidence of the lessor's knowledge of the Act of the tenant constituting a breach of conditions of the lease. It is not enough for the lessee to prove an act on the part of the lessor showing recognition of the tenancy, or to show that the lessor's ignorance of the breach has not been proved. It is incumbent on him to prove positively that the lessor had knowledge of the breach and yet continued to recognise the tenancy. (1923) A C. 435, Foll. (*Guha and M. C. Chose, JJ.*) SWARNAMOYEE DEBYA *v.* AOYAJADDI. **60 Cal. 47 = I.R 1932 Cal. 577 = 139 I.C. 239 = 36 C.W.N. 819 = A.I.R. 1932 Cal 787.**

———**S. 113**—*Acceptance of rent for period after suit under order of Court—If waiver.*

Acceptance by landlord of rent for period after the institution of the suit for ejectment, paid by the tenant under a consent order of Court, does not constitute waiver of notice to quit, although the payments are made out of Court, and cannot nullify the proceedings or pejudice the landlord's rights. (*Buckland, J.*) SUSIL CHANDER NEOGY *v.* BIRENDRAJIT SHAW. **38 C W.N. 782 = 153 I C. 673 = 7 R C. 398 (1) = A.I R. 1934 Cal. 837.**

———**S. 114**—*Applicability — Agricultural lease—Relief against forfeiture—Power of Court to grant—C. P. Tenancy Act, S. 39—If a bar.*

A Court has power to extend the principles of S. 114 of the T. P. Act to agricultural leases which are not the subject of any local Act. The terms of a lease with a sub tenant are matters between him and his landlord and are not regulated by the C. P. Tenancy Act. They are governed by the ordinary laws of contract subject to the exceptions provided in S. 38 of the C. P. Tenancy Act. The principles of equity can therefore be applied in such cases. S. 39, C. P. Tenancy Act, no doubt states that

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a decree for arrears of rent may be executed by ejectment, but ejectment is not an inevitable consequence; nor does S. 39 exclude the consideration of granting relief against penal clauses. S. 39 does not therefore create any bar to the application of the principles of equity relieving against forfeiture. (*Grille, Offg. J.C.*) SHRIDEO TEMPLE JANKIRAMANJI *v.* RAMCHAND. **8 R. N. 204 = 160 I.C. 1012 = 18 N.L.J. 159.**

———**S. 114**—*Applicability—Maintenance deed.*

The relief as to forfeiture contained in the section is a special provision applicable to the case between landlord and tenant and has no application as to maintenance deed alleged to contain a penal clause. (*Niyogi, A. J. C.*) MT. BANA BAI *v.* MT. CHANDRABHAGA. **27 N.L.R. 24 = I.R. 1931 Nag. 98 = 132 I.C. 450 = A. I.R. 1931 Nag. 60.**

———**S. 114**—*Principle underlying—English and Indian Law compared.*

S. 114 is based on the principles of the Chancery Courts, the only difference being that under the English Law a tenant is allowed the same right to relieve after a judgment for recovery of land on the ground of forfeiture for non-payment of rent as if the judgment had been given after trial. Under the Indian Law relief from forfeiture cannot be claimed after the order for ejectment had been made. (*Mitter, J.*) THE DHURRUMTOLLA PROPERTIES, LTD. *v.* DHUNBAI PEROSHAW SORABJEE. **58 Cal. 311 = I R. 1931 Cal. 519 = 132 I.C. 87 = A.I.R 1931 Cal. 457.**

———**S. 114**—*Relief against forfeiture—Discretion—Scope of equity—Rent in arrear—Meaning.*

Where a lessee admits that a forfeiture under the lease for non-payment of the rent had occurred and seeks relief from the forfeiture under S. 114, the Court is given a discretionery power which it may or may not exercise in favour of the tenant. In such a case the question turns on the meaning of the words "rent in arrear". The expression is not equivalent to the rent claimed by the suit but includes all that is due to the lessor up to the date when the application for ejectment is heard and order for relief against forfeiture made on condition of the lessee paying the entire arrears of rent with interest and on payment of costs. *Peachy's case*; (1724) 1 Stra, 477; *Howard* v. *Fanshawe*, (1895) 2 Ch. 581, Rel. on. (*Mitter, J.*) THE DHURRUMTOLLA PROPERTIES, LTD. *v.* DHUNBAI PEROSHAW SORABJEE. **58 Cal. 311 = I R. 1931 Cal. 519 = 132 I. C. 87 = A.I.R. 1931 Cal. 457.**

———**S. 116**—*Applicability—Holding over under invalid lease—Liability for rent.*

A verbal lease for more than one year is valid for one year if it is accompanied by delivery of possession. Where after the expiry of the term the lessee continues in possession he may be held to hold over and is liable for rent. (*Mahomed Noor, J.*) AZIZ AHMAD *v.* ALAUDDIN AHMAD. **6 I R. (Pat.) 9 = 144 I.C. 788 = A.I.R 1933 Pat. 485.**

———**S. 116**—*Applicability—Tenant holding over—Suit by landlord for rent—If evidence of assent to continuance of possession—Nature of tenancy—Rent—Rate of—Bengal Tenancy Act, S. 51.*

A tenant holding over after the expiry of his lease is ordinarily a trespasser, unless the landlord in some manner signifies his intention to recognise the continuance of the tenancy. The institution by the landlord of a suit for rent is a sufficient indication of such an intention and the tenant so continuing in possession will be presumed to be a tenant from year to year in the absence of any evidence of holding on a different tenure. With regard to the amount of rent, S. 51 of the Bengal Tenancy Act

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which applies to all agricultural tenancies, will apply in the absence of evidence of a special contract varying the rate of rent; and from year to year, the rent payable in the previous year is presumed to be the rent payable for the holding. He must be deemed to be governed by the same conditions as governed his tenancy while holding under the lease or *kabuliat*, in the absence of proof of a contrary arrangement. (*James, J.*) RAMSUNDAR TEWARI *v.* DULHIN BATASO KUAR. **155 I.C. 367 = 7 R.P. 578 = A.I.R. 1935 Pat. 271.**

———**S. 116**—Construction—"In the absence of an agreement to the contrary"—Meaning—Term dispensing with notice—Holding over—Notice necessary to eject. *See* T. P. ACT, S. 106. NOTICE—NECESSITY. **37 C. W.N. 971.**

———**Ss. 116 and 106**—Holding over—Lease for term of premises in Calcutta—Monthly tenancy, created. *See* T. P. ACT, SS. 106 AND 116. **38 C.W N. 782.**

———**S. 116**—Holding over by tenant—Inference—Circumstances. *See* LEASE — CONSTRUCTION—HOLDING OVER, **A.I.R. 1934 Mad. 458 = 67 M.L.J. 455.**

———**Ss. 116 and 107**—Holding over—Invalidity of lease—No ground for escaping liability for rent. *See* EVIDENCE ACT, S. 116. **A.I.R. 1934 Pat. 369.**

———**S. 117**—"*Agricultural purpose—Holding land for collection of agricultural rent—Nature of tenancy—If a tenure under B. T. Act.*

The right to hold land for the purpose of collecting agricultural rents, whether or not it constitutes a tenancy for agricultural purposes within the meaning of S. 117, T. P. Act, does constitute a tenure within the Bengal Tenancy Act. (*Courtney Terrell, C. J. and Dhavle, J.*) SRI RAMCHANDRA NAIK KALIA *v.* AJODHYA SINGH. **15 Pat. 8 = 158 I C 399 = 8 R.P. 197 = 16 Pat.L.T 633 = A.I.R. 1935 Pat 508.**

———**S. 117**—Agricultural purposes—Original letting for residential purposes—Subsequent user for agricultural purposes—If becomes tenancy for agricultural purposes—Law applicable—T. P. Act or Bengal Tenancy Act—Tenant—If occupancy raiyat. *See* B. T. ACT, S. 5 (2). **39 C.W N. 1041.**

———**S. 117**—*Construction—Class of leases exempted—Bengal Rent Acts—How far affected.*

The words of S. 117, T. P. Act, should be given a liberal interpretation, because it was probably the intention of the legislature in exempting leases for agricultural purposes from the operation of Chapter V of the Act to retain in force the special provisions relating to the class of leases dealt with in the Bengal Rent Acts of 1859 and 1869 and which may be compendiously described as leases for agricultural purposes. (*Courtney-Terrell, C. J. and Dhavle. J.*) SRI RAMCHANDRA NAIK KALIA *v.* AJODHYA SINGH. **15 Pat. 8 = 158 I.C. 399 = 8 R.P. 197 = 16 Pat.L.T. 633 = A.I.R. 1935 Pat. 508.**

———**S. 117**—*Lease exempted under—Registration unnecessary.*

Leases in respect of agricultural lands come under the operation of S. 117 and a registered instrument is not necessary. (*Pearson and Mallik, JJ.*) GIRIBALA DASI *v.* DWARKA NATH MISTRI. **55 C L.J. 312 = 142 I.C. 81 = I R. 1933 Cal. 232 = A.I.R. 1932 Cal. 715.**

———**S. 118**—'*Exchange*'—*Requisites—Transfer in consideration of forbearance to sue not an exchange.*

An exchange is the mutual transfer of the ownership of one thing for the ownership of another. A transfer of property partly in consideration of forbearance on the part of the transferee to take certain legal proceedings is not an exchange because a right to sue or to take

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proceedings cannot be the subject of ownership. (*Beasley, C. J. and Curgenven, J.*) VENKATA JAGANNADHA RAO *v.* VENKATA KUMARA MAHIPATHI SURYA RAO BAHADUR. **54 Mad. 163 = 33 L.W. 95 = 135 I.C. 17 = I.R. 1932 Mad. 49 = A.I.R. 1931 Mad. 140 = 60 M. L.J. 56.**

———**S. 118**—*Oral exchange—Validity—Transaction acted on.*

Where the exchange of land accompanied by delivery of possession was acted on for more than 30 years and there was nothing to show that the value of the land at the time of exchange was Rs. 100 or upwards,

Held, that the exchange though not evidenced by a registered instrument, was valid under S. 118 read with S. 54, T.P. Act. (*Bisheshwar Nath and Smith, JJ.*) INDAR GIR *v.* SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE. **I.R. 1932 Oudh 49 = L.R. 12 A. (O.) 409 = 135 I.C 689 = 8 O.W.N 1275 = 15 R D. 745. = A.I.R. 1932 Oudh 135.**

———**S. 119**—*Applicability—Third parties.*

S. 119 can have no reference to the case of a third person, who is not a party to the exchange and who is not in any way bound by it. (*Staples, A.J.C.*) SUJATKHAN *v.* NAZAFALI. **30 N L.R. 208 = 6 R.N. 200 = 148 I.C. 733 = A I.R. 1934 Nag. 61.**

———**S. 119. (Before amendment)**—*Applicability—Third parties.*

S. 119 of the Transfer of Property Act before amendment related only to the rights of the parties to the exchange *inter se* and there is no reason for holding that it was intended to relate to a third person not bound by an exchange to which he was not a party. The original section assumed a case in which the parties to the exchange had retained the properties exchanged and were in a position to restore them. Therefore the principle of that section did not apply to an innocent transferee for value from one of the parties to the exchange. (*Cold stream, J.*) GANGA SINGH *v.* RAGHO RAM. **A.I.R. 1934 Lah. 934 (2).**

———**S. 122**—*Acceptance—If need be express—Possession as evidence of acceptance.*

Acceptance under S. 122 need not be express but may be implied. There is no presumption of acceptance operating immediately upon the gift whether known or unknown to the donee. Actual or constructive possession is however proof of acceptance and in zemindari property, and especially in a case concerning husband and wife mutation means delivery of possession and the acts of the husband after mutation are acts on behalf of his wife. 25 A.L.J. 69, Ref. (*Sulaiman and Young, JJ.*) ANANDI DEVI *v.* MOHAN LAL. **54 All. 534 = I.R. 1932 All. 356 = 137 I.C. 756 = 1932 A.L.J. 335 = A.I. R. 1932 All. 444.**

———**S. 122**—*Onerous gift—Acceptance by donee.*

There is no authority for the view that for an acceptance of an onerous gift acceptance of the gift itself is not sufficient but an acceptance of the onerous condition also at the same time is necessary. This is specially so where the onerous condition is of a trifling character which was not intended to be thought of or enforced. (*Mukerji and Bartley, JJ.*) SARBA MOHAN BANERJEE *v.* MANMOHAN BANERJEE. **I.R. 1933 Cal. 471 = 143 I.C. 757 = 37 C.W.N. 149 = A.I.R. 1933 Cal. 488.**

———**S. 123**—*Absence of registered instrument—Validity of gift.*

Where there was no registered instrument in respect of the alleged gift, the subject-matter thereof being immoveable property, the provisions of S. 123 are not complied with and the gift is not valid. (*Sir Lancelot*

T. P. ACT (1882), S. 123.

Sanderson.) LIM CHARLIE *v.* OFFICIAL RECEIVER. **12 Rang. 238=6 R.P.C. 45=36 Bom.L.R. 235=59 C.L.J. 91=3 A.W.R. 112=39 L.W. 318=11 O.W.N. 131=147 I.C. 328=A.I.R. 1934 P.C. 67=66 M.L.J. 144 (P.C.).**

———**Ss. 123 and 3**—Attestation — Validity of—Endorsement by Sub-Registrar. *See* T. P. ACT, S. 3. **1931 M.W.N. 1242.**

———**Ss. 123 and 3**—*Attestation — Validity and sufficiency of—Marking by illiterate person.*

The Amending Act, XXVII of 1926, which inserted a definition of the word "attested" has altered the law and a person who cannot sign his name is no longer qualified to attest a document. Marking by an illiterate person is not sufficient attestation. As the Act is retrospective in operation, it applies to a deed of gift executed in 1912, though at that time illiterate persons were capable of attesting by putting their mark. 3 Bom. 382 and 11 Cal. 429, Rel. (*Curgenven, J.*) VENKATARAMAYYA *v.* NAGAMMA. **35 L.W. 233=136 I.C. 343=I R. 1932 Mad. 295=1931 M.W.N. 1242=A.I.R. 1932 Mad. 272.**

———**Ss. 123 and 3**—Attestation—Person signing on behalf of executant, if can attest. *See* T. P. ACT, S. 3. **1931 M.W.N. 1242.**

———**S. 123**—*Dedication to temple—If can be made orally—Unexpressed intention—If sufficient.*

Although the provisions of S. 123, T. P. Act, have been somewhat modified and whittled down by judicial decisions, and although, in spite of that section, a dedication may be effective without an instrument in writing, there must be a real dedication, where by the property is completely given away and the owner completely divests himself of his ownership. A mere unexpressed intention to dedicate cannot operate as a formal dedication so as to invalidate a transfer of that property to a third person made after the idea of dedication had been formed in the mind of the transferor. (*James and Agarwala, JJ.*) BIRENDRA KESHRI PRASAD NARAIN SAHEE *v.* BAHURIA SARASWATI KUER. **13 Pat. 356=16 Pat. L.T. 147=155 I C 756 =7 R.P. 619=A.I.R. 1934 Pat. 612.**

———**Ss. 123 and 3**—*Gift deed—Attestation by only one witness—Sufficiency—Signature of Registrar—Absence of evidence that Registrar signed in executant's presence—Validity of gift.*

Under S. 123 of the T. P. Act, a deed of gift of immovable property must be effected by a registered instrument attested by at least two witnesses and under S. 3, T. P. Act, an attesting witness must have either seen the executant sign or received from the executant a personal acknowledgment of the signature, and must himself sign the instrument in the presence of the executant. If the conditions of a valid attestation under the T. P. Act are fulfilled, there is nothing in law to prevent a Registrar from being treated as an attesting witness even though the signature of the Registrar might have been made *alio intuito*, to satisfy the requirements of the Registration Act. Where on the face of a deed of gift the name of one person alone appears as attesting witness, and though the endorsement of the Rigistrar on the back of the deed shows that the executant had admitted execution of the document before the Registrar, there is no evidence at all that the Registrar signed in the presence of the executant, the deed of gift cannot be held to be validly attested and cannot affect the immovable property which is the subject-matter of the deed of gift. (*Roy, J.*) NILIMA BASU *v.* JOHARLAL SARKAR. **61 Cal. 525=151 I.C. 1063=7 R.C. 216=38 C.W.N. 753=A.I.R. 1934 Cal. 772.**

T. P. ACT (1882), S. 129.

———**S. 123**—Gift or will—Construction—Shares allotted to children but right of management alone retained. *See* DEED—CONSTRUCTION—WILL OR GIFT. **A.I.R. 1934 Rang. 129.**

———**S. 123**—Husband and wife—Presumption of advancement—Applicability—Fixed deposit in bank in joint name—Rights *inter se*. *See* HUSBAND AND WIFE—PRESUMPTION OF ADVANCEMENT. **A.I.R. 1931 All. 596.**

———**S. 123**—*Marksman, if can attest.*

A marksman can in law be a valid attestor to a gift deed. (*Beasley, C.J. and King, J.*) NAGAMMA *v.* VENKATARAMAYYA. **58 Mad. 220=154 I.C. 777=7 R.M. 497=40 L.W. 937=A.I.R. 1935 Mad. 178 (2) =68 M.L.J. 191.**

———**S. 126**—*Revocation—Right personal to donor.*

S. 126 does not lay down that a gift can be revoked in the same manner as a contract can be rescinded. The right given thereunder is personal to the donor. (*King and Collister, JJ.*) AZIZUNNISSA *v.* SURAJ HUSAIN. **152 I.C. 146=7 R.A. 268=1934 A.L.J. 817=3 A.W.R. 302=A.I.R. 1934 All. 507.**

———**S. 126**—*Revocation—Validity.*

Where a document amounts to a deed of gift and operates as such, then subsequent revocation, if any, cannot have a valid effect. (*Mya Bu and Baguley, JJ.*) LUCY MOSS *v.* MAH NYEIN MAY. **149 I.C. 1113=6 R.R. 365=A.I.R. 1933 Rang. 418 (2).**

———**S. 128**—Applicability—Gift by Mahomedan—Provision making donee liable for all debts of donor—Amount of debt not specified—If void. *See* MAHOMEDAN LAW—GIFT—VALIDITY OF. **155 I.C. 303=1935 O.W.N. 589=A I.R. 1935 Oudh 432.**

———**S. 128**—Applicability—Hindu widow—Surrender of whole estate to daughter and daughter's son—Nature and effect of *See* HINDU LAW—WIDOW—SURRENDER. **18 N.L.J. 179.**

———**S 128**—*Universal donee—Gift of entire property —Necessity*

The deed of gift related only to the donor's share in village *K*. His share in village *P* was subject to an encumbrance but the share had not been foreclosed.

Held, that the deed of gift did not comprise the donee's whole property and that the donee was not a universal donee. (*Hasan, C J. and Bisheshwar Nath, J.*) BRIJ RAJ KUER *v.* RAM DAYAL. **7 Luck. 411=135 I.C. 369=I R. 1932 Oudh 17=8 O.W.N. 1291=A.I.R. 1932 Oudh 40.**

———**S. 128**—*Universal donee—Who is—Liability for payment of debts.*

Where the donee was in possession of all the properties except a small item which was given over to the donor under a lease for his lifetime,

Held, that the donee was a universal donee and that he was liable for all the debts of the donor. If he found that the property was burdened with too much debts he could throw away the property. (*Mukerji, J.*) SHAHZAD SINGH *v.* MADAN GOPAL. **I.R. 1932 All. 614=140 I C. 120 (1)=A.I.R. 1933 All. 146.**

———**S. 128**—Universal legatee—Liability for debts of testator. *See* CONTRACT ACT, S. 37. **1935 O.W.N. 1031.**

———**S. 129**—*Mahomedan gift—Applicability of T.P. Act.*

The rules as to gifts under the Mahomedan Law are contrary to the rules under the T. P. Act and the latter do not apply to a Mahomedan gift. (*Wort and Fasl Ali, JJ.*) BISHUN PRASAD SHEORATAN *v.* MAHOMED NAYIN. **147 I.C. 504=6 R.P. 359=14 Pat.L.T. 599.**

T. P. ACT (1882), S. 130.

———S. 130—*Applicability—Lease by mortgagor—Lessee to pay revenue or be liable in damages—Default by lessee—Assignment of rights to mortgagee—Suit by mortgagee against lessee—Maintainability.*

A mortgagor leased the mortgaged properties and the lessee agreed to pay the Government dues or be responsible to lessor in damages. Lessee defaulted and the mortgagee who purchased the properties in auction sale under a previous mortgagee's decree paid the dues. The mortgagor had also assigned his rights against the lessee to the purchaser mortgagee. In a suit by mortgagee against lessee for the amount of dues paid, it was pleaded that the assignment was invalid under S. (6) (*e*).

Held, that S. 6 (*e*) had no application to the facts of the present case. What was assigned was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract with the lessor to repay him. This would be an actionable claim to which S. 130, T. P. Act, would apply. The failure of the lessee to fulfil this obligation did not give rise to a claim of damages but to a claim for reimbursement of the precise sum which the landlord had disbursed to meet the obligation and this right having been assigned by a formal deed the claim for payment must be decreed. (*Lord Salvesen.*) MANMATHA NATH MULLICK *v.* SHEIK HEDAIT ALI. **59 I.A. 41=11 Pat. 266=36 C.W.N. 280=135 I.C 635=I.R. 1932 P C. 27=1932 M.W.N. 222=35 L.W. 245=34 Bom.L.R. 489=55 C L.J. 152=13 Pat.L T. 541=1932 A.L J. 341=9 O.W.N. 418=A.I.R. 1932 P.C. 32=62 M.L.J. 287 (P.C.).**

———S. 130—Applicability—Punjab — Oral assignment of promissory note. *See* PROMISSORY NOTE—ASSIGNMENT. **134 I C. 121=I R. 1931 Lah. 889.**

———S. 130—*Applicability—Transfer of bales of cotton held as security from one creditor to another—Substitution of liability—Necessity for writing.*

M was indebted to *L. S.* & Co. to the extent of Rs. 10,400, to *J. J.* to the extent of Rs. 3,491 and to *G.* & Co. to the extent of Rs. 27,500. *G.* & Co. also held with them 212 bales of cotton belonging to *M.* as security. By an arrangement to which all of them were parties, the bales of cotton were transferred to *J. J.* who in turn took over the liability to all the creditors. In a suit by *L. S.* & Co. against *M.* and *J. J.*

Held, that the transaction was in fact a "novation" and not the transfer of an actionable claim, that no writing was necessary to evidence the transaction and that the beneficial interest in the bales passed to *J. J.* and the other creditors of *M.* had no right over the same. (*Beaumont, C.J. and Mirza, J.*) JIVRAJ JOHARMAL *v.* LALCHAND SHREEKISON & CO. **56 Bom. 462=I R. 1932 Bom 506=139 I.C. 582=34 Bom.L.R. 837=A.I.R. 1932 Bom. 446.**

———Ss. 130 and 134—*Construction and respective scope.*

There is a contradiction between the provisions of S. 130 and those of S. 134 of the Transfer of Property Act. While S. 130 says "all the rights and remedies of the transferor vest in the transferee," the words in S. 134 are "the residue, if any, belongs to the transferor." The wording ought to be, "the residue, if any, shall be transferred by the original transferee to the original transferor." (*Costello and Lort Williams, JJ.*) RANJIT ROY *v.* D. A. DAVID. **62 Cal. 1=155 I.C. 193=7 R. C. 568=38 C.W.N. 1190=A.I.R. 1935 Cal. 218.**

———S. 130—*Construction and scope—Reference to English authorities.*

S. 130, T. P. Act, contains a special scheme having some of the features both of the English Common Law and of the principles of equity. But at the same time it is unsafe, in deciding a case under the section, to decide the point by any extensive reference to the English authorities. (*Costello and Lort Williams, JJ.*) RANJIT ROY *v.* D. A. DAVID. **62 Cal. 1=155 I.C. 193=7 R. C. 568=38 C.W.N. 1190=A.I.R. 1935 Cal. 218.**

———S. 130—*Construction and scope—Mortgage of money subscribed to chit fund—When complete—Notice to stake-holder—If condition precedent — Subsequent mortgagee giving notice to stake-holder before prior mortgagee—If entitled to priority—English law.*

A subscriber's right to receive the amounts subscribed by him to a chit fund is certainly an actionable claim, and when he executes a hypothecation bond in respect of the instalments paid by him it must be deemed to effectively transfer to the mortgagee his claim thereto. No further act on the part of the subscriber is necessary to complete the title of the hyphothecatee to recover the amount from the stake-holder under S. 130, T. P. Act. The issue of a notice to the stake-holder is not a condition precedent to the completion of the assignment or to vest the title in the assignee. A subsequent hypothecatee from the subscriber who issues a notice to the stake-holder of his claim before the first hypothecatee gives a notice will not give the former priority over the prior hypothecatee, although it is otherwise under the English law. (*Curgenven and K. S. Menon, JJ.*) SUBRAMANIA AYYAR *v.* RAMASUBBA AYYAR **59 Mad. 141=159 I.C 127=1935 M.W.N. 1097=42 L. W. 666=A.I.R 1935 Mad. 1003=69 M.L.J. 803.**

———S. 130—*Debt secured on immovable property—Debt, apart from security, if transferable.*

A debt is distinct from the security. A debt secured upon immovable property does not become identified with it; it exists as movable property. The debt can be transferred without the security. The effect of the definition of "actionable claim" introduced by the Amending Act of 1900 is only to restrict the statutory rights on transfer such as the right to sue in the transferee's name, etc., to such transfers as are transfers of actionable claims as defined. But it does not mean that the debt without the security cannot be made the subject of transfer at all. (*Lord Atkin.*) THE IMPERIAL BANK OF INDIA *v.* THE BENGAL NATIONAL BANK, LIMITED. **58 I A. 323=59 Cal. 377=I.R 1931 P C 299=134 I.C. 651=34 L.W. 569=33 Bom L.R 1338=1931 A L J. 804=1931 M W.N. 910=54 C.L.J. 117=35 C W N 1034=A.I.R. 1931 P.C. 245=61 M.L.J. 589 (P. C.).**

———S. 130—*Equitable assignment—Order by debtor on another person to pay out of a specific fund.*

An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, operates as an equitable assignment of that part of the debt or funds to which the agreement or order refers. (*Tek Chand and Monroe, JJ.*) THAKAR DAS BHATIA *v.* MALIK CHAND. **14 Lah. 325=I.R. 1933 Lah. 412 (2)=144 I.C. 6=34 P.L.R. 988=A.I.R. 1933 Lah. 102.**

———S. 130—*Mortgage bond—Transfer by endorsement—Effect of.*

The separation between debt and security is well established; the creditor is entitled to take a judgment for the debt without having recourse to his security. Where a mortgage bond was transferred by an endorsement to the plaintiff and plaintiff sued on it.

T. P. ACT (1882), S. 130.

Held, that the document on which suit was based cannot be regarded as a mortgage bond because the security had not been legally transferred. But there was no reason why the Court should not regard it as a simple money bond which had been transferred by the endorsement to the plaintiff and there was a legal transfer. (*Kendall, J.*) GOPI NATH *v.* MT. BEKALI. **158 I.C. 525=8 R.A. 311=1935 A.L.J. 1012=1935 A. W.R. 1014=A.I.R. 1935 All. 837.**

———**S. 130**—*Personal covenant — Assignability—Power given by submission clause in contract.*

Power given by a submission clause in a contract, being a personal covenant, cannot be validly transferred. Where a contract therefore contains a submission clause and one of the parties thereto assigns the subject matter of the contract, the assignee cannot enforce the submission clause on the strength of the assignment of the subject-matter of the contract in his favour, though, no doubt, he may be compelled, by a stay of proceedings instituted by him, to go to arbitration. (1928) 2 K. B. 423, Foll., A I.R. 1926 Sind 209, Dist. (*Ferrers, J C. and Rupchand, A. J. C.*) DESA *v.* GIRDHARILAL GHANSHAMDAS. **26 S.L.R. 368=I.R. 1932 Sind 133 =139 I.C. 596=A.I.R. 1932 Sind 128.**

———**S. 130**—Promissory note—Allotment in partition—No endorsement by payee—Right of suit. *See* NEGOTIABLE INSTRUMENTS ACT, S. 13 (1) EXPL. AND S. 48. **A.I.R. 1934 Bom. 356.**

———**S. 130**—Promissory note—Assignability, apart from endorsement. *See* PROMISSORY NOTE—ASSIGNMENT. **61 Cal. 425=A.I.R. 1934 Cal. 549.**

———**S. 130** — Transferee of bond—Right to avoid stipulations inserted by undue influence practised upon transferor. *See* CONTRACT, S. 19-A. **159 I.C. 320= 1935 O.W.N 1293.**

———**S. 130** — Transfer of debts by way of sale—Vendor continuing to realise debt—Right of vendee. *See* VENDOR AND PURCHASER. **A.I.R. 1930 All. 875.**

———**S. 130**—*Assignment of debt—Conditions.*

An assignment of a debt, to be valid, must be of the whole debt and not of a part of it. (*Lort Williams and Jack, JJ.*) GHISULAL GONESHILAL *v.* GUMBHIRMALL PANDHWA. **62 Cal. 510=164 I.C. 111 (2)=9 R.C. 137=39 C.W.N. 606.**

———**S. 130**—*Writing—Sufficiency of.*

Where certain bales held as security by one creditor were transferred in favour of another to be held by him as security and the next day, the debtor wrote to the latter a letter which after stating the total of the indebtedness continued : "As against the said amount, our bales 212 which are lying with (previous creditor) are got transferred to your name. When these are sold, please credit proceeds towards this amount."

Held, the writing was sufficient to satisfy the statute. "It would be much too narrow a construction to put on this document to say that, merely because it is expressed in the past tense, it cannot operate as a present transfer within S. 130, which does not require the transfer to be in any particular form." (*Beaumont, C.J. and Mirza, J.*) JIVRAJ JOHARMAL *v.* LALCHAND SHREEKISON & CO. **56 Bom. 462=I.R. 1932 Bom. 506=139 I.C. 582=34 Bom.L.R. 837=A.I.R. 1932 Bom. 446.**

———**S. 132**—*Applicability—Assignee of co-sharer's right to profits—Suit against lambardar—Right to set off.*

Where the assignee of a co-sharer's right to profits sued the lambardar in the Revenue Court and the defendant claimed a set-off in respect of a decree for revenue he had obtained against the assignor.

T. P. ACT (1882), S. 136.

Held, that the defendant could not plead set-off or claim the benefit of S. 132. (*Sulaiman, C.J., Mukerji and King, JJ.*) LALLU SINGH *v.* CHANDER SEN. **6 R.A. 586=147 I.C. 937=15 L.R. 29 (Rev)=56 All. 624=3 A.W.R. 39=18 R.D. 32=1934 A.L.J. 1=A. I.R. 1934 All. 155 (F.B.).**

———**S. 134**—*Applicability—Book-debt—Assignment by way of security—Effect of.*

When there is an assignment of a book-debt by way of security in order to secure re-payment of a debt, it amounts to a mortgage of the debt and S. 134 of the Transfer of Property Act applies to the case. The section is intended to deal with a case of a mortgage debt. (*Costello and Lird Williams, JJ.*) RANJIT ROY *v.* D. A. DAVID. **62 Cal. 1=155 I.C. 193=7 R.C. 568=38 C.W.N. 1190=A.I.R. 1935 Cal. 218.**

———**S. 134**—*Debenture creating charge on secured debts but not enforceable against the security—Right of debenture holder to realise debts only.*

The respondent bank had executed two debentures in favour of the appellant, creating a floating charge on its whole undertaking, properties, assets and interests, present and future, as security for a loan. When on suspension of payment by the respondent bank, the charge became fixed, the principal assets of the bank consisted of loans due from customers, secured by title deeds of immovable property deposited with the bank. The question was if the appellant, who was bound by an admission of counsel and decree based thereupon that the debentures not being registered under the Registration Act, did not affect the immovable property comprised in the title deeds, could nevertheless claim any interest in the loans due to the bank and secured upon immovable property.

Held, that the debts though secured upon immovable property, was movable assets of the respondent bank, over which the debentures created a charge and the appellant was entitled, under S. 134 of the Transfer of Property Act, to the benefit of all sums received in reduction of the debts whether from the realisation of the security or otherwise. (*Lord Atkin.*) IMPERIAL BANK OF INDIA *v.* BENGAL NATIONAL BANK. **58 I.A. 323 =59 Cal. 377=I R. 1931 P C. 299=134 I.C. 651=34 L.W. 569=33 Bom.L.R. 1338=1931 A.L J. 804= 54 C.L.J. 117=1931 M.W N. 910=35 C.W.N. 1034 =A.I.R. 1931 P.C. 245=61 M.L.J. 589 (P.C.).**

———**S. 136**—*Applicability — Dower debt—Transfer to legal practitioner.*

A transfer of an unpaid dower debt relates to an actionable claim and is hit at by S. 136 where the transferee is a legal practitioner. (*Pullan and Niamatullah, JJ.*) AMIR HASAN KHAN *v.* MAHOMED NAZIR HASAN. **54 All 499=I.R 1932 All. 254=1932 A.L. J. 275=136 I.C. 833=A.I.R. 1932 All. 345.**

———**S. 136**—*Bar under—Applicability—Attachment of provident fund in execution—Fund assigned to legal practitioner prior to suit—Rights of parties.*

A obtained a simple money decree against *B* and in execution of that decree attached the money standing to the credit of *B* in his provident fund. Previously to the suit of *A* the provident fund had been assigned by *B* to *C*, a legal practitioner, on account of a certain sum of money borrowed from him by *B*. *C* therefore instituted a suit against *A* for the recovery of money realised by him by attachment of the fund.

Held, that the suit was not maintainable as the assignment to *C* by *B* of his provident fund was an assignment of an actionable claim and hence S. 136, T. P. Act, was bar to *C's* suit. (*Nasim Ali and Henderson, JJ.*) BHUPATI MOHAN DAS *v.* PHANINDRA CHANDRA CHAKRAVARTY. **63 Cal. 578=62 C.L.J. 359=**

T. P. ACT (1882), S. 137.

160 I.C. 219=8 R.C. 412=40 C.W.N. 102=A.I.R. 1935 Cal. 756.

———**S. 137**—Promissory note—Benami assignment—Release of maker by real owner—Assignee not entitled to sue on note. *See* NEGOTIABLE INSTRUMENTS ACT, SS. 78 AND 32. **13 Pat. 655=A.I.R. 1934 Pat. 382.**

———**S. 137**—*Promissory note—Transfer by endorsement.*

S. 137 gives an extended privilege to mercantile documents and is in no way restrictive. There is nothing to prevent the transfer of a promissory note by deed without endorsement. (*Jackson and Krishnan Pandalai, JJ.*) VENKATARAMA AYYAR *v.* KRISHNASWAMI CHETTIAR. **I.R. 1932 Mad. 551=138 I.C. 262=1932 M.W.N. 653=35 L.W. 755=A.I.R. 1933 Mad. 133 (1).**

TRANSFER OF PROPERTY (AMENDING) ACT (XX OF 1929), S. 16—Scope and effect of—Applicability of S. 53-A to pending proceedings. *See* T. P. ACT, S. 53-A. **1935 M.W.N. 267=41 L.W. 364=A.I.R. 1935 Mad. 404.**

TRANSFER OF PROPERTY (AMENDMENT) SUPPLEMENTARY ACT (XXI OF 1929), S. 10—*Applicability—N.-W.F. Province.*

Act XXI of 1929 does not amend a single provision either of Act XX of 1929 or of Transfer of Property Act of 1882 which Acts are not in force in the N.-W.F. Province; but on the contrary it does amend numerous Acts which are in force in that Province. S. 10 thereof amends the Indian Registration Act. The Indian Registration Act is in force in this Province, and hence S. 10 of Act XXI of 1929 is also in force in this Province. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ABDULLAH KHAN *v.* BAHRAM KHAN. **155 I C. 1022 =7 R. Pesh. 109=A.I.R. 1935 Pesh. 69.**

TREASURE TROVE ACT (1878)—*Applicability.*

The act applies only to things which have been hidden. 31 Mad. 397, Foll. (*Suhrawardy and Graham, JJ.*) RAM RANJAN MALLIK *v.* SECRETARY OF STATE. **59 Cal. 21=I.R. 1931 Cal. 692=133 I.C. 564=A.I.R. 1931 Cal. 430.**

TREES.

See (1) B. T. ACT, SS. 23, 26-F, 102 A AND 103-B.
(2) LANDLORD AND TENANT—TREES.
(3) MADRAS ESTATES LAND ACT, S. 13 (3).

TRESPASS—*Damages—Measure of—Injury to land by trespass—Depreciation in selling value as the basis.*

In respect of injury done to land by trespass the measure of damages is the depreciation in the selling value of the land not the amount required to put the premises in repair. It is only where no adequate compensation could otherwise be given that a decree for restoration should be passed, especially in a case where the cost of restoration is much more than the depreciation in the value of the land. (*Suhrawardy and Jack, JJ.*) KRISHNA LAL SAHA CHOUDHURY *v.* RADHIKA MOHAN DAS. **I.R. 1931 Cal. 637=133 I.C. 109=53 C. L.J. 148=A.I.R. 1931 Cal. 462.**

———*Suit for use and occupation—Right to compensation.*

The action for use and occupation is founded in the English Common Law upon a permission, expressed or implied, giving rise to a presumption that a reasonable compensation for the use of the premises has been agreed upon between the parties; so that the action is not, according to English authorities, maintainable against a wilful trespasser who sets up a tenancy for a third person claiming adversely to the plaintiff. But in India actions of this kind against trespassers are recognised. The question, however, was left open. 17 Cal. 541; 22 M. 149; A.I.R. 1925 Lah. 196 and A.I.R. 1928 Nag. 118. (*Doraiswami Iyer, C.J.*) HUSSAIN BI *v.* ABDUL RAHIMAN SAHEB. **8 Mys.L.J. 443.**

TRESPASSER.

See (1) ADVERSE POSSESSION—TRESPASSER.
(2) AGRA TENANCY ACT (1926), SS. 106 (2), 192 AND 194.
(3) EJECTMENT.
(4) LIMITATION ACT, ARTS. 142 AND 144.

TRUST.

See also (1) ADVERSE POSSESSION—TRUSTEE.
(2) DEED—CONSTRUCTION—TRUST.
(3) HINDU LAW—RELIGIOUS ENDOWMENT —TRUSTEE.
(4) LIMITATION ACT, ART. 144—TRUST.
(5) MAHOMEDAN LAW—WAKF—TRUST.
(6) RELIGIOUS ENDOWMENT.

Alienation.
Appointment of trustee.
Breach of trust.
Cestui que trust.
Construction.
Co-trustee.
Creation of.
Enforcement of.
Estoppel.
Liability of trustee.
Nature of.
Power of Court.
Powers of trustee.
Private trust.
Public or private.
Religious endowment.
Rights of beneficiary.
Rights of trustee.
Right to trusteeship.
Scheme.
Suit relating to.
Tracing.
Validity of.
Miscellaneous.

Alienation.

———*Alienation—Declaration of trust by decree—Mortgage by trustee as private property—Suit to set aside—Plea by mortgagee that property not subject to trust, if open.*

R got a decree declaring that certain properties were trust properties. Subsequently he mortgaged those properties to *D* as if they were his private property. After *R*'s death, his successor *S* instituted a suit to set aside the mortgage in favour of *D*. In such a suit, *D* is not barred, by reason of the original decree in favour of *R*, from contending that the properties were the private properties of *R* and not subject to any trust. That decree is, at the highest, only a piece of evidence in considering whether any trust existed. (*Beasley, C.J. Ananthakrishna Aiyar and Curgenven, JJ.*) RAJA DAMARA KUMARA *v.* PANAGANTI JAGANNADHA. **I.R. 1931 Mad. 383=130 I.C. 463=33 L.W. 485=1930 M.W. N. 1217=A.I.R. 1931 Mad. 97=60 M.L.J. 155 (F.B.).**

———*Alienation—Mortgage by trustee—Trustee obtaining trust property by declaration of Court.*

Semble.—When a person assuming the position of trustee in respect of property as to which there was no previous dedication obtains from Court a declaration that that property is trust property and acts as such trustee, has he any title to mortgage the property on the footing that it is his private property? Question dis-

TRUST—Alienation.

cussed in the reference but not by the F.B. (*Beasley, C. J., Ananthakrishna Aiyar and Curgenven, JJ.*) RAJA DAMARA KUMARA *v.* PANAGANTI JAGANNADHA. **I. R. 1931 Mad. 383=130 I.C. 463=33 L.W. 485=1930 M.W.N. 1217=A.I.R. 1931 Mad. 97=60 M.L.J. 155 (F.B.).**

———*Alienation—Sale by trustee to his wife—Onus—Suspicion.*

Trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which the circumstance is calculated to excite is one which it would require a very strong case to remove. Therefore in the case of sale by a trustee or an executor to his wife, the Court will seek to be certain, by vigilant scrutiny of the true nature of such a transaction, because one can readily see that the close relationship between husband and wife may, unless the nature of the transaction is explained, give rise to the not unnatural inference that the husband was truly the party intervening in the case, and that not without benefit to himself. *Burrell* v. *Burrell*, (1915) S.C. 333, Foll. (*Lord Thankerton.*) ACHI THAYARAMMAL *v.* BALKIS NACHIAL. **I.R. 1931 P.C. 173=131 I.C. 781=34 L.W. 740=14 O L.J. 357=8 O.W.N. 330=A.I.R. 1931 P.C. 68=61 M.L.J. 456 (P.C.).**

Appointment of trustee.

———*Appointment of trustee—Power to surviving trustees to appoint new trustee—Power of surviving trustee to appoint new trustee by will.*

A will provided as follows: "If by chance any of the said trustees dies either before or after my death, the surviving trustees should appoint a new one in his place and that the said newly appointed trustee shall have the same authority and powers as the others."

Held, that the clause did not authorise the last surviving trustee to appoint a new trustee by will in his own place or in the place of the others. "When the will takes effect, he has ceased to be a a surviving trustee." (*Beaumont, C.J. and Murphy, J.*) KALIDAS DAMODAR *v.* RUKSHAMANI. **I.R. 1932 Bom. 152=136 I.C. 168 =33 Bom.L.R. 1285=A.I.R. 1932 Bom. 108.**

Breach of trust.

See also TRACING, *infra.*

———*Breach of trust—Earlier services of trustee—Effect on subsequent misappropriation.*

While trustee's meritorious services to the trust at an earlier stage might well justify him in asking that proceedings against him should be prosecuted with discretion rather than with zeal, these services cannot be allowed to justify his subsequent misappropriation of trust funds and conversion of trust property to his own use. It was found that a trustee had been guilty of serious breaches of trust, that he had not spent in charity all the trust funds which came to his hands and that some of those he had applied to his own use; that while he himself found the moneys necessary to prosecute certain litigation, he had represented in his accounts that he had borrowed these moneys at high rates of interest from outside lenders, so that in the name of expenditure which he had never made he might retain for himself a rate of interest which could not be claimed by a trustee in respect of advances made by himself.

Held, such conduct on the part of the trustee, however meritorious in earlier days his acts in relation to the trust might have been, could not be overlooked. (*Lord Blanesburgh.*) GULZARI LAL *v.* COLLECTOR OF ETAH. **58 I.A. 460=53 All. 910=I.R. 1931 P.C. 233=132 I.C. 745=34 L.W. 63=53 C.L.J. 537=33 Bom.L.R. 968=1931 M.W.N. 662=1931 A.L.J. 369**

TRUST—Breach of trust.

=35 C.W.N. 699=A.I.R. 1931 P.C. 121=61 M.L.J. 402 (P.C.).

———*Breach of trust by trustee—Personal liability—When may be relieved from.*

In order to be relieved from personal liability for any breach of trust, the trustee must establish that he acted honestly and reasonably, and ought fairly to be excused for the breach of trust. Where a trustee never considered the question of his dealings with the trust funds in the light of his duty as a trustee, or paused to consider whether it was prudent for him as a trustee to lend on the personal security of the borrowers, he is not entitled to any relief from personal liability for the loss occasioned to the estate by the loans on personal security. (*Lord Russel of Killowen.*) KHOO TEK KEONG *v.* CH'NG JOO TUAN NEOH. **153 I.C. 149=7 R P.C. 104=1934 A.L.J. 1001=A.I.R. 1934 P.C. 243 (P C.).**

———*Breach of trust—Trustee—Rights and duties—School committee leaving moneys in charge of secretary for extension of buildings—Rights and duties of secretary—Applying money to his own purpose.*

Where the committee of management of a school leaves certain moneys in charge of its secretary for the purpose of carrying out certain alterations and additions to the school buildings, the secretary is entitled and empowered to apply them, as in his discretion is proper, for any of the purposes named by him and accepted by the committee. As to the resulting balances, it is his duty to keep the moneys standing to the credit of one or other of the accounts authorised and sanctioned by the committee, until they are required for any of the purposes aforesaid. With reference to these balances, he is under no further obligation, unless and until their application is otherwise directed by the committee. Accordingly if, and to the extent to which he withdraws these moneys and applies them to his own purposes, he is guilty, as from the moment of withdrawal of a criminal breach of trust. (*Lord Blanesburgh.*) TOSHANPAL SINGH *v.* DISTRICT JUDGE, AGRA. **61 I A. 350=56 All. 548=7 R.P.C. 39=151 I.C. 33=11 O.W.N. 1124 =40 L.W. 420=1934 A.L.J. 925=4 A.W.R. 405= 60 C.L.J. 518=16 Pat.L.T. 25=39 C.W.N. 145= 1935 M.W.N. 620=A.I.R. 1934 P.C. 238=68 M.L. J. 1 (P.C.).**

———*Breach of trust—Trustee—Liability for breach of trust—Right of beneficiary for accounts—Wilful default—Accounts on basis of—Pleadings as to—Procedure.*

If a trustee employs trust funds for improper purposes or negligently fails to recover trust funds or to employ trust property to the best advantage, he renders himself liable to damages. He is also liable for breach of the duty of furnishing accounts and giving information. But as a matter of procedure, breaches of trust, both positive and negative, must, when accounts are claimed on the footing of wilful default, be pleaded at the outset, unless the trustee has refused to show the trust account. If a trustee refuses to show accounts, a beneficiary has a clear right to sue for an account, and to be allowed to formulate his charges of 'wilful default' and breaches of trust after inspection. But, where a beneficiary has had an opportunity of seeing the trust accounts, he must formulate his charges at the outset, or at any rate before the issues are framed; where the plaintiff fails to do so, he cannot be allowed at the trial to allege or rely on breaches of trusts not pleaded at the outset. (*Barlee and Sen, JJ.*) SHIRINBAI *v.* NAVROJI PESTONJI. **37 Bom.L.R. 946=160 I.C. 612=8 R.B. 267=A.I.R. 1936 Bom. 30.**

TRUST—Cestui que trust.

Cestui que trust.

———Cestui que trust—*Claim of—Nature of.*

The claim of a *cestui que trust* is in general a simple contract debt and it makes no difference for this purpose whether the defendants are in the strict sense of the term trustees or mere managers of the kind as described in 44 Mad. 831 (P. C.) (*Venkatasubba Rao, J.*) ANNAMALAI CHETTIAR *v.* SOLAVAPPA CHETTIAR. **1935 M.W.N. 607=42 L.W. 505=8 R.M. 793=161 I.C. 177=A.I.R. 1935 Mad. 983=69 M.L.J. 274.**

———*Cestui que trust*—Decree against trustee—Binding character. *See* OUDH ESTATES ACT, S. 8. **1935 O.W.N. 674=A.I.R. 1935 Oudh 394.**

———Cestui que trust—*Minor—Suit against fraudulent trustee—Claim for damages or for an account—Right of minor to elect.*

A minor may elect to sue a fraudulent trustee either for damages or for an account. Where the trustee is assisted in his fraudulent acts by his agents the *cestui que trust* can call on the trustee as well as his agents to render an account. (*Madhavan Nair and Jackson, JJ.*) RAMANATHAN CHETTIAR *v.* ANNAMALAI CHETTIAR. **57 Mad. 1031=150 I.C. 602=7 R.M. 17=39 L.W. 404=1934 M.W.N. 347=A.I.R. 1934 Mad. 367=66 M.L.J. 451.**

Construction.

———*Construction—Long usage.*

Where the original instrument of dedication is indefinite, the trust must be construed in the light of long continued usage. (*Dhavle and Saunders, JJ.*) NAJIHUDDIN AHMAD *v.* AMIR HASAN KHAN. **153 I.C. 557=7 R.P. 361=A.I.R. 1934 Pat. 443.**

Co-trustee.

———*Co trustee—Liability as agents—Breach of trust by co trustee.*

Where a co trustee, who was the nephew of the author of the trust, took a leading part in administering the trust, it is only in exceptional cases that a co-trustee can be made liable for the breach of trust committed by such a co-trustee. (*Shadi Lal, C. J. and Abdul Rashid, J.*) HOLAS RAI *v.* KALLA RAM. **154 I.C. 366=7 R. L. 553=A.I.R. 1934 Lah. 47.**

Creation of.

———Creation of—Deed by Hindu coparceners throwing properties into family fund—Appointment of manager for managing and utilising income for maintenance of members—No divesting of ownership—Trust, if created—Manager—If trustee. *See* T. P. ACT, S. 14. **62 C.L.J. 71.**

———Creation of—Verbal assignment by attorney to himself of property known to be his principal—Vesting of property in trust—Purpose, if specific. *See* STRAITS SETTLEMENTS ORDINANCE NO. 56 (LIMITATIONS), S. 9. **155 I.C. 855=A.I.R. 1935 P.C. 28 (P.C.).**

———Creation of—Gift of property or income—Charitable purpose set out in will. *See* HINDU LAW—RELIGIOUS ENDOWMENTS— DEDICATION. **A.I.R. 1932 Mad. 589.**

———*Creation of—Dedication—Property to—What amounts to—Unexpressed intention—If effective.*

A mere unexpressed intention to dedicate certain property to a trust cannot operate as a formal dedication. There may be a dedication without an instrument in writing; but the dedication must be real, that is, the property must be completely given away and the owner must completely divest himself of his ownership. (*James and Agarwala, JJ.*) BIRENDRA KESHARI PRASAD NARAIN SAHEE *v.* BAHURIA SARASWATI KUER. **13 Pat. 356=16 Pat L.T. 147=155 I.C. 756=7 R.P. 619=A.I.R. 1934 Pat. 612.**

TRUST—Liability of trustee.

———Creation of—Possession of goods—Delivery to agent in lieu of trust receipts in violation of agreement. —Effect—No trust created by trust receipts. *See* CONTRACT ACT, S. 178—APPLICABILITY. **60 Cal. 262=A.I.R. 1933 Cal. 366.**

———*Creation of—Proof—Conveyance under will—Conduct of trustees.*

Where the testator, an old man of about 74 years of age, creates a trust by will and dies only two days after making the will, the question of whether he had a disposing mind and whether the will was the result of an undue influence is not free from difficulty, and it cannot be seriously urged that the trustees, who saved the bulk of the property for the trust by paying only Rs. 5,000 to the daughter and the grandson of the testator, did not act in the interest of the trust. (*Shadi Lal, C. J. and Abdul Rashid, J.*) HOLAS RAI *v.* KALLA RAM. **7 R. L. 553=154 I.C. 366=A.I.R. 1934 Lah. 47.**

———Creation of—Trust for creditors—Direction to vendee to pay creditors—Trust not constituted. *See* TRUSTS ACT, S. 78 (*c*). **134 I.C. 100=32 P.L.R. 876.**

———Creation of—Trust for creditors—Partition suit —Compromise decree—Arrangement regarding payment of debt—Right of creditor to enforce—No trust or charge in favour of creditors. *See* CONTRACT—THIRD PARTY. **55 Mad. 436=A.I.R. 1932 Mad. 457=62 M. L.J. 533.**

———Creation of—Vendor and purchaser—Direction to vendee to discharge obligation of vendor—Trust in favour of third party—Enforcement. *See* CONTRACT—THIRD PARTY—RIGHT TO SUE. **7 Luck. 292=A.I R. 1932 Oudh 82.**

Enforcement of.

———*Enforcement of—Public and private trusts—Provision relating to the funeral of the testator.*

Generally speaking, if a trust is of a charitable or public nature, the Advocate-General or the Collector that is the Officer corresponding to the Attorney-General in England—is the only person who can apply to the Court to enforce the trust. In the case of a private trust it is the beneficiary interested who can apply. When the will contains provisions as to the funeral of the testator or the disposal of his body in the performance of which no person has any direct interest, there is no one who can insist on those provisions being carried out. It is not the law that a person who claims to be the nearest relative of the testator has in that capacity a *locus standi* to apply to the Court to enforce the provisions of the will in which no one is directly interested. (*Beaumont, C. J. and Murphy, J.*) KALIDAS DAMODAR *v.* RUKSHAMANI. **136 I.C. 168=I R. 1932 Bom. 152=33 Bom.L.R. 1285=A I.R. 1932 Bom. 108.**

———Enforcement of—Settlement deed—Direction for payment of money—Trust created—Suit to enforce—Limitation. *See* DEED—CONSTRUCTION — TRUST. **39 L.W. 496=A.I.R. 1934 Mad. 273.**

Estoppel.

———*Estoppel—Trustee.*

A person who has come into possession of the properties as a trustee cannot subsequently take up the position that they are his private properties. 34 Mad. 257; 22 A.L.J. 983, Ref. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

Liability of trustee.

See also BREACH OF TRUST, *supra.*

———*Liability of trustee—Costs—Personal liability of trustee.*

TRUST—Liability of trustee.

When a plaintiff who sues a trustee incurs a liability as to costs, the rule is that it is in the first instance a personal liability unless he obtains an order from the Court that the costs are to come out of the estate. Where a trustee has recovered costs and is afterwards ordered to refund the same in restitution, he is personally liable, and the same can be recovered in restitution by his arrest and attachment of his property. (*Curgenven and Cornish, JJ.*) MUNUSWAMY MUDALIAR *v.* KANDASWAMY PILLAI. **40 L.W. 805=154 I.C. 109=7 R.M. 412 (2)=1934 M.W.N. 1342=A.I.R. 1935 Mad. 5 (1)=67 M.L.J. 787.**

———*Liability of trustee—Misconduct—Neglect to sue debtors—No personal liability of trustees.*

The trustees cannot be expected to devote more care and attention to the business of the trust than an ordinary man would use in dealing with his own affairs. Where therefore the trustees recover large sums of money from the debtors of the trust, but allow some items aggregating to Rs. 770 to become barred by time, the trustees cannot be made personally liable for this sum. (*Shadi Lal, C.J. and Abdul Rashid, J.*) HOLAS RAI *v.* ROLLA RAM. **154 I.C. 366=7 R.L. 553=A.I.R. 1934 Lah. 47.**

———*Liability of trustee—Suit on behalf of trust estate dismissed—Order for costs—Personal liability of trustee.*

Where the decree dismissing the trustee's suit against strangers directs him to pay the costs of the defendants without stating that the costs should be paid out of the trust estate the costs are executable personally against the trustee. (*Bajpai, J.*) HAR KISHAN DAS *v.* PARSHOTAMANAND GIR. **151 I.C. 952=7 R.A. 238 =1934 A.L.J. 225=3 A.W.R. 576=A.I.R. 1934 All. 793.**

Nature of.

———Nature of—English and Muhammadan conceptions of trust—Distinction between. *See* MAHOMEDAN LAW—WAKF—NATURE OF. **11 Pat. 288=A.I.R. 1932 Pat. 33.**

Power of Court.

———*Power of Court—Suit regarding trust property —Power of Court to award relief apart from pleadings.*

Where the suit relates to wakf property, the chief Court has jurisdiction to pass such an order as may be just and proper in all the circumstances of the case and is not bound to the granting of the relief of ejectment asked for by the plaintiff mutawalli. Property declared to be *wakf* and status of defendants declared to be that of tenants paying rent. (*Hasan, C. J. and Kisch, J.*) DILAWAR HUSAIN *v.* SUBHAN KHAN. **136 I.C. 241 =I.R. 1932 Oudh 97=8 O.W.N. 722=A.I.R. 1931 Oudh 375.**

Powers of trustee.

———*Powers of trustee—Persons entitled to benefit of trust—Decision of trustee—Interference.*

Though the trustees have the power to decide whether particular persons are entitled to the benefit of the trust income or not, that discretion is liable to be supervised and if necessary altered by Court; but once the trustees have exercised the discretion and the exercise is within their power, unless it is shown that the exercise of the discretion was not *bona fide* or was perverse, the Court would not interfere with the exercise of that discretion. The Court cannot assume jurisdiction to inquire into the action of the trustees upon a mere general allegation of want of *bona fides*. (*Kania, J.*) ALICE RICE *v.* CAMA. **58 Bom. 181=147 I.C. 579=6 R.B. 216=35 Bom.L.R. 840=A.I.R. 1933 Bom. 404.**

TRUST—Powers of trustee.

———*Powers of trustee—Power to borrow—Personal liability.*

Where a debt is incurred by a trustee for the benefit of the estate and the creditor sues such trustee personally and obtains a decree and in execution of the decree attaches the trust property and obtains an order for sale of the property, only the beneficial interest of such trustee in the trust property can be sold and the question of indemnity and subrogation cannot be gone into in execution but such relief must be sought in independent proceedings. Right of creditor of trustee against trust estate explained. (*Ameer Ali, J.*) MACKINTOSH BURN, LTD. *v.* SHIVAKALI KUMAR. **60 Cal. 801=6 R.C. 554=149 I.C. 282=A.I.R. 1933 Cal. 668.**

———*Powers of trustee—Power to release debt.*

An executor, administrator or trustee who desires to avoid liability for a debt released by him must show that he has acted honestly and reasonably, in which case only can he fairly claim to be excused. (*Mukerji and S.K. Ghose, JJ.*) SHIVAPRASAD SINGH *v.* PRAYAG KUMARI DEBEE. **61 Cal. 711=154 I.C. 479=7 R.C. 459=A.I.R. 1935 Cal. 39.**

———*Powers of trustee—Power to sell—Position of purchaser.*

Apart from authority conferred by the deed of endowment, scheme or sanction of Court, the trustees have, under certain circumstances, the power to sell property in their possession for "provident administration" of a particular charity but the purchaser takes the property subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances. (*C.C. Ghose, A. C. J. and Costello, J.*) MISRILAL RAIDANI *v.* NETAI CHAND NANDI. **150 I.C. 389=6 R.C. 839=58 C.L.J. 513=A.I.R. 1934 Cal. 372.**

———*Powers of trustee—Reduction of rent.*

Where a trustee for the time being is authorized by the trust deed to grant reduction and remission of rent, such reduction or remission allowed by the trustee is binding on the trust estate. (*Guha, J.*) SATYANIRANJAN CHAKRAVARTY *v.* HABIBAR SOBHAN. **6 I.R. (Cal.) 4=144 I.C. 598=A.I.R. 1933 Cal. 393.**

———*Powers of trustee—Transfer of property specified trustees—Authority of trustees to declare terms of trust—Trustees of jewish synogogue—Property acquired in the name of.*

Certain property was acquired in the names of the trustees of the jewish synogogue for the purpose of a jewish school. The purchase money was contributed, partly out of the synogogue funds, partly by Government and partly by private donors. Subsequently the then trustees of the synogogue conveyed the property by a registered deed in the name of two persons by way of trust, upon the terms set therein. A new set of trustees of the synogogue brought the present action claiming that the property belonged to the synogogue.

Held, (*i*) when a fund is raised for a charitable purpose in the name of certain persons, such persons must be deemed to have implied authority for and on behalf of the donors to declare the trusts to which the fund is to be subject and the trusts so declared will be presumed to be those intended by the donors or contributors; (*ii*) so the transfer of the property to the two specified trustees to hold it on certain terms of the trust was valid. *Attorney General* v. *Mathison*, (1907) 2 Ch. D. 383 and *Attorney-General* v. *Clapham*, 43 E.R. 638, Foll. (*Page, C.J. and Mya Bu, J.*) A. J. COHEN *v.* C. S. JOSEPH. **9 Rang. 392=134 I.C. 1249=I.R. 1932 Rang. 1=A.I.R. 1931 Rang. 286 (2).**

TRUST—Private trust.

Private trust.

———Private trust—Dedication for worship of family deity—Direction for feeding of the poor and students—Incidental to main purpose of trust—Private trust created. *See* RELIGIOUS ENDOWMENT—PRIVATE TRUST. **60 Cal. 538=37 C.W.N. 181=A.I.R. 1933 Cal. 519.**

———Private trust for maintenance of members of Hindu joint family born and to be born—Tying up of property for purpose of—Validity. *See* T. P. ACT, S. 14. **62 C.L.J. 71.**

———*Private trust—Right of management.*

In the case of a private trust, where there are more trustees than one, all must join in the execution of the trust such as in electing the shebait. (*C. C. Ghose, A. C. J. and Mitter, J.*) PRASADDAS PAL *v.* JAGANNATH PAL. **60 Cal. 538=6 I.R. (Cal) 58=144 I.C. 894=37 C.W.N. 181=A.I.R. 1933 Cal. 519.**

———*Private trust—Trust property divided among members of family by award of arbitrators—Award acted on by parties—Right of one member to sue for profits.*

Certain property described as wakf was divided among the members of family by the award of arbitrators. It was stated that each was to receive a share of profits and apply them himself for trust. One of them was appointed lambardar and, according to the award, he was to pay the share of profits. This was acted on by the parties for a long time.

Held, that the trust was a private one and that each member was for purposes of suit for profits a proprietor and had a right to sue as a co-sharer. (*Mukerji, Ag. C. J. and King, J.*) MANOHARI SARAN *v.* SHAMBHU NATH. **14 L.R. 261 (Rev.)=17 R.D. 820=6 R.A. 582=147 I.C. 916=A.I.R. 1933 All. 622.**

Public or private.

———*Public or private—Criterion—Intention of founder.*

The criterion for deciding whether a particular trust is or is not of a private nature is whether the said trust is or is not for the benefit of individuals. Where the intention of the founder, as shown by the recitals in his will, was that the property was to be dedicated for the benefit of idols, which in its wider sense means for the benefit of the public, the trust is undoubtedly of a public nature and not for the benefit of the individual members of the family. (*Niamatullah and Collister, JJ.*) SHEO SHANKAR *v.* KASHI SHANKER. **157 I.C. 532=4 A.W.R. 585=A.I.R. 1935 All. 139.**

Religious endowment.

———Religious endowment—Creation by Hindus or Mahomedans—Not trust. *See* RELIGIOUS ENDOWMENT—TRUST. **10 Pat. 506=A.I.R. 1931 Pat. 354.**

Rights of beneficiary.

———Rights of beneficiary—Member of caste—Caste documents—Right of inspection. *See* C. P. CODE, S. 9—CASTE QUESTION. **56 Bom. 242=34 Bom.L.R. 343=A.I.R. 1932 Bom. 122 (F.B.).**

———*Rights of beneficiary—Right to enforce trust.*

The right of the public to interfere and claim the preparation of a scheme in case of a property conveyed to a specified person for the benefit of the public is not effected by the fact that there is no privity of contract between the grantee and the public. (*Khaja Mahomed Noor and Scroope, JJ.*) MAHOMED KAZIM *v.* ABI SAGHIR. **11 Pat. 288=I.R. 1932 Pat. 81=136 I.C. 417=12 Pat.L.T. 817=A.I.R. 1932 Pat. 33.**

Rights of trustee.

———Rights of trustee—*De facto* trustee—Right to maintain suit. *See* HINDU LAW—RELIGIOUS ENDOWMENT—TRUSTEE. **61 M.L.J. 887.**

TRUST—Scheme.

———*Rights of trustee—Management—Vote of majority—Right of minority.*

One trustee in minority has no legal right to sue to set aside a majority vote even when strict obedience to technical rules has not been observed if in substance the rules have been complied with. 40 Mad. 941, Dist. (*Wallace, J.*) SHANMUGA MUDALI *v.* ARUNAGIRI MUDALI. **I.R. 1932 Mad. 910=140 I.C. 443=1932 M.W.N. 1311=36 L.W. 669=A.I.R. 1932 Mad. 658.**

Right to trusteeship.

———*Right to trusteeship—No acceptance by specified trustee—Right of his heirs to trusteeship.*

Where the founder specified *A* and his heirs as trustees after her lifetime, *A* does not get a vested estate in the trusteeship until he accepts the trusteeship, though the trusteeship would take effect only after the death of the founder. So if *A* never accepted it, the estate conferred on *A* remains only a contingent estate and if he predeceased the founder, nothing remained to be transmitted to his heirs, who could not claim any right to the trusteeship. 18 M.L.J. 304, Ref. (*Ramesam, J.*) APPASAMI PILLAI *v.* RAMU TEVAR. **136 I.C. 340=34 L.W. 776=I.R. 1932 Mad. 292=A.I.R. 1932 Mad. 267=61 M.L.J. 887.**

———*Right to trusteeship—No properly constituted trustees—Rights of founder's heirs.*

Where there are no properly constituted trustees of the will the heirs of the founders are entitled to manage the trusts of the will. 32 Bom.L.R. 1687, Foll. (*Beaumont, C.J. and Murphy, J.*) KALIDAS DAMODAR *v.* RUKSHAMANI. **33 Bom.L.R. 1285=136 I.C. 168=I.R. 1932 Bom. 152=A.I.R. 1932 Bom. 108.**

Scheme.

———*Scheme for management of mosque—Some trustees to be "Bengalees"—Committee of appointment to consist of some "Bengalee Sunni Mahomedan worshippers"—First appointed Bengalee trustee a Mahomedan born of Burmese mother—"Bengalee" and "Bengalee Sunni Mahomedan worshippers"—Meaning of.*

An application was filed before the District Judge for the filling of certain vacancies occurring among the appointment committee and trustees of the Bengalee Sunni Mosque of Bassein. In the scheme as originally framed it is directed that of the six trustees, "three should be Bengalees and the remaining three should be from among the other communities of the worshippers at the Mosque".

Held, that whether a Mahomedan of mixed blood retains his position in the Bengalee Mahomedan community or whether he definitely throws in his lot with the Mahomedans of Burma and classifies himself as a Zerbadi or Burma Muslim is a matter of evidence in each case and it depends on the social unit to which he has attached himself and in which he is received on equal terms by the other members and that when a descendant of an Indian male parent identifies himself with Burma to the extent that Burmese is his family tongue and possibly he adopts Burmese clothes and manners of living, he must be regarded as having definitely left the Indian community and joined the community of the Burma Muslims, but when, on the other hand, he keeps some Indian tongue as his family tongue, and retains the use of Indian clothes and remains in the same social circle with Indians of pure blood, he would then very properly be said to belong to the Indian Mahomedan community, or as the case might be, the Bengalee Mahomedan community, and so on. (*Mya Bu, Offg. C.J. and Baguley, J.*) ABDUL HAMID *v.* ABDUL AZIZ. **162 I.C. 917=8 R.R. 601=13 Rang. 27=A.I.R. 1935 Rang. 112.**

TRUST—Scheme.

———*Scheme—Scheme rules—Construction—Rule regarding powers of majority.*

Any body of trustees can by resolution in the ordinary way appoint any one of their number as the managing or executive trustee. Where a clause in High Court scheme ran "one of the trustees shall be the executive trustee by consent in writing of the others and he shall not continue as such for a period exceeding two years."

Held, that the clause did not mean that all the trustees must consent in writing to the appointment of the executive trustee. It did not deprive the body of trustees of their right to appoint by resolution a managing trustee and did not interfere with their right to pass such a resolution by a majority vote. The appointment so made was valid and did not give any cause of action to trustee not voting to have it declared void. A. I.R. 1929 Mad. 526, Dist. (*Wallace, J.*) SHANMUGA MUDALI *v.* ARUNAGIRI MUDALI. **I.R. 1932 Mad. 910=140 I.C. 443=1932 M.W.N. 1311=36 L.W. 669 =A.I.R. 1932 Mad. 658.**

Suit relating to.

———Suit relating to. *See* (*i*) CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920), S. 6.
(*ii*) C. P. CODE, S. 92.

Tracing.

———Tracing—Applicability of—Deposit as security for performance of terms of contract—Amount not earmarked—Debt and not trust no preferential payment. *See* COMPANY—WINDING UP. **34 Bom.L.R. 728= A.I.R. 1932 Bom. 311.**

———*Tracing—Breach of trust on the part of trustee.*

Where the plaintiff endorsed four hundies in which he was named the payee to *R* for negotiation and payment into the plaintiff's account which *R* was to open with some respectable firm and where *R* contrary to instructions invested the money in his own account,

Held, *R* was guilty of a breach of trust and the money placed by *R* in the hands of another can be got back from that other person, as it could in the particular case be identified. The relationship created was a fiduciary one and the plaintiff was entitled to follow the amount in the hands of the banker. (*Beasley, C.J. and Cornish, J.*) MURUGAPPA CHETTIAR *v.* KUMARANANDASWAMI. **55 Mad. 541=137 I.C. 622=I.R. 1932 Mad. 429=1932 M.W.N. 3=35 L.W. 150=A.I.R. 1932 Mad. 247=62 M.L.J. 281.**

———*Tracing—Doctrine of—Essentials of.*

It is not sufficient for the creditor of an insolvent merely to prove a deposit with the insolvent to be entitled to a charge on the assets of the insolvent; he must prove a deposit with the insolvent for a *definite* purpose. (*Bardswell, J.*) SATYAMMA *v.* OFFICIAL RECEIVER, KRISHNA DISTRICT. **6 I.R. (Mad.) 303=146 I.C. 699=38 L.W. 891=A.I.R. 1933 Mad. 917.**

———*Tracing—Money paid to wrong person—Receiver appointed to collect rents due to estate—Payment of rent by lessee to mortgagee of judgment-debtor—Right of receiver to follow rent.*

Where a receiver is appointed in execution of a decree with authority to collect rent due to the estate but the lessee pays the rent to a mortgagee of the judgment-debtor, the receiver is entitled to follow it in the hands of the mortgagee either on the footing that it is rent had and received to the use of the receiver of the estate or as being held by the mortgagee in trust for the estate. (*Page, C.J. and Das, J.*) U BA THIT *v.* RAMAN CHETTYAR. **149 I.C. 1042=6 R.R. 356=A.I.R. 1934 Rang. 84.**

TRUST—Validity of.

———Tracing—Unauthorised investment in business—Insolvency of trustee—Charge in favour of trust. *See* PRESIDENCY TOWNS INSOLVENCY ACT (1909), S. 52. **60 I.A. 203=56 Mad. 570=65 M.L.J. 1 (P.C.).**

Validity of.

———*Validity of—Requirements.*

The general rule is that a trust to be effective must be communicated to the *cestui que trust* or that he should at least know about it. The question as to whether there has been an irrevocable trust or not, must be a question of fact in almost every case. Where a certain fund was set apart in the books for the purpose of charity and it was so continued for over 60 years but there was no evidence that the owners of the fund intended to part with the ownership or control of it and its existence was not communicated to the general trustees of the temple and there was no document creating the trust except the entry in the account book and this fund was treated as an asset in partition.

Held, that no irrevocable trust fund was created. (*Beasley, C.J. and Butler, J.*) ARUNACHALAM CHETTIAR *v.* OFFICIAL ASSIGNEE, MADRAS. **1934 M.W.N. 979=155 I.C. 772=7 R.M. 605=A.I.R. 1935 Mad. 60.**

———Validity of—Father—Power to execute trust deed—Renunciation of his interest—Benefit of minor. *See* HINDU LAW—JOINT FAMILY—FATHER. **36 Bom.L.R. 738.**

———*Validity of—Charitable bequest—Setting apart funds for benefit of poor family—Object whether sufficiently certain.*

The essential feature of most of the charitable trusts is that the beneficiaries are an uncertain and indefinite class of persons described in general, often fluctuating and changing in their individual numbers. Where a Hindu directed by his will that the executors should apply a sum of money to the relief of any poor and deserving Karan family or families or individuals in shape of necessaries for life in times of distress, medical or educational aid, help for marriage of daughter and such other deserving cause,

Held, that the charitable bequest was operative since the words were sufficiently certain and descriptive to indicate the class of persons whom the testator intended to benefit. (*Fazl Ali and Scroope, JJ.*) NAKSHETRAMALI DEI *v.* BRAJA SUNDER DAS. **6 I.R. (Pat.) 290 (2)=146 I.C. 865=12 Pat. 708=A.I.R. 1933 Pat. 647.**

———*Validity of—Essentials—Property acquired by offerings made to spiritual head—Trust-deed in respect of—Provision that trustees were to follow his directions—Legality of trust.*

If a trust is to be valid and enforceable according to law, certain material matters must be ascertainable. In the first place it is material to ascertain the author or authors of the alleged trust. Next the intention to create a trust must be indicated by words or acts with reasonable certainty. The purpose of the trust, the trust property, and the beneficiaries must be indicated and in such a way that the trust could be administered by the Court if the occasion arose. Where the properties which are the subject-matter of an alleged trust were acquired by means of offerings made to a spiritual head by the followers of a certain faith and the trust deed executed by the spiritual head along with certain others provides that the trustees are to act in accordance with the directions of the spiritual head for the time being and that his mandates should be paramount and absolute in all matters referred to therein.

Held, that the followers of the faith when making their gifts to the spiritual head cannot be supposed to

TRUST—Validity of.

have intended to create any trust and that the provisions of the trust deed are wholly inconsistent with any intention on the part of the spiritual head to alter his position as such or to divest himself of the control of the properties and that therefore it cannot be treated as a title deed creating a legal trust, even though the offerings by means of which the properties were acquired, were not only for the personal use of the spiritual head but also for the advancement of the faith. (*Sir Lancelot Sanderson.*) CHHOTABHAI *v.* JNAN CHANDRA BASAK. **62 I.A. 146=57 All. 330=39 C.W.N. 865=42 L.W. 188=1935 A.L.J. 775=37 Bom. L.R. 567=1935 M.W.N. 625=1935 A.W.R. 677=155 I.C. 409=7 R.P.C. 201=1935 O.W.N. 627=61 C.L.J. 285=A.I.R. 1935 P.C. 97=69 M.L.J. 1 (P.C.).**

———Validity of—Uncertainty of object—Bequest for Dharmath and two other valid objects, which are joined—Validity of. *See* HINDU LAW—WILL. **14 Lah. 827.**

Miscellaneous.

———Miscellaneous—Decree against heirs of testator—Interest conferred by will on idol—Non-representation—Effect. *See* DECREE—VALIDITY OF. **A.I.R. 1931 Cal. 782.**

———Miscellaneous—Shares settled on trust—Payment by company—Income or corpus—Rights of life-tenants and remainderman. *See* COMPANY—SHARES. **A.I.R. 1930 P.C. 302=60 M.L.J. 320 (P.C.).**

TYPED DOCUMENTS. *See* EVIDENCE ACT, S. 45.

TRUSTS ACT (II OF 1882)—*Applicability—Districts in Rangoon.*

The Trusts Act applies only to Rangoon and does not apply to the districts; but still the principles enunciated therein can be applied to cases coming from the districts. (*Ba U and Mackney, JJ.*) U TUN AUNG *v.* MA THAI NU. **156 I.C. 325 (2)=7 R.R. 394=A.I.R. 1935 Rang. 44.**

———*Appointment of new trustees—Compromise—Interference by Court.*

The provision for the appointment of new trustees contained in the compromise in case the continuing trustees do not agree (as required by the will) is clearly an addition to the will of the testator and no such provision can be validly added, nor can the trustees delegate the powers conferred on them by the will. It was therefore held necessary in view of the deadlock which had arisen, to resort to the powers of the Court. (*Monroe, J.*) MANOHAR LAL, *In re.* **154 I.C. 364=7 R.L. 554=A.I.R. 1934 Lah. 331.**

———**S. 1**—*Applicability—Raddimazalim fund.*

The "raddimazalim" fund is an endowment partly public and partly private for religious and charitable purposes and hence the Trusts Act (1882) will not apply to it. 3 Luck. 521, Rel. on. (*Smith, J.*) MAHOMED SADIQ ALI KHAN *v.* KAZIM ALI KHAN. **9 Luck. 507=150 I.C. 193=6 R.O. 619=11 O.W.N. 323=A.I.R. 1934 Oudh 118 (2).**

———**S. 2**—*Trust—Meaning—Declaration of trust—What amounts to.*

In 1800, the Nawab of Surat was, under a treaty entered into with the British Government, granted a political pension. The last of the Nawabs died in 1842 without male issue. He left only a daughter who had two daughters. The pension was however continued in favour of the two grand-daughters, the daughter having died in the meanwhile. One of the two grand-daughters died in 1887 and that event gave rise to rival claims. Instead of paying the whole of it to the surviving grand-daughter, the Government took half of it, and after paying a portion of it to some of the descendants of the deceased, directed that the balance of the accumulated fund should be "paid into a trust fund and invested as a nucleus of Provident Fund for the benefit of the children on lapse of the pension." The fund was held by the Accountant-General, no trustees being appointed. In a suit for administration and distribution of the fund in question,

Held, that the fund was not constituted a "trust fund," and that the use of the words "trust" and "trust fund" did not have the effect of creating a trust by declaration or giving it a technical jural character; and that the Accountant General who held the fund was not a "trustee" but the agent or cashier of the Government under whose orders he acted. (*Murphy and Barlee, JJ.*) NASIRUDDIN AHMED KHAN *v.* SECRETARY OF STATE. **160 I.C. 846=8 R.B. 282=37 Bom.L.R. 763=A.I.R. 1935 Bom. 439.**

———**S. 5**—*Creation of trust—Absence of registered instrument—Acquisition of right by prescription.*

Although it is not possible to create a trust in respect of immovable property without a registered instrument, twelve years' enjoyment by the beneficiary will in general confer a prescriptive right. (*Niamatullah, J.*) RAMCHANDRA *v.* JAITHMAL. **4 A.W.R. 676=A.I.R. 1934 All. 990.**

———**S. 5**—Trust—Creation of—Employees' Death Benefit Fund—Funds payable to children on death—No disposing power to the member—Valid trust—Ownership of the interest of the deceased transferred to the trustees. *See* C. P. CODE, S. 60—BENEFIT FUND. **33 Bom.L.R. 720=A.I.R. 1931 Bom. 300.**

———**S. 5, Proviso**—*Deed of gift—Declaration of trust by donee not registered—Admissibility of.*

Where a deed of gift is executed in favour of a person and registered and on the same day, the donee executes a declaration of trust specifying the objects of the trust and reserving a power of revocation with the donor, the declaration of trust is admissible in evidence even though not registered, because the terms of S. 5 are not applicable where they would operate so as to effectuate a fraud. (*Beaumont, C.J.*) RAM CHANDRA SHANKAR *v.* ANANDIBAI **I.R. 1932 Bom. 304=137 I.C. 580=34 Bom.L.R. 218=A.I.R. 1932 Bom. 188.**

———**Ss. 6 and 8**—*Unregistered contract to sell interest under settlement of immovable property—Creation of trust.*

X contracted on certain terms to sell to a person as trustee for a company to be formed, among other assets the interest of *Y* under a settlement of immovable property, which X had acquired from *Y* by a registered deed of transfer. This agreement was adopted by the company after its incorporation and the trustee was discharged from all liability thereunder. *X* was the managing director and in substance the proprietor of the company. Under the settlement, *Y* was entitled to 'a vested right in the income, contingent rights in the corpus" of the settled property. No registered instrument of transfer was executed by *X* in favour of the company in respect of this property. It was contended that a trust was created of which *X* was the trustee and the company the beneficiary.

Held, that on the facts *X* did not indicate with reasonable certainty by any words or acts an intention to create a trust as required by S. 6 of the Trusts Act and further the interest of *Y* under the settlement was a beneficial interest which could not be a subject-matter of trust under S. 8. (*Page, C.J. and Mya Bu, J.*) OFFICIAL ASSIGNEE *v.* MOOLA SONS, LTD. **12 Rang. 589=154 I.C. 9=7 R.R. 274=A.I.R. 1935 Rang. 84.**

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———**S. 6**—Vesting of property—Terms of deed—Right of trustee to sue for possession. *See* DEED—CONSTRUCTION—TRUST. **A.I.R. 1934 Lah. 307.**

———**S. 8**—*Scope—Trust upon trust—Trust not a trust of mere beneficial interest.*

What S. 8 forbids is a trust upon a trust, a trust of a mere right of the beneficiary to proceed against the trustee. *K* by his will directed his trustees to appropriate the proceeds of certain shares of the Bank of Bombay to each of his five children (one of whom was named *B*) to pay the income of the shares to the child during his or her life and after the deceased of such child, to hold the share appropriated to him or her in trust and equally divide the same among the issue of such child. *G*, daughter of *B*, who died during lifetime of *B* made a will by which she made a trust of the property which she would have received on her mother's death under *K's* trust deed.

Held, that the trust was not a trust of a mere beneficial interest, that it was a trust of the actual property given by the will of *K* to *G* receivable by her on the death of her mother and that the trust was a valid one. (*Beaumont, C. J. and Blackwell, J.*) PESTONJI JALBHOY *v.* JALBHOY JEHANGIR. **150 I.C. 474=6 R.B. 428=36 Bom. L.R. 42=A.I.R. 1934 Bom. 64.**

———**S. 11**—*Powers of Court—Scope of—Will conferring contingent interest on grand-daughter—No provision for expenses of her marriage—Payment by trustee for such expenses, if can be sanctioned.*

Where the Court is called upon to authorise the trustees to do an act or incur an expenditure, which the trustee himself has no power to do, the particular contingency not having been anticipated or provided for by the testator and the consent of the beneficiaries cannot be obtained by reason of their being minors, it is open to the Court to ascertain the paramount intention expressed in the will and to consider if the act to be done by the trustees can properly be read as subordinate to such intention and sanction, on behalf of all the parties interested and if beneficial to them, the act being done by the trustees. So where a deed of trust executed by the testator disclosed a paramount intention to benefit his grand daughter who had a contingent interest in it; the Court may allow the trustee to expend a reasonable amount for the expenses of her consummation ceremony, though the deed made no provision for any intermediate payment except by way of maintenance. But expenses of litigation incurred by the widow who had only a life interest under the will cannot be allowed. (*Ramesam and Mockett, JJ.*) RAJAGOPALA GRAMANI *v.* BAGGIAMMAL. **56 Mad. 508=I.R. 1933 Mad 187=142 I.C. 108=37 L.W. 137=1933 M.W.N. 60 =A.I.R. 1933 Mad. 242=64 M.L.J. 235.**

———**S. 19**—*Suit for breach of trust—Accounts—Veracity.*

In a suit for the breach of trust against the trustees where the plea is that the trustees have not maintained proper accounts or furnished them to the beneficiaries, it is not sufficient to show that the account was not regularly and correctly kept from day to day, but was mostly written up for the purpose of being produced in Court. What is more important is the question whether the account as far as it goes can be shown to be untrue in the sense that the actual receipts are not entered or the expenditure entered is fictitious or excessive. Thus the faults in the mode of account keeping are to be distinguished from the faults involving dishonestly or misconduct. (*Pandalai and Curgenven, JJ.*) TIRUNARAYANA PILLAI *v.* MANICKAVACHAGAM CHETTIAR. **40 L.W. 122=1934 M.W.N. 460=155 I.C. 359**

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=7 R. M. 569=A.I.R. 1934 Mad. 448=67 M.L.J. 222.

———**S. 19 (b)**—*Members of caste—Right to inspect caste documents.*

Every member of a caste is at all reasonable times and on proper demand entitled to full and free inspection of all account books, papers and vouchers relating to the management of the trust properties in the defendants' possession. (*Beaumont, C. J., Rangnekar and Nanavati, JJ.*) NAGINDAS NARANDAS *v.* SOMNATH PREMCHAND. **56 Bom. 242=I R. 1932 Bom. 266= 137 I.C 461=34 Bom. L.R. 343=A.I.R. 1932 Bom. 122 (F.B.).**

———**S. 20**—*Investment—Purchase of house—If authorised by S. 20.*

The money invested in the purchase of a house is not an investment authorised by S. 20 of the Trusts Act. (*Beasley, C. J. and Bardswell, J.*) IMPERIAL BANK OF INDIA, MADRAS *v.* KRISHNAMURTHI. **I. R. 1933 Mad. 411=38 L. W. 119=144 I.C. 479=A.I.R. 1933 Mad. 628=65 M L.J. 471.**

———**S. 23**—*Interest—Liability to account.*

An accounting party not rendering accounts properly, but retaining trust moneys (such as the unpaid purchase-moneys due by the trustees on the several benami purchases) in their hands must pay interest even if the debt by its nature does not carry interest. (*Pandalai and Curgenven, JJ.*) TIRUNARAYANA PILLAI *v.* MANICKAVACHAGAM CHETTIAR. **155 I.C. 359=7 R. M. 569=40 L.W. 122=1934 M.W.N. 460=A.I.R. 1934 Mad. 448=67 M.L.J. 222.**

———**S. 23 (a)**—*Marriage settlement by way of trust—Unauthorised investment—Liability of trustee.*

The object of a marriage settlement by way of trust is to protect the beneficiary against herself; and merely because the beneficiary happens to know that the trust fund or any part thereof is to be invested in a particular manner and consents thereto, the trustees are not absolved from liability under S. 23, Trusts Act, unless she concurred or acquiesced in the breach with full knowledge of the facts of the case and of her rights as against the trustee. The onus is on the trustees, so soon as it is established that a breach of trust has been committed, to satisfy the Court that the plaintiff concurred or acquiesced in the breach of trust with full knowledge of the facts of the case and of her rights as against the trustees. (*Page, C. J. and Ba U, J.*) FURHA KHOTOON ARON *v.* E SADKA. **156 I.C. 578=8 R.R. 21=A.I.R. 1935 Rang. 146.**

———**S. 23 (f)**—*Breach of trust—Trust property employed in trade—Liability to account — Rate of interest.*

Though it may not be necessary in the absence of an express provision in the statute, for the guardian to obtain the sanction of the Court before making a loan or other investments of the ward's funds, he is bound to act honestly and faithfully and exercise a sound discretion such as men of ordinary prudence and intelligence use in their own affairs. (*See* S. 27.) But the making of a loan by a guardian without security is a breach of his official duty and the borrower if cognisant of his breach of duty becomes a trustee of the money and the ward may at his election hold the guardian and borrower accountable as joint and several trustees. (*See* Corpus Juris, Vol. 28, page 1143.) S. 23 of the Indian Trusts Act provides that where a trustee commits a breach of trust and the breach consists in the employment of the trust property or the proceeds thereof in trade or business, he is liable to account at the option of the beneficiary either for compound interest (with half yearly

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rests) at 6 per cent. or for the nett profits made by such employment. The rate fixed in that section though the Act is not in force in Mysore may be considered as a proper rate of interest payable in respect of the breach of trust by the trustee. (*Doraiswami Iyer, C. J. and Srinivasa Iyer, J.*) AHMED SAB *v.* LAKSHMANA SETTY. **11 Mys.L.J. 480.**

———**S. 23 (f) and 88**—Applicability—Mahomedan family—Ancestral trade—Trade carried on by eldest son for benefit of the family—Fiduciary relationship—Advantage gained—Managing member bound to hold for the other members of the family. *See* MAHOMEDAN LAW—JOINT FAMILY—MANAGER. **54 Mad. 543=A.I.R. 1931 Mad. 553=61 M.L.J. 139.**

———**S. 23 (f)**—*Breach of trust—Account to be taken.*

In a suit for breach of trust the account to be taken must be a common account which will give the beneficiaries liberty to surcharge and falsify, but not an account on the footing of wilful default. (*Pandalai and Curgenven, JJ.*) TIRUNARAYANA PILLAI *v.* MANICKAVACHAGAM CHETTIAR. **40 L.W. 122=155 I.C. 359=7 R.M. 569=1934 M.W.N. 460=A.I.R. 1934 Mad. 448=67 M.L.J. 222.**

———**S. 23 (b)**—Mutawalli—Claim against—Interest on—Beneficiary entitled to interest on equitable ground—Position of quasi trustee. *See* MAHOMEDAN LAW—WAKF—MUTAWALLI. **55 All. 164=1933 A.L.J. 21=A.I.R. 1933 All. 186.**

———**S. 26**—*Gross negligence of one trustee—Liability of co-trustees.*

Trustees are liable nat only to account for the moneys that have actually come into their hands but also for moneys which might have come into their hands if they had acted with due deligence and without gross negligence and in all cases they would be liable for the result of their gross negligence. But where there are a number of trustees and there is such disunion among them that, however much a trustee or trustees are honest, diligent and willing to discharge their duty, it is practically impossible to carry on the management properly, the diligent trustee should not under such circumstances be made liable as for gross negligence or wilful default ; and he cannot be made jointly and severally liable for the loss occasioned by the gross negligence or the other trustees. (*Ramesam and Cornish, JJ.*) VASUDEVAN ADISERPAD *v.* BHAWADASAN NAMBUDIRI. **57 Mad. 315=148 I.C. 1155=6 R.M. 586=1933 M.W.N. 1433=38 L.W. 902=A.I.R. 1934 Mad. 115.**

———**S. 32**—*Trustee's right of indemnity—Creditor whether can be subrogated—Decision in execution—Sale of trust property.*

In order that a creditor may obtain the relief of subrogation to the trustee's right of indemnity (1) the plaintiff should sue the trustee as a trustee ; (2) under O. 31, R. 2, C. P. Code, all the trustees should be represented ; (3) the parties beneficially interested should be represented; and (4) indemnity and subrogation to that right should be claimed. The right of subrogation can be determined in the suit by the creditor against the trustee but not in execution.

Quaere, whether a Court in enforcing the right of indemnity against any trustee will allow actual sale of the trust property in execution. (*Ameer Ali, J.*) MACKINTOSH BURN, LTD. *v.* SHIVAKALI KUMAR. **6 R.C. 554=149 I.C. 282=60 Cal. 801=A.I.R. 1933 Cal. 668.**

———**S. 34**—Application under—Order dismissing—Appeal. *See* APPEAL—COMPETENCY—TRUSTS ACT. **11 O.W.N. 153?=A.I.R. 1935 Oudh 72.**

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———**S. 34**—Right to trusteeship—Remedy for declaration—Suit under S. 92 (1), C. P. Code, not an application under S. 34 or 74—Trusts Act. *See* C. P. CODE, S. 92—APPLICABILITY. **A.I.R. 1934 Oudh 118 (2).**

———**S. 37**—*Possession of property—Duty of trustee.*

Trustees are not authorized to give possession of property comprised in a trust for sale before receiving the purchase-money. (*Pandalai and Curgenven, JJ.*) TIRUNARAYANA PILLAI *v.* MANICKAVACHAGAM CHETTIAR. **40 L.W. 122=155 I.C. 359=7 R.M. 569=1934 M.W.N. 460=A.I.R. 1934 Mad. 448=67 M.L.J. 222.**

———**S. 44**—*Joint trustees—Death of one—Right of surviving trustee to administer estate.*

Where two persons were appointed trustees and the deed further provided that the trustees shall conduct all proceedings jointly and that if any difference arose between them they should settle it in a particular manner.

Held, that on the death of one of the trustees, the surviving trustee had the power to continue to administer the estate. (*Curgenven, J.*) RAGHAVACHARIAR *v.* CHAKRAPANI NAIDU. **1932 M.W.N. 297.**

———**S. 47**—*Appointment of managing trustee—Whether amounts to delegation.*

The appointment of a managing trustee does not involve any legal question of the trustees delegating their powers to others. (*Wallace, J.*) SHANMUGA MUDALI *v.* ARUNAGIRI MUDALI. **I.R. 1932 Mad. 910=140 I.C. 443=1932 M.W.N. 1311=36 L.W. 669=A.I.R. 1932 Mad. 658.**

———**S. 47**—*Investment in house property—House-building—Approval by directors—Procedure.*

House-building does not mean the same thing as purchase of house property. Hence where the directors of an insurance company are authorized to invest the policy-holders' trust fund in the purchase of house property, they are not entitled to invest money in construction of a building and a resolution, even if passed unanimously, by the directors to invest in constructing a building is *ultra vires*. Where the rules regarding the administration of policy holders' trust fund in an Insurance Company authorize the directors to purchase house property if there is a unanimity of opinion among them, such unanimity is necessary not only as regards the amount to be spent but also as regards the property to be purchased. And the duty of deciding which property is to be purchased cannot be delegated to a committee but must be decided unanimously by the directors. (*Madhavan Nair and Jackson, JJ.*) UNITED INDIA LIFE ASSURANCE CO., LTD. *v.* KRISHNA RAO. **7 R.M. 296=1934 M.W.N. 446=39 L.W. 779=A.I.R. 1934 Mad. 411=67 M.L.J. 336.**

———**S. 48**—*Joint trustees—Death of one trustee—Right of surviving trustee to administer estate.*

The provisions of S. 48 are made only to control the conduct of the trustees so long as they are both alive, they are not framed for the purpose of arranging what should ensue upon the death of either of them. The surviving trustee can administer the trust even though the trust deed contains provisions regarding joint management during their lives. (*Curgenven, J.*) RAGHAVACHARIAR *v.* CHAKRAPANI NAIDU. **1932 M.W.N. 297.**

———**S. 59**—*Applicability—Life insurance policy—Benefit reserved for wife—Suit to enforce.*

The plaintiff's husband had insured his life for her benefit with a certain Company at Calcutta. The business of the said Company was subsequently taken over by the defendant company. The insured subsequently

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obtained a loan from the defendants and he later on surrendered his policy on receipt of a certain amount. After her husband's death the plaintiff sued to recover the insurance amount on the ground that a trust had been created in her favour. She states that the Official Trustee had refused to move in the matter unless she furnished funds.

Held, that the contract having been completed in Calcutta the proper person to sue was the Official Trustee of Bengal.

Held, further, S. 59 of the Trusts Act had no application because it was not shown that the execution of the trust had become impracticable or that the Official Trustee had disclaimed trusteeship. (*Madhavan Nair and Reilly, JJ.*) LAKSHMI AMMAL *v.* SUNLIFE ASSURANCE CO. **57 Mad. 536=1934 M.W.N. 653=151 I.C. 112=7 R.M. 87=39 L.W. 379=A.I.R. 1934 Mad. 264=66 M.L.J. 667.**

——**S. 62**—*Power to order conditional re-sale.*

Under S. 62 the Court has no power to make an order directing a conditional re-sale, conditional on such sale producing a higher price than that for which the trustees themselves brought. (*Pandalai and Curgenven, JJ.*) TIRUNARAYANA PILLAI *v.* MANICKA VACHAGAM CHETTIAR. **40 L.W. 122=155 I.C. 359=7 R.M. 569=1934 M.W.N. 460=A.I.R. 1934 Mad. 448=67 M.L.J. 222.**

——**Ss. 63 and 64** — *Applicability — Negotiable instrument—Suit for declaration of benami—Maintainability.*

A suit for a declaration that a person is only in the position of a trustee towards the plaintiff will lie even in the case of negotiable instruments. (*Beasley, C.J., Varadachariar and King, JJ.*) VENKATARAMA REDDIAR *v.* VALLI AKKAL. **58 Mad. 693=153 I.C. 944=7 R.M. 384=1935 M.W.N. 1=41 L.W. 15=A.I.R. 1935 Mad. 181=68 M.L.J. 81 (F.B.).**

——**S. 63**—*Investment of charity funds with co-trustee—Liberty to co-trustee to use the moneys—Adjudication of trustee—Doctrine of tracing—Limits of—Book adjustment.*

Where a trustee is authorized by the terms of the trust to invest the trust moneys in his own business and directed to pay interest thereon and the moneys are so utilised, the trust is not entitled to follow up the money into the assets of the trustee after he becomes an insolvent. All that the trust is entitled to in such a case is to rank as an ordinary creditor of the trustee. The consequence of the liberty so conferred upon the trustee is to convert the object of the trust from a particular sum of money into a personal obligation to pay on the part of the trustee. Subject to this modification, the trust still subsists. But the claim of the trust on the trustee rests on his personal obligation and can stand on no higher footing than that of the other ordinary creditors. 33 Mad. 154, Foll.; 59 M.L.J. 718, Not Foll.

Quaere.—If the doctrine of tracing applies at all to cases of authorized conversion. Tracing is a claim *in rem*—not *in personam*. This distinction affords an index to the necessary limits of the doctrine of tracing. It may be in most cases sufficient for the *cestui que trust* to show that the trust moneys have found their way into the assets of the trustee and the trade assets of the trustee have, no doubt, been for purposes of the doctrine, treated as a single entity, with an identity enduring throughout every phase and transformation and taking its latest form in whatever may ultimately remain of those assets at the time of the insolvency. But the very nature of the doctrine of tracing makes it a rebuttable presumption and it must be open to the competing

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claimants to show that the particular sums of money constituting the available assets are not, and in fact could not, possibly form part of the trust moneys. (52 Mad. 919; 59 M.L.J. 718 and English case law referred to.) It is immaterial for this purpose if the trustee received the trust moneys by a settlement of accounts—and not *in specie*. It only avoids the fiction of a payment and repayment but it is none the less equivalent to payment in cash. In re *Hallett & Co.*: Ex parte *Blane*, (1894) 2 Q.B. 237, Dist. (*Curgenven and Bhashyam Ayyangar, JJ.*) NAGAPPA CHETTIAR *v.* OFFICIAL ASSIGNEE OF MADRAS **I.R. 1931 Mad. 817=134 I.C. 161=1930 M.W.N. 1077=A.I.R. 1931 Mad. 251=60 M.L.J. 355.**

——**S. 63**—*Tracing—Right of—Trust—Proof of—Mere proof of deposit insufficient.*

It is not sufficient for the creditor of the insolvent merely to prove a deposit with the insolvent to be entitled to a charge on the assets of the insolvent. He must prove a deposit with the insolvent for a definite purpose. (*Bardswell, J.*) SATYAMMA *v.* OFFICIAL RECEIVER, KRISHNA DISTRICT. **6 I.R. (Mad.) 303=146 I.C. 699=38 L.W. 891=A.I.R. 1933 Mad. 917.**

——**Ss. 63 and 66**—*Tracing—Trust money invested in trustee's business with authority of other trustees—Firm becoming insolvent—Right of* cestui que trust *to follow.*

The trustees of a trust fund appointed one of themselves, a firm in Calcutta, to manage the affairs of the fund, the firm acting through its agent in Calcutta. Funds were received by the firm on behalf of the trust and placed to the credit of the trust in the account books and credited with interest, the money being clearly utilized by the firm in its own business with the approval of the other trustees. The firm became insolvent.

Held, (1) that the relationship between the trust and the firm was not one of creditor and debtor; (2) that the right of the beneficiary to follow the trust money did not depend upon the act of the trustee being wrongful one; (3) that trust money invested in the business could be traced within the meaning of S. 63, Trusts Act, to the eventual assets of the business; (4) that the doctrine of tracing was not affected by the fact that moneys were invested in their own business with the authority of the other trustees. The only effect of such authority was to save the trustee from what would otherwise be a breach of trust; (5) that the moneys must be taken to have remained as part of the assets of the insolvent's business and to have been there from the date of the insolvency; and (6) the beneficiary, *i.e*, the trust, was entitled at all times to a charge upon such assets in the hands of the firm. A.I.R. 1933 P.C. 148 and In re *Hallett's Knatchbull* v. *Hallet*, 13 Ch.D. 696, Foll. (*Beasley, C.J. and Madhavan Nair, J.*) VEERAPPA CHETTY *v.* OFFICIAL ASSIGNEE. **161 I.C. 891=8 R.M. 889=A.I.R. 1935 Mad. 686.**

——**Ss. 63 and 66**— *Trust amount invested in trustee's business—Trustee becoming insolvent—Assets are subject to charge of trust.*

Where a certain amount is a trust in the hands of the trustees to be invested in their business and is so invested, it must be taken to have remained a part of the assets of that business and to have been there at the date of their insolvency, the beneficiaries being entitled at all times to a charge upon such assets in the hands of the firm. Upon the insolvency of the trustees the assets no doubt pass to the Official Assignee but they pass subject to the charge. 13 Ch. D. 696 and 4 De. G. M. & G. 372, Rel. on. (*Sir George Lowndes.*) OFFICIAL ASSIGNEE OF MADRAS *v.* KRISHNAJI BHAT. **60 I.A.**

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203=56 Mad. 570=37 C.W.N. 713=1933 M.W.N. 575=57 C.L.J. 433=35 Bom.L.R. 756=1933 A.L.J. 637=I.R. 1933 P.C. 138=143 I.C. 162=37 L.W. 780 =A.I.R. 1933 P.C. 148=65 M.L.J. 1 (P.C.).

———**S. 64**—Pledge of goods—Pawnor being in possession—Third party's legal rights not known—Right of pledgee—Pledgee advancing money *bona fide*, protected under S. 64. *See* CONTRACT—THIRD PARTY. **60 Cal. 262=A.I.R. 1933 Cal. 366.**

———**S. 66**—*Applicability—Money advanced for specific purpose—Frustration of object—Insolvency—Right to follow trust money—Election to pursue remedy as creditor—Effect.*

A deposited a sum of Rs. 1,000 with *K. Co.* in anticipation of executing an agreement of sub-agency. The agreement was never executed but the amount remained with the company who paid interest on it. *A* subsequently filed a suit to recover the amount from the company and pending the suit the company were adjudged insolvent. *A* obtained a decree and later on sought to follow the amount due to him into the general mass of assets in the hands of the Official Assignee.

Held, that the company held the money in trust as the purpose for which it was advanced had not been fulfilled and *A* was entitled to a charge on the general assets.

Held, however, that the effect of the claimant recovering a judgment for the amount of the debt was either to extinguish the charge or at any rate to make it unenforceable because of O. 2, R. 2, C. P. Code. (*Beaumont, C. J. and Rangnekar, J.*) OFFICIAL ASSIGNEE OF BOMBAY *v.* ABDUH HAYEE. **58 Bom. 67=35 Bom. L.R. 946=6 I.R. (Bom.) 175 (2)=146 I.C. 984=A.I.R. 1933 Bom. 437.**

———**S. 74**—Right to trusteeship—Suit under S. 92, C. P. Code, the proper remedy. *See* C. P. CODE, S. 92 —APPLICABILITY. **A.I.R. 1934 Oudh 118 (2).**

———**S. 78 (c)**—*Trust for creditors—Revocation.*

The vendor directed his vendee by deed to pay off his creditors out of the price due to him and get him receipts.

Held, that a trust for creditors was not constituted.

Held, further, that so long as it was not communicated to the creditors, the trust, if any, could be revoked. (*Shadi Lal, C.J. and Broadway, J.*) GURDIT SINGH *v.* CHUNI LAL. **I.R. 1931 Lah 868=134 I.C. 100=32 P.L.R 876=A.I.R. 1932 Lah. 66.**

———**S. 81**—Money deposited by Anglo-Indian in Central Provinces in joint names of himself and his wife—Presumption of advancement. *See* BENAMI—PRESUMPTION—ADVANCEMENT. **A.I.R. 1933 Nag. 337.**

———**S 83**—Defendant alleging possession as mutawalli—No wakf proved—Right of owner to recover property. *See* ADVERSE POSSESSION — TRUSTEE. **1935 A.W.R. 493=A.I.R. 1935 All. 458 (1)**

———**S. 88**— Applicability— Mahomedan family—Ancestral trade carried on by eldest son with the shares of minor members—Fiduciary relationship—Liability to account—Advantage gained—Manager bound to hold for the other members of the family. *See* MAHOMEDAN LAW—JOINT FAMILY—MANAGER. **54 Mad. 543=A.I.R. 1931 Mad. 553=61 M.L.J. 139.**

———**S. 88**—Contract produced by undue influence—Vendee in possession—Account for mesne profits—Period of. *See* SPECIFIC RELIEF ACT, S. 35. **59 I. A. 147=7 Luck 64=62 M.L.J. 451 (P.C.).**

———**S. 88**—Partnership—Surviving partner—Liability to account regarding continuing business. *See* CONTRACT ACT, S. 263—CONTINUING PARTNER. **53 All. 479=A.I.R. 1931 All. 327.**

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———**S. 88**—*Person taking management of estate of deceased contractor— New contract obtained from Government—If addition to estate.*

The defendants-respondents took over the management of the estate of *M*, a Government forest contractor, soon after his death, and later, when they had obtained letters, carried on its administration and obtained a new contract from Government.

Held, that they occupied a fiduciary position when they did so and that the new agreement must be treated as a graft or addition to the estate of *M*.

Held, further, that even assuming that they had obtained the renewal of the contract in their personal capacity, still it would obviously be contrary to public policy to allow them to retain the benefit for themselves, since it was clearly their duty to obtain it in the interest of all persons interested in the old agreement. (*Ba U and Mackney, JJ.*) U TUN AUNG *v.* U THAI NU. **156 I.C. 325 (2)=7 R.R. 394=A.I.R. 1935 Rang. 44.**

———**S. 88**—*Pleader and client.*

Where a pleader has not obtained an advantage over his clients by using his confidential position, he does not become a trustee within the meaning of S. 88 (*Mukerji and Guha, JJ.*) AMRITA LAL BAISYA *v.* PRATAP CHANDRA CHAKRAVARTY. **I.R. 1931 Cal. 417=130 I.C. 897=52 C.L.J. 492=A.I.R. 1931 Cal. 144.**

———**S. 89**—Scope and effect—Co-debtors—Exercise of undue influence by one over another—Latter undertaking former's liability to creditor—Creditor having notice of fiduciary relationship — Right to enforce liability. *See* CONTRACT ACT, S. 16. **58 Mad. 454 =41 L.W. 228=A.I.R. 1935 Mad. 726=69 M.L.J. 104.**

———**S. 90**—Accretions to mortgaged property—Case not falling under S. 90, Trusts Act—Subordinate tenures acquired by mortgagee for his own benefit—Right of mortgagor to. *See* T. P. ACT, S. 63. **36 C.W.N. 947 =A.I.R. 1932 P.C. 199=63 M.L.J. 116 (P.C.).**

———**S. 90**—*Applicability—Mahomedan brothers—Elder managing for younger—Liability to account.*

A Mahomedan died leaving an adult son and a minor son. The former assumed management of the properties after obtaining succession certificate on behalf of himself and as guardian of the minor. It was found that he earned 9 per cent. compound interest on his own moneys while he did not satisfactorily account for the income of the moneys of his minor brother.

Held, that the elder brother had by his conduct put himself in a fiduciary relationship with the minor brother and that his liability could be determined with reference to S. 90 of the Trusts Act ; and that under the circumstances he was liable to account for the moneys of the minor on the footing that thay had earned a unifrom rate of 9 per cent. compound interest. (*Venkatasubba Rao, J.*) PEER MOHIDEEN ROWTHER *v.* ASIA BIVI. **152 I.C. 739=1934 M.W.N 1253=7 R.M. 282= A.I.R. 1934 Mad. 686=67 M.L.J. 563.**

———**S. 90**—Co-sharer—Procuring default in payment of revenue—Purchase at sale—Duty to reconvey. *See* CO-SHARER—MUTUAL RELATION. **59 Cal. 180= A.I.R. 1932 Cal. 434.**

———**S. 90**—*Co sharer—Separate enjoyment of property—Exclusion of other members.*

It is a common practice for one of the co sharers to be in separate possession of part of common land, without objection by other co-sharer, the other co sharers being left to their remedy by partition and obtaining compensation by award of the land of a similar quality. And his possession cannot be considered to be "in derogation" of the rights of the other co sharers within the meaning

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of S. 90, Trusts Act, the principle of which has no application to such a case. (*Niamatullah and Rachhpal Singh, JJ.*) FAZAL HUSAIN *v.* MAHOMED KAZIM. **56 All. 582=1934 A.L.J. 544=150 I.C. 81=18 R.D. 374=6 R.A. 1027=15 L.R. 465 (Rev.)=4 A.W.R. 1427=A.I.R. 1934 All. 193.**

——**S. 90**—*Grant of lease to co-sharers—Lease by one in favour of the other and subsequent mortgage in favour of plaintiff—Renewal of Government lease in favour of the lessee in possession and grant of occupancy rights in ignorance of true rights of parties—Trust in favour of plaintiff.*

The Government granted a lease of certain sheri lands in 1883 to defendants 1 and 2, co-sharers, for a period of three years. In 1897 defendant No. 1 granted to D1 a lease for ten years. In 1899, D2 mortgaged it to plaintiff. In 1901, in execution of a decree against D2, the plaintiff purchased the share of D2 and took symbolical possession. On the expiry of the lease in favour of D1, the plaintiff called on him to deliver possession of the moiety but the defendant refused and continued in possession. The plaintiff thereupon brought a suit to recover possession of the moiety and for arrears of rent. Pending the suit, the thirty years' lease by Government expired and in 1914 the Government gave the suit lands to D1 and granted him occupancy rights. The suit by the plaintiff was dismissed on the ground that in view of the Government grant of 1914 a fresh suit was necessary. The plaintiff thereupon brought the present suit.

Held, that (*i*) the relationship between the parties from the date of the expiry of the lease in 1907 was that of co-sharers and so no question of adverse possession arose; (*ii*) a co-sharer of an estate as D1 was, was a person who would be subjected to a trust, if the other conditions in S. 90 were fulfilled; (*iii*) D1 had obtained occupancy rights from the Government by suppressing the fact that the rights of D2 in a moiety were still subsisting; (*iv*) as D1 did not have the beneficial interest in half of the properties, he must be held to hold the same for the benefit of the plaintiff having such interest. (*Baker and Wadia, JJ.*) DHARMA RAGHUNATH *v.* KESHAV GUNAJEE. **151 I.C. 1056=7 R.B. 106=36 Bom L R. 339=A.I.R. 1934 Bom. 219.**

——**S. 90**—*Lessee gaining advantage in derogation of interest of superior landlord—He holds such advantage to benefit of superior landlord.*

A lessee is a qualified owner of the property inasmuch as he exercises the power of the landlord during the continuance of his lease and can give his consent to transfers, and therefore if he gains any advantage in derogation of the interest of the superior landlord, he holds that advantage for the benefit of the latter. Even though the Trusts Act was enforced in the province of Bihar and Orissa in 1913 only and the acquisitions of the occupancy right were before the Act came into force, the principle enacted in the section applies to cases before 1913 as it is based upon the principle of justice and equity that no man can take advantage of his position to the detriment of the interest of another, and if he does, so he will hold such advantage in trust for the latter. (*Mohammad Noor and Dhavle, JJ.*) PAR MESHWAR RAI *v.* RAMRUDRA PRASAD. **158 I.C. 162=8 R.P. 178=A.I.R. 1935 Pat. 360.**

——**S. 90**—*Mahomedan co-heirs—Debt due to—Assignment by one—Debt realised by assignee—Suit for recovery of share by minor co-heir—Money had and received.*

A mortgage debt due to a deceased Mahomedan was fraudulently assigned by his widow, *A* in favour of *C*, who recovered the amount. *B*, the daughter of *A*, who was a minor at the time of assignment, sued *C*, to recover her share of the mortgage money collected by him. *C* was aware that the assignment by *A* was neither for benefit nor for necessity.

Held, that the case was governed by S. 90 of the Trusts Act, that the assignment in so far as it conveyed the share of *B* being void and ineffectual, *C* was liable to refund the amount on the principle of money had and received and that *C* being assimilated to the position of a co-owner with *B*, the latter had a cause of action against *C*. 41 M. 923 Dist.; 37 M. 381; 32 C. 527; 30 M. 459, Foll.; 39 M. 62, Ref. (*Sundaram Chetty, J.*) KANNUSAMI CHETTI *v.* RAHIMAT AMMAL. **38 L.W. 539=147 I.C. 83=A.I.R. 1933 Mad. 806=65 M.L.J. 548.**

TRUSTEES AND MORTGAGEES POWERS ACT (1866), S. 43.

——**S. 90**—*Principle—Persons in the position of trustees—Obligation not to gain advantage—Lands belonging to several but held by one.*

The terms of S. 90 are not exhaustive. In the case of a trustee, it is an absolute irrebuttable rule that he is not to derive any benefit by reason of his position as a trustee, but other persons may be placed in a position resembling, to a greater or less extent, the position of a trustee. In re *Biss*, (1903) 2 Ch. 40, Ref. Certain lands belonging to the respondent and his two nephews were acquired by the Government in 1865 and restored in 1912 to the respondent alone on his paying the amount of compensation. The transferees from the nephews sued for partition.

Held, that as the land was ordered to be restored to the 'original owner' the respondent held it as a constructive trustee for the benefit of all persons deriving their right from the original owner and that he was bound to share the benefit of it with the nephews. (*Tyabji, J.*) BABANI SOIROO *v.* DULBA GOVIND. **I.R. 1932 Bom. 259=137 I.C. 355=34 Bom.L.R. 357=A.I.R. 1932 Bom. 240.**

——**S. 91**—*Applicability—Purchase with notice of prior contract of—Purchaser holds for benefit prior promissee.*

By reason of S. 91 of the Act, the natural result of a person purchasing a property with notice of a prior contract in another person's favour is, that the purchaser holds the property for the benefit of the latter to the extent necessary to give effect to the contract. For all other purposes and as between the purchaser and his vendor, the purchaser is the owner and that is the reason why in such circumstances the decree in a suit for specific performance must direct the first purchaser to join in execution of the conveyance. (*Varadachariar and Burn, JJ.*) SATHIRAJU *v.* VENKANNA. **41 L.W. 645=1935 M.W.N 186=157 I.C. 1056=A.I.R. 1935 Mad. 333.**

——**S. 91**—*Specific performance of contract—Third party affected—Mode of enforcing contract.*

Where specific performance of a contract in respect of property which has subsequently passed into the hands of a third party with due notice of the contract is enforced, the law is that the property in question shall pass to the person entitled thereto and existing at the time of the contract. To such a case the principles of S. 91 of the Trusts Act will apply. (*Grille, A.J.C.*) KASHI *v.* KANHAIVALAL. **I.R. 1932 Nag. 73=138 I.C. 188=15 N.L.J. 18=A.I.R. 1932 Nag. 93.**

TRUSTEES AND MORTGAGEES POWERS ACT (XXVIII OF 1866), S. 43.—*Trust created by will—Compromise effected in the matter of appointment of new trustees—Interference of Court.*

The provision for the appointment of new trustees contained in the compromise in case the continuing trus-

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tees do not agree (as required by the will) is clearly an addition to the will of the testator and no such provision can be validly added, nor can the trustees delegate the powers conferred on them by the will. It was therefore held necessary in view of the deadlock which had arisen, to resort to the powers of the Court. (*Monroe, J.*) MANOHAR LAL, *In re.* **154 I.C. 364=7 R.L. 554 =A.I.R. 1934 Lah. 331.**

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See (1) B. T. ACT, SS 66, 85, ETC.
(2) LANDLORD AND TENANT.

UNDER-TRIAL PRISONER.

See CRIMINAL TRIAL—UNDER-TRIAL PRISONER.

———Solitary confinement. *See* CR. P. CODE (1898), S. 114. **A.I.R. 1933 All 676**

U. P. AGRICULTURISTS' RELIEF ACT (XXVII OF 1934), S. 30 (2)—*"Court which passed the decree" —Meaning of.*

It would be most in consonance with the intention of the legislature and best conducive to convenience of business to holdt hat "the Court which passed the decree" in S. 30 (2), U. P. Agriculturists' Relief Act, is the Court of first instance and not the Court of appeal. Accordingly, an application under the section for reduction of the amount of interest awarded in a decree, which is modified on appeal, must be made to the Court of first instance. (*Srivastava and Thomas, JJ.*) PRITHIPAL SINGH *v.* RAGHUBAR DAYAL SHUKLA. **1936 R D. 212=158 I.C. 427=8 R.O. 98=1935 O.W.N. 1094= A.I.R. 1936 Oudh 5.**

———**S. 30 (2)**—*"Court which paseed in decree"— Meaning of.*

The words in sub-S (2) of S. 30, "the Court which passed the decree," refer to the trial Court and not to the appellate Court. 1935 O.W.N. 1094, Foll. (*King, C.J. and Zia-ul-Hasan, J.*) NIHAL SINGH *v.* SHISHADHAR SINGH. **1935 O W.N. 1198.**

U P. ASSISTANCE OF TENANTS ACT (1932)—Scope—Omission to give benefit of—Effect—If ground for review. *See* AGRA TENANCY ACT (1926), S. 251. **18 R.D. 611.**

———**S. 2**—*Scope—Thekadar covenanting to pay rent in spite of calamities affecting the produce—Right to relief.*

The provisions of S. 2 of Act VIII of 1932 are quite general in their character and relief under the section is not based on the ground of any calamity affecting the produce of the land. It is a matter of common knowledge that the Act was passed in order to give relief to tenants against the abnormal slump in the prices which prevailed during the years 1337 and 1338 F. The right of a thekadar to relief under this section is not, therefore, affected by a covenant in the kabuliyat, not to claim remission on account of any calamities which affected the crops or produce. (*Srivastava and Zia-ul-Hasan, JJ.*) ZAMIN ALI KHAN *v.* SANKATA PRASAD **158 I.C. 714=8 R.O. 115=1935 R.D. 487=1935 O.W.N. 1128=A.I.R. 1936 Oudh 83.**

U. P. COURT OF WARDS ACT (III OF 1899), S. 34—*Consent of Court of Wards Withholding—Conditions.*

If conditions mentioned in Prov. 1 to S. 34 did not exist the Court of Wards was precluded from withholding its consent, that is to say, it was bound to grant its consent. (*Wazir Hasan, C.J and Smith, J.*) MT. RAJ RANI *v.* DWARKA NATH SINGH. **147 I.C. 160=6 R. O. 236=10 O.W.N. 1041=A.I.R. 1933 Oudh 491.**

U.P. COURT OF WARDS ACT (IV OF 1912), S. 10—*Hindu joint family—Entire property taken over at instance of father—Sons whether under disability.*

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A ward with certain disabilities is a creation of law. Assuming it is open to a father to hand over the entire family property to the Court of Wards without the consent of his sons it does not follow that the sons themselves would become the wards of the Court so as to be subject to the disabilities mentioned in Ss. 37 and 55 of the Act. Where they have entered into independent contracts they can be enforced as against them if they have not been taken over as wards by notification under S. 10. (*Sulaiman, C.J., Mukerji and Banerji, JJ.*) KAULPATI KUNWAR *v.* RAM BARAN SINGH. **54 All. 954=I R. 1932 All. 513=139 I C. 39=1932 A.L.J. 677=A.I R 1932 All. 494 (F.B.).**

———**S. 11**—*Declaration without complying with formalities under S. 8—If can be questioned in Civil Court.*

If a declaration made by the Local Government under S. 8 of the Court of Wards Act is wholly without jurisdiction and outside the scope of the section, it might be treated as a nullity in which case it can have no legal effect. But in all other cases such declarations are final and cannot be questioned in any Civil Court on the ground of non compliance with any formalities, whether directory or imperative. The making of the declaration without complying with the formalities laid down in S. 8 may be in one sense unlawful, but such an illegality would be *intra vires* and should not be open to question by reason of the bar contained in S. 11. (*Srivastava, J.*) THE DEPUTY COMMISSIONER, KHERI *v.* DAVA CHAND CHAUBEY. **154 I.C 142=7 R.O. 448 =1935 O.W.N. 132=A.I.R. 1935 Oudh 234.**

———**Ss. 12 and 55**—*Scope and effect of—Limitation —If affected.*

Under S. 12 the Court of Wards merely assumes superintendence of the property of any proprietor. The estate does not vest in the Court of Wards. The provision in S. 55, that the Collector in charge of the property should sue and be sued, in a mere matter of procedure and does not effect the law of limitation. (*Sulaiman, C.J. and Mukerji, J.*) MUSI IMRAN *v.* COLLECTOR OF BIJNORE. **148 I.C. 1166=3 A W.R. 671=6 R.A. 839=1934 A.L.J. 803=A.I.R. 1934 All. 434.**

———**S. 15**—*Notification under—Effect on previously existing guardian—Right to custody of minors.*

When the Court of Wards, in pursuance to a notification by the Local Government under S. 15 of U. P. Court of Wards Act, assumes superintendence of the person and property of minor child of a disqualified (deceased) proprietor, the powers of a guardian, claiming to be legally constituted as such under an instrument by the late proprietor, come to an end, and the Deputy Commissoner becomes the legal guardian by virtue of the notification under S. 15.

Consequently, the refusal of the ex-guardian to hand over the minor to the Deputy Commissoner constitutes illegal detention justifying the issue of a direction by Court under S. 491, Cr. P. Code. (*Srivastava, J.*) DEPUTY COMMISSIONER, GONDA *v.* MOHAMMAD SHIKOH. **10 Luck. 141=7 R.O 40=150 I.C. 706= 35 Cr L.J. 1108=11 O.W.N. 803=1934 Cr. C. 1203 =A.I.R. 1934 Oudh 392.**

———**S 17**—*"Claim for money" meaning—Claim for settlement of accounts and profits under S. 227, Agra Tenancy Act—If claim for money.*

The words "claim for money" include all claims, which if successful, would give rise to a pecuniary liability against the ward or his property. A claim for a specific movable property or for recovery of an immovable property would not come within those words. A.

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claim for money need not be for an ascertained sum. For, even where it is for an ascertained sum, it does not follow that that sum would necessarily be decreed by the Court, if litigation should be necessary. All that the words appear to mean is that the Collector should know that a particular man (the claimant) thinks that he should be paid by the ward or from his property. Therefore, a claim for settlement of accounts and profits under S. 227, Tenancy Act, is a "claim for money" within the meaning of S. 17, Court of Wards Act. (*Sula man, C. J. and Mukerji, J.*) COLLECTOR OF MEERUT *v.* CHAUDHARY RISAL SINGH. **57 All. 212=151 I.C. 7 =7 R A. 106=1934 A.L.J. 835=A.I.R. 1934 All. 681.**

——**S. 17**—Notification of claim—Period whether can be deducted in computing limitation. *See* LIMITATION ACT, S. 15 (2). **A.I.R. 1931 All. 752 (2).**

——**Ss. 17 and 54**—*Notices under—Omission to give —Effect.*

The omission to give notice in response to notification under S. 17 has the effect of extinguishing the claim altogether whereas the omission to give notice as required by S. 54 of the Act does not amount to an extinction of the claim itself but merely makes the suit not maintainable with the result that the suit would have to be dismissed for want of due notice and creditor would be entitled to serve a notice on the Collector and then file a fresh suit. The notice under S. 17 is in order to keep alive the claim and to prevent it from being deemed to be discharged, whereas the notice under S. 54 is to inform the Collector of the proposed suit and give time to prepare his defendence and to make offer if so advised. Though two separate and independent notices are neces sary under the Court of Wards Act, both can be combined but the document must profess to be a combined notice. A.I.R 1928 Oudh 495; A.I.R. 1931 All. 752, Ref. (*Sulaiman, C. J. and Thom, J.*) COLLECTOR OF BULANDSHAHR *v.* GOKAL CHAND. **1934 A.L.J. 1069 =4 A W R 1488=153 I.C. 788=7 R A. 599= A.I. R. 1934 All. 573.**

——**Ss. 34 and 47**—*Finding that consent was withheld—Propriety whether can be questioned—Withdrawal of consent.*

Where there is a finding that consent was withheld by the Court of Wards the question as to whether it was properly or improperly withheld cannot be discussed.

Per *Obiter.*—The Court of Wards has power to withdraw on proper grounds a consent previously given. (*Wazir Hasan, C.J. and Smith, J.*) MT RAJ RANI *v.* DWARKA NATH SINGH. **10 O.W.N. 1041=147 I.C. 160=6 R.O. 236=A.I.R. 1933 Oudh 491.**

——**S. 17 (1)**—*Notification under—Absence—Burden of proof.*

The failure of a decree holder to notify his claim against a ward of the Court of Wards under S. 17 of the Act must be held to be due to its due discharge. When the holder of a decree pleads as a reason for his failure to notify that there has been no notice under S. 17 (1) in his village and that he has no knowledge of any such notice, the burden of proving that there had been gross irregularity on the part of the Court of Wards which prevented notification of his decree is heavily on him (*Grant, J.M.*) LALTA PRASAD *v.* JANI KUER. **1935 R.D. 378.**

——**Ss. 18 and 22**—*Notice of claim—Bond not produced—Secondary evidence—Admissibility of—Claim on loan independent of bond—Permissibility of.*

In pursuance of a notification under S. 15, the plaintiff sent two notices, dated the 3rd and 7th January, 1929, intimating his claim against the estate under a bond; but neither the original nor a copy of it was produced with his claim as required by S. 17 (4). His claim was disallowed; hence the suit. He claimed to be entitled to produce a certified copy of the bond as secondary evidence of it, as he had lost the original.

Held, that the story of the loss of the document was untrue and so he was not entitled to produce secondary evidence of it; that the case fell within S. 22 and that he had failed to show any good cause for the non-production of the bond; and that as the notices issued by him based his claim only on the bond and not to any loan independent of it, he could not, under S. 18, be allowed to rest his claim on the original consideration. (*Bisheshwar Nath, and Kisch, JJ.*) DAU-LAT SHAH *v.* DEPUTY COMMISSIONER OF BAHRAICH. **6 Luck. 663=I R. 1932 Oudh 378=139 I.C. 723=9 O.W.N. 824=A.I.R. 1932 Oudh 311.**

U. P. COURT OF WARDS ACT (1912), S. 37.

——**S. 19 (3)**, Proviso—*Right to claim benefit of —Intimation by Collector that entire debt is discharged —Failure of mortgagee to inform him of outstanding —No estoppel.*

Where with the last of a series of payments made within two years from an order under S. 19 of the U. P. Court of Wards Act, the Collector sends a letter intimating to the mortgagee that the entire debt has then been paid off, no duty lies upon the mortgagee to inform the Collector that a portion of the debt yet remained unpaid. His omission to do so, does not estop him from claiming the benefit of the proviso contained in sub-S. (3), S. 19. No duty of giving information should be thrusted on one of the parties in respect of a matter which has been equally within the cognisance of both parties. (*Lord Thankerton.*) KISHORI LAL *v.* COLLECTOR OF ETAH. **6 R P C. 125=148 I.C. 546= 38 C.W.N. 344=A.I.R. 1934 P.C. 83 (P.C.).**

——**S. 20** — *Interpretation — Marginal note—If controls section.*

Where S. 20 of the Court of Wards Act says that if the Collector disallows any claim, the claimant may pursue his remedy in a Court of competent jurisdiction, and the marginal note to the section is headed as "prosecution of claims in Civil Court" suggesting that the competent Court mentioned in the body of the section is the Civil Court. The marginal note is unduly restricted and is wrong. It merely gives a clue or hint to the substance of the provision and cannot control the section itself. (*Sulaiman, C. J. and Mukerji, J.*) COLLECTOR OF MEERUT *v.* CHAUDHARY RISAL SINGH. **57 All. 212=151 I.C. 7=7 R.A. 106=1934 A.L.J. 835=A I R. 1934 All. 681.**

——**S 20, Proviso**—*Failure to notify claim under S. 17—When may be condoned.*

Where it appeared that the failure of the plaintiff to give notice of his claim under S. 17 of the Court of Wards Act to the Collector, was due to the fact that he did not know that the claim came within the purview of S. 17 of the Act and there was much to be said in favour of his argument as the section was not free form an biguilty and there was no decision directly to the point, it was held that good and sufficient cause for failure to give notice had been shown within the meaning of the proviso to S. 20 and that the suit should be allowed to be maintained. (*Sulaiman, C. J. and Mukerji, J.*) COLLECTOR OF MEERUT *v.* CHAUDHARY RISAL SINGH **57 All. 212=151 I C. 7=7 R.A. 106=1934 A.L.J 835=A.I.R. 1934 All. 681.**

——**Ss. 37 and 55**—Hindu joint family—Entire property taken over at father's instance—Sons whether under disability. *See* U. P. COURT OF WARDS ACT, S. 10. **A.I.R. 1932 All. 494 (F.B.).**

U. P. COURT OF WARDS ACT (1912), S. 44.

——**S. 44**—*Release from Superintendence—Sanction—Effect.*

When a Court of Wards takes over the Superintendence of an estate its management and right to possession vest in it for the time being. When the estate is released the management passes on to the ex ward The responsibility of the Court of Wards has to cease on the date of the release. Up to the time of the release the Court of Wards continues to be liable for all claims. Unless release legally takes effect on the date of the original sanction by the Court of Wards, the release can take place only when some act is done by the Collector as representative of the Court of Wards. The sanction of the Court of Wards does not automatically bring about the release of an estate. (*Sulaiman, C. J. and Thom, J.*) COLLECTOR OF BULANDSHAHR *v.* GOKAL CHAND. **153 I.C. 788=7 R.A. 599=1934 A.L.J. 1069=4 A.W.R. 1488=A.I.R. 1934 All. 573.**

——**S. 53**—*Suit by Collector—Representative suit—Application by Collector to withdraw—Right of beneficiary to continue litigation.*

Where in a suit instituted by the Collector representing the estate of the last male owner under the Court of Wards Act, for the recovery of certain properties, he applied to withdraw the suit, *held*, that the suit was a representative suit instituted for the benefit of the two widows of the last male owner and a reversioner to that estate and that in such a case it was open to the Court to allow the reversioner to be made a party and then to allow the Collector to go out of the suit, if he dit not want to prosecute it. (*Mukerji and Young, JJ.*) JAIMALA KUNWAR *v.* COLLECTOR OF SAHARANPUR. **55 All. 825=149 I.C 704=6 R.A. 949=1933 A.L.J. 1512=A.I.R. 1934 All. 4.**

——**S. 54**—*Notice under—Waiver.*

The mere fact that the Collector applies to the Court to be made a party in order that he might be in a position to put up a defence does not amount to a waiver on his part of his right to get notice. His main object in being impleaded may be to enable him to defend the claim and urge the ground *inter alia* that no proper notice had been served upon him. (*Sulaiman, C. J. and Thom, J.*) COLLECTOR OF BULANDSHAHR *v.* GOKAL CHAND. **153 I.C 788=7 R.A. 599=1934 A.L.J. 1069=4 A.W.R. 1488=A.I.R. 1934 All. 573.**

——**S. 54**—*Scope and applicability—Rule as to notice.*

S. 54 applies not only to a case where the plaintiff institutes a suit against the Collector but also to a case where the Collector is made a party subsequently either on his own application or by an order of the Court. The section is mandatory and imposes a statutory obligation on the Court. The section is comprehensive enough to include a suit on a promissory note brought against the ward which would result ultimately in a money decree being passed against him which can be executed only either by his arrest or by the attachment of his property. (*Sulaiman, C. J. and Thom, J.*) COLLECTOR OF BULANDSHAHR *v.* GOKAL CHAND. **153 I.C 788=7 R.A. 599=1934 A.L.J. 1069=4 A.W.R. 1488=A.I.R. 1934 All. 573.**

——**S. 55**—*Applicability—Personal claim for damages.*

The terms of S. 55 of the Court of Wards Act are perfectly general and make no distinction between claims relating to the property and claims of a personal nature and therefore even in the case of a personal claim for damages, the Court of Wards should represent the disqualified proprietor. (*Srivastava, J.*) THE DEPUTY COMMISSIONER, KHERI *v.* DAYA CHAND CHAUBEY. **154 I.C 142=7 R.O. 448=1935 O.W.N. 132=A.I.R. 1935 Oudh 234.**

U. P. DISTRICT BOARDS ACT (1922), S. 18.

——**S 55**—*Collector applying to withdraw suit—Application by ward to be made plaintiff dismissed—Subsequent application after end of wardship—If competent.*

Where a Collector applies to withdraw a suit filed by him under S. 55 as representing two widows under wardship and the widows apply to be made plaintiffs in the suit, the dismissal of their application while they are under wardship will not prejudice their application to be made plaintiffs made after their wardship has come to an end. (*Sir John Wallis.*) ATMA RAM *v.* BENI PRASAD **62 I.A. 257=57 All. 678=17 Pat L.T. 93=42 L.W. 554=1935 O.W.N. 997=157 I.C 894=37 Bom L.R. 861=1935 A.L.J. 1124=8 R.P.C. 65=1935 M.W.N. 1251=1935 A.W.R. 1058=39 C.W.N. 1249=A.I.R. 1935 P.C. 185 (P.C.).**

——**S 55**—*Property of father under management of Court of Wards—Suit by minor by next friend—Maintainability.*

Where the property of the late adoptive father of the minor was under the superintendence of the Court of Wards and the minor sued through a next friend without impleading the Court of Wards,

Held, that neither the mother nor the next friend could maintain the suit and that the Court of Wards alone could do so. (*Nanavutty, J.*) RAMESHWAR PRASAD *v.* SHIAM KUER. **6 I.R. (Oudh) 34=145 I.C. 239=10 O W.N. 314=A.I.R. 1933 Oudh 273.**

——**S. 55**—*Suit by Collector—Representative suit—Application to withdraw—Right of next reversioner to continue suit.*

Where a Collector applies to withdraw a suit filed by him under S. 55 for possession of certain properties as representing two widows, and the nearest reversioner applies to be added as a plaintiff and continue the suit;

Held, that the suit filed on behalf of the widows by the Collector is a representative one in which the nearest reversioner is interested, and he has a right *ex debito justitiae* to be added as a plaintiff, and given an opportunity of continuing the suit. (*Sir John Wallis*) ATMA RAM *v.* BENI PRASAD. **62 I A. 257=57 All 678=17 Pat. L T. 93=42 L.W. 554=1935 O.W N 997=157 I.C 894=37 Bom L R. 861=1935 A.L J. 1124=8 R P C. 65=1935 M.W.N. 1251=1935=A.W.R. 1058=39 C.W.N. 1249=A.I.R. 1935 P.C. 185 (P.C.).**

U. P DISTRICT BOARDS ACT (X OF 1922), Ss. 15 and 18—*Validity of election—Mode of questioning.*

The U. P. District Boards Act does not contemplate that the validity of an election shall be questioued on any of the grounds mentioned in S. 15 otherwise than by means of an election petition which must be decided by an election tribunal constituted under the provisions of the Act, and the Civil Court has no jurisdiction to go into the question. (*Wazir Hasan, C. J. and Allsop, J.*) ABDUL AHAD *v.* ASHFAQ ALI. **147 I C. 792=6 R. O. 308=10 O W N. 917=A.I.R. 1933 Oudh 423 (2).**

——**S. 18**—Declaratory suit in Civil Court that election is invalid—Maintainability. *See* SPECIFIC RELIEF ACT, S. 42—RELIEF UNDER. **A.I.R. 1933 Oudh 423 (2).**

——**Ss 18 and 19**—*Election enquiry — Decision of District Judge—Revision.*

A District Judge hearing an election petition under S. 18 of the U. P District Boards Act is not a Civil Court and his decision therein is not open to revision under S. 115 of the C. P. Code or S. 107 of the Government of India Act. Where, therefore, the District

U. P. DISTRICT BOARDS ACT (1922), S. 19.

Judge dismissed a petition challenging the validity of an election on the ground that the dispute had been private ly adjusted, his order cannot be revised. 40 M. 793 (P. C.); 47 M. L. J. 795; 37 B. 365; 49 C. 528 and 47 All. 513, Dist.

Per *Mukerji, J.*—Having regard to the special procedure laid down in S. 20, under which the order of the Election Court is to be executed by the District Magistrate and in a manner inconsistent with the idea of execution of a Civil Court decree, the District Judge presides over the Election Court as a *persona designata.*

Per *Bennet, J.*—S. 19 of District Boards Act says that the decision of that tribunal shall be final and so the High Court has no power of appeal, superintendence or revision. (*Mukerji and Bennet, JJ.*) GULAM NIZAMUDDIN *v.* AKHTAR HUSAIN KHAN. **55 All. 1008 = 147 I.C. 148 = 6 R.A. 403 = 1933 A.L.J. 971 = A.I.R. 1933 All. 764.**

——**S. 19 (f)**—*If* ultra vires.

Per *Bennet, J.*—The local legislature has power (with previous sanction to pass laws affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, 1919, the Letters Patent or the Codes. Hence S. 19 (*f*), U. P. District Boards Act, is not *ultra vires* of the legislature. (*Mukerji and Bennet, JJ.*) MASOON ALI KHAN *v.* ALI AHMAD KHAN. **147 I.C. 148 = 6 R A. 403 = A.I.R. 1933 All. 764.**

——**Ss. 34, 63-A and 65-A**—*Applicability—Contracts by Educational Committee.*

The contracts given by the Educational Committee of the Board under the provision of S. 63-A and S. 65-A which empower the Educational Committee to give contracts for educational purposes are given on behalf of the Board and come within S. 34. (*Bennet and Bajpai, JJ.*) RUDRA DAT BHATT *v.* EMPEROR. **55 All. 798 = 6 I.R. (All.) 270 = 146 I.C. 149 (2) = 34 Cr. L.J. 1208 = 15 L.R. 374 (Cr) = 1933 A.L.J. 1559 = 1933 Cr.C. 874 = A.I R. 1933 All. 543.**

——**S. 34**—*Contract between Board and its member—Validity of.*

A contract entered into by the Board with one of its members for the supply of lime is highly objectionable, contrary to the express provisions of S. 34 of the Act and also contrary to the principle embodied in S. 31 (*c*) of the rules contained in the District Board Manual, (*Sulaiman, C. J. and Kisch, J.*) RAZA HUSAIN *v.* DISTRICT BOARD, BANDA. **I.R. 1933 All. 259 = 143 I.C. 460 = 1932 A.L.J. 1081 = A.I.R. 1933 All. 104.**

——**S. 34**—*Scope.*

S. 34, sub S. (1) refers in general terms to "a member of the Board" and is not limited to members of particular committees. (*Bennet and Bajpai, JJ.*) RUDRA DAT BHATT *v.* EMPEROR. **55 All. 798 = 6 I. R. (All) 270 = 146 I.C. 149 (2) = 34 Cr.L J. 1208 = 14 L.R. 374 (Cr.) = 1933 A.L.J. 1559 = 1933 Cr.C. 874 = A.I.R. 1933 All. 543.**

——**S. 34 (2) (f)**—*Scope and applicability.*

Sub-S. (2) (*f*), S. 34 refers to occasional sales of single articles as distinct from contracts. Contracts for the supply of thousands of yards of coir matting cannot be considered to be occasional sale of single articles. The exemptions under S. 34 (2) (*f*) therefore do not apply to such contracts. (*Bennet and Bajpai, JJ.*) RUDRA DAT BHATT *v.* EMPEROR. **55 All. 798 = 6 I.R. (All) 270 = 146 I.C. 149 (2) = 34 Cr.L.J. 1208 = 14 L.R. 374 (Cr.) = 1933 A.L.J. 1559 = 1933 Cr.C. 874 = A.I.R. 1933 All. 543.**

——**S. 35 (3)**—*Election of chairman—Suit challenging validity of—Jurisdiction of Civil Court—No tribunal appointed by Government—Effect of.*

U. P. DISTRICT BOARDS ACT (1922), S. 71.

The civil Court has no jurisdiction to try a suit challenging the validity of the election of a chairman of a District Board. Such a suit is is impliedly barred by S. 35 (3). Even an arbitrary disregard by the Local Government of the mandatory provisions of that section by refusing to appoint a tribunal to decide the question does not bring into play the jurisdiction of the Civil Court. The right of an elected member to participate in the election of the chairman owes its existence to the Act and the remedy prescribed by the Act for its infringement is exhaustive. 47 M. 585 Diss. from. (*Iqbal Ahmad and Kisch, JJ.*) JOTI PRASAD UPADHIYA *v.* AMBA PRASAD. **55 All. 406 = I.R. 1933 All. 111 = 142 I.C. 403 = 1933 A.L.J. 303 = A.I.R. 1933 All. 358.**

——**S. 48**—*Notice—Sufficiency — Issue of agenda paper.*

Where the agenda paper as issued made it perfectly clear that the draft resolution of the members about the dismissal of a Secretary, together with his explanation and the report of the Sub-Committee, would come up before the Board on the date mentioned therein "for final decision".

Held, that due notice was given, as required by S. 48 of the U.P. District Boards Act, of the special resolution adopting the draft resolution as proposed by the members. (*Sulaiman, C.J. and Bennet, J.*) MOHAMMAD MUSTAFA ALI KHAN *v.* DISTRICT BOARD, BAREILLY. **155 I.C. 593 = 7 R.A. 952 = 1935 A.W.R. 485 = A.I.R. 1935 All. 663.**

——**S. 65**—*Applicability —Building contract—Instructions of overseer, as to quality of materials.*

Where the overseer gave certain instructions to the contractor as regards the quality of materials, etc., and the contractor claimed payment at a higher rate on that ground,

Held, that S. 65 did not apply to such slight variations. (*King and Thom, JJ.*) DISTRICT BOARD, ALLAHABAD *v.* BAIJNATH PRASAD. **1934 A.L.J. 55 = 151 I.C. 731 = 7 R.A. 197 = 3 A.W.R. 171 = A.I.R. 1934 All. 458 (2).**

——**S. 65**—*Resolution appointing a person—Necessity of contract in writing, if dispensed with.*

A mere resolution of the Board appointing a person does not dispense with necessity of a contract in writing under S. 65, without which a Board is not bound in law. (*Bennet and Allsop, JJ.*) ROSHAN LAL GOSWALA *v.* DISTRICT BOARD, ALIGARH. **58 All. 40 = 158 I.C. 626 = 8 R.A. 320 = 1935 A.W.R. 850 = A.I.R. 1935 All. 802.**

——**S. 70**—"*Whole time officer*", *meaning.*

The meaning of "whole time officer" is one who gives all his time to the service of the Board, and an officer who does so would be a whole time officer even though part of his time is spent in doing the work of secretary and part in doing the work of engineer. (*Bennet and Allsop, JJ.*) ROSHAN LAL GOSWALA *v.* DISTRICT BOARD, ALIGARH. **58 All. 40 = 158 I.C 626 = 8 R. A. 320 = 1935 A.W.R. 850 = A.I.R. 1935 All. 802.**

——**S. 71**—Dismissal of District Board servant—Law as to. *See* MASTER AND SERVANT. **1935 A.W.R. 850 = A.I.R. 1935 All. 802.**

——**S. 71**—*Suit by dismissed servant for injunction—Maintainability.*

Though in the ordinary case of a master and a servant, an injunction certainly would not lie restraining a master from dismissing his servant, the remedy of the servant, if he was wrongly dismissed, would be for damages. In the case of the District Board the servants being governed by the District Boards Act and the

U. P. DISTRICT BOARDS ACT (1922), S. 85.

rules framed thereunder, a dismissed servant can ask the Court for an injunction on the ground that the rules relating to dismissal have not been complied with. (*Young, J.*) SHEO NARAIN *v.* DISTRICT JUDGE, SHAHJAHANPUR. **148 I.C. 123=6 R.A. 644=A.I.R. 1933 All. 826.**

——**S. 85**—*Meaning of 'transfer' and 'lent.'*

The transfer which is contemplated by the Financial Handbook, Chapter XII and by S. 85 of the District Boards Act is a transfer which is not of a permanent nature. The word 'lent' is used in the Act in the sense of temporary transfer. (*Bennet, J.*) ANWARULLAH *v.* EMPEROR. **6 R.A. 653=148 I.C. 218=35 Cr.L.J. 617=1933 A.L.J. 1623=1934 Cr.C. 229=A.I.R. 1934 All. 173.**

——**S. 105**—*Interpretation*—"*Or otherwise*"—Ejusdem generis.

The word "otherwise" in S. 105 must be taken to be *ejusdem generis* with the words "allowing a projection." (*Iqbal Ahmad, J.*) AMBA PRASAD MAHESHWARI *v.* JUGAL KISHORE. **1935 A.W.R. 1497.**

——**S. 126 (2)**—*Oral questions not answered truthfully—Offence.*

Where a person is called upon to answer certain questions under S. 126, District Boards Act, put to him orally, he is not legally bound to answer the questions truthfully and he cannot be convicted under S. 179, I. P. Code, on ground that he did not answer the questions truthfully. (*Kendall, J.*) KUNWAR SEN *v.* EMPEROR. **157 I.C. 119=8 R.A. 105=36 Cr.L.J. 1102 (1)=1935 A.Cr.C. 163=1935 A.L.J. 1021=1935 A.W.R. 791=1935 Cr.C. 640=A.I.R. 1935 All. 620 (1).**

——**S. 146**—*Grant of exclusive permit to an individual to ply lorries on hire on particular roads—Power of District Board.*

There is no provision in the U. P. District Boards Act authorising the Board to create a monopoly in favour of an individual entitling him to run lorries on hire on particular roads in the district to the exclusion of others. By S. 146 of the Act, the soil of the road no doubt vests in the Board, but the right of the public to use the road for the purpose of passing and repassing is untrammelled by the provisions of that section. Every owner or driver of a car or lorry that is registered under the Motor Vehicles Act, and who has the necessary license or permit required by that Act, has a right to use all public roads, whether vested in the Board or not, as a highway and the Board is not authorised to jeopardize this right of the public by creating monopolies in favour of particular individuals. (*Iqbal Ahmad, J.*) AMBA PRASAD MAHESHWARI *v.* JUGAL KISHORE. **8 R.A. 505=1935 A.W.R. 1497=159 I.C. 790=A.I.R. 1936 All. 112.**

——**S. 174 (2) (q)**—*Grant of exclusive right to an individual to ply lorries on hire on particular roads—Power of District Board.*

S. 174 (2) (*q*) of the District Boards Act does not authorise the Board to grant to an individual the exclusive right to ply lorries on hire on particular roads in the district. Under that provision, the Board has by a bye law the right to prohibit *generally* any description of traffic, provided the prohibition appears to the Board to be necessary. The prohibition however cannot be partial. Either the Board can totally prohibit traffic of a particular description or it cannot. The word "regulation" in sub-Cl. (*q*) is used in the sense of making provision for the time at which and the manner and order in which a particular description of traffic, which is not prohibited, can be carried on, on the roads, and is certainly not used in the sense of authorising the Board to make a bye-law that as the indirect effect of a partial prohibition of a particular description of traffic. (*Iqbal Ahmad, J.*) AMBA PRASAD MAHESWARI *v.* JUGAL KISHORE. **1935 A.W.R. 1497=159 I.C. 790=1936 A.L.J. 438=8 R.A. 505=A.I.R. 1936 All. 112.**

U. P. ENCUMBERED ESTATES ACT, S. 7.

——**S. 182**—*Applicability—Prosecution under S. 168, Penal Code, read with S. 34 of the Act.*

Prosecution under S. 168, I.P. Code, read with S. 34 District Boards Act, need not be started under S. 182 of the Act on a complaint of the Board or some person authorized by the Board. As the wording of S. 182 is different and does not purport to deal with offences referred to in the Act, S. 182 has no application to the case. (*Bennet and Bajpai, JJ.*) RUDRA DAT BHATT *v.* EMPEROR. **6 I.R. (All.) 270=146 I.C. 149 (2)=34 Cr.L.J. 1208=14 L.R. 374 (Cr.)=1932 A.L.J. 1559=1933 Cr.C. 874=A.I.R. 1933 All. 543.**

——**S. 192**—"*Act*"—*Whether includes omission to perform private contract.*

It is difficult to hold that the word "act" in S. 192 includes all cases of mere omission to perform a private contract, even though not amounting to an illegal omission within the meaning of S. 4 of U. P. General Clauses Act. (*Sulaiman, C.J., Niamatullah and Bennet, JJ.*) THE DISTRICT BOARD, ALLAHABAD *v.* BEHARI LAL. **1935 A.W.R. 1330=8 R.A. 576=160 I.C. 226=1935 A.L.J. 1214=A.I.R. 1936 All. 18 (F.B.).**

——**S. 192**—*Applicability — Suit by contractor against Board on private contract.*

A suit by a contractor to recover amounts due to him on a private contract with the Board is not governed by the provisions of S. 192 at all It is an ordinary suit governed by the relevant provisions of the Limitation Act. (*Sulaiman, C.J., Niamatullah and Bennet, JJ.*) THE DISTRICT BOARD, ALLAHABAD *v.* BEHARI LAL. **8 R.A. 576=160 I.C. 226=1935 A.W.R. 1330=1935 A.L.J. 1214=A.I.R. 1936 All. 18 (F.B.).**

——**S. 192**—*Applicability—Suit by District Board against member.*

The section would apply even if the District Board itself is the plaintiff. The section is intended for the protection not only of the Board and its officers and servants but also of the members of the Board. So long as the defendant is a member of the Board and the suit is instituted in respect of an act done or purporting to have been done by him in his official capacity, the section would be applicable, no matter whether the plaintiff is a stranger to the Board or the Board itself. So a suit brought by the Board against one of its members for a return of the advance amount paid to him in his official capacity as a member of the Board under a contract with him should be brought within six months after the accrual of the cause of action. (*Sulaiman, C.J. and Kisch, J.*) RAZA HUSAIN *v.* DISTRICT BOARD, BANDA. **I.R. 1933 All. 249=143 I.C. 460=1932 A.L.J. 1081=A.I.R. 1933 All. 104.**

U P. ENCUMBERED ESTATES ACT, S. 7—*Order of Collector under S. 6, pending appeal against order appointing receiver—Order appointing receiver—If should be stayed.*

Where an order for the appointment of a receiver had already been made and the receiver had already taken possession of the property before an order was made by the Collector under S. 6 of the U.P. Encumbered Estates Act, the appointment of the receiver cannot be held to have been a proceeding 'pending' at the date of the Collector's order, simply because the order for the appointment of the receiver was under appeal at the time, and, therefore, the order appointing the receiver should not

U. P. ENCUMBERED ESTATES ACT, S. 7.

be stayed under S. 7. (*King, C.J. and Zia-ul-Hasan, J.*) GOBARDHAN SINGH *v.* HAZARI LAL. **158 I.C. 586=8 R.O. 107=1935 O.W.N. 1118=1936 R.D. 209 =A.I.R. 1935 Oudh 497.**

———**S. 7 (1) (a)**—"*Execution process*"—*Order for appointment of receiver.*

An order for the appointment of a receiver for the protection of property in respect of which a mortgage decree had been passed, is not an "execution process" issued by the Civil Court, and, therefore, under S. 7, Sub-S. (1) (*a*) the order does not become null and void. (*King, C. J. and Zia ul-Hasan, J.*) GOBARDHAN SINGH *v.* HAZARI LAL, **158 I.C. 586=8 R O. 107= 1935 O.W.N. 1118=1936 R.D. 209=A.I.R. 1935 Oudh 497.**

U.P. EXCISE ACT (IV OF 1910), S. 3 (2)—*Excise Officer—Sub Inspector of Police specially authorised.*

A Sub-Inspector of Police who is invested with powers under S. 10, Excise Act, is an 'Excise Officer' for the purposes of S. 70 and can file a complaint in an offence under S. 60. (*Bajpai, J.*) CHEDI *v.* EMPEROR. **I. R. 1932 All. 624=140 I.C. 116=33 Cr. L.J. 888= 1932 A.L.J. 107=13 L.R. 73 (Cr.) =1932 Cr.C. 203 =A.I.R. 1932 All. 187.**

———**S. 10**—Police Officer—Special Powers in U. P. —Report of Police Officer—Magistrate can take cognizance of offence under S. 70. *See* U. P. EXCISE ACT, S. 70. **8 O.W.N. 304=14 O.L.J. 257.**

———**S. 50**—*Notification under— Police Officer— Powers—Arrest of accused.*

In the U.P., the Notification of the Local Government under S. 50 of the Excise Act authorises police officers to perform the duties mentioned therein. Consequently a police officer can arrest an accused under S. 50 in connection with an offence under S. 60 (*a*). And a Magistrate can take cognizance of the offence under S. 70. (*Raza and Bisheshwar Nath, JJ.*) EMPEROR *v.* CHUNNI. **6 Luck. 646=I.R. 1931 Oudh 233=132 I.C. 73=32 Cr. L.J. 833=14 O.L.J. 259=8 O.W.N. 300=1931 Cr.C. 827=A.I.R. 1931 Oudh 395.**

———**Ss. 50 and 53**—*Search by head constable—Legality—Revision.*

Though under Ss. 50 and 53 of the U. P. Excise Act a search should be made only by a Sub-Inspector in charge of the police station, where the Sub-Inspector finding it necessary to search two premises in a village simultaneously, proceeded to the village with the head constable and searched one of those premises himself while the head constable searched the other.

Held, the procedure did not constitute such an irregularity as would justify interference in revision, where there has been no miscarriage of justice. (*Kisch, J.*) UJAGAR SINGH *v.* EMPEROR. **I.R. 1932 Oudh 242= 137 I.C. 621=33 Cr.L.J. 492=9 O.W.N. 313=1932 Cr.C. 590=A.I.R. 1932 Oudh 249 (2).**

———**S. 53**—*Failure to record reasons—Witnesses of search not residents of locality—Validity of search.*

The failure of the Excise Inspector to make a memorandum recording his reasons as provided for by S. 53 or the fact that the witnesses, in whose presence the search was made, did not belong to the village in which the search had taken place, is only an irregularity which, however, does not invalidate the search. Nor is there any reason for holding that because a memo. was not prepared, the evidence of the Excise Inspector should not on that account be accepted. (*Rachhpal Singh, J.*) MAQBOOL AHMAD KHAN *v.* EMPEROR. **6 R.O. 472=148 I.C. 934=35 Cr.L.J. 832=1934 Cr. C., 683=A.I.R. 1934 Oudh 232.**

U. P. EXCISE ACT (1910), S. 60.

———**S. 53**—*Failure to record reasons—Validity of search.*

The non-recording of reasons for suspecting the presence of articles in respect of which an offence against the Excise Law has been committed before searching the premises, although an irregularity, is not one that vitiates the proceedings. (*Kisch, J.*) UJAGAR SINGH *v.* EMPEROR. **I.R. 1932 Oudh 242=137 I.C. 621= 33 Cr. L.J. 492=9 O W.N. 313=1932 Cr.C. 590= A.I.R. 1932 Oudh 249 (2).**

———**Ss. 53 and 53 (1), Proviso**—*Scope—Search by officer not in charge of police station—If conviction vitiated.*

A police officer who carries out a search under the U. P. Excise Act must be regarded as having been acting ostensibly under the provisions of S. 53 of the Act. But a Sub-Inspector who is not in charge of a police station is not competent to make a search; and when such officer carries out a search without complying with the requirements of the proviso to S. 53 (1) of the Act, it is illegal. But the illegality in the procedure does not vitiate the conviction, because it can nevertheless be proved that certain articles were recovered in the course of the search. (*Thomas and Smith, JJ.*) EMPEROR *v.* HUSSAINI. **36 Cr.L.J. 6=152 I.C. 310=11 O W.N. 1290 =1934 Cr.C. 1385=A.I.R. 1934 Oudh 506.**

———**Ss. 53 and 60 (a) and (f)**—*Search by chaukidar, not authorised by S. 53—Illegality not affecting guilt of accused—Accused pleading guilty—Acquittal of accused improper.*

The provisions regarding searches of houses and the precaution necessary to be taken before any search is held have been framed with a view to protect the interests of the accused. The chaukidar, it is true, is not one of the persons authorised to make a search under S. 53. But where the accused himself did not consider the intrusion of the chaukidar into his house as tantamount to criminal trespass, his entry was not apparently against the wishes of the owner of the house nor was it with the intention to intimidate, annoy or insult the owner in possession of the house and the accused himself admitted his having been distilling illicit liquor,

Held, that any alleged illegality committed by the chaukidar in entering the house of the accused had no casual connection with the question of the guilt or innocence of the accused and the judgment of acquittal could not therefore be sustained. (*Nanavutty and Rachhpal Singh, JJ.*) EMPEROR *v.* CHANDEVA PASI. **10 Luck. 82=6 R O. 543=149 I.C. 255=35 Cr. L J. 939=11 O.W.N. 727=1934 Cr.C. 874=A.I.R. 1934 Oudh 321.**

———**S. 60**—Complaint under—Sub-Inspector specially empowered. *See* U. P. EXCISE ACT, S. 3 (2). **A.I.R. 1932 All. 187.**

———**Ss. 60 (a) and 60-A**—*Applicability—Charge of possession of more than one seer of country liquor.*

Where the charge against the accused is that he was in possession of over one seer of country liquor, the charge should be framed under S. 60 (*a*) of the U. P. Excise Act, and not under S. 60-A—the latter Section having been cancelled and omitted in virtue of the Indian Dangerous Drugs Act (II of 1930). (*Nanavutty, J.*) KALURAM *v.* EMPEROR. **151 I.C. 288=7 R.O. 106=35 Cr. L.J. 1278=11 O.W.N. 1035=1934 Cr.C. 1285=A.I.R. 1934 Oudh 424.**

———**S. 60 (a)**—*Charge of possession of country liquor in excess of quantity prescribed—Conviction for possession not lawfully obtained—Legality.*

The accused was convicted under S. 60 (*a*) of the Excise Act on a charge of possession of country liquor in excess of the quantity prescribed by law. On revision

U. P. EXCISE ACT (1910), S. 60.

the High Court found that the evidence as to the total quantity found in possession of the accused was insufficient but it was contended for the crown that the accused had been rightly convicted, because he was in possession of country liquor which he has not proved that he obtained lawfully.

Held, that the application for revision must be allowed on the ground that the accused cannot be convicted of an offence with which he has not been charged, and which is of a different nature from the one with which he has been charged. (*Kendall, J.*) SHEONANDAN *v.* EMPEROR. **155 I.C. 492=7 R A. 934=1935 A.W.R. 511=1935 A.Cr.C. 111=36 Cr. L. J. 777=1935 A. L.J. 393=1935 Cr.C. 622=A.I.R. 1935 All. 597.**

———**S. 60 (a) and (f)**—*Conviction under—Illegality in search—If vitiates.*

Although a search in illegal, it can neverthe less be proved that certain articles were discovered in the course of the search; and a conviction for offences punishable under S. 60 (*a*) and (*f*) is not necessarily vitiated by any illegality in the procedure in connection with the search. (*Thomas and Smith, JJ.*) EMPEROR *v.* HUSSAINI. **152 I.C. 310=11 O.W.N. 1290=36 Cr.L.J. 6=7 R.O. 200=1934 Cr.C. 1385=A.I.R. 1934 Oudh 506.**

———**S. 60 (a)**—*Offence under—Irregularity regarding search and warrant—Effect.*

Irregularity in a search and the failure to obtain warrant would always afford ground for scrutiny but if after close scrutiny the Court comes to the conclusion that an excisable article was recovered from the possession of the accused the conviction under S. 60 (*a*) would be sound. 19 M. 349 and 41 C. 350, Ref. (*Bajpai, J.*) MAHOMED BASHIR *v.* EMPEROR. **I.R. 1932 All. 634 =140 I.C. 246=33 Cr.L.J. 943=1932 A.L J. 104= 13 L.R. 66 (Cr.)=1932 Cr.C. 201=A.I.R. 1932 All. 185.**

———**S. 60 (a)**—Offence under—Power of Police Officer to arrest accused. *See* U. P. EXCISE ACT, S. 50. **A.I.R. 1931 Oudh 395.**

———**S. 60 (b)**—*Sentence—First offence.*

A sentence of one year's rigorous imprisonment and Rs. 500 fine under S. 60 (*b*) is too much for a first offence. The illicit manufacture of liquor is primarily an offence against the revenue. It is not like being in possession of or selling cocaine. In the case of a first conviction a sentence of six months' rigorous imprisonment and a fine of Rs. 500 is sufficient. (*Young, J.*) EMPEROR *v.* MAHOMED ALI KHAN. **55 All. 557= I.R. 1933 All. 333=143 I.C. 781=34 Cr.L.J. 641= 14 L.R. 197 (Cr.)=1933 A.L.J. 746=1933 Cr.C. 744 =A.I.R. 1933 All. 438.**

———**S. 60 (b) and (f)**—*Separate sentences under—Legality of.*

When a man is found guilty of the major offence of illicitly manufacturing excisable articles, it is unreasonable that he should be separately punished for keeping in his possession materials for manufacturing those articles and for possessing them. The one offence includes all the others. (*Young, J.*) EMPEROR *v.* MAHOMED ALI KHAN. **55 All. 557=I.R. 1933 All. 333=143 I.C. 781=34 Cr.L.J. 641=14 L.R. 197 (Cr.)=1933 A.L.J. 746=1933 Cr.C. 744=A.I.R. 1933 All. 438.**

———**S. 64 (c)**—*Conditions of licence—Opening and closing hours—Shop kept closed during opening hours—If an offence.*

An Abkari Licence provided as follows:—"The orders for the opening and closing of the shops have been fixed as follows: "It is necessary that shop should not be kept open at any other hours." The licensee was prosecuted for having closed the shop on account of picketing.

U. P. EXCISE ACT (1910), S. 69.

Held, that the object of the condition was to prevent the sale of liquor outside the fixed hours and that it could not be interpreted to mean that at no time between the limits the shop should be closed temporarily and that the accused was not guilty. (*Sulaiman, A.C.J.*) PUTTU LAL *v.* EMPEROR. **54 All. 5=I.R. 1931 All. 645=133 I.C. 405=32 Cr. L.J. 1014 (1)=1931 Cr.C. 926 (1)=A.I.R. 1931 All. 629.**

———**S. 64 (c)**—*Offence under—When made out—Failure to meet demand.*

The mere fact that the accused does not stock the packets of every size which he is authorized to sell under the license does not prove that he has broken a condition of the license. It must be proved that there was a demand for the particular denomination which accused has not in stock and that he has failed to meet the demand. (*Kendall, J.*) GUR PRASAD *v.* EMPEROR. **1933 A.L.J. 506=1933 Cr.C. 647=I.R. 1933 All. 406 =144 I.C. 273=34 Cr.L.J. 750=14 L.R. 117 (Cr.)= A.I.R. 1933 All. 370.**

———**S. 60 (f)**—*Offence under—Evidence — Articles used for distillation found in kothris—Liability of occupants.*

Things used for the illicit distillation of liquor were found and the illicit distillation was being conducted in the kothris occupied by the three accused persons. The articles found were of such a nature that they obviously could not escape the notice of the occupants. The pitchers, canisters, the drum of wash, were large articles which any one, merely entering the kothris would be bound to see. The distillation of liquor was accompanied by a characteristic smell which also could not escape notice.

Held, that the articles found were such that they must have been within the knowledge of the accused, who were occupying the kothri and the articles were being used by them. The accused were thus guilty under S. 60 (*f*) (*Sulaiman, C.J. and King, J.*) PARMAI *v.* EMPEROR. **56 All. 594=151 I.C. 775=7 R.A. 206 =35 Cr.L.J. 1395=3 A.W.R. 497=1934 Cr.C. 187 =A.I.R. 1934 All. 129.**

———**S. 60-A**—*Offence under—Proof—Evidence insufficient.*

Where the water connection installed by the accused was not proved to be in connection with that portion of the building in which the cocaine was found and there was nothing to show that he was in a position to prevent the illicit sale of cocaine in that building.

Held, that the accused was not liable to be convicted under S. 60-A. (*Nanavutty, J.*) WILAYAT HUSAIN *v.* EMPEROR. **7 Luck. 208=33 Cr.L.J. 225=136 I.C. 218=I.R. 1932 Oudh 90=8 O.W.N. 857=1931 Cr.C. 820=A.I.R. 1931 Oudh 388.**

———**S. 60-A**—*Offence under—Proof—Circumstantial evidence.*

Where the evidence showed that a large quantity of cocaine in a number of tin boxes arranged in a row were found in the courtyard and the accused were found very near and they did not explain their presence,

Held, that the accused were either vendors or purchasers of the cocaine and that they were liable to be convicted under S. 60 (*a*). (*Nanavutty, J.*) WILAYAT HUSAIN *v.* EMPEROR. **7 Luck. 208=33 Cr.L.J. 225 =136 I.C. 218=I.R. 1932 Oudh 90=8 O.W.N. 857= 1931 Cr.C. 820=A.I.R. 1931 Oudh 388.**

———**S. 69**—*Applicability—Conditions.*

Where the Court considers that a higher sentence should be inflicted because of a previous conviction, then alone it is necessary to call in aid the provisions of S. 69 of the Act. Where, however, it has not been

U. P. EXCISE ACT (1910), S. 70.

established under what section of the Excise Act the accused has been previously convicted, he should be treated as a first offender. (*Rachhpal Singh, J.*) MAQBOOL AHMAD KHAN *v.* EMPEROR. **6 R.O. 472 = 148 I.C. 934 = 35 Cr.L.J. 832 = 1934 Cr.C. 683 = A.I.R. 1934 Oudh 232.**

——**S. 70**—'Excise Officer'—Sub-Inspector of Police specially empowered. *See* U. P. EXCISE ACT, S. 3 (2). **A.I.R. 1932 All. 187.**

——**S. 70**—Report of Police Officer—Power of Magistrate to take cognizance of offence. *See* U. P. EXCISE ACT, S. 50. **A.I.R. 1931 Oudh 395.**

——**S. 70**—*Report of Police Officer—Power of Magistrate to take cognizance of offence.*

Police Officers have been empowered in the United Provinces under S. 10 of the Excise Act to perform the functions enumerated in Ss. 49 and 50 of the Act. Where therefore there is a report on the file from a Sub-Inspector of Police a Magistrate can take cognizance of the offence under S. 70 of the Excise Act. (*Raza, J.*) KALLOO *v.* EMPEROR. **8 O.W.N. 304 = 14 O.L.J. 257.**

——**S. 71**—*Presumption under—When arises.*

In order to raise a presumption of guilt against an accused person under S. 71, U. P. Excise Act, it must be proved that he was in possession of the excisable article. There is no absolute presumption that a person in occupation of a house is in possession of everything found inside it. (*King, C.J. and Srivastava, J.*) EMPEROR *v.* CHANDRABHAI. **10 Luck. 419 = 153 I.C. 88 = 7 R.O. 289 = 36 Cr.L.J. 265 = 11 O.W.N. 1484 = 1935 Cr.C. 116 = A.I.R. 1935 Oudh 69.**

U. P. GENERAL CLAUSES ACT (I OF 1904), S. 6—*Applicability—Question of jurisdiction.*

Where the Courts are dealing merely with the question as to what forum has jurisdiction to determine the rights of the parties and not with the question of accrual of any right, S. 6 has no application. (*Bennet and Bajpai, JJ.*) MT. RAM SIRI *v.* IQBAL BAHADUR. **I.R. 1933 All. 349 = 143 I.C. 876 = 14 L.R. 334 (Rev.) = 17 R.D. 435 = 1933 A.L.J. 946 = A.I.R. 1933 All. 456.**

——**S. 6**—*Application of.*

Held, on the application of S. 6 that a valid mortgage created before 1902 did not become invalid under S. 32 of the Agra Tenancy Act, 1926, merely because possession is delayed. (*Keane, S. M. and Oppenheim, J. M.*) JHAMMAN *v.* LAL GAJENDRA SINGH. **15 R.D. 473.**

——**S. 6**—*Scope and effect of—Agra Tenancy Act II 1901—Suits instituted under.*

All suits instituted under the old Tenancy Act must be decided as though the new Act had not been passed. (*Keane, S.M. and Oppenheim, J.M.*) BINDHYACHAL PATHAK *v.* GHARIB CHAMAR. **15 R.D. 204 = 12 L. R. 63 (Rev.).**

——**S. 6 (a)**—*Scope—Repealing Act—Old Act if revived.*

S. 6 (*a*) merely implies that a repealing Act does bring into existence the previous Act which had been itself repealed by the repealed Act. (*Sulaiman and Young, JJ.*) OFFICIAL RECEIVER OF MORADABAD *v.* MURTAZA ALI **54 All. 616 = I.R. 1932 All. 373 = 138 I.C. 112 = 1932 A.L.J. 402 = 16 R.D. 466 = 13 L. R. 332 (Rev.) = A.I.R. 1932 All. 434.**

——**S. 6**—*Effect.*

The effect of S. 6 (*e*) is that all suits instituted under the old Agra Tenancy Act is to be decided as though the new Act had not been passed. If under the old Act a decree for ejectment can be passed against certain trespassers such a decree would have to be passed under the new Act also. (*Smith, S. M. and Oppenheim, J. M.*) RAM ADHAR *v.* NARAIN. **15 R.D. 579 = 12 L.R. 316 (Rev.).**

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——**S. 21**—*Power to issue notification—Power to amend same.*

Where a power to issue a notification is conferred, that power is deemed to comprehend a power to amend, vary or rescind any notification whatsoever. (*Mukerji and Niamatullah, JJ.*) MAHABIR PRASAD *v.* MAHESH PRASAD. **I.R. 1931 All. 121 = 128 I.C. 825 = 1931 A. L.J. 45 = 14 R.D. 586 = A.I.R. 1930 All. 856.**

U. P. HONORARY MUNSIFS' ACT (II OF 1896), S. 7 (4)—Suit of small cause nature—Jurisdiction of Honorary Munsif. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 16—SCOPE **1935 A.L.J. 426 = 1935 A.W.R. 354 = A.I.R. 1935 All. 574.**

——**S. 8**—*Case from Small Cause Court transferred to Honorary Munsif—Latter, if a Court of Small Couses for purposes of appeal.*

In the case of a transfer by the District Judge of a case pending in the Court of Small Causes to the Court of Honorary Munsifs, Cl. (4) of S. 24, C. P. Code, will not apply. Therefore, the Honorary Munsif, trying the suit so transferred, cannot, for the purposes of appeal, be deemed to be a Court of Small Causes. (*Bajpai, J.*) BHARAT LAL *v.* JIWAN SINGH. **158 I.C. 1114 = 8 R. A. 375 (1) = 1935 A.L.J. 200 = 1935 A.W.R. 77 = A.I.R. 1935 All. 141 (1).**

——**S. 8**—*Case from small Cause Court transferred to Honorary Munsif—Re-transfer to Munsif with small cause powers—Case to be tried as small cause suit.*

Where a suit of a small value of Rs. 13 14-6 is transferred from the Court of Munsif having Small Causes Side to the Court to the Honorary Munsif and the same is re-transferred to the Munsif in whose Court it was originally instituted, the case should be tried by the Munsif as a Judge of the Small Cause Court. (*Mukerji and Bennet JJ.*) KALU RAM GANPAT RAM *v.* RAM SARAN. **6 I R. (All.) 150 = 145 I.C. 701 (2) = 1933 A.L.J. 1196 = A.I R. 1933 All. 662.**

——**S. 8, Proviso**—*Small cause suit transferred to Honorary Munsifs—Re-transfer to Munsif without small cause powers—Decree by Munsif—Appealability.*

Where a suit cognizable by the Munsif on the Small Cause Court side of his jurisdiction is transferred to a Bench of Honorary Munsifs and from there to the Court of an Additional Munsif who has no jurisdiction to try cases under the Provincial Small Cause Courts Act, the latter cannot aquire the jurisdiction of the Court of Small Causes in respect of this suit by virtue of S. 24 (4), C. P. Code, which does not in terms apply, the transfer not being from a Court of Small Causes, and the decree passed by the Additional Munsif in this suit is as much open to appeal as any other decree passed by him in any suit of a like description instituted in his Court. (*Niamatullah, J.*) MT. MUNIRAM *v.* ALI HUSAIN. **57 All. 957 = 158 I.C. 106 = 8 R.A. 283 = 1935 A.L.J. 591 = 1935 A.W.R. 602 = A.I.R. 1935 All. 765.**

U.P. LAND RECORDS MANUAL—*Entries contemplated.*

The Land Records Manual does not contemplate entries regarding individual trees. The land records are concerned with those who own or hold land. (*Drake Brockman, S. M. and Knox, J.M.*) DANI *v.* GOPI NATH. **1935 O.W.N. 406 = 1935 R.D. 192.**

——*Partition entries—Evidentiary value of—Grove—Claim to ownership not raised—Effect.*

Partition entries are certainly a pice of evidence but are not conclusive or binding. A person who claims to

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be the owner of a grove but who fails to object to the entry of another's name at partition cannot be held to be bound by such entry, though it is strange that he did not object and remained silent. (*Drake Brockman, S. M. and Knox, J. M.*) DANI *v.* GOPI NATH. **1935 O.W.N. 406=1935 R.D. 192.**

———**S. 244-B and R. 2**—*Admission to Patwari School.*

S. 244-B of the Land Records Manual must be read with R. 2 of the same Manual. To become a patwari a man must be nominated by the lambardars or at any rate the process of nomination must be gone through. In the event of the heir of the patwari being nominated but being unqualified or, owing to failure of nomination, in the event of the Collector desiring to nominate the heir of the late patwari when he is not qualified, the law permits conditional appointment of such heir and gives such heir preferential admission to the patwari school to enable him to qualify himself. The word "heir" in Rule 2 is left intentionally vague because it is not every patwari who has sons. It is intended to be liberally interpreted as meaning the person who succeeds to the patwari's property and undertakes his domestic liabilities, such as maintenance of his widow and so on. In the face, therefore, of sons no one else would rank as the heir of the patwari. (*Drake Brockman, S. M. and Knox, J M.*) ALI KAUSAR *v.* KHEM SINGH. **1935 R.D. 330=1935 O.W.N 702.**

———**Para 264**—*Order appointing person as Registrar, Kanungo—Appealability.*

An order appointing a person acting as Assistant Registrar, Kanungo as Registrar, Kanungo is an administrative arrangement and is not appealable. (*Drake Brockmn, J M.*) HAR SARUP JAUHARI *v.* BHAGWAN BHAROSE. **18 R.D. 162 (1)=15 L.R. 217 (Rev.).**

———**R. 2**—"Heir"—Meaning of. *See* U. P. LAND RECORDS MANUAL, S. 244-B AND R. 2. **1935 R.D. 330=1935 O.W.N. 702.**

U. P. LAND REVENUE ACT (III OF 1901)—*Applicability of O. 22, C. P. Code, to suits under.*

The provisions relating to abatement of suits contained in O. 22 do not apply to original suits under the U. P. Land Revenue Act. (*Oppenheim, S. M.*) GHANSHIAM DAS *v.* YUSUF. **14 L.R. 455 (Rev.)=17 R.D. 575.**

———*Applicability of O. 41, Rr. 4 and 33, C.P. Code, to appeals under.*

Rr. 4 and 33 of O. 41 apply to appeals under the U. P. Land Revenue Act by virtue of R. 33 of the Revenue Court Manual and the Collector has power to pass any order he thinks just. (*Oppenheim, S. M. and Walton, J. M.*) BANWARI LAL *v.* DEBI PRASAD. **16 R.D. 528 =13 L R. 345 (Rev.).**

———*Applicability of principal of* res judicata *to proceedings under.*

The principle of *res judicata* is applicable to proceedings taken under the Land Revenue Act and questions regarding the nature of payment on account of malikhana settled once and for all may not be re-opened. (*Watson, J. M.*) RAJ BAHADUR SINGH *v.* RAJA SRI PRATAP BAHADUR SINGH. **14 L.R. 298 (Rev.)=17 R.D. 418.**

———Applicability of C. P. Code, 1908, to proceedings under. *See* C. P. C., O. 32, R. 7—MUTATION PROCEEDINGS. **7 Luck. 493.**

———Chakbat *partition—Mode of—Allotment of good and bad land.*

In making a *chakbat* partition on the basis of valuation, the *chaks* must be formed in such a way that every co-sharer, as far as possible, may get a fair share of good and bad land. (*Oppenheim, S.M. and Drake Brockman, J. M.*) LALA RAM *v.* SURENDRA SINGH, **11 O. W.N. 1321=18 R.D. 559.**

———*Partition proceedings—Land with special value—Scheme of valuation—Necessity.*

Where there is clearly a good deal of land having a special value owing to its potential urban value, it is essential to have a scheme of valuation in partition proceedings in respect of such land. (*Oppenheim, S. M. and Drake Brockman, J. M.*) PREM NARAIN *v.* SADDIQ AHMAD. **18 R.D. 648=16 L.R. 59 (Rev.).**

———*Partition—Trees—Mode of division.*

Trees must obviously go with the land on partition among co-sharers. If a tree belongs to one co-sharer and the land on which it stands is alloted to another, the tree must go with the land, and the co-sharer to whom it belonged originally should get compensation therefor. It is not a proper way of partition to allot the tree to the owner co-sharer and to make him a tenant of the co-sharer to whom the land is allotted. (*Oppenheim, S. M. and Drake Brockman, J. M.*) RAJ BALI PANDAY *v.* CHHOTKAN RAI. **1935 R.D. 57.**

———Proceedings under—Compromise on behalf of minor—Provisions of O. 32, R. 7, C. P. Code, not complied with—Effect of. *See* C. P. C., O. 32, R. 7—REVENUE PROCEEDINGS. **14 L.R. 464 (Rev.)=17 R D. 625.**

———Proceedings under—Joinder of some only of legal representatives—Abatement. *See* C. P. C., O. 22, R. 4—REVENUE PROCEEDINGS. **14 L.R. 469 (Rev.) =17 R.D. 616.**

———Revenue Court—Power to review. *See* C. P. C., O. 47, R. 1—REVENUE COURT. **1932 A.L.J. 437 (F.B.).**

———*Second appeal—Question of fact—Findings arrived at on mistaken assumptions—Value.*

Findings of fact, arrived at on assumptions which are without any foundation or value, are liable to be disregarded in second appeal (*Oppenheim, S. M. and Walton, J. M.*) DIPTI SINGH *v.* SURENDER BAHADUR SINGH. **14 L R. 301 (Rev.)=17 R.D. 422.**

———*Second appeal—Question of fact—Powers of the Board.*

A finding as to admission to tenancy is one of fact, and in second appeal the Board can consider only if there is evidence to support it. (*Oppenheim, S. M.*) JAWAHAR SINGH *v.* FATEH. **14 L.R. 381 (Rev.)=17 R.D. 503.**

———*Third appeal—Findings of fact—Binding nature of.*

Where the Commissioner in second appeal did not discuss the evidence and had based his decision on an incomplete report and reversed the judgment of the lower Court, the findings of fact arrived at by him are not binding on the third appellate tribunal. (*Oppenheim, S. M. and Drake Brockman, J. M.*) UDAI NARAIN PRASAD *v.* HANSAL TELI. **14 L.R. 483 (Rev.)=17 R.D. 630.**

———*Third appeal—Interference—Remedy in appeal not availed of.*

Where the remedy of the party lay in appeal, it is not in the power of the Board in third appeal or revision to interfere with an erroneous order of the Assistant Collector. (*Walton, J. M.*) JASWANT SINGH *v.* NAWRANG SINGH. **14 L.R. 73 (Rev.)=17 R.D. 75.**

———**S. 4 (8) and (9)**—Roster Officer—Status and powers of—Finding that land was khudkasht—Binding nature of, *See* AGRA TENANCY ACT, S. 57. **14 L.R. 706 (Rev.).**

U. P. LAND REVENUE ACT (1901), S. 4.

———**S. 4 (15)**—*Permanent lease—Lessor retaining rights of superior proprietor—Lessee conferred full ownership—Entry in* khewat.

Under a lease, the lessor retained rights of superior proprietor. He was paid a lump sum as premium together with a yearly rental. The lessee was given full power of transfer by sale, mortgage, will, gift, etc., and he and his heirs were permitted to do whatever they liked with the land.

Held, that the lessee should be entered as a sub-proprietor at the bottom of the *khewat*. (*Oppenheim, S M. and Drake Brockman, J. M.*) LACHMAN DAS *v.* SANDAL SINGH **14 L.R 589 (Rev.) = 17 R.D. 744.**

———**S. 23**—*Patwari—Disciplinary action against—Jurisdiction of Commissioner—Discretion of Collector.*

The Collector, under the Land Revenue Act, is primarily responsible for the maintenance of the land records and the discipline of patwaris. The Commissioner must leave such matters to the Collector. If he wishes to express his opinion, he should only direct the attention of the Collector to the particular point he wishes to impress on him, and suggesting to him the desirability of taking action, but at the same time leaving the Collector discretion to act as he thought best. He should not go farther than that and should refrain from expressing *obiter dicta* in such cases. (*Oppenheim, S. M. and Drake Brockman, J. M.*) BHIRGUNATH LAL *v.* NARBADESWAR PRASAD. **1935 R D. 55.**

———**S. 23**—*Patwari—Disciplinary action against—*Locus standi *of public or Zamindar to file appeal.*

The Zamindars have of course a right to complain to the Sub-Divisional Officer or to the Collector or to any other Revenue Authority regarding the conduct of a patwari, and a complaint from persons who have the right to nominate to the post will naturally receive special consideration. But it is the Collector who makes the appointment, and it is the Collector who has the responsibility of inflicting suitable punishment when it is called for. Neither the public nor the Zamindars are parties to disciplinary action against the patwari and they have, therefore, no *locus standi* to file an appeal. (*Knox, J.M*) RAJ NARAIN ROY *v.* KIRTARTH LAL. **1935 R.D. 129 = 1934 A.W.R. 311 = 1935 O.W.N. 310.**

———**S. 24**—*Appointment of patwari—Rival candidates—If both disqualified.*

In the appointment of a patwari, it is not the law that if there is a contest between two rival candidates, both of them should be regarded as disqualified since if either is appointed, he is likely to take vengeance on the lambardars who nominated his opponent. It would obviously be unfair to disqualify a suitable candidate with no previous connection with the circle merely because his opponent may have influenced certain lambardars to oppose him. (*Knox, S. M. and Grant, J.M.*) SHEO NAIK RAI *v.* RAJPAT LAL. **1935 A.W.R. 1115 = 1935 R.D. 463.**

———**S. 24**—*Appointment of patwari—Law as to.*

The law gives the right of nomination of a patwari to the lambardars, and to the whole body of proprietors if there are no lambardars; if these lambardars disagree, local custom has to be followed. The law does not specifically say what is to be done if neither or none of the nominations are in accordance with local custom. But such a case would apparently fall under S. 24 (6) and the Collector would notify his refusal to appoint either of nominees, wait for 15 days and then appoint his own man. There would be nothing to prevent him appointing one of the nominees. (*Drake Brockman, S. M.*) HARBAN SINGH *v.* MOHAMMAD MUSTAFA HAIDER. **1935 O.W.N. 1194 = 1935 R.D. 509.**

U. P. LAND REVENUE ACT (1901), S. 24.

———**S. 24**—*Appointment of patwari—Disqualification—Near relationship to unreliable Zamindar in the circle.*

An heir of a deceased patwari is not a suitable candidate for the appointment of a patwari where he is nearly related to one of the zemindars in the circle, who is an unreliable character. (*Knox, S. M. and Grant, J.M.*) SHEO NAIK RAI *v.* RAJPAT LAL. **1935 A.W.R. 1115 = 1935 R.D 463.**

———**S. 24 (1)**—*Appointment of patwari—Lambardars' right of nomination—Custom to the contrary—Legality.*

Under S. 24 (1) of the U. P. Land Revenue Act, only the lambardars have the right to nominate a patwari to be appointed. The plot proprietors have no right to be heard. A custom to the contrary, if any does exist, is not valid because law overrides it (*Oppenheim, S.M. and Drake Brockman, J.M.*) JAINTI PERSHAD *v.* JAGMOHAN LAL. **18 R.D. 608 = 15 L.R. 709 (Rev.).**

———**S. 24**—*Appointment of patwari—Law as to—Powers of Collector—Local custom—Value of—Wishes of lambardars.*

Under S. 24 of the U. P. Land Revenue Act, the wishes of the lambardars are to be considered in appointing a patwari of the circle. In cases of disagreement as regards nominees, the Collector is bound in the first place to appoint the person nominated in accordance with the local custom under S. 24 (2); and it is only when no such custom can be ascertained that the Collector can appoint any one, whether he has been nominated or not. Heirs of the old patwaries are also considered if they are nominated, and they can be appointed provisionally and may be given time to pass the requisite patwari examination; the Collector, however, is not bound to do so. The appointment rests with the Collector and only on very strong grounds will his appointment be interfered with by superior authority. The fact that a rival candidate happens to be the heir of the old patwari, is not. when there is no local custom laying down that the office should be more or less hereditary, sufficient reason for interference with the Collector's appointment of another qualified candidate. (*Oppenheim, S. M. and Drake Brockman, J.M.*) HAZARI PRASAD *v.* GIRJA PRASAD. **11 O.W.N. 1068 = 18 R.D. 451.**

———**S. 24**—*Appointment of patwari—Procedure.*

Under S. 24, the lambardars have the right to nominate a person to be a patwari of the circle and subject to opportunity being given them to nominate in accordance with sub-S. (5) and subject to an opportunity being given them to make a nomination in accordance with local custom, if they have neglected to observe it or to nominate a fit person or if their nominee is not a fit person, the nominee or nominees nominated in accordance with local custom must be appointed. If there is disagreement as to the nominee, local custom has to be ascertained and the person nominated in accordance therewith appointed, but such appointment is again subject to the provisions of sub-Ss. (5) and (6). Under sub-S. (6)the Collector has again to give an opportunity to the lambardars, if none of the nominations follow local custom, to make nominations in accordance therewith, or if the nomination has been made in accordance with local custom but the person nominated is not fit. There is no necessity for the Collector to call upon the lambardars to nominate anybody. It is only necessary for him to notify his refusal to them and if they do not nominate anybody within 15 days from that date, he is competent to appoint anybody. (*Drake Brockman, S. M. and Knox, J.M.*) ALI KAUSAR *v.* KHEM SINGH. **1935 R.D. 330 = 1935 O.W.N. 702.**

———**S. 24**—*Appointment of patwari—Preferential rights—Relation, but not heir of deceased patwari.*

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In the appointment of a patwari, a person related to the deceased patwari but not his heir is not entitled to any preference. (*Knox, S.M. and Grant, J.M.*) SHEO NAIK RAI *v.* RAJPAT LAL. **1935 A.W.R. 1115=1935 R.D. 463.**

———**S. 24**—*Appointment of* patwari—*Vacancy in lambardari—Right of proprietors to vote.*

It would be straining the language of S. 24 of the U. P. Land Revenue Act to construe it as meaning that if any lambardari is vacant, the proprietors of his *thok* or *mahal* should have a vote. The appointment of the *patwari* cannot be postponed or held up until the vacant lambardari is filled up, *i.e.*, until the co-sharers have made up their minds whom to appoint as lambardar. (*Knox, S. M.*) BISHAMBAR SINGH *v.* BHAGWAN SINGH. **1935 R.D. 435.**

———**S. 24**—*Nomination of patwari—Dispute as to Co-sharer's right to nominate person not nominated before.*

On a disagreement between the lambardars and co-sharers as to the nomination of a patwari, notice was issued to the co-sharers to nominate according to the local custom. Some of the co-sharers who had already nominated one of the candidates now nominated the other.

Held, that it was competent for the co sharers to so change their mind and to nominate a different candidate. (*Drake Baockman, S. M.*) RAMESHWAR PRASAD *v.* RAGHUBIR PRASAD **1935 O.W.N. 385=1935 R.D. 181 (2)=1935 A.W.R. 488.**

———**S. 24 (6)**—*Appointment of patwari by Collector—Interference.*

It would not be justifiable for superior authorities to interfere with an appointment of patwari made by the Collector except for very strong and good grounds, since the appointment is in the nature of an executive appointment. (*Oppenheim, S. M. and Drake Brockman, J.M.*) DEBI SARAN LAL *v.* DEBI PRASAD. **11 O.W.N. 1303=18 R.D. 557.**

———**S. 32**—*Co-tenants—Brothers—Death of one leaving widow—Re-marriage of widow—Effect of.*

Where two brothers were co-tenants, one of them died leaving a widow, and she re-married.

Held, that in the absence of any new contract of tenancy entered into between the widow and the landlord, the name of the widow should be expunged from the papers on the ground that she was not an occupancy tenant. (*Oppenheim, S.M. and Walton, J.M.*) SHEO BALAK KOERI *v.* SAMINATH. **14 L.R. 228 (Rev.)=17 R.D. 235.**

———**S. 32**—*Entry in* khewat—*Revisional settlement—If can alter status of* taluqdar.

A Settlement Officer, acting under the U. P. Land Revenue Act, cannot, by making entries in the *khewat* or otherwise, convert a proprietary into an under-proprietary right or *vice versa*, because a Settlement Officer at the time of the revisional settlement of Fasli 1331, was only given powers of a record officer. In the face of an irrebuttable presumption that a particular person is a *taluqdar*, it cannot be accepted that he became an under-proprietor, notwithstanding the entries in the recent settlement papers. The said entries cannot destroy rights of the *taluqdar* conferred on him by the sanad and by the provisions of S. 3 of the Oudh Estates Act; and his status as a *taluqdar* cannot by an proceedings taken at the revisional settlement, be converted to that of an under proprietor liable to pay rent to another, who under the terms of the sanad had no status of any kind in the land in dispute. (*Nanavutty and Smith, JJ.*) FARIDUDDIN AHMAD *v.* RAFIUDDIN AHMAD. **151 I.C. 563=7 R.O. 140=18 R.D. 454=11 O.W.N. 1064=A.I.R. 1934 Oudh 435.**

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———**S. 32**—Khewat—*Entries in—Possessory rights—If need be mentioned.*

Where, under a Civil Court decree, the parents had the exclusive right of management and appropriation of proceeds during their lifetime and their sons were to be the owners entitled to possession after their parents.

Held, that as the *khewat* was a register of proprietors the father's name could not appear therein but that the restriction on the rights of the sons by the possessory rights of the father must find a place in the *khewat*. (*Drake Brockman, S.M. and Holmes, J.M.*) CHUNNI LAL BHATELAY *v.* SHEO KUMAR BHATELAY. **14 L. R. 813 (Rev.).**

———**S. 32**—*Title to collect rent—Questions relating to—Order of the Board of Revenue, final.*

So far as the Revenue Courts are concerned, the order of the Board of Revenue as the last appellate Court in mutation cases must govern all future questions as to the title to collect rent. (*Oppenheim, S.M. and Walton, J.M.*) BAHORI *v.* KASTOLA KUAR. **14 L.R. 154 (Rev.)=17 R.D. 222.**

———**S. 32 (a)**—*Remainderman—Entry of name in papers.*

Where one person has a limited interest and another is the remainderman the name of the latter should also be shown in the revenue papers in the same way as that of a mortgagor or a tenant. (*Smith, J.M.*) HAR NARAIN DAS *v.* HARI SARAN DAS. **15 R.D. 457.**

———**S. 32 (b) and (c)**—*Applicability*—Thekadar *holding under jungle clearance lease—Entry in* khewat.

Where the *thekadars* held under a jungle clearing lease which conveyed to them the whole land in the hamlet at 10 per cent. less than the recorded rental with the proviso that should the land ever become *kham* they would be entitled to 10 per cent. on the rent roll.

Held, that the *thekadars* had no claim to a place in the *khewat*. (*Oppenheim, S.M. and Walton, J.M.*) BHAGWAN DATT SINGH *v.* COURT OF WARDS, AJODHYA ESTATE. **13 L.R. 323 (Rev.)=16 R.D. 545.**

———**S. 32 (c)**—Khewat—*Right to be recorded in—Holder of heritable, non-transferable lease.*

The holder of a heritable, non-transferable lease holding under a judicial decision is entitled to have his name recorded as heritable, non-transferable lessee in the under-proprietary *khewat* maintained under S. 32 (*c*) of the Land Revenue Act. ((*Drake Brockman, S. M. and Knox, J.M.*) MAHOMED ASGHAR ALI *v.* NAWAB ALI. **1935 R.D. 364=1935 O.W.N. 733.**

———**Ss. 32 (e) and 44**—*Civil suit to contest correctness of entries under—Maintainability.*

S. 44 says that any person may have a right to establish in the Civil Court any interest in land which is recorded in the registers prescribed by Cls. (*a*) to (*d*) of S. 32. But the interest of occupancy tenants is recorded in the *Khatauni* which is the register under S. 32 (*e*) and S. 44 does not give any right of suit to establish that right, relating as it does to the register of all persons cultivating or occupying land. The final decision in those matters rests with the Revenue Courts. 25 A. L. J. 799, Foll. (*Bennet, J.*) SARBATI *v.* ZAMINPAL. **I.R. 1933 All. 34=141 I.C. 87=14 L.R. 389 (Rev.)=17 R.D. 549=A.I.R. 1933 All. 291.**

———**S. 33**—*Application under—Contest—Adjudication*—Res judicata.

An application for correction becomes a suit on contest and a finding therein that a person is a sub-tenant and not co-tenant operates as *res judicata*. (*Kean*

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S.M. and Oppenheim, J.M.) RAGHUBAR DAYAL *v.* BHAGWAN DIN. **15 R.D. 720=12 L.R. 389 (Rev.).**

——**Ss. 33 and 39**—*Correction of papers—Dispute between descendants of brothers as to whether they were co-tenants—Revenue Court, if can decide.*

In a case where the descendants of one *X* applied for correction of papers on the ground that they alone were the tenants of the holding in suit and that the names of the descendants of *Y*, *X's* brother, had been wrongly recorded as co tenants.

Held, that the dispute was one that could be decided by the Revenue Court under the Land Revenue Act. (*Knox, J.M.*) RAM LAKHAN SINGH *v.* SARJU PRASAD SINGH. **1935 R.D. 124 (2)=1935 O.W.N. 308.**

——**S. 33**—*"Errors"—Meaning of—Correction—Power of Court.*

The powers of Court under S. 33 are not confined to the correction of clericial errors only. Where, owing to the Tahsildar's neglect of duty and inaccuracy on the part of the Registrar Kanungo, the name of the respondent was recorded against one-fourth of the joint property instead one-half to which she was indubitably entitled and the mistake was promptly brought to the notice of the officials concerned, the Court has jurisdiction to make the necessary correction. (*Walton, J. M.*) TODHI MAL *v.* MT. BHAGWATI. **17 R.D. 368 =14 L.R. 240 (Rev.).**

——**S. 33**—*Mistake in* khewat—*Correction—Entry by Court in mutation proceedings—Entry if can be corrected.*

Where on account of an alleged mistake in the *khewat* an entry made by order of Court in mutation proceedings was sought to be corrected.

Held, that it was not the Collector's duty to ensure the accuracy of the records by deciding complicated questions of proprietary right which should have been decided when the entry in the annual register sought to be corrected was made and that the application for correction was not maintainable. (*Drake Brockman, J. M.*) MAHOMED HASHIB ULLAH SHEIKH *v.* MUNNU PANDEY. **14 L R 364 (Rev.)=17 R.D. 508.**

——**S. 33**—*Scope.*

The only errors that can be corrected under S. 33 are errors proved to have been made in the record of rights or in any annual register previously prepared. (*Drake Brockman, S.M.*) DEOKI NANDAN PRASAD *v.* PATESHWARI PRASAD. **11 O.W.N. 164=15 L.R. 122 (Rev.)=18 R.D. 52.**

——**Ss. 33 and 34**—*Scope—Applicability—Mosque with platforms—Decree of Civil Court awarding platforms to deity and profits to co sharers of village—Application for mutation on behalf of deity—Maintainability—Procedure.*

When there has been a decision by a Civil Court that certain platforms appurtenant to a mosque were part of the mosque property but that the proceeds or profits derived therefrom were to go to the co-sharers of the village in which the mosque stood, an application under S. 34, U. P. Land Revenue Act, on behalf of the deity for mutation in respect of the platform property is maintainable, but not as regards the mosque land. In regard to the latter, it is the duty of the mutation officer to proceed under S. 33 of the Act. (*Oppenheim, S.M. and Drake Brockman, J.M.*) MAHOMED EJAZ RASUL KHAN *v.* HARNAM SINGH. **1935 O.W N. 244=1935 R.D. 30.**

——**Ss. 33 (2) and 34**—*Construction—Right to correction of entries in* khewat—*If barred.*

Ss. 33 (2) and 34 of the U. P. Land Revenue Act cannot be interpreted as barring the right of a person to have the entries in the *khewat* altered. The omission to make a report under S. 34 is not fatal. (*Oppenheim, S.M. and Drake Brockman, J. M.*) ANAND SWARUP SINHA *v.* GYAN SARUP. **18 R.D. 574=15 L.R. 706 (Rev.).**

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——**S. 33 (2)**—*Entry in register—Decision of dispute—Possession as the test.*

A dispute as to entry in the register prescribed by S. 32 (*e*) should be decided on the basis of possession. (*Drake Brockman, S.M and Holmes, J.M.*) BAIJNATH SINGH *v.* SURAJ BALI SINGH. **11 O.W.N. 214=18 R.D. 105=15 L.R. 139 (Rev.).**

——**S 33 (3)**—*Annual registers—Entries in—Presumption of truth.*

The entries in annual registers made under S. 33 (3), Land Revenue Act, shall be presumed to be true until the contrary is proved. Only the decisions in disputed cases falling under Ss. 40, 41 and 42 constitute conclusive evidence in respect of the subject matter of the dispute in proceedings in the Revenue Courts. (*Wazir Hasan C.J.*) HANSRAJIKUAR *v.* SURAJ BAKHSH SINGH. **11 O.W.N. 118=18 R.D. 68 (1).**

——**S. 33 (3)**—*Changes in* khewat—*Procedure.*

Under S. 33 (3) changes affecting the *khewat* cannot be recorded without the order of the Collector. The patwari should report the matter to the Collector making a provisional entry. (*Drake Brockman, S.M.*) DEOKI NANDAN PRASAD *v* PATESHWARI PRASAD. **11 O. W.N. 164=15 L R. 122 (Rev.)=18 R.D. 52.**

——**S. 34**—*Civil Court decree unexecuted—Mutation on basis of—Right to.*

A person, obtaining a decree for possession in a Civil Court, but not executing it, cannot be said to have obtained possession by transfer and cannot obtain mutation on the basis of the decree. (*Oppenheim, S.M*) TUKMAN SINGH *v.* GANGA SINGH. **18 R.D. 497= 15 L.R. 609 (Rev.).**

——**S. 34**—*Mutation proceedings — Transfer by member of joint family—Power of other members to question.*

In mutation proceedings it is not open to the other members of the family of the transferring co sharer to object to the competence of the transferor. It is not the law that a person, duly recorded in the *khewat*, is incapable of transferring his share without the consent of the other members of his family. (*Oppenheim, S. M. and Walton, J.M.*) MT. NAWAB BEGAM *v.* TIKA RAM. **14 L.R. 348 (Rev.)=17 R D 481.**

——**S. 34**—*Mutation relating to lease—Delay in report—Effect of.*

Mutation in respect of a lease should be reported within three months and the period not being one of limitation, a person who reports beyond that time renders himself only to a fine. (*Oppenheim, S.M. and Drake Brockman, J.M*) RAM LAGAN MISRA *v.* MT. UREHA. **14 L R. 477 (Rev.)=17 R.D. 627.**

——**S. 34**—Res judicata—*Mutation—Second application for.*

When an application for mutation has been dismissed, a fresh application under S. 34 of U. P. Land Revenue Act, on the same grounds, in respect of the same succession or transter is not maintainable. (*Oppenheim, S.M. and Drake Brockman, J.M*) SUKHDEI *v.* BAQAR KHAN. **18 R.D. 711 (1)=16 L R. 104 (Rev.).**

——**S. 34**—*Right to apply for mutation—Reversioner—Proof of possession—Necessity—Forcible possession—Sufficiency.*

Before an application for mutation under S. 34 can be filed by a reversioner claiming a right to succeed to property he must obtain possession arising out of or

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based on such right of succession. It may be actual, or formal, or constructive. Where he has not been put in possession by any Court or competent authority, there is neither formal nor constructive possession. Forcible possession which he enforces because he thinks he has right and title is not such possession as will justify the Revenue Court in ordering mutation. (*Drake Brockman, S.M.*) BHANPARTAP SINGH *v.* BIRAN KUAR. **1935 R.D. 438.**

——**Ss. 34, 35 and 44**—*Scope—Mutation proceedings—Order of tahsildar—Finality.*

Where the mutation proceedings do not show that any question relating to *sir* lands was considered, the person interested in the *sir* land not having been summoned at all, the order in such proceedings does not bar a subsequent proceeding in respect of the *sir* lands. (*Oppenheim, S. M. and Drake Brockman, J. M.*) SHANKER SINGH *v.* RAM PIAREY. **18 R.D. 530=15 L.R. 636 (Rev.).**

——**S. 34**—*Scope—Past profits—Assignment of—Report of transfer—If necessary.*

Where profits are transferred to a person after they have accrued due, the transferee gets no right either in the *mahal* or in any share of it or in the profits of it in respect of the year in which the transfer is made or in respect of any future year. It is not a transfer of the right to the profits in a mahal. Consequently no report is necessary in order to entitle the transferee to sue for the profits transferred. S. 34 of the U. P. Land Revenue Act does not bar such a suit. (*Allsop, J.*) ASHFAQ ALI KHAN *v.* INAYAT BEG. **155 I C. 1103 = 1935 A.W.R. 750=1935 R.D. 300=7 R.A. 1026= 1935 A.L.J. 815=A.I.R 1935 All. 704.**

——**S. 34**—*Scope—Sale of holding and transfer of possession admitted—Mutation.*

S. 34 contemplates different treatment for transfers by mortgage and transfers by sale. In the case of a sale there is no reason for refusing mutation when the vendor admits the sale deed and the passing of possession. (*Oppenheim, S.M. and Walton, J.*) MT. NAWAB BEGAM *v.* TIKA RAM. **14 L.R. 358 (Rev.)=17 R. D. 481.**

——**S. 34 (5)**—*Object of.*

The intention of S. 34, U. P. Land Revenue Act, was to prevent any one whose name had not been mutated from exercising the functions of a proprietor; and the intention of Cl (5) of that section was not to prevent a person claiming to be a proprietor from applying to have his name entered in *khewat*. (*Oppenheim, S M. and Drake Brockman, J.M.*) ANAND SWARUP SINHA *v.* GYAN SARUP. **18 R.D. 574=15 L.R. 706 (Rev.).**

——**S 34 (5)**—*Pre-emption decree followed by mutation—Suit for profits—Bar.*

Where a pre-emption decree was followed by mutation and a suit for profits was subsequently filed after the report was made, *held* that the suit was not barred by S. 34 (5) (*Oppenheim, J.M. and Knox, S M.*) JAGESH WAR *v.* RAM CHARAN. **16 R D. 169=13 L R. 54 (Rev.).**

——**S. 34 (5)**—'Transfer'—Vesting in insolvency if —Duty of Receiver to make a report. *See* PROVINCIAL INSOLVENCY ACT, SS. 28 (2) AND 56 (1)—RECEIVER. **11 O.W N. 1037=18 R.D. 430 (2).**

——**S. 35**—*Mutation—Objection based on stay order of Civil Court—Disallowance of—Procedure—Failure to order mutation—Propriety.*

Where an objection to mutation based on an order of partial stay passed by a Civil Court is disallowed, and there is nothing further to decide in the case the mutation officer is not justified in refusing alteration of

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entries in accordance with Civil Court's power. (*Oppenheim. S.M. and Drake Brockman, J.M.*) SRI NARAIN *v.* KISHORI RAMAN SINGH. **18 R.D. 523=15 L.R. 641 (Rev).**

——**S. 36**—*Claim to ex-proprietary rights—Limitation.*

A person out of possession can claim ex proprietary rights within six months of losing possession (*Drake Brockman, J.M.*) BINDESARI MISIR *v.* RAGHUNATH MISIR. **18 R.D 605=15 L R. 712 (Rev.).**

——**S. 36**—*Court entering rent according to agreement between parties—If amounts to fixing of rent by it.*

In a suit for arrears of rent for an agricultural holding, the facts were that the defendants who were Zamindars mortgaged their proprietary rights and became ex-proprietary tenants of a certain area of *sir* (*i.e.*) the area in suit. An application was apparently made by the mortgagee to the Revenue Court to fix the rent according to an agreement evidenced by a kabuliat executed by the defendants. The Court wrote an order saying that the nature of the tenancy should be changed and the rent should be entered in accordance with the kabuliat. The argument of the defendants was that they were not bound to pay any rent at all for the ex-proprietary holding because no rent had been fixed by the Revenue Court under S. 36 of the Land Revenue Act.

Held, that the Revenue Court did fix the rent to which the parties had agreed and that there is nothing in the form of the order which would lead to the conclusion that the Court failed to do its duty or to go into the question of what rent be fixed. (*Allsop, J.*) GHAFOOR *v* ABDULLAH KHAN. **157 I.C. 521=8 R.A. 201=1935 R D 361=1935 A.W.R. 815=1935 O.W.N. 794=A.I R. 1935 All. 923.**

——**S. 36**—Exproprietary tenancy—Fixation of rent —Agreement of parties- Validity—Rent not fixed by Court—Recoverability. *See* AGRA TENANCY ACT, S. 14 EX PROPRIETARY TENANCY. **1935 R D. 442.**

——**S. 36**—*Ex-proprietary tenancy-Rent—Enhancement by consent—Duty of Court.*

The rent of an ex proprietary tenant must be fixed by Court and the parties cannot contract themselves out of the law. But if an enhanced rent has been agreed upon and paid for a long period the Court will not interfere and reduce the rent, especially if the question could have been agitated at an earlier proceeding. (*Oppenheim, S. M.*) KRISHNA DUTT SHUKLA *v.* RAJARAM RAI. **16 R.D 460=13 L R. 295 (Rev.).**

——**S. 36**—*Ex-proprietary rights—Claim to—Limitation.*

A claim to ex-proprietary rights must be made within six months. (*Oppenheim, S. M. and Walton, J.M.*) FARID AHMAD KHAN *v.* LACHMI NARAIN. **14 L. R. 522 (Rev.)=17 R D. 648.**

——**S 36**—*Fixation of rent—Agreement between the parties—Duty of Court.*

A Court in proceedings under S. 36 has to fix the rent of the tenant in accordance with the provisions of the Tenancy Act. When the Court fixes the rent it should, if the parties agree as to the rent, give effect to the agreement. (*Oppenheim, S.M. and Drake Brockman, J.M.*) HARKHA KUNWARI *v.* JANG BAHADUR SINGH. **18 R D 5=15 L.R. 23 (Rev).**

——**S. 36**—*Procedure under—Duty of Court—Waiver of right of occupancy.*

S. 36 of the U. P. Land Revenue Act is clearly worded. An agreement waiving right of occupancy created under S. 14 is void entirely. The Court is bound to specify the area in which such right is created,

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and if a party is absent, it may proceed *ex parte* according to law. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KUREY SINGH *v.* DEBI DAYAL. **18 R.D. 423 (1)=15 L.R. 540 (Rev.).**

——**S. 36**—*Rent fixed without local inspection—Validity of.*

Rent the rate whereof is fixed without a local inspection is illegal. (*Oppenheim, S.M. and Walton, J.M.*) PANCHAM KHAN *v.* NANDA KISHOR. **14 L R. 295 (Rev.)=17 R.D. 410.**

——**S. 36**—*Sale of proprietary rights—Surrender of ex-proprietary rights within six months—Sanction not obtained—Effect.*

Where a person sold his proprietary rights and subsequently executed a deed relinquishing his ex-proprietary rights mentioning that he had given up his possession but no sanction had been obtained as required by S. 15 of the Agra Tenancy Act.

Held, that ex proprietary rights continued in the vendor and could only be lost with the Court's sanction or by a fresh surrender after six months. (*Oakden, S. M. and Smith, J.M.*) DURGA DASS *v.* BHOLA RAM. **15 R.D. 104=12 L.R. 18 (Rev.).**

——**S. 36**—Sir *land mortgaged with possession—Sale of equity of redemption— Claim to ex-proprietary right —Liability to discharge mortgage.*

A person who sells proprietary rights while *sir* lands are in the possession of the mortgagees, must in equity pay off the mortgage-money, if he claims the benefit of ex-proprietary rights and not leave it to the purchaser to pay off the mortgage. Without payment of the mortgage money ex proprietary right cannot arise. The purchaser should either get his quota of *Sir* without the encumbrances of ex-proprietary rights or the seller should get the advantage of ex-proprietary rights subject to payment of the mortgage money. (*Oppenheim, S.M. and Drake Brockman, J.M.*) RADHA MOHAN DUBE *v.* SHEO PRAGAS MISRA. **18 R.D. 634=16 L R. 68 (Rev.).**

——**S. 36**—Sir *land—Usufructuary mortgage of*—Kabuliyat *by mortgagor to mortgagee to pay rent—Liability for rent*—Kabuliyat *not registered—Effect.*

The proprietor of a plot of *sir* land mortgaged it usufructuarily, but executed a *kabuliat* to the mortgagee agreeing to continue in possession as *thekadar* and to pay rent to the mortgagee. The mortgagee having sued for arrears of rent,

Held, that the defendant ex-proprietor could not escape liability for payment of rent to the mortgagee in terms of the *kabuliyat* executed by him. The fact that the *kabuliyat* is inadmissible in evidence for want of registration, does not bar the Court from decreeing the claim by way of damages for use and occupation, the amount of damages being the rent agreed under the *kabuliyat*. (*Niamatullah, J.*) BAKHTAWAR *v.* LILA PAT. **158 I.C. 50=8 R.A. 279=1935 R.D. 299=1935 A.W.R. 711=A.I.R. 1935 All 785.**

——**S. 39**—*Correction of papers—Procedure.*

Whereon the death of a recorded statutory tenant the tenancy devolved on his grandson but the *patwari* improperly recorded the name of the brother of the deceased also and the landlord instituted proceedings for correction of papers,

Held, that the proper procedure is to record the grandson as sole heir and leave the other party to a regular suit. (*Oakden, S.M. and Smith, J M.*) CHARAN SINGH *v.* BHAGWANDAS. **14 R.D. 638.**

——**S. 39**—*Proceedings under—Scope of enquiry—Change in character of land.*

Where land is recorded as grove, the correction of papers proceedings cannot be utilised for an enquiry whether the land has changed its character. (*Walton, J M.*) CHUT KANNO LAL *v.* ABDUL KAKIM KHAN. **16 R.D. 520.**

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——**S. 39 (2)**—Scope—Divided tenant—Interest in other portion of holding—Effect of S. 37, Agra Tenancy Act, 1926. *See* AGRA TENANCY ACT (1926), S. 37—EFFECT. **15 R.D. 239=12 L.R 126 (Rev.).**

——**S. 39**—*Suit under, claiming to be tenant—Proof.*

In a suit under S. 39 a man claiming to be a tenant must prove that he is actually in possession. (*Knox, S. M. and Grant, J M.*) BHAGWANT TEWARI *v.* RAMANUJ TEWARI. **1935 R.D. 470=1935 O W N. 1147.**

——**S. 39 (2)**—Scope and applicability—Consent of landlord to partition--Effect of decree. *See* AGRA TENANCY ACT, S. 37—DECREE FOR PARTITION. **18 R.D. 327=A.I.R. 1934 All. 905.**

——**S. 40**—*Application to expunge names of recorded tenants—Rejection on finding of possession with tenant —If bars ejectment suit under S. 86, Agra Tenancy Act.*

An application by a landlord merely for expunging the names of the recorded tenants on the ground that the latter do not pay rent, that they are not tenants and that the land was uncultivated and in his own possession is not one for recording the tenants as non-occupancy tenants; nor does it raise the question of their status. Under the U.P. Land Revenue Act, the Revenue Courts have only to come to a finding as regards possession, and if it is with the recorded tenants the application has to be thrown out. Such a decision, will not, however, operate as *res judicata* so as to bar a subsequent suit by the landlord to eject the tenants under S. 86, Agra Tenancy Act. (*Oppenheim, S M. and Drake Brockman, J M.*) BAL MUKUND LAL *v.* SALHA BEGAM. **18 R D. 434.**

——**S. 40**—*Claimant under forged will—If can apply for mutation.*

A person claiming under a will which has been declared a forgery cannot apply for mutation. (*Keane, S.M. and Oppenheim, J.M*) GOPAL CHANDRA *v.* RADHEY SHIAM. **15 R D. 652.**

——**S. 40**—*Collector's decision under—Basis.*

Under S. 40, U P. Land Revenue Act, the Collector is bound to base his decision on possession. When there is evidence to satisfy him that a *Pathsala* has been in possession and has a reasonable claim to ownership, the name of the *Pathsala* must be shown in the records as owner. (*Oppenheim, S.M. and Drake Brockman, J M.*) ANAND SWARUP SINHA *v.* GYAN SARUP. **18 R.D. 574=15 L R. 706 (Rev.).**

——**S. 40**—*Complicated question of law—Disposal by Civil Court.*

A complicated question of succession, such as whether a half sister is entitled to succeed under the Hindu Law Amendment Act of 1929, should be left to the Civil Court for decision. (*Drake Brockman, S.M.*) BISHUNI *v.* BHIKHI. **14 L.R. 883 (Rev)**

——**S. 40**—*Dispute as to entry in records—Basis of decision.*

A dispute relating to an entry in the records must be decided on the basis of possession, though the dispute is really one as regards proprietary rights. (*Oppenheim, S.M. and Drake Brockman, J M.*) RAM PRASAD *v.* SULTANAT RAI. **15 L.R. 563 (Rev.).**

——**S. 40**—*Dispute as to entry in record of right—Basis of decision.*

A dispute which is really one as regards proprietary rights, but relates to an entry in the record of rights, must be decided on the basis of possession. (*Oppen-*

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heim, S.M. and Drake Brockman, J.M.) RAMA PRASAD *v.* SALTANAT RAI. **11 O.W.N. 1137=18 R.D. 457.**

———**S. 40**—Enquiry under—Nature of—Collector deciding dispute under—Evidence given by witness in—Is admissible in subsequent suit. *See* EVIDENCE ACT, S. 33. **1935 R.D. 567=1935 A.W.R. 1422.**

———**S. 40**—*Grove—Claim to—Evidence—Family not having right therein.*

Exceptionally good evidence will be necessary to prove that certain persons had obtained possession of a grove which had never been a grove in which their family had ever had any interest where the name entered in the papers of 1867 is shown to be not a relative of the claimants the latter can hardly raise their claim to the land. (*Keane, S.M. and Oppenheim, J.M.*) ZALIM SINGH *v.* SHEO MANGAL SINGH. **15 R.D. 572=12 L.R. 293 (Rev.).**

———**S. 40**—*Mutation cases—Duty of Revenue Courts—Possession how far a criterion.*

The duty of Revenue Courts in mutation cases is simple. Possession first; if there are doubts about possession then a summary enquiry as to the person best entitled to succeed should be taken up. The word 'summary' was not incorporated in the Act without an object and it should not be lost sight of. Where the Court finds that the mortgagee is in possession the criterion of possession cannot be applied. (*Keane, S.M.*) DULHIN GHURA KUAR *v.* KAULESHWAR LAL. **15 R.D. 273.**

———**S. 40**—*Mutation cases—Duty of Revenue Courts.*

It is not the province of a Revenue Court in dealing with proceedings under the Act to go into complicated questions of the right of persons to alienate interests in land. It is sufficient for the persons who claims the entry of his name to show that he has possession and that possession is based on a reasonably clear and *prima facie* sustainable title. (*Drake Brockman, S.M.*) SUBEDAR *v.* CHET RAM. **14 L.R. 766 (Rev.).**

———**S. 40**—*Mutation—Death of—Manager of dedicated property—Record of name of successor—Basis—Enquiry into title.*

A mutation officer is not concerned to record the names of *mutwallis* trustees, etc., in the *khewat* as such. The *khewat* must contain, in the case of dedicated property, the name of the person who in fact manages the the property and is liable for the payment of land revenue; and when such manager dies, his successor must be recorded. But in so doing, his position should be described in a non-committal manner which should in no way raise a question of title. It is not the business of a Revenue Court to investigate a question of title. The dispute must be decided on the basis of possession or on a summary enquiry into title; and the name of the person *prima facie* best entitled to manage the property should be recorded. (*Oppenheim, S.M. and Drake Brockman, J.M.*) BALKISHAN DAS *v.* SARASWATI BIBI. **18 R.D. 615=11 O.W.N. 1430=16 L.R. 1 (Rev.).**

———**S. 40**—*Mutation officer—Powers—If a 'Court'.*

The provisions of the U. P. Land Revenue Act, 1901, relating to cases of mutation of names distinctly show that the officer seized of mutation cases is enjoined by law to decide disputes regarding entries of names by means of an inquiry into the question of possession and when he is unable to satisfy himself as to which party is in possession he shall ascertain by a summary inquiry who is the person best entitled to the property and shall put such person in possession. It is difficult to hold that such an officer is not a "Court" (*Hasan, C.J. and Kisch, J.*) TRILOKI NATH *v.* RAM MANORATH. **I.R. 1931 Oudh 297=132 I.C. 537=8 O.W.N. 764=15 R.D. 375=14 O.L.J. 494=A.I.R. 1931 Oudh 296.**

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———**S. 40**—*Party in possession—Recording as tenant.*

Provided the person having the possession obtained it on the basis of succession and such succession is *prima facie* legally capable of justification he can claim to have his name recorded in the papers and the party who challenges his right should be directed to the Civil Court. (*Drake Brockman, S.M. and Holmes, J.M.*) RAMJI CHAUBE *v.* HAZARI CHAUBE. **18 R.D. 126=15 L.R. 299 (Rev.).**

———**S. 40**—*Possession—Meaning of.*

By possession in S. 40 is meant possession at the date of dispute. (*Oppenheim, S.M. and Drake Brockman, J.M.*) SURAJ PRASAD *v.* THAKUR. **14 L.R. 471 (Rev.)=17 R.D. 611.**

———**S. 40**—*Possession—Scope and meaning.*

Possession in S. 40 would cover proprietary possession duly acknowledged and enjoyed but interrupted by an 'act of God' such as flood. (*Drake Brockman, S.M.*) DEOKI NANDAN PRASAD *v.* PATESHWARI PRASAD. **11 O.W.N. 164=15 L.R. 122 (Rev.)=18 R.D. 52.**

———**S. 40**—*Possession—Material date.*

Possession for the purposes of mutation is possession on the date of the institution of the case and not possession *pendente lite*; the question of possession after that date need not be considered. (*Oppenheim, S.M. and Walton, J.M.*) PRABHU NATH *v.* SHEO MANGAL. **14 L.R. 315 (Rev.)=17 R.D. 470.**

———**S. 40**—*Question of title—Duty of Revenue Court.*

Where the question in dispute is highly contentious and relates to a question of title the proper forum is the Civil Court. All that the Revenue Court has to decide is who is in possession and record his name. (*Drake Brockman, S.M. and Holmes, J.M.*) ASHARFI LAL *v.* MATA DIN. **11 O.W.N. 285=18 R.D. 135=15 L.R. 154 (Rev.).**

———**S. 40 (1)**—*Mutation proceedings—Decision—Basis—Possession—Judgment-debtor in possession in spite of decree.*

All disputes in mutation proceedings should be decided on the basis of possession. The fact that the existing record is in favour of a person from whom a claimant derives his title is no ground for allowing the claimant mutation unless he has obtained possession. The Collector has no power to enter the name of a person who has continued in unbroken possession in spite of a decree and dakhalnama for possession in favour of his creditor. (*Oppenheim, S.M. and Walton, J.M.*) ABDUL SAMAD *v.* NANDKISHORE. **13 L.R. 399 (Rev.)=17 R.D. 53.**

———**S. 40 (1)**—"*Possession*"—*Meaning of.*

Possession for the purpose of S. 40 (*i*) means possession on the date of the institution of the suit and not possession *pendente lite*. (*Oppenheim, S.M. and Walton, J.M.*) SHEO SHANKAR SADU *v.* SHEO DAS SAHU. **14 L.R. 643 (Rev.).**

———**S. 40 (3)**—Suit for profits—Denial of proprietary right—Procedure. *See* AGRA TENANCY ACT, S. 222. **18 R.D. 257=A.I.R. 1934 All. 847.**

———**S. 41**—*Jurisdiction of Revenue Court—Possession delivered by Civil Court—Demarcation of boundary by Civil Court Amin—Alteration of boundary.*

Where, under a decree of a Civil Court, the Civil Court Amin delivers possession of the area decreed and demarcates the boundary, the remedy of the party who thinks that the Amin has fixed the boundary wrongly is to go to the Civil Court and get it corrected. The Revenue Court has no jurisdiction to fix a boundary contrary to the possession delivered by the Civil Court

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which is the sole judge of title. Revenue maps will be altered or should be altered in conformity with possession as decreed by the Civil Court. (*Drake Brockman, S.M. and Knox, J.M.*) MOHAN LAL *v.* RATAN SEN. **1935 R D. 292 = 1935 O.W.N 648.**

———**S. 41**—*Scope*—"*Actual possession*" — *Meaning and effect of*—*Plot left undivided at partition*—*Shares of proprietors recorded*—*Demarcation of boundaries*—*Permissibility.*

Where the partition officer leaves a plot undivided, merely recording the shares of the proprietors in it, there is no case for demarcation of boundaries. The plot can only be divided by a partition. Until physical partition is effected, the plot remains the common holding of all parties. The words "actual possession in S. 41, U. P. Land Revenue Act, rule out the consideration of constructive or judicial possession, as distinguished from physical possession. The section only provides for the laying down of a boundary the exact position of which has become obscure; it is not intended for the laying down of a boundary which never existed. (*Drake Brockman, S.M. and Knox, J.M.*) RAM JAG SINGH *v.* BHOLA NATH. **1935 R D. 280 = 1935 A.W.R. 700.**

———**S. 41 (1)**—*Boundary dispute*—*Duty of Revenue Court.*

A dispute as to boundary should be settled so far as possible by the Revenue Courts in order that the party not satisfied with that decision should seek redress in the Civil Courts with whom the ultimate decision must lie. The Revenue Officer should carry out the demarcation on the basis of the existing survey maps. (*Oppenheim, S.M. and Drake Brockman, J.M.*) JAI RAM *v.* MAHOMED YUSUF. **18 R D. 332 = 15 L.R. 394 = (Rev.).**

———**S. 42**—*Applicability and scope.*

S. 42 covers disputes respecting class or tenure of a tenant, that is, the man must be a tenant. Where, therefore, the landlord considers the other party to be a trespasser, S. 42 is not applicable. (*Drake Brockman, S.M and Holmes, J.M.*) SUBEDAR *v.* CHET RAM. **14 L.R. 766 (Rev.).**

———**S. 42**—*Applicability and scope*—*Dispute as to who is the tenant*—*Agra Tenancy Act, S.* 121.

S. 42, U. P. Land Revenue Act, applies only to cases where the tenancy is admitted and the dispute relates to the class or tenure of the tenant. The scope of the section is very limited. It has no application to a dispute as to who is the tenant. It is also a mistake to read into the section all the provisions of S. 121 of the Agra Tenancy Act of 1926. An order of the Revenue Court in an application for the correction of *Jamabandi* does not operate as *res judicata* so as to bar a suit in the Civil Court for declaration. (*Gangi Nath, J.*) KALP NATH CHAND *v.* SAMAK DHUJ CHAND. **155 I C. 1097 = 7 R A 1027 = 1935 R.D. 342 = 1935 A.W. R. 820 = 1935 O.W.N 943 = A I.R 1935 All 751.**

———**S 42**—*Declaration as to statutory tenancy*—*Finality of order.*

Where a lawful order is made under S. 42 recording certain persons as statutory tenants and that order is not appealed against it be comes final and the persons whose rights have been recognised cannot be ejected by notice. (*Wilton, J.M.*) SURAJ KUAR *v.* SHEO PRASAD. **13 L.R 310 (Rev.) = 16 R D 558.**

———**S. 42**—*Enquiry by Sub-Divisional Officer*—*Statement of Patwari before Tahsildar*—*Admissibility of.*

The statement of a Patwari taken by the Tahsildar but not re-taken by the Sub-divisional Officer to whom the proceedings were submitted cannot be considered in a proceeding under S. 42. (*Oppenheim, S.M. and Drake Brockman, J.M.*) RAGHURAJ SINGH *v.* ORI AHIR. **14 L R. 466 (Rev.) = 17 R.D. 637.**

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———**S. 42**—Proceeding under—Contest—Adjudication—Operates as *res judicata*. *See* U. P. LAND REVENUE ACT, S. 33. **15 R.D. 720.**

———**S. 42**—Scope—Dispute amongst ex-proprietary tenants *inter se*. *See* AGRA TENANCY ACT, SS. 121 AND 123. **17 R.D. 542.**

———**S. 43**—*Excess payment*—*Effect.*

Payments in excess of the amount legally due do not alter the amount legally due. (*Oppenheim, S. M. and Drake Brockman, J M*) HANSA *v.* BALBIR SARAN. **18 R D. 168 = 15 L.R. 212 (Rev.).**

———**S. 43**—*Scope*—*Commutation of rent*—*Consent of parties.*

S 43 does not permit commutation of rent by a registered agreement. This does not however mean that when both parties come forward and agree to a commutation of rent and there is no dispute such commutation cannot be entered in the papers, under the Revenue Act. It is only in the case of a dispute that the Collector is prohibited from deciding it and making an entry of the altered rent. (*Keane, S.M. and Oppenheim, J.M.*) RAM GHULAM MANI *v.* RAJ BALI. **16 R.D. 209 = 13 L R. 141 (Rev.).**

———**S 44**—*Entries in* khewat—*Presumption as to correctness*

Where the party has not given any evidence to show that the entries in the *khewat* are wrong or were made by the patwari on his own authority, the Court may presume them to be correct. (*Hasan, C.J. and Bishesh-war Nath, J.*) MAHOMED HANIF *v.* GOBARDHAN DAS. **8 O.W.N. 294 = 15 R.D 180 = 131 I.C. 901 = 14 O.L J. 339 = 12 L R. 114 (Rev.) = A.I.R. 1931 Oudh 316.**

———**S. 44**—*Entry in settlement record*—*Presumption of correctness.*

In the absence of evidence to the contrary, it must be presumed that the entry in the settlement papers was made after due enquiry and is correct. (*Oppenheim, S. M*) GAWRI SHANKER *v.* KUNWAR BEHARI LAL. **18 R.D. 502 = 15 L R. 619 (Rev.)**

———**S. 44**—*Entries in settlement records*—*Presumption*—*Strong evidence necessary to rebut.*

It would want strong proof to rebut the entry in the settlement records, especially when it is that of an occupancy holding in respect of which no patwari is likely to make an unauthorized change. (*Oppenheim, S.M. and Drake Brockman, J.M.*) SUBHAN *v* CHANGUR LONIA. **11 O.W.N. 631 = 18 R.D. 269 = 15 L.R. 357 (Rev.).**

———**S. 44**—Ex parte *order*—*Binding nature of.*

Under S. 44 of the Act, a decision presupposes the presence of both parties, the setting forth of issues or points for determination and the production of evidence together with a final adjudication. An *ex parte* order passed in proceedings under the Act cannot operate as *res judicata* or be binding on Revenue Courts. (*Drake Brockman, S.M. and Holmes, J M*) BISMILLA BIBI *v.* SHER ALI KHAN. **14 L.R 722 (Rev.).**

———**S 44**—"*Interest*" *of persons in village*—*Jurisdiction of Civil Court.*

S. 44 gives the Civil Court jurisdiction to determine the "interest" of persons in a village, provided the entry of their names is required by law to be recorded in any one of the registers prescribed by Cls (*a*) to (*d*) of S. 32 (*Wazir Hasan, C.J. and Allsop, J.*) AUADHESH SINGH *v.* LACHMAN. **14 L.R. 826 (Rev.) = 17 R.D. 985 = 10 O.W.N. 1138 = A.I.R. 1933 Oudh 514.**

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——**S. 44**—Sir *land—Exclusive right—Proof.*

If there is evidence to prove that under a private partition, certain land had become the exclusive *sir* land of one person, that may be taken as evidence that it was not the exclusive *sir* of another. Value of entries in annual registers pointed out. (*Oppenheim and Knox, J.M.*) TEJA *v.* MOHAN SINGH. **16 R.D. 171=13 L.R. 57 (Rev.).**

——**S. 44**—Sir *land—Question of—Decision of Revenue Court—Finality of.*

The question whether the land is *sir* or ex proprietary tenancy is a matter peculiarly within the jurisdiction of the Revenue Court and its decision cannot be challenged in the Civil Court under S. 44. (*Bennet, J.*) MAULA BAKSH *v.* DEBI PRASAD HAKIM. **14 L.R. 760 (Rev.).**

——**Ss. 45 and 197**—*Revenue Manual, para. 20—Appointment of lambardar — Proclamation — Local custom—Value of.*

In the matter of appointment of a lambardar particular care must be taken to see that the proclamation receives proper publicity. Resort may be had, if necessary, to beat of drum. The local custom has also got to be recorded. It should not be neglected. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KAMAKHA PRASAD *v.* NARAIN PRASAD. **18 R.D. 584 (2)=15 L.R. 697 (Rev.).**

——**S. 54**—Applicability—Ex-proprietary tenant—Abatement of rent only under S. 87, not under S. 54. *See* U. P. LAND REVENUE ACT, S. 87. **15 R.D. 662.**

——**Ss. 56 and 86**—*Scope—Memorial dues—Recovery of—Jurisdiction of Revenue Court.*

Memorial dues which a tenant has to render to his landlord, which are not cesses recorded by the Record Officer under S. 56 or by the Settlement Officer under S. 86 are not recoverable, at any rate, through the Revenue Courts. (*Oppenheim, S.M. and Drake Brockman, J.M.*) WAHIDUDIN *v.* KONWAR. **18 R.D. 607.**

——**S. 57**—Entry of land as '*sir*'—Entry obviously incorrect—Holder held to be occupancy tenant. *See* LANDLORD AND TENANT—SIR LAND. **14 L.R. 206 (Rev)=17 R.D. 230.**

——**S. 57**—*Land recorded as Sir in* 1896 *and since—No cultivation before entry or after—Correctness of entry.*

The plaintiffs purchased the land in 1896 and were recorded as *sir* holders from that date. But the land was all along in the possession of sub-tenants.

Held, that the entry of the land as plaintiffs' *sir* in 1896 was wrong; they have not cultivated the land for twelve years before the entry was made nor was it possible for them to acquire *sir* rights by the time Act II of 1901 was passed. So the land was not the *sir* of the plaintiffs. (*Oppenheim, S.M. and Walton, J.M.*) POHAP SINGH *v.* BHORE MOTI LAL. **14 L.R. 216 (Rev.)=17 R.D. 353.**

——**S. 57**—*Land wrongly described as* 'sir' *for a long time—Effect of.*

The fact that the land has been wrongly recorded as '*sir*' for a long number of years has not the effect of altering the character of the land. Such an entry is open to disproof. (*Oppenheim, S.M. and Walton, J.M.*) UDIT AHIR *v.* JUGAL KISHORE PANDEY. **14 L.R. 62 (Rev.)=17 R.D. 76.**

——**S. 57**—*Record of rights—Entries—Presumption as to correctness.*

Entries in record of rights framed before 1902 and maintained ever since is not conclusive proof that such land is *sir*. It is open to the Court in a proper case to hold that such entry was incorrectly so recorded. (*Oppenheim, S.M. and Walton, J.M.*) NARAIN *v.*

U. P. LAND REV. ACT (1901), S. 87.

VIZIA NAND GAJRAJ MAHARAJ KUMAR BAHADUR. **16 R.D. 483=13 L.R. 241 (Rev.).**

——**S. 57**—Sir *land—Ex-proprietary rights—Non-accrual of—Sub tenants if trespassers.*

Land which had not become *sir* by the date of the passing of the Agra Tenancy Act of 1901 by virtue of 12 years' continuous possession, cannot give rights to ex-proprietary rights, and a person who was cultivating the land, wrongly described as an ex-proprietary holding, is a tenant-in-chief, and cannot be ejected as trespasser. (*Oppenheim, S.M. and Walton, J.M.*) MAHOMED BADIUDDIN *v.* PRAN. **14 L.R. 291 (Rev.)=17 R.D. 407.**

——**S 79**—*Co-sharers—Joint liability for rent—Modification—Procedure.*

Per *Hasan, C.J.*—The language of S. 79 shows that the joint responsibility of all co-sharers for the rent of an under-proprietary tenure cannot be destroyed by a private agreement and that it can only be severed by an order of the Settlement Officer as such. (*Hasan, C.J. and Bisheshwar Nath, J.*) MAHOMED HANIF *v.* GOBARDHAN DAS. **8 O.W.N. 204=15 R.D. 180=131 I.C. 901=14 O.L.J. 339=12 L.R. 114 (Rev.)=A.I.R. 1931 Oudh 316.**

——**S. 79**—*Determination of rent—Rent fixed by Settlement Court—If can be modified by Rent Courts.*

Where a tenant was declared by a Settlement Court to be entitled to hold the land claimed at favourable rates but without a transferable right, the rent payable by him was not liable to enhancement under the Oudh Rent Act and under S. 87 of the Land Revenue Act, but had to be determined under S. 79 of the Act; and the Rent Courts had no power to alter or modify the terms of the Settlement Court. (*Oppenheim, J.M.*) MAHOMED RAZA *v.* DURGA DIN. **12 L.R. 423 (Rev.) =16 R.D. 73.**

——**S. 79**—*Rent payable by under-proprietor—Order of Settlement Officer—If conclusive.*

S. 233 (*e*) debars the Civil Court from entertaining any suit or other proceeding with respect to the amount to be paid to a proprietor by an inferior proprietor when that amount has been fixed by the Settlement Officer. This provision of the Land Revenue Act clearly shows that the order of the Settlement Officer under S. 79 of the Act determining the rent payable by the under-proprietors is conclusive between the parties. It is not open to the Civil Courts or for the matter of that to a Rent Court, to question the correctness of the Settlement Officer's order. (*Srivastava, J.*) KUBERA KUAR *v.* CHHABRAJ KUAR. **157 I.C. 714=7 R.O. 676=1935 R.D. 383=1935 O.W.N. 780=A.I.R. 1935 Oudh 441.**

——**S. 86**—Chaukidara—*If ground-rent or cess—Recoverability.*

Chaukidara is not ground-rent for the houses occupied by the *raiyats* of the village, but is apparently a cess, and when such cess is not recorded in the last settlement, it is not recoverable under S. 86. (*Ganga Nath, J.*) MAHOMED-UD-DIN *v.* BHUPAN. **155 I.C. 658=7 R.A. 967 (1)=1935 R.D. 282=1935 A.W.R. 710=1935 A.L.J. 955=A.I.R. 1935 All. 642 (2).**

——**S. 87**—*Application under—Decree against dead person—Binding nature of—Fresh suit—Maintainability of.*

Where during the course of an application under S. 87 of the Act, the landlord died and no action was taken to implead his heir, the decree passed against the dead person should be disregarded altogether. Another suit brought by the tenant for abatement of rent is under the circumstances maintainable. (*Oppenheim, S. M.*)

U. P. LAND REV. ACT (1901), S. 87.

GHANSHIAM DAS *v.* YUSUF. **14 L.R. 455 (Rev.) = 17 R.D 575.**

——**S. 87**—*Ejectment proceedings—Tenant holding under special agreement—Enhancement of rent—Decree against tenant for arrears—Rent deposited in Court—Ejectment of defendant as an occupancy tenant—Permissibility.*

Where a tenant who is holding under a special agreement under which he is to be ejected only on the rent falling into arrears, suffers a decree to be passed against him for such arrears, and deposits the amount into Court, he cannot be ejected on the groudd of his failing to pay rent at an enhanced rent at the suit of the landlord, as though he were an occupancy tenant. (*Walton, J.M.*) SHYAM BIHARI MISIR *v.* RAM SUNDAR. **14 L.R. 360 (Rev.) = 17 R.D. 488.**

——**S. 87**—*Ex-proprietary tenant — Abatement — Mode.*

In the case of an ex-proprietary tenant, the abatement of rent can be made by the Settlement Officer under S. 14 of the Agra Tenancy Act, 1926, and not under S. 10 of Act II of 1901. (*Smith, S.M. and Oppenheim, J.M.*) DULLAN SINGH *v.* TIKA SINGH. **15 R.D. 664.**

——**S. 87**—*Ex-proprietary tenant—Abatement of rent.*

In the case of an ex-proprietary tenant abatement of rent can be allowed by the Settlement Officer not under S. 54 but only under S. 87 in accordance with S. 14 of the Agra Tenancy Act, 1926. (*Smith, S.M. and Oppenheim, J.M.*) EWAZ ALI KHAN *v.* MAHBOOB ALI KHAN. **15 R.D. 662.**

——**S. 87**—*Object—Contract against enhancement under S. 33 (2), Rent Act—Liability to enhancement.*

Tenants are liable to enhancement under S. 87, Land Revenue Act, on the general principle that all contracts regarding revenue paying lands are liable to adjustment at the settlement. It is difficult to see why S. 87 was enacted if not to catch people whose rent cannot be enhanced under S. 33 (2) of the Rent Act by reason of the contract made against enhancement. (*Walton, J. M.*) MAHOMED ALI KHAN *v.* IRSHAD HUSAIN TALUQDAR. **16 R.D. 446 = 13 L.R. 191 (Rev.).**

——**S. 87**—*Scope—Increase in rent.*

The term of S. 87 are sufficiently wide to allow a discretion to deal with the determination of the rent separate from the enhancement of it. (*Keane, S.M. and Oppenheim, J.M.*) SHYAM BEHARI MISRA *v.* SALIG RAM. **15 R.D. 802.**

——**S. 87 (2) (b) (ii)**—*Order for abatement of rent—Previous sanction of Government necessary.*

An order for the abatement of rent cannot be made by the Settlement Officer unless the previous sanction of the Government has been obtained for that purpose. (*Oppenheim, J.M.*) DAN SINGH *v.* ABDUL HASAN QADRI. **15 R.D. 606 = 12 L.R. 335 (Rev.).**

——**S. 103**—*Scope—Wrong person paying—Procedure.*

Under S. 103 the Collector can determine the proportion of revenue payable on any specific area other than a definite share, the ownership of which is transferred during the currency of the settlement. But the Collector cannot determine who is responsible for paying the revenue so determined. The revenue is payable by the proprietor under the law. Where a person is wrongly assessed to revenue he should first apply to have the revenue determined under S. 103 and then bring a suit against the owner for arrears at such rate under Ss. 221 and 222. (*Oppenheim, S.M. and Drake Brockman, J. M.*) KUNJ BEHARI SINGH *v.* SHEO DAN SINGH. **18 R.D. 167 = 15 L.R. 434 (Rev.).**

U. P. LAND REV. ACT (1901), S. 110.

——**S. 103**—*Vendor selling his share reserving a specific area—Vendee's right to have revenue assessed on that area.*

When a specific area is reserved in favour of the vendor on a sale by him of his share, the vendee has a right to have revenue assessed on that area under S. 103. (*Grant, J.M.*) PUNA *v.* SHEO GOVIND. **1935 O.W. N. 1191 = 1935 R.D. 505.**

——**S. 106**—*Proceeding for partition—Correction of papers found necessary—Procedure.*

In a partition proceeding, the Assistant Collector passed the following order:—"The correction of the papers concerned should at once be taken in hand and the appellant should be informed when those corrections have been completely finished so as to enable him to file another partition application if he wishes so to do."

Held, that the order was not a proper one. The proper course was to have kept the case pending until the papers had been corrected and not to drive the party to a fresh partition. (*Oakden, S. M. and Oppenheim, J. M.*) SADHOSARAN MANI *v.* RAM RAJI. **15 R.D. 99 = 12 L.R. 10 (Rev.).**

——**Ss. 107 and 110**—*Application for imperfect partition—Subsequent application for perfect partition as imperfect partition was not practicable—Fresh proclamation and copy of* khewat—*If to be filed.*

The proprietors of a *thok* applied for an imperfect partition on which proceedings were taken, but it was found impracticable. An application for perfect partition was then made on the advice of the partition officer.

Held, that a copy of the *khewat* of the whole *mahal* must be filed and that a fresh proclamation must issue in the names of all the co-sharers. Whether the partition was to be perfect or imperfect or for a part or whole of the *mahal*, it is necessary that a copy of the *khewat* of whole *mahal* must be filed, and that the proclamation must issue to all the recorded co sharers of the *mahal*. (*Oppenheim, S.M. and Drake Brockman, J.M.*) MANNA SINGH *v.* BHIKHAM SINGH. **18 R.D. 613 = 16 L.R. 16 (Rev.).**

——**S. 107**—*Ganwadhar—Partition.*

A ganwadhar is exactly the same as an ordinary zamindar except that he pays a quit rent to a superior proprietor. It cannot be partitioned under S. 37 of the Agra Tenancy Act but can only be partitioned under S. 107 of the Land Revenue Act. (*Keane, S.M. and Oppenheim, J.M.*) RAM SUNDAR MISIR *v.* JADUNATH MISIR. **15 R.D. 779.**

——**S. 109**—*Partition proceeding—Collector's sanction accorded—Patti of less than five acres formed—Subsequent quashing of partition—Propriety.*

The partition officer first referred the matter to the Collector whether such a small area as 9 bighas and 16 biswas could be the subject matter of partition. The Collector decided that partition should continue and partition was actually carried out but when it went to the Collector for confirmation he quashed the proceedings on the ground that a separate patti of less than five acres should not be formed.

Held, that the partition should not be quashed at that stage, the parties having consented and incurred expense. (*Fremantle, S.M. and Burn, J.M.*) HARCHARAN SINGH *v.* SHER BAHADUR SINGH. **16 R. D. 289 = 13 L.R. 193 (Rev.).**

——**S. 110**—*Board's Circular 21-II, R. 5—Object.*

S. 110 was intended to apply only to cases where the *Mahal* or *Patti* under the partition was owned by more than two co-sharers.

Semble.—R. 5 of the Circular is capable of leading to grave abuses and requires to be amended. (*Smith,*

U. P. LAND REV. ACT (1901), S. 110.

J M.) HARIHAR BAKSH SINGH *v.* INDRA SEKHAR **14 R.D. 703.**

——**S. 110**—*Objections to partition—Limitation for —Extension of.*

The delay in filing objections to a partition may be condoned on good cause shown. (*Oppenheim, S.M. and Drake Brockman, J.M*) JAGDEO SINGH *v.* BANPHAL PANDEY. **14 L.R. 459 (Rev.)=17 R.D. 640.**

——**Ss. 110, 112 and 232**—*Objections to partition long after period allowed—Dismissal of—Appeal.*

Where, in a partition suit, no objections under S. 110 were filed within the period allowed by law, but an objection filed several years later was heard and dismissed by the partition officer under the special powers conferred by a circular of the Board of Revenue which did not, however, provide for appeals.

Held, that the circular did not, and could not, enlarge the powers of the District Judge under S. 112 of the Act and that the order of dismissal was not appealable. (*Bennet and Collister, JJ*) HARI DAS SAHU *v.* MT. NAIMA BIBI. **6 I R. (All) 392=146 I.C. 980=14 L. R. 677 (Rev.)=A.I R. 1933 All 845.**

——**S. 110**—*Scope—Purdanashin lady having knowledge of proceedings—Absence of personal notice—Effect.*

S. 110 does not require personal service of the proclamation at all. What the section lays down is that a copy of the proclamation shall if possible be served on each co-sharer personally. Where several attempts were made to serve a purdanashin lady personally with notice and it appeared that she should have had notice of the proceedings, *held*, that the case should be proceeded with on the assumption that she had notice (*Keane, S. M. and Smith, J. M.*) ABDUL HAMID *v.* FARIDAN BIBI. **15 R.D. 509=12 L.R. 169 (Rev.).**

——**S 110 (1) and (2)**—*Applicability—Application by co-sharer after expiry of time fixed by proclamation —Fresh proclamation—Necessity.*

The provisions of S. 110 (2) are not applicable when the time fixed by the proclamation under S. 110 (1) has already expired before a co-sharer puts in his application. In such a case it is necessary to issue a fresh proclamation. (*Oppenheim, S. M and Drake Brockman, J. M.*) HANSRAJ SINGH *v.* MAM RAJ. **11 O.W. N 1200=18 R.D. 500=15 L.R. 613 (Rev.).**

——**S. 110 (2)**—*Application for partition—Presumption as to regularity of proceeding—Onus of proving irregularity.*

The presumption is in favour of regularity of partition proceedings. Where it is alleged that applications for formation of a separate mahal were made subsequent to the proclamation, the onus is on the party alleging the irregularity to prove the same. (*Mukerji and Bennet, JJ.*) RAM REKHA MISRA *v.* LALLU MISIR. **53 All. 568=I.R 1931 All. 676=133 I.C 468=1931 A.L.J. 307=15 R D 322=A I.R. 1931 All 462.**

——**S. 110 (2)**—Pattis—*Partition by local officer—Impropriety*

It is desirable in the absence of reasons to the contrary that partition should be done by local officers. The mere fact that there are special reasons applicable to the partition of a large estate cannot apply to partition of new *pattis* in which strangers are also interested (*Keane, S. M. and Oppenheim, J. M*) JANG BAHADUR SINGH *v.* RAM PAT SINGH. **15 R D. 789**

——**S. 111**—*Appeal—Competency—Objection to partition—Rejection by Collector—Appeal.*

Where the objection to a partition raises a question of proprietary title within the meaning of S. 111 the order of the Collector rejecting the objection is appealable. (*Bisheshwar Nath, J.*) LAL BEHARI *v.* MAHARAJ DIN.

U. P. LAND REV. ACT (1901), S. 111.

130 I.C. 504=8 O.W.N. 66=15 R.D. 63=14 O.L.J. 140=12 L.R. 41 (Rev)=A I.R. 1931 Oudh 98.

——**Ss. 111 and 112**—*Case relating to partition or union of mahals—Jurisdiction of Civil Court.*

The jurisdiction of a Civil Court in a case relating to the partition or union of mahals is entirely restricted by the provisions of Ss. 111 and 112 of the Land Revenue Act having regard to S. 233 (*k*) of the Act And a suit cannot be maintained in a Civil Court when a Revenue Court has for one reason or other declined to entertain a question of proprietary title and has not dealt with the matter in any of the three ways set out in S. 111. (*Hasan, C.J., Raza and Fisheshwar Nath, JJ.*) KAMTA SINGH *v* RUDRA PRATAP SINGH. **9 Luck 249=6 I R. (Oudh) 93 (2)=14 L.R. 785 (Rev)=17 R.D 969 =10 O W.N. 1125=146 I.C. 138=A.I.R. 1933 Oudh 507 (F.B).**

——**S. 111**—*Non compliance—Interference in revision.*

It is open to the Assistant Collector to adopt any of the three courses mentioned in S. 111. Where however he holds that it is not obligatory on him to adopt any of the courses and proceeds with the partition, his order is erroneous and is liable to be set aside in revision. (*Keane, S. M. and Oppenheim, J. M.*) DHANUK DHARI *v.* GORAKH PRASAD. **15 R.D. 410.**

——**S. 111**—*Objection to partition—Procedure.*

Where in a partition suit one of the parties claims that they had been enjoying the properties in separate lots for a long time under a private partition the Court should afford the objector an opportunity to adduce evidence and prove his plea. (*Mukerji and Bennet, JJ.*) RAM PRASAD *v.* MITHAN LAL. **I R. 1931 All. 558 =132 I C. 814=14 R D. 700=A I R. 1931 All. 16.**

——**S. 111**—*"Question of proprietary title"—Objections to partition.*

A dispute as to whether certain plots should be treated as the severalty of a tenant or not raises a question of proprietary title. (*Oppenheim S. M. and Drake Brockman, J. M*) JAGDEO SINGH *v.* BANPHAL PANDEY. **14 L.R. 459 (Rev.)=17 R D. 640.**

——**S. 111**—*"Question of proprietary title"—Decision by Court of competent jurisdiction—Decree impugned on ground of fraud—Reference.*

When the question of proprietary title has been determined by a Court of competent jurisdiction, then S. 111 is no longer applicable and it is not open to the Revenue Court to refer the objector to the Civil Courts for getting the decree set aside on the ground of fraud. The question whether the decree of the Civil Court was obtained by fraud is not "a question of proprietary title" within the meaning of S. 111. (*Banerji and King, JJ.*) NURUL HASAN *v.* MT AISHA BI **53 All. 920=I R. 1931 All. 715=133 I C. 603=15 R D. 626=12 L.R. 240 (Rev)=A.I.R 1931 All 760.**

——**Ss 111 and 112**—*Question of proprietary title —Question as to which patti* arazidari *land is to be allotted.*

No question of proprietary title is raised in a case where the question is as to which patti the *arazidari* land is to be allotted. (*Knox, S. M. and Grant, J. M*) JAMUNA SINGH *v.* NASIRUDDIN. **1935 R.D. 412= 1935 O W.N. 957.**

——**S. 111**—*Question of proprietary title—Setting up prior partition.*

An objection made to an application for partition on the ground that the village has already been partitioned and could not be partitioned again raises a question of proprietary title within the meaning of S. 111. (Case-law discussed.) (*Bisheshwar Nath, J.*) LAL BEHARI *v.*

U. P. LAND REV. ACT (1901), S. 111.

MAHARAJ DIN. **130 I.C. 504=8 O W.N. 66=14 O. L.J. 140=12 L.R.41 (Rev.)=15 R.D. 63=A.I.R. 1931 Oudh 98.**

—— **Ss. 111 (1) (c) and 112**—*Death of party—Application for substitution of names—Dismissal—Appealability.*

Where during the course of partition proceedings a party died after the expiry of the date fixed for objection under S. 110 and an application for substitution of names was dismissed.

Held, that the order of dismissal did not fall under S. 111 (1) (*c*) and that no appeal lay under S. 112. (*Sulaiman, A C. J. and Smith, J.*) RAMJI BODH SHUKUL *v.* MT. MANTORNA. **I.R. 1931 All. 649=133 I.C. 409=1931 A.L.J. 1062=16 R.D. 20=A.I.R. 1932 All. 82.**

—— **S. 111 (1)**—*Effect of—Doctrine of constructive* res judicata—*Applicability of.*

Per *Hasan, C. J*—S. 111, sub-S. (1) of the Act does not create a bar of jurisdiction against the Court of Revenue to try questions of proprietary title, where such questions have previously been determined by a Court of competent jurisdiction. It is intended to give the effect of *res judicata* to a judgment of a Court of competent jurisdiction on a question of proprietary title determined by that Court. To such a case, the rule of constructive *res judicata* also may be extended.

Per *Bisheshwar Nath, J.* (with whom *Raza, J.*, concurred).—In order, however, that the bar of *res judicata* may prevail, it is essential that there must be a previous decree or order having the force of a decree. There is no room for incorporating in S. 111, the doctrine of constructive *res judicata* as contained in Explanation 4 to S. 11 of the C. P. Code and the bar of *res judicata* contained in S. 111 cannot be applied to a case where no objection was raised and no decision arrived at, on the ground that such an objection might and ought to have been raised in the earlier proceeding. (*Hasan, C. J., Raza and Bisheshwar Nath, JJ.*) BAJRANG BAHADUR SINGH *v.* BENI MADHO BAKHSH SINGH. **7 Luck. 716=I R. 1932 Oudh 243=137 I.C 606=16 R.D. 246=9 O.W N 488=13 L R. 246 (Rev.)=A. I R. 1932 Oudh 199 (F.B.).**

—— **S. 111 (1)**—*Plea of* res judicata *not raised—Issue regarding proprietary title—Jurisdiction of Collector to decide.*

A party relying on the plea of *res judicata* must prove in evidence the judgment on which the plea rests. In the absence of any such plea or proof, it is open to the Court of revenue to try the issue involving the question of proprietary title under Cl. (*c*) of sub-S. (1) in the event of its not proceeding to act under either of the two preceding Cls. (*a*) and (*b*). (*Hasan, C. J., Raza and Bisheshwar Nath, JJ.*) BAJRANG BAHADUR SINGH *v.* BENI MADHO BAKHSH SINGH. **7 Luck. 716=I.R. 1932 Oudh 243=137 I C. 606=9 O.W.N 488=16 R. D. 246=13 L.R. 246 (Rev.)=A.I.R. 1932 Oudh 199 (F.B.).**

—— **S. 112**—*Partition proceeding—Stay of—Power of High Court.*

Where an application for partition was filed in the Civil Court and a declaration was given and subsequently one of the parties preferred an appeal but the Collector meanwhile continued the partition proceedings,

Held, that the said proceedings could not be stayed by the High Court. (*King, J*) MATLOOB HASAN *v.* KALAWATI. **53 All 180=I R. 1931 All. 474=132 I.C. 42=14 R.D. 651=1930 A.L J. 1469=A.I.R. 1931 All. 57 (2).**

—— **S. 112**—*Powers of District Judge—Board's Revenue Circular No. 21, Dept. II, R. 9.*

U. P. LAND REV. ACT (1901), S. 118.

Circular of Board of Revenue No. 21, Dept. II, R. 9 cannot give powers to the District Judge which are in excess of those conferred by S. 112. (*Bennet and Collister, JJ.*) HARI DAS SAHU *v.* MT. NAIMA BIBI. **6 I. R (All.) 392=146 I.C. 980=17 R.D. 798=A.I.R. 1933 All. 845.**

—— **Ss. 113 and 114**—*Effect.*

As S. 114 follows immediately after S. 113, the only possible way to interpret the two sections is that the partition proceeding mentioned in S. 114 need not necessarily be drawn up in cases referred to arbitration. (*Oppenheim, S.M. and Knox, J.M.*) SHEORAJ SINGH *v.* DULAM SINGH. **13 L.R. 85 (Rev.)=16 R.D. 182.**

—— **S. 114**—*Chaklat partition—Essentials of.*

The most essential part of a partition, in which each party is to have an area equivalent in value to his share in the property, is a scheme of valuation. It is also desirable in such a case to make local inspections during the course of the partition. (*Oppenheim, S.M. and Drake Brockman, J. M.*) FIRDAUS ZAMANI BEGAM *v.* MAHOMED MUZAMMIL HUSAIN. **18 R.D. 533=15 L R 605 (Rev.).**

—— **S. 116**—*Costs of partition proceedings—Liability of other co-sharers to reimburse applicant—Mode of realisation.*

S. 116 does not say that the costs shall be realised from the applicant but shall be levied from the parties, which implies that while an applicant may be ordered to pay up in the first instance, the other parties are liable to pay their share. It is the duty of the partition officer, though he may levy the estimated costs of the partition from the applicant in the first instance, to reimburse him to the extent, that is payable by the other co-sharers by realising their shares from them. It is presumed, especially when there is an agreement to that effect in the partition proceeding, that the other participants will pay their share of the costs without demur, but where they do not do so, it is the duty of the partition officer with or without application by the applicant to realise the amount from the defaulting participants. Such costs are recoverable as if they were "an arrear of revenue" which means that they are recoverable by the various processes and in the manner set forth in Chapter VIII of the Land Revenue Act. There is no period of limitation governing proceedings for the recovery of such costs. (*Oppenheim, S.M. and Drake Brockman, J.M.*) GHAFURAN BIBI *v.* JAI KISHAN RAM. **11 O.W.N. 675=18 R D. 291=15 L R. 345 (Rev.).**

—— **S. 116**—*Partition—Costs—Abortive partition—Liability of Government—Procedure*

The costs of partition proceedings have to be borne by the parties thereto in the manner laid down in the proceedings to which they have agreed. But where the proceedings have been abortive owing largely to the fault of partition officer, it is open to the Collector, if he thinks the case a hard one and that the Government should in equity bear the costs, to make a reference to the Board of Revenue on the matter. (*Oppenheim, S.M. and Drak Brockman, J.M.*) MANNA SINGH *v.* BHIKHAM SINGH **18 R.D. 613=16 L.R. 16 (Rev.).**

—— **S. 117**—*Construction—"Severalty".*

"Severally" for purposes of partition under the U P. Land Revenue Act really means separate ownership and not separate proprietary possession; and land which is not in the separate ownership of a person is not his severally. (*Oppenheim, S.M. and Drake Brockman, J. M*) AJIT SINGH *v.* BEG RAM. **11 O.W.N. 1394=18 R.D. 577.**

—— **S. 118**—*Construction—"Dwelling house or other building"—Manure heap or cattle trough.*

U. P. LAND REV. ACT (1901), S. 118.

A heap of manure or a cattle trough is not a "dwelling-house or other building," within the meaning of S. 118 and, therefore, a co-sharer to whose share is allotted a plot of land over which another co-sharer has made such troughs or heaps of manure, is entitled to actual possession of the plot. (*Ganga Nath, J.*) BRAJ KISHORE UPADHYA *v.* PANCHAITI AKHARA. **155 I. C. 667 = 7 R.A. 971 = 1935 R.D. 265 = 1935 A.W.R. 727 = 1935 A.L.J. 819 = A.I.R. 1935 All. 666.**

——**S. 118**—*Partition—Allotment to co-sharer of land built on by another—Right to actual possession.*

On a partition under the U. P. Land Revenue Act, if the site of the house of one co sharer is allotted to another, the presumption is that the former is to retain possession of the house owned by him. But when there is no building at the time of partition, he has no right to remain in possession of the plot, and the co-sharer to whose share the plot is allotted is entitled to actual possession of it. (*Ganga Nath, J.*) BRAJ KISHORE UPADHYA *v.* PANCHAITI AKHARA. **155 I.C. 667 = 7 R.A. 971 = 1935 R D. 265 = 1935 A.L.J. 819 = 1935 A.W.R. 727 = A.I.R. 1935 All. 666.**

——**Ss. 118 and 119**—*Partition—Erection of building and planting of trees on the eve of—Valuation—Basis.*

A co sharer who erects a building and plants trees on common land on the eve of an application for partition by another co-sharer with a view to secure that land for himself, such land having a special potential urban value, should not be allowed to have his own way. If that plot is to be allotted to him, it must be valued on a basis higher than the market-value. (*Oppenheim, S.M. and Drake Brackman, J.M.*) PREM NARAIN *v.* SADDIQ AHMAD. **18 R D. 648 = 16 L.R. 59 (Rev.).**

——**S. 118**—*Partition—Sites of buildings belonging to other co-sharers, allotted to a co-sharer—No ground rent fixed—Co-sharer, if can apply subsequently for assessment of ground rent.*

Where at a partition the sites of buildings belonging to other co sharers are allotted to a co-sharer, and no ground rent is fixed in the course of the partition proceedings, it is open to the co-sharer to subsequently ask the Revenue Authorities to assess the ground rent. It is the duty of the owners of the buildings to apply to the Partition Officer for fixing ground rent on the sites occupied by them, and it would be most inequitable if they are to derive any benefit, for the neglect of their duty at the time of the partition. (*Knox, S. M. and Grant, J.M.*) AHMADI BEGAM *v.* DEBI DIN. **1935 O.W.N. 1176 = 1935 R.D. 511.**

——**Ss. 120 and 233 (k)**—*Partition proceeding—Declaration of ownership of well—Finality.*

Under S. 120 of the Land Revenue Act, a well has to be considered as attached to the land for the benefit of which it was made and a decision in the partition proceedings as to its ownership is final under S. 233 (*k*). (*Kendall, J.*) BALWANT *v.* KEHRI. **151 I.C. 830 (2) = 7 R.A. 229 = 3 A.W.R. 485 = 18 R.D. 164 = 15 L.R. 221 (Rev.) = A.I.R. 1934 All. 619.**

——**S. 123**—*"Consent"—Meaning.*

A co-sharer who presses for the inclusion of a certain plot of land in his share does more than "consent" to the course, within the meaning of S. 123. Such inclusion is not "without his consent." (*Oppenheim, S.M. and Drake Brackman, J.M.*) AJIT SINGH *v.* BEG RAM. **11 O.W.N. 1394 = 18 R.D. 577.**

——**S. 126**—*Partition—Allotment of* sir *land—Acquisition of exproprietary rights.*

Arrangements made at a partition are binding on the parties to the partition. Where certain *sir* land was allotted to a co-sharer but he failed to cultivate the land after partition.

Held, that he did not become an exproprietary tenant. (*Oppenheim, S.M.*) INTA KHATUN *v.* GHANI KHAN. **18 R.D. 140 = 15 L.R. 173 (Rev.).**

U. P. LAND REV. ACT (1901), S. 130.

——**S. 126**—*Partition—Allotment of* sir *land of one to another—Mortgagee continuing in possession—Exproprietary rights—If arise.*

In a partition among co-sharers *sir* land of one of them was allotted to another. The land, which had been mortgaged with possession, continued to be in the mortgagee's possession even after the partition.

Held, that there was no accrual of ex-proprietary rights in favour of the previous *sir* holder. (*Oppenheim, S.M. and Drake Brockman, J. M.*) BINDHACHAL SAHI *v.* SURAJDIN. **1935 R.D. 49.**

——**Ss. 126 and 127**—*Partition of village—Land allotted to a person as not burdened by tenant right—Subsequent declaration of ex-proprietary rights in favour of another on his application—Suit by former to eject latter as trespasser.*

In a suit for ejectment of the defendant as trespasser, it was found that at a partition of village, the plaintiff was given the land in question on the assumption that it was not burdened by tenant right and that subsequently, on the application of the defendant claiming ex-proprietary rights, a number of holdings of such land were declared to be ex proprietary tenancies under the orders of the partition officer.

Held, that there has been irregularity and carelessness in the conduct of this partition, and one or the other party must suffer, and that on the whole, when a claim has been made and definitely allowed, it would be more inequitable to disallow it now, than to give to the other side a small area which is burdened by ex-proprietary right. (*Knox, J.M.*) LACHHMI NARAIN RAM *v.* RAM PRASAD MISIR. **1935 R.D. 241 = 1935 O.W.N. 507.**

——**Ss. 126 and 127**—*Partition—Omission to fix rent—Accrual of ex-proprietary rights—Liability of tenants to ejectment.*

Where no rent was fixed on the plots during the partition but the defendants continued to cultivate them, the entry in the rent column of the revenue papers being "*bila tasfia*" and subsequently the plaintiffs sued for rent and for their ejectment as trespassers,

Held, that the omission to fix the rent at the partition did not deprive the defendants of their ex-proprietary rights, and that they could not be ejected. (*Kisch, J.*) NANAK PRASAD *v.* CHANDRIKA PRASAD. **8 O.W.N. 1023 = 15 R.D. 637.**

——**S. 130**—*Duty of Collector under—Distribution of revenue on partition—Effect of contract between parties—Principles of distribution.*

The Collector is responsible, under S. 130, for distributing the revenue according to the rules, and the parties to the partition have no authority to decide, by contract *inter se*, how much revenue should be assessed on a particular share. Their contract may or may not be enforceable, but the Collector is bound, and would be bound, even in the absence of an appeal against the order of the Partition Officer, to see that the revenue is properly distributed according to the rules. To value only one share would lead to a faulty distribution. The whole share of all the parties should be valued on the principles accepted by the Settlement Officer, and only then would a fair distribution be possible. (*Knox, S.M. and Grant, J.M.*) HARI SHANKAR *v.* AMBA PRASAD. **1935 R.D. 501.**

U. P. LAND REV. ACT (1901), S. 133.

———**S. 133 (1)**—*Construction—'Partition'—Meaning.*

The word 'partition' in S. 133 (1) (*d*) may be taken to include proposals of partition. (*Drake Brockman, S. M. and Holmes, J.M.*) BALRAM DHAR DUBEY *v.* NAGESHAR DHAR DUBEY. **14 L.R. 927 (Rev.)=11 O.W.N. 46=18 R.D. 7.**

———**S. 133 (1) (d)**—*Construction—"Confirmation"—Proposal of partition—Appeal.*

The word "confirmation" in S. 133 (1) (*d*) means either original orders of a Collector who is himself making a partition accepting or approving of proposals made by the officer who has been deputed to allot lands on the spot or appellate orders accepting or approving of orders passed by an Assistant Collector where the latter is making the partition. The section also covers original orders changing the proposals made. When effect has been given to all orders passed by the Collector in the second stage of the proceedings whether original or appellate, only then is an order of confirmation of the partition in the true sense of the word in S. 131 passed. This is the order which is appealable under S. 133 (2), not the orders passed under S. 133 (1) (*d*). (*Drake Brockman, S.M. and Holmes, J.M.*) BALRAM DHAR DUBEY *v.* NAGESHAR DHAR DUBEY. **14 L. R. 927 (Rev.)=11 O.W.N. 46=18 R.D. 7.**

———**S. 133 (2)**—*Appeals under—Question of fact—Correction of injustice.*

Appeals under S. 133 (2) are first appeals and therefore questions of fact may be taken up. The Commissioner has also under that section wide powers and can correct injustices even to the extent of amending the partition proceeding. (*Drake Brockman, S.M and Holmes, J.M.*) BALRAM DHAR DUBEY *v.* NAGESHAR DHAR DUBEY. **14 L.R. 927 (Rev.)=11 O.W.N. 46 =18 R.D. 7.**

———**Ss. 133 (2) and 214**—Objections to partition—Decision by Partition Officer—Appeal—Limitation for —Confirmation of partition—No extension by. *See* U. P. LAND REVENUE ACT, SS. 214 AND 133 (2). **14 L. R. 683 (Rev.).**

———**S. 139**—*Union of* mahals *under—If effects change in ownership.*

A union of two or more *mahals* under S. 139 does have the result of effecting a change in the rights of ownership of the proprietor or proprietors of the original *mahals*. The proprietors of the different *mahals* so amalgamated do not thereby become joint owners of the entire area of the new combined *mahal*. (*Nanavutty, Thomas and Zia Ul-Hasan, JJ.*) ABUZAR *v.* SHASHDAR SINGH. **7 R.O. 346=153 I.C. 498=1935 R.D. 7 =16 L.R. 155 (Rev.)=1935 O.W.N. 1=A I.R. 1935 Oudh 82 (F.B.).**

———**Ss. 142 and 146**—Assignee of revenue—Right to proceed against all co-sharers of mahal—Remedy, if confined against lambardar only. *See* AGRA TENANCY ACT, S. 223. **1935 R.D. 577=1935 A.W.R. 1479.**

———**S. 142**—Purchase of zamindari—Payment of arrear of revenue—Right to recover from vendor. *See* CONTRACT ACT, SS. 69 AND 70—APPLICABILITY. **18 R.D. 254=A.I.R. 1934 All. 712.**

———**S. 142**—*Suit for arrears of revenue by assignee—Decree against co sharers of mahal—Decree specifying liability of each—Legality.*

The assignee of revenue is given the right to sue under S. 223 of the Agra Tenancy Act for arrears of revenue, and under S. 142 of the Land Revenue Act, it is provided that the proprietors of a mahal are jointly and severally responsible to Government for the revenue assessed thereon. There is no reason why they should not be burdened with the same liability in the case of an assignee of revenue. Therefore in a suit by him for arrears of revenue, a joint decree should be passed aginst the co sharers for the entire claim without apportioning the separate liability of each. (*Baipai, J.*) MEHRZIA BEGUM *v.* GULZAR SINGH. **157 I.C. 1119 =8 R A. 263=1935 A.L J. 517=1935 R.D. 256 (2) =1935 A.W.R. 621=A.I.R. 1935 All. 553.**

U. P. LAND REV. ACT (1901), S. 201.

———**S. 143**—Right to interest—Assignee of Government Revenue—Right to arrears and interest. U. P. LAND REVENUE ACT, S. 184. **18 R.D. 308=11 O.W. N. 754=A.I.R. 1934 Oudh 259 (2).**

———**S. 152**—Transferee of share in under proprietary right—Status of. *See* OUDH RENT ACT, S. 3 (10). **11 O.W.N. 1559=18 R.D. 673.**

———**S. 164**—Order of Commissioner under—Right of appeal to the Board. *See* U. P. LAND REVENUE ACT, S. 212. **1935 R.D. 197=1935 O.W.N. 476.**

———**S. 184**—*Right to interest—Assignee of Government Revenue—Suit for arrears—Right to interest.*

In a suit by the Assignee of Government Revenue against the lambardar, he is entitled to recover his arrears of land revenue with interest. A.I.R. 1929 All. 29, Rel. on; 23 All. 5, Ref. (*Nanavutty, J.*) SHAMS ARA BEGAM *v.* AMBIKA DUTT RAM. **149 I.C. 901= 18 R D. 308=6 R.O. 602=11 O.W.N. 754=A.I.R 1934 Oudh 259 (2).**

———**S. 185**—*Wrong order—No revision—Remedy.*

Matters relating to the whole of Chap. VIII collection of Revenue, under which S. 185 falls have not been declared judicial matters by the Local Government and no revision lies to the Board. The proper procedure is for the Collector to submit the proceedings of the Assistant Collector through Commissioner for the orders of the Local Government under S. 218. (*Drake Brockman, S.M. and Holmes, J.M.*) LAL JOGENDRA BUX SINGH *v.* AHMAD ALI KHAN. **14 L.R. 903 (Rev.).**

———**S. 199**—*Civil Court—Revenue Court deciding question of title.*

"There is nothing in S. 199 to justify the suggestion that the Revenue Court deciding a question of title must be deemed to be a Civil Court." (*Boys and Young, JJ.*) SARJU PRASAD SONAR *v.* MAHADEO PRASAD PANDEY. **54 All. 786=1932 A.L.J. 511=16 R.D. 400= 141 I.C. 641=I.R. 1933 All. 85=A.I.R. 1932 All. 483.**

———**S. 200**—*Failure of party to appear—Procedure*—Ex parte.

Under S. 200, when the parties fail to appear, the Court is competent to determine the proceedings *ex parte*, but it is bound to determine in accordance with law. (*Oppenheim, S.M. and Drake Brockman, J. M.*) KUREY SINGH *v.* DEBI DAYAL. **18 R.D. 423 (1)=15 L.R. 540 (Rev.).**

———**S. 201**—*Order appointing* patwari—*Appeal to Collector—Persons impleaded as parties but not appearing—If precluded from appealing against Collector's order.*

Persons who were impleaded as parties to an appeal before the Collector from an order of an Assistant Collector appointing a *patwari*, but who did not appear before him, are not precluded thereby from appealing to the Commissioner from the order of the Collector. (*Drake Brockman, S.M.*) HARBAN SINGH *v.* MOHAMMAD MUSTAFA HAIDER. **1935 O.W.N. 1194=1935 R.D. 509.**

———**S. 201**—*Power to review—Requisites for.*

The power to review decisions under S. 201 can only be exercised when summons have been served on the parties and they have not appeared as laid down in

U. P. LAND REV. ACT (1901), S. 201.

S, 200. (*Walton, J.M.*) JASWANT SINGH *v.* NAURANG SINGH. **14 L.R. 73 (Rev.)=17 R.D. 75.**

———**S. 201**—*Refusal to restore case—Remedy—Appeal.*

An appeal is the proper remedy of an aggrieved party against an order under S. 201, refusing to restore a case. (*Drake Brockman, J. M.*) KUREY SINGH *v.* DEBI DAYAL. **18 R.D. 423 (1)=15 L.R. 540 (Rev.).**

———**S. 203 and 204**—*No reference under S. 203—Application for filing award—Competency of.*

There is no provision in the Land Revenue Act or in the C. P. Code, which would give a Court hearing cases under the land Revenue Act jurisdiction to entertain an application under R. 20, Sch. II, C.P. Code. Where there has been no reference to arbitration under S. 203 of the Land Revenue Act, S. 204 does not apply and an application is not maintainable to file an award made in a reference touching the subject-matter of the suit but made out of Court. (*Oppenheim, S. M.*) JHANGAI KOERI *v.* RAM KARAN SINGH. **14 L.R. 35 (Rev.)=17 R.D. 36.**

———**S. 204**—*Applicability—Arbitrations in partition cases.*

The procedure prescribed in Sch. II, C. P. Code, will equally apply to arbitrations in partition cases. (*Oppenheim, S. M. and Knox, J. M.*) SHEORAJ SINGH *v.* DULAM SINGH. **13 L.R. 85 (Rev.)=16 R.D. 182.**

———**Ss. 210 and 211**—*Effect—Appealable—Orders.*

A reference to the provisions of Ss. 210 and 211 shows that no orders under the Act other than those passed in proceedings under Cl. (*c*) of S. 111 (1) are made appealable to Civil Courts. (*Sulaiman, A. C. J. and Smith, J.*) RAMJI BODH SHUKUL *v.* MT. MANTORNA. **16 R.D. 20=I.R. 1931 All. 649=133 I.C. 409=1931 A.L.J. 1062=A.I.R. 1933 All 82.**

———**(as amended by Act II of 1932), S. 210 (5)**—Partition proceeding—Specific orders—Objections to—Limitation for—Belief that orders could be challenged in appeal—Sufficient cause for extension of. *See* LIMITATION ACT, S. 5—SUFFICIENT CAUSE. **14 L.R. 191 (Rev.)=17 R.D. 247.**

———**S. 212**—*Applicability—Partition Officer—Order based on local inspection—Confirmation by Collector—Interference by Commissioner—Jurisdiction.*

A Partition Officer after a local inspection passed an order with regard to certain trees, which he found standing on the boundary line. The Collector confirmed that order on appeal, accepting the opinion of the Partition Officer. The Collector's order showed that he applied his mind to the case and considered the order judicially.

Held, that none of the provisions of S. 212 applied to the case and that the Commissioner had no jurisdiction to set aside the Collector's order in second appeal. (*Oppenheim, S.M. and Drake Brockman, J.M.*) UGGER SINGH *v.* RANJIT SINGH. **18 R.D. 529=15 L.R. 628 (Rev.).**

———**S. 212**—*Order of Commissioner under S. 164—Right of appeal to the Board.*

An order passed by the Commissioner under S. 164 is not a "judicial" order in the sense of the Act, and the Board has, therefore, no jurisdiction to entertain an appeal against that order under S. 212, the provisions of which are subject to the provisions of S. 210. The appellant's remedy, if any, lies under S. 219 of the Act, first paragraph. (*Drake Brockman, J. M.*) SOHAN LAL *v* NANHA. **1935 O.W.N. 476=1935 R.D. 197.**

———**S. 212**—*Partition—Confirmation—Subsequent changes—Rights of parties if modified.*

U. P. LAND REV. ACT (1901), S. 219.

In partition cases, it is not the date of filing the suit but the conditions laid down in the partition proceeding which determine the rights of the parties as against each other. When a partition proceeding has been confirmed, saying that partition would be made on the basis of the papers of a certain year, the conditions of that year so far as proprietary rights are concerned should be maintained irrespective of subsequent changes. (*Oakden, S. M. and Smith, J. M.*) RAM HARAKH PANDEY *v.* CHUNNI SINGH. **15 R.D. 1.**

———**S. 212 (b)**—*Second appeal — Commissioner's order—Question of fact—Interference.*

Where the Collector varies the order of the Assistant Collector, an appeal lies to the Commissioner on law as well as on facts. The order of the Commissioner cannot be impugned in second appeal on a question of fact. (*Walton, J M*) CHUT KANNO LAL *v.* ABDUL KARIM KHAN. **16 R.D. 520.**

———**S. 212**—*Second appeal — Findings of fact — Interference.*

The question whether the allotment made in pursuance of a partition was properly done is a question of fact and the Commissioner cannot interfere in second appeal with concurrent findings on that question. Commissioner's order set aside in further appeal. (*Keane, S. M. and Oppenheim, J M.*) MAHADEO PRASAD *v.* GIRDHAR DAS. **15 R.D. 791.**

———**S. 213**—*Jurisdiction of Board of Revenue.*

Where the decision of the appellate Court is not contrary to any specified law but it is contrary to case-law as decided by the Board of Revenue, the Board may interfere. (*Oakden, S. M. and Smith, J. M.*) RAM SARUP PANDE *v.* RAM GHULAM. **14 R.D. 649.**

———**S. 213**—*Proceeding for fixation of ex-proprietary rent—Interference by Revenue Board.*

In proceedings for the fixation of ex proprietary rent there is no right of appeal to the Board but it can interfere in revision if there is an obvious error in the decision of the Assistant Collector. (*Oakden, S. M. and Smith, J. M.*) UMRAO KUNWAR *v.* GANGA SAHAI. **14 R.D. 599.**

———**Ss. 214 and 133 (2)**—*Objection to partition—Decision by Partition Officer—Appeal—Limitation for—Confirmation of partition—No extension by.*

Objections against the Amin's proposals were decided by the Partition Officer in May, 1928, and the Collector decided the appeal in September, 1928. The partition was finally confirmed by Collector in June, 1932. The appellant filed the appeal in January, 1933, not against the order confirming the partition but against the Kuras,

Held, that the appeal should have been filed within sixty days of the decision of the appeal in September, 1928 and that the confirmation of the partition did not give a fresh starting point of limitation. (*Holmes, J. M.*) BHAGWAT SINGH *v* BISHAMBHAR SAHAI. **14 L.R. 683 (Rev.).**

———**S. 219**—*Appeal—Order of Commissioner directing transfer of a certain patwari—Appeal to Board of Revenue—Maintainability—Proper remedy.*

The Commissioner, in his order disposing of an appeal in a different matter, added a rider that the Collector should transfer a certain patwari to another circle, and he was so transferred.

Held, that no appeal lay to the Board of Revenue, the proper remedy of the patwari being to proceed under S. 219, U. P. Land Revenue Act, of the proceedings were non-judicial, not connected with the settlement the Board had the same powers as the Local Government under the 1st part of S. 219; and notwithstanding that the appeal was not competent the Board could deal with

U. P. LAND REV. ACT (1901), S. 219.

the matter in revision. (*Oppenheim, S. M. and Drake Brockman, J.M.*) BHIRGUNATH LAL *v.* NARBADESWAR PRASAD. **1935 R.D. 55.**

———**S 219**—*Revision—Cases governed by Scheduled Districts Act.*

The Board has no revisional jurisdiction in cases governed by rules framed under S. 6 (*b*) of the Scheduled Districts Act, 1874, to regulate the procedure of the Revenue Officers appointed in Kumaun. (*Oppenheim, J.M.*) HIRA SINGH *v.* NATHUA. **15 R.D. 656.**

———**S. 219**—*Revision—Competency—Second appeal available—No revision.*

Where the order of the Collector refusing mutation is reversed in appeal by the Commissioner, a second appeal lies to the Board under S. 212 (*b*); where no second appeal has been made, the Board has no jurisdiction in revision. (*Oppenheim, S. M. and Drake Brockman, J M.*) DWARKA DHISH JI *v.* MT. ARBI. **14 L.R. 595 (Rev.)=17 R.D. 675.**

———**S. 219**—*Revision—Powers of revision under the Nayabad Rules of* 1931 *and Water Rules of* 1930.

The Board of Revenue had powers of revision under the Nayabad Rules of 1916. But they had no such power under the Water Rules of 1917 nor have they any such power under the Nayabad Rules of 1931 and under the Water Rules of 1930 (*Oppenheim, S. M. and Walton, J. M.*) DHAN SINGH *v.* BHANA. **13 L.R. 415 (Rev.)=17 R.D. 40**

———**S. 220 (2)**—*Scope—Board of Revenue—Power to review their orders.*

S. 220 (2) contemplates decrees or orders passed judicially by it being reviewed and the Board have always unrestricted powers of reviewing their own orders, whether these relate to judicial matters or non-judicial matters. The amendment to S. 220 made by the U. P. Board of Revenue Act was not intended to restrict the power to matters only connected with settlement. (*Drake Brockman, S. M. and Holmes, J. M.*) LAL JOGENDRA BUX SINGH *v.* AHMAD ALI KHAN. **14 L.R. 903 (Rev).**

———**S. 227**—*Jurisdiction of Revenue Court—Injunction restraining lambardar from making collections—Revenue Court's jurisdiction.*

An application by the sole proprietor of a *patti* for permission to make collections himself amounts to an injunction prohibiting the lambardar from collecting which the Revenue Courts have no jurisdiction to grant. The matter is not covered by S. 227 of the U. P. Land Revenue Act. There is nothing in that Act which gives the Revenue Courts jurisdiction in the matter. The Civil Courts alone have jurisdiction in the matter. (*Oppenheim, S.M. and Drake Brockman, J.M.*) KHUNNI LAL *v.* BAKHT BAHADUR. **18 R.D. 412=15 L.R. 535 (Rev.)=11 O.W.N. 990.**

———**S. 232**—*Appeal—Competency—Objection to partition long after period allowed—Dismissal of—Appeal.*

Where, in a partition suit, no objections under S. 110 were filed within the period allowed by law, but an objection filed several years later was heard and dismissed by the partition officer under the special powers conferred by a circular of the Board of Revenue which did not, however, provide for appeals.

Held, that the circular did not and could not enlarge the powers of the District Judge under S. 112 of the Act and that the order of dismissal was not appealable. (*Bennet and Collister, JJ.*) HARI DAS SAHU *v.* MT. NAIMA BIBI. **6 R.A. 392=146 I.C. 980=14 L.R. 677 (Rev.)=A.I.R. 1933 All. 845.**

———**S. 233**—*Applicability—Suit between under-proprietors for declaration as to rent—Maintainability in Civil Court.*

U. P. LAND REV. ACT (1901), S. 233.

The words of S. 233 are wide enough to cover all kinds of disputes in connection with S. 79 of the Act and no person, whether superior proprietor or under proprietor or whether a stranger, can bring in the Civil Court a suit challenging the under-proprietary rent determined by the Settlement Officer under S. 79.

Held, a suit between two under-proprietors for a declaration as to rent was barred by S. 233. (*Nanavutty, J.*) SHAHDEO BUX SINGH *v.* BALBHADDAR SINGH. **I R 1931 Oudh 399 (2)=134 I.C. 607 (2)=15 R.D. 419=12 L.R. 187 (Rev.)=14 O.L.J. 478=8 O.W.N. 841=A.I.R 1931 Oudh 343.**

———**S. 233**—*Jurisdiction of Civil Court—Declaratory suit that defendants are not lessees possessed of heritable and non-transferable rights*

A suit for a declaration that defendants are not lessees of heritable and non-transferable rights in the village is not cognizable by Civil Court, as the declaration, if granted, will amount to the determination of the class of tenants to which the defendants belong. (*Wazir Hasan, C. J. and Allsop, J.*) AVDHESH SINGH *v.* LACHHMAN SINGH. **9 Luck 154=147 I C 823=6 R.O. 313=14 L.R. 826 (Rev.)=17 R.D. 985=10 O.W.N. 1138=A.I R 1933 Oudh 514.**

———**S. 233 (b)**—*Jurisdiction of Civil Court—Co-sharer exclusively entitled to patti—Suit for declaration regarding lambardar's right to collect rent—Maintainability.*

S 233 (*b*) does not bar the jurisdiction of the Civil Court to entertain a suit by a co-sharer who is exclusively entitled to a *patti* to sue for a declaration that the lambardar has no right to sue for the rent of that co sharer for that *patti*. (*Mukerji and Niamatullah, JJ.*) KHAN ALI KHAN *v.* MASIH UL ZAMAN KHAN. **16 R.D 22=I.R 1931 All 839=134 I.C. 455=1931 A.L J. 1068=A.I R. 1932 All. 152.**

———**S. 233 (k)**—*Applicability.*

The provisions of S 233 (*k*) have no application to the rights of persons who do not seek litigation but are merely defending their own possession. (*Hasan, C. J. and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I R 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

———**S. 233 (k)**—*Applicability—Defendant's title to grove admitted—Defendant shown as tenant by mistake of Partition Officer—Suit for ejectment.*

The title of the defendant to a grove was admitted by the plaintiff himself before the Partition Officer and there was no adjudication of the title of defendant in respect of the grove but the Partition Officer by a mistake showed defendant as tenant and the plaintiff as owner of the grove. The plaintiff sued for rent and the defendant claimed title to the grove.

Held, that defendant's claim should not be rejected under S. 233 (*k*), as the section has no application to this case. (*Nanavutty, J.*) MANI LAL *v.* LAL BAHADUR. **6 R.O 465=148 I.C. 911=18 R.D. 272=11 O.W.N. 519=A.I.R. 1934 Oudh 174.**

———**S. 233 (k)**—*Applicability—Jurisdiction of Civil Court—Application for partition—Partition not effected.*

The provisions of S. 233 (*k*) do not come into operation in a case where an application for partition is made, but the proceedings are afterwards quashed and no partition takes place. A suit in the Civil Court is not barred in such a case. (*Allsop, J.*) MOHAMMAD MUSA *v.* QASIM HUSAIN. **155 I C. 1063=1935 A.W.R. 766=7 R.A. 1025=1935 R.D. 316=1935 A.L.J. 964=A.I.R. 1935 All. 739.**

———**S. 233 (k)**—*Applicability—Partition decreed by Revenue Court—Suit for declaration of title against strangers—Bar.*

U. P. LAND REV. ACT (1901), S. 233.

Where in the civil suit by one co sharer there was no attempt made to interfere with any distribution of shares made by the Revenue Court and all that was done was to ask the Court to determine the plaintiff's proprietary title as against defendants, *held*, that the suit was not barred by S. 233 (*k*). (*Raza and Pullan, JJ.*) CHANDRA BALI *v.* DRIGPAL SINGH. **6 Luck. 419=I.R. 1931 Oudh 93=129 I.C. 173=7 O.W.N. 1106=14 R.D. 669=14 L.R. (Rev.) 385=A.I.R. 1931 Oudh 21.**

——S. 233 (k)—*Applicability—Separate entry in partition case—Subsequent suit for declaration—Bar.*

Where the Revenue Court allowed separate entry in a partition proceeding and subsequently a widow in whose name the property stood but who had no title thereto sued for a declaration that a gift deed executed by her was invalid, *held*, that the latter suit was not barred by S. 233 (*k*). (*Sen and Niamatullah, JJ.*) RAM SUKH PANDEY *v.* PIRTHI SINGH. **I.R. 1931 All. 383=131 I.C. 527=15 R.D. 74=1930 A.L.J. 1307=A.I.R. 1931 All. 47.**

——S. 233 (k)—*Applicability—Suit to settle rights* inter se.

Where the object is not to disturb the mahals that were formed at the partition, but is merely to decide the rights *inter se* of the plaintiff and defendant within those mahals, the suit is not barred by the provisions of S. 233 (*k*). (*Smith and Allsop, JJ.*) RAJ RAJESHWARI KAUR *v.* JANG BAHADUR SINGH. **9 Luck. 97=6 I.R. (Oudh) 88=146 I.C. 131=14 L.R. 746 (Rev.)=17 R.D. 887=10 O.W.N. 958=A.I.R. 1933 Oudh 415.**

——S. 233 (k)—*Application for partition—Mahal divided into four pattis—Entry in name of brothers and sister—Claim for larger share—Civil suit, if maintainable.*

Two co-sharers of a village made an application to the Revenue Court for separation of their shares by partition. The result of the partition was to divide the mahal into four pattis. One of these pattis was allotted to two brothers *A* and *B* and their sister *C* jointly, the two brothers being recorded as owning 14 shares and the sister *C* being recorded as owning one share only. Subsequently *C* brought a civil suit against *A* and *B* claiming a larger share than what was recorded in her name as a result of the partition proceedings,

Held, that as in the partition proceedings, there was no conflict of interest between *A*, *B* and *C* and as for the purpose of effecting the partition, it was unnecessary to determine the shares of the parties *inter se*, *C's* suit was not barred by *res judicata*.

Held, further, that *C's* suit was not barred by S. 233 (*k*) because the question of title, though it might have been raised under S. 111 did not affect the partition. (*Banerji and King, JJ.*) MD. MOHIT ULLAH *v.* BIBI HALIMA BEGAM. **54 All 742=I.R. 1932 All. 546=139 I.C. 176=16 R.D. 476=13 L.R. 298 (Rev.)=1932 A.L.J. 621=A.I.R. 1932 All. 666.**

——S. 233 (k)—*Construction—"Suit with respect to partition."*

Per *Hasan, C.J.*—The word 'partition' in Cl. (*k*) must be understood in precisely the same sense in which it is defined in S. 106. So a suit for a declaration that the plaintiff is the proprietor—and not the under-proprietor of certain lands—is not a suit with respect to partition.

Per *Bisheshwar Nath, J.* (with whom *Raza, J.*, concurred).—The words "with respect to partition" are very wide. Any matter which has the effect of disturbing the area or the revenue or affecting the qualities of land or the assets thereof will undoubtedly be a matter falling within the scope of S. 233 (*k*) and as such excluded

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from the jurisdiction of the Civil Courts. So a suit of the nature (abovementioned) is a "suit with respect to partition". (*Hasan, C.J., Raza and Bisheshwar Nath, JJ.*) BAJRANG BAHADUR SINGH *v.* BENI MADHO BAKHSH SINGH. **7 Luck. 716=I.R. 1932 Oudh 243=137 I.C. 606=9 O.W.N. 488=16 R.D. 246=13 L.R. 246 (Rev.)=A.I.R. 1932 Oudh 199 (F.B.).**

——S. 233 (k)—*Entries in mutation case—Jurisdiction of Revenue Officer to decide question of title.*

The only case recognized by law of entries for consolation is in mutation cases in a *khewat* where a widow is occasionally entered for her consolation and not with the intention that she should hold the property for which she is entered as a Hindu widow's estate. But in a mutation case the Revenue Officer making the entry does so in an administrative capacity and he is not entitled to decide a question of title. (*Mukerji and Bennet, JJ.*) SADA SHEO *v.* RAM PEARY. **130 I.C. 382=1930 A.L.J. 1281=15 R.D. 70=A.I.R. 1931 All. 29.**

——S. 233 (k)—Jurisdiction of Civil Court—Case relating to partition or union of mahals. *See* U. P. LAND REVENUE ACT, SS. 111 AND 112. **10 O.W.N. 1125=A.I.R. 1933 Oudh 507 (F.B.).**

——S. 233 (k)—*Jurisdiction of Civil Court—Suit for partition of houses in village* abadi.

A suit for a partition of houses in a village *abadi* is cognisable by the Civil Court. All that the Civil Court does in such a suit, is to divide the houses between the parties, and to grant along with the portion of the house given to a party, the right to occupy the site. It will thus become a matter for a subsequent partition of the *abadi* in the Revenve Courts as to whom that particular site is allotted. There is, therefore, no infringement of the jurisdiction of the Revenue Court by the Civil Court. (*Sulaiman, C.J. and Bennet, J.*) AULAD HUSAIN *v.* NASIR HUSAIN. **159 I.C 730=1935 R.D 550=8 R. A. 500=1935 A.W.R. 1412=1935 A.L.J. 1340=A.I.R. 1936 All. 220.**

——S. 233 (k)—*Jurisdiction of Civil Court—Suit seeking to alter nature of subordinate tenure in mahal.*

The constitution of a mahal can be altered not only by increasing or decreasing its area, but also by altering the nature of the subordinate tenures that go to make up the mahal. A suit for a declaration that defendants are under-proprietors of a certain plot although they are entered in the revenue papers as having only occupancy rights, seeks to alter the constitution of the mahal as framed by the Revenue authorities at the time of the partition, and such a suit is barred by the provisions of S. 233 (*k*). (*Nanavutty, J.*) MANGAL *v.* BHAGWAN DIN. **1935 O.W.N. 1372=1936 O.W.N. 95=1936 R.D. 75=8 R.O. 223=159 I.C. 909=A.I.R. 1936 Oudh 94.**

——S. 233 (k)—*Order of Revenue Court—Guardian's negligence—Minor's right to avoid.*

The bar created by S. 233 (*k*) is not so absolute as to prevent a party from going behind an order of the Revenue Court even on the ground of fraud, or collusion or on the ground of the negligence of the guardian of the minor. When an original decree of a Civil Court can be set aside by a minor on the ground of the gross negligence of his guardian, there is no valid reason why a Revenue Court's order in a partition proceeding cannot be set aside on the same ground. When the order of the Revenue Court for the final partition can be vacated, it would no longer stand as an obstacle in the way of the plaintiffs claiming recovery of possession. When the order under S. 112 itself falls to the ground, S. 233 (*k*) would have no application. That section could be

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applied only when there is an order for partition passed by a Revenue Court which is binding on the plaintiffs. (*Sulaiman, Boys and Sen, JJ.*) MT. SIRAJ FATIMA *v.* MAHOMED ALI. **54 All. 646=I.R. 1932 All. 418=138 I.C. 465=16 RD. 327=1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.).**

———**S. 233 (k)**—*Partition—Allotment of plot—Binding nature on parties.*

Where a plot is allotted to one party at a Revenue Court partition, whether the allotment is due to a mistake or is intentional, the other party to the partition proceedings is bound by it, because S. 233 (*k*) bars the defence that the plot was wrongly allotted on the previous occasion. (*Banerji and King, JJ.*) DIPAN RAI *v.* KAPIL DEO SINGH. **1931 A.L.J. 1004=15 R.D. 810.**

———**S. 233 (k)**—Partition case—Entry in *khewat*—Objection not raised—Subsequent suit in Civil Court—Bar. *See* C. P. CODE, S. 11—COMPETENT COURT—REVENUE COURT AND CIVIL COURT. **1930 A.L.J. 1281=15 R.D. 70=A.I.R. 1931 All. 29.**

———**S. 233 (k)**—Partition not consented to—Party claiming larger share subsequently—Bar under S. 11, C. P. Code, and not S. 233 (*k*), U. P. Land Revenue Act. *See* C. P. CODE—MISCELLANEOUS PROCEEDINGS—PARTITION PROCEEDINGS. **53 All. 568=A. I.R. 1931 All. 462.**

———**Ss. 233 (k) and 120**—Partion proceedings—Declaration of ownership of well—Finality. *See* U. P. LAND REVENUE ACT, SS. 120 AND 233 (*k*). **A.I.R. 1934 All. 619.**

———**S. 233 (k)**—*Partition proceeding—Power of High Court to stay.*

The High Court cannot stay a partition proceeding before a Revenue Court. (*King, J.*) MATLOOB HASAN *v.* KALAWATI. **53 All. 180=I.R. 1931 All. 474=132 I.C. 42=14 R.D. 651=1930 A.L.J. 1469=A.I.R. 1931 All. 57 (2).**

———**S. 233 (k)**—*Purchaser of half share of one of two sisters applying for partition—Objection by other sister disallowed and partition effected—Suit by her on sister's death for possession on ground of survivorship—If barred.*

A purchaser of a half share of the sister of the plaintiff instituted a suit for partition in the Revenue Court. In the course of that suit, the plaintiff objected on the ground that her sister was not entitled to alienate the property. The Court directed her to institute a suit tn the Civil Court and as she failed to do, her objection was disallowed and the partition was effected. Sometime later, the sister died and the plaintiff instituted a suit in order to obtain possession of the deceased sister's half share in the property on the allegation that it had come to her by right of survivorship.

Held, that the most that could be held in respect of the decision of the Revenue Court was that it might be *res judicata*, that the plaintiff was not entitled to recover the share of her sister during the latter's lifetime, and that the decision could not prevent the plaintiff from recovering the share after her sister's death. (*Niamatullah and Allsop, JJ.*) CHHATTAR SINGH *v.* MT. HUKUM KUNWAR. **1935 R.D. 495=1935 A.W.R. 1213.**

———**S. 233 (k)**—*Scope.*

The correct view of S. 233 (*k*) is that it only bars suits which would alter the partition in regard to the amount of shares in any mahal or sub-division of a mahal or suits which would transfer the particular fields or holdings from any mahal or sub-division of a mahal. The section should not be interpreted so as to make it

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co-extensive with the rule of *res judicata*. (*Mukerji and Bennet, JJ.*) RAM REKHA MISRA *v.* RALLU MISIR. **53 All. 568=I.R. 1931 All. 676=133 I.C. 468=1931 A.L.J. 307=15 R.D. 322=A.I.R. 1931 All. 462.**

———**S. 233 (k)**—*Scope.*

The scope of S. 233 (*k*) is narrower than that of S, 241 (*f*) of the old Act. (*Sulaiman, Boys and Sen, JJ.*) MT. SIRAJ FATIMA *v.* MAHOMED ALI. **54 All. 646=I.R. 1932 All. 418=138 I.C. 465=16 R.D. 327=1932 A.L.J. 437=A.I.R. 1932 All. 293 (F.B.).**

———**S. 233 (k)**—"*Suit with respect to partition*"—*Suit for declaration of proprietary right—Civil Courts—Jurisdiction.*

The plaintiffs and defendant No. 69 were co sharers of lands in a village. In 1906, there was a perfect partition of the village, five mahals were allotted to others and the sixth to the ancestors of the plaintiffs and defendant No. 69, and recorded as their rent free under-proprietary tenure. In 1929 when the lambardars of the five mahals obtained decrees for assessment of rent against the plaintiffs and defendant No. 69, the plaintiffs brought the present suit for a declaration that they were the superior proprietors and not the under-proprietors of the land in suit.

Held (*per curiam*), that the suit was not maintainable.

(Per *Raza and Bisheshwar Nath, JJ.*) on the ground that the present suit which raised questions of title affecting the partition was one 'with respect to' partition, excluded from the cognizance of the Civil Court under S. 233 (*k*) of the Land Revenue Act.

(Per *Hasan, C.J.*) on the ground of constructive *res judicata*, the question of title now raised by the plaintiffs being one which they might and ought to have raised in the partition proceedings of 1906. (*Hasan, C.J. Raza and Bisheshwar Nath, JJ.*) BAJRANG BAHADUR SINGH *v.* BENI MADHO BAKHSH SINGH. **53 All. 963=I.R. 1932 Oudh 243=9 O.W.N. 488=137 I.C. 606=16 R.D. 246=13 L.R. 246 (Rev.)=A.I.R. 1932 Oudh 199 (F.B.).**

———**S. 233 (m)**—Amount realised by Collector under requisition by Registrar of Co-operative Societies—Civil suit in respect of—Maintainability. *See* CO-OPERATIVE SOCIETIES ACT, S. 42, CL. (4 A). **11 O.W. N. 1060.**

———**S. 233 (m)**—*Attachment in execution of award obtained by Co-operative Bank against member—Dismissal of objection filed under O. 21, R. 58, C. P. Code—Regular suit, if barred.*

Where a dispute is referred to arbitration under R. 20 (1) of the Rules of the Manual for Co-operative Societies and an award is obtained against a member of a Co-operative Society for a certain amount, the amount is recoverable in the same manner as arrears of land revenue. Where, therefore, in execution of such award, a certain property is attached and the objection filed under O. 21, R. 58 is dismissed, the remedy of the objector to file a regular suit in a Civil Court is barred by the provisions of S. 233 (*m*) of the Land Revenue Act. (*Thomas, J.*) KHUD MUKHTAR BANK, UTRAWAN *v.* BHAGWAN DIN. **11 Luck. 106=155 I. C. 92=7 R.O. 552=1935 R. D. 238=1935 O.W.N. 487=A.I.R. 1935 Oudh 325.**

———**S. 233 (m)**—*Scope*—"*Connected with or arising out of*"—*Co-sharer paying revenue in excess of share—Suit for contribution—Jurisdiction—Civil Court.*

A suit by a co-sharer who has been made to pay revenue in excess of his share for contribution from the other co-sharers in the *mahal* is not cognizable by a

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Civil Court. The words "connected with or arising out of" in S. 233 (*m*) are wide enough to include such a claim, and jurisdiction in such cases rests with the Revenue Court. (*Srivastava, J.*) RAMA NAND *v.* LAL BEHARI. **11 Luck. 28=154 I.C. 704=7 R. O. 499=1935 R D. 160=1935 O.W.N. 350=A.I R. 1935 Oudh 253.**

——**S. 234**—*R.* 450, *Land Records Manual—Omission to issue notice—Effect on entry effected.*

A Naib Tahsildar who orders the occupancy land of one party to be ordered as *khudkasht* of another party without issuing notices to the parties acts in contravention of R 450 of the Land Records Manual, framed under S. 234 of the Land Revenue Act; and the entry made by him cannot stand. The entry as it stood before the order should be restored, (*Oppenheim, S. M. and Drake Brockman, J. M.*) HARI HAR DATT SINGH *v.* SUKHRAJ SINGH. **18 R.D 510.**

——**Ch. VII, S. 131**——*Applicability — Agreement —between co-sharers to hold exclusively — Partition What is.*

Chapter VII of the U. P. Land Revenue Act applies to partition and union of mahals, and it does not in any manner affect the rights of co-sharers to agree among themselves to hold certain plots exclusively. Where the only effect of such an agreement is that the interest of one party is extinguished in one plot in lieu of the extinction of the other party's right in another plot, the transaction is more in the nature of an exchange than a revenue partition. (*Sulaiman, C. J and Rachhpal Singh, J.*) DALJIT *v.* KACHERU. **152 I.C. 192=7 R.A. 290=18 R.D. 479=4 A W.R. 683.**

——**Ch. VII**—*Private partition—Enforcement.*

Where parties are let into possession under a private partition, they can apply for a formal decree from the Revenue Court giving effect to it. (*Oppenheim, S. M. and Walton, J. M.*) GANGA RAM *v.* SOHAN PRASAD. **16 R.D. 232=13 L.R. 119 (1) (Rev.).**

U. P. LOCAL RATES ACT (I OF 1914), S. 8—*Right of superior proprietor to recover cesses from his lessee—If affected by superior proprietor stipulating in lease to pay old chaukidari and patwari rates, or by order of Settlement Officer.*

Under S. 8 the superior proprietor has a legal right to recover the cesses from his lessees or under proprietors. The fact that in the lease executed in 1878 the superior proprietor undertook to pay the old chaukidari and patwari rates that were then recoverable from landlords cannot take away this right; nor can an order of the Settlement Officer that the lessees who were pukhtadars were not liable for cesses. (*Nanavutty, J.*) MAHOMED AGHA *v.* BAIJNATH SINGH. **11 Luck 260=155 I.C. 701=7 R.O. 613=1935 R. D. 270=1935 O. W.N. 652=A I.R. 1935 Oudh 372.**

U. P. MOTOR VEHICLES RULES (1928), Rr. 3 (m) and 22—*Number assigned reproduced in Hindi script—Offence under S.* 16 *of Motor Vehicles Act (VIII of* 1914), *S.* 16.

The word 'number' in U. P. Motor Vehicles Rules is not used only in an arithmetical sense, but is wide enough to cover letters, figures and marks, which may be assigned by the registering authority to a motor vehicle. When the registering authority assigns certain letters and numbers to a car, those letters and numbers should be exactly reproduced; else the rules cannot be deemed to have been complied with. Where the Police authorities assigned to a motor car the number "U. P. 561, B. S." the owner is guilty of an offence if he reproduces on the number plate "U. P. 561" and the letters "B. S." in Hindi script. (*Sulaiman, C. J. and Mukerji, J.*)

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SHIVA PRASAD GUPTA *v.* EMPEROR. **6 I. R (All.) 137=145 I.C. 670=34 Cr. L J. 1029=1933 Cr. C. 1418=1933 A.L.J. 1239=15 L R.A.Cr. 21=A.I R. 1933 All. 820.**

——**R. 18**—*Construction—"The registering authority"—District Superintendent of Police—Power to suspend registration.*

"*The*" registering authority in R. 18 of the U. P. Motor Vehicles Rules does not refer to the authority which issued the license; and under the rule, the District Superintendent of any district within which an offence is committed can suspend the registration of the motor vehicle concerned. The power to so suspend is not confined to the Superintendent who actually gives the license. (*Nanavutty and Thomas, JJ.*) ALI RAZA KHAN *v.* ABDUL RAUF KHAN. **154 I.C. 31=10 Luck-517=7 R.O. 454=1935 O.W.N. 20=A.I.R. 1935 Oudh 457.**

——**R. 31**—*Scope—Registering authority—Power to suspend.*

A registertng authority has power not only to rescind the permit but also to suspend. Where a major power is given, it includes the minor power as well. If the registering authority has, therefore, power to rescind, he had also the power to suspend. (*Nanavutty and Thomas, JJ.*) ALI RAZA KHAN *v.* ABDUL RAUF KHAN. **10 Luck. 517=154 I.C. 31=7 R.O. 454=1935 O.W.N. 20=A.I R. 1935 Oudh 457.**

——**Rr. 79 and 81 and Motor Vehicles Act, S. 16** — Permit specifying district and route—Lorry plied in other route—R. 79 violated—Maximum number of passengers not specified in permit—R. 81 not violated for carrying more passengers. *See* MOTOR VEHICLES ACT, (1914), S. 16 AND U. P. MOTOR VEHICLES RULES, 1928, RR. 79 AND 81. **1933 A.L.J. 499=A.I.R. 1933 All. 465.**

U. P. MUNICIPAL ACCOUNT CODE, R. 132 Cl. (14)—*Motor tyres and tubes—Exemption from octroi.*

Tyres and tubes which are specially designed for motor cars only and not meant for anything else, which is not a machinery, are exempt from the payment of octroi under Cl, (14) of R. 132 of U. P. Municipal Account Code. (*Sulaiman, C. J. and Rachhpal Singh, J.*) KASHI PRASAD VERMA *v.* EMPEROR. **57 All. 648=154 I.C 750=7 R A. 790=36 Cr. L. J. 560=1935 A.L.J. 68=4 A.W.R 1299=A.I.R. 1935 All. 28.**

U. P. MUNICIPALITIES ACT (II OF 1916), Ss. 2 and 186—*Permanent chabutra with roof thereon is building.*

No doubt a temporary protection against heat or rain is not a building but a permanent chabutra with a shed erected on it is a "building" as defined in S. 2 of the Act. It is immaterial whether the roof is or is not of a permanent character like the chabutra. (*Kendall, J.*) MUNSHI LAL *v.* EMPEROR. **55 All. 603=6 I. R. (All.) 278=146 I.C. 254=34 Cr. L.J. 1217=14 L.R. 446 (Cr.)=1933 A.L.J. 1190=1933 Cr. C. 1141=A I.R. 1933 All. 657.**

——**S. 2 (2)**—*Construction—"Other such portable or merely temporary shelter"—Chaptar if included.*

The words "other such portable and merely temporary shelter" should be taken *ejusdem generis* with what precedes, *viz.*, tent. Though it is not strictly necessary for the exception to apply that the shelter should be made of cloth or canvas, *e.g.*, a roof consisting of nothing but a reed screen spread over bamboo poles, cannot be a building. Shed made of straw and standing on either side supported on four poles cannot invariably be

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considered to be a "building" as defined in S. 2 (2); but what is ordinarily called a "chappar" may be "building" if its dimensions are sufficiently large. (*Niamatullah, J.*) BALA PRASAD *v.* MUZAMMIL HUSAIN. **1934 A.L.J. 541 = 149 I.C. 612 = 6 R.A. 930 = 35 Cr. L.J. 998 = 4 A.W.R. 569 = 1934 Cr. C. 200 (2) = A.I.R. 1934 All. 190.**

——**S. 2 (17)**—"*Carrying on business*"—*Subordinate Judge discharging duties of office—Liability to profession tax.*

Where a Subordinate Judge who was resident in the canfonment outside the Municipal area was assessed to protession tax,

Held, that the Subordinate Judge in performing the duties of his office within Municipal limits was not 'carrying on any business' and was not liable to be assessed to profession tax. (*Raza, Bisheshwar Nath and Smith, JJ.*) GAURI SHANKAR VARMA *v.* MUNICIPAL BOARD, SITAPUR. **8 Luck. 670 = I.R. 1933 Oudh 80 = 141 I C. 737 = 10 O.W.N. 24 = A.I.R. 1933 Oudh 91 (F.B.).**

——**S. 3 (1) (a)**—*Combination of detached areas—Prohibition as to inclusion in Municipal area.*

Although it is probable that it was never contemplated that detached areas should form part of one Municipality, there is nothing in the Act which prohibits the combination of detached areas and which makes it compulsory that the entire area within the Municipal limits must be a compact area consisting of contiguous parts. (*Sulaiman, C.J. and King, J.*) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241 = 6 R.A. 727 = 148 I.C. 603 = 35 Cr.L.J. 704 = 3 A W.R. 181 = 1934 A.L.J. 80 = 1934 Cr.C. 70 (2) = A.I.R. 1934 All. 39.**

——**S. 14 (3) (d)**—*Discharged insolvent—Right to remain in voters' list.*

In 1904 the plaintiff applied to be declared an insolvent. He was so adjudged in 1905 and Judge directed : "I grant the application and discharge the insolvent." The plaintiff's name having been taken off the electoral roll he sued for a declaration that he was a qualified voter.

Held, that though the debts of the insolvent were not wiped out by reason of the Judge's order the plaintiff was a discharged insolvent and was entitled to the declaration. (*Sen and Niamatullah, JJ.*) PARMESHWARI DAS *v.* MUNICIPAL BOARD, BAREILLY. **I R 1931 All. 765 = 133 I.C. 909 = A.I.R. 1932 All. 58 (2)**

——**S. 29**—*Election Rules—Order by District Magistrate—Jurisdiction of Civil Court.*

Orders passed by the Revising Committee or the District Magistrate under the election rules framed by the Local Government under S. 29 are final and cannot be impugned in a Civil Court. (*Kendall, J.*) NIAZ AHMAD KHAN *v.* ABDUL LATIF. **157 I C. 270 = 8 R.A. 159 = 1935 A.W.R. 1094 = 1935 A.L.J. 1111.**

——**S. 29**—*Election Rules, R. 14—Orders passed by Revising Committee or District Magistrate—Jurisdiction of Civil Court.*

Orders passed by the Revising Committee or the District Magistrate under the election rules framed by the Local Government are final and cannot be impugned in a civil suit. In matters of procedure there are frequently non compliance with the existing rules and it may be that sometimes irregularities are committed. But it by no means follows that such omissions or irregularities would vest in the Civil Court jurisdiction to reopen the matter and question the propriety of any order passed by the Revising Committee or the District Magistrate. (*Sulaiman, C.J. and Rachhpal Singh, J.*) MAHOMED IKRAM KHAN *v.* MIRZA MAHOMED BAQAR. **152 I.C. 817 = 7 R.A. 401 = 4 A.W.R. 1392 = 1935 A.L.J. 139 = A.I.R. 1935 All. 106.**

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——**S. 43**—*Applicability—Salaried Government servant—Pleader giving legal advice—Receipt of monthly payment.*

Where a pleader besides acting as civil Government Pleader received Rs. 50 per mensem for giving legal advice to local officers outside Court hours.

Held, that the Rs. 50 received was no doubt 'salary' but the pleader was not a servant in respect of the work of giving legal advice and S. 43 did not apply. (*Sulaiman, C.J. and Bennet, J.*) HARNANDAN PRASAD *v.* KAMTA PRASAD KAKKAR. **56 All 330 = 149 I C 587 = 6 R.A. 920 (2) = 4 A.W.R. 1369 = 1934 A.L.J. 129 = A.I.R. 1934 All. 376.**

——**S. 45**—*Sanction—Whether should be previously obtained.*

Per *Bennet, J.*—S. 45 does not require the sanction of the Government to be previous to the election. (*Sulaiman, C.J. and Bennet, J.*) HARNANDAN PRASAD *v.* KAMTA PRASAD KAKKAR. **56 All. 330 = 149 I.C. 587 = 6 R.A. 920 (2) = 4 A.W.R. 1369 = 1934 A.L.J. 129 = A.I.R. 1934 All. 376.**

——**S. 85 (1) (b)**—*Strike—If "reasonable cause."*

S. 85 (1) (*b*) is specially intended to prevent a strike. By a "reasonable cause", the sub-section would include illness or festivities, such as marriage in the family of a sweeper and not a strike. Therefore a sweeper who strikes work acts without reasonable cause and is liable under S. 85 even if he gives notice. (*Bennet, J.*) BASWA *v.* EMPEROR. **158 I C. 1116 = 8 R A. 373 = 36 Cr.L J. 1508 = 1935 A.W.R. 133 = 1935 A.L.J. 297 = 1935 Cr.C. 259 = A.I.R. 1935 All. 216.**

——**S. 92 (1)**—*Majority of total votes—Votes obtained by disqualified candidate—Exclusion.*

Where at a meeting of a Municipal Board convened for the purpose of electing a chairman the names of the plaintiff and defendant were duly proposed and seconded and 28 voted for the defendant while 6 voted for the plaintiff but the defendant could not hold the office as he was ineligible for the chairmanship and the question was raised whether plaintiff was entitled to the office.

Held, that the plaintiff should show that he got a majority of the total votes and that he could not be considered to have been elected. (*Sulaiman, C.J. and Bennet, J.*) HARNANDAN PRASAD *v.* KAMTA PRASAD KAKKAR. **56 All 330 = 142 I.C 587 = 6 R A. 920 (2) = 4 A.W.R. 1369 = 1934 A.L J. 129 = A.I R. 1934 All. 376.**

——**S 96 (1)**—*Scope—Contract by Board—Resolution sanctioning contract to N. M—Application for contract and deed by M.R.—Enforceability of contract.*

One M. R. applied to a Municipality for the grant of a contract to him and paid an advance. The Municipal Board passed a resolution sanctioning a contract in the name of one N, M. who was a nephew of M. R. Subsequently, a deed was drawn up in accordance with the resolution, but instead of the name of N. M., the name of M. R. was substituted, and the deed of contract was signed by M. R. and also by the Chairman and Secretary of the Municipal Board. It was found as a fact that the name of N. M. was entered in the resolution either by mistake or as benamidar for his uncle M R.

Held, that the name of N.M must be deemed to have been entered in the resolution only as an *alias* for M. R. and that the resolution sanctioning the contract must be deemed to be in respect of the contract in question and that it was not invalid or unenforceable by reason of S. 96 (1). (*Srivastava, Ag.C.J., Zia-ul-Hasan and Smith, JJ.*) MOHAMMAD RAMZAN *v.* MUNICIPAL

U. P. MUNICIPALITIES ACT (1916), S. 97.

BOARD, TANDA. **10 Luck. 176=151 I.C. 1049=7 R.O. 161=11 O.W.N. 1171=A.I.R. 1934 Oudh 439 (F.B.).**

———**S. 97**—Contract not under seal—Executed consideration—Suit on—Relief upon *quantum meruit*—Not permissible. *See* CONTRACT ACT, S. 65—PRINCIPLE. **8 Luck. 1=9 O.W.N. 461=A.I.R. 1932 Oudh 193 (F.B.).**

———**Ss. 116, 124, 219 (c) and 224 (b)**—*Public property—Power of Board to stop public from using it—Sale of the property by the Board—Remedy of public against vendee.*

Where the well and the land attached to it is public property, it vests in the Municipal Board under S. 116 (*b*) and it belongs to it. S. 124 of the same Act gives power to the Board to sell such property under Ss. 219 (*c*) and 224 (*b*); the Board has a right to stop the public from using the well and the land attached to it. It follows, therefore, that a member of the public has no remedy, against a vendee who has acquired the land for valuable consideration from the Board. (*Ganga Nath, J.*) ZAHUR UDDIN AHMAD *v.* CHIMMAN LAL. **1935 A.W.R. 1414=160 I.C. 943=8 R.A. 681=1936 A.L.J. 424=A.I.R. 1936 All. 66.**

———**S. 116**—*Streets running on private land—Rights of proprietor.*

Where a street vests in and belongs to the public authority, the owner of the land over which the public street runs is not completely deprived of all his rights to everything below the street and to the air space above it. The effect of such vesting is that owner's rights to every thing below the street and to the air space above it is limited. The owner for example is not entitled to interfere with the Municipality in the discharge of its duties in maintaining and keeping open a street. It is equally certain that neither the Municipality nor the occupiers of houses abutting on a public street are entitled to appropriate any mineral which may be beneath the street, the ownership of which remains with the proprietor. The proprietor is also entitled to certain rights to the air space above the street but what constitutes an infringement by Municipality or by members of the public of the rights of the proprietors to the said space above a street is a question of degree. The Municipality are clearly in their capacity as custodians of the public interest entitled to take reasonable steps for the convenience and comfort of the public who use the public street. The owners and occupiers of the houses or shops which abut on the public street are entitled to take reasonable steps for their own convenience and comfort and for the convenience and comfort of the members of the public visiting their houses and their shop. The erection of a shelter at a reasonable height from the ground to protect the shops and houses and afford shelter to members of the public frequenting the shops and houses is a reasonable step which the owners and occupiers are entitled to take and which it is within the competence of the Municipality to sanction. (*Thom and Kisch, JJ.*) ARJUN *v.* MAN SINGH. **56 All. 784=149 I.C. 190=6 R.A. 864=1934 A.L.J. 418=3 A.W.R. 800=A.I.R. 1934 All. 338.**

———**S. 124**—Public property—Sale by the Board—Remedy of public against vendee. *See* U. P. MUNICIPALITIES ACT, S. 116. **1935 A.W.R. 1414=A.I.R. 1936 All. 66.**

———**S. 128 (1) (viii)**—*Applicability—Transit of goods from one part of Municipality to another.*

The words "introducing within octroi limits" in S. 155 and similar words "brought within the Municipality" in S. 128 (1) (*viii*) imply that goods or animals are imported from some place entirely outside the Municipalities and brought inside such limits. They are not meant to cover a case of transit where goods are transferred from one part of the Municipality to another part within its limits. And this is so even if it so happens that owing to irregular boundaries of the Muncipality or owing to the fact that a part of it is a detached area, the goods have to cross non-Municipal lands in transit. The significance of the words "introducing and brought in" is that they must be imported from outside the Municipal limits altogether. (*Sulaiman, C. J. and King, J.*) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241=6 R.A. 727=148 I.C. 603=35 Cr L J. 704=3 A.W.R. 181=1934 A.L.J. 80=1934 Cr C. 70 (2)=A.I.R. 1934 All. 39.**

U. P. MUNICIPALITIES ACT (1916), S. 155.

———**S. 128 (1) (viii)**—*Cattle imported for use—Importation for slaughter house.*

Cattle imported for the purpose of being slaughtered in order that dry meat may be prepared, are cattle imported for use, (*Sulaiman, C.J. and King, J.*) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241=6 R.A. 727=148 I C. 603=35 Cr L.J. 704=3 A.W.R. 181=1934 A.L. J. 80=1934 Cr.C. 70 (2)=A.I.R. 1934 All. 39.**

———**S. 128 (1) (viii)**—*Rules framed under—Rule for refund of octroi duty—Refund for transit of goods.*

The rules framed for refund of octroi duty do not contemplate the refund of octroi duty for transit of goods from one part of the Municipality to another part. (*Sulaiman, C. J. and King, J.*) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241=6 R.A. 727=148 I.C. 603=35 Cr.L J. 704=3 A.W.R. 181=1934 A.L.J. 80=1934 Cr.C. 70 (2)=A.I.R. 1934 All 39.**

———**S. 128 (1) (ix)**—Subordinate Judge residing outside Municipal area—No liabilty to profession tax. *See* U.P. MUNICIPALITIES ACT, S. 2 (17) **10 O.W.N. 24=A.I.R. 1933 Oudh 91 (F.B.)**

———**Ss. 135 (2), 136 and 299 (b)**—*Saharanpur Municipality—Notifications of* 1919 *and* 1932—*Articles in course of transit—Terminal toll, if leviable.*

Under the Notifications of 1919 and 1932 issued under sub-S. (2) of S. 135 read with S. 136 of the U. P. Municipalities Act terminal toll is leviable only when the articles remain within the toll limits of the Saharanpur Municipality for some time, and if the calts simply pass through the Municipality for the purpose of the articles being conveyed to some other destination, the toll would not be leviable. If the articles are in the course of transit, they could not be said to have been *brought* within or *imported* by road through the toll limits, within the meaning of the notifications. (*Bajpai, J.*) NEK MOHAMMAD *v.* EMPEROR. **1935 A.W.R. 1405=160 I.C. 862=37 Cr.L J. 335=8 R.A. 650=1936 Cr.C. 105=1935 A.Cr.C. 300=A.I.R. 1936 All. 83.**

———**S. 151**—*Construction—"Vacant" and "unproductive of rent"—Meaning.*

Under S. 151 a building is vacant and unproductive of rent, when neither the owner nor his friends or relations occupy it; or when it is not let out to any tenant or lessee "vacant" is used in the sense of non-occupation and does not mean that the land should be barren land and be not covered by trees or vegetation. Similarly the words "unproductive of rent" do not mean not incapable of producing rent. (*Sulaiman, C.J. and Rachhpal Singh, J.*) UPENDRANATH BASU *v.* MUNICIPAL BOARD, BENARES. **57 All. 408=153 I.C. 359=7 R.A. 487=4 A.W.R. 603=1934 A.L.J. 1067=A.I.R. 1934 All. 1007.**

———**S. 155**—*Construction.*

S. 155 is a penal enactment and has to be construed strictly against the prosecution. (*Sulaiman, C.J. and*

U. P. MUNICIPALITIES ACT (1916), S. 155.

King, J.) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241=6 R.A. 727=148 I.C. 603=35 Cr.L.J. 704=3 A.W.R. 181=1934 A.L.J. 80=1934 Cr.C. 70 (2)= A.I.R. 1934 All. 39.**

———**S. 155**—*Goods brought into Municipal limits—Onus to show that they have come from Municipal limits.*

If animals or goods are introduced into or brought into a certain detached area forming a part of the Municipality the burden of showing that they were within the Municipal limits and have come from a place within those limits is on the accused and not on the Municipality. (*Sulaiman, C.J. and King, J.*) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241=6 R.A. 727=148 I.C. 603 =35 Cr.L.J. 704=3 A.W.R. 181=1934 A.L.J. 80= 1934 Cr.C. 70 (2)=A.I.R. 1934 All. 39.**

———**S. 155 and Municipal Account Code, Chap. 10**—*Octroi dues—Recovery by civil suit—C. P. Code, S. 9.*

Although the Municipalities Act has expressly laid down that a suit would lie for recovery of other taxes, there is no such express mention as regards Octroi dues. It is therefore not intended by the legislature that apart from the special penalty imposed for the non-payment of the octroi dues, the right to recover which has been created by the Act itself, there should be a further and an additional right to recover the same by suit. The case of Octroi dues does not fall under S. 9, C. P. Code, which makes an exception in case of suits of which cognizance is either expressly or impliedly barred. (*Sulaiman, C.J. and King, J.*) MUNICIPAL BOARD, BAREILLY *v.* ABDUL AZIZ KHAN. **57 All 219=4 A.W.R. 314=152 I.C. 792=7 R.A. 389=1934 A.L.J. 739= A.I.R. 1934 All. 795.**

———**S. 155**—*Offence under—Ingredients—Burden of proof.*

It is an essential ingredient of an offence under S. 155 that there should be importation of goods which are liable to the payment of octroi. If the goods imported are exempt from liability to octroi, it is no offence under the section. The complainant must therefore satisfy the Court that the accused has introduced or attempted to introduce or abetted the introduction of any goods or animals "liable to the payment of octroi". Unless this condition is satisfied, there is no offence and there can be no conviction. (*Sulaiman, C.J. and Rachhpal Singh, J.*) KASHI PRASAD VERMA *v.* EMPEROR. **57 All. 648=154 I.C. 750=7 R.A. 790=1935 A.L.J. 68= 36 Cr.L.J. 560=4 A.W.R. 1299=A.I.R. 1935 All. 28.**

———**S. 155**—*Scope—Conviction under—Accused not appealing under S. 164—If precludes inquiry.*

The mere fact that the accused in a prosecution under S. 155, U.P. Municipalities Act, has not sought the easier remedy of appealing to the District Magistrate under S. 164 of the Act would not compel the Criminal Court to convict him in the face of an express exemption under the Act. It is open to the Criminal Court to enquire into the question whether the goods are really liable to the payment of octroi, though the accused has not appealed. S. 164 would more appropriately apply to the cases where the goods are detained by the Municipal authorities or where octroi duty has been paid which the importer thinks is in excess of what he was bound to pay. (*Sulaiman, C. J. and Rachhpal Singh, J.*) KASHI PRASAD VERMA *v.* EMPEROR. **57 All. 648=154 I.C. 750=7 R.A. 790=1935 A.L.J. 68=36 Cr.L.J. 560= 4 A.W.R. 1299=A.I.R. 1935 All. 28.**

———**S. 155**—*Scope—Dutiable articles exhibited—Inference.*

The words "introducing or attempting to introduce within the octroi limits" occurring in S. 155 obviously imply the introduction of dutiable articles from a place outside the Municipal limits into the Municipal limits. Where there is an intervening space between two parts of a Municipal area and goods are taken from one such part to another, it cannot be said that such goods are being introduced within the octroi limits. If articles which are of foreign production are found exhibited by vendors within a Municiipality it is permissible to presume that they had paid octroi duty on such goods when the same were originally imported. (*Niamatullah, J.*) RAJ NARAIN VERMA *v.* EMPEROR. **6 R.A. 626 =147 I.C. 1199=1934 Cr.C. 386=A.I.R. 1934 All. 318.**

U. P. MUNICIPALITIES ACT (1916), S. 164.

———**Ss. 160 and 164**—Appeal to District Magistrate from order of Octroi Superintendent—Order of District Magistrate—No revision by High Court. *See* CR. P. CODE, S. 435—SUBORDINATE COURT. **1933 A.L.J. 469=A.I.R. 1933 All. 281.**

———**S. 160**—*Applicability—Octroi schedule—Assessment of articles under—Suit to contest—Maintainability—Remedy.*

The correct remedy open to a person who contends that certain articles imported by him do not come under the headings in the octroi schedule under which they have been assessed to octroi, is to proceed by way of appeal to the District Magistrate under S. 160 of the U.P. Municipalities Act, S. 164 of the Act bars a suit by such a person in the Small Cause Court. (*Bennet, J.*) MUNNA LAL *v.* MUNICIPAL BOARD, JHANSI. **57 All. 655=4 A.W.R. 1255=160 I.C. 170=8 R.A. 573=A. I.R. 1935 All. 153.**

———**S. 160 (1)**—*"Assessment"—Octroi—If subject to.*

It cannot be said that there is no assessment in the case of octroi. The process by which an octroi *muharrir* examines goods and refers to his schedule and comes to the conclusion that certain goods come under certain heads in the schedule and should pay a certain tax is a process of "assessment" within the meaning of S. 160 (1) of the U. P. Municipalities Act. (*Bennet, J.*) MUNNA LAL *v.* MUNICIPAL BOARD, JHANSI. **57 All. 655=4 A.W.R. 1255=160 I.C. 170=8 R.A. 573=A. I.R. 1935 All. 153.**

———**S. 160 (1)**—*Construction—"Any other tax"—If includes octroi.*

Octroi is one of the taxes coming under the expression "any other tax" in S. 160 (1). An appeal therefore lies to the District Magistrate against an assessment under the octroi schedule. (*Bennet, J.*) MUNNA LAL *v.* MUNICIPAL BOARD, JHANSI. **57 All. 655=4 A.W. R. 1255=160 I.C. 170=8 R.A. 573=A.I.R. 1935 All. 153.**

———**S. 164**—Applicability and scope—Prosecution under S. 155—Accused not appealing to District Magistrate—If bars plea of non-liability to octroi *See* U.P. MUNICIPALITIES ACT, S. 155. **57 All. 648=4 A.W. R. 1299=A.I.R. 1935 All. 28.**

———**S. 164**—Scope—Assessment of articles to octroi —Suit to contest—Maintainability. *See* U.P. MUNICIPALITIES ACT, S. 160. **57 All. 655=4 A.W.R. 1255 =A.I.R. 1935 All. 153.**

———**S. 164**—*Suit for refund of octroi duty—Jurisdiction of Civil Court.*

The language of S. 164 together with its marginal note is quite emphatic and no suit for a refund of octroi which has been assessed by the Municipal Board on goods imported lies in a Civil Court on the ground that the goods were not in fact assessable or that the amount of assessment was excessive. (*Sulaiman, C.J. and Bennet, J.*) MUNICIPAL BOARD, BENARES *v.* KRISHNA & CO. **57 All. 916=156 I.C. 281=7 R.A. 1060=1935**

U. P. MUNICIPALITIES ACT (1916), S. 175.

A.L.J. 635=1935 A.W.R. 585=A.I.R. 1935 All. 760.

——**S 175**—*Scope.*

If some amount is due from a person and a warrant is issued against him and there is a defect in the form of that warrant it will not be open to the defaulter to plead by reason of S. 175 of the U.P. Municipalities Act that the distress was unlawful, but it does not entitle the Municipal Board to say that it is not open even to a stranger form whom nothing is due, to allege that the warrant was unlawful. Such a person can file a suit for damages for unlawful distress of his goods. (*Sulaiman, C.J. and Bajpai, J.*) MUNICIPAL BOARD OF MAINPURI *v.* AJUDHIA PRASAD. **154 I C. 1064= 7 R A. 867=4 A W.R. 1325=A I.R. 1935 All. 51.**

——**(as amended in 1919), Ss. 178, 180 and 185**—*Applicability to notified area.*

Ss. 180 and 185, Municipalities Act of 1916, were made applicable to notified area, but the provisions of the amended Act of 1919 were not extended to such area.

Held, that a person could construct after giving notice to the Board without waiting to get sanction as provided under the amended Act.

Held, further, that as Ss. 178 ane 185 were not repealed and re enacted, S. 8, General Clauses Act, had no application. (*Kendall and Iqbal Ahmad, JJ.*) MT. BAFATAN *v.* EMPEROR. **55 All. 843=6 I R. (All.) 17=144 I C 951=34 Cr L J. 854=1933 Cr.C. 989=1933 A.L J 1053=A.I R. 1933 All. 617.**

——**S. 178**—*Construction—"Adjacent to such street".*

The words "adjacent to such street" merely mean near such street. (*Sulaiman, C.J. and Bennet, J.*) PAR SHOTTAM KANDU *v.* EMPEROR. **8 R A. 456=159 I C. 513=1935 A L J 1101=1935 A.Cr.C. 251=1935 A.W.R 1140=37 Cr L.J. 110=1935 Cr.C. 1207=A.I.R. 1935 All. 986.**

——**Ss 178 and 180 (3)**—*Scope—Notice of intended erection—Failure to sanction—Remedy of party—Notice after erection—If sufficient.*

Where an application under S. 178, U. P. Municipalities Act, is made to the Municipal Board for permission to erect a building, but is not promptly dealt with by the Board, the applicant is not justified in proceeding with the erection in anticipation of sanction. He should call the attention of the Board to the matter under S. 180 (3) of the U. P. Municipalities Act. An application by him after erection of the building is not sufficient and cannot be regarded as one under S 180 (3). (*Smith, J.*) MUNICIPAL BOARD, BAHRAICH *v.* JWALA PRASAD. **154 I.C 45=7 R.O 452=36 Cr.L J 471=1935 Cr.C. 286=11 O.W.N. 1622=A I.R. 1935 Oudh 197.**

——**S. 178 (2)**—*Notice under S* 178 (2).

Where the room to be constructed does neither abut nor is adjacent to a public street or place, notice under S. 178 (2) is not necessary. (*Kendall and Iqbal Ahmad, JJ.*) MT. BAFATAN *v.* EMPEROR. **55 All 843=6 I.R (All.) 17=144 I C 951=34 Cr.L J. 854=1933 A.L J. 1053=1933 Cr.C. 989=A.I.R. 1933 All. 617.**

——**Ss. 180 and 318**—Application for permission to build—Board not acting under S. 180—Refusal on ground of want of title in applicant—Legality—Suit to recover compensation—Maintainability *See* U P. MUNICIPALITIES ACT, S. 318 **I R 1931 All. 570=133 I.C 26=A.I R. 1931 All. 670**

——**S. 180**—*Permission to erect temple—Grant of—Objections overruled—Appeal by objectors—Maintainability—Aggrieved.*

U. P. MUNICIPALITIES ACT (1916), S. 180.

A Municipal Board issued a notice on receipt of the application of *K* inviting objections by persons who may be affected by the permission which *K* had asked for from the Board to erect a temple on the site indicated by him in his application. The objectors filed their petition of objections in response to the invitation, These objections were founded on an alleged right of their own in the piece of land on which *K* proposed to build a temple. The objections were overruled by the Municipal Board and in consequence sanction was granted under S. 180 to build the temple. The objectors appealed to the District Magistrate.

Held, that the appeal of the objectors before the learned District Magistrate was a competent appeal as the objectors were party to the proceeding and "aggrieved" within the meaning of S. 318. (*Hasan, C.J. and Kisch, J.*) BALDEO BEHARI *v.* KAILASH NARAIN. **6 Luck. 456=I R. 1931 Oudh 385=134 I.C. 593=14 O L.J. 353=8 O.W.N. 531—A.I.R. 1931 Oudh 305.**

——**S. 180**—*Public street, running on privately owned land—Erection of porticos—Sanction by board.*

Where a public street running through a privately owned plot of land vests in and belongs to the Municipal Board, it is competent for the Municipal Board under S. 180 to grant permission to the owners or occupiers of shops and houses abutting on the street, to erect porticos and shelter at a reasonable height from the ground for the comfort and convenience of public visiting the shops and houses (*Thom and Kisch, JJ.*) ARJUN *v.* MAN SINGH. **56 All. 781=149 I C. 190=6 R A. 864=1934 A.L.J. 418=3 A.W.R. 800=A.I.R. 1934 All. 338.**

——**S. 180**—*Sanction obtained under, from Chairman—If covers constructions contemplated by S.* 209.

Under S. 180, the Chairman of a Board can only accord a general sanction for the erection or re-erection of a building but where such erection or re-erection involves the making of any constructions contemplated by S 209, the provision of Cl. (2) of S. 184 comes into operation and makes it incumbent on the person desiring to make such constructions to obtain a separate sanction in respect of them under S. 209, and in view of S. 60 read with Sch. II, such sanction can be given only by the Executive Officer. The failure to obtain a separate sanction under S. 209 cannot be condoned merely on the ground that he was misled by the fact that the sanction obtained by him, which on the face of it had been given by the Chairman alone, also bore the signature of the Executive Officer. (*Sulaiman, C. J and Mulla, J.*) BAIJNATH RAM *v.* EMPEROR. **1935 A.Cr C. 274=1935 A L J. 1260=1936 Cr C. 56=160 I C. 927 (2)=37 Cr L.J. 348=8 R A. 675=1935 A.W.R. 1253.**

——**S. 180 (3)**—Applicability—Application under S. 178—Failure of Municipal Board to pass orders—Erection of building in anticipation of sanction and subsequent application—If justified *See* U. P. MUNICIPALITIES ACT, SS. 178 AND 180 (3). **11 O.W.N. 1622=A.I.R. 1935 Oudh 197.**

——**Ss. 180 (3), 186 and 307 (b)**—*Application for building—No reply by Board—Implied sanction—Notices under S. 186—Legality of—Prosecution for disobedience—Validity of.*

The applicant sent a notice under S. 178 to the Board of his intention to build a house. He waited for 5 months, sent a reminder as required by S. 180 (3) and having received no reply for nearly a month, began to build. The reupon the Board sent a notice under S. 186 to stop the construction and later, another notice to demolish the building which had by that time been completed. On a

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prosecution and conviction under S. 307 (*b*) for disobedience of the notice,

Held, that, under sub-S. (3) the Board, having neglected to send a reply, must be deemed to have sanctioned the work absolutely; that the notices issued under S. 186 to stop or demolish the building were illegal and so the conviction should be set aside. The legality of the notice could be questioned in a prosecution even though no appeal had been preferred under S. 318 against the notice. (*Kisch, J.*) YUSUF HUSAIN *v.* EMPEROR. **I R. 1932 Oudh 393 = 140 I.C. 185 = 33 Cr L J. 933 = 9 O.W.N. 870 = 1932 Cr.C. 846 = A.I.R. 1932 Oudh 306.**

——S 180 (5)—*Applicability—Notice given under S. 178 when it is not necessary.*

Under S. 180 (5) it is incumbent on a person who has given notice under S 178, not to commence any work of which notice has been given until sanction has been given or deemed to have been given by the Board. This sub-section does not require that the notice under S. 178 must be such notice as was absolutely necessary to be given. Where the notice has been given under that section, sub-S. (5) is applicable. (*Sulaiman, C. J. and Bennet, J.*) PARSHOTTAM KANDU *v.* EMPEROR. **159 I C. 513 = 1935 A L J. 1101 = 1935 A.W.R. 1140 = 1935 A Cr.C. 251 = 8 R.A. 456 = 1935 Cr.C. 1207 = A.I.R. 1935 All 986.**

——S 184—*Power of Municipal Board under.*

The Municipal Board is not given any authority to encroach on the rights of the inhabitant except for the purpose of the benefit to the public in general. The decisions of the Board or the appellate authority (Collector or the Commissioner as the case may be) is no doubt final; under S. 321 it is impossible to believe that a decision on a question of private rights could have been given finality where the decision is arrived at without hearing evidence or where the decision is arrived at by a body of men not specially trained in law respecting private rights. It is not open either to the Board or to the appellate authority to disallow a proposal to erect a building on the ground that it is hideous in its appearance and would therefore injuriously affect the value of a neighbour's property. In such matters the parties should be left to seek their own remedy in Civil Court. (*Sen, J. on difference between Mukerji and Bennet, JJ.*) ABDUL QAYUM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All 500 = I R. 1931 All. 596 = 133 I.C. 148 = 1931 A.L J. 206 = A.I.R 1931 All 147.**

——S. 185—*Applicability—Sanction given to applicant to re erect wall leaving certain space from lane—Applicant re erecting wall but without leaving such space.*

Where the Chairman of the Municipal Board in granting a sanction to the applicant for re-erecting a wall of his house which was close to a lane, laid down a condition that the wall should be constructed leaving a certain space from the lane, but the applicant constructed the wall without leaving such space,

Held, that there was no sanction given to the applicant to build the wall at the place where it had been actually constructed and the case, therefore, fell within the scope of S. 180 5) and that being so, he was liable to be convicted under S. 185. (*Sulaiman, C. J. and Bennet, J.*) PARSHOTTAM KANDU *v.* EMPEROR **8 R A. 456 = 159 I C. 513 = 1935 A L J. 1101 = 1935 A Cr C. 251 = 1935 A.W.R 1140 = 1935 Cr.C. 1207 = A I.R. 1935 All 986.**

——Ss. 185 and 186—*Issue of notice—Authority of Municipal Board.*

Per *King, C.J.*—Under S. 186, the Municipal Board is competent to issue a written notice to the owner of

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any land directing him to demolish a building upon the land in any case where the Board considers that the erection of the building is an offence under S. 185. It is for the Board to decide whether the erection of the building is an offence under S. 185. The Board may be right or wrong in its decision, but if it *considers* that the erection of the building amounts to an offence under S. 185, then it is competent to issue a notice under S. 186. (*King, C.J., Srivastava and Zia ul Hasan, JJ*) EMPEROR *v* MUMTAZ HUSAIN. **11 Luck. 123 = 155 I.C. 344 = 7 R O 583 = 36 Cr L.J 720 = 1935 O W.N. 509 = 1935 Cr C. 670 = A.I.R. 1935 Oudh 337 (F.B.).**

——S. 186—*Erection—Setting up roof on chabutra.*

Where a chabutra is already in existence, setting up of a roof thereon is at least altering part of a building, if not actually erecting a building and the Board is entitled to issue a notice under S. 186. (*Kendall, J.*) MUNSHI LAL *v.* EMPEROR. **55 All 603 = 6 I R. (All) 278 = 146 I C. 254 = 34 Cr.L J. 1217 = 14 L.R. 446 (Cr) = 1933 A L.J. 1190 = 1933 Cr.C. 1141 = A I R. 1933 All 657.**

——S. 186—*Notice to remove chabutra—Subsequent notice to quit—Prior notice not waived.*

Where a person is in possession of the plot on payment of tabhazari dues and the Municipal Board issues a notice to remove a chabutra on the plot, the Board cannot be said to waive their right to have the chabutra removed by issuing a second notice to quit the land, for failure to remove the chabutra. (*Kendall, J*) MUNSHI LAL *v.* EMPEROR. **55 All. 603 = 6 I.R (All.) 278 = 146 I.C 254 = 34 Cr.L.J. 1217 = 14 L.R. 446 (Cr.) = 1933 A.L.J 1190 = 1933 Cr.C. 1141 = A.I.R. 1933 All. 657.**

——S. 209—Constructions contemplated by—If covered by sanction obtained under S. 180. *See* U. P. MUNICIPALITIES ACT, S. 180. **1935 A.W.R. 1253 = 1935 A.L J. 1260.**

——S. 209 (b)—*Operation of—Private drain.*

There is absolutely no justification for supposing that the operation of Cl. (*b*) to S. 209 is confined to public drains. All that is needed to attract the operation of that clause is that the drain, over which it is sought to make some structure or projection should be situated in a street. It follows, therefore, that any person wishing to make a structure or projection over a private drain is bound to obtain permission therefor under S. 209 (*b*), provided the drain lies in a street. (*Sulaiman, C. J. and Mulla, J.*) BAIJNATH RAM *v* EMPEROR. **1935 A.W.R. 1253 = 1935 A.Cr C. 274 = 1936 Cr C. 56 = 160 I.C 927 (2) = 37 Cr.L.J. 348 = 8 R.A. 675 = 1935 A.L.J. 1260.**

——S. 219 (c)—*Closing of public lane—Order by chairman—Validity of.*

The property in all public streets and things existing on or appertaining to such streets vests in the Municipal Board under S. 116 (*g*) of the Act. Hence in the absence of any resolution of the Board directing the closing of a public lane and in the absence of any evidence to show that the Municipal Board had delegated its power under S. 219 (*c*) to the Chairman of the Public Works Committee, the Chairman of the Public Works Committee cannot direct the closing of the lane and his order cannot be regarded as an order of the Municipal Board closing the public lane. Such an order of the Chairman cannot prevent the plaintiff from seeking relief against the defendants in respect of the encroachment made by them on the land in suit which has been found to be a public lane (*Srivastava, J.*) SUBRATI *v.* MADURI SARAN. **6 R.O. 223 = 147 I.C. 107 = 11 O.W.N. 149 = A.I.R. 1934 Oudh 100.**

U. P. MUNICIPALITIES ACT (1916), S. 219.

——**Ss. 219 (c) and 224 (b)**—Public property—Power of Board to stop public from using it—Sale of the property by the Board—Remedy of public against vendee. *See* U. P. MUNICIPALITIES ACT, S. 116. **1935 A.W.R. 1414 = A.I.R. 1936 All. 66.**

——**S. 244 (1)**—*Power of Executive Officer under—If can be delegated to Medical Officer of Health.*

The power to seize articles of food or drink found to be unfit for human consumption which could be exercised by the Executive Officer of the Board under S. 244 (1) of the Municipalities Act, can be delegated by him, with the sanction of the Chairman, to any servant of the Board (*e.g.*) Medical Officer of Health, by virtue of the provisions of S. 62 (1) of the Act. (*Zia-ul-Hasan, J.*) KALLU *v.* H. S. DUBE **158 I.C. 481 = 8 R.O. 104 = 36 Cr.L.J. 1386 = 1936 Cr.C. 27 = 1935 O.W.N. 1124 = A.I.R. 1936 Oudh 20.**

——**S. 245**—Bye-laws under S. 298-F for regulation of meat trade—Applicability to areas outside Municipal limits—Power of Municipal Board to demand licence fee. *See* U. P. MUNICIPALITIES ACT, S. 298 F. **A.I.R. 1935 All. 903.**

——**Ss. 267 and 307**—*Prosecution under—Scope of enquiry.*

In a prosecution under Ss. 267 and 307, U. P. Municipalities Act, for failure to comply with a notice calling upon the accused to close a privy, the only question before the Court is whether the accused had failed to comply with the notice properly issued to him. The Court has no jurisdiction to consider whether the erection of the privy which has been ordered to be closed is or is not objectionable. That is a matter which is within the province and jurisdiction of the Municipal Board. (*Smith, J.*) MUNICIPAL BOARD, BAHRAICH *v.* JWALA PRASAD. **154 I.C. 45 = 7 R.O. 452 = 36 Cr.L.J. 471 = 11 O.W.N. 1622 = 1935 Cr.C. 286 = A.I.R. 1935 Oudh 197.**

——**S. 295**—"*Molesting*"—*Meaning of.*

The word "molesting" in S. 295 of the Municipalities Act is something less than an assault or use of criminal force and is *ejusdem generis* with "obstructing". (*Collister, J.*) CHHOTE LAL *v.* EMPEROR. **1935 A.W.R. 1318 = 1934 A.Cr.C. 292 = 1936 Cr.C. 100 = 8 R.A. 702 = 37 Cr.L.J. 382 = 1936 A.L.J. 427 = 160 I.C. 1089 = A.I.R. 1936 All. 74.**

——**S. 296**—*Rules under Rr. 2 and 3—Breach of—Keeping motor car without licence for long time—Subsequent application for license.*

Where a person keeps a motor car without a licence for a long period he commits a breach of Rr. 2 and 3 framed under S. 296. And the fact that he applies for licence subsequently does not absolve him from the breach already committed (*Rachhpal Singh, J.*) FARUQI *v.* MUNICIPAL BOARD, ALLAHABAD. **6 I.R. (All.) 320 = 146 I.C. 691 = 35 Cr.L.J. 175 = 1933 A.L.J. 1369 = A.I.R. 1933 All. 814.**

——**S. 298**—*Bye-laws — Applicability— 'Public prostitute'—Meaning of.*

A public prostitute is a woman who usually and generally offers her person to sexual intercourse for hire and who openly advertises and acknowledges her occupation by word of mouth, department or conduct. For the bye-laws to be applicable, a woman should not only be a prostitute but a public prostitute; and a woman cannot be said to be a public prostitute merely because she belongs to the caste of prostitutes or that her mother and mother's sisters were public prostitutes. (*Sen and Niamatullah, JJ.*) MUNICIPAL BOARD, ETAH *v.* ASGHARI JAN. **I.R. 1932 All 590 = 139 I.C. 804 = 1932 A.L.J. 117 = A.I.R. 1932 All. 264.**

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——**S. 298**—*Bye-laws framed under—Terms "overcrowding", and "sanitation"—Meaning.*

Bennet, J.—The bye-law being framed by a Hill Municipality, the term "overcrowding" as used in it, cannot mean overcrowding in the sense in which it is used in densely populated cities. The term "overcrowding" means that houses should be at such distance from each other, that one house is not injuriously affected by another house. "Sanitation" is also a wide term. It is mistake to consider sanitation as equivalent to a drainage system. Sanitation means the science of health and hence the health of the inhabitants is a question that may be considered under the term "sanitation." There is no limitation that these bye-laws to be framed by a Municipality under S. 298 must only deal with buildings which abut on a road. The bye laws on other matters such as sanitation can as well be framed. If there are such bye-laws, they regulate the discretion of the Board and the District Magistrate on questions as to how and when the rules under the bye-laws should be relaxed, otherwise their discretion is not limited. (*Sen, J. on difference between Mukerji and Bennet, JJ.*) ABDUL QAYAM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All. 500 = I.R. 1931 All. 596 = 133 I.C. 148 = 1931 A.L.J. 206 = A.I.R. 1931 All. 147.**

——**S. 298**—*Bye-law No. 23 framed under—Modification by Municipal Board—Interference by Court.*

Sen, J.—It is within the competency of the Full Board during the season to relax the rigour of any rule under the bye-law No. 23 framed by the Board under S. 298 of the Act in any particular case for special reasons to be recorded in writing.

Bennet, J.—For relaxing bye law 23 framed by the Municipal Board anything which would come under the three heads, *viz.*, sanitation, prevention of disease and overcrowding of houses, is a matter which should be nonsidered by the District Magistrate in an appeal. But it is open to the appellant to show that the relaxation of the bye-law would adversely affect his premises in regard to any of the three heads and if he succeeds in showing this, then it will be for the District Magistrate to consider whether under those circumstances the bye-law should be relaxed or not. The very basis of the bye law involves a question of private rights. (*Sen, Mukerji and Bennet, JJ.*) ABDUL QAYAM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All. 500 = I.R. 1931 All. 596 = 133 I.C. 148 = 1931 A.L.J. 206 = A.I.R. 1931 All. 147.**

——**S. 298**—*Bye-law No. 23—framed under—District Magistrate's decision—Power of High Court to interfere.*

It is not open to the High Court to question the District Magistrate's decision that the bye-law No. 23 framed by the Municipal Board under S. 298 of the Act has been properly disregarded or departed from. (*Sen, J. on difference between Mukerji and Bennet, JJ.*) ABDUL QAYAM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All. 500 = I.R. 1931 All. 596 = 133 I.C. 148 = 1931 A.L.J. 206 = A.I.R. 1931 All 147.**

——**S. 298**—*Bye-laws—Residence of prostitutes—Invidious distinction made—Validity.*

The Agra Municipal Committee made a bye-law to the following effect: "No public prostitute shall reside in any house or building or ply her trade within the Municipal limits except on both sides of the streets. . . Exception. Prostitutes owning houses in places other than those mentioned above may continue to reside therein but future acquisitions of property shall not entitle them to live and carry on their profession there.

Held, that the Municipality was itself an area for purposes of S. 298 H (e), but the bye-law was bad as-

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containing an invidious distinction among the several classes of prostitutes mentioned therein. (*Sulaiman and Young, JJ.*) NAZIRAM *v.* EMPEROR. **54 All. 611 = I. R. 1932 All. 315 = 137 I C. 209 = 13 L R. 76 (Cr.) = 1932 A L J 399 = 1932 Cr. C. 634 = 33 Cr. L.J. 437 = A.I.R. 1932 All. 537.**

——**S. 298, List I Group H, Cl. (e)**—*Bye-laws under—Validity of—Bye law permitting some prostitutes and prohibiting others from residing in particular area.*

The bye-law must be general and must prohibit the residing of public prostitutes in that area. The prohibition must be aimed against the residence of public prostitutes in general and not the residence of individual prostitutes or any particular class of prostitutes. Where the bye-law in question permitted prostitutes who owned and resided in houses in March, 1925, to continue to live there as before (and perhaps to carry on their profession undisturbed) and prohibited others from residing in that particular locality, it is creating an invidious distinction between one class of prostitutes and another and therefore not valid. (*Sulaiman, Ag C. J.*) CHANCHAL *v.* EMPEROR. **I R. 1932 All 261 = 136 I.C. 787 = 33 Cr. L.J. 348 = 12 L.R. 162 (Cr) = 1932 A.L.J. 28 = 1932 Cr. C. 90 = A.I.R. 1932 All. 70.**

——**S 298 List I, Group H, Cl (c)**—*Construction—Bye-law prohibiting prostitutes from residing in the whole of the municipal area—Validity of.*

The interpretation which must be placed on clause (*e*) of S. 298-II is the one which is not only the more reasonable one but also the one that encroaches less on the rights of individual citizens, *viz.*, that the Board has power to make a bye-law prohibiting prostitutes from residing in a specified street or area, but not to make a bye law prohibiting them from residing in the whole of the municipal area with the exception of a certain specified part. (*Kendall, J.*) MUHAMMADI *v.* EMPEROR. **54 All 1 I R 1932 A. 272 = 137 I.C. 80 = 33 Cr. L. J 416 - 13 L.R. 28 (Cr.) = 1932 A.L.J. 15 = 1932 Cr. C. 145 (2) = A.I R 1932 All. 110.**

——**S 298**—*Power to frame bye-laws.*

Under the Act, the Municipal Board has got power to frame bye-laws both for prohibiting the residing of public prostitutes and the keeping of a brothel. (*Sen and Niamatullah, JJ.*) MUNICIPAL BOARD, ETAH *v.* ASGHARI JAN **I R. 1932 All. 590 = 139 I.C. 804 = 1932 A L J 117 = A.I R. 1932 All 264.**

——**S. 298**—*Scheme of Act.*

The whole scheme of the Act discloses the fact that the power of the Municipal Board to grant or withhold sanction to a building is confined to the question of sanitation and to some extent uniformity of buildings where they abut a road—*Bennet, J.* (contra). (*Sen, J., on difference between Mukerji and Bennet, JJ.*) ABDUL QAYAM KHAN *v.* CITY BOARD MUSSOORIE. **53 All. 500 = I R 1931 All 596 = 133 I.C. 148 = 1931 A.L J. 206 = A I R 1931 All. 147.**

——**Ss 298-F and 245**—*Bye laws for regulation of meat trade—Applicability to areas outside Municipal limits—Power of Municipal Board to demand licence fee.*

For the regulation of meat trade there are special bye laws under S. 298 F of the Municipalities Act which cannot be made applicable by virtue of S 245 to areas outside the Municipal limits. It is, of course, open to the Municipal Board to approach the Local Government for the extension of the limits of the Board under S. 3 of the Act. Without such extension there seems to be no provision in the Act under which bye laws under S. 298-F can be made applicable outside Municipal

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limits. Nor has the Board authority under the substantive S. 245 to demand licence fee or insist on payment of licence fee before business is carried on. (*Sulaiman, C.J. and Bennet, J.*) IMAM BAKHSH *v.* EMPEROR. **158 I.C. 919 = 8 R A 351 = 36 Cr.L.J. 1481 = 16 L.R 58 (Cr) = 1935 A.Cr.C 192 = 1935 A. W.R. 932 = 1935 Cr.C. 1054 = A.I.R. 1935 All. 903.**

——**S. 298 F**—*Bye-laws framed under—Sale of milk and* dahi—*Shop used force—Licence for—Rule imposing fees—Validity of.*

A statutory power conferred upon a Municipal Council to make bye laws for regulating and governing a trade does not, in the absence of an express power of prohibition, authorise the making it unlawful to carry on a lawful trade in a lawful manner. The wide powers conferred by S. 130 of the Act of 1900 to control and regulate places for the sale of articles of food and drink have been considerably curtailed by S. 241 and S. 298-F. The former relates to a market or shop for the sale of animals, meat, fish, fruit or vegetables; the latter only confers power on the Board to provide for the establishment, regulation and inspection of markets and slaughter houses. Cl. F does not either speak of a prohibition or of levying of a licence and the words "regulate places" cannot be said to include the power to charge a fee for licence. The power to grant licences is contained in S. 298 (2) *F* (*a*) and (*b*) but that is confined to sale of animals, first, fruit and vegetables, milk and *dhai* cream are not articles which, under the scheme of the Act, a licence is required for. So a rule purporting to be framed under S. 298 (2) *F* (*d*) and imposing a licence fee on a shop used for the sale of milk and *dahi* is *ultra vires*. (*Bajpai, J.*) ASA RAM *v.* EMPEROR. **55 All 538 = I R. 1933 All. 339 = 143 I C. 796 = 34 Cr. L J. 647 = 14 L.R. 410 (Cr.) = 1933 A.L.J. 905 = 1933 Cr.C. 995 = A.I.R. 1933 All. 593.**

——**Ss. 298 (2) H (c) and 299**—*Levy of licence fee apart from tax—Power of Municipality.*

S. 298 (2) H(c) contemplates the making of a bye-law imposing an obligation of taking out licences on proprietors or drivers of vehicles plying for hire and there is no inconsistency between demanding a tax for the use of a motor car for private purposes and demanding a further licence fee for its use when plying for hire. It is reasonable that the Municipal Board should recover by means of licence fees the expenses incidental to the business of licensing. But it was not the intention of the legislature that Municipalities should raise revenue for general purposes under the guise of imposing licensing fees. (*Sulaiman, C. J and King, J.*) BRIJ MOHAN LAL *v.* EMPEROR. **1934 A L.J. 244 = 149 I C. 11 = 6 R A. 879 = 35 Cr.L J. 931 = 3 A.W.R. 592 = 1934 Cr.C. 594 = A I.R 1934 All. 497.**

——**S 298 (j) (d)**—*Bye law framed under—Rule regarding levy of fees—Validity.*

A bye-law framed under S. 298 (*j*) (*d*) levying fees may itself be unlawful, if the fee levied is exorbitant or so excessive as to make the bye-law itself unreasonable. (*Sulaiman, C. J. and King, J.*) SHEIKH AJMERI *v* EMPEROR. **56 All 241 = 6 R.A 727 = 35 Cr L.J 704 = 148 I C. 603 = 3 A W.R. 181 = 1934 A. L.J. 80 = 1934 Cr.C. 70 (2) = A.I R. 1934 All. 39.**

——**S. 298 (j) (d)**—*Bye-law levying fee—Reasonableness—Question of fact cannot be raised in revision.*

The question whether a fee levied by a bye-law framed under U. P. Municipalities Act is excessive and unreasonable is mixed question of fact and law and cannot be raised in revision for the first time. (*Sulaiman, C. J. and King, J.*) SHEIKH AJMERI *v.* EMPEROR. **56 All. 241 = 6 R.A. 727 = 148 I.C. 603 = 35 Cr L.J.**

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704=3 A.W.R. 181=1934 A.L.J. 80=1934 Cr.C. 70 (2)=A.I R. 1934 All. 39.

———S. 299 (1)—*Bye-law that no person may ply the trade of weighman without obtaining licence—Buyer of grain weighing it himself and obtaining commission from vendor—Offence.*

The applicants were fined under S. 299 (1) of the Municipalities Act for infringement of a bye-law of the Notified Area Committee. This bye-law is to the effect that no person may ply the trade of a weighman without obtaining a licence. The facts found are that one *X* sold some grain to the applicants and that they weighed it themselves without employing a professional weighman and that in consideration of not employing a weighman they demanded and obtained from the vendor the commission which the weighman would have received.

Held, that the action of the applicants is not one which contravenes the bye-law as it cannot be said that they were plying the trade of a weighman. (*Allsop, J.*) **DURJAN** *v* **EMPEROR. 157 I C. 1091=8 R A. 262 (1) =36 Cr L J. 1292=1935 A.L.J. 660=1935 A.Cr.C. 140=1935 Cr.C. 655=1935 A.W.R. 702=A.I.R. 1935 All. 655.**

———S. 307—*Conviction under—Validity of notice—If can be challenged in revision.*

Where the applicant had challenged the validity of the notice issued against him by the Municipal Board by appealing to the Collector who decided that the notice was a valid one, it is not open to him to reopen that question in a revision application against an order upholding his conviction under S 307 of the Municipalities Act for failure to obey the notice. (*Kendall, J.*) **BISHAMBAR NATH** *v.* **EMPEROR 1935 A.W R. 943= 1935 A.L J 971=1935 A Cr C 190=8 R A.65 (1)= L R 16 A. 53 (Cr.)=156 I.C. 950=36 Cr.L J. 1036 (2).**

———S 307—*First conviction—Recurring fine, if can be imposed.*

Under S. 307 where a person fails to comply with a notice to remove certain construction, a recurring fine should not be imposed at the time of the first conviction itself. Before a recurring fine is imposed, the offender must be 'proved' to have persisted in the offence. (*Sulaiman and Niamatullah, JJ*) **EMPEROR** *v.* **HURMAT. I.R. 1932 All 331=137 I C. 513 (2)=33 Cr.L J 473=1932 A.L J. 154=13 L R. 4 (Cr.)= 1932 Cr.C. 145 (1)=A I.R. 1932 All 109.**

———S. 307—*Notice falling within purview of S. 318—Validity of—Criminal Court, if can question.*

A person aggrieved by a notice falling within the purview of S. 318 can challenge the validity of that notice by way of an appeal to the District Magistrate or other special officer appointed by the Local Government and, if he fails to avail himself of that remedy, no other authority such as a Criminal Court trying a case under S. 307 can question the validity of the notice. 1932 A. L.J. 579. Foll. (*Sulaiman, C. J. and Mulla, J.*) **BAIJNATH RAM** *v.* **EMPEROR. 1935 A W.R. 1253= 1935 A Cr C. 274=1935 A.L J. 1260=1936 Cr.C. 56 =160 I C 927 (2)=37 Cr.L J. 348=8 R A. 675=A. I.R. 1936 All 56**

———S. 307—*Order inflicting fine under S. 307 and further daily fine until breach continues—Legality.*

Where a magistrate not only fines the accused under S. 307 of the Act and orders him to remove the shed and the chabutra within ten days, but adds "failing to do it he shall pay a further fine of Re. 1 per day until such time as he continues the breach" the latter part of the order inflicting further fine is bad and should be set aside. 40 All. 569, Rel. on. (*Kendall, J.*) **MUNSHI LAL** *v.* **EMPEROR. 55 All. 603=6 I.R. (All.) 278= 146 I.C. 254=34 Cr.L.J. 1217=14 L.R. 446 (Cr.)= 1933 A.L.J. 1190=1933 Cr.C. 1141=A.I.R. 1933 All. 657.**

———S. 307—*Prosecution under—Legality of notice under S. 186—Criminal Court, if can consider.*

Per *King, C. J. and Srivastava, J.* (*Zia ul-Hasan, J., dissenting*).—The answer to the question whether a Criminal Court can, in a prosecution under S. 307 of the Municipalities Act, for failure to obey a notice issued by a Municipal Board under S. 186 of that Act go into the question of the legality, validity and reasonableness of the notice, depends on whether the District Magistrate has, or has not, made an appellate order under S. 318. If he has, then the answer to the question is in the negative. If he has not, then the trying Magistrate may decide (if the question is raised) whether the notice is a notice which has been given by the Board under S. 186 or a nullity. If he finds that the notice was given by the Board under S. 186 then he is precluded by S. 321 from trying its legality, validity or reasonableness. The obvious interpretation of S. 321 is that an order made by a Municipal Board under S. 186 can be questioned only by means of an appeal to the District Magistrate. (*King, C. J., Srivastava and Zia ul-Hasan, JJ*) **EMPEROR** *v.* **MUMTAZ HUSAIN. 11 Luck. 123=155 I.C 344=7 R.O. 583=36 Cr.L.J. 720=1935 O.W N. 509=1935 Cr.C. 670=A.I.R. 1935 Oudh 337 (FB.).**

———S. 307—*Prosecution under—Validity of notices under Ss. 186 and 211—Whether can be gone into.*

Where notices are issued under Ss. 186 and 211 but the accused does not avail himself of the remedy, the Magistrate before whom the prosecution is launched is precluded from questioning the legality or the validity of the notices. (*King and Thom, JJ*) **HAR PRASAD** *v.* **EMPEROR. 54 All. 864=I.R. 1932 All. 497=138 I C 839=33 Cr.L J 692=1932 A.L.J. 579=13 L.R. 136 (Cr.)=1932 Cr.C. 825=A.I.R 1932 All. 673.**

———S. 307—Scope—Failure to comply with notice under S. 267—Prosecution for—Enquiry—Scope of—Jurisdiction to enquire into merits. *See* **U. P. MUNICIPALITIES ACT, SS. 267 AND 307. 11 O.W.N. 1622= A.I.R. 1935 Oudh 197.**

———S. 307 (b)—*Applicability—Need for second prosecution.*

S. 307 (*b*) is applicable only to a case of a continuing breach, where the offender is proved to have persisted in the offence. Obviously the conviction for such offence must be on account of an offence which has already been committed. For such an offence, therefore, a second prosecution would be necessary. (*Sulaiman, C J. and Bennet, J*) **PARSHOTTAM KANDU** *v.* **EMPEROR. 159 I C 513=1935 A L.J. 1101=1935 A. Cr.C 251=1935 A.W R. 1140=8 R.A. 456=1935 Cr C. 1207=A.I.R 1935 All. 986.**

———S. 314—*Complaint under—By President whose election had been declared invalid—Validity.*

A complaint in respect of a construction alleged to have been made by a person without the previous sanction of the Municipal Committee under S. 185 of the Act is invalid, where it was made by a person whose authority to make the complaint was derived from his capacity as President of the notified area and it had been held by the Civil Court that his election as President was invalid (*Kendall and Iqbal Ahmad, JJ.*) **EMPEROR** *v.* **MT. BAFATAN 55 All. 843=6 I R. (All) 17=144 I C. 951=34 Cr.L.J. 854=1933 A.L. J. 1053=1933 Cr C. 989=A.I.R. 1933 All 617.**

———S. 314—*Prosecution for assault—Complaint by Board—If necessary.*

U. P. MUNICIPALITIES ACT (1916), S. 318.

A complaint by the Board or some person authorised on this behalf is not necessary under S. 314 of the Municipalities Act, for a prosecution under S. 353 I. P. Code, for assaulting a Municipal employee in the performance of his duty, as the offence of assault is not punishable under the Act. (*Zia-ul Hasan, J.*) KALLU *v.* H. S. DUBE. **158 I.C. 481 = 8 R.O 104 = 1936 Cr. C. 27 = 36 Cr L J. 1386 = 1935 O.W.N. 1124 = A I R. 1936 Oudh 20.**

——— **S. 318**—*Application for permission to build —Illegal refusal—Suit to recover compensation—Maintainability.*

Where the Municipal Board never professed to act under S. 180 and refused permission on the ground that the title to the property did not vest in the applicant,

Held, that the Municipality had no power to decide a question of title, and that its refusal being wrongful the Court could interfere and award compensation to the aggrieved party. (*Mukerji and Bennet, JJ.*) MUNICIPAL BOARD ETAWAH *v.* MT RAM SRI. **I.R. 1931 All. 570 = 133 I.C. 26 = A.I.R. 1931 All. 670.**

——— **S. 318**—*Order of District Magistrate—No revision to High Court.*

The District Magistrate exercising powers under S. 318, U. P. Municipalities Act, 1916, is not a Court subordinate to the High Court and no revision lies. (*Iqbal Ahmad, J.*) BISHAMBHAR NATH *v.* ACHAL SINGH. **54 All 891 = I.R. 1932 All 615 = 140 I.C. 123 = 1932 A.L J. 816 = A.I.R. 1932 All 651.**

——— **S. 318**—*Right to appeal—Aggrieved person—Permission granted in spite of objections—Objectors preferring appeal—Appeal is competent.*

A Municipal Board issued a notice on receipt of the application of *K* inviting objections by persons who may be affected by the permission which *K* had asked for from the Board to erect a temple on the site indicated by him in his application. The objectors filed their petition of objections in response to this invitation. These objections were founded on an alleged right of their own in the piece of land on which *K* proposed to build a temple. The objections were overruled by the Municipal Board and in consequence sanction was granted under S. 180 to build the temple. The objectors appealed to the District Magistrate.

Held, that the appeal of the objectors before the learned District Magistrate was a competent appeal as the objectors were party to the proceeding and "aggrieved" within the meaning of S. 318. (*Hasan, C. J. and Kisch, J.*) BALDEO BEHARI *v.* KAILASH NARAIN. **6 Luck 456 = I.R. 1931 Oudh 385 = 134 I.C. 593 = 14 O.L.J. 353 = 8 O.W.N. 531 = A.I.R. 1931 Oudh 305.**

——— **S. 319**—District Magistrate's decision—Power of High Court to question. *See* U. P. MUNICIPALITIES ACT, S. 298. **53 All. 500 = A.I.R. 1931 All 147.**

——— **S. 319**—*Reference—Duty of High Court—Defects—Procedure.*

Under S. 319, all that the High Court is required to do is to see a statement of facts made by the District Magistrate himself and to express its opinion on a point of law arising out of the statement. It is not the duty of the High Court to investigate the facts. The District Magistrate is the appellate authority and the High Court may be required to state its opinion on a point of law for his benefit. The point of law should also be formulated by the District Magistrate. Consequently where, for the facts, the High Court is asked not to confine itself to the reference made by the District Magistrate, but is referred to certain other extraneous documents and further, exact point of law is not formulated in terms, the reference is defective and must be returned. (*Mukerji and Niamatullah, JJ.*) SHEIKH MAHOMED *v.* SAGAR MAL. **I.R. 1932 All 362 = 1932 A.L. J. 470 = 138 I.C. 59 = A I.R. 1932 All. 407.**

U. P. MUNICIPALITIES ACT (1916), S. 321.

——— **S. 320 (1)**—*Costs—Discretion of Court.*

S. 320 (1) clearly invests the appellate Court with a very wide discretion in the matter of awarding costs though the case of an order for costs against an appellant and in favour of the original applicant is not specifically provided for (*Hasan, C.J. and Kisch, J.*) BALDEO BEHARI *v.* KAILASH NARAIN. **6 Luck. 456 = I R. 1931 Oudh 385 = 134 I.C. 593 = 14 O.L.J. 353 = 8 O.W.N. 531 = A.I.R. 1931 Oudh 305.**

——— **S 320**—*Scope.*

S. 320 only provides for costs in appeals from orders of the Board made in accordance with S. 318 of the Act. The section does not apply to a prosecution under S. 307 (*b*) of the Act for alleged disobedience, to a notice issued by the Board under S. 186 (*Kisch, J.*) YUSUF HUSAIN *v.* EMPEROR. **I.R. 1932 Oudh 393 = 140 I. C. 185 = 33 Cr L.J 933 = 1932 Cr. C. 846 = 9 O.W N. 870 = A.I.R. 1932 Oudh 306.**

——— **S. 321**—*Decision of Municipal Boards—Finality.*

Bennet, J.—The Municipalities Act is an Act for local Self-Government. The principal of Local Self-Government is that the inhabitants and not experts should decide their own local affairs. Hence the decisions of the Municipal Board and the appellate authority, though the Board is composed of members without legal training and not being experts, are conclusive under S. 321. (*Sen, Mukerji and Bennet, JJ.*) ABDUL QAYUM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All 500 = I.R 1931 All 596 = 133 I.C. 148 = 1931 A L J 206 = A.I.R. 1931 All. 147.**

——— **S. 321**—*Decision of Municipal Board—Finality—Civil suit when maintainable.*

The Municipal Board is not given any authority to encroach on the rights of the inhabitant except for the purpose of the benefit to the public in general. The decisions of the Board of the appellate authority (Collector or the Commissioner as the case may be) is no doubt final under S. 321. It is impossible to believe that a decision on a question of private rights could have been given finality where the decision is arrived at without hearing evidence or where the decision is arrived at by a body of men not specially trained in law respecting private rights. It not open either to the Board or to the appellate authority to disallow a proposal to erect a building on the ground that it is hideous in its appearance and would therefore injuriously affect the value of a neighbour's property. In such matters the parties should be left to seek their own remedy in Civil Court. (*Sen, J* on difference between *Mukerji and Bennet, JJ.*) ABDUL QAYUM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All 500 = I R 1931 All 591 = 133 I.C. 148 = 1931 A.L.J. 206 = A.I.R. 1931 All. 147.**

——— **S. 321**—Notices under Ss. 186 and 211—Questioning—Mode. *See* U. P. MUNICIPALITIES ACT, S. 307. **1932 A.L J. 579 = A.I R 1932 All. 673.**

——— **S. 321**—*Civil suit- Notice on husband to demolish building—Wife not party to proceedings—Suit by wife —If lies.*

The Town Committee served on *M* a notice to demolish the building. Thereupon his wife instituted a suit to obtain a declaration that the shop was her property having been sold to her in lieu of her dower as early as 1928 and that the shop was not liable to be demolished, because it had been constructed before the sections

U. P. MUNICIPALITIES ACT (1916), S. 321.

which authorized the Town Area Committee to demolish unauthorized buildings came into force.

Held, that the wife not being a party to the proceedings before the Town Area Committee and before the appellate authority, she was entitled to maintain the suit. The notices or orders passed against the husband could not be binding on the wife, simply because she was the wife. A. I. R. 1929 All. 912, Dist (*Mukerji, J.*) TOWN AREA MANDHA *v.* MT. MANGLO. **6 R.A. 550 = 147 I.C. 873 = 1933 A.L.J. 960 = A.I.R. 1933 All. 592.**

———**S. 321**—Prosecution for failure to obey notice under S. 186—Legality of notice—Criminal Court, if can consider. *See* U P. MUNICIPALITIES ACT. S. 307. **1935 O.W.N. 509 = A.I.R. 1935 Oudh 337 (F B.).**

———**S. 321 (1)**—*Construction—"Authority"—Meaning of.*

Per *King, C. J. and Srivastava, J.*—The word "authority" used in sub-section (1) of S. 321 is sufficiently wide to cover both Criminal and Civil Courts.

Per *Zia-ul-Hasan, J*—The Legislature intended to mean by the word "authority" an authority that might be appealed to or moved against an order or direction made by a Municipal Board by the person against whom the order or direction has been made under any of the sections referred to S. 318. They did not intend thereby to deprive a citizen of his right to defend himself if prosecuted in a Criminal Court by the Board, though to guard against even the remotest possibility of such a person moving the Criminal Court thay used a word comprehensive enough to include Criminal Courts (*King, C. J, Srivastava and Zia-ul-Hasan, JJ.*) EMPEROR *v.* MUMTAZ HUSAIN. **155 I.C. 344 = 11 Luck. 123 = 7 R.O. 583 = 36 Cr. L.J. 720 = 1935 O.W. N. 509 = 1935 Cr. C. 670 = A.I.R. 1935 Oudh 337 (F.B).**

———**S. 326**—*Applicability—Suits based on contract.*

S. 326 does not apply to suits by a person based on a contract. It is intended to cover wrongful acts done by Municipal Board or by officers or servants of that Board. Hence a suit by a contractor based on a contract for money due to him, for execution of some work, is not governed by the limitaton of six months provided in S. 326. (Case-law referred.) (*Mukerji and Bennet. JJ.*) MUNICIPAL BOARD, AGRA *v.* RAM KISHAN. **147 I.C. 186 (2) = 6 R.A 415 = 55 All. 1002 = 1933 A.L.J. 1414 = A I R. 1933 All. 785.**

———**S. 326**—*Applicability—Suit for price of coal supplied.*

S. 326 is applicable to a suit for price due for coal supplied to the municipality and the suit would be barred under sub-section (3) if commenced otherwise than within six months after the accrual of the cause of action. (*Wazir Hasan, C.J., Raza and Bisheswar Nath, JJ*) MUNICIPAL BOARD, LUCKNOW *v.* S. C. DEB. **8 Luck 1 = I.R. 1932 Oudh 236 = 137 I C. 574 = 9 O. W.N. 461 = A I.R. 1932 Oudh 193 (F.B).**

———**S. 326**—*Applicability—Suit for malicious prosecution against Chairman of Municipal Board.*

Where the defendant acted and profess to act in his capacity as the Chairman of the Municipal Board, S. 326, Municipalities Act is in terms applicable. Therefore notice must be given by the plaintiff to the defendant before he institutes a suit for damages for malicious prosecution. Further Sub-S. (3) of S. 326 makes it necessary for him to institute his suit within six months from the date of the accrual of the cause of action (*i e.*) the date on which he was acquitted. (*Niamatullah and Collister, JJ*) HABIBUR RAZZAQ *v.* RAM SARU. **152 I. C. 393 = 7 R. A. 337 = 1934 A.L. J. 1149 = 4 A W.R. 884 = A.I.R. 1935 All. 31.**

U. P. NAYABAD RULES (1931).

———**S. 326**—*Interpretation—Authority of decisions under S. 80, C.P. Code—Value.*

Cases governed by S. 80, C.P Code, are of authority in cases having reference to S. 326, Municipalities Act, which is couched in similar terms. (*Niamatullah and Collister, JJ*) HABIBUR RAZAQ *v.* RAM SARUP **152 I.C. 393 = 7 R A. 337 = 1934 A.L.J. 1149 = 4 A.W.R. 884 = A I.R 1935 All. 31.**

———**S. 326**—*Notice—Amount claimed in, varied at the time of suit—Effect.*

There is no provision which authorises a Court to dismiss the suit if the amount claimed in the notice under S. 326, U. P. Municipalities Act, has been subsequently reduced at the time of the institution of the suit. The mere fact that a larger amount was claimed in the notice does not in any way prejudice the person to whom the notice is sent in the preparation of his defence nor does it in any way prevent him from making proper amends. In proper cases this factor might be taken into consideration in connection with the order regarding costs. The plaintiff has the option to abandon a portion of his claim. (*Sulaiman, C.J and Bajpai, J.*) MUNICIPAL BOARD, MAINHURI *v.* AJUDHIA PRASAD. **154 I C 1064 = 7 R.A. 867 = 4 A.W.R. 1325 = A.I. R. 1935 All 51.**

———**S. 326**—*Notice—Necessity—Suit for injunction.*

Notice under S. 326, U. P. Municipalities Act, is not necessary in the case of a suit where the relief claimed is an injunction covered by the last proviso to the section. (*Sulaiman, C J. and Rachhpal Singh, J.*) MAHOMED IKRAM KHAN *v.* MIRZA MAHOMED BAQAR. **152 I.C. 817 = 7 R.A. 401 = 4 A.W R. 1392 = 1935 A.L.J. 139 = A I.R. 1935 All. 106.**

———**S. 337 (3)**—*Notified area—Meaning—Finality.*

Under S. 337 (3) of the U. P. Municipalities Act the decision of the local Government that a local area is not an agricultural village is final and conclusive and under S. 4 (6) of the Agra pre-emption Act a notified area merely means a local area in regard to which a Government notification has been issued. (*Sulaiman, C. J.*) MAHOMED SAID KHAN *v.* MANGAL PRASAD DUBE. **6 R A 461 = 147 I.C. 339 = 3 A.W.R. 198 = A.I.R. 1934 All. 175.**

U. P. MUNICIPALITIES ACT (II OF 1916)—*Rules under R. 34—No vote recorded—Forfeiture of deposit.*

Where an election is quashed on the ground that all the ballot papers were invalid and that no valid vote was cast at all,

Held, that it was impossible to say that any particular candidate received less than the requisite minimum and that there could be no forfeiture of deposit in such a case. (*Sulaiman, Ag. C. J. and Banerji, J.*) KALYAN DAS *v* MUNICIPAL BOARD CHANDAUSI. **54 All. 112 = I.R. 1932 All. 64 = 135 I. C. 240 = 1931 A.L.J. 1097 = A.I.R. 1932 All. 158.**

———*Rules under R. 45—Ballot paper—Rejection.*

A ballot paper which is rejected under R. 45 must be spoiled ballot paper. (*Sulaiman, Ag. C. J and Banerji, J.*) KALYAN DAS *v.* MUNICIPAL BOARD, CHANDAUSI. **54 All 112 = I.R. 1932 All 64 = 135 I.C. 240 = 1931 A.L.J 1097 = A.I.R 1932 All. 158.**

U P. NAYABAD RULES (1931)—*Board of Revenue—Powers of revision.*

No application lies in revision to the Board under the Nayabad Rules of 1931. It cannot be said that because the grant was made when the old rules were in force the suit relating to it should for ever be governed by those rules. (*Drake Brockman. S.M.*) KHIM SINGH *v.* KESAB DATT. **14 L.R. 868 (Rev.).**

U. P. NAYABAD RULES (1931).

———*Board of Revenue—Powers of revision.*

The Board of Revenue have no revisionary jurisdiction in cases under the Nayabad Rules. (*Oppenheim, S. M. and Drake Brockman, J. M.*) MADHO SINGH *v.* PREM BALLABH BELWAL. **18 R.D. 427=15 L.R. 542 (Rev.).**

———*Grant under—Rights of user—Custom of* Kumaun—*Co-sharer's rights of cultivation.*

By the Customary Law of *Kumaun*, rights of user would have to give place to home cultivation; and possessors of the right would have no right to contest a Nayabad grant. Rights of user over lands within the boundaries of another land cannot prevail as against the rights of cultivation of the *hissedars* of that village. (*Drake Brockman, J. M.*) BIR DEB *v.* ISHURU DATT. **18 R.D. 689=16 L.R. 122 (Rev.).**

———R. 17—*Applicability—Application and suit under Rules of* 1916—*Revision.*

Where both the application for a *nayabad* grant and the suit to contest the validity of the grant were filed when the Rules of 1916 were in force, the Board has jurisdiction to interfere in revision though under the new Rules of 1931, the Board has no jurisdiction. (*Drake Brockman, J.M.*) BIR DEB *v.* ISHURU DATT. **18 R.D. 689=16 L.R. 122 (Rev.).**

———R. 17—*Scope—Reversionary jurisdiction of Board of Revenue—Extent of.*

Under the R. 17 of the Nayabad Rules of 1916, the jurisdiction of the Board of Revenue in revision is limited to seeing whether the Commissioner has exercised a jurisdiction not vested in him by law or had acted in the exercise of his jurisdiction illegally or with material irregularity. (*Drake Brockman, J. M.*) BIR DEB *v.* ISHURU DATT. **18 R.D. 689=16 L.R. 122 (Rev.).**

———R. 31—*Board of Revenue—Powers of revision.*

The Board of Revenue had powers of revision under the Nayabad Rules of 1916. But they had no such power under the Water Rules of 1917 nor have they any such power under the Nayabad Rules of 1931 and under the rules of 1930. (*Oppenheim, S. M. and Walton, J. M.*) DHAN SINGH *v.* BHANA. **13 L.R. 415 (Rev.)= 17 R.D. 40.**

———R. 36—*Applicability—Board's powers of revision.*

An application for a *nayabad* grant was made when the Rules of 1916 were in force and was rejected by the Deputy Commissioner. The applicant did not appeal, but allowed the matter to rest there. Subsequently after the Rules of 1916 were abrogated and the Rules of 1931 came into force, the applicant brought a declaratory suit which would enable him to apply for a *nayabad* grant.

Held, that the suit was not a continuation of the original proceedings and was not governed by the Rules of 1916, but that the suit must be deemed to have been brought under R. 36 of the *Nayabad* Rules of 1931 and that the Board had no revisional jurisdiction. (*Drake Brockman, S. M.*) NATHU SINGH *v* NAIN SINGH. **18 R.D. 633=16 L.R. 88 (Rev.).**

———R. 36—*Suit under—Revenue Board's powers of revision.*

The Board of Revenue have no revisional jurisdiction in suits which are specifically brought under R.36, Nayabad Rules. (*Drake Brockman. J.M.*) KUSHAL SINGH *v.* DEBI DATT. **18 R.D. 430 (1)=15 L.R. 541 (Rev.).**

U. P. PREVENTION OF ADULTERATION ACT (VI OF 1912), S. 4—*Applicability—Sale of cocoanut oil.*

S. 4 will only apply if the article sold is an article of food or drug. Cocoanut oil is edible but is not sold as food in bazaars and its adulteration is therefore not punishable under S. 4. (*Pullan, J.*) BOHRA RAGHUBAR DAYAL *v.* EMPEROR. **I.R. 1931 All. 658=133 I.C. 418=32 Cr.L J. 1031=1931 A.L.J 690=12 L. R. 95 (Cr.)=1931 Cr.C. 1041=A.I.R. 1931 All. 705.**

———S. 4—*Object and Scope of.*

If the purchaser demands pure wheat flour and the seller professes to sell pure wheat flour, which turns out on analysis to have even a negligible mixture of barley flour, warranty of quality expressly given is clearly broken and the seller is guilty of an offence under S. 4; but if the seller warns him that a negligible percentage of barley flour is mixed with or may be found to be mixed with it, as is generally the case, it would seem that the seller cannot be held to be guilty, under the first part, if a mixture of barley flour is detected to an extent which is negligible and which does not prejudice the purchaser. The object of this part of the section is to prevent deception or misrepresentation. Cases contemplated by Cl. B stand on a slightly different footing. In such cases the seller is assumed to have given an implied warranty to the effect that the article of food which is offered or exhibited for sale is, in fact, what it purports to be. So where he offers to sell wheat flour, which is generally understood to mean what flour with a negligible admixture of barley, and it is in evidence that wheat flour, however pure, must contain mixture of barley flour to an extent which can only be traced by an analyst and cannot be detected by an ordinary consumer, however fastidious he may be, the evidence falls short of the requirements of S. 4. (*Niamatullah, J.*) MITHAN LAL *v.* EMPEROR. **149 I.C. 222=6 R.A. 869=35 Cr.L J. 913=1934 Cr.C. 517= A.I.R. 1934 All. 439.**

———S. 4—*Scope of—Mixed flour sold as pure wheat flour—If an offence.*

S. 4 of the Act does not exempt from punishment a person who sells as pure wheat flour, a flour which is not pure but contains some mixture of barley however slight. The fact that the amount of adulteration is negligible or is universally tolerated may affect the sentence but cannot affect the conviction. (*Niamatullah, J.*) BUDH SEN *v.* EMPEROR. **6 R A. 694=148 I.C. 384=35 Cr.L.J. 681 (1)=1934 Cr. C. 414 (1)=A.I.R. 1934 All. 329.**

———Ss 4 and 6—*Offence under—Plea in defence.*

A person who sells ghee which is found to be below standard is liable to a conviction under S. 4 of the Prevention of Adulteration Act, unless he successfully establishes the defences which are set out in S. 6 of the Act. It is no defence to a charge under S. 4 that the accused was not regularly engaged in selling ghee. (*Thom and Kisch, JJ.*) EMPEROR *v.* NUR AHMAD. **3 A.W R. 783=1934 A.L J. 839=151 I.C. 114=35 Cr.L J. 1229=7 R.A. 88=1934 Cr.C. 1028=A.I.R. 1934 All. 842.**

———S 5—*Applicability—Conditions.*

Where the case against the accused was that a food inspector saw some substance at the accused's place of business and purchased some quantity of it under the impression that it was ghee but the accused had consistently stated that it was not ghee but cocoanut oil and that it was not intended for food and on chemical analysis the substance was proved to be adulterated cocoanut oil.

Held, that as there was nothing to show that ghee was demanded and the particular substance was offered in its place, S. 5 of the Act had no application. (*Pullan, J.*) BOHRA RAGHUBAR DAYAL *v.* EMPEROR. **I.R. 1931 All 658=133 I C. 418=32 Cr L.J 1031=1931 A L J. 690=12 L.R. 95 (Cr.)=1931 Cr.C. 1041=A. I.R. 1931 All. 705.**

U. P. PREVN. OF ADULTN. ACT (1912), S. 15.

——**S. 15**—*Particulars of offence not specified—If fatal.*

The provisions of S. 15 are mandatory and the failure to state the particulars of the offence charged is fatal to the prosecution. (1930) A.L.J. 911, Foll. (*Pullan, J.*) BOHRA RAGHUBAR DAYAL *v.* EMPEROR. **I.R. 1931 All. 658 = 133 I C 418 = 32 Cr L J. 1031 = 1931 A L. J. 690 = 12 L.R. 95 (Cr.) = 1931 Cr.C. 1041 = A.I R. 1931 All 705.**

—— **S. 15**—*Non-compliance with—Legality of conviction—Cr. P. Code, S. 537.*

Although the provisions of S. 15 of the U. P. Prevention of Adulteration Act are mandatory and ought to be followed by magistrates, they are subject to the general provisions of S. 537, Cr. P. Code. The mere fact that certain particulars are not mentioned in a summons as required by S. 15 would not in every case be prejudicial to the accused when at the trial he is aware of such particulars. On the other hand, the hearing of a case within less than seven days from the date of the service contrary to S. 15, may in most cases be prejudicial to him and he may not be able to defend himself at such short notice. But if the accused never appears to have made a grievance of it either before the trial Magistrate or before the Sessions Judge in revision, he cannot be deemed to have been prejudiced in any way and the irregularity is, therefore, cured by S. 537, Cr. P. Code. (*Sulaiman C. J. and Rachhpal Singh, J.*) KEHAR SINGH *v.* EMPEROR. **57 All 400 = 152 I C. 367 = 36 Cr.L.J. 68 (2) = 1935 Cr C. 262 = 7 R A. 326 = 1934 A.L J. 1152 = 4 A.W.R. 940 = A.I.R. 1935 All. 219.**

U. P. PUBLIC GAMBLING ACT (III OF 1825), S. 6—*Instruments of gaming found—Evidence as to use of.*

Where over and above the fact that instruments of gaming were found in the house, there is evidence of two witnesses to the effect that they staked money and the stakes had been accepted by the accused, there can be no doubt that the instruments of gaming were kept or used for such gaming. (*Bennet and Bajpai JJ*) LACHHI RAM *v.* EMPEROR. **6 I R. (All.) 286 = 146 I.C. 293 = 34 Cr.L J. 1244 = 1933 A L.J. 1254 = 14 L. R. 361 (Cr.) = 1933 Cr.C. 876 = A I.R. 1933 All 544.**

U. P. RENT ACT (XII OF 1881), S. 9—Occupancy rights acquired by female tenant—Succession by daughter—Death of daughter after Agra Tenancy Act came into force—Devolution. *See* AGRA TENANCY ACT, S. 25. **14 L.R. 609 (Rev.).**

——**S. 9**—*Succession to occupancy holding—Hindu joint family—Members taking as to joint tenants.*

Where the inheritance to occupancy rights is governed by S 9 of the U. P. Rent Act of 1881 the ordinary Hindu Law would apply. If the several branches of the family are separate the inheritance would go to the nearest relative. Where however the different branches are joint the rights would enure for the whole family and the members will continue to be joint tenants of the grove land so inherited. (*Oppenheim, J M.*) NAND KISHORE SINGH *v.* LAL BAHADUR SINGH. **15 R. D 611 = 12 L.R. 249 (Rev).**

U. P. REVENUE COURT MANUAL, Chap I, R. 8—*Appeal—Presentation after hours fixed but during Court hours—Propriety.*

As a matter of Convenience both for Courts and counsel it is customary for appeals to be presented at certain fixed hours. But if an appellant is unable to present his appeal at the hour fixed he would not be debarred from presenting it during the time the courts are open. (*Knox, S. M. and Oppenheim, J.M.*) TRIPATHI GOVIND NATH *v.* BADRI KOHAR. **13 L.R. 47 (Rev.).**

U P. TOWN AREA ACT (1914), S. 14.

U. P. REVENUE MANUAL—Limitation—Order of Collector appointing Registrar, Kanungo—Appeal—Delay—Power of Commissioner to excuse—Reasons to be recorded. *See* LIMITATION ACT, S. 5—APPLICABILITY. **18 R.D. 710.**

——**R. 223 (1) (c)**—*Lambardar—Appointment—Person not competent to perform duties—Refusal to appoint—Propriety.*

The *wajib-ul-arz* of a village provided that if the lambardar transferred his proprietary rights, the post of lambardar should go to his transferee. It was found, however, that the transferee was not competent to perform the duties of the office and the Collector therefore refused to appoint him.

Held, that he was right in refusing to appoint him as lambardar. (*Oppenheim, S.M.*) DULEY RAM *v.* KUNJ BEHARI LAL. **18 R.D. 713 = 16 L R. 73 (Rev.).**

——**Para. 223 (2)**—*Minority—If a bar to appointment—"Special reasons"—What constitute.*

When a minor had once been lambardar in a *mahal* in which his father and grandfather were lambardars before him, and such minor and his rival claimant both secure the support of their respective families, and the minor also pays more revenue than his rival the other co-sharers three in number paying only small amounts of revenue, there are "special reasons" for appointing the minor as lambardar of a *mahal* which is but the residuary portion of the old *mahal*. His minority is not fatal to his claim. (*Oppenheim, S M. and Drake Brockman, J.M.*) CHANDAN LAL *v.* MOHAR SINGH. **18 R.D. 463 = 15 L R 625 (Rev.) = 11 O.W.N. 1163.**

——**Ch. XL**—*Revision—Limitation—Reasonable time.*

The period of limitation for preferring an application for revision to the Board of Revenue is four months from the date of the order sought to be revised, which period has been held to be a reasonable time for the same. (*Drake Brockman, S.M.*) AJAI VARMA *v.* BHAGWAN DAS. **1935 R.D. 386.**

——**Ch. XL**—*Rules for sale in execution of Civil Court decree—Scope and effect of—Retrospective operation—Extent of revisionary powers of Board of Revenue.*

Revisionary powers in respect of sales of land in execution of Civil Court decree were vested in the Board of Revenue for the better control of the work of sales in such cases, and the rules for such sales in Ch. XL of the Revenue Court Manual must be held to invest the Board with revisionary powers over any case that might come to the Board in revision, whether final orders in a case had been passed before the date on which the Board were invested with those powers or were passed later. (*Drake Brockman, S M.*) AJAI VARMA *v.* BHAGWAN DAS. **1935 R D. 386.**

——**Ch. XL**—*Rules under—Notification No. 298-1 A—93—1932—Construction—Inadequacy of sale price—Sale if to be postponed.*

The rules passed by the Local Government in Notification No. 298-1-A—93—1932 dated 9—2—1933, and contained in Ch XL of the U. P. Revenue Manual, for the sale of land in execution of Civil Court decrees, cannot be interpreted to mean that all sales of agricultural land were to be postponed till 31—12—1934. What the Government really meant and in fact laid down, was that if a price less than 20 times the net profits could only be obtained, the sale should be postponed and could be postponed for any period up to 31—12—1934. (*Drake Brockman, S M.*) AJAI VARMA *v.* BHAGWAN DAS. **1935 R.D 386.**

U. P. TOWN AREA ACT (II OF 1914), S. 14—*"Occupier"—Person occupying land regularly and holding his office.*

U. P. TOWN AREA ACT (1914), S. 18.

Plaintiff spread a *bister* of carpet upon the ground and there sat at the seat of custom regularly every day: clients came to consult him there, his clerk sat there, he received instructions from his clients and was paid his fees there. Further, according to the custom the plaintiff occupied the same position every day, and had his name attached to the particular spot where he sat.

Held, that he was an occupier within the meaning of S. 14 of the Town Area Act and that the local panchayat was justified in assessing him. (*Young, J.*) SHEO NARAIN *v.* TOWN AREA PANCHAYAT, CHHABRAMAN. **153 I.C. 549=7 R.A 538=A.I.R. 1934 All. 792.**

———**S. 18**—*Person assessed by panchayat—Appeal to District Magistrate dismissed—Bar of civil suit*

Where a person is assessed by the local panchayat as an occupier under S. 14 of the Town Area Act, and an appeal from that order to the District Magistrate is dismissed, any subsequent action in the Civil Court is barred. (*Young, J.*) SHEO NARAIN *v.* TOWN AREA PANCHAYAT, CHHABRAMAN. **153 I C. 549=7 R A. 538=A I.R. 1934 All. 792.**

U. P TOWN IMPROVEMENT ACT (VIII OF 1919), S 64 (1) (b)—*Ex parte* decision—Refusal to set aside—Appeal. *See* U. P TOWN IMPROVEMENT (APPEALS) ACT, S. 3 **55 All 153=A I.R. 1933 All 168**

———**Ss 72 and 97**—*Applicability—Dismissed servant—Suit to recover Provident Fund.*

The plaintiff was in the service of the Lucknow Improvement Trust. His services were dispensed with on 1st April, 1931 He then brought the present suit to recover Rs. 180 on account of his Provident Fund. The lower Court dismissed the suit as being barred by time by referring to Ss. 97 and 72, Act VIII of 1919.

Held, that those sections did not apply to the case and that the suit should be tried on merits. (*Rasa, J.*) ABDUL GHAFOOR KHAN *v.* LUCKNOW IMPROVEMENT TRUST. **6 I.R. (Oudh) 160 (1)=146 I.C. 706 =10 O.W N. 841=A.I.R. 1933 Oudh 420.**

———**S 97**—Applicability—Dismissed servant—Suit to recover Provident Fund. *See* U. P. TOWN IMPROVEMENT ACT, SS. 72 AND 97. **10 O.W.N. 160 (1)= A.I.R. 1933 Oudh 420.**

———**Sch. I, S. 10 (3)**—*Acquisition of bazaar—Method of valuation*

In a proceeding for acquiring a bazaar under the Land Acquisition Act for Improvement Trust, it was found that the income of the property was of a fluctuating character and it was necessary to employ a costly staff for making realizations from day to day from the various stall-keepers in the bazaar and that considerable vigilance was required on the part of the collection staff to prevent evasion of payments and close supervision was also necessary in order to prevent embezzlements by the staff entrusted with the realisation of these dues.

Held, taking into consideration the use to which the land was put at the time of the acquisition, it is difficult to think that any buyer would be prepared to purchase the property on the basis of the gross collections without making any allowance for the expenditure necessary for making the collections, and that while it is not possible to lay down any general method of valuation as it is necessary to take the circumstances of each property into consideration in determining the suitable basis of compensation, yet the circumstances of the property in dispute are such that it is impossible to say that it is wrong to award compensation on the basis of the net profits. (*Srivastava and Zia ul-Hasan, JJ.*) ROSHAN JAHAN BEGAM *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **11 Luck. 180=155 I.C. 579=7 R O. 610 =1935 O.W N 557=A I R. 1935 Oudh 364.**

U. P. TOWN IMPROVEMENT (APPEALS) ACT (III OF 1920), S 3—Ex parte *order under S. 64 (1) (b) of the Town Improvement Act—Refusal to set aside—Appeal.*

An order of the President of the Tribunal refusing to set aside an *ex parte* decision on the question of the apportionment of compensation passed under S. 64 (1) (*b*) of Act VIII of 1919 is not appealable under S. 3 of the (Appeals) Act (III of 1920). (*King and Thom, JJ.*) BHAWANI PRASAD *v.* SECRETARY OF STATE FOR INDIA. **55 All. 153=6 I.R. (All.) 290=146 I.C. 412=1933 A.L.J. 25=A I.R 1933 All. 168.**

U. P. VILLAGE PANCHAYATS ACT (VI OF 1920), S. 49—Scope—Judgment of Panchayat Court—Revision. *See* CR. P. CODE, S. 195—PANCHAYAT COURT. **1934 A.L J. 339=A I.R. 1934 All 216.**

———**S 71**—*Order made by panchayat—Power of Collector to review—Suit to vacate his order.*

The Collector is competent to review his order vacating a decree and the Civil Court has no jurisdiction to entertain a suit to vacate such an order of the Collector because the proceedings of the Collector in exercise of the powers vested in him under the Act must be deemed to be proceedings of the panchayat. (*Kisch, J.*) LALA RAM *v.* BUDHU. **6 R A 600=147 I.C. 990=15 L R. 60 (Rev)=3 A.W.R. 64=18 R D. 51=A.I.R. 1934 All. 330.**

———**S 74**—Scope—Judgment of Panchayat Court—Revision. *See* CR P. CODE, S 195—PANCHAYAT COURT. **1934 A.L J. 339=A.I.R. 1934 All. 216.**

———**S. 75**—Rules framed under—Rr. 34 and 35—Report of chaukidar about alleged murder—Admissibility of *See* CR. P. CODE, S. 174 (4). **A.I.R. 1933 All. 939.**

U. P. WATER RULES (1930)—Board of Revenue—Powers of revision. *See* U . P. NAYABAD RULES (1931), R. 31 **17 R.D 40.**

UNLAWFUL ASSEMBLY. *See* PENAL CODE, SS. 141 148.

UNLAWFUL INSTIGATION ORDINANCE (VI OF 1930), S. 3—*Offence under—Need for proving special notification—Omission—Irregularity.*

Where the accused was convicted of instigating people not to pay land revenue to the Government unless it was reduced to one half, thereby infringing the law embodied in S. 3, and the prosecution did not produce the notification whereby the particular province was declared a notified area for the purposes of the said ordinance,

Held, that the proper procedure was to produce the notification or tender it in evidence, and the trial Court should have clearly shown in its judgment that requirements of S. 3 had been fulfilled; but the technical flaw was not sufficient to invalidate the orders passed as the facts clearly showed that the accused had committed the offence under S. 3. (*Abdul Qadir, J.*) NANAK CHAND *v* EMPEROR. **I.R. 1931 Lah. 977=134 I.C. 769=32 Cr.L.J. 1227=1931 Cr.C. 529=A.I.R. 1931 Lah. 273.**

———**S. 3**—Offence under—Notification—Proof—Presumption. *See* EVIDENCE ACT, S. 81. **A.I.R. 1931 Lah. 273.**

UNPROFESSIONAL CONDUCT. *See* LEGAL PRACTITIONER—MISCONDUCT.

UNREGISTERED DOCUMENTS. *See* REGISTRATION ACT, SS 17 AND 49.

UNSOUNDNESS OF MIND.

See (1) LUNACY.

(2) LUNACY ACT (1912).

URBAN AREA. *See* LANDLORD AND TENANT.

USE AND OCCUPATION—Right to recover for—Basis of. *See* LANDLORD AND TENANT—RENT—RIGHT TO. **29 N.L.R 57=A.I.R. 1933 Nag. 93.**

USER.

See (1) ADVERSE POSSESSION.
(2) EASEMENTS ACT (1882), S. 15.

USUFRUCTUARY MORTGAGE

See (1) MORTGAGE—USUFRUCTUARY.
(2) T. P. ACT, SS. 58 (*d*), 59, 67, 68, etc.

USURIOUS LOANS ACT (X OF 1918)—*Amending Act XXVIII of 1926—Applicability—Mortgage executed before Act but sued on later.*

Where a mortgage executed in 1923 was sought to be redeemed after the Usurious Loans Amendment Act, 1926, took effect,

Held, that it was open to the Court to reduce the rate of interest payable to the mortgagee. (*C. C. Ghose and Pearson, JJ.*) JNANCHANDRA DUTTA *v.* MAHIM CHANDRA DAS. **35 C.W.N. 654=135 I.C. 800=I.R. 1932 Cal. 160=A.I.R. 1932 Cal. 83 (1).**

———*Applicability—Capitalisation of interest—Rate of interest not excessive—Power of Court to reopen transaction.*

When the rate of interest is not excessive, and the transaction is not substantially unfair, the fact that interest is capitalised once in three years and that as a result of accounts lasting for about 30 years the amount of Rs. 23 originally advanced has amounted to Rs. 5,250 is no ground for disallowing the claim, though the case is a hard one. The Usurious Loans Act does not apply to the transaction and the Court cannot reopen the account. (*Hilton and Rangilal, JJ.*) NANUN *v.* LACHHMAN. **7 R.L. 281=152 I.C. 522=A.I.R. 1935 Lah. 38.**

———**S. 2 (3)**—*Applicability—Suits on negotiable instruments.*

The Usurious Loans Act is applicable to all suits for the recovery of loans advanced after the commencement of that Act. S. 2 (3) is quite general and includes not only suits based on bonds but also on negotiable instruments. (*Pullan and Niamatullah, JJ.*) SHEOBANS RAI *v.* SHAH MADHO LAL. **53 All. 776=136 I.C. 78=I.R. 1932 All. 126 (1)=1931 A.L.J. 645=A.I.R. 1931 All 662.**

———**S. 3**—*Applicability—Conditions.*

In order to permit of the application of S. 3 of the Act, two facts are to be proved. The first is that the interest is excessive and the second is that the transaction was as between the parties thereto substantially unfair. Where interest which had been charged before the pro-note at the rate of Rs. 0 12-0 per cent. per month was capitalized again bearing interest at rate of Rs. 0 12-0 per cent. per month.

Held, it was not excessive. (*Almond, J.C.*) KANSHI RAM *v.* BISHAMBAR DAS. **153 I.C. 943=7 R. Pesh. 78=A.I.R. 1935 Pesh. 4.**

———**S. 3**—*Applicability—Conditions.*

The conditions must be satisfied before the debtor can be relieved under S. 3; 1st, that the interest must be excessive, and 2nd, the transaction, substantially unfair as between the parties thereto. (*Mukerji, J.*) NARENDRA NATH MITRA *v.* PABAN MONDAL. **I.R. 1931 Cal 382=130 I.C. 254=52 C.L.J. 73=A.I.R. 1930 Cal. 776.**

———**S. 3**—*Power of Court—Reduction of interest.*

Apart from any circumstance vitiating the contract and even if the contract is quite valid and operative, the Court has powers under S. 3 of the Usurious Loans Act to reduce the rate of interest if it finds on facts that the interest is excessive. 1 Pat. 263; 3 Pat. 279 and 7 Pat. 294 (P.C.), Dist. (*Niyogi, A.J.C.*) BHADU *v.* GANPATI. **I.R. 1931 Nag. 39=130 I.C. 103=A.I.R. 1931 Nag. 25.**

USURIOUS LOANS ACT (1918), S. 3.

———**S. 3**—*Scope—Mortgage—Default clause—Stipulation for simple and compound interest—Unconscionable nature*

S. 3 confers ample jurisdiction upon the Court to go behind the terms of a contract when the Court has reason to believe that the interest is excessive and that the transaction was as between the parties thereto substantially unfair. The mere fact that the principal sum claimed enormously exceeds the amount originally advanced is no ground for holding the transaction to be unconscionable. A clause, however, providing for simple interest and compound interest on the entire sum advanced to the debtor in the event of the latter failing to deliver about one-fourth of the mortgaged property appears, on the face of it, an unconscionable stipulation. (*Shadi Lal, C.J. and Monroe, J.*) JAWAYA *v.* MUL RAJ. **13 Lah 512=I.R. 1932 Lah 236=33 P.L.R. 172=136 I.C. 556=A.I.R. 1932 Lah. 252.**

———**S. 3 (1)**—*Words "has reason to believe"—Meaning.*

The words "has reason to believe" mean something more than mere suspicion. (*Mukerji, J.*) NARENDRA NATH MITRA *v.* PABAN MONDAL. **I.R. 1931 Cal. 382=130 I.C. 254=52 C.L.J. 73=A.I.R. 1930 Cal. 776.**

———**S. 3 (1)**—*Words "whether heard ex parte or not" and "Court has reason to believe"—Meaning.*

The words "whether heard *ex parte* or not" and the "Court has reason to believe" indicate that the intention of the legislature was to enable the Court to take up the question of its own motion, whether it has been raised by the defence or not. It is incumbent on the Court even in *ex parte* cases to apply its mind to the question. (*Mukerji, J.*) NARENDRA NATH MITRA *v.* PABAN MONDAL. **I.R. 1931 Cal 382=130 I.C. 254=52 C.L.J. 73=A.I.R. 1930 Cal. 776.**

———**S. 3 (2)**—*Words "substantially unfair"—Effect.*

The words "substantially unfair" relieve the Courts from the necessity of going into elaborate and often very intricate questions which arise under Ss. 16 and 19 A, Contract Act. (*Mukerji, J.*) NARENDRA NATH MITRA *v.* PABAN MONDAL. **I.R. 1931 Cal 382=130 I.C. 254=52 C.L.J. 73=A.I.R. 1930 Cal. 776**

——— **S. 3 (2) (a), (b) and (c)**—*High rate—Inference—Circumstances to be considered.*

Clauses (*a*), (*b*) and (*c*), sub S. (2) indicate with sufficient particularity the inquiries to be made in order to find out in any given case whether the rate of interest stipulated for is excessive or not; the points to be noted are to be determined by taking into account such matters as the financial conditions of the debtor, the nature of the security etc., the risk incurred by the creditor; the extra amounts not paid but incorporated into the principal as expenses, etc., in the case of compound interest the periods of the rests; and lastly the total advantage that may be reasonably expected to accrue to the respective parties from the transaction. (1906) A. C. 467, Ref. (*Mukerji, J.*) NARENDRA NATH MITRA *v.* PABAN MONDAL. **I.R. 1931 Cal. 382=130 I.C. 254=52 C.L.J. 73=A.I.R. 1930 Cal. 776.**

———**S. 3 (2) (a)**—*Reasonable rate of interest—Duty of Court to decide.*

The provisions of sub-cl. (*a*), cl. (2), S. 3, Usurious Loans Act (1918), impose upon the Court the duty of coming to a conclusion as to what will be a reasonable rate of interest, having regard to the risk incurred.

USURIOUS LOANS ACT (1918), S. 3.

(*Varadachariar and Burn, JJ.*) NAGESWARA AIYAR *v.* RAMANATHAN CHETTIAR **157 I C 232=8 R. M. 118=1935 M W N 408=A.I R 1935 Mad 468.**

———**S. 3 (2) (d)**—*Interest at 25 per cent. compound —Transaction between landlord and tenant—If unfair.*

Interest at 25 per cent. per annum compound with yearly rests by itself is not excessive and would not, under Cl. (*d*), sub-S. (2) justify a conclusion that the transaction was substantially unfair. Further the fact that the amount consisted of arrears of rent and selami, if those items were justly due, and the fact that tenant entered into the stipulation with his landlord, are hardly sufficient to form the foundation for a reasonable belief that the transaction was substantially unfair. (*Mukerji, J.*) NARENDRA NATH MITRA *v.* PABAN MONDAL **I.R 1931 Cal. 382=130 I.C. 254=52 C. L J. 73=A I.R 1930 Cal. 776.**

———**S. 3 (2) (d)**—*Unfair bargain—Test—Point of time.*

A bargain which is fair in its inception cannot be come unfair by the happening of subsequent events, nor can interest which was reasonable in the beginning become excessive at a later date. The Court is limited to a consideration of circumstances which existed "at the date of the loan." 23 Cal. 15 (P.C.) and A I R. 1918 P.C. 249, Ref. (*Bose, A.J C.*) MANLADINA AYUB SHOP *v.* SUKHDEO DATTAJI. **I R. 1933 Nag. 210=144 I C. 218=A.I.R. 1933 Nag. 224.**

———**S. 3 (2) (d)**—"*Unfair transaction*"—*Circumstances to be considered.*

For a transaction to be regarded as unfair within the meaning of sub S. (*d*), Cl 2 S 3, Usurious Loans Act, it is not necessary that Court should be able to ascribe some moral blameworthiness to the creditor in the sense that he has tricked the debtor into entering into that bargain, though the terms of sub-Cl. (*d*) show that taking undue advantage of the position of the debtor is one category of cases falling under that clause. But it is also open to the Court to come to the conclusion that the transaction is substantially unfair by taking into account the circumstances materially affecting the parties at the time of the loan. On a consideration of the facts in the case,

Held, that the circumstances of the case justified the exercise of the jurisdiction conferred by the Usurious Loans Act; that the debtor was hardly competent to come to a proper conclusion as to the prudence or otherwise of borrowing on the terms agreed merely for the purpose of effecting improvements in his village, that the terms of the mortgage were meant to provide that, up to the date of payment, the debt should carry compound interest at 18 per cent. per annum with six monthly rests; and that the ends of justice will be met by directing that compound interest at 18 per cent per annum should be calculated with annual rests. (*Varadachariar and Burn, JJ.*) NAGESWARA AIYAR *v.* RAMANATHAN CHETTIAR. **157 I.C. 232=8 R.M. 118=1935 M.W.N 408=A.I R. 1935 Mad. 468**

———**S. 3 (2) (d), Expl.**—*Applicability—Parties money lenders—Interest 2 per cent. per mensem simple —In default 3 per cent.—'Excessive'—Test.*

The mere fact that parties are money lenders and that the interest is 2 per cent. per mensem simple and in default 3 per cent. does not bring the case within the explanation to S. 3 (2) (*d*). 'Excessive' is a relative term and what is 'excessive' in one case will not necessarily be so in another. It depends upon the surrounding circumstances. Courts however cannot assume their existence; they must be found on proper evidence. A.I. R. 1930 Cal. 207; A.I R. 1928 P.C. 249 and A.I.R. 1928 Oudh 396 (F.B), Rel. on. (*Bose, A.J.C.*) MANLADINA AYUB SHOP *v.* SUKHDEO DATTAJI. **I R. 1933 Nag. 210=144 I.C. 218=A.I.R. 1933 Nag. 224.**

UTBANDI.

See (1) BENGAL TENANCY ACT, SS. 180 AND 182.
(2) LANDLORD AND TENANT—UTBANDI TENANCY.

UTBANDI TENANT—Ejectment—Notice of necessary. *See* T P. ACT, S. 106. **60 Cal. 681=A.I.R. 1933 Cal 609.**

VACCINATION REGISTER. *See* EVIDENCE ACT, S. 35.

VAKALATNAMA.

See (1) C. P. CODE, O. 3, RR. 2 AND 4.
(2) LEGAL PRACTITIONER—AUTHORITY.

VAKIL. *See* LEGAL PRACTITIONER.

VENDOR'S LIEN.

See (1) CONTACT ACT. S. 108, EXCEP. I.
(2) T. P. ACT, S. 55.

VENDOR AND PURCHASER—*Amount reserved with vendee for payment to mortgagee—Failure to pay —Right of vendor to refund of—Amount of debt.*

Where, on a sale of immovable property, a sum of money is reserved with the vendee for payment in discharge of a mortgage on the property and the vendee fails to pay off the amount, the vendor would be entitled to have the amount refunded to him, and it can, therefore, be attached as a debt due to the vendor from the vendee. (*Bhide, J.*) BAHADUR CHAND *v.* BAHADUR SINGH **152 I.C 645=7 R.L. 298=A.I.R. 1935 Lah 50 (2).**

———*Agreement of sale—Defect of title—Question on which High Courts differ.*

It would not be proper to force upon an unwilling purchaser a title in regard to which there is a conflict of opinion between two full benches of different High Courts, the title in such a case cannot be said to be a title which is free from reasonable doubt. (*Blackwell, J.*) HARKISANDAS *v.* DWARKADAS. **161 I C. 374=8 R.B. 342=37 Bom.L.R. 913=A I.R. 1936 Bom. 94**

———*Breach of contract of sale—Suit for damages by purchaser—Facts to be proved.*

Where the purchaser sues the vendor in damages for breach of a contract of sale readiness and willingness to carry out his part of the obligation is a condition precedent to the plaintiff's claim being decreed. The onus may easily be discharged by the plaintiff in the absence of evidence to the contrary adduced by the defendant and a tender of money is not necessary in the case of an obligation to pay money. Evidence of inability to discharge the obligation adduced by the defendant may however render it necessary for the plaintiff to satisfy the Court that he was at the material moment in a position to discharge his obligation; otherwise he cannot succeed in his claim for damages. (*Lord Tomlin.*) ABDULLAH BEY CHEDID *v.* TENENBAUM. **6 R.P.C. 155=149 I.C. 816=1933 A.L.J. 1570=A.I.R. 1934 P.C. 91 (P.C.).**

———*Clause against alienation—Validity of—Option to recovery—Legal effect of.*

By the terms of a sale deed the purchaser bound himself in the following terms: "As I have taken a sale deed from you of the site and house mentioned below, I will be residing in the said site and house. While I so reside, neither I nor my heir shall mortgage or hypothecate or otherwise alienate the property. If myself or my heirs should not like to reside in the said site and house, we shall reconvey the property to you for a price not exceeding the sale price of Rs. 60."

VENDOR AND PURCHASER.

Held, that the clause amounted to an undertaking by the purchaser to give the vendor the first offer whenever he chose to sell it, that it was supported by consideration that there was in fact no offer in this case that the only effect of the undertaking was that in the event of a breach by the purchaser the vendor could sue for damages but not for specific performance and that it had not the effect of invalidating an alienation by way of mortgage made by the purchaser. 1925 M W.N. 609 and 46 M. 30, Ref. to. (*Ramesam, J.*) ALAGAR SAMI NAIDU *v* KATHIA GOUNDAN. **135 I C 540 = I R 1932 Mad. 124 = 1931 M.W.N. 957 = A.I R. 1931 Mad. 799.**

——Breach of covenant—Direction to pay creditors of vendor—Suit by vendor to recover unpaid price—Maintainability. *See* T.P. ACT, S. 55 (5) (*b*)—LIABILITY OF VENDEE. **1931 A.L J. 985 = A.I.R. 1931 All. 419.**

——Consideration—Direction to pay third party—Enforceability by third party. *See* CONTRACT—THIRD PARTY. **8 O W.N 1191.**

——Contract to pay mortgagee—Breach by purchaser—Mortgage decree passed—Suit for damages against vendee—Maintainability. *See* CONTRACT ACT, S 73—MISCELLANEOUS. **1931 A.L J. 687 = A.I.R 1931 All 754.**

——Covenant for title—Breach of—Suit for damages—Discharge of encumbrances by purchaser not necessary. *See* T.P. ACT, S. 55 (1) (*g*)—COVENANT FOR TITLE. **27 N L R. 392.**

——Covenant to pay mortgage debt—Default by vendee—Vendor's right of indemnity. *See* CONTRACT ACT, S. 125—VENDOR AND PURCHASER. **60 Cal 761 = A.I.R. 1933 Cal. 641.**

——Covenant regarding property sold—Insolvency of purchaser—Binding nature on Official Receiver and his transferee. *See* PROVINCIAL INSOLVENCY ACT, S. 28—RECEIVER. **I.R. 1931 All 701 = 133 I C. 541.**

——*Covenant to pay vendor's mortgagee—Suit on default—Vendee, if can plead breach of contract by vendor.*

The plaintiff executed a sale-deed of certain property in favour of the defendants. That sale deed contained a covenant that the defendant would pay a portion of the sale price to a mortgagee of other property. The defendants did not pay and the mortgagee obtained an order under O. 34, R 6 and realised a portion of the amount due from the plaintiff. In a suit by the plaintiff, the defendants pleaded that they had not paid because the plaintiff did not carry out his part of the sale-deed where it was provided that actual possession of certain plots should be given to the defendants.

Held, that although the defendants might have other remedies by way of a suit for ejectment or a suit for damages, the existence of other remedies did not preclude them from pleading the breach of contract by the plaintiff as a defence and that the suit was liable to be dismissed unless the plaintiff was able to show that the damage which the defendants sustained from failure to deliver possession was a smaller sum than the amount paid by the plaintiff to his mortgagee (*Bennet, J.*) ABDUL WAHID KHAN *v.* SHER MOHAMMAD KHAN. **154 I C. 305 (2) = 7 R A. 731 = 1935 R D 75 = 1935 A.W.R 199 = 1935 A.L J. 255 = A I R. 1935 All 463.**

——*Delivery of goods—Seller to deliver at some mill—Failure of mill to deliver—Purchaser, if should inform seller.*

Under the contract in suit, it was not the duty of the purchasers to give notice to the sellers when they would take delivery, but that it was the right of the sellers to select the time at their option when they would give delivery. The seller arranged to give delivery at some mill but there was a failure to give delivery fully. The seller was aware of this but took no steps to arrange for delivery at some other mill.

Held, that the seller could not blame the purchaser for the trouble into which they have fallen merely because the purchaser did not inform seller about failure of mill to give delivery. (*Page, C.J. and Ba U. J.*) MANGOOMAL JESSA SING *v.* HANSRAJ KOOVERJEE & CO. **156 I C. 561 = 8 R R. 17 = A.I R. 1935 Rang. 166.**

——Fraud of vendor—Suit by one of two joint vendees to recover compensation—Maintainability. *See* CONTRACT ACT, S. 45—JOINT VENDEES. **A.I R. 1932 Mad. 583 = 62 M.L.J 154.**

——Guardian — Alienation — Invalid sanction of Court—Claim for damages by vendee. *See* GUARDIAN AND WARD—ALIENATION BY GUARDIAN. **1934 A. L.J. 350 = A.I R. 1934 All. 645.**

——*Indemnity clause—Scope of—Dispossession by pre-emptor.*

A sale deed contained the following indemnity clause: "Kisi nuqs qanuni ya waqiati ke bais se, babt arazi mazkura bai shuda ke, mustri go khalal pauche." The vendee was dispossessed by the pre emptor and had to suffer loss as the pre-emptor was ordered to pay only a smaller amount than what the vendee paid. In a suit by the vendee against his vendor,

Held, that the words in the sale deed in question were wide enough to cover any loss that may be sustained by the vendee as a result of a pre-emption suit. (*Jai Lal and Abdul Rashid, JJ.*) GOPI CHAND *v.* FAKIR CHAND. **147 I C. 803 = 6 R.L. 451 (2) = 34 P.L.R. 627 = A I R. 1933 Lah. 782 (2).**

——Liability of vendee—Payment of zar i chakaram. *See* T.P. ACT S. 55 (1)—LIABILITY OF VENDEE. **1931 A.L.J. 429 = A.I.R 1931 All 552.**

—— Purchase money—Personal liability of vendee. *See* T.P. ACT S. 55—LIABILITY OF VENDEE. **52 All. 901**

——Mesne profits—Purchaser of undivided share can claim. *See* HINDU LAW—JOINT FAMILY—ALIENATION—COPARCENER. **57 M. 687 = 66 M.L J. 561**

——Misrepresentation—When sufficient to set aside executed contract—Shortage of land sold—Compensation for. *See* T P. ACT, S. 55—RIGHTS OF VENDEE. **A.I R. 1933 Sind 144.**

——*Mortgage by vendee in favour of vendor—Suit by vendor on mortgage—Plea of* jus tertii *by vendee—Permissibility.*

Where a purchaser of certain property mortgages the same after the sale to the vendor, in a suit by the vendor on the mortgage, the vendee cannot set up title in a third person. A.I.R. 1923 Pat 203 and A.I.R. 1923 Oudh 57. Ref. (*Bhide J.*) UDHO DAS *v.* MEHR BAKHSH **I.R. 1933 Lah 457 = 144 I.C. 340 (2) = 34 P L.R. 714 = A I R 1933 Lah. 262**

——Property sold free from encumbrance—Direction to vendee to discharge encumbrances—Default—Remedy of vendor *See* T P. ACT, S. 55—RIGHTS OF VENDOR. **1934 A.L.J 318 = A.I R. 1934 All 406 (F B.).**

——Purchaser of equity of redemption paying off prior mortgage—Rights as against subsequent mortgagee—Principle of S. 101, T. P. Act, applied. *See* T. P. ACT, S. 101. **A I.R. 1930 Lah. 1063.**

——*Purchaser of property subject to mortgage with notice of prior contract—Decree for specific performance in favour of prior promisee—Full value deposited in Court—Purchaser discharging encumbrances—Right to charge.*

VENDOR AND PURCHASER.

Where the property sold is subject to a mortgage and as per decree in a suit for specific performance against the owners of the property and the prior purchaser, the successful plaintiff deposits in Court the full value of the property and not merely the value of the equity of redemption, the prior purchaser who had discharged the encumbrances on the property is as between himself and the vendor and his representatives in interest entitled to the amount deposited in Court, but not to a charge on the property in the hands of the plaintiff in the specific performance suit. (*Varadachariar and Burn, JJ.*) SATHIRAJU *v.* VENKANNA. **157 I.C 1056 = 41 L W. 645 = 1935 M W.N. 186 = A.I.R. 1935 Mad 333**

———Sale deed - Covenant for title—Provision for damages for breach—Vendee whether can claim costs of litigation from vendor *See* T P ACT, S. 55 (2)—RIGHTS OF VENDEE. **1931 A L.J. 97.**

———*Sale of immovable property—Punjab Registration not necessary.*

In the Province of the Punjab it is not necessary that a sale of immovable property should be effected by a registered sale deed. A valid sale can be effected by an oral contract. (*Jai Lal and Agha Haidar, JJ.*) PUNJAB AND SINDH BANK, LTD. *v.* NAZIR AHMAD. **I.R. 1931 Lah. 791 = 32 P.L.R. 295 133 I C 551**

———Sale of land—Vendee repudiating contract—Right to sue vendor for refund of purchase money paid in advance. *See* CONTRACT - BREACH. **69 M L J 536.**

———Sale of materials and site of hotel—Goodwill whether passes. *See* TRADE MARK—TRADE NAME. **A.I.R 1931 Lah. 650.**

———Specific performance—Decree for—Contents of—Date of showing good title—Importance of. *See* SPECIFIC PERFORMANCE—DECREE FOR. **59 Cal. 536 = A.I.R 1932 Cal. 516.**

——— *Transfer of debts by way of sale—Vendor continuing to realise debt—Right of vendee.*

When debts are transferred by way of sale and the vendor, in spite of the sale, realises one of such debts it is only just and equitable that the vendee should be allowed credit for the amount so realised out of the consideration. (*Sulaiman and Kendall, JJ.*) RAM DAS *v.* DWARKA DAS **I R. 1931 All. 91 = 128 I C. 763 = A.I.R. 1930 All. 875.**

———Warranty of title—Breach of—Liability for purchase money—Absence of loss not relevant. *See* T. P. ACT, S. 55 (1) (*a*)—COVENANT FOR TITLE. **A.I. R. 1934 Pat. 280.**

VESTED INTEREST.

See (1) DEED—CONSTRUCTION—VESTED INTEREST.
(2) WILL—CONSTRUCTION—VESTED ESTATE.

VESTED REMAINDER. *See* WILL—CONSTRUCTION—VESTED REMAINDER.

VESTED RIGHTS. *See* INTERPRETATION OF STATUTES—VESTED RIGHT.

VICARIOUS LIABILITY. *See* TORT.

VILLAGE—Custom—Arasa pradakshanam—Validity of—Residents of a village, if a definite body. *See* CUSTOM (GENERAL)—RIGHT OF WAY. **A.I.R. 1933 Mad. 390.**

VILLAGE COURTS ACT (I OF 1889), S. 45—*Hearing—Procedure—Irregularities.*

It is very irregular for a Panchayat Court to allow a complete stranger to record the proceedings. The undue haste of the Panchayat Court to pronounce judgment when the accused had informed them of the stay of proceedings by the Sub Divisional Magistrate throws doubts on the fairness of the trial (*Burn, J.*) ARULAPPA CHETTY *v.* EMPEROR. **1933 M.W.N. 728.**

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———**S. 77 (2)**—Conviction by panchayat Court—Revision. *See* GOVT. OF INDIA ACT, S. 107—VILLAGE PANCHAYAT COURT. **1933 M.W.N. 728.**

WAGERING CONTRACT. *See* CONTRACT ACT (1872), S. 30.

WAIVER.

See also (1) ARBITRATION.
(2) C. P. CODE, S. 11—PLEA OF RES JUDICATA, S. 80; O. 21, RR. 22 AND 90, SCH. II, PARA. 15.
(3) EVIDENCE ACT (1872), S. 115—WAIVER.
(4) JURISDICTION—WAIVER.
(5) LIMITATION ACT, ART. 75.
(6) PRACTICE—ABANDONMENT OF PLEA.

———*Plea of—Facts to be proved.*

A double duty ordinarily devolves upon the party who alleges that his opponent has waived any of the rights which the law confers upon him. He must allege and he must prove, first that the opponent knew what his rights were, and second that he knowingly discarded them. 34 Cal. 257, Dist. (*Ferrers, J. C. and Mehta, A. J. C.*) LADHOMAL PREM CHAND *v.* BUDHO. **I.R. 1933 Sind 99=142 I.C. 501=A.I.R. 1933 Sind 1.**

———*Non-objection to mutation—If amounts to.*

A person left a will in favour of his sons by third wife in 1893. When the property was mutated in favour of the sons of first wife and the sons of the third wife the latter objected. The property was in possession of the mortgagees. The sons of the third wife however did not object to the subsequent mutations on the death of sons of first wife and their sons. Sons of the third wife alone redeemed the mortgage in 1903 and thereafter they continued in exclusive possession of the property.

Held, that from these facts it could not be deduced that the sons of the third wife waived or abandoned their right under the will. (*Dalip Singh, J.*) SHANKAR DAS *v.* MT. DHAN DEVI. **6 I.R. (Lah.) 78=145 I.C. 241=A.I.R. 1933 Lah. 53.**

WAJIB-UL-ARZ. *See also* RECORD OF RIGHTS.

———*Absence of entry—Inference from.*

The argument from the omission of an entry from a new *wajib-ul-arz* is a very strong one. It is a natural presumption from the omission of an entry that it has been done deliberately, and with due cause. When a new *wajib-ul-arz* is prepared it supersedes the old and the new one cannot be altered without due cause. (*Irving, F. C.*) DILBAGH RAI *v.* MEHR SHAH. **11 Lah. L.T. 101.**

———*Absence of entry—Inference from.*

Where the inferior proprietors claiming rights to the village waste and forest produce relied on the fact that in the *wajib-ul-arz* prepared in 1904, an entry opposite to the heading, "rights of inferior proprietors," was left blank and did not say 'nil'.

Held, that in the absence of proof of the existence of the rights claimed before that settlement, the absence of any entry could not be interpreted as a reservation of such rights. (*Sir Dinshah Mulla.*) LAL INDRA SHAH *v.* SHEO

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SHANKAR. **59 I.A. 197=28 N.L.R. 201=35 L.W. 789=I.R. 1932 P.C. 132=136 I.C. 628=36 C.W.N. 603=A.I.R. 1932 P.C. 129=62 M.L.J. 708 (P.C.).**

———*Construction.*

The *wajib-ul-arz* must be construed strictly as well as reasonably. (*Gordon, R. M.*) DHULCHAND *v.* NARAYANRAO. **17 N.L.J. 97.**

———Construction—Agreement relating to succession to occupancy tenant—Punjab Tenancy Act, S. 59. *See* PUNJAB TENANCY ACT, S. 59. **36 P.L.R. 31.**

———*Construction*—La walad—*Meaning—Exclusion of daughters from inheritance.*

A *wajib-ul-arz* contained the following clause: "If amongst the wives one is *la walad* or has only a daughter and the other has a son, in that case the male issue will take possession of the property and provide the mother who is *'mahruma aulad'* with food and clothing and will perform the marriage of the unmarried daughter. . . . If two brothers hold property jointly and one of them dies leaving a *la walad* widow the widow is entitled to get maintenance only.

Held, that word *'la walad'* meant 'issueless' and not 'sonless' and that the *wajib-ul-arz* did not exclude daughters and their sons from inheritance. (*Raza, J. on difference between Bisheshwar Nath and Smith, JJ.*) DWARKA *v.* RAGHUBANSA. **8 Luck. 354=I.R. 1933 Oudh 144=142 I.C. 872=10 O.W.N. 69=A.I.R. 1933 Oudh 182.**

———*Construction—"Profit and loss due to alluvion and diluvion enjoyed and sustained by all co-sharers"—Dhardhura rule.*

The wajib-ul-arz contained the following entry:—"Often there is a case of alluvion and diluvion (of the Ganges). The profit and loss is enjoyed and sustained by all the co-sharers of the mahal."

Held, that what was meant was that where there was a gain by alluvion or a loss by diluvion, all the co-sharers in the mahal should bear that gain or loss in the areas of the shares which they owned in the mahal, if there was a loss by diluvion, it was to be generally borne and the recognition was to some established rule of gain by alluvion and loss by diluvion, which in the circumstances was the rule of *dhardhura* or deep stream rule prevailing in all the neighbouring villages. (*Niamatullah and Bennet, JJ.*) RAM SUBHAG RAI *v.* SHEO SAHAI RAI. **17 R.D. 252=14 L.R. 172 (Rev.)=6 I.R. (All.) 339=146 I.C. 795=A.I.R. 1933 All. 376.**

———*Construction—Rules of Hindu Law to be given effect to if possible—Nature of estate conferred on widow.*

Where a construction can be put on a wajib-ul-arz which is compatible with the rules of Hindu Law, that is the proper construction to be placed upon the wajib-ul-arz. Where a wajib-ul-arz recites that if a sharer died issueless, his widow became the owner of his assets and she became the owner in possession in the same way as her husband and also possessed power of transfer, the power of transfer should be interpreted as the power of transfer of her husband's estate in accordance with Hindu Law. 3 O.C. 181; 5 O.W.N. 992 and 1 O.L.J. 319, Foll.

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(*Pullan and Srivastava, JJ.*) SANT BAKHSH SINGH *v.* BHAGWAN BAKHSH SINGH. **6 Luck. 365=I.R. 1931 Oudh 104=129 I.C. 328=7 O.W.N. 1082=A.I.R. 1931 Oudh 25.**

———*Construction—Right to droppings of cattle.*

An entry in the *wajib-ul-arz* was that "the malguzars and tenants collect the droppings of their own cattle outside the *basti* or in their own compounds, and then take it to their fields.

Held, that the clause in question was intended to deal generally with the right of appropriation of the droppings, that the tenants had the right to take such droppings of their own cattle, wherever found, without an exception in favour of malguzars in respect of any particular area where the droppings accrue. (*Gordon, R. M.*) MUKUNDKAR *v.* BAHORAN. **16 N.L.J. 221.**

———*Construction—Right of tenant to use timber for necessity—Timber in one village—Right of tenant to use it in another.*

Where the wajib-ul-arz recited that the tenant had a right to cut the trees in his grove for special necessity,

Held, that there were no geographical limits prescribed by the terms of the wajib-ul-arz only the particular objects to which the use of timber of such tenant groves was confined having been specifically set forth in it; that it was permissible for the tenant to utilise the timber of his trees in one village for constructing a well in another village; if anything to the contrary had been intended, such an intention on the part of the zamindars ought to have been set out in clear terms. (*Nanavutty, J.*) RAM HARAKH SINGH *v.* JAMUNA PRASAD. **6 R.O. 473=148 I.C. 931=18 R.D. 248=11 O.W.N. 514=A.I.R. 1934 Oudh 296.**

———*Construction—Succession to sonless owner—Rights of widow.*

A *wajib-ul-arz* provided that on the death of a sonless owner his widow becomes the full or absolute heir (*waris kamil*) of the properties.

Held, that the words were sufficient to confer full rights of ownership on the widow. (*Raza and Smith, JJ.*) ABDUR RAHMAN KHAN *v.* AHMAD KHAN. **I.R. 1933 Oudh 203=143 I.C. 831=10 O.W.N. 42=17 R.D. 104=14 L.R. 137 (Rev.)=A.I.R. 1933 Oudh 427.**

———*Construction*—Warisan shauhari se jo karibi—*Meaning.*

Where a *wajib-ul-arz* provided that after the death of a *la walad* widow the nearest heir to her husband shall enter into possession of the property (*warisan shauhari se jo karibi hoga*),

Held, that the words were intended to refer to the nearest male collaterals. (*Raza, J. on difference between Bisheshwar Nath and Smith, JJ.*) DWARKA *v.* RAGHUBANSA. **I.R. 1933 Oudh 144=142 I.C. 872=8 Luck. 354=10 O.W.N. 69=A.I.R. 1933 Oudh 182.**

———*Construction—Whole field of Adna Malik washed away—Right to appropriate equal area from shamilat—Ala Malik, if can refuse.*

The condition in the *wajib-ul-arz* was that if a whole field or plot is washed away then it becomes a part of the shamilat and at the time of its emersion same conditions attach to it which

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attach to the remaining shamilat. But the adna malik whose land has been submerged has a prior right as against other owners to appropriate land out of the shamilat or other land which has emerged from water equal to the area which had submerged but he must pay to the ala maliks fresh jhuri up to the maximum of Re. 1 per acre and the ala maliks cannot refuse to accept the jhuri against the general custom in respect of such land:

Held, that the adna malik whose entire land had submerged in water had a right to appropriate other shamilat land immediately to the extent of his original holding and in that case the ala malik was not entitled to refuse to recognize his right to appropriate it or to receive jhuri in respect thereof. The adna malik was not entitled to wait till the land originally held by him as adna malik emerged from water and to claim it on that occasion. 109 I.C. 59, Rel. on. (*Jai Lal, J.*) HAYAT *v.* MOHAMMAD KHAN. **154 I.C. 1012=7 R.L. 628 (2)=A.I.R. 1934 Lah. 561 (2).**

———*Construction—Widow's right—"Without regard to nature of haqiat"—Effect.*

The wajib-ul-arz provided that "A widow, without any regard as to the nature of the haqiat (*bila lihaz kisi qism haqiat ke*), becomes the owner of the share of her husband, in the absence of the male issue,"

Held, that the words "bila lihaz kisi qism haqiat ke" had reference merely to the distinction between ancestral and self-acquired property, and it was never intended that the share of a deceased husband in a joint family property should go to his widow. (*Smith and Allsop, JJ.*) RAJ RAJESHWARI KAUR *v.* JANG BAHADUR SINGH. **6 I.R. (Oudh) 88=146 I.C. 131=17 R.D. 887=14 L.R. 746 (Rev.)=10 O.W.N. 958 =A.I.R. 1933 Oudh 415.**

———*Customary dues—Bhusa and Karab—Mode of realising arrears.*

Demands of Bhusa and Karab which are recognized by custom and entered in the wajib-ul-arz form part of rent and can be the subject of a suit for arrears of rent. (*Oakden, S.M. and Smith, J.M.*) BOHRA PANNA LAL *v.* UNIS ALI. **14 R.D. 634.**

———Custom—Exclusion of daughters—Strict proof. *See* CUSTOM (GENERAL)—PROOF. **8 Luck. 354=10 O.W.N. 69=A.I.R. 1933 Oudh 182.**

———*Custom—Proof of—Exclusion of daughters from inheritance.*

Where the wajib-ul-arz contained discrepant statements regarding the customs of adoption and succession but they were in perfect agreement regarding the question of exclusion of daughters and the same was also supported by the prevalent notions of the people in the province and the oral evidence in the case,

Held, that the custom regarding exclusion of daughters should be given effect to. (*Raza and Bisheshwar Nath, JJ.*) HUBRAJI *v.* CHANDRABALI UPADHIYA. **6 Luck. 519=I.R. 1931 Oudh 161=130 I.C. 849=14 O.L.J. 66=8 O.W.N. 6=A.I.R. 1931 Oudh 89 (2).**

———*Custom recorded in—Right of reclaiming proprietor in abadi—Burden of proof.*

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One of the proprietors of a village brought a suit against the remaining proprietors for a declaration that he was the full owner of a plot of land which he had reclaimed from the *shamilat deh* and which had ever since its reclamation been under his cultivating possession. In support of his claim he relied upon a condition embodied in the wajib-ul-arz of 1865 which had been repeated in the Settlement Record of 1893 to the effect that if a proprietor of land or a tirniguzar makes land abadi out of the shamilat, it shall be recorded as his exclusive possession.

Held, that the burden of proving that the custom embodied in the wajib-ul-arz had been subsequently abrogated lay heavily on the defendants and that they had failed to discharge it. (*Jai Lal and Abdul Rashid, JJ.*) BAKHTAWAR *v.* JINWADDA SHAH. **I.R. 1933 Lah. 425=144 I.C. 206=34 P.L.R. 629=A.I.R. 1933 Lah. 757.**

———*Entries in—Admissibility of—Limits—Entries relating to legitimacy and succession.*

It is not the function of the wajib-ul-arz to record statements about the legitimacy of children and their succession. Such statements are inadmissible in evidence for establishing the facts stated therein. (*Tek Chand and Monroe, JJ.*) SUKHDEV SINGH *v.* MATHRA SINGH. **I.R. 1933 Lah. 215=142 I.C. 606=34 P.L.R. 115= A.I.R. 1933 Lah. 412.**

———*Entries in—Agreement—If enures beyond term of settlement.*

It is a question of fact in each case whether a particular agreement in a wajib-ul-arz was intended to enure for the term of the settlement in the course of which it was recorded or for all time. There is no fixed rule on this point which applies to all agreements. (*Rangi Lal, J.*) COURT OF WARDS, ANANDPUR ESTATE *v.* JIWAN SINGH. **7 R.L. 110=151 I.C. 233=36 P.L. R. 31=A.I.R. 1935 Lah. 20.**

———*Object of—Entry as appointment of lambardar.*

The object of the wajib-ul-arz is to give a simple statement of the general lines on which it has been customary to appoint the lambardar. It cannot be expected to give detailed instructions. The Revenue Courts can only interpret the wajib-ul-arz according to the dictates of common sense. It is opposed to common sense to give a voice in the choice of the lambardar to the persons who take no *bona fide* interest in the village or to appoint a lambardar before the proprietary body is duly consulted. (*Gowan, R.M.*) DAULAT RAM *v.* MAN SINGH. **16 Nag.L.J. 122.**

———*Entries—Construction*—Patti ka thipalwali—*Land washed away—Re-appearance—Rights of* adna *and* ala *proprietors.*

Held, on a construction of the entries in the wajib-ul-arz that in *patti ka thipalwali* if an area owned by *adna* proprietors is washed away and then re-appears it is to be held to be the property of the *ala* proprietors but the *adna* proprietors have a right to be reinstated if they are prepared to pay *jhuri*. If the *ala* proprietors do not intentionally (*amadan*) accept the *jhuri* dues offered, then the *adna* proprietors are not en-

titled to take possession (*qabza*) of the land until fair *jhuri* dues fixed with regard to the quality of the land are paid. (*Tek Chand and Coldstream, JJ.*) KHUDA BAKSH *v.* VIR BHAN. **12 Lah. 318=I.R. 1931 Lah. 677=132 I.C. 837=32 P.L.R. 683=A.I.R. 1931 Lah. 486.**

———*Entries in—Construction—"Ta-chakri maf" —Meaning of—Tenant or licensee.*

The remark in wajib-ul-arz "ta-chakri maf" might just as well apply to a tenant who held land rent-free as long as he performed certain services, as to a servant or licensee who held land only on condition of service: in fact it is more applicable to the first case. (*Staples, A.J.C.*) FATERAM *v.* JANAK. **6 I.R. (Nag.) 88=146 I.C. 404=A.I.R. 1933 Nag. 313.**

———*Entries—Correctness—Infèrence from circumstances—Exclusion from right of pre-emption in case of sales and mortgages.*

Where the statement in a wajib-ul-arz as to the custom of free right of alienation by any co-sharer of his share of the property in favour of any person whatsoever is altogether unambiguous and clear and there is no suggestion that the settlement officer in stating the custom as he did, had neglected to perform his duty in ascertaining what the custom was or was misled in recording it, the entries may be taken to record the custom of the village excluding the right of the pre-emption in case of sales and mortgages. (*Hasan, C.J. and Bisheshwar Nath, J.*) SRIPAL SINGH *v.* ABDUL SATTAR. **14 O.L.J. 273=131 I.C. 899=12 L.R. 120 (Rev.)=8 O.W.N. 321= 15 R.D. 190=A.I.R. 1931 Oudh 348.**

———*Entries—Corroboration if necessary.*

The wajib-ul-arz is *prima facie* a record of custom and it is not necessary to corraborate the entry therein by evidence of specific instances. (*Mears, C.J. and Sen, J.*) CHUNNI *v.* RAFIUNNISHA BEGAM. **I.R. 1931 All. 548=132 I.C. 804=15 R.D. 439=12 L.R. 221 (Rev.) =1931 A.L.J. 411=A.I.R. 1931 All. 547.**

———*Entry as to custom—Value of—Grove-holder's right to trees.*

An entry in a wajib-ul-arz, that holders of groves of certain specified plots can cut trees and sell or mortgage them cannot be taken to be a record of a custom applicable to all the grove-holders of the village generally. (*Zia-ul-Hasan, J.*) BINDESHURI DEVI *v.* SARDAR KHAN. **153 I.C. 818=7 R.O. 404=16 L.R. 38 (Rev.)= 11 O.W.N. 1365=18 R.D. 621=A.I.R. 1935 Oudh 208.**

———*Entry in—Landlord and tenant—Agreement between.*

The entry in a wajib-ul-arz as regards agreement between landlord and tenant does not hold good after the settlement. (*Irving, F.C.*) ALLAH BAKHSH *v.* BASHIRUDDIN. **11 Lah. L. T. 56.**

———*Entry in—Landlord and tenant—Agreement between.*

An agreement entered in a wajib-ul-arz as to the rights of tenants not to be ejected holds good only for the period of settlement. (*Irving, F.C.*) QAMAK DIN *v.* SULTAN. **11 Lah.L.T. 51.**

———*Entries—Meaning of words "lawalad" and "Khandan Qaribi Shauhar".*

A wajib-ul-arz provided that if both the widows are "lawalad" then after their death the inheritance is to devolve on the nearer relations of their husband's family. The words "Khandam Qaribi Shauhar" also frequently appeared.

Held, the "lawalad" should be interpreted as meaning as sonless and not issueless. Khandan Qaribi Shauhar are generally used with reference to the nearest male collaterals. (*Hasan, C.J. and Bisheshwar Nath, J.*) LACHHMAN DEI *v.* BEHARI LAL. **6 Luck. 651=131 I.C. 897=14 O.L.J. 344=8 O.W.N. 288=A.I.R. 1931 Oudh 322.**

———*Entries—Presumption as to correctness.*

The entries in a wajib-ul-arz may be taken to have been made after the enquiry by the Settlement Officer unless the contrary is shown by the party alleging it. There is a presumption that the official acts which were performed long ago were regularly performed. (*Raza and Bisheshwar Nath, JJ.*) HUBRAJI *v.* CHANDRABALI UPADHIYA. **6 Luck. 519=I.R. 1931 Oudh 161 =130 I.C. 849=14 O.L.J. 66=8 O.W.N. 6=A.I.R. 1931 Oudh 89 (2).**

———*Entries in—Presumption—Evidence in rebuttal—Sufficiency of entry restricting reayas' right to transfer residence—Construction of—Shops not included therein.*

In a suit by the proprietor of a village for recovery of possession of sites of two shops improperly alienated by the defendant, his reayas, the plaintiff alleged that it was an agricultural village and relied on the general custom in all agricultural villages supported by entries in the wajib-ul-arz to the effect that the reayas had no right to transfer their residential houses.

Held, (*i*) that the burden was on the plaintiff to prove it was an agricultural village and he had failed to discharge it; (*ii*) that the question whether the presumption attaching to the entries in the wajib-ul-arz has been rebutted by the evidence to the contrary was one of fact, that the conclusion of the Court below that in the present instance it had been rebutted by 30 sale-deeds and mortgage deeds executed by occupiers of houses in the suit village, three execution sale of reaya's houses and a wakf of his house by a reaya, could not be impugned in second appeal; and (*iii*) that even the entry in the wajib-ul-arz related only to dwelling-houses occupied by reayas and did not refer to shops situated in the business centre of the town which were governed by different considerations. (*Niamatullah and Bennet, JJ.*) KUSHALPAL SINGH *v.* GULZARI LAL. **I.R. 1933 All. 372= 144 I.C. 120=14 L.R. 265 (Rev.)=17 R.D. 298=1933 A.L.J. 439=A.I.R. 1933 All. 603.**

———*Entries in—Statements made by zamindar and recorded therein—Value of.*

A statement in a wajib-ul-arz made by a zamindar is not a statement narrating a tradition but it is a statement by a person possessing an interest and an existing right in a village and is *prima facie* evidence (till it is rebutted by evidence to the contrary) that he is entitled to the right recorded therein. 40 All. 56 (F.B.), Foll. (*Thom, J.*) TIKA *v.* KULSUM-UN-NISSA. **150 I.C. 264=6 R.A. 1068=17 R.D. 188= 14 L.R. 193 (Rev.)=A.I.R. 1933 All. 624.**

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———*Entry in—Value.*

A wajib-ul-arz is not conclusive proof of custom but the record is valuable evidence of custom.

Held, that the entries in the wajib-ul-arz constituted evidence of a well established custom excluding daughters from inheritance in the particular family. (*Raza and Smith, JJ.*) AMINA KHATUN *v.* KHALIL-UR-RAHMAN. **8 Luck. 445 =10 O.W.N. 268=150 I.C. 282=6 R.O. 629 =A.I.R. 1933 Oudh 246.**

———*Entry in—Value of.*

An entry in the wajib-ul-arz is sufficient to establish a custom (that a childless widow takes an absolute estate) even though not supported by specific instances. (*Kisch, J.*) WARIS ALI *v.* GHULAM DASTAGIR. **I.R. 1932 Oudh 366=139 I.C. 560=13 L.R. 324 (Rev.)=9 O.W.N. 725=16 R.D. 494=A.I.R. 1933 Oudh 153.**

———*Entries in—Value of custom recorded, prejudicial to* riyayas.

Where the tenants are not parties to the preparation of a wajib-ul-arz, the value to be attached to customs prejudicial to their interests and recorded *ex parte* at the instance of zemindars cannot be the same as in other cases in which the zamindars are responsible for dictating customs which concern themselves. This is more so where the record of custom is prejudicial to the interests of the *riyayas* who are not agricultural tenants. (*Srivastava, J.*) SHYAMA KUMAR SINGH *v.* SAT NARAIN. **11 Luck. 397=157 I. C. 654=8 R.O. 36=1935 R.D. 426=1935 O.W.N. 928=A.I.R. 1935 Oudh 459.**

———*Entry—Value of—Entries denoting views of individuals to.*

There is no class of evidence which is more likely to vary in value according to circumstances than that of the wajib-ul-arz. Where from internal evidence it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of well established custom, it is proper to attach weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. (*Wazir Hasan, C. J. and Raza, J.*) JAGDAMBA BUX SINGH *v.* BADRI PRATAB SINGH. **8 Luck. 586=6 I.R. (Oudh) 46 =145 I.C. 352=10 O.W.N. 493=17 R.D. 379=A.I.R. 1933 Oudh 322.**

———*Entry in—Value of—Provision in* Wajib-ul-arz *about saleable interest of judgment-debtor.*

The decree-holder cannot attach the house of the judgment-debtor in the face of the provisions contained in the *Wajib-ul-arz* that the judgment-debtor has got no saleable interest therein. (*Nanavutty, J.*) BAIJ NATH *v.* MAUJI LAL. **16 R.D. 589=9 O.W.N. 1144=14 L.R. 8 (Rev.)=141 I.C. 766=I.R. 1933 Oudh 84= A.I.R. 1933 Oudh 79.**

———*Entries in—Value of—Settlement not eventually sanctioned.*

Entries in a Wajib-ul-arz prepared in the course of a Settlement, do not lose their value by the mere fact that the Settlement was not eventually sanctioned by the Government. (*Rangi Lal, J.*) COURT OF WARDS, ANANDPUR ESTATE *v.* JIWAN SINGH. **7 R.L. 110=151 I.C. 233=36 P.L. R. 31=A.I.R. 1935 Lah. 20.**

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———Impartible *abadi*—Wrongful erection of building—Consent of some proprietors—Right of single proprietor to sue in ejectment. *See* LANDLORD AND TENANT—ABADI. **I.R. 1931 Lah. 653 =132 I.C. 669.**

———*Inheritance—Exclusion of daughters—Inference.*

Where a wajib-ul-arz provides that the widows might make an adoption from the family of their husbands and it further provides that after their death the inheritance should devolve on the nearest male collaterals.

Held, that the intention of the framers of the wajib-ul-arz was that the property should remain in the husband's family and should not go out of the family, and that the daughters should be excluded both in case of widow making an adoption and in the case where no adoption is made. (*Hasan, C. J. and Bisheswar Nath, J.*) LACHMAN DEI *v.* BEHARI LAL. **6 Luck. 651=131 I. C. 897=14 O.L.J. 344=8 O.W.N. 288=A. I.R. 1931 Oudh 322.**

———*Mohalla Katra is not part of Basitnagar estate.*

The house situated in Mohalla Katra of Shahabad is not a part of the estate of Basitnagar. (*Wazir Hasan, C. J. and Smith, J.*) MAHOMED ABDUL KARIM KHAN *v.* RAHAT ALI KHAN. **6 R.O. 391=148 I.C. 246 (1)=11 O.W.N. 72 =A.I.R. 1934 Oudh 10 (2).**

WAKF.

See (1) DEED—CONSTRUCTION—WAKFNAMA.
(2) MAHOMEDAN LAW—WAKF.

WANEPRASTHAS—*See* HINDU LAW—SUCCESSION.

WARAPATH LAND. *See* LANDLORD AND TENANT—WARAPATHLAND.

WARD.

See (1) GUARDIAN AND WARD.
(2) GUARDIAN AND WARDS ACT (1890).

WARRANT CASE. *See* CR. P. CODE, SS. 251-259, 342.

WARRANTY OF TITLE. *See* T. P. ACT, S. 55.

WASTE LAND.

See also (1) ADVERSE POSSESSION.
(2) LIMITATION ACT, ART. 142.

———*Exemption from revenue—Liability under Tenancy Legislation—Exemption—Waste Land Sale Rules*, 1862.

The exemption of waste lands from payment of land revenue does not *ipso facto* exempt such land from the operation of the Land Revenue and Tenancy Acts. *Held*, that there was nothing in the *Sanad* or in the Waste Land Rules to exempt the holder from liability under future legislation. (*Subhedar, Niyogi and Grille, A. J. Cs.*) LAXMIPRASAD *v.* PURUSHOTTAM. **28 N.L. R. 169=I.R. 1932 Nag. 67=137 I.C. 750= 15 N.L.J. 35=A.I.R. 1932 Nag. 75 (F.B.).**

———*Right of Crown—Presumption—Land within temple enclosure.*

There is a general presumption that waste lands are the property of the Crown, but it is not applicable where the alleged waste is, at all events physically, within a temple enclosure. (*Sir George Lowndes*) MADURA, TIRUPPARAN

WATAN.

KUNDRAM, ETC., DEVASTHANAMS *v.* ALI KHAN SAHIB. **35 C.W.N. 1089=34 L.W. 340=1931 M.W.N. 1111=I.R. 1931 P.C. 289=134 I. C. 641=8 O.W.N. 952=A.I.R. 1931 P.C. 212=61 M.L.J. 285 (P.C.).**

WATAN.

See (1) ADVERSE POSSESSION—WATAN LANDS.
(2) BOMBAY HEREDITARY VILLAGE OFFICERS ACT (III OF 1874), S. 15.
(3) BOMBAY WATAN ACT (V OF 1886), S. 2.

———*Adverse possession.*

There is nothing in the nature of a watan estate which prevents the bar of adverse possession against one holder of a watan from operating as a bar against succeeding watandar. A succeeding watandar derives his title as son and heir of the watandar which is capable of being barred and extinguished by adverse possession. 24 B. 556 (P.C.) and 7 Bom.L.R. 135, Rel. on. (*Patkar and Shingne, JJ.*) TUKA *v.* GANU. **55 Bom. 21=I.R. 1931 Bom. 129=129 I.C. 145=32 Bom.L.R. 1398=A.I.R. 1931 Bom. 24.**

WATER RIGHTS.

See (1) EASEMENTS—WATER RIGHTS.
(2) EASEMENTS ACT (1882), SS. 7, ILLS. (H.) AND (J.), 35, 38, EXPL. II.
(3) LAND TENURE—RYOTWARI TENURE.

———Percolating water. *See* EASEMENTS ACT, (1882), S. 7.

WATER RULES. *See* U. P. WATER RULES.

WATERS AND WATER COURSES.

See also (*i*) ALLUVION AND DILUVION.
(*ii*) EASEMENT.
(*iii*) EASEMENTS ACT.
(*iv*) FISHERY.
(*v*) MADRAS IRRIGATION CESS ACT.
(*vi*) RIPARIAN RIGHTS.

———*Ownership of water—If implies ownership of land below.*

The ordinary law is *eujus est solum ejus est usque ad inferos, i.e.,* he who owns surface owns whatever that is beneath and ownership of water in a pond or a tank, whether natural or artificial, would usually imply ownership of the land under water. In fact, ownership of water, if separated from ownership of the land upon which the water rests, would be no more than a right of easement to keep water upon another person's land and would not really be ownership at all. (*Staples, A. J. C.*) MADHORAM LALA *v.* SECRETARY OF STATE. **31 N.L.R. 165=156 I.C. 180 =7 R.N. 226=A.I.R. 1935 Nag. 61 (2).**

———*Public navigable river—Ownership of bed —Presumption.*

The bed of a public navigable river is presumed to be the property of the Government and not that of a private person. (*Sir Shadi Lal.*) TARAKDAS ACHARJI CHOUDHURY *v.* SECRETARY OF STATE. **1935 O.W.N. 749=39 C.W.N. 994 =42 L.W. 167=37 Bom.L.R. 638=37 P.L. R. 546=16 Pat.L.T. 555=61 C.L.J. 491= 1935 M.W.N. 1075=156 I.C. 548=A.I.R. 1935 P.C. 125=69 M.L.J. 171 (P.C.).**

———*Right to* nirasardhi—*Grant by Government —Nature.*

WHIPPING ACT (1906), S. 3.

The right to *nirasardhi* or use of water is a concession made by Government and is not an easement so as to be heritable or transferable. (*Doraswami Iyer, C.J., Mahadevayya and Ramachandra Rao, JJ.*) BHORE *v.* LINGAPPA. **11 Mys.L.J. 26 (F.B.).**

———*Submersion of land by water—Customary storage of water by Government—Right to restrain Government from submersion.*

The Government has a right to maintain the *status quo* the long-established customary method of storing water in its tanks. The whole system of tank irrigation and the right of wet raiyats to water for irrigation in India has no counterpart in England and in English Common Law. The law on such matters here is determined by custom and customary right. Submersion of lands on the foreshore of a tank when it is at its full tank level is no uncommon occurrence and is a feature of the recognised irrigation system. Where such submergence is a matter of the customary conditions of the locality when a tank is at its full tank level and is not the result of a direct and proved interference with these customary conditions, no cause of action for any of the wet raiyats does arise and no suit can be brought to restrain Government and other wet raiyats for a declaration that they have no right to submerge the lands of the plaintiff on the foreshore of the tank and for an injunction to restrain them from doing so. 7 M.H.C.R. 37 and 27 Mad. 409, Dist.; 28 Mad. 72; A.I.R. 1927 Mad. 144 and 24 Mad. 202, Ref. (*Wallace, J.*) SESHADRI AIYANGAR *v.* NARASIMHA CHARI. **I.R. 1932 Mad. 813=140 I.C. 28=36 L.W. 408= A.I.R. 1932 Mad. 532.**

———Suit for injunction—Prayer to restrain putting up of dam and for damages—Determination of right to injunction—Question of damages whether can be gone into. *See* PRACTICE—RELIEF. **37 C.W.N. 355=64 M.L.J. 228 (P.C.).**

WAY. *See* RIGHT OF WAY.

WEIGHTS AND MEASURES. *See* PENAL CODE, SS. 265-266.

WHIPPING.

See (1) CR. P. CODE, SS. 391 (*b*) AND 393.
(2) WHIPPING ACT (IV OF 1906).

WHIPPING ACT (IV OF 1906)—*Conviction under Ss.* 394 *and* 397, *I. P. Code and also under S.* 19 (*e*), *Arms Act on same facts—Total sentence exceeding seven years—Sentence of whipping in addition—Legality.*

A person who has been convicted of an offence under S. 394 read with S. 397, I. P. Code, and also under S. 19 (*e*) of the Arms Act, on the same facts, and sentenced to a term exceeding seven years in the two cases collectively, cannot also be punished with whipping. A sentence of whipping awarded in such a case is illegal and must be set aside. (*Dunkley, J.*) KWAN TONE *v.* EMPEROR. **156 I.C. 1015=8 R.R. 63 (1)= 36 Cr.L.J. 1050.**

———**Ss. 3 and 4**—*Relative scope—Conviction on charge of theft—Sentence of whipping—Order under S.* 565, *Cr. P. Code—Legality.*

When a sentence of whipping has been passed on a convicted person under S. 3 of the Whipping Act, a further sentence of imprisonment for the same offence is illegal. Section 3 differs in

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this respect from S. 4 which authorises the passing of a sentence of whipping in lieu of or *in addition* to any other punishment. Where the accused on conviction on a charge of theft under S. 380, I. P. Code, was awarded a sentence of whipping under S. 3, and in addition was also ordered under S. 565, Cr. P. Code, to notify his whereabouts for three years.

Held, that the order under S. 565, Cr. P. Code, was illegal in the absence of a sentence of imprisonment and must be set aside. (*Agarwala and Luby JJ.*) EMPEROR *v.* ETWARU DOME. **15 Pat. 44=158 I.C. 991=8 R.P. 232=36 Cr. L.J. 1497=16 Pat.L.T. 586=1935 Cr.C. 1106=A.I.R. 1935 Pat. 435.**

———**Ss. 3 and 4**—*Scope—Theft—Whipping in addition to imprisonment—Legality.*

Theft is not an offence punishable with whipping in addition to imprisonment by S. 4 of the Whipping Act, though under S. 3, it may be punished with whipping in lieu of imprisonment. (*Mosley, J.*) EMPEROR *v.* BA CHO. **153 I.C. 516=1935 Cr.C. 190=7 R.R. 219=36 Cr.L. J. 366=12 Rang. 607=A.I.R. 1935 Rang. 64.**

———**S. 4**—Accused giving way to his passions in relations with women and girls—Offence under S. 366-A, I. P. Code—Whipping more efficacious than detention in a Borstal institution. *See* BURMA PREVENTION OF CRIME ACT (III OF 1930), S. 25. **12 Rang 349.**

———**S. 4**—Conviction under Ss. 326 and 324, I. P. Code—Legality of. *See* BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT, 1930, S. 25. **12 Rang. 344.**

———**S. 4**—Maximum period of imprisonment —Computation of—Period of imprisonment prior to offence. *See* CR. P. CODE, S. 393. **12 Rang. 404.**

———**S. 4 (b)**—*Scope—Sentence.*

According to the Whipping Act the sentence of whipping in lieu of imprisonment appears to have been regarded as a sentence to be reserved for graver forms of offences. Section 4 (*b*) does not contemplate the offence of sodomy only. It imposes a special penalty upon the offence of sodomy combined with aggravating circumstances. (*Ferrers, J.C. and Aston, A.J.C.*) UDHARAM *v.* EMPEROR. **I.R. 1932 Sind 170=140 I.C. 23=33 Cr.L.J. 900=1932 Cr.C. 587=A.I.R. 1932 Sind 143.**

———**S. 5**—*Applicability.*

Section 5 does not supersede S. 4. Section 5 is meant to be applied in proper cases alternatively with Ss. 3 and 4 which apply to juvenile offenders as well as to offenders who are not within the definition of juvenile offenders. (*Macpherson and James JJ.*) TARINI MAHTON *v.* EMPEROR. **I.R. 1932 Pat. 288=140=I.C. 11 (1)=13 Pat. L.T. 573=1932 Cr.C. 851=34 Cr.L.J. 10 =A.I.R. 1932 Pat. 334.**

———**S. 5**—*Whipping in addition to imprisonment—Legality of sentence.*

Under S. 5 of the Whipping Act, a sentence of whipping is to be imposed in lieu of, and not in addition to, any other punishment. A sentence of whipping on a juvenile offender in addition to a sentence of imprisonment is illegal. (*Bajpai, J.*) LURKHUR *v.* EMPEROR. **153 I.C. 582=**

WILL.

7 R.A. 521=36 Cr.L.J. 368=16 L.R. 13 (Cr.)=57 All. 395=4 A.W.R. 669=1934 Cr.C. 1300=A.I.R. 1934 All. 976.

WHIPPING (BURMA AMENDMENT) ACT OF 1927, S. 3—*Offence under S. 325, I. P. Code—Whipping as an additional or alternative punishment.*

If the offence charged is punishable with imprisonment or fine and, if whipping is given as an additional punishment, it can be added either to imprisonment or fine. But in the case of an offence under S. 325, I. P. Code, where imprisonment is imperative and fine is optional, whipping can only be given in addition to imprisonment or in addition to imprisonment and fine, but not in addition to fine alone. If, however, whipping is inflicted as an alternative punishment, no other punishment is to be added. (*Ba U and Mackney, JJ.*) EMPEROR *v.* ABDUL MAN. **13 Rang. 115=157 I.C. 244=8 R.R. 90=36 Cr.L.J. 1129=1935 Cr.C. 845=A.I.R. 1935 Rang. 219 (2).**

WIDOW.

See (1) ADVERSE POSSESSION.
(2) HINDU LAW—MAINTENANCE, REVERSIONER AND WIDOW.
(3) LIMITATION ACT, ARTS. 142 AND 144—HINDU WIDOW.
(4) MAHOMEDAN LAW—SUCCESSION.

WIFE.

(1) CR. P. CODE, S. 488.
(2) HINDU LAW—MAINTENANCE—WIFE.
(3) HINDU LAW—MARRIAGE.
(4) HINDU LAW—PARTITION—FEMALE SHARER.
(5) HUSBAND AND WIFE.
(6) MAHOMEDAN LAW—MARRIAGE.

WILL.

See also (1) HINDU LAW—WILL.
(2) MAHOMEDAN LAW—WILL.
(3) SUCCESSION ACT.

Absolute estate. *See* CONSTRUCTION.
Administration.
Adoption.
Charge.
Charitable endowment.
Codicil.
Conditional gift.
Construction.
Disposing power.
Election.
Executor.
Genuineness.
Joint tenancy.
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Mahomedan Will.
Operation of.
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Persona designata. *See* CONSTRUCTION.
Probate.
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WILL—Administration.

Testamentary capacity.
Test of.
Trust.
Validity of.
Vested estate. *See* CONSTRUCTION.

Administration.

———Enforcement of bequest—Effect of S. 307 (2) (*ii*), Succession Act. *See* SUCCESSION ACT, (1925), S. 307 (2) (*ii*). **53 All. 422=A.I.R. 1931 All. 212.**

———*Administration—Foreign asset—Promissory note made in India but held in Europe—Part of the estate.*

Where the debt was originally a European debt in that it was entered in the testator's book in Zurich and the promissory note was held in Europe but on the death of the testator the debt was discharged by the appointment of the debtor as executor under the will and his acceptance of the office.

Held, that the debt being due from a person resident in India on a promissory note made in Calcutta, the debt became an Indian asset forming part of the estate of the deceased. (*Buckland, J.*) F. J. EUGSTER *v.* E. O. GAMMETER. **37 C.W.N. 531=147 I.C. 1160=6 R.P. 402=A.I.R. 1933 Cal. 820.**

Adoption.

See also OUDH TALUQDAR, *infra.*

———*Adoption—Absolute estate—Words if dispositive or descriptive—Provision in will for adoption—Whether inconsistent with the absolute nature of the widow's estate.*

Where a person ill of body and wishing to make a will while he was in the enjoyment of his understanding wrote a will saying "It is a long time since a division was made between me and my pangalis. They have no right whatever to my properties, namely, the house, ground, jewels; ready money and all immovable and movable properties and all the properties I have been enjoying. But they have only to observe pollution but have no other rights. Therefore my wife *J* has the right to my properties and all the properties which I have been enjoying up to this time. No others have the least right thereto," and then proceeded to confer on his wife the power to adopt.

Held, that considering the last clause, in the light of the surrounding circumstances, it is virtuously a dispositive clause whereby the testator wanted to confer an absolute estate in his properties on his widow. L.R. 57 I.A. 282=59 M.L.J. 437 (P.C.). The giving of an authority to the widow by a will to adopt is not necessarily inconsistent with conferring on her an absolute estate. (*Curgenven and Sundaram Chetty, JJ.*) JEEVAKORE BHAI *v.* KRISHNADOSS PARAMANANDADOSS. **I.R. 1932 Mad. 637=139 I.C. 188=1932 M.W.N. 1002=36 L.W. 396=A.I.R. 1932 Mad. 680=63 M.L.J. 242.**

Charge.

———*Charge—Charge for annuities—Creation of.*

The fact that the incidents of various allowances payable by way of maintenance have been thrown on particular estates means that these allowances are to be paid out of the profits of the specified estates and constitute a charge on those estates. (*Bisheshwar Nath and Raza, JJ.*) HUNTER *v.* NISAR AHMAD. **8 Luck. 168=I.R. 1933 Oudh 194=143 I.C. 692=9 O.W.N. 900=A.I.R. 1932 Oudh 336.**

WILL—Conditional gift.

Charitable endowment.

See also RESIDUARY BEQUEST AND RELIGIOUS ENDOWMENT, *infra.*

———Charitable endowment—Bequest for *dharmath, dharmasala* and for Sanskrit education. *See* HINDU LAW—WILL—VALIDITY. **14 Lah. 827.**

———Charitable endowment—Conveyance of property or gift subject to burdens. *See* HINDU LAW—RELIGIOUS ENDOWMENT. **35 L.W. 350=A.I.R. 1932 Mad. 589.**

———Charitable endowment—*Setting apart fund for benefit of poor family—Object sufficiently certain. See* TRUST—VALIDITY OF. **12 Pat. 708=A.I.R. 1933 Pat. 647.**

———Charitable endowment—Trust in favour of charities or only a charge on estate. *See* HINDU LAW—WILL. **A.I.R. 1933 Mad. 204.**

Codicil.

———*Codicil—Reference to subsequent codicil.*

Where the language used in the body of a will threw some doubt on the nature of the estate conferred by the testator on his wife, but the codicil stated in explicit terms that he had by the will declared his wife to be "permanent owner" of the estate like himself, and he himself was admittedly the absolute owner of his property.

Held, that this was the testator's own interpretation of the language used by him in his will, and this interpretation must be treated as authoritative and that the testator intended to bestow an absolute estate of inheritance upon the lady. (*Sir Shadi Lal.*) RAMESHWAR BAKHSH *v.* BALRAJ KUAR. **1935 A.L.J. 1133=1935 O.W.N. 989=157 I.C. 888=8 R.P.C. 62=37 P.L.R. 666=37 Bom.L.R. 862=1935 A.W.R. 1302=40 C.W.N. 8=1935 M.W.N. 1122=A.I.R. 1935 P.C. 187 (P.C.).**

Conditional gift.

———Conditional gift—Bequest with condition as to good character—Absolute property conveyed—Restriction on power of alienation—Effect. *See* SUCCESSION ACT (1925), S. 172. **1932 A.L.J. 564=A.I.R. 1932 All. 476.**

———*Conditional gift—Condition that if son marries non-Roman Catholic, he shall forfeit inheritance—Marriage with girl baptised on day of wedding—Condition, if satisfied.*

Where a father executed a will bequeathing a certain property to his son and stating that should he form a matrimonial alliance with any but a Roman Catholic, he should forfeit his inheritance and the son married a girl who was born a Buddhist and who only became baptised on the day of her wedding.

Held, that the son has satisfied the condition imposed upon him by his father's will inasmuch as the girl was a Roman Catholic at the time of her marriage, even though she was ignorant of the most fundamental doctrines of the Catholic religion. (*Ba U, J.*) GALI LOPE *v.* MA IN. **7 R.R. 61=151 I.C. 314 (2).**

WILL—Construction.

———Conditional gift—Restriction on marriage —Condition if unreasonable. *See* SUCCESSION ACT, S. 127. **59 Cal. 102=A.I.R. 1932 Cal. 350.**

Construction.

———Construction—Absolute estate—Words if dispositive or descriptive. *See* WILL—ADOPTION. **A.I.R. 1932 Mad. 680=63 M.L.J. 242.**

———*Construction—Absolute estate.*

A testator bequeathed property to his wife "with full power of transfer of every description. * * * * she may sell any share or part of the land or the entire estate or she may make any other kind of transfer on the occasion of any suitable and proper necessity arising."

Held, that the earlier words conferred an absolute estate and the last clause was a surplusage. (*Wazir Hasan, C.J. and Raza, J.*) RAMESHAR BAKHSH SINGH *v.* BALRAJ KUAR. **9 O.W.N. 660=144 I.C. 199=I.R. 1933 Oudh 39=A.I.R. 1932 Oudh 327.**

———*Construction—Absolute estate—Restraint on alienation absolute.*

A will ran as follows: "After my death and that of my wife, my sons *J* and *D* with their heirs and representatives shall take in equal shares my movable and immovable property left behind. Out of the afore-mentioned immovable property, the southern portion, being the half portion belonging to the executant, is not partible. In case my sons *J* and *D* together with their heirs and representatives wish to occupy this portion, they are at liberty to do so. But in case they do not pull on amicably with each other and there arises conflict between them, then *D* with his heirs and representatives should receive Rs. 2,100 from *J* or his heirs and representatives on account of his half share in the dwelling-house, and should give up possession and occupation whereafter *J* with his heirs and representatives shall become the proprietor of the whole building; and the aforesaid *D* or his heirs and representatives shall have no right or interest whatever.

Held, that the superadded restraint was an absolute restraint on alienation and not merely partial and as such was invalid. (*Rupchand Bilaram and Mehta, A. J. Cs.*) HARI DAYARAM *v.* JETHOMAL. **29 S.L.R. 321=158 I.C. 72=8 R.S. 39=A.I.R. 1935 Sind 182.**

———Construction—Absolute estate—Bequest by Hindu to wife. *See* CONSTRUCTION—ENGLISH WILL. **58 Cal. 77.**

———*Construction—Absolute estate—Bequest to wife—Gift over to daughter—Absolute estate conferred on wife.*

In construing a Hindu will it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the distribution of property. Where the testator began by saying. "I am the owner of the entire property whatever is present. My wife Mt. *D* is owner after my death. None else has any concern", and at the end he said "This Will has been executed in favour of *D*. She shall be owner after me. None else has any concern", but there was an intervening clause

WILL—Construction.

to the following effect, "I have also got two daughters *P* and *V*. My wife shall be owner after me. She shall be competent to betroth the girls. *P* and *V* shall be owners after me and my wife."

Held, that the intention and wish of the testator was that his widow should become full owner of the property bequeathed. (*Broadway and Bhide, JJ.*) PARKASH *v.* CHANDAR PARKASH. **I. R. 1932 Lah. 493=33 P.L.R. 35=138 I.C. 365=33 P.L.R. 35=A.I.R. 1932 Lah. 215.**

———*Construction—Absolute estate—Bequest by Hindu to his wife—Evidence as to intention of testator.*

The rule of construction enunciated in *Shamsool Hooda* v. *Sheomukram*, 2 I.A. 7 is still applicable in the case of wills by Hindus. Where however the testator who was not much influenced by orthodox notions made an unqualified bequest of his entire property to his wife and it appeared that he had made provision for his other relations and there was no provision made for the devolution of the estate after the wife.

Held, that the intention of the testator was to confer an absolute estate on his widow and that the absence of words such as 'malik' in the will was immaterial. (*Bhide and Tapp, JJ.*) MOHAN SINGH *v.* MT. GUR DEVI. **12 Lah. 767=33 P. L.R. 196=I.R. 1931 Lah. 498=131 I.C. 738 =A.I.R. 1931 Lah. 728.**

———*Construction—Absolute estate—Clauses repugnant to it—If invalid.*

Where an absolute estate is created by a will in favour of the devisee, the clauses in the will which are repugnant to such absolute estate cannot cut down the estate; but they must be held to be invalid. (*Sir Shadi Lal.*) RAMESHWAR BAKHSH *v.* BALRAJ KUAR. **1935 A.L.J. 1133 =1935 O.W.N. 989=157 I.C. 888=8 R.P. C. 62=37 P.L.R. 666=37 Bom.L.R. 862= 1935 A.W.R. 1302=40 C.W.N. 8=1935 M. W.N. 1122=A.I.R. 1935 P.C. 187.**

———*Construction—Absolute estate—Devise of interest according to Act I of* 1869*—Intention of testator—Guide to.*

In construing the provisions of a will, the Court may ascertain the dominant intention of the testator; for that purpose it is legitimate to look to other provisions of the settlement, in order to see what is the vocabulary of the testator and how he expresses himself with regard to other matters. An Oudh Taluqdar, by his will, bequeathed certain villages to his son, S. R., in the following terms: "Other villages and shares in villages entered in List IV given at the foot of this deed shall pass to the said S. R. and after him to his eldest son under the rules of succession laid down in Act I of 1868."

Held, that the devise in favour of S. R. conferred on him an absolute right or property in the villages and shares in villages comprised in List IV and not merely a life interest. (*Lord Macmillan.*) KAMAKHYA DAT RAM *v.* KUSHAL CHAND. **61 I.A. 145=9 Luck. 349=6 R.P. C. 112=3 A.W.R. 403=11 O.W.N. 305= 1934 A.L.J. 299=38 C.W.N. 477=36 Bom. L.R. 399=39 L.W. 415=1934 M.W.N. 255**

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=59 C.L.J. 214=147 I.C. 1133=A.I.R. 1934 P.C. 72=66 M.L.J. 294 (P.C.).

———*Construction—Absolute estate—Gift for life coupled with a general power of appointment.*

A gift for life coupled with a general power of appointment may sometimes be taken to indicate the gift of an absolute estate. (*Wazir Hasan, C. J. and Raza, J.*) RAMESHAR BAKHSH *v.* BALRAJ KUAR. **141 I.C. 199=I.R. 1933 Oudh 39=9 O.W.N. 660=A.I.R. 1932 Oudh 327.**

———*Construction—Absolute estate—Gift over—Validity of.*

A devise by way of a gift over in favour of the daughter's children after an absolute estate created in favour of the wife in the earlier part of the will must be rejected as repugnant to the absolute estate. (*Wazir Hasan, C. J. and Raza, J.*) RAMESHAR BAKHSH SINGH *v.* BALRAJ KUAR. **9 O.W.N. 660=141 I.C. 199=I.R. 1933 Oudh 39=A.I.R. 1932 Oudh 327.**

———*Construction—Absolute estate—Meaning of words*—'Rasnashin' *and* 'Janashin'—*Power to appoint—Effect of.*

Rasnashin and *Janashin* are words of Persian language, meaning 'successor' and *locum tenans*. Both these expressions are intended to connote the same status and not two different characters, one of an adoptee and the other of an appointee. The word "*muqarrar karen*" is wholly inappropriate to the act of adoption under the Hindu Law. It is singularly appropriate to denote a power of appointment. So if a testator has conferred on his wife a power to appoint a successor in those terms, it is only to emphasise the absolute estate conferred on her. It does not mean a mere permission to make an adoption as a Hindu widow. (*Wazir Hasan, C. J. and Raza, J.*) RAMESHAR BAKHSH SINGH *v.* BALRAJ KUAR. **9 O.W.N. 660=I.R. 1933 Oudh 39=141 I. C. 199=A.I.R. 1932 Oudh 327.**

———Construction—Absolute estate to widow—Gift over to named person—If void for as repugnant or uncertain. *See* HINDU LAW—WILL. **68 M.L.J. 707.**

———*Construction—Absolute estate—Absolute devise to wife—Gift over to sister's son of whatever properties left after her death—Validity.*

A testator by his will directed that after his death his wife, on becoming sole heir to all his properties moveable or immoveable and all monies, etc., shall hold and enjoy the same and become entitled to make gift and sale and that whatever properties shall be left after her death shall vest in his sister's son who will be sole heir to the said properties.

Held, the widow took an absolute estate and the gift over in favour of the sister's son was invalid; and that the latter had therefore no *locus standi* to apply for letters of administration. (*D. N. Mitter and Patterson, JJ.*) BHUPATI CHARAN BASU *v.* CHANDI CHARAN BASU MALLI. **156 I.C. 241=7 R.C. 696=39 C.W.N. 390 =A.I.R. 1935 Cal. 154.**

———*Construction—Absolute interest—Restriction on alienation* inter vivos.

Where the only restriction imposed on the widow's right to deal with the immoveable property bequeathed to her is a restriction on her power of sale or disposition in her lifetime, and nothing is said as to what is to happen if the property remains unsold and there is nothing which expressly restricts her power to dispose of the property by will if not sold in her lifetime, it may be legitimately inferred that the testator intended to take away the widow's unrestricted right of alienation *inter vivos*, but it is difficult to infer anything more from these provisions. The devise is a devise of an absolute interest but with a limited restriction on alienation *inter vivos* annexed to it. In the event of alienation *inter vivos* only is the widow's absolute interest cut down and if she retains the property throughout her life she is at the date of her death the absolute owner of it. Further, the provisions depriving the widow of her absolute interest in the property in the event of her selling it are repugnant to the devise or bequest itself and must be disregarded. (*Harries, J.*) TWALLING, *In the goods of.* **1935 A.L.J. 1207=1935 A.W.R. 1203=159 I.C. 989=8 R.A. 532=A.I.R. 1935 All. 1042.**

———*Construction—Absolute estate—Power of alienation conferred to grantee—Gift over of what may be left of the estate—Void for uncertainty.*

A testator bequeathed his properties to his wife on whom he conferred full powers of alienation and appointment. The testator also purported to make a gift over of what may be left of the estate at the time of her death.

Held, that even if the gift over was not void as repugnant to the absolute estate, it was void for uncertainty. (Case-law referred.) (*Wazir Hasan, C. J. and Raza, J.*) RAMESHAR BAKHSH SINGH *v.* BALRAJ KUAR. **I.R. 1933 Oudh 39= 141 I.C. 199=9 O.W.N. 660=A.I.R. 1932 Oudh 327.**

———Construction—Absolute estate—Bequest of —Restricted powers of will and gift—Power to mortgage, sell or lease—If prohibited. *See* HINDU LAW—WILL—BEQUEST TO WIFE. **1935 O. W.N. 68=A.I.R. 1935 Oudh 198.**

———*Construction—Absolute estate—Use of* word *'malik'.*

Though the use of the word 'malik' imports an absolute estate, it is not a term of art and its real significance should be considered in the light of the setting in which it occurs. If there is nothing in the context to indicate a contrary intention, the word 'malik' certainly denotes full ownership; but it is consistent with a limited estate if it is controlled by other clauses in the will. (*Niamatullah and Allsop, JJ.*) CHHATARPALI *v.* KALIP DEI. **160 I.C. 617=8 R.A. 636 =1935 A.W.R. 1351=A.I.R. 1936 All. 50.**

———*Construction—Bequest by implication—Erroneous recital of intended legacy—Effect of—Bequest—When implied.*

Where a testator, in one part of his will, has recited that he had given a legacy to a certain person, but it does not appear that any such legacy has been given, the Court would take the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, would give to the erroneous recital the effect of an actual gift. But where the recital amounts only to a declaration that he supposes that a party has

an interest independent of the will, such recital is no evidence of an intention to give by the will and cannot be treated as a gift by implication. The distinction between the two cases is marked and obvious. (*Costello and Lort Williams, JJ.*) SATIS CHANDRA MUKHERJEE *v.* NILADHRI NATH MUKHERJEE. **160 I.C. 124=8 R.C. 403=39 C.W.N. 237=A.I.R. 1935 Cal. 788.**

———*Construction—Bequest by implication—Recital of testator's erroneous impression—No gift by implication.*

Cl. (3) of the will ran as follows: "On my demise my wife shall become full (absolute) owner of my entire moveable properties according to law. Consequently there is no necessity for any will in respect of the same also. The copyright in my books is reckoned among moveable properties". The question was whether, on a proper construction of the will, there was a testamentary disposition of the copyright in the books in favour of his wife.

Held, that there were no words of gift in cl. (3). If a testator has, in one part of his will recited that he had given a legacy to a certain person but it has not appeared that any legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will and given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration that he supposes that a party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will and cannot be treated as a gift by implication. The present case falls under the latter class. The testator might have supposed that his wife would get an absolute title to the moveable properties under the law and that may be erroneous but since he has actually made no gift, express or implied, the copyright in the books formed part of the undisposed of residue. 1 Hare 537; Jarman on Wills, 7th Ed., pp. 597 and 603, Ref. (*Roy, J.*) NILADRI NATH MUKHERJEE *v.* SATIS CHANDRA MUKHERJEE. **152 I.C. 835=7 R.C. 320=155 I.C. 867=7 R.C. 636=38 C.W.N. 604=A.I.R. 1934 Cal. 668.**

———Construction—Contingent interest, vested interest and *spes successionis*—Meaning of. *See* HINDU LAW—WILL—CONTINGENT—INTEREST. **59 Cal. 859=A.I.R. 1932 Cal. 600.**

———*Construction—English will—Bequest by Hindu to wife—Absolute or limited estate—Presumption.*

Where a Vernacular Will was to be construed due allowance must be made for shades of meaning not susceptible of exact translation. Where however the Will is in English no such considerations can arise. Where the testator said: "it is my will and desire and I direct that my wife *S* will get a legacy of Rs. ..... out of my estate if she survives me".

Held, that the wife who survived the testator took an absolute estate in the legacy and no question of presumption under Hindu Law arose. (*Buckland, J.*) PRAMATHANATH SARKAR *v.* SUPRAKASH GHOSH. **58 Cal. 77=I.R. 1931 Cal. 616=132 I.C. 904=A.I.R. 1932 Cal. 337.**

———*Construction—Guidance—Value of other decisions.*

In matters of construction of wills, decisions in other cases cannot afford sufficient guidance. (*Guha and M. C. Ghose, JJ.*) PROVABATI DEBYA *v.* SOROJINI DEVI. **36 C.W.N. 1015=142 I.C. 95=I.R. 1933 Cal. 229=A.I.R. 1933 Cal. 72.**

———*Construction—Inconsistent clause—Subject—Self-acquired property and ancestral property—Statement in preamble that former alone was dealt with.*

The preamble of a will declared that the testator was making the will in regard to his self-acquired property and in the course of the will the testator definitely and distinctly stated that he had no power to make a will of ancestral plots of land.

Held, that the will related only to the self-acquired property and that the testator did not make, or intend to make, or believe he was making, a will in respect of ancestral plots; that a family arrangement consented to by all the members under which the ancestral plots were dealt with in the will as being in accordance with his wishes, was permissible as a transfer *inter vivos;* that the words, "that land too shall along with the *muafi* land devolve on the eldest branch of the family, etc.", constituted a demise of the property by the testator. (*Hilton, J.*) RANBIR CHAND *v.* JODHA MAL. **6 R.L. 847=150 I.C. 311=36 P.L.R. 71=A.I.R. 1934 Lah. 764.**

———*Construction—Familiarity of Judge with the language—Value of.*

It is true that familiarity with the language in which a will is written is a distinct advantage to the Judge construing it; but care should be taken to avoid arbitrariness. Where the right construction depends not so much on the meaning of a word which has a somewhat flutuating meaning but on the setting in which it occurs, logical deductions are of greater importance, and familiarity with the language in which the will is written does not make any appreciable difference. (*Niamatullah and Allsop, JJ.*) CHHATARPALI *v.* KALAP DEI. **160 I.C. 617=8 R.A. 636=1935 A.W.R. 1351=A.I.R. 1936 All. 50.**

———*Construction—Limited estate—Use of word 'malik'—Effect—Life estate to wife with contingent estate in favour of daughters—Intention of testator—Rule of repugnancy—Applicability.*

The testator by his will provided as follows: "After my death my wife shall be owner (malik) of my estate and after the death of my wife, my daughters shall be the owners (malik) and they shall have the power of all sorts of transfer, gift, etc. Wherefore I have executed this will in the above noted condition so that it may serve as an authority and be of use at the time of need." The will was scribed by a lawyer and was duly attested.

Held, (1) that the word "unto" which the vernacular equivalent of the word "they" governs the person to whom reference has been made immediately before, namely the daughters and not the wife who had been referred to in the first clause. The word "and" used after the word "estate" takes the effect of a full stop and the

second clause should be read as a sentence by itself providing that after the death of the wife his daughters should be owners with full powers of transfer;

(2) that the word 'malik' in the context in which it has been used with reference to the wife means only the owner of a life-estate and not an absolute estate;

(3) that the proper method of giving effect to the intention of the testator was to give effect to both parts of the will and not to give effect to the rule that the ultimate disposition in favour of daughters was invalid on the ground of repugnancy; and

(4) that consequently the will conferred on the wife not only a life estate with a vested remainder in favour of the daughters. (*Razâ and Beshesh-war Nath, JJ.*) SWAMI DAYAL *v.* RAMADHAR. **6 Luck. 715=I.R. 1931 Oudh 401=134 I.C. 865=8 O.W.N. 566=A.I.R. 1931 Oudh 358.**

———*Construction—Limited estate—Gift over to sister's sons—Inference.*

A Hindu will provided as follows:—"After my death my wife *A* shall have the power of gift and sale in all my immovable property which should remain unsold and undisposed of by me in gift in my lifetime. My wife *A* shall have power to adopt any boy she would like if she feels inclined to make an adoption with power to give him such property as she should like; she has power to make such adoptions till my family is perpetuated. If she does not like to make an adoption my sister's sons *B* and *V* should after her lifetime enjoy in equal moieties with power of gift and sale, they, their sons and grandsons in succession, *i.e.*, from generation to generation, such of the property which my wife should not have disposed of by gift or sale in her lifetime."

Held, that the widow took a limited estate under the will and the sister's sons had a gift over. (*Waller and Krishnan Pandalai, JJ.*) MANUMALLASWAMI *v.* NARAYANASWAMI. **I.R. 1932 Mad. 548=138 I.C. 276=1932 M.W.N. 798=35 L.W. 756=A.I.R. 1932 Mad. 489=63 M.L.J. 107.**

———*Construction—Limited estate—Right of alienation limited to specified purposes and right to accelerate succession.*

The testratrix left a will in the following terms: "After my death, *M* and *D* (co-widows of testatrix) shall be owners and possessors of my property and they will have power to sell and mortgage for charity and maintenance. The power to manage and to transfer shall be only for charity and maintenance. . . . . Whatever property is left after expenditure on charity and maintenance will belong to *S* (a male collateral) as owner. If the two ladies, my successors, are pleased with *S*, they can give the property to him or do as they like."

Held, that the will conferred a limited estate on *M* and *D* with remainder to *S*, that the power of *M* and *D* to alienate was limited to charity and maintenance and that a simple mortgage executed by them was therefore invalid and not binding on *S*. (*Niamatullah and Rachhpal Singh, JJ.*) SANSAR CHAND *v.* DURGA DASI. **1933**

A.L.J. 1436=149 I.C. 648=6 R.A. 940=A.I.R. 1934 All. 93.

———*Construction—Limited estate—Widow to enjoy during her life "without hindrance" and the properties to be taken by another afterwards.*

Where the testator directed that his wife should take the property and enjoy them during her life "without any hindrance" and the properties were to be taken by the plaintiff on her death,

Held, that though where a will contained clear dispositive words creating in the first instance an absolute estate in favour of a person and also contained a further clause under which further interests are given merely after, or on the termination of, that donee's interest, his absolute interest is not cut down and the further interests fail. In this case, however, the language used by the testator indicated clearly that he intended to create only a life-estate in favour of his wife, with a gift over in favour of the plaintiff. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) RAMA RAO *v.* YAMUNABAYAMMA. **12 Mys.L.J. 54=39 Mys.H.C.R. 658.**

———*Construction—Meaning of words*—'Bangsa'.

The word *'bangsa'* as used in a Hindu will means family and not merely lineal descendants. (*C. C. Ghose, A.C.J. and Mitter, J.*) PRASADDAS PAL *v.* JAGANNATH PAL. **60 Cal. 538=6 I.R. (Cal.) 58=144 I.C. 894=37 C.W.N. 181=A.I.R. 1933 Cal. 519.**

———*Construction*—Persona designata—*Bequest to adopted son—Adoption invalid—Reference to status as adopted son merely description of donee or motive of gift.*

The distinction between what is description only and what is the reason or motive of gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances. The deed in question after making a declaration of the adoption of the donee by the testator mentioned that the said adopted son was to remain in possession and occupation like a son, generation after generation, descent after descent after the death of the declarant of the entire properties.

Held, that the reference to the status of the donee as an adopted son was merely a description of the donee and not motive of the bequest and that the bequest was valid even if the adoption was invalid. 11 Cal. 463 (P.C.); *Wilkinson* v. *Joughin,* 2 Eq. 319, Rel. on; 28 All. 488 (P.C.), Dist. (*Wazir Hasan, C.J. and Nanavutty, J.*) ALI BAHADUR KHAN *v.* HAFIZ SAMIULLAH KHAN. **9 Luck. 530=6 R.O. 429=148 I.C. 692=11 O.W.N. 346=A.I.R. 1934 Oudh 137.**

———*Construction*—Persona designata—*Bequest to person named as adopted boy—Adoption invalid—Bequest—If fails—If takes effect as* persona designata.

The widow of the last holder of an impartible zemindari took a boy in adoption, but being apprehensive that the Courts might ultimately hold that she was setting up a false authority to adopt she executed certain wills conveying to that boy some properties which were at her disposal, the motive for the said wills being her

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affection for the boy himself and the desire to provide for him irrespective of the validity of the adoption.

Held, that the adopted boy took the properties as *persona designata,* and was entitled to them, even though his adoption be declared invalid. (*Ramesam and Stone, JJ.*) NAVANEETHAKRISHNA MARUDAPPA THEVAR *v.* COLLECTOR OF TINNEVELLY. **160 I.C. 647=8 R.M. 674=42 L.W. 875=1935 M.W.N. 1001=A.I.R. 1935 Mad. 1017=69 M.L.J. 632.**

———*Construction—Personal effects—Bequest of personal effects in the room—Pass-books in drawer not included.*

The testator by his will created several legacies. One of the bequests was in following words: "I bequeath my personal effects in my room including pictures, roll-top desk and chiffonier complete with their contents to my niece, Esther Phillips, wife of Nathan Phillips." There were in this drawer three pass-books referring to his deposit accounts nine promissory notes, all payable to order and not endorsed.

Held, that the bequest was one of personal effects. The mere direction to include the desk with its contents did not intend so to enlarge the scope of the bequest as to include property not within the term "personal effects", the pass-books and promissory notes not being within the description of personal chattels. (*Lord Warrigton of Clyffe.*) KENNETH DE SOLA JOSEPH *v.* ESTHER PHILLIPS. **6 R.P.C. 177=150 I.C. 225=1934 A.L.J. 591=40 L.W. 234=4 A.W.R. 622=A.I.R. 1934 P.C. 125=67 M.L.J. 241 (P.C.).**

———*Construction—Power—Power to sell property conferred only for special valid necessity—Sale as act of good management not competent.*

Where a person's powers under the will were strictly restricted and he could not sell the property except for special valid necessity such as marriage of a daughter's son, daughter's daughter or other lawful expenses,

Held, that that did not include a power to sell the property as "an act of good management". (*Jai Lal and Monroe, JJ.*) LEKH RAJ *v.* MT. MEHTAB KAUR. **147 I.C. 968=6 R.L. 475=35 P.L.R. 244=A.I.R. 1933 Lah. 861.**

———*Construction—Residuary clause—Scope of.*

Under the Indian law a residuary clause does not apply to property unknown to the testator. The law in this respect differs from the English law. 38 M. 1096, Foll. (*Mitter and Henderson, JJ.*) SUBODHCHANDRA NIYOGI *v.* BHUBALIKA DASEE. **149 I.C. 410=6 R.C. 580=60 Cal. 1406=A.I.R. 1934 Cal. 356.**

———*Construction—Rules of—Intention—How gathered.*

The intention of the testator must be inferred from what he actually wrote and not from what a Court thinks the testator intended to write. (*Harries, J.*) J. W. TWALLING, *In the goods of.* **1935 A.L.J. 1207=1935 A.W.R. 1203=159 I.C. 989=8 R.A. 532=A.I.R. 1935 All. 1042.**

———*Construction—Rules of—Rigid construction of English language to be avoided.*

Wills of people speaking a different tongue, trained in different habits of thought, and brought

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up under different conditions of life, though executed in the English language and character, must not be interpreted by the application to them of a too rigid construction of the English language. This rule must be particularly borne in mind if it appears that a rigid construction would lead to consequences operating to confer benefits outside the scope of or directly opposed to the scheme of distribution intended by the testator. (*Lord Blanesburgh.*) INDIRA RANI *v.* AKHOY KUMAR. **59 I.A. 419=37 L.W. 1=14 Pat.L.T. 101=60 Cal. 554=1933 A.L.J. 382=35 Bom. L.R. 211=9 O.W.N. 1113=56 C.L.J. 423=1932 M.W.N. 1301=I.R. 1932 P.C. 327=37 C.W.N. 153=140 I.C. 433=A.I.R. 1932 P.C. 269=64 M.L.J. 48 (P.C.).**

———*Construction—Rules of—Rules formulated for construction of English documents—Usefulness of.*

"It is a matter of difficulty to determine from translations the true effect of testamentary instruments framed in the vernacular by persons with customs and habits of mind differing widely from the customs and habits of mind of testators in England and it would be unwise to adhere too rigidly to rules of construction formulated for the interpretation of instruments created in a different environment." (*Lord Tomlin.*) NISAR ALI KHAN *v.* MAHOMED ALI KHAN. **59 I.A. 268=7 Luck. 324=9 O.W.N. 614=1932 A.L.J. 691=36 C.W.N. 937=36 L.W. 146=56 C.L.J. 36=34 Bom.L.R. 1299=I.R. 1932 P.C. 197=137 I.C. 539=36 L.W. 146=A.I.R. 1932 P.C. 172=63 M.L.J. 336 (P.C.).**

———*Construction—Rules of—Clear language.*

One cardinal principle in the construction of wills is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. 24 C. 304, Ref. (*Mukerji and Guha, JJ.*) BASANTA KUMAR BASU *v.* LALA RAM SANKAR RAY. **59 Cal. 859=I.R. 1932 Cal. 540=138 I.C. 882=55 C.L.J. 205=A.I.R. 1932 Cal. 600.**

———*Construction—Rules of—Intention of testator—Testator's own exposition of—Preference to be given to.*

When the meaning of an instrument is doubtful, it is a very good mode of getting at his meaning to see what he himself thought he had done.

The testator, after describing all his properties, said that "in respect of all this property I make a will according to the conditions below in favour of my wife." There were certain earlier clauses in the will, however, which lent colour to the view that only a restricted interest was contemplated. About eleven years later, the testator had executed an *ekrarnama* in the nature of a codicil in which he said that by the earlier will he had constituted his wife "*malik mustaqil*" (permanent owner) and "that she has and will have the same *ikhtiarat malikana*" (proprietor's powers) as he himself had.

Held, the subsequent exposition by the testator of his intention and his explanation in the codicil of the nature of the device contained in the earlier will should be preferred and that the wife took an absolute estate. (*Wazir Hasan, C. J. and Raza, J.*) RAMESHAR BAKHSH SINGH *v.* BALRAJ KUAR. **9 O.W.N. 660=141 I.C.**

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199=I.R. 1933 Oudh 39=A.I.R. 1932 Oudh 327.

[*See* on Appeal 1935 P.C. 187.]

———*Construction—Rules of—All parts to be reconciled.*

In interpreting a will it is the duty of the Court to find out the intention of the testator. That intention is to be gathered from the language used by the testator, because it is the words used in the instrument, by which he has conveyed the expression of his wishes. The meaning to be attached to the words may however be affected by surrounding circumstances and, when this is the case, those circumstances should be taken into consideration. The meaning of any clause in a will is to be collected from the entire instrument; and all the parts of a will are to be construed with reference to each other and so as, if possible, to form one consistent whole. Where it is not possible to reconcile all the parts, the latter must prevail. (*Sir Shadi Lal.*) RAMESHWAR BAKHSH *v.* BALRAJ KUAR. **1935 A.L.J. 1133=1935 O.W.N. 989=157 I. C. 888=8 R.P.C. 62=37 P.L.R. 666=37 Bom.L.R. 862=1935 A.W.R. 1302=40 C. W.N. 8=1935 M.W.N. 1122=A.I.R. 1935 P.C. 187 (P.C.).**

———*Construction—Rules of—Intention—Ascertainment of.*

In construing the will, the object should in all cases be to ascertain from its wording the expressed intention, and effect has to be given to the same. The intention has to be gathered from the words of the entire will, taking them in the ordinary meaning, not overlooking the predilection of the class to which the testator belonged. 37 Mad. 199 (P.C.), Foll. (*Guha and Lodge, JJ.*) SASANKA BHUSAN CHOWDHURY *v.* GOPI BALLAV MONDAL. **63 Cal. 385=8 R.C. 313= 159 I.C. 437=A.I.R. 1935 Cal. 716.**

———*Construction—Rules of—Intention of testator to be effectuated.*

That construction of the will should be adopted, "which bespeaks a reasonable and probable intention, rejecting that which would indicate an intention unreasonable, capricious and inconsistent with the testator's view as evidenced by his conduct and by the dispositions of his will which are not open to controversy." (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130=8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———*Construction—Rules of—Intention of testator—Two wills relating to separate properties.*

Where a testator left two wills one relating to a property within the jurisdiction of the Court and the other to property without, and both of them were executed within a few months of each other, the legal declaration of the intention of the testator must be gathered not from one document but by reading both the documents together. *Douglas Menzies* v. *Umphalby,* (1908) A.C. 224, ref. (*Patkar and Broomfield, JJ.*) AHRONEE SHEMAIL *v.* SHEIKH AHMED OMER. **135 I.C. 817=I.R. 1932 Bom. 129=33 Bom. L.R. 1056=A.I.R. 1931 Bom. 533.**

———*Construction—Rules of—Will to be construed as a whole.*

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A will should be construed as a whole. A clause in the will in which the words "permanent owner" occur, should not be taken as standing by itself, rejecting the clauses which indicate the contrary on the ground that they are repugnant to the earlier clause or that they merely express pious wishes of the testator. (*Niamatullah and Allsop, JJ.*) CHHATARPALI *v.* KALAP DEI. **160 I.C. 617=8 R.A. 636=1935 A.W. R. 1351=A.I.R. 1936 All. 50.**

———*Construction—Rules of—Will to be construed as a whole.*

One of the elementary rules of construction is that the document to be construed should be read as a whole. It is not permissible to single out one clause and to hold on the strength of it and without reference to other clauses that the interest conferred upon the lgatee was that of an absolute owner, and then reject other clauses which follow and which materially qualify the earlier clause, on the ground that they are repugnant to full ownership conferred by the earlier clause. (*Niamatullah and Rachhpal Singh, JJ.*) SANSAR CHAND *v.* DURGA DASI. **149 I.C. 648=6 R.A. 940= 1933 A.L.J. 1436=A.I.R. 1934 All. 93.**

———Construction—Vested estate—Estate conferred on sons—Contingency regarding their dying issueless—Nature of estate. *See* SUCCESSION ACT, S. 131—APPLICABILITY. **A.I.R. 1931 Cal. 499.**

———*Construction—Vested estate—Bequest to daughters on death of testator and his wife.*

A testator provided by his will as follows: "I have of my own accord given the ownership to all the four daughters in equal shares to be enjoyed by them after my death and that of my wife *S.*" The testator having died,

Held, that property vested in the daughters and not in *S,* but they were entitled to possession and enjoyment only after the death of *S.* (*Shadi Lal, C. J. and Abdul Qadir, J.*) MT. GHULAM JANNAT *v.* RAHMAT DIN. **15 Lah. 889=153 I. C. 33 (2)=7 R.L. 378=35 P.L.R. 450=A. I.R. 1934 Lah. 427.**

———Construction—Vested estate—Enjoyment alone postponed. *See* SUCCESSION ACT (1925), S. 119. **55 C.L.J. 420=36 C.W.N. 758.**

———Construction—Vested estate—Possession postponed. *See* SUCCESSION ACT (1865), Ss. 106 AND 98. **A.I.R. 1933 Mad. 885=66 M.L.J. 170.**

———*Construction—Vested or contingent estate—Presumption in favour of vested estates—Doubtful terms—Construction.*

"In construing devises, all estates are to be holden to be vested, except estates, in the devise of which a condition precedent to the vesting is so clearly expressed, that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will. If there be the least doubt, advantage is to be taken of the circumstance occasioning that doubt, and what seems to make a condition, is holden to have only the effect of postponing the right of possession. (*Duffield* v. *Duffield,* 4 Eng. Rep. 1334 at p. 1358, Foll. (*Pandrang Row, J.*) VISVANADHAN *v.* ANJANEYALU. **158 I.C. 1083=8 R.M. 432= 1935 M.W.N. 1119=42 L.W. 746=A.I.R. 1935 Mad. 865.**

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———Construction—Vested interest. *See* HINDU LAW—WILL—CONTINGENT INTEREST. **59 Cal. 859.**

———*Construction—Vested remainder—All properties to be enjoyed by wife without power of gift or sale and at death to be delivered to daughter—Direction that wife's funeral should be performed by daughter and thereafter daughter and her children to be absolute owners—Nature of estate—Intention—Performance of funerals—If condition precedent to vesting.*

The material portion of a will addressed to the testator's wife ran as follows: "On my death all my moveable and immoveable properties you should keep in your possession and enjoyment and at the time of your death deliver possession thereof to my daughter Seshamma. During the time you are in possession of the estate you should not make a gift or sale thereof. You should spend the income accruing therefrom not for improper purposes but only for necessary expenses. You should not only keep with you my daughter and my son-in-law and look after them, but also after your death your funerals should be got performed by my daughter and thereafter my daughter and the children to be born to her should enjoy the properties with powers of gift and sale as long as the sun and moon last."

Held, that the intention of the testator was to bequeath the estate to his daughter and her children after the expiration of the life estate which he intended his wife to enjoy.

Held also, that the performance of the funeral ceremonies could not be construed as a condition precedent to the vesting of the estate in his daughter and her children. 38 Cal. 468, Foll. (*Pandrang Row, J.*) VISVANADHAN *v.* ANJANEYALU. **158 I.C. 1083=8 R.M. 432=1935 M. W.N. 1119=42 L.W. 746=A.I.R. 1935 Mad. 865.**

———Construction—Will or conveyance or deed of adoption—Document stating adoption and registration of adoptee in the Revenue records and bequeathing entire property—No adoption in fact—Registration in wrong book—If takes effect as will. *See* DEED—CONSTRUCTION—WILL OR ADOPTION DEED OR CONVEYANCE. **58 I.A. 148 =54 Mad. 440=A.I.R. 1931 P.C. 109=61 M.L.J. 91 (P.C.).**

———Construction—Will or settlement—Revocability—Reservation of life-estate—Effect of. *See* DEED—CONSTRUCTION—WILL OR SETTLEMENT. **A. I.R. 1933 Mad. 492=64 M.L.J. 650.**

Disposing power.

———Disposing power—Presumption—Disposition of after-acquired property—Property 'now' owned. *See* SUCCESSION ACT, 1925, S. 90. **28 N.L.R. 255=A.I.R. 1932 Nag. 163.**

———*Disposing power—Will in favour of defendants relating to properties sold by testator—Declaratory decree obtained by plaintiff that his rights are not affected by sale after demise of vendor—Effect of.*

The plaintiffs, who had obtained a declaratory decree that a certain sale effected by one *X* could not affect their reversionary rights after the demise of *X*, sued for possession. The defendants resisted the suit basing their claim on a will executed in their favour by *X*.

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Held, that so far as the will of *X* is concerned with regard to the properties dealt with in the declaratory decree, the defendants' plea was of no avail as the will could not convey anything to them for the simple reason that *X* had no interest left to convey after making the sale, and that the plaintiffs' suit must, therefore, be decreed. (*Dalal, C. J. and Sawhney, J.*) BADAR DIN *v.* ABDULLAH. **37 P.L.R.J. & K. 29.**

Election.

———Election—Doctrine of—Limits of. *See* SUCCESSION ACT (1925), S. 180. **60 Cal. 1406= A.I.R. 1934 Cal. 356.**

Executor.

———*Executor—Administration of assets—Omission to include debt.*

Where assets come to the hands of an executor after probate has been granted, which are not included in the affidavit of assets, a further sum is payable by way of duty and that debt cannot be deemed to have been comprised in the original grant. (*Buckland, J.*) F. J. EUGSTER *v.* E. O. GAMMETER. **147 I.C. 484=6 R.C. 343=37 C.W.N. 531=A.I.R. 1933 Cal. 820.**

———*Executor—Appointment of receiver by Court—Rules governing.*

The general principle is that the Court does not as a rule appoint a receiver as against executors whenever they have obtained probate, unless there is gross misconduct or mismanagement or waste on their part. If they are rightly in possession and there is no dispute as to their title they will not be replaced by the Court Receiver except on very strong grounds. Their appointment itself shows that the testator had confidence in them and the Court gives effect to the expression of the confidence reposed in parties by one who knows them best. (*Wadia, J.*) PANDURANG SHAMRAO *v.* DWARKADAS KALLIANDAS. **6 I. R. (Bom.) 161=146 I.C. 621=35 Bom.L.R. 700=A.I.R. 1933 Bom. 342.**

———Executor—Authority to act—Grant of probate. *See* SUCCESSION ACT, SS. 213 AND 214. **35 Bom.L.R. 700=A.I.R. 1933 Bom. 342.**

———*Executor—Authority to employ agents—Delegation of fiduciary character*

The mere fact that executors are authorised under the will to appoint servants and agents will not relieve them of their ordinary liabilities as executors or empower them to delegate to others their fiduciary character. (*Mukerji and Bartley, JJ.*) KANTI CHANDRA TARAFDAR *v.* RADHARAMAN SIRKAR. **150 I.C. 36=6 R. C. 806=58 C.L.J. 271=A.I.R. 1934 Cal. 296.**

———*Executor—Authority to sell property—Necessity—Mere advantage if sufficient.*

The testator authorised the executors to realise the immoveable properties and invest the sale proceeds in authorised securities. Subsequently in a suit by the widow of the testator for enhancement of her maintenance, the Court ordered that a certain house was to be set apart for her residence as distinct from the other immoveable properties and that it was not to be sold unless a necessity arose to do so.

Held, that a mere advantageous offer by a person to purchase such house for a fair price was not

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a necessity, but that it could be sold only for a necessity which might arise under the will when the trust mentioned in the will could not be carried out unless this property was sold out. (*Sir Dinsha Mulla.*) BAI KRISHNA BAI *v.* FRAMROZ EDULJI DINSHAH. **1933 A.L.J. 697=I.R. 1933 P.C. 101=142 I.C. 545=1933 M.W.N. 379=37 L.W. 617=A.I.R. 1933 P.C. 118 (P.C.).**

———Executor—Borrowing for benefit of estate —Right of creditor against estate. *See* DEBTOR AND CREDITOR—EXECUTOR. **35 C.W.N. 850=53 C.L.J. 589=A.I.R. 1932 Cal. 182.**

———*Executor—Direction to continue testator's business—Debts incurred by executors—Estate of testator—Liability of.*

Under a will the executors were asked to carry on the business of the testator, though on a reduced scale, for the realization of outstandings for the purpose of winding-up of the business. The executors incurred debts in continuation of the business as directed. In borrowing, the executors were only acting according to the directions of the will.

Held, that the creditors could have direct recourse to the estate of the deceased, as the debts incurred in carrying on the trade in pursuance of the directions of the will will bind the estate. (*Madhavan Nair, J.*) THIRUNAVUKKARASU PANDARAM *v.* PURUSHOTHAM LAKSHMIDAS & Co. **8 R.M. 479=159 I.C. 266=1935 M.W.N. 1136 =A.I.R. 1935 Mad. 890.**

———*Executor—Duty of.*

Executors are bound to carry out the direction of the will. It is unseemly on their part to obtain probate of a will and then, instead of acting as ministers of the will of the testator, turn against his wishes and try to act in contravention of the directions of the testator. (*Tyabji, J.*) BALKRISHNA *v.* VINAYAK. **I.R. 1932 Bom. 518=139 I.C. 594=34 Bom.L.R. 113=A.I.R. 1932 Bom. 191.**

———*Executor—Liability to accounts—Default of co-executor—Mutual liability for wilful default.*

In an ordinary administration action an executor can only be charged for actual receipt by himself or his agent, not for a default of a co-trustee. But if the statement of claim alleges wilful default but the judgment at the trial gives no relief on that footing but does not dismiss the claim for that relief, the Court can, at any subsequent stage of the proceedings, upon evidence of wilful default, direct further enquiries and accounts on that footing. (*Mukerji and Bartley, JJ.*) KANTI CHANDRA TARAFDAR *v.* RADHARAMAN SIRKAR. **58 C.L.J. 271=150 I.C. 36=6 R.C. 806=A.I.R. 1934 Cal. 296.**

———Executor—Majority authorised to act—Right of minority. *See* SUCCESSION ACT, S. 311. **A.I.R. 1933 Sind 232.**

———*Executor—Mortgage executed by—Mortgagee omitting to scrutinise will—Constructive notice.*

In the case of transfer by an executor there is an initial presumption that the transfer is valid *qua* the transferee and this is so until it is established that the executor was acting in breach

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of trust. From the mere failure of the mortgagee to scrutinize the will, it cannot be inferred that he has notice that the amount raised as loan is not necessary for the administration. (*Ameer Ali, J.*) GEETARANEE DE *v.* NARENDRAKRISHNA DE. **60 Cal. 394=I.R. 1933 Cal. 510=144 I.C. 137=A.I.R. 1933 Cal. 429.**

———*Executor—Power of alienation—Restriction by implication—Direction not to divide property till sons attained majority.*

The mere fact that the testator intended that the property should not be divided till the minor sons of the testator attained the age of twenty-one years does not give rise to the inference that the testator intended to impose any restriction on the power and duty of an executor to make such disposition of the estate as is necessary to discharge the testator's debts. (*Patkar and Broomfield, JJ.*) AHRONEE SHEMAIL *v.* SHEIKH AHMED OMER. **135 I.C. 817=I.R. 1932 Bom. 129=33 Bom.L.R. 1056=A.I.R. 1931 Bom. 533.**

———*Executor—Powers—Compromise of suit disputing will.*

In the absence of any restriction upon the power of executor, he is perfectly competent to compromise the suit disputing the will by agreeing to the creation of a maintenance charge on the estate of the deceased in favour of the contesting widow. (*Khaja Mohammad Noor and Dhavle, JJ.*) SABITRI THAKURAIN *v.* MRS. F. A. SAVI. **12 Pat. 359=6 I.R. (Pat.) 17 =145 I.C. 1=14 Pat.L.T. (Sup.) 1=A.I.R. 1933 Pat. 306.**

———*Executor—Power of—Direction to carry on business—If confers power to mortgage immovable property.*

A testator carried on the business of printer, publisher and bookseller; he had also certain house properties including an ancestral house. He executed a will which *inter alia* contained a direction that his executors should carry on his business. The executors took over the business and the properties, and for the purpose of opening a new branch executed a mortgage of the house properties, and another mortgage of the business. The evidence showed that the testator pooled all his liquid funds together and mixed up the accounts of his property with those of his business taking the expenses connected with both from the common fund.

Held, that the direction in the will conferred on the executors authority to mortgage his properties for the purpose of the business. (*Lort Williams and Jack, JJ.*) SUNEELKUMAR *v.* SHISHIRKUMAR KAR. **62 Cal. 552.**

———Executor—Right of suit—Probate if a condition precedent. *See* SUCCESSION ACT, S. 213. **61 Cal. 1081.**

———*Executor—Suit by one executor against another—Maintainability—Deed of release in favour of one executor by another—Whether extinguishes other executor's debt.*

One executor may sue another. Where an executor happens to be the debtor of the estate, the release executed in his favour by another executor cannot be relied on to show that the debt had ceased to exist. (*Buckland, J.*) F. J.

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EUGSTER *v.* E. O. GAMMETER. **147 I.C. 484=6 R.C. 343=37 C.W.N. 531=A.I.R. 1933 Cal. 820.**

———*Executor—Termination of duties—Whether becomes* functus officio.

There is no question of an executor being *functus officio*. Where he has no duties to perform and the estate has been made over to beneficiaries, he may be said to be *functus officio* in a certain sense, but he has not on that account divested himself of his office, so that if occasion arises for him again to assume the role of executor, he can do so. (*Buckland, J.*) F. J. EUGSTER *v.* E. O. GAMMETER. **147 I.C. 484=6 R.C. 343=37 C.W.N. 531=A.I.R. 1933 Cal. 820.**

Genuineness.

———*Genuineness—Presumpion as to—Power of adoption contained exercised publicly and without objection—Existence of will known for long time—Inference.*

Where a will executed by a person has been publicly produced twenty-three years before the death of his widow, and it appears to have been attested by witnesses of evident respectability, and this widow, in pursuance of a power of adoption contained therein, has taken a boy in adoption 17 years before her death,—the adoption having taken place with great publicity and formality and without any objection by the members of the family—there arises a very strong presumption in favour of the genuineness of the will. The fact that the will was not registered or that it did not contain any express provision for the widow in the event of the testator leaving a son natural or adopted during his lifetime, or that the will was not registered will not lead to any inference adverse to its genuineness, as these circumstances are not unusual. (*Lord Thankerton.*) BASANT SINGH *v.* BRIJ RAJ SARAN SINGH. **156 I.C. 864=1935 O.W.N. 759=1935 A.W.R. 879=8 R.P.C. 4=1935 A.L.J. 847=39 C.W.N. 1057=42 L.W. 231=62 I. A. 180=57 All. 494=37 P.L.R. 614=16 Pat.L.T. 669=37 Bom.L.R. 805=1935 M. W.N. 768=A.I.R. 1935 P.C. 132=69 M. L.J. 225 (P.C.).**

———*Genuineness—Proof of—Evidence—Difference in quality of ink—Inference.*

No inference for or against the genuineness of a will can possibly be drawn from difference in the quality of the ink especially where the will is a long document. (*Fazl Ali and James, JJ.*) GAYESHWAR PRASAD *v.* MT. BHAGWATI KUER. **148 I.C. 5=6 R.P. 439=A.I.R. 1933 Pat. 612.**

———*Genuineness — Non-registration — Inference from signature not tallying with admitted signatures.*

Where a prior registered will was alleged to have been revoked by a later unregistered will but there was no reason why the later document was not registered though the registration office was only 3 or 4 furlongs from the house of the testator and the signature in the later document did not also tally with other admitted signatures.

Held, that the later will set up was not genuine.

WILL—Mahomedan will.

(*Raza and Smith, JJ.*) ABDUL BARI KHAN *v.* NASIR AHMAD KHAN. **10 O.W.N. 201=150 I.C. 330=6 R.O. 635=A.I.R. 1933 Oudh 142.**

Joint tenancy.

———*Joint tenancy—Proof—Bequest to widow and daughters-in-law—Omission to specify shares—Inference.*

Where property was bequeathed in favour of the widow of the testator and his daughters-in-law, but the will did not make any specification of their shares,

Held, that the non-specification of shares would not by itself be sufficient to establish a joint tenancy. (*Hasan, C.J. and Bisheshwar Nath, J.*) DEOKALI *v.* RAM JAG. **134 I.C. 1103=8 O.W.N. 1008=I.R. 1932 Oudh 15=A.I.R. 1931 Oudh 421.**

Legacy.

———*Legacy—Legatee taking property under the will—Right to set up title in conflict with.*

A person who takes property under a will, and not by inheritance, is bound by the terms of the will so far as they are valid, and cannot set up a title as heir under the ordinary rule of inheritance. (*Niyogi and Staples, A.J.Cs.*) BHIMRAO *v.* PUNJAB RAO. **18 N.L.J. 1=158 I.C. 1042=8 R.N. 105.**

———Legacy—Universal legatee—Liability for debts of testator. *See* CONTRACT ACT, S. 37. **1935 O.W.N. 1031.**

———*Legacy—Will set aside—Payments made by legatee—No charge for.*

Where the legatee has, in pursuance of the directions of the testator, made certain maintenance charges and the will itself is subsequently set aside as invalid, the alleged legatee cannot claim a charge on the estate for the payments made by him. (*Nanavutty and Smith, JJ.*) ABDUL QAYUM *v.* ABDUL RAHMAN. **8 Luck. 602=6 I.R. (Oudh) 160 (2)=146 I.C. 710=10 O.W.N. 844=A.I.R. 1933 Oudh 439.**

Mahomedan will.

See also OUDH TALUQDAR, *infra.*

———*Mahomedan will—Absolute estate to wife—Intention of testator.*

Where there are no words in a will indicating the bequest of a restricted interest, the devisees are entitled to the whole interest of the testator, although the will does not use expressions of known legal import, such as *malik* (owner) or *naslan bad naslan* (generation after generation) or does not expressly confer power of alienation. The creation of a life estate does not seem to be consistent with Mahomedan usage and there ought to be a very clear proof of such an unusual transaction. Where the testator describes all his three legatees as "my heirs" and as his heirs, they exhaust the whole of his estate both in taluqdari and non-taluqdari property. That is a strong indication of his intention to confer an absolute estate. Where the subject-matter of the devise is "the remaining property, movable and immovable of any kind which is owned and possessed by me" the bequest is absolute. Where according to the terms of the will the legatees

WILL—Operation of.

were to enjoy the benefits of the devised property and there was no restriction placed by the will as to the time or manner of enjoyment.

Held, that the bequest was absolute and it would make no difference that the bequest was, in lieu of dower, due by the testator to his wife. 56 I.A. 372; 25 I.A. 77, Foll.; 17 W.R. 525 and 56 I.A. 213, Ref. (*Hasan, C.J., and Pullan, J.*) ABADI BEGAM *v.* MAHOMED KHALIL KHAN. **6 Luck. 282=I.R. 1931 Oudh 305=132 I.C. 753=7 O.W.N. 1010=A.I.R. 1930 Oudh 481.**

Operation of.

———*Operation of—Execution on the eve of journey—Automatic cancellation after return—Need for express language.*

The testator executed a will the opening words of which were as follows: "I am going to Delhi for the darbar, therefore, I am writing the following conditions about my property. I hope, by the grace of God, such an occasion will not arise but strange is the course of time."

Held, that though the estator's contemplated journey was the occasion and probably the reason of his making the will there was nothing to indicate that the will was to cease automatically to be operative on his return. (*Sir George Lowndes.*) JAGANNATH RAO DANI *v.* RAM BHAROSA. **60 I.A. 49=I.R. 1933 P.C. 24=141 I.C. 520 (2)=37 C.W.N. 321=1933 M.W.N. 117 =16 N.L.J. 50=35 Bom.L.R. 230=37 L.W. 349=57 C.L.J. 51=1933 A.L.J. 486=29 N.L.R. 94=A.I.R. 1933 P.C. 33=64 M.L. J. 142 (P.C.).**

Oral will.

———*Oral will—Burden of proof.*

Where the defendants set up an oral will in support of their title, the onus is on them to establish the will and they will have to discharge it as they were propounding a will for probate. 12 M.I.A. 1 and 58 I.A. 362, Ref. (*Patkar and Tyabji, JJ.*) SHIVAPPA RUDRAPPA *v.* RUDRAVA CHANBASAPPA. **57 Bom. 1=142 I.C. 164 =I.R. 1933 Bom. 181=34 Bom.L.R. 539= A.I.R. 1932 Bom. 410.**

———*Oral will—Proof of—Nature of evidence necessary.*

Only the clearest and most cogent proof should be accepted of a nuncupative will. He who rests on it is bound to prove with the utmost precision, the words on which he relies, with every circumstance of time and place. The propriety of the contents of the alleged oral will does not make it any the less necessary for the Court to be on its guard and to scrutinise closely the evidence of execution. 62 M.L.J. 23 (P.C.), Ref. (*Curgenven and Sundaram Chetty, JJ.*) RAMANUJACHARYULU *v.* NARASAMMA. **1933 M.W.N. 1118.**

———*Oral will—Proof of—Nature of evidence necessary—Declaration of intention to make a will—Sufficiency of.*

The onus of establishing an oral will is always a very heavy one. It must be proved with the utmost precision and with every circumstance of time and place. A declaration of testamentary intentions to which effect was to be given by a written will intended to be shortly executed cannot be regarded as an oral will. Unless it is shown that the declarant, feeling he would not survive to make a written will, made a fresh declaration of his testamentary wishes with the intention of making an oral will, it cannot be inferred from the mere expression of the declarant's wishes that there was the necessary *animus testandi* or intention that the oral declaration should itself operate as a testamentary disposition of the declarant's property. 12 M.I.A. 1 at p. 28, Ref. (*Sir John Wallis.*) VENKAT RAO *v.* NAMDEO. **58 I.A. 362=I.R. 1931 P.C. 247=133 I.C. 711=36 C.W.N. 83=1931 A. L.J. 1131=14 N.L.J. 158=35 L.W. 769= 8 O.W.N. 963=A.I.R. 1931 P.C. 285=62 M.L.J. 23 (P.C.).**

WILL—Oudh Taluqdar.

Oudh Taluqdar.

———*Oudh Taluqdar—Mahomedan Taluqdar—Will by—Power to adopt conferred on wives in succession—Conditions as to qualifications of boy and time-limit—Effect—Meaning of* sharayat-e-bala.

A will of a Mahomedan taluqdar set forth that the testator had four wives and in case no wife had any issue then the first wife was permitted to adopt a son within two years of the death of the testator, that the boy to be adopted was to be a Sunni lad under ten years and was not to belong to a particular family; that if the first wife failed to adopt a son within the prescribed period then the second wife was authorised within the space of two years to adopt subject to the "above conditions" '(*sharayat-e-bala*).' If the second wife also failed to adopt then the third was empowered to adopt. If she too failed, then the fourth was given power to adopt on conditions as above.

Held, that the proper construction to be put upon the will was that if the first wife died after the death of the testator without making an adoption, then the second wife was at once to come into possession and become entitled to make an adoption within two years of her coming into possession subject to the condition that the boy was a Sunni lad under ten years of age and not belonging to the particular family. The phrase 'sharayat-e-bala' may be taken to mean only the conditions relating to the qualifications of the boy and not also the conditions as to the time-limit for adoption. 15 I.A. 127, Rel. on. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **8 O.W.N. 349=136 I.C. 642=I.R. 1932 Oudh 130= A.I.R. 1931 Oudh 177.**

———*Oudh Taluqdar—Will by—Life estate—Power to adopt in favour of widow of Mahomedan Taluqdar—Disclaimer of power—Effect.*

Where a Mahomedan taluqdar creates under his will a life estate in favour of his widow with power to adopt, the widow is fully justified in law in refusing the life estate as well as the power to adopt, and where she so disclaims her right her estate is lost and the estate of another legatee entitled to succeed under the will is accelerated. (*Nanavutty, J.*) MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **136 I.C. 642=I.R. 1932 Oudh 130= 8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———*Oudh Taluqdar—Will by—Nomination of three successors in succession, each with full*

WILL—Probate.

rights—Dominant intention—Series of life-estates only.

The will of a talukdar in Oudh provided for the succession in the following terms:—"Under S. 11 of Act I of 1869 I hereby appoint *F*, my brother's son, my executor and successor of this estate with all rights. . . *F*, after my lifetime, shall have like myself the very same powers with powers of succession and enjoyment as owner, provided he be alive. Similarly after his lifetime, my son *M* shall, if alive, be his successor. He shall have the same powers as *F*. After the lifetime of *M*, *H*, another brother's son, shall be his successor, provided he be alive. After all these three successors, the fit among the descendants of the successors shall succeed", etc.

Held, that the dominant intention of the testator was that the property should pass to three persons in succession and thereafter to some one or more persons in a specified manner; such an intention was inconsistent with the idea of a series of absolute interests; the intention of the testator could only be given effect to if each taken voluntarily denied himself the exercise of the power of alienation *inter vivos* or by will and that regarding the will as a whole, a series of limited or life estates only were conferred. (*Lord Tomlin.*) NISAR ALI KHAN *v.* MAHOMED ALI KHAN. **59 I.A. 268=7 Luck. 324=1932 A.L.J. 691=9 O.W.N. 614=36 C.W.N. 937=36 L.W. 146=56 C.L.J. 36=34 Bom. L.R. 1299=I.R. 1932 P.C. 197=137 I.C. 539=A.I.R. 1932 P.C. 172=63 M.L.J. 336 (P.C.).**

Probate.

See also PROOF OF, *infra.*

———Probate—Application by executor under will—Representative character of proceeding—Death of applicant during pendency of proceeding—Right of sons to intervene. *See* C. P. CODE, O. 22, RR 3 AND 11—PROBATE PROCEEDINGS. **58 Mad. 340=A.I.R. 1933 Mad. 114=63 M. L.J. 899.**

———*Probate—Caveat—Agreement to withdraw—Fresh facts placed before Court—Procedure.*

In a probate proceeding the Court cannot insist, because of the bargain between the parties on having a caveat discharged so as to prevent a person who desires to show that the testator never executed such a document from bringing such facts to notice at the time when the Court is considering the probate of the will. The Court can at the decree stage go into the question of grant of probate *de novo*. (*Rankin, C. J. and C. C. Ghose, J.*) PASHUPATI MUKERJI *v.* SHITALKUMAR SARKAR. **58 Cal. 699=I.R. 1931 Cal. 679=133 I.C. 327=A.I.R. 1931 Cal. 587.**

———*Probate—Conveyance of property without title—Effect.*

Where it appeared that the testatrix had lost her right to the property, a will in respect of that property is a nullity. And when there is no will in the eye of the law there can be no probate in respect of it.

Semble: The case would be different if some of the property bequeathed had belonged to the testatrix and some had not. (*Wazir Hasan, C. J. and Raza, J.*) SHRI MAHARAJ NANDESHWAR MAHADEOJI *v.* MUNNI. **142 I.C. 293 (1)=I.R. 1933 Oudh 100 (1)=9 O.W.N. 1078=A.I.R. 1933 Oudh 84.**

WILL—Proof of.

———Probate—Grant of—Proof that few wills contain the real intention of testator. *See* WILL—PROOF OF. **A.I.R. 1933 Cal. 449.**

Probate Court.

———*Probate Court—Duties—Decision on question of title—Propriety.*

The function of the probate Court is to determine what documents are testamentary and who is entitled to be constituted the personal representative of the deceased. The Court has no power to go beyond the terms of the will and decide a question of title which ought to be gone into in another Court. Thus it cannot go into the question whether a gift over in the will is valid or not. (*C. C. Ghose and S. K. Ghose, JJ.*) SUDHIR CHANDRA PAL *v.* UTTARA SUNDARI PAL. **6 I.R. (Cal.) 132=145 I.C. 684=37 C.W.N. 435=A.I.R. 1933 Cal. 571.**

Procedure.

———Procedure—Matter if can be decided by originating summons—Calcutta High Court (Original Side) practice. *See* PRACTICE—ORIGINATING SUMMONS. **52 C.L.J. 475=A.I.R. 1931 Cal. 138.**

———*Procedure—English Law—Applicability.*

Questions of probate law and procedure in India should be determined on an examination of the language of the relevant Indian enactment such as the (Succession Act) uninfluenced by any consideration of the previous state of the law or the English Law upon which the enactment is founded. (*Shadi Lal, C. J. and Broadway, J.*) GADODIA *v.* RAGHUBAR DAYAL. **13 Lah. 233=33 P.L.R. 542=I.R. 1931 Lah. 766=133 I.C. 286=A.I.R. 1931 Lah. 746.**

———*Procedure—Revocation of grant—Non-issuing of special citation—Party having knowledge of proceedings—Irregularity.*

If a person is entitled to special citation and such citation has not been served on him, the absence of such special citation would not of itself be sufficient to entitle him to require a will to be proved in his presence after it has once been proved in solemn form, if he was aware of the proceedings. Where the application is for revocation by such a person, the propounder will have to show that the objector was aware of the proceedings. (*Mukerjee and Mitter, JJ.*) SADAFAL KANU *v.* GADARI HAJAM. **I.R. 1931 Cal. 504 (2)=131 I.C. 856 (2)=35 C.W.N. 58=A.I.R. 1931 Cal. 497.**

Proof of.

———*Proof of—Beneficiary—Approval of testator.*

Where a will is propounded by the chief beneficiary under it, who has to take a leading part in giving instructions for its preparation, etc., it is necessary that the evidence should clearly prove that the testator approved the will. (*C. C. Ghose, and S. K. Ghose, JJ.*) SUDHIR CHANDRA PAL *v.* UTTARA SUNDARI PAL. **6 I.R. (Cal.) 132=145 I.C. 684=37 C.W.N. 435=A.I.R. 1933 Cal. 571.**

———*Proof of—Evidence—Duty to examine attesting witnesses.*

Where the signature of a will is disputed, the best evidence procurable that it was signed by the alleged testator should be furnished and the

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attesting witnesses should be called or their absence accounted for. (*Srivastava and Zia-ul-Hasan, JJ.*) SHEO SHANKAR *v.* RAM DEI. **10 Luck. 569=154 I.C. 135=7 R.O. 445=1935 R.D. 78=1935 O.W.N. 162=A.I.R. 1935 Oudh 231.**

———*Proof of—Execution—Admission of execution to witnesses—Sufficiency—Law in Punjab.*

It is open to a testator either to sign the will in the presence of witnesses or to acknowledge the document to be his will in their presence. (*Jai Lal, J.*) BHAGWAN SINGH *v.* MT. SHIV DEVI. **153 I.C. 244=7 R.L. 422=35 P.L.R. 536=A.I.R. 1934 Lah. 689.**

———Proof of — Execution — Markswoman—Statement put by writer—Validity. *See* SUCCESSION ACT (1925), S. 63 (*a*). **57 Mad. 979=67 M.L.J. 721.**

———*Proof of—Execution proved—Presumption.*

Although the onus of proving that the testator has a disposing mind lies on the propounder of the will, the initial presumption in the case of a will, which is natural and simple is that where execution is proved, the testator did intend what he purports to have done by the will. (*Coldstream and Dalip Singh, JJ.*) FAZAL DAD *v.* MT. GHULAM SUGHRA. **13 Lah. 219=I.R. 1931 Lah. 825=133 I.C. 649=32 P.L.R. 782 =A.I.R. 1931 Lah. 453.**

———*Proof of—Misrepresentation and fraud—Execution obtained.*

The health of the testatrix was far from satisfactory due to mental and physical weakness for a long time. The executrix legatee under the will who had considerable influence over the testatrix falsely misrepresented to the testatrix and made her believe that she was heavily indebted pecuniarily to her and got execution of the will in consideration of such pecuniary indebtedness and help rendered to the testatrix.

Held, that the will was procured by fraudulent misrepresentation which vitally affected the judgment of the testatrix and that probate should not be granted. Although the testatrix did know and approve of the contents of the will, the paper may be refused probate if it be found that fraud has been purposely practised on the testatrix in obtaining the execution thereof. (*Mukerji and Mitter, JJ.*) NABAGOPAL SARKAR BAHADUR *v.* SARALA BALA MITTER. **6 I.R. (Cal.) 218=146 I.C. 414=57 C.L.J. 71=A.I.R. 1933 Cal. 574.**

———*Proof of*—Onus.

Where a will is propounded, the *onus probandi* is on the party who propounds the will. He must prove that the will was duly executed, and that it was in existence at the date of the death of the testator. (*C. C. Ghose and S. K. Ghose, JJ.*) JOTINDRA NATH ROY CHOWDHURY *v.* RAJ LAKSHMI DEBI. **6 I.R. (Cal.) 97=145 I.C. 338=57 C. L.J. 8=A.I.R. 1933 Cal. 449.**

———*Proof of*—Onus.

A Court of probate must first consider the question of the execution of the will. If the Court considers that the 'due execution' has been proved that in itself will amount to a finding that the testator with full knowledge of the claims of his relations upon his bounty with full

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knowledge of the state of his properties and with full knowledge of every material circumstance had executed the will. No doubt where the circumstances are such as cast suspicion upon the fact of the execution of the will the Court in examining the evidence bearing on that point will of necessity exercise the utmost vigilance and will insist upon the propounder removing all grounds of suspicion that might exist. But it is not permissible for a Court of probate to consider *aliunde* the terms of the will, to consider whether the terms are generous or not, to consider whether the relations have been cut off altogether or not, and then to consider the due execution of the will and hold that the *onus* had not been fully discharged by the propounder and to refuse to grant probate. (*C. C. Ghose and S. K. Ghose, JJ.*) SHYAM SUNDARI DEBANSHI *v.* KAMAL KUMARI DASSI. **148 I.C. 33=6 R.C. 447=57 C.L.J. 246=A.I.R. 1933 Cal. 769.**

———*Proof of*—Onus—*Application for probate—Propounder the principal beneficiary.*

Where on an application for probate of a will, it appeared that the testatrix, aged 70, had been suffering from diabetes for a long time, that for a few months before her death she was being looked after and tended and nursed by the propounder and his wife, it was the propounder himself who procured the draft of the will, called together the witnesses, called in the Sub-Registrar, it was he and one of the attesting witnesses who were the only persons present at the time of registration and upon the will itself it appeared that the propounder received the largest share of benefit under it.

Held, that the *onus* lay heavily on the propounder to show that the testatrix was a free and voluntary agent capable of understanding the nature of the disposition and was a willing party capable of exercising her judgment in the matter of the disposition that she was making. (*Mukerji and Guha, JJ.*) SURENDRA NATH LAHIRI *v.* JNANENDRA NATH LAHIRI. **I.R. 1932 Cal. 574=139 I.C. 237=55 C.L.J. 189=A. I.R. 1932 Cal. 574.**

———*Proof of*—Onus—*Will written by party taking benefit.*

The fact that a will is written by a party who took a benefit under the will is no doubt such a circumstance as might call upon the Court to be vigilant and jealous in examining the evidence in support of the instrument. Unless every suspicion is removed, it might be improper to pronounce in favour of such a will. (*Ferrers, J. C.*) SILVIAN REGINALD WALTER SMITH *v.* IVAN HAROLD DONALD SMITH. **147 I.C. 404=6 R.S. 146=A.I.R. 1933 Sind 262.**

———*Proof of—Parol evidence—Admissibility after lapse of time.*

In order to support a will propounded, when it is proved by parol evidence only, that evidence must be of extreme cogency and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator. It is very difficult after a great lapse of time to rely on loose statements based on the recollection of witnesses with regard to what was contained in a will made several years before the death of the tes-

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tator. (*Mitter and Henderson, JJ.*) BRAJABALA DHAR *v.* NETYAMAYEE BISWAS. **150 I.C. 209 =6 R.C. 770=57 Cal.L.J. 447=A.I.R. 1934 Cal. 17.**

———*Proof of—Quantum of evidence.*

When a Court is dealing with the question of proof of a will, it is entitled to insist upon sufficient proof to satisfy itself. If on hearing the witness the Court is satisfied about the will and afterwards before the decree is drawn up and perfected, the Court for any reason thinks that that evidence is not sufficient and changes its mind as to the sufficiency of proof, it is open to the Court to say that the matter should be reheard and further evidence received upon the question. (*Rankin, C. J. and C. C. Ghose, J.*) PASHUPATI MUKHERJI *v.* SHITALKUMAR SARKAR. **58 Cal. 699=I.R. 1931 Cal. 679=133 I.C. 327=A.I.R. 1931 Cal. 587.**

———*Proof of—Suspicion—Application for probate by executor having benefit—Scrutiny by Court.*

When executors propounding a will take a large and appreciable benefit thereunder, the Court treats the will with suspicion of more or less weight according to the facts of each case and the *onus* lies on such an executor to prove to the satisfaction of the Court that the testator understood what he did and that it was his will and no probate can issue unless the conscience of the Court is satisfied that the person propounding the will had led sufficient evidence which on a close and careful examination entirely remove the suspicion. (*Wadia, J.*) PANDURANG SHAMRAO *v.* DWARKADAS KALLIANDAS. **6 I. R. (Bom.) 161=146 I.C. 621=35 Bom.L.R. 700=A.I.R. 1933 Bom. 342.**

———*Proof of—Suspicion—Delay in obtaining probate if material.*

A testator executed a will by which he left his estate to his widow for life, with remainder to a woman whom he had practically adopted as his daughter and her daughter. After the death of the testator, the widow entered into possession without obtaining probate of the will. On her death, the testator's sister's sons claimed as reversioners, whereupon the will was sought to be proved. It was contended that the will was open to suspicion as there was delay in the attempt to prove it.

Held, that the widow, who would have succeeded even under ordinary circumstances, had every inducement to postpone proof of the will, so long as she was alive, because the proof of the will would involve payment of probate duty on the value of the estate and hence the delay did not matter in this case. (*Fazl Ali and James, JJ.*) GAYESHWAR PRASAD *v.* MT. BHAGWATI KUER. **148 I.C. 5=6 R.P. 439=A.I.R. 1933 Pat. 612.**

———*Proof of—Suspicion—Party benefited having induced.*

A will procured by a party who is benefited by it is not void, but this circumstance forms a just ground of suspicion, against the document and calls upon the Court to be vigilant and jealous; and unless clear and satisfactory proof be given that the will contains the real intentions of the testator, such will will not be admitted to probate.

WILL—Religious Endowment.

(*C. C. Ghose and S. K. Ghose, JJ.*) JOTINDRA NATH ROY CHOWDHURY *v.* RAJ LAKSHMI DEBI. **6 I.R. (Cal.) 97=145 I.C. 338=57 C.L.J. 8=A.I.R. 1933 Cal. 449.**

———*Proof of—Unnatural contents.*

The extraordinary character of the contents of the will ought not to overbalance the direct or positive evidence as regards the execution of the will. (*C. C. Ghose and S. K. Ghose, JJ.*) JOTINDRA NATH ROY CHOWDHURY *v.* RAJ LAKSHMI DEBI. **6 I.R. (Cal.) 97=145 I.C. 338=57 C.L.J. 8=A.I.R. 1933 Cal. 449.**

———*Proof of—Unnatural will.*

A will cannot be treated as an unnatural one, simply because it disinherits the reversionary heirs. (*Fazal Ali and James, JJ.*) GAYESHWAR PRASAD *v.* MT. BHAGWATI KUER. **148 I.C. 5 =6 R.P. 439=A.I.R. 1933 Pat. 612.**

Religious endowment.

———*Religious endowment—Bequest for "religious, educational or philanthropic purposes"—Validity of.*

A clause in will by a Hindu testator was to the effect, "as to one-fourth or one-half share which may remain, my executors shall deposit the same at interest and utilise the interest for religious, educational or philanthropic purposes after me (for the benefit of my soul)."

Held, the words "religious, educational or philanthropic purposes," could only be construed as creating conjunctive or cumulative classes of objects and not conjunctive or cumulative qualifications for each of the objects specified, and the bequest was therefore invalid and not binding in law.

Held further, that the bequest being one for religious, among other, purposes, was bad as being too vague and uncertain. (*Blackwell, J.*) HARILAL *v.* BAI MANJOOLA. **160 I.C. 194=8 R.B. 249=37 Bom.L.R. 901=A.I.R. 1936 Bom. 13.**

———Religious endowment—Religious bequest—Dedication of property to family idol. *See* HINDU LAW—RELIGIOUS ENDOWMENT—DEDICATION. **53 C.L.J. 421=A.I.R. 1931 Cal. 782.**

———*Religious endowment*—Brittis *or allowance to wife of spiritual guide—Transferability of interest conferred.*

The material clause in the will ran as follows: "For the promotion of my spiritual welfare I settle, as fixed *brittis* or allowances, to be received from generation to generation, Rs. 400 a year for the 'nij seva' of *K*, wife of my spiritual guide and one rupee a month for the 'seba' of the temple of *G*."

Held, that (i) the words "from generation to generation" applied as well to the gift to *K* as to the gift to the temple; (*ii*) the allowance was to be received by *K* and her heirs either for their personal use or for the worship of their deity but in either case it was expressed to be for the spiritual benefit of the testator, so that the beneficial interest was restricted to the line appointed by the testator and would revert to the testator's heirs when that line came to an end; (iii) the beneficial interest could not, therefore, be transferred. (*Richardson and Panton, JJ.*) BISHNU CHARAN SEN *v.* RADHA BHUSAN THAKUR. **58 C.L.J. 328.**

WILL—Religious Endowment.

———*Religious endowment—Void for uncertainty—Provision appointing shebait.*

By one of the clauses in the will the testator directed that the number of shebaits shall always be five including the Secretary of the Subarnabanik Samaj. It appeared that the said committee had always two secretaries.

Held, that the appointment was void for uncertainty. (*Panckridge, J.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* KUMAR KARTIC CHANDRA MULLICK. **I.R. 1931 Cal. 740=133 I.C. 692 =54 C.L.J. 57=A.I.R. 1932 Cal. 112.**

Residuary bequest.

———*Residuary bequest—Bequest of partial interests in land—Subsequent residuary devise—Effect of.*

Even though a testator may have given partial interests in land by his will, a subsequent residuary devise passes the reversion of those lands, in spite of the fact that the residuary devise is of lands "not hereinbefore devised or disposed of" and there are directions or limitations which are not appropriate to the reversion in the lands previously devised.

A testator devised (cl. 21) "all the residue of all my real and personal estate" to trustees during 21 years from his death to manage and then to pay out; he directed (cl. 23) that "the land in which I may be buried shall not be sold or mortgaged (during lifetime of my sons) but shall be kept as a family burial ground"; and also (cl. 24) that "the trustees shall call in all investments and sell by public auction the residue of my real estate and divide the net proceeds thereof among my sons."

Held, the devise of residuary real estate in cl. 21 or 24 included every interest in the testator's real estate, which he had not effectively devised by other dispositions contained in his will and that even the burial ground referred to in cl. 23 was covered by the residuary devise. (*Lord Russell of Killowen.*) LIM TECK KIM *v.* WEE HUM SOON. **I.R. 1931 P.C. 113=34 L.W. 244=131 I.C. 305=A.I.R. 1931 P.C. 171= 61 M.L.J. 102 (P.C.).**

———*Residuary bequest—Charitable bequest—First two objects failing—Validity of.*

Where a testator by his will provided that after his death, the trustees should manage the properties, pay certain legacies and "whatever properties are left after deductions, the trustees should utilise the same in distributing brass (vessels) or in giving dinner to Brahmins and if any amount is still left in surplus, the same should be utilised in the sadavarta of Shukaltirth,"

Held, whether or not the direction to distribute brass vessels and to give dinner to Brahmins was charitable, the last few words created a good residuary bequest and if any of the previous gifts failed, the property in respect of which the gift failed fell into residue. (*Beaumont, C.J. and Murphy, J.*) KALIDAS DAMODAR *v.* RUKSHAMANI. **33 Bom.L.R. 1285=136 I.C. 168= I.R. 1932 Bom. 152=A.I.R. 1932 Bom. 108.**

———*Residuary bequest—Claim to estate under resulting trust on failure of bequest for trust—If claims under the will.*

WILL—Testamentary Capacity.

Where a bequest by the testator of the residue of his estate in favour of a trust, which is constituted the residuary legatee under his will, fails on the ground of uncertainty, there is a resulting trust of residue to the heirs of the testator as an intestacy; and the persons who claim the residue by virtue of the resulting trust are not persons claiming under the will but *de hors* the will. (*Ameer Ali, J.*) VEDABALA DEVI *v.* THE OFFICIAL TRUSTEE OF BENGAL. **62 Cal. 1062=39 C.W.N. 1154.**

Revocation.

———*Revocation—Deed not forthcoming—Presumption.*

Where the will is not forthcoming, the general presumption of law is that it must have been destroyed by the testatrix with the intention of revoking it. This presumption is however rebuttable. (*Wadia, J.*) GEORGE ANTHONY HARRAS *v.* MILLICENT SPENCER. **149 I.C. 251=6 R.B. 346 (2)=35 Bom.L.R. 708=A.I.R. 1933 Bom. 370.**

———*Revocation—Loss of document—Presumption.*

If a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it may be presumed to have been destroyed and that presumption would have effect unless there is sufficient evidence to rebut it. (*Mitter and Henderson, JJ.*) BRAJABALA DHAR *v.* NETYAMAYEE BISWAS. **57 C.L.J. 447=150 I.C. 209 =6 R.C. 790=A.I.R. 1934 Cal. 17.**

———Revocation—Long delay—Effect—Proof of will in revocation proceeding. *See* SUCCESSION ACT, 1925, S. 263. **35 C.W.N. 568=A.I.R. 1931 Cal. 717.**

———*Revocation—Proof of.*

Where a duly executed will is alleged to have been orally revoked, the Court ought to insist on very clear, cogent and consistent proof of the revocation and on the evidence being most precise as to time and place. (*Ramachandra Rao and Shankaranarayana Rao, JJ.*) RAMA RAO *v.* YAMUNABAYAMMA. **12 Mys.L.J. 54=39 Mys. H.C.R. 658.**

Testamentary capacity.

———*Testamentary capacity—Burden of proof —Principles formulated.*

(1) Generally speaking, the law presumes sanity, and where the will is not challenged, it is enough for the purpose of establishing the will that it was duly executed by the testator, that he was not a minor and was otherwise capable of making a will under the law by which he was governed. (2) If the testator's sanity is disputed, the burden of proof lies upon the person propounding the will to prove affirmatively that the testator was of sound mind at the date of its execution, and that he knew, understood and approved of its contents. 7 Bom.L.R. 175, Ref. (3) If the insanity of the testator before the date of the will is once established, the burden of proof lies on the person propounding the will to show that it was made after the testator's recovery or during a lucid interval. If, however, it is not established, or habitual insanity does not exist, the burden of proving actual insanity at the

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date of the execution of the will shifts to the person impeaching the will. (4) If the person propounding the will takes an appreciable benefit under it, that is an element of suspicion, of more or less weight according to the facts of each case, and the burden lies upon him to show that it is the will of the testator, and no probate can issue unless the Court is satisfied that the person propounding the will has led sufficient evidence which on a close and careful examination removes that suspicion. The same rule also applies to other circumstances which create suspicion in the mind of the Court. 2 M.P.C. 480; 32 Bom. L.R. 511 (P.C.) and 32 Bom.L.R. 1289, Ref. (5) If there is sufficient evidence to displace the suspicion, and the will has been made and is apparently in proper form, and the evidence of the attesting witnesses is trustworthy, it does not lie in the mouth of any party to say that the testator ought not to have made such a will, and to attempt to re-create another for him. 18 Bom.L.R. 408 (P.C.), Ref. (6) In order that a will may be found good it is not necessary that the testator should have been in perfect state of health and that his mind should have been so clear as to enable him to give complicated instructions for his will. It is sufficient if, when the will was read out to him and explained to him, when he reads it himself, he was capable of understanding that his instructions in the main had been carried out. 23 Bom.L.R. 1068, Ref. (*Wadia, J.*) GANPATRAO *v.* VASANTRAO. **141 I.C. 747 (2)=I.R. 1933 Bom. 145=34 Bom.L.R. 1371 =A.I.R. 1932 Bom. 588.**

———*Testamentary capacity—Mental weakness.*

To be such mental weakness as would be sufficient to constitute testamentary incapacity, such incapacity must be *qua* the will in question. (*Mukerji and Mitter, JJ.*) NABAGOPAL SARKAR BAHADUR *v.* SARALA BALA MITTER. **6 I.R. (Cal.) 218=146 I.C. 414=57 C.L.J. 71=A.I.R. 1933 Cal. 574.**

———*Testamentary capacity—Proof of.*

As regards the disposing mind the onus lies on the person who propounds the will. (*Dalip Singh, J.*) SHANKAR DAS *v.* MT. DHAN DEVI. **5 I.R. (Lah.) 78=145 I.C. 241=A.I.R. 1933 Lah. 53.**

———*Testamentary capacity—Testator suffering from tuberculosis.*

Where the testator, who was suffering from tuberculosis and who died the next day after the making of the will, was shown to have gone himself to the petition-writer's place for preparation of the will and then to have appeared before the Sub-Registrar and presented the will for registration in the usual manner, it could not be held that he was not possessed of sufficient mental capacity on that day to make a will, although he was then very weak and emaciated and suffered from cough. (*Bhide and Rangi Lal, JJ.*) AMIR *v.* MT. JALLAN. **6 R.L. 641=148 I.C. 1205 (2) =A.I.R. 1934 Lah. 628.**

Test of.

———Test of. *See* DEED—CONSTRUCTION—WILL OR SETTLEMENT. **A.I.R. 1933 Mad. 492=64 M.L.J. 650.**

WILL—Validity of.

Trust.

———*Trust—Trust for works of public utility and helping individuals and families in distress—If void for uncertainty—Effect of invalidity—Resulting trust to heirs.*

A testator, after making certain bequests in his will, made a trust, placing the trust in the position of a residuary legatee, and after setting out the objects to be benefitted by the trust, proceeded: "The Official Trustee—shall make expenses in works of public utility and for helping individuals and families in miserable circumstances."

Held, that the bequest was void for uncertainty, and on failure of the same, there would be a resulting trust to the heirs of the testator. (*Ameer Ali, J.*) VEDABALA DEVI *v.* THE OFFICIAL TRUSTEE OF BENGAL. **62 Cal. 1062=39 C.W.N. 1154.**

Validity of.

———*Validity of—Bequest for 'pious acts'—Void for uncertainty.*

The testatrix after providing for certain pecuniary legacies directed the balance of the surplus income to be spent on 'pious acts' (Punyakarya) according to the discretion of the trustees.

Held, that the residuary bequest was void for uncertainty. Case-law discussed. (*Mitter, J.*) SATKARHI BHATTACHARYA *v.* HAZARILAL KHANNA. **I.R. 1932 Cal. 25=58 Cal. 1025=134 I.C. 1065=A.I.R. 1932 Cal. 44.**

———*Validity of—Bequest to take effect in future—Interposition of life-estate—If prevents the remainder from vesting.*

The mere fact that possession of the estate bequeathed is to be given at a future time is not by itself a reason for coming to the conclusion that the estate was not to be vested at the time of the testator's death. The mere interposition of a life-estate will not prevent the remainder from being a vested one. 12 Mad. 411, Dist. (*Pandrang Row, J.*) VISVANADHAN *v.* ANJANEYALU. **158 I.C. 1083=8 R.M. 432=1935 M. W.N. 1119=42 L.W. 746=A.I.R. 1935 Mad. 865.**

———*Validity of—Direction to pay debts including charities and subscriptions promised—Validity —Oral evidence to certain intended charities—Admissibility.*

A testator by his will directed: "I direct that all my debts be paid out of my estate in the first instance including the charities and subscriptions promised."

Held, that the latter part of clause was void for uncertainty, that the words "including the charities and subscriptions promised" could not be given legal effect to, that the legacies thereby given were invalid, and that the charities and subscriptions were not debts and could not be included in the category of debts or within the direction to pay the debts.

Held further, that parol evidence could not be admitted for the purpose of ascertaining by enquiry the persons to whom and the charities to which the testator had promised subscriptions. (*Costello and Lort Williams, JJ.*) DINANATH *v.* HANSRAJ GUPTA. **160 I.C. 1056=8 R.C. 464 =62 Cal. 190=A.I.R. 1936 Cal. 44.**

WILL—Validity of.

———Validity of—Uncertainty—Bequest to living son—Whether enures for subsequently born sons—Bequest subject to condition as to residence. *See* SUCCESSION ACT (1925), S. 112, EXCEP. **12 Pat. 708=A.I.R. 1933 Pat. 647.**

———*Validity of—Undue influence*—Onus *of proof.*

Where the testatrix is an intelligent lady, the *onus* of proving that the will is brought about by fraud or undue influence is on the caveator. Where a will is made in favour of a person who is in a position of active confidence with the testatrix, it is the duty of the Court to scan the evidence of independent volition closely in order to be sure that there had been a thorough understanding of the consequences by her. (*Mukerji and Mitter, JJ.*) NABAGOPAL SARKAR BAHADUR *v.* SARALA BALA MITTER. **6 I.R. (Cal.) 218=146 I.C. 414 =57 C.L.J. 71=A.I.R. 1933 Cal. 574.**

———*Validity of—Undue influence—Proof.*

Where the testator was looked after by the legatee who was his sister and by her husband and he had a desire to benefit them but he was not ignoring the legitimate claims of any one else, it cannot be said that the will was brought about by any undue influence. (*Bhide and Rangi Lal, JJ.*) AMIR *v.* MT. JALLAN. **6 R.L. 641= 148 I.C. 1205 (2)=A.I.R. 1934 Lah. 628.**

———*Validity of—Undue influence—Proof of.*

It is not enough to show that the testator's will was dominated by the propounder but it must be further shown that the influence was exercised on the particular occasion and the will was the result of that influence. (*Mukerji and Mitter, JJ.*) RAI NABAGOPAL SARKAR BAHADUR *v.* SARALA-BALA MITTER. **57 C.L.J. 71=6 I.R. (Cal.) 218=146 I.C. 414=A.I.R. 1933 Cal. 574.**

———Validity of—Undue influence—Propounder taking benefit under will—Good faith—Burden of proof. *See* EVIDENCE ACT, S. 111. **61 C.L.J. 304.**

WILLS ACT (ENGLISH 1837), S. 34—Will—Codicil confirming will—Effect of. *See* SUCCESSION ACT, S. 73. **A.I.R. 1931 P.C. 307= 61 M.L.J. 340 (P.C.).**

WINDING UP.

See (1) COMPANY—WINDING UP.
(2) COMPANIES ACT (1913), SS. 162, 174, 202, 207, ETC.

WITHDRAWAL OF APPEAL. *See* APPEAL—WITHDRAWAL OF.

WITHDRAWAL OF CLAIM. *See* C. P. CODE, O. 21, R. 63.

WITHDRAWAL OF COMPLAINT. *See* CR. P. CODE S. 248.

WITHDRAWAL OF PROSECUTION *See* CR. P. CODE, SS. 439 AND 494.

WITHDRAWAL OF SUIT. *See* C. P. CODE, SS. 11 AND 115; O. 2, R. 2, AND O. 23, R. 1.

WITNESS.

See (1) CR P. CODE, S. 476.
(2) CRIMINAL TRIAL—EVIDENCE.
(3) EVIDENCE—WITNESS.
(4) EVIDENCE ACT (1872), Ss. 118, 166.
(5) PENAL CODE SS. 499 AND 500.

WORDS AND PHRASES—"Abadharita and dharjya". *See* B. T. ACT, S. 30 (*b*). **39 C.W.N. 1244.**

———Abadharita Jama—The words *Abadharita Jama* have a significance of the fixity of rental and mean fixed rent. KUMUD NATH DAS SAHA *v.* KUNJABALA DASSYA. **62 C.L.J. 67.**

———'Access' meaning of. *See* EVIDENCE ACT, S. 112. **69 M.L.J. 868 (P.C.).**

———'Access'—Meaning of. *See* EVIDENCE ACT, S. 112. **12 Rang. 243=66 M.L.J. 288 (P.C.).**

———"*Act*".

The word 'Act' when used in a statute is wide enough to cover a judicial or quasi-judicial act. SECRETARY OF STATE FOR INDIA *v.* HUSENABU DAUDBHAI. **33 Bom.L.R. 361=A.I.R. 1931 Bom. 432.**

———'Acts'. *See* (*i*) C. P. CODE, S. 80.
(*ii*) BOMBAY DISTRICT POLICE ACT (IV OF 1890), S. 80 (3)

———'Adam Vasuli' *and* 'Adam Vasul'.

'*Adam Vasuli*' may mean not realised or not realizable while '*Adam Vasul*' means not realised. The former term is an incorrect grammatical variation of the latter. The former is sometimes used to signify rent or other payment which is not realizable. PARABU NARAIN SINGH SAHEB BAHADUR *v.* JANG BAHADUR. **I.R. 1931 All. 395 (2)=15 R.D. 505=131 I.C. 555 (2)= 1931 A.L.J. 360=12 L.R. 174 (Rev.).**

———'*Adjoining*"—*New Zealand Municipal Corporation Act* (1920), *S.* 282

The word "adjoining" as employed in S. 282 means "conterminous." **6 I.R. (P.C.) 20=146 I.C. 179=38 L.W. 626=1933 A.L.J. 1478=A.I.R. 1933 P.C. 216 (P.C.).**

———"*Adjournment* sine die".

"Adjournment *sine die*" differs altogether from discontinuance. It is after all an adjournment, to a date not fixed at the moment. MENAKA BALA DASI *v.* HIRALAL GOBINDALAL. **37 C.W.N. 583=A.I.R. 1933 Cal. 816.**

———'Agent'. *See* EVIDENCE ACT, S. 18.

———"Agnate". *See* HINDU LAW—SUCCESSION—WORDS. **59 I.A. 173=36 C.W.N. 1073=A.I.R. 1932 P.C. 142=63 M.L.J. 287 (P.C.).**

———"*Agreement*" *and* "*bond*"—*Distinction.*

An "agreement" is a wider expression than a "bond" RAJ BALAMGIR, *In the matter of.* **I.R. 1931 All. 605=133 I.C. 157=1931 A.L.J. 608=A.I.R. 1931 All. 392 (F.B.).**

———"*Agriculture.*"

Meaning of the term. CHANDRASEKHARA BHARATHI SWAMIGAL *v.* DURAISWAMI NAIDU. **54 Mad. 900=I.R. 1931 Mad. 794=134 I.C. 42=34 L.W. 185 =A.I.R. 1931 Mad. 659=61 M.L.J. 648.**

———"*Agricultural rent*"—*Meaning in Burma.*

"Agricultural rent" in Burma is used in the strictly accurate sense unlike in other provinces. It is money payable under a lease, that is to say, it is money payable under a contract. RAMAN CHETTYAR *v.* U BA THIT. **A.I.R. 1933 Rang. 357.**

———"Agriculturist" Meaning. *See* C. P. CODE, S. 60 (1) (*c*). **8 O.W.N. 1353.**

———'*Alienation*'.

The word 'alienation' is distinct and different from 'partition'. The latter is not included in the former, KHIMANMAL *v.* SHER MAHOMED KHAN. **25 S.L.R. 430=I.R. 1931 Sind 87=132 I.C. 471=A.I.R. 1931 Sind 118.**

———'*Amla*'

Though the word 'amla' literally means materials, it is frequently used to indicate the house as it stands in as contrasted with the site. RAM SAHAI *v.* IMAMI. **1935 A.L.J. 772=A.I.R. 1935 All. 586.**

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———*Anglo-Indian.*

A person of mixed European and Indian decent, professing Christian faith and domiciled in India is an Anglo Indian. SARGON *v.* SARGON. **6 I R. (Nag.) 110 = 146 I.C. 1034 = A.I.R. 1933 Nag. 337.**

———Amanat—*Use in deed providing for payment of creditors—If trust.*

The use of the word '*amanat*' in a deed by which the vendor kept certain moneys with the purchaser for payment of debts does not necessarily imply that a trust in favour of creditors was constituted. GURDIT SINGH *v.* CHUNI LAL. **I R. 1931 Lah. 868 = 134 I.C. 100 = 32 P.L R. 876.**

——— *And' as meaning or.*

A consent decree provided that "in default of payment of two consecutive instalments by the Receiver and in breach of the terms in cl. (*d*)" (as to insurance) execution should be proceeded with.

Held, that the effect is that in default of payment of two consecutive instalments the plaintiff will be entitled to execute the decree and in case of a breach of covenant to insure plaintiff will be similarly entitled to execute the decree. CHANDRA NATH BAGCHI *v.* NABADWIP CHANDRA DUTT. **I R. 1931 Cal. 494 = 131 I.C. 702 = 34 C.W N. 9 = 53 C.L.J. 329 = A.I R. 1931 Cal. 476.**

———*Annual value—Meaning.*

The phrase 'annual value' whether in Income-tax Acts, or wherever else it appears in connection with rating or taxation means the sum at which the property may reasonably be expected to let from year to year CHHUNNA MAL SALIG RAM *v.* COMMISSIONER OF INCOME TAX. PUNJAB. **32 P L.R. 517 = I R. 1931 Lah 433 = 131 I C. 193 = A.I R. 1931 Lah. 320 (2) (F.B.).**

——— '*Appeal*".

There is no definition of appeal in the C. P. Code, but there is no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a Subordinate Court, is an appeal within the ordinary acceptation of the term, and it is no less an appeal for purposes of limitation because it is irregular or incompetent. NAGENDRA NATH DEY *v* SURESH CHANDRA DEV. **59 I.A. 283 = 36 C W.N. 803 = A.I. R. 1932 P.C. 165 = 63 M.L J. 329 (P.C.).**

———"*Approval*" *and* '*permission*'—*Difference between.*

Ordinarily in the first the act holds good until disapproved while in the other case it does not become effective until permission is obtained. But permission subsequently obtained may all the same validate the previous Act. SHAKIR HUSAIN *v.* CHANDOO LAL. **I.R. 1931 All 852 = 134 I C. 836 = 1931 A L J. 865 = A.I R. 1931 All 567 (F.B).**

———*Arrear of revenue.*

An arrear of revenue under the Oudh Rent Act means an arrear not from the point of view of the Government but from the point of the persons who ought to have paid it. NIL KANTHA *v.* SURAJ PRASAD. **I.R. 1931 Oudh 113 = 130 I C. 65 (1) = 7 O.W N. 1089 = 14 R.D. 667 = A.I.R. 1931 Oudh 32.**

———'Attestation'. *See* T. P. ACT, (1882), S. 3.

———"*Aulad*".

In common parlance the word "Aulad" connotes both the male and the female children. SARDAR KHAN *v.* AISHA BIBI. **14 Lah 315 = I.R. 1933 Lah. 81 (2) = 141 I C. 440 = 34 P.L.R. 570 = A.I R. 1933 Lah. 197 (2)**

———"*Avyavaharika.*"

Varied meanings of, set out. BAI MANI *v.* USAFALI BHUDAR. **33 Bom.L.R. 130 = A.I.R. 1931 Bom. 229.**

———"*Bakasht*" *malik* or *thiccadar*—Meaning of. *See* B. T. ACT, S. 120. **14 Pat. 824 = 16 Pat.L.T. 484.**

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———'*Bangsa*'.

The word '*Bangsa*' as used in a Hindu will means family and not merely lineal descendants. PRASADDAS PAL *v.* JAGANNATH PAL. **60 Cal. 538 = 37 C.W.N. 181 = A I.R. 1933 Cal. 519.**

———'*Bed of river*".

The 'bed of a river' is a space between the banks occupied by the river at its fullest flow. ASHGAR ALI *v* SECRETARY OF STATE **129 I.C. 416 = 53 C.L.J. 229 = A.I.R. 1930 Cal. 764.**

———"Bengalees" and "Bengalee Sunni Mohamedan worshippers"—Meaning of. *See* TRUST. **13 Rang. 27.**

———"*Bhagra*".

The word "Bhagra" means the old bed of a river. RAM SUBHAG RAI *v.* SHEO SAHAI RAI. **14 L.R 172 (Rev.) = 146 I.C. 795 = 17 R.D. 252 = A.I R. 1933 All. 376.**

———*Bhakti.*

Bhakti, or bhagti, means devotion or loving faith and involves the idea of God as a personal being. RAMLAKHAN TIWARI *v* RAMI AGAN GOSAIN. **14 Pat.L.T. 415 = A.I.R. 1933 Pat. 449.**

———"*Bila lagan*".

The words '*bila lagan*' do not necessarily imply a rent free grant but merely denotes that rent has not been fixed. (*Oakden, S.M and Smith, J M.*) SANTA SINGH *v* RAM SHANKER SHUKLA. **14 R D. 712,**

———'*British subject*'.

In the early statutes relating to India the words "British subject" mean a subject of the King of British India. PHANINDRA CHANDRA SET, *In the matter of.* **58 Cal. 919 = 133 I.C. 188.**

———"*Brother*"—*Meaning of—If half brother included—Workmen's Compensation Act* (*VIII of* 1923), *S.* 2 (1) (*d*).

The term "brother" in its primary sense means a brother of the whole blood and it is only in a secondary and extended sense that the term is deemed to include a brother of the half blood. Whether the term is to be taken in its primary or secondary sense depends in each case upon the context. The term 'minor brother' in S. 2 (1) (*d*) of the Workmen's Compensation Act does not include a minor half brother. (*Page, C J., Das and Maung Ba, JJ.*) MAUNG KYAN, *In the master of* **9 Rang. 46 = I R 1931 Rang. 158 = 131 I.C. 734 = 1931 Cr C. 669 = A.I R. 1931 Rang 173.**

———'*Buildings*'—*Whether includes gas mains in public streets.*

The term "buildings" covers constructions such as gas mains under public streets. They should be regarded as immovable and can be taxed as immovable property. MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED *v.* CITY OF OUTREMONT. **I.R. 1932 P.C. 165 = 136 I.C. 858 (P.C.).**

———*Building materials and furniture—If include electric fittings.*

Electric fittings in a house come under the category of "building materials and furniture." MUNNA LAL *v.* MUNICIPAL BOARD, JHANSI. **57 All. 655 = A.I.R. 1935 All. 153.**

———*Bungas.*

Bungas are hostels where pilgrims coming from various parts of India to pay a visit to the Golden Temple stay. These hostels were founded by rich men, and were dedicated to the public as wakf property. There was appointed in each bunga a custodian called bungai, Bungas are partly religious and partly charitable institutions and the office of Manager may therefore be said to partake of the nature of a religious office. The duties of the

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bungai is to read the Granth Sahib. His other duties are to look after the visitors and to take the proper care of the building COMMITTEE OF MANAGEMENT OF GURDWARAS, AMRITSAR *v.* INDAR SINGH. **15 Lah. 117 = A.I.R. 1933 Lah. 1041.**

———"Business connection". *See* INCOME-TAX ACT (XI OF 1922), S. 42. **57 Bom. 519 = A.I.R. 1933 Bom. 427.**

———*'By'*.

When time is given for the performance of any act till or *by* a certain date it includes that date also, so that an order dismissing a petition for non performance of that act on that date is without jurisdiction. 39 Mad. 583 and 55 M L J 274, Foll. CHINNIAH CHETTIAR *v.* KUMARASWAMIAH. **1933 M.W.N. 88 (1).**

———*"Calendar month"*.

A "calendar month' means one of the twelve months or to which the year is divided according to the calendar, also the space of time from any day of any such month to the corresponding day of the next, as opposed to a lunar month of four weeks. GNANAPRAKASAM PILLAI *v.* F. S. VAZ. **33 L W. 763 = A.I R. 1931 Mad. 352 = 60 M L J. 293.**

———*Carriage—Motor car.*

A motor car is a 'carriage'. HIRA CHAND *v.* EMPEROR. **132 I.C. 694 = 32 Cr.L.J. 946 = A.I.R. 1931 Lah. 572.**

———Carrying on business. *See* C. P. CODE, S. 20. **14 Lah. 42 = A.I.R. 1933 Lah. 11.**

———*"Casual vacancy."*

"A casual vacancy" means a vacancy occurring by death, resignation or bankruptcy and not by efflux of time. SRINIVASAN *v.* WATRAP SUBRAMANIA AIYAR. **34 L W. 746 = 61 M.L J. 724.**

———'Caste question'—What is. *See* C. P. CODE, S. 9—CASTE QUESTION. **56 Bom. 242.**

———Cause of action—Meaning. *See* C. P. CODE, S. 20 (*c*). **58 Cal. 539 = A I R. 1931 Cal. 659.**

———Cause of action. **60 Cal 918 = 38 C.W.N. 120 = A.I R. 1933 Cal. 706 and** *see also* **61 Cal. 1023.**

———Cause of action. *See* C. P. CODE, S. 20 (*c*). **27 S.L.R 230 = A.I.R. 1933 Sind 179.**

———'Cause of action'. *See* C. P. CODE, O. 33, R. 5. **14 Pat.L.T. 338 = A.I.R. 1933 Pat. 284.**

———*Chathram—Distinction from choultry.*

A choultry is a corruption of chavady. It means a shelter or resting place for travellers. A chathram (corruption of the Sanskrit sathram) is a house where pilgrims and travellers are fed. KOTHANDARAMA PILLAI *v.* MUNICIPAL COUNCIL, TRICHINOPOLY. **A. I.R. 1933 Mad. 782 = 65 M.L.J. 672.**

———'Chela'. *See* **134 I.C. 484 = 32 P.L.R. 589 = A.I.R. 1931 Lah. 385.**

———Choultry—Distinction from chathram. *See* **A.I.R. 1933 Mad. 782 = 65 M.L.J. 672.**

———"Claiming through". *See* AGRA TENANCY ACT (1926), S. 99. **1931 A.L.J. 1018 = A.I.R. 1931 All. 635 (F.B.).**

———"Collusion". *See* GURLINGAPPA SHIVAPPA *v.* SABU RAMAPPA. **I R. 1931 Bom. 310 = 131 I.C. 886 = 33 Bom L R. 141 = A.I.R 1931 Bom. 218.**

———"Collusion". *See* COMPROMISE—CONSENT DECREE. **1935 R.D. 259.**

———"Collusion." *See* DIVORCE ACT (1869), S. 12. **A.I.R 1933 Sind 70.**

———"Common gaming house"—Meaning of. *See* CALCUTTA POLICE ACT (1866), SS. 44 AND 45. **62 Cal. 1093.**

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———"Compromise"—Whether includes agreement to refer to arbitration. *See* COMPROMISE—MEANING. **6 Luck 591 = A.I.R. 1931 Oudh 127.**

———Chukani. *See* LEASE — CONSTRUCTION — CHUKANI. **A.I.R. 1935 Cal. 462.**

———*"Constructive possession"*.

By 'constructive possession' is generally meant possession, as distinguished from actual possession, through a tenant or agent. It has also been used in connection with property which is incapable of actual possession and is said to be in the constructive possession of the owner as waste lands or lands under water. If the person is the owner of a property but does not use it for some time, he is still in actual possession. MAHENDRA NATH BAGCHI *v.* TARAK CHANDRA SINHA. **I.R. 1932 Cal. 443 = 138 I.C. 349 = 36 C.W.N. 326 = A.I. R. 1932 Cal 504.**

———*'Convicted'*.

The word "convicted" is not in the English language confined to an association with offences. KATWAROO RAI *v.* EMPEROR. **1932 A L.J. 624 = 33 Cr. L.J. 731 (2) = A I.R. 1932 All. 680.**

———"Co sharer" *See* **1935 A L.J. 973 = A.I.R. 1935 P.C. 169 (P C.).**

———'Cowle'—Ordinarily denotes a lease and not a mortgage. *See* DEED—CONSTRUCTION. **69 M.L.J. 115.**

———'Custody'

See (*i*) EVIDENCE ACT, S. 26

(*ii*) GUARDIAN AND WARDS ACT, S. 52.

———*'Custom'*.

A mere statement of liability in cash or in kind enforceable at the option of another party cannot be held to be a custom. (*Gowan, R. M.*) GODRA LUNGRYA *v.* NAMDEO. **14 N.L J. 37 (Rev.).**

———*'Custom'—Meaning'*.

'Custom' in one sense means simply a usual practice. In another sense it means an established practice or usage having the force of law. MUNICIPAL BOARD, BENARES *v.* KANDHIYA LAL. **134 I. C. 21 = 1931 A. L.J. 757 = A.I R. 1931 All. 499 (S. B).**

———*"Custom" and "usage"—Distinction.*

The words "custom" and "usage"are not synonymous. A usage need not possess the same degree of antiquity as a custom. RAJARAM MEHTA *v.* NARAYANASWAMI NAIDU. **34 L.W. 276 = 1931 Mad. 723 = 61 M.L.J. 357.**

———'Dakhilkas'. *See* **A.I.R. 1931 Pat. 361.**

———Darputni.

The word *Darputni* (as the word 'Putni') has acquired a technical meaning, and means a permanent tenure with fixity of rent. KUMUD NATH DAS SAHA *v.* KUNJABALA DASSYA. **62 C.L.J. 67.**

———"Dawam." *See* **A.I.R. 1935 All. 492.**

———'Dayadi'. *See* HINDU LAW—SUCCESSION—WORDS. **55 Mad. 40 = A.I.R. 1932 Mad. 198 = 62 M.L.J. 116.**

———*'Debt'*.

A debt is a sum payable in respect of a money demand recoverable by action. 22 Mad. 139, Foll. BHARAT NATIONAL BANK, LTD. *v.* BISHAN LAL. **13 Lah. 448 = 135 I.C 673 = A.I.R. 1932 Lah. 212.**

———*"Debra"*.

"Debra" is generally used to describe a cremation place or death place. A birth place is never described as a debra. KARTAR SINGH *v.* GURDWARA PRABANDHAK COMMITTEE. **145 I.C. 727 = A.I.R. 1933 Lah. 475.**

———*"Decision" on point of law—What constitutes.*

Held (by the majority). The word 'decision' cannot be read so as to cover cases where the Judge has never

applied his mind to the matter and has not pronounced an opinion on it. The expression 'point of law' in Cl. 26 of the Letter Patent means a point of law submitted to and decided by the Trial Judge or any direction as to the law given by him in the course of his summing up to the jury. EMPEROR *v.* RAMANUJA AIYANGAR. **58 Mad. 523 = A.I.R. 1935 Mad. 258 = 158 I.C. 662 = 8 R.M. 293 = 36 Cr.L.J. 1398 = 1934 M.W.N. 1410 = 42 L.W. 53 = 1935 Cr.C. 686 (2) = A.I.R. 1935 Mad. 486 = 68 M.L.J. (Supp.) 1 (F.B.).**

———Decree.

See (1) AGRA TENANCY ACT (III OF 1926), S. 3 (14).

(2) C. P. CODE, S. 2 (2).

———*Default—Meaning.*

The word 'default' is of stronger import than negligence. (*Boys and Niamatullah, JJ.*) RIKHAI LAL BINDESHRI PRASAD *v.* BANARSI SINGH. **1931 A.L.J. 961.**

———"Defraud". This always denotes dishonesty *See* BOMBAY MUNICIPAL BOROUGHS ACT, S. 96. **A.I.R. 1935 Bom. 162.**

———"Degi chur," "Doba chur", "Nutan chur"—Meaning. *See* BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4. **A.I.R. 1930 Cal 764.**

———'Dharduia' *See* ALLUVION AND DILUVION—DEEP STREAM BOUNDARY RULE. **A.I.R. 1933 All. 376.**

———"Dharmasala". *See* PUNJAB SIKH GURDWARA ACT (1925), S. 16 (2). **A.I.R. 1932 Lah. 268.**

———"*Discretion*".

The word 'discretion" in itself implies vigilant circumspection and care ; therefore where the legislature concedes wide discretion it also imposes a heavy responsibility. IBRAHIM *v.* EMPEROR. **143 I. C. 351 = 34 Cr. L.J. 591 = A.I.R. 1933 Sind 49.**

———'Distinct subjects.' *See* COURT-FEES ACT, S. 17.

———"*Dogmas*" *and* "*tenets*".

While dogmas may properly be described as tenets, the latter word has a much wider range, and includes opinions on religious matters, which do not involve the holder of such opinions in the risk of expulsion from his Church. (*Lord Thankerton*). GERALD *v.* CARMELO. **A.I.R. 1935 P.C. 34 (P.C.)**

———Domicile— Meaning. *See* INTERNATIONAL—LAW. **A.I.R. 1933 Rang. 193.**

———'Dowam'. *See* LEASE—CONSTRUCTION—PERPETUAL LEASE. **1935 A.L.J. 1288 = A.I.R. 1935 All. 492.**

———"*Drawing lottery*".

The word "drawing" with reference to a lottery is that the lots should be drawn by some mechanical or human agency involving their chance extraction. Where there was no physical or mechanical "drawing" to determine the lucky lots which depended on a sort of arithmetical progression based on an original number to be determined merely by the chance-death of a bond-holder.

Held, that the publication of the scheme involving such a lottery was no offence. GURBAKSH SINGH *v.* EMPEROR. **35 P.L.R. 753 = 1934 Cr.C. 1182 = A.I.R. 1934 Lah. 840.**

———'*Ekabhogam*'.

The word 'ekabhogam' according to the glossary in the "North Arcot District Manual of 1895", means the possession or tenure of all the lands of a village by a single individual or family without any co-sharer. NARASIMHA RAGHAVACHARI *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL. **A.I.R. 1931 Mad. 135 = 60 M.L.J. 137.**

———Fakir. *See* MAHOMEDAN LAW—WAKF—MISCELLANEOUS. **12 Lah. 590 = A.I.R. 1931 Lah. 379.**

———'*Fakir*' *and* '*Khadim*'—*Meaning.*

The word 'fakir' does not mean a beggar but a religious man who devotes his life to meditation and spiritual exercises. Nor does the word "khadim" mean a servant; it is a mode of describing the peculiar relationship which exists between a spiritual preceptor and his disciple, HAJI ALI MAHOMED *v.* ANJUMANI ISLAMIA, PUNJAB. **12 Lah. 590 = A.I.R. 1931 Lah. 379.**

———"Ferry" meaning of *See* BURMA FERRIES ACT (1898), S. 15. **13 Rang 619 = A.I.R. 1935 Rang. 464.**

———'Floating charge' meaning. *See* CHARGE. **58 Cal. 136.**

———'From to-day' *See* DECREE—CONSTRUCTION—RECKONING OF PERIOD. **A.I.R. 1935 Lah. 291.**

———"Gradual accession." *See* BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 2.

———*Grain*

The expression is confined popularly to seed or cereal plants. Dal does not come under the heading of grain. SURENDRANATH DATTA *v.* CORPORATION OF CALCUTTA. **58 Cal. 955 = 32 Cr.L.J. 1235 = A.I.R. 1931 Cal. 705.**

———*Guzara—Meaning and incidents.*

The guzara is a sort of subordinate zamindari, or under-proprietary tenure carved out in the estate, but this fact will not make the widow of a guzaradar who has been expressly given only a life-estate under a family arrangement. a talukdar. ABDUL QAYUM *v.* ABDUL RAHMAN. **146 I.C 710 = 10 O.W.N. 844 = A.I.R. 1933 Oudh 439.**

———' Grove holder'. *See* AGRA TENANCY ACT (1926), S. 196.

———"*Gyani*".

The word implies a person possessing too much wisdom to worship idols. RAMLAKHAN TIWARI *v.* RAMLAGAN GOSAIN. **14 Pat. L.T. 415 = A.I.R. 1933 Pat. 449.**

———'*Hamshira*'—*Meaning of.*

Though in its literal significance "hamshira" means a sister by the same milk, the word might also be used loosely in comnon parlance for a sister who is not a sister of the full blood. (*Kisch and Bajpai, JJ.*) BARKAT ULLAH *v.* NISAR HUSAIN. **1935 A.W.R. 1197**

———*Haq buha.*

Haq buha is a village cess. A suit to recover is maintainable only in a Revenue Court. BHAGTA NAND *v.* MAHOMED NAWAZ KHAN. **131 I.C. 338 = A.I.R. 1931 Lah. 175.**

———'*Haq murafiq*'—*Meaning.*

The word "Haq murafiq" do not necessarily mean the right of redemption. They mean the right, title and interest. PUTTOO LAL *v.* RAGHUBIR PRASAD. **10 O.W.N. 1166 = A.I.R. 1933 Oudh 535.**

———"*Hardware*"—*Meaning.*

The word "hardware" in Art. 82 of the Schedule of octroi rates of Benares Municipality does not include electric fans. It comes under "machinery" which is exempt from duty under the Act. MUNICIPAL BOARD, BENARES *v.* KRISHNA & CO. **148 I.C. 508 = 1934 A.L.J. 761 = A.I.R. 1934 All. 550.**

———"Hasab rasad khewat" — Meaning of. *See* REVENUE RECORDS—CONSTRUCTION. **A.I.R. 1935 Lah. 446.**

———"*Haveli.*"

The term in the Madras Presidency is intended to indicate the lands reserved for the zemindar's personal use. MAHARAJA OF PITHAPURAM *v.* VENKATAMAHIPATI. **142 I.C. 744 = A.I.R. 1933 Mad. 462.**

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———*'Honourable acquittal'*

The expression "honourably acquitted" is one which is unknown to Courts of justice. Apparently it is a form of order used in Courts-martial and other extra-judicial tribunals. ROBERT STUART WANCHOPE *v.* EMPEROR. **61 Cal. 168.**

———Hotel—Meaning—Sale of premises — Goodwill of business whether passes. *See* TRADE MARK — TRADE NAME. **32 P.L.R. 542=A.I.R. 1931 Lah. 650.**

———*Inam—'Major' and 'minor'.*

Technically, a major inam is a whole village or more than one village, and a minor inam is something less than a village. SECRETARY OF STATE FOR INDIA *v.* MALLAYYA. **A.I.R. 1932 P.C. 238=63 M.L.J. 649 (P.C.)**

———Income—Distinction from profits. *See* INCOME-TAX ACT (1922), S. 4.

———"Indefeasible." *See* UNDER AGRA PREEMPTION ACT, S. 20. **A.I.R. 1934 All. 343 (F.B.)**

———"*Interest on interest*".

The expression in mortgage deeds means compound interest. MAHOMED HUSAIN KHAN *v.* LACCHMAN SINGH. **10 O.W.N. 915=A.I.R. 1933 Oudh 411.**

———"*Jagir*"—*Meaning of.*

The word "Jagir" is not a term of art. It might consist of the grant of revenue free property, or it might consist of mere grant of land revenue. It does not convey the same meaning in all parts of India. The grant of Jagir in Oudh is generally considered to confer a proprietary right in the soil. SHAMSARA BEGAM *v.* FAKHR JEHAM BEGAM. **159 I.C. 311=1935 O.W.N. 1232=A.I.R. 1936 Oudh 121.**

———"*Jhora*".

"Jhora" according to Oriyah dictionaries means a bunch of flowers. It does not signify a concubine.

Held on the evidence the term referred to a woman married before coronation as contrasted with Patta Mahadevi, a woman married after coronation. NANDAMANI ANANGA BHIMA DEO *v.* SUSEELA MALA PATTA MAHADEVI. **37 C.W.N. 237=A.I.R. 1933 P.C. 20=64 M.L.J. 1 (P.C.)**

———Jibka tenure. *See* LAND TENURE—JIBKA TENURE. **39 C.W.N. 98=A.I.R. 1935 Cal. 261.**

———*Jote.*

The word 'jote' does not necessarily mean an occupancy holding; it may mean a raiyati, under-raiyati or any sort of holding for the purpose of cultivation. UPENDRA KISHORE SARKAR *v.* SHAIK KHALIL FAKIR. **139 I.C. 544=55 C.L.J. 170=A.I.R. 1932 Cal. 568.**

———"Jote." *See* LANDLORD AND TENANT—RIGHT OF TENANT. **6 R.C. 475=148 I.C. 729=A.I.R. 1934 Cal. 398.**

———"Jote". *See* LAND LENURE — JOTE. **A.I.R. 1935 Cal. 462.**

———"*Judicial*"—*Declaring result of election.*

The term "judicial" does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law. The act of the presiding member of a municipal council in declaring the result of a poll is a purely ministerial or administrative act—and not judicial. So no writ of *certiorari* can lie in respect of such an act. VENKATA NARASIMHA RAO BAHADUR *v.* MUNICIPAL COUNCIL, NARASARAOPET. **A.I.R. 1931 Mad. 122=60 M.L.J. 260.**

———'*Judicial discretion.*'

A judicial discretion presupposes that power has been confided to a tribunal to act or refrain from acting in a particular way in certain proved or admitted circumstances. Some of the instances are the discretion regarding payment of costs of appointment of receiver, granting of injunction, case under O. 9, R. 9, or O. 41, R. 19, C. P. Code or under S. 5, Limitation Act. ABDUL BARI CHOWDHURY *v.* COMMISSIONER OF INCOME-TAX, BURMA. **9 Rang. 281=A.I.R. 1931 Rang. 194 (F.B.).**

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———Judgment—Meaning discussed. **69 M.L.J. 25 (P.C.).**

———Kanganam. *See* LANDLORD AND TENANT—CESSES. **A.I.R. 1935 Mad 259.**

———'*Kankar*' *as minerals.*

Kankar is concretionary lime-stone and comes under the category of minerals. KHUSHAL SINGH *v.* SECRETARY OF STATE. **133 I.C. 611=1931 A.L.J 660=A.I.R 1931 All. 394.**

———"Karsa chakran". *See* B. T. ACT, S. 181. **39 C.W.N. 581=A.I.R. 1936 Cal. 49.**

———"Kashtkar." *See* C. P. TENANCY ACT, 1920, S. 3. **16 N.L.J. 307.**

———*Kayemi jote.*

The expression '*kayemi jote*' is applicable to a raiyat or tenure holder. It does not connote fixity of rent. SARADA SUNDARI *v.* RAJANI KANTA MANDOL. **37 C.W.N. 643=A.I.R. 1933 Cal. 682.**

———"*Keep*" *and* "*keep open*".

The words "keep" and "keep open" are entirely different things. Effect of words "keep open," in S. 391 of the Calcutta Municipal Act considered. U. K. MITRA *v.* CORPORATION OF CALCUTTA. **58 Cal. 1293=35 C.W.N. 865.**

———"*Kefalat*".

"Kefalat" means incumbrance, pledge, security. The root meaning is "something to stand upon." RAMESHWAR NARAIN SINGH *v.* PANI RAM MODI. **A.I.R. 1934 Pat. 217.**

———Khadim. *See* MAHOMEDAN LAW—WAKF—MISCELLANEOUS. **12 Lah. 590=A.I.R. 1931 Lah. 379.**

———*Khairat.*

Khairat under Mahomedan jurisprudence might include all kind of things which would not be covered by the word "charity" according to the English system of jurisprudence MUSHTAQ HUSAIN *v.* HAKIM MOHAMMAD. **146 I.C. 1075=A.I.R. 1933 Lah. 961.**

———Khandan—*Meaning.*

The word *Khandan* denotes the descendants of one's paternal grandfather. MAHOMED AZIM KHAN *v.* RAJA SAIYID MAHOMED SAADAT ALI KHAN. **8 O.W.N. 349=A.I.R. 1931 Oudh 177.**

———"Khandagutta cowle". *See* DEED—CONSTRUCTION. **A.I.R. 1935 Mad. 320=69 M.L.J. 115.**

———"*Khandanirishtadaran*"— *Meaning— Power to adopt—Prohibitory clause—Effect.*

A will which authorised a widow of the testator to adopt contained a prohibition against the adoption of "any one of the relations of her family" (Khandanirishtadaran). She adopted her brother's daughter's son.

Held, that the word "Khandan" was used by the testator in a general sense as applying to blood relations and not applying only to his lineal descendants and ascendants and his collaterals in the male line, that the boy adopted fell within the prohibited clause and that the adoption was invalid. KALAWATI DEVI *v.* DHARAM PRAKASH. **60 I.A. 90=55 All. 78=A.I.R. 1933 P.C. 71=64 M.L.J. 427 (P.C.).**

———"*Khandrika*".

A Khandrika means a small hamlet. It is a large block of land granted as inam, less than a village, but much larger than an ordinary inam. SECRETARY OF

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STATE FOR INDIA *v.* MALLAYYA. **56 C.L.J. 341 = 139 I.C. 546 = 36 L.W. 525 = A.I.R. 1932 P.C. 238 = 63 M.L.J. 649 (P.C.).**

———*'Khewat'*.

"Khewat" for the purposes of revenue administration means register of proprietors, under-proprietors and perpetual lessees, the register prescribed by Cls. (*a*), (*b*) and (*c*), S. 32, Land Revenue Act (1901). AVADHESH SINGH *v.* LACHHMAN SINGH. **14 L.R. 826 (Rev.) = 17 R.D. 985 = 10 O W.N. 1138 = A.I.R. 1933 Oudh 514.**

———*Khudkasht malikan.*

Khudkasht means land actually cultivated by the proprietor himself or in the case of a joint *Khudkasht* by the holders jointly. The word "*Malikan*" cannot mean in the case of *Khudkasht* "any proprietors who may at any particular time be recorded as proprietors" it must mean certain definite proprietors. CHHOTU SINGH *v.* MAHADEO PRASAD. **14 L.R. 382 (Rev.) = 17 R.D. 521.**

———*Khurli.*

A khurli is merely a trough for feeding cattle, made of mud. It is a structure of a purely temporary character which usually breaks down when it rains. NAWAB KHAN *v.* ABDULLA KHAN. **134 I.C. 294 = A.I.R. 1931 Lah. 489.**

———Kulavettu. *See* LANDLORD AND TENANT—CESSES. **A.I.R. 1935 Mad. 259 and 995.**

———Lathi— Deadly weapons. *See* PENAL CODE, S. 148. **10 Luck. 320 = A.I.R. 1935 Oudh 52.**

———*"Lawala"*.

"Lawald" means without descendants, either male or female. SUDHAN *v.* MST. SURTI. **16 Lah. 255 = 158 I.C. 343 = A.I.R. 1935 Lah 343.**

———*'Lawalad' and khandan qaribi shauhar.*

A *wajib-ul-arz* provided that "if both the widows are lawalad" then after their death the inheritance devolves on the nearer relations of their husband's family. The words "khandan qaribi shauhar" also frequently appeared.

Held, the 'lawalad' should be interpreted as meaning as sonless and not issueless. The words 'Khandan qaribi shauhar" are generally used with reference to the nearest male collaterals. LACHMAN DEVI *v.* BEHARI LAL. **131 I.C. 897 = 8 O.W.N. 288 = A.I.R. 1931 Oudh 322.**

———"Lease"—Meaning of, prior to T. P. Act. *See* REGISTRATION ACT, S. 17 (1) (*d*). **39 C.W.N. 98 = A.I.R. 1935 Cal. 261.**

———*"Legal efforts" to realise arrears of rent—Meaning of.*

The phrase 'legal efforts' is not equivalent to 'legal proceedings in a Court of justice'. It indicates the usual and lawful efforts to collect rents. (*Sir Lancelot Sanderson.*) BACHCHU LAL *v.* CHAUDHURI SYED MOHAMMAD MAH. **37 C.W.N. 457 = A.I.R. 1933 P.C. 136 (P.C.).**

———*Lessee.*

A person cannot be a lessee unless he has enjoyment of the property which is the subject of the lease. MAHADEB PAL *v.* SIBU CHARAN PAL. **62 C.L.J. 147.**

———*"Lottery"—Meaning.*

A word "lottery" is nowhere defined in the Cr. P. Code or in any other statute. Its common meaning is "a scheme for the distribution of prizes by lot or chance". GURBAKSH SINGH *v.* EMPEROR. **16 Lah. 51 = 35 P.L.R. 753 = A.I.R. 1934 Lah 840.**

———*Lottery—Meaning—Distinction from wager.*

A lottery is a distribution of prizes by lot or chance without the use of skill. It is different from a wager.

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It is not essential to a lottery that there should be a money prize. UNIVERSAL MUTUAL AID AND POOR HOUSES ASSN., LTD *v.* THOPPA NAIDU. **36 L.W. 610 = 139 I.C. 644 = 63 M.L.J. 554.**

———*"Mahadevi"*

"Mahadevi" signifies a married woman. NANDAMANI ANANGA BHIMA DEO *v.* SUSEELA MALA PATTA MAHADEVI. **37 C.W.N. 237 = A.I.R. 1933 P.C. 20 = 64 M.L.J. 1 (P.C.).**

———*'Makful" and "mustaghraq"*.

The words "makful" and 'mustaghraq" are terms of art which are known to every conveyancer and in the proper context, connote only one meaning and no other. They are terms to indicate that a simple mortgage has come into existence. RADHE LAL *v.* KISHORI LAL. **157 I.C. 811 = A.I.R. 1935 Lah. 527.**

———*Malik.*

The word "malik" imports full proprietary rights, unless there is something in the context to indicate an intention to the contrary. SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 278 = 59 Cal. 142 = 35 C.W.N. 903 = A.I.R. 1931 P.C. 179 = 61 M.L.J. 509 (P.C.).**

———'Malik'. KAMALA PRASAD *v.* MURLI MANOHAR. **13 Pat. 550 = 152 I.C. 446 = 7 R.P. 190 = 15 Pat.L.T. 715 = A.I.R. 1934 Pat. 398.**

———*Malik—Meaning—Life estate.*

The word "malik" in the context in which it had been used with reference to the wife means only the owner of a life estate and not of an absolute estate. SWAMI DAYAL *v.* RAMADHAR. **134 I.C. 865 = 8 O.W.N. 566 = A.I.R. 1931 Oudh 358.**

———*'Malikana.'*

The term 'Malikana' is as much appropriate to describe proprietary interest as under proprietary interest. MAULA BAKHSH *v.* SPECIAL MANAGER, COURT OF WARDS BALRAMPUR. **147 I.C. 1011 = 10 O.W.N. 1263 = A.I.R. 1934 Oudh 47.**

———*Malikana—Meaning.*

Malikana is compensation paid to the proprietor of resumed lands for the loss of his right when the land is formed. It is distinct from revenue and is governed by different considerations. MAHENDRANARAYAN ROY CHOUDHURY *v.* ABDUL GAFUR CHAUDHURY. **35 C.W.N. 1233.**

———*Manjudgi.*

It means continuance as wedded wife. **A.I.R. 1935 Lah 902.**

———Malik. **160 I.C. 617.**

———Malik. *See* WILL—CONSTRUCTION—ABSOLUTE ESTATE. **A.I.R. 1936 All. 50.**

———*'Masjid'*.

The word 'masjid' etymologically means a place where the head may be laid down in prostration (for prayer). The word does not connote any building. AKBARALLY *v.* MAHOMEDALLY. **34 Bom.L.R. 655 = A.I.R. 1932 Bom. 356**

———"Means of gaming". *See* BOMBAY PREVENTION OF GAMBLING ACT, S. 3 (*b*). **56 Bom. 192 = A.I.R. 1932 Bom. 194.**

———"Melwaram" — Possessory right. *See* MELWARAM. **56 Mad. 366 = A.I.R. 1933 Mad. 279 (2) = 64 M.L.J. 361.**

———Minerals. *See* C. P. LAND REVENUE ACT, 1917, S. 218. **29 Nag.L.R. 148 = A.I.R. 1933 Nag 233.**

———*Miras talukdari pattas*

The words imply a paramount and heritable estate. (*Sir Dinshaw Mulla.*) SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270 = 35 C.W.N. 903 = A.I.R. 1931 P.C. 179 = 61 M.L.J. 501 (P.C.).**

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———"Misconduct". *See* RAILWAYS ACT, S. 72. **159 I.C 580 = 16 Pat.L.T. 837 = A.I.R. 1936 Pat. 70.**

———*'Mokhasa.'*

Mokhasa a well known tenure in Northern Circars implies a tenure subject to service NARAYANASWAMI BAHADUR *v.* BODA THAMMAYYA. **1930 M W.N. 945.**

———*'Mokra'—'Mokarari'—'Karar'.*

The word 'Mokra' admittedly is a corruption of the Arabic word Mokarrar which is derived from the word 'Karar' meaning agreement. The inflexions of 'Karar', 'Mokarrar' or 'Mukarrara' which has taken the Indian form of Mokarrari means agreed upon or fixed. The word 'Mokarari' has assumed a special signification by usage; so that the word 'Mokarari' or 'Mokra' in itself does not signify perpetual fixity. But if a document indicate that it was used in place of Mokarari, it certainly would have the significance. NABENDRA KISHORE ROY *v.* CHOUDHURY MIAN. **131 I.C. 584 = 52 C.L.J. 583 = A.I.R. 1931 Cal. 265 (2).**

———Money owing - Meaning of. *See* COMPANY—ARTICLES OF ASSOCIATION—CONSTRUCTION. **36 Bom L.R. 32 = A I.R. 1934 Bom. 97.**

———*'M qadma'.*

The word is very general and should be translated by the word "case" and applies not only to an original suit but to an appeal. SHEO NATH SINGH *v.* LALA BANSIDHAR. **A.I.R. 1931 All. 415 (2).**

——— Muqarrar karen'. *See* WILL—CONSTRUCTION—ABSOLUTE ESTATE. **9 O.W.N. 660 = A I R. 1932 Oudh 327.**

———Money due. *See* COMPANY—ARTICLES OF ASSOCIATION—CONSTRUCTION. **36 Bom.L.R. 32 = A.I.R. 1934 Bom. 97.**

———Naslan bad naslan. *See* **155 I.C. 909 = A I.R. 1935 Oudh 96 and A.I.R. 1935 Mad. 638 = 68 M. L.J 684.**

——— *"Neota"—Nature of.*

"Neota" is not a legal but a social obligation and is therefore not recoverable by means of a suit. MOHAN LAL *v.* RAHMAT. **34 P L.R. 218 = A I.R. 1933 Lah. 317 (1).**

———Nirdharita—Meaning *See* AMBIKA CHARAN DAS *v.* BASANTA KUMAR MANDAL. **58 Cal 1046 = 134 I.C. 1130.**

———Noabad. *See* LAND TENURE — NOABAD TALUQ. **56 C.L.J 4 = A.I.R. 1932 Cal 514.**

———"Notice." *See* TRANSFER OF PROPERTY ACT (1882), S. 3.

———*'O.K.'—Letters placed on 'delivery order and invoice or bill.'*

Where a contract of sale was entered into by which the vendor sold a certain number of bags of rice lying at a mill subject to a Bank's security and the vendor signed two documents—one being a delivery order addressed to the 'Godown Master' at the mill requesting him to deliver them to the vendee and the other an invoice or bill to the vendee for the price of the bags and on each document were placed the letters O.K. and the manager of the mill signed his name underneath these letters.

Held, the letters 'O.K.' constitute a statement by the manager that there was at the mill the specified number of bags of the specified rice with the specified mark and of the specified weight, the property of the vendor. It is not a statement that the rice is unencumbered nor is it a representation that the rice is free of all encumbrances and it therefore cannot ground an estoppel so as to prevent the bank from asserting and proving their rights as encumbrancers. DAWSONS BANK, LTD. *v.* NIPPON MENKWA KABUSHIKI KAISHA. **62 I A. 100 = 13 Rang. 256 = 68 M.L.J. 725 (P.C.).**

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———"Occupier." *See* FACTORIES ACT (1911), S. 41 (*a*).

———'Ordinary residence'—Meaning of. *See* BENGAL VILLAGE SELF-GOVERNMENT ACT (1919), S. 7 (2). **61 Cal. 532.**

———Over-crowding of houses—Meaning. ABDUL QAYAM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All. 500 = 1931 A.L.J. 206 = A.I.R. 1931 All. 147.**

———'Pakki Adat'. *See* CONTRACT—PAKKI ADAT. **A.I.R. 1935 Sind 38.**

———"Paricharak"—*Shebait—If.*

There is no special significance on the word *"Paricharak."* It literally means a servitor of the deities. Every Mohunt in his capacity as shebait is a *Paricharak* Mohunt. GOBINDA RAMANUJ DAS MAHUNT *v.* MOHUNT RAM CHARAN RAMANUJ DAS. **62 C.L.J. 153.**

———*"Partap"*

"Partap" means "iqball" an Urdu word and corresponds to the Latin word "felix" as applied to the Roman General Sulla and connotes prestige resulting from success and good fortune. KARTAR SINGH GIANI *v.* LADHA SINGH. **A.I.R. 1934 Lah. 777.**

———*Party wall.*

The words "party wall" is used in four senses, *viz.*, (1) a wall of which the two adjoining owners are tenants-in-common; (2) a wall divided longitudinally into two strips one belonging to each of the adjoining owners; (3) a wall which belongs entirely to one of the adjoining owners but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements; (4) a wall divided longitudinally into two moieties each moiety being subject to a cross easement in favour of the owner of the other moiety. MARVI & SONS *v.* AHMADALI. **A.I.R. 1933 Sind 244.**

———*"Patit," "Lapta paystha," "Sasthal paystha".*

The word "patit" means fallow or uncultivated land and the words "lapta paystha" mean contiguously formed land or accretions, as opposed to "sasthal paystha" land re-formed *in situ*. ASHGAR ALI *v.* SECRETARY OF STATE. **129 I.C. 416 = 53 C.L.J. 229 = A.I.R. 1930 Cal. 764.**

———"Pawn-broker". *See* BURMA MUNICIPAL ACT (1898), SS. 142 AND 140. **13 Rang. 32 = A.I.R. 1935 Rang. 104.**

———'Pension"—Meaning of. *See* PENSIONS ACT (1871), S. 4. **37 Bom.L.R. 763 = A.I.R. 1935 Bom. 439.**

———Pension—Meaning of. *See* PENSIONS ACT (1871). **58 I.A. 215 = 61 M.L.J. 208 (P.C.).**

———*"Pension"—Meaning of.*

"Pension" is a periodical payment of money for past services. MUNICIPAL COUNCIL, SALEM *v.* GURURAJAH RAO. **58 Mad. 469 = A.I.R. 1935 Mad. 249 = 68 M.L.J. 118.**

———"Personal use"—Meaning—If includes limited company. *See* BOMBAY MUNICIPAL BOROUGHS ACT. **37 Bom L.R. 703 = A.I.R. 1935 Bom. 415.**

———Petty proprietor. *See* AGRA PRE EMPTION ACT, S. 4. **1935 A.L J. 973 = A I.R. 1935 P.C. 169 (P.C.).**

———*Picketing—Meaning.*

The meaning applied to the picketing of liquor shops is to intercept people going to the shop to buy liquor and prevail upon them to desist from doing so. PINDI DAS *v.* EMPEROR. **132 I.C. 393 = 32 Cr.L.J. 878 = A.I.R. 1931 Lah. 469.**

———*"Pisran, Warison, Kaymokamian".*

Where under a deed of endowment the trusteeship was limited to "pisran, warisan, kaymokamian"

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Held, that the words limited the trusteeship to the male line of descent of the donor. BIMALABALA SINHA *v.* DEB KINKAR GHOSH. **140 I C. 687 = A.I.R. 1932 Pat. 267.**

———"Pons talab"—Meaning. *See* BENGAL LAND REVENUE SALES ACT, S. 3. **35 C.W.N. 912.**

———*Preliminary objection.*

A preliminary objection is one that challenges the competence of a Court to hear and decide a particular cause before it. BRITISH INDIA CORPORATION, LTD. *v.* SHANTI NARAIN. **156 I.C. 1088 = 1935 A.L.J. 527 = A.I.R. 1935 All. 310.**

———"*Proceeds*"—*Trade discount.*

"Proceeds" mean produce, outcome, profit. An amount never received cannot be part of the proceeds. So where the commission of certain receivers was fixed at certain percentage of the "gross sale proceeds" the term does not include the trade discount which is invariably deducted before the sale price is arrived at. KABALAMURTHI PILLAI *v.* SUBRAMANIA PILLAI. **A I.R. 1931 Mad. 500 = 60 M.L.J. 332.**

———'Profits'—Word occurring in a Notification—Continuous practice followed by legislation—Reference to—Permissibility *See* INTERPRETATION OF STATUTES—MEANING OF WORDS. **56 Mad. 837 = A.I. R. 1933 Mad. 489 = 64 M.L.J. 640 (F.B.) and 11 Rang 521 = A.I.R. 1934 Rang. 27 (S.B.).**

———*Procession—Meaning.*

Procession is the action of a body of persons going or marching along in orderly succession in a formal or ceremonial way especially as a religious ceremony or on a festive occasion. Where an image was merely carried down the ghat by four or five carriers and immersed in the river and there was nothing to be described as a body of persons going or marching along in orderly succession in a formal or ceremonial way, it is not correct to say that it was carried in a procession. HARI KISHORE SAHA *v.* EMPEROR. **130 I.C. 239 = 32 Cr.L.J. 482 = A.I.R. 1931 Cal. 128.**

———Profits—Distinction from income. *See* INCOME-TAX ACT (1922), S. 4. **11 Rang. 521 = A I.R. 1934 Rang. 27 (S.B.).**

———"*Profits*" *and* "*receipts.*"

Profits is the surplus by which the receipts exceed the expenditure. DHANARAJAGERJI *v.* PARTHASARATHY VARU. **57 Mad. 49 = A.I.R. 1933 Mad. 825 = 66 M.L. J. 263.**

———Public place—Verandah of private house adjoined street *See* CANTONMENTS ACT, S. 118. **A.I.R. 1931 Lah. 576.**

———"Public purposes"—Meaning—Madras District Municipalities Act, 1884, S. 63 (1) (*a*). *See* MADRAS DT. MUNICIPALITIES ACT (1884), S. 63 (1) (*a*). **54 Mad. 495 = A.I.R. 1931 Mad. 55 = 60 M.L.J. 456.**

———"Public prostitute." *See* U.P. MUNICIPALITIES ACT, S. 298. **A.I.R. 1932 All. 264.**

———*Punyakarya—Meaning.*

The word includes a variety of things, *viz.*, religious duty, acts of charity and moral duty or obligation. SATKARHI BHATTACHARYA *v.* HAZARILAL KHANNA. **58 Cal. 1025 = 134 I C. 1065.**

———Qarabati. **A.I R. 1934 Lah. 488.**

———"Qualified to vote" and "entitled to vote". *See* BENGAL MUNICIPAL ACT (XV OF 1932), SS. 21 AND 23. **39 C.W.N. 971.**

———*Putni talukdari patta.*

The words import a permanent estate subject to a fixed rent SARAJU BALA DEBI *v.* JYOTIRMOYEE DEBI. **58 I.A. 270 = 35 C W.N. 903 = A.I.R. 1931 P. C. 179 = 61 M.L.J. 501 (P.C.).**

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———"*Qabiz.*"

The word does not necessarily mean something less than "malik". WARIS ALI *v.* GHULAM DASTGIR. **139 I.C. 560 = 9 O.W.N. 725 = 16 R D. 494.**

———*Qabiz Warsa.*

The words in a wajib-ul-arz which describe the position of the widow are used equally to describe the male inheritor of the estate. BHAGWAN BAKHSH SINGH *v.* DIGBIJAI SINGH. **132 I.C. 779 = 8 O.W N. 83 = A.I. R. 1931 Oudh 301.**

———"Raddimazalim" fund. *See* MAHOMEDAN LAW—WAKF—MISCELLANEOUS. **9 Luck. 507 = A.I.R. 1934 Oudh 118 (2).**

———Rajaswa—Whether includes cess. *See* BENGAL CESS ACT. **60 Cal. 587 = A I.R. 1933 Cal 527.**

———'Rasnashin' and 'janashin.' *See* WILL—CONSTRUCTION—ABSOLUTE ESTATE. **9 O.W.N. 660 = A.I R. 1932 Oudh 327.**

———'Reasonable care'—Interpretation. *See* T. P. ACT, S. 41. **A.I R. 1935 Rang. 423.**

———*Reclamation—Meaning.*

Ths word means the bringing into cultivation of land not previously cultivated. JOGESHAR *v.* THAKUR PRASAD. **15 R.D. 582 = 12 L.R. 320 (Rev.).**

———"Reformation *in situ*" meaning. *See* BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), S. 4. **13 Pat. 614 = A.I.R. 1934 Pat 469.**

———'Renewals' and 'repairs.' *See* INCOME-TAX—REPAIRS OR CAPITAL CHARGE. **A.I.R. 1933 P.C. 222 = 65 M L J. 541 (P.C.).**

———"Reside." *See* BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919), S. 7 (2), EXPI. **61 Cal. 532 = A.I.R. 1934 Cal. 770.**

———'*Rule*'—*Meaning.*

A rule is "that which is prescribed for the guidance of conduct or action." A mere statement of liability in cash or kind enforceable at the option of another party cannot be held to be a rule, nor can the failure to discharge it be held to be a contravention of the rule. GODRA LUNGRYA *v.* NAMDEO. **14 N.L.J. 37 (Rev.).**

———Sadharaner—*Meaning of.*

The word "*Sadharaner*" means that which is common. There is nothing in the meaning to suggest that the word means "public." JATINDRA NATH BORAT *v.* CORPORATION OF CALCUTTA. **51 Cal. 1124 = 35 C. W.N. 397 = A.I.R. 1931 Cal. 433.**

———"*The sale to be kept under the hammer*"—*Meaning of.*

The phrase implies that the sale has in fact started. JAGDISH BAHADUR *v.* RAMJI RAM. **11 Pat.L.T. 743.**

———'Sarwaswathanthiramayi'—Tamil word—Settlement in favour of wife—Effect. *See* DEED—CONSTRUCTION—WORD. **69 M L.J. 911.**

———*Sanitation—Meaning.*

It is a mistake to consider sanitation as equivalent to a drainage system. Sanitation means the science of health and hence the health of the inhabitants can be considered under the term 'sanitation.' Word sanitation used in U. P. Municipalities Act of 1916 explained. ABDUL QAYAM KHAN *v.* CITY BOARD, MUSSOORIE. **53 All. 500 = 1931 A L.J. 206 = A.I.R. 1931 All. 147.**

———'Sayar.' *See* AGRA TENANCY ACT (III OF 1926), S. 3 (4). **55 All. 375 = A.I.R. 1933 All. 310.**

———'Seri'—Meaning of. *See* MADRAS ESTATES LAND ACT, SS. 3 (10) AND 185. **A.I.R. 1935 Mad. 583 = 69 M.L.J. 25.**

———Sharayet-e-bala. *See* WILL—TALUQDAR WILL. **A.I.R. 1931 Oudh 177.**

WORDS AND PHRASES.

———*Shikmi.*

The word "shikmi" as used in the word "shikmi taluq" denotes some degree of dependence on the zamindar, and some vernacular equivalent having to be found for non-occupancy, it would not be inapt to describe tenants who are so much less independent of their landlords than tenants who possess occupancy rights. ANUP MAHTO *v.* MITA DUSADH. **61 I.A. 93=13 Pat. 254 =39 L.W. 708=A.I.R. 1934 P.C. 5=66 M.L.J. 298 (P.C.).**

———*'Shikmi dakhilkar.'*

The word 'dakhilkar' is commonly used in the upper part of India as meaning a tenant with occupancy rights and the words 'shikmi dakhilkar' mean that the under-raiyat has occupancy rights in respect of the holding. DOMA SINGH *v.* JAIGOBIND PANDE. **A.I.R. 1931 Pat. 361**

———"Sowjanyam." *See* **A.I.R. 1935 Mad. 411.**

———*Strike.*

Per *Beaumont, C.J., obiter.*—The conduct of the workmen amounting to a concerted refusal to work for the employers as the result of a trade dispute is a strike. A strike is not the less a strike because it does not involve any breach of contract. BAKARALLI *v.* SAS SOON AND ALLIANCE SILK MILLS CO., LTD. **58 Bom. 262=36 Bom L.R. 190=A.I.R. 1934 Bom. 126.**

———"Subsisting right." *See under* AGRA PRE-EMPTION ACT, S. 19. **A I.R. 1932 All. 509 (F B.).**

———"Sufficient cause." *See* (*i*) C. P CODE, O. 9, RR 9 AND 13; O. 47, R 1 AND SCH. II, PARA. 17 (4).
(*ii*) LIMITATION ACT, S. 5.

———"Suit." *See* (*i*) C. P. CODE, S. 80; O. 39, R. 2 AND SCH. II, PARA. 17.
(*ii*) SPECIFIC RELIEF ACT, S. 9.

———*Suit—Meaning.*

The word "suit" ordinarily means a civil proceeding instituted by the presentation of a plaint. HANSRAJ GUPTA *v.* OFFICIAL LIQUIDATORS OF THE DEHRA DUN MUSSORIE TRAM CO. **60 I.A. 13=54 All. 1067=A I.R. 1933 P.C. 63=64 M.L.J. 403 (P.C.).**

———*Takia.*

The word connotes a graveyard of an individual faqir. NOOR MAHOMED *v.* BALLABH DAS. **134 I.C. 870=8 O.W.N. 579=A.I.R. 1931 Oudh 293.**

———*Tenant—Meaning of.*

Tenancy implies possession of the land by a person claiming a subordinate interest. A person who has parted with his interest to possess and enjoy the land can by no stretch of imagination be called a tenant. MAHADEB PAL *v.* SIBU CHARAN PAL. **62 C.L.J. 147.**

———*"Terij."*

"Terij" is now an obsolete form. It is an extract of the jamabandi slips which give details of all kinds of cultivation including *sir*, khudkasht, ex-proprietary, occupancy, non-occupancy and rent free. GOBIND *v.* MUKAT SINGH. **14 L.R. 242 (Rev)=17 R.D. 365.**

———*"Theka"—Use in agricultural lease—Effect.*

Where a document is otherwise an ordinary agricultural lease the mere use of the word "theka" does not alter it. MAHOMED BAKSH *v.* PABITTARA PANDAIN. **15 R.D. 212=12 L.R 55 (Rev.).**

———Ticca. *See* LEASE—CONSTRUCTION. **61 C.L.J. 351=A.I.R. 1936 Cal. 29.**

———'Time immemorial.' *See* CUSTOMS (GENERAL)—MISCELLANEOUS. **38 C.W.N. 139=A.I.R. 1934 Cal. 452.**

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———"Time immemorial." CHINTAMANRAO *v.* RAMCHANDRA. **56 Bom. 82=34 Bom.L.R. 92=A.I.R. 1932 Bom. 130.**

———"Transfer." *See* PARTITION ACT, S. 4. **60 Cal. 379=A.I.R. 1933 Cal. 467 and 54 All. 840=A.I R. 1932 All. 678.**

———'Try' and 'trial'—Meaning. JIBAN MALLA *v.* EMPEROR. **144 I.C. 90=37 C.W.N. 906=A.I R. 1933 Cal. 551.**

———"Under protest"—Payment made under protest cannot be said to be voluntary. BASHIAM NAIDU *v.* CORPORATION OF MADRAS. **158 I.C. 407=42 L. W. 317=A I.R. 1935 Mad. 625.**

———*"Underwrite"—Meaning of.*

The word "underwrite" commonly means "to agree to take up by way of subscription in a new company or new issue a certain number of shares if and so far as not applied for by the public." AUSTRALIAN INVESTMENT TRUST, LTD. *v.* STRAND AND PITT STREET PROPERTIES, LTD. **1932 A.C. 735=139 I.C. 9=A.I.R. 1932 P.C. 212=63 M.L J. 533 (P C.).**

———*"Unmarried"—Meaning.*

The dictionary meaning of the word "unmarried" is not married; the popular and more usual sense is "never having been married." The word is commonly used in either sense. In the case of deeds and wills where there is no context, where the document is completely colourless, the popular sense will usually be adopted. SOLEMAN BIBI *v.* EAST INDIAN RAILWAY. **60 Cal. 820=37 C.W.N. 453=A.I.R. 1933 Cal. 358.**

———'Unlawful'. *See* PENAL CODE, S. 361, EXCEPTION. **62 Cal. 629**

———*'Uralan" and "uraima".*

"Uralan" means a guardian or manager of a temple, and "uraima" is the office of uralan to which is attached the superintendence of the affairs of the temple. KOMAN *v.* ACHUTHAN NAIR. **61 I.A. 405=58 Mad. 91=A I. R. 1934 P C. 230=67 M L J. 788 (P.C).**

———Vamsastha. *See* HINDU LAW—SUCCESSION—WORDS. **A I R. 1935 Mad 327=68 M.L.J. 354.**

———*'Veedham".*

The Malayalam word "veedham" has not the exclusive mathematical connotation which "proportion" or "ratio" has in English. It is not confined to the sense of "ratio" or "proportion." "Rate" would be a better word. The best course would be simply to consider the Malayalam word "veedham." GANAPATHY IYER *v.* SUBRAMANIA IYER. **144 I.C. 95=A.I.R. 1933 Mad. 516.**

———Waguzasht — Meaning. KAMESHWAR SINGH BAHADUR *v.* SONEY MISSER. **14 Pat.L.T. 645=A. I.R. 1933 Pat. 529.**

———*Wa guazasht kara lengen*—Use in deed of sale—Effect MUMTAZ BEGAM *v.* LACHMI. **130 I C. 15=1930 A.L.J. 1435=A.I R 1931 All. 196.**

———*Wakf—Meaning.*

The word "wakf" is borrowed from Mahomedan Law and implies permanent dedication of property for religious or charitable purposes. When property is declared wakf, the original owner is divested of it and it vests in Almighty God. RIKHI KESH *v.* MELA RAM. **131 I C. 283=32 P L.R. 304=A.I.R 1931 Lah. 170.**

———*"Wala"—Meaning of.*

"Wala" is a term applied under the Mahomedan Law to a particular kind of inheritance. There is no authority in support of the proposition that this word occurring in a document (or even "wila" if it be so read) refers to wakf. AHMAD ASHRAF *v.* MURTAZA ASHRAF. **154 I.C. 1023=1935 O W.N. 415=A.I.R. 1935 Oudh 299.**

———Yajman vritti—Meaning—Nature of. *See* HINDU LAW—RELIGIOUS OFFICE. **25 S.L.R. 451=A.I R. 1932 Sind 60.**

WORKMEN'S BREACH OF CONTRACT ACT (XIII OF 1859)—Jurisdiction under, after 1st October, 1933—Complaint made prior to 1st October, 1933—Order passed after—If *ultra vires*—Mysore Regulation (IV of 1933)—Scope. *See* MYSORE REGULATION (IV OF 1933). **40 Mys.H.C.R. 136.**

——**S. 2**—*Nature of the offence.*

Mere neglect or refusal to perform the contract resulting in an order under S. 2 for the re payment of the money advanced is not the offence contemplated by the Breach of Contract Act, but it is the failure on the part of the workmen, against whom such an order was passed, to obey that order. (*Doraiswami Iyer, C.J.*) KOOKRA *v.* J. D'SOUZA. **8 Mys. L J. 486.**

——**S. 2**—*Nature of proceedings—Non-appearance of complainant—Case struck off—Propriety—Restoration.*

The proceedings under S. 2 are not 'criminal proceedings' to which the provisions of S. 247 of the Cr. P. Code will apply. So an order 'striking off' the case for the non-appearance of the complainant is illegal. But if it be treated as a dismissal of the complaint for default of prosecution, such an order will not preclude the Magistrate from again calling upon the petitioner under S. 2, either to pay back the money advanced or to perform the work agreed to be done. (*Doraiswami Iyer, C.J.*) KOOKRA *v.* J. D'SOUZA. **8 Mys. L J. 486.**

WORKMEN'S COMPENSATION ACT (VIII OF 1923), S. 2—*Appeal to High Court—Interference—Duty of Commissioner to record finding.*

If a substantial question of law arises, the High Court can interfere on points of law as well as on points of fact. It is the duty of the Commissioner to state as to what the applicant's employment or duties were, what he was engaged to do and then go on to state his finding as to how the accident happened in fact. (*Rankin, C. J. and C.C. Ghose, J.*) GOURI KINKAR BHAKAT *v.* RADHA KISSEN COTTON MILLS. **60 Cal 421=I.R. 1933, Cal. 276=142 I C. 472=37 C.W.N. 81=1933 Cr.C. 301=A.I.R. 1933 Cal. 220.**

——**S. 2 (1) (d)**—"*Brother*"—*Meaning of—If half-brother included.*

The term brother in its primary sense means a brother of the whole blood and it is only in a secondary and extended sense that the term is deemed to include a brother of the half blood. Whether the term is to be taken in its primary or secondary sense depends in each case upon the context. The term 'minor brother' in S. 2 (1) (*d*) does not include a minor half brother. (*Page, C.J., Dis and Maung Ba, JJ.*) MAUNG KYAN, *In the matter of.* **9 Rang. 46=I.R. 1931 Rang. 158=131 I. C. 134=1931 Cr C. 669=A.I.R. 1931 Rang. 173.**

——**S. 2 (1) (d)**—*Dependent—Meaning — Object of legislature.*

The actual dependence on the deceased workman is not the criterion for judging whether compensation should be paid to the persons mentioned in the definition or to any of them. The mere proof of the specified relationship would entitle the person concerned to compensation. Policy of the legislature stated. (*Jai Lal, J.*) MT. MOTI BAI *v.* AGENT, NORTH-WESTERN RAILWAY. **13 Lah. 228=134 I.C. 108=I.R. 1931 Lah. 876=33 P.L.R. 126=A.I.R. 1932 Lah. 1.**

——**S 2 (1) (d)**—'*Dependent*'—*Definition exhaustive—Adopted daughter—Right to receive compensation.*

The definition of the word 'dependent' in S. 2 (1) (*d*) is exhaustive. An adopted daughter is not a dependent and is not entitled to receive compensation. (*Addison and Bhide, JJ.*) MUNSHI RAM, *In the matter of.* **12 Lah. 658=I.R 1931 Lah. 394=131 I.C. 234=32 P. L.R. 341=A.I.R. 1931 Lah. 399.**

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——**S. 2 (1) (d)**—'*Dependent' minor adopted son.*

Provided the personal law of the deceased workmen permits an adoption, a minor adopted son, will fall within the scope of the definition of 'dependent' in S. 2 (1) (*d*). S. 3 (53) of the General Clauses Act, 1897, relied on. (*Currie, J.*) DEVI DITTA, *In re.* **12 Lah. 50=32 P.L.R 213=1931 Cr.C. 527=135 I C 48 (1)=I.R. 1932 Lah. 32 (1)=A I.R. 1931 Lah. 661.**

——**S. 2 (1) (d)**—'*Dependent*'—*Minor brother and unmarried sister of half blood.*

The terms "minor brother" and "unmarried sister", which occur in the definition of the expression "dependent" in Cl. (*d*) of sub-S. (1) of S. 2 include a minor brother and unmarried sister of the half blood. (*Tapp, J.*) KARTAR SINGH, *In the matter of.* **I.R. 1931 Lah. 794=133 I C. 554=1931 Cr.C. 1040=A.I.R. 1931 Lah 752 (2).**

——**S. 2 (1) (d)**—"*Unmarried daughter*"—*Widowed daughter whether comes under.*

The expression "unmarried daughter" in S. 2 (1) (*d*) should be construed as including widowed daughter. (*Rankin, C J. and Ameer Ali, J.*) SOLEMAM BIBI *v.* EAST INDIAN RAILWAY. **60 Cal. 820=I.R. 1933 Cal. 351=143 I.C. 154=37 C.W.N. 453=1933 Cr.C. 494 (2)=A.I.R. 1933 Cal. 358.**

——**S. 2 (1) (d)**—"*Unmarried sister*" *includes widowed sister.*

The words "unmarried sister" in S. 2 (1) (*d*) include a widowed sister. (*Dalip Singh, J.*) MT. SHAMO BAI *v.* DAYA RAM. **1934 Cr.C. 290 (1)=A I.R. 1934 Lah. 115 (1).**

——**S. 2 (1) (d)**—"*Unmarried sister*"—*Widowed sister, if included.*

A widowed sister who has not remarried comes under the definition of 'unmarried sister" and is a dependent within the meaning of S. 2 (1) (*d*) (*Jai Lal, J.*) MT. MOTI BAI *v.* AGENT, NORTH-WESTERN RAILWAY. **I R. 1931 Lah. 876=134 I.C. 108.**

——**S. 2 (1) (n)**—"*Workman*" —*Employment of casual nature—Onus of proof.*

The question whether an employment is of a casual nature is one of evidence. The onus in such cases would be on the employer to prove the condition which is necessary for the purpose of excluding a person from the category of a workman and it has to be shown that the workman's employment was of a casual nature. (*Patkar and Barlee, JJ.*) EBRAHIM *v.* JAINIBI. **6 I R (Bom.) 75=145 I.C. 273=35 Bom. L.R. 410=A.I.R. 1933 Bom. 270.**

——**S. 2 (1) (n)**—*Workman—Casual employee for employer's trade or business.*

If a man be employed for the purposes of the trade or business, the employer is liable to him even though the employment be of a casual nature *Manton* v. *Cantwell*, (1920) A. C. 781, Foll. (*Page, C.J. and Das, J.*) ABDUL HUSSAIN *v.* SECRETARY OF STATE. **11 Rang. 433=6 I R. (Rang.) 122=146 I C. 729=1933 Cr.C. 910=A.I.R. 1933 Rang 244.**

——**S 2(1)(n)**—*Workman—Temporary employment.*

A workman who is employed even for two days for the purposes of the employer's trade or business is a workman under the Act. (*Das and Baguley, JJ.*) THAVER BROS *v* MUTHU MARIAMMAL. **6 I R. (Rang.) 136=146 I.C. 1027=1933 Cr.C. 923=A.I. R. 1933 Rang. 208.**

——**S. 2 (1) (n)**—*Workman.*

The claimant, who was employed in works where sand was dredged from the creek and sifted so as to remove mud and stones, is a workman within the

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meaning of the Act. (*Baker and Divatia, JJ.*) HOGAN *v.* GAFUR RAMZAN. **58 Bom 128=149 I.C. 247 =6 R.B. 350=35 Bom. L. R. 1142=1934 Cr C. 115 =A.I.R. 1934 Bom. 28.**

——S. 2 (1) (n)—"*Workman*"—*Man employed for a few days at a time.*

Before a person can be excluded from the definition of "workman" in S. 2 (1) (*n*) he must not only be one "whose employment is of a causal nature," but also one who is employed otherwise than for the purpose of the employer's trade or business. Both these qualifications must be present together. The mere fact that a person is employed only for a few days at a time will not of itself remove him from the category of " workman". (*Curgenven and King, JJ.*) PERIYAKKAL *v.* AGENT, S.I. RY. CO., LTD. **58 Mad. 804=1935 M.W.N 674= 41 L W. 805=159 I C. 873 - 1935 Cr.C. 1024=A. I.R. 1935 Mad. 721=69 M.L.J. 93**

——S. 3—*Accident arising out of employment explained.*

Where a workman is injured by the falling upon him of the premises where he is employed, the accident necessarily arises out of the employment. (*Lord Atkin.*) MARGARET BROOKER *v* THOMAS BORTHWICK & SONS **6 I.R. (P.C) 38=146 I.C. 973=38 L.W 805=1933 A.L.J. 1308=1933 Cr C. 1441=35 P.L R. 102= A.I.R. 1933 P C. 225=66 M.L.J. 225 (P.C).**

——S. 3—*Accident arising out of employment—Test.*

The question as to whether the accident arose out of the employment cannot be determined on any general view of facts. It is dependent on the facts of each particular case. There is one test which is always applicable. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury. If yea, the accident arose out of his employment. If nay it did not, because what it was not part of the employment to hazard, to suffer, or to do, cannot well be the cause of an accident arising out of the employment. And the question whether the workman did his duty negligently or not arises only where the workman was doing something which it was his duty to perform. *Lancashire and Yorkshire Railway* v. *Highly*, (1917) A. C. 352, Foll. (*Miller and Patterson, JJ.*) NAWAB ALI *v.* HANUMAN JUTE MILL **6 I.R (Cal.) 10=144 I.C. 701 (2)=37 C.W.N. 186=1933 Cr.C. 857=A.I. R. 1933 Cal 513.**

——S. 3—*Accident arising "out of and in the course of" employment—Interpretation—Tribunal of fact is Commissioner and not High Court.*

In deciding the question as to whether the fatal accident has arisen out of and in the course of his employment, the tribunal of fact is the Commissioner for workmen's compensation and not the High Court; and whether or not the fatal accident with befell arose out of and in the course of his employment depends upon the facts of the case. The Commissioner must take into account the material facts of the case, and must determine whether or not upon the facts, the accident did, or did not arise out of and in the course of employment. A person who with the permission and to the knowledge of his employer lives at some distance from the place where he is called upon, to work, must be allowed reasonable time in all the circumstances within which to proceed from his place of residence to the place where he is to work, and if in the course of proceeding in a reasonable time and in a reasonable manner from the place where he resides to the place where he works, he meets with a fatal accident, then that fatal accident would be held to arise out of and in the course of his employment (*Page, C.J., Mya Bu and Baguley JJ.*) MA HMWE YIN *v.* BURMAH OIL CO., LTD. **156 I.C. 377=7 R.R. 412= A I.R. 1935 Rang. 173 (S.B.).**

WORKMEN'S COMPENS' ACT (1923), S. 3.

——S. 3—"*Arising out of employment*"—*Meaning—Injury caused by added peril caused by workman—Claim for compensation—Sustainability.*

The expression "arising out of employment" is not confined to "the mere nature of the employment". The expression applies to the employment as such, to its nature, its conditions, its obligation and its incidents. But the claim for compensation cannot be sustained where the accident is caused by "an added peril produced by the workman himself." The applicant, who was a piecer in a cotton mill, went out of his work and interfered with tin rollers while in motion and his dhoti having been caught put out his hand to pull it and got his hand crushed.

Held, that injury was the result of an "added peril produced by the workman" and the claim was not sustainable. (*Rankin, C. J. and C. C. Ghose, J.*) GOURI KINKAR BHAKAT *v.* RADHA KISSEN COTTON MILLS. **60 Cal. 421=I.R. 1933 Cal. 276=142 I C. 472=37 C.W N 81=1933 Cr C. 301=A I.R 1933 Cal. 220.**

——S. 3—*Compensation for permanent partial disablement—Liability of employer—Test—Assessment of compensation.*

Where a workman claims compensation on the ground of permanent partial disablement due to fracture caused by the falling of roof, negligence either on the part of the employer or the employed is not the criterion to be employed. The question is whether the workman at the time of the injury was working within the scope of the employment, and if so, whether the employer has proved that he is exempted from paying compensation because of the provisos to S. 3. The employer will only escape liability if he can definitely satisfy the provisos in S 3. If the workman is permanently partially disabled, which according to medical estimate is 20 per cent., compensation should be awarded at 20 per cent. of the total earning capacity. (*Courtney Terrell, C J. and Luby, J.*) DHANPAL MADRASI *v.* SUPERINTENDENT OF COLLIERIES. **16 Pat L T. 32=7 R P. 294=152 I.C. 1024=1934 Cr.C. 1289=A I R. 1934 Pat. 630**

——S. 3—*Accident arising out of and in the course of employment—Accident caused while returning from work.*

The deceased was a cooly. He had been working at unloading coal from a ship lying at anchor. At the end of his work, he got into a sampan to go ashore with other coolies. When in the sampan owing to the falling on the occupants of some hot cinders thrown overboard and leaning on one side, to avoid them, the sampan capsized and all were thrown into the river. The deceased was drowned.

Held, that as deceased was on his way back to the wharf where his day's employment would end, in a recognized way for the coolies to travel without any added risk, the accident must be regarded as one arising out of as well as being in the course of his employment. English cases referred (*Das and Baguley, JJ.*) THAVER BROS. *v.* MUTHU MARIAMMAL. **6 I.R. (Rang) 136= 146 I.C. 1027=1933 Cr.C. 923=A.I.R. 1933 Rang. 208.**

——S. 3—*Injury by natural force—Whether sustained in course of employment.*

Whether an accident arises out of the employment depends on the particular facts. If a workman is injured by some natural force such as lightning the heat of the sun, or extreme cold, which in itself has no kind of connexion with employment, he cannot recover compensation unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to

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suffering such an injury. But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the premises there is no need to make further inquiry as to why the accident happened. (*Lord Atkin.*) MARGARET BROOKER *v.* THOMAS BORTHWICK & SONS. **6 I.B. (P.C.). 38=146 I.C. 973=38 L.W. 805=1933 A.L.J. 1308=35 P.L.R. 102=1933 Cr.C. 1441=A.I.R. 1933 P.C. 225=66 M.L.J. 225 (P.C.).**

———**S. 3**—*"In the course of employment"—Duties allotted by superior.*

That a person is employed as a gin-fitter for the upkeep and repair of the gins and is required to perform such duties as the manager or engineer might allot to him, does not exclude his liability to perform such duties as might be allotted to him by anyone else set over him; and if an accident occurs while performing such duty, the accident does occur in the course of the employment of such workman. (*Pollock, A. J. C.*) ABBU BAKAR ABDUL RAHMAN & Co. *v.* NARAYAN. **6 I.R. (Nag.) 47=145 I.C. 402=1933 Cr. C. 1004=A.I.R. 1933 Nag. 272 (2).**

———**S. 3**—*Liability to pay compensation—Negligence of employee—Effect of.*

Mere negligence of the worker cannot be regarded as wilful disobedience by the workman to an order expressly given. Contributory negligence on the part of the employee does not exonerate the employer from liability to compensate the employee if the accident could have been avoided by the exercise of ordinary care and diligence. (*Abdul Rashid, J.*) ALLAH BAKSH *v.* MIAN MOHAMMAD. **158 I.C. 830=8 R.L. 298=A.I.R. 1935 Lah. 670.**

———**S. 3 (1)**—*Death of workman by snake bite on his way to work from his quarters—Employer's liability.*

In order to come within the Act, an accident must not only occur "in the course of" but in addition, must arise "out of" the employment. An employer is not liable to pay compensation in respect of every injury that a workman may suffer in the course of his employment, but only in respect of such injuries as are the result of risks incidental to his employment. An employer is not liable to compensate a workman for an injury that has been caused by reason of the workman being exposed to a risk to which all persons who happened lawfully to be present at the time and place of the accident would be subjected, unless the workman at such time and place was exposed to an exceptional risk of sustaining the injury by reason of the work which he was engaged by the employer to carry out. Where the deceased workman was bitten by a snake while going by one of the routes to his place of employment from the quarters provided by the employer, which was about four miles away.

Held, the fatal accident to the workman did not "arise out" of his employment, both because at the time when he was bitten by the snake he was not doing an act which he was under an obligation to do by reason of his contract of service with the employer, and also because the accident was the result of a risk common to every one who happened to make use of the highway along which he was walking, and was not due to any exceptional risk which he ran as the result of performing his duties as an employee.

Held also, that the accident was not one arising "in the course" of the employment as it was not part of his contract that he should use the route that he chose, and as it was for him and not for his employer to decide the route by which and the time when he should make his way to his place of work. (*Page, C. J. and Mya Bu, J.*) THE BURMA OIL CO., LTD. *v.* MA HMWE YIN. **13 Rang. 553=1935 Cr.C. 1245=159 I.C. 1095=8 R.R. 328=A.I.R. 1935 Rang. 428.**

———**S. 3 (1)**—*Order for compensation in the absence of legal claim—Legality.*

It may be that an employer, in cases where neither the workman nor his dependants have any legal claim upon him, is sometimes prepared *ex gratia* to make a payment to the persons affected by way of compensation; but it is, of course, solely for the employer to decide whether in any particular case he will act in this way or not; and it is a matter with which the Court has no concern. Hence where a Commissioner finds that neither the workman nor his dependants had any claim on the employer, he has no jurisdiction to order a small compensation to be paid by employer. (*Page, C. J. and Mya Bu, J.*) CONSOLIDATED TIN MINES *v.* CANTARAJ. **158 I.C. 44=8 R.R. 142=1935 Cr.C. 999=A.I.R. 1935 Rang. 303.**

———**Ss. 3 (1) (c) and 2 (1) (1)**—*Partial disablement—Injury to fingers—Right to compensation.*

M a crane driver in a company which had undertaken the construction of a bridge across the Indus, met with an accident and lost 2-3rds of index and middle finger of his right hand and the whole of his third and fourth fingers of the same hand, his thumb and hand remaining intact. *M* applied for compensation.

Held, that *M* was not entitled to any compensation by virtue of S. 3 (1) (*c*) as the percentage of the loss of his earning capacity was at the most 25 per cent. and according to the schedule there was no permanent total disablement. (*Addison, J.*) ALL-INDIA CONSTRUCTION CO., LTD. *v.* MUNSHI RAM. **I.R. 1931 Lah. 914=134 I.C. 290=33 P.L.R. 232=A.I.R. 1931 Lah. 319.**

———**S. 4 (1) (A) and (D)**—*Payments made to injured before death—Deduction from amount payable after death.*

Payments made to an injured workman before his death under S. 4 (1) (D) cannot be deducted from the compensation payable under S. 4 (1) (A) after the death of the workman, as the right of the dependants to compensation upon the death of the workman is independent of the workman's right to compensation. (*Page, C. J., Das and Mya Bu, JJ.*) MAUNG NYI OF KHANGONE, *In the goods of.* **11 Rang. 154=I. R. 1933 Rang. 51=142 I.C. 825=1933 Cr.C. 286=A.I.R. 1933 Rang. 33 (F.B.).**

———**S. 5**—*Power to award full amount even though only smaller amount was asked for.*

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Under the Act the Commissioner has a duty to see that the injured party, usually a cooly ignorant of the law, gets fair play. The provisions of the Act so far as the calculation of compensation is concerned are mandatory. The Commissioner has no jurisdiction to give less compensation than that laid down in the Act, and the Commissioner is in no way fettered by what an ignorant cooly helped perhaps by advisers only less ignorant than himself may enter in his original application to the Commissioner. *(Baguley and Maung Ba, JJ.)* BENGAL, BURMA STEAM NAVIGATION CO., LTD. *v.* RAMANA. **I.R. 1932 Rang. 206=140 I.C. 46=1932 Cr.C. 704=A.I.R. 1932 Rang. 141.**

———**S. 5 (1) (b)**—*Applicability—Casual employment.*

S. 5 (1) (*b*) applies to all cases in which the employment has not been continuous for not less than one year. When a workman is casually employed he cannot be held to be in permanent service and when there are breaks in his service for various periods, though each period in itself is not more than 14 days he cannot be held to be in continuous service, where the workman has worked during the intervals under another employer. *(Baguley and Maung Ba, JJ.)* BENGAL, BURMA STEAM NAVIGATION CO, LTD. *v.* RAMANA. **I.R. 1932 Rang. 206=140 I.C. 46=1932 Cr. C. 704=A.I.R. 1932 Rang. 141.**

———**S. 10 (1), proviso**—*"Sufficient cause"—Ignorance of rules.*

Ignorance of the existence of the Act and of the provision contended therein that the claim should be instituted within six months from the date of accident is no "sufficient cause" within the meaning of proviso to S. 10. *(Heald and Mya Bu, JJ.)* CONSOLIDATED MINES OF BURMA LTD. *v.* MAUNG TUN E. **9 Rang. 118=I.R. 1931 Rang. 124=131 I.C. 60=1931 Cr.C. 671=A.I.R. 1931 Rang. 175.**

———**S. 10 (1)**—*Claim against contractor of Railway company—Notice to contractor—Necessity for.*

Where a claim for compensation was made by the dependants of a deceased labourer in a Railway Company's employment for accidental death of deceased and claim was made against the contractor employing the deceased and not against Railway Company but the Commissioner served notice on the Company.

Held, that notice ought to have been served on the contractor and not on the Company. *(R. C. Mitter, J.)* BISWESWAR ROY CHAUDHURY *v.* KHAGENDRA KAIBARTA. **63 Cal. 547=159 I.C. 423=1935 Cr.C. 1075=A.I.R. 1935 Cal. 683.**

———**S. 10 (1)**—*Failure to give earlier notice—Sufficient cause—Workman not realising permanent loss of eyesight earlier.*

The Commissioner is the sole judge to determine whether or not the want of or a defect in a notice shall bar the proceedings, and his decision is one of fact which cannot be appealed against except on the ground that there is no evidence to support it. The fact that the workman did not realize until a certain day that he had permanently lost his eye-sight of one eye, is

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sufficient cause for his not giving notice earlier and the omission in the notice to state the cause of injury is not material when the manager or the employer is already aware of it. *(Pollock, A. J. C.)* ABBU BAKAR ABDUL RAHMAN & CO. *v.* NARAYAN. **6 I.R. (Nag.) 47=145 I.C. 402 =1933 Cr.C. 1004=A.I.R. 1933 Nag. 272 (2).**

———**S. 10 (1)**—*Sufficient cause—Failure to give notice—Trivial injury—Sufficient cause.*

Where in the opinion of the deceased the injury was trivial and was such that he was not entitled to compensation under the Act the failure to give notice by the deceased workman is due to sufficient cause within the meaning of S. 10. *(Patkar and Barlee, JJ.)* HALEMABAI *v.* ARDESHIR B. CURSETJI. **I.R. 1933 Bom. 309 =144 I.C. 648=35 Bom.L.R. 293=1933 Cr. C. 607=A.I.R. 1933 Bom. 197.**

———**S. 10 (1)**—*Sufficient cause—Ignorance of the time limit, no excuse.*

Ignorance of the existence of the Act and of the provision contained therein that the claim should be instituted within six months from the date of accident is no "sufficient cause" within the meaning of proviso to S. 30. *Rolls* v. *Pascali,* (1911) 1 K.B. 982, Rel. *(Heald and Mya Bu, JJ.)* CONSOLIDATED MINES OF BURMA, LTD. *v.* MAUNG TUN E. **9 Rang. 118=I.R. 1931 Rang. 124=131 I.C. 60=1931 Cr.C. 671= A.I.R. 1931 Rang. 175.**

———**S. 10 (1)**—*Notice—Failure to give—Power of Court to condone.*

The notice under S. 10 should be given as soon as practicable after the happening of the accident and before the workman has voluntarily left the employment in which he was injured. Want of notice can however be excused under the proviso if there is sufficient cause.

Semble: It is desirable that both the provisos to S. 14 (1) of the English Act, 1925, should be reproduced in S. 10 of the India Act in order that want of notice may be expressly made liable to be condoned. *(Patkar and Murphy, JJ.)* JAI CHAND *v.* VITHAL BAJIRAO. **57 Bom. 150 =I.R. 1933 Bom. 250=142 I.C. 630=35 Bom.L.R. 83=1933 Cr.C. 257 (2)=A.I.R. 1933 Bom. 109.**

———**S. 10 (1) and (2)**—*Notice—Need for stating cause of injury—Delay in giving notice.*

S. 10 requires a notice in writing and it is necessary that it should state in ordinary language the cause of the injury; but that does not mean that the notice should state in language to the same effect as the subsequent application before the Commissioner. Delay in giving notice under the section may be a matter of great importance. *(Rankin, C.J. and C. C. Ghose, J.)* HIRA LAL MANDAL *v.* BURMAH SHELL OIL STORAGE AND DISTRIBUTING CO., LTD. **I.R. 1933 Cal. 244= 142 I.C. 250=37 C.W.N. 225=1933 Cr.C. 205 (2)=A.I.R. 1933 Cal. 130.**

———**S. 10 (1)**—*Sufficient cause—Question of law—Appeal.*

The question whether the facts found by the Commissioner under the Workmen's Compensation Act constitutes reasonable cause for failure of the injured workman to give notice of the accident or to claim compensation within the

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statutory period is a question of law and the Commissioner's decision on the question is open to review by the High Court. (*Patkar and Barlee, JJ.*) HALEMABAI *v.* ARDESHIR B. CURSETJI. **I.R. 1933 Bom. 309=144 I.C. 648==35 Bom.L.R. 293=1933 Cr.C. 607=A.I.R. 1933 Bom. 197.**

———**S. 10 (1) and provisos**—*Application to Commissioner—Limitation for.*

The period of six months, to which S. 10 refers, relates to the claim for compensation made by the workman against his employer and has no reference to the period within which an application for the settlement of the matter by the Commissioner can be made. If the claim has not been made within time, even then the Commissioner may, in the exercise of the discretion allowed by the second proviso to the section, admit the claim and decide it. (*Buckland, A.C.J., Costello and Panckridge, JJ.*) ABDUL KARIM *v.* EASTERN BENGAL RAILWAY. **61 Cal. 508=149 I.C. 169=6 R.C. 522=38 C.W.N. 613=1934 Cr.C. 613=A.I.R. 1934 Cal. 460 (S.B.).**

———**S. 10 (1)**—*Notice—Sufficiency of—Decision of Commissioner final.*

The Commissioner is the sole judge to determine whether or not the want of, or a defect in, a notice shall bar the proceedings and his decision is one of fact which cannot be appealed against except on the ground that there is no evidence to support it. (*Pollock, A.J.C.*) ABDUL RAHIMAN & Co. *v.* NARAYANAN. **1933 Cr.C. 1004=16 Nag.L.J. 63=145 I.C. 402==6 R.N. 47=A.I.R. 1933 Nag. 272 (2).**

———**S. 12 (1)**—*Contractors engaging workmen through sub-contractor—Liability of contractor.*

Where the employers who are contractors engage workmen through a sub-contractor under them, for the execution of work which was ordinarily part of their own trade or business, the employers and not the sub-contractor is liable. (*Das and Baguley, JJ.*) THAVER BROS. *v.* MUTHU MARIAMMAL. **6 I.R. (Rang.) 136=146 I.C. 1027=1933 Cr.C. 923=A.I.R. 1933 Rang. 208.**

———**S. 12 (1)**—*Labourer in Railway company dying of accident—Claim for compensation from contractor employing deceased—Liability of company.*

The deceased was a labourer in the employ of a Railway company and died of an accident whereon the dependants of the deceased claimed compensation from the contractor who had employed the deceased.

Held, that the company was directly liable to dependants as if it was the employer. (*R. C. Mitter, J.*) BISWESWAR ROY CHOUDHURY *v.* KHAGENDRA KAIBARTA. **63 Cal. 547=159 I.C. 423=1935 Cr.C. 1075=A.I.R. 1935 Cal. 683.**

———**S. 12 (1)**—*Principal—Test of liability—Building by Bank—Injuries—Liability of Bank for.*

The idea underlying S. 12 is that, if it is ordinarily part of the business of a person to execute certain work, then he will ordinarily do that work by his own servants; he is not to escape

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liability for any accident that takes place merely by interposing a contractor—the contractor undertaking to do what ordinarily the principal would do for himself. It is not part of the ordinary business of a Bank to build houses. The fact that one of its objects is stated in its Memorandum to be "to build offices, buildings, etc." is not by itself sufficient to entitle the Bank to build houses in the sense of building them itself as distinct for getting them built in the ordinary way. There must be some evidence to show that the Bank is 'building' as part of its ordinary business before it is rendered liable under S. 12 for injuries sustained in the course of the building. 53 B. 203, Ref. (*Rankin, C.J. and Costello, J.*) KARMANI INDUSTRIAL BANK, LTD. *v.* RANJAN. **60 Cal. 24=1933 Cr.C. 106=142 I.C. 54=I.R. 1933 Cal. 215=36 C.W.N. 841=A.I.R. 1933 Cal. 63.**

———**S. 10 (2)**—*Sufficient reason for delay—Claimant employed by same employer on same pay on light duties.*

Where during the period of six months immediately following the accident, the claimant was employed on light duties on the same pay by the employer, that is a sufficient reason for his not having made the claim within that period. And once a reasonable cause is established for failure to make a claim for compensation within six months of the occurrence of the accident, the bar to the maintenance of the proceedings under the Act is removed. (*Baker and Divatia, JJ.*) HOGAN *v.* GAFUR RAMZAN. **58 Bom. 128=35 Bom.L.R. 1142=149 I.C. 247=6 R.B. 350 =1934 Cr.C. 115=A.I.R. 1934 Bom. 28.**

———**S. 12 (1)**—*"Trade or business"—Railway company—Maintenance or upkeep of railway line—If part of its business.*

Maintenance or upkeep of the railway line is ordinarily part of the business of a Railway company. The business of keeping the line in order is as normal and as essential a feature of the running of a Railway as the issue of tickets or the handling of goods. (*Curgenven and King, JJ.*) PERIYAKKAL *v.* AGENT, S. I. RY. CO., LTD. **58 Mad. 804=1935 M.W.N. 674=41 L.W. 805=1935 Cr.C. 1024=159 I.C. 873=A.I.R. 1935 Mad. 721=69 M.L.J. 93.**

———**S. 12 (2)**—*Construction—"Any such" indemnity—Liability of sub-contractor.*

The contractor referred to in S. 12 (2) is the contractor who contracts directly with the principal as defined in S. 12 (1). If there is any further sub-letting of the contract an indemnity cannot be obtained under the contract and must be sought by recourse to the Civil Court. The words "any such" indemnity are restricted to the indemnity between the principal and the original contractor. (*Wadia, J.*) DHUNJIBHOY BOMANJI *v.* GUNPA KHANDU KOLI. **57 Bom. 699=6 I.R. (Bom.) 166=146 I.C. 616=35 Bom. L.R. 694=1933 Cr. C. 915=A.I.R. 1933 Bom. 338.**

———**S. 12 (2)**—*Claim for compensation—Notice to contractor under employer—If essential.*

In a claim for compensation, as sub-S. (2), S. 12 puts the contractor under the liability to indemnify the Railway company, he is entitled to

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notice of the claim and can certainly dispute the claim of the dependants of the deceased labourer. (*R. C. Mitter, J.*) BISWESWAR ROY CHAUDHURY *v.* KHAGENDRA KAIBARTA. **63 Cal. 547 =159 I.C. 423=1935 Cr.C. 1075=A.I.R. 1935 Cal. 683.**

———**S. 13**—*Distinction between independent and sub-contractor—Liability of sub-contractor.*

An independent contractor generally speaking is one who undertakes to produce a given result to do a certain work without being controlled by the person for whom he does the work. A contractor executing an employment is not the servant of the person who engages his services and he does not make such person liable for any torts he or his servants have committed nor is a sub-contractor the servant of the contractor who has employed him. Even when there is a sub-contractor, if the injury was caused while the workman acted under the principal and owing to the latter's negligence the liability fastens to the principal and not to the sub-contractor. (*Wadia, J.*) DHUNJIBHOY BOMANJI *v.* GUNPA KHANDU KOLI. **57 Bom. 699=6 I.R. (Bom.) 166= 146 I.C. 616=35 Bom.L.R. 694=1933 Cr.C. 915=A.I.R. 1933 Bom. 338.**

———**S. 19 (1)**—*Review—Application for compensation on behalf of applicant and other members—Rejection of claim of applicant—Application for review—Order in favour of other members—Legality.*

Where a person made an application to the Commissioner for compensation to himself as the son of the deceased and for the widow and minor children and on the Commissioner rejecting his claim, filed an application purporting to be for review stating that he had claimed in his original application compensation for other members of the family and the Commissioner thereupon awarded compensation to the widow,

Held, that there was nothing in the Workmen's Compensation Act to confer any power of review on a Commissioner under that Act.

Held, further, that the order of the Commissioner did not purport to be one in review or setting aside his previous order and what he purported to do was to pass orders in regard to the original application in so far as it referred to the claim of the widow and the minors as he had not passed any order in regard to that claim in that application and that under S. 19, the Commissioner was bound to settle the question of whether compensation was due to the widow and the minors on the original application. (*Bennet, J.*) NANAK CHAND SHADI RAM *v.* MAHABIR. **154 I.C. 308=7 R.A. 732=1935 A.L.J. 349=1935 A.W.R. 233=A.I.R. 1935 All. 408.**

———**S. 19**—*Rules under App. II, R. 30—Question referred to Commissioner—Notice issued—Medical report as evidence.*

Where a question is referred to Commissioner and a claim for compensation is made and notice to employer is issued, the Commissioner cannot summarily reject the application merely on the strength of the medical report. He has to record issues and in a judgment under R. 30 to state concisely his finding on each of the issues. The

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Surgeon's report is not admissible unless the Surgeon himself comes to prove it, giving an opportunity to the claimant, if necessary, to examine him if the Surgeon is his own witness or cross-examine him if the Surgeon is a witness on the other side. (*Wort A.C.J. and Kulwant Sahay, J.*) APPAL SWAMMY EAST PLANT MECHANICAL DEPT. *v.* TATA IRON AND STEEL CO., LTD. **14 Pat.L.T. 625=1933 Cr.C. 1165=148 I.C. 210=6 R.P. 433=A.I.R. 1933 Pat. 532.**

———**S. 23**—*Commissioner—Powers of review.*

There is nothing in the Workmen's Compensation Act to confer any power of review on a Commissioner under that Act. (*Bennet, J.*) NANAK CHAND SHADI RAM *v.* MAHABIR. **154 I.C. 308=7 R.A. 732=1935 A.L.J. 349= 1935 A.W.R. 233=A.I.R. 1935 All 408.**

———**S. 24**—*Application by managing member of joint family on behalf of other members—Competency.*

The words "other person" in S. 24 are joined to legal practitioner and these words indicate formal appearances on behalf of the persons claiming. A managing member of a joint Hindu family can apply to the Commissioner for compensation on behalf of the widow and the minor members of the family and no authorisation in writing by them is necessary. (*Bennet, J.*) NANAK CHAND SHADI RAM *v.* MAHABIR. **154 I.C. 308=7 R.A. 732=1935 A.L.J. 349= 1935 A.W.R. 233=A.I.R. 1935 All. 408.**

———**Ss. 26 and 30 (a)**—*Ground for re-trial—Failure of Commissioner to comply with rules in S. 26.*

The failure of the Commissioner to comply with the rules mentioned in S. 26 is not by itself sufficient ground for ordering a re-trial. Re-trial cannot be ordered unless in consequence of such non-compliance, there has been a failure of justice and unless there are not sufficient materials on the record to enable the High Court to deal with the case. (*Ferrers, J.C. and Rupchand, A.J.C.*) PESTONJI BHICAJI *v.* FARID KHAN PIR MAHOMED. **27 S.L.R. 377=6 I.R. (Sind) 72 =146 I.C. 696=1933 Cr.C. 947=A.I.R. 1933 Sind 273.**

———**S. 30**—*Finding of fact—Interference by High Court.*

The High Court will interfere with the decision of the Commissioner only if the statement of law by him or its application to the facts is obviously wrong. (*Patkar and Barlee, JJ.*) EBRAHIM *v.* JAINIBI. **6 I.R. (Bom.) 75=145 I.C. 273=35 Bom.L.R. 410=A.I.R. 1933 Bom. 270.**

———**S. 30**—*Question of fact—Injury due to accident.*

A finding that a workman was scraping the cylinder of the gas engine in the employer's factory and that a particle of rust entered his eye, which eventually caused complete loss of sight in that eye, is a finding of fact that cannot be challenged. (*Polock, A.J.C.*) ABBU BAKAR ABDUL RAHMAN & CO. *v.* NARAYAN. **6 I.R. (Nag.) 47=145 I.C. 402=1933 Cr.C. 1004= A.I.R. 1933 Nag. 272 (2).**

———**S. 30**—*Question of law—Sufficient cause under S. 10—Appeal.*

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The question whether the facts found by the Commissioner under the Workmen's Compensation Act constitutes reasonable cause for failure of the injured workman to give notice of the accident or to claim compensation within the statutory period is a question of law and the Commissioner's decision on the question is open to review by the High Court. (*Patkar and Barlee, JJ.*) HALEMABAI *v.* ARDESHIR B. CURSETJI. **I.R. 1933 Bom. 309=144 I.C. 648=35 Bom. L.R. 293=1933 Cr.C. 607=A.I.R. 1933 Bom. 197.**

———**S. 30, Proviso**—*Interference by High Court—Scope of.*

Obiter.—The effect of the proviso to S. 30 is to limit the power of the Court to interfere only with such findings of fact of the Commissioner as depend upon questions of law. (*Ferrers, J.C. and Rupchand, A.J.C.*) PESTONJI BHICAJI *v.* FARID KHAN PIR MAHOMED. **27 S.L.R. 377=6 I.R. (Sind) 72=146 I.C. 696=1933 Cr.C. 947=A.I.R. 1933 Sind 273.**

———**Sch. I**—*Claim to 70 per cent. of earning capacity—When maintainable.*

In order that a workman may claim 70 per cent. of loss of earning capacity as compensation, he should bring his case within the words "complete and permanent loss of the use of any limb or member." It is only then that the Commissioner can deem it to be a case of loss of the limb. (*Ferrers, J.C. and Rupchand, A.J.C.*) PESTONJI BHICAJI *v.* FARID KHAN PIR MAHOMED. **6 I.R. (Sind) 72=146 I.C. 696=27 S.L.R. 377=1933 Cr.C. 947=A.I.R. 1933 Sind 273.**

———**Sch. II, Cl. (12)**—*Applicability—Workman employed in hand-dug well.*

Sch. II, Cl. (12) applies to a workman engaged as a well-digger in a hand-dug well. (*Page, C. J., Das and Dunkley, JJ.*) MAUNG YA DA, *In the matter of.* **11 Rang. 404=6 I.R. (Rang.) 135=146 I.C. 1009 (1)=1933 Cr. C. 1532 (1)=A.I.R. 1933 Rang. 418 (1).**

WORKS OF PUBLIC UTILITY COMPANIES ACT (XXII of 1863)—Scope and object of—Declaration that "the land may be taken"—If conclusive—Act VI of 1857. *See* PUBLIC PURPOSES LAND ACQUISITION ACT (VI OF 1857)—SCOPE AND OBJECT OF. **15 P.L.T. 681.**

———**S. 26**—*Construction and scope.*

The earlier sections of the Act provide for the machinery the promoters of the concern are to satisfy the Government that the matter in hand is a matter of public utility for the purposes of which the land should be acquired under the Act; provision is also made for the survey of the lands sought to be acquired. S. 26 of the Act contemplates a definite declaration by the Government that they are proceeding under the Act and the land is required for the work on hand; and when once the declaration is made, it is conclusive for the authorities to exercise their powers under the Act to acquire the land for the purposes of public utility. (*Wort and Agarwala, JJ.*) JAINTY CENTRAL COLLIERY, LTD. *v.* JAGDISH PRASAD SINGH. **155 I.C. 98=7 R.P. 547=15 P.L.T. 681=A.I.R. 1935 Pat. 134.**

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WORSHIP.

See (1) HINDU LAW—RELIGIOUS ENDOWMENT —TEMPLE.
(2) MAHOMEDAN LAW—WAKF—MOSQUE.

WORSHIPPER. *See* C. P. CODE, S. 92—RIGHT TO SUE.

WRIT OF CERTIORARI. *See* CERTIORARI.

WRIT OF HABEAS CORPUS.

See (1) CR. P. CODE, S. 491.
(2) HABEAS CORPUS.

WRIT OF PROHIBITION.

See (1) JURISDICTION—WRIT OF PROHIBITION.
(2) PROHIBITION.

WRITTEN STATEMENT. *See* C. P. CODE, O. 8.

WRONGFUL ARREST. *See* TORT.

WRONGFUL ATTACHMENT. *See* TORT.

WRONGFUL CONFINEMENT. *See* PENAL CODE, Ss. 339 AND 342.

WRONGFUL EX-COMMUNICATION. *See* TORT.

WRONGFUL INDUCEMENT. *See* TORT.

WRONGFUL LOSS. *See* PENAL CODE, S. 24.

WRONGFUL RESTRAINT. *See* PENAL CODE, S. 341.

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See (1) HINDU LAW—RELIGIOUS OFFICE.
(2) RELIGIOUS OFFICE.

YOUTHFUL OFFENDER.

See (1) BORSTAL SCHOOL.
(2) CR. P. CODE, S. 562.

"ZAID MUTALBA". *See* LANDLORD AND TENANT —RENT. **17 R.D. 712.**

ZAILDAR—*Appointment—Claim of Sufedposh and Sarbarah—Religion of claimant whether need be taken into account.*

When the claim of the Sufedposh and Sarbarah conflict, the Sarbarah should not be regarded as having a superior claim so as to justify departing from the collector's choice. Religion is not one of the considerations to be taken into account in making the appointment. (*Irving, F. C.*) KHAN MAHOMED *v.* GURDIT SINGH. **11 Lah.L.T. 108.**

———*Appointment of—Concurrent selection by Collector and Commissioner—Revision—Interference in.*

An appointment to the post of zaildar or sufedposh by Collectors should, as far as possible, be upheld on appeal; where the appointment by the Collector has been confirmed by the Commissioner on appeal, the selection cannot be interfered with in revision. (*Irving, F. C.*) NARAIN SINGH *v.* ABDUL MAJID. **12 Lah.L.T. 19.**

———*Appointment of—Discretion of Collector.*

No hereditary claim can be considered in making the appointment of a Zaildar or sufedposh and the decision whether to appoint a substitute or to dismiss a Zaildar or sufedposh for incapacity due to old age is one which should normally be left to the Collector. (*Irving, F. C.*) JAWALA SINGH *v.* EMPEROR. **12 Lah.L.T. 16.**

———*Appointment — Disqualification — Candidate being Honorary Magistrate.*

The fact that a candidate is an Honorary Magistrate does not necessarily disqualify him from being appointed Zaildar. Every case must be

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decided on its merits. (*Townsend, F. C.*) RAJINDAR SINGH *v.* NARAIN CHAND. **10 Lah.L.T. 4.**

———*Appointment—Order of Collector—Interference.*

The Collector's order regarding appointment to the office of Zaildar should not ordinarily be interfered with but when his order is in contravention of the rules on the subject, the order can be interfered with. (*Irving, F. C.*) FAQIR MAHOMED *v.* DALIP SINGH. **11 Lah.L.T. 124.**

———*Appointment—Qualification—Possession of property—Decision of Collector—Interference.*

The general rule in Zaildari cases is that the Collector's choice should be upheld. When other things are equal or nearly equal the Collector's choice should not be upset unless the rival candidate has done good service either as sufedposh or as acting zaildar. In the case of a zaildar, possession of land is required as a proof of status in the zail. It is therefore permissible to consider how it was acquired and whether any such deduction can be drawn from the possession. It is undesirable that a man, whose ancestral home and primary claims are in one zail should be qualified for the zaildari of another zail on the ground of an acquisition of land made for that purpose, which is also of somewhat doubtful reality. (*Irving, F. C.*) RANDHIR SINGH *v.* JALAL DIN. **11 Lah.L.T. 38.**

———*Appointment — Qualification — Service in army whether a disqualification.*

Service in the Army cannot be regarded as a disqualification for appointment to the office of Zaildar. (*Irving, F. C.*) FAQIR MAHOMED *v.* DALIP SINGH. **11 Lah.L.T. 124.**

———*Appointment—Sanction of Commissioner—Collector whether can go back on recommendation—Punjab Land Revenue Rules, Rr. 4 and 7.*

Where the candidate for the office of Zaildar is not a lambardar, it is necessary to obtain the Commissioner's approval, for him as a suitable candidate. Once the Commissioner approves a particular candidate, the Collector is not competent to find that he is not a suitable candidate. (*Irving, F. C.*) FAQIR MAHOMED *v.* DALIP SINGH. **11 Lah.L.T. 124.**

———*Appointment—Widow of Zamindar—Punjab Land Revenue Rules modified by Jhelum Inam Rules.*

In a case governed by the Jhelum Inam Rules, the widow of a deceased zaildar can be appointed in his place. (*Irving, F. C.*) MT. SARDAR BANO *v.* FAZAL ILAHI. **11 Lah.L.T. 23.**

———*Dismissal—Grounds—Incapacity due to old age—Decision of Collector—Finality.*

The decision whether to appoint a substitute or to dismiss a zaildar or Sufedposh for incapacity due to old age is one which should normally

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be left to the Collector. (*Irving, F. C.*) JAWALA SINGH *v.* EMPEROR. **11 Lah.L.T. 105.**

———*Selection by Collector—Failure to exercise jurisdiction—Power of Commissioner to select.*

It is only in exceptional cases that the Collector's selection of a Zaildar should be upset but where he has failed to exercise his duty of making a choice and has merely given effect to the hereditary claim, the duty devolves on the Commissioner to make the selection. (*Irving, F. C.*) RIAZ HUSSAIN SHAH *v.* AHMAD YAR KHAN. **11 Lah.L.T. 93.**

———*Selection of—Discretion of Collector—Interference by higher authority—Grounds—Principles.*

The Collector's choice in the matter of appointment of a zaildar should not normally be interfered with even though the appellate authority thinks that his choice is not the best. But it is not necessary that the Superior Revenue authority should find the Collector's appointment flagrantly perverse before interfering with the Collector's choice. (*Latifi, F. C.*) UJAGAR SINGH *v.* INDAR SINGH. **14 Lah.L.T. 24.**

———*Selection of—Principles—Appointment of person not lambardar—Justification—Duty of Commissioner.*

Where a suitable lambardar candidate is available for a Zaildari, it is not desirable to extend the field of selection beyond the lambardars of the zail. Occasionally the ablest and most influential man in a zail may be a land owner or a pensioned Indian Officer who is not a lambardar. But in according sanction to such a choice, the Commissioner must satisfy himself, firstly, that none of the lambardar candidates are really suitable, and secondly, that the candidate for whom sanction is sought is the best outsider available. (*Latifi, F. C.*) AMIR HAIDAR *v.* DAST MAHOMED. **14 Lah.L.T. 17.**

ZAMINDAR.

See (1) GRANT—CONSTRUCTION, INAM, MINERALS, ETC.
(2) LANDLORD AND TENANT.
(3) LAND TENURE—INAM.
(4) MADRAS PERMANENT SETTLEMENT REGULATION (1802).
(5) MINERALS.
(6) LOCAL TENANCY ACTS.

ZARIPESHGI LEASE.

See (1) AGRA TENANCY ACT (1901), S. 25.
(2) AGRA TENANCY ACT (1926), SS. 30, 31, 86 AND 99.
(3) BENGAL TENANCY ACT (1885), S. 159.
(4) LEASE—ZARIPESHGI.
(5) T. P. ACT, S. 58.

ZIRAIT. *See* BENGAL TENANCY ACT (1885), SS. 116 AND 120.

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